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FDIC/RTC SUITS AGAINST BANK AND THRIFT OFFICERS AND DIRECTORS—WHY NOW, WHAT'S LEFT?

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INTRODUCTION

STARTING with the creation of the Federal Home Loan Bank System in 1932[1] and continuing through the 1960s, thrift executives profited by the disparity between long and short-term interest rates. By utilizing the 3-6-3 Rule—pay three percent interest on deposits, charge six percent interest on loans, and be on the golf course by 3:00 p.m.—thrifts made money.[2] During the early 1980s, however, that trend reversed and insured banks and thrifts failed in numbers not seen since the Great Depression.

Where the blame lies for the profusion of bank and thrift failures and their resulting cost depends on one's perspective, but certainly there were many factors that contributed to the "thrift crisis."[3] When concerns were expressed in the late 1970s and early 1980s about the competitive disadvantage of thrifts in comparison with other segments of the financial services industry, Congress was sympathetic and deregulated the thrifts largely in hopes that market forces would restore their profitability. By 1987, that strategy had obviously failed. Congress then sought to "recapitalize" the thrift deposit insurance fund to protect depositors. Again, the emphasis was on saving the industry and not on changing the way it conducted business. Once the magnitude of the crisis became evident, however, Congress shifted its focus and largely blamed the directors and officers ("D&Os") of many of the failed institutions, alleging that excessive behavior and criminal activity were principal causes of the industry's losses.[4]

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1. Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988 & Supp. V 1993)).

2. Kathleen Day, S&L Hell: The People and the Politics Behind the $1 Trillion Savings and Loan Scandal 54 (1993).

3. *See infra* part I.

4. *See infra* notes 36-40 and accompanying text.

Accordingly, Congress passed legislation in 1989[5] and 1990[6] that dramatically increased the power of government regulatory agencies to investigate and prosecute persons involved with financial institutions for fraud, waste and insider abuse. With these new powers, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation aggressively pursued the D&Os of many failed institutions in an effort to recoup government losses.

The saying that "hard facts make bad law" applies more dramatically to the congressional and regulatory reaction to the thrift crisis than is now appreciated. While there clearly was a crisis—and there certainly were persons committing intentional fraud that caused a portion of the losses—the draconian measures passed by Congress were unnecessary to prosecute those persons. Laws then on the books would have been sufficient. What the new laws did do, however, was to create a broad net that ensnared thousands of innocent persons whose only wrongdoing had been to serve on the board of directors of an insured institution. The FDIC and the RTC routinely assert negligence claims,[7] not the graphic intentional and excessive conduct described to justify the new regulatory powers. Because of the political blame shifting and the zealous positions taken by the FDIC and the RTC, and their outside counsel, many innocent lives have been disrupted with no benefit to the American taxpayers.[8]

This Article explores the tug of war between defendant D&Os and the FDIC and RTC and considers the changing rules governing litigation between them. Part I surveys the causes and features of the thrift crisis and examines Congress' varied responses to the problem. Part II looks at the permissible scope of investigations by the FDIC and RTC into wrongdoings of potential defendant D&Os, particularly as defined by the D.C. Circuit in 1994 in the seminal case, *RTC v. Walde.*[9] Part III considers the inconsistent standard of care with which D&Os of federally and state chartered financial institutions are legally charged in their conduct of official duties. Part IV discusses the uncertain availability to defendant D&Os of affirmative defenses,

5. Financial Institutions Reform, Recovery & Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C. (Supp. V 1993)).

6. The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. 101-647, § 2500, 104 Stat. 4789 (codified in scattered sections of 18, 12 and 11 U.S.C.) (enacted as Title XXV of the Crime Control Act of 1990).

7. *See infra* notes 88-94 and accompanying text (discussing § 212(k) of FIRREA (codified at 12 U.S.C. § 1821(k) (Supp. V 1993)) and whether simple negligence in making a lending decision can give rise to a governmental assault on one's personal assets).

8. *See, e.g.*, Mollie Dickenson, *The Real S&L Scandal*, Worth Magazine, Sept. 1994, at 92 (describing damage caused by unwarranted RTC investigations and recounting story of a suit against a former chief financial officer of a New Orleans real estate development company).

9. 18 F.3d 943 (D.C. Cir. 1994).

such as contributory negligence and the failure to mitigate damages. Finally, Part V examines the statute of limitations, and its exceptions, for fraud and negligence suits against defendant D&Os. This Article concludes that, with the hysteria surrounding the thrift crisis on the wane, courts have trimmed the formerly sweeping powers of the FDIC and RTC, giving way to more reasonable rules governing litigation against D&Os of failed financial institutions.

I. Background—The Thrift Crisis

Clearly, economic factors beyond the control of thrift institutions contributed to the industry's troubles. In reaction to the inflationary surge of the 1970s, the Federal Reserve Board changed its monetary policy in 1979.[10] Instead of pursuing a policy of stabilizing interest rates, as it had previously, the Federal Reserve switched to a policy of controlling the growth of the money supply. This change resulted in a dramatic increase in interest rates, including the cost of funds at savings institutions. Because thrifts were locked into long-term, fixed-rate mortgages, they paid more for funds than they earned on assets. "This 'negative' interest rate mismatch was the beginning of the thrift crisis as we know it."[11]

Congress responded to what was described as the "disintermediation" of the thrift and banking industries[12] by passing major legislation.[13] The legislation was designed to allow depository institutions—particularly thrifts—to develop new products and markets to combat the deposit outflow and to create new opportunities for profits. Unfortunately, as history now shows, "a number of thrift managers did not have the expertise needed to utilize these new powers, and as a whole the industry had great difficulty in exercising its newfound powers in a safe and sound manner."[14]

Congress was also to blame for the crisis, however, because it deregulated the thrift and banking industries in 1980[15] and 1982[16] while at

10. House Comm. on Banking, Finance & Urban Affairs, Financial Institutions Reform, Recovery and Enforcement Act of 1989, H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, at 295 (1989) [hereinafter H.R. Rep. No. 54(I)], *reprinted in* 1989 U.S.C.C.A.N. 86, 86.

11. *Id.*

12. *Id.* Between 1977 and 1981, money market mutual funds ("MMMFs") grew in net assets from $5 billion to $166 billion. "Commercial banks and thrifts have borne the cost of this rapid growth because their deposits represent a major source of the MMMFs' new assets." James E. Tucker, Comment, *Bank Sponsorship of a Money Market Mutual Fund: Can It Survive Glass-Steagall?*, 3 Ann. Rev. Banking L. 195, 195 (1984).

13. *See infra* notes 15-16.

14. H.R. Rep. No. 54(I), *supra* note 10, at 297.

15. Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMC"), Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C. (1988)). This statute blurred the lines between banks and thrifts by allowing all depository institutions to offer interest bearing checking accounts, write residential

the same time, it increased the deposit insurance ceiling from $40,000 to $100,000 without a readily identifiable justification. Moreover, the Reagan Administration, and to a lesser extent the Bush Administration, were also at fault. Each administration sought to decrease government oversight of insured institutions during the period of deregulation. Accordingly, they slashed the number of examiners.[17] In addition, the Reagan Administration's preoccupation with smaller government obscured early warning signs of trouble. Regulators were encouraged to "resolve" troubled thrifts by using novel methods that kept the government's exposure "off budget." Added to this mix, was the never-to-be underestimated avarice of a small group of thrift and bank owners who were willing to commit massive fraud for personal gain.

Against this backdrop of political naivete and personal greed entered upwardly spiraling interest rates and a nationwide economic recession. Fueled by new powers authorized under the Garn-St Germain Depository Institutions Act of 1982,[18] insured thrifts accumulated $1 trillion in deposits by the end of 1984. The Federal Savings & Loan Insurance Corporation, however, had only $2 billion to insure them, down from $8 billion just a few years earlier. Nonetheless, voices from the industry expressed optimism:

> At this point in time [1984], a thrift's charter is probably the envy of a lot of commercial bankers. A thrift has broader powers than a commercial bank; it has all the powers that they have plus the power to make investments in real estate and to engage in the insurance business and the brokerage business.[19]

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mortgage loans and make consumer loans. DIDMC also preempted state usury ceilings on mortgage loans, allowed federal thrifts to branch statewide and permitted all associations to put up to 20% of their assets in commercial loans and corporate debt instruments. Most importantly, DIDMC phased out interest rate caps on bank and thrift deposits (Regulation Q of the Board of Governors of the Federal Reserve System) to "enable [depository institutions] to compete for funding with money market mutual funds." H.R. Rep. No. 54(I), *supra* note 10, at 295.

16. Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain"), Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified in scattered sections of 11, 12, 15, 26 and 42 U.S.C. (1988)). At the signing ceremony, President Reagan reportedly said, "I think we hit a home run." Martin Mayer, The Greatest-Ever Bank Robbery—The Collapse of the Savings and Loan Industry 95 (1990). Described as the most significant piece of thrift legislation since the Great Depression, Garn-St Germain authorized thrifts to commit up to 10% of their assets to commercial or agricultural loans, to increase non-real estate secured loans from 20% to 40% of assets, to invest 100% of their assets in state or municipal securities and to increase from 20% to 30% the permissible level of assets in consumer loans. H.R. Rep. No. 54(I), *supra* note 10, at 297.

