Asset Preservation Orders by the Office of Thrift Supervision

Dwight C. Smith III
Jonathan H. Talcott

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Five years ago, Congress directed the federal banking agencies to act promptly to ensure that the assets of suspected wrongdoers are preserved to satisfy any judgment that ultimately may be issued against them. The Office of Thrift Supervision ("OTS") has used this authority in a responsible and effective manner, but it has come under attack by groups such as the American Bar Association. There is no basis for this challenge. OTS's asset preservation orders have been used in a measured fashion and are a useful part of the agency's enforcement work.

I. Statutory Authority

One of the primary purposes of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") was "to strengthen the enforcement powers of Federal regulators of depository institutions." The 1989 legislation included several provisions to expand the enforcement authority of OTS and to enable the agency to proceed promptly and effectively against those believed to have profited unjustly from abuses in the savings and loan industry. Such reforms were necessary because "[l]ittle doubt exist[ed] that fraud and insider abuse contributed substantially to the [thrift] crisis." The Senate noted specifically the testimony of one witness that "[a]t the very least, there was an enormous failure of individuals to exercise their fiduciary responsibilities."

* Deputy Chief Counsel, Office of Thrift Supervision. B.A. 1977, J.D. 1981, Yale University. The views expressed herein are those of the authors and do not necessarily reflect those of the Office of Thrift Supervision or the U.S. Government.
** Associate, Alston & Bird. Former Staff Attorney, Office of Thrift Supervision. B.A. 1984, University of North Carolina; J.D. 1989, University of Virginia.
3 Id. at 9-10.
Among the FIRREA reforms was the grant of authority to OTS to issue temporary orders to preserve the assets of respondents in enforcement proceedings whenever there might be a significant, or non-minimal dissipation of assets. In short, whenever federal regulators sought a significant recovery from a respondent, they had the power to step in and prevent the respondent from dissipating his assets. Such orders could be entered whenever a prima facie case for restitution exists.

In *Spiegel v. Ryan*, the first case where the agency used this authority, a federal district court held that a phrase added to section 8(c) of the Federal Deposit Insurance Act ("FDIA") by FIRREA that was intended to emphasize the importance of temporary cease and desist orders as a means of enforcing growth limitations, implied that such orders could be used only for such purpose. The pertinent phrase in section 8(c) was "[s]uch order may include any requirement authorized under subsection (b)(6)(B)." Nothing in the legislative history indicates that this phrase was intended to be an exclusive statement of the scope of temporary cease and desist orders.

Congress promptly undertook to correct the district court's misapprehension. The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (the "Comprehensive Act") clarified the authority of federal banking agencies to issue temporary orders to preserve the assets of respondents in enforcement proceedings. Senate Banking Committee Chairman Donald Riegle explained that the amendment made explicit the types of relief available under temporary cease and desist orders: "The Of-

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4 See Pub. L. No. 101-73, § 902(a)(2), 103 Stat. 183 (1989) (amending 12 U.S.C. § 1818(c)(1)); see also FIRREA CONFERENCE REPORT, supra note 1, at 439. In 1993, Congress amended this authority to require that Rule 65 preliminary injunction showings of likelihood of success, balance of harms, and the public interest, although no showing of irreparable injury is required. See Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, § 25(b), 107 Stat. 2408 (1993). This article was prepared as part of the public dialogue on asset preservation orders before this amendment; and we accordingly do not address its provisions here. The OTS orders that are the subject of this article were issued under FIRREA authority and before enactment of RTC Completion Act.


7 See id. at 1438-39. The Ninth Circuit reversed the district court decision, and held that the district court had given an inappropriately narrow construction to the 1989 FIRREA statute. Id. at 1437.

Office of Thrift Supervision has requested this technical change because of some differing applications of the current statutes by some district courts. These changes are consistent with the congressional intent at the time FIRREA was enacted and are to clarify any ambiguity."

Congressman Charles Schumer made the same point:

"[It] was never Congress' intention to limit temporary C&Ds to only growth restrictions, which would have substantially reduced the scope of temporary C&Ds. (At every juncture, Congress expanded the banking agencies’ powers in the Financial Institution Reform, Recovery, and Enforcement Act and the legislative history bears this out.). Accordingly, this subsection clarifies the banking agencies temporary C&D authority, to conform with congressional intent in passing the Financial Institution Reform, Recovery and Enforcement Act." \(^\text{11}\)

In addition, in the same 1990 statute, Congress authorized the federal courts, on application of a federal banking agency, to limit a respondent's use of his assets and to appoint a receiver to administer the assets of a respondent. \(^\text{12}\) In order to obtain such an order, an agency must make a prima facie showing of the respondent's wrongdoing. \(^\text{13}\)

Congress provided that the terms of Rule 65 of the Federal Rules of Civil Procedure,\(^\text{14}\) which apply to preliminary injunctions, would not apply to judicial proceedings for asset preservation orders.\(^\text{15}\) The legislative history explains: "Congress is granting such relief from the more rigorous requirements of Rule 65 because the Federal Deposit Insurance Corporation and the Resolution Trust Corporation ("RTC") are in the position of protecting the depository insurance fund, i.e., the taxpayers' money." \(^\text{16}\)

Issuance of an asset preservation order does not depend on whether the depository institution affected by the suspected
wrongdoing is open or closed. The statute authorizes temporary orders upon an agency determination that the order will prevent prejudice to the interests of depositors. When an institution has failed, the FDIC or the RTC succeeds to the depositors' interests, and the OTS owes a fiduciary duty to protect the interests of the insurers. The courts have sustained OTS's use of its authority without regard to the open or closed status of the institution involved.

