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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,365

ALLAN GEE, as Official
Liquidator of UNIVERSAL
CASUALTY & SURETY COMPANY
LTD. (in Liquidation),

Petitioner,

v.

SEIDMAN & SEIDMAN, and
BINDER DIJKE OTTE & CO., et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

BRIEF AMICI CURIAE OF BUSINESS AND FINANCIAL LAWYERS IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE OF BUSINESS AND FINANCIAL LAWYERS IN SUPPORT OF RESPONDENTS

The amici curiae, a group of business and financial lawyers, respectfully submit this brief pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure in support of respondents Seidman & Seidman and Binder Dijke Otte & Co. and the decision of the Florida District Court of Appeal.[1]

INTEREST OF THE AMICI

An increasingly familiar scenario has emerged in multi-million dollar tort litigation: A corporation fails. A liquidator, receiver, or bankruptcy trustee is appointed. After corporate control shifts out of the hands of management, fraudulent transactions that management had painstakingly concealed are uncovered. In the search for "deep pockets," the liquidator, receiver, or trustee on behalf of the corporation sues an outside professional who provided limited services to the corporation and alleges that the professional breached a duty of reasonable care owed to the corporation to uncover the fraud. Millions of dollars of damages are sought on behalf of the corporation on the allegation that the professional's negligence "artificially" prolonged the life of the corporation, even though the professional never even worked on most or any of the

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[1] Respondents raise strong and persuasive arguments that, on the particular facts and procedural posture of this case, the Court lacks jurisdiction over the certified question and the certified question, as applied to this case, does not address an issue of public importance. This amici brief has nothing to add to respondents' powerful jurisdictional arguments. Amici wish to emphasize, however, that this brief is not intended in any way to detract from respondents' jurisdictional arguments.

transactions in which management committed fraud or for which damages are sought. When the professional defends itself by showing that management -- as agents of the corporation -- knew that which the professional allegedly failed to discover, the liquidator, receiver, or trustee argues that traditional imputation principles do not apply because the beneficiaries of a recovery will be creditors of the corporation.

This scenario applies to this case. What particularly concerns amici, however, is that this scenario increasingly has been applied by plaintiffs to attorney defendants. Indeed, here petitioner equates this case to others that have been filed against attorneys. See Petitioner's Initial Brief on the Merits at 41.

This litigation scenario already has had a deleterious effect on lawyers, their clients, and the attorney-client relationship. Lawyers giving advice to corporate clients, especially those in start-up and competitive industries, face potential conflicts of interests between the duties they owe their clients and the implied duties to creditors that underlie theories of liability like that advocated by petitioner. These conflicts are aggravated by the knowledge that if a business fails, a liquidator, receiver, or trustee may well argue that instead of relying on corporate management to supply accurate information, as has been the traditional practice, lawyers have a duty to conduct exhaustive and intrusive investigations of corporate management.

Amici constitute a group of business and financial lawyers who have years of experience in representing a variety of business and financial enterprises. Amici are committed to the provision of quality legal services consistent with the best ethical traditions of the profession. If the Court grants review, acceptance of the legal theories advanced by petitioner may well have a detrimental impact on the role lawyers play when serving business and financial clients.

Amici have already seen first-hand the negative consequences of the kinds of lawsuits described. Indeed, some work at or represent law firms that have faced such suits. At the most obvious level, the survival of a number of professional firms has been threatened by these kinds of lawsuits. The deeper threat, however, is even more pernicious. To avoid the prospect of debilitating liability, a number of firms simply will no longer represent companies, or even industries, facing any sort of unusual competitive or financial risk. Sometimes this is the firm's own choice. In other situations, it has become impossible to obtain malpractice insurance coverage for representation of clients in certain industries, or for suits by certain potential receivers.

Even where lawyers continue to provide services, their fees for all clients are increased and their own insurance premiums are increased. Moreover, their advice will inevitably tend toward the overcautious, blocking or unduly raising the costs of many transactions at the slightest sign of innovation or

risk. This, and the other effects of expanded professional liability described above, are particularly harmful to the economy of Florida, which has long benefited from entrepreneurial and high-growth companies.

The amici here thus seek to protect lawyers, and the clients they serve, from the negative consequences of the all-too-common litigation scenario described above. If lawyers were stripped of traditional imputation defenses, they could face potentially impossible burdens. Sophisticated corporate fraud is extremely difficult to uncover -- particularly for corporate lawyers who receive no training (in law school or later) in detecting fraud by their own corporate clients. Such lawyers certainly are not retained, as part of a normal corporate representation, to conduct an investigation for management fraud. Moreover, the abolition of traditional imputation defenses will create conflicts of interest for lawyers between the duties they owe to their corporate clients and the implied duties to a corporation's creditors advocated by petitioner and other plaintiffs. These implied duties to creditors may even require disclosures to persons outside the corporation that violate the corporation's attorney-client privilege. Amici thus believe that the preservation of traditional imputation defenses is vital to the proper functioning of the attorney-client relationship. The role served here by amici is similar to that recently served by the American Bar Association in filing an amicus brief in support

of traditional imputation defenses in a case currently being heard by the United States Supreme Court. See infra, at 26-27.

