Trust and Confidence and the Fiduciary Duty of Banks in Iowa

by

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TRUST AND CONFIDENCE AND THE FIDUCIARY DUTY OF BANKS IN IOWA

I. INTRODUCTION

The current crisis has put a strain on many relationships in agriculture but perhaps no relationship has been strained more than the relationship between farmer and bank. An emerging issue as courts reshape this relationship is the duty a bank owes to its customers.[1] A need exists today to apply fiduciary standards to the bank-customer relationship under certain circumstances.[2] The Iowa Supreme Court recently addressed the issue of whether the duty of a bank reached the level of fiduciary duty.[3] While the court attempted to generally define what constitutes a fiduciary relationship, it did not establish specific criteria for deciding when a fiduciary relationship is created or explore what duties may be imposed on a bank should a fiduciary relationship be found to exist.[4] While it is true that a bank-depositor relationship is that of debtor-creditor, it is generally accepted that under certain circumstances a fiduciary relationship may arise.[5] Even though these

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1. There are a number of topics closely related to breach of fiduciary duty which are beyond the scope of this Note, including negligent misrepresentation, *see, e.g.*, Larsen v. United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281 (Iowa 1981); breach of contract to loan money, *see, e.g.*, Harsha v. State Sav. Bank, 346 N.W.2d 791 (Iowa 1984); fraudulent concealment or misrepresentation, *see, e.g.*, Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373 (Iowa Ct. App. 1986); and defenses such as unequal bargaining power, unconscionability, and undue influence, *see, e.g.*, Peoples Bank and Trust Co. v. Lala, 392 N.W.2d 179 (Iowa Ct. App. 1986) (undue influence). For a good discussion of the relationships between these topics and fiduciary duty see Ogilvie, *Banks, Advice-Giving and Fiduciary Obligation*, 17 OTTAWA L. REV. 263, 281-83 & 287-92 (1985).

Also beyond consideration are alleged breaches of fiduciary duty based on duties owed to shareholder-borrowers. *See, e.g.*, Graber v. Southeast Iowa P.C.A., No. CL-1408, District Court for Washington County (January 2, 1986) (jury award of $1,279,666.00 was set aside and a new trial was ordered).

The works most often cited on the subject of fiduciary duties are: J. SHEPHERD, THE LAW OF FIDUCIARIES (1981) and P. FINN, FIDUCIARY OBLIGATIONS (1977).

2. *See infra* notes 55-65 and accompanying text.

3. Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986). It is still not entirely clear whether breach of fiduciary duty exists as a separate cause of action in Iowa, although the *Kurth* court seems to have acknowledged, by implication, that it does. The fiduciary duty question was addressed separately, and breach of fiduciary duty was distinguished from fraud in *Kurth*. *Id.* at 696. *See also* Clinton Land Co. v. M/S Associates, Inc., 340 N.W.2d 232, 234 n.1 (Iowa 1983) (reserved question of whether separate cause of action existed for breach of fiduciary duty); Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1981) (majority-minority shareholders).

4. *See* Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986).

5. *See infra* notes 14, 16 and accompanying text.

circumstances necessarily vary and courts have been unwilling to adopt precise standards that define when a fiduciary relationship arises,[6] certain patterns can be discerned. Fiduciary obligations are made part of the bank-customer relationship if there exists a relationship of trust and confidence.[7] The customer may repose trust and confidence in the bank because of the customer's lack of knowledge, experience, or education, or due to the customer's age, mental acuity, or simply based on the length of his association with the bank.[8] The bank in turn may be required to accept this trust, or be deemed to have accepted it.[9] Once a fiduciary relationship has been established, the task of determining whether a breach has occurred becomes somewhat easier, since breach generally takes one of three forms: breach of the duty of disclosure, loyalty, or stewardship.[10]

II. Fiduciary Relationships

A. *A General Definition*

In *Kurth v. Van Horn*,[11] the Iowa Supreme Court adopted the following definition of fiduciary relationship:

> [A] very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal. Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.[12]

Banks and customers develop relationships on various levels so it is difficult to categorize them.[13] Ordinarily, a bank-depositor relationship is one of debtor-creditor and does not give rise to a fiduciary duty.[14] Other bank-cus-

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6. *See infra* notes 13, 16 and accompanying text.

7. *See, e.g.*, Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 23 (Colo. Ct. App. 1981).

8. *See infra* notes 56-78 and accompanying text.

9. *See, e.g.*, Denison State Bank v. Madeira, 230 Kan. 684, _, 640 P.2d 1235, 1243-44 (1982); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 24 (Colo. Ct. App. 1981).

10. *See infra* notes 94-101 and accompanying text.

11. 380 N.W.2d 693 (Iowa 1986).

12. *Id.* at 695-96 (quoting Black's Law Dictionary 564 (5th ed. 1979)). The court also noted other indicia such as the " . . . acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon the other." *Id.* at 696 (citing First Bank of Wakeeney v. Moden, 235 Kan. 260, 262, 681 P.2d 11, 13 (1984)).

13. Kurth v. Van Horn, 380 N.W.2d at 696.

14. *Id. See* Manson State Bank v. Tripp, 248 N.W.2d 105, 108 (Iowa 1976); Davis Bros. &

tomer relationships go beyond that of bank-depositor, however, and most courts have recognized that a confidential or fiduciary relationship[15] may exist when the customer reposes trust and confidence in the bank.[16] The duty imposed on the bank in these cases arises out of the transaction between the parties, and not necessarily the parties' legal relationship; it depends upon the facts and circumstances of each case; there is no precise definition.[17]

Iowa courts have imposed a fiduciary duty upon banks due to the legal relationship they have with others as, for example, agent, trustee, executor or administrator, and guardian or conservator.[18] These relationships must be

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Potter v. Fort Dodge Nat'l Bank, 216 Iowa 277, 279, 249 N.W. 170, 171 (1933); Andrew v. Colorado Sav. Bank, 205 Iowa 872, 875, 219 N.W. 62, 64 (1928). 46 states have so held. Palmer v. Idaho Bank & Trust, 603 P.2d 597, 600 n.2 (Idaho 1979).

15. The Iowa Supreme Court has stated that a fiduciary relationship can exist without the presence of a confidential relationship and vice versa, and explained that a fiduciary has a duty to act for the benefit of the other within the scope of the relationship. But in a confidential relationship, one has gained the complete confidence of the other and acts with only the other's interest in mind. Burns v. Nemo, 252 Iowa 306, 311, 105 N.W.2d 217, 220 (1960). But compare the definition of confidential relationship in *In re* Estate of Herm, 284 N.W.2d 191, 199 (Iowa 1979) (citing Dibel v. Meredith, 233 Iowa 545, 549, 10 N.W.2d 28, 30 (1943) ("A confidential relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another . . . .") with the fiduciary relationship definition quoted above from the *Kurth* case. *See supra* note 12. *See also* First Nat'l Bank v. Curran, 206 N.W.2d 317, 321-22 (Iowa 1973).

16. *See, e.g.*, Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 23 (Colo. Ct. App. 1981).

The focus here is on the overall lender-borrower relationship. Certain specific aspects of this relationship are considered elsewhere and will not be discussed in detail here. One such aspect is the purchase of mortgage or credit life insurance as part of a loan transaction. It is clear that the bank is under a duty to inform the borrower that he must purchase such insurance himself when he asks the bank about it. *See, e.g.*, Henson v. Bell Fed. Sav. & Loan Ass'n, 280 S.C. 354, _, 312 S.E.2d 586, 587 (Ct. App. 1984); Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash. App. 91, _, 588 P.2d 1192, 1199-1200 (1978) ("quasi-fiduciary"); Stone v. Davis, 66 Ohio St. 2d 74, _, 419 N.E.2d 1094, 1099, *cert. denied sub nom*, Cardinal Fed. Sav. & Loan Ass'n v. Davis, 454 U.S. 1081 (1981). *But see* Wesson v. Jefferson Sav. & Loan Ass'n, 641 S.W.2d 903, 906 (Tex. 1982) (lender under no fiduciary obligation to purchase mortgage cancellation insurance since parties did not agree that lender was to procure it); Mullen v. North Pac. Bank, 25 Wash. App. 864, _, 610 P.2d 949, 957 (1980) (no duty to inform borrower that bank had purchased only vendor's single interest insurance). Closely related is the situation where the bank requires the purchase of credit life insurance in its loan transactions then fails to purchase it. A duty is then breached. Watkins v. Valley Fidelity Bank & Trust Co., 63 Tenn. App. 493, _, 474 S.W.2d 915, 918 (1971). *See generally* Budnitz, *The Sale of Credit Life Insurance: The Bank as Fiduciary*, 62 N.C.L. REV. 295 (1984).

