Michigan Law Review

Volume 90 | Issue 5

1992

The Liability of Officers and Directors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989

Jon Shepherd
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Banking and Finance Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Jon Shepherd, *The Liability of Officers and Directors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 90 MICH. L. REV. 1119 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss5/7>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Liability of Officers and Directors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989

Jon Shepherd

In August 1989 President George Bush signed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)¹ into law. Congress enacted FIRREA in response to its concern over the increasing losses sustained by the savings and loan industry and the costs to the taxpayers of the resulting bailout.² FIRREA attempts to avert future problems caused by mismanagement of both savings and loan associations (S&Ls) and banks, and furnishes funds for the S&L bailout.³

FIRREA also imposes civil liability on officers and directors who mismanage insured depository institutions. Toward this goal, FIRREA supplies a standard of liability under which the Federal Deposit Insurance Corporation (FDIC) can sue S&L officers and directors.⁴ This standard, found in section 1821(k), states that

[a] director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf

1. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of the U.S.C.A.).

2. See, e.g., Paul T. Clark et al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1013, 1013 (1990) (stating that over 500 savings associations failed between 1980 and 1988); Robert A. Rosenblatt, *House Panel Lowers Ceiling on RTC's Borrowing by 75%*, L.A. TIMES, Oct. 3, 1991, at D1 (total price tag of bailout could exceed \$500 billion). The stories describing some of the failed S&L's are appalling. See, e.g., Stephen Labaton, *U.S. to File S&L Lawsuit Against Arizona Governor*, N.Y. TIMES, Dec. 16, 1991, at D1 (Regulators accused Arizona's governor of improperly taking \$8 million in "development fees" for a real estate deal while he was a director of an S&L that invested \$52 million and ultimately lost \$38 million in the same deal. The governor and a partner were also guaranteed 38% of the deal's profits for only a \$432 investment.); David R. Sands, *FDIC Sues McLean S&L Ex-Officials*, WASH. TIMES, Dec. 7, 1991, at C5 (FDIC alleges officials made \$7.6 million in unsecured loans to subsidiary that was losing \$12 million, and that two officials received bonuses for anticipated profits that never materialized).

3. Congress, in enacting FIRREA, also abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and transferred its functions and property, including the right to sue officers and directors of failed institutions, to the Federal Deposit Insurance Corporation (FDIC). FIRREA, Pub. L. No. 101-73, 103 Stat. 354-363 (1989) (codified at 12 U.S.C.A. § 1437 note (West Supp. 1991)).

4. When the FDIC acts in its capacity as a receiver, it acts as the institution for which it is responsible. See *Gaff v. FDIC*, 919 F.2d 384, 385-86 n.1 (6th Cir. 1990) (explaining how the FDIC becomes a receiver of a financial institution); *FDIC v. Jenkins*, 888 F.2d 1537, 1539-40 (11th Cir. 1989) (same); Peter G. Weinstock, *Directors and Officers of Failing Banks: Pitfalls and Precautions*, 106 BANKING L.J. 434, 434-35 n.4 (1989). FIRREA also provides that the FDIC as receiver shall succeed to "all rights, titles, powers, and privileges of . . . any stockholder, member, accountholder, depositor, officer, or director of [a financial institution]." 12 U.S.C.A. § 1821(d)(2)(A)(i) (West 1989).

of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation —

- (1) acting as conservator or receiver of such institution,
- (2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or
- (3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title,

for *gross negligence*, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. *Nothing in this paragraph shall impair or affect any right of the corporation under other applicable law.*⁵

Congress intended section 1821(k) to preempt state "insulating" statutes, which commonly shield the directors and officers of corporations and financial institutions from suits for breach of a duty to the institution.⁶ These statutes typically shield directors and officers from liability for certain breaches of fiduciary duty or permit the articles of incorporation to do so. They do not, however, permit corporations to protect these actors when they engage in reckless or intentional misconduct.⁷ In states that limit liability of directors and officers to that resulting from particularly egregious behavior, FIRREA expands potential liability by holding agents of financial institutions to a more stringent standard of care.

Several courts have held that FIRREA mandates a *uniform* federal

5. 12 U.S.C.A. 1821(k) (West 1989) (emphasis added).

6. See 135 CONG. REC. S4278-79 (daily ed. Apr. 19, 1989) (statement of Sen. Riegle).

7. For examples of state insulating statutes, see ALASKA STAT. § 10.06.210(1)(N) (1989); ARIZ. REV. STAT. ANN. § 10-054(A)(9) (1990); ARK. CODE ANN. § 4-27-202(B)(3) (Michie Supp. 1991); CAL. CORP. CODE § 204(a)(10) (1990); COLO. REV. STAT. § 7-3-101(u) (Supp. 1991); DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 1991); GA. CODE ANN. § 14-2-202(b)(4) (Michie 1989); HAW. REV. STAT. § 23-415-48.5 (Supp. 1991); IDAHO CODE § 30-1-54(2) (Supp. 1991); IND. CODE ANN. § 23-1-35-1(e) (West Supp. 1991); IOWA CODE ANN. § 490.832 (West 1991); KAN. STAT. ANN. § 17-6002(b)(8) (1988); KY. REV. STAT. ANN. § 271B.2-020(2)(d) (Michie 1989); LA. REV. STAT. ANN. § 12:24(c)(4) (West Supp. 1991); ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1991); MD. CORPS. & ASSNS. CODE ANN. § 2-405.2 (Supp. 1991); MASS. GEN. L. ch. 156B, § 13(b)(1) (1988); MICH. COMP. LAWS ANN. § 450.1209(c) (West 1990); MINN. STAT. ANN. § 302A.251(4) (West Supp. 1992); NEB. REV. STAT. § 21-2035(2) (Supp. 1990); NEV. REV. STAT. § 78.037(1) (1991); N.H. REV. STAT. ANN. § 293-A:54(I-a) (Supp. 1991); N.J. STAT. ANN. § 14A:2-7(3) (West Supp. 1991); N.M. STAT. ANN. § 53-12-2(E) (Michie Supp. 1991); N.Y. BUS. CORP. LAW § 402(b) (McKinney Supp. 1992); N.C. GEN. STAT. § 55-2-02(b)(3) (1990); OKLA. STAT. ANN. tit. 18, § 1006(B)(7) (West Supp. 1992); OR. REV. STAT. § 60.047(2)(c) (1989); R.I. GEN. LAWS § 7-1.1-48(a)(6) (Supp. 1991); S.C. CODE ANN. § 33-2-102(e) (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 47-2-58.8 (1991); TENN. CODE ANN. § 48-12-102(b)(3) (Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 1302-7.06(B) (West Supp. 1992); UTAH CODE ANN. § 16-10-49.1 (1991); WASH. REV. CODE § 23B.08.320 (1989); WIS. STAT. ANN. § 180.0828 (West Supp. 1991); WYO. STAT. § 17-16-834 (1989). For a general discussion of state insulating statutes, see James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988).

standard of care governing the liability of officers and directors of financial institutions, thus preempting all state laws on this subject.⁸ Other courts, however, have held that section 1821(k) merely establishes a *minimum* standard of care for the liability of officers and directors of financial institutions and does not prevent states from applying more stringent standards.⁹ Because the FDIC is pursuing numerous cases against the officers and directors of failed S&Ls,¹⁰ many courts will address this issue in the near future.

This Note argues that FIRREA's gross negligence standard implements a minimum federal requirement that preempts state law only to the extent state law provides a more relaxed criterion. Part I examines the plain meaning of the statute and concludes that FIRREA preempts state law only to the extent the state law standard of care is lower than gross negligence. Part II scrutinizes FIRREA's legislative history and demonstrates that Congress did not intend to prevent states from imposing more stringent standards of liability. Part III analyzes the policies behind FIRREA and argues that the statute's

8. See, e.g., *Gaff v. FDIC*, 919 F.2d 384, 391 (6th Cir. 1990) (assuming without discussing); *FDIC v. Swager*, 773 F. Supp. 1244 (D. Minn. 1991); *FDIC v. Canfield*, 763 F. Supp. 533 (D. Utah 1991); *FDIC v. Brown*, No. NC89-30G, 1991 WL 294524 (D. Utah Nov. 18, 1991); cf. *FDIC v. Miller*, No. 90-C5515, 1991 WL 280026, at *3 (N.D. Ill. Nov. 13, 1991) (federal claims preempted by FIRREA).

Two different types of S&Ls exist — state-chartered and federally-chartered. Prior to FIRREA, most courts apparently applied state common law to breach of duty claims brought against the officers and directors of state-chartered insolvent institutions and federal common law to claims against federally-chartered institutions. Compare *FDIC v. Jenkins*, 888 F.2d 1537, 1546 (11th Cir. 1989) (rejecting formulation of federal common law in favor of state law); *FSLIC v. Capozzi*, 855 F.2d 1319, 1324 (8th Cir. 1988) ("claims . . . have . . . origin in state law"); *FSLIC v. Ticktin*, 832 F.2d 1438, 1445-46 (7th Cir. 1987) (state law applied), *revd. on other grounds*, 490 U.S. 82 (1989); *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1373-74 (S.D. Fla. 1991) (same) with *Eureka Fed. Sav. & Loan Assn. v. Kidwell*, 672 F. Supp. 436, 439 (N.D. Cal. 1987) (federal common law applied); *First Hawaiian Bank v. Alexander*, 558 F. Supp. 1128, 1132 (D. Haw. 1983) (same); *FDIC v. Bird*, 516 F. Supp. 647, 649 (D.P.R. 1981) (same). This Note discusses only the debate over whether section 1821(k) preempts the application of state common law in suits for breach of duty brought by the FDIC against the officers and directors of insolvent state-chartered financial institutions. A discussion of the effect of section 1821(k) on the federal common law is beyond the scope of this Note. But see *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (finding that the Federal Water Pollution Control Act displaces federal common law, implying that federal common law may be preempted by FIRREA); *FDIC v. Miller*, No. 90-C5515, 1991 WL 280026, at *3 (N.D. Ill. Nov. 13, 1991) (holding that FIRREA preempts federal, but not state, common law).

