

court to make an award.⁸ The district court is free to decide the issue afresh. We include our calculating efforts for any assistance they may provide.

III

[13] We turn now to the banks' gross negligence claim against the United States under the FTCA. The banks' only recovery is for the FDIC's breach of its contractual duty to pay the banks their share of funds attributable to the "Y" Ranch Note. That is, the banks' recovery is only in contract and falls outside the FTCA's waiver of sovereign immunity. See *Blanchard v. St. Paul Fire and Marine Ins. Co.*, 341 F.2d 351, 357-58 (5th Cir.), cert. denied, 382 U.S. 829, 86 S.Ct. 66, 15 L.Ed.2d 73 (1965); *Walsh v. United States*, 672 F.2d 746, 747 (9th Cir.1982).⁹

IV

In sum, we hold that substantial evidence supports the jury's finding that the FDIC breached its contract with the banks and reverse the district court's contrary finding. We find that the damages awarded by the jury on the contract claim, however, are not supported by the evidence and remand the damages portion of the claim for consideration by the trial court. It may be that the damage calculation is no more than a matter of math and will not require a trial, but we leave these issues for the district court. We affirm the district court's dismissal of the FTCA claim against the United States.

8. In its cross-appeal the FDIC contends that the jury's finding that the FDIC did not fail to act in good faith absolves it of liability for gross negligence in performing its duties under the contract. Because the banks' recovery is not for negligence in performing the contract, however, but instead for breaching its contractual duty to pay the banks their share of money paid to the FDIC in connection with the "Y" Ranch Note, we need not address this argument. Good faith, even if it existed here, is not a defense to the FDIC's breach of a purely contractual obligation.

9. We note that the United States has taken the position throughout this litigation that the

AFFIRMED in part, REVERSED in part, and REMANDED in part.



FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, (substituted for Federal Savings and Loan Insurance Corporation, etc.), Plaintiff-Appellee,

v.

John A. MMAHAT and Mmahat & Duffy, Defendants-Appellants.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, (substituted for Federal Savings and Loan Insurance Corporation, etc.), Plaintiff-Appellant, Cross-Appellee,

v.

NEW ENGLAND INSURANCE CO., Defendant-Appellee, Cross-Appellant.

No. 89-3160.

United States Court of Appeals,
Fifth Circuit.

Aug. 3, 1990.

Federal Deposit Insurance Corporation (FDIC), as receiver of insolvent savings and loan association, brought suit against debtor general counsel for association and

banks' cause of action sounded solely in tort in the hope that all of the banks' claims would be dismissed because they fell within the discretionary function exception to FTCA liability. See 28 U.S.C. § 2680(a). But we are not bound by the United States' characterization of the banks' cause of action. The federal government's waiver of sovereign immunity is jurisdictional. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701, 102 S.Ct. 2099, 2103, 72 L.Ed.2d 492 (1982); *Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 912 (5th Cir.1988).

debtor's law firm for legal malpractice and breach of fiduciary duty. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 97 B.R. 293, entered judgment on jury verdict finding debtor and his firm liable, and found that debt was nondischargeable, but found that FDIC could not recover from firm's malpractice insurer. On appeal, the Court of Appeals, Garza, Circuit Judge, held that: (1) general counsel was entitled to credit against malpractice verdict for amount paid by officers and director of association who settled with FDIC at or before trial; (2) general counsel's debt was nondischargeable on basis of fraud or defalcation while acting in fiduciary capacity; (3) legal malpractice claim by FDIC was tolled, under Louisiana doctrine of *contra non valentem*, until attorney-client relationship between general counsel and association ended when association went into receivership; and (4) firm could be found "dishonest," within exclusion in legal malpractice policy, based on conduct of general counsel.

Affirmed in part and remanded with directions in part.

1. Damages \S 63

General counsel for insolvent savings and loan was entitled to dollar-for-dollar credit against judgment against him, in suit brought by Federal Deposit Insurance Corporation (FDIC), as receiver, for malpractice and breach of fiduciary duty, for amount paid to FDIC by settling defendants, based on determination of what portion of amount paid by settling defendants was attributable to seven loans on which general counsel was sued.

