Attorney Liability for Assisting Clients with Wrongful Conduct: Established And Emerging Bases of Liability

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ATTORNEY LIABILITY FOR ASSISTING CLIENTS WITH WRONGFUL CONDUCT: 
ESTABLISHED AND EMERGING BASES OF LIABILITY

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I. INTRODUCTION ................................................. 803
II. COMMON LAW BASES OF LIABILITY ........................... 804
   A. Malicious Prosecution and Abuse of Process .......... 805
   B. Tortious Interference with a Contract ................. 809
   C. Civil Conspiracy: The California Example ............. 811
III. STATUTORY BASIS OF LIABILITY: AIDING AND ABETTING .. 815
IV. THE S & L CASES: DO THEY REPRESENT A NEW, 
    EMERGING BASIS OF LIABILITY? ........................... 823
   A. Suing the Lawyers Who Assisted Lincoln: A Study 
      in the Government's Theory of Attorney Liability .. 828
      1. Failure to Report Directly to the Board of Directors 828
      2. Duty of Disclosure to Regulatory Authorities ...... 834
V. CONCLUSION ..................................................... 835

I. INTRODUCTION

Courts have long recognized the rule that attorneys owe no duty to those 
not in privity with them.¹ Under this rule, even attorneys who perform their 
duties negligently cannot be held liable to anyone other than their clients. The 
exceptions to this longstanding rule have been relatively few in number and, 
for the most part, have been strictly construed by the courts.²

The question that has arisen with increasing frequency over the past two 
decades is whether an attorney may be held liable to third parties for conduct 
that, at least arguably, merely constituted the representation of the client,
whether negligent or otherwise. This issue usually arises when the client has engaged in misconduct and the wronged third party seeks to hold the attorney liable for assisting the client in that conduct.

In light of the nation’s banking crisis, this issue has taken on increasing importance in the past several years. In an attempt to recover funds to help bail out failed financial institutions, the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the Resolution Trust Corporation (RTC) have gone after the attorneys and accountants who served those institutions. In seeking to recover against these attorneys, the government has argued that attorneys who represent financial institutions have a fiduciary obligation to the governmental regulatory authorities which oversee those institutions. The government’s position is that this fiduciary obligation includes a duty to disclose to regulatory authorities any known or suspected wrongful conduct by an attorney’s client. Failure to fulfill this duty to disclose may constitute assistance of the client’s wrongful conduct and, in any event, should give rise to attorney liability for losses suffered as a result of that conduct.

This article will first explore, in general terms, the areas of common law in which attorneys have faced potential liability for allegedly assisting their clients with wrongful conduct. It will next examine one of the better known statutory bases for holding attorneys liable for aiding and abetting their clients’ wrongful conduct and the court-imposed requirements that arose as a result of such conduct. This article will then examine several cases in which attorneys have been sued by the federal banking authorities for allegedly aiding and abetting their clients’ wrongful conduct, the theories of liability offered by the government in those cases, and whether those theories represent a departure from those previously recognized by the courts.

II. COMMON LAW BASES OF LIABILITY

Generally, as stated above, an attorney may not be held liable to third parties for conduct undertaken as part of the attorney’s representation of a client.3 An exception to this rule arises when the attorney acts fraudulently, maliciously, or tortiously.4

The common law claims against attorneys for assisting their clients with wrongful conduct generally fall into three categories: (1) abuse of process and malicious prosecution; (2) tortious interference with contract; and (3) civil

3. See supra text accompanying note 1.
conspiracy.\textsuperscript{5} As discussed below, each of these claims requires that a third-party plaintiff prove both that the attorney knew the client was engaging in wrongful conduct and that the attorney took affirmative action to further that conduct.

\section*{A. Malicious Prosecution and Abuse of Process}

A cause of action for malicious prosecution "arises when a party institutes a lawsuit with a malicious motive and lacking probable cause."\textsuperscript{6} An action for abuse of process, on the other hand, arises "against any person using 'a legal process against another in an improper manner or to accomplish a purpose for which it was not designed.'"\textsuperscript{7} Malicious prosecution and abuse of process are separate concepts:

The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some other purpose other than that which it was intended by the law to effect.\textsuperscript{8}

The elements of an action for malicious prosecution include the following: "(1) the institution of a proceeding, (2) actuated by malice, (3) without probable cause by the defendant in [the malicious prosecution] action, (4) which terminated in the plaintiff's favor, and (5) caused him damages."\textsuperscript{9} A

\begin{footnotesize}
\begin{itemize}
\item[5.] Other common law actions against attorneys by non-clients include fraud, intentional infliction of emotional distress, defamation, invasion of privacy and, in some cases, negligence. \textit{See} 1 MALLEN & SMITH, \textit{supra} note 1, § 6.1, at 286-87. For the most part, however, these causes of action are premised on the attorney's independent wrongs, rather than on the theory that the attorney assisted the client in committing the wrongful act or acts at issue.
\item[8.] Raine v. Drasin, 621 S.W.2d 895, 902 (Ky. 1981). In other words, "The fundamental distinction between malicious use and malicious abuse of process is that the first is an employment of process for its ostensible purpose, although without probable cause, whereas the second is employment of process for a purpose not contemplated by law." 72 C.J.S. \textit{Process} § 106 (1987) (footnote omitted), quoted in Bickel v. Mackie, 447 F. Supp. 1376, 1382 (N.D. Iowa), aff'd, 590 F.2d 341 (8th Cir. 1978).
\end{itemize}
\end{footnotesize}
suit for malicious prosecution may be brought against any person who "was
affirmatively active in the initiation or continuation of the prior action." 10
Courts have expressed distaste for this tort, particularly when aimed at
attorneys, because of its potential "'chilling effect' on the ordinary citizen's
willingness . . . to bring a civil dispute to court." 11

To prevent this potential chilling effect, a number of courts have applied
more rigorous standards for proving the elements of malice and lack of
probable cause when the defendants are attorneys. Specifically, in determining
whether an attorney had probable cause 12 for bringing or maintaining an
action on behalf of a client, courts have referred to the Restatement (Second)
of Torts, which provides:

An attorney who initiates a civil proceeding on behalf of his client or
one who takes any steps in the proceeding is not liable if he has probable
cause for his action (see § 675); and even if he has no probable cause and
is convinced that his client's claim is unfounded, he is still not liable if he
acts primarily for the purpose of aiding his client in obtaining a proper
adjudication of his claim. (See § 676). An attorney is not required or
expected to prejudge his client's claim, and although he is fully aware that
its chances of success are comparatively slight, it is his responsibility to
present it to the court for adjudication if his client so insists after he has
explained to the client the nature of the chances. 13

After reviewing this language, the Indiana Court of Appeals noted the
following:

This standard contemplates something more on the part of an attorney
filing suit than a questionable belief as to the merits of a case, or the
failure to fully investigate all the facts prior to initiating suit. As long as
grounds exist to support the belief that bringing a particular action may

v. Lee, 601 So. 2d 24, 26 (La. Ct. App.), cert. denied, 605 So. 2d 544 (La. 1992); Ackerman
10. Nelson, 607 P.2d at 443; accord RESTATEMENT, supra note 6, § 674.
11. Sheldon Appel Co., 765 P.2d at 502; see also Wilson v. Hayes, 464 N.W.2d 250, 260
(Iowa 1990) (en banc) ("'[T]he chilling effect that a broad rule of attorney liability would have
upon the legal system, and ultimately upon its popular acceptance as a means of dispute
resolution, appears to outweigh the value of the protection it would afford to those who might
be deemed 'innocent' defendants.'" (quoting Wong v. Tabor, 422 N.E.2d 1279, 1286 (Ind. Ct.
App. 1981)); Ackerman, 412 A.2d at 1057 ("'[T]he law does not look with favor upon actions
for malicious prosecution; it does not encourage them.'" (citations omitted)).
12. Whether probable cause exists under the facts of a particular case is usually a question of
law to be determined by the court. See, e.g., Sheldon Appel Co., 765 P.2d at 503; Nelson, 607
P.2d at 444.
13. RESTATEMENT, supra note 6, § 674 cmt. d.
help to secure a proper adjudication of a claim, no liability would adhere under the Restatement to an attorney for wrongful use of civil proceedings.\textsuperscript{14}

In keeping with the concept that an attorney should be afforded wide latitude to file and prosecute a claim on behalf of a client, some courts have also held that an attorney’s liability for malicious prosecution may not be premised on the attorney’s failure to investigate the claim fully or to research the law prior to filing suit.\textsuperscript{15}

Generally, in a malicious prosecution action, the element of malice may be inferred from a lack of probable cause.\textsuperscript{16} In a further attempt to narrow attorney liability for malicious prosecution, however, at least one court has held that malice may not be presumed when the defendant is an attorney.\textsuperscript{17} Instead, the Iowa Supreme Court adopted the rule in the Restatement (Second) of Torts that an attorney’s improper purpose in bringing an action must be established by evidence independent of the issue of probable cause.\textsuperscript{18}

Examples of improper purpose offered by the Restatement include the following: (1) bringing a claim despite knowledge that it is not meritorious; (2) initiating a proceeding primarily because of hostility or ill will; (3) initiating a proceeding for the sole purpose of depriving a person of a beneficial use of property; (4) initiating a proceeding to force a settlement that

\begin{footnotesize}
\textsuperscript{14} Wong, 422 N.E.2d at 1287; accord Wilson, 464 N.W.2d at 261; see also MacFadyen v. Lee, 601 So. 2d 24 (La. Ct. App.) (holding no cause of action for malicious prosecution existed against an attorney who zealously prosecuted a weak case on behalf of his clients), cert. denied, 606 So. 2d 544 (La. 1992); Junot v. Lee, 372 So. 2d 707, 710 (La. Ct. App.) ("[A]n attorney who urges a position which has little or no chance of winning under current jurisprudence [does not necessarily lack probable cause for bringing the action]."), cert. denied, 375 So. 2d 944 (La. 1979). But cf. Bird v. Rothman, 627 P.2d 1097, 1100 (Ariz. Ct. App.) ("[W]hether [probable cause existed for bringing or prosecuting an action is] determined by a reasonable person test: Upon the appearances presented to the defendant, would a reasonably prudent person have instituted or continued the proceeding?" (citations omitted)), cert. denied, 454 U.S. 865 (1981).

