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OTS VS THE BAR: MUST ATTORNEYS ADVISE DIRECTORS THAT THE DIRECTORS OWE A DUTY TO THE DEPOSITORY FUND?

SUSAN SAAB FORTNEY*

I. INTRODUCTION

[T]he average American was terrorized by thugs whose weapons were pens, not guns; whose attire was a suit, not a ski mask; and whose place of attack was a boardroom, not a back alley. While no pistol was pointed at their heads, the American people got mugged anyway. The one thing the street crook and the S&L criminal have in common is their goal: The public's money. Over the past decade, the taxpayer has been robbed of billions in the most pervasive financial swindle in our times.¹

This quotation from Congressman Schumer captures the sentiments of many critics who believe that white-collar criminals in the savings and loan industry bilked the American taxpayer in the largest heist in our nation's history.² The attack on the white-collar thugs in pinstripes does not

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¹136 CONG. REC. H6003 (daily ed. July 31, 1990) (statement of Rep. Schumer).

²Despite the fact that many legal commentators have recognized that other factors contributed to the savings and loan crisis, most commentators dwell on the fraudulent, abusive practices of those who controlled institutions. Compare LAWRENCE J. WHITE, *THE S&L DEBACLE, PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION* (1991) (arguing that the majority of thrifts failed because of an amalgam of problems including deregulation, poor management and deteriorating real estate markets) with MARTIN MAYER, *THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY* (1990) (discussing the crisis in terms of a swindle perpetrated

stop with an indictment of the corporate insiders, but extends in many cases to the lawyers who performed services for the financial institutions.³ In the eyes of some critics, those attorneys should now bear some responsibility for the losses incurred in connection with the bank and thrift crisis.

In an attempt to recover billions lost by the government in connection with the bank and thrift crisis, government regulators have proceeded with a sense of mission.⁴ Nationwide, these regulators have launched an attack against former officers and directors of the financial institutions. They have also embarked on a crusade against the professionals who represented the institutions.

In 1990, the government received a symbolic boost from an opinion of United States District Court Judge Stanley Sporkin in which he upheld the thrift regulators' 1989 seizure of the Lincoln Savings and Loan Association ("Lincoln").⁵ In oft-quoted dicta, Judge Sporkin offered scathing criticism of the professionals who represented Lincoln. Noting that not enough scrutiny had been focused on the private sector, Judge Sporkin asked the following questions:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

by a "community of villains"). For the bank regulator's view, see OFFICE OF THE COMPTROLLER OF THE CURRENCY, *BANK FAILURE: AN EVALUATION OF THE FACTORS CONTRIBUTING TO THE FAILURE OF NATIONAL BANKS* (1988). The National Commission on Financial Institution Reform, Recovery, and Enforcement, a Congressional panel established by the Crime Control Act of 1990, will be investigating the causes of the savings and loan crisis, including the role of the private sector. *S&L Investigative Commission Talks About Causes of S&L Crisis, Elects Co-Chairman*, 58 Banking Rep. (BNA) 830 (May 11, 1992).

³"Financial institution" can refer to an array of entities including banks, savings and loans associations, credit unions, and insurance companies. This Article uses "financial institutions" to refer to banks and thrifts whose deposits are insured by the U.S. government. "Insured depository institution" is the technical statutory reference. 12 U.S.C. § 1813(c)(2) (Supp. II 1990). "Bank counsel" refers to attorneys who represent financial institutions.

⁴See Paul W. Grace, *Why FSLIC Sues, Outlook of the Federal Home Loan Bank System* (Sept./Oct. 1987) (noting that it was the government's "responsibility to proceed with a sense of mission") appended to *Civil Enforcement Investigations of Failing Thrifts and Claims Against Directors, Officers and Third Parties*, at Attachment I (PLI Commercial Law & Practice Course Handbook Series No. 466, 1988). Paul Grace served as former Associate General Counsel and Director of Litigation at the former Federal Home Loan Bank Board.

⁵*Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

Why didn't any of them speak up or disassociate themselves from the transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?⁶

At a press briefing following Judge Sporkin's opinion, Timothy Ryan, Director of the Office of Thrift Supervision ("OTS"), stated that the ruling would give the OTS "powerful ammunition" to launch a major round of enforcement actions against lawyers, accountants and other professionals involved in thrift failures.⁷ Referring to Judge Sporkin's opinion, Harris Weinstein, Chief Counsel of the OTS, echoed Mr. Ryan's comments, stating, "The court recognized that depositors are investors in a financial institution and must be protected by the board of directors and the professionals [and that] the federal government, as the insurer of the deposits, stands in the shoes of depositors."⁸

In 1992, the government's campaign reached a crescendo when the OTS filed an action against the prestigious New York-based law firm of Kaye, Scholer, Fierman, Hayes and Handler ("Kaye Scholer"). The OTS, in an unprecedented move, sued Kaye Scholer for \$275 million and moved to freeze the firm's assets.⁹ In an eighty-three page Notice of Charges, the OTS and the Justice Department claimed that Kaye Scholer attorneys had participated in regulatory violations in the course of the firm's representation of the now-defunct Lincoln and Lincoln's parent, American Continental Corporation.¹⁰ Within days, the firm settled for \$41 million.¹¹

These lawsuits, coupled with various policy statements by Harris Weinstein, have both alarmed the bar and ignited a controversy over the proper role of bank counsel. The American Bar Association ("ABA") established a task force in 1990 to study the liability of attorneys representing depository

⁶*Id.* at 920.

⁷In the press briefing on August 24, 1990, Ryan also stated that Judge Sporkin's ruling "clearly and definitively" reflected the OTS's view that professionals cooperated with Lincoln's management and "that view 'will be reflected soon in [the OTS's] enforcement actions' regarding professionals involved with other failed thrifts." See *OTS Sees Keating Ruling as Ammunition for Major Round Enforcement Actions*, 55 Banking Rep. (BNA) 399-400 (Sept. 10, 1990) (suggesting that the decision would be a "blueprint" for OTS actions against attorneys).

⁸*Id.* at 400.

⁹*OTS Freezes Kaye, Scholer's Assets, Asks for \$275 Million in Restitution*, 58 Banking Rep. (BNA) 419 (Mar. 9, 1992) [hereinafter *OTS Freezes*].

¹⁰*Id.*

¹¹Kaye, Scholer admitted no wrongdoing. *Lincoln Savings & Loan*, CHRISTIAN SCIENCE MONITOR, Dec. 28, 1992, at 9.

institutions.¹² Since that time, attorneys from the public and private sectors have debated the issues raised by the government's enforcement activity and policy statements.¹³

Public debate focused on Weinstein's early speeches which were interpreted as suggesting that attorneys have a fiduciary duty to the depository fund. Following the outcry of the private bar, Weinstein clarified his argument, asserting that bank attorneys have a duty to advise the bank directors that the directors have a duty to both depositors and the depository fund.

Part II of this paper discusses the first OTS actions against attorneys.¹⁴ Part III generally discusses this emerging theory of liability based on counsel's duty to advise directors on their duties to depositors and the depository fund.¹⁵ In Part IV, a comparison of the experience of the securities bar to that of the banking bar demonstrates how the government's enforcement activity has already changed attorneys' perceptions of their role and their approach to law practice.¹⁶ Finally, Part V considers questions related to the proper role of counsel.¹⁷

II. OTS ENFORCEMENT ACTIONS AGAINST ATTORNEYS

The OTS has used the enhanced enforcement tools granted to regulators under the Financial Institution Reform, Recovery, and Enforcement Act

¹²ABA Task Force Studies Liability of Counsel for Depository Institutions, 55 Banking Rep. (BNA) 755 (Nov. 5, 1990). In response to concerns arising out of the Kaye Scholer case, the ABA also formed the Working Group on Lawyers' Representation of Regulated Clients. See ABA, *OTS Square Off on Lawyer Liability in Moves Toward Debate, Possible Battle*, 59 Banking Rep. (BNA) 266 (Aug. 24, 1992).