2. Bankruptcy \S 3357(2)

Conduct of debtor general counsel of insolvent savings and loan association in urging association to make improper loans so that he could earn fees, thereby enriching himself at cost of association's assets, was acquisition or use of property that was not debtor's, so that resulting debt was nondischargeable as debt arising from fraud or defalcation while acting in fiduci-

ary capacity. Bankr.Code, 11 U.S.C.A. \S 523(a)(4).

3. Limitation of Actions \S 55(3)

Louisiana doctrine of *contra non valentem* tolled one-year limitation period on legal malpractice action brought against debtor general counsel for insolvent savings and loan association by Federal Deposit Insurance Corporation (FDIC), as receiver, until attorney-client relationship ended when association went into receivership, even though counsel allegedly did not conceal facts which would have put FDIC on notice of malpractice; FDIC could not have enforced claims until it took over as receiver. LSA-C.C. art. 3492.

4. Federal Civil Procedure \S 1938

District court had discretion to allow several witnesses for plaintiff to give opinion testimony even though pretrial order listed them as fact, not expert, witnesses, in suit brought against debtor attorney for legal malpractice and seeking determination of nondischargeability. Fed.Rules Evid.Rule 701, 28 U.S.C.A.

5. Evidence \S 222(4)

Federal Home Loan Bank Board (FHLBB) examination reports containing statements by brother of general counsel for insolvent savings and loan association, prepared without association's knowledge before it went into receivership, opining that general counsel encouraged improper loans so that his law firm could earn fees were admissible as nonhearsay admissions, in suit brought by Federal Deposit Insurance Corporation (FDIC), as receiver, against general counsel for legal malpractice; counsel's brother was still party defendant at time document was introduced into evidence. Fed.Rules Evid.Rule 801(d)(2)(A), 28 U.S.C.A.

6. Evidence \S 333(1)

Though public records containing factual findings are admissible under exception to hearsay rule for factual findings from an investigation pursuant to authority granted by law, hearsay statements contained in records containing factual findings are not admissible under such exception, absent a hearsay exception for the

statements. Fed.Rules Evid.Rules
803(8)(C), 805, 28 U.S.C.A.

7. United States ⇨78(12)

Louisiana law claims brought by general counsel of insolvent savings and loan association against Federal Deposit Insurance Corporation (FDIC) for alleged negligent regulation of association in failing to earlier place association into receivership addressed discretionary functions excepted from the Federal Tort Claims Act. 28 U.S.C.A. §§ 2671 et seq., 2680(a).

8. Attorney and Client ⇨129(2)

Findings that general counsel for insolvent savings and loan association gave advice specifically on seven loans in question and was acting as attorney rather than as chairman of board of association were supported by evidence, in legal malpractice suit brought by Federal Deposit Insurance Corporation (FDIC), as receiver, against general counsel.

9. Insurance ⇨435.22(2)

Law firm could be adjudged "dishonest," within exclusion from malpractice coverage for dishonest conduct, based on actions of member of firm, who was general counsel for insolvent savings and loan association, in recklessly granting commercial loans against general banking wisdom and, thus, policy did not provide coverage in malpractice and breach of fiduciary duty suit brought by Federal Deposit Insurance Corporation (FDIC), as association's receiver, against general counsel and firm; reckless loans were continuing and planned, made up a large portion of firm's revenue, and were "the pet" of general counsel, who was key member of firm.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Courts ⇨13

Although claim that legal malpractice policy limit of \$1 million for single claims, rather than \$2 million for aggregate claims, should apply to legal malpractice suit was moot as to law firm and member who was general counsel for insolvent savings and loan association, based on determination that firm and member were exclud-

ed from coverage under dishonest acts exclusion, issue would be considered on appeal based on possibility that second member of firm could be held personally liable for firm's actions as "innocent coinsured."

11. Insurance ⇨512(4)

Legal malpractice policy's \$2 million limit for aggregate claims, rather than \$1 million limit for single claims, applied to claims by Federal Deposit Insurance Corporation (FDIC), as receiver for insolvent savings and loan association, against firm and firm's members, one of whom was general counsel for association, despite claim by FDIC that member who was general counsel gave all his advice towards single end of generating fees for his firm; there were three discrete acts of malpractice: failure to advise of existence and applicability of "loans to one borrower" regulations, giving wrong advice as to amount of regulatory limit, and giving wrong advice as to aggregate limits when borrowers had common ownership, resulting in discrete losses on seven loans.

