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Alison M. Bennett

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1993]

FIRREA—THIRD CIRCUIT JOINS OTHER CIRCUITS IN HOLDING THAT
FIRREA ABOLISHES PREEXISTING CONTRACTS REGARDING CAPITAL
REQUIREMENTS

Carteret Savings Bank, FA v. Office of Thrift Supervision (1992)

I. INTRODUCTION

Savings banks, credit unions and savings and loan associations comprise what is commonly referred to as the thrift industry.¹ As a result of the risky and turbulent nature of this industry,² the federal government imposes heavy regulations on thrift institutions.³ In this regulatory capacity, the federal government may enter into agreements with thrifts. Under one such agreement, a forbearance agreement, the government agrees to hold a thrift to certain standards and, in exchange, the thrift agrees to take a particular action.⁴

In 1989, Congress enacted the Financial Institutions Reform, Re-

1. See generally EDWARD J. KANE, *THE S & L INSURANCE MESS: HOW DID IT HAPPEN?* (1989) (providing detailed discussion of savings and loan crisis).

The thrift industry has two areas of specialty. *Id.* at 2. The first area of specialty is raising funds through issuing and servicing financial instruments for customer accounts. *Id.* Asset management is the other segment of a thrift's work. *Id.* In managing assets, the thrift reinvests customers' funds in high yield assets. *Id.* A thrift earns a profit when the interest on these investments exceeds the interest paid out to customers. *Id.* at 3.

2. See H.R. REP. NO. 54(I), 101st Cong., 1st Sess. 292-308 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 88-104 [hereinafter HOUSE REPORT] (describing unstable history of thrifts); ANDREW S. CARRON, *THE PLIGHT OF THE THRIFT INSTITUTIONS* 1-26 (1982) (discussing problems of thrift industry such as interest rate fluctuations and restrictions, insolvency and liquidity issues).

3. See KANE, *supra* note 1, at 34-37 table 2-3 (listing Acts passed by Congress between 1932 and 1987 that affected thrift industry); AMERICAN BAR ASSOCIATION, *HANDBOOK OF SAVINGS AND LOAN LAW* (1953) (discussing history, powers, operations and regulation of state and federally chartered savings and loans); Ronald R. Glancz, *Thrift Industry Restructured: An Overview of FIRREA*, FED. B. NEWS & J., Dec. 1989, at 472 (discussing regulation of thrift industry).

4. See generally David B. Toscano, *Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty*, 92 COLUM. L. REV. 426, 427-30 (1992) (discussing creation and effect of forbearance agreements); see also Linda B. Coe, Note, *Abrogation of Forbearance Agreements: Unauthorized by FIRREA and Unconstitutional*, 59 GEO. WASH. L. REV. 157, 158 (1990) (discussing forbearance agreements between government and thrift). The basic arrangement can be explained as follows:

In exchange for the [thrift's] acquisition of assets and assumption of deposit liabilities, the government gave consideration consisting partly of an agreement that the government would forbear from enforcing certain regulatory accounting and capital requirements. These forbearance agreements shielded the thrift acquirors from supervisory action and permitted them to undertake activities normally only allowed for fully capitalized thrifts.

Coe, Note, *supra*, at 158.

(1271)

covery and Enforcement Act (FIRREA),⁵ a massive piece of legislation regulating the thrift industry.⁶ As enacted, some portions of FIRREA dealing with capital requirements⁷ are inconsistent with the terms of pre-existing forbearance agreements between the government and the thrifts.⁸ As a result of this inconsistency, both the government and the thrifts began questioning whether FIRREA invalidated the terms of the agreements or whether the pre-existing agreements continue to be operative.⁹

In *Carteret Savings Bank, FA v. Office of Thrift Supervision*,¹⁰ the United States Court of Appeals for the Third Circuit addressed the issue of whether the new capital requirements created by FIRREA applied to thrifts that had previously entered into forbearance agreements with the government.¹¹ Although the Third Circuit found that a binding contract existed between the thrift and the government,¹² the court, in ac-

5. Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C. (1989)).

6. See Glancz, *supra* note 3, at 472 ("Congress has created a behemoth (the statute runs 400 to 1,500 pages long . . .) that will affect many financial institutions, including thrifts, commercial banks, and the real estate industry.").

7. For a discussion of the new capital requirements imposed by FIRREA, see notes 31-33 and accompanying text.

8. See Coe, Note, *supra* note 4, at 158. FIRREA provides minimum capital requirements for federally insured thrifts. *Id.* The Office of Thrift Supervision (OTS), the agency in charge of regulating thrifts under FIRREA, "subsequently declared that this statutory mandate required it to dishonor the government's obligations to refrain from enforcing certain capital and accounting requirements under forbearance agreements." *Id.* For a more detailed discussion of forbearance agreements whose terms were subsequently made unlawful by FIRREA, see *infra* notes 34-36 and accompanying text.

9. See Department of Justice, *Billions Riding on Federal Programs Case*, DEP'T JUST. ALERT, Aug. 1992, at 11 (discussing effect of FIRREA on pre-existing agreements between thrifts and government regarding capital requirements). From the thrifts' perspective, "the government's enforcement of [FIRREA] breached the contracts they entered with the government when they took over operation and obligations of failed [thrifts]." *Id.* From the government's perspective, however, the thrifts "knew all along the benefits they received from the government were subordinate to the law of the land, and that they cannot prevent Congress from later changing the rules." *Id.* For further discussion of whether the pre-existing agreement or FIRREA prevails in the Third Circuit, see *infra* notes 61-98 and accompanying text.

10. 963 F.2d 567 (3d Cir. 1992).

11. See *id.* at 573-82 (deciding whether Carteret had contract right to treat supervisory goodwill as regulatory capital and whether FIRREA abrogated contracts between Carteret and government). The agreements seemingly exempted the thrifts from FIRREA's capital requirements. See *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 762 F. Supp. 1159, 1170-73 (D.N.J. 1991) (detailing contents of agreements between government and thrift), *vacated*, 963 F.2d 567 (3d Cir. 1992). For further detail of the agreements between Carteret and the government, see *infra* note 52 and accompanying text.

12. *Carteret*, 963 F.2d at 573-74. The agreements between Carteret and the federal regulatory agencies seemingly exempted Carteret from FIRREA's capital requirements. See *id.* (finding no real issue concerning existence of binding con-

cordance with three other circuit courts, determined that FIRREA abolished all agreements not consistent with its terms.¹³ Finally, the Third Circuit held that it had no jurisdiction to hear the thrift's claim that, by abrogating the forbearance agreements, the government was taking the thrift's property without just compensation.¹⁴

II. BACKGROUND

A. *The Thrift Crisis of the 1980s*

During the late 1970s and 1980s, savings and loan institutions began experiencing financial difficulties. First, the thrifts lost money as a result of holding long-term, low-yield, fixed-rate mortgages at a time when interest rates were climbing.¹⁵ The problem rapidly escalated as the result of several factors.¹⁶ What began as "financial difficulties" in the early 1980s subsequently culminated into the failure of many savings and loan institutions.¹⁷

tracts). For a detailed analysis of the court's finding that contracts existed between Carteret and the government, see *infra* note 61-64 and accompanying text.

13. See *Carteret*, 963 F.2d at 574-82 (examining statutory language, legislative history and other circuit courts' opinions and holding that FIRREA supercedes prior agreements inconsistent with its terms). For a discussion of the decisions of the United States Courts of Appeals for the Sixth, Ninth and Eleventh Circuits holding that FIRREA abolished contracts inconsistent with its capital requirement provisions, see *infra* notes 37-39 and accompanying text. For a discussion of the *Carteret* court's interpretation that FIRREA abolished pre-existing contracts, see *infra* notes 65-98 and accompanying text.

14. See *Carteret*, 963 F.2d at 584 ("We take no position as to whether Carteret has a viable takings claim, but hold only that neither the district court nor [the circuit] court provides the appropriate forum to decide that issue."). For an examination of the *Carteret* court's takings claim analysis, see *infra* notes 99-104 and accompanying text.

15. See Brief for Appellee at 4, *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992) (No. 91-5290) (noting that "record-high interest rates pushed the cost of funds at thrifts to substantially above the rate of return on thrift portfolios (which consisted principally of long-term fixed-rate mortgages)"). One commentator has asserted that the "thrifts were paying more to attract funds than they were earning on their mortgage portfolios." Glancz, *supra* note 3, at 472.

16. Glancz, *supra* note 3, at 472. In an initial attempt to remedy the problem, Congress rapidly deregulated the industry, hoping to make it easier for the thrifts to attract and acquire funds. *Id.* This period of deregulation, however, combined with the economic decline in the Southwest and resulted in a significant number of thrift failures. *Id.* Professor Glancz has suggested that several other factors contributed to the thrift emergency including: "accounting trickery, blind growth, the dismal performance of many thrift managers, lax underwriting standards, the lack of internal and external controls, radical deregulation, weak supervision by a number of large states, reliance on 100 percent deposit insurance and outright fraud and insider abuse." *Id.*

17. See Lawrence J. White, *The S&L Debacle*, 59 *FORDHAM L. REV.* 557, 557 (1991) (examining savings and loan crisis and, from economic perspective, telling "the story of what happened, why it happened, how it happened, and what

In response to the increasing number of failures, the government created an agency to provide various forms of financial assistance to aid troubled thrifts.¹⁸ This agency's funds were quickly drained, however, and the agency neared bankruptcy itself as a result of a great number of thrifts needing financial assistance.¹⁹

Because the agency was unable to continue assisting the failing thrifts on its own, the government entered into forbearance agreements with healthy savings and loan institutions.²⁰ Under the terms of these agreements, healthy savings and loan institutions agreed to merge with failing institutions and to take over the failing institutions' assets and liabilities.²¹ Consequently, the healthy institutions were acquiring failing thrifts whose liabilities greatly exceeded their own assets.²² The healthy institutions wanted consideration in return for accepting this responsibility.²³ Therefore, the government agencies compromised and permitted any healthy institution that acquired a failing thrift to treat the

must be done so that it never happens again"); Brief for Dollar Bank, FSB as amicus curiae at 11, *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992) (No. 91-5597, 91-5290) (noting that thrift industry incurred losses of \$8.8 billion in 1981 and 1982, and that over 80% of all FSLIC insured thrifts incurred losses between mid-1981 and mid-1982).

18. See 12 U.S.C. § 1729(f)(2)(A) (repealed 1989) (authorizing FSLIC to bail out troubled thrifts by either issuing promissory notes, cash contributions or guarantees against loss by reason of merger).