9. See, e.g., *FDIC v. Williams*, No. CA3-91-1428-C, 1991 WL 263922, at *1 (N.D. Tex. Nov. 27, 1991); *FDIC v. Miller*, No. 90-C5515, 1991 WL 280026, at *4 (N.D. Ill. Nov. 13, 1991); *FDIC v. Isham*, 777 F. Supp. 828, 832 (D. Colo. 1991); *FDIC v. Black*, 777 F. Supp. 919, 922 (W.D. Okla. 1991); *FDIC v. McSweeney*, 772 F. Supp. 1154, 1158-59 (S.D. Cal. 1991); *FDIC v. Haddad*, No. 90-0779-CIV, 1991 WL 252965, at *7 (S.D. Fla. July 21, 1991); *FDIC v. Burrell*, 1991 WL 256362, at *4 (S.D. Iowa July 17, 1991).

10. See, e.g., Thomas P. Vartanian & Michael D. Schley, *Bank Officer and Director Liability — Regulatory Actions*, 39 BUS. LAW. 1021, 1021 (1984) (stating that since the early 1980s, officers and directors have been more likely to be defendants in suits brought by federal regulators than at any other time); see also *F.D.I.C. Sues Officials of Failed Texas Bank*, N.Y. TIMES, July 26, 1991, at D16; *Guaranty Federal Ex-Official, Law Firm Are Sued by FDIC*, WALL ST. J., Oct. 1, 1991, at A9.

purposes are best served by allowing states to impose a more stringent standard of care than the standard Congress provided in FIRREA.

I. PLAIN MEANING OF SECTION 1821(k)

When interpreting a statute, courts "must give effect to the unambiguously expressed intent of Congress" by following the statute's plain meaning.¹¹ To determine a statute's plain meaning, courts "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."¹² Further, when focusing on specific statutory language, courts must give that language its "ordinary meaning."¹³ A word's "ordinary meaning" has been interpreted by the courts as being the dictionary meaning given to that word.¹⁴

Section 1821(k) provides that directors or officers of insured institutions may be held personally liable for conduct that demonstrates gross negligence or a greater disregard of that standard of care. In other words, the FDIC may bring suits for gross negligence, or for simple negligence in states that allow such actions.¹⁵ Because the statute does not profess to provide an exclusive standard of care, courts should not imply such exclusivity.¹⁶ If Congress had intended to remove negligence suits pursued under *state* law from the FDIC's arsenal, Congress could have said that "[a] director or officer of an insured depository institution may be held liable . . . *only* for gross negligence."

The nonexclusive nature of the first sentence in section 1821(k), which imposes the gross negligence standard, sheds light on the provision's next sentence. The second sentence clarifies the first: Congress did not intend section 1821(k) to "impair or affect any right of the Corporation under other applicable law."¹⁷ This portion of the statute suggests that section 1821(k) neither promulgates a uniform standard of care nor preempts the FDIC's right to pursue actions for simple negligence under state law. Indeed, if the first sentence created an ex-

11. *Norfolk & Western Ry. v. American Train Dispatchers Assn.*, 111 S. Ct. 1156, 1163 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); see 2A SUTHERLAND STAT. CONSTR. § 46.05 (Norman T. Singer ed., 4th ed. 1984) [hereinafter SUTHERLAND].

12. *K. Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); see 2A SUTHERLAND, *supra* note 11, at § 46.05.

13. *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)); 2A SUTHERLAND, *supra* note 11, at § 47.28.

14. See, e.g., *Freytag v. Commissioner*, 111 S. Ct. 2631, 2660 (1991) (Scalia, J., concurring).

15. *FDIC v. McSweeney*, 772 F. Supp. 1154, 1158 (S.D. Cal. 1991).

16. *Rose v. Rose*, 481 U.S. 619, 627-28 (1987) (recognizing that Congress is explicit when desiring to preempt state jurisdiction over areas traditionally within state law).

17. 12 U.S.C.A. § 1821(k) (West 1989).

clusive standard of care, the second sentence would be surplusage;¹⁸ such a reading would violate “the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.”¹⁹ Moreover, if the first sentence somehow provides a uniform standard of care, the first and second sentences of section 1821(k) are contradictory: the first sentence would preempt all other law in this area while the second preserves rights belonging to the FDIC under existing law.²⁰ Additionally, a separate rule of statutory construction dictates that “applicable law” includes all relevant law not otherwise specifically excluded.²¹

Moreover, both federal²² and state courts²³ have long held directors of financial institutions²⁴ liable for negligent mismanagement of their institutions. Therefore, the canon of statutory construction that “[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute [is] clear and explicit for this purpose”²⁵ is

18. *McSweeney*, 772 F. Supp. at 1158.

19. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (quoting *Colausti v. Franklin*, 439 U.S. 379, 392 (1979)); see also *United States v. Morton*, 467 U.S. 822, 828 (1984) (Court reads statute “as a whole”); *Crane v. Commissioner*, 331 U.S. 1, 13 (1947) (stating that courts cannot construe one section of an act so as to defeat the intention of another or to frustrate the act as a whole); 2A SUTHERLAND, *supra* note 11, at § 46.06 (each word must be given meaning).

20. A minority of courts has suggested that the second sentence of section 1821(k) refers to other provisions of FIRREA. However, this assertion is refutable. See *infra* notes 38-45 and accompanying text.

21. See *Norfolk & Western Ry. v. American Train Dispatchers Assn.*, 111 S. Ct. 1156, 1163 (1991) (“[T]he phrase ‘all other law’ indicates no limitation.”); see also *Abbott Lab. v. Gardner*, 387 U.S. 136, 145-46 (1967); *Bluwaters, Inc. v. Boag*, 320 F.2d 833, 835 (1st Cir. 1963) (“‘applicable’ ordinarily means related to”); *Vytar Assocs. v. Mayor of Annapolis*, 483 A.2d 1263, 1266 n.4 (Md. 1984) (“other” is an uncompromising word to be defined broadly); *Hodges v. Canal Ins. Co.*, 223 So. 2d 630, 633 (Miss. 1969) (“applicable” means “capable of being applied”).

22. See *Bowerman v. Hamner*, 250 U.S. 504, 513 (1919); *Briggs v. Spaulding*, 141 U.S. 132, 165-66 (1891); *FDIC v. Greenwood*, 739 F. Supp. 450, 451 (C.D. Ill. 1989); *FDIC v. Butcher*, 660 F. Supp. 1274, 1277-78 (E.D. Tenn. 1987).

23. See, e.g., *FSLIC v. Huff*, 704 P.2d 372 (Kan. 1985); *Prudential Trust Co. v. Brown*, 171 N.E. 42 (Mass. 1930); *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981); *Litwin v. Allen*, 25 N.Y.S.2d 667 (Sup. Ct. 1940); *Warren v. Robison*, 57 P. 287 (Utah 1899).

24. Courts have not distinguished “banks” from “savings and loan associations” in the context of the duties owed to depositors by officers and directors. Furthermore, FIRREA substituted “insured depository institution” for “insured bank” in all relevant provisions. Pub. L. No. 101-73, § 201(a)(1), 103 Stat. 187 (1989). An “insured depository institution” was then defined as including “any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act.” FIRREA, § 204(c)(2), 103 Stat. 191 (1989) (codified at 12 U.S.C.A. 1813(c)(2) (West 1989)).

25. *Norfolk Redev. & Hous. Auth. v. C & P Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)); see also *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880); 2A SUTHERLAND, *supra* note 11, at § 50.01 (courts should not interpret a statute to supplant the common law absent an indication the legislature intends for them to do so); *id.* at § 50.05 (recognizing the presumption that a statute is consistent with the common law); 3 SUTHERLAND, *supra* note 11, at § 61.01 (courts strictly construe statutes in derogation of the common law and a clear and plain expression must exist if a change is to be made in the common law).

particularly relevant. If section 1821(k) created an exclusive remedy, the FDIC would no longer have the federal and state common law causes of action in its arsenal.²⁶ The plain language of section 1821(k) does not indicate that Congress sought or desired such a result.²⁷ Furthermore, the last sentence of section 1821(k) suggests that Congress did not intend to preempt any state common law that imposes a standard of care equal to or greater than gross negligence.²⁸ One court has referred to this caveat as "the very antithesis of a repealer."²⁹

In addition to the presumption favoring the common law, a presumption also exists that Congress does not intend a federal regulation to intrude unnecessarily into traditional areas of state responsibility.³⁰ States have long controlled the standards of care under which officers and directors may be found liable for breach of a duty to the institution.³¹ The plain language of section 1821(k) suggests that FIRREA preempts only those state laws that impose a more lenient standard of care than gross negligence. Because reading section 1821(k) as a uniform standard would preempt all state law pertaining to the liability of officers and directors of financial institutions, FIRREA would infringe upon a traditional area of state responsibility without the requisite language or intent³² required to do so.³³

Moreover, FIRREA provides that the FDIC as conservator or receiver³⁴ succeeds to all rights of the stockholders (if any), members, account holders, depositors, officers, and directors of a failed financial institution, including all rights belonging to the institution itself.³⁵ This provision creates an anomaly, however, if courts interpret section 1821(k) to impose a gross negligence standard in all cases brought by the FDIC. Because an institution itself may pursue claims against its officers and directors for conduct that does not rise to the level of gross negligence,³⁶ section 1821(k) would subject the FDIC, the federal reg-

26. *FDIC v. McSweeney*, 772 F. Supp. 1154, 1158 (S.D. Cal. 1991).

27. In fact, Part II demonstrates that the Senate specifically disavowed any intent to infringe generally upon state law. See *infra* notes 50-63 and accompanying text.

28. *McSweeney*, 772 F. Supp. at 1159.

29. *FDIC v. Isham*, 777 F. Supp. 828, 831 (D. Colo. 1991).

30. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); see also *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78-79 (1987).

31. See *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (stating that legislation in the area of officer and director liability "is generally enacted against the background of existing state law"); see, e.g., William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663-68 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 252 (1977); cases cited *supra* notes 8 and 23.

32. The legislative history of § 1821(k) suggests that Congress intended only limited preemption of state law. See *infra* Part II.

33. See *supra* note 25 and accompanying text.

34. The FDIC can transfer all rights accruing to it in its capacity as receiver to the FDIC in its corporate capacity. See 12 U.S.C.A. § 1823(d)(1) (West 1989).

35. 12 U.S.C.A. § 1821(d)(2)(A)(i) (West 1989).

