I. The Uniform Fiduciaries Act (The “UFA”)

A. Currently adopted by at least 26 states, including Minnesota. Minn. Stat. § 520.01, et seq.

1. The drafters intended the statute to be a defense for banks, expressly authorizing them to conduct certain transactions without incurring expensive monitoring costs for fear of liability.

2. Likewise, the statute was intended to “facilitate the fiduciary’s performance of his responsibilities by limiting the liability of those who deal with him, and to cover situations which arise when one person honestly deals with another knowing him to be a fiduciary.” Appley v. West, 832 F.2d 1021, 1031 (7th Cir. 1987).

3. The statute has evolved into a sword, now used to impose liability on banks. Often the banks are engaging in the very conduct for which the statute originally contemplated there should not be liability.

B. In general, the UFA imposes liability against endorsees, payees, transferees, and depository-banks for facilitating the breach of a fiduciary’s obligations as such, if acting either with: (1) actual knowledge that a fiduciary is violating a fiduciary duty; or (2) is aware of facts such that proceeding with the transaction constitutes an act of bad faith.

More specifically, the UFA will impose liability by default upon endorsees, payees, or banks that are personal creditors of the fiduciary depending on which is involved. Some of the UFA’s key provisions include the following:

C. Endorsees: UFA Section 4 – Transfer of Negotiable Instruments by Fiduciary (i.e. applies to endorsees of negotiable instruments payable to a fiduciary as such)

1. Any endorsee of a negotiable instrument payable to a fiduciary as such is liable if the endorsee takes the instrument with: (1) actual knowledge of such breach or with (2) knowledge of such facts that his action in taking the instrument amounts to bad faith.

2. However, if the endorsee has actual knowledge that such instrument is being transferred in payment of or as security for a personal debt of the fiduciary, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact has committed a breach in endorsing the instrument.
3. Example: A issues a check payable to “T as Trustee.” “T as Trustee” then endorses the check to B to pay off a debt that “T” owes B in his personal (non-trustee) capacity. B knows that the check is endorsed for the benefit of T personally, and is therefore liable to the Principal by default if T has breached his fiduciary duty by endorsing the check.

D. Payees: UFA Section 5 – Check Drawn by Fiduciary Payable to Third Person (i.e. applies to payees of checks drawn by a fiduciary as such)

1. Any payee of a check or other bill of exchange drawn by a fiduciary as such is liable if the endorsee takes the instrument with: (1) actual knowledge of such breach or with (2) knowledge of such facts that his action in taking the instrument amounts to bad faith.

2. However, if the payee is a personal creditor of the fiduciary and the instrument is delivered as payment of or as security for a personal debt of the fiduciary, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach in drawing or delivering the instrument.

3. Example: “T as Trustee” draws a check from the trust account made out to B to pay a personal debt. B will be liable to the Principal if drawing the check is a breach of T’s fiduciary duty.

E. Transferees: UFA Section 6 – Checks Drawn by and Payable to Fiduciary (i.e. transferees of checks drawn by a fiduciary payable to the fiduciary personally)

1. Any transferee of a check or other bill of exchange drawn by a fiduciary as such and made payable to the fiduciary personally (or to a third person who then transfers the instrument to the fiduciary personally) is liable if the transferee takes the instrument with: (1) actual knowledge of such breach or with (2) knowledge of such facts that his action in taking the instrument amounts to bad faith.

2. Here, the transferee is not liable to the principal – even if a personal creditor of the fiduciary – unless the transferee carries actual knowledge of breach or knowledge of such facts that his action in taking the instrument amounts to bad faith.

3. Example: “T as Trustee” draws a check from the trust payable to T. T then endorses the check to B in payment of a personal debt. In the absence of any other facts indicating B’s knowledge of breach or facts establishing bad faith, then B is not liable to the principal.

F. Depository Banks: UFA Section 7 – Deposits in Name of Fiduciary as Such (i.e. deposits made in a bank to the credit of a fiduciary as such)

1. If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal unless the bank pays the check with (1) actual knowledge that the
fiduciary is committing a breach in drawing the check, or (2) with knowledge of such facts that its action in paying the check amounts to bad faith.

