

DOUBLE LIABILITY OF BANK SHAREHOLDERS: HISTORY AND IMPLICATIONS

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INTRODUCTION

For three quarters of a century—between, roughly, the Civil War and the Great Depression—shareholders in American banks were responsible not only for their investments, but also for a portion of the bank's debts after insolvency. If a bank failed, the receiver would determine the extent of the insolvency and then assess shareholders for an amount up to and including the par value of their stock. This system of "double liability"¹ was actively and vigorously enforced throughout the period of its existence, generating an enormous volume of litigation, including nearly fifty decisions by the United States Supreme Court and hundreds more in the state courts and lower federal courts.

The double liability of bank shareholders raises fundamental questions for corporate law and banking regulation. Corporations, almost by definition, operate under a regime of limited liability: shareholders stand to lose their investments if the corporation becomes insolvent, but they have no personal responsibility for its debts. Double liability presents a richly documented example of a major American industry that did not follow the standard rule of limited liability. How double liability functioned in practice, accordingly, is a matter of considerable interest for corporate law theory—especially in light of recent scholarship that casts new light on the fundamental justifications for limited liability.²

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1. "Double liability" is something of a misnomer because bank shareholders could not be assessed for an amount above the par value of their stock, even if, as was often the case, they purchased their stock above its par value. The usage is sufficiently well-established and clear enough in context, however, to warrant adoption here.

2. Limited liability has long seemed so self-evident as not to warrant serious investigation. Issues did arise in extreme cases when the firm was inadequately capitalized, *see* *Wolkowsky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966), or where shareholders had engaged in inequitable conduct to the detriment of creditors, *see, e.g., Costello v. Fazio*, 256 F.2d 903 (9th Cir. 1958), but the fundamental justification for limited liability was not seriously questioned.

Over the past few years, however, scholars have investigated the economic effects of

Moreover, the catastrophic failures of the thrift deposit insurance fund³—and now of the bank deposit insurance fund⁴—raise basic questions about our current system of bank regulation. The regime of bank double liability was rejected and abandoned on three grounds: (1) that it had failed to protect bank creditors; (2) that it did not maintain public confidence in the banking system; and (3) that deposit insurance was a far preferable means for accomplishing the regulatory objectives.⁵ These arguments have a certain irony in light of recent history, in which deposit insurance itself has proved incapable of protecting the soundness of the banking system or maintaining public confidence in the nation's depository institutions. Double liability, on the other hand, holds the promise for instilling sound banking practices through the application of incentives and shareholder monitoring, rather than the pervasive regulatory scrutiny necessitated under deposit insurance systems. History shows that the nation took a wrong turn when it abandoned double liability for a system of governmentally administered deposit insurance.

limited liability and found it to be a valuable means for enhancing capital markets and facilitating the separation of ownership and control in large corporations. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Paul Halpern, Michael Trebilcock & Stuart Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117 (1980); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991). Others have explored the impact of limited liability in important legal contexts such as: (1) bankruptcy law, see F.H. Buckley, *The Bankruptcy Priority Puzzle*, 72 VA. L. REV. 1393 (1986); (2) tort law, see Merritt B. Fox, *Corporate Successors Under Strict Liability: A General Economic Theory and the Case of CERCLA*, 26 WAKE FOREST L. REV. 183 (1991); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991); Lewis A. Kornhauser & Richard L. Revesz, *Apportioning Damages Among Potentially Insolvent Actors*, 19 J. LEGAL STUDIES 617 (1990); William M. Landes, *Insolvency and Joint Torts: A Comment*, 19 J. LEGAL STUDIES 679 (1990); Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820 (1987); and (3) the law of corporate groups, see, e.g., Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986); Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499 (1976). Scholars have even begun to take seriously the possibility of regimes of unlimited liability in modern corporate settings. See Hansmann & Kraakman, *supra*.

Most of the work to date has been theoretical rather than empirical in orientation. The discussion has focused on the impact of different liability regimes on capital markets and on management incentives from the standpoint of abstract principle. The *actual* functioning of systems of shareholder liability has not been as thoroughly investigated. For a recent exception (not specifically concerned with bank double liability), see Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991).

3. For popular accounts, see JAMES R. ADAMS, *THE BIG FIX: INSIDE THE S&L SCANDAL: HOW AN UNHOLY ALLIANCE OF POLITICS AND MONEY DESTROYED AMERICA'S BANKING SYSTEM* (1990); MARTIN MAYER, *THE GREATEST EVER BANK ROBBERY* (1990); NED EICHLER, *THE THRIFT DEBACLE* (1989).

4. See Paulette Thomas, *FDIC Expects to be Insolvent by Year End*, WALL ST. J., June 27, 1991, at A3.

5. For a discussion of these anti-double liability factors, see *infra* notes 37-44 and accompanying text.

While deposit insurance serves the useful function of preventing bank runs by instilling public confidence in the banking system, it does so at the cost of providing incentives for excessive risk taking by banks, which, in turn, leads to a greater risk of bank failures generally.⁶ As we have shown in a previous article, deposit insurance creates a perverse incentive problem that causes bank shareholders to use their control position to cause banks to engage in increasingly risky activities in order to transfer wealth from creditors, depositors, and ultimately the deposit insurance fund itself, to the shareholders of FDIC-insured banks.⁷ As we point out, depositors and other fixed claimants always face the possibility that shareholders will attempt to transfer wealth from them by increasing the riskiness of the firms in which they have invested *ex post*, i.e., after the fixed claimants have made their initial investments:

What makes banks fundamentally different from other types of firms, however, is the lack of significant discipline from other fixed claimants. FDIC insurance removes any incentive that insured depositors have to control excessive risk taking because their funds are protected regardless of the outcomes of the investment strategies that the banks select. In a world without deposit insurance, depositors would demand that banks refrain from engaging in risky investment strategies or else would demand that they be compensated in the form of a higher interest rate for the extra risk.⁸

The advantage of double liability for bank shareholders over a system of federally-sponsored deposit insurance thus seems clear. Double liability transforms shareholders from investors seeking to advantage themselves at the expense of other investors by *increasing* the riskiness of the banks in which they have invested into investors who benefit themselves by *decreasing* the riskiness of these firms. In light of the fact that many small banks are closely held and that most large banks are controlled by a single bank holding company, shareholders are likely to be successful in their efforts to control the risk-taking proclivities of the banks in which they have invested.

Thus, at the very least, recent events in the banking industry reveal the value of an investigation into the history and functioning of the double liability system for bank shareholders. Surprisingly, no general history of the subject exists,⁹ although discrete issues were frequent grist for law reviews during the heyday of the system. This paper attempts to fill that gap in the literature.

The historical evidence shows that double liability rules were quite effectively enforced and resulted in substantial recoveries for depositors

6. Jonathan R. Macey & Geoffrey P. Miller, *Bank Failures, Risk Monitoring and the Market for Bank Control*, 88 COLUM. L. REV. 1153, 1165 (1988).

7. *Id.* at 1159-65.

8. *Id.* at 1165.

9. For a useful history of limited liability, which does not, however, focus on the issue of double liability for bank shareholders, see Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986).

and other creditors. It is true, as the Supreme Court once observed, that "attempts [were] made in many forms to give [the double liability provision] a technical construction which would . . . greatly delay and impede the settlement of the affairs of insolvent banks."¹⁰ But, as will be illustrated below, the courts resisted such attempts and insisted on a flexible and practical interpretation that served the public policy of "expeditiously and justly winding up the affairs and paying the debts"¹¹ of failed banks. In almost every case, the courts crafted sensible rules that facilitated the free alienability of bank stock while ensuring that the assessment remedy could be easily and consistently administered.

Empirical evidence substantiates the inference that double liability was an effective regulatory system. Over the life of the system, the recovery rate on national bank assessments was just about 51%—about half the assessed amounts were collected.¹² This rate appears remarkably good when one considers that many bank shareholders were also managers who were forced into personal insolvency when their institutions failed. Moreover—remarkably—the recovery rate on assessments was not significantly lower during the difficult years 1930-34 than it was at other times.¹³

The sums recovered from shareholders under the double liability system significantly benefited depositors and other bank creditors, and undoubtedly did much to enhance public confidence in the banking system despite the fact that almost all bank deposits were uninsured. Assessments collected from national bank shareholders equalled approximately 28% of the net losses suffered by creditors over the life of the system.¹⁴

Of great relevance in light of recent events in U.S. banking is the fact that, unlike deposit insurance, the threat of double liability appears to have induced caution on the part of bank managers in their use of depositors' funds. Many more banks liquidated voluntarily during the period than went into involuntary insolvency.¹⁵ Bank managers apparently wished to wind up the affairs of their institutions before insolvency in order to avoid assessment. The result of these voluntary liquidations usually was to convey bank assets into other, presumably better qualified hands without the need for costly insolvency proceedings. If financially troubled banks can be closed early—before liabilities exceed assets—creditors, including depositors, will be paid in full. Early closures in the form of voluntary liquidations kept losses to creditors remarkably low during the regime of double liability. Between 1865 and 1934 the average annual loss to depositors of failed national banks was a mere forty-four cents per thousand dollars of deposit.¹⁶ And even during the hard times of 1930-34 the average annual loss to depositors of failed national banks

10. *Korbly v. Springfield Inst. for Sav.*, 245 U.S. 330, 333 (1917).

11. *Id.*

12. *See infra* part III, Table 1.

13. *Id.*

14. *See infra* text accompanying note 144.

15. *See infra* text accompanying notes 145-49.

16. *See infra* text accompanying notes 151-52 and Table 2.

rose only to seventy-seven cents per thousand dollars on deposit.¹⁷

Banks with double liability also appear to have been able to operate with lower capital ratios than banks without double liability.¹⁸ State-chartered banks in states which required double liability displayed aggregate capital ratios in 1912 of 18.2%, as compared with 22.9% for state-chartered banks in states without required double liability.¹⁹ One possible inference from these data is that bank creditors relied on the assessment remedy for assurances that the bank's debts would be repaid, and accordingly demanded less by way of equity capitalization as their cushion against insolvency. Put another way, the potential liability of bank shareholders served as supplemental off-balance sheet capital that was not reflected in banks' capital ratios. On balance, double liability was a success. That it was not perfect is no objection to its efficacy; no regulatory program is perfect, and the one that supplanted double liability—deposit insurance—certainly is not.

Part I of this Article provides an overview of the double liability system. Part II examines the major problems in administering the system: determining the assessment amount; identifying the persons liable for assessment; defining the scope of administrative discretion; enforcing assessments in group litigation settings or in foreign jurisdictions; and accommodating the assessment remedy to fundamental corporate changes. Part III considers the empirical evidence.

Our analysis indicates that private-sector initiatives such as the double liability system for bank shareholders can be an effective, low-cost substitute for the moribund federally sponsored deposit insurance system. Recent experience has demonstrated that federal deposit insurance creates perverse incentives for the managers and shareholders of insured banks, incentives that have contributed to the downfall of so many of the nation's banks and thrift institutions and have led to costly taxpayer bailouts and the near-collapse of the nation's banking industry. At the very least, our study shows that double liability should be considered as a supplement to deposit insurance as a means of protecting depositors and other bank creditors.

