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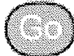
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Understanding Fiduciary Duty

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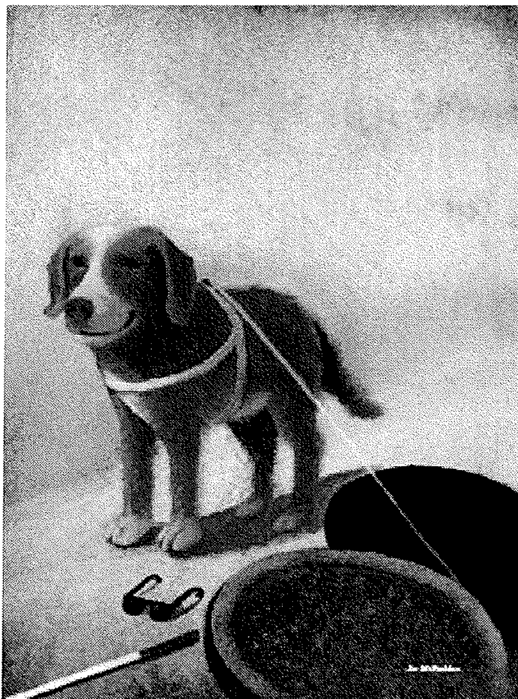


When does a person owe another a **fiduciary** duty? Unless their relationship is one of the classic relationships that impose **fiduciary** duties, such as the attorney/client, executor/heir, guardian/ward, agent/principal, trustee/beneficiary, or corporate officer/shareholder,[1] the answer is often unclear. Courts in recent years have imposed a **fiduciary** duty on persons in numerous other types of relationships. Depending on the particular facts, lenders,[2] clerics,[3] and even wives[4] have all been saddled with **fiduciary** duties. Commentators have attempted to isolate a defining principle that specifies the circumstances or relationships that warrant the imposition of **fiduciary** duties.[5] None of their theories, however, fully captures the myriad applications of **fiduciary** duty,[6] leading one commentator to refer to the **fiduciary** relationship as "one of the most elusive concepts in Anglo-American law,"[7] another to describe it as "a concept in search of a principle,"[8] and yet another to state that it may be more accurate to speak of relationships having a **fiduciary** component to them rather than to speak of **fiduciary** relationships as such.[9] The purpose of this article, then, is to facilitate an **understanding** of the **fiduciary** relationship and to offer practical guidance regarding when a **fiduciary** duty might arise in a given relationship, the scope and limitations of the duty, and the remedies available.

The Fiduciary

At the heart of courts' interpretations of the **fiduciary** relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might abuse their position.[10] Black's defines a "**fiduciary**" as:

> [a] person *holding the character of a trustee, or a character analogous to that of a trustee*, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires ... [a] person having [a] duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking...a person having duties involving good faith, trust, special confidence, and candor towards another.[11]

No one principle fully captures all the circumstances in which a **fiduciary** duty is imposed because the concept of owing a **fiduciary** duty was not originally conceived as a strict legal rule. Instead, it is fundamentally a flexible equitable concept that arose to provide relief when

no legal remedy was available.[12] It is applied through analogy to circumstances in which **fiduciary** duties conventionally apply and is, therefore, necessarily situation-specific.[13] **Understanding** its origin and historical development, described in a somewhat lengthy endnote, is important to understand its proper application.[14] The language used by courts to describe the **fiduciary** relationship reflects its historical origin in equity. For instance, in *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002), *quoting Quinn v. Phipps*, 113 So. 419, 421 (Fla. 1927), the Florida Supreme Court, using centuries old language, characterized the **fiduciary** relationship as follows:

> [T]he relation and duties involved *need not be legal*; they may be moral, social, domestic, or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief.[15]

The court in *Doe* also stated 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 that relation,"[16] relying on Comment a to §874 of the Restatement (Second) of Torts. Comment a has been fairly criticized as being both under- and over-inclusive, arguably excluding established categories of actors who are subject to **fiduciary** duties, while perhaps including many relationships that normally do not result in the imposition of **fiduciary** duties.[17]

Duty of a Fiduciary

The most basic duty of a **fiduciary** is the duty of loyalty, which obligates the **fiduciary** to put the interests of the beneficiary first, ahead of the **fiduciary**'s self interest, and to refrain from exploiting the relationship for the **fiduciary**'s personal benefit.[18] This gives rise to more specific duties, such as the prohibition against self-dealing, conflicts of interest, and the duty to disclose material facts.[19] Perhaps the most famous description of the duty of loyalty is by Chief Judge Benjamin Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928):

> 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.[20]

In addition to a duty of loyalty, a **fiduciary** also owes a *duty of care* to carry out its responsibilities in an informed and considered manner and to act as an ordinary prudent person would act in the management of his or her own affairs.[21] If the **fiduciary** has special skills, or becomes a **fiduciary** on the basis of representations of special skills or expertise, the **fiduciary** is under a duty to use those skills.[22]

How Fiduciary Duty Arises

A **fiduciary** duty may arise either expressly or impliedly.[23]

A **fiduciary** duty arises expressly by contract when the parties specifically agree to a relationship, such as the attorney/client or agent/principal relationship, that is considered to be a **fiduciary** relationship.[24] The Florida statutes also expressly impose a **fiduciary** duty in a variety of relationships, including broker/client,[25] trustee/beneficiary,[26] guardian/ward,[27] partners to partners,[28] corporate directors to shareholders,[29] general partners to limited partners,[30] and managing members of limited liability companies to members.[31]

A **fiduciary** duties may also be implied in law, regardless of whether contractual relations or formal writings exist or a statute imposes such a duty, when one party relies on another to act on the party's behalf and to look out for its best interests.[32] This requires proper factual allegation of dependency by the party and an undertaking by the other side to advise, counsel, protect, or benefit the dependent party.[33]

For example, in *Masztal v. The City of Miami,* 971 So. 2d 803, 808 (Fla. 3d DCA 2008), putative class action plaintiffs and their attorneys were held to owe an implied **fiduciary** duty to potential members of a class of property owners prior to certification of a class.[34] The named plaintiffs brought a class action against the City of Miami, challenging a special assessment to fund fire rescue services and seeking a refund to all who had paid the assessment.[35] Prior to the court considering class certification, the named plaintiffs and the city settled for $7 million.[36] Another group of property owners sought to intervene and vacate the settlement agreement on the grounds of breach of **fiduciary** duty and collusion between the attorneys and the named plaintiffs.[37] The city also moved to vacate the settlement because it believed that the settlement was for an entire class of property owners.[38] The trial court granted both motions.[39]

