M&A BANKER LIABILITY FOR FIDUCIARY DUTY BREACH: STILL "IN PLAY" IN NORTH CAROLINA

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ABSTRACT

Investment banker liability for "aiding and abetting" a fiduciary duty breach gained attention in 2015 when the Delaware Supreme Court upheld a $76 million judgment against an investment bank for its role in advising a corporate takeover. North Carolina courts have never explicitly recognized this cause of action under state law, and that has led some courts and commentators to speculate that aiding and abetting fiduciary duty breach claims are not viable in North Carolina. This paper argues that this conclusion is premature. A close analysis of the state's case law reveals that these claims are indeed viable in North Carolina. Investment bankers advising North Carolina corporations on takeovers should therefore assume they are vulnerable to aiding and abetting fiduciary duty breach claims. In the wake of the recent Delaware ruling, North Carolina corporations and their investment bankers will likely face these claims more often.

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INTRODUCTION

Two years ago, the nation's premier court for corporate law issued an opinion that reverberated across Wall Street.[1] In *RBC Capital Markets, LLC v. Jervis*,[2] the Delaware Supreme Court upheld an approximately $76 million judgment against an investment bank for its role in advising a corporate takeover.[3] The Court upheld the Delaware Court of Chancery's ruling that the board of directors of Rural/Metro Corporation ("Rural/Metro"), a provider of ambulance services, breached its fiduciary duty of care to shareholders by overseeing a shoddy sale process.[4] The Court held investment bank RBC Capital Markets, LLC ("RBC") liable for "aiding and abetting" the breach of fiduciary duty based on conduct that included encouraging Rural/Metro to put itself "in play" at the same time its main competitor was trying to sell itself.[5] RBC also sought to parlay its role as Rural/Metro's adviser to win financing business from private equity firms interested in buying Rural/Metro or its main competitor.[6] RBC bankers never disclosed this conflict of interest, a practice known as "staple financing," to client Rural/Metro.[7]

While considerable analysis of the *RBC Capital* decision has focused on

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[1] *See, e.g.*, Steven Davidoff Solomon, *Ruling in Rural/Metro Case Could Affect All Wall St. Banks*, N.Y. TIMES: DEALBOOK (Oct. 30, 2015), https://www.nytimes.com/2015/10/31/business/dealbook/ruling-in-rural-metro-case-could-affect-all-wall-st-banks.html?_r=0 (describing the Delaware Court of Chancery decision, which the Delaware Supreme Court upheld, as a "bombshell").
[2] RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).
[3] *Id.* at 823.
[4] *See id.* at 862–63.
[5] *See id.* at 828–29; *see also* Deborah A. DeMott, *Culpable Participation in Fiduciary Breach*, RESEARCH HANDBOOK ON FIDUCIARY LAW 1, 25 (D. Gordon Smith & Andrew S. Gold, eds.) (forthcoming), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6361&context=faculty_scholarship (noting that RBC's conduct "seems to constitute original authorship of the board's breaches of duty").
[6] *See RBC Capital*, 129 A.3d at 828–29.
[7] *Id.* at 829–30.

its implications for Wall Street[8] and Delaware corporate law,[9] commentators have spent less time focusing on what the ruling could mean for jurisdictions beyond Delaware. North Carolina presents an interesting case study for analyzing the broader impact of *RBC Capital*. The state is reasonably representative of the jurisdictions that follow the Model Business Corporation Act.[10] It has also made a concerted effort during the past several decades to attract corporate charters and restructure its legal system to allow courts to resolve more corporate law cases.[11]

North Carolina courts have never explicitly said whether they recognize a claim for aiding and abetting[12] fiduciary duty breach ("AAFDB") like the one upheld in *RBC Capital*.[13] This has resulted in speculation that AAFDB claims are not viable in North Carolina.[14] This paper argues that this conclusion is premature and that such claims are indeed viable. North Carolina courts have not foreclosed this cause of action. There is an ill-founded misconception that the U.S. Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*[15] "invalidated" the

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[8] *See, e.g.*, Solomon, *supra* note 1.

[9] *See, e.g.*, Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEXAS L. REV. 1079, 1134–51 (2016); *see also* Deborah A. DeMott, *Fiduciary Breach, Once Removed*, 94 TEXAS L. REV. 238, 238–40 (2016).

[10] *See* RUSSELL M. ROBINSON II, ROBINSON ON NORTH CAROLINA CORPORATION LAW § 1.02 (7th ed. 2017).

[11] *See id.* at § 1.04 (describing the 1995 establishment of the North Carolina Business Court); *see also id.* at § 2.01 ("The North Carolina Business Corporation Act is based on the Revised Model Business Corporation Act of 1984 and was drafted with a purpose of making North Carolina an attractive incorporating state.").

[12] "Aiding and abetting" is also referred to as "lending substantial assistance." *See* DeMott, *supra* note 9, at 238.

[13] *See* ROBINSON, *supra* note 10, at § 14.08, n.9.

[14] *See, e.g.*, Mack Sperling, *Internal Affairs Doctrine Leads to Dismissal of an Aiding and Abetting a Breach of Fiduciary Duty Claim by NC Business Court*, N.C. BUS. LITIG. REP. (Jan. 25, 2017), http://www.ncbusinesslitigationreport.com/2017/01/articles/fiduciary-duty/internal-affairs-doctrine-leads-to-dismissal-of-an-aiding-and-abetting-a-breach-of-fiduciary-duty-claim-by-nc-business-court/ (arguing that the claim is not viable in North Carolina and citing Bottom v. Bailey, 767 S.E.2d 883 (N.C. Ct. App. 2014), as "unsparing in its assessment" that the claim cannot be brought in North Carolina).

[15] 511 U.S. 164, 200–01 (1994).

rationale for recognizing the AAFDB claim in North Carolina.[16] Investment bankers advising North Carolina corporations on mergers and acquisitions ("M&A") should therefore assume they are vulnerable to AAFDB claims.

Part I of this article overviews the *RBC Capital* decision and analyzes the emerging issue of M&A banker liability for AAFDB and its regulatory effects on investment banks.[17] Part II evaluates the salient case law on the AAFDB claim in North Carolina and argues that the claim remains viable in the state's courts. Part III discusses the policy implications of the AAFDB claim for North Carolina, placing it within the context of the state's choice-of-law rules and efforts to attract corporate charters.

