1991

International Minerals &(and) Mining Corp. v. Citicorp North America, Inc.: A Contractual Relationship between Loan Applicant and Lender

Jason D. Topp

Comment

International Minerals & Mining Corp. v. Citicorp North America, Inc.: A Contractual Relationship Between Loan Applicant and Lender

Jason D. Topp

Traditionally, American courts have been unwilling to impose general obligations on parties negotiating contracts unless one party makes a specific promise to the other.[1] Contrary to this practice, a federal district court in New Jersey recently held that a bank's acceptance of a commercial loan application obligates the bank to consider the application in good faith.[2] In *International Minerals & Mining Corp. v. Citicorp North America, Inc.*,[3] the court thus imposed a general obligation of good faith and fair dealing on parties during the negotiation stage of contract formation.

This Comment explores the dimensions and traces the likely consequences of an *IMMCO* contract. Part I describes the status of common law precontractual and lender liability.[4] Part II describes the *IMMCO* reasoning and holding.[5] Part III explores the significance of the *IMMCO* reasoning,[6] criticizes

1. In 1987, Professor Farnsworth asserted that American courts never impose general obligations on negotiating parties due solely to the negotiation process:

> In recent decades, courts have shown increasing willingness to impose precontractual liability. I shall group the possible grounds under four headings. The first three, unjust enrichment resulting from the negotiations, misrepresentation made during the negotiations, and specific promise during the negotiations, have been recognized by courts in the United States; the fourth, general obligations arising out of the negotiations themselves, has not.

E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 222 (1987).

2. International Minerals & Mining Corp. v. Citicorp North America, Inc., 736 F. Supp. 587, 595 (D.N.J. 1990) [hereinafter *IMMCO*].

3. 736 F. Supp. 587 (D.N.J. 1990).

4. *See infra* part I.

5. *See infra* part II.

6. *See infra* part III.A.

the decision,[7] and concludes that parties who sufficiently manifest an intention not to be bound by a contractual relationship during loan negotiations should remain free from any contractual obligation.

I. BACKGROUND

A. Common Law Precontractual Liability

A bargain theory contract consists of two elements: mutual assent and consideration.[8] Parties enter into contractual negotiations for the purpose of creating legally enforceable agreements.[9] By negative implication, prior to the successful completion of negotiations, the parties do not create anything for the legal system to enforce.[10] This freedom from contract

---

7. *See infra* part III.B.

8. Bargain theory contract is the leading type of promise enforced by contract law. ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND REVIEW OBLIGATIONS: THEORY, DOCTRINE, AND PRACTICE 48 (1987). This type of contract involves two elements: mutual assent and consideration. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979).

The first element, mutual assent, consists of an agreement on essential terms. The *Restatement (Second) of Contracts* summarized this element as follows: "The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties." *Id.* § 22(a).

The second element, consideration, consists of bargained for exchange. "A performance or return promise is bargained for if it is sought by the promisor in exchange for [a] promise and is given by the promisee in exchange for that promise." *Id.* § 71(2).

9. The purpose of a contract is to create promises which the law recognizes as duties. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). "A contract is a promise, or set of promises, for breach of which the law gives as a remedy, or the performance of which the law in some way recognizes as a duty." SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 1 (3d ed. 1957); *see* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979); RESTATEMENT OF CONTRACTS § 1 (1932); *cf.* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 3 (rev. ed. 1963) ("[A] contract is a promise enforceable at law directly or indirectly," *quoted in* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 1-1, at 2 n.1 (3d ed. 1987).

10. Farnsworth, *supra* note 1, at 221-22 (discussing the fact that the traditional view of the negotiation process states that parties have the freedom to negotiate without the risk of liability); Charles L. Knapp, *Enforcing a Contract to Bargain*, 44 N.Y.U. L. REV. 673, 674-75 (1969) ("Correlative to (but not necessarily dictated by) the proposition that creation of a contract relation results in the immediate existence of rights, is the converse: until the stage of contract is reached, no rights exist because none have been created."); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 41 (1979); 1 CORBIN, *supra* note 9, § 38; Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 813 (Tex. Ct. App. 1987) (emphasizing that courts use an objective standard in determining whether the parties

intended to enter into a contractual agreement), *cert. dismissed*, 485 U.S. 994 (1988).

Although negotiations do not give rise to contract liability, negotiating parties can be held liable under other theories of recovery. For example, plaintiffs have recovered, prior to the creation of a binding contract, for statutory violations, unjust enrichment, fraud, misrepresentation, and promissory estoppel. Plaintiffs also may recover under numerous other tort theories. A quick introduction to each of these theories of recovery sheds light on their importance.

Statutory law frequently restricts the options of negotiators. Three areas where federal regulations shroud the negotiation process are: labor trade negotiations, trade regulation, and improper discrimination. For a discussion of the scope of these areas, see E. ALLAN FARNSWORTH, CONTRACTS § 3.26 (2d ed. 1990) [hereinafter FARNSWORTH, CONTRACTS]. The National Labor Relations Act, 29 U.S.C. § 158(d) (1988), requires that labor negotiations be conducted in good faith. *See generally* NLRB v. Katz, 369 U.S. 736, 742-43 (1962) (discussing duties imposed by the National Labor Relations Act); Continental Ins. Co. v. NLRB, 495 F.2d 44, 48 (2d Cir. 1974) (discussing the good faith obligation).

In trade regulation, the Sherman Act, 15 U.S.C. §§ 1-7 (1988), places some duties on negotiating parties. For a discussion of duties under the Sherman Act, see Donald A. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 689 (1962) (noting that the Supreme Court has held that "a manufacturer cannot refuse to deal, or deal only on certain conditions, where the conduct reflects or is part of 'an attempt to monopolize' forbidden by section 2 of the Sherman Act").

In terms of the third area, improper discrimination, courts also restrict negotiations. Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e - 2000e-15 (1988), prohibits employers and unions from discriminating on the basis of race, color, sex, religion or national origin when considering job applications. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971). Section 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1982 (1988), prohibits "*all* racial discrimination, private as well as public, in the sale or rental of property." Jones v. Alfred Mayer Co., 392 U.S. 409, 413 (1968) (emphasis added by court); *see generally* Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The* Contract Buyers League *Case*, 80 YALE L.J. 516 (1971) (analyzing § 1982 and issues of racial discrimination in the real estate market).

In the absence of statutory restrictions, plaintiffs can look to the common law for redress for precontractual wrongdoing. For example, a plaintiff may recover if the other party unjustly enriched itself due to the negotiations: "A negotiating party may not with impunity unjustly appropriate such benefits [received during the negotiation process] to its own use." Farnsworth, *supra* note 1, at 229. To constitute unjust enrichment, a party must be enriched by the receipt of some benefit. *See*, FARNSWORTH, CONTRACTS, *supra*, § 2.20; Gay v. Mooney, 50 A. 596 (N.J. 1901) (finding that services rendered to defendant were not gratuitous and that plaintiffs deserved recovery for those services), *aff'd per curiam*, 52 A. 1131 (N.J. 1902). Additionally, the party must retain the benefit *unjustly*. *See* Anderco, Inc. v. Buildex Design, Inc., 538 F. Supp. 1139 (D.D.C. 1982) (no recovery fee for benefit conferred when no proof of unjust retention of benefit proved). Damages in an unjust enrichment action are limited to the benefit conferred. Gay v. Mooney, 50 A. at 597.

Fraud can be caused by misrepresentation. *See, e.g.*, State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, 680 (Tex. Ct. App. 1984). For examples of misduring negotiations is a fundamental concept in contract law.[11]

representation in precontractual situations, see Markov v. ABC Transfer & Storage Co., 457 P.2d 535 (Wash. 1969) (intentional misrepresentation of an intent to renew a lease); *In re* Slefco, 107 B.R. 628, 644 (E.D. Ark. 1989) (intentional misrepresentation of intent to make additional loans).

The *Restatement (Second) of Contracts* defines promissory estoppel as follows:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

In the widely discussed case of Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965), the Wisconsin Supreme Court applied promissory estoppel to contract negotiations. In the two decades since *Red Owl*, however, "its influence [on precontractual liability] has been more marked in the law reviews than the law reports." Farnsworth, *supra* note 1, at 237. Cases that have applied promissory estoppel to the precontractual arena include: Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 73 (2d Cir. 1989) (finding that material issues of fact existed in promissory estoppel claim arising out of failed negotiations); Zimmerman v. First Fed. Sav. & Loan, 848 F.2d 1047, 1055 (10th Cir. 1988) (allowing recovery of lost profits on a promissory estoppel claim against a lender); Skycom Corp. v. Telstar Corp. 813 F.2d 810, 817 (7th Cir. 1987) (remanding promissory estoppel claim for reconsideration by the parties and the district court); Werner v. Xerox Corp., 732 F.2d 580, 582-84 (7th Cir. 1984) (upholding promissory estoppel decision based on promises by Xerox that it would purchase machines from Werner); Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900, 905 (Colo. 1982) (en banc) (adopting promissory estopel in Colorado).