Richard T. Simmons, Jr., William R. Seay, Jr., Hailey, McNamara, Hall, Larmann & Apale, Metairie, La., for Mmahat Groups.

John A. Mmahat, Mmahat & Associates, Ltd., Metairie, La., pro se.

James C. Gulotta, Jr., Phillip A. Wittman, Stone, Pigman, Walther, Wittman & Hutchinson, New Orleans, La., for FSLIC.

James P. Murphy, Paul E. Guterma, Squire, Sanders & Dempsey, Harry Quillan, Gen. Counsel, Federal Home Loan Bank Bd., Washington, D.C., for plaintiff-appellee.

Domald A. Hammet, John V. Baus, Jr., Metairie, La., for New England Ins.

Thomas S. Rees, Trial Atty., Jeffrey Axelrad, Director, Jerome A. Madden, Sr., Trial Atty., Torts Branch, Civ. Div., Dept. of Justice, Eugene J. Comey, Robert F. Schiff, Tuttle & Taylor, Washington, D.C., for FDIC.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, SMITH and BARKSDALE, Circuit Judges.

GARZA, Circuit Judge:

General counsel for a now-defunct savings and loan, and his law firm, were found liable for legal malpractice through a jury verdict for \$35 million. The district court held that their conduct was excluded from their malpractice insurance coverage. 97 B.R. 293. Because the law firm was adjudged dishonest by the jury, we AFFIRM the exclusion from coverage, but we RE-MAND this cause to the district court to give credit for amounts paid by settling defendants before trial.

FACTS

John Mmahat, a partner in Mmahat & Duffy, was general counsel for Gulf Federal, a federally-chartered savings and loan, for over twenty years. He even served as chairman of the board for six years in the early 1980s. Gulf Federal began to sustain losses in the residential lending market, and by 1982 was insolvent. Because the Garn-St Germain Depository Institutions Act of 1982 let S & L's lend more freely and widely, Gulf Federal began making commercial loans rather than merge with a more sound institution.

About this time, the Federal Home Loan Bank Board (the "FHLBB") restricted the amount any S & L could lend to any one borrower. 12 C.F.R. § 563.9-3. An S & L could lend only a certain percentage of its net worth or withdrawable accounts under these "loans to one borrower" or LTOB restrictions. Gulf Federal's LTOB limit was \$200,000 (later \$500,000).¹ But Gulf Federal, under Mmahat's direction, violated the LTOB regulations on a regular basis, even after warnings by the FHLBB. In fact, Mmahat specifically instructed the

board of directors "never [to] turn a loan down because it is over our loans to one customer limits."

Those commercial loans followed the path of many of their brothers in the mid-1980s, and Gulf Federal fell under the weight of the defaults. The FDIC sued Mmahat for malpractice in advising Gulf Federal to make all those loans in violation of the LTOB regulations.² At trial, the evidence showed that Mmahat had encouraged the loans so that his law firm could make fees on the closings. As a result, the jury found Mmahat and his firm liable for \$35 million in bad loans.³ Though the jury found in specific interrogatories that Mmahat & Duffy had committed malpractice and breached their fiduciary duty to Gulf Federal, there was no evidence that anyone at the firm, other than Mmahat, had done any culpable acts.

The court below found, however, that FDIC could not recover from New England Insurance Co. ("New England"), Mmahat & Duffy's insurance carrier, as their acts fell under a "dishonesty exclusion," which read:

III. EXCLUSION:

The policy shall not indemnify the Insured for any damages or claim expenses as the result of any claim:

A- that results in a final adjudication that any Insured has committed a dishonest, fraudulent or malicious act, error, omission or personal injury with deliberate purpose and intent. Nothing contained in the foregoing shall exclude coverage to any other Insured who is not so adjudged to have committed any such act, error, omission or personal injury as described above.

Claiming that Mmahat & Duffy was not "dishonest," and that the policy should cov-

EREA"), Pub.L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989). For ease of understanding, we will use "FDIC" to denote all federal regulators involved here.

