1992

FIRREA and Federal Common Law: The Extent to Which They Preempt State Law Regarding the Duties and Standard of Liability Imposed upon Financial Institution Directors

Eric G. Zajac

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Banking and Finance Law Commons

Recommended Citation


Available at: http://digitalcommons.law.villanova.edu/vlr/vol37/iss5/5

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
FIRREA AND FEDERAL COMMON LAW: THE EXTENT TO WHICH THEY PREEMPT STATE LAW REGARDING THE DUTIES AND STANDARD OF LIABILITY IMPOSED UPON FINANCIAL INSTITUTION DIRECTORS

I. INTRODUCTION

Over the past few years, the press has focused much of its attention on the collapse of the federal savings and loan industry and the resulting impact on the nation’s economy. More recently, the press has turned some of that attention to the federal banking industry in which the highest rate of bank failures since the Great Depression has raised the specter that the federal funds insuring deposits are at serious risk of drying up. The two federal regulatory agencies that overlook the savings and loan and banking industries, the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC), have become more aggressive in their efforts to recoup lost funds. Congress has joined these efforts by passing the Financial Institution Reform, Re-


The collapse of the savings and loan industry is largely to blame for an expected all-time record deficit in fiscal 1992 of $348.3 billion; the 1991 deficit of $268.7 billion was itself a record. See U.S. Deficit for ’91 Was Worst Ever, PHILA. INQUIRER, Oct. 30, 1991, at A1 (discussing impact of savings and loan cleanup on federal budget deficit).

2. See, e.g., Alan S. Blinder, The Bank Crisis and the S&L Fiasco: Two Sides of a Bad Coin, BUS. WK., Feb. 4, 1991, at 16 (noting that Federal Deposit Insurance Corporation (FDIC) is badly underfunded). Blinder, a Princeton University economics professor, believes that while savings and loans owe their demise to the failure of risky but high-yielding investments, banks are losing money due to bad business judgment. Id. In particular, developing countries, corporate raiders and defenders, and real estate developers have proven to be bad credit risks for the banks. Id.

3. Brett D. Fromson, Will the FDIC Run Out of Money?, FORTUNE, Oct. 8, 1990, at 119 (noting that banks have been failing at highest rate since Great Depression and that 354 banks reported consecutive annual losses from 1986 to 1990).

4. See id. at 120 (indicating that FDIC’s insurance fund shrunk by $5.1 billion in 1988 and 1989); John Greenwald, Requiem for a Heavyweight, TIME, Jan. 21, 1991, at 54-55 ("[I]t is certainly not beyond the realm of possibility that taxpayer money will be needed to finance bank bailouts if conditions deteriorate." (quoting FDIC Chairman L. William Seidman)).
covery and Enforcement Act of 1989 (FIRREA). Among other goals, FIRREA targets depository institution directors, imposing liability for breach of their corporate duties.

While Congress broadens the potential liability of financial institution directors, state legislatures are curbing corporate director liability. Several states, including Pennsylvania, recently enacted legislation


6. In at least three ways, FIRREA expands the ability of federal regulators to affect the operation of financial institutions. First, the statute expands the scope of parties subject to the regulators' enforcement authority. The enforcement authority not only reaches a bank, savings and loan, or their directors and officers, but also now reaches consultants and independent contractors such as attorneys and accountants. 12 U.S.C. § 1813(a)(4) (Supp. II 1990) (defining "institution-affiliated party"). Second, FIRREA increases the personal liability of parties who are subject to the statute's enforcement authority. See id. § 1818(i)-(j). Third, FIRREA grants new enforcement mechanisms to regulators, including cease and desist orders, removal orders and the authority to take action against a party who has left the financial institution. See id. See generally Sczudlo & Dederick, supra note 5, at 123-28 (discussing impact of FIRREA changes).

7. The term "depository institution" is one of the terms of art used in FIRREA. See FIRREA, Pub. L. No. 101-73, 103 Stat. 183 (1989). This term is used instead of the term "bank" to make it clear that the statute addresses savings associations and banks alike. 12 U.S.C. § 1818 (Supp. II 1990); Sczudlo & Dederick, supra note 5, at 124.

Another FIRREA term of art is "institution-affiliated party," which replaces terms such as "director," "officer," "employee," "agent" and "other person participating in the affairs of an institution." 12 U.S.C. § 1818; Sczudlo & Dederick, supra note 5, at 123.

8. 12 U.S.C. § 1821(k) (Supp. II 1990). Under § 1821(k), depository institution directors and officers are personally liable for breaching their "duty of care." Id. For the text of § 1821(k), see infra note 24. For a discussion of § 1821(k), see infra notes 23-26 and accompanying text.


10. See 15 PA. CONS. STAT. ANN. §§ 1701-1793 (Supp. 1992). For a further discussion on how the Pennsylvania corporate law seeks to shield directors from personal liability, see infra notes 11-13 and accompanying text.
narrowly defining the scope of a corporate director's duties, the standard of liability imposed upon a director and the parties who have standing to bring an action against a director. Certain aspects of these laws conflict with FIRREA and the rules of decision found in the accumulated federal cases involving actions brought against savings and loan and bank directors. Accordingly, the goal of this Comment is to determine the extent to which FIRREA and "federal common law" preempt state law regarding the duties and standard of liability imposed upon bank and savings and loan directors.

II. FIRREA

A. History of FIRREA

Prior to the passage of FIRREA in 1989, two primary sources of legislation granted federal regulators enforcement power over financial institutions. The first source of legislation was the Financial Institutions Supervisory Act of 1966 (FISA). FISA gave federal banking agencies the authority to issue cease and desist orders, to suspend and remove directors and to issue prohibition orders. The second source of legislation was the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA). FIRA enhanced federal regulators' power

11. 15 Pa. Cons. Stat. Ann. § 1717 (duty of director runs "solely to the business corporation"). Pennsylvania law provides that a director "shall perform his duties . . . in a manner he reasonably believes to be in the best interests of the corporation." Id. § 1712(a). In considering what is in the "best interests of the corporation," the director may, but is not required to, consider what effect his action will have "upon any or all groups affected by such action, including shareholders." Id. § 1715(a)(1). Similarly, a Pennsylvania director is free to consider both the long-term and short-term impact of his action "and the possibility that these interests may be best served by the continued independence of the corporation." § 1715(a)(2).

12. Id. § 1713 (shareholders may adopt by-laws providing that director is not personally liable for any action taken, unless director breached duty under subchapter, and breach constitutes self-dealing, willful misconduct or recklessness).

13. Id. § 1717 (duty of director may be enforced directly by corporation or may be enforced by shareholder in derivative suit but may not be enforced directly by a shareholder individually or by another person or group).

14. See, e.g., Lane v. Chowning, 610 F.2d 1385, 1388-89 (8th Cir. 1980) ("[I]t is well settled that the fiduciary duty of a bank officer or director is owed to the depositors and shareholders of the bank." (emphasis added)); see also FDIC v. Mason, 115 F.2d 548, 550-51 (3d Cir. 1940) (holding that "bank directors have a duty at common law to exercise ordinary care and prudence in the administration of the affairs of their bank" (emphasis added) (citing Briggs v. Spaulding, 141 U.S. 132 (1891)); Fleishhacker v. Blum, 109 F.2d 543, 547 (9th Cir. 1940) (noting that law holds bank president "to standards of probity and fidelity more lofty than those of 'the market place'", cert. denied, 311 U.S. 665 (1940).