\textsuperscript{15} See Sheldon Appel Co., 765 P.2d at 509; Wong, 422 N.E.2d at 1287; Wilson, 464 N.W.2d at 261. But see Nelson, 607 P.2d at 448 ("We further reject the statement . . . that an attorney may act on the assumption that the facts related by his client are honestly given and are substantially correct and that it is not his duty to go elsewhere for information respecting the honesty of the claim or the good faith of his client.").


\textsuperscript{17} Wilson, 464 N.W.2d at 262 (citing RESTATEMENT, supra note 6, § 674 cmt. d).

\textsuperscript{18} Id.
\end{footnotesize}
has no relation to the merits of the claim; and (5) filing a counterclaim for the sole purpose of delaying the original cause of action.\(^\text{19}\)

The tort of abuse of process "is broader than malicious prosecution and may provide a remedy where malicious prosecution will not. Malice, want of probable cause, and termination in the plaintiff's favor are not required."\(^\text{20}\) Rather, the only two elements of the tort are "(1) a use of process ... in a manner not proper in the regular conduct of the proceedings and (2) the existence of an ulterior motive."\(^\text{21}\) "The tort involves the use of the process as a club by which to extort something unrelated to the process from the other party."\(^\text{22}\)

In discussing abuse of process, the Restatement makes clear that the gravamen of this cause of action is the use of legal process \textit{primarily} for the purpose of extorting something from an opponent:

The significance of [the word "primarily" in section 682] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. . . .

For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.\(^\text{23}\)

As with malicious prosecution actions, the courts have been careful to tailor narrowly the bases for an attorney's liability for abuse of process resulting from the attorney's representation of a client.\(^\text{24}\) In general, the courts have held that an attorney will not be liable if the attorney exercises good faith and that such good faith exonerates the attorney from liability even if the attorney has acted erroneously.\(^\text{25}\) As the Wisconsin Supreme Court explained:

"If the issue of liability is one which is fairly debatable, then under the

\(^{19}\) \textit{Restatement}, \textit{supra} note 6, § 676 cmt. c.

\(^{20}\) Strid v. Converse, 331 N.W.2d 350, 355 (Wis. 1983) (citing Maniaci v. Marquette Univ., 184 N.W.2d 168 (Wis. 1971)).


\(^{23}\) \textit{Restatement}, \textit{supra} note 6, § 682 cmt. b.

\(^{24}\) \textit{See}, \textit{e.g.}, \textit{Strid}, 331 N.W.2d at 356.

\(^{25}\) \textit{Id.}
oath of office of an attorney he is not only authorized to present and urge his position upon the court, but in the discharge of his duties towards his client he must do so; and if it subsequently is determined that the position taken by him was erroneous, he should be relieved from responsibility. . ."

. . . .

. . . The immunity from liability to third parties extends to an attorney who pursues in good faith his or her client's interests on a matter fairly debatable in the law. 26

Similarly, the Connecticut Supreme Court held that a plaintiff cannot state a claim against an attorney for abuse of process unless the plaintiff "can point to specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation. Any other rule would ineluctably interfere with the attorney's primary duty of robust representation of the interests of his or her client." 27

As both the Restatement and the case law demonstrate, the probable cause and malice elements of a malicious prosecution action and the "primary purpose" element of an abuse of process action serve the same purpose: to ensure that attorneys are not held liable for their good faith representation of their clients. Indeed, both the authors of the Restatement and the courts have been careful to tailor narrowly these requirements to ensure that no liability will attach to any attorney's good faith representation of a client, even if that representation is founded on scant legal authority or incomplete investigation or is pursued in a particularly zealous fashion. Such requirements are no doubt necessary because "[o]ur legal system favors the representation of litigants by counsel." 28

B. Tortious Interference with a Contract

Another avenue that third parties have pursued to hold attorneys liable for assisting the wrongful conduct of their clients is suing attorneys for tortious interference with a contractual relationship. These cases arise when a client breaches a contract with a third party upon the advice of counsel. The third party then seeks to hold the attorney liable for tortious interference with that

26. Id. (quoting Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925))
27. Mozzochi v. Beck, 529 A.2d 171, 174 (Conn. 1987) (footnote omitted) (emphasis added); see also Bothmann v. Harrington, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984) ("For the [abuse of process] cause of action to exist there must be a use of the process for an immediate purpose other than that for which it was designed." (footnote omitted) (emphasis in original)); Ion Equip. Corp. v. Nelson, 168 Cal. Rptr. 361, 364 ( Ct. App. 1980) ("Some definite act or threat beyond the scope of the process is required in an abuse of process cause of action.").
The courts which have addressed this issue have uniformly held that an attorney cannot be held liable for tortious interference with a contract if the attorney was acting within the scope of the attorney-client relationship and for the benefit of the client. 29 Under these circumstances, an attorney is privileged from liability for inducing a breach of contract. 30 Thus, liability attaches only if the plaintiff can prove that an attorney "either is dominated by his own personal interest or knowingly participates with his client in the perpetration of a fraudulent or unlawful act." 31

One court has articulated the public policy behind this rule as follows:

Under certain circumstances a third party may be privileged purposely to bring about a breach of contract between other parties. This privilege occurs where the third party acts to protect a conflicting interest which is considered to be of equal or greater value than that accorded the contractual rights involved.

The fiduciary duty owed by an attorney to his client is such an interest . . . . We need not decide whether the advice given was correct in every aspect. Although incorrect advice as to a client's contractual obligations might cause the client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect. 32


30. See, e.g., Los Angeles Airways, Inc., 687 F.2d at 325; Schott, 440 N.E.2d at 379; D. & C. Textile Corp., 246 N.Y.S.2d at 816.

31. McDonald, 182 N.W.2d at 440; see also Schott, 440 N.E.2d at 380 (stating that a plaintiff can state a claim against an attorney for tortious interference with contract only if the plaintiff "can set forth factual allegations from which actual malice [on the part of the attorney] may reasonably be said to exist" (citations omitted)); Burger, 516 N.Y.S.2d at 708 ("Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client." (citations omitted)).

32. Schott, 440 N.E.2d at 379 (citations omitted); see also D. & C. Textile Corp., 246 N.Y.S.2d at 817 ("Public policy requires that attorneys — acting strictly in their professional capacities as agents and not as principals — shall be free to advise their clients without fear that
At least one court addressing the issue has held that the attorney privilege attaches even when the attorney’s conduct was motivated in part to secure a personal benefit, so long as the conduct was also motivated in part to benefit the client.\textsuperscript{33} As the Ninth Circuit explained:

The protection of the privilege may be lost if the advisor acts with improper intent. In determining whether an advisor’s intent will result in the loss of the privilege, it is necessary to evaluate his intent in light of the societal interests which the privilege is designed to promote. . . .

. . . .

We conclude that where, as here, an advisor is motivated in part by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged. The privilege is designed to further certain societal interests by fostering uninhibited advice by agents to their principals. The goal of the privilege is promoted by protecting advice that is motivated, even in part, by a good faith intent to benefit the principal’s interest.\textsuperscript{34}

C. Civil Conspiracy: The California Example

One seemingly logical way to hold an attorney liable for assisting a client with wrongful conduct would be to assert a claim for civil conspiracy against both the attorney and the client. Because of the relative lack of case law on this subject, however, it appears that few attempts to state such a claim have made it beyond the pleading stage. This lack of precedent could result from the fact that a cause of action for civil conspiracy requires a wrongful act that the attorney and client conspired to commit; however, the existence of a wrongful act sufficient to give rise to a claim for conspiracy would likely be sufficient to state a claim against the attorney for the wrong itself. Therefore, the wrongful acts likely to give rise to a conspiracy claim would also likely be one of the recognized common law bases for attorney liability to third parties, such as fraud, malice, or tortious conduct for personal gain.

In the past decade, California has seen a number of civil conspiracy claims launched against attorneys. The proliferation of such claims appears to have resulted from the California Court of Appeals’ decision in \textit{Wolfrich Corp. v. United Services Automobile Ass’n.}\textsuperscript{35} In that case the plaintiff sued the attorneys will be personally liable to third persons if the advice the attorneys have given to their clients later proves erroneous.”\textsuperscript{).}

\textsuperscript{33} \textit{Los Angeles Airways, Inc.,} 687 F.2d at 326-28.

