

1-1-1970

Implied Contractual Duty of Banks Not to Disclose Information to Third Parties Concerning Its Depositors' Accounts

Stephen J. Kolski

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Stephen J. Kolski, *Implied Contractual Duty of Banks Not to Disclose Information to Third Parties Concerning Its Depositors' Accounts*, 24 U. Miami L. Rev. 405 (1970)
Available at: <https://repository.law.miami.edu/umlr/vol24/iss2/10>

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

longer true. Members of the armed forces had the right to counsel⁴⁵ long before such right was given to the civilian,⁴⁶ whether he is indigent or not.⁴⁷

The criticism that the courts-martial are under direct command influence because the convening authority appoints both the defense and the prosecution is also unfair. Actually, such criticism can be leveled at the civil courts as well; the public defenders, state attorneys, judges, and even the jury are all paid and "convened" by the same party, the state.

Although it is historically true that courts-martial jurisdiction should be limited solely to "service-connected offenses," this is not because they are instruments of discipline rather than justice; a more rational explanation is that courts-martial, by their very nature, are limited as to their jurisdiction, as are all courts.

GEORGE A. KOKUS

IMPLIED CONTRACTUAL DUTY OF BANKS NOT TO DISCLOSE INFORMATION TO THIRD PARTIES CONCERNING ITS DEPOSITORS' ACCOUNTS

Plaintiffs (depositors) alleged that the defendant bank negligently, willfully or maliciously, or intentionally divulged information concerning their accounts to third parties. The third parties then sued the plaintiffs and enjoined the bank from distributing any of plaintiffs' monies on deposit, whereby plaintiffs suffered damages equal to the cost of settlement of that suit and attorneys' fees expended in defense thereof. The trial court granted defendant's motion to dismiss on the ground that plaintiffs' complaint failed to state a cause of action and denied plaintiffs' motion for a rehearing. On appeal to the District Court of Appeal, Third District, *held*, reversed and remanded: A complaint which alleges that a bank negligently, willfully or maliciously, or intentionally divulged information concerning plaintiffs' accounts to third parties states a cause of action upon which relief can be granted, upon the theory that the bank breached its implied contractual promise of nondisclosure. *Milohnich v. First National Bank*, 224 So.2d 759 (Fla. 3d Dist. 1969).

The relationship existing between a bank and its depositors is generally considered to be that of debtor and creditor,¹ and it arises only out

45. Uniform Code of Military Justice of 1950, art. 32, 64 Stat. 118.

46. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

47. *United States v. Tempia*, 16 U.S.C.M.A. 629 (1967). For further reforms within the military law see Bellin, *The Revolution in Military Law*, 54 A.B.A.J. 1194 (1968).

1. See cases collected at 10 AM. JUR. 2d *Banks & Banking* § 339 n.11 (1963).

of contract, express or implied.² In this contractual relationship, however, greater rights and obligations exist than those that are found in the ordinary debtor and creditor relationship.³

Even though the bank-depositor relationship is generally recognized as a debtor-creditor contractual relationship and numerous courts have held that a bank owes a greater duty than an ordinary debtor,⁴ there is relatively little reported law on the issue of whether that contractual relationship includes an implied obligation of the bank not to disclose information concerning its depositors' accounts.

The leading English case on the subject is *Tournier v. National Provincial & Union Bank*,⁵ in which a unanimous court, remarking on the lack of authority directly on point, held that a duty on the bank not to disclose the depositor's account or transactions relating thereto, except in certain circumstances, was implied in the banker's contract with his customers.⁶ Likewise, in an earlier case, the jury found the bank liable for unauthorized disclosure when it allowed the payee of two checks to pay into the drawer (plaintiff's) account an amount equal to the difference between the balance in the account and the sum of the two checks.⁷ However, where the bank disclosed to a moneylender that the depositor was overdrawn, hoping to obtain the moneylender's assistance for the depositor, it was held that such a communication was made on a reasonable and proper occasion.⁸

In a situation very similar to the instant case, a third party, after disclosure, requested the bank not to pay out further funds. This resulted in several of plaintiff's checks being dishonored. The English court failed to acknowledge plaintiff's claim that such disclosure violated the bank's implied contractual duty, but nevertheless allowed recovery for the bank's wrongful dishonor.⁹

2. See cases collected at 10 AM. JUR. 2d *Banks & Banking* § 337 n.18 (1963).

3. "The relation existing between a bank and its depositors is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor the bank must do so subject to the rules obtaining between principal and agent." *Crawford v. West Side Bank*, 100 N.Y. 50, 53, 2 N.E. 881, 881 (1855).

"Ordinarily, the relation between a bank and its depositors is that of debtor and creditor. . . . However, a bank deposit is more than an ordinary debt, and the depositor's relation to the bank is not identical with that of an ordinary creditor." *Gibraltar Realty Corp. v. Mount Vernon Trust Co.*, 276 N.Y. 353, 356; 12 N.E. 2d 438, 439 (1938).

4. See note 3 *supra* and the cases collected at 10 AM. JUR. 2d *Banks & Banking* § 339 nn.19 & 20 (1963).

5. [1924] 1 K.B. 461.