SUMMARY OF ARGUMENT

This brief makes three basic points. First, if the court grants review, the certified question should be answered in the negative. It would be contrary to both the common law and Florida statutes to allow insurance liquidators to assert the claims of creditors. Moreover, allowing a liquidator to prevail based on the asserted interests of creditors would abrogate the settled rules of duty and proximate causation under which creditors themselves cannot sue outside professionals. Second, the decision of the District Court of Appeal that imputation of management's knowledge exists here is supported by well-established case law. The soundness of the decision below is particularly clear because the cases reveal that imputation is more broadly permissible when, as here, the outside professional is accused of negligence but not of fraud. Third, the Court should decline petitioner's invitation to create exceptions to traditional imputation principles based on petitioner's asserted reasons of policy and equity. Following that course would embroil the Florida courts in deciding whether to create additional exceptions to traditional imputation principles for a host of other situations, each with its own variations in the applicable policy concerns and equities.

ARGUMENT

I. LIQUIDATORS CANNOT PREVAIL BY ATTEMPTING TO ASSERT THE CLAIMS OF CREDITORS.

Petitioner's Initial Brief On The Merits ("Pet. Br.") essentially ignores the certified question, which is:

> Whether the liquidator of a bankrupt company should be permitted to recover for losses suffered by the company's customers and creditors, against an auditor which negligently failed to discover the fraud of the company's manager, where the manager's fraudulent act was intended to and did benefit the company. (emphasis added)

If the Court grants review of the certified question, we believe it should be answered in the negative for two reasons. The first is that, as a matter of both the common law and legislative enactment in Florida, an insurance liquidator has no authority to assert claims of creditors.

As the leading treatise on insurance law has stated, an insurance liquidator's

> authority does not extend beyond that of the property, contracts, and rights of action of the company as of the date of the order directing liquidation. Accordingly, . . . [a] receiver . . .[stands] in the shoes of the company with the same rights and obligations with respect to assets and property of the company that it had at the inception of the receivership. The insolvency of an insurance company does not enable its receiver to maintain actions which the company could not . . . .

19 A. Appleman, Insurance Law and Practice § 10682 at 121-122 (1982 & 1991 Supp.) (emphasis added), and cases cited therein; accord 2A Couch on Insurance 2d § 22:50 at 634 (Rev. ed. 1984 & 1993 Supp.), and cases cited therein. And, although this Court has not addressed this precise question in the exact context of an insurance liquidator, it too has recognized that receivers of failed corporations stand in the shoes of the corporation, not its creditors. See Hamilton v. Flowers, 134 Fla. 328, 343, 183

So. 811, 817 (1938); Young v. Victory, 112 Fla. 66, 80-81, 150 So. 624, 629 (1933).

Moreover, by statute, Florida has enacted the rule that a receiver for an insurance corporation succeeds to the "rights of action . . . of the insurer." § 631.141(2), Fla. Stat. (emphasis added); see also id. § 631.111(2). Even the principal case cited by petitioner holds that the "plain text" of such a provision does not permit an insurance liquidator to assert claims of creditors. Schacht v. Brown, 711 F.2d 1343, 1346 n.3 (7th Cir.), cert. denied, 464 U.S. 1002 (1983).[2]

It is thus clear that an insurance liquidator cannot assert claims of creditors. Even if the liquidator had such authority, however, a second reason supports a negative answer to the certified question. That is, even if the petitioner could assert the claims of creditors, it has not sustained its burden of showing that the creditors in and of themselves can satisfy the elements for a viable claim of negligence against an outside professional. See FDIC v. Shrader & York, 991 F.2d 216, 223 (5th

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[2] In the one instance where the statute gives the liquidator authority to assert creditors' claims, it does so expressly. See § 631.261, Fla. Stat. (liquidator may bring action to avoid preference or fraudulent conveyance that a "creditor . . . might have avoided"). Professional liability claims plainly fall within the general rule that liquidators succeed to the claims of the insurer only, see id. §§ 631.111(2), 631.141(2), not the express and narrow exception for actions to avoid preferences and fraudulent conveyances. Additional statutory provisions emphasize that the insurance receiver succeeds only to the "assets of the insurer" and "the property and business of the insurer." Id. §§ 631.111(1), 631.141(1), (5), (7). Cayman Islands law is in accord. See Cayman Islands Companies Law, Chap. 22, pt. V § 108(a).

Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3336 (U.S. Oct. 26, 1993); FDIC v. Deloitte & Touche, 834 F. Supp. 1129, 1135-36 (E.D. Ark. 1992). Indeed, petitioner does not even attempt to do this, and instead emphasizes that it is asserting Universal's claims, a breach of duty by Seidman & Seidman owed to "its client Universal," and causation of Universal's damages. Pet. Br. at 3 & n.4, 24, 25, 27 (emphasis added). Petitioner's choice is a calculated one, for creditors of Universal could not satisfy (and certainly have not satisfied) at least two fundamental elements necessary for a claim -- duty and proximate causation.

This Court has held that an auditor's duty to exercise reasonable care extends only to its client and others "whom an accountant 'knows' will rely on his opinion." First Florida Bank v. Max Mitchell & Co., 558 So.2d 9, 15 (Fla. 1990). Petitioner has adduced no evidence to satisfy this requirement for a claim by creditors.

The limitations in Max Mitchell on the persons to whom an auditor owes a duty reflect the fundamental policy of "'protect[ing] [accountants] from liability that unreasonably exceeds the bounds of their real undertaking.'" Id. at 16 (quoting Raritan River Steel Co. v. Cherry, Bekaert & Holland, 367 S.E.2d 609, 617 (N.C. 1988)). This policy is particularly important to amici and lawyers in general because a very strict rule -- privity -- limits those persons who may sue a lawyer for alleged negligence, thus reflecting the narrow bounds of a lawyer's undertaking. See, e.g., Espinosa v. Sparber, Shevin,

Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1379-80 (Fla. 1993); Angel, Cohen & Rogovin v. Oberon Inv., N.V., 512 So. 2d 192, 194 (Fla. 1987). Pursuant to the privity rule, an attorney does not owe a duty to the client's creditors. See, e.g., Schechter v. Blank, 1993 WL 365065, at *4-6 (Ill. Ct. App. 1993).