A negotiating party may also utilize several tort theories to hold another party liable in the absence of contractual privity. Examples of tort theories include fraud, intentional misrepresentation, breach of fiduciary duty, and negligence. High v. McLean Fin. Corp., 659 F. Supp. 1561, 1566-71 (D.D.C. 1987). In *High*, the misrepresentation claim was founded on a statement recklessly made. *Id.* at 1567; *see* STEVE H. NICKLES, LENDER LIABILITY: MAJOR CAUSES AND EFFECTIVE CURES 35 (4th ed. 1990); RESTATEMENT (SECOND) OF TORTS § 525 (1977). A claim for breach of fiduciary duty can be a basis for liability in the absence of an agency relationship. NICKLES, *supra*, at 35 (citing Stone v. Davis, 419 N.E.2d 1094 (Ohio), *cert. denied*, 454 U.S. 1081 (1981)). When a third party has knowledge of a contract and interferes with that contract, plaintiffs sometimes can hold that party liable for tortious interference with contract despite the absence of contractual privity. *See Texaco*, 729 S.W.2d at 828 (discussing the knowledge required under this theory).

These theories of recovery impose extensive obligations on negotiating parties. Thus, any discussion of freedom of negotiations must be made against the backdrop of these restrictions.

11. "The logic would seem irrefutable: if all contracts are promises, then the promises that create contracts can be negated by express declarations that they do not bind the promisor." Wendell H. Holmes, *Freedom Not to Contract*, 60 TUL. L. REV. 751, 752-53 (1969).

"Adam Smith, Ricardo, Bentham, and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress; and imposed their theories on the educated thought of their

Determining whether a contract exists is therefore a vital first step in determining contractual liability.

The existence of a contract is equally important for determining whether the parties owe each other an obligation of good faith and fair dealing.[12] Courts normally require good faith only when parties have entered into a valid contract.[13] Absent special circumstances, the obligation generally has not applied to negotiating parties.[14] Once a contractual relationship exists, however, courts may imply a covenant of good faith and fair dealing even if the parties attempt to disavow the obligation contractually.[15]

Further, courts and scholars disagree about what consti-

---

times with a thoroughness not common in economic speculation." Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921).

12. The obligation of good faith does not apply prior to the existence of a contractual relationship. Farnsworth, *supra* note 1, at 239; Dennis M. Patterson, *Good Faith, Lender Liability and Discretionary Acceleration: Of Llewellyn, Wittgenstein and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 185 n.123 (1989) (explaining that the UCC does not impose a good faith obligation in absence of a contract); *see* Holmes, *supra* note 11, at 752.

13. *See* Holmes, *supra* note 11, at 752.

14. One example of a special circumstance is when parties negotiate contract modifications. *See* T & S Brass and Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098, 1105 (4th Cir. 1986) (explaining that good faith requires a legitimate commercial reason for a party to seek a contract modification); Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 145-46 (6th Cir. 1983) (finding that the good faith standard applies to contract modifications and requires two inquiries: (1) whether the party's conduct conforms with the standard of reasonable commercial standards of fair dealing; and (2) whether the party sought the modification for honest purposes).

15. Though courts are sometimes willing to enforce such agreements, *see* Winterstein v. Wilcom, 293 A.2d 821 (Md. Ct. Spec. App. 1972) (enforcing exculpatory agreement with respect to the use of a drag strip), two major exceptions render such provisions invalid. The first exception involves parties with disparate bargaining power. Ellis and Gray argue that if all lenders required an exculpatory provision, courts would refuse to enforce the provision due to this exception. *See* Nan S. Ellis & John A. Gray, *Lender Liability for Negligently Processing Loan Applications*, 92 DICK. L. REV. 363, 390 (1988). The second exception involves businesses operating in the public interest. *Winterstein*, 293 A.2d at 825 (citing Tunkle v. Regents of the Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963)). Factors for determining whether this second exception applies include: whether the business is of the type generally thought suitable for public regulation, whether the service performed is one of great importance to the public, whether the party holds itself out as willing to perform the service for any member of the public who meets certain minimum standards, whether one party has superior bargaining power, and whether the property of one party is placed under the control of the party seeking exculpation. *Id.* A disappointed loan applicant would have a legitimate argument under either of these exceptions to the enforceability of exculpatory provisions. *See* Djowharzadeh v. City Nat'l Bank & Trust Co., 646 P.2d 616, 619 (Okla. Ct. App. 1982) (emphasizing that the public invests enormous public

tutes good faith.[16] In recent years, commentators have struggled to apply this "duty of good faith" to lenders.[17] These discussions have concentrated on three sources of law that define the obligation of good faith and fair dealing: the Uniform Commercial Code, the *Restatement (Second) of Contracts*, and the common law. The Uniform Commercial Code applies a subjective standard of good faith[18] to most commercial transac-

---

trust in banks, that banks have a virtual financial monopoly on the community, and that the legislature carefully regulates banks).

16. Two widely cited articles generally discussing the obligation of good faith are: E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); and Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) [hereinafter Summers, *Good Faith Under the UCC*]. Several more recent articles have examined the obligation of good faith. *See e.g.*, Steven J. Burton, *Breach of Contract and the Common Law Duty Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984); B.J. Reiter, *Good Faith in Contracts*, 17 VAL. U. L. REV. 705 (1983); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) [hereinafter Summers, *The General Duty of Good Faith*].

17. For examples of articles discussing this duty of good faith, see Alan A. Blakeboro & Rex Heeseman, *Good Faith Duties and Tort Remedies in Lender Liability Litigation*, 15 W. ST. U. L. REV. 617 (1988); Werner F. Ebke & James R. Griffin, *Good Faith and Fair Dealing in Commercial Lending Transactions: From Covenant to Duty and Beyond*, 49 OHIO ST. L.J. 1237 (1989); Peter A. Forgosh, *Good Faith and the Asset Based Lender*, N.J. ST. B.J., Summer 1986, at 28; Patterson, *supra* note 12; Cary Smith, *Breach of Good Faith as an Expansive Basis for Lender Liability Claims: An Idea Whose Time Has Come—and Gone?*, 42 RUTGERS L. REV. 177 (1989); Mark L. Snyderman, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335 (1988); William P. Young & R. William Wyand, *The Sanctity of Contract—in Good Faith*, MD. B.J., May/June 1989, at 2; Susan D. Gresham, Special Project, *"Bad Faith Breach": A New and Growing Concern for Financial Institutions*, 42 VAND. L. REV. 891 (1989); Jill Pride Anderson, Note, *Lender Liability for Breach of the Obligation of Good Faith Performance*, 36 EMORY L.J. 917 (1987); Kenneth J. Goldberg, Note, *Lender Liability and Good Faith*, 68 B.U. L. REV. 653 (1988); Note, *Lender Liability: Breach of Good Faith in Lending and Related Theories*, 64 N.D. L. REV. 273 (1988); Jane L. Rodda, Note, *The Role of Good Faith in Lender Liability Suits: Rising Star or Fading Gadfly?*, 31 ARIZ. L. REV. 939 (1989); Brad Schacht, Note, *Bad Faith Lenders*, 60 U. COLO. L. REV. 417 (1989).

18. " 'Good faith' means honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1989). This standard is applied to all contracts through UCC § 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1989).

Some debate does exist as to whether UCC §§ 1-203 and 1-208 apply a subjective or objective standard. Although some courts have been willing to imtions. This standard requires "a state of mind" in which "[a] party is advantaged only if [that party] acted with innocent ignorance or lack of suspicion."[19] In contrast, the *Restatement (Second) of Contracts* adopts an objective standard of good faith and fair dealing.[20] An objective standard requires decency, fairness, or reasonableness in performance or enforcement.[21] The common law provides a third source for defining good faith. Common law definitions vary widely.[22]

---

pose an objective component to these sections, *see* Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1375-80 (9th Cir. 1979), the vast majority of cases hold that the UCC obligation is purely subjective. *See generally* NICKLES, *supra* note 10, at 133-48. For examples of cases applying a subjective good faith test, see Watseka First Nat'l Bank v. Ruda, 552 N.E.2d 775, 779 (Ill. 1990) (adopting an "honest belief" standard); Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 533 (Mo. Ct. App. 1986) (explaining that this standard is far less stringent than the commercial test of reasonableness and fair dealing).

A plaintiff forced to argue an objective standard of good faith under UCC § 1-203 faces a very difficult challenge. The Code defines good faith as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1989). This standard contains no language supporting an objective interpretation. Additionally, earlier drafts of this definition contained an objective standard, but the drafters then modified it to the final form. Robert Braucher, *The Legislative History of the Uniform Commercial Code,* 58 COLUM. L. REV. 798, 812 (1958); Farnsworth, *supra* note 16, at 671. Thus, both the language of the section and the history of its drafting support a subjective interpretation.

In a sales context, the UCC subjects merchants to an objective standard of good faith. U.C.C. § 2-103(1)(b) (1989). This standard, however, does not apply to debtor-creditor relationships. *See* U.C.C. § 2-104 (1989); Van Bibber v. Norris, 419 N.E.2d 115, 122-23 (Ind. 1981).