36. See *supra* note 4.

ulator of financial institutions, to a greater standard of proof than other civil litigants.³⁷

Two courts³⁸ have concluded that the second sentence of section 1821(k) — the savings provision — refers only to other sections of FIRREA, principally sections 1818³⁹ and 1821(l).⁴⁰ Under this view, Congress did not intend to preserve common law causes of action, but merely desired to avoid inconsistencies within FIRREA. This reading, however, is inconsistent with the statutory language. Section 1818 provides the FDIC with authority to take certain administrative enforcement actions against officers or directors of depository institutions.⁴¹ Section 1821(k) applies only to civil actions brought by the FDIC, so its gross negligence standard does not apply to enforcement actions taken pursuant to section 1818.⁴² Similarly, section 1821(l) defines the proper measure of damages for various parties, including officers and directors, who are found liable for the “improvident or otherwise improper use or investment of any insured depository institution’s assets. . . .”⁴³ The savings provision of section 1821(k) is not needed to preserve the measure of damages announced in section 1821(l) because section 1821(l) applies only to violators of the standard of care promulgated by section 1821(k).

The minority view that “other applicable law” refers only to other sections of FIRREA reads section 1821(k) to say “[n]othing in FIRREA shall affect the rights of the FDIC found in FIRREA.” This awkward reading is precisely why a statute refers to itself, rather than to other federal or state law, “by stating ‘in this Title’ or ‘in this Chapter.’”⁴⁴ The absence of such language in section 1821(k) implies that Congress intended the savings provision to apply generally to all “other applicable law.” Interpreting section 1821(k) to provide a uniform standard of gross negligence renders its savings provision pointless. The term “other applicable law” must refer to laws outside FIRREA.⁴⁵

37. See *FDIC v. McSweeney*, 772 F. Supp. 1154, 1159 (S.D. Cal. 1991).

38. *FDIC v. Swager*, 773 F. Supp. 1244, 1247 (D. Minn. 1991); *FDIC v. Canfield*, 763 F. Supp. 533, 537 (D. Utah 1991).

39. 12 U.S.C.A. § 1818 (West 1989).

40. 12 U.S.C.A. § 1821(l) (West 1989).

41. Such actions include termination of insurance; cease-and-desist orders; removal, suspension and prohibition of reentry of any officer or director of an insured institution; and civil money penalties for certain acts by an institution or an institution-related party. 12 U.S.C.A. § 1818 (West 1989).

42. See 12 U.S.C.A. § 1818(a)(2)(A) (West 1989) (stating that the FDIC can terminate deposit insurance if an institution engages in unsafe or unsound practices, is in an unsafe or unsound condition, or violates any applicable law or regulation).

43. 12 U.S.C.A. § 1821(l) (West 1989).

44. *FDIC v. McSweeney*, 772 F. Supp. 1154, 1159 (S.D. Cal. 1991) (noting such references in 12 U.S.C. §§ 1821(e)(8) and 1821(i)).

45. *FDIC v. Haddad*, No. 90-0779-CIV, 1991 WL 252965, at *7 (S.D. Fla. July 21, 1991);

In a slightly different vein, the court in *FDIC v. Swager* stated that "other applicable law" as used in section 1821(k) means all applicable law other than state law.⁴⁶ The court believed that because Congress used the word "state" in the first sentence of section 1821(k), Congress would have used the word "state" in the second sentence if it had intended to include state law within "other applicable law."⁴⁷ The court stated that if Congress had intended section 1821(k) to strengthen or broaden the FDIC's power to recover damages from insolvent bank directors and officers, the final sentence should have read: "Nothing in this paragraph shall impair or affect any right of the Corporation under *any* applicable law."⁴⁸ The *Swager* court's argument thus rests on a one word distinction: "other" versus "any." Not only does this change fail to alter the meaning of section 1821(k),⁴⁹ but it also unduly emphasizes a distinction that Congress probably did not contemplate. One can also turn the *Swager* rationale on its head: if Congress intended to save only federal laws, it would have stated, in the second sentence, that "federal law is not impaired or affected by section 1821(k)." Alternatively, if Congress desired to preempt all state law other than that which defines the terms "gross negligence" and "intentional tortious conduct," it would have stated, in the second sentence of section 1821(k), that "all other applicable state law is preempted."

The plain language of section 1821(k) supports the interpretation that it establishes a minimum standard of care. Because the last sentence of section 1821(k) states that FIRREA does not affect the FDIC's rights under "other applicable law," the FDIC can still pursue negligence actions in those states that allow them. To read section 1821(k) in any other way would ignore the plain language of the statute.

II. LEGISLATIVE INTENT

This Part examines the legislative history of FIRREA and concludes that Congress intended to preempt only those state laws that insulate officers and directors from liability for conduct violating stan-

see *Home Sav. Bank v. Gillam*, No. 90-35765, 1991 WL 276241, at *9 (9th Cir. Dec. 31, 1991) (§ 1821's "other applicable law must, at a minimum, include other types of legal actions permitted by the Federal Deposit Insurance Act"); cf. *IRS v. FLRA*, 494 U.S. 922, 930 (1990). In *IRS v. FLRA*, the Court was interpreting language found in § 7106(a)(2) of the Civil Service Reform Act. 494 U.S. at 926-27. The Court held that to interpret the language "nothing in this chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws" as applying to other provisions of the Reform Act would make the provision "a pointless tautology. It is clear that the term 'applicable laws' refers to laws *outside the Act*." 494 U.S. at 930.

46. *FDIC v. Swager*, 773 F. Supp. 1244, 1248 (D. Minn. 1991).

47. 773 F. Supp. at 1248.

48. 773 F. Supp. at 1248.

49. For alternative definitions of "other applicable law" see *supra* note 21.

dards of care equal to or less stringent than gross negligence. Section II.A shows that the Senate specifically desired FIRREA to have such an effect. Section II.B explains that the House and the Conference Committee, although making inconsequential changes in the language of the Senate version of the bill, did not mean to alter the meaning of section 1821(k) as it was promulgated by the Senate. Section II.C demonstrates that the Senate did not believe that the House and Conference Committee version of FIRREA had altered the meaning of section 1821(k). When considered as a whole, the legislative history of section 1821(k) indicates that Congress intended to promulgate a minimum standard of liability for the directors and officers of insured financial institutions.

A. Senate Intent

The Senate clearly expressed its intent to enact a statute that only preempted state law to the extent of preempting insulating statutes.⁵⁰ The original Senate version of FIRREA provided that

“[n]otwithstanding any provision of State law, a director or officer . . . may be held personally liable . . . for any cause of action available at common law, including, but not limited to[] negligence [and] gross negligence”⁵¹

The bill’s managers then amended the bill on the Senate floor to state that a director or officer of an insured financial institution may be held personally liable in suits brought by the FDIC:

“for gross negligence or intentional tortious conduct, as those terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right, if any, of the Corporation that may have existed immediately prior to the enactment of the FIRREA Act.”⁵²

One of the bill’s managers, Senator Riegle, stated that although “[t]he reported bill totally preempted State law . . . with respect to suits brought by the FDIC against bank directors or officers . . . the managers’ amendment scales back the scope of this preemption.”⁵³ Senator Riegle added that “[u]nder the managers’ amendment, State law would be overruled only to the extent that it forbids the FDIC to bring suit based on ‘gross negligence’ or an ‘intentional tort.’”⁵⁴ Furthermore, the Managers’ Report that accompanied the Senate version of FIRREA stated that FIRREA “does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers or directors of a financial institu-

50. See *supra* note 7 and accompanying text for an explanation and list of insulating statutes.

51. S. 774, 101st Cong., 1st Sess. § 214(n) (1989).

52. 135 CONG. REC. S4318 (daily ed. Apr. 19, 1989).

53. *Id.* at S4278-79 (statement of Sen. Riegle).

54. *Id.* at S4279.

tion to be sued . . . for violating a lower standard of care, such as simple negligence"⁵⁵

Comments made during the Senate floor debate over FIRREA also indicate that the Senate intended to enact a bill that only preempts insulating statutes and allows the FDIC to bring negligence claims in those jurisdictions that allow them.⁵⁶ Senator Roth remarked that the bill did not "pre-empt State corporation law in any general way. . . . It is surgically designed to protect the Federal interest, the taxpayers' interest, and no other."⁵⁷ A second senator commented that the "bill adds several important provisions to *help* prosecutors make their cases and to speed[] recovery of lost funds."⁵⁸ This statement demonstrates that courts should not read section 1821(k) to mandate a uniform gross negligence standard. Such an interpretation conflicts with the intent of the Senate because the FDIC would have to conform its pleadings and proof to a gross negligence standard in cases where a simple negligence standard previously would have applied.⁵⁹

During the debates, yet another senator remarked that FIRREA was needed "to avoid the risky investment activities that have crippled so many S&L's"⁶⁰ This statement suggests that the Senate intended to suppress those speculative investment practices that helped

55. S. REP. NO. 19, 101st Cong., 1st Sess. 318 (1989). In *FDIC v. Canfield*, 763 F. Supp. 533 (D. Utah 1991), the court indicated that it did not find the report persuasive because (1) the Banking Committee did not issue the report until two months after the Senate had considered its version of FIRREA, (2) the report was not directed to the final version of FIRREA, and (3) the report failed to consider the before-enactment/after-enactment distinction in the last sentence of the section. 763 F. Supp. at 539. However, as Senator Cranston explained, "there was no section-by-section analysis provided by the committee for the bill when it was reported simply because of the time rush constraints facing the committee as it moved the bill to the floor." 135 CONG. REC. S4283 (daily ed. Apr. 19, 1989) (statement of Sen. Cranston). Additionally, the report merely restates the remarks that Senator Riegle made on the Senate floor during the debate over the bill. See *supra* notes 53-54 and accompanying text. Furthermore, reports are often published after the adoption of a bill and still considered to be authoritative. See, e.g., *Home Sav. Bank v. Gillam*, No. 90-35765, 1991 WL 276241, at *9-10 (9th Cir. Dec. 31, 1991) (citing the committee report as authority for its conclusion). With respect to the second criticism, the Senate considered the House changes in the bill and did not indicate that it felt the House had made any substantive changes in the provision adopted by the Senate. See *infra* notes 80-85 and accompanying text. The third criticism is specious because no before/after distinction exists in the second sentence of § 1821(k), so it is obvious that the Senate intended its bill to allow negligence actions, which could be brought by the FDIC *before* the enactment of FIRREA, also to be brought *after* FIRREA's enactment.

