

NIBBLING ON THE CHANCELLOR'S TOESIES: A "ROGUISH" CONCURRENCE WITH PROFESSOR BAXTER

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I

INTRODUCTION

HEREIN OF VILLAINS AND ROGUES

The Office of Thrift Supervision of the Department of the Treasury ("OTS"),¹ successor to the now defunct Federal Home Loan Bank Board,² regulator of thrift institutions³ and their holding companies,⁴ and the principal villain of this piece, has been at the forefront in advocating the broadest and most far-reaching standards of professional liability. These standards, which affect not only officers and directors but also accountants and attorneys, are not established in any case law. They are articulated principally in speeches given by OTS officials, especially those of its former Chief Counsel, Harris Weinstein. Nevertheless, a firm understanding of the agency's views is important to academics and practitioners alike in view of the escalation of administrative enforcement activity against lawyers and law firms.⁵

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1. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of Titles 5, 12, 18, and 31 of the U.S. Code (Supp. III 1991)) ("FIRREA"), Congress amended the Home Owners' Loan Act of 1933 and created OTS. FIRREA, § 301 (codified at 12 U.S.C. § 1462a).

2. The Federal Home Loan Bank Board was abolished by § 401(a)(2) of FIRREA, 103 Stat. 354.

3. 12 U.S.C. §§ 1462a(e), 1463(a). Thrift institutions include primarily federal and state-chartered savings and loan associations, building and loan associations, and federal savings banks. *See id.* § 1841(i). The popular press tends to lump these categories of institutions together under the rubric "S&Ls."

4. *Id.* § 1467a.

5. On the basis of publicly available information, OTS enforcement actions have been initiated against the law firms of Ingram, Matthews & Stroud, Professional Association (Hattiesburg, Mississippi) and several of its individual lawyers (Carroll H. Ingram, Jolly W. Matthews, III, Howard M. Stroud, and Walter C. Ferguson); Sherman & Howard (Denver, Colorado) and one of its members (Ronald H. Jacobs); Kaye, Scholer, Fierman, Hays & Handler (New York, New York) and three of its members (Peter M. Fishbein, Karen E. Katzman, and Lynn Toby Fisher); James Fleischer of the law firm of Silver, Freedman & Taff (Washington, D.C.); Anthony F. DiFabio of Gaffney Law Assoc. (New Britain, Connecticut); and Kirkpatrick & Lockhart (Pittsburgh, Pennsylvania) and the managing partner of its Washington, D.C. office (Alan Berkeley). *See, e.g.,* Order to Cease and Desist for Reimbursement and Other Affirmative Relief, *In re Ingram, Matthews & Stroud, Professional Association*, Resolution No. DAL-91-56 (June 17, 1991); Offer of Settlement, Ronald H. Jacobs and Sherman & Howard, *In re Ronald H. Jacobs and Sherman & Howard*, OTS AP 91-33 (June 18, 1991) [hereinafter *Sherman &*

Mr. Weinstein has suggested that insiders of an insured depository institution (“IDI”) and outside counsel to the institution owe a *fiduciary duty* to the federal government because of what is, in his view, the government’s “unlimited” liability in the event of the IDI’s failure. Whether one views this theory as a restatement of existing law—as OTS does—or, more accurately, as a radical departure from existing law, one is reminded of Selden’s views on the nature of equity and the capacity for mischief inherent in the arbitrations of a “roguish” and unchecked authority.⁶ Hence, Professor Baxter’s article rightly begins with Selden’s metaphor of the “Chancellor’s foot.”⁷

One need not traverse the full length of that metaphorical extremity to realize that OTS’s position is (pardon the pun) out on a limb. Introducing a fiduciary duty running from the private bar to the government represents the first bite of a complete devouring of our system of civil justice. Think of it as “nibbling on the Chancellor’s toesies.” If it sounds cute, think again, for the government has very sharp teeth!

Professor Baxter’s thesis is eminently sound, and its exposition is brilliantly argued. His major point is that OTS’s roguish fiduciary musings would yield no more protection for the deposit insurance system than Congress has *already* provided in the Federal Deposit Insurance Act (“FDIA”),⁸ which imposes the obligation not to engage in “unsafe or unsound” banking practices. The corollary to Professor Baxter’s argument is that divination (by regulatory rogues and other scoundrels) of some overarching fiduciary duty to the government, the breach of which duty gives rise to liability for administrative enforcement action, is contrary to the intent of Congress and would render superfluous a good portion of the statute that confers that very enforcement authority: section 8 of the FDIA.⁹

Howard Consent Order]; Order to Cease and Desist for Affirmative Relief from Kaye, Scholer, Fierman, Hays & Handler, *In re Peter M. Fishbein, Karen E. Katzman, Lynn Toby Fisher, and Kaye, Scholer, Fierman, Hays & Handler*, OTS AP No. 92-24 (Mar. 10, 1992) [hereinafter Kaye, Scholer Consent Order]; *In re James S. Fleischer*, OTS AP No. 92-53 (May 21, 1992); *OCC/OTS Actions Against Connecticut Lawyers: The Plot Thickens with Politics and a Class Action*, Bank Lawyer Liability Rep., July 16, 1992, at 1; Sharon Walsh, *Pa. Law Firm to Pay U.S. \$9 Million*, WASH. POST, Oct. 6, 1992, at D3, col. 1.

6. Published in 1689, *Table Talk* immortalized John Selden’s observation on the nature of equity:

Equity is A Roguish thing, for [at] Law we[] have a measure [we] know what to trust to[]. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so[] is Equity. ‘Tis all one as if they should make the Standard for the measure we[] call A foot, to be the Chancellor[’]s foot; what an uncertain measure would this be; One Chancellor has a long foot[,] another A short foot[,] a third an indifferent foot; ‘tis the same thing in the Chancellor[’]s Conscience.

Table Talk of John Selden 43 (Frederick Pollack ed., 1927) (1689) (modern English inserted to replace some, but not all, of the archaisms).

7. Lawrence G. Baxter, *Fiduciary Issues in Federal Banking Regulation*, 56 LAW & CONTEMP. PROBS. 7 (Winter 1993).

8. 12 U.S.C. §§ 1811-1834b (“FDIA”).

9. *Id.* § 1818. See *infra* notes 68-71 and accompanying text.

II A ROGUISH ALLEGORY

Professor Baxter's oral presentation of his paper, in which he good-naturedly compared the maladroit requisitioning of fiduciary law by federal regulators to a Welsh comedian's views on the merits of English rugby, brings to mind a tale of duty and betrayal originating a little bit south of Wales and from a time before the dawn of equity itself. Nowhere have the themes of duty, conflict of interest, and breach of duty been more movingly portrayed than in the tale of *Tristan and Yseult*. In Wagner's operatic version of the familiar medieval tale¹⁰ (with a "roguishly" contemporary S&L variant italicized and in parentheses), Sir Tristan (S&L malefactor), beloved nephew and trusted vassal of Marke, the King of Cornwall (the federal government or the deposit insurance fund), has been dispatched by Marke to Ireland (granted deposit insurance) to bring back the Irish Princess Isolde, whom Marke intends to wed¹¹ (to facilitate funding for the extension of housing credit and other noble policy objectives of the federal government). The unfortunate Tristan, bewitched by a magic potion (by lust, greed, and other cultural imperatives of 1980's America), has himself fallen in love with Isolde (has become enamored with using the government's money to finance high-risk investments) and enjoys clandestine liaisons with her (engages in unsafe or unsound practices) at the palace while Marke is off hunting or doing other kingly things¹² (while the regulators are asleep at the switch). Returning only to discover Tristan's betrayal (when Congress and the regulators wake up), King Marke confronts his beloved nephew (they issue subpoenas) and, with a broken heart (worried about reelection and their jobs, respectively), asks for an explanation (holds hearings/takes depositions), which Tristan (not to mention the, by now, notorious congressional highwaymen in the pay of the S&L varlets), of course, cannot provide.

Freely translated into the contemporary argot (with a dash of legalese), the dialogue went as follows:

King Marke: "Yo! Tristan! You were my agent; I was your principal. You were the servant, I the master. You owed me a fiduciary duty—a duty of undivided loyalty (not

10. RICHARD WAGNER, *TRISTAN UND ISOLDE* (1865).

11. Earlier, in Act 1, we learn that Tristan has vanquished an Irish incursion into Cornwall's sovereignty by the Irish Lord Morold, who originally had been betrothed to Isolde. Tristan, having killed Morold in battle in Ireland, is severely wounded, but, disguising his true identity with the anagram "Tantris," he is nursed back to health by none other than Isolde, who apparently is duped by this "clever" (to medieval sensibilities) ruse. Upon his recovery, Tantris swears eternal gratitude and loyalty to Isolde and departs, only to return later, revealed as Tristan, and acting as King Marke's emissary to bring the reluctant bride back to Cornwall. WAGNER, *supra* note 10, act 1, sc. 3. An amateur sorceress, Isolde—who thus far in the story has displayed a level of perspicacity equal to that of management of the average failed S&L—does at least recognize Tristan when he returns *in propria persona* and, stung by the deception and mortified by her forced marriage to the aging and issueless Marke, resolves to take her life with a death potion. *Id.* Tristan, for his part stung by Isolde's blistering attack on his honor, and perceiving her true intent when she invites him to join her in a drink, accepts the invitation. Unbeknownst to both of them, however, Isolde's maidservant Brangaene has substituted a love potion for the death draught. Thus the stage is set for Tristan's betrayal of the King. *Id.* act 1, sc. 5.

