



## Derivative Liabilities a Danger

A relatively new line of cases, gaining precedential strength, holds lawyers liable for damages if they assist a client with fiduciary duties to others in breaching those duties. This concept of “derivative” fiduciary duty is not new in Arizona.<sup>1</sup> Nor does the concept add very much to notions of aiding and abetting fraud found in the common law.<sup>2</sup> What appears to be happening is that courts are finding more direct paths to holding lawyers liable to the people whom their fiduciary-clients injure when those lawyers have substantially assisted the breach of the duty violated.

A recent case from Oregon is instructive. In *Reynolds v. Schrock*,<sup>3</sup> the lawyer represented one of the parties in a joint venture. When the deal turned bad, the unrepresented joint venturer sued the lawyer’s client and the lawyer, claiming they were jointly liable for damages—the joint venturer for breach of a fiduciary duty, and the lawyer for substantially aiding, encouraging and acting in concert with his client in that breach. On contested facts, the Oregon Court of Appeals reversed a summary judgment granted to the lawyer by the trial court and sent the case back for trial.

The *Reynolds* court recognized that lawyers should be free to render advice to their clients without fear of personal liability to third persons if the advice later goes awry. However, the court said, the privilege of rendering professional services is not absolute, and lawyers should not be free to substantially assist their clients in committing tortious acts. The way to protect lawyers in these cases, the court suggested, was to strictly interpret the common law elements of aiding and abetting the alleged breach of a fiduciary duty, as found in the RESTATEMENT, which requires “substantial assistance or encouragement” by the lawyer. Citing other cases, the Oregon court held that merely acting as a scrivener for a client is insufficient, and that “substantial assistance” or “encouragement” of the client’s breach of fiduciary duty should consist of, for example, affirmative conduct that furthers the client’s breach of fiduciary duty, done by the lawyer with knowledge that he or she is furthering the breach.<sup>4</sup>

Other cases recognizing a lawyer’s potential liability for assisting in the breach of a fiduciary duty owed to a third party by his client include situations in which the lawyer:

- Assisted a former partner in appropriating a partnership opportunity<sup>5</sup>;
- Wrongly advised his client that he could buy another partner’s share without telling the remaining partner and then hid fact of purchase from that partner<sup>6</sup>;
- Assisted the majority shareholder in a corporation in freezing out the minority, including assisting a sale designed to deflate the value of corporate assets and securing the vote to approve the sale<sup>7</sup>;
- Wrongly advised his client, a partner, to disclose contents of wiretap tapes to customers of the partnership, an act he knew would harm another nonclient partner<sup>8</sup>;
- Assisted the majority shareholder in ousting the minority shareholder and in the devaluation of his stock with knowledge that his majority shareholder-client was breaching his fiduciary duty to the minority.<sup>9</sup>

As long as the courts strictly apply the RESTATEMENT tests when it comes to allegations against lawyers that they have aided and abetted a breach of fiduciary duty, prudent lawyers who use good judgment should not be overly concerned with these cases. What should concern us is the apparent expansion of classes of non-clients to whom a lawyer can be liable, even in situations in which the client is not acting as a fiduciary. In this respect, you should again review ER 4.1 (Truthfulness in Statements to Others), as it has been affected by Arizona’s new ER 1.6 (Confidentiality of Information). Lawyers are now permitted to disclose facts that will prevent or rectify harm done by their clients to others while using the lawyer’s services—that is, they are no longer prohibited from disclosing such information under ER 1.6(d). This new permissive option closes the safe harbor that used to exist in ER 4.1 for not disclosing that kind of confidential information, and it may provide additional grounds for suits against lawyers. **AZ**

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### endnotes

1. *Fichett v. Superior Court of Pima County*, 558 P.2d 988, 990-91 (Ariz. Ct. App. 1976) (lawyer for guardian owes a duty of reasonable care to guardian’s ward); *Estate of Shano*, 869 P.2d 1203, 1208 (Ariz. 1993) (lawyer for personal representative owes duty of loyalty and competence to surviving spouse).
2. RESTATEMENT (SECOND) OF TORTS § 876(b) (one is subject to liability to third parties harmed by the tortious conduct of another if he gives substantial assistance or encouragement to the tortfeasor).
3. 197 Or. App. 564, 2005 WL 357633 (Or. Ct. App. 2005).
4. 2005 WL 357633 at ¶ 6.
5. *Thornwood, Inc. v. Jenner & Block*, 799 N.E. 2d 756 (Ill. Ct. App. 2003).
6. *Cacciola v. Nelhaus*, 733 N.E. 2d 133 (Mass. Ct. App. 2000).
7. *Kurker v. Hill*, 689 N.E. 2d 833 (Mass. Ct. App. 1998).
8. *Noel v. Hall*, 2000 WL 251709 (D. Or. 2000).
9. *Granewich v. Harding*, 985 P.2d 788 (Or. 1999).



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