

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
Nos. 08-1343

SPENCER BANK, S.L.A.
Plaintiff,

v.

LAWRENCE B. SEIDMAN, SEIDMAN & ASSOCIATES, LLC, VETERI
PLACE CORPORATION, and MENLO ACQUISITION CORPORATION
Defendants.

On Appeal from a January 4, 2008 Order
of the United States District Court for the
District of New Jersey, Case No. 07-1337 (Walls, J.)

**BRIEF OF AMICI CURIAE FOR THE
AMERICAN BANKERS ASSOCIATION,
NORTH CAROLINA BANKERS ASSOCIATION,
OHIO BANKERS LEAGUE,
PENNSYLVANIA BANKERS ASSOCIATION, AND
WISCONSIN BANKERS ASSOCIATION
("THE ASSOCIATIONS")
IN SUPPORT OF APPELLANT**

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May 27, 2008

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I. IDENTITY AND INTEREST OF THE AMICI CURIAE

The ABA is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States. The ABA represents 80 percent of all Federal Deposit Insurance Corporation (“FDIC”) insured mutually chartered institutions. ABA’s mutual members, a number of which have been in existence since the 1800s, have survived world wars, depression, and a variety of financial and economic turmoil.

The NCBA is the statewide, full-service trade association representing all commercial banks and savings institutions, as well as a number of independent trust companies, doing business in North Carolina. Chartered in 1897, the NCBA has 150 members, including 20 mutual savings institutions that it represents in legislative, regulatory and legal arenas.

The OBL is a non-profit trade association representing the needs of FDIC-insured financial institutions and their affiliates doing business in the state of Ohio. While its membership consists of the full range of financial institutions, including

multi-bank holding companies doing business around the globe, a significant percentage of its membership remains small mutual thrifts like the plaintiff. The OBL represents the vast majority of all FDIC-insured financial institutions in Ohio, and nearly 25 percent of its membership is mutual associations that have made the strategic decision that they can best meet the needs of local borrowers by staying independent and retaining the mutual form of ownership.

The PBA is a statewide trade association representing 189 banks, savings institutions, including numerous mutual savings institutions, banks, and trust companies of all sizes, as well as their affiliates, operating in the Commonwealth of Pennsylvania.

The WBA, incorporated in 1892, is the largest financial trade association in Wisconsin, representing approximately 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state. The WBA actively represents 87 percent of the savings institutions in Wisconsin and of those, 23 savings institutions, or 72 percent are mutually-chartered.

At issue in this case is the ability of mutual associations to defend themselves from skillful and exploitive efforts, like those of the Appellee-Defendants Seidman, *et. al.* (“Seidman”), to pursue unlawful takeovers in an effort

to “harvest” the depositors’ equity in the institution. The Associations respectfully request that this Court remand the case to the District Court in order to rule on the merits of Appellant-Plaintiff Spencer’s (“Spencer”) claim that the actions of Seidman violate the Savings and Loan Holding Company Act (“SLHCA”) and, ultimately, to issue an injunction to provide equitable relief to Spencer based on the merits of that claim.

II. REGULATORY AND INDUSTRY BACKGROUND

Mutual savings institutions are among the oldest financial institutions in the United States. They originated as “saving societies” and were created to encourage thrift and savings among the poor. Many were started by notable philanthropists of their time.¹ BankNewport, located in Providence, Rhode Island, is the oldest mutual in continuous operation, having opened its doors in 1819. An ABA member, BankNewport is still serving its customers today and has assets in excess of \$1 billion.²

There are two types of mutual savings institutions. The older, state-chartered mutual institution uses the trustee/corporator form of governance that

¹ Weldon Welfling, Mutual Savings Banks: The Evolution of a Financial Intermediary, 9, 10 (1968).