6. The exceptions enumerated by the *Tournier* court were as follows:

- (a) Where disclosure is under compulsion by law;
- (b) Where there is a duty to the public to disclose;
- (c) Where the interests of the bank require disclosure; and
- (d) Where the depositor expressly or impliedly consents to the disclosure. *Id.* at 473.

7. *Foster v. Bank of London*, 176 Eng. Rep. 96 (N.P. 1862).

8. *Hardy v. Veasy* [1868] L.R. 3 Ex. 107, cited frequently in *Tournier v. Nat'l Provincial & Union Bank*, [1924] 1 K.B. 461.

9. *Tassell v. Cooper*, 137 Eng. Rep. 990 (Ex. 1850). In the instant case there is no showing that the plaintiff attempted to draw on his account, but even if he had, recovery for wrongful dishonor would be unlikely because the defendant bank was legally enjoined from distributing plaintiff's monies. In the *Tassell* case, however, the bank dishonored the plaintiff's check at the request of the third party.

American opinion on the subject has been divergent in its analysis, and no less than four different theories have been advanced as to the nature and scope of the duty owed to the depositor by the bank.

Without discussing the propriety of the disclosure as such, one group of decisions has viewed an unauthorized disclosure as giving rise to an action for libel or slander.¹⁰ Generally, these cases allow a bank to disclose, absent bad faith or malice on the bank's part,¹¹ but where the disclosure was false and the bank knew it, this qualified privilege was held inapplicable.¹²

Another theory, advanced by the New Jersey equity court but not relied on since, viewed the depositor as having a property right in the information contained in his account, and therefore disclosure (upon request by a public prosecutor) was improper.¹³

A third view is advanced by the banking industry itself. This view follows a conservative policy of nondisclosure on the theory that any communication from depositor to bank is as privileged¹⁴ as is the attorney-client relationship. Courts have not been receptive to this ultraconservative policy and have often rejected it, allowing disclosure: of general credit information upon the consent of the depositor;¹⁵ under the common-law right of a stockholder to examine the corporation's books and records;¹⁶ to another bank, for whom the depositor's bank became a collection agent;¹⁷ under subpoena;¹⁸ and to the Internal Revenue Service pursuant to an income tax investigation.¹⁹

10. *Ritchie v. Arnold*, 79 Ill. App. 406 (1898); *Deal v. Bank of Smithville*, 52 S.W.2d 201 (Mo. 1932); *Sewall v. Catlin*, 3 Wend. 291 (N.Y. Sup. Ct. 1829); *First State Bank v. Parker*, 28 S.W.2d 269 (Tex. Civ. App. 1930); see also Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

11. See cases cited in note 10 *supra*.

12. *Froslee v. Lund's State Bank*, 131 Minn. 435, 155 N.W. 619 (1915).

13. *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (1929).

14. See, e.g., 1 PATON'S DIGEST OF LEGAL OPINIONS 619 (4th ed. 1940), where it is stated: "A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification." Paton, however, is of the opinion that "[a] bank disclosing to the holder of an overdraft the balance in the drawer's account is apparently not liable to the drawor."

See also J. BRADY, *THE LAW OF BANK CHECKS* 332 n.7 (Bailey 4th ed. 1969); Limburg, *The Bankers' and the Brokers' Privilege*, 25 COLUM. L. REV. 152 (1925); *United States v. First Nat'l Bank*, 67 F. Supp. 616 (S.D. Ala. 1946), as discussed in note 19 *infra*.

15. *Hindman v. First Nat'l Bank*, 98 F. 562 (6th Cir. 1899). The weight of authority, however, is to the effect that a bank may not act as a credit agency for third parties without the express or implied consent of the depositor. *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962); *People's Nat'l Bank v. Southern State Fin. Co.*, 192 N.C. 69, 133 S.E. 415 (1926). See also, Annot. 48 A.L.R. 528 (1927).

16. *Guthrie v. Harkness*, 199 U.S. 148 (1905); *State ex rel. G. M. Gustafson Co. v. Crookston Trust Co.*, 222 Minn. 17, 22 N.W.2d 911 (1946). At least one state has abolished this right by statute, MONT. REV. CODES ANN. § 5-1035 (1947).

17. *Grant County Deposit Bank v. Greene*, 200 F.2d 835 (6th Cir. 1952); cf. *Irby v. Citizens Nat'l Bank*, 239 Miss. 64, 121 So.2d 118 (1960).

18. *In re Davies*, 68 Kan. 791, 75 P. 1048 (1904); *Smith v. Dawson*, 234 S.W. 690, (Tex. Civ. App. 1921); Annot., 109 A.L.R. 1450 (1937).