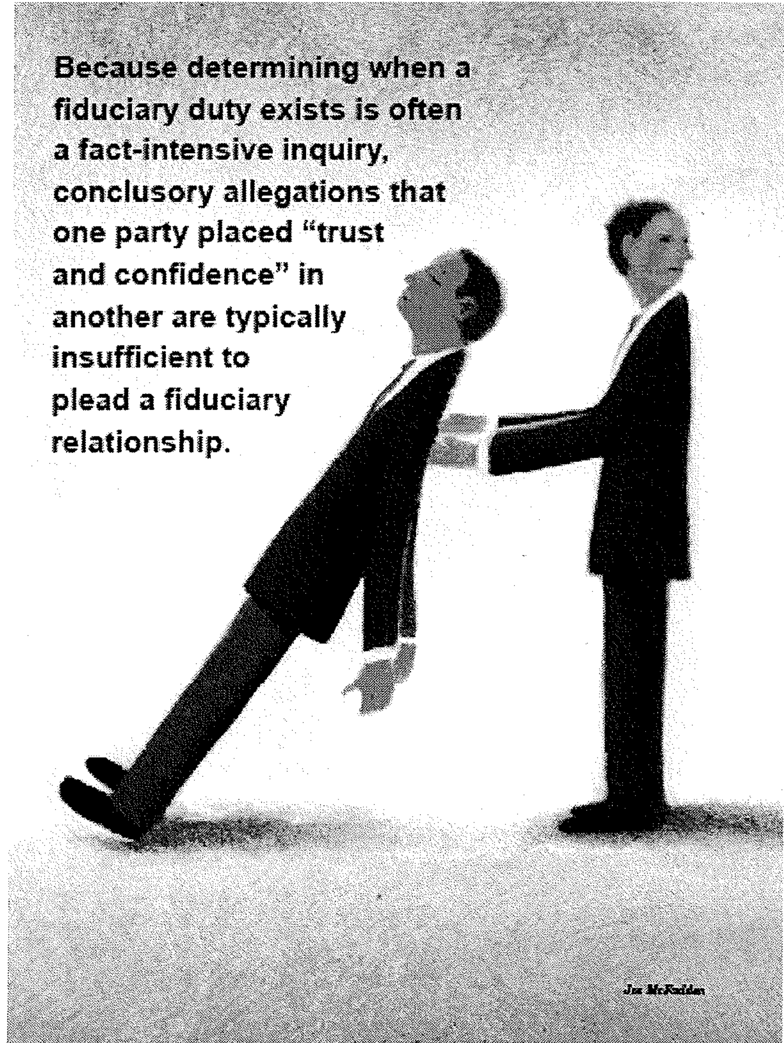
On appeal, the named plaintiffs and their attorneys argued that the trial court erred in determining that they had breached a **fiduciary** duty to a class because no class had been certified at the time of the settlement and, thus, the named plaintiffs could settle their individual claims without a fairness hearing or judicial approval.[40] The Third District Court of Appeal rejected that argument, stating that from the outset of the case, the named plaintiffs and their attorneys had proceeded on behalf of a class, and that class certification was "nothing more than a ministerial act," the absense of which could not be used to circumvent or undermine a **fiduciary** relationship.[41] According to the court, there was an implied **fiduciary** relationship between the named plaintiffs, their attorneys, and a class, because the original plaintiffs voluntarily accepted the position of class representatives, and they and their attorneys proposed to represent an entire class.[42]

Scope of a Fiduciary Relationship

When a **fiduciary** relationship exists, the **fiduciary** is under a duty to act for the benefit of the beneficiary only as to matters within the scope of the **fiduciary** relationship.[43] No duty attaches to matters beyond the scope of the **fiduciary** relationship.[44] As an example, consider the decision in *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817 (10th Cir. 1986) (applying Colorado law). In *Hill*, a customer brought an action against a commodity futures brokerage after he lost $50,000, asserting, among other claims, one for breach of **fiduciary** duty.[45] Following a jury verdict, the trial court awarded the plaintiffs $47,000 in compensatory damages and $2 million in punitive damages. The trial court had instructed the jury as follows:

"In order for the plaintiff to recover from the defendant on his state law breach of **fiduciary** duty claim, you must find that all of the following elements have been proved by a preponderance of the evidence: 1) That the plaintiff reposed his trust and confidence in [the broker], or plaintiff's trust and confidence was induced from him by [the broker], and thus a **fiduciary** relationship existed; 2) [t]hat [the broker] breached his **fiduciary** duty by failing to deal with the plaintiff in utmost good faith and solely for the plaintiff's benefit in the handling of his commodity futures account; 3) [t]hat the plaintiff incurred losses; and 4) [t]hat the plaintiff's losses were caused by [the broker's] breach of duty."[46]

The court of appeals reversed and remanded because the trial court's instruction for breach of **fiduciary** duty was too broad and failed to address the scope of the **fiduciary** duty that the broker owed the plaintiffs.[47] The court of appeals reasoned that 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.*[48] The trial court's instruction had failed to address a key question: What had been *the scope* of the agency between the broker and the customer?[49] The court of appeals ruled that a **fiduciary** duty cannot be defined by asking a jury to determine simply whether the principal reposed "trust and confidence" in the agent.[50] The court ordered that, on remand, the trial court should instruct the jury that each task the broker agreed to undertake must be established clearly before the jury could determine whether a **fiduciary** duty existed and whether it was breached.[51]



Practice Points Regarding Fiduciary Duty

*1) Conclusory allegations are insufficient to plead a **fiduciary** duty* — Because determining when a **fiduciary** duty exists is often a fact-intensive inquiry, conclusory allegations that one party placed "trust and confidence" in another are typically insufficient to plead a **fiduciary** relationship. For example, in *Raymond, James & Associates, Inc. v. Zumstorchen Investment, Ltd.*, 488 So. 2d 843, 846 (Fla. 2d DCA 1986), the Second District Court of Appeal affirmed a trial court's dismissal of a breach of **fiduciary** duty claim because the plaintiff failed to allege any ultimate facts indicating that a **fiduciary** relationship existed.[52] Another example is provided by the decision in *Faulkner v. Arista Records, LLC,* 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009) (applying New York law), in which the court held that allegations that a contractually bound record company and recording artist shared a "long and enduring relationship...of trust and confidence" were insufficient to plead a **fiduciary** relationship.[53]

