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Morrison-Knudsen Co. v. CHG International: The Federal Savings and Loan Insurance Corporation's Authority to Adjudicate Creditor Claims Against Its Receiverships

The Federal Savings and Loan Insurance Corporation (FSLIC), a division of the Federal Home Loan Bank Board (FHLBB), insures depositor accounts in savings and loan associations.¹ The FSLIC's role as insurer involves both regulating the financial health of insured institutions to prevent default and paying deposit insurance when it cannot prevent default.² If an insured institution does fail, the FHLBB may appoint the FSLIC receiver of the failed institution under certain circumstances.³ In its role as receiver, as distinguished from its role as insurer, the FSLIC assumes control of the failed institution, liquidating the institution's assets when the FSLIC cannot sell the institution or restore it to a profitable condition.⁴

When the FSLIC liquidates an institution, it evaluates the claims of the institution's creditors and pays those it deems valid.⁵ Creditors whose claims are disputed by a receiver traditionally may bring suit in court to establish the validity of their claims.⁶ Recently, however, the FSLIC began asserting the

1. See 12 U.S.C. § 1725(a) (1982). Congress created the FSLIC in 1934 as a counterpart to the Federal Deposit Insurance Corporation (FDIC), instituted in 1933 to insure banks. See T. MARVELL, *THE FEDERAL HOME LOAN BANK BOARD* 27-28 (1969). In structure, however, the FSLIC, a division of the FHLBB, differs from the FDIC, an independent agency. See *id.* at 85.

2. See, e.g., 12 U.S.C. § 1726(b) (1982) (providing that institutions applying for FSLIC insurance must agree to periodic examinations by FSLIC); *id.* § 1730(b) (providing for termination of institution's insurance by FSLIC under certain conditions).

3. See *infra* notes 30-31 and accompanying text.

4. See *infra* note 34 and accompanying text. The FSLIC works hard to prevent liquidating institutions. In 1986, for example, the FSLIC assisted in the sale of 27 troubled institutions, inducted 23 institutions into its Management Consignment Program, transferred accounts from 11 institutions to various new institutions, and liquidated 10 institutions, only two of which required cash payouts. See FHLBB ANN. REP. 27 (1986).

5. See *infra* notes 35, 37-42 and accompanying text.

6. See *infra* notes 25-28 and accompanying text.

right to adjudicate disputed creditor claims itself, denying creditors their traditional access to the courts⁷ and prompting them to challenge the FSLIC's authority for such actions.⁸

In a recent case addressing the FSLIC's authority to adjudicate creditor claims, a borrower sued Gibraltar Savings of Washington (Gibraltar) in an Oregon state court to have the court declare his repayment obligation void.⁹ Gibraltar impleaded Westside Federal Savings and Loan Association (Westside) as guarantor on the loan and removed the case to federal court.¹⁰ Meanwhile, Westside became insolvent and the FHLBB appointed the FSLIC receiver for Westside.¹¹ After the receivership appointment, the court substituted the FSLIC for Westside as a party in the pending suit.¹² The FSLIC moved to dismiss Gibraltar's third-party claim for lack of subject matter jurisdiction, alleging the FSLIC had exclusive authority to adjudicate creditor claims against its receiverships.¹³

7. See *infra* notes 17-21 and accompanying text.

8. See *infra* note 50.

9. *Morrison-Knudsen Co. v. CHG Int'l*, 811 F.2d 1209, 1212 (9th Cir. 1987).

10. *Id.* at 1213.

11. *Id.* The FHLBB appointed the FSLIC receiver pursuant to 12 U.S.C. § 1464(d)(6)(A) (1982), which provides in relevant part:

The grounds for the appointment of a . . . receiver for an association shall be one or more of the following: . . . insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members The [FHLBB] shall have exclusive power and jurisdiction to appoint a . . . receiver. If, in the opinion of the [FHLBB], a ground for the appointment of a . . . receiver as herein provided exists, the [FHLBB] is authorized to appoint *ex parte* and without notice a . . . receiver for the association.

Id.

12. *Morrison-Knudsen*, 811 F.2d at 1213. The appointment of a receiver does not affect pending suits, but courts may, upon the receiver's application, substitute the receiver for the insolvent institution. See, e.g., *Hardman v. Whitney*, 176 Okla. 142, 144, 54 P.2d 1065, 1067 (1936) (receivers not necessary parties to suits pending against receivership property at time of appointment); *Garrett v. Nespelem Consol. Mines*, 18 Wash. 2d 340, 345-46, 139 P.2d 273, 276 (1943) (court may substitute receiver as party in pending suit upon application of receiver).

13. *Morrison-Knudsen*, 811 F.2d at 1213. The FSLIC has no claim to sovereign immunity in such suits. Section 1729(c)(4) provides that the FSLIC may "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States." 12 U.S.C. § 1729(c)(4) (1982). Such statutes operate as congressional waivers of a federal agency's sovereign immunity. See, e.g., *FHA v. Burr*, 309 U.S. 242, 245 (1940) (holding that "sue and be sued" clause creates presumption that agency is as amenable to judicial process as private enterprise in same situation); *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364, 369 (7th Cir.) (finding that "sue and be sued" clause acts as waiver of sovereign immunity for federal agencies), *cert. denied*, 444 U.S. 829 (1979).

The district court granted the motion.¹⁴ In *Morrison-Knudsen Co. v. CHG International*,¹⁵ the United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the FSLIC does not have power to adjudicate creditor claims.¹⁶

Until the early 1980s, little controversy existed as to the extent of the FSLIC's receivership powers. Only thirteen savings and loan failures before 1980 required FSLIC payouts to depositors.¹⁷ Recently, however, savings and loan associations have been failing at an unprecedented rate.¹⁸ This trend threatens the FSLIC's financial stability and pressures the FSLIC to recoup its insurance payouts as rapidly as possible through prompt liquidation of failed institutions' assets.¹⁹ To achieve this goal, the FSLIC has interpreted the relevant statutes and regulations as granting it sole jurisdiction over the receivership process, including adjudication of creditor claims, subject to review by the FHLBB.²⁰ Under the FSLIC's inter-

14. *Morrison-Knudsen*, 811 F.2d at 1213. The district court opinion is reported at *Rembold v. Gibraltar Sav. & Loan Ass'n*, 624 F. Supp. 1006, 1007 (W.D. Wash. 1985). On appeal the Ninth Circuit consolidated the Gibraltar case and four other cases involving similar creditor claims against Westside. In four of the five cases, the district courts had granted the FSLIC's motion to dismiss the case. In the fifth case, the district court had denied the FSLIC's motion, prompting the FSLIC to appeal the denial immediately without waiting for a final judgment. *Id.* The *Morrison-Knudsen* court, after a discussion of legal principles irrelevant to this Comment, dismissed the appeal in the fifth case because the district court's denial of the motion to dismiss was not an appealable interlocutory order. *Id.* at 1214-15. The court also dismissed one of the other appealed cases because the original plaintiffs failed to appeal and a defendant who had cross-claimed against the FSLIC brought the appeal. The court stated that "[i]t is hornbook law that 'a party may only appeal to protect its own interests, and not those of a coparty.'" *Id.* at 1214 (quoting *Libby, McNeill, & Libby v. City Nat'l Bank*, 592 F.2d 504, 511 (9th Cir. 1978)).

15. 811 F.2d 1209 (9th Cir. 1987).

16. *Id.* at 1222.

17. Grant, *The FSLIC*, FED. HOME LOAN BANK BOARD J. 9, 9 (Feb. 1981), cited in *Morrison-Knudsen*, 811 F.2d at 1216.

18. In 1986, for example, the FSLIC ended the year with 183 defaulted institutions in its caseload compared with 91 such cases at the end of 1985. FHLBB ANN. REP. 27 (1987).

19. See, e.g., Carrizosa, *Appeal Court Cuts Agency's Powers Over Debt Payouts: Circuits Split on Issue*, 100 L.A. Daily J., Feb. 26, 1987, at 1, col. 2 (FSLIC adjudication of creditor claims speeds up reimbursement of insurance fund).

20. See *infra* notes 25-44 and accompanying text. For an early case in which the FHLBB maintained the right to adjudicate creditor claims, see *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251 (D. Haw. 1981). The court dismissed the case because the plaintiff failed to name the FHLBB as a party, but the court noted in dicta that the FHLBB's position does not deny all judicial review of creditor claims because review is still available under the Administrative Procedure Act (APA). *Id.* at 254.

pretation, courts have jurisdiction only to review the FSLIC's adjudication of claims under the deferential standards of the Administrative Procedure Act (APA).²¹ The two other circuits besides the Ninth Circuit to rule on the issue adopted the FSLIC's position, and numerous district courts have followed suit.²²

This Comment considers whether the FSLIC has or should have the right to adjudicate creditor claims against its receiverships. Part I briefly discusses the relevant statutes and regulations governing the FSLIC's receivership powers, pre-*Morrison-Knudsen* cases interpreting the extent of the FSLIC's powers, and the restrictions on administrative agency adjudication imposed by article III of the Constitution. Part II examines the Ninth Circuit's decision in *Morrison-Knudsen* that the FSLIC does not have the power to adjudicate creditor claims. Part III analyzes the relevant statutes and regulations, the statutory scheme, constitutional issues, and the policy considerations not addressed by the Ninth Circuit in *Morrison-Knudsen*. The Comment concludes that although the Ninth Circuit correctly decided *Morrison-Knudsen*, Congress should pass new legislation regulating creditor claims in FSLIC receiverships to protect both creditors and the FSLIC.

I. FSLIC RECEIVERSHIP POWERS

A. STATUTORY RECEIVERSHIP POWERS

Courts with jurisdiction over an insolvent institution generally appoint a receiver to liquidate the institution's assets.²³ The receiver, as representative of the court, acts under the court's direction and obtains its powers only from the court or applicable statutes.²⁴

21. The APA provides different standards of review for general agency action and agency hearings specifically provided for by statute. 5 U.S.C. § 706 (1982). The standard for general agency action is "arbitrary, capricious, an abuse of discretion." *Id.* § 706(2)(A). Agency hearings, in contrast, receive the less deferential standard of "unsupported by substantial evidence." *Id.* § 706(2)(E). Because hearings on creditor claims are not explicitly provided for in the statute, the arbitrary and capricious standard would probably apply. See *Morrison-Knudsen*, 811 F.2d at 1222.

22. See *infra* note 50 and accompanying text.

23. See, e.g., *Drexler v. Walters*, 290 F. Supp. 150, 154 (D. Minn. 1968) (receivers subject to control of appointing court).

24. See, e.g., *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 413 (1944) (receiver's duties limited to those conferred by court); *Taylor v. Sternberg*, 293 U.S. 470, 472 (1935) (receiver is officer of appointing court); *Parcells v. Price*,

In handling creditor claims against an insolvent institution, a court-appointed receiver normally has the power to make a preliminary determination as to what claims the court should allow.²⁵ If the receiver disallows a claim, the applicable statute²⁶ provides for appeal to the court that appointed the receiver, resulting in a trial on the merits of the claim.²⁷ Once the receiver has settled and prioritized all creditor claims, the court issues an order permitting distribution of the receivership assets.²⁸

In addition to allowing state courts to appoint the FSLIC receiver for defaulted state savings and loan associations,²⁹ Congress granted the FHLBB the power to appoint the FSLIC receiver in certain enumerated situations for both defaulted federal³⁰ and state associations.³¹ Furthermore, if the defaulted

110 Mont. 537, 540, 104 P.2d 12, 13 (1940) (receiver's powers limited to those conferred by court or statute).

25. In making this determination, the receiver can conduct hearings, including the examination of claimants and witnesses, and require the production of documents. *See, e.g., Jacobs, Receivership Practice in the Delaware Courts*, 6 DEL. J. CORP. L. 487, 499 (1981) (describing receivership practice under Delaware law); Wyatt, *State Court Receiverships in North Carolina*, 17 WAKE FOREST L. REV. 745, 756 (1981) (describing receivership practice under North Carolina law).

26. Receivership practice is typically governed by state statutes. *See, e.g., DEL. CODE ANN. tit. 5, §§ 131, 1709* (1985) (governing Delaware receivership practice for banks and building and loan associations).

27. *See, e.g., Jacobs, supra note 25, at 499; Wyatt, supra note 25, at 756.*

28. Wyatt, *supra note 25, at 761.*

29. When the grounds for FHLBB appointment of the FSLIC as receiver of a defaulted state association are not present, the FHLBB may offer the receivership services of the FSLIC to the state court having jurisdiction over the defaulted state savings and loan association. 12 U.S.C. § 1729(c)(1) (1982). The state, however, is under no obligation to accept the FSLIC as receiver. In fact, most state courts prefer to appoint their own receivers. *See, e.g., DEL. CODE ANN. tit. 5, § 1709* (1985) (providing for appointment of State Bank Commissioner as receiver for failed building and loan associations). Congress originally passed § 1729(c)(2), which allows the FHLBB to appoint the FSLIC receiver of state associations in certain situations, in response to a severe financial drain on the FSLIC caused by the slow progress of several simultaneous state court receiverships. *See T. MARVELL, supra note 1, at 105.* It is important to distinguish between FSLIC receiverships in which the FHLBB appointed the FSLIC and those in which a state authority appointed the FSLIC because § 1729(d) specifically reserves regulatory authority over the receivership to state authorities that appoint the FSLIC receiver. *See infra note 36.*

30. 12 U.S.C. § 1464(d)(6)(A) (1982). These situations include insolvency; "substantial dissipation of assets or earnings due to any violation . . . of law, rules, or regulations, or to any unsafe or unsound practice;" "unsafe or unsound conditions to transact business;" "willful violation of a cease-and-desist order which has become final;" and concealment of certain association records

association does not challenge the receivership within thirty days,³² section 1464(d)(6)(C) of title 12 in the United States Code, the "restrain or affect" provision, forbids courts to interfere with the FSLIC's receivership functions.³³

When either the FHLBB or a state authority appoints the FSLIC receiver of a defaulted thrift institution, section 1729(b)(1) of title 12 in the United States Code, the "payment" provision, authorizes the FSLIC to take a variety of actions, including merging the association with another institution, organizing a new institution to assume its assets, or liquidating

or refusal to submit such records to the FHLBB. *Id.* The FHLBB appointed the FSLIC receiver for Westside pursuant to this statute. *See supra* note 11.

