

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN W. ATHERTON, JR., Petitioner v. FEDERAL
DEPOSIT INSURANCE CORPORATION, AS RECEIVER
FOR CITY SAVINGS, F.S.B.

CASE NO: No. 95-928

PLACE: Washington, D.C.

DATE: Monday, November 4, 1996

PAGES: 1-60

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

NOV 12 1996

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'96 NOV 12 P2:52

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 JOHN W. ATHERTON, JR., :

4 Petitioner :

5 v. : No. 95-928

6 FEDERAL DEPOSIT INSURANCE :

7 CORPORATION, AS RECEIVER FOR :

8 CITY SAVINGS, F.S.B. :

9 - - - - -X

10 Washington, D.C.

11 Monday, November 4, 1996

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:02 a.m.

15 APPEARANCES:

16 RONALD W. STEVENS, ESQ., Washington, D.C.; on behalf of
17 the Petitioner.

18 RICHARD P. BRESS, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the Respondent.

C O N T E N T S

| | | |
|----|-----------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | RONALD W. STEVENS, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | RICHARD P. BRESS, ESQ. | |
| 7 | On behalf of the Respondent | 28 |
| 8 | REBUTTAL ARGUMENT OF | |
| 9 | RONALD W. STEVENS, ESQ. | |
| 10 | On behalf of the Petitioner | 58 |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-928, John W. Atherton, Jr. v. Federal
5 Deposit Insurance Corporation.

6 Mr. Stevens.

7 ORAL ARGUMENT OF RONALD W. STEVENS

8 ON BEHALF OF THE PETITIONER

9 MR. STEVENS: Mr. Chief Justice and may it
10 please the Court:

11 At issue in this case is whether the FDIC, in
12 its capacity as Receiver of a federally chartered savings
13 association, has a Federal common law claim based on
14 simple negligence against the former directors and
15 officers of that association for breach of their fiduciary
16 duty of care, which is the proposition for which the
17 Government contends, or whether the FDIC's sole Federal
18 claim is the statutory claim for gross negligence under 12
19 U.S.C. section 1821(k), which is the proposition for which
20 we contend. That latter provision was adopted as part of
21 the Financial Institution Reform, Recovery, and
22 Enforcement Act of 1989, otherwise known as FIRREA.

23 Although a divided panel of the Third Circuit
24 found that 1821(k) does not even apply to federally
25 chartered depository institutions, the Government has

1 conceded in this Court that it does. Where petitioner and
2 the Government part company is on the question of whether
3 the FDIC has a preexisting Federal common law claim for
4 simple negligence and, if it does, whether that claim was
5 displaced by section 1821(k).

6 QUESTION: Mr. Stevens, I think, if I remember
7 correctly, the Third Circuit Court of Appeals assumed
8 there was a Federal common law standard here, and left it
9 open on remand to the district court to determine the
10 scope of the standard, is that right?

11 MR. STEVENS: Yes, Justice O'Connor, they did --
12 they --

13 QUESTION: Did the petitioners here concede in
14 the court of appeals that a Federal common law standard
15 applied?

16 MR. STEVENS: No, we did not. We argued to the
17 Third Circuit, which argument occurred subsequent to this
18 Court's decision in O'Melveny and Myers, that under that
19 decision there was no general Federal common law right of
20 action that accrued prior to the enactment of FIRREA.

21 QUESTION: And do you think that the question
22 whether there exists a Federal common law rule was
23 preserved --

24 MR. STEVENS: Yes, I do.

25 QUESTION: -- here?

1 MR. STEVENS: Yes.

2 QUESTION: It wasn't -- it wasn't set out that
3 clearly in your original cert petition.

4 MR. STEVENS: Well, in the -- the second of the
5 two questions presented in the cert petition is as
6 follows, quote, Whether the court of appeals erred in
7 concluding that section 1821(k) -- and I'm leaving out
8 some descriptive language of that now -- has no
9 application whatsoever to RTC actions against officers and
10 directors of failed federally chartered FDIC insured
11 institutions, and that the liability of officers and
12 directors of such institutions is instead governed
13 exclusively by Federal common law.

14 The second of the reasons for granting the writ
15 which was set forth at page 8 of the petition is, quote,
16 the court of appeals' conclusion that Federal common law
17 instead of section 1821(k) supplies the applicable law in
18 this case violates this Court's longstanding rules
19 respecting the creation and application of such judge-
20 made law, and finally, section 2 of the petition is
21 expressly entitled, quote, the Third Circuit's decision is
22 in direct conflict with this Court's prior rulings
23 respecting the application of Federal common law, and
24 particularly its recent decision in O'Melveny and Myers v.
25 FDIC.

1 QUESTION: And what State law do you say applies
2 in this case?

3 MR. STEVENS: It's our contention that the State
4 law that would apply in cases such as this would be the
5 law of the place of the location of the principal place of
6 business of the association.

7 QUESTION: Which is?

8 MR. STEVENS: New Jersey. In this case,
9 however, the FDIC has waived its State law claim.

10 QUESTION: But that was in response to the
11 district court's ruling, wasn't it?

12 MR. STEVENS: No, Your Honor. That was a
13 unilateral voluntary action taken by the FDIC and
14 articulated in its brief to the district court below when
15 the matter was being briefed in connection with the motion
16 to dismiss. It was not an action taken subsequent to the
17 district court's order. It was a voluntary, unilateral
18 decision by the FDIC.

19 QUESTION: But do I understand correctly that
20 the district court's opinion said that 1821(k) was the
21 exclusive law applicable to a Federal, federally chartered
22 institution?

23 MR. STEVENS: That's correct.

24 QUESTION: And you are not defending that
25 position.

1 MR. STEVENS: No, Your Honor, we are not. It is
2 our --

3 QUESTION: So no one is supporting the district
4 court, who said that 1821(k) is just it, there's nothing
5 else?

6 MR. STEVENS: Well, let me be clear. It's our
7 position that the only Federal law claim that the FDIC has
8 postreceivership is a claim for gross negligence under
9 section 1821(k). It is our position, however, that that's
10 not the only claim that's available to the Government.
11 The Government would also have a claim under State law for
12 simple negligence if the State law in question provided
13 such a claim.

14 QUESTION: Yes, so to that extent you agree that
15 the district court was wrong.

16 MR. STEVENS: Yes, Your Honor.

17 QUESTION: May I ask --

18 QUESTION: It's also --

19 QUESTION: I don't think the briefs tell us what
20 the rule is in New Jersey.

21 MR. STEVENS: Well, to be candid, Your Honor, I
22 think that's why the FDIC waived its State law claim.

23 (Laughter.)

24 MR. STEVENS: It's our position that the
25 standard in New Jersey is gross negligence.

1 QUESTION: So it really doesn't matter, then, if
2 there's a --

3 MR. STEVENS: I don't think it does. I'm sure
4 the FDIC will argue that it's in fact simple negligence,
5 but at this point it's an academic issue because they've
6 waived the claim.

7 QUESTION: Well, it might not be. They've
8 waived that legal basis for the claim, but I would think
9 there's a question whether the basically alleging the
10 same, you know, misconduct by the defendants in the case.
11 Whether it's too late for them to say an alternative legal
12 base for the claim would be State law even though we
13 haven't argued it up to now, I'm not sure what the answer
14 to that is is all I'm saying. That's why I was curious
15 about whether there is a difference, but the answer to
16 that is, you would disagree with your opponents, probably.

17 MR. STEVENS: Correct.

18 QUESTION: Okay.

19 MR. STEVENS: We would take the position there's
20 no difference.

21 QUESTION: Do you --

22 QUESTION: If the State law issue -- the State
23 law standard were, let's say, intentional negligence, you
24 would still concede that there was a gross negligence
25 claim under (k), is that right?

1 MR. STEVENS: Yes, Your Honor.

2 QUESTION: Yes.

3 MR. STEVENS: Absolutely.

4 QUESTION: Do you say that Federal law
5 governs --

6 MR. STEVENS: Well, it --

7 QUESTION: -- federally chartered --

8 MR. STEVENS: Institutions?

9 QUESTION: -- savings and loans?

10 MR. STEVENS: No, and the reason for that is
11 that this Court has made it clear that for Federal common
12 law to apply, two tests have to be met.

