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Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs

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I. Introduction

Over the past thirty years, judicial decisions and legislative revisions of corporate statutes have reflected the belief that traditional norms of corporate governance are not entirely applicable to closely-held corporations.[1] Although the norms of centralized control and majority rule have served the needs of the publicly-held corporation, they often create oppressive situations for minority shareholders in the close corporation.[2] For example, majority shareholder control, coupled with the illiquidity of an investment in a close corporation, may fuel a "squeeze-out"[3] designed to flush the minority investor from the entity.[4]

In the mid-1970s, courts began to modify the body of corporate law to resolve the awkwardness that arises when close corporations are subject to legal principles developed for larger entities.[5] One modern legal response has

1. *See* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993) (stating that traditional corporate norms have proven unsuitable for close corporations); Lori A. Lechner, Note, *The Fate of Shareholders of Closely Held Corporations in the Wake of* Bily v. Arthur Young, 34 CAL. W. L. REV. 245, 257-58 (1997) (noting that courts recognized special considerations of close corporations around 1970).

2. *See* Thompson, *supra* note 1, at 699 (recognizing that statutory norms of centralized control and majority rule leave minority investor in close corporation in oppressive situations).

3. *See* F.H. O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1.01, at 1-2 (2d ed. rev. 1991) (defining squeeze-out). O'Neal and Thompson defined the term "squeeze-out" as follows:

> By the term "squeeze-out" is meant the use by some of the owners or participants in a business enterprise of the strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants. . . . A squeeze-out normally does not contemplate fair payment to the squeezees for the interests, rights, or powers which they lose.

Id. In describing the causes of squeeze-outs, O'Neal and Thompson wrote:

> The majority of squeeze-out cases are characterized by basic conflicts of interest among the participants in the enterprise, protracted policy disagreements, prolonged and bitter dissension prior to the squeeze play, or demonstrated inability of one or more of the participants (because of habitual drinking or lack of business skills, for example) to carry a fair share of the responsibility and work involved in operating the business.

Id. § 2.02, at 3-4 (footnotes omitted).

4. *See* Thompson, *supra* note 1, at 699 (noting that traditional corporate norms may result in squeeze-out).

5. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (recogniz-

been the enhancement of a majority shareholder's fiduciary obligations to a minority shareholder in a closely-held corporation.[6] This enhanced fiduciary duty has created the opportunity for minority shareholders in the close corporation to bring an individual cause of action for breach of fiduciary duty against majority shareholders.[7] In the recent decision of *Granewich v. Harding*,[8] the Oregon Supreme Court significantly expanded the protections afforded to minority shareholders in close corporations by concluding that an oppressed minority shareholder could state a claim of aiding and abetting the breach of fiduciary duty against attorneys who assisted controlling shareholders in effecting a corporate squeeze-out.[9]

The common law has long recognized that one who assists a fiduciary's breach of duty may be liable for the harm caused.[10] Imposing liability upon

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ing unique nature of closely-held corporation and holding that stockholders in such entity owe enhanced fiduciary duties); Thompson, *supra* note 1, at 700 (noting that courts resolved awkwardness in several ways).

6. *See Donahue*, 328 N.E.2d at 515 (holding "that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another").

7. *See* Thompson, *supra* note 1, at 699 (noting that courts have expanded ability of shareholders to bring direct, individual cause of action based on majority shareholder's breach of fiduciary duty).

8. 985 P.2d 788 (Or. 1999).

9. *See* Granewich v. Harding, 985 P.2d 788, 795 (Or. 1999) (stating conclusion of Oregon Supreme Court). In *Granewich*, the Oregon Supreme Court considered whether an attorney could be held liable for aiding and abetting the breach of fiduciary duty in rendering legal advice and assistance to controlling shareholders to effect a corporate squeeze-out. *Id.* at 790. Two controlling shareholders devised a plan to remove Granewich, a minority shareholder, from the corporation. *Id.* After that plan proved ineffective, the controlling shareholders hired a law firm to provide legal services to the corporation. *Id.* at 791. First, the attorneys attempted to enforce the controlling shareholders' prior actions to remove the plaintiff from the corporation. *Id.* The attorneys then assisted the controlling shareholders in exercising control of the corporation in ways inconsistent with their fiduciary duties by calling special meetings, amending the corporate by-laws, removing the plaintiff as a director, and diluting the value of the plaintiff's stock. *Id.* at 791-792. The plaintiff filed suit against the controlling shareholders for breach of fiduciary duty and against the attorneys for aiding and abetting the breach of fiduciary duty. *Id.* In analyzing the claims against the defendant-attorneys, the court initially held that the defendant-attorneys personally need not have committed a tortious act as a prerequisite to liability. *Id.* at 794. The *Granewich* court further noted that the defendant-attorneys could be held liable in the absence of any duty directly flowing from the attorneys to the plaintiff. *Id.* at 794-95. The court stated that the defendants' status as attorneys was irrelevant to the resolution of the issue. *Id.* at 795. The *Granewich* court concluded that the allegations were sufficient to demonstrate that the defendant-attorneys provided substantial assistance to the controlling shareholders in the breach of fiduciary duties and could be held liable for aiding and abetting the breach of fiduciary duty. *Id.* at 795-96. The court reversed and remanded the case to the circuit court. *Id.*

10. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and

those who provide assistance to a fiduciary's breach of duty is consistent with one of tort law's principal goals – deterring wrongful actions that result in harm.[11] Over the past twenty years, courts in a variety of jurisdictions increasingly have recognized "aiding and abetting the breach of fiduciary duty" as a legitimate cause of action against individuals, including attorneys, who assist in the breach of fiduciary duties.[12] Consequently, *Granewich*'s mere recognition of an attorney's liability for assisting a breach of fiduciary duty is not earth-shattering. Rather, *Granewich*'s import rests in its extension of the cause of action to the corporate squeeze-out,[13] in its conflict with the Model Rules of Professional Conduct,[14] and in its ramifications for redefining an attorney's obligations in close corporation squeeze-outs.[15]

In light of the *Granewich* opinion, this Note analyzes the extension of attorney liability for aiding and abetting the breach of fiduciary duty in the corporate squeeze-out and discusses its implications for redefining the attorney's obligations in the representation of majority shareholders in a close corporation. Part II provides a brief introduction to primary liability and third-party liability for breach of fiduciary duty.[16] Additionally, Part II outlines the

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is subject to liability for the harm thereby caused."); 3 AM. JUR. 2D *Torts* § 299 (1986) ("A person who intentionally causes or assists an agent to violate a duty to the principal is subject to liability in tort for the harm he has caused to the principal....").

11. *See* GCM, Inc. v. Ky. Cent. Life Ins. Co., 947 P.2d 143, 148 (N.M. 1997) (stating that imposing aiding and abetting liability is consistent with goal of tort law).

12. *See* Thornton v. Evans, 692 F.2d 1064, 1082 (7th Cir. 1982) (holding that attorney aided breach of fiduciary duty by preparing documents that furthered deceptive transfer of funds to defraud union); FDIC v. Nathan, 804 F. Supp. 888, 896-97 (S.D. Tex. 1992) (holding attorneys liable for aiding and abetting breach of fiduciary duties to savings association by structuring, documenting, and closing loans that attorneys knew to be illegal); Amerifirst Bank v. Bomar, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) ("[T]he majority of case law ... recognizes a cause of action for aiding and abetting common-law torts, such as breach of fiduciary duty."); Katell v. Morgan Stanley Group, Inc., Fed. Sec. L. Rep. (CCH) ¶ 97,437, 97,443 (Del. Ch. 1993) (recognizing action for aiding and abetting breach of fiduciary duty under Delaware law); Granewich v. Harding, 985 P.2d 788, 795-96 (Or. 1999) (allowing plaintiff to state claim of aiding and abetting breach of fiduciary duty against attorney who assisted controlling shareholders' breach). *But see* Koutsoubos v. Casanave, 816 F. Supp. 472, 475 (N.D. Ill. 1993) (dismissing claims against attorneys after finding that "Illinois has never recognized the tort of aiding and abetting a breach of fiduciary duty"); Weingarten v. Warren, 753 F. Supp. 491, 496-97 (S.D.N.Y. 1990) (dismissing aiding and abetting claim against lawyer who was not in privity with beneficiary in suit for diversion of trust assets).

13. *See infra* notes 200-31 and accompanying text (analyzing extension of cause of action in squeeze-out).

14. *See infra* notes 232-64 and accompanying text (discussing conflict with Model Rules of Professional Conduct).

15. *See infra* notes 371-91 and accompanying text (discussing ramifications for redefining attorney's role in corporate squeeze-out).

16. *See infra* Part II (analyzing primary and third-party liability for breach of fiduciary duty).

traditional elements of common-law formulations of aiding and abetting the breach of fiduciary duty as a cause of action in light of cases decided prior to *Granewich*.[17] Part III details the intricacies of the *Granewich* decision, focusing on the factual background and the analysis of both the Oregon Court of Appeals and the Oregon Supreme Court.[18] Part IV analyzes *Granewich* in light of the unique nature of the close corporation fiduciary,[19] prior applications of liability for aiding and abetting the breach of fiduciary duty,[20] the necessity for attorney involvement in a squeeze-out,[21] and conflicts that the case creates with the Model Rules of Professional Conduct.[22] Part V.A presents California case law addressing attorney assistance in the breach of fiduciary duties owed to minority shareholders.[23] Part V.B reconciles differences in outcome between *Granewich* and California case law by examining California's experiences with attorney liability to non-clients,[24] by contrasting the principle of non-accountability against the substantive law of agency,[25] and by evaluating policy arguments regarding the extension of liability in the squeeze-out context.[26] Part VI of this Note proposes that *Granewich* signals the need for redefining an attorney's role in the close corporation squeeze-out and promotes a new conceptualization of an attorney's ethical obligations in the squeeze-out.[27] Finally, Part VII concludes that the conceptualization of an attorney's obligations in a squeeze-out has lagged behind the evolution of the close corporation fiduciary relationship.[28]

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17. *See infra* Part II (outlining traditional elements of aiding and abetting liability).

18. *See infra* Part III (discussing *Granewich*).

19. *See infra* Part IV.A (examining unique nature of close corporation fiduciary).

20. *See infra* Part IV.B (analyzing *Granewich*'s consistency with prior applications of liability for aiding and abetting breach of fiduciary duty).

21. *See infra* Part IV.C (discussing necessity for attorney involvement in squeeze-out).

22. *See infra* Part IV.D (examining ethical considerations under Model Rules of Professional Conduct).

23. *See infra* Part V.A (discussing Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991)).

24. *See infra* Part V.B.1 (analyzing California case law and statutes on attorney liability to non-clients).

25. *See infra* Part V.B.2 (analyzing principle of non-accountability and substantive law of agency).

26. *See infra* Part V.B.3 (evaluating policy arguments).

27. *See infra* Part VI (discussing implication of *Granewich* for redefining attorney's role in squeeze-out).

28. *See infra* Part VII (concluding that conceptualization of attorney obligations in squeeze-out has lagged behind evolution of close corporation fiduciary relationships).

II. Aiding and Abetting the Breach of Fiduciary Duty as a Cause of Action

A full understanding of liability for aiding and abetting the breach of fiduciary duty must begin with a discussion of the primary fiduciary duty itself. The legal conceptualization of fiduciary relationships arose from the area of trusts.[29] Over time, courts have extended fiduciary duties to a variety of legal relationships including, but not limited to, agent-principal, director-corporation, guardian-ward, attorney-client, and majority shareholder-minority shareholder.[30] It is the circumstances of these relationships, rather than contractual obligations, that give rise to a fiduciary duty.[31] While these aforementioned relationships span a variety of circumstances, each individual relationship poses the potential problem of an abuse of power.[32] Fiduciary jurisprudence seeks to prevent that abuse of power by obligating a fiduciary "to exercise the utmost loyalty to the interests" of the beneficiary.[33] Indeed, the greatest minds of American jurisprudence have recognized the high responsibility of a fiduciary, which Justice Cardozo characterized as "the punctilio of an honor the most sensitive."[34]

As inspiring as Justice Cardozo's words have proven to be, fiduciary duty jurisprudence is not the most concrete legal doctrine. Scholars have suggested that the "sermonizing" of the courts "serves only to mask an underlying vagueness, or perhaps even emptiness, at the heart of the fiduciary concept."[35] The vague language of fiduciary jurisprudence, however, corresponds to the highly contextualized nature of fiduciary relationships – relationships in which the confines of duty are determined through analysis of "what a 'faithful steward' would do in this particular circumstance."[36] The contextual nature of the fiduciary relationship thus requires that the fiduciary use the discretion with which he has been vested to protect the vulnerability of the beneficiary.[37] Yet, the relationship involves more than protecting the vulnerable; it requires the

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29. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 896 (describing development of fiduciary duty jurisprudence).

30. *See* Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1149 (1999) (discussing development of fiduciary duty jurisprudence); Tuttle, *supra* note 29, at 896 (same).

31. *See* Duncan, *supra* note 30, at 1150 (noting that law allows plaintiff to pursue cause of action for breach of fiduciary duty in absence of contractual agreement between parties).

32. *See id.* at 1149 (discussing features of fiduciary relationships).

33. *Id.* at 1150.

34. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

35. Tuttle, *supra* note 29, at 896.

36. *Id.*

37. *See id.* at 897-99 (discussing fiduciary's discretion and vulnerability of beneficiary).

fiduciary to act in the best interest of the beneficiary, rather than in the fiduciary's self-interest.[38] A fiduciary who fails so to act may find himself liable to the beneficiary, even in the absence of scienter or intent.[39]

Just as the fiduciary may be liable for breaching his duty, or the "primary duty," to the beneficiary, the common law has long recognized that one who assists a fiduciary's breach of duty may be liable to the beneficiary.[40] Scholars have called this basis of liability "third-party liability."[41] Some plaintiffs have pursued third-party liability for breach of fiduciary duty as counts of conspiracy,[42] while others have done so under the cause of action of aiding and abetting the breach of fiduciary duty.[43] This Note focuses primarily on the latter.

A cause of action for aiding and abetting the breach of fiduciary duty arises in the absence of any direct or "primary" duty to the plaintiff.[44] Consequently, aiding and abetting the breach of fiduciary duty is a "secondary theor[y] of liability for a single civil wrong."[45] In this respect, it is a form of vicarious liability with roots in the common law.[46]

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38. *See id.* at 897-98 (discussing fiduciary's obligation to act in beneficiary's best interest).

39. *See id.* at 901 (noting that fiduciary is responsible for all breaches of duty, "whether knowing or negligent, intentional or unintentional").

40. *See* Mertens v. Hewitt Assoc., 508 U.S. 248, 255 (1993) (stating that non-fiduciaries have common-law duty to beneficiaries not to assist in fiduciary's breach).

41. *See* Tuttle, *supra* note 29, at 900-01 (discussing "third-party liability" for providing assistance to fiduciary's breach of duty).

42. *See* Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 629 (Ct. App. 1991) (noting that beneficiary filed conspiracy action against attorney who assisted client in breach of fiduciary duty).

43. *See* Thornton v. Evans, 692 F.2d 1064, 1082 (7th Cir. 1982) (holding that attorney aided breach of fiduciary duty by preparing documents that furthered deceptive transfer of funds to defraud union); FDIC v. Nathan, 804 F. Supp. 888, 896-97 (S.D. Tex. 1992) (holding attorneys liable for aiding and abetting breach of fiduciary duties to savings association by structuring, documenting, and closing loans that attorneys knew to be illegal); Amerifirst Bank v. Bomar, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) ("[T]he majority of case law . . . recognizes a cause of action for aiding and abetting common-law torts, such as breach of fiduciary duty."); Granewich v. Harding, 985 P.2d 788, 795-96 (Or. 1999) (allowing plaintiff to state claim of aiding and abetting breach of fiduciary duty against attorney who assisted controlling shareholders' breach).

44. *See* Dudrow v. Ernst & Young, LLC, No. X-01-CV98-0144211S, 1999 WL 78261, at *8, *10 (Conn. Super. Ct. Sept. 15, 1999) (upholding aiding and abetting breach of fiduciary duty claim in absence of primary duty to plaintiff).

45. David F. Heroy & Lee C. Carter, *Alternative Liability Theories for Fraudulent Conveyances: Breach of Fiduciary Duty, Conspiracy, Aiding and Abetting, Negligence and Contribution Rights, in* FRAUDULENT CONVEYANCES, PREFERENCES & VALUATION 1994, at 275, 301 (PLI Comm. Practice Course Handbook Series No. A4-4446, 1994).

46. *See* Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S

In summarizing common-law traditions, the *Restatement of Torts* first recognized the general tort of aiding and abetting over sixty years ago.[47] Section 876(b) of the *Restatement (Second) of Torts* provides that a defendant is liable for harm resulting to a third person from the tortious conduct of another if the defendant knows that the tortfeasor's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the tortfeasor in such conduct.[48] Courts commonly recognize Section 876(b) as mapping the general confines of aiding and abetting liability in the entire spectrum of tortious conduct, including products liability[49] and negligence.[50]

Numerous courts recognizing common-law formulations of aiding and abetting the breach of fiduciary duty as a viable cause of action have done so with reference to Section 876(b) of the *Restatement (Second) of Torts*.[51] Those courts generally advocate the following three elements in some combi-

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L.J. 213, 229-30 (noting that aiding and abetting liability is secondary liability theory grounded in common law of agency and trusts).