¹³The April 11, 1991, meeting of the American Bar Association Section of Business Law discussed the liability of attorneys who represent financial institutions. *Ohio, Louisiana Draft Bills Would Limit Liability of Bank and Thrift Attorneys*, 56 Banking Rep. (BNA) 765 (Apr. 22, 1991). In addition, on March 21, 1991, the Administrative Conference of the United States held a colloquy on the "Ethical Obligations of Attorneys Representing Depository Institutions." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1991 ANNUAL REPORT 22 (1992).

¹⁴See *infra* notes 18-40 and accompanying text.

¹⁵See *infra* notes 41-97 and accompanying text.

¹⁶See *infra* notes 98-125 and accompanying text.

¹⁷See *infra* note 126 and accompanying text.

of 1989 ("FIRREA")¹⁸ by filing administrative actions against institution-affiliated parties,¹⁹ including attorneys and accountants. In its first move against an institution-affiliated person, the OTS filed an action against Coopers & Lybrand, the former accounting firm of Silverado Banking and Loan Association ("Silverado").²⁰

The OTS action against Silverado's counsel, the Denver law firm of Sherman & Howard followed OTS's actions against Silverado's accountants.²¹ On June 18, 1991, the OTS announced that it had reached an agreement in which Sherman & Howard agreed to a cease and desist order.²² Among other things, the firm agreed to comply with conditions that governed its representation of federally insured thrifts, including provisions to avoid conflicts of interest.²³ The firm also agreed to advise an institution's directors and officers to address safety and soundness issues concerning the institution's operations, as well as to seek advice from the OTS when needed to assure compliance with federal laws.²⁴

On June 18, 1991, the OTS also announced that it had reached a settlement of its administrative action against the Mississippi law firm of Ingram, Matthews & Stroud ("Ingram").²⁵ Ingram and its attorneys agreed

¹⁸Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at scattered sections of 12 U.S.C.).

¹⁹Attorneys and accountants were explicitly made subject to regulatory liability by the FIRREA definition of institution-affiliated parties, which included the following category of persons: "any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in (A) any violation of any law or regulation; (B) any breach of fiduciary duty; or (C) any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution." 12 U.S.C. § 1813(u)(4) (Supp. II 1990) (defining institution-affiliated parties for insured depository institution). See John C. Murphy, Jr. & Linda S. Matlack, *Significant Provisions Related to Institution-Affiliated Parties*, in CIVIL & CRIMINAL LIABILITY OF OFFICERS, DIRECTORS AND PROFESSIONALS: BANK AND THRIFT LITIGATION IN THE 1990s, at 11 (PLI Commercial Law & Practice Course Handbook Series No. 595, 1991) (for a thorough discussion of issues related to the liability of counsel and other professionals).

²⁰On December 12, 1990, Coopers & Lybrand agreed to a cease and desist order that implemented a number of auditing procedures. See *Coopers & Lybrand Enters C&D Order with OTS over Silverado Audit Charges*, 55 Banking Rep. (BNA) 991 (Dec. 17, 1990).

²¹*OTS Settles with Silverado Law Firm, Reaches Separate Agreement on C&D Order*, 57 Banking Rep. (BNA) 1204 (June 24, 1991) [hereinafter *OTS Settles*].

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

to sign a consent order, which included provisions for payment of civil penalties and restitution.²⁶

In response to the settlements with Ingram and Sherman & Howard, Kenneth Guido, Jr., OTS Deputy Chief Counsel for Special Projects, stated that the most important message of the agreements was that both firms recognized the OTS's jurisdiction over thrift counsel practice.²⁷ Guido also stated that the OTS can regulate thrift counsel as persons who practice before the agency and as persons who participate in the conduct of the affairs of the institution.²⁸

On March 2, 1992, the OTS used its statutory authority to bring an administrative action against Kaye Scholer.²⁹ In this action, the OTS focused on the statutory liability of the firm and its attorneys as institution-affiliated parties, as defined in FIRREA, and as persons participating in the "conduct of the affairs of [the] institution" as defined in former Federal Home Loan Bank Board ("FHLBB") regulations.³⁰

Among other claims, the OTS alleged that the firm acted as Lincoln's agent in the FHLBB's examination and that the attorneys omitted material facts from, and made misrepresentations in submissions to the FHLBB.³¹ The OTS asserted that these allegedly false and misleading statements and omissions violated the FHLBB regulation which prohibited "persons participating in the conduct of the affairs of [the] institution" from making any false or misleading statements to the FHLBB.³²

As a consequence of this alleged conduct, the government claimed that it incurred actual losses of at least \$275 million.³³ The OTS sought reimbursement from Kaye Scholer for these losses. The government also sought

²⁶*Id.* See also *OTS Considering Policy on Requesting Information from Outside S&L Counsel*, 57 Banking Rep. (BNA) 305, 306 (Aug. 19, 1991) (describing the alleged professional misconduct of Ingram in connection with its representation of First Guaranty Bank for Savings).

²⁷*Thrift Lawyers Can Be Regulated by OTS, Senior Agency Official Says*, 56 Banking Rep. (BNA) 1202-03 (June 24, 1991).

²⁸*Id.* at 1203.

²⁹*OTS Freezes*, *supra* note 9, at 419.

³⁰Section 563.18(b) of the FHLBB Regulations, formerly 12 C.F.R. § 563.18(b) (1986).

³¹Notices of Charges Filed in the Administrative Proceeding of *In re* Fishbein, OTS AP-92-19 (Mar. 1, 1992) [hereinafter *Notice of Charges*].

³²This prohibition was set forth in 563.18(b)(2) of the FHLBB regulations, formerly 12 C.F.R. § 563.18(b)(2) (1986).

³³See *Notice of Charges*, *supra* note 31, at 79.

to bar Kaye Scholer from representing federally insured depository institutions.³⁴ Six days after the OTS filed these charges and issued the temporary cease and desist order "freezing assets," Kaye Scholer and its attorneys reached a settlement with the OTS.³⁵ The firm agreed to pay \$41 million.³⁶

In the Kaye Scholer action, the OTS used FIRREA provisions to expand remedies for conduct that occurred prior to the enactment of FIRREA. The pre-FIRREA banking law statutes relating to restitution and civil penalties authorized such sanctions against "persons participating in the conduct of the affairs"³⁷ of the institutions.³⁸ Because Kaye Scholer and the other law firms settled, the authority of the OTS to use the FIRREA provisions against outside counsel for pre-FIRREA conduct has not yet been tested.³⁹ Therefore, the extent to which attorneys are liable for pre-FIRREA violations will not be determined until there is a contested enforcement action.⁴⁰

³⁴Under 12 C.F.R. § 513.4(a) (1992) the OTS has the authority to disbar any person from practicing before the OTS.

