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MICHAEL P. BATTIN*

The court, of course, is greatly troubled with the callous disregard of law, fiduciary duties, and the interests of depositors shown by directors and officers of countless banks and savings and loans. Like FDIC and taxpayers everywhere, the court would like to see these individuals made to pay for their errors and forced to reimburse the public fisc. Justice and equity demand no less.1

INTRODUCTION

By 1989, a nationwide series of bank2 failures had provided catastrophic evidence of the need for legislative reform of the nation's bank regulatory system. A deluge of insolvencies forced the federal government to confront tens of billions of dollars in claims from depositors whose savings had been insured by the Federal Deposit Insurance Corporation. To instill some semblance of order and to limit the calls on the federal treasury, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").3 President Bush signed FIRREA into law on August 9, 1989, thereby enacting a "comprehensive and wide-ranging set of proposals"4 for thorough realignment of the regulatory system.5

Because many of the bank failures were due, in whole or in part, to either outright fraud or negligent mismanagement6 by bank directors,7

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* I wish to thank Dr. Michael Malloy for his guidance and encouragement during the preparation of this Note.

2. For simplicity, in this Note "bank" refers to all federally insured depository institutions unless otherwise specified. The term "depository institution" was defined in the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Mar. 31, 1980, 94 Stat. 132 (1980), as including: any commercial bank the deposits of which are federally insured or are eligible for federal insurance; any mutual savings bank that is federally insured or eligible for insurance; any stock savings bank that is federally insured or eligible for insurance; any credit union that is insured or eligible for insurance; any member of the Federal Home Loan Bank System; and any savings association (such as [Savings and Loans, or "S&Ls"], savings banks, and the like) that is insured or eligible for insurance.
3. RTC v. Walde, 18 F.3d 943, 944 (D.C. Cir. 1994).
5. 1 Malloy, supra note 2, at 1.115-1.118.
6. Most of the negligence or gross negligence claims brought against bank directors were based on decisions to make specific loans. Loans that proved disastrous "for the development of real estate or new businesses, loans that sometimes failed
FIRREA was intended, among other things, "to strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors" and to "strengthen the enforcement powers of Federal regulators of depository institutions." FIRREA sought, in other words, "to maximize the federal government's ability to recover from individuals who have caused banks to fail or lose substantial sums of money." To effectuate these purposes, Congress for the first time legislated on the standard of liability applicable to directors of federally insured banks. The result of this Congressional foray was section 214(n), codified at 12 U.S.C. § 1821(k). In the words of President Bush, § 1821(k) was enacted to enable the FDIC to "seek out and punish those that have committed wrongdoing in the management of these failed institutions." Section 1821(k) reads as follows:

(k) Liability of directors and officers
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 [FDIC, or "Corporation"], which action is prosecuted wholly or partially for the benefit of the Corporation—

(1) acting as conservator or receiver of such institution,
(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or
(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title, for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this para-

before a single payment was made, loans that were extended or 'rolled over' two or three times, often with accrued interest being added to the principle, and so forth." Robert W. Hamilton, Corporations Including Partnerships and Limited Partnerships 755 (5th ed. 1994).

7. For simplicity, in this Note "directors" refers to both directors and officers of depository institutions unless otherwise specified. Cf. 12 U.S.C. § 1813(u)(1) (Supp. V 1993) (including in the definition of "Institution-affiliated party," "any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution").


Section 1821(k) allows the FDIC or the Resolution Trust Corporation\(^\text{14}\) to hold directors or officers of federally insured depository institutions personally liable "for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care."\(^\text{15}\) Thus it is clear that § 1821(k) preempts state laws prohibiting the FDIC from suing officers and directors for gross negligence or other more egregious conduct.\(^\text{16}\) Due, however, to the ambiguous language of § 1821(k), especially the last sentence, or "savings clause,"\(^\text{17}\) courts have not been able to agree on a number of other issues. First, courts have not been able to reach a consensus on whether § 1821(k) preempts state laws holding bank directors to a more stringent—simple negligence—standard of liability.\(^\text{18}\) Second, courts are divided as to whether § 1821(k) preempts the federal common law of bank director liability.\(^\text{19}\) Further, the courts holding that § 1821(k) does not preempt federal common law disagree on the standard of liability for bank directors under federal common law.\(^\text{20}\) Finally, courts differ as

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14. For simplicity, in this Note “FDIC” refers to both the FDIC and the RTC.


16. FDIC v. Barham, 794 F. Supp. 187, 190 (W.D. La. 1991), aff’d, 995 F.2d 600 (5th Cir. 1993); see also O’Melveny & Myers v. FDIC, 114 S. Ct. 2048, 2054 (1994) (“1821(k) . . . permit[s] claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability.”); Norwood P. Beveridge, Jr., Director Liability Under FIRREA: Negligence and Gross Negligence in the Courts, 48 Consumer Fin. L.Q. Rep. 77, 79 (1994) (“At the present time, all courts are agreed that FIRREA was intended to preempt state laws that would hold directors to a standard of liability lower than gross negligence.”). The practical effect is that the statute invalidates state “insulating statutes,” which allow corporations to include in their articles of incorporation provisions shielding directors from personal liability. See Revised Model Business Corporation Act § 2.02(b)(4) (1994).

17. The last sentence of section 1821(k) reads: “Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.” 12. U.S.C. § 1821(k).


19. Compare RTC v. Miramon, 22 F.3d 1357, 1364 (5th Cir. 1994) (holding that “federal common law in this area is preempted” by § 1821(k)) with RTC v. Gibson, 829 F. Supp. 1110, 1118 (W.D. Mo. 1993) (holding that § 1821(k) “does not preempt federal common law”).

to whether federally chartered banks may be sued under state director-liability law\textsuperscript{21} and as to whether state-chartered banks may be sued under federal common law.\textsuperscript{22}

Given the numerous disparities among judicial interpretations of § 1821(k), it is obvious that a reinterpretation or reformulation of that statute is necessary. Part I of this Note delineates the differing approaches to § 1821(k) and concludes that the language of the statute is susceptible to two diametrically opposed, yet equally valid, interpretations with regard to each of the above detailed issues.\textsuperscript{23} Part II suggests that because § 1821(k) is open to several conflicting interpretations, courts should accept the ambiguity of the "plain language" and the legislative history of the statute and address the real question of what public policy § 1821(k) should advance. FIRREA was not enacted in a vacuum, however, and analysis of the policy issues surrounding § 1821(k) therefore necessarily includes an examination into the public policy concerns surrounding the origination of bank regulation in this country—specifically the creation of the deposit insurance system.

Part III of this Note applies the public policy rationale behind the creation of federal deposit insurance to § 1821(k), concluding that the aims of the insurance system—security of small deposits, stability of the banking system, and protection of the deposit insurance fund—dictate that bank directors should be subject to a simple negligence for negligence against the directors and officers of federally insured banks does not fall within the province of federal common law\textsuperscript{24}).

\textsuperscript{21.} Compare RTC v. Gibson, 829 F. Supp. at 1109 n.2 ("There is nothing to suggest that officers . . . of federally chartered institutions are only subject to federal causes of action.") with RTC v. Hess, 820 F. Supp. 1359, 1362 (D. Utah 1993) ("federal law exclusively governs the internal affairs of federal savings and loan associations, including director liability").

\textsuperscript{22.} Although few courts dealing with § 1821(k) have addressed this issue, at least one court has held that "federal common law should not be applied to state chartered, federally-insured associations." Hess, 820 F. Supp. at 1370.

\textsuperscript{23.} FDIC v. Canfield, 967 F.2d 443, 449 (10th Cir.) (en banc) ("Canfield III"), cert. dismissed, 113 S. Ct. 516 (1992) (noting that "Congress' choice of language in 12 U.S.C. § 1821(k) is susceptible to two valid yet opposing interpretations").

\textsuperscript{24.} "The deposit insurance fund is the net worth of the FDIC, and represents accumulated earnings retained since 1933." Federal Deposit Insurance Corporation, Federal Deposit Insurance Corporation: The First Fifty Years: A History of the FDIC 1933-1983, at 66 (1984) [hereinafter History of the FDIC]. "The primary statutory mandate of the FDIC has been to provide deposit insurance to all banks qualifying for insurance . . . In this regard, . . . it is the responsibility of the FDIC to pay off depositors of insured banks that are closed without sufficient assets to satisfy claims of depositors. . . ." Malloy, supra note 2, at 1.66-1.67. The FDIC satisfies these claims out of the insurance fund. FIRREA, in addition to § 1821(k), also gave the FDIC "responsibility for insurance of deposits of savings associations. It will now administer a Bank Insurance Fund (BIF), formerly the Permanent Insurance Fund with respect to deposits of insured banks, and a Savings Association Insurance Fund (SAIF), replacing the functions of the Federal Savings and Loan Insurance Corporation (FSLIC)." Id. at 1.68-1.70; see also 12 U.S.C. § 1814(a) (Supp. V 1993) (continuing insurance for insured depository institutions and savings associations formerly cov-
standard. By limiting the standard under which the FDIC can bring suit to gross negligence and leaving other issues unresolved, Congress not only divided the federal judiciary, but also relieved bank directors of the costs of their simple negligence and forced the insurance fund to bear the cost of that negligence. Because the federal taxpayer must ultimately shoulder the financial burden if the insurance fund's expenses exceed its earnings, the gross negligence standard is inadequate. Nevertheless, until Congress decides to redraft § 1821(k), federal courts must decide whether to allow the FDIC to bring claims against bank directors—under state law or federal common law—based on simple negligence. This Note concludes that courts should acknowledge the public policy issues underlying FIRREA and permit the FDIC to bring claims against bank directors for simple negligence.

I. **SECTION 1821(k): JUDICIAL INTERPRETATION**

Courts have been divided on a number of issues surrounding the interpretation of § 1821(k). The focus by some courts on the "plain language" and legislative history of the statute is misplaced, however, because § 1821(k) is ultimately ambiguous and open to several reasonable interpretations. Any analysis of § 1821(k) must therefore center on the public policy behind the deposit insurance system, the FDIC, and § 1821(k).

A. **Preemption of State Law**

The first issue brought before the courts was whether § 1821(k) preempts state law claims based on simple negligence. The district court for the District of Utah first addressed this question in *FDIC v. Canfield* ("Canfield I"). The *Canfield I* court held that § 1821(k) fully preempts state law, and, therefore, the FDIC could not bring suit based on a state law claim of simple negligence. The Tenth Circuit,
however, reversed the district court. In fact, only a minority of the courts subsequently addressing the issue have followed Canfield I and held that § 1821(k) fully preempts state law. A majority of courts addressing § 1821(k) have held that the statute only partially preempts state law. In other words, FIRREA does not preempt state law claims premised on simple negligence. Despite the numerical distribution of the courts, however, courts holding that § 1821(k) fully preempts state law make arguments as plausible and cogent as those made by courts holding that the statute only partially preempts state law.

1. Full Preemption—the Minority View

The Canfield I court was faced with the question of whether § 1821(k) preempted Utah director liability law permitting the FDIC to bring actions against bank directors for conduct amounting to less than gross negligence. In Canfield I, the FDIC brought suit against former directors and officers of Tracey Collins Bank & Trust Company, seeking damages for imprudent loans made or approved by the defendants, for waste of bank assets, and for mismanagement. The FDIC's claims were based on simple negligence. The Canfield I court held that § 1821(k) preempts state law claims based on simple negligence. Like most others subsequently dealing with § 1821(k), the Canfield I court analyzed the statute from three different perspectives: (1) the “plain language” of the statute; (2) the legislative history; and (3) public policy.

28. Canfield III, 967 F.2d 443, 449 (10th Cir.) (en banc), cert. dismissed, 113 S. Ct. 516 (1992) (because the lower court’s reasoning has been adopted by many of the other minority courts, and because it remains the best explication of the full preemption position, I will refer to the district court’s opinion throughout this Note).

29. FDIC v. McSweeney, 976 F.2d 532, 537 n.5 (9th Cir. 1992) (“The lower courts are split on the question of the FDIC’s ability to proceed against officers and directors for simple negligence under state law. The majority, however, agree with the FDIC that § 1821(k) does not preempt state law allowing such claims.”).


