Approved: 2-23-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 5, 1993 in Room 514-S of the Capitol.

All members were present except: Senators Harris, Parkinson and Emert (all excused)

Committee staff present: Michael Heim, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Arris Johnson, Speaker of the Silver-Haired Legislature
Bud Grant, Kansas Chamber of Commerce and Industry
Frances Kastner, Kansas Food Dealers Association
John Bork, Deputy of the Criminal Division, Attorney General's Office
Jim Maag, Kansas Bankers Association
Jim Turner, President, Kansas-Nebraska League of Savings Institutions
Jerel Wright, Kansas Credit Union Association
Kirk Lowry, Kansas Trial Lawyers Association

Others attending: See attached list

INTRODUCTION OF BILLS

Arris Johnson, Speaker of the Silver-Haired Legislature, requested the Committee reintroduce 1992 SB 648 concerning violation of fiduciary duty under power of attorney with the change that civil penalties be substituted for the criminal penalties in the bill. Senator Feleciano moved introduction of the bill. Senator Vancrum seconded. Motion carried.

SB 124 - Civil remedies for shoplifting.

Bud Grant, Kansas Chamber of Commerce and Industry, appeared in support of SB 124 stating merchants in Kansas should be able to recover the value of merchandise taken preventing a loss that ultimately results in higher consumer prices (Attachment 1). He noted 45 other state have adopted a civil remedy system. The prescribed penalty is twice the retail value of the item stolen or $50.00, whichever is greater.

Frances Kastner, Kansas Food Dealers Association, testified in support of SB 124 and asked the Committee to amend the bill to include the theft of shopping carts (Attachment 2).

John Bork, Deputy of the Criminal Division, Office of Attorney General, appeared in support of SB 124 (Attachment 3). In response to a question, Mr. Bork stated in his opinion the bill would apply to theft of gasoline.

SB 125 - Liability of officers and directors of certain financial institutions.

Jim Maag, Kansas Bankers Association, appeared in support of SB 125 noting the bill establishes a single standard of liability for breach of the duty of care in suits by Kansas banks against their officers and directors or by the FDIC (Attachment 4). Mr. Maag emphasized that to obtain qualified individuals to serve on boards of banks, Kansas needs reasonable protection for directors from liability for monetary damages. Under SB 125 a director will be liabile for damages for a breach of the duty of care only upon proof of willful or gross and wanton negligence. A member stated a full-time bank employee in ordinary course should be held to the same standard as a board member.

Jim Turner, President, Kansas-Nebraska League of Savings Institutions, testified in support of SB 125 which incorporates gross negligence provisions as the standard for liability of directors of financial institutions, superseding single negligent liability resulting from what is later viewed as mistakes or bad judgment (Attachment 5). Mr. Turner stated absence of an appropriate liability statute has begun to have an adverse economic impact with institutions making only "gold-plated" loans and avoiding marginal loans.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on February 5, 1993.

Jerel Wright, Kansas Credit Union Association, appeared in support of SB 125 (Attachment 6). Mr. Wright requested the Committee to amend SB 125 on page l, line 38, after the word "union" by inserting "or federal credit union."

Kirk Lowry, Kansas Trial Lawyers Association, testified in opposition to SB 125 (Attachment 7). He stated SB 125 would give immunity to officers and directors of financial institutions for acts of negligence which cause financial loss to a depositor and shareholders. Mr. Lowry stated Kansas should not give immunity to inside officers of financial institutions. The Chairman announced the hearing on SB 125 would be completed at a future meeting.

Senator Petty moved approval of the minutes of the joint meeting on January 20 and the minutes of January 26 and January 27, 1993 as written. Senator Feleciano seconded. Motion carried.

Chairman Moran announced the assignment of SB 134 and SB 147 to the Civil Law Subcommittee.

INTRODUCTION OF BILLS

Senator Feleciano moved introduction of six bills requested by the Sedgwick County DA identified by Revisor Nos. 3RS0771, 3RS0459, 3RS0508, 3RS0457, 3RS0458 and 3RS0456. Senator Ranson seconded. Motion carried.

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for February 9, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-5-93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JOHN K. BORK	2nd Floor, Judicial Ctr Topeka	ATTORNEY GENERAL
Rochelle Ol[illegible]	Topeka	AP
[illegible]	Topeka	KTLA
[illegible]	"	"
Arlan Holm[illegible]	Topeka	Div of Budget
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
Paul Shelby	Topeka	OJA
Ron Smith	"	KBA
Kathy Taylor	"	Kans Banker Assn
Chuck Stones	"	"
J.C. Anderson	Topeka	KSCPA
Susan Somers	Topeka	KSCPA
FRANCES KASTNER	Topeka	Ks Food Dealers Assn
Gerald Goodell	Topeka	Ks-[illegible] Finance [illegible]
JIM TURNER	TOPEKA	KNLSI
Terel Wright	Topeka	Ks CU Assn
Jim Maag	"	KBA
JEFF SONNICH	TOPEKA	KNLSI

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the Kansas State Chamber of Commerce, Associated Industries of Kansas, Kansas Retail Council

SB 124

February 5, 1993

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Judiciary Committee

by

Bud Grant
Executive Director
Kansas Retail Council

Mr. Chairman and members of the Committee:

My name is Bud Grant and I appear on behalf of the Kansas Retail Council, a major division of the Kansas Chamber of Commerce and Industry (KCCI). I want to thank you for introducing SB 124, and for allowing me to appear here today.

> The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.
>
> KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.
>
> The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

This proposal has been before this committee on several occasions and I have discussed with you on each of those occasions why I feel the time has come for Kansas to

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Attachment 1

join with the 45 other states that have already put a civil remedy system in place. . recap briefly, Kansas residents are negatively impacted by shoplifting in at least three ways:

1. **Higher consumer prices** - merchants are forced to raise retail prices to cover their increase in cost of doing business (i.e. loss of merchandise, working capital and cost of security) placing the financial burden ultimately on the honest consumer.
2. **Overburdened criminal justice system** - many apprehended shoplifters are referred to the already overcrowded system (police, courts, corrections), resulting in the need for more tax revenue to pay for a continual expansion of the system.
3. **Lost tax revenues** - merchandise lost to theft is not converted to profit in the form of sales for the retailer. As a result, millions in tax revenues are lost. Keep in mind, the FBI has estimated that the annual loss to shoplifters in Kansas exceeds $250 million, and nationally $24 billion.

During the waning hours of the 1992 Kansas legislative session, a House-Senate Conference Committee agreed on a civil recovery bill. In the rush of adjournment, it failed to get to the floor. SB 124 is representative of 90% of the Conference Committee Report. The interim allowed time to review the report and to fine tune its provisions. I don't honestly believe any of the conferees from last session will object to any of this bill's provisions.

Mr. Chairman, the bill defines "shoplifting" on page 2 to include six different elements. It further provides that if a merchant is damaged by shoplifting, the merchant may demand that an individual alleged to be civilly liable under this act reimburse the merchant for the damages, in consideration for the merchant agreeing not to commence a civil action. Should the alleged shoplifter not agree, the merchant may pursue the issue in small claims court or through the criminal court system.

This issue is very important to the retailers in your community. I hope you will do what the legislature in 45 other states have already done and support them by recommending to the full Senate that SB 124 be passed.

