NATIONAL BANK DIRECTOR LIABILITY FOR LOANS EXCEEDING STATUTORY LENDING LIMITS: SHAREHOLDER ACTIONS AND THE SCOPE OF THE COMPTROLLER'S CEASE AND DESIST POWER AS RECOVERY AND ENFORCEMENT MECHANISMS

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TABLE OF CONTENTS

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I. Introduction

As is true in the case of any commercial enterprise in any sector of the American economy, those stout-hearted individuals who accept a position on the board of directors of a bank are vested with a great deal of responsibility, authority, and trust. While a person accepting the position of a director on a bank's board generally receives respect from his or her peers in the banking community (if not among disgruntled borrowers or investors), the director is also subject to a "concomitant exposure to potential liability for a host of actions and inactions."[1]

As one commentator has pointed out, a national bank director, as a matter of statistical probability, is more likely to be subject to suit in his or her capacity as a director at the present time than at any other time during the past fifty years.[2] The reason for the dramatic increase in the quantity of legal proceedings instituted against directors is basically twofold. First, there has been an increase in the concern over directors' activities and their

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1. Grunewald & Golden, *Bank Director Liability Post-FIRA: How to Avoid It*, 98 Banking L.J. 412, 412 (May 1981) [hereinafter Grunewald & Golden].

2. Vartanian & Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law 1021, 1021 (May 1984). The increased legal activity against bank directors for their errors and omissions in the discharge of their duties is illustrated by the following statistics:
Federal Savings and Loans: The Federal Savings and Loan Insurance Corporation (FSLIC), in 1982 alone, increased the volume of cease and desist orders by nearly 400%; increased the number of directors and officers removed from regulated institutions by 100%; and increased criminal referrals with respect to directors by 50%. *Id.*
National Banks: Formal regulatory proceedings by the Office of the Comptroller of Currency (hereinafter OCC) against national bank directors in each of the years 1981-1983 *averaged* a number greater than the *total number* of such actions in the five-year period 1971-1976. *Id.*

impact on the safety and soundness of banks due to the tremendous impact a bank's fiscal integrity has upon the economic health of the community in which the bank is located.[3] Second, the powers of the federal bank regulatory agencies[4] charged with monitoring the safety and soundness of banks generally have been expanded by congressional enactment of the Financial Institutions Regulatory and Interest Rate Contract Act[5] in 1978 and the Garn-St. Germain Depository Institutions Act[6] in 1982. When these congressional mandates became effective, the aforementioned regulatory agencies[7] were empowered to take varying actions to correct improper banking activities conducted by institutions subject to their oversight. The enforcement actions include cease and desist proceedings, suspension of removal of bank officials, imposition of civil monetary penalties, and even referral of volitionally imprudent bank officers, directors, and other management personnel to the Attorney General for imposition of criminal sanctions in appropriate cases.[8] Shareholder actions against bank directors have been commonplace for years.[9]

There are, then, several distinct types of actions which can be brought against a bank director, depending on several variable factors. First, the bank can be a nationally chartered bank, a state chartered bank which is a member of the Federal Reserve System (hereinafter "the Fed"), or a state chartered bank which has opted out of the Fed. Second, the suit can be brought by a bank shareholder directly against the defendant director, or derivatively on behalf of the bank. Third, the action can be brought by the appropriate regulatory authority.[10] Discussion of all of the potential actions involving different combinations of these variables is beyond the scope of this article. The discussion here will be limited to those actions which are brought against the directors of a national bank.

National bank directors' duties, functions, and obligations are governed generally by the provisions of the National Bank Act.[11] A discussion of all of

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3. *See* Grunewald & Golden, *supra* note 1, at 412.

4. National banks are subject to regulation by the Office of the Comptroller of Currency. State chartered banks which choose to be members of the Federal Reserve Board are regulated by the Federal Reserve's Board of Governors (hereinafter Federal Reserve Board or simply FRB). State chartered banks which opt out of participation in the Federal Reserve System are monitored by the Federal Deposit Insurance Corporation (hereinafter FDIC). The state chartered banks are, of course, subject to state regulation as well. *See* IOWA CODE chapter 524. *See generally* Galbraith & Seidel, *FDIC vs. Imprudent Banking Officials: The Enforcement Apparatus*, 104 BANKING L.J. 92, 94 (Mar.-Apr. 1987).

5. Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified at 12 U.S.C. § 226 (1982)).

6. Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified at 12 U.S.C. § 226 (1982)).

7. *See supra* note 4.

8. *See* Vartanian & Schley, 39 BUS. LAW. at 1021.

9. *See* Glidden, *National Bank Directors' Liability: The Case for Private Rights of Action*, 102 BANKING L.J. 142, 142 (March-April 1985).

10. *See supra* note 4.

11. The National Bank Act is codified in title XII of the United States Code.

the duties and obligations imposed upon national bank directors pursuant to the National Bank Act is not possible in the limited context of this article. However, one particular obligation of national bank directors has been the subject of much litigation in recent years. National banks are subject to limits on the amount of funds that can be advanced to any one borrower.[12] When loans are made by a national bank to a single borrower in excess of the statutory maximums, the directors can be held personally liable if they approved the loans and knew or should have known that they were approving extensions of credit in violation of the applicable limit.[13]

The purpose of this article will be to examine the difficulties involved in complying with the loan limits imposed upon national banks;[14] the current state of the law with respect to the rights of shareholders to sue national bank directors directly for approving excessive loans;[15] and the propriety of the OCC's use of the cease and desist power to compel national bank directors personally to reimburse the bank for loans approved by the board in excess of the statutory lending limits, without first having sued to determine the directors' personal liability in the appropriate United States district court.[16]

II. Scylla and Charybdis: Refusing Loans to Individuals Affiliated with a Borrowing Business Due to the National Bank Act Loan Limits and Customer Satisfaction

It would seem, at first blush, that refusing to approve loans in excess of a statutory limit on lending to a single borrower would be an utterly simple task. National bank directors would seem to need only to look at the applicable statute[17] and examine the outstanding loan balance of the loan applicant; if the latter amount did not exceed the statutory limit, the loan could be approved without fear of personal liability for the bank board. Nothing in a bank director's job is that simple, however. To understand why national bank directors have been increasingly subjected to legal proceedings by the OCC and the bank's shareholders for, *inter alia*, loans in excess of statutory loan limits, the starting point for inquiry is in the statutory scheme which sets national bank lending limits.[18]

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12. The lending limits as to national banks are set forth at 12 U.S.C. § 84 (1987), *infra* note 19.

13. *See* Larimore v. Conover, *infra* note 158 (administrative law judge imposing personal liability on directors for loans in excess of statutory limit); *see generally* 12 U.S.C. § 84 (1987), *infra* note 19, and 12 U.S.C. § 93(a) (1987), *infra* note 63.

14. *See infra* notes 17-55.

15. *See infra* notes 56-142.

16. *See infra* notes 143-195.

17. 12 U.S.C. § 84 (1987), *infra* note 19.

18. *Id.*

A. *Scylla: 12 U.S.C. § 84 and 12 C.F.R. § 32.5*

The section of the National Bank Act imposing limits upon the amount of money a single national bank can loan to any one of its customers is 12 U.S.C. § 84.[19] Pursuant to section 84 of the Act, a national banking association may not legally make loans to a single borrower in excess of fifteen percent of the unimpaired capital and surplus of the bank, if the loans are either unsecured or secured in part by collateral which is not both readily marketable and subject to valuation on a continuously available market quotation system.[20]

A single national bank can loan an additional ten percent of its unimpaired capital and surplus to a particular borrower, but only if the loans in excess of the fifteen percent cap are secured exclusively by readily marketable collateral which has "a market value as determined by reliable and continuously available price quotations, at least equal to the amount of

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19. 12 U.S.C. § 84 (1987) provides, in relevant part:

§ 84 Limit of obligation of any person to bank

(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association at one time and fully secured by readily marketable collateral . . . shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Definitions

For the purpose of this section,—

(1) the term "loans and extensions of credit" shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person . . .;

(2) the term "person" shall include an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

. . . .

(d) Authority of Comptroller of the Currency

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section, including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

20. *See id.* at (a)(1).

the funds outstanding" in excess of the fifteen percent limit.[21] Generally, the aggregate of loans advanced to a single borrower cannot exceed twenty-five percent of a national bank's unimpaired capital and surplus.[22]

The first error which could create a loan in excess of the statutory lending limit is an overrating of the quality of the collateral provided by the borrower. If bank directors believe that the collateral securing a loan in excess of the fifteen percent base loan limit is "readily marketable" and subject to valuation on a continuing price quotation system, when in fact it is not, a loan in excess of the section 84 lending limits will exist to the extent that the borrower's loan balance exceeds the fifteen percent base limit of 12 U.S.C. § 84(a)(1) (1987).[23]

Bank directors, presumably familiar with various types of collateral, are not likely to approve a loan in excess of the section 84 limits by overrating the quality of the borrower's collateral—or at least not on a continuing basis. A more difficult problem for directors attempting to discern whether loans are within the section 84 limits is determining whether the "person"[24] applying for the loan has outstanding loan balances for section 84 purposes due to the applicant's affiliation with a business entity which also borrows from the bank.