17. Kurth v. Van Horn, 380 N.W.2d at 696; Denison State Bank v. Madeira, 230 Kan. at _, 640 P.2d at 1241.

18. *See, e.g.*, Darling v. Nineteen-Eighty Corp., 176 N.W.2d 765 (Iowa 1970) (agent); *In re* Estate of Wiese, 257 N.W.2d 1 (Iowa 1977) (trustee); Liska v. First Nat. Bank, 322 N.W.2d 892 (Iowa Ct. App. 1982) (executor); Brown v. Monticello State Bank, 360 N.W.2d 81 (Iowa 1980) (conservator).

Iowa statutes define a fiduciary to include these roles. *See* IOWA CODE § 524.103(11) (1985).

distinguished from the equitable doctrine under consideration, since a fiduciary duty in these situations is created out of the formal relationships of the parties, not the transaction, and is governed by the substantive law in each area.[19]

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19. *See* Kurth v. Van Horn, 380 N.W.2d at 696. A good example of the differing treatment claimants receive based on whether a relationship is found to be fiduciary or not is found in *People ex rel. Barrett v. Central Republic Trust Co.*, 300 Ill. App. 297, 20 N.E.2d 999 (1939). This was a claim in the liquidation proceeding of a bank. *Id.* at _, 20 N.E.2d at 1000. The claimant had a savings and checking account at the bank and frequently sought the advice of an assistant vice-president there regarding her considerable investments; her husband having introduced her to the bank officer before his death. *Id.* at _, 20 N.E.2d at 1000-01. Relying in part on the advice of the bank officer, she purchased sizable mortgages on two properties in which the bank had also invested, and later renewed them at maturity. *Id.* at _, 20 N.E.2d at 1001. She sustained a considerable loss on the deal. *Id.* On these facts the court rejected her claim of breach of fiduciary relationship based on alleged misrepresentations as to the value of the properties, citing such factors as her intelligence, her business experience, and especially the fact that while the bank officer gave advice and recommendations concerning investments, he did not exercise the dominating influence the court thought necessary in order to establish a fiduciary relationship. *Id.* at _, 20 N.E.2d at 1002. During this time the claimant also purchased bonds in a real estate venture, again upon the advice of the bank, and again with the bank's involvement, in this instance both as underwriter and bondholder. *Id.* at _, 20 N.E.2d at 1002-03. The significant difference in this transaction, however, was that the bonds were secured by trust deed held by the bank as trustee, the bondholders being the beneficiaries. *Id.* at _, 20 N.E.2d at 1003. The bank had convinced her to retain the bonds for an extended term although she expressed a contrary wish, while at the same time the bank was cashing in its own bonds. *Id.* When the investors in the project defaulted she again lost a large sum of money. *Id.* at _, 20 N.E.2d at 1004. In this instance the express trust arrangement created the fiduciary relationship and the failure to inform her of the bank's involvement and her right to be paid on the bonds without agreeing to an extension constituted the breach thereof. *Id.* It is apparent from these somewhat inconsistent results that those benefited by an expressly created fiduciary relationship, in this case beneficiaries of a deed of trust, will fare better than those seeking to establish a fiduciary duty based on the circumstances surrounding the transaction. The parties in this case were in the same posture in both transactions in terms of confidence and trust on the part of the customer, on the one hand, and advice giving and acceptance of trust on the part of the bank, on the other hand. *See id.* at _, 20 N.E.2d at 1002-04. Two relationships similar in fact should be treated similarly, yet the court found no fiduciary relationship to exist in the first situation. *Id.* at _, 20 N.E.2d at 1002. While it is clear that there was a more definite breach of duty in the second case than in the first since in the first there was simply a loss resulting from allegedly fraudulent advice whereas in the second the bank also engaged in self dealing, the initial question of whether there is a fiduciary relationship should not be affected by this.

Some courts do suffer from a misapprehension that there must be a breach or at least a gain by the fiduciary in order for there to be a fiduciary relationship. *See, e.g.*, Atlantic Nat'l Bank v. Vest, 480 So. 2d 1328, 1333 (Fla. Dist. Ct. App. 1985) ("The procurement of a benefit or advantage by reason of the misrepresentation is one of the factors to be considered in determining the existence of a fiduciary relationship implied in law."). It may seem unnecessary to consider the existence of a fiduciary relationship when no breach has occurred, but the two are separate issues and should be considered separately. Plus, existence of a fiduciary relationship relieves a claimant of certain burdens. *See infra* note 141.

In *Rankin v. Mount Lebanon School Dist.*, 70 Pa. Commw. 210, _, 452 A.2d 1117, 1119 (1982), the court found no duty breached by a bank that acted both as district treasurer (pro-

B. *Fiduciary Relationships With Banks in Iowa*

As stated above, the Iowa Supreme Court has considered the question of the fiduciary relationship between banks and borrowers.[20] In *Kurth v. Van Horn*,[21] an eighty year old "mentally astute and well oriented"[22] farmer was being pressured by his tenant to help him obtain a loan from First National Bank in Glidden in order to free farm machinery pledged to the bank as security.[23] After several meetings with the president of the bank, the farmer cosigned with the tenant on a note secured by a mortgage on the farmer's land.[24] The supreme court reversed a jury verdict in favor of the trustee of the farmer's estate on the trustee's claim of breach of fiduciary duty by the bank in its failure to disclose the bank's interest in having the tenant obtain the loan.[25] The court held that the evidence failed to establish a fiduciary duty, and even if there was such a duty, there was no breach.[26] The rationale appears to be that the farmer was fully aware of the tenant's financial condition (although there was evidence that financial statements shown to the farmer were inconsistent)[27] and that he did not rely upon the banker's advice.[28]

It is clear that the court found the evidence lacking,[29] but there is little indication of whether the evidence failed to establish a fiduciary relationship, and if so, a breach of that duty. The court emphasized the fact that the farmer was not misled in any way and that "[t]he bank had no affirmative duty to prevent [the borrower] from doing what the evidence clearly shows he wanted to do,"[30] both of which address the issue of breach of fiduciary duty. On the other hand, the court relied upon the Kansas Supreme Court in *Denison State Bank v. Madeira*,[31] when it determined that no fidu-

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fessional fiduciary) and as depository (non-fiduciary) for district funds since the bank was acting as a depository and not treasurer at the time; even though the bank commingled the funds, made a profit on district investments, failed to inform the district that it made better interest rates available to similarly situated customers, and failed to inform the district that better authorized investments were available. One wonders when the bank had time to act as district treasurer.

Some standards of "professional" fiduciaries are codified. *See* IOWA CODE §§ 633.123, 633.155-633.160 (1985).

