

1993

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Recommended Citation

Eric William Hess, *Federal Preemption of Rent Regulation Under FIRREA*, 20 *Fordham Urb. L.J.* 939 (1993).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol20/iss4/7>

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FEDERAL PREEMPTION OF RENT REGULATION UNDER FIRREA

I. Introduction

During the 1980's, hundreds of savings and loans ("S & L's") became insolvent, threatening the continued health and viability of the industry.¹ Since accounts at most failed S & L's were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") for all amounts up to \$100,000, the failure of S & L's forced the Federal Government to pay out billions of dollars to the depositors of these institutions.²

In response to the crisis, Congress enacted the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") on August 9, 1989.³ The primary purposes of FIRREA are to supply affordable housing mortgage finance and housing opportunities for low- and moderate-income individuals; to ensure a well-funded, independent thrift insurance fund;⁴ to establish organizations and procedures to procure and administer funding for resolving thrift failures; and to dispose of the assets of failed institutions.⁵ FIRREA confers broad authority on the Federal Deposit Insurance Corporation ("FDIC") and the newly created Resolution Trust Corporation ("RTC") (referred to collectively as the "Corporation") to manage and dispose of the assets of failed thrifts⁶ in an expeditious and economical manner.⁷ Since RTC was a new entity, FDIC was empowered to act on its behalf until RTC was able to perform its duties.

1. *Smallwood v. Office of Thrift Supervision*, 925 F.2d 894, 897 (6th Cir. 1991); see generally Robert J. Laughlin, Note, *Causes of the Savings and Loan Debacle*, 59 FORDHAM L. REV. 301 (1991); Ryan *Addresses Outlook For RTC Funding, Some Hot Issues Facing Thrift Industry*, 59 BANKING REP. 309, Aug. 31, 1992 (available in Westlaw, BNA Library) (between 1989 and August 31, 1992, 720 thrifts became insolvent due to poor earnings and low capital).

2. *Smallwood*, 925 F.2d at 897.

3. Pub. L. No. 101-73, 103 Stat. 183 (1989).

4. FIRREA replaced the FSLIC with the Savings Associations Insurance Fund, which collects deposit insurance premiums to cover savings association insolvencies. See 12 U.S.C.A. § 1821(a) (West Supp. IV 1993); Anne M. Taylor, Note, *The FDIC's Enhanced Powers Over Savings Associations: Does FIRREA Make It SAIF*, 59 FORDHAM L. REV. 381 (1991).

5. See Laughlin, *supra* note 1, at 311-12.

6. One of a number of types of mutually owned, cooperative, savings associations, originally established for the primary purpose of making loans to members and others, usually for the purchase of real estate or homes. See BLACK'S LAW DICTIONARY 1343 (6th ed. 1990).

7. See H.R. REP. NO. 54(I), 101st Cong., 1st Sess., pt. I, at 411 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 207 [hereinafter HOUSE REPORT].

Thereafter, FDIC was to act as RTC's manager.⁸

The Corporation can manage and dispose of a distressed thrift's assets in its capacity as conservator⁹ or as receiver¹⁰. When appointed conservator, the Corporation is authorized to take the necessary steps to restore a thrift to sound financial condition.¹¹ When appointed receiver, the Corporation supervises the liquidation of an insolvent institution's assets.¹² In either capacity, the Corporation is instructed by statute to maximize returns from the liquidation of institutions without overly disrupting local markets and to maintain an affordable supply of low- and moderate-income housing.¹³

RTC and FDIC possess the same rights and powers when acting in their respective capacities as conservators or receivers of failed institutions.¹⁴ These powers and rights include the ability to disaffirm or repudiate any lease that the Corporation deems to be "burden-

8. 12 U.S.C.A. § 1441a(b)(1)(C) (West Supp. IV 1993). The FDIC's Board of Directors acts as RTC's Board of Directors. FDIC's Chairman acts as RTC's Chairman. H.R. CONF. REP. NO. 222, 101st Congress, 1st Sess. 411 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 450.

9. A preserver appointed by a court to manage the affairs of an entity which is unable to manage its property and business affairs effectively. BLACK'S LAW DICTIONARY 306 (6th ed. 1990).

10. An entity appointed by a court to receive and preserve a debtors's property pending an action against it, or applying the property and/or its rents, issues and profits in satisfaction of a creditor's claim, whenever there is danger that, in the absence of such appointment, the property will be lost, removed or injured. *Id.* at 1268.

11. HOUSE REPORT, *supra* note 7, at 86, 310-11.

12. *Id.*

13. 12 U.S.C.A. § 1441a(b)(3)(C) (West Supp. IV 1993) instructs the Corporation to conduct its operations in a manner which:

- (i) maximizes the net present value return from the sale or other disposition of institutions. . . or the assets of such institutions;
- (ii) minimizes the impact of such transactions on local real estate and financial markets;
- (iii) makes efficient use of funds obtained from the Funding Corporation or from the Treasury;
- (iv) minimizes the amount of any loss realized in the resolution of cases; and
- (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

14. 12 U.S.C. § 1441a (b)(1)(B) (West Supp. IV 1993) provides:

[RTC], when it is acting as a conservator or receiver of an insured depository institution, shall be deemed to be an agency of the United States to the same extent as the Federal Depository Insurance Corporation when it is acting as a conservator or receiver of an insured depository institution.

12 U.S.C.A. § 1821(c)(1) (West Supp. IV 1993) provides:

Notwithstanding any other provision of Federal law, the law of any State, or the Constitution of any State, the Corporation may accept appointment and act as conservator or receiver for any insured depository institution upon appointment in the manner provided . . .

some."¹⁵ FIRREA provides that the Corporation is not subject to the "direction or supervision" of any state in the exercise of its "rights, powers or privileges."¹⁶ Taken together, these factors raise an issue regarding the Corporation's authority to preempt state and local rent regulations.

In *Resolution Trust Corp. v. Diamond*,¹⁷ Judge Carter of the United States Court for the Southern District of New York ruled that state and local rent regulation of apartments is not preempted by FIRREA. In arriving at this decision, the court failed to consider that the apartments were probably not even occupied by low- or moderate-income tenants.¹⁸

The deleterious impact of the restriction on the Corporation's powers caused by the *Diamond* decision¹⁹ must be analyzed in light of the Congressional Budget Office's estimation that the cost of past thrift resolutions, current conservatorships, and additional projected thrift failures will total \$180 billion and will be paid almost entirely by taxpayers.²⁰ *Diamond's* failure to recognize the expansive nature of FIRREA's powers forces the Corporation to comply with local regulations that obstruct the liquidation of assets from failed banks. Although such a ruling benefits the tenants occupying the regulated units at issue (higher income tenants in the case of *Diamond*²¹),

15. 12 U.S.C.A. § 1821(e)(1) (West Supp. IV 1993) provides:

Provisions relating to contracts entered into before appointment of conservator or receiver-

(1) Authority to repudiate contracts. . . . In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease . . .

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

16. 12 U.S.C.A. § 1821(c)(2)(C) (West Supp. IV 1993) provides:

When acting as conservator or receiver pursuant to an appointment [to act as Conservator or Receiver] . . . , the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers or privileges.

17. *Resolution Trust Corp. v. Diamond*, 801 F. Supp. 1152 (S.D.N.Y. 1992).

18. The building at issue was a luxury complex. None of the tenants in the units provided any evidence that they were low- or moderate-income individuals. *Id.* at 1160-61.

19. 801 F. Supp. 1152.