16. See id.


Published by Villanova University Charles Widger School of Law Digital Repository, 1992
already granted under FISA.\textsuperscript{18} Other statutes complemented FIRA and FISA with additional enforcement powers.\textsuperscript{19}

FIRREA was designed in part to consolidate FIRA, FISA and other scattered regulatory statutes into a single enforcement scheme.\textsuperscript{20} FIRREA was also designed to clarify ambiguities in the agencies' enforcement authority.\textsuperscript{21} Most importantly, FIRREA was designed to expand "the ability of regulators to impose personal liability on directors, officers and others affiliated with financial institutions."\textsuperscript{22}

B. The Extent to Which FIRREA Preempts State Law

FIRREA expands the ability of regulators to impose personal liability on financial institution directors by codifying the standard of liability.\textsuperscript{23} Section 1821(k) of FIRREA provides that depository institution directors and officers face civil monetary damages if they are grossly negligent in the discharge of a "duty of care."\textsuperscript{24} A director also faces...
liability for "conduct that demonstrates a greater disregard for a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law." 25

FIRREA contemplates the imposition of liability in cases where the FDIC is acting in its role as a conservator or receiver of a failed depository institution. 26 The civil monetary damages can be very steep. The maximum penalties begin at five thousand dollars per day and can reach as high as one million dollars per day for as long as a FIRREA violation continues, depending upon the type of violation. 27

In defining the standard of liability imposed upon financial institution directors and officers, FIRREA does not expressly preempt state law. A review of the statute’s legislative history, however, erases any doubt as to Congress’ intention in this matter. A House Conference report on the statute reads: "[Section 1821(k)] preempts state law with respect to claims brought by the FDIC in any capacity against officers or

institution directors and officers, is a cornerstone provision of FIRREA. It states:

A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the [FDIC] under other applicable law.

Id. (emphasis added)....

25. Id.

26. Id. After a bank has been declared insolvent, the FDIC takes over as the receiver. Id. § 1821(c). The FDIC as receiver has two choices: 1) liquidate the assets of the bank and pay off the depositors; or 2) sell certain assets and liabilities of the failed bank to another bank and purchase any leftover assets in its own corporate capacity. See FDIC v. Butcher, 660 F. Supp. 1274, 1279 (E.D. Tenn. 1987).

27. 12 U.S.C. § 1818(i)(2) (Supp. II 1990). The types of penalties and their corresponding monetary damages are divided into three tiers. The first tier applies to individuals or institutions who violate a law, regulation, final or temporary agency order, written condition imposed by a regulator or agreement between the institution and the regulator. Id. § 1818(i)(2)(A). The maximum civil penalty under the first tier is not more than $5,000 per day for each day during which such violation continues. Id. Second tier violations require a showing that a party has: 1) engaged in an unsafe and unsound practice, breached a fiduciary duty to the institution or committed a Tier I violation, and 2) that the violation, practice or breach of duty is a pattern of misconduct, that the institution will suffer more than a minimal loss as a result or that the conduct resulted in a pecuniary gain to the party. Id. § 1818(i)(2)(B). Under the second tier, the maximum penalty is $25,000 per day for each day of violation. Id. A third tier violation involves knowing violations of FIRREA and either knowingly or recklessly causing a “substantial loss” to the institution or receiving a “substantial pecuniary gain or other benefit.” Id. § 1818(i)(2)(C). The maximum penalty under the third tier is $1,000,000 per day for each day of the violation. Id. § 1818(i)(2)(C)-(D). See Szczudlo & Dederick, supra note 5, at 131-33 (discussing three tiers of penalties and conduct necessary to qualify for each tier).
directors of an insured depository institution." Thus, the inference is strong that, with regard to the standard of liability for breach of a "duty of care," FIRREA preempts state law.

The proper definition and scope of the "duty of care" remain unclear under § 1821(k). This provision refers to state law as a source for defining certain terms, such as "intentional tortious conduct." Some commentators have postulated that because the statute depends upon state law to supply definitions for terms, the law of the forum state also may define "gross negligence" itself. The question remains whether state law also may define the "duty of care" expected of depository institution directors within the meaning of FIRREA, or whether FIRREA incorporates a body of federal common law defining the duties of financial institution directors and officers.

Whether there is a body of federal common law is of great importance to financial institution directors because state common law differs from federal common law in this area. Pennsylvania corporate law, for instance, affords much greater protection to financial institution directors than the law developed by the federal cases. One difference between Pennsylvania law and federal law is in the scope of the duty of financial institution directors. In Pennsylvania, a director's duties run "solely to the business corporation." Conversely, under federal common law, a bank director owes fiduciary duties to the depositors. Another difference between Pennsylvania law and federal common law is standing. Pennsylvania law bars suits against directors by anyone other than shareholders or the corporation; even then, shareholders may only bring claims derivatively and not individually. By contrast, when a...
bank is in receivership, the federal cases hold that an individual depositor may bring a claim for breach of fiduciary duties against savings and loan directors. To succeed, the depositor must prove he or she suffered an injury uncommon to other depositors. Given these types of differences, it becomes necessary to determine whether a financial institution director should be held accountable under the broader expectations imposed by the federal cases, or whether the director can instead rely on the greater protection provided by state law. The answer to this question depends on whether federal common law in this area really exists today.

III. FEDERAL COMMON LAW IN SAVINGS AND LOAN DISPUTES

A. Briggs v. Spaulding

A discussion of bank director duties under the federal common law appropriately begins with the centenarian Supreme Court case of Briggs v. Spaulding. In Briggs, a bank receiver brought a suit in equity against five directors of the bank for “neglect of duty and wrongful conduct.” The case arose after the bank’s board of directors changed hands in January 1882. In October of the previous year, the bank was solvent and prosperous, but by April 1882—only a few months after the new directors took office—the bank was insolvent. The complaint alleged that the directors committed misconduct, failed “to perform faithfully and rectly by corporation or may be enforced by shareholder in derivative suit but may not be enforced directly by a shareholder individually or by another person or group).

34. In re Sunrise Sec. Litig., 916 F.2d 874, 880 (3d Cir. 1990); Brandenberg v. Seidel, 859 F.2d 1179, 1191 (4th Cir. 1988). Generally, once a financial institution goes into receivership, all claims belong to the receiver as assets of the institution. See Brandenberg, 859 F.2d at 1191 (damages recoverable in depositors’ RICO action against officers of failed savings and loan belong to state receiver as asset to institution). An exception is carved out for depositors who suffer an injury uncommon to other depositors. See In re Sunrise, 916 F.2d at 880 (holding that depositors permitted to maintain nonderivative action against officers and directors of savings and loan association only if their injuries are separate and distinct from injuries sustained by institution and other depositors).

35. In re Sunrise, 916 F.2d at 880; Brandenberg, 859 F.2d at 1191.


37. Id. at 134. The named plaintiff was the receiver of the bank, who succeeded two earlier receivers. Id. Before the case came before the Supreme Court, it was heard and dismissed by the United States Circuit Court for the Northern District of New York (now represented by the Second Circuit). Id. at 144.

38. Id. at 135. The new directors were Reuben Porter Lee, Francis E. Coit, Eldredge E. Spaulding, William H. Johnson and John H. Vought. Id. The named officers were Lee as president, Coit as vice president, a man named McKnight as cashier and another man named Bogert as assistant cashier. Id.