I. OVERVIEW OF DOUBLE LIABILITY

The common law rule, at least in the United States in the latter part of the Nineteenth Century, was that shareholders of a corporation were not liable for the corporation's debts—the rule of limited liability we know today.²⁰ This common law rule, however, was extensively modified by statute and private contractual arrangement during the first half of the nineteenth century, in order to impose liability on shareholders of

17. *Id.*

18. See *infra* text accompanying notes 153-54 and Tables 3 and 4.

19. *Id.*

20. For a discussion of the common law rule, see *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 526 (1874); *Sumner v. Marcy*, 23 F. Cas. 384 (C.C.D. Me. 1847) (No. 13,609).

banking institutions.

New Hampshire and Pennsylvania imposed joint and several liability on bank shareholders early in the nineteenth century.²¹ The laws of some states imposed double liability on all corporate shareholders.²² During the 1840's and 1850's, some southern state legislatures granted special banking charters subject to a requirement that the shareholders would be severally (but not jointly) liable for the bank's debts.²³ Some banks established double shareholder liability by means of charter provisions.²⁴ A number of states—New York, Kansas, Iowa, Indiana, Minnesota, and others—adopted double liability rules in their constitutions.²⁵

Congress drew on these state provisions when, in the National Banking Act of 1863, it established a system of national banks and provided that "each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares."²⁶ Senator Sherman, who proposed the provision, explained that it tracked the laws of "most of the States of the Union."²⁷ Sherman explained that the goal was to give bank creditors "something more than the stock to fall back upon; and that if you provide a limited liability to an amount equal to the stock, in addition to the stock, you will make it ample beyond all danger."²⁸ Looking back on the statute the following year, Sherman explained that in addition to providing security for creditors, the double liability provision "tends to prevent the stockholders and directors of a bank from engaging in hazardous operations."²⁹

A revision of 1864 added that the shareholders would be liable "equally and ratably, and not one for the other."³⁰ This meant that no shareholder could be assessed for more than his or her pro rata share even if other shareholders were insolvent or beyond the jurisdiction of the

21. For a discussion of the imposition of joint and several liability on bank shareholders during the first half of the nineteenth century, see Joseph M. Leonard, Note, *Superadded Liability of Bank Stockholders*, 14 TEMP. L.Q. 522, 522 (1940).

22. See, e.g., *Bernheimer v. Converse*, 206 U.S. 516 (1907) (applying Minnesota law); *Sumner v. Marcy*, 23 F. Cas. 384 (C.C.D. Me. 1847) (No. 13,609) (applying Massachusetts law).

23. See, e.g., *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520 (1874) (special banking charter granted by Alabama legislature); *Hatch v. Burroughs*, 11 F. Cas. 795 (S.D. Ga. 1870) (No. 3,203) (special banking charter granted by Georgia legislature).

24. See, e.g., *Terry v. Little*, 101 U.S. 216 (1879) (charter bound each stockholder to pay debts "for any sum not exceeding twice the amount of . . . his . . . shares"); *Queenan v. Palmer*, 7 N.E. 613 (Ill. 1886) (savings bank charter promised that stockholders would be responsible for amount "equal to the amount of stock held by them respectively").

25. See, e.g., N.Y. CONST. of 1846, art. VIII, § 7 (repealed 1935); *Whitman v. Oxford Nat'l Bank*, 176 U.S. 559 (1900) (Kansas); Henry W. Ballantine, *Stockholders' Liability in Minnesota*, 7 MINN. L. REV. 79 (1923); Sumner Kenner, *Liability of Stockholders Under the Indiana Banking Law*, 2 IND. L.J. 602 (1927); Note, *Statutory Liability of Bank Stockholders in Iowa*, 21 IOWA L. REV. 611 (1936).

26. National Banking Act of 1863, ch. 58, 12 Stat. 665.

27. CONG. GLOBE, 37th Cong., 3d Sess. 824 (1863).

28. *Id.*

29. CONG. GLOBE, 38th Cong., 1st Sess. Part II 1069 (1864).

30. Act of June 3, 1864, ch. 106, § 12, 13 Stat. 99, 103.

court.

Following the implementation of the federal double liability system, states continued to adopt similar programs for their state-chartered banks; by 1931, all states had implemented double liability rules for bank shareholders except Alabama, Connecticut, Delaware, Louisiana, Massachusetts, Missouri, New Jersey, Rhode Island, Vermont and Virginia.³¹ Most of these state provisions were closely modeled on the National Bank Act, and the courts in construing them tended to look to the federal statute³² even when there were substantial differences in wording between state and federal law.³³ There were a few substantive differences, however: California's law made no mention of any limit of liability to par value,³⁴ and Colorado imposed triple liability.³⁵

The wave of bank failures that occurred between 1929 and 1933 placed heavy strains on the double liability system and ultimately precipitated its downfall. Shareholders were assessed in large numbers at a time when many were already in serious financial difficulty. Meanwhile, the dispersal of bank shares among the public, which had progressed rapidly during the economic boom of 1923-1929, meant that many of the shareholders being assessed had no insider connection with the failed bank, either by way of family relationships or employment status. Many had purchased their shares in prosperous times without serious consideration of their potential liability in the event of bank failure.³⁶

These factors resulted in political pressure during the 1930's to repeal double liability or blunt its force. Following--or perhaps inciting--the public dismay, the consensus of scholarly opinion as reflected in the law journals turned sharply against double liability after 1929.³⁷ As one author noted in 1936, the double liability "effectively bankrupt[s] many innocent stockholders who have taken no part in the active management and control of the bank."³⁸ By 1944, the tide had so far turned against double liability that the Supreme Court was roundly lambasted in much of the popular press for upholding an assessment of shareholders of a holding company for the liabilities of a failed subsidiary bank—a result that would almost certainly have received widespread acclaim twenty

31. See Note, *Ambit of Double Liability of National Bank Stockholders*, 80 U. PA. L. REV. 1133, 1133 n.1 (1932).

32. See, e.g., *Davis v. Moore*, 197 S.W. 295 (Ark. 1917) (observing that Arkansas statute had been "borrowed" from federal enactment and relying on federal court interpretations as authority for meaning of state law).

33. See, e.g., *McNeill v. Pace*, 68 So. 177 (Fla. 1915) (state statute construed by analogy to federal statute to authorize receiver to enforce double liability even though such authorization was absent from statutory language).

34. See CAL. CONST. (Treadwell, 1931), art. XII, § 3 (repealed 1930).

35. COLO. STAT. ANN. vol. 2, ch. 18, § 50 (Mitchie, 1935) (repealed 1935).

36. See Leonard, *supra* note 21, at 522.

37. For a representative sample, see Perry L. Greenwood, Note, *Banks—Liability of Stockholders of Holding Company on National Bank Stock Held by Company*, 7 U. DEF. L.J. 123 (1944); Note, *Statutory Liability of Bank Stockholders in Iowa*, 21 IOWA L. REV. 611 (1936) [hereinafter *Statutory Liability*].

38. *Statutory Liability*, *supra* note 37 at 620.

years earlier.³⁹

Bolstering the objection that double liability imposed unfair harms on innocent shareholders was the widespread perception that it had failed to fulfill its intended purpose.⁴⁰ After all, thousands of banks had failed, notwithstanding double liability, and the nation had plunged into an unprecedented economic catastrophe. Runs on banks occurred throughout the country and the entire banking system collapsed in 1933.⁴¹ Depositors wanted money immediately, and it was little solace for them to know that sometime down the road they might receive a check from a receiver—especially when it was clear that many bank shareholders would never be able to meet their assessments because of their own personal insolvency. Under conditions such as these, double liability, despite its venerable heritage, seemed “inadequate as a means of protecting the depositing public.”⁴²

The third and decisive factor contributing to the downfall of double liability was the establishment of federal deposit insurance in the Banking Act of 1933.⁴³ At the time most observers believed that government deposit insurance was a far more effective remedy for the problems of the banking system than the outmoded system of double liability—an evaluation that seemed to be borne out by the success of federal deposit insurance at stopping bank runs.⁴⁴

These three factors taken together—political resentment by bank shareholders against assessment, the perception that double liability had failed as a regulatory system, and the creation of a substitute regulatory system deemed more effective by most observers—spelled the doom of double liability. In 1933, Congress repealed double liability for newly-issued national bank shares;⁴⁵ and in 1935, it prospectively extinguished all double liability for national bank stock provided that a bank gave six months notice of termination.⁴⁶ Federal double liability was all but moribund after 1934. By 1953, all but 25 of the nearly 5,000 national banks

39. See Note, *Banks and Banking—Liability of Bank Stock Holding Company Shareholders*, 44 COLUM. L. REV. 561, 565 n.30 (1944).

40. For congressional disenchantment, see *Hearings on H.R. 141 before the House Committee on Banking & Currency*, 71st Cong., 2d Sess. 17 (1930) (observing that double liability had afforded “inadequate” protection to depositors).

41. See generally HELEN M. BURNS, *THE AMERICAN BANKING COMMUNITY AND THE NEW DEAL BANKING REFORMS 1933-1935* (1974); H. PARKER WILLIS & JOHN M. CHAPMAN, *THE BANKING SITUATION* (1934).

42. *Statutory Liability*, *supra* note 37 at 620.

43. Banking Act of 1933, ch. 89, § 12B, 48 Stat. 162, 168 (1933); see also 49 Stat. 435 (1935).

44. See, e.g., Leonard, *supra* note 21, at 524-25; Note, *Banks and Banking—Stockholder's Double Liability as Applied to Stockholder of "Bank Stock" Holding Company—Public Policy as to Interpretation of Moribund Law*, 30 VA. L. REV. 490, 491 (1944); Note, *Statutory Double Liability of Shareholders in Bank Holding Companies*, 46 YALE L.J. 718, 719 n.9 (1937) [hereinafter *Double Liability*].

45. See Banking Act of 1933, ch. 89, § 22, 48 Stat. 162, 189 (repealed 1959).

46. See Banking Act of 1935, ch. 614, § 304, 49 Stat. 684, 708 (repealed 1959).

had published the required notice and opted out of double liability.⁴⁷ Congress eliminated the double liability of these few holdovers in 1953, thus bringing ninety years of double liability for national banks to a formal close.⁴⁸

State legislatures also dismantled their double liability systems after 1930. Iowa authorized state banks to issue nonassessable stock in 1933;⁴⁹ and soon thereafter, it repealed double liability altogether subject to a limited set of transition rules.⁵⁰ Many other states did the same.⁵¹ By 1944, thirty-one states had abolished double liability.⁵² Today, double liability for bank shareholders is a dead letter everywhere.