31. The FHLBB may appoint the FSLIC receiver of a state-chartered institution when the grounds for appointment of a federal receiver under § 1464(d)(6)(A) exist, *see supra* note 30, when the appropriate authority has appointed a receiver whose appointment has been outstanding for at least 15 days, and when a holder of a withdrawable account is unable to obtain a withdrawal. 12 U.S.C. § 1729(c)(2) (1982).

In 1982 Congress further strengthened the power of the FHLBB over state savings and loan associations by adding a new subsection to § 1729(c) which gives the FHLBB the power to immediately appoint the FSLIC receiver of a failed state institution whenever any of the grounds specified in § 1464(d)(6)(A)(i), (ii), or (iii) exists. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), (f), 96 Stat. 1482 (1982) (codified at 12 U.S.C. § 1729) (DIA). Congress also amended § 1729(c)(3) to extend the application of § 1464(d), *see supra* note 30 and accompanying text; *infra* notes 32-33 and accompanying text, to all FSLIC receiverships, even when a state court appoints the FSLIC as receiver. The Senate Report interpreting the DIA described § 122 as "provid[ing] the FSLIC with . . . receivership powers over State-Chartered insured institutions approximately equal to those which it now has with respect to Federal Associations." S. REP. NO. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3102. The provisions of the DIA expired on October 13, 1986. *See* Act of Oct. 8, 1986, Pub. L. No. 99-452, § 1(c), 100 Stat. 1140 (1986) (codified as amended at 42 U.S.C. § 1729 (Supp. IV 1987)). Nevertheless, an amendment to the DIA provided that "[t]he repeal . . . shall have no effect on any action taken or authorized pursuant to the amendments made by this title." Act of Jan. 12, 1983, Pub. L. No. 97-457, § 11, 96 Stat. 2507, 2508 (1983) (codified as amended at 12 U.S.C. § 1729 (Supp. IV 1987)). For this reason most of the cases cited in this Comment, including the principal case, were decided under the amendments made by the DIA. On August 10, 1987, Congress reinstated the provisions of the DIA when it passed the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 509, 101 Stat. 552, 635 (1987) (to be codified at 12 U.S.C. § 1464).

32. 12 U.S.C. § 1464(d)(6)(A) (1982) permits an association to challenge the appointment of a receiver in federal district court, provided the association files suit within 30 days of such appointment.

33. *Id.* § 1464(d)(6)(C). "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any . . . receiver, or, except at the instance of the Board, *restrain or affect* the exercise of powers or functions of a . . . receiver." *Id.* (emphasis added).

the association.³⁴ The payment provision further directs the FSLIC to "pay all valid credit obligations of the association."³⁵ In addition, when the FSLIC liquidates an insured institution, section 1729(d), the "necessary action" provision, authorizes the FSLIC to settle claims made against the receivership and do all other things necessary to the liquidation, subject to the control of the FHLBB or the appropriate public authority.³⁶

To supplement the FSLIC's statutory authority, the FHLBB has promulgated regulations governing the FSLIC's handling of creditor claims in receiverships.³⁷ The regulations require notice to possible claimants and a deadline for the filing of claims.³⁸ When creditors file claims, the FSLIC, as the receiver, examines the claims, allowing claims received before the deadline that claimants prove to the FSLIC's satisfaction.³⁹ The FSLIC may disallow any claims not so proved.⁴⁰ The regulations do not dictate procedures for the evaluation of claims,⁴¹ but they do provide that disallowance is final unless the claimant protests in writing within thirty days.⁴² After the deadline for submitting claims has passed, the FSLIC files with the

34. *Id.* § 1729(b)(1)(A). The statute leaves the choice of actions to the FSLIC's discretion, stating "whichever it deems to be in the best interest of the association, its savers, and the [FSLIC]." *Id.*

35. *Id.* § 1729(b)(1)(B).

36. *Id.* § 1729(d). The statute authorizes the FSLIC

to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [FHLBB], or, in cases where the [FSLIC] has been appointed . . . receiver . . . solely by a public authority having jurisdiction over the matter other than [the FHLBB], subject only to the regulation of such public authority.

Id.

37. *See* 12 C.F.R. § 549.4 (1987) (governing creditor claims when the FSLIC acts as receiver for federal associations); *id.* § 569a.8 (governing creditor claims when the FSLIC acts as receiver for state associations). Because the regulations governing state and federal associations are similar, this Comment will discuss and quote the federal association regulations but will note any significant differences between the two sets of regulations.

38. *Id.* § 549.4(a). The regulation provides for both notice by publication and notice by mail to creditors on the books of the institution. The length of time allowed for the submission of claims is left to the FSLIC's discretion, but the deadline must be at least 90 days after the notice is first published. *Id.*

39. *Id.* § 549.4(b) ("The receiver shall allow any claims seasonably received and proved to its satisfaction.").

40. *Id.* ("The receiver may wholly or partly disallow any creditor claim . . . not so proved . . .").

41. *Id.*

42. *Id.* "Unless, within 30 days after notice is mailed, the claimant files a written request for payment . . . disallowance shall be final . . ." The regula-

FHLBB a list of claims together with its decision on the claims,⁴³ and then pays the allowed claims as directed by the FHLBB.⁴⁴

B. COURT DECISIONS ON THE FSLIC'S ADJUDICATORY POWER

The FSLIC asserts that the relevant statutes and regulations grant it exclusive authority to adjudicate creditor claims against its receiverships, denying district courts subject matter jurisdiction over such claims.⁴⁵ In 1985 the Fifth Circuit, in *North Mississippi Savings & Loan v. Hudspeth*,⁴⁶ adopted the FSLIC's interpretation, holding that federal courts do not have jurisdiction to adjudicate creditor claims against the FSLIC except for review under the APA.⁴⁷ Avoiding the threshold issue of whether adjudication of creditor claims is a receivership function, the *Hudspeth* court asserted that judicial adjudication of such claims would delay the distribution of assets, which is clearly a receivership function.⁴⁸ The court noted, however, that FHLBB regulations "are evidence that adjudication is a receivership function."⁴⁹ The Seventh Circuit and various district courts have followed *Hudspeth*, dismissing creditor claims against FSLIC receiverships for lack of subject matter jurisdiction.⁵⁰

tions governing state associations do not contain this provision. *See id.* § 569a.8.

43. *Id.* § 549.4(c). The FSLIC files a "list of claims presented, indicating the character of each claim and whether allowed by the receiver." *Id.*

44. *Id.* § 549.4(d). "Creditor claims which were allowed by the receiver . . . shall be paid by the receiver . . . in such manner and amounts as the [FHLBB] may direct." *Id.* The regulations governing state associations do not contain this provision. *See id.* § 569a.8.

45. *See supra* notes 20-21 and accompanying text.

46. 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

47. The court conducted a cursory examination of the relevant statutes and regulations, focusing on the prohibition against restraining or affecting the FSLIC's receivership functions in 12 U.S.C. § 1464(d)(6)(C) (1982). The court concluded:

[R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

Id. at 1102.

48. *Id.*

49. *Id.* at 1102 n.5 (emphasis in original).

50. The Seventh Circuit followed *Hudspeth* in *Lyons Sav. & Loan Ass'n v. Westside Bancorp.*, 828 F.2d 387 (7th Cir. 1987). The plaintiffs in *Lyons* sought

Courts supporting the FSLIC's position emphasize the FSLIC's financial predicament and the need to maintain public confidence in the savings and loan industry.⁵¹ These courts find reflected in the statutes an overriding congressional intent of allowing the FSLIC to recoup its insurance payouts rapidly.⁵² Furthermore, some courts have declared that the plain meaning of the relevant statutes supports the FSLIC's interpreta-

declaratory judgment against the FSLIC as receiver for a defaulted institution that had served as lead lender in a finance agreement with the plaintiffs, other savings and loan associations. *Id.* at 388. The plaintiffs asserted the right to strip the failed institution of its lead lender status by election among themselves. *Id.* The court noted the conflict between the circuits over the issue of FSLIC adjudication of creditor claims but declined to decide whether or not the adjudication of claims is a receivership function for the FSLIC. *Id.* at 392. Apparently the parties failed to challenge the authority of the FSLIC to adjudicate claims but rather asserted that adjudication of their claim would not restrain or affect the receivership within the meaning of the statute. *Id.* at 391. Assuming that the FSLIC was empowered to adjudicate claims, the court held that a determination to strip the FSLIC receivership of lead lender status would restrain or affect the FSLIC based on *Hudspeth's* broad interpretation of the phrase. *Id.* at 394-95.

Several district courts have followed *Hudspeth's* holding. *See, e.g.,* Acquisition Corp. v. Sunrise Sav. & Loan Ass'n, 659 F. Supp. 138, 140 (S.D. Fla. 1987) (reasoning in *Hudspeth* persuasive); Federal Sav. & Loan Ins. Corp. v. Oldenburg, 658 F. Supp. 609, 611 (D. Utah 1987) (statutory scheme supports *Hudspeth's* interpretation); First Fin. Sav. & Loan v. Federal Sav. & Loan Ins. Corp., 651 F. Supp. 1289, 1291 (E.D. Ark. 1987) (overwhelming majority of courts follow *Hudspeth*).

51. "The FSLIC's primary responsibility is to guarantee FSLIC-insured deposits, and to do so in a way that bolsters public confidence in America's financial institutions." FHLBB ANN. REP. 25 (1986). There is no doubt that the FSLIC is in an unstable condition which undermines public confidence in the thrift industry. *See supra* notes 17-19 and accompanying text. The FSLIC's primary reserve fund is under severe stress. The high rate of savings and loan failures has forced the FSLIC to use large amounts of its reserve fund's cash to pay insured depositors in liquidated institutions. FHLBB ANN. REP. 25 (1986). A recent article advised investors concerned about protecting their investment to deposit their money in institutions insured by the FDIC rather than the FSLIC because of the depleted condition of the FSLIC's reserves, thereby implying that the FSLIC might default on its insurance obligations. Anderson & Binstein, *Is Your Deposit Safe?*, Parade, Sept. 20, 1987, at 15. In response to this crisis, Congress passed the Federal Savings and Loan Insurance Corporation Recapitalization Act of 1987, Pub. L. No. 100-86, § 302, 101 Stat. 552, 585 (1987) (to be codified at 12 U.S.C. § 1441), which supplements FSLIC reserves. The bill establishes a Financing Corporation which is authorized to raise capital for the FSLIC by the sale of bonds. The FSLIC began marketing the bonds in September of 1987. *See Yang, S & Ls Operated by FSLIC Incur Large Losses*, Wall St. J., Sept. 22, 1987, at 23, col. 1.

52. *See, e.g., Hudspeth*, 756 F.2d at 1102 (Congress intended to expedite liquidation of FSLIC receiverships); Federal Sav. & Loan Ins. Corp. v. Hall Whispertree Assocs., 653 F. Supp. 148, 151 (N.D. Tex. 1986) (Congress intended to provide for expedient relief to FSLIC through statutory scheme).

tion.⁵³ The traditional deference afforded agency interpretations⁵⁴ further persuades the courts to accept the FSLIC's position.⁵⁵

C. CONSTITUTIONAL LIMITATIONS ON ADMINISTRATIVE AGENCY ADJUDICATION

In addition to statutory regulation of the FSLIC's asserted adjudicative authority, the Constitution regulates the FSLIC's authority to adjudicate. Article III vests the judicial power of the United States in courts staffed by judges possessing life tenure and irreducible compensation.⁵⁶ Although the Supreme Court has not interpreted article III as an absolute bar to adjudication by non-article III courts,⁵⁷ it has not established any

53. See, e.g., *Kohlbeck v. Kis*, 651 F. Supp. 1233, 1235 (D. Mont. 1987). The court in *Kohlbeck* stated that "[t]he plain language of the applicable statutes precludes federal court jurisdiction over claims against the receiver until the administrative procedure is complete. The courts adhere to and enforce the plain meaning of the statutes." *Id.*

54. See, e.g., *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (longstanding administrative construction is entitled to great weight); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971) ("[C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

55. See *Hudspeth*, 756 F.2d at 1103 (FHLBB's opinion entitled to deference); *York Bank & Trust Co. v. Federal Sav. & Loan Ins. Corp.*, 663 F. Supp. 1100, 1104 (M.D. Pa. 1987) (same); *Federal Sav. & Loan Ins. Corp. v. Oldenburg*, 658 F. Supp. 609, 611 (D. Utah 1987) (FHLBB regulations set up adjudicatory process for FSLIC and are entitled to deference).

