O/A 5-5-86

IN THE
SUPREME COURT OF FLORIDA

BARNETT BANK OF WEST FLORIDA,

PETITIONER,

CASE NO. 67,777

V.

W. RICHARD HOOPER,

RESPONDENT.

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

DOCKET NO.: AZ-395

AMICUS CURIAE BRIEF OF FLORIDA BANKERS ASSOCIATION

James L. Bacchus
Susan V. Wheeler
Akerman, Senterfitt & Eidson
Post Office Box 231
Orlando, Florida 32802
(305) 843-7860
Counsel for Florida Bankers Association

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STATEMENT OF THE CASE

This is an amicus curiae brief in support of the general rule that a bank owes to the bank's customers and depositors a duty of confidentiality and non-disclosure with respect to their accounts, and in support of the position of the petitioner in this case, Barnett Bank of West Florida.

Dr. Richard Hooper filed a complaint in the Circuit Court in Escambia County to void a promissory note to Barnett Bank of West Florida on the ground that the bank had failed to disclose material facts relating to the loan. After hearing the evidence, the court took the case from the jury and directed a verdict in favor of the bank.

Dr. Hooper appealed to the District Court of Appeal, First District, which reversed the circuit court judgment and directed that the case be submitted to a jury. This Court granted the bank's request for discretionary review on February 6, 1986.

STATEMENT OF THE FACTS

We accept the facts as stated by the petitioner.

ISSUES PRESENTED FOR REVIEW

ISSUE I

WHETHER FLORIDA LAW RECOGNIZES A DEPOSITOR'S RIGHT TO FINANCIAL PRICACY.

ISSUE II

WHETHER THE DECISION BELOW ERODES THE RIGHT TO FINANCIAL PRIVACY.

ISSUE III

WHETHER THE DECISION BELOW PLACES AN UNREASONABLE BURDEN AND RISK ON THE BANK

ISSUE IV

WHETHER ANY EXCEPTION TO THE GENERAL RULE OF NON-DISCLOSURE SHOULD BE NARROWLY DRAWN.

SUMMARY OF THE ARGUMENT

Florida law recognizes a depositor's right to privacy in his accounts and deposits with a bank. Bank customers have a right to expect that their financial affairs will be kept private. The decision of the First District Court of Appeal erodes a bank customer's right to financial privacy. The fundamental flaw in the decision is that the degree and extent of privacy of the customer depends on the bank's relationship with a third party. Moreover, the decision places an unreasonable burden and risk on the bank. For, if the decision of the First District Court of Appeal holds, a bank will be required to determine whether the interest of one customer in obtaining information outweighs the right of another customer to financial privacy. A bank's employees will therefore be required to make a legal determination on the spot. No exception to the general rule is warranted. However, if the Court finds that an exception to the general rule of non-disclosure is warranted, then any such exception should be explicitly stated and carefully limited.

ARGUMENT

I. Florida Law Recognizes a Depositor's Right to Privacy

Florida law clearly recognizes the right of a depositor to privacy in his accounts and deposits with a bank. A bank has a special relationship with its customers such that the customers have the right to expect that the privacy of their financial

affairs will be respected and protected by the bank. Underlying this expectation is the notion that individuals generally have the right to expect freedom from intrusion in their personal affairs.

Long-recognized common law doctrine holds that "there is an implied term of contract between a banker and his customer that the banker would not divulge to third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank." 10 Am. Jur. 2d Banks }332.

The leading Florida case supporting this general proposition is Milohnich v. First National Bank of Miami Springs, 224 So. 2d 759 (Fla. 3d DCA 1969). In Milohnich, the plaintiff alleged that the bank divulged information about the plaintiff's existing accounts to third parties who then sued the plaintiff and enjoined the defendant bank from distributing any of the plaintiff's deposits. The complaint further alleged that the bank had willfully and maliciously divulged secret information about the plaintiff's accounts, without regard for the plaintiff's rights as a depositor, and in direct and willful violation of the duty owed by the bank to keep the intimate details of the depositor's accounts secret.

The court held that the complaint was sufficient to state a cause of action for breach by the bank of an implied contractual duty to the depositor by negligently, willfully, intentionally, or maliciously disclosing information about a depositor's accounts to third parties.

Florida law is consistent with that of other jurisdictions. For example, the Idaho Supreme Court faced a problem similar to that which faces this Court today in Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961). In Peterson, that Court stated at 367 P.2d 290:

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositor's accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors....
>
> It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank may be held liable for breach of the implied contract."