32. Id.

33. Id. at 535.

34. Id. at 540.
Beginning its analysis with the "plain language" of the statute, the *Canfield I* court noted that the first sentence of § 1821(k), standing alone, "expressly defines the parameters of liability for officers and directors where the FDIC is acting as a successor in interest to the claims of a depository institution. It carefully sets the standard [at gross negligence]." The first sentence does not, however, stand alone, and the court next focused on the last sentence of § 1821(k), which reads: "Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law." The court reasoned that reading the last sentence of § 1821(k) as only a partial preemption of state law—leaving intact state statutory or common law causes of action against bank directors for simple negligence—would defeat Congressional intent to create a uniform national standard:

>This interpretation results in a chaotic situation where the liability of directors and officers of federal depository institutions is governed not by a uniform federal standard, as surely was intended by this sweeping federal legislation governing the issue, but by varying state standards which leave liability and exposure mostly dependent on state of residence.

To avoid this result, the *Canfield I* court concluded, in a series of inferences, that "other applicable law" in the final sentence of § 1821(k) refers not to state law but to other provisions in FIRREA.

First, the court found it significant that other provisions of FIRREA—including § 1821(k)—explicitly refer to "state law" when such reference is intended. Therefore, if Congress intended "other applicable law" to mean "applicable state law," Congress would have made explicit reference to state law, as it did at the close of the first sentence of § 1821(k). In light of the conspicuous absence of any reference to state law in the savings clause, the *Canfield I* court found that constru-
ing the phrase "other applicable law" to include state law permitting suits against directors for simple negligence would render the explicit gross negligence standard "facially meaningless."42

Second, the court analyzed the use of the word "impair" in § 1821(k). The final sentence of § 1821(k) states that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law."43 According to Canfield I, the sentence has no meaning unless there is some other non-applicable law under which the rights of the FDIC are impaired. The court reasoned that Congress intended that § 1821(k)—"this paragraph"—would not impair the FDIC's rights under FIRREA—"other applicable law."44

Under the court's reasoning, however, Congress also intended that § 1821(k) would impair the FDIC's right to proceed on a less stringent cause of action, simple negligence, based on state law. Therefore, the court found that Congress intended that § 1821(k) would impair the rights of the FDIC by preempting any state law containing a simple negligence standard of liability for bank directors.

To support its conclusion that the phrase "other applicable law" refers to FIRREA itself, the court noted that the FDIC can, under other provisions of FIRREA, obtain, inter alia, civil penalties45 and cease-and-desist orders46 against officers and directors under different standards of liability than that in § 1821(k). Therefore, the last sentence of § 1821(k) was meant to "clarify any ambiguity regarding the different standards of liability which may apply in varied, but potentially related, enforcement and regulatory situations."47 In other words, the savings clause was meant to preserve the FDIC's ability to take other regulatory actions based on simple negligence.48 The court found that the phrase "other applicable law" was meant to ensure that § 1821(k) would not be construed to "impair or affect" the rights of the FDIC or the RTC under other sections of FIRREA.49

b. Legislative History

The Canfield I court next explored § 1821(k)'s "long and confusing" legislative history.50 First, the court noted that the earliest version of

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43. 12 U.S.C. 1821(k).
44. Canfield I, 763 F. Supp. at 536-37.
47. Canfield I, 763 F. Supp. at 537.
48. Cf. FDIC v. Bates, 42 F.3d 369, 372 (6th Cir. 1994) ("[W]e find that the savings clause preserves the FDIC's ability to take other regulatory actions based on simple negligence, i.e., to remove directors and to issue cease and desist orders, but does not preserve federal common law claims.").
49. Canfield I, 763 F. Supp. at 537.
50. Id. at 538.
§ 1821(k) contained a simple negligence standard, which was later amended to reflect the current gross negligence standard. Second, the court noted that the Conference Committee Report addressed the amended, gross negligence, version of § 1821(k) as follows:

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

According to the court, the Conference Report suggests that the FDIC may not hold bank directors personally liable for conduct amounting to less than gross negligence "despite state law to the contrary." The court conceded, however, that two months after the Senate passed the amended version of § 1821(k), which did not support the court's full preemption rationale,

the managers of the bill inserted a section-by-section analysis of the § 1821(k) provision into the Congressional Record. That analysis provides, in part, that § 1821(k) does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers and directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty.

Because of the confused nature of the legislative proceedings, the court was unable to glean any clear legislative intention. It thus declined to give weight to the legislative history of § 1821(k).

c. Public Policy

Finally, the court in Canfield I considered § 1821(k) from a policy perspective. It reasoned that interpreting § 1821(k) to establish a national standard of gross negligence balances the public interest in attracting qualified people to direct the affairs of banks with the public interest in holding "these high fiduciaries liable for intentional or grossly-negligent conduct in the administration of an institution's affairs."

According to the court, a reading of § 1821(k) permitting state law claims based on simple negligence would contravene the

51. Id.
54. Id. at 538.
55. Id. at 539 (finding that the "convoluted and contradictory nature of the proceedings culminating in the codification of § 1821(k) renders it impossible for the court to discover any meaningful legislative opinion about its purpose or impact").
56. Id. at 538.
57. Id. at 539.
long recognized need to attract bright and ambitious leaders to serve as directors. Under a partial preemption interpretation, the personal risk is just too great, and "honest, responsible persons with assets to protect" would be driven from banking directorships.\(^{58}\)

The *Canfield I* court also reasoned that reading § 1821(k) to establish a national gross negligence standard promotes economic efficiency by focusing the FDIC's efforts and the taxpayers' dollars on truly culpable parties.\(^{59}\) Further, a uniform national standard promotes the public interest because "[u]niformity saves money, time and manpower" by relieving the FDIC of the monumental and costly task of maneuvering through each state's common and statutory law regarding director liability.\(^{60}\)

Accordingly, the *Canfield I* court concluded that § 1821(k) fully preempts state law on bank director liability, adding that "[a]ny other interpretation results in little improvement over pre-FIRREA conditions and is inconsistent with the national goals addressed by Congress in the enactment of FIRREA, and particularly § 1821(k)."\(^{61}\)

The court in *RTC v. O'Bear, Overholser, Smith & Huffer*,\(^{62}\) also finding that § 1821(k) fully preempts state law, added yet another policy consideration to those considered by the *Canfield I* court. The *O'Bear* court reasoned that "Congress has undisputed power to determine the incentives and potential liabilities to being a director of a federally insured savings institution."\(^{63}\) Permitting state law to override Congress' decision to limit those potential liabilities to conduct rising to the level of gross negligence would impair "'federal superintendence of the field'"\(^{64}\) and therefore contravene public policy.

2. Partial Preemption—The Majority View\(^{65}\)

A majority of courts addressing § 1821(k) do not find that it fully preempts state law. For example, the Court of Appeals for the Tenth Circuit, reviewing the district court's holding in *Canfield I*, both in its

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59. *Canfield I*, 763 F. Supp. at 540 (noting that "claims of ordinary negligence, without more, may only amount to questioning business judgments").
60. Id. (noting that a uniform standard avoids the necessity of the FDIC "wind[ing] its way through the morass of state legislation engulfing the issue of director and officer liability").
61. Id.
63. Id. at 1277.
64. Id. (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981)).
65. See Schipani, *supra* note 30, at 761 ("Most of the district courts deciding the section 1821(k) question support the FDIC's contention that directors and officers of insured financial institutions may be held personally liable for actions sounding in simple negligence under state law despite the gross negligence standard defined in section 1821(k).").
original hearing of the case, Canfield II,\textsuperscript{66} and in its rehearing en banc, Canfield III,\textsuperscript{67} reversed the lower court, holding that § 1821(k) only partially preempts state law. Therefore, because Utah holds directors liable for simple negligence, the FDIC was allowed to bring a simple negligence action based on state law.\textsuperscript{68} The court in Canfield III, like the Canfield I court, began its analysis with the “words used in section 1821(k).”\textsuperscript{69}

\subsection{“Plain Language”}

Courts finding only partial preemption of state law under § 1821(k) focus on different statutory language than those that find full preemption of state law. The Canfield III court first considered the term “may” as used in § 1821(k)’s first sentence. Because “may” is a permissive term and does not imply a limitation on the standards of director liability, the court explained that “no reasonable construction of ‘may’ results in an absolute limitation of the liability of officers or directors to instances of gross negligence.”\textsuperscript{70} Rather, to find that § 1821(k) preempts state law, the phrase “may be held personally liable” would have to be construed as meaning “may only be held personally liable for gross negligence.”\textsuperscript{71} This the court declined to do.\textsuperscript{72}

Next the Canfield III court determined that in the savings clause, “other applicable law” means \textit{all} other applicable law,\textsuperscript{73} including state director liability law. Therefore, § 1821(k) does not impair any right of the FDIC under state director liability law. Where state law permits bank directors to be held liable for simple negligence, construing § 1821(k) to bar its application would impair the FDIC’s rights under that state law—contrary to the plain language of the section.

Following the general rule of construction that statutes should be read as a whole, the court found that the language used in other parts of FIRREA supported its construction of the last sentence of § 1821(k). The drafters of FIRREA used very specific language to

\begin{itemize}
\item \textsuperscript{66} FDIC v. Canfield, 957 F.2d 786 (10th Cir.) (“Canfield II”), \textit{opinion superseded on reh’g en banc} by, 967 F.2d 443 (10th Cir.), \textit{cert. dismissed}, 113 S. Ct. 516 (1992).
\item \textsuperscript{67} Canfield III, 967 F.2d 443 (10th Cir.) (en banc), \textit{cert. dismissed}, 113 S. Ct. 516 (1992).
\item \textsuperscript{68} Id. at 446.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id. However, the dissent noted that, \[g\]iven the unmistakable purpose of § 1821(k) to define a standard of liability, the majority's discussion of the term “may” is a red herring. Read in context, the word “may” refers to the right of the FDIC 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 of the provision. \textit{Id.} at 450 n.4 (Brorby, J., dissenting) (citations omitted).
\item \textsuperscript{73} Id. at 446.
\end{itemize}
effectuate their intent, referring, in other parts of § 1821, specifically to other bodies of law or to FIRREA itself. On the other hand, when the drafters intended to refer to the whole universe of other laws, they used the same language that is used in § 1821(k). Therefore, the court reasoned that an interpretation limiting the scope of the language "other applicable law" to "other sections of FIRREA" is untenable.

Relying on the plain language of the statute, the Tenth Circuit refused to conclude that Congress intended to impose a national standard for bank director liability; FIRREA contains no language expressing an intention to create a national standard. The court also noted that the provision's "reliance on state law for its definition of gross negligence directly refutes the proposition that FIRREA establishes a national standard of liability for officers or directors." Because state law definitions of gross negligence differ, the court reasoned, the statute cannot create a national standard of liability, even if § 1821(k) fully preempts state law.

Finally, the court contended that had Congress intended a national standard of liability, the final sentence of § 1821(k) would be superfluous. Under the full preemption theory, both the first sentence and the savings clause pronounce the same exclusive liability standard. The court reasoned that any interpretation leading to such a result "is necessarily less compelling than our construction, which gives each of the sentences independent force." The court concluded that

74. Id. at 447.
In other parts of section 1821, the statute refers specifically to the other bodies of law it touches. Similarly, when the statute refers only to itself, it does so specifically. Finally, when the statute refers to the whole universe of other laws, it uses the same language employed in section 1821(k).


75. Canfield III, 967 F.2d at 447 ("Nowhere does the statute announce its intention to create a national standard of liability ... .")

76. Id.

77. Id. at 447; see, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 34, at 212 (5th ed. 1984) (noting that there is "no generally accepted meaning [of gross negligence]"); see also Ronald W. Stevens & Bruce H. Nielson, The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether Section 1821(k) Preempts Federal Common Law, 13 Ann. Rev. Banking L. 169, 194-231 (1994) (detailing the various state law definitions of both simple and gross negligence).

78. See Canfield III, 967 F.2d at 448 ("The first sentence announces the exclusive liability standard, while the second makes the same announcement in a different form.").