The petitioner attempts -- as have other liquidators and receivers -- to avoid traditional imputation principles on the basis that although the petitioner's claim is brought on behalf of the failed company, creditors will be the ultimate recipients of a recovery. Such arguments are nothing less than an impermissible attempt to make an end run around the rule and policies of Max Mitchell (or, in the case of lawyers, the requirement of privity). See FDIC v. Shrader & York, 991 F.2d at 223; FDIC v. Deloitte & Touche, 834 F. Supp at 1135-36.[3]

In addition to being unable to establish the existence of a duty to exercise reasonable care owed to them by an auditor or a lawyer, creditors also could not establish proximate cause in a case of this kind. The injury claimed by petitioner is that by failing to discover Shah's fraud, Seidman & Seidman permitted Shah to aggravate Universal's insolvency. Petitioner concedes that creditors were only "derivatively injured" in that Universal was rendered further insolvent and further unable to pay its

[3] Even if some creditors could satisfy the requirement of Max Mitchell, the claims of even these creditors would still fail if they had not individually received and relied on the allegedly improperly audited financial statements. See, e.g., Beiger v. Price Waterhouse, 81 B.R. 303, 305-06 (E.D. Pa. 1987); Cotten v. Republic Nat'l Bank, 395 S.W.2d 930, 941 (Tex. Civ. App. 1965).

creditors. Pet. Br. at 30 n.20. A recent decision of the United States Supreme Court unanimously holds that in the kind of situation described by petitioner, neither a creditor nor its successor can establish proximate cause for such a "derivative" injury.

In Holmes v. SIPC, 112 S. Ct. 1311 (1992), a federal insurer of creditors of failed broker-dealers asserted the claims of the creditors against a defendant for fraudulently causing and aggravating the insolvency of the broker-dealers. See id. at 1319. The federal insurer asserted rights as a subrogee of, and thus the successor to, the creditors. Although Holmes is a RICO case, the Court held that RICO requires application of the "common law" requirement of "proximate cause," particularly the "demand for some direct relation between the injury asserted and the injurious conduct alleged." Id. at 1317-18. The Court held that the claims of the creditors, and their successor, foundered "on the rule that creditors generally may not sue for injury affecting their debtors' solvency." Id. at 1320 n.19.[4] As the Court explained: "The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the . . . creditors." Id. at 1319. The holding of the Supreme Court

[4] This rule itself applies the traditional principles of the common law that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" and that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." Id. at 1318, 1319 (quotations and citations omitted).

reflected the fundamental unfairness of a rule of law that would allow one person to be held liable for all the claims of creditors of an insolvent company when, in the great portion of such situations, the extent of the insolvency and the creditors' losses would reflect "other, independent, factors." Id. at 1318.

Florida's requirements for proximate cause retain the common law demand of some direct relation between the injury asserted and the conduct alleged. See, e.g., Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301 So. 2d 441, 444 (Fla. 1974). There is thus every reason for Florida to adopt the rationale of Holmes v. SIPC, a decision well grounded in both traditional common law principles and sound policy. Indeed, this case, where an outside professional has allegedly been negligent, presents an even stronger basis for holding that creditors' losses were not proximately caused than did Holmes, where the defendant was accused of participation in a fraudulent conspiracy. As noted infra at 13, it is axiomatic that the scope of proximate cause is narrower in cases of negligence than in cases of fraud.

In sum, if the Court grants review, the certified question should be answered in the negative. First, the petitioner has no authority to assert the claims of creditors. Second, creditors would have no viable claims for the petitioner to assert because no creditor claims satisfy the requirements of either Max Mitchell or proximate causation. Of course, it must follow that if neither Universal nor its creditors have a viable claim, petitioner cannot have one, even if petitioner were

considered a successor to creditors' claims. Petitioner simply cannot somehow weave together a hybrid claim by selectively mixing and matching elements of a claim that Universal might be able to satisfy but creditors cannot (e.g., privity and direct causal relation) with other elements that creditors might satisfy but Universal cannot because Shah was Universal's agent.

II. THE DISTRICT COURT OF APPEAL CORRECTLY APPLIED TRADITIONAL PRINCIPLES OF IMPUTATION.

Rather than address the certified question, petitioner devotes its brief to arguing that the District Court of Appeal wrongly imputed Shah's knowledge to Universal. Even assuming the Court has or should exercise jurisdiction over this different question, the decision of the District Court of Appeal correctly applied well-established principles of law to the contentions in and undisputed facts of this case.

Before discussing the imputation issue, however, amici note that petitioner's claim on behalf of the corporation itself for the "artificial" prolongation of the corporation's life has never been recognized by a court in a negligence case. In the cases cited by petitioner, there was either a viable claim for fraud against the defendant itself,[5] or the state statute --

[5] Schacht v. Brown, 711 F.2d at 1346; Tew v. Chase Manhattan Bank, 728 F. Supp. 1551, 1560-61 (S.D. Fla. 1990); Robertson v. White, 633 F. Supp. 954, 962, 969 (W.D. Ark. 1986); In re Huff, 109 B.R. 506, 508, 511-12 (Bankr. S.D. Fla. 1989) (in addition, defendants were directors and officers, not outsiders); Holland v. Alexander Grant & Co., 70 B.R. 729, 731 (Bankr. N.D. Ill. 1987). Petitioner's citation to Feltman v. Prudential Bache Securities, 122 B.R. 466 (S.D. Fla. 1990), is mystifying. Not only was the third party accused of fraud in Feltman, see id. at
(continued...)

contrary to Florida law, see supra at 6-7 -- permitted receivers to assert the claims of creditors,[6] or both.[7] Cases involving fraud by the defendant are particularly inapposite because it is settled law that the ambit of proximate causation is potentially broader for an intentional tort such as fraud than for negligence. See, e.g., Restatement (Second) of Torts § 435B & comment a (1965); Johnson v. Greer, 477 F.2d 101, 106 (5th Cir. 1973).

