Corporate Officer and Director Liability: Atherton v. Federal Deposit Insurance Corporation: A Final Resolution of the Issues Surrounding Section 1821(k) of FIRREA

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NOTES

Corporate Officer and Director Liability: *Atherton v.* Federal Deposit Insurance Corporation: A Final Resolution of the Issues Surrounding Section 1821(k) of FIRREA

*Introduction*

As a general matter of corporate law, officers and directors owe a duty of care and a duty of loyalty to the corporations they manage.¹ A breach of either of these duties may subject the officer or director to personal liability for any damage caused by the breach. In 1989, Congress adopted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)² to deal with the issue of personal liability as applied to officers and directors of insolvent, federally chartered savings institutions. Specifically, section 1821(k) of FIRREA³ states that directors and officers can be held liable for gross negligence or intentional tortious conduct.

On the surface, the provision appears to establish a clear test for imposing liability on former corporate executives.⁴ In reality, however, the meaning of section 1821(k) has been anything but obvious. Since the promulgation of FIRREA, courts confronting the issue of officer and director liability have been unable to agree on the definite meaning of section 1821(k).⁵ The source of the dispute is the ambiguous language of the statute, particularly the first and last sentences in the provision.⁶ Courts have differed in judgment as to whether the statute establishes a national standard of care in all situations or whether it leaves room for the application of certain state law or federal common law standards of liability.⁷

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⁴ See id.
⁵ See Norwood P. Beveridge, Director Liability Under FIRREA: Negligence and Gross Negligence in the Courts, 48 CONSUMER FIN. L. Q. REP. 77, 77 (1994) ("[T]he meaning of [section 1821(k)] was called into doubt from the beginning by conflicting court decisions and commentary."); see also Christopher T. Gorman, Liability of Directors and Officers Under FIRREA: The Uncertain Standard of § 1821(k) and the Need for Congressional Reform, 83 KY. L.J. 653, 654 (1995) ("[T]he language of § 1831(k) is ambiguous regarding the proper standard of care by which to evaluate the conduct of . . . officers and directors."); Steven B. Price, FIRREA's Statute on the Standard of Liability for Bank Directors and Officers: Through the Looking Glass of New Textualism, 30 IDAHO L. REV. 219, 224 (1994) (finding that the language in § 1821(k) of FIRREA is subject to two interpretations).
⁶ See Beveridge, supra note 5, at 140; see infra notes 30, 81.
⁷ See FDIC v. Canfield, 967 F.2d 443, 445 n.3 (10th Cir. 1992) (listing the district courts that are
On January 14, 1997, the United States Supreme Court, in Atherton v. Federal Depository Insurance Corp., put an end to the disharmony. In Atherton, the Court clarified the meaning of section 1821(k) by holding that the statute guarantees that officers and directors of federally chartered savings institutions must meet at least a gross negligence standard of care. The Court also held that the provision does not preclude stricter state law standards making directors and officers liable for less culpable conduct, such as simple or ordinary negligence.

This note examines the Supreme Court's opinion in Atherton and the potential effects of the decision on corporate law in Oklahoma. Part I reviews the state of the savings industry at the time Congress enacted FIRREA and the purposes behind the adoption of the statute. Also, Part I specifically discusses section 1821(k) of FIRREA in detail, focusing on the portions of the statute that have been the primary cause of the dissension among the courts. Part II explores the law preceding the Supreme Court's decision, describing the considerable disagreement among the federal courts and explaining the reasoning behind the federal courts' differing opinions. Part III recounts the facts of Atherton, the procedural background of the case, and the Supreme Court's decision. Finally, Part IV of this note analyzes the Court's opinion regarding the existence of any federal common law standard of liability and its judgment regarding the preemption of state law. Part IV concludes with an analysis of the implications of Atherton in general, and its effects on Oklahoma law.

I. Background Information

A. The Adoption of FIRREA

In the mid-1980s, the nation experienced a tremendous increase in the number of bank and thrift failures. This "deluge of insolvencies" forced the federal government to confront numerous claims brought by depositors whose savings had been insured by the Federal Deposit Insurance Corporation (FDIC). Initial estimates indicated that the collapse of the industry would cost the federal treasury

split on the interpretation of § 1821(k)); see also RTC v. CityFed Fin. Corp., 57 F.3d 1231, 1244-45 (3d Cir. 1995) (holding § 1821(k) does not preempt state or federal common law); RTC v. Frates, 52 F.3d 295, 297 (10th Cir. 1995) (holding § 1821(k) preempts federal common law); RTC v. Gallagher, 10 F.3d 416, 424 (7th Cir. 1993) (concluding § 1821(k) preempts federal law); FDIC v. McSweeney, 976 F.2d 532, 540 (9th Cir. 1992) (finding § 1821(k) does not preempt state law).


9. See Atherton, 319 U.S. at 216.

10. See id.

11. See Christopher S. Lam, Resolution Trust Corp. v. Cityfed Financial Corp.: The State Law and Federal Common Law Distinction, 41 VILL. L. REV. 1035, 1035 n.2 (1996) (citing Paul T. Clark et al., Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 45 BUS. LAW. 1013 (1990)) (estimating the rate of bank failure increased three and one half times from the rate in 1935 to the rate between 1980 to 1988); see also RTC v. Chapman, 29 F.3d 1120, 1126 (7th Cir. 1994) (finding in the mid-1980s that banks were "falling like ninepins").

tens of billions of dollars in cleanup costs.\textsuperscript{15} Later reports, however, revealed that the cost of the savings and loan (S\&L) crisis was more likely to total one trillion dollars in damages.\textsuperscript{14}

In response to the crisis, the FDIC and the Resolution Trust Corporation (RTC) brought actions against former officers and directors of the failed institutions.\textsuperscript{15} In a majority of these failures, the dismal performance and mismanagement by corporate executives largely contributed to the depository's downfall.\textsuperscript{16} Congress found that by holding the former officers and directors personally responsible for their contribution to the damaged savings industry, the government could recoup some of its loss.\textsuperscript{17} During the 1980s, however, many states passed legislation effectively insulating officers and directors from liability.\textsuperscript{18} For instance, several states adopted laws that impose liability only for intentional misconduct, willful or wanton conduct, or similar behavior.\textsuperscript{19} The liability-relaxing statutes made it more difficult for the government to hold directors and officers of the failed institutions responsible, thereby decreasing the likelihood of the government relieving its financial burden.

Finally, in 1989, Congress set out to remedy this situation. By adopting FIRREA, Congress intended to "strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors"\textsuperscript{20} and to "strengthen the enforcement powers of the federal regulators of depository institutions."\textsuperscript{21} "To effectuate these purposes, Congress, for the first time, legislated on the standard of liability governing claims against officers and directors of federally chartered, federally insured depositories."\textsuperscript{22}

\begin{thebibliography}{99}
\bibitem{13} See Gorman, \textit{supra} note 5, at 653 (noting original estimates of savings and loan crisis near $100 billion).
\bibitem{14} See Banning K. Lary, \textit{Apres de Deluge: Cleaning Up After the S\&L Mess}, MGMT. REV., July 1990, at 24, 24 ("S\&L clean-up estimates have swelled from $100 billion to over $300 billion, climbing toward the $1 trillion mark . . . .").
\bibitem{17} See \textit{id.} (noting the FDIC and the RTC sued in response to the bank and thrift failures and now continue to bring actions against hundreds of former officers and directors of the savings institutions which subject the executives to personal liability and frequently lead to multi-million dollar verdicts and settlements).
\bibitem{19} See Glanze & Darland, \textit{supra} note 1, at 822 ("[B]road based concerns that [the ordinary prudent person] standard operated as a substantial disincentive in attracting the best qualified candidates for service as directors prompted many states to enact statutes that limited further the liability of directors . . . .").
\bibitem{21} \textit{id.} (quoting FSLIC v. Shelton, 789 F. Supp. 1360, 1364 & n.21 (M.D. La. 1992)).
\bibitem{22} \textit{id.} at 2348 (citing RTC v. Rahn, 854 F. Supp. 480, 485 (W.D. Mich. 1994)).
\end{thebibliography}
B. Section 1821(k) of FIRREA