79. Id.
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{80}

Also relying on the plain language of the statute, the district court in \textit{FDIC v. McSweeney}\textsuperscript{81} found that the partial preemption analysis is supported by the fact that the FDIC is granted "\textit{all} rights, titles, powers, and privileges [enjoyed by] any stockholder, member . . . depositor, officer, or director" of a failed bank.\textsuperscript{82} The court reasoned that because the stockholders of a bank in a state with a simple negligence standard are granted certain rights for claims based on conduct not amounting to gross negligence, the FDIC must also enjoy those rights. Reading § 1821(k) as fully preempting state law would impair the rights of the FDIC when "FIRREA itself means to provide the FDIC access to [the same] arsenal."\textsuperscript{83} Affirming the lower court's decision, the Court of Appeals for the Ninth Circuit added that "[j]udicially construing an implied loss of existing remedies is particularly inappropriate when applied to the rights of the government."\textsuperscript{84}

\section*{b. Legislative History}

Courts finding that § 1821(k) only partially preempts state law look to the same three relevant sources of legislative history examined by the district court in \textit{Canfield I}:\textsuperscript{85} the Conference Report, the Senate Report, and a Senate floor debate.\textsuperscript{86} As discussed above,\textsuperscript{87} however, the legislative history is unclear, and where legislative history " "cuts both ways," " courts rely more heavily on the words of the statute and on policy considerations.\textsuperscript{88}

\begin{footnotesize}
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\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} 772 F. Supp. 1154 (S.D. Cal. 1991), aff'd, 976 F.2d 532 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 2440 (1993).
\item \textsuperscript{83} \textit{McSweeney}, 772 F. Supp. at 1159.
\item \textsuperscript{84} \textit{FDIC v. McSweeney}, 976 F.2d 532, 538 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 2440 (1993).
\item \textsuperscript{85} \textit{See, e.g., Canfield II, 957 F.2d 786, 789 (10th Cir.), \textit{opinion superseded on reh'g by} 957 F.2d 443 (10th Cir.), \textit{cert. dismissed}, 113 S. Ct. 516 (1992) (reviewing Conference Report, Senate Report, and Senate floor debate).}
\item \textsuperscript{86} \textit{See supra notes} 50-56 and accompanying text.
\item \textsuperscript{87} \textit{See supra notes} 55-56 and accompanying text.
\item \textsuperscript{88} \textit{Canfield II, 957 F.2d at 791} (quoting \textit{Miller v. C.I.R.}, 836 F.2d 1274, 1284 (10th Cir. 1988)). It should also be noted that many courts assert that the legislative history does support their respective position. For example, the district court in \textit{FDIC v. McSweeney} maintained that the legislative history supported its finding that § 1821(k) does not preemt state laws with a simple negligence standard of liability: When considering the Section, Congress was particularly concerned that in recent years many states had enacted legislation "insulating" directors and officers for certain suits, and that \textit{while no one wanted to preempt all of state...}
\end{itemize}
\end{footnotesize}
c. Public Policy

The Canfield III court suggested that the policy arguments against a simple negligence standard were addressed to the wrong forum. The court's role is to apply the existing law; it is the role of the legislature to consider the need for uniformity and the need to attract qualified directors willing to serve in a particular state. Despite its deference to the legislature, however, Canfield III did consider one troubling policy consideration. Under the district court's full preemption interpretation, § 1821(k) creates an incentive for negligent bank directors to allow their banks to fail. Where state law held directors to a simple negligence standard, prior to failure liability would attach for simple negligence. After failure, however, "liability would only attach if the officer or director could be proven grossly negligent under the applicable state definition. As the institution struggles, therefore, section 1821(k) would create an incentive for the officers and directors to allow the bank to fail." The Canfield III court was concerned that a finding of full preemption of state law would permit bank directors to deliberately allow their banks to fail in order to shield themselves against simple negligence claims.

Other courts finding partial preemption of state law were not so deferential to Congress. The district court in McSweeney, for example, found that the need to attract qualified directors does not support a national gross negligence standard, and that this public interest ra-

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90. Id. at 449. The dissent argues in reply, however, that more likely than not "deliberate conduct designed to allow a bank to fail in order to take advantage of the gross negligence standard would in and of itself constitute gross negligent conduct actionable under § 1821(k)." Id. at 451 n.9.

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law, it was viewed as necessary to "allow the FDIC to sue a director or officer guilty of gross negligence or willful misconduct, even if State law did not allow it." Thus, the legislative history confirms that Congress established a jurisdictional basis upon which the FDIC could be assured of bringing suit in the most serious cases of alleged director mismanagement, while at the same time not prejudicing the FDIC's full range of rights in those states that had not passed protective legislation for directors.


90. Id. at 449. The dissent argues in reply, however, that more likely than not "deliberate conduct designed to allow a bank to fail in order to take advantage of the gross negligence standard would in and of itself constitute gross negligent conduct actionable under § 1821(k)." Id. at 451 n.9.
tionale is in fact at odds with the goals of FIRREA.\textsuperscript{91} Whereas "FIRREA sought to \textit{strengthen} the hand of federal regulators in pursuing those responsible for the mismanagement of failed thrifts,"\textsuperscript{92} preemption of simple negligence standards weakens the position of the FDIC by imposing a more stringent pleading burden.\textsuperscript{93}

Courts have thus made cogent and plausible arguments for both full preemption and partial preemption of state law. Nevertheless, as far as sheer numbers go, the partial preemption contingent is winning the debate.\textsuperscript{94}

B. \textit{Preemption of Federal Common Law}

Courts also set out cogent and plausible arguments regarding preemption of federal common law by §1821(k), though here too, there is disagreement. Indeed, there is not even a consensus regarding the proper standard of liability for bank directors under federal common law or whether there even is any federal common law concerning bank director liability.

Some courts explicitly acknowledge that the federal common law recognizes a simple negligence cause of action against bank directors. For example, the court in \textit{RTC v. Miramon}\textsuperscript{95} acknowledged the existence of a federal common law standard of simple negligence in its conclusion that FIRREA's gross negligence standard supersedes federal common law.\textsuperscript{96} Likewise, the court in \textit{FDIC v. Mintz}\textsuperscript{97} held that §1821(k) preempts the federal common law standard of simple negligence.\textsuperscript{98}

On the other hand, some courts hold that the federal common law standard is gross negligence or that there is no federal common law concerning bank director liability. For example, in \textit{Washington Bancorporation v. Said},\textsuperscript{99} the court held that federal common law estab-

\textsuperscript{92} Id. (citations omitted).
\textsuperscript{93} Id.
\textsuperscript{94} See supra note 30.
\textsuperscript{96} Id. at *2 ("FIRREA's standard of gross negligence supersedes the federal common-law standard of simple negligence.").
\textsuperscript{98} Id. at 1544 (finding "that the federal common law standard of simple negligence is preempted by § 1821(k)"); \textit{see also} FDIC v. Bates, 838 F. Supp. 1216, 1218 (N.D. Ohio 1993) ("[T]he issue is whether 12 U.S.C. § 1821(k) establishes a national standard of gross negligence for director liability, thereby preempting federal common law permitting liability for simple negligence."), \textit{aff'd in part}, 42 F.3d 369 (6th Cir. 1994); FDIC v. Miller, 781 F. Supp. 1271, 1276 (N.D. Ill. 1991) (holding that §1821(k) "must take precedence over previous judicial determinations articulating 'federal common law' claims based on allegations of conduct less egregious than gross negligence").
lishes a standard of gross negligence. In *FDIC v. Gonzalez-Gorrondona*, the court stated that it was "not fully convinced" that federal common law provides a claim for simple negligence. But in *First Hawaiian Bank v. Alexander*, the court expressly held that there is no federal common law claim for negligence against bank directors.

Even assuming for the present discussion, however, that the standard of liability for bank directors under federal common law is simple negligence, federal courts are split as to whether § 1821(k) permits or preempts claims under that federal common law standard.

1. No Preemption of Federal Common Law—The Minority View

Generally, the arguments concerning federal common law are framed in the same terms as those concerning state law—plain language, legislative history, and public policy. Because the analysis of the legislative history of § 1821(k) regarding preemption of federal common law mirrors the discussions by courts addressing the question with regard to state law, discussions of preemption of federal common law will be considered only where courts have added significantly to the previous discussion.

100. *Id.* at 1266 (noting that "both D.C. law and federal common law hold the directors... to a gross negligence standard").
102. *Id.* at 1550. The court noted further that in light of the stated purpose of FIRREA... of strengthening the FDIC's enforcement powers and to increase the civil sanctions for S & L mismanagement—the enactment by § 1821(k) of a gross-negligence-or-higher federal standard... would run counter to that stated purpose if the FDIC already had a federal common law claim for ordinary negligence in its arsenal.

104. *Id.* at 1131 ("Negligence is an area traditionally left to the state courts. There is no interest in national uniformity which would be served by the creation or application of any federal decisional law... Therefore this court declines to recognize a federal common law cause of action for negligence.").
105. See *RTC v. Gallagher*, 10 F.3d 416, 418-19 (7th Cir. 1993) (noting that the majority of district courts have agreed with the appellees that § 1821(k) pre-empts federal common law"); Joyce E. Raupp, "Recent Cases, 6 Loy. Consumer L. Rep. 91, 99 (1994) ("A majority of district courts, however, have held that Section 1821(k) preempts federal common law.").
a. Plain Language

Under the plain language analysis, courts addressing the question of preemption of federal common law find that the statutory language "may" is a permissive term and that "other applicable law" means all other applicable law. For example, the court in FDIC v. Nihiser, adopting the rationale used in McSweeney and FDIC v. Black, found that the "permissive language of the first sentence and the broad language of the savings clause clearly evidence the intent to preserve the FDIC's rights under other laws, including state and federal common law." The Nihiser court concluded that federal common law is not preempted; § 1821(k) would not preempt or repeal common law rights unless the language of the statute demonstrated clearly that that was its purpose—and it did not. The court in RTC v. Hess, following the reasoning of Canfield III as it pertained to the word "may" and the phrase "other applicable law," held that § 1821(k) does not preempt applicable state or federal common law. Similarly, the court in FDIC v. McSweeney held that the language of the savings clause preserves the FDIC's preexisting rights under federal common law.

b. Public Policy

The public policy arguments against preemption of federal common law, as well as the plain language and legislative history arguments, vary little from the analysis employed by courts addressing whether § 1821(k) preempts state law. For example, the court in RTC v. Frates adopted the public policy reasoning of McSweeney, finding that preclusion of federal common law remedies "would lead to absurd results, creating 'the perverse incentive for a director in an institution that is having difficulty to permit the thrift to fall into ruin ... since the director's own exposure would be greatly reduced upon the institution of a receivership,'" when § 1821(k) and its gross negligence standard would apply. The court in RTC v. Gibson rea-

109. Id.
111. Id. at 1364 (holding that "§ 1821(k) does not set a minimum federal liability standard of gross negligence, and ... does not preempt applicable state law or federal common law").
112. 976 F.2d 532 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).
113. Id. at 538 n.7 (holding that "the express saving language preserving the FDIC's rights 'under other applicable law' would preserve its preexisting rights under the federal common law").
115. Id. at *2 (quoting McSweeney, 976 F.2d at 540 (quoting FDIC v. McSweeney, 772 F. Supp. 1154, 1159 (S.D. Cal. 1991), aff'd 976 F.2d 532 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993))).
soned that one of the purposes of FIRREA is to strengthen the powers of government regulators over officers and directors engaging in harmful misconduct. Thus, interpreting § 1821(k) as preempting federal common law

frees officers and directors from the federal common law standards of liability and thereby affords them greater protection than they enjoyed prior to the enactment of § 1821(k). Interpreting § 1821(k) to strip the government of its federal common law powers, under which it could hold officers and directors liable for less than gross negligence, is inconsistent with Congress' stated purposes.117

Interpreting § 1821(k) as preempting federal common law, therefore, is inconsistent with public policy.