47. *See* Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 15 (1993) (stating that drafters of *Restatement* acknowledged tort of aiding and abetting in 1939).

48. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). In its entirety, Section 876 states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. Subsection (a) is not applicable to aiding and abetting the breach of fiduciary duty because the attorney usually has not committed a tortious act himself but merely has provided assistance to client's commission of a tortious act. Subsection (c) is not applicable because the attorney generally does not owe a primary duty to the third person; rather, the attorney assists the client in breaching a duty which the client owes to the third person.

49. *See* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1015-16 (D.S.C. 1981) (citing subsection (b) in products liability case against drug manufacturer); Payton v. Abbott Labs, 512 F. Supp. 1031, 1034-36 (D. Mass. 1981) (same).

50. *See* Lombardo v. Hoag, 566 A.2d 1185, 1188 (N.J. Super. Ct. App. Div. 1989) (citing subsection (b) in negligence case involving injuries stemming from intoxicated driver), *overruled by* 643 A.2d 550 (N.J. Super. Ct. App. Div. 1993); Aebischer v. Reidt, 704 P.2d 531, 533 (Or. Ct. App. 1985) (same).

51. *See* Kurker v. Hill, 689 N.E.2d 833, 837 (Mass. App. Ct. 1998) (noting that Section 876 of *Restatement (Second) of Torts* is germane to plaintiff's aiding and abetting breach of fiduciary duty claim against attorney); GCM, Inc. v. Ky. Cent. Life Ins. Co., 947 P.2d 143, 147 (N.M. 1997) (recognizing aiding and abetting breach of fiduciary duty claim under Section 876 of *Restatement (Second) of Torts*); Granewich v. Harding, 985 P.2d 788, 792 (Or. 1999) (noting that Section 876 of *Restatement (Second) of Torts* sets out three theories of liability for aiding and abetting).

nation.[52] First, a plaintiff must prove the fiduciary breached his obligations to the plaintiff.[53] Second, the plaintiff must prove that the defendant knowingly participated in or induced the breach.[54] Third, the plaintiff must prove damages suffered as a result of the breach.[55]

Two important considerations distinguish third-party liability from the fiduciary's liability for breach of duty.[56] The first concerns injury to the beneficiary. While a beneficiary need not prove actual harm in an action against a fiduciary for breach of duty, a third party who assisted in the breach is only liable if the beneficiary suffered actual harm.[57] The second consideration involves the nature of liability. The fiduciary's liability for breach of duty does not require a specific mental state.[58] Consequently, a fiduciary who unintentionally or unknowingly breaches his duty to a beneficiary is still subject to liability.[59] In this sense, primary liability for breach of fiduciary duty is essentially strict liability.[60] In contrast, third-party liability for breach of fiduciary duty requires *knowing* participation in the breach.[61] That is, third-party liability is based on knowledge that the fiduciary's actions constitute a breach of duty to the beneficiary.[62]

Indeed, "knowing participation" in the fiduciary's breach of trust is the gravamen of a claim of aiding and abetting a breach of fiduciary duty.[63] Legal authorities have rephrased knowing participation in a variety of ways, includ-

52. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 281-82 (2d Cir. 1992) (stating elements of cause of action for aiding and abetting breach of fiduciary duty); S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 847-48 (2d Cir. 1987) (same); Nebenzahl v. Miller, No. 13206, 1993 Del. Ch. LEXIS 249, at *6-7 (Del. Ch. Nov. 8, 1993) (same); *In re* Wheelabrator Tech. Inc. Shareholders Litig., No. 11495, 1992 Del. Ch. LEXIS 196, at *34 (Del. Ch. Sept. 1, 1992) (same); *GCM, Inc.*, 947 P.2d at 148 (same); *see also* Heroy & Carter, *supra* note 45, at 305 (same); Pietrusiak, *supra* note 46, at 233-34 (same).

53. *S & K Sales Co.*, 816 F.2d at 847.

54. *Id.* at 847-48.

55. *Id.* at 848.

56. *See* Tuttle, *supra* note 29, at 901 (discussing two major differences between primary and third-party liability for breach of fiduciary duty).

57. *See id.* (discussing differences in harm between primary and third-party liability for breach of fiduciary duty).

58. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 282 (2d Cir. 1992) (noting that fiduciary's liability for breach of duty does not turn on specific mental state).

59. *See supra* notes 29-39 and accompanying text (discussing primary liability for breach of fiduciary duty).

60. *See* Tuttle, *supra* note 29, at 901 (noting that "fiduciary is responsible for all breaches of duty").

61. *See supra* notes 51-55 and accompanying text (discussing elements of cause of action).

62. *See* Tuttle, *supra* note 29, at 901 (recognizing differences in level of knowledge between primary and third-party liability for breach of fiduciary duty).

63. Holmes v. Young, 885 P.2d 305, 309 (Colo. Ct. App. 1994) (citing S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 848 (2d Cir. 1987)).

ing "knowing assistance"[64] and "substantial assistance or encouragement."[65] Although courts occasionally use the three phrases interchangeably,[66] it is important to remember that these phrases embody two necessary elements of an aiding and abetting claim. "Knowing participation" places emphasis on the third party's knowledge of the fiduciary's status as a fiduciary and knowledge that the fiduciary's action constitutes a breach of duty.[67] "Substantial assistance" emphasizes the character and nature of assistance provided to the fiduciary's breach of duty.[68] *Granewich* provides the perspective for analyzing these two elements in light of aiding and abetting the breach of fiduciary duty in the corporate squeeze-out context.[69]

III. Granewich v. Harding

In *Granewich v. Harding*,[70] the Oregon court considered whether an attorney could be held liable for aiding and abetting the breach of fiduciary duty in rendering legal advice and assistance to majority shareholders to effect a corporate squeeze-out.[71] The corporation at issue formed in 1992, with ownership split equally between Granewich, Harding, and Alexander-Hegert.[72] In May of 1993, Harding and Alexander-Hegert, the controlling shareholders, met with Granewich to inform him that they had taken action to remove him from the corporation by removing him as a director and by terminating his employment as an executive of the corporation.[73] Granewich objected to their actions on the grounds that the controlling shareholders failed to provide notification of shareholders' or directors' meetings, that the cumulative voting requirements of the by-laws protected his position on the

64. RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979).

65. *Id.* § 876(b).

66. *See* S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 849 (2d Cir. 1987) (using three terms to describe level of participation required to sustain aiding and abetting breach of fiduciary duty claim).

67. *See infra* notes 133-75 and accompanying text (discussing knowing participation in corporate squeeze-out).

68. *See infra* notes 176-99 and accompanying text (discussing substantial assistance in corporate squeeze-out).

69. *See supra* note 9 (commenting on *Granewich*); *infra* notes 70-107 and accompanying text (discussing facts of *Granewich*).

70. 985 P.2d 788 (Or. 1999).

71. *See* Granewich v. Harding, 985 P.2d 788, 791 (Or. 1999) (stating issue).

72. *See id.* (noting that plaintiff and two defendants each owned one-third of corporation's stock).

73. *See id.* (stating that controlling shareholders met with plaintiff and informed him that he had been removed as director, relieved of executive position, and terminated as employee of corporation).

board, and that the termination of his employment breached a prior agreement that the corporation would permanently employ each shareholder.[74]

After meeting with Granewich, the controlling shareholders, acting in their corporate capacities, hired a law firm to provide legal services to the corporation.[75] Initially, the attorneys attempted to enforce the controlling shareholders' earlier actions to remove Granewich from the corporation.[76] In this respect, the attorneys drafted and sent to Granewich two letters containing statements that Granewich alleged the attorneys knew to be false regarding the effectiveness of the controlling shareholders' previous actions.[77] Once the attorneys realized that their actions were "invalid and ineffective," they undertook additional steps to remove Granewich from the corporation.[78] Granewich alleged that the attorneys "assisted [the controlling shareholders] in exercising actual control of the management and policies of [the corporation] in ways inconsistent with their claimed fiduciary duties by calling special meetings, amending corporate by-laws, removing [him] as a director, and taking other actions to dilute the value of [his] stock."[79] Such actions included removing the cumulative voting provision from the corporate by-laws and issuing shares of treasury stock to the controlling shareholders, which reduced Granewich's interest in the corporation from one-third to less than ten percent.[80]

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74. *See id.* (noting that Granewich objected to his removal and termination on grounds that he had not received any notice of meetings, that his termination was in contravention of prior agreement between parties, and that those actions constituted breach of fiduciary duties which defendants, as controlling shareholders, owed to him as minority shareholder).

75. *See id.* (stating that defendant controlling shareholders met with attorneys in "their corporate capacities"). The complaint alleged that the corporation hired the lawyers, that the corporation had no interest in the dispute between plaintiff and the controlling shareholders, and that the work the attorneys performed was "outside of the scope of any legitimate employment on behalf of the corporation." *Id.* at 795. The Oregon Supreme Court noted, however, that the court of appeals erroneously referred to both the corporation and the individual shareholders as clients of the attorneys. *Id.* at 794. The court indicated that whether the shareholders or the corporation were the client of the attorney may not affect the outcome of the decision. *Id.*

76. *See* Granewich v. Harding, 945 P.2d 1071, 1075 (Or. Ct. App. 1997) (Armstrong, J., dissenting) (noting that attorneys attempted to enforce prior efforts of controlling shareholders to remove Granewich from corporation), *rev'd*, 985 P.2d 788 (Or. 1999).

77. *See id.* at 1068 (noting that attorneys sent two letters to Granewich regarding effectiveness of controlling shareholders' prior actions).

78. *See id.* at 1075 (Armstrong, J., dissenting) (noting that attorneys undertook plan of action after learning that controlling shareholders' prior efforts were "invalid and ineffective").

79. Granewich v. Harding, 985 P.2d 788, 791-92 (Or. 1999).

80. *See* Granewich v. Harding, 945 P.2d 1067, 1068 (Or. Ct. App. 1997) (describing attorneys' assistance), *rev'd*, 985 P.2d 788 (Or. 1999).

Not surprisingly, Granewich sued the controlling shareholders for breach of fiduciary duty.[81] However, the lower court ultimately dismissed those claims.[82] Granewich also brought suit against the controlling shareholders' attorneys.[83] Rather than alleging that the attorneys acted in a direct, tortious manner,[84] Granewich sought to hold the attorneys liable for substantially assisting the controlling shareholders' breach of fiduciary duties.[85] The aiding and abetting allegations against the attorneys became the central focus of the case.

The trial court dismissed Granewich's complaint against the attorneys for failure to state a claim,[86] and a divided court of appeals affirmed.[87] On appeal, the court first considered whether the defendant-attorneys themselves owed any fiduciary duty to the plaintiff.[88] The court noted that the corporation retained the defendant-attorneys.[89] Consequently, no attorney-client relationship existed between Granewich and the defendant-attorneys.[90] In the absence of such a relationship, the attorneys had not entered into a fiduciary relationship with Granewich.[91]

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81. *See Granewich*, 985 P.2d at 790 (describing allegations against controlling shareholders).

82. *See id.* ("As the case comes to us, all claims against the corporation and the [controlling] shareholders have been dismissed, and only the allegations concerning the lawyers' role in the alleged squeeze-out are at issue."). The opinion does not state the reason why the claims against the controlling shareholders were dismissed.

83. *See id.* (noting that Granewich named attorneys in complaint).

84. *See Granewich*, 945 P.2d at 1075 (stating that "there are no allegations that defendant-attorneys acted in a direct, tortious manner").

85. *See* Granewich v. Harding, 985 P.2d 788, 790 (Or. 1999) (describing allegations in complaint). Granewich alleged that the attorneys assisted the controlling shareholders by drafting and sending two letters to plaintiff, at the direction of controlling shareholders, containing statements that the lawyers knew to be false concerning the effectiveness of the controlling shareholders' previous actions to remove plaintiff from the corporation. *Id.* at 791. Granewich alleged, too, that the attorneys' provision of legal services constituted "substantial assistance" to the controlling shareholders in breaching the fiduciary duties which they owed to him. *Id.*

86. *See id.* at 790 (noting that trial court dismissed complaint against attorneys for failure to state claim).

87. *See id.* (stating that court of appeals affirmed trial court's dismissal of complaint against attorneys). The supreme court noted that "all claims against the corporation and the shareholders have been dismissed, and only the allegations concerning the lawyers' role in the alleged squeeze-out are at issue." *Id.*

88. *See* Granewich v. Harding, 945 P.2d 1067, 1069 (Or. Ct. App. 1997) (considering whether attorneys are "directly" liable to plaintiff), *rev'd*, 985 P.2d 788 (Or. 1999).

89. *See id.* (noting that corporation hired attorneys).

90. *See id.* (stating that attorneys did not have attorney-client relationship with plaintiff).

91. *See id.* (noting that in absence of attorney-client relationship, there is no fiduciary duty owed to plaintiff in his personal capacity).

After finding the attorneys owed no direct duty to the plaintiff, the court of appeals considered whether the attorneys could be held liable for aiding and abetting the breach of fiduciary duty by rendering legal advice and assistance to the controlling shareholders.[92] The court of appeals recognized that Section 876(b) of the *Restatement (Second) of Torts*[93] imposes liability upon one who provides "substantial assistance" in the commission of a tort injuring a third person.[94] The court of appeals noted, however, that the defendant-attorneys could not be held liable for aiding and abetting the breach of fiduciary duty in this case "because they could not commit 'the same tort with their own hands.'"[95] In the view of the court of appeals, the defendant-attorneys were not liable for aiding and abetting the breach of fiduciary duty because they were not in a fiduciary relationship with the plaintiff.[96] In this respect, it appears that the court of appeals confused the distinction between primary and third-party liability for the breach of fiduciary duty.[97] The reluctance of the court of appeals to hold the attorneys liable appears to be influenced, in large part, by the fact that Oregon courts had not previously recognized aiding and abetting the breach of fiduciary duty as a cause of action.[98] The court of appeals buttressed its decision with the policy consideration that holding the attorneys liable in this circumstance could undermine attorney-client relationships and damage the corporate attorney's role in other situations.[99]

The Oregon Supreme Court noted that the court of appeals "found dispositive the absence of any duty flowing directly from the lawyers to plaintiff."[100] However, the supreme court concluded that the lower court's reasoning was flawed in two respects.[101] First, in stating that the defendant-attorneys

92. *See id.* (stating that issue is whether attorneys can be held liable for their role in rendering legal advice and assistance).

93. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ." *Id.*

94. Granewich v. Harding, 945 P.2d 1067, 1072 (Or. Ct. App. 1997), *rev'd*, 985 P.2d 788 (Or. 1999).

95. *Id.* at 1073.

96. *See id.* (noting that defendant-attorneys did not owe fiduciary duty to plaintiff and could not be held vicariously liable for breach of that duty).

97. *See supra* notes 40-46 and accompanying text (discussing distinction between primary and third-party liability for breach of fiduciary duty).

98. *See Granewich*, 945 P.2d at 1074 (noting that cause of action has not previously existed under Oregon law).

99. *See id.* (discussing policy implications of extending liability in this circumstance); *see also infra* notes 350-70 and accompanying text (discussing policy arguments).

100. Granewich v. Harding, 985 P.2d 788, 794 (Or. 1999).

101. *See id.* at 794-95 (noting two flaws in court of appeals's analysis).

could not be liable because they did not owe the plaintiff any fiduciary duty, the court of appeals erroneously fused together Subsections 876(a) and 876(c) of the *Restatement (Second) of Torts*.[102] Second, prior Oregon case law established that "not all persons acting in concert need to have committed an overt tortious act against the plaintiff" in order to be held liable.[103] After holding that a defendant need not personally have committed a tortious act as a prerequisite to liability, the supreme court briefly addressed the lower court's policy justifications for refusing to extend liability.[104] In direct opposition to the appellate court's approach, the supreme court tersely refused to carve out an exception to aiding and abetting liability for attorneys in this circumstance, noting that the defendants' "status as lawyers is irrelevant."[105] The supreme court concluded that the allegations were sufficient to demonstrate that the defendant-attorneys provided substantial assistance to the controlling shareholders in the breach of fiduciary duties.[106] Consequently, the Oregon Supreme Court reversed and remanded the case to the circuit court.[107]

IV. Analysis of Granewich

For the corporate attorney, the import of *Granewich* does not rest in the Oregon court's holding that a defendant may be held liable as a tortfeasor in the absence of any tortious behavior by the defendant personally.[108] While the majority opinion of the court of appeals may have misread applicable Oregon law on that issue,[109] tort law has long recognized assistance and encouragement, as opposed to active participation, as a basis for liability.[110] Rather, the very heart of *Granewich*'s importance rests in an issue summarily dismissed by the Oregon Supreme Court: Whether the defendants' status as lawyers is

102. *See id.* at 794 (noting incorrect interpretation by court of appeals).

