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December 5, 2008

FINANCIAL INSTITUTIONS MAY BE SUBJECTED TO HEIGHTENED FIDUCIARY DUTIES

Brown v. Wells Fargo Bank, NA et al.,
2008 Cal. App. Lexis 2355 (November 25, 2008)

In its November 25th decision *Brown v. Wells Fargo Bank, NA et al.*, the California Court of Appeals held that a broker – even before an agreement has been entered – may owe a fiduciary duty to individuals to disclose the material terms of a proposed contract between them. The unique facts of *Brown* make it unclear how broadly courts will interpret the decision, but it may pave the way for new lawsuits by brokerage account holders, as well as borrowers and other individuals under contract with financial and other institutions, seeking relief from their contracts. In the economic climate we presently face, look out for the plaintiff's bar adding this potential lender liability redux to its growing number of predatory lending claims.

The plaintiffs in *Brown* were an unusually sympathetic elderly couple, and were long-standing customers of Wells Fargo (the "broker"). At the time of the transaction at issue, the Browns used a "relationship manager," who visited them at home every other week to help them manage their financial affairs. After determining that some of the Browns' investments were not sound, the relationship manager referred the couple to one of the broker's senior vice president financial consultants, who arranged for the opening of a brokerage account. The Browns signed the brokerage agreement without ever reading it or consulting with an attorney, and neither the broker relationship manager nor the financial consultant, both present at the signing, offered to read the material terms to the Browns, or advised them to consult with their attorney. Nearly two years after the brokerage account was opened, the Browns brought suit against the broker for breaching its duties with respect to the sale of certain stock.

The broker sought to compel arbitration of the dispute, relying on the arbitration clause in the brokerage account agreement. The trial court denied the motion, finding the arbitration clause procedurally unconscionable. On appeal, the court concluded that the arbitration clause was not substantively unconscionable and that procedural unconscionability alone is an insufficient basis on which to deny a motion to compel arbitration. The court observed the unique characteristics of the case, including the relationship manager's regular visits to the Browns' house, the broker's knowledge that Mr. Brown had poor vision and was "a little slow," and the relationship manager's insistence that the Browns seek investment advice through the broker, ultimately finding that the broker "knowingly induced the elderly and increasingly frail couple to rely on it to handle their financial affairs, thus creating a fiduciary relationship." The court further found that if a fiduciary duty existed between the broker and the Browns before the execution of the brokerage agreement, the rule that "generally, it is *not reasonable* to fail to read a contract," would not apply since the "the same degree of diligence is not required by the non-fiduciary party."

The court remanded the case for the ultimate determination whether a fiduciary duty to orally disclose the material terms of the contract to the Browns potentially allows for their defense of fraud in the execution of the agreement and a voiding of the agreement altogether.

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As noted above, the *Brown* decision may signal a new avenue for brokerage account holders and borrowers to avoid obligations under their contracts. Given the unique facts of *Brown*, it is not yet clear how other courts will react to the holding, and whether it will in fact represent a significant change in the fiduciary duties of financial institutions and others. Indeed, a concurring opinion (by J. Kitching) warns that the import of the decision should be limited to the unusual facts of the case. Regardless, in the near future, the decision is likely to be a source of ammunition for individual litigants until the scope of the decision is further developed.

While HRO acts as counsel for Wells Fargo in other matters, HRO was not involved in the *Brown* case.

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