20. *Total Thrift Crisis Cleanup Will Cost Taxpayers \$180 Billion, CBO Estimates*, 60 BANKING REP. 767, May 24, 1993, available in Westlaw, BNA Library.

21. The term "higher income tenant" is used to refer to those tenants who earn more

it impedes the replenishment of the insurance fund.²² Taxpayers ultimately pay for the shortfall.

This Note takes the position that *Diamond* was wrongly decided. Part II of this Note reviews rent regulation in New York City and the basis of its conflict with FIRREA.²³ Part III introduces the preemption doctrine and discusses the *Diamond* case. Part IV analyzes the legal and policy arguments supporting federal preemption of rent regulation under FIRREA. Part V concludes that the plain language of FIRREA, prior caselaw, and public policy favor allowing the Corporation to disaffirm rent controlled or stabilized leases occupied by higher-income tenants.²⁴

II. Rent Regulations in New York City

The Federal Emergency Price Control Act of 1942²⁵ imposed rent control on a national scale in response to wartime housing emergencies.²⁶ Although federal controls had expired by 1953, approximately ten percent of the rental housing units in the United States (2.8 million units) remain subject to state or local rent controls.²⁷ Rent control currently exists in New York, New Jersey, Massachusetts, Maryland, Connecticut, California, and the District of Columbia.²⁸ Rent controlled units are predominantly found in major urban centers.²⁹

In 1946, the New York State Legislature extended rent control in response to a continuing shortage of affordable housing faced by an expanding population.³⁰ Initially, rent control was intended only as a

than those in the low- or moderate-income categories, as defined by the RTC. *See infra* note 133.

22. *See supra* note 4.

23. *Diamond* was a case of first impression regarding the preemption of rent regulations under FIRREA. Due to the intricate nature of New York's rent regulations, the reasoning set forth herein is applicable to rent regulations throughout America.

24. Although this Note deals specifically with the applicability of 12 U.S.C.A. § 1821(c)(2)(C) to rent regulated properties, it also raises the broader question as to the limits to which § 1821(c)(2)(C) can be applied to other state regulations.

25. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942).

26. Emergency Price Control Act, ch. 26, §§ 1-2, 56 Stat. at 23-25. OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUSING AND URBAN DEV., REPORT TO CONGRESS ON RENT CONTROL 3 (Sept. 1991) [hereinafter RENT CONTROL REPORT].

27. RENT CONTROL REPORT, *supra* note 26.

28. *Id.* at 4 (stating that New York City has 39 percent of all rent controlled units in the United States; Los Angeles has 17 percent).

29. *Id.*

30. Although federal controls had not expired, the New York State Legislature enacted the Act of March 30, 1946 to provide for the continuation of rent control after federal controls had lapsed. The Act provided:

temporary measure, to be repealed upon the legislature's determination that the housing emergency had ceased to exist.³¹ In 1962, New York City, pursuant to state legislative authority,³² further extended rent control by enacting the City Rent and Rehabilitation Law ("CRRL"),³³ which gave tenants a statutory right to occupancy in addition to their leasehold rights.³⁴ CRRL applies rent control to buildings built before February 1947 and whose tenants were in occupancy prior to July 1, 1971.³⁵

In order to protect those exposed to a chronic housing shortage but not protected by rent control, New York City also enacted rent stabilization regulations.³⁶ Rent stabilization was originally intended to be a gradual phase out of rent control — once rent controlled apartments were vacated they would become subject to rent stabilization.³⁷ Generally, rent stabilization applies to leases entered into after July 1971 in buildings built before 1947, and in all dwelling units in buildings of six or more units built between 1947 and 1974 that were not

The legislature hereby finds that a serious public emergency exists in the housing of a considerable number of persons in the State of New York which emergency has been created by war, the effects of war and the aftermath of hostilities; that such emergency has necessitated the intervention of the federal government in order to prevent speculative, unwarranted and abnormal increases in rents; that such emergency has produced an acute shortage in dwellings . . . ; that unless [the current federal rent control law] be renewed and such regulation and control be continued, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils . . . preventive action by the legislature is imperative

Act of March 30, 1946, ch. 274, § 1, 1946 N.Y. Laws 723, 723.

31. *Id.*

32. The Local Emergency Housing Rent Control Act, which was passed by the New York State Legislature in 1962, granted cities with populations in excess of one million the right to enact local rent control legislation. Local Emergency Housing Rent Control Act, N.Y. UNCONSOL. LAWS §§ 8602-03 (McKinney 1987).

33. NEW YORK CITY, N.Y., ADMIN. CODE § 26-401 (1985) [hereinafter N.Y.C. ADMIN. CODE].

34. N.Y.C. ADMIN. CODE, § 26-408(a) provides that:

No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter by action to evict or recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated.

Id. § 26-468(a).

35. *Id.* § 26-403e.

36. A limited form of rent stabilization was instituted in New York City in 1969 and was expanded in 1974. Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAWS § 8623 (McKinney 1987).

37. *Id.*

originally rent controlled.³⁸ New York City's rent stabilization laws established a Rent Guidelines Board³⁹ to set a maximum allowable yearly rent increase,⁴⁰ as opposed to the static rent ceiling imposed by rent control laws.

Prior to 1993, no income limitations applied to New York's rent controlled units. Effective October 1, 1993, all luxury units with monthly rents of two thousand dollars or more and occupied by tenants earning a combined income of over two hundred and fifty thousand dollars were decontrolled.⁴¹ This limitation, however, does not affect all higher income tenants in possession of rent controlled units.⁴²

Rent regulation, where applicable, has drastically affected the landlord/tenant relationship. It is unclear whether rent regulation effectively imposes a new relationship on the landlord that escapes regulation by federal statutes aimed at the underlying leasehold relationship.

III. The Federal Preemption Doctrine and the *Diamond* Case

No clear consensus exists as to whether Congress intended for the Corporation's lease disaffirmance powers to cover rent regulated leases.⁴³ Although FIRREA expressly grants the Corporation the power to preempt⁴⁴ conflicting state regulations,⁴⁵ in *Diamond* the federal district court for the Southern District of New York ques-

38. N.Y.C. ADMIN. CODE, *supra* note 33, § 26-504. Exceptions exist, but they are not relevant to this discussion.

39. N.Y.C. ADMIN. CODE, *supra* note 33, § 26-510.

40. *Id.*

41. Rent Regulation Reform Act of 1993, ch. 253, § 2, 1993 N.Y. LAWS 675 (McKinney 1993) (*amending* Act of March 30, 1946, ch. 274, 1946 N.Y. LAWS 723)

42. The term "higher income tenant" refers to a family or individual whose income exceeds 115% of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development. *See supra* note 22. In New York, the relevant area is comprised of Bronx, Kings, New York, Putnam, Queens, Richmond, and Rockland counties. U.S. DEP'T OF HOUS. AND URBAN DEV., STATE LIST OF PRIMARY METROPOLITAN STATISTICAL AND METROPOLITAN STATISTICAL AREAS (March 22, 1993). In the New York area, the median income is \$41,700. U.S. DEP'T OF HOUS. AND URBAN DEV., TRANSMITTAL OF 1993 INCOME LIMITS FOR LOW-INCOME AND VERY LOW-INCOME FAMILIES UNDER THE HOUSING ACT OF 1937 (March 22, 1993). Thus, there remains a large class of higher income, rent controlled tenants who do not meet the luxury decontrol requirements.

43. The only court to address this issue to date has been the Southern District of New York in the *Diamond* case. 801 F. Supp. 1152.