Under 12 U.S.C. § 1821(k), the government may hold officers and directors of failed financial institutions personally liable for the mismanagement of the corporation. This section specifically provides:

A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation — (1) acting as conservator or receiver of such institution, (2) acting based on a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or (3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title, for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

By enacting section 1821(k), Congress undoubtedly intended to preempt those state law standards that prohibit the FDIC from pursuing claims against officers and directors for gross negligence or less stringent conduct, such as simple or ordinary negligence. It is unclear, however, if Congress intended to accomplish anything further by enacting the statute. Interpreting the provision has proven troublesome for many courts and legal commentators. One problem involves the courts' difficulty agreeing on whether section 1821(k) preempts not only more culpable state standards, but also state standards requiring only a showing of simple negligence. Furthermore, courts have been unable to reach an accord as to

25. See Battin, supra note 12, at 2349 (basing this conclusion on research of following case law and commentary); see also O'Melveny & Myers v. FDIC, 412 U.S. 79, 85 (1994) (concluding § 1821(k) provides for actions against directors and officers for gross negligence, even though state law standards of liability are more stringent); FDIC v. Barham, 794 F. Supp. 187, 190 (W.D. La. 1991), aff'd, 995 F.2d 600 (5th Cir. 1993); Battin, supra note 12, at 2349 n.16 (reasoning, based on this research, "[t]he practical effect is that the statute invalidates state 'insulating statutes,' which allow corporations to include in their articles of incorporation provisions shielding directors form personal liability") (citing REv. MODEL BUS. CORP. ACT § 2.02(b)(4) (1994)); Beveridge, supra note 5, at 78 (concluding that courts have reached agreement that the purpose of FIRREA was to displace state statutes that imposed liability on officers and directors only for more culpable conduct, like simple negligence); Glance & Darland, supra note 1, at 823 (stating courts generally agree that FIRREA preempts state laws attempting to shield directors from liability for more serious conduct).
26. See Lam, supra note 11, at 1036 (noting the ambiguous text of § 1821(k) has caused disagreement regarding its interpretation).
27. See Battin, supra note 12, at 2349; see also FDIC v. McSweeney, 976 F.2d 532, 539 n.5 (9th
whether section 1821(k) usurps any preexisting federal common law. The final problem concerning section 1821(k) is that decisions have varied on the determination as to whether state law concerning directors applies to federally chartered banks.

The source of the inconsistent application of section 1821(k) lies in the language of the statute. The last sentence of the provision, commonly referred to as the "savings clause," is a primary source of much of the disagreement as to the meaning of the statute. The government relies on the "savings clause" for its assertion that the statute does not create an exclusive standard of care. Rather, the government argues that "other applicable law" encompasses the law of the United States and the federal common law. In contrast, defendant officers and directors generally contend that the "savings clause" limits the right of the government to pursue claims against officers and directors solely under the law of FIRREA, and not under any other state law standard. According to this line of reasoning, the government is confined to pursuing remedies under the statutory authority of FIRREA, and therefore has no right to sue the defendant executives under state law or federal common law.

Cir. 1992) ("[T]he lower courts are split on the question of the FDIC's ability to proceed against officers and directors for simple negligence under state law."); see also FDIC v. Canfield, 967 F.2d 443, 446 n.3 (10th Cir. 1992) (listing district court cases both supporting and opposing the application of state law simple negligence standards to officers and directors of failed banks).

28. See Battin, supra note 12, at 2349 n.18 (comparing RTC v. O'Bear, Overholser, Smith & Huffer, 840 F. Supp. 1270 (N.D. Ind. 1993) (holding § 1821(k) "does preempt RTC's state law [simple negligence] claims"), with McSweeney, 976 F.2d at 537 (en banc) (holding "state law claims premised on lesser culpability (than the gross negligence standard in § 1821(k)) are not preempted by FIRREA").

29. See id. at 2349-50 & n.21 (comparing RTC v. Gibson, 829 F. Supp. 1103, 1110 n.2 ("There is nothing to suggest that officers . . . of federally chartered institutions are only subject to federal causes of action."); with RTC v. Hess, 820 F. Supp. 1359, 1362 (D. Utah 1993) ("[F]ederal law exclusively governs the internal affairs of federal savings and loan associations, including director liability.").

30. The "savings clause" reads: "Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law." 12 U.S.C. § 1821(k) (1994); see Battin, supra note 12, at 2349 ("Due . . . to the ambiguous language of § 1821(k), especially the last sentence, or 'savings clause', courts have not been able to agree on a number of . . . issues."); see also Glanz & Darfand, supra note 1, at 823 (noting that the "savings clause" has prompted extensive litigation).

31. See RTC v. Gallagher, 10 F.3d 416, 420 (7th Cir. 1993) (rejecting RTCs argument that the "savings clause" specifically preserves actions under federal common law). But see FDIC v. Stahl, 89 F.3d 1510, 1515 (11th Cir. 1996) (agreeing with FDIC that "Congress enacted the last sentence of the statute to permit courts to decide whether to apply state law to federally chartered financial institutions"); FDIC v. Canfield, 967 F.2d 443, 447 (10th Cir. 1992) (agreeing with FDIC's argument that "other applicable law" means all other applicable laws such as state and federal common law standards).

32. In McSweeney, 976 F.2d at 538, the defendant-officers and directors argued that "other applicable law" refers to the law of FIRREA, and that had Congress intended to safeguard the government's rights to seek remedies under state law, it would have said so explicitly. Furthermore, in Canfield, 967 F.2d at 447, the court dismissed the defendant-officer's suggestion that "other applicable law" refers to the FDIC's powers in "other contexts," and that it applies only to other sections of FIRREA itself.
An additional source of conflict is the use of the word "may" in the first sentence of section 1821(k).\textsuperscript{33} Commonly, the officers and directors of the failed institutions maintain that Congress' use of the word "may" illustrates its intent to limit actions brought against them to a showing of "gross negligence."\textsuperscript{34} On the other hand, plaintiffs typically argue that the word "may" should not be construed as a limitation, but as a permissive term, allowing the FDIC to proceed with claims under state and federal common law as well as the federal statute.\textsuperscript{35}

II. The Development of Officer and Director Liability Under FIRREA

A. The Question of State Law Preemption

Officers and directors of insolvent financial institutions generally contend that section 1821(k) of FIRREA preempts state law in its entirety and establishes a national standard of liability.\textsuperscript{36} Excluding the Sixth Circuit, which accepted this argument in dicta,\textsuperscript{37} courts dealing with this issue have held that section 1821(k) only partially preempts state law.\textsuperscript{38} Specifically, the United States Courts of Appeals for the Ninth, Tenth, and Eleventh Circuits have all concluded that the provision preempts state law only to the extent that state law standards are less culpable than "gross negligence."\textsuperscript{39} Specifically, these courts have agreed that the government may pursue state claims against former officers and directors under state laws providing for simple or ordinary negligence.\textsuperscript{40}