In cases where the plaintiff is the failed institution itself, or a successor on its behalf, and the alleged tort is negligence, the courts consistently hold that, as a matter of law, the "artificially" prolonged life theory fails to satisfy proximate cause. See, e.g., Bergeson v. Life Ins. Corp. of Am., 265 F.2d 227, 233-34 (10th Cir.), cert. denied, 360 U.S. 932 (1959); RTC v. Azevedo, No. 92-C-1304, Ruling at 11 (N.D. Cal. 1993) (the theory of "'I did wrong, but you should have stopped me' and 'If you didn't stop me, you're liable for everything I did wrong' . . . just doesn't go");[8] Stratton v. Miller, 113 B.R.

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[5] (...continued)
469, but the court held there was no legally recognized injury when the corporation, as here, was dominated by wrongdoers, see id. at 473-74 & n.8; see also id. at 474 n.9.

[6] Bonhiver v. Graff, 248 N.W.2d 291, 296 (Minn. 1976); see Schact v. Brown, 711 F.2d at 1346-47 n.3.

[7] Foster v. Peat Marwick Main & Co., 587 A.2d 382, 384-85 (Pa. Commw. Ct. 1991); In re Integrity Ins. Co., 573 A.2d 928, 931, 933-35, 941-42 (N.J. App. Div. 1990); Corcoran v. Frank B. Hall & Co., 545 N.Y.S.2d 278, 279, 281-83 (N.Y. App. Div. 1989).

[8] A copy of RTC v. Azevedo is appended hereto.

205, 210 (D. Md. 1989) (theory rejected as "mere speculation"), aff'd, 900 F.2d 255 (4th Cir. 1990); Stratton v. Sacks, 99 B.R. 686, 696 (D.Md. 1989) (same), aff'd, 900 F.2d 255 (4th Cir. 1990); see also Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 62 (2d Cir. 1985) (rejecting theory where defendant allegedly committed fraud); Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523, 528-29 (9th Cir. 1976) (same); Johnson v. Chilcott, 590 F. Supp. 204, 208-09 (D. Colo. 1984) (same); In re Investors Funding Corp. Secs. Litig., 523 F. Supp. 533, 540 (S.D.N.Y. 1980) (same); Holland v. Arthur Andersen & Co., 571 N.E.2d 777, 782-83 (Ill. App. 1991) (fraud and breach of contract).[9]

As these cases recognize, there are so many attenuated steps to the "artificial" prolongation theory that, as a matter of law, "the failure of the corporation to use proceeds wisely or the theft of corporate funds by officers was hardly a reasonably foreseeable result, let alone the direct result, of any of [the outside professional's] alleged actions." Bloor, 754 F.2d at 62. Amici respectfully urge this Court not to become the first to hold that this highly questionable theory satisfies the

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[9] Cf. Holmes v. SIPC, 112 S. Ct. at 1327 (Scalia, J., concurring):

> Life is too short to pursue every human act to its most remote consequences; "for want of a nail, a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith.

requirements of proximate cause where the only claim is one by the corporation, or its successor, for negligence.[10]

Although the District Court of Appeal at one point refers to a "Cenco estoppel," proximate causation is also the best heading under which to address whether the knowledge of Shah should be imputed to Universal. First, proximate causation principles provide the best guidance for determining how far it is fair to extend the consequences for an allegedly tortious act. See Holmes v. SIPC, 112 S. Ct. at 1318. Second, proximate causation is an element of the plaintiff's claim. If that element is not satisfied, it is unnecessary to consider whether any affirmative defense exists. Here, if Shah's knowledge is imputed to Universal, this means that Universal knew what Seidman & Seidman allegedly failed to discover and disclose. Accordingly, it cannot be said that Universal relied on Seidman & Seidman or that Seidman & Seidman's alleged negligence was a substantial factor in Universal's actions or the extent of its insolvency. See, e.g., FDIC v. Ernst & Young, 967 F.2d 166, 169 (5th Cir. 1992); Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 454 (7th Cir.), cert. denied, 459 U.S. 880 (1982); RTC v. Azevedo, Ruling at 11-13; FDIC v. Deloitte & Touche, 834 F. Supp.

[10] If the Court does adopt the "artificial" prolongation theory, we respectfully request that the Court make plain, as held by Schacht v. Brown, 711 F.2d at 1350, that damages are limited to losses from the continuation of the exact same kind of fraudulent transaction. There is an increasing tendency of plaintiffs to use this theory to seek damages for all subsequent transactions, no matter how unrelated or different in kind.

at 1137; Begier v. Price Waterhouse, 135 B.R. 222, 224 (E.D. Pa. 1991).[11]