2. If, however, such check is payable to the drawee bank, and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of the fiduciary’s obligation in drawing or delivering the check.

3. Example: “T as Trustee” deposits $50,000 into an account at Bank X for the benefit of “T as Trustee.” “T as Trustee” – in violation of his fiduciary obligations -- then issues a check to B for $40,000. Bank X is not liable to the Principal for paying the check unless Bank X has actual knowledge of breach, or knowledge of such facts that renders paying the check an act of bad faith.

4. Example: “T as Trustee” deposits $50,000 into an account at Bank X for the benefit of “T as Trustee.” “T as Trustee” – in violation of his fiduciary obligations -- then issues a check to Bank X for $40,000 to pay off T’s personal loan. Bank X is liable to the Principal for paying the check.

G. Depository Banks: UFA Section 8 – Deposits in Name of Principal (i.e. deposits made in a bank to the credit of a principal)

1. If a check is drawn upon the account of a fiduciary’s principal in a bank by a fiduciary, who is empowered to draw such checks, the bank is liable for paying the check with (1) actual knowledge that the fiduciary is breaching its obligations; or (2) with knowledge of facts that render paying the check to amount to bad faith.

2. If, however, such check is payable to the drawee bank and is delivered in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach by drawing or delivering the check.

3. Example: “T as Trustee” deposits $50,000 into the Principal’s account at Bank X. “T as Trustee” – in violation of his fiduciary obligations -- then issues a check from Principal’s account to B for $40,000. Bank X is not liable to the Principal for paying the check unless Bank X has actual knowledge of breach, or knowledge of such facts that renders paying the check an act of bad faith.

4. Example: “T as Trustee” deposits $50,000 into Principal’s account at Bank X. “T as Trustee” – in violation of his fiduciary obligations -- then issues a check from Principal’s account to Bank X for $40,000 to pay off T’s personal loan. Bank X is liable to the Principal.

H. Depository Banks: UFA Section 9 – Deposits in Fiduciary’s Personal Account (i.e. where a fiduciary deposits into his personal account funds held by the fiduciary as such)

1. If a fiduciary makes a deposit in a bank to the fiduciary’s personal credit of checks drawn or issued by the fiduciary as such, then the bank is liable if it receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach or with knowledge of facts such that receiving the deposit or paying the check amounts to bad faith.
2. There is no strict liability provision for paying checks drawn upon such deposits.

3. Example: “T as Trustee” deposits $50,000 into Principal’s account at Bank X. “T as Trustee” – in violation of his fiduciary duties – then issues a check from Principal’s account to “T” in his personal capacity. T deposits the check into T’s personal account (also at Bank X). T then pays Bank X $40,000 in satisfaction of a personal loan. Bank X is not liable for paying the check unless Bank X has actual knowledge of breach, or knowledge of such facts that renders paying the check an act of bad faith.

I. Additionally, many states that have yet to adopt the UFA have common law analogs that impose liability on banking institutions for aiding and abetting the breach of a fiduciary duty.

1. E.g., Iowa. See Independent Consolidated Sch. Dist. of Dow City v. Crawford County Trust & Savings Bank, 298 N.W. 667, 671 (Iowa 1941):

“The general rule is that if a bank has notice or knowledge that a fiduciary is misappropriating or intends to misappropriate trust funds which he seeks to withdraw, good faith requires that the bank prevent such accomplishment. By failing so to do the bank makes itself a privy and instrumentality to the commission of the fraud and therefore liable for the amount misappropriated.”