II. PROBLEMS IN ADMINISTERING THE DOUBLE LIABILITY RULE

By the time of its demise, double liability had existed for the better part of a century. During that time, the states and the federal government developed extensive experience with the administration of the system. As might be expected, problems arose at both the state and federal level in implementing shareholder liability. What is surprising is not that problems arose, but that they appear to have been handled with such remarkable success. Courts, legislatures, and administrative agencies cooperated to craft clear, sensible, and easily applied rules to govern the administration of the double liability system.

A. *Determining the Assessment Amount*

One repeated problem was that of determining the proper assessment amount. The receiver of a defunct bank could not definitively know the full extent of the shortfall of liabilities over assets until he had finished winding up the liquidation of the institution, which could take many years if complex litigation were involved.⁵³ If the receiver had to wait until the actual extent of shareholder liability was known, the result could be extremely inconvenient. Creditors would not be paid until the end of the process, and shareholders could in the interim die, leave the jurisdiction, secrete their assets, become bankrupt, or otherwise avoid their eventual liability, even though the fact that they would certainly be liable for some payment would not be in dispute. On the other hand, if the Comptroller (or similar state official) were required to make one and only one assessment at the outset to avoid the danger of a shortfall, the practical effect would be that the Comptroller would always levy an assessment above the expected liability, with the expectation of remitting the differ-

47. See 99 CONG. REC. 3159 (1953) (remarks of Rep. Wolcott).

48. See Act of May 18, 1953, ch. 59, § 2, 67 Stat. 27 (1953).

49. Act of Jan. 20, 1933, ch. 156, § 3, 1933 Iowa Acts 187, 187-88.

50. Act of Nov. 23, 1933, ch. 119, § 5, 1933 Iowa Acts Ex. Sess. 233, 235.

51. See Vincens, *On the Demise of Double Liability for Bank Shareholders*, 12 BUS. LAW. 275, 276-78 (1957).

52. See Greenwood, *supra* note 37, at 125.

53. See, e.g., *Aldrich v. Yates*, 95 F. 78, 80 (C.C.D. Ky. 1899) (mistakes in assessments early in receivership proceedings virtually inevitable because of "uncertain value of assets").

ence back to shareholders at the close of the receivership.⁵⁴ This would work an unnecessary hardship on shareholders.

To avoid these problems, the rule developed early on that the receiver could levy multiple assessments, starting with a provisional charge and levying additional assessments as the sale of the receivership assets progressed.⁵⁵ If too much was collected from the shareholders, the receiver would remit back the difference at the end.⁵⁶ If shareholders failed to pay the interim assessment, the receiver could sue either in equity⁵⁷ or law⁵⁸ to obtain the funds. Additional flexibility was provided by the rule that if shareholders protested interim assessments the Comptroller could put off the date for actual payment until the extent of the insolvency had been better defined.⁵⁹

The need for "administrative discretion and flexibility"⁶⁰ in determining the amount of assessments meant that the receiver would often levy original or supplemental assessments a considerable amount of time after the failure of the institution in question. When the receiver had already prosecuted an action at law on an initial assessment, shareholders sometimes defended on the ground that the assessment suit was precluded by the doctrine of *res judicata*. The courts, however, rejected this defense with the sensible rule that the termination of an action at law on an initial assessment did not preclude a claim on a subsequent assessment.⁶¹ Shareholders also argued, with some regularity, that the assessment suit was time-barred, either because the Comptroller had waited too long to institute the initial action or because the statute had run prior to the declaration of a supplemental assessment. Again, the courts adopted a reasonable rule that the limitations period began to run at the time of each assessment order in question or such later time as might be set by the Comptroller for payment.⁶²

Shareholders sometimes attempted to reduce their liability by re-

54. See, e.g., *Studebaker v. Perry*, 184 U.S. 258, 264 (1902).

55. See, e.g., *Kennedy v. Gibson*, 75 U.S. (8 Wall.) 498, 505 (1869); *Aldrich v. Yates*, 95 F. 78 (C.C.D. Ky. 1899).

56. See *Kennedy v. Gibson*, 75 U.S. (8 Wall.) 498, 506 (1868); *Bailey v. Tillinghast*, 99 F. 801, 805 (6th Cir. 1900); *In re Hulitt*, 96 F. 785, 789 (C.C.S.D. Ohio 1899).

57. E.g. *Kennedy v. Gibson*, 75 U.S. (8 Wall.) 498, 505 (1869); *Bailey v. Tillinghast*, 99 F. 801, 805-06 (6th Cir. 1900). However, if the receiver sought to recover the full par value of the stock, the action was required to be in law. *Id.* This was because there was no danger of duplicative litigation if the original action was for the full assessment, thereby making equitable jurisdiction unnecessary. *Studebaker v. Perry*, 184 U.S. 258, 264 (1902).

58. E.g. *Studebaker v. Perry*, 184 U.S. 258, 264 (1902).

59. See, e.g., *Fisher v. Whiton*, 317 U.S. 217 (1942); *Rawlings v. Ray*, 312 U.S. 96 (1941). If the Comptroller set a future date for payment, the receiver had no authority to collect an assessment before the date set. *Fisher v. Whiton*, 317 U.S. at 221.

60. *Fisher v. Whiton*, 317 U.S. 217, 220 (1942) (citing *Korbly v. Springfield Inst. for Sav.*, 245 U.S. 330, 333 (1917)).

61. See *Studebaker v. Perry*, 102 F. 947 (7th Cir. 1900), *aff'd*, 184 U.S. 258 (1902).

62. See, e.g., *Rawlings v. Ray*, 312 U.S. 96 (1941) (statute of limitations begins to run on date set by Comptroller); *Rankin v. Barton*, 199 U.S. 228 (1905) (liability dates from the order of the Comptroller); *McClaine v. Rankin*, 197 U.S. 154 (1905); *Aldrich v. Yates*, 95 F. 78 (D. Ky. 1899).

sisting assessment orders for as long as possible, in order to take advantage of the time value of money in the interim between the assessment and the time when the shareholder would finally pay the charge. The courts controlled the costs associated with this sort of delay, however, by developing the rule that interest on the assessment was payable from the date of the Comptroller's order.⁶³

Other problems arose in determining the amount of the assessment against solvent defendants when other shareholders were either insolvent or beyond the reach of process. For example, if a bank's creditors could be fully satisfied by an assessment of 50% of par value against all shareholders, was it necessary or permissible to increase the assessment of solvent shareholders above 50% in order to make the creditors whole when other shareholders were absent or insolvent? The Comptroller, early on, took the position, later endorsed by the Supreme Court, that shareholders could only be assessed their pro rata liability, without regard to whether the insolvency or absence of other shareholders would reduce the amounts recoverable by the receiver below the full amount of the creditors' claims. The rationale behind this position was that to do otherwise would violate the requirement of the National Bank Act that shareholders be assessed "equally and ratably, and not one for another."⁶⁴

The purpose of this rule appears to have been to prevent favoritism in the administration of receiverships. While the rule of ratable contribution may have accomplished this purpose to a degree, it did not do so fully, since shareholders who were insolvent or beyond the jurisdiction of the court were not assessed at all, and, to the extent the rule of ratable assessment achieved equality, it did so at the price of undercompensating creditors who bore the costs of uncollected assessments. Congress revised the double liability provision in the Federal Reserve Act of 1913 and dropped the language that shareholders were to be assessed "equally and ratably, and not one for another."⁶⁵ This change led one court to conclude that within the overall limits of double liability, shareholders before the court could be assessed more to make up for shortfalls owing to the insolvency or unavailability of other shareholders, subject to a right of contribution against the absent shareholders.⁶⁶ Most courts, however, appeared to continue the rule of ratable assessments, treating the change in statutory language as inconsequential.

In addition, along the same lines, the general rule was that a shareholder could not assert a claim against the bank as a set-off against his statutory liability, but was required to prove his claim as a creditor in the receivership and take his share of the proceeds realized by way of a dividend.⁶⁷ In some cases shareholders claimed a set-off on the ground that

63. *Casey v. Galli*, 94 U.S. 673, 677-78 (1876).

64. *United States v. Knox*, 102 U.S. 422, 424 (1880).

65. Rev. Stat. § 5151, amended by Federal Reserve Act of 1913, 38 Stat. 273.

66. *First Nat'l Bank in Eureka v. First Nat'l Bank of Eureka*, 14 F.2d 129 (D. Kan. 1926) (court held stockholders may be assessed to full extent of their liability).

67. See, e.g., *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610 (1873). This rule did not hold, for

they had paid additional funds to a bank in order to make up for a deficit in its capital accounts, either voluntarily or by administrative order. The courts refused to allow the credit on the theory that the initial assessment was for purposes of keeping the bank open, not for the benefit of creditors.⁶⁸

B. *Persons Liable*

Another set of problems, which generated extensive litigation, arose in the identification of the party liable to pay on an assessment. The courts in these cases displayed acute awareness that the rules they crafted needed to reflect a balance between competing social policies: the goals, on the one hand, of protecting bank creditors, and, on the other, of facilitating the free transferability of bank shares. The doctrines developed in these cases, in general, achieved those purposes with notable success.

The basic rule was that liability followed ownership: a shareholder could relieve himself of assessment liability, and transfer the liability to another, by selling the stock in good faith at a time when the bank was solvent.⁶⁹ For purposes of determining who the owner was at any given time, however, the courts presumed that the responsible party was the person shown as the owner on the bank's shareholders list.⁷⁰ If the true owner of the stock was shown to be someone other than the record owner, the general rule was that both could be assessed at the discretion of the receiver.⁷¹

The rationale for holding record owners liable was two-fold: it facilitated administration of the assessment remedy after insolvency and, more generally, it allowed potential creditors to evaluate a bank's creditworthiness by examining its shareholder list.⁷² Both of these purposes required

obvious reasons, if the shareholder had an individual claim to specific, segregated assets in the hands of the receiver, since then participating pro rata with the other shareholders would dilute the priority of the shareholder's claim. *See Welles v. Stout*, 38 F. 807 (N.D. Iowa 1889).

68. *See, e.g., Delano v. Butler*, 118 U.S. 634 (1886); *Andrew v. Farmers' Trust & Sav. Bank*, 213 N.W. 925 (Iowa 1927); *Blackert v. Lankford*, 176 P. 532 (Okla. 1918).

69. *See Ohio Valley Nat'l Bank v. Hulitt*, 204 U.S. 162 (1907); *Germania Nat'l Bank v. Case*, 99 U.S. 628 (1878). State rules were the same. *See, e.g., Austin v. Pool*, 299 S.W. 935 (Tex. Civ. App. 1927).

70. *See Rev. Stat. § 5139; Richmond v. Irons*, 121 U.S. 27, 58 (1887). A national bank could not refuse to enter a bona fide transfer on its books at the request of the selling shareholder. *Bank v. Lanier*, 78 U.S. (11 Wall.) 369 (1870); *Johnson v. Laffin*, 13 F. Cas. 758, 761 (E.D. Mo. 1878), *aff'd*, 103 U.S. 800 (1880).