² www.banknewport.com/why-bank-history.htm. (Accessed May 22, 2008).

dates back to 1819. The newer form, the precursor to the modern federal mutual savings association charter, has its origins in the Home Owner's Loan Act of 1933 ("HOLA"). Both mutual forms are non-stock institutions built on the foundation of pledged deposits. Both have the mission to provide a means of savings for those who were uncomfortable with or discouraged by the financial institutions of their day. Many of the early savings associations were truly "pooled" funds – money collected and held at the local general store and loaned out once enough funds were gathered. They had limited hours and served immigrant and other populations. Their focus was home ownership and wealth accumulation. These were the institutions that the average citizen turned to after World War II to buy and finance their homes.

There are currently 737 financial institutions that operate in some form of mutual ownership. While the number has shrunk over the years, a number of institutions continue to operate with mutuality at the core of their operating strategy.³ These institutions employ almost 60,000 employees, represent \$282 billion dollars in assets, manage \$209 billion in deposits, and focus on single

³ Of that number, 562 are mutual savings banks or mutually chartered savings and loan association and 175 are mutual holding companies. Federal Deposit Insurance Corporation Industry Statistics as of December 31, 2007, <http://www2.fdic.gov/sdi/main.asp>. At one time, all federal savings and loan associations were mutual in charter.

family and other real estate loans (accounting for over 90 percent of their total loan portfolio).⁴ The median mutual institution has assets of \$131 million.⁵

What differentiates mutual institutions from their stock brethren is their ability to focus on their communities because they do not have quarterly financial pressures to deliver returns to stockholders. The equity interest of mutual members cannot be traded like the stock representing the equity in a stock institution. Mutual thrift institutions have the ability of taking a longer view without the concern of satisfying stockholder demands, and also have greater flexibility to engage in a wider range of activities that benefits their local communities. While mutual thrifts have evolved as their communities have changed, it is still their ability to focus on a longer financial horizon that makes them unique. However, because they are not stock institutions, they do not have access to many of the familiar tools and techniques available to stock institutions to counter or prevent attempts by speculators (such as Seidman) to force a conversion to stock form in order to realize a short-term profit.

Congress partially addressed this issue when it enacted the Savings and Loan Holding Company Act (“SLHCA”), set forth in Section 10 of the Home Owners’

4 Id.

5 Id.

Loan Act (“HOLA”), 12 U.S.C. § 1467a (2006). The SLHCA prevents savings and loan holding companies (“SLHCs”) and their subsidiary non-mutual institutions from unduly pressuring mutual association depositors to convert to stock form. The particular reference to this prohibition is set forth at HOLA § 10(h)(1), 12 U.S.C. § 1467a(h)(1) (2006), and is implemented by the Office of Thrift Supervision (“OTS”) at 12 C.F.R. § 584.9(a) (1992)⁶. Most importantly, the SLHCA prohibits companies, their control persons and their subsidiaries from acquiring mutual associations. The SLHCA further prohibits companies from soliciting mutual association depositors for their voting proxies.

**III. ARGUMENT – THE COURT SHOULD REMAND SO THE
LOWER COURT MAY REACH THE ISSUE OF WHETHER
DEFENDANT-APPELLEES’ CONDUCT VIOLATES THE
SAVINGS AND LOAN HOLDING COMPANY ACT**

Setting aside the question of whether a private right of action exists to enforce the SLHCA at HOLA § 10(h)(1) (2006), it is clear that the SLHCA applies

⁶ Section 584.9(a) provides:

No savings and loan holding company or any subsidiary thereof, or any director, officer, or employee of a savings and loan holding company or subsidiary thereof, or person owning, controlling, or holding with power to vote, or holding proxies representing, more than 25 percent of the voting shares of such holding company or subsidiary, may hold, solicit, or exercise any proxies in respect of any voting rights in a mutual savings association.

to situations involving a company's efforts – including the efforts of persons controlling a company or its subsidiary – to use proxies to exercise voting rights in a mutual savings association. As noted above, pursuant to § 10(h)(1), it is unlawful for a SLHC or a person controlling a SLHC to “hold, solicit, or exercise any proxies in respect of any voting rights” of a mutual savings association. OTS regulations at 12 C.F.R. § 584.9(a) (1992) reiterate this requirement.