SUMMARY OF CIVIL RECOVERIES LAWS

STATE	STATUTE	APPLIES TO MINORS	ACTUAL DAMAGES	RETAIL VALUE OF MERCHANDISE	ADDITIONAL PENALTY	COURT COST	ATTY'S FEES
AK	9.65.1100	YES	YES	TO $1000	$100-$200	**	YES
AZ	12.691	YES	YES	YES	$100	**	**
CA	490.5(b)(c)	YES	NO	IF NOT SALABLE	$50-$500	YES	YES
CO	13-21-107.5	YES	YES	**	$100-$250	**	**
FL	772.11	NO	$200+	**	**	YES	YES
GA	51-10-6	NO	YES	YES	> OF $150 OR 2 x DAMAGES	YES	YES
HI	663A2	YES	YES	IF NOT SALABLE	SEE 1	YES	**
ID	48-701,702	YES	NO	YES	$100-$250	YES	YES
IL	16A-7	YES	YES	ACTUAL DAMAGES RETAIL VALUE	$100-$1000	YES	YES
IN	34-4-30-1	NO	YES	**	ACTUAL x 3	YES	YES
LA	9.2799.1	NO	NO	IF NOT SALABLE	$50-$500	**	**
MA	231:85G, 85R½	YES	YES	**	ADULTS $50-$500	**	**
MI	600-2953	YES	NO	SEE 2	SEE 2	SEE 2	SEE 2
MN	332-51	YES	NO	IF NOT RECOVERED	> OF $50 OR VALUE OF MERCHANDISE	**	**
MT	27-1-718	YES	YES	MANDATORY: TO $500	RETAIL VALUE MERCHANDISE	**	**
NE	24-523	YES	YES	YES	NO	YES	YES
NV	598.033.035	YES	YES	YES	$100-$250	YES	YES
NH	644:17a	NO	SEE 3	NO	NO	NO	NO
NM	30-16-21	NO	NO	IF NOT RECOVERED OR DAMAGED	$100-$250	YES	YES
NC	1-538.2	YES	YES	SEE 4	SEE 4	**	YES
ND	51-21-05	YES	NO	YES	TO $250	YES	YES
OH	2307.60/61	YES	YES	YES	SEE 5	YES	YES
OR	30.875	YES	YES	TO $500	$100-$250	**	**
TN	39-3-1124	YES	NO	IF NOT RECOVERED	NO	YES	YES
TX	ART. 1	YES	YES	**	ADULTS TO $1000 CT. AWARDS	YES	YES
UT	78-11-15	YES	NO	YES	$100-$500	YES	YES
VA	18.2-104.1	NO	NO	IF NOT RECOVERED	COST OF PROSECUTION	**	**
WA	4.24.230	YES	YES	TO $1000 JUV. TO $500	$100-$200	**	**
WY	61-3A-5	NO	SEE 6	IF NOT SALABLE	SEE 6	YES	YES
WI	943.51	NO	YES	IF NOT RECOVERABLE OR NOT SALABLE	TO 3 x RETAIL PLUS ACTUAL	YES	YES

1 **HAWAII:** ADDITIONAL PENALTY ON WRITTEN DEMAND, $75 CIVIL SUIT PENALTY OF $50 TO $500.

2 **MICHIGAN:** RETAIL VALUE OF MERCHANDISE IF NOT RECOVERED OR NOT SALABLE ADDITIONAL PENALTY ON WRITTEN DEMAND: 10 x RETAIL VALUE OF THE MERCHANDISE, BUT NOT LESS THAN $40 AND NO MORE THAN $100. CIVIL SUIT, PENALTY OF $200 PLUS REASONABLE COSTS NOT GREATER THAN $50.

3 **NEW HAMPSHIRE:** ONLY DAMAGES AVAILABLE+COST OF EMPLOYEES WAGES FOR ARRAIGNMENT AND PROSECUTION.

4 **NORTH CAROLINA:** RETAIL VALUE OF MERCHANDISE CALCULATED AS FULL VALUE IF DESTROYED. LOSS OF VALUE IF RECOVERED DAMAGED. ADDITIONAL PENALTY OF 3 x ACTUAL OR CONSEQUENTIAL DAMAGES.

5 **OHIO:** ADDITIONAL PENALTY OF THE GREATER OF $200 OR 2 x ACTUAL DAMAGES. OHIO IS THE ONLY STATE IN WHICH NON-PAYMENT OF CIVIL DEMAND MAY RESULT IN THE INITIATION OF CRIMINAL PROCESS.

6 **W. VIRGINIA:** ACTUAL DAMAGES ARE ALLOWED BUT STATUTE SPECIFICALLY STATES THAT MERCHANT MAY NOT RECOVER THE COST OF PROCESSING THE CASE.

**Statute silent on provisions indicated

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KANSAS FOOD DEALERS ASSOCIATION

EXECUTIVE DIRECTOR
JIM SHEEHAN
Shawnee Mission

February 5, 1993

SENATE JUDICIARY COMMITTEE **SUPPORTING SB 124**

As Director of Governmental Affairs for the Kansas Food Dealers Association, I speak for the retailers of food products throughout the State of Kansas and their suppliers.

Many of you have heard me say over the past years that we are in favor of ANY measure which helps reduce the cost of doing business for all Kansas retailers. Shoplifting is a major cost to our members and we certainly support SB 124.

Whenever a merchant has the opportunity to recover the cost of the stolen merchandise, and seek damages, it helps reduce one element in the broad term "cost of doing business". That in turn can keep the businessman from having to increase prices paid by the honest consumer.

Another great cost to our members is the theft of shopping carts, which average $350 each. You have all seen individuals pushing one down the street to their home, or loaded with laundry on the way to a laundromat. It has become so commonplace in larger cities the cart is left in plain sight in front of a house.

Since I am not an attorney, I don't know if SB 124 can be amended by adding the words "or property" wherever the word "merchandise" appears, so it would include shopping carts without jeopardizing the passage of SB 124. If so, it would be one more way to help Kansas businesses.

We are very much in favor of SB 124 (with or without the provision for shopping carts) and respectfully request that you recommend SB 124 for passage.

I appreciate the opportunity to share our concerns with you, and will try to answer any questions you may have.

Frances Kastner

Frances Kastner, Director
Governmental Affairs, KFDA

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Attachment 2

2809 WEST 47TH STREET SHAWNEE MISSION, KANSAS 66205 PHONE (913) 384-3838 FAX (913) 384-3868

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

STATEMENT OF
DEPUTY ATTORNEY GENERAL JOHN K. BORK
BEFORE THE SENATE COMMITTEE ON JUDICIARY
RE: SENATE BILL 124
FEBRUARY 5, 1993

I am here today on behalf of Attorney General Stephan to urge your support of Senate Bill 124, which will further enable the victims of theft, specifically shoplifting, to receive restitution for their loss and compensation for their time and trouble.

While the criminal law on theft does address this situation and the sentencing laws address restitution, there are several reasons why these procedures should be supplemented by the procedures outlined in Senate Bill 124.

First of all restitution is now, unfortunately, a hit and miss proposition. With increasing case loads it is not practical to expect county attorney offices to be a collection agency for all restitution. In addition many shoplifting charges are prosecuted through the municipal courts of various cities. Often times the cities do not have the means to enforce orders of restitution. Where the penalty is usually a

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Attachment 3

fine, the municipal courts are reluctant to order someone to jail for failure to pay restitution, and the cities lack the resources for probation or court services officers to follow up on the cases.

The restitution ordered by the courts, even if it is paid, often does not return the victim to the same financial position he or she had prior to the theft. There are expenses incurred by merchants in assisting the investigation, time off from work to testify and loss of the use of the item while it is held for evidence. The penalty provisions of the bill help to rectify that situation.

This bill will certainly not take the place of criminal prosecution, nor will it be a practical solution to the problem of shoplifting in all cases, but it does give the merchant one more tool in the battle against the very expensive problem of shoplifting. The office of the Attorney General urges the passage of this bill.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 5, 1993

TO: Senate Judiciary Committee
RE: SB 125 - Liability of Officers and Directors of Financial Institutions

Mr. Chairman and Members of the Committee:

The Kansas Bankers Association appears today in support of SB 125. The bill establishes a single standard of liability for breach of the duty of care in suits by Kansas banks against their officers and directors or by the FDIC, in their capacity as conservator or receiver.

A recent decision by the U. S. Court of Appeals for the Tenth Circuit concerning a section of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) has created an inconsistent standard for the filing of suits against bank officers and directors. Due to the decision in the case of <u>FDIC v. Canfield</u> we now have a situation where the FDIC could likely recover monetary damages upon proof of simple negligence against officers or directors of a <u>nationally-charterd</u> bank in Kansas whereas they could only recover upon proof of gross negligence against officers and directors of a <u>state-chartered</u> bank. The provisions of SB 125 would create a single standard for directors of both state and national banks.

While there is an immediate necessity to clarify the state and national bank problem, it must also be emphasized that unless a more realistic standard for recovery of monetary damages is implemented the serious problem of finding and retaining qualified individuals for service on the boards of directors of banks throughout Kansas will continue to grow. This problem is becoming particularly acute for our community banks in the more rural areas of the state. When community leaders throughout the state see their peers in other communities being pulled into lengthy and costly court proceedings as a result of their tenure on the board of directors of a bank they are extremely reluctant to consider such service. Under no circumstances are we asking that the necessary and proper legal responsibilities of bank directors and officers be diminished, but we are requesting that the Legislature establish a <u>reasonable</u> standard to such individuals.