71. *See, e.g., Pauly v. State Loan and Trust Co.*, 165 U.S. 606 (1897); *Robinson-Pettit Co. v. Sapp*, 169 S.W. 869 (Ky. 1914). There was a limited exception for cases when one bank purchased stock of another bank in an auction sale of stock which the purchasing bank held as collateral for a defaulted loan. *See Robinson v. Southern Nat'l Bank*, 180 U.S. 295 (1901).

72. *See Pauly v. State Loan and Trust Co.*, 165 U.S. 606, 622 (1897) (Court reasoned that "by allowing his name to appear upon the stock list as owner, [a lender holding bank stock as collateral] represents [to the bank's creditors] that he is the [the] owner . . .").

that there be a simple, objectively verifiable method for ascertaining the identity of the person liable for assessment. Thus, as a general rule, in the absence of any indication that the stock was not owned in a personal capacity, the shareholder of record could be assessed even if the stock was actually owned by another person.⁷³

While generally adhering to a strict rule tying assessment liability to record ownership, the courts crafted a number of reasonable exceptions designed to serve competing social policies. For example, in cases where a selling shareholder had taken all necessary steps to ensure a change of record ownership on the bank's books and the bank had failed to carry out the instructions, a wooden application of the rule of record ownership would make little sense as a policy matter, and in fact would be counter-productive. The value of bank shares to shareholders would have been undercut, without much offsetting social benefit, if shareholders were required to engage in costly monitoring to ensure that the bank had in fact carried out the transfer of record ownership so as to relieve them from liability. Sensibly, the courts recognized this fact and allowed a defense when the shareholder had taken all reasonable steps to ensure that the transfer of record ownership would in fact be made.⁷⁴ Similarly, a record owner would not be assessed when another person surreptitiously transferred the shares without his knowledge or consent; but the courts presumed knowledge and consent if the record owner had reason to know of the transfer.⁷⁵

The courts also made appropriate modifications to the rule of record ownership in cases where the actual owner had pledged bank stock as security for a loan and the lender, to perfect its security interest, had caused the bank to change record ownership to some other name. In such cases, the courts applied the principle of record ownership in order to assess the pledgee when the record books contained no indication that the stock was held as collateral.⁷⁶ But by 1884 the Supreme Court had estab-

73. See, e.g., *McDonald v. Dewey*, 134 F. 528, 533-34 (7th Cir. 1905), *rev'd on other grounds*, 202 U.S. 510 (1906); *Price v. Whitney*, 28 F. 297 (D. Mass. 1886). State rules were similar. See, e.g., *Andrew v. American Sav. Bank*, 252 N.W. 245 (Iowa 1934).

74. See, e.g., *Earle v. Carson*, 188 U.S. 42 (1903); *Matteson v. Dent*, 176 U.S. 521 (1900); *Richmond v. Irons*, 121 U.S. 27 (1887); *Whitney v. Butler*, 118 U.S. 655 (1886). State rules were similar. See, e.g., *Chapman v. Sparks*, 283 S.W. 338 (Tex. Civ. App. 1926). However, the record shareholder might still be assessed, even if he or she had done everything reasonably possible to assure transfer of record ownership, if the transfer was *ultra vires* the buyer. See *Man v. Cheeseman*, 16 F. Cas. 568 (S.D.N.Y. 1874) (No. 9,002a).

75. See, e.g., *Finn v. Brown*, 142 U.S. 56 (1891).

76. See, e.g., *Rankin v. Fidelity Ins. Trust & Safe Deposit Co.*, 189 U.S. 242 (1903). The lender would be liable in such a case even if the debt had been repaid and the certificates returned to the borrower. See, e.g., *Moore & Janney v. Jones*, 3 Woods Circuit Court Reports (5th Cir.) 53 (1877); *Bowden v. Farmers' & Merchants' Bank*, 3 F. Cas. 1029 (C.C.D. Md. 1877) (No. 1,714); *Moore v. Jones*, 17 F. Cas. 690 (C.C.D. La. 1877) (No. 9,769). The rule was similar at the state level. See, e.g., *Van Tuyl v. Robin*, 145 N.Y.S. 121 (Sup. Ct. 1913), *aff'd per curiam*, 105 N.E. 1101 (N.Y. 1914). Record ownership might not be conclusive, however, if the record owner was acknowledged to be a mere trustee of an actual owner who had already been assessed, even if the assessment was not paid. See *Yardley v. Wilgus*,

lished that a lender could perfect its security interest while avoiding assessment liability by causing stock to be registered in the name of an irresponsible third party under the lender's control, so long as the transfer was made in good faith at a time when the bank in question was solvent.⁷⁷ Later cases further facilitated the ability of pledgees to avoid assessment, declaring that the mere pledge of bank stock would not subject the holder to assessment if no transfer were made on the bank's books,⁷⁸ if the transferee were shown on the books as "pledgee,"⁷⁹ or even "cashier" of a different bank,⁸⁰ or if the stock were described on the books as "collateral."⁸¹ Estoppel did not arise in such cases because a creditor would not be deceived into believing that the record holder was the actual owner.⁸² Pledgees were further protected by the rule that the receiver had the burden of proving estoppel against the pledgee through the introduction of sufficient evidence.⁸³

The courts developed equally sensible rules to deal with the situation in which a trustee or other fiduciary held bank stock for the benefit of another. A trustee was liable for assessment if he consented to have his name entered on the bank's records as the owner, without the qualification that he was holding only as a fiduciary.⁸⁴ But the rule was otherwise if the trustee was shown on the bank's shareholders list as holding in a fiduciary rather than a personal capacity—as, for example, if the word "trustee" were added after the holder's name.⁸⁵ In such cases, the trustee was liable only in a fiduciary capacity, with the assessment amount taken out of the trust corpus rather than the trustee's personal assets.

The courts also developed appropriate rules governing transfers incident to the death of the owner. In *Matteson v. Dent*,⁸⁶ for example, the Comptroller assessed the heirs of the owner of shares of a national bank that had failed while the decedent's estate was in probate. The heirs defended, *inter alia*, on the ground that the assessment liability was a personal obligation that did not succeed the shareholder's death. The

56 F. 965 (E.D. Pa. 1893).

77. See *Anderson v. Philadelphia Warehouse Co.*, 111 U.S. 479 (1884).

78. See, e.g., *Hulitt v. Bank*, 14 Ohio Fed. Dec. 664 (6th Cir. 1905). In such cases security could be provided to the lender by the practice of holding pledged stock endorsed in blank by the borrower, without the necessity of obtaining formal transfer of ownership on the bank's books. See, e.g., *id.*

79. See, e.g., *Pauly v. State Loan & Trust Co.*, 165 U.S. 606 (1897). The rule was the same at the state level. See, e.g., *Andrew v. City-Commercial Sav. Bank*, 217 N.W. 431 (Iowa 1928).

80. See *Frater v. Old Nat'l Bank of Providence*, 101 F. 391 (1st Cir. 1900).

81. See, e.g., *Beal v. Essex Sav. Bank*, 67 F. 816 (1st Cir. 1895).

82. A similar rule applied at the state level. See, e.g., *Andrew v. City-Commercial Sav. Bank*, 217 N.W. 431 (Iowa 1928).

83. See, e.g., *Tourtelot v. Stolteben*, 101 F. 362 (N.D. Iowa 1900).

84. See, e.g., *Lewis v. Switz*, 74 F. 381 (D. Neb. 1896).

85. See, e.g., *Lucas v. Coe*, 86 F. 972 (N.D.N.Y. 1898); *Welles v. Larrabee*, 36 F. 866 (N.D. Iowa 1888). Again the state rules were similar. See, e.g., *Andrew v. City-Commercial Sav. Bank*, 217 N.W. 431 (Iowa 1928).

86. 176 U.S. 521 (1900).

Supreme Court, however, following earlier lower court decisions, sensibly rejected this construction and upheld the assessment.⁸⁷ Other cases, exploring the interaction of assessment and state probate law, ruled that although the assessment liability was not extinguished by death, the receiver was placed in the position of an unsecured creditor of the estate and had to comply with the reasonable probate rules of the jurisdiction in which the estate was being administered,⁸⁸ although state probate law would be preempted if it thwarted or impeded the federal remedy.⁸⁹ Within these general constraints the courts were receptive to assessment suits against estates, allowing them even when the assets had been distributed among the heirs.⁹⁰ In such situations, the executor might be held personally responsible for the debt, even if he had no knowledge of the potential assessment liability at the time he distributed the assets of the estate, on the theory that the distribution to legatees constituted a breach of trust.⁹¹

In some cases, defendants would resist an assessment on the ground that the transaction by which they had acquired their securities was infected by fraud, incapacity or illegality. The courts rejected arguments of lack of capacity when raised by married women⁹² and persons purchasing bank stock for minors.⁹³ In several cases, courts accepted the defense raised by corporate shareholders that they could not be assessed when the transaction under which they had acquired their stock was *ultra vires*.⁹⁴ But challenges to assessments based on an alleged defect in a stock subscription were generally unavailing, particularly if the Comptroller had approved the subscription offer or the shareholder had accepted the benefits of ownership.⁹⁵ Similarly, after the failure of a bank, a shareholder generally could not assert a defense or counterclaim of fraud in the in-

87. *Id.* at 532.

88. *See, e.g.,* Pufahl v. Estate of Parks, 299 U.S. 217 (1936); Wickham v. Hull, 60 F. 326 (N.D. Iowa 1894).

89. *See, e.g.,* Seabury v. Green, 294 U.S. 165 (1935).

90. *See, e.g., id.* In related cases involving property held in life estate, the general rule was that the remaindermen and not the life tenant were liable for assessment, even if the life tenant enjoyed the power to invade the principal for his or her own support. *See, e.g.,* Earle v. Rogers, 105 F. 208 (E.D. Pa. 1900); Blackmore v. Woodward, 71 F. 321 (6th Cir. 1895).

91. *See* Rankin v. Miller, 207 F. 602 (D. Del. 1913).

92. *See, e.g.,* Keyser v. Hitz, 133 U.S. 138 (1890); Robinson v. Turrentine, 59 F. 554 (E.D.N.C. 1894); Witters v. Sowles, 35 F. 640 (D. Vt. 1888); Hobart v. Johnson, 8 F. 493 (S.D.N.Y. 1881). The state rule was similar. *See, e.g.,* Bryan v. Bullock, 93 So. 182 (Fla. 1922).

93. *See, e.g.,* Early v. Richardson, 280 U.S. 496 (1930); Foster v. Chase, 75 F. 797 (D. Vt. 1896). The adult purchaser for the benefit of a minor was liable for assessment, even if the (presumably impecunious) minor subsequently affirmed the purchase upon coming of age. *See* Foster v. Wilson, 75 F. 797 (D. Vt. 1896).

94. *See* Concord First Nat'l Bank v. Hawkins, 174 U.S. 364 (1899); California Bank v. Kennedy, 167 U.S. 362 (1897).

