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Liability of Directors and Officers Under FIRREA: The Uncertain Standard of § 1821(k) and the Need for Congressional Reform

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INTRODUCTION

With the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Congress began what is certain to be a long and expensive resolution of the savings and loan association ("S&L") crisis. As most taxpayers are well aware, the original estimates of a $100 billion cleanup have long been abandoned, and now some forecasters anticipate that the total cost of the S&L bailout will reach $1 trillion. This amount includes the 743 failed thrifts the government seized in order to protect over 22 million depositors.

One source that Congress intends to tap for a contribution to this costly cleanup is the group that many feel is largely responsible for the crisis in the first place—the officers and directors of the failed S&Ls. Under § 1821(k) of FIRREA, the government may hold officers and directors of federally insured financial institutions personally liable for mismanagement. However, the language of § 1821(k) is ambiguous.

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2 The provisions of FIRREA apply to all FDIC-insured institutions, including banks and S&Ls, 12 U.S.C. § 1813 (Supp. V 1993), and references to S&L officers and directors should be considered equally applicable to bank officers and directors.
3 Banning K. Lary, Apres le Deluge: Cleaning up After the S&L Mess, MGMT. REV., July 1990, at 24, 24 ("S&L clean-up estimates have swelled from $100 billion to over $300 billion, climbing toward the $1 trillion mark that some cynics say will ultimately be the tab for American taxpayers."). But see Birge Watkins, Examining the Past and Present of the RTC, NAT’L REAL ESTATE INVESTOR, June 1994, at 138, 138 ("[T]he cost of the savings and loan crisis will be much less than some early estimates.").
4 Although the term "thrifts" may be used to include credit unions, in this Note it is used interchangeably with S&Ls.
5 Watkins, supra note 3, at 138.
6 12 U.S.C. § 1821(k) (Supp. V 1993) (stating directors and officers can be held
regarding the proper standard of care by which to evaluate the conduct of S&L officers and directors in certain situations, and its conflicting legislative history has resulted in costly litigation that may continue unless this section is clarified.\(^7\)

This Note begins by looking at the history of the S&L crisis.\(^8\) Part II chronicles the history of officer and director liability.\(^9\) Part III explores the conflicting congressional history behind FIRREA, especially § 1821(k).\(^10\) Part IV examines the cases which have attempted to resolve the unanswered questions presented by FIRREA.\(^11\) The Note then concludes that Congress should revisit § 1821(k) to establish a uniform negligence standard for use in all cases involving officers and directors of federally insured financial institutions, which would thus spare the taxpayers the high cost of litigating this issue time and time again.\(^12\)

I. THE HISTORY OF THE S&L CRISIS AND THE QUESTIONS PRESENTED BY 1821(k)

America’s S&L, or thrift, industry originated during the 1830s with the establishment of the Oxford Provident Building and Loan association in Frankfort, Pennsylvania.\(^13\) The industry grew steadily throughout the 1800s and early 1900s, establishing itself as a provider of domestic financial services. This growth pattern continued until the Great Depression, when over 1700 thrifts failed.\(^14\) This industry-wide collapse prompted Congress and the President to increase government regulation of the nation’s S&Ls with the hope of stabilizing and saving these institutions.\(^15\) “The Great Depression spurred the reformation of the thrift industry into a federally conceived and assisted system to provide

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\(^7\) See infra notes 103-206 and accompanying text.
\(^8\) See infra notes 13-55 and accompanying text.
\(^9\) See infra notes 56-102 and accompanying text.
\(^10\) See infra notes 103-22 and accompanying text.
\(^11\) See infra notes 123-96 and accompanying text.
\(^12\) See infra notes 197-206 and accompanying text.
\(^14\) H.R. Conf. Rep. No. 101-54(I), supra note 13, at 292, reprinted in 1989 U.S.C.C.A.N at 88. These failures were due to borrowers’ inability to service their mortgages. Id.
\(^15\) Id.
citizens with affordable housing funds. It is accurate to say that the present thrift industry structure was born during the Depression." 16

In 1932, Congress enacted the Federal Home Loan Bank Act, 17 which authorized the creation of twelve district banks to lend money to thrifts and established the Federal Home Loan Bank Board ("FHLBB") to oversee these district banks. 18 In the following year, Congress passed the Home Owners' Loan Act of 1933. 19 This Act authorized the FHLBB to grant federal S&L charters and established the Home Owner's Loan Corporation ("HOLC") to purchase and refinance delinquent loans in order to help home owners avoid foreclosure. 20 Additional regulation came with the passage of the National Housing Act of 1934, 21 which created the Federal Housing Administration ("FHA") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). 22

These measures enabled the thrift industry to rebound in the post-Depression years and accumulate three percent of the country's total financial assets by 1945. 23 This growth continued over the years, and by 1985 thrifts held fifteen percent of America's assets. 24 Thrifts were also responsible for originating forty-nine percent of all one-to-four family mortgages nationwide in 1988. 25 These loans flowed from the congressional regulatory plan to utilize S&Ls to increase the availability of affordable housing through mortgage credit. 26

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16 Id.
20 H.R. CONF. REP. No. 101-54(I), supra note 13, at 293, reprinted in 1989 U.S.C.C.A.N at 89 ("Over its life, the HOLC refinanced $2.75 billion worth of home mortgages, and invested $300 million in thrift institutions.").
22 H.R. CONF. REP. No. 101-54(I), supra note 13, at 293, reprinted in 1989 U.S.C.C.A.N at 89. The FSLIC insured thrift deposits up to $5000 in order to encourage public re-investment in the savings and loan industry. The FHA provides insurance which offers protection to mortgage lenders by guaranteeing the repayment of defaulted loans. Id.
23 Id.
24 Id.
26 Id. at 294, reprinted in 1989 U.S.C.C.A.N at 90 ("[A] critical factor in achieving
However, during the late 1970s and early 1980s, the increase in interest rates — following the Federal Reserve Board's decision to switch from a policy of stabilizing interest rates to one focusing on controlling the growth of the money supply — hit the thrift industry particularly hard. As one congressional report noted:

This shift caused a dramatic increase in interest rates with an equally dramatic increase in the cost of funds at thrifts. At the same time, thrift assets were locked into long-term, low-yielding, fixed-rate mortgages. This meant thrifts were paying more to attract funds than they were earning on their mortgage portfolios. This "negative" interest rate mismatch was the beginning of the thrift crisis as we know it.