\textsuperscript{34} \textit{Id.} at 326, 328 (citations omitted). \textit{But see} Duggin v. Adams, 360 S.E.2d 832 (Va. 1987) (holding that a third party had stated a claim against an attorney for tortious interference with contract because, although the attorney’s conduct appeared to have benefitted the client, it was motivated, at least in part, by the attorney’s personal financial interests).

\textsuperscript{35} 197 Cal. Rptr. 446 (Ct. App. 1983), \textit{modified by statute}, CAL. CIV. CODE § 1714.10
an insurance company and its attorneys for conspiracy to violate California Code section 790.03(h)(5), which made it an unfair practice for an insurance company not "to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."\textsuperscript{36} In refusing to dismiss the claims against the attorneys, the California Court of Appeals stated that "[a]ttorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy."\textsuperscript{37}

Following the \textit{Wolfrich} decision, the proliferation of conspiracy claims against attorneys apparently became so great that the California Legislature enacted Civil Code section 1714.10.\textsuperscript{38} As originally enacted in 1988, section 1714.10 provided the following in relevant part:

\begin{quote}
No cause of action against an attorney based upon a civil conspiracy with his or her client shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes a 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. The court may allow the filing of a pleading claiming liability based upon a civil conspiracy following the filing of a verified petition therefor [sic] accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. \ldots \textsuperscript{39}
\end{quote}

One year after the enactment of section 1714.10, the California Supreme Court decided \textit{Doctors' Co. v. Superior Court},\textsuperscript{40} which disapproved the holding of \textit{Wolfrich}. As in \textit{Wolfrich}, the plaintiffs in \textit{Doctors' Co.} alleged that an insurance company and its attorneys had conspired to violate California Insurance Code section 790.03(h)(5). The California Supreme Court,

\begin{quote}
\begin{footnotesize}
\textsuperscript{36} \textit{Wolfrich Corp.}, 197 Cal. Rptr. at 447 n.1 (quoting CAL. INS. CODE § 790.03(h) (West 1993)).
\textsuperscript{37} \textit{Id.} at 449 (citations omitted).
\textsuperscript{38} \textit{See} CAL. CIV. CODE § 1714.10 (West Supp. 1994). The California Court of Appeals discussed the purpose underlying the enactment of § 1714.10 as follows:

\begin{quote}
The analysis prepared by the Assembly Subcommittee on the Administration of Justice reflects that [§ 1714.10] was introduced because defense counsel were "routinely" being threatened with claims that they were conspiring with their insurance company clients in refusing to settle tort actions. As a result of threatened and actual litigation, defense counsel were required to notify their malpractice insurance carriers, resulting in increased premium costs.
\end{quote}
\end{footnotesize}
\end{quote}

\textbf{Hung v. Wang}, 11 Cal. Rptr. 2d at 119.

\begin{footnotesize}
\textsuperscript{39} \textit{Hung}, 11 Cal. Rptr. 2d at 116 n.1 (quoting CAL. CIV. CODE § 1714.10 (West 1988)).
\textsuperscript{40} 775 P.2d 508 (Cal. 1989) (en banc).
\end{footnotesize}
however, held that attorneys for insurers could not be held liable for a violation of this provision because the duty imposed by section 790.03(h)(5) applies only to insurers. In reaching this decision, the court stated the following:

A cause of action for civil conspiracy may not arise, however, if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.

Thus, even assuming that the attorneys had advised their clients to violate the statute or had otherwise assisted such violation, their conduct could not give rise to liability because they owed no duty to the party injured by their conduct. The court further stated that an attorney could be held liable for conspiring with a client to injure a third party only when the attorney: (1) acted in furtherance of the attorney’s own financial gain; (2) committed actual fraud by making express misrepresentations to the third party; or (3) violated an independent duty owed by the attorney to the third party. In essence, the California Supreme Court’s decision in Doctors’ Co. did nothing more than reiterate the traditional common law rule that an attorney may not be held liable to a third party absent the existence of an independent duty, fraud, malice, or other personal motive.

Several years after the decision in Doctors’ Co., the California Court of Appeals decided Skarbrevik v. Cohen, England & Whitfield, which demonstrated just how narrow the bases for attorney liability for conspiracy really are. Skarbrevik involved the buyout of a minority shareholder of a close corporation. The minority shareholder, Skarbrevik, left the company after agreeing with the majority shareholders that they would buy him out. After his departure, however, the remaining shareholders declined to purchase Skarbrevik’s shares and instead asked Comis, the outside counsel to the corporation, for advice on diluting Skarbrevik’s ownership interest in the corporation.

Comis explained that the dilution could be achieved by issuing additional shares of stock, but under a preemptive rights provision in the corporate

41. Id. at 511.
42. Id.
43. See id. at 512-13.
44. In 1991 the California Legislature amended California Civil Code § 1714.10 to reflect the exceptions articulated by the California Supreme Court in Doctors’ Co. See CAL. CIV. CODE § 1714.10 (West Supp. 1994).
46. Id. at 630-31.
articles, twenty-five percent of any new shares would have to be offered to Skarbrevik. Comis explained, however, that this problem could be resolved by amending the articles of incorporation to eliminate the preemptive rights provision. He suggested that the majority shareholders convene a “special shareholders meeting” to approve the amendment and further advised them that they should give notice to Skarbrevik of that meeting.\textsuperscript{47}

The meeting never took place, and several months later Comis advised the majority shareholders that the annual shareholders’ meeting could be used to amend the articles of incorporation. Comis then forwarded to the corporation a new set of papers which memorialized the annual shareholders’ meeting, which he knew had never taken place, and memorialized actions supposedly taken at the “meeting” to delete the preemptive rights provision. Comis then perfected the amendment by filing the requisite documents with the appropriate state officials.\textsuperscript{48}

Skarbrevik later sued the majority shareholders and their attorneys for, among other things, conspiracy to defraud. The jury returned a verdict against Comis and his law firm.\textsuperscript{49} On appeal, the attorneys contended that Skarbrevik had failed to prove the claim against them for conspiracy to defraud “because they acted only as legal advisors to the corporation and its officers and not for their own advantage, and because they cannot be liable for conspiring to breach a fiduciary duty that they themselves do not owe [Skarbrevik].”\textsuperscript{50} The California Court of Appeals agreed with this argument and reversed the judgment against the attorneys. In reaching its holding, the Court of Appeals noted:

The record in this case contains substantial evidence that . . . the majority shareholders of the corporation[] committed the tort of fraudulent concealment. . . .

The record also contains evidence from which the jury could infer that Comis knowingly participated in the majority shareholders’ fraud. He perfected the amendment deleting the preemptive rights provision from the corporate articles knowing that [Skarbrevik] was entitled to, but had not been given, notice of the annual shareholders’ meeting and of the proposal to amend the corporate articles, and knowing that in fact no annual meeting had been held. We cannot and do not condone these activities. The question, however, is whether a finding of liability can be upheld on the theory under which the case was tried, in light of controlling case law.\textsuperscript{51}

\textsuperscript{47} Id. at 631-32.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 629-30.
\textsuperscript{50} \textit{Skarbrevik}, 282 Cal. Rptr. at 637.
\textsuperscript{51} Id. at 637-38.
The court then reviewed the decision in *Doctors' Co.* and concluded:

[Skarbrevik] failed to establish that Comis had a fiduciary relationship with him upon which to base a duty of disclosure. Under the facts of this case, any duty to disclose the concealed or suppressed information regarding actions taken to dilute [Skarbrevik’s] shareholders’ interest in the corporation was “peculiar” to [the majority shareholders], who, as majority shareholders, had a fiduciary duty to [Skarbrevik] as minority shareholder. Comis, as attorney for the corporation, had no personal duty to disclose the facts intentionally concealed. Indeed, the same would be true even if Comis were regarded as attorney for the majority shareholders in addition to, or instead of, counsel for the corporation.

Absent either an individual duty to the plaintiff or a personal financial interest in the matter, under the authority of *Doctors’ Co. v. Superior Court*, Comis cannot be held accountable on a theory of conspiracy to conceal based on his actions as attorney for the corporation or for the majority shareholders.  

III. STATUTORY BASIS OF LIABILITY: AIDING AND ABETTING

In addition to the traditional common law bases of liability, at least two statutory bases exist for holding attorneys liable for assisting their clients with wrongful conduct: (1) aiding and abetting a client’s violation of the Racketeer Influenced and Corrupt Organizations Act (RICO); and (2) aiding and abetting a client’s violation of section 10(b) of the Securities and Exchange Act of 1934 and rule 10b-5 promulgated thereunder.

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52. *Id.* at 639-40 (footnote omitted) (citations omitted).
53. 18 U.S.C. §§ 1961-68 (1988). Section 1962(a) makes it illegal for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . , to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. *Id.* § 1962(a).

Section 1962(b) makes it illegal “for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” *Id.* § 1962(b). It is also illegal “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” *Id.* § 1962(c).

Section 1962(d) makes it illegal “for any person to conspire to violate any of the provisions of subsections (a), (b), or (c).” *Id.* § 1962(d).