Attached to this testimony are comments by Charles Henson, general counsel for the KBA. He has clearly outlined why the provisions of SB 125 are needed in Kansas. Also attached is a copy of the <u>Canfield</u> decision.

Thank you for the opportunity to appear in support of SB 125 and we strongly urge the committee to report the bill favorably.

James S. Maag

James S. Maag
Senior Vice President

SJ
2-5-93

Office of Executive Vice President • 1500 Merchants National Building
Eighth and Jackson • Topeka, Kansas 66612 • (913) 232-3444
FAX (913) 232-3484

Attachment 4

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) contains a provision [12 U.S.C. §1821(k)] prescribing the standard under which the FDIC may recover monetary damages from officers and directors of insured depository institutions. This includes state and national banks. The standard prescribed is gross negligence or a greater degree of culpability.

It was thought by many that in actions brought by the FDIC, as conservator, receiver, etc. of a bank, this federal law preempted state laws which allowed recovery by a depository institution (and the FDIC in case of conservatorship, receivership, etc.) against its officers and directors for simple negligence. However, in the case of FDIC v. Canfield, 967 F.2d 443 (1992), the United States Court of Appeals for the Tenth Circuit held that §1821(k) allows the FDIC to recover monetary damages from the officers and directors of insured depository institutions upon proof of simple, ordinary negligence, if such standard of care is applicable under state law. The court held the FIRREA provision preempts only state laws which require proof of a higher degree of culpability than gross negligence for the FDIC to recover.

To aid corporations to secure highly qualified persons to serve as directors, since 1985 more than 80% of the states have enacted some form of legislation designed to protect corporate directors from liability for monetary damages. Kansas enacted such legislation in 1987 when it amended the corporation code to add K.S.A. 17-6002(b)(8). Under this provision, the Articles of Incorporation of a Kansas corporation, including a Kansas bank, may contain a provision eliminating the personal liability of a director to the corporation or its stockholders for monetary damages for breach of duty as a director, except the Articles of Incorporation may not limit the liability of a director for (1) breach of duty of loyalty to the corporation or to its stockholders; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) unlawful payment of dividends or unlawful stock purchases or redemptions; or (4) any transaction from which the director derives an improper personal benefit.

If the Articles of Incorporation of a Kansas state bank contain such a provision, under state law a director will be liable to the corporation or its stockholders for monetary damages for a breach of the duty of care only upon proof of intentional or knowing violations of law. Because of the FIRREA provision as interpreted in FDIC v. Canfield, if suit for monetary damages is brought by the FDIC, as conservator, receiver, etc., of such a Kansas bank against its directors, the FDIC may recover upon proof of a lesser degree of negligence, i.e., gross negligence.

If the FDIC, as conservator, receiver, etc. seeks recovery against the directors of a Kansas national bank, under the FIRREA provision as interpreted in FDIC v. Canfield, it is likely the FDIC can recover monetary damages upon proof of simple negligence. National banks in Kansas cannot take advantage of the provision of the Kansas Corporate Code found at K.S.A. 17-6002(b)(8).

It is the purpose and intent of SB 125 to establish a single standard of liability for breach of the duty of care in suits by

Kansas banks, state and national, against their officers and directors, or by the FDIC, as conservator, receiver, etc. of a Kansas bank. The standard is willful or gross and wanton negligence.

SB 125 is patterned after K.S.A. 17-6002(b)(8), except that, in the case of Kansas banks, willful or gross and wanton negligence as a basis for recovery of monetary damages against officers and directors (the FIRREA standard for recovery by the FDIC) is substituted for the more stringent corporate code standard of intentional misconduct or knowing violation of law.

Under SB 125, the personal liability of officers and directors of Kansas banks, state and national, for breach of the duty of loyalty to the bank, or for any transaction for which the officer or director derives an improper personal benefit, would be unaffected, except liability for an improper personal benefit would be limited to the amount of the benefit. In the case of officers and directors of Kansas state banks, liability for violations of the banking code which concern unlawful payment of dividends or unlawful stock purchases or redemptions would be unaffected, just as the liability of the directors of Kansas corporations for violations of the corporate code for such actions is unaffected by K.S.A. 17-6002(b)(8).

Doc. #49007

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff–Appellant,

v.

Charles R. CANFIELD; Benjamin F. Armstrong; Theodore May; Newell P. Parkin; Mac Christensen; Richard A. Christenson; Dale R. Curtis; Frank Diston; Robert Garff; Lee K. Irvine; Ellis Ivory; Arch Madsen; Gus Paulos; Aline Skaggs; Ronald Swenson; Harold W. Milner; and Ernest Wilkinson, Defendants–Appellees.

Utah Bankers Association, the American Bankers Association, Gene Rice, Lola M. Rice, George E. Leonard, Jr., Mary Sandra Leonard, Gloria Leonard, Ernest F. Modzelewski, Nancy L. Modzelewski, Reginald T. Morrison, Catherine G. Morrison, Mel L. Decker, Clarice O. Decker, Donald S. Johnson, Marian E. Johnson, Gilberto I. Valdez, Gloria Ann Valdez, Hayden C. Hayden, Ms. Hayden C. Hayden, Peter C. Byrne, Mrs. Peter C. Byrne, Howard E. Kraff, Mrs. Howard E. Kraff, and Utah State Department of Financial Institutions, Amici Curiae.

No. 91–4143.

United States Court of Appeals, Tenth Circuit.

June 23, 1992.

Federal Deposit Insurance Corporation (FDIC) brought suit against former directors and officers of failed bank, seeking to hold them liable for their allegedly negligent management of bank. The United States District Court for the District of Utah, David Sam, J., 763 F.Supp. 533, granted motion of officers and directors to dismiss, and FDIC appealed. The Court of Appeals reversed, 957 F.2d 786, and on rehearing en banc, Seymour, Circuit Judge, held that section of Financial Institution Reform, Recovery, and Enforcement Act providing that director or officer could be held personally liable for monetary damages in any civil action by FDIC for gross negligence did not preempt state statutory or common law permitting such actions for simple negligence.

Reversed.

Brorby, Circuit Judge, filed dissenting opinion in which John P. Moore, Circuit Judge, joined.

John P. Moore, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇔776

Court of Appeals reviews construction of federal statutes de novo.

2. Banks and Banking ⇔50

States ⇔18.19

Section of Financial Institutions Reform Recovery and Enforcement Act (FIRREA) providing that director or officer of insured depository institution may be held personally liable for monetary damages in any civil action by Federal Deposit Insurance Corporation (FDIC) for gross negligence did not preempt state statutes or common-law permitting actions against officers and directors for simple negligence, but rather preempted only those state laws requiring higher degree of culpability than gross negligence in such actions. Federal Deposit Insurance Act, § 2[11](k), as amended, 12 U.S.C.A. § 1821(k); U.S.C.A. Const. Art. 6, cl. 2.

3. Statutes ⇔188

In construing statute, reliance must be placed on unambiguous statute's evident meaning.

4. Banks and Banking ⇔508

Phrase "other applicable law," in section of Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) providing that director or officer of insured depository institution could be held personally liable for monetary damages in civil action brought by Federal Deposit Insurance Corporation (FDIC) for gross negligence, and that nothing in paragraph should "impair or affect any right of the Corporation under other applicable law," meant all other applicable law. Federal

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Deposit Insurance Act, § 2[11](k), as amended, 12 U.S.C.A. § 1821(k).

See publication Words and Phrases for other judicial constructions and definitions.

5. States ⚬=18.3

Field preemption, for federal law preemption purposes, cannot be inferred. U.S.C.A. Const. Art. 6, cl. 2.

Edward J. O'Meara, Counsel, F.D.I.C., Washington, D.C. (Ann S. Duross, Asst. Gen. Counsel, Richard J. Osterman, Jr., Sr. Counsel, and Jeffrey Ross Williams, Sr. Atty., F.D.I.C., Washington, D.C.; and Warren Patten and Craig T. Jacobsen of Fabian & Clendenin, Salt Lake City, Utah, of counsel, with him on the brief), for plaintiff-appellant F.D.I.C.