As outlined in the pleadings at the District Court, it is appropriate in the current context to subject Seidman to the requirements of the SLHCA, including the prohibitions at § 10(h)(1) on holding, soliciting or exercising proxies with respect to the voting rights of a mutual savings association such as Spencer. Seidman's carefully-choreographed efforts are those of a “company” whose actions are restricted under the SLHCA. See 12 U.S.C. §§ 1467a(a)(1)(C) and (2).

Given the applicability of the SLHCA to a company, such as Seidman, the issue that remains is enforcement of the SLHCA and, in particular, enforcement of the prohibition at § 10(h)(1). Clearly, failure to enforce the statute would frustrate its purpose and the intent of Congress to regulate activities by companies, such as Seidman, to control or exercise the voting rights of a mutual institution. The Associations respectfully submit that the actions of Seidman in the current controversy clearly involve the type of situation envisioned with enactment of

SLHCA § 10(h)(1) (2006). In this regard, Seidman has engaged in extensive activity with respect to the voting rights and proxies of Spencer, much of which has been detailed in the pleadings at the District Court.

In particular, Spencer has pled facts which, if true, describe a systematic and deliberate attempt at an illegal takeover by Seidman. While the District Court granted Seidman's Motion to Dismiss with Prejudice, the District Court limited its ruling entirely to the absence of a private right of action under the SLHCA at HOLA § 10(h)(1) (2006). Absent a remedy or tools to address Seidman's efforts to force the conversion and sale of the institution through the takeover of Spencer's Board via board of director elections, Seidman will be able to effectuate an action clearly prohibited by the SLHCA.

It is well settled that lacking a statutory or other remedy in law, the courts may enjoin parties to provide equitable relief where the circumstances warrant. As this Court noted in Roe v. Operation Rescue, 919 F.2d 857, 867 (3rd Cir.1990), there are three prerequisites for permanent injunctive relief:

First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. Second, the plaintiff must actually succeed on the merits of its claims. Third, the plaintiff must show that the balance of equities tips in favor of injunctive relief. Northeast Women's Center, Inc. v. McMonagle, 665 F.Supp. 1147, 1152-53 (E.D.Pa. 1987).

Setting aside for the moment the first prerequisite for equitable relief, the pleadings below articulate a viable claim that Seidman has violated the SLHCA at HOLA § 10(h)(1) (2006). This issue was not taken up by the District Court because the Court deemed the issue to be moot based on its conclusion that the statute did not grant a private right of action to Spencer to pursue the claim. We submit, however, that in order to present as complete a record as possible for any future appeals of this case, it is appropriate for the Court to remand the matter back to the District Court for a determination of this issue.

Finally, with respect to the first prerequisite – a showing that the Court’s exercise of equity jurisdiction is proper – three additional criteria are relevant. First, the plaintiff must show that there is no adequate legal remedy. Second, the threatened injury must be real. Third, there must be no equitable defenses to the Court’s exercise of equity jurisdiction. Roe v. Operation Rescue, 919 F.2d 868.

It is clear that there is no adequate legal remedy available to Spencer in the current context. Absent equitable relief, Spencer will be powerless to prevent Seidman’s continuing violation of the SLHCA. In addition, absent equitable relief, the threatened injury to Spencer is very real, encompassing its ability to continue to serve its community as a mutual savings association. Finally, regarding any equitable defenses to the Court’s exercise of equity jurisdiction, it appears based on

the facts presented that Seidman has no basis to assert any equitable claim that overcomes their continuing violation of the provisions of the SLHCA set forth at HOLA § 10(h)(1) (2006).

In support of the Associations' suggestion that it would be appropriate for the Court to remand this case to the District Court in order to rule on the issue of whether a grant of equitable relief is merited, we note that the current holders of the equity rights of Spencer are its depositors. The depositors of Spencer not only have an inchoate right to the assets and capital of the institution, they also control the institution's ability to continue to serve its community via the mutual form of ownership. As previously highlighted, this enhances the institution's continued, long-term stability within the community.