The Ninth and Tenth Circuits relied heavily on the "plain language" of the statute to demonstrate that, contrary to the argument of defendant officers and directors, Congress did not intend to authorize an exclusive standard of care.\textsuperscript{41} In Federal

\textsuperscript{33} See Battin, supra note 12, at 2356-57.
\textsuperscript{34} See McSweeney, 976 F.2d at 536 (illustrating officers interpreting "may" as a limitation on the types of claims that the FDIC may pursue).
\textsuperscript{35} See McSweeney, 976 F.2d at 537 (finding in accord with FDIC's argument that "[h]ad Congress intended this authorizing provision to limit the FDIC to claims alleging gross negligence or greater culpability, it would have inserted the word 'only' in the sentence"); see also RTC v. Miramon, 22 F.3d 1357, 1361 (5th Cir. 1994) (arguing if the first sentence of § 1821(k) were meant to be exclusive it would have said "may only").
\textsuperscript{36} See Stahl, 89 F.3d at 1514; Miramon, 22 F.3d at 1359; Canfield, 967 F.2d at 445.
\textsuperscript{37} See Gaff v. FDIC, 919 F.2d 384, 390-91 (6th Cir. 1990) (reasoning the legislative history of § 1821(k) clearly expresses an intent to provide a uniform standard of liability across the nation); see also Lam, supra note 11, at 1047 n.74 (noting, in support of its decision, the Gaff court quoted the legislative history: "§ 1821(k) preempts State law... The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of duty of care"). The legislative history is also quoted at H.R. CONF. REP. NO. 101-222, at 398 (1989), reprinted in 1989 U.S.C.C.A.N. 437.
\textsuperscript{38} See Lam, supra note 11, at 1045.
\textsuperscript{39} See Stahl, 89 F.3d at 1516; Canfield, 967 F.3d at 446; McSweeney, 976 F.2d at 537.
\textsuperscript{40} See Stahl, 97 F.3d at 1516; Canfield, 967 F.3d at 446; McSweeney, 976 F.2d at 537.
\textsuperscript{41} See McSweeney, 976 F.2d at 539 ("[N]owhere does FIRREA indicate an aim to create national uniformity in liability standards."); Canfield, 967 F.3d at 446 ("[T]he words used in § 1821(k) to describe the potential liability of officers and directors belie the creation of an exclusive federal standard of liability.").
Deposit Insurance Corp. v. Canfield, the Tenth Circuit began its analysis of the statute's text by rejecting the defendants' interpretation of the word "may." The court concluded that "no reasonable construction of the word 'may' results in an absolute limitation of the liability of officers and directors to instances of gross negligence," and instead, found that "may" is a permissive term entitling the FDIC to rely on stricter state law standards of negligence. The Ninth Circuit, in Federal Deposit Insurance Corp. v. McSweeney, joined the Tenth Circuit in concluding that "[h]ad Congress intended this authorizing provision to limit the FDIC to claims alleging gross negligence . . . [it] would have inserted the word 'only' in the sentence."47

In evaluating the meaning of the "savings clause," both the Canfield and McSweeney courts interpreted the last sentence of section 1821(k) as preserving the government's right to pursue stricter state law causes of action against corporate executives in a state where such actions are otherwise permissible. The defendants in each case asserted that the phrase "other applicable law" refers not to other state or federal law on this particular issue, but instead to the FDIC's power in "other contexts," such as the FDIC's right to seek remedies other than personal damages. Both courts, however, rejected this argument, finding that the pattern of usage of the "savings clause," as well as the "evident" meaning of the phrase supports the determination that "other applicable law" includes stricter state law standards of officer and director liability.

Finally, in their conclusions, the Ninth and Tenth Circuit courts described the absurd effects of full state preemption. The Tenth Circuit in Canfield explained that, under the defendants' interpretation of section 1821(k), the officer or director of a troubled federally insured institution located in a state allowing action for negligence, would have an incentive to allow the institution to fail. The court

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42. 967 F.3d 443 (10th Cir. 1992).
43. In Canfield, the defendants argued that the use of the word "may" in the first sentence of the provision results in an absolute limitation of the liability of officers and directors. Id. at 446.
44. Id.
45. See Canfield, 967 F.3d at 446.
46. 976 F.2d 532 (9th Cir. 1992).
47. Id. at 537.
48. Canfield, 967 F.3d at 446-47; see also McSweeney, 976 F.2d at 538.
49. Canfield, 967 F.3d at 447; see also McSweeney, 976 F.2d at 538.
50. The court in Canfield reasoned that as "a general rule of construction," the statute should be read as a whole. Id. at 446. The court then looked at other parts of section 1821 and made three conclusions concerning the pattern of the linguistic choices made by Congress: when the statute refers only to itself, it does so specifically, and when the statute refers to the whole universe of other laws, it uses the same language employed in section 1821(k). See id. As such, the court concluded that the pattern of usage "runs squarely against the suggestion of the defendants that 'other applicable law' refers to the FDIC's powers in 'other contexts.'" Id.
51. See Canfield, 967 F.3d at 446 ("In construing a statute, reliance must be placed on the . . . statute's 'evident' meaning.") (citing Small v. Britton, 500 F.2d 299, 301 (10th Cir. 1974)). Accordingly, the court found that "other applicable law" means "other applicable law." Id.
52. See Canfield, 967 F.3d at 449; McSweeney, 976 F.2d at 540.
53. Canfield, 967 F.3d at 449.
stated, "[p]rior to failure, liability would attach for simple negligence. After failure, liability would only attach if the officer or director could be proven grossly negligent." As such, the language of section 1821(k), and the possibility of ludicrous results, convinced most courts that Congress did not intend to fully preempt state law. Much of the debate in the federal court system, however, concerns the question of whether the statutory provision displaces federal common law standards for negligence.

B. The Question of Federal Common Law Displacement

The ambiguous text of section 1821(k) has also been the source of dispute as to whether the statute's standard of gross negligence supplants any preexisting common law standard of officer and director liability. The majority of the district courts have agreed with the defendant officials that the provision commands displacement of federal common law. Furthermore, the circuit courts have been inclined to agree with the district courts' decisions. The United States Courts of Appeals for the Fifth, Sixth, Seventh, and Tenth Circuits have all determined that Congress "spoke directly" to the issue of director and officer liability and effectively supplanted federal common law. Like the courts dealing with the issue of state law preemption, these circuit courts relied on the "plain language" of the statute to support their conclusion. Additionally, the courts relied on the legislative history

54. Id.; see also McSweeney, 976 F.2d at 540-41 ("We refuse to adopt a construction of FIRREA that 'would indirectly encourage' officials to hasten the demise of a troubled thrift, contrary to the stated intent of Congress 'to curtail . . . activities of savings associations that pose unacceptable risks' to the FDIC.") (quoting Pub. L. No. 101-73, § 101(3), 103 Stat. 183, 187 (1989)).
55. See Lam, supra note 11, at 1045-47.
56. See id. at 1048.
57. See id.
59. See RTC v. Frates, 52 F.3d 295, 297 (10th Cir. 1995); FDIC v. Bates, 42 F.3d 369, 373 (6th Cir. 1994); RTC v. Miramon, 22 F.3d 1357, 1364 (5th Cir. 1994); RTC v. Chapman, 29 F.3d 1120 (7th Cir. 1994); RTC v. Gallagher, 10 F.3d 416, 424 (7th Cir. 1994).
60. See, e.g., Frates, 52 F.3d at 297 (holding "[s]upersession [of federal law] involves the less rigorous test of whether Congress 'spoke directly' to the matter in the statutory enactment"); Miramon, 22 F.3d at 1364 (concluding federal common law in the area of director and officer liability is preempted "[a]s this statute 'speaks directly' to the issue").
61. See Gallagher, 10 F.3d at 419 ("In order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law . . . .") (citing United States v. Texas, 507 U.S. 529, 534 (1993)); Miramon, 22 F.3d at 1360 ("When Congress does speak to an issue previously governed by federal common law, the need to resort to . . . lawmaking by the federal courts disappears.") (citing Milwaukee v. Illinois, 451 U.S. 304, 314 (1981)).
62. See Miramon, 22 F.3d at 1361; Gallagher, 10 F.3d at 420 ("The plain language of § 1821(k) 'speaks directly' to the issue . . . and establishes a gross negligence standard of liability for officers and directors of failed financial institutions."). In RTC v. Gallagher, the government made the familiar argument that section 1831(k)'s use of the term "may" permits action under state and federal common law. Id. The Gallagher court rejected this argument finding that "[r]ead in context, the word 'may' refers to the right of the [RTC] to bring an action under this section. 'May' cannot reasonably be read to qualify the gross negligence liability standard and is therefore irrelevant . . . ." Id. (quoting FDIC v. Canfield,
of the provision in making the determination that section 1821(k) displaced federal common law.\(^{63}\)