19. Farnsworth, *supra* note 16, at 668. Commentators have described this as "the rule of 'the pure heart and the empty head.'" Braucher, *supra* note 18, at 812.

20. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). Comment (a) to this section defines "good faith" as follows:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness, or reasonableness.

Id. § 205 cmt. a (1979).

21. Larese v. Creamland Dairies, Inc., 767 F.2d 716, 717-18 (10th Cir. 1985) (finding that the obligation imposes a duty of reasonableness on a franchisor when determining whether to consent to a franchise sale); Pizza Management, Inc. v. Pizza Hut, Inc., 737 F. Supp. 1154, 1179 (D. Kan. 1990) (A "breach [of duty] occurs when a party's actions are commercially unreasonable."); Centronics Corp. v. Genicom Corp., 562 A.2d 187, 193 (N.H. 1989) (explaining that a party with discretion in a satisfaction contract owes a duty to observe reasonable limits in the exercise of that discretion).

22. The good faith concept arose in the context of "satisfaction cases" in which one party's performance was contingent on that party being satisfied

Given these three methods of defining the duty of good faith and its varying interpretations in the common law, opinions vary regarding what the duty requires.[23] This uncertainty

with the performance of the other party. *See* Mattei v. Hopper, 330 P.2d 625, 626-27 (Cal. 1958) (holding that a clause requiring a contractor to obtain satisfactory leases qualifies as consideration because the party with the power to terminate the contract must exercise its power in good faith). Courts imposed an implied duty of good faith on the non-performing party to combat arguments that this type of contract was unsupported by consideration. *Id.* at 627.

Courts have been willing to impose a subjective standard, Tiffany v. Pacific Sewer Pipe Co., 182 P. 428, 430 (Cal. 1919) (holding that there was "no sufficient evidence to support the finding that the defendant was satisfied with his work"); an objective standard, Collins v. Vickter Manor, Inc., 306 P.2d 783, 788 (Cal. 1957) (adopting the "reasonable person" standard); or a combination of the two standards, K.M.C. v. Irving Trust Co., 757 F.2d 752, 761 (6th Cir. 1985) (applying dual standard of reasonableness and honesty).

Often, the courts apply sweeping definitions which seem to go beyond either standard. Many definitions of good faith appear quite abstract, sweeping and formalistic. For a general listing, see FARNSWORTH, CONTRACTS, *supra* note 10, § 7.17; *see also* Conoco v. Inman Oil Co., 774 F.2d 895, 908 (8th Cir. 1985) ("Th[e] implied covenant imposes upon each party the duty to do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose.") (citations omitted); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1038 (Ariz. 1985) ("The covenant requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement."); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (stating that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract") (citations omitted).

Commentators even have argued that it makes no difference which standard courts apply. Because defendants rarely will admit subjective bad faith, plaintiffs must prove it through the same external criteria that plaintiffs use under an objective standard. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-3, at 1192-94 (3d ed. 1988).

23. *See supra* notes 12-22 and accompanying text. The appropriate role for the duty of good faith and fair dealing has sparked so much dispute because the issue goes to the heart of the distinction between contract law and tort law. The basic difference between tort and contract law lies in whether society or individuals determine legal duties. Society determines tort duties. *See* 21st Century Properties Co. v. Carpenter Insulation & Coatings Co., 694 F. Supp. 148, 151 (D. Md. 1988) (indicating that "[t]ort rules are evolved from considerations of overriding public policy"); Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1153 (1942) ("The hornbook 'test' of negligence is: Did the defendant act as an ordinarily prudent [person] would in like circumstances?"). Individuals determine contract duties. *See supra* note 10 and accompanying text. An objective standard of good faith injects a societal standard of reasonableness on an agreement between individuals. *See* Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 650 (1981) ("The result [of an objective interpretation of good faith] may be an individualized jurisprudence in which judicial discretion exists to alter risks previously allocated between the parties."); Snyderman, *supra* note 17, at 1338 (arguing that judicial use of the obligation of good faith and fair dealing has

imposes a difficult burden on courts interpreting the duty and on businesses trying to act in accordance with it.

This analytical difficulty surrounding the obligation of good faith is compounded further by questions about whether a contract exists between the parties.[24] The classic model of two parties negotiating a purchase price[25] may accurately depict the process by which Aunt Ida sells a blender at her garage sale but bears little resemblance to the process by which a multi-million dollar loan or a large sale of real estate is made:

> Major contractual commitments are typically set out in a lengthy document, or in a set of documents, signed by the parties . . . and exchanged more or less simultaneously at a closing. The terms are reached by negotiations, usually face to face over a considerable period of time and often involving corporate officers, bankers, engineers, accountants, lawyers, and others.[26]

---

caused good faith to become a loose cannon that courts have used to further their views of justice). An objective standard of good faith thus undermines a fundamental precept of contract law—that individuals, not society, should determine their respective obligations.

The legal community generally agrees that the imposition of societal standards on contracts is necessary in some situations, such as a contract that contravenes public policy, *see, e.g.*, Myers v. Western-Southern Life Ins. Co., 849 F.2d 259, 261 (6th Cir. 1988) (holding that if the purpose of a contract is to create a situation detrimental to the public interest, then it is unenforceable); Bond v. Charlson, 374 N.W.2d 423, 429 (Minn. 1985) (indicating that a contract for fraudulent sale of securities violates public policy); Sternamen v. Metropolitan Life Ins. Co., 62 N.E. 763, 764 (N.Y. 1902) (holding that parties cannot make a binding contract that violates public policy); or a retail contract that takes advantage of an unsophisticated buyer, *see* U.C.C. § 2-103(1)(b) (1989). Beyond such specialized situations, however, traditionalists cringe at the thought of societal standards altering agreements made in an arms-length commercial setting. *See* Snyderman, *supra* note 17, at 1346 (supporters of imposing community standards into contracts "have shifted the presumption decidedly away from the text of the contract"). Other commentators argue that such interference is necessary. *See* Farnsworth, *supra* note 16, at 672 (good faith must include an objective standard); Summers, *Good Faith under the UCC*, *supra* note 16, at 210-12 (criticizing the UCC standard of good faith); Michael L. Weissman, *Lender Liability, the Obligation to Act in Good Faith and Deal Fairly*, J. COM. BANK LENDING, Dec. 1986, at 2-3.

24. *See generally* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 4-10 (1980) (discussing the complexities involved in defining a contract).

25. "Usually an essential prerequisite to the formation of contract is an agreement: a mutual manifestation of assent to the same terms. This mutual assent ordinarily is established by a process of offer and acceptance." JOHN D. CALAMARI & JOSEPH D. PERILLO, THE LAW OF CONTRACTS § 2-1, at 25 (3d ed. 1987); *see* Dura-Wood Treating Co. v. Century Forest Indus., 675 F.2d 745, 750-51 (5th Cir.), *cert. denied*, 459 U.S. 865 (1982); Eisenberg v. Continental Casualty Co., 180 N.W.2d 726, 734 (Wis. 1970); Hahnemann Medical College & Hosp. v. Hubbard, 406 A.2d 1120, 1122 (Pa. Super. Ct. 1979).

26. FARNSWORTH, CONTRACTS, *supra* note 10, § 3.5 (2d ed. 1990).

These procedures blur the distinction between precontractual and contractual relationships. Under the classic method of finding a contract, courts often are forced to make decisions based on an inaccurate factual model.[27]

In order to cope with this weakness in the classic contract model, parties occasionally enter into agreements that cannot readily be categorized as either a "contract" or "no contract." These agreements include: a preliminary agreement with open terms,[28] a preliminary agreement to negotiate,[29] an agreement to engage in a transaction,[30] and a stop-gap agreement.[31] These agreements define obligations that lie somewhere between no obligation and a finalized contract.

Courts occasionally hesitate to enforce these interim agreements. Such agreements raise questions about intent to be bound, sufficient definiteness, authority of the negotiators, applicability of the statute of frauds, and interpretation of the agreement's language.[32] Courts are most willing to enforce such agreements when some sort of public interest supports implementing them, such as in labor negotiations.[33]

B. LENDER LIABILITY

A lender faces enormous potential exposure in a loan setting.[34] As a result, ambiguities in the law governing lending contracts can have serious financial consequences. Recent

---

27. Farnsworth, *supra* note 1, at 285. Farnsworth recognizes the factual shortcomings of the classic model of contract formation but argues that the model serves the legal system well anyway. *Id.* at 285-87.

28. This type of agreement sets out the basic terms of a deal and binds the parties to those terms. The parties further agree to negotiate the remaining terms of the agreement. *See id.* at 250.

29. This type of agreement does not bind the parties with respect to any terms, but the parties agree to work toward an ultimate agreement. *See id.* at 251.

30. The loan commitment letter typifies this type of agreement. It binds the parties but leaves the actual creation and execution of the contract for later. *See id.*

31. A stop-gap agreement may exist, for example, when a target company of a takeover bid agrees to continue conducting business in a manner that preserves the value of the company. *See id.* at 252.

32. *See id.* at 252-53 (citing cases).

33. *Id.* at 261.

