THE LIABILITY

Why you should understand the five tests of civil aiding and abetting in Texas.

BY NELSON S. EBAUGH

Civil aiding and abetting claims have steadily gained recognition over the past 50 years. In fact, there are now at least five different tests for civil aiding and abetting. Texas state courts rely on several "distinct lines of [aiding and abetting] cases without distinguishing or acknowledging the different lines."[1] Significantly, aiding and abetting claims are not only predicated on fraud claims or securities law violations but also on a wide range of torts, from assault[2] to breach of the duty of good faith and fair dealing.[3] Given the widespread number of situations under which aiding and abetting liability could arise, all practitioners should at least have a cursory understanding of it.

This article identifies tests for aiding and abetting liability, their origin, their elements, the scope of their applicability, and which ones have been adopted by the Texas Supreme Court. Recognizing the distinctions between each of these tests is crucial because some have significantly higher scienter requirements than others. For example, if a bank is accused of aiding and abetting a Ponzi scheme, it might be liable under one test but not another. If the bank noticed that the perpetrator of the Ponzi scheme was engaged in some sort of fraud, turned a blind eye to the fraud, and continued to provide routine banking services while generally aware of the perpetrator's fraud, then the bank might be liable under one of the tests but not under all of them. Some tests require essentially nothing more than proof of the aider and abettor's general awareness of the perpetrator's fraud while providing ordinary banking assistance. However, there is at least one test that requires not only general awareness of the fraud but also proof of the aider and abettor's intent to assist the perpetrator in committing the fraud. Under such circumstances, identifying the proper test could determine the outcome of the aiding and abetting claim against the bank. For this reason, it is important to understand the nuances of each test and under what situations they apply.

OVERVIEW

Until about 50 years ago, civil aiding and abetting claims were rarely asserted. This changed in the 1960s after federal courts recognized a civil aiding and abetting claim predicated on a federal securities violation. Subsequently, there was an explosion of such claims. Throughout the 1970s, civil aiding and abetting claims were largely confined to those made in securities fraud cases.[4]

In the 1980s, many courts began to expand the scope of civil aiding and abetting liability to apply to claims predicated on a variety of common law torts. This trend began in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) when the court applied the aiding and abetting test developed under the securities laws to a claim for aiding and abetting a wrongful death.[5] The U.S. Supreme Court has described *Halberstam* as a "comprehensive opinion on the subject."[6]

Several states have adopted the test set forth in *Halberstam* to determine aiding and abetting liability predicated on a common law tort.[7] Other states have adopted the test set forth in Section 876(b) of the Restatement (Second) of Torts to determine liability predicated on a common law tort.[8] However, neither of these tests has been applied uniformly. For example, as noted by the U.S. Supreme Court, Section 876(b) "has been at best uncertain in application."

The Texas Supreme Court has not adopted either the *Halberstam* test or the Section 876(b) test for common law torts. Nonetheless, intermediate appellate courts in Texas and federal courts applying Texas law have generally assumed that the Texas Supreme Court would recognize an aiding and abetting claim predicated on a common law tort.[9] If the Texas Supreme Court were to do so, it is unclear which test would be applied by the court. Presumably, the court would follow the lead of other states by adopting either the *Halberstam* test or the Section 876(b) test.

The Texas Supreme Court has issued opinions identifying the tests for aiding and abetting a breach of a fiduciary duty and for aiding and abetting a violation of the Texas Securities Act. In addition, the court has issued an opinion commenting on how it would construe Section 876(b) if it were to recognize such a claim. Below is a brief summary of these tests and others.