2. Preemption of Federal Common Law—The Majority View118

Courts holding that § 1821(k) preempts federal common law begin their analysis with a different premise: namely, that it is the role of Congress, not the courts, to determine the applicable federal standards.119 When a court determines that a statutory scheme established by Congress directly addresses the problem formerly governed by federal common law, it necessarily determines that any previously existing common law action has been displaced by the congressional scheme.120

a. Plain Language

Starting from this premise, courts holding that federal common law is preempted reason that by enacting § 1821(k), Congress "spoke directly" to the issue of bank director liability.121 For example, as one district court held:

Congress has now expressly defined the magnitude of negligence which would give rise to a federal cause of action against officers and directors of federally insured financial institutions. . . . [T]he explicit definition of the standard of actionable conduct—"gross negligence"— in § 1821(k) must take precedence over previous ju-

117. Id. at 1119.
118. See supra note 105.
119. See RTC v. Vanderweele, 833 F. Supp. 1383, 1386 (N.D. Ind. 1993) ("In determining a statute's effect on previously existing federal common law, the court starts 'with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.'" (quoting City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981))).
120. FDIC v. Gonzalez-Gorrondona, 833 F. Supp. 1545, 1552 (S.D. Fla. 1993) (noting that a court's "determination of 'whether a previously available common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law,'" (quoting City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 315 n.8 (1981))).
dicial determinations articulating "federal common law" claims based on allegations of conduct less egregious than gross negligence.\textsuperscript{122}

To support this assertion, courts holding that federal common law is preempted reason that if § 1821(k) were construed to preserve federal common law simple negligence causes of action, the provision requiring gross negligence would have no effect.\textsuperscript{123} The FDIC could use the federal common law to bring a simple negligence action instead of being constrained by FIRREA's explicit gross negligence standard. Under such a reading,

the general language of the "savings clause" would be permitted to swallow-up the specific language establishing a gross negligence standard of liability. Reading the "savings clause" as preserving a federal common law standard of liability for less culpable conduct than gross negligence would render the substantive portion of section 1821(k) surplusage. . . . 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.\textsuperscript{124}

When these courts discuss the actual language of § 1821(k), they adopt many of the arguments made in favor of preemption of state law. For example, in \textit{RTC v. Gallagher},\textsuperscript{125} the court, citing the dissent in \textit{Canfield III}, reasoned that the word "may" is understood to refer to the right of the FDIC to bring an action under § 1821(k) and cannot "reasonably be read to qualify the gross negligence liability standard."\textsuperscript{126} Similarly, in \textit{RTC v. Camhi},\textsuperscript{127} the court mirrored the analysis made in \textit{Canfield I}, finding that the savings clause should be interpreted to preserve the FDIC's other regulatory powers under FIRREA. For example, the savings clause preserves the FDIC's authority "to remove directors for simple negligence, or their power to issue 'cease and desist' orders in cases of simple negligence. Without the savings clause, FIRREA could have been interpreted to withdraw from these agencies the other regulatory powers that they previously possessed."\textsuperscript{128} The plain language of § 1821(k), therefore, should be interpreted as preempting federal common law.

\textsuperscript{122} Id. at 1275-76; see also FDIC v. Barham, 794 F. Supp. 187, 191 (W.D. La. 1991) ("In enacting § 1812(k) [sic], Congress created a federal statutory standard applicable to officers and directors of national banks. Any federal common law in existence previous to the enactment of FIRREA would be superseded by the statute."); aff'd, 995 F.2d 600 (5th Cir. 1993).

\textsuperscript{123} Miller, 781 F. Supp. at 1275-76.

\textsuperscript{124} RTC v. Gallagher, 10 F.3d 416, 420 (7th Cir. 1993).

\textsuperscript{125} Id. at 420.

\textsuperscript{126} Id. at 1128 (citation omitted).
b. Legislative History

Although most discussions of § 1821(k)'s legislative history reassess the same material discussed with regard to preemption of state law, the court in *Gallagher*\(^\text{129}\) pointed to two post-enactment efforts to amend § 1821(k) that imply that federal common law is preempted. First, the FDIC submitted a proposed amendment that would have reintroduced a simple negligence standard.\(^\text{130}\) Second, Congressman Richard Baker proposed a similar amendment to the savings clause, which also would have reintroduced a simple negligence standard.\(^\text{131}\) Neither proposal was adopted by Congress. The *Gallagher* court reasoned that "[t]hese post-enactment efforts to amend section 1821(k) to reinstate a simple negligence standard of liability belie the . . . contention that section 1821(k), as enacted, preserved a federal common law action for simple negligence."\(^\text{132}\)

c. Public Policy

Finally, the public policy arguments in favor of preemption of federal common law are analogous to the arguments made by courts holding that § 1821(k) preempts state law. These courts conclude that, given the comprehensive enforcement mechanism created by FIRREA, including the establishment of several expert regulatory agencies to supervise that mechanism, it is simply not the job of the courts to try to embellish that program through federal common law decisions.\(^\text{133}\)

C. Choosing What Law to Apply

As if there were not enough confusion surrounding § 1821(k), there is also turmoil concerning what law to apply to each bank. Section 1821(k), regardless of whether it is found to preempt state law, can be applied to both federal and state-chartered banks.\(^\text{134}\) Where courts

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\(^\text{129}\) 10 F.3d 416 (7th Cir. 1993).

\(^\text{130}\) *Id.* at 423 n.7 ("The FDIC amendment provided: ‘Nothing in this subsection shall impair or affect any right of the [RTC] under other applicable state or federal law, including a right to hold such director or officer personally liable for negligence.’").

\(^\text{131}\) *Id.* at 423 n.8 ("The Baker amendment provided: ‘Paragraph (1) shall not be construed as impairing or affecting any right of the . . . [RTC] under any provision of applicable State or other Federal law, including any provision of common law or any law establishing the personal liability of any director or officer of an insured depository institution under any standard pursuant to such law.’").

\(^\text{132}\) *Id.* at 423. The court did not appreciate, however, the fact that these efforts to amend § 1821(k) may simply have been an effort to make clear, after the numerous divergent court decisions, that § 1821(k) was not intended to preempt state laws containing a simple negligence standard of bank director liability.

\(^\text{133}\) *Id.* at 424.

\(^\text{134}\) See FDIC v. Swager, 773 F. Supp. 1244, 1248-49 (D. Minn. 1991) (finding that FIRREA preempted state law and allowing gross negligence claims against a state-chartered bank to proceed under § 1821(k)).
BANK DIRECTOR LIABILITY

hold that FIRREA does not preempt state law, state law simple negligence claims are clearly cognizable against directors of state-chartered banks.135 It is unsettled, however, whether state law applies to federally chartered banks.

Many cases hold that state law can be applied to federally chartered banks. For example, in RTC v. Gibson,136 the court noted that "[t]here is nothing to suggest that officers and directors of federally chartered institutions are only subject to federal causes of action."137 Similarly, in RTC v. Ascher,138 the court reasoned that § 1821(k) allows state based claims for ordinary negligence against the directors of a federally chartered institution.139

In RTC v. Hess,140 however, the court concluded that

[f]ederal 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. Allowing state law to govern the actions of directors of federal savings and loan associations would result in different and conflicting standards of conduct in the different states, thus impeding Congress’ goal of treating such institutions in a uniform manner. For these reasons, it is apparent that as a general rule federal law exclusively governs the internal affairs of federal savings and loan associations, including director liability.141

Similarly, in RTC v. Chapman,142 the court applied the internal affairs doctrine, which states that the law presumptively applicable to a corporation’s internal affairs, such as director liability, is the law of the place of incorporation.143 Thus, where a bank holds a federal charter, national law governs the issue of liability for director mismanagement.144

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135. See FDIC v. Haddad, 778 F. Supp. 1559, 1566-67 (S.D. Fla. 1991) (finding that state common law claims were not preempted by FIRREA and allowing state law claims against a banking corporation organized under Florida law).


137. Id. at 1109 n.2.


139. Id. at *3 (holding that “the savings clause of section 1821(k) allows the RTC to bring state based claims for ordinary negligence against the director defendants of a federally insured, federally-chartered institution”).


141. Id. at 1362 (citations omitted); see also RTC v. Farmer, 823 F. Supp. 302, 307 (E.D. Pa. 1993) (declining to reach issues of liability standard under state law “since the bank is federally chartered and is not incorporated under and regulated by state law”).

142. 29 F.3d 1120 (7th Cir. 1994).

143. Id. at 1122.

144. Id. at 1123 (holding that “national law governs the liability of officers and directors for their management”); see also RTC v. Gallagher, 800 F. Supp. 595, 602 (N.D. Ill. 1992), aff’d, 10 F.3d 416 (7th Cir. 1993). The banks involved in Gallagher were federally chartered, federally regulated, federally insured thrifts which were organized under federal law. Moreover, [one of the banks] was declared insolvent and
Additionally, it is not clear in jurisdictions where courts have held that § 1821(k) does not preempt federal common law, whether the FDIC or RTC may pursue directors of state-chartered banks under the federal common law standard. After determining that federal law exclusively governs federally chartered banks,\textsuperscript{145} the court in \textit{RTC v. Hess} held that federal common law does not apply to state chartered, federally insured banks.\textsuperscript{146} At least two courts, however, in cases dealing with issues other than § 1821(k), have applied federal common law against state chartered, federally insured banks.\textsuperscript{147} In \textit{First Hawaiian Bank v. Alexander},\textsuperscript{148} the court found that First Hawaiian Bank, a state chartered bank, was "federally insured and as a result subject to the same laws governing federal associations."\textsuperscript{149}

D. The State of the Law

There is clearly no consensus on the preemptive reach of § 1821(k). Some courts have held that § 1821(k) preempts both state and federal common law, while others have concluded that the statute preempts federal, but not state, common law. Still others have ruled that the statute displaces neither state nor federal common law.\textsuperscript{150}

This division among the federal judiciary has led to an interesting predicament. Courts holding that § 1821(k) preempts federal common law, but not state law, apply one line of reasoning to support preemption of federal common law, but then apply contradictory reasoning to preserve state law simple negligence claims.\textsuperscript{151} These courts concede that this interpretation of the statute can be characterized as "'splitting the baby,'"\textsuperscript{152} but nevertheless attempt to explain why doing so is consistent.\textsuperscript{153} In reality, however, the results are internally inconsistent and are, therefore, somewhat troubling. For example, in

\textsuperscript{145} See supra note 141 and accompanying text.
\textsuperscript{149} Id. at 1132.
\textsuperscript{152} Id. at 1545.
\textsuperscript{153} See RTC v. Chapman, 29 F.3d 1120, 1122 (7th Cir. 1994) ("[W]e would not think it prudent to create a conflict among the circuits."); Mintz, 816 F. Supp. at 1545 ("[T]his construction gives all of the provisions in the section meaning.").
the RTC was suing the directors of a bank that was originally a state-chartered bank, but later became a federally chartered bank. On a summary judgment motion, the court held that § 1821(k) preempted federal common law, but that it did not preempt state law simple negligence claims. Thus, a state law negligence claim against defendants would survive summary judgment insofar as the claims related to the time when the bank was state-chartered. The court also held, however, that state law claims could not be brought against directors of a federally chartered bank. Therefore, claims asserted against the former directors which pertained to the period when the bank was federally chartered must be brought under FIRREA's standard—gross negligence as defined by state law. Thus, under this “split” approach, the same directors of the same bank are held to two different standards for the same actions on two different days—the day before the bank converted to a federal charter and the day after.

Clearly, the case law interpreting § 1821(k) is problematic: judicial interpretation of the section has produced a plethora of inconsistent holdings. These holdings, however, are the consequence of the ambiguous language of § 1821(k); “Congress’ choice of language in 12 U.S.C. section 1821(k) is susceptible to two valid yet opposing interpretations.” The case for preemption of state law, based primarily on the need for uniformity and the need to attract qualified and competent directors to banks, is as compelling as is the case for partial preemption of state law, based on the plain language of the statute and the need to hold bank directors liable for their misconduct. Similarly, the case for preemption of federal common law is as compelling as is the case for allowing simple negligence claims based on federal common law. Few courts, however, are willing to concede the merit of each of the competing interpretations, and to resolve this conflict by focusing on the real task of deciding why to adopt one approach over another.

Thus, the judicial focus on the plain language of the statute—on the words “may” and “other applicable law”—is misplaced, as is the de-
bate over an inconclusive legislative history. The real question is which public policy should be encouraged and why. In the words of Circuit Judge Brorby, dissenting in Canfield III, the numerous interpretations of § 1821(k) are all "supportable and . . . well written; however, [the courts] ha[ve] lost sight of the forest but for a single tree. When construing statutes we must remember 'laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends.'"\textsuperscript{163} Hence the focus of the debate over § 1821(k) should be on which public policy that section should further.

II. Deposit Insurance and Section 1821(K)

The public policy behind bank director liability cannot be examined in a vacuum. Section 1821(k) was enacted as part of a huge legislative package aimed at thorough realignment of the bank regulatory structure. Thus, any examination of the policy issues concerning bank director liability must begin with the policy behind the nation's bank regulatory framework, specifically the policy underlying the deposit insurance system.