II. IMPLEMENTATION OF THE ASSET PRESERVATION AUTHORITY

Since the enactment of FIRREA, OTS has issued a total of thirty-one temporary cease and desist orders under its section 1818(c)(1) authority in order to preserve a respondent's assets. Twenty-two of the orders imposed comprehensive constraints on an individual's use of his or her assets. Six orders were issued to savings associations or their holding companies to prevent certain asset transfers by those institutions. The remaining three orders were against individuals but either limited withdrawals only from certain accounts or prohibited only transfers of funds outside the United States.

18 Cf. Spiegel v. Ryan, 946 F.2d 1435, 1438 (9th Cir. 1991) (discussing "OTS' compelling point that restitution may not only compensate an institution for past wrongs, but may also serve to prevent dissipation of assets that may belong to it, and thereby prevent prejudice to its depositors").
19 See Parker v. Ryan, 959 F.2d 579, 579 (5th Cir. 1992) (upholding OTS's order in proceeding involving closed institution).
20 See Robert Cooper, The Office of Thrift Supervision, 59 FORDHAM L. REV. 363, 371-72 (1991) (noting that OTS has authority to issue temporary cease and desist orders); Peter P. Swire, Bank Insolvency Law Now That It Matters Again, 42 DUKE L.J. 469, 487 (1992). Government agencies, such as OTS, have a wide range of authority, including the power to issue temporary cease and desist orders to preserve an institution's assets. Id.; see also Parker v. Ryan, 959 F.2d 579, 580 (5th Cir. 1992) ("The OTS has authority to pursue proceedings against an institution when it determines that the institution . . . is about to engage in unsound business practices or is violating or about to violate the law."); In re Paul, 763 F. Supp. 568 (S.D. Fla. 1990); In re Spiegel, OTS AP No. 92-64 (June 30, 1992). Proceedings in these two matters have produced several additional orders; these orders are not included in the thirty-one.

See Cooper, supra, at 371-72. Cooper has argued FIRREA has reduced the burden of proof required to issue this order thus enhancing OTS's power in this area. Id. Thus, instead of requiring a standard of likeliness of insolvency, substantial dissipation of assets, or likeliness of seriously weakening the condition of the thrift, the new standard requires a finding that the "unsafe or unsound practice was likely to cause a significant dissipation of assets." Id. at 372; see also Raymund G. Kuwasaki, Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 42 HASTINGS L.J. 249, 261 (1990).
21 See Moskowitz & Rudd, OTS AP No. ERC-90-46 (June 5, 1990) (resolution).
22 See Cone, OTS AP No. 92-43 (April 24, 1992); Motohari, OTS AP No. 92-44 (Apr. 24,
Two-thirds or fifteen of the comprehensive asset orders have been challenged in court. In all of these fifteen cases, the court has upheld or followed the agency's exercise of its discretion. More specifically, each occasion on which a federal court of appeals has been asked to render a final decision on an asset preservation order, the court has approved imposition of an order or declined the opportunity to disapprove it.

At the district court level, with the exception of Landmark Land Co. v. OTS, the courts have either upheld the OTS's orders or substituted their own order, which achieves substantially the same goal.

The issuance of temporary cease and desist orders that restrict a respondent's use of assets is not routine. The twenty-two asset preservation orders that have been issued to restrict use of an individual respondent's assets pending the outcome of enforcement proceedings arose out of cases involving eighteen institutions. Over the same period of time (1990-1992), OTS has issued a total of 754 final cease and desist orders and civil money penalties—the kinds of enforcement actions where asset orders may be considered—involving several hundred savings associations. In 1992, OTS issued seven asset preservation orders against individuals; in the same year there were 326 cease and desist orders and civil

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23 See Landmark Land Co. v. OTS, No. 91-3938 (E.D. La. 1991) (district court issued preliminary injunction), rev'd, 990 F.2d 807 (5th Cir. 1993). The court of appeals reversed the district court's decision on the ground that the district court failed to apply the necessary criteria for a preliminary injunction. Id. The parties have since stipulated to the entry of a temporary order that bars transfers of property with a value of $5,000 or more without adequate consideration. Id.; Landmark Land Co., OTS AP No. 93-51 (June 25, 1993) (order).

24 See Parker v. Ryan, 959 F.2d 579 (5th Cir. 1992); Feitt v. OTS, 950 F.2d 721 (3d Cir. 1991); Spiegel v. Ryan, 946 F.2d 1435 (9th Cir. 1991); Paul v. OTS, 763 F. Supp. 568 (S.D. Fla. 1990), aff'd per curiam, 948 F.2d 1297 (11th Cir. 1991); see also OTS v. Lopez, 960 F.2d 958 (11th Cir. 1992) (recognizing validity of preliminary injunction sought to preserve assets in civil money penalty context).

25 990 F.2d 807 (5th Cir. 1993). But see Cone v. OTS, No. 92-1506 (E.D. La. May 8, 1992). Despite the injunction ordered by the district court in Landmark, the same court upheld an asset preservation order that OTS entered against different respondents in a proceeding involving the same thrift institution.


money penalties. Clearly, OTS issues asset preservation orders sparingly.

The purpose of an asset preservation order is to preserve those assets against which the agency ultimately may have to execute a judgment. The decision to issue a temporary order necessarily involves predictive judgments, a matter on which administrative agencies have broad discretion. Asset preservation orders provide respondents with an option to either post security in a specified amount, or seek OTS approval before making expenditures above a certain amount ($5,000 or more). The security requested is tied explicitly to the amount that the OTS believes to represent a respondent's wrongful gain, or the loss to a savings association caused by respondents' actions. The respondents are allowed to continue their normal financial lives while otherwise preserving their assets.