³⁵Director of Office of Thrift Supervision Press Release (Mar. 8, 1992) (available from the Office of Thrift Supervision Information Services Division). The OTS's pre-judgment attachment triggered a great deal of national publicity in both popular and legal newspapers. See, e.g., John C. Coffee, Jr., *What Constitution Says on Freeze Orders*, NAT'L L.J., June 8, 1992, at 18 (questioning the constitutionality of the *ex parte* freeze order); John C. Coffee, Jr., *Due Process for Kaye, Scholer?*, LEGAL TIMES, Mar. 16, 1992, at 22 (surveying the due process issues raised by freeze orders); Marvin E. Frankel, *Lawyers Can't Be Stool Pigeons*, N.Y. TIMES, Mar. 14, 1992, at A25 (referring to the asset freeze as a "Draconian" exercise of the government's preattachment power).

³⁶Stephen Labaton, *Law Firm Will Pay a \$41 Million Fine in Savings Lawsuit*, N.Y. TIMES, Mar. 9, 1992, at A1. The firm had already paid \$20 million in settle securities and racketeering lawsuits brought against it by investors who had purchased bonds from Lincoln's parent company. Stephen Labaton, *U.S. Moves to Freeze Assets of Law Firm for S&L Role*, N.Y. TIMES, Mar. 3, 1992, at A1, D8.

³⁷See *FIRREA Expands Civil Enforcement Powers of Regulators, Increases Penalties Allowed*, 53 Banking Rep. (BNA) 424 (Sept. 25, 1989).

³⁸In its Notice of Charges, the OTS went to great lengths to show that Kaye Scholer attorneys acted as agents for Lincoln and participated in defining the course of conduct of Lincoln. See, e.g., *Notice of Charges*, *supra* note 31, at 8.

³⁹Most recently, an attorney of Silver, Freeman & Taff in Washington, D.C. agreed to pay \$600,000 to settle an OTS administrative action which charged that he was a person who had "participated in the conduct of the affairs of Lincoln" and rendered an improper legal opinion. See Steve France, *Nightmare For Bank Lawyers*, NAT'L L.J., Sept. 21, 1992, at 13, 14 (noting that the attorney's role was limited to rendering an opinion on a transaction that had already been structured by other law firms).

⁴⁰See John K. Villa, *Bank and Thrift Lawyers are Targets for Agency Actions*, BANKING POL'Y REP., June 17, 1991, at 3-4 (noting that the consent orders agreed to by accounting firms did not address the crucial question of administrative sanction for

III. FIDUCIARY LIABILITY

Although the thrust of the OTS action against Kaye Scholer was that the firm violated regulations, the OTS also asserted a new theory of liability. The OTS pleading stated that the Kaye Scholer attorneys failed to inform the directors of the directors' "fiduciary duties to the depositors and to the federal insurance fund."⁴¹ The Notice of Charges against the Kaye Scholer attorneys made two references to the attorneys' failure to advise the directors of their fiduciary duties.⁴²

The OTS allegations against Kaye Scholer should come as no surprise to bank counsel, given OTS Chief Counsel Weinstein's public statements. As early as 1990, Weinstein declared that bank fiduciaries owe a duty to depositors and the depository fund.⁴³ Weinstein asserted that financial institution directors owe a duty to the government which springs from two sources: (1) the notion that the government should be treated as a creditor in an imminent insolvency situation, and (2) the view that the government is a "holder of the potentially unlimited negative equity risk."⁴⁴ In a speech at Southern Methodist University ("the SMU speech"), Weinstein elaborated on these theories by noting that the government is owed strict fiduciary duties as subrogee of the depositors.⁴⁵

A. Directors' Duty to Creditors

In the SMU speech, Weinstein adverted to the "Hornbook principle that a debtor who is insolvent or nearly so owes a fiduciary duty to

pre-FIRREA conduct). The issue was recently raised in a Petition for an Order to Show Cause and for Summary Enforcement of an Administrative Subpoena filed in OTS v. Ernst & Young, No. 91-401 (D.D.C. 1991). The U.S. District Judge issued an order enforcing the subpoena, rejecting Ernst & Young's argument that under pre-FIRREA law, accountants were not "persons participating" in the affairs of an institution. Memorandum Opinion and Order in OTS v. Ernst & Young, 786 F. Supp. 46, 53 (D.D.C. 1992).

⁴¹Notice of Charges, *supra* note 31, at 79.

⁴²Notice of Charges, *supra* note 31, at 26, 79.

⁴³See Bank, Thrift Attorneys React to Duties Outlined by OTS Chief Counsel Weinstein, 55 Banking Rep. (BNA) 547 (Oct. 1, 1990) [hereinafter *Attorneys React*].

⁴⁴Thomas C. Rice & Blake A. Bell, *Liability of Lender's Counsel*, in LENDER LIABILITY AND OTHER COMPLEX LITIGATION INVOLVING FINANCIAL INSTITUTIONS, C665 ALI-ABA at 271, 277 (1991).

⁴⁵Speech By OTS Chief Counsel Weinstein On Duties Of Depository Institution Fiduciaries, 55 Banking Rep. (BNA) 510, 511 (Sept. 24, 1990) [hereinafter *Text of SMU Speech*].

creditors.”⁴⁶ He also noted the well-established rule that a trustee for a bankrupt estate owes a fiduciary duty to the estate’s creditors, and that a breach of such duty can lead to personal liability.⁴⁷

Applying these principles to an insolvent thrift institution or to one “close to the line,” Weinstein maintained that the government is essentially a creditor of an insolvent institution.⁴⁸ As fiduciaries of a bankrupt estate are concerned primarily with the interest of creditors, Weinstein argued that the fiduciaries of an institution that is insolvent, or nearly so, should be concerned primarily with the interest of the United States Government as the institution’s largest creditor.⁴⁹ Based on this analysis, Weinstein reached the following conclusion:

The closer an institution is to solvency [sic], the more paramount does the duty to the government become. The duties that, in a solvent, uninsured, continuing enterprise might be owed only to the common shareholders, are now owed to the creditors, and the fiduciaries are charged with the duty to avoid losses to the creditors.⁵⁰

Therefore, Weinstein asserted that fiduciaries of financial institutions should not be free to gamble away the remaining assets of an institution sinking into insolvency. Weinstein argued that directors must understand that the government, as the true party in interest, is owed a fiduciary duty.⁵¹

In analyzing this theory, the starting point is to determine if and when, depositors as creditors, are owed fiduciary duties. Prior to insolvency, corporate directors are the fiduciaries of the corporation and its shareholders.⁵² Generally speaking, prior to insolvency the directors owe no fiduciary duties to the corporation’s creditors.⁵³

⁴⁶*Id.*

⁴⁷*Id.* (citing *In re Consupak, Inc.*, 87 B.R. 529, 546 (Bankr. N.D. Ill. 1988); *In re Gorski* 766 F.2d 723, 727 (2d Cir. 1985); *Red Carpet Corp. of Panama City Beach v. Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983).

⁴⁸*Text of SMU Speech, supra* note 45, at 511.

⁴⁹*Text of SMU Speech, supra* note 45, at 511.

⁵⁰*Text of SMU Speech, supra* note 45, at 511.

⁵¹*Text of SMU Speech, supra* note 45, at 512. According to Weinstein, counsel has a duty to advise the corporate fiduciary of this duty. Counsel who fails to do so breaches a duty to the institution-client. Remarks of Harris Weinstein Delivered at the University of Michigan Law School, March 24, 1992 at 19.

⁵²DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGEMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 1 (3d ed. & Supp. 1991).