*2) A **fiduciary** duty cannot be imposed unilaterally by one party* — One cannot unilaterally create a **fiduciary** relationship with another and thereby impose a **fiduciary** duty on that person.[54] Instead, that person must (expressly or impliedly) agree to serve the interests of the first party.[55] This issue was addressed in *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.,*

850 So. 2d 536 (Fla. 5th DCA 2003), which involved two real estate developers, Taylor Woodrow and Heathrow, who were competing to acquire a parcel of land.[56] The owner ultimately agreed to sell to Heathrow.[57] In order to secure the funds to purchase the land, Heathrow began discussions with numerous banks, lenders, and builders, including Taylor Woodrow, with whom Heathrow discussed a possible joint venture or limited partnership.[58] As part of their negotiations, Heathrow provided Taylor Woodrow with documents about its business plan.[59] Heathrow later declined Taylor Woodrow's joint venture proposals but reached a loan agreement with Taylor Woodrow.[60] While negotiating with Heathrow, Taylor Woodrow was also speaking with one of Heathrow's competitors about buying a different residential development.[61] After Taylor Woodrow entered into an agreement to purchase the competitor's residential development, Heathrow sued Taylor Woodrow for breach of **fiduciary** duty, alleging that Taylor Woodrow had obtained an advantage through Heathrow's disclosure of confidential materials and had breached a **fiduciary** duty by failing to disclose its negotiations with Heathrow's competitor.[62]

After a jury trial, the trial court entered a judgment in favor of Heathrow, awarding it $12.1 million.[63] The Fifth District Court of Appeal reversed, holding that the relationship between Taylor Woodrow and Heathrow was an arm's length contractual relationship, not a **fiduciary** one. Because no **fiduciary** duty had been specifically agreed to by the parties, no **fiduciary** duty or relationship arose.[64] According to the court, "even assuming that Heathrow reposed trust in Taylor Woodrow, there was no evidence that Taylor Woodrow agreed to accept it and to act to protect Heathrow's interests."[65]

Another instructive case is the decision in *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 799 (2d Cir. 1980) (applying Delaware law).[66] There, Morgan Stanley was engaged by a client to find a company for the client to acquire.[67] One of the companies that Morgan Stanley considered was Olinkraft, whose management cooperated with Morgan Stanley and supplied it with highly favorable confidential internal earnings projections to be used in connection with a bid by Morgan Stanley's client.[68] The client later did not bid for Olinkraft, but two other companies did.[69] A shareholder of Olinkraft subsequently brought a derivative action against Morgan Stanley, alleging that it traded in Olinkraft's stock on the basis of the confidential information, contending that Morgan Stanley became a **fiduciary** of Olinkraft by virtue of receiving the confidential information and that Morgan Stanley breached its **fiduciary** duties by using the confidential information for its own benefit.[70] The Court of Appeals for the Second Circuit rejected the argument, observing that the parties had bargained at arm's length and that there had not been a pre-existing confidentiality agreement between Morgan Stanley and Olinkraft. The court stated:

> [T]he fact that the information was confidential did nothing, in and of itself, to change the relationship between Morgan Stanley and Olinkraft's management. Put bluntly, although, according to the complaint, Olinkraft's management placed its confidence in Morgan Stanley not to disclose the information, Morgan Stanley owed no duty to observe that confidence.[71]

*3) Arm's length business transactions do not create a **fiduciary** duty* — As the decisions in *Taylor Woodrow* and *Walton v. Morgan Stanley & Co.* illustrate, an arm's length business transaction does not create a **fiduciary** relationship. This is so even when one party has

superior bargaining power.[72] The parties in an arm's length business transaction are viewed as rightfully pursuing their own, often divergent, interests, with no duty to protect or benefit the other party or to disclose facts that the other party could, by its own diligence, discover.[73]

Consider the decision in *West Indies Network-I, LLC v. Nortel Networks (CALA), Inc.,* 243 Fed. Appx. 482; 2007 WL 1745901 (11th Cir. 2006) (applying Florida law). In that case, West Indies brought suit against Nortel for breach of contract and breach of **fiduciary** duty.[74] West Indies claimed that Nortel failed to perform an agreement to obtain equity financing for West Indies to construct and operate a fiber optic cable telecommunications network to connect various Caribbean islands.[75] West Indies asserted that it lost the ability to proceed with the construction and operation of its planned network as a result of Nortel's alleged breaches.[76] West Indies originally predicated the existence of a **fiduciary** relationship on a claim of a partnership with Nortel that obligated Nortel to obtain financing for West Indies.[77] West Indies was forced to concede that no partnership existed in a legal sense but argued that there was sufficient indicia of a confidential relationship between West Indies and Nortel to support the imposition of a **fiduciary** obligation on Nortel. [78]

On Nortel's motion for summary judgment, the trial court concluded that the evidence could not support the imposition of a **fiduciary** relationship on parties to an arm's length transaction who were each trying to fulfill their own business interests, even if those interests overlapped to a degree.[79] The appellate court affirmed, stating that the record did not support the imposition of "implied in law" **fiduciary** obligations and ruling that West Indies failed to proffer sufficient indicia of trust and confidence reposed in Nortel.[80] Relying on *Taylor Woodrow*, the court noted that parties acting in their own business interest owe no duty to protect or benefit the other, and, thus, held that no duty arose under the circumstances.[81]

*4) An otherwise arm's length business transaction may be converted into one imposing a **fiduciary** duty when a party takes on responsibilities beyond those required* — A **fiduciary** relationship and duty may arise from what would normally be an arm's length business transaction when one party takes on responsibilities not required by the transaction, thereby leading the other party to reasonably believe that the first party is acting on behalf of the other party's interests.[82] For example, in *First National Bank and Trust Company of the Treasure Coast v. Pack,* 789 So. 2d 411 (Fla. 4th DCA 2001), the buyers of a new home sued the bank that provided them with a construction loan for breach of **fiduciary** duty after the builder failed to correct various defects in the home.[83] Before their purchase, the buyers viewed a model home, which also served as the builder's sales office in which the bank's representative offered construction loans to prospective buyers.[84] The buyers met with the bank's representative, who told them that the bank had an excellent relationship with the builder and that the builder was a quality company.[85] Shortly thereafter, the buyers entered into a contract with the builder and a construction loan agreement with the bank.[86]