If a respondent fails to post security, the OTS considers the respondent's reasonable needs when limiting expenditures. A preservation order ordinarily provides that a respondent may continue to make payments for living expenses and must seek OTS approval only for individual expenditures in excess of $5,000. The asset preservation orders usually also request the submission of financial information about the respondent, so that OTS can appropriately assess respondent's reasonable needs.

Additionally, the preservation orders permit a respondent to apply to the Director for hardship relief. Upon such application, the agency undertakes an intensive review of respondents' financial condition and legitimate needs before limiting expenditures. For example, in a case involving David Paul, the former chairman of CenTrust Bank in Miami, Florida, OTS issued several orders over a five-month period in 1991 in response to the hardship applications of Mr. Paul. OTS ultimately determined to limit Mr. Paul to a monthly allowance of $7,000 and appointed a receiver to ad-

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30 See Spiegel, OTS AP No. 92-64 (June 30, 1992) (order) (temporary order provided that respondent give two business days notice of proposed expenditure of $5,000 or more).
31 See infra notes 32-37 and accompanying text.
32 See FSLIC v. Dixon, 835 F.2d 554, 556 (5th Cir. 1987) (allowing only $3500 monthly allowance).
minister his assets. He failed to comply with the order, and the federal district court later issued a similar order designed to preserve his assets.

A similar series of orders were issued in connection with the enforcement proceeding against Thomas Spiegel. After requesting separate budget proposals from Mr. Spiegel and from the agency’s enforcement staff, the Director imposed a monthly budget of approximately $60,000 largely to enable Mr. Spiegel to make monthly mortgage payments.

The agency also has permitted, through its asset preservation orders, expenditures to pay reasonable attorney’s fees. However, the agency has followed the decision of the United States District Court for the Southern District of Florida in Paul v. OTS, which limited Mr. Paul’s lawyers to a maximum hourly rate of $250 and an overall rate of $200 an hour. The agency does not permit respondents subject to asset preservation orders to pay attorneys in advance, through retainers or other mechanisms, since the agency will only authorize payments on a monthly basis subject to rate limitations and on receipt of certain documentation. This approach has found judicial approval.

In short, asset preservation orders serve “an important government interest, which Congress identified as fighting insider abuse of savings and loan institutions, as well as to protect the public fisc, which, because of deposit insurance is obligated to make good on most of the deposits in those institutions.”

III. DUE PROCESS

The principal constitutional issue surrounding asset preservation orders is whether they comport with due process. The two

33 See Paul, OTS AP No. 91-26 (June 1, 1991) (order).
35 See Spiegel, OTS AP No. 92-64 (June 30, 1992) (order). The Director allowed the respondent those expenses which did not “appear to perpetuate an extravagant lifestyle.” Id. at 5. For example, respondent was permitted to pay mortgage payments; office expenses; general household expenses; and education expenses. Id. However, the Director determined that respondent's proposed monthly expenditures for food, clothing, and entertainment, approximately $7,000, were “unreasonably high in view of the purpose of the asset preservation order.” Id.
courts of appeal to consider the issue have concluded that they do. Due process jurisprudence fully supports this conclusion. Due process requires only an opportunity to be heard in a meaningful time and manner. All that the Supreme Court requires is "some form of hearing... before an individual is finally deprived of a property interest." An asset preservation order is not a final deprivation of property because the property is not transferred to the agency and the respondent has the right to a prompt adversarial hearing.

Congress has authorized comparable asset preservation orders under the Futures Trading Act. Under that Act, a district court may issue an ex parte order that preserves assets subject to the supervision of a temporary receiver. Congress's purpose in doing so was to "prohibit movement or disposal of funds, assets, and other property which may be subject to lawful claims of customers." Such asset orders are also appropriate "to preserve the status quo while an investigation is conducted."

These policies for ensuring the availability of funds to remedy wrongdoing and preserving the status quo were recognized by the Supreme Court as sufficient justification for ex parte asset preservation orders in Coffin Brothers & Co. v. Bennett.

More recent Supreme Court decisions have recognized the continuing validity of Coffin Brothers. In Sniadach v. Family Fi-

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39 See Parker v. Ryan, 959 F.2d 579 (5th Cir. 1992); Spiegel, 946 F.2d at 1435.
40 See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (adoption decree found unconstitutional because divorced father was not notified of proceedings and not given opportunity to be heard); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (constructive notice may be given those beyond reach of process); see also Acorn Ponds v. North Hills, 623 F. Supp. 688, 693 (E.D.N.Y. 1985) (claim of deprivation of property without due process of law arising from denial of future expectation of property right denied).
41 Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (termination of social security benefits) (emphasis added); see also Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (civil rights action challenging administrative procedures at Nebraska correctional facility); Committee v. McGrath, 341 U.S. 123, 168 (1951) ("there is a basic right to be heard... even if it involves stigma and hardship of a criminal conviction").
45 277 U.S. 29, 30 (1928) (upheld validity of ex parte execution order against shareholders of failed bank and issued order to ensure depositors paid in full).
ASSET PRESERVATION ORDERS

nance Corp., the Supreme Court explained that Coffin Brothers was a "situation requiring special protection to a state . . . interest." That same "situation" exists here. An immensely important federal interest is at stake. Depositors, the group protected in Coffin Brothers, are now protected by federal insurance. The insurers—federal taxpayers—are at great risk because of wrongdoing at troubled and failed thrift institutions. It is wholly appropriate that those against whom there is prima facie evidence of unlawful conduct be subject to restraints on their ability to dissipate their assets during the pendency of an enforcement proceeding. An asset preservation order is an essential mechanism for making certain the assets do not disappear while their true ownership is being finally adjudicated.