Imputation as a matter of law is proper in this case on two grounds: short-term benefit and control. First, imputation based on the short-term benefit to the corporation -- the ground relied on by the District Court of Appeal -- is certainly supported by the vast weight of authority in negligence cases. See FDIC v. Shrader & York, 991 F.2d at 223-24; Cenco Inc. v. Seidman & Seidman, 686 F.2d at 453; FDIC v. Deloitte & Touche, 834 F. Supp. at 1136 n.7, 1138-40; In re Wedtech Secs. Litig., 138 B.R. 5, 6, 9 (S.D.N.Y. 1992); see also Schneider v. Thompson, 58 F.2d 94, 98 (8th Cir. 1932) (fraud that allows bank "to continue in business" is "for the benefit of the bank," even though officer's motive was to hide his own looting); Feltman v. Prudential Bache Secs., 122 B.R. 466, 474 n.9 (S.D. Fla. 1990) (approving of Cenco); Security America Corp. v. Schacht, No. 82-C-2132 (N.D. Ill. 1983) (available on LEXIS).[12]

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[11] Indeed, in the District Court of Appeal, Seidman & Seidman itself principally raised imputation as part of a its contention that petitioner failed to prove proximate causation or reliance. See Initial Brief of Appellants, at 20-21. As explained infra at 19 n.14, an estoppel defense is also properly sustained.

[12] All but two of the cases cited by petitioner in opposition to imputation based on short-term benefit had viable fraud claims against the outside professional, and thus a potentially broader range of proximate causation. See Schacht v. Brown, 711 F.2d at 1345; Kempe v. Monitor Intermediaries, Inc., 785 F.2d 1443, 1443 (9th Cir. 1986); In re Investors Funding Corp., 523 F. Supp. at 536, 540; In re Liquidation of Integrity Ins. Co., 573 A.2d at 931; Corcoran, 545 N.Y.S.2d at 283. The other two cases are also inapposite. In FDIC v. Clark, 978 F.2d 1541 (10th Cir. 1992), although the claim was labelled negligence, the defendants
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The short-term benefit rule is logical both as a matter of agency law and as a matter of proximate causation. Under agency law, the adverse interest exception applies only if the agent's actions are "entirely" for the agent's own purposes. Restatement (Second) of Agency § 282(1) (1958); accord FDIC v. Shrader & York, 991 F.2d at 223. Where, as here, the actions of the agent bring money into the company some of which is used for operating or other company purposes, the "entirely" requirement of the adverse interest exception is not satisfied. See, e.g., id. at 224; Cenco, 686 F.2d at 456; Security America Corp. v. Schacht.

Principles of proximate causation also support the short-term benefit rule. The rule recognizes that the act of bringing money into the corporation does not injure the corporation. It is only the subsequent misuse of the proceeds (here, Shah's appropriation of proceeds of the fraud) that even arguably depletes the assets of the corporation. Because the outside professional has only the most attenuated connection to this subsequent misuse -- as illustrated by this case, where the

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[12] (...continued)
actually knew of the fraud. See id. at 1546-47. Moreover, there was no short-term benefit in Clark, unlike here, because all of the money brought in went directly into the pockets of those engaged in looting the institution. See id. at 1546. (Clark also involved officials who did not control the institution. See id. at 1547-48; compare infra at 17-19.) FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992), is pending before the United States Supreme Court after a grant of certiorari. See 114 S. Ct. 543 (1993). Reliance on the lower court's decision is thus inappropriate at this time. It is worth noting that the American Bar Association has filed an amicus brief urging the Supreme Court to reverse the O'Melveny decision. See infra at 26-27.

outside professional certainly has no direct involvement in the subsequent misuse -- the short-term benefit rule serves the traditional function of proximate cause by placing a reasonable limit on the scope of liability and damages for alleged negligence.

A second basis for imputation also fully supports the decision below. It is universally recognized that, even when a corporate official is acting entirely adversely to the interests of the corporation, imputation is appropriate for a high-level corporation official who exercises control over operations and for any corporate official who has control over the transactions at issue.[13] There can be no dispute that Shah controlled both

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[13] See, e.g., Stratton v. Sacks, 99 B.R. 686, 694 n.9 (D. Md. 1989), aff'd, 900 F.2d 255 (4th Cir. 1990); Schneider v. Thompson, 58 F.2d 94, 97-99 (8th Cir. 1932); Dewey v. Lutz, 462 N.W.2d 435, 443 (N.D. 1990); Merchants Nat'l Bank & Trust Co. v. H.L.C. Enters., 441 N.E.2d 509, 514 (Ind. Ct. App. 1982); Griffith Motors, Inc. v. Parker, 633 S.W.2d 319, 322 (Tenn. Ct. App. 1982); Supreme Petroleum, Inc. v. Briggs, 433 P.2d 373, 378-79 (Kan. 1967); Nissen v. Nissen Trampoline Co., 39 N.W.2d 92, 96-97 (Iowa 1949); Bowen v. Mt. Vernon Sav. Bank, 105 F.2d 796, 799 (D.C. Cir. 1939); National Turners Bldg. & Loan Ass'n v. Schreitmueller, 285 N.W. 497, 499 (Mich. 1939); Post v. Maryland Casualty Co., 97 P.2d 173, 176 (Wash. 1939); Wood & Co. v. State ex rel. Johnson, 80 P.2d 261, 264 (Okla. 1938); West Am. Fin. Co. v. Pacific Indem. Co., 61 P.2d 963, 969 (Cal. App. 1936); Citizens' Nat'l Bank v. Speck, 164 A. 810, 811-12 (Pa. 1933); State Bank v. Payne, 159 S.E. 163, 165 (Va. 1931); Hughes v. Riggs Bank, 239 P. 297, 298 (Ariz. 1925); Knobley Mountain Orchard Co. v. People's Bank, 129 S.E. 474, 475-76 (W. Va. 1925); Evona Inv. Co. v. Brummitt, 240 P. 1105, 1111 (Utah 1925); Tremont Trust Co. v. Noyes, 141 N.E. 93, 98 (Mass. 1923); First Nat'l Bank v. C.W. Leeton & Bro., 95 So. 445, 448 (Miss. 1923); Mays v. First State Bank, 247 S.W. 845, 846 (Tex. Comm'n App. 1923); Little Red River Levee Dist. No. 2 v. Garrett, 242 S.W. 555, 557 (Ark. 1922); State v. American State Bank, 187 N.W. 769, 770-71 (Neb. 1922); Tatum v. Commercial Bank & Trust Co., 69 So. 508, 512-13 (Ala. 1915); Saratoga Inv. Co. v. Kern, 148 P. 1125,
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the operations of Universal and the transactions at issue. See T. 1406, 1474, 3659; Defendants' Ex. RR.