More recently, in a Maryland case, Suburban Trust Company v. Waller, 408 A.2d 758 (Md. Ct. Spec. App. 1979), a bank became suspicious when its depositor made a deposit of $800 in fifty and one hundred dollar bills with sequential serial numbers. Suspicious, the bank contacted the local police department and supplied it with the name, address, description, and employment of the depositor, as well as with some surveillance photographs taken of him at the deposit window. This call led to an investigation that ultimately resulted in the filing of robbery charges against the depositor that were ultimately dropped. The court held that the bank wrongfully disclosed information about the depositor without his express or implied consent. The court further held that a bank depositor has a right to expect that the

bank will, to the extent permitted by law, treat as confidential all information about his accounts and any transaction relating to them. Accordingly, absent compulsion by law, a bank may not make disclosures concerning a depositor's account without the express or implied consent of the depositor. Waller, 408 A.2d 758.

Earlier, in Tournier v. National Provincial and Union Bank, 1 K.B. 461, 480, (Eng. 1924) (cited in Milohnich, 224 So.2d 759, 760), the leading English case on this subject, the court said the following: "I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances."

This duty of non-disclosure, while imposing, is not absolute. The courts have recognized four qualifications:

1. A disclosure under compulsion of law,
2. Where there is a duty to the public to disclose,
3. Where the interests of the bank require disclosure,
4. Where the disclosure is made with the express or implied consent of the customer.

Tournier, 1 K.B. 461; Milohnich, 224 So. 2d 761.

These four exceptions involve situations where disclosure is necessary to provide certain protections that a broad general rule would not provide. The case at hand does not involve any of these exceptions. Dr. Hooper did not have a court order, his interest did not involve a public interest, the bank had no interest in disclosure, and Mr. Hosner did not consent, expressly

or impliedly, to the disclosure. The restrictive application of the exceptions assures proper balance between a bank's conflicting duties of disclosure and non-disclosure. In their current form, the exceptions reaffirm the rule. It is imperative that they not become the inspiration for painting with a broad brush.

As have the Florida courts, Congress too has been mindful of the need to avoid sweeping strokes that might impair rights to financial privacy. The Fair Credit Reporting Act of 1970 and the Right to Financial Privacy Act of 1978 are two examples of Congressional concern in this area. The Fair Credit Reporting Act provides that any "consumer reporting agency" must adhere to certain safeguards before disseminating virtually any information about an individual. 15 U.S.C. }1681(a)(4) (1982). These safeguards are designed, in part, to insure that "consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and respect for the consumers' right to privacy." 15 U.S.C. }1681(a)(4) (1982).

Congress enacted the Right to Financial Privacy Act in direct response to a Supreme Court case, United States v. Miller, 425 U.S. 435 (1976); 12 U.S.C.A. }3401-3422 (1980). In the Miller case, the Court denied a motion to suppress bank records sought by a federal prosecutor without the use of a subpoena, holding that no Fourth Amendment right had been violated by the seizure because a customer of a bank had no individual right to privacy in financial records held by the bank. Miller, 425 U.S. 435. Congress disagreed; the Right to Financial Privacy Act is

evidence of Congressional concurrence with Justice Brennan's dissent in Miller, in which he argued that such information is within the customer's zone of privacy because there is a reasonable expectation that such information will be kept confidential. Miller, 425 U.S. 435, 447 (1976). The act is an effort to strike a balance between a customer's right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations. H. Rep. No. 1383, 95th Cong., 2d Sess. 33-34 (1978); The Banking Law Journal, The Bank-Customer Relation: Part I - The Relevance Of Contract Doctrine, (March 1983).

The banking industry strongly favors maintaining the current state of Florida law, which promotes clear methods of compliance with the legal requirements relating to disclosure. The principles espoused in Milohnich permit customers and depositors to develop certain expectations about their relationship with their banks. Needless to say, reasoned and reliable expectations are vital to the strength and the stability of the banking system, in Florida as elsewhere.

As the banking industry grows, as technology continues to advance rapidly, more and more people have access to customer and depositor account information. This expansion of access underscores the importance of maintaining financial privacy. It is essential that this Court reaffirm in no uncertain terms a bank's clear duty to maintain financial privacy.

II. The Decision Below Erodes the Right to Financial Privacy

The decision in this case by the First District Court of

Appeal departs from the well-reasoned rule of Milohnich and, in so doing, erodes the right of bank customers to the expectation of privacy in their financial affairs with their bank.