I. RBC AND THE EMERGING ISSUE OF M&A BANKER LIABILITY FOR AIDING AND ABETTING FIDUCIARY DUTY BREACH

The *RBC Capital* ruling highlights the growing significance of investment banker liability for aiding and abetting corporate breaches of fiduciary duties. *RBC Capital* is part of a trend of recent cases in which Delaware courts have held investment bankers liable for their conduct in M&A transactions.[18] Although the Delaware Supreme Court's legal reasoning entailed only "the application of well-settled tort doctrine to conduct in connection with a large transaction,"[19] *RBC Capital* was nevertheless a unique case because it was the product of rare circumstances. The law sets a high bar for proving AAFDB. It requires showing: (1) a fiduciary relationship existed, (2) a breach of a fiduciary duty occurred, (3) a third-party's "knowing participation" in that breach, and (4) "damages proximately caused by the breach."[20] Further, *RBC Capital's* facts are well-documented.[21] In addition, investment banks often settle cases like *RBC Capital*,[22] but RBC declined to participate in a settlement.[23] The $76 million judgment against RBC was conspicuous because of the large dollar figure.

RBC Capital raises questions about how it will influence investment

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[16] ROBINSON, *supra* note 10, at § 14.08, n.9.
[17] RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).
[18] Solomon, *supra* note 1 ("R.B.C.'s loss is one of a series of recent cases holding banks to task for problematic practices, including Barclays in the buyout of Del Monte Foods and Goldman Sachs in Kinder Morgan's purchase of the El Paso Corporation.").
[19] DeMott, *supra* note 5, at 22.
[20] Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001).
[21] *See RBC Capital*, 129 A.3d at 862, 856–66 (ruling that RBC acted with scienter based on a detailed review of the facts in the case).
[22] *See* Solomon, *supra* note 1, (describing other Delaware cases against investment banks that were resolved through settlements).
[23] *RBC Capital*, 129 A.3d at 824.

banker conduct on mergers and acquisitions.[24] Wall Street bankers and lawyers believe that the ruling goes too far to the extent it makes banks liable for actions that are difficult to hold directors accountable for in the first place.[25] In contrast, one academic perspective is that the *RBC Capital* decision and others like it could have an important regulatory effect on deterring harmful investment banker conduct if the Delaware courts show more willingness to clearly define bankers as fiduciaries of their clients.[26]

A. The RBC Capital Ruling

The outcome of the *RBC Capital* case was unusual because of its extensive and blatant fact record, the difficulty of proving the tort at issue, and RBC's unwillingness to settle the case out of court. While the *RBC Capital* ruling has significant implications for investment banking firms, it is important to acknowledge that courts will not often issue a decision of such scope.

First, the *RBC Capital* opinion is lengthy, and the facts and details are extreme. The Delaware Supreme Court's final opinion in the case is more than one hundred pages long,[27] and the opinion launches into a detailed fact recitation in a way that is out of character with the approach typically taken by appellate courts. Justice Karen L. Valihura wrote the opinion for a unanimous *en banc* court.[28] From the outset, Valihura seems intent on scrutinizing the facts of the case in extreme detail. She notes RBC's contention that it deliberately made arguments on appeal that would not require the appellate court to go through the findings of fact, but she nevertheless proceeds to review all the facts in her opinion.[29] In several parts of the opinion, Valihura appears to go out of her way to highlight facts that exhibit especially blatant instances of RBC's bad conduct. For example, she quotes e-mail messages in which RBC bankers discuss the Rural/Metro

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[24] *See* Tuch, *supra* note 9, at 1084.
[25] *See* Solomon, *supra* note 1; *see also* Martin Lipton et al., *The Delaware Courts and the Investment Banks*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGS. (Oct. 30, 2015), https://corpgov.law.harvard.edu/2015/10/30/the-delaware-courts-and-the-investment-banks/ (questioning the appropriateness of making investment bankers liable for exculpated director conduct).
[26] *See* Tuch, *supra* note 9, at 1141–42.
[27] *RBC Capital*, 129 A.3d at 822.
[28] *Id.* at 822.
[29] *See id.* at 823–24.

engagement as "the most important fee opportunity we have," as they believed that serving as Rural/Metro's M&A adviser would help RBC solicit financing business from private equity firms interested in financing the takeover.[30]

She also notes that RBC's enthusiasm in encouraging Rural/Metro to put itself up for sale at the same time as its competitor Emergency Medical Services Corporation (EMS) was driven by the knowledge that several private equity firms were interested in combining Rural/Metro with EMS or its subsidiary.[31] Although EMS hired a different investment bank, Goldman Sachs, to serve as its M&A adviser,[32] RBC bankers believed their ability to influence the Rural/Metro sale decision would be crucial to maximizing fees they could generate from both the sell-side and buy-side of Rural/Metro's potential transaction.[33] RBC never told Rural/Metro about this conflict of interest in the sales process.[34] Similarly, the opinion quotes an e-mail written during the sales process by a partner of the private equity firm that ultimately acquired Rural/Metro, where the partner stated, "[w]e are in a good position" because among other reasons "the bankers are pulling for us."[35] RBC bankers also never disclosed to Rural/Metro that its bankers had altered key valuation metrics to make a sale to private equity firm Warburg Pincus look more attractive.[36]

No single anecdote that Valihura cited appears to have been a smoking gun that had disproportionate influence on the ultimate ruling, but her choice