103. *Id.* at 795.

104. *See id.* (addressing policy issues of holding defendant-attorneys liable).

105. *Id.*

106. *See id.* at 795-96 (concluding that complaint states claim against defendant-attorneys based on their alleged participation in breach of duties owed to plaintiff).

107. *See id.* (reversing and remanding).

108. *See id.* at 794 (holding that "a defendant personally need not have committed a tortious act as a prerequisite to liability for acting in concert with another person who did commit that tortious act").

109. *See* Granewich v. Harding, 945 P.2d 1067, 1079 (Armstrong, J., dissenting) ("There is no requirement in Oregon law that defendants must be legally capable of committing the underlying tortious acts or that they must do anything other than join the conspiracy."), *rev'd*, 985 P.2d 788 (Or. 1999).

110. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. b (1979) (noting that one who gives advice or encouragement to tortfeasor is himself tortfeasor and is liable).

truly irrelevant to the disposition of the case. In order to assess that issue, four aspects of attorney liability for aiding and abetting the breach of fiduciary duty, discussed in light of *Granewich*, are revealing: (a) the nature of the fiduciary relationship in the close corporation,[111] (b) traditional common-law conceptualizations of substantial assistance,[112] (c) the necessity for attorney involvement in squeeze-outs,[113] and (d) ethical dilemmas posed by the extension of aiding and abetting liability in this context.[114]

A. The Unique Nature of Fiduciary Duty in the Close Corporation

As an initial matter, the unique nature of the close corporation fiduciary relationship strains the wholesale importation of prior applications of liability for aiding and abetting the breach of fiduciary duty to the close corporation squeeze-out context.[115] Given the highly contextual nature of a fiduciary's responsibilities to a beneficiary,[116] it is not surprising that fiduciary relationships will vary from one relationship to the next.[117] Despite the undercurrent of acting in the best interest of the beneficiary, fiduciary relationships differ in the degree to which "a fiduciary's own self interest intermingles with the beneficiary's best interest."[118] In the trust relationship, for example, a trustee generally has no valid self-interested involvement in the trust.[119] In the trust setting, then, the line between appropriate conduct and conduct that breaches a fiduciary duty is somewhat clear.[120] However, in the close corporation setting, the controlling shareholder as a fiduciary "legitimately pursues his own self-interest through the fiduciary relationship."[121] Indeed, because the fiduciary concept is so flexible, "it is likely that the duty will vary depending on the fiduciary's motive and the offensiveness of the conduct as perceived by

111. *See infra* notes 115-25 and accompanying text (discussing nature of fiduciary relationship in close corporation).

112. *See infra* notes 126-99 and accompanying text (analyzing traditional common-law conceptualizations of substantial assistance).

113. *See infra* notes 200-31 and accompanying text (discussing necessity of attorney involvement in corporate squeeze-outs).

114. *See infra* notes 232-64 and accompanying text (discussing ethical considerations).

115. *See* Tuttle, *supra* note 29, at 948 (noting unique nature of close corporation fiduciary).

116. *See supra* notes 35-38 and accompanying text (noting contextual nature of fiduciary relationship).

117. *See* Tuttle, *supra* note 29, at 948 (stating that all fiduciaries are not alike).

118. *Id.*

119. *See id.* (stating that trustee generally has no self interest in relationship). This assumption is made, however, contingent upon the fact that the trustee is not also a beneficiary. When a trustee is a beneficiary, the relationship becomes more complicated. *Id.*

120. *See id.* (noting that fiduciary duty is more clear in trust setting).

121. *Id.*

the court."[122] Understandably, the line between appropriate conduct and breaching conduct is less clear in the close corporation setting. Consequently, the corporate attorney's task is more difficult because the nature of the relationship and the standard of appropriate conduct are clouded, at least to a degree, by a permissible modicum of self-interest on the part of the fiduciary.[123] Moreover, even though some decisions suggest that the fiduciary obligations of the majority shareholder are quite stringent,[124] others have tempered that language with the competing interests of the business judgment rule.[125] What constituted substantial assistance to a fiduciary's breach in prior applications of aiding and abetting the breach of fiduciary duty outside of the corporate squeeze-out context, then, may not square well with the realities of the close corporation fiduciary, despite the strength of the logical analysis.

B. Traditional Conceptualizations of Knowing Participation and Substantial Assistance

In *Granewich*, the Oregon Supreme Court devoted the bulk of its analysis to the issue of whether one could be liable for participating in a breach of duty.[126] After concluding that legal authorities were unanimous in their support of the proposition that one could be held liable for assisting in the breach of fiduciary duty,[127] the court concisely stated that the principle "readily extends to lawyers."[128] Although the court recognized that substantial assistance is a key element of the cause of action,[129] any discussion of the limits of substantial assistance clearly is lacking from the opinion. The absence of such a discussion is troubling for two reasons. First, as previously recognized, substantial assistance is the dispositive issue in a claim of aiding and abetting

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122. O'NEAL & THOMPSON, *supra* note 3, § 7.03, at 13-14.

123. *See* Tuttle, *supra* note 29, at 948 (noting that lawyer's task in close corporation setting is more difficult because line between acceptable and prohibited conduct is less distinct).

124. *See* O'NEAL & THOMPSON, *supra* note 3, § 7.04, at 38 (discussing enhanced fiduciary duty in close corporation).

125. *See id.* § 7.04, at 39 (noting cases that temper enhanced fiduciary duty with business judgment rule).

126. *See* Granewich v. Harding, 985 P.2d 788, 793-95 (Or. 1999) (analyzing issue of whether Oregon recognizes cause of action against defendant for assisting another's breach of fiduciary duty).

127. *See id.* at 793-94 ("Legal authorities, however, are virtually unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one thereby harmed.").

128. *Id.* at 794.

129. *See id.* at 795 (noting that complaint alleged that attorneys provided substantial assistance to breach).

the breach of fiduciary duty.[130] Second, interpretations of the limits of substantial assistance frequently determine the outcome of a given case.[131]

Given the lack of discussion in *Granewich* regarding the limits of substantial assistance, the case must be analyzed according to prior common-law conceptualizations of substantial assistance. Traditional understandings of substantial assistance typically turn on two factors: (i) the defendant's knowledge of the fiduciary's duty and breach, and (ii) the amount of participation required to reach the level of substantial assistance.[132] Accordingly, this Note will analyze *Granewich* in that framework.

1. Knowing Participation: The Requisite Degree of Knowledge

Knowing participation in a fiduciary's breach of duty requires both knowledge as to the primary violator's status as a fiduciary and knowledge that the primary violator's conduct contravenes his fiduciary duty.[133] This approach echoes the standards announced in the *Restatement (Second)*.[134] The *Restatement (Second)*, however, fails to define "knowledge."[135] Unfortunately, general tort standards of knowledge have been only of limited help in assessments of liability for aiding and abetting the breach of fiduciary duty.[136] Consequently, courts have reached divergent results, and the question of whether actual knowledge or constructive knowledge is sufficient has not been decided conclusively, but may turn upon the specific facts of each case.[137] To further

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130. *See* Holmes v. Young, 885 P.2d 305, 309 (Colo. Ct. App. 1994) (noting that substantial assistance is gravamen of aiding and abetting breach of fiduciary duty claim (citing S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 848 (2d Cir. 1987))).

131. *See* Pietrusiak, *supra* note 46, at 234-35 ("Courts that have found insufficient evidence to support aiding and abetting liability have generally staked their holdings on their interpretations of the limits of 'substantial assistance.'").

132. *See* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws – Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313, 322 (1989) (stating that elements that cause greatest difficulty are knowledge and substantial assistance).

133. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 282-83 (2d Cir. 1992) (stating two elements of knowing participation in fiduciary's breach of duty).

134. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (stating knowledge requirements).

135. *See* Kuehnle, *supra* note 132, at 322 (stating that *Restatement (Second)* fails to define knowledge).

136. *See id.* (noting that general tortfeasor liability precedent is of limited help in addressing knowledge issues of aiding and abetting breach of fiduciary duty).

137. *Compare* Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (requiring actual knowledge under circumstances of case), *with Diduck*, 974 F.2d at 283 (stating that constructive knowledge is sufficient), *and* Donovan v. Schmoutley, 592 F. Supp. 1361, 1396 (D. Nev. 1984) (requiring only constructive knowledge that fiduciary's conduct is breach of duty).

complicate the matter, scholars widely have accepted the premise that proving knowledge is nearly impossible in aiding and abetting cases.[138]

Despite problems in defining and determining knowledge, the outcome of at least one case addressing attorney liability for aiding and abetting the breach of fiduciary duty turned on the definition of knowledge.[139] In *Holmes v. Young*,[140] the Colorado Court of Appeals addressed an attorney's liability for aiding and abetting the breach of fiduciary duty in the partnership context.[141] Resolution of the attorney's liability for aiding and abetting the general partner's breach of fiduciary duty turned on the question of knowledge.[142] The *Holmes* court noted the disagreement between jurisdictions over whether actual or constructive knowledge was necessary to sustain the cause of action.[143] The Colorado court refused to resolve that question, however, finding that the defendant-attorney could not have known that the client would breach the fiduciary duties owed to the plaintiff.[144] The result in *Holmes* is sensible, as the breach of duty occurred well after the attorney's involvement in the matter.[145] In the corporate squeeze-out, however, the breach occurs contemporaneously with the attorney's involvement.

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138. *See* Kuehnle, *supra* note 132, at 324 (stating that knowledge is difficult to prove); McNulty & Hanson, *supra* note 47, at 14 (stating that knowledge of tortious act generally is proven by circumstantial evidence); Pietrusiak, *supra* note 46, at 235 (stating that actual knowledge is non-existent in aiding and abetting situations).

139. *See* Holmes v. Young, 885 P.2d 305, 310 (Colo. Ct. App. 1994) (noting that defendant-attorney could not have known that his client would breach fiduciary duty).

140. 885 P.2d 305 (Colo. Ct. App. 1994).

141. *See* Holmes v. Young, 885 P.2d 305, 307 (Colo. Ct. App. 1994) (stating issue). In *Holmes*, the court addressed whether an attorney representing a partnership could be held liable for aiding and abetting the breach of fiduciary duty owed to a limited partner. *Id.* The plaintiff was a limited partner in a Colorado limited partnership the purpose of which was to develop or to dispose of real estate it had acquired. *Id.* The defendant-attorney had represented the limited partnership in a prior civil action and was the signatory officer on a bank account of the limited partnership maintained for the purpose of disbursing money received from the settlement of that action. *Id.* After negotiations with the plaintiff, the attorney turned the account over to the corporate general partner, who was to make payments to the plaintiff. *Id.* Four years later, the corporate general partner stopped making payments to the plaintiff. *Id.* The plaintiff brought suit against the defendant-attorney alleging aiding and abetting the breach of fiduciary duty. *Id.* at 308. Relying on Section 874, comment c, and Section 876(b) to the *Restatement (Second) of Torts*, the court noted that to be liable the defendant must have known that the corporate general partner would fail in its obligations and would breach its duty when the defendant-attorney turned the money over to the general partner. *Id.* at 309. The court concluded that the attorney could not have known of the breach. *Id.* Therefore, the court upheld the lower court's judgment for the attorney. *Id.* at 310.

142. *See id.* at 309 (analyzing issue of knowledge).

143. *See id.* (noting discrepancies in legal standard).

144. *See id.* (refusing to resolve dispute and noting that defendant could not have known, or even have been on notice, that corporate general partner would breach fiduciary duty).

145. *See id.* at 307 (noting that breach occurred four years after attorney delivered funds).

Even though the determination of whether actual or constructive knowledge is required varies from one jurisdiction to the next, the Minnesota Supreme Court recently synthesized the law in an attempt to resolve the dispute.[146] In *Witzman v. Lehrman, Lehrman & Flom*,[147] the Minnesota Supreme Court noted that knowledge is evaluated best in tandem with substantial assistance.[148] Whether the requisite degree of knowledge exists "depends in part on the particular facts and circumstances of each case."[149] The Minnesota court noted that constructive knowledge has been deemed sufficient in those cases in which the aider-and-abettor has maintained a long-term or in-depth relationship with the fiduciary.[150] Actual knowledge of the fiduciary's breach of duty, however, has been required "where the conduct is not a facial breach of duty."[151] Regarding the knowledge issue specific to that case, the *Witzman* court concluded that the fiduciary's actions "were not clear violations of the broad discretionary authority he held."[152] Accordingly, the Minnesota court applied the actual knowledge standard in that case.[153]

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146. *See* Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (synthesizing case law on knowledge requirements for aiding and abetting).

147. 601 N.W.2d 179 (Minn. 1999).

148. *See* Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (stating that courts should evaluate in tandem knowledge and substantial assistance). In *Witzman*, the Minnesota Supreme Court addressed, inter alia, an accounting firm's liability for aiding and abetting a trustee's breach of fiduciary duty. *Id.* at 181-82. Although refusing to grant a wholesale exemption to professionals from liability for aiding and abetting, the court stated that it would strictly and narrowly construe the elements of such a claim to limit professionals' liability. *Id.* at 187. The court first evaluated the knowledge requirement of aiding and abetting, concluding that the requisite degree of knowledge depended on the specific facts of the case. *Id.* at 188. Because the fiduciary's breach was not a clear violation of his authority, the court concluded that the defendant-accountants had to possess actual knowledge of the breach in order to be liable. *Id.* The Minnesota court found that the defendant-accountants lacked actual knowledge. *Id.* Turning to the substantial assistance element, the Minnesota court stated that professional liability for aiding and abetting required more than the mere provision of routine professional services. *Id.* at 189. The defendant-accountants had provided assistance by preparing financial statements and drawing up accounts. *Id.* The court concluded that such activity was routine and insufficient to constitute substantial assistance. *Id.* The *Witzman* court held that the plaintiff had failed to state a claim of aiding and abetting the breach of fiduciary duty against the defendant-accountants. *Id.*

149. *Id.* at 188.

150. *See id.* ("In cases where the primary tortfeasor's conduct is clearly tortious or illegal, some courts have held that a defendant with a long-term or in-depth relationship with that tortfeasor may be deemed to have constructive knowledge that the conduct was indeed tortious." (citing Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 283-84 (2d Cir. 1992))).

151. *Id.* (citing Future Group II v. NationsBank, 478 S.E.2d 45, 50 (S.C. 1996)).

152. *Id.*

153. *See id.* (refusing to infer that aiding-and-abetting defendant possessed actual knowledge of fiduciary's breach).

The *Witzman* court's clarification provides a workable baseline for determining whether constructive or actual knowledge is required for attorney liability for aiding and abetting the breach of fiduciary duty in a corporate squeeze-out. By linking the determination of the requisite degree of knowledge to the particular type of assistance provided, the *Witzman* solution allows for a more flexible, albeit less predictable, determination of liability. Thus, attorneys who have committed more egregious acts of assistance or who have assisted in breaches of duty over an extended period of time will be held to the lower standard of knowledge. Although the *Restatement (Second)* does not assess substantial assistance with respect to the length of the relationship between the primary tortfeasor and the aider and abettor, at least one court has recognized that length of relationship is an important factor in the analysis.[154]

In the context of attorney liability for aiding and abetting a majority shareholder in the breach of fiduciary duty in a corporate squeeze-out, however, final resolution of the knowledge issue is probably of relatively little practical importance. Knowledge, as defined in prior aiding and abetting cases, essentially has two requirements.[155] The first is knowledge as to the primary violator's status as a fiduciary.[156] Most likely, corporate counsel will be familiar with the status of fiduciary duty jurisprudence and, in turn, will know whether a majority shareholder stands in a fiduciary relationship with a minority shareholder in the applicable jurisdiction. The second requirement is knowledge that the primary's conduct constitutes a breach of fiduciary duty.[157] Once again, corporate counsel most likely will be cognizant that certain squeeze-out techniques may violate the majority shareholder's fiduciary obligations. Thus, it is probable that a corporate attorney may satisfy the higher actual knowledge standard in the context of a corporate squeeze-out.

One must be careful not to confuse knowledge of the defendant's breach with an intent to harm the plaintiff. Admittedly, the line between the two is not a bright one, but a number of decisions confronting aiding and abetting liability under the *Restatement (Second) of Torts* conclude that assistance in a fiduciary's breach of duty does not require proof of wrongful intent.[158] That

154. *See* Halberstam v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983) (adding sixth factor of "length of relationship" to *Restatement*'s five-part test for determining substantial assistance); *infra* note 179 (discussing facts and analysis of *Halberstam*).

155. *See supra* note 133 and accompanying text (stating that relevant knowledge is knowledge as to primary's status as fiduciary and knowledge that primary's conduct constitutes violation of duty).

156. *See supra* note 133 and accompanying text (noting first requirement of knowledge).

157. *See supra* note 133 and accompanying text (noting second requirement of knowledge).

158. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 282 (2d Cir. 1992) ("No intent to harm need be proven in connection with a knowing participation claim." (citing S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 849 (2d Cir. 1987))); *S & K Sales Co.*, 816 F.2d

principle logically extends from an understanding that a primary violation of fiduciary duty itself requires no specific mental state.[159] Rather, in order to find a defendant liable for aiding and abetting the breach of fiduciary duty, "the factfinder is required only to find that the defendant knew of the breach of duty and participated in it."[160]

Even though the Supreme Court has abolished causes of action for aiding and abetting under certain provisions of federal securities laws,[161] analysis of those prior aiding and abetting cases under federal securities laws provides a deeper understanding of the broad nature of common-law formulations of aiding and abetting liability. Indeed, common-law formulations of aiding and abetting the breach of fiduciary duty differ from aiding and abetting liability under the federal securities laws, and courts have carefully distinguished the two types of aiding and abetting liability in this respect.[162] The differentiation especially is notable with respect to issues of intent. For example, a primary violation of fiduciary duty under certain provisions of the federal securities laws requires an intent to defraud.[163] Likewise, liability for aiding and abetting under the federal securities laws requires a specific intent to assist in the breach.[164]

The fact that courts have applied common-law formulations of aiding and abetting liability under federal statutes that do not proscribe aiding and abet-

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at 848 (noting that lower court's refusal to instruct on wrongful intent was proper); Holmes v. Young, 885 P.2d 305, 309 (Colo. Ct. App. 1994) (stating that wrongful intent is not necessary element (citing *S & K Sales Co.*, 816 F.2d at 848)).

159. *See Diduck*, 974 F.2d at 282 (noting that fiduciary's liability for breach of duty does not turn on intent).

160. *S & K Sales Co.*, 816 F.2d at 848.

161. *See* Cent. Bank v. First Interstate Bank, 511 U.S. 164, 191 (1994) (holding that private plaintiff may not maintain aiding and abetting suit under Securities Exchange Act § 10(b)). In *Central Bank*, the Supreme Court settled the question of whether private civil liability under section 10(b) of the Securities Exchange Act of 1934 extends to those who aid and abet a manipulative or deceptive practice under that statute. *Id.* at 167. The court stated the "uncontroversial conclusion" that the text of the 1934 Act does not itself reach those who aid and abet a section 10(b) violation. *Id.* at 177. Thus, the court concluded that section 10(b) does not create an implied cause of action for aiding and abetting violations of that provision. *Id.* at 177-78; *see also* Theodore Sonde & Jennifer L. Kim, *The Evolution of Professional Liability – A Work in Progress*, SC88 ALI-ABA 277, 280 (1998) (stating that *Central Bank* clearly eliminated certain private causes of action against attorneys and accountants under federal securities laws).

162. *See Diduck*, 974 F.2d at 282 (noting that defendants' reliance on securities laws to dismiss cause of action is misplaced).

163. *See* Ernst & Ernst v. Hochelder, 425 U.S. 185, 197 (1976) (discussing primary liability under federal securities laws).

164. *See* DiLeo v. Ernst & Young, 901 F.2d 624, 628 (7th Cir. 1990) (noting that aiding and abetting under federal securities laws requires specific intent to assist in breach).

ting as a cause of action complicates the distinction between common-law and federal statutory bases of liability.[165] For example, in *Diduck v. Kaszycki & Sons Contractors, Inc.*,[166] the Court of Appeals for the Second Circuit addressed liability for aiding and abetting the breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA).[167] Even though ERISA does not address liability for aiding and abetting the breach of fiduciary duty, the court concluded that one who knowingly participates in a fiduciary's breach of duty under that federal statute could be held liable under common-law formulations of aiding and abetting the breach of fiduciary duty.[168] Because aiding and abetting liability in that case was derived from the common law, rather than from a statutory basis, the court concluded that no specific intent was required in order to hold the defendant liable for aiding and abetting.[169]

A minority of jurisdictions analyzing the claim under common-law traditions, however, places an emphasis on intent in determining whether an attorney should be held liable for aiding and abetting the breach of fiduciary duty.[170] For example, the California courts have required a defendant-attorney

165. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 281 (2d Cir. 1992) (supplementing federal statute with common-law formulations of aiding and abetting breach of fiduciary duty).

166. 974 F.2d 270 (2d Cir. 1992).

167. Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 270 (2d Cir. 1992) (stating issue). In *Diduck*, the Second Circuit considered, inter alia, whether a third party could be held liable for aiding and abetting the breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). The Trump Organization, Inc., aided and abetted a union official in the breach of his fiduciary duties by knowingly participating in a scheme to defraud a union pension fund. *Id.* at 274-75. The court initially considered whether common-law formulations of aiding and abetting breach of fiduciary duty should supplement the rights provided in ERISA. *Id.* at 281. The court concluded that allowing the cause of action under ERISA was consistent with the statute's purposes, holding that one who knowingly participates in an ERISA fiduciary's breach of duty is jointly and severally liable with the fiduciary for resulting damages under ERISA. *Id.* Turning to the elements of aiding and abetting the breach of fiduciary duty, the court of appeals stated that the plaintiff need not prove intent to harm in connection with a knowing participation claim. *Id.* at 282. The court then addressed the question of whether a defendant charged with aiding and abetting liability must possess either actual or constructive knowledge. *Id.* at 282-83. The court concluded that constructive knowledge was sufficient. *Id.* at 283. Finally, the court considered what level of participation by the Trump defendants was necessary to sustain the aiding and abetting claim. *Id.* at 284. The court concluded that one participates in a fiduciary's breach if he affirmatively assists, helps conceal, or fails to act when required to do so. *Id.*

168. *See id.* at 281 (allowing common-law formulations to supplement federal statute).

169. *See id.* at 282 (stating that plaintiff need not prove intent).

170. *See* Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 639 (Cal. Ct. App. 1991) (requiring nonfiduciary attorney to act "in furtherance of [his] own financial gain" in order to be liable for aiding and abetting breach of fiduciary duty); Tuttle, *supra* note 29, at

to have acted in furtherance of his own financial gain in order for aiding and abetting liability to attach.[171] California's focus on intent, however, may be based upon a general California rule against holding an individual liable for assisting in the violation of a duty when that individual was not personally bound by the duty.[172] Legal scholarship has suggested that the California approach represents the proposition "that lawyers who act as agents, and not as principals furthering their own interests, do not act as 'participants' in their clients' breach of duty."[173] Illinois courts have echoed a focus on intent in determining substantial assistance by requiring an attorney to act from personal malice or a desire for personal profit in order to trigger liability for aiding a fiduciary in the breach of duty.[174] While this focus on intent appears to provide greater protection to attorneys that perform legal services for clients but do not actively participate in the breach, at least one court has determined that the receipt of legal fees is a basis for concluding that an attorney "participated" in his client's breach of fiduciary duty for his own financial gain.[175]

2. *Substantial Assistance: Level of Participation*

The *Restatement (Second) of Torts* sets out a five-part balancing test for determining whether the assistance given rises to the level of "substantial."[176]

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929 (noting that Illinois requires nonfiduciary attorney to act from personal malice or desire for personal profit in order to trigger aiding and abetting liability (citing Schott v. Glover, 440 N.E.2d 376, 379 (Ill. App. Ct. 1982))).

171. *See Skarbrevik*, 282 Cal. Rptr. at 639 (requiring nonfiduciary attorney to act "in furtherance of [his] own financial gain"); *infra* notes 267-301 and accompanying text (discussing *Skarbrevik* in detail).

172. *See* City of Atascadero v. Merril Lynch, Pierce, Fenner & Smith, Inc., 80 Cal. Rptr. 2d 329, 342 (Ct. App. 1999) ("As a general rule, a cause of action for civil conspiracy will not arise if the alleged coconspirator, even though a participant in some agreement underlying the injury, was not *personally bound* by any duty violated by the wrongdoing.") (emphasis added).

173. Tuttle, *supra* note 29, at 930; *see also infra* notes 309-39 and accompanying text (discussing California's experience with attorney liability to non-clients).

174. *See* Tuttle, *supra* note 29, at 929 (noting that Illinois requires nonfiduciary attorney to act from personal malice or desire for personal profit in order to trigger aiding and abetting liability (citing Schott v. Glover, 440 N.E.2d 376, 379 (Ill. App. Ct. 1982))). *But see* Wiebolt Stores, Inc. v. Schottenstein, No. 878C811, 1989 WL 99545, at *1 (N.D. Ill. Aug. 23, 1989) (noting that Illinois courts have never recognized aiding and abetting breach of fiduciary duty as cause of action).

175. *See* Weingarten v. Warren, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) (allowing aiding and abetting breach of fiduciary duty claim against attorney because he had reaped legal fees for twenty-eight years in representation of trustee).

176. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) (setting out balancing test for substantial assistance).

In making this determination, courts are to evaluate (1) the nature of the act encouraged, (2) the amount of assistance given by the defendant, (3) his presence or absence at the time of the tort, (4) his relation to the fiduciary, and (5) the defendant's state of mind.[177] In *Halberstam v. Welch*,[178] the Court of Appeals for the District of Columbia Circuit added "duration of the assistance provided" as a sixth factor for analysis.[179]

Relevant case law recognizes that substantial assistance need not require actual commission of or physical participation in the tortious act.[180] The *Restatement (Second) of Torts* is clear in this respect, recognizing that "advice or encouragement" to act can constitute substantial assistance in the commission of a tort.[181] Advice or encouragement to act provides moral support to the tortfeasor, and courts have concluded that it may have the same effect upon a third party's liability as participation or physical assistance.[182] For example, the Court of Appeals in *Halberstam* concluded that the defendant's encouragement to the primary actor to carry out a burglary scheme was sufficient to warrant liability for aiding and abetting the wrongful death of the

177. *See id.* (listing factors in balancing test).

178. 705 F.2d 472 (D.C. Cir. 1983).

179. *See* Halberstam v. Welch, 705 F.2d 472, 484 (D.C. Cir. 1983) (noting that sixth factor is necessary because length of relationship between one who actually committed crime and third party providing assistance influences amount of aid provided). In *Halberstam*, the Court of Appeals for the District of Columbia Circuit addressed whether the live-in companion (defendant) of a burglar could be held jointly liable in a civil action for a murder committed in the course of the burglary, even though she was not present at the time of the murder-burglary. *Id.* at 474-75. To resolve the question, the court analyzed both conspiracy and aiding and abetting as potential bases of liability. *Id.* at 476-78. The court distinguished the two theories of joint liability by noting that although conspiracy analysis turned on an agreement to commit an act, aiding and abetting liability turned on substantial assistance rather than an agreement to join the wrongful conduct. With respect to conspiracy, the D.C. Circuit stated that circumstantial evidence, such as the relationship between the tortfeasor and conspirator and the duration of their activity, could give rise to an inference of an agreement. *Id.* at 486. With respect to aiding and abetting liability, the court's analysis turned upon whether the assistance given rose to the level of substantial. *Id.* at 488. After setting out the five factors from the *Restatement (Second)* as a guide for analysis, the court added as a sixth factor the duration of the relationship between the primary actor and the aider-and-abettor. *Id.* at 484, 488. Although the defendant's involvement in the actual commission of the act in question was minimal, the length of the relationship between the defendant and the burglar-murderer warranted a finding of substantial assistance and participation in the scheme. *Id.* at 484. The *Halberstam* court concluded that liability was proper under both theories offered. *Id.* at 489.

180. *See id.* at 488 (noting that substantial assistance does not require physical participation); *see also* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) (stating that advice or encouragement may constitute substantial assistance).

181. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

182. *See id.* (stating that advice or encouragement provides moral support to tortfeasor).

burglary victim.[183] Even though the cause of action in *Halberstam* is quite different than the one in *Granewich*, the limits of substantial assistance in *Halberstam* illustrate the broad range of conduct that may constitute participation in an underlying tort.

Similarly, the Court of Appeals for the Second Circuit has adopted a rather broad definition of what actions constitute substantial assistance in the breach of fiduciary duty.[184] The Second Circuit's definition concludes that one participates in a fiduciary's breach of duty if he "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed."[185] In *Diduck*, the defendant's "silence in the face of plaintiff's inquiries" regarding the fiduciary's suspected breach of duty was sufficient "concealment" to warrant liability for aiding and abetting.[186] Under the Second Circuit's approach, the "aider and abettor" need not profit from the fiduciary's breach.[187]

The Second Circuit's broad approach to defining substantial assistance in the breach of fiduciary duty demonstrates how courts have differentiated liability for aiding and abetting the breach of fiduciary duty from other torts. Although the failure to stop an imminent breach of duty or to notify the person to whom the duty is owed generally does not amount to participation in a tort,[188] courts have not adhered to that general rule when addressing liability for aiding and abetting the breach of fiduciary duty.[189] For example, numerous courts have taken the position that one may be liable for aiding and abetting the breach of fiduciary duty by inaction or failing to prevent the breach, ignoring the general rule that nonfeasance does not amount to tortious conduct.[190] This distinction begins to illuminate the difficulties in applying the elements of the cause of action to an attorney and his corporate client.[191]

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183. *See Halberstam*, 705 F.2d at 488 (noting that despite her absence at scene of crime, defendant was liable as aider-and-abettor).

184. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 283 (2d Cir. 1992) (defining substantial assistance).

185. *Id.*; *see also supra* notes 166-69 and accompanying text (discussing factual background and analysis of *Diduck*).

186. *Diduck*, 974 F.2d at 284.

187. *See id.* (stating that defendant need not profit from breach).

188. *See* Tuttle, *supra* note 29, at 928 (noting general rule regarding failure to act).

189. *See* Pietrusiak, *supra* note 46, at 238 (noting that numerous aiding and abetting cases support notion that one may be held liable for inaction or failing to prevent another's breach of duty).

190. *See id.* (citing cases finding nonfeasance actionable and stating that courts ignore traditional tort rule in this context).

191. *See id.* at 243 (noting that elements of cause of action are difficult to apply in context of corporate attorney).

In *Granewich*, the defendant-attorneys' preparation of documents and letters, provision of legal assistance, and orchestration of the squeeze-out plan enabled the controlling shareholders to exercise actual control of the corporation.[192] Arguably, assistance of that nature constitutes "affirmative assistance" under *Diduck*'s test of substantiality by enabling the breach to occur.[193] Moreover, traditional understandings of causation in tort law support such a result. Under tort law's traditional causation analysis, the proper test is whether the plaintiff would have suffered harm "but for" the defendant-attorneys' assistance.[194] The facts of *Granewich* indicate that the plaintiff would satisfy this test. The plaintiff resisted the early attempts of the controlling shareholders to remove him from the corporation,[195] and the defendant-attorneys' efforts to enforce those prior actions proved futile.[196] In the words of the Oregon Court of Appeals, the actions of the controlling shareholders prior to the involvement of the defendant-attorneys were "invalid and ineffective."[197] Yet once the defendant-attorneys became involved in the attempt to squeeze-out the plaintiff, the controlling shareholders were able to amend the by-laws, to remove plaintiff as a director, and to dilute the value of the plaintiff's stock in the corporation.[198] Therefore, but for the involvement of the defendant-attorneys, Granewich would not have suffered harm.

Thus, the wide net cast by the Second Circuit's test, whereby nearly any degree of participation can constitute assistance in the breach of fiduciary duty, and tort law's traditional proximate cause test support the conclusion that imposing liability on the defendant-attorneys in *Granewich* is consistent with prior legal doctrine. Yet scholarship has recognized that the "but for" proximate cause test "represents a serious challenge to the way corporate attorneys do business with their clients."[199] Thus, despite coherence between the result in *Granewich* and prior formulations of substantial assistance under

192. *See* Granewich v. Harding, 985 P.2d 788, 791-92 (Or. 1999) (noting that defendant-attorney "assisted [controlling shareholders] in exercising actual control of the management and policies" of corporation).

193. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 283 (2d Cir. 1992) (noting that substantial assistance may include affirmative assistance to tortfeasor).

194. *See* Pietrusiak, *supra* note 46, at 249-50 (noting "but for" causation test).

195. *See Granewich*, 985 P.2d at 791 (noting that plaintiff objected to controlling shareholders' actions to remove him from corporation).

196. *See* Granewich v. Harding, 945 P.2d 1067, 1075 (Or. Ct. App. 1997) (Armstrong, J., dissenting) (stating that defendant-attorney realized that controlling shareholders' prior actions were "invalid and ineffective"), *rev'd*, 985 P.2d 788 (Or. 1999).

197. *Id.*

198. *See* Granewich v. Harding, 985 P.2d 788, 791-92 (Or. 1999) (describing actions of controlling shareholders with assistance from defendant-attorneys).

199. Pietrusiak, *supra* note 46, at 250.

the common law, the necessity for attorney involvement in corporate squeeze-outs exacerbates *Granewich*'s implications for redefining the attorney's role in the squeeze-out.