Robert S. Campbell, Jr. (Joann Shields of Campbell Maack & Sessions, Blake S. Atkin of Parry, Murray & Cannon, James R. Holbrook and Lynda Cook of Callister, Duncan & Nebeker, Michael N. Zundel of Jardine, Linebaugh, Brown & Dunn, Dale J. Lambert of Christensen Jensen & Powell, George J. Romney of Romney & Condie, and John W. Lowe, Salt Lake City, Utah, with him on the brief), for defendants-appellees.

James S. Jardine and Don B. Allen of Ray, Quinney & Nebeker, Salt Lake City, Utah, filed brief for amicus curiae Utah Bankers Ass'n.

John J. Gill, General Counsel, and Michael F. Crotty, Deputy General Counsel for Litigation, filed brief for amicus curiae American Bankers Ass'n.

Aaron M. Peck, Terry O. Kelly, and Carl W. Sonne of McKenna & Fitting, Peter K. Rosen of Rosen & Winston, Los Angeles, Cal., and Stephen M. Dichter, and Gregg H. Temple of Harrison, Harper, Christian & Dichter, P.C., Phoenix, Ariz., for amici curiae Gene Rice, Lola M. Rice, George E. Leonard, Jr., Mary Sandra Leonard, Gloria Leonard, Ernest F. Modzelewski, Nancy L. Modzelewski, Reginald T. Morrison, Catherine G. Morrison, Mel L. Decker, Clarice O. Decker, Donald S. Johnson, Marian E. Johnson, Gilberto I. Valdez, Gloria Ann Valdez, Hayden C. Hayden, Ms. Hayden C. Hayden, Peter C. Byrne, Mrs. Peter C. Byrne, Howard E. Kraff, and Mrs. Howard E. Kraff.

George Sutton, Com'r, Utah Dept. of Financial Institutions, Paul Van Dam, Atty. Gen. of State of Utah, Jan Graham, Utah Sol. Gen., Bryce H. Pettey, Asst. Atty. Gen., and Billy L. Walker, Sp. Asst. Atty. Gen., Salt Lake City, Utah, for amicus curiae Utah Dept. of Financial Institutions.

Before HOLLOWAY, LOGAN, SEYMOUR, MOORE, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges.

SEYMOUR, Circuit Judge.

This case requires our construction of section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(k) (Supp. I 1989). The Federal Deposit Insurance Corporation (FDIC) brought this action in its corporate capacity seeking to hold the officers and directors of the failed Tracy Collins Bank & Trust Company liable under Utah law for their allegedly negligent management of the institution. *See* 12 U.S.C. § 1823(c), (d)(3)(A); *id.* § 1821(d)(2)[1]; *see also FDIC v. Bank of Boulder*, 911 F.2d 1466, 1468–71 (10th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 1103, 113 L.Ed.2d 213 (1991). The district court granted defendants' motion to dismiss, holding that section 1821(k) preempts state law and bars the FDIC from seeking damages from officers and directors of failed institutions for simple negligence. *FDIC v. Canfield*, 763 F.Supp. 533 (D.Utah 1991). A panel of this court concluded that

1. Section 1821(d) provides:
(2) General powers
(A) Successor to Institution
The Corporation shall, as conservator or receiver, and by operation of law, succeed to—
(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; ....

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this holding was contrary to the plain language of section 1821(k) and reversed. We granted rehearing en banc and vacated the panel opinion. After considering additional briefing and hearing oral argument, we conclude that the panel was correct.

[1] "As in any case of statutory interpretation, we begin with the plain language of the law." *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2803, 115 L.Ed.2d 976 (1991). "'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570, 1575, 108 L.Ed.2d 842 (1990) (citation omitted). We review the construction of federal statutes de novo. *United States v. Temple*, 918 F.2d 134, 134 (10th Cir.1990).

[2] The central question in this appeal is whether section 1821(k) establishes a national standard of gross negligence for officers and directors in actions brought by the FDIC, and thereby preempts state statutory or common law permitting such actions for simple negligence. The statute 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 or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation—
>
> (1) acting as conservator or receiver of such institution,
>
> (2) acting based upon a suit, claim or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or
>
> (3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under section 1823 of this title,
>
> *for gross negligence*, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are *defined and determined under applicable State Law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.*

12 U.S.C. § 1821(k) (emphasis added).

The district court held, and defendants argue, that section 1821(k) preempts state law and limits the FDIC's ability to pursue recovery from officers and directors to those cases in which it can demonstrate gross negligence under the applicable state definition. Under this interpretation, an action like this one, enabled by state law and sounding in simple negligence, would therefore be barred by the statute.

The FDIC contends that the statute preempts only those state laws that require a higher degree of culpability than gross negligence in actions brought by the FDIC against officers and directors.[2] Under the FDIC's construction, the last sentence of section 1821(k) is a "savings clause" that saves a simple negligence action against officers and directors of a failed bank in a

2. Recently, numerous states have acted to insulate officers and directors from liability. At least two states require willful or wanton conduct in order for liability to attach. *See* Ind. Code Ann. § 23–1–35–1(e) (West 1991); Wis. Stat.Ann. § 180.0828(1) (West 1992). Other states have adopted less extreme approaches. *See, e.g.*, Va.Code Ann. § 13.1–690 (Michie 1989) (good faith business judgment). Some states permit corporations to opt into a restriction on liability. For example, the Colorado statute authorizes a corporation to adopt "a provision to eliminate or limit the personal liability of a director ... for monetary damages for breach of fiduciary duty as a director." Colo.Rev.Stat. § 7–3–101(1)(u). For a chart summarizing the various state laws, *see* James J. Hanks, Jr., *Recent State Legislation on D & O Liability Limitation*, 43 Bus.Law. 1207, 1246–54 (1988). For a general discussion of the issue, *see id.* at 1243 ("Since 1985, more than four-fifths of the states have enacted some form of legislation designed to protect directors from money damages."); Douglas M. Branson, *Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 Fordham L.Rev. 375 (1988).

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state where such an action is otherwise permissible.[3]

In our judgment, the words used in section 1821(k) to describe the potential liability of officers and directors belie the creation of an exclusive federal liability standard. The section provides that "a director or officer *may* be held personally liable for monetary damages ... for gross negligence." 12 U.S.C. § 1821(k) (emphasis added). "May" is a permissive term, and it does not imply a limitation on the standards of officer and director liability. *See Rose v. Rose,* 481 U.S. 619, 626–27, 107 S.Ct. 2029, 2034, 95 L.Ed.2d 599 (1987) (Court refused to read "may" as establishing anything other than discretionary power). FIRREA enables the FDIC to stand in the shoes of the failed bank and its stockholders and to sue the officers and directors for mismanagement under state law. *See* 12 U.S.C. § 1821(d)(2) *infra* n. 1; *id.* § 1823(c), (d)(3)(A). In this context, no reasonable construction of "may" results in an absolute limitation of the liability of officers or directors to instances of gross negligence. Rather, the first sentence of section 1821(k) effectively provides that even where state law under which the FDIC is authorized to bring suit otherwise limits actions against officers and directors to *intentional* misconduct, an officer or director may nevertheless be held liable for gross negligence. In states where an officer or director is liable for simple negligence, however, the FDIC may rely, as it does in this case, on state law to enable its action.

In order to uphold the district court's construction of section 1821(k), we would have to construe the first sentence of the section as saying that an officer or director *may only* be held personally liable for gross negligence. This would require us to insert a word into the statute, and we decline to do so. *See Resolution Trust Corp. v. Lightfoot,* 938 F.2d 65, 66–67 (7th Cir. 1991) ("may" does not, on its face, mean "may only").

[3, 4] The last sentence of the statute cements our understanding of it. In construing a statute, reliance must be placed on an unambiguous statute's "evident" meaning. *See Small v. Britton,* 500 F.2d 299, 301 (10th Cir.1974). With this in mind, we believe that "other applicable law" means *all* "other applicable law."[4] Under the statute then, any other law providing that an officer or director may be held liable for simple negligence survives; such a law would be an "other applicable law," and construing the statute to bar its application would "impair" the FDIC's rights under it.

