

Supreme Court of Pennsylvania Recognizes Cause of Action for “Aiding and Abetting Fraud”

By Louis A. DePaul and Eric Brill

On January 19, 2023, in *Marion v. Bryn Mawr Trust Co.*, the Supreme Court of Pennsylvania unanimously held that aiding and abetting fraud is a cognizable claim under state law.¹ The ruling expands the potential liability of secondary actors who provide substantial assistance or encouragement to fraudulent activities, such as bankers, lawyers, and accountants. To prove such a claim, however, the aider/abettor must have had *actual knowledge* of the fraud.

Justice Dougherty, writing for the Court, stressed the “clear societal benefits” of recognizing this cause of action, including deterring fraud and fully compensating fraud victims. Many frauds, according to the Court, especially complex commercial frauds, “cannot be perpetrated without the active assistance of secondary actors.” Therefore, recognition “may help to deter secondary actors from contributing to fraudulent activities,” as well as offer “a greater measure of redress” to fraud victims.

The Supreme Court cited existing Superior and Commonwealth Court decisions, as well as case law from around the country, and the Restatement of Torts, in support of its ruling. The Court explained, “we do not see today’s holding as a ‘change’ in the law so much as affirmation of existing jurisprudence.”

Justice Dougherty rejected Bryn Mawr Trust’s (BMT) argument (and those of its *amici*) that aiding and abetting fraud would be “duplicative” of other causes of action, including fraud, breach of fiduciary duty, negligence, and civil conspiracy, because each involves distinct elements. Likewise, the Court was not receptive to BMT’s position that, *inter alia*, recognition of the tort would “lead to ‘litigation mischief’ by plaintiffs in search of deep-pocketed defendants” and/or that it would “compel banks and other professional organizations to [either] adopt expensive investigative measures, the costs of which will be passed on to customers, or to leave the Pennsylvania economy entirely.”

The Court’s skepticism toward these arguments was rooted, in large part, in the Court’s imposition of an “actual knowledge” requirement for proving liability. In other words, “innocent actors” will not be subject to liability because “a party must provide substantial assistance or encouragement to the primary actor. Unwitting or uncooperating actors will not face liability.” Therefore, arguments that a secondary actor “should have known” about the fraudulent activity are insufficient to demonstrate culpability under Pennsylvania law. Such a standard, which is supported by “a veritable mountain of case law,” ensures that the Court is “not breaking new ground that will set Pennsylvanians scrambling to change their behaviors.”

Note, however, that circumstantial evidence of intentional ignorance or willful blindness may support an inference of actual knowledge in particular cases. For example, possession of documents or presence during relevant conversations may be sufficient to meet this knowledge requirement where the party was aware of the facts that made the primary conduct wrongful. While secondary actors need not “engage in costly and intrusive monitoring and investigations of their customers’ activities,” they should nonetheless remain vigilant and not turn a blind eye to potentially fraudulent conduct.

¹ *Marion v. Bryn Mawr Trust Co.*, No. 72 MAP 2021, 2023 WL 308110 (Pa. Jan. 19, 2023).

Marion underscores the increased scrutiny that financial institutions face as a result of the regulatory crackdown on Ponzi schemes and other fraudulent ventures that followed in the wake of the Bernie Madoff scandal. When these houses of cards collapse and the primary fraudster is inevitably insolvent, trustees, receivers, and aggrieved investors focus their recovery efforts on solvent entities – however unwittingly involved those parties were in the underlying scheme. Although the burden of proof for recovering under Pennsylvania’s newly recognized cause of action is high, secondary actors must perform due diligence in order to insulate themselves from potential liability.