1. The "one borrower" definition includes any person who owns more than 10% of a corporate borrower. For example, if Individual A borrowed \$100,000, and B Corp. (of which A owned 15%) borrowed \$100,000, then A would have an aggregate of \$200,000 in loans.
2. FDIC is successor to FSLIC in this action by virtue of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIR-

3. The \$35 million represents seven specific loans that were made in violation of the LTOB restrictions, and whose default contributed to the collapse of Gulf Federal.

er its vicarious liability, FDIC brought this appeal. Mmahat and Mmahat & Duffy also appeal the jury's liability verdict.

DISCUSSION

I. Appeal of Liability

Mmahat and Mmahat & Duffy appeal—on multiple points—the jury's finding of liability for malpractice and breach of fiduciary duty.

A. Contribution of Settling Defendants

[1] Several officers and directors of Gulf Federal settled with the FDIC at or before trial for some \$1.9 million, but the jury was not given an interrogatory to determine what portion of ultimate fault should be attributed to them. Mmahat complains that was error; under Louisiana law he is entitled to a proportionate reduction of his liability by the percentage of fault attributed to the settlors. La.Civ. Code Ann. art. 1804 (West 1988); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180–81 (5th Cir.1987).

The FDIC concedes that Mmahat is entitled to some credit for the amounts paid by the settling defendants, but since “[f]ederal law governs the rights of the FDIC,” *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 143 n. 6 (5th Cir.1981), they urge us to adopt a federal common law rule to govern this type of case and insure uniformity in similar suits tried nationwide. Under FDIC's proposed *pro tanto* rule, Mmahat would get a dollar-for-dollar credit for any amount paid by the settling defendants.⁴ The Second Circuit has adopted the *pro tanto* approach where interests of uniformity in a federal case mandate application of a federal common law. *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, — U.S. —, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990).

Mmahat had the burden at trial of proving the settlors' share of fault, but the

4. For example, assuming A and B are co-defendants, under a *pro tanto* rule, if A settled for \$1000 before trial, then B would get a \$1000 credit on whatever amount the jury assessed against him. Under Louisiana's proportionate

court below found that there was insufficient evidence in the record to permit a finding of proportionate fault. This finding makes the proportionate reduction *pro tanto* inquiry moot, so we will not resolve it here, but we are left with a question of double recovery. Because the money paid by the settling defendants and recovery from Mmahat overlap, we feel Mmahat should get credit for the amount paid. We therefore remand this issue to the district court to determine what portion of the amount paid by the settlors is attributable to the seven loans Mmahat was sued on, and give Mmahat a dollar-for-dollar credit on that amount.

B. Discharge in Bankruptcy

[2] Mmahat filed for bankruptcy protection after this suit was filed but before trial; the district court lifted the automatic stay and consolidated the actions. Because the jury found that Mmahat had breached a fiduciary duty, the court found that the judgment was not dischargeable because of his bankruptcy. The bankruptcy code exempts from discharge acts committed by “fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Mmahat argues that the exception should not apply since there was no “acquisition or use of property that is not the debtor's.” *Boyle v. Abilene Lumber, Inc.*, 819 F.2d 583, 588 (5th Cir.1987).

FDIC argues that there was defalcation: Mmahat urged Gulf Federal to make improper loans so that he could earn fees. Mmahat thereby enriched himself at the cost of Gulf Federal's assets. *Carey Lumber Co. v. Bell*, 615 F.2d 370, 376 (5th Cir.1980). We agree. Mmahat cannot discharge this judgment in bankruptcy.

C. Prescription

[3] Mmahat and New England argue that FDIC's claim was prescribed by Louisiana law before FDIC took over Gulf Fed-

reduction rule, if \$50,000 were assessed against B, and A were found to be 25% at fault, B would get a \$12,500 credit (25% X \$50,000). But because A and the plaintiff had settled, A would not be liable for more in damages.

eral as receiver. Torts such as malpractice are covered by a one year limitations period in Louisiana. La.Civ.Code Ann. art. 3492. Taken alone, that period seems to bar the claims today.⁵ But in a legal malpractice action, the doctrine of *contra non valentem* tolls the limitations period until the attorney-client relationship ends. *Montgomery v. Jack*, 556 So.2d 267 (La.App. 2d Cir.1990), cert. denied, 559 So.2d 1377 (La. 1990). In this case, the relationship ended when Gulf Federal went into receivership.