19. See 135 CONG. REC. H2703 (daily ed. June 15, 1989) [hereinafter CONGRESSIONAL RECORD] (statement of Rep. Hyde) (noting that FSLIC "did not have the money in its insurance deposit fund to take care of the depositors in these 100 [failing] institutions"); Brief for Appellee, *supra* note 15, at 5 (stating that "[t]he regulators quickly realized that providing tangible assistance at [the rate the FSLIC was progressing] would bankrupt the insurance fund by April 1982").

20. CONGRESSIONAL RECORD, *supra* note 19, at H2700 (statement of Rep. Quillen). As Congressman Quillen described the scenario:

Back in the early 1980's, the Federal Home Loan Bank Board went to some healthy savings and loan institutions throughout the country and said in effect, "You have a good financial statement, you have good management, and we need your help. There are some failing savings and loans in your area. The Federal Government does not have the insurance funds to bail them out, and we need your help. If you will go and take over these failing institutions, we will allow goodwill to be amortized over a period of 40 years."

Id.

21. See 12 U.S.C. § 1729(f)(1) (repealed 1989) (empowering FSLIC to organize mergers of financially distressed thrifts with healthy thrifts "in its sole discretion and upon such terms and conditions as [it] may prescribe").

22. See CONGRESSIONAL RECORD, *supra* note 19, at H2703 (statement of Rep. Hyde) (noting that by acquiring failing institutions, healthy thrifts were "getting half sick themselves").

23. Coe, Note, *supra* note 4, at 158 ("In exchange for the buyers' acquisition of assets and assumption of deposit liabilities, the government gave consideration consisting partly of an agreement that the government would forbear from enforcing certain regulatory accounting and capital requirements.").

acquired thrift's excess liabilities as supervisory goodwill.²⁴ Treating the excess liabilities in this manner enabled these healthy thrifts to include goodwill as part of their risk-based capital and to amortize the goodwill over a period of forty years.²⁵ Although this practice temporarily alleviated the government's funding problems, savings and loan institutions continued to fail during the 1980s.²⁶ As a result, Congress subsequently made numerous statutory attempts to remedy the situation.²⁷

B. *Enactment of FIRREA and its Effect*

In 1989, shortly after the Bush administration came into office, President Bush presented Congress with a plan to resolve the savings and loan crisis.²⁸ Congress enacted this plan, known as the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).²⁹ The major purposes of FIRREA were to properly allocate funding for failed thrifts, to distinguish between the regulatory and insurance roles of the thrift industry, to strengthen capital standards for thrifts and to protect against insider abuse by reinforcing regulatory powers.³⁰

FIRREA made many changes to both the substance and the form of savings and loan regulation.³¹ One notable change was the imposition

24. HOUSE REPORT, *supra* note 2, at 497-98, reprinted in 1989 U.S.C.C.A.N. at 292-93. "Supervisory goodwill represents the difference between the value of the assets and liabilities of the failed institutions." *Id.* at 497, reprinted in 1989 U.S.C.C.A.N. at 293; see Toscano, *supra* note 4, at 426 (noting that supervisory goodwill is "an intangible asset that when included in capital does not provide a genuine cushion against losses").

25. See HOUSE REPORT, *supra* note 2, at 497-98, reprinted in 1989 U.S.C.C.A.N. at 292-93. "Supervisory goodwill is not carried as a permanent asset. It is amortized, or written off over a specified period. Every year savings and loans with supervisory goodwill expense a portion of it. To cover this expense, an institution must earn a profit on its other assets." *Id.* at 498, reprinted in 1989 U.S.C.C.A.N. at 293.

26. See Stuart M. Gerson, *Goodwill and Net Worth Maintenance Actions*, 588 PRAC. L. INST. 287 (1991) ("[M]any thrifts . . . used their expanded powers and inflated capital in ways that perpetuated the crisis.").

27. See HOUSE REPORT, *supra* note 2, at 294-96, reprinted in 1989 U.S.C.C.A.N. at 90-92 (discussing 1978 Financial Institutions Regulatory and Interest Rate Control Act (FIRICA), Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMC) and other regulatory actions).

28. HOUSE REPORT, *supra* note 2, reprinted in 1989 U.S.C.C.A.N. at 88.

29. Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C. (1989)).

30. Glancz, *supra* note 3, at 472.

31. See generally 12 U.S.C. §§ 1422a-1468c (Supp. 1991). FIRREA replaced the Bank Board with the Federal Housing Finance Board for matters concerning the Federal Home Loan Banks. *Id.* § 1422a. The statute also created the Office of Thrift Supervision (OTS), which was to "be an office in the Department of the Treasury." *Id.* § 1462a. OTS took over the duties of the Bank Board and the FSLIC in regulating and examining thrifts. *Id.* §§ 1462a-1467c (defining duties

of new capital requirements on thrifts.³² These new capital requirements severely restricted the use of supervisory goodwill as regulatory capital.³³

After Congress enacted FIRREA, questions arose concerning the restrictions on the use of supervisory goodwill. Some thrifts held forbearance agreements with the government that allowed them to use su-

of OTS). In addition, the statute established the Resolution Trust Corporation (RTC), which "assume[d] all rights and obligations of the Federal Savings and Loan Insurance Corporation." *Id.* § 1441a(h)(1). The RTC is in charge of merging or liquidating thrifts placed into receivership or conservatorship after 1988 and before 1993. *Id.* § 1441a(b)(1)(A) & (3).

Substantively, FIRREA also made many changes. Savings deposits are no longer insured by the FSLIC but by the Savings Association Insurance Fund (SAIF), which the FDIC administers. *Id.* § 1815. In addition, the thrifts have investment restrictions, housing related investment requirements, limited loaning powers, accounting and capital requirements, and acquisition authorization. Glancz, *supra* note 3, at 472. Finally, the statute expanded civil and criminal penalties. *Id.*

For a more detailed analysis of FIRREA's provisions and of how FIRREA changed the structure of the thrift industry, see Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 OHIO ST. L.J. 1117 (1989). For a general discussion of FIRREA that concentrates on the RTC, which manages and resolves thrifts that have been placed in conservatorship or receivership, see Patti G. Meire et al., *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts*, 25 U. RICH. L. REV. 1 (1990).

32. 12 U.S.C. § 1464(t)(1) (noting that Director may set "uniformly applicable capital standards . . . [including] a leverage limit; . . . a tangible capital requirement; and . . . a risk-based capital requirement"); see Alex M. Azar II, Note, *FIRREA: Controlling Savings and Loan Association Credit Risk through Capital Standards and Asset Restrictions*, 100 YALE L.J. 149, 151-54 (1990) (discussing three types of risks encountered by thrifts—credit risk, interest rate risk and liquidity risk—and FIRREA's means of controlling these risks through capital requirements and asset restrictions).

33. See 12 U.S.C. § 1464(t)(3) (describing limits on use of supervisory goodwill). In general, "an eligible savings association may include qualifying supervisory goodwill in calculating core capital." *Id.* A savings association is "eligible" if the Director of OTS determines that the association: (1) has competent management; (2) has substantially complied with all applicable regulations; and (3) has not engaged in fraudulent or speculative practices. *Id.* FIRREA defines qualifying supervisory goodwill as "supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of . . . 20 years, or . . . the remaining period for amortization in effect on April 12, 1989." *Id.* § 1464(t)(9)(B). "Core capital," for purposes of FIRREA, is the amount of "core capital as defined . . . for national banks, less any unidentifiable intangible assets, plus any purchased mortgage servicing rights excluded from . . . definition of capital [for banks] but included in calculating the core capital of savings associations . . ." *Id.* § 1464(t)(9)(A).

The amount of qualifying supervisory goodwill may not, however, exceed the applicable percentage of total assets set forth in tabular form in the statute. *Id.* § 1464(t)(3). The table essentially allows thrifts to include supervisory goodwill in core capital in an amount equal to 1.5% of total assets acquired before January 1, 1992. *Id.* For assets acquired after January 1, 1992, the table gradually phases out the allowable amount until 1995, when no supervisory goodwill may be included in core capital. *Id.*

pervisory goodwill in a manner that was contrary to FIRREA's directive.³⁴ Therefore, an issue arose as to whether FIRREA applied only prospectively or whether FIRREA affected the existing forbearance agreements. The Office of Thrift Supervision (OTS) issued a bulletin addressing this issue stating that FIRREA abrogated these prior contracts.³⁵ Suddenly, thrifts that the government, the public and investors had considered "healthy" were no longer in compliance with regulatory capital standards.³⁶

C. Case Law

The OTS bulletin stating that FIRREA's capital requirements applied to all thrifts, regardless of agreements to the contrary, caused a great deal of disturbance in the thrift industry.³⁷ The bulletin had a marked effect on thrifts that had entered into what they believed were binding contracts allowing them to include supervisory goodwill in their regulatory capital and to amortize it over a long period.³⁸ Consequently, many of these thrifts brought suit in federal court to clarify FIRREA's effect on these purported contracts.³⁹ The thrifts based their claims for relief on two alternative theories: (1) FIRREA did not abrogate binding forbearance agreements; and (2) if FIRREA did abrogate these contracts, such abrogation constituted a taking by the government

34. For a discussion of forbearance agreements in the context of supervisory goodwill, see *supra* notes 20-25 and accompanying text.

35. See OFFICE OF THRIFT SUPERVISION, CAPITAL ADEQUACY: GUIDANCE ON THE STATUS OF CAPITAL AND ACCOUNTING FORBEARANCES AND CAPITAL INSTRUMENTS HELD BY A DEPOSIT INSURANCE FUND, THRIFT BULLETIN No. 38-2 (Jan. 9, 1990) [hereinafter OTS THRIFT BULLETIN].

36. See HOUSE REPORT, *supra* note 2, at 27, reprinted in 1989 U.S.C.C.A.N. at 410 (stating that "[m]any of these institutions [were] the financially healthy portion of this industry—making profits and paying dividends, [but] [o]vernight, as the accounting standards [were] re-legislated, they [became] 'unsafe and unsound' for the purposes of federal banking law").

37. See Gerson, *supra* note 26, at 287 ("FIRREA's enhanced capital requirements led to an outpouring of litigation from thrifts which, without supervisory goodwill, were unable to meet FIRREA's stricter capital requirements.").

38. For a discussion of the effect of FIRREA's capital requirements on thrifts that entered into forbearance agreements with the government, see *infra* notes 110-14 and accompanying text.