56. The Senate also accepted a suggestion offered by Senator Heinz that the RICO statute be amended to include additional predicate offenses relating to bank and financial fraud. 135 CONG. REC. S4115 (daily ed. Apr. 18, 1989). This amendment demonstrates that Congress wanted to expand the penalties for harming depository institutions, not contract them.

57. 135 CONG. REC. S4281 (daily ed. Apr. 19, 1989). Senator Garn, one of the bill's managers, concurred. See *id.* ("We are not imposing any rules that go beyond our purpose. Section [1821(k)] is not a general provision. It is limited.")

58. 135 CONG. REC. S4000 (daily ed. Apr. 17, 1989) (statement of Sen. Dixon) (emphasis added).

59. See *infra* notes 113-16 and accompanying text.

60. 135 CONG. REC. S4239 (daily ed. Apr. 19, 1989) (statement of Sen. Burns).

cause the S&L crisis. The interpretation of section 1821(k) as a minimum standard is consistent with this purpose. Such a standard curbs dangerous investment practices by increasing the potential sanctions on officers and directors if the investments harm the institution.⁶¹ A fourth senator stated that FIRREA “increases the enforcement powers and remedies the Government has to go after fraudulent and *incompetent* practices.”⁶² The minority view that section 1821(k) is a uniform standard would, to the contrary, decrease the effectiveness of the FDIC’s enforcement practices. Under the uniform standard of care, a negligent officer or director may escape liability under the enforcement mechanisms, leaving the FDIC with no other avenue to regain lost funds.⁶³

In support of the uniform standard interpretation, the court in *FDIC v. Canfield*⁶⁴ used the statements of Senators Heflin and Sanford expressing concern over the FDIC’s authority over state institutions. The court suggested that these senators desired a general preemption of state law, rather than a preemption of only insulating statutes.⁶⁵ This interpretation, however, is largely unfounded. For example, not only did Senator Heflin direct his comments at the civil penalties included in Title IX of the bill — not section 1821(k), which is found in Title II — but he also stated that his recommendations were minor.⁶⁶ Senator Sanford expressed support for the managers’ amendments, which, as previously noted, were intended only to preempt insulating statutes.⁶⁷

B. House and Conference Committee Intent

Neither the House of Representatives nor the Conference Committee expressly addressed the issue of whether section 1821(k) provides a uniform standard or a minimum standard of gross negligence. The

61. See *infra* notes 89-98 and accompanying text.

62. 135 CONG. REC. S4303 (daily ed. Apr. 19, 1989) (statement of Sen. Kerry) (emphasis added).

63. See *infra* notes 114-18 and accompanying text.

64. 763 F. Supp. 533 (D. Utah 1991).

65. 763 F. Supp. at 538 (stating that Senators Heflin and Sanford expressed concern over a plan that would greatly increase the authority of the FDIC over financial institutions).

66. 135 CONG. REC. S4264 (daily ed. Apr. 19, 1989).

67. *Id.* at S4276-77. Senator Sanford’s remarks indicate that he himself was confused about the scope of preemption. For example, shortly after stating that FIRREA “permit[s] the FDIC to bring an action . . . if the director or officer acted with gross negligence or committed an intentional tort,” he went on to say that “the preemption of State law permitted by this bill is limited *solely* . . . to those cases in which the directors or officers have committed intentional torts or acts of gross negligence.” *Id.* (emphasis added). However, even if the statements of Senators Heflin and Sanford are interpreted to support massive preemption of state and federal common law, the statements are not persuasive when the many other statements of intent are taken into consideration. Cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988) (views of opponents of a bill are not persuasive with respect to its meaning).

House and Committee did change the language of the Senate bill, promulgating the version of section 1821(k) that Congress eventually enacted.⁶⁸ However, an examination of the relevant House reports, hearings,⁶⁹ and floor debates pertaining to FIRREA and the Conference Committee report reveals that, in making these changes, neither the House nor the Committee wished to alter the Senate's intent that FIRREA only preempt insulating statutes.

The House suggested several times that FIRREA would increase the supervisory and enforcement authority of the FDIC.⁷⁰ An interpretation that FIRREA preempts all state and federal law claims for negligence would weaken, not enhance, the power of the FDIC to oversee the activities of financial institutions.⁷¹ Testimony during House hearings on FIRREA also demonstrates that the House was aware of the need to impose liability on numerous parties whose negligent actions contributed to the problems of S&Ls.⁷²

Courts advancing the uniform standard interpretation of section 1821(k) have relied almost exclusively on the Conference Report in concluding that no "clearly expressed legislative intention" existed regarding whether FIRREA preempts negligence actions brought by the FDIC.⁷³ The Conference Report states that section 1821(k) "preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross

68. See *supra* note 5 and accompanying text.

69. See 2A SUTHERLAND, *supra* note 11, at § 48.10 (stating that the members of Congress are assumed to have knowledge of committee hearing statements).

70. H.R. REP. NO. 54, 101st Cong., 1st Sess., pt. 5, at 26 (1989), *reprinted in* 1989 U.S.C.C.A.N. 397, 409 ("bill would significantly expand the supervisory and enforcement authority of the Federal Government with respect to the thrifts"); H.R. REP. NO. 54, 101st Cong., 1st Sess., pt. 7, at 2 (1989), *reprinted in* 1989 U.S.C.C.A.N. 421, 421-22 (bill would "provide increased enforcement authority"); *id.* at 6 ("bill would impose tighter restrictions on activities of the thrifts"). Additionally, comments made during the hearings also suggest that House members desired to punish officers and directors for negligent acts. See *Failure of Independent CPA's To Identify Fraud, Waste and Mismanagement and Assure Accurate Financial Position of Troubled S&L's: Hearing Before the House Committee on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 6 (1989) (statement of Rep. LaFalce) [hereinafter *CPA's Hearing*].

71. See *infra* Part III.

72. *CPA's Hearing*, *supra* note 70, at 12 (statement of Frederick D. Wolf, Assistant Comptroller General) ("[F]inancial institutional failures have often been associated with management-related problems such as serious internal control weaknesses, insider abuse and fraud, unresponsiveness to regulators and disregard for the safety and soundness of financial operations."); *id.* at 64 (statement of William Gladstone, Chairman, Arthur Young & Co.) ("Even today troubled S&L's are offering inflated interest rates to attract depositors . . ."); *id.* at 85 (statement of Thomas Myers, President, T.A. Myers & Co.) ("I would concur with [Representative LaFalce] about the directors and officers . . . [Those] who were involved in negligent situations . . . should be pursued.").

73. See *FDIC v. Swager*, 773 F. Supp. 1244, 1248 (D. Minn. 1991); *FDIC v. Canfield*, 763 F. Supp. 533, 539 (D. Utah 1991). In contrast, the *McSweeney* court did not discuss the Conference report in holding that FIRREA does not "prejudic[e] the FDIC's full range of rights in those states that had not passed protective legislation for directors [and officers]." *FDIC v. McSweeney*, 772 F. Supp. 1154, 1158 (S.D. Cal. 1991).

negligence or any conduct that demonstrates a greater disregard of a duty of care”⁷⁴ At first blush this language seems to imply that the conferees disregarded both the intent of the Senate and the statements made by several representatives that FIRREA would effect only a narrow preemption of state and federal law. However, an examination of the dynamics of the enactment process reveals that the report does not necessarily conflict with the conclusion that Congress intended FIRREA simply to preempt insulating statutes.

The Conference Report is inconclusive regarding the preemption issue. First, its drafters wrote the Report very hastily.⁷⁵ Because of FIRREA’s rapid journey through Congress, the authors of the Report did not have time to write an in-depth description of every provision in the bill.⁷⁶ The authors simply expressed their desire to preempt state law to some extent — by superseding insulating statutes — but did not clearly articulate their desire to allow the FDIC to bring state law claims in states with a simple negligence standard.

Furthermore, the authors of the Conference Report never indicated that the rewording of section 1821(k) represented a substantive change from the original versions of this section approved by the Senate.⁷⁷ Because the Conference Committee indicated each time it altered the meaning of other sections of FIRREA from the original Senate version,⁷⁸ the lack of such a statement with regard to section

74. H.R. CONF. REP. NO. 222, 101st Cong., 1st Sess. 398 (1989), *reprinted in* 1989 U.S.C.A.N. 432, 437 [hereinafter CONFERENCE REPORT].

75. As Senator Riegle stated, Congress put together “the most sweeping financial services reform package . . . in record time.” He went on to say, “[i]t is roughly a thousand pages of legislation, and any time a bill has to be that long because of its complexity, particularly of a problem of this kind, it speaks for itself, of its far-ranging nature and the difficulty of doing it and doing it on a timely basis and having it right.” 135 CONG. REC. S9872 (daily ed. Aug. 3, 1989). Additionally, the Conference Report was drafted in an extremely short time span. *See* 135 CONG. REC. D879 (daily ed. July 27, 1989) (conferees agree to file report) and 135 CONG. REC. S9871, H5331 (daily ed. Aug. 4, 1989) (report received from conference committee); *cf.* Clark et al., *supra* note 2, at 1015 n.16 (noting that FIRREA itself is unclear in some areas as a result of the remarkable speed with which it moved through Congress).

76. The “Joint Explanatory Statement of the Committee of Conference” is only 75 pages long. *See* CONFERENCE REPORT, *supra* note 74, at 393-467. The actual statute consists of 390 pages. *See id.* at 1-392.

77. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985) (if Congress wishes to change the law in a “novel way,” some mention of this intent should be present in the statute or the legislative history); *Sedima*, 473 U.S. at 489 n.8 (recognizing that a minor departure in wording, without more, does not indicate a fundamental change in meaning); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (stating that inaction in the face of an already promulgated construction suggests that such construction be followed).

78. *See* CONFERENCE REPORT, *supra* note 74, at 393 (“The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.”) (emphasis added); *id.* at 396 (“cho[osing] the Senate requirements . . . rather than the House”); *id.* at 402 (“[c]onferes deleted from statutory language the . . . requirements enacted by the Senate”); *id.* at 417 (“conference agreement contains the House proposal with a number of significant changes”); *id.* at 422 (report not authorizing funds provided for in House bill); *id.* at 430 (report adopting House provision with an

1821(k) strongly implies that the Committee intended no substantive change in the meaning of this section. The similarity between the language of the two provisions also indicates that the House meant to make no substantive changes in the provision.⁷⁹ The Conference Report, then, is consistent with the minimum standard interpretation of section 1821(k).