20. *See supra* notes 3-4 & 11-16.
21. 380 N.W.2d 693 (Iowa 1986).
22. *Id.* at 698.
23. *Id.* at 696-97.
24. *Id.* at 694.
25. *Id.* at 698.
26. *Id.*
27. *Id.* at 697.
28. *Id.*
29. *Id.* at 698.
30. *Id.* at 697.
31. 230 Kan. 684, 640 P.2d 1235 (1982). In this case, Madeira discussed purchasing a car dealership heavily indebted to the bank with officials and agents of that bank. *Id.* at _, 640

ciary duty existed in the first place.[32] The court insisted that the farmer did not rely on the bank for advice in any matter, had never borrowed money there before, and was only a depositor and did not know the bank officer at all.[33] The two issues, duty and breach, were given insufficient attention simply because they were not considered separately. The effect of disposing of the two issues at once is to have lack of breach of duty weigh on the question of whether a duty existed in the first place, when it is the latter issue that must be resolved. The claimant is thus robbed of any presumptions he may be entitled to under a fiduciary relationship before the existence or nonexistence of a fiduciary relationship has been established.[34]

The *Kurth* case is not the first Iowa case to address the issue of the existence of a relationship of trust and confidence between bank and customer. In *First National Bank v. Brown*,[35] a borrower and cosigner alleged fraud as a defense in an action to collect on a note.[36] The purpose of the loan was to purchase one-half interest in a business.[37] The president of the bank, in making the loan, failed to disclose to the borrower that the present owner of the business was heavily indebted to the bank, that the bank had a perfected security interest in much of the business property, and that he intended to apply at least a portion of the loan proceeds to the present owner's indebtedness.[38] The court affirmed the lower court determination of equitable fraud in the inducement against the bank for failing to disclose material facts.[39] The key passage in the case states that:

> ordinarily mere silence on the part of one party, in an arms length transaction, as to material facts discoverable by the other does not serve to create actionable fraud. This is not the case, however, where there exists a relationship of trust or confidence, and the trusted party has superior

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P.2d at 1238. As a counterclaim to the bank's action on three promissory notes, Madeira alleged breach of the fiduciary duty of disclosure by the bank in failing to disclose its involvement with the current owner as the owner's major creditor. *Id.* The court cited such factors as Madeira's business expertise, education and experience, and the fact that he had access to the files of the business as well as the fact that the bank's security interests in the business were a matter of public record to find no fiduciary relationship. *Id.* at _, 640 P.2d at 1243. Even though Madeira trusted and relied upon the bank to furnish him complete, honest information, he knew the dealership was in financial difficulty and he "should have exercised some degree of diligence to assure himself that he was fully informed as to the extent of such difficulty" and not abandon all caution and responsibility for his own protection. *Id.* He could not burden the bank with a fiduciary duty without the bank assuming such a burden. *Id.* at _, 640 P.2d at 1243-44.

32. *See id.* at _, 640 P.2d at 1244.

33. *See* Kurth v. Van Horn, 380 N.W.2d at 698.

34. *See, e.g.*, Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 647 (Iowa 1979) ("[w]hen a violation of fiduciary duty is involved, the fiduciary must establish he properly discharged his obligation.").

35. 181 N.W.2d 178 (Iowa 1970).

36. *Id.* at 180.

37. *Id.*

38. *Id.* at 180-81.

39. *Id.* at 184.

> knowledge of the facts. In the latter situation the superior party has a duty to disclose all material facts of which he is aware, or at least those favorable to his own position and adverse to the other.[40]

The court found that the bank officer "so comported himself that he knew or should have known from [the borrower's] questions and reaction that the latter trusted him implicitly."[41] Also, the court indicated that when the officer failed to alert the borrower to the true situation, he "purported to act solely for the [borrowers]."[42] The final factor was that the bank was more familiar with the material facts of the situation.[43] This opinion appears to sweep broadly in its characterization of a relationship of trust and confidence. Even though the Browns had never dealt with the bank before this transaction, their mere asking about how the businesses were doing and the bank officer's comportment gave rise to a duty to disclose, since the bank was closer to the true facts.[44]

This characterization, however, must be tempered by several factors. First, the court was addressing a claim of fraud[45] and the factors it considered had much more to do with the misrepresentation itself than with the relationship giving rise to the duty to disclose.[46] When the court reexamined this question a few years later and genuinely explored the transaction and interaction of the parties, no duty was found.[47]

In *Manson State Bank v. Tripp*,[48] the court did explore relevant factors and found no relationship of trust and confidence between bank and borrower which would require disclosure of the fact that the holding corporation in which Tripp planned to invest held two corporations heavily indebted to the bank.[49] The court, in support of its holding, distinguished *Brown* by citing such factors as the investor never having banked there before, his receipt of financial statements showing the corporations to be in trouble, his education and previous business experience, and the fact that he had consulted others.[50] While the factors considered by the court in ascertaining whether a "relationship of trust and confidence" existed are basically the same as those considered in a fiduciary relationship case, the two concepts are not the same; the results head in different directions.[51] Conse-

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40. *Id.* at 182 (citations omitted).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 180.
45. *Id.* at 182.
46. *See id.*
47. Manson State Bank v. Tripp, 248 N.W.2d 105, 108 (Iowa 1976).
48. 248 N.W.2d 105 (Iowa 1976).
49. *Id.* at 108.
50. *Id.*
51. The differing result is intuitive. The injury in the fraud case is deceit, but the injury in the fiduciary duty case is breach of duty by failing to disclose something which may be

quently, the relevance of the court's discussion in *Brown* and *Tripp* is limited to the initial determination of whether a fiduciary relationship exists.[52] It is important to note that the *Kurth* court did distinguish itself from the *Brown* decision, pointing out that *Brown* was framed as a fraud case.[53]

C. *The Facts and Circumstances of Fiduciary Relationships*

Since *Kurth* only defined the issue and it is unclear whether *Brown* and *Tripp* are precisely on point, Iowa courts are left with no clear direction in this area. This is especially so given the court's view that the existence of a fiduciary relationship depends upon the facts and circumstances of each case.[54] Assuming, for present purposes, that the factors giving rise to a relationship of trust and confidence, as in the *Brown* and *Tripp* cases, would also be relevant in determining whether a fiduciary relationship like that in *Kurth* exists,[55] we may examine them to see which factors must be considered in resolving the issue of whether a fiduciary relationship exists.

It is clear that there must be trust or confidence reposed in the fiduciary,[56] but this merely restates the question. Still, some courts are willing to recite the circumstances of a case and declare that one party has or has not placed its trust or confidence in the other so that the latter was under a duty to act for the other;[57] or was not under such a duty.[58] These cases are

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important to someone to whom you are obligated. *See infra* note 95 and accompanying text. Fraud or deceit may be involved in the latter case as well, but the injury is the failure to discharge one's duty, and nothing more need be proven because injury is presumed. In addition, breach of duty may take several forms other than failure to disclose. *See infra* notes 96-100 and accompanying text. Failure to disclose a material fact to someone with whom one is in a relationship of trust and confidence *may* result in actionable injury in the case of fraud if other elements are present, such as reliance and intent. *See, e.g.*, First Nat'l Bank v. Brown, 181 N.W.2d 178, 181 (Iowa 1970) The burden of establishing equitable fraud remains with the claimant. *Id.*

For a good discussion of this difference see Ogilvie, *Banks, Advice-Giving and Fiduciary Obligation*, 17 OTTAWA L. REV. 263, 281-82 (1985). Others have assumed that the *relationship* discussed in *Brown* is the same as a fiduciary relationship. *See, e.g.*, Hooper v. Barnett Bank, 474 So.2d 1253, 1256 (Fla. Dist. Ct. App. 1985); Annot., 70 A.L.R.3d 1344, 1356 (1976).

Those cases not framed with breach of fiduciary duty as a separate injury will not be considered here, even as they relate to existence of fiduciary duty as opposed to breach. *See, e.g.*, MacKenzie v. Summitt Nat'l Bank, 363 N.W.2d 116 (Minn. Ct. App. 1985); Klein v. First Edina National Bank, 293 Minn. 418, 196 N.W.2d 619 (1972).

52. Kurth v. Van Horn, 380 N.W.2d at 696.

53. *Id.*

54. *Id.*

55. *See supra* note 52.

56. *See* Kurth v. Van Horn, 380 N.W.2d at 697.

57. *See, e.g.*, Warsofsky v. Sherman, 326 Mass. 290, _, 93 N.E.2d 612, 615 (1950) (bank loan committee member learned of a real estate offer from a customer who gave the information in the hope of obtaining a loan to purchase it but committee member bought the land for his wife— the bank employee "stood in a fiduciary relation toward the [customer] with reference to the matters disclosed.").

the clearest illustrations of the need to establish a more systematic approach to this issue. Most courts, on the other hand, consider various factors which weigh on the issue of whether trust or confidence has been invested.[59] Consideration of the following factors would be consideration of credible, albeit circumstantial, evidence on this threshold determination.[60]

In *Kurth* and *Tripp*, for example, the fact that the borrower was aware of the third party's financial condition, and had access to financial statements, seemed to indicate to the court that the borrower had not relied upon the bank for advice in the matter.[61] Actual or constructive knowledge of the true state of affairs, or access to such knowledge, tends to negate an inference of reliance.[62] It is hoped that courts will treat the knowledge aspect separately, first while the existence issue is examined, and then when the breach issue is scrutinized. With the latter issue, knowledge is only relevant in certain alleged breaches such as the duty to disclose, and not in others, such as breach of loyalty.[63]

Closely related to knowledge is a person's previous education or experience in the subject matter of the transaction. Other courts have been unwilling to impute trust or confidence if the person is, for example, an experienced businessman.[64]

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58. *See, e.g.*, Snow v. Merchants National Bank, 309 Mass. 354, _, 35 N.E.2d 213, 217 (1941) (widow, seventy-seven years old, with no education beyond age sixteen, relied upon advice freely given for years by bank president and successor could not recover on losses sustained on investments suggested by the bank and upon which it received commissions because relations were of a "business character").