34. In delineating the extent of the ever-expanding lender liability area, defining the component parts of the subject becomes important. In his book, Professor Nickles divides the subject of lender liability into eight broad areas: processing the loan; contracting to loan; managing and policing the loan; capping the loan; calling the loan; collecting the loan; confidential and fiduciary relations; and accounting to the debtor's other creditors. NICKLES, *supra* note

shifts in contract and tort law, for example, have delivered a

---

10. Plaintiffs successfully have imposed liability in each of these areas. A brief introduction to each of these areas follows.

"Processing the loan application" is discussed throughout this Comment. Courts have begun to widen the duty of care during loan processing. *See* Hill v. Equitable Bank, 655 F. Supp. 631, 648 (D. Del. 1987) (holding that a lender can be liable for negligent misrepresentation during loan application processing), *aff'd*, 851 F.2d 691 (3d Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989). Lenders also can be held liable for intentional torts during loan processing. In High v. McLean Financial Corp., 659 F. Supp. 1561 (D.D.C. 1987), the defendants assured plaintiffs that their loan would go through but then refused to lend when they were unable to broker the loan. The court upheld the plaintiffs' claims for breach of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (1988), fraud and intentional misrepresentation, breach of fiduciary duty, and negligence. *High*, 659 F. Supp. at 1570-71. The court dismissed the breach of contract claim. The fraud claim was sustained based on an allegation that the defendants recklessly made assurances of the likely success of the loan application. The breach of fiduciary duty claim was based on an allegation that the bank was acting as the plaintiffs' agent. The negligence claim was sustained based on negligent processing and negligent failure to inform the applicants about the decision-making process in determining whether to lend. *Id.* at 1570.

In the loan application process, if special circumstances warrant, courts sometimes hold lenders to a fiduciary duty. After approving a borrower's mortgage application, the lender in Stone v. Davis, 419 N.E.2d 1094 (Ohio 1981), gave the borrower a "Regulation Z" disclosure form. A clause in the form asked the borrower to indicate whether the borrower was interested in mortgage insurance. *Id.* at 1096. The plaintiffs indicated that they were interested in the insurance, but the lender failed to take any steps to procure the insurance. The court held that this factual situation gave rise to a fiduciary duty: "[W]e hold that, in broaching the subject of mortgage insurance to a loan customer, a lender has a duty to advise the customer as to how this insurance may be procured." *Id.* at 1099. Courts also have applied this duty to hold a lender responsible for negligence in advising a customer about financial decisions. Production Credit Ass'n v. Vodak, 441 N.W.2d 338, 344-45 (Wis. Ct. App. 1989).

The basic issues in a "contract to loan" case are similar to those encountered in a first-year contracts course. Some examples of these issues include: whether a contract was formed, *see* J. Russell Flowers, Inc. v. Itel Corp., 495 F. Supp. 88, 91-92 (N.D. Miss. 1980); whether consideration existed, Carrico v. Delp, 490 N.E.2d 972, 974-75 (Ill. App. Ct. 1986); whether a contract has been breached, Runnemade Owners, Inc. v. Crest Mortgage Corp., 861 F.2d 1053, 1056-58 (7th Cir. 1988); whether anticipatory repudiation has occurred, Glatt v. Bank of Kirkwood Plaza, 383 N.W.2d 473, 479-80 (N.D. 1986); whether damages are due, United Cal. Bank v. Prudential Ins. Co., 681 P.2d 390, 447-49 (Ariz. Ct. App. 1983) (because lender breached contract to provide permanent financing for a hotel, plaintiff was awarded its equity, $25 million); and whether a borrower has a duty to mitigate damages, 999 v. C.I.T. Corp., 776 F.2d 866, 871 (9th Cir. 1985).

"Managing and policing the loan" involves situations where a lender, in monitoring a business which owes it a debt, becomes so involved in the operation of the debtor-business that it may be held liable for business decisions. *See* NICKLES, *supra* note 10, at 53-88. The leading case in this area is State National Bank v. Farah Manufacturing. Co., 678 S.W.2d 661 (Tex. Ct. App. 1984), sting to lending institutions.[35] Five of the ten largest civil judg-

---

where the lender pressured Farah to make changes in management. Farah sued, and the jury awarded $18,947,348.77 for Farah on grounds of misrepresentation, duress, and tortious interference with business relations. The Texas Court of Appeals affirmed every aspect of the jury verdict. *Id.* at 698.

"Capping the loan" cases typically involve a line of credit in an ongoing debtor-creditor relationship. NICKLES, *supra* note 10, at 89-108. When the lender decides to stop funding the debtor, this decision can have devastating consequences for the debtor. Courts therefore have been sympathetic to arguments that such decisions were made in bad faith, *see* K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 759-60 (6th Cir. 1985), or that such decisions made lenders liable under a promissory estoppel theory, *see* Yankton Prod. Credit Ass'n v. Larsen, 365 N.W.2d 430, 433-34 (Neb. 1985).

"Calling the loan" involves acceleration clauses in loan agreements. NICKLES, *supra* note 10, at 109-48. An acceleration clause gives the lender a right to demand the entire amount owed by the debtor if the debtor defaults. The purpose of these clauses is to allow the lender to obtain a legal remedy against the debtor in one proceeding, rather than being forced to institute a lawsuit every time payment is in default. This decision to accelerate the obligation is restricted by a duty of good faith. Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 526-27 (Mo. Ct. App. 1986). A small minority of courts have held that the breach of this good faith limitation can by itself be a tort. *See* Reid v. Key Bank, Inc., 821 F.2d 9, 15 (1st Cir. 1987); First Nat'l Bank v. Twombly, 689 P.2d 1226, 1230 (Mont. 1984).

"Collecting the loan" cases revolve around creditors' remedies issues. These issues include: wrongful set-off, Briggs v. Southern Bakeries Co., 182 S.E.2d 459, 462-63 (Ga. 1971), and torts arising in the collections process, Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 238 (Minn. 1980).

"Paying for trust and confidence" includes confidential and fiduciary relationships. NICKLES, *supra* note 10, at 233. A fiduciary relationship makes it easier for the plaintiff to impose liability under other theories. Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 189-91 (Iowa Ct. App. 1986) (holding that the bank had a duty to disclose that an unencumbered homestead was judgment-proof). A fiduciary relationship normally does not arise out of a lender-debtor relationship. *See, e.g., In re* Letterman Bros. Energy Sec. Litig., 799 F.2d 967, 975 (5th Cir. 1985), *cert. denied*, 480 U.S. 918 (1987); Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21, 23 (Colo. Ct. App. 1981). Such a relationship, however, can arise out of a course of dealing when the borrower has placed trust in the lender. Deist v. Wachholz, 678 P.2d 188, 192-95 (Mont. 1984). A fiduciary relationship also can arise when the lender controls the borrower's assets. Blue Line Coal Co. v. Equibank, 683 F. Supp. 493, 496-97 (E.D. Pa. 1988).

"Accounting to other creditors" involves the ways in which a lender can be liable to third parties. NICKLES, *supra* note 10, at 295-457. These issues arise when a lender dominates a borrower's business to the point that courts are willing to hold the creditor liable for the debtor's action. The most extreme case of this type is United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991), where the court held that a creditor of an operator of a facility may incur cleanup liability under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") if that creditor's "involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.* at 1558.

35. Lender liability has delivered a sting in two ways: in the size of the

ments in 1987 involved lender liability claims.[36] The impact of these judgments extends beyond the dollar amounts awarded. Such judgments encourage litigation. Even if potential borrowers' claims fail, the cost to lenders of defending such claims is enormous.[37]

In recent years, lenders have been liable for statutory violations[38] and torts, including fraud,[39] duress,[40] tortious interference with business relations,[41] prima facie tort,[42] breach of

---

judgments, *see infra* note 36, and in the variety of theories by which plaintiffs have successfully imposed liability, *see supra* note 34.

36. *See* Rodda, *supra* note 17, at 939 & n.4. All of these judgments were over $50 million dollars. *See, e.g.*, Penthouse Int'l v. Dominion Fed. Sav. & Loan Ass'n, 665 F. Supp. 301 (S.D.N.Y. 1987) ($129 million compensatory damages), *aff'd in part, rev'd in part*, 855 F.2d 963 (2d Cir. 1988). A sixth judgment involved fraud by the *borrower*. F.D.I.C. v. W.R. Grace & Co., 691 F. Supp. 87 (N.D. Ill. 1987) ($25 million in compensatory damages, $25 million in punitive damages), *aff'd in part, rev'd in part*, 877 F.2d 614 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1524 (1990).

37. For a discussion of the cost problems associated with civil litigation, see BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATIONS 5-7 (1989).

