Texas Law Review
See Also
Volume 94

Response

Fiduciary Breach, Once Removed

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Introduction

In *Banker Loyalty in Mergers and Acquisitions*,[1] Professor Andrew Tuch argues that investment bankers serving as advisors on merger and acquisition ("M&A") transactions should be characterized as fiduciaries who advise and act on behalf of their clients. Additionally, Professor Tuch examines the present state of Delaware law through the lens of optimal deterrence theory, finds that it under deters disloyalty, and proposes additional measures better to assure that investment bankers are subject to sanctions more closely approximating the social costs that stem from disloyalty in the M&A context. The article is provocative, informative, and so richly developed that this Response cannot pretend to be comprehensive. Instead, this Response focuses on the principal legal vehicle through which recent Delaware cases impose monetary liability on investment bankers. This is the tort of aiding and abetting—or lending substantial assistance to—another actor's breach of fiduciary duty—in this setting, breaches by the board of directors that an investment bank advised and represented.

The Response delineates this under scrutinized tort, freshly prominent (and controversial) in the wake of the $76 million judgment against an investment bank upheld by the Delaware Supreme Court in *RBC Capital*

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1. Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEXAS L. REV. 1079 (2016).

Markets, LLC v. Jervis.[2] To be sure, the tort's stance is indirect or secondary,[3] but that does not undermine its significance as a potential source of liability. The tort's potency also confirms the heterogeneity of interests protected by contemporary tort law,[4] which, capable as it is interstitial operation, can fill in gaps left by other sources of law and regulation. Complicating the picture is the fact that through contract an investment bank and its client demarcate their relationship's scope and, at least potentially, limit the bank's liability. To impose aiding-and-abetting liability on investment bankers may appear potentially unbalanced or one sided. As is well known, Delaware law enables exculpation from monetary liability of directors whose breaches of fiduciary duty amount to no more than gross negligence untainted by disloyalty.[5] Delaware has long protected directors who reasonably rely on advisers, including investment banks providing fairness opinions in M&A transactions.[6] Seen in this broader perspective, aiding-and-abetting liability is a vehicle that disrupts an overall pattern that attenuates liability risks and shifts ultimate responsibility to actors situated outside the corporation, who seem more remote from liability.[7] Although the disruption does not operate as fully or neatly as Professor Tuch's analysis would require for optimal-deterrence purposes, its potential is substantial.

This Response proceeds by situating aiding-and-abetting liability within the broader framework of contemporary tort law. As structured, this tort illustrates the centrality of duty within tort doctrine. The Response then turns to selected specifics of *RBC Capital* and the Delaware cases that preceded and followed it. As it happens, both the holding in *RBC Capital* and contemporary tort doctrine make salient another intentional tort—fraud—that's distinct from aiding-and-abetting liability. The *RBC* court emphasizes how the principal investment bank "knowingly induced the breach" by its client's directors and "illicit[ly] manipulate[ed] . . . the [b]oard's deliberative processes" by warping the financial analysis furnished to the board.[8] These characterizations venture into the province of fraud and beyond other modes

2. 129 A.3d 816 (Del. 2015).

3. *See* Tuch, *supra* note 1, at 1147–48.

4. Stated more vividly, tort law exemplifies what to some observers is the common law's character as "'a chaos with a full index.'" Gerald J. Postema, *Introduction: Search for an Explanatory Theory of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 1, 1 (Gerald J. Postema ed., 2001) (referring to Sir Thomas Holland's characterization (internal citation omitted)).

5. As one of the amici in *RBC Capital* characterized the result, imposing aiding-and-abetting liability "would create an anomalous imbalance of responsibilities where a non-fiduciary may be held liable for an unintentional violation of a fiduciary duty by a fiduciary." 129 A.3d at 865. Delaware permits exculpatory provisions in certificates of incorporation consistent with DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2014).

6. DEL. CODE ANN. tit. 8, § 141(e) (West 2014).

7. Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1572 (2006).