Pursuant to the terms of the National Bank Act, the OCC has the authority to promulgate rules and regulations to guide those attempting to determine whether loans "made to a person shall for purposes of [12 U.S.C. § 84] be attributed to another person."[25] Exercising this authority, the OCC promulgated 12 C.F.R. § 32.5 (1988).[26]

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21. *See id.*

22. *See generally* 12 U.S.C. § 84(a) (1987), *supra* note 19. As a practical matter the bank could enter into participation agreements to sell off the portion of the borrower's loans in excess of the limits imposed by either 12 U.S.C. § 84(a)(1) or (a)(2). Also, there is an exception to the 25% maximum for "corporate group" borrowers. *See infra* notes 40-44 and accompanying text.

23. *See* 12 U.S.C. § 84(a)(1) and (2) (1987), *supra* note 19. A similar problem will arise if the value of the collateral decreases significantly.

24. The term "person," in a lending limit context under 12 U.S.C. § 84, is broadly defined to include individuals, business entities, and even some governmental units. *See* 12 U.S.C. § 84(b)(2) (1987), *supra* note 19.

25. *See* 12 U.S.C. § 84(d)(1) and (2) (1987), *supra* note 19.

26. 12 C.F.R. § 32.5 (1988), in relevant part, provides:

§ 32.5 Combining loans to separate borrowers

(a)(1) *General rule*: Loans or extensions of credit to one person will be attributed to other persons, for purposes of this part, when (i) the proceeds of the loans or extensions of credit are to be used for the direct benefit of the other person or persons or (ii) a "common enterprise" is deemed to exist between the persons.

The term "common enterprise" is defined at 12 C.F.R. § 32.5(a)(2) (1988). Rules as to the aggregation of loans made to corporations with those made to other borrowers are set forth in 12 C.F.R. § 32.5(b). Aggregation of loans to partnerships with loans to other borrowers is governed by 12 C.F.R. § 32.5(c). Aggregation of loans to foreign governmental units is the topic of 12 C.F.R. § 32.5(d). For an excellent discussion of the 12 C.F.R. § 32.5 art of aggregation of

Under 12 C.F.R. § 32.5, there are two situations in which loans to different borrowers must be aggregated in order to determine whether a violation of 12 U.S.C. § 84 has occurred: first, when the proceeds of the applicant's loan are to be used for the benefit of another borrower at the national bank (the "use-of-proceeds" test);[27] and second, when the applicant and another borrower at the bank are deemed to be engaged in a "common enterprise"[28] (the "common enterprise" test).[29]

Hence, before approving a loan to *any* borrower, the bank's directors must first determine from the facts available to them whether the funds are in fact being borrowed for a person other than the applicant, and if so, whether that other person also has loans outstanding at the bank.[30] If the funds are being borrowed for the benefit of a person other than the applicant, and that person does have outstanding loans at the bank, the directors must aggregate the outstanding loans of that person with the applicant's requested loan to determine whether approving the applicant's loan would violate 12 U.S.C. § 84 (1987).[31]

If the funds are being borrowed only for the applicant's benefit, the bank board must then determine whether the applicant is affiliated with another borrower at the bank in such a manner that a "common enterprise"[32] exists between them.[33] Three *per se* rules as to the existence of a "common enterprise" for purposes of loan aggregation are contained in 12 C.F.R. § 32.5(a)(2) (1988),[34] although the existence of a "common enterprise" is generally dependent upon the facts of a given case.[35] A "common enterprise" under 12 C.F.R. § 32.5 (1988) exists *per se*, requiring aggregation of loans to the applicant and another borrower at the bank for 12 U.S.C. § 84 analysis, in the following situations:

1. When the expected source of repayment is the same for the applicant and another borrower;[36] or

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loans for purposes of 12 U.S.C. § 84, *see* Glidden, *National Bank Lending Limits and the Comptroller's Regs: A Clarification*, 101 BANKING L.J. 430 (July-Aug. 1984) [hereinafter Glidden, *Lending Limits*].

27. *See* 12 C.F.R. § 32.5(a)(1)(i) (1988), *supra* note 26.

28. "Common enterprise" is defined at 12 C.F.R. § 32.5(a)(2).

29. *See* 12 C.F.R. § 32.5(a)(1)(ii) (1988), *supra* note 26.

30. *See* 12 C.F.R. § 32.5(a)(1)(i) (1988), *supra* note 26. The necessary information would presumably be disclosed by the loan application submitted by the applicant for the board's approval.

31. *See* 12 C.F.R. § 32.5(a)(1)(i) (1988), *supra* note 26; 12 U.S.C. § 84(a), (d), *supra* note 19.

32. *See supra* note 28.

33. *See* 12 C.F.R. § 32.5(a)(1)(ii) (1988), *supra* note 26.

34. *See* 12 C.F.R. § 32.5(a)(2)(ii-iv) (1988).

35. *See* 12 C.F.R. § 32.5(a)(2)(i) (1988).

36. 12 C.F.R. § 32.5(a)(2)(ii) (1988). This section provides: "(ii) Where the expected source of repayment for each loan or extension of credit is the same for each person, a 'common enterprise' will be deemed to exist and the loans or extensions of credit must be combined [for

2. When loans are made to an applicant and another borrower related to the applicant by common control,[37] if the applicant and the other borrower are engaged in interdependent business, or if there is substantial financial interdependence among the applicant, the other borrower, and any third borrower who controls both the applicant and the other borrower;[38] or

3. When loans are made to an applicant and another borrower at the bank for the purpose of acquiring a controlling share of a business.[39]

The *per se* rules set forth above are supplemented by special rules regarding aggregation of loans to corporate groups[40] and partnerships.[41] While loans to a corporation and its subsidiaries *may* have to be aggregated, such loans may properly be treated as loans to separate borrowers *if* the bank's board determines that the applicant and the borrower (1) are obtaining the funds for their own use; (2) are not members of a partnership or joint venture; and (3) are not engaged in a common enterprise.[42] No corporate group, however, may borrow more than fifty percent of the bank's capital.[43]

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purposes of loan limit computations under 12 U.S.C. § 84]."

37. "Control" is defined in 12 C.F.R. § 32.5(a)(2)(v) (1988), *infra* note 38.

38. 12 C.F.R. § 32.5(a)(2)(iii) (1988). This portion of the Comptroller's regulation states, in relevant part:

> (iii) where loans or extensions of credit are made to persons who are related through common control, including where one person is controlled by another person, a "common enterprise" will be deemed to exist if the persons are engaged in interdependent businesses or there is substantial financial interdependence among them. A "common enterprise" will be deemed to exist when 50 percent or more of one person's gross receipts or gross expenditures (on an annual basis) are derived from transactions with one or more persons related through common control (as defined in paragraph (a)(2)(v) of this section) . . . .

"Control" for purposes of 12 C.F.R. § 32.5(a)(2)(iii) (1988) is defined in 12 C.F.R. § 32.5(a)(2)(v) (1980) as follows:

> (v) "[C]ontrol" shall be presumed to exist when:
> (A) One or more persons acting in concert directly or indirectly own, control or have power to vote 25 percent or more of any class of voting securities of another person; or
> (B) One or more persons acting in concert control, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or
> (C) Any other circumstances exist which indicate that one or more persons acting in concert directly or indirectly exercise a controlling influence over the management or policies of another person.

39. 12 C.F.R. § 32.5(a)(2)(iv) (1988). This paragraph explains that: "(iv) A 'common enterprise' will also be deemed to exist when separate persons borrow from a bank for the purpose of acquiring a business enterprise of which those persons will own more than 50 percent of the voting securities."

40. *See* 12 C.F.R. § 32.5(b)(3) (1988). A "corporate group" is defined as "a person and all of its subsidiaries."

41. *See* 12 C.F.R. § 32.5(c) (1988).

42. Glidden, *Lending Limits*, *supra* note 26, at 440; *see generally* 12 C.F.R. § 32.5(b)(2), (a)(1) (1988).

43. *See* 12 C.F.R. § 32.5(b)(3) (1988).

These changes from the prior law applicable to evaluation of loans to a corporate borrower's subsidiaries in a lending limit context[44] create a potential for director error in determining whether a loan exceeds 12 U.S.C. § 84 limits. If the directors determine that the applicant subsidiary is borrowing for its own use, that the subsidiary is not a member of a partnership or joint venture, and that the subsidiary is not engaged in a common enterprise with its parent which also borrows at the bank, when in fact one of these determinations is erroneous, the result could very well be approval of a loan exceeding section 84 lending limits.

Loans to a general partnership are considered loans to each partnership member under 12 C.F.R. § 32.5(c)(1).[45] The converse is not true, however. Loans to individual members of a partnership are not automatically attributed to the partnership.[46] Aggregation will occur only if the "use-of-proceeds" test[47] or the "common enterprise" test[48] is satisfied with respect to a particular loan to a partnership member;[49] or if a loan is made to a partnership member for the purpose of purchasing a partnership interest.[50]

With respect to limited partnerships, loans to the limited partnership are not automatically attributed to the limited partners.[51] Loans to the lim-

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44. Prior to the enactment of the Garn-St. Germain Depository Institutions Act, *supra* note 6, the National Bank Act and OCC regulations operated to automatically combine loans to a corporation and its subsidiaries. *See* OCC Interpretive Ruling 7.1310, 12 C.F.R. § 7.1310 (1981); *see generally* Glidden, *Lending Limits*, *supra* note 26, at 440. In addition, the fifty percent cap applicable to a "corporate group" represents the first time that an aggregate limit, rather than a per customer limit, has been imposed on corporate borrowing. *Id.*

45. 12 C.F.R. § 32.5(c)(1) (1988) provides:

(c) Loans to partnerships, joint ventures and associations.

(1) Loans or extensions of credit to a partnership, joint venture, or association shall, for purposes of [loan limit analysis under 12 U.S.C. § 84] be considered loans or extensions of credit to each member of such partnership, joint venture, or association.