38. For example, a secured lender may be liable for hazardous waste cleanup under CERCLA § 107, 42 U.S.C. § 9607 (1988), when the lender's involvement is such that it could have exercised control over the debtor's business. *See Fleet Factors*, 901 F.2d at 1557-59. Courts have applied the state uniform fraudulent conveyance acts to void liens created in a leveraged buyout. *See* United States v. Tabor Court Realty Corp., 803 F.2d 1289, 1296 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). Courts have voided foreclosure sales of collateral property made shortly before the borrower filed bankruptcy under the fraudulent transfer provisions of the federal Bankruptcy Act. 11 U.S.C. § 548 (1988). *See* Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980) (applying pre-1978 law); *contra In re* Madrid, 727 F.2d 1197, 1199 (9th Cir. 1984) (holding that foreclosure sale is not a transfer under § 548). Courts have equitably subordinated lender claims during bankruptcy under 11 U.S.C. § 510(c) (1988). *See In re* Slefco, 107 B.R. 628, 644 (Bankr. E.D. Ark. 1989) (The bank told a debtor to "ride out" suppliers until the debtor harvested his crops, resulting in a $270,000 unsecured debt to those suppliers. Once its collateral was harvested, the bank forced the debtor into bankruptcy, leaving the suppliers out of luck. The court reacted by relegating the bank's security interest to "the bottommost rung" of claims.).

39. Fraud consists of misrepresenting fact, opinion, or law for the purpose of inducing another person to act or to refrain from acting in reliance upon the misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS §§ 525, 526 (1977). A leading lender liability case of fraud, State National Bank v. Farah Mfg. Co., 678 S.W.2d 661, 680-82 (Tex. Ct. App. 1984), involved a lender who falsely stated an intention to declare a default for the purpose of influencing the election of the director of the company. In fact the lender had made no such decision. *Id.* at 686. Courts have held that both actual and constructive fraud constitute a violation. *See* Jackson v. Seymour, 71 S.E.2d 181, 185 (Va. 1952) (holding that "constructive fraud is a breach of a legal or equitable duty").

40. *See Farah Mfg.*, 678 S.W.2d at 686.

41. *See, e.g.*, Melamed v. Lake County Nat'l Bank, 727 F.2d 1399, 1403-04

fiduciary duty[43] and negligent misrepresentation.[44] Lenders also have been liable for breach of contract[45] and for breaching a contractual obligation of good faith and fair dealing.[46] Before the 1986 case of *Jacques v. First National Bank*,[47] however, a debtor-creditor relationship normally was a prerequisite to a successful lender liability case.[48]

Jacques, however, imposed tort liability on a lender for acts occurring prior to the creation of a debtor-creditor relationship.[49] The *Jacques* court based tort liability in part on a contractual relationship between the parties.[50] Although not cited

---

(6th Cir. 1984) (finding sufficient evidence for a tortious interference claim when the bank implemented an extensive plan in an attempt to salvage the debtor-company); Walsh v. Glendale Fed. Sav. & Loan Ass'n, 81 Cal. Rptr. 804, 812 (Ct. App. 1969) (cause of action exists for misrepresenting the size of mortgagee's debt); Peacock v. General Motors Acceptance Corp., 432 So. 2d 142, 144 & n.2 (Fla. Dist. Ct. App. 1983) (finding liability for physically invading a dealership for the primary purpose of driving the debtor out of business); First Wyo. Bank v. Mudge, 748 P.2d 713, 715-17 (Wyo. 1988) (finding liability for tortious interference with contract when bank induced a borrower to violate a purchase agreement in order to obtain priority over another security interest).

42. The elements of this cause of action include: intentional conduct; specific intent to injure the plaintiff; injury to the plaintiff; and absence of sufficient justification. Rigby Corp. v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 543 (Mo. Ct. App. 1986); Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo. Ct. App. 1980).

43. *See supra* note 34.

44. *Cf.* Berkline Corp. v. Bank of Miss., 453 So. 2d 699, 702 (Miss. 1984) (reversing the dismissal of a complaint).

45. *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Caudle, 425 So. 2d 1050 (Ala. 1982). The significant aspect of this case involved the fact that the lender received no fees in exchange for agreeing to help a borrower obtain a subsidized loan from the Department of Housing and Urban Development. *Id.* at 1052. The court held that a contract to obtain a subsidized loan did exist. *Id.* The bank's promise was supported by consideration because the bank would receive a one percent origination fee for making any loan resulting from the application. *Id.* For a discussion of the general contract to loan issues, see *supra* notes 28-33 and accompanying text.

46. K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 759-60 (6th Cir. 1985). For a general discussion of the obligation, see *supra* notes 16-23 and accompanying text.

47. 515 A.2d 756 (Md. 1986).

48. Commentators have claimed that all successful lender liability cases involve a debtor-creditor relationship. *See* Ellis & Gray, *supra* note 15, at 369. This claim is incorrect. In 1982, the Alabama Supreme Court held a lender liable under a contract theory for mistakenly telling a loan applicant that a subsidized loan from the department of Housing and Urban Development had been granted. First Fed. Sav. & Loan Ass'n v. Caudle, 425 So. 2d 1050 (Ala. 1982). For description of *Caudle*, see *supra* note 45 and *infra* notes 66-69 and accompanying text.

49. *Jacques*, 515 A.2d at 765.

50. *Id.* at 761-62.

in *IMMCO, Jacques* used an identical analysis to find a contract to process a loan application.[51] An examination of *Jacques* thus sheds light on the *IMMCO* approach to the relationship between loan applicant and lender.

C. *Jacques v. First National Bank of Maryland*

After processing Margaret and Robert Jacques' loan application, the defendant lender determined that the plaintiffs were eligible for a loan of less than half the amount they requested.[52] Plaintiffs brought suit against the bank on a number of theories, including a tort-based claim for negligent processing of the loan application.[53] The jury found the bank negligent and awarded $10,000 in compensatory damages.[54] A divided intermediate appellate court reversed, holding that a lender owes no duty to a loan applicant prior to a contractual relationship.[55]

The Maryland Court of Appeals[56] reinstated the trial court verdict, holding that the defendant lender did owe a duty of

---

51. *Compare infra* notes 56-65 and accompanying text (describing the reasoning the *Jacques* court used in finding a contractual relationship between a mortgage applicant and a lender), *with infra* notes 86-96 and accompanying text (describing the *IMMCO* reasoning).

52. *Jacques*, 515 A.2d at 757. After processing the loan, the bank determined the plaintiffs qualified for a loan of only $74,000. Subsequently, the bank informed the plaintiffs that because of an error in calculating eligibility, plaintiffs only qualified for a loan of $41,400. *Id.* Plaintiffs were forced to take personal loans from relatives and a $50,000 short-term loan from the bank to make the increased down payment on their house. *Id.* The plaintiffs found themselves in a vulnerable financial position due to their purchase agreement. Under the purchase agreement the plaintiffs made a $30,000 down payment. The real estate contract was contingent on the availability of financing the remaining $112,000 at a rate of no more than 12.25%. An additional provision required the plaintiffs to increase their down payment, if necessary, to obtain a loan at the stated rate. Plaintiffs submitted an application to First National for the loan. A copy of the real estate contract, and a processing fee were submitted with the application.

This situation carries some similarity to a confidential or fiduciary relationship which make it easier for a plaintiff to recover under other theories. *See supra* note 34 (describing fiduciary relationships). This vulnerable position may have affected the court's opinion.

53. Other claims brought by plaintiffs included: breach of fiduciary duty, prima facie tort, malicious interference with contract, gross negligence, and negligence in processing a loan application. *Jacques*, 515 A.2d at 757-58.

54. *Id.*

55. Jacques v. First Nat'l Bank, 488 A.2d 210, 214-15 (Md. Ct. Spec. App. 1985).

56. Maryland's highest court.

reasonable care.[57] Significantly, the court based this tort duty on a contractual relationship that it held to exist between the mortgage applicants and the lender.[58] The court reasoned that because the plaintiffs suffered only economic harm, a tort duty could arise only if a close relationship existed between the parties.[59] Contractual privity, the court held, was a sufficiently close relationship to meet this requirement.[60]

The court then turned to the issue of whether contractual privity existed on the facts. The court found mutual assent between Margaret and Robert Jacques and the lender in the lender's processing of the loan application.[61] The court concluded that consideration also existed because the plaintiffs paid a $144 loan processing fee and gave the lender a potential economic benefit—the possibility of future profits from the loan agreement.[62] In return, the lender met the consideration

---

57. Because tort liability normally does not exist for pure economic harm, the *Jacques* court based liability on the close relationship between the parties. The court stated:

> We discern from our review of the development of the law of tort duty that an inverse correlation exists between the nature of the risk on one hand, and the relationship of the parties on the other. As the magnitude of the risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury. Conversely, as the magnitude of the risk decreases, a closer relationship between the parties must be shown to support a tort duty. Therefore, if the risk created by negligent conduct is no greater than one of economic loss, generally no tort duty will be found absent a showing of privity or its equivalent.

Jacques, 515 A.2d at 761.

Essential to this close relationship was the court's finding of a contract to process the loan application: "Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent." *Id.* at 759-60 (footnote omitted).

58. *Id.* at 761-62.

59. *Id.* at 759-61.

60. *Id.* at 760-61.