8. *RBC Capital*, 129 A.3d at 862–63. To be sure, the bank also failed to disclose its conflicting interests to the board, an omission discussed below.

of culpable participation in a board's breach of duty.[9] This Response next examines the always contested relationship between fiduciary duty and contract, relevant here because a client engaging an investment bank enters into a contract with the bank for services as specified by their agreement. As Professor Tuch observes, *RBC Capital* "muddied the waters somewhat" because the court equivocated on the role of contract in specifying and modifying duties owed by actors who contract to provide advisory or representational services.[10] This Response suggests a clarification that emphasizes the distinctive qualities of aiding and abetting as an intentional tort.

I. The Structure of Aiding-and-Abetting Liability

The elements of aiding-and-abetting liability are settled in Delaware cases and general tort doctrine. To establish that an actor aided and abetted a fiduciary's breach of duty requires showing the existence of a fiduciary relationship, a breach of duty by the fiduciary, knowing participation by the actor in the breach, and damages proximately caused by the breach.[11] The same basic structure governs claims that an actor aided and abetted any other instance of tortious conduct, such as fraud.[12] Importantly, aiding and abetting a fiduciary's breach of duty is an intentional tort because the actor must have acted with scienter, that is, must have acted "'knowingly, intentionally, or

9. Thus, my reading of *RBC Capital* adds to—without necessarily disagreeing with—Professor Tuch's conclusion that the Delaware cases "envision[] M&A advisors as loyal advisors of their clients." *See* Tuch, *supra* note 1, at 1154.

10. Tuch, *supra* note 1, at 1142.

11. Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001); RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). Contemporary English law, likewise, recognizes a theory of liability against actors who knowingly assist or induce breaches of trust or fiduciary duty. *See* PAUL S. DAVIES, ACCESSORY LIABILITY 96–100 (2015). English law categorizes the underlying or primary wrong as a breach of an equitable obligation, not a tort. When the primary wrong is a tort, accessory liability under English law requires showing that the defendant authorized the primary wrongdoing, combined with the primary wrongdoer, or induced the wrong. *Id.* at 213–21. Knowingly to lend assistance to the primary wrongdoer by itself does not suffice for liability, in contrast with black-letter U.S. law. In *RBC Capital*, RBC urged the court to adopt what amounts to the English position: that "aiding and abetting is a 'subset of conspiracy' and therefore rests on proof that the aider and abettor agreed to a joint course of conduct with the primary actor." *RBC Capital*, 129 A.3d at 861. In response, the court relied on *Malpiede*'s standard configuration of the tort's elements. For further discussion comparing U.S. and English law on aiding-and-abetting liability, see generally Deborah A. DeMott, *Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach*, *in* EQUITY, TRUSTS AND COMMERCE (Paul S. Davies & James E. Penner eds., forthcoming 2017).

12. RESTATEMENT (SECOND) OF TORTS § 876 (1979). The illustrations to this section engage a wide array of tortious conduct, spanning the strict-liability tort of trespass, negligence, and the intentional physical torts of battery and false imprisonment. On the distinctive form of wrongfulness captured by aiding-and-abetting torts, see Deborah A. DeMott, *Culpable Participation in Fiduciary Breach*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold, eds., forthcoming 2016).

with reckless indifference . . . .'"[13] But the primary wrongdoer—the fiduciary—need not have acted with a level of culpability that matches the scienter required for aiding-and-abetting liability.[14] Whether the knowledge element requires showing that action was taken with actual knowledge or whether constructive knowledge will suffice is open to dispute,[15] as is whether "conscious avoidance," sometimes termed willful blindness, can substitute for actual knowledge on the part of the secondary actor whose furnished substantial assistance to the primary wrongdoer.[16]

Integral to the tort's definition is the element of participatory action that assists the primary breach. Knowledgeable omissions or failures to act do not count as substantial assistance because aiding-and-abetting liability requires that a defendant have affirmatively assisted or concealed the primary wrongdoer's misconduct. Put differently, absent a duty of disclosure, possessing knowledge of the primary wrongdoer's conduct does not trigger aiding-and-abetting liability for actors who remain silent, even when doing so furthers their own interests.