It is a general rule of construction that the statute should be read as a whole. 2A N. Singer, *Sutherland Statutory Construction* § 46.05 (5th ed. 1992). Linguistic choices made by Congress in other sections of FIRREA enrich our understanding of the choice made by Congress in section 1821(k). Unless the rest of the statutory scheme gives us reason to think that section 1821(k) does not mean what it says, we

3. The district courts that have considered this question are split, but a clear majority agrees with the FDIC's interpretation. *See FSLIC v. Shelton,* 789 F.Supp. 1360 (M.D.La.1992) (following panel opinion); *FDIC v. Williams,* 779 F.Supp. 63 (N.D.Tex.1991) (rejecting district court opinion in this case); *FDIC v. Miller,* 781 F.Supp. 1271 (N.D.Ill.1991) (same); *FDIC v. Isham,* 777 F.Supp. 828 (D.Colo.1991) (same); *FDIC v. Black,* 777 F.Supp. 919 (W.D.Okla.1991) (same); *FDIC v. McSweeny,* 772 F.Supp. 1154 (S.D.Cal.1991) (same); *FDIC v. Fay,* 779 F.Supp. 66 (S.D.Tex.1991) (same); *FDIC v. Haddad,* 778 F.Supp. 1559 (S.D.Fla.1991) (same); *FDIC v. Burrell,* 779 F.Supp. 998 (S.D.Ia.1991) (same). *But see FDIC v. Brown,* No. NC89-306, 1991 WL 294524 (D.Utah Nov. 18, 1991); *FDIC v. Swager,* 773 F.Supp. 1244 (D.Minn.1991).

The two circuit opinions that have discussed section 1821(k) do not decide the issue facing us. *See Home Sav. Bank, F.S.B. v. Gillam,* 952 F.2d 1152 (9th Cir.1991); *Gaff v. FDIC,* 919 F.2d 384, 391 (6th Cir.1990). As a result, we are the first court of appeals to directly address the scope of section 1821(k).

4. In *Patterson v. Shumate,* — U.S. —, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), the Supreme Court read the phrase "applicable nonbankruptcy law" used in 11 U.S.C. § 541(c)(2) to include state and federal law. "Plainly read, the provision encompasses any relevant nonbankruptcy law, including federal law such as ERISA. We must enforce the statute according to its terms." *Id.* at 2247. This principle applies with equal force here.

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will take the statute at its word. In other parts of section 1821, the statute refers specifically to the other bodies of law it touches. *See, e.g.*, 12 U.S.C. § 1821(c)(3)(B) ("powers imposed by State law"); *id.* (c)(4) ("notwithstanding any other provision of Federal law, the law of any State"). Similarly, when the statute refers only to itself, it does so specifically. *See, e.g., id.* (d)(2)(I) (FDIC may "take any action authorized by this chapter"); *id.* (e)(3)(C)(ii) ("except as otherwise specifically provided in this section"). Finally, when the statute refers to the whole universe of other laws, it uses the same language employed in section 1821(k). *See id.* (e)(12)(B) ("No provision of this paragraph may be construed as impairing or affecting any right ... under other applicable law."). Consideration of the pattern of usage in the rest of FIRREA therefore supports the position of the FDIC. It runs squarely against the suggestion of defendants that "other applicable law" refers to the FDIC's powers in "other contexts," Appellee's Answering Brief at 20, and the conclusion of the district court that it applies to other sections of FIRREA itself, *Canfield*, 763 F.Supp. at 537.

Defendants urge that the "other applicable law" language refers to the FDIC's rights in other contexts. By this they apparently mean rights of the FDIC against officers and directors, under state or federal law, to seek remedies *other than* personal damages. Any other interpretation of the last sentence, they reason, would eviscerate the attempt to create a national standard of liability. The problem with this argument is that it limits the statutory language by fiat. Nowhere does the statute announce its intention to create a national standard of liability, and the vehemence of the assertions to the contrary made by defendants will not persuade us to interpret the statute in light of a fiction. We refuse to depart from the principle of "general adherence to the words of the statute as commonly understood.... [O]ur limited function, in deference to the legislative process, is to interpret and apply the law, not to make it." *Miller v. Commissioner*, 836 F.2d 1274, 1281 (10th Cir. 1988).

The statute's reliance on state law for its definition of gross negligence directly refutes the proposition that FIRREA establishes a national standard of liability for officers or directors.[5] State law definitions of gross negligence differ. Indeed, "there is ... no generally accepted meaning [of gross negligence]." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984). These differences mean that the statute cannot possibly, even without the last sentence, create a national standard of liability. Instead, section 1821(k) limits the ability of the states to insulate officers and directors of federally insured institutions from liability. Once the notion of a national standard is dismissed, the function of the last sentence becomes clear. "[I]t is difficult to think of a more appropriate place to put a *general saving clause* than where Congress placed it—at the conclusion of the section setting out a special procedure for use in certain specified instances." *Abbott Labs. v. Gardner*, 387 U.S. 136, 145, 87 S.Ct. 1507, 1513–14, 18 L.Ed.2d 681 (1967) (emphasis added). Under section 1821(k), states may require that the FDIC show "gross negligence," under the state definition, in order to establish an officer or director's personal liability. They simply may not require greater culpability.

The officers and directors offer a reading of section 1821(k) contrary to the established principle of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." 2A N. Singer, *Sutherland Statu-*

5. In a different context, where Congress intended to create a national standard, the Supreme Court adopted a national definition of "burglary," rather than relying on state law definitions. *See Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (construing 18 U.S.C. § 924(e)). Section 924(e) does not refer to any source for the definitions of the terms it employs. *See* 18 U.S.C. § 924(e) (1988). Here, the specific choice to rely on state law definitions of gross negligence directly supports our conclusion that Congress did not adopt a national standard of officer and director liability when it enacted section 1821(k).

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tory Construction § 46.06. Under defendants' suggested interpretation, both the first and the second sentence say the same thing. The first sentence announces the exclusive liability standard, while the second makes the same announcement in a different form. The second sentence thus serves no independent purpose; it merely explicitly limits the application of the gross negligence standard to actions against officers and directors for money damages. This construction is necessarily less compelling than our construction, which gives each of the sentences independent force.

[5] In the face of the language, defendants in effect assert that section 1821(k) preempts the field of liability law governing officers and directors of federally insured institutions. Importantly, "field preemption cannot be inferred." *Wisconsin Public Intervenor v. Mortier,* — U.S. —, 111 S.Ct. 2476, 2486, 115 L.Ed.2d 532 (1991). It is true that "[a]bsent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* at 2481 (citation omitted). In this case, the explicit preemptive language moves in only one direction and its scope is explicitly limited. The statute blocks only those state laws that require more than gross negligence in order to establish the personal liability of directors and officers. By saving "other applicable law," the statute makes unreasonable any inference that the entire field was the target of the legislation. "Preemption should not ... be presumed absent *a clear manifestation* of federal intent to exclude state law provisions." *Guschke v. City of Oklahoma City,* 763 F.2d 379, 383 (10th Cir.1985) (emphasis added). At the very least, the statutory language fails to evince a "clear manifestation of federal intent" to preempt claims like the one brought by the FDIC below.

The policy arguments marshalled by the officers and directors against a negligence standard are addressed to the wrong forum. By saving "other applicable law," 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 of obtaining liability insurance, and the need to attract those people defendants claim will not accept directorships under a simple negligence standard. Unlike a state legislature making such a policy choice, we are in no position to weigh these factors. Instead, we may consider only whether the statute prohibits the FDIC from pursuing the action it has filed in Utah against these defendants. On its face, section 1821(k) does not do so.[6]

6. The legislative history is consistent with our interpretation of the statute's plain language. As originally proposed in the Senate, the provision would have held officers and directors liable for "any cause of action available at common law, including ... simple negligence," thus totally preempting all more restrictive state laws. S. 774, 101st Cong., 1st Sess. § 214(n) (1989). During the Senate debate, the proposal was modified. Senator Riegle, the bill's floor manager, explained the purpose of the amendment:

> In recent years, *many States have enacted legislation that protects directors or officers of companies from damage suits.* These 'insulating' statutes provide for various amounts of immunity to directors and officers. For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."
>
> *The reported bill totally preempted state law* in this area, with respect to suits brought by the FDIC against bank directors and officers. However, *in light of the state law implications raised by this provision, the manager's amendment scales back the scope of this preemption.*

135 Cong.Rec. S4278–79 (daily ed. April 19, 1989) (emphasis added). Two other senators, Roth and Garn, specifically commented on the limited preemptive scope of the section. *See id.* at S4281.