61. Specifically, the court stated:

> [T]he Bank contends that there was no contract, and therefore no legal relationship between it and the Jacques at the time of the alleged negligence. We disagree. The Bank made at least two express promises to the Jacques. It agreed first to process their loan application and second to "lock in" the interest rate of 11-7/8% for a period of ninety days. If these promises were supported by valid consideration, they were enforceable.

Id. at 761.

62. *Id.*

requirement by agreeing to process the loan application.[63] The *Jacques* court found a promise to process the application with reasonable care implicit in this agreement.[64] Thus, a contractual relationship existed between the parties.[65]

Other courts have followed a similar rationale. A case prior to *Jacques*, *First Federal Savings & Loan Ass'n v. Caudle*,[66] held that potential profit alone can constitute consideration.[67] *Caudle* involved a lender who agreed to assist a borrower in arranging a subsidized loan with the Department of Housing and Urban Development.[68] Even though the lender received no fees for its help, the court held that the economic advantage the bank would receive if its efforts were successful created sufficient consideration to support the existence of a contract.[69]

In addition to *Caudle*, subsequent case law has continued to expand the lender's duty under *Jacques* to include negligent misrepresentation[70] and has extended the *Jacques* tort duty to physicians.[71] Plaintiffs even have attempted to use *Jacques* rea-

---

63. *Id.*
64. *Id.* at 762.
65. *Id.*
66. 425 So. 2d 1050 (Ala. 1982).
67. *Id.* at 1052.
68. *Id.* at 1050-51.
69. The court noted:

> Irrespective of the fact that First Federal did not receive any consideration at the time the forms were filled out and filed with HUD, First Federal would have nevertheless received, after the loan was approved, an origination fee of 1% of the total mortgage amount for making the loan and also benefited as the lending institution making a government subsidized loan at the prevailing mortgage interest rates.

Id. at 1052.

70. *See* Hill v. Equitable Bank, 655 F. Supp. 631, 650-51 (D. Del. 1987), *aff'd sub. nom.* Hill v. Equitable Trust Co., 851 F.2d 691 (3d Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989). The plaintiffs in *Hill* sued defendant Equitable Bank for, *inter alia*, negligent misrepresentation of the soundness of a limited partnership in which the plaintiffs invested, using money borrowed from the defendant. *Hill*, 655 F. Supp. at 650. The *Hill* court noted the similarity between the plaintiffs' position and that of the plaintiffs in *Jacques*, stating that the plaintiffs had paid the defendant for a promise to fairly process the loan and to provide accurate investment advice. *Id.* The *Hill* court held that this promise by defendant gave rise to a legal duty. *Id.* at 650-51.

71. *See* Chew v. Meyer, 527 A.2d 828, 832 (Md. Ct. Spec. App. 1987). In *Chew*, the defendant physician failed to fill out a form which explained the plaintiff's absence from work, resulting in the plaintiff's termination. The court held that even if the physician's contractual duty to provide medical care did not include a duty to complete and submit the insurance form, under *Jacques*, a sufficient intimate nexus existed to support a tort claim. *Id.*

soning to sue lenders for negligently *granting* a loan request.[72]

In *Jacques*, the lender's tort liability was based in part on a contract to process the loan application.[73] Also important to the decision was the lender's knowledge that the plaintiffs were in a uniquely vulnerable financial position because of an unusual real estate agreement.[74] The real estate agreement required that the Jacques proceed to settlement no matter what financing they obtained or else lose a $10,000 deposit.[75] *Jacques* left open the question of whether courts would be willing to find a contractual relationship between loan applicant and lender in the absence of similarly unique facts.

IMMCO presented an opportunity for a court to determine whether a contractual relationship exists between a loan applicant and a lender in the absence of the particular *Jacques* fact situation. Unlike *Jacques*, *IMMCO* involved contractual rather than tort liability.[76] Instead of individuals applying for a mortgage, the plaintiffs in *IMMCO* were sophisticated businessmen[77] bargaining on a level playing field in a commercial setting.[78] Moreover, unlike the plaintiffs in *Jacques*, the *IMMCO* plaintiffs were not under pressure from a unique contractual obligation.

---

72. *See Hill*, 851 F.2d at 699; Wagner v. Benson, 161 Cal. Rptr. 516, 520 (Ct. App. 1980); Ebenhoh v. Production Credit Ass'n, 426 N.W.2d 490, 492-93 (Minn. Ct. App. 1988); *cf.* Schuyler State Bank v. Cech, 423 N.W.2d 464, 467 (Neb. 1988) (Plaintiff attempted to hold a lender liable for granting too large of a loan in violation of a statute.).

73. Jacques v. First Nat'l Bank, 515 A.2d 756, 762 (Md. 1986).

74. The *Jacques* court stated:

> Examining further the relationship that existed between these parties, we note that the rather extraordinary financing provisions contained in the real estate sales contract, and thereby integrated into the loan application, left the Jacques particularly vulnerable and dependant upon the Bank's exercise of due care. The Jacques, while indicating they would request a loan of $112,000, were required by contract to proceed to settlement with whatever loan they could obtain at the agreed rate of interest. . . . In accepting the loan application for processing, the Bank had knowledge that the Jacques would be legally obligated to either proceed to settlement with the loan determined by the Bank or forfeit their deposit of $10,000.

Jacques, 515 A.2d at 762-63.

75. *Id.*

76. *See IMMCO*, 736 F. Supp. 587, 594 (D.N.J. 1990).

77. *Id.* at 589-90. Abraham Bosman formerly was the president of a multimillion dollar corporation and director of a bank. *Id.* at 590. Plaintiff Steven Fotos was experienced in world-wide coal shipment. *Id.* Plaintiff Michael Faleski was experienced in the business of supplying machinery for coal processing. *Id.*

78. *Id.* at 590-93.

II. *JACQUES* IN A COMMERCIAL SETTING: *IMMCO v. CITICORP*

Three sophisticated businessmen[79] formed International Minerals and Mining Corporation for the purpose of purchasing a coal mine.[80] They contacted Citicorp to obtain a $21 million loan.[81] Local representatives of Citicorp initially were receptive to the idea and began to investigate the proposal.[82] Citicorp drafted a proposal letter specifying a set of terms upon which it would consider lending the money.[83] The letter explicitly stated that Citicorp intended no commitment to the applicant.[84] After the applicants signed the proposal and gave Citicorp a $20,000 good faith deposit, the proposal became a formal application for a loan.[85]

The *IMMCO* court, using an analysis similar to *Jacques*, found a contract to process a loan application through the traditional approach of finding mutual assent and consideration.[86] The letter from Citicorp to IMMCO was crucial to the court's analysis.[87] The letter contained a twenty-two-step process Citicorp promised to follow in evaluating IMMCO's application.[88] A note attached to the proposal read: "Citicorp Industrial Credit Inc. is pleased to make the following financial *proposal. It should be emphasized that the following is only a letter of*

79. *See supra* note 77.
80. *IMMCO*, 736 F. Supp. at 589.
81. *Id.* at 590.
82. *Id.* at 591. As reported by the court, Citicorp's loan application process involves the following steps: (1) the applicant meets with local Citicorp representatives; (2) the local representatives develop a working proposal of the terms and conditions upon which a loan could be consummated; (3) the local representatives draft a proposal letter listing the terms upon which Citicorp would consider lending the money; (4) the proposal letter is submitted to the borrower. If the borrower signs it and puts down a good faith deposit, the proposal becomes a formal loan application. The deposit is non-refundable if the loan application goes elsewhere. If the application is refused, the deposit is returned once administrative costs have been deducted; (5) Citicorp undertakes a "due diligence" period where it conducts a detailed analysis of the proposed transaction; (6) the local representatives submit an initial credit memo to Citicorp headquarters (in this case, 37 single-spaced, typed pages); (7) two senior officers review the application, both of whom must recommend approval; (8) in some cases, the loan must receive approval at the credit policy level with Citicorp. *Id.* at 590.
83. *Id.* at 591.
84. *See infra* note 89 and accompanying text.
85. *IMMCO*, 736 F. Supp. at 591.
86. *Id.* at 595.
87. *Id.* at 594.
88. *Id.* at 591.

proposal and is not intended nor should be construed to be a commitment on the part of Citicorp."[89]

The plaintiffs did not contend that this note constituted a commitment to loan.[90] Instead, they argued that the letter satisfied the requirements of a bargain theory contract to process the loan application. IMMCO first argued, and the court held, that the letter manifested mutual assent between the parties to process the loan application.[91] The court reasoned that the letter represented more than a unilateral offer on the part of the lender.[92] Rather, it constituted an integrated agreement between the parties to bargain in good faith regarding the possible loan.[93]

The court next determined that the promise to process the application was supported by consideration.[94] Citicorp gave consideration under the contract by agreeing to consider IMMCO's loan application. The court reasoned that Citicorp's promise to process the loan application carried with it an implied duty to carry out its obligations in a responsible manner.[95] IMMCO also had given consideration. Citicorp made its promise in exchange for IMMCO's $20,000 good faith deposit and for the prospect of profits if the loan were approved.[96]

Because New Jersey law imposes an obligation of good faith and fair dealing on every contract,[97] the court next examined whether Citicorp had lived up to this standard of good faith in processing the loan application.[98] The court failed to define the precise standard required of a lender.[99] Instead, it

89. *Id.* (emphasis added by court).
90. *Id.*
91. *Id.* at 595.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. The court described the New Jersey standard of good faith as follows:

> In every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.' Where performance of a contract depends upon the satisfaction by one party with the commercial performance of another, the party holding the power to determine whether or not performance is satisfactory must exercise that judgment in good faith.