Mmahat argues that *contra non valentem* did not apply because he did not conceal facts which would have put the FDIC on notice of the malpractice. But FDIC did not own, nor could it enforce the claims until it took over as receiver; no amount of notice would have allowed FDIC to sue before that time. Further, the only court to address this issue held that when the government acquires a cause of action from an institution, limitations begins to run as figured from the perspective of the institution, not the regulators. *FDIC v. Buttram*, 590 F.Supp. 251, 254-55 (N.D. Ala.1984). And we agree with the *Buttram* court.

Because we find that *contra non valentem* tolled the limitations clock on this action until the attorney-client relationship ended at receivership, we affirm on this point. This action was not prescribed when FDIC stepped in.

D. Conduct of Trial

[4] The trial court allowed several witnesses to give opinion testimony even though FDIC's pre-trial order listed them as fact, not expert, witnesses. Mmahat argues this was an abuse of discretion, but we do not agree. Fed.R.Evid. 701 allows

5. The FDIC gets the benefit of an extended limitations period which begins to run from the time it takes over as receiver. 28 U.S.C. § 2415. Because we find that limitations here was tolled until FDIC came in as receiver, we need not address whether the FDIC's extended period would have revived an already-prescribed claim.
6. FDIC argues here that the documents are admissible as factual findings from an investigation made pursuant to authority granted by law. Fed.R.Evid. 803(8)(C). That exception may well

even lay witnesses to give opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." It was clearly within the trial court's discretion to allow the witnesses to give opinion testimony.

[5, 6] Mmahat also argues that the court below erred in admitting into evidence certain FHLBB examination reports, prepared without Gulf Federal's knowledge before it went into receivership. Specifically, the documents contained hearsay statements from Joseph Mmahat—John's brother—opining that Mmahat encouraged improper loans so his law firm could make fees. The document itself was admissible as a public record, but Fed.R.Evid. 805 demands that all hearsay within a document have its own exception. Because Joseph Mmahat was himself still a defendant at the time the document was introduced into evidence, it was clearly admissible as a non-hearsay admission under Fed. R.Evid. 801(d)(2)(A).⁶

E. Counter-Claims

[7] Mmahat brought a series of state law counter-claims against FDIC for negligent regulation. In essence, Mmahat claims the FDIC should be liable for failure to put Gulf Federal into receivership sooner. The district court dismissed the claims because they addressed discretionary functions and so were excepted from the Federal Torts Claims Act ("FTCA"). 28 U.S.C. § 2671 *et seq.* That exception to the FTCA reads, in pertinent part:

The provisions of [the FTCA] shall not apply to—

apply to the documents themselves, but it would not solve the "hearsay within hearsay" problem, were that problem not already solved. Though factual findings are admitted by Fed.R.Evid. 803(8)(C), hearsay statements contained in the report are not. *McClure v. Mexia Indep. School Dist.*, 750 F.2d 396, 401-02 (5th Cir.1985). For a discussion of the admissibility of conclusory reports and construction of the term "factual finding," See, *McCormick on Evidence*, § 316 (3d ed. 1984).

(a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a).

Mmahat argues that the discretionary function exception does not apply to negligent regulation of a financial institution, and cites *Gaubert v. U.S.*, 885 F.2d 1284 (5th Cir.1989). In *Gaubert*, we held that the FHLBB could lose the protection of the exception if it went beyond discretionary acts and began day-to-day management of a financial institution. *Id.* at 1290. But Mmahat's reliance on *Gaubert* is misplaced. There, we found that over-interference can take regulators outside the discretionary function exception; here, Mmahat wants us to take the FDIC out of the exception for *failure* to interfere. We decline to do so, and affirm the district court on this point.⁷

F. Legal Malpractice

[8] Mmahat argues that there was insufficient evidence to sustain the jury's finding of legal malpractice, because there was no evidence that he gave advice specifically on the seven loans at issue in this case. We will not disturb the jury's verdict unless, considering the evidence in the light most favorable to the FDIC, the facts and inferences point so overwhelmingly to Mmahat that reasonable jurors could not have arrived at a verdict except in his favor. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 268-69 (5th Cir.1980).