59. *See infra* notes 61-73.

60. *See* Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984).

61. *See* Kurth v. Van Horn, 380 N.W.2d at 697; Manson State Bank v. Tripp, 245 N.W.2d at 108.

62. *See, e.g.*, Pardue v. Bankers First Fed. Sav. & Loan Assn, 175 Ga. App. 814, _, 334 S.E.2d 926, 926 (1985) (no fiduciary duty to disclose a matter that was on public record and equally accessible to the borrowers—in this case tax consequences of a loan prepayment program offered by the bank without explanation); Denison State Bank v. Madeira, 230 Kan. 684, _, 640 P.2d 1235, 1243 (1982) (security interest of bank a matter of public record); Moorhead v. First Peidmont Bank & Trust Co., 273 S.C. 356, _, 256 S.E.2d 414, 416 (1979) (knowledge of title defects and value of real estate barred claim); Palmer v. Idaho Bank & Trust, 100 Idaho 642, _, 603 P.2d 597, 600 (1979) (no duty to warn of possible IRS levy on deposit since customer received four IRS notices).

An interesting twist to the knowledge aspect is mistake. *Compare* M.L. Stewart & Co. v. Marcus, 124 Misc. 86, _, 207 N.Y.S. 685, 693 (Sup. Ct. 1924) (no confidential relationship found because information given to bank officer was mistaken so the court reasoned that if it was not of sufficient importance to check its accuracy, it could not have been regarded as confidential by prospective borrower) *with* Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 22 (Colo. Ct. App. 1981) (same type of mistaken information given to loan officer who similarly took advantage of it would not prohibit finding of fiduciary duty of nondisclosure if borrower intended it to be confidential and bank accepted or invited his trust).

63. *See, e.g.*, Hooper v. Barrett Bank, 474 So.2d 1253, 1258 (Fla. Dist. Ct. App. 1985) (disclosure); Warsofsky v. Sherman, 326 Mass. 290, _, 93 N.E.2d 612, 615 (1950) (loyalty).

64. *See, e.g.*, Baylor v. Jordan, 445 So. 2d 254, 256 (Ala. 1984) (all parties were "sophisti-

Just as education or experience will sometimes preclude a finding of fiduciary duty, lack of either will promote such a finding.[65] In *Kurth*, the court alluded to the borrower's age and mental astuteness.[66] These factors indicate disparities in the relationship which would prompt a court to impose fiduciary duties upon the superior party, a result consistent with the *Kurth* definition of fiduciary relationships.[67] After all, one of the principal characteristics of a fiduciary relationship is the power of the fiduciary to dominate and influence the beneficiary.[68] Other courts have also considered infirmities of age or mentality on this question.[69] It has been said that even a sophisticated, informed beneficiary may need the protection of fiduciary duty, since it is the nature of the fiduciary relation which creates dangers of abuse.[70] Therefore, it would appear that neither knowledge, intelligence, nor experience would be accorded undue weight.

A factor often mentioned is length of association between bank and customer. In both *Kurth* and *Tripp* the fact that the customer had never borrowed at that bank before the transaction in question seemed to be important.[71] Naturally, a long association with the lender would indicate that the customer had confidence in the bank to act for him, especially if the customer had entrusted the bank to handle other matters for him.[72] On the

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cated businessmen" fully aware of what they were doing); Denison State Bank v. Madeira, 230 Kan. 684, _, 640 P.2d 1235, 1243 (1982) (borrower had bought other car dealerships in financial trouble before the one at issue).

65. *See, e.g.*, Deist v. Wachholz, 678 P.2d 188, 190 (Mont. 1984) ("little, if any, experience in real estate matters"); Earl Park State Bank v. Lowman, 92 Ind. App. 25, _, 161 N.E. 675, 677 (1928) (farmer inexperienced in business affairs).

66. Kurth v. Van Horn, 380 N.W.2d 693, 698 (Iowa 1986).

67. Kurth v. Van Horn, 380 N.W.2d at 696.

68. *See supra* note 12 and accompanying text.

69. *See* Baylor v. Jordan, 445 So.2d 245, 256 (Ala. 1984); Midland Nat'l Bank v. Perranoski, 299 N.W.2d 404, 413 (Minn. 1980); Snow v. Merchants Nat'l Bank, 309 Mass. 354, _, 35 N.E.2d 213, 217 (1941).

70. Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 810 (1983).

71. *See* Kurth v. Van Horn, 380 N.W.2d 693, 698 (Iowa 1986); Manson State Bank v. Tripp, 248 N.W.2d 105, 108 (Iowa 1976).

72. *See* Hooper v. Barnett Bank, 474 So.2d 1253, 1258 (Fla. Dist. Ct. App. 1985) (bank acted as plaintiff's trustee and personal representative of his estate); Deist v. Wachholz, 678 P.2d 188, 194 (Mont. 1984) (twenty-four year relationship and financial advisor); Stewart v. Phoenix National Bank, 49 Ariz. 34, _, 64 P.2d 101, 106 (1937) ("where it is alleged [that] a bank has acted as the financial advisor of one of its depositors for many years, and that the latter has relied upon such advice, it is a sufficient allegation that a confidential relationship in regard to financial matters does exist and that, if it is proved, the bank is subject to the rules applying to confidential relations in general.") Some courts, however, will not impose a fiduciary duty upon the bank despite a substantial amount of involvement by the bank in the customer's finances. *See* Pulse v. North American Land Title Co., 707 P.2d 1105, 1110 (Mont. 1985). A Montana court after *Deist* found that the borrowers had not dealt with the bank in the "exclusive repeated nature necessary to justify finding a fiduciary relationship." *Id.* In *Pulse*, the Pulses and a Mr. Hanson met at First Security Bank of Glendive with a senior vice-president to work out financing for the purchase by Hanson of certain Pulse real estate. *Id.* at

other hand, if it is the first association between them, or if the borrower consults with others during the transaction, especially if it is an attorney, it would indicate that he is attempting to keep the relationship at arms-length.[73]

A close reading of the *Kurth* case reveals that the Iowa court would require that the trust and confidence reposed by the customer in the bank be accepted by the bank before a fiduciary duty will arise.[74] This part of the