⁵³*See, e.g., Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1524–25 (S.D.N.Y. 1989) (declining to recognize that a fiduciary duty was owed to bond holders who were unsecured creditors of the corporation). *See also* Gardner & Florence

Insolvency transforms this relationship by shifting the fiduciary duty of the directors from the shareholders to the creditors.⁵⁴ Thus, directors of insolvent corporations can be personally liable in an action brought by creditors, or in an action by a trustee in bankruptcy on behalf of the corporation or all creditors as a group.⁵⁵ As stated in *FDIC v. Sea Pines Co.*,⁵⁶ "[t]he law by the great weight of authority seems to be settled that when a corporation becomes insolvent, or in a failing condition, the officers and directors *no longer represent the stockholders*, but by the fact of insolvency become trustees for the creditors. . . ."⁵⁷ Corporate officers and directors of an insolvent corporation are in a sense trustees "holding the corporate property for the benefit of all creditors."⁵⁸

The court in *Sea Pines* stated that the duty of directors and officers shifts when the corporation reaches "a failing condition."⁵⁹ The court did not provide any further guidance on the meaning of the phrase, "in a failing condition."

Determining when a company's financial condition is sufficient to shift the director's duties from shareholders to creditors may be difficult to

Call Cowles Found. v. Empire Inc., 589 F. Supp. 669, 673 (S.D.N.Y. 1984) (noting that fiduciary duties in a debenture contract do not exist in the abstract, but are derived from the indenture itself), *vacated on jurisdictional grounds*, 754 F.2d 478 (2d Cir. 1985).

⁵⁴*See In re STN Enters.*, 779 F.2d 901, 904 (2d Cir. 1985) (criticizing the lower court for not recognizing that creditors of an insolvent corporation are owed fiduciary duties).

⁵⁵Dennis J. Block & Jonathan M. Hoff, *Duties of Directors of Distressed Corporations*, 204 N.Y.L.J., Nov. 8, 1990, at 5, 6. *See also* Frederick G. Kempin, Jr., *Enforcement of Management's Duties to Corporate Creditors*, 6 AM. BUS. L.J. 371, 372-78 (1968) (discussing types of creditors' suits).

⁵⁶692 F.2d 973 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

⁵⁷*Id.* at 977 (quoting *Davis v. Woolf*, 147 F.2d 629, 633 (4th Cir. 1945) (quoting *Arnold v. Knapp*, 84 S.E. 895, 899 (W. Va. 1915))) (emphasis added).

⁵⁸*Id.* at 977 (quoting *Davis v. Woolf*, 147 F.2d 629, 633). *See also* WILLIAM E. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 7.03, at 171 (3d ed. 1978) (noting recent litigation which has rejuvenated the trust fund doctrine, that requires the directors of an insolvent corporation to conserve and apply corporate property as trustee for all creditors and stockholders). For a jurisprudential analysis of the "trust fund" doctrine, *see* Joseph Jude Norton, *Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine to Corporate Assets*, 30 BUS. LAW. 1061 (1975).

⁵⁹The case law does not answer the question as to whether directors of an insolvent corporation owe fiduciary duties to shareholders, as well as creditors. For a discussion of this question and other questions related to the fiduciary duties of directors of distressed corporations, *see* Dennis J. Block, *In the Lion's Mouth*, University of Texas 14th Annual Conference on Securities Regulation and Business Law Problems, March 12, 1992, at 12-27.

determine.⁶⁰ Insolvency is a slippery term which is defined differently in various contexts. A corporation is considered insolvent when it is unable "to pay its debts as they become due in the usual course of business."⁶¹ For the purposes of appointing a receiver or conservator for a state depository institution and a federal savings association, an entity is considered insolvent when its assets "are less than its obligations to its creditors and others, including its members."⁶² Although definitions of insolvency can be applied to an institution's balance sheet, some assets require valuation.⁶³ For example, should loans of a financial institution be valued at their current market value? Clearly, loans sold on a "fire sale" basis are deeply discounted and do not reflect their actual value. This illustrates that a factual determination of an institution's insolvency depends on the valuation method. Therefore, it may be very difficult for directors to objectively discern when an institution is approaching insolvency and when its duties to creditors arise.

Recognizing the difficulty in determining when directors' duties shift from shareholders to creditors, other government regulators have declined to endorse Weinstein's theory that a duty is owed to the government as an institution slides into insolvency. When asked to comment on Weinstein's theory, FDIC General Counsel Al Byrne said that he was puzzled by the notion of drawing "bright lines on approaching insolvency or imminent failure [that would] convert the legal [duties] of an individual from that of an independent advisor to that of a fiduciary."⁶⁴ Apparently, Byrne interpreted Weinstein's comments as suggesting that the duty to creditors was owed by the attorney, rather than the directors. In recent speeches,

⁶⁰WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 5.08 (4th ed. 1988 & Supp. 1991).

⁶¹Revised Model Bus. Corp. Act § 6.40(c)(1) (1991) (prohibiting distributions to shareholders by insolvent corporations). The common definition of insolvency, when applied to a bank is as follows: capital stock and assets are insufficient to meet liabilities. 3 MICHIE ON BANKS AND BANKING, ch. 6 § 58, at 178-79 (1974). For national banks, the Comptroller of the Currency has broad discretion to determine whether a national bank is insolvent. *Liberty Nat'l Bank of S.C. v. McIntosh*, 16 F.2d 906, 908 (4th Cir. 1927), *cert. denied*, 273 U.S. 783 (1927). As stated by one commentator, the rule on insolvency "is not whether the [b]ank is insolvent, but whether the Comptroller [of the Currency] is satisfied that it is insolvent." Frank L. Skillern, *Closing and Liquidation of Banks in Texas*, 26 Sw. L.J. 830, 831, & n.8 (1972).

⁶²12 U.S.C. § 1464(d)(2)(A)(i) (Supp. II 1990).

⁶³*See* MICHIE, *supra* note 61, at 180 (noting that insolvency of a going concern is a question of fact).

⁶⁴*See* FDIC General Counsel Declines to Embrace Higher Duty for Fiduciaries in Failing Banks, 55 Banking Rep. (BNA) 941, 942 (Dec. 10, 1990) (reporting on the remarks of Al Byrne).

Weinstein has attempted to clarify his belief that the attorney's duty is to advise the directors on the directors' duties to creditors.⁶⁵

Although imminent failure may not convert the legal position of outside legal counsel, *Sea Pines* lends support to Weinstein's argument that the officers' and directors' duties to creditors arise when their institution approaches insolvency. This duty to creditors would flow to depositors who normally are viewed as creditors. Once an institution fails and the government makes payment to depositors, the government stands in the shoes of the depositors, and arguably becomes a creditor of the institution.⁶⁶ As a creditor, the government might question various activities of the directors, claiming that directors knew that the institution was approaching insolvency and that the directors breached their fiduciary duties to creditors by gambling the institution's remaining assets. At the same time, the government could challenge such activities as violative of the statutory provisions prohibiting unsafe and unsound practices.⁶⁷

B. Directors' Duty to "Negative Equity Holders"

Weinstein has also stated that attorneys must apprise directors of the directors' obligation to consider the potential risk of loss to the "owners" of the corporate entity.⁶⁸ He has asserted that the owners of a corporate entity insured by the government consist of two constituencies: (1) the positive equity holders who are common shareholders and (2) the "negative equity holders" who have assumed risk by issuing a charter and insuring the deposits of the entity.⁶⁹ Weinstein stated that, by virtue of insurance and this "negative equity risk," the government has assumed an equity position with unlimited risk of loss and no prospect of gain.⁷⁰ Weinstein has

⁶⁵See *Speech by OTS Chief Counsel Weinstein on Duties of Depository Institution Fiduciaries*, 55 Banking Rep. (BNA) 508 (Sept. 24, 1990).

⁶⁶The position of the FDIC as a creditor would be in addition to the position of the FDIC as receiver.