56. Article III provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

57. See, e.g., *United States v. Raddatz*, 447 U.S. 667, 682 (1980) (magistrate determinations subject to de novo review by district court constitutional); *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (administrative fact finding in adjudicating congressionally created rights constitutional). Nevertheless, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court held that the legislative bankruptcy scheme, which gave nonarticle III courts jurisdiction over all actions related to bankruptcy proceedings, violated article III. *Id.* at 76. Congress established a United States bankruptcy court for each judicial district in 1978. The bankruptcy court judges were appointed for 14-year terms, subject to removal for "incompetency, misconduct, neglect of duty, or . . . disability." *Id.* at 61. The judges' salaries were set by Congress, subject to adjustment. *Id.* The bankruptcy courts exercised all the powers of the district courts and issued binding, enforceable judgments subject to review under the clearly erroneous standard. *Id.* at 85-86. The Court found the broad grant of jurisdiction to the bankruptcy courts unconstitutional based on the constitutional system of checks and bal-

bright line rules to determine when an adjudicatory grant to an administrative agency or non-article III court is constitutional.⁵⁸ Instead, the Court has emphasized protecting the integrity of the judicial branch,⁵⁹ examining a variety of factors to determine the degree of intrusion into the judicial process.⁶⁰

One factor the Court considers in article III analysis is the origin of adjudicated rights, which entails a distinction between public and private rights.⁶¹ Public rights disputes arise between

ances which requires an impartial judiciary free from legislative or executive control. *Id.* at 59-60.

58. See *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261 (1986) (“[B]right line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.”).

59. See *id.* at 3258 (underlying issue is “the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary”).

60. See *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985), which involved an arbitration scheme established by Congress under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136-136y (1982)). The Act required manufacturers of pesticides to register their products with the Environmental Protection Agency but allowed the manufacturers to use the data presented by other manufacturers of the same chemicals in filing their claims. The Act provided for an independent arbitrator to determine the amount of compensation that manufacturers using such data should pay the submitting manufacturers. The Court noted a variety of factors in determining that the arbitration scheme did not impermissibly intrude on the function of the judiciary. To begin with, the Court determined that the right involved “bears many of the characteristics of a ‘public’ right.” *Id.* at 589. The Court noted that the Act created the right to compensation and did not depend on such a right under state law. *Id.* at 584. In addition, the Court reasoned that the claimants had extinguished their trade secret rights under state law by disclosing them to the federal agency. *Id.* The Court also considered the necessity of a prompt and inexpensive method of determining compensation to avoid delays in registration of pesticides. *Id.* at 590. Furthermore, the Court noted that the arbitration scheme contained its own sanctions and did not rely on the enforcement mechanisms of the judiciary. *Id.* at 591. Finally, the Court commented that judicial review, available to review the arbitrator’s findings for fraud, misconduct, or misrepresentation, provided an “appropriate exercise of the judicial function” in the situation. *Id.* at 592 (quoting *Crowell v. Benson*, 285 U.S. 22, 54 (1932)).

In *Schor*, 106 S. Ct. at 3245, the statutory scheme at issue involved a grant of authority over counterclaims to an administrative agency. The counterclaims were based on state law, but the Court refused to invalidate the scheme because claimants could choose to bring their counterclaims either in the administrative proceeding or in court. *Id.* at 3260. Congress granted the agency the right to adjudicate counterclaims in the interest of efficiency, stated the Court, and the “magnitude of any intrusion on the Judicial Branch can only be termed *de minimus*.” *Id.* (emphasis in original).

61. See *Schor*, 106 S. Ct. at 3258. *Northern Pipeline* distinguishes three judicially recognized exceptions to the article III rule: military courts, courts governing territorial areas not controlled by state courts, and adjudication involving public rather than private rights. 458 U.S. at 64-70. The territorial ex-

the federal government and individuals in connection with the exercise of governmental power.⁶² Administrative agencies may freely adjudicate public rights.⁶³ Private rights disputes arise between individuals.⁶⁴ Normally, administrative agencies may not adjudicate private rights unless an article III court retains the right of *de novo* review.⁶⁵ When the private rights are created by Congress, however, a standard of review by an article III court more deferential than the *de novo* standard is constitutionally acceptable, provided the standard is less deferential than the clearly erroneous standard.⁶⁶

ception applies to situations in which no state operates as sovereign and Congress exercises the general powers of government. *Id.* at 64. An example of this exception is the non-article III courts with jurisdiction over the District of Columbia. *Id.* at 65. The *Northern Pipeline* Court noted that "the distinction between public rights and private rights has not been definitively explained in our precedents." *Id.* at 69.

62. The *Northern Pipeline* Court stated "that a matter of public rights must at a minimum arise 'between the government and others.'" 458 U.S. at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1928)). For a further elaboration of the public rights distinction, see Note, *Constitutional Law—Article III: A Clear Test for the Constitutionality of Non-Article III Courts*: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 18 LAND & WATER L. REV. 313, 322-24 (1983). In interpreting *Northern Pipeline*, the Note states that "the public rights exception extends to matters which (1) arise between the government and persons subject to the constitutional exercise of its legislative or executive authority, (2) historically have been determined by the executive and legislative branches of the government, and (3) are not private rights disputes." *Id.* at 324.

63. See *supra* note 61.

64. See Note, *supra* note 62, at 324. The Note comments that "[p]rivate rights disputes involve 'the liability of one individual to another under the law as defined' and may not be removed from the cognizance of article III courts." *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). The reason for the Court's distinction between public and private rights lies in the nature of private rights claims, many of which are based on state law derived from traditional common law. "[A]t the time the Constitution was written, common law disputes constituted the heart of the English judiciary's work, making it reasonable to conclude that the framers referred to such traditional judicial activity when they employed the term 'judicial power' and vested that 'judicial power' in the article III judiciary." Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 211.

65. See Rehel, *Legislative and Administrative Courts: Northern Pipeline and Related Developments in Federal Constitutional Law*, 5 J. NAT'L ASS'N ADMIN. L. JUDGES 5, 10-11 (1985). Rehel comments that the *Northern Pipeline* Court identified two subclasses of private rights that require differing degrees of judicial power to be retained by article III courts. *Id.* at 10. With respect to the private common law rights subclass, any adjudication by administrative agencies "must be subject to *de novo* review by the district court." *Id.* at 11 (emphasis in original).

66. See *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 589 (1985) (commenting that a right created by federal government as part of

Another factor, the amount of judicial power reserved to article III courts, involves the extent to which the administrative agency usurps traditional judicial functions.⁶⁷ The considerations that prompted Congress to create the legislative adjudication scheme provide a further factor in determining the constitutionality of agency adjudication.⁶⁸ A strong need for efficient agency adjudication can help establish the constitutionality of the adjudicatory scheme.⁶⁹

II. THE MORRISON-KNUDSEN DECISION

The Ninth Circuit in *Morrison-Knudsen Co. v. CHG International*⁷⁰ became the first circuit to narrowly interpret the receivership statute and hold that the FSLIC does not have the authority to adjudicate creditor claims.⁷¹ Examining first the restraint or affect provision of section 1464(d)(6)(C),⁷² the court concluded that the provision does not grant the FSLIC the

regulatory scheme "bears many of the characteristics of a 'public' right"); see also Rehel, *supra* note 65, at 11. Rehel observes that with respect to congressionally created private rights, administrative agencies can adjudicate specialized matters and issue binding orders as long as an article III court retains a right of review less deferential than the clearly erroneous standard. *Id.*

67. See *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986). In *Schor*, the Court refused to invalidate the agency adjudication scheme because claimants could choose to bring their claims in either the agency adjudication or federal district court. *Id.*; see also *supra* note 60.

68. See *Schor*, 106 S. Ct. at 3258.

69. In *Thomas*, for example, the Court refused to invalidate agency adjudication of pesticide data claims designed to avoid delay in registration of pesticides. 473 U.S. at 590.

70. 811 F.2d 1209 (9th Cir. 1987).

71. See *supra* notes 46, 50 and accompanying text. The court acknowledged the FSLIC's current difficulties, noting that over "four hundred thrift associations failed from 1981 to 1984." *Morrison-Knudsen*, 811 F.2d at 1216 (citing Comment, *The "Brokered Deposit" Regulation*, 33 UCLA L. REV. 594, 607 (1985)). In addition, the court noted that "[i]n 1981 and 1982, FSLIC spent more than four times what it had in the preceding forty-five years." *Id.* at 1216 (citing Chamberlain, *Protecting America's Savings*, FED. HOME LOAN BANK BOARD J. 9, 9 (Feb. 1981)). Although the court shared the FSLIC's concern over its pressing financial difficulties, it observed that Congress passed the statutes in question before the FSLIC's current problems. The court concluded that the policy issue, however pressing, could not empower the court to revise the FSLIC's statutory authority. *Id.* In addition, the court commented that the FSLIC did not assert a right to adjudicate claims until 1980, noting, however, that this would not defeat the claim if the statute authorized the claimed adjudicative powers. *Id.*

72. See *supra* note 33 and accompanying text. The court observed that this section provides the FSLIC's strongest argument for the authority to adjudicate creditor claims and that it was the FSLIC's interpretation of this section that persuaded the court in *Hudspeth. Morrison-Knudsen*, 811 F.2d at 1216.

power to adjudicate creditor claims but merely prohibits courts from interfering with receivership powers already granted to the FSLIC.⁷³ Traditional receivership functions do not include adjudication.⁷⁴ Consequently, the court reasoned that the prohibition on court interference with the FSLIC's receivership powers is inapplicable to creditor claims in the absence of the authority to adjudicate such claims in the statutes, regulations, or statutory scheme.⁷⁵

The court then examined the statutes, regulations, and statutory scheme to determine whether Congress had indeed granted the FSLIC the authority to adjudicate creditor claims. Examining the payment provision in section 1729(b)(1),⁷⁶ and the necessary action provision in section 1729(d),⁷⁷ the court found that the FSLIC placed unreasonable emphasis on a single word in each statute.⁷⁸ Regarding the payment provision, the court stated that a direction to pay all *valid* credit obligations does not grant the authority to determine validity.⁷⁹ As to the necessary action provision, the court found that a direction to

73. *Morrison-Knudsen*, 811 F.2d at 1217. The court characterized *Hudspeth's* argument, that judicial adjudication of claims restrains the FSLIC's receivership powers by delaying distribution of assets, as attempting to derive substantive powers "by pointing to the time-consuming tasks that FSLIC as a receiver must undertake." *Id.* Moreover, the court argued that if judicial review which causes a significant delay does not restrain or affect a receiver, then initial adjudication by a court creates no such restraint or effect. See *supra* notes 46-48 and accompanying text. The court noted that the statute "does not speak in terms of the magnitude of such restraint or effect." *Morrison-Knudsen*, 811 F.2d at 1217. In addition, the court noted that "the *Hudspeth* opinion makes no reference to any statutory language or legislative history indicating a congressional intent to confer adjudicatory power upon FSLIC in its receivership capacity." *Id.*

74. See *supra* notes 25-27 and accompanying text. As support for its contention that "[j]udicial adjudication . . . does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets," the court cited *Morris v. Jones*, 329 U.S. 545, 549 (1947) ("The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court."). *Morrison-Knudsen*, 811 F.2d at 1217.

75. *Morrison-Knudsen*, 811 F.2d at 1217. The court noted that *Hudspeth* "permitted section 1464(d)(6)(C) to expand FSLIC's receivership authority. We decline to do so." *Id.*

76. See *supra* note 35 and accompanying text.

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

78. *Morrison-Knudsen*, 811 F.2d at 1218-19.

79. *Id.* at 1218. The court noted that the word *valid* was required as a qualifier to prevent the duty to pay from encompassing invalid claims. *Id.* The FSLIC's assertion that this provision grants the authority to adjudicate claims "imposes an unreasonable burden on the plain meaning of simple and straightforward language." *Id.*

do everything *necessary* in connection with liquidation cannot alone support a claim to adjudicative authority.⁸⁰ Moreover, the court reasoned that the necessary action provision's explicit grant of power to settle, compromise, and release claims is incompatible with an assertion of adjudicative power because a body authorized to render binding decisions does not need to settle, compromise, or release claims.⁸¹ Consequently, the court found a congressional grant of adjudicatory power lacking in the statutes.

Turning to the FHLBB regulations, which provide an administrative procedure for processing creditor claims,⁸² the court asserted that the ability to disallow claims does not imply that the FSLIC has the authority to make binding factual and legal determinations.⁸³ Rather, the court characterized the administrative process as merely determining "*whether a dispute exists*."⁸⁴ The dispute, once identified, is settled by adjudication in court.⁸⁵ Consequently, the court concluded that, like the statutes, the regulations relied on by the FSLIC granted no adjudicatory authority to the FSLIC.⁸⁶

Analyzing the statutory scheme, the court again found no congressional grant of adjudicatory authority. The court contrasted the FSLIC's statutory role as receiver of failed thrift institutions with its statutory role as insurer of operating institutions. Various statutes authorize the FSLIC to adjudicate in its role as insurer and provide guidance as to the procedural and substantive rights of the parties with review under the APA.⁸⁷ The court inferred that had Congress intended the

80. *Id.* at 1219. The court noted that once again the FSLIC "seeks to burden a word . . . with more weight than it reasonably can carry." *Id.*

81. *Id.* The court also commented that the need for "settlement or compromise strongly suggest[s] the presence of the power of the other party to take the dispute to court," with settling or compromising designed to avoid such a result. *Id.*

82. *See supra* notes 37-44 and accompanying text.

83. *Morrison-Knudsen*, 811 F.2d at 1218. The court noted that the FSLIC and the FHLBB "must be permitted to exercise some judgment before paying a claim against a thrift institution." *Id.* Nevertheless, the court likened the FSLIC process to that of an insurance company requiring sufficient proof before paying claims. *Id.*

84. *Id.* (emphasis in original). The finality of a FSLIC disallowance to which a creditor fails to object is not, the court asserted, proof of adjudicative power but is instead "the ordinary consequence of waiver." *Id.*

85. *Id.* The court asserted that "the administrative process ends precisely where the adjudicative process begins." *Id.*

86. *Id.* at 1222.