44. *See infra* notes 86-94 and accompanying text.

45. *See* 12 U.S.C.A. § 1821(c)(2)(C). For the text of § 1821(c)(2)(C), *see supra* note 16.

tioned the scope of this power.⁴⁶

A. The Federal Preemption Doctrine

The Supremacy Clause⁴⁷ empowers Congress to preempt state law.⁴⁸ Preemption can occur in several ways. Express preemption occurs when Congress explicitly states its intent to preempt state law.⁴⁹ If this intent is not explicitly stated, preemption occurs when state law conflicts with federal law⁵⁰ ("conflict preemption") or when federal law so "thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the states to supplement it'" ("field preemption").⁵¹ Conflict preemption can be further broken down into two distinct sub-types: 1) compliance with both federal and state law is a "physical impossibility,"⁵² and 2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵³

B. The *Diamond* Case

In *Diamond*,⁵⁴ RTC, acting as receiver of Nassau Federal Savings and Loan Association, acquired nine rent regulated condominium leases in a luxury apartment building⁵⁵ located in Manhattan.⁵⁶ RTC sought to repudiate these leases pursuant to its lease disaffirmance powers⁵⁷ and asserted that FIRREA preempted⁵⁸ any state regulations that were inconsistent with such powers.⁵⁹ The New York State Attorney General successfully challenged RTC's power to preempt

46. See *infra* notes 61-76 and accompanying text.

47. U.S. CONST. art. VI, cl. 2 provides, in pertinent part, that "the Laws of the United States which shall be made . . . under the Authority of the United States, shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

48. *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368 (1986).

49. *Jones v. Roth Packing Co.*, 430 U.S. 519, 525 (1977).

50. *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992).

51. *Id.* (quoting *Fidelity Fed. Sav. and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

52. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)).

53. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

54. 801 F. Supp. 1152.

55. See *supra* note 18.

56. *Diamond*, 801 F. Supp. at 1154-55.

57. See 12 U.S.C.A. § 1821(e)(1). For the text of § 1821(e)(1), see *supra* note 15.

58. See 12 U.S.C.A. § 1821(c)(2)(C). For the text of § 1821(c)(2)(C), see *supra* note 16.

59. *Diamond*, 801 F. Supp. at 1154-55.

state rent regulations.⁶⁰

Judge Carter, who wrote the *Diamond* opinion, reasoned that RTC's authority to preempt state law⁶¹ existed only for those powers expressly delegated to RTC under FIRREA.⁶² Since FIRREA contains no provisions specifically granting RTC the power to preempt rent regulations, the court held that RTC could not repudiate statutory tenancies.⁶³

To support its reasoning, the court analogized the powers of a trustee in bankruptcy under section 365 of the Bankruptcy Code⁶⁴ to the Corporation's lease disaffirmance powers.⁶⁵ The court cited a Southern District Bankruptcy Court decision in which a trustee's lease rejection powers under section 365 of the Bankruptcy Code were considered "suspect" as applied to rent regulated tenants because such tenants held "statutory tenancies."⁶⁶ The *Diamond* court found this reasoning applicable to RTC's powers under FIRREA.⁶⁷

The *Diamond* court found a strong presumption against preemption of state law by federal statute because the regulations at issue were within New York's traditional police powers.⁶⁸ The court stated that the presumption could be overcome only if preemption was the only permissible conclusion or if Congress had clearly expressed preemptive intent.⁶⁹

In interpreting Congress's intent behind the Corporation's lease disaffirmance powers, the court looked to the instructions in FIRREA.⁷⁰ Two of these instructions suggested to Judge Carter that Congress had not intended for lease disaffirmance powers to apply to statutory tenancies.⁷¹ One instruction required the Corporation to minimize the market impact of its transactions.⁷² The court reasoned that allowing RTC to repudiate all rent regulated tenancies under its

60. *Id.* at 1155.

61. See 12 U.S.C.A. § 1821(c)(2)(C). For the text of § 1821(c)(2)(C), see *supra* note 16.

62. *Diamond*, 801 F. Supp. at 1159.

63. *Id.*

64. 11 U.S.C. § 365 (1993). This section, entitled "Executory Contracts and Unexpired Leases" states: "(a) . . . the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

65. *Diamond*, 801 F. Supp. at 1160.

66. *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986).

67. *Diamond*, 801 F. Supp. at 1160.

68. *Id.* at 1155-57.

69. *Id.* at 1156.

70. *Id.* at 1160.

71. *Id.* at 1161-62.

72. *Diamond*, 801 F. Supp. at 1161-62; 12 U.S.C.A. § 1441a(b)(3)(C)(ii). For the text of § 1441a(b)(3)(C)(ii), see *supra* note 13.

control would contravene this instruction, because repudiation would have an adverse impact on the housing market.⁷³ The other instruction required the Corporation to maximize the preservation of affordable housing for low- and moderate-income individuals.⁷⁴ Since RTC's disaffirmance of rent regulated leases would remove the leases from the market, repudiation would reduce the supply of affordable housing available to low- or moderate-income individuals, thereby contravening the latter instruction. Thus, the court concluded that Congress did not expressly intend to preempt rent regulations.⁷⁵

The *Diamond* court also rejected conflict preemption as a grounds for federal preemption.⁷⁶ Judge Carter reasoned that since the Corporation did not possess the power to repudiate statutory tenancies, the state's regulation of such tenancies did not conflict with the Corporation's powers or functions.⁷⁷

The court read section 1821(j),⁷⁸ the provision prohibiting courts from restraining the Corporation in the exercise of its powers or functions, narrowly. Applying the same reasoning used to reject the conflict preemption issue — i.e., that the repudiation of a statutory tenancy was not a “power or function” of RTC — the court found section 1821(j) inapplicable.⁷⁹ It determined that the provision was at most a restraint on the ability of courts to interfere with RTC's substantive decisions, but did not apply to RTC's statutory interpretations.⁸⁰ The court stated that the alternative to its interpretation of section 1821(j) would bar judicial review of the Corporation's construction of FIRREA.⁸¹

IV. Preemption of Rent Regulation Under FIRREA

Rent control and rent stabilization laws exist only on the state and local level. Thus, such laws may be preempted by federal law. As

73. *Diamond*, 801 F. Supp. at 1161 (as of February 1991, the RTC controlled 1000 rent-regulated condominium and cooperative apartments in New York State).

74. *Id.* at 1161-62; 12 U.S.C.A. § 1441a(b)(3)(C)(v). See *supra* note 13 for the text of § 1441a(b)(3)(C)(v).

75. *Diamond*, 801 F. Supp. at 1161, 1162 n.6.

76. *Id.* at 1162-64.

77. *Id.*

78. 12 U.S.C.A. § 1821(j) (West Supp. IV 1993) provides:

Except as provided in this section, no court may take any action, except at the request of the Board of Directors, by regulation or by order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

79. *Diamond*, 801 F. Supp. at 1160.

80. *Id.* at 1160.