The federal courts of appeal have invoked the same principle of protecting federally-insured entities in upholding the constitutionality of unilateral orders under the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"). These decisions involve a mechanism designed to minimize the risk of loss to a federal government insurer, the Pension Benefit Guaranty Corporation ("PBGC"). The PBGC is "modeled after the Federal Deposit Insurance Corporation."48

The MPPAA cases deal with a provision of the 1980 amendments to the Employee Retirement Income Security Act ("ERISA"). Under the MPPAA, an employer who withdraws from a multiemployer pension fund (such as a Teamster or Machinist Union fund) is required to pay "withdrawal liability" to the fund if the fund is underfunded. Whether a fund is underfunded is a complex calculation involving the comparison of the fund's assets with the present value of the pension benefits owed to participants who have vested in the fund.

Under the procedures established in MPPAA, the pension fund makes a unilateral determination of whether it is underfunded. If the fund decides that it is underfunded, it sends a withdrawn employer an assessment of its liability. ERISA requires the employer to pay that assessment (usually in installments) within sixty days.49 The employer does not have the opportunity to litigate the

47 Sniadach, 395 U.S. at 339.
validity of the assessment before paying. The employer does have
the right to arbitrate the claim, but must begin to pay the assess-
ment and continue paying while arbitration proceeds, regardless
of whether the assessment is justified. The unilateral demand of
the pension fund, without review by any government agency or
any judge or other neutral party, forces the employer to pay
amounts that are significant, often millions of dollars. This pro-
vision was adopted to implement Congressional intent “to protect
the funding base” of pension plans and to guard against “with-
drawals [that] will lead to plan failures with unnecessary losses
for participants and the PBGC.”

While employers have challenged the constitutionality of the
“pay now, litigate later” requirement of MPPAA, the courts have
repeatedly sustained the constitutionality of this part of MP-
PAA.51 As one district court has explained, the MPPAA payment
provision is designed to shift the burden of withdrawal from the
affected pension plan to the withdrawing employer.52

The OTS asset preservation order achieves essentially the same
result. The affected savings association and its depositors and in-
surer should not have to bear the costs of wrongdoing when there
is prima facie evidence against the perpetrator. To foreclose the
possibility that the respondent in a regulatory enforcement pro-
ceeding may dissipate assets prior to a final order, and thus viti-
ate the effect of such an order, OTS may issue a temporary order
preserving the assets. The agency does not gain control of the as-
ssets, and the respondent is not finally deprived of them.

In the Spiegel case, the court of appeals, when applying the
Fuentes test, held that “[a]n important government interest, ac-
companied by a substantial assurance that the deprivation is not
baseless or unwarranted, may in limited cases demanding prompt
action justify postponing the opportunity to be heard until after

51 See Board of Trustees v. Thompson Building Materials, Inc., 749 F.2d 1396, 1404 (9th
Cir. 1984) (no deprivation of property because of several opportunities to be heard), cert.
Co., 725 F.2d 843, 854 (2d Cir.) (Pension Plan Trust Fund brought action to recover against
employer who withdrew from plan), cert. denied, 467 U.S. 1259 (1984); Republic Industries,
Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628, 641-42 (4th
Cir. 1984) (suit by employer against pension fund alleging MPPA unconstitutional).
52 See Dorn’s Transportation, Inc. v. IAM National Pension Fund, 578 F. Supp. 1222,
1232 (D.D.C. 1984), aff’d, 753 F.2d 166 (D.C. Cir. 1985) (noting that liability was assessed
based upon congressionally prescribed methods, not merely upon allegations of fact).
the initial deprivation." The vital governmental interest in minimizing the cost of resolving the savings and loan crisis, together with the prerequisite prima facie case, justify the OTS asset orders.

IV. CHALLENGES TO ASSET PRESERVATION ORDERS

OTS asset preservation orders have come under attack recently, largely as a result of the publicity surrounding the notice of charges and temporary cease and desist order issued with respect to the law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"). The notice of alleged misrepresentations and material omissions made to the regulators and other alleged violations of law and professional rules by the firm were in connection with its representation of Lincoln Savings.

The temporary cease and desist order in that case was crafted to strike a careful balance between the interests of the respondent and the interests of the taxpayers. The order preserved the financial status quo by permitting the firm to continue its normal financial life while requiring the firm to give OTS advance notice of any unusual financial or organizational changes. The firm's obligations to banks and creditors (including its own clerical staff and associates), all operating expenses, its client accounts, its capital transactions under $50,000, and most partner compensation were explicitly included as approved firm expenditures. The firm was directed to establish an escrow account consisting of a percentage of the distributable earnings of those partners who would have had to shoulder joint and several liability for any potential judgment. The percentage to be placed in escrow was twenty-five percent for all partners other than the three named individually in the notice of charges. This requirement conforms with the common law firm practice of holding back twenty to twenty-five percent or more of partners' earnings until at least

53 Spiegel v. Ryan, 946 F.2d 1435, 1439 (9th Cir. 1990) (quoting FDIC v. Mallen, 486 U.S. 230, 240 (1988)). The court applied the following Fuentes test for extraordinary situations: (1) seizure must be directly necessary to secure important government interest; (2) there must be a special need for prompt action; and (3) the State must have kept strict control over the monopoly of legitimate force. Id.


year-end.