C. Necessity for Attorney Involvement in Squeeze-Outs

A particularly disturbing facet of the extension of liability for aiding and abetting the breach of fiduciary duty into the corporate squeeze-out context stems from the necessity of attorney involvement in that type of transaction.[200] A brief return to the facts of *Granewich* illustrates this dilemma.[201] The controlling shareholders in *Granewich* attempted to remove the plaintiff on their own accord before hiring the defendant-attorneys.[202] They did so by removing him from the board of directors, relieving him of his executive position, and terminating his employment with the corporation.[203] Only when the plaintiff challenged the validity of those actions did the majority shareholders hire the defendant-attorneys to assist them in their efforts to squeeze-out the plaintiff.[204] The defendant-attorneys then provided the legal expertise to effect the squeeze-out by calling special meetings, amending the corporate by-laws, and issuing stock to dilute the value of plaintiff's interest in the corporation.[205]

The degree of attorney involvement in the *Granewich* squeeze-out is certainly not unique. Attorneys routinely facilitate corporate squeeze-outs because the close corporation is a legal entity whose very existence derives from attorney input and whose rules of governance and procedures are not easily understood by lay persons.[206] Moreover, by definition, a squeeze-out

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200. *See Granewich*, 945 P.2d at 1075 (Armstrong, J., dissenting) (noting that controlling shareholders' actions prior to attorney involvement were ineffective). The failure of the controlling shareholders to remove Granewich on their own accord demonstrates the importance of the defendant-attorneys' role in this transaction. Without the assistance of the defendant-attorneys' involvement, the controlling shareholders were unable to accomplish their goal of removing Granewich from the corporation.

201. *See supra* note 9 (commenting on *Granewich*); *supra* notes 70-107 and accompanying text (discussing facts of *Granewich*).

202. *See Granewich*, 985 P.2d at 791 (noting that controlling shareholders devised plan to squeeze plaintiff out of corporation).

203. *See id.* (noting controlling shareholders' actions).

204. *See id.* (noting that controlling shareholders hired defendant-attorneys after plaintiff rejected prior efforts).

205. *See id.* at 791-92 (describing defendant-attorneys actions to remove plaintiff from corporation).

206. *See generally* WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed. 1999) (providing comprehensive discussion on nature of corporate entity in twenty volumes); WILLIAM H. PAINTER, PAINTER ON CLOSE CORPORATIONS: CORPORATE, SECURITIES, AND TAX ASPECTS (3d ed. 1997) (providing in-depth coverage of

involves the controlling shareholder's utilization of powers of control and "some legal device or technique" to remove the minority shareholder from the entity.[207] For example, squeeze-outs often involve fundamental corporate change, such as modification of the corporate by-laws, that can only be accomplished by an attorney with knowledge of the statutory mechanisms authorizing such action.[208] It is only natural that a majority shareholder would turn to legal assistance when seeking to alter the corporate entity.

The necessity for attorney involvement in corporate squeeze-outs raises concerns about holding attorneys liable for rendering professional services. For example, one could argue that the defendant-attorneys in *Granewich* did nothing more than prepare documents and conduct routine transactions at the request of their client. Prior aiding and abetting litigation under federal securities laws has recognized that holding attorneys liable for rendering professional services poses a dilemma.[209] In *Schatz v. Rosenberg*,[210] the Court of Appeals for the Fourth Circuit addressed an attorney's liability for aiding and abetting a breach of duty under federal securities law.[211] The plaintiff alleged, inter alia, that the attorneys assisted a client's breach by drafting financial statements

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corporate, securities, and taxation aspects of closely-held corporations in two volumes); SEYMOUR D. THOMPSON & JOSEPH W. THOMPSON, THOMPSON ON CORPORATIONS (Edward F. White ed., 3d ed. 1927) (discussing application of basic corporate law principles in ten volumes). The sheer number of multi-volume treatises, cyclopedias, and collections on corporate law and governance illustrates the complexity of the subject matter.

207. *See* O'NEAL & THOMPSON, *supra* note 3, § 1.01, at 1 (defining squeeze-out).

208. *See id.* § 5.01, at 3 (stating that squeeze-outs may involve fundamental corporate change).

209. *See* Schatz v. Rosenberg, 943 F.2d 485, 494-95 (4th Cir. 1991) (addressing attorney liability for "papering the deal").

210. 943 F.2d 485 (4th Cir. 1991).

211. Schatz v. Rosenberg, 943 F.2d 485, 487 (4th Cir. 1991) (noting allegations against attorneys). In *Schatz*, the Court of Appeals for the Fourth Circuit considered an attorney's liability for fraud and aiding and abetting a violation under federal securities laws. *Id.* The primary allegations against the defendant-attorneys stated that they had provided assistance by drafting misleading financial statements for their client. *Id.* at 488. First, the court distinguished the case from earlier cases involving the solicitation of securities, noting that there was no affirmative duty upon an attorney to disclose a client's misrepresentations to a non-client. *Id.* at 490-92. Second, the court noted that the defendant-attorneys were not liable for merely "papering the deal" which their client had negotiated, noting that the presence of an agency relationship does not automatically make an attorney liable for the misrepresentations of his client. *Id.* at 494-95. Finally, the court concluded that the defendant-attorneys were not liable for aiding and abetting their client's violation based on the fact that they had acted merely as scriveners, which was not enough to warrant liability under the federal securities laws. *Id.* at 496-97. The Fourth Circuit held that the defendant-attorneys had no duty of disclosure and that a lawyer cannot be held liable for the representations of a client, even if the lawyer incorporates the client's misrepresentations into legal documents necessary for closing a transaction. *Id.* at 492, 495.

containing omissions and misrepresentations.[212] In affirming the lower court's judgment in favor of the defendant-attorney, the Fourth Circuit stated:

> [T]he "substantial assistance" element requires that a lawyer be more than a scrivener for a client; the lawyer must actively participate in soliciting sales or negotiating terms of the deal on behalf of a client to have "substantially assisted" a securities violation. In other words, a plaintiff must prove that a defendant rendered "substantial assistance" to the primary securities law violation, not merely to the person committing the violation . . . . While it is true that some of [the client's] documents prepared by [the attorneys] were misleading, this fact alone does not meet the "substantial assistance" threshold. Otherwise, there would be a *per se* rule holding attorneys liable in every securities fraud case, because in virtually every transaction, attorneys draft the closing documents.[213]

The Fourth Circuit's approach to aiding and abetting liability under federal securities laws provides strong protection to attorneys who prepare documents for clients that breach their legal duties and responsibilities. Arguably, such a position would have exonerated the defendant-attorneys in *Granewich*.[214] Yet there is substantial justification for Oregon's refusal to exempt the *Granewich* attorneys' actions from the range of conduct that constitutes substantial assistance.

Granewich differs from *Schatz* in the material respect that the latter involved alleged violations of federal securities law.[215] The basis of liability in *Granewich*, however, was the common-law development of liability for aiding and abetting the breach of fiduciary duty, not interpretations of aiding and abetting liability under federal statutes.[216] That material difference alone may account for the discrepancy between the two cases regarding attorney liability because common-law formulations of aiding and abetting liability explicitly recognize a broader test for substantial assistance than understandings derived under federal law.[217] For example, the Second Circuit noted that the substantial assistance necessary to impose common-law liability for aiding and abetting "is less than the 'substantial assistance' necessary to impose aider-

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212. *See id.* at 488 (noting allegations against attorneys).

213. *Id.* at 497.

214. *See supra* notes 76-80 and accompanying text (discussing attorneys' assistance).

215. *See Schatz*, 943 F.2d at 488 (noting allegations under federal securities laws).

216. *See* Granewich v. Harding, 985 P.2d 788, 792 (Or. 1999) (noting reliance on Oregon case law, rather than federal securities statutes, to resolve dispute).

217. *See* Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 284 (2d Cir. 1992) (noting differences between common law and federal securities law in determining substantial assistance); *supra* notes 176-99 and accompanying text (discussing substantial assistance under common law).

abettor liability under the securities laws."[218] Aiding and abetting liability under certain provisions of federal securities laws requires proof of purposeful conduct.[219] However, the District Court for the District of Columbia concluded in *Foltz v. U.S. News & World Report, Inc.*[220] that the degree of participation required under common-law formulations of liability need not reach that level of purposeful conduct.[221] Even though *Foltz* did not involve allegations against an attorney, the court stated that the defendant-appraiser's services in that case were no different than those an attorney would provide.[222] Thus, *Foltz* supports the assumption that common-law formulations of liability for aiding and abetting the breach of fiduciary duty do not provide the same degree of protection to an attorney as does liability under federal securities laws.

A recent Minnesota case regarding common-law liability for aiding and abetting the breach of fiduciary duty, however, appears to conflict with *Grane-*

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218. *Diduck*, 974 F.2d at 284.

219. *See* Foltz v. U.S. News & World Report, Inc., 627 F. Supp. 1143, 1068 (D.D.C. 1986) (stating that aiding and abetting liability under federal securities laws requires proof of purposeful conduct).

220. 627 F. Supp. 1143 (D.D.C. 1986).

221. *See* Foltz v. U.S. News & World Report, Inc., 627 F. Supp. 1143, 1068 (D.D.C. 1986) (noting that degree of participation required under common law derived liability for aiding and abetting breach of fiduciary duty need not reach level of purposive conduct). In *Foltz*, the District Court considered, inter alia, whether American Appraisal Associates (American Appraisal) could be held liable for aiding and abetting U.S. News & World Reports's (U.S. News) breach of fiduciary duty under federal securities laws and ERISA. *Id.* at 1155. American Appraisal was alleged to have assisted U.S. News's breach by providing assistance in the undervaluing of U.S. News's stock. *Id.* at 1148. The plaintiffs alleged that the undervaluing of the stock reduced the ERISA benefits to which they were entitled. *Id.* at 1147. With respect to the claims against American Appraisal under federal securities laws, the court concluded that the majority of the plaintiff's claims against American Appraisal were invalid because there was no proof that American Appraisal possessed the higher level of scienter required for those actions. *Id.* at 1162. The court then turned to the plaintiff's claims under ERISA. *Id.* at 1165. The court analyzed those claims under common-law formulations of liability for aiding and abetting the breach of fiduciary duty, which had been incorporated under ERISA. *Id.* at 1168. The court determined that American Appraisal was not a fiduciary under ERISA. *Id.* at 1167. It noted, however, that non-fiduciaries who knowingly participate in the breach may be held liable. *Id.* at 1168. In response to American Appraisal's argument that it had not benefitted from the breach, the court stated prior case law had clearly established that participation, not receipt of profit, was the basis of liability for aiding and abetting the breach of fiduciary duty. *Id.* at 1168. Moreover, the court noted, the degree of participation was less than that required under prior cases evaluating federal securities law. *Id.* Consequently, the degree of participation need not reach the level of purposive conduct. *Id.* Accordingly, the court concluded that the plaintiff had stated a valid cause of action for aiding and abetting the breach of fiduciary duty against American Appraisal. *Id.*

222. *See id.* at 1166-67 (noting that defendant-appraiser's services "were certainly no different" than those of "attorneys, accountants, actuaries and consultants performing their usual functions").

wich's imposition of liability for rendering professional services.[223] In *Witzman*,[224] the Minnesota court stated that "[i]n addressing aiding and abetting liability in cases involving professionals, most courts have recognized that 'substantial assistance' means something more than the provision of routine professional services."[225] However, the Minnesota court provided relatively weak support for that proposition.[226] The *Witzman* court cited *Schatz* to support the conclusion that professionals are entitled to greater protection, yet the applicability of *Schatz* to common-law formulations of aiding and abetting liability is questionable.[227] The Minnesota court also cited *Spinner v. Nutt*,[228] which concluded that "an allegation that a trustee acted under the *legal advice* of the defendant, without more, is insufficient" to establish substantial assistance.[229] Although the defendant-attorneys in *Granewich* did provide legal advice, they also drafted documents, sent letters containing misrepresentations, and provided assistance in the amendment of the by-laws to eliminate voting requirements that protected the minority shareholder's interest in the corporation.[230] In short, they orchestrated the entire squeeze-out. Despite the fact that drafting documents and assisting in the amendment of corporate by-laws may be commonplace in the practice of the corporate attorney, the actions of the *Granewich* attorneys certainly do not fit within *Spinner*'s limited exemption from liability for the mere provision of legal advice.[231] Conse-

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223. *See* Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (analyzing substantial assistance in aiding and abetting cases involving "professionals").

224. *See supra* note 148 (discussing *Witzman* in detail).

225. *Witzman*, 601 N.W.2d at 188.

226. *See id.* at 188 (supporting statement with *Schatz* and *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994)).

227. *See supra* notes 210-18 and accompanying text (discussing *Schatz*'s applicability to federal securities violations).

228. 631 N.E.2d 542 (Mass. 1994).

229. Spinner v. Nutt, 631 N.E.2d 542, 546 (Mass. 1994) (emphasis added). In *Spinner*, the court addressed, inter alia, whether an attorney could be held liable for aiding and abetting a trustee's breach of fiduciary duty. *Id.* at 546. The plaintiffs alleged that the defendant-attorneys participated in the trustee's breach of duty by advising the trustees not to sell stock held in trust. *Id.* at 544. Addressing the aiding and abetting claims, the *Spinner* court concluded that the mere allegation by the plaintiffs that the trustees acted under the legal advice of the defendant-attorneys was insufficient to impose aiding and abetting liability upon the defendant-attorneys. *Id.* at 546. Therefore, the court concluded that the allegations were insufficient to support a finding that the defendant-attorneys should be held liable for aiding and abetting the trustee's breach of fiduciary duty. *Id.*

230. *See* Granewich v. Harding, 985 P.2d 788, 791-792 (Or. 1999) (describing allegations against attorneys).

231. *See supra* notes 76-80 and accompanying text (discussing assistance provided by defendant-attorneys in *Granewich*).

quently, the nexus between *Spinner* and *Granewich* is strained, at best. Thus, *Granewich*'s imposition of liability for rendering professional services appears to be consistent with traditional notions of common-law aiding and abetting liability.

D. Conflicts with Ethical Obligations

Under common-law formulations of substantial assistance in the breach of fiduciary duty, "concealment" of the fiduciary's breach may be a basis for liability.[232] As previously noted, the Second Circuit in *Diduck* concluded that the defendant's "silence in the face of the plaintiff's inquiries" about the fiduciary's suspected breach of duty was sufficient to warrant liability for aiding and abetting the breach of the fiduciary duty.[233] The extreme application of that interpretation of substantial assistance would yield a result whereby the defendant-attorneys in *Granewich* could be liable merely for not explicitly informing the plaintiff of the breach of duty. Revelation of the controlling shareholders' plan, however, would violate the obligation of confidentiality that the defendant-attorneys owe to their client.[234] Such a contradictory result illustrates the apparent conflict between the ethical rules governing attorney conduct and the legal liability of attorneys for aiding and abetting the breach of fiduciary duty in a corporate squeeze-out.

Every lawyer, regardless of his particular area of specialization, is charged with the obligation to act only for the benefit of the client and "free of compromising influences and loyalties."[235] Loyalty to the client, however, is not absolute. For example, the obligation to refrain from assisting the client in committing criminal or fraudulent acts tempers the attorney's duty of loyalty to the client.[236] Additionally, an attorney may disclose information relating to representation of a client absent consent of the client if the attorney does so to prevent a criminal act likely to result in imminent death or substantial bodily harm.[237] For the most part, though, the "moral and legal universe"

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232. *See supra* notes 184-87 and accompanying text (stating Second Circuit's test).

233. *See supra* note 186 and accompanying text (noting that silence in face of inquiry by plaintiff constituted concealment).

234. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983) (defining nature of confidential relationship between attorney and client).

235. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1 (1980) (stating obligations of attorney to act solely for benefit of client).

236. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983) (stating that lawyer should not assist client in conduct that lawyer knows is criminal or fraudulent).

237. *See id.* R. 1.6 (stating that attorney may not disclose information relating to representation of client absent consent unless attorney does so to prevent imminent death or substantial bodily harm).

of the attorney centers on loyalty to the client.[238]

Save the exceptions regarding criminal acts, fraud, or substantial bodily harm previously noted, the attorney's ethical obligations to those outside the attorney-client relationship, or "non-clients," are relatively few.[239] In this respect, the ethical obligations of an attorney embrace the "principle of non-accountability."[240] Attorney liability for aiding and abetting the breach of fiduciary duty illustrates the collision between the Model Rule's embodiment of the non-accountability principle[241] and tort law. For example, although the Model Rules prohibit an attorney from participating in the criminal or fraudulent acts of a client,[242] the breach of fiduciary duty may be accomplished in ways that are neither criminal nor fraudulent.[243] Thus, tort law may impose attorney liability for aiding and abetting the breach of fiduciary duty even though the Model Rules do not proscribe such conduct.

Although Model Rule 1.13 addresses problems that arise when representing "organizational clients,"[244] it provides little guidance for an attorney confronted with the close corporation squeeze-out. Rule 1.13 provides that an attorney for an organizational client "shall proceed as is reasonably necessary in the best interest of the organization" when a representative of the organization intends to act in a way that is a violation of the legal obligation of the organization.[245] The rule lists possible measures that an attorney can take in such a situation, including asking the representative to reconsider the action or, should that prove ineffective, disclosing the matter to higher authority within the organization.[246] Rule 1.13, however, permits an attorney to make disclosures only to those who can take action on the organization's behalf and forbids disclosures to third parties who cannot do so, such as minority shareholders.[247]

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238. *See* Tuttle, *supra* note 29, at 902 (defining "moral and legal universe" of attorney comprised of client and non-clients).