IMMCO, 736 F. Supp. at 595 n.7 (citations omitted).
98. *Id.* at 595.
99. *Id.*

focused its discussion on the procedures Citicorp followed, labelling them as "a Herculean effort."[100] The court also stated that Citicorp's decision not to lend was reasonable given the circumstances, which included the difficulties the bank had in documenting the value of IMMCO's collateral and an appearance of dishonesty on the part of the plaintiffs.[101] The court therefore granted Citicorp's motion for summary judgment.[102]

III. *IMMCO* LIABILITY: A DUTY TO PROCESS COMMERCIAL LOAN APPLICATIONS REASONABLY

In *IMMCO*, Citicorp explicitly expressed its desire not to be bound by a commitment during the loan application process.[103] Nonetheless, the court *did* bind Citicorp to a contractual obligation.[104] *IMMCO* held that a contractual relationship existed between the negotiating parties despite the lender's explicit statement.[105] This holding contradicts the traditional requirement of contract law that a party to a contract must manifest intent to be bound by a contractual obligation.[106]

The significance of *IMMCO* depends on the resolution of two issues: a determination of the precise stage at which an *IMMCO* contract is created and an evaluation of the specific duties required by an *IMMCO* contract.

---

100. *Id.*

101. *Id.* at 596.

102. *Id.*

103. *See supra* note 89 and accompanying text.

104. *IMMCO*, 736 F. Supp. at 595. A plaintiff arguing for an *IMMCO* contract may also cite other supporting cases. For example, in High v. McLean Financial Corp., 659 F. Supp. 1561 (D.D.C. 1987), the court stated: "[P]laintiffs maintain that District of Columbia law supports the existence of a contract 'at the point the loan application is received and acted upon by the lender.' . . . *The [c]ourt agrees that an implied contract may arise at that time.*" *Id.* at 1565 (emphasis added). A Sixth Circuit case, K.M.C. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1986), may also support the imposition of an *IMMCO* contract. *K.M.C.* involved an agreement in which Irving Trust Company had extended a line of credit to K.M.C. but then unreasonably refused to lend. *Id.* at 754. K.M.C. recovered from Irving under a "breach of good faith" theory for Irving's refusal to lend. *Id.* at 763. It is unclear from the case whether the parties' original agreement constituted optional future advances or a contractual commitment to make future advances. If the future advances were optional, then the K.M.C. contractual commitment was identical to an *IMMCO* contract. Of course, the *Jacques* court also found the existence of an *IMMCO* contract. *See supra* notes 56-65 and accompanying text.

105. *IMMCO*, 736 F. Supp. at 595.

106. *See supra* note 8.

A. ESTABLISHING AN *IMMCO* CONTRACT

1. Mutual Assent

The *IMMCO* decision raises the question of whether a lender may undertake the processing of a loan application without being bound by a contractual obligation. The court read the language of the April 14th letter as "clearly evidenc[ing] a lack of intent on Citicorp's part to be bound by any commitment until it could reach a confidence level at which it felt able to fund the purchase."[107] The court held, however, that the letter constituted an enforceable contract. It stated that "[t]he letter clearly constituted an integrated agreement to bargain in good faith over the possibility of funding the assets."[108] The only way to reconcile these statements is to find mutual assent inherent in processing a loan application.[109]

Such a reading of *IMMCO* suggests that once a lender agrees to process the loan application, the lender and the loan applicant have established mutual assent. Under traditional contract law, once mutual assent is found, consideration is the next element necessary to establish a contract between loan applicant and lender.[110]

2. Consideration

Under bargain theory, a contract requires consideration.[111] In an *IMMCO* contract the lender meets this requirement by

107. *IMMCO*, 736 F. Supp. at 594.

108. *Id.* at 595.

109. The *IMMCO* court failed to address adequately the central issue in the case. The *IMMCO* court made a compelling argument for distinguishing a contract to loan and a contract to process a loan application. 736 F. Supp. at 594. As the court recognized, however, the central issue in the case was whether the letter signed by both parties constituted a contract to process the loan application: "The more subtle question about which the parties do disagree, however, is . . . whether Citicorp's decision [not to loan] is even reviewable by this court." *Id.* The opinion fails to deal adequately with this issue.

The court stated that "[i]t is axiomatic that no contract exists in the absence of a mutual intent to be bound." *Id.* It also found that Citicorp, in the letter, "clearly evidence[d] a lack of intent . . . to be bound by any commitment . . . until . . . [it] successfully completed its credit evaluation." *Id.* Nonetheless, the court held that this very same letter "clearly constituted an integrated agreement to bargain in good faith over the possibility of funding." *Id.* at 595. The court failed to explain how a single document can both clearly express a desire not to be bound by any commitment and yet constitute an agreement. This holding is simply inconsistent.

110. *See supra* note 8.

111. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71-81 (1979).

promising to consider the loan application.[112] The debtor's consideration, however, raises more difficult problems.

In *IMMCO*, the court readily established consideration because the loan applicant had made a $20,000 dollar deposit.[113] The court also noted, however, that "both parties held mutually optimistic expectations of making substantial profits."[114]

IMMCO was not the first case to suggest that potential economic benefit alone can constitute consideration.[115] The *Jacques* court indicated that "business advantage" was sufficient consideration,[116] and the court in *First Federal Savings & Loan Ass'n v. Caudle*[117] held that potential profit alone can constitute consideration.[118]

Thus, *IMMCO* indicates that once a lender agrees to process a loan application, the elements of a bargain theory contract exist. The parties have mutually agreed that the lender will consider the proposed loan. The loan applicant has conferred potential economic benefit on the lender in exchange for the lender's effort. These elements create an *IMMCO* contract that imposes a common law duty of good faith and fair dealing on the parties. The next logical step in analyzing the *IMMCO* contract therefore involves determining the parameters of the lender's duty of good faith and fair dealing.

B. Good Faith and Fair Dealing as Applied to a Contract to Process a Loan Application

The obligation of good faith and fair dealing that *IMMCO* imposed on defendant Citicorp raises two issues. The first issue is whether the obligation applies to the procedures employed in processing the loan application, to the actual substantive decision of whether to loan, or to both. The second issue is whether the standard of good faith required of a lender is a subjective or objective standard. The *IMMCO* decision failed to discuss these issues explicitly.

112. *IMMCO*, 736 F. Supp. at 595.

113. *Id.*

114. *Id.*

115. *See* First Fed. Sav. & Loan Ass'n v. Caudle, 425 So. 2d 1050 (Ala. 1982); Jacques v. First Nat. Bank, 515 A.2d 756 (Md. 1986)

116. *Jacques*, 515 A.2d at 761 ("[T]he bank obtained a business advantage and potential benefits sufficient to support its promise [to process the loan application].").

117. 425 So. 2d 1050 (Ala. 1982).

118. *Caudle*, 425 So. 2d at 1052.

1. Substance or Procedure? The Reach of the Standard of Good Faith and Fair Dealing Imposed in *IMMCO*

Defining the scope of the duty of good faith is vital to determining the clout of the *IMMCO* decision. A standard that examines only a lender's procedure in processing a loan application would impose a small burden. Under such a standard, a lender could make any decision it wanted, as long as it followed all of the steps it promised to follow. On the other hand, a standard that examines the actual lending decision creates great potential for litigation, litigation costs, and liability. Every lending decision involves some degree of judgment that might be questioned in a lawsuit.[119]

Even though the *IMMCO* decision did not explicitly discuss the scope of the standard of good faith, the court decided the issue implicitly. Once the court found a contract, it was forced to determine whether Citicorp had lived up to the standard as imposed by the contract.[120] The court's analysis of Citicorp's actions focused on the complicated procedure employed in processing the loan application.[121] The court also discussed the reasonableness of Citicorp's decision given the problems Citicorp encountered in documenting the value of the assets IMMCO pledged to secure the loan and the appearance of dishonesty on the part of the plaintiffs.[122] At a minimum, the *IMMCO* court considered the substantive decision a significant factor in determining whether Citicorp had lived up to its duty.[123] The *IMMCO* duty of good faith thus restricts the substantive decision a lender can make.[124]

---

119. In *Jacques*, the defendant lender argued that the process of evaluating loan applications largely was judgmental and defied the imposition of a standard. The court rejected this argument by pointing out that tort standards are imposed on medical doctors and motorists whose decisions are equally judgmental. *Jacques*, 515 A.2d at 764.

120. *IMMCO*, 736 F. Supp. at 595.

121. *Id.* at 595-96.

122. *Id.* at 596.