BREACH OF FIDUCIARY DUTY

The oldest test for aiding and abetting in Texas was developed in the context of a claim for breach of fiduciary duty. In *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942), the Texas Supreme Court adopted a cause of action for knowing participation in the breach of duty of a fiduciary. Subsequently, Texas courts began referring to this cause of action as one for "aiding and abetting a breach of fiduciary duty."[10] The elements are: (1) a breach of fiduciary duty by a third party; (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party; and (3) the aider's awareness of his participation in the third party's breach of its duty.[11]

Of course, such a claim is limited to those cases where there is an underlying fiduciary duty owed by the primary violator to the plaintiff.[12] Moreover, the aider and abettor must not only know of the fiduciary duty but also be "aware of his participation in the third party's breach of its duty."[13]

A VIOLATION OF THE TEXAS SECURITIES ACT

In 1977, the Texas Legislature amended the Texas Securities Act to provide for civil aiding and abetting liability. However, it was not until the Texas Supreme Court's decision in *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex. 2005) that it construed aiding and abetting under the TSA and set forth the test for such a cause of action. For the most part, the Texas Supreme Court adopted the test that federal courts use to evaluate an aiding and abetting claim predicated on the violation of a securities statute. However, the Texas Supreme Court modified this test to require nothing less than the aider's "general awareness that his role was part of an overall activity that is improper."[14] In other words, recklessness alone will not satisfy the scienter requirement under the aiding and abetting provision of the TSA. This is in contrast to federal appellate court decisions that have applied a "recklessness standard" under certain circumstances to satisfy the scienter element of an aiding and abetting claim.[15]

The Texas Supreme Court adopted the general awareness standard by referring to federal court decisions on aiding and abetting liability issued in the mid-1970s (at about the time that the Texas Legislature amended the TSA to provide for aiding and abetting liability).[16] In addition, the Texas Supreme Court based its decision on its own precedent equating recklessness to conscious indifference.[17] In doing so, the court concluded that even though the TSA expressly requires nothing more than "reckless disregard for the truth or the law" to demonstrate liability, proof of "general awareness" is necessary to establish aiding and abetting liability under the TSA.[18]

In sum, "[t]o prove aider-and-abettor liability under the Texas Securities Act ("TSA"), the plaintiff must demonstrate: (1) that a primary violation of the securities laws occurred; (2) that the alleged aider had general awareness of its role in this violation; (3) that the alleged aider rendered substantial assistance in this violation; and (4) that the alleged aider either (a) intended to deceive plaintiff or (b) acted with reckless disregard for the truth of the representations made by the primary violator."[19] Under *Adderley*, the "general awareness" and "reckless disregard" elements may be satisfied by demonstrating the aider's "conscious indifference" to the primary violation.[20]

UNDER RESTATEMENT (SECOND) OF TORTS § 876(B) AKA CONCERT OF ACTION CLAIM

Section 876(b) of the Restatement (Second) of Torts reads as follows: "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." This test for aiding and abetting liability is often referred to as the "modern application of civil aiding and abetting."[21]

Across the nation, both federal and state courts often make at least a passing reference to Section 876(b) when evaluating an aiding and abetting claim. However, as explained by various courts and commentators, including the U.S. Supreme Court, "the doctrine has been at best uncertain and limited in application."[22] Texas courts con-

struing Section 876(b) have likewise applied the doctrine in a limited fashion.

When Texas courts first considered a claim under Section 876(b), it was not even expressly identified as a form of aiding and abetting liability. Instead, they simply referred to it as a "concert of action" claim.[23] In *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996), the Texas Supreme Court construed this concert of action claim. Because the *Juhl* court found that the concert of action claim could not succeed as a matter of law under the facts, it left open the question of whether such a cause of action was recognized in Texas. In any event, the court made a number of significant holdings in *Juhl* concerning the scope of a claim under Section 876(b) and its elements.

As to scienter, the *Juhl* court held that Section 876(b) "requires that the defendant have 'an unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions.'"[24] Moreover, a claim under Section 876(b) "has a specific and narrow purpose: to deter antisocial or dangerous behavior."[25] In *Juhl*, the Texas Supreme Court held that the plaintiff could not prevail under Section 876(b) because, among other reasons, the conduct complained of did not involve "highly dangerous, deviant, or anti-social group activity which was likely to cause serious injury or death to a person or certain harm to a large number of people."[26] Since the *Juhl* decision, a number of Texas intermediate appellate courts have likewise barred claims under Section 876(b) because they did not arise from antisocial or dangerous behavior "such as drag racing, group assault, reckless driving, and assisting a driver in becoming intoxicated."[27]

Due to the limited circumstances under which a Section 876(b) claim apparently applies, it has not been successfully asserted in any reported decisions issued by Texas state courts. However, at least one federal court applying Texas law has allowed a Section 876(b) claim to survive a motion to dismiss.[28] Notably, although this court cited *Juhl* for the elements of a Section 876(b) claim, it did not consider whether the Section 876(b) claim arose from antisocial or dangerous behavior.[29]

Both state and federal courts in Texas have recently begun to refer to Section 876(b) more often as a test for aiding and abetting liability.