The government, both at the state and federal level, attempted to remedy this situation by rapidly deregulating the thrift industry and allowing S&Ls to diversify their loan bases and other investments. In addition, Congress endorsed the use of Regulatory Accounting Principles ("RAP"), which allow for the inclusion of certain speculative forms of capital and the exclusion of certain liabilities, rather than insisting on the use of Generally Accepted Accounting Principles ("GAAP") to track S&L performance and regulatory compliance.

This swift deregulation allowed many S&Ls to participate in high-risk investment schemes and undergo rapid expansion without experiencing any reduction of their liabilities or improvement in their actual overall financial condition. The use of RAP rather than GAAP to track the government's housing goal is the existence of a safe, efficient and viable thrift industry.

28 Id.
29 As of 1980, a little over half of the FSLIC-insured thrifts were state chartered and thereby regulated primarily by state legislatures. By 1984, over one third of the states had granted these state-chartered banks greater investment flexibility than that enjoyed by federally chartered banks. Id. at 297, reprinted in 1989 U.S.C.C.A.N at 93.
S&Ls magnified this problem. "By 1984, the difference between RAP and GAAP net worth at S&L’s stood at $9 billion. This meant that the industry’s capital position, or stated differently, its cushion to absorb losses was overstated by $9 billion. . . . By 1986, the difference had grown to $13.3 billion."

In the late 1980s, the bubble burst, as at least one third of the nation’s S&Ls stood on the brink of insolvency and had become targets for regulatory intervention. A congressional report in 1989 summarized the crisis as follows:

The thrift industry and FSLIC are now in perilous financial condition. The causes of this crisis can be traced to a number of factors: poorly timed deregulation; the dismal performance of some thrift managements; inadequate oversight, supervision and regulation by government regulatory agencies and the Reagan Administration; a regional economic collapse; radical deregulation by several large States; and outright fraud and insider abuse. What emerges all too clearly is that when the savings and loan industry was deregulated, the Reagan Administration, the Congress, several State legislatures, the government agencies assigned to supervise and examine these institutions, and the thrifts themselves badly misjudged the extent of the underlying problems.

In response to this troubling situation, Congress passed FIRREA, which abolished the FSLIC and the FHLBB and transferred most of their

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33 Id.
34 Id.
35 Lary, supra note 3, at 24 ("[T]he thrift industry began to topple like a house of cards, taking with it the Federal Savings & Loan Insurance Corp. (FSLIC), the Federal Home Loan Bank Board (FHLBB), and the good nights’ sleep of many thrift executives.").
functions and property to the FDIC. In addition, FIRREA also created the Office of Thrift Supervision ("OTS") and the Resolution Trust Corporation ("RTC") to deal with the failed S&Ls. Since its inception in August of 1989, the RTC has managed $458 billion in assets, and it holds approximately $69 billion in additional assets for future sale. In addition, the RTC has begun seeking recovery from accounting firms, as well as from former officers and directors, of failed S&Ls for their alleged misconduct during the S&L debacle.

Under FIRREA, the RTC may seek damages for mismanagement by directors and officers of federally insured institutions. Section 1821(k) states:

A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the [Resolution Trust] 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.


The FDIC and the RTC share many powers under FIRREA, and many of the statutory references in this Note refer to the RTC and the FDIC interchangeably.

See generally John Pickering, RTC Set to Unlock Legal Floodgates: Resolution Trust Corp. Cases From the Savings and Loan Crisis, ACC. TODAY, Apr. 6, 1992, at 1 (discussing RTC actions against the Big Six accounting firms for their alleged misconduct during the S&L collapse, including claims for $154 million against KPMG Peat Marwick and $319 million against Deloitte & Touche).

RTC v. Chapman, 29 F.3d 1120 (7th Cir. 1994) (involving an action against former directors and officers of a federally insured thrift in receivership); RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993) (involving an action against former directors and officers of a federally insured thrift in receivership).

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. 47

Although at first glance it may appear that this section establishes a generally applicable gross negligence standard of liability for officers and directors of S&Ls,48 a closer analysis reveals such an application may not be appropriate in all instances. First, § 1821(k) states that “[a] director or officer of an insured depository institution may be held personally liable.”49 Some courts have found that “may” is a permissive rather than a restrictive term,50 and it should therefore not be construed to mean “may only.”51 Second, the final sentence of § 1821(k) preserves the RTC’s rights under “other applicable law,” and one commentator has argued this sentence clearly precludes the statute from having a preemptive effect on the application of state negligence standards to directors and officers of financial institutions.52 The confusion over the congressional intent behind this statute has forced courts to interpret the language of § 1821(k) in order to answer the following inquiries:

1) May the RTC impose a simple negligence standard of liability on officers and directors of failed federally chartered S&Ls under the federal common law?53

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47 Id.
48 See generally David B. Fischer, Comment, Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions — or a Tighter Noose?, 39 UCLA L. Rev. 1703 (1992) (arguing that gross negligence is the proper standard to apply to officers and directors).
50 FDIC v. Canfield, 967 F.2d 443, 446 (10th Cir.) (en banc), cert. denied, 113 S. Ct. 516 (1992).
51 See RTC v. Lightfoot, 938 F.2d 65, 66-67 (7th Cir. 1991) (interpreting the use of “may” in FIRREA provisions regarding the RTC’s right to remove actions to a district court to be permissive and not a bar to the use of other applicable venue rules).
53 See RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993) (holding that § 1821(k) establishes a standard of gross negligence for officers and directors of federally chartered financial institutions and preempts application of any other federal common law); infra
2) May the RTC impose a simple negligence standard of liability on officers and directors of failed state-chartered S&Ls under state law?54

3) May the RTC impose a simple negligence standard of liability on officers and directors of failed federally chartered S&Ls under state law?55

The decisions reached by the courts dealing with these issues are largely conflicting and difficult to reconcile, a situation which points to a need for congressional reform in the area of officer and director liability under FIRREA. However, before turning to an analysis of the cases that have interpreted § 1821(k), it is important to understand the traditional rules regarding the liability of officers and directors and the congressional history of the statute itself.

II. THE HISTORY OF OFFICER AND DIRECTOR LIABILITY

A. The Traditional Rule

In 1891, the United States Supreme Court, in the case of Briggs v. Spaulding, addressed the issue of whether a group of bank directors could be held liable for allowing a healthy bank to become insolvent over a six-month period.56 The plaintiffs alleged the directors had "utterly failed to perform each and every of their official duties, and . . . [had] paid no attention to the affairs of the bank."57 In finding for the defendants, the Court held the directors had not unreasonably relied on the officer that was running the bank.58 The Court then laid out the common law rule

notes 123-50 and accompanying text.