39. See *Charter Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 773 F. Supp. 809, 826-27 (W.D. Va. 1991), *aff'd in part and rev'd in part*, 976 F.2d 203, 214 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1643 (1993); *Hansen Sav. Bank v. Office of Thrift Supervision*, 758 F. Supp. 240, 247 (D.N.J. 1991); *Security Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 747 F. Supp. 656, 660 (N.D. Fla. 1990); *Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision*, 742 F. Supp. 1159, 1163 (M.D. Ga. 1990), *rev'd*, 928 F.2d 994, 1006 (11th Cir. 1991); *Far W. Fed. Bank v. Director, Office of Thrift Supervision*, 738 F. Supp. 1559, 1571 (D. Or. 1990); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, No. CIV-2-90-166, 1990 WL 123145, at *1 (E.D. Tenn. July 16, 1990), *rev'd*, 927 F.2d 1332, 1334 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991).

and required just compensation.⁴⁰

Nearly all the district courts that decided these issues provided equitable relief for the thrifts.⁴¹ As a threshold issue, many district courts found that a binding contract existed between the thrift and the government agency.⁴² In providing relief for the thrifts, these courts held that

40. See *Charter Fed. Sav. Bank*, 773 F. Supp. at 826-27 (bringing claim that FIRREA did not abrogate contracts and, alternatively, that such abrogation constituted taking); *Hansen Sav. Bank*, 758 F. Supp. at 247 (same); *Security Fed. Sav. Bank*, 747 F. Supp. at 660 (same); *Guaranty Fin. Servs.*, 742 F. Supp. at 1163 (same); *Far W. Fed. Bank*, 738 F. Supp. at 1571 (same); *Franklin Fed. Sav. Bank*, 1990 WL 123145, at *1 (same).

41. See *Charter Fed. Sav. Bank*, 773 F. Supp. at 827 (declaring that contract existed and allowing rescission of contract if thrift was substantially burdened by OTS enforcement action); *Hansen Sav. Bank*, 758 F. Supp. at 247 (preliminarily enjoining OTS from "declaring [thrift's] . . . current noncompliance . . . unsafe or unsound" and excluding thrift's "supervisory goodwill . . . from its capital calculations for all regulatory purposes"); *Security Fed. Sav. Bank*, 747 F. Supp. at 660 (enjoining OTS "from enforcing against the [thrift] any regulatory capital requirements inconsistent with the [forbearance agreement]"); *Guaranty Fin. Servs.*, 742 F. Supp. at 1163 (preliminarily enjoining OTS "from excluding the amortization of supervisory goodwill from any and all determinations of the [thrift's] capitalization as set out in the forbearance agreement"); *Far W. Fed. Bank*, 738 F. Supp. at 1571 (preliminarily enjoining OTS from "imposing or enforcing any regulatory restrictions against [thrift] that are inconsistent with the express terms of [forbearance agreement]"); *Franklin Fed. Sav. Bank*, No. CIV-2-90-166, 1990 WL 123145, at *1 (permanently enjoining OTS from "excluding the amortization of supervisory goodwill from any and all determinations of the [thrift's] capitalization as set out in the [forbearance agreement]"). But see *Northeast Sav., FA v. Director, Office of Thrift Supervision*, 770 F. Supp. 19, 25 (D.D.C. 1991) (granting OTS's motion to dismiss and denying thrift's motion for preliminary injunction); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, No. CIV.A.90-1678, 1991 WL 201178, at *10 (D.D.C. Aug. 1, 1991), *aff'd*, 967 F.2d 598 (D.C. Cir. 1992) (denying motion for preliminary injunction); *Flagship Fed. Sav. Bank v. Wall*, 748 F. Supp. 742, 749 (S.D. Cal. 1990) (granting no injunctive relief because there was "no irreparable harm, and [because] the [thrift was] not likely to succeed in showing that FIRREA prohibited the actions of the OTS or FDIC, or that there was a breach of contract"); *Century Fed. Sav. Bank v. United States*, 745 F. Supp. 1363, 1370 (N.D. Ill. 1990) (denying motion for preliminary injunction).

42. See *Charter Fed. Sav. Bank*, 773 F. Supp. at 821-22 (finding contract based on existence of consideration and mutual promises between OTS and thrift); *Hansen Sav. Bank*, 758 F. Supp. at 244-47 (finding contractual forbearances based on documentary evidence and oral testimony of parties' intent); *Franklin Fed. Sav. Bank*, 1990 WL 123145, at *1 (finding that forbearance agreement was "an integral part of the entire agreement and was for the benefit of all parties in order to recapitalize the failing institution and to prevent additional agency and taxpayer expenditures which would have been necessitated by a failure of the institution"); *Security Fed. Sav. Bank*, 747 F. Supp. at 658 (stating that evidence "strongly indicat[ed] . . . that [thrift] bargained for, and received, a promise from the government that its unamortized deferred loan losses would be treated as a component of its regulatory capital"); *Guaranty Fin. Servs.*, 742 F. Supp. at 1162 (not expressly finding existence of contract but basing holding on this fact); *Far W. Fed. Bank*, 738 F. Supp. at 1564 (existence of contract inherent in holding). But see *Century Fed. Sav. Bank*, 745 F. Supp. at 1370 (finding that thrift was subject to subsequent congressional action under FIRREA because agree-

the savings provision in FIRREA preserved the binding contracts.⁴³ On appeal, however, all circuit courts that heard the claims reversed the district courts' decisions.⁴⁴ The circuit courts found that the savings provision did not apply to the agreements between the thrifts and the government.⁴⁵ In addition, the circuit courts either rejected the taking claims asserted under the Fifth Amendment to the United States Constitution or found that the federal courts did not have jurisdiction over the claims.⁴⁶

III. CARTERET SAVINGS BANK, FA V. OFFICE OF THRIFT SUPERVISION

A. Introduction

Carteret Savings Bank (Carteret), one of New Jersey's largest sav-

ment "did not contain a forbearance or waiver of existing regulations" as in other cases).

43. See *Hansen Sav. Bank*, 758 F. Supp. at 246 (finding that § 401 "preserve[s] contractual forbearances of capital standards even though section 301 states that the new capital standards apply to all thrifts"); *Security Fed. Sav. Bank*, 747 F. Supp. at 658-59 (same); *Guaranty Fin. Serv.*, 742 F. Supp. at 1162 (same); *Far W. Fed. Bank*, 738 F. Supp. at 1562-64 (same); *Franklin Fed. Sav. Bank*, 1990 WL 123145, at *1 (same). But see *Flagship Fed. Sav. Bank*, 748 F. Supp. at 748 (rejecting applicability of § 401 because that section "prevents any change in agency obligations as a result of the abolition of the [Bank Board] and the FSLIC" not as a result of controversy at issue); *Transohio Sav. Bank*, 1991 WL 201178, at *8 (finding statute ambiguous and deferring to OTS's interpretation that § 401 does not preserve forbearances at issue).

44. See *Far W. Fed. Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1100 (9th Cir. 1991) (reversing district court and remanding to vacate judgment); *Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision*, 928 F.2d 994, 1006 (11th Cir. 1991) (reversing and remanding with instructions to dissolve preliminary injunction); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1339, 1341 (6th Cir.) (reversing district court), *cert. denied*, 112 S. Ct. 370 (1991).

45. See *Far W. Fed. Bank*, 951 F.2d at 1098 (holding that language of § 401, structure of statute and legislative history support notion that § 401 does not preserve forbearance agreements); *Guaranty Fin. Servs.*, 928 F.2d at 1006 (stating that "FIRREA would abrogate supervisory goodwill forbearances" and holding that § 401(g) did not apply to treatment of supervisory goodwill); *Franklin Fed. Sav. Bank*, 927 F.2d at 1339 (examining language of statute as well as legislative history and holding that § 402(g) does not preserve forbearance agreements).

In many of the cases in which the circuit courts found that the savings provision did not apply to forbearance agreements, the courts did not address the preliminary issue of whether a binding contract existed. See, e.g., *Far W. Fed. Bank*, 951 F.2d at 1097-1100 (deciding case without discussing issue of existence of contract); *Franklin Fed. Sav. Bank*, 927 F.2d at 1339 (same). But see *Guaranty Fin. Servs.*, 928 F.2d at 1001 (recognizing that contract existed but interpreting contract to mean that thrift "had the right to treat its goodwill as regulatory capital and amortize it over a twenty-five year period for so long as the statutes and regulations governing the area remained as they were when the agreement was signed").

46. See *Far W. Fed. Bank*, 951 F.2d at 1100 (holding that court had no jurisdiction to hear taking claim); *Franklin Fed. Sav. Bank*, 927 F.2d at 1341 (same); see also *Guaranty Fin. Servs.*, 928 F.2d at 1006 (failing to address taking issue).

ings and loan institutions, engaged in several business transactions during the 1980s.⁴⁷ The first of these transactions took place in 1982 when Carteret acquired two failing thrifts.⁴⁸ In 1986, Carteret merged with three additional savings associations, two of which had financial difficulties.⁴⁹ Upon each acquisition, Carteret accepted full responsibility for all financial difficulties accompanying the thrift.⁵⁰ Carteret, like many other healthy institutions, attempted to utilize its financial responsibility for the acquired thrift in a manner that would not be detrimental to its own financial well-being.⁵¹ Therefore, Carteret entered into several agreements with government regulatory agencies at the time of the thrift acquisitions to ensure that it would achieve this goal.⁵²

47. *Carteret Sav. Bank, FA v. Office of Thrift Supervision*, 963 F.2d 567, 569 (3d Cir. 1992). At trial, both parties acknowledged that Carteret suffered losses in 1981 and 1982 as a result of engaging in "long-term, low yielding fixed rate mortgag[ing] while their cost of funds sharply increased as a result of record inflation." *Id.* In 1982, Carteret converted to a federally chartered mutual association and in 1983 to a federally chartered stock association. *Carteret Sav. Bank v. Office of Thrift Supervision*, 762 F. Supp. 1159, 1162 (D.N.J. 1991), *vacated*, 963 F.2d 567 (3d Cir. 1992). By 1991, AmBase Corporation, a publicly traded corporation, owned Carteret. *Id.*

48. *Carteret*, 963 F.2d at 569. In 1982, Carteret acquired First Federal Savings and Loan Association located in Delray Beach, Florida (Delray) and Barton Savings and Loan Association located in Newark, New Jersey (Barton). *Id.*

49. *Id.* at 571. Although Carteret acquired three thrifts, only the two troubled thrifts are pertinent to the case: First Federal Savings and Loan Association of Montgomery County, Blacksburg, Virginia (First Federal) and Mountain Security Savings Bank, Wytheville, Virginia (Mountain Security). *Id.*

50. *Id.* at 569-70. All parties to the action agreed that both Barton and Delray had liabilities in excess of their assets. *Id.* at 569. Barton's liabilities exceeded its assets by \$46 million, and Delray's liabilities exceeded its assets by \$168 million. *Id.* The Federal Savings and Loan Insurance Corporation (FSLIC) assisted Carteret in the Barton acquisition by giving Carteret \$11.7 million. *Id.* The 1986 acquisitions also generated liabilities in excess of assets approximating \$22 million. *Id.* at 571.