⁶⁷See Lawrence G. Baxter, *Fiduciary Issue in Federal Banking Regulation*, 56 LAW AND CONTEMP. PROBS. 1 (forthcoming 1992) for a critical analysis of the fiduciary duty to the federal insurer. Professor Baxter concludes that recognition of such a fiduciary duty adds nothing to the substance of the regulatory scheme which already prohibits unsafe and unsound practices. Nevertheless, Professor Baxter points out that the recognition of such a duty would have practical enforcement advantages for the regulators. *Id.* at 39.

⁶⁸*Text of SMU Speech*, *supra* note 45, at 510.

⁶⁹*Text of SMU Speech*, *supra* note 45, at 511.

⁷⁰*Text of SMU Speech*, *supra* note 45, at 511.

also asserted that this equity position warrants the "highest conceivable standard of fiduciary conduct."⁷¹

In connection with this duty owed to the government, Weinstein noted that corporate fiduciaries owe duties to those who provide the equity with which the institution operates.⁷² Weinstein has not, however, cited any actual authority in support of his proposition that the federal government, as an insurer or chartering agency, assumes some equity position.⁷³

In dissecting the "negative equity holder" theory, it is necessary to define the terms used and to consider basic principles of corporate finance. Generally, a corporation's capitalization consists of equity, and often debt.⁷⁴ Persons who provide debt financing receive a debt instrument evidencing the amount of interest and principal that must be repaid by the borrower.⁷⁵ Traditionally, such holders of debt instruments were not viewed as having any ownership interest and, in the case of a solvent corporation, were not owed any fiduciary duties by directors.⁷⁶

Weinstein blurs this distinction between shareholder-equity holders and debt holders by characterizing the depositor-creditors and the government as "negative equity holders." As such, he suggests that depositors and the government are new classes of owners to whom fiduciary duties are owed.

Weinstein's use of "negative equity" is a departure from the term's normal usage. "Negative equity" commonly describes an enterprise's financial position.⁷⁷ In the corporate context, for example, negative equity might be reflected on the corporate balance sheet when the stockholders have

⁷¹Text of SMU Speech, *supra* note 45, at 511.

⁷²Text of SMU Speech, *supra* note 45, at 511.

⁷³The logical extension of this theory is that other government agencies hold a "negative equity" position. For example, the Pension Benefit Guaranty Corporation and state insurance departments that operate guaranty funds would be considered "negative equity holders."

⁷⁴LARRY D. SODERQUIST & A.A. SOMMER, JR., UNDERSTANDING CORPORATION LAW 89 (1990).

⁷⁵This classic distinction between debt and equity does not apply to innovative financing techniques and instruments. See CECIL WRAY, JR. & SUZANNE VEILLEUX, INNOVATIVE CORPORATE FINANCING TECHNIQUES (BNA Corp. Practice Series No. 48, 1986) (for a detailed analysis of various financial instruments that have features of both debt and equity financing).

⁷⁶Text of SMU Speech, *supra* note 45, at 511.

⁷⁷For example, in the context of a savings and loan association, one commentator noted that in 1981, 450 savings and loans were technically insolvent in that they had a negative equity position. Russell W. King, Comment, *The FSLIC and Subject Matter Jurisdiction: Is a Court Really Necessary*, 20 TEX. TECH L. REV. 155, 158 n.26 (1989).

withdrawn from the corporation more than they have invested or when the corporation's losses exceed the shareholders' equity contribution.⁷⁸

Weinstein does not concede that the duty to depositors must await the presence of a "negative equity" position. Instead, he insists that the directors of even a solvent stock corporation owe duties to depositors (as well as shareholders), because depositors also add significantly to the institution's operating funds.⁷⁹ By analogy, the depositors are similar to equity holders.⁸⁰ In that regard, Weinstein maintains that the depositors, as well as the government as insurer of the deposits, are owed fiduciary duties prior to insolvency.

Weinstein's argument ignores the legal obstacles to imposing such a fiduciary duty on directors. First, the argument conflicts with existing precedent which refuses to extend a fiduciary duty to creditors, such as debenture holders.⁸¹ Among other reasons, courts believe that creditors can contractually protect their interests by incorporating provisions in the debt instrument.⁸²

Second, and more fundamentally, the imposition of a fiduciary duty on directors creates what may be an irreconcilable conflict of interest. The interests of the shareholders and the debt holders often diverge.⁸³ When

⁷⁸See, e.g. *Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884, 885 (Nev. 1987) (noting that the corporate balance sheet reflected a negative equity position).

⁷⁹*Text of SMU Speech*, *supra* note 45, at 511.

⁸⁰Using Weinstein's analysis, large creditors in highly leveraged corporations could qualify as "negative equity holders." Similarly, insurers of bond offerings could be considered "negative equity holders."

⁸¹See *Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988) (holding that no fiduciary duties were owed to debenture holders). "Before a fiduciary duty arises, an existing property right or equitable interest supporting such a duty must exist." *Id.*

⁸²JONATHAN R. MACEY & GEOFFREY P. MILLER, *FEDERAL REGULATION OF BANKING* 290 (forthcoming 1992) (suggesting that the government, in its role as banking regulator, protect itself by contract). Query whether the government could follow the lead of insurance companies that use contractual provisions to define the duties and obligations of the insured to the insurer. The government could expand its use of regulations to spell out the duties and obligations of the insured institution and its directors. See Fischer Black et al., *An Approach to the Regulation of Bank Holding Companies*, 51 J. BUS. 379, 385-87 (1978) (arguing that efficient government supervision should resemble the measures adopted by private lenders, imposing controls on borrowers). The OTS has already taken steps in this direction. For example, on November 19, 1991, the OTS issued a regulatory bulletin stating it would bar thrifts with the lowest financial condition ratings (MACRO 4 and 5), from "entering into contracts outside the normal course of business unless they obtain prior approval [from] the OTS regional directors." See *OTS Restricts Third Party S&L Contracts, Says Macro 4 and 5 Thrifts Need Approval*, 57 Banking Rep. (BNA) 893 (Dec. 2, 1991) (quoting an OTS spokesman who stated that the new policy was designed to prevent troubled thrifts from wasting assets).

⁸³Depending on the degree of risk, the shareholders' and depositors' interests may converge. Both shareholders and depositors want directors to avoid making patently unwise investments. Under Weinstein's theory, both shareholders and creditors could bring actions against directors for such investments. After an institution fails, the FDIC

called upon to make business decisions, corporate directors may be torn between protecting the interests of debt holders, who prefer low risk, and enhancing the interests of shareholders, who stand to gain by way of a higher level of risk.⁸⁴ In a solvent corporation, a director who elevates "creditor-depositor" interests above those of shareholders might be inviting the shareholders to sue the directors for negligence and breach of their fiduciary duties.

As a financial institution approaches insolvency, the potential conflict between the shareholders and creditors becomes more acute. At that point, the shareholders might prefer that directors "bet the bank." Creditors, by contrast, would almost certainly prefer conservation of the remaining assets.

Another flaw in Weinstein's argument is that it implies that the courts have uniformly recognized that directors owe depositors a fiduciary duty. In reality, the courts are split. While some courts have referred to a fiduciary duty to depositors,⁸⁵ the vast majority of judicial opinions refuse to recognize such a duty.⁸⁶ Similarly, commentators have expressed different views on the extent to which directors owe fiduciary duties to depositors.⁸⁷

pays depositors. At that point, the FDIC, standing in the shoes of the depositors, could sue. If the shareholders have claims, circuit courts reach opposite conclusions on the issue of whether the shareholders must stay their action until the FDIC has litigated or settled its claims. See James P. Murphy, *Standards Governing Conduct of Officers, Directors, and Others, in CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS AND PROFESSIONALS: BANK AND THRIFT LITIGATION IN THE 1990s*, at 115, 122 (PLI Commercial Law & Practice Course Handbook Series No. 565, 1991).