17. H.R. Rep. No. 54(I), *supra* note 10, at 301.

18. Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified in scattered sections of 11, 12, 15, 26 and 42 U.S.C. (1988)).

19. Gilbert G. Roessner, *Growth Through Diversification of Financial Services*, 3 Ann. Rev. Banking L. 175, 175 (1984). Mr. Roessner was then Chairman of the City Federal Savings & Loan Association of New Jersey. *Id.*

The perception that the regulators were there to help added to this sense of well being:

> [T]he thrift industry has a set of regulators—the Federal Home Loan Bank Board . . . and the Federal Savings & Loan Insurance Corporation . . . that is supportive of the efforts and initiatives of their constituents. Their attitude seems to be: "The more we can help our constituency to compete and prosper, the better regulatory job we are doing." This attitude stands in stark contrast to those of the other regulators, such as the Federal Reserve Board.[20]

Underneath this exterior, the thrift industry was collapsing. By the summer of 1986, the Treasury Department determined that legislative action was necessary to recapitalize the FSLIC and restore public confidence. To avoid any budget effect, the twelve regional Federal Home Loan Banks agreed to "donate" a total of $3.5 billion of their profits to a government fund, which would in turn buy twenty-year and thirty-year Treasury bonds through a newly created federal entity. That entity would then use the bonds as collateral to borrow up to $15 billion, which, when added to increased assessments against thrifts and money transferred from the sale of the assets of failed institutions, would create a fund of $25 to $30 billion for "case resolutions."[21] Still, some commentators considered the measure to be insufficient.[22]

The thrift industry successfully defeated this proposal in the 99th Congress, arguing that the increased premiums would cripple thrifts.[23] The industry maintained that the deficit thrifts faced was less than $6 billion,[24] which they could grow out of.[25] Neither proved to be the case.

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20. Hans H. Angermueller, *The Thrift Industry: A Breath of Fresh Air*, 3 Ann. Rev. Banking L. 155, 158 (1984). Mr. Angermueller was Vice Chairman of Citicorp. *Id.* at 155. The General Accounting Office was not as sanguine about the thrift regulator's role as cheerleader for the industry. *See* Letter from M. Danny Wall, Chairman, Federal Home Loan Bank Board to Frederick D. Wolf, Asst. Comptroller General, General Accounting Office (Apr. 10, 1989) (complaining about the GAO's finding that regulatory violations and unsafe and unsound practices at thrifts occurred repeatedly and/or remained uncorrected, "which leaves the impression that lack of supervisory or enforcement action contributed to the thrifts' failures") *in* General Accounting Office, Thrift Failures—Costly Failures Resulted from Regulatory Violations and Unsafe Practices, G.A.O. Rep. No. B-232798, app. III, at 95 (1989). The GAO turned out to be more accurate than Mr. Wall. "The lack of adequate supervision and examination . . . was one of the primary causes of the thrift crisis. . . . Without adequate supervision, thrifts were free to engage in fraudulent and risky activities, often at the expense of the FSLIC." H.R. Rep. No. 54(I), *supra* note 10, at 301.

21. Day, *supra* note 2, at 225-26.

22. *Id.* at 226.

23. H.R. Rep. No. 54(I), *supra* note 10, at 305. At the time, banks paid 8.33 cents per $100 in deposits, but thrifts could have seen their premiums soar to 21 cents. *Id.*

24. *Id.* (citing letter from Edwin J. Gray, Chairman, Federal Home Loan Bank Board to the GAO (Jan. 27, 1986) (chastising the GAO for "overstating" the size of the FSLIC insolvency at $6 billion)).

25. Some in the industry were concerned that if the FSLIC suddenly had money, it would move to shut down ailing but open institutions. Moreover, the industry did not

When Congress revisited the FSLIC recapitalization during the first session of the 100th Congress, sufficient concern existed to push through the Treasury Department's proposal as Title III of the Competitive Equality Banking Act of 1987.[26] "[T]he overall objective . . . was to provide funding to stabilize the FSLIC, and to insure the long-term viability of the thrift industry at the lowest cost to FSLIC."[27] CEBA established the Financing Corporation as a government instrumentality authorized to borrow up to $3.75 billion in any calendar year, but not to exceed a total of $10.825 billion. Congress was clear, however, that there was no "full faith and credit" backing the Financing Corporation's indebtedness.[28] CEBA also loosened the restrictions on interstate acquisitions of failed institutions and extended for five years the moratorium governing actions against institutions that failed to meet regulatory requirements as a result of an acquisition.[29]

In the year following CEBA, the thrift crisis deepened. At the end of 1988, there were 2949 insured thrifts holding $1.35 trillion in assets.[30] Of those, Congress classified 754 thrifts holding $428.3 billion in assets—representing almost one-third of all thrift assets—as insolvent or "troubled."[31] When the full extent of the "thrift crisis" finally

think it should bear the cost. There were those who believed that if action on recapitalization could be delayed, the problem would grow so big as to require a taxpayer-funded resolution. Mayer, *supra* note 16, at 158-59.

26. ("CEBA") Pub. L. No. 100-86, 101 Stat. 552 (codified as amended in scattered sections of 12 U.S.C. (1988)).

27. H.R. Rep. No. 54(I), *supra* note 10, at 312.

28. Even though this $10.825 billion proved to be wholly inadequate, the thrift industry continues to be burdened with its repayment. The increased assessment to pay the 1987 Financing Corporation bonds will contribute to a significant competitive disadvantage in the near future. Currently, commercial banks insured by the Bank Insurance Fund and savings associations insured by the Savings Association Insurance Fund both pay an insurance assessment of 24 cents per $100 in deposits. The FDIC, however, recently announced a reduction in BIF premiums to four cents. The General Accounting Office has predicted that thrifts will have to pay assessments even higher than the current 24 cents due to a shrinking deposit base. Barbara A. Rehm, *Big Thrift Seeks Bank Charters to Beat Higher SAIF Premium*, Am. Banker, Mar. 2, 1995, at 1. Industry representatives project an assessment of 30 cents by the year 2000. Robert M. Garsson, *GAO Says Thrift Premiums May Rise Within Five Years*, Am. Banker, Mar. 3, 1995, at 1. Because of the flight from thrift to commercial bank charters to avoid the higher assessment, regulators are now concerned that the thrift industry will not be able to pay the FICO bonds and payment will have to come either from the BIF insured banks or the taxpayers. Robyn Meredith, *OTS Says Thrifts May Be Unable to Meet Payments on FICO Bonds*, Am. Banker, Mar. 10, 1995, at 2. This strategy is described as a "de facto merger of the [deposit insurance] funds." Barbara A. Rehm, *Bank Charter Bids by Thrifts Threaten BIF Premium Cut*, Am. Banker, Mar. 10, 1995, at 2.

29. CEBA § 414 (codified at 12 U.S.C. § 1730a(m)(1)(A) (1988)).

30. H.R. Rep. No. 54(I), *supra* note 10, at 303. By the end of 1994, there were only 1543 thrifts holding $774 billion in assets.

31. *Id.* These thrifts had a GAAP capital of less than three percent. *Id.*

came into focus,[32] Congress sought to identify scapegoats and avoid responsibility. The result was the Financial Institutions Reform, Recovery & Enforcement Act of 1989.[33]

Among other things, FIRREA established "organizations and procedures to obtain and administer the necessary funding to resolve failed thrift cases and to dispose of the assets of these institutions."[34] The principal organization established by FIRREA was the Resolution Trust Corporation.[35] FIRREA was also intended to "enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse."[36]

Not satisfied with its work the previous year, Congress revisited the issue of thrift crisis in 1990. The House Judiciary Committee declared:

> Since last August, when [FIRREA] became effective, the losses from failed financial institutions have ballooned. Reports of criminal activity and grossly excessive behavior that led to the dramatic decline of the savings and loan industry have proliferated. [This bill] responds to the public outcry to bring to justice those who defrauded the savings and loan industry . . . .[37]

The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990,[38] enacted as Title XXV of the Crime Control Act of 1990,[39] dramatically expanded the government's power and increased the potential exposure to criminal prosecution of persons involved with financial institutions. Part of the hysteria that propelled this act through Congress is reflected in the opening segment of the House Report that accompanied H.R. 5269:

> Society also pays a heavy price for the activities of "white-collar" criminals. No more vivid or current example of this price can be found than in the unfolding savings and loan scandal, in which executives of thrift institutions . . . enriched themselves by fraudulently diverting immense amounts of funds from those institutions. It is estimated that the ultimate cost of this scandal may be as much as

32. The depth of the FSLIC insolvency was generally thought to be $140-$150 billion in 1989 dollars. Mayer, *supra* note 16, at 2. When added to the cost of money over time, however, the cost increases to $300 billion by the year 2000. *Id.*

33. ("FIRREA") Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C. (Supp. V 1993)).