12. *Id.* act 2, sc. 1-2.

to mention fealty). You've always performed services for me loyally in the past: you vanquished my enemies, enlarged my kingdom, and enhanced my reputation for truth, justice, and the Cornish Way. And in return for your loyal service I've always treated you handsomely (even royally). But now I ask you to do a simple thing for me and bring back my chosen bride over the Irish Sea, and look what happens—you breach your position of trust and engage in self-dealing. I should have you beheaded, or else do something radical like create a court system and sue you for breach of fiduciary duty, but first I think I'm entitled to an explanation. What gives?"

Tristan: "Yo, King! I wish I could tell you. Something came over me. I got in over my head. I had a conflict. I guess I'm no longer a righteous dude."¹³

While no magic potion defense has yet been successfully advanced in defense of bank fraud or so-called "S&L kingpins," the use of the Tristan legend as an allegory for these more modern examples of greed and lust may not be entirely amiss, particularly with regard to the notion of breaching some duty to the sovereign.

Tristan, a knight in King Marke's court, swore an oath of fealty to his liege. In our day and in our system of government, the only courts are courts of law, and the only officers of such courts are lawyers admitted to practice. The oath they swear is to uphold the Constitution of the United States and to practice law in accordance with the rules of practice and ethical standards laid down by the judiciary (and occasionally, the legislature) in the jurisdiction in which they are admitted to practice.¹⁴ Those standards impose upon a lawyer a duty of

13. An attempt at a more literal translation of the German original is made below. This is one of the most moving and beautiful scenes in Wagner's oeuvre and really needs to be heard to be fully appreciated (especially when sung by one of the great Wagnerian basses, such as the late Martti Talvela or Karl Ridderbusch).

King Marke:

(Deeply affected) This to me? This, Tristan, to me? Where now is trust if Tristan has betrayed me? Where now is honor and truthfulness, now that the champion of all honor, Tristan, has lost it? Where now has virtue, which Tristan embodied, flown, if it flies from my friend, from Tristan, who has betrayed me?

(Tristan slowly lowers his eyes; in his demeanor, as Marke goes on, one can read growing sadness)

Why did you serve me so unstintingly? Why did you win for King Marke renown for honor and great power? Must this honor and renown, greatness and power, and your services beyond counting be recompensed only with Marke's shame?

* * *

Why this disgrace to me that no punishment can atone for? Who can explain the uncharted depths of its secret foundation to the world?

Tristan:

(Raising his eyes to Marke with pity) O King, I cannot tell you that; and what you ask you can never understand.

14. For example, in the oath administered when lawyers are admitted to practice before the Supreme Court of the United States, the clerk asks each of those applying for admission to "solemnly swear [or affirm] that as an attorney and counselor of this Court, you will conduct yourself uprightly, and according to law, and that you will support the Constitution of the United States." See ROBERT L. STERN, EUGENE GRESSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 741 n.13 (6th ed. 1986). Similar oaths are administered in the lower federal courts and upon admission to the bar in most states.

undivided loyalty to the client.¹⁵ The lawyer must balance that duty with his obligation, as an officer of the court, to uphold the law and our system of justice.¹⁶ That balancing act forbids, for example, the lawyer from construing his or her duty of loyalty to the client as requiring (or permitting) counseling or aiding and abetting that client's commission of a crime or fraud.¹⁷

This is a far cry, however, from suggesting that a lawyer owes a "fiduciary" duty to the government when representing a client, such as an IDI, that is subject to pervasive regulation and supervision by agencies of the government. Were such a duty to exist, then the lawyer would be unable, in an extraordinarily high percentage of engagements, to provide legal services to the client because of an inherent conflict of interest. Such a duty would, for example, require the lawyer representing an IDI in a "cutting edge" transaction to notify the regulator and to seek to ascertain its position on the matter. This effort is not, in general, required of the client or the lawyer. Moreover, it may not be desired by the client, and may not even be practical in view of the timing of most business transactions and the often protracted process of obtaining guidance from a government agency. Further, if the lawyer does ascertain the agency's position and finds it to be in conflict with the client's position, the lawyer finds himself or herself in an ethical quagmire. The Model Rules of Professional Conduct generally proscribe representing a client if the representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . ."¹⁸ While the rule does permit exceptions with client consent after full disclosure, that consent alone is insufficient, as the rule also requires that "the lawyer reasonably believes the representation will not be adversely affected"¹⁹—a judgment many lawyers will be unable to make if it is clear that the government's and the client's respective positions are irreconcilable.

This conflict of interest becomes worse when the lawyer has reason to be concerned about his or her own liability if an enforcement action should subsequently be brought by the government. "The lawyer's own interests should not be permitted to have adverse effect on representation of a client. . . . If the

15. This principle is not new. Nearly 60 years ago, a formal ABA ethics opinion observed, "It cannot be proper for a lawyer to represent his client when the lawyer's own interests may tempt him to temper his efforts to promote to the utmost his client's interests." ABA Comm. on Professional Ethics and Grievances, Formal Op. 132 (1935). Similarly, Canon 15 of the ABA Canons of Professional Ethics stated in part: "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." Canon 7 of the Model Code of Professional Responsibility likewise requires the lawyer to represent the client's interest zealously, provided this is done within the bounds of the law. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980). At the same time, however, the rule does permit the lawyer to exercise independent professional judgment and to refuse to aid or participate in conduct that he or she believes to be unlawful, even though there is some support for an argument that the conduct is legal.

16. See, e.g., *id.* DR 7-102.

17. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

18. *Id.* Rule 1.7(b).

19. *Id.* Rule 1.7(b)(1)-(2).

probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."²⁰

Accordingly, it is important to examine carefully this newly articulated equitable obligation and to assess its validity.

III

WHEREIN TRUTH AND JUSTICE SMITE A ROGUISH EQUITY

A. OTS's Theories: The Rogue's Progress

While it is clear that OTS's Chief Counsel would expand the liability of counsel representing IDIs (or at least thrift institutions) beyond what is currently understood by practitioners to be the law, the precise contours of the liability he espouses are not so clear. This is due in part to the novelty of some of the theories he has advanced and in part to the protean nature of those theories.²¹

20. *Id.* Rule 1.7 cmt.

21. Much of the following discussion is adapted from the Chairman's Exposure Draft, dated August 3, 1992, of the First Interim Report of the ABA Task Force on the Liability of Counsel Representing Depository Institutions, which was released for public comment at the 1992 Annual Meeting of the American Bar Association in San Francisco, California. Lest the discussion appear overly critical of Mr. Weinstein or his theories, a few preliminary observations are in order.

First, most practitioners in this area recognize that Mr. Weinstein inherited a difficult job in a particularly difficult era. That he did so without any prior background or experience in the complex web of statutes, regulations, and case law governing federally regulated depository institutions undoubtedly gave him an outlook untainted by a practitioner's preconceptions. At the same time, unfamiliarity with these matters may have led him to take positions that are unrealistic and that may, in the long run, be counterproductive to the ability of such institutions to enjoy access to competent, ethical, and affordable legal services.

Second, the majority of practitioners have no doubt that Mr. Weinstein was acting in good faith and that his effort to articulate views on what should be the duties of depository institution counsel and the standards applicable to their professional conduct was sincere. They take these views seriously and believe it is appropriate to do so in the context of fostering discussion and debate as to what *should* be the roles, duties, and standards of care of depository institution counsel in the post-S&L bailout era and, in addition, whether those roles, duties, and standards should, as a matter of public policy, be different from those applicable to counsel in other areas of practice. They do not, however, believe it is appropriate to articulate novel theories as though they *are* established law and apply them retrospectively to lawyer conduct which antedates FIRREA. (To be sure, Mr. Weinstein probably would not disagree with this as a policy matter; the point of disagreement is whether the views he has espoused are novel or whether, as he believes, they constitute merely a rearticulation of well-established legal principles).

Apart from the unfairness of such a retrospective application in the enforcement context, concern exists about the dangerous level of uncertainty that is spreading within the banking bar as to the degree to which it can continue to rely upon the Rules of Professional Conduct, the Code of Professional Responsibility, and the opinions of courts, the ABA, and state Bar authorities interpreting these rules of practice and ethical conduct. That uncertainty has spread to malpractice insurers, which are diminishing coverage even as they are raising premiums for firms engaged in this area of practice. *See, e.g.,* Ellen J. Pollock & Christi Harlan, *Law Firm Insurance Premiums May Rise*, WALL ST. J., Apr. 1, 1992, at B6 (reporting that premium increases of as much as 50% over the next two years are a likely consequence of the Kaye, Scholer settlement with OTS and a Jones, Day settlement with FDIC). The uncertainty has also begun to affect clients, in that lawyers can no longer give completely objective, disinterested advice or be zealous advocates if they are apprehensively looking over their own shoulders with concern about how such advice or advocacy may someday be characterized by an agency of the federal government. *Cf. Baxter, supra* note 7, at 32 ("[T]he suggestion that lawyers should disregard their legitimate ethical and legal responsibilities in favor of a general duty to play public watchdog seems more the product of regulatory zealotry and public hysteria than reasoned analysis.").