That imputation based on control serves the principles of proximate cause is illustrated by the analogous case of Flagg v. Seng, 60 P.2d 1004 (Cal. App. 1936). In Flagg, a bankruptcy trustee sued outside auditors for alleged negligence in failing to discover false records and improper transactions. The controlling directors of the failed corporation had known the true facts. Id. at 1007. The court held that this knowledge demonstrated that nothing done by the auditors "had any causal relation to" the losses of the corporation. Id. Rather, the controlling directors "were not only not deceived by the audits and reports, but they had intentionally handled the transactions in such a manner as to make them appear on the books [falsely.]" Id. Similarly, here Shah was obviously not deceived by Seidman & Seidman's audits, and Shah controlled Universal.

Addressing imputation in the context of proximate cause also exposes petitioner's final argument to be a red herring -- i.e., that it is inequitable to allow Seidman & Seidman, an allegedly negligent defendant, to raise an imputation defense. See Pet. Br. at 42-46. Of course, it is commonplace that an allegedly negligent defendant may prevail based on the plaintiff's inability to prove proximate cause. Thus, in the

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[13] (...continued)
1128 (Or. 1915); First Nat'l Bank v. Harvey, 137 N.W. 365, 369 (S.D. 1912).

context of proximate cause, defendants are regularly permitted to raise imputation defenses. See supra at 10-11, 15.[14]

Imputation in this negligence case is also supported by basic principles of fairness and sound policy. Fairness suggests that it is reasonable to distinguish between an outside professional who fails to discover what the officers of his or her client are hiding and an outside professional who acts with knowledge or whose client's officers do not know the true facts. Plainly, corporate fraud is by its nature hidden, complex, and extremely difficult for an outside professional to discover. See Cenco, 686 F.2d at 456; cf. RTC v. Holland & Knight, 832 F. Supp.

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[14] Petitioner is even wrong when imputation is addressed as part of an equitable estoppel defense. The well-recognized equitable defense of in pari delicto fully rebuts petitioner's argument that an allegedly negligent party may not raise an equitable defense. See, e.g., Whitelock v. Geiger, 368 So. 2d 372, 374 (Fla. Dist. Ct. App. 1979); Feltman, 122 B.R. at 474 n.9; cf. Devco Premium Fin. Co. v. North River Ins. Co., 450 So. 2d 1216, 1220 (Fla. Dist. Ct. App.) (recognizing defense for allegedly negligent accountant that "plaintiffs should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care") (quotations and citation omitted), review denied, 458 So. 2d 272 (1984). It requires "collusion," not alleged negligence, to bar a defendant from raising an imputation defense. FDIC v. Shrader & York, 991 F.2d at 226; accord, e.g., Lettieri v. American Sav. Bank, 437 A.2d 822, 827-28 (Conn. 1980); Crystal Ice Co. v. First Colonial Corp., 257 S.E.2d 496, 498 (S.C. 1979); Sussel v. First Fed. Sav. & Loan Ass'n, 238 N.W.2d 625, 628 (Minn. 1976). The cases cited by petitioner are entirely inapposite. See Reitano v. Fote, 50 So. 2d 873, 874 (Fla. 1951) (purchaser could not recover partial payment on contract it improperly breached); Standard Accident Ins. Co. v. Bear, 184 So. 97, 103 (Fla. 1938) (based on terms of surety bond, owner who improperly paid contractor, rather than materialman, could not recover from surety); Meyers v. Moody, 693 F.2d 1196, 1209, 1210 n.12 (5th Cir. 1982) (defendant was president and CEO, was "at least grossly negligent," and had acted with "a blatant, callous disregard"); In re Integrity Ins. Co., 573 A.2d at 931 (fraud claim against defendant).

1532, 1537 (S.D. Fla. 1993) ("Third-party professionals . . . do not have the control or oversight responsibilities of officers and directors.")

Moreover, courts have recognized that there are a number of harmful consequences associated with an expansion of professional liability. See, e.g., Pinter v. Dahl, 486 U.S., 622, 654 n.29 (1988) (expanded professional liability "risks over-deterring activity related to lawful" transactions); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214-16 n.33 (1976). Some professionals will withdraw from representing risky or entrepreneurial enterprises. Others will be unable to obtain malpractice insurance for such representations, or only at substantially higher premiums. Fees will rise for all clients to compensate for the increased risk of liability and enterprise-wide damages.

Those professionals who continue to provide services to riskier businesses (such as start-up companies and those in highly competitive industries) will inevitably gravitate to one of two categories. Some will be of a type unconcerned with potential liability and increased insurance premiums (perhaps lacking any insurance at all) -- and thus less likely to be careful and scrupulous than those who leave these areas of practice. Others will be so worried about their own liability that they will block, or add costs to, even sound transactions that contain any innovation or risk. Neither reaction is

conducive to the well-being of Florida enterprises, or those who deal with them.