51. *Id.* at 569-70. Carteret wanted to treat the acquired thrifts' excess liabilities as supervisory goodwill and to amortize a portion of this goodwill in calculating regulatory capital at the end of each year. *Id.* (noting that statutes and regulations govern amount of regulatory capital that financial institutions must maintain). Because Carteret's acquisitions generated approximately \$214 million of liabilities in excess of assets, including supervisory goodwill in calculating capital requirements was extremely important to Carteret, particularly because this amount "far exceeded Carteret's own net worth prior to the acquisitions." *Id.* Carteret wished to amortize the supervisory goodwill generated by the 1982 acquisitions over a period of 40 years. *Id.* The Bank Board and the FSLIC must each approve arrangements such as the merger between Carteret and the failing thrifts. *Id.* If the Bank Board and the FSLIC did not approve Carteret's plan, Carteret intended to request that the FSLIC compensate Carteret for the difference in earnings caused by this failure. *Id.* With respect to the 1986 acquisition, Carteret wished to amortize the amounts over only a 25 year period. *Id.* at 571.

52. *Id.* at 570. The 1982 acquisitions resulted in a Merger Resolution in which the Bank Board accepted Carteret's suggested procedures. *Id.* The Merger Resolution contained several forbearance clauses, one of which is significant to this case:

Provided that Carteret submits to the Bank Board . . . certification . . .

In 1989, several years after Carteret's acquisitions, Congress enacted FIRREA.⁵³ When OTS examined and calculated Carteret's capital in 1990, OTS did not include the supervisory goodwill that Carteret obtained during the 1982 and 1986 acquisitions.⁵⁴ As a result, Carteret failed to meet FIRREA's risk-based capital requirements.⁵⁵

Carteret subsequently filed a complaint against OTS in the United States District Court for the District of New Jersey seeking injunctive and declaratory relief.⁵⁶ As a preliminary matter, the district court

that Carteret has accounted for the assets and liabilities acquired in the Mergers, and the resulting periods for the amortization of goodwill and the accretion of the loan discount, in accordance with generally accepted accounting principles ("GAAP"), as GAAP existed at the time of the Bank Board's approval of the Mergers, such certification shall be considered to be satisfactory evidence that Carteret's use of the purchase method of accounting is in accordance with GAAP, and such use of the purchase method of accounting will be considered to be in accordance with regulatory accounting procedures.

Id. The Bank Board and the FSLIC also "expressly reserve[d] all of their statutory rights and privileges with respect to Carteret." *Id.* The Bank Board explained this phrase as meaning that the Bank Board and FSLIC reserved only those rights that it did not expressly waive in the forbearance agreement. *Id.* at 571. Carteret also entered into an Assistance Agreement with the FSLIC that "bound the parties'" successors, and contained an integration clause that combined any letters or decisions (made by the regulators) with the agreement as long as they did not conflict. *Id.* at 570. Carteret did not insist on a forbearance agreement for the 1986 acquisition, but only requested that the Bank Board approve Carteret's use of supervisory goodwill and amortization of the goodwill. *Id.*

53. For a thorough discussion of FIRREA, see *supra* notes 28-33 and accompanying text.

54. *Carteret*, 963 F.2d at 571.

55. *Id.* The OTS Assistant Director sent Carteret a "Stipulation and Consent to the Issuance of a Capital Directive" and instructed Carteret to employ it within 24 days. *Id.* This plan required Carteret to take steps to bring its regulatory capital into compliance with FIRREA. *Id.*

56. *Carteret Sav. Bank v. Office of Thrift Supervision*, 762 F. Supp. 1159, 1165 (D.N.J. 1991), *vacated*, 963 F.2d 567 (3d Cir. 1992). Carteret named OTS and the FDIC as defendants. *Id.* Although the district court held that the FDIC was a proper defendant, the court found that any claim Carteret had against the FDIC was not ripe. *Id.* at 1166-67.

Carteret's original complaint contained seven counts: (1) the defendant exceeded its statutory authority under FIRREA when it failed to consider supervisory goodwill; (2) the defendant violated the Administrative Procedure Act (APA); (3) the plaintiff seeks a declaration that FIRREA does not, and cannot, abrogate alleged contracts between the plaintiff's and defendant's predecessors; (4) the defendant's conduct and the plaintiff's reliance thereon estops defendant from disregarding supervisory goodwill; (5) the right to use the goodwill is property protected by the Fifth Amendment and the defendant's refusal to consider it is a taking requiring due process of the law; (6) the plaintiff is entitled to reformation of the contract to give plaintiff the cash it is entitled to as consideration under the contract between the parties; and (7) the defendant breached its contract with the plaintiff. *Id.* at 1165. Carteret also sought a temporary restraining order to prevent OTS from taking action against Carteret for being undercapitalized, which the district court granted. *Id.*

found that it had jurisdiction to hear Carteret's claims.⁵⁷ The district court granted Carteret's motion for a preliminary injunction and ordered OTS to include supervisory goodwill in calculating Carteret's capital.⁵⁸ OTS appealed the district court's order to the United States

57. *Id.* at 1165-68. The district court reaffirmed the bases of its jurisdiction that it had previously announced in oral opinion. *Id.* at 1166. These bases for jurisdiction included the Administrative Procedure Act (APA) and FIRREA, which waives sovereign immunity. *Id.* at 1167; see 5 U.S.C. §§ 702, 706 (1988) (right of review under APA); 12 U.S.C. § 1464(d)(1) (Supp. 1991) (providing that Director of OTS is subject to suit under FIRREA). Supplementing its original oral opinion, the court also found that it had jurisdiction over Carteret's takings claim. *Carteret*, 762 F. Supp. at 1167-68. The court noted that the federal courts have disagreed on whether a district court or a circuit court has jurisdiction to hear a takings claim under FIRREA. *Id.* The court rejected OTS's argument that Carteret could only bring its claim in the claims court pursuant to the Tucker Act. *Id.* at 1168; see 28 U.S.C. § 1491 (1988) (giving claims court jurisdiction over claims against United States). The district court found that because Carteret brought its claim against OTS and FDIC, not the United States, and sought injunctive relief, not money damages, the Tucker Act did not provide exclusive jurisdiction. *Id.*

58. *Carteret*, 762 F. Supp. at 1182. The district court first discussed the four factors governing the grant of a preliminary injunction:

- (1) whether the movant has shown a reasonable probability of success on the merits;
- (2) whether the movant will be irreparably injured by the denial of such relief;
- (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
- (4) whether granting preliminary relief will be in the public interest.

Id. at 1168-69. The court ultimately found that each one of these elements was satisfied. *Id.* at 1169-82.

In determining whether Carteret met the first element, the district court addressed two major issues. *Id.* at 1169. The first issue was whether Carteret had entered into binding contracts with FSLIC and the Bank Board and whether FIRREA abrogated these contracts. *Id.* at 1169-78. Dissecting the agreements between Carteret and the FSLIC and Bank Board and applying principles of state and federal contract law, the district court found that binding agreements existed between the parties. *Id.* at 1169-73. In deciding whether FIRREA abrogated these contracts, the district court found that the language and legislative history of the statute was ambiguous. *Id.* at 1173-78. The district court examined, therefore, whether OTS's interpretation of the statute was reasonable. *Id.* at 1176-78. The district court concluded that interpreting FIRREA as intending to abrogate pre-existing contracts was not reasonable. *Id.* As a result, the district court found that there was a substantial likelihood of success on the merits of Carteret's contracts claim. *Id.* at 1178.

The second issue was whether an abrogation of this sort was a taking under the Fifth Amendment, which required the government to provide just compensation. *Id.* at 1178-81. The district court first determined that it had jurisdiction to hear a takings claim. *Id.* at 1179-80. Because monetary relief under the Tucker Act in the United States Claims Court would not adequately compensate Carteret, the district court found that it could properly entertain a claim for injunctive relief. *Id.* The district court next considered the likelihood that Carteret would be successful in its takings claim and the court found that the "economic impact of the governmental action and its interference with investment-backed expectations [were] extreme." *Id.* at 1180-81. The district court concluded that Carteret would probably be successful in proving a takings claim if the case were tried on the merits. *Id.*

The district court also concluded that Carteret successfully met the final

Court of Appeals for the Third Circuit.⁵⁹ On appeal, the three issues of first impression before the court in *Carteret Savings Bank, FA v. Office of Thrift Supervision* were (1) whether a contractual right to treat supervisory goodwill as capital arose out of the agreements between the thrift and the government; (2) whether FIRREA abrogated such contracts; and (3) whether abrogation of such contracts constituted a taking under the Fifth Amendment that the district court could enjoin.⁶⁰

three elements for preliminary injunction. *Id.* at 1181-82. First, the court found that Carteret would suffer irreparable harm in three ways: Carteret would be subject to sanctions for noncompliance solely because it could not include the supervisory goodwill in capital; Carteret's reputation would suffer greatly; and Carteret would be restrained from expanding its assets. *Id.* at 1181. In addition, the court decided that the government would not suffer additional harm if the injunction were granted. *Id.* at 1182. The government would only be harmed, the court reasoned, if Carteret was likely to fail in the near future, because this was the government's sole concern in enforcing FIRREA. *Id.* Finally, the court concluded that the public would be protected because the injunction would prevent Carteret from sustaining injury. *Id.*

Accordingly, the district court granted Carteret's request for a preliminary injunction. *Id.* The April 12, 1991 preliminary injunction prevented OTS from "taking any action against plaintiff, either directly or indirectly, by reason of defendants' failure to count as capital the total amount of supervisory goodwill recorded by plaintiff (amortized in accordance with plaintiff's agreements with defendants) for all supervisory and regulatory capital determinations and purposes." *Carteret Sav. Bank v. Office of Thrift Supervision*, 963 F.2d 567, 572 (3d Cir. 1992) (quoting trial court appendix).