Mr. Weinstein expressed the earliest version of his views in remarks he made at the July 1990 Attorney's Clinic sponsored by the U.S. League of Savings Institutions in Chicago, Illinois. Mr. Weinstein argued that attorneys representing IDIs owe a fiduciary duty to the government based on two alternate, if somewhat inconsistent, hypotheses:

- (1) that the government, as the holder of "potentially unlimited equity risk" in the IDI, holds a "negative equity" interest in the institution; and
- (2) that the government, as the largest, single potential creditor of the IDI (assuming *arguendo*, one supposes, insolvency and deposit insurance payoff), should be treated as bankruptcy law treats creditors in situations of imminent insolvency.

While each of these asserted justifications suggests that only the FDIC as deposit insurer, and not any other federal agency,²² should be the beneficiary of these alleged duties, Mr. Weinstein was deliberately ambiguous about which federal entity or entities could rely on such duties.

Roughly two months later, Mr. Weinstein offered a revised version of his theories in a speech delivered at Southern Methodist University.²³ In this iteration, he retreated from a bald assertion of fiduciary duties owed by *attorneys* and spoke instead of the duties of *directors*. The obligation of counsel apparently was to advise the acknowledged corporate fiduciaries of their fiduciary duties.²⁴ The next question—exactly what those duties are—remained in the *terra incognita* of "negative equity" interests²⁵ and "single largest creditor"²⁶ introduced in the Chicago speech. In addition, Mr. Weinstein added

22. To the extent that there is any validity to these alternative predicates for the existence of a fiduciary duty to the government, it is the deposit insurance fund—and not the OTS or any other regulator—that holds the "potentially unlimited negative equity risk" and is the largest creditor upon a deposit payoff. Interestingly enough, however, FDIC, according to statements made in the Fall of 1990 by its General Counsel, Alfred Byrne, has expressly disavowed any such views. *See, e.g., FDIC General Counsel Declines to Embrace Higher Duty for Fiduciaries in Failing Banks*, 55 BANKING REP. (BNA) 941 (1990). Mr. Byrne rejected the negative equity notion out of hand and, with respect to the creditor approach, observed 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 independent advisor." *Id.*

23. Harris Weinstein, Speech delivered at Southern Methodist University (Sept. 13, 1990), *reprinted in* 55 BANKING REP. (BNA) 510 (1990) [hereinafter SMU Speech].

24. This obligation has made its way into some of the OTS consent orders, such as those entered with Sherman & Howard and Kaye, Scholer. *See infra* text accompanying notes 31-36.

25. In his SMU speech, Mr. Weinstein articulated the "negative equity" concept as follows:

It is also a Hornbook principle that corporate fiduciaries owe their duties to those who provide the equity with which an institution operates. By providing deposit insurance, the federal government has assumed a major equity position in every insured depository institution. What Judge Sporkin said of Lincoln Savings is true of each and every insured depository institution in the country: "By virtue of its insurance of Lincoln's accounts, the federal government's interest in Lincoln is many times that of [any other equity holder]."

The point is that the government has an unlimited negative equity risk while it has none of the potential for gain that common shareholders enjoy. This type of equity position should call forth the highest conceivable standard of fiduciary conduct.

SMU Speech, *supra* note 23, at 511. Mr. Weinstein offered no citations in support of this proposition.

26. Mr. Weinstein decried the rationale for imposing fiduciary duties upon officers and directors of depository institutions as follows:

a third justification for such duties to the government:

(3) "hornbook" insurance law dictates that an insurer who covers a loss is subrogated to the rights of the insured.²⁷

Meanwhile, even as bank and thrift counsel began to worry whether developments at OTS were harbingers of the wolf at the door, the Chief Counsel's lycanthropic theories shape-shifted yet again. In a March 1991 speech before a panel of the Administrative Conference of the United States, and again at a program held during the April 1991 meeting of the ABA Business Law Section in Williamsburg, Virginia, Mr. Weinstein unveiled a fourth justification:

(4) a duty of counsel to practice the "whole law."

While the "whole law" concept remains somewhat inchoate, even somewhat mystical, it clearly comprehends an ethos of giving advice to a thrift institution client only after due consideration has been given to (1) the entirety of the skein of federal statutes and regulations affecting such institutions; (2) concepts of safety and soundness (which are largely undefined, often subjective, and always enforced with the perfect vision of hindsight); (3) concepts of fiduciary responsibility (that is, to the government); and (4) "the principle that imposes hostility to law avoidance schemes."²⁸

More recently, at speaking engagements in the wake of OTS administrative action against Kaye, Scholer, Mr. Weinstein has expatiated his concept of the duties of counsel. The most significant of these speeches is the one he delivered at the University of Michigan Law School on March 24, 1992, wherein he sought to distill several "important points of professional responsibility" gleaned from "the savings and loan experience":

The first is that a lawyer must be sensitive to the role he or she chooses to play, for the rules and principles that govern an advocate in the courtroom do not apply to the lawyer as advisor or to the lawyer in the bank examination process.

"Safe and sound" policies must be instituted and maintained first to protect the public at large from the adverse consequences inherent in the failure of depository institutions and second to limit the risks that ultimately are borne by depositors and their insurer, the federal government. Because of the importance of safekeeping depositors' funds, directors and officers of a depository institution must be held to "standards of probity and fidelity more lofty than those of the marketplace." Accordingly, officers and directors of depository institutions are held to a strict fiduciary duty to act in the best interest of the institution, its shareholders and its depositors.

Id. at 510. Mr. Weinstein cites the following cases in support of his argument: *Briggs v. Spaulding*, 141 U.S. 132 (1891); *Fleishhacker v. Blum*, 109 F.2d 543, 547 (9th Cir.), *cert. denied*, 311 U.S. 665, *reh'g denied*, 311 U.S. 726 (1940); *Lane v. Chowning*, 610 F.2d 1385 (8th Cir. 1979); *Brickner v. FDIC*, 747 F.2d 1198 (8th Cir. 1984); *Hoye v. Meck*, 795 F.2d 893 (10th Cir. 1986); *Rengeon v. Albinson*, 35 F.2d 753 (D. Minn. 1929); *First Nat'l Bank of Lamarque v. Smith*, 436 F. Supp. 824 (S.D. Tex. 1977), *aff'd in part, vacated in part on other grounds*, 610 F.2d 1258 (5th Cir. 1980); *Goodman v. Perpetual Building Ass'n*, 320 F. Supp. 20 (D.D.C. 1970). As discussed in further detail below, these cases do not support his argument. See *infra* text accompanying notes 48-54.

27. Here again, and even more explicitly, is a concept that is applicable, if at all, to the deposit insurer and not to OTS or any other federal regulator.

28. See *Advice on How to Exploit Loopholes May be Unethical*, *OTS' Weinstein Says*, 56 BANKING REP. (BNA) 616, 617 (1991).

The second is the need to practice the whole law. So-called "loophole lawyering" must be illuminated by the whole body of law that pertains to an issue.

The third is that a lawyer is at all times governed by a duty to deal honestly with the facts and to comply with the disclosure and other regulations that govern submissions to the regulatory agency.

The fourth is that a lawyer advising a fiduciary must not forget that the fiduciary's conduct must be in the best interests of the institutional client.

The fifth is that a lawyer must report unlawful client activity up the corporate chain of command, going as far as the corporate board of directors.

The sixth is that a lawyer may not knowingly further a client's unlawful activity.²⁹

Expounding on his concept of the "whole law," Mr. Weinstein continued:

What do I mean by practicing the "whole law"? I mean that all pertinent legal principles must be brought to bear on a problem.

The whole law is the prescribed antidote to misguided "loophole lawyering." What is misguided loophole lawyering? It is the reliance on an implied exception to a statute or regulation that mistakenly disregards the significance of principles of general applicability.

In banking regulation, there is no exception to the fiduciary duties of bank officers and directors to the shareholders, depositors, and the insurance fund, or to the duty to operate safely and soundly. Whether a lawyer believes he or she has found a legal loophole in a regulation or statute, or is counseling a client in a gray area without clear guidelines, the lawyer must advise banking fiduciaries that their conduct must be consistent with their fiduciary duties, and must meet their obligation to operate their institution safely and soundly.

Loophole lawyering that disregarded the whole of the law made its contribution to the savings and loan disaster. That form of lawyering represents a professional failure, not success. Lawyers must consider all of the applicable law in rendering an opinion. True professionalism allows for nothing less and nothing less truly serves the interests of the client.³⁰

Mr. Weinstein's theories have made their way into OTS consent orders entered into with law firms. For example, one paragraph of the Sherman & Howard Consent Order provides:

When a Sherman & Howard attorney has reasonable notice that an officer or director of an [IDI] client *appears to have* improperly construed such person's fiduciary duties, the Sherman & Howard attorney *shall advise* said officer or director (a) concerning such person's fiduciary duties to the institution's shareholders, *depositors, and the federal insurance fund* and (b) *that the fiduciary duties of such person include the responsibility for the safety and soundness* of the [IDI], which, in turn, precludes transactions that pose an *undue risk of loss* to the depositors and/or federal insurance fund.³¹

As will be seen from the discussion that follows, this obligation could create a dilemma for counsel if required to advise a person (1) concerning a fiduciary duty that does not exist (that is, to the depositors and the federal insurance fund) or (2) as to a misstated standard of safety and soundness (the subjective standard of "undue" risk versus the standard contemplated by Congress and the courts: *abnormal risk*).