In contrast, the minority view is that federal common law actions against officers and directors survive section 1821(k) even if those actions are based on laws requiring less culpable conduct, such as simple negligence.\(^{64}\) These courts determined that the "ambiguous statutory language does not specify Congress' intent to preempt federal common law claims."\(^{65}\) In other words, these courts determined that the provision did not displace federal common law actions.\(^{66}\) In light of the

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\(^{63}\) 967 F.2d 443, 450 n.4 (10th Cir. 1992) (Borby J., dissenting); see also Miramon, 22 F.3d at 1361 (finding the word "may" empowers the FDIC to bring cause of action under § 1821(k), but does not qualify substantive part of statute). Additionally, the circuit courts interpreted the "savings clause" in favor of the defendant officers and directors. Generally, the courts found that the last sentence of the provision preserved only the government's ability to take other regulatory actions based on simple negligence, but did not permit claims based on state or federal common law standards. See RTC v. Chapman, 29 F.3d 1120, 1122 (7th Cir. 1994); see also 12 U.S.C § 1818(b)-(g) (1994); Gallagher, 10 F.3d at 420 ("A better reading of the 'savings clause' is that it . . . preserve[s] the RTC's ability to take other regulatory actions based on simple negligence. For example, it preserves the RTC's power to remove directors for simple negligence and its power to issue 'cease and desist' orders in cases of simple negligence."). The court in Miramon, in rejecting the RTC's construction of the "savings clause," asked itself, "Why would the RTC ever bring an action under section 1821(k), where it would have to prove gross negligence, when it could bring an action under the federal common law and only be required to prove simple negligence?" Miramon, 22 F.3d at 1361.

\(^{64}\) See Miramon, 22 F.3d at 1362-63; Gallagher, 10 F.3d at 421-22. In Miramon, the FDIC argued that the legislative history of the statute contradicts the court's interpretations of § 1821(k). Miramon, 22 F.3d at 1362. The government relied heavily on a Senate report providing in part that § 1821(k) does not prevent the FDIC from pursuing claims under State law or other applicable Federal law, if such law permits the officers or directors of a financial institution to be sued 1) for violating a lower standard of care, such as simple negligence, or 2) on an alternative theory such as breach of contract or breach of fiduciary duty.

S. Rep. No. 101-19, at 318 (1989). But see FDIC v. Bates, 42 F.3d 369, 372-73 (6th Cir. 1994) ("The legislative intent underlying director liability is insufficient to overcome the plain meaning of the statute."). The Miramon court rejected this argument finding that the RTC did not "demonstrate the kind of 'clearly expressed legislative intention' needed to overcome the plain meaning of the statute." Miramon, 22 F.3d at 1363-64 (citing Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 833-34 (1990). The court in Miramon found that examination of all the legislative history, and inquiry into the sequence of events leading up to the bill's passage, calls into question the conclusion of the Senate report relied on by the government. Id. at 1362. In Gallagher, the court concluded that because the Senate report was not available when the Senate initially voted on FIRREA, it was not entitled to substantial weight. See Gallagher, 10 F.3d at 421 (citing Clarke v. Securities Indus. Ass'n. 479 U.S. 388, 406-08 (1987)).

\(^{65}\) See Lam, supra note 11, at 1050 (citing RTC v. CityFed Fin. Corp., 57 F.3d 1231 (3d Cir. 1995) (holding § 1821(k) does not displace federal common law)). With the exception of the Third Circuit's decision, supra, this view only exists at the district court level. For examples of decisions concluding that § 1821(k) does not displace federal common law simple negligence claims, see RTC v. Smith, 872 F. Supp. 805 (D. Or. 1995); RTC v. Gibson, 829 F. Supp. 1110, 1118 (W.D. Mo. 1993); RTC v. Hess, 820 F. Supp. 1359, 1364 (D. Utah 1993); FDIC v. Black, 777 F. Supp. 919 (W.D. Okla. 1991). See also Lam, supra note 11, at 1050 n.92 (citing the same and similar examples).

\(^{66}\) Lam, supra note 11, at 1051 & n.93 (citing FDIC v. Nihiser, 799 F. Supp. 904, 907 (C.D. Ill. 1992) (holding § 1821(k) does not preempt federal common law causes of action)).

\(^{67}\) See id. at 1051.
confusion and inconsistent findings, the Supreme Court of the United States addressed the state preemption and federal displacement issues in *Atherton v. Federal Deposit Insurance Corp.*

**III. Atherton v. Federal Deposit Insurance Corporation**

**A. Facts**

City Federal Savings Bank (City Federal) was a federally chartered, federally insured savings institution located in Bedminster, New Jersey. In December 1989, the Office of Thrift Supervision (OTS) declared City Federal insolvent and appointed the RTC as the bank's receiver. The RTC, in its capacity as receiver for City Federal and its successors in receivership and conservatorship, filed suit against several of the bank's former officers and directors. John W. Atherton, Jr. was one of the former officers and directors targeted by the RTC. Mr. Atherton, at various times, had served as Chief Operating Officer, Chairman, President, and Chief Executive Officer of City Federal.

In 1993, the RTC brought a civil action for money damages against Atherton and five others alleging that these corporate officers were liable for breaching their duty of care in connection with several unwise development, construction, and business acquisition loans that resulted in losses to City Federal of more than $100 million. Specifically, the RTC claimed that these acts (or omissions) were unlawful because they amounted to gross negligence, simple negligence, and breaches of fiduciary duty.