87. *See, e.g.*, 12 U.S.C. § 1464(d)(7)(A) (1982) (governing hearings provided for by § 1464); *id.* § 1730(j)(2) (governing hearings under § 1730). These stat-

FSLIC to adjudicate in its role as receiver as well, it would have provided similar specific authorization of power.⁸⁸

In addition, section 1728(c) provides a statute of limitations for depositor insurance claims brought against the FSLIC in court.⁸⁹ The court deduced from this statute that Congress must have similarly intended the FSLIC to litigate rather than adjudicate creditor claims.⁹⁰

Finally, the court noted that section 1730(k)(1), the "jurisdiction provision" which grants federal district courts jurisdiction over all civil actions to which the FSLIC is a party,⁹¹ contains a proviso that certain actions fall under the exclusive jurisdiction of state courts, including actions involving creditor rights in state-chartered institutions.⁹² The court inferred from

utes "provide detailed, exact, and comprehensive measures precisely delineating agency procedure, the remedies available, and judicial review." *Morrison-Knudsen*, 811 F.2d at 1220.

88. *Morrison-Knudsen*, 811 F.2d at 1220. The court termed the inference "irresistible" and commented that Congress would not have "painstakingly circumscribed" the FSLIC's adjudicative authority in its supervisory role as insurer, in which its expertise is greatest, and failed to circumscribe its adjudicative authority in its role as receiver. *Id.*

89. 12 U.S.C. § 1728(c) (1982). The court stated that "[t]he language used indicates unambiguously that Congress anticipated judicial adjudication in the event of a disputed [depositor] claim." *Morrison-Knudsen*, 811 F.2d at 1220 (citing *Jugum v. Federal Sav. & Loan Ins. Corp.*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986)).

90. The court termed "irrational" an interpretation allowing the FSLIC to adjudicate creditor claims in which it has little expertise, while requiring it to litigate depositor claims in which it has significant expertise. *Morrison-Knudsen*, 811 F.2d at 1220.

91. *Id.* at 1221. As an additional element in its statutory scheme analysis, the court noted that unlike the FSLIC, the FDIC has never claimed the right to adjudicate creditor claims when acting as a receiver. *Id.* at 1218. During its discussion of the FSLIC regulations, the court noted that the FDIC has "the same powers by statute that the [FHLBB] has given FSLIC by regulation: to receive 'legal' proof of creditors' claims and to pay only on 'such claims as may have been proved to its satisfaction.'" *Id.* (citing 12 U.S.C. §§ 193, 194, 1821(d) (1982)). According to the court, the legislative history of the DIA, Pub. L. No. 97-320, § 122, 96 Stat. 1469, 1480-83 (1982) (codified at 12 U.S.C. § 1729), indicates congressional intent to give the two agencies "parallel authority over their respective institutions." *Morrison-Knudsen*, 811 F.2d at 1221 (citing S. REP. NO. 536, 97th Cong., 2d Sess. 7, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3054). Congress easily could have distinguished the FSLIC's receivership functions from the FDIC's but did not do so, leading the court to conclude that the FDIC's receivership practice provides a persuasive model for the FSLIC's receivership powers. *Id.* at 1221. In addition, the court noted that the FDIC's "longstanding interpretation of the receiver's role, acquiesced in by Congress, [is] very persuasive authority" because it had been defending disputed creditor claims in its capacity as receiver for longer than the FSLIC. *Id.*

92. *Id.* at 1220. 12 U.S.C. § 1730(k)(1)(B) (1982) provides:

the proviso that Congress intended the FSLIC to defend creditor suits in court.⁹³ The court thus rejected the argument that Congress intended the FSLIC as receiver to adjudicate creditor claims, holding instead that Congress intended the FSLIC to pay all undisputed claims, without court supervision, settling or releasing such claims as it sees fit, but not to adjudicate disputed claims.⁹⁴ Consequently, the court concluded that the statutory scheme, like the statutes and regulations, does not indicate any congressional grant to the FSLIC of the authority to adjudicate claims.

To prevent claimants from inappropriately bypassing the FSLIC's claim procedure, however, the court held that district courts should consider requiring exhaustion of administrative remedies when creditor claimants file suit. As a result, the court remanded the cases for the district courts to determine

[A]ny civil action, suit, or proceeding to which the [FSLIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; . . . [p]rovided, [t]hat any action . . . to which the [FSLIC] is a party in its capacity as . . . receiver . . . of an insured State-chartered institution and which involves only the rights or obligations of . . . creditors . . . and such institution under State law shall not be deemed to arise under the laws of the United States."

Id. (emphasis in original). The court noted that the proviso clause "is designed to keep certain actions in state courts." *Morrison-Knudsen*, 811 F.2d at 1220.

93. *Morrison-Knudsen*, 811 F.2d at 1221. The court noted that the purpose of § 1730(k)(1) is to distribute jurisdiction between federal and state courts and that jurisdictional limitations still apply. *Id.* at 1220. The plaintiffs apparently urged a reading of the statute that would grant federal courts jurisdiction whenever the proviso clause did not apply. The court pointed out that carrying this theory to its logical conclusion would grant federal courts jurisdiction even if a case raised only a moot or political question, a result beyond congressional authority. The court commented, however, that the statute fails to "address how the initial distribution of jurisdiction between administrative and judicial tribunals, be the latter state or federal, is to be accomplished." *Id.* Nevertheless, § 1730(k)(1) indicates that Congress intended state courts to adjudicate state law creditor claims. The court finished this line of reasoning by stating that Congress intended the FSLIC's powers to be identical with respect to state- and federally-chartered institutions, thus concluding "that Congress clearly expected creditors' suits against FSLIC as receiver to be . . . adjudicated in court." *Id.* at 1221. The court cited 12 U.S.C. § 1729(c) (1982), which "grant[s] FSLIC the 'same powers' as receiver for state associations as it has for federal ones," as an indication of congressional intent that FSLIC powers as receiver over state and federal institutions be identical. *Id.*

94. *Morrison-Knudsen*, 811 F.2d at 1222. The court stated that the "FSLIC stands in the shoes of the insured institution" when acting as receiver, and thus is required to adjudicate disputed claims in court "just as the institutions it represents would have had to do." *Id.*

the appropriateness of requiring such exhaustion.⁹⁵ The exhaustion requirement, according to the court, will allow courts to balance the FSLIC's interest in applying its expertise and maintaining efficiency against the interests of claimants in receiving appropriate relief.⁹⁶

III. THE SCOPE OF THE FSLIC'S RECEIVERSHIP POWERS

The Ninth Circuit in *Morrison-Knudsen* relied primarily on the statutes and regulations in denying FSLIC adjudicatory authority. Further support for the court's result may be found in the legislative history of the statutes and regulations as well as in an examination of the article III constitutional violation and policy problems inherent in the FSLIC's current assumption of adjudicative power. This section presents those arguments and proposes a legislative solution that goes beyond the exhaustion of administrative remedies requirement to balance the rights of both creditor claimants and the FSLIC.

95. *Id.* at 1223. The court listed factors for the district courts to consider when ruling on the exhaustion of administrative remedies requirement. These factors included

whether resort to the administrative process would be futile, whether the administrative process is well understood and well developed, whether a prompt decision as to all of the contested issues in the case is likely, whether an exhaustion [of remedies] requirement would be fair to the parties in light of their resources, whether it would be fair to other parties in the case whose interests might be affected, whether the interests of judicial economy would be served by requiring exhaustion, and whether the agency demonstrates that not requiring exhaustion would unduly interfere with its functioning.

Id. at 1223-24.

96. *Id.* at 1223. The court stated that the exhaustion requirement, in the absence of a statutory directive, is a judicially created doctrine which does not limit jurisdiction and is committed to the discretion of the trial court. *Id.* (citing *Wong v. Department of State*, 789 F.2d 1380, 1384-85 (9th Cir. 1986); *Rodrigues v. Donovan*, 769 F.2d 1344, 1349 (9th Cir. 1985)). The court commented that the exhaustion of remedies doctrine is a means for the court "to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief." *Id.* In addition, the court noted that the district court has three options: it can allow the case to proceed, it can dismiss the case, or it can stay the proceedings pending exhaustion of administrative remedies. The last option, the court observed, is preferable because it prevents a statute of limitations problem from developing. *Id.*

A. LEGISLATIVE HISTORY AND STATUTORY PROVISIONS

1. Restrain or Affect Provision

The pivotal provision in the FSLIC's statutory interpretation of its adjudicatory authority is section 1464(d)(6)(C), which prohibits courts from restraining or affecting the FSLIC's receivership functions.⁹⁷ A careful reading of the restrain or affect provision reveals that the prohibition against court interference applies to the exercise of receivership powers or functions already possessed by the FSLIC.⁹⁸ In upholding the FSLIC's adjudicatory power, the Fifth Circuit in *North Mississippi Savings & Loan v. Hudspeth* held that delay in the distribution of assets caused by adjudication of creditor claims was a restraint within the meaning of the restrain or affect provision.⁹⁹ As the *Morrison-Knudsen* court commented, however, judicial review under the APA would delay distribution of assets in the same manner as initial adjudication.¹⁰⁰ Consequently, unless Congress intended no judicial consideration of creditor claims, an unlikely result in light of congressional concern for the rights of individuals expressed in the legislative history,¹⁰¹ the restrain or affect provision does not prohibit court interference because of concerns with delays in asset distribution.¹⁰²

The key question is thus whether the FSLIC is authorized

97. 12 U.S.C. § 1464(d)(6)(C) (1982); see *supra* notes 32-33, 72 and accompanying text. This section is pivotal because it outlines the situations in which courts lack jurisdiction over the FSLIC as a receiver. Section 1730(k)(1) grants courts jurisdiction over suits against the FSLIC, including, at least in the case of state courts, jurisdiction over creditor claims. See *supra* notes 92-93 and accompanying text. Without the specific prohibition against court interference, the FSLIC could not prevent courts from adjudicating creditor claims even if the statutes also supported administrative adjudication of such claims. Consequently, establishing that Congress intended § 1464(d)(6)(C) to apply to adjudication of creditor claims is critical to the FSLIC's interpretation.

98. See *supra* note 33 and accompanying text for a discussion of the statute. When interpreting statutes, courts prefer the plain meaning of the language to any hidden or obscure meanings. See, e.g., *Payne v. Ostrus*, 50 F.2d 1039, 1042 (8th Cir. 1931). The restrain or affect provision does not outline the FSLIC's receivership powers but rather applies to the powers specified by either common law or other statutes.

99. 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); see *supra* notes 46-49 and accompanying text.

100. *Morrison-Knudsen Co. v. CHG Int'l*, 811 F.2d 1209 (9th Cir. 1987); see *supra* note 73 and accompanying text. The court pointed out that the statute does not specify the magnitude of an impermissible restraint. *Id.* at 1217.

101. See *infra* note 112.

102. The *Morrison-Knudsen* court reached the same conclusion. See *supra* notes 72-75 and accompanying text.

to adjudicate either implicitly through its receivership role or explicitly by the statutes or regulations. Traditionally, receivers are responsible for only an initial determination of creditor claims which claimants can appeal to the supervising court for a de novo trial on the merits.¹⁰³ Accordingly, authority to adjudicate with limited, deferential review is not implicit in the receivership role, which means that the restrain or affect provision does not apply to such adjudication unless other statutes, regulations, or the restrain or affect provision itself grant the FSLIC the authority to adjudicate.¹⁰⁴

The legislative history, however, illustrates that Congress did not intend the restrain or affect provision to expand the FSLIC's receivership powers.¹⁰⁵ Congress passed the restrain or affect provision as part of the Financial Institutions Supervisory Act of 1966 (FISA).¹⁰⁶ The FISA's purpose was to give the FSLIC more regulatory options to prevent defaults in its role as insurer of thrift institutions.¹⁰⁷ The receivership provisions, in-

103. See *supra* notes 25-27 and accompanying text.

104. The *Morrison-Knudsen* court reached a similar conclusion. See *supra* notes 73-75 and accompanying text.

105. At least one court has claimed that language in the legislative history discussing administrative review supports the FSLIC's position. *Lyons Sav. & Loan Ass'n v. Westside Bancorp.*, 636 F. Supp. 576, 580 (N.D. Ill. 1986) (citing H.R. REP. NO. 2077, 89th Cong., 2d Sess. 6 (1966)), *aff'd*, 828 F.2d 387 (7th Cir. 1987). The history cited falls under the broad heading "Hearings and Review" and is a complement to a paragraph beginning "[h]earings provided for in the bill." H.R. REP. NO. 2077, 89th Cong., 2d Sess. 6 (1966). The provision covering judicial review under the APA, codified at 12 U.S.C. § 1464(d)(7) (1982), by its own terms applies to "[a]ny hearing provided for in this subsection (d)." *Id.* § 1464(d)(7)(A). Section 1464(d)(6), the section covering receiverships, does not provide for any administrative hearings. Therefore the provision for review under the APA does not apply to the FSLIC's receivership functions.

106. Pub. L. No. 89-695, 80 Stat. 1028 (1966) (codified at 12 U.S.C. § 1464). The FISA allows the FSLIC to intervene in thrift management problems at an early stage, authorizing the FHLBB to issue cease-and-desist orders to and remove officers of dangerously mismanaged thrift institutions. Prior to the FISA, in confronting a mismanaged institution the FHLBB was faced with the "choice between letting the matter ride, commencing a slow determination of whether the association is in violation, or moving to take complete control of the institution [through receivership]." *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 11 (1966) (statement of John E. Horne, Chairman, FHLBB). The FISA provided "new and effective intermediate remedies, more limited in impact and more readily employable." *Id.* at 13.