29. Harris Weinstein, Chief Counsel, Office of Thrift Supervision, United States Department of the Treasury, Issues of Professional Responsibility Arising from the Savings and Loan Failures, Remarks at the University of Michigan Law School (Mar. 24, 1992), at 8-9.

30. *Id.* at 11.

31. Sherman & Howard Consent Order, *supra* note 5, ¶ V.5 (emphasis added).

Even more troubling is the next paragraph of the Sherman & Howard order, which essentially deprives the IDI of the objective and independent judgment of the law firm in the context of providing a legal opinion on a novel or cutting edge issue. Instead, the law firm is required, to a certain extent, to “make appropriate use of” the agency’s view (the order suggests, furthermore, that doing so is necessary under the ABA Business Law Section’s exposure draft of the Third-Party Opinion Report):

In the event that Sherman & Howard is requested to provide a legal opinion regarding the applicability of provisions of the federal banking statutes, 12 U.S.C. §1724 *et seq.* [*sic*], and regulations promulgated thereunder to a transaction and Sherman & Howard believes that the question presented has not been resolved by prior court order or agency order or interpretation and the answer is not reasonably predictable, Sherman & Howard shall comply with applicable professional standards with respect to determining the type of opinion that Sherman & Howard may render (the current standards applicable herein are set forth in the Exposure Draft of the Third-Party Legal Opinion Report of the Business Law Section of the American Bar Association) *including making appropriate use of advice and guidance from the [IDI]’s primary regulatory agency.* In such circumstances, Sherman & Howard shall explicitly include in its advice that the directors and officers of the institution must, among other relevant matters, address the effect of the transaction on the safety and soundness of the [IDI], taking into account its present financial condition, *or seek advice and guidance from the [IDI]’s primary regulatory agency.*³²

This article should not, of course, be read to suggest that it is inappropriate for counsel to consult with the institution’s principal regulator to obtain its views. To *mandate* that procedure, however, imposes a terrible burden on the law firm and on the client due to the importance of time in consummating business transactions. Often, as banking practitioners know, the regulatory agency takes many months to provide an answer to such a question, or may not answer at all, depending on its view of the policy implications of the question. The language of this provision also implies that the agency’s “advice and guidance” will inevitably be correct or worthwhile, but experience has shown that is not always the case.

Paragraph 16 of the Kaye, Scholer Consent Order is even worse. It provides:

When, to the knowledge of a Kaye Scholer attorney, an employee, officer or director of an [IDI] client *may* have improperly construed such person’s fiduciary duties, *including but not limited to engaging in the activities described in paragraph 15 above*, the Kaye Scholer attorney shall inform the banking partner in charge, who, if he or she concurs, *shall advise* such employee, officer or director (i) concerning such person’s fiduciary duties to the institution’s shareholders, *depositors, and the federal insurance fund* and (ii) *that the fiduciary duties of such person include the responsibility for the safety and soundness of the [IDI] which, in turn, precludes transactions that pose an undue risk of loss to the depositors and/or the federal insurance fund.* Should such employee, officer or director fail to adhere to Kaye Scholer’s advice concerning fiduciary duties, Kaye, Scholer *shall* further inform a responsible executive officer of the [IDI] of the facts and circumstances surrounding the actions or intended actions of such employee, officer or director and of the advice provided to such employee, officer or director. Kaye Scholer *shall further advise the responsible executive officer that pursuant to his or her own fiduciary duties he or she must (i) ascertain whether a breach of fiduciary duty is threatened or has occurred*

32. *Id.* ¶ 6 (emphasis added).

and (ii) in the event that a breach of fiduciary duty is threatened or has occurred, take action to correct or nullify the actions constituting the threatened or actual breach of fiduciary duty and remedy any harm to the [IDI] caused by those actions. If the responsible executive officer fails to act pursuant to Kaye Scholer's advice, Kaye Scholer *shall take the same steps with respect to such [IDI's] Board of Directors* as it was required to take with respect to such responsible executive officer. If the Board of Directors fails to act pursuant to Kaye Scholer's advice, Kaye Scholer shall consider whether the applicable ethical rules require Kaye Scholer's resignation from the engagement or some other action and shall act in accordance with such ethical rules and *shall document its decision*.³³

In addition to the "undue" risk formulation, the Kaye, Scholer Consent Order also contains another, even more subjective, phrase:

When advising any person concerning his or her responsibility for the safety and soundness of an [IDI], Kaye Scholer shall advise that person that an unsafe or unsound practice embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be *unacceptable* risk of loss or damage to an institution, its depositors, or the insurance fund.³⁴

The Kaye Scholer order further contains a legal opinion paragraph virtually identical to the one quoted above from the Sherman & Howard order³⁵ and also contains an even more chilling limitation on the lawyer's independence:

In the course of representing an [IDI] in *any* matter:

* * *

Kaye Scholer shall not omit to disclose material facts related to a matter addressed in any oral or written submission to a federal banking agency by Kaye Scholer because Kaye Scholer has determined that the facts are not relevant to Kaye Scholer's theory of applicable law and regulations where Kaye Scholer knows that the agency *may* have a different view of the law and regulations.³⁶

As representing an IDI "in *any* matter" presumably includes litigation against the agency, this proposition is startling indeed.

B. Binding the Chancellor's Foot: A Critique of OTS's Theories

Financial institutions and their officers and directors are entitled to have counsel of their choice to advise them on a variety of subjects, including the requirements for compliance with the increasingly complex skein of federal statutes and regulations governing the business of banking.³⁷ For those institutions that are going concerns, the directors owe an unquestioned fiduciary duty to the shareholders. Of course, corporate law may ultimately move in a direction that imposes upon the directors similar obligations to other constituencies (the wisdom of which clearly cannot be debated here). Even under existing law, some fiduciary obligation to creditors exists once an institution approaches

33. Kaye, Scholer Consent Order, *supra* note 5, ¶ 16 (emphasis added). The cross-reference to ¶ 15 demonstrates OTS's position that "attempting to evade [federal banking] statutes or regulations by elevating form over substance," *id.* ¶ 15(c) (emphasis added), is a breach of fiduciary duty.

34. *Id.* ¶ 9 (emphasis added).

35. *Id.* ¶ 5.

36. *Id.* ¶ 12(d) (emphasis added).

37. For ease of reference, use of the term "banks," "bankers," and "banking" herein will encompass thrift institutions unless otherwise expressly noted.

insolvency. However, it would impose an intolerable burden on institution affiliated parties ("IAPs") (and *a fortiori* upon counsel) if they were required, as a matter of fiduciary duty, to protect the interests of the government over the interests of the institution itself.

Frequently, there are situations in which reasonable people may disagree over what is in the best interests of the institution, its stockholders, or its creditors.³⁸ Moreover, the case in which the government is seizing control of the institution and the directors wish to resist, is not, from a process-oriented viewpoint, different from any other battle for control. The government is represented by its own counsel, as are the institution and (most likely) the board of directors. If, however, the private parties' counsel owe a fiduciary duty to the government, they are unable to advise the institution to oppose the government seizure without breaching that alleged duty.³⁹ In fact, the existence of such a duty would tend to make the government's own counsel superfluous.

The hypothesis that attorneys in private practice who represent insured depository institutions owe a duty to the government is untenable for a variety of reasons. First, as a matter of policy, it inhibits financial institutions and their directors from obtaining access to counsel who can provide them with objective, disinterested advice. Second, as discussed further below, it is predicated on a misreading of existing case law. Third, it renders superfluous the supervisory scheme Congress has erected with section 8 of the FDIA. Finally, it ignores, as Professor Baxter and others⁴⁰ have pointed out, the fact that the government is well positioned to protect its own interests—whether as regulator or as insurer of deposits—through its already pervasive regulatory authority over depository institutions.

The various pronouncements of OTS's theories obviously raise a large number of questions, the answers to which are well beyond the scope of this paper. Nevertheless, one can readily identify a number of problems with Mr. Weinstein's premises that would call into question the validity of his conclusions. Some of these problems are outlined below.

1. "*Negative Equity.*" The "negative equity" approach has the obvious advantage of bootstrapping the government into the acknowledged and long-recognized fiduciary duties of *directors* to shareholders. From the agency's point of view, being elevated to the status of *any* kind of an equity holder triggers such duties. The problem with the whole "negative equity" is that it is a thoroughly extravagant notion and completely lacking in precedent.

Indeed, the "negative equity" theory borders on the frivolous. It misconceives the deposit insurance relationship and function and, if extended to the

38. Baxter, *supra* note 7, at 31 n.132.

39. For a recent example of a contested takeover of a thrift institution, see *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 742 F. Supp. 1089 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991).

40. See, e.g., Andrew J. Nussbaum, *Like Money in the Bank? An Economic Analysis of Fiduciary Duties to Protect the S&L Deposit Insurance Fund*, 44 ADMIN. L. REV. 355 (1992).

private sector, would require every enterprise that maintains various categories of insurance (including insurance against catastrophic risks in amounts that can significantly exceed the net worth, or even the assets, of the enterprise) to conduct its business in the best interests of the insurer, as though the latter were an equity holder.