34. H.R. Rep. No. 54(I), *supra* note 10, at 307.

35. FIRREA § 501(a)(b) (codified at 12 U.S.C. § 1441a(b) (Supp. V 1993)).

36. H.R. Rep. No. 54(I), *supra* note 10, at 307-08.

37. House Judiciary Comm., Crime Control Act of 1990, H.R. Rep. No. 681(I), 101st Cong., 2nd Sess., 170-71 (1990) [hereinafter H.R. Rep. No. 681(I)], *reprinted in* 1990 U.S.C.C.A.N. 6472, 6576-77.

38. Pub. L. 101-647, § 2500, 104 Stat. 4789, 4859 (codified in scattered sections of 18, 12 and 28 U.S.C. (Supp. V 1993)).

39. Pub. L. 101-647, 104 Stat. 4789 (codified in scattered sections of 18, 12, 11 and 28 U.S.C. (Supp. V 1993)).

> $500 billion—an amount that might otherwise be put to useful purposes in our society.[40]

Congress then set about making it a federal felony if any person:

> (1) knowingly conceals or endeavors to conceal an asset or property from the [FDIC or RTC] acting as conservator or receiver . . . ; (2) corruptly impedes or endeavors to impede the functions of [the FDIC or RTC]; or (3) corruptly places or endeavors to place an asset or property beyond the reach of [the FDIC or RTC].[41]

Congress also made it a crime to obstruct corruptly the examination of any insured institution.[42] Additionally, Congress prohibited the discharge in bankruptcy of certain obligations owed to the FDIC and specifically empowered the FDIC to avoid fraudulent transfers of assets by institution-affiliated parties and debtors of an institution within five years of the appointment of the FDIC as conservator or receiver.[43] Thus, violations that had been administrative or civil became criminal. The witch hunt was on to recover billions of dollars from former executives of failed banks and thrifts.[44]

II. The Scope of the Investigation

As a matter of course, when the RTC or FDIC becomes a conservator or receiver, the respective agencies investigate whether the association or bank has claims against former officers and directors, whether it would be cost effective to assert such claims, and whether the agency should seek a freeze or avoid the transfer of assets.[45] An Order of Investigation identifies the purpose of all RTC and FDIC investigations, and the propriety of the agencies' conduct thereafter is measured against these purposes.[46] The typical Order of Investigation provides that the investigation is conducted

> to determine whether (1) former officers, directors and others who provided services to, or otherwise dealt with, [the institution] . . . may be liable as a result of any actions, or failures to act, in connection with or which may have affected [the institution] . . . ; (2) the [agency] should seek to avoid a transfer of any interest or any incurrence of any obligations; (3) the [agency] should seek an attachment of assets; and (4) pursuit of such litigation would be cost-effective,

40. H.R. Rep. No. 681(I), *supra* note 37, at 69.
41. 18 U.S.C. § 1032 (Supp. V 1993).
42. 18 U.S.C. § 1517 (Supp. V 1993).
43. 12 U.S.C. § 1821(d)(17)-(19) (Supp. V 1993).
44. The causes of the banking and thrift crisis of the late 1980s is better addressed in other places. The authors recommend Kathleen Day, S&L Hell: The People and the Politics Behind the $1 Trillion Savings and Loan Scandal (1993) (documenting the history of the S&L crisis through stories of the principal players).
45. McVane v. FDIC (*In re* McVane), 44 F.3d 1127, 1131 (2d Cir. 1995); RTC v. Walde, 18 F.3d 943, 944 (D.C. Cir. 1994).
46. *See* FTC v. Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993).

considering the extent of the potential defendant's ability to pay a judgment in any such litigation.[47]

Relying on these four purposes, the RTC and FDIC routinely issue subpoenas early in the investigation seeking all institution-related records that may be relevant to possible liability for negligence, gross negligence and intentional misconduct. Furthermore, the subpoenas also routinely demand personal financial records, including checkbooks, bank statements, alimony records, insurance records, financial statements, trust records and inheritance documents.[48] Targeted D&Os of failed institutions have complained bitterly that the agencies seek discovery of their personal papers to determine their respective net worth. This type of discovery is an exercise every litigant would love to pursue but which federal civil discovery rules expressly prohibit unless the financial records are found relevant to some litigated issue or lead to relevant information.

In 1993, targeted D&Os began to contest the breadth of the administrative subpoenas, arguing that Congress did not sanction the FDIC or RTC to peruse their personal financial records for any purpose other than to determine liability. While the RTC, in unguarded moments, has conceded that it has sought financial records of former D&Os under investigation to determine their net worth,[49] both the RTC and FDIC, in litigation, have argued that the sought-after financial information is necessary for the investigation of possible wrongdoing, including the possibility of fraudulent transfers of assets.[50] In the alternative, the agencies have argued that Congress accorded them vast powers that include the authority to investigate a target's net worth—a right that purportedly enables the agency to assess in a meaningful manner the cost effectiveness of bringing a civil action.[51] The courts, at least initially, uniformly deferred to the agencies, agreeing with the RTC and FDIC in approximately twenty cases that Congress accorded them the broad subpoena power they claimed, including the right to subpoena personal financial records.[52]

47. *Walde*, 18 F.3d at 944 (citing Amended Order of Investigation, J.A. at 17-A (Sept. 11, 1992)).

48. *See, e.g.*, *id.* at 945-46 (detailing personal financial information sought by subpoena).

49. Affidavit of D. Gay Walde, Memorandum in Support of Motion to Quash Administrative Subpoenas *Duces Tecum* and in Opposition to Petition of Resolution Trust Corporation for Summary Enforcement of Administrative Subpoenas *Duces Tecum* ¶ 3, RTC v. Walde, Misc. No. 92-419, 1992 WL 448858 (D.D.C. Dec. 9, 1992).

50. Appellee's Brief at 20-28, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495).

51. *Id.* at 28-36.

52. *See, e.g.*, RTC v. Frates, 860 F. Supp. 5, 6 (D.D.C. 1994) (granting enforcement of RTC's administrative subpoenas *duces tecum* requesting personal financial information); RTC v. Liebert, Misc. No. 93-032 (D.D.C. March 2, 1993) (granting RTC's petition for expedited summary enforcement of administrative subpoenas *duces tecum*); RTC v. Brown, Misc. No. 93-17 (D.D.C. Feb 18, 1993) (granting RTC's petition

The routine enforcement of agency subpoenas by district courts came to a screeching halt in *RTC v. Walde*[53] when the United States Court of Appeals for the District of Columbia Circuit unexpectedly granted a thrift official's motion to stay an order enforcing an RTC subpoena. The *Walde* court's holding surprised both government and private attorneys who were long accustomed to the judiciary's utter deference to agency investigative practices. Given the novelty of the Court of Appeals' stay and the implications of such a decision, district courts both inside and outside of the D.C. Circuit—where most enforcement actions are filed—commenced a practice of staying enforcement actions pending final resolution of *Walde.*

A. *The* Walde *Appeal*

On appeal to the circuit court, both the RTC and the appellant William Walde agreed that the Supreme Court, in *United States v. Morton Salt Co.*[54] and *United States v. Powell,*[55] set forth the applicable standard against which the validity of the RTC subpoena would be measured.[56] In *Morton Salt*, the Supreme Court held that, at least where corporate records are sought, the agency subpoena

for summary enforcement of administrative subpoenas *duces tecum*); RTC v. Koch, Misc. No. 93-003, 1993 WL 177736, at *2 (D.D.C. Feb. 17, 1993) (enforcing RTC's administrative subpoenas *duces tecum*); RTC v. Silveous, 812 F. Supp. 244, 245 (D.D.C. 1993) (ordering former officer of a failed insurance institution to produce personal financial records); RTC v. Green, Misc. No. 92-503 (D.D.C. Jan. 28, 1993) (enforcing RTC's administrative subpoenas *duces tecum*); RTC v. Adams, No. 92-492, 1993 WL 56177, at *1 (D.D.C. Jan. 15, 1993) (enforcing RTC administrative subpoena *duces tecum*), *aff'd in part and rev'd in part sub nom.* RTC v. Walde, 18 F.3d 943, 947 (D.C. Cir. 1994) (holding that the RTC has authority to subpoena some personal financial information such as bank statements of officers and directors); RTC v. Ringer, Misc. No. 92-500, (D.D.C. Jan. 12, 1993) (granting summary enforcement of RTC's administrative subpoenas *duces tecum*); RTC v. Baldini, Misc. No. 92-0466, 1992 WL 469735, at *1 (D.D.C. Dec. 18, 1992) (enforcing RTC's subpoena that requested the production of documents relating to respondent's personal assets and asset transfers); RTC v. Walde, Misc. No. 92-419, 1992 WL 448858, at *1 (D.D.C. Dec. 9, 1992) (enforcing RTC subpoenas *duces tecum*), *aff'd in part and rev'd in part*, 18 F.3d 943 (D.C. Cir. 1994); RTC v. Towne, No. 92-451, 1992 WL 404159, at *1 (D.D.C. Nov. 24, 1992) (granting summary enforcement of RTC administrative subpoenas *duces tecum*); RTC v. Lopez, 794 F. Supp. 1, 3 (D.D.C. 1992) (enforcing RTC subpoena requests for bank statements, tax returns and insurance policies). *But see* Freese v. FDIC, 837 F. Supp. 22, 24 (D.N.H. 1993) (finding that the FDIC "may not freely peruse personal financial records in order to determine the party's financial ability to satisfy a judgment"); RTC v. Feffer, 793 F. Supp. 11, 14 (D.D.C. 1992) (finding that "even the broad statutory powers afforded the RTC are insufficient to justify this extreme and unprecedented invasion of personal privacy").