Construction did not go smoothly.[87] Numerous delays ensued.[88] When the buyers had difficulty getting responses from the builder, they contacted the bank from time to time and asked the bank to intercede with the builder.[89] The bank did intercede, with varying degrees of

success.[90]

The day before the closing, the buyers informed the bank that there were numerous defects in the house and asked the bank to freeze the final draw on the construction loan because they were continuing to have difficulty with the builder.[91] The buyers also asked the bank whether they needed an attorney at the closing.[92] The bank assured them that it was unnecessary and told them that a bank officer would be present at the closing and that the funds would be withheld from the builder to ensure that the defects would be corrected.[93] When the buyers arrived at the closing, they learned that another bank officer had overridden the earlier promise to withhold the funds and that the final draw on the construction loan was issued jointly to the buyers and the builder.[94] The bank officers assured the buyers that the builder was trustworthy and that the bank would obtain an affidavit from the builder assuring that the builder would fix the construction defects.[95] The bank also told the buyers that it could not wait until they hired an attorney and that, if they did not close, the bank was "washing its hands of the matter" and the buyers would have to go to court.[96] The buyers proceeded with the closing.[97] The bank never obtained an affidavit from the builder,[98] and the defects were never fixed.[99] The buyers brought suit against the bank and the builder.[100]

The jury found that the bank had voluntarily taken on extra services for the buyers and knew, or had reason to know, that they were relying on the bank to counsel and inform them and, thus, owed a **fiduciary** duty to the buyers.[101] The jury awarded damages equaling the costs of the repair for the poor workmanship of the builder.[102] The bank appealed, arguing that no **fiduciary** relationship existed between it and the buyers.[103] The Fourth District Court of Appeal affirmed, holding that the evidence supported the jury's findings.[104] While acknowledging generally that the relationship between a bank and its borrower is normally an arm's length transaction, a **fiduciary** relationship could be implied in law based on the specific facts surrounding the transaction and the relationship of the parties.[105] The court noted that throughout the construction, the buyers relied on the bank for help and the bank advised the buyers of their options, and that at closing, the bank assured the buyers about obtaining an affidavit from the builder and that they did not need an attorney.[106]

Another example of an arm's length business transaction being converted into a **fiduciary** relationship is the decision in *Capital Bank v. MVB, Inc.*, 644 So. 2d 515 (Fla. 3d DCA 1994). In *Capital Bank*, which is cited in the *First National* decision, a vendor of hair care products and its supplying manufacturer each had a borrower relationship with the bank.[107] When the manufacturer verged on bankruptcy, a loan officer recommended and assisted the vendor's purchase of the manufacturer's assets.[108] The equipment proved to be defective and continuously broke down, forcing the vendor to sell both companies.[109] The vendor then filed an action against the bank for breach of **fiduciary** duty, alleging that the loan officer knew that the equipment was faulty and convinced the vendor to purchase it by showing him a "walk -thru appraisal" of the equipment, which is not as accurate as a specific appraisal that separately describes, lists, and assigns specific values to each machine.[110] The vendor further alleged that the bank benefitted from the sale of the manufacturer's assets because the manufacturer would not have been able to pay its debt to the bank without the sale.[111]

The jury found that the bank breached its **fiduciary** duty.[112] On appeal, the Third District Court of Appeal ruled that the bank acted beyond its role as a lender by orchestrating the purchase of the manufacturer's assets and fostering the perception to the vendor that the bank was its financial advisor. As a result, the bank was held to have assumed a **fiduciary** duty to the vendor.[113] The court further ruled that the bank breached its **fiduciary** duty by not acting in the vendor's best interests and by failing to disclose the lacking nature of the appraisal.[114]

Contrast these decisions with the decision in *Building Education Corp. v. Ocean Bank*, 982 So. 2d 37 (Fla. 3d DCA 2008), that declined to impose a **fiduciary** duty. In *Building Education Corp.*, a company sought financing from Ocean Bank for real property on which the company planned to build an international preparatory school and residential development.[115] As part of the discussions, the attorney for the company provided the bank with documents, including various development plans and appraisals that the attorney considered confidential, although he did not obtain a confidentiality agreement.[116] After the company later defaulted on a purchase money mortgage and the property proceeded through foreclosure, the company formed a joint venture to raise funds in an effort to reinstate the mortgage.[117] The property, however, was purchased at a foreclosure sale by a group that included a developer who was also an outside director of the bank.[118] The group resold the property, realizing a $2.5 million profit.[119]

When the company learned that the outside director was involved with the purchase, the company brought an action against the bank for breach of **fiduciary** duty, alleging that the director obtained its confidential information regarding the property.[120] The company also alleged that a member of the joint venture had met with the director prior to the foreclosure sale to discuss the property and its development plans as part of the joint venture's effort to raise funds to avert the foreclosure.[121]

The trial court granted summary judgment in favor of the bank, and the Third District affirmed on appeal, ruling that no relationship existed between the company and the bank that would give rise to a **fiduciary** duty.[122] The ruling emphasized the company was merely a potential customer of the bank — it was not a depositor, borrower, or trust department client — and the dealings between the company and the bank were only preliminary discussions.[123]

*5) Remedies for breach of **fiduciary** duty* — Both legal and equitable remedies are available for a breach of **fiduciary** duty. The equitable remedies include an accounting, imposition of a constructive trust, disgorgement of profits or commissions, and injunctive relief.[124] Legal remedies include tort actions for both compensatory and punitive damages.[125] These remedies may result in damages greater than traditional breach of contract damages,[126] including recovery when the nonbreaching party has suffered no loss at all.[127]

6) Entitlement to jury trial — A right to a jury trial applies only to legal and not equitable causes of action.[128] The federal test is often phrased in terms of whether "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action

in equity or admiralty."[129] The Florida test is similarly whether the party seeking a jury trial is trying to invoke rights and remedies of the sort traditionally enforceable in an action at law.[130]

Because a beneficiary of a **fiduciary** duty can obtain both legal and equitable remedies, whether there is an entitlement to a jury trial depends upon the remedy sought. For example, in *First National Bank*, a jury trial was conducted because the plaintiffs there sought compensatory damages.[131] The mere use of the label "damages," however, is not sufficient to create a right to a jury trial.[132] For example, in *King Mountain Condominium Association, Inc. v. Gundlach*, 425 So. 2d 569 (Fla. 4th DCA 1982), despite the plaintiffs labeling their claim for breach of **fiduciary** duty as one for "damages," the court held that there was no right to a jury trial because the plaintiffs sought disgorgement, which is an equitable remedy.[133]