81. *Id.*

indicated earlier, the three types of preemption are express preemption, conflict preemption, and field preemption.⁸² Field preemption is inapplicable to rent regulation because FIRREA does not provide for any form of rent regulation. "Physical impossibility," a form of conflict preemption, is not an issue as both lease disaffirmance powers and rent regulations can function simultaneously. Conflict preemption, however, may still be applicable since, to the extent that New York's rent regulations grant tenants statutory rights to their leases, the regulations obstruct the accomplishment of Congress's purposes and objectives in enacting FIRREA.⁸³

A. Express Preemption

Before examining the applicability of conflict preemption, a court should consider whether the statutory language expressly preempts state law.⁸⁴

1. Statutory Language

In determining whether federal law is preemptive, the Supreme Court has stated that courts must "give effect to the unambiguously expressed intent of Congress."⁸⁵ The purpose behind the federal statute is the "touchstone" of preemption analysis.⁸⁶ Therefore, to determine Congress's "plain purpose," a court must first look to the plain language of the statute itself.⁸⁷ There is a "strong presumption" that the plain language of the statute expresses congressional intent,⁸⁸ the presumption is rebutted only where a contrary intent is "clearly expressed."⁸⁹

Congress has clearly expressed its intent to provide the Corporation, in its capacity as conservator or receiver, with preemption powers.⁹⁰ Section 1821(c)(2)(C) provides that the Corporation shall not be subject to the "direction or supervision" of "any State" in the exer-

82. See *supra* notes 49-51 and accompanying text.

83. See *supra* notes 4-7, 13; *supra* text accompanying note 5.

84. See *supra* note 49 and accompanying text.

85. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1983).

86. *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992).

87. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986); *MCorp Fin., Inc. v. Board of Governors*, 900 F.2d 852, 856 (5th Cir. 1990), *aff'd*, 112 S. Ct. 459 (1991).

88. *Ardestani v. Immigration and Naturalization Serv.*, 112 S. Ct. 515, 520 (1991) (*quoting* *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)).

89. *Id.*

90. See 12 U.S.C.A. § 1821(c)(2)(C). For the text of § 1821(c)(2)(C), see *supra* note 16.

cise of its “powers, functions, or privileges.”⁹¹ Furthermore, where Congress intended for state law to apply, it was expressly provided for.⁹²

The statutory language of FIRREA provides no evidence that the power to disaffirm “any lease” excludes rent regulated leases. The term “lease” is defined as “any agreement which gives rise to [a] relationship of landlord and tenant or lessor and lessee.”⁹³ Neither this definition nor the statutory language of FIRREA indicate that a lease ceases being a lease once it is subject to rent regulation or that such regulations dissolve the landlord-tenant relationship arising from “any agreement.”

2. *Lack of Contrary Intent*

FIRREA’s legislative history suggests that the statute does not distinguish between rent regulated leases and non-regulated leases.⁹⁴ Since the statute does not exclude rent regulated leases, the “strong presumption” that such an exclusion was not intended controls. Furthermore, the broad authority granted to the Corporation to deal with the “monumental problems” and “unprecedented costs” of the savings and loan crisis favors an expansive interpretation of the term

91. See 12 U.S.C.A. § 1821(c)(2)(C).

92. Congress has made special provisions for state law to govern in FIRREA. These include: 12 U.S.C.A. § 1821(c)(13)(B) (West Supp. IV 1993):

(13) Additional Powers

In any case in which the Corporation is appointed conservator or receiver . . . for any insured State depository institution. . .

(B) the Corporation shall apply the law of the State in which the institution is chartered insofar as that law gives the claims of depositors priority over those of other creditors or claimants;

12 U.S.C.A. § 1823(f)(3)(F) (West Supp. IV 1993):

(F) Other requirements not affected

This paragraph does not affect any other requirements under Federal or State law for regulatory approval of an acquisition under this paragraph.

12 U.S.C.A. § 1823(f)(4)(D) (West Supp. IV 1993):

Any out-of-State bank holding company which acquires control of an insured bank in any State . . . may acquire any other insured bank and establish branches in such State to the same extent as a bank holding company whose insured bank subsidiaries’ operations are principally conducted in such state may acquire any other insured bank or establish branches.

93. BLACK’S LAW DICTIONARY 889 (6th ed. 1990). BLACK’S LAW DICTIONARY has been used to define statutory terms. See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990).

94. See HOUSE REPORT, *supra* note 7. Proposed legislation aimed at requiring RTC to conform to state and local law in the exercise of its lease repudiation powers has been repeatedly rejected by Congress. See also H.R. 320, 102d Cong., 1st Sess. (1991); H.R. 121, 102d Cong., 1st Sess. (1991); H.R. 2244, 102d Cong., 1st Sess. (1991); S. 1692, 102d Cong., 1st Sess. (1992).

“lease.”⁹⁵

The *Diamond* court appropriately analogized the Corporation’s lease disaffirmance powers to those of a trustee in bankruptcy.⁹⁶ The court, however, failed to make two distinctions between these two provisions, which illustrate how Congress might have framed FIRREA had it not intended for the Corporation’s lease disaffirmance powers to apply to rent regulated leases. First, section 365 of the Bankruptcy Code expressly subjects the trustee’s lease rejection powers to the bankruptcy court’s approval.⁹⁷ No such limitation exists in FIRREA.⁹⁸ To the contrary, section 1821(j) forbids courts from restraining the Corporation in the exercise of its powers or functions.⁹⁹

Second, under section 365 of the Bankruptcy Code, a lessee may continue to occupy the premises even after the lease is rejected by the trustee.¹⁰⁰ FIRREA does not contain a similar provision. Since the functions of a trustee in bankruptcy and those of a conservator or receiver of a failed institution are similar,¹⁰¹ Congress could easily have used the Bankruptcy Code as a model and granted such a right to a lessee in possession. Congress, however, recognized that the “interests of the American taxpayers demand an expedited resolution” to the crisis.¹⁰² These interests outweigh the interests of a high income tenant to the continued occupancy of a premises once the underlying lease has been disaffirmed.

In *Smallwood v. Office of Thrift Supervision*,¹⁰³ the Sixth Circuit found that FIRREA established federal authority as “paramount regarding the maintenance of the solvency of the federal deposit insurance system.”¹⁰⁴ There, the issue was whether FIRREA had preempted state statutory requirements regarding the conversion of a state-chartered savings and loan association to a federally-chartered association.¹⁰⁵ The conversion was authorized by and performed in

95. See HOUSE REPORT, *supra* note 7, at 308.

96. See *supra* notes 64-67 and accompanying text.

97. *Id.*

98. See 12 U.S.C.A. § 1821(e)(1). For the text of § 1821(e)(1), see *supra* note 15.

99. See 12 U.S.C.A. § 1821(j). For the text of § 1821(j), see *supra* note 78.

100. 11 U.S.C. § 365(h)(1) (1992) provides:

If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, . . . the lessee . . . may treat such lease . . . as terminated . . . or, may remain in possession . . . for the balance of such [lease] term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable non-bankruptcy law.

101. See HOUSE REPORT, *supra* note 7.

102. *Id.*

103. *Smallwood v. Office of Thrift Supervision*, 925 F.2d 894 (6th Cir. 1991).

104. *Id.* at 898.

105. *Id.*

accordance with FIRREA.¹⁰⁶ The court found that FIRREA preempted¹⁰⁷ state laws that impeded the authority to deny or approve conversions pursuant to FIRREA.¹⁰⁸ In reaching this decision, the court emphasized the “primacy of the [f]ederal interest as regards the solvency and viability of the [f]ederal deposit insurance system.”¹⁰⁹ Similarly, FIRREA’s lease disaffirmance powers are impeded by the state rent regulations restricting the exercise of those powers. The *Diamond* court, however, neglected to consider the “primacy” of the federal interest involved.