46. 12 C.F.R. § 32.5(c)(2) (1988) provides:

(2) Loans or extensions of credit to members of a partnership, joint venture, or association shall, for purpose [sic] of [loan limit analysis under 12 U.S.C. § 84] be attributed to the partnership, joint venture, or association where one or more of the tests set forth in [12 C.F.R. § 32.5(a) (1988), *supra* note 26] is satisfied with respect to one or more such members. However, loans to members of a partnership, joint venture, or association will not be attributed to other members of the partnership, joint venture or association . . . under this paragraph unless one or more of the tests set forth in [12 C.F.R. § 32.5(a) (1988), *supra* note 26] is satisfied with respect to such other members. The tests set forth in [12 C.F.R. § 32.5(a) (1988), *supra* note 26] shall be deemed to be satisfied when loans or extensions of credit are made to members of a partnership, joint venture or association for the purpose of purchasing an interest in such partnership, joint venture or association.

47. *See supra* note 27.

48. *See supra* note 29.

49. *See* 12 C.F.R. § 32.5(c)(2) (1988), *supra* note 46.

50. *Id.*

51. 12 C.F.R. § 32.5(c)(3) (1988). This section provides that:

(3) The rule set forth in paragraph (c)(1) of this subsection [*supra* note 45] is not

ited partners may be considered loans to the limited partnership, however, if the "use-of-proceeds" test[52] or the "common enterprise" test[53] is satisfied.[54]

To summarize, if the applicant for a loan is a general partnership, the amount of the loan requested by the partnership must also be attributed to the partners themselves before bank directors can properly determine whether a loan will violate 12 U.S.C. § 84. If the applicant for a loan is a limited partnership, the loan obligations of the partnership need not automatically be attributed to limited partners, but the requested loan will be attributed to the general partners for purposes of loan limit analysis. Finally, if the applicant is a partner in either a limited or a general partnership, the directors must apply the "use-of-proceeds" and "common enterprise" tests to determine whether aggregation is necessary for purposes of 12 U.S.C. § 84 loan limit analysis.

The obvious complexity involved in determining whether a loan will exceed the lending limits imposed on national banks by 12 U.S.C. § 84 provides some explanation of the frequency of suits against national bank directors based on lending limit violations. But there are consumer relations complications as well—and these may be adding fuel to the figurative fire of litigation.

B. *Charybdis: Loan Refusal Due to Potential Lending Limit Violations and Resulting Customer Dissatisfaction*

As a practical matter, directors of a national bank will want to maintain their bank's clientele of borrowers. Hence, the bank directors probably will be willing to do nearly anything legally possible to promote the satisfaction of their major borrowing customers—typically corporations, partnerships, and individuals who are in some fashion related to a borrowing business.

Admittedly, the entire community has an interest in the fiscal integrity of the banks in the area.[55] When a borrower requests a loan from a bank and is turned away due to loan limitations arising from the aggregation of loans which the borrower perceives as having been made to another entity, however, the thought of promoting the interests of the community will offer little solace to the disgruntled borrower, whose selfish interest in obtaining

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applicable to limited partners in limited partnerships or to members of joint ventures or associations if such partners or members, by the terms of the partnership or membership agreement, are not to be held liable for the debts or actions of the partnership, joint venture, or association. However, the rules set forth in [12 C.F.R. § 32.5(a) (1988), *supra* note 26] are applicable to such partners or members.

Compare note 45 and accompanying text (loans to general partnership attributed to each general partner).

52. *See supra* note 27.
53. *See supra* note 29.
54. *See* 12 C.F.R. § 32.5(c)(3) (1988), *supra* note 51.
55. *See supra* note 3 and accompanying text.

desired financing has been impinged upon.

As a result, tremendous pressure may be brought to bear upon a national bank's board of directors by large borrowing customers, through implications or even outright threats to "find another bank" or "elect a new board of directors" which will think the way the borrower does, if a particular loan is refused on a lending limit basis. Some national bank boards of directors have probably capitulated to the demands of their better borrowing customers to make loans in excess of lending limits "or else."

C. *Summary*

Whatever the reason for doing so, be it the complexity of the lending limit scheme, or the pressure for financing exerted by large borrowers, it is simply a fact that national bank directors do approve loans in excess of the limits permissible under 12 U.S.C. § 84. The result: suits against the directors by disgruntled shareholders, and by the OCC for violations of the National Bank Act. The focus of the remainder of this article will be on the propriety of certain actions brought by the bank's shareholders, and on the appropriateness of the use of the OCC's cease and desist power as a device to compel directors personally to bring the bank into compliance with 12 U.S.C. § 84 lending limits by reimbursing the bank for loans in excess of those limits.

III. Shareholders' Direct Actions Against National Bank Directors: A Proper Remedy for Director Approval of Loans in Excess of 12 U.S.C. § 84 Limits?

A. *The Standard of Care*

In the discharge of their duties, including the observation of lending limits imposed by 12 U.S.C. § 84, bank directors are bound to exercise that degree of care "which ordinarily prudent and diligent men would exercise under similar circumstances."[56] A bank director's duty of care is sometimes said to be an even higher duty than that owed by his or her commercial business counterparts.[57] This is so because the actions of bank directors are measured against the conduct of persons acting "under similar circumstances."[58] This phrase has been construed to mean that actions taken by bank directors are measured against the actions other bank directors would have taken in the given situation, as opposed to the actions other persons generally would deem appropriate.[59]

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56. Briggs v. Spaulding, 141 U.S. 132, 152 (1890) *cited in* Deal, *Liability of Bank Directors*, 39 Bus. Law. 1033, 1038 (May 1984) [hereinafter Deal].

57. *See* Deal, *supra* note 56, at 1038 n.21.

58. *See supra* note 56 and accompanying text.

59. *See supra* note 57.

The above standard of care has served as the basis for common law bank director liability for a number of years.[60] In several instances the suits filed by national bank shareholders for damages allegedly resulting from director misconduct have been direct actions against the directors.[61] The shareholders in these actions asserted that certain sections of the National Bank Act gave rise to a private right of action in the shareholders against the directors for the directors' conduct in violation of the Act.

B. *Direct Injury: A Prerequisite to Direct Actions by Bank Shareholders Against Bank Directors for Loans Exceeding the Lending Limits of the National Bank Act?*

When directors approve loans in excess of the statutory lending limits set forth in 12 U.S.C. § 84,[62] any resulting direct action brought against the directors is likely to be premised on 12 U.S.C. § 93.[63] As recently as 1985 a

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60. *See* Grunewald & Golden, *supra* note 1, at 413.

61. Direct actions by shareholders against national bank directors are to be distinguished from derivative actions instituted by the shareholders on behalf of the bank. In essence a derivative action consists of two suits. The first suit is an action by the shareholders to compel the bank itself to bring suit against the "real defendants," typically the management or directors, for improper actions which caused the value of the bank's stock to decline. The directors and management will generally be hesitant to sue themselves. If the defendant directors or management do decide not to sue themselves, this decision is not entitled to the presumption that the managers or directors acted in the best interests of the bank. To bolster the credibility of decisions concerning suit, the bank's board may well appoint an independent special litigation committee. This committee will hire outside, disinterested counsel and will make the ultimate decision whether it would be in the best interest of the bank to sue its own directors and management. If the court rejects the decision not to sue, however, the derivative action proceeds to the second suit for the recovery of damages. Any damages recovered in a derivative suit go to the bank itself, unless the result would be to enrich those directors and officers accused of wrongdoing. *See generally* Bishop, *Derivative Suits Against Bank Directors: New Problems, New Strategies*, 97 BANKING L.J. 158 (Feb. 1980); Pearlman v. Feldmann, 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

62. *See supra* note 19.

63. Section 93 of the National Bank Act provides, in relevant part:

> 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty
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> (a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this chapter, all the rights, privileges and franchises of the association shall be thereby forfeited. *Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States* in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And *in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation* [emphasis added].

Section 93(b)(1) provides that a director can also be assessed a civil monetary penalty of up to

commentator recognized that 12 U.S.C. § 93 "contemplates two types of lawsuits, one by the Comptroller of Currency to take away the rights and privileges of a national bank and one by private parties to obtain damages from responsible directors."[64]

The Office of the Comptroller of Currency (OCC) has used its 12 U.S.C. § 93 forfeiture of privileges power very sparingly, to say the absolute least. The most recent institution of a forfeiture action by the OCC under section 93 of the National Bank Act was in 1922.[65] Even that "recent" action was dismissed when ownership and management of the bank at issue were transferred to parties other than the defendants.[66] By and large the actions under 12 U.S.C. § 93 have been instituted by national bank shareholders against the bank's directors in private actions.

That a shareholder of a national bank can bring a direct action against the bank's directors for violations of the National Bank Act, including violations of the lending limit provisions of 12 U.S.C. § 84, *is* clear from the language of 12 U.S.C. § 93.[67] But the inquiry cannot stop there. The issue then becomes what type of injury a shareholder must demonstrate in order to have standing, a jurisdictional prerequisite to a federal court action,[68] to bring a direct action against the directors of a national bank. There is a split of authority on the issue.