Appellate Review

Whether a **fiduciary** relationship exists and a whether **fiduciary** duty has been breached present a number of appellate concerns. When the facts concerning an alleged **fiduciary** relationship are not in dispute, the issue of whether those facts establish a **fiduciary** relationship and whether a **fiduciary** duty should be imposed, are matters of law to be determined by the trial court.[134] Appellate review of those determinations is de novo.[135]

If, however, the facts that give rise to an alleged **fiduciary** relationship are not conceded, the issue of whether a **fiduciary** relationship exists and whether a **fiduciary** duty should be imposed may be mixed questions of law and fact.[136] In such cases, the disputed facts that would either establish or refute the existence of a **fiduciary** relationship or duty are to be determined by the fact finder.[137] Those findings should be upheld when substantial, competent evidence supports them.[138]

Once a **fiduciary** relationship and a **fiduciary** duty are established, whether the **fiduciary** duty was breached is a factual determination for the fact finder. That factual determination is reviewed on appeal under the substantial, competent evidence standard of review.[139] If substantial, competent evidence supports the factual finding of a breach or of no breach of **fiduciary** duty, the finding will be upheld by the appellate court.[140]

Conclusion

While the parameters of the **fiduciary** relationship may be undefinable, the relationship itself is fundamentally concerned with persons who assume trustee-like positions with discretionary power over the interests of others. The relationship may arise expressly, through contracts and statutes, or may be implied under the specific circumstances of the parties' relationship, which often requires a factually intensive inquiry. Although arm's length business transactions generally do not create **fiduciary** relationships (because the parties are expected to pursue their own interests and, therefore, have no duty to protect the other's interests), a court may impose a **fiduciary** duty when one party assumes responsibilities beyond those normally required by an arm's length business transaction. It is never sufficient simply to decide that a **fiduciary** relationship exists. As addressed by Justice Frankfurter, in *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 86 (1943), "to say a man is a **fiduciary** only begins the analysis; it gives direction to further inquiry. To whom is he a **fiduciary**? What obligations does he owe as a **fiduciary**? And what are the consequences of his deviation from duty?"

[1] *See Elkind v. Bennett*, 958 So. 2d 1088, 1091 (Fla. 4th D.C.A. 2007), *relying on Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 560 (Fla. 1997) (the relationship between an attorney and client is a **fiduciary** relationship of the very highest character); *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1132 (Fla. 5th D.C.A. 2003) (an executor/personal representative owes a **fiduciary** duty to the heirs and creditors of the estate); Fla. Stat. §733.609(1) ("A personal representative's **fiduciary** duty is the same as the **fiduciary** duty of a trustee of an express trust"); *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st D.C.A. 1990) (guardian owes **fiduciary** duty to ward); *Doyle v. Maruszczak*, 834 So. 2d 307, 309 (Fla. 5th D.C.A. 2003) (an agent owes a **fiduciary** duty to the principal and may not put itself in a position adverse to that of the principal); *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th D.C.A. 2008) (trustee owes a **fiduciary** duty to settlor/beneficiary); *Cohen v. Hattaway*, 595 So. 2d 105, 107 (Fla. 5th D.C.A. 1992) (officers and directors of a corporation have **fiduciary** obligations to the corporation and shareholders).

[2] *See Susan Fixel, Inc. v. Rosenthal, Inc.*, 842 So. 2d 204, 208 (Fla. 3d D.C.A. 2003); *Capital Bank v. MVP, Inc.*, 644 So. 2d 515, 518 (Fla. 3d D.C.A. 1994); *Hooper v. Barnett Bank of West Florida*, 474 So. 2d 1253, 1257 (Fla. 1st D.C.A. 1985) (a bank may have a duty to disclose material facts and owes a **fiduciary** duty when the bank holds itself out as a financial advisor or otherwise has reason to know that a depositor is reposing trust and confidence in the bank).

[3] *See Doe v. Evans*, 814 So. 2d 370, 374-375 (Fla. 2002).

[4] *See S.E.C. v. Yun*, 327 F.3d 1263, 1272-1273 (11th Cir. 2003) (applying Florida law where wife learned confidential financial information about her husband's employer in connection with negotiations concerning marital assets, the wife had a **fiduciary** duty to keep confidential the financial information of the employer).

[5] Deborah A. DeMott, *Breach of **Fiduciary** Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 Ariz. L. Rev. 925, 934-35 (2006) (hereinafter *Breach of **Fiduciary** Duty*); Deborah A. DeMott, *Beyond Metaphor: An Analysis of **Fiduciary** Obligation*, 1988 Duke L. J. 879, 908 (1988) (hereinafter *Beyond Metaphor*).

[6] DeMott, *Breach of **Fiduciary** Duty* at 934-35; *see also* D. Gordon Smith, *The Critical Resource Theory of **Fiduciary** Duty*, 55 Vand. L. Rev. 1399, 1423 (2002).

[7] DeMott, *Beyond Metaphor* at 879.

[8] A. Mason, *Themes and Prospects,* Essays in Equity 246 (P. Finn ed. 1985).

[9] J.C. Shepherd, The Law of Fiduciaries 4-8 (1981).

[10] *U.S. v. Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) ("A **fiduciary** relationship involves discretionary authority and dependency: One person depends on another — the **fiduciary** — to serve his interests."); DeMott, *Beyond Metaphor* at 914 ("Described instrumentally, the **fiduciary** obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another"); Tamar Frankel, ***Fiduciary** Law*, 71

Cal. L. Rev. 795, 807-808 (1983) ("all **fiduciary** relations give rise to the problem of abuse of power ... the purpose of **fiduciary** law should be to solve this problem"); Ernest J. Weinrib, *The **Fiduciary** Obligation*, 25 U. Toronto L. J. 1, 4 (1975) ("The **fiduciary** obligation is the law's blunt tool for the control of ... discretion.").

[11] Black's Law Dictionary 625 (6th ed. 1990) (emphasis added). Black's also defines the word "confidence" as "[t]rust; reliance; relation of trust. Reliance on the discretion of another. In the construction of a will, this word is considered peculiarly appropriate to create a trust." Black's Law Dictionary 297 (6th ed. 1990).