13 QUESTION: Well now, wait a minute. That's a
14 separate question. You could say yes, Federal law
15 applies, but the Federal law in turn refers to State law.

16 MR. STEVENS: Well, that would be predicated
17 upon a finding that the criteria for the application of
18 Federal law, Federal common law is present, but that there
19 is no conflict, and that there's no conflict between the
20 application of State law and Federal law as in Kimbell
21 Foods, where this Court held that the issue there was
22 governed by Federal law, but that there was no reason not
23 to use State law as the rule of Federal decision.

24 But before you can get to that point, you have
25 to decide that there's a uniquely Federal interest

1 present. And it's our position that in this case no such
2 uniquely Federal interest is present because this Court
3 has defined such interest principally to involve the
4 rights and duties of the United States and, as this Court
5 said in O'Melveny, the FDIC is not the United States, and
6 even if it were it, would be begging the issue because the
7 FDIC is asserting claims in this case in its capacity as a
8 receiver for the institution, standing in the shoes of the
9 institution.

10 In fact, the FDIC's position would not only
11 require the application of Federal common law to cases
12 where it's bringing the claims, it would require the
13 application of Federal common law if the institution when
14 solvent was bringing claims like this against its
15 directors and officers or if a shareholder of a solvent
16 institution was bringing a derivative action where the
17 FDIC itself wouldn't be a party, where no United States
18 entity would be a party, where no United States funds
19 would be directly involved, and where not even the
20 insurance fund would be directly involved.

21 QUESTION: The only thing to be said on the
22 other side, however, is what -- it's -- other corporations
23 that are established under Delaware law, New Jersey law,
24 or whatever, they have a clear law to apply when there is
25 a suit by shareholders as far as internal management is

1 concerned. You know what the law is. Is it likely that
2 Congress set up this Federal corporation without any
3 internal procedures governed by Federal law?

4 MR. STEVENS: It's not only likely, it's what
5 they did. They have adopted a statute, HOLA, the
6 Homeowners Loan Act, back in 1933 which has all kinds of
7 statutory provisions in it that talk about what banks
8 and -- I'm sorry, what S&L's have to do, how they conduct
9 their operations and so forth, but there's nothing in that
10 statute that talks about a standard of care for officers
11 and directors.

12 QUESTION: When was that adopted?

13 MR. STEVENS: 1933, and it -- and we have had 63
14 years when Congress --

15 QUESTION: It was before Erie, wasn't it?

16 MR. STEVENS: It was before Erie, but Congress
17 has had every opportunity to amend the statute numerous
18 times after Erie and it hasn't done so, and --

19 QUESTION: So I guess what Congress was thinking
20 at the time was that there is up in the sky there a common
21 law concerning directors' liability.

22 MR. STEVENS: Well, it might have thought that
23 there was a State common law, but it would have been hard
24 to think that there was a Federal common law.

25 QUESTION: No, it didn't. No, it didn't. It

1 didn't. There was no such thing as State common law and
2 Federal common law before Erie.

3 MR. STEVENS: I agree, but --

4 QUESTION: We made that up after Erie.

5 MR. STEVENS: Correct, Your Honor, but in this
6 Court's decision in Herrmann v. Edwards and Whittemore v.
7 Amoskeag Bank, the Court made it clear that the mere fact
8 that there was an assertion by shareholders of a national
9 bank against its directors and officers for mismanagement
10 was not sufficient to give rise to a Federal cause of
11 action where the assertion was made under common law.

12 Now, I think the Court was saying in that case,
13 this is a case for the application -- in those two cases,
14 those are cases for the application of State law, not
15 Federal law.

16 QUESTION: What you're saying is, we -- in light
17 of what happened after Erie we should treat corporate law
18 the same way we treat contract law. Although we thought
19 there was a Federal law, having discovered there is not,
20 it goes back to being governed by State law.

21 MR. STEVENS: Well, assuming for the sake of
22 argument that there was a Federal common law pre-Erie in
23 this area, yes, Erie demolishes it.

24 QUESTION: But Mr. Stevens, one problem is that
25 there is no entity, no State that has chartered the

1 Federal institution, so let's assume for the minute that
2 we don't have any 1821(k), and the question is simply,
3 what law governs the internal operations of a federally
4 chartered institution? How do you answer that? It
5 wouldn't be the law of incorporation.

6 MR. STEVENS: No, it would be State law where
7 the principal place of business was located, and I would
8 point Your Honor to the recent regulation promulgated by
9 the Office of the Comptroller of the Currency, which
10 regulates all nationally chartered banks. They recently
11 adopted a regulation which is cited in our --

12 QUESTION: You cited that in your brief.

13 MR. STEVENS: Yes.

14 QUESTION: But you have to get to the principal
15 place of business by some Federal law, and you at least
16 have a Federal choice of law rule, right?

17 MR. STEVENS: I don't think you do. I think
18 that --

19 QUESTION: Well then, where did the
20 identification of the principal place of business come
21 from?

22 MR. STEVENS: I --

23 QUESTION: Not the sky.

24 MR. STEVENS: No. I think you do it by
25 reference to State law. For example, in 1821(k) --

1 QUESTION: But under State law the State of
2 incorporation would govern internal operations.

3 MR. STEVENS: I understand that, but in 1821(k)
4 Congress itself said, define gross negligence under
5 applicable State law. Congress itself indicated it had no
6 interest in having some Federal uniform standard apply
7 here. And by the same token, it seems to me that the fact
8 that the institution happens to have gotten its charter
9 from the Federal Government is not sufficient to predicate
10 the creation of an entire body of Federal common law,
11 which would --

12 QUESTION: That may be, but I think you still
13 have to overcome Justice Ginsburg's assertion that if
14 there is no Federal substantive law there is also no
15 Federal choice of law, so you really can't say for sure
16 that the law which governs is the law of principal place
17 of business. It depends on what the State law of the
18 forum is, doesn't it?

19 MR. STEVENS: Correct.

20 QUESTION: So you really don't know what law
21 governs.

22 MR. STEVENS: It's -- it's my -- I --

23 QUESTION: In most forums it would probably be
24 the State of the --

25 MR. STEVENS: I can't say definitively, but

1 that's not the issue that's in front of the Court, and it
2 could be resolved below.

3 QUESTION: In a way it is, because we hate to
4 have these corporations floating out there with no
5 accepted law governing their internal operations.

6 QUESTION: And you've already said that under
7 State law it would not be the principal place of business,
8 it would be the place of incorporation that determines the
9 internal operations.

10 MR. STEVENS: Well, if it's necessary to
11 establish a uniform Federal rule that says it's the
12 principal place of business, I suppose the Court could do
13 that, although it strikes me that that's antithetical to
14 the --

15 QUESTION: You have identified the principal
16 place of business as the State law that would control. I
17 asked you how you get there, how you get that pointing
18 rule. You have to get it from some place.

19 MR. STEVENS: Well, I guess I get it from the
20 fact that the rule in most States is that, that that's the
21 rule in the Model Business Code, that that's the rule
22 that --

23 QUESTION: But I thought the rule --

24 MR. STEVENS: -- the OCC has indicated --

25 QUESTION: No, but --

1 QUESTION: I thought the rule in most States is
2 the State of incorporation.

3 MR. STEVENS: It is, but that rule wouldn't be
4 applicable here.

5 QUESTION: No, but you're --

6 QUESTION: So then you're not -- then you're not
7 getting the pointing rule from State law, because State
8 law would say, we look to the State of incorporation to
9 determine matters of internal operations.

10 MR. STEVENS: That's correct, but I think you
11 have to keep in mind that historically the reason they
12 looked to the State law of incorporation was because that
13 was where the principal place of business was.