53. 18 F.3d 943 (D.C. Cir. 1994).

54. 338 U.S. 632 (1950).

55. 379 U.S. 48 (1964).

56. Appellee's Brief at 15, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495); Appellant's Brief at 23-25, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495).

> is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."[57]

In *Powell*, the Supreme Court elaborated, noting that an administrative subpoena is valid where:

> the investigation [is] conducted pursuant to a legitimate purpose, . . . the inquiry [is] relevant to the purpose, that the information sought is not already within [its] possession, and . . . the administrative steps required by the Code have been followed . . . .[58]

In short, the subpoena is enforceable if the document demands are reasonably related to one or more of the identified purposes of the Order of Investigation.

While Walde challenged three of the four purposes, he focused primarily on the RTC's assertion that the agency was free to subpoena records to assess the cost-effectiveness of litigation, a position that plainly represented the Achilles' Heel of the RTC's efforts to enforce the subpoena. Walde recognized that " '[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute.' "[59] Therefore, he argued, Congress' failure in FIRREA to authorize specifically and expressly a right for the banking agencies to investigate a target's net worth was dispositive that no such right was ever granted.[60] In support, Walde noted that Congress' silence here was especially persuasive because Congress has, on occasion, granted such authority to the United States in other circumstances.[61]

Specifically, Walde noted that section 3611 of the Crime Control Act of 1990 explicitly authorizes the United States to have discovery regarding the financial condition of a debtor in advance of judgment.[62] In the legislative history of this section, Congress observed that, although the financial condition of a debtor was not relevant to liability for damages, "permitting reasonable discovery of financial condition prior to judgment allows the United States to determine at an early phase of the case whether the debtor will be able to [pay]; if not, the matter may not be worth the investment of prosecutorial re-

57. *Morton Salt*, 338 U.S at 652-53 (quoting Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946)).

58. *Powell*, 379 U.S. at 57-58.

59. Appellant's Brief at 12, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495) (quoting Peters v. United States, 853 F.2d 692, 696 (9th Cir. 1988) (citing 3 B. Mezines et al., Administrative Law § 20.02 (1988))).

60. *Id.* at 12-13.

61. *Id.*

62. Pub. L. No. 101-647, § 3611, 104 Stat. 4789, 4939 (codified at 28 U.S.C. § 3015 (Supp. V 1993)).

sources."[63] In contrast, the Banking Law Enforcement title of the same Act wholly failed to accord the RTC the same broad powers. Because Congress granted the power to demand prelitigation discovery of personal financial information in section 3611 of the Crime Control Act but did not do so in the whole of the Banking Law title, Walde argued Congress could not have intended to accord the RTC the sweeping powers the agency so desired.[64]

Walde also relied upon a string of decisions in which courts have denied the efforts of civil litigants and administrative agencies to discover the net worth of a potential defendant. In *Sanderson v. Winner*,[65] for example, the Tenth Circuit determined that litigants are not entitled to discovery of personal financial documents of the other litigants unless such information is necessary to determine a party's potential liability. In so holding, the court concluded: "Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation."[66]

Walde further relied on the Fifth Circuit's decision in *FTC v. Turner*[67] to support *Sanderson*.[68] There, the court of appeals denied the Federal Trade Commission's attempt to enforce a subpoena seeking personal financial records intended to assist the agency in ascertaining whether the respondent "ha[d] sufficient financial resources to make worthwhile a civil damage action."[69] While acknowledging that such information "would be interesting to any person or agency considering a civil suit for damages," the Fifth Circuit concluded that the respondent's "financial status, like the financial status of most putative defendants, is not relevant to any issue that will be raised in the contemplated lawsuit."[70] The court of appeals therefore affirmed the district court's decision not to enforce the subpoena, holding that "the

63. Appellant's Brief at 12-13, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495) (quoting 136 Cong. Rec. S17603 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley)).

64. *Id.* at 13 (citing Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(citation omitted)); United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) (stating the same proposition); California Rural Legal Assistance Inc. v. Legal Svs. Corp., 917 F.2d 1171, 1175-77 (9th Cir. 1990) (stating the same proposition).

65. 507 F.2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975).

66. *Id.* at 479.

67. 609 F.2d 743 (5th Cir. 1980).

68. Appellant's Brief at 15-17, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495).

69. *Turner*, 609 F.2d at 744.

70. *Id.* at 745.

public need for this information does not justify the pretrial invasion of [respondent's] privacy."[71]

The RTC countered that, contrary to Walde's representation, Congress specifically instructed the RTC to "minimize[ ] the amount of any loss realized in the resolution of cases."[72] Because Congress also accorded the agency authority to subpoena records " 'for purposes of carrying out any power, authority or duty with respect to an insured depository institution,' "[73] Congress had authorized the RTC to discover a putative defendant's net worth so that the agency could allocate its limited funds wisely. As to Walde's reliance on *Sanderson* and *Turner*, the RTC argued that the scope of the former was confined to civil discovery—and therefore lacked relevance to the enforcement of an administrative subpoena—[74] and that the latter was not good law in the D.C. Circuit.[75]

B. *The* Walde *Decision*

In March 1994, the D.C. Circuit handed down what was plainly a compromise decision. While on its face the holding provided a partial victory to both the agencies and defendant D&Os, in practice it allowed the RTC and FDIC to subpoena almost everything they need to determine a target's net worth.

The D.C. Circuit's analysis was an attempt to discern the intent of Congress. Complicating this mission, however, was the court's own finding that Congress failed to offer *any* "clues" in "the language and history of FIRREA . . . as to whether [it] intended to authorize the RTC to use its subpoena powers for the purpose of determining which

71. *Id.* at 746. Federal courts have applied a similar "rule of reason" in like circumstances. While it is well established that a party's financial status is relevant and discoverable where punitive damages may be awarded, the D.C. Circuit will not compel discovery of such records unless and until there is first a determination of liability. *See, e.g.*, John Does I-VI v. Yogi, 110 F.R.D. 629, 633 (D.D.C. 1986) (stating that defendant's financial status "should not be revealed until necessary to prove up punitive damages").

72. Appellee's Brief at 28, RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994) (No. 92-5495) (citing 12 U.S.C. § 1441a(b)(3)(C)(iv) (Supp. V 1993)).

73. *Id.* (quoting 12 U.S.C. § 1821(d)(2)(I)(i) (Supp. V 1993)).

74. *Id.* at 31-32 (stating that rules of civil discovery "do not govern administrative subpoenas"); *see also* United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (discussing the specific limitations on judicial subpoena power); Bowles v. Bay of New York Coal & Supply Corp., 152 F.2d 330, 331 (2d Cir. 1945) (stating that rules of civil procedure do not apply to restrict or control administrative subpoenas); EPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 447 (9th Cir. 1988) (reasoning that while the administrative subpoena cannot constitute a "fishing expedition," the subpoena was not required to be connected to the investigation of a charge)(citation omitted)).

75. *Id.* at 32-34; *see also* FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992) (concluding that the *Turner* court's statement that net worth was not relevant to the inquiry was "mere dictum for which the *Turner* court provided no explanation").

of the possible targets of an investigation were sufficiently wealthy to warrant pursuit."[76]

Notwithstanding Congress' failure to address the issue, the court plodded on, rendering what is a legislative-type compromise. It balanced the historic "latitude" accorded agencies "seeking the information they deem relevant to their duties"[77] with the equally historic judicial concern for privacy rights.[78] The court attempted to split the difference: "[W]e think," the court held, "that the RTC must have at least an articulable suspicion that a former officer or director is liable to the failed institution before a subpoena for his personal financial information may issue."[79]

With this compromise, the court apparently hoped to reign in the RTC, preventing it from invading the privacy of directors or officers in the absence of some likelihood of liability. Assuming that to be the D.C. Circuit's motivation, the court failed miserably for several reasons.

First, the decision itself lacks judicial credibility, appearing instead to be an exercise in intellectual gymnastics. On the one hand, the court recognized that Congress *never* spoke to the issue of whether the RTC may subpoena documents for the purpose of determining the cost effectiveness of a civil action.[80] On the other hand, the court presumed that Congress *intended* to accord the RTC the right to prelitigation discovery on a putative defendant's net worth so long as the

76. RTC v. Walde, 18 F.3d 943, 948 (D.C. Cir. 1994).

77. *Id.* at 949.