1. *The* Harmsen *Case: Diminution of the Value of a National Bank's Stock Is Injury Sufficient to Support a Direct Action Against the Bank's Directors Under 12 U.S.C. § 93(a)*

One of the important cases which has reached a United States court of appeals on the issue whether stock value diminution is an injury giving a national bank shareholder standing to sue the bank's directors under 12 U.S.C. § 93(a) was *Harmsen v. Smith*.[69] In the *Harmsen* case the minority shareholders of the United States National Bank of San Diego (USNB) had instituted a direct action against the bank's directors after the bank failed. The plaintiffs' complaint alleged, *inter alia*, that the USNB directors had

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$1000 per day for each day the violation continues. Section 93(b)(2) grants the OCC discretion to determine the appropriate size of the penalty in light of the facts of the case. Sections 93(b)(3) and (4) provide the hapless director with an opportunity for an agency hearing through the OCC, and review of the agency decision by the appropriate United States court of appeals, respectively.

64. *See* Glidden, *National Bank Directors' Liability: The Case for Private Rights of Action*, 102 BANKING L.J. 142, 143 (March-April 1985) [hereinafter Glidden, *Directors' Liability*].

65. First Nat'l Bank v. Crissinger, 279 F. 818 (4th Cir. 1922).

66. *Id*; *see* Glidden, *Directors' Liability*, *supra* note 64, at 143 n.4.

67. This author agrees with Mr. Glidden that private direct actions by shareholders are expressly provided for in the last sentence of 12 U.S.C. § 93(a) (1987). *See supra* note 64 and accompanying text.

68. *See generally* Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

69. Harmsen v. Smith, 542 F.2d 496 (9th Cir. 1976), *cert. denied*, 464 U.S. 822 (1983).

violated the provisions of the National Bank Act.[70] The plaintiffs' complaint, however, failed to allege facts substantiating their allegations that misleading statements made in audits of USNB and its affiliates, which were ratified by the directors and submitted to the OCC in violation of the National Bank Act,[71] were relied upon by the plaintiffs to their direct injury.[72] The only injury alleged by the plaintiffs in *Harmsen* was diminution of the value of the plaintiffs' bank stock after the bank had failed.[73]

Shortly after the plaintiffs filed their complaint, the FDIC as receiver for the USNB moved to intervene to displace the shareholders as plaintiffs, and the directors of the USNB moved to dismiss the complaint.[74] The district court refused to permit the FDIC to displace the minority shareholders as plaintiffs,[75] and denied the directors' motion to dismiss the complaint with respect to violations of the National Bank Act and pendent state law claims.[76] Both the FDIC and the defendant directors appealed to the United States Court of Appeals for the Ninth Circuit.[77]

The Ninth Circuit affirmed the district court's refusal to allow the FDIC to displace the minority shareholders as plaintiffs,[78] found that 12 U.S.C. § 93 did provide the plaintiffs with a direct action against the directors,[79] and affirmed the district court's refusal to dismiss the plaintiffs' complaint in its entirety.[80]

With respect to the plaintiffs' allegations as to the directors' violation of the National Bank Act, the Ninth Circuit's holding was twofold. First, the court in *Harmsen* found that the direct cause of action which national bank shareholders may assert against the bank's directors under 12 U.S.C. § 93 was limited to suits arising from director conduct in violation of chapter 2 of title 12 of the United States Code.[81] The second and more significant holding in *Harmsen* was that "minority shareholders may, under Section 93 of the National Banking Act, maintain in their own right a cause of action for

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70. The plaintiffs in *Harmsen* alleged that the defendant USNB directors violated 12 U.S.C. § 161 by making and ratifying "false and misleading reports to the Comptroller of audits of USNB and its affiliates." *Id.* at 502.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 498.

75. *Id.*

76. *Id.* The district court did, however, grant the directors' motion to dismiss the portion of the complaint alleging violations of the federal securities laws. *Id.*

77. *Id.* No appeal was taken from the district court's dismissal of the securities law portion of the plaintiffs' complaint. *Id.*

78. *Id.*

79. *Id.* at 498-99.

80. *Id.* at 499.

81. *Id.* at 501. The court summarily dismissed the pendent state law claims asserted by the plaintiffs, stating that a direct action under 12 U.S.C. § 93 precluded state law claims of common law fraud and deceit. *Id.* at 502.

damages after their bank has failed where the only damages claimed are the diminution of the value of their shares."[82]

The second holding in *Harmsen*[83] seemed to establish that when a national bank's shareholders allege that the bank's directors violate the provisions of chapter 2 of the National Bank Act, a decrease in the value of the bank's stock is an injury sufficient to establish the shareholders' standing to sue the directors directly under 12 U.S.C. § 93. The issue had not been settled in other circuits, however.

2. *The* Gaff *Decision: Diminution of the Value of National Bank Shareholders' Stock Is Not a Personal Injury Sufficient to Support a Direct Action Against the Bank Directors Under 12 U.S.C. § 93*

The Sixth Circuit Court of Appeals had occasion to take issue with the *Harmsen* decision recently in *Gaff v. FDIC*.[84] The plaintiffs in *Gaff* were shareholders of the National Bank and Trust Company of Traverse City (NBT).[85] The defendants were NBT's chairman of the board and NBT's president.[86]

The plaintiffs originally filed their actions in a Michigan state court alleging state law causes of action, and the defendants removed the actions to a Michigan federal district court on the ground that both cases involved federal questions, including questions arising under the National Bank Act.[87] The district court remanded the cases to the Michigan state court, which entered an order consolidating the cases into a single proceeding.[88]

Subsequently the OCC declared the NBT insolvent, closed the NBT, and appointed the FDIC as the NBT's receiver.[89] The FDIC, in its capacity as the NBT's receiver, removed the entire proceeding to the Michigan federal district court.[90] The FDIC in its corporate capacity then filed a "Motion to Intervene and Motion to Dismiss Present Party Plaintiffs" in an effort to gain control of the proceedings.[91] Next, the defendants filed a motion to dis-

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82. *Id.* at 499.
83. *See supra*, text accompanying note 82.
84. Gaff v. FDIC, 814 F.2d 311 (6th Cir. 1987).
85. *Id.* at 312.
86. *Id.*
87. *Id.* at 312-13.
88. *Id.* at 313.
89. *Id.*
90. *Id.*; *see infra* note 91.
91. *Id.* The FDIC's claim that it was the proper party plaintiff in the Gaff litigation arose from the dual roles the FDIC plays when it takes control of a failing bank. The FDIC's first role is that of a *corporation*, in this case a corporation which advanced a great deal of money to insure the safety of NBT's depositors and creditors. *Id.* The recipient of the sums advanced was the FDIC in its second capacity, as a *receiver* for NBT. *Id.* In return for the funds advanced by the FDIC (as a corporation) to the FDIC (as NBT's receiver), the FDIC (as NBT's receiver) assigned all causes of action against NBT's officers and directors to the FDIC (as a

miss the fifth count of the plaintiffs' complaint, captioned "Stockholders' Class Action," arguing that while it had been characterized by the plaintiffs as a direct action against the former NBT directors and officers, it was actually a derivative action for injuries sustained by the NBT.[92]

The district court granted the FDIC's Motion to Intervene in its corporate capacity, reasoning that the FDIC was a proper party plaintiff, but refused to dismiss the original plaintiffs from the action.[93] The district court denied the defendants' motion to dismiss count five of the complaint, and granted the original plaintiffs leave to amend that count.[94]

One of the original plaintiffs, Gaff, did amend count five, adding claims to the original state law claims contained in that count.[95] A portion of the amended version of count five of Gaff's complaint alleged that Gaff had standing to sue for violations of the National Bank Act.[96]

The defendants moved to dismiss the amended version of count five of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that count five did not state a claim because it was a derivative claim which could not be maintained by an individual shareholder.[97] In support of their motion to dismiss, the defendants noted that Gaff had not alleged a *personal* injury resulting from the defendants' acts as NBT directors, as distinguished from injuries to the NBT corporate entity.[98]

The district court held that 12 U.S.C. § 93 does create a private right of action such that under certain circumstances shareholders can bring direct actions against the bank's directors for violation of the national banking laws.[99] The district court then held that Gaff had sufficiently stated a claim under 12 U.S.C. § 93, even though no specific personal injuries had been alleged in count five of the complaint.[100] The district court cited *Harmsen*[101]

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corporation). *Id.* Hence it was the FDIC in its *corporate capacity* that sought to displace the original plaintiffs in this action, on the basis of the assignment of the actions it had received from the FDIC in its capacity as NBT's *receiver*.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 313 n.1.

96. *Id.* at 313-14. Specifically, Gaff asserted that he had standing to sue for violations of the National Bank Act pursuant to 12 U.S.C. § 93 (*supra* note 63) and 12 U.S.C. § 503. *Id.* 12 U.S.C. § 503 (1987) provides:

> § 503. Liability of directors and officers of member banks
>
> If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers or directors of any member bank to violate any of the provisions of [Title 12 governing insider transactions], every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders or any other persons shall have sustained in consequence of such violation.

97. Gaff v. FDIC, 814 F.2d at 314.

98. *Id.*

99. *Id.*

100. *Id.*

and a Sixth Circuit case, *Marx v. Centran Corp.*,[102] in support of its position, and denied the defendants' motion to dismiss.[103]

The defendants moved the district court to reconsider, or to certify a question to the Sixth Circuit as to the plaintiffs' standing to sue directly, on the basis of *Warren v. Manufacturers National Bank*,[104] a case decided by the Sixth Circuit just after the district court had denied the defendants' motion to dismiss.[105] The district court examined the holding in *Warren*, found that the Sixth Circuit had rejected the *Harmsen* court's position that the diminution of stock value is a personal injury conferring standing on shareholders like Gaff to sue directly under the National Bank Act, dismissed count five of Gaff's complaint, and entered a final judgment to that effect pursuant to Federal Rule of Civil Procedure 54(b).[106] Gaff appealed to

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101. *See supra* notes 69-83 and accompanying text.