Starkly illustrating this point, in *In re Sharp International Corp.*,[17] a bank officer with lending responsibility for a corporate borrower came to suspect (and with good reason) that the borrower's controlling shareholders were looting its assets and otherwise engaging in fraud.[18] After confirming the officer's suspicions through third-party sources of information, the bank then allegedly "arranged quietly" for the borrower to repay its loan from the proceeds of new indebtedness created by selling new notes to unsuspecting purchasers, who had already invested in notes.[19] Giving the purchasers no warnings and blowing no whistles on the borrower, the bank also forbore to pull the borrower's line of credit when the bank had the right to foreclose and consented to the borrower's incurrence of new indebtedness, as their loan agreement required. Once the noteholders invested the new $25 million, the borrower paid off the bank's loan; soon thereafter the fraud came to light and

13. *RBC Capital*, 129 A.3d at 862 (quoting Metro Commc'n Corp. v. Advanced Mobilecomm Techs, Inc., 854 A.2d 121, 143 (Del. Ch. 2004)).

14. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). Likewise, contemporary English law does not require symmetrical culpability as between primary and secondary defendants. *See* DAVIES, *supra* note 11, at 13–14 (underscoring that accessories must be culpable, but their culpability need not have to be identical to the primary wrongdoer's).

15. *Compare RBC Capital*, 129 A.3d at 862 (aider and abettor had actual or constructive knowledge that conduct was legally improper), *with* Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC, 479 F. Supp. 2d 349, 368 (S.D.N.Y. 2007) (constructive knowledge is insufficient).

16. *Compare Fraternity Fund*, 479 F. Supp. 2d at 368 (showing that the defendant acted consciously to avoid learning the truth involves a culpable state of mind and may satisfy knowledge element), *with* Go-Best Assets Ltd. v. Citizens Bank, 947 N.E.2d 581, 598 (Mass. App. Ct. 2011) (conscious avoidance does not establish knowledge in the aiding-and-abetting context).

17. 403 F.3d 43 (2d Cir. 2005).

18. *Id.* at 47.

19. *Id.*

the borrower entered bankruptcy.[20] Although the bank's forbearance assisted the fraud by delaying its revelation, the court held that the bank's conduct did not constitute culpable participation in the fraud. By consenting to the borrower's incurrence of new indebtedness, the bank only removed an impediment; it neither induced nor concealed its borrower's fraud. Under the circumstances the bank had no "duty to consider the interests of anyone else" and it did not communicate with the prospective note purchasers.[21] Acting to protect its own interests did not constitute "participation" in the fraud.[22]

As *Sharp* illustrates, aiding-and-abetting liability is consistent with the inescapable presence of duty as a fundamental organizing principle in contemporary tort law. All actors are subject to a negative duty to refrain from conduct that constitutes an intentional tort such as fraud, battery, or conversion; an actor whose conduct creates a risk of physical harm ordinarily has a duty to exercise reasonable care.[23] For actors in neither category, duty requires a distinct justification, grounded for example in a special relationship between the actor and persons within the confines of the relationship.[24] Like the bank in *Sharp,* actors generally are, in the absence of a special relationship, under no duty to rescue prospective victims from a peril that the actor did not create. Always a reliable way to illustrate disconnects between moral intuition and the common law, the proposition that there is no general duty to rescue can be critiqued and rationalized on many bases. Not the least among rationalizing strategies is the difficulty of proving that an actor's failure to act was the cause-in-fact of harm to someone else.[25] Moreover, focusing on the centrality of duty helps to situate *RBC Capital* and other cases examined by Professor Tuch well within contemporary tort law, as the next section explains.

II. Investment Bankers as Tortfeasors

As Professor Tuch explores in detail, several recent cases in Delaware courts scrutinized the conduct of investment bankers in M&A transactions in suits brought by shareholders alleging that the bankers, subject to undisclosed conflicts of interest, aided and abetted breaches of duty by directors of the target corporation.[26] In these cases, the failure of the target's directors to act

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20. The borrower's controlling shareholders also pled guilty to criminal charges. *Id.* at 48.