In sum, the short-term benefit basis for imputation applied below, as well as the alternative ground of control, are supported by well-established case law, fundamental principles of proximate cause and agency law, basic notions of fairness, and sound policy reasons. If the court grants review, the decision below should be affirmed.

III. ACCEPTING PETITIONER'S POLICY ARGUMENTS WOULD EMBROIL THE FLORIDA COURTS IN DECIDING NUMEROUS OTHER IMPUTATION ISSUES.

Essentially, petitioner invites the Court to create an exception to traditional rules governing imputation because of petitioner's asserted reasons of policy and equity applicable to this case. If the Court were to embark down that road, the Florida courts inevitably would become embroiled in deciding which policies and equities should prevail in a host of other varying circumstances. We strongly urge the Court to decline petitioner's invitation. If, however, the Court grants review, and reverses or modifies the decision below, we respectfully request that the Court not express its holding in terms that would inadvertently and prematurely decide any of the issues listed below.

A. Statute of Limitations. The kind of challenge mounted by petitioner against traditional imputation principles is particularly pernicious when the defense is statute of limitations. This is because plaintiffs regularly seek to avoid limitations bars by arguing that they did not have knowledge or

reason to know of a possible cause of action. When the plaintiff is a corporation, or its successor, the defendant responds by showing the knowledge of corporate officers. If this knowledge is not imputable to the corporation, stale claims could be brought many years, even decades, after the underlying events. This is antithetical to the policies against such stale claims underlying the statute of limitations.[15] To prevent this injustice, courts have been particularly receptive to imputation in the context of statute of limitations defenses. See, e.g., FDIC v. Regier, Carr & Monroe, 996 F.2d 222, 225 (10th Cir. 1993); FDIC v. Shrader & York, 991 F.2d at 222.

B. Negligence of Officers. Imputation of an officer's knowledge is, not surprisingly, easier when the officer acts negligently but not fraudulently. Neither short-term benefit nor control need be shown to impute the knowledge of an officer who is negligent to the corporation. To the contrary, such knowledge and negligence is imputed pursuant to the doctrine of respondeat superior. See, e.g., FDIC v. Ferguson, 982 F.2d 404, 406-07 (10th Cir. 1991); FDIC v. Gantenbein, 811 F. Supp.

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[15] See Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condominium Assn., 581 So. 2d 1301, 1303 (Fla. 1991):

> Statutes of limitations bar the enforcement of an otherwise valid cause of action. The purpose is to "protect against the risk of error in decisions concerning the merits of such claims which results from the difficulty of obtaining evidence of events which transpired and circumstances which prevailed in the remote past." 3A Sutherland Statutory Construction § 70.03, at 493 (Sands 4th ed. 1986).

593, 596 (D. Kan. 1992); Stratton v. Sacks, 99 B.R. 686, 694 (D. Md. 1989), aff'd, 900 F.2d 255 (4th Cir. 1990); cf. Falkenberg v. Baldwin, 1977-78 Fed. Sec. L. Rep. (CCH) ¶ 96,086, at 91,911 (imputation required as a matter of law where the only personal interest "on the part of the officers or directors is a desire to remain in office").

C. Other Receivers. Petitioner has argued that factors unique to the protection of insurance company creditors support creation of a special immunity for insurance liquidators from imputation defenses. As explained supra at 6-12, this argument contradicts restrictions on the authority of insurance liquidators set forth in both the common law and Florida statutes, as well as the policies underlying the rules limiting the scope of professional duties and proximate cause. If petitioner were to prevail in its insurance-is-different argument, however, amici urge the Court to make plain that it is not upsetting the settled law that receivers of other corporations,[16] receivers of banks and savings and loans,[17] and

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[16] See supra at 6-7; see also Armstrong v. Ashley, 204 U.S. 272, 283 (1907).

[17] See, e.g., Rankin v. City Nat'l Bank, 208 U.S. 541, 546 (1908); Scott v. Armstrong, 146 U.S. 499, 507 (1892); FDIC v. Harrison, 735 F.2d 408, 412 (11th Cir. 1984); FDIC v. Shrader & York, 991 F.2d at 222-23; R. Clark, A Treatise on the Law and Practice of Receivers § 362, at 619-20 (3d ed. 1959).

bankruptcy trustees,[18] are subject to defenses available against their predecessors, including defenses based on imputation.

D. Lawyer Defendants. A number of policy considerations favor application of traditional imputation principles when the defendant is a lawyer. First, by retaining the requirement of privity for a legal malpractice claim, this Court has previously recognized essentially no role for negligence suits by nonclients against attorneys. See supra at 8-92. The same policies underlying the privity requirement barring nonclient suits against lawyers counsel that receivers or liquidators have absolutely no basis for asserting the interests of nonclient creditors as a means to avoid a lawyer's imputation defense.

Second, an attorney "does not have the responsibility to 'audit' the affairs of his client." ABA Formal Op. 335, at 5, 60 A.B.A.J. 488 (1974). Beyond that, it is well settled that "[a] lawyer ordinarily has no duty to initiate investigation of a client's affairs." Florida Rules of Professional Conduct, Rule 4-2.1, comment.[19] In particular, an investigation of corporate

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[18] See, e.g., Bank of Marin v. England, 385 U.S. 99, 101 (1966); In re Gebco Inv. Corp., 641 F.2d 143, 146 (3d Cir. 1981); Miller v. New York Produce Exch., 550 F.2d 762, 768 (2d Cir.) cert. denied, 434 U.S. 823 (1977); McKee v. American Casualty Co., 316 F.2d 428, 430 (5th Cir. 1963); In re Wedtech Secs. Litig., 138 B.R. at 8; Begier v. Price Waterhouse, 135 B.R. 222, 224 (E.D. Pa. 1991); Stratton v. Sacks, 99 B.R. at 692.