59. *Carteret*, 963 F.2d at 567. OTS and its director brought two appeals that were consolidated in this action. *Id.* at 572. One appeal challenged the preliminary injunction and the other challenged the district court's calculation of the amount of Carteret's supervisory goodwill. *Id.* OTS challenged the district court's calculation because the district court included amounts of goodwill from banks that Carteret subsequently sold. *Id.* Although the FDIC was also a defendant in the action, the FDIC did not appeal the decision because the district court did not include the FDIC in the preliminary injunction. *Id.* at 572 n.1.

60. *Id.* at 573. Before addressing these three issues, the Third Circuit first determined whether it had jurisdiction to hear the appeal. *Id.* at 572-73. The court found it had jurisdiction over the appeals pursuant to 28 U.S.C. § 1292(a)(1) (1988). *Carteret*, 963 F.2d at 572-73. The court next determined whether the issues presented in the case were moot because a real legal controversy no longer existed. *Id.* The Third Circuit questioned whether a real legal controversy still existed as a result of the following sequence of events. *Id.* After the district court issued the preliminary injunction, Carteret submitted a plan to OTS describing its capital situation. *Id.* at 573. Carteret then consented to allow OTS to take action against it for being undercapitalized. *Id.* The subject of the preliminary injunction, however, was to prevent OTS from taking such action. *Id.*

The court stated that a case would be moot unless it involved: "(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution." *Id.* at 573 (quoting *International Brotherhood of Boilermakers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987)). The court was concerned only that Carteret's situation failed to satisfy the first and second elements. *Id.*

While OTS conceded that Carteret no longer suffered irreparable injury be-

B. Case Analysis

1. Effect of FIRREA on Existing Contracts

In *Carteret*, the Third Circuit first considered whether the agreements between the government and Carteret created a contractual right to treat supervisory goodwill as capital.⁶¹ In examining this issue, the Third Circuit first stated that it was assuming that both the 1982 and 1986 transactions had produced binding contracts between the Bank Board and Carteret.⁶² The terms of these contracts allowed Carteret to include supervisory goodwill "dollar for dollar" in its regulatory capital and to amortize the supervisory goodwill over a period of years.⁶³ The court qualified this assumption, however, by noting that the mere existence of a binding contract between Carteret and the government did not limit or terminate the government's right to change minimum capital requirements.⁶⁴

The essence of each party's claim, therefore, centered around the effect of FIRREA on the 1982 and 1986 contracts between Carteret and

cause it submitted a Capital Plan and consented to issuance of a Capital Directive, OTS still contended that the issue of whether supervisory goodwill should be included in Carteret's regulatory capital was not moot. *Id.* The issue was not moot, OTS asserted, because Carteret's regulatory capital not only limited the amount of loans a bank could make, but also governed the volume of transactions into which the bank could enter with its affiliates and subsidiaries. *Id.* (citing 12 U.S.C. §§ 1464(u), 1468 (Supp. 1991) and 56 Fed. Reg. 34,005, 34,008 (1991) (to be codified at 12 C.F.R. § 563)). The Third Circuit rejected OTS's arguments as "merely speculative," finding Carteret's arguments more persuasive. *Id.* at 573. Carteret argued that because it had voluntarily subjected itself to action by OTS, the issue of whether it could include supervisory goodwill in calculating regulatory capital was not moot. *Id.* Moreover, Carteret asserted that, if it could include the goodwill, it could come into compliance more easily because a bank in compliance with applicable capital requirements is more attractive to outside investors. *Id.*

61. *Carteret*, 963 F.2d at 573-74.

62. *Id.* at 574.

63. *Id.* at 573-74. The court's assumption was based primarily on the fact that neither party pressed the issue of whether the agreements could properly be considered binding contracts. *Id.* OTS asserted that the Third Circuit did not need to reach the issue of whether Carteret and the government entered into a binding contract concerning the treatment of goodwill because FIRREA would expressly override any such contract. *Id.* at 573. Similarly, Carteret did not contend that its contracts could not be affected by subsequent legislative changes. *Id.* Rather, Carteret contended that FIRREA did not abrogate the contracts. *Id.*

64. *Id.* at 574. The Third Circuit noted that the government's right to change these capital requirements through a statute was derived from the government's sovereign power. *Id.* According to the court, "sovereign power 'is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" *Id.* (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) and citing *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C. Cir.) (holding that lease granting right to mine coal in federal land should not be construed to reserve Congress' power to provide by law for specific readjustment), *cert. denied*, 498 U.S. 811 (1990)).

the Bank Board.⁶⁵ The parties disagreed as to whether FIRREA abrogated these contracts or whether Carteret could rely on the terms of the contracts and use supervisory goodwill as part of its regulatory capital.⁶⁶

Before analyzing the statutory language of FIRREA, the Third Circuit examined the context in which Congress had enacted the statute.⁶⁷ The court first noted that the poor financial state of many thrift institutions in the late 1980s had created a lack of consumer confidence in the thrift industry.⁶⁸ In addition, the court reviewed the basic goals behind FIRREA's enactment: providing affordable mortgages to both low-income and moderate-income individuals, resolving failed thrifts, strengthening capital requirements for thrifts, providing stronger oversight to the thrifts and strengthening regulatory enforcement powers to prevent fraud and insider abuse.⁶⁹

Against this backdrop, the court examined the statutory language of FIRREA.⁷⁰ The court sought to determine whether the language of

65. *Id.* at 574.

66. *Id.* at 574-82.

67. *Id.* at 574-75.

68. *Id.* at 574. The court noted several sources for these difficulties. *Id.* at 575. Congress described various causes, highlighting "the poorly timed deregulation; the dismal performance of some thrift managements; inadequate oversight, supervision and regulation by government regulatory agencies and the Reagan Administration; a regional economic collapse; radical deregulation by several large States; and outright fraud and insider abuse." *Id.* (quoting HOUSE REPORT, *supra* note 2, at 294, reprinted in 1989 U.S.C.C.A.N. at 90). In addition to these emphasized causes, the court noted Congress' opinion that "accounting gimmickry" intensified the problem. *Id.* (citing HOUSE REPORT, *supra* note 2, at 310-11, reprinted in 1989 U.S.C.C.A.N. at 106-07). The court noted that what Congress termed accounting gimmickry included treatment of supervisory goodwill as regulatory capital. *Id.* (citing HOUSE REPORT, *supra* note 2, at 310-11, reprinted in 1989 U.S.C.C.A.N. at 106-07). Treatment of supervisory goodwill as regulatory capital was considered accounting gimmickry for the following reason. Supervisory goodwill is an intangible asset. *Id.* By including supervisory goodwill as regulatory capital, less of investors' own *tangible* assets were at stake. *Id.*

69. *Id.* at 575. The court noted some of the basic changes FIRREA made in an attempt to reach these goals. *Id.* While these changes included abolishing the FSLIC and the Bank Board and replacing it with OTS, the court focused on FIRREA's changes to capital requirements. *Id.* The court highlighted Congress' discussion of the importance of the capital requirements:

[S]trong capital standards are essential to protect the safety of our deposit insurance system. Capital represents the investment made by owners of a savings association in that association. Without sufficient capital, the owners have little incentive to limit the risks taken with depositors' funds. Therefore, an adequate capital requirement will provide the self-restraint necessary to limit risk-taking by Federally insured savings associations.

Capital also protects the deposit insurance fund by providing a cushion against losses if the institution's condition deteriorates. *Id.* (quoting H.R. CONF. REP. No. 222, 101st Cong., 1st Sess. 393, 404 (1989), reprinted in 1989 U.S.C.C.A.N. 432, 443).

70. *Id.* at 575-78.

FIRREA revealed any intent to abrogate pre-existing contracts, such as those between Carteret and the Bank Board.⁷¹ The Third Circuit first discussed the general provisions of FIRREA relevant to the issues presented on appeal.⁷² The court found that FIRREA does contain provisions requiring all savings institutions to maintain minimum capital requirements.⁷³ Accordingly, the court stated that the Director of OTS was correct in finding that institutions that failed to meet these requirements were unsound.⁷⁴ Moreover, the court stated that the Director of OTS possesses the power to direct unsound institutions to submit and follow a plan to increase capital.⁷⁵ The *Carteret* court also discussed FIRREA's provisions governing required capital, particularly the provision specifically excluding the use of supervisory goodwill in calculating regulatory capital.⁷⁶

The Third Circuit conceded that FIRREA did not explicitly prohibit institutions with pre-existing contracts from using supervisory goodwill in calculating capital requirements.⁷⁷ The court, nevertheless, found support in the statute for the proposition that FIRREA prohibits such use of supervisory goodwill.⁷⁸ The court accepted OTS's argument that

71. *Id.*

72. *Id.* at 575-76.

73. *Id.* at 575. The Third Circuit noted that FIRREA provides that "the Director [of OTS] shall require all savings associations to achieve and maintain adequate capital by—(A) establishing minimum levels of capital for savings associations; and (B) using such other methods as the Director determines to be appropriate." *Id.* (emphasis added) (quoting 12 U.S.C. § 1464(s)(1) (Supp. 1991)).

74. *Id.* The Third Circuit noted that § 1464 of FIRREA also "permits the Director to treat the failure of any savings association to maintain capital at or above the minimum levels required as an 'unsafe or unsound practice.'" *Id.* (quoting 12 U.S.C. § 1464(s)(3) (Supp. 1991)).

75. *Id.* at 575-76 (citing 12 U.S.C. § 1464(s)(4) (Supp. 1991) (stating "the director may issue a directive requiring any savings association which fails to maintain capital at or above the minimum level required . . . to submit and adhere to a plan for increasing capital")).

76. *Id.* at 576. FIRREA requires "uniformly applicable capital standards for savings associations." 12 U.S.C. § 1464(t)(1) (Supp. 1991). In its capital requirements, FIRREA requires a "savings association to maintain core capital in an amount not less than 3 percent of the savings association's total assets and to maintain tangible capital in an amount not less than 1.5 percent of the savings association's total assets." *Id.* § 1464(t)(2)(A) & (B). FIRREA excludes intangible capital such as supervisory goodwill from its definition of tangible capital. *Id.* § 1464(t)(9)(C). In tabular form, FIRREA gradually reduces the percentage of supervisory goodwill that may be used in meeting core capital to zero. *Id.* § 1464(t)(3)(A).

77. *Carteret*, 963 F.2d at 576.

