

UNITED STATES OF AMERICA  
Before the  
OFFICE OF THRIFT SUPERVISION  
DEPARTMENT OF THE TREASURY

IN THE MATTER OF

ALAN J. BERKELEY

and

KIRKPATRICK & LOCKHART

Former counsel to  
American Savings of Florida, FSB,  
Miami, Florida, and  
the Enstar Group, Inc.

Re: OTS AP 92-106

Dated: October 5, 1992

STIPULATION AND  
CONSENT TO ENTRY OF  
CEASE AND DESIST ORDER  
FOR AFFIRMATIVE RELIEF

10-05-1992

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OTS PUBLIC AFFA

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The Office of Thrift Supervision ("OTS") and  
Kirkpatrick & Lockhart (the "Firm") and Alan J. Berkeley  
("Berkeley") hereby stipulate and agree as follows:

1. Consideration. The OTS, based upon information reported to it, is of the opinion that the grounds exist to initiate an administrative proceeding against Berkeley and the Firm pursuant to the Federal Deposit Insurance Act, § 8(b), 12 U.S.C. § 1818(b) (West 1989 & Supp. 1992). Berkeley and the Firm desire to cooperate with the OTS and to avoid the time and expense of such administrative litigation and, without either admitting or denying the factual or legal conclusions reached by OTS or that such grounds exist, hereby stipulate and consent to the issuance of the accompanying Cease and Desist Order for Affirmative Relief, attached hereto as Exhibit A (the "Order") in consideration for OTS hereby forever releasing and discharging Berkeley and the Firm from all potential claims and charges that have been or might be

asserted by the OTS arising out of or relating to the Firm's and Berkeley's representation of American, its parent, subsidiaries, and affiliates.

2. Jurisdiction.

(a) American is a "savings association" and an "insured depository institution" as defined by 12 U.S.C. §§ 1462 and 1813.

(b) Berkeley and the Firm are institution-affiliated parties as defined by 12 U.S.C. § 1813(u).

(c) The Director of the OTS is the "appropriate Federal Banking agency" to maintain administrative proceedings against Berkeley and the Firm pursuant to 12 U.S.C. § 1818(b).

3. Consent. Berkeley and the Firm, without admitting or denying any violation of law or regulation, consent to the jurisdiction of OTS and to issuance by the OTS of the Order. Berkeley and the Firm agree to comply with the terms of the Order upon issuance and stipulate that the Order complies with all requirements of law.

4. Finality. The Order will be issued under Section 8(b) of the FDIA, 12 U.S.C. § 1818(b). Upon its issuance by the Director of OTS, it shall be a final order, effective and fully enforceable by the OTS under the applicable provisions of the FDIA, as amended by FIRREA. Nothing in this stipulation or the attached Order shall restrict the legal rights of the OTS concerning the use of

these documents in litigation or otherwise nor shall the Firm and Berkeley be restricted by this Stipulation or Order from interposing any objection to the use of these documents which the law may otherwise allow them.

5. Waivers. The Firm and Berkeley will waive their right to a notice of charges and the administrative hearing provided by Section 8(b) of the FDIA, 12 U.S.C. § 1818(b), and will waive any right to seek judicial review of this Stipulation and the Order or to seek any post-hearing procedures, including any such right provided by Section 8(h) of the FDIA, 12 U.S.C. § 1818(h), and further will waive any other right to challenge the validity of the Order.

6. This Stipulation and the Order are not intended to limit, nor shall they have the effect of limiting, the right or authority of any other governmental agency to initiate or pursue any other action, civil or otherwise, against Berkeley and the Firm, except for the claims released by American as set forth in paragraph 7 below.

7. Simultaneously with the settlement of this matter, American has entered into a Settlement Agreement and Mutual Release with the Firm and Berkeley in which American, on behalf of itself, its subsidiaries, affiliates, officers, directors, employees, heirs, successors and assigns (collectively the "Releasing Party"), has agreed that the amount paid pursuant to paragraph C of the Order shall fully discharge any liability that the Firm and/or Berkeley may have



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Former counsel to  
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ORDER TO CEASE AND DESIST  
 FOR AFFIRMATIVE RELIEF

OTS PUBLIC AFFAIRS

P.08/40

WHEREAS, the Office of Thrift Supervision ("OTS") has conducted an investigation pursuant to Resolution ATL 90-17 dated November 30, 1990 into American Savings of Florida, FSB, Miami, Florida, formerly known as American Savings & Loan Association of Florida ("American") and, as a result of that investigation, has concluded that:

During the period 1987 to 1990, Kirkpatrick & Lockhart (the "Firm") provided legal services to the Enstar Group, Inc. ("Enstar"). From mid-1988 until October 1990, the Firm also provided legal services to American which was, during the period relevant hereto, a fifty-percent owned subsidiary of Enstar. Alan J. Berkeley ("Berkeley") was the Firm partner with overall responsibility for the client relationship with Enstar and American.