The government does not have an equity position in IDIs solely by virtue of providing insurance for deposits. Equity ownership interests constitute legal capital; deposit insurance does not.⁴¹ Whereas shareholders provide IDIs with capital, depositors provide them with credit,⁴² and deposit insurance furnishes these creditors with a federal government guarantee, up to \$100,000, of the institution's creditworthiness. Deposit insurance, however, is under no circumstances available for use by the IDI as an asset thereof.

Furthermore, the nature of the legal interest being asserted is, at best, anticipatory—indeed, contingent—in nature. Even if it could be recognized in that light, this "equity interest" is "acquired" by the government without any consideration, inasmuch as every IDI pays for its federal deposit insurance in full with premiums assessed by the FDIC by regulation.⁴³ Even then, if one could somehow characterize this contingent or anticipatory equity interest as having been acquired for some consideration (as if it were, for example, a convertible debt security), the conclusion sought by Mr. Weinstein still does not follow, because most courts that have considered the issue have held that a convertible interest does not assume its equity aspect until conversion actually occurs, and therefore no fiduciary duty is owed by the issuer to holders of convertible debentures.⁴⁴

2. *Government as "Single Largest Creditor."* Mr. Weinstein invokes "traditional notions of bankruptcy" for the proposition that a fiduciary duty is owed to creditors generally as an entity *approaches* insolvency. Preliminarily, one must note that this theory places the asserted duty in limbo. Generally, while the fiduciary duty of directors shifts from equity holders to creditors once an entity *becomes* insolvent,⁴⁵ no fiduciary duty is owed to creditors while the entity is still solvent.⁴⁶ So, even though some courts appear to be willing to recognize such a duty when an institution approaches the abyss of insolvency,⁴⁷

41. Indeed, it is unlikely that the OTS would acquiesce to a contention by an IDI that OTS capital adequacy requirements were met, in whole or in part, by the SAIF deposit insurance paid for by the institution's premiums.

42. Mr. Weinstein himself acknowledges this: "Let us not forget that depositors are creditors and deposits are liabilities of insured institutions." SMU Speech, *supra* note 23, at 511.

43. See 12 C.F.R. § 327.1-327.33 (1992).

44. See, e.g., *Metropolitan Life Ins. Co. v. RJR Nabisco Inc.*, 716 F. Supp. 1504, 1525 (S.D.N.Y. 1989); *Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988).

45. See, e.g., *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976-77 (4th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

46. See, e.g., *Metropolitan Life*, 716 F. Supp. 1504; *Katz v. Oak Industries, Inc.*, Del. Ch., 508 A.2d 873 (Del. Ch. 1986).

47. Cf. *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*, No. 12150, 1991 LEXIS 215, at n. 55 (Del. Ch. Dec. 30, 1991) ("At least where a corporation is operating in the vicinity

a substantial gray area exists in terms of defining the exact distance from the brink where the obligation attaches. Is it where the IDI's net worth declines below two percent? one and one-half percent? one percent? Even assuming that each of the banking agencies was willing publicly to define this point with such precision, what happens to that duty if the net worth rises above that level shortly after the approach point has been reached? Would the financial resurrection of the IDI render nugatory any liability for breach of fiduciary duty that would otherwise have attached had the institution's fortunes not reversed? Clearly, the degree of uncertainty attending this "approaching insolvency" concept is unacceptable. Neither the agencies nor the community of IDI directors and officers should wish to have the exercise of enforcement authority resting on so friable a foundation.

Lest this discussion become too theoretical, it must also be noted that the "largest single creditor" hypothesis suffers from an even more fundamental flaw. Any such assertion by the government is entirely derivative of the deposit insurer's becoming subrogated to the rights of depositors of a failed institution once those depositors have been paid off by the insurance fund. Subrogation does not, however, enlarge the nature of the claims that can be brought, and it is clear that the fiduciary duty to act in the best interests of the IDI and its shareholders does not, under present law, extend to depositors, as Mr. Weinstein asserts. Nor do the cases he cites⁴⁸ in support of his "hornbook principles" support his conclusions.

Included among these authorities is perhaps the most frequently miscited case in banking law, *Briggs v. Spaulding*,⁴⁹ which is typically offered in support of the assertion of broader fiduciary duties for bank directors than for corporate directors generally. Anyone who bothers to read the case will note that it actually says nothing of the kind. The other cases cited by Mr. Weinstein likewise add nothing to his argument. Professor Baxter's critique of Mr. Weinstein's approach has cogently summarized the defects in his citations, and this criticism need not be repeated here.⁵⁰

Indeed, the only decision cited in support of Mr. Weinstein's contention that even touches on this subject (in dictum) is *Lane v. Chowning*.⁵¹ In that case, Lane, the former Chairman of the Board and Chief Executive Officer of a bank, sued his fellow officers and directors for breaching their fiduciary duties to *him* as an officer. He claimed that the other officers and directors fraudulently

of insolvency, a board of directors is not merely the agent of the residu[al] risk bearers, but owes its duty to the corporate enterprise . . .").

48. See *supra* note 26.

49. 141 U.S. 132 (1891).

50. Baxter, *supra* note 7, at 30 (explicating the *Briggs* holding and observing that "[t]he insurance cases do no more than illustrate the trite proposition that an insurer is subrogated to the rights of the insured against third parties, and this proposition is not in dispute").

51. 610 F.2d 1385 (8th Cir. 1979). Again, as noted by Professor Baxter, none of the other cases cited by Mr. Weinstein involves any duties owed to depositors; rather, they all merely reflect the uncontroversial (and uncontroverted) point that, upon payment of a claim, an insurer is subrogated to the rights of the insured against third parties.

induced him to enter into an illegal loan on the bank's behalf. In holding that directors and officers owe no fiduciary duty to one another, the court observed that "it is well settled that the fiduciary duty of a bank officer or director is owed to the *depositors* and shareholders of the bank, and not to the Chairman of the Board or Chief Executive Officer."⁵²

The cited authority for this statement, section 845 of Fletcher's *Cyclopedia of the Law of Private Corporations*, does not, however, pertain to stock companies at all. It reads:

On account of the peculiar nature and organization of savings banks in some jurisdictions, the directors of such banks are held to be trustees for the depositors. It is said, that, *savings banks being organized without capital stock*, and their profits being paid to the depositors under a *mutual* plan of operation, the depositors stand in the *same relation to them as that occupied by stockholders in commercial banks to such banks*⁵³

Lane is not, therefore, the broad authority Mr. Weinstein holds it out to be. Its dictum stands, at most, for the relatively uncontroversial proposition that officers and directors of a mutual savings and loan have a fiduciary relationship with depositors because the latter are the equivalent of the stockholders in a stock institution.⁵⁴

In fact, contrary to the position asserted by Mr. Weinstein, case law throughout the United States stands overwhelmingly for the proposition that the relationship between a bank and its depositors is one of debtor and creditor, and is purely contractual and not fiduciary in nature.⁵⁵ Therefore, to the extent the

52. *Id.* at 1388 (emphasis added) (citing 11 WILLIAM M. FLETCHER, *FLETCHER'S CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* vol. 3 § 845 (perm. ed. rev. vol. 1975)).

53. *Id.* (emphasis added).

54. Even this is subject to some doubt, as Professor Baxter has noted. See Baxter, *supra* note 7, at 19 n.65 (citing *York v. Federal Home Loan Bank Board*, 624 F.2d 495, 499-500 (4th Cir.), *cert. denied*, 449 U.S. 1043 (1980) (quoting *Society for Savings v. Bowers*, 349 U.S. 143, 150 (1955)). See also Paulsen v. Commissioner of Internal Revenue, 716 F.2d 563, 569 (9th Cir. 1983); *East New York Savings Bank Depositors Litigation v. Murray*, 547 N.Y.S.2d 497, 500 (1989).

55. See, e.g., *United States v. Bank of Celina*, 721 F.2d 163 (6th Cir. 1983) (applying Tennessee law; depositor is merely creditor of bank); *Gilbert v. First Nat'l Bank of Jackson*, 633 F.2d 686 (5th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981) (debtor/creditor relationship exists between banks and depositors); *Crocker-Citizens National Bank v. Control Metals Corp.*, 566 F.2d 631 (9th Cir. 1977) (applying California law; relationship between bank and depositor is one of debtor and creditor); *APCOA, Inc. v. Fidelity Nat'l Bank*, 703 F. Supp. 1553 (N.D. Ga. 1988) (relationship between bank and depositors is contractual in nature); *Wexseblatt v. Bank of Boston Int'l*, 666 F. Supp. 513 (S.D.N.Y. 1987) (relationship between banks and depositors is purely contractual; therefore, depositors may not sue bank in negligence for failure to carry out instructions); *Walter v. Texas Commerce Bank, N.A.*, 635 F. Supp. 678 (S.D. Tex. 1986) (relationship between bank and depositors under common law or U.C.C. is contractual in nature); *Olmeca, S.A. v. Manufacturers Hanover Trust Co.*, 629 F. Supp. 214 (S.D.N.Y. 1985) (depositor has no claim for breach of fiduciary duty against bank because relationship is contractual only); *In re Wilson*, 56 B.R. 74 (E.D. Tenn. 1985) (bank's relationship to depositor is debtor/creditor with customer as creditor and bank as debtor); *In re Werth*, 37 B.R. 979 (D. Colo. 1984), *aff'd*, 54 B.R. 619 (D. Colo. 1985) (bank does not act in a fiduciary capacity towards its customers or depositors absent special circumstances); *In re Hecht*, 41 B.R. 701 (S.D.N.Y. 1984) (deposit in bank account creates debt owed by bank to depositor); *Johnston Memorial Hospital v. Hess*, 44 B.R. 598 (W.D. Va. 1984) (bank deposit creates relationship of debtor/creditor between bank and depositor); *In re Amco Products, Inc.*, 50 B.R. 723 (D. Mo. 1983) (foremost principle of relationship between bank and customer is that relationship is contractual in nature); *Burwell v. South Carolina Nat'l Bank*, 340 S.E.2d 786 (S.C. 1986) (normal bank/depositor arrangements creates a debtor/creditor relationship and not a fiduciary one); *Denison*

government, acting through the deposit insurance fund, becomes subrogated to the rights of depositors of a failed IDI, the government acquires no claims predicated on a putative breach of fiduciary duty to those depositors.