[12] *See* DeMott, *Beyond Metaphor* at 880-82.

[13] *Id.* at 879, 880-81,

[14] The concept of a "**fiduciary**" originated in equity and is derived from the "use," the forerunner of today's trusts. The use — from the Latin "ad opus" (meaning "on his behalf") — grew out of arrangements in medieval England that allowed land to be held on behalf of religious orders who were pledged to vows of poverty and hence unable to own land. *See* F.W. Maitland, Equity: A Course of Lectures on Equity 24-25 (A.H. Claytor & W.J. Whittaker eds., Cambridge Univ. Press 2d ed. 1969) (1909); *see generally* Marcey L. Grigsby, *Seeking Privacy; Examining a Role for the **Fiduciary** in Protecting Personal Information*, 50 N.Y.L. Sch. L. Rev. 1031, 1044-49 (2006). The use was later employed by landowners to effectively will land so as to avoid feudal inheritancy rules by conveying land to a group of joint tenants who then held the land for the landowner's benefit during his life. After his death, the joint tenants conveyed the land according to the landowner's direction. *See* Maitland, Equity: A Course of Lectures on Equity at 25-28, 30-31. England's chancery courts (courts of equity), which had emerged to supplement the common law in order to provide relief when no legal remedies were available in the courts of law, began formally to enforce uses as they became popular and extended them to include agency and bailment relationships. *Id.* at 6-7, 30-31. The chancery courts followed broad principles referred to as "the rules of equity and good conscience" and relied on general words such as "trust" and "confidence." *Id.* at 7-8; L.S. Sealy, ***Fiduciary** Relationships*, Cambridge L. J. 69, 70 (1962). Breach of trust or confidence was one the traditional bases of equity jurisdiction and was used to describe a variety of situations involving employees and agents, professional advisors, guardians, and what today are considered formal trust/trustee relationships. Sealy, ***Fiduciary** Relationships* at 69; *see also* Maitland, Equity: A Course of Lectures on Equity at 24; The general principle applied was that "if a confidence is reposed, and that confidence is abused, a court of equity shall give relief." Sealy, ***Fiduciary** Relationships*, Cambridge L. J. at 69-70, *citing* Lord Thurlow in *Gartside v. Isherwood* 1 Bro. C.C. 558, 560 (1788), *citing Filmer v. Gott* 4 Bro. P.C. 230 (1774). As these broad equitable principles evolved into concrete rules, descriptive words like "confidence" gave way to more precise terms, and the word "trust" came to be recognized as a formal term with its modern technical meaning. Sealy, ***Fiduciary** Relationships*, Cambridge L. J. at 70-71. The word "**fiduciary**" was later adopted to describe those relationships that fell short of the now strictly defined trust, but in which one person was nonetheless obliged to act like a trustee. *Id.* at 71-72; DeMott, *Beyond Metaphor* at 880. *See, e.g., Bishop of Winchester v. Knight*, 1 P. Wms. 406, 407; 2 Eq. Ca. Ab. (1717) (tenant who dug copper ore was a **fiduciary** of his lord); *Woodhouse v. Meredith*, 1 Jac. & W. 204, 213 (1820) (describing a "trustee" as an agent or any other person possessing a **fiduciary** character). "**Fiduciary**" is an anglicized derivation of

the Latin "fides," which means "faith, honesty, confidence, trust, veracity, and honor." *See* Black's Law Dictionary 625 (6th ed. 1990). Under Roman law, there were a number of relationships derived from "fides" including "fiducia," a type of security in which a debtor transferred ownership of a property to a creditor; the creditor held the property until the debt was repaid and then returned it; and "fiduciarius haeres," which instituted a person as heir, who was charged to deliver the succession to a person designated by testament. *Id.*

[15] *Doe*, 814 So. 2d at 374 (emphasis added). In *Quinn v. Phipps*, 113 So. 419, 421, 425-426 (Fla. 1927), the Florida Supreme Court addressed the **fiduciary** relationship in the context of the development of equity. Other courts characterize the **fiduciary** relationship in similar terms. *See, e.g., Faulkner v. Arista Records, LLC*, 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009) ("A **fiduciary** relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another."); *Pension Committee of The University of Montreal Pension Plan v. Banc of America Securities, LLC*, 592 F. Supp. 2d 608, 624 (S.D.N.Y. 2009) ("While the 'exact limits' of what constitutes a **fiduciary** relationship are 'impossible of statement,' a **fiduciary** relationship may be found in any case 'in which influence has been acquired and abused, in which confidence has been reposed and betrayed'").

[16] *Doe*, 814 So. 2d at 374.

[17] *See* DeMott, *Breach of **Fiduciary** Duty* at 933-934. DeMott writes that Comment a's definition has the effect of excluding established categories of actors who are subject to **fiduciary** duties as a consequence of their status or the position they occupy, such as corporate directors, as well as potentially including many relationships that do not result in the imposition of **fiduciary** duties, such as parties to a contract. A party to a contract who renders performance may arguably have a duty to act "for the benefit" of the other party who receives the performance, regardless of whether the performance consists of paying money, or tendering services, but that duty is not **fiduciary** in nature. *Id.*

[18] *See* Restatement (Third) of Agency §8.01 (2006); *see also Capital Bank,* 644 So. 2d at 520.

[19] *See Capital Bank,* 644 So. 2d at 520 ("A **fiduciary** owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts").

[20] *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

[21] An example of the duty of care is the duty of a trustee to invest or manage the assets of an estate prudently, as set forth in Fla. Stat. §518.11(1)(a) ("the **fiduciary** has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust"); *see United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (a **fiduciary** administering trust property owes a fundamental common law duty as trustee to preserve and maintain trust assets; "the standard of responsibility is 'such care and skill as a man of ordinary prudence would exercise in dealing with his own property'") (citations omitted).

[22] *See* Fla. Stat. §518.11 ("Investments by Fiduciaries; prudent investor rule (1)(a).... If the **fiduciary** has special skills, or is named **fiduciary** on the basis of representations of special skills or expertise, the **fiduciary** is under a duty to use those skills"); *see also Parker v. Shullman*, 983 So. 2d 643, 647 (Fla. 4th D.C.A. 2008) (applying Fla. Stat. §518.11); *Matter of Estate of Janes*, 681 N.E.2d 332, 338 (N.Y. 1997) (applying New York law) (corporate **fiduciary** breached its duty to beneficiaries by failing to exercise the due care and skill the **fiduciary** held itself out as possessing as a corporate **fiduciary**).