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1106-07. The bank agreed to finance Hanson's purchase and to prepare the necessary documents as a service to its customers. *Id.* at 1107. Hanson borrowed part of the purchase price from the bank and the Pulses carried the balance by way of a second mortgage on the property. *Id.* As security for the loan from the bank, Hanson executed a deed of trust to the same property in favor of the bank. *Id.* The bank was advised that the Pulses were also to receive a second mortgage on the property. *Id.* The document to the Pulses, drafted by a bank employee, contained a notation "no exceptions" after the form language stating "free from all encumbrances excepting." *Id.* The bank filed its deed of trust before the Pulses filed their mortgage. *Id.* When Hanson defaulted on his payments to the bank, the bank advised the Pulses that it was going to foreclose on its deed of trust. *Id.* Hanson executed a quit claim deed in lieu of foreclosure to the bank which in turn executed a warranty deed to the Pulses, they having already agreed to accept the premises subject to the bank's deed of trust. *Id.* The Pulses made a few payments and then decided to bring suit rather than continue. *Id.* One of the claims raised by the Pulses was breach of fiduciary duty. *Id.* at 1110. The court first distinguished *Deist* in that the bank did not locate the buyer as it had in the prior case, nor in this case was the bank a party to the transaction beyond its role as Hanson's lender, again, unlike *Deist*. *Id.* at 1110. The court found that the terms of the sale were formulated by Hanson and not by the bank and that the bank did not advise the Pulses on the terms of the sale. *Id.* The court went on to state that although the Pulses had accounts with the bank *since 1947*, and had dealt with the loan department for the purchase of their residence, the purchase of the same premises involved in the case, and "a few small loans" insured by the Small Business Administration, since they had accounts and certificates of deposit in other banks as well, the facts did not justify a finding of fiduciary relationship. *Id.* It is difficult to understand how these factors should have any bearing on the question of whether a fiduciary relationship existed regarding the particular transaction at issue. There are problems with using only the number of prior loans at the bank to decide the issue since these types of facts seem difficult to quantify. Where is the line to be drawn? The *Deist* court did mention the fact that the Deists had banked at Conrad National Bank for 24 years, but emphasized the nature of her association with the bank and her reliance on the bank in the transaction at issue—this is what gave rise to the fiduciary relationship. Deist v. Wachholz, 678 P.2d 188, 194 (Mont. 1984). The fact that a borrower also used other banks in the past has no bearing whatsoever on the issue of the borrower's relationship to the bank in question. The court in *Deist* never even considered this factor. Still, the two cases are distinguishable in terms of the extent of involvement by the banks in the transactions, the bank in *Deist* assuming an advisory role and the bank in *Pulse* merely acting as a conduit. The grounds cited by the court in *Pulse*, however, are immaterial.

73. *See* Manson State Bank v. Tripp, 248 N.W.2d 105, 108 (Iowa 1976); *See also* Ward v. Worthen National Bank & Trust Co., 284 Ark. 355, 681 S.W.2d 365 (1984) (attorney); Busby v. Parish National Bank, 464 So.2d 374, 379 (La. Ct. App. 1985) (attorney); *but see* Deist v. Wachholz, _, 678 P.2d 188, 197-98 (Mont. 1984) (attorney representing Joan Deist gave less than yeoman's effort) (constructive fraud discussion).

74. *See* Kurth v. Van Horn, 380 N.W.2d 693, 698 (Iowa 1986). Although the court in *Kurth* does not set out acceptance of trust by the bank in its definition of a fiduciary relationship, it seems to read it into the requisites of a fiduciary relationship. *Id.* Its reliance on *Ma-*

Kurth analysis is the most troubling. If this is really only a requirement that the bank understand that the customer is placing its trust and confidence in it, then the requirement is reasonable. If instead this is a requirement that the bank in some way expressly accept its role as fiduciary, then the requirement is too stringent. Courts adhering to this requirement may be clinging to agency or contract principles where acceptance is necessary.[75] With the equitable doctrine under consideration, there need not be an express agreement if the relationship is one of trust and confidence in fact.[76] The bank need only act for the customer by giving him advice, for example.[77] If it is reasonable for the customer to place his trust and confidence in the bank, the bank may be deemed to have accepted that trust and confidence.[78] Thus, the bank's subjective role in the relationship can be inferred from the circumstances, just as with the customer's role.[79]

The particular mix of the above factors in each case will determine whether a fiduciary duty will be imposed on the transaction. It is important to first determine whether a fiduciary relationship exists before the "taint" of the breach issue enters into it.[80] To the court's credit, it appears the *Kurth* decision reflected an appreciation of this difference when it was stated that there was no duty, but even if there was, there was no breach.[81] Factors such as the customer's knowledge, education and experience, mental strength, and age, along with a determination of the nature and length of his

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deira underscores this point since the assumption of duty was a theme running through the Kansas case. *See* Denison State Bank v. Madeira, 230 Kan. 684, _, 640 P.2d 1235, 1243-44 (1982). *See also* Paskas v. Illini Federal Savings and Loan Ass'n, 109 Ill. App. 3d 24, _, 440 N.E.2d 194, 199 (1982).

75. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1958); RESTATEMENT OF CONTRACTS § 50 (1981).

76. W. SELL, SELL ON AGENCY § 1 (1975). *Cf.* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3 (1964) (legal consequences of an act by an agent determined by rules of law and not intent).

77. *See* Stewart v. Phoenix Bank, 49 Ariz. 34, _, 64 P.2d 101, 106 (1937); Hooper v. Barnett Bank, 474 So. 2d 1253, 1258 (Fla. Dist. Ct. App. 1985); Earl Park State Bank v. Lowmon, 92 Ind. App. 25, _, 161 N.E. 675, 677 (1928); Pigg v. Robertson, 549 S.W.2d 597, 600-01 (Mo. Ct. App. 1977); Deist v. Wachholz, 678 P.2d 188, 193-94 (Mont. 1984).

78. *See, e.g.*, First Nat'l Bank v. Brown, 181 N.W.2d 178, 182 (Iowa 1970) (banker should have known that the customer trusted him implicitly); Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 24 (Colo. Ct. App. 1981) (did lender accept or *invite* customer's trust); Warsofsky v. Sherman, 326 Mass. 290, _, 93 N.E.2d 612, 615 (1950) (bank *impliedly* at least understood the confidential nature of information imparted).

79. *See, e.g.*, Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984).

80. *See supra* note 19. *Compare* Deist v. Wachholz, 678 P.2d 188 (1984) (upheld a finding of breach of fiduciary duty when bank officer became a secret partner of purchaser of ranch from borrower) *with* Baylor v. Jordan, 445 So. 2d 254 (Ala. 1984) (no breach of duty when bank president made secret agreement with purchaser of shares from borrower to purchase them from him). The court found no duty to exist in the first place in the latter case. *Id.* at 255. If it had not, the difference would have been inexplicable.

81. *See* Kurth v. Van Horn, 380 N.W.2d at 698. It would have been more helpful had the court segregated the two issues by more than a comma.

association with the bank, should be taken into account when addressing the issue of existence of fiduciary relationships. These are the objective criteria and will provide a more complete and accurate picture of the relationship between bank and customer.

III. Fiduciary Duties

A. *The Need for a Fiduciary Duty*

The court in *Madeira* made a strong argument against imposition of a fiduciary duty upon banks.[82] It was stated that such an imposition "would put an intolerable obligation upon banking institutions and convert ordinary day-to-day business transactions into fiduciary relationships where none were intended or anticipated."[83] On the other hand, present-day commercial transactions are not, as in past generations, primarily for cash; rather, modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer.[84]

There does not seem to be anything ordinary or day-to-day about going behind a closed door and divulging information sufficient to allow the bank to make an informed decision about one's creditworthiness.[85] The bank should understand that the information is to be used for no other purpose than to make this determination, and certainly not to use it to the customer's disadvantage.[86] After all, "[b]anks present a constant invitation to intending borrowers, and thus subject themselves to whatever implication or obligation is to be drawn from that fact."[87] The name many banks choose might itself suggest that placement of trust or confidence in it is not unwarranted; "trust," "security," "guarantee," and "fidelity" are not uncommon names above a bank door.[88] These institutions do not seem to be just another corporation where we do business, we entrust our financial security there.[89] Therefore, as long as the customer's actions are reasonable, perhaps it is reasonable to lift the ethics of bankers beyond mere business interests

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82. Denison State Bank v. Madeira, 230 Kan. 684, _, 640 P.2d 1235, 1243 (1982).

83. *Id.*

84. Stewart v. Phoenix Nat'l Bank, 49 Ariz. 34, _, 64 P.2d 101, 106 (1937).

85. Warsofsky v. Sherman, 326 Mass. 290, _, 93 N.E.2d 612, 615 (1950). *Contra* Bank Computer Network Corp. v. Continental Ill. Nat'l Bank & Trust Co., 110 Ill. App. 3d 492, _, 442 N.E.2d 586, 594 (1982) (information given, although confidential, was such that is typically supplied to a creditor to aid in evaluating the creditworthiness of a prospective borrower).