14 Now, it's true that over time that's changed,
15 and as Delaware passed laws that made it more receptive to
16 corporations, more and more corporations incorporated
17 there even though their principal places of business were
18 elsewhere, but the concept here to my way of thinking is
19 that the Federal Government, the only Federal banking
20 agencies that's indicated any thoughts on this has said
21 the principal place of business is fine.

22 QUESTION: No, but you --

23 QUESTION: Mr. Stevens, maybe we have here what
24 is -- what conflict-of-laws mavens call "renvoi." That is
25 to say that the State law would look to the place of -- to

1 the State of incorporation, the State of incorporation
2 here being the Federal Government, the Federal Government
3 having no rule on the question refers it back to State
4 law, and maybe that's how you get where you want to be.

5 MR. STEVENS: I think that's right, Your Honor.

6 QUESTION: Yes, but even on Justice Scalia's
7 analysis, you've still got to have a basis for looking to
8 some State law somewhere, and it seems to me that your
9 answer to Justice Ginsburg boils down to this, that in
10 addition to the O'Melveny standard, there's another source
11 of Federal common law here, and the source is something
12 like necessity.

13 If there's got to be a basis for court dealing
14 with a federally chartered institution, to say what law
15 applies, there is of necessity a Federal common law to the
16 extent of deriving a pointing rule, and you're saying, I
17 think, the necessity here is that Federal laws say that
18 you look to the State of principal place of business.
19 Isn't that --

20 MR. STEVENS: I would -- I would agree with that
21 as well, Your Honor.

22 QUESTION: Okay.

23 QUESTION: Well, do we have to determine in this
24 case before us which State law is applicable --

25 MR. STEVENS: No, you don't.

1 QUESTION: -- in order to answer the questions
2 before us?

3 MR. STEVENS: No, you do not, Justice O'Connor.

4 QUESTION: What about applying the gross
5 negligence standard in accordance with State law and so
6 forth? Would you look to the State of incorporation or
7 the place of business of the State?

8 MR. STEVENS: Well, I think you'd look to State
9 conflicts laws. I mean, Congress has made it clear you're
10 supposed to determine that issue according to applicable
11 State law. However you would go about doing that is --
12 Congress didn't --

13 QUESTION: But on your view of the case, that's
14 what has to be done in this case.

15 MR. STEVENS: Yes.

16 QUESTION: It's the gross negligence standard
17 specified in 1821(k) in conformity with State law.

18 MR. STEVENS: Right, in my --

19 QUESTION: And what State law are we talking
20 about in this --

21 MR. STEVENS: New Jersey in my --

22 QUESTION: Everybody agrees to that.

23 MR. STEVENS: New Jersey --

24 QUESTION: And is that because that's the
25 principal place of business?

1 MR. STEVENS: Yes.

2 QUESTION: And I take it that if the State of
3 New Jersey allowed an action for simple negligence, that
4 would be permissible under the Reserve Clause?

5 MR. STEVENS: Absolutely, Your Honor.

6 QUESTION: So they have to allow at least gross
7 negligence, but if they have a more proplaintiff standard
8 of liability than that, that, too, is incorporated.

9 MR. STEVENS: That's correct, which I think is
10 entirely consistent with the policy behind FIRREA and the
11 legislative history of the act.

12 QUESTION: Could all this be solved by
13 regulation? I mean, suppose the Federal Government is
14 very upset that there is no clear -- clear rule as to
15 which law governs the internal affairs on this particular
16 issue, could a regulation be issued which would set
17 forth --

18 MR. STEVENS: Well, this Court, in de la questa,
19 said that the Federal Home Loan Bank Board, which has been
20 succeeded by the OTS, has plenary authority over federally
21 chartered thrifts.

22 QUESTION: Mm-hmm.

23 MR. STEVENS: I think that the OTS would have
24 authority to promulgate regulations, all kinds of
25 regulations related to the internal operations by saying

1 you can only make loans that have this loan-to-value
2 ratio, or you have to have this kind of collateral. They
3 could establish standards of conduct for virtually every
4 aspect of the operations of the institution.

5 I don't believe that they could articulate a
6 standard that would create a Federal common law standard
7 of liability for application in Federal court actions,
8 civil court actions, and the reason for that is that
9 Congress in section 1818(b)(6)(a), which was part of
10 FIRREA, has provided an administrative remedy for all the
11 Federal banking agencies to pursue claims against Federal
12 and State-chartered institution thrifts and directors, and
13 to recover losses from those individuals incurred as a
14 result of their misconduct. But in that statutory
15 provision Congress has said that such recoveries can only
16 be had where there is a showing of either unjust
17 enrichment or reckless disregard.

18 Congress imposed that statutory standard, and I
19 don't believe that any of the Federal banking agencies has
20 the authority to adopt a less stringent standard than that
21 in the face of Congress having spoken. I think that's
22 what a number of prior decisions of this Court indicate.

23 QUESTION: Well, this is only after takeover,
24 though, isn't it?

25 MR. STEVENS: No.

1 QUESTION: No?

2 MR. STEVENS: That administrative remedy is
3 available to the agencies when the institution is solvent
4 at any time.

5 QUESTION: What about the savings clause in this
6 Federal statute, 18 --

7 MR. STEVENS: 21(k)?

8 QUESTION: -- 21(k)?

9 MR. STEVENS: The savings clause in this statute
10 doesn't help the Government here for several reasons.
11 What the savings clause says is that nothing in this
12 paragraph shall impair or affect any right of the FDIC
13 under other applicable law. Other applicable law can't be
14 read in a way that renders the first sentence of 1821(k)
15 inoperative.

16 QUESTION: Well, it isn't inoperative if you
17 look at it from the point of view that at least faced with
18 State law that says you need intentional misconduct, that
19 the Federal law says no gross negligence will suffice, so
20 of course it isn't inoperable.

21 MR. STEVENS: It isn't -- it doesn't render the
22 language inoperable with respect to State-chartered
23 institutions. It does with respect to federally chartered
24 institutions if you assume the existence of a Federal
25 common law simple negligence claim.

1 QUESTION: Yes, but it doesn't if what you just
2 said is the case. That is, if Federal common law is, look
3 to the State where the principal place of business exists,
4 then it means just what Justice O'Connor said, and what we
5 would do if the principal place of business is New Jersey,
6 and if New Jersey has a statute of simple negligence, this
7 statute would retain that cause of action.

8 MR. STEVENS: Absolutely correct. I -- we do
9 not contend that the savings clause precludes the
10 Government from asserting a claim for simple negligence
11 under applicable State law. That is not our contention.

12 QUESTION: And also that would be true if, as
13 you've just said, the Federal law is that we look to the
14 law of the State where the principal place of business of
15 the federally incorporated bank exists.

16 MR. STEVENS: No, I wouldn't agree with that for
17 this --

18 QUESTION: Why not?

19 MR. STEVENS: For this reason. In City of
20 Milwaukee, one of the arguments that was made there was
21 that there was a statutory section that dealt with citizen
22 suits, and there was a provision in that section that said
23 that any person was preserved the right to assert any
24 remedy under State or common law, and that respondent in
25 that case argued -- petitioner in that case argued that

1 that savings clause preserved Federal common law.

2 The Court rejected that argument and said at
3 most -- at most, that language only provided that that
4 section dealing with citizen rights didn't have the effect
5 of impacting a claim under common law, but that didn't
6 mean that the comprehensive nature of the act as a whole
7 didn't displace Federal common law, number 1, and number
8 2, it made the comment that the term common law as used in
9 that savings clause was highly unlikely to have meant the
10 specific narrowly construed Federal common law as opposed
11 to the more generic State common law.

12 In this statutory provision, the savings clause
13 doesn't even use the phrase, common law, and in our brief
14 we point to a number of statutory provisions where when
15 Congress wanted to save Federal common law it did so
16 expressly.

17 Here, the only phrase used is other applicable
18 law, and we think that means Federal statutory law, State
19 statutory law, State common law, which is the routine
20 common law, but not the narrow, specific, rarely invoked
21 Federal common law.