In *Resolution Trust Corp. v. Elman*,¹¹⁰ the Second Circuit held that the expansive nature of FIRREA’s provisions governing property interests preempted New York’s statutorily conferred rights in such property. The court found that “[FIRREA] superimposes a new arrangement over the state law scheme, and alters . . . the respective rights and duties of the parties.”¹¹¹ This “new arrangement” was an administrative process for adjudicating claims to which claimants were required to submit before seeking relief in federal courts.¹¹² In *Elman*, a firm had a retaining lien under New York law to the files of a bank for which RTC had been appointed receiver.¹¹³ The court found that although the firm had a statutory right to the files, under FIRREA the firm did not have a retaining lien, and FIRREA’s provisions preempted the New York law governing such liens.¹¹⁴

The *Diamond* court found *Elman* to be inapposite because there, the power to preempt New York law had been more clearly set forth in FIRREA.¹¹⁵ The cases are similar, however, in that the power to disaffirm a lease does not distinguish between rent regulated and non-rent regulated leases, and thus, the regulations are subject to preemption. Although a firm’s statutory lien on a bank’s files represents an interest different from a statutory tenancy, the state rights conferred in both situations conflict with FIRREA. *Elman*, therefore, serves to

106. *Id.* at 896; see 12 U.S.C.A. §§ 1464(i), (p).

107. The court found that state law was implicitly preempted and explicitly chose not to decide the issue of express or conflict preemption. *Smallwood*, 925 F.2d at 898. The court’s discussion regarding the broadness of FIRREA’s powers, however, is relevant in determining whether the scope of FIRREA is sufficiently wide so as to expressly preempt state law.

108. *Id.* at 898.

109. *Id.*

110. *Resolution Trust Corp. v. Elman*, 949 F.2d 624 (2d Cir. 1991).

111. *Id.* at 627.

112. *Id.*

113. *Id.* at 626.

114. See *id.* at 627.

115. See *Diamond*, 801 F. Supp. at 1162.

illustrate the Second Circuit's interpretation of the broad powers conferred on the Corporation pursuant to FIRREA.

3. *Statutory Rights Not Outside The Scope of FIRREA*

When a statutory right is premised on an agreement, such an agreement should fall within the scope of FIRREA's disaffirmance powers. Under both rent stabilization and rent control schemes, a contract forms the basis of the landlord and tenant's relationship.¹¹⁶ That the statutory tenancy rests on this contractual relationship has been recognized by both the Second Circuit and New York State courts.¹¹⁷ According to the New York Court of Appeals, "[r]ent control and other landlord-tenant regulations . . . merely involve restrictions on existing tenancies."¹¹⁸ Disaffirming the underlying lease removes the basis for any statutory tenancy rights;¹¹⁹ once the lease is disaffirmed, nothing remains to be restricted and all statutory rights cease to exist.¹²⁰

The dependence of rent regulations on an underlying lease is particularly evident where rent stabilization regulations are at issue. Under New York's rent stabilization regulations, tenants have the right to renew their leases for a one or two year term.¹²¹ The tenant's occupancy rights are inextricably connected to the underlying lease, and thus repudiation of the lease extinguishes the rent stabilization regulations governing it. Consequently, FIRREA regulations expressly preempt the lease-dependent rent stabilization laws.

On the other hand, New York's rent control regulations provide

116. See, e.g., *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F.2d 752, 753 (2d Cir.) (holding that nonconflicting provisions of lease are enforceable during term of statutory tenancy), *cert. denied*, 348 U.S. 829 (1954); *Glauber v. University Place Apartments, Inc.*, 66 N.Y.S.2d 335, 336 (Sup. Ct. 1946) (holding that tenant is statutory tenant under State rent control regulations as to "term and rental obligation, but subject to the rights and obligation of the lease not otherwise affected" and is bound by terms of expired lease covenant against assignment and subletting without written consent of the landlord), *aff'd*, 70 N.Y.S.2d 139 (App. Div. 1947); *Ten Fifth Ave. Corp. v. Baker*, 179 N.Y.S.2d 288, 293 (N.Y. Mun. Ct. 1958) ("the tenant having been in possession under a lease which expired . . . continued in possession of the premises as a statutory tenant, the terms and condition of said lease being projected into the statutory tenancy."), *rev'd on other grounds*, 189 N.Y.S.2d 69 (Sup. Ct. 1959).

117. See *McCue Bros. & Drummond, Inc.*, 210 F.2d 752; *Glauber*, 66 N.Y.S.2d 335; *Ten Fifth Ave. Corp.*, 179 N.Y.S.2d 288.

118. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 105 (Ct. App.) (finding law prohibiting demolition, alteration or conversion of single room occupancy properties and obligating owners to restore properties and lease them at controlled rents indefinitely to be facially invalid), *cert. denied*, 493 U.S. 976 (1989).

119. See *supra* note 116.

120. See, e.g., *Ten Fifth Ave. Corp.*, 179 N.Y.S.2d 288.

121. N.Y.C. ADMIN. CODE, *supra* note 33, § 26-511(c)(4).

that a right to occupancy created pursuant to a rent controlled lease is an interest independent of the lease.¹²² Thus, FIRREA does not expressly preempt rent control. In contrast, the rights conferred on tenants under rent stabilized leases are expressly tied to the existence of the lease.¹²³

B. Conflict Preemption

1. Nature of the Conflict

Although FIRREA does not expressly preempt state rent control regulations, such regulations are preempted to the extent that they conflict with the Corporation's exercise of its liquidation powers under FIRREA. In *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, the Supreme Court stated that where state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress . . . state law is nullified to the extent that it actually conflicts with federal law."¹²⁴ At issue in *De La Cuesta* was a regulation enacted by the Federal Home Loan Bank Board (the "Board") authorizing federal savings and loans to include a due-on-sale clause¹²⁵ in their loan agreements.¹²⁶ The Court held that the Home Owner's Loan Act expressly authorized the issuance of the regulation and that the due-on-sale regulation preempted conflicting state limitations governing the exercise of such clauses.¹²⁷ The reasoning set forth in *De La Cuesta* also applies to the rent control issue, since the preservation of rent regulated leases clearly conflicts with the exercise of the Corporation's lease disaffirmance powers.

The congressional instructions in FIRREA,¹²⁸ read in the context of the statute as a whole, indicate that rent control regulations represent an "obstacle" to the accomplishment of FIRREA's intended purposes. The continuing imposition of rent control regulations forces the Corporation to liquidate properties below market value. This di-

122. See Local Emergency Housing Rent Control Act, N.Y. UNCONSOL. LAWS § 8602 (McKinney 1987).

123. See *supra* note 36 and accompanying text.

124. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

125. A due-on-sale clause is a "provision that permits the association to declare the entire balance of the loan immediately due and payable if the property securing the loan is sold or otherwise transferred without the [lender's] prior written consent." *De La Cuesta*, 458 U.S. at 141.

126. *Id.* at 146-47.

127. *Id.* at 141.

128. See 12 U.S.C.A. § 1441a(b)(3)(C). For the text of § 1441a (b)(3)(C), see *supra* note 13.

rectly conflicts with Congress's instructions to "maximize the net present value" from the sale of an institution's assets¹²⁹ and to "minimize the amount of loss" in either managing or selling the units.¹³⁰ RTC's internal policy, on the other hand, is more in line with FIRREA's intended purposes.¹³¹

In a policy statement setting forth RTC's interpretation of its lease disaffirmance powers ("Policy Statement"), the RTC states that the powers are only applicable to units that are not occupied by low- or moderate-income tenants.¹³² This interpretation abides by Congress's instructions to preserve the supply of low- and moderate-income housing.¹³³ This limitation diminishes the large adverse impact on the housing market that the *Diamond* court feared.¹³⁴ Thus, in contrast to *Diamond*'s findings,¹³⁵ the Policy Statement's interpretation complies with Congress's instructions to minimize the impact on local real estate markets and to preserve the supply of affordable housing.¹³⁶

In addition to conflicting with Congress's policy, at least as to high-income tenants, rent control renders lease disaffirmance powers meaningless unless the tenancy can be terminated. Although rent regulation is within the traditional police power of the states,¹³⁷ the Supreme Court has stated that "the relative importance to the State of its own law is not material when there is a conflict with a valid federal

129. *See id.* § 1441a (b)(3)(C)(i).