**B. Procedural Background**

The RTC filed its original complaint, and its first amended complaint, in the United States District Court for the District of New Jersey stating claims for negligence, gross negligence, and breach of fiduciary duty under both state and federal common law. Neither pleading asserted any claim based on section 1821(k) against Atherton and the other defendants. The defendants moved to

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68. See Brief for Respondent at 2, Atherton (No. 95-928).
69. FIRREA created the Office of Thrift Supervision (OTS) within the Department of Treasury in 12 U.S.C. § 1462(a) of the Act. See Brief of Petitioner at 4, Atherton (No. 95-928). This provision conferred upon the Director of the OTS the authority to charter and regulate federal savings associations. See id.; see also 12 U.S.C. §§ 1463(a), 1464(a) (1994).
70. On December 31, 1995, the RTC terminated in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1) (1994). The Federal Deposit Insurance Corporation succeeded the Resolution Trust Corporation in its capacity as receiver. See Brief for Respondent at 6-7, Atherton (No. 95-928).
71. See id. at 2.
72. See id.
74. See Brief for Respondent at 2.
75. See Brief for Petitioner at 5, Atherton (No. 95-928).
76. See id.
dismiss the RTC's complaint arguing that section 1821(k) of FIRREA established a mandatory standard of gross negligence in suits against officers and directors of failed savings institutions.77 The RTC conceded that its state law claim against the defendants was invalid, based on its belief that state law was not applicable to federally chartered institutions.78 The RTC argued, however, that the "savings clause" of section 1821(k) preserved the right to proceed with its federal common law claim.79 The district court granted the defendants' motions and dismissed the RTC's first amended complaint to the extent that it alleged liability based on standards other than that set forth in section 1821(k) of FIRREA.80 The district court held that the statute set forth a uniform federal gross negligence standard applicable to the situation at issue, thus prohibiting the government from bringing claims against former officers and directors under any preexisting federal common law.81

Subsequently, the RTC filed a second amended complaint asserting claims against Atherton and the other defendants based solely on section 1821(k).82 In addition, the RTC moved to certify the district court's ruling on the standard of liability issue for immediate appeal to the United States Court of Appeals for the Third Circuit.83 The Third Circuit granted the RTC's request for interlocutory review84 and reversed the district court's order dismissing the RTC's claims against Atherton and the other City Federal defendants.85 Rejecting the district court's judgment that Congress intended section 1821(k) to establish a uniform standard of liability, the Third Circuit held that the enactment of FIRREA did not limit the RTC to federal claims under the federal statute's gross negligence standard.86 Moreover, the Third Circuit concluded that section 1821(k) does not preempt the government's right to sue the officers and directors of failed banks under state law claims for ordinary or simple negligence, or breach of fiduciary duty.87

77. See id.
78. See id.
79. See id. The RTC asserted that the federal common law standard of liability is simple or ordinary negligence. See id.
80. See Brief for Petitioner at 6.
81. See id. The district court further held that the RTC had effectively dismissed its state law claims; thus, it did not deal with this aspect of the issue.
82. See id.
83. See id. On appeal, the RTC did not challenge the district court's ruling that the RTC had withdrawn its state law claims. See id.
84. See id. The court of appeals consolidated the appeal with an interlocutory appeal that had been filed by other defendants in an unrelated suit brought by the RTC as receiver for the United States Savings and Loan of Trenton, New Jersey (United Savings). See Brief for Respondent at 4, Atherton (No. 95-928). Because United Savings was a state chartered institution, the negligence and breach of fiduciary duty claims that the RTC asserted were based on New Jersey law. See id. The district court in the United Savings case had rejected the defendants' argument that section 1821(k) preempted the RTC's ability to assert state law claims. See id.
86. See id. at 1242.
87. See id. at 1244 ("Congress did not intend to hinder the RTC by denying it an opportunity to recover for instances of director and officer negligence when shareholders of these institutions would
Following the Third Circuit's decision, the City Federal defendants petitioned the United States Supreme Court for certiorari. Thereafter, five of the six defendants settled with the government and withdrew from the case, leaving Atherton as the sole petitioner.

C. The Decision

In Atherton v. Federal Deposit Insurance Corp., the Supreme Court focused its efforts on determining once and for all where courts should look to find the standard of care to measure the legal propriety of the conduct of former officers and directors of failed institutions. The Court discussed whether courts should look to state law, to federal common law, or to the federal statute, 12 U.S.C. § 1821(k). Justice Breyer, writing the opinion for a unanimous Court, discussed with detail and clarity the reasons supporting the Court's decision to vacate the circuit court's judgment.

To begin its analysis, the Court temporarily set aside the federal "gross negligence" standard in order to determine whether, in the absence of such a law, federal common law would provide the applicable standard. The Court, quoting O'Melveny & Myers v. Federal Deposit Insurance Corp., stated that "normally, when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Accordingly, the Court determined that a federal standard of common law liability applicable to officers and directors of failed depositories exists only in the event that the "application of state law standards of care to such banks would conflict with, and thereby significantly threaten, a federal policy or interest."

In support of a federal common law standard, the FDIC made four arguments. First, the FDIC invoked the need for uniformity. The government argued that a
federal common law "will provide uniformity, but [s]uperimposing state standards of fiduciary responsibility . . . would . . . 'upset the balance' that the federal chartering authority 'may strike . . . ."\textsuperscript{99} The Court rejected this argument, finding that the FDIC failed to show an obvious federal concern for uniformity among liability standards.\textsuperscript{100} Second, the FDIC suggested that the courts should apply a federal common law standard of care simply because the banks at issue are federally chartered.\textsuperscript{101} The Court concluded that federal banks are customarily subject to the laws of the states, and thus, a federal charter itself demonstrates "no conflict, threat, or need for 'federal common law.'\textsuperscript{102}

The Court's opinion then discussed the FDIC's third argument which concerned the "internal affairs doctrine."\textsuperscript{110} Here, the government argued that because states normally look to the laws of the state of incorporation for the relevant corporate governance standard of care, courts should look to federal common law to determine the standard governing officers and directors of federally chartered banks.\textsuperscript{104} The Court immediately discounted this argument and concluded that the internal affairs doctrine shows no need for federal common law.\textsuperscript{105} For that reason, the Court found that the argument does not support the existence of federal common law.\textsuperscript{106}

Finally, in its last effort to establish the existence of a federal common law, the FDIC pointed to statutes providing the Office of Thrift Supervision (OTS) with "the authority to fine or remove from office savings bank officers and directors for certain breaches of fiduciary duty."\textsuperscript{107} The FDIC argued that in "the course of such proceedings, the OTS, applying the ordinary-care standard [of negligence] . . . has spoken authoritatively respecting the duty of care owed by directors and officers to federal savings associations."\textsuperscript{108} The Court, however, declined to find in favor of the government.\textsuperscript{109} The opinion stated that the FDIC failed to make the claim that

\textsuperscript{99} Id.; Brief for Respondent at 23, Atherton (No. 95-928) (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 103 (1991)).
\textsuperscript{100} See id. at 220-21.
\textsuperscript{101} See id. In response to this assertion, the Court commenced a fairly extensive discussion of the development of the nation's dual banking system, concluding that state law has, for some time, applied to federally chartered banks. See id. at 220-223.
\textsuperscript{102} Id. at 223.
\textsuperscript{103} Id. at 223-24 (The Court described the internal affairs doctrine as "a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs — matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders — because otherwise a corporation could be faced with conflicting demands.") (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)); see also RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 309 (1971).
\textsuperscript{104} See Atherton, 519 U.S. at 224 ("[T]his argument . . . is to substitute analogy for formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest.") (citing O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)).
\textsuperscript{105} See Atherton, 519 U.S. at 224.
\textsuperscript{106} See id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.; see also Brief for Respondent at 23-25, Atherton (No. 95-928).
\textsuperscript{109} See Atherton, 519 U.S. at 224.
the OTS's statements, allegedly interpreting a preexisting judge-made federal law, amounted to an agency effort to create a binding regulation.\footnote{110} Furthermore, the Court's own examination of the OTS opinions failed to introduce any convincing evidence of a significant conflict or threat to a federal interest.\footnote{111} Thus, in approximately four pages of analysis, the Supreme Court resolved the issue of federal common law displacement by holding that there is no federal common law creating a general standard of care applicable to former officers and directors of insolvent federal savings institutions.\footnote{112}