Striving to meet his burden of proof on appeal, Mmahat cites examples of certain officers and directors who did not hear or follow his advice on certain specific occa-

sions. We do not find those examples sufficient to overcome the verdict of a correctly instructed jury. We likewise reject New England's complaint that Mmahat acted not as attorney but as chairman of the board, and therefore could not have committed legal malpractice as a matter of law. The jury's verdict will stand.

G. Jury Instructions

Finally, Mmahat and the firm argue that the court below incorrectly instructed the jury as to proximate cause, failure to mitigate damages, and the attorney-client relationship. We find that the court gave full and complete instructions on each of the issues, and defer to the district court's broad discretion to formulate a charge. *U.S. v. Graves*, 669 F.2d 964, 970 (5th Cir. 1982).

II. Insurance Coverage

The district court found that Mmahat had been adjudged "dishonest" when the jury found he breached his fiduciary duty to Gulf Federal, so his conduct was excluded from the New England policy's coverage. Further, the court held that since the jury also found that Mmahat & Duffy had breached its fiduciary duty, it was excluded from coverage as well. Finally, the court held that, if the policy did apply, the aggregate limits ought to be paid, and not the individual act sum.

A. Dishonesty of the Firm

[9] FDIC does not challenge the district court's finding of dishonesty as to Mmahat. Rather, they argue that Mmahat & Duffy cannot be held "dishonest" as they are liable only vicariously and did no culpable acts outside of Mmahat's personal participation. The policy's dishonesty exclusion has a safety hatch for "innocent co-insureds" who are "not so adjudged to have committed" a dishonest act. But this is not just an issue of vicarious liability; here the firm *was* adjudged dishonest: the jury

7. Not only is *Gaubert* inapposite here, but it perhaps should be cited with care in any case. The Supreme Court has granted certiorari in

that case, so *Gaubert* as we know it may not be with us long. See, *U.S. v. Gaubert*, — U.S. —, 110 S.Ct. 3211, 110 L.Ed.2d 659 (1990).

found specifically that Mmahat & Duffy had breached its fiduciary duty.

In *Ashland Oil, Inc. v. Miller Oil Purchasing Co., Inc.*, 678 F.2d 1293 (5th Cir. 1982), the president, vice-president and three managers of a company conspired to commit an environmental tort. We held there that the conduct was excluded from insurance coverage because the conspiracy was not "the unauthorized intentional act of an individual employee," but was a "deliberate execution of a preconcerted plan, conceived in the mind of [the company] and carried out by a central nervous system of key [company] personnel." *Id.* at 1317. Here, though only Mmahat himself did the culpable acts, they weren't one-time, individual acts. Nor were they unauthorized. Rather, they were continuing and planned, made up a large portion of firm revenue, and were the pet of Mmahat, who was nothing if not key personnel at the firm.

The FDIC argues that acts of one player, no matter how key in the firm's structure, cannot transfer dishonesty absent something more. *Rivers v. Brown*, 168 So.2d 400 (La.Ct.App. 3d Cir.1964), *cert. ref'd*, 247 La. 250, 170 So.2d 509 (La.1965) (company not excluded from coverage by assault by president and major shareholder), and *Baltzar v. Williams*, 254 So.2d 470 (La.Ct.App. 3d Cir.1971) (town not excluded by violence of sheriff's deputy). But Mmahat's systematic and pervasive wrongdoing in this case is completely distinguishable from the one-time outbursts at issue in an assault and battery setting, such as *Rivers* and *Baltzar*.

Had FDIC not asked the jury whether Mmahat & Duffy breached its fiduciary duty to Gulf Federal, the firm would not have been "adjudged dishonest," and we might not be here today. But, as the district court correctly pointed out, FDIC "was not content to rest its case on whether Mmahat and his firm were guilty of malpractice solely because of improper advice.... Rather, [FDIC] included in its

argument and evidentiary presentation to the jury the claim that Mmahat and his firm breached their fiduciary duties as lawyers because of actions taken to generate fees." We will not let FDIC undo what it has wrought.