[23] *See Capital Bank*, 644 So. 2d at 518; *see also In re National Century Financial Enterprises, Inc., Investment Litigation*, 604 F. Supp. 2d 1128, 1147-48 (S.D. Ohio 2009) ("The **fiduciary**'s role may be assumed by formal appointment, or it may arise de facto from a more informal relationship between the parties; for the de facto status to be recognized, however, both parties must understand under the circumstances that a special trust and confidence has been reposed in one by the other." The party asserting a claim for breach of **fiduciary** duty must establish the existence of a **fiduciary** duty, a breach of that duty, and an injury proximately resulting therefrom.).

[24] *Capital Bank,* 644 So. 2d at 518.

[25] Pursuant to Fla. Stat. §475.01(1)(f); §§475.278(1) and (3), several types of brokers owe **fiduciary** duties, including real estate brokers and brokers who coordinate business opportunities and arrange business sales.

[26] Fla. Stat. §518.11.

[27] Fla. Stat. §744.446.

[28] Fla. Stat. §620.8404.

[29] Fla. Stat. §607.0830.

[30] Fla. Stat. §620.1408.

[31] Fla. Stat. §608.4225(1).

[32] *See Capital Bank*, 644 So. 2d at 518; *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.,* 850 So. 2d 536, 540 (Fla. 5th D.C.A. 2003).

[33] *See Brigham v. Brigham*, 11 So. 3d 374, 387 (Fla. 3d D.C.A. 2009) ("To establish a **fiduciary** relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel and protect the weaker party."); *Masztal v. The City of Miami*, 971 So. 2d 803, 809 (Fla. 3d D.C.A. 2008) ("An implied **fiduciary** relationship will lie when there is a degree of dependency on one side and an undertaking on the other side to protect and/or benefit the dependent party.").

[34] *Masztal,* 971 So. 2d at 808.

[35] *Id.* at 806.

[36] *Id.*

[37] *Id.* at 807.

[38] *Id.* at 808.

[39] *Id.* at 807-08.

[40] *Id.* at 808.

[41] *Id.*

[42] *Id.* at 809.

[43] *Building Educ. Corp.*, 982 So. 2d at 41, *relying on Doe v. Evans*, 814 So. 2d at 374, *quoting* Restatement (Second) of Torts §874, Comment a.

[44] *Building Educ. Corp.*, 982 So. 2d at 41.

[45] *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 819 (10th Cir. 1986).

[46] *Id.* at 823-24.

[47] *Id.*

[48] *Id.* at 824.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 825. The court stated that the jury should have been instructed to decide first what the broker had agreed to do for the customer and then to determine whether the broker executed those tasks properly. In particular, the court explained that the jury in that case had to determine whether the customer or the broker controlled the trading account, and whether the broker undertook an advisory role to instruct the customer on trading mechanics or actual trades to make, concluding that, "[t]he jury should not, under the evocative phrase '**fiduciary** duty,' be given carte blanche to decide any and all perceived transgressions, regardless of the law."

[52] *See also Bankers Trust Realty, Inc. v. Kluger*, 672 So. 2d 897, 898 (Fla. 3d D.C.A. 1996)

(pleader failed to state claim for breach of **fiduciary** duty because pleader failed to allege sufficient ultimate facts); *Shave v. Stanford Coins & Bullions, Inc.,* No. 08-61503-CIV, 2009 WL 1748084 at *2, 3 (S.D. Fla. June 19, 2009) (applying Florida law) (investor stated claim for breach of **fiduciary** duty against rare coin dealer whose agents solicited him and represented that dealer was an expert in rare coins).

[53] *See also Sony Music Entertainment, Inc. v. Robison, et al.*, 2002 WL 272406 at *3 (S.D.N.Y. Feb 26, 2002) (artists' assertions that they placed "trust and confidence" in a record company during the six years of their relationship were not sufficient to create **fiduciary** duties in the absence of a special relationship).

[54] *See Chestman*, 947 F.2d at 567 (**fiduciary** duty cannot be imposed unilaterally by entrusting a person with confidential information).

[55] *Taylor Woodrow Homes Florida, Inc.*, 850 So. 2d at 542; *Abele v. Sawyer*, 747 So. 2d 415, 417 (Fla. 4th D.C.A. 1999) (no **fiduciary** relationship existed where no promises were made).

[56] *Taylor Woodrow Homes Florida, Inc.*, 850 So. 2d at 538.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 539.

[61] *Id.* at 538-39.

[62] *Id.* at 540.

[63] *Id.*

[64] *Id.* at 541-42.

[65] *Id.* at 542.

[66] *See also Dirks v. S.E.C.*, 463 U.S. 646, 662 n. 22 (1983) (*Walton* is cited approvingly as "a case turning on the court's determination that the disclosure did not impose any **fiduciary** duties on the recipient of the inside information").

[67] *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 797 (2d Cir. 1980).

[68] *Id.* at 797.

[69] *Id.*

[70] *Id.* at 798-79.

[71] *Id.* at 799.

[72] *See Sony Music Entertainment, Inc. v. Robison, et al.*, 2002 WL 272406 at *3 (S.D.N.Y. Feb 26, 2002) ("Generally, an arms length business transaction, even those where one party has superior bargaining power, is not enough to give rise to a **fiduciary** relationship").

[73] *See Watkins v. NCNB Nat. Bank of Florida, Inc.*, 622 So. 2d 1063, 1065 (Fla. 3d D.C.A. 1993) ("in an arms-length transaction, there is no duty imposed on either party to act for the benefit or protection of the other party, or to disclose facts that the other party could, by its own diligence have discovered); *Argonaut Development Group, Inc. v. SWH Funding Corp.*, 150 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001) (applying Florida law) ("there is no case law which suggests that a **fiduciary** duty arises between arm['s] length parties to a proposed contract").

[74] *West Indies Network-I, LLC v. Nortel Networks (CALA), Inc.*, 243 Fed. Appx. 482, 2007 WL 1745901 at *1 (11th Cir. 2006).

[75] *Id.* at *1.

[76] *Id.*

[77] *Id.*

[78] *Id.* at *1-2 (West Indies did not meet its burden to show that a partnership existed between the parties because there was no evidence that West Indies and the defendants ever shared profits or losses or had any duty to do so).

[79] *Id.* at *2.