21. *Id.* at 52.

22. *Id.*

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (2010).

24. *Id*. § 40 cmt. f (2012).

25. *Id*. § 37 cmt. e (2012).

26. For cases preceding *RBC Capital,* see In re El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012) (involving directors who relied on advice from an M&A advisor that owned 19% equity interest in the prospective buyer led by a team headed by a banker with a large personal shareholding in the buyer), In re Del Monte Foods Co. S'holder Litig., 25 A.3d 813, 817, 833–34

reasonably to obtain the best deal for shareholders constituted the primary breach. Knowing of this failure, the M&A advisors allegedly facilitated the directors' primary breach by providing flawed advice concerning valuation, undermining the board's processes, or otherwise.[27] Unsurprisingly, these cases proved controversial.[28] The Court of Chancery resolved all cases but one without full trial on the merits.[29] Thus the significance in late 2015 of *RBC Capital*, in which the Delaware Supreme Court endorsed the applicability of aiding-and-abetting liability following trial in the Court of Chancery and post-trial opinions from the lower court. *RBC Capital* thus "went the distance" through pre-trial discovery and trial on the merits, enabling both courts to apply the law in light of facts fully tested and developed at trial.[30] Nonetheless, this procedural history does not explain a striking quality of the Supreme Court's opinion. Although the appellant bank emphasized to the court that it made no arguments on appeal requiring review of findings of fact, the court examined the record in its entirety. A detailed factual narrative as supported by the record occupies more pages in the opinion than the court's analysis of those facts applying the law.[31] But the Supreme Court's factual narrative underlies its parsing of elements requisite for aiding-and-abetting liability in terms that appear congenial to a complementary account of liability—fraud—to sustain the judgment against the appellant.

The appellant (RBC) in *RBC Capital*, engaged to advise the board of Rural/Metro Corp. ("Rural") about its potential sale, structured the sale process on two tracks to enable RBC to secure a role in financing the sale and acquisition of another company, which was a competitor of Rural. This, of course, resulted in a complicated sale process, daunted as it was by timing and confidentiality concerns. RBC did not disclose its interest in obtaining an additional and more lucrative engagement to provide financing for the purchase of the competitor, nor did it initially disclose its plan to use the Rural sell-side advisory engagement as a hook to capture buy-side financing work from bidders for Rural's competitor.[32] As Professor Tuch characterizes the

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(Del. Ch. 2011) (regarding a target M&A advisor, inter alia, that surreptitiously assisted potential bidders in formulating a joint bid), and In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1005–06 (Del. Ch. 2005) (calling into question the propriety of staple financing, i.e., acquisition financing offered by target's M&A advisor to prospective bidders).

27. Tuch, *supra* note 1, at 1103–04.

28. *See* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEXAS L. REV. 1, 3–7 (2014) (noting controversy).

29. *See id.* at 6 (referencing In re Rural Metro Corp., 88 A.3d 54 (Del. Ch. 2014)).

30. *RBC Capital* is not a case in which the facts exonerated the defendants upon full testing and development. *See* Amalgamated Bank v. Yahoo! Inc., No. 10774–VCL, 2016 WL 402540, at *17 (Del. Ch. Feb. 2, 2016) (discussing In re Walt Disney Co. Deriv. Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006), as instance in which defendants prevailed on the merits after a full trial in a case that "went the distance").

31. *RBC Capital*, 129 A.3d at 823–48.