In December 1989, pursuant to the provisions of the Financial Institutions Reform, Recovery and Enforcement Act

("FIRREA"), American transferred its junk bond securities to an affiliate of Enstar in exchange for a promissory note in the principal amount of approximately \$209 million. The note, which was approved by OTS as required by law, was secured by collateral maintained in a collateral account and subject to a collateral pledge agreement between the parties. Under the terms of the agreement, the note had to be secured by collateral with a value of at least 120% of the note balance, which was a condition of OTS approval, and American and OTS had to approve any new or substituted collateral.

In the weeks prior to June 8, 1990, certain senior officers and directors of American and Enstar, including Harris Friedman and Richard Grassgreen, devised a plan ("The Collateral Substitution Plan") to pledge as collateral stock of a retail subsidiary of Enstar, in order to create "excess collateral" in the collateral account. In effect this was a plan to substitute stock of uncertain value for cash that would be withdrawn from the collateral pool securing the note from Enstar to American. The Collateral Substitution Plan was devised to provide up to \$45 million of capital needed by the retail subsidiary of Enstar.

On June 8, 1990, Enstar convened a special telephonic Board of Directors meeting. Berkeley attended the Board meeting by telephone. At the meeting, Richard Grassgreen, the Board's Chairman and Chief Executive Officer, discussed both a proposal recently received for the possible purchase of Enstar's subsidiary insurance company and the Collateral Substitution.

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Plan. The Enstar Board of Directors approved the Collateral Substitution Plan. The Collateral Substitution Plan, with the material dollar amount involved, was never presented to the American Board of Directors so that the Board could evaluate the risks posed by the Plan.

Enstar's General Counsel drafted minutes of the June 8 Board meeting that described the proposed offer for sale of the

insurance subsidiary and the purpose and general outline of the

Collateral Substitution Plan. He thereafter requested Berkeley

to review the draft minutes and to confer with Friedman about

what was required from a regulatory standpoint. Berkeley's

edited version eliminated the description of the Collateral

Substitution Plan contained in the original draft and did not

describe any intention by Enstar to pledge the retail

subsidiary's stock to enable Enstar to withdraw "excess

collateral" to finance the retail subsidiary.

Berkeley was also consulted by Harris Friedman, American's

Chairman and Chief Executive Officer ("CEO") concerning whether

OTS approval was required for the pledge of the Enstar retail

subsidiary stock to the collateral account. Berkeley and another

Firm member advised American's CEO that OTS approval was required

and understood that the CEO would seek that approval. Berkeley

subsequently reviewed a draft of a letter to OTS seeking OTS

approval for the retail subsidiary stock as collateral under the

collateral pledge agreement. The draft did not disclose the

purpose of the pledge of the retail subsidiary stock and did not

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state that "excess collateral" would be withdrawn from the collateral account. On June 22, 1990 the letter was in fact sent to OTS. Berkeley did not advise American's Chairman or its Board of Directors that the draft was incomplete or misleading or counsel against its delivery. When the letter was delivered neither the Firm nor Berkeley knew that Grassgreen and Friedman intended to withdraw cash from the collateral account without OTS approval of the retail subsidiary stock as collateral.

10-05-1992 In fact, however, on June 22, 1990, the same day that the P.11/40 letter seeking OTS approval was first sent, Enstar withdrew \$29,000,000 in cash from the collateral account. In August 1990, OTS advised American that the stock of the retail subsidiary was not acceptable as collateral. In August and September, Enstar made additional withdrawals from the account increasing the total to \$38 million. American has lost more than \$23 million as a result of the Collateral Substitution Plan.