54. Codified at 15 U.S.C. § 78j(b) (1988). Section 10(b) makes it illegal for any person to use or employ, in connection with the purchase or sale of any security registered
For the most part, these causes of action do not depart from the common law bases of liability for such conduct because they each require proof that an attorney has engaged in fraudulent or criminal activity. Claims for aiding and abetting a violation of section 10(b) or rule 10b-5, which involve allegations that the defendant attorney failed to disclose certain material information to the plaintiffs, do not necessarily require proof of affirmative conduct or an affirmative misrepresentation by the attorney. In such cases, given the absence of affirmative conduct or representations by an attorney, the courts have incorporated the common law concepts regarding an attorney's fiduciary duty to disclose.

As a general rule, to establish a defendant's liability for aiding and abetting a rule 10b-5 violation, a plaintiff must prove three things: (1) a violation of rule 10b-5 by one other than the aider and abettor; (2) knowledge of the violation by the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the violation. Knowledge has generally been equated with scienter and requires knowledge of the primary violator's wrongful purpose.

In cases involving liability for failure to disclose material information, the degree of knowledge or scienter that a plaintiff must prove depends upon

on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

55. 17 C.F.R. § 240.10b-5 (1993). Rule 10b-5 makes it illegal for any person:
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.


57. See cases cited supra note 56.

58. See, e.g., Camp, 948 F.2d at 459 (citation omitted); Schatz, 943 F.2d at 495; Abell, 858 F.2d at 1126.

59. See, e.g., Schatz, 943 F.2d at 496.

60. See, e.g., Camp, 948 F.2d at 459.

https://scholarcommons.sc.edu/sclr/vol45/iss4/8
whether the alleged aider and abettor had a duty to disclose that information to the plaintiff.\textsuperscript{61} "When there is no duty running from the alleged aider and abettor to the plaintiff, the defendant must possess a 'high conscience intent' and a 'conscience and specific motivation' to aid the fraud."\textsuperscript{62}

In determining whether the requisite degree of intent exists, courts have examined the nature of the assisting activity in which the aider and abettor engaged. As the former Fifth Circuit explained:

In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws. Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.\textsuperscript{63}

Thus, in cases involving allegations that an attorney has aided and abetted a client's 10b-5 violation, courts have been reluctant to find liability when the attorney was under no duty to disclose information to the plaintiff-investors and apparently did nothing more than represent the client by "papering the deal."\textsuperscript{64} Furthermore, in this context, the courts have been decidedly reluctant to find a duty of disclosure running from the defendant-attorneys to the plaintiff-investors.\textsuperscript{65}

For example, in \textit{Abell v. Potomac Insurance Co.}\textsuperscript{66} a class of investors who had purchased certain bonds sued a number of individuals, including Wright, Lindsey & Jennings (WLJ), the law firm which represented the bond issue's underwriters. The plaintiffs alleged that the offering statement, which had been prepared by the underwriters (clients of WLJ), failed to reveal a number of material facts regarding the investment.\textsuperscript{67} A jury found in favor of the plaintiffs against the attorneys, but the Fifth Circuit held that, under the facts proven at trial, the law firm could not be held liable for aiding and

\textsuperscript{61} See, e.g., \textit{Schatz}, 943 F.2d at 496; \textit{Abell}, 858 F.2d at 1126; \textit{In re Cascade Int'l Sec. Litig.}, 840 F. Supp. 1558, 1565 (S.D. Fla. 1993).

\textsuperscript{62} \textit{Schatz}, 943 F.2d at 496 (citations omitted).

\textsuperscript{63} \textit{Woodward v. Metro Bank of Dallas}, 522 F.2d 84, 97 (5th Cir. 1975) (footnote omitted); accord \textit{Schatz}, 943 F.2d at 497; \textit{Abell}, 858 F.2d at 1126-27; \textit{In re Cascade Int'l Sec. Litig.}, 840 F. Supp. at 1565-66.

\textsuperscript{64} \textit{Schatz}, 943 F.2d at 497; \textit{see also} cases cited supra note 56.

\textsuperscript{65} \textit{See} cases cited supra note 56.

\textsuperscript{66} 858 F.2d 1104.

\textsuperscript{67} \textit{Id.} at 1111-12.
abetting securities fraud. 68

The court first found that the attorneys were under no duty to disclose the material misrepresentations and omissions contained in the offering statement. In reaching this conclusion the Fifth Circuit stated:

Traditionally, lawyers are accountable only to their clients for the sufficiency of their legal opinions. It is well understood in the legal community that any significant increase in attorney liability to third parties could have a dramatic effect upon our entire system of the legal ethics. An attorney required by law to disclose "material facts" to third parties might thus breach his or her duty, required by good ethical standards, to keep attorney-client confidences. Similarly, an attorney required to declare publicly his or her legal opinion of a client's actions and statements may find it impossible to remain as loyal to the client as legal ethics properly require. 69

Upon examining the evidence produced at trial, the court found the following:

[The plaintiffs] established that WLJ knew that one of its clients . . . was under S.E.C. investigation for securities violations. The evidence also permitted the jury to conclude that WLJ knew that the FBI, the S.E.C., and the National Association of Securities Dealers were also investigating [that client]. Additionally, WLJ was aware that both the original underwriter's counsel and the original bond counsel had resigned from their representations — a further sign that something might be amiss.

Nonetheless, WLJ did little to investigate what its client had done previously or why the original counsel had resigned. Moreover, WLJ readily made several material changes to the final offering statement without asking its clients (who requested the changes) why they should be made. Finally . . . , WLJ failed to investigate properly the truth of the offering statement despite its duty to its clients to do so. 70

Despite WLJ's knowledge and its failure to act thereon, however, the court concluded that such evidence was insufficient to support the jury verdict against WLJ for aiding and abetting its clients in securities fraud. The court reasoned as follows:

First, in examining what WLJ did to assist in the fraud, we determine that WLJ provided only legal services that "[constitute] the daily grist of the mill" of a law firm with a substantial securities practice. Consequently,

68. *Id.* at 1128.
69. *Id.* at 1124 (footnotes omitted).
70. *Id.* at 1127 (footnote omitted).
Woodward requires "clear proof of intent to violate the securities laws." But at best, the evidence shows only that WLJ recklessly disregarded its duties to its clients. WLJ ignored several warning signs that the jury could have found aroused the law firm to suspect the propriety of the offering.

Aroused suspicions, however, do not constitute actual awareness of one's role in a fraudulent scheme. Moreover, to prove plainly that an alleged abettor intended to violate the securities laws, plaintiffs must prove more than that the abettor recklessly ignored danger signals.\footnote{71}{Abell, 858 F.2d at 1128 (footnote omitted) (quoting Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975)).}

In Schatz v. Rosenberg\footnote{72}{943 F.2d 485 (4th Cir. 1991), cert. denied, 112 S. Ct. 1475 (1992).} the defendant, Rosenberg, purchased an eighty percent interest in two companies owned by the Schatzes. As payment, the Schatzes received $1.5 million in promissory notes that Rosenberg personally guaranteed. According to the complaint, "The plaintiffs relied on a financial statement dated March 31, 1986 and an update letter delivered at closing on December 31, 1986 which indicated that Rosenberg's net worth exceeded $7 million. These financial documents contained several misrepresentations obscuring the fact that Rosenberg's financial empire had crumbled between April and December of 1986."\footnote{73}{Id. at 489-89.}

Rosenberg subsequently siphoned off cash from the companies he had purchased from the Schatzes and then filed for personal bankruptcy. The Schatzes then filed suit against Rosenberg and his attorneys, the law firm of Weinberg & Green (W & G). The complaint alleged three counts against W & G for primary violation of section 10(b), aiding and abetting liability, and common law misrepresentation. The district court dismissed all three counts for failure to state a claim upon which relief could be granted, and the Fourth Circuit affirmed.\footnote{74}{Id. at 489.}

The plaintiffs premised W & G's liability on the firm's alleged failure "to disclose Rosenberg's misrepresentations and by making affirmative misrepresentations about Rosenberg's financial condition."\footnote{75}{Id. at 489-89.} The Fourth Circuit, however, noted that "[s]ilence, absent a duty to disclose, does not violate section 10(b) and Rule 10b-5,"\footnote{76}{Id. at 490 (citing Chiarella v. United States, 445 U.S. 222, 228 (1980)).} and held that "a lawyer or law firm cannot be held liable for misrepresentation under section 10(b) for failing to disclose information about a client to a third party absent some fiduciary or other confidential relationship with the third party."\footnote{77}{Id.}
existence of an ethics ruling issued by the Maryland State Bar Committee On Ethics. The plaintiffs' attorneys had submitted to the Bar Committee an anonymous request for a ruling on "hypothetical" facts at issue in the case. "The committee concluded that a law firm in [W & G's] position had an ethical duty to either withdraw from representation or disclose the misrepresentations to the third person."78 The Fourth Circuit, however, declined to find a duty to disclose based on this ethical ruling, stating:

An ethical duty of disclosure does not create a corresponding legal duty under the federal securities laws. Courts have consistently refused to use ethical codes to define standards of civil liability for lawyers. More specifically, courts have refused to base a legal duty of disclosure for section 10(b) on a disciplinary rule.79

Because W & G was under no duty to disclose their client's financial condition to the Schatzes and because it did not allege the "high conscience intent" to aid the fraud, the court found that the complaint failed to state a claim for aiding and abetting liability. The allegation of intent was necessary in the absence of any duty to disclose by W & G.80

The court also found that the Schatzes failed to allege sufficiently that the attorneys had substantially assisted their client's securities fraud. In reaching this conclusion, the court rejected the Schatzes' argument that "a lawyer provides 'substantial assistance' in aiding and abetting tortious conduct if he prepares or disseminates documents containing material misrepresentations or omissions."81 On appeal the Fourth Circuit responded to the argument as follows:

[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.