39. Id. at 135-36. Up until the time of the election of the new directors, the bank had $100,000 in paid-up capital stock, had paid declared dividends “amounting in the aggregate of 285 per cent” of the par value and had a surplus fund of over $74,000. Id. By April 14, 1882, the surplus no longer existed, the
diligently the duties of their office” and were grossly negligent in trusting the entire management to a president “of inconsiderable financial responsibility and of insufficient age and experience to qualify him for that position.” The thrust of the allegations was that the board had deferred all business of the bank to a president who squandered the bank’s money and who made irresponsible and undersecured loans. The plaintiff sought recovery for the bank, its stockholders and its creditors.

The plaintiff’s complaint in Briggs was “framed upon a theory of a breach by the defendants as directors of their common-law duties as trustees of a financial corporation and breaches of special restrictions and obligations of the National Banking Act.” The relevant section under the National Banking Act (Act) provided that “[e]ach director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title.” If a director knowingly violated a provision of the Act or knowingly permitted a violation of the Act by officers, agents or servants of the bank, then the bank could be dissolved. The directors also could be held personally and individually liable for any resulting losses.

While the plaintiff did not allege that the defendants knowingly committed any violations of the Act, he did allege that the directors bank’s liabilities totaled over a million dollars and many of the bank’s assets were worthless. The “greater part” of the bank’s losses were alleged to have occurred from the period of October 3, 1881 to April 14, 1882, when the defendants were in control of the bank.

Lee, the appointed president, was formerly the bank’s cashier and had served as a director for five years. The opinion does not indicate how old Lee was when he was elected president.

The list of charges were made against the president, including lending large sums of money to himself, family members, friends and “to other persons with whom [he] was engaged in speculations.” The defendant also could be held personally and individually liable for any resulting losses.

The plaintiff claimed that the defendants were charged as jointly and severally liable for the bank’s losses after the capital became impaired or after the bank became insolvent. The complaint had been brought in equity, suggesting that the receiver himself was unsure of whether there was a viable remedy at law. Bank officials must take the same oath today. Other sections of the Act delineated the organizational and managerial structure of banks.

The plaintiff also did not allege that the directors were guilty of any dishonesty in administering the affairs of the bank. The Court did
failed to diligently perform duties imposed upon them by the Act.\textsuperscript{49} The Court rejected the plaintiff's argument.\textsuperscript{50} In a five-to-four decision authored by Chief Justice Fuller, the majority held that "directors must exercise ordinary care and prudence in the administration of the affairs of the bank, and that this includes something more than officiating as figure-heads."\textsuperscript{51} The directors had a "duty of reasonable supervision" over the bank's officers.\textsuperscript{52} The majority concluded that under the facts, the five directors had satisfied their duty.\textsuperscript{53} In a dissent authored by Justice Harlan, the minority agreed with the standard but disagreed as to its application to three of the directors.\textsuperscript{54}

The Court rejected the plaintiff's argument involving the directors' obligations under the National Banking Act because the act did not specifically impose any duty upon the directors as individuals.\textsuperscript{55} The Court found, however, that the charge of neglect of duty on the part of the board was "another question" apart from the provisions of the National Banking Act.\textsuperscript{56} The resolution of the case therefore did not turn on the note that the bank had not followed its own by-laws, which, among other requirements, called for monthly meetings of the board of directors. \textit{Id.}

\textsuperscript{49} \textit{Id.} at 145-46. If any board director had participated in or assented to a violation of the law, he could be held individually liable. \textit{Id.} at 146.

\textsuperscript{50} \textit{Id.} at 163.

\textsuperscript{51} \textit{Id.} at 165.

\textsuperscript{52} \textit{Id.} The Court added that bank directors should not be shielded from liability because they are ignorant of their misconduct "if that ignorance is the result of gross inattention." \textit{Id.} at 166. The Court's remark about "gross inattention" is at odds with its standard of "reasonable care and prudence." The opinion can therefore be criticized for announcing one standard but applying another.


\textsuperscript{53} \textit{Briggs}, 141 U.S. at 166. The Court examined in great detail the alleged liability of each defendant and the relevant facts entered into evidence. \textit{See id.} at 152-66. The dispositive factor, according to the Court, was the limited period of time between the defendant directors' election and the bank's fall into liquidation. \textit{Id.} at 166. The Court did not consider "the[] defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors." \textit{Id.}

\textsuperscript{54} \textit{Id.} at 166-74 (Harlan, J., dissenting). The dissent's standard of liability rested on "such diligence and supervision as the situation and the nature of the business require[d]." \textit{Id.} at 170 (Harlan, J., dissenting). Under the evidence before them, the dissent believed that Spaulding, Coit and Johnson should have been liable for the bank's losses. \textit{Id.} at 166 (Harlan, J., dissenting).

\textsuperscript{55} \textit{Id.} at 146. Under the National Banking Act, the business and affairs of the bank could be carried out by its officers. \textit{Id.} at 144-45. This did not mean to the Court that officers had unfettered, unsupervised control over the bank's business. \textit{Id.} at 146. Nevertheless, the Court believed that the language of the Act permitted the directors to claim they were "guilty of no violation of a duty directly devolved upon them." \textit{Id.}

\textsuperscript{56} \textit{Id.} at 146. The majority asserted that "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrongdoing." \textit{Id.}
provisions of the National Banking Act. Instead, as the Court stated, "[t]he liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal."\(^{57}\) Under this theory, directors are not liable "for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents."\(^{58}\)

The holding in *Briggs* soon became the cornerstone upon which a tower of "common law" banking director duties was built. After *Briggs*, federal courts applied the standard of "ordinary care and prudence in the administration and affairs of the bank" to a myriad of circumstances, including: the duty of bank directors to commission an independent audit of the bank's affairs;\(^ {59}\) the duty to forbid the approval of loans in excess of federal statutes;\(^ {60}\) the duty to monitor the financial condition of the bank;\(^ {61}\) and the duty to approve and institute loan policies and

\[\text{(quoting Victor Morawetz, Treatise on the Law of Private Corporations § 556 (1882))}\]

57. *Id.* (emphasis added). It was believed by the Court that there could be no bright line rule governing the degree of care and the prudence to be exercised by the director. See *id.* at 147. The Court stated: "The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances." *Id.*

58. *Id.* at 147.

59. FDIC v. Mason, 115 F.2d 548, 551 (3d Cir. 1940) (citing *Briggs* standard of care and indicating that directors have duty at common law to periodically examine affairs of bank). *Mason* was an action brought by the FDIC as a receiver of a failed commercial bank. *Id.* at 548. The FDIC alleged, *inter alia*, that former directors of the bank failed to take an accounting of money lost by the bank as a result of the directors' negligence. *Id.* at 549. The trial court dismissed the action after the FDIC presented its case. *Id.* at 548. The Third Circuit, however, overruled the trial court and remanded the case for further proceedings. *Id.* at 552.

60. Atherton v. Anderson, 99 F.2d 883, 888 (6th Cir. 1938) (depositors have right to expect that directors will retain and maintain reasonable supervision over affairs of bank).