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[30] *Id.* at 828.
[31] *See id.* at 825–28.
[32] *See* Jessica Hall, *EMS Reviews Strategic Alternatives; Hires Adviser*, REUTERS (Dec. 14, 2010), http://www.reuters.com/article/us-ems-idUSTRE6BD3UB20101214.
[33] *See RBC Capital*, 129 A.3d at 828.
[34] *See id.* at 831.
[35] *Id.* at 839. Ironically, RBC Capital got no financing from Warburg Pincus when it bought Rural/Metro, nor did EMS merge with Rural/Metro during the time period at issue in the Delaware case. *See id.* at 846. Another private-equity firm, Clayton, Dubilier, & Rice, subsequently bought EMS in 2011 and took the company public in 2013 under the name Envision Healthcare Holdings Inc. *See Envision Healthcare Holdings Files for IPO of UP to $100 Million*, REUTERS (June 14, 2013), http://www.reuters.com/article/envisionhealthcare-ipo-idUSL3N0EP4BC20130613. As RBC Capital expected, Rural/Metro and the EMS business were combined. Shortly before the Delaware Supreme Court's ruling on the Rural/Metro case in 2015, Warburg Pincus sold Rural/Metro to Envision Healthcare. *See* Press Release, Envision Healthcare Holdings, Inc., Envision Healthcare Announces Closing of Rural/Metro Acquisition (Oct. 28, 2015), http://www.businesswire.com/news/home/20151028006590/en/Envision-Healthcare-Announces-Closing-RuralMetro-Acquisition.
[36] *RBC Capital*, 129 A.3d at 843–44.

to highlight portions of the trial record extensively sends a signal to investment bankers that similar conduct could make them liable. This is probably an effective way to promote deterrence, but the highly fact-specific nature of the *RBC Capital* ruling should make similar court rulings rare. Staple financing itself is an uncommon practice in M&A transactions and is generally only relevant on large Wall Street deals involving major private equity firms.[37]

The second reason *RBC Capital* is unusual is due to the difficulty of proving the AAFDB tort. Plaintiffs must show not only that a breach of fiduciary duty occurred, but also that the accessory defendant played a culpable role in that breach and proximately caused damages to the plaintiff.[38] Significantly, culpable participation requires *deliberate* participation in the fiduciary duty breach.[39] This scienter requirement creates a high evidentiary hurdle, even for plaintiffs who are able to prove a fiduciary duty breach.

In *RBC Capital*, "aiding and abetting" is a misnomer when it is used to describe RBC's conduct. It is more accurate to state that RBC incited or deliberately encouraged the Rural/Metro board to breach its fiduciary duties.[40] Thus, the facts in *RBC Capital* nearly proved the tort on their own. However, this will not be the situation in most cases, as it is difficult for plaintiffs to prove the fiduciary duty breach itself. Furthermore, proving that an outside investment banking firm had sufficient intentionality to meet the tort's scienter requirement will be even more difficult, especially in the absence of e-mails like those in the *RBC Capital* record.

Finally, the Delaware Supreme Court's opinion in *RBC Capital* was unusual because similar cases usually settle before trial, or at least before they reach the appellate level. In *RBC Capital*, Rural/Metro's M&A co-adviser Moelis & Company LLC ("Moelis") settled with the plaintiff stockholder class for $5 million before trial.[41] Other individual defendants

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[37] TRAVERS SMITH, LLP, *An Introduction to Stapled Financing*, https://www.traverssmith.com/media/581665/an_introduction_to_stapled_financing.pdf (last visited Mar. 11, 2018).
[38] *See* Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001); *see also* DeMott, *supra* note 5, at 3 (using the term "culpable participation" to describe the tort).
[39] *See Malpiede*, 780 A.2d at 1096.
[40] *See* DeMott, *supra* note 5, at 25 (stating that RBC Capital's conduct "seems to constitute original authorship of the board's breaches of duty").
[41] *See RBC Capital*, 129 A.3d at 824.

settled with the stockholder class for $6.6 million, leaving the case to go to trial "solely against RBC."[42] Other recent shareholder lawsuits alleging wrongdoing by investment banks Goldman Sachs and Barclays were also resolved through large settlements.[43]

Analyzing the *RBC Capital* case requires acknowledgement that a similar appellate decision is rare because of the unique circumstance of the case and its extensive and blatant fact record. The difficulty of proving the AAFDB tort and the fact that many cases against M&A advisers settle rather than proceed to trial also set this case apart. Still, *RBC Capital* holds significance because of its potential to regulate investment banker conduct.

B. The Regulatory Effect of RBC Capital on Banker Conduct

Opinions differ about the broader significance of *RBC Capital*, especially over the potential regulatory effect that it should or likely will have on investment banker conduct. The view among some bankers is that the Delaware courts have gone overboard.[44] Another view is that the Delaware Supreme Court did not go far enough because the opinion failed to specifically define M&A bankers as fiduciaries of their clients.[45]

Professor Andrew Tuch argues that *RBC Capital* and other recent Delaware cases scrutinizing investment bankers will not serve as an effective deterrent against misconduct.[46] He points out that bankers will rarely be held liable since cases like *RBC Capital* are so unusual.[47] He also notes that the AAFDB tort only subjects bankers to secondary rather than primary liability, and he argues that the tort's scienter requirement excludes many scenarios in which investment bankers still meaningfully harm their clients.[48] In particular, the AAFDB tort is generally only relevant to M&A bankers when they advise sellers but not when they advise acquirers.[49]

Tuch envisions M&A bankers as fiduciaries, rather than an "arm's-length counterparty," in relation to clients.[50] In his view, recent Delaware cases have begun to implicitly characterize M&A bankers as fiduciaries.[51] The Delaware Supreme Court "muddied the waters" for this view in *RBC*

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[42] *See id.*
[43] *See* Solomon, *supra* note 1.
[44] *See id.*
[45] *See* Tuch, *supra* note 9, at 1142 (stating that *RBC Capital* "muddied the waters somewhat" in contrast to other recent Delaware decisions that characterized M&A bankers as fiduciaries).
[46] *Id.* at 1084–85.
[47] *See id.*
[48] *See id.* at 1145–46.
[49] *Id.* at 1081.
[50] *Id.* at 1085.
[51] *Id.* at 1140.

Capital because the court said that investment bankers merely enter contractual relationships but the court also characterized bankers as having a fiduciary-like "obligation" not to act against clients' interests.[52]

RBC Capital and other recent Delaware cases against investment banks Goldman Sachs and Barclays have "left banks quietly fuming, complaining that although it is almost impossible to hold directors liable in Delaware courts for misconduct, [investment] banks are being repeatedly put on the hook and painted in the worst possible light."[53] Under Delaware's corporate statute, corporations can exculpate directors from personal liability for a breach of fiduciary duty.[54] Corporations can also indemnify directors who become part of a lawsuit.[55] M&A bankers on the other hand, do not receive these protections from the corporation they are advising.