78. *Id.* In construing the statute, the court found evidence that Congress intended to prohibit the use of supervisory goodwill in the definition of "qualifying supervisory goodwill." *Id.* This definition states that the amortization period allowable for supervisory goodwill is the shorter of 20 years or "the remaining period for amortization in effect on April 12, 1989." *Id.*; 12 U.S.C. § 1464(t)(9)(B) (Supp. 1991). The Third Circuit reasoned that "[t]here would

the statute's general attempt to establish uniformly applicable regulation acutely diminished the use of supervisory goodwill.⁷⁹

The Third Circuit rejected Carteret's argument that the language in FIRREA preserved contracts allowing the use of supervisory goodwill.⁸⁰ Carteret based its argument on a savings clause provision in FIRREA.⁸¹ This provision essentially preserved rights, arising under certain acts, that existed before the date of the statute.⁸² Carteret contended that the savings clause provision expressly preserved contract rights, not abrogated them, and that Carteret's specific contract rights fell within this provision.⁸³ Although the Third Circuit acknowledged that other district court decisions supported Carteret's interpretation, the court found these opinions unpersuasive.⁸⁴ The Third Circuit determined that the savings clause provision only applied to pre-existing agreements affected by FIRREA's abolition of the FSLIC and the Bank Board.⁸⁵ Therefore, the court held that the savings provision did not apply to agreements such as Carteret's that were affected by changes in capital

have been no reason to refer to the 'remaining period for amortization in effect' if the new provisions were inapplicable to previously accepted supervisory goodwill." *Carteret*, 963 F.2d at 576.

79. *Carteret*, 963 F.2d at 576. OTS reasoned that by imposing uniform regulations in FIRREA, Congress intended "to abrogate any pre-existing agreements between the former regulators and savings institutions authorizing greater use of supervisory goodwill as regulatory capital." *Id.*

80. *Id.* at 576-78.

81. *Id.*

82. *Id.* at 576. The relevant savings clause provision in FIRREA provides:

(g) Savings Provisions Relating to FHLBB—

(1) Existing Rights, Duties, and Obligations Not Affected — Subsection (a) [which abolishes the FHLBB and FSLIC] shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan Bank Board, or any other person, which—

(A) arises under or pursuant to the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933, or any other provision of law applicable with respect to such Board (other than title IV of the National Housing Act); and

(B) existed on the day before the date of the enactment of this Act.

12 U.S.C. § 401(g); *see also* 12 U.S.C. § 401(f) (similar provision regarding FSLIC instead of Bank Board).

83. *Carteret*, 963 F.2d at 577. In its brief, Carteret maintained that its "bargained-for contract rights to include supervisory goodwill in regulatory capital (and [the Bank Board's] corollary obligation) fit squarely within 'any' right or obligation arising under [the act]." *Id.* (quoting Brief of Appellee, *supra* note 15, at 32).

84. *Id.* (citing *Security Savings & Loan Ass'n v. Office of Thrift Supervision*, 761 F. Supp. 1277, 1284 (S.D. Miss. 1991) (holding OTS bound to forbearance agreements and enjoining OTS from excluding supervisory goodwill in calculating regulatory capital), *aff'd in part and rev'd in part*, 960 F.2d 1318 (5th Cir. 1992), and *Hansen Savings Bank v. Office of Thrift Supervision*, 758 F. Supp. 240, 246 (D.N.J. 1991) (same)).

85. *Id.*

requirements.⁸⁶ In rejecting Carteret's argument, the Third Circuit relied on recent decisions in the United States Courts of Appeals for the Sixth, Ninth and Eleventh Circuits that had also addressed the issue and had rejected the savings clause provision argument.⁸⁷

Because the Third Circuit found the statutory language persuasive, rather than conclusive on the issue, the court analyzed the legislative history of FIRREA in order to determine the congressional intent.⁸⁸ In discerning the legislative intent, the Third Circuit disagreed with the district court's findings.⁸⁹ The Third Circuit concluded from its review of the legislative history that Congress had intended to exclude intangible assets, such as supervisory goodwill, from capital.⁹⁰ The Third Circuit noted that several Congressmen dissented from the portion of FIRREA that phased out the use of supervisory goodwill.⁹¹ Drawing from these dissents, the court concluded that these Congressmen themselves believed that FIRREA abrogated capital forbearance

86. *Id.* The court held that "by its terms, section 401(g) only saves those contracts that would be abolished as a result of the elimination of the Bank Board and the FSLIC." *Id.*

87. *Id.* at 577-78 (citing and discussing: *Guaranty Financial Service, Inc. v. Director, Office of Thrift Supervision*, 928 F.2d 994, 1003 (11th Cir. 1991) (noting that "the possible loss of [the thrift's] supervisory goodwill forbearance is the result not of the abolition of the agencies, but of the new capital standards, and that a savings provision . . . is inapplicable to [the thrift's] situation"); *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1339 (6th Cir.) (noting that savings provision "is intended to assure that the OTS remained in privity with the FSLIC and the FHLBB, not to exempt banks with forbearance agreements from the substantive provisions of FIRREA"), *cert. denied*, 112 S. Ct. 370 (1991); and *Far West Federal Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1098 (9th Cir. 1991) (relying on rationale in *Guaranty Fin. Servs. and Franklin Fed. Sav. Bank*)).

88. *Id.* at 578-82.

89. *Id.* at 579.

90. *Id.* The Third Circuit noted a "clear congressional intent to remedy promptly the problem of inadequate capitalization of thrifts caused by the use of intangible assets (such as supervisory goodwill) as regulatory capital." *Id.* The court found this Congressional intent in the House Report accompanying FIRREA:

To a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts. It is the shared belief of the Committee and the Administration that *if a crisis of this nature is to be prevented from happening again, thrifts must be adequately capitalized against losses.*

The legislation seeks to provide this protection by establishing a core capital requirement [that] . . . takes effect on June 1, 1990. Beginning then, certain qualifying intangibles can be included on a declining basis until, by January 1, 1995, the [core capital requirement] must be met without any qualifying intangibles.

Id. (quoting HOUSE REPORT, *supra* note 2, at 310-11, *reprinted in* 1989 U.S.C.A.N. at 106-07). The court hypothesized that the threat of "massive failures" would continue as long as the government allowed thrifts to capitalize with inadequate assets. *Id.*

91. *Id.*

agreements.⁹²

By examining a congressional debate on a proposed amendment dealing with abrogation of pre-existing forbearance contracts, the Third Circuit found additional, and even more compelling, support for OTS's interpretation of FIRREA.⁹³ The court first acknowledged that the amendment did not "squarely present" the issue of congressional intent to abrogate forbearance agreements.⁹⁴ The court then stated that the debates concerning the amendment did indicate that the Congressmen understood that FIRREA would invalidate agreements allowing use of supervisory goodwill as capital.⁹⁵ In addition, the court reasoned that if Congress intended the savings clause provision to preserve the forbear-

92. *Id.* The court stated that "[i]f [these] members, those most intimately familiar with the proposed statute, did not believe that FIRREA would abrogate the earlier capital forbearance agreements, there would have been no need for a dissent grounded on precisely that basis." *Id.* The dissenters wrote in the House report that "[s]imply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill. . . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, the Committee is abrogating those agreements." *Id.* (quoting HOUSE REPORT, *supra* note 2, at 498, reprinted in 1989 U.S.C.C.A.N. at 293-94).

93. *Id.* at 579-80. Although Congressman Quillen originally proposed an amendment that would "grandfather" all savings and loan institutions that had entered into forbearance agreements, he withdrew his proposal when Representative Hyde proposed another, more complex amendment. *Id.* at 579; CONGRESSIONAL RECORD, *supra* note 19, at H2701 (statement of Rep. Quillen). Congressman Hyde summarized his amendment as follows:

My proposal is that the banking regulators . . . should consider the special claims of this limited class of thrifts through the forum of a due process administrative hearing. This hearing would take place before any enforcement action is taken. Only those institutions that would meet the new capital standards requirements *but for* the statutory change in the treatment of their supervisory goodwill would be eligible to plead their case.

. . . The "appropriate federal banking agencies" would have the discretion to determine whether or not a particular thrift had a valid, pre-existing contract with the United States with regard to the on-going treatment of their supervisory goodwill . . . [and] whether or not these savings associations have a potential claim under the Constitution.

HOUSE REPORT, *supra* note 2, at 27, reprinted in 1989 U.S.C.C.A.N. at 410. Congressman Hyde also referred to the situation as "Congress . . . telling these same thrifts that they cannot count this goodwill toward meeting the new capital standards." *Id.* Congress debated and ultimately voted against the Hyde Agreement. CONGRESSIONAL RECORD, *supra* note 19, at H2703-18.

94. *Carteret*, 963 F.2d at 580.

95. *Id.* The Third Circuit first noted Representative Price's statement that "[t]he proponents of the amendment say a 'Deal is a Deal' and wear buttons proclaiming this sentiment. But to claim that Congress can never change a regulatory's decision . . . in the future is simply not tenable." *Id.* (quoting CONGRESSIONAL RECORD, *supra* note 19, at H2710 (statement of Rep. Price) (alteration added)). The court next noted Representative Annunzio's statement that "[i]t is ironic that Congress . . . wants to undo the supervisory goodwill approvals [because] [i]t makes no sense . . . that Congress would . . . overturn those agreements in which others volunteered to take the losses. Yet that is what [the bill]

ance agreements, Congress would have expressly indicated such an intent during these debates and discussions.⁹⁶ Relying on this rationale, the court concluded that the savings provision was not “the magical elixir” that would allow financial institutions like Carteret to rely on their forbearance agreements from the government.⁹⁷ In reaching such

does.” *Id.* (quoting CONGRESSIONAL RECORD, *supra* note 19, at H2710 (statement of Rep. Annunzio)).

96. *Id.* Because Carteret did not present any evidence in the legislative history regarding § 401(g) to rebut OTS’s strong argument, the court accepted OTS’s interpretation of the legislative history of FIRREA. *Id.*

97. *Id.* In concluding that the savings provision did not allow a financial institution to rely on its pre-existing forbearance agreements, the Third Circuit rejected each of Carteret’s arguments concerning the legislative history of FIRREA. *Id.* at 580-81. In asserting that the savings clause preserved forbearance agreements, Carteret relied on a section of FIRREA pertaining to the Resolution Trust Corporation (RTC) and not OTS. *Id.* at 581; see 12 U.S.C. § 1441a(b)(3) (Supp. 1991) (describing RTC as agency managing and resolving cases of institutions placed in conservatorship or receivership). Section 1441a(b)(3) authorizes RTC to “review and analyze assistance agreements related to insolvent institution cases.” *Carteret*, 963 F.2d at 581; see 12 U.S.C. § 1441a(b)(10)(C)(i) (authorizing RTC “to modify, renegotiate, or restructure agreements . . . where savings would be realized by such actions” but not authorizing RTC “to modify, renegotiate, or restructure agreements between the [FSLIC] and any other party which did not exist prior to [a certain date]”); HOUSE REPORT, *supra* note 2, at 444, reprinted in 1989 U.S.C.C.A.N. at 240 (restructure of resolution agreement only as “permitted by the terms of the agreement”). The Third Circuit recognized that this section of the statute had nothing to do with FIRREA’s capital standards for thrifts. *Carteret*, 963 F.2d at 581.