107. The purpose of the FISA was to "arm regulatory agencies with a wider range of effective enforcement remedies" in order "to assure the continued good health of [thrift] institutions." H.R. REP. NO. 2077, 89th Cong., 2d Sess. 4 (1966). "The thrust of this bill . . . is merely to provide sorely needed flexibility to protect the public's money." *Id.* at 5.

cluding the restrain or affect provision, are the ultimate tool in the FSLIC's regulation of mismanaged thrifts.¹⁰⁸ The legislative history contains no discussion of the FSLIC's functions as a receiver, and both Congress and witnesses at the hearing on the FISA virtually ignored the receivership provisions.¹⁰⁹ The only legislative history relevant to the restrain or affect provision in the Senate Report merely restates the terms of the provision.¹¹⁰ It seems likely that had Congress intended the restrain or affect provision's prohibition on judicial interference to include the creation of an important judicial function such as adjudicating creditor claims, the provision would have incited significant debate.¹¹¹

108. The legislative history indicates that Congress designed the receivership provisions as part of the regulatory scheme:

In the light of the new enforcement powers provided by the bill, the committee would expect the [FHLBB] to appoint a . . . receiver only in cases where it judged that the exercise of the lesser intermediate remedies would not adequately protect the interests of the public or of the savings account holders of the association or of the [FSLIC].

S. REP. NO. 1482, 89th Cong., 2d Sess. 14, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3545.

109. Various thrift industry associations proposed the removal of § 1464(d)(6)(C) from the FISA along with all other provisions denying access to courts to preserve judicial recourse granted under other laws. *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 593 (1966) (explanation of changes in markup of S. 3158 suggested by the National League of Insured Savings Associations). The associations might have feared that courts would lose jurisdiction over FSLIC receiverships. Because the associations' specific protest was in regard to the FHLBB rather than a judge appointing the receiver, the inference can be drawn that the thrift industry was concerned about the grant of appointment power to the FHLBB in its supervisory capacity rather than the grant of greater receivership powers to the FSLIC.

110. S. REP. NO. 1482, 89th Cong., 2d Sess. 14, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532. "The provisions of this subparagraph would, in effect, limit the jurisdiction of a court to order the removal of a . . . receiver, . . . or, except at the instance of the [FHLBB], to restrain the exercise of the powers or functions of a . . . receiver." *Id.*, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3545. This history contributes nothing to the question of whether adjudication of creditor claims is a receivership function because it fails to define receivership functions or explain what constitutes a restraint or effect within the scope of the statute.

111. In contrast to the lack of testimony on the receivership provisions, many witnesses testified on the perceived usurpation of state regulatory authority by the expanded federal powers. *See, e.g., Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 172 (1966) (statement of Allan Houseley, First Vice President, National Association of State Savings & Loan Supervisors) (FHLBB "should not be permitted to take any action involving insured, State-chartered associations without consultation with the

Moreover, the legislative history reveals significant congressional concern with protecting the rights of individuals who might be affected by the FSLIC's proposed new regulatory powers in its role as insurer, but no discussion of how the FISA might affect the rights of creditors in FSLIC receiverships.¹¹² The lack of controversy over the receivership section thus buttresses the *Morrison-Knudsen* court's conclusion that Congress did not intend the prohibition on judicial interference to broaden the FSLIC's receivership functions.¹¹³ Consequently,

State Supervisor"); *id.* at 247 (statement of Milton Stewart, Special Counsel, Savings Association League of New York State) (Congress should exempt state associations from federal regulation if state regulatory authorities regulate such associations to FHLBB's satisfaction). This concern with the apportionment of regulatory authority between federal and state agencies illustrates that a perceived federal agency usurpation of adjudicatory authority in FSLIC receiverships would have sparked significant controversy.

112. The Committee heard a substantial amount of testimony from members of the savings and loan association community on the issue of procedural safeguards to protect the rights of individual thrift association officers affected by the regulatory powers established in the FISA. One member testified that "[t]he practical effect of the review procedures recommended by [the FHLBB] . . . are not due process de facto even if they could ultimately succeed in being classified as due process de jure." *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 201 (1966) (statement of Arthur H. Courshon, National League of Insured Savings Associations). The Committee concluded, however, that the insurers' concerns were unfounded.

The enactment of this legislation will result in substantial improvement in the supervision and regulation of . . . savings and loan associations. The provisions in the bill for administrative hearings and judicial review of final orders will adequately protect the rights of any insured institution and its officers, directors, or other persons against whom action proves necessary.

Id. at 319A.

The legislative history demonstrates that congressional concern with FSLIC protection mentioned in many decisions must be balanced against the congressional interest in protecting individuals from peremptory agency action. Consequently, evidence of congressional intent to shield the FSLIC is insufficient to support a significant grant of adjudicatory power based on meager statutory authority despite the FSLIC's current financial difficulties. The *Morrison-Knudsen* court reached the same conclusion. *Morrison-Knudsen*, 811 F.2d at 1216; *see supra* note 71 and accompanying text.

113. The legislative history contains the following statement: "These new tools do not expand Federal control over insured institutions, because . . . the [FSLIC] already possess[es] the ultimate authority over an insured institution, that of terminating its insured status." H.R. REP. NO. 2077, 89th Cong., 2d Sess. 4-5 (1966). Although it may be debatable that the new supervisory powers authorized by the FISA do not expand federal powers, it is clear that Congress intended the FISA to refine the FSLIC's supervisory powers in regulating thrift institutions, not to expand the FSLIC's powers over individual creditors in its receivership capacity.

the FSLIC's asserted authority to adjudicate creditor claims must be found elsewhere in the statutes or regulations.

2. Payment and Necessary Action Provisions

Apart from the restrain or affect provision, courts have relied on the payment and the necessary action provisions of section 1729, both established by the National Housing Act of 1934 (NHA),¹¹⁴ as authority for the FSLIC to adjudicate claims.¹¹⁵ In contrast to ordinary receivers who must apply to the supervisory court for authorization to pay claims,¹¹⁶ the FSLIC has the power, granted by the payment provision, to pay all valid claims.¹¹⁷ The payment provision, however, does not specify who is authorized to determine which claims are valid.¹¹⁸

The legislative history of the NHA, moreover, contains no discussion of the payment provision.¹¹⁹ This lack of controversy indicates that neither Congress nor hearing witnesses viewed the payment provision as granting an unprecedented adjudicatory function to the FSLIC in its role as receiver.¹²⁰ Consequently, although the section does grant the FSLIC authority to pay all valid claims, it does not support the FSLIC's assertion of the right to adjudicate what constitutes a valid creditor claim in case of a dispute.

The necessary action provision, which grants the FSLIC the power to do all things necessary in liquidating institutions,

114. Ch. 395, § 406(b), (d), 48 Stat. 1246, 1260 (1934) (codified at 12 U.S.C. § 1729) (1982).

115. See, e.g., *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1102 (5th Cir. 1985) (section 1729 authorizes FSLIC to liquidate and distribute receivership assets), *cert. denied*, 474 U.S. 1054 (1986); *Sunrise Sav. & Loan Ass'n v. LIR Dev. Co.*, 641 F. Supp. 744, 746 (S.D. Fla. 1986) (section 1729 authorizes FSLIC to liquidate institutions subject only to FHLBB regulation); *Lyons Sav. & Loan Ass'n v. Westside Bancorp.*, 636 F. Supp. 576, 581 (N.D. Ill. 1986) (section 1729(d) "reiterates in its language the FHLBB's exclusive regulatory authority over the FSLIC's actions"), *aff'd*, 828 F.2d 387 (7th Cir. 1987).

116. See *supra* note 28 and accompanying text.

117. See *supra* text accompanying note 35.

118. See *supra* notes 78-79 and accompanying text.

119. See *infra* note 124 and accompanying text.

120. In contrast to the lack of controversy over the receivership provisions, the provisions establishing the price of FSLIC insurance and the FSLIC's governance attracted significant debate. See, e.g., *National Housing Act of 1934: Hearings on S. 3603 Before the Senate Comm. on Banking and Currency*, 73d Cong., 2d Sess. 237 (1934) (statement of I. Friedlander, President, Gibraltar Savings & Building Association) (cost of proposed insurance "unnecessarily high"); *id.* at 261 (statement of Morton Bodfish, Executive Vice President, United States Building & Loan League) (rather than FHLBB, board of trustees should govern FSLIC).

including the right to settle, compromise, or release claims, also fails to provide support for FSLIC adjudication of claims.¹²¹ Although the *Morrison-Knudsen* court reasoned that the power to settle, compromise, or release claims is inconsistent with authority to adjudicate,¹²² the court failed to recognize that Congress may have granted these powers to give the FSLIC the flexibility to effect a compromise rather than rule on a disputed claim which could entangle the receivership in a lengthy judicial review process. Nevertheless, the necessary action provision places the word *necessary* in the context of receivership functions in liquidating institutions, indicating that Congress intended the necessary actions to be defined with reference to accepted receivership powers.¹²³

Moreover, the only legislative history relevant to the necessary action provision likens the liquidation functions granted the FSLIC to those granted the FDIC,¹²⁴ which has never asserted the right to adjudicate creditor claims.¹²⁵ In addition, the lack of controversy over the necessary action provision, as with the payment provision, demonstrates that Congress did not intend the word *necessary* to include adjudication of creditor claims.¹²⁶ Thus, like the payment provision, the necessary action provision provides no support for the FSLIC's assertion that Congress intended the FSLIC to adjudicate creditor claims.¹²⁷

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

122. See *supra* note 81 and accompanying text.

123. The statute begins with the phrase, "[i]n connection with the liquidation of insured institutions . . ." 12 U.S.C. § 1729(d) (1982 & Supp. I 1983).

124. H.R. REP. NO. 1922, 73d Cong., 2d Sess., pt. 1, at 4 (1934) ("Adequate provision is made for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance.").

125. See *supra* note 91.

126. See *supra* note 120 and accompanying text.

127. *Northern Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), bolstered its holding with the principle of deference to agency interpretation. *Id.* at 1103; see *supra* notes 54-55 and accompanying text. In *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), the Supreme Court implied that such deference is not determinative:

It is a commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight. This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. But this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.

3. FHLBB Regulations

The FSLIC also contends that FHLBB regulations governing the processing of creditor claims in receiverships support its assertion of authority to adjudicate creditor claims.¹²⁸ The regulations, however, establish a procedure for handling creditor claims similar to the one used in traditional receiverships.¹²⁹ Nothing in the language of the regulations indicates that the FHLBB intended the FSLIC to adjudicate creditor claims.¹³⁰ In fact, the absence of controversy regarding the regulations when the FHLBB proposed them actually supports the assertion that the FHLBB did not intend them to encompass adjudication of creditor claims.¹³¹ If the interested members of the business community had viewed the proposed regulations as encompassing binding adjudication of creditor claims rather

Id. at 566 n.20 (citations omitted). Consequently, the FSLIC's interpretation, which is unsupported by § 1729(d)'s language, purpose, or history, is not entitled to deference. Moreover, the FSLIC's interpretation is neither consistent nor longstanding because it did not assert the right to adjudicate creditor claims until the 1980s. See *Morrison-Knudsen*, 811 F.2d at 1216.

128. See *supra* notes 37-44 and accompanying text.

129. See *supra* notes 25-28 and accompanying text. The well-established procedure for review of creditor claims by receivers does not imply that binding adjudication of creditor claims is a receivership function. Although courts may require processing of claims through the receivership procedure, it is an exhaustion of administrative remedies requirement rather than a denial of subject matter jurisdiction for courts to adjudicate such claims. Indeed, the Supreme Court in *Morris v. Jones*, 329 U.S. 545, 549 (1947), found that "[t]he establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court . . . and does not necessarily involve a determination of what priority the claim should have." Moreover, the supervisory court retains complete control over the receiver who is an instrument of the court, not a separate body making independent judgments. Furthermore, a disputed claim results in a trial on the merits, not a review giving deference to the receiver's factual findings.

130. The differences between the regulations governing federal associations and those governing state associations actually indicate that the FHLBB did not intend the FSLIC to adjudicate creditor claims. The regulations governing state associations omit both the provision that denials not protested within thirty days will be final and the provision that the FSLIC shall pay all allowed claims as directed by the FHLBB. See 12 C.F.R. § 569a.8 (1987). The lack of these provisions demonstrates that the FHLBB expected the FSLIC to be governed by state court receivership procedures when it was appointed receiver by such courts.

131. The FHLBB first proposed the regulations in 21 Fed. Reg. 813, 820 (1956) with invitation for comments from interested parties. The regulations were made effective in 21 Fed. Reg. 4546, 4553 (1956) (codified at 12 C.F.R. §§ 541-56) with the following comment: "no persons have filed any written data or made oral arguments with respect [to the published regulations], either within the time allotted or at any later date." *Id.* at 4554.

than the usual processing of such claims by receivers, they would have protested the denial of their right to court adjudication.¹³²

Moreover, the lack of procedures for a hearing, production of documents, or the like sharply contrasts with other FHLBB regulations which provide detailed procedures for investigative proceedings against savings and loan associations by the FSLIC in its regulatory capacity.¹³³ The lack of procedures further indicates that the FHLBB did not intend the FSLIC to adjudicate creditor claims when it promulgated the regulations.¹³⁴ As the

132. It is possible to argue that the regulations substitute the FHLBB for a court in the traditional receivership model because the regulations specify that the FSLIC file approved claims with the FHLBB and allow the FHLBB to approve claims disallowed by the FSLIC. See 12 C.F.R. § 549.4 (1987). The lack of controversy over the regulations, however, argues strongly against such a construction. The FHLBB's role as supervisor of FSLIC receiverships, moreover, is based on the fact that the FSLIC is only a division of the FHLBB, not an independent agency. See *supra* note 1 and accompanying text. The regulations allow the FHLBB to have final control over the FSLIC's receivership determinations in accordance with its statutory governance of the FSLIC, not as a substitute for a court.