UNDER *HALBERSTAM*

Several states have applied the *Halberstam* test to aiding and abetting claims based on common law torts. With one notable exception, it is for the most part equivalent to the *Adderley* test. Under *Halberstam*, a civil aiding and abetting claim requires proof that (1) the party whom the defendant aids performed a wrongful act that causes an injury; (2) the defendant was generally aware of his or her role as part of an overall illegal or tortious activity at the time of providing the assistance; and (3) the defendant knowingly and substantially assisted the principal violation.[30] The *Halberstam* test is broader in scope than the *Adderley* test because it applies to all common law torts.

Not surprisingly, both tests have a common origin. When the *Halberstam* court formulated its test for aiding and abetting a common law tort, it modeled its test on the one set forth in *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975), a leading case on aiding and abetting liability under the federal securities laws.[31] Similarly, when the Texas Supreme Court formulated its test for aiding and abetting liability under the TSA in *Adderley*, it modeled its test on the principles set forth in *Woodward* and other federal securities cases.[32]

Given the *Halberstam* test's common origin with the *Adderley* test and the fact that the *Halberstam* test has been adopted in multiple jurisdictions, it seems logical that the Texas Supreme Court would apply it to an aiding and abetting claim predicated on a common law tort. However, the Texas Supreme Court has not yet been presented with the opportunity to recognize the *Halberstam* test under such circumstance. Nonetheless, plaintiffs often rely upon this standard in Texas state and federal courts when pursuing an aiding and abetting claim predicated on a common law tort, especially common law fraud.

Unlike Section 876(b) as construed by the Texas Supreme Court in *Juhl*, there is no requirement under *Halberstam* or *Adderley* that the alleged aider and abettor have "wrongful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions." Instead, proof of "general awareness" alone is sufficient. Consequently, aiding and abetting is significantly easier to prove under *Halberstam* and *Adderley* than under the Texas Supreme Court's version of Section 876(b).

Ironically, the "general awareness" test arose from securities fraud cases that initially made reference to Section 876(b) as one of the bases for aiding and abetting liability.[33] However, federal courts borrowed various criminal law concepts to put their own gloss on Section 876(b).[34] Ultimately, the general awareness standard evolved to the extent that it did not even remotely resemble the "wrongful intent" scienter requirement under Section 876(b).[35] As explained by one court, the "'general awareness' test ... has its genesis not in the Restatement, or in general tort law, but in federal cases applying the aiding-and-abetting theory to securities law violations."[36] For this reason, principles under Section 876(b) may be inapplicable to the general awareness test under *Halberstam* or *Adderley*, especially those concerning scienter. For example, at least one intermediate appellate court in Texas has refused to apply concepts from Section 876(b) when construing the *Adderley* test under the TSA.[37]

UNDER RESTATEMENT (SECOND) OF TORTS § 876(C)

There is at least one other test for civil aiding and abetting liability that deserves mention.[38] Under Restatement (Second) of Torts § 876(c), liability exists "for harm resulting to a third person from the tortious conduct of another, ... if he ... gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." In other words, the elements of aiding and abetting under Section 876(c) are: (1) the primary actor's activity accomplished a tortious result; (2) the defendant provided substantial assistance to the primary actor in accomplishing the tortious result; (3) the defendant's own conduct, separate from the primary actor's, was a breach of duty to the plaintiff; and (4) the defendant's participation was a substantial factor in causing the tort.[39] Significantly, Section 876(c) "does not require knowledge about the primary party's wrongdoing."[40] As with Section 876(b), Section 876(c) has not been adopted by the Texas Supreme Court.[41]