J. Common Tag-Along Claims:

1. Conversion
2. Unjust Enrichment
3. Interference with Contract
4. Conspiracy to Commit Fraud
5. Aiding and Abetting

II. Liability Scenario: Receiving Money from Fiduciary as Such to Pay Personal Debt


1. Facts: Plaintiff-country club sued its president-Fiduciary and defendant-Bank under the UFA for converting substantial corporate assets for Fiduciary’s own personal use. Fiduciary funded his acquisition of a 51% interest in the country club through varying loan transactions from Bank. As collateral for the loans, Fiduciary pledged certain assets of the country club, despite a provision in the purchase agreement prohibiting the pledging of the country club’s assets as collateral to finance the acquisition. Fiduciary eventually paid off these loans by liquidating the country club’s savings certificates. Those savings certificates were reduced to a cashier’s check payable directly to Bank, who in turn, issued a cashier’s check to the country club, which the Fiduciary then endorsed in favor of his alter-ego corporation (Golf Shares, Inc.). Golf
Shares then deposited the cashier’s check, and promptly paid Bank the remaining balance owing on the Fiduciary’s personal loan.

2. **Posture:** Minnesota Court of Appeals affirms jury verdict finding Bank liable under UFA – Sections 8 (Deposits in Name of Principal) and 9 (Deposits in Fiduciary’s Personal Account).

3. **Held:** Affirmed. Technically, there was no check drawn by Gill upon the account of the country club, as the savings certificates were reduced to a cashier’s check payable to the country club. The cashier’s check was then endorsed over to the alter-ego and was deposited. A separate check was then issued to Bank from the alter-ego. Accordingly, the facts do not fit squarely within any Section of the UFA.

Regardless, the Court held that “the actual format of the transactions which occurred . . . is not as important as their substance, which was conduct that the provisions in sections 520.08 and 520.09 were intended to prevent.” *Id.* at 362.

The Court imposed the strict liability rule of Section 8, which holds banks liable for depositing funds from a fiduciary as such towards a fiduciary’s personal debt. The Court noted that liability could exist under Section 9, as well, given that the Bank had actual knowledge that the stock purchase agreement prohibited the stock acquisition through loans collateralized by corporate assets, and that the savings certificates were not allowed to be applied towards the outstanding debt obligations either. *Id.* at 362.

4. **Red Flags:** The Bank knew or should have known of the breach because the underlying contract that necessitated the lending transaction prohibited the use of corporate assets to pay the loan.


1. **Facts:** Employee-Fiduciary embezzled nineteen checks totaling over $18,000 from Employer. Fiduciary forged an authorization form listing her as a specified “officer” allowed to initiate certain transactions with defendant-Bank, which Fiduciary then presented to defendant Bank. This form also absolved the Bank of liability for honoring any such requests. Fiduciary then caused checks issued from the Employer for legitimate business purposes to be made to cash, or deposited in her personal account also held at Bank, or to be applied to personal debt owing to Bank. Of the nineteen checks, eleven (totaling $5,264.40) were credited to Fiduciary’s personal loan balance owing to defendant Bank.

2. **Posture:** Appeal from district court’s dismissal of claims brought under UFA Section 5 (Payees) against defendant-Bank pursuant to the authorization agreement (albeit forged) presented to the Bank authorizing it to pay on transactions initiated by the Fiduciary.

3. **Held:** Reversed. The Court first stated the rule that under Section 5 of the UFA, a fiduciary’s creditor is liable to the fiduciary’s principal if it applies to the personal debt of the fiduciary a check of the principal designating the creditor as payee.
Accordingly, the Court first found the Bank liable for the $5,264.40 applied to Fiduciary’s personal debts.

The Court next discussed the remaining $12,849.35, and stated the “actual knowledge” or “bad faith” rule that exists under Section 9 (Deposits into Fiduciary’s Account). The Court found both actual knowledge and bad faith.

As to actual knowledge, the Court noted that when a drawee bank applies money received from a fiduciary in its capacity as such in payment of personal debt owing to the Bank, the UFA imposes strict liability, and treats such an act as one automatically made with “actual knowledge” of a breach of fiduciary duty. Because the second check (of the nineteen) that Fiduciary cashed with the Bank was applied towards her personal debt with the Bank, the Bank is found to have actual knowledge of the breach for all subsequent checks, regardless of whether they were applied towards personal debt owing to the Bank.