Furthermore, the regulations governing state associations contain the same provisions regarding FSLIC filing of claims with the FHLBB and FHLBB approval of denied claims. See 12 C.F.R. § 569a.8 (1987). In 1956, when the FHLBB promulgated the regulations, the only way the FSLIC could be appointed receiver for a state association was by a state court, which required governance by the state court, not the FHLBB. See *infra* notes 137-38 and accompanying text. Consequently, allowing the FHLBB to supervise the FSLIC's processing of creditor claims does not indicate that the FHLBB intended to substitute itself for a court in the traditional model.

133. See, e.g., 12 C.F.R. § 512 (1987). This provision contains elaborate procedures covering the transcripts, the rights of witnesses, and subpoenas in FSLIC investigations under 12 U.S.C. § 1730a(h)(2) (1982), which concerns compliance with the FSLIC's regulations in regard to holding companies.

134. The FHLBB itself apparently does not consider that the current regulations provide sufficiently strong support for adjudication of creditor claims because it has recently proposed new regulations explicitly authorizing the FSLIC to adjudicate such claims. The FHLBB offered the new regulations in 50 Fed. Reg. 48,970 (1985) (proposed Nov. 8, 1985), containing the statement that the "[FHLBB] may . . . establish additional procedures . . . in much the same manner as a court supervising a court-appointed equity receivership." *Id.* at 48,971. As adopted in the new regulations, "all claims against a receiver, including those that arise during the pendency of the receivership, must be presented to the receiver for administrative determination." *Id.* at 48,978. The proposed regulations still require submission of creditor claims on brief forms but allow the FSLIC to request further *written* documentation at the FSLIC's discretion. The regulations contain no provision for hearings on creditor claims. *Id.* The proposed regulations provide appeal to courts but restrict judicial review to the written record established in the claims process subject to the APA. *Id.* at 48,979-80.

The FHLBB apparently does not view the statutes as clearly supporting

Morrison-Knudsen court determined, the current regulations provide only an efficient procedure to separate out disputed claims for court adjudication while shielding undisputed claims from the expensive adjudicatory process, but they do not encompass adjudication of creditor claims.¹³⁵ Consequently, like the statutes, the regulations do not support the FSLIC's alleged authority to adjudicate creditor claims.

4. Statutory Scheme

The *Morrison-Knudsen* court found that the statutory scheme provided further evidence that Congress intended courts, and not the FSLIC, to adjudicate creditor claims against FSLIC receiverships.¹³⁶ An examination of the legislative history, moreover, sheds additional light on congressional intent in the statutory scheme. The legislative history of the Bank Protection Act of 1968, which granted the FHLBB the power to appoint the FSLIC as receiver of state thrift institutions, offers some support for the FHLBB's interpretation.¹³⁷ The history indicates Congress intended to give the FSLIC control over the

its claim to adjudicatory power because the proposal quotes a significant portion of the *Hudspeth* opinion, *see supra* notes 46-49 and accompanying text, as authority for its assertion of adjudicatory power. 50 Fed. Reg. 48,970, 48,977 (1985).

135. Review by the FHLBB may also be considered, as phrased by the *Morrison-Knudsen* court, to be merely a determination that a dispute exists. *See supra* notes 84-85 and accompanying text. Several courts have asserted that congressional acquiescence in the regulations, promulgated in 1956, is evidence that Congress intended the FSLIC to adjudicate creditor claims. *See, e.g.*, *First Am. Sav. Bank v. Westside Fed. Sav. & Loan*, 639 F. Supp. 93, 98 (W.D. Wash. 1986) (Congress intended FSLIC adjudication by acquiescing in FHLBB regulations); *Baer v. Abel*, 637 F. Supp. 347, 351 (W.D. Wash. 1986) (Congress acquiesced in FHLBB regulations allowing adjudication of claims). Because the regulations do not provide for adjudication of creditor claims, congressional acquiescence to them is actually evidence that Congress did not intend the FSLIC to adjudicate such claims.

136. *See supra* notes 87-93 and accompanying text. The *Morrison-Knudsen* court used the FDIC interpretation as another consideration arguing against FSLIC adjudication of creditor claims. *See supra* note 91. The FDIC has the same powers regarding processing of creditor claims that the FSLIC has by regulation accorded to it by statute. The FDIC, however, has never asserted the right to adjudicate creditor claims. *See Morrison-Knudsen Co. v. CHG Int'l*, 811 F.2d 1209, 1218 (9th Cir. 1987). The FDIC statutes, however, lack the "restrain or affect" language found in § 1464(d)(6)(C), the pivotal statutory provision used by courts to assert their lack of jurisdiction over creditor claims in FSLIC receiverships. *See Colony First Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 643 F. Supp. 410, 416 (C.D. Cal. 1986).

137. Pub. L. No. 90-389, 82 Stat. 294 (1968) (codified at 12 U.S.C. §§ 1729(c)(2), (3) (1982 & Supp. I 1983)); *see supra* note 31.

disposition of failed institutions' assets to recoup its insurance payments quickly.¹³⁸ The Senate Report comments that the FSLIC's financial viability is necessary to maintain public confidence in the thrift industry,¹³⁹ the precise congressional concern on which the FSLIC bases its current assertion of the right to adjudicate creditor claims.¹⁴⁰

Much of the legislative history, however, does not support the FSLIC's position. The legislative history uses the terms *disposition* and *liquidation* of assets, but it never mentions adjudication of the validity or priority of claims to the assets.¹⁴¹ The situation cited in the Senate Report as the reason for extending the FHLBB's authority over state institutions was one in which a protracted state-appointed receivership had apparently mismanaged the receivership assets and had failed to liquidate

138. S. REP. NO. 1263, 90th Cong., 2d Sess. 2, 6-11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2531, 2535-40.

The legislation also authorizes the [FHLBB] to appoint the [FSLIC] as a receiver in the case of State-chartered savings and loan associations placed in receivership . . . by State authorities. The aim of the legislation is to enable the FSLIC to effect an orderly disposition of the assets of insured associations whose depositors have been reimbursed by FSLIC insurance payments. Since the FSLIC would normally have a claim to at least 95 percent of the assets of a State-insured association undergoing liquidation, the FSLIC has a vital interest in seeing that the liquidation of the association proceeds in an orderly manner.

Id. at 1-2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2530-31.

The Senate Report further states that "[t]he basic objective of the legislation is to safeguard the financial integrity of [FSLIC]." *Id.* at 6, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2535. Additionally, "[t]he reserves of the FSLIC are not unlimited and cannot stand an indefinite repetition of unrecovered receiverships." *Id.* at 8, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537.

139. The Senate Report states:

Much of the credit for maintaining this public confidence [in the savings and loan industry] must be attributed to the savings account insurance provided by [FSLIC]. Therefore, if the ability of the FSLIC to meet its insurance commitments is ever called into question, there would be grounds for serious public concern.

Id. at 6, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2536. The Report uses the need to maintain FSLIC reserves as justification for extending the FHLBB's power to appoint the FSLIC as receiver over state institutions. *Id.* at 8, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537.

140. The FSLIC places great emphasis on congressional intent to protect its reserves in claiming the authority to adjudicate creditor claims. *See supra* notes 17-21 and accompanying text. The FSLIC's precarious financial situation prompted many courts to agree with the FSLIC's interpretation. *See supra* notes 46-50 and accompanying text.

141. S. REP. NO. 1263, 90th Cong., 2d Sess. 1-2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2530-31.

them properly.¹⁴² The state-appointed receiver also had refused to give the FSLIC information as to the conduct or status of the receivership.¹⁴³ The legislative history does not mention any concern with adjudication of creditor claims delaying the receivership.¹⁴⁴ In fact, the main policy concern expressed in the legislative history is the apportionment of control between the FSLIC and state regulatory agencies, not the extension of the FSLIC's power over the rights of individual creditors.¹⁴⁵ Congressional concern for the FSLIC's financial situation thus only applied to extending federal regulatory control over traditional receivership functions, not to extending the FSLIC's re-

142. Congress passed the Bank Protection Act in response to several simultaneous state-appointed receiverships which tied up receivership assets for years. The Senate report cited as an example the receivership of Marshall Savings and Loan Association of Illinois which had "free use of the FSLIC's \$83 million paid to the association's insured savers." *Id.* at 7, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537. In the report's calculation,

[t]he unpaid interest on \$83 million at 4.5 percent for 3 years amounts to nearly \$12 million. When the financial condition of the association is adjusted to reflect this unpaid interest, the association was insolvent on March 31, 1968, by almost \$11 million, compared to the admitted insolvency of \$6.7 million when the association first went into receivership.

Id. at 8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537.

143. In regard to the Marshall receivership, the report commented that "[i]t was not until the Senate Banking and Currency Committee held hearings on this measure that the Illinois savings and loan commissioner agreed to make some financial records on Marshall available to the FSLIC and the committee." *Id.* at 8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537. It was the fear of mismanaged assets and lack of control over the traditional receivership functions of conserving and liquidating receivership assets, as reflected in the Marshall situation, that prompted the Bank Protection Act, not any perceived delays caused by judicial adjudication of creditor claims.

144. In the explanation of § 406(c)(3)(B), codified at 12 U.S.C. § 1729(c)(3)(B) (1982 & Supp. I 1983), the report comments that "[i]n carrying out its receivership responsibilities, the committee expects the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, and association stockholders." S. REP. NO. 1263, 90th Cong., 2d Sess. 10, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539. The comment illustrates congressional concern with preserving the assets of the institution during liquidation in preparation for the final distribution, but it gives no indication that the FSLIC is authorized to determine the validity and priority of claims for such distribution.

145. "To permit the [FHLBB] to appoint the FSLIC as a receiver for State associations does, of course, have implications for the division of responsibility between the States and Federal Government." S. REP. NO. 1263, 90th Cong., 2d Sess. 8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2538. The committee went on to state, however, that "[FHLBB's] authority to appoint the FSLIC as receiver would not be exercised if the state authorities were able to handle the problem." *Id.*

ceivership powers to adjudication of creditor claims.¹⁴⁶

The Depository Institutions Act of 1982 (DIA), which extended the restrain or affect provision's prohibition on court interference with FSLIC receiverships to such receiverships even when a state court, rather than the FHLBB, appoints the FSLIC as receiver, provides additional support for the *Morrison-Knudsen* court's holding.¹⁴⁷ The FSLIC interprets the relevant statutes, through the operation of the restrain or affect provision, as granting it exclusive jurisdiction over anything it deems necessary to the receivership, including creditor claims.¹⁴⁸ The result of the FSLIC's interpretation is to strip state courts of any jurisdiction over such claims, even though state receivership statutes grant state courts such jurisdiction.¹⁴⁹ Such a result is contrary to the legislative history of the DIA, which observes that state authorities may still appoint the FSLIC as receiver and require the FSLIC to act according to state regulation.¹⁵⁰ Furthermore, the FSLIC's interpretation conflicts with the necessary action provision's specific grant of jurisdiction to state courts over state-appointed FSLIC receiverships,¹⁵¹ and the jurisdiction provision's specific denial of juris-

146. In addition, Congress has also expressed concern for the rights of private parties when extending the FSLIC's regulatory powers. *See supra* note 112.

147. *See supra* note 31 and accompanying text.

148. *See supra* notes 20-21 and accompanying text.

149. In traditional receiverships courts have jurisdiction to adjudicate disputed creditor claims de novo. *See supra* notes 25-28 and accompanying text. The FSLIC cannot claim that § 1464(d)(6)(C) means one thing in respect to FHLBB-appointed receiverships and another thing with respect to state-appointed receiverships because § 1729(c)(3)(A) clearly states that when the FSLIC is appointed receiver by a state authority "the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to which [FSLIC] had been appointed receiver." 12 U.S.C. § 1729(c)(3)(A) (1982 & Supp. I 1983). Congress thus intended that the restrain or affect language apply in the same manner to all FSLIC receiverships.

150. The Senate Report notes that "the FSLIC still could accept an appointment as receiver . . . from a State authority, and operate according to its regulation." S. REP. NO. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3102. Congress intended to provide the "FSLIC with . . . receivership powers over State-Chartered insured institutions approximately equal to those which it now has with respect to Federal Associations." *Id.* Nevertheless, Congress explicitly preserved the right of state regulatory authorities to appoint the FSLIC as receiver and require the FSLIC to operate under state regulation, illustrating congressional intent that courts still have jurisdiction at least when a state authority appoints the FSLIC as receiver.

151. *See supra* note 31 and accompanying text.

diction to federal courts in state receiverships concerning questions of state law.¹⁵² The conflict indicates that Congress did not view the liquidation and disposition of assets as encompassing adjudication of creditor claims. Thus, consideration of the statutory scheme, especially in light of the legislative history, buttresses the conclusion that Congress did not intend the FSLIC to adjudicate creditor claims.

B. ARTICLE III VIOLATION

Not only is FSLIC adjudication of creditor claims unsupported by statutory authority,¹⁵³ it also violates article III of the Constitution, which limits congressional grants of adjudicatory power to administrative agencies and nonarticle III courts.¹⁵⁴ The *Morrison-Knudsen* court noted the possibility of an article III violation but declined to reach a decision as to the alleged constitutional defect.¹⁵⁵

The Supreme Court examines several factors in determining whether administrative agency adjudication is constitutionally permissible.¹⁵⁶ Considering the factor of the origin of the adjudicated rights, the mere fact that the FSLIC, a federal agency, is a party does not require characterization of the creditor rights as public.¹⁵⁷ In defending creditor claims the FSLIC is acting as a substitute for the failed institution, not as a federal agent.¹⁵⁸ Moreover, the FSLIC did not create the rights; the claims of Gibraltar against Westside in *Morrison-Knudsen*,

152. See *supra* notes 91-93 and accompanying text.

153. At least one court has admitted that the statutory authority for FSLIC adjudication of claims is meager. That court, however, followed *Hudspeth*, holding that the statutory scheme, bolstered by deference to the FHLBB's opinion, is persuasive. *Federal Sav. & Loan Ins. Corp. v. Oldenburg*, 658 F. Supp. 609, 611 (D. Utah 1987).