Prominent M&A lawyer Martin Lipton expressed similar concern about the *RBC Capital* ruling and what it could mean for the boards of directors and bankers.[56] Before the Delaware Supreme Court issued its final opinion, Lipton asked, "[d]oes imposing aiding-and-abetting liability based on exculpated director conduct undermine the Delaware legislature's determination to authorize charter provisions that exculpate directors from liability for breaches of the duty of care and the stockholders' vote to adopt such provisions?"[57] While Professor Tuch said that the Delaware Supreme Court "muddied the waters"[58] when the final *RBC Capital* ruling clarified that it viewed the relationship between M&A bankers and their clients as contractual, Lipton authored a memorandum calling that portion of the opinion a "carefully balanced intervention."[59]

Market forces could theoretically serve to regulate investment banker

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[52] *Id.* at 1142.
[53] Solomon, *supra* note 1.
[54] DEL. CODE ANN. tit. 8, § 1-102(b)(7) (2015).
[55] *See* tit. 8, § 145(a).
[56] *See* Lipton, *supra* note 25.
[57] *Id.*
[58] Tuch, *supra* note 9, at 1142.
[59] Martin Lipton, Theodore N. Mirvis, William Savitt & Ryan A. McLeod, *The Delaware Supreme Court Speaks to Boards and the Investment Banks*, WACHTELL, LIPTON, ROSEN & KATZ (Dec. 3, 2015), https://slideblast.com/delaware-supreme-court-speaks-to-boards-and-the-investment-banks_596fa32a1723ddffe5abdd7e.html.

conduct where tort liability or other regulatory schemes fall short,[60] but *RBC Capital* provides only limited insight. "Boutique" M&A investment banks have gained market share in recent years pitching their services as free from conflict of interests like RBC's desire to generate financing work for itself.[61] Rural/Metro did hire Moelis, one of Wall Street's top boutique firms,[62] to serve as its co-adviser alongside RBC.[63] Because Moelis settled with the plaintiffs before trial for $5 million, the Delaware Supreme Court did not analyze its liability for AAFDB.[64] However, the *RBC Capital* opinion rejected the argument that Moelis "cleansed" the defective sale process since Moelis was incentivized by its own contingent fee to push Rural/Metro toward a sale.[65] Thus, *RBC Capital* suggests that Delaware courts are still willing to scrutinize boutique firms for the same conflicts of interest as their larger competitors.

In conclusion, the *RBC Capital* ruling is probably not a comprehensive solution to regulating Wall Street investment banker conduct. However, it likely has caused at least some deterrent effect among bankers due to its large judgment and dramatic recitation of facts. As one Charlotte-based corporate attorney wrote in a 2014 presentation, "Many investment bankers will question whether [*RBC Capital*] is instructive for them, given the extreme facts involved, but the case yields useful reminders for all bankers about fundamental aspects of the job."[66]

II. VIABILITY OF AIDING AND ABETTING FIDUCIARY DUTY BREACH CLAIMS IN NORTH CAROLINA

Some courts and legal commentators have concluded prematurely and without sufficiently thorough analysis that the AAFDB claim is not viable in North Carolina because the state's courts have never explicitly recognized

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[60] *See, e.g.*, Tuch, *supra* note 9, at 1109 (describing the possibility that 'market forces' could keep M&A banker misconduct in check but calling this "a crude measure for constraining misconduct").
[61] Thiago Luis Da Silva Frazao, *The Rise of the M&A Advisory Boutique and Independent Firms*, U.C. BERKELEY SCH. OF L.: THE NETWORK (Feb. 20, 2014, 8:41 AM), https://sites.law.berkeley.edu/thenetwork/2014/02/20/the-rise-of-the-ma-advisory-boutique-and-independent-firms/.
[62] *Id.*
[63] RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 864 (Del. 2015).
[64] *Id.* at 824.
[65] *Id.* at 864.
[66] Seth Huffstetler, *M&A Update*, ROBINSON BRADSHAW (Apr. 10, 2014), http://www.robinsonbradshaw.com/media/publication/575_RBH%20MA%20Update.pdf.

it.[67] They have also relied on a misconception that the U.S. Supreme Court's holding in *Central Bank of Denver v. First Interstate Bank of Denver*[68] "invalidated" the rationale for recognizing the AAFDB claim in North Carolina.[69] It is more likely that North Carolina's courts have never recognized the AAFDB claim because they have never been presented with the requisite facts. As discussed above,[70] the law sets an exceedingly high bar for a plaintiff making such a claim. In addition, North Carolina courts do not hear the same kinds of high-stakes M&A litigation cases involving major Wall Street banks as Delaware courts.

As such, AAFDB remains a viable claim in North Carolina. It is premature to conclude that the claim is a dead end, or that it is inevitable the state's courts will eventually refuse to recognize any AAFDB claim.[71] North Carolina's courts have never indicated that this view is well founded, not even in dicta.[72] The North Carolina Court of Appeals has even allowed jury verdicts resolving AAFDB claims to stand.[73] Plaintiffs are likely to continue bringing the claim in North Carolina because they have every right to and they may be emboldened to argue it more strenuously in the wake of *RBC Capital*.