The Court also found bad faith as “the Bank’s personnel had before their eyes clear evidence of a probable misappropriation. The Bank was both witness and participant when it began receiving corporate checks and applying them to Miss Ewing’s private debt.” Id. Finally, the Court found it “noteworthy” that the Bank had a monetary interest in not notifying the Employer since an investigation would jeopardize the flow of repayments on the Fiduciary’s personal debt. Id. at 555.

4. Red Flags: The Court noted a few: First, the Court held that once a bank is strictly liable under the UFA for applying funds towards its personal debt, then all subsequent transactions (even if not applied towards a personal debt) are automatically made with actual knowledge or in bad faith. Second, the Court saw the fact that the bank was a creditor of the fiduciary as an additional red flag because of the dis-incentive to report the fraud. The Court additionally suggests that the very transactions themselves signaled a probability of breach, and warranted a finding of bad faith. This runs in absolute contravention to the UFA’s purpose and plain language.

C. American Bank of St. Paul v. TD Bank, N.A., No. 12-1806 (8th Cir. April 26, 2013). (*Not an UFA Case, but provides an important example of exposure to potential liability under facts that might be surprising).

1. Facts: Defendant-Bank discovered that security offered on $16 million in loans made to Investor-Borrower was falsely represented, and was likely fabricated. In fact, the Borrower expressly told the Bank’s president that the security was a “can of worms.” Bank then entered into a forbearance agreement with Borrower and shortly after Borrower established a new financing facility to pay off existing debt, and finance Borrower’s further investment in acquiring rights to a popular television production.

Several small banks participated in the facility, each performing its own due diligence. Eventually, Borrower requested a $5,000,000 advance from the facility to make a payment on the investment, but because the facility was not yet fully participated it could not close. The Investment Firm leading the deal presented two options to the Bank: (1) close the facility and receive a partial payoff of its outstanding debt; or (2) allow the Investment Firm to provide the additional funds, but
once the facility was closed, the Investment Firm would be paid first before the Bank. Bank chose option (1), investing an additional $2million, but receiving over $10,000,000 in payment towards its debt within a month.

Borrower was eventually convicted of felony bank fraud and running Ponzi schemes. The other participating banks lost substantially all of their investments, and tried to recoup those proceeds by bringing suit for aiding and abetting against the Bank.

2. Posture: After a jury verdict for $14million against the Bank, the Bank appeals arguing that as a matter of law it cannot be held liable for aiding and abetting on the factual record.

3. Held: Affirmed. The Court holds that Bank’s conduct could be seen as substantially assisting or encouraging the Borrower in its achievement of committing fraud and breaching its fiduciary duty to the other investor banks.

Under Minnesota law, an aiding and abetting claim requires proof that: (1) the primary tort-feasor committed a tort that caused an injury to the plaintiff; (2) the defendant knew that the primary tort-feasor’s conduct constituted a breach of duty; and (3) the defendant substantially assisted or encouraged the primary tort-feasor in the achievement of the breach.

The Court reasons that it is best left to a jury to determine whether the Bank’s acts constituted “substantial assistance,” and thus left the verdict alone. Those acts include electing option one presented above, thus allowing the investment to close, which in turn allowed the Bank to recoup about $10million of its investment, and gave the Bank a continuing interest in the new debt.

The Court further emphasized that in Minnesota, the knowledge and substantial-assistance elements of aiding and abetting are evaluated “in tandem,” thus allowing the jury to employ a balancing approach to the analysis. If the jury found that the defendant-Bank’s knowledge of the Borrower’s breach was certain, it could very well have reached its verdict with a lesser showing of substantial assistance.

III. Liability Scenario: Honoring Misappropriated Checks or Deposits

A. McCartney v. Richfield Bank & Trust Co., 2001 WL 436154 (Minn. Ct. App.)

1. Facts: Attorney-Fiduciary establishes a client trust account at Bank and then engages in misappropriation of client funds through a check-kiting scheme. Throughout the scheme, there were at least 25 overdrafts against the trust account. The Fiduciary later admitted that he would float checks among several banks, using successive deposits to cover the checks when there was insufficient money.