32. *Id.* at 862.

consequence, RBC "compromised the sale process," tilting it toward the bidder most likely to provide it with financing fees.[33] As the sale process proceeded, RBC lobbied for a financing role, while at the same time leading negotiations over the sale price for Rural. And RBC engaged in "illicit manipulation" of Rural's board's deliberative processes through a warped financial analysis, leaving the board unaware that RBC altered its valuation analyses.[34] All led to a "poorly-timed sale at a price that was not the product of appropriate efforts to obtain the best value reasonably available," aggravated by the board's "failure to recognize that Rural's stand-alone value exceeded the sale price."[35] RBC's conduct, including its failure to make full disclosure of its conflicts, led to another breach of duty by the board via a proxy statement that included a false valuation analysis and omitted information about RBC's conflicts.[36] Although Rural's board engaged a second investment bank for negotiations with the company's eventual purchaser, that bank's financial analysis was secondary to RBC's and its compensation (like RBC's) was contingent on concluding a transaction. Thus the secondary bank's involvement did not break the causal chain proximately linking RBC to the harm suffered by shareholders.[37]

In summary, for the Supreme Court, RBC "misled" Rural's board into a breach of the duty of care, thereby acting with scienter to aid and abet the board's breach of fiduciary duty.[38] Knowingly to mislead another through a material misrepresentation to induce that person to act or refrain from acting is a predicate of common law fraud.[39] Additionally, failing to disclose material information constitutes common law fraud when an actor has made a prior statement that the actor knows will mislead another if it is not amended, or when the parties' relationship obliges the actor to make disclosure.[40] In an ongoing advisory relationship, failures to disclose can

33. Tuch, *supra* note 1, at 1139.

34. *RBC Capital*, 129 A.3d at 863.

35. *Id.*

36. *Id.* at 857–60, 863.

37. *Id.* at 863–65.

38. *Id.* at 863. *See also* In re Rural Metro Corp., 88 A.3d 54, 99 (Del. Ch. 2014) (for purposes of aiding-and-abetting liability, a court need only find that a defendant misled directors into breaching their duty of care for improper motives of its own).

39. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (Tentative Draft No. 2, 2014) (stating the general rule of liability for the tort of fraud). As formulated in general tort doctrine, fraud requires showing that the recipient of a misrepresentation relied on it in acting or refraining from acting and that the reliance was justifiable. *Id.* § 11. And only the recipient of a fraudulent misrepresentation may recover against the maker of the statement. *Id.* The required match between recipient, reliance, and loss suffered through reliance is not a perfect fit with the configuration in *RBC Capital*, in which the target's directors were the recipients of the misrepresentations but the loss was suffered by the shareholders whose company was sold. For this reason (and no doubt others) aiding and abetting a breach of fiduciary duty is a more plausible theory of liability.

40. *Id.* § 13(a)–(b).

breach duties that do not govern relationships among parties who are not so linked, like the lender in *Sharp* and subsequent purchasers of its crooked borrower's notes.[41] To be sure, when an advisor intentionally misleads a board of directors with the consequence that the board breaches its own duties to shareholders, the advisor's conduct readily fits within the contours of aiding-and-abetting liability. As the elements of the tort are formulated, RBC's conduct appears to lie at one (admittedly extreme) end of a spectrum of possible means through which an investment bank might knowingly participate in a board's breach of duty.

The Supreme Court's opinion stresses the narrowness of the Chancery Court's holding—which it affirmed—that misleading a board or creating an informational vacuum triggered aiding-and-abetting liability.[42] All the same, the Supreme Court's legal analysis begins with the broader statement of the elements of aiding-and-abetting liability with which Section II of this Response begins,[43] leaving open the prospect of liability on less extreme facts, especially so when problematic facts concerning the target's directors or the process leading to the transaction are not fully disclosed to shareholders.[44]

RBC Capital, like aiding-and-abetting cases more generally, illustrates the foundational significance of duty within contemporary tort law that this Response stressed in Section II. As the Supreme Court formulated the duty,

41. In re Sharp Int'l Corp., 403 F.3d 43, 47–52 (2d Cir. 2005)

42. *RBC Capital*, 129 A.3d at 862.