A. North Carolina Courts Never Recognized or Precluded an Aiding and Abetting Fiduciary Duty Breach Claim

North Carolina's courts have never explicitly recognized the viability of an AAFDB cause of action.[74] This has led some courts and commentators to conclude that the state likely is not inclined to recognize the viability of such

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[67] Sperling, *supra* note 14.
[68] 511 U.S. 164 (1994).
[69] ROBINSON, *supra* note 10, at § 14.08, n.9.
[70] *See supra* Part I.
[71] Sperling, *supra* note 14.
[72] *See, e.g.*, Bottom v. Bailey, 767 S.E.2d 883, 889 (N.C. Ct. App. 2014) ("While we need not address whether a claim for aiding and abetting a breach of fiduciary duty exists at law in North Carolina, we note that plaintiffs' amended compliant does not state such a claim with the required specificity.").
[73] *See* Greensboro Rubber Stamp Co. v. Se. Stamp & Sign, Inc., No. COA10-914, 2011 WL 2462933, at *1 (N.C. Ct. App. June 21, 2011) (affirming a jury verdict that found defendants liable for AAFDB); *see also* Blow v. Shaughnessy, 364 S.E.2d 444 (N.C. Ct. App. 1988) (finding no error where a jury returned a verdict finding no liability for AAFDB).
[74] ROBINSON, *supra* note 10, at § 14.08, n.9.

a claim.[75] This logic is ill-founded. AAFDB claims are rare because the facts required to prove the underlying breach of fiduciary duty are rare and the law sets a high bar for plaintiffs. Generally, North Carolina courts dispose of the claim without deciding its viability because the plaintiff has failed to survive a motion to dismiss.[76] Furthermore, third-party outside advisers such as investment bankers are highly motivated by reputational concerns and likely prefer pre-trial settlements to litigation in many cases where a breach of fiduciary duty is alleged.[77] Thus, a more accurate conclusion for the absence of an explicit North Carolina court ruling on the merits of the AAFDB tort claim is simply that no court has ever encountered a claim that was strong enough to survive a pre-trial motion.

Mack Sperling, a Greensboro-based business litigation attorney who publishes an informative blog called the "North Carolina Business Litigation Report," has argued that the claim is "a dead end" and plaintiffs should stop bringing it.[78] He also contends that most of the state court decisions that have discussed the claim's viability have "cast doubt" on its existence.[79] Sperling argues that it is "inevitable" that the North Carolina Business Court will eventually dismiss an aiding and abetting fiduciary breach claim on the basis that it is not recognized in North Carolina.[80] He cites *Bottom v. Bailey*,[81] a case in which the North Carolina Court of Appeals quoted an opinion written by the U.S. District Court for the Western District of North Carolina stating, "[t]he court finds that no such cause of action exists in North Carolina."[82]

Sperling's reliance on this language is misplaced. The *Bottom* opinion was quoting a federal court case, *Laws v. Priority Trustee Services of N.C., LLC.*,[83] which relies on flawed logic about the *Central Bank of Denver* case undermining the viability of the AAFDB claim in North Carolina.[84] Oddly, the *Bottom* opinion excerpts a portion of the *Laws* opinion where the federal court appears to state conclusively that the claim is not viable in North

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[75] Sperling, *supra* note 14.
[76] *See, e.g.*, *Bottom*, 767 S.E.2d at 889 ("While we need not address whether a claim for aiding and abetting a breach of fiduciary duty exists at law in North Carolina, we note that plaintiffs' amended compliant does not state such a claim with the required specificity.").
[77] *See, e.g.*, RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 824 (Del. 2015) (describing the Moelis settlement).
[78] Sperling, *supra* note 14.
[79] *Id.*
[80] *Id.*
[81] 767 S.E.2d 883 (N.C. Ct. App. 2014).
[82] Sperling, *supra* note 14 (citing *Bottom*, 767 S.E.2d at 889 (quoting Laws v. Priority Tr. Servs. of N.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009))).
[83] 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009).
[84] *Bottom*, 767 S.E.2d at 889.

Carolina, but then the *Bottom* opinion provides no further discussion or analysis of the apparently conclusive statement it has just quoted.[85] Instead, the *Bottom* opinion goes on to state that "we need not address whether a claim for aiding and abetting a breach of fiduciary duty exists at law in North Carolina."[86] Thus, the *Bottom* court seems to contradict the portion of the *Laws* federal court opinion it quoted earlier, which conclusively ruled out the claim's viability in the state.

The federal district court's opinion in *Laws* contains the flawed logic that others have relied upon to draw the premature conclusion that the AAFDB claim is not viable in North Carolina.[87] In *Laws*, the federal court reasoned that "no such cause of action exists in North Carolina" because the "underlying rationale" for recognizing AAFDB as a cause of action in the state was "eliminated" by the U.S. Supreme Court in its *Central Bank of Denver* holding.[88] This is a misconception because the underlying rationale for the AAFDB cause of action in North Carolina was originally established in *Blow v. Shaughnessy*,[89] a North Carolina Court of Appeals ruling that predated *Central Bank of Denver*.[90]

In *Central Bank of Denver v. First Interstate Bank of Denver*,[91] the U.S. Supreme Court held that no cause of action exists for aiding and abetting *fraud* under section 10(b) of the Securities Exchange Act of 1934 ("'34 Act").[92] Because Congress never specifically addressed liability for aiding and abetting securities fraud in the '34 Act or any amendments, the Court ruled that federal courts should not interpret the antifraud provisions of section 10(b) and Rule 10b-5 as including aiding and abetting liability.[93]

Blow, which supposedly had its rationale for recognizing AAFDB

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[85] *Id.* at 889–90.
[86] *Id.* at 889.
[87] *See* ROBINSON, *supra* note 10, at § 14.08, n.9.
[88] *See* Laws v. Priority Tr. Servs. of N.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009).
[89] 364 S.E.2d 444 (N.C. Ct. App. 1988), *abrogated by* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).
[90] *See* ROBINSON, *supra* note 10, at § 14.08, n.9.
[91] 511 U.S. 164 (1994).
[92] *See id.* at 192; *see also* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 THE BUS. LAW. 1135, 1142–43 (2006) (describing reasoning of *Central Bank of Denver* opinion).
[93] *See Cent. Bank of Denver*, 511 U.S. at 186; *see also* Mason, *supra* note 92.