22 QUESTION: Mr. Stevens, I thought your position
23 was that there was in effect nothing to save, because
24 there never was any governing Federal common law.

25 MR. STEVENS: That is our position.

1 QUESTION: Which is quite different from -- your
2 answer to Justice Breyer seemed to imply there was Federal
3 common law but there is no longer by virtue of the first
4 sentence of 1821(k).

5 MR. STEVENS: I didn't mean to say that, Your
6 Honor. Our position is there never was a Federal common
7 law claim. There isn't now. Our alternative argument is,
8 should the court determine that there was a preexisting
9 Federal common law claim for simple negligence that
10 existed prior to the adoption of FIRREA, then Congress'
11 reference to gross negligence standard in that statutory
12 provision displaces that preexisting Federal common law,
13 and that preexisting Federal common law is not preserved
14 by the savings clause, so it's an alternative argument.

15 QUESTION: But your position is that there is no
16 substantive Federal common law, no common law governing
17 the substantive standard of liability. It is consistent
18 with your argument that there might be a Federal pointer
19 law telling you where you look, what State you look to.

20 MR. STEVENS: Yes.

21 QUESTION: And that's what Justice Breyer's
22 question was assuming, and I would have supposed that the
23 Milwaukee case did not deal with that.

24 MR. STEVENS: I think that's --

25 QUESTION: -- because the Milwaukee case was

1 dealing with substantive law.

2 MR. STEVENS: That's correct, Your Honor.

3 QUESTION: So I would -- then would you change
4 your answer to --

5 MR. STEVENS: Yes. If that's where your
6 question was coming from, Your Honor, then I misunderstood
7 the question, and I would agree with Justice Souter. If
8 the --

9 QUESTION: Does the State of New Jersey under
10 your view of the case have certain obligations that it
11 imposes on directors by which we measure whether or not
12 there has been gross negligence? That is to say, you must
13 have three appraisals before you lend on real property in
14 excess of \$3 million, or something like that?

15 Does the State of New Jersey have specific
16 duties that are imposed on directors that are applicable
17 to this corporation?

18 MR. STEVENS: I don't believe so. There are
19 State banking provisions under the law of New Jersey, but
20 I don't know that -- I don't think that they -- they would
21 be preempted by Federal regulations on the same subject
22 matter. They do have general statutory provisions that
23 establish a duty of care for officers and directors of
24 banking corporations, which would be applicable.

25 Mr. Chief Justice, I'd like to reserve the

1 remainder of my time for rebuttal, if I may.

2 QUESTION: Well, I have one last question. I'd
3 asked you before if you -- if petitioners had conceded
4 below that Federal common law governed. Now, Judge
5 Becker's opinion says both parties conceded that.

6 MR. STEVENS: Your Honor --

7 QUESTION: So was that an error?

8 MR. STEVENS: Yes. We are -- we did argue at
9 the district court level that Federal law governed. We
10 did make that argument, and we have reversed our position
11 since then, but we reversed it at the Third Circuit level
12 in light of this Court's decision in O'Melveny and Myers,
13 not because the law fundamentally changed with that
14 decision, to be honest, but because that decision focused
15 attention on the fact -- on the importance of the
16 proposition that there is no general Federal common law,
17 and we argued to the Third Circuit that the Government's
18 position was wrong because it had no general Federal
19 common law claim. The Third Circuit was in error.

20 What we did concede is that the only thing at
21 issue in that case, because they had waived their State
22 law claim, was, what was the nature of their Federal law
23 claim?

24 QUESTION: Mr. Stevens, I don't follow how you
25 suddenly saw a light from O'Melveny which involved a State

1 chartered institution, so this question of what law
2 governs the internal operations of a federally chartered
3 institution wasn't touched by O'Melveny.

4 MR. STEVENS: Well, Your Honor, it's true that
5 that case involved a State-chartered institution, but the
6 proposition that there is no general Federal common law,
7 the --

8 QUESTION: To govern a State-chartered
9 institution that has internal operations controlled by the
10 State of incorporation.

11 MR. STEVENS: Well, as I said, it's true that
12 the facts of that case involved a State-chartered
13 institution, but the propositions articulated by the Court
14 at the beginning of that opinion I don't believe are
15 limited by the fact that the institution in that case was
16 State-chartered.

17 I don't think the fact that you have to have
18 unique Federal interests present and a conflict, a
19 significant conflict between the application of State law
20 and some identifiable Federal purpose is unique to State-
21 chartered institutions. I think that standard applies for
22 the creation of Federal common law no matter what the
23 facts of the case are.

24 QUESTION: Thank you, Mr. Stevens. You've
25 reserved the time remaining.

1 Mr. Bress, we'll hear from you.

2 MR. STEVENS: Thank you, Mr. Chief Justice.

3 ORAL ARGUMENT OF RICHARD P. BRESS

4 ON BEHALF OF THE RESPONDENT

5 MR. BRESS: Mr. Chief Justice and may it please
6 the Court:

7 Section 1821(k) is a plainly worded provision,
8 and in our view it means precisely what it says. It
9 provides that the FDIC as receiver may hold officers and
10 directors of failed financial institutions liable for
11 their gross negligence or worse misconduct while
12 preserving the FDIC's preexisting right to assert against
13 those officers and directors whatever claims the
14 institution could have asserted on its own behalf.

15 Now, petitioner's argument to the contrary is
16 based on a supposed negative implication. At least --

17 QUESTION: They haven't argued to the contrary.
18 They would agree with everything you've said so far. The
19 only issue is, they don't think there are any rights that
20 it had under --

21 MR. BRESS: Your Honor, that is certainly their
22 primary argument. Their secondary argument, however, is
23 that even if there was Federal common law it's been
24 supplanted by the statute.

25 QUESTION: Is that what you're going to address

1 now, or the primary?

2 MR. BRESS: Well, the arguments have sort of
3 switched place in terms of what's primary and what's not
4 from the briefing schedule. If you'd like, Your Honor, I
5 can address the underlying law at this point. I'd just
6 like to note before I do it that either Federal common law
7 exists, in which case the statute preserves the FDIC's
8 right to assert it, or Federal law, common law doesn't
9 exist, in which case we're all agreed that State law
10 governs and that the FDIC can assert the institution's
11 State law claims.

12 QUESTION: I think that's generally agreed.

13 MR. BRESS: All right, and I'd like to note one
14 extra thing at this point which is, to the degree that
15 there's an argument here that the FDIC has waived its
16 State law claims, there has been no waiver here. In fact,
17 the third amended complaint that's been filed simply
18 alleges counts for negligence, gross negligence, and
19 breach of fiduciary duty.

20 QUESTION: Well, do you agree we don't have to
21 decide what the applicable State law is here?

22 MR. BRESS: Oh, I agree, Your Honor, primarily
23 because we don't believe that there is applicable State
24 law here. I'd like to address that, if I may.

25 QUESTION: May I -- I think this is what you're

1 going to address, but you contend there is a Federal
2 common law that is applicable.

3 MR. BRESS: Yes, Your Honor.

4 QUESTION: And is the Federal common law rule
5 one that is the same in all States in the country?

6 MR. BRESS: Yes.

7 QUESTION: And why, then, is the Federal
8 statutory gross negligence law -- rule somewhat different
9 in different States?

10 MR. BRESS: Your Honor, that can be explained by
11 what the state of the law was at the time that Congress
12 acted, and what Congress' purposes here were.

13 This was emergency legislation, and Congress had
14 a very simple purpose, which was to preempt State
15 insulating statutes that could insulate officers and
16 directors of financial institutions from liability to the
17 FDIC.

18 Now, at that time, while the majority of courts
19 were applying the uniform ordinary care standard of
20 Federal common law to officers and directors of federally
21 chartered associations, some courts were applying State
22 law to officers and directors of federally chartered
23 associations.

24 Congress didn't try to sort out which was the
25 right answer. Congress just wanted to make sure, whatever

1 a court might otherwise apply, the FDIC would always have
2 a suit for gross negligence, so if a court would apply the
3 State's law to a federally chartered association, Congress
4 was telling them, well, apply that State's gross
5 negligence standard.