154. See *supra* notes 56-69 and accompanying text.

155. *Morrison-Knudsen*, 811 F.2d at 1221-22. The court noted that Congress could construct adjudicatory jurisdiction for the FSLIC with carefully crafted limitations similar to 12 U.S.C. §§ 1464, 1730 (1982), the statutes governing the FSLIC's adjudication of regulatory violations. In the opinion of the court, however, Congress has not chosen to grant such adjudicatory power. *Morrison-Knudsen*, 811 F.2d at 1219-20. The court "reject[ed] FSLIC's interpretation because it raises these 'serious' constitutional difficulties which the statutes can quite 'fairly be read' to avoid." *Id.* at 1222 (citing *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3252 (1986)).

156. See *supra* notes 61-69 and accompanying text.

157. See, e.g., *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 587 (1985) (identity of parties not determinative in article III violation).

158. The FSLIC, in its receivership capacity, steps into the shoes of the failed institution. *Morrison-Knudsen*, 811 F.2d at 1222.

for example, were based on state contract law.¹⁵⁹ The majority of creditor claims against failed thrifts are likewise based on state law.¹⁶⁰ Consequently, the private rights the FSLIC seeks to adjudicate are those not created by the federal government, the precise rights that "lie at the core of the historically recognized judicial power."¹⁶¹

Another factor the Supreme Court examines in article III analysis is the amount of judicial power usurped by the administrative agency.¹⁶² In adjudicating creditor claims the FSLIC usurps a wide range of judicial powers by denying federal district courts subject matter jurisdiction to hear the claims and reach a judgment based on the evidence presented.¹⁶³ Some courts have found no article III violation in FSLIC adjudication because the FSLIC's decisions are not enforceable as binding final judgments.¹⁶⁴ Nevertheless, the FSLIC does not require judicial recognition of its judgments to enforce them.¹⁶⁵ The FSLIC is authorized to pay all valid claims under the direction of the FHLBB.¹⁶⁶ If the FSLIC has the power to determine validity, it can pay the claims it finds valid and force claimants whose claims it disallows to pursue judicial review, just as they would if a district court had denied their claims.¹⁶⁷ The

159. See *supra* notes 9-10 and accompanying text.

160. See, e.g., *Chupik Corp. v. Federal Sav. & Loan Ins. Corp.*, 790 F.2d 1269, 1269-70 (5th Cir. 1986) (involving a materialman's lien perfected under state law); *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1099 (5th Cir. 1985) (involving an employment contract under state law), *cert. denied*, 474 U.S. 1054 (1986).

161. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982). The *Morrison-Knudsen* court noted that the creditor rights at issue arguably constituted private rather than public rights. *Morrison-Knudsen*, 811 F.2d at 1221. The court commented "that FSLIC may well be seeking to adjudicate matters of state contract law reserved to Article III courts." *Id.* at 1221-22 n.4.

162. See *supra* note 67 and accompanying text.

163. See *supra* notes 19-21 and accompanying text.

164. See, e.g., *First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 99 (W.D. Wash. 1986) (no article III violation because FSLIC's actions are not binding and review is available under APA); *Lyons Sav. & Loan Ass'n v. Westside Bancorp.*, 636 F. Supp. 576, 582 (N.D. Ill. 1986) (no article III violation because FSLIC cannot "render 'final judgement' or issue 'binding orders'"), *aff'd*, 828 F.2d 387 (7th Cir. 1987).

165. The *Thomas* Court cited the adjudicatory scheme's system of internal sanctions as evidence that the intrusion on the judiciary was minimal. 473 U.S. at 591. *Thomas*, however, involved a question of public, not private, rights created by the executive branch. The FSLIC's adjudication, in contrast, involves private rights traditionally adjudicated by the judiciary.

166. See *supra* note 35 and accompanying text.

167. See *supra* notes 34-44 and accompanying text.

FSLIC's determinations thus have the impact, if not the technical effect, of binding final judgments. Moreover, judicial review subject to the deferential standards of the APA,¹⁶⁸ the only review available according to the FSLIC, does not preserve constitutionality when private rights are at issue.¹⁶⁹ Consequently, the current FSLIC adjudication scheme intrudes impermissibly on the powers of the judiciary.¹⁷⁰

Another factor the Supreme Court uses in determining if an adjudicatory grant of power to an administrative agency is constitutional is the congressional reason for the grant.¹⁷¹ The FSLIC cites congressional concern with promoting efficiency in its receiverships to justify its assertion of adjudicatory power.¹⁷² Such congressional concern, however, is balanced by the need to protect the rights of private claimants.¹⁷³ Moreover, the interests of private claimants endangered by the FSLIC's statutory interpretation are the precise rights that article III's guarantee of an independent judiciary exists to protect.¹⁷⁴ Consequently, in light of the other factors indicating the need for article III court adjudication of creditor claims, the FSLIC cannot save its interpretation by claiming congressional intent to promote agency efficiency.¹⁷⁵ Although the FSLIC's concern

168. See *supra* notes 19-21 and accompanying text.

169. The *Northern Pipeline* Court noted that administrative agencies can serve as fact-finding adjuncts to courts. When private rights are involved, however, the scrutiny of such adjuncts is far stricter than when public rights are at issue. *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 82-83 (1982). Indeed, the Court stated that article III courts must be afforded an opportunity to determine the facts on the evidence when private rights are at issue. *Id.* at 82 (citing *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932)); see also *United States v. Raddatz*, 447 U.S. 667, 683 (1980) (upholding Magistrates Act because findings subject to de novo review by district courts).

170. In *Schor* the Court found the adjudicatory scheme, which admittedly involved private rights, constitutional because the claimants had the option of bringing their claims in court. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3260 (1986). The FSLIC's scheme, in contrast, does not allow claimants the option of a court suit, thus effectively replacing court adjudication with an agency determination.

171. See *supra* notes 68-69 and accompanying text.

172. See *supra* notes 51-52 and accompanying text.

173. See *supra* note 112.

174. See *Schor*, 106 S. Ct. at 3256. "[O]ur prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests." *Id.*

175. It is important to note that in cases in which administrative agency adjudication has been upheld based on congressional intent to promote efficiency, the adjudication involved narrow questions related to the agency's

for efficiency is valid, Congress can design a statutory scheme that protects the rights of all the parties involved without violating the Constitution.

C. POLICY CONSIDERATIONS

Public policy considerations, although overlooked by the *Morrison-Knudsen* court, nevertheless reinforce the Ninth Circuit's decision and support the need for congressional clarification of the FSLIC's handling of creditor claims in its receiverships.¹⁷⁶ The FSLIC in its capacity as insurer is usually the largest claimant to the assets of its receiverships because depositors subrogate their claims to the FSLIC when it pays deposit insurance.¹⁷⁷ Therefore, when the FSLIC in its receivership capacity adjudicates the rights of claimants to the

expertise. *See, e.g.*, *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 590 (1985) (holding that congressional intent to promote prompt registration of pesticides supported grant of adjudicatory power to Environmental Protection Agency arbitrators in determining valuation of pesticide data); *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (involving congressional intent to furnish expert and inexpensive agency determination of employer liability in maritime accidents). The FSLIC's adjudication of creditor claims, in contrast, involves a wide range of questions based on multiple aspects of state and federal law. *See supra* notes 159-60 and accompanying text. Such claims, moreover, are unrelated to the FSLIC's regulatory expertise in managing thrift institutions and providing thrift insurance. The FSLIC's claim of adjudicatory power is thus similar to the broad grant of jurisdiction found unconstitutional in the federal bankruptcy scheme. *See supra* note 57 and accompanying text.

176. The *Morrison-Knudsen* court briefly examined the need for the FSLIC to recoup its insurance payouts rapidly through prompt liquidation but refused to "effect a wholesale revision of an agency's statutory authority in response to changed national conditions." *Morrison-Knudsen*, 811 F.2d at 1216. The court also stated that "the likelihood of FSLIC being a claimant . . . intensifies its interest in these cases" but failed to further develop the conflict of interest problem. *Id.* (emphasis in original).

177. The *Morrison-Knudsen* court noted that the FSLIC is usually the "single largest claimant" to the receivership assets. *Id.* at 1215-16. *See* 12 U.S.C. § 1729(b)(2) (1982) (payment of insurance on an insured account subrogates FSLIC with respect to claims on account); *see also* S. REP. NO. 1263, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2531 (FSLIC typically has claim to at least 95% of assets of liquidated associations). In addition, receivers are ordinarily disinterested third parties who do not have any claim against the receivership in their personal capacity. *See, e.g.*, *Phelan v. Middle States Oil Corp.*, 154 F.2d 978 (2d Cir. 1946). The *Phelan* court stated the general rule for avoiding conflict of interest through appointment of an impartial receiver.

Where a receiver has a possible personal interest adverse to those of any parties to the receivership, it is usually unwise for him to participate in the reorganization; if he does so he must act with unusual caution; that the court has acquiesced in his participating does not relieve him of his duty of disinterestedness.

receivership assets, it creates a conflict of interest.¹⁷⁸

Traditionally, receivers do not make claims against the receivership in their personal capacity.¹⁷⁹ In allowing the FSLIC to make such claims, as it must to satisfy the claims it has in its corporate capacity, the statutory scheme departs from the receivership model.¹⁸⁰ Nevertheless, when the FSLIC performs the ordinary receivership functions of liquidating and preserving the receivership assets for eventual distribution to claimants, including itself, its interest in maximizing those assets accords with the interest of the other claimants.¹⁸¹ When the FSLIC decides with binding force which claimants have the right to share in those assets, however, its interests and those of other claimants directly conflict.¹⁸² The FSLIC's current financial predicament with the pressure to relieve the strain on its reserves could lead the FSLIC to prefer its own claims over those of rival creditors.¹⁸³

Id. at 991.

The claim of the FSLIC in its capacity as insurer against the receivership assets controlled by the FSLIC in its capacity as receiver is specifically contemplated by the statutory scheme. Nevertheless, creditors of defaulted savings and loan associations have alleged that the FSLIC's adjudication of competing creditor claims creates a conflict of interest. *See, e.g.,* Finlay, *Taking Spent Thrifts to Court*, 7 CAL. LAW. 14, 14 (1987) (creditors challenge constitutionality of FSLIC conflict of interest); *FSLIC as Federal Receiver Can Adjudicate Claims Against Insolvent Savings Institution*, 52 LEGAL BULL. 180, 183 (1986) (ruling may thrust FSLIC into conflict situation); Trigoboff, *Ruling May Change Rules for Swing FSLIC*, 100 L.A. Daily J., June 22, 1987, at 5, col. 1 (creditors object to FSLIC conflict of interest); Cox, *Savings and Loan Bar Applauds Ninth Circuit Ruling on Receiverships*, 9 Nat'l L.J., Mar. 16, 1987, at 40, col. 1 (ruling resolves unseemly situation of FSLIC resolving claims of other creditors).

178. *See infra* notes 181-82 and accompanying text.

179. *See supra* note 177 and accompanying text.

180. The statutory scheme, however, contemplates only FSLIC preservation and liquidation of receivership assets, not adjudication of claims to those assets. *See supra* notes 97-152 and accompanying text.

181. Congress granted the FSLIC receivership powers to facilitate preservation and liquidation of receivership assets with the intent to protect the FSLIC's interest in the assets. *See supra* notes 137-40 and accompanying text. Efficient preservation and liquidation of receivership assets also benefits the remaining claimants, however, by yielding the largest possible amount of money for distribution among all creditors.

182. The FSLIC and the other claimants are rival creditors, each competing for their share of the same pool of receivership assets. *See supra* note 177.

183. The FSLIC alleged authority to adjudicate creditor claims to recoup its insurance payouts rapidly, thereby lessening the strain on its reserves. *See supra* notes 17-20 and accompanying text. At least one court, when confronted with the conflict of interest issue, summarily concluded that the FSLIC is presumed to act in the best interests of all claimants. *See Baer v. Abel*, 648 F. Supp. 69, 78 (W.D. Wash. 1986) (belief that FSLIC's position as plaintiff would

The FSLIC adds to the perception of unfairness in its adjudication by basing decisions on brief forms, without hearings or subpoenas for production of documents.¹⁸⁴ Claimants who receive little opportunity to provide supporting evidence for their claims will consider a resulting denial unfair even without the FSLIC's conflict of interest magnifying the problem. Moreover, this perception of unfair adjudication encourages appeals that further delay distribution of receivership assets, frustrating the FSLIC's goal of rapidly recouping its insurance payouts.¹⁸⁵

Arguably, the apparent unfairness of the FSLIC's adjudication constitutes a procedural due process violation.¹⁸⁶ One basic component of due process, a hearing or other fair procedure to determine the facts, is lacking.¹⁸⁷ In addition the FSLIC procedure lacks the impartial decisionmaker required for due process because of the FSLIC's inherent conflict of interest.¹⁸⁸

undermine other plaintiff's position was speculative). The FSLIC's financial pressures, however, cast doubt on such a presumption.

184. See, e.g., *Finlay*, *supra* note 177, at 14 (FSLIC does not hold administrative hearings or publish opinions in receivership adjudications); *Carrizosa*, *supra* note 19, at 1, col. 2 (FSLIC prohibits subpoenas of witnesses or documents).

