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## Lender Liability—Banks as Fact-Sensitive Fiduciaries: It's All in the Pleadings

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## **Lender Liability—Banks as Fact-Sensitive Fiduciaries: It's All in the Pleadings**

### **Erratum**

A printing error caused a sentence beginning at the bottom of page 895 to read incorrectly. The sentence should read as follows: "More importantly, the court did not find it relevant that the Bank had followed a practice of informing its customers when their credit life policies had lapsed." The UALR Law Review extends its apologies to the author.

LENDER LIABILITY—BANKS AS “FACT-SENSITIVE FIDUCIARIES:”  
IT’S ALL IN THE PLEADINGS. *Mans v. Peoples Bank*, 340 Ark. 518, 10  
S.W.3d 885 (2000).

## I. INTRODUCTION

When a traditional, formal fiduciary relationship is not in existence, courts have consistently relied on the facts and circumstances of the case to determine the scope of the relationship. However, courts have not consistently reached the same result or applied the same standards when dealing with a bank and its customer. This area of the law is, therefore, vague and imprecise. On one hand, customers find it difficult to prove that a bank owed them any special duty. At the same time, lenders may be left wondering what conduct on their part is permissible without subjecting themselves to the possibility of liability under a non-traditional fiduciary standard. Furthermore, when a bank engages in the sale of credit life insurance to its customers, a bank may bring itself into the realm of agency law, making it easier for a court to find a fiduciary duty. The Arkansas Supreme Court recently recognized the importance of pleading specific facts in order to establish a fiduciary-like relationship between a bank and its customer in *Mans v. Peoples Bank*.<sup>1</sup>

The note begins by detailing the state of affairs that resulted in this case coming before the Arkansas Supreme Court. The note then addresses how courts typically treat a bank-customer relationship, followed by a discussion of the circumstances that may result in the finding of a non-traditional fiduciary relationship. By way of illustration, the note then provides examples of cases in which courts were faced with the issue of what duty a bank owed to its customer. Next, the note examines the Arkansas Supreme Court’s reasoning for its decision in *Mans*. Finally, the note addresses the significance of this case for future plaintiffs who claim that their bank owed them a duty in a certain situation, as well as for the banks defending those claims.

## II. FACTS

Laverne and Jimmie Mans, husband and wife, borrowed money to finance home improvements from the Peoples Bank of Imboden (“the Bank”).<sup>2</sup> They executed a promissory note in the amount of \$25,949.55 on June 21, 1993.<sup>3</sup> This was not the first time Mr. and Mrs. Mans had

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1. 340 Ark. 518, 10 S.W.3d 885 (2000).

2. See *Mans v. Peoples Bank*, 340 Ark. 518, 519, 10 S.W.3d 885, 886 (2000).

3. See *id.*, 10 S.W.3d at 886.

done business with the Bank.<sup>4</sup> In fact, they had been banking with the Peoples Bank since Mrs. Mans moved to Imboden in 1974.<sup>5</sup> Despite such a long relationship, Mrs. Mans had not actually visited the Bank on many occasions.<sup>6</sup>

Mr. and Mrs. Mans had previously taken out a loan from the Bank on their house and property in September of 1984 for just over \$10,000.<sup>7</sup> At that time, they also took out a credit life policy on the note.<sup>8</sup> In November of 1991, they obtained a second loan through the Bank.<sup>9</sup> The Manses did not take out credit life insurance on this note, nor did they discuss purchasing it.<sup>10</sup>

Mrs. Mans testified that prior to executing the June 1993 loan, which is the loan involved in this lawsuit, she told an employee of the Bank, Janet Clark, to make sure that she and her husband had a credit life policy in effect.<sup>11</sup> Mrs. Mans stated that they took out the credit life policy because they were aging; therefore, they felt they needed insurance that would pay off the loan in case anything was to happen to either of them.<sup>12</sup>

When the Manses executed the June 1993 loan, they also signed a Truth-in-Lending Disclosure, which informed them that they had the option to purchase credit life insurance.<sup>13</sup> Because they had already decided that they needed this insurance, the Manses obtained a policy through the Bank, which acted as an agent for American Pioneer Life Insurance Company.<sup>14</sup> As agent, the Bank received thirty to forty percent of credit life insurance premiums.<sup>15</sup>

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4. See Abstract and Brief of Appellant at 4, *Mans v. Peoples Bank*, 340 Ark. 518, 10 S.W.3d 885 (2000) (No. 99-773).

5. See *id.*

6. See *id.* at 8.

7. See *id.* at 5.

8. See *id.*

9. See *id.* at 6.

10. See Abstract and Brief of Appellant at 8, *Mans* (No. 99-773). Mrs. Mans stated that whenever she and her husband were in need of money, they jointly decided whether to borrow from the Bank. See *id.* at 11. Then, Mrs. Mans went on to state that her husband would call the Bank, and someone from the Bank would say something such as, "Well, yeah, Jim, we'll fix you right up, go get what you want and then come on in, we'll get you fixed up." *Id.*

11. See *id.* at 7.

12. See *id.* at 6.

13. See *id.* at 1.

14. See *Mans*, 340 Ark. at 519, 10 S.W.3d at 886.

15. See Abstract and Brief of Appellant at 12, *Mans* (No. 99-773).

Both the promissory note and the credit life policy had terms of two years.<sup>16</sup> The Manses financed the credit life policy annual premium of \$1054.55, along with the note, based on a ten-year amortization schedule.<sup>17</sup> Under this financing arrangement, the Manses would make monthly payments in the amount of \$351.70 for twenty-three months, with the balance of \$21,666.72 due two years later on June 21, 1995.<sup>18</sup> When the note matured, the Manses did not have the money to pay the balance.<sup>19</sup> Therefore, Mr. Mans went to the Bank alone and negotiated an extension on the note.<sup>20</sup> On this same date, the credit life insurance policy also expired.<sup>21</sup>

The chief executive officer of the Bank, Preston Clark, testified in his deposition that customers of the Bank rely on the Bank for certain services.<sup>22</sup> Although Mrs. Mans never testified that she was aware of such a practice, Mr. Clark stated that the Bank had an unwritten policy of notifying customers when a credit life policy had lapsed at the same time that a note had matured.<sup>23</sup> Despite such an unwritten policy, Mrs. Mans testified that neither she nor her husband ever received oral or written notice of the lapse.<sup>24</sup> The Manses did not in fact purchase another credit life policy,<sup>25</sup> but their monthly payments under the note remained the same.<sup>26</sup>

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16. See *Mans*, 340 Ark. at 519, 10 S.W.3d at 886.

17. See *id.* at 519-20, 10 S.W.3d at 886.

18. See Abstract and Brief of Appellant at 5, *Mans* (No. 99-773).

19. See Abstract and Brief of Appellee at 2, *Mans v. Peoples Bank*, 340 Ark. 518, 10 S.W.3d 885 (2000) (No. 99-773).

20. See Abstract and Brief of Appellant at 9, *Mans* (No. 99-773). Mrs. Mans testified that she did not know what was said between the Bank and her husband at this time, but she knew that her husband was certain that he had credit life insurance. See *id.*

21. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886.

22. See Abstract and Brief of Appellant at 13, *Mans* (No. 99-773).

23. See *Mans*, 340 Ark. at 526, 10 S.W.3d at 890. Mr. Clark also explained another practice of the Bank. See Abstract and Brief of Appellant at 13, *Mans* (No. 99-773). He stated that the Bank makes credit life available to its customers but cannot require them to purchase the coverage. See *id.* The Bank employee generally asks the customers whether they want credit life, tells them what the premium will be, and then lets them make the final decision as to whether to purchase. See *id.*

24. See Abstract and Brief of Appellant at 23, *Mans* (No. 99-773).

25. See Abstract and Brief of Appellee at 2, *Mans* (No. 99-773).

26. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886. Mrs. Mans testified that she assumed that the credit life policy had been extended because the payments were the same. See Abstract and Brief of Appellant at 10, *Mans* (No. 99-773). However, she also acknowledged that she knew the premium had been financed over ten years. See *id.*

After Mr. Mans died on July 23, 1997, Mrs. Mans discovered for the first time that the credit life policy had not been extended beyond the original two years.<sup>27</sup> When she asked the Bank to make a claim to the insurance company to pay off the balance of the note, the Bank informed her that the policy had lapsed over two years before on the same date that the note had expired.<sup>28</sup> Mrs. Mans testified that no one from the Bank had called to inform her or her husband that their policy needed to be extended, nor did they receive any letter from the Bank stating the same.<sup>29</sup> Although she had signed the disclosure statement stating that the policy was in effect for twenty-four months, she believed that the policy had been extended at the time the note was extended.<sup>30</sup> She stated that had she known that the policy had expired, she would have renewed it.<sup>31</sup>

On September 10, 1997, Mrs. Mans refinanced the note through the Arkansas Bank and paid off the balance to the Peoples Bank.<sup>32</sup> Nearly one year after her husband's death, Mrs. Mans filed suit against the Bank for negligence in failing to notify her that the credit life policy had expired.<sup>33</sup> Mrs. Mans sought judgment against the Bank in an amount equal to the balance due on the date of her husband's death, in addition to all payments that she had paid since that day, pre- and post-judgment interest, her costs, and a reasonable attorney's fee.<sup>34</sup> The Bank denied any liability in its initial answer to the complaint and later amended its answer to plead the doctrine of comparative fault.<sup>35</sup> The Bank stated that Mrs. Mans was either equally or more at fault than the Bank and should, therefore, be barred from recovery or receive a reduced recovery.<sup>36</sup>

A jury trial commenced in the Circuit Court of Lawrence County, Arkansas, on January 27, 1999.<sup>37</sup> After Mrs. Mans presented her case, the attorney for the Bank moved for a directed verdict on the ground that Mrs. Mans and the Bank had a relationship of debtor and creditor,

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27. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886.