54 See Canfield, 967 F.2d 443 (holding that § 1821(k) establishes a baseline standard of gross negligence but does not preempt imposition of a stricter standard under state law upon officers and directors of state-chartered institutions); infra notes 151-73 and accompanying text.

55 See RTC v. Chapman, 29 F.3d 1120 (7th Cir. 1994) (holding that § 1821(k) establishes a uniform standard of gross negligence for officers and directors of federally chartered financial institutions and preempts any application of a stricter state standard against them); infra notes 174-96 and accompanying text.


57 Id. at 137.

58 Id. at 160. The directors allowed bank officer Reuben Porter Lee to handle the bank's affairs. Id. at 159. Lee worked for the bank for 14 years and held the positions of "messenger boy, book-keeper, teller, assistant cashier, cashier, vice-president and president." Id. at 158-59. He was the son of a well-known local citizen, the treasurer for a leading church and the Young Men's Christian Association, and a member of the Young Men's Association. Id. at 159. "His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow citizens."
regarding the standard of care required of directors of financial institutions:

[D]irectors must exercise ordinary care and prudence in the administration of the affairs of a bank, and ... this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention.\(^5\)

Despite recently celebrating its 100th birthday, the Briggs decision endures as the generally accepted rule regarding the liability standard for directors of financial institutions.\(^6\) However, it should be noted that although the Briggs Court focused on the “gross inattention” aspect of this rule in finding for the defendant directors,\(^6\) the mention of “ordinary care” in this excerpt has complicated the application of this rule.\(^6\)

For the most part, corporate officers and directors enjoy the protection of the “business judgment rule.”\(^3\) This rule, in deference to the difficulty of making corporate decisions, establishes a presumption in favor of officers and directors whose decisions are informed and made in good faith.\(^4\) In Aronson v. Lewis, the Delaware Supreme Court described the business judgment rule as “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best

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\(^5\) See 3A William Fletcher, Cyclopedia of the Law of Private Corporations § 1042.10, at 76 (1994) (“This is one of those unusual areas of law in which contemporary courts are not bashful about citing and quoting century old authority.”); see also Fischer, supra note 48, at 1712 n.36, 1716 n.50 (noting that the Briggs approach has enjoyed “marked durability” and has been “invoked faithfully” with only minor variations).

\(^6\) Briggs, 141 U.S. at 165-66.

\(^3\) See Fischer, supra note 48, at 1717 n.53 (discussing the results of numerous cases involving bank director liability).


\(^6\) Mathews et al., supra note 63, at 799.
interests of the company." The Aronson court continued by stating that "under the business judgment rule director liability is predicated upon concepts of gross negligence."65

Officers and directors at financial institutions generally fall outside of the scope of the business judgment rule and are "held to a stricter accountability than the director[s] of an ordinary business corporation."66 This statement is true for two reasons.67 First, the business judgment rule provides protection to officers and directors in regard to specific decisions they reach.68 However, parties bringing lawsuits against officers and directors at financial institutions often seek to impose liability for general mismanagement or failure to supervise without calling any specific decision or action into question.69 Second, one of the major

65 473 A.2d 805, 812 (Del. 1984). The American Law Institute has defined the business judgment rule as follows:

A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:

(1) is not interested . . . in the subject of the business judgment;
(2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
(3) rationally believes that the business judgment is in the best interests of the corporation.

American Law Institute, 1 Principles of Corporate Governance: Analysis and Recommendations § 4.01 (1994); see also R. Franklin Balotti & James J. Hanks, Jr., Rejudging the Business Judgment Rule, 48 Bus. Law. 1337 (1993) (analyzing these and other approaches to the business judgment rule).

66 Aronson, 473 A.2d at 812.

67 Litwin v. Allen, 25 N.Y.S.2d 667, 678 (Sup. Ct. 1940). In Litwin, the court held the directors of the Guaranty Trust Company of New York responsible for losses incurred in a transaction in which the trust company agreed to buy certain bonds and give the seller an option to repurchase them six months later at the same price. The court noted this agreement placed all of the risk of loss on the trust company yet provided it with little or no potential for profit. Id.

68 See 3A Fletcher, supra note 60, at 77-78 (discussing the business judgment rule and its application to bank directors).

69 See supra note 65 and accompanying text.

70 Aronson, 473 A.2d at 813 ("[I]t should be noted that the business judgment rule operates only in the context of director action. Technically speaking, it has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act."); see also J.F. Rydstrom, Annotation, Liability of Corporate Directors for Negligence in Permitting Mismanagement or Defalcations by Officers or Employees, 25 A.L.R.3d 941 (1969 & Supp. 1994) (citing cases that consider liability for directors' neglect of their duties). But see FDIC v. Greenwood, 739 F. Supp. 450 (C.D. Ill. 1989) (discussing the business judgment rule in a case involving allegations of improper supervision by bank directors).
policy reasons behind the business judgment rule is that business operations involve risk, and generally bigger risks lead to larger payoffs.\textsuperscript{71} However, because S&Ls and banks are closely regulated depository institutions,\textsuperscript{72} courts have more stringently reviewed risk-taking by officers and directors of those institutions that are "charged with responsibility for other people's money."\textsuperscript{73}

Although bank officers and directors are generally denied the protection of the business judgment rule, their reasonable reliance on qualified managers has normally protected them from personal liability.\textsuperscript{74} Accordingly, bank officers, along with the rest of the corporate world, took notice when in 1985 the Delaware Supreme Court handed down its landmark \textit{Van Gorkom} decision in which the court appeared to move away from the traditional approach to the liability of officers and directors and the protection afforded them through reliance on representations made by a corporation's management personnel.\textsuperscript{75}