19. *United States v. First Nat'l Bank*, 67 F. Supp. 616 (S.D. Ala. 1946). Even though the court held that banks were obligated to cooperate with Internal Revenue Service agents in proper cases, the court recognized the bank's obligation to its depositors:

The fourth and most recent view was expressed by the Idaho Supreme Court in *Peterson v. First National Bank*,²⁰ the single American precedent squarely on point with the instant case. In *Peterson*, the court held that a disclosure not authorized either by law or by the depositor breaches the bank's implied contractual duty not to disclose. This decision provided the court in the instant case with an American counterpart to the *Tournier* decision referred to above.²¹

In the instant case, *Milohnich v. First Nat'l Bank*, the court, taking care to point out that the Uniform Commercial Code did not apply to the case,²² relied on the two leading precedents, *Peterson v. First National Bank*²³ and *Tournier v. National Provincial & Union Bank*,²⁴ and held that the duty of nondisclosure is derived from the implied contractual relation between the bank and its customers. In doing so, however, the court recognized that disclosure may be proper under certain circumstances, such as disclosure relating to loan information, safe-deposit rentals, general credit information between banks, disclosure required by statute or under court compulsion, and disclosure made with the express or implied consent of the depositor.

Milohnich neither enlarges nor restricts the scope of the duty of a bank as set forth in *Peterson* and *Tournier*, but when placed in tandem with these decisions it provides both banks and their customers a firmer body of case law on a subject which is not likely to be litigated frequently due to the banking industry's general policy of nondisclosure.²⁵

Although the rationale of the court's decision is contrary to the argument that the nature of an action for unauthorized disclosure is tortious,²⁶ the decision is nevertheless acceptable. Whichever legal theory is fol-

All agree that a bank should protect its business records from the prying eyes of the public, moved by curiosity or malice. No one questions its right to protect its fiduciary relationship with its customers, which, in sound banking practice, as a matter of common knowledge, is done everywhere. *Id.* at 624.

20. 83 Idaho 578, 367 P.2d 284 (1961), where the disclosure was to the depositor's employer. The case is noted in Note, *A Bank-Depositor's Right of Sanctity*, 39 U. DET. L.J. 590

21. See notes 5 and 6 *supra* and accompanying text. Even though the *Peterson* case appears to stand alone, it is supported by the following statement contained in 10 AM. JUR.2d *Banks & Banking* § 332 (1963):

Indeed, it is an implied term of the contract between a banker and his customer that the banker will 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, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court

22. 224 So.2d 759 (Fla. 3d Dist. 1969). The plaintiff was a depositor from January 29, 1962 until November 1, 1966. Florida adopted the Uniform Commercial Code in 1967. Nevertheless, this author's opinion is that nothing contained in the Uniform Commercial Code would affect the result of this case.

23. 83 Idaho 578, 367 P.2d 284 (1961).

24. [1924] 1 K.B. 461.

25. See note 14 *supra*.

26. Pearson, J., concurring specially in the instant case, rejected the analysis that the action lay for breach of contract and urged instead that the bank committed a business tort. 224 So.2d at 763. See also Note, *A Bank-Depositor's Right of Sanctity*, 39 U. DET. L.J. 590 (1962).

lowed,²⁷ a cause of action in favor of the depositor arises when unauthorized disclosure occurs. Moreover, the court's conception of the bank's disclosure as a breach of an implied contract follows what appears to be the most recently expounded judicial view.²⁸ Consequently, this case, along with the *Peterson* and *Tournier* decisions, may provide the nucleus of the beginning of the end of an era of uncertainty.

STEPHEN J. KOLSKI

LIABILITY OF HARMLESS COMPONENT MANUFACTURER TO THIRD PARTY

Plaintiff was injured by an explosion of a water repellent compound which contained two percent "Tyzor HS," a harmless component developed by the defendant, E.I. DuPont, and ninety-eight percent Shell Sol B. The compound was manufactured by a corporation not a party to this action. Plaintiff sought recovery based upon negligence and strict liability in tort. The jury found for the plaintiff only on the count alleging negligence. On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, affirmed: The manufacturer of a harmless component is liable in negligence to a third party harmed by the end product containing such component, based upon the prominent location of the component manufacturer's trade-mark on the label and its active role in producing and advertising the product. *E.I. DuPont de Nemours and Co. v. McCain*, 414 F.2d 369 (5th Cir. 1969).

The landmark case of *MacPherson v. Buick Motor Co.*¹ signaled the close of an era in which the negligent manufacturer was protected from third-party liability by the absence of a contractual relationship. The Court of Appeals of New York, led by Justice Cardozo, replaced the burden of privity of contract imposed by *Winterbottom v. Wright*² with the more realistic test of foreseeable danger.³ With the advent of

27. The difference in the theoretical basis of liability is not wholly academic, for damages recoverable in tort may be more comprehensive than those recoverable in contract. The contractual theory, in other words, may not compensate a depositor for his total loss; see 22 AM. JUR. 2d *Damages* § 18 (1965). The bank in the instant case asserted that if a breach of contract was stated, the complaint would nevertheless be insufficient for failure to allege recoverable damages. The court disposed of the argument by citing 25 C.J.S. *Damages* § 50(e) (1966), and the cases cited therein, which suggest that when a breach of contract results in the necessity to defend an action against third parties, recovery of attorney's fees incurred in the prior litigation should be allowed in the action for breach of contract.

28. *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); *Tournier v. Nat'l Provincial & Union Bank*, [1924] 1 K.B. 461.

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

3. The court stated:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . [and] there is . . . knowledge that the thing will