239. *See id.* at 902-03 (noting that attorney has relatively few obligations to non-clients).

240. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) (discussing "principle of non-accountability" as limiting attorney's obligations to nonclients); Tuttle, *supra* note 29, at 931 (same).

241. *See* Tuttle, *supra* note 29, at 931 (noting that Model Rules are premised on non-accountability principle).

242. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983) (stating that lawyer should not assist client in conduct that lawyer knows is criminal or fraudulent).

243. *See* Tuttle, *supra* note 29, at 935 (noting that Model Rule 1.2 does not cover breach of fiduciary duty that is neither criminal nor fraudulent).

244. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983) (addressing problems that arise in representation of organizational client).

245. *Id.*

246. *See id.* (recommending remedial measures).

247. *See id.* (stating that lawyer may disclose to "highest authority that can act on behalf of the organization"); *see also* Tuttle, *supra* note 29, at 925 (noting that Rule 1.13 "permits dis-

Thus, the disclosure requirement of Rule 1.13 is not applicable to the close corporation squeeze-out. Rule 1.13 does provide that an attorney may withdraw from representation when a representative of the organization intends to violate the legal obligations of the entity,[248] but resignation of the individual attorney involved ultimately does little to protect adequately the interests of the minority shareholder.

The Model Rules are not devoid of any reference to an attorney's ethical obligations to a non-client beneficiary.[249] A comment to Rule 1.2 states that "where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary."[250] Thus, the Model Rules suggest that a corporate attorney providing assistance to a majority shareholder may have "special obligations" to a non-client minority shareholder. The comment states, however, that those obligations arise when "dealing" with the beneficiary.[251] One could fashion a colorable argument that the defendant-attorneys in *Granewich* were "dealing" only with their client, the controlling shareholders, and were not "dealing" with the beneficiary. Thus, the comment to Rule 1.2 provides only tenuous support for the result reached in *Granewich*. A later ABA pronouncement substantially undermines that tenuous support.[252]

Formal Opinion 94-380 (ABA 94-380) of the American Bar Association's Committee on Ethics and Professional Responsibility heightens the apparent conflict between *Granewich*'s result and the Model Rules.[253] In addressing the applicability of the Model Rules to attorneys representing a fiduciary in a trust or estate matter,[254] ABA 94-380 provides:

> The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer

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closure to those who can act on behalf of organization, but not to those who cannot act"); Pietrusiak, *supra* note 46, at 245 (stating that Rule 1.13 forbids disclosure to those who are unable to take action on organization's behalf).

248. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983) (allowing attorney to resign from representation if disclosure to higher authority is ineffective).

249. *See id.* R. 1.2 cmt. (noting that lawyer may have special obligations where client is fiduciary).

250. *Id.*

251. *Id.*

252. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (addressing applicability of Model Rules to lawyers representing fiduciary in trust or estate matter).

253. *See id.* (noting that attorney representing fiduciary in estate or trust matter has no special obligation to beneficiary).

254. *See id.* (addressing applicability of Model Rules to lawyers representing fiduciary in trust or estate matter).

> obligations toward the beneficiaries that the lawyer would not have toward other third parties.[255]

This language undercuts any suggestion provided in the comment to Model Rule 1.2 that an attorney representing a fiduciary may have "special obligations" to the beneficiary in the trust situation.[256] Note, however, that ABA 94-380 does not purport to interpret the Model Rules with respect to an attorney representing a fiduciary in any other setting.[257] Therefore, a strict textual interpretation of ABA 94-380 renders it moot in assessing the ethical obligations of an attorney representing a majority shareholder in a corporate squeeze-out.

Yet ABA 94-380 may have some predictive value in determining the Model Rule's response to an attorney's ethical obligations to minority shareholders in a corporate squeeze-out. For example, ABA 94-380 addresses those circumstances that arise when the lawyer represents only the fiduciary of the trust or estate, as opposed to representing the entire trust or estate.[258] Thus, ABA 94-380 interprets the Model Rules in situations in which the attorney has no attorney-client relationship with the beneficiary.[259] In this regard, ABA 94-380 may have some value in interpreting the operation of the Model Rules with respect to the defendant-attorneys in *Granewich* because they represented only the controlling shareholders and did not have an attorney-client relationship with the plaintiff-minority shareholder.[260] The language of ABA 94-380, though, is incongruent with the result in *Granewich* because it indicates in no uncertain terms that an attorney does not have any special ethical obligation to the non-client beneficiary.[261]

The *Restatement (Third) of the Law Governing Lawyers* does little to resolve the conflict between the Model Rules and attorney liability in this context. Section 73 of the *Restatement (Third)* provides that a lawyer may

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255. *Id.*

256. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983) (noting that lawyer may have special obligations where client is fiduciary); *supra* notes 249-52 and accompanying text (discussing comment to Model Rule 1.2).

257. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (stating that opinion addresses applicability of Model Rules to lawyers representing fiduciary in trust or estate matter "with specific reference to whether there are exceptions to Model Rules that apply only to lawyers practicing in this area").

258. *See id.* ("We address in this opinion the circumstances of a lawyer who has undertaken to represent only the fiduciary . . . .").

259. *See id.* (stating that opinion does not address those circumstances that arise when attorney provides joint representation to both fiduciary and beneficiary).

260. *See* Granewich v. Harding, 945 P.2d 1067, 1069 (Or. Ct. App. 1997) (noting no attorney-client relationship between plaintiff and defendant-attorneys), *rev'd*, 985 P.2d 788 (Or. 1999).

261. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (stating that lawyer has no special obligation to beneficiary when representing fiduciary).

have a duty to rectify a fiduciary client's breach of duty to a beneficiary when the attorney has assisted in the breach and the non-client is not reasonably able to protect himself.[262] One scholar has suggested that this section recognizes an attorney's legal and ethical obligations towards a non-client beneficiary.[263] The comments to Section 73, however, explicitly state that the duty contained therein does not apply when the client is a corporate officer, director, or controlling stockholder.[264] Consequently, the *Restatement (Third) of the Law Governing Lawyers* reinforces the conflict between attorney liability in this context and the current understanding of an attorney's ethical obligations in a corporate squeeze-out. One result of *Granewich* is that tort law will expose an attorney to legal liability without any indication that the ethical guidelines prohibit providing assistance to a majority shareholder's breach of fiduciary duty in a corporate squeeze-out.

V. The Conflict Between Granewich *and* Skarbrevik v. Cohen, England & Whitfield

The preceding Part outlined four troubling aspects of *Granewich* for corporate attorneys.[265] A full understanding of *Granewich*'s implications requires an understanding of how courts confronting similar factual situations have resolved the question of attorney liability. Although few cases are exactly on point, a California decision addressing an attorney's alleged conspiracy with majority shareholders to oppress minority shareholders sharpens the under-

262. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(4) (Preliminary Draft No. 12, 1996) (stating attorney's duty to use care in fiduciary representation). Section 73(4) provides in pertinent part that a lawyer owes a duty to use care to a non-client when and to the extent that:

> (a) the lawyers' client is a trustee, guardian, executor, lawyer or similar fiduciary for the non-client;
> (b) circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where: (i) the breach would be a crime or fraud; or (ii) the lawyer has assisted or is assisting the breach;
> (c) the non-client is not reasonably able to protect its rights; and
> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Id.

263. *See* Tuttle, *supra* note 29, at 942 (noting that Section 73 advocates affirmative legal duty to prevent breach).

264. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. h (Preliminary Draft No. 12, 1996) (stating that lawyer's duty to rectify client's breach of fiduciary duty does not apply when client is corporate officer, director, or controlling stockholder).

265. *See supra* Part IV (analyzing four aspects of *Granewich*).

standing of *Granewich*'s implications for redefining an attorney's role in a corporate squeeze-out.[266]

A. Skarbrevik v. Cohen, England & Whitfield

In *Skarbrevik v. Cohen, England & Whitfield*,[267] the California Court of Appeal confronted vicarious liability allegations similar to those in *Granewich*.[268] The plaintiff in *Skarbrevik* was a minority shareholder with a twenty-five percent interest in a closely-held corporation.[269] The majority shareholders informed the plaintiff that financial circumstances dictated his removal from the corporation.[270] After discussing the value of his shares, the plaintiff negotiated a buy-out agreement with the majority shareholders.[271] The majority shareholders hired the defendant-attorney to prepare the documents to effect the agreement.[272] While waiting for those documents, the plaintiff

266. *See* Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991) (addressing liability of corporate attorney for conspiring with majority shareholders to defraud minority shareholder).

267. 282 Cal. Rptr. 627 (Ct. App. 1991).

268. Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991). In *Skarbrevik*, the California Court of Appeal addressed the liability of a corporate attorney for conspiring with majority shareholders to defraud the minority shareholder. *Id.* at 629. After breaching a buy-out agreement with the minority shareholder, the majority shareholders hired corporate counsel to assist them in diluting the minority shareholder's interest in the corporation. *Id.* at 630-31. The defendant-attorney prepared and filed with the Secretary of State documents memorializing a shareholders' meeting at which the shareholders amended the corporate by-laws to delete the preemptive rights provision. *Id.* at 632. The defendant-attorney knew, however, that no such meeting had occurred and that the plaintiff was unaware of the proposal to amend the by-laws. *Id.* After rejecting a professional negligence claim against the attorney due to the absence of any legal duty between the attorney and the minority shareholder, the California court addressed conspiracy charges against the attorney. *Id.* at 636-37. Relying on *Doctors' Co. v. Superior Court*, 775 P.2d 508 (Cal. 1989), the court stated that a cause of action for civil conspiracy may not arise if the alleged conspirator was not personally bound by the duty violated and was acting only as the agent or employee of the party who did have that duty. *Id.* at 638. Moreover, a nonfiduciary attorney is liable for conspiracy in the breach of fiduciary duty only if the attorney acts in furtherance of his own financial gain. *Id.* at 638-39. Noting that the defendant-attorney received only "modest" compensation, the *Skarbrevik* court concluded that the defendant-attorney could not be held liable for conspiracy to breach the fiduciary's duties. *Id.* at 640. The court held that the plaintiff's causes of action for negligence and conspiracy were barred. *Id.* at 629.

269. *See id.* (noting that Skarbrevik was officer, director, employee, and twenty-five percent shareholder in closely-held corporation).

270. *See id.* at 630 (stating that majority shareholder advised plaintiff that "they could not afford to keep [him] on the books").

271. *See id.* (stating that plaintiff negotiated buy-out agreement whereby he would receive $4,500 per month for ten years in return for his shares).

272. *See id.* (stating that majority shareholder hired defendant-attorney to prepare documents to effect buy-out).

resigned from his director and officer positions and terminated his employment with the corporation.[273] Although the defendant-attorney prepared the necessary documents and forwarded them to the majority shareholders, the majority shareholders informed the plaintiff that they were refusing to honor their prior agreement with him.[274] Apparently, the plaintiff took no further action to enforce the agreement at that time.

Approximately four months later, the majority shareholders sought the defendant-attorney's assistance in the issuance of additional shares of stock to themselves.[275] The majority shareholders told the defendant-attorney that the issuance of such stock was necessary to compensate them for their "financial sacrifices" in preserving the financially-troubled corporation.[276] The defendant-attorney, however, knew that the majority shareholders' purpose was to dilute the plaintiff's interest in the entity.[277]

The defendant-attorney informed the majority shareholders that the preemptive rights provision of the corporation's by-laws required that they offer twenty-five percent of the new shares to the plaintiff.[278] Consequently, the defendant-attorney advised the majority shareholders to hold a special shareholders' meeting at which the preemptive rights provision would be deleted.[279] He further advised the majority shareholders to notify the plaintiff at least ten days prior to the meeting.[280] Moreover, the defendant-attorney informed the majority shareholders that any amendment had to be in pursuit of a legitimate corporate purpose and rendered his opinion that the financial concerns of the majority shareholders constituted such a valid purpose.[281]

The majority shareholders, however, did not convene a special shareholders' meeting and, consequently, they did not amend the corporate by-laws to

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273. *See id.* (stating that plaintiff resigned at request of majority shareholders while awaiting necessary documents).

274. *See id.* at 630-31 (noting that majority shareholders had decided not to pay plaintiff).

275. *See id.* at 631 (stating that majority shareholders contacted defendant-attorney four months later to inquire about issuance of additional shares of stock).

276. *See id.* (stating that corporation was experiencing financial difficulties and that majority shareholders had personally secured corporate loans and reduced their salaries to save corporation).

277. *See id.* (quoting letter from defendant-attorney to majority shareholders regarding plan to issue more stock).

278. *See id.* (noting communications between defendant-attorney and majority shareholder).

279. *See id.* (stating that defendant-attorney advised majority shareholders to amend corporate by-laws at special shareholders' meeting).

280. *See id.* (noting that defendant-attorney advised majority shareholders that plaintiff had right to be notified at least ten days prior to meeting).

281. *See id.* (stating that defendant-attorney advised majority shareholders that proposed amendment was in pursuit of proper corporate purpose).

permit the issuance of additional stock.[282] On March 8, approximately three months later, the defendant-attorney informed the majority shareholders by letter that they could amend the by-laws at the annual shareholders' meeting in lieu of a special shareholders' meeting.[283] Yet there was one significant obstacle to this solution: The defendant-attorney knew that the by-laws required the annual meeting to occur by March 1, seven days prior to the date of his letter to the majority shareholders.[284] The defendant-attorney, however, attached to the letter a set of papers memorializing the annual shareholders' meeting that never occurred and the action supposedly taken to delete the preemptive rights provision of the by-laws.[285] Despite knowledge that the annual meeting had not occurred and that the majority shareholders had not informed the plaintiff of any proposal to amend the by-laws, the defendant-attorney perfected the amendment by filing the requisite documents with the Secretary of State and the Department of Corporations.[286] Within nine months, the majority shareholders issued to themselves 500 additional shares of stock each, thereby diluting the plaintiff's interest in the corporation from twenty-five percent to less than five percent without his knowledge.[287]

The plaintiff learned of the dilution of his stock when he filed an action against the majority shareholders for breach of the buy-out agreement.[288] He subsequently amended his complaint to include allegations of breach of fiduciary duty.[289] The amendment also named the defendant-attorney and his firm, alleging counts of professional negligence and conspiracy to defraud.[290] The plaintiff settled with the majority shareholders prior to trial, and the action against the defendant-attorney proceeded.[291]

The trial court returned a general verdict against the defendant-attorney, coupled with special findings that he had conspired to commit fraud against the plaintiff.[292] On appeal, the California Court of Appeal initially addressed

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282. *See id.* at 632 (noting that meeting never took place).

283. *See id.* (noting that defendant-attorney wrote majority shareholders on March 8, 1994, to inform them that they could amend by-laws at annual meeting).

284. *See id.* (noting that meeting was to occur by March 1).

285. *See id.* (stating that defendant-attorney "attached a new set of papers memorializing the 'meeting' and action supposedly taken to delete the preemptive rights provision").

286. *See id.* (stating that defendant-attorney perfected amendment to by-laws by filing it).

287. *See id.* (noting that, as result of five corporate resolutions each authorizing issuance of 100 shares to each majority shareholder, plaintiff's stock was diluted to 4.7 percent without his knowledge).

288. *See id.* (stating that plaintiff learned of dilution when he filed action against majority shareholders).

289. *See id.* at 629 (noting procedural posture).

290. *See id.* (noting procedural posture).

291. *See id.* (noting procedural posture).

292. *See id.* at 629-30 (noting trial court findings).

whether the defendant-attorney had breached a primary duty to the plaintiff.[293] Because the plaintiff was not the intended beneficiary of the defendant-attorney's actions, the court refused to find the existence of a primary duty of care between the defendant-attorney and the plaintiff.[294]

In addressing the conspiracy claim, the court of appeal initially noted that the majority shareholders committed a tort against the plaintiff by concealing their breach of fiduciary duties from him.[295] The court then noted that the record contained evidence from which a jury could infer that the defendant-attorney "knowingly participated" in the majority shareholders' fraud.[296] Had *Skarbrevik* involved allegations of aiding and abetting the breach of fiduciary duty, the above conclusions of the court would have been sufficient to support a finding that the plaintiff had successfully proved the elements of that cause of action.[297] Even so, the California court concluded that the defendant-attorney could not be held liable "[a]bsent either an individual duty to the plaintiff or a personal financial interest in the matter."[298] Recall that the court had determined earlier that the defendant-attorney did not owe an individual duty to the plaintiff.[299] And although the defendant-attorney received "modest compensation" for services to the majority shareholders, the court concluded that the receipt of legal fees in this circumstance did not constitute a personal financial interest in the matter.[300] Thus, the California Court of Appeal reversed the lower court's finding for the plaintiff on the grounds that the defendant-attorney neither violated a primary duty to the plaintiff nor assisted the majority shareholders in furtherance of his own financial gain.[301]

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293. *See id.* at 632 (addressing whether defendant-attorney breached primary duty to plaintiff).