6 However, if a court were to apply Federal common
7 law the question really would never come up, because under
8 Federal common law the standard is, and has for a long
9 time, been a standard of ordinary care.

10 QUESTION: That's by no means the only reading
11 of that statute, certainly. I mean, to -- your
12 interpretation is certainly not the only one that comes
13 from the language.

14 MR. BRESS: No, Your Honor, but we believe it's
15 the one that makes the most sense out of the language in
16 the following sense. The savings clause preserves the
17 FDIC's rights under other applicable law.

18 Now, at the time, Congress is presumed to enact
19 laws with knowledge of what the surrounding law is, and at
20 that time the vast majority of courts were applying
21 Federal common law to suits against officers and directors
22 of federally chartered associations, so to take their
23 interpretation of the statute you have to believe that
24 Congress missed that entirely and believed that State law
25 was applicable.

1 QUESTION: You're saying there's no reference to
2 State law, that that provision does not refer to State law
3 at all?

4 MR. BRESS: Oh, no, no, no. No, that's not what
5 I'm saying, Your Honor. What I'm saying is that with
6 regard to federally chartered associations the reference
7 to other applicable law --

8 QUESTION: But --

9 MR. BRESS: -- in terms of civil suits would be
10 Federal common law.

11 QUESTION: Right.

12 QUESTION: Ordinarily, when Congress legislates
13 in a particular field, it is substituting a statute for
14 what might have been Federal common law before.

15 MR. BRESS: That's correct, Your Honor.

16 QUESTION: That's the City of Milwaukee.

17 MR. BRESS: Your Honor, when the statute speaks
18 to the matter at issue this Court has said that that's
19 what -- but in order to determine what the statute says
20 when it speaks we've got to look at the words of the
21 statute, and what this statute says is, the FDIC can
22 always sue for gross negligence, but the FDIC can also
23 assert whatever it could have asserted otherwise under
24 other applicable law.

25 QUESTION: Well, but when you say other

1 applicable law, do you think that -- you say that meant
2 they meant to preserve Federal common law, too?

3 MR. BRESS: Yes, Your Honor. In fact, it would
4 have been odd had they not, because as I've said, with
5 regard to Federal associations that was the primary law
6 that was applicable.

7 QUESTION: Yes, but no -- there were no
8 decisions from this Court on point.

9 MR. BRESS: No, but there were decisions from
10 courts of appeals in district courts, and Congress is
11 presumed to know those.

12 QUESTION: So Congress is supposed to sort out
13 the various Federal rules and the State rules?

14 MR. BRESS: Your Honor, we're not contending
15 that Congress sorted out and decided what was correct and
16 what was incorrect. All we're saying is that Congress
17 would have been aware that the vast majority of courts
18 were applying Federal common law. Congress didn't try to
19 sort it out. Congress just said whatever the courts are
20 applying, you've got a gross negligence standard.

21 QUESTION: But some weren't, and to say in the
22 statute that nothing in this paragraph shall affect any
23 right of the FDIC under other applicable law reads to me
24 as though they are also saving State law where it applies.

25 MR. BRESS: Oh, there's no doubt about that.

1 QUESTION: And quite possibly the Federal common
2 law directs us to State common law for the standard.

3 MR. BRESS: All right. I'd like to address
4 that, Your Honor. Let me just preface it with a notion,
5 though, that the statute doesn't purport to affect what
6 the rights of the institution would have against its own
7 officers and directors, so if you adopt the position that
8 Federal common law is supplanted with respect to FDIC
9 suits, you do have a situation where the institution
10 before it fails could sue under Federal common law for
11 ordinary care, but if the officer-directors perform so
12 poorly the institution goes under, the FDIC is limited to
13 the gross negligence standard. That's a bit odd.

14 But now let me address what the underlying law
15 is.

16 QUESTION: But Mr. Bress, that depends on
17 assuming that there is Federal common law that would
18 govern the internal operation, something that this Court
19 has never decided.

20 MR. BRESS: That's right, Your Honor, and let me
21 now address that.

22 This Court has long understood that a
23 corporation is a creature of law, and that its internal
24 affairs are governed by the laws of the chartering
25 authority, that the chartering authority and no other

1 sovereign is the sovereign that has the predominant
2 interest in those internal affairs.

3 Now, that's not just as a conflict of laws
4 principle. The Court has applied that in the context
5 where you've got Federal preemption in dormant Commerce
6 Clause challenges. It's a principle of sovereignty at its
7 fundamental base.

8 Now --

9 QUESTION: Of sovereignty?

10 MR. BRESS: Yes, Your Honor.

11 QUESTION: You think it would be
12 unconstitutional for a State, for example, to impose upon
13 directors for certain activities a liability higher -- to
14 that State's citizens a liability higher than what the
15 corporate State of incorporation would provide?

16 MR. BRESS: Your Honor, it flows from principles
17 of sovereignty. It does not make it unconstitutional, but
18 it certainly does flow from principles of sovereignty.
19 This Court has stated that in Burks, in Kamen, in Cohens.
20 With regard to State institutions the Court has said,
21 because it's created by the State, all of the rights and
22 responsibilities flow from that State's laws, and it has
23 also made clear the flip side, that when an institution --
24 the Court has made clear that when an institution is
25 chartered by the Federal Government it's from the Federal

1 Government and from that charter that the rights and
2 responsibilities flow.

3 QUESTION: In contracts --

4 QUESTION: Well, that may be, but it --

5 MR. BRESS: What's that?

6 QUESTION: In contracts, too.

7 MR. BRESS: And in contracts as well.

8 QUESTION: No. I mean, I said that somewhat
9 facetiously, because I just wondered under the principles
10 of Erie what good reason there is to have a special
11 Federal law that's substantive in relation to banks that
12 are chartered federally that wouldn't also apply to
13 contracts, torts, and a whole bunch of things, and indeed,
14 what is the implication of that for Erie? Are we
15 recreating Federal common law in a new area across the
16 board? That's, I guess, the question you've been asked by
17 others.

18 MR. BRESS: Not at all, Your Honor, in this
19 sense. I mean, Erie, the primary purpose of Erie and the
20 primary insight of Erie is that law has to flow from an
21 identifiable sovereign. There's no transcendental common
22 law floating out there.

23 But after Erie, it was not the case that all
24 common law was State. Most common law was, but in areas
25 of unique or essential Federal interest the law is

1 Federal.

2 Now, with regard to contracts, we're not saying
3 that a bank's contracts with third parties are governed by
4 Federal law.

5 QUESTION: But that's exactly my question, to be
6 less elliptical, is what is the practical Federal interest
7 here that requires a Federal common law that could not be
8 served as well by a Federal common law pointer rule that
9 said, simply apply the law of the State, a principal place
10 of business, or the Model Business Code? In other words,
11 the things that were cited.

12 MR. BRESS: Your Honor, it's certainly true that
13 in many areas this Court as a pointer rule will look to a
14 State's law really as a convenient point of reference, and
15 we think that that's appropriate in many instances.

16 It is not appropriate, however, where analogous
17 Federal law provides you with some idea of what Congress
18 thought about the matter, and in this case, by providing
19 under section 1818(i) and section 1818(e) that the Federal
20 regulators can enforce breaches of fiduciary duties which
21 at the time the statute was created clearly included the
22 duty of ordinary care, Congress is telling us that for
23 Federal purposes enforcement of the duty of ordinary care
24 is an important interest.

25 QUESTION: But your argument goes well beyond

1 that. It goes to the entire internal management of the
2 corporation if the theory you're putting before us is
3 correct, and I would go further than Justice Breyer. It
4 seems to me that there's a lot more chance of some
5 certainty in the law if we refer to State law than if we
6 try to apply some nebulous Federal common law of internal
7 operations of the corporation. It will take us, you know,
8 100 years to develop a Federal law of internal management
9 of corporations. We've never done it.