Although at least one federal court in Texas has identified the test in Section 876(c) as a possible form of aiding and abetting liability under Texas law,[42] it might not be considered as such by Texas state courts. As an initial matter, it is questionable whether Section 876(c) even represents a form of aiding and abetting liability. According to at least one commentator, Section 876(c) is not a form of civil aiding and abetting liability.[43] Instead, Section 876(c) simply represents another form of vicarious tort liability. Moreover, "only a minority of jurisdictions recognize a claim under § 876(c)."[44] For these reasons, the test under Restatement Section 876(c) may not be a viable form of aiding and abetting liability under Texas law.

CONCLUSION

In sum, the *Kinzbach* test applies to a claim for aiding and abetting a breach of fiduciary duty, while the *Adderley* test applies to a claim for aiding and abetting a violation of the Texas Securities Act; Section 876(b) applies only where antisocial or dangerous behavior is involved, and the *Halberstam* test applies to aiding and abetting predicated on a common law tort. Depending upon the circumstances, Section 876(c) might apply, although it is questionable whether it is even a viable form of aiding and abetting liability under Texas law. Recognizing the differences between these tests and determining which one is applicable to the aiding and abetting claim at hand is often critical to the outcome of the claim. **TBJ**

NOTES

1. *Len B. Blackwell v. Wells Fargo Bank, N.A. (In re I.G. Services, Ltd.)*, Adv. No. 04-5041-C (Bankr. W.D. Texas June 28, 2005) (mem. op. regarding the defendants' motion for summary judgment).
2. E.g., *Stein v. Meachum*, 748 S.W.2d 516, 518-19 (Tex. App.—Dallas 1988, no writ).
3. E.g., *Woloshen v. State Farm Lloyds*, No. 3:08-CV-0634-D, 2008 WL 4133386 at *2 n. 3 (N.D. Tex. Sept. 2, 2008) (unable to conclude that a Texas court would refuse to recognize an aiding and abetting claim predicated on a breach of the duty of good faith and fair dealing).
4. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) ("the leading cases applying [Restatement (Second) of Torts § 876(b)] are statutory securities cases, with the common-law precedents 'largely confined to isolated acts of adolescents in rural society.'"); *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 722 F.Supp.2d 875, 902 (W.D. Mich. 2010) ("By 1979, ... federal securities cases were virtually the only authority that had applied the aiding-and-abetting concept in a commercial setting").
5. Notes, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241 (2005) ("*Halberstam v. Welch*, the most influential case to employ the judicial test ..."); Jeffrey Haag, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity*, 30 Tex. Tech L. Rev. 1421, 1454 (1999) ("*Halberstam v. Welch*, the seminal case to recognize that a party who aids and abets a criminal act may be civilly liable for the tortious conduct of the criminal").
6. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994).
7. E.g., *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994) (adopting the *Halberstam* test for determining liability in connection with "aiding or abetting a tortious act"); *Efthimiou v. Smith*, 846 A.2d 222, 226 (Conn. 2004) (quoting *Halberstam* for the elements of the aiding and abetting a tort); *Aetna Life Ins. Co. v. Appalachian Asset Mgmt. Corp.*, 110 A.D.3d 32, 42 (N.Y. App. Div. 2013) (quoting *Halberstam* for the elements of "aiding and abetting a breach of fiduciary duty"). See also *Crawford v. City of Kansas City*, 952 F. Supp. 1467, 1477 (D. Kan. 1997) (referring to *Halberstam* for the elements of an "aiding and abetting a tortious act" under Kansas law); *Bailey v. Kenney*, 791 F. Supp. 1511 (D. Kan. 1992) (in *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220 (Kan. 1991), "[t]he Kansas Supreme Court recently set forth the elements for aiding and abetting in the civil context" by adopting the test set forth in *Halberstam*); *Sarei v. Rio Tinto*, PLC, 671 F.3d 736, 771 (9th Cir. 2011) (J. Reinhardt, concurring) (referring to the test in *Halberstam* as the "federal common law aiding and abetting standard").