After eliminating the possible existence of federal common law, the Court turned to the issue of state law preemption to determine whether section 1821(k) establishes an exclusive standard of liability for "gross negligence."\footnote{113} Ultimately, the Court held that the statute's "gross negligence" standard provided only a floor — a guarantee that officers and directors must meet at least a gross negligence standard before facing liability.\footnote{114} The Court found, however, that the standard does not stand in the way of stricter state law standards, such as simple or ordinary negligence.\footnote{115}

In the final portion of the opinion, the Court discussed one final argument made by Atherton in support of full state preemption.\footnote{116} The petitioner, conceding that section 1821(k) of FIRREA applies to both federal and state banks, asked the court to assume that, in the absence of the federal statute, federal common law would determine liability for federal banks.\footnote{117} Atherton then urged the Court to consider why Congress would have applied the "gross negligence" standard to federal banks unless it intended the statute to set an absolute standard.\footnote{118} Atherton reasoned, relying on the assumption that federal common law would hold directors and officers to a standard as strict, if not stricter than, gross negligence, that the FDIC would never have any reason to bring suit under section 1821(k).\footnote{119} The Court made reference to the creativity of the petitioner's reasoning, yet determined that the argument's critical assumption — the existence of a federal common law standard — runs contrary to the Court's finding that there is no preexisting federal common law standard,\footnote{120} and that state law applies to these federally insured institutions. Without that assumption, the Court stated, it is clear that the gross negligence "floor" is needed to limit state efforts to insulate officers and directors from liability and that a gross-negligence floor serves that purpose.\footnote{121}
IV. Analysis of the Atherton Court's Decision

A. Ruling Out the Existence of a Preexisting Common Law Standard

In the past, several circuit courts have concluded that section 1821(k) of FIRREA displaces federal common law standards for bank director or officer liability.122 The Third Circuit, on the other hand, has found that the federal statute does not supplant the federal common law.123 However, the appellate courts have all agreed that a federal common law standard for director and officer liability does exist, regardless of whether section 1821(k) displaces the standard. Nevertheless, the United States Supreme Court essentially nullified these cases in Atherton by ruling out the existence of a federal common law corporate governance standard.124

The decision denying the existence of a federal common law standard is perhaps the most well-supported determination made by the Atherton Court.125 In 1994, the Supreme Court in O'Melveny & Myers126 held that "there is no general federal common law," and no basis for creating special federal judge-made rules of decision simply to enhance recoveries in failed thrift receivership litigation.127 In the appellate level decisions, the courts noted that federal common law is a creature of the federal judiciary and applies only in limited instances when there is a significant conflict between federal policy and the use of state law;128 yet, these courts neglected to determine whether a conflict actually existed creating a need for a common law standard. Similarly, the Third Circuit in Atherton cited O'Melveny & Myers in its opening legal analysis, but apparently failed to recognize the persuasiveness of the case when deciding that there existed a federal common law standard of liability.129 Unfortunately, the Third Circuit, as well as the other appellate courts, wasted considerable time attempting to ascertain whether FIRREA displaced or supplanted federal common law, rather than determining whether there was ever any basis for creating federal common law in the first place.130

122. See RTC v. Frates, 52 F.3d 295, 297 (10th Cir. 1995); RTC v. Miramon, 22 F.3d 1357, 1360 (5th Cir. 1994); RTC v. Chapman, 29 F.3d 1120, 1124-25 (7th Cir. 1994); RTC v. Gallagher, 10 F.3d 416, 424-25 (7th Cir. 1993).
125. See id.
127. Id. at 83 (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).
128. See RTC v. Miramon, 22 F.3d 1357, 1360 (5th Cir. 1994); RTC v. Gallagher, 10 F.3d 416, 419 (7th Cir. 1993).
129. In RTC v. CityFed Fin. Corp., 57 F.3d 1231 (3rd Cir. 1995), the Third Circuit relied on Briggs v. Spaulding, 141 U.S. 132, 145-46 (1891), in holding that there was a standard of care applicable to officers and directors as a matter of federal common law. See CityFed, 57 F.3d at 1247 n.16. The Court acknowledged that the Briggs case was decided before Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), in which the Supreme Court rejected the existence of any general federal common law. See Erie, 304 U.S. at 78. The Court in O'Melveny & Myers, relying on Erie, promptly rejected any notion that there is a general federal common law. O'Melveny & Myers, 512 U.S. at 84. As such, the appellate court in Atherton erroneously relied on Briggs as support for its finding of a federal common law standard of bank director and officer liability.
130. See Brief of Amici Curiae for the Washington Legal Foundation and Allied Educational
Unlike the circuit courts, the Supreme Court went straight to the heart of the matter. From the beginning, it acknowledged that federal common law exists only in the "few and restricted" cases where there is a conflict between state law and a federal interest, and therefore, wasted no time on the issue of displacement.\(^{131}\) As a result, the Court accurately determined that the FDIC failed to show any significant threat to a federal interest.\(^{132}\) The government's argument that state law standards of liability conflicted with the need for uniformity did not successfully persuade the Court. For one, the Court reasoned that to invoke the concept of uniformity is not to prove its need.\(^{133}\) Therefore, the FDIC needed to show an obvious federal concern for uniformity among liability standards. The respondent, however, failed to do so, and the Court correctly concluded that the uniformity argument must fail.\(^{134}\) The Court rejected the uniformity argument finding that because the number of federally insured banks is almost equally divided between federally chartered and state chartered banks,\(^{135}\) and a federal standard that increases uniformity among the former will decrease uniformity among the latter.\(^{136}\) Further, the Court reasoned that disparities in matters of corporate governance have existed for quite some time with no noticeable negative impact on any federal interest.\(^{137}\) Consider, for example, the divergent state law standards applicable to banks chartered in different states.\(^{138}\) Under Oklahoma law, directors and officers are not liable unless conduct constitutes at least "gross negligence, or willful or intentional misconduct,"\(^{139}\) while in Iowa, the law requires only a showing of "ordinary negligence.\(^{140}\)

Furthermore, the fact that a savings institution is federally chartered in no way justifies the application of any uniform federal common law standard in determining the liability of officers and directors.\(^{141}\) A federal charter does not produce a need for uniformity regarding an issue that falls squarely within two traditional areas of

\(^{131}\) See Atherton v. FDIC, 519 U.S. at 218 (citing O'Melveny & Myers, 512 U.S. at 87).

\(^{132}\) See Atherton, 519 U.S. at 217-26.

\(^{133}\) Id. (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979) (rejecting generalized pleas for uniformity)).

\(^{134}\) See Atherton, 519 U.S. at 220-21.

\(^{135}\) See id. (citing FDIC, STATISTICS ON BANKING: A STATISTICAL HISTORY OF THE UNITED STATES BANKING INDUSTRY tbl. SI-9, at B-9 (1995) (showing in 1989, there were 1595 federally chartered institutions and 1492 state-chartered institutions)).

\(^{136}\) See id. at 220. Moreover, the Court recognized that "our nation's banking system has prospered despite disparities in matters of corporate governance" and, therefore, was unpersuaded by the argument for uniformity. Id.; see also IND. CODE ANN. § 23-1-35-1(e)(2) (West 1994) (Directors not liable unless conduct constitutes at least "willful misconduct or recklessness."), cited in Atherton, 510 U.S. at 220; IOWA CODE § 524.605 (1995) (providing ordinary negligence standard), cited in Atherton, 510 U.S. at 220.

\(^{137}\) See id.

\(^{138}\) See id.


\(^{140}\) See IOWA CODE § 524.605 (1995).