\textbf{B. The Van Gorkom Scare}

In \textit{Smith v. Van Gorkom}, a group of shareholders of the Trans Union Corporation ("Trans Union"), filed a class action lawsuit against its chairman and chief executive officer, Jerome W. Van Gorkom, and the rest of its board of directors.\textsuperscript{76} The shareholders sought damages from

\begin{footnotes}
\footnote{71}{Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982), \textit{cert. denied}, 460 U.S. 1051 (1983).}
\footnote{72}{Fischer, \textit{supra} note 48, at 1722 ("Beyond the common law, the federal and state banking statutes impose on depository-institution directors many additional requirements and rigorous obligations that are unique to their industry.") (footnotes omitted).}
\footnote{73}{Hoye v. Meek, 795 F.2d 893, 896 (10th Cir. 1986); \textit{see also} Litwin v. Allen, 25 N.Y.S.2d 667, 678 (Sup. Ct. 1940) ("A director of a bank is entrusted with the funds of depositors, and the stockholders look to him for protection from the imposition of personal liability.").}
\footnote{74}{\textit{See supra} note 58 and accompanying text.}
\footnote{75}{Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). To understand the importance of decisions by the Delaware Supreme Court regarding corporations, it is important to note "Delaware . . . is the principal architect and steward of a 'national corporation law' since it is the domicile of over 180,000 corporations, many of which are major, national public corporations . . . . Indeed, over half of the Fortune 500 companies are Delaware corporations." E. Norman Veasey et al., \textit{The Delaware Takeover Law: Some Issues, Strategies and Comparisons}, 43 BUS. LAW. 865, 866 (1988).}
\footnote{76}{488 A.2d at 863. At the time of the transaction at issue, Van Gorkom, a certified public accountant and lawyer, had been on Trans Union's board for 24 years, its chief}
\end{footnotes}
Van Gorkom and the rest of Trans Union’s board for their alleged misconduct in agreeing to certain provisions of an offer for a leveraged buyout from Jay A. Pritzker, “a well-known corporate takeover specialist.”

In 1980, Van Gorkom and Trans Union’s senior management began analyzing solutions to a recurring tax problem, including possible sale of the company. Trans Union’s chief financial officer completed a preliminary investigation of the potential for a leveraged buyout of Trans Union and estimated “$50 [a share] would be very easy to do but $60 [a share] would be very difficult . . . .”

Armed only with this preliminary information, Van Gorkom decided to meet with Pritzker secretly. At their initial meeting, Van Gorkom told Pritzker that he believed a leveraged buyout of Trans Union at $55 would be feasible. Two days later, Pritzker told Van Gorkom he was interested in purchasing at that price, and the two consented to the deal. However, Pritzker insisted that if Trans Union’s board of directors did not approve the deal before the opening of the English stock exchange three days later, his offer would be removed.

executive officer for more than 17 years, and its chairman for two years. Id. at 865-66.

77 Id. at 866.
78 Trans Union was a publicly traded holding company with extensive dealings in the railcar leasing industry, a business which produced large amounts of investment tax credits. Id. at 864. Trans Union often had trouble generating sufficient taxable income to fully utilize these credits. Id. From the late 1960s through the 1970s, it alleviated this problem by acquiring small companies with outstanding taxable income. Id. at 864-65.
79 Id. at 865. One other solution sought by Van Gorkom was a change in the tax law. In the summer of 1980, he testified to and lobbied Congress to alter the investment tax credit rules in order to allow companies like Trans Union to receive cash refunds for credits they did not have income to offset. Id. at 864-65.
80 Id. at 865 (quoting the chief financial officer).
81 Id. at 866. Before the meeting, Van Gorkom asked Trans Union’s controller to quietly calculate the feasibility of a buyout of Trans Union at $55 per share. The choice of $55 was apparently based solely on Van Gorkom’s personal knowledge of the company and was not supported by any actual evidence or study of Trans Union’s intrinsic value. Id.
82 Id.
83 Id. at 867. Under the arrangement, Pritzker would agree to buy all outstanding Trans Union shares at $55 per share, subject to the availability of financing. Id. at 868. In return, Trans Union would be allowed to receive competing bids for 90 days, but it could not solicit the bids and only published information could be provided to bidders. In addition, Trans Union would agree that in the event the deal did not materialize, it would sell Pritzker one million newly issued shares at $38 per share. Id.
84 Id. at 867.
Van Gorkom quickly called a board meeting to present the terms of the proposed agreement to the board members.\textsuperscript{85} Van Gorkom,\textsuperscript{86} attorney James Brennan,\textsuperscript{87} Trans Union's chief financial officer,\textsuperscript{88} and Trans Union's president\textsuperscript{89} all spoke in favor of the proposal. Based on these oral representations, the board accepted the terms of the agreement after deliberating for less than two hours.\textsuperscript{90}

Not all of Trans Union's shareholders were happy with the arrangement, and one shareholder, Alden Smith, filed a lawsuit to enjoin the merger.\textsuperscript{91} After the trial court denied plaintiff's motion for a preliminary injunction, Trans Union's shareholders approved the buyout agreement with Pritzker.\textsuperscript{92} However, Smith and another plaintiff, John W. Gosselin, continued the lawsuit as representatives of a certified class of shareholders.\textsuperscript{93}

The Delaware Supreme Court held that Trans Union's directors were not protected by the business judgment rule, even though their decision was based on the representations of three experienced management personnel and an attorney who advised them they might be sued if they did not accept the proposal.\textsuperscript{94} The court summarized its decision as follows:

The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic

\textsuperscript{85} Id. at 865.
\textsuperscript{86} Van Gorkom gave a 20-minute oral presentation regarding the potential deal with Pritzker and explained that it would put Trans Union "up for auction" and allow the "free market . . . [the] opportunity to judge whether $55 is a fair price." Id. at 868.
\textsuperscript{87} Brennan "advised the members of the Board that they might be sued if they failed to accept the offer and that a fairness opinion was not required as a matter of law." Id.
\textsuperscript{88} Trans Union's chief financial officer told the board he had not been previously aware of Van Gorkom's actions, but that by his estimation $55 a share was "in the range of a fair price," but 'at the beginning of the range.'" Id. at 869.
\textsuperscript{89} The president spoke in support of Van Gorkom's representations and noted he agreed with him regarding "the necessity to act immediately on this offer," and about 'the adequacy of the $55 and the question of how that would be tested.'" Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 864.
\textsuperscript{92} Id. The stockholders' vote was held on February 10, 1980, and 69.9% of the outstanding shares were voted in favor of the deal while 7.25% were voted against it. The remaining 22.85% of the shares were not voted. Id. at 870.
\textsuperscript{93} Smith owned 54,000 shares of Trans Union stock, while Gosselin personally owned 23,600 shares of Trans Union stock and his family owned another 20,000 shares. Id. at 864.
\textsuperscript{94} Id. at 893.
value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.55

Although the Van Gorkom court couched its decision in terms of "gross negligence," its refusal to provide protection to directors that relied on the representations of key management personnel "set off a storm [in the corporate world, as many] feared that courts, with the advantage of judicial hindsight, might soon begin second-guessing corporate directors on all kinds of questions."56 Increased premiums for director and officer liability insurance policies soon reflected this uneasiness and uncertainty.57 One report noted a 271% increase in insurance premiums for officers and directors of banks and other financial institutions in just one year.58