95. *See, e.g.,* Pacific Nat'l Bank v. Eaton, 141 U.S. 227 (1891); Thayer v. Butler, 141 U.S. 234 (1891); Delano v. Butler, 118 U.S. 634 (1886); Bailey v. Tillinghast, 99 F. 801 (6th Cir. 1900).

ducement in an assessment proceeding,⁹⁶ although a defrauded shareholder might establish his or her status as an unsecured creditor of the receivership by way of a direct action against the bank and the receiver,⁹⁷ at least if the shareholder could not have uncovered the fraud through the exercise of reasonable diligence.⁹⁸

The courts also adopted sensible rules to handle the problem of bank holding companies, which appeared on the scene in significant numbers during the 1920's.⁹⁹ Since the holding company was the official "owner" of the subsidiary bank's stock, and was so listed on the shareholders list, a strict application of the rule of record ownership would permit assessment only against the holding company and not against the holding company's shareholders. This raised the possibility that holding companies could be established as shields against assessment liability. The courts, however, rejected such arguments, even when the parent holding company had been created in good faith at a time when the subsidiary bank was solvent, even in the absence of any evidence of intent to evade assessment liability.¹⁰⁰ Nor was it possible for shareholders of a holding company to avoid assessment by dissolving the corporation; the liabilities of the former corporation were traced to its shareholders, who were individually liable for the assessment.¹⁰¹

Finally, the courts appear to have coped remarkably well with the problem of opportunistic transfers to insolvent parties. A leading case was *National Bank v. Case*,¹⁰² in which an owner of a national bank's stock, upon discovering the bank's perilous condition, transferred shares to one Waldo, an impecunious clerk, on the understanding that Waldo would retransfer the stock on request. The Supreme Court had no trouble upholding the assessment, finding the transfer a clear sham since the original owner retained the right to recover the stock from Waldo on demand. But, with the apparent intention of deterring opportunistic transfers of all sorts, the Court went beyond the facts and endorsed the broader rule that a transfer of shares in a national bank, made with the purpose of escaping shareholder liability and to a person who for any reason was incapable of paying the liability, was void as to the creditors of the bank, even if transfer as between the parties was bona fide and without re-

96. See *Scott v. Deweese*, 181 U.S. 202 (1901); *Salter v. Williams*, 219 F. 1017 (D.N.J. 1914). State cases were similar. See, e.g., *Andrew v. People's State Bank of Humboldt*, 234 N.W. 542 (Iowa 1931).

97. See *Oppenheimer v. Harriman Bank*, 301 U.S. 206 (1937).

98. See, e.g., *Lantry v. Wallace*, 182 U.S. 536, 549 (1901); *Ryan v. Mt. Vernon Nat'l Bank*, 206 F. 452 (2d Cir. 1913) and *Ryan v. Mt. Vernon Nat'l Bank*, 224 F. 429 (2d Cir. 1915) (deciding that shareholder's allegations of fraud in purchase of stock did not affect assessment action).

99. See *Double Liability*, *supra* note 44.

100. See *Anderson v. Abbott*, 321 U.S. 349 (1944); *Fors v. Farrell*, 260 N.W. 886 (Mich. 1935).

101. See *Benton v. American Nat'l Bank*, 276 F. 386 (5th Cir. 1921).

102. 99 U.S. 628 (1878).

course.¹⁰³ Courts routinely applied this broader rule to impose liability on solvent shareholders who had transferred stock to nominees in contemplation of insolvency.¹⁰⁴

Somewhat greater difficulties arose when owners placed bank stock in the hands of insolvent persons prior to the bank's falling into difficulty. But here too, the courts crafted sensible compromises between the goals of facilitating the free transferability of bank stock and protecting the interests of bank creditors. The courts were unanimous that assessment liability could not be avoided, even if the bank was solvent at the time of transfer, if the transfer was made with the purpose of avoiding possible assessment and the transferor retained effective ownership over the stock in question.¹⁰⁵ In the early case of *Davis v. Stevens*,¹⁰⁶ for example, an investor caused certain shares of a solvent national bank to be registered in the name of an irresponsible porter in the office of his New York stockbroker, subject to a power of attorney allowing the investor plenary control over the securities. Subsequently, the bank failed and the receiver sought to assess the investor. Finding that the sole purpose for registering the shares in the name of the nominee was to conceal ownership and thus "escape all statutory liability,"¹⁰⁷ the court upheld the assessment. If, however, an owner made a transfer to a financially irresponsible person for some purpose other than that of avoiding potential liability (such as the desire to make a gift to a family member), and the original owner relinquished effective control over the securities, the transfer would be

103. *Id.* at 632.

104. *See, e.g.,* *McDonald v. Dewey*, 202 U.S. 510, 520 (1906); *Stuart v. Hayden*, 169 U.S. 1, 8 (1898); *Pauly v. State Loan & Trust Co.*, 165 U.S. 606, 619 (1897); *Richmond v. Irons*, 121 U.S. 27, 58 (1887); *Bowden v. Johnson*, 107 U.S. 251, 261 (1882). However, in a somewhat dubious decision, the Supreme Court held that if the transfer to an irresponsible person were final and without recourse, the transferor would be liable only for debts of the bank incurred prior to the transfer on the theory that subsequent creditors would not rely on the transferor's credit after the transferor had been removed from the bank's shareholder list. *McDonald v. Dewey*, 202 U.S. 510 (1906).

A variant on the transfer to an insolvent nominee was the situation in which a shareholder, knowing that a forthcoming assessment would render him insolvent, transferred other, good assets to a third party in order to avoid the assessment liability and confer a benefit on another. The courts had little trouble rejecting such transfers as invalid preferences and recovering the shareholder's assets for the benefit of the bank's creditors. *See, e.g.,* *Gatch v. Fitch*, 34 F. 566 (D. Ind. 1888).

105. *See, e.g.,* *Anderson v. Philadelphia Warehouse Co.*, 111 U.S. 479, 483 (1884); *Bowden v. Johnson*, 107 U.S. 251, 261 (1882). In addition to imposing liability on the real owners in such cases, the courts, sensibly, held the nominees liable as well on the theory that because they had consented to have their names placed on the bank's books as the owners, they were therefore estopped to deny their ownership in an assessment suit. *See, e.g.,* *Whitney v. Butler*, 118 U.S. 655 (1886). Although such nominees were generally impecunious, there was no reason not to hold them liable if they had consented to participate in a scheme to avoid the statutory liability. If, however, the individual named on the bank's books had no knowledge of the use of his name as nominee, he would not be assessed. *See, e.g.,* *Keyser v. Hitz*, 133 U.S. 138, 149 (1890).

106. 7 F. Cas. 177 (S.D.N.Y. 1879).

107. *Id.* at 178.

respected and the original owner released from any assessment liability.¹⁰⁸

Another fact pattern involved transfers made while the bank was in distress or insolvent, but where the transferor was unaware of the bank's insolvency at the time of the transfer. Here, the general rule was that the transferor's bona fides were sufficient to validate the transfer, even if the transferee was impecunious, at least if the transferor was not negligent in failing to ascertain the bank's condition.¹⁰⁹ This rule appears sensible as stated, although a few cases go rather far in accepting protestations of ignorance on the part of transferors who had good access to information about the bank's condition.¹¹⁰ The rules on transferor liability were clarified somewhat, in the case of national banks, by statutory amendment in 1913, which established that stockholders who had transferred their shares within sixty days of a bank's default, or who transferred with knowledge of the impending failure, would be liable "to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability."¹¹¹ This statute made transferors strictly liable for any transfers within sixty days of insolvency, and thus avoided much litigation.¹¹²

It is impossible to measure the losses caused by transfers to nominees for the purpose of avoiding assessment. Shareholder insolvency undoubtedly reduced the amounts recovered by bank receiverships in many cases. In *United States v. Knox*,¹¹³ for example, the receiver assessed shareholders \$350,000 but "by reason of the insolvency of many of the shareholders" netted less than \$113,000.¹¹⁴ One might infer that some of the shortfall reflected opportunistic transfers to nominees. However, in many cases, shareholder insolvencies were due to failures of the banks themselves, since insiders who often controlled substantial blocks of bank stock were likely to be driven into personal insolvency as a result of the collapse of their banks. The evidence is, accordingly, ambiguous as to the actual extent of opportunistic transfers to nominees. Given the surprisingly large number of cases in which such transfers do not appear, the better view may be that the problem was actually not as severe as might be inferred on the basis of cases like *Knox* standing alone.

108. See, e.g., *Anderson v. Philadelphia Warehouse Co.*, 111 U.S. 479, 484-85 (1884).

109. See, e.g., *Fowler v. Crouse*, 175 F. 646, 648-49 (2d Cir. 1910).

110. For a particularly egregious case, see *Sykes v. Holloway*, 81 Fed. 432 (D. Ky. 1897) (wife's gratuitous transfer to impecunious child relieved her of assessment liability even though husband knew of distressed condition of the bank and wife never transacted business without husband's advice).

111. 38 Stat. 273 (1913). The House Report observed that the purpose of the addition was to "overcome the practice which has sprung up on the part of dishonest or cowardly national bank stockholders of evading . . . double liability . . . when they have been informed of the failure of a bank in which they hold shares, by transferring such shares to some 'dummy' who is immune from recovery." CHANGES IN THE BANKING AND CURRENCY SYSTEM OF THE UNITED STATES, H.R. REP. NO. 69, 63d Cong., 1st Sess. 72 (1913).

112. See Note, *supra* note 31, at 1137.

113. 102 U.S. 422 (1880).

114. *Id.* at 423.

C. Control of Administrative Discretion

Another important problem that was solved over time was the development of standards to evaluate whether a receiver had made a legally binding assessment order. The leading case under the National Bank Act was *Kennedy v. Gibson*,¹¹⁵ an action by a receiver of a national bank against the stockholders seeking payment of \$200,000 in par value. The defendants demurred on the ground that the complaint alleged only that the receiver had determined to proceed against the shareholders, but had not alleged that the Comptroller had made such a determination. The Supreme Court sustained the demurrer, observing that the statute vested in the Comptroller the sole responsibility to determine whether and how much shareholders should be assessed.¹¹⁶

Later cases extended the principle of *Kennedy* into a broad grant of administrative discretion on the part of the Comptroller to determine whether the assets of a bank were insufficient to satisfy the liabilities, as well as to determine the extent of the assessments necessary to make up the shortfall.¹¹⁷ The Comptroller's determinations in this regard could not be attacked at all by way of a defense or counterclaim in a receiver's assessment suit and could only be challenged in a direct action against the Comptroller on the narrow grounds of clear error of law, fraud, or mistake of fact.¹¹⁸

The rationale for this broad grant of discretion to the Comptroller appears obvious. Allowing shareholders to challenge the determination of insolvency in every case would be an intolerable burden on creditors' rights. Moreover, the extended delays that such challenges could cause would slow down receivership proceedings and harm bank creditors by impeding the satisfaction of their claims. Recognizing the importance of "prompt liquidation,"¹¹⁹ the courts established a firm rule that neither the Comptroller's determination of insolvency nor the amount of assessment levied by the Comptroller could be challenged collaterally by shareholders in assessment proceedings.¹²⁰

115. 75 U.S. (8 Wall.) 498, 501 (1869).