A. The Birth of the FDIC

Congress established the FDIC in 1933 following the worst banking crisis in the nation's history. During the period from 1921 through 1929, an average of more than 600 banks per year failed, over ten times the failure rate of the past decade.\textsuperscript{164} Despite their numbers, these earlier failures elicited relatively little concern because they involved mostly small town banks.\textsuperscript{165} This ambivalent attitude disappeared, however, after 1350 banks suspended their operations during the last few months of 1930.\textsuperscript{166} The failures were no longer confined to rural, agricultural areas but affected even large New York City banks, such as the esteemed Bank of United States, one of the nation's largest banks.\textsuperscript{167} Driven by a fear that their banks were next, depositors began to panic and lose confidence in the banking system, attempting, en masse, to withdraw deposits.\textsuperscript{168}

The peculiar nature of the banking industry made banks highly susceptible to failure during these "bank runs." Banks in the early twentieth century served two major functions: accepting demand deposits

\textsuperscript{163}. Id. (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947), reprinted in 3 N. Singer, Sutherland Statutory Construction 265, 272 (4th ed. 1986)).
\textsuperscript{164}. History of the FDIC, supra note 24, at 33.
\textsuperscript{165}. Id.
\textsuperscript{166}. Id. at 35.
\textsuperscript{167}. Id.
\textsuperscript{168}. See id. at 33.
and making commercial loans.\textsuperscript{169} By providing a "safe place for small, unsophisticated depositors to store liquid assets,"\textsuperscript{170} banks accumulated liquid assets. Banks used their accumulated liquid deposits to supply credit to other institutions, thereby facilitating economic growth.\textsuperscript{171} These functions, however, exposed the banks to a serious risk of failure. A bank's deposits (its primary liabilities) were due (withdrawable) at any time, while its loans (its primary assets) were due at a specified time in the future.\textsuperscript{172} In other words, a bank's primary liabilities were

\textit{liquid} bank deposits, or extremely short-term liabilities that are often withdrawable on demand. At the same time, bank assets are concentrated in highly \textit{illiquid} loans, which cannot be sold quickly without a loss in value. The combination of these two factors makes banks inherently susceptible to depositor runs, or panic withdrawals of deposits.\textsuperscript{173}

Thus, when many depositors of even a healthy bank suddenly demanded cash, the bank was often unable to meet those demands because its assets, the depositors' money, were tied up in illiquid loans. Where enough depositors suddenly sought to convert their deposits to cash, the resulting liquidity crises caused the bank's failure.\textsuperscript{174}

The effect of bank runs and subsequent bank failures quickly spread to other banks. First, they undermined the public confidence in the banking system as a whole, causing depositors even of sound banks to question whether their money was safe and often encouraging these depositors to withdraw their own deposits. Thus, one bank run triggered another in a domino effect.

In addition, because banks served as an engine for economic growth, a single bank failure decreased the investment capital available to the entire community. Other banks were forced to compen-

\begin{itemize}
\item \textsuperscript{169} Oulton v. Savings Inst., 84 U.S. (17 Wall.) 109, 118 (1872).
\item \textsuperscript{170} Banks in the commercial sense are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver.
\item \textsuperscript{171} Id. at ix (noting that "lending [was] an important engine for economic growth").
\item \textsuperscript{172} Robert E. Litan, What Should Banks Do? 11 (1987).
\item \textsuperscript{173} Treasury Study, \textit{supra} note 170, at 3.
\item \textsuperscript{174} \textit{Id.} ("Sooner or later, a run will itself cause a bank to fail, regardless of the bank's actual condition at the time the run began.").
\end{itemize}
sate for the loss of this source of funding or economic growth would be stifled. Although the banking community could compensate for the failure of individual banks, the combined failure of bank after bank increasingly strained the banking system to its limits.\textsuperscript{175}

In the early 1930s these factors combined to bring the banking system to a screeching halt.

[The] wave of bank failures during the last few months of 1930 triggered widespread attempts to convert deposits to cash. Many banks, seeking to accommodate cash demands or increase liquidity, contracted credit, and, in some cases, liquidated assets. This reduced the quantity of cash available to the community which, in turn, placed additional cash demands on banks. Banks were forced to restrict credit and liquidate assets, further depressing asset prices and exacerbating liquidity problems. As more banks were unable to meet withdrawals and were closed, depositors became more sensitive to rumors. Confidence in the banking system began to erode and bank 'runs' became more common.\textsuperscript{176}

As depositor confidence failed, and the number of bank runs increased, the banking system fell into turmoil. During 1931 alone, 2293 banks failed, followed by 1453 in 1932, and 4000 in 1933.\textsuperscript{177} During the beginning of 1933, the number of bank runs increased suddenly, causing every state in the union to declare a bank holiday.\textsuperscript{178} Subsequently, President Roosevelt proclaimed a nationwide bank holiday, stating to Congress that "the government has been compelled to step in for the protection of depositors and the business of the nation."\textsuperscript{179}

Prior to the banking crisis of the 1930s, there was relatively little regulation at either the state or federal levels.\textsuperscript{180} This free environment, however, would not last long. The stockmarket crash of 1929 and the accompanying nationwide series of bank failures through the mid-1930s "provided catastrophic evidence of the need for further improvements in the nation's bank regulatory system."\textsuperscript{181} The FDIC was born amid the ruins of the worst banking crisis in the nation's history when President Roosevelt signed the Banking Act of 1933.\textsuperscript{182}

\textsuperscript{175} See Helen A. Garten, Banking on the Market: Relying on Depositors to Control Bank Risks, 4 Yale J. on Reg. 129, 161-62 (1986) ("Although the repercussions of individual bank failure can be tolerated if a sufficient number of healthy banks remain in operation, as the liquidity crisis spreads, each successive failure puts additional strain on the rest of the banking system.").

\textsuperscript{176} History of the FDIC, supra note 24, at 33.

\textsuperscript{177} Id. at 36.

\textsuperscript{178} Id. at 38.

\textsuperscript{179} Id. at iii.

\textsuperscript{180} See id. at 132-33 (noting that the "environment was characterized by relatively free banking").

\textsuperscript{181} 1 Malloy, supra note 2, at 1.66.

\textsuperscript{182} History of the FDIC, supra note 24, at iii.
B. The Banking Act of 1933

The government responded to the crises of the early 1930s with the creation of the Banking Act of 1933. The 1933 Act had two major effects. First, it required all banking institutions to restrict their business activities either to the field of commercial banking (e.g., receiving deposits) or to investment banking functions. Second, the Act created a deposit insurance system and a supervisory agency to oversee that system, the FDIC.

Prior to the 1933 Act, commercial banks increasingly had become involved in investment activities. Their involvement was such that “the end of the decade commercial banks and their affiliates had become the dominant force in the investment banking field.” In the wake of the stock market crash of 1929 and the subsequent banking crisis, however, legislative reformers like Senator Carter Glass, along with other banking authorities, came to regard investment banking and “stock gambling” as intrinsically risky and speculative and a threat to the economic stability of commercial banking. Therefore, they “considered any dealings in stocks and bonds an improper business pursuit for financial institutions entrusted with the savings of the general public.” Congress, under pressure to halt the persistent wave of bank failures and reintroduce stability into the financial system, divorced investment from commercial banking. By prohibiting “stock gambling” altogether, the reformers believed that fewer banks would fail and the banking system would thus stabilize itself.

The 1933 Act also created a system of federal deposit insurance and the FDIC. By establishing a system of deposit insurance, Congress intended “to insure bank deposits and reduce the economic disruptions caused by bank failures.” Deposit insurance contributes to the stability of the banking system in two ways. First, deposit insurance protects depositors. In turn, this protection prevents depositors, during a financial crisis, from stampeding into a bank to convert de-

186. 2 Malloy, supra note 2, at 7.14 (“The number of banks engaged in investment activities, either directly or through affiliates, was steadily rising during the 1920s.”).
187. Perkins, supra note 184, at 495.
188. Id. at 499 (citing Carter Glass, Letters to the Editor, N.Y. Times, Aug. 21, 1929).
189. Perkins, supra note 184, at 485.
190. Id. at 521.
191. History of the FDIC, supra note 24, at 40 (noting that reformers and the general public agreed that “recent events had shown that a system of federal deposit insurance was necessary to achieve and maintain financial stability”).
192. Id. at 3.
posits to cash. Their deposits, if lost in a bank failure, are covered by the FDIC. 193 Second, because depositor funds are protected and runs are therefore less likely, banks are able to attract deposits and rely upon those deposits to make long-term loans, thus promoting economic growth while maintaining stability. 194 Deposit insurance, by protecting individual deposits, also functions to "protect communities, states, and the nation against the economic consequences of widespread bank failure," 195 thereby reinstilling confidence in the entire banking system.

Deposit insurance, however, does not eliminate the risk of bank failure. Instead, deposit insurance protects depositors by shifting the risk of bank failure from depositors to the FDIC. 196 When a bank fails, it is no longer the depositor who loses, but the deposit insurance fund. Deposit insurance gave the federal government "a direct economic stake in the health of our financial institutions." 197 It exposed the federal government, and ultimately the taxpayer, to a significant portion of the risk of bank failure.

The possibility that the taxpayer might be exposed to the costs associated with bank failure provided a powerful justification for bank regulation and supervision: Bank activities should be monitored and restricted to limit the exposure of the insurance system. 198 This rationale led Congress, in 1935, to give significant supervisory powers to the FDIC that enabled it to regulate and examine certain insured


194. See Douglas, supra note 193, at 16. The FDICs' protection of depositors had an ameliorating effect on commercial banks. It allowed commercial banks to rely upon a more stable source of funding [deposits] and to avoid maintaining large cash reserves while forced to liquidate long term assets at inopportune times. Banks, thus, had the confidence to convert cash deposits into longer term investments - the loans that allow our economy to function.

195. Isaac, supra note 193, at 200.


197. See id. at 16. The costs associated with bank failure, due to the deposit insurance obligation, directly justify the plethora of rules and regulations imposed on banks and thrifts today. By assuming a significant portion of the risk from the marketplace, the government has been forced to play part of the role the marketplace might otherwise demand of banks by attempting to regulate that banks operate in a safe and sound manner.

198. History of the FDIC, supra note 24, at 133 ("The establishment of the FDIC provided an additional rationale for bank supervision, which was monitoring and restricting bank risk to limit the exposure of the insurance system.").
Initially, Congress granted the FDIC the authority only "to arrange for the payment of depositors, up to the insured maximum, after a bank was closed and placed in liquidation." Since that time, however, the FDIC has been delegated extensive statutory authority to enforce safe and sound banking practices and to prevent and prohibit unsafe and unsound banking practices. The FDIC has significant regulatory responsibility in order to minimize the risk of loss to the deposit insurance fund.

The banking crisis of 1933 fundamentally altered bank regulation. Prior to the crisis, both federal and state governments subscribed to a laissez-faire approach to banking. The crisis of 1933, however, forced those attitudes to change. The crisis precipitated a realization that the functions served by banks call for stability in the banking industry and that a relatively heavy dose of federal regulation was necessary to ensure the soundness and stability of the banking system. In addition, by giving the government a direct stake in the success of financial institutions, deposit insurance provided an additional rationale for heavy regulation by the FDIC: protection of the insurance fund, and the taxpayer.

Since 1933, FDIC regulation has been fairly successful in protecting both depositors and the insurance fund. The vast majority of de-

199. Banking Act of 1935, ch. 614, § 1, 49 Stat. 684 (1935); see also History of the FDIC, supra note 24, at 52-53 (discussing the powers granted); Seward & Zaitzeff, supra note 185, at 1707.
201. 1 Malloy, supra note 2, at 1.67.

Banks and bank regulators have long since recognized the importance of banks acting in ways that preserve public confidence in banks' capacity to meet their deposit obligations, thereby minimizing the likelihood of large, sudden drains of bank deposits. Indeed, deposit insurance constitutes a public safety net under the deposit taking function of banks. The presence of this public safety net reflects a long-standing consensus that banking functions are essential to a healthy economy. However, the presence of the public safety net—uniquely available to a particular class of institutions—also implies that those institutions have unique public responsibilities and may therefore be subject to implicit codes of conduct or explicit regulations that do not fall on other institutions.

Id.
204. See Litan, supra note 172, at 11 ("The first and most important motivation for bank regulation has been to ensure the safety and soundness of the banking and monetary system.").
205. See Douglas, supra note 193, at 17.

For many years, deposit insurance could properly be characterized as an unqualified success. From 1934 until 1939, bank failures averaged only sixty per year, at a total cost to the FDIC of only $18 million. From 1940 through 1980, bank and thrift failures were rare. Bank failures averaged less than seven per year, at an average cost to the FDIC of less than $4 million per
positors now have little to fear from bank failure;\textsuperscript{206} since the inception of federal deposit insurance there have been "few instances of actual losses to depositors."\textsuperscript{207} As a result, deposit insurance has also been successful in preventing depositor runs. Even during the worst period of bank and thrift failures in the late 1980s there were few bank runs.\textsuperscript{208} Furthermore, the FDIC has been a financial success. From 1933 to 1982, the FDIC's income from deposit insurance assessments and investment income surpassed its insurance losses and administrative and other expenses.\textsuperscript{209} By the end of 1948, the FDIC was able to repay fully the government's initial funding of $289 million.\textsuperscript{210}

C. The Crisis of the 1980s

In the late 1980s, another nationwide series of bank failures threatened the success of the FDIC. Between 1987 and 1989, banks failed at a rate of 200 per year.\textsuperscript{211} During the same years, 354 banks reported losses every year.\textsuperscript{212} Not since the Great Depression had the nation faced as grievous a banking disaster. These failures proved that the banking system was not immune from instability and needed further reform.