To ensure that talented and qualified persons remained interested in serving on corporate boards, many states began enacting statutes to increase the legal protection afforded officers and directors.59 Indiana was the first, enacting legislation in 1986 to absolve directors of liability unless their behavior rose to the level of "willful misconduct or recklessness."60 Delaware soon followed with a slightly different approach allowing corporations the option of adopting as part of their certificate of incorporation:

[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for

56 Fischer, supra note 48, at 1738.
57 James J. Hanks, Jr., Evaluating Recent State Legislation on Director and Officer Liability, Limitation and Indemnification, 43 BUS. L. 1207, 1209 (1988) (noting that as a result of Van Gorkom and other related cases, "the almost reflexive deference of courts to boardroom decisions evaporated — and with it the predictability on which directors and D&O [director and officer] insurance carriers have for so long relied.").
59 Fischer, supra note 48, at 1738-40.
acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; . . . or (iv) for any transaction from which the director derived an improper personal benefit.101

By 1988, forty additional states had enacted some type of legislation insulating officers and directors from personal liability for corporate decisions.102 It was against this backdrop that Congress began the task of drafting § 1821(k) and establishing the proper standard for imposing personal liability on officers and directors of federally insured financial institutions.

III. THE CONGRESSIONAL HISTORY OF § 1821(k)

A. Senate Intent

Under pressure from the President to respond quickly to the S&L crisis, FIRREA’s supporters in the Senate set a tight schedule for the bill’s consideration with the hope of passing the measure unburdened by amendments and excessive debate.103 Despite this hectic timetable, one issue that surfaced during the two-day debate over the bill was the liability standard that should be imposed on officers and directors.

In its original form, the FIRREA section dealing with the liability of officers and directors would have imposed personal liability for “any cause of action available at common law, including, but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty, breach of contract, conversion, fraud, waste of corporate assets, and violations of statutes.”104 However, certain senators expressed concern that such a strict liability standard would disrupt the public policy of encouraging the best possible persons to serve on corporate boards. As Senator Howell Heflin noted:

Federal regulatory officials constantly stress the need for effective and honest board management. The Office of Comptroller of the Currency


102 Hanks, supra note 97, at 1209. The Hanks article provides an in-depth look at the various types of insulating statutes that were passed in the mid-1980s and analyzes the potential implications for this nationwide move to limit the liability of officers and directors. See also Shepherd, supra note 52, at 1120 n.7 (citing examples of 37 insulating state statutes).

103 Fischer, supra note 48, at 1746-48 (discussing the push to complete consideration of the 564-page measure in two days and the unhappiness of many senators in having to vote on this important legislation in such a short time frame).

has stated: "At the OCC we recognize the important contributions knowledgeable and active directors make to the bank and the community. . . . We want to support directors by ensuring that they have a clear idea of what is expected of them."

Therefore, without a clarifying amendment, financial institutions may lose effective directors, maybe an entire board of directors.105

The concerns of Heflin and others led to an amendment of the section that read as follows:

LIABILITY—A director or officer of an insured financial institution may be held personally liable . . .

. . . 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 [FDIC] that may have existed immediately prior to the enactment of the FIRREA Act.106

Following this amendment, Senator Terry Sanford thanked the floor managers for making these changes and stated:

I believe that these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions. The bill as [first] drafted would have preempted numerous State laws which provide limited indemnification for directors and officers. These State laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. . . .

The amendment which the managers have accepted modifies the bill to preempt State law only in a very limited capacity. The amendment would permit the FDIC to bring an action . . . if the director or officer acted with gross negligence or committed an intentional tort.107

Two months after the debates were completed and the measure passed,108 the Senate released a section-by-section analysis regarding its

106 Id. at S4318.
107 Id. at S4276-77.
108 The Senate passed its original version of FIRREA by a vote of 91-8 on April 19,
version of FIRREA. The report stated that § 214(n) (the precursor of § 1821(k)) enables the FDIC to pursue claims against directors or officers of insured financial institutions for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence) or for intentional tortious conduct. This right supersedes State law limitations that, if applicable, would bar or impede such claims. This subsection 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 institution to be sued . . . for violating a lower standard of care, such as simple negligence . . . .

Therefore, it appears that in enacting § 214(n), the Senate intended to establish a "baseline" of liability for officers and directors. Under this approach, any state statute passed in the wake of Van Gorkom to absolve officers and directors from liability for gross negligence would be neutralized by the language of FIRREA, but any applicable law imposing a more stringent standard would remain in effect. Thus, an officer or director could be held personally liable for 1) gross negligence or intentional tortious conduct regardless of any insulating state statute, or 2) simple negligence if a state or federal law more stringent than FIRREA were applicable to the officer or director. This relatively straightforward approach to liability of officers and directors under FIRREA did not last long. Just six weeks later, the House Conference Committee, after making minor, non-substantive changes to the section, expressed a different understanding of § 1821(k)'s language in its section-by-section analysis.

B. House Intent

The House, proceeding less rapidly than the Senate, passed its original version of FIRREA on June 15, 1989. Although the House altered the
wording of the final sentence, or "savings clause," of the Senate's § 214(n),\(^{114}\) the change was not presented as substantive, and no relevant debate took place in the House regarding this section.\(^{115}\)

However, in its section-by-section analysis of § 1821(k), the House Conference Committee expressed an understanding of the liability of officers and directors under FIRREA different from that presented in the Senate's section-by-section report.\(^{116}\) According to the House report:

Title II preempts State law with respect to claims brought by the FDIC in any capacity [sic] against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.\(^{117}\)

The language of the House report implies an intent to establish a uniform liability standard for officers and directors of financial institutions which would preempt the application of any other law, including a state law that would impose a more stringent liability standard.\(^{118}\) This position conflicts with that of the Senate, which interpreted § 1821(k) to establish a "baseline" for the liability of officers and directors to apply only when a state's law had a more lenient standard than the FIRREA standard.\(^{119}\) Under the House's approach, officers or directors may be held personally liable only for gross negligence or intentional tortious conduct.\(^{120}\) Hence, according to the House's interpretation of § 1821(k), a law imposing a simple negligence standard would not apply.

Apparently, the Senate did not address the conflict between its view and the House's view of § 1821(k) when considering the final version of FIRREA generated by the House Conference Committee.\(^{121}\) These

\(^{114}\) See supra text accompanying note 110. This alteration became the final version of § 1821(k). See supra text accompanying note 47.

\(^{115}\) Fischer, supra note 48, at 1751 (discussing the House consideration of the Senate's section regarding the liability of officers and directors under FIRREA).


\(^{118}\) Id.