8. E.g., *Matthews v. Eichorn Motors, Inc.*, 800 N.W.2d 823 (Minn. App. 2011) ("The Minnesota Supreme Court has adopted the Restatement (Second) of Torts § 876(b) when defining aiding and abetting in the context of civil tort liability"); *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 23 (2002) ("Arizona recognizes aiding and abetting as embodied in Restatement [(Second) of Torts] § 876(b)").
9. *Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610, 615 (Tex. Civ. App.—Amarillo 1979, pet. denied) (court upheld a jury verdict that defendants "knowingly aided and abetted in a fraudulent scheme"); *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 586 (5th Cir. 2008) (holding that a claim for aiding and abetting a fraudulent scheme under Texas law is not part of a bankruptcy estate); *Hill v. Day (In re Today's Destiny, Inc.)*, Bankr. No. 05-90080, Adv. No. 06-3285, 2009 WL 1232140, at *10 (Bankr. S.D. Tex. May 1, 2009) (mem. op.) (denying motion to dismiss aiding and abetting fraudulent scheme claim); *Woloshen v. State Farm Lloyds*, No. 3:08-CV-0634-D, 2008 WL 4133386 at *2 n. 3 (N.D. Tex. Sept. 2, 2008) (unable to conclude that a Texas court would refuse to recognize an aiding and abetting claim predicated on a breach of the duty of good faith and fair dealing). See also Jeffrey Haag, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity*, 30 Tex. Tech L. Rev. 1421, 1454 (1999) ("Texas has recognized aiding and abetting as a cause of action in several contexts. ... Texas has also recognized aiding and abetting breach of a fiduciary duty and aiding and abetting fraud as causes of action").
10. *Woloshen v. State Farm Lloyds*, No. 3:08-CV-0634-D, 2008 WL 4133386 at *2 n. 3 (N.D. Tex. Sept. 2, 2008).
11. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet.).
12. *Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.) ("A claim that a defendant knowingly participated in a breach of fiduciary duty by a third party necessarily hinges on the existence of a fiduciary duty owed by the third party to the plaintiff").
13. *Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.).
14. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 842 (Tex. 2005).
15. E.g., *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 621 (5th Cir. 1993) (a recklessness standard applies if there is "some special duty of disclosure, or evidence that the assistance to the violator was unusual in character and degree"); *Howard v. S.E.C.*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) ("A secondary violator may act recklessly, and thus aid and abet an offense, even if he is unaware that he is assisting illegal conduct").
16. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840-41 (Tex. 2005).
17. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 841-42 (Tex. 2005).
18. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 842 (Tex. 2005).
19. *Willis v. Marshall*, 401 S.W.3d 689, 704 (Tex. App.—El Paso 2013, no pet.) (citing *Navarro v. Thornton*, 316 S.W.3d 715, 720-21 (Tex. App.—Houston [14th Dist.] 2010, no pet.)).
20. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 841 (Tex. 2005) ("at the time that the Legislature enacted the TSA, this Court had long held that 'recklessness' required evidence of 'conscious indifference' in the context of gross negligence"); cf. Kathy Bazoian Phelps and Hon. Steven Rhodes, The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes, § 7.08[2] (LexisNexis 2012) (citing *Lautenberg Found. V. Madoff*, 2009 U.S. Dist. LEXIS 82084, at *48-49 (D.N.J. Sept. 9, 2009) ("Although recklessness is not sufficient to satisfy the knowledge element of aiding and abetting, conscious avoidance may be sufficient").