\(^{141}\) Brief for Petitioner at 12, Atherton (No. 95-928).
state law — tort law and corporate law.\textsuperscript{142} Congress, in section 1821(k), clearly expressed its preference for the use of "applicable State law" to define "gross negligence,"\textsuperscript{143} thereby evidencing its view that there does not exist any overriding federal policy in favor of a uniform standard of liability.\textsuperscript{144}

Additionally, the Court relied on considerable precedent to accurately conclude that state law is applicable to federally chartered banks.\textsuperscript{145} Since 1869, the Court has continually found that federal banks are subject to the laws of the states.\textsuperscript{146} In National Bank v. Commonwealth, the Court stated that federal banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation."\textsuperscript{147}

Furthermore, the Atherton Court was correct in pointing out that the respondent's reference to the internal affairs doctrine did not demonstrate the need for a federal common law standard of liability governing claims against bank directors and officers.\textsuperscript{148} The argument urged by the FDIC in support of the internal affairs doctrine was that applying the doctrine will ensure that, where savings institutions are engaged in multistate lending activities, their directors and officers will not be subject to conflicting state fiduciary requirements.\textsuperscript{149} The Seventh Circuit in Resolution Trust Corp. v. Chapman held that the internal affairs doctrine mandated application of federal law to the internal affairs of a federal institution.\textsuperscript{150} Contrary to the Chapman majority, the Atherton Court held that this argument does not amount to the required showing of a "significant interest."\textsuperscript{151} The Atherton Court's reasoning is sound. First, the Court pointed out that the purpose of the internal affairs doctrine is to avoid conflict by requiring that there be a single point of legal reference.\textsuperscript{152} In cases involving the internal affairs of state banks, the laws of the state of incorporation will apply. Federally chartered banks, however, are not incorporated in any state and therefore have no natural point of legal reference.

\textsuperscript{142} See id. at 13.
\textsuperscript{143} See 12 U.S.C. § 1821(k) (1994) ("A director or officer . . . may be held personally liable . . . for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of duty of care . . . , as such terms are defined and determined under applicable State law.") (emphasis added).
\textsuperscript{144} See id.; see also Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 209 (1946) (finding where part of a regulatory scheme relies on state law, the "assumption" that uniformity is necessary cannot be made).
\textsuperscript{145} See Atherton, 519 U.S. at 222-23.
\textsuperscript{146} See id.
\textsuperscript{147} National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869).
\textsuperscript{148} See Atherton, 519 U.S. at 223. The Atherton Court continued by citing several more Supreme Court cases with essentially the same holding. See, e.g., Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 248 (1944) ("National banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."); First Nat'l Bank v. Missouri, 263 U.S. 640, 656 (1924) ("[National banks] are subject to the laws of a State in respect of their affairs . . . .")
\textsuperscript{149} See Atherton, 519 U.S. at 223-24.
\textsuperscript{150} RTC v. Chapman, 29 F.3d 1120, 1123-24 (7th Cir. 1994).
\textsuperscript{151} Atherton, 510 U.S. at 225.
\textsuperscript{152} See id.
Considering, however, that state law applies to these banks, the potential complication is easily obviated. The *Atherton* majority aptly suggested that, in absence of federal common law, the federally chartered bank could simply look to the law of the state where it has its "main office or maintains its principal place of business,"152 thereby effectively establishing a single point of legal reference.

This is a well-reasoned decision. Consider, for example, the situation where the main branch of a federally chartered bank and a state chartered bank sit across the street from each other in State X. Further assume that the state chartered bank is incorporated in State X. Using the *Atherton* Court's reasoning, any internal conflict within either of these banks would be settled by the laws of State X. Consequently, the disparity between federally chartered and state chartered banks would tend to decrease, because there would not be the problem of state and federal law conflict. Moreover, the internal affairs doctrine is a conflicts of law doctrine which does not assist in determining questions of conflict between state and federal law. The doctrine concerns the issue of choice of law as between states, not between federal or state law.154

B. The Court's Decision Regarding State Law Preemption

The United States Supreme Court joined the Ninth, Tenth, and Eleventh Circuits by concluding that section 1821(k) does not prevent the FDIC from bringing actions against officers and directors under state law standards of gross negligence or stricter standards such as ordinary or simple negligence.155 The result is that officers and directors of failed financial institutions may be held personally liable for mismanagement under section 1821(k)'s standard of gross negligence in any state in which the law requires a showing of more culpable conduct. On the other hand, if the state law requires only a showing of ordinary or simple negligence, there is no reason to invoke the federal statute's gross negligence standard because the government may sue under the state law.

The *Atherton* Court based its state law preemption conclusion on the plain language of the statute.156 In answering the preemption question, the Court first looked at the statute's "savings clause" and determined that the language, when "read naturally, suggests an interpretation broad enough to save rights provided by other state, or federal, law."157 As a result, the statute's evident meaning clearly preserves the applicability of stricter state standards, such as simple negligence.

Furthermore, the Court found that the background of the statute as a whole supports the conclusion that Congress intended to preserve the federal government's ability to recover funds by creating a standard-of-care floor.158 The Court pointed

153. *Id.* at 224.
154. *See id.*
155. *See FDIC v. Stahl*, 89 F.3d 1510, 1516 (11th Cir. 1996); *FDIC v. Canfield*, 967 F.3d 443, 446 (10th Cir. 1992) (en banc); *FDIC v. McSweeney*, 976 F.2d 532, 537 (9th Cir. 1992).
156. *See id.* at 227-28.
157. *Id.* at 227.
158. *See Atherton*, 510 U.S. at 227; *see also* Small v. Britton, 500 F.2d 299, 301 (10th Cir. 1974) (reasoning in construing a statute, reliance must be placed on an unambiguous statute's "evident"
to FIRREA's legislative history, indicating that Congress continually referred to the harm "liability-relaxing" state statutes had caused the federal government, and ultimately, the taxpayer.\textsuperscript{159} The Court's conclusion that section 1821(k) does not preempt stricter state standards is correct; if Congress intended FIRREA to mandate a national standard of care, the problem of "liability-relaxing" state regulation would have only been solved in those instances where state law was weaker, but the problem would have been aggravated in states where the law was stronger.\textsuperscript{160}

The Court acknowledged, nonetheless, that the legislative history of section 1821(k) is not entirely consistent with the Court's conclusion.\textsuperscript{161} The Congressional Record contains one statement suggesting that the purpose of the statute is to protect bank officers and directors from strict liability standards, such as simple negligence.\textsuperscript{162} This sole statement, however, failed to persuade the Court that FIRREA created a national standard of care.\textsuperscript{163}

\textbf{C. Implications of Atherton v. Federal Deposit Insurance Corporation}

Following the Supreme Court's decision in \textit{Atherton}, the states retain the authority to enact statutes regarding the personal liability of directors and officers of savings associations. The only limitation is that these state standards may not fall below a standard of gross negligence; if so, the state law will be preempted by section 1821(k) of FIRREA. The Court's decision provides states with the option to adopt statutes that will provide greater accountability for officers and directors and further safeguard the system, or to adopt less stringent standards effectively offering more protection to bank officials.

As such, one potential argument against the \textit{Atherton} decision is that, by preserving the applicability of stricter state standards, "the majority's interpretation of section 1821(k) contravenes the long recognized need to attract and retain bright, ambitious community leaders to serve as officers and directors."\textsuperscript{164} In other words, meaning). The defendant, in contending that the statute displaces federal common law, argues that "any right" means only a right created elsewhere in the same Act of Congress, for example, by various regulatory enforcement provisions. \textit{See Atherton}, 519 U.S. at 227.