78. Quoting *Morton Salt*, the D.C. Circuit affirmed that " 'corporations can claim no equality with individuals in the enjoyment of a right to privacy.' " *Id.* at 948 (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)). The court further relied upon the high Court's decision in Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894), in which the Supreme Court recognized that the Fourth Amendment right to privacy extends to personal papers:

> [I]t cannot be too often repeated . . . that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. . . . [O]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, *but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.* Without the enjoyment of this right, all others would lose half their value.

Walde, 18 F.3d at 948 (quoting *Brimson*, 154 U.S. at 479 (emphasis added)). Finally, the D.C. Circuit relied upon Justice Holmes' famous admonition:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

Walde, 18 F.3d at 949 (quoting FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924)).

79. *Walde*, 18 F.3d at 949.

80. *Id.* at 948.

agency could articulate a theory of liability.[81] The court would have been more intellectually honest had it simply ruled that Congress never accorded the RTC any power to subpoena such records for the purpose of determining cost effectiveness, or alternatively, that the language relied upon by the RTC reflected an intent to grant such powers. The middle of the road position, however, required the adoption of a standard made out of whole cloth.

Second, the decision is rife with loopholes. Early in the opinion, the court held that many of Walde's personal financial documents may be relevant to one or more of the other purposes contained in the Order of Investigation, particularly whether the target fraudulently transferred assets.[82] As practitioners in the industry are quick to note, the RTC and FDIC have only rarely relied upon their powers to freeze assets or set aside asset transfers. By including language indicating that the agency is investigating possible fraudulent transfers in its Order of Investigation, the RTC frees itself to discover a putative defendant's net worth.

As proof, one need only look to the district court opinions since *Walde*. They have generally enforced similarly broad subpoenas, finding that financial records are relevant to the agency's investigation into the existence of fraudulent transfers.[83] As a result, these courts have not even required the agency to articulate any suspicion of liability before enforcing the subpoenas.[84]

A third problem with the decision lies in the "articulable suspicion" standard itself. At least in its early stages, this standard has proven to be an artificial barrier to enforcement of administrative subpoenas.

81. *Id.* at 949.

82. *Id.* at 947-48.

83. *See, e.g.*, RTC v. Burke, 869 F. Supp. 15, 19 (D.D.C. 1994) ("[T]he Court finds that a current statement of assets and liabilities, as well as the last three years of tax returns, are reasonably relevant to the issue of the Respondents' liability and to the RTC's need to investigate whether it should . . . seek a judicial attachment of current assets."); RTC v. Adams, 869 F. Supp. 1, 2-3 (D.D.C. 1994) ("The Court finds that each category of information sought is reasonably relevant to the RTC's purpose of investigating respondents' potential liability . . . ."); RTC v. Barton, Misc. No. 94-284, 1994 WL 725327, at *1 (D.D.C. Oct. 17, 1994) (containing similar language regarding the relevance of financial statements); RTC v. Frates, 860 F. Supp. 5, 6 (D.D.C. 1994) ("The Court finds that each category of information sought is reasonably relevant to the issues of liability . . . .").

84. *Burke*, 869 F. Supp. at 18 ("If, and only if, the Court finds that the . . . subpoena requests are not reasonably relevant . . . the Court must then turn to the question of whether the RTC has an articulable suspicion of liability."); *Adams*, 869 F. Supp. at 3 (stating that a showing of articulable suspicion "is required only where the RTC subpoenas personal financial information for the sole purpose of assessing the cost-effectiveness of litigation"); *Barton*, 1994 WL 725327, at *1 (stating that "because the . . . subpoenas request information relevant" to the investigation, "it appears unnecessary for the Court to determine whether the RTC has demonstrated an 'articulable suspicion' that a former officer or director is liable"); *Frates*, 860 F. Supp. at 6 ("[T]he court need not determine whether the RTC has shown a reasonable suspicion of liability.").

District courts have routinely accepted unsupported and conclusory representations of negligence.[85] Consequently, the RTC and FDIC, to obtain documents sufficient to assess a target's net worth, can always submit a blanket declaration or affidavit alleging that mismanagement or poor underwriting has caused losses to the institution. The agency will not be required to offer any evidence in support.

If the *Walde* decision has curbed RTC and FDIC excesses at all, its force may best be likened to a line in the sand. Although the D.C. Circuit was willing to accord the RTC much latitude, it has at least put the RTC on notice that it will not countenance any subpoenas that step over that already generous line. Indeed, where the RTC or FDIC has crossed that barrier, the courts have been quick to deny enforcement.[86]

Notwithstanding the superficial language of compromise contained in the *Walde* opinion, the FDIC and RTC enjoy subpoena rights in excess of that of their sister agencies. These broad powers allow the FDIC and RTC to invade the most personal financial documents of former officers and directors, even though these officers and directors have not yet been found liable. As a result of the expanding nature of D&O liability and the truly invasive subpoena powers of the RTC and FDIC, the notion of joining the board of directors of a financial institution has become repugnant to many. Respectable business people who have little to gain but much to lose by subjecting themselves to the ever-shifting political winds find it simply no longer worth the exposure in both emotional and financial terms.

III. The Standard of Care

While the *Walde* decision represented a pyrrhic or, at best, limited victory for D&O defendants, more significant victories have been achieved with respect to the standard of care against which D&O defendants' conduct is to be measured. Because the D&O's exposure to liability correlates directly with the degree of care with which they are legally charged, the significance of such decisions cannot be understated.

85. McVane v. FDIC (*In re* McVane), 44 F.3d 1127, 1140 (2d Cir. 1995) (finding the articulable suspicion requirement satisfied by RTC affidavit stating that institution lost $9 million due to insider loans); *Barton*, 1994 WL 725327, at *2 (finding the articulable suspicion standard satisfied by RTC affidavit stating that losses were caused by insufficient underwriting).

86. For example, in RTC v. Thornton, 41 F.3d 1539 (D.C. Cir. 1994), the D.C. Circuit held that the RTC lacked statutory authority to subpoena financial documents solely to assess the cost effectiveness of pursuing litigation once litigation commenced. *Id.* at 1546. Similarly, in *McVane*, the Second Circuit denied enforcement of a subpoena that sought the personal financial records of a target's family. *McVane*, 44 F.3d at 1138-39. The Second Circuit determined that these individuals did not relinquish protection of their privacy rights "by virtue of marriage or other familial relationship" to the target. *Id.* at 1137.

A. *The National Standard of Care*

From December 1993 through December 1994, three different courts of appeals found that FIRREA "pre-empt[ed] federal common law and establish[ed] a gross negligence standard of liability for officers and directors of failed federally chartered financial institutions."[87] Section 212(k) of FIRREA[88] provides:

> 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 Corporation . . . 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.[89]

Relying on this section, these courts concluded that Congress spoke directly to the issue of the minimum standard of care that must be breached before liability may be imposed. In so deciding, these courts rejected a flurry of RTC and FDIC arguments to the contrary.

In *RTC v. Gallagher*,[90] the first of the three appellate courts to have addressed the issue, the RTC argued that section 212(k) was designed to nullify state laws that prohibited liability for anything but *intentional misconduct*.[91] In other words, Congress, according to the RTC, enacted this section *not* to enact a heightened standard of care for most of the states, but rather to loosen the standard of care in a handful of states. In support, the RTC argued that if Congress wished to abolish all claims for simple negligence, Congress would have employed the term "may only"—and not "may"—in the first sentence of section 212(k), thereby making clear that *only* gross negligence and more culpable conduct would subject D&Os to liability.[92] The Fifth, Sixth and Seventh Circuits, however, found that the word "may" connotes the permissive nature of the RTC's right to bring a cause of action for gross negligence "rather [than] as a qualification which undermines the very cause of action the section creates."[93]

87. RTC v. Gallagher, 10 F.3d 416, 418 (7th Cir. 1993); *see also* FDIC v. Bates, 42 F.3d 369, 372 (6th Cir. 1994) (noting that FIRREA imposes a gross negligence standard of care even in states that have statutes absolving director negligence); RTC v. Miramon, 22 F.3d 1357, 1365 (5th Cir. 1994) (holding that the standard of care under Louisiana law for director liability is gross negligence).

88. FIRREA § 212(k) (codified at 12 U.S.C. § 1821(k) (Supp. V 1993)).

89. *Id.*

90. 10 F.3d 416 (7th Cir. 1993).

91. *Id.* at 418.

92. *Id.* at 420.