61. Hoye v. Meek, 795 F.2d 893, 896 (10th Cir. 1986). The facts of *Hoye* are hauntingly familiar to *Briggs v. Spaulding*. For the facts of *Briggs*, see *supra* notes 36-49 and accompanying text. In *Hoye*, a trustee in bankruptcy brought an action against a trust company's board of directors for breaches of their duties of care under Oklahoma law. *Hoye*, 795 F.2d. at 894. The cause of action centered around a highly leveraged investment the company made in certain mortgage certificates. *Id.* During a two-year period, the company continued the investment while losses resulting from the certificates exceeded the company's assets. *Id.* The district court held that one of the directors, Maxwell Meek, breached his duty of care by failing "to monitor the investment decisions and results, and the excessive authority which [he] delegated to his son." *Id.* The United States Court of Appeals for the Tenth Circuit upheld the district court's finding of liability. *Id.* at 897. The Oklahoma corporate law implicated in the case was apparently inspired by *Briggs* and held boards of directors to a standard of care "which
The duties included are extensive. In sum, the Briggs decision served as a genesis for litigation over what conduct constituted a breach of "ordinary care and prudence."

While the Briggs decision established a standard of care for bank directors based on a common-law rule, it failed to label the "common law" as either state common law or federal common law. At the time of Briggs, however, it simply did not matter whether the distinction was made, since federal courts freely recognized the existence of federal common law. Briggs was decided long before the landmark case of Erie Railroad Co. v. Tompkins in which the Supreme Court first expressed serious hostility toward the recognition of "federal common law."

B. The Standard for Granting Federal Courts Authority to Fashion a Body of Federal Common Law

Since Erie, the Supreme Court has expressed great reluctance in recognizing federal common law rights. However, every rule has its exception. As the Supreme Court noted in Texas Industries, Inc. v. Radcliff Materials, Inc., federal courts can recognize a federal common law right ordinarily prudent men would exercise under similar circumstances in like position.\footnote{Id. at 895 (quoting OKLA. STAT. ANN. tit. 18, § 1.34(b) (West 1986)).}


63. See generally DENNIS BLOCK ET AL., THE BUSINESS JUDGMENT RULE—FIDUCIARY DUTIES OF CORPORATE DIRECTORS 30-48 (3d ed. 1989 & Supp. 1991) (discussing standard of care and standard of culpability for imposing personal liability on corporate directors). These commentators note that Briggs v. Spaulding is "the most frequently cited of early American decisions involving corporate fiduciary obligations." Id. at 1. While courts and legislatures articulate in varying language the standard of care expected of corporate directors, "most agree upon a 'traditional standard' dating back to the nineteenth century" decision found in Briggs. Id. at 30 (footnote omitted) (citing Briggs v. Spaulding, 141 U.S. 132, 152 (1891)).

64. The distinction between state and federal common law is important because a state statute defining a corporate director's duties would supersede that state's common law definitions. But a state statute would not supersede a federal common law standard.

65. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (federal courts exercising diversity of citizenship free to exercise independent judgment as to what common law of state is or should be), overruled sub silentio by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

66. 304 U.S. 64 (1938).

67. Id. at 78 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or 'general,' be they commercial law or a part of the law of torts.").

68. See, e.g., Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) ("The instances where we have created federal common law are few and restricted.").

69. 451 U.S. 630 (1981). Texas Industries involved an antitrust action brought by a cement purchaser against a ready-mix concrete manufacturer. Id. at 632. The suit alleged that Texas Industries and other unnamed firms conspired to raise concrete prices unlawfully. Id. Following discovery, Texas Industries sought to bring a third-party complaint against Radcliff materials, seeking
in two circumstances: 1) when it is "necessary to protect uniquely federal interests"70 or 2) when Congress has specifically given federal courts the power to fashion substantive law.71

The first factor outlined in Texas Industries is not without qualification. Implicating uniquely federal interests by itself is not sufficient to displace a field of state law.72 The Court has stated that state law may be displaced only where either a "significant conflict" exists between federal policy or interests and the operation of state law, or where specific objectives of federal legislation would be frustrated were state law to be applied.73

Some lower federal courts have carved out an exception to the Texas Industries factors to fashion a body of federal common law. This exception is based on a Supreme Court pronouncement made in United States v. Little Lake Misere Land Co.74 that the rule of Erie does not apply to issues "arising from or having a bearing on" a federal regulatory program.75 In such an event, federal courts are free to choose between applying existing state law or creating an applicable body of federal law.76

contradiction should Texas Industries be found liable. Id. at 633. Radcliff filed a motion to dismiss the claim, arguing that federal law does not allow an antitrust defendant to recover in contribution against alleged co-conspirators. Id. The Supreme Court agreed, holding that contribution did not implicate "uniquely federal interests" of the kind obliging courts to create federal common law. Id. at 646-47.

70. Id. at 640 (quoting Banco Nacional de Cuba v. Sabatino, 376 U.S. 398, 426 (1964)).
71. Id. (citing Wheeldin, 373 U.S. at 652).
73. Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)). The Boyle Court stated that when Congress legislates in an area traditionally occupied by the states, the federal policy urging preemption must be more "sharp" than that which must exist for "ordinary preemption." Id. The Court elaborated: "[T]he fact that the area is one of uniquely federal concerns changes what would otherwise be a conflict that cannot produce pre-emption into one that can." Id. at 507-08.
74. 412 U.S. 580 (1973). For a more detailed discussion of the facts and issue in Little Lake, see infra notes 121-35 and accompanying text.
75. Little Lake, 412 U.S. at 592-93 ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.")
76. Id. at 593. The Court stated that federal legislative silence must signify the "recognition of federal judicial competence to declare the governing law in one area comprising issues substantially related to an established program of government operation." Id.
C. The Savings and Loan Industry as a Model

None of the reported cases address whether a body of federal common law has emerged from disputes involving federally chartered or state-chartered banks. There are a number of cases in the savings and loan context, however, which serve as an appropriate model. A review of the recent cases reveals a trend toward rejecting federal common law in this area, although earlier cases recognized a federal body of law.

Some courts have sidestepped the Texas Industries factors altogether in fashioning a body of federal common law for savings and loan cases. Noting the pervasiveness of regulations in the federal savings and loan industry, at least one circuit court has cited Little Lake to support a holding that federal regulations preempt state law from applying to the entire savings and loan industry. In embracing this view, the District Court for the Eastern District of Wisconsin in City Federal Savings and Loan Association v. Crowley reasoned that because a savings and loan director’s duties arise from or have a bearing on the regulatory scheme, it is free to create federal law. The Crowley court recognized a federal common law governing the internal affairs of federal savings and loan associations; this federal common law “includes the usual common law fiduciary duties.” Thus, the court deemed the corporation’s claims of wasting corporate assets, appropriation of business opportunities, fraud, unjust enrichment and breach of contract to have arisen under the federal common law. In concert with the Crowley reasoning, at least one circuit court has concluded that when state courts “deal with the internal affairs of federal savings [and] loan associations, . . . they are nonetheless applying federal law.”

77. See Meyers v. Beverly Hills Fed. Sav. & Loan Ass’n, 499 F.2d 1145, 1146-47 (9th Cir. 1974) (indicating that exclusion of state action may be implied from nature of congressional legislation and subject matter although express declaration of preemption is absent).

78. 393 F. Supp. 644 (E.D. Wis. 1975).