43. *Id.* at 861. This broader statement encompasses the holdings of cases decided by the Court of Chancery prior to the Supreme Court's opinion in *RBC Capital. See, e.g.*, In re TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 WL 6155894, at *24–26 (Del. Ch. Oct. 20, 2015) (denying a motion to dismiss when an investment bank, arguably concerned lest it jeopardize $47.7 million fee, allegedly created an "informational vacuum" by withholding information from the board concerning miscount of target shares relevant to how the buyer calculated deal consideration, including information that the buyer conceded to the bank that it relied on miscount); In re Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 WL 5853693, at *17 (Del. Ch. Oct. 1, 2015) (denying a motion to dismiss when an investment bank allegedly undermined the target board's ability to maximize stockholder value in a merger when the senior member of the bank's team had earlier "pitched" the target to an eventual bidder while in possession of inside information concerning the target and the target board relied on the bank's representation that it had had only limited prior relationships with the bidder). *See also* Singh v. Attenborough, 137 A.3d 151, 152 (mem.) (Del. 2016) (affirming *Zale* as modified following reargument, see 2015 WL 6551418 (Del. Ch. Oct. 29, 2015), and "distanc[ing]" Supreme Court from Court of Chancery's treatment of financial advisor's liability). *Singh* expresses skepticism that the requisite scienter could be inferred from the adviser's alleged wrongdoing. *See* 137 A.3d at 152. *Singh* also emphasizes that "[n]othing in this record comes close to approaching the sort of behavior at issue" in *RBC Capital*. *Id.* at 153.

44. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015) (holding that the business judgment rule is applicable to a merger transaction through which a limited partnership acquired interests in a limited liability company, where full disclosure was made of "all of the objective facts" concerning target board's interests, process leading to transaction, and interests of acquiring party, followed by approval of the merger by an uncoerced shareholder vote); In re Volcano Corp. S'holder Litig., No. 10485-VCMR, 2016 WL 3626521, at * 18 (Del. Ch. June 30, 2016) (holding that a fully informed and uncoerced shareholder vote approving merger forecloses aiding-and-abetting claims against secondary actors).

it's to refrain from action that constitutes an intentional tort.[45] In contrast, the Court of Chancery ventured further, and into legally uncharted waters, in formulating an advisor's duty. In dictum, the Court of Chancery cast M&A advisors in the role of "gatekeepers," that is, parties external to the corporation who provide verification services to those who lack the requisite expertise, such as a target corporation's directors.[46] But the observation that M&A advisors "function as gatekeepers"[47] lacks a translation into tort law's vocabulary of duty: what conduct does the duty require or proscribe? And to whom is it owed? And who has a claim against the advisor when the duty is breached? The Supreme Court, explicitly rejecting the "gatekeeper" dictum, stressed the contractual underpinnings of investment-banker retention,[48] explored in Section III of this Response. In any event, an investment bank's duty to refrain from intentionally tortious conduct does not itself create a duty to prevent directors from breaching their own duties to shareholders. A bank might undertake such a duty, as any actor may undertake a duty to protect another from harm,[49] or regulation might impose gatekeeping duties, but the duty does not stem from the more basic obligation that proscribes the commission of intentional torts.

Consequences follow from the fact that aiding and abetting is an intentional tort.[50] In some jurisdictions, an intentional tortfeasor is barred from obtaining contribution from other tortfeasors when the intentional tortfeasor has paid—or would pay—more than its share of any judgment amount, based on its share of responsibility.[51] But Delaware imposes no such categorical bar. In an opinion addressing questions of first impression stemming from RBC's quest for contribution, the Court of Chancery held that no bright-line rule bars contribution for intentional tortfeasors.[52] RBC sought to claim credit against the judgment amount for amounts paid in settlement by other defendants.[53] Nothing in Delaware's statute authorizing contribution imposes such a bar, while a prior case applying Delaware law to bar contribution involved a tortfeasor who consciously intended to cause physical harm.[54] Nonetheless, the court applied the equitable doctrine of

45. *RBC Capital*, 129 A.3d at 862–63.

46. In re Rural Metro Corp., 88 A.3d 54, 88 (Del. Ch. 2014).

47. *Id.*

48. *RBC Capital*, 129 A.3d at 865 n.191.

49. In the realm of physical harm, undertaking a duty to guard or otherwise reduce the risk of harm to another person is well-established. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 42 (2012).