28. See *id.*, 10 S.W.3d at 886.

29. See Abstract and Brief of Appellant at 7, *Mans* (No. 99-773).

30. See *id.* at 9.

31. See *id.* at 8.

32. See *id.* at 6. Mrs. Mans testified that she ended her twenty-three year relationship with the Bank after this incident because she felt that she had been treated unfairly and could no longer trust the Bank. See *id.*

33. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886.

34. See Abstract and Brief of Appellant at 2, *Mans* (No. 99-773).

35. See *id.* at 2-3.

36. See *id.* at 3.

37. See *id.* at 29.

and Mrs. Mans had not established proof of any relationship beyond debtor-creditor.<sup>38</sup> The Bank's attorney also turned the court's attention to the case of *Scott-Huff Insurance Agency v. Sandusky*<sup>39</sup> for the proposition that the insured is responsible for educating himself about his coverage.<sup>40</sup> As an alternate argument, the Bank argued that there was no proof that the Bank did *not* tell Mr. Mans that the policy had lapsed.<sup>41</sup> As a third basis for the motion, the Bank's attorney argued that before Mrs. Mans could file such a complaint, there had to be proof that she actually made a claim to the insurance carrier and was denied.<sup>42</sup>

In response to this motion, Mrs. Mans's attorney argued to the court that the Manses continued to pay the same monthly payment after the policy had expired.<sup>43</sup> Because of this fact, Mrs. Mans assumed that the policy had been extended, and she placed her trust in the Bank to inform her if the policy had expired.<sup>44</sup> In response to opposing counsel's third argument that there was no proof that Mrs. Mans had made a claim and been denied, counsel for Mrs. Mans stated that the Bank was the agent of the insurance company and, for all practical purposes, was the insurance company.<sup>45</sup>

The trial court granted the Bank's motion for directed verdict, finding that no duty existed on the part of the Bank under any negligence theory to inform the Manses that the credit life policy had lapsed.<sup>46</sup> Mrs. Mans appealed the decision to the Arkansas Court of Appeals on February 26, 1999.<sup>47</sup> She argued that the trial court erred in not finding a duty on the part of the Bank to notify her of a lapse in her credit life insurance policy.<sup>48</sup> The court of appeals transferred the case to the Arkansas Supreme Court on the basis that it was an issue of first impression, presenting the opportunity for the supreme court to address potential liability of lenders in such cases.<sup>49</sup>

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38. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886.

39. 318 Ark. 613, 887 S.W.2d 516 (1994).

40. See Abstract and Brief of Appellant at 14, *Mans* (No. 99-773).

41. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886. To support this contention, the Bank's attorney pointed out that Mr. Clark had no notes stating whether he did or did not tell Mr. Mans that the policy had lapsed. See Abstract and Brief of Appellant at 15, *Mans* (No. 99-773).

42. See Abstract and Brief of Appellant at 15, *Mans* (No. 99-773).

43. See *Mans*, 340 Ark. at 520, 10 S.W.3d at 886.

44. See *id.*, 10 S.W.3d at 886.

45. See Abstract and Brief of Appellant at 17, *Mans* (No. 99-773).

46. See *Mans*, 340 Ark. at 520-21, 10 S.W.3d at 886.

47. See Abstract and Brief of Appellant at 4, *Mans* (No. 99-773).

48. See *Mans*, 340 Ark. at 521, 10 S.W.3d at 886.

49. See Abstract and Brief of Appellant, *Mans* (No. 99-773) (the specific page to

### III. BACKGROUND

#### A. Bank-Customer Relationship Is Ordinarily Debtor-Creditor

Courts have generally found the relationship between a bank and its customers to be that of debtor and creditor.<sup>50</sup> In fact, when a customer deposits money in a bank, the Arkansas Supreme Court has stated that the relationship of debtor-creditor is "unquestionably the law."<sup>51</sup> A depositor is the bank's creditor to the extent of the funds deposited with the bank.<sup>52</sup> A depositor may also be a bank's debtor if the bank permits checking overdrafts.<sup>53</sup> This standard deposit contract is governed by the principles found in Part Four of Article Four of the Uniform Commercial Code.<sup>54</sup>

The customer's money on deposit at the bank becomes part of the bank's general fund, and the bank has the right to loan it to other bank customers.<sup>55</sup> The customer in turn has the right to have his debt repaid upon request or by virtue of the bank honoring the customer's checks written against the deposit.<sup>56</sup> The parties to the relationship are said to transact with one another at arm's length.<sup>57</sup> This relationship of rights and obligations thus creates a simple debtor-creditor relationship with no fiduciary implications.<sup>58</sup> Conversely, when the bank acts as a lender to the customer, the relationship changes; the bank is now the creditor, and the customer is the debtor.<sup>59</sup> Although the roles have reversed in

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which this sentence refers was not numbered but was placed between page (i) and (ii) of the abstract).

50. See Bruce E. H. Johnson, *Lender Liability Litigation Checklist: A Summary of Current Theories and Developments*, 59 U. MO. KAN. CITY L. REV. 205, 217 (1991). See, e.g., *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 654, 966 S.W.2d 894, 898 (1998); *Milam v. Bank of Cabot*, 327 Ark. 256, 265, 937 S.W.2d 653, 658 (1997); *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 346, 836 S.W.2d 853, 855 (1992).

51. See *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 347, 836 S.W.2d 853, 855 (1992) (quoting *Cherokee Carpet Mills v. Worthen Bank*, 262 Ark. 776, 561 S.W.2d 310 (1987)).

52. See BARKLEY CLARK, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* ¶ 2.01[1], at 2-3 (3d ed. 1990).

53. See *id.*

54. See *id.* This part of the UCC is codified at Arkansas Code Annotated sections 4-4-401 to -407 (Michie Repl. 1991).

55. See 5A EDITORIAL STAFF OF THE PUBLISHERS, *MICHIE ON BANKS AND BANKING*, at 15 (repl. vol. 1994).

56. See *id.*

57. See Johnson, *supra* note 50, at 217.

58. See *id.*

59. See Kenneth W. Curtis, *The Fiduciary Controversy: Injection of Fiduciary*



this situation, the relationship is still that of debtor and creditor with no fiduciary obligations involved.<sup>60</sup> Although the relationship of debtor and creditor is generally the rule in most courts, certain situations may call for a greater duty to exist on the part of the bank.<sup>61</sup>

## B. When the Relationship Between Bank and Customer Goes Beyond Debtor-Creditor to Impose a Fiduciary Duty on the Bank

Courts have typically found two broad categories that impose fiduciary duties: general or traditional fiduciary duties and specific or non-traditional fiduciary duties.<sup>62</sup> The determination of what type of relationship a certain situation embodies is important to the determination of what duties and obligations the parties owe to one another.<sup>63</sup> Although traditional fiduciary duties may not be implicated in the beginning of a bank-customer relationship, certain facts may later impose fiduciary-like duties on the bank.<sup>64</sup> The traditional fiduciary relationship is discussed first, followed by a discussion of the fact-sensitive fiduciary relationship.

### 1. *Traditional Fiduciary Relationships*

The concept of fiduciary duty traces its roots back to the English Court of Chancery.<sup>65</sup> The King of England granted the court authority to give relief where the law would not, based on principles of morality and fairness.<sup>66</sup> Because of the nature of this court, flexible, fact-specific principles of equity were created, rather than strict rules of law.<sup>67</sup>

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*Principles into the Bank-Depositor and Bank-Borrower Relationships*, 20 LOY. L.A. L. REV. 795, 803 (1987) (citing 2 THEODORE EISENBERG, DEBTOR-CREDITOR LAW 12 A-4 (1986)).