The Bank had in place a “suspect kiting report” whenever ratios of deposits to check writing reached suspicious levels. The report identified the trust account as a suspect account, and the bank wrote the Fiduciary in 1994 instructing that the overdrafts must stop. Despite writing this letter, it continued honoring over-drawn checks, and never contacted any banks when a suspect kiting entry would appear on his account reports.
2. **Posture:** Appeal from summary judgment granted in favor of Bank on claims brought under UFA Section 7 (Deposits in the Name of Fiduciary as Such).

3. **Held:** Reversed. The Minnesota Court of Appeals found that with respect to actual knowledge, the Beneficiaries have “presented material fact questions as to whether the actual nature of the lawyer’s overdraft practices became apparent to the bank and whether knowledge of those practices and the danger posed by the overdrafts constitutes knowledge sufficient to create liability.” *Id.* at *3.

The Court inexplicably approves of a negligence standard, stating that bad faith can be proven by the existence of “facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated. . . and a bank’s failure to conduct a reasonable inquiry when the obligation to do so arises will result in the bank being charged with such knowledge as inquiry would have disclosed.” *Id.* at *4* (emphasis added on negligence standard language). The Court holds that this fact question exists, despite the fact that “not every overdraft practice constitutes a breach of fiduciary duty.” *Id.* at *3.

With respect to “bad faith,” the Court finds a material fact question here, as well, noting that “there is no precedent for the proposition that dishonesty cannot arise in the form of a bank’s toleration of a severe practice of overdrafts or significant evidence of check kiting.” *Id.* at *4.*

Essentially, the Court employs an “ostrich rule,” holding that the UFA can impose liability on banks that “remain passive” when facts suggest that a fiduciary might be breaching its duty.

4. **Red Flags:** The Court points to: (1) the Fiduciary’s commonly overdrawn personal account; and (2) the check-kiting alert.


1. **Facts:** Fiduciary misappropriated third party checks payable to his Employer. The Fiduciary endorsed these checks to himself and deposited them in his bank account at defendant Bank. Defendant Bank then paid checks drawn from the personal account which contained the misappropriated funds.

There are no any facts tending to demonstrate the Bank’s actual knowledge or bad faith aside from the transactions themselves. Indeed, the Court recognizes as much in a footnote: “[w]e note the limited designated facts before the trial court. The parties failed to designate the banking agreement between the parties, the signature card(s) or any material regarding commercial standards.” *Id.* at 239 n. 2.

2. **Posture:** The trial court granted the Bank summary judgment on the Employer’s claims under UFA Sections 4 (Endorsees) and 9 (Deposits in Fiduciary’s Personal Account). The Employer appealed arguing that there is a material fact question as to the Bank’s actual knowledge or bad faith.
3. **Held:** The Court reversed, finding a material fact question as to whether it was commercially unjustifiable for the Bank to disregard and refuse to learn facts readily available under the circumstances of the case.

   The Court’s discussion includes a background about the UFA, instructing that the Act is intended to shield banks from liability, and relieve depository banks “of the duty of seeing that funds are properly applied,” and instead places the “burden upon the principal to employ honest fiduciaries.” *Id.* at 238.

   The Court further defines “bad faith” as “not simply bad judgment or negligence; rather, ‘it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity’ and ‘contemplates a state of mind affirmatively operating with furtive design or ill will.’” *Id.* at 239.

   Despite this preface, the Court somehow arrives at the following rule: “In determining whether a bank has acted with bad faith under the UFA, courts have asked ‘whether it was commercially unjustifiable for the payee to disregard and refuse to learn facts readily available.’” *Id.* The Court’s holding seems to ignore that the UFA requires knowledge of at least some facts, and affirmatively does away with a bank’s obligation to inquire in the absence of knowledge.