93. RTC v. Miramon, 22 F.3d 1357, 1361 (5th Cir. 1994). The *Gallagher* Court reached the same conclusion, noting that "the word 'may' refers to the right of the [RTC] to bring an action under this section. 'May' cannot reasonably be read to qualify the gross negligence liability standard and is therefore irrelevant to the substance

The RTC and FDIC also have argued that the last sentence of the section "saves" both state and federal common law claims from preemption. This sentence, generally referred to as the savings clause, provides: "Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law."[94] That Congress saw fit to preserve expressly the agencies' rights under other applicable law without limitation, the agencies have argued, reflected a legislative determination that the section was not intended to preempt federal common law claims. But the courts, having found that Congress created a national minimum standard before liability may attach, determined that such an interpretation would be nonsensical in that the savings clause would eviscerate the very standard created by Congress in that paragraph. In *RTC v. Miramon*,[95] for example, the Fifth Circuit found that "[r]eading the savings clause to nullify the substantive portion of the section would violate 'the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' "[96] In *FDIC v. Bates*,[97] the Sixth Circuit similarly reasoned that "[i]f the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated in the savings clause is redundant, meaningless surplusage."[98]

The courts of appeals' unanimous rejection of the RTC's reading of section 212(k) no doubt reflects a reluctance among those courts to expand the role of federal common law beyond its historically parameters. As the Seventh Circuit noted in *Gallagher*, federal common law should apply only in those "few and restricted" situations[99] "[w]hen Congress has not spoken to a particular issue and there exists a significant conflict between some federal policy or interest in the use of state law."[100] Here, where Congress has been found to have "spoken" to the issue at hand, the need for federal common law disappears.

The preceding troika of decisions—*Gallagher*, *Bates* and *Miramon*—represents a body of appellate case law that has accorded D&Os far more protection and solace than perhaps any other set of D&O decisions. Indeed, because the vast majority of D&O claims do

of the provision." RTC v. Gallagher, 10 F.3d 416, 420 (7th Cir. 1993) (quoting FDIC v. Canfield, 967 F.2d 443, 450 n.4 (10th Cir.) (Brorby, J., dissenting), *cert. dismissed*, 113 S. Ct. 516 (1992)) (internal quotations omitted).

94. FIRREA § 212(k) (codified at 12 U.S.C. § 1821(k) (Supp. V 1993)).

95. 22 F.3d 1357 (5th Cir. 1994).

96. *Id.* at 1361 (citations omitted).

97. 42 F.3d 369 (6th Cir. 1994).

98. *Id.* at 372; *see also Gallagher*, 10 F.3d at 420 (noting that the RTC's reading "would . . . swallow-up the specific language establishing a gross negligence standard of liability").

99. *Gallagher*, 10 F.3d at 419 (citing Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

100. *Id.* (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 313, (1981)) (internal quotations omitted).

not allege fraud or other intentional wrongdoing, the level of discretion accorded to these defendants before liability attaches is likely the single greatest determining factor of liability or exoneration. The gross negligence standard renders claims of simple negligence not cognizable under federal law. The number of cases the RTC and FDIC can bring, much less prevail upon, therefore, is significantly diminished.

B. *Preemption of State Law*

While the *Gallagher, Bates* and *Miramon* courts all found that section 212(k) preempts federal common law, the courts of appeals appear equally uniform in holding that section 212(k) does *not* preempt *state* law. Specifically, in *FDIC v. McSweeney*[101] and *FDIC v. Canfield*,[102] the respective courts of appeals found that the savings clause in section 212(k) reflected Congress' concern to defer to states' determinations of the appropriate level of fault before liability may be imposed.

On its face, the decisions of *McSweeney* and *Canfield* do not conflict with the *Gallagher*, *Miramon* or *Bates* decisions. The former decisions merely held that Congress, by speaking directly to the issue of a standard of care, preempted federal common law; the latter decisions determined that state laws were preserved under the savings clause. Nonetheless, the respective courts' analyses appear irreconcilable. For example, *McSweeney* concluded that Congress' use of the word "may"—rather than the phrase "may only"—in section 212(k) reflected Congress' understanding that the RTC and FDIC could bring a cause of action for a breach of a less stringent standard of care than gross negligence, provided, of course, that the applicable state law so allowed.[103] As the Ninth Circuit stated, "Had Congress intended this authorizing provision to limit the FDIC to claims alleging gross negligence or greater culpability, it would have inserted the word 'only' in the sentence."[104] This analysis is anathema to that adopted in *Gallagher*, *Miramon* and *Bates*.

As a consequence of the dichotomy of decisions, former D&Os may confront differing standards of care depending both on the state in which their institution is chartered as well as the nature of their former institution's charter. Specifically, the "national" standard of care of gross negligence generally applies to those former officers and di-

101. 976 F.2d 532 (9th Cir. 1992).
102. 967 F.2d 443 (10th Cir. 1992).
103. *McSweeney*, 976 F.2d at 537.
104. *Id.*; *see also Canfield*, 967 F.2d at 446 ("In order to uphold the district court's construction of [§ 212(k)], we would have to construe the first sentence of the section as saying that an officer or director *may only* be held personally liable for gross negligence. This would require us to insert a word into the statute, and we decline to do so.").

rectors of federally chartered institutions. Those officers and directors of state chartered thrifts and banks, however, must look to the law of the state of incorporation to determine the applicable standard against which they will be judged.[105] Some states impute liability for simple negligence,[106] while other states require gross negligence or willful misconduct.[107] While the absence of a uniform standard of care may seem odd to some (certainly to the RTC and FDIC), Congress has found no need to preempt state law, nor does the Supreme Court believe that any national interest mandates the application of a single, generally applicable standard.[108]

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105. RTC v. Chapman, 29 F.3d 1120, 1122 (7th Cir. 1994) ("[T]he law presumptively applicable is the law of the place of incorporation."); RTC v. Camhi, 861 F. Supp. 1121, 1126 (D. Conn. 1994) ("Charter Federal was chartered, organized, regulated and insured under federal law, and subsequently also was placed into receivership pursuant to federal law. In essence, Charter Federal was a creature of federal law from its cradle to its corporate grave.") (quoting RTC v. Gallagher, 800 F. Supp. 595, 602 (N.D. Ill. 1992)) (internal quotations omitted); RTC v. Hess, 820 F. Supp 1359, 1362 (D. Utah 1993) ("Federal savings and loan institutions are federally chartered, federally regulated, federally insured, and federally organized. Such comprehensive coverage leaves little or no room for state law claims."); RTC v. Farmer, 823 F. Supp. 302, 307 (E.D. Pa. 1993) (same proposition). *But see* RTC v. Everhart, 37 F.3d 151, 153-54 (4th Cir. 1994) (finding that state law, rather than federal common law, governed the question of whether the applicable statute of limitations had run on a claim brought by the RTC as for a federally chartered financial institution).

106. *See, e.g.*, Chicago Title and Trust Co. v. Munday, 131 N.E. 103 (Ill. 1921) (holding that simple negligence subjects officers and directors to liability in Illinois).

107. *See, e.g.*, Ind. Code Ann. § 23-1-35-1(e) (Burns 1995); Wis. Stat. Ann. § 180.0828(1) (West 1992). In addition, as many as 30 states have adopted legislation attempting to minimize exposure to D&Os. For example, many states have on their books some form of the business judgment rule. Under this principle, jurors are instructed to accord directors and officers wide latitude in the exercise of their professional judgment, even if, in hindsight, the wrong judgment was made. *See, e.g.*, RTC v. Eason, 17 F.3d 1126, 1133 n.5 (8th Cir. 1994) (stating that the business judgment rule "is a presumption that in making a business decision the directors or officers of a corporation acted on an informed basis, in good faith, and in an honest belief that the action taken was in the best interest of the company. This rule is based on the assumption that the directors or officers of the corporation are better equipped than the Court or the jury to make business judgments or decisions"); *see also* Va. Code Ann. § 13.1-690 (Michie 1993) ("A director shall discharge his duties as a director . . . in accordance with his good faith business judgment of the best interests of the corporation."). For a further discussion of various state laws, see Douglas M. Branson, *Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 Fordham L. Rev. 375 (1988). For those states that have adopted the business judgment rule, it is a significant weapon in defending suits alleging unintentional conduct. *Id.* at 376.

108. In O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994), the Supreme Court found that uniformity of law was not a compelling justification to preempt the applicable state law:

> Uniformity of law might facilitate the FDIC's nationwide litigation of these suites, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules.

Id. at 2055 (citing United States v. Yazell, 382 U.S. 341, 347 n.13 (1966)).

IV. The Impact of *O'Melveny* on Affirmative Defenses

The Supreme Court's recent holding in *O'Melveny & Myers v. FDIC*[109] is by now well known to litigators in the financial institutions arena. *O'Melveny* represents another setback for the FDIC and RTC and raises the specter that defenses asserted previously by D&O defendants and stricken on motion may now be resuscitated, enabling defendants to raise these defenses anew. Narrowly construed, the Court held that state law and not federal common law determines the liability of lawyers with regard to a professional negligence claim asserted by the FDIC.[110] The larger and more critical issue is whether *O'Melveny* has restored an entire body of state law affirmative defenses previously rejected by federal courts.

Prior to *O'Melveny*, it appeared well settled that state law affirmative defenses, including claims of contributory negligence or failure to mitigate by the bank or regulatory agencies, could not be pled by defendant directors and officers in actions brought by the thrift and banking regulatory agencies. Cases dismissing state law defenses typically relied on two arguments: (1) under federal common law principles, federal regulators owed "no duty" to the directors and officers of the failed S&Ls; and (2) it would be contrary to public policy to charge agencies with the improper conduct of directors and officers.[111] Courts also have relied, less frequently, on a third rationale: that regulatory agencies perform a discretionary function under the Federal Tort Claims Act that is not subject to judicial second guessing.[112]

O'Melveny casts doubt on the continuing validity of this previously settled law. In *O'Melveny*, the FDIC, as receiver to an insolvent S&L, sued a law firm that had represented the failed institution in risky real estate deals, alleging state law claims of professional negligence and breach of fiduciary duty.[113] O'Melveny countered with various defenses seeking to impute the fraudulent conduct of the S&L officers to the S&L and then to the FDIC as receiver.[114] The Supreme Court considered the question of whether state law or federal common law controlled the resolution of these state law defenses.