60. *See id.*

61. *See id.* at 800 (quoting *Umbaugh Pole Bldg. Co. v. Scott*, 390 N.E.2d 320, 323 (Ohio 1979), as an example of the general rule).

62. *See* David Unseth, *What Level of Fiduciary Duty Should Mortgage Brokers Owe Their Borrowers?*, 75 WASH. U. L.Q. 1737, 1739-40 (1997).

63. *See id.* at 1740.

64. *See id.*

65. *See* Cecil J. Hunt, II, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 WAKE FOREST L. REV. 719, 728 (1994). The English Court of Chancery's purpose was "to reflect the conscience of the King as seen through the moral considerations of the dictates of the church." *Id.*

66. *See id.*

67. *See id.* at 728-29.

A contract between two parties, such as principal-agent or attorney-client, can expressly create a traditional fiduciary role.<sup>68</sup> According to the Restatement of Torts, a fiduciary relationship exists when one person is under a duty to act on behalf of the best interests of another or offer advice for the benefit of the other upon certain matters that are within the scope of the parties' relationship.<sup>69</sup> Similarly, the Restatement of Trusts imposes on a fiduciary the duty of acting for the benefit of the other.<sup>70</sup> The fiduciary relationship imposes the highest duty owed under the law.<sup>71</sup>

Essential to the fiduciary relationship is acceptance on the part of the one called "fiduciary" of the specific obligations arising under the relationship.<sup>72</sup> Along with acceptance of this duty, a transfer of power takes place, subject to the limitation that the fiduciary use the power to maximize the interests of the beneficiary.<sup>73</sup> Fiduciaries are guided in their actions by principles of loyalty.<sup>74</sup> Under no circumstances should a fiduciary sacrifice the interests of his beneficiary to better his own interests,<sup>75</sup> and in a situation where the fiduciary's interests directly conflict with the interests of the beneficiary, the former must yield to the latter.<sup>76</sup>

In addition, the fiduciary must always act with the highest level of good faith and candor, must disclose to the beneficiary all relevant information, and must not profit from the relationship.<sup>77</sup> A fiduciary

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68. See *id.* at 731-32.

69. See RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979). The comment provides that "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Id.*

70. See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959). According to the comment, "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation." *Id.*

71. See Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMUL. REV. 315, 317 (2000).

72. See Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 27 (1992).

73. See *id.* at 27-28.

74. See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 909 (1993).

75. See *id.*

76. See Anderson, *supra* note 71, at 317.

77. See *id.* Justice Cardozo characterized the fiduciary relationship as follows:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and

would be violating his duty if he took any type of benefit for himself, such as a bribe or kickback, or delegated away the discretion entrusted to him by the beneficiary.<sup>78</sup> The more discretion that is given to him by the beneficiary, the larger the fiduciary duty he has.<sup>79</sup> Individuals with such fiduciary obligations are normally aware that they are not acting at arm's length with their respective beneficiaries.<sup>80</sup>

A traditional fiduciary relationship does not require the element of reliance on the part of the beneficiary.<sup>81</sup> Because of the fiduciary's heightened duty to act in the best interests of the beneficiary at all times, a fiduciary will be held liable for a breach of his duty whether or not the beneficiary actually relied on him and was harmed as a result.<sup>82</sup>

The concept of placing another's interest on the same footing or above one's own interests is contrary to human nature and explains why the law has reserved such fiduciary obligations for just a few formal relationships.<sup>83</sup> Some courts have, however, recently expanded the fiduciary principles to other types of non-traditional, or informal, fiduciary relationships where the facts establish a need for such an obligation.<sup>84</sup>

## 2. *Non-Traditional Fiduciary Relationships*

### a. Factors to Consider

In a traditional fiduciary case, the central issue is the determination of the exact scope of the fiduciary's duty.<sup>85</sup> In contrast, a court faced with a non-traditional fiduciary situation will shift its focus from the

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inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

*Id.* at 317-18 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

78. See Scallen, *supra* note 74, at 910.

79. See *id.*

80. See Schaumann, *supra* note 72, at 33-34.

81. See Hunt, *supra* note 65, at 731.

82. See *id.* As one scholar expressed this point, "[T]he law entitles the entrustor to rely on the fiduciary's trustworthiness. The entrustor is therefore not required to show that he actually relied on the fiduciary, and the fiduciary has the burden of justifying self-dealing transactions." Hunt, *supra* note 65, at 731 (quoting Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 824-25 (1983)).

83. See Anderson, *supra* note 71, at 318.

84. See Hunt, *supra* note 65, at 736.

85. See Schaumann, *supra* note 72, at 45.

scope of the fiduciary's duty to whether a fiduciary relationship even existed.<sup>86</sup> If such a relationship is established, then the court will typically find that the duty claimed was breached.<sup>87</sup> Perhaps the most significant difference between traditional and non-traditional fiduciary relationships is that the former are based on status of the one party in relation to the other, i.e. trustee-beneficiary, guardian-ward, etc., while the latter depend entirely on the facts of the particular situation.<sup>88</sup>

Despite the lack of specific rules defining what constitutes a non-traditional fiduciary relationship, the cases presented with the issue in the bank-customer context have articulated several factors that support a finding of such a relationship. For example, the giving of business advice by the lender, and in some instances, the lender's actual or constructive knowledge that the borrower relied on that advice are relevant to establishing a fiduciary duty.<sup>89</sup> Courts have also considered the length of the relationship and whether one party has improperly benefitted from the relationship.<sup>90</sup> The relative sophistication of the borrower as compared to the lender may also be relevant; for example, a court may require that a borrower be in a position of inequality, dependence, or weakness of age or mental capability as compared to the lender.<sup>91</sup> In considering whether this relative advantage of the lender is unfair to the borrower, the court should keep in mind all of the other surrounding circumstances.<sup>92</sup> For instance, if the lender does have an advantage over the borrower, but the borrower is still in a position to help himself despite this advantage, a duty may not be in order.<sup>93</sup> Finally, if a lender holds himself out to the borrower as possessing

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86. See *id.* at 46.

87. See *id.*

88. See Anderson, *supra* note 71, at 330. Non-traditional relationships are often characterized by words and phrases such as "placing faith in," "confidence" being "reposed," and relationships of "trust and confidence." See Scallen, *supra* note 74, at 922-23. However, these terms alone may offer little guidance for lenders. See *id.* at 923. The author calls such phrases "metaphors" and states that while metaphors can add vividness to an otherwise abstract concept, courts have become bound by words such as "trust" and "arm's length transactions." See *id.* To quote Justice Cardozo, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.* (quoting *Berky v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926)).

89. See Schaumann, *supra* note 72, at 52.

90. See *id.* at 60-61.

91. See Kenneth M. Lodge & Thomas J. Cunningham, *The Banker as Inadvertent Fiduciary: Beware a Borrower's Special Trust and Confidence*, 98 COM. L.J. 277, 286 (1993).

92. See *id.* at 294.

93. See *id.*

special knowledge or expertise, has made certain representations, or has failed to disclose certain information to the borrower, a duty may be created.<sup>94</sup>

Perhaps the most critical element in proving a non-traditional fiduciary relationship is a reposing of trust and confidence by one party in another such that the other will act in the best interest of the one who has placed his trust and confidence in him.<sup>95</sup> A borrower may also have to prove that the bank expressly or impliedly accepted the trust and confidence.<sup>96</sup> A court would be more likely to impose a duty on a lender if the lender knew or had reason to know that the borrower had placed trust or confidence in the lender.<sup>97</sup>

#### b. Case Examples from Other States

Because of the case-by-case, fact specific nature of the non-traditional fiduciary relationship, courts have reached varying results when a bank customer brings a suit against his bank for breach of some duty, for acting negligently or not acting at all. One scholar in the area places courts that have been faced with these issues into the following categories: a distinct minority of courts feel that fiduciary obligations should never be imposed in debtor-creditor relationships; a large majority have held that fiduciary obligations can arise in "special circumstances;" a small, controversial minority have held that the debtor-creditor relationship is at least "quasi-fiduciary;" and another small but respected minority have held that there are a number of "usual, normal, and discrete aspects" of the debtor-creditor relationship that impose a fiduciary obligation.<sup>98</sup>

One of the earliest cases to reflect a change in the attitude that the bank-customer relationship is strictly debtor-creditor is *Stewart v. Phoenix National Bank*.<sup>99</sup> The plaintiff, Frank Stewart, had been a customer of Phoenix National Bank for twenty-three years and had relied on officers of the bank for financial advice.<sup>100</sup> On several occasions, he had borrowed money from the bank and at one time owed the bank \$17,800.<sup>101</sup> The bank thus requested that he give it a mortgage

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94. See Johnson, *supra* note 50, at 219.