. . . [W]hen a lawyer offers no legal opinions or affirmative misrepresentations to the potential investors and merely acts [as] a scrivener for the investment group, the lawyer cannot be liable as a matter of law for aider and abettor liability under the securities laws without an allegation of conscious intent to violate the securities laws. . . .

78. Schatz, 943 F.2d at 492.
79. Id. (citations omitted).
80. Id. at 496.
81. Id. at 497.
... While it is true that some of Rosenberg's documents prepared by [W & G] (on the basis of information provided by Rosenberg) 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. Clearly, the fact that an attorney drafts a closing document does not automatically create a warranty that every statement and agreement made by the client is true.82

In re Cascade International Securities Litigation83 involved a class action by common stock shareholders of Cascade International, Inc. The plaintiffs sued, among others, two law firms, Karp & Sommers (K & S), and Gunster, Yoakley & Stewart (GY & S) who had represented the corporation in various matters related to the issuance of stocks.84 The complaint alleged, inter alia, that the defendant law firms had committed primary violations of section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 of the Securities and Exchange Commission, and that they had aided and abetted their clients' violations of those laws.85 However, the district court found that the plaintiffs' complaint could not state a cause of action against either of the law firms and dismissed the complaint as to those defendants.86

The court first held that because the law firm owed plaintiffs no duty to disclose potentially negative information about their clients, the counts alleging primary violations of section 10(b) and rule 10b-5 had to be dismissed.87 The court then found that, given that no duty to disclose existed, the aiding and abetting claims also failed.88 The failure to state an aiding and abetting claim resulted from plaintiffs' inability to allege that the attorneys had acted with the "conscience intent to aid the fraud," which was necessary in the absence of a duty to disclose.89

In finding that the plaintiffs failed to state a claim for aiding and abetting, the court rejected the plaintiffs' allegation that the attorneys had discovered and ignored numerous "red flags," constituting facts which plaintiffs allege should have made the defendant law firms aware that Cascade was committing fraud, or at least compelled them to investigate their client.90 The court stated that "'red flags,' or 'aroused suspicions,' 'do not constitute actual

82. Id.
84. Id. at 1561.
85. Id. at 1561-62.
86. Id. at 1562-67.
87. Id. at 1564-65.
89. Id. at 1565-66.
90. Id. at 1565.
awareness of one’s role in a fraudulent scheme.’ Furthermore, when no duty to disclose exists, ‘allegations that a defendant knew of the wrongdoing and did not act fail to state an aiding and abetting claim.’ Thus, allegations that the law firms merely failed to investigate their client is not sufficient to establish an aiding and abetting claim.”91 The court went on to conclude that the plaintiffs’ complaint failed to allege facts demonstrating that the defendant law firms had substantially assisted their clients’ securities fraud. “Plaintiffs have failed to allege any activities on the part of K & S and GY & S that constituted anything more than acting as scriveners for their clients or conducting activities that make up the ‘daily grist of the mill.’”92

As the foregoing cases demonstrate, courts have been reluctant to find that attorneys owe third parties a duty of disclosure, and therefore have been reluctant to find attorneys liable for aiding and abetting securities fraud. This reluctance has persisted even in cases where the courts have found an attorney’s conduct questionable. The Seventh Circuit explained this hesitation as follows:

The extent to which lawyers and accountants should reveal their clients’ wrongdoing — and to whom they should reveal — is a question of great moment. There are proposals to change the rules of legal ethics and the SEC’s regulations governing accountants. The professions and the regulatory agencies will debate questions raised by cases such as this one for years to come. We express no opinion on whether the Firms did what they should, whether there was malpractice under state law, or whether the rules of ethics (or other fiduciary doctrines) ought to require lawyers and accountants to blow the whistle in equivalent circumstances. We are satisfied, however, that an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions. Liability depends on an existing duty to disclose. The securities law therefore must lag behind changes in ethical and fiduciary standards. The plaintiffs have not pointed to any rule imposing on either Firm a duty to blow the whistle.93

91. Id. (citations omitted).
92. Id. at 1566 (quoting Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975)).

Another court has stated that

[i]t is the extent of a law firm’s liability for knowingly incorporating a client’s misrepresentations into closing documents for a financial transaction presents troubling legal issues. However, we do not sit as an ethics or other attorney disciplinary committee, but as a civil court with a duty to interpret the securities laws, and the solution to these legal issues cannot be found in the securities laws.

The reluctance to find attorneys liable for assisting their clients under such circumstances is attributable to a policy in favor of clients making full disclosures to their counsel regarding all relevant facts surrounding a particular transaction. The Fourth Circuit explained this policy:

While we sympathize with plaintiff’s position [that as a matter of public policy, lawyers should not be permitted to perpetrate or assist in a fraud without being held responsible for their wrongdoing] and certainly do not condone lawyers making misrepresentations, we find that public policy counsels against imposing such a duty [requiring attorneys to disclose their clients’ misrepresentations to innocent third parties]. Attorney liability to third parties should not be expanded beyond liability for conflicts of interest. Any other result may prevent a client from reposing complete trust in his lawyer for fear that he might reveal a fact which would trigger the lawyer’s duty to the third party. Similarly, if attorneys had a duty to disclose information to third parties, attorneys would have an incentive not to press clients for information. The net result would not be less securities fraud. Instead, attorneys would more often be unwitting accomplices to the fraud as a result of being kept in the dark by their clients or by their own reluctance to obtain information. The better rule — that attorneys have no duty to “blow the whistle” on their clients — allows clients to repose complete trust in their lawyers. Under those circumstances, the client is more likely to disclose damaging or problematic information, and the lawyer will more likely be able to counsel his client against misconduct.  

IV. THE S & L CASES: DO THEY REPRESENT A NEW, EMERGING BASIS OF LIABILITY?

In November 1990 approximately fifty legal malpractice actions were pending against attorneys who had represented failed financial institutions. For the most part, the suits had been instigated either by the FDIC or by financial institutions which had later been taken over by the federal government. At that time, the RTC announced its intent to pursue approximately 140 additional professional liability claims against attorneys who had represented failed banks. The then assistant general counsel for the FDIC explained, “‘In many cases, it’s much easier for us to sue attorneys than directors and officers because they have insurance.’”

94. Schatz, 943 F.2d at 493 (citation omitted).
95. Linda Himelstein, Malpractice Mayhem; RTC Officials Eye 140 Suits Against Lawyers, LEGAL TIMES, Nov. 19, 1990, at 1.
96. Id.
97. Id.
98. Id.
Given that many cases are not reported, it is remarkable that the RTC has managed to obtain the number of settlements it has in these cases. The ability of the government to persuade so many defendants to settle may be attributable to some of the novel theories of liability proffered by the government and the defendants' fear that courts would adopt some of them.

The most infamous of the S & L failures was, of course, that of the Lincoln Savings & Loan Association (Lincoln), which was owned by Charles H. Keating Jr.'s company, American Continental Corporation (ACC). In one of the first published decisions concerning the demise of Lincoln, it appears that a court asked pointed questions about the propriety of the conduct of attorneys and accountants representing that institution. These questions were asked even though the issue of professional liability was not before the court. Rather, the case of Lincoln Savings & Loan Association v. Wall involved a lawsuit by Lincoln and its parent company ACC against Danny Wall, the director of the Office of Thrift Supervision (OTS). Lincoln and ACC were seeking to regain operational control of Lincoln after the Federal Home Loan Bank Board (FHLBB) had seized the bank and appointed a conservator, which it later replaced with a receiver.

In reaching the decision that the FHLBB and the OTS had acted properly in placing Lincoln first in conservatorship and then in receivership, Judge Stanley Sporkin reviewed a number of Lincoln's practices which he found to be unsafe and unsound. Judge Sporkin then concluded his opinion by blasting what he called the "private sector's" failure to "blow the whistle" on Keating:

[T]he Court permitted the parties the widest latitude to develop a full and complete record. What has emerged is not a pretty picture. It is abundantly clear that ACC's officials abused their positions with respect to Lincoln. Bluntly speaking, their actions amounted to a looting of Lincoln. This was not done crudely. Indeed, it was done with a great deal of sophistication. The transactions were all made to have an aura of legality about them. . . . While it is clear ACC overreached in its relationship with Lincoln, it is not discernible why ACC 's officials acted as they did.