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109. 114 S. Ct. 2048 (1994).
110. *Id.* at 2053.
111. *See, e.g.*, FDIC v. Mijalis, 15 F.3d 1314, 1323-24 (5th Cir. 1994); FDIC v. Bierman, 2 F.3d 1424, 1438-40 (7th Cir. 1993); RTC v. Hecht, 818 F. Supp. 894, 900-01 (D. Md. 1992); RTC v. Youngblood, 807 F. Supp. 765, 771-74 (N.D. Ga. 1992); FDIC v. Isham, 782 F. Supp. 524, 530-32 (D. Colo. 1992); FSLIC v. Burdette, 718 F. Supp. 649, 662-64 (E.D. Tenn. 1989); FSLIC v. Roy, Civ. JFM-87-1227, 1988 WL 96570, at *1-*2 (D. Md. June 28, 1988); FSLIC v. Williams, 599 F. Supp. 1184, 1204-06 (D. Md. 1984).
112. United States v. Gaubert, 499 U.S. 315, 322-25 (1991); *Bierman*, 2 F.3d at 1439-41 (finding that RTC should not be held liable for discretionary decisions often made under extreme time constraints); RTC v. Fleischer, 835 F. Supp. 1318, 1323-24 (D. Kan. 1993) (arguing that discretionary function exception to FTCA bars judicial second guessing of decision by regulatory agencies).
113. *O'Melveny*, 114 S. Ct. at 2051-52.
114. *Id.* at 2052.

The Supreme Court unanimously held that state law controlled resolution of O'Melveny's defenses.[115] In a passage that has been frequently cited since the decision was handed down, the Court echoed *Erie*'s edict that "[t]here is no federal general common law."[116] The Court rejected the FDIC's claim that FIRREA was a nonexclusive grant of rights that could be supplemented by federal common law.[117] The Court instead held that state law supplies the rule of decision unless the federal statute explicitly does so.[118] The Court concluded that creation of a special federal rule is permissible only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "[119] The Court found no conflict between state and federal law based solely upon a federal interest in uniformity, nor did it find that there would be harm to the FDIC's insurance fund if state law doctrine defeated agency claims. As the Court tersely held, "there is no federal policy that the fund should always win."[120]

The *O'Melveny* decision has prompted a flurry of motions for reconsideration in cases where affirmative defenses had been stricken. Although results have been mixed, a majority of federal courts have interpreted *O'Melveny* as abolishing the old "no duty" rule, previously the applicable federal common law. Instead these courts have concluded that state law defenses are permissible where not expressly preempted by FIRREA.

An illustrative case is *RTC v. Ross*.[121] In *Ross*, the RTC filed a motion to strike the defendants' affirmative defenses, including failure to mitigate damages, estoppel and contributory negligence.[122] The court originally granted the RTC's motion, citing *FDIC v. Mijalis*[123] for the proposition that under the no duty rule defendants were precluded from shifting the focus to the conduct of the regulatory agency.[124] Upon defendants' motion for reconsideration, however, the district court reversed itself. It determined that "the federal common law 'no duty' rule cannot survive" the Supreme Court's decision in *O'Melveny*, and it declined to follow the rationale of cases such as *FDIC v. Bierman*[125] and *Mijalis*.[126] The district court summarily re-

115. *Id.* at 2053.
116. *Id.* (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).
117. *Id.* at 2053-55.
118. *Id.* at 2054.
119. *Id.* at 2055 (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).
120. *Id.*
121. Civ. A. No. 2: 94CV20(P)(S), 1994 WL 534210 (S.D. Miss. June 22), *rev'd on reconsideration*, 1994 WL 534210, at *4 (S.D. Miss. Aug. 26, 1994).
122. *Id.* at *1.
123. 15 F.3d 1314 (5th Cir. 1994).
124. *Ross*, 1994 WL 534210, at *2.
125. 2 F.3d 1424 (7th Cir. 1993).
126. *Ross*, 1994 WL 534210, at *4.

jected the RTC's rote policy arguments regarding the need to preserve the national insurance fund and, observing *O'Melveny*'s admonition, declined to create a federal rule of decision under the circumstances.[127] Other courts similarly have decided that whether affirmative defense claims are permissible must be determined solely by reference to state law in the absence of a federal statute barring those defenses.[128] A minority of courts has attempted to distinguish *O'Melveny* when possible.[129]

The *O'Melveny* decision undoubtedly represents a significant victory for the defense bar because it appears to open the door to increased reliance on favorable statutory affirmative defenses. As shown immediately below, no defense has been more instrumental to D&O defendants than application of state statutes of limitations.

V. The Statute of Limitations and Adverse Domination

Under FIRREA, the receiver of a financial institution may bring any claim on behalf of the institution within either three or five years from the date the receiver was appointed, depending on the nature of the action,[130] *or* until the state limitations period expires, whichever is

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127. *Id.* at *6.

128. *See, e.g.*, RTC v. Forest Grove, Inc., 33 F.3d 284, 290-91 (3d Cir. 1994) (noting that *O'Melveny* supported the argument that state law governed the opening of confessed judgments), *cert. denied*, 115 S. Ct. 923 (1995); RTC v. Liebert, 871 F. Supp. 370, 373 (C.D. Cal. 1994) (holding that the federal common law "no duty" rule is an "impermissible" addition to FIRREA and refusing to limit *O'Melveny* to defenses directed at the conduct of private parties); RTC v. Baker, No. CIV. A. 93-0093, 1994 WL 637359, at *3 (E.D. Pa. Nov. 14, 1994) (holding that legal sufficiency of affirmative defenses must be analyzed under the laws of the state or FIRREA instead of federal common law); RTC v. Williams, Civ. A. No. 93-2018-GTV, 1994 WL 477231, at *3 (D. Kan. Aug. 4, 1994) (stating that, after *O'Melveny*, estoppel and mitigation of damages defenses are governed by state law or FIRREA).

129. *See, e.g.*, RTC v. Edie, Civ. No. 94-772 (DRD), 1994 WL 744672, at *4 (D.N.J. Oct. 4, 1994) (distinguishing *O'Melveny* because it did not implicate actions taken by the FDIC in its discretionary capacity, and holding that the no duty rule insulates discretionary FDIC actions); RTC v. Sands, 863 F. Supp. 365, 370 (N.D. Tex. 1994) (finding *O'Melveny* inapplicable because RTC had brought suit in corporate, not receivership, capacity); RTC v. Bright, 157 F.R.D. 397, 400 (N.D. Tex. 1994) (holding that the defenses of contributory negligence and mitigation of damages are unavailable where based on the post-conservatorship conduct of RTC). In the wake of *O'Melveny*, the RTC may rely more heavily on arguments that the RTC's conduct is insulated as a discretionary function exception under the Federal Tort Claims Act, claiming that FIRREA delegated broad discretion to the agency to dispose of assets. *See, e.g.*, RTC v. Fleischer, 871 F. Supp. 1362, 1366 (D. Kan. 1994) (acknowledging that other courts have viewed "the conservator or receiver's conduct in managing failed financial institutions as insulated from affirmative defenses by the discretionary function exception to the Federal Tort Claims Act").

130. In cases of fraud or intentional misconduct resulting in substantial loss to the institution or in unjust enrichment, the limitations period is five years; for all other claims, the limitations period is three years. 12 U.S.C. § 1441a(b)(14)(C) (Supp. V 1993).

longer.[131] If the limitations period expires before the agency is appointed receiver, then the claim is stale and the receiver generally may not revive the claim.[132] The agencies, however, have frequently brought suit alleging D&O misconduct occurring outside the limitations period. To circumvent the applicable statute of limitations, the RTC and FDIC have argued that the statute does not begin to run until the alleged wrongdoers are no longer in control of the institution. In this way, the agencies seek to reach back and challenge D&O conduct previously assumed to be impervious to suit because the limitations period had expired.

The tolling doctrine principally relied upon by the RTC and FDIC—which has spawned a great volume of litigation—is referred to as "adverse domination." Under this doctrine, the statute of limitations does not begin to run against a D&O unless and until the majority of the institution's board of directors is composed of disinterested members—those not alleged to have participated in misconduct.[133] Courts instead presume that "control of the association by culpable directors and officers precludes the possibility of filing suit because these individuals can hardly be expected to sue themselves or to initiate any action contrary to their own interests."[134] A more D&O-friendly application of the doctrine allows tolling only where the entire board of directors is alleged to have participated in the misconduct, thereby precluding application of the doctrine if just one member is "disinterested."[135]

The RTC and the FDIC enjoyed the benefits of a judiciary too eager to please, as court after court adopted generous applications of the tolling doctrine.[136] The Fourth and Fifth Circuits, however, stunned the agencies with back-to-back decisions that greatly scaled back the scope of the tolling doctrine.[137] In the process, the courts caused an almost cataclysmic re-evaluation of the scope of the doctrine.