3. *Subrogation and "Hornbook" Insurance Law.* Mr. Weinstein cites "hornbook" insurance law in support of his contention that a fiduciary duty is owed to the government. This theory may properly be regarded as a variation on the "largest single creditor" theme.⁵⁶ As noted above in the quote from Professor Baxter, however, "[t]he insurance cases do no more than illustrate the trite proposition that an insurer is subrogated to the rights of the insured against third parties, and this proposition is not in dispute."

Thus, a major distinction can be drawn here. To the extent that Mr. Weinstein contends that a fiduciary (or similarly higher) duty runs to the government as deposit insurer throughout the life of the IDI, such a hypothesis cannot possibly be proved by the subrogation principle. Subrogation takes place only after the IDI has been placed in receivership and the depositors have been paid off. At that point, and then only to the extent of the deposit insurance

State Bank v. Madeira, 640 P.2d 1235 (Kan. 1982) (relationship between bank and depositor is that of creditor/debtor and not fiduciary); Dugan v. First National Bank in Wichita, 606 P.2d 1009 (Kan. 1980) (relationship between bank and depositor is that of debtor/creditor and not fiduciary; existence of a fiduciary relationship between a bank and a customer arises only in unusual circumstances); Security Pacific National Bank v. Williams, 262 Cal. Rptr. 260 (Cal. Ct. App. 1989) (as a general rule, relationship between bank and depositor is that of creditor/debtor, dealing at arm's length, and not fiduciary); Higgs v. Higgs, 343 S.E.2d 699 (S.C. Ct. App. 1986) (normal bank/depositor arrangement creates debtor/creditor relationship rather than a fiduciary one; in limited circumstances, fiduciary relationship may be created if bank undertakes to advise customer as part of services offered); Hooper v. Barnett Bank of West Florida, 474 So. 2d 1253 (Fla. Dist. Ct. App. 1985) (generally, bank/depositor relationship is that of debtor/creditor unless a confidential relationship is shown); Paskas v. Illini Fed. Sav. & Loan Ass'n, 440 N.E.2d 194 (Ill. Ct. App. 1982) (no fiduciary duty will be found to exist absent facts showing that the depositor was subject to domination and influence on the part of the bank); Suburban Trust Co. v. Waller, 408 A.2d 758 (Md. Ct. Spec. App. 1979) (relationship of bank to its customers is not fiduciary in nature but rather that of debtor/creditor with the rights of the parties being contractual).

One California decision to the contrary, *Commercial Cotton Co. v. United California Bank*, 209 Cal. Rptr. 551 (Cal. Ct. App. 1985) (finding the relationship between a bank and its depositor to be at least "quasi-fiduciary"), has since been sharply criticized in *Copesky v. Superior Court*, 280 Cal. Rptr. 338 (Cal. Ct. App. 1991) and *Price v. Wells Fargo Bank*, 261 Cal. Rptr. 735 (Cal. Ct. App. 1989).

56. Mr. Weinstein makes the following argument:

Only loose or wishful thinkers would claim that the presence of federal deposit insurance eliminates this historic duty of bankers to depositors. One can analyze the federal insurers' position from any one of several perspectives—and each yields the same unequivocal answer. The answer is that every fiduciary of a federally insured depository institution owes the federal insurer, at the very minimum, the very same high fiduciary duties that are owed to depositors—and that, as I have said, is the duty not to risk insolvency and the resulting loss of funds deposited with the institution

One perspective that clearly leads to this conclusion is that of insurance law. It is a straightforward Hornbook principle that an insurer who covers a loss is subrogated to the rights of the insured. Those rights are necessarily those of the depositors and include the right to seek restitution and other money damages from fiduciaries who have failed to safeguard deposits.

SMU Speech, *supra* note 23, at 511.

payout,⁵⁷ does the government succeed to the rights those depositors may have against the defunct institution and any IAPs. The existence *vel non* of the higher duty Mr. Weinstein posits must be established by principles of law applicable to the IDI and its insiders *while the institution is solvent*. To date, this has not been established.

Nor, as a policy matter, is there any compelling need to afford depositors the protection of a fiduciary duty comparable to that enjoyed by the shareholders. Indeed, no cogent argument has been advanced to explain why the federal deposit insurance funds should be treated any differently from a private insurance company. Unlike shareholders, depositors bear no investment risk in the IDI and know that their deposits will be repaid, up to the statutory \$100,000 ceiling, if the institution fails. The insurance is paid for by the IDI, based on a premium schedule established by the FDIC. Although today the U.S. Treasury (and ultimately, the U.S. taxpayer) stands behind the deposit insurance funds, this has not always been so; indeed, it is only a development of the 1980s, born out of political expediency rather than any economic rationality (the result of pandering by a few influential individuals in the Congress to certain private interests). The dangers of this situation have now been well publicized. Creation of fiduciary duties by regulatory fiat, however, is not the answer. The absence of market discipline in the S&L and banking industries and the "moral hazard" of taxpayer-backed federal deposit insurance subsidizing essentially private activity are matters that Congress can and should address in sensible banking reform legislation.

Moreover, it makes sense to treat the deposit insurance funds like a private insurer. As a recent economic criticism of Mr. Weinstein's fiduciary duty theory has noted, the depositors' interests are quite different from those of the deposit insurer:

That the interests of the insurer and the depositor are not perfectly aligned further limits the vigor of the subrogation right as a source for the fiduciary obligation. This is evident from comparing the ideal scenarios for each party. The insurer would prefer that the S&L accept funds, agree to pay no interest, and lock the funds up in a safe place, promising only to return the depositors' funds, with no interest, when the depositor requests. This situation is ideal for the insurer because it involves no financial risk (ignoring the administrative costs of running the institution) to the insurer. Thus, the insurer's "safe and sound" policy would be to assume no risk at all.

The depositor, on the other hand, prefers to reap the benefits of an insurance regime whose rates are structured independent of the riskiness of the institution's investments. A depositor has no downside risk; he will be paid either by the S&L or by the federal insurer. As with car insurance, in which a driver buys insurance not to stop himself from driving, but to protect himself against loss, a depositor whose deposit insurance is "free" views insurance as a protection against loss, not a restraint on investment risk. Under the current deposit insurance regime, shareholders *and* depositors can benefit from the fund's

57. Section 11(g) of the FDIA, 12 U.S.C. § 1821(g), provides that the FDIC, "upon payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment." See also *FDIC v. Sumner Fin. Corp.*, 602 F.2d 670, 682 (5th Cir. 1979) (FDIC subject to general rule that "subrogation arises only when payment is made").

idiosyncratic rate structure, by gaining a wealth transfer. A depositor will thus prefer that the S&L promise him a very high rate of interest because he is totally indifferent to the amount of risk the bank takes with his money (as long as his deposits do not exceed \$100,000) in order to meet these payments. The OTS argument that the insurer stands in the shoes of the depositor is therefore somewhat unavailing; it is limited not only by the contractual, rather than fiduciary, nature of the depositor-S&L relationship, but also by the reality that the interests of the insurer are most imperfectly aligned with those of the depositor.⁵⁸

Finally, if the application of insurer/insured-based theories to create a fiduciary duty to the government were to receive wide acceptance, the implications would be far-reaching indeed, well beyond the confines of the banking and thrift industries. In the financial services industries alone, insurance programs exist, analogous to federal deposit insurance, in which a government entity stands behind the ability of a regulated business to repay funds entrusted to it by its customers: Securities Investor Protection Corporation ("SIPC") for brokerage houses and State guaranty funds for insurance companies are obvious examples. If fiduciary duties to the government were created here as well, the landscape for private enterprise would be radically altered. One might as well nationalize the provision of all types of financial services in the United States.

4. *Practicing the "Whole Law."* Mr. Weinstein's "whole law" theory appears to arise both from his stated aversion to thrift counsel advising clients with respect to "loopholes" in the law⁵⁹ and from his apparent conviction (which seems to be mistaken) that a fiduciary duty is owed to the federal government. These two components are addressed separately below.

a. *"Loophole lawyering."* The OTS preoccupation with "loophole lawyering" is particularly troubling, because much of what regulatory lawyers do for IDIs could easily be so characterized. To criticize these lawyers for doing their jobs, simply because a few S&L lawyers in the 1980s made use of "loopholes" to permit or assist their clients in fraudulent or criminal behavior, is not logical. One would not think of criticizing criminal defense lawyers for availing themselves of "loopholes" or "technicalities" in the law in representing their clients, even if it resulted in guilty individuals escaping punishment. Nothing about IDIs should lead to a different result.