The purpose of the temporary order was to preserve Kaye, Scholer's assets in the event of any dissolution, but not to coerce a settlement. All available evidence demonstrates that the order had no coercive effect. In May 1992, at a public forum in Chicago, the lead attorney for Kaye, Scholer in the OTS proceeding acknowledged that the temporary order had been "irrelevant" to the firm's decision to settle. What appears to have prompted settlement was the concern expressed by Kaye, Scholer's bank lenders about the merits of the notice of charges and the firm's ultimate liability.56

The facts of the Kaye, Scholer case, and the limited reach of the temporary cease and desist order and its modest practical impact, have not deterred others from broad and misplaced criticisms of the banking agencies' asset preservation power. The Association of the Bar of the City of New York produced a report (the "City Bar Report") asserting that "the Government may use the coercive power of a freeze order to obtain an unfair advantage."57 More recently, the Working Group on Lawyers' Representation of Regulated Clients of the American Bar Association has stated that it "shares much of the concern expressed" by that Association regarding the coercive power of a freeze order. Although the ABA Working Group differs in other respects,58 both reports recommend that asset preservation orders should be available only through the judicial process and that a higher burden of proof should be required. The reports differ on the precise elements of that burden. Both the ABA Report and the City Bar Report recom-

58 See AMERICAN BAR ASSOCIATION WORKING GROUP ON LAWYERS' REPRESENTATION OF REGULATED CLIENTS, LABORERS IN DIFFERENT VINEYARDS? THE BANKING REGULATORS AND THE LEGAL PROFESSION 105 (1993) [hereinafter ABA DISCUSSION DRAFT]. The ABA Working Group since has issued a final report and recommendations to the House of Delegates. The recommendations were approved in August 1993; cf Spiegel v. Ryan, 946 F.2d 1435, 1438-39 (9th Cir. 1991) (holding that OTS's temporary order did not amount to improper deprivation of property because contemplated seizure was one of few limited in which Supreme Court allowed an outright seizure without opportunity for proper hearing).
mend that the federal banking agencies exempt law firms from asset preservation orders.

The recommendations of the ABA Working Group and the City Bar Association are unwise as they are based on flawed analysis of the statutes and the Constitution. Specifically, we would like to address three points raised by the ABA Working Group pertinent to asset preservation authority: the function of a prior judicial hearing; the burden of proof; and whether lawyers are entitled to special treatment.

A. Judicial Review

Section 8(c) of the Federal Deposit Insurance Act authorizes a thrift or banking agency to issue an asset preservation order after making certain determinations. The affected party then may seek judicial review within ten days. The opposition to this approach rests on the rationale that "the combination of the notice of charges and the immediate impact of the temporary order carries the danger that a respondent might be coerced to settle against his or her interests and in violation of his or her (often untested) legal rights." The ABA Working Group also contends that existing judicial review is inadequate and that there is an inherent bias in favor of asset preservation orders. Each of these three arguments is either unsubstantiated or incorrect. The current approach to asset preservation orders preserves assets for ultimate judgments while permitting respondents to live normal lives.

First, as to the "coercive" effect of an asset preservation order, the only factual basis that the ABA Working Group relies on for its assertion of coercion is the ex post rationalization of Kaye, Scholer's defense counsel that the asset preservation order was...
one factor—together with severity of the charges and the size of the claim—that induced the firm to settle. The ABA Working Group recounts no other complaints that an OTS asset order has coerced a settlement. No such complaints exist because the standard provisions of an asset preservation order are designed to permit a respondent to continue to lead a reasonably normal life. They do not strip a respondent of access to all assets.

The ABA Working Group's second argument, that judicial review is insufficient, is essentially a restatement of its first argument on the assertedly coercive effect of asset preservation orders. It is this so-called coercion that is "[t]he heart of the objection" to lack of prior judicial review of the Kaye, Scholer order. There is no substantiated factual basis for this contention. Any respondent may seek immediate judicial review of an asset preservation order. In Kaye, Scholer, the firm unilaterally and voluntarily waived the available judicial review process. Within four days of the issuance of the asset preservation order in that case, the firm had prepared papers and scheduled a hearing in district court but then (for reasons unknown to OTS) declined to proceed with the hearing. These events occurred three days before the firm agreed to settle.

The potential disadvantages to a respondent under the current asset preservation procedures are remote for several reasons. First, the asset preservation order typically prevents a respondent only from undertaking certain actions involving his or her assets. The agency does not gain possession of or title to the assets. Sec-

60 See ABA DISCUSSION DRAFT, supra note 58, at 106 n.296. The same counsel stated at a public forum in Chicago, in May 1992, that the asset preservation order was "irrelevant" to the firm's decision to settle. The ABA Working Group does not challenge the accuracy of this report of what was said in Chicago, and it relies on a later private discussion with this counsel. Id.; cf. Landmark Land Co., Inc. v. OTS, 990 F.2d 807, 810 (5th Cir. 1993) (holding that preliminary injunction may be obtained after a showing that there is: (1) a substantial likelihood of success on the merits; (2) substantial threat of irreparable harm; (3) threatened injury exceeds harm that would flow from the injunction; and (4) injunction would not undermine public interest).

61 ABA DISCUSSION DRAFT, supra note 58, at 105.

62 See 12 U.S.C. § 1818(c)(2) (1992); see also Landmark Land Co. v. OTS, 990 F.2d 807, 810 (5th Cir. 1993) (party may file application for temporary restraining order); Parker v. Ryan, 959 F.2d 579, 581-82 (5th Cir. 1992) (temporary cease and desist order may be entered without hearing and may require affirmative action).

63 See Kaye, Scholer, Fierman, Hays & Handler, Misc. No. 92-101 (D.C. Cir. 1992). The day after the asset preservation order issued, the firm approached OTS about modifying the order. The agency asked the firm to submit any comment or request in writing, but the firm never did so. In other cases, OTS has modified its asset orders, often extensively. See supra notes 28-38.
ond, judicial review is available promptly. Third, administrative remedies under the hardship relief provisions also may be sought.

The difference in the timing of judicial review, therefore, is this: under the current procedure, the government can preserve assets immediately and, if an error has been made, a court can correct it promptly; under the system proposed by the ABA Working Group, a respondent receives advance notice of the government’s claims and has some time period in which to dispose of his or her assets before a court order issues. If such a disposition occurs, those assets are unlikely ever to be recovered.\(^4\) We think the balance clearly weighs in favor of agency-issued asset preservation orders.