294. *See id.* at 637 (concluding that plaintiff was not intended beneficiary of defendant-attorney's actions and that no primary duty existed between them).

295. *See id.* (stating that majority shareholders committed tort of fraudulent concealment).

296. *Id.*

297. *See supra* notes 51-55 and accompanying text (discussing three elements of aiding and abetting breach of fiduciary duty).

298. Skarbrevik v. England, Cohen & Whitfield, 282 Cal. Rptr. 627, 640 (Ct. App. 1991).

299. *See supra* notes 293-94 and accompanying text (stating that *Skarbrevik* court determined that defendant-attorney did not owe individual duty to plaintiff).

300. *See Skarbrevik*, 282 Cal. Rptr. at 639 (noting that defendant-attorney received only modest compensation).

301. *See id.* at 640 (reversing on grounds that defendant-attorney did not violate primary duty and did not act in furtherance of own financial interest).

B. Resolving Differences in Outcome

The factual similarities between *Granewich* and *Skarbrevik* are quite striking.[302] Majority shareholders in each case terminated the minority's employment, removed the minority from the board of directors, clandestinely amended the corporate by-laws, and issued stock to themselves to dilute the minority's interest.[303] In both cases, the defendant-attorneys played a vital role in the squeeze-out process by providing legal expertise and by orchestrating the process to reduce the minority shareholder's interest in the corporation.[304] Curiously, the outcomes are diametrically opposed.[305] Yet, were we to weigh the actions of each defendant-attorney, one could argue that the attorney in *Skarbrevik* committed the more egregious action by fabricating and filing documents for a fictitious meeting and phony amendment to the corporate by-laws.[306] One might mistakenly believe that the difference in outcomes is based on different causes of action.[307] Instead, the difference in outcomes rests on a fundamental disagreement over an attorney's ethical obligations to non-clients in a squeeze-out. *Skarbrevik*'s limitations on attorney liability rest upon the "principle of non-accountability,"[308] a conceptualization of an attorney's ethical obligations that conflicts with *Granewich*'s extension of liability. In order to properly frame the inapplicability of the principle of non-accountability in the squeeze-out context, one must view *Skarbrevik* in light of California's prior case law regarding attorney liability.

1. *Historical Foundations of* Skarbrevik

Although traditional norms of lawyer accountability were based on the privity concept, which embraced the belief that a lawyer could never owe a

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302. *Compare supra* notes 70-107 and accompanying text (discussing facts of *Granewich*), *with supra* notes 267-301 and accompanying text (discussing facts of *Skarbrevik*).

303. *Compare supra* notes 73-80 and accompanying text (describing squeeze-out techniques in *Granewich*), *with supra* notes 270-87 and accompanying text (describing squeeze-out techniques in *Skarbrevik*).

304. *Compare supra* notes 75-80 and accompanying text (noting defendant-attorneys' role in *Granewich*), *with supra* notes 272-87 and accompanying text (noting defendant-attorney's role in *Skarbrevik*).

305. *Compare supra* notes 106-07 and accompanying text (discussing resolution of *Granewich*), *with supra* notes 296-301 and accompanying text (discussing resolution of *Skarbrevik*).

306. *See supra* notes 283-86 and accompanying text (noting that defendant-attorney in *Skarbrevik* filed fabricated documents with state).

307. *Compare supra* notes 83-85 and accompanying text (noting plaintiff in *Granewich* alleged aiding and abetting breach of fiduciary duty), *with supra* note 290 and accompanying text (noting plaintiff in *Skarbrevik* alleged conspiracy).

308. *See* Tuttle, *supra* note 29, at 932 (noting that *Skarbrevik* extends non-accountability principle to fiduciary representation).

duty to a non-client,[309] California courts led the way in extending a lawyer's duty to non-clients[310] by abandoning the privity requirement with respect to attorneys in 1961.[311] In *Lucas v. Hamm*,[312] a California court addressed the issue of attorney liability to non-clients for the negligent drafting of a will.[313] Even though prior California cases confronting the identical issue had turned on the question of privity,[314] the *Lucas* court noted that the issue of privity had been greatly "liberalized."[315] In abandoning the privity requirement,[316] the court concluded that the issue of liability involved a matter of policy and should turn on a balancing test specific to each case.[317]

By 1976, however, the California courts retreated from the broad balancing test adopted in *Lucas* to a test centered more on foreseeability of harm.[318] The justification for doing so was based on the policy argument that broad-based attorney liability to third parties with whom the client deals at arm's

309. *See* David Hricik, *Attorney Liability to Non-Clients: Is Privity the Issue?*, PROF. LAW., Spring 1998, at 1, 1 (noting that privity rule holds attorney can never owe duty to non-client).

310. *See* Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 661 (1994) (describing California as "jurisdiction that led the way in extending a lawyer's duty to non-clients").

311. *See* Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961) (stating that lack of privity between plaintiffs and defendant-attorney does not preclude plaintiffs from maintaining action in tort against defendant-attorneys).

312. 364 P.2d 685 (Cal. 1961).

313. *See* Lucas v. Hamm, 364 P.2d 685, 686 (Cal. 1961) (stating that beneficiaries of will brought action against defendant-attorneys alleging negligent drafting of will). In *Lucas*, the California Supreme Court addressed the issue of whether an attorney could be liable to non-client beneficiaries of a will that he had drafted. *Id.* Relying on earlier precedent abandoning the privity requirement with respect to notary publics, the California court determined that lack of privity would not shield the defendant-attorney from liability for a tort. *Id.* at 688. The court determined that liability should instead turn on a balancing test. *Id.* at 687. The court addressed the following factors: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm. *Id.* The court also assessed whether imposing liability on the attorney would cause undue burden on the legal profession. *Id.* at 688. The court resolved the balancing test in favor of the plaintiff. *Id.* Despite that conclusion, however, the court determined that the defendant-attorneys were not negligent. *Id.* at 691-92.

314. *See id.* at 687 (noting that earlier cases had turned on privity).

315. *Id.*

316. *See id.* at 688 (noting that plaintiffs could state claim in tort despite lack of privity).

317. *See id.* at 687 (stating that whether defendant-attorney should be held liable to non-client is matter of policy involving balancing of factors).

318. *See id.* at 662 & n.21 (noting that California retreated from balancing test in legal malpractice actions by 1976).

length would threaten the attorney's counseling role, resulting in both an undue burden on the profession and a reduction in the quality of legal services.[319] Despite that realization, however, California again opened the door to attorney liability seven years later in *Wolfrich Corp. v. United States Automobile Ass'n.*[320]

Wolfrich addressed attorney liability to a non-client for assisting an insurance company in the non-payment of a claim made by a policy holder.[321] Although the *Wolfrich* court emphasized that attorneys should not be held liable for rendering legal advice,[322] the court stated that "[a]ttorneys may be liable for *participation* in tortious acts with their clients, and such liability may rest on a conspiracy."[323] With respect to attorney liability for participation in a client's tortious conduct, *Wolfrich* bears a strong resemblance to *Granewich.*[324] Had the holding of *Wolfrich* remained good law, perhaps the result in *Skarbrevik* would have squared with *Granewich.*

Following the *Wolfrich* decision, however, the number of conspiracy claims filed against attorneys proliferated in California.[325] Plaintiffs filed so many claims, in fact, that the California legislature enacted Section 1714.10[326]

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319. *See id.* at 662 (arguing that liability to non-clients would threaten professional relationship).

320. Wolfrich Corp. v. United States Auto. Assoc., 197 Cal. Rptr. 446 (Ct. App. 1983). In *Wolfrich,* the California court addressed whether an attorney could be held liable to a non-client for conspiracy with a client to violate the insurance code. *Id.* at 447. The attorneys were alleged to have assisted an insurance company by failing to make a good faith attempt to effect a prompt settlement of an insurance claim and by filing a frivolous lawsuit to avoid payment of the claim. *Id.* at 447-48. The court considered whether the relationship among the parties insulated the attorneys from liability. *Id.* at 448. Noting that there was a line of authority for granting immunity to attorneys for assisting clients in the commission of a tort, the *Wolfrich* court concluded that "[a]ttorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy." *Id.* at 449. The court was careful, however, to note that attorneys should not be liable for *advising* their clients but that participation in tortious activity may subject attorneys to liability. *Id.* The court concluded that the plaintiffs had alleged the necessary facts to sustain a cause of action of conspiracy against the attorneys. *Id.* at 450.

321. *See id.* at 447 (noting that defendant-attorneys assisted insurance company in ignoring claim).

322. *See id.* at 449 (noting that attorneys must be free to fully advise their clients).

323. *Id.* (emphasis added).

324. *See* Granewich v. Harding, 985 P.2d 788, 793-94 (Or. 1999) (concluding that attorney can be liable for participating in client's tortious conduct).

325. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability,* 45 S.C. L. REV. 803, 812 (1994) (stating that claims against attorneys by non-clients proliferated following *Wolfrich*).

326. *See* CAL. CIV. CODE § 1714.10 (West 1998) (abolishing conspiracy cause of action against attorney by non-client absent certain circumstances).

to curtail litigation by non-clients.[327] As originally enacted, Section 1714.10 prevented non-clients from filing conspiracy claims against attorneys absent a finding and an order by the court that the plaintiff had a reasonable probability of prevailing in the action against the attorney.[328]

One year after the legislature passed Section 1714.10, the California courts again faced a conspiracy claim against an attorney by a non-client in *Doctors' Co. v. Superior Court*.[329] Rather than relying on Section 1714.10 to dispose of the plaintiff's claim against the attorneys, however, the California Supreme Court stated that the applicable rule of law precluded liability when the attorney "was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the of the party who did

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327. *See* Evans & Dorvee, *supra* note 325, at 812 (noting that California legislature passed statute in response to proliferation of claims against attorneys by non-clients).

328. *See* CAL. CIV. CODE § 1714.10 (West 1998) (stating that court must issue order allowing conspiracy claim against attorney in order for plaintiff to include cause of action in complaint). Section 1714.10 provides in relevant part:

> No cause of action against an attorney for civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.

Id.

329. *See* Doctors' Co. v. Super. Ct., 775 P.2d 508, 509 (Cal. 1989) (stating issue of whether attorney could be liable to non-client for conspiracy to assist insurance company in failing to settle claim when liability was clear). In *Doctors' Co.*, the Supreme Court of California addressed an attorney's liability for allegedly entering into a conspiracy with an insurance company to refrain from attempting a fair claim settlement in violation of the California Insurance Code. *Id.* at 509. The court began its analysis of the conspiracy claim against the defendant-attorneys by noting that they were not bound by the Insurance Code. *Id.* at 510. Rather, the defendant-attorneys' client was bound by the duty. *Id.* The court stated that the applicable rule of law held that a cause of action for civil conspiracy may not arise if the alleged conspirator was not personally bound by the duty violated and was acting only as the agent of the party who did have that duty. *Id.* at 511. Because the duty involved in this case was "peculiar" to the insurance company, the defendant-attorneys could not be liable for conspiring to violate it. *Id.* at 512. The court criticized *Wolfrich* for misconstruing the applicable rule of law. *Id.* at 511. The court noted that attorney liability for conspiracy with a client could arise in two circumstances. *Id.* at 512. First, an attorney may be liable for civil conspiracy to violate a duty peculiar to the client when the attorney acts not only in the performance of a professional duty to serve the client "but also in furtherance of the attorney's own financial gain." *Id.* at 513. Second, an attorney may be liable for civil conspiracy with a client "by violating the attorney's own duty to the plaintiff." *Id.* The *Doctors' Co.* court concluded that the plaintiff failed to state a cause of action because the defendant-attorneys "acted solely as the [client's] agents and did not personally share the statutory duty alleged to have been violated." *Id.* at 514.

have the duty."[330] Even though the attorneys may have assisted their client's violation of duty, such conduct could not give rise to liability because the defendant-attorneys were not personally bound by the duty.[331] The court recognized two situations in which an attorney could be liable for conspiracy to violate a client's duty.[332] First, an attorney may be liable for conspiring to assist a client in a violation of duty peculiar to the client if the attorney was acting "in furtherance of the attorney's own financial gain."[333] Thus, an attorney who wrongly acts for his individual advantage and not solely on behalf of the principal may be liable to a non-client.[334] Second, an attorney may be liable for conspiring with his client to violate the attorney's own duty to the plaintiff.[335] The California Supreme Court dismissed the complaint against the defendant-attorneys because they had "acted solely as the [client's] agents and did not personally share the statutory duty alleged to have been violated."[336]

By the time that *Skarbrevik* reached the California Court of Appeal, the California Supreme Court had adopted *Doctors' Co.* as the new standard for attorney liability.[337] Thus, the interpretation of attorney liability from *Doctors' Co.* controlled the determination of liability in *Skarbrevik*.[338] When viewed in the context of California's experience with attorney liability, the result in *Skarbrevik* reveals that policy arguments against attorney liability and concerns of judicial economy apparently influenced the disposition of the case.[339]

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330. *Id.* at 511.

331. *See* Evans & Dorvee, *supra* note 325, at 813 (analyzing *Doctors' Co.* and stating that attorneys could not be liable because duty was peculiar to client).

332. *See Doctors' Co.*, 775 P.2d at 512 ("It remains true, of course, that under other sets of circumstances '[a]ttorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy.'" (quoting Wolfrich Corp. v. United States Auto. Assoc., 197 Cal. Rptr. 446, 449 (Ct. App. 1983))).

333. *Id.*

334. *See id.* at 513 (stating that attorney may be liable to non-client when acting for own individual advantage and not solely on behalf of principal).

335. *See id.* ("Also to be distinguished from the present case are claims against an attorney for conspiring with his or her client to cause injury by violating the attorney's own duty to the plaintiff.").

336. *Id.* at 514.

337. *See* Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 638 (Ct. App. 1991) (noting that supreme court handed down *Doctors' Co.* decision after trial of *Skarbrevik* but before case reached court of appeal).

338. *See id.* at 640 (applying test formulated in *Doctors' Co.*).

339. *See infra* notes 340-49 and accompanying text (revealing that policy arguments influenced decision in *Skarbrevik*).

2. Skarbrevik *and the "Principle of Non-Accountability"*

As mentioned above, *Skarbrevik*'s limitations on attorney liability to a non-client beneficiary represent an extension of the concept that scholars have referred to as the "principle of non-accountability."[340] The principle of non-accountability morally and legally distances the lawyer from the client's project when the lawyer is acting in a professional capacity.[341] It allows the lawyer to perform acts for a client that would normally be morally, and perhaps even legally, wrong for non-lawyers to perform.[342] As *Skarbrevik* illustrates, as long as the attorney acts to further the client's interest, as opposed to acting for personal motive or profit, the non-accountability principle shields him from liability.[343]

Attorney non-accountability, as embraced in *Skarbrevik*, suffers fatal doctrinal flaws that undermine its applicability in the corporate squeeze-out context.[344] Recall that the *Skarbrevik* court precluded the beneficiaries from asserting claims against the defendant-attorneys because the defendant-attorneys were acting merely as agents of the principal.[345] That result, however, clearly contradicts the substantive law of agency.[346] Section 343 of the *Restatement (Second) of Agency* provides, in pertinent part, that "[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal."[347] Thus, agency status does not limit the liability of an agent who assists the violation of a duty peculiar to the principal.[348] Applying agency principles to the fiduciary context, Section 343 indicates that the mere fact that the agent

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340. *See supra* note 308 and accompanying text (noting that *Skarbrevik* extends principle of non-accountability to fiduciary representation).

341. *See* Tuttle, *supra* note 29, at 931 (defining non-accountability principle).

342. *See id.* at 932 (stating that non-accountability principle shields attorneys from moral and legal blame when acting for client).

343. *See* Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 640 (Ct. App. 1991) (noting that attorney is not liable absent individual duty or personal financial interest); Tuttle, *supra* note 29, at 932 ("Provided that the attorney acts for her client, she is not charged with the moral or, in most cases, the legal quality of her act.").

344. *See* Tuttle, *supra* note 29, at 932 (noting that non-accountability principle suffers from legal flaw).

345. *See Skarbrevik*, 282 Cal. Rptr. at 639 (stating that courts may not impose liability on attorneys who act merely as agents).

346. *See* RESTATEMENT (SECOND) OF AGENCY § 343 (1957) (providing liability for agents); Tuttle, *supra* note 29, at 933 (noting that non-accountability contradicts agency law).

347. RESTATEMENT (SECOND) OF AGENCY § 343 (1957).

348. *See* Tuttle, *supra* note 29, at 933 (stating that agency status does not shield agent from liability).

acted on behalf of the fiduciary does not shield the agent from liability.[349] It is clear, then, that the result in *Granewich* is remarkably consistent with the substantive law of agency, while the result in *Skarbrevik* contradicts that law to create an exemption solely for attorneys. Given *Granewich*'s consistency with legal doctrine, the difference in outcome between *Granewich* and *Skarbrevik* must rest on policy arguments regarding attorney liability.