There are other unanswered questions presented by this case. Keating testified that he was so bent on doing the 'right thing' that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

100. 743 F. Supp. 901.
101. Id. at 902-03.
Why didn’t any of them speak up or disassociate themselves from the transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

While we in this nation have been trying to place blame for the savings and loan crisis on the various governmental participants in the crisis and on the government’s fostering of deregulation within the thrift industry, this Court believes far too little scrutiny has been focused on the private sector. We are the world’s greatest example of the success of the private enterprise system. It would thus seem that the private sector ought to be able to put in place a system that would prevent the kinds of excesses that took place in Lincoln from recurring. Here it is clear the private sector was not willing to cooperate with the public oversight regulators. Indeed, the private sector at times impeded the regulatory authorities from discharging their duties. All too often Keating and those individuals working with him adopted strategies to thwart and frustrate the regulatory process.102

As prophesied in Judge Sporkin’s observations, many actions against banking attorneys were premised on lawyers’ services which assisted their clients, the financial institutions, in circumventing applicable federal and state banking regulations.103 In turn, this circumvention allowed the financial institutions to breach fiduciary duties they owed to their investors, depositors, as well as to themselves to engage in safe and sound banking practices.104 Thus, on a practical level, these actions against attorneys are actions for assisting clients with wrongful conduct. However, the issue is somewhat complicated given that the client allegedly committing the wrongful conduct was an institution, which could only act through its agents. Therefore, lawsuits against attorneys are often brought by the institutional clients themselves, by the FDIC or by the RTC as the conservator or receiver of those institutions.105

102. Id. at 919-20 (footnotes omitted).
As noted above, given the lack of case law in this area, a large number of cases never made it to trial.\textsuperscript{106} However, the limited case law indicates that attorney liability has been premised on the lawyers' alleged failure to do three things: (1) investigate their clients' activities to determine the existence of fraud or wrongdoing;\textsuperscript{107} (2) disclose to the banks' board of directors either suspected wrongdoing by the banks' officers, or the banks' failure to comply with applicable federal and state banking laws and regulations;\textsuperscript{103} and (3) failure to disclose those same items to governmental regulatory authorities.\textsuperscript{109} Additionally, in some cases, most notably those associated with Lincoln, attorney liability has been premised on affirmative conduct by the attorneys in representing their clients before regulatory agencies or in connection with the sale of securities.\textsuperscript{110}

Obviously, premising legal malpractice liability on violation of federal

\textsuperscript{106} See Himelstein, \textit{Malpractice Mayhem}, supra note 95, at 1 (noting that as of November 19, 1990, the RTC had only filed 10 professional liability claims against lawyers).

\textsuperscript{107} See, e.g., FDIC v. Clark, 978 F.2d 1541, 1549-51 (10th Cir. 1992) (holding ample evidence existed for the jury to find defendant attorneys were negligent in failing to conduct an independent investigation to "ferret out and discover [the] nature" of client's fraud); FDIC v. O'Melveny & Meyers, 969 F.2d 744, 749 (9th Cir. 1992) ("An important duty of securities counsel is to make a 'reasonable independent investigation to detect and correct false or misleading materials.'" (quoting Felts v. National Account Sys. Ass'n, 469 F. Supp. 54, 67 (N.D. Miss. 1978) (mem.)), cert. granted, 114 S. Ct. 543 (1993); FDIC v. Wise, 758 F. Supp. 1414, 1418-19 (D. Colo. 1991) (denying defendant attorneys' motions to strike allegations of legal malpractice in complaint for their failure to conduct independent investigations).

\textsuperscript{108} See, e.g., FDIC v. Shrade & York, 991 F.2d 216, 218 (5th Cir. 1993) (noting the FDIC's allegations that defendant law firm failed to give competent legal advice which caused some of its client's transactions to violate federal laws); \textit{Clark}, 978 F.2d at 1547-48 (noting that jury could find from the evidence that had the defendant attorney advised the board competently, the board could have discovered the fraud).


\textsuperscript{110} \textit{See In re American Continental Corp.}, 794 F. Supp. 1424; \textit{In re Fishbein}, OTS AP-92-19; \textit{see also} Susan Beck & Michael Orey, \textit{They Got What They Deserved}, AM. L. W., May 1992, at 68 (offering a detailed chronology of the government's case against Kaye, Scholer, Fierman, Hays & Handler for their role in the Keating Lincoln Savings & Loan debacle); Linda Himelstein, \textit{Last Link To Keating: Sidley & Austin Settles RTC Malpractice Case}, LEGAL TIMES, Oct. 21, 1991, at 2 (discussing the firm's settlement with the RTC over its representation of Keating); Jensen, \textit{Behind the Settlement}, supra note 109, at 1, 33.
securities laws is not new. Nor does holding attorneys liable for fraudulent conduct before a regulatory agency signal a departure from the traditional, common law bases of attorney liability. However, the concept that attorneys have a duty to investigate, and indeed even to regulate, their clients’ activities and transactions is a departure from the traditional notion of liability. Similarly, the concept that an attorney representing a financial institution owes the governmental agencies regulating such institutions an affirmative duty to disclose any wrongful or questionable conduct by the client is also a marked departure from the traditional bases of attorney liability. Specifically, both of these concepts represent a deviation from common law theories of duty and liability. Moreover, it does not appear that these newly recognized bases of liability originate from those courts applying securities laws. Indeed, as noted above, in securities cases, courts have found little duty to investigate potential client fraud and have been markedly reluctant to find a duty of disclosure running to third parties:

Rather, these cases appear to be premised, at least in part, on a new theory of attorney liability created by the government. Specifically, the OTS has publicly announced, both in cases it filed against lawyers and in public statements it has made, that “they consider lawyers who represent financial institutions to be fiduciaries of the FDIC.”\(^{111}\) The OTS’s theory is that by providing deposit insurance, the government has a “major equity position” in every savings and loan in the country. Consequently, this type of equity position requires that attorneys representing thrifts owe the FDIC “the highest conceivable standard of fiduciary conduct.”\(^{112}\) Holding that attorneys who represent financial institutions have independent fiduciary duties to the government certainly represents an expansion of the bases of attorney liability.\(^{113}\) Additionally, if successful, the government’s theory could foreclose some defenses otherwise available to attorneys in such situations, such as contributory negligence on the part of the client and the client’s knowing participation in or acquiescence to the wrongful conduct.\(^{114}\)

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111. See Kanige, supra note 109, at 22.
112. Id. (quoting Harris Weinstein, general counsel for OTS).
113. The fact that the government serves as the insurer of the institutions does not give the government’s position regarding attorney liability a basis in common law. There is no case law to support the proposition that an attorney acting for a client owes fiduciary duties directly to a client’s insurer.
114. See, e.g., FDIC v. Clark, 978 F.2d 1541, 1549 (10th Cir. 1992) (noting the court’s rejection of defendant attorney’s argument that their clients defrauded them, because the court found an independent duty on the part of the defendant attorneys to make a “reasonable independent investigation” (quoting FDIC v. O’Melveny & Meyers, 969 F.2d 744, 749 (9th Cir. 1992), cert. granted, 114 S. Ct. 543 (1993))).
A. Suing the Lawyers Who Assisted Lincoln: A Study in the Government’s Theory of Attorney Liability

The theories of expanded attorney liability to third parties advanced by the government are well illustrated in the actions taken by the RTC and the OTS against law firms that represented Keating’s Lincoln Savings & Loan Association. The most notorious of these actions were those instituted against Cleveland-based Jones, Day, Reavis & Pogue (Jones Day) and New York-based Kaye, Scholer, Fierman, Hays & Handler (Kaye Scholer). Those actions resulted in settlements of $51 million and $41 million respectively, as well as agreements between the law firms and the OTS about new procedures to be used in future representation of clients before the OTS.115

Building on their theory that attorneys representing financial institutions owe fiduciary duties to the government, the RTC and the OTS argued that the attorneys representing Lincoln could be held liable directly to them on at least two different grounds. These grounds included the attorneys’ failure to report suspected client wrongdoing to the board of directors, rather than in-house counsel or bank officers.116 Additionally, the government premised liability on the attorneys’ failure to disclose client conduct to the appropriate regulatory authority.117

1. Failure to Report Directly to the Board of Directors

Among the theories the government advanced was that an attorney’s failure to inform an institution’s board of directors of known or suspected improprieties at the institution automatically constitutes a basis for attorney liability.118 Many of the cases against Lincoln’s attorneys involved allegations that the attorneys, by failing to make such disclosures, aided and abetted the bank’s officers and other employees in breaching their fiduciary duties to, or otherwise harming, the bank.119 The RTC and the OTS advanced the

115. See, e.g., Beck & Orey, supra note 110, at 68; Jensen, Behind the Settlement, supra note 109, at 1.
116. See, e.g., FDIC v. Shrader & York, 991 F.2d 216, 218 (5th Cir. 1993); In re Fishbein, OTS AP-92-19, at 25 (Dep’t Treas. 1992) (Notice of Charges and of Hearing); see also Beck & Orey, supra note 110, at 68; Linda Himelstein, Atlanta Firm Agrees To Settle RTC Allegations for $20 Million, LEGAL TIMES, Sept. 21, 1992, at 4; Jensen, Behind the Settlement, supra note 109, at 32-33.
117. While Jones Day and Kaye Scholer both represented Lincoln in the context of a bank exam, the OTS’s position appears to be that these fiduciary duties are owed to the government. See Kanige, supra note 109, at 22.
119. See, e.g., In re American Continental Corp., 794 F. Supp. at 1450-53; In re Fishbein,
theory of liability even when the facts at issue were already known to in-house counsel, or bank officers, or board members. Additionally, the government contended that this failure "to move up the chain of command" gave rise to potential attorney liability not only to the institution, but also to the depositors, and the government, as both insurer and regulator.