50. Implications for insurability and insurance coverage come to mind.

51. *See* In re Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 233–35 (Del. Ch. 2014) (discussing fragmentation among states on the question of contribution for intentional torts).

52. *Id.* at 227.

53. *Id.* at 236. Alone among the defendants—Rural's directors and both investment banks—RBC did not settle before trial.

54. *Id.* at 233.

unclean hands to bar RBC from claiming settlement credit to the extent RBC perpetrated a fraud on Rural's board.[55] This had the consequence of barring the credit for all but the portions of the claim concerning the sale process that did not involve RBC's misrepresentations and omissions targeted toward Rural's board and the secondary investment bank.[56] The Supreme Court affirmed, agreeing that to hold otherwise would permit RBC to take "advantage of the targets of its own misconduct."[57]

Surveying the broader landscape of tort law suggests that actors who commit torts requiring culpability fit in three general categories of conduct: "'inadvertence,'"[58] which typifies negligence; inadequate impulse control, which typifies most intentional physical torts; and deliberation or calculation, which typifies both fraud and, as this Response argues, knowingly assisting or encouraging a fiduciary's breach of duty. Although it's understandable to focus on M&A advisors' conflicting interests generated by prior or ongoing ties with other parties, the broader perspective that tort law affords makes more prominent the range of motivations that may undermine an advisor's performance. In particular, as the Supreme Court acknowledged in *RBC Capital*, although outcome-contingent compensation structures can be "salutary" because they align the advisor's pecuniary interests with its client's,[59] the advisor's interest in securing its fee can lead it to withhold information from the target's board[60] or defer disclosure of a conflict or another inconvenient truth until the board has no practical alternative to completing the transaction.[61]

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55. *Id.* at 239.

56. *Id.* In the end, the court allocated 17% of the responsibility for damages suffered by Rural's shareholders to two directors with personal interests inclining them toward a sale. *Id.* at 262. This had a dollar value of $15,525,004.28, which was greater than the settlement payments made by those directors ($6.6 million) and the secondary investment bank ($5 million). *Id.* RBC's liability was reduced by the larger of these two amounts, which implies that the two directors were wise to settle. *Id.*

57. *RBC Capital*, 129 A.3d at 876.

58. *See Rural/Metro*, 102 A.3d at 228 (quoting Professor Charles O. Gregory, drafter of the 1939 uniform act on which Delaware's statutory treatment of contribution among tortfeasors is based).

59. *RBC Capital*, 129 A.3d at 864.

60. In re Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 WL 5853693, at *3 (Del. Ch. Oct. 1, 2015) (involving disclosure of an advisor's pitch concerning a client to the acquirer that was not made until prompted by preparation of proxy materials after the merger agreement was signed). *But see* Attenborough v. Singh, 137 A.3d 151, 153 (mem.) (Del. 2016) (observing that nothing in record "comes close to approaching" conduct in *RBC Capital* and questioning whether facts support inference of the requisite scienter).

61. In re TIBCO Software Inc. Stockholders Litig., No. 10319-CB, 2015 WL 6155894, at *25–26 (Del. Ch. Oct. 20, 2015) (regarding an advisor, anticipating $47.4 million fee, that concealed from the target board information that shares had been miscounted and that the acquirer relied on the miscount in calculating the consideration it would pay).

III. Contract and Duties

In disavowing the characterization of M&A advisors as "gatekeepers," the Supreme Court's opinion in *RBC Capital* observes that the Chancery Court did "not adequately take into account the fact that the role of a financial advisor is primarily contractual in nature, is typically negotiated between sophisticated parties, and can vary based upon a myriad of factors."[62] Professor Tuch fairly characterizes this passage as having "muddied the waters."[63] A few lines later on, the same passage continues: "[t]he banker is under an obligation not to act in a manner that is contrary to the interests of the board of directors, thereby undermining the very advice that it knows the directors will be relying upon in their decision making processes."[64] Based on the analysis thus far in this Response, one might reconcile these passages by treating the duty not to undermine its own advice as acknowledging that knowingly to dupe one's client to its detriment constitutes an intentional tort that carries legal consequences, which are likely to follow regardless of how the parties' contractual arrangements defined the advisor's responsibilities. This is so even when an advisor agrees to provide only limited services as specified in its engagement.[65]