10 MR. BRESS: Well, Your Honor, if we were talking
11 about inventing all of corporate law for financial
12 institutions I would be constrained to agree with you.
13 We're not talking about that. All we're talking about is
14 an area where Congress has itself said that the duty of
15 ordinary care will be enforced.

16 Now, matters as demand on the corporation,
17 futility of demand, that sort of thing, sure, a pointer
18 rule would be appropriate, but where Congress has said the
19 duty of ordinary care should be enforced, it would be
20 appropriate to enforce that duty of ordinary care rather
21 than, for instance -- let me give you an example.

22 If a State were to completely remove all duty of
23 care from its officers and directors, should that then
24 mean that the Federal institution would have no claim
25 whatever and no ability to enforce fiduciary duties of its

1 own officers-directors, and similarly --

2 QUESTION: Are you talking about preinsolvency,
3 or postinsolvency?

4 MR. BRESS: I'm talking about preinsolvency, and
5 similarly, if a State were to enact strict liability as
6 the standard, should that mean that the Federal chartering
7 authority should have no ability to make sure that their
8 institutions could attract officers and directors --

9 QUESTION: But it's one thing to say the Federal
10 chartering authority has no right to do that, but it's
11 another thing to say that the Federal courts should step
12 in on their own and develop a body of law.

13 MR. BRESS: Well, Your Honor, I'm glad you've
14 mentioned that. The OTS, Office of Thrift Supervision,
15 enforces section 1818(i) and section 1818(e), and in the
16 context of agency adjudication has interpreted those
17 sections to refer, when they refer to breach of fiduciary
18 duties, to the duty of ordinary care, and further than
19 that, and in terms of looking for certainty in the law,
20 the OTS has set out the sorts of duties that are expected
21 of an ordinarily prudent director in those circumstances.

22 QUESTION: Mr. Bress, those duties govern the
23 relationship between the regulator and the bank, is that
24 correct?

25 MR. BRESS: Those duties are --

1 QUESTION: Does OTS purport to be governing the
2 relationship between the bank and its shareholders?

3 MR. BRESS: The OTS has spoken in agency
4 adjudication and said that the duties that are enforced
5 should be the duties that the Federal regulator enforces
6 as a matter of Federal law and should not depend on the
7 courts of State law.

8 QUESTION: All right.

9 MR. BRESS: It said that in agency adjudication.

10 QUESTION: Well, it says it shouldn't depend on
11 the quirks of State law, and yet under O'Melveny don't we
12 have to see whether there is a conflict between the
13 Federal interest and the State law, and it has been
14 virtually conceded here that the law of every State on
15 this point is ordinary negligence. Why, then, do we have
16 an occasion to look to this issue?

17 MR. BRESS: Okay. Your Honor, I'd like to
18 address that in two parts, if I may. First of all, the
19 conflict and the degree of conflict that is necessary
20 really depends on what you're doing with regard to State
21 law.

22 In O'Melveny and many other of these courts'
23 cases what you're dealing with is -- and in Boyle as
24 well -- you're displacing State law that would, in fact,
25 otherwise apply in an area where the State has an

1 interest.

2 Here what you're talking about is --

3 QUESTION: And you're displacing that law
4 presumably in favor of a standard substantively which is
5 different from the State law.

6 MR. BRESS: That's right. That's right, Your
7 Honor.

8 QUESTION: That's not the case here.

9 MR. BRESS: Well, let me -- I will address that,
10 Your Honor. What --

11 QUESTION: Mr. Bress, I think you ought to
12 clarify one thing. It isn't the State law generally that
13 ordinary negligence is the standard, is it?

14 MR. BRESS: I --

15 QUESTION: I thought -- if that were the case
16 there would never have been any need for this statute.

17 MR. BRESS: Your Honor, most States as a matter
18 of common law and a matter of statutory law, they don't
19 speak in terms of ordinary negligence. What they speak of
20 in terms of is ordinary care is the standard, and they
21 apply that with the business judgment rule, so that you've
22 got to demonstrate ordinary care to even get within the
23 business judgment rule, and if you've exercised ordinary
24 care -- and we agree with this. If you've exercised
25 ordinary care you will not be held liable for honest

1 mistakes of judgment. There's no --

2 QUESTION: But --

3 QUESTION: Maybe I'm confused. I thought that
4 the whole reason for 1812 had nothing to do with federally
5 chartered institutions. It had to do with States that
6 were insulating officers and directors from any
7 liability --

8 MR. BRESS: Okay --

9 QUESTION: -- so Congress wanted to say at least
10 gross negligence.

11 MR. BRESS: Your Honor, there are several
12 States, and there was a trend during the late 1980's of
13 States that were, as a matter of statutory law,
14 restricting liability of officers and directors to gross
15 negligence or worse. Many -- several of them were
16 restricting it to intentional or wanton misconduct.

17 QUESTION: Yes, I think where we got confused is
18 that the State common law was ordinary negligence, but the
19 State insulating statutes supplanted common law and that's
20 why we got --

21 MR. BRESS: That's correct, Your Honor, and in
22 terms of negligence and ordinary negligence this -- it's
23 somewhat helpful, I think, even now to look back at the --
24 at this Court's formulation in Briggs where it said what
25 you're really talking about is ordinary care is the

1 standard, and in some circumstances perhaps slight care is
2 required. For example, it isn't a transaction that really
3 has much impact on the bank.

4 In some instances, however, you've got a bet --
5 your company transaction and great care is required, and
6 you look to whether the director has satisfied the care
7 required under the circumstances.

8 QUESTION: May I --

9 MR. BRESS: But if I might continue as to why we
10 use a Federal standard --

11 QUESTION: May I interrupt with one question?
12 Your argument based on 1818(i) and (e) and the regulatory
13 power, are those regulatory powers of the OTS applicable
14 to State-chartered institutions as well as Federal?

15 MR. BRESS: They are, Your Honor, and in those
16 instances you do have --

17 QUESTION: Well --

18 MR. BRESS: Well, in those instances you have
19 two separate standards that are going to apply to the
20 officers and directors, because you have two separate
21 sovereigns that have an interest.

22 However, as petitioner has effectively conceded
23 here, I think, while we can point as a pointer rule to the
24 State where the main office is, that doesn't necessarily
25 mean that that State has a substantial interest in the

1 internal workings of a federally chartered institution.
2 We're just pointing to it as a matter of convenience, Your
3 Honor, and in that circumstance --

4 QUESTION: Yes, but if you're right that those
5 sections dictate ordinary care across the board, Congress
6 didn't have to enact this statute.

7 MR. BRESS: No, Your Honor, and I think Congress
8 did, because there's no question that ordinary care is the
9 standard for purposes of Federal regulatory enforcement as
10 a Federal standard, because the statute was enacted to
11 protect the Federal interest in the safety and soundness
12 of all banks.

13 However, Congress recognizes that States are the
14 ones that dictate the civil standards of liability for
15 their own institutions, the rights of the institution and
16 the shareholders vis-a-vis the directors.

17 You have two different standards for States
18 because you've got two different sovereigns. Here, you've
19 one sovereign with an interest in it, and under HOLA, as
20 this Court recognized in de la questa, the Homeowners Loan
21 Act, Congress evinced a desire to have uniformity in the
22 regulation of savings and loans. This isn't just the
23 courts invoking the interest of uniformity, this is
24 Congress saying that uniformity is important.

25 QUESTION: But then in --

1 QUESTION: Mr. Bress, what are the problems
2 about the uniformity? You are saying Federal common law,
3 and we look to an administrative agency, OTS, to get that
4 Federal common law, and that -- that's rather odd. There
5 is no Delaware corporation statute for the Federal, so we
6 have to get the law from some place, and you say, well,
7 the Federal common law should be what the OTS has
8 pronounced.