102. Marx v. Centran Corp., 747 F.2d 1536, 1540 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985). The *Marx* case involved a complaint by a shareholder (Marx) of a bank holding company (Centran) that owned Central National Bank of Cleveland (CNB). *Id.* at 1538. CNB embarked on an ill-fated investment scheme. *Id.* at 1539. Centran issued and sold 500,000 shares of Centran stock to Marine Midland Banks, a New York bank holding company, using the proceeds to infuse capital into CNB. *Id.* Marx's suit was premised on the illegality of the Marine Midland transaction, and was instituted by a two-count complaint. *Id.* at 1539-40. One count asserted a direct action by Marx and all Centran shareholders against the directors of Centran and CNB for violations of, *inter alia*, the provisions of the National Bank Act. *Id.* at 1540. The second count presented the identical claims in a derivative action format. *Id.* The injury alleged by Marx was diminution in the value of Centran's stock due to the actions of CNB and Centran. *Id.* Affirming the district court and citing *Harmsen* (*see supra* text accompanying note 82), the Sixth Circuit in *Centran* found that:

> The district court held that Marx does have a direct and derivative cause of action for alleged violations of 12 U.S.C. § 24. This result is obviously correct. [The court quotes 12 U.S.C. § 93(a)] . . . . Thus, it is "beyond dispute that under proper circumstances Section 93 creates a direct cause of action by the shareholders against the directors of a national bank" [citing *Harmsen, inter alia*] . . . . [S]ince both § 24 and § 93 are contained in chapter 2 of title 12 of the United States Code, it is clear that Marx may maintain a cause of action both directly and derivatively for the benefit of Centran for violations of § 24.

Marx v. Centran Corp., 747 F.2d at 1540.

103. Gaff v. FDIC, 814 F.2d at 314.

104. Warren v. Manufacturers Nat'l Bank, 759 F.2d 542 (6th Cir. 1985).

105. Gaff v. FDIC, 814 F.2d at 314.

106. *Id.* at 814-15. Although *Warren*, *supra* note 104, involved a RICO suit brought directly against the bank's directors by a stockholder of a *borrowing corporation*, instead of a direct action by the *bank's shareholders* against the directors under the National Bank Act, the district court in *Gaff* apparently found the following language in *Warren* applicable in either factual scenario:

> An action to redress injuries to a corporation cannot be maintained by a shareholder in his own name, but must be brought in the name of the corporation. The shareholder's rights are merely derivative and can be asserted only through the corporation. Although this rule does not apply in a case where the shareholder shows a violation of duty owed directly to him, *diminution in value of the corporate assets is insufficient direct harm* to give the shareholder standing to sue in his own right.

the Sixth Circuit.[107]

The Sixth Circuit found the issue presented to be "whether the district court erred in holding that Gaff lacked standing to assert a direct claim for monetary damages under the federal banking acts because he had not alleged sufficient personal injury."[108] The Sixth Circuit noted that the *Harmsen* decision[109] supported Gaff's position, but examined the general rules as to injuries conferring standing to sue in a direct action as opposed to a derivative action in affirming the district court's decision.[110]

The Sixth Circuit in *Gaff* stated the rule and rationale for finding that diminution in share value does not constitute a personal injury sufficient to provide a shareholder of a national bank with the standing necessary to bring a suit directly against the bank's directors under title 12 of the United States Code:

> [W]here an injury is suffered by a corporation and the shareholders suffer solely through depreciation in the value of their stock, only the corporation itself, its receiver, if one has been appointed, or a stockholder suing derivatively in the name of the corporation may maintain an action against the wrongdoer.[111]
>
> The reasoning behind this rule is that a diminution in the value of corporate stock resulting from some depletion of or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder.[112]

The court in *Gaff* did note an exception to the general rule that decreases in share value did not constitute a "personal injury" in a standing context:

> [W]here the shareholder suffers an injury separate and distinct from that suffered by other shareholders, or the corporation as an entity, the shareholder may maintain an action in his own right.[113]

In light of these general rules, the Sixth Circuit in *Gaff* reached the following conclusion:

> Gaff primarily claims that his shares in the failed bank became totally worthless as a result of defendants' conduct. Gaff therefore is claiming injury based on a decrease, albeit to zero, in the value of his stock. As we just stated, a diminution in the value of stock is merely indirect harm to a shareholder and does not bestow upon a shareholder the standing to

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Warren v. Manufacturers Nat'l Bank, 759 F.2d at 544.

107. Gaff v. FDIC, 814 F.2d at 315.

108. *Id.*

109. *See supra* notes 69-83 and accompanying text.

110. *See generally* Gaff v. FDIC, 814 F.2d at 315-18.

111. *Id.* at 315 (citing Vincel v. White Motor Corp., 521 F.2d 1113, 1118 (2d Cir. 1985)).

112. *Id.* at 315 (citing Eagle v. American Tel. & Tel. Co., 769 F.2d 541, 545-46 (9th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986)).

113. *Id.* (citing Twohy v. First Nat'l Bank, 758 F.2d 1185, 1194 (7th Cir. 1985)).

> bring a direct cause of action under [12 U.S.C.] § 93.[114]

At first blush it would appear that the holdings in *Harmsen*[115] and *Gaff*[116] are diametrically opposed. When a full comparison is undertaken, however, it becomes clear that *Harmsen* and *Gaff*[117] can be reconciled, and that the two cases actually define the current parameters for allowable shareholder suits filed directly against national bank directors pursuant to 12 U.S.C. § 93(a).

3. *The Prerequisite to Direct Shareholder Actions Against National Bank Directors Under* Gaff *and* Harmsen: *Diminished Stock Value—Plus*

The courts in both *Harmsen*[118] and *Gaff*[119] "recognized the well-accepted principle that [12 U.S.C.] § 93 creates a direct cause of action in shareholders '*under proper circumstances.*' "[120] The next inquiry necessary in order to reconcile the two cases is: what facts constitute the "proper circumstances" allowing a national bank shareholder to sue the national bank's directors directly under 12 U.S.C. § 93?

The courts in both *Harmsen*[121] and *Gaff*[122] held that a shareholder bringing a direct action against a national bank's directors under 12 U.S.C. § 93 must "demonstrate that the damages he seeks are personal to him [since] Section 93 does not permit him to recover for injuries done to the bank of which the defendant is a director."[123] The issue then becomes: what kind of injury is sufficiently personal to confer standing upon a shareholder for purposes of 12 U.S.C. § 93?

The conflicting outcomes in *Harmsen*[124] and *Gaff*[125] arose from the different allegations of injury contained in the complaints in the respective cases. In *Gaff* there were only allegations that the defendant directors' conduct was wrongful; allegations that the defendant directors had violated NBT shareholders' preemptive rights; a request for damages; and a request for an accounting.[126] Nowhere did the plaintiffs even allege that they them-

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114. *Id.* at 318.
115. *See supra* notes 69-83 and accompanying text.
116. *See supra* notes 84-114 and accompanying text.
117. *See supra* notes 115 and 116.
118. *See supra* note 69.
119. *See supra* note 84.
120. Gaff v. FDIC, 814 F.2d at 317; *see, e.g.*, Harmsen v. Smith, 542 F.2d at 500 ("[I]t is beyond dispute that under proper circumstances [12 U.S.C.] § 93 creates a direct cause of action"). This principle was established long before either *Harmsen* or *Gaff* was decided, in Chesbrough v. Woodworth, 244 U.S. 72, 76 (1917).
121. *See supra* note 69.
122. *See supra* note 84.
123. Gaff v. FDIC, 814 F.2d at 316 (quoting Harmsen v. Smith, 542 F.2d at 500).
124. *See supra* note 69.
125. *See supra* note 84.
126. Gaff v. FDIC, 814 F.2d at 313.

selves had personally relied on any wrongful statements, acts, or omissions of the defendant directors.[127] The only harm Gaff alleged he had suffered was the diminution in the value of his stock to worthlessness upon the bank's failure.[128]

The complaint in *Harmsen*, however, was different. The allegations in the *Harmsen* complaint were that the defendant directors had violated 12 U.S.C. § 161 by making and ratifying false reports to the OCC regarding audits of the USNB and its affiliates.[129] While the complaint in *Harmsen did* allege that the plaintiffs had been injured by the diminution in the value of their shares, the *Harmsen* complaint also did more.[130]

Having noted plaintiffs' allegations that the defendant directors had violated 12 U.S.C. § 161, the *Harmsen* court found that in the complaint:

> [t]he plaintiffs then allege[d] that *they relied on these misleading statements to their direct injury*. We hold this is sufficient to allege a cause of action for which Section 93 permits a shareholder to sue directly.
>
> . . . .
>
> The shareholders' *failure to allege the facts* upon which they intend to base their *showing of reliance and the injury resulting therefrom* does not entitle the defendants to dismissal of the complaint.[131]

The complaint in *Harmsen*, unlike that in *Gaff*,[132] stated a cause of action against the directors for fraudulent misrepresentation independent of the violation of the banking laws which arose from the same misrepresentations.[133] More specifically, the complaint in *Harmsen* alleged that the plaintiff stockholders personally relied on the false statements made by the defendant directors to the OCC in violation of 12 U.S.C. § 161 to the plaintiffs' personal detriment and injury, *but failed to allege facts tending to prove* personal reliance on the directors' false statements or the extent of plaintiffs' resulting personal damages.[134]

What the *Harmsen* court held was that in addition to the 12 U.S.C. § 161 violation, the plaintiffs' complaint stated the elements of a cause of action involving the type of personal injury which would give them standing to sue the defendant directors directly under 12 U.S.C. § 93.[135] Therefore, dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) was not warranted merely because the plaintiffs omitted facts supporting the reliance and personal injury elements of the cause of action stated in their

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127. *See generally* Gaff v. FDIC, 814 F.2d 311 (6th Cir. 1987).
128. *Id* at 318.
129. *See* Harmsen v. Smith, 542 F.2d at 502.
130. *Id.*
131. *Id.*
132. *See supra* notes 126-28 and accompanying text.
133. *See* Harmsen v. Smith, 542 F.2d at 502.
134. *Id.*
135. *Id.*

complaint, nor because the complaint coincidentally stated that the plaintiffs had *also* been injured by the diminution in value of their bank stock.