\(^{119}\) See supra notes 109-11 and accompanying text.


\(^{121}\) See 135 Cong. Rec. S9871-99 (daily ed. Aug. 4, 1989); see also Shepherd, supra note 52, at 1133 ("If any senator believed that section 1821(k) as promulgated by the
opposing views of § 1821(k) set the stage for later conflict. As one commentator noted, “Unfortunately, neither the President nor the Congress perceived that, in their haste to pass a comprehensive legislative package, [Congress] had permitted FIRREA’s key director-liability statute to be drafted without clarity. The price of their negligence would be paid by the taxpayers whom they had endeavored to spare.”

IV. THE CASES ADDRESSING THE QUESTIONS PRESENTED BY § 1821(k)

A. RTC v. Gallagher

In RTC v. Gallagher, the government filed a lawsuit against the former officers and directors of the Concordia Federal Bank for Savings, a federally chartered and insured thrift in receivership. In its complaint, the RTC sought damages from the defendants for “negligence, breach of fiduciary duty, gross negligence and breach of contract.” The defendants filed a motion to dismiss the complaint for a failure to state a claim, arguing that § 1821(k) establishes a uniform gross negligence standard for officers and directors that preempts the use of a simple negligence standard. The RTC countered by alleging that Congress, by using “may” instead of “may only” in § 1821(k), did not intend to displace the federal common law standard of liability. In addition, the RTC argued that § 1821(k)’s “savings clause” preserves actions based on federal common law. Accordingly, this case forced the Seventh Circuit Court of Appeals to resolve whether the language of § 1821(k) permits the imposition of a simple negligence standard of liability on officers and directors of federally chartered S&Ls under federal common law.

The Gallagher court discounted the RTC’s “may” versus “may only” argument by determining the word “may” was used in this section in reference to the RTC’s right to bring an action under the section.

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122 Fischer, supra note 48, at 1753.
123 10 F.3d 416, 418 (7th Cir. 1993).
124 Id.
126 Gallagher, 10 F.3d at 418.
127 Id. at 420.
128 Id.
129 Id.
Thus, the court held that "may" could not be read to modify the statute's gross negligence standard and was thus irrelevant to the issue at hand. The court then turned its attention to § 1821(k)'s "savings clause."

The last sentence of § 1821(k) states: "Nothing in this paragraph shall impair or affect any right of the corporation under other applicable law." In *Gallagher*, the RTC argued that "other applicable law" included federal common law and contended that it could hold officers and directors liable for simple negligence under federal common law. After considering the plain language of the statute, the legislative history, and the presumption that comprehensive regulatory programs are intended to "occupy the field," the court rejected the RTC's argument.

In analyzing the language of § 1821(k), the court determined:

> It is illogical that Congress intended in one sentence to establish a gross negligence standard of liability and in the next sentence to eviscerate that standard by allowing actions under federal common law for simple negligence.

> A better reading of the savings clause is that it was drafted to preserve the RTC's ability to take other regulatory actions based on simple negligence.

In examining § 1821(k)'s legislative history, the court looked first at the House Conference Committee report "because it is the most persuasive evidence of congressional intent besides the statute itself." The court held that "the Conference Report shows that Congress intended for officers and directors to be held liable 'for gross negligence . . . , not simple negligence.'" The court also discussed the conflicting section-

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130 *Id.*
131 *Id.*
133 *Gallagher*, 10 F.3d at 420.
134 *Id.* at 420-21.
135 *Id.* at 421-23.
136 *Id.* at 423-25.
137 *Id.* at 425.
138 *Id.* at 420.
139 See *supra* notes 113-22 and accompanying text.
140 *Gallagher*, 10 F.3d at 421.
141 *Id.* (quoting H.R. CONF. REP. NO. 101-222, *supra* note 112, at 398, reprinted in
by-section analysis but determined the legislative history "does not demonstrate the kind of 'clearly expressed legislative intention' necessary to trump the plain meaning of the statute." The court also noted subsequent attempts to alter § 1821(k)'s savings clause to specifically include simple negligence had failed.

Finally, the court applied the U.S. Supreme Court's City of Milwaukee v. Illinois decision to the issue and found FIRREA, as a comprehensive regulatory program, preempted application of federal common law. In City of Milwaukee v. Illinois, the Court determined the Federal Water Pollution Control Act Amendments of 1972 "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Therefore, the Court found these amendments preempted a federal common law nuisance action for interstate water pollution. Analogously, the Gallagher court determined that FIRREA was a comprehensive regulatory scheme supervised by an expert agency (the OTS), occupied the field in regard to the liability of officers and directors, and therefore preempted the application of federal common law. However, despite its resolution that federal common law could not serve as a basis to impose simple negligence on officers and directors of financial institutions, the Gallagher court expressly reserved judgment on whether a state-based cause of action might stand.


142 Id. at 421-22; see supra notes 109-11 and accompanying text.
143 Gallagher, 10 F.3d at 422-23; see supra notes 105-07 and accompanying text.
144 Gallagher, 10 F.3d at 423 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990)).
146 Gallagher, 10 F.3d at 423-24 (citing City of Milwaukee v. Illinois, 451 U.S. 304 (1981)).
148 451 U.S. at 317.
149 Gallagher, 10 F.3d at 424.
150 Id. at 424-25. See infra notes 151-73 and accompanying text for a discussion of
B. FDIC v. Canfield

In FDIC v. Canfield, the Tenth Circuit Court of Appeals addressed the question expressly reserved by the Seventh Circuit in Gallagher. The Canfield court decided that the RTC may impose a simple negligence standard of liability on officers and directors of failed state-chartered financial institutions under state law. In Canfield, the FDIC brought a lawsuit against the officers and directors of the failed Tracy Collins Bank & Trust Company under Utah law for alleged negligent mismanagement. Accepting the defendants’ argument that § 1821(k) preempted the application of state law to impose personal liability on officers and directors, the district court dismissed the FDIC’s complaint. However, the Tenth Circuit, sitting as a panel and later en banc, reversed the district court and held the FDIC could pursue recovery for negligence under Utah law.

In reaching its decision, the Canfield court relied on both the plain language of § 1821(k) and its legislative history. The court first determined that the use of “may,” a permissive term, rather than “may only” in the first sentence of § 1821(k) implied the section might be used by the FDIC in situations where other applicable law imposed a standard of liability more lenient than § 1821(k). However, “[i]n states where an officer or director is liable for simple negligence . . . the FDIC may rely, as it does in this case, on state law to enable its action.”