C. Senate Consideration of the House and Conference Version of FIRREA

The Senate considered the changes made in the House and Conference version of FIRREA and eventually passed that version with several minor amendments.⁸⁰ Several senators reiterated their earlier views that FIRREA increased, rather than decreased, the control of the FDIC over insured depository institutions.⁸¹ Reading section 1821(k) as mandating a uniform standard actually decreases, not increases, the effectiveness of the FDIC's enforcement mechanisms.⁸²

amendment); *id.* at 431 (same); *id.* at 432 (report adopts House provision); *id.* at 433 (report contains House provision with an amendment); *id.* at 437 (pointing out differences between the House and Senate bills); *id.* at 438 (report contains the House provision with an amendment); *id.* at 443 (conferees deleting section of House bill); *id.* at 446 (pointing out similarities between the Senate and House versions); *id.* at 451 (report contains House version plus an amendment); *id.* at 457 (House version adopted with modifications); *id.* at 458 (report contains amended language of the House bill); *id.* (adopting House provisions as modified); *id.* at 459 (pointing out where House recedes to Senate provision and where Senate recedes to House version); *id.* at 460 (House provision adopted with amendments); *id.* (conferees deleted from statute certain requirements enacted by the House); *id.* at 461 (conferees clarifying House provision and stating provision should be construed narrowly); *id.* at 463 (adopting House bill with certain clarifications); *id.* at 464-65 (conferees follow House bill since Senate bill had no provision); *id.* at 465 (same); *id.* at 466 (following House bill with certain changes).

79. *Cf. Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 552 (1987) ("The similarity between the language of [a statute] and its two predecessor statutes . . . also refutes the contention that Congress intended [any substantive change].").

80. These minor amendments are not relevant to this Note.

81. 135 CONG. REC. S987 (daily ed. Aug. 4, 1989) (statement of Sen. Riegle) (FIRREA "raise[s] the standards"); *id.* at S10,200 (statement of Sen. Chafee) ("The legislation . . . increas[es] civil money penalties in cases when a bank, thrift . . . or an individual connected to the institution[] violates regulations or engages in a *unsafe or unsound practice* I am confident that this and other requirements contained in the S&L bill will discourage abuse and mismanagement") (emphasis added); *id.* at S10,206 (statement of Sen. Dixon) ("[A]ny thrift legislation we enact will only work if . . . it goes after those whose *negligence* and criminal behavior contributed to this problem. . . . They must be prosecuted to the full extent of the law. Legislation must ensure that they are not permitted to profit from their greed, their *negligence*, or their criminal behavior.") (emphasis added); *id.* at S10,209 (statement of Sen. Cranston) ("bill has many admirable qualities such as . . . [n]ew increased civil penalties and enforcement provisions to prosecute those who are to blame for a huge costly mess"). Senator Riegle, in reference to the extended statute of limitations period promulgated under FIRREA, stated that "[t]he provisions should be construed to maximize potential recoveries by the Federal Government by *preserving to the greatest extent possible by law* claims that otherwise would have been lost to the expiration of hitherto applicable limitations periods." *Id.* at S10,205 (emphasis added); *cf. Clark et al., supra* note 2, at 1028 (recognizing that FIRREA significantly expands the supervisory and enforcement authority of the FDIC). Senator Riegle's statement demonstrates his concern with maximizing the FDIC's options for recovery from officers and directors of financial institutions.

82. See *infra* notes 113-18 and accompanying text.

If any senator believed that section 1821(k) as promulgated by the House substantively changed the Senate's version of that section, the debate does not show it. As the Senate debate over the House version of FIRREA showed,⁸³ the Senate believed the House changes concerned only whether the S&L bailout should be financed "off-budget" or "on-budget" and whether the affordable housing amendments added to FIRREA by the House should be retained.⁸⁴ No senator indicated that the House had made any substantive changes in section 1821(k) — in fact, the statements made in the Senate show that the intent of section 1821(k) remained unchanged, even if the words had been slightly altered.⁸⁵

Thus, the legislative history of FIRREA supports the minimum standard interpretation of section 1821(k). The Senate rejected an attempt to preempt generally state law in the area of officer and director liability in favor of a version of FIRREA that preempted only state insulating statutes. The House and the Conference Committee, although changing the proposed language of section 1821(k), did not intend to change substantively the meaning of the provision passed by the Senate.

III. CONSIDERATIONS AFFECTING THE INTERPRETATION OF SECTION 1821(k)

This Part examines policy arguments for and against the preemption of state law by section 1821(k)'s gross negligence standard. It concludes that the policies and purposes underlying FIRREA weigh in favor of reading section 1821(k) as preempting only insulating statutes and preserving the right of the FDIC to bring negligence actions in those states that allow them.

Congress, when enacting FIRREA, stated that its primary purposes included promoting a safe and stable system of housing finance, curtailing excessively speculative investments, putting the federal deposit insurance fund on sound financial footing, providing funds from nontaxpayer sources to help pay for the S&L bailout, and strengthening the powers of the FDIC to oversee financial institutions.⁸⁶ The

83. See 135 CONG. REC. S9871-99 (daily ed. Aug. 4, 1989).

84. See Marirose K. Lescher & Merwin A. Mace, III, *Financing the Bailout of the Thrift Crisis: Workings of the Financing Corporation and the Resolution Funding Corporation*, 46 BUS. LAW. 507, 532 (1991).

85. See *supra* note 81 and accompanying text.

86. In relevant part, the Report provides:

The primary purposes of the bill are:

(1) to promote, through regulatory reform, a safe and stable system of affordable housing finance; (2) to improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards; (3) to curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds; (4) to promote the independence of the Federal Deposit Insurance Corporation through an independent board of directors, adequate funding, and appropriate powers; (5) to put the Fed-

Supreme Court has repeatedly stated that courts should look to congressional policy pronouncements such as these to interpret provisions like section 1821(k).⁸⁷ Accordingly, section III.A examines policies that favor the minimum standard of care interpretation. Section III.B scrutinizes those competing policies that seem to favor the uniform standard of care interpretation. This Part concludes that the policies underlying FIRREA can best be served by allowing states to impose a more stringent standard of care than the gross negligence standard Congress provided in FIRREA.

A. *Arguments Advanced in Support of the Minimum Standard Interpretation of Section 1821(k)*

Judicial interpretation of section 1821(k) as a minimum standard will help promote "a safe and stable system of affordable housing finance" by ensuring a continued flow of affordable mortgage financing.⁸⁸ During the period immediately preceding and extending through the current S&L crisis, institutions that traditionally concentrated their lending activities in home mortgage financing increasingly transferred their funds into riskier and more speculative investments.⁸⁹

eral deposit insurance funds on a sound financial footing for the future; (6) to establish an Office of Thrift Supervision in the Department of the Treasury, under the general oversight of the Secretary of the Treasury; (7) to create a new corporation, to be known as the Resolution Trust Corporation, to deal with failed thrift institutions; (8) to provide funds from public and private sources to deal expeditiously with failed financial institutions; (9) to strengthen the enforcement powers of Federal regulators of financial institutions; (10) to strengthen the penalties for defrauding or otherwise damaging financial institutions and their depository.
 CONFERENCE REPORT, *supra* note 74, at 393 (emphasis added).

87. See, e.g., *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Dole v. United Steelworkers*, 494 U.S. 26, 36-38 (1990) (statute must be construed to effectuate its purposes as defined by Congress); *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250 (1970) ("[C]onsideration must be given to the total corpus of pertinent law and the policies that inspired [a statute]."); *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'") (citations omitted).

88. See *supra* note 86.

89. The share of S&L industry assets devoted to home mortgage lending decreased from 67% in 1980 to 39% by 1988, the period of S&L deregulation. James R. Barth et al., *Moral Hazard and the Thrift Crisis: An Empirical Analysis*, 44 CONSUMER FIN. L.Q. REP. 22, 24 (1990). The statements of Thomas A. Myers, president of T.A. Myers & Co., are especially insightful on this matter:

[S]ome fast growing savings and loan associations poured money into high-risk investment and lending situations.

Acquisition development and construction lending became common where 100 percent or more of project funding, including reserves for interest, were often provided by the lender in exchange for a participation in profits.

Overnight a number of thrifts went from single-family home lending to more exotic loan and investment vehicles. The lending program for certain of these thrifts was typified by poor underwriting procedures and an emphasis on taking risks, as thrift managers played an aggressive lending game in which "heads they would win and tails the FSLIC would lose." *CPA's Hearing*, *supra* note 70, at 60; see also H.R. REP. NO. 54, 101st Cong., 1st sess., pt. 7, at 6 (1989), reprinted in U.S.C.C.A.N. 421, 426 ("The tendency of weakly capitalized thrifts to un-

These speculative investments played a major role in causing the current crisis by rendering many institutions insolvent as the investments increasingly failed.⁹⁰ Allowing the FDIC to pursue negligence actions against the officers and directors of insured financial institutions should inhibit the unreasonably speculative investment of an institution's funds.⁹¹ Because officers and directors know they may be forced to reimburse the FDIC for any losses caused by their overly speculative investment strategy, they are more likely to channel investment funds into the home lending market, thereby allowing more people to borrow funds necessary for home ownership.⁹² Most importantly, depositors' funds will be much safer and the FDIC's liability much less than current levels.⁹³

Any deposit insurance system must ultimately deal with the problem of "moral hazard."⁹⁴ A moral hazard arises because an insured

dertake excessively risky investments is an important source of the current problem."); ROBERT E. BARNETT, RESPONSIBILITIES AND LIABILITIES OF BANK AND BANK HOLDING COMPANY DIRECTORS 11 (1985) (stating that unusually rapid growth can be a danger signal); Kenneth E. Scott, *Never Again: The S&L Bailout Bill*, 45 BUS. LAW. 1883, 1892 (1990) (S&Ls that strayed from traditional investment strategies were particularly hard hit by insolvency).