[19] See, e.g., In re Cascade Int'l Secs. Litig., 1993 WL 535210, at *4 (S.D. Fla. 1993) (attorneys do not have "duty to investigate their client"); Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F. Supp. 1571, 1572 (S.D. Fla.
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management is not part of the normal retention of a corporate lawyer and corporate lawyers are lacking in the necessary expertise and training.

Third, an attorney owes its client duties of loyalty and confidentiality, the latter forming the basis for the

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[19] (...continued)
1987) (in responding to inquiry from client's auditor, "an attorney has no duty 'to investigate . . . legal problems of the client, even when on notice of some facts which might conceivably constitute a legal problem'"), aff'd, 846 F.2d 753 (11th Cir.), cert. denied, 488 U.S. 854 (1988); Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469, 474 (4th Cir. 1992) (ABA's standard "permits an attorney to assume that the facts related to him by the client are accurate, so long as he has no knowledge that would raise suspicion"); Stokes v. Lokken, 644 F.2d 779, 783 n.3 (8th Cir. 1981) (ethical standards do not impose duty on attorney to investigate information supplied by client); RTC v. Blasdell, 1993 U.S. Dist. LEXIS 16575, at *40 (D. Ariz. 1993) ("attorney-client relationship ... did not encompass a general duty to be continually vigilant for possible regulatory violations"); Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974) ("As a general rule, an attorney is not required to investigate the truth or falsity of facts and information furnished by his client, and his failure to do so would not be negligence. . . ."); Zahorsky v. Griffin, Dysart, Taylor, Penner & Lay, 690 S.W.2d 144, 154 (Mo. App. 1985) (attorney has no duty of independent investigation; rather, attorney that "in good faith believe[s] the facts brought to him by his clients" satisfies his professional duties); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 652 P.2d 962, 966 (Wash. Ct. App. 1982) (Attorneys do not have "an obligation to make extensive inquiries into [clients'] personal or financial conditions . . . . Otherwise, there would be no possible limit on the advice attorneys would be required to give."); Friedman v. Dozorc, 312 N.W.2d 585, 605-06 (Mich. 1981) ("A lawyer is entitled to accept his client's version of the facts and to proceed on the assumption that they are true absent compelling evidence to the contrary."); Pacelli v. Kloppenberg, 382 N.E.2d 570, 571 (Ill. App. 1978) (when an attorney does not have a "reason to question the honesty" of a fiduciary and agent of the client, the attorney has no duty of "investigation" regarding that fiduciary); Bryan & Amidei v. Law, 435 S.W.2d 587, 593 (Tex. Civ. App. 1968) ("an attorney has a right, in good faith, to advise and act upon the facts which he gets from his client, and it is not his duty to go elsewhere for information").

attorney-client privilege. As stated by the American Bar Association in a recent amicus brief to the United States Supreme Court in support of imputation defenses by attorneys, it is antithetical to these duties owed to the client, as well as the client's privilege, to give attorneys potentially conflicting implied duties to a corporation's creditors by rendering the corporation's receiver immune from imputation.[20] As the American Bar Association explained, "the likely result" of such a duty to creditors

> would be to have a significant chilling effect on the zealous representation of clients and could even lead to those clients not being represented by legal counsel . . . . [L]egal counsel would be required to provide dual or alternative and possibly even conflicting advice to corporate clients, while recognizing that the [appointment of a receiver] could result in the removal of all defenses to a malpractice claim. This not merely could and would affect advice provided by lawyers, because of the inherent conflict of interest, but more likely would result in certain entities, or entities in financial difficulty, not being represented at all.

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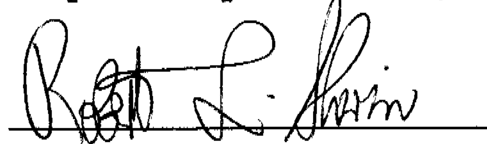
[20] "It is well understood in the legal community that any significant increase in attorney liability to third parties could have a dramatic effect upon our entire system of legal ethics." Abell v. Potomac Ins. Co., 858 F.2d 1104, 1124 (5th Cir. 1988), cert. denied, 492 U.S. 918 (1989). Indeed, where an attorney learns of a fraud by a corporate client, it may well violate the sanctity of the attorney-client privilege for the attorney to disclose the fraud to persons outside the corporation. See, e.g., In re Cascade Int'l Secs. Litig., 1993 WL 535210, at *4 (S.D. Fla. 1993); Schatz v. Rosenberg, 943 F.2d 485, 491, 493 (4th Cir. 1991), cert. denied, 112 S. Ct. 1475 (1992); Abell, 858 F.2d at 1133; Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986).

Brief for the American Bar Association As Amicus Curiae In Support of Petitioner, O'Melveny & Myers v. FDIC, No. 93-489 (Jan. 13, 1994), at 3-4.

CONCLUSION

If the Court grants review, the certified question should be answered in the negative and the decision of the District Court of Appeal affirmed.

Respectfully submitted,



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February 14, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief _Amici Curiae_ Of Business And Financial Lawyers In Support Of Respondents were mailed this 14th day of February, 1994, to:

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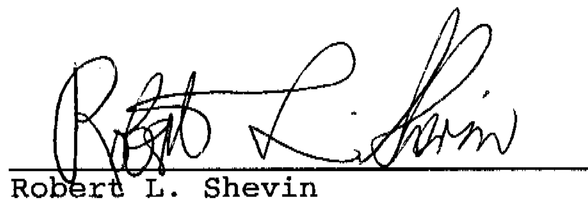

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