79. Id. at 646, 656 (holding that savings and loan association suit against former directors and officers for breach of fiduciary duty, wasting of assets, fraud, conversion, unjust enrichment and breach of contract actionable under federal common law); see also Rettig v. Arlington Heights Sav. & Loan Ass’n, 405 F. Supp. 819 (N.D. Ill. 1975) (applying federal common law).

80. Crowley, 393 F. Supp. at 656. The Crowley court relied heavily on the text of the Home Owners Loan Act, which provided that a director could be removed from the board for a breach of fiduciary duty if the breach involved activity for personal profit. Id. (quoting 12 U.S.C. § 1464(d)(4) (1988)).

81. Id. at 657.

82. Murphy v. Colonial Fed. Sav. & Loan Ass’n, 388 F.2d 609, 612 (2d Cir. 1967). Murphy involved a battle between a federal savings and loan’s board of directors and its management. Id. at 610-11. In anticipation of an upcoming board election, the existing board sought to obtain a list of shareholders who would vote in the election. Id. The list was in the hands of management, which remained recalcitrant in handing it over to the board. Id. Not surprisingly, the directors proposed by management were elected and certified. Id. The ousted directors then brought suit in federal court challenging management’s actions.
Other courts have stated that recognizing federal common law rights is necessary under *Texas Industries* to protect the uniquely federal interests implicated in the internal administration of federal savings and loan associations. To support this conclusion, the United States District Court for the Northern District of California referred to the "comprehensive legislative construction" and "overwhelming preponderance of federal interests" involved in the operation of federal savings and loan associations. In *First Hawaiian Bank v. Alexander*, the United States District Court for the District of Hawaii held that because the savings and loan association in question was federally insured and subject to many of the same laws governing federal institutions, a federal common law suit could be maintained in federal court even though the savings and loan was state-chartered. In *First Hawaiian*, a ninety percent stockholder of a savings and loan brought an action for breach of fiduciary duty and negligence against former officers and directors of the defunct savings and loan. The complaint alleged "federal common law negligence" and "federal common law breach of fiduciary duties." The court held that the second claim could be maintained in the federal court, but not the first.

---


84. Id. at 439.

85. 558 F. Supp. 1128 (D. Haw. 1983) (breach of fiduciary duty and negligence claim brought against former directors and officers by stockholder of 90% of shares).

86. Id. at 1132. The impact of the *First Hawaiian* court's decision is that state-chartered banks can be sued in federal court under federal common law causes of action.

87. Id. at 1130. The plaintiff was First Hawaiian Bank, the assignee of 90% of the savings and loan's shares. Id. The original purchase of shares was financed by the same bank. Id.

88. Id. The court's opinion does not provide any factual background for the claims. See id.

89. Id. at 1132.
The *First Hawaiian* decision represents a breaking away from the decision in *Crowley*. The *First Hawaiian* court permitted only the breach of fiduciary duty claim to be governed by federal common law; state common law would govern an additional negligence claim. The court distinguished the claims on the ground that negligence is an area traditionally left to state courts. The court opined that there was no interest in national uniformity which would be served by creating or applying any federal decisional law to the negligence claim, nor was any statute applicable or relevant.

The second exception to *Erie* outlined in *Texas Industries* centers on congressional intent to preempt state law. In 1983, the Federal Home Loan Bank Board—now the Office of Thrift Supervision—promulgated regulations under 12 C.F.R. § 545.2 "pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operation of Federal savings associations .... This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." Despite this regulation, at least one court has continued to grapple with the question of whether claims for breach of fiduciary duty, negligence and waste purport to address the "operations of federal associations" within the meaning of 12 C.F.R. § 545.2.

90. *Id.*
91. *Id.* at 1131. The court found that federal common law remedies would not be precluded where a federal statute's remedies did not afford the aggrieved parties "at least a reasonable alternative to the relief sought." *Id.* at 1132 (citing *Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982)). Because the Home Owner Loan Act's remedial scheme did not provide the kind of remedy sought by the plaintiff, recognition of a federal common law cause of action would not be precluded. *Id.*

The court's reasoning here can be disputed on two grounds. First, since the Home Owners Loan Act does not provide for a claim for negligence, the court's refusal to recognize the negligence claim appears indistinguishable from its reason for accepting the breach of fiduciary duty claim. After all, a breach of fiduciary duty claim is arguably as much left to state corporate law as negligence is left to state tort law. Second, the court recognized, but gave little more than lip service to, a Supreme Court pronouncement that when a federal law carries an integrated scheme of remedies but omits the relief sought by the plaintiff, the court must assume that the requested relief was deliberately omitted. *Id.* at 1131 (citing *Milwaukee v. Illinois*, 451 U.S. 304 (1981)).

92. *First Hawaiian*, 558 F. Supp. at 1131; *see also* *Eureka Fed. Sav. & Loan Ass'n v. Kidwell*, 672 F. Supp. 436, 441 (N.D. Cal. 1987) (noting that claims of negligence and waste of corporate assets are governed by state law while claim for breach of fiduciary duty is governed by federal common law).
93. For a discussion of the exceptions to the *Erie* doctrine, see * supra* notes 70-76 and accompanying text.
for example, the United States District Court for the Northern District of California answered the question in the affirmative, stating that “where negligence and waste are alleged regarding the lending practices of defendants, these state causes of action constitute de facto regulation because they can directly affect the conduct of bank operations.”

D. Recent Trend Toward Rejecting Recognition of Federal Common Law in Savings and Loan Disputes

An identifiable trend has been developing toward rejecting recognition of a body of federal common law as applied to the savings and loan industry, at least absent express preemption over the subject matter of the claim. Federal Savings and Loan Insurance Corp. v. Capozzi represents a watershed case for the holding that there is no body of federal common law governing directoral duties. In Capozzi, the Federal Savings and Loan Insurance Corp. (FSLIC) brought an action on behalf of itself and as conservator for a Missouri thrift. The FSLIC alleged that the thrift’s former directors breached their fiduciary duties. At trial, the district court rejected the FSLIC’s argument that, in light of Crowley and its progeny, the court should recognize a federal common law cause of action for the FSLIC claims. The Eight Circuit affirmed, reasoning:

The use of state law principles to determine director liability does not pose a threat to the integrity of the savings and loan industry and the insurance fund. The crux of [plaintiff’s] claims is whether its directors breached agreements with or fiduciary duties to [the thrift]. In these circumstances an interplay certainly exists between federal regulations in the savings and loan industry and the director defendants’ liability. Ultimately, however, no substantive rights or duties of the federal government hinge on the outcome of this appeal.