90. See *Problems of the Federal Savings and Loan Insurance Corporation: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 101st Cong., 1st sess., pt. 1, at 244 [hereinafter *Problems Hearing*] (statement of Paul Volcker) ("[T]he largest losses have been concentrated in institutions moving away from home mortgage lending . . ."); *id.* at 265 (statement of Paul Volcker) ("[T]he most successful and profitable institutions currently are those that followed, basically, traditional saving and loan patterns. They are heavily concentrated on home mortgage lending."); *id.*, pt. 2, at 43 (statement of Nicholas F. Brady, Secretary of the Treasury) ("[T]he great body of successful savings and loans are ones that have stuck to [home mortgage lending] and earned a decent, reasonable profit, not extraordinary profits . . ."). Indeed, reading § 1821(k) as mandating a uniform standard "creates the perverse incentive for a director in an institution that is having financial difficulty to permit the thrift to fall into ruin — benignly and with a lesser degree of fault than gross negligence — since the director's own exposure would be greatly reduced upon the institution of a receivership." *FDIC v. McSweeney*, 772 F. Supp. 1154, 1159 (S.D. Cal. 1991); see also Clark et al., *supra* note 2, at 1021; Scott, *supra* note 89, at 1890; *infra* note 102.

91. FIRREA should not be read as an attempt to eliminate entirely the element of risk from an institution's asset portfolio, clearly an impossibility. See Scott, *supra* note 89, at 1894. This Note does suggest that savings associations should either devote more resources to traditional home mortgage lending or, if they should expand into other areas, retain employees who have the necessary expertise to formulate wise investment strategies and decisions. If an institution aggressively devotes its funds to nontraditional investments and the institution is harmed as a result of the new investment strategy, managers that did not consult persons who have special expertise in the new area of investment should be found to be negligent.

92. The FDIC's proposed new rules, which lessen the costs incurred by S&Ls in making mortgage loans, should further expand the funds available for home mortgage lending. See Stephen Labaton, *U.S. Seeks Eased Rule for Loans*, N.Y. TIMES, Dec. 24, 1991, at D1.

93. "Deposit insurance was designed to cover individuals who put their life savings into banks, not to finance speculative activities." Allan Sloan & Howard Rudnitsky, *What Will the Bank Dicks Do Now?*, FORBES, July 1, 1985, at 86, 89 (quoting then-FDIC chairman William Isaac).

94. See, e.g., Barth et al., *supra* note 89; Scott, *supra* note 89, at 1886; Kenneth E. Scott & Thomas Mayer, *Risk and Regulation in Banking: Some Proposals for Federal Deposit Insurance Reform*, 23 STAN. L. REV. 857, 886-87 (1971); Alex M. Azar II, Note, *FIRREA: Controlling Savings and Loan Association Credit Risk Through Capital Standards and Asset Restrictions*, 100 YALE L.J. 149, 154-57 (1990). For a graphical analysis of the effects that deposit insurance has

institution can undertake risky investments, confident that the insurance fund will ultimately cover all the institution's losses.⁹⁵ Similarly, the insurance fund also gives insured depositors little incentive to impose discipline on the lending industry.⁹⁶ Furthermore, for those institutions that are publicly traded, neither shareholder discipline nor discipline imposed by the takeover market has effectively deterred opportunism, excessive risk-taking, or other managerial conduct that can lead to insolvency.⁹⁷

Interpreting section 1821(k) to allow negligence actions will help the FDIC deal with the moral hazard problem. By holding the officers and directors of financial institutions liable for any losses that they cause through negligent conduct, FIRREA gives these individuals greater incentive to make sounder, safer, and more prudent operating decisions. If officers and directors must reimburse the fund for losses caused by their negligent conduct, they should be sufficiently deterred from poor and uninformed decisionmaking.⁹⁸

on the riskiness of an institution's investments, see Stephen K. Halpert, *The Separation of Banking and Commerce Reconsidered*, 13 J. CORP. L. 481, 509-13 (1988).

95. Deregulation exacerbated this problem by allowing the thrift industry to pursue excessively risky lending activities in search of higher profits, increasing the likelihood of S&L failures. Barth et al., *supra* note 89, at 28. Also, "[t]he management of many savings associations lacked the necessary expertise to take profitable advantage of their expanded lending and investment powers." Clark et al., *supra* note 2, at 1021-22. This lack of expertise suggests not only that the officers are liable for negligence, but that the directors are also liable for negligence because they neither barred the officers from investing in areas in which the officers had little or no expertise nor did they act to bring in outsiders who had the necessary expertise. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, THE DIRECTOR'S BOOK: THE ROLE OF A NATIONAL BANK DIRECTOR, 21, 23 (1987) [hereinafter THE DIRECTOR'S BOOK] ("Many new undertakings require substantial systems support and new expertise. . . . Outside experts can help the board evaluate the likely impact of proposed policies and procedures.").

96. Barth et al., *supra* note 89, at 29; Helen A. Garten, *What Price Bank Failure*, 50 OHIO ST. L.J. 1159, 1180-87 (1989). In fact, some evidence exists that depositors are ignoring chances to discipline troubled institutions in favor of taking advantage of the deposit insurance system. See Sharon Walsh, *Bank Customers Shuffling Accounts to Ensure Federal Protection*, WASH. POST, Aug. 22, 1991, at C13 (depositors splitting up large accounts into accounts of \$100,000 or less in order to be fully protected by deposit insurance).

97. Garten, *supra* note 96, at 1177, 1187-94; *cf. id.* at 1177 n.104 (noting that agency costs allow management to pursue its own goals rather than those of the institution's real risk-bearers).

98. For a discussion of the fundamental notion that changes in the standard of care effect changes in conduct, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 39-41 (1987). *Cf. Gadd v. Pearson*, 351 F. Supp. 895, 903 (M.D. Fla. 1972) (stating that a higher standard of care is required of financial institution directors); *FSLIC v. Huff*, 704 P.2d 372, 378 (Kan. 1985) (same); *Cosmopolitan Trust Co. v. Mitchell*, 136 N.E. 403, 408 (Mass. 1922) (same); *Litwin v. Allen*, 25 N.Y.S.2d 667, 678 (Sup. Ct. 1940) (same); *Hun v. Cary*, 82 N.Y. 65, 71 (1880) (same); BARNETT, *supra* note 89, at 18 (noting that financial institution directors should exercise greater care than the average businessperson); THE DIRECTOR'S BOOK, *supra* note 95, at 9 ("Bank directors face special challenges, however, because . . . most of the funds they put at risk belong to others."); Carol Galbraith & Joseph Seidel, *FDIC v. Imprudent Banking Officials: The Enforcement Apparatus*, 104 BANKING L.J. 92, 92 (1987) ("[A] weak, negligent board of directors can often be the single most important factor leading to a failure."); Charles D. Lewis, *The Business Judgment Rule and Corporate Directors' Liability for Mismanagement*, 22 BAYLOR L. REV. 157, 163 (1970) (suggesting that bank directors should be held to stricter standards than other corporate directors). *But cf.* Richard B. Dyson, *The Direc-*

In addition to channeling money away from risky investment activities, a standard of negligence should force officers and directors of financial institutions to institute and follow prudent underwriting controls,⁹⁹ pay closer attention to federal banking regulations,¹⁰⁰ and obtain more information about potential lending activities.¹⁰¹ Providing an institution's management with incentives to procure more information about potential borrowers and their uses of borrowed funds should result in better lending practices and lower costs to the FDIC and taxpayers.¹⁰² Further, because credit risk — the possibility that borrowers will default on their loans — is the principal cause of the current S&L crisis,¹⁰³ a standard of care that causes financial institutions to strengthen their lending policies and supervisory mechanisms should reduce the default rate.¹⁰⁴

tor's Liability for Negligence, 40 IND. L.J. 341, 343-44 (1965) (because bank directors are often local citizens with no particular business skill, the community may wish to hold them to a lesser standard).

99. See *CPA's Hearing*, *supra* note 70, at 200 (statement of Frederick Wolf) (failures often associated with serious internal control weaknesses); *id.* at 171 (statement of Thomas Myers) ("vast majority of failed thrifts exhibited virtually no effective controls in [their underwriting systems]"); THE DIRECTOR'S BOOK, *supra* note 95, at 19 ("[The board] is expected to supervise bank operations to ensure that they reflect sound planning, are effectively governed by comprehensive policies and internal control and compliance procedures, and are administered by competent management.").

100. See *CPA's Hearing*, *supra* note 70, at 232 (letter from Thomas A. Myers) (institutions violating regulatory standards).

101. *Id.* at 60 (statement of Thomas Myers) (S&Ls often accepted developers' appraisals and market studies without much question); *id.* at 171-72 (statement of Thomas Myers) (opportunistic buyers preyed on inept lenders who were lackadaisical or aggressively stupid in lending decisions); *id.* at 233 (letter from Thomas Myers) (S&Ls purchasing direct investments without the expertise required to evaluate fully and analyze the economics of them).

102. Many S&Ls today are apparently still engaging in imprudent activities, even after the huge debacle of the recent past. See *id.* at 64 (statement of William Gladstone) ("Even today troubled S&Ls are offering inflated interest rates to attract depositors . . .").

103. Azar, *supra* note 94, at 152, 153-54; see also Barth et al., *supra* note 89, at 24 (all of the record \$12 billion S&L losses in 1988 was due to nonoperating factors and taxes). S&Ls face two other main risks: interest rate risk and liquidity risk. See generally Azar, *supra* note 94, at 151-52.

104. For example, a study by the Office of the Comptroller General found that "[m]anagement-driven weaknesses played a significant role in the decline of 90 percent of the failed and problem banks" between 1979 and 1987. *National Banks: OCC Study Evaluates Factors Contributing to the Failure of National Banks*, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,387, at 93,979-83 (June 30, 1988). In these banks, 81% either had no loan policies or failed to follow them; 69% had inadequate oversight mechanisms by which compliance with internal policies or banking laws could be ensured; 63% exhibited inadequate control and supervision of bank officers; 59% inadequately identified problem loans; 57% were dominated by a single officer, director, or stockholder; and 49% had nonexistent or inadequately followed policies for asset and liability management. Additionally, the OCC found that 86% of the failed banks had extremely liberal lending policies; 51% had excessive loan growth in relation to the expertise and abilities of management and the internal oversight systems; 41% placed undue reliance on overly volatile assets; 38% had inadequate liquid assets; 81% exhibited inadequate credit examinations and reports; 72% showed overlending to borrowers; 53% lent based on collateral value rather than cash flow; and 36% showed an unwarranted concentration of credits. Insider abuse was found to be a significant factor in 35% of the failed banks. *Id.* at 93,981-82.