"invalidated" by *Central Bank of Denver*,[94] in fact only briefly mentions that federal courts recognize a cause of action for aiding and abetting securities fraud.[95] Instead for the bulk of its reasoning regarding the AAFDB claim in North Carolina, it analyzes "common law concepts of civil liability for aiding and abetting."[96] This makes sense given that the tort's history dates back hundreds of years and the majority of U.S. jurisdictions have explicitly recognized that claims for some form of aiding and abetting civil liability are viable.[97] *Blow* only references the federal securities fraud cases to help it resolve how "substantial assistance" should be defined in jury instructions.[98] It also relies on the common law to clarify this question.[99] Ultimately, *Blow* upheld a jury verdict finding no liability for AAFDB, but it did not explicitly recognize or preclude the claim's viability in North Carolina.[100]

Thus, it is incorrect to conclude that *Central Bank of Denver* "invalidated" a preexisting rationale for the AAFDB claim's viability in North Carolina.[101] In fact, *Blow* never even fully provided any rationale for why the claim should or should not be recognized in North Carolina.[102] The North Carolina Court of Appeals simply rejected an argument about defective jury instructions and disposed of an AAFDB claim by upholding a jury verdict that found no liability on the claim.[103]

It is also unclear why North Carolina-based courts on the federal and state level believe that *Central Bank of Denver* would have had any implications at all for North Carolina tort law.[104] *Central Bank of Denver* is a U.S. Supreme Court case involving a question of statutory interpretation regarding aiding and abetting securities fraud under the '34 Act. There is no obvious reason why a U.S. Supreme Court ruling on a federal securities statute would foreclose the viability of a common-law state tort claim like AAFDB.

North Carolina courts and legal commentators have concluded prematurely that *Central Bank of Denver* eradicated the AAFDB claim in North Carolina. This faulty conclusion is based on a failure to fully analyze the *Central Bank of Denver* and *Blow* opinions and their limited importance

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[94] ROBINSON, *supra* note 10, at § 14.08, n.9.
[95] *See* Blow v. Shaughnessy, 364 S.E.2d 444, 447 (N.C. Ct. App. 1988).
[96] *Id.*
[97] Mason, *supra* note 92, at 1138–40.
[98] *See Blow*, 364 S.E.2d at 447–48.
[99] *Id.*
[100] *Id.*
[101] ROBINSON, *supra* note 10, at § 14.08, n.9.
[102] *See Blow*, 364 S.E.2d at 447–48.
[103] *Id.*
[104] *See* Bottom v. Bailey, 767 S.E.2d 883, 889 (N.C. Ct. App. 2014); *see also* Laws v. Priority Tr. Servs. of N.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009).

in the overall development of North Carolina tort law.

B. Aiding and Abetting Fiduciary Duty Breach Still a Viable Claim in North Carolina

Plaintiffs are likely to continue bringing the AAFDB claim in North Carolina because its viability has never been foreclosed and they have every right to bring it. Although North Carolina courts have never explicitly recognized that the claim is viable,[105] trial courts in the state have instructed juries on the claim and allowed them to deliver verdicts on it.[106] In *Blow*, as described above,[107] the lower court jury delivered a verdict finding no liability against a third-party defendant on a claim for AAFDB.[108] The plaintiffs appealed on the AAFDB claim, arguing that the AAFDB jury instructions were defective.[109] The North Carolina Court of Appeals noted that the tort had never been recognized but then simply declined to grant the plaintiff's motion for a new trial without further discussing AAFDB's viability.[110] In other words, the North Carolina Court of Appeals was comfortable allowing the lower court jury to decide whether the third-party defendants were liable for AAFDB without specifying whether North Carolina recognized the claim.

In a more recent North Carolina Court of Appeals case, the appellate court even allowed a jury verdict for AAFDB to stand.[111] In *Greensboro Rubber Stamp Co. v. Southeast Stamp & Sign, Inc.*,[112] the jury found two defendants liable for AAFDB.[113] However, the jury was unable to reach unanimous agreement on the damages to award for the successful AAFDB claim.[114] After a new trial on that issue, the jury awarded $1.00 of nominal

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[105] ROBINSON, *supra* note 10, at § 14.08, n.9.
[106] *See* Greensboro Rubber Stamp Co. v. Se. Stamp & Sign, Inc., No. COA10–914, 2011 WL 2462933, at *5–6 (N.C. Ct. App. June 21, 2011) (affirming a jury verdict that found defendants liable for AAFDB); *see also Blow*, 364 S.E.2d at 447 (finding no error where a jury returned a verdict finding no liability for AAFDB).
[107] *See* Blow v. Shaughnessy, 364 S.E.2d 444 (N.C. Ct. App. 1988).
[108] *Id*. at 446.
[109] *Id.* at 446–47.
[110] *Id.* at 447–49.
[111] *See Greensboro Rubber Stamp*, 2011 WL 2462933, at *9.
[112] *Id.* at *1.
[113] *Id.* at *2.
[114] *Id.*

damages, which the plaintiffs appealed.[115] After commenting that plaintiff's brief was "poorly organized and falls frustratingly short of serving the purpose of an appellate brief," the North Carolina Court of Appeals denied the plaintiff's motion for a new trial on the damages.[116] Thus, the *Greensboro Rubber Stamp* plaintiffs successfully won a jury verdict, though small, for AAFDB that was allowed to stand after appeal. The *Greensboro Rubber Stamp* opinion even described the ruling in *Blow* as "recognizing the cause of action for aiding and abetting a breach of fiduciary duty" based on common law principles.[117] This is convincing dicta that the AAFDB tort is fully viable in North Carolina, despite the fact that, as an unpublished opinion,[118] *Greensboro Rubber Stamp* lacks any "controlling legal authority."[119] Though citing unpublished opinions is "disfavored," the North Carolina Rules of Appellate Procedure allow it.[120]

Considering that North Carolina juries have been allowed to render verdicts on AAFDB claims and this practice has been tolerated by the North Carolina Court of Appeals at least twice in the last thirty years,[121] it is no wonder that plaintiffs continue to bring these claims. As the North Carolina Business Court continues to expand,[122] the state's court system can handle more M&A litigation, thus potentially exposing investment bankers to more AAFDB claims within the state. Two of North Carolina's most recent high-profile M&A transactions—the takeovers of grocery chain Harris Teeter and tobacco company Reynolds American—have garnered unsuccessful AAFDB claims in state court.[123] In both cases, the claims were dismissed, and the courts expressed skepticism about whether the claim was viable.[124] This skepticism is likely based on misconceptions about the AAFDB claim