185. Even review under the arbitrary and capricious standard of the APA, the review alleged appropriate by the FSLIC, grants claimants some measure of protection against unfair adjudication. See *supra* note 21 and accompanying text. Delays, such as those caused by appeals, frustrate the FSLIC's purpose of recouping insurance payouts faster. See *supra* notes 17-20 and accompanying text.

186. Claimants of FSLIC receiverships have raised the conflict of interest problem unsuccessfully in several cases as a procedural due process violation. See, e.g., *Baer*, 648 F. Supp. at 78 (presumption that FSLIC acts in best interests of whole estate); *First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 100 (W.D. Wash. 1986) (due process issue not ready for consideration until administrative procedure has produced injury).

187. The Supreme Court has established a balancing test to determine which procedures satisfy due process in a given situation. The test requires weighing the private interest involved together with the risk of an erroneous deprivation against the governmental interest involved. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The private interest involved in creditor claims of FSLIC receiverships is usually a substantial amount of money. An erroneous determination could in some cases cause extreme financial hardship or bankruptcy. Governmental interest in maintaining efficiency, even given the FSLIC's financial difficulties, weighs less heavily than the private interest. At the very least, due process arguably requires that the FSLIC allow claimants to submit substantial documentation for their claims instead of brief forms.

188. Decisionmakers who are personally biased do not meet the due process requirement of impartiality. See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding that mayor acting as judge who imposed fines constituting substantial amount of village revenues did not satisfy impartial decisionmaker component of due process). For a discussion of the FSLIC's impartiality, see *infra* note 190.

Determining the procedures required to satisfy constitutional due process is a complicated process, however, which renders a comprehensive analysis of the possible due process violation beyond the scope of this Comment.¹⁸⁹

Even if the FSLIC's adjudication of creditor claims does not strictly violate due process, the apparent unfairness erodes public confidence in FSLIC receiverships, an important policy consideration.¹⁹⁰ Such an erosion of confidence could lead business people to be more cautious in dealing with savings and

189. Because the focus on statutory interpretation, violations of article III, and public policy considerations are sufficient to establish the untenability of the FSLIC's claim, due process analysis has been omitted in this Comment.

190. Numerous statutes guarantee the right to an impartial decisionmaker, indicating congressional intent to preserve public confidence in government. For example the federal ethics laws requiring disqualification of executive employees for personal interest, although applying only to situations involving the employee's own pecuniary interest in the outcome of the administrative determination, provide an analogy to the FSLIC's adjudication of rival creditor claims. *See, e.g.*, 18 U.S.C. § 208 (1982) (executive personnel participation in administrative adjudication involving financial interests of themselves, their relations, or their organizations is a crime). The strength of congressional concern for maintaining unbiased decisions is evidenced in making the conflict of interest a *criminal* act. The legislative history of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (financial disclosure provisions codified at 2 U.S.C. §§ 701-709 & title 5 App. (1983 & Supp. IV 1987)), which imposed financial disclosure requirements on government employees, states that "[t]he purpose of this legislation is to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government." S. REP. NO. 170, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4217. The Senate Report elaborated on the prophylactic goal of the Ethics Act.

[P]ublic confidence in all three branches of the Federal government has been seriously eroded by the exposure, principally in the course of the Watergate investigation, of corruption on the part of a few high-level government officials. Public financial disclosure was seen as an important step to take to help restore public confidence in the integrity of top government officials, and, therefore, in the government as a whole.

Id. at 21, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4237. Although the Act applies to personal financial conflicts of interest on the part of individual officials, the congressional intent to improve public confidence by preventing conflicts of interest is clear. When an entire agency has a financial interest, as in the FSLIC's case, the public perception of a conflict of interest will be far more widespread and damaging than an isolated incident of conflict of interest on the part of individual government officials. In addition the provisions of the APA dealing with personal bias further exemplify congressional concern with agency impartiality by requiring that administrative employees disqualify themselves if they are personally prejudiced toward one party. *See* 5 U.S.C. § 556(b) (1982) (administrative employees should disqualify themselves from agency determination when personally biased). Given the FSLIC's current financial predicament, it is naturally prejudiced toward its own pressing interests. *See supra* note 183 and accompanying text. Furthermore, the

loan associations, especially those experiencing difficulties, thereby contributing to the failure of such institutions and the subsequent drain on the FSLIC's assets.¹⁹¹ Such a drain is the precise result the FSLIC seeks to avoid by adjudicating creditor claims.¹⁹² Consequently, Congress could better promote the FSLIC's financial stability by providing an impartial adjudicatory scheme for creditor claims that balances the interests of all concerned parties.

D. PROPOSED SOLUTION

The need for an impartial adjudicatory scheme to protect the rights of all parties in FSLIC receiverships demonstrates the need for legislative clarification beyond the exhaustion of administrative remedies requirement imposed by the *Morrison-Knudsen* court.¹⁹³ The exhaustion of administrative remedies

FSLIC's employees might also feel pressured by the FSLIC's precarious situation to favor their employer.

Statutes governing disqualification for judges provide another analogy, as judges must disqualify themselves whenever claimants might reasonably question their impartiality. See 28 U.S.C. § 455 (1982) (judge must disqualify self "in any proceeding in which his impartiality might reasonably be questioned"); see also CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1) (amended 1982) (containing the "impartiality might reasonably be questioned" standard for judicial disqualification). The legislative history states that Congress intended § 455(a) to "promote public confidence in the impartiality of the judicial process." H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6355. Section 455(a) thus further indicates that Congress intended to avoid the negative public image produced by conflicts of interest such as the FSLIC's. Because the FSLIC is essentially adjudicating its own claims, claimants not only might but already have questioned its impartiality. See *supra* note 177. The test for impartiality is "whether a reasonable man might doubt the judge's impartiality." Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 248 (1978) (citing *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978)). Courts apply the impartiality standard from the point of view of a disinterested observer, not a litigant. *Id.* at 251. Even though it is other claimants who have accused the FSLIC of partiality, a reasonable person, in light of the FSLIC's large personal financial interest and pressing financial difficulties, would most likely also question the FSLIC's impartiality.

191. Business people will, of course, always be cautious in dealing with troubled institutions. Nevertheless, they can ordinarily count on the impartial determinations of a court to protect their claims. Moreover, the FDIC does not adjudicate creditor claims, but rather litigates such claims in court. See *supra* note 91. The distinction between FDIC practice and FSLIC practice results in creditors of insolvent saving and loan associations being denied the right of impartial adjudication accorded to creditors of insolvent FDIC-insured institutions.

192. See *supra* notes 17-20 and accompanying text.

193. See *supra* notes 95-96 and accompanying text. The effect of a court compelling exhaustion of administrative remedies is the same as requiring ad-

question, as noted by the court, is left to the discretion of district courts.¹⁹⁴ This discretion allows significant variations of result between similar claimants, which is especially problematic in view of the various ways courts in different circuits currently treat FSLIC receiverships.¹⁹⁵ Moreover, under the *Morrison-Knudsen* court's solution, the FSLIC would be required to argue for exhaustion in each case, an inefficient use of both judicial resources and the assets of the receivership.¹⁹⁶ Furthermore, individual courts lack the authority to impose procedural safeguards for the administrative determination when ordering exhaustion of administrative remedies.¹⁹⁷ Consequently, new legislation is the best solution to the current confused state of the law concerning FSLIC adjudication of creditor claims.

To protect the interests of both the FSLIC and the creditors of its receiverships, the new legislation should provide for a compulsory administrative hearing on disputed claims with an independent administrative law judge¹⁹⁸ or arbitrator.¹⁹⁹ The

ministrative adjudication with de novo court review, because courts usually stay proceedings on a case rather than dismiss it when requiring exhaustion of administrative remedies. Nevertheless, the exhaustion requirement can result in significant variations of treatment among similarly situated claimants. See *infra* notes 194-95 and accompanying text.

194. See *supra* notes 95-96 and accompanying text.

195. See *supra* notes 46-50 and accompanying text. A court in the Fifth Circuit, for example, would require creditor claimants to pursue the administrative process, while a court in the Ninth Circuit might, exercising its discretion, allow a claimant to bypass the administrative process. The *Morrison-Knudsen* court, of course, could not change current practice in the Fifth Circuit. A legislative solution, however, can guarantee a uniform procedure in all circuits. See *infra* notes 198-203 and accompanying text.

196. In seeking to adjudicate creditor claims, the FSLIC attempts to recoup its insurance payouts rapidly and lessen the strain on its reserves. See *supra* notes 17-21 and accompanying text. Arguing for exhaustion in each case would not only satisfy neither of these goals but would also be detrimental to the claimants by increasing their litigation expenses and reducing the amount of money available to satisfy successful claims.

197. Assuming a court required a claimant to exhaust administrative remedies, the claimant would be subject to the FSLIC's cursory claims procedure with its concurrent conflict of interest. See *supra* notes 176-85 and accompanying text.

198. See, e.g., 12 U.S.C. § 1464(d)(4)(E) (1982) (providing a hearing for officers the FSLIC seeks to remove with a provision that the officers or their representatives appear at the hearing). A similar provision for hearings with an administrative law judge would effectively provide creditors an opportunity to present their claims.

199. The Federal Savings and Loan Insurance Recapitalization Act of 1987, Pub. L. No. 100-86, § 302, 101 Stat. 552, 585 (1987) (to be codified at 12 U.S.C. § 1441), proposed the appointment of a panel of independent arbitrators with

use of independent judges or arbitrators avoids the conflict of interest problem.²⁰⁰ Making the entire administrative process mandatory gives the FSLIC the greatest opportunity possible to determine which claims to allow.²⁰¹ In addition the statute should provide detailed procedural guidelines, including the right to subpoena witnesses and documents.²⁰² Review of the administrative adjudication, however, should be de novo to avoid an article III violation.²⁰³ Although the suggested administrative adjudication procedure would be less efficient than the FSLIC's present practice, the loss of efficiency is necessary to prevent the erosion of public confidence caused by the FSLIC's conflict of interest.²⁰⁴ The proposed legislation would thus replace the FSLIC's current summary adjudication of creditor

respect to the appraisal value of loans or property used as collateral for loans held by associations, the classification of loans held by associations, and requirements of allowance for loan loss imposed on associations. As the committee noted, "[t]estimony was received in which there were allegations that in some instances the [FHLBB] was overly aggressive and perhaps less than completely fair with some institutions, in its efforts to protect the FSLIC fund. Such evidence is of concern to the Committee." H.R. REP. NO. 62, 100th Cong., 1st Sess. 38 (1987). A similar provision for either a single arbitrator or a panel of arbitrators would avoid the perception of unfairness in FSLIC determinations.

200. The FSLIC creates a significant conflict of interest when it adjudicates the rights of rival creditors. *See supra* notes 176-82 and accompanying text.

201. Allowing the FSLIC the first chance to review creditor claims accords with traditional receivership practice. *See supra* notes 33-36 and accompanying text. It also gives the FSLIC an opportunity to settle disputed claims, thereby avoiding the significant drain on assets caused by protracted adjudication. *See supra* note 36 and accompanying text.

202. This right is provided in traditional receiverships. *See supra* note 25. This right is also provided in other statutes. *See, e.g.*, 12 U.S.C. § 1730a(h)(2) (1983) (granting FSLIC power to issue subpoenas for both witnesses and documents in investigations of regulatory violations). The new regulations proposed by the FSLIC do not include this right, underlining the need for congressional action to protect creditors' rights. *See supra* note 135.

203. Granting creditors of FSLIC receiverships de novo review of their claims makes the proceeding similar to the Magistrates Act, upheld by the Supreme Court in *Raddatz*, in which the magistrates' findings were subject to de novo review. *United States v. Raddatz*, 447 U.S. 667, 683 (1980); *see supra* note 169.

204. *See supra* notes 190-92 and accompanying text. The Supreme Court has held that a full administrative hearing is not necessary when de novo court review is available. *See Nickey v. Mississippi*, 292 U.S. 393, 396 (1934) (holding that administrative hearing was not required in tax collection case when de novo court review was available before payment of tax). Nevertheless, allowing the FSLIC to continue its summary process would not solve the conflict of interest problem. Moreover, court appeals are expensive to both claimants and the receivership, making a summary adjudication process actually less efficient than a full administrative hearing.

claims, including the accompanying constitutional violation and conflict of interest problem, with a procedure that would constitutionally balance the rights of both parties and guarantee a uniform process to all creditors of FSLIC receiverships.

CONCLUSION

Under current law the *Morrison-Knudsen* court's refusal to allow the FSLIC the right to adjudicate creditor claims is correct because the statutory authority does not support a grant of adjudicative power. Moreover, the FSLIC's current adjudication procedure lacks sufficient safeguards to protect the rights of the claimants, violates article III of the Constitution, and creates an undesirable conflict of interest. Nevertheless, the financial predicament of both the FSLIC and the thrift industry, as the *Morrison-Knudsen* court realized in requiring exhaustion of administrative remedies, makes some protection for the FSLIC in adjudication of creditor claims advisable. Ideally, however, that protection will consist of new legislation designed to balance the competing interests of the FSLIC and the creditor claimants because an exhaustion of remedies requirement does not provide a uniform result. The proposed legislation would grant creditors the right to an administrative hearing with an independent judge or arbitrator, including the right to subpoena witnesses and documents, but it would make the administrative process mandatory to provide the FSLIC the opportunity to either allow or settle most claims. Judicial review would be de novo to avoid a constitutional violation. In light of the current disparate treatment of similarly situated FSLIC-receivership creditors in different circuits, the new legislation is desperately needed to provide a uniform, comprehensive, and equitable solution.

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