95. See Anderson, *supra* note 71, at 365-66.

96. See Lodge & Cunningham, *supra* note 91, at 291.

97. See Hunt, *supra* note 65, at 741.

98. See *id.*

99. 64 P.2d 101 (Ariz. 1937).

100. See *id.* at 104.

101. See *id.*

on some of his real estate to secure the debt.<sup>102</sup> Stewart's complaint alleged that the bank falsely represented to him that it did not actually want his property but had to secure the debt to satisfy certain banking requirements.<sup>103</sup> When Stewart could not repay the debt, the bank foreclosed on the property.<sup>104</sup> Stewart alleged that because of his confidential relationship with the bank and reliance on the bank's representation that it did not want his property, he had been induced to execute the mortgage.<sup>105</sup>

The Arizona Supreme Court stated that ordinarily no confidential relationship arises out of a debtor-creditor situation and noted that no other court had previously considered whether a bank and its customer could have a confidential relationship.<sup>106</sup> The court, although affirming a dismissal of the action on procedural grounds, recognized that Stewart had a cause of action against the bank based on a confidential relationship because the bank acted as his financial advisor for twenty-three years, and Stewart had relied on such advice.<sup>107</sup>

The Supreme Court of Montana has also traditionally held that the relationship between a bank and its customer is a debtor-creditor relationship; however, in *Deist v. Wachholz*,<sup>108</sup> the court made an exception.<sup>109</sup> After her husband died, the plaintiff, Joan Deist, obtained advice from the president of the bank, who also happened to be a family

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102. *See id.*

103. *See id.*

104. *See id.* at 105.

105. *See Stewart*, 64 P.2d at 104-05.

106. *See id.* at 106. "[A] confidential relationship giving rise to a fiduciary obligation may include any business, social, or purely personal relationship in which one party justifiably places trust and confidence in another to care for his or her welfare and interests." Anderson, *supra* note 71, at 316.

107. *See Stewart*, 64 P.2d at 106. Although the case was decided in 1937, the following language of the court seems quite modern:

It may have been that generations ago, when most commercial transactions were for cash, or at least consisted merely of personal obligations between vendor and purchaser, and the highly complicated modern structure of credit and corporate securities did not exist, that banks, which were originally merely places of security where a man might deposit his cash and valuables, did not, as such, hold any greater confidential relations with their clients than those between any other two businessmen. But times have changed. It is almost inconceivable that any man should engage in financial transactions of any magnitude in the modern time without having recourse to some bank not only as a place of safety to keep his money, but as a place where he might secure loans to conduct his business.

*Id.*

108. 678 P.2d 188 (Mont. 1984).

109. *See id.* at 193-94.

friend, as to what to do with the family ranch.<sup>110</sup> The vice-president of the bank, Paul Wachholz, found a buyer for Deist, but Deist did not know that Wachholz was also a partner in the purchase.<sup>111</sup> Deist sought to rescind the contract and claimed that Wachholz and the bank owed her a fiduciary duty.<sup>112</sup> The court found that there was evidence that the relationship between Deist and the bank went beyond that of debtor-creditor to a fiduciary relationship; the Deists had been customers of the bank for twenty-four years, and they had reposed trust and confidence in the advice of the bank's president.<sup>113</sup>

In *Denison State Bank v. Madeira*,<sup>114</sup> the Supreme Court of Kansas was not as sympathetic to the plaintiff's claim.<sup>115</sup> C.C. Madeira invested in a car dealership, owned by Tom King, that was in need of financial and management experience.<sup>116</sup> In order to make the investment, Madeira needed to obtain financing; thus, King introduced him to the bank with which he had done business.<sup>117</sup> In his dealings with the bank, Madeira was not fully informed about King's financial situation with the bank.<sup>118</sup> Thus, when the bank sued Madeira to recover on three promissory notes, Madeira counterclaimed that the bank owed him a fiduciary duty and breached it by failing to fully disclose King's financial situation.<sup>119</sup>

The court in this case found that no fiduciary relationship existed because Madeira was a sophisticated businessman and could have discovered the facts undisclosed to him through other readily available means.<sup>120</sup> While the court noted that fiduciary principles are equitable,

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110. See *id.* at 190.

111. See *id.* at 190-92.

112. See *id.* at 192.

113. See *id.* at 193-94.

114. 640 P.2d 1235 (Kan. 1982).

115. See *id.* at 1244.

116. See *id.* at 1237-38.

117. See *id.* at 1238.

118. See *id.* For example, there were \$15,000 of outstanding drafts for automobiles and a \$5000 overdraft in King's account with the bank. See *id.* In addition, Madeira had planned on using money from rebates that were to be paid by the car manufacturer to the dealership to pay off part of his initial loan. See *id.* at 1235. However, these rebates had already been pledged to King's uncle, as security for a loan that the uncle had made to King, and to the bank, as security for King's outstanding debt there. See *id.* at 1238-39.

119. See *id.* at 1237-38.

120. See *Denison State Bank*, 640 P.2d at 1243. "[O]ne may not abandon all caution and responsibility for his own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary." *Id.* at 1243-44.

incapable of precise definition, and determined on a case-by-case basis, it described a non-traditional fiduciary as having the confidence of the beneficiary, acting for the benefit of the beneficiary, and having influence or an advantage over the beneficiary.<sup>121</sup>

The court in *First National Bank v. Brown*<sup>122</sup> reached an opposite result in a situation somewhat similar to *Madeira*.<sup>123</sup> In that case, Dean Evans planned on selling his failing service station to Wyn Brown.<sup>124</sup> Evans had previously borrowed money from First National Bank, and the bank had taken substantial security interests on his property.<sup>125</sup> Brown planned on borrowing from the same bank in order to purchase the station, and throughout all of his negotiations and dealings with the bank, he was never informed of the bank's lien on the property.<sup>126</sup> In addition, Brown was not informed that part of the proceeds from his note would be applied to Evans's existing debt.<sup>127</sup> When Brown discovered these facts, he left the business, and the bank brought suit against him when his note became due.<sup>128</sup>

The court first noted that silence on the part of one party in an arm's length transaction, such as lender-borrower, is ordinarily not enough to impose a duty; however, if one party has superior knowledge of the situation, a duty may ensue to disclose all facts material to the transaction.<sup>129</sup> The court went on to hold that the bank did have such a duty in this case.<sup>130</sup>

The court in *Klein v. First Edina National Bank*<sup>131</sup> failed to find a fiduciary obligation on the part of the bank.<sup>132</sup> The plaintiff, Virginia Klein, had volunteered to pledge shares of her stock as collateral to enable her employer, Florence Schaub, to obtain a loan from the bank of which Klein was also a customer.<sup>133</sup> Klein testified that she did not

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121. See *id.* at 1241.

122. 181 N.W.2d 178 (Iowa 1970).

123. See *id.* at 183.

124. See *id.* at 180.

125. See *id.*

126. See *id.* at 180-81.

127. See *id.* at 181.

128. See *First Nat'l Bank*, 181 N.W.2d at 181. While the court did not explain more specifically why Brown left, it did state that after he discovered the liens on the business, he told Evans that he no longer wanted to have any connection to the business and then left. See *id.*

129. See *id.* at 182.

130. See *id.*

131. 196 N.W.2d 619 (Minn. 1972) (per curiam).

132. See *id.* at 623 (per curiam).

133. See *id.* at 621 (per curiam).



know that Schaub already owed the bank on another loan, nor did she know that Schaub had assigned to the bank an account receivable from her business.<sup>134</sup> Klein was also not aware that the bank was going to release the account receivable and use her stock alone as security.<sup>135</sup> However, Klein did not ask the loan officer any questions about the transaction and testified that she was very emotional and did not care enough to even read the documents before she signed them.<sup>136</sup> When the bank issued Klein a notice of foreclosure on her stock, she sued on the basis that failure to inform her of all the details of the transaction amounted to fraud.<sup>137</sup>

The court, however, did not agree with the plaintiff, despite the fact that she had been a customer of the bank for twenty years, maintained checking and saving accounts with the bank, rented a safety deposit box from the bank, obtained a mortgage for real estate from the bank, received the bank's assistance in transferring securities, and had socialized with the wife of the bank's president on several occasions.<sup>138</sup> The court stated that if the bank had known or had reason to know that Klein was placing her trust and confidence in the bank, the bank may have had a duty to disclose all facts relevant to the transaction.<sup>139</sup> In this case, however, the bank employee making the loan had not personally met the plaintiff.<sup>140</sup>

A California court at one time even went so far as to hold that a bank could be a "quasi-fiduciary" in some situations.<sup>141</sup> The same court later applied this holding to *Barrett v. Bank of America*.<sup>142</sup> In *Barrett*, the plaintiffs, owners of an electronics business, obtained a Small Business Administration loan and a line of credit with Bank of America.<sup>143</sup> They executed two personal guarantees to the bank to secure these loans.<sup>144</sup> About a month later, the plaintiffs technically defaulted on their loans because their company's liability-to-assets ratio did not meet the bank's

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134. See *id.* (per curiam).