The Conference Report, relied on by defendants, is not to the contrary. It provides that: "The preemption *allows* the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct." *Id.* 1989 U.S.C.C.A.N. 86,437. (emphasis added). The language of the report merely explains that the section *allows* actions for gross negligence. It is thus consistent with the partial preemption interpretation of the statute.

Finally, the language of the final Senate Report fully supports our result. Discussing the amended section, the report states: "This sub-

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Finally, under defendants' interpretation, consider the position of an officer or director of a troubled federally insured institution in a state allowing actions for negligence. Prior to failure, liability would attach for simple negligence. After failure, liability would only attach if the officer or director could be proven grossly negligent under the applicable state definition. As the institution struggles, therefore, section 1821(k) would create an incentive for the officers and directors to allow the bank to fail. It simply cannot be that FIRREA would indirectly encourage such behavior when it was designed in part, according to its stated purposes, "to *curtail ... activities of savings associations that pose unacceptable risks* to the Federal deposit insurance funds." FIRREA, Pub.L. No. 101–73, § 101(3), 103 Stat. 183, 187 (1989) (emphasis added).

We hold that the plain language of the statute demands reversal of the district court's opinion in this case. "In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, — U.S. —, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991).

Accordingly, the decision of the court below is REVERSED.

BRORBY, Circuit Judge, respectfully dissenting.

Few are so naive as to believe there exists but a single correct interpretation of any given statute. Those who are intellectually honest admit the real question is: Which "correct" interpretation will the court adopt, and why?[1]

The parties in this case have aptly illustrated that Congress' choice of language in 12 U.S.C. § 1821(k) is susceptible to two valid yet opposing interpretations. The majority has adopted the FDIC's interpretation—the plain words of § 1821(k) do not create an exclusive federal standard of liability for bank directors and officers in civil damages suits brought by the FDIC. This interpretation is supportable and the majority opinion is well written; however, I fear the majority has lost sight of the forest but for a single tree. When construing statutes we must remember "laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527 (1947), *reprinted in* 3 N. Singer, *Sutherland Statutory Construction* 265, 272 (4th ed. 1986). Believing the majority has construed the phrase "other applicable law" in isolation from the substantive import of § 1821(k) and the overriding objectives of the national banking system, I respectfully dissent. The better interpretation of § 1821(k)—the interpretation advocated by defendant directors and officers and numerous Amici Curiae—not only gives effect to the plain language of the statute, but also serves Congress' longstanding goal to achieve uniform administration of federal financial institutions and heeds important public policy concerns which underlie this legislation.

Congress enacted § 1821(k) of FIRREA as part of its extensive revision of the national banking system and "to nationalize the law of directors' and officers' liability when banks are taken over by the FDIC." *Gaff v. FDIC*, 919 F.2d 384, 391 (6th Cir.1990).[2] The substantive import of

section 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." 135 Cong.Rec. S6912 (daily ed. June 19, 1989).

1. For nearly every canon of statutory construction, there exists an opposing canon which supports a contrary interpretation. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand.L.Rev. 395 (1950), *reprinted in* 3A N. Singer, *Sutherland Statutory Construction* 203, 206–09 (4th ed. 1986).

2. Although the interpretation of § 1821(k) was not squarely before the *Gaff* court, the Sixth Circuit's reading of § 1821(k) was integral to its holding that federal law totally preempts state law under various FIRREA sections, including § 1821(k).

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. DIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429 Legal Division

Statement Concerning the Responsibilities of Bank Directors and Officers

The Federal Deposit Insurance Corporation is issuing this statement in response to concerns expressed by representatives of the banking industry and others regarding civil damage litigation risks to directors and officers of federally insured banks.

Duties of Directors and Officers

Service as a director or officer of a federally insured bank represents an important business assignment that carries with it commensurate duties and responsibilities.[1]

Banks need to be able to attract and to retain experienced and conscientious directors and officers. When an institution becomes troubled, it is especially important that it have the benefit of the advice and direction of people whose experience and talents enable them to exercise sound and prudent judgment.

Directors and officers of banks have obligations to discharge duties owed to their institution and to the shareholders and creditors of their institutions, and to comply with federal and state statutes, rules and regulations. Similar to the responsibilities owed by directors and officers of all business corporations, these duties include the duties of loyalty and care.

The duty of loyalty requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank.

The duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank.

This means that directors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the

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[1] The regulatory agencies and others have produced guides that provide useful advice on ways directors can meet their duties to their institutions. These include the Pocket Guide for Directors (FDIC, 1988), The Director's Book (OCC, 1987), and FHLBB, Memorandum No. R 62, reprinted at 52 Fed. Reg. 22,682, 22,683 (1987). See also The Director's Guide: The Role and Responsibilities of a Savings Institution Director (FHLB-SF, 1988).

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progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.

Officers are responsible for running the day to day operations of the institution in compliance with applicable laws, rules, regulations and the principles of safety and soundness. This responsibility includes implementing appropriate policies and business objectives.

Directors must require and management must provide the directors with timely and ample information to discharge board responsibilities. Directors also are responsible for requiring management to respond promptly to supervisory criticism. Open and honest communication between the board and management of the bank and the regulators is extremely important.

The FDIC will not bring civil suits against directors and officers who fulfill their responsibilities, including the duties of loyalty and care, and who make reasonable business judgments on a fully informed basis and after proper deliberation.

Procedures Followed to Institute Civil Lawsuits

Lawsuits brought by the FDIC against former directors and officers of failed banks are instituted on the basis of detailed investigations conducted by the FDIC. Suits are not brought lightly or in haste.

The filing of such lawsuits is authorized only after a rigorous review of the factual circumstances surrounding the failure of the bank. In addition to review by senior FDIC supervisory and legal staff, all lawsuits against former directors and officers require final approval by the FDIC Board of Directors or designee.

In most cases, the FDIC attempts to alert proposed defendants in advance of filing lawsuits in order to permit them to respond to proposed charges informally and to discuss the prospect of prefiling disposition or settlement of the proposed claims.

The FDIC brings suits only where they are believed to be sound on the merits and likely to be cost effective. On that basis, where investigations have been completed, the FDIC has brought suit (or settled claims) against former directors and officers with respect to 24% of the banks that have failed since 1985.

Nature of Suits Filed

The FDIC's lawsuits are premised on the established legal principles that govern the conduct of directors and officers. Lawsuits against former directors and officers of failed banks result from a demonstrated failure to satisfy the duties of loyalty and care. Most suits involve evidence falling into at least one of the following categories:

- Cases where the director or officer engaged in dishonest conduct or approved or condoned abusive transactions with insiders.

- Cases where a director or officer was responsible for the failure of an institution to adhere to applicable laws and regulations, its own policies or an agreement with a supervisory authority, or where the director or officer otherwise participated in a safety or soundness violation.

- Cases where directors failed to establish proper underwriting policies and to monitor adherence thereto, or approved loans that they knew or had reason to know were improperly underwritten, or, in the case of outside directors, where the board failed to heed warnings from regulators or professional advisors, or where officers either failed to adhere to such policies or otherwise engaged in improper extensions of credit. Examples of improper underwriting have included lending to a borrower without obtaining adequate financial information, where the collateral was obviously inadequate, or where the borrower clearly lacked the ability to pay.

One factor considered in determining whether to bring an action against a director is the distinction between inside and outside directors. An inside director is generally an officer of the institution, or a member of a control group. An inside director generally has greater knowledge of and direct day to day responsibility for the management of the institution.

By contrast, an outside director usually has no connection to the bank other than his directorship and, perhaps, is a small or nominal shareholder. Outside directors generally do not participate in the conduct of the day to day business operations of the institution. The most common suits brought against outside directors either involve insider abuse or situations where the directors failed to heed warnings from regulators, accountants, attorneys or others that there was a significant problem in the bank which required correction. In the latter instance, if the directors fail to take steps to implement corrective measures, and the problem continued, the directors may be held liable for losses incurred after the warnings were given.

December 3, 1992

Kansas-Nebraska League of Savings Institutions

James R. Turner, President

Suite 512
700 Kansas Avenue
Topeka, Kansas 66603
(913) 232-8215

February 5, 1993

TO: SENATE JUDICIARY COMMITTEE

FROM: JIM TURNER, KANSAS-NEBRASKA LEAGUE OF SAVINGS

RE: S.B. 125

Mr. Chairman. Members of the Committee. The Kansas-Nebraska League of Savings Institutions appreciates the opportunity to appear before the Senate Judiciary Committee in support of S.B. 125 which would define liability for officers and directors of savings and loan associations, commercial banks, and credit unions.