Fourth, the ABA Working Group argues that the issuance of asset preservation orders, at least by the single-person heads of federal banking agencies (OTS and OCC), “might well run afoul of the impartiality requirement of the Due Process Clause of the Fifth Amendment.”\(^6\)

By statute, OTS may issue an asset preservation order only after the Director “determines” that the respondent is “likely . . . to cause significant dissipation of assets.”\(^6\) Like all agency determinations, this determination must be made on the record, with the considered judgment of the Director.

This procedure is in accord with due process jurisprudence. “The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias”—essentially the point the ABA Working Group advances—

must overcome a presumption of honesty and integrity in

\(^{64}\) OTS has had to act promptly. See Wurzelbacher, OTS AP No. 92-70, ¶ 8 (July 17, 1992) (order) (imminent transfer of $300,00); Spiegel, OTS AP No. 91-31, ¶ 6 (Mar. 31, 1992) (order) (below-market sale of property to family member); Kiely, OTS AP No. 92-100, ¶¶ 12-13 (Sept. 22, 1992) (order). In Kiely, the principal asset was up for sale, prior dissipation of $93,000. Id. OTS based an original asset preservation order in part on the respondent’s history of travel overseas and transactions with foreign banks. See Paul, OTS AP No. 97-50, ¶¶ 16-17 (Aug. 28, 1991) (order); Paul, OTS AP No. 90-1873, ¶ 16 (Oct. 22, 1990) (order). As alleged in the notice of assessment of civil money penalties against Paul, on receiving notice of the notice of charges and asset preservation order, he immediately transferred $200,000 overseas and $50,000 to a law firm.

\(^{65}\) ABA DISCUSSION DRAFT, supra note 58, at 106. The ABA Working Group suggests that there may be “a difference in the degree of independence from Administration policy experienced by each [banking] agency” since OTS and OCC are part of the Treasury Department, and the FDIC and the Federal Reserve are not. Id. at 70. The Secretary of the Treasury may not intervene in particular OTS enforcement cases. See also 12 U.S.C. § 1462a(b)(3) (1992); 31 U.S.C. § 321(c)(2)-(3)(1992) (powers of Comptroller and Director of OTS not vested in Secretary).

those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.67

The ABA Working Group does not appear to question the honesty and integrity of the Director of OTS (or the head of any banking agency), nor is there any inherent bias in a section 1818 procedure. OTS has no interest in the assets preserved.68 Any monetary relief must be paid to the institution affected or its insurer, or, if in the form of civil money penalties, to the United States Treasury. Thus there is no built-in-bias in OTS's attempt to seek to preserve assets.

No court has ever questioned the independence of the Director's decision making on these matters. As discussed above, two-thirds (fifteen) of the comprehensive asset orders have been challenged in court. In all of these cases, the court has upheld or followed the agency's exercise of its discretion.

The ABA Working Group also argues that because the temporary receiver provision69 permits the banking agencies to seek asset orders in court, it must be that Congress somehow intended to limit or repeal section 1818(c).70 This argument overlooks the fact

68 This separates § 1818 cases from the ones in which the decision-maker has an interest in a particular outcome. In such cases, the Supreme Court has invalidated the decision-making procedure. See Ward v. Monroeville, 409 U.S. 57, 60 (1972) (mayor may not adjudge traffic offenses when village depends on revenues generated by traffic fines); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (mayor may not try offenses when compensation of mayor's services depends on conviction of defendants).
69 "[T]he test is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused.'" Ward, 409 U.S. at 60 (quoting Tumey, 273 U.S. at 532).
71 See ABA DISCUSSION DRAFT, supra note 58, at 75-76. The Working Group apparently has abandoned the argument in its Discussion Draft that the temporary receiver provisions for the FDIC and RTC § 1821(d)(18)-(19), cover failed institutions, and so preclude asset orders involving these institutions. Id. Section 1821(d)(18)-(19), say nothing about supplementing section 1818 (c)(1), and it would be inconsistent with the comprehensive enforcement scheme that Congress has envisioned for these provisions to do so. Section 1821(d)(18)-(19) cover only civil court actions that the FDIC and RTC may bring. Thus asset preservation orders would become unavailable in OTS's regulatory enforcement actions for civil money penalties and other monetary relief that involve failed institutions. We do not believe Congress intended that certain classes of respondents or certain types of claims be completely exempt from asset preservation orders by the regulator.

The Working Group also refers to, but correctly appears to reject, the contention that
that Congress quite clearly intended that the banking agencies have the power to preserve the respondents' assets.\textsuperscript{71} The 1990 amendment to section 1818(c) was specifically designed to overrule the district court decision in \textit{Spiegel} and to clarify that the agencies do have this power.\textsuperscript{72} Section 1818(i)(4) is simply an alternative mechanism.\textsuperscript{73} In some cases, the OTS enforcement staff has determined that section 1818(i)(4) is preferable.

\subsection*{B. Burden of Proof}

In order to issue a temporary cease and desist order, a thrift or banking agency must determine that:

\begin{quote}
[T]he violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges \ldots or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of depositors prior to the completion of the proceedings.\textsuperscript{74}
\end{quote}

The ABA Working Group argues that this standard needs to be

asset preservation orders are unavailable in cases of failed institutions because in such cases there are no depositors to be prejudiced. See ABA DISCUSSION DRAFT, supra note 58, at 90-91. This argument erroneously ignores the fact that the insurance funds are subrogated to the interests of depositors and may also be prejudiced. See Akin v. OTS, 950 F.2d 1180, 1183 (5th Cir. 1992); cf. 90 A.L.R. Fed. 344 (validity construction and application of provision of 12 U.S.C. § 1818(c) limiting jurisdiction of courts to enjoin enforcement of, or otherwise affect, federal banking agency's cease and desist orders direct at bank).