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131. 12 U.S.C. §§ 1821(d)(14), 1441a(b)(4) (Supp. V 1993).

132. RTC v. Artley, 28 F.3d 1099, 1101 (11th Cir. 1994) (citing FDIC v. Dawson, 4 F.3d 1303, 1307 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 2673 (1994)). Claims for fraud and intentional misconduct causing substantial loss to the institution or resulting in unjust enrichment, however, may be revived if brought not more than five years from the expiration of the state statute of limitations. 12 U.S.C. § 1441a(b)(14)(E) (Supp. V 1993); *see also supra* note 131 and accompanying text.

133. RTC v. Gallagher, 800 F. Supp. 595, 600 (N.D. Ill. 1992), *aff'd*, 10 F.3d 416 (7th Cir. 1993); FDIC v. Greenwood, 739 F. Supp. 450, 453 (C.D. Ill. 1989); FDIC v. Howse, 736 F. Supp. 1437, 1441 (S.D. Tex. 1990); Hecht v. RTC, 635 A.2d 394, 407 (Md. 1994).

134. *Hecht*, 635 A.2d at 406 (quoting FDIC v. Bird, 516 F. Supp. 647, 652 (D.P.R. 1991) (citations omitted)).

135. *Fleisher*, 826 F. Supp. at 1276.

136. *See supra* note 134 (citing cases).

137. FDIC v. Cocke, 7 F.3d 396, 399-401 (4th Cir. 1993); FDIC v. Dawson, 4 F.3d 1303, 1306-07 (5th Cir. 1993).

In *FDIC v. Cocke*,[138] the Fourth Circuit held that Virginia tolled the limitations period only where a defendant has intentionally concealed the wrongdoing from the plaintiff.[139]

> "The character of fraud necessary to toll the statute [in Virginia] must be of a variety involving moral turpitude. A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply."[140]

That a majority (or all) of the directors may have been implicated in the alleged wrongdoing was irrelevant; the limitations period would be tolled only if the respective defendants fraudulently concealed the alleged wrongdoing.[141] The *Cocke* decision has since formed the basis for dismissals of other cases filed in Virginia[142] and undoubtedly has caused the government to reconsider suit in other instances.

In *FDIC v. Dawson*,[143] the Fifth Circuit agreed with the FDIC that Texas followed the "majority test" of adverse domination.[144] Nonetheless, the court limited the scope of the doctrine, holding that adverse domination was inapplicable to claims of negligence[145] and that the agency must show "that a majority of its directors was more than negligent for the desired tolling period."[146] In one fell swoop, the Fifth Circuit lopped off a significant number of claims the RTC and FDIC had brought or were preparing to bring. The *Dawson* case was especially troubling for the agencies because no region has suffered more bank and association failures than the Southwest and no other Circuit has handled more D&O cases.[147]

The damage inflicted upon the agencies by these cases extended far beyond the Fourth and Fifth Circuits. After *Cocke* and *Dawson* were decided, courts in other circuits began to shy away from the wholesale adoption of the doctrine. Many found either that the respective fo-

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138. 7 F.3d 396 (4th Cir. 1993).

139. *Id.* at 402.

140. *Id.* (quoting Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 80 S.E.2d 574, 582 (Va. 1954)).

141. *Id.*

142. *See, e.g.*, RTC v. Everhart, 37 F.3d 151, 155 (4th Cir. 1994); RTC v. Walde, 856 F. Supp. 281, 286 (E.D. Va. 1994).

143. 4 F.3d 1303 (5th Cir. 1993).

144. *Id.* at 1310.

145. *Id.* at 1312.

146. *Id.* at 1313.

147. As of September 1, 1994, there were 38 cases pending in federal district courts in the Fifth Circuit, compared to just one in the First Circuit, five in the Fourth and Sixth Circuits and six in the Second Circuit. In petitions for *certiorari* in these case (both of which were denied), the government contended that the *Dawson* ruling threatened at least $500 million in FDIC claims and that the *Cocke* decision threatened more than $1.3 billion in claims. *See generally* Bank Lawyer Liability, June 24, 1994, at 15-17 (discussing effect on RTC of rulings by various circuit courts).

rum state has not adopted the principle, or it has adopted only a limited application of the doctrine.[148]

Reacting to the wave of government losses and to agency arguments that they should not be barred from pursuing claims expiring before their appointment, Congress considered RTC and FDIC sponsored legislation that would have gone beyond the adverse domination doctrine. This legislation would have allowed the FDIC and RTC to revive stale claims so long as the limitations period did not expire more than five years prior to the appointment of a receiver. According to trade publications, some legislation in this form was "virtually certain to pass."[149]

In an attempt to compromise, the banking industry proposed its own language, which would extend the limitations period only for intentional misconduct. Much to the disappointment of the agencies, the final approved language largely tracked the industry proposal. As a result, only claims of fraud, intentional misconduct resulting in unjust enrichment, and intentional misconduct resulting in substantial loss to the institution may be revived, so long as the claim had not expired more than five years before the institution failed and the RTC or FDIC was appointed receiver.[150] Because only a fraction of the professional liability suits are for fraud or other intentional misconduct, the effect of the legislation has been minimal.[151]

Conclusion

In the midst of the crisis atmosphere that pervaded the Halls of Congress and was reflected in the opinions of the judiciary during the thrift crisis, the RTC and FDIC wielded wide-ranging power with unbridled enthusiasm and arrogance. They aggressively sifted through D&O's personal financial papers and brought dated claims for nothing more than mere negligence. Frequently, the agencies relied on the

148. *See, e.g.*, RTC v. Artley, 28 F.3d 1099, 1101 (11th Cir. 1994) (finding that Georgia has not adopted doctrine); RTC v. Farmer, 865 F. Supp. 1143, 1157 (E.D. Pa. 1994) (finding that doctrine may be applied in Pennsylvania only in cases that go beyond mere negligence); Brandt v. Bassett, 855 F. Supp. 353, 358 (S.D. Fla. 1994) (finding that Florida has not adopted doctrine).

149. *Legislation: Limitations-Buster Could Emerge from Conference This Week*, Bank Lawyer Liability, June 24, 1994, at 3.

150. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 201(a), 108 Stat. 2338, 2368 (codified at 12 U.S.C. § 1821(d)(14)(C) (1994)).

151. In limiting the amendment to the revival of claims alleging intentional wrongdoing, the Senate-House Conference sided with the House against broader Senate language favored by the agencies. House conferees repeatedly expressed satisfaction with the final result. *See, e.g.*, 140 Cong. Rec. H6776 (daily ed. Aug. 4, 1994) (statement of Cong. Fish) ("This extraordinary remedy [of revival] would allow the [agencies] to go after those most culpable of defrauding S&L institutions; but would not reexpose every sitting or former board member to a suit in negligence. To allow the revival of claims for mere negligence would be inequitable to those who are not actually responsible for the wrongdoing.").

threat of multimillion dollar lawsuits to exact settlements from D&Os and their insurance carriers who remained fearful of adverse publicity and daunting legal fees.

The histrionics, however, have diminished, and perhaps as a result, the courts have curtailed both the agencies' powers and their ambitions. Courts have modified the breadth of the agencies' subpoena powers, recognized a national standard of care of gross negligence (rendering claims for simple negligence not cognizable), permitted defendant D&Os to assert state defenses that were previously stricken, and limited the application of broad tolling doctrines.

At the end of the day, notwithstanding the aggressive lawyering by the RTC and the FDIC, total judgments and settlements obtained through the end of 1994 were only $3 billion[152]—substantially less than the $140 billion purportedly lost. Moreover, amounts actually collected were somewhat less. During this time, the RTC pursued 564 claims to judgment or settlement.[153] The FDIC pursued 786 cases. In one six month period, January 1, 1994 through June 30, 1994, the RTC paid outside counsel $117 million.[154]

All agree that any individual who commits a fraud or other intentional wrongdoing should be held accountable. The net, however, should be cast no farther than necessary. It should not, for example, be cast so wide and so far that scores of innocent people who have dedicated their lives to financial institutions and the communities they serve are inadvertently caught up with the rest. The recent developments have served to protect the innocents better while leaving intact the agencies' statutory authority to investigate and prosecute claims. The path to reason has had its bumps and thrills, but the most turbulent years are no doubt behind us. That is good news for those who have opted to remain in the industry.

152. $1.3 billion has been recovered by the RTC and $1.7 billion by the FDIC. RTC, Division of Legal Services, PLS Fact Sheet (1995) (documenting RTC recoveries up to January 31, 1995 (on file with the author); Professional Liability-Recoveries Fact Sheets (1992-95) (documenting FDIC recoveries for the years (1990-94) (on file with the author).

153. *Id.*

154. *Id.* These payments were made to 1876 firms. *Id.*