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[115] *Id.* at *3.
[116] *Id.*
[117] *Id.* at *6.
[118] *Id.*
[119] N.C. R. APP. P. 30(e)(3).
[120] *Id.*
[121] *See Greensboro Rubber Stamp*, 2011 WL 2462933, at *1; *see also* Blow v. Shaughnessy, 364 S.E.2d 444 (1988).
[122] Lisa Snedeker, *Newest North Carolina Business Court Dedication Set for Wednesday, Jan. 18, at Wake Forest Law*, WAKE FOREST U. SCH. OF L.: NEWS & EVENTS (Jan. 17, 2017), http://news.law.wfu.edu/2017/01/newest-north-carolina-business-court-dedication-ceremony-to-be-held-wednesday-jan-18-at-wake-forest-law/.
[123] *See* Corwin v. Brit. Am. Tobacco PLC, 796 S.E.2d 324, 327 (N.C. Ct. App. 2016); *In re* Harris Teeter Merger Litig., No. 13 CVS 12579, 2014 WL 4748566, at *6 (N.C. Super. Ct. Sept. 24, 2014).
[124] *See Corwin*, 796 S.E.2d at 327, 340; *In re Harris Teeter*, 2014 WL 4748566, at *6; *see also* ROBINSON, *supra* note 10, at § 14.08 n.9 (describing the skepticism that both court opinions expressed about the claim's viability).

in North Carolina.[125]

Courts that express skepticism about the AAFDB claim's viability in North Carolina likely fail to consider that a majority of states recognize AAFDB already.[126] North Carolina is among a small handful of jurisdictions where courts have addressed the claim without either clearly recognizing or specifically foreclosing its viability.[127] In several other states, courts have simply not dealt with the claim at all.[128] Most states that have not recognized the claim have not ruled out its potential viability either.[129]

III. POLICY IMPLICATIONS OF THE AIDING AND ABETTING FIDUCIARY DUTY BREACH CLAIM FOR NORTH CAROLINA

The *RBC Capital* ruling and the viability of AAFDB claims raise important policy considerations for choice-of-law rules in North Carolina. North Carolina's choice-of-law rules can be interpreted to make these claims broadly applicable;[130] as such, state courts may need to consider this broad choice-of-law approach in the context of in-state efforts to attract corporate charters.

It is noteworthy that the viability of AAFDB claims has not inspired legislative action. While North Carolina's legislature has recently engaged in tort reform, it has focused on medical malpractice cases.[131] It is improbable

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[125] *See generally supra* Part II(A) (explaining that some courts and commentators incorrectly conclude that North Carolina does not recognize AAFDB claims because no North Carolina court has, to date, explicitly recognized the validity of such claims).

[126] *See* Alison Gurr, *Three's a Crowd or a Charm? Third Party Liability for Participating in Breaches of Fiduciary Duty*, 53 SAN DIEGO L. REV. 609, 611, 612 n.7 (2016) (stating that courts in twenty-eight states have recognized a cause of action for AAFDB, while only two states have explicitly declined to recognize the claim).

[127] *Id.* at 612 n.8.

[128] *Id.* at 612.

[129] *Id.*

[130] *See* John Buford, *Ct. App. Reverses Business Court on Audit Choice of Law Issue*, N. CAROLINA BUS. LITIG. REP.: WATCHING THE COURT (Sept. 8, 2017), http://www.ncbusinesslitigationreport.com/2010/09/articles/watching-the-court/ct-app-reverses-business-court-on-audit-choice-of-law-issue/ (analyzing North Carolina's commitment to the *lex loci* test).

[131] David Donovan, *Latest data show state's tort reform act delivered a knock-down blow*, N.C. LAW. WKLY. (July 24, 2015),

that investment banker liability will become a legislative priority. In that sense, the deterrence effect of AAFDB liability is appropriately balanced against the reality that it is a difficult tort to prove.

A. North Carolina Choice-of-Law Rules Make the Claim Broadly Applicable

North Carolina's choice-of-law rules could make the AAFDB claim broadly applicable; however, this will depend on the policy choices made by courts. There are four main scenarios in which choice-of-law rules could theoretically determine the outcome of an AAFDB claim filed in a North Carolina court against an M&A adviser. The first scenario (hereinafter referred to as "Scenario One") is triggered when a plaintiff sues a North Carolina corporation[132] and its North Carolina-based M&A adviser. The second scenario (hereinafter referred to as "Scenario Two) occurs when a plaintiff sues a North Carolina corporation and its New York[133] M&A adviser. The third scenario (hereinafter referred to as "Scenario Three") describes a situation where a plaintiff sues a foreign[134] corporation and its North Carolina M&A adviser. The fourth scenario (hereinafter referred to as "Scenario Four") occurs when a plaintiff sues a Delaware corporation[135] and its New York M&A adviser. North Carolina state courts could conceivably assert jurisdiction in *all four* of these scenarios.

Scenario One would probably not present any choice-of-law issues since both defendants are based in North Carolina; however, Scenarios Two and Three would present more challenging choice-of-law questions. North Carolina generally applies the "internal affairs" doctrine in shareholder litigation.[136] However, torts committed by outside M&A advisers are unlikely to fall within it.[137] On choice-of-law questions involving tort law, North Carolina applies the *lex loci* test to "matters affecting substantial rights of the parties,"[138] which means that tort claims are generally resolved in "the

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http://nclawyersweekly.com/2015/07/24/latest-data-show-that-states-tort-reform-act-delivered-a-knock-down-blow/.

[132] This means a corporation that is incorporated in North Carolina.

[133] New York is only an example. This could cover any out-of-state adviser too.

[134] "Foreign" is used to mean a corporation not incorporated in North Carolina, but incorporated in another U.S. state. For example, this could be a Delaware corporation with its business headquarters in North Carolina.

[135] This is used to mean any foreign corporation.

[136] Sperling, *supra* note 14.

[137] *See id.* (noting that the North Carolina Business Court dismissed an AAFDB claim on grounds that the internal affairs rule did not apply).