Naturally, a bank's business with a customer will frequently be of interest to other bank customers. In some instances, there may be significant reason to disclose information about the affairs of one customer to another. But if the bank is obligated to disclose such information in circumstances other than those involving the narrow exceptions enumerated in Tournier and acknowledged in Milohnich, then no customer can truly have any genuine expectation that his affairs will be kept private by his bank.

In particular, a customer's expectation of privacy should not in any respect depend on his bank's relationship with a third party. The fundamental flaw in the decision of the First District Court of Appeal in this case is that the degree and extent of the privacy right of the depositor, Mr. Hosner, depends on the nature of the bank's relationship with a third party, another customer, Dr. Hooper. In brief, a bank customer's privacy right must not be so frail as to bend and break from the weight of what the bank may or may not say to some other customer. If it is, then it is really no right at all.

III. The Decision Below Places an Unreasonanable Burden and Risk on the Bank

The decision of the First District Court of Appeal places an unreasonable burden on a bank - to choose between its customers. A bank is required by the decision below to decide

whether one customer's interest in the privacy of his financial affairs outweighs another customer's interest in obtaining information. This is an unfair burden to impose on bank officers who are neither schooled nor qualified to make such difficult legal distinctions.

In truth, in determining whether any specific situation warrants an exception to the general rule against disclosure, the bank officer, to invoke a cliche, is damned if he does and damned if he doesn't. If he misjudges the circumstances and discloses, the bank will, under Milohnich, be liable. If he misjudges the circumstances and does not disclose, the bank will, under the decision below, be liable. How then should banks instruct their employees to act?

IV. If The Court Finds That A Bank's Duty Of Non-Disclosure Should Be Qualified By An Additional Exception, Such Exception Should Be Narrowly Drawn.

If the existence of a fiduciary relationship is to be the test of whether a new exception to the non-disclosure rule is invoked, then the evidence of such a fiduciary relationship in this case is anything but convincing. At best, the evidence of a fiduciary relationship here is weak and tenuous - hardly the kind of facts that should give rise to new law.

To date, Florida courts have recognized no exceptions to the general duty of non-disclosure other than the four listed in Milohnich. The banking industry believes that no other exceptions are needed or desirable. But if the court chooses to draw another exception, then that exception should be drawn narrowly. And if that exception is to be based on the existence

of a fiduciary relationship, then the evidence of that relationship, and thus the existence of a fidiciary duty, should be clear and convincing.

One view voiced in some case law in other states, as well as in the brief submitted by the bank customer in the District Court of Appeal, can be stated as follows: although a bank is not ordinarily under a duty to disclose facts when dealing with a depositor or a customer, such a duty does arise where a bank knows that the customer is relying on it for advice.

In Klein v. First Edina National Bank, 169 N.W. 2d 619 (Minn. 1972), the Supreme Court of Minnesota concluded that when a bank transacts business with a customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction (including the bank's motive, if material, for participating in the transaction) unless there are special circumstances, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and relying on the bank to counsel and inform him.

The Klein case involved the suit by a bank customer to recover stock she had pledged as security for a loan by the bank to a third party. The suit was based on the customer's claim that a loan officer had concealed certain facts that might have kept her from pledging the stock if brought to her attention.

According to evidence developed at the trial, the plaintiff was a divorced woman who suffered from alcoholism, who had been institutionalized on several occasions, and whose psychological makeup was characterized by a need to please and

susceptibility to suggestions. She had been a long-time customer of the bank.

Learning that her employer was low on working capital, the plaintiff offered to pledge her stock to help her employer obtain a loan. The loan officer had not met the plaintiff before the interview preceding the loan, nor did he know that she suffered from alcoholism and was unfamiliar with business matters.

According to the plaintiff's testimony, she was unaware at the time of the loan that her employer already owed the bank on another loan, that a portion of the present loan was to be used to retire the earlier loan, and that the bank intended to rely entirely on plaintiff's stock for security on both loans. And, moreover, she was unaware of the possible consequences of pledging her stock and signing the instruments. The customer, according to her testimony, relied on the loan officer to look after her interest very much in the way that a lawyer would.