130. *See* 12 U.S.C. § 1441a (b)(3)(C)(iv).

131. In a policy statement issued in February, 1991, the RTC declared that when it is in possession of the burdensome leases of closed or insolvent thrifts, such leases will be disaffirmed or repudiated if such action will promote the orderly administration of the institution's affairs. If, however, the units are leased by low or moderate income tenants, the RTC will not disaffirm or repudiate such leases. A low or moderate income tenant is defined as a family or individual whose income does not exceed 115% of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size. After the disaffirmance or repudiation of a lease, the RTC may, in its discretion, offer the units for sale to existing tenants or negotiate other arrangements, provided recovery is maximized. If the existing tenants fail to enter into an agreement acceptable to the RTC, the RTC will be free to take whatever action it deems appropriate for the disposition of the units. *Diamond*, 801 F. Supp. at 1154 n.1.

132. *Id.*

133. *See* § 1441a(b)(3)(C)(v). For the text of § 1441a(b)(3)(C)(v), *see supra* note 13.

134. *Diamond*, 801 F. Supp. at 1161.

135. *Id.* at 1161-62.

136. As of November 20, 1991, the RTC, in its capacity as conservator or receiver, owned 274 rent regulated cooperative and condominium units which would be affected by its Statement of Policy. *See supra* note 132; Aff. of John R. Gillespie, Asset Specialist for the Northeast Consolidated Office of the RTC, Jan. 24, 1992, ¶ 3, Resolution Trust Corp. v. *Diamond*, 801 F. Supp. 1152 (S.D.N.Y. 1992) (No. 91-1631).

137. *See Diamond*, 801 F. Supp. at 1155-57.

law."¹³⁸ Some courts, nonetheless, have weighed the importance to the state of its own law in the initial determination of whether Congress intended preemption.¹³⁹

The *Diamond* court cited *Rowe v. Pierce*,¹⁴⁰ which was decided by the United States District Court for the District of Columbia, for the proposition that there was a presumption against the preemption of state rent regulations.¹⁴¹ In *Rowe*, Department of Housing and Urban Development ("HUD") regulations,¹⁴² which were promulgated under the authority of the National Housing Act, required tenants to sign a HUD lease as a condition of continued occupancy in property foreclosed upon by HUD.¹⁴³ This requirement, however, directly contravened the District of Columbia's rent regulations, which stated that unless the regulation provided otherwise no tenant could be evicted from a rental unit as long as the tenant continued to pay the rent.¹⁴⁴

The tenants in *Rowe* had signed a favorable three-year lease with their landlord, who subsequently defaulted on a mortgage insured by HUD.¹⁴⁵ HUD foreclosed on the property and sought to limit the lease to one year. HUD argued that its authority derived from the National Housing Act, which provided that if HUD was preparing property for sale, the continued occupancy of all tenants was temporary and subject to termination.¹⁴⁶ HUD took the position that if the tenant failed to execute a HUD lease at a fair market price, HUD could take "appropriate eviction action."¹⁴⁷

The court in *Rowe* found no preemption, since there was no evidence of congressional intent to preempt, and since HUD's regulation was not a "reasonable accommodation of conflicting policies" with respect to the tenants and HUD.¹⁴⁸ The court went on to state that it would not "lightly conclude that the federal government should be permitted to enhance the value of its property for quick sale by frustrating local law [and] extinguishing the tenants' protections against

138. *De la Cuesta*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

139. *See, e.g., Rowe v. Pierce*, 622 F. Supp. 1030 (D.D.C. 1985).

140. *Id.*

141. *Diamond*, 801 F. Supp. at 1162.

142. 24 C.F.R. § 203.670 (1992).

143. *Rowe*, 622 F. Supp. at 1031.

144. District of Columbia Rental Housing Act of 1985, § 501(a), 32 D.C. Reg. 3089 (1985).

145. *Rowe*, 622 F. Supp. at 1031.

146. 24 C.F.R. § 203.679 (1992).

147. *Id.*

148. *Rowe*, 622 F. Supp. at 1032 (citations omitted).

eviction. . . ."¹⁴⁹

Diamond's reliance on *Rowe*, however, was misplaced. First, FIRREA differs from the National Housing Act because, unlike FIRREA, "[n]othing in the [National Housing Act] or [its] legislative history indicat[ed] any congressional intent to preempt state property and contract law."¹⁵⁰ Second, the court in *Rowe* found that HUD's previous acquiescence to local law with respect to its mortgages and insurance had created a continuing obligation to observe local law.¹⁵¹ Third, HUD's powers under the National Housing Act were not granted pursuant to an emergency mandate; the Corporation, in contrast, acts pursuant to FIRREA's emergency mandate when it seeks to preempt rent regulated tenancies.¹⁵² Finally, whereas the court in *Rowe* found that the National Housing Act did not provide a reasonable accommodation of conflicting policies, Congress's statutory instructions in FIRREA provide a "reasonable accommodation" of the conflicting interests of the tenants by limiting the impact on low- and moderate-income tenants.

2. *The Agency Standard Applied To Conflict Preemption*

The court in *Diamond* imposed its own construction of FIRREA upon the RTC, narrowly reading RTC's powers so that no conflict would be found between rent regulations and the statute. This method of reasoning, however, ignores the deference that should have been accorded to RTC's interpretation of FIRREA.¹⁵³ Had the court deferred to the Policy Statement, it would have found conflict preemption.

The *Diamond* court should have applied the more deferential agency standard¹⁵⁴ to the Policy Statement.¹⁵⁵ FIRREA expressly confers agency status on RTC.¹⁵⁶ The appropriate standards for re-

149. *Id.* at 1033.

150. *Id.* at 1032.

151. *Id.*

152. See HOUSE REPORT, *supra* note 7, at 104.

153. See *supra* note 131.

154. See *infra* note 160 and accompanying text.

155. See *supra* note 131.

156. The RTC is an "instrumentality" of the United States. 12 U.S.C.A. § 1441a(b)(1)(A) (West Supp. IV 1993).

The Corporation shall be deemed to be an agency of the United States for purposes of subchapter II of chapter 5 and chapter 7 of Title 5 when it is acting as a corporation. The Corporation shall be deemed to be an agency of the United States to the same extent as the Federal Deposit Insurance Corporation when it is acting as a conservator or receiver of an insured depository institution. 12 U.S.C.A. § 1441a(b)(1)(B) (West Supp. IV 1993). Subchapter II of chapter 5 of Title 5 provides that an "agency means each authority of the Government of the United States,

view of agency actions and interpretations are set forth in the Administrative Procedure Act¹⁵⁷ and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵⁸ According to the Administrative Procedure Act, which governs judicial review of federal agency action, an agency's decision may be set aside if the decision is (1) an abuse of discretion or contrary to law, or (2) in excess of statutory authority.¹⁵⁹ The standard for reviewing an agency's interpretation of a statute it administers was set forth by the Supreme Court in *Chevron*. There, the Court described the proper standard of review where Congress has not spoken directly to the issue:

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . Such [interpretations] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹⁶⁰

Therefore, if the congressional intent underlying FIRREA is not clear, then a court's analysis of RTC's lease disaffirmance powers must be limited to whether RTC's interpretation, as expressed in its Policy Statement,¹⁶¹ is reasonable in light of Congress's instructions.¹⁶²

whether or not it is within or subject to review by another agency." Administrative Procedure Act § 10(a), 5 U.S.C. § 701(b)(1) (1988).