135. See *id.* (per curiam).

136. See *id.* at 622 (per curiam).

137. See *Klein*, 196 N.W.2d at 622 (per curiam).

138. See *id.* (per curiam).

139. See *id.* at 623 (per curiam).

140. See *id.* at 622-23 (per curiam). For example, the bank employee did not know that the plaintiff was an alcoholic and lacked good judgment in financial matters. See *id.* at 622 (per curiam).

141. See *Commercial Cotton Co. v. United Cal. Bank*, 209 Cal. Rptr. 551, 554 (Cal. Ct. App. 1985).

142. 229 Cal. Rptr. 16 (Cal. Ct. App. 1986).

143. See *id.* at 17.

144. See *id.*

requirement.<sup>145</sup> The bank informed the plaintiffs that, if their company merged with another, the other company would be responsible for their loans, and their personal guarantees would be released.<sup>146</sup> However, when the company with which the plaintiffs' company merged filed for bankruptcy, the bank assigned the plaintiffs' guarantees to the Small Business Administration.<sup>147</sup> Because the bank did not honor its promise to release the plaintiffs' guarantees, the plaintiffs raised several causes of action against the bank, including fraud.<sup>148</sup>

The court found that there was substantial evidence to support a constructive fraud theory.<sup>149</sup> The court stated that constructive fraud generally arises in a situation where one party reposes trust and confidence in another; the court called this type of relationship confidential or fiduciary.<sup>150</sup> The court went on to state that a bank-depositor relationship is at least quasi-fiduciary.<sup>151</sup> However, after much criticism, the same court in a later decision considered the term "quasi-fiduciary" to be inappropriate.<sup>152</sup>

### c. Case Examples from Arkansas

The Supreme Court of Arkansas has also entertained the idea that a bank-customer relationship may go beyond that of debtor and creditor

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145. See *id.* at 17-18.

146. See *id.* at 18.

147. See *id.*

148. See *Barrett*, 229 Cal. Rptr. at 18.

149. See *id.* at 20. Because of this finding, the court of appeals held that the trial court committed reversible error in refusing to give the requested instruction on constructive fraud. See *id.* at 21.

150. See *id.* at 20.

151. See *id.*

152. See, e.g., Curtis, *supra* note 59, at 814-30 (criticizing *Commercial Cotton* for being without precedent in California and criticizing *Barrett* for misapplying the case law in the area of the bank-borrower relationship). The later decision that found "quasi-fiduciary" inappropriate is *Copesky v. Superior Court*, 280 Cal. Rptr. 338, 348 (Cal. Ct. App. 1991). The court in *Copesky*, however, did not say that a bank had no duty to its customers:

Our digest of the rule of *Commercial Cotton* might be stated as follows: The ordinary relationship between commercial bank and its depositor is such as to impose upon the bank a duty, derived from the obligation of good faith and fair dealing implied in all contracts, to refrain from intentional breaches of contract and from interjection of spurious and bad faith defenses to contract claims, which duty if breached will give rise to an action in tort with attendant entitlement to punitive damages.

*Copesky*, 280 Cal. Rptr. at 342.

in certain situations.<sup>153</sup> In *Marsh v. National Bank of Commerce*,<sup>154</sup> Robert Marsh and Gurvis Vines signed as guarantors on a promissory note in the amount of \$245,000.<sup>155</sup> Two years prior to this, Vines executed a note to the bank in the amount of \$420,000, and at the time Vines and Marsh signed as guarantors, Vines still owed a substantial portion of this note.<sup>156</sup> Marsh stated that if he had known about Vines's payment history on his note, he would not have signed as a co-guarantor with him because he was relying on Vines to pay the \$245,000 note if needed.<sup>157</sup> However, an employee of the bank testified that he told Marsh that Vines could not borrow from the bank without assistance and "had problems of his own."<sup>158</sup> Marsh also said that he only guaranteed the note "as a favor to the bank."<sup>159</sup>

Marsh claimed that the bank breached a fiduciary duty to him, and when the trial court failed to find such a relationship, he appealed.<sup>160</sup> The court of appeals stated the general rule that a relationship between a bank and its customer is debtor-creditor.<sup>161</sup> The court then went on to hold that a confidential relationship is not determined by any set rules, but instead depends on the specific facts of the case.<sup>162</sup> The court found that in a debtor-creditor situation, the existence of a confidential relationship is a question of fact, and the proponent of the relationship has the burden of proving its existence.<sup>163</sup> The court eventually affirmed the trial court's finding that no fiduciary relationship existed between Marsh and the bank.<sup>164</sup>

Arkansas's highest court again failed to find a fiduciary duty on the part of a bank in *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*<sup>165</sup> Country Corner obtained a business loan from First State

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153. See *Marsh v. National Bank of Commerce*, 37 Ark. App. 41, 822 S.W.2d 404 (1992).

154. 37 Ark. App. 41, 822 S.W.2d 404 (1992).

155. See *id.* at 42, 822 S.W.2d at 405.

156. See *id.* at 45, 822 S.W.2d at 406.

157. See *id.*, 822 S.W.2d at 406.

158. See *id.* at 45, 822 S.W.2d at 406.

159. See *id.* at 47, 822 S.W.2d at 408.

160. See *Marsh*, 37 Ark. App. at 47, 822 S.W.2d at 407.

161. See *id.*, 822 S.W.2d at 407.

162. See *id.*, 822 S.W.2d at 407-08. The court stated, "There is no set formula by which the existence of a confidential relationship may be determined, for each case is factually different and involves different individuals." *Id.*, 822 S.W.2d at 407-08 (quoting *Donaldson v. Johnson*, 235 Ark. 348, 359 S.W.2d 810 (1962)).

163. See *id.*, 822 S.W.2d at 408 (citing, as an example, *Denison State Bank v. Madeira*, 640 P.2d 1235 (Kan. 1982)).

164. See *id.* at 47-48, 822 S.W.2d at 408.

165. 332 Ark. 645, 966 S.W.2d 894 (1998).

Bank & Trust in the amount of \$194,734 to finance inventory.<sup>166</sup> Two men, who were business partners of the storeowners, signed the note as guarantors.<sup>167</sup> When the note became due, the guarantors would not sign a renewal, and the bank foreclosed on the note and collateral.<sup>168</sup> After the foreclosure, Country Corner filed several tort causes of action against the bank, including breach of fiduciary duty.<sup>169</sup> The circuit court granted the bank's motion to dismiss on grounds that Country Corner had failed to state a claim under Arkansas Rule of Civil Procedure 12(b)(6), and Country Corner appealed.<sup>170</sup>

In its complaint, Country Corner claimed that the bank established a fiduciary relationship between itself and the bank when the bank's attorney averred that he represented both the store and the bank in the loan transaction.<sup>171</sup> Country Corner contended that the bank breached its fiduciary duty when the attorney informed Country Corner that it did not need to obtain independent counsel and also when the bank gave such a substantial amount of financing on a one-year note to an "unsophisticated borrower."<sup>172</sup> The supreme court acknowledged that certain facts can establish a relationship beyond debtor-creditor.<sup>173</sup> The

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166. *See id.* at 650, 966 S.W.2d at 896.

167. *See id.*, 966 S.W.2d at 896.

168. *See id.*, 966 S.W.2d at 896. After the foreclosure, the guarantors, Watson and Shannon, filed suit against Country Corner, requesting that the court appoint a receiver, to prevent Country Corner's owners from selling off the store's inventory. *See id.*, 966 S.W.2d at 896. The bank intervened in this suit as well. *See id.*, 966 S.W.2d at 896. The circuit court did appoint a receiver who sold the store along with its assets. *See id.*, 966 S.W.2d at 896. Watson and Shannon then paid the outstanding balance of the note. *See id.*, 966 S.W.2d at 896.

169. *See id.* at 650-54, 966 S.W.2d at 896-98. Country Corner also filed suit against the guarantors. *See id.* at 650, 966 S.W.2d at 896. The circuit court eventually granted summary judgment to these parties. *See id.* at 651, 966 S.W.2d at 896. On appeal, the supreme court failed to find any question of material fact and affirmed the circuit court's grant of summary judgment to the guarantors. *See id.* at 657, 966 S.W.2d at 899.