In summary, the *Harmsen* court found that while plaintiffs would be hard pressed factually to support the reliance and damage elements of their independent cause of action, "difficulty of proof provides no reason for dismissing the complaint" unless "it appears beyond a reasonable doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief."[136] The *Harmsen* court was apparently of the opinion that the plaintiffs *could possibly* show that they had in fact relied on the defendant directors' misstatements to the OCC, and *could possibly* show that they had suffered resulting damages *other than* diminution in the value of their shares. Because the plaintiffs could potentially establish a cause of action for fraudulent misrepresentation independent of the 12 U.S.C. § 161 violation, with resulting personal injuries other than diminution in the value of their USNB stock, the *Harmsen* court refused to dismiss the complaint.

This reading of *Harmsen* makes that court's holding consistent with *Gaff*'s statement that diminution in stock value is not, without more, an allegation of a direct personal injury giving a national bank stockholder standing to assert a direct action against the bank's directors under 12 U.S.C. § 93.[137] Reading the two cases together establishes the following rules with respect to direct actions by national bank shareholders against bank directors under 12 U.S.C. § 93: to establish standing to institute a direct action against the directors of a national bank under 12 U.S.C. § 93, a national bank shareholder must:

1. Demonstrate that the provision of the National Bank Act allegedly violated by the directors is a provision contained in chapter 2 of title 12 of the United States Code (12 U.S.C. §§ 21-216d);

2. Establish that the same facts constituting the violation of the National Bank Act give rise to an *independent* cause of action and injury personal to the shareholder (*i.e.*, shareholder reliance on misstatements by bank directors to the OCC); and

3. Allege the elements of the independent cause of action in the complaint, *including damages other than mere diminution in the value of the bank's stock.*

Since the lending limits for national banks are set forth in chapter 2 of title 12 of the United States Code at 12 U.S.C. § 84, the above-stated rule would be applicable to any direct actions brought by national bank shareholders against the bank's directors under 12 U.S.C. § 93 for lending limit violations.

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136. *Id.*

137. *See supra* text accompanying note 114.

4. *The* Harmsen-Gaff *Rule Applied: Shareholders' Direct Suits Against a National Bank's Directors for 12 U.S.C. § 84 Lending Limit Violations Pursuant to 12 U.S.C. § 93 Are Generally Improper*

Assuming that a national bank's directors have approved loans which they should have known exceeded the lending limits imposed upon national banks by 12 U.S.C. § 84,[138] the issue arises as to whether a shareholder could directly sue the bank's directors on the basis of such loans under section 93. The difficulty in bringing such an action becomes immediately apparent when the issue is analyzed under the rules established by the holdings in *Gaff* and *Harmsen* as reconciled above.

The first rule, that the provision of the National Bank Act violated must be contained in chapter 2 of title 12 of the United States Code, is satisfied.[139] The second rule, however, which requires that the same facts giving rise to the banking law violation also establish the plaintiff shareholder's independent cause of action and injury, would be satisfied in few if any cases.

The directors' decision to approve a loan application is typically made within the confines of the boardroom, and the decision-making process is not generally made the subject of a report to third parties, other than bank employees and OCC examining teams. Hence it is not likely that a shareholder could rely on the board's decisions with respect to loan applications and lending limits to their personal injury. The *Harmsen* court noted this problem:

> [W]ith respect to [12 U.S.C. § 84 lending limit] violations the shareholders' proof must demonstrate that the directors knowingly violated Section 84 and that the shareholders relied upon reports of the directors falsely indicating compliance with Section 84 to their injury. In the absence of such proof any injury resulting from the violation of Section 84 is to the bank and not directly to the shareholders. Such proof cannot be supplied by simply demonstrating that the violation of Section 84 contributed to, or was the proximate cause of, the insolvency of [the bank]. Any such demonstration indicates an injury to the [bank], but not to the shareholders in their individual and personal capacity. Nor can the required proof be provided by a showing of a general belief that all was going well, accompanied by inaction, up to the date the bank was declared insolvent.[140]

In light of this statement in *Harmsen*, it is difficult to imagine any cases in which the directors' decision to approve a loan in excess of 12 U.S.C. § 84 lending limits would give rise to an independent cause of action in favor of a

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138. *See supra* notes 17-55.

139. Chapter Two of Title 12 of the United States Code consists of 12 U.S.C. §§ 21-216d, including 12 U.S.C. § 84.

140. Harmsen v. Smith, 542 F.2d at 502 (9th Cir. 1976).

shareholder. As a result, the use of a shareholder direct action against national bank directors under 12 U.S.C. § 93 to recover damages arising from violations of the provisions of the 12 U.S.C. § 84 lending limits is, as John Dillinger once put it, "an exercise in futility" for all practical purposes.

5. *Summary*

The holdings in *Harmsen*[141] and *Gaff*[142] restrict the array of permissible causes of action which national bank shareholders may assert directly against their bank's board of directors. In most cases a shareholder upset about the lending decisions of the bank would, in all probability, be unable to establish that the directors' decision to approve a loan exceeding 12 U.S.C. § 84 lending limits also independently injured the shareholder. As a result, direct shareholder actions against national bank directors under 12 U.S.C. § 93 for approval of loans in excess of 12 U.S.C. § 84 lending limits are an ineffective device for procuring compliance with those lending limits.

Often, however, the OCC has taken steps to procure compliance with the lending limits imposed on national banks by 12 U.S.C. § 84 when such limits have not been observed by national bank directors. Recently, the propriety of the use of one of the OCC's enforcement powers as a tool to compel directors to take corrective measures regarding loans in excess of the 12 U.S.C. § 84 lending limits has been called into question.

IV. Use of the OCC's Cease and Desist Power to Impose Personal Liability upon National Bank Directors for Loans Exceeding 12 U.S.C. § 84: A Practice of Continuing Validity?

It is beyond question that the OCC has the power to regulate the conduct of the officers and directors of national banks, and to take appropriate steps to ensure that the provisions of the National Bank Act are given proper observance by those same bank officers and directors. One of the powers which the OCC frequently uses to compel directors to bring their bank into compliance with the provisions of the National Bank Act is the cease and desist (hereinafter C & D) power conferred upon the OCC pursuant to 12 U.S.C. § 1818(b)(1).[143]

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141. *See supra* notes 69-83 and accompanying text.

142. *See supra* notes 84-114 and accompanying text.

143. 12 U.S.C. § 1818(b)(1) provides, in relevant part:

(b)(1) If, in the opinion of the appropriate Federal banking agency, any insured bank . . . or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director . . . or other person participating in the conduct of the affairs of such bank . . . is violating or has violated . . . a law, rule, or regulation . . . the agency may issue and serve upon the bank or such director . . . a notice of charges in respect thereof . . . . In the event . . . the agency shall find that any violation . . . specified in the notice of charges has been estab-

The OCC has in the past used its 12 U.S.C. § 1818(b)(1) C & D power as a tool for enforcement of the lending limits imposed upon national banks pursuant to 12 U.S.C. § 84, by issuing a C & D order requiring national bank directors *personally* to reimburse their banks for loans they approved in excess of 12 U.S.C. § 84 lending limits.[144] The authority of the OCC to compel national bank directors personally to indemnify their banks for excessive loans under the 12 U.S.C. § 1818 C & D power has been called into question in at least one recent case, and the continuing vitality of this practice will be the focus of the remainder of this article.

A. Del Junco *and* Larimore I: *Cease and Desist Orders Compelling National Bank Directors to Indemnify Their Banks for Loans in Excess of 12 U.S.C. § 84 Limits Permissible*

Perhaps the seminal case establishing the OCC practice of requiring national bank directors to indemnify their banks for loans exceeding the statutory lending limits is *Del Junco v. Conover*.[145] In *Del Junco* the OCC discovered that loans made by the Los Angeles National Bank (LANB) to Rehbock Lewis and Ralph Ware, the president and treasurer, respectively, of Fame Furniture, should have been aggregated with loans the LANB had made to Fame Furniture itself.[146] Upon aggregation, it was found that the loans to Fame Furniture and its officers exceeded the lending limits of 12 U.S.C. § 84.[147]

The OCC requested that the LANB directors indemnify the bank for any losses resulting from the excessive loans to Fame Furniture and its officers. The directors refused, and the OCC began formal C & D proceedings by issuing a notice of charges.[148] In the ensuing agency hearing conducted by the OCC, the directors of the LANB admitted that they knew the loans to Fame Furniture and Lewis would be used to benefit Fame Furniture.[149] A subsequent evidentiary hearing was held, and an administrative law judge

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lished, the agency may issue . . . an order . . . to cease and desist from the same, *and, further, to take affirmative action to correct the conditions resulting from any such violation or practice* [emphasis added].