The interpretation of section 1821(k) as providing a minimum standard of care will lessen the negative impact of financial institution failures. The decline of the S&L industry, or even the demise of a single institution, has many repercussions both locally and nationally. An institution's failure often freezes depositors' funds, imperils creditors of the institution, causes an increase in unemployment, and results in the consumption of valuable judicial and administrative resources.¹⁰⁵ Furthermore, "[d]eposit insurance gives certain innocent bystanders — healthy banks and their depositors, the bank regulatory system, and the public — a stake in bank failure that is more direct than . . . in other business failure."¹⁰⁶ This interest arises because each failure can result in higher insurance premiums for healthy banks — and at least part of this increased cost of doing business is likely to be passed on to consumers — and a loss of public confidence in the system.¹⁰⁷ A negligence standard should lead to a more careful and better informed decisionmaking process,¹⁰⁸ minimizing economic disruptions and declines in consumer confidence caused by failures.¹⁰⁹

The minimum standard interpretation of section 1821(k) will increase the contribution of the private sector, reducing the cost to the taxpayers of the S&L bailout. If courts allow the FDIC to pursue negligence actions, it will be able to recover funds from those individuals who, through their negligence, helped to cause the current S&L crisis, thereby reducing the amount of taxpayer funds that must be expended to resolve the crisis.¹¹⁰ If the FDIC can pursue negligence

105. *FSLIC v. Huff*, 704 P.2d 372, 379 (Kan. 1985) (a failure has a direct effect on the construction, sale and resale of houses, which in turn affects many other areas of the economy); *Cosmopolitan Trust Co. v. Mitchell*, 136 N.E. 403, 405 (Mass. 1922) (noting the "vast importance" of financial institutions to "commercial prosperity"); *THE DIRECTOR'S BOOK*, *supra* note 95, at 1 (financial service industry serves an important function in the nation's economy); Garten, *supra* note 96, at 1166, 1171-72. *But see* Halpert, *supra* note 94, at 521-22 (recognizing these costs but suggesting they do not necessarily diminish social welfare).

106. Garten, *supra* note 96, at 1166; *see also* BARNETT, *supra* note 89, at 10 (directors assume responsibilities to the institution itself, shareholders, depositors, management, employees, the community at large and also to the industry as a whole); *THE DIRECTOR'S BOOK*, *supra* note 95, at 39 ("The board's concern for the financial success of its shareholders must be tempered . . . by its responsibilities to the bank's depositors, employees, and community."); Dyson, *supra* note 98, at 343 (depositors as possible plaintiffs).

107. *Huff*, 704 P.2d at 379; *see also* Joel G. Brenner, *Perpetual Reports Fall in Deposits*, WASH. POST, Nov. 26, 1991, at D1 (\$736 million withdrawn from thrift during first nine months after negative reports concerning its financial condition); 55% in *Poll See Banks as Unsound*, CHI. TRIB., July 5, 1991, at C1.

108. *See supra* notes 98-104 and accompanying text.

109. Additionally, even under FIRREA, an institution's management may "change drastically the risk profile of an institution . . . by a massive program of asset disposition and reinvestment" without attracting the attention of FDIC regulators. Scott, *supra* note 89, at 1897. Allowing the FDIC to pursue negligence actions against the directors and officers of any institution that undertakes such acts should be sufficient to deter them because the officers and directors know that they can be held liable for any resulting losses.

110. BARNETT, *supra* note 89, at 69-70 ("Almost all of the recent FDIC suits against directors have been settled prior to trial, some for settlement amounts of millions of dollars."); *see CPA's Hearing*, *supra* note 70, at 86 (statement of Rep. LaFalce) ("What I want to do is get as

actions against officers and directors, it will be able to recover from a greater number of culpable individuals than if gross negligence was the uniform standard of care.¹¹¹ By enlarging the pool of potential targets, FIRREA expands the amount of total liability and thereby increases the amount of private contributions to the bailout fund.¹¹²

The minimum standard interpretation of section 1821(k) also strengthens both the FDIC's enforcement powers and the sanctions imposed on those who harm insured depository institutions.¹¹³ Congress, through FIRREA, sought to strengthen civil sanctions against those persons who damage insured financial institutions.¹¹⁴ Interpreting section 1821(k) as providing a uniform gross negligence standard, however, would have the opposite effect. Instead of being able to plead and prove simple negligence on the part of a defendant, the FDIC would be forced to plead and prove conduct amounting to at least gross negligence before it could recover squandered funds.¹¹⁵ This interpretation would have the unanticipated result of imposing on the FDIC "a more stringent pleading burden [and burden of proof] than that which faced its predecessors in interest."¹¹⁶ Reading section 1821(k) as preempting all state law, then, would damage the FDIC's

much non-taxpayer money as possible . . ."); 135 CONG. REC. S4273 (daily ed. Apr. 19, 1989) (statement of Sen. Riegle) ("[E]very dollar that we recover . . . is a dollar that the taxpayer does not have to pay."). See also *FDIC v. Burrell*, 1991 WL 256362, at *4 (S.D. Iowa July 17, 1991) (noting the FDIC's claim that preemption of negligence actions would result in "manifest injustice to the right of the FDIC to seek to replenish the insurance fund").

111. See Sarah Bartlett, *Savings Fraud Losses Seen as Lost for Good*, N.Y. TIMES, Feb. 10, 1989, at D1 (FDIC recovered \$50 million in civil suits during 1988).

112. See *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986) ("As the size of the defendant pool increases, the chances for settlement of the suit and achievement of one of the federal government's objectives under [CERCLA]—[payment by the] responsible parties — is met."); Elizabeth A. McLaughlin, Comment, *Civil Money Penalties in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989: An Analysis*, 12 GEO. MASON U. L. REV. 289, 294 (1990) (noting that FIRREA's civil money penalties were intended to accomplish restitution).

113. See *supra* note 86.

114. For examples of FIRREA provisions other than section 1821(k) that increase the FDIC's enforcement powers, see 12 U.S.C.A. §§ 1786(e)-(f), 1818(b)-(c) (West 1989 & Supp. 1991) (expanded cease and desist powers); 12 U.S.C.A. §§ 1817(j)(16), 1818(i)(2), 1828(j)(4) (West 1989 & Supp. 1991) (expanded and increased civil money penalties); 12 U.S.C.A. § 1847 (West 1989 & Supp. 1991) (criminal and civil penalties).

115. *FDIC v. McSweeney*, 772 F. Supp. 1154, 1159 (S.D. Cal. 1991).

116. *McSweeney*, 772 F. Supp. at 1159; see also *FDIC v. Swager*, 773 F. Supp. 1244, 1248 n.4 (D. Minn. 1991) (recognizing this conflict but concluding that the plain language of section 1821(k) requires this result); BARNETT, *supra* note 89, at 23 (stating that an institution may bring suit against directors based on the common law); THE DIRECTOR'S BOOK, *supra* note 95, at 56 (stating that suits for a director's violation of the common law duty of care may be brought by shareholders, depositors, and creditors who have been injured by the violation); Raymond G. Kawasaki, Note, *Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 42 HAST. L.J. 249, 273 (1990) ("Presumably regulators still may institute lawsuits against independent contractors based on a common law negligence cause of action.").

ability to sue incompetent officers and directors of depository institutions.

Finally, by reading section 1821(k) as supplying a minimum standard, courts may ensure that all persons whose negligence contributed to the demise of an institution are made to bear the consequences. A negligence action is valuable as an additional enforcement mechanism available to the FDIC, especially in those cases in which the conduct at issue does not "present a strong basis for statutory enforcement proceedings."¹¹⁷ A negligence action also gives the FDIC the opportunity to proceed in the most economically efficient fashion.¹¹⁸

B. *Arguments Advanced in Support of Interpreting Section 1821(k) as a Uniform Standard*

1. *Deterring Competent Persons from Accepting Positions with Financial Institutions*

Some have argued that the minimum standard interpretation of section 1821(k) would deter qualified and competent people from becoming officers and directors of financial institutions.¹¹⁹ As one court has stated, "[o]ne motivation for sheltering officers and directors from claims for ordinary negligence is the important interest in encouraging aggressive and ambitious leaders to take the necessary steps to remedy the financial institution crisis this country faces."¹²⁰ The thrust of this argument is that a simple negligence standard deters risk-averse or risk-neutral people from becoming officers and directors.¹²¹ However, such people always have the option of procuring director and officer liability insurance (D&O insurance).¹²² Although competent people conceivably should not be forced by fear of liability to expend their

117. Vartanian & Schley, *supra* note 10, at 1029.

118. *Cf. Sedima, S.P.R.L. v. Imrex Corp.*, 473 U.S. 479, 492 (1985) (noting that the government may choose to pursue civil remedies instead of other available options).

119. *See FDIC v. Canfield*, 763 F. Supp. 533, 539 (D. Utah 1991).

120. *Canfield*, 763 F. Supp. at 539.

121. The *Canfield* court, when it spoke of "aggressive and ambitious leaders," may have been expressing a preference for risk-seeking individuals. If so, this preference is misplaced. After all, overly risky investments caused the S&L crisis. *See supra* notes 89-98 and accompanying text. *See also Problems Hearing*, *supra* note 90, at 66 (statement of Lowell L. Bryan, Director and Senior Partner, McKinsey & Co.) ("[W]hen an institution gets in trouble, the easy way out is always . . . simply [to] take more risk."); *id.* at 244 (statement of Paul Volcker) ("[T]he largest losses have been concentrated in institutions moving away from home mortgage lending and aggressively exploiting . . . some new or broadened powers provided thrifts in recent years, especially by some states."). Furthermore, risk-seeking persons are likely to ignore standards of care because they, by their very nature, will take extraordinary risks, especially when they know that the full faith and credit of the FDIC is guaranteeing whatever adverse results may occur.

122. *See BARNETT*, *supra* note 89, at 82 (stating that directors should insist on insurance before agreeing to serve); *CPA's Hearing*, *supra* note 70, at 234 (statement of Thomas Myers) ("Directors and officers are normally cognizant of the potential liability that they may face as a result of their negligence, ineptitude or fraudulent misconduct and are, therefore, frequently covered by directors and officers liability insurance . . .").

own money on D&O insurance, prospective officers and directors may require the institution that is seeking their services to pay for or reimburse them for purchasing insurance as a condition to accepting the offer.

