Blogs
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Asset Management ADVocate

Maybe a Lender Could be a Fiduciary

In an earlier post, I criticized the case of *Lash v. Cheshire Count Savings* for holding that a bank could be a fiduciary to its borrowers. One problem with the decision is a failure to cite, with one exception, any precedents that could not be distinguished from the facts of the case. The one exception, *First Nat'l Bank in Lenox v. Brown*, presents a more difficult challenge to my efforts to exclude debtor/creditor relationships from fiduciary status. **A Guileful Bank Officer** Superficially, the facts are close to *Lash*. The bank lent Brown $4500, deposited $500 in the account of a service station in which Brown intended to become a part owner and deposited the balance in Evan's, the owner of the service station, account. The bank then withdrew almost $2500 from Evan's account and applied it to Evan's obligation to the bank. What was different from *Lash* was that Brown didn't owe any money to Evans. Brown intended to become half owner of the service station, but "this transaction was never actually formalized." The other difference was that the assets of the service station secured the bank's loan to Evans. No one mentioned the bank's security interest to Brown, even though the court found the bank's officer "so comported himself that he knew or should have known from Wyn Brown's questions and reaction that the latter trusted him implicitly." The bank foreclosed on the assets shortly after suing Brown. If an oil company had borrowed money to buy an interest in Evan's service station, this would have been a malpractice suit against the company's attorney for failing to run a UCC search. (The bank's security interests were duly recorded.) Brown was too unsophisticated to look out for his own interest, and the court needed to prevent the bank from taking advantage of him. The court did not expressly find that the bank was a fiduciary (which presumably is why Fiduciary Law doesn't cite the case). Instead, the court used Brown's trust and confidence in the bank officer to find the officer had "a duty to disclose all material facts of which he was aware." As this is a core fiduciary duty, the court's holding is tantamount to finding that the bank was a fiduciary to this borrower. In any event, the court voided the note as induced by fraud. **Should Misleading Someone about Being a Fiduciary Make You One?** The court in *Brown*, unlike *Lash*, clearly reached the right result. The court might have reach the same result without imposing a fiduciary duty on the bank, however. It might be more accurate to say that the bank officer misled Brown into believing that the officer was looking out for Brown's interest than to say that the officer acted as a fiduciary. Brown might also have argued failure of consideration, insofar as the bank turned over the loan proceeds to a business in which Brown never had nor acquired any interest; or that the bank's conduct violated an implied covenant to deal in good faith. Nevertheless, *Brown* presents a hard case for my view that we should not treat debtor/creditor relationships as fiduciary. To return to my the example in the first post, this is like a boxer telling his opponent "Don't worry; I'll go easy on ya," and then pummeling him senseless? Is it better to treat the boxer as a fiduciary or just a liar? Was Evander Holyfield a fiduciary to Mitt Romney? Or should we just admit this wasn't a real boxing match?

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