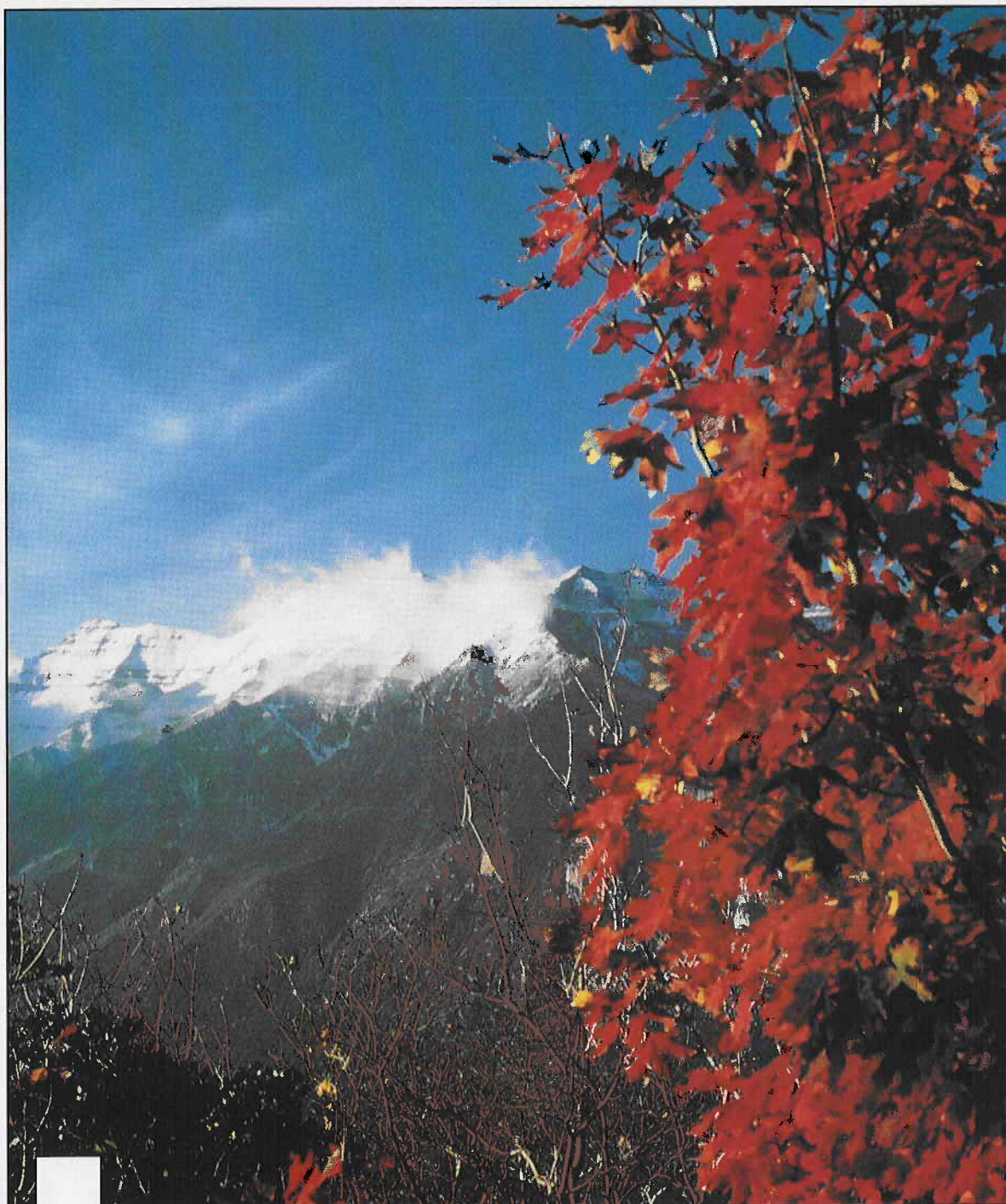


UTAH BAR JOURNAL

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COVER: Back of Mt. Timponogos, taken by E. Craig McAllister, Esq. of the firm of McAllister and Chuntz.

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LETTERS

Dear Editor:

The August-September 1993 issue of the *Utah Bar Journal* featured an article written by Mr. Peter Billings, Sr., of counsel to the law firm of Fabian and Clendenin. In that article Mr. Billings made some strong accusations and allegations regarding the passage of H.B. 137, Director and Officer Liability legislation, in the 1993 session of the Utah Legislature. Mr. Billings has conveniently chosen to ignore some of the compelling background information that served as a catalyst for the Utah Bankers Association to sponsor and "lobby" the legislation into law.

In his article, Mr. Billings does not make clear that in passing H.B. 137, Utah law, with respect to duties and obligations of the directors of financial institutions, was only being aligned with the standard set forth by Congress for directors of federally insured financial institutions in the Financial Institutions Reform Recovery

and Enforcement Act of 1989.

By 1992, it was clear that the FDIC and RTC were on a witch hunt of unprecedented proportions. The FDIC's motive in pursuing these actions often seemed more grounded in the availability of directors and officers insurance proceeds as opposed to the actual merits of the case. Mr. Alfred J.T. Byrne, the FDIC's general counsel, indicated in early 1993 that the dwindling availability of D & O insurance proceeds would mean that fewer of these law suits would be filed.¹

Finally, it is perhaps instructive to note the reason for Judge Brorby's dissent with the respect to the Tenth Circuit Appellate Court decision. His thinking actually parallels in large part the concerns expressed by the Utah Supreme Court in the 1899 *Warren v. Robinson* decision cited in Mr. Billings' article. Judge Brorby stated, "[the majority's] interpretation . . . contravenes the long recognized need to attract bright, ambitious leaders to serve as officers and director. Under the majority's interpreta-

tion, the personal risk is just too great Given the benefit of hindsight and a simple negligence or fiduciary standard, the FDIC is a formidable opponent. Under the circumstances *no reasonable attorney would advise his client to accept and no reasonable person would accept an offer to become a bank officer or director*" [emphasis added].²

In short, the adoption of the gross negligence standard in H.B. 137 by the Utah Legislature serves to conform the Utah standard with federal law with respect to financial institutions and to create an environment in which community leaders can render valuable service without the type of exposure to which the Tracy Collins' directors were subjected.

Lawrence W. Alder
President
Utah Bankers Association

¹Wall Street Journal, Friday, November 13, 1992.

²FDIC v. Canfield, No. 91 4143.

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