3. Evaluation of Policy Arguments

In retreating from increased attorney liability to non-clients, the California Supreme Court expressed concern that broad-based liability would result in a diminution in the quality of legal services and would inject "self protective reservations" into the attorney-client relationship.[350] The Oregon Court of Appeals cataloged additional arguments against the imposition of attorney liability for aiding a client's breach of fiduciary duty in a corporate squeeze-out.[351] In evaluating those arguments, the Oregon Court of Appeals stated:

> [I]t could be argued that to impose liability on attorneys for giving legal advice and acting on behalf of their clients in the context of the facts of this case will undermine the attorney-client relationship as well as other professional relationships where highly specialized advice or services are rendered.... The giving of professional advice will be "chilled" by the knowledge that liability could result to those outside the professional relationship. The litigation of the knowledge element of Section 876(b) [of the *Restatement (Second) of Torts*] may require clients and their attorneys to disclose confidential communications in defense of claims made against them.[352]

These arguments apparently influenced the court of appeals's refusal to hold the defendant-attorneys liable for aiding and abetting the controlling shareholders' breach of fiduciary duty.[353]

The arguments supporting the decision of the Oregon Court of Appeals do seem persuasive. The threat of chilling the delivery of professional advice and services by exposing the attorney and confidential communications to potential disclosure requirements is more than enough to strike fear in the hearts of corporate attorneys and corporate clients. A common-law exception to the attorney-client relationship, however, substantially undermines the

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349. *See id.* (applying Section 343 to fiduciary context).

350. Goodman v. Kennedy, 556 P.2d 737, 743 (Cal. 1976).

351. *See* Granewich v. Harding, 945 P.2d 1067, 1074 (Or. Ct. App. 1997) (discussing policy concerns at length), *rev'd*, 985 P.2d 788 (Or. 1999).

352. *Id.*

353. *See id.* at 1074 (noting that policy concerns are "part of the equation" and that case has implications for anyone who assists in conduct that breaches duty owed by another).

strength of these policy arguments offered by the California Supreme Court and Oregon Court of Appeals.[354]

The common law has long recognized a fiduciary exception to the attorney-client privilege.[355] Arising initially from the common law of trusts, the fiduciary exception expanded into shareholder litigation around 1970.[356] In Section 134A, the *Restatement (Third) of the Law Governing Lawyers* addresses the fiduciary exception, explaining that "[i]n a proceeding in which a . . . fiduciary is charged with breach of fiduciary duties by a beneficiary, the tribunal may direct that a communication otherwise within [the attorney-client privilege] is nonetheless not privileged."[357] Moreover, Section 134B of the *Restatement (Third) of the Law Governing Lawyers* provides for a similar fiduciary exception to the attorney-client privilege in a dispute between an organizational client and its shareholders if the tribunal finds that those managing the organization are charged with breach of their obligations toward the shareholders.[358] Even though the *Restatement (Third)* sections do not specifically address the applicability of the fiduciary exception in the close corporation context, the District Court of Delaware has held that the attorney-client privilege does not protect communications between a controlling shareholder and his attorney from discovery in a breach of fiduciary duty action brought by minority shareholders.[359] In so holding, the District Court noted that "where the fiduciary represents conflicting interests, particularly where one of those interests is its own, the only purpose to be served by the use of the [attorney-client] privilege to withhold information from those to whom the fiduciary obligation runs is fraud."[360]

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354. *See* Valente v. PepsiCo, Inc., 68 F.R.D. 361, 369 (D. Del. 1975) (holding that attorney-privilege did not protect documents relating to majority shareholder's breach of fiduciary duty from discovery in action by minority shareholders); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A (Preliminary Draft No. 11, 1995) (stating exception to attorney-client privilege in fiduciary-lawyer communication).

355. *See* Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L.J. 827, 828 (1999) (noting that fiduciary exception to attorney-client privilege is common-law exception).

356. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1099 (5th Cir. 1970) (extending fiduciary exception to attorney-client privilege in shareholder litigation); Martin & Metcalf, *supra* note 355, at 828 (tracing development of fiduciary exception).

357. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A (Preliminary Draft No. 11, 1995).

358. *See id.* § 134B (providing organizational fiduciary exception to attorney-client privilege).

359. *See Valente*, 68 F.R.D. at 369 (holding that attorney-client privilege does not protect documents).

360. *Id.* at 369 n.16.

The existence of the fiduciary exception to the attorney-client privilege renders moot the policy arguments of the Oregon Court of Appeals against the imposition of attorney liability for aiding and abetting the breach of fiduciary duty.[361] The fiduciary exception undermines the confidentiality of any fiduciary-attorney relationship because documents relating to the fiduciary's breach of duty may be discoverable in an action by the beneficiary.[362] That threat has existed in shareholder litigation for at least thirty years.[363] It is certainly plausible that attorney liability for aiding and abetting the breach of fiduciary duty will not chill fiduciary-attorney communications anymore so than the fiduciary exception to the attorney-client privilege.

California's previous experiences with attorney liability provide another argument against the extension of attorney liability into this context.[364] Recall that plaintiffs flooded the California courts with claims against attorneys after both *Lucas* and *Wolfrich*.[365] The historical notes to Section 1714.10 explicitly indicate that California passed the statute in response to *Wolfrich*.[366] Thus, an additional argument against the imposition of attorney liability for aiding a fiduciary's breach of duty in the corporate squeeze-out may be one of judicial economy – that the courts simply could not handle the case load resulting from such increased attorney liability to non-clients. As a predicate to any action against an attorney for aiding and abetting, though, the fiduciary must have breached the primary duty to the plaintiff.[367] Thus, the minority shareholder already has a cause of action against the fiduciary. Any claim against an attorney for aiding and abetting simply could be consolidated with the claim against the fiduciary, thereby reducing the case load of the court.

Admittedly, the extension of liability for aiding and abetting the breach of fiduciary duty into the corporate squeeze-out context places the attorney in a precarious position. Under a scheme that imposes attorney liability for

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361. *See supra* note 352 and accompanying text (quoting policy arguments of Oregon Court of Appeals).

362. *See* Valente v. PepsiCo, Inc., 68 F.R.D. 361, 369 (D. Del. 1975) (holding documents discoverable); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A (Preliminary Draft No. 11, 1995) (noting that documents may be discoverable).

363. *See* Martin & Metcalf, *supra* note 355, at 828 (noting extension of fiduciary exception to shareholder litigation in 1970).

364. *See supra* notes 310-39 and accompanying text (discussing California's experience with attorney liability to non-clients).

365. *See supra* note 325 and accompanying text (noting that claims by non-clients against attorneys rose sharply).

366. *See supra* notes 326-27 and accompanying text (noting that legislature acted in response to *Wolfrich*).

367. *See supra* notes 40-46 and accompanying text (discussing primary and third-party liability for aiding and abetting breach of fiduciary duty).

aiding a fiduciary's breach of duty, an attorney likely will avoid those actions that clearly violate the beneficiary's legal rights. Yet given the "underlying vagueness" which masks fiduciary jurisprudence,[368] coupled with a permissible modicum of self-interest in the close corporation fiduciary relationship,[369] it is not always clear, absent a ruling from a court, whether a particular course of action is either legitimate or in breach of the fiduciary's obligations. It is probable, then, that attorneys will act more cautiously whenever minority shareholders' rights are at stake. But an attorney who acts more cautiously with respect to a minority shareholder's rights may expose himself to liability for failing to aggressively represent the interest of his client, the majority shareholder.[370] Thus, attorney liability for aiding and abetting the breach of fiduciary duty in a corporate squeeze-out has the potential for placing the attorney in a "double bind." As a result, an attorney may face aiding and abetting liability to a non-client for overly aggressive representation of his client's interests, yet the attorney may face malpractice liability or ethical sanctions for overly cautious representation of the client's interests.

VI. Redefining the Attorney's Obligations in the Squeeze-Out

Analysis of case law reveals that *Granewich* is remarkably consistent with the substantive law of torts[371] and agency[372] in holding an attorney liable for assisting a client in a breach of fiduciary duty. Although aiding and abetting liability in this context justly should raise concern in the legal profession, the common law's recognition of the fiduciary exception to the attorney-client privilege substantially weakens one of the strongest policy arguments against such liability.[373] But the apparent conflict between the ethical obligations of an attorney espoused in the Model Rules and the imposition of liability in this circumstance remains.[374] Therein lies *Granewich*'s greatest implication: The

368. *See supra* notes 35-37 and accompanying text (discussing fiduciary jurisprudence).

369. *See supra* notes 115-25 and accompanying text (discussing unique nature of close corporation fiduciary).

370. *See* Duncan, *supra* note 30, at 1140-48 (discussing attorney's malpractice liability for negligent representation of client).

371. *See supra* notes 126-99 and accompanying text (discussing *Granewich*'s consistency with common-law formulations of knowing participation and substantial assistance in liability for aiding and abetting breach of fiduciary duty).

372. *See supra* notes 344-49 and accompanying text (noting *Granewich*'s consistency with substantive law of agency).

373. *See supra* notes 354-63 and accompanying text (discussing fiduciary exception to attorney-client privilege).

374. *See supra* notes 232-64 and accompanying text (analyzing conflict between *Granewich* and Model Rules).

law must redefine an attorney's obligations when representing majority shareholders in the close corporation squeeze-out.

The *Restatement (Third) of the Law Governing Lawyers* may provide the best approach towards reconciling the conflicts created by *Granewich*.[375] Despite the disclaimer of an attorney's ethical obligation to rectify a client's breach of fiduciary duty to a non-client in the closely-held corporation context,[376] the *Restatement (Third)* provides that a lawyer who advises a client to dissolve a legal relationship is civilly liable to a non-client for interference with that relationship if the lawyer advances the client's interests by the use of "wrongful means."[377] This section provides partial reconciliation of the inconsistencies of tort law and ethical obligations in the squeeze-out context. First, the fiduciary relationship is a legal relationship, one that arises by operation of law and in the absence of contract.[378] Second, tort law's imposition of liability for breach of fiduciary duty clearly indicates that such actions constitute "wrongful means." Thus, an attorney who assists a client in dissolving a legal relationship through a corporate squeeze-out by means of breach of fiduciary duty has employed "wrongful means" to dissolve that relationship.

Another solution to the conflicts that *Granewich* creates may rest in reconciling the evolving concept of the close corporation fiduciary relationship with an attorney's underlying role in society. Fiduciary jurisprudence is premised upon protection of the vulnerable.[379] Courts and commentators have recognized that the realities of the close corporation, wherein majority control and illiquidity of the investment lead to an inability to protect one's interest, heighten the vulnerability of the minority.[380] Perhaps more so than any other

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375. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78(3) (Preliminary Draft No. 12, 1996) (discussing lawyer liability for assisting client in dissolution of legal relationship).

376. *See id.* § 73 cmt. h (stating that lawyer's duty to rectify client's breach of fiduciary duty does not apply when client is corporate officer, director, or controlling stockholder); *supra* notes 262-64 and accompanying text (discussing Section 73 of *Restatement (Third) of the Law Governing Lawyers*).

377. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78(3) (Preliminary Draft No. 12, 1996).

378. *See supra* note 31 and accompanying text (noting that fiduciary relationship arises by operation of law).

379. *See supra* notes 29-39 and accompanying text (discussing development of fiduciary jurisprudence).

380. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514-15 (Mass. 1975) (recounting plight of minority shareholder in close corporation); O'NEAL & THOMPSON, *supra* note 3, § 1.03, at 4 (stating that minority shareholder in close corporation "may be deprived of any effective voice in the making of business decisions"); Thompson, *supra* note 1, at 702-07 (discussing possibilities for oppression in close corporation).

fiduciary relationship, the one in the close corporation bears a resemblance in terms of vulnerability to the guardian-ward relationship. Just like the guardian, the controlling shareholder may possess the final voice in matters affecting those over which he has power. And like the ward of the court, the minority shareholder may have no ability or means for protecting his interest. Although the Model Rules do not heighten an attorney's obligations when representing a majority shareholder,[381] the Model Rules do recognize that an attorney may have enhanced ethical obligations in the representation of a guardian.[382] A comment to Model Rule 1.14 provides that "[i]f the lawyer represents the guardian as distinct from the ward, and is aware the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct."[383] Of course, Rule 1.14 is directed toward protecting individuals with a "disability."[384] In a sense, the minority shareholder in a close corporation is saddled with a legal disability because he may be denied employment with the corporation, cut-off from all corporation-related revenue, and trapped with a substantial investment that no outsider knowingly would assume or purchase.[385] In short, the minority shareholder has no ability to shape the operations of the entity once he falls in disfavor with the controlling shareholders.[386] Thus, a reconceptualization of the attorney's role in a closely-held corporation squeeze-out may resemble the attorney's role in the guardian-ward relationship and include an ethical obligation to prevent or rectify a majority shareholding client's breach of fiduciary duty to a minority shareholder.

One formulation of an attorney's ethical obligation is the duty of "nonmaleficence," the duty not to inflict harm on another.[387] Of course, zealous representation of the client is the attorney's preeminent obligation,[388] but "admission to the bar does not create a license to act maliciously, fraudulently,

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381. *See supra* notes 232-64 and accompanying text (discussing *Granewich*'s conflict with Model Rules).

382. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4 (1983) (noting that attorney representing guardian distinct from ward may have enhanced ethical obligations).

383. *Id.*

384. *See id.* (noting that purpose of rule is to protect those with disability).

385. *See Donahue*, 328 N.E.2d at 514-15 (recounting plight of minority shareholder in close corporation).

386. *See* O'NEAL & THOMPSON, *supra* note 3, § 1.03, at 4 (stating that minority shareholder in close corporation "may be deprived of any effective voice in the making of business decisions").

387. *See* Tuttle, *supra* note 29, at 927 (discussing duty of nonmaleficence).

388. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980) (noting duty to zealously represent client).

or knowingly to tread upon the legal rights of others."[389] Indeed, the fiduciary relationship creates certain legal rights for the beneficiary, legal rights designed to protect him from the oppressive and self-interested actions of the fiduciary.[390] In the words of the Oregon Court of Appeals, "the tort [of aiding and abetting the breach of fiduciary duty] seeks to protect fiduciary relationships and to promote the worthy goal that fiduciary duties be kept and performed."[391] The surest ways to promote that worthy goal are to redefine an attorney's obligations to rectify a client's breach to minority shareholders in a corporate squeeze-out and to impose liability upon those who knowingly provide substantial assistance to the fiduciary's breach.

VII. Conclusion

Over the last thirty years, the body of corporate law has evolved to reflect the belief that the close corporation is a conceptually distinct entity from the publicly-held corporation.[392] The enhancement of fiduciary duties among close corporation investors best illustrates that evolution.[393] In turn, the protections afforded to minority shareholders demonstrate that Justice Cardozo's characterization of the nature of the fiduciary's duty as "the punctilio of an honor the most sensitive" continues to shape our beliefs of corporate governance.[394] In *Granewich v. Harding*, the Oregon Supreme Court substantially advanced the protections due to minority shareholders in a closely-held corporation.[395] By allowing a minority shareholder to state a claim not only against those who have breached a primary duty, but also against those who provided the legal expertise to facilitate that breach, *Granewich* discourages the use of unlawful means in a corporate squeeze-out.[396]

As this Note demonstrates, the extension of attorney liability for aiding and abetting the breach of fiduciary duty to the corporate squeeze-out context

389. Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1080 (2d Cir. 1977).

390. *See* Duncan, *supra* note 30, at 1149-50 (discussing features of fiduciary relationships).

391. Granewich v. Harding, 945 P.2d 1067, 1075 (Or. Ct. App. 1997), *rev'd*, 985 P.2d 788 (Or. 1999).

392. *See supra* notes 1-7 and accompanying text (discussing evolution of law regarding close corporations).

393. *See supra* notes 5-7 and accompanying text (noting enhancement of fiduciary duties in close corporation).

394. *See supra* note 34 and accompanying text (quoting Cardozo's characterization of fiduciary duty).

395. *See supra* note 9 (commenting on *Granewich*); *supra* notes 70-107 and accompanying text (discussing *Granewich*).

396. *See supra* notes 105-07 and accompanying text (noting conclusion of *Granewich* allowing minority shareholders to state claim against defendant-attorneys).

is wholly consistent with the substantive law of torts[397] and agency.[398] Even though *Granewich* conflicts with traditional understandings of an attorney's obligations in a squeeze-out,[399] the Oregon Supreme Court properly resolved the case by protecting the sanctity of the close corporation fiduciary relationship. *Granewich*'s implication is resoundingly clear – the legal profession must engage in dialogue to redefine the attorney's obligations in the representation of majority shareholders in the closely-held corporation squeeze-out.[400] And this is only appropriate, for the relationship among shareholders in the close corporation has evolved into a more complex legal issue in the past three decades, yet the predominant conceptualization of an attorney's obligations in the squeeze-out has remained steadfast.

397. *See supra* notes 126-99 and accompanying text (discussing common-law liability for aiding and abetting breach of fiduciary duty).

398. *See supra* notes 344-49 and accompanying text (discussing substantive law of agency).

399. *See supra* notes 232-64 and accompanying text (discussing conflicts with ethical rules).

400. *See supra* notes 371-91 and accompanying text (promoting new conceptualization of attorney's obligations in squeeze-outs).