The court then turned its attention to § 1821(k)’s “savings clause” and found the clause supported the court’s prior conclusion reached in the “may” versus “may only” debate. The defendants argued the “other applicable law” portion of the “savings clause” must be read to refer only

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151 967 F.2d 443 (10th Cir.) (en banc), cert. denied, 113 S. Ct. 516 (1992).
152 Id. at 444-45. The Ninth Circuit Court of Appeals also addressed this issue regarding California law and reached the same result as the Tenth Circuit reached in Canfield. FDIC v. McSweeney, 976 F.2d 532, 533 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).
153 Canfield, 967 F.2d at 444.
154 Id.
155 Id. at 445.
156 Id. at 445-48.
157 Id. at 448-49.
158 Id. at 446. For example, if the state law only held the officers and directors liable for intentional conduct, the FDIC could still use the gross negligence standard. Id.
159 Id.
160 Id.
to other sections of FIRREA in order to preserve the congressional attempt to create a national standard of liability.\textsuperscript{161} The court rejected this line of reasoning, stating:

The problem with this argument is that it limits the statutory language by fiat. Nowhere does the statute announce its intention to create a national standard of liability, and the vehemence of the assertions to the contrary made by [the] defendants will not persuade us to interpret the statute in light of a fiction.\textsuperscript{162}

Additionally, the court noted that § 1821(k)'s reliance on state law to define gross negligence “directly refutes the proposition that FIRREA establishes a national standard of liability for officers or directors.”\textsuperscript{163}

The court also rejected the defendants' argument that FIRREA preempts the application of state law in this area by occupying the field:

In this case, the explicit preemptive language moves in only one direction and its scope is explicitly limited. The statute blocks only those state laws that require more than gross negligence in order to establish the personal liability of directors and officers. By saving “other applicable law,” the statute makes unreasonable any inference that the entire field was the target of the legislation.\textsuperscript{164}

The court supported this reading of § 1821(k) by discussing the Senate’s section-by-section report of the measure\textsuperscript{165} which states that the section does not preempt the imposition of a simple negligence standard to officers or directors under any applicable law.\textsuperscript{166} The court discounted any argument that the House Conference Committee report\textsuperscript{167} regarding § 1821(k) implied an intention to create a uniform liability standard, holding: “The language of the [House Conference Committee] report merely explains that the section allows actions for gross negligence. It is thus consistent with the partial preemption interpretation of the statute.”\textsuperscript{168}

\textsuperscript{161} Id. at 447.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 448.
\textsuperscript{165} See supra notes 109-11 and accompanying text.
\textsuperscript{166} Canfield, 967 F.2d at 448.
\textsuperscript{167} See supra notes 116-20 and accompanying text.
\textsuperscript{168} Canfield, 967 F.2d at 448 n.6.
Finally, the Canfield court noted that because FIRREA applies only to troubled institutions, directors and officers in states with a simple negligence standard would be encouraged to further weaken institutions on the verge of failure. Absent failure, they would be subject to a simple negligence state standard, but following failure, a gross negligence federal standard would apply. The court noted: "It cannot be that FIRREA would indirectly encourage" officers and directors to further weaken their institutions.

With the Canfield court’s resolution that a state-based simple negligence standard may be imposed on officers and directors of a state-chartered bank under § 1821(k) and the Gallagher court’s determination that simple negligence may not be imposed on officers and directors using federal common law under § 1821(k), the question arose as to which rule should apply to a federally chartered bank in a state with a simple negligence standard of liability for officers and directors.

C. RTC v. Chapman

In RTC v. Chapman, the Seventh Circuit Court of Appeals addressed the issue raised by Canfield and Gallagher. The court ruled that § 1821(k) prevents the RTC from imposing a simple negligence liability standard on officers and directors of federally chartered financial institutions in those states which hold corporate officers and directors to a simple negligence standard. Unfortunately, the two-to-one ruling against the RTC raises as many questions as it answers. In the decision, Judges Frank H. Easterbrook and Richard A. Posner took opposing views on the issue. The deadlock was broken by Judge Rovner, who stated that while she was “sympathetic to the sentiments expressed by the dissent” and shared many of Posner’s concerns over Gallagher, the unanimous decision in Gallagher forced her to side with Easterbrook.

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169 Id. at 449.
170 Id.
171 Id.
172 See supra notes 151-71 and accompanying text.
173 See supra notes 123-50 and accompanying text.
174 29 F.3d 1120 (7th Cir. 1994).
175 Chapman, 29 F.3d at 1124-25.
176 Easterbrook wrote the opinion of the court. Id. at 1121-25. Posner wrote the dissenting opinion. Id. at 1125-28 (Posner, J., dissenting).
177 Id. at 1125 (Rovner, J., concurring).
In Chapman, the RTC filed a lawsuit against the officers and directors of the Security Savings & Loan Association ("Security Savings"), a 100-year-old, Illinois-based financial institution that exchanged its state charter for a federal charter in 1982 and failed seven years later. In its complaint, the RTC alleged the officers and directors at Security Savings mismanaged the affairs of the institution and violated their duty of care through simple negligence. On appeal from the district court's dismissal of the action based on the pleadings, the RTC argued it could impose a simple negligence standard against the defendants under Illinois law. This standard could apply, the RTC advocated, since the Gallagher decision expressly reserved judgment on the issue of whether a state-based simple negligence cause of action could lie against the officers and directors of a financial institution under § 1821(k).

In rejecting this argument, Easterbrook held that this case presented a choice of law issue. Therefore, under the internal-affairs doctrine, which holds that "internal corporate affairs are governed by the state of incorporation," the liability of officers and directors at federally chartered institutions should be controlled by federal law. Easterbrook noted the court "concluded in Gallagher that this statute [§ 1821(k)] adopts gross negligence as the rule for managers and directors of federal financial institutions." Accordingly, the RTC could not use Illinois law to impose a simple negligence standard of liability on the officers and directors of a federally chartered financial institution.