Affirming a directed verdict in favor of the bank, and applying the above rule to the facts of the case, the Klein court concluded that the plaintiff had not established a prima facie case that the bank stood in a confidential relationship to her. The court saw no evidence to indicate that the bank ought to have known that the customer was placing her trust and confidence in the bank and was depending on the bank to look out for her interests. The court said this conclusion was not altered by the mere fact that the customer had patronized the bank for twenty years and had occasionally socialized with the bank president's wife.

Thus, in a case presenting a factual situation much more compelling than our own, the Supreme Court of Minnesota nevertheless decided that there was no special fiduciary relationship requiring an exception to the general rule of non-disclosure.

The court in Klein emphasized that the bank had no knowledge that the customer was relying on the bank for advice. In our case, the respondent is apparently attempting to impute knowledge on the part of the bank that Dr. Hooper required investment advice based on one initial statement made by Mr. Riffel at their first meeting. This statement was apparently made by Mr. Riffel as a type of introduction to assure the customer that the bank had been involved in these types of transactions with Mr. Hosner before. This "advice" was not solicited, and there is no evidence to indicate that at any time Dr. Hooper sought or required any investment advice from the Bank.

In Earl Park State Bank v. Lowmon, 161 N.E. 675 (Ind. Ct. App. 1928), a customer alleged in a suit against a bank for money had and received, that the customer had in excess of $6,000.00 on deposit in a checking account with the bank. The complaint further alleged that the customer was a farmer inexperienced in business affairs with respect for the judgment of the bank manager in such matters. The manager allegedly persuaded the customer to allow the bank to loan $6,000 from his account to a third party, telling him that the loan was "on the bank's own responsibility" -- without disclosing that the third party was

indebted to the bank or that the loan would be applied to such debt. Thereafter, the bank refused to honor the customer's checks drawn on the account and return the sum he borrowed. The Lowmon court held that the trial judge did not err in instructing the jury that if they found, as the bank claimed, that the plaintiff had asked the bank to find him a borrower, and that the plaintiff relied on the bank manager to give him disinterested advice, the jury would be warranted in concluding that the manager was under a duty to furnish such advice and not to conceal the fact that the borrower was indebted to the bank.

Logically, whether a bank has reasonable or constructive knowledge that a customer is relying on the bank for advice should depend in part on the nature of the customer. Is the customer a farmer inexperienced in business? Is the customer a known alcoholic who has been institutionalized and who is known to have psychological problems? Or is the customer a noted physician, a student of tax shelters, an experienced participant in the entrepreneurial sweepstakes of capitalism? It is only reasonable to assume that such a sophisticated investor will be much less in need of advice from his banker than customers with much less experience in the ways of a material world.

Whether a bank "knows" that a customer is relying on the bank for advice should also depend in part on whether the bank knows that the customer is relying on other investment advisers. The transactions entered into by Dr. Hooper were arranged by his attorney, Mr. Hosner. As a general proposition, where a customer is represented by an attorney (whether the attorney is a customer

of the bank or not), it is difficult to conclude reasonably that the customer is in need of or desires advice from the bank, much less that the bank "knows" that the customer is relying on the bank for such advice.

Lastly, we suggest one more distinction that should be made with respect to any possible new exception to the non-disclosure rule. If a confidential relationship requiring disclosure is to arise when a bank has knowledge that the customer is relying on the bank for advice, then the standard compelling disclosure should vary depending on whether the privacy rights of another customer are affected. If the information to be disclosed does not involve facts relating to another customer's or depositor's account, then the "knowledge or reason to have knowledge" standard should be sufficient. However, if the information to be disclosed involves facts about another customer or depositor, then actual knowledge by the bank should be required -- because such disclosure is in direct conflict with the bank's duty to the other customer not to disclose information relating to his account.

CONCLUSION

The Florida Bankers Association respectfully requests that this Court reverse the decision of the District Court of Appeal,

First District, with directions to affirm the judgment of the trial court.

James L. Bacchus, Esq.
Susan V. Wheeler, Esq.
Akerman, Senterfitt & Eidson
Post Office Box 231
255 South Orange Avenue
Suite 1700
Orlando, Florida 32802
(305) 843-7860
Counsel for Florida
Bankers Association

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was mailed to Robert P. Gaines, Esquire and Donald H. Partington, Esquire on February 25, 1986.

James L. Bacchus, Esq.
Susan V. Wheeler, Esq.
Akerman, Senterfitt & Eidson
Post Office Box 231
255 South Orange Avenue
Suite 1700
Orlando, Florida 32802
(305) 843-7860
Counsel for Florida
Bankers Association