144. *See* Del Junco v. Conover, 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983); Larimore v. Conover, 775 F.2d 890 (7th Cir. 1985), *rev'd*, 789 F.2d 1244 (7th Cir. 1986) (en banc).

145. Del Junco v. Conover, 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

146. *Id.* at 1339. The OCC found that the loans had to be aggregated because the loans granted Lewis and Ware were to be used for the benefit of Fame Furniture, Inc., their business. *Id.*; *see generally supra* notes 24-27 and accompanying text for a discussion of the rules requiring aggregation of the loans in *Del Junco*.

147. Del Junco v. Conover, 682 F.2d at 1339.

148. *Id.* The issuance of the notice of charges in an OCC cease and desist action is similar to service of an original notice in a civil court suit; *see supra* note 143.

149. *Id.*

(ALJ) found that the LANB loan to Ware was also used for Fame Furniture's benefit, making aggregation of all of the loans proper.[150] The ALJ recommended that the OCC issue a C & D order, that the LANB directors indemnify the LANB for the loans, that the LANB recover costs of collection fees, and that the LANB recover the attorney's fees it had paid in defense of the directors.[151] The directors appealed to the Ninth Circuit Court of Appeals.[152]

The Ninth Circuit found that in the context of 12 U.S.C. § 84 lending limit violations, the OCC had "broad discretion to fashion a remedy," and that the remedy adopted could be "in such a form as to prevent future abuses."[153] Finding that the OCC also had "broad discretion to cure the effect of a violation" of 12 U.S.C. § 84, the Ninth Circuit turned to the issue of whether the OCC's action requiring the directors personally to indemnify the LANB was appropriate.[154]

The *Del Junco* court noted that previous OCC actions against bank directors for lending limit violations had been instituted in federal district courts pursuant to 12 U.S.C. § 93, and that the OCC action in *Del Junco* was instead "an enforcement proceeding . . . seeking to indemnify [the LANB] through the application of 12 U.S.C. § 1818(b)(1)."[155] The court found that although the LANB directors did not have to have acted *knowingly* in violating 12 U.S.C. § 84 in order to be subject to a 12 U.S.C. § 1818(b)(1) C & D order, they had in fact acted knowingly in granting loans exceeding the bank's lending limits in loaning money to Fame Furniture and its officers.[156] The court therefore found that the directors would have been equally liable to indemnify the LANB if the action had been brought by the OCC in the district court pursuant to 12 U.S.C. § 93, and upheld the validity of the C & D order requiring the directors to personally indemnify the LANB.[157]

The *Del Junco* opinion was followed by the United States Court of Appeals for the Seventh Circuit in *Larimore v. Conover*.[158] In *Larimore I* the Seventh Circuit was presented with a factual scenario very similar to that involved in *Del Junco*.[159]

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150. *Id.*

151. *Id.* at 1339-40.

152. *Id.* at 1340.

153. *Id.* (quoting Groos Nat'l Bank v. Comptroller of Currency, 573 F.2d 889, 897 (5th Cir. 1978)).

154. Del Junco v. Conover, 682 F.2d at 1340.

155. *Id.* at 1341-42.

156. *Id.* at 1342.

157. *Id.*

158. Larimore v. Conover, 775 F.2d 890 (7th Cir. 1985) *rev'd* 789 F.2d 1244 (7th Cir. 1986) (en banc). The 1985 opinion will be referred to in this text as *Larimore I*. The 1986 opinion will be called *Larimore II*.

159. *See supra* notes 145-157 and accompanying text.

In *Larimore I* the directors of the First National Bank of Auburn, Illinois (FNB), had approved loans exceeding the 12 U.S.C. § 84 lending limits to various borrowers.[160] The OCC, upon discovering the violations, told the directors to exercise more supervision over the loan approval process, and warned the directors of their potential personal liability.[161] Notwithstanding the OCC warning, the directors of the FNB continued unanimously to approve excessive loans, some of which were rather staggering in size.[162] The OCC thereupon issued a C & D order, requiring the FNB directors to:

1. Cease lending money to any borrower in an amount exceeding the lending limits of 12 U.S.C. § 84;[163]

2. Cause all loans or other extensions of credit which were in excess of 12 U.S.C. § 84 to be reduced to conforming amounts without loss to the FNB;[164]

3. Adopt policies and procedures to prevent recurring violations;[165] and

4. Personally indemnify the FNB for any losses incurred due to excessive loans to certain customers.[166]

The FNB directors sought review in the Seventh Circuit Court of Appeals.[167]

The majority in *Larimore I* stated the issue presented in the following fashion:

> [W]hether or not 12 U.S.C.A. § 1818(b)(1), which authorizes the Comptroller to order bank directors "to take affirmative action to correct the conditions resulting" from their violations of 12 U.S.C.A. Sec. 84, should encompass the requirement of proof of knowledge on the part of directors, a condition of liability found in 12 U.S.C.A. Sec. 93(a).[168]

The court in *Larimore I* first noted that traditionally bank directors had been held personally liable in federal district court for loans in excess of the 12 U.S.C. § 84 lending limits pursuant to 12 U.S.C. § 93.[169] The court went on to state that apart from 12 U.S.C. § 93, the directors of a national bank could be subjected to OCC C & D proceedings under 12 U.S.C. §

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160. Larimore I, 775 F.2d at 893.
161. *Id.*
162. *Id.* at 893-94. As stated by the *Larimore I* court:
> One example is the Porter Construction line [of credit] which became excessive [less than one year after the OCC audit] with the advancement of $11,000. Prior to that time, the balance on the Porter line of credit was $94,199. Thereafter, the balance on this line reached a total of 820,982 . . . .

Id. at 894.
163. *Id.* at 892.
164. *Id.*
165. *Id.* at 892-93.
166. *Id.* at 893.
167. *Id.* at 891.
168. *Id.* at 892.
169. *Id.* at 894.

1818(b)(1) in the event that the OCC discovered that loans in excess of the section 84 lending limits were approved by the board.[170] The Seventh Circuit held that in addition to the power to issue an order directing the bank's directors to cease and desist from their imprudent loan practices, the OCC had the power to take affirmative action " 'to correct the conditions resulting' " from the violation of 12 U.S.C. § 84.[171]

Citing *Del Junco* as authority, the *Larimore I* court found that the scope of the "affirmative action" the OCC could take to "correct the conditions resulting" from the FNB directors' violation of 12 U.S.C. § 84 included the power to issue an order requiring the directors personally to indemnify the FNB for any damages resulting from the excessive loans.[172] Noting that the Comptroller was an expert in the bank regulatory field, the *Larimore I* court found that "his choice of remedies under Sec. 1818 'will not be disturbed except when the exercise is arbitrary, capricious, or contrary to law.' "[173] The Seventh Circuit summarized its holdings in *Larimore I*:

> [W]e determine that the Comptroller's finding that the directors "knowingly" violated the lending limits of Sec. 84 is supported by substantial evidence. We further find that the Comptroller's choice of remedy in requiring the directors to compensate the bank for any losses caused by approval of excessive loans was not an arbitrary or capricious choice of remedy in that there is a clear, rational basis for a remedy which corrects the financial harm that results from the directors' unlawful conduct.[174]

Neither *Del Junco*[175] nor the majority in *Larimore I*[176] examined the OCC's authority to impose personal liability upon bank directors for excessive loans under 12 U.S.C. § 1818(b)(1). The dissent of Circuit Judge Coffey in *Larimore I* did so, however, and argued that the legislative history of 12 U.S.C. § 1818(b)(1) demonstrated that "Congress never intended to grant the [OCC] the authority to impose such personal liability upon directors pursuant to 12 U.S.C. § 1818(b)(1)."[177] Judge Coffey's argument proved persuasive when *Larimore I* was submitted for rehearing.

B. Larimore II: *OCC Exceeds Scope of Authority by Issuing Cease and Desist Order Requiring Directors to Indemnify Bank for Loans in Violation of 12 U.S.C. § 84*

On review of *Larimore I*, the Seventh Circuit altered the focus of its

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170. *Id.* at 895.
171. *Id.* (quoting 12 U.S.C. § 1818(b)(1)); *see supra* note 143.
172. *Id.*
173. *Id.* at 895-96 (quoting First Nat'l Bank v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980)).
174. *Id.* at 896.
175. *See supra* note 145.
176. *See supra* note 158.
177. Larimore I, 775 F.2d at 896 (Coffey, J., dissenting).

inquiry into the scope of the OCC's cease and desist power.[178] The *Larimore II* court first stated that the OCC's interpretation of its authorizing statute[179] was to be accorded due deference, short of allowing the OCC "the broad and unbridled authority to decide the limits or boundaries of its own authority."[180]

The court in *Larimore II* then noted that since June 3, 1864,[181] the OCC has had the "authority to file a lawsuit [pursuant to 12 U.S.C. § 93(a)] in a Federal district court against a bank director in his individual capacity for damages resulting from his knowing violation of the legal lending limits in 12 U.S.C. § 84."[182] The *Larimore II* court then took issue with the OCC's action in ordering the FNB Board personally to indemnify the bank for the excessive loans at issue.