On the contrary, the balkanized system of depository institution regulation in the United States has long encouraged the identification and exploitation of so-called "loopholes."⁶⁰ For example, the practices of moving banks back and forth between national charters and state charters, solely to avoid certain kinds of regulation, have long been regarded as legitimate. Moreover, some

58. Nussbaum, *supra* note 40, at 384-85 (emphasis in original).

59. See *Advice on How to Exploit Loopholes May be Unethical*, OTS' Weinstein Says, 56 BANKING REP. (BNA) 616, 617 (1991).

60. See Dennis J. Lehr, *Balancing the Fourth Branch: Dealing With FDIC/RTC Focus on Attorney Conduct*, 57 BANKING REP. (BNA) 59, 61 (1991) ("In the area of financial institution regulation, the word 'loophole' has been around for many years.").

"loopholes" actually reflect deliberate choices or compromises by Congress. Some of the more well-known "loopholes" exploited by banking organizations in recent years have included the following:

- the creation of "nonbank banks" by exploiting a loophole in the pre-1987 definition of "bank" in the Bank Holding Company Act of 1956;⁶¹
- the use of statutory language in the FDIA to permit the offering of federally insured brokered deposits, notwithstanding efforts by the FDIC and the Federal Home Loan Bank Board to prohibit such practices by regulation;⁶²
- the creation of bank securities affiliates engaging in underwriting and dealing in all manner of securities by exploiting a loophole in the Glass-Steagall Act;⁶³ and
- the use of state law to permit bank holding companies to engage indirectly in various aspects of the insurance business, conducted through a bank rather than a nonbank subsidiary, to avoid a prohibition against such activities in the Bank Holding Company Act.⁶⁴

Some of these examples of "loophole lawyering" were bitterly contested by the agencies. The private parties all prevailed in court, but, had they not, it would not have been possible at the conclusion of the court battle for the agencies to initiate enforcement actions against counsel. The chilling effect on counsel of a "whole law" theory or any other theory that might lead to a contrary result is self-evident.

In support of his theory, Mr. Weinstein relies heavily on Judge Learned Hand's decision in *Helvering v. Gregory*,⁶⁵ which Mr. Weinstein characterizes as standing for the proposition that activity that technically complies with the law by resort to a loophole is nonetheless unlawful because of its fundamental law-avoidance nature. His reliance on this decision is astonishing, not merely because it is a tax case and tax law principles are widely known to be *sui generis* and not necessarily of general applicability, nor even because it is an older case, decided well before the spate of recent Supreme Court decisions holding that the plain language of a statute is controlling notwithstanding a contrary agency interpretation based on its view of the statute's overarching purpose, but because the case actually rejects the broad proposition for which he cites it. Judge Hand declined to accept the argument that a transaction is necessarily a nullity if it is motivated by a desire to reduce or evade taxes:

61. See *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

62. See *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985).

63. See *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360 (D.C. Cir. 1990); *Securities Indus. Ass'n v. Board of Governors*, 839 F.2d 47 (2d Cir. 1988), *cert. denied*, 486 U.S. 1059 (1988).

64. See, e.g., *Citicorp v. Board of Governors*, 936 F.2d 66 (2d Cir. 1991); *Independent Ins. Agents of America, Inc. v. Board of Governors*, 890 F.2d 1275 (2d Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *American Ins. Ass'n v. Clarke*, 656 F. Supp. 404 (D.D.C. 1987), *aff'd in part and rev'd in part*, 854 F.2d 1405 (D.C. Cir. 1988), *withdrawn in part*, 865 F.2d 278 (D.C. Cir. 1989).

65. 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one chooses, evade, taxation. Anyone may so manage his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.⁶⁶

On appeal, the Supreme Court agreed: "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted [T]he question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."⁶⁷ As the characteristic of "loophole lawyering" is doing precisely what the statute says (which the Supreme Court believes is the best indication of what the statute intended), holding forth *Gregory* as an emblem of regulatory animosity toward "loophole lawyering" seems quite peculiar.

b. Fiduciary duty redux. The fiduciary duty to the government underpinning the "whole law" theory is likewise untenable, not only for the reasons discussed above, but also because, as thoughtfully expounded in Professor Baxter's excellent article, it would render superfluous much of the supervisory scheme established by Congress in FDIA section 8. There, Congress has specifically identified breach of fiduciary duty as (1) one of several alternative grounds for establishing the first element of a removal and prohibition order⁶⁸ and (2) one of several alternative predicates for the imposition of second and third tier civil money penalties.⁶⁹ In contrast, breach of fiduciary duty is not a permissible statutory ground for the initiation of a cease and desist proceeding,⁷⁰ which demonstrates that Congress endeavored to be quite precise in statutory language authorizing the various enforcement powers. If, as Mr. Weinstein suggests, the concept of fiduciary duty already encompassed avoiding violations of law and regulation and engaging in unsafe or unsound practices, the majority of the alternative statutory grounds under the removal and civil money penalty statutes would become mere surplusage. Thus, Professor Baxter concludes that Mr. Weinstein's novel fiduciary duty theory—whether derived from "negative equity," "largest single creditor," "subrogation," or "whole law" antecedents—is inconsistent with the clearly expressed intent of

66. *Id.* at 810.

67. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

68. There are three alternative grounds for establishing the first element under the removal and prohibition authority: (1) violation of any law, regulation, cease and desist order, written agreement with the agency, or condition imposed in writing by the agency; or (2) engaging or participating in any unsafe or unsound practice; or (3) committing or engaging in any act, omission, or practice which constitutes a breach of fiduciary duty. 12 U.S.C. § 1818(e)(1)(A).

69. The alternative predicates are as follows: (1) committing any violation which would justify imposition of a *first tier* civil money penalty under 12 U.S.C. § 1818(i)(2)(A); or (2) engaging in any unsafe or unsound practice in conducting the IDI's affairs; or (iii) breaching any fiduciary duty. *Id.* § 1818(i)(2)(B)(i), (C)(i).

70. *See id.* § 1818(b)(1).

Congress evidenced by the language, structure, and history of the very statutory powers that Mr. Weinstein would use to enforce his theory.

Professor Baxter's article also questions the need to create a concept of fiduciary duty aimed at protecting the interests of the deposit insurance fund, as this goal is already accomplished by the statutory prohibition against unsafe or unsound practices.⁷¹ And while the statutory phrase "unsafe or unsound practice" is itself less than a model of clarity, there are some legislative and judicial guideposts to its meaning.

The phrase "safety and soundness" and its converse, "unsafe or unsound," are not statutorily defined and have "no definite or fixed meaning."⁷² The legislative histories of the Financial Institutions Supervisory Act of 1966⁷³ and the Financial Institutions Regulatory and Interest Rate Control Act of 1978,⁷⁴ however, provide guidance on how Congress intended this standard to be applied. In general, as the courts have recognized, unsafe or unsound banking practices "encompass what may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in *abnormal risk or loss* to a banking institution or shareholder."⁷⁵

Nevertheless, the vagueness of this concept engendered considerable congressional concern and debate.⁷⁶ Congressman Wright Patman, then Chairman of the House Committee on Banking and Currency and sponsor of the House bill, stated that his committee had been concerned about possible agency abuse of the "unsafe or unsound" standard.⁷⁷ To allay the concerns of his fellow legislators about an "overly broad delegation of power to administrative agencies," Patman stated:

[O]f course, it should be clear to all that the cease-and-desist powers and management removal powers are aimed specifically at actions impairing the safety and soundness of our insured financial institutions. These new flexible tools relate strictly to the insurance risk and to assure the public of sound banking facilities.⁷⁸

The concept of "*abnormal risk or loss*," and Patman's relation of the removal power to the "insurance risk" to the FDIC, demonstrate the magnitude of injury Congress sought to prevent. The courts have concurred: The "breadth of the

71. Baxter, *supra* note 7, at 24.

72. S. REP. NO. 1482, 89th Cong., 2d Sess. 8 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532, 3539.

73. Pub. L. No. 89-695, 80 Stat. 1028 (1966).

74. Pub. L. No. 95-630, 92 Stat. 3641 (1978).

75. *First Nat'l Bank of Eden v. Department of the Treasury*, 568 F.2d 610, 611 n.2 (8th Cir. 1978) (emphasis supplied). *Accord* *First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 685 (5th Cir. 1983). This formulation was originally urged during congressional hearings on the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028 (1966), by then FHLBB Chairman John Horne. *See* 112 Cong. Rec. 26,474 (1966).

76. *See* *Gulf Federal Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

77. 112 Cong. Rec. 24,984 (1966).