9 MR. BRESS: If I -- if that's how I came across,
10 Your Honor, I'm sorry. I would -- and that's further that
11 I wanted to go. What I'm saying is that the statute
12 itself includes a duty of ordinary care in it. The OTS,
13 in enforcing that duty of ordinary care, will, as the
14 expert body, flesh it out somewhat, give an idea of what
15 that entails for officers and directors of federally
16 chartered institutions, and that's going to give you a
17 better idea -- I mean, perhaps Delaware does have a --

18 QUESTION: But that's not common law, then.
19 You're saying there's a statutory preemption.

20 MR. BRESS: No, Your Honor.

21 QUESTION: If you're saying its right in the
22 statute and that's all that OTS is doing, then aren't you
23 saying there's a preemption?

24 MR. BRESS: Well, not quite, Your Honor. What
25 we're really saying is this is --

1 QUESTION: Well, how close do you --
2 MR. BRESS: All right -- well, fairly close,
3 Your Honor. What we're coming at is really in Kamen what
4 this Court said is if there is an analogous Federal
5 provision that gives you an idea of what Congress would
6 have done in this area, you look to that. This Court did
7 that in Musick and Peeler, the same sort of a thing, where
8 under 10(b)(5) the Court said that you would use the
9 contribution from the '34 act.

10 QUESTION: Well, that would be a much stronger
11 argument, I would suppose, if this statute had never been
12 passed.

13 QUESTION: Yes.

14 QUESTION: Because if (k) had never been -- if
15 subsection (k) had never been enacted, then if I follow
16 your argument I would say, well, there's an area which is
17 analogous to something covered by the statute that OTS is
18 administering, but that statute doesn't cover it
19 literally, and therefore I could say, well, there's a
20 place where there seems to be a conflict between perceived
21 Federal interest and State common law, and therefore we
22 better develop some Federal common law for -- to govern
23 that.

24 But this statute has been passed which in effect
25 is saying that in the area of possibly perceived conflict

1 the threshold of gross negligence is good enough, so there
2 doesn't seem to be any occasion to develop a common law to
3 supplement that.

4 MR. BRESS: Your Honor, I think what the
5 statute's telling you, and I think that what's actually
6 the case here, is that there is a Federal interest, for
7 instance, with regard to all banks whether they're State
8 or Federal, that's clear, and in 1821(k) that interest was
9 the Federal interest as in Shaw, and what Congress did is
10 said -- the first draft, in fact, of the Senate bill would
11 have allowed the FDIC to proceed as receiver under any
12 common law action, including ordinary negligence.

13 There were objections to that that were
14 federalism-based. The federalism-based objection said,
15 look, what you're talking about are, you're including
16 corporations that we've chartered, and as to which we
17 dictate the internal affairs, and some States might
18 legitimately believe that gross negligence rather than
19 ordinary negligence is the right standard.

20 So Congress compromised. They said the FDIC
21 will always be able to sue for gross negligence even
22 though, if a State has chosen a lower threshold or a
23 higher threshold --

24 QUESTION: But that suggests neither uniformity,
25 nor does it suggest, as I thought you said earlier, that

1 1821(k) adopts some sort of standard of ordinary
2 negligence.

3 MR. BRESS: No, Your Honor, I -- I'm sorry if
4 that point has become confused.

5 QUESTION: I'm not sure I correctly understood
6 you.

7 MR. BRESS: We don't say that 1821(k) as a
8 standard of ordinary negligence. What we're pointing to
9 for that is --

10 QUESTION: It has -- to the extent it has a
11 standard, its standard is gross negligence.

12 MR. BRESS: Your Honor, there's no question
13 about that, and that's not where our argument's going.
14 1818(i) and 1818(e) are provisions where the Federal
15 regulator can enforce breaches of fiduciary duties. At
16 the time those provisions were enacted, it was very
17 clear --

18 QUESTION: Preinsolvency.

19 MR. BRESS: -- that breach of fiduciary duties
20 included -- preinsolvency that breach of fiduciary duties
21 included the breach of the duty of ordinary care. All
22 we're saying here is, you've got a circumstance where
23 you're either going to use a State law pointer rule, or
24 you're going to adopt a uniform Federal standard.

25 Because Congress has said that the uniform

1 Federal standard should be enforced as ordinary care, it's
2 more appropriate to use that Federal standard that
3 Congress has already told us is the standard that should
4 apply --

5 QUESTION: I think your argument's just
6 extremely opaque on that point. Are we getting into a
7 position where we're like the King of France? We march up
8 the hill and then march down again?

9 If Federal law points to State law, then what
10 difference does it make?

11 MR. BRESS: We're not saying that Federal law
12 points to State law, Your Honor. What we're saying is
13 that Federal law is the law that's applicable. It's been
14 suggested that we could point to State law. We're
15 disagreeing with that. We're saying, no, there's a
16 Federal standard that Congress has already said these
17 officers and directors should live up to.

18 QUESTION: At a different stage of the
19 proceeding, preinsolvency.

20 MR. BRESS: Well, but again, all the FDIC's
21 taking here are the rights that the institution had
22 preinsolvency.

23 QUESTION: Well then, we are just -- if you're
24 saying 1821(k) addresses this, we're talking about gross
25 negligence, not simple negligence.

1 MR. BRESS: Your Honor, 1821(k) says that if the
2 other applicable law doesn't give you a gross negligence
3 standard, you can still sue for gross negligence.

4 What we're saying is that with regard to
5 federally chartered institutions their rights vis-a-vis
6 their own directors and officers are governed by Federal
7 law because they operate under a Federal charter, and in
8 determining what those rights are and what the duties are,
9 we can either look for the State pointer -- and by the
10 way, the pointer is not always going to look to States
11 with a well developed corporate law.

12 According to petitioner, the pointer might point
13 to any State where you've got the main office, but you can
14 either use a State pointer, or you could look to what
15 the --

16 QUESTION: Mr. Bress --

17 MR. BRESS: -- Federal Government has said ought
18 to be enforced as the duty, and we're just saying, given
19 the interest in uniformity demonstrated in the Homeowners
20 Loan Act that savings and loans should be subject to
21 uniform standards, one should look to what Congress has
22 said and apply a uniform standard, otherwise --

23 QUESTION: What Congress has said where, in (i)?

24 MR. BRESS: In section 1818(i)(b)(2) Congress
25 has said that officers and directors can be subject to

1 civil money penalties for breach of fiduciary duties that
2 cause or are likely to cause more than minimum damage to
3 the institution.

4 Now, I grant that that section doesn't say what
5 breach of fiduciary duties means, but this Court has long
6 looked, and the latest case is DeSaterfield v. Mans and
7 CCNV v. Reid -- has long said that when the Congress uses
8 a common law term, we look to what that term -- whether
9 that term had an established meaning.

10 The term did have an established meaning, and
11 that included the duty of ordinary care, and if you rule
12 against us, Your Honor, what will occur is that officers
13 and directors of Federal institutions will have different
14 and varying duties of care. It will have a duty of care
15 for the Federal regulators and a different one --

16 QUESTION: Well, they do under the gross
17 negligence standard anyway. You've agreed they do under
18 the gross negligence standard, because that refers to
19 State law in any event.

20 MR. BRESS: Officers and directors of federally
21 chartered associations --

22 QUESTION: Oh. Oh, you're --

23 MR. BRESS: That's all I'm talking about, is
24 officers and directors of Federals.

25 QUESTION: Am I correct that -- you're familiar

1 with the Seventh Circuit case where Judge Easterbrook took
2 part of your position and Judge --

3 MR. BRESS: That's right.

4 QUESTION: -- Posner took another part. You
5 wouldn't agree with either one of those opinions, would
6 you?

7 MR. BRESS: That's right, Your Honor.

8 QUESTION: Yes.

9 MR. BRESS: We think that Judge Easterbrook
10 correctly recognized that --

11 QUESTION: He went the first step.

12 MR. BRESS: -- throughout the chartering
13 authority --

14 QUESTION: Yes.

15 MR. BRESS: -- but he was incorrect in believing
16 that it was displaced when you've got an express savings
17 clause.

18 QUESTION: Then you are taking the position,
19 Mr. Bress, that the first sentence has no application to a
20 federally chartered institution because you will have
21 under the Federal common law this ordinary negligence
22 standard.