The court also rejected Carteret’s statutory construction argument that when Congress terminates pre-existing contract rights, it does so in “clear and unmistakable terms.” *Id.* (noting Carteret’s citing of *Feres v. United States*, 340 U.S. 135, 146 (1950), which decided application of Federal Tort Claims Act to servicemen’s injuries sustained during service). The court reasoned that such a standard was not appropriate in this action because the government regulates the banking industry so heavily and the rules change frequently. *Id.*

Carteret next relied on *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808 (3d Cir. 1990). *Chester County* presented the issue of whether insurance companies could exclude from coverage any amounts provided to individuals free of charge under a federal act. *Id.* The *Chester County* court found that it could not “conclude, without clear statutory support, that Congress intended [the act] to abrogate such a provision in a privately negotiated contract . . . [and] that Congress would not have done so without explicitly so providing.” *Id.* at 815. The Third Circuit pointed out that its holding in *Chester County* was specifically limited to private contracts. *Carteret*, 963 F.2d at 581.

The Third Circuit also rejected Carteret’s argument that OTS’s interpretation of FIRREA was entitled to no deference. *Id.* at 582. In arguing that the court should not defer to OTS’s interpretation, Carteret first cited a recent Supreme Court opinion. *Id.* (citing *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991)). The Third Circuit found this case inapposite, however, because the Court “neither deferred to nor even discussed the [agency’s] interpretation” on the subject. *Id.* The Third Circuit noted that the Supreme Court’s opinion was based on Congressional intent and not deference to the agency’s interpretation. *Id.* Finally, the Third Circuit rejected Carteret’s argument that the court should not defer to OTS’s interpretation because OTS was a party to the forbearance

a conclusion, the Third Circuit joined the Sixth, Ninth and Eleventh Circuits in finding that the legislative history supported the premise that Congress, under FIRREA, intended to abrogate pre-existing contracts allowing the use of supervisory goodwill as capital.⁹⁸

2. *Fifth Amendment Takings Claims*

The final issue that the Third Circuit considered on appeal was Carteret's Fifth Amendment takings claim.⁹⁹ Carteret argued that by abrogating Carteret's contractual right to utilize supervisory goodwill as regulatory capital, the government was taking Carteret's property without just compensation.¹⁰⁰ The Third Circuit accepted OTS's jurisdictional challenge to this claim.¹⁰¹ In concluding that an injunction issued by the Third Circuit was not an appropriate remedy, the court stated that Carteret must seek a damage award in the United States Claims Court.¹⁰²

The court reasoned that the taking of property is only unconstitutional when the government fails to award just compensation.¹⁰³ The

agreements. *Id.* In rejecting this argument, the court stated that Carteret's contention presumed bias by OTS and no evidence of bias existed in the record. *Id.* The court found no evidence of bias because OTS announced its interpretation prior to Carteret bringing its case to trial. *Id.*

98. *Id.* at 578-79. Each of the three circuit courts deciding the issue found the same arguments persuasive. *Id.* In analyzing the legislative history of FIRREA, the Eleventh Circuit found several sources of support for the proposition that Congress, in enacting FIRREA, intended to abrogate supervisory goodwill agreements. *Guaranty Fin. Servs., Inc. v. Director, Office of Thrift Supervision*, 928 F.2d 994, 1004-06 (11th Cir. 1991). The *Guaranty* court found that those Congressmen supporting and those opposing treatment of supervisory goodwill in this manner believed FIRREA would abrogate these contracts. *Id.* at 1004-05. Although the *Guaranty* court did not support Congress' reasoning in rejecting the Hyde Amendment, the court found the debates surrounding the amendment persuasive. *Id.* at 1005-06. The *Guaranty* court concluded that "the statements [found in the legislative history] give an accurate picture of the congressional understanding that FIRREA would abrogate supervisory goodwill forbearances . . . [and the court did not find] a single reference to section 401(g) . . . in any of the congressional discussions of the treatment of supervisory goodwill." *Id.* at 1106. In *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, the Sixth Circuit similarly found these portions of the legislative history persuasive on the issue of FIRREA's abrogation of forbearance agreements. 927 F.2d 1332, 1339-41 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991). In deciding a similar case, the Ninth Circuit incorporated by reference the Sixth and Eleventh Circuits' analyses of FIRREA's legislative history. *See Far W. Fed. Bank v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1098 (9th Cir. 1991).

99. *Carteret*, 963 F.2d at 582-84.

100. *Id.* at 582.

101. *Id.* at 582-83.

102. *Id.* at 584.

103. *Id.* at 583; *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (stating that Fifth Amendment does not "limit the governmental interference with property rights *per se*, but rather . . . secure[s] compensation in the event of an otherwise proper interference amount-

court recognized that while it would be difficult to measure compensation for Carteret's injury, such compensation was the only relief to which Carteret was entitled.¹⁰⁴

ing to a taking"). In affording the challenging party process under the Tucker Act, a claims court must first determine whether the damages awarded under that statute would rise to the level of just compensation. *Carteret*, 963 F.2d at 583-84. The Third Circuit stated that if the party seeking compensation from the government in a takings claim may bring suit, a court should not entertain a suit for equitable relief. *Id.* at 583; *see* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985) (discussing takings issue in context of environmental statute requiring permits for use of wetlands); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (discussing takings issue in context of government agency requiring submission and disclosure of data for permitting). The Third Circuit further explained that takings claims are premature until a party exhausts remedies under the Tucker Act. *Carteret*, 963 F.2d at 583; *see* *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (deciding whether statute allowing government agency to preserve abandoned railway rights-of-way for future rail use constituted taking); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1986) (deciding whether subsequent zoning density requirements constituted taking); *Monsanto*, 467 U.S. at 1018 n.21 (noting that "[t]o the extent that the operation of the statute provides compensation, no taking has occurred and the original submitter of data has no claim against the government").

104. *Carteret*, 963 F.2d at 583-84. Carteret claimed that because its injury meant that OTS would be able to "issue directives severely interfering with Carteret's ability to acquire new assets and liabilities, it [would] be impossible to obtain relief under the Tucker Act rising to the constitutionally required level of 'just compensation.'" *Id.* at 583. The Third Circuit noted that a district court recently considered and rejected this type of argument. *Id.* (citing *Northeast Savings, FA v. Director, Office of Thrift Supervision*, 770 F. Supp. 19, 23-25 (D.D.C. 1991) (stating that source of rights claimed by plaintiff is alleged contract between plaintiff and government and that plaintiff could only get damages but not specific performance)). In addition, the Third Circuit found support in other federal cases for its conclusion on this matter. *Id.* at 584 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 155-56 (1974) (assuring that Tucker Act remedy is applicable if there was taking) and *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir. 1990) (noting that "[i]n the event [that this action was] determined to be taking, [the thrift] would be entitled to compensation, not to equitable relief"), *cert. denied*, 112 S. Ct. 370 (1991)).

Carteret cited several cases to support the proposition that a court may enjoin a taking when monetary damages are inadequate. *Id.* at 584. The court stated that these cases were inapposite. *Id.* The court stated that the Tucker Act did not apply to the cases cited by Carteret, and therefore an injunction was the appropriate remedy in those cases, according to the Third Circuit. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1951) (takings not affected by statutory authority so Tucker Act does not apply); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1522-23 (D.C. Cir. 1984) (en banc) (same), *vacated on other grounds*, 471 U.S. 1113 (1985); and *Regional Rail Reorganization Act Cases*, 419 U.S. at 127 n.16 (1974) (officer's act of taking not act of government so Tucker Act does not apply)). The Third Circuit did not find *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), relevant to the issue because the plaintiffs in that case were not requesting injunctive relief. *Carteret*, 963 F.2d at 584.

IV. CONCLUSION

The Third Circuit based its analysis in *Carteret* on sound legal principles and reasoning. First, no provision in the statute expressly or impliedly preserves forbearance agreements allowing thrifts to use supervisory goodwill in meeting regulatory capital requirements.¹⁰⁵ In addition, the legislative history supports the Third Circuit's finding that Congress intended courts to construe the statute to abolish forbearance agreements.¹⁰⁶ The Third Circuit's decision is further supported by opinions of several circuit courts that addressed the issue both prior to *Carteret*¹⁰⁷ and after *Carteret*, reaching the same conclusion as the Third Circuit.¹⁰⁸ Finally, the fact that the United States Supreme Court has denied certification on this issue further supports the notion that the conclusions these courts have reached are sound because it implies that the Court agrees with the way in which the cases have been decided.¹⁰⁹

Although the Third Circuit's opinion is legally sound, its mandate produces several unfortunate results. FIRREA's treatment of supervisory goodwill, as construed by the Third Circuit, forces many thrifts out of compliance with FIRREA's regulatory capital requirements.¹¹⁰ Be-

105. For a discussion of the *Carteret* court's analysis of the statutory language of FIRREA, see *supra* notes 70-79 and accompanying text.

106. For a discussion of the legislative history of FIRREA, see *supra* notes 88-97 and accompanying text.

107. For a discussion of the Sixth, Ninth, and Eleventh Circuit opinions addressing this issue, see *supra* note 98 and accompanying text.

108. See *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613-14 (D.C. Cir. 1992) (holding that FIRREA's new capital requirements applied to all thrifts, including those that had forbearance agreements, and rejecting thrift's constitutional takings claim); *Security Sav. and Loan v. Director, Office of Thrift Supervision*, 960 F.2d 1318, 1322 (5th Cir. 1992) (same); *accord Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 213 (4th Cir. 1992) (holding that Bank Board "did not contract to exempt [thrift] from FIRREA's capital regulatory requirements . . . [but] agreed only to permit such use of supervisory goodwill as was lawful under the regulations").