Seidman has a long history of activist involvement at numerous depository institutions. He is particularly adept at forcing mutual associations to convert to stock form and then have the institution sell out at a substantial profit above the offering price. In some cases, Seidman is even able to extract an additional fee for his cooperation in facilitating a subsequent takeover.⁷ The net result is a loss for

⁷ See YNB Announces Postponement of Annual Meeting, Settlement of Seidman Litigation and Agreement to Merge Into PNC, Zangani Investor Community (June 14, 2007), <http://www.zangani.com/node/659>.

the community of a community-based lending organization attune to and responsive to the particular needs of the members of the community.

Efforts by Seidman to unlawfully subvert the institution's ability to continue to operate in the mutual form of ownership only serve to undermine the best interests of the depositors, account holders and community served by the institution. A small group of institution members, such as Seidman, should not be permitted unlawfully to band together to promote their interests to change the structure of and harvest the capital of the institution, particularly at the expense of all other members of the institution and community who are operating within the constraints of the law.

Further underscoring the inequity of denying the ability of the mutual institution to defend itself from violations of the law is that, if Spencer currently operated under the stock form of ownership, the rules would be clear and balanced.⁸ However, because Spencer is a mutual institution, Seidman is able to take advantage of circumstances that do not permit a lawful fight over the

⁸ In this regard, it is worth highlighting that Seidman has been before this Court before in connection with a proxy fight over the election of directors to the board of a stock institution. See IBS Fin. Corp. v. Seidman & Assoc., 136 F.3d 940, (3rd Cir. 1998). Again, as in this case, a variety of Seidman entities were used to seek a board seat; however, in that case, because the disclosure rules of the Securities and Exchange Commission required transparency, Seidman's disclosures were ruled inadequate and the Seidman nominees were properly rejected.

ownership structure of the institution. It clearly defeats the spirit and letter of the law to permit Seidman to take advantage of a gap in the statutory scheme and exploit the vacuum at the expense of the institution's continued existence as a mutual institution.

For all of these reasons, we respectfully request this Court to remand the case to the District Court in order to rule on the merits of the claim for violation of the SLHCA and to issue an injunction to provide equitable relief to Spencer based on the merits of its claim. Absent such equitable relief, mutual association members of the ABA and NCBA will be unable to defend themselves from skillful and exploitive efforts, such as those of Seidman, to pursue unlawful takeovers.

IV. CONCLUSION

Spencer has pled facts which, if true, describe a systematic and deliberate attempt at an illegal takeover by Seidman. However, Spencer is without a remedy to force Seidman to comply with the law. As a result, absent judicial intervention, Seidman will be able to effectuate an action adverse to Spencer and clearly prohibited by the SLHCA.

Judicial intervention is appropriate in the current context both to provide the opportunity for the lower court to establish a violation of the SLHCA and, lacking

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 28.3(d) of the Rules of this Court, I hereby certify that I am a member in good standing of the bar of this Court.

/s/Neal D. Mollen
Neal D. Mollen

CERTIFICATE OF WORD COUNT

Pursuant to the requirements of Rule 32(a)(7)(C)(i) of the Federal Rules of Appellant Procedure, the foregoing brief contains 3,074 words.

/s/Neal D. Mollen
Neal D. Mollen

CERTIFICATE OF SERVICE

I hereby certify that I caused an original and nine copies of the foregoing Amicus Curiae Brief to be sent to the Clerk of the Court of Appeals for the Third Circuit and that I caused a true and correct copy of the foregoing to be served upon counsel for all parties to this proceeding as follows:

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the foregoing Amicus Curiae Brief is identical to the E-Brief filed via electronic mail with the court on May 27, 2008.

/s/Neal D. Mollen
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CERTIFICATE OF VIRUS CHECK

I hereby certify that the E-brief served on the court via email contains no viruses and has been checked by McAfee Virus Scan of McAfee, Inc.

/s/Neal D. Mollen

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