[80] *Id.*

[81] *Id.* Consider also *Faber v. FJH Music Co., Inc.*, No. 06-12669, 2007 WL 1098259 at *2, 7-8 (E.D. Mich. Apr. 11, 2007) (applying Michigan law). *Faber* involved piano composers who transferred their interests in copyrighted works by written agreement with a music company to publish their piano teaching works. The composers filed suit alleging that the company breached a purported **fiduciary** duty when it failed to publish or utilize the composers' works. The trial court dismissed the claim, holding that no **fiduciary** relationship existed because the agreement expressly provided that the company, in its sole discretion, could decline to publish any of the composers' works. The court held that the composers knew the company's interests could at some point diverge from their interests in having their works published. Hence, it was unreasonable for the composers to repose confidence and trust in the company. Therefore, no **fiduciary** relationship (or duty) was ever formed.

[82] *First National Bank and Trust Company of the Treasure Coast v. Pack,* 789 So. 2d 411, 414-16 (Fla. 4th D.C.A. 2001).

[83] *Id.* at 413.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 414.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id*

[103] *Id.*

[104] *Id.* at 415-16.

[105] *Id.* at 414-16.

[106] *Id.* at 415-16.

[107] *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 518 (Fla. 3d D.C.A. 1994).

[108] *Id.* at 518.

[109] *Id.*

[110] *Id.* at 519.

[111] *Id.* at 518.

[112] *Id.*

[113] *Id.* at 520.

[114] *Id.*

[115] *Building Education Corp. v. Ocean Bank*, 982 So. 2d 37, 39 (Fla. 3d D.C.A. 2008).

[116] *Id.* at 39.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 39-40.

[121] *Id.* at 39.

[122] *Id.* at 40-41.

[123] *Id.* at 41. The court stated that a bank and its customers generally deal at arm's length, but that a **fiduciary** relationship may arise under special circumstances where "the bank knows or has reason to know that the customer is placing trust and confidence in the bank and is relying on the bank so to counsel and inform him." *Id.* at 40-41*, quoting Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 208 (Fla. 3d D.C.A. 2003). Those special circumstances, according to the court, include instances where the lender "takes on extra services for a customer, receives any greater economic benefit than from a typical transaction,

or exercises extensive control." *Id.* at 41. The court also noted that a contractual relationship between the parties was not required to form a **fiduciary** relationship.

[124] *See Williams v. Stanford,* 977 So. 2d 722, 730 (Fla. 1st D.C.A. 2008) ("A constructive trust is an equitable remedy available in cases dealing with breaches of **fiduciary** duty; such an instrument restores property to its rightful owner and prevents unjust enrichment"); *Cassedy v. Alland Investments Corp.*, 982 So. 2d 719, 720 (Fla. 1st D.C.A. 2008) (dissolved corporation and its representatives had **fiduciary** relationship with investor such that they were required to render final accounting); *Heina v La Chucua Paso Fino Horse Farm, Inc.*, 752 So. 2d 630, 636 (Fla. 5th D.C.A. 1999) (corporate president's wrongful appropriation of corporation's assets warranted an accounting and constructive trust); *c.f. Young v. Field*, 548 So. 2d 784, 786 (Fla. 4th D.C.A. 1989) (broker who breaches **fiduciary** duty forfeits his commission and has to account for any profits); *Vargas v. Vargas*, 771 So. 2d 594, 595-96 (Fla. 3d D.C.A. 2000) (temporary injunction was warranted in sisters' action against brothers for breach of **fiduciary** duty and conversion in order to freeze various safe deposit boxes containing bearer shares to offshore companies and $4.4 million in bank accounts).

[125] *See First National Bank,* 789 So. 2d at 412-16 (affirming award of compensatory damages for breach of **fiduciary** duty claim); *Mortellite v. American Tower, L.P.,* 819 So. 2d 928, 934 (Fla. 2d D.C.A. 2002) (minority shareholder was entitled to punitive damages for majority shareholder's breach of **fiduciary** duty, irrespective of any compensatory damages).

[126] The standard damages remedy for breach of contract is either the recovery of lost profits or recovery of expenditures. *See, e.g., Beefy Trail, Inc. v. Beefy King International, Inc.,* 267 So. 2d 853, 856 (Fla. 4th D.C.A. 1972).

[127] For instance, when a person who has breached a **fiduciary** duty forfeits profits or commissions or, as in *Mortellite,* 819 So. 2d at 934, when punitive damages are imposed against a person who owed a **fiduciary** duty irrespective of any compensatory damages.

[128] *King Mountain Condominium Association, Inc. v. Gundlach*, 425 So. 2d 569, 570 (Fla. 4th D.C.A. 1982).

[129] *Id.*

[130] *Id.*

[131] *See First National Bank,* 789 So. 2d at 414.

[132] *King Mountain Condominium Association, Inc.*, 425 So. 2d at 571.

[133] *Id.* at 571-72.

[134] *See Hooper v. Barnett Bank of West Florida*, 474 So. 2d 1253,1257-1258 (Fla. 1st D.C.A. 1985).

[135] *Id. See Gracey v. Eaker*, 837 So. 2d 348, 354, n. 7 (Fla. 2002); *cf. Dudley v. City of*

Tampa, 912 So. 2d 322, 324 (Fla. 2d D.C.A. 2005) (whether any duty in tort exists is a question of law).

[136] *See Hooper*, 474 So. 2d at 1258.

[137] *Id.* at 1258; *see also Gracey*, 837 So. 2d at 354 n. 7, 9 (holding that whether a confidential relationship exists is a determination for the fact finder to make at trial, while "[t]he existence, vel non, of a duty is a question of law and is appropriate for an appellate court to review").

[138] *Hooper,* 474 So. 2d at 1258.

[139] *See Amjad Munim, M.D., P.A. v. Azar, M.D.*, 648 So. 2d 145, 148 (Fla. 4th D.C.A. 1995); *Garcia v. Lujando*, 253 So. 2d 725 (Fla. 3d D.C.A. 1971) (where there is substantial, competent evidence to support a jury's finding of fact, that finding should be upheld and the appellate court will not substitute its judgment for that of the jury).

[140] *See Central Waterworks, Inc. v. Town of Century,* 754 So. 2d 814, 816 (Fla. 1st D.C.A. 2000) (findings of fact by a trial court in a nonjury trial will not be set aside unless there is no substantial, competent evidence to support the findings).

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