116. *Id.* at 505.

117. See, e.g., *Oppenheimer v. Harriman Bank*, 301 U.S. 206, 213 (1937); *Forrest v. Jack*, 294 U.S. 158, 162 (1937); *National Bank v. Case*, 99 U.S. 628, 634-35 (1878); *Casey v. Galli*, 94 U.S. 673 (1876).

118. See, e.g., *United States v. Knox*, 102 U.S. 422, 425 (1880). Although this rule drastically limited the ability of shareholders to contest an assessment after it had been ordered, shareholders exercised greater influence before the fact, sometimes convincing the responsible official to disallow claims of creditors that would increase their assessment if approved. See, e.g., *Schrader v. Manufacturers Bank*, 133 U.S. 67, 69 (1890).

119. *Adams v. Nagle*, 303 U.S. 532, 540 (1938).

120. See *Adams v. Nagle*, 303 U.S. 532, 540 (1938); *McCormick v. Market Bank*, 165 U.S. 538 (1897); *Bushnell v. Leland*, 164 U.S. 684 (1897); *Chubb v. Upton*, 95 U.S. 665 (1877); *Casey v. Galli*, 94 U.S. 673 (1876). Similarly broad grants of discretion developed at the state level. New York, which originally required its banking superintendent to prove the necessity of enforcement by evidence, see *Cheney v. Scharmann*, 129 N.Y.S. 993 (Sup. Ct. 1911), amended its statute to provide that the superintendent's determination was conclusive in the absence of "fraud, illegality, bad faith, or obvious error." *Broderick v. Adamson*,

The converse situation was presented when creditors of a failed national bank believed that the Comptroller was proceeding too slowly, or not at all, to enforce the statutory assessment. In *United States v. Knox*,¹²¹ the Supreme Court entertained a petition for a writ of mandamus to force the Comptroller to proceed against shareholders for the benefit of a creditor. Although the Court refused the writ on the merits, the fact that it entertained the suit rather than dismissing it at the outset suggests that in a proper case a creditor might have been able to obtain judicial review of the Comptroller's decision not to act in these circumstances.

D. Enforcement of Assessments

Once an assessment was declared, the receiver had to enforce it against stockholders. Receivers faced two principal problems: suing large numbers of shareholders was costly and cumbersome, and enforcing assessments in remote jurisdictions often proved equally problematic. Sometimes those difficulties could prove a real hindrance. A poignant example is the Carnegie Trust Company of New York, which failed in 1911. The state banking department filed suit against 225 stockholders to recover a 100% assessment. *American Banker*, a leading trade journal, described the litigation as follows:

Some seventy-five or eighty attorneys have appeared for these various defendants and the litigation, since the beginning of the action, has been active and continuous. While the company at the time of its closing had a capital of \$1,500,000, several of the largest stockholders have since . . . gone into bankruptcy and they, therefore, will not be in a position to pay their liability. A number of other stockholders reside outside of the state and it will be necessary to obtain a judgment against those stockholders in the states in which they reside . . . [T]he complaint of the Superintendent of Banks . . . has been attacked from every angle and every point which legal acumen could suggest has been raised by the defendants . . . [O]ne stockholder bought up a large number of claims of the depositors against the trust company and attempted to plead them as an offset Another countered with a bill for legal services. Still another attempted to set up a judgment which he had obtained against the trust company. The complaint has also been attacked on the ground that the law under which it was brought was unconstitutional¹²²

Notwithstanding these difficulties, the assessment remedy appears to have been rather effectively enforced over the time period of this study. Indeed, even the Carnegie Trust failure eventually resulted in enforcement. *American Banker* reported that the New York courts rejected all objections to assessment, upheld the authority of the Superintendent of

265 N.Y.S. 804 (Sup. Ct. 1933).

121. 102 U.S. 422 (1880).

122. Albany, New York, 82 AM. BANKER 2760 (1917).

Banks, and required shareholders to pay in their assessment liability.¹²³ A variety of legal rules facilitated effective enforcement of shareholders' assessment obligations despite problems of group litigation and geographic dispersal of shareholders.

1. *Group litigation*

The Nineteenth Century cases mostly involved suits against a single bank shareholder. By the early Twentieth Century, however, share ownership in banks was often dispersed among persons holding relatively small blocks of stock. In such cases, receivers began to join shareholders as defendants in order to conserve on litigation costs. Although these joinder efforts met resistance from shareholders, the courts adopted workable strategies for coping with the difficulties of group litigation, even in the absence of a developed class action procedure.

Thus, by the turn of the century it was established that an action in equity could be maintained against multiple shareholders without the necessity of any community of interest between the shareholders, so long as common questions of law and fact were present.¹²⁴ It was, accordingly, possible for receivers to join many shareholders in a single proceeding in which the validity of the assessment could be firmly established. Shareholders would then be able to raise their individual defenses; but the probability of success for such individual defenses was low unless the shareholder could demonstrate that he was neither the actual nor the record owner of the securities. Thus, substantial economies of scale were achieved, although the absence of developed procedures for large-scale litigation undoubtedly raised transaction costs beyond what they would be under today's more flexible rules of civil procedure.

2. *Enforcement in foreign states*

More significant problems sometimes arose when shareholders were not available for suit within the jurisdiction of the failed bank. In such cases the receiver had to go where the shareholder could be found and bring suit there. Often receivers found it excessively costly to pursue shareholders in remote locations and potential defendants escaped the net of the assessment remedy. Even when the receiver did bring suit in a foreign jurisdiction, the jurisdictional overlap—coupled, sometimes, with parochial favoritism towards in-state defendants—sometimes made enforcement difficult for receivers of state chartered banks.¹²⁵

123. *Id.* at 2769. See also *Holds Stockholders Liable*, 80 AM. BANKER 1066 (1915); *Stockholders' Liability*, 91 BANKERS MAGAZINE 465 (1915); *Stockholders' Double Liability*, 88 BANKERS MAGAZINE 312 (1914).

124. See *Benton v. American Nat'l Bank*, 276 F. 368 (5th Cir. 1921); *Bailey v. Tillinghast*, 99 F. 801 (6th Cir. 1900). The same rule applied for cases arising under state double liability rules. See, e.g., *Conway v. Owensboro Sav. Bank & Trust Co.*, 165 F. 822 (W.D. Ky. 1908).

125. However, jurisdictional overlap was not a problem for receivers of national banks, who could bring suit in any federal district court in which a shareholder could be found.

In a remarkable turn of events, New Jersey in 1897 enacted a statute clearly aimed at subverting the assessment remedy of other states as applied to New Jersey shareholders. The New Jersey law provided that any action to enforce the personal liability of bank stockholders under the laws of any other state had to be in the nature of an equitable accounting for the proportionate benefit of all parties represented, to which the bank and all its stockholders and all creditors had to be necessary parties. As a practical matter, the New Jersey statute virtually precluded the possibility of an assessment remedy against New Jersey stockholders of other states' banks, since under prevailing concepts, jurisdiction could not be obtained against all shareholders and creditors not residing in New Jersey.¹²⁶

In other cases, state courts, displaying more than a little favoritism for parochial interests, refused to allow a receiver of a bank chartered in another state to enforce the double liability against shareholders resident in the forum state on grounds of public policy.¹²⁷ Ultimately, however, these efforts to prevent receivers of foreign banks from assessing local shareholders were usually unavailing. Foreign state courts generally rejected the argument that enforcement should be refused on grounds of public policy.¹²⁸ As the Connecticut Supreme Court observed in the leading case of *Broderick v. McGuire*, "We are not at liberty to refuse the enforcement of the foreign law in order to suit our own view of what is fair and right"¹²⁹

Even if a state were otherwise inclined to deny foreign receivers the right to sue in-state shareholders, courts were likely to hold that enforcement was required under the federal Constitution. It was clear that a state or federal court located in a foreign jurisdiction could not refuse on grounds of forum state law or policy to enforce a judgment validly obtained in the courts of the insolvent bank's jurisdiction.¹³⁰ More problematic was whether a receiver, having ordered an assessment, could proceed directly to enforce the assessment in an unconsenting foreign jurisdiction without first obtaining a valid judicial judgment against the shareholder. At least one court refused to enforce such an assessment on the ground that the defendant had not received sufficient opportunity to challenge the validity of the assessment.¹³¹ However, the Supreme Court eventually ruled that foreign courts had to enforce assessment orders which were valid in the failed bank's state, even if the receiver did not come equipped with a valid judicial judgment.¹³²

126. *Broderick v. Rosner*, 294 U.S. 629, 639-40 (1935).

127. See, e.g., *Finney v. Guy*, 189 U.S. 335 (1903); *Van Tuyl v. Carpenter*, 188 S.W. 234 (Tenn. 1916).

128. See Arthur K. Kuhn, *The Extraterritorial Enforcement of Statutes Imposing Double Liability Upon Stockholders*, 17 YALE L.J. 457 (1908).

129. 174 A. 314, 319 (Conn. 1934).

130. See *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900).

131. *Van Tuyl v. Carpenter*, 188 S.W. 234 (Tenn. 1916). See also Kuhn, *supra* note 128.

132. *Broderick v. Rosner*, 294 U.S. 629 (1935). The rule was otherwise, however, if the

Finally, it was clear that suits to enforce state double liability rules could generally be prosecuted in the federal court where the defendant could be found, even if the suit were based on the law of a foreign state, so long as the requirements of federal jurisdiction were otherwise met.¹³³

E. Fundamental Corporate Changes

The double liability provision gave bank shareholders an incentive to transfer bank assets to other, more efficient users before insolvency. From an economic point of view, transfers of assets prior to insolvency were far preferable to transfers occurring after insolvency, both because assets were moved to more efficient uses quickly and because the transaction costs of insolvency proceedings were avoided.¹³⁴

All parties, particularly depositors and other creditors, benefit if a troubled bank can be liquidated, merged or otherwise consolidated with a healthy institution prior to insolvency. Where a bank is liquidated or merged before it becomes insolvent, then, by definition, its assets will exceed its liabilities, and depositors and other creditors (including the deposit insurance fund) bear no losses. Thus, an aggressive policy of liquidating or merging troubled banks should be a cornerstone of any sensible bank regulatory policy. The current system of bank regulation has failed dismally at identifying and closing troubled banks in a timely fashion. There simply are too many insured banks with too many loans for bank regulators to be able to monitor and evaluate their solvency effectively.

In addition, the ability of shareholders to delay bank closings or mergers, either by political machinations, or by legal maneuvering, adds to the problems enormously. Shareholders in insolvent banks have a strong incentive to delay closure or merger. Once the shareholders' equity is wiped out by losses, shareholders can expect to receive little if anything if their bank merges or is liquidated. On the other hand, by keeping the bank open and taking even bigger risks than before, there is always the chance—however slight—that the risks will pay off and the bank will return to solvency. Of course, at this point, the shareholders have nothing to lose if these risks do not pay off, since they have lost their investments already. Any additional losses will be borne by depositors and other creditors, such as the FDIC.