4. **Red Flags:** The Court holds that the existence of the transactions themselves (over one hundred checks totaling over $182,000) creates a fact question as to whether “it was commercially unjustifiable for [the Bank] to disregard and refuse to learn facts readily available under the circumstances of this case.” *Id.* at 239.


1. **Facts:** Real estate Attorney-Fiduciary embezzled funds from client’s trust account held at defendant-Bank, and used those funds to gamble. Fiduciary would issue checks payable to himself, and either cash those checks at the defendant-Bank or have them certified and then cashed at the casino.

   In course of one month, Fiduciary issued 52 checks from the trust account totaling $241,350. Because of the amounts of the checks, the bank managers had to authorize the withdrawals. ATM records that the Bank managers reviewed during the time demonstrated that Fiduciary was frequently overdrawn on his personal business account, was spending considerable time in Atlantic City, and was depositing money from the trust account into his business account, and then withdrawing those funds in Atlantic City. Moreover, the Bank managers learned that Fiduciary never followed the proper procedure for opening sub-accounts in his trust account for respective clients.

   Eventually, the Bank closed the business account because of the overdrafts, the gambling, and because it was not satisfied in the way he was doing business. However, the following day, the Bank allowed Fiduciary to withdraw on the trust account for $25,000.

   The Bank never reported to the IRS the large daily deposits that Fiduciary made, despite its stated policy that such deposits required disclosure to the IRS.
2. **Posture:** The trial court granted summary judgment for the Bank on the plaintiff's claims under UFA Section 6 (Checks Drawn by and Payable to Fiduciary). Plaintiff appealed, arguing that a reasonable trier could find bad faith.

3. **Held:** The Court reversed, finding that there were sufficient facts such that a jury could infer bad faith. Despite recognizing that the UFA shields transferees who are merely negligent from liability, the Court held that the jury might find that the “Bank recklessly disregarded or was purposefully oblivious to facts suggesting impropriety by the [Fiduciary].” *Id.* at 157.

4. **Red Flags:** The Court cites the following facts that might justify a finding of bad faith:
   (1) the frequency and amount of the withdrawals (almost daily for a month, totaling $291,000); (2) acknowledgment by Bank management that these withdrawals were extraordinary, thus requiring approval (which was granted); (3) knowledge of the Fiduciary’s gambling; (4) willingness to close the Fiduciary’s personal business account, but still allowing Fiduciary to withdraw $25,000 from the open trust account the following day; and (5) the Bank’s failure to report Fiduciary to the I.R.S. for making substantial daily deposits into his business account contrary to its established policy.


   1. **Facts:** Corporate Comptroller-Fiduciary embezzled funds from Corporation by endorsing checks into his personal bank account. The checks were payable to the defendant-Bank for purposes of paying payroll taxes. At the onset, Corporation and defendant-Bank entered into an agreement whereby the Bank was “authorized and directed to honor and pay all checks . . . whether such checks be payable to the order of any officer or person signing said checks . . . in their individual capacities or not . . . or whether such checks are deposited to the individual credit of any officer or person signing said checks.” *Id.* at 357. Fiduciary was authorized to sign checks for the account.

      Fiduciary deposited nine checks ranging from $40,000 to $50,000 (totaling $370,000), into his personal account. Each was deposited by use of an ATM automated deposit envelope function. Bank did not pay itself on any of the checks but rather allowed the checks to be deposited into Fiduciary’s personal account.

      This is yet another case where the evidence of bad faith before the court consists of the transactions themselves.

   2. **Posture:** Insurance Company (who acquired Corporation’s rights) appealed the trial court’s order granting summary judgment to the defendant-Bank under the Illinois Fiduciary Act, Section 9 (Deposits in Fiduciary’s Personal Account).