157. Administrative Procedure Act, 5 U.S.C.A. §§ 701-706 (1992).

158. *Chevron U.S.A., Inc.*, 467 U.S. 837.

159. 5 U.S.C. §§ 706(2)(A) & (C). Section A also provides for review of agency actions which are arbitrary and capricious, but this is not an issue since FIRREA contains protections for low and moderate income tenants, and RTC seeks to disaffirm the leases of those with higher incomes because they have the ability to pay for higher rents.

160. *Chevron*, 467 U.S. at 843-44; see *Resolution Trust Corp. v. Cedarminn Bldg. Ltd. Partner*, 956 F.2d 1446, 1450-51 (8th Cir.), *cert. denied*, 113 S. Ct. 94 (1992); *Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 936 (10th Cir. 1991); *Securities Indus. Ass'n v. Board of Governors*, 839 F.2d 47, 52-53 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988).

161. See *supra* note 131.

162. Although an interpretation of a statute expressed in a policy statement is not as authoritative as a regulation (as was the case in *Chevron*), it is still entitled to deference. *Pacific Gas & Elec. Co. v. Federal Power Com'n.*, 506 F.2d 33, 40 (D.C. Cir. 1974); see also *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1002 (2d Cir.) (finding the distinction between formal rules and interpretive rules or general statements of policy to be vague, but the latter being entitled to judicial respect if a reasonable interpretation), *aff'd*, 474 U.S. 801 (1985). Such interpretations "constitute a body of experience and informed judgment," the weight of which depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pro-

The Policy Statement did not offer an unreasonable interpretation of Congress's intent. First, as discussed earlier,¹⁶³ RTC's position that the power to disaffirm a lease encompasses the landlord-tenant relationship comports with the common usage of the term "lease." Second, in accordance with the congressional instruction¹⁶⁴ to maximize the supply of affordable housing for low- and moderate-income tenants, RTC adopted the policy of not disaffirming any lease that was held by low- or moderate-income tenants.¹⁶⁵ Finally, where the lease was held by a higher income tenant, RTC could either offer to sell the unit to the existing tenant or negotiate another arrangement, provided however, that the sale or renegotiation complied with the congressional instructions to maximize recovery.¹⁶⁶ Only after an existing higher income tenant has refused either of these options would RTC become free to dispose of the unit.¹⁶⁷

In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,¹⁶⁸ the Supreme Court stated the standard for finding an agency's interpretation "arbitrary, capricious or manifestly contrary to the statute."¹⁶⁹ Under this standard, RTC's interpretation must be applied unless RTC

relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁷⁰

RTC's interpretation of its lease disaffirmance powers is not unreasonable under the *State Farm* standard. It is a reasonable construction of Congress's instructions,¹⁷¹ and accommodates the competing policies underlying rent regulation and the need to liquidate assets at minimal taxpayer expense. Tenants who can afford to pay market rates may have their subsidized leases repudiated in preparation for an asset

nouncements, and all those factors which give it power to persuade, if lacking power to control." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

163. *Supra* notes 95-96 and accompanying text.

164. 12 U.S.C. § 1441a(b)(3)(C)(v). For the text of § 1441a (b)(3)(C)(v), see note 13.

165. *Supra* note 131.

166. *See* 12 U.S.C. § 1441a (b)(3)(C)(i), (iii) and (v). *See supra* note 131 for the text of § 1441a(b)(3)(C)(i).

167. *See supra* note 131.

168. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

169. *State Farm*, 463 U.S. at 43.

170. *Id.*; *Soler v. G & U, Inc.*, 833 F.2d 1104, 1107 (2d Cir. 1987), *cert. denied*, 488 U.S. 832 (1988).

171. *See supra* notes 163-67 and accompanying text.

sale; however, the leases of low- or moderate-income tenants, who would be more adversely affected by displacement, are not subject to repudiation. Thus, under the Supreme Court's decision in *State Farm*, RTC's interpretation should survive judicial challenge.

*Colorado State Banking Board v. Resolution Trust Corp.*¹⁷² illustrates an application of the *Chevron* standard for review of an agency's interpretation of a statute. In *Colorado*, the Tenth Circuit determined that FIRREA authorized RTC to override the state branch-banking laws.¹⁷³ The issue arose because RTC had relied upon FIRREA¹⁷⁴ and promulgated a regulation that preempted state banking laws which had prohibited banks from operating failed thrift offices as bank branches.¹⁷⁵

The State, contending that preemption was not warranted, had asserted that no absolute conflict between state and federal law existed since RTC was not required to contravene state law by marketing the failed thrift as a bank branch.¹⁷⁶ Instead, the state argued, the conflict between FIRREA and state law was avoidable since the acquired offices could have been marketed as thrift subsidiaries or as independently chartered and capitalized banks.¹⁷⁷

The court observed that RTC possessed broad authority to issue interpretive rules, regulations, policies, guidelines, and statements that RTC considered necessary to carry out its statutory purpose.¹⁷⁸ The court found that although other marketing options were available, the RTC was not required to choose an alternative simply to avoid conflict with state law, where the alternative risked impeding the fulfillment of RTC's statutory mandate.¹⁷⁹

The Tenth Circuit's reasoning applies as well to the RTC's position that it may repudiate leases without regard to the existence of statutory tenancies.¹⁸⁰ The RTC should not be required to act contrary to its statutory mandate to maximize revenues simply because the RTC can sell rent regulated units without repudiating the corresponding leases.

172. *Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 936 (10th Cir. 1991).

173. *Id.* at 936.

174. 12 U.S.C. § 1823(k) (Supp. IV 1993).

175. *Colorado State Banking Bd.*, 926 F.2d at 937; see also *Arkansas State Bank Comm'r v. Resolution Trust Corp.*, 911 F.2d 161 (8th Cir. 1990) (upholding RTC preemption of regulations for state bank branching laws under 12 U.S.C. § 1823(k)).

176. *Colorado State Banking Bd.*, 926 F.2d at 938.

177. *Id.*

178. *Id.* at 945 (interpreting 12 U.S.C. § 1441(b)(12)(A)).

179. See *id.*

180. See *supra* note 131.

3. *Objections to Agency Deference*

According deference to RTC's interpretation of its lease disaffirmance powers might raise jurisdictional objections.¹⁸¹ In *Adams Fruit Co. v. Barrett*,¹⁸² the Supreme Court recently stated that "an agency may not bootstrap itself into an area in which it has no jurisdiction."¹⁸³ Under FIRREA, RTC's interpretation of its lease disaffirmance powers may be construed as either 1) an authorized application of the Corporation's powers or 2) an expansion of the Corporation's jurisdiction. Justices White and Scalia have indicated that where such an ambiguity exists, deference to the agency's interpretation is both necessary and appropriate.¹⁸⁴ The Supreme Court has deferred to an agency's interpretation of its own powers so long as the interpretation does not expand the agency's authority into broad, new areas of regulation.¹⁸⁵ Even if RTC's interpretation would have the effect of expanding its jurisdiction, it is still entitled to deference since the expansion of jurisdiction would be, at most, marginal. RTC's interpretation confirms the Corporation's power to disaffirm rent regulated leases without state interference. The interpretation does not grant the power to regulate tenancies; nor does it extend beyond leasehold arrangements. RTC's interpretation of its lease disaffirmance powers does not attempt to expand into a broad, new area of regulation. Therefore, the jurisdictional objections discussed in *Adams Fruit*

181. See generally Cass Sunstein, *Law and Administration*, 90 COLUM. L. REV. 2071, 2097-2101 (1990).

182. *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990).