⁸⁴For a thorough discussion of this conflict between shareholders and debtors in a financial institution context, see Helen A. Garten, *Regulatory Growing Pains: A Perspective on Bank Regulation in a Deregulatory Age*, 57 *FORDHAM L. REV.* 501, 541-47 (1989).

⁸⁵See, e.g., *Lane v. Chowning*, 610 F.2d 1385, 1388-89 (8th Cir. 1979) (stating that it is "well settled" that the fiduciary duty of a bank officer or director is owed to the depositors and the shareholders); *Missouri v. State Bank of Hallsville*, 561 S.W.2d 722, 724 (Mo. Ct. App. 1978) (stating that directors serve as agents of the depositors, as well as the shareholders and the corporation). See also *Garner v. Pearson*, 545 F. Supp. 549, 556-57 (M.D. Fla. 1982) (holding that control persons of a bank had a duty to depositors), *aff'd*, 732 F.2d 850 (11th Cir. 1984).

⁸⁶These cases which deny the existence of a fiduciary relationship characterize depositors as creditors of the institution. See, e.g., *Bank of Marin v. England*, 385 U.S. 99, 101 (1966); *United States v. Bank of Celina*, 721 F.2d 163, 167 (6th Cir. 1983) (under Tennessee law); *Crocker-Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977) (under California law); *Jensen v. State Bank of Allison*, 518 F.2d 1, 5 (8th Cir. 1975) (under Iowa law); *First Nat'l Bank of Clinton v. Julian*, 383 F.2d 329, 338 (8th Cir. 1967) (under Missouri law); *Sec. Pac. Int'l Bank v. Nat'l Bank of W. Pa.*, 772 F. Supp. 874, 877 (W.D. Pa. 1991) (under Pennsylvania law); *Texas Commerce Bank-Hurst, N.A. v. United States*, 703 F. Supp. 592, 594 (N.D. Tex. 1988) (under Texas law); *Phillips & Jacobs, Inc. v. Color-Art, Inc.*, 553 F. Supp. 14, 16 (N.D. Ga. 1982) (under Georgia law).

⁸⁷One author has gone so far as to refer to directors as trustees of depositors. See EDGAR G. ALCORN, *THE DUTIES AND LIABILITIES OF BANK DIRECTORS* 27 (1980).

In an attempt to reconcile these conflicting cases, one treatise suggests that the parties' intentions in entering the deposit contract should control.⁸⁸ An analysis of the conflicting case law indicates that some courts have considered the parties intentions, finding that a fiduciary relationship exists when:

- (1) the customer has reposed trust and confidence in the bank; and
- (2) the bank has invited or accepted such trust and confidence.⁸⁹

This analysis, however, fails to explain why some courts find that a fiduciary duty is owed to all depositors while other courts deny the existence of such a duty.

C. Implications for Counsel

Given the lack of consensus on the extent to which directors owe fiduciary duties to depositors, what is counsel's role in advising institutional directors? Until such time as there is clarification on the scope of directors' duties to depositors, counsel must advise directors of the government's position and the applicable state and federal laws.

What are the practical consequences of counsel advising directors that their activities may be considered a breach of their duties to depositors? Certainly, counsel's communication to the directors charges them with notice. Consequently, by merely suggesting these theories, the government

Other commentators have stated that directors will not be liable to depositors for mismanagement or negligence in the absence of fraud or willful misconduct. JOSEPH J. NORTON & SHERRY CASTLE WHITLEY, *BANKING LAW MANUAL: LEGAL GUIDE TO COMMERCIAL BANKS, THRIFT INSTITUTIONS, CREDIT UNIONS* § 6.05, 6-38 (Supp. 1988). Another view is that in order for directors to be personally liable, directors must intentionally commit a wrongful act that directly injures the depositors or creditors. WILLIAM H. SCHLICHTING, ET AL., *BANKING LAW* §§ 6.10, 6.57 (Supp. 1992).

⁸⁸"The circumstances of various bank customer relations range from the elderly widow relying on the bank for a broad spectrum of financial advice to the publicly traded corporation with only a deposit." EDWARD L. SYMONS, JR. & JAMES J. WHITE, *BANKING LAW* 285 (2d ed. 1984).

⁸⁹Kenneth W. Curtis, *The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank Depositor and Bank-Borrower Relationships*, 20 LOY. L.A. L. REV. 795, 799 (1987). Decisions of the California Courts of Appeals illustrate the confusion surrounding this issue. In 1985, the California Court of Appeals (Fourth District) found that the bank-depositor relationship was "at least quasi-fiduciary." *Commercial Cotton Co. v. United Cal. Bank*, 163 Cal. App. 3d 511, 516 (1985). Then in 1988, the same court changed its position, rejecting its earlier characterization of the relationship as "quasi-fiduciary." *Copesky v. Superior Court for San Diego*, 229 Cal. App. 3d 678, 693 (1991).

has effectively made the institution's lawyer the mouthpiece of the government. As illustrated by the following scenarios, this enhances the government's ability to affect the directors' decision-making processes and to recover from directors or their attorneys.

Under the first scenario, counsel advises the directors of the government's position. If directors heed the warning, and only make conservative choices, the "government message" has influenced the decision-making of the directors.

In the second scenario, the attorney goes through the counseling exercise, advising the directors on the government's position. As noted above, counsel's warning puts the directors on notice. Prior to this notice, the directors may be sued for common law negligence or breach of fiduciary duty.⁹⁰ After this notice, however, directors may be exposed to liability under FIRREA and other banking legislation which requires more than negligence.⁹¹ Warnings from regulators, or others, heighten a director's standard of care.⁹² Therefore, counsel's warning may convert the claim against the directors from an ordinary negligence claim to a gross negligence claim.⁹³ Once sued, a director may be deprived of a defense based on either reliance on counsel or exercise of business judgment.⁹⁴

A third possibility is the scenario where counsel fails to advise the directors of the government's position. In that event, the directors who are later pursued by the government might then sue counsel for negligently failing

⁹⁰On Feb. 24, 1992, the U.S. Court of Appeals for the Tenth Circuit held that the FDIC can sue bank officers and directors for ordinary negligence. The court found that FIRREA did not limit the FDIC to gross negligence claims in suits against directors. *FDIC v. Canfield*, No. 91-4143 (10th Cir. Feb. 24, 1992) (LEXIS, Genfed library, U.S. App. file). For discussion of the case, see *FDIC Wins on Appeal in D&O Litigation as Ordinary Negligence Claims Stand Up*, 58 Banking Rep. (BNA) 419 (Mar. 9, 1992).

⁹¹For example, under U.S.C. § 93 (1988), a national bank director is personally liable for damages sustained as a consequence of "knowing" violations.

⁹²*Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984) (noting that directors should have taken additional precautions after regulators' warnings).

⁹³A director or officer may be held personally liable for damages due to gross negligence and intentional tortious conduct. The elements of gross negligence and tortious conduct will be defined by applicable state law. In addition, higher civil penalties can be assessed against the director upon demonstration of certain types of culpability, such as recklessness or knowing violations. See, e.g., 12 U.S.C. § 1818 (i)(2) (Supp. II 1990) (setting forth the graduated penalties for institution-affiliated parties).