97. Id. at 1317; accord Rettig v. Arlington Heights Fed. Sav. & Loan Ass’n, 405 F. Supp. 819, 823 (N.D. Ill. 1975) (noting intention of Congress to have federal law govern regulation and supervision of federal savings and loan associations).
99. Id. at 602 (rejecting argument that court should recognize “common law” duties owed by savings and loan directors to institution in connection with approval and consummation of certain “ill-advised” business transactions).
100. Id. at 594.
101. Id. The defendants had been directors of Bohemian Savings & Loan up until the time the thrift failed. Id. The claims were based on the recovery of certain assets lost on “allegedly ill-advised business transactions.” Id. at 602. The court provided no further details about the underlying transactions.
102. Id. at 602. Despite the federal regulations, the actions brought by the FDIC were essentially breach of fiduciary duty and breach of contract claims. Id.
By contrast, the United States Court of Appeals for the Third Circuit held in Ford Motor Co. v. Insurance Commissioner104 that Congress did not envision that all state regulations would be in conflict with the federal regulatory scheme governing thrift institutions.105 Ford Motor involved the challenge of a Pennsylvania law forbidding simultaneous ownership of a savings and loan and an insurance company.106 Ford, the simultaneous owner that brought the suit, sought declaratory relief alleging, inter alia, that the Pennsylvania law was preempted by federal legislation governing the savings and loan industry.107 The Third Circuit agreed with Ford that federal law preempted Pennsylvania state law to the extent that it applied to the acquisition of failing thrifts.108 The court concluded, however, that Congress had not intended to entirely preempt the states’ authority to impose regulations upon savings and loan associations operating within the state.109

Thus, under the Third Circuit’s approach in Ford Motor, whether federal regulations preempt state law depends on the claim brought.110 The Ford Motor court was “unconvinced that the federal banking regulatory scheme permits no conclusion other than that Congress intended to occupy the field exclusively.”111 The court noted that the regulations at issue provided for explicit preemption on two of the issues in the case, but not for a third.112

While none of the issues in Ford Motor involved breach of directors’ duties, the court’s analysis is nonetheless instructive. Ford Motor establishes a claim-by-claim approach to determining whether federal regulations in the banking industry preempt state law. Absent any conflict between state law and federal objectives, the court will respect the state law unless Congress has “left no room” for supplementary state

---

105. Id. at 940.
106. Id. at 929-30. One of Ford’s subsidiaries was an insurance company that had been doing business in Pennsylvania for many years. Id. Another of Ford’s subsidiaries was a recently acquired savings and loan, also doing business in Pennsylvania. Id. at 929.
107. Id. at 930. Ford also claimed that the state law violated the Dormant Commerce Clause and the Equal Protection Clause of the United States Constitution. Id.
108. Id. at 936. One of the relevant statutory provisions providing for the preemption of the Pennsylvania law states that the FSLIC “may authorize any company to acquire control of said insured institution.” Id. at 937 (quoting 12 U.S.C. § 1730a(m) (Supp. 1987)).
109. Id. at 939 (accepting district court’s view that intent of federal scheme was to regulate operation of federally insured thrifts).
110. Id. at 936-37. The court specifically noted that “§ 641’s proscription of affiliations between insurance companies and savings and loan institutions has not been preempted.” Id. at 937.
111. Id. at 939 (“[W]e interpret the absence of clear preemptive language as indicative that Congress did not intend to displace state law entirely.”).
112. Id.
More recently, in AmeriFirst Bank v. Bomar, the United States District Court for the Southern District of Florida decided a case in which a federally chartered savings and loan and its subsidiary brought suit. The court held that federal common law did not recognize a cause of action for breach of fiduciary duty by the savings and loan's officers, directors and outside accountants. The court concluded that whether traditional state law claims have a sufficient nexus to the federal government to warrant the creation of a federal common law cause of action is questionable. The Bomar court further stated that federal common law could not displace state corporate law because state law did not conflict or frustrate the objectives of federal legislation regulating federally-chartered banks. The court nonetheless stated that the violation of federal regulations would be some evidence of a breach of fiduciary duties under substantive principles of state law.

IV. THE STANDARD OF LIABILITY FOR THE DIRECTORS OF STATE-CHARTERED AND FEDERALLY CHARTERED BANKS

Against this background, the question remains: would the federal courts recognize a body of federal common law regarding directors' duties if a director of a federally chartered or state-chartered bank were sued for breach of fiduciary duties? In order to answer this question, the same factors courts have considered in the savings and loan cases should be considered.

113. Id. at 938-39 (quoting Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 714 (1985)).
115. Id. at 1369. The suit was a by-product of a settlement of class action litigation brought by AmeriFirst’s shareholders against the bank for violations of federal securities laws. Id. Thomas Bomar, the defendant, was one of the bank’s former directors. Id. at 1369 n.2.
116. Id. at 1381-82. The effect of the holding was that the court had no subject matter jurisdiction over the breach of fiduciary duty claims. Id. at 1381.
117. Id. at 1373 (citing Federal Sav. & Loan Ins. Corp. v. Capozzi, 855 F.2d 1319 (8th Cir. 1988), vacated on other grounds, 490 U.S. 1062 (1989)). The Bomar court was not ignorant of the decisions favoring the recognition of federal common law. Id. The court commented: “Although the substantial federal regulation of savings and loans provides a tempting justification for creating federal common law to govern the fiduciary duty claims asserted by the plaintiffs, the Court declines to follow those courts which have chosen to do so.” Id.
118. Id. at 1374. The court reasoned:
[Permitting the bank to sue its former directors] for breach of fiduciary duties under state common law principles will not interfere with the successful functioning of the comprehensive federal scheme governing the savings and loan industry or with the protection of the federal insurance fund even though the law of fiduciary duties may vary somewhat from state to state.

Id.

119. Id.
A. The "Exemption from Texas Industries" Argument

In bringing suit against a savings and loan's directors and officers, a plaintiff could argue that a breach of fiduciary duties has a bearing on the FDIC's federal regulatory program within the meaning of Little Lake. Following Crowley, a court would accept the plaintiff's argument and feel free to create federal common law to decide the claim. Savings and loan cases like Crowley, however, may have asserted a misplaced reliance on Little Lake, which held that the rule of Erie did not apply to controversies intertwined with a federal regulatory program.

In Little Lake, the Supreme Court confronted the question of "whether state law may retroactively abrogate the terms of written agreements made by the United States through which the United States acquired land for public purposes explicitly authorized by Congress." In the 1930s, the federal government acquired land in Louisiana by sale and condemnation for the purpose of creating a wildlife refuge. The land acquisition scheme was authorized by the Migratory Bird Conservation Act. The government granted mineral rights to the land to Little Lake Misere for ten years. After the ten year period ended, title returned to the government, which in turn granted mineral right leases to other parties.

In deciding the issue, The United States Supreme Court stated that "[t]o permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs." As a choice of law dispute, the

120. For a discussion on how Little Lake has been relied upon to find that a breach of fiduciary duties of a savings and loan director has a bearing on a regulatory program, see supra notes 74-76 and accompanying text. For a discussion of the facts, holding and reasoning of Little Lake, see infra notes 122-35 and accompanying text.
121. For a discussion of Crowley, see supra notes 78-82 and accompanying text, and infra note 140.
123. Id. at 582.
124. Id.
125. Id.
126. Id.
127. Id. at 582-83.
128. Id. at 584. Little Lake relied on the state law to dispose of the mineral rights it had originally been granted in the two tracts of land. Id. (citing LA. REV. STAT. ANN. § 9:5806, subdiv. A (West Supp. 1973)). Little Lake argued that the state law rendered inoperative the provisions of the agreement between Little Lake and the government as to the extinguishment of the reservations following the ten-year period. Id.
129. Id. at 597. The Court further stated: "Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here,
Court stated that it must follow federal law and disregard the state law, because the issue's outcome hinged on a federal regulatory program.\textsuperscript{130}