86. *See id.*

87. M. L. Stuart & Co. v. Marcus, 124 Misc. 86, _, 207 N.Y.S. 685, 692 (Sup. Ct. 1924).

88. Lash v. Cheshire County Sav. Bank, Inc., 124 N.H. 435, _, 474 A.2d 980, 981 (1984).

89. *See id.* at _, 474 A.2d at 982.

to the benchmark of legal obligations,[90] even to protect the banks themselves.[91] Indeed, the modern trend in Iowa seems to be away from predatory philosophies in business relationships as these relate to agents and fiduciaries in general.[92]

B. *Fiduciary Duties of Banks*

It appears that even when a court is willing to find that a fiduciary relationship exists between bank and borrower, it is unwilling to define precisely what duty is created. While it is true that existence of a fiduciary duty depends entirely upon the facts and circumstances, courts are not so limited in determining breach of that duty. A look at those cases holding that a breach of fiduciary duty has occurred, or at least that a jury question was created on the issue, will show that certain classifications of duty are identifiable. These classifications are borrowed from the substantive fiduciary law of agency, trusts, and corporations. The fact that other doctrines must be called upon in order to find what duties attend a relationship of trust and confidence has generated criticisms for this approach.[93] These principles are well established, however, and should be incorporated into the doctrine under discussion.

As a general proposition, the fiduciary owes a duty of complete loyalty, honesty, and good faith.[94] This general statement of duty may be broken down into more specific duties including: 1) the duty to disclose[95] or 2) not

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90. *Cf.* Miller v. Berkoski, 297 N.W.2d 334, 340 (Iowa 1980) (describing impact of modern decisions on honest agents and fiduciaries).

> 91. If the information furnished by the applicant for a loan is to be seized upon immediately by the bank official to whom it is given and if by virtue of the information he can purchase the property behind the back of the applicant, then the public confidence in such institutions will be seriously impaired if not utterly destroyed. In any event, an applicant for a loan ought not to be subjected to such risks. A bank official to whom an application for a loan is made must act fairly and impartially toward the bank and toward the applicant. He is prohibited from deriving any personal gain at the expense of the applicant . . . .

Warsofsky v. Sherman, 326 Mass. 290, _, 93 N.E.2d 612, 616 (1950).

92. *See* Miller v. Berkoski, 297 N.W.2d 334, 340 (Iowa 1980).

93. *See* Budnitz, *The Sale of Credit Life Insurance: the Bank as Fiduciary*, 62 N.C.L. REV. 295, 318-19 (1984).

94. *Cf.* Midwest Management Corp. v. Sephens, 353 N.W.2d 76, 80 (Iowa 1984) (director's duty towards corporation); *accord* Rowen v. Le Mars Mutual Ins. Co., 282 N.W.2d 639, 649 (Iowa 1979); Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 525 (Iowa 1974); Holden v. Construction Mach. Co., 202 N.W.2d 348, 358 (Iowa 1972); Gord v. Iowana Farms Milk Co., 245 Iowa 1, 16-17, 60 N.W.2d 820, 829 (1953); Des Moines Bank & Trust Co. v. George M. Bechtel & Co., 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952).

This duty has also been stated as a duty to perform duties with "diligence, honesty, and the utmost good faith." First Nat'l Bank v. One Craig Place, Ltd., 303 N.W.2d 688, 695 (Iowa 1981); Des Moines Bank & Trust Co. v. George M. Bechtel & Co., 243 Iowa at 1081, 51 N.W.2d at 216.

95. *Cf.* Miller v. Berkoski, 297 N.W.2d 334, 338 (Iowa 1980) (duty of agent to make full,

to disclose as the case may be;[96] 3) the duty to not engage in self-dealing;[97] 4) not to act for an adverse party;[98] 5) not to appropriate a beneficiary's opportunity;[99] and 6) the duty of diligent service or stewardship.[100] The following examples show that often more than one duty has been breached. For example, nearly all breaches of duty could be cast in terms of the duty to disclose since a fiduciary acting in "perfect candor"[101] would not conceal the fact that it had engaged in self-dealing or had not been diligent in its obligations (though few probably would not do so). One breach of duty will be emphasized at a time for the purposes of this discussion.

1. *Disclosure*

A bank must disclose to a customer facts which the customer in good conscience is entitled to know.[102] The circumstances vary considerably when considering a breach of this type but examples are helpful. In *Hooper v. Barrett Bank*,[103] an action, based in part on breach of the fiduciary duty of disclosure by a bank in Florida, was brought by a borrower to cancel a promissory note.[104] A loan officer at the bank approved a loan to the bor-

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fair, and prompt disclosure of material facts).

96. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 395 (1958) (agent's duty not to communicate confidential information); RESTATEMENT (SECOND) OF TRUSTS § 171(1) Comment(s) (1959) (duty of trustee not to disclose).

97. *Cf.* Holden v. Construction Mach. Co., 202 N.W.2d 348, 358 (Iowa 1972) (duty of corporate director to avoid self-dealing).

98. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 391 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge."). *Accord* Darling v. Nineteen-Eighty Corp., 176 N.W.2d 765, 768 (Iowa 1970) (duty of bank officer as agent not to become a common agent with respect to customer-seller and third party-buyer).

99. *Cf.* Rowen v. Le Mars Mutual Ins. Co., 282 N.W.2d 639, 660 (Iowa 1979) (citing to Schildberg Rock Products Co. v. Brooks, 258 Iowa 759, 766-67, 140 N.W.2d 132, 137 (1966), where the rule from *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (1939) was adopted by the Iowa court. That rule is that a corporate fiduciary may not appropriate for himself a business opportunity which in all fairness belongs to the corporation)).

100. *Cf.* Liska v. First Nat'l Bank, 322 N.W.2d 892, 894 (Iowa Ct. App. 1982) (professional fiduciary owes beneficiary a duty to act in a manner commensurate with the degree of skill it represents it possesses—fiduciary acted as an estate planner); *In re* Weise's Estate, 257 N.W.2d 1, 6 (Iowa 1977) ("[W]ith respect to assets coming into the hands of a fiduciary, there is an additional duty to act more cautiously than would be expected in the management of its own property; furthermore, a bank normally engaged in a fiduciary capacity must exercise the skill and knowledge ordinarily possessed by such professionals."). *See* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); RESTATEMENT (SECOND) OF AGENCY § 379 (1958).

101. *Cf.* First Nat'l Bank v. One Craig Place, Ltd., 303 N.W.2d 688, 695 (Iowa 1981) (citing Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 402-03, 107 N.W. 629, 632 (1906) (duty of corporate promoters "to act in good faith and to deal . . . in perfect candor.").

102. *See* RESTATEMENT (SECOND) OF AGENCY § 381 (1958); RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977). *See generally* Annot., 70 A.L.R.3d 1344 (1976).

103. 474 So. 2d 1253, 1259 (Fla. Dist. Ct. App. 1985).

104. *Id.* at 1254.

rower for the purpose of investing in a third party who was also one of this same loan officer's accounts, and whose financial condition was well known to the loan officer.[105] Days before the loan was made, the loan officer warned the third party to get funds into his account because of a large amount of uncollected funds and his delinquent loan payments.[106] In addition, the loan officer knew that the IRS was investigating the third party, and bank officials were suspicious of and had taken steps to protect themselves against a possible check-kiting scheme by the third party.[107] The trial court had granted the bank's motion for a directed verdict but the Florida Court of Appeals reversed.[108] Essentially, the loan officer undertook to give the borrower financial advice concerning the third party and the bank was at the time trustee of the borrower's trust so that a confidential relationship was present.[109] This relationship was breached when the bank had knowledge of material facts it was required to disclose and failed to disclose them.[110]

The *Hooper* case brings up the potentially conflicting duties of disclosure of material information to the customer, on the one hand, and of nondisclosure of the financial condition of a bank's customer, on the other; in this case the third party's financial condition.[111] The Florida court favored resolving this conflict by having the jury weigh the duty to the borrower to disclose against the bank's duty of confidentiality to its customers.[112] The bank could also simply refuse to make the loan.[113] There are a few situations in which a bank could disclose financial information about its customers with impunity, for example when the customer consents, when the information is sought through lawful court order, and when the information is required pursuant to statute.[114] In other situations the bank is left with, quite simply, hard choices.

2. *Loyalty*

The duty to remain loyal to the principal contains various aspects but essentially the obligation is to refrain from becoming involved in transac-

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105. *Id.* at 1255.

106. *Id.*

107. *Id.*

108. *Id.* at 1256, 1259.

109. *Id.* at 1258.