78. *Id.*

'unsafe or unsound formula' is restricted by its limitation to practices with a *reasonably direct effect on an association's financial soundness.*⁷⁹

The banking agencies have not always adhered to this view. In the *Stoddard/Michigan National* case, for example, the Federal Reserve Board made a radical and utterly unsupported departure from this standard. In the administrative hearing, the administrative law judge found that the alleged improper benefits attributed to Mr. Stoddard, and the corresponding loss to the bank in question (then known as Michigan National Bank—Detroit), amounted to a total of \$110,000 over an eight-year period (or an average of \$13,750 per year). The Board's removal order accepted this finding. Then, asserting that "the safety and soundness element addresses the *nature*, rather than the degree, of the departure from ordinary standards of prudent banking," the removal order defined "abnormal risk" as any risk "other than those inherent in doing business, whether in a bank or elsewhere." In short, "unsafe and unsound banking practices" were to be mutated into *unusual business practices* and the concept of "risks inherent in doing business" was to be defined in a manner known only to the Board.⁸⁰

Six months after Stoddard resigned from his position as Chairman of the holding company Michigan National Corporation, it published a fourth quarter report showing 1984 earnings for the bank of \$21.4 million. Taking that as the denominator, and using the \$13,750 average calculated from the administrative law judge's findings of fact (adopted by the Board) as the numerator, one can calculate the percentage of loss. Measured by annual *earnings*—not even by annual revenues—the percentage of loss was approximately 0.06%.⁸¹ Stoddard contended that it was therefore readily apparent that these amounts of alleged losses were so remote from anything even approaching "substantial" or "unsafe or unsound" that they could not meet the standard imposed by Congress and could not justify the Board's removal order. The court did not reach this issue, however, as it decided that there was no jurisdiction to have brought the removal proceeding in the first place.⁸²

79. Gulf Federal, 651 F.2d at 264 (emphasis added). *Accord* Bellaire, 697 F.2d at 681; Otero Sav. & Loan Ass'n v. FHLBB, 665 F.2d 279, 288 (10th Cir. 1981); FSLIC v. Bass, 576 F. Supp. 848, 852 (N.D. Ill. 1983); Magellsen v. FDIC, 341 F. Supp. 1031, 1035 (D. Mont. 1972).

80. In virtually the next breath, the Board recharacterized the issue as "whether the practice is of a type that could if continued bear upon the financial integrity of a bank." Of course, a *type* of practice that *could bear upon* financial integrity describes virtually every banking practice. If a bank granted a borrower in temporary difficulties an opportunity to catch up on several delinquent loan payments instead of accelerating the entire indebtedness and foreclosing, that is surely a *type* of practice which *could*, conceivably, if the bank were to do it with every borrower, *bear upon* financial integrity. But this is a long way from what Congress had in mind: practices with a *reasonably direct effect* upon and threat to the bank's financial integrity or the insurance risk to the FDIC.

81. Even taking as the numerator the total for *all eight years*—\$110,000—would yield only about 0.51%. If one performed the same two calculations with 1984 *revenues* of \$845 million, the loss would be 0.0016% and 0.013%, respectively. Applying a percentage of *assets* standard, with 1984 assets of \$7.25 billion, would yield, of course, even more minuscule percentages, 0.00019% and 0.0015%, respectively.

82. *Stoddard v. Board of Governors*, 868 F.2d 1308 (D.C. Cir. 1989). (The author argued the *Stoddard* case before the D.C. Circuit.)

*Gulf Federal Sav. & Loan Ass'n v. FHLBB*⁸³ is another example of a novel but unfounded standard. There the FHLBB issued a cease and desist order prohibiting an institution from calculating interest under the "365/360" method when loan contracts called for the "365/365" method. The Fifth Circuit explained its holding reversing the agency as follows:

[T]he only risks the [FHLBB] has identified are Gulf Federal's potential liability to repay overcharged interest, and an undifferentiated "loss of public confidence" in the bona fides of Gulf Federal's operations. Such potential "risks" bear only the most remote relationship to Gulf Federal's financial integrity

* * *

The [FHLBB]'s rationale would permit it to decide, not that the public has lost confidence in Gulf Federal's financial soundness, but that the public may lose confidence in the fairness of the association's contracts with its customers. If the [FHLBB] can act to enforce the public's standard or fairness in interpreting contracts, the [FHLBB] becomes the monitor of every activity of the association in its role of proctor for public opinion. This departs entirely from the congressional concept of acting to preserve the financial integrity of its members. . . . We limit the "unsafe or unsound practice" provision to an association's financial condition.⁸⁴

Even with its limitations, the "unsafe or unsound practice" concept vindicates the same goals articulated in Mr. Weinstein's speeches for his fiduciary duty concept. The former has the advantage of having been enacted by a politically accountable body and having already been construed by a number of courts. The latter has no legal or policy justification and constitutes an example of what Professor Deborah DeMott has called fiduciary duty as "metaphor": the careless or improper use of the restrictive equity concept of fiduciary duty as a haphazard substitute (or "metaphor") for some other concept.⁸⁵

The validity of Mr. Weinstein's theory of a fiduciary duty is further called into question by *United States v. Kensington Hospital*,⁸⁶ a recent federal court decision dealing with an insurance fund that is somewhat analogous, the Medicare/Medicaid trust funds. *Kensington Hospital* arose as a suit by the government alleging misrepresentation, fraud, violation of certain statutory provisions, and breach of fiduciary duty to the trust funds against a hospital and several of its directors, administrators, and doctors. In granting a motion to dismiss the fiduciary duty claims, the court concluded that the complex statutory scheme allowing payment by the trust funds for medical services "provided economically and only when, and to the extent, that they are medically necessary"⁸⁷ created statutory obligations, but no fiduciary duty. "A fiduciary duty may not be forced upon someone; they must explicitly, through an agreement, or implicitly, through actions, assume the duty."⁸⁸ The court refused

83. 651 F.2d 259 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982).

84. *Id.* at 264-65.

85. See generally Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879.

86. 760 F. Supp. 1120 (E.D. Pa. 1991).

87. 42 U.S.C. § 1320c-5 (1988).

88. *Kensington Hospital*, 760 F. Supp. at 1130. Interestingly, the government's brief invoked banking regulation as support for its hypothesis.

to accept the government's contention that the hospital assumed a fiduciary duty to the trust funds because the latter reposed trust in the hospital, and likewise rejected the argument that a doctor's obligation to a Medicare patient (analogous in this context to an IDI's duty to a depositor) created a fiduciary duty to the trust funds.⁸⁹

IV CONCLUSION

There can be no doubt that the federal bank regulatory agencies currently lack the resources adequately to perform their appointed supervisory tasks, whereas the legal profession, by dint of training and experience, can perform similar watchdog functions with great efficiency.⁹⁰ Therefore, the question arises whether national interest in the safety and soundness of our financial institutions should, as a matter of policy, outweigh the societal interests served by the strict duties of loyalty and confidentiality which obtain in the relationship of attorney and client. Also to be weighed in this calculus will be the costs of imposing a new regime in terms of the availability (and cost, if available) of malpractice insurance for counsel representing IDIs, the costs to IDI clients of obtaining legal services generally, the access of IDIs in rural or other less populous areas to competent and affordable counsel, and the ultimate burden upon the consumer of financial services once these increased costs are passed on.

A policy determination of this kind is decidedly unsuitable for retroactive application in the litigation context. The lawyers of today should be held accountable only if they breach accepted and well-established norms of professional conduct. In that regard, the results of professional liability litigation in the post-FIRREA era are worth noting.

Using traditional theories (for example, malpractice, negligence, or breach of contract), the FDIC and the RTC, acting as receivers for failed IDIs, have, since 1989, "recovered \$174 million from lawyers implicated in the S&L mess."⁹¹ This figure does not, however, include OTS recoveries, during 1992 alone, of \$41 million from Kaye, Scholer, \$9 million from Kirkpatrick & Lockhart, and \$600,000 from James Fleischer in settlement of much larger claims initially brought by the agency.⁹² Yet each of these two enforcement proceedings, as with the other administrative actions OTS has brought against lawyers and law firms, were based on factual allegations that, if proved, would give rise to liability under common law theories or under Section 8 of the FDIA without the need for concocting a new, and wholly inappropriate, fiduciary duty owed to the government by private counsel. Such a duty, if upheld, will truly open a

89. *Id.* at 1130-31.

90. For some interesting theoretical speculations, see generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); Rainier Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

91. W. John Moore, *Clubbing Counsel*, 24 NAT'L J. 1714, 1714 (July 25, 1992).

92. *See supra* note 5.

Pandora's box of assertable claims against counsel by any governmental entity—federal, state, or local—that maintains insurance, trust, guaranty, or similar funds to pay off losses in a variety of regulated businesses: securities brokerage houses, insurance companies,⁹³ hospitals and other public health care facilities,⁹⁴ and nuclear power plants, to mention but a few.

Once government agencies start nibbling on the Chancellor's toesies, they may develop a taste for it. One must then recall Voltaire's quip to the effect that the art of government is taking as much money as possible from one class of people to give to another. Perhaps, in the end, the answer will be to abandon this erstwhile "learned profession" and find another line of work. Now that Tristan is out of a job, there may be career opportunities in Cornwall.

93. See Steve Cannizaro, *Insurance firm lawyers sued for malpractice*, NEW ORLEANS TIMES-PICAYUNE, July 27, 1992, at B1, B8 (reporting suits by Louisiana Insurance Commissioner against two law firms to recoup money paid out as a result of insurance company insolvencies and alluding to fiduciary duties owed by the insurance companies' attorneys).

94. See *supra* notes 86-89 and accompanying text.