An additional dimension of structuring a contract with an advisor warrants separate discussion. The process that leads to a contract can be integral to how a target board discharges its own duties in choosing an advisor and assuring that the advisor is capable of loyal service, taking into account asymmetries of information and insight between the advisor and its client. A good starting point is a set of representations and warranties concerning conflicts incorporated into an engagement letter, which suggests the significant role early on that legal counsel should play.[66] As *RBC Capital* underlines, directors "need to be active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest."[67] Although the board may consent to a conflict, its duty includes requiring that the advisor disclose, on an ongoing

62. *RBC Capital*, 129 A.3d at 865 n.191.

63. Tuch, *supra* note 1, at 1142.

64. 129 A.3d at 865 n.191.

65. *See* Houseman v. Sagerman, No. 8897-VCG, 2014 WL 1600724, at *10 (Del. Ch. Apr. 16, 2014) (holding that the board of the target company retained the bank for limited services as specified by agreement, having determined that cost considerations ruled out incurring expense of obtaining a fairness opinion; the board, which undertook some process to achieve the best price for the shareholders, did not act in bad faith; and the fact that the bank agreed to provide, and did provide, only limited services does not support the inference that the bank knew of the breach of fiduciary duty by the board).

66. *See* Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 689–90 (2015).

67. *RBC Capital*, 129 A.3d at 855.

basis, material information relevant to the board's sale process.[68] And the board might deal with an advisor known to be conflicted "at arm's-length" by insisting on contractually-defined "protections to ensure that conflicts that might impact the board's process are disclosed."[69] Alternatively, the board would be wise to choose an advisor that is free—or that represents it is free—of material conflicts, as well as to negotiate contract terms that enable the board to mitigate the costs of engaging a second advisor when the board learns its initial advisor no longer can be trusted.[70]

Finally, these specifics should not cloud the basic point that contract's potential to address an advisor's conflicts of interest does not insulate the advisor from liability on the basis of generalized acknowledgements that the advisor might do business with other parties, including parties involved in transactions with the target.[71] Although the Supreme Court's opinion encourages ex ante contractual arrangements concerning conflicts, it does not override the basic point that consent requires knowledge and specificity. Again, tort law is a source of illumination: consent, which may be manifested by action or inaction or in words, is "willingness in fact for conduct to occur."[72] Additionally, returning to the court's formulation in *RBC Capital*, undertaking to furnish advice and act in a representative capacity can limit the operative effect of consent that an adviser obtains from a client when what's consented to would undermine the advisory relationship.[73]

Conclusion

The relationships explored by Professor Tuch are complex, as is the professional work done by M&A advisors. This complexity, like that of the cases that followed, can divert attention from the ease with which advisors' conduct detailed in the cases fits within established categories of intentional tort. Seeing these cases from this perspective clarifies the legal interests at stake.

68. *Id.* at 856.

69. *Id.* at 856 n.130.

70. For this possibility, see Eric S. Klinger-Wilensky & Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-*Rural/Metro *Thoughts and Observations*, 71 BUS. LAW. 53, 57, 71–72 (2016).

71. In re Rural Metro Corp., 88 A.3d 54, 100–01 (Del. Ch. 2014).

72. RESTATEMENT (SECOND) OF TORTS § 892 (1979). Elsewhere I argue that the same definition of consent is applicable within agency law to a principal's consent to conduct by the agent that would other constitute a breach of the agent's duty of loyalty. *See* Deborah A. DeMott, *Defining Agency and Its Scope (II)*, *in* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 396, 407–08 (Larry A. DiMatteo & Martin Hogg eds., 2016).

73. This is consistent with the standard applicable to agents; in obtaining such consent from a principal the agent must act in good faith and deal fairly with the principal. RESTATEMENT (THIRD) OF AGENCY § 8.06(1)(a) (2006).