[138] Harco Nat'l Ins. Co. v. Grant Thornton LLP, 698 S.E.2d 719, 722 (N.C. Ct. App. 2010).

state where the injury occurred."[139] In *Harco National Insurance Co. v. Grant Thornton LLP*,[140] the North Carolina Court of Appeals rejected the North Carolina Business Court's attempt to fashion a special choice-of-law test for tort liability against auditors holding that it should have applied *lex loci* instead.[141] Therefore, a North Carolina court could not rely on the internal affairs doctrine to hear a Scenario Two case, but it could apply *lexi loci* to assert jurisdiction depending on where it deems the tort injury occurred. Scenario Three is also not governed by the internal affairs doctrine but a North Carolina court might be able to hear such a case depending on where the injury is deemed to have occurred.

Scenario Four could be heard in North Carolina courts. For instance, Belk, Inc., a department store chain, has operated in North Carolina since the nineteenth century and continues to have its headquarters in Charlotte.[142] Belk has extensive roots in North Carolina,[143] but like many other public corporations, it was incorporated in Delaware.[144] In 2015, private equity firm Sycamore Partners acquired Belk for three billion dollars.[145] New York-based Goldman Sachs was Belk's financial advisor.[146] Hypothetically, under Scenario Four, if Goldman Sachs bankers traveled to Charlotte, spent enough time there advising Belk on its takeover, and then were sued for AAFDB, they could face liability in North Carolina. A North Carolina court could apply the *lex loci* test in a manner that would enable North Carolina courts to assert jurisdiction over the AAFDB claim against Goldman Sachs, despite Belk being a Delaware corporation.

The Delaware Court of Chancery has said that even in cases where it is

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[139] *Id.*
[140] 698 S.E.2d 719 (N.C. Ct. App. 2010).
[141] *Id.* at 722; *see also* Buford, *supra* note 130 (summarizing the ruling as providing that "a tort is a tort is a tort" for all choice-of-law purposes).
[142] BELK, INC., *About Us*, http://www.belk.com/customer-service/about-us/ (last visited Mar. 5, 2018).
[143] *Id.*
[144] Belk Inc., Annual Report (Form 10-K) (Jan. 28, 2006), https://www.sec.gov/Archives/edgar/data/1051771/000095014406003495/g00773e10vk.htm.
[145] Belk Inc., *Belk, Inc. Enters Into Definitive Agreement to be Acquired by Sycamore Partners*, PR NEWSWIRE (Aug. 24, 2015, 9:00 AM), http://www.prnewswire.com/news-releases/belk-inc-enters-into-definitive-agreement-to-be-acquired-by-sycamore-partners-300132150.html.
[146] *Id.*

unable to hear an AAFDB claim because of the internal affairs rule's inapplicability, it might still decide that a "policy interest" is "paramount" and assert jurisdiction to hear the case anyway.[147] In other words, this dicta suggests that Delaware could assert jurisdiction based on a policy-driven need to protect Delaware corporations from tort injuries.[148] North Carolina may need to decide whether it favors similar policy interests, justified by its desire to protect the North Carolina corporations it has sought to attract.

B. Investment Banker Liability and North Carolina Tort Reform

Legal scholars and practitioners assessing North Carolina's efforts to make itself an attractive place to incorporate have often focused on topics like corporate fiduciary duties and takeover laws.[149] However, they generally have not evaluated how state law governs investment bankers who advise North Carolina corporations on mergers and acquisitions.

The arguments discussed above raise questions that North Carolina policymakers should consider in future deliberations about attracting corporate charters to the state.[150] For instance, North Carolina's corporate statute generally allows for a corporation's Articles of Incorporation to provide for exculpation of directors from personal liability.[151] Therefore, North Carolina courts should consider the question that Martin Lipton has raised in the Delaware context: does the North Carolina legislature intend for investment bankers to be liable for exculpated director conduct?[152]

The potentially broad applicability of North Carolina's choice-of-law rules to AAFDB claims implicate important policy choices. Moreover, the state must consider whether it is comfortable with its courts hearing cases involving the four hypothetical Scenarios described above. It may need to reevaluate its commitment to *lex loci*, even though the North Carolina Court of Appeals recently reaffirmed the test in *Harco*.[153]

C. Investment Banker Liability and North Carolina Tort Reform

The North Carolina legislature ought to consider the regulatory effects of the AAFDB tort on investment bankers. Gurr has argued that states should enact legislation to explicitly provide recognition for AAFDB claims,[154] and

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[147] *In re* Am. Int'l Grp., Inc., 965 A.2d 763, 822 (Del. Ch. 2009).
[148] *See id.* (describing possible need to protect Delaware corporations).
[149] ROBINSON, *supra* note 10, at § 2-1.
[150] *See supra* Part III(A), (B).
[151] N.C. GEN. STAT. ANN. § 55-2-02 (2016).
[152] Lipton, *supra* note 25.
[153] Harco Nat'l Ins. Co. v. Grant Thornton LLP, 698 S.E.2d 719, 722 (N.C. Ct. App. 2010).
[154] Gurr, *supra* note 126, at 640.

Tuch has argued that "public enforcement by regulators" is needed in addition to judicial scrutiny.[155]

Despite the scholar support for reform, the North Carolina legislature is unlikely to undertake tort reform for the purpose of reducing the liability of investment bankers. The wave of tort reform in the state has focused on reducing damages in medical malpractice cases.[156] Regulating investment banker conduct in the manner envisioned by Tuch is probably a more significant prerogative for New York, Delaware, and federal policymakers than it is for North Carolina.

As discussed, the viability of the AAFDB tort raises important policy issues relating to North Carolina choice-of-law doctrine, investment banker regulation, and the state's efforts to attract corporate charters. However, the AAFDB tort's viability is not something that demands immediate legislative action.

CONCLUSION

In the aftermath of the Delaware's Supreme Court's decision in *RBC Capital*, the issue of investment banker liability for aiding and abetting a breach of corporate fiduciary duty gained prominence. While a cause of action on this ground is viable in North Carolina, some courts and commentators have reached the premature conclusion that it is not recognized in the state. Furthermore, investment bankers advising North Carolina corporations on takeover matters should expect to be vulnerable to claims for aiding and abetting breaches of fiduciary duties. In the wake of the recent *RBC Capital* ruling, North Carolina corporations and their investment bankers can probably expect to face these claims more often.

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[155] Tuch, *supra* note 9, at 1151.
[156] Donovan, *supra* note 131.