We are now in the throes of an S & L crisis, and the final bill of failures like Gulf Federal is sure to touch us all for years to come. Mmahat and others like him played a big part in that crisis by recklessly granting commercial loans against general banking wisdom, and they are rightly being called on to pay for those errors. But worthy as the cause may be, we will not stretch this insurance policy to help pay the bill. We affirm the district court's exclusion of coverage.

B. Aggregate Coverage Limits⁸

[10, 11] The New England policy has a \$1 million limit for single claims and a \$2 million limit for aggregate claims. The district court held that the aggregate limit applied, as there were multiple instances of malpractice. New England argues that the single limit ought to apply, as Mmahat carried out a series of related acts, which constitute a single claim under the policy.

New England cites *Gregory v. Home Ins. Co.*, 876 F.2d 602 (7th Cir.1989), where the single limit applied though there were multiple plaintiffs. But there the insured had done only one act—prepared a brochure and tax opinion—that had harmed many. Still, *Gregory* helps us by defining "related acts:" they are acts which are "logically or causally connected." *Id.* at 605. So, if Mmahat's opinions and advice to Gulf Federal were logically or causally connected, they were related acts and the single claim limit ought to apply.

The FDIC has maintained throughout that Mmahat gave all his LTOB advice towards one end: generate fees for his firm. New England argues that his acts were, then, logically and causally connected

8. This point is moot as to Mmahat and Mmahat & Duffy, whose conduct is excluded from coverage, aggregate or otherwise, as discussed above. But FDIC is currently in litigation against Peter Duffy, who, as a Mmahat & Duffy partner, may

be personally liable for the firm's actions. If he is held liable, the New England policy may well apply to him as an innocent co-insured. So, since this show won't be over until the fat lady sings, we will address this issue now.

and the single limit applies. But a single motive does not make a single act. *Eureka Fed. S & L Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 229 (9th Cir.1989) (single aggressive marketing plan does not make multiple bad loans one loss for insurance aggregation purposes). We have three discrete acts of malpractice here: (1) failure to advise of the existence and applicability of LTOB regulations; (2) giving wrong advice as to the amount of the LTOB limit; (3) giving wrong advice as to the aggregate LTOB limits when the borrowers had common ownership. And those discrete acts of malpractice resulted in discrete losses on seven loans. For this reason, and because insurance policies should be construed against the carrier, we affirm on this point. The aggregate limit should apply.

CONCLUSION

Because we find that FDIC is not entitled to double recovery of the amount paid by settling defendants, we REMAND this case to the district court to determine what portion of that settlement relates to the loans at issue in this case. Mmahat and the firm should then get a dollar-for-dollar credit for that amount. For the reasons stated above, the judgment of the district court is in all other things AFFIRMED.



James C. CATHEY and Bette Cathey,
Plaintiffs-Appellants,

v.

The DOW CHEMICAL COMPANY
MEDICAL CARE PROGRAM,
Defendant-Appellee.

No. 89-2971

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 3, 1990.

Participant in health plan governed by the Employee Retirement Income Security

Act (ERISA) sought reinstatement of prior home nursing benefits and declaration of rights of future benefits. The United States District Court for the Southern District of Texas, Norman W. Black, J., held that fiduciary's adverse determination of benefits was not actionable under ERISA, and participants appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) participants were not entitled to around-the-clock home nursing benefits under terms of plan, but (2) participants were minimally entitled to 50 home nursing visits annually, if medically prescribed, and were due measure of noncustodial nursing services provided during such visits.

Affirmed in part, reversed in part, and remanded.

1. Pensions ⇌139

Relevant language of ERISA-regulated health plan, if unambiguous, is reviewed de novo for purposes of determining discretion retained by plan administrator or fiduciary. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

2. Pensions ⇌139

If ERISA-regulated health plan confers discretionary judgment upon plan administrator, judicial review of eligibility determination is limited to "abuse of discretion" standard; if, in contrast, plan does not vest its discretionary authority with plan administrator or fiduciary, or is silent regarding such authority, judicial deference terminates, and eligibility determinations are reviewed de novo. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

3. Pensions ⇌136, 139

Employee health plan did not expressly grant discretionary decision-making authority regarding entitlements to plan administrator or plan fiduciary and, therefore, denial of benefits was subject to de novo review by courts, rather than for abuse of