170. *See Country Corner Food & Drug*, 332 Ark. at 651, 966 S.W.2d at 896.

171. *See id.* at 654, 966 S.W.2d at 898.

172. *See id.*, 966 S.W.2d at 898.

173. *See id.*, 966 S.W.2d at 898 (citing *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997); *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992); *Marsh v. National Bank of Commerce*, 37 Ark. App. 41, 822 S.W.2d 404 (1992)). In *J.W. Reynolds Lumber Co.*, the court held that for trust to be established in what is a typical debtor-creditor relationship, the bank must know or have reason to know of such trust. *See J.W. Reynolds Lumber Co.*, 310 Ark. 342, 347, 836 S.W.2d 853, 855 (1992) (citing *Cherokee Carpet Mills v. Worthen Bank*, 262 Ark. 776, 561 S.W.2d 310 (1987)). Again, the court found no fiduciary relationship on the part of the bank. *See id.*, 836 S.W.2d at 855.

supreme court, however, disagreed that the facts of this case established a fiduciary relationship.<sup>174</sup>

### C. Relationship Between Bank and Customer When Bank Is Selling Credit Life Insurance

Credit life insurance is a special type of insurance that pays off the balance of an outstanding debt when the debtor dies.<sup>175</sup> Unlike traditional insurance, credit life pays the creditor directly upon the death of the debtor, rather than paying the beneficiary.<sup>176</sup> Credit life insurance is often purchased when a person makes a major purchase, such as a car, furniture, or a house.<sup>177</sup> Because the premium is typically paid in installments, the cost per month may appear to be small from the debtor's viewpoint.<sup>178</sup> However, the cost of the insurance is usually quite high, and the bank profits greatly from selling the insurance.<sup>179</sup> For this reason, and because a debtor is often adequately covered through another policy, credit life insurance is not always a sound investment decision for the debtor.<sup>180</sup>

When a bank obtains credit life insurance for a customer, courts have sometimes recognized a fiduciary duty on the part of the bank.<sup>181</sup> One way in which such a duty can arise in the sale of credit life insurance is through the special circumstances or facts of the situation, including a reposing of trust and confidence.<sup>182</sup>

The case of *Lowery v. Guaranty Bank & Trust Co.*<sup>183</sup> is an example of such a situation. Although not expressly finding that the bank was a fiduciary, the court held that the jury should have been able to decide whether the bank was negligent and had breached a fiduciary duty by

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174. See *Country Corner Food & Drug*, 332 Ark. at 654, 966 S.W.2d at 898. "Lack of sophistication and the alleged advice not to seek independent counsel at best may have resulted in Country Corner's being misled, but these facts do not create a fiduciary relationship." *Id.*, 966 S.W.2d at 898.

175. See JoClaudia Mitchum, Comment, *The Death of Credit Life Insurance*: McCullar v. Universal Underwriters Life Insurance Company, 27 CUMB. L. REV. 719 (1996).

176. See *id.*

177. See *id.*

178. See Mark Budnitz, *The Sale of Credit Life Insurance: The Bank As Fiduciary*, 62 N.C. L. REV. 295, 298 (1984).

179. See *id.* at 297.

180. See *id.* at 297-98.

181. See *id.* at 299.

182. See *id.* at 300.

183. 592 So. 2d 79 (Miss. 1991).

failing to inform the plaintiff that her credit life policies had expired.<sup>184</sup> The plaintiff and her husband, the Lowerys, had taken out credit life insurance on two notes through a group policy that the bank had with an insurance company.<sup>185</sup> While Mr. Lowery was out of state working, one of the notes came due.<sup>186</sup> As a result, Mrs. Lowery informed Robert Steinriede of the bank that her husband would not be able to take care of the renewal until he returned home from work in two weeks.<sup>187</sup> When her husband did not return in two weeks, Mrs. Lowery called again to ask if it would be okay to wait until he returned; this time Steinriede's secretary instructed her to have her husband come in as soon as he arrived home.<sup>188</sup>

However, Mr. Lowery died before ever returning home.<sup>189</sup> Mrs. Lowery assumed that the credit life policy would pay off the notes, but Steinriede informed her that the credit life policy on the notes had expired.<sup>190</sup> Mrs. Lowery then brought suit against the bank and the insurance company.<sup>191</sup> The court first held that without some statutory requirement or policy provision, an insurer has no duty to inform the insured about policy termination; thus, the trial court properly granted the insurance company's motion for summary judgment.<sup>192</sup> The court then discussed what constitutes a fiduciary relationship and held that in credit life insurance cases, a fiduciary relationship may be found on a theory of contract, agency, or the reposing of trust and confidence.<sup>193</sup>

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184. See *id.* at 85.

185. See *id.* at 80.

186. See *id.* at 80. Mr. Lowery was working as a crop duster in Louisiana. See *id.*

187. See *id.* at 80-81. While Steinriede did not tell Mrs. Lowery that he would extend the notes, he said something that made her believe that her husband would be able to take care of the renewal when he returned home. See *id.* at 81.

188. See *id.*

189. See *Lowery*, 592 So. 2d at 81. The court did not state how Mr. Lowery died, only that he died on October 24th before returning home from his work in Louisiana. See *id.*

190. See *id.*

191. See *id.*

192. See *id.* at 83.

193. See *id.* (citing Mark Budnitz, *The Sale of Credit Life Insurance: The Bank As Fiduciary*, 62 N.C. L. REV. 295, 299 (1984)). The court went on to discuss the case of *Stone v. Davis*, 419 N.E.2d 1094 (Ohio 1981). See *id.* at 84. In *Stone*, a young couple financed the purchase of a farm through a loan and wanted to obtain mortgage insurance. See *id.* However, they were not informed that they had to obtain the insurance themselves. See *id.* After a foreclosure action was instituted against them, the wife claimed that the savings and loan acted negligently in failing to obtain insurance for her and her husband. See *id.* (citing *Stone*, 419 N.E.2d at 1096). Because of their age and inexperience with mortgages, the Supreme Court of Ohio agreed; when the savings and loan did not inform them that they had to procure the insurance

The court also discussed a case in which a question for the jury existed as to whether a lender was negligent in failing to procure credit life insurance on a theory that the lender was a quasi-fiduciary.<sup>194</sup> The court eventually held that, in this case, while no formal fiduciary relationship was established, the jury could have found a fiduciary duty because of the Lowerys' relationship with the bank.<sup>195</sup>

Another way to analyze the relationship between the bank and its customer when the bank sells credit life insurance is through principles of agency.<sup>196</sup> Agency principles are much more certain than those applied in the fact-sensitive fiduciary situation because objective facts determine whether the bank is an agent.<sup>197</sup> An agency relationship is formed when a principal consents to an agent acting on his behalf, and the agent accepts this duty.<sup>198</sup> The consent of both parties can be reasonably inferred from their conduct, such as the agent performing the task to which the principal consented.<sup>199</sup> For example, when the customer signs the Truth in Lending disclosure stating that he desires credit life insurance, this act can manifest consent.<sup>200</sup> Similarly, when the bank gives the customer the Truth in Lending form to sign, this act may show consent to act as the agent for the customer.<sup>201</sup>

If a bank and customer can be shown to have entered into a consensual principal-agent relationship for the sale of the credit life insurance, then the bank must act in accordance with traditional fiduciary duties.<sup>202</sup> An agent has a duty to act with the care and skill that is standard in his locality and to exercise any special skills he possesses.<sup>203</sup> The agent also must use reasonable efforts to give the

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themselves, as was its usual policy, the savings and loan breached a fiduciary duty. *See id.* (citing *Stone*, 419 N.E.2d at 1098).

194. *See id.* at 84-85 (citing *Hutson v. Wenatchee Fed. Savings & Loan Assoc.*, 588 P.2d 1192 (Wash. 1978)).

195. *See Lowery*, 592 So. 2d at 85. The court noted the following facts as possibly weighing toward the bank owing Mrs. Lowery a duty to inform her that her policy had lapsed: Steinriede had dealt with the Lowerys on all of their loans; the Lowerys usually took out credit life insurance; Mrs. Lowery knew little about the couple's financial business; Steinriede represented to Mrs. Lowery that it would be fine to wait until her husband returned home; and Mrs. Lowery was not told that the credit life policy would not be in effect while the notes were on hold. *See id.*

196. *See Budnitz*, *supra* note 178, at 301.

197. *See id.*

198. *See id.* at 320.

199. *See id.*

200. *See id.* at 321.

201. *See id.*

202. *See Budnitz*, *supra* note 178, at 321-22.