In dissent, Posner attacked the majority's decision on two grounds. First, he contended Congress passed § 1821(k) with the intent of establishing a baseline liability for officers and directors guilty of gross negligence, not with the intent of "creating a new immunity for

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178 Id. at 1125 (Posner, J., dissenting).
179 Id. at 1121.
180 Id.
181 Id. at 1122; see Chicago Title & Trust Co. v. Munday, 131 N.E. 103, 105 (Ill. 1921) (holding that directors of financial institutions are liable to depositors and stockholders when they fail to exercise ordinary care and diligence in the performance of their duties).
182 Chapman, 29 F.3d at 1122; see supra note 150 and accompanying text.
183 Chapman, 29 F.3d at 1122.
184 MODEL BUSINESS CORP. ACT § 15.05, at 1632 (1988).
185 Chapman, 29 F.3d at 1122-23.
186 Id at 1123.
187 Id.
188 Id. at 1125-28 (Posner, J., dissenting).
directors of federal S & Ls by depriving the RTC of the benefit of state laws that imposed higher duties on directors. 8

Posner further argued:

The purpose of section 1821(k), as the timing of the statute's enactment and other features of its history make clear, was to place a floor under the liability of directors of savings and loan associations, which were falling like ninepins. . . . The saving clause [of § 1821(k)] ensured that if a state went further than the federal statute, and punished simple negligence by directors, the RTC could use state rather than federal law.

Next, Posner contended the majority's application of the internal-affairs doctrine was misguided. 9 He argued the doctrine only creates a presumption that can be "rebutted by reference to (among other things) 'justified expectations,' 'certainty,' and 'ease in the determination and application of the law to be applied.'" 10 Posner determined that Illinois law should apply under this approach, noting:

Security [Savings] had been an Illinois corporation for a century, and nothing in . . . the statute under which it converted to a federal S & L would have suggested that the liability of its directors or officers was being altered by the change. . . . [In addition, t]his case well illustrates the difficulty of determining the rule of decision if federal law, the law of the chartering jurisdiction, is applied instead of the law of the S & L's principal place of business. For it is far from clear that section 1821(k), rather than federal common law, is the place to find that rule . . . .

Finally, in comparison to the majority's decision, Posner argued Gallagher was "riven by a similar paradox," 11 and he suggested the court might consider rehearing it en banc. 12 In addition, he stated that "[i]f Gallagher was decided erroneously, let us not compound the error by misapplying the internal-affairs doctrine." 13

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8 Id. at 1126 (Posner, J., dissenting).
9 Id. (Posner, J., dissenting).
10 Id. (Posner, J., dissenting).
11 Id. at 1127 (Posner, J., dissenting) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971)).
12 Id. (Posner, J., dissenting) (citations omitted).
13 Id. (Posner, J., dissenting).
14 Id. (Posner, J., dissenting).
15 Id. (Posner, J., dissenting).
16 Id. at 1128 (Posner, J., dissenting).
LiABILITY UNDER FIRREA

CONCLUSION

As the preceding discussion indicates, the negligence standard the RTC may impose on former officers and directors of failed S&Ls is unclear in many circumstances under § 1821(k). The plain language of the statute is subject to two equally plausible interpretations: 1) § 1821(k) establishes a baseline of liability at gross negligence for officers and directors of federally insured financial institutions, but it does not bar the application of a more stringent state standard, such as simple negligence; 197 or 2) § 1821(k) establishes a uniform gross negligence standard for officers and directors of federally insured financial institutions that preempts the application of a more stringent standard under any other law. 198

Unfortunately, the legislative history of § 1821(k) offers little help in determining which of these two readings is the proper approach. The relevant congressional history indicates the Senate 199 believed § 1821(k) would have the former effect while the House 200 believed it would have the latter.

The cases in which courts have struggled to resolve this discrepancy are difficult to reconcile. In Gallagher, the court used the plain language of § 1821(k), its legislative history, and the presumption that congressional regulatory programs are intended to “occupy the field” to conclude that § 1821(k) preempts the application of a standard more stringent than gross negligence. 201 Conversely, the Canfield court also used the plain language of § 1821(k), its legislative history, and the presumption that congressional regulatory programs are intended to “occupy the field” to conclude that § 1821(k) establishes a baseline of liability for officers and directors at gross negligence without preempting the possible application of a more stringent state standard. 202 Finally, in Chapman, Judges Easterbrook and Posner clashed over the use of the internal-affairs doctrine in applying § 1821(k) to the officers and directors of a federally chartered bank in a state with a simple negligence standard. 203 Two

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197 See supra notes 109-11 and accompanying text.
198 See supra notes 117-20 and accompanying text.
199 See supra notes 109-11 and accompanying text.
200 See supra notes 117-20 and accompanying text.
201 RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993); see supra notes 123-50 and accompanying text.
202 FDIC v. Canfield, 967 F.2d 443 (10th Cir.) (en banc), cert. denied, 113 S. Ct. 516 (1992); see supra notes 151-73 and accompanying text.
203 RTC v. Chapman, 29 F.3d 1120 (7th Cir. 1994); see supra notes 174-96 and
members of the three-judge panel expressed concern over whether the 
Gallagher court had properly interpreted congressional intent behind 
§ 1821(k)\textsuperscript{204}

As Gallagher, Canfield, and Chapman display, troublesome inconsis-
tencies exist in the rule regarding the liability of officers and directors 
under FIRREA. These inconsistencies have led to extensive litigation that 
is likely to continue unless § 1821(k) is clarified. Considering that 
FIRREA was passed to strengthen the powers of federal regulators\textsuperscript{205} 
and to emphasize the public interest in maximizing recovery from 
negligent directors and officers of financial institutions, § 1821(k) should 
be revised to clearly establish a federal baseline of gross negligence for 
assessing the liability of officers and directors. This baseline would still 
allow the RTC to seek recovery under other, more exacting, applicable 
state law. The argument that the RTC should be prevented from utilizing 
an otherwise applicable state simple negligence standard conflicts with 
FIRREA's objectives and is adverse to the important public policy of 
maximizing the RTC's recovery from officers and directors of S&Ls.

As enacted, § 1821(k) has created as many problems as it has 
resolved. Considering the magnitude of the S&L crisis\textsuperscript{206} and the 
important role lawsuits against officers and directors will play in reaching 
a resolution of this calamity, Congress should revisit § 1821(k) and adopt 
a rule establishing a minimum gross negligence standard for officers and 
directors that allows the RTC to seek recovery under more stringent 
applicable state law. Such an approach would allow the government to 
maximize recovery and avoid costly relitigation of this issue.

Christopher Tyson Gorman

\textsuperscript{204} See supra notes 177, 194-96 and accompanying text.

\textsuperscript{205} In its report on FIRREA, the Joint Conference Committee stated:

The primary purposes of the bill are [among others]: . . . (2) to improve the 
supervision of savings associations by strengthening capital, accounting, and 
other supervisory standards; . . . (9) to strengthen the enforcement powers of 
federal regulators of financial institutions; and (10) to strengthen the penalties 
for defrauding or otherwise damaging financial institutions and their depository.

at 432.

\textsuperscript{206} See supra notes 3-5 and accompanying text.