109. See *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 976 F.2d 1332 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 370 (1991) (Supreme Court denying certification to decide issue of whether FIRREA abrogated contractual forbearances allowing use of supervisory goodwill in calculating regulatory capital). The Supreme Court probably will not decide the issue unless another circuit court, addressing the issue for the first time, holds that FIRREA does not abolish forbearance agreements allowing use of supervisory goodwill as part of required capital. See Stephen Kleege, *High Court Lets Stand Curb on S&L Goodwill*, THE AM. BANKER, Nov. 5, 1991, at 1 (noting that lawyers who argued *Franklin Federal* case stated that "[s]hould another federal appeals court reach a contrary ruling, the Supreme Court might have to resolve the conflict").

110. See HOUSE REPORT, *supra* note 2, at 26, *reprinted in* 1989 U.S.C.C.A.N. at 410 ("Estimates [at the time FIRREA was enacted were] that [when] the new capital standards [went] into effect . . . at least 152 savings associations [would] automatically become insolvent on paper."). Even though the estimated figures were high to begin with, as the stricter capital provisions of FIRREA took effect, even greater number of thrifts fell short of the capital standards. See Debra Cope, *241 More S&L's Short of Capital Under '91 Rules*, THE AM. BANKER, Jan. 9,

cause a thrift in non-compliance must conform to certain minimum procedures outlined in FIRREA, OTS essentially dictates the thrift's operations.¹¹¹ This control includes the power to significantly limit the transactions a thrift may undertake respecting asset growth and to appoint a conservator or receiver.¹¹² Under FIRREA's mandate, many thrifts could conceivably fail—the exact result Congress intended to prevent by enacting FIRREA.¹¹³ Moreover, the financial burden of resolv-

1991, at 1 (noting that John Downey, OTS deputy director for regional operations, predicted that “some 241 thrifts are expected to fall short of the 1991 standards and . . . [t]hat is on top of the 276 capital deficient thrifts operating under [capital] plans at the end of November 1990”).

Many thrifts such as Carteret, whose capital base met regulatory standards through the use of supervisory goodwill prior to FIRREA, were forced out of compliance the day FIRREA took effect. See Robert M. Garsson, *S&L Law: 'A' for Effort, 'C' for Execution*, THE AM. BANKER, Aug. 2, 1991, at 1 (recognizing that “[m]any profitable thrifts have suffered unnecessarily”); *Capital Requirements for Thrifts as they Apply to Supervisory Goodwill: Hearing before the Subcomm. on General Oversight and Investigations of the Comm. on Banking, Finance and Urban Affairs*, 102nd Cong., 1st Sess. 7 (1991) [hereinafter *House Hearing*] (statement of Rep. John LaFlace) (stating that fear that Congress would “maximize the number of thrift institutions which would be deemed insolvent, catching even viable institutions within the net” was realized).

111. See 12 U.S.C. § 1464(t)(6) (Supp. 1991) (detailing consequences of failure to comply with capital standards); see also Cope, *supra* note 110, at 1 (noting that in order “[t]o win regulators' permission to operate with low capital, a thrift must spell out and defend strategies for raising additional funds”).

112. See 12 U.S.C. § 1464(s)(4) (Supp. 1991) (stating that Director of OTS “may issue a directive requiring any savings association which fails to maintain capital at or above the minimum level . . . to submit and adhere to a plan for increasing capital which is acceptable to the Director”); see *id.* § 1464(t)(6)(A) (requiring plan that “addresses [thrift's] need for increased capital, . . . describes the manner in which the [thrift] will increase its capital, . . . specifies the types and levels of activities in which the [thrift] will engage . . . [and] requires increase in assets to be accompanied by an increase in tangible capital”); see also Brief for Appellee, *supra* note 15, at 47 (citing 12 C.F.R. § 567.10(b)(2) & (b)(1) (1991) and 12 U.S.C. § 1464(t)(6)(A) & (B) and stating that “[i]f a thrift fails a capital requirement, OTS *must* impose a capital directive and *must* prohibit asset growth”); *House Hearing*, *supra* note 110, at 33 (statement of Timothy Ryan, Director of OTS) (“The capital plan process . . . provides OTS with the flexibility to allow undercapitalized, but economically viable institutions to remain open while operating under an approved capital plan.”).

Although 241 capital plans of undercapitalized thrifts were approved, 281 were not approved. Cope, *supra* note 110, at 1. Even if a thrift's plan is approved, the thrift may not survive because only approximately 75% of thrifts with approved plans survive. *Id.* If a capital plan is not accepted by OTS, the thrift is frozen, “unable to lend or invest funds.” *Id.*

If a thrift is undercapitalized, OTS also has the power to appoint a conservator or receiver. See 12 U.S.C. § 1464(d)(2)(A) (for federal savings associations) & § 1464(d)(2)(C) (for state savings associations); see also Jordan Luke, *The Impact of FIRREA on the Thrift Industry*, 171 ALI-ABA RESOURCE MATERIALS, BANKING AND COMMERCIAL LENDING LAWS 495, 495 (1990) (discussing effects of FIRREA on thrift industry and examining resulting trends).

113. See Garsson, *supra* note 110, at 1. A thrift lobbyist, who was at first enthusiastic about FIRREA, two years later believed “the bill set us off on a course debilitating to the thrift industry.” *Id.* Many thrift and bank executives,

ing or selling such a failed thrift ultimately falls on the government and the taxpayers.¹¹⁴

Carteret illustrates the difficulties in trying to strengthen capital requirements for the thrift industry without forcing some of the industry's constituents into non-compliance. At the time Congress enacted FIRREA, some Congressmen offered alternative solutions to the thrift crisis, which were not adopted.¹¹⁵ Presently, a thrift's only option is applying to OTS for an exemption.¹¹⁶ This alternative, however, does not pro-

analysts, and consultants share this belief. *Id.* The Director of OTS claims, however, that "the agency will not shut down profitable thrifts, but will allow investors to replace the goodwill with other assets." Kleege, *supra* note 119, at 1. The Director did not discuss, however, whether investors in this economy are willing to invest in an undercapitalized thrift. *Id.*

114. See Garsson, *supra* note 110, at 1 (noting that some Congressmen believe FIRREA is "a deeply flawed piece of legislation" and that "the largest deficit in history . . . [was] caused by the S&L and banking industries"); *House Hearing, supra* note 110, at 7 (statement of Rep. LaFlace) (noting that "[t]hrifts with weakened capital position, but clear franchise value, are nevertheless being closed rather than assisted" and "[t]he cost of the thrift bailout is now more than double the original estimate and is still rising").

115. See CONGRESSIONAL RECORD, *supra* note 19, at H2700-03 (describing some potential solutions); see also *House Hearing, supra* note 110. Several Congressmen have suggested allowing thrifts time to use supervisory goodwill as capital while the thrifts build their capital base with tangible assets. *House Hearing, supra* note 110. These Congressmen have advanced two reasons why an extension of time would aid the thrifts. *Id.* at 3. First, the current recession makes it more difficult for thrifts to raise capital. *Id.* Second, it is "very, very difficult for institutions . . . haunted by the regulations imposed by FIRREA to become viable institutions by going out into the marketplace to raise that capital." *Id.*; One congressman noted that "[w]e could minimize the taxpayer cost and the disruption to our economy if we only gave these institutions some more time to adjust to a very dramatic change." *Id.* at 7. Several commentators have also supported this solution. See, e.g., Cope, *supra* note 110, at 1 (noting that institutions would be able to build capital by "augmentation of earnings or contraction of the balance sheet, . . . changing [the] portfolio mix to reduce the risk-based capital requirement, . . . [and] cut[ting] overhead, starting with the payroll" and further noting that OTS's deputy director for regional operations stated that "[OTS] is considering whether to give thrifts extra time to achieve their goals" in light of the "turbulent economic times"); Garsson, *supra* note 110, at 1 (quoting Representative Hoagland stating that "[i]f we had known then that the economy was going to have the difficulties it has had, and that the price tag (for the law's reforms) would be so high, I think we would have tried to give the S&Ls more time to adjust").

116. 12 U.S.C. § 1464(t)(7)(A) (Supp. 1991). If a thrift does not meet the capital requirements, it may request an exemption from OTS. *Id.* The director of OTS will approve a request for exemption if he or she determines that

- (I) such exemption will pose no significant risk to the affected deposit insurance fund;
- (II) the savings association's management is competent;
- (III) the savings association is in substantial compliance with all applicable statutes, regulations, orders, and supervisory agreements and directives; and
- (IV) the savings association's management has not engaged in insider dealing, speculative practices, or any other activities that have

vide an acceptable remedy to an industry that relied on the government's promises, only to find itself penalized by the government for that reliance.¹¹⁷

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jeopardized the association's safety and soundness or contributed to impairing the association's capital.

Id. § 1464(t)(7)(C)(i). Previously, a thrift that did not meet capital requirements could alternatively request an exception if the thrift was "eligible" within the meaning of the statute. *Id.* at § 1464(t)(8) (no longer applicable after January 1, 1991).

Since the Third Circuit decided *Carteret*, the United States Claims Court has addressed similar issues to those presented in *Carteret*. See *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904 (Cl. Ct. 1992), *vacated sub nom.* *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993). *Statesman* involved the claims of two thrifts, *Statesman Savings Holding Corp.* and *Glendale Federal Bank, FSB*. *Id.* at 906. The Claims Court found that a binding contract existed between each thrift and the government, requiring the Bank Board "to forbear from exercising its authority to bring enforcement proceedings against [the thrifts] for failure to meet regulatory capital standards." *Id.* at 911-13. The Claims Court held that the government could not abrogate these contracts under FIRREA without liability to the thrifts for breach of contract. *Id.* at 913-15. However, the United States Court of Appeals for the Federal Circuit reversed the Claims Court's decision in *Statesman*. *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993). The Federal Circuit held that the thrifts "had no contract right to have the goodwill generated by their acquisition(s) treated as regulatory capital." *Id.* at 813. Therefore, what at one time seemed to be an avenue for relief to a thrift has now been closed.

117. See CONGRESSIONAL RECORD, *supra* note 19, at H2703 (statement of Rep. Hyde). During the debate on the proposed Hyde Amendment, Congressman Hyde discussed the inherent unfairness of the thrifts' situation. *Id.* He noted that the effected institutions were not the "bad guys," "high fliers," or "fast buck artists that exploited the deposit insurance to make risky investments." *Id.* Representative Hyde concluded that the thrifts' only mistake "was trusting the bank regulators and accepting their word that they could count this accounting procedure, this supervisory goodwill, for up to 40 years, and in reliance on the word of their Government they merged and they tried to make viable and profitable and solvent the sick institutions." *Id.* at H2703-04.