\textit{Little Lake}, in turn, referred to an earlier Supreme Court case, \textit{Clearfield Trust Co. v. United States.}\textsuperscript{131} The issue in \textit{Clearfield Trust} was whether to apply Pennsylvania law or federal law to resolve a dispute over a check written by the United States and forged by the payee.\textsuperscript{132} After the federal government learned that a check it wrote and sent never arrived to the proper payee but was instead cashed by a forger, the federal government sought to recover the amount of the cashed check from the bank that guaranteed the endorsement.\textsuperscript{133} The district court held that Pennsylvania law applied, and because the federal government had unreasonably delayed in giving notice of the forgery, recovery was barred under Pennsylvania common law.\textsuperscript{134} In reversing this determination, the Supreme Court reasoned that the rule espoused in \textit{Erie} did not apply because the "rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."\textsuperscript{135} The Court added: "The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources."\textsuperscript{136}

An alleged breach of fiduciary duties against a bank director arguably does not fall within the orbit of \textit{Little Lake}. After all, "[c]orporations are creatures of state law."\textsuperscript{137} Thus, directors' duties and federal regulations do not "find their roots in the same federal source."\textsuperscript{138} As the Court stated in \textit{Little Lake}, asking the federal court to look to state law when resolving a breach of fiduciary duty claim would not "deal a serious blow" to the federal regulatory scheme behind the Federal Deposit the federal officials carrying out the mandate of Congress irrevocably commit scarce funds." \textit{Id.}

\textsuperscript{130} \textit{Id.} at 604. Resolution of the dispute ultimately boiled down to the terms of the contract, and not federal common law. The Court stated:

The choice of law merges with constitutional demands of controlling federal legislation; we turn away from state law by default. Once it is clear that [the state law] has no application here, we need not choose between "borrowing" some residual state rule of interpretation or formulating an independent federal "common law" rule . . . . The contract itself is unequivocal.

\textit{Id.}

\textsuperscript{131} 318 U.S. 363 (1943).

\textsuperscript{132} \textit{Id.} at 364-65.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 366 (citing Market St. Title & Trust Co. v. Chelton Trust Co., 145 A. 848 (Pa. 1929)).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Clearfield Trust}, 318 U.S. at 366.
Insurance Act.\textsuperscript{139} Moreover, one can argue that any nexus between the FDIC as a regulatory agency on the one hand, and the traditional role of state law to define directors’ duties on the other, is remote and tenuous.\textsuperscript{140} In light of the Third Circuit’s claim-by-claim approach in Ford Motor, it is much less clear whether federal regulations attached to the industry establish federal preemption over the entire banking industry, precluding any state law from applying.\textsuperscript{141}

FIRREA itself indicates how state law in this area is not entirely preempted despite the enormous federal regulatory scheme woven into the thrift and banking industries. Section 1821(k) of the statute expressly refers to state law as a source for defining “intentional tortious conduct” and other “such terms.”\textsuperscript{142} While the statute holds directors and officers to a standard of “gross negligence,” it fails to define the term, leading some to believe that the standard should be defined under the law of the state where the case arises.\textsuperscript{143} Remarks made on the Senate floor about the bill that ultimately became FIRREA shed even more light on the matter. Generally, these statements reinforce the conclusion that FIRREA only preempts state law with regard to the standard of liability imposed on financial institution directors, leaving state law to guide the remainder of the dispute.\textsuperscript{144} Accordingly, a director charged with a...
breach of fiduciary duties under FIRREA may contend that the scope and definition of the fiduciary duties should also be defined under state law.145

B. The "Express Congressional Authority" Argument

A review of the Federal Deposit Insurance Act and regulations promulgated by the Office of the Comptroller of Currency and the FDIC do not reveal any blanket preemption clauses similar to the one issued by the Office of Thrift Supervision in FIRREA. Neither the section of the Code of Federal Regulations (C.F.R.) governing incorporation, organization and conversion of federal stock associations, nor the subsection governing boards of directors specifically, define a director's duties.146 Only two specific duties can be identified under the C.F.R.: (1) "the specific duty of seeing that the Bank complies with applicable provisions of the Act and these regulations,"147 and (2) the duty to establish and maintain hazard insurance to protect the association's interest in real estate security for its loans.148

The regulations are peppered with language suggesting a deliberate attempt not to displace state law entirely. For instance, the section governing the disposition of credit life insurance income states that 

"[d]irectors shall observe the rules in Sec. 2.4 and shall be mindful of their duty under both the common law and 12 U.S.C. 73 [(oath of bank directors)] to promote and advance the interests of the bank over their own personal interests."149 Furthermore, while removal for cause includes breach of fiduciary duty involving personal profit,150 breach of fiduciary duty is not a defined term.

There is no intention, I am happy to say, to pre-empt State corporation law in any general way. Section [1821 (k)] sets a standard of care owed to the financial institution because it is federally insured. It is surgically designed to protect the Federal interest, the taxpayers' interest, and no other.

Id. § 4281 (statement of Sen. Roth). Senator Garn added:

I likewise am reluctant to pre-empt State corporation law. Here ... we have a special case. The pre-emption is limited to protecting a Federal interest. To do so we impose on directors and officers of federally insured financial institution[s] a standard of care they owe to the institution and its shareholders. We do this for the sole purpose of protecting the insurance fund. We are not imposing any rules that go beyond our purpose. Section [1821(k)] is not a general provision. It is limited.

Id. (statement of Sen. Garn) (emphasis added).

145. This argument is bolstered by the last sentence in section 1821(k), which reads: "Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law." 12 U.S.C. § 1821(k) (Supp. II 1990).

146. See 12 C.F.R. § 552.6-1 (1992) ("The business and affairs of the association shall be under the direction of the board of directors.").

147. Id. § 932.28.
148. Id. § 556.4.
149. Id. § 2.5 (emphasis added).
150. Id. § 563.39.
Congress has evinced intentions to preempt state law in some notable areas. Perhaps the most important area is the standard of liability imposed upon financial institution directors and officers under FIRREA. Section 212 of Title II of FIRREA holds directors and officers to a standard of gross negligence in actions where the FDIC is acting as conservator or receiver, in actions purchased from or assigned by a receiver or conservator or actions assigned by an institution in connection with receipt of FDIC assistance. The provision's legislative history indicates that it does preempt state law with respect to the standard of liability imposed upon a depository institution director.

Besides liability for civil monetary damages, Congress has also indicated an intention to preempt other areas of state banking law. One area is indemnification. A national bank's articles of association cannot allow the indemnification of directors and other bank officials against expenses, penalties or other payments incurred in an action by a regulatory agency resulting in a final order assessing civil monetary penalties.

The fact that specific duties are mentioned in the regulations and that specific areas of state law are preempted by them does not necessarily indicate that Congress has mandated a preemption over the entire area of directors' duties. In the landmark implied cause of action decision, 151 the preemption remark in the legislative history proves to be of great importance. Without it, a defendant director could argue that the provision sets forth a minimum—but not maximum—liability standard below which state legislatures may not address. An argument would exist that states are still free to require conduct more culpable than gross negligence, such as recklessness, before directors will be found guilty of misconduct. The argument stems from the provision's declaration that "[n]othing in this paragraph shall impair or affect any right of the Corporation under other applicable law." 152

The counterargument would be that § 1821(k) preempts state law because it directly conflicts with state law provisions—like Pennsylvania's—limiting or eliminating director liability absent conduct more culpable than gross negligence. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) (noting that state law is preempted by federal law if there is actual conflict between federal and state provisions).