The crisis was attributable to a number of factors, but one cause in particular stood out in the public eye—director mismanagement. Amid reports that bank directors were fraudulently enriching themselves while driving their institutions to failure, the public reacted with great hostility toward bank directors.\textsuperscript{213} The public hostility was not without foundation. Director mismanagement clearly exacerbated the crises.\textsuperscript{214} One study of 184 failed banks and twenty-six failed thrifts "revealed that, in virtually every case, there had been a breach of fiduciary duty and a breakdown in managerial competence and responsibility."\textsuperscript{215}

\textsuperscript{206} See Isaac, supra note 193, at 200 (noting that the deposit insurance system has been able to "protect depositors of modest means from the consequences of bank failure").

\textsuperscript{207} Treasury Study, supra note 170, at 4.

\textsuperscript{208} Id.

\textsuperscript{209} History of the FDIC, supra note 24, at 62-63.

\textsuperscript{210} Id. at 58.

\textsuperscript{211} Brett D. Fromson, Will the FDIC Run Out of Money?, Fortune, Oct. 8, 1990, at 119, 120.

\textsuperscript{212} Id. at 119.


\textsuperscript{214} Sarah J. Hughes, Banking and Deposit Insurance: An Unfinished Agenda for the 1990s, 68 Ind. L.J. 835, 837 (1993).

\textsuperscript{215} Fischer, supra note 213, at 1744.
The crisis also resulted in a sudden realization that the insurance fund was not inexhaustible. During the 1980s, 700 commercial banks with aggregate assets of almost $170 billion failed or required assistance. The Federal Deposit Insurance Fund for commercial banks, which stood at an historic high at the end of 1987, had essentially exhausted its net worth by the end of the decade. Similarly, in handling 600 thrift failures between 1980 and 1988, the Federal Savings and Insurance Corporation overspent its resources by almost $60 billion.216

The Treasury Department, in its 1991 study, concluded that “the overextension of deposit insurance, result[ed] in excessive exposure for taxpayers.”217 The realization that the insurance fund was not a golden goose and that the taxpayer could be forced to bear the burden of bank failures, combined with public hostility toward bank directors, resulted in a desire to make those who contribute to a particular bank’s failure help pay the costs of that failure. To prevent taxpayer exposure and to protect the insurance fund, Congress enacted FIRREA, and included in it § 1821(k), the director and officer liability clause.

III. SECTION 1821(K) AND THE CASE FOR SIMPLE NEGLIGENCE

Congress expressly intended FIRREA to “strengthen the enforcement powers of Federal regulators of depository institutions”218 and “to strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.”219 Congress sought to further both these functions through the enactment of § 1821(k). Section 1821(k) is based on the premise that when bank directors cause their institutions to fail or lose significant amounts of money, those directors should be held personally liable. Thus, it maximizes the government’s ability to recover lost funds and to hold directors accountable for their mismanagement.220

217. Treasury Study, supra note 170, at ix. The Report argued that the banking crisis was due to a “four-part” problem:

(1) reduced bank competitiveness and financial strength, caused by outdated legal restrictions that have prevented banking organizations from responding to the evolution of financial markets and technology; (2) the overextension of deposit insurance, resulting in excessive exposure for taxpayers and weakened market discipline for banks; (3) a fragmented regulatory system that has created duplicative rules and has often failed to produce decisive remedial action; and (4) an undercapitalized deposit insurance fund.

Id.
As originally proposed, § 1821(k) would have allowed the FDIC to pursue directors 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." Because of the need to ensure that financial institutions are able to attract capable individuals as directors, however, Congress lowered the standard to gross negligence. In so doing, Congress undermined both the explicit purposes of FIRREA and the historical rationales underlying the regulatory powers of the FDIC and gave the FDIC a blunted weapon.

A. The Case for Simple Negligence

Congress' decision to lower the standard in § 1821(k) to gross negligence is flawed for several reasons. First, Congress gave excessive weight to the need to attract qualified directors. Second, the gross negligence standard forces the FDIC to bear the cost of negligent director mismanagement, thereby increasing the risk to the insurance fund and to taxpayers.

1. Attracting Qualified Directors

The only justification given by Congress for lowering the standard in § 1821(k) was the need for banks to be able to attract qualified directors. Congress, along with those courts holding that § 1821(k) preempts simple negligence claims, assume that if it were possible to sue officers and directors under a simple negligence standard, banks would not be able to attract qualified directors.

While all agree that it is in the public interest for banks to have competent people serving as directors, there appears to be little, if any, factual support for a theory that a mass exodus of directors will occur on the implementation of a simple negligence standard. Certainly Congress, in its debate over § 1821(k), considered no such evidence. Moreover, there is apparently no data that banks in states...
with a simple negligence standard have any more trouble attracting directors than those in states with a gross negligence or intentional tort standard. There is also no evidence that bank directors fled their positions en masse following the enactment of § 1821(k) as it now stands—despite the fact that in many states the gross negligence standard currently in § 1821(k) exposes directors to greater liability.

Further, Congress did not explain why simple negligence would create insurmountable barriers to attracting directors whereas gross negligence would not. Although Congress "balanced" the need to attract qualified directors with the need to hold directors liable for mismanagement resulting in bank failure, Congress gave no indication why gross negligence is the proper balance. Senator Riegle, one of FIRREA's floor managers, did note that, "[u]nlike other corporations, when a bank officer or director is guilty of gross negligence, it will often be the Federal taxpayer who is harmed. It would therefore appear to be justifiable to authorize the FDIC to seek to collect some of those funds from the guilty parties." 226 No senator noted, however, why the federal taxpayer would not be harmed, or why it would not appear to be justifiable to authorize the FDIC to seek to collect some of the lost funds, when a bank officer or director is guilty of simple negligence.

In addition, Congress ignored the possibility that, instead of deterring competent directors, a simple negligence standard may in fact "appropriately deter those people who lack the requisite qualifications or expertise from becoming directors of financial institutions." 227 In light of one study revealing that only eleven percent of those individuals nominated as bank directors in Georgia during the period from 1983 to 1988 had previous experience as bankers or directors of financial institutions, such a result may well be beneficial to the stability of the banking system. 228

Furthermore, the promise of large salaries earned by bank officers and directors, especially in large banks, rebuts the argument that large banks will not be able to attract directors under a simple negligence standard. For example, the chairman of the board of Citicorp was paid a salary of $1,150,000 in 1993, as well as a bonus of $3,000,000,
not including stock options and other compensation.\textsuperscript{229} Citicorp's Senior Executive Vice President, on the other hand, made a salary of \$437,500, with a bonus of \$875,000, also not including stock options.\textsuperscript{230} There can be little doubt that large banks paying these salaries will be able to attract qualified directors.

Admittedly, smaller banks in smaller towns cannot afford to pay the same salaries as large banks. Furthermore, small town banks have a more limited pool of candidates from which to select their officers and directors. Arguably, such banks would not be able to attract directors under a simple negligence standard and, therefore, may not be able to compete with larger banks who can attract directors. If smaller banks are forced out of business by a simple negligence standard, that end result may be for the best. Smaller banks cannot offer the economies of scale available to larger banks.\textsuperscript{231} Small banks, especially in relatively small towns, also have a more difficult time decreasing risk through asset diversification and, therefore, are less likely to be safe and sound.\textsuperscript{232} This risk in turn may threaten the stability of the nation's banking system.\textsuperscript{233} Nevertheless, even smaller banks have the option of acquiring director and officer liability insurance ("D&O insurance"). If D&O insurance is too expensive, all state-chartered banks have the option of declining federal deposit insurance altogether, thus removing the simple negligence standard, and ensuring that any possible negligence on the part of bank directors will not be passed on to the taxpayer.\textsuperscript{234}

\textsuperscript{230} Id.
\textsuperscript{232} Id. at 1102-03.
\textsuperscript{233} Id. at 1105.
\textsuperscript{234} While the idea of dropping federal insurance may seem unrealistic, at least one article has contemplated the possibility of "uninsured depository facilities" as an alternative to the costs of banking industry regulation—such as high director liability standards. Jonathan R. Macey and Geoffrey P. Miller, in their article \textit{Toward Enhanced Consumer Choice in Banking: Uninsured Deposit Facilities as Financial Intermediaries for the 1990's}, 1991 Ann. Surv. Am. L. 865, 867 (1992), argue that given the burdens of the regulatory system, the establishment of uninsured depository facilities or, as labeled by the authors, consumer choice banks, is a viable alternative:

A consumer choice bank, as we envision it, is simply a bank chartered and regulated at the state level which is not insured by the FDIC or subject to most of the existing forms of federal bank regulation. Such a bank would be able to operate at lower costs, and with greater efficiency and more flexibility, than existing commercial banks or thrift institutions. For this reason, it would be able to pay higher interest on deposits than banks which are federally regulated and insured. The consumer choice bank would thus be capable of competing with nonbank financial institutions on a more level playing field.

In addition to evening the playing field on which banks and nonbanks now compete, and providing consumers with an option currently unavailable to
Finally, it is illogical to insist that a simple negligence standard will make it difficult to attract directors when such a standard is applied in countless other situations. For example, a lawyer who negligently represents a client may be sued by that client for simple negligence. A doctor who negligently treats a patient may be sued for simple negligence. A driver who negligently injures a bystander may also be sued for simple negligence. Despite this "high" standard of personal liability in other areas of the law, many competent people seek to enter the medical and legal professions and to exercise their privilege to drive an automobile. Moreover, neither the client, patient, or bystander is a governmental entity ultimately supported by the taxpayer. Perhaps the FDIC deserves the benefit of a negligence standard just as much as the individual patient, especially considering the fact that the taxpayer may ultimately have to pay for the bank director's negligence.

Even if the adoption of a simple negligence standard would make it difficult for banks to attract directors, there are stronger countervailing considerations that outweigh this concern.

2. Protecting the Taxpayer and Making the Director Pay

The primary countervailing consideration is that by preventing the FDIC from holding directors liable for simple negligence, Congress has forced the FDIC to suffer the consequences of a director's negligence. Consider, for example, a situation where a director has negligently permitted her bank to make risky loans, thereby ultimately contributing to the bank's failure. The FDIC sues under § 1821(k) for gross negligence and loses. If the FDIC cannot find a purchaser for the bank's assets, it must guarantee insured deposits and the insurance fund must absorb this expense. Thus, the FDIC pays the cost of the director's negligence. Moreover, forcing the insurance fund to absorb the cost of the director's negligence contravenes one of the most im-

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them, the consumer choice bank offers additional advantages in terms of regulatory flexibility and capital formation. Because deposits in consumer choice banks would not be insured, the federal government's interest in regulating these banks would be much smaller than its interest in regulating traditional insured banks. Consumer choice banks could be allowed to take on levels of risk, or experiment with activities, that would be unacceptable for banks operating under federal deposit insurance, even under the forthcoming system of risk-adjusted premiums. Consumer choice banks could thus fill market niches that are inadequately served by existing depository institutions, and could act as innovators in the development of new banking products or services that, if successful, might be allowed for depository institutions operating under federal deposit insurance.

Id. at 867-68.

important goals of granting the FDIC enforcement authority—protecting the insurance fund. Most importantly, however, should the FDIC’s insurance fund fail, as did that of the FSLIC,236 the taxpayer would ultimately be forced to pay for the director’s negligence. 

‘[N]othing could be more paradoxical or contrary to sound policy than to hold that it is the public which must bear ... a risk that would never have been created but for defendant’s wrong-doing in the first instance.’237

3. The Stability of the System

Beyond taxpayer exposure, the gross negligence standard can threaten the stability of the banking system, even if the insurance fund remains healthy. To understand why, it is first necessary to describe the current state of commercial banking.

Although banks still serve the dual functions of accepting deposits and making loans,238 recent market innovations have allowed other financial intermediaries to produce services that are close substitutes for these essential bank services.239 Yet banks perform other essential, unique functions. The first and most important distinguishing characteristic of banks is that they issue transaction accounts; “that is, they incur liabilities payable on demand at par and are readily transferable by the owner to third parties.”240 A checking account is an example of a transaction account. Through a checking account, an individual or a business is able to deposit earnings and pay bills—to transact business. Through transaction accounts, banks create a safe payment system by which individuals and businesses are able to make and receive payments. Thus, even where a bank does not directly provide funding in a given situation, it still provides the payment mechanism by which others do business.