203. *See* RESTATEMENT OF AGENCY (SECOND) § 379(1) (1958). The Restatement

principal information that the principal would desire and that is relevant to the transaction or relationship.<sup>204</sup> In addition, an agent must obey the instructions of the principal if they are reasonable.<sup>205</sup>

Even though agency principles are more defined, the scope of the agent's duty still depends somewhat on the facts of the situation.<sup>206</sup> Generally, courts, including those in Arkansas, have held that an insured has a duty to educate himself regarding his insurance.<sup>207</sup> However, a contributory negligence defense such as this may be ineffective in a principal-agent relationship because the principal is entitled to rely on the agent's care and skill.<sup>208</sup> Some courts have held that in situations where the agent is actively involved in the business affairs of the insured and advises him on a regular basis, the agent may have a duty to inform the insured of certain things.<sup>209</sup>

#### IV. REASONING

The Arkansas Supreme Court began its analysis of *Mans* by stating the specific issues that it would address.<sup>210</sup> First, the court determined what duty the bank owed the plaintiff based on her relationship with the

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provides that "unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has." *Id.*

204. *See id.* § 381. The agent has "a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person." *Id.*

205. *See id.* § 385(1). An agent must "obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform." *Id.*

206. *See* Douglas L. Hallett et al., *Liability of Insurance Agents and Brokers*, 495 PLI/LITIG. 519, 543 (1994).

207. *See, e.g.,* Scott-Huff Ins. Agency v. Sandusky, 318 Ark. 613, 615, 887 S.W.2d 516, 517 (1994); Continental Cas. Co. v. Didier, 301 Ark. 159, 164, 783 S.W.2d 29, 31 (1990); Howell v. Bullock, 297 Ark. 552, 554, 764 S.W.2d 422, 424 (1989); Stokes v. Harrell, 289 Ark. 179, 181, 711 S.W.2d 755, 756 (1986).

208. *See* Budnitz, *supra* note 178, at 323.

209. *See* Stokes v. Harrell, 289 Ark. 179, 181, 711 S.W.2d 755, 756 (1986) (citing Bicknell, Inc. v. Havlin, 402 N.E.2d 116 (Mass. App. Ct. 1980); Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961)). The court, however, said that this rule does not have a "large following among the courts;" rather, the traditional rule that an insured must educate himself regarding his policy is generally in place. *See id.*, 711 S.W.2d at 756 (citing Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164 (Ariz. 1980)).

210. *See Mans*, 340 Ark. at 521, 10 S.W.3d at 886-87.



Bank.<sup>211</sup> Next, the court decided whether the trial court erred in not finding a duty on the part of the Bank based on trust.<sup>212</sup>

#### A. Majority Opinion

After reviewing a sidebar conference that took place between counsel for Mans, counsel for the Bank, and the trial court judge, Justice Brown, writing for the majority, noted that Mans's attorney had apparently tried to prove a duty of trust on the part of the bank without first establishing that there was a fiduciary relationship.<sup>213</sup> In this dialogue, Mans's attorney actually stated that he was not claiming that the Bank owed Mans a fiduciary duty.<sup>214</sup> The court noted the contrast between this statement and Mans's contention that her relationship with the Bank was one of trust.<sup>215</sup>

The court then addressed several rules of law that applied to the issues of the case.<sup>216</sup> The court cited cases for the rule in Arkansas that a policyholder has a duty to educate himself regarding his insurance coverage.<sup>217</sup> However, the court went on to note that some courts have found a special relationship between an insurance agent and the insured, which would impose a duty on the agent to inform the insured about certain matters.<sup>218</sup> Such a duty would result when there is an established

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211. *See id.*, 10 S.W.3d at 886-87.

212. *See id.*, 10 S.W.3d at 887.

213. *See id.* at 523, 10 S.W.3d at 888.

214. *See id.* at 521, 10 S.W.3d at 887. The sidebar conference took place between the attorneys and the judge after Mans's attorney began to ask her on direct examination whether she had trusted the bank during her twenty-three year relationship with it. *See id.*, 10 S.W.3d at 887. The Bank's attorney objected to the questioning "because fiduciary or confidential relationship was not pled and to establish anything other than just ordinary debtor-creditor relationship, those allegations have to be pled." *Id.*, 10 S.W.3d at 887. After this objection, Mans's attorney stated that he was not claiming a fiduciary relationship, only that Mans relied on and trusted the Bank. *See id.* at 521-22, 10 S.W.3d at 887. The trial judge then stated that the situation was only an arm's length transaction, and "if you have to trust, you have a fiduciary relationship." *Id.*, 10 S.W.3d at 887. In addition, after Mans's attorney had commented on the fact that the bank received thirty to forty percent of the credit life premium, the judge remarked, "Now you're close on the fact that he's an agent, but that doesn't have anything to do with the type of insurance so, no, I don't think this is correct." *Id.*, 10 S.W.3d at 887.

215. *See id.* at 523-24, 10 S.W.3d at 888.

216. *See Mans*, 340 Ark. at 524, 10 S.W.3d at 888.

217. *See id.*, 10 S.W.3d at 888 (citing *Scott-Huff Ins. Agency v. Sandusky*, 318 Ark. 613, 887 S.W.2d 516 (1994); *Continental Cas. Co. v. Didier*, 301 Ark. 159, 783 S.W.2d 29 (1990); *Howell v. Bullock*, 297 Ark. 552, 764 S.W.2d 422 (1989); *Stokes v. Harrell*, 289 Ark. 179, 711 S.W.2d 755 (1986)).

218. *See id.*, 10 S.W.3d at 888 (citing *Stokes*, 289 Ark. at 181, 711 S.W.2d at 756

relationship between the agent and the insured, and the agent is actively involved in the insured's business matters.<sup>219</sup> Finally, citing to its decisions in *Country Corner* and *J.W. Reynolds Lumber Co. v. Smackover State Bank*,<sup>220</sup> the court stated that "factual underpinnings" are necessary to establish a fiduciary relationship in a debtor-creditor situation.<sup>221</sup>

Although the court agreed with Mans that this was an issue of first impression, the court disagreed with her claim that a "special relationship" had been established based solely on her trust in the Bank, whereby the Bank owed her a duty of informing her that her policy had lapsed.<sup>222</sup> Supporting this conclusion, the court stated as it had in *J.W. Reynolds* that a bank and its customer are normally debtor-creditor, and to establish something more, factual underpinnings must be proved by the proponent of the special relationship.<sup>223</sup> The court then explained that because Mans did not even attempt to prove a fiduciary relationship, the trial court correctly concluded that the Bank did not owe her a duty based on her trust in the Bank.<sup>224</sup>

The court then explained that even if Mans had been attempting to claim implied trust based on a fiduciary relationship or a special relationship because of their course of dealing, she would have failed for lack of substantial evidence, and a verdict would still have been directed against her.<sup>225</sup> The court stated that her lack of sophistication and twenty-three year relationship with the Bank were not enough evidence to establish a fiduciary relationship even if she had alleged one in her complaint.<sup>226</sup> In addition, instead of proof that the Bank advised the Manses regarding their business affairs, the court had proof

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(1986)).

219. *See id.*, 10 S.W.3d at 888 (citing *Stokes*, 289 Ark. at 181, 711 S.W.2d at 756 (1986)).

220. 310 Ark. 342, 836 S.W.2d 853 (1992).

221. *See Mans*, 340 Ark. at 525, 10 S.W.3d at 889 (citing *Country Corner Food & Drug, Inc. v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (1998); *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997); *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992)).

222. *See id.*, 10 S.W.3d at 889.

223. *See id.* at 525-26, 10 S.W.3d at 889 (citing *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992)).

224. *See id.* at 526, 10 S.W.3d at 889.

225. *See id.*, 10 S.W.3d at 889. The court stated that "[s]ubstantial evidence must be sufficient to compel a conclusion one way or the other and must go beyond suspicion or conjecture." *Id.*, 10 S.W.3d at 889 (citing *Barnes, Quinn, Flake, & Anderson v. Rankins*, 312 Ark. 240, 848 S.W.2d 924 (1993)).