21. E.g., *Helena Chemical Co. v. Texell Federal Credit Union*, No. W-05-CA-52, 2006 WL 5266765, at *6, (W.D. Tex. Jun. 14, 2006); *Pavlovich v. National City Bank*, 435 F.3d 560, 570 (6th Cir. 2006) ("Section 876(b) of the Second Restatement of Torts provides the basis for "modern application of civil aiding and abetting ... ").
22. *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836, 842 (D.Md. 1996), reversed on other grounds, 128 F.3d 233 (4th Cir. 1997); see also *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 US 164, 181 (1994) ("the doctrine [under Restatement (Second) of Torts § 876(b)] has been at best uncertain in application ... "); Note, *Who Is to Blame? (and What Is to Be Done?): Liability of Secondary Actors Under Federal Securities Laws and the Alien Tort Claims Act*, 74 Brooklyn L. Rev. 1539 (2009) ("Although the Restatement (Second) of Torts made an attempt at bringing some uniformity to the field, the Restatement's definition of aiding and abetting has not enjoyed wide acceptance among courts").
23. E.g. *C.W. v. Zirus*, No. SA-10-CV-1044-XR, 2012 WL 3776978, *10 (W.D. Tex. Aug. 29, 2012)("[I]t appears that Texas courts consider civil aiding and abetting claims as concert of action claims").
24. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (citing *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981).
25. *West Fork Advisors, LLC v. SunGard Consulting Services, LLC*, --- S.W.3d ----, 05-13-01289-CV, 2014 WL 3827937, *4 (Tex. App.—Dallas Aug. 5, 2014) (citing *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996)); e.g. *Shinn v. Allen*, 984 S.W.2d 308, 311 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("It is commonly recognized that driving while intoxicated is an antisocial and dangerous behavior, likely to cause serious injury or death to a person").
26. *Juhl v. Airington*, 936 S.W.2d 640, 645 (Tex. 1996).
27. *Martinez v. Ford Motor Credit Co.*, No. 04-11-00306-CV, 2012 WL 3711347, *5 (Tex. App.—San Antonio Aug. 29, 2012); see also *West Fork Advisors, LLC v. SunGard Consulting Services*, LLC, --- S.W.3d ----, 05–13–01289–CV, 2014 WL 3827937, *4 (Tex. App.—Dallas Aug. 5, 2014); see also *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2006 WL 3716669, *8 (S.D. Tex. Dec. 12, 2006) (finding no antisocial or dangerous behavior "applicable to the claims against the banks" that would warrant a Section 876(b) claim under Texas law).
28. *Premier Research Labs, LP v. Nurman*, No. A-13-CA-069-SS, 2014 WL 978477, *3-4 (W.D. Tex. Mar. 12, 2014).
29. *Premier Research Labs, LP v. Nurman*, No. A–13–CA–069–SS, 2014 WL 978477, *3-4 (W.D. Tex. Mar. 12, 2014).
30. *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).
31. *Halberstam v. Welch*, 705 F.2d 472, 477-78 n. 8 (D.C. Cir. 1983) (employing in part the test developed in *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975).
32. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840 (Tex. 2005).
33. Ronald M. Lepinskas, 87 Ill. B.J. 532, 533 (1999) ("[I]n defining the scope of aiding and abetting liability under the federal securities laws, most federal courts of appeals had applied a test 'patterned on' section 876(b)").
34. *S.E.C. v. Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974) ("Aiding and abetting has been defined by courts considering securities law cases with reference to both the Restatement of Torts, 876 (1939), and the criminal law, 18 U.S.C. 2 (1969)").
35. Note, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241, 264-67 (2005).
36. *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 722 F.Supp.2d 875, 908-909 (W.D. Mich. 2010).
37. *Navarro v. Grant Thornton*, LLP, 316 S.W.3d 715, 727 n. 12 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
38. *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011) (identifying Restatement Section § 876(c) as another theory of civil aiding and abetting liability).
39. *Premier Research Labs, LP v. Nurman*, No. A–13–CA–069–SS, 2014 WL 978477, *3 (W.D. Tex. Mar. 12, 2014).
40. *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011).
41. *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996).
42. *Premier Research Labs, LP v. Nurman*, No. A–13–CA–069–SS, 2014 WL 978477, *3 (W.D. Tex. Mar. 12, 2014).
43. Note, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241, 260-62 (2005).
44. *In re Evans*, 467 B.R. 399, 409 (Bankr. S.D. Miss. 2011).

NELSON S. EBAUGH

is a Houston-based attorney with more than 15 years of experience. He handles all types of complex commercial litigation with an emphasis on securities litigation and arbitration.