For example, in the lawsuit brought against Jones Day by the RTC on behalf of Lincoln, the RTC alleged that the law firm had breached its duties to Lincoln and had aided and abetted the looting of Lincoln, in part by failing to disclose potential regulatory violations and suspicious transactions to Lincoln's board of directors. The facts surrounding the case demonstrated that Jones Day was retained primarily to represent Lincoln in an internal regulatory compliance audit, which was in turn to assist the bank in preparing for an upcoming bank exam by the San Francisco branch of FHLBB. Jones Day's primary contact with Lincoln was through Mark Sauter, Lincoln's chief regulatory counsel, and Robert Kielty, the head of the Office of General Counsel for ACC. Lincoln was, at all times, a wholly owned subsidiary of ACC.

At the first meeting between Mark Sauter, Robert Kielty, and William Schilling, a Jones Day partner, the client provided Schilling with "an eight-page list of 'examinations concerns'" that included a number of "potentially serious regulatory problems." Shortly after this initial meeting, Jones Day sent a number of associates and partners into Lincoln's

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120. See, e.g., In re American Continental Corp., 794 F. Supp. at 1453; see also Beck & Orey, supra note 109, at 70-71; Himelstein, Atlanta Firm Agrees To Settle, supra note 116, at 4; Jensen, Behind the Settlement, supra note 109, at 33.

121. See, e.g., Dick Goldberg, Law Firm Will Pay $51 Million; Jones Day Settles RTC Suit in Lincoln Savings Case, L.A. DAILY J., Apr. 20, 1993, at 1 ("The government insisted ... that Jones Day had a duty to inform the Lincoln ... Board of Directors and federal regulatory agencies of any potential fraud. That failure was a breach of fiduciary duty to Lincoln and the entire thrift system, government lawyers argued." (emphasis added)); Himelstein, Atlanta Firm Agrees to Settle, supra note 116, at 4; Jensen, Behind the Settlement, supra note 109, at 33.

122. See In re American Continental Corp., 794 F. Supp. at 1453; see also Jensen, Behind the Settlement, supra note 109, at 33.

123. See In re American Continental Corp., 794 F. Supp. at 1450; Jensen, Behind the Settlement, supra note 109, at 32.

124. Jensen, Behind the Settlement, supra note 109, at 32.


126. Prior to joining Jones Day in late 1985, Schilling was the Director of the FHLBB Office of Examinations and Supervision. The district court found that "[I]n that capacity, [Schilling] was directly involved in the supervision of Lincoln Savings. During the summer of 1985, he wrote at least one memorandum and concurred in another, expressing serious regulatory concerns about numerous aspects of Lincoln's operations." Id. at 1450.

127. Jensen, Behind the Settlement, supra note 109, at 32.
offices in Irvine, California to review Lincoln’s transactional files. It is undisputed that, during that investigation, Jones Day attorneys found “multiple regulatory violations.” The firm then apparently began the task of advising their client on how to rectify these problems, presumably to bring them into compliance with federal regulations prior to the FHLBB audit.

Jones Day reported its findings regarding the problem loans and suspicious transactions to Kielty and Sauter. The law firm contended that under the terms of its retainer agreement, it was required to report them. However, according to the RTC attorneys, “Jones Day lawyers knew that the inside lawyers they were reporting to were the same people who had engineered and executed the unlawful and the criminal diversion of Lincoln’s federally insured deposits, and the conspiracy to misdirect and mislead Lincoln’s regulators about that unlawful activity,” and that by failing to report directly to Lincoln’s board, “the Jones Day attorneys knew the practices would not change.”

However, evidence established that approximately one month after Jones Day’s compliance audit began, Schilling met with not only Kielty and Sauter, but also one of Lincoln’s corporate officers, who was also a lawyer and the chairman of Lincoln’s board of directors. At that meeting, Schilling presented a thirty-five page typewritten outline of topics to be discussed, including the numerous suspicious transactions and potential regulatory violations that the audit discovered.

In its defense, Jones Day argued that it was entitled to assume that Sauter

128. Id.
129. In re American Continental Corp., 794 F. Supp. at 1450. The court noted the following: Jones Day found that Lincoln did no loan underwriting and no post-closure loan follow up to ensure that Lincoln’s interests were being protected. Jones Day learned Lincoln had multiple “loans” which were, in fact, joint ventures which violated FHLBB regulations, made real estate loans in violation of regulations, and backdated corporate resolutions which were not signed by corporate officers and did not reflect actual meetings.

Id.
130. See In re American Continental Corp., 794 F. Supp. at 1450 (“There is evidence that Jones Day instructed ACC in how to rectify deficiencies so that they would not be apparent to FHLBB examiners.”). One point that both the district court and the RTC appeared to find particularly troublesome was the fact that Jones Day went to great lengths to keep the audit and related activities a secret, particularly from the FHLBB. Id.; see also Jensen, Behind the Settlement, supra note 109, at 32-33. Jones Day’s position was that such secrecy was necessary to maintain client confidences. Jensen, Behind the Settlement, supra note 109, at 33. The government argued that this conduct constituted aiding and abetting ACC and Keating in deceiving federal regulators. Id.
131. Jensen, Behind the Settlement, supra note 109, at 33.
132. Id. (quoting unnamed RTC attorney).
133. Id.
134. Id.
and Kielty were making full disclosures to the board of directors "urging that the board take proper measures."135 Jones Day further argued that "it would have been futile to act on these fiduciary obligations because those controlling ACC/Lincoln would not have responded."136 Neither of these arguments succeeded on the firm's motion for summary judgment.137 In denying that motion, the district court noted that there existed evidence "that Jones Day may have been aware that ACC/Lincoln did not follow its compliance advice with respect to ongoing activities. There are material questions of fact concerning the procedures Jones Day used — if any — to ascertain whether their compliance advice was being heeded."138 The court also noted repeatedly that Jones Day had a duty to counsel its client about potential fraud and illegal transactions, to encourage the client to cease any illegal activities, and to withdraw from further representation of the client if such activity did not cease.139

How Jones Day would have fared before a jury will never be known, because a mere five minutes before opening arguments were to begin, the firm reached a settlement with the OTS.140 As part of the agreement, Jones Day agreed to pay $51 million, including $19.5 million from its own funds, and agreed to a three year cease-and-desist order.141 The $51 million settlement "is the largest single recovery of funds by the federal government from law firms accused of malpractice during the infamous bank and S & L failures of the 1980's."142

The cease-and-desist order requires Jones Day to do what the RTC had argued the firm was already legally obligated to do — inform the board of directors of any thrift that Jones Day represents of potential wrongdoings by the client.143 This order, which provides that under given circumstances the

135. Id.
137. Id. The denial of the motion for summary judgment involved not only the RTC's breach of fiduciary duty claims against Jones Day, but also claims for violations of the securities laws and a RICO action lodged against Jones Day by both the RTC and investors of ACC/Lincoln. Id. at 1452.
138. Id. at 1450.
139. Id. at 1452-53.
141. Id.
142. Goldberg, supra note 121, at 1.
143. The order provided, in relevant part, that if a Jones Day attorney knows that "an employee, officer or director of an insured depository institution that is regulated by the OTS has acted or is threatening to act in violation of such person's fiduciary duties," then the attorney must inform the firm's "financial institutions supervising partner." Jensen, Jones Day Pact Sets Conditions, supra note 140, at 42 (quoting the settlement order). If the supervising partner
firm “shall” report to the bank’s board of directors, is at variance with the ABA’s Model Rules of Professional Conduct. The Rules provide that an attorney’s duty to report wrongdoings of corporate officers may include reporting such wrongdoings to the corporation’s board of directors. 144 By requiring Jones Day to sign an order which provided that the firm would move up the chain of command in future banking cases, the RTC appeared to acknowledge that, in the absence of such an order, Jones Day was not automatically obligated to act in such a fashion. Jones Day agreed to this order despite its insistence that by following standard practice and by reporting to the bank’s general counsel, it had not violated any fiduciary responsibility to Lincoln. “Regardless of which view would have prevailed before a jury, the obligation to report wrongdoing is now part of Jones Day’s thrift practice.” 145

Another large recovery obtained by the OTS from attorneys representing financial institutions came from New York-based Kaye Scholer. The case against Kaye Scholer ended in a negotiated settlement that was based on an eighty-three page complaint 146 (OTS Complaint) filed against the firm and three of its partners by the OTS as part of an administrative action. The OTS Complaint sought $275 million in damages reflecting “the losses that Lincoln suffered from the time Lincoln would have been shut [by federal authorities] absent Kaye Scholer’s alleged conduct . . . until it was taken over by the government in April 1989” and on “amounts lost on direct investments that the OTS [contended] would not have been made absent a go-ahead from Kaye

agrees with the attorney’s assessment, then the partner “shall advise the potential violator of the belief that banking laws are being or about to be broken.” Id. If that person “fails to adhere to the firm’s advice,” the partner is required to go up the thrift’s chain of command to the bank’s ‘responsible executives.’ The executive must ascertain if the breach is threatened or has occurred and - if convinced - must take steps to correct or nullify the action.” Id. (quoting the settlement order). If the firm learns that the executive has failed to act then the firm shall inform the thrift’s board of directors. Id. In addition to agreeing to this cease-and-desist order, the OTS required Schilling to sign an individual cease-and-desist order, which disbarred him from practicing before the OTS. Id.

144. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992) (suggesting that a possible measure for an attorney who knows of wrongdoings is to refer “the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization”).

145. Jensen, Jones Day Pact Sets Conditions, supra note 140, at 42.

146. In re Fishbein, OTS AP-92-19 (Dep’t Treas. 1992) (Notice of Charges and of Hearing). The document was formally titled In the Matter of Peter M. Fishbein, Karen E. Katzman, and Lynn Toby Fisher, Kaye, Scholer, Fierman, Hays & Handler, titled Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief; Notice of Intention to Remove and Prohibit from Participation in the Conduct of the Affairs of Insured Depository Institutions; and Notice of Intention to Debar from Practice Before the Office of Thrift Supervision.
Rather than litigating, Kaye Scholer agreed to settle the claims for $41 million, a mere six days after the OTS Complaint was filed. The OTS Complaint focused on Kaye Scholer's representation of Lincoln with respect to two examinations of the bank by the San Francisco branch of the FHLBB, specifically, responses that Kaye Scholer submitted on behalf of Lincoln following negative examination reports. In each of those responses, Kaye Scholer, as attorneys for Lincoln, insisted that the bank "was a safe, sound, prudently run thrift." 

While the primary issue in this case concerned whether Kaye Scholer deliberately misled the regulators on behalf of its client, the OTS based its action against the law firm in part on the attorneys' failure to inform Lincoln's board of directors of the problems they had discovered while assisting Lincoln with the regulatory exam. Unlike other cases, the OTS did not argue that this failure by Kaye Scholer caused the bank's losses on the grounds that, had such disclosures been made, Lincoln's board would have acted to stop the questionable practices and transactions. Rather, appearing to concede that such disclosure to the board would have made little, if any, difference, the OTS Complaint merely alleged:

As a consequence of [Kaye Scholer's] failure to inform the Board of Directors of Lincoln of its fiduciary duties to the depositors and to the federal insurance fund in light of the material facts of which [Kaye Scholer was] aware, the Board of Directors was deprived of the opportunity to take appropriate action with full knowledge of its fiduciary duties concerning

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147. Beck & Orey, supra note 110, at 73; see also In re Fishbein, OTS AP-92-19, at 79.
148. See Beck & Orey, supra note 110, at 68. In addition to paying the $41 million, Kaye Scholer partners Peter Fishbein, Karen Katzman, and Lynn Toby Fisher agreed to certain limitations on their practice before the OTS. Id. The speedy resolution of the matter resulted from the fact that, as part of the proceedings against Kaye Scholer, the OTS imposed a freeze on many of the firm's assets and operations. Id. at 69.

Despite being hugely prosperous — with revenue of $185 million and average per partner profits of $660,000 in 1990 — Kaye, Scholer, like many firms, lives off a bank line of credit for much of the first half of each year. When the OTS freeze hit, Kaye, Scholer was $15 million in the hole. While the freeze made Kaye, Scholer's banks look up, it was the $275 million complaint that caught their eye, and they pulled the plug on further borrowing. The firm concluded that it couldn't survive and that it had to settle.

Id.

149. See In re Fishbein, OTS AP-92-19; Beck & Orey, supra note 110, at 70.
150. Beck & Orey, supra note 110, at 70.
152. See, e.g., FDIC v Shradar & York, 991 F.2d 216 (5th Cir. 1993); FDIC v. Clark, 978 F.2d 1541 (10th Cir. 1992); Federal Sav. & Loan & Ins. Corp. v. McGinnis, Juban, Bevan, Mullins & Patterson, P.C., 808 F. Supp. 1263 (E.D. La. 1992).
the transactions described in this Notice of Charges. 153

Obviously, given Kaye Scholer's rapid settlement with the OTS, we will never know how this theory of liability would have fared either in an administrative hearing or in the courts.

2. Duty of Disclosure to Regulatory Authorities

As previously noted, both the OTS and the RTC have used their new theory of fiduciary responsibility that an attorney who is representing a financial institution owes a duty of disclosure to governmental regulatory authorities. According to the government, any such attorney who fails to report suspected client wrongdoings or improprieties to the regulatory authorities, has not only breached a fiduciary duty owed to the government, but has in fact assisted the client's wrongdoing and therefore, may be held independently liable. 154 This theory was again offered as a basis of liability against both Jones Day and Kaye Scholer. 155

This theory of attorney liability runs counter not only to relevant case law regarding an attorney's liability for failure to disclose facts to non-clients, 156 but also to a recent ABA opinion addressing the lawyer's obligation in such a situation. 157 In this formal opinion, the American Bar Association's Standing Committee on Ethics and Professional Responsibility concluded the following:

[T]hat in representing a client in a bank examination, a lawyer may not under any circumstances lie to or mislead agency officials, either by affirmative misstatement or by omitting a material fact necessary to assure that statements made are not false and misleading. However, she is under no duty to disclose weaknesses in her client's case or otherwise to reveal confidential information that would be protected under Rule 1.6. 158

155. See Beck & Orey, supra note 110; Goldberg, supra note 121; Jensen, Behind the Settlement, supra note 109; Kanige, supra note 109. Again, given the settlement of the cases, it is unknown how this theory would have fared in court.
156. See supra note 56 and accompanying text.
158. Id. at 2. The opinion further noted that while a client may owe a duty of disclosure to a regulatory agency, that duty does not ipso facto become the lawyer's duty. However, the opinion further notes the following

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This duty of disclosure to a third party in the banking area stands in sharp contrast to the duties, or lack thereof, found in either the common law or the current statutory law. If such a duty is to be premised on public policy, it is difficult to determine why attorneys who represent banks should have a duty to blow the whistle on their clients, while attorneys who represent clients who sell securities should not.

If anything, an argument can be made that sound public policy reasons exist for finding that attorneys do not owe such whistle-blowing duties to governmental authorities. As in the securities field, knowledge that an attorney has a duty to report any suspected improprieties is not likely to make clients voluntarily curb any such wrongdoing. Rather, such a requirement might only serve to make clients less forthcoming with their attorneys. If banking clients decline to inform their attorneys of all relevant facts relating to a transaction, then counsel cannot render sound advice, including advice that the transaction might violate applicable federal regulations. Additionally, if the OTS’s views regarding an attorney’s duty of disclosure is adopted, lawyers who represent clients before regulatory agencies may well find themselves confronted with a proverbial Hobbesian choice: breach the duty of client confidentiality and disclose the wrongdoing of the client, or pay the government any losses it might suffer as a result of the client’s conduct.

V. CONCLUSION

For years courts have carefully limited attorneys’ liability to third parties, even when attorneys allegedly assist their clients in wrongful conduct that injured third parties. They have been especially careful to tailor narrowly the bases of liability when attorneys arguably have done nothing more than represent their clients. Additionally, courts have interpreted the statutory bases for such liability in a similarly narrow fashion.

The reasons for the judiciary’s reluctance to hold attorneys liable for allegedly assisting their clients with wrongful conduct are sound ones, firmly grounded in public policy and the traditions of our legal system. To expose attorneys to greater liability would impede the attorney-client relationship, as well as an attorney’s ability to represent and counsel clients effectively.

In the banking cases, the government has taken the position that attorneys

[1] lawyer may put herself in a situation where she has assumed such obligations. When the lawyer is the only individual to deal directly with the bank examiners during the course of the examination, takes full responsibility for gathering factual information and preparing the client’s submissions to the regulators, and cuts off the regulator from access the regulator otherwise might have to employees of the regulated entity, the lawyer may well have taken on the client’s own obligation under the regulations to respond.

Id. at 3 (emphasis in original).
who represent financial institutions owe fiduciary duties to the government and may be held liable for a breach of those duties. The theories advanced by the government, if accepted by the courts, will represent a significant expansion of the bases of attorney liability for allegedly assisting their clients with wrongful conduct.

In view of the magnitude of the banking crisis in this country and the perceived failure of the governmental regulatory authorities to prevent it, the government's theories regarding attorney liability in this area may in fact represent an attempt to shift the regulatory responsibilities to attorneys and other professionals who represent thrift institutions. Others might feel, as Judge Sporkin apparently did, that the S & L crisis in the country resulted from the failure of professionals to police their own ethical conduct. For those who have such a perspective, expanding the bases for attorney liability in this area might be viewed as serving the much-needed function of forcing attorneys to engage in more than the minimal conduct required to avoid disbarment. However, given that the securities laws were not viewed as a vehicle for "blazing a trail towards approved ethical standards in the legal profession," it is hard to see why banking regulations should serve this function.

Finally, it should be noted that the concept that attorneys owe governmental regulatory authorities fiduciary duties has the potential for expansion far beyond the banking arena. The federal government has established regulatory authorities that oversee any number of areas, from the environment to food and drugs to nuclear energy. Additionally, states often have similar regulatory authorities. Thus, if this new bases of liability is widely adopted, then attorneys who represent clients subject to such regulatory authorities may find that their role has been transformed from that of advocate to that of overseer.

160. Id.
161. See Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986).