226. *See id.*, 10 S.W.3d at 889 (citing *Country Corner Food & Drug, Inc. v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (1998)).

that the Manses themselves made the decision when to take out credit life and when not to do so.<sup>227</sup>

The court then addressed the Bank's unwritten but customary practice of informing its customers when their credit life policies had lapsed.<sup>228</sup> This fact was of no consequence to the court, however, because Mans was not aware of the policy and also testified that she knew her policy had a term of two years; therefore, she could not have been relying on this practice.<sup>229</sup> Moreover, Mans gave no testimony that the Bank had ever previously informed her or her husband that a credit life policy had lapsed.<sup>230</sup>

The court then acknowledged that had certain facts been in place, the result may not have been the same.<sup>231</sup> For example, if the Bank had previously informed the Manses that a policy had lapsed, or if the Manses were not aware of the two-year term of the policy or that the premiums were paid over ten years, or if the Manses had known of the Bank's unwritten policy, the court would have viewed the situation differently.<sup>232</sup>

The court concluded by analogizing this case to that of *Country Corner* wherein the bank was found to have no fiduciary duty to its "unsophisticated" customers.<sup>233</sup> The court stated that if it agreed with Mans's claim that the Bank owed her a duty, it would be ignoring case law that an insured has a duty to educate herself regarding her insurance.<sup>234</sup> The court then affirmed the trial court's grant of a directed verdict to the Bank.<sup>235</sup>

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227. See *Mans*, 340 Ark. at 526, 10 S.W.3d at 890.

228. See *id.*, 10 S.W.3d at 890.

229. See *id.*, 10 S.W.3d at 890. Further, the court noted that although she knew the policy premiums were financed over ten years, she assumed her policy was still in existence because her note payment remained the same each month. See *id.* at 526-27, 10 S.W.3d at 890.

230. See *id.* at 527, 10 S.W.3d at 890. The court observed that it had no way of knowing whether Mr. Mans knew that the policy had expired since he was the one who had gone to the Bank to renew the June 21, 1995 loan. See *id.*, 10 S.W.3d at 890.

231. See *id.*, 10 S.W.3d at 890.

232. See *id.*, 10 S.W.3d at 890 (citing *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991)).

233. See *Mans*, 340 Ark. at 527, 10 S.W.3d at 890.

234. See *id.*, 10 S.W.3d at 890.

235. See *id.*, 10 S.W.3d at 890.

## B. Dissenting Opinion

Based on the Arkansas Supreme Court's precedent that a gratuitous undertaking can result in a duty to act with care, Justice Glaze dissented.<sup>236</sup> He stated that liability for failing to act when one has a duty to act, or nonfeasance, has been recognized more and more throughout the last century.<sup>237</sup> Justice Glaze then stated that although it may have been a gratuitous undertaking, the Bank assumed a duty to act with care when it adopted its practice of informing customers that their credit life policies had lapsed.<sup>238</sup>

The dissent disagreed with the majority's claim that Mans had no right to rely on the unwritten policy because she was not aware of it.<sup>239</sup> In support of his belief, Justice Glaze stated that the pedestrian struck in *Haralson v. Jones Truck Line*<sup>240</sup> did not know that the truck driver had signaled the truck behind him to pass; however, the court imposed a duty on the truck driver.<sup>241</sup> Therefore, the dissent concluded that it was irrelevant that Mans did not know of the Bank's policy.<sup>242</sup> For these

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236. See *id.* at 528, 10 S.W.3d at 890 (Glaze, J., dissenting) (citing *Haralson v. Jones Truck Line*, 223 Ark. 813, 270 S.W.2d 892 (1954)). In *Haralson*, a truck driver signaled to the truck driving behind him that it was safe to pass. See *id.*, 10 S.W.3d at 891 (Glaze, J., dissenting). When the truck behind veered into the left lane to pass, he struck and killed a man who was walking on the left side of the road. See *id.*, 10 S.W.3d at 891 (Glaze, J., dissenting). The *Haralson* court held that although the truck driver was under no duty to give the signal, once he did, he had a duty to act with ordinary care. See *id.*, 10 S.W.3d at 891 (Glaze, J., dissenting) (citing *Haralson*, 223 Ark. at 816-17, 270 S.W.2d at 894-95)).

237. See *id.*, 10 S.W.3d at 891 (Glaze, J., dissenting). The dissent stated that liability for nonfeasance has been imposed more frequently in the last century in the following situation:

[T]he plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.

*Id.*, 10 S.W.3d at 891 (Glaze, J., dissenting) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 374 (5th ed. 1984)).

238. See *id.* at 528-29, 10 S.W.3d at 891 (Glaze, J., dissenting). The dissent also observed the fact that the Bank acted as agent of the insurance company in selling credit life insurance and receiving thirty to forty percent of policy premiums. See *id.* at 528, 10 S.W.3d at 891 (Glaze, J., dissenting).

239. See *Mans*, 340 Ark. at 529, 10 S.W.3d at 891 (Glaze, J., dissenting).

240. 223 Ark. 813, 270 S.W.2d 892 (1954).

241. See *Mans*, 340 Ark. at 529, 10 S.W.3d at 891 (Glaze, J., dissenting).

242. See *id.* at 529, 10 S.W.3d at 891 (Glaze, J., dissenting). Justice Glaze's exact reasoning was as follows:

reasons, Justice Glaze believed that the Bank did owe Mans a duty and would have reversed the trial court's decision.<sup>243</sup>

#### V. SIGNIFICANCE

The Arkansas Supreme Court in *Mans* made it clear that it will not recognize a fiduciary duty that has not been pleaded by the plaintiff, even if, perhaps, the failure to plead the duty was unintentional.<sup>244</sup> The court was seemingly perplexed as to why the plaintiff did not plead fiduciary duty when the duty that she attempted to place on the Bank was fiduciary in nature.<sup>245</sup> The court's perplexity is apparent in its observation that although Mans claimed a special relationship based on trust, she did not characterize it as fiduciary.<sup>246</sup> Therefore, one can only speculate as to why a fiduciary duty was not pleaded. Perhaps, Mans's attorney realized that a duty between a bank and its customer is ordinarily debtor-creditor and, therefore, tried to establish a duty based on trust alone. Perhaps also, he did not realize that the Arkansas Supreme Court, like many other courts, has recognized that a non-traditional fiduciary duty can be placed on a bank when certain facts and circumstances exist. In any event, future plaintiffs trying to establish a relationship with their bank beyond debtor-creditor should be cognizant of the importance of explicitly pleading a fiduciary duty.

Furthermore, future plaintiffs should also be warned that the charge of fiduciary duty must be supported with substantial and sympathetic facts in their favor in order to establish a non-traditional fiduciary duty.<sup>247</sup> Even if Mans's attorney had explicitly pleaded a fiduciary relationship, the Arkansas Supreme Court still would not have imposed a fiduciary duty on the Bank because the court found that she did not have enough proof.<sup>248</sup> The fact that Mans was "unsophisticated" and had a twenty-three year relationship with the Bank were not enough to ward off a directed verdict.<sup>249</sup> More importantly, the court did not find

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The [pedestrian] in *Haralson*, with his back to the traffic, was unaware that one truck driver had just signaled another that it was safe to pass, yet this court found a duty existed. Thus, in the circumstances now before us, it did not matter that Ms. Mans may have had no knowledge of the bank's policy.

*Id.*, 10 S.W.3d at 891 (Glaze, J., dissenting).

243. *See id.*, 10 S.W.3d at 891 (Glaze, J., dissenting).

244. *See id.* at 527, 10 S.W.3d at 890.

245. *See id.* at 523, 10 S.W.3d at 888.

246. *See id.* at 523-24, 10 S.W.3d at 888.

247. *See Mans*, 340 Ark. at 525, 10 S.W.3d at 889.

248. *See id.* at 526, 10 S.W.3d at 889-90.

249. *See id.*, 10 S.W.3d at 890.

that the Bank had followed a practice of informing its customers when their credit life policies had lapsed.<sup>250</sup> Consequently, the amount of proof necessary for a plaintiff to succeed in establishing a fiduciary duty on her bank is unpredictable and appears to depend in large part on how sympathetic the plaintiff is in the eyes of the court.

Bearing in mind that the court will not impose a duty which has not been pleaded by the plaintiff, and considering that the facts necessary to establish a non-traditional fiduciary relationship are imprecise and uncertain, a plaintiff seeking to impose a duty on his bank in the sale of insurance may be better off basing his claim on principles of agency. If a plaintiff can establish a consensual principal-agent relationship between himself and the bank in the sale of credit life insurance, then the bank will be regarded as a fiduciary in the traditional sense.

Both the bank and its customers benefit from injecting agency principles into such a relationship. The bank knows with more certainty what activities will subject it to the status of fiduciary, and a plaintiff, such as Mrs. Mans, will not have to provide the obscure proof that a court desires in order to prove a fiduciary relationship.<sup>251</sup> Of course, when the transaction at issue does not involve the sale of insurance, a plaintiff seeking to impose a fiduciary duty on his bank will not get the benefit of agency principles; in that case, the plaintiff will be forced to revert to the difficult task of creating a "fact-sensitive" fiduciary relationship.

*Robyn Phillips Allmendinger\**

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250. *See id.*, 10 S.W.3d at 890.

251. *See supra* notes 196-209 and accompanying text.

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