110. *Id.*

111. *See id.* at 1259; *see also* Milohnich v. First Nat'l Bank, 224 So. 2d 759, 761 (Fla. Dist. Ct. App. 1969); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, _, 367 P.2d 284, 290 (1961); *see generally* Annot., 92 A.L.R.2d 900 (1963).

112. Hooper v. Barrett Bank, 474 So. 2d 1253, 1259 (Fla. Dist. Ct. App. 1985).

113. *Cf.* Richfield Bank & Trust Co. v. Sjogren, 309 Minn. 362, _, 244 N.W.2d 648, 652 n.2 (1976) (when duty to disclose depositor's fraudulent activity would breach duty not to disclose, bank should simply refuse to make loan).

114. Hagedorn, *Impact of Fiduciary Principles on the Bank-Customer Relationship in Washington*, 16 WILLAMETTE L. REV. 803, 828 (1980).

tions antagonistic to the customer.[115] A good illustration of breach of such a duty is found in *Deist v. Wachholz*.[116] Joan Deist inherited a large debt on the family ranch in Montana, and having little experience in real estate matters, Joan was advised by a family friend, who was also the president of Conrad National Bank of Kalispell, to completely liquidate her interest in the property.[117] Deist asked another officer of the bank, Paul Wachholz, to help her find a buyer, and he agreed to.[118] Deist eventually signed a contract for deed with a local real estate investor whom Wachholz had referred to her and who had been represented to Deist by Wachholz and others as a reputable buyer and that he was offering a good deal.[119] As it turns out, Wachholz and one other person were partners with the buyer.[120] The Montana Supreme Court affirmed the lower court's determination that a prima facie case for the existence of a fiduciary relationship was still found to be established as between the bank and Deist even though the court found no true agency relationship established.[121] Therefore, Wachholz had an obligation to fully inform Deist as to his involvement in the ranch purchase and not to do anything which would place her at a disadvantage.[122] The court framed the duty in terms of disclosure, but it is clear that Wachholz's involvement on the other side of the transaction brought about the need to disclose.[123]

Disloyalty can also take the form of self-dealing by the fiduciary.[124] In *Lash v. Cheshire County Savings Bank, Inc.*,[125] borrowers owed a debt to a business creditor who then made loan arrangements with a bank since the borrowers understood that part of the loan proceeds were to be used to reduce that indebtedness to the creditor.[126] The bank disbursed approximately $11,000 of the $35,000 to the borrowers and then, without authorization from the borrowers, credited the remaining $24,000 to the creditor's

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115. Pigg v. Robertson, 549 S.W.2d 597, 600 (Mo. Ct. App. 1977); RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

116. 678 P.2d 188 (Mont. 1984).

117. *Id.* at 190.

118. *Id.* at 190-91.

119. *Id.*

120. *Id.*

121. *Id.* at 193-94.

122. *Id.* at 195.

123. *Id.*

124. *See supra* note 98. In *Darling v. Nineteen-Eighty Corp.*, 176 N.W.2d 765, 768 (Iowa 1970), the farm owner was at the time residing in Florida and desirous of selling a farm. *Id.* at 766. He entrusted the matter to a vice-president and trust officer at Central National Bank & Trust Company of Des Moines who had represented and advised the farm owner before in the establishment of trusts and also in the administration of his family's affairs. *Id.* at 766. The court viewed the relationship as confidential and fiduciary in character because of the ten year relationship between the farm owner and the bank officer. *Id.* at 768.

125. 124 N.H. 435, 474 A.2d 980 (1984).

126. *Id.* at _, 474 A.2d at 981.

account at the bank.[127] The New Hampshire court upheld the jury's finding that the bank's actions constituted a breach of fiduciary duty even though no breach of the loan contract was found.[128] This court saw a trend toward liberalizing fiduciary obligations in order to prevent unjust enrichment.[129] A quote cited by the court summarizes the court's views: "[O]nce a person becomes a fiduciary, the law places him in the role of a moral person and pressures him to behave in a selfless fashion . . . . [while] contract law does not go beyond the morals of the market place . . . [where] self interest is the norm."[130] Apparently the bank could not maneuver into a more favorable position with regard to the creditor's debt at the expense of its other borrower.

Closely related to self-dealing is another form of breach of loyalty, appropriation of a customer's opportunity.[131] This is illustrated by the Massachusetts case of *Warsofsky v. Sherman*.[132] A member of a bank's loan committee learned of an offer to sell real property from a loan applicant who was going to use the loan to repurchase the property from another bank.[133] The loan committee member used the information gained from the prospective borrower to buy the land for his wife shortly after the meeting with the customer.[134] The court in *Warsofsky* drew on the constructive trust device and stated that "[t]here is jurisdiction in equity to prevent, by means of the remedial device of a constructive trust, unjust enrichment arising out of a

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127. *Id. Contra* Bankcom v. Continental Illinois Nat'l. Bank & Trust Co., 110 Ill. App. 3d 492, _, 442 N.E.2d 586, 594 (1982) (no fiduciary duty breached when bank set off against past due notes entire balance of corporate customer's checking account during negotiations for renewal of those notes).

128. *Id.* at _, 474 A.2d at 982.

129. *Id.* at _, 474 A.2d at 981 (citing Cornwell v. Cornwell, 116 N.H. 205, 209, 356 A.2d 683, 686 (1976)).

130. *Id.* (quoting Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 830 (1983)). *See* BOGERT, TRUSTS AND TRUSTEES § 543 (2d ed. 1978) (citing Meinnard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). *But see* Bale v. Mammoth Cave Production Credit Association, 652 S.W.2d 851 (Ky. 1983) (breach of fiduciary duty is no affirmative defense to an action on a promissory note even had the bank misrepresented the borrower's financial condition to the borrower and his partners so they would delay bankruptcy proceedings until lender's second mortgage was no longer in jeopardy of being set aside as a preferential transfer). *Cf.* Ward v. Worthen Bank & Trust Co., 681 S.W.2d 365 (Ark. 1984) (inaction by bank after default of third party, on notes assigned to third party by borrower and upon which borrower was still liable to bank, not a defense on the notes, even though the inaction was to insure that an assignment by the third party of royalties to the bank would not be jeopardized in bankruptcy).

131. *Cf.* Holden v. Construction Mach. Co., 202 N.W.2d 348, 358 (Iowa 1972) (duty of officers and directors to the corporation and its stockholders: "They are thus required to at all times act in utmost good faith, and must exercise powers held for the sole benefit of the corporation and its stockholders, never for their personal gain. Equity holds them strictly accountable as trustees.").

132. 326 Mass. 290, 93 N.E.2d 612 (1950).

133. *Id.* at _, 93 N.E.2d at 614.

134. *Id.* at _, 93 N.E.2d at 614-615.

breach of a fiduciary relation."[135] A bank or its agent appropriating a customer's opportunity after learning of it via disclosure by the customer is fairly typical in these cases.[136]

3. *Stewardship*

The final duty apart from disclosure and loyalty is what might be called the duty of diligence or stewardship.[137] The fiduciary must act in the beneficiary's best interest and must act for him with care.[138] A bank failed to and was held accountable in *Smith v. Saginaw Savings & Loan Ass'n*.[139] The Smiths obtained a construction loan from the bank.[140] Sauer was branch manager and the only bank official with whom the Smiths dealt since they were elderly and lived 250 miles away.[141] Mr. Smith had been ill and recently hospitalized, so they completely relied on Sauer.[142] Sauer assured the Smiths that the bank would make sure that construction work was completed before progress payments were released.[143] Sauer had approved of the builder, the building agreement, and the building specifications.[144] Citing all of these factors, the court affirmed the lower court's denial of the bank's motion for a directed verdict, and found that the facts "plainly established the existence of a fiduciary obligation and breach thereof" when the builder became bankrupt without finishing the home.[145] Sauer knew of the financial difficulties the builder was having, but still released funds for work not fully completed and even had taken steps to protect his interests in his own home which was being built by the same contractor at the same time, while failing to do the same for the Smiths.[146]

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135. *Id.* at _, 93 N.E.2d at 615. *Contra* Cohn v. Jefferson Sav. & Loan Ass'n, 349 S.W.2d 854, 859 (Mo. 1961) (no need for constructive trust in "hardfisted, cold-blooded deal").