⁹⁴Under the business judgment rule, the plaintiff must plead and prove facts sufficient to overcome the presumption that the directors acted with due care. Stephen A. Radin, *The Director's Duty of Care Three Years After Smith v. Van Gorkom*, 39 HASTINGS L.J. 707, 714 (1988).

to advise. In addition, the government, standing in the shoes of the institution, could claim that counsel breached his or her duty to the corporation by failing to competently advise the directors.

The government improves its position in all of the cited scenarios. Because lawsuits are seldom large enough to compensate for losses, the government would prefer the first scenario. Under the first scenario, the government's message is followed by directors who avoid risky ventures and possible receivership. In this regard, the regulators are acting as "super-managers" in influencing the management's risk taking.⁹⁵

The government's policy statements create a dilemma for counsel representing financial institutions. Counsel may criticize one or more of the government's theories. Still, in an effort to be diligent, counsel may communicate the theories to the directors.

In order for counsel to establish that he or she warned the officers and directors, counsel may document the communication. If the lawyer does, the government could use the writing as a trial exhibit when suing the directors. Failure to document the advice impairs counsel's ability to defend a legal malpractice case. Therefore, a prudent lawyer often documents advice. Such documentation would protect the lawyer and incriminate the directors. As a consequence, bank counsel has been co-opted into being an arm of the regulators.⁹⁶ This may have a chilling effect, causing attorneys and directors to err on the side of excessive caution, perhaps to the detriment of the industry.⁹⁷

⁹⁵As described by Helen Garten, the new regulation that focuses on risk taking puts the regulator into the position of "supermanager" who can impose direct discipline on the business decisions of management. See Garten, *supra* note 84, at 546.

⁹⁶As characterized by one commentator, the government is attempting to recruit "policemen" in the form of attorneys and accountants. Lawrence G. Baxter, *Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators*, 59 FORDHAM L. REV. 193, 238 (1991).

⁹⁷*Id.* See also Sidney S. Rosdeitcher, *The Thrift Crisis and Lawyer's Liability*, in CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS, AND PROFESSIONALS: BANK AND THRIFT LITIGATION IN THE 1990s, at 409, 431-32 (PLI Commercial Law & Practice Course Handbook Series No. 565, 1991) (noting that the government's enforcement activity may transform the independent bar into a group of timid, obstructive lawyers who are ready to abandon or turn in their clients at any hint of wrongdoing and who are primarily concerned with protecting themselves).

IV. EXPERIENCE OF THE SECURITIES AND BANKING BARS

The OTS's efforts to convert counsel into government agents remind some lawyers of the SEC's efforts in the 1970s.

Beginning in the 1970s, the General Counsel and Enforcement Division of the SEC started scrutinizing the conduct of attorneys.⁹⁸ In 1972, the SEC brought its most significant and celebrated injunctive action against attorneys. In *SEC v. National Student Marketing Corp.*,⁹⁹ the SEC alleged that the law firm aided and abetted the client in securities law violations. Still, what is significant about the case is that the SEC did not condemn the law firm for actually participating in the wrongdoing, but rather for failing to take action to prevent the client's misconduct.¹⁰⁰

This case captured the attention of the securities bar, causing the attorneys to re-evaluate their own duties and corresponding liabilities. Although much of the initial focus related to lawyers' civil and criminal exposure, the focus broadened to include fundamental questions relating to the attorney-client relationship.¹⁰¹ As stated by the court in *National Student Marketing*:

The filing of the complaint in this proceeding generated significant interest and an almost overwhelming amount of comment within the legal profession on the scope of a securities lawyer's obligations . . . to the investing public. The very initiation of this action, therefore, has provided a necessary and worthwhile impetus for the profession's recognition and assessment of its responsibilities in this area.¹⁰²

The SEC complaint emphasized the view that securities attorneys have responsibilities to the investing public.¹⁰³ SEC Commissioners have reiterated

⁹⁸Prior to 1971, the SEC had taken no action against major law firms. Richard H. Rowe, *The SEC Moves Cautiously on Lawyer Accountability*, LEGAL TIMES, Aug. 13, 1979, at 35.

⁹⁹Securities Exch. Comm'n v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978).

¹⁰⁰*Id.* See also Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436, 460-61 n. 147 (1987) (citing the National Student Marketing complaint which alleged that the corporation's attorneys failed to insist that the shareholders be resolicited and failed to notify the SEC concerning the misleading nature of the corporation's financial statements).

¹⁰¹See ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 312 (2d ed. 1984) (noting that there was a flood of commentary following *National Marketing*).

¹⁰²457 F. Supp. at 714 (footnote omitted).

¹⁰³KAUFMAN, *supra* note 101, at 313

this message, delivering speeches on attorneys' professional responsibility.¹⁰⁴ In a published speech, Commissioner A.A. Sommer asserted that securities attorneys were gatekeepers, holding the pass keys to securities transactions.¹⁰⁵ In this role, securities attorneys must function more like auditors than advocates.¹⁰⁶

The ABA issued a policy statement to address these questions ("Policy Statement").¹⁰⁷ In its Policy Statement, the ABA strongly rejected the SEC's position and reaffirmed the sanctity of the attorney-client relationship.¹⁰⁸

In 1979, the SEC riveted the securities bar by bringing an administrative action against two attorneys from the well-known Wall Street law firm of Brown, Wood, Ivey, Mitchell & Perry.¹⁰⁹ The SEC brought this disciplinary action, *In re Carter and Johnson*,¹¹⁰ ("Carter-Johnson") under Rule 2(e) of the Rules of Practice of the SEC.¹¹¹ Noting that the SEC had never

¹⁰⁴Commissioner Roberta Karmel did not share the views of the other Commissioners. She frequently criticized the position that the securities bar owed the investing public certain duties of care and disclosure. See Joseph C. Daley & Roberta S. Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747 (1975). After leaving the SEC, Karmel continued to question the SEC's theories of liability. See, e.g., Roberta S. Karmel, *Duty to the Target: Is an Attorney's Duty to the Corporation a Paradigm for Directors?*, 39 HASTINGS L.J. 677 (1988).

¹⁰⁵See A.A. Sommer, Jr., *The Emerging Responsibilities of the Securities Lawyer* [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,631 (1974) (referring to the new focus upon the role of attorney as the keeper of the stop and go signal).

¹⁰⁶Commissioner Sommer admitted, however, that the implications of this role raised many questions as to how attorneys should represent clients. *Id.*

¹⁰⁷*Statement of Policy Adopted by American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission, Report to the House of Delegates, Section of Corporation, Banking and Business Law Recommendation*, 31 BUS. LAW 543, 544 (1975) (Report to the House of Delegates, Section of Corporation, Banking and Business Law Recommendation).

¹⁰⁸According to the ABA Policy Statement, attorney-client confidentiality encourages clients to consult legal counsel freely. Forcing attorneys to disclose confidences to third parties, such as the SEC, would seriously impair the lawyer's ability to counsel and defend clients. *Id.*

¹⁰⁹See Barry M. Hager, *Karmel Out in Key Carter-Johnson Discipline Case*, LEGAL TIMES, July 30, 1979, at 1. Prior to Carter-Johnson, the SEC was slow to use its Rule 2(e) authority to bring actions against attorneys from large firms.

¹¹⁰See *State Developments: Regulatory Briefs*, 16 SEC. REG. & L. REP. (BNA) No. 7, at 278 (Feb. 17, 1984).