152. For the relevant legislative history, see supra text accompanying note 28.

The counterargument would be that § 1821(k) preempts state law because it directly conflicts with state law provisions—like Pennsylvania's—limiting or eliminating director liability absent conduct more culpable than gross negligence. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) (noting that state law is preempted by federal law if there is actual conflict between federal and state provisions).

sion of Cort v. Ash,\textsuperscript{154} for example, the Supreme Court stated that “except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”\textsuperscript{155} Thus, the absence of a clear preemption of state law defining directors’ duties suggests that Congress has not expressly granted the federal courts authority to fashion a body of federal common law in this area.

C. The “Uniquely Federal Interests” Argument

The final consideration is whether the duties of a bank director involve uniquely federal interests such that the creation of a body of federal common law is necessary to protect uniquely federal interests. The First Hawaiian court, citing Rettig and Crowley, held that creation of federal common law is necessary to protect uniquely federal interests.\textsuperscript{156} Despite First Hawaiian, courts recently have focused on whether the federal interests are significantly threatened by the application of state

\textsuperscript{154} 422 U.S. 66 (1975). Cort is most famous for establishing the criteria necessary for recognizing an implied private cause of action under a federal statute. The case involved a stockholders’ derivative action to enforce a federal criminal statute prohibiting corporations from making contributions or expenditures in connection with any presidential or vice presidential election. \textit{Id.} at 68. The Court held that a private cause of action could not be implied to enforce the statute. \textit{Id.} at 85. Justice Brennan, writing for a unanimous court, stated the criteria for determining when a private right of action should be recognized:

1. Is the Plaintiff a member of the class for whose especial benefit the statute was enacted?
2. Is there any explicit or implicit indication of legislative intent to create a remedy or to deny one?
3. Is a remedy consistent with a legislative scene? and
4. Is this an area traditionally relegated to state law?
\textit{Id.} at 80-85.

In the cases since Cort, the Supreme Court has been reluctant to infer a statutory private cause of action absent the most compelling evidence of affirmative congressional intent. \textit{See TransAmerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (noting private breach of fiduciary duty actions limited under Investment Advisors Act); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (disregarding four \textit{Cort} factors in favor of sole inquiry into congressional intent); Cannon v. University of Chicago, 441 U.S. 677, 731 (1977) (Powell, J., dissenting) (stating that \textit{Cort} four-factor test was “an open invitation to federal courts to legislate causes of action not authorized by Congress.”). The ultimate focus today is on the legislative intent at the time the statute was passed.

Under FIRREA, there is no indication of congressional intent to provide an implied cause of action. Recently, a federal district court found that FIRREA provides no implied private cause of action. Homes by Michelle, Inc., v. Federal Sav. Bank, 733 F. Supp. 1495, 1499 (N.D. Ga. 1990) (noting that “legislative desire to regulate all financial institutions in similar manner does not evince corresponding intent to allow same private causes of action against all financial institutions”).

\textsuperscript{155} Cort, 422 U.S. at 84.

The issue has boiled down to whether compliance under both state and federal law is impossible.\textsuperscript{158}

The shortcoming of those cases invoking federal common law is in their failure to specifically name the federal interests implicated. The \textit{Capozzi} and \textit{Bomar} courts, two courts that have rejected recognizing federal common law, noted that federal regulations are forward-looking, not retrospective.\textsuperscript{159} The aim of federal regulations is to prevent insolvency in the first place, and not to provide recompense after insolvency has occurred.\textsuperscript{160} With their emphasis on forestalling insolvency, these cases suggest that the true federal interest woven through the entire fabric of the regulations is in preserving the fund that insures depositors' accounts.\textsuperscript{161}

Indeed, FIRREA was passed with this interest specifically in mind.\textsuperscript{162} FIRREA's text and legislative history show respect to state law in the pursuit of protecting the insurance fund.\textsuperscript{163} Thus, the issue simply cannot boil down to whether compliance under both state and federal law is feasible, for compliance under federal law, at least with respect to FIRREA, will at times be a function of state law.\textsuperscript{164} Congress' express deferral to state law in FIRREA makes it impossible for the courts in each circuit to apply the statute uniformly.\textsuperscript{165} Uniform application of federal law thus cannot be asserted as a justification for relying on federal common law rather than state law. Moreover, many state


\textsuperscript{158} \textit{Ford Motor Co.}, 874 F.2d at 937.


\textsuperscript{160} \textit{Capozzi}, 855 F.2d at 1326.

\textsuperscript{161} See 12 C.F.R. § 330.3 (1991) ("In general, deposit insurance is for the benefit of the owner or owners of funds on deposit.").


\textsuperscript{163} For the relevant text of FIRREA, see supra note 24. For the relevant legislative history, see supra note 28.

\textsuperscript{164} The Third Circuit has noted that, in savings and loan cases, a court should respect state law unless Congress has "left no room" for supplementary state participation. \textit{Ford Motor Co. v. Insurance Comm'r}, 874 F.2d 926, 988-99 (3d Cir.), \textit{cert. denied}, 493 U.S. 969 (1989). \textit{Ford Motor} is authority for the proposition that Congress left room in FIRREA for state participation in defining the "duty of care" and its scope. \textit{id.} at 940. For a more detailed discussion of \textit{Ford Motor}, see supra notes 103-12 and accompanying text.

\textsuperscript{165} Cf. Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 209 (1946) (noting that by permitting local taxation of real property, Congress made it impossible to apply the Reconstruction Finance Corporation Act with uniform consequences in each state and locality).
statutes were already on the books, so that Congress can fairly be charged with full awareness of them when FIRREA was passed.\textsuperscript{166} It is therefore reasonable to infer that the creation of federal common law is unnecessary to protect the fund insuring depositors' accounts.

V. CONCLUSION

Financial institution directors must be wary of two sources of law outside state law that can affect the liability they face in the discharge of their duties. The first is FIRREA, which preempts state law regarding the standard of liability imposed upon financial institution directors. Any director guilty of breaching a "duty of care" under a uniform standard of gross negligence may be held personally liable for his wrongdoing.\textsuperscript{167} State law remains important in FIRREA, however, in determining how gross negligence is defined.\textsuperscript{168} It also remains important in determining the scope of a director's duty and in the definition of the duty itself.

Second, directors must be wary of federal common law, which often provides much less protection to a director than state law. This Comment argues that recognition of federal common law in actions against financial institution directors is unwarranted. Congress has not given the courts the power to develop substantive law in this area. On the contrary, Congress' recent deferral to state law in FIRREA reflects an understanding that directors will face varying degrees of liability depending upon the law of the state in which the action arises. While courts in the past have been more willing to rely on federal common law, the trend is toward harmonizing state corporate law governing directors' duties with the federal government's interests in regulating the banking industry generally, and with protection of depositors' funds specifically.\textsuperscript{169}

\textit{Eric G. Zajac}

\textsuperscript{166} Accord Rodriguez v. United States, 480 U.S. 522, 525 (1987) (observing that when Congress passes statute, it is presumed to act with full awareness of existing legislation).

\textsuperscript{167} See 12 U.S.C. \textsuperscript{1821(k)} (Supp. II 1990). For a discussion of \textsuperscript{1821(k)}, see supra notes 24-25 and accompanying text.

\textsuperscript{168} For a discussion on the role state law plays in defining gross negligence under FIRREA, see supra note 30 and accompanying text.

\textsuperscript{169} For a discussion of the trend of courts toward not recognizing federal common law to define the standard of liability, see supra notes 97-119 and accompanying text.