The *Larimore II* court found that while the OCC's action was technically referred to as a cease and desist order to indemnify, its effect was that of an enforceable personal judgment against the directors for the FNB's damages due to the excessive loans.[183] The court found that in effectively "adjudicating" the directors personally liable for violations of 12 U.S.C. § 84 in an administrative C & D action, the OCC had derogated the language of 12 U.S.C. § 93(a), which "mandates that such liability 'shall' be 'determined and adjudged by a proper district . . . court of the United States.' "[184]

The OCC countered by arguing that its power to impose liability upon the FNB directors individually for the 12 U.S.C. § 84 violations under the C & D power arose from the language of 12 U.S.C. § 1818(b)(1), which permitted the OCC "to take such affirmative action to correct the conditions resulting from any such violation or practice."[185] The *Larimore II* court re-

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178. Larimore II, 789 F.2d 1244 (7th Cir. 1986). Specifically, Judge Coffey, writing for the majority, made the following statements with respect to the issue involved in *Larimore II*:

> A panel of this court (with Judge Coffey dissenting) affirmed the Order of the Comptroller [in *Larimore I*], but the panel failed to address the initial issue of whether the Comptroller, pursuant to [12 U.S.C.] § 1818(b)(1), had the authority to order the directors to indemnify the bank for potential losses arising from their approval of loans in excess of the statutory limit contained in 12 U.S.C. § 84.
>
> The issue before this court is whether the Comptroller has the authority to unilaterally impose personal liability against a bank director under 12 U.S.C. § 1818(b)(1) without instituting an action to seek damages from a director in the "proper district or territorial court," as required by 12 U.S.C. § 93.

Id. at 1248.

179. In this case the authorizing statute was 12 U.S.C. § 1818(b)(1), which the Comptroller interpreted as enabling the OCC to impose personal liability against national bank directors for violation of the 12 U.S.C. § 84 lending limits. *See* Larimore II, 789 F.2d at 1248.

180. *Id.* (citations omitted).

181. 12 U.S.C. § 93(a) was originally enacted on June 3, 1864. *See* Larimore II, 789 F.2d at 1249.

182. Larimore II, 789 F.2d at 1249.

183. *Id.*

184. *Id.* (quoting 12 U.S.C. § 93(a), *supra* note 63).

185. Larimore II, 789 F.2d at 1249 (quoting 12 U.S.C. § 1818(b)(1), *supra* note 143 (em-

jected this argument somewhat disdainfully.[186]

The *Larimore II* court first noted that the only authority advanced by the Comptroller in support of his broad construction of 12 U.S.C. § 1818(b)(1) was a Senate report published in conjunction with the amendment to 12 U.S.C. § 1818(b)(1) which added the "affirmative action" clause[187] to that section.[188] The court found, however, that the legislative history of 12 U.S.C. § 1818 did not support the broad construction of that section advanced by the OCC.[189] The extent of the OCC's § 1818(b)(1) power was only to issue an order against a particular bank director, as opposed to an entire bank, "to cease and desist from engaging in unsound or unsafe banking practices or from violating a particular bank law or rule . . . ."[190]

The *Larimore II* court also noted that if Congress had intended to grant the OCC the power to impose personal liability on individual bank directors pursuant to 12 U.S.C. § 1818(b)(1) for violations of 12 U.S.C. § 84, it would have so stated in its recent amendments to 12 U.S.C. § 1818(b)(1).[191] Having failed to find a grant of such power to the OCC in the language of 12 U.S.C. § 1818(b)(1), or in the legislative history of the amendments to § 1818(b)(1), the court refused to infer it.[192]

The *Larimore II* court found that Congress had provided a statutory procedure for the OCC to follow in an effort to recover damages from indi-

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phasis deleted)).

186. Specifically, the *Larimore II* court stated:

> The Comptroller has taken it upon himself to broadly interpret the last clause in 12 U.S.C. § 1818(b)(1) allowing him "to take such affirmative action" as authorization to assess personal liability in any amount up to millions of dollars upon any director who, in the Comptroller's opinion, may have violated 12 U.S.C. § 84 in granting loans in excess of the statutory limit without even so much as a trial before a court of law to determine if the director "knowingly violate[d] or knowingly permit[ted] any officer or agents . . . of the bank to violate the National Banking laws."

Larimore II, 789 F.2d at 1249-50, citing 12 U.S.C. § 93(a).

187. *See supra* note 143. The emphasized language is the "affirmative action" clause referred to.

188. Larimore II, 789 F.2d at 1250 (citing S. REP. No. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3536-37).

189. Specifically, the *Larimore II* court held that "there is no language or indication in the legislative history of section 1818 that can legally, logically or reasonably be interpreted to give the Comptroller the authority to unilaterally assess personal liability and damages against a bank director." *Id.* at 1250 (footnote omitted).

190. *Id.* at 1251.

191. *Id.* The language used by the *Larimore II* court was:

> The legislative history to the 1978 amendments to 12 U.S.C. § 1818, however, has never provided, much less indicated, that the Comptroller has the authority or power to impose personal liability on a bank director and had Congress intended to authorize the Comptroller to impose personal liability, it would have provided this authority in its 1978 amendment.

Id.

192. *Id.*

vidual bank directors for violations of 12 U.S.C. § 84.[193] That procedure required the OCC to bring an action against the director in the proper federal district court under 12 U.S.C. § 93(a), not under 12 U.S.C. § 1818(b)(1).[194]

Finally, the *Larimore* court made the following statements in the conclusion of its opinion:

> [B]ank directors are to be adjudged personally liable only after receiving all the constitutional and legal protections accorded every citizen in a trial in a United States District Court. These protections would effectively be abolished and the clear intent of section 93 would be cast aside if 12 U.S.C. § 1818(b)(1) were to be interpreted as granting the Comptroller the authority to act as prosecutor, judge, and jury and unilaterally issue an order to an individual director to indemnify the bank.
>
> . . . .
>
> The Comptroller exceeded the scope of his authority when he issued the order to the petitioners in this case imposing personal liability for violating 12 U.S.C. § 84.[195]

C. *The Impact of* Larimore II: *A Hollow Victory for National Bank Directors*

The impact of *Larimore II* is *not* to insulate national bank directors completely from liability for 12 U.S.C. § 84 violations. It is true that *Larimore II*, if ultimately followed by the Supreme Court, would prohibit one form of OCC action against national bank directors, namely C & D orders mandating personal indemnification of a national bank by its directors for damages arising from director-approved violations of 12 U.S.C. § 84. As a practical matter, though, the *Larimore II* holding only protects the directors' due process rights by requiring the OCC to sue the directors for 12 U.S.C. § 84 violations in a federal district court.

The OCC's power to pursue the directors for violations of 12 U.S.C. § 84 remains unfettered; it is simply more clearly defined as a result of *Larimore II*. The OCC can still issue a C & D order mandating that the directors

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193. *Id.* at 1253.

194. *Id.* The Court said:

> [T]he enforcement scheme of 12 U.S.C. § 93 clearly indicates Congress intended that an action seeking personal liability for violations of the banking laws only be brought under 12 U.S.C. § 93(a) in federal district court and not under 12 U.S.C. § 1818(b)(1), that allows the Comptroller, pursuant to his cease and desist authority, to take "affirmative action" to correct unsound and unsafe banking practices or violations of the banking laws. It is a "well established canon of construction that a single provision [in this case 12 U.S.C. § 1818(b)(1)] will not be interpreted so as to defeat the general purpose that animates and informs a particular legislative scheme. We . . . attribute to [Congress] a general overriding intent to avoid results that would undermine or vitiate the purposes of specific provisions."

Id. (quoting Milwaukee County v. Donovan, 771 F.2d 983, 986 (7th Cir. 1955)).

195. *Id.* at 1255-56.

bring accounts into compliance with the lending limits of 12 U.S.C. § 84 pursuant to 12 U.S.C. § 1818(b)(1). And while the OCC can no longer simply *order* the directors to indemnify the bank for § 84 violations under 12 U.S.C. § 1818(b)(1), the OCC *can still* proceed against the directors in the proper district court pursuant to 12 U.S.C. § 93.

The *Larimore II* decision is a hollow victory for the directors of national banks. It does not completely vitiate the OCC's power to sue the directors; it merely changes the statute the action will be premised upon, and makes the proper forum a federal district court. In sum, a guilty director will still be found guilty of 12 U.S.C. § 84 violations, but the finding will be made by a non-agency tribunal: the appropriate federal district court.

V. Conclusion

This article has attempted to provide some insight into the complex job performed by national bank directors, and into the legal complexities involved in defending their actions. These directors must know the loan limits imposed by 12 U.S.C. § 84, and they must know when loans must be aggregated pursuant to 12 C.F.R. § 32.5 to ensure compliance with those section 84 limits. The directors must also be able to calm the ire of potential borrowers who cannot obtain needed funding due to the loan limits.

In the event that national bank directors should somehow commit an error in determining whether a loan violates 12 U.S.C. § 84, they can be subjected to suit in their individual capacities. This article attempts to demonstrate that, in most cases, a direct shareholder action under 12 U.S.C. § 93, premised on a violation of 12 U.S.C. § 84, will not survive a motion to dismiss unless the plaintiff's complaint alleges a cause of action involving a personal injury other than diminution in the value of the bank's stock—a difficult row to hoe for such a plaintiff. This article also seeks to demonstrate that a director of a national bank probably can be successful in resisting a C & D order from the OCC which commands the director individually to indemnify the bank for damages arising from 12 U.S.C. § 84 lending limit violations. The OCC will probably reinstate the action in an appropriate federal district court pursuant to 12 U.S.C. § 93. However, successful defense against the C & D action will at least ensure a neutral forum for determination of the client's liability.

In sum, there is nothing simple about bank director liability. And there is even less which is simple in defending a director who has approved a loan in violation of 12 U.S.C. § 84.