¹¹¹Rule 2(e) of the SEC's Rules of Practice, 17 C.F.R. § 201.2(e) (1991), states: "The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully

promulgated standards of professional responsibility, the respondents in *Carter-Johnson* argued that it was fundamentally unfair to impose standards retroactively.¹¹²

In the aftermath of *Carter-Johnson*, law firms became more circumspect. Securities attorneys continued to reassess their responsibilities. For example, law firms scrutinized their due diligence procedures and opinion letter policies.¹¹³

The mere threat of government action intimidated securities lawyers. This affected the manner in which lawyers represented clients. As described:

Law firms anxious to avoid an SEC prosecution began to err by placing too much emphasis on their duty of candor to the government. . . . The SEC's position intimidated attorneys, curtailed zealous representation of clients, and interfered with the continuing development of the securities laws.¹¹⁴

Once sued, law firms felt an extraordinary amount of pressure to settle.¹¹⁵ The prospect of lengthy and expensive litigation, negative publicity, and occasionally, civil and criminal contempt charges, intimidated law firms into settlement.¹¹⁶ Perhaps the most insidious effect of the SEC's actions was the subtle influence on attorneys' thought processes.¹¹⁷ Under the circumstances, attorneys' fear of liability conceivably colors their advice to clients.¹¹⁸

There are numerous comparisons between the enforcement agenda of the federal securities regulators and that of the banking regulators. Both

violated, or willfully aided and abetted the violation of any provision of the Federal securities laws . . . or the rules and regulations thereunder."

¹¹²SEC Release No. 34-17597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, 84,145, 84,164 (Feb. 28, 1981). The Commissioners agreed that it would be unfair to establish new rules of conduct and to impose rules retroactively, on those who acted "without reason to believe their conduct was unethical or improper." *Id.*

¹¹³Although securities lawyers refined their practice and took steps to minimize their liability, insurers regarded securities practice as a high risk specialty. This affected both the availability and cost of malpractice insurance. See KAUFMAN, *supra* note 101, at 318 (attributing the enormous increase in malpractice premiums to the uncertainties in securities practice).

¹¹⁴Krach, *supra* note 100, at 462 (footnote omitted).

¹¹⁵Krach, *supra* note 100, at 461-62.

¹¹⁶Krach, *supra* note 100, at 461-62.

¹¹⁷Richard H. Rowe, *Potential Exposure to Governmental Action Under the Federal Securities Laws for Rendering Legal Opinions*, in OPINION LETTERS OF COUNSEL 1987, at 865, 944 (PLI Corp. Law & Practice Course Handbook Series No. 583, 1987).

¹¹⁸See *id.*

groups emphasized counsel's gatekeeping role, taking the position that counsel owes a duty to persons other than the immediate client. Both groups of regulators made a big splash by filing actions against major firms.

Banking regulators have also followed the lead of the SEC Commissioners who spoke and wrote on counsel's emerging duties. Harris Weinstein said that lawyers would be held to the "highest standards of the profession."¹¹⁹ The SEC Commissioners referred to the "rigorous standards of professional honor."¹²⁰ Neither the SEC Commissioners nor Weinstein described such standards.

The private bar's reaction to the public statements by Harris Weinstein has mirrored its earlier reactions to the SEC Commissioners' statements. The *Carter-Johnson* attorneys challenged the retroactive application of duties. Similarly, bank counsel now argue that retroactive application is fundamentally unfair.¹²¹

Banking attorneys, like their colleagues in the securities bar, are scrutinizing their duties and re-evaluating their policies and procedures. For example, banking attorneys are adopting policies prohibiting service on the boards of directors and requiring specific engagement letters. Firms are also instituting peer review procedures and are employing trained ethics experts.¹²²

Banking practice, like securities practice, is now perceived as a high risk specialty. As a result, some malpractice insurers refuse to underwrite banking attorneys. Other insurers are increasing premiums for banking attorneys or are specifically excluding coverage for banking regulators' claims.¹²³

The bank regulators, like the securities regulators, have created a climate of intimidation. The commentary on the Kaye Scholer action reflects this perception. For example, in referring to the recent action against Kaye

¹¹⁹Harris Weinstein, Remarks at the Administrative Conference of the U.S. Colloquy on the Ethical Obligations of Attorneys Representing Depository Institutions 14 (Mar. 21, 1990).

¹²⁰*In re Emanuel Fields*, Fed. Sec. L. Rep. (CCH) ¶ 79,407 (June 18, 1973).

¹²¹*See Attorneys React*, *supra* note 43, at 547-48 (quoting Ron Glancz, a partner at Drinker, Biddle & Reath, who noted the constitutional obstacles presented by retroactive application).

¹²²David Margolick, *What Price Ethics? \$41 Million Settlement Has Lawyers Asking a Lot More Questions*, N.Y. TIMES, Mar. 13, 1992, at B16.

¹²³*See Linda Himelstein, Insurers Dodge S&L Claims Against Lawyers*, LEGAL TIMES, Apr. 29, 1991, at 1, 18 (discussing insurers' efforts to limit their liability by including "regulatory exclusions" in legal malpractice policies and noting that insurers are also raising deductibles and premiums for bank attorneys who are high-risk insureds).

Scholer, one critic stated that the government employed a "heavy-handed tactic meant to bludgeon settlement."¹²⁴ The subject law firms have also expressed similar sentiments.¹²⁵ In their opinion, they were forced to settle because of the exorbitant costs of prolonged litigation and the adverse effect of negative publicity.

V. RETHINKING THE ROLE OF COUNSEL

As a result of these settlements, the answers to the serious questions raised by the government's actions remain muddled.¹²⁶ Apparently, litigation will not resolve these questions. As illustrated by recent settlements, law firms cannot afford to fight the government's charges. The cases that proceed to trial will inevitably result in endless appeals with fact-specific results that have limited precedential value. Although the OTS's theories of counsel liability have not been tested in court, the instigation of these lawsuits has already affected the conduct of bank counsel, on both the firm and the individual level, where the government's enforcement message shadows attorney's actions and thought processes.

Given the uproar following the Kaye Scholer case, banking regulators may be less inclined to bring enforcement actions based on untested theories. Nevertheless, the real legacy of Kaye Scholer and other OTS actions is their insidious influence on banking practice. Even assuming that the government does not bring further actions alleging new theories, the government has already scored a victory in forcing attorneys to reassess their role in the changing legal landscape where attorneys are targets.

¹²⁴Stephen Labaton, *Law Firm Will Pay a \$41 Million Fine in Savings Lawsuit*, N.Y. TIMES, Mar. 9, 1992, at A1, D5.

¹²⁵*See, e.g., OTS Settles with Silverado Law Firm, Reaches Separate Agreement on C&D Order*, *supra* note 21 (quoting a Sherman & Howard release stating that the firm settled to avoid the millions of dollars and years of litigation needed to fight the charges). In May 1991, Sherman & Howard also agreed to settle the FDIC's action brought in connection with the firm's representation of Silverado. Judge Sherman Finesilver of the U.S. District Court for the District of Colorado approved the Sherman & Howard settlement with the FDIC, stating that "[t]he allegations in the complaint did in fact present difficult and novel legal issues in a complex and changing legal environment. The dynamics of this type of litigation are still unfolding and settlement dialogue recognizes the uncertainties of results and inevitability of endless appeals." *Neil Bush, Other Silverado Board Member, and S&H's Law Firm Agree to Settle with FDIC*, 56 Banking Rep. (BNA) 1058 (June 3, 1991).

¹²⁶*Accountability by Sledgehammer*, N.Y. TIMES, Mar. 10, 1992, at A24 (arguing that the government's coercive methods deprive the public of answers to important questions relating to the proper role of counsel).