\textsuperscript{71} See 136 CONG. REC. E3691 (daily ed. Nov. 2, 1990) (statement of Representative Charles E. Schumer) ("[t]he Congress intended in section 902(a)(2) of the Financial Institutions Reform, Recovery, and Enforcement Act to authorize temporary C&D orders to correct conditions by stating affirmative actions, including making restitution or providing reimbursement, restricting growth, and other actions which are specifically listed"); see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 302 (1981) (acknowledging that summary administrative action may be justified in emergency situation).

\textsuperscript{72} See 136 CONG. REC. S17599 (daily ed. Oct. 27, 1990) (statement of Sen. Donald Riegle); see also Paul v. OTS, 763 F. Supp. 568, 571 (S.D. Fla. 1990) (where OTS order restrains chief of bank from dissipating assets, it is justified by statutory scheme for dealing with emergency of bank failures and does not deprive defendant of due process).

\textsuperscript{73} The Working Group recites with apparent approval a comment to the effect that the Federal Debt Collection Procedures Act also evidence a congressional intent that § 1818(c) does not permit asset preservation orders. See ABA DISCUSSION DRAFT, supra note 58, app. at 2. This Act applies only to certain debts owing to the United States. See 28 U.S.C. § 3002(3) (1992). Because the monetary relief OTS seeks is paid to a saving association or the insurance fund, the Act does not apply. See Lang v. Ryan, 789 F. Supp. 744, 745 (N.D. Miss. 1991) (holding that the court's jurisdiction over request for stay is precluded by 12 U.S.C. § 1818(i)).

\textsuperscript{74} 12 U.S.C. § 1818(c)(1) (1992); see also Hoffman v. Fed. Deposit Ins. Corp., 912 F.2d 1172, 1174-75 (9th Cir. 1990) (temporary cease and desist order may be entered without hearing and may require affirmative action).
revised in order to incorporate a showing that the “person against whom the order is being sought is likely to dissipate or otherwise improperly transfer assets of the institution concerned.”

The ABA Working Group indicated that the proposed burden of proof is intended to incorporate two pieces of evidence: “particularized facts indicating that the order is necessary to prevent IAP (institution-affiliated party) from transferring or dissipating the assets sought for recovery in the principal enforcement action”; and a showing “that the terms of the freeze order are limited to conditions necessary to remedy the risk of transfer or dissipation that gave rise to the order.”

The ABA Working Group apparently intends to emphasize that “the court has a duty to ensure that the asset preservation order is properly tailored to the risk of dissipation involved.” The Working Group does not specify a particular burden of proof here; rather, the court must “weigh various factors, including possible harm to both the IAP and the public, the degree of urgency involved, and the burden of any affirmative action sought from the defendant.”

It is difficult to predict when the proposal would differ from the existing “likely . . . to cause significant dissipation” standard in section 1818(c)(1), but we foresee some troubling issues. If the standard of “necessary to prevent” transfer or dissipation requires proof that in the absence of the order, the respondent certainly will transfer assets, the practical effect would be to provide each respondent with at least one free opportunity to transfer his or her assets before the agency establishes the required proof. If the term “necessary to remedy the risk of transfer or dissipation” requires the agency to show that specific assets or dollar amounts

75 The ABA recommends:
[A]mending section 8(i)(4)(B), 12 U.S.C. § 1818(i)(4)(B), to require the federal banking agencies, when seeking an asset preservation order under section 8(i)(4), to demonstrate that the person against whom the order is being sought is likely to dissipate or otherwise improperly transfer assets of the institution concerned. Recommendation No. 2.
This recommendation is premised on the authority to issue asset preservation orders being assigned exclusively to the courts. We do not believe, as discussed above, that there is any basis for taking away the agencies’ ability to preserve assets through their own orders.
76 ABA DISCUSSION DRAFT, supra note 58, at 109-10.
77 Id. at 111.
78 Id.
79 Of course, if the agency then must apply to a court for an asset preservation order, the respondent will have multiple opportunities before the hearing to move his assets beyond the regulatory agencies’ reach. See supra note 64 and accompanying text.
are likely to be transferred, the effect would severely hamstring the agency. OTS asset orders are based on evidence of a respondent's proclivity to transfer assets, but the specific account to be transferred rarely is provable.

The case law cited by the ABA Working Group\textsuperscript{80} fails to support the notion that an agency is or should be required to demonstrate the "need" for an order. The Working Group concludes that when the court in \textit{CFTC v. Muller}\textsuperscript{81} said that "[a] prima facie case of illegality is sufficient," it meant that a showing of need also is required.\textsuperscript{82} \textit{Muller} says nothing to that effect.\textsuperscript{83} Rather, in addressing Muller's argument that the CFTC was required to prove, as part of its case for an asset preservation order, the likelihood of future violations, the court said that such evidence "might be necessary" \textit{if} the CFTC had sought to enjoin future violations of the Commodities Futures Trading Commission Act.\textsuperscript{84} The only reservation expressed in Muller concerning the burden of proof related to a hypothetical circumstance where the underlying wrongdoing is solely prospective. OTS's asset orders, by contrast, have been based solely on past misconduct and have sought to preserve assets in order to remedy the harm caused by that misconduct.