By contrast, when a bank's shareholders face the specter of double liability, these shareholders have a strong incentive to move for early closure or merger in order to avoid such additional liability. For this reason alone, it appears unfortunate, at least in hindsight, that the double liability system was abandoned. If such a system had been in place in the

receiver would not have been entitled to prosecute the action in the receiver's home state. See, e.g., *Finney v. Guy*, 189 U.S. 335 (1903).

133. See *Whitman v. National Bank of Oxford*, 176 U.S. 559 (1900); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900).

134. For an argument that private transfers of assets to more efficient users should be facilitated under modern banking conditions, see Macey & Miller, *supra* note 6.

1980s, the costs of the bank failures of that decade would have been reduced enormously as banks would have avoided last minute efforts to "grow out of their problems" by expanding their deposit bases and assuming even more risks than before. In addition, earlier closure with the cooperation of bank shareholders would have saved countless millions in legal and regulatory costs.¹³⁵

The rules adopted by the courts to govern such transfers appear to have been well designed to facilitate the free movement of banking assets within the economy without impairing the efficacy of the assessment remedy.

1. Liquidations

One means for placing the assets of a national bank in other hands prior to insolvency was voluntary liquidation. The bank's shareholders would vote to liquidate the institution and to appoint a fiduciary to realize on the assets and pay off creditors. Voluntary liquidations occurred frequently under the double liability system.¹³⁶ Shareholders could not willy-nilly avoid their statutory liability by engaging in a voluntary liquidation rather than waiting for the Comptroller to close the institution. Under provisions added to the National Bank Act in 1876, either a receiver or a creditor could enforce double liability on behalf of all the creditors in the event that the liquidating bank was unable to meet its obligations.¹³⁷

2. Asset transfers to other banks

During the 1920's, banks began to utilize a new type of transaction to effect the transfer of assets away from troubled institutions. These transactions involved mergers in the form of asset transfers from a troubled bank to a solvent one. Such asset transfers were made by insolvent institutions in consideration for the acquiring bank's supplying the funds needed to satisfy the liquidating banks' creditors.¹³⁸ These transfers protected creditors, including depositors, and facilitated the rapid movement

135. Congress has now enacted a requirement of "prompt regulatory action" into law as § 133 of the Federal Deposit Insurance Corporation Improvements Act of 1991. While this program is a marked improvement over the earlier system in which shareholders and regulators alike could delay closing an insolvent institution, it relies on intervention by federal regulators rather than on the private market incentives that provide the stimulus for early closure under a double liability system.

136. For statistics on banks in voluntary liquidation, see *infra* text accompanying notes 145-49.

137. Act of June 30, 1876, ch. 156, 19 Stat. 63 (1876). Despite these provisions, voluntary liquidation was subject to potential abuse because the bank's own shareholders often remained on as liquidators, during which time they could loot the assets, engage in preferential transfers, or otherwise harm the interests of creditors. See, e.g., *Richmond v. Irons*, 121 U.S. 27 (1887).

138. This type of transaction resembled, in some respects, the standard device known today as a "purchase and assumption" transaction. See Macey & Miller, *supra* note 6, at 1182-87.

of banking assets into the hands of more efficient users. Equally important, these transactions preserved the going concern value of the selling bank's customer base.

The courts adopted workable and sensible rules to allow the double liability system to accommodate these socially beneficial asset transfer transactions. In a typical transaction, the acquiring bank, by virtue of assuming or paying off the liabilities of the selling bank, became a creditor of the latter, with the assets of the acquired bank standing as security for the debt. It was important that the transaction be structured so that the acquiring bank would enjoy the status of creditor, rather than that of purchaser of the assets in question. As a creditor rather than a purchaser, the acquiring bank could assert the rights of a creditor in assessment proceedings against the shareholders of the selling institution if the assets failed to generate sufficient revenues to pay off the debt.¹³⁹ Thus, asset transfers did not offer an escape to the selling bank's shareholders an escape from their assessment liability.¹⁴⁰

3. Mergers and consolidations

If a bank merged or consolidated with another bank, the question sometimes arose as to whether the statutory liability of the former bank's shareholders survived the merger. The general rule was that the assessment liability of shareholders was not extinguished by the reorganization, but instead remained in effect as to the debts of the old corporation,¹⁴¹ at least in cases where the creditors of the old institution were not insiders in the former bank.¹⁴² This rule permitted banks relative freedom to merge or consolidate with one another—thus facilitating the transfer of banking assets into the hands of efficient users and encouraging the rapid closure of institutions which would otherwise fail—while effectively preserving the assessment remedy as needed.

III. EFFECTIVENESS OF THE ASSESSMENT REMEDY

The assessment remedy was effective. Shareholders paid up, as a rule. Despite the large amount of litigation, the overall level of shareholder compliance with assessment orders was relatively high. As shown in Table 1, over the entire functional lifespan of the federal double liability rule, the average assessment netted 50.8% of the amount assessed.

139. See, e.g., *Harris v. Briggs*, 264 F. 726 (8th Cir. 1920); *American Nat'l Bank v. Commercial Nat'l Bank*, 254 F. 249 (5th Cir. 1918); *Western Underwriting & Mortgage Co. v. Valley Bank*, 237 F. 45 (9th Cir. 1916).

140. In those rare cases where asset transfers created difficulties for the assessment remedy, the courts devised sensible rules to handle the problem on a case-by-case basis. An example is *Adams v. Nagle*, 303 U.S. 532 (1938), where the court disregarded a purchase and assumption transaction in order to facilitate administration of the assessment remedy in a situation where the acquiring bank had also failed.

141. See, e.g., *In re Receivership of Germania Bank*, 98 N.W. 341 (Minn. 1904).

142. See *Andrew v. Dunn*, 210 N.W. 425 (Iowa 1926).

TABLE 1

NATIONAL BANK CLAIMS EXPERIENCE 1865-1934

<u>Receiver Appointed</u>	<u>Assessment</u>	<u>Collected</u>	<u>Compliance Rate</u>
1865-69	1,485	109	7.3%
1870-74	3,009	1,256	41.7%
1875-79	3,805	1,544	40.6%
1880-84	3,329	2,333	70.1%
1885-89	2,775	1,386	49.9%
1890-94	12,186	5,210	42.8%
1895-99	11,030	5,317	48.2%
1900-04	3,954	2,648	67.0%
1905-09	3,841	1,923	50.1%
1910-14	2,845	1,264	44.4%
1915-19	2,760	1,627	58.9%
1920-24	13,720	6,418	46.8%
1925-29	27,880	15,558	55.8%
1930-34	42,161	21,846	51.8%
TOTALS:	134,780	68,439	50.8%

Source: Derived from 1937 Annual Report, Comptroller of the Currency, at 451-53. All amounts in thousands of dollars.

Moreover, contrary to what might be expected, the percentage recoveries on assessments did not deteriorate over time, but instead held to a range of around 50% after an initial period of low recoveries that can be explained as due to start-up problems. One inference from this data is that bank shareholders and their attorneys were not able to devise strategies to evade the double liability rule—substantiating our evaluation of the cases, which indicates that virtually no loopholes were allowed in the statutory scheme. It is noteworthy, moreover, that the levels of recovery did not drop off significantly during the 1920's and 1930's, even though bank share ownership during this period appears to have become significantly more widely dispersed than before. Problems of group litigation and geographic dispersal of shareholders did not seem to have any significant effect on the recovery rates. Further, it is remarkable that the level of recoveries from the troubled years 1930-1934 followed the historical pattern and does not appear to have been significantly depressed by personal insolvencies of bank shareholders.

One might suppose that a 51% recovery rate is not very good. After all, any merchant who was able to collect only half his accounts receivable would quickly be out of business. In our judgment, however, the 51% ratio should be considered a success. It must be remembered that many shareholders were also bank insiders, and the failure of the bank often spelled their personal insolvency as well. Moreover, in any given case it was likely that some shareholders would not be reachable by process or otherwise would be able to evade responsibility for the assessment. And under the prevailing rule, shareholders who were solvent and before the court would not be required to make up for shortfalls owing to the insol-

vency or unavailability of others.¹⁴³ Under these conditions, a 51% recovery rate appears to be quite good.

Similarly, while the total amount recovered from shareholders over the life of the federal program—\$68.4 million—may not seem large by modern standards, in historical context this amount represented a significant benefit to creditors. The total losses to all creditors from national bank failures between 1865 and 1934 was only \$241.9 million.¹⁴⁴ This sum included expenses such as the costs of the receiverships themselves and all liabilities in excess of capital stock. Recoveries from shareholders thus equalled 28.3% of losses experienced by national bank creditors over the period in question.

There appear to be two principal reasons for the relatively good recovery rates under the double liability system, at least at the federal level. First, receivers vigorously pursued shareholders to recoup the assessment liability. This fact is attested by the hundreds of cases in the federal courts and hundreds more in state courts in which receivers sought compensation under double liability rules. For every case in the books, of course, there were others which did not go into litigation because the shareholders paid voluntarily, knowing that the receiver would come after them if they did not comply. Receivers enforced assessment orders vigorously, not only because it was their duty to do so, but also because they were paid to do so out of the receivership assets. Going after shareholders was good business for receivers, and shareholders (or their attorneys) knew it.

Compliance was also facilitated by the doctrines developed in the courts to flesh out the assessment remedy, which as we have seen were exceedingly well designed to encourage payment. From the beginning, the courts uniformly administered the assessment remedy to close off all strategies for avoiding compliance; and as the precedents built up year after year, including numerous decisions by the Supreme Court, the prospects of actually avoiding assessment became bleak indeed. It is not surprising, therefore, to find that shareholders usually paid their assessments.

In addition to inducing shareholder compliance, double liability facilitated and encouraged the transfer of banking assets to efficient users. It is no accident that bank shareholders frequently placed their institutions in voluntary liquidation during the regime of double liability. In fact, the number of national banks voluntarily placed in liquidation during the period greatly exceeded the number placed into liquidation involuntarily. Between 1863 and 1912, 2,357 national banks liquidated voluntarily, representing 22.8% of the total of national banks organized during the period.¹⁴⁵ During the same period, only 525 banks were involuntarily

143. For a discussion of the origin of the prevailing rule holding shareholders responsible for their own losses only, see *supra* text accompanying note 64.

144. Derived from 1937 Annual Report of the Comptroller of the Currency at 454-55.

145. See 1912 Annual Report of the Comptroller of the Currency at 98.

liquidated and 25 of these were subsequently returned to solvency.¹⁴⁶ Most of these liquidations resulted in the transfer of banking assets into other, presumably more efficient, hands.¹⁴⁷ The figures are similar for later years: between 1913 and 1928, 2,072 national banks either liquidated or consolidated with another institution without liquidation (a transaction permitted in 1918), while only 725 national banks liquidated involuntarily.¹⁴⁸ The number of involuntary liquidations approaches the number of voluntary liquidations and consolidations only for the difficult years 1929-33, when 1,280 national banks were forced into involuntary liquidation as compared with 1,343 which liquidated or consolidated voluntarily.¹⁴⁹ There can be little doubt but that many of these voluntary liquidations were motivated in part—sometimes in substantial part—by a desire on the part of the banks' shareholders to avoid assessment liability through continued operation of a money-losing bank.