\textsuperscript{159} \textit{See Atherton}, 519 U.S. at 228-29. The opinion pointed to Senate reports and Congressional Record statements illustrating the legislature's intent only to preempt state laws that tend to shield officers and directors from liability. \textit{Id.; see also} 135 CONG. REC. 7150-51 (1989) ("[T]he establishment of a Federal standard of care is based on the overriding Federal interest in protecting the soundness of the Federal Deposit Insurance Corporation fund and is very limited in scope. It is not a wholesale preemption of long-standing principles of corporate governance . . . "). (statement of Sen. Riegle); S. REP. NO. 101-19, at 318 (1989).

\textsuperscript{160} \textit{See Atherton}, 519 U.S. at 228-29.

\textsuperscript{161} \textit{See id.}

\textsuperscript{162} \textit{See id.}

\textsuperscript{163} \textit{See id.}  (supporting "provisions relating to State laws affecting the liability of officers and directors of financial institutions" because "these changes are essential if we are to attract qualified officers and directors to serve our financial institutions") (citing 135 CONG. REC. 7150 (1989) (statement of Sen. Sanford)). The Court was undeterred by this statement because "it suggests an interpretation largely rejected in lower courts" and it is "inconsistent with the language of the Senate Report." \textit{Id. at 675-76} (referring to S. REP. NO. 101-19, \textit{supra} note 63).

\textsuperscript{164} FDIC v. Canfield, 967 F.2d 443, 451 (10th Cir. 1992) (Borby J., dissenting). The Supreme
it is possible that states in which the law requires only a showing of simple
negligence will have a difficult time persuading qualified business people to work
for savings associations in that state.

In light of this argument, the Tenth Circuit, in *Federal Deposit Insurance Corp.
v. Canfield*, stated that "Congress left it to the states to decide the propriety of
a simple negligence standard." In reaching that decision, "a state may well
choose to consider the difficulty in obtaining liability insurance, and the need to
attract those people . . . [that] will not accept directorships under a simple
negligence standard." Likewise, the Supreme Court's decision in *Atherton*
provides states with the power to legislate on the issue of bank director and officer
liability, giving them the freedom to balance state interests and provide for those
interests in their laws. Accordingly, each state has the autonomy to determine
whether it wants to hold directors to a more lenient standard of gross negligence,
which would likely attract more officers and directors to the state, or whether
the state wants to impose a strict state standard, such as simple negligence, to protect
the savings industry from officer and director mismanagement.

In 1992, Oklahoma adopted a statute addressing the issue of liability for directors
and officers of failed financial institutions. Title 6, section 712(c) of the Oklahoma
Statutes specifically provides:

[n]o claim or action seeking to recover money damages shall be brought
by the Federal Deposit Insurance Corporation, Resolution Trust
Corporation or other banking regulatory agency against any director or
officer, including any former director or officer, of any insured financial
depository institution as defined in the Financial Institutions Reform,
Recovery, and Enforcement Act of 1989, unless such claim or action
arises out of the gross negligence, or willful or intentional misconduct
of such officer or director during his term of office with such insured
financial institution.

Before the enactment of this statute, Oklahoma common law permitted actions
against bank directors and officers to be maintained when these officials failed to
execute their duties with ordinary care and diligence. Section 712(c), however,
effectively raised the standard of proof from ordinary, or simple negligence, to gross

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Court found that the statement in the *Congressional Record* is inconsistent with the language of the
Senate report and suggests an interpretation "largely rejected in the lower courts," namely that it creates
a mandatory standard of liability across the board. *Id.* at 230.
165. 967 F.2d 443 (10th Cir. 1992).
166. Canfield, 967 F.2d at 451.
167. *Id.* at 445.
168. 6 OKLA. STAT. § 712(c) (1991).
169. See RTC v. Wright, 868 F. Supp. 301, 303 (W.D. Okla. 1993) ("At common law, a bank
director has the duty to act in good faith and with ordinary care and diligence when conducting
the bank's affairs. Bank directors are liable for losses which could have been prevented by the exercise of
such care in attending their duties.") (citing Gay v. Akin, 766 P.2d 985, 991 (Okla. 1988)).
negligence, thereby providing greater protection from liability to officers and directors of the failed institution.\textsuperscript{170} It is notable that, as enacted in 1992, Oklahoma's section 712(c) changed not only the standard of proof required for future actions brought by the government, but also in actions pending at the time the statute was adopted.\textsuperscript{171} Essentially, the statutory provision retroactively destroyed the government's right to sue defendants under the Oklahoma common law simple negligence standard in actions arising prior to the statute's enactment.\textsuperscript{172} Consequently, several federal district courts agreed that section 712(c) violates the Oklahoma Constitution which prohibits the legislature from taking away a cause of action that has already commenced.\textsuperscript{173} As such, all causes of actions that accrued before the enactment of the statute are subject to a simple negligence standard for liability. Section 712(c)'s gross negligence standard, however, still applies prospectively in cases brought by the government against officers and directors of insolvent financial institutions.

Considering that Oklahoma was not one of those states having enacted "liability-relaxing" laws to shield bank officials, the \textit{Atherton} decision has little, if any, impact in the state. Five years before the Supreme Court's decision, the Oklahoma Legislature had already decided to hold officers and directors to a minimum standard of gross negligence. If the Oklahoma law had been more protective of bank officials, \textit{Atherton} would have required the state to change its standard, or else be preempted by FIRREA section 1821(k)'s gross negligence standard. The \textit{Atherton} decision, however, does not require Oklahoma to amend its law because the state standard does not fall below the standard-of-care floor which the Court determined Congress established by enacting FIRREA. Accordingly, as "other applicable law" under section 1821(k), any suit brought by the FDIC against an officer or director of a failed financial institution must be based on a theory of gross negligence, as such terms are defined by the state.

\textbf{Conclusion}

In rendering its decision in \textit{Atherton v. FDIC}, the United States Supreme Court finally resolved an extremely muddled area of corporate governance. According to the Court, the proper interpretation of FIRREA section 1821(k) is that Congress intended only to preempt state laws setting a standard for director and officer liability lower than gross negligence, as defined by applicable state law. By holding

\textsuperscript{170} \textit{See Wright}, 868 F. Supp. at 304.

\textsuperscript{171} \textit{See id.}

\textsuperscript{172} \textit{See id.} Section 712(c) explicitly refers to claims maintained by the government after Aug. 9, 1989. However, the section was not given effect until July 1, 1992. \textit{See id.} at 305. As such, the statute attempts to destroy the right of the government to maintain suits on a basis stricter than gross negligence, a right that existed under the common law prior to the statute's enactment. \textit{See id.}

\textsuperscript{173} \textit{See id.; see also Okla. Const. art. V, § 54 ("The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."); Okla. Const. art. II, § 7 (Oklahoma Due Process Clause); RTC v. Alexander, No. CIV-92-507-T, 1993 WL 761299 (W.D. Okla. Feb. 24, 1993); RTC v. Conner, 871 F. Supp. 1424 (W.D. Okla. 1993).}
that section 1821(k) of FIRREA acts as a "floor" under which corporate liability standards may not fall, the Court effectively removed the ability of officers and directors of failed financial institutions to shield themselves from personal liability for mismanagement in many states. As a result, it is less difficult, at least in some states, for the government to hold these corporate officials personally accountable for some of the damages suffered by financial institutions in the event of insolvency.

The implications of the Supreme Court's decision on Oklahoma state law are minimal. Oklahoma law regarding the liability of bank directors and officers requires a showing of gross negligence. Section 1821(k) of FIRREA, therefore, does not preempt the law of the state. Thus, in the event the FDIC seeks to recover money damages from a bank director or officer in Oklahoma, the government must show that the executive was grossly negligent in his management of the savings institution.

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