236. See Douglas, supra note 193, at 12 (noting that the Federal Savings and Loan Insurance Corporation (“FSLIC”), which was “abolished by Congress in 1989, left behind massive liabilities measured in the tens of billions of dollars as a result of the thrift failures which occurred through 1988”); 54 Banking Rep. (BNA) No. 21, at 899 (May 28, 1990) (estimating FSLIC’s deficit at $56.7 billion) (footnote omitted).


238. See supra notes 169-79 and accompanying text.

239. See Corrigan, supra note 203, at 5 (noting that “there are numerous instances in which nonbanks have been able to provide ‘bank-like’ services at a lower cost (or a higher rate of return) to the individual or corporate customer”); Treasury Study, supra note 170, at 6.


The owner of a transaction account can demand and receive currency in the face amount deposited in the account; write a check in the full amount of the account; or, perhaps most importantly, the owner of the account can transfer the full amount of the account to a third party . . . . The liquidity, mobility, and acceptability of bank issued transaction accounts permit our diverse economic and financial system to work with the relative ease and efficiency to which we are accustomed.

Id.
Second, "banks [remain] the primary source of liquidity for all other classes and sizes of institutions, both financial and nonfinancial."\textsuperscript{241} In other words, banks still make loans. Banks also issue contingent credit obligations such as loan commitments and standby letters of credit, which are equally important to the nation's economy.\textsuperscript{242} Whether directly supplying money in the form of a loan or providing a guarantee in the form of a loan commitment, banks provide direct and standby sources of credit and liquidity central to the efficient functioning of the economy.

Because banks provide these functions, they are still subject to the same systemic liquidity crisis as they were in the 1930s. Because a bank's primary assets are still liquid, and its primary liabilities are still highly illiquid, banks today remain inherently susceptible to depositor runs.\textsuperscript{243} Furthermore, because banks today still serve unique functions, when a bank encounters problems or fails, the rest of the banking system must fill the void left by the problem bank in the backup credit system. Therefore, the failure of a bank still has a far reaching effect on the liquidity of the banking system as a whole. Professor Helen Garten explained the systemic effects of a bank failure in today's economy.

\begin{quote}
[T]he most significant cost associated with bank failures is not their impact on the individual bank's own customers or community, but their broader effect on the liquidity of the banking system as a whole. . . .
\end{quote}

\begin{quote}
. . . [D]efault by a bank results in a net loss of a source of liquidity for which no alternative exists except other banks. These remaining banks must themselves weather the sudden increased demand for liquidity either by liquidating assets or by selling new deposits. Since the only way to stem the domino effect of credit withdrawal caused by any business failure is to have at least some firms that remain ready and willing to provide liquidity, it is essential that
\end{quote}

\textsuperscript{241} Id. at 9; cf. 1 Malloy, supra note 2, at 1.10 fig. 1.1 (indicating that banks have the single largest share of total private financial assets of all financial intermediaries).

\textsuperscript{242} Corrigan, supra note 203, at 9-10.

These standby credit facilities are, for example, the arrangements which permit most financial markets and institutions to function as they do. It is highly unlikely that the commercial paper market would function very well were it not for the presence of standby bank credit facilities obtained by those corporations that issue commercial paper. Similarly, it is very difficult to imagine that even the best managed and capitalized broker/dealers could handle their day-to-day business with the efficiency that is now so common without ready access to bank lines of credit. The same, of course, applies to nonfinancial corporations. Indeed, while all such institutions may, over time, have access to a wide variety of funding sources, direct or standby bank credit facilities are the cornerstone upon which these alternative sources of credit rest. . . .

\begin{quote}
[T]he direct and standby credit facilities provided by banks are the foundation upon which other credit markets depend for their vitality.
\end{quote}

\textit{Id.}

\textsuperscript{243} See supra notes 173-175 and accompanying text.
these sources of funding be secured. Although the repercussions of individual bank failure can be tolerated if a sufficient number of healthy banks remain in operation, as the liquidity crisis spreads, each successive failure puts additional strain on the rest of the banking system.\(^ {244}\)

Because a systemic liquidity crisis is a constant and serious threat facing the banking system, it is important to note how that system may be affected by § 1821(k).

Under the gross negligence standard in § 1821(k), the insurance fund, not the negligent director, bears the costs of a director's simple negligence. The insurance fund, however, must be kept at a statutorily defined minimum percentage of the total amount of insured deposits.\(^ {245}\) Therefore, when the failure of a bank partially depletes the fund, the cost of restoring the fund to its statutory minimum amount must be passed on somehow. If a bank fails due to directorial negligence, and the FDIC cannot find a purchaser for the bank's assets, the FDIC may ultimately be forced to pass on the cost in the form of higher premiums for federal deposit insurance.

Higher deposit insurance premiums may cause one of two results. First, the banks may pass the cost of the higher premiums on to the consumer. This, however, may reduce bank competitiveness, causing banks to lose even more customers to nonbank competitors. When a bank loses a customer to a nonbank competitor, an important source of liquidity—that customer's deposits—is lost to the bank and the banking industry. Second, if a bank cannot afford to pass the premiums on to consumers for fear of losing customers, the bank must pay

\(^{244}\) Garten, supra note 175, at 161-62. Garten also discusses why the failure of a general corporation does not have the same effect on liquidity:

If a corporation defaults on its bond payments, the bondholders have been deprived of access to their funds to the same extent as depositors in a failed bank. Nevertheless, even if this default has raised questions about the creditworthiness of every other corporate borrower, alternative sources of funds, such as bank deposits, have not been eliminated either for bondholders in need of cash or other corporate issuers temporarily unable to raise funds in the debt markets. Even if some bondholders default on payments to their own creditors, precipitating further failures, so long as banks remain as back-up sources of liquidity, a financial panic can be contained.

\(^{245}\) The FDIC must maintain a “designated reserve ratio” currently set at 1.25% of estimated insured deposits. 12 U.S.C. § 1817(b)(2)(A)(I), (iv)(I) (Supp. V 1993). The reserve ratio, however, may be set at “a higher percentage of estimated insured deposits [if] the Board of Directors determines [it] to be justified for that year by circumstances raising a significant risk of substantial future losses to the fund.” 12 U.S.C. § 1817(b)(2)(A)(iv)(II). If the reserve ratio falls below the designated reserve ratio, the FDIC is authorized to “set semiannual assessment rates . . . that are sufficient to increase the reserve ratio . . . to the designated reserve ratio not later than 1 year after such rates are set.” 12 U.S.C. § 1817(b)(3)(A). See also History of the FDIC, supra note 24, at 61 (noting that mandatory adjustments to the assessment rate must be made “if the ratio of the deposit insurance fund to estimated ‘insured’ deposits were to exceed 1.40 percent or were less than 1.10 percent”).
the higher premium out of its own assets, again resulting in a loss of liquidity which could have been applied toward more profitable investments.

In either case, higher premiums result in a loss of liquidity to the individual banks and, therefore, to the banking system. This puts an unnecessary strain on the banking system. The system must absorb not only the loss of liquidity caused by the bank failure, but also the additional loss of liquidity caused by the higher premiums. In light of the need for stability in the banking system, evidenced by the banking crises in the 1930s and 1980s, this result is both dangerous and unnecessary.

There is no evidence that a simple negligence standard will make it impossible for banks to attract directors. On the other hand, it is intuitively correct and just for directors to be held accountable for their negligent management of a bank; indeed, this is one of the purposes of § 1821(k). The alternative—requiring the FDIC to bear the cost of a director's simple negligence—exposes taxpayers to financial liability, threatens the liquidity of the banking system, and prevents the FDIC from "using every legal means available to conserve FDIC financial resources." For these reasons, the FDIC should be allowed to hold bank directors liable under a standard of simple negligence.

B. Applying a Simple Negligence Standard

There are two ways to ensure that the FDIC will be allowed to bring simple negligence causes of actions against bank directors. The first would be for the Supreme Court to dispose of the issues surrounding § 1821(k) in favor of simple negligence claims. Judicial interpretation of § 1821(k) does not, however, suffice for two reasons. First, because relatively few states have simple negligence standards for directors, a holding that § 1821(k) does not preempt state laws with a lower, simple negligence standard of liability would be of limited assistance to the FDIC in its attempts to maintain the insurance fund. Second, following the Supreme Court's decision in O'Melveny & Myers v. FDIC, it is unlikely that the Court would allow the FDIC to bring federal common law claims of simple negligence against bank directors. In O'Melveny & Myers, the Court held that there is no federal common law under FIRREA and declined to adopt "a court-made

246. See supra notes 223-225 and accompanying text.
247. History of the FDIC, supra note 24, at 57.
248. See Schipani, supra note 30, at 744 (noting that "over forty states have enacted legislation either insulating or permitting corporations to insulate certain governance officials from acts of simple negligence" and that "[m]any states also provide exculpation for acts of gross negligence").
250. Id. at 2052-53.
rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.\textsuperscript{2} Because the Supreme Court in \textit{O'Melveny & Myers} found that FIRREA was comprehensive and detailed, it is almost beyond doubt that the Supreme Court would find that bank director liability is not one of those "extraordinary cases" that would warrant use of federal common law.\textsuperscript{252}

The second method to ensure that the FDIC will be able to bring suits against bank directors based on simple negligence is a congressional revision of § 1821(k). Because of the limited effect of a Supreme Court disposition, Congress should raise the standard of liability in § 1821(k) to simple negligence. Changing the law, however, is not as simple as inserting "simple" in the place of "gross" in § 1821(k) and otherwise leaving the current provision as is. The split of judicial authority, previously discussed, demonstrates the need to redraft the section entirely.

1. Uniformity

The present § 1821(k) defines the standard of conduct according to state law. As many of the courts finding that § 1821(k) preempts state law noted, however, public policy supports a national, uniform standard of liability\textsuperscript{253} to "replace an increasingly confusing body of state law."\textsuperscript{254} Defining the standard of conduct by state law is problematic because different states have different definitions of standards of conduct.\textsuperscript{255} Allowing culpable conduct to be defined by state law causes director liability to turn, not on the significance of the misconduct, but instead on the location of the federally insured bank. As the \textit{Canfield I} court noted: "Surely one of the goals of this legislation was to make liability dependent upon culpable conduct rather than state of residence."\textsuperscript{256} To make liability truly dependent on culpability instead of state of residence, the simple negligence standard must be defined according to federal law.

A national standard of bank director liability also promotes efficiency in prosecuting directors of failed, federally insured banks. Forcing regulators to learn different state law definitions means more time, legal research, and cost borne by the regulators. The administrative and legal costs of pursuing directors of failed institutions is tre-

\begin{itemize}
\item \textsuperscript{251} Id. at 2054.
\item \textsuperscript{252} See id. at 2056.
\item \textsuperscript{253} See supra notes 57-61 and accompanying text.
\item \textsuperscript{255} See supra note 77 and accompanying text.
\item \textsuperscript{256} Canfield I, 763 F. Supp. at 540.
\end{itemize}
Definition of the standard of liability by reference to state law increases this cost. On the other hand, defining the standard under federal law "establishes the parameters of liability for the benefit of officers and directors and the FDIC. Everyone now knows where they stand." A national standard of liability, defined by federal common law, will allow both the regulators' time and effort and the taxpayers' dollars to be focused on pursuing culpable parties, not on deciphering state law definitions. Such a standard allows greater efficiency for regulators than if they are "forced to wind [their] way through the morass of state legislation engulfing the issue of director and officer liability. Uniformity saves money, time and manpower. In the midst of the financial institution crisis facing this nation these are goals worthy of serious consideration."

2. The Business Judgment Rule

There is an additional reason for defining the negligence standard through federal law. Absent federal statutory law governing bank director liability and fully preempts state law, application of a state's business judgment rule could defeat a simple negligence standard. In the context of director liability, most states apply the business judgment rule, "a doctrine limiting the liability of a director." Beyond such a general description it is hard to define the rule, however, because of a "lack of consensus ... as to what the rule really is."