This legislation is an effort to address the problems that resulted from the 1992 United States Court of Appeals decision in FDIC vs. Canfield. 967F. 2nd 443 (10th Circuit 1992). This decision reversed what was believed to be a preemptive Federal law creating a uniform gross negligence standard of conduct for officers and directors of Federally-insured financial institutions. (Financial Institutions Reform, Recovery, and Enforcement Act of 1989 - FIRREA).

The Federal Appeals Court essentially held that the liability statute created by FIRREA permitted simple negligence action against directors and officers in states whose laws permit such actions. Since the general corporate liability defense known as the Business Judgment Rule does not extend to financial institutions, then exposure to simple negligence exists. This was affirmed several years ago in the Kansas Supreme Court decision in FSLIC vs. Huff. (1985).

The provisions of S.B. 125 provide that an officer or director of an insured institution could be held liable for monetary damages for breach of duty of loyalty to the institution, acts of willful or gross and wanton negligent breach of the duty of care, violation of K.S.A. 17-5811 and 17-5812 (attached), or any transaction which derives improper personal benefit. This type of gross negligence provisions supersedes single negligent liability resulting from what is later viewed as mistakes or bad judgment.

The passage of S.B. 125 is important in attracting and retaining qualified officers and directors and directly impacts upon the economy and economic development of the State.

It has become increasingly more difficult to secure Board members whose service on a financial institution board would not be governed by the corporate standard.....business judgment rule and good faith reliance on books and records.....but on a simple negligence standard of "thou shalt never make a mistake"! Why should successful business leaders expose themselves or their resources by serving on a financial institution board? The intensity of the attorneys for the RTC in seeking monetary settlements in Kansas has focused this concern within the past year. Community leaders throughout this State are being sued.....not because of fraud, but because of business decisions made during a booming real estate economy.

SJ
2-5-93
Attachment 5

Kansas-Nebraska League of Savings Institutions

Further, the absence of an appropriate liability statute has begun to have an adverse impact on the economy. Only the "gold plated" loans or loans made in concert with selected Federal government agencies have become the norm. Why should a financial institution make a loan to a marginal borrower, start-up business, or multi-family housing project when a liability action may be brought in the future because of such decisions? The recent credit crunch is as much a response to legal actions as it is to economic conditions.

We do not support avoidance of fiduciary responsibility and we support the prosecution of fraud, but we do feel it is very important that Kansas have a properly defined liability statute to protect officers and directors of our financial institutions.

We would request that the Judiciary Committee report S.B. 125 favorably for passage.

James R. Turner
President

JRT/bw

17-5811. Accepting payments when capital impaired; felony; share defined. No association shall accept or receive payments upon shares when there is an impairment of capital, and any officer, director or employee who shall knowingly violate the provisions of this section or be accessory to or permit or connive at the receiving or accepting payments on such shares, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than five (5) years. The word "share" as used in this section shall not include guarantee shares or stock.

History: L. 1943, ch. 133, § 214; L. 1955, ch. 141, § 11; June 30.

Cross References to Related Sections:

Guarantee shares, see 17-5403, 17-5421 to 17-5428.

Attorney General's Opinions:

Savings and loan associations; preemption of state code by federal law. 83-26.

17-5812. Fraudulent acts; civil liability; felony. Any officer, director, trustee, attorney, agent or servant of any association heretofore or hereafter to be incorporated who shall use or dispose of any part of the moneys, property, assets or funds of such association, or assign, transfer, cancel, deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized or otherwise than in the regular and legitimate business of the association, or who shall be guilty of any fraud in the performance of his duties, shall be liable civilly to the association, and also to any other party injured, to the extent of the damage thereby caused, and shall also be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one nor more than five years.

History: L. 1943, ch. 133, § 215; July 1.

Source or prior law:

17-1020.

Research and Practice Aids:

Building and Loan Associations ⇐ 23(8).

C.J.S. Building and Loan Associations §§ 14, 15.

CASE ANNOTATIONS

1. On question certified relative to 60-258a, standards of duty on savings and loan association officers discussed. Federal Savings & Loan Ins. Corp. v. Huff, 237 K. 873, 880, 704 P.2d 372 (1985).

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Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6280

Timothy Ryan
Director

November 18, 1992

TO THE CHIEF EXECUTIVE OFFICER

The Office of Thrift Supervision has become concerned that misperceptions of enforcement actions by federal regulators may be discouraging savings associations from making sound loans and may be deterring qualified individuals from serving on the boards of these institutions.

In order to clarify our views on what we expect of directors and officers of savings institutions, we are today releasing the enclosed Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions. This Statement explains the duties of loyalty and care that directors and officers owe to their institutions.

We hope that this Statement may remove uncertainty that may exist in connection with our enforcement approach to the conduct of directors and officers. I would appreciate it if you would provide a copy of this document to all of your directors and officers.

Sincerely,

Timothy Ryan

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Office of Thrift Supervision
Department of the Treasury

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Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions

Representatives of the banking and thrift industries and others have expressed concerns regarding the litigation risks to those who serve as directors or officers of federally insured depository institutions.

This statement addresses this important issue from the standpoint of the Office of Thrift Supervision.

Duties of Directors and Officers

Service as a director or officer of a federally-insured savings institution represents an important business assignment that carries with it commensurate duties and responsibilities.[1]

All thrifts need to be able to attract and to retain experienced and conscientious directors and officers. When an institution becomes troubled, it is especially important that it have the benefit of the advice and direction of business persons whose experience enables them to exercise sound and prudent judgment.

Directors and officers of savings institutions have obligations to discharge duties owed to shareholders and creditors of the institutions they serve, and to comply with federal and state statutes, rules, and regulations. Similar to the responsibilities owed by directors and officers of all business corporations, these duties include the duties of loyalty and care.

The duty of loyalty requires directors and officers to

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1. The regulatory agencies and others have produced guides that provide useful advice on ways directors can meet their duties to their institutions. These include the Pocket Guide for Directors (FDIC, 1988), The Director's Book (OCC, 1987), and FHLBB, Memorandum No. R 62, reprinted at 52 Fed. Reg. 22,682, 22,683 (1987). See also The Director's Guide: The Role and Responsibilities of a Savings Institution Director (FHLB-SF, 1988).

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administer the affairs of the institution with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the institution.

The duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the institution.

This means that directors are responsible for selecting, monitoring, and evaluating competent management; establishing business strategies and policies; monitoring and assessing the progress of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulation, and principles of safety and soundness; and for making business decisions on the basis of fully informed and meaningful deliberation.

Officers are responsible for implementing the policies and business objectives set by the board and for running the day to day operations of the institution consistent with those policies and objectives and in compliance with applicable laws, rules, regulations and the principles of safety and soundness. Directors must require and management must provide the directors with timely and ample information to discharge board responsibilities.

Directors also are responsible for requiring management to respond promptly to supervisory criticisms. Open and honest communication between the board and management of the institution and the regulators is extremely important.

Procedures Followed to Institute Claims

The OTS will not bring civil claims against directors and officers who fulfill their responsibilities, including the duties of loyalty and care, and who make business judgments on a fully informed basis and after proper deliberation.

Claims against directors and officers of thrifts are made following a detailed investigation. Contested claims are asserted only with the concurrence of the Deputy Director for Regional Operations and the Chief Counsel. Suits by the agency are not brought lightly or in haste.

The filing of such claims is authorized only after a rigorous review of the factual circumstances. Preliminary findings and recommendations are subject to review by senior supervisory and legal representatives of the agency.

In most cases, the OTS attempts to alert proposed defendants in advance of filing claims in order to permit them

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to respond to proposed charges informally and to discuss the prospect of prefiling resolution of the proposed claims.

Nature of Claims Filed

The numerous civil and administrative cases that have been brought in recent years are premised on the established legal principles that govern the conduct of directors and officers.

Claims against former directors and officers of failed savings institutions result from a demonstrated failure to satisfy the duties of loyalty and care. Most claims involve evidence falling into at least one of the following categories:

* Cases where the director or officer engaged in dishonest conduct or approved or condoned abusive transactions with insiders.

* Cases where a director or officer was responsible for the failure of an institution to adhere to its own policies, an agreement with a supervisory authority or where the director or officer otherwise participated in a safety or soundness violation.