Moreover, the double liability system fostered cautious banking practices on the part of bank managers who were either themselves shareholders and always were subject to monitoring by shareholders anxious to avoid the specter of assessment. While it is difficult to measure the extent to which such caution prevented more bank failures from occurring, it is clear that the value of double liability as a mechanism for controlling risk was recognized from the start.¹⁵⁰

It is no accident, however, that the actual losses to creditors from bank failures during the era of double liability were extremely small. In the case of national banks, as shown in Table 2, over the functional life of the double liability system the average annual losses from failure as a percentage of deposits was a mere .049%, and as a percentage of all liabilities was only .044%.¹⁵¹

146. *Id.*

147. In 1912, for example, approximately 25% of the liquidating national banks converted to state charter, 17% were absorbed by other national banks, 26% consolidated with other national banks, 13% were absorbed by state banks and trust companies, and 10% reorganized as national banks. Only 8% liquidated for the purpose of going out of business. *See id.* at 32.

148. 1933 Annual Report of the Comptroller of the Currency at 158; 1920 Annual Report of the Comptroller of the Currency, Vol. I at 164.

149. *Id.*

150. *See supra* text accompanying note 29.

151. *See* Table 2, *infra*.

TABLE 2

AVERAGE ANNUAL LOSSES FROM NATIONAL BANK FAILURES AS A PERCENTAGE OF DEPOSITS
AND TOTAL LIABILITIES: 1865-1934

<u>Year</u>	<u>% of Deposits</u>	<u>% of All Liabilities</u>
1865-69	.055%	.040%
1870-74	.061%	.043%
1875-79	.067%	.050%
1880-84	.061%	.049%
1885-89	.044%	.039%
1890-94	.126%	.117%
1895-99	.056%	.043%
1900-04	.006%	.005%
1905-09	.017%	.015%
1910-14	.009%	.008%
1915-19	.002%	.001%
1920-24	.065%	.058%
1925-29	.060%	.056%
1930-34	.077%	.072%
1865-34	.049%	.044%

Source: Derived from 1931 Report, Comptroller of the Currency, at 1021-22; 1937 Report, Comptroller of the Currency, at 454-55, 765.

Since depositors typically stood in the same shoes as other creditors (most of whom held the bank's circulating notes), this statistic implies that for every \$1000 in deposits in a given year, depositors on average lost only 44 cents—hardly an indication of a banking system run amok. The evidence is rather strong that national banks were conservatively managed during the regime of double liability.¹⁵²

The double liability system appears to have had an important influence on bank capital ratios. As shown in Tables 3 and 4, as of 1912, banks in states with double liability generally operated at a significantly lower ratio of capital to assets (18.2%)¹⁵³ than banks in states without double liability systems (22.9%).¹⁵⁴

152. Especially noteworthy is the fact that average losses were not significantly greater during the difficult years 1930-33 than they were in other periods. This evidence lends support to the thesis that the banking difficulties of this period had more to do with problems of liquidity in the banking system than with any fundamental defect in the system of bank regulation or in the management tactics of bankers during this period. See generally MILTON FRIEDMAN & ANNA J. SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES 1867-1960* (1963).

153. See Table 3, *infra*.

154. See Table 4, *infra*.

TABLE 3

1912 CAPITAL RATIOS—*States with Double Liability*

<u>State</u>	<u>Ratio</u>	<u>State</u>	<u>Ratio</u>
Arizona	14.3%	Nevada	18.9%
California	23.2%	New Hampshire	13.6%
Colorado	24.8%	New Mexico	23.7%
Florida	19.6%	New York	13.2%
Georgia	31.3%	North Carolina	21.5%
Idaho	22.8%	North Dakota	20.2%
Illinois	18.1%	Ohio	16.4%
Indiana	19.2%	Oklahoma	23.5%
Iowa	17.1%	Oregon	17.1%
Kansas	21.7%	Pennsylvania	20.1%
Kentucky	24.0%	South Carolina	30.5%
Maryland	17.9%	South Dakota	17.2%
Michigan	12.4%	Texas	30.6%
Minnesota	13.7%	Utah	16.3%
Mississippi	25.2%	West Virginia	22.3%
Montana	24.6%	Wisconsin	13.8%
Nebraska	17.7%		

WEIGHTED AVERAGE: 18.2%

Source: Derived from Comptroller of the Currency Annual Report 1912, at 704-13. The ratio used here is that of capital (capital stock, surplus, undivided profits and unpaid dividends) to total assets. Figures are unavailable for Massachusetts, Maine and Vermont.

TABLE 4

1912 CAPITAL RATIOS—*States Without Double Liability*

<u>State</u>	<u>Ratio</u>	<u>State</u>	<u>Ratio</u>
Alabama	28.5%	New Jersey	18.6%
Connecticut	26.1%	Rhode Island	19.7%
Louisiana	24.7%	Tennessee	24.6%
Missouri	21.0%	Virginia	23.7%

WEIGHTED AVERAGE: 22.9%

Source: Derived from Comptroller of the Currency Annual Report 1912, at 704-13.

National banks also displayed a capital ratio (18.3%) considerably below that of banks in states without double liability.¹⁵⁵ The obvious explanation for the disparities in capital ratios is that creditors did not demand as high a level of capitalization in double liability states as they did in states without double liability because they believed they could obtain repayment of some or all of their deposits by means of assessment in the event a bank failed. As noted earlier, the balance sheets of banks with double liability understate the amount of equity cushion depositors and other creditors in such banks actually enjoy by the amount of the assessments shareholders can be expected to pay in the event of insolvency.

Along the same lines, creditors may have demanded less by way of

155. Derived from 1912 Annual Report of the Comptroller of the Currency at 315.

capitalization in states with double liability because they believed the threat of assessment would deter managers from taking undue risks with bank assets, thus reducing the risk of insolvency in the first place. These figures should be viewed with caution, however, because of the relatively small number of states without double liability.

It is unclear whether or not the lower level of capitalization made possible through double liability was more efficient than the higher levels prevailing in the absence of double liability. A standard theorem in corporate finance is that, in general, the ratio of debt to equity in a firm has no consequence for its total value.¹⁵⁶ Double liability did apparently free up capital to be invested in projects other than the banking business, which may have been more productive. Investment of funds outside the banking business may also have allowed manager-shareholders to diversify their investment portfolios, thus reducing their personal risk exposure from fluctuations in share values; this would have been wealth-enhancing unless the value of portfolio diversification for managers was more than offset by countervailing costs such as a reduced incentive to manage efficiently. Bank shares with double liability were complex financial instruments and their effect on capital ratios is a fascinating part of the historical puzzle; but whether this effect was good, bad or indifferent is a matter beyond the scope of this paper.

CONCLUSION

This paper has examined enforcement and economic impact of the double liability system for bank shareholders, which existed for national banks and most state banks during the period between the Civil War and the Depression. The study demonstrates that the double liability system was remarkably effective at protecting bank creditors, including depositors. The courts devised sensible and workmanlike rules to facilitate administration. All of the major problem areas — determining the assessment amount, identifying the persons liable for assessment, defining the scope of administrative discretion, enforcing assessments in group litigation settings or in foreign jurisdictions, and accommodating the assessment remedy to fundamental corporate changes—were addressed and, to all appearances, satisfactorily resolved. This system worked. The way in which it worked should be of considerable interest for the analysis of limited liability in modern corporate law, and for the reform of banking regulation and the deposit insurance system.

The empirical data support the inference that double liability was a success. Recoveries from shareholders were good under the circumstances; and the amounts recovered substantially benefited creditors of insolvent banks. Double liability encouraged the private transfer of banking assets before failure rather than—as happens so often today—by government-

156. This is the Modigliani-Miller Theorem. See F. Modigliani & M. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958).

tally administered insolvency proceedings. Double liability encouraged cautious bank management by threatening shareholders with assessment if a bank failed. Despite the virtual absence of deposit insurance, depositors lost very little money due to bank failure during the double liability era. Double liability also appears to have enabled banks to operate with lower capital ratios than were needed in the absence of double liability, although neither the evidence nor the policy implications on this score are clear cut.

We have not considered whether double liability—or some variant on the idea—offers promise for coping with contemporary problems in the banking industry. Given the dimensions of the present crisis, however, it is useful to consider all regulatory options, even one discarded many years ago for the supposedly better system of federal deposit insurance. Double liability may now be worth a second look, either as a supplement or even a replacement for our current system of federal deposit insurance.

THE NEW PHASE OF BANK CONSOLIDATION: REGULATORY ISSUES AND CONSIDERATIONS

*Rodgin Cohen**

In 1991, the process of bank consolidation in the United States entered a new and accelerated phase. Six transactions announced within a six-month period—Chemical-Manufacturers Hanover, BankAmerica-Security Pacific, NCNB-C&S/Sovran, Society-Ameritrust, Comerica-Manufacturers National and Wachovia-South Carolina National—collectively involved more assets (based on the assets of the smaller institution) than all the bank mergers in 1989 and 1990 combined.¹ During the same period, four of the largest FDIC-assisted transactions ever occurred—Bank of New England, Southeast, Goldome and various New Hampshire institutions.

As the pace of bank mergers has accelerated, public debate over whether the consolidation process is in the best interests of the American banking system, consumers of banking services and the economy as a whole has also increased.² Proponents of the consolidation process have focused on its strengthening of the American banking system through enhanced profitability, which, they maintain, will provide both greater availability of and better terms for credit and other banking services.³ Opponents have assumed a contrary position, arguing that increased concentration will produce higher costs and less available credit.⁴

Less attention has been paid to the regulatory response to this consolidation process, in particular the apparent contradiction between regulatory support for the general concept of consolidation and the imposition

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1. Calculated from *Biggest Bank Mergers of 1990*, AM. BANKER, Jan. 8, 1991, at 13; AMERICAN BANKER RANKING THE BANKS, TOP 300 COMMERCIAL BANKS IN THE UNITED STATES 20 (1991); AMERICAN BANKER TOP NUMBERS: PART TWO, 1989 AGREEMENTS AND OFFERS 56 (1990).

2. John Greenwald, *The Large Economy Size*, TIME, July 15, 1991, at 48.

3. John P. Danforth, *Merger Economics and Recent Trends in Bank Consolidation*, BANKING POL'Y REP., Oct. 7, 1991, at 7, 9.

4. See generally, *Hearing of the Committee on Banking, Finance and Urban Affairs before the United States House of Representatives*, 102d Cong., 1st Sess. (Sept. 26, 1991) (statement of Jonathan Brown, Director, Banking Research Project Essential Information).