   3. **Held:** Reversed. The Court found that this is not an “actual knowledge” case, but there remain sufficient facts to support a finding of bad faith. Specifically, the Court found it commercially unreasonable for the defendant-Bank to “establish and maintain an ATM deposit procedure that allowed [the Fiduciary] to randomly deposit nine unaltered, non-forged checks in the amounts of $40,000 to $50,000 each into
his personal account, where he was not a signatory to the account, and where the checks were payable to the order of [Bank] and drawn on [Corporation’s] corporate account.” *Id.* at 367. “Therefore [the Bank’s] failure to examine the checks is not excused by the fact that [Fiduciary] deposited the checks into an ATM.” *Id.*

The Court additionally recognizes that the claims are not time-barred as the three-year statute of limitations is subject to the “discovery rule,” where the action does not accrue until the plaintiff discovered the defendant’s violation.

4. **Red Flags:** In addition to highlighting the number of checks and substantial dollar amounts, the Court’s opinion is essentially taking issue with the Bank’s procedure for dealing with ATM deposits.


   1. **Facts:** Court-appointed Guardian of incompetent ward opened a checking account in defendant-Bank in the name of the Guardian as guardian for the ward. In the ensuing seven months, Guardian misappropriated over $10,000 from the guardianship account.

      The Guardian drew and cashed 25 checks at the Bank made payable to Guardian, signed by the Guardian, and drawn against the guardianship account. Two of the checks contained handwritten notations stating that they were in payment of services. Similar statements appeared on two other checks, reading, “Payment in full for services as guardian, January ’71 through April ’71 (at $100.00 per Mo.) as per Probate Court’s 4-30-71 verbal order.” The second check read “Payment for future services – in advance – as per Court’s verbal order on 6-11-71.” *Id.* at 457.

   2. **Posture:** Appeal from dismissal for failure to state a claim for which relief can be granted in favor of defendant Bank for claims brought pursuant to UFA Section 9 (Deposits in Fiduciary’s Personal Account).

   3. **Held:** Affirmed. The Court recognizes that the Fiduciary Act expressly authorizes depository institutions to “assume that the notations made by the guardian were made in carrying out the purposes of the guardianship.” *Id.* at 459. The Court noted that “The bank’s obligation to the trustee is to honor his checks when drawn to form. It owes no duty to the trust estate save to refrain from participating in misappropriation of the funds.” *Id.* at 459.

   4. **Red Flags:** None. This case is difficult to reconcile with the holdings in *UNR-ROHN* and *Continental Casualty Co.*

   **F. In re Bernard L. Madoff Investment Securities, LLC, No. 11-5044, (2d Cir. June 20, 2013).**

   1. **Facts:** Fiduciary-Investor (“F”) orchestrated the largest Ponzi scheme in history, defrauding investor-Principals (“P”). Numerous financial institutions (collectively and severally, “Banks”) allegedly facilitated the fraud despite clear warning signs.
2. **Posture**: Trustee appointed pursuant to the Securities Investment Protection Act brings claims for aiding and abetting, contribution, and numerous other tort theories against financial institutions, seeking over $30 billion in damages. The Trustee appeals after the lower court dismissed the action under the doctrine of *in pari delicto*, and for lack of standing.

3. **Held**: Affirmed. The Trustee stepped into the shoes of Madoff’s defunct entity, and therefore could not collect against the Banks because the entity participated in the fraud. As to standing, the Trustee could not assert the claims of the defrauded Principals, and therefore there was no live case or controversy.

4. **Red Flags**: There are many: (1) the personal checking account that held the money exhibited a “glaring absence of securities activity”; (2) the fund showed strong gains during a time when the S&P 100 dropped 30%; (3) widespread rumors within the banking community (including defendant-Banks) that F’s fund was a Ponzi scheme; (4) Banks collected enormous fees for facilitating the transactions; (5) Banks performed little or no due diligence; (6) when Banks did perform due diligence, they ignored it; (7) F was unable to identify counterparties to certain options transactions; (8) Banks had atypical fee structures, indicating that they understood the increased risk in associating with the fund; (9) F reported an “impossibly high” volume of trades; (10) there were thousands of instances where F’s reported trades exceeded the actual trade volume on the market.