WHEREAS, Berkeley and the Firm neither admit nor deny the allegations arising from the OTS investigation; and

WHEREAS, Berkeley and the Firm have executed a stipulation between Berkeley, the Firm and the Director of OTS attached hereto and incorporated herein by this reference (the "Stipulation"); and

NOW THEREFORE, the Director of OTS, pursuant to Section 8 of the Federal Deposit Insurance Act ("FDIA"), as amended, HEREBY ORDERS as follows:

**A. The Firm:**

1. In undertaking the representation of any "savings association" within the meaning of Section 2(4) of the Home Owners' Loan Act of 1933, as amended by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), 12 U.S.C.A. 1813(b), in a particular matter, the Firm will comply with standards of professional conduct applicable to such representation which may include the

Model Rules of Professional Conduct and the Model Code of Professional Responsibility. In particular:

a. The Firm will not simultaneously represent both (i) a savings association and (ii) the holding company of such an association (or any other subsidiary of the holding company) with respect to a matter in which their respective interests are adverse (i) unless each client, by the chief legal officer of that client, or by a senior official of that client who does not have the principal responsibility for the matter in question, consents to such representation after disclosure and consultation concerning the nature of any possible conflict and its possible adverse consequences, which disclosure and consent shall be appropriately documented by the Firm; (ii) unless the Firm reasonably concludes that the representation of either client will not be adversely affected by the Firm's representation of the other; and (iii) unless

such representation is permitted by applicable standards of professional conduct.

b. In all instances other than those covered by paragraph (A)(1)(a), while the Firm has a continuing professional relationship with a savings association, the Firm will not represent any other client in a matter involving that savings association and in which the other client's interests are adverse to the savings association (regardless of whether the Firm is engaged to provide legal services to the savings association in connection with that matter) (i) unless the savings association, by a senior official of the savings association who does not owe a fiduciary duty to the other party, or, in the absence of such official, by the chief legal officer of that savings association, or by a senior official of that savings association who does not have the principal responsibility for the matter in question, consents to such representation after disclosure and consultation concerning the nature of any possible conflict and its possible adverse consequences, which disclosure and consent shall be appropriately documented by the Firm; and (ii) unless such representation is permitted by applicable standards of professional conduct.

2. The Firm has adopted, and will maintain, procedures previously reviewed by OTS with respect to the undertaking

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and representation of savings association clients, and the acceptance of new assignments for existing savings association clients, that are designed to identify actual or potential conflicts of interest presented by any such engagement. Where such conflicts are identified in connection with the representation of any savings association, the partner primarily responsible for such association or assignment (i) shall resolve any such conflicts in a manner consistent with this Order and applicable professional standards of conduct, acting in consultation with, and with the concurrence of, a member of the Firm's Professional Standards Committee not otherwise involved in the representation of the clients in question or (ii) shall decline any such engagement.

B. Berkeley: 1. Berkeley will not serve as a director, officer or employee of any insured depository institution or its holding company and will not provide legal advice or legal services to: (a) any insured depository institution; or (b) the holding company of any insured depository institution concerning (i) filings or submissions to the OTS or matters that relate to a subsidiary insured depository institution, or (ii) any other matter if the insured depository institution represented more than fifty percent of the consolidated assets of such holding company at the close of the last fiscal year for which financial statements are

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generally available and contributed more than fifty percent of the consolidated net earnings of such holding company for that year.

2. For purposes of paragraph B(1), the phrase "insured depository institution" shall mean any savings and loan association, savings bank, commercial bank, credit union or other depository institution that holds federally insured deposits.

3. In the course of representing any client, Berkeley shall exercise due diligence to insure that any information that he prepares or assists in preparing and that he knows is to be submitted to any federal banking agency is accurate and complete in all material respects. If, after the submission of information that Berkeley believes is accurate and complete, he determines that any such information was not, in fact, accurate and complete when and as submitted, he shall take such steps, as may be consistent with applicable law and professional standards, to correct or supplement such information.

C. The Firm will make a payment to the OTS, for the benefit of American, in the amount of \$9,000,000 which may be provided through insurance coverage.

D. The Order shall remain in full force and effect for a period of three years.

E. Settled Claims. The amount paid pursuant to Paragraph C shall inure to the benefit of American and shall fully discharge and release the Firm and Berkeley from all potential claims and charges that have been or might be asserted by the OTS arising

out of or relating to the firm's and Berkeley's representation of American, its parent, subsidiaries and affiliates.

F. All technical words or phrases used in this Order, for which meanings are not otherwise specified or otherwise provided by the provisions of this Order, shall insofar as applicable, have the meanings set forth in one or more of the following laws and regulations: The Home Owners' Loan Act, as amended by FIRREA; the FDIA, as amended by FIRREA; and the regulations of the FRB, as codified in the Code of Federal Regulations, Title 12, Chapter V (or currently published in the Federal Register). Any technical words or phrases not subject to definition in the foregoing laws and regulations shall have meanings that accord with the best custom and usage in the savings association industry.

G. This Order shall be and is effective and enforceable upon service on counsel for Berkeley and the Firm.

IT IS SO ORDERED on this 9th day of October, 1992..

OFFICE OF THRIFT SUPERVISION

By:

/s/

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Timothy Ryan  
Director