Even if officers and directors are forced to pay for the insurance themselves, a requirement that they bear a portion of the risk of their own negligence seems fair. These individuals seem a more appropriate group to bear the risk than the taxpayers, particularly given the prestige and significant remuneration of their positions.¹²³ Therefore, even if some extremely risk-averse people will decline to be officers or directors of financial institutions, the net effect on the pool of qualified people should not be inordinately large.

Moreover, a negligence standard may appropriately deter those people who lack the requisite qualifications or expertise from becoming directors of financial institutions.¹²⁴ Also, it is worth noting that the law imposes a negligence standard of liability on a myriad of activities and many competent people still participate in them. Finally, no one has shown any pattern of adverse effects on the number of persons accepting offers to become officers or directors of financial institutions in those states that allowed negligence actions against the officers and directors of financial institutions before the enactment of FIRREA.

2. "Crippling" Directors of Financial Institutions

At least one court has argued that a negligence standard judges the conduct of officers and directors on the basis of hindsight.¹²⁵ This standard may make officers and directors fearful of having their decisions second-guessed years later and, as a result, cause them to become "crippled, reluctant and ineffective."¹²⁶ However, all standards, not merely the negligence standard, evaluate conduct on the basis of hindsight. Even if courts were to read section 1821(k) as mandating a uniform standard of gross negligence, they would still judge on the basis

123. See Larry D. Soderquist, *The Proper Standard for Directors' Negligence Liability*, 66 NOTRE DAME L. REV. 37, 45 (1990) (suggesting that courts should punish directors for blameworthy conduct because the director receives a large stipend and a prestigious position from the institution but, by participating in the blameworthy conduct, fails to "keep faith" with the institution). For more information regarding director and officer insurance, see generally JOSEPH W. BISHOP, JR., *THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE* (1981); Joseph F. Johnston, Jr., *Corporate Indemnification and Liability Insurance for Directors and Officers*, 33 BUS. LAW. 993 (1978).

124. One study revealed that many people nominated as directors of banks in Georgia had no previous experience as bankers or directors of financial institutions. Robert F. Cook & Stanley H. Pollock, *Bank Directors: Understanding Their Role, Responsibility and Liability*, 40 MERCER L. REV. 587, 588 n.5 (1989).

125. See *FDIC v. Canfield*, 763 F. Supp. 533, 539 (D. Utah 1991).

126. *Canfield*, 763 F. Supp. at 539. The court does not cite any authority for this proposition. The *Canfield* court goes on to state that a goal of FIRREA was to make liability dependent upon culpable conduct. 763 F. Supp. at 540. A negligence standard, however, does hold people liable for culpable conduct.

of hindsight; officers and directors would still be fearful of courts second-guessing their decisions. Additionally, there is no indication that a simple negligence standard "crippled" officers and directors in those states that followed such a standard before the passage of FIRREA.

Furthermore, the fact that directors and officers can meet a negligence standard relatively easily supports reading section 1821(k) to allow the FDIC to pursue negligence actions.¹²⁷ One commentator has suggested that directors and officers can lessen the probability of liability for negligence by taking ten easy steps:¹²⁸ (1) they should be thoroughly knowledgeable about their duties and the institution before accepting their positions;¹²⁹ (2) they must review all securities and regulatory filings for the prior three years; (3) they should request and receive necessary materials and agendas before board meetings and should attend those meetings;¹³⁰ (4) they must acquaint themselves with current directors and top management to ensure competence and lack of conflicts; (5) they should review all reports of examinations and correspondence from regulatory agencies for the prior three years; (6) they should review all communications between auditors and the institution for the prior three years;¹³¹ (7) they must familiarize themselves with the existing plans for the future of the institution; (8) they must supervise and review the performance of management;¹³² (9) they should disclose all conflicts of interest, their own and those of others; and (10) they must comply with all applicable laws. If they do not take these steps as consideration for the compensation and prestige they receive by virtue of their position, they ought to be held liable for all acts that damage the institution.¹³³

3. *Fear of Frivolous Actions*

One court suggested that interpreting FIRREA to provide a uniform standard of gross negligence will prevent the FDIC from pursuing costly litigation that it has little chance of winning.¹³⁴ No evidence exists, however, to prove that the FDIC is bringing or will bring actions in which it has little chance of prevailing on the merits.¹³⁵ The

127. See generally Ira S. Newman, *Reducing the Risk of Bank Director Liability*, 96 BANKING L.J. 418, 427-36 (1979).

128. John C. Deal, *Liability of Bank Directors*, 39 BUS. LAW. 1033, 1034-39 (1984); see also THE DIRECTOR'S BOOK, *supra* note 95, at 19-52.

129. See also Cook & Pollock, *supra* note 124, at 612 (officers and directors need to have a basic understanding of banking and bank laws and regulations).

130. *Id.* (stating the need to attend board meetings).

131. *Id.* (recognizing the need to be familiar with audits and supervisory communications).

132. *Id.* (must ask questions and receive adequate explanations).

133. See Soderquist, *supra* note 123, at 45.

134. FDIC v. Canfield, 763 F. Supp. 533, 540 (D. Utah 1991).

135. Indeed, the *Canfield* court cites no authority for its proposition that the FDIC will bring baseless claims. One report has suggested, however, that the FDIC does not successfully pursue the vast majority of claims that are referred to it. See Sarah Bartlett, *Savings Fraud*

FDIC does not have unlimited funds — its sole economically rational choice is to pursue only cases in which it has a relatively high probability of recovering taxpayers' dollars.¹³⁶ This probability is determined only after extensive investigation into the circumstances surrounding the failure of an insured institution.¹³⁷ The FDIC, on its own, has an incentive not to bring frivolous actions.

4. *Disservice of Federal Interests*

The most forceful argument in favor of the uniform gross negligence standard is that such a standard will "clearly establish[] the parameters of liability for the benefit of officers and directors and the FDIC."¹³⁸ However, "there is no federal interest in uniformity for its own sake."¹³⁹ The true federal interest supports the minimum standard interpretation because institutions whose officers and directors are not liable for acts inconsistent with the goals of the deposit insurance system should not be insured. If states, acting under their traditional authority in this area,¹⁴⁰ wish to hold the officers of state-chartered S&Ls to a more exacting standard, they should be allowed to do so. Such a standard will increase both protection for the deposit insurance fund and security for those state residents who deposit their life savings in an insured depository institution.¹⁴¹

Additionally, interpreting FIRREA to allow the FDIC to bring simple negligence actions will not create uncertainty. Directors and officers should know whether the state in which their financial institu-

Losses Seen as Lost for Good, N.Y. TIMES, Feb. 10, 1989, at D1 (From 1985 through 1988, the Federal Home Loan Bank Board referred to the Department of Justice 14,613 criminal cases involving savings associations. During the period from 1984 through 1988, the Department of Justice obtained only 172 convictions for fraud or criminal misconduct involving such institutions.).

136. Galbraith & Seidel, *supra* note 98, at 125 (contending that the FDIC is able to expand its litigation resources only as long as it is "economically justifiable"); Weinstock, *supra* note 4, at 436-37 ("If the bank's failure resulted largely from economic factors or well-intentioned but unfortunate business decisions, it is unlikely that the FDIC will bring suit.").

137. See Weinstock, *supra* note 4, at 436.

138. *Canfield*, 763 F. Supp. at 540.

139. *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 993 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); see also *FSLIC v. Capozzi*, 855 F.2d 1319, 1325 (8th Cir. 1988), *vacated*, 490 U.S. 1062 (1989); *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1374 (S.D. Fla. 1991).

140. See *supra* notes 23 and 31.

141. See *Burks v. Lasker*, 441 U.S. 471, 479-80 (1979) (state law can be applied where its application does not significantly threaten any identifiable federal interests and where no unreasonable or aberrant state rules are applied); *Capozzi*, 855 F.2d at 1325-26 ("[N]o substantive rights or duties of the federal government hinge on the outcome of [state law breach of duty claims]."); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d at 994 ("It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens."); *Amerifirst Bank*, 757 F. Supp. at 1374 (permitting state law breach of duty claims "will not interfere with the successful functioning of the comprehensive federal [regulatory] scheme," even though different states may apply different rules); THE DIRECTOR'S BOOK, *supra* note 95, at 1 ("This dual [regulatory] system allows each jurisdiction to govern its own system of banks.").

tion is incorporated permits representatives of the institution to pursue negligence actions against them. The mere fact that a potential director or officer does not know such a fundamental fact suggests that she is not qualified to hold a position with potentially large liabilities.

CONCLUSION

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 attempted in section 1821(k) to give the Federal Deposit Insurance Corporation a tool that it could use to recover funds from those parties who helped to bring about the current crisis. However, that tool is now in danger of being lost. A minority of courts have interpreted section 1821(k) to remove from the FDIC's arsenal the ability to pursue simple negligence actions against officers and directors of failed institutions. The courts following this interpretation have held that section 1821(k) implements a uniform standard of care and thereby preempts all state law in this area. Because the standard of care under section 1821(k) is gross negligence, these courts have held that the FDIC can no longer pursue some of the parties who are responsible for the current crisis.

The majority view is that section 1821(k) sets a minimum standard that preempts all state law that allows a more relaxed standard of care. The courts adhering to this interpretation have held that the FDIC is still able to pursue simple negligence claims in those states that allow such actions. These courts interpret section 1821(k) in a way that aids the FDIC in its quest to seek out and recover funds from those officers and directors who are responsible for an insured institution's failure.

The plain meaning of section 1821(k) supports the majority view that FIRREA merely sets a minimum standard of care of gross negligence. The legislative history surrounding the passage of FIRREA and, specifically, section 1821(k) shows that Congress did not intend to preempt all state law in this area, but only to set a minimum standard. Finally, the policies and goals served by FIRREA support the majority view that section 1821(k) sets a minimum, not a uniform, standard of care.

FIRREA gives the FDIC greater regulatory and enforcement powers over financial institutions by greatly revising the existing law governing the conduct of officers and directors of financial institutions. In response to the enormous cost imposed on the general public by the actions of people within the S&L industry, Congress attempted to ensure that such a debacle would never again occur. It would indeed be a Pyrrhic victory for the FDIC if this zealous protection of the deposit insurance fund were interpreted to strip the FDIC of one of its most powerful weapons in the fight against incompetence and fraud. Courts should interpret section 1821(k) to permit the FDIC to pursue negligence actions in those states that allow them.