123. *Id.*

124. By imposing a standard of reasonableness on a substantive lending decision, *IMMCO* squarely presents the issue of what should control the obligations owed by a lender to a loan applicant: community standards of reasonableness applied to a lender through an objective standard of good faith; or no duty at all because the lender and loan applicant have not yet reached a contractual relationship?

The *Jacques* opinion makes the argument that industry standards should control lending decisions. *Jacques*, 515 A.2d at 764. The *Jacques* court wholeheartedly embraced the imposition of tort liability for the negligent processing of a loan application. The court reasoned that banks have a special "public

2. Objective or Subjective? The Standard of Good Faith Defined With Respect to Lending Decisions

The *IMMCO* decision apparently imposed an objective standard of good faith on Citicorp's decision not to loan. Although the court did not explicitly define the duty it was imposing on Citicorp, the decision discussed the common law duty of good faith in New Jersey and found that standard implicit in the contract between the parties.[125] The court construed the terms of the contract as implying an objective standard, one which commands reasonable action.[126] The court first discussed lending "in a responsible manner"[127] and then addressed reasonableness, stating that "[a]s long as Citicorp made this decision in a reasonable manner, no liability can attach for the decision not to fund."[128] A lender would be hard pressed to argue that this language constitutes a subjective standard.[129] "Good faith," as defined in *IMMCO*, therefore requires an objective standard of reasonableness.

IV. *IMMCO*'s BROAD STRETCH

The *IMMCO* rationale could apply to a broad range of situ-

---

calling" because they are powerful and because vulnerable loan applicants are at their mercy. *Id.* at 762-63. The court likened banks to physicians, attorneys, and insurance companies. *Id.* at 763. A tort duty of care is placed upon such professionals because of the public nature of their businesses. *Id.* Hence, the court concluded that a similar standard of care should be imposed on banks. *Id.* at 764.

The *IMMCO* court did not make this argument. The *IMMCO* court analyzed the transaction solely by looking to the manifestations of intent of the parties. The court found that the parties intended a contract to process the loan application. *IMMCO*, 736 F. Supp. at 595. Thus, *IMMCO* held that a contract to process the loan application existed. *Id.*

125. The court stated:

> Thus while Citicorp cites cases from Florida, Colorado, Indiana, and Georgia for the proposition that the covenant of good faith and fair dealing cannot be used to alter the express terms of an agreement, . . . IMMCO has not argued that the terms of the agreement should be altered, but rather that the terms of the agreement must be construed and acted upon in good faith. There is nothing novel in this assertion.

IMMCO, 736 F. Supp. at 595 n.7.

126. In its opinion, the *IMMCO* court discussed its reasoning for granting summary judgment on the factual issue of the commercial reasonableness of Citicorp's actions. The entire discussion emphasizes reasonableness, including, for example, the statement that "[o]n the facts of this case no room for doubt exists as to the reasonableness of Citicorp's actions." *Id.* at 596 n.8.

127. *Id.* at 595.

128. *Id.*

129. *See supra* notes 18-19 and accompanying text (discussion of subjective standard).

ations that clearly have never given rise to contractual obligations. It could apply, for example, when a stockbroker calls a potential client with an investment opportunity. If the potential client listens, asks the stockbroker to send some literature, and promises to consider the investment opportunity, no conceivable contractual relationship would exist between the parties in the absence of an *IMMCO* contract. The potential client clearly would not owe the stockbroker a duty to make a good faith decision.

Under *IMMCO,* however, the parties might have formed a contract. First, mutual assent arguably exists. In *IMMCO,* the plaintiff coal mine purchasers offered an investment opportunity to Citicorp and Citicorp agreed to consider that opportunity.[130] In this scenario, the stockbroker offered a business opportunity to the potential client, and the potential client agreed to consider the opportunity. Similarly, consideration could be found. *IMMCO* suggested that potential economic benefit satisfies the need for consideration. The stockbroker in this example offered potential economic benefit to the prospective client. Thus, under the *IMMCO* analysis, the potential client arguably owes the stockbroker a duty to make a reasonable decision under their contract to evaluate the business opportunity.

Few would seriously argue that the stockbroker scenario constitutes an enforceable contract. Attempts to distinguish the stockbroker example within the rubric of the *IMMCO* analysis, however, yield unsatisfactory results. The intent of the parties in the two situations is identical. The *IMMCO* plaintiffs, in substance, offered to Citicorp the same thing the stockbroker offered the potential customer: an investment with risk attached. In terms of consideration, the only possible distinction between *IMMCO* and the stock investment opportunity is the processing fee. Such a distinction is unsatisfactory, however, because the element of potential economic benefit exists in both situations.

The stockbroker situation is just one example of the wide variety of situations to which an *IMMCO* contract could attach. Under *IMMCO,* any time a person offers a potential customer an investment opportunity with potential economic benefit to the customer, and that customer agrees to consider the opportunity, a contract may exist.

130. *IMMCO,* 736 F. Supp. at 591.

The *IMMCO* decision creates problems even if confined to the banking community. It is difficult to determine the reasonableness of investment decisions. For example, the recent performance of savings and loan institutions indicates that industry standards do not provide a useful guide as to what sort of investment is reasonable.

In addition, policy considerations do not support extending a tort-like duty of reasonable care to commercial lending decisions. Classic contract analysis governs commercial loan transactions particularly well. Parties negotiate on a relatively level playing field. They act with substantial knowledge of the subject being negotiated. Individuals seeking commercial loans are businesspersons, not individuals at the mercy of the lending institution. If these businesspersons are dissatisfied with their treatment, they will go elsewhere. Market forces have powerful influence on parties considering a large loan. Litigation adds an unwanted and inefficient cog in the system. If ever the legal system should leave parties free to make their own decisions, it is in this situation.

V. PRESERVING THE IMPORTANCE OF CONSENT IN CONTRACT LAW: AGREEMENTS TO BYPASS *IMMCO* LIABILITY

Despite possible criticism of the *IMMCO* decision,[131] the issue remains whether lenders can do anything to protect themselves from *IMMCO* liability. The *IMMCO* court enforced a contract to process the loan application despite the statement that this arrangement "is not intended nor should [it] be construed as a commitment on the part of Citicorp."[132] It is difficult to imagine that language could express a more explicit intent not to be bound. Future courts faced with facts similar to *IMMCO* therefore should enforce the parties' manifestations of intent, including assertions of intent not to be bound.

Parties can help courts by clearly stating when they intend to establish a contractual relationship. Assuming that a lender wishes to avoid *IMMCO* liability, the following provision would make that intent clear:

> By undertaking to process this loan application, the parties do not consent to be bound by a commitment *of any kind*. The parties intend no obligations relating to this loan application, *prior to the sign-*

131. *See supra* note 109 (asserting that the *IMMCO* court failed to address the case's major issue adequately).
132. *See IMMCO*, 736 F. Supp. at 591.

ing of a written loan agreement. This application is a proposal only, and does not constitute a contract to process the application.

This provision improves upon defendant Citicorp's provision in three ways. First, instead of merely indicating an intent not to be committed to making the loan, the provision indicates an intent not to be bound by *any* commitment. The addition of the phrase "of any kind" to the provision makes it more difficult for the court to distinguish between a contract to loan and a contract to process the loan application. The second advantage of this provision is that it states precisely when, and in what manner, the loan applicant and lender intend to establish a contract.[133] A contract will exist only when the parties sign a written loan contract. Finally, the provision explicitly rejects a contract to process the loan application, making it difficult to argue that consent to such an obligation was given.[134] Courts wishing to apply contract principles faithfully to the loan processing situation should uphold this provision.

CONCLUSION

Through the guise of bargain contract analysis and a duty of good faith, the *IMMCO* decision imposes an objective standard of reasonableness on a commercial lender's decision to loan. This decision represents an expansion of bargain theory contract liability by functionally eliminating mutual assent as a prerequisite to this type of contract. The *IMMCO* court failed to defend this potential expansion in lender liability sufficiently.

Under *IMMCO*, a contractual relationship and its attendant duties could exist whenever a person proposes to do business with another. Such proposals do not properly come within the

133. This provision is not an exculpatory clause that could give rise to arguments that it contravenes public policy. *See supra* note 15 (discussing exculpatory clauses). An exculpatory clause releases one party from liability for its own negligence. This provision merely defines a condition that must take place before the lender chooses to be bound by a contract.

134. The provision would also make it more difficult to prove *Jacques* tort liability. The contract obligation was the vehicle by which the *Jacques* court found a close enough relationship between the parties to impose a tort duty. Jacques v. First Nat'l Bank, 515 A.2d 756, 762 (Md. 1986). In the absence of a contract, a plaintiff would have a more difficult time showing this relationship. Unless a court is willing to expand the *Jacques* holding to imply a contract to process an application based entirely on the nature of the business of lending, the agreement not to agree could be an effective tool. This provision would make clear the parties' intent with respect to their potential contractual relationship.

scope of contract law. In addition, an *IMMCO* contract places an undefined and ill-conceived duty of reasonableness on a lender. By imposing societally-defined duties and objective standards of behavior on commercial lending negotiations, *IMMCO* is an unwarranted intrusion into the lending process. The decision to make an investment should be left to the investor, not to the courts.