136. *See* Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. Ct. App. 1981); Pigg v. Robertson, 549 S.W.2d 597 (Mo. Ct. App. 1977). For a combination of self-dealing and appropriation of borrower opportunity, see Henkin, Inc. v. Berea Bank & Trust Co., 566 S.W.2d 420 (Ky. Ct. App. 1978).

137. *See supra* note 100 and accompanying text.

138. *Id. See* IOWA CODE § 633.160 (1985).

139. 94 Mich. App. 263, 288 N.W.2d 613 (1980).

140. *Id.* at _, 288 N.W.2d at 614.

141. *Id.* at _, 288 N.W.2d at 615.

142. *Id.*

143. *Id.*

144. *Id.* at _, 288 N.W.2d at 618.

145. *Id.*

146. *Id.* Cases involving construction lenders have developed into a sub-category, that of the fiduciary duty of construction lenders to disburse proceeds carefully. For cases holding that a fiduciary duty exists see Smith v. Saginaw Sav. & Loan Ass'n, 94 Mich. App. 263, 288 N.W.2d 613 (1980); D'Aubin v. Mauroner-Craddock, Inc., 262 La. 350, 263 So. 2d 317 (1972); M.S.M. Corp. v. Knutson Co., 283 Minn. 527, 167 N.W.2d 66 (1969); Bollinger v. Livingston State Bank & Trust Co., 187 So. 2d 784 (La. Ct. App. 1966). *But see, e.g.*, Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wash. App. 456, _, 656 P.2d 1089, 1094 (1982) (no fiduciary duty since no extra

There are various duties comprising the term fiduciary duty; such as disclosure or nondisclosure, loyalty, and diligence. These are spread throughout the substantive law of other areas, but need to be pulled together and applied to the relationships of trust and confidence which often develop between banks and their customers. These duties are familiar to banks based on their experiences as agent, trustee, executor or administrator, or guardian or conservator,[147] but no bank can be expected to fulfill its duties to its customers if it cannot identify what its duties are. A systematic approach to both the issue of existence of fiduciary duties and breach thereof is needed.[148]

C. *Purpose of Fiduciary Duty*

The main reason for imposing the duties listed above upon a bank seems to be to put the relationship "beyond the reach of temptation and the enticement of illicit profit."[149] For this reason, once a fiduciary relationship has been established, and breach alleged, the burden shifts to the fiduciary to show proper discharge of duty.[150] In this way beneficiaries may accept the constant invitation on the part of the bank to relax the care and diligence they would ordinarily use in an arms-length transaction to make sure that the other party was not taking advantage of them.[151]

D. *Scope of the Duty*

All bank employees are also under a duty as agents of the bank.[152] Even an *apparent* bank employee may be under a fiduciary duty to a bank customer.[153] It has been stated that as long as a bank and some of its officers

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services other than lender, no control over construction, borrower did not ask about financial problems of lender); Daniels v. Big Horn Fed. Sav. & Loan Ass'n, 604 P.2d 1046 (Wyo. 1980). The difference in these cases seems to be whether any additional responsibility was assumed by the lender other than the responsibility to disburse proceeds.

147. *See supra* note 18 and accompanying text.

148. Budnitz, *The Sale of Credit Life Insurance: The Bank as Fiduciary*, 62 N.C.L. REV. 295, 326 (1984).

149. Des Moines Bank & Trust Co. v. George M. Bechtel & Co., 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952).

150. Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 647 (Iowa 1979) (citing Perlman v. Feldmann, 219 F.2d 173, 177 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955)); Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 525 (Iowa 1974); Gord v. Iowana Farms Milk Co., 245 Iowa 1, 18, 60 N.W.2d 820, 829 (1953). *See* Holden v. Construction Mach. Co., 202 N.W.2d 348, 357 (Iowa 1972); Des Moines Bank & Trust Co. v. George M. Bechtel & Co., 243 Iowa 1007, 1081, 51 N.W.2d 174, 216 (1952). *But see* Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 235 (Iowa 1983) (burden does not shift automatically) (real estate broker and seller agency relationship).

151. Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 24 (Colo. Ct. App. 1981).

152. *See* Henkin, Inc. v. Berea Bank & Trust Co., 566 S.W.2d 420, 424 (Ky. Ct. App. 1978).

153. *See* Pigg v. Robertson, 549 S.W.2d 597, 600-01 (Mo. Ct. App. 1977).

owed a fiduciary duty to a borrower, any other officer involved in the same transaction also owed a duty to the borrower as long as the duty imposed did not extend beyond the scope of the bank's or the officer's association with the transaction.[154] As can be seen in the customer opportunity cases cited above, the duty can extend to *prospective* borrowers as well as current borrowers.[155]

IV. Conclusion

The issue is not *if* banks should be held accountable as fiduciaries, but under what circumstances they are so held. Depositors should not expect fiduciary treatment if a deposit is the extent of their relationship with a bank.[156] But other customers sometimes have a right to expect such treatment.[157] If certain objective factors are present, fiduciary obligations necessarily follow.[158] Still, many courts refuse to impose such a duty upon banks even in the presence of many of the factors generally regarded as necessary for the establishment of a fiduciary relationship.[159] Part of the reason may be that these courts fail to treat the existence issue separate from the breach issue.[160] Or perhaps they still regard fiduciary relationships as exclusively an express arrangement between bank and customer since that has been the traditional way in which these duties have arisen.[161] It could be that in the absence of clearly established criteria, courts are unwilling to impose fiduciary obligations upon banking transactions as a matter of policy. It seems likely that any bank customer who lacks knowledge or experience, expertise, or education in financial matters, or suffers from infirmities of health or old age, or has dealt with the same bank in a variety of ways over a number of years, is relying on the bank to act with his best interests in mind.[162] When the customer thus lets down his guard, the position of the bank becomes one of domination and influence.[163] It is this more powerful position from which the opportunity for abuse originates. It is under these circumstances that the customer needs the protection that fiduciary obligations can afford.

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154. Deist v. Wachholz, 678 P.2d 188, 194 (Mont. 1984). While this reasoning could be viewed expansively to hold any innocent employee liable for the breach of duty of a co-worker, the court maintained that this holding was limited by the agency principle that an agent of a disclosed principal is not liable for the conduct of other agents unless he is at fault in cooperating with them. *Id.* at 194. *See* Restatement (Second) of Agency § 358(1) (1957).

155. *See supra* notes 125-30 and accompanying text.

156. *See supra* note 15 and accompanying text.

157. *See supra* note 14 and accompanying text.

158. *See supra* note 17 and accompanying text.

159. *See, e.g.*, Pulse v. North Am. Title Co., 707 P.2d 1105, 1110 (Mont. 1985); Busby v. Parish Nat'l Bank, 464 So. 2d 374, 379 (La. Ct. App. 1985).

160. *See supra* notes 29-34 and accompanying text.

161. *See supra* notes 18, 75 and accompanying text.

162. *See supra* notes 56-79 and accompanying text.

163. *See supra* notes 67-68 and accompanying text.

It is not at all clear what harm could be brought about by making sure that banks make full disclosure to customers, that they do not take advantage of their close relationship with customers, or act adversely towards them, or by making sure that banks act diligently in handling their customer's affairs.[164] Since banks often enter into these same types of relationships in their "professional" fiduciary capacity,[165] they have a vast amount of experience to draw upon in order to properly discharge their fiduciary duty toward customers when they enter into them "nonprofessionally." But the various factors giving rise to these obligations must be approached in a systemized manner so that banks are able to recognize when a bank-customer relationship has evolved into a relationship of trust and confidence.[166] It is true that no formula exists for determining when a particular mix of factors has so evolved since each transaction differs,[167] but as long as the factors themselves are identified, the bank can be alert to the possibility and act accordingly. Once a fiduciary relationship is identified, there must be clearly cognizable duties under which the diligent banker may operate. Only then will it be fair to both parties to the transaction to go beyond the morals of the marketplace.[168]

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164. *See supra* notes 93-147 and accompanying text.
165. *See supra* note 18 and accompanying text.
166. *See supra* note 148 and accompanying text.
167. *See supra* note 17 and accompanying text.
168. *See supra* notes 83-92 and accompanying text.