* Cases where the director or officer failed to take reasonable steps to respond either to criticisms or directions of the regulatory authority or to advice from professional advisors to the institution.

One factor considered in determining whether to bring an action against a director is the distinction between inside and outside directors. An inside director generally has greater knowledge of and direct day-to-day responsibility for the management of the institution. Inside directors may include, as examples, officers and members of the control group of the institution.

By contrast, outside directors generally do not participate in the conduct of the day-to-day business operations of the institution. The most common claims brought against outside directors either involve insider abuse or situations where the directors were on notice of circumstances existing at the institution that required correction and failed to take steps to implement corrective measures after receiving such notice.

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TESTIMONY ON SB 125

AN ACT concerning liability of officers and directors of certain financial institutions

Presented to the
SENATE JUDICIARY COMMITTEE

FEBRUARY 5, 1993

by the
KANSAS CREDIT UNION ASSOCIATION

Mr. Chairman, members of the Committee:

I am Jerel Wright, Governmental Affairs Director of the Kansas Credit Union Association. Our association enjoys the voluntary membership of all but 3 of the 177 credit unions in Kansas. The Kansas credit unions support passage of Senate Bill 125.

Directors of Kansas credit unions are presently provided limited immunity from liability under K.S.A. 1992 Supp. 60-3601 (attached) which grants immunity from liability to volunteers of nonprofit organizations (as defined under 501(c) of the Internal Revenue Code). Credit unions are regulated as 501(c)(14)(a) nonprofit organizations. Credit union directors qualify as volunteers under K.S.A. 1992 Supp. 60-3601 since they serve without receiving direct or indirect compensation. Directors are elected by the members of each credit union during the credit union's annual meeting.

In 1987, when the Kansas legislature adopted the volunteer immunity statute, Kansas credit unions were very encouraged because potential volunteers became less sensitive about the idea of personal liability for service as a volunteer. The statute went a long way toward relieving apprehension over volunteering as a credit union director.

Credit unions support SB 125 as an effort to codify and clarify the liability of directors for breach of fidiciary duty as directors of Kansas credit unions. The bill clearly establishes, in credit union law, the standard under which a director may be held personally liable for an action or failure to act.

Mr. Chairman, I respectfully request the committee to amend SB 125 on page 1, line 38, after the word union, by inserting the following language "or federal credit union". With this amendment, we support the passage of SB 125. Mr. Chairman, I stand for any questions at your direction.

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Attachment 6

..le 36.—IMMUNITY FROM LIABILITY FOR VOLUNTEERS OF NONPROFIT ORGANIZATIONS AND ATHLETIC OFFICIALS

60-3601. Immunity from liability for volunteers of certain nonprofit organizations, limitations. (a) As used in this section:

(1) "Nonprofit organization" means those nonprofit organizations exempt from federal income tax pursuant to section 501(c) of the Internal Revenue Code of 1986, as in effect on the effective date of this act.

(2) "Compensation" does not include actual and necessary expenses that are incurred by a volunteer in connection with the services that the volunteer performs for a nonprofit organization and that are reimbursed to the volunteer or otherwise paid.

(3) "Volunteer" means an officer, director, trustee or other person who performs services for a nonprofit organization but does not receive compensation, either directly or indirectly, for those services. Volunteer does not include a person who delivers health care services to patients in a medical care facility as defined in K.S.A. 65-425 and amendments thereto.

(b) If a nonprofit organization carries general liability insurance coverage, a volunteer of such organization shall not be liable for damages in a civil action for acts or omissions as such volunteer unless: (1) Such conduct constitutes willful or wanton misconduct or intentionally tortious conduct; or (2) such volunteer is required to be insured by law or is otherwise insured against such acts or omissions but, in such case, liability shall be only to the extent of the insurance coverage.

(c) If a nonprofit organization carries general liability insurance coverage, a volunteer of such organization shall not be liable for damages in a civil action for the actions or omissions of any of the officers, directors, trustees, employees or other volunteers of the nonprofit organization unless: (1) The volunteer authorizes, approves, ratifies or otherwise actively participates in the action or omission and the action or omission constitutes willful or wanton misconduct or intentionally tortious conduct; or (2) such volunteer is required to be insured by law or is otherwise insured against such acts or omissions but, in such case, liability shall be only to the extent of the insurance coverage.

(d) Nothing in this section shall be construed to affect the liability of a nonprofit organization for damages caused by the negligent or wrongful act or omission of its volunteer and a volunteer's negligence or wrongful act or omission, when acting as a volunteer, shall be imputed to the nonprofit organization for the purpose of apportioning liability for damages to a third party pursuant to K.S.A. 60-258a and amendments thereto.

(e) The provisions of this act shall apply only to causes of action accruing on or after July 1, 1987.

History: L. 1987, ch. 215, § 1; L. 1988, ch. 223, § 1; April 28.

Law Review and Bar Journal References:

"A Practitioner's Guide to Tort Reform of the '80s: What Happened and What's Left after Judicial Scrutiny," Jerry R. Palmer and Martha M. Snyder, 57 J.K.B.A. No. 9, 21, 27 (1988).

"Personal Liability of Nonprofit Directors," Charles Engel, 60 J.K.B.A. No. 4, 28, 30, 31, 32 (1991).

Attorney General's Opinions:

County extension councils do not qualify as "nonprofit organizations" unless they have I.R.S. exemption. 87-117.

Immunity from liability for volunteers; certain nonprofit organizations; limitations; insurance requirements. 87-174.

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Testimony of the Kansas Trial Lawyers Association before the Senate Judiciary Committee regarding SB 125 - Liability of Officers/Directors

One of the fundamental principals of our society is that people should take responsibility for their conduct. Common law of Kansas holds that a person who's conduct falls below the specified standard of care and who's breach of this standard of care causes another's damage should be held liable for that damage. At this time in Kansas this principle applies to bank officers and directors.

The Kansas Trial Lawyers Association strongly opposes Senate bill No. 125 because it would give immunity to officers and directors of financial institutions for acts of negligence which cause financial loss to depositor and share holders and others.

Negligence in Kansas should be distinguished from absolute liability or strict liability. As professionals, bankers are held to a standard of care in conducting banking business to that of what an ordinary banker would do under the circumstances acting with due care. Just because a shareholder or depositor is damaged or loses money in a bank does not mean that an officer or director is liable for that damage. The plaintiff has a strong burden of proof to prove that the bank officer or director breached the standard of care. The standard of care for bankers is probably beyond the understanding of the ordinary layperson and therefore a court will require expert testimony on the issue of whether a banker has breached the standard . That means a person who is qualified as a bank officer or examiner would have to testify and establish what the standard of care was and that the officer or director in this case breached that standard of care. Simply because a person is an officer or a director does not mean they are going to be held liable. The party claiming damage will have to prove that liability specifically in order to recover.

Senate Bill No. 125 does provide for liability for breach of duty of loyalty, willful, gross and wanton conduct, violation of statutory law or where the officer/ director derived a personal benefit from a

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transaction. It is important to state these remaining liabilities are very narrow and would be very difficult to prove. It would eliminate legitimate claims by people who did nothing other than deposit money in a bank or savings and loan.

Officer and director liability ordinarily does not become an issue until a bank or savings and loan has failed or been closed by the FDIC or RTC. If a bank or savings and loan is viable then officers and directors are ordinarily not at risk personally. When a bank or savings and loan fails, the FDIC covers deposits in certain circumstances up to one hundred thousand dollars, but the financial institution may not have assets to pay legitimate claims. The negligence of an officer or director may be responsible for the failure of the bank. Comparative fault laws in Kansas would insure that the officer or director is only responsible for his or her share of the failure. There is no good reason why a depositor should lose their life savings simply because they, for example, deposited money in a bank or savings and loan and an officer of the bank negligently set up a certain account, thereby leaving substantial sums of money uninsured by the FDIC. It has happened.

Finally, most directors and officers have directors and officers liability insurance that covers acts of negligence in the scope and course of their service with the bank or savings and loan. This small item of overhead should not be eliminated and leave shareholders and depositors who have suffered loses without a remedy by due course of law.

Senate Bill No. 125 may well be unconstitutional in that is violates section 18 of the Kansas Constitution which provides that all persons who suffer a loss of property shall have remedy by due course of law. This statute would deny depositors who have lost deposits because of an officer's negligence a remedy by due course of law.