23 MR. BRESS: Your Honor, our position is that it
24 really has no practical application. I mean, when
25 Congress passed the statute, though, it wasn't acting

1 imprudently, because at that time some courts were
2 applying State law to Federal institutions, so Congress --

3 QUESTION: You were saying that Congress said we
4 don't know what it is, but whatever it is, we're not
5 leaving -- we're leaving it alone.

6 MR. BRESS: Whenever the law is out there, we're
7 leaving it alone.

8 If they were going to apply State law to you,
9 and that State law would not give you a cause of action
10 for gross negligence, you've got it.

11 QUESTION: But you are saying, if your reading
12 is correct that there is an ordinary negligence, Federal
13 common law standard, then there would be no occasion ever
14 to resort to the gross negligence part --

15 MR. BRESS: There would be no -- there would --
16 no --

17 QUESTION: -- for any federally chartered
18 institution.

19 MR. BRESS: By virtue of this Court's decision,
20 if the Court were to rule that way, there would be no need
21 to resort to the first sentence.

22 However, I am at pains to emphasize that at the
23 time Congress passed the statute, that sentence would have
24 had meaning even with regard to Federal associations
25 because some courts were applying State law, and if

1 Congress hadn't included Federal associations within the
2 first sentence, then as to those courts that were applying
3 State law to Federal charters, you wouldn't have a
4 standard of -- a cause of action of gross negligence
5 available.

6 So a subsequent event, this Court's decision
7 unifying the law and saying that there is a Federal common
8 law standard, and I don't believe the Court has to go on
9 and say what it is, but if it does, it's ordinary care --

10 QUESTION: Well --

11 MR. BRESS: -- a subsequent decision of that
12 sort would render the first sentence of no practical
13 effect with regard to Federal charters, that's true.

14 QUESTION: It's that last part. I want to be --
15 assume I'm with you. Assume for the sake of argument that
16 1821(k) leaves Federal common law where it found it, all
17 right. That's base.

18 Now, where did it find it, and what you're
19 saying is, it found it (a) a rule of law that points you
20 to the principle place of business, no. You say no,
21 correct? It doesn't point you to the law of the principal
22 place of business. Rather, it creates its own standards.
23 So I say, what leads you to think that?

24 And now you're only reply to that is to
25 source -- is to cite primarily is 1818(e) and (i), and

1 1818(e) and (i), from my finding it here, are these
2 infinitely long page-full procedural requirements that go
3 on endlessly that I can't find anything that seems to be
4 relevant, except for one sentence that refers to gross or
5 continuing disregard, or something like that.

6 MR. BRESS: All right, Your Honor, let me
7 address that. We're not saying that Congress acted in
8 recognition of the standard under 1818(i) or 1818(e) at
9 the point when it enacted 1821(k). What we're saying is
10 that when it enacted 1821(k), Justice Breyer, the courts,
11 the majority, vast majority of courts at that time were
12 already applying a uniform ordinary care standard.

13 QUESTION: We, this Court had not. This Court
14 had not.

15 MR. BRESS: This Court had not, but Congress
16 doesn't -- it doesn't just enact laws in recognition of
17 what this Court's decisions are. Congress is presumed to
18 know at least where there is a majority --

19 QUESTION: Well, but you just told us the
20 opposite. You just told us that the reason the -- in
21 response to Justice Ginsburg that the reason the first
22 sentence makes sense even as applied to Federal
23 institutions is that Congress didn't know what the law
24 was.

25 MR. BRESS: No --

1 QUESTION: It might be applying State law, they
2 might be applying Federal law. That's what you told
3 Justice Ginsburg.

4 MR. BRESS: Your Honor --

5 QUESTION: Now in response to this question you
6 say Congress must have assumed that they -- you know,
7 since the vast majority of lower courts were applying
8 Federal law, that this was a Federal law at issue.

9 MR. BRESS: Your Honor, there's no contradiction
10 whatever.

11 QUESTION: Okay, well --

12 MR. BRESS: What we're saying is that Congress
13 had no view as to what the correct answer was. The vast
14 majority of courts were applying Federal law, but some
15 courts clearly were applying State law as well. Congress
16 had no reason, no desire to sort that out. This was
17 emergency legislation. Congress said, whatever the courts
18 are applying, they -- you can continue to have that, but
19 you're going to have gross negligence as a minimum, as a
20 floor.

21 QUESTION: Then how do you get a congressional
22 policy for uniformity?

23 You've just said Congress took no position as to
24 what was the correct law.

25 MR. BRESS: That's right, Your Honor.

1 QUESTION: If that's correct, how do you
2 conclude in answer to Justice Breyer's question and other
3 questions that somehow there is a congressional indication
4 somewhere, (e), (i), or anyway, that there is a need for a
5 uniform standard?

6 MR. BRESS: Your Honor, if that's gotten lost,
7 I'm sorry. The uniformity comes from HOLA itself, the
8 Homeowners Loan Act. As this Court interpreted the
9 Homeowners Loan Act --

10 QUESTION: Well, that's Congress.

11 MR. BRESS: What's that?

12 QUESTION: Oh, you're --

13 MR. BRESS: Right. No, what I'm saying is, as
14 this Court has interpreted the Homeowners Loan Act in de
15 la questa, Congress intended at the time that statute was
16 enacted to have uniform regulation of savings and loans.

17 Now, at the time FIRREA was enacted Congress
18 wasn't interested in changing the workings of the internal
19 affairs of banks themselves. All it was saying was, when
20 the FDIC comes in as receiver, in order to protect the
21 insurance fund the FDIC is always going to be able to sue
22 for gross negligence.

23 Now, it's still going to step into the shoes of
24 the institution, but --

25 QUESTION: You've answered the question,

1 Mr. Bress.

2 Mr. Stevens, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF RONALD W. STEVENS

4 ON BEHALF OF THE PETITIONER

5 MR. STEVENS: Thank you, Mr. Chief Justice.

6 The FDIC is saying, as a matter of policy we
7 have to have uniformity. That's its argument in this
8 Court.

9 In FDIC v. Thall, a decision which came down in
10 August of 1996 of this year from the Eleventh Circuit, the
11 FDIC argued and prevailed exactly the opposite
12 proposition, that State law should apply to federally
13 chartered institutions. They took the position in that
14 case that the application of the internal affairs doctrine
15 to federally chartered institutions was, and I quote from
16 their brief, which is cited at --

17 QUESTION: Of course, they're entitled to change
18 their position. You've changed your position too, but --

19 (Laughter.)

20 MR. STEVENS: We changed our position on the
21 basis of a change in the law. Theirs is a policy
22 argument.

23 QUESTION: Well, but basically you do -- you
24 agree with Judge Posner's analysis, as I understand it.

25 MR. STEVENS: No. He uses an internal

1 affairs -- the internal affairs --

2 QUESTION: No, he rejected that.

3 MR. STEVENS: -- doctrine.

4 QUESTION: Well, that --

5 MR. STEVENS: Well, that's -- he still used it,
6 but he's -- I believe -- to the extent that he indicated
7 it's not applicable, I agree with him.

8 The second point is that -- that the OTS
9 standard that they're talking about has nothing to do with
10 simple negligence. The -- the -- well, the -- first of
11 all, 1818(i) is a civil money penalty provision. It's a
12 provision for imposing a penalty, but the provision that
13 deals with conduct precisely analogous to that at issue
14 here is not a civil money penalty section. It's not a
15 fining section.

16 It's 1818(b)(6)(a), which is the section which
17 gives the agencies to recover losses incurred by the
18 institutions, Federal or State chartered, caused by
19 directors and officers, and the standard for recovery
20 there is not simple negligence. Congress set the standard
21 at unjust enrichment or reckless disregard.

22 QUESTION: And what section are you referring
23 to?

24 MR. STEVENS: 1818(b)(6)(a).

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Stevens. The case is submitted.

2 (Whereupon, at 11:02 a.m., the case in the
3 above-entitled matter was submitted.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOHN W. ATHERTON, JR., PETITIONER V FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F.S.B.
CASE NO. 95-928

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)