183. *Id.* at 650 (1990); see also *National Wildlife Fed'n v. I.C.C.*, 850 F.2d 694, 699 n.6 (D.C. Cir. 1988) (acknowledging that special concerns are raised when an agency's interpretation of a statute increases its own authority or jurisdiction).

184. See *Dole v. Steelworkers of Amer.*, 494 U.S. 26, 54 (1990) (White, J., dissenting); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 377-83 (1988) (Scalia, J., concurring).

Giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is necessary because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. . . . Deference is appropriate because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory jurisdiction or authority.

Id.; Sunstein, *supra* note 181, at 2097.

185. *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (deferring to Customs Service interpretation of its power to regulate "gray market goods" infringing on trademark rights); *Equal Employment Opportunity Comm'n v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1987) (deferring to EEOC interpretation of statute governing timely filing of complaints).

*Co.*¹⁸⁶ are inapplicable.

Another possible objection is that RTC's policy statement, which set forth its interpretation of section 1821(c)(2)(C),¹⁸⁷ was not subjected to the formal notice and comment proceedings that are required for rulemaking. Since policy statements may be adopted without public participation, the scope of judicial review for such interpretations may be broader than for a rule adopted pursuant to formal rulemaking proceedings.¹⁸⁸

In *Bowen v. Georgetown University Hospital*,¹⁸⁹ the Supreme Court refused to defer to an agency's "convenient litigating position."¹⁹⁰ RTC's Policy Statement, however, rises above an interpretation offered by an attorney at trial. The Policy Statement is based on the expertise of the agency. As the Supreme Court has stated, an agency's interpretation constitutes "a body of experience and informed judgment," the weight of which depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹⁹¹ Although an interpretation of a statute expressed in a policy statement is not subject to the same notice and comment proceedings as a regulation, it is still entitled to deference.¹⁹²

D. Policy Considerations

Congress recognized the troubled state of the thrift industry as a national problem.¹⁹³ In response, Congress set forth in FIRREA a framework for a federal program to be administered by the Corporation.¹⁹⁴ The efficient functioning of the thrift industry is integral to the health of the housing industry and to maintaining a viable system of affordable housing throughout the country.¹⁹⁵ Allowing higher-income tenants to continue to occupy their rent regulated dwellings at

186. *Adams Fruit Co.*, 110 S. Ct. 1384, 1390-91.

187. *See supra* note 132.

188. *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974)

189. 488 U.S. 204 (1988).

190. *Id.* at 474.

191. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

192. *Pacific Gas & Elec. Co.*, 506 F.2d at 40; *see also* *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1002 (2d Cir. 1985) (finding the distinction between formal rules and interpretive rules or general statements of policy to be vague, but the latter being entitled to judicial respect if a reasonable interpretation).

193. *See* HOUSE REPORT, *supra* note 7, at 100-05.

194. *Id.*

195. *Id.* at 103-05.

below market rates results in a transfer of the Corporation's possessory interest in the units to these tenants.¹⁹⁶ This lack of a possessory interest on the part of the Corporation makes the rent regulated units less attractive to potential investors in a liquidation sale. This clearly impedes the Corporation's ability to maximize the net present value of the assets of failed thrift institutions, resulting in wasted taxpayer dollars.

The protection extended to a tenant under rent regulation must be comparable with the extent of the emergency.¹⁹⁷ The New York State Legislature's recent decontrol of luxury units is indicative of a growing awareness that rent control has benefitted all classes and not just the needy. Although the luxury units of certain wealthy tenants have been decontrolled,¹⁹⁸ higher income tenants still reap the subsidies from their rent regulated units.¹⁹⁹ These higher-income tenants, who tend to occupy the more expensive units, benefit from larger rent savings than low- and moderate-income tenants under rent regulations.²⁰⁰ Higher-income tenants do not need the protection afforded by rent regulation and should therefore be given the option of either purchasing their properties from the Corporation at market value, paying the market rental cost of the units, or moving to another residence. These options would prevent higher-income tenants from having their housing subsidized by taxpayers.

Governments traditionally have met the needs of those who cannot afford to pay "reasonable prices" for necessities through the distribution of taxpayer funds, either in the form of cash subsidies or in-kind benefits.²⁰¹ The provision of basic necessities has been found to be a burden which, in the interests of fairness, ought to be borne by the public as a whole.²⁰² Few, however, would argue that nonincentive subsidies provided at taxpayer expense to those with higher incomes forward any clear policy interest. Therefore, whenever the federal government's interest conflicts with state and local rent regulations,

196. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

197. *Glauberman v. University Place Apartments*, 66 N.Y.S.2d 335, 336 (Sup. Ct. 1946).

198. See Rent Regulation Reform Act of 1993, ch. 253, § 2, 1993 N.Y. LAWS 675 (McKinney 1993).

199. See *supra* note 42.

200. In 1987, one-quarter of rent regulated households with incomes above the New York City mean family income accounted for approximately half of total subsidies due to rent regulation. RENT CONTROL REPORT, *supra* note 27, at 13, 16, 18.

201. *Pennell v. City of San Jose*, 485 U.S. 1, 23 (1988).

202. *Id.* at 22.

such an interest should not be subordinate to those of higher income tenants benefitting under rent regulation.

V. Conclusion

The savings and loan crisis has had a significant impact on the national deficit, interest rates, employment, and the economy as a whole. The Corporation has a vital role in the resolution of the savings and loan crisis; if it were forced to halt its resolution activities, the banking structure of the United States would be tremendously weakened as undercapitalized banks would continue to cause instability throughout the entire banking system.

Rather than acknowledge the Corporation's power to preempt state rent regulations that interfere with its ability to disaffirm the leases of higher-income tenants, the court in *Diamond* imposed its own construction of FIRREA on the Corporation. In effect, the court authorized rent subsidies for those who need them least. Furthermore, the court contravened section 1821(j)²⁰³ which, at a minimum, should have curtailed the court from restraining RTC in the exercise of its congressional mandate.

When courts restrain the Corporation's efforts to resolve the savings and loan crisis, the taxpayers absorb the cost. The public's best interest, therefore requires that courts recognize the Corporation's broad power. To further aid the courts in their interpretation of FIRREA, Congress should explicitly address the Corporation's ability to preempt state regulations under section 1821(c)(2)(C)²⁰⁴ by defining the term "lease," as used in section 1821(e)(1),²⁰⁵ to encompass the occupancy rights held by tenants under rent regulated leases. Even without a direct Congressional statement on the matter, courts should recognize the broad scope of the Corporation's lease disaffirmance powers.

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203. See 12 U.S.C.A. § 1821(j). For the text of § 1821(j), see *supra* note 78.

204. 12 U.S.C.A. § 1821(e)(1). For the text of § 1821(e)(1), see *supra* note 15.

205. 12 U.S.C.A. § 1821(c)(2)(C). For the text of § 1821(c)(2)(C), see *supra* note 16.