Some courts have held that the business judgment rule has the effect of raising the standard of liability for directors to gross negligence. For example, both the courts in FDIC v. Mintz and RTC v. Gibson held that the gross negligence standard in the current § 1821(k) does not preempt state law claims based on simple negligence. Both courts went on to conclude, however, that the business judgment rule effectively lowered the standard of liability for directors to gross negligence and, therefore, the business judgment rule barred the FDIC from pursuing its simple negligence claims. Obviously

257. See id.
258. Id.
259. Id.
260. Id.
265. See Mintz, 816 F. Supp. at 1546 ("The result of the application of the business judgment rule in Florida is that the standard of liability for corporate directors is 'gross negligence.'"); Gibson, 829 F. Supp. at 1117 ("This court believes that the Missouri business judgment rule provides shelter for conduct equivalent to what the parties have referred to as 'simple negligence.'... [T]he Missouri business judgment rule bars claims for simple negligence.").
this application of the business judgment rule disembowels any simple negligence standard and is paramount to lowering that standard to gross negligence.

Other courts have held that the business judgment rule imposes a good faith standard. Therefore, "as long as a director acts in good faith and with due care in the process sense, the director will not be found liable even though the [business] decision itself was not that of the 'ordinarily prudent person.'"266 Here the question is not whether the director was negligent or grossly negligence, but whether she acted in bad faith.

Finally, some courts have held that the business judgment rule is simply a rebuttable presumption that a director's actions are "within the powers of the corporation (intra vires) and the authority of management, and involve[] the exercise of due care and compliance with applicable fiduciary duties."267 Courts applying this version of the business judgment rule often state that the rule " 'does not conflict with the concept of negligence'"268 because the rule simply presupposes that reasonable diligence has been exercised. This version of the business judgment rule poses the least threat to a simple negligence standard because it is merely a tautology:

Stating that directors will be immune from liability so long as they act with due care (or reasonable diligence) and comply with their fiduciary duties (that is, are disinterested and act in good faith) is simply saying that directors will not be liable for their decisions unless there is a reason for holding them liable.269

In other words, directors will not be held liable unless they are negligent.

The lack of consensus on the definition of the business judgment rule demonstrates that courts should not apply the business judgment rule to actions brought under § 1821(k). Allowing courts to apply differing versions of the business judgment rule undermines the rationale behind a uniform standard of liability. Allowing directors to hide behind the differing state definitions of the business judgment rule makes liability dependent, not on culpable conduct, but on state of residence. Furthermore, forcing regulators to learn different state law definitions of the business judgment rule increases the time, effort, and cost of pursuing bank directors. Finally, states applying the "gross negligence" definition of the business judgment rule effectively ban suits brought by the FDIC under simple negligence. Defining the neg-

266. Hansen, supra note 261, at 1240.
269. Gevurtz, supra note 262, at 290-91.
BANK DIRECTOR LIABILITY

ligence standard under federal law, without applying the business judgment rule, would avoid these results.

Because the business judgment rule is an established element of corporate law, however, it is important to illustrate why, even were the business judgment rule defined by federal law, it should not be applied to suits brought by the FDIC under § 1821(k). The business judgment rule should not be applied because none of the rationales supporting application of the rule apply to actions by the FDIC against bank directors.

There are three main policy grounds advanced for the application of the business judgment rule:

a. If management were liable for mere good faith errors in judgment, few capable individuals would be willing to incur the financial and emotional risk of serving as a director or officer. Competent persons should be encouraged rather than deterred from seeking to serve as corporate managers.
b. Courts are generally ill-equipped to evaluate business judgments or to second guess the validity of a business decision.
c. Corporate managers should be encouraged to efficiently manage the corporation by taking reasonable risks and by being allowed wide discretion in the handling of corporate affairs.

The first rationale, the availability of applicants, has been discussed above. The argument that courts are "ill-equipped to evaluate business judgments or to second guess the validity of a business decision" raises an issue that seemingly collapses under its own weight. If fact finders are not equipped to evaluate business judgments, how can they be equipped to evaluate other tort claims for negligence or, for that matter, any of the numerous and complex issues that courts daily undertake? In this respect, making a business decision is indistinguishable from making a medical decision or a decision as to the safe speed for an automobile. Judges and juries are not business experts, yet neither are they medical or traffic experts. If courts can evaluate the decision to perform or not to perform a specific medical procedure, the intent behind an allegedly criminal act, or the allegedly negligent decision of a driver to drive at a certain speed, certainly a court can evaluate the reasonableness of a business decision. Business decisions do not represent a distinct and impenetrable field rendering them particularly inappropriate for judicial review. On the contrary, business decisions are quite similar to decisions by other professionals. In fact, "there is nothing about business decisions which makes

270. Id. at 287 (noting that "the rule, in one form or another, extends back through 160 years of judicial decisions").
272. See supra notes 223-235 and accompanying text.
274. Gervurtz, supra note 262, at 309.
an after-the-fact judicial review of reasonableness inherently less accurate than in other areas."²⁷⁵

Finally, courts urge that the business judgment rule is important because a corporate manager should be encouraged to manage a corporation efficiently by taking reasonable risks and by being allowed wide discretion.²⁷⁶ In Joy v. North,²⁷⁷ the Second Circuit described the "risk encouraging" rationale for the business judgment rule in the following terms: "[B]ecause potential profit often corresponds to the potential risk, it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions... Shareholders can reduce the volatility of risk by diversifying their holdings."²⁷⁸

The risk-taking rationale is problematic for two reasons. First, it is far from clear why this rationale applies only to directors of corporations and not to others:

Overall, the concern that liability for ordinary negligence will deter directors from taking worthwhile risks sounds remarkably like the lament of doctors who complain that the threat of malpractice suits has forced them to engage in "defensive medicine" with the result of unnecessarily increased costs and the avoidance of worthwhile but more risky medical treatments. Similar laments can be heard coming from other professionals faced with liability for negligence. The concern about director liability and risk taking may well be valid. It is not, however, unique.²⁷⁹

Thus, while the risk-taking rationale may be a valid argument for tort reform, it does not justify differentiating between corporate directors and other potential tort defendants who make similar assertions for more lenient treatment.²⁸⁰

Second, while a risk-taking rationale might make sense for a general business corporation, it does not make sense for a bank. Because

²⁷⁵ Id. at 311. In addition, although courts repeatedly maintain that "judges are not business experts," Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919), and, therefore, courts will not substitute their business judgment for that of the corporate director, they often do just that. As a classic example, in Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919), the Supreme Court of Michigan, after stating that it is not "the duty of the courts to interfere" in business decisions, held that Henry Ford's business decision not to declare special dividends, while not tainted with fraud, illegality, or even negligence, was an improper business decision. Id. at 684. In Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Supreme Court of Delaware announced that, in determining whether a motion to dismiss a derivative suit, made by an independent committee set up by the corporation, should be granted, the court "should determine, applying its own independent business judgment, whether the motion should be granted." Id. at 789 (emphasis added). Not only are courts qualified to exercise review of business judgments, they often do.

²⁷⁶ Granada Investments, 823 F. Supp. at 455.
²⁷⁸ Id. at 886.
²⁷⁹ Gevurtz, supra note 262, at 312.
²⁸⁰ Id. at 289.
banks serve essential economic functions, 

"[t]he first and most important motivation for bank regulation has been to ensure the safety and soundness of the banking and monetary system." Because banks provide liquidity for other institutions, it is essential that banks' assets be sound. Thus, risk taking in the banking context is more vulnerable to criticism because it may threaten the maintenance of a strong national banking system. 

The concern with limiting the risk-taking activities of banks is, in fact, precisely the rationale behind the original divorce of investment and commercial banking. Because "stock gambling" was seen as inherently risky, it was perceived to be a threat to the stability of the banking system. Not only did Congress ban commercial banks from participating in what it reasoned to be an inherently risky activity, but the savings and loan crisis of the late 1980s forcefully demonstrated the dangers of risk taking in the banking context. 

The dangers of commercial banks engaging in risk-taking behavior was aptly demonstrated by the banking crisis of the 1980s. The rash of bank failures in the late 1980s "can be attributed in great measure to the concentrations of risky assets in the banks' portfolios." By making large, imprudent, and risky loans, most notably for real estate, many savings and loan directors drove their institutions to ruin. These "[p]oor thrift management decisions . . . resulted in failure for hundreds of FSLIC insured thrifts," thereby threatening the stability of the nation's banking system. While directors were not solely to blame for the banking crises in the 1980s, the risk taking of many directors contributed significantly to that crisis. 

Finally, it must be noted that the FDIC is forced into the role of receiver; "like a bankruptcy trustee and unlike a normal successor in interest, [the FDIC] does not voluntarily step into the shoes of the bank, it is thrust into those shoes." The FDIC is, therefore, an "involuntary stockholder," and cannot diversify its "holdings." 

Due to the nature of banks and the banking system, courts should not encourage bank directors to take risks to the same degree that might be tolerable in a general business corporation. In the case of

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281. See supra notes 238-244 and accompanying text.
282. Litan, supra note 172, at 11.
283. Corrigan, supra note 203, at 11 (noting that "the ability of banks to fulfill their role as standby sources of liquidity and credit rests importantly on the quality and consistency of credit judgments made by banks").
284. See supra notes 188-190 and accompanying text.
banks, "the law [must] create incentives for overly cautious corporate decisions."\textsuperscript{288}

In light of the foregoing considerations, Congress should redraft § 1821(k) to allow the FDIC to hold bank directors liable for simple negligence. Further, this simple negligence standard should be defined by federal law without the benefit of the business judgment rule.\textsuperscript{289}

C. Meanwhile . . . Back in the Courts

It is clear that until Congress redrafts § 1821(k), federal courts will be faced with the preemption problem. Those courts faced with the preemptive reach of § 1821(k) must concede that "Congress' choice of language in 12 U.S.C. section 1821(k) is susceptible to two valid yet opposing interpretations,"\textsuperscript{290} and then face the real question: "Which 'correct' interpretation will the court adopt, and why?"\textsuperscript{291} Courts should not waste time composing treatises on the plain language and legislative history of the section; they should instead focus on the public policy rationales underlying that section. Moreover, the courts should not limit themselves to the considerations of uniformity and


\textsuperscript{289} The resulting statute may resemble the following:

\textsuperscript{(k)} Liability of directors and officers

(1) 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, which action is prosecuted wholly or partially for the benefit of the Corporation—

(1) acting as conservator or receiver of such institution,

(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or

(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title, for \textit{simple negligence}, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than simple negligence) including intentional tortious conduct, as such terms are defined and determined in paragraph (ii) of this section or as they are defined and determined under applicable federal common law as developed by the courts. In developing that law, the courts shall not apply the business judgment rule, or any other similar rule limiting the Corporation's ability to hold directors and officers personally liable for simple negligence. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable state or federal law.

(ii) Simple negligence for the purposes of this section shall be defined as a failure to act with the care which an ordinarily prudent person would exercise under similar circumstances. Violation of this standard shall not be construed to require bad faith, fraud, self-dealing, or a conflict of interest on the part of the director charged with a violation under this section.

\textsuperscript{290} FDIC v. Canfield, 967 F.2d 443, 449 (10th Cir.) (Brorby, J., dissenting), cert. dismissed, 113 S. Ct. 516 (1992).

\textsuperscript{291} Id.
the attraction of qualified directors. Instead, courts should look to the policy behind the regulation of banking in general as well as the policy behind the FDIC and its regulatory and supervisory powers. Given these policy considerations, courts must find that § 1821(k) does not preempt simple negligence claims under either state law or federal common law.

CONCLUSION

Section 1821(k) must be amended to contain a simple negligence standard to hold directors liable for their negligence and to allow the FDIC to protect the deposit insurance fund and the taxpayer, thereby helping to maintain the stability of the banking system. If an automobile driver "who makes a mistake in judgment as to speed or distance injuring a pedestrian will . . . be called upon to respond in damages," and a doctor who makes a negligent mistake as to treatment will be held liable to the injured patient, then a bank director or officer who negligently fails to investigate a potentially risky loan, or fails reasonably to oversee bank operations, thereby causing the bank to fail and threatening the stability of the banking system, must also be held personally liable.293

293. See Franklin A. Gevurtz, The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?, 67 S. Cal. L. Rev. 287, 336 (1994). In concluding that "corporate law would do well without" the business judgment rule, id. at 337, Professor Gevurtz writes:
The obstetrician dealing with a difficult labor, the trial lawyer planning strategy, or just the automobile driver attempting a left turn into a busy thoroughfare must exercise judgment. So must we all. When this judgment results in harm to another, then the doctor, attorney, or driver can find him or herself as the defendant in a suit based upon negligence. Perhaps this has produced a system in which there is too much second guessing by those who have the benefit of twenty-twenty hindsight. Perhaps an unintended effect of this Article will be to add to the debate over tort law reform. Be that as it may, there is simply no call for treating business judgments by corporate directors any differently than any other judgment.

Id. at 336.