In OTS v. Lopez,\textsuperscript{85} another case cited by the ABA Working Group, the court discussed the equitable discretion inherent in construction of "shall."\textsuperscript{86} The court "f[ou]nd that while district courts retain discretion to order prejudgment attachment of assets on a prima facie showing of illegality, such orders should ordinarily ensue upon such a showing."\textsuperscript{87} The Eleventh Circuit's construction of "shall" is correct. If this is what the ABA Working Group understands as "need," then the recommendation is unremarkable, but the tone of the ABA Report and the Discussion

\textsuperscript{80} ABA DISCUSSION DRAFT, \textit{supra} note 58, at 66-68; see also OTS v. Lopez, 960 F.2d 958, 961 (11th Cir. 1992) (Bank Fraud Act authorizes district courts to grant OTS's request for injunctions upon showing of prima facie illegality); CFTC v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978) (noting that in an action for preliminary injunction agency need not prove irreparable harm or inadequacy of other remedies, but rather need only establish prima facie case of illegality).

\textsuperscript{81} 570 F.2d 1296 (5th Cir. 1978).

\textsuperscript{82} See ABA DISCUSSION DRAFT, \textit{supra} note 58, at 66.

\textsuperscript{83} See also Parker v. Ryan, 760 F. Supp. 1189 (N.D. Miss. 1991) (regulatory agency need not prove irreparable injury or inadequacy of other remedies, need only demonstrate prima facie illegality).

\textsuperscript{84} See \textit{Muller}, 570 F.2d at 1300 (emphasis added).

\textsuperscript{85} 960 F.2d 958 (11th Cir. 1992).

\textsuperscript{86} Lopez, 960 F.2d at 961 n.8.

\textsuperscript{87} Id.
Draft suggests something more is intended. If so, the case law does not support it.

The Working Group also contends that its proposed standard of proof would be consistent both with the standards of proof applicable to the FDIC and RTC as conservator or receiver and with congressional intent.88 Neither proposition is correct. The FDIC or RTC as conservator or receiver may obtain an asset preservation order in court upon a showing of the elements necessary for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure—except that neither agency is required to show “that the injury, loss, or damage is irreparable and immediate.”89 The statute granting the FDIC and RTC authority to seek asset preservation orders thus excludes the showing of dissipation that the Working Group proposes.

Nor is there any basis for supposing that congressional intent favors this change in the law. The best evidence of congressional intent is the statute currently on the books, and it sets forth a different standard of proof.90

C. Special Treatment for Lawyers

The ABA Working Group has argued that, in addition to legislative changes, the federal banking agencies should exercise their discretion and accord special treatment to lawyers when considering asset preservation orders.91 The Working Group characterizes their plea for forbearance as “so important that it should be the subject of an independent resolution.”92

It is not clear what the statutory basis is for special treatment for lawyers. If the banking agencies should accord special treatment to lawyers in the agencies' enforcement actions, then it would be necessary to amend the enforcement statutes. However,
the Working Group has chosen not to recommend asking Congress to embrace this request for special handling.

OTS has not taken a different approach to lawyers in its enforcement actions than it has to any other group of respondents, and there is no reason to adopt a special policy for lawyers on the matter of asset preservation orders. Certainly there is no evidence that OTS has singled out lawyers; only one of the twenty-two comprehensive asset preservation orders was entered in an action against lawyers. The agency does, of course, weigh all the circumstances in each case before deciding whether an asset preservation order is appropriate. In the one case where such an order was entered, individual lawyers had refused to supply information relating to their financial conditions, and the agency had evidence that the firm planned to reduce its insurance coverage. In this circumstance, these facts justified an asset preservation order.

The City Bar Report asserts that law firms are fragile and an asset preservation order can hurt a law firm's relationship with its lenders even more than the underlying suit.93 The City Bar Report alleges that both the attorney client privilege and zealous advocacy are threatened by an asset preservation order's severe effects.94 No substantiation is offered for these assertions. The ABA Report does not attempt to assert them.

The argument that an asset preservation order is more damaging to a firm's relationship with its creditors than a notice of charges alone is difficult to believe, and is contrary to the facts of the Kaye, Scholer case, where the firm's lenders were concerned about the size of the ultimate judgment. The City Bar Report's other arguments concerning the attorney client privilege and zealous advocacy are also unpersuasive. The financial disclosure required by the Kaye, Scholer order did not remotely touch on the attorney client relationship. Zealous advocates have no more to fear from an asset preservation order than from any other action alleging lawyer misconduct.

CONCLUSION

When the savings and loan crisis became a national concern, Congress stepped forward and supplied regulators with the neces-

93 See City Bar Report, supra note 57, at 5.
94 Id. at 6-7.
sary tools to address the problem. One of the primary tools, the ability of the OTS and other banking agencies to issue temporary cease and desist orders to prevent the dissipation of assets, was considered so important that Congress acted not once but twice to give regulators such authority. The temporary cease and desist orders are not broad unspecific assertions of government power. Instead, the temporary orders issued by OTS and upheld by the federal courts have been carefully crafted documents aimed at securing the funds of alleged wrongdoers while preserving the financial security of those same wrongdoers. Based on thorough administrative procedures and subject to immediate judicial scrutiny, the temporary orders provide excellent means of fairly preserving the financial status quo and thereby protecting the taxpayers' interest while the merits of a case are resolved.

The recent publicity surrounding the OTS's use of the asset preservation powers against a major law firm, Kaye, Scholer, Fierman, Hays & Handler, only serves to underscore the need for the authority to act. Some mistakenly believe that the temporary order only highlighted the underlying enforcement action. The action taken by the firm's lenders, by reason of their own assessment of the strength of the underlying suit, appears to have induced the firm to settle quickly. Providing sanctuary for law firms that allegedly inflicted substantial damage on federally insured institutions would only impair the efforts of the federal banking agencies to recover taxpayer funds by creating a doctrine that establishes lawyers as a sacrosanct class, immune from the remedies available against others charged with complicity in causing great losses to the citizens of the Nation. Nothing in the nature of the role of a lawyer or the extent or use of the cease and desist authority by OTS justifies such a change.