Catholic University Law Review

Volume 37
Issue 2 *Winter 1988*

Article 8

1988

Morrison-Knudsen Co. v. CHG International, Inc.: Does Judicial Adjudication Restrain the FSLIC as Receiver?

Michael R. Maryn

COMMENTS

MORRISON-KNUDSEN CO. v. CHG INTERNATIONAL, INC.: DOES JUDICIAL ADJUDICATION RESTRAIN THE FSLIC AS RECEIVER?

Federal statutes authorize the Federal Home Loan Bank Board (FHLBB) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver or conservator to take control of the assets and operations of insolvent or mismanaged savings and loan associations.[1] The FSLIC as receiver[2] has a broad range of powers at its disposal to effect the association's reorganization, its merger with another insured association, or its liquidation.[3] One of the most important and disputed powers of the FSLIC as receiver derives from section 406(d)[4] of the National Housing Act (NHA),[5] where Congress

1. Home Owners' Loan Act of 1933, § 5(d)(6)(A), 12 U.S.C. § 1464(d)(6)(A) (Supp. IV 1986) [hereinafter HOLA]. Congress also authorized the Federal Home Loan Bank Board (FHLBB) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver of a state savings and loan association upon finding that grounds exist for the appointment of the FSLIC as receiver of a federal thrift and upon completion of specific procedural requirements. National Housing Act, Pub. L. No. 73-479, § 406(c)(2), 48 Stat. 1246, 1260 (1934) (as amended by the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 295 (codified as amended at 12 U.S.C. § 1729(c)(2) (1982 & Supp. IV 1986)) [hereinafter NHA]; *see also infra* note 4. State authorities may also appoint and regulate the FSLIC as receiver of state thrifts under state law. *See* Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294, 295 (codified as amended at 12 U.S.C. § 1729(c)(1) (1982 & Supp. IV 1986)); *see also infra* note 4.

2. The phrase "FSLIC as receiver" is a term of art used to distinguish the receiver from the FSLIC in its corporate capacity. *See* 12 C.F.R. § 569a.5 (1987). Although this Comment will often use the terms "receiver" or "FSLIC," the reader should understand the meaning to be "FSLIC as receiver."

3. *See* NHA, § 406(a)-(d), 12 U.S.C. § 1729(a)-(d) (1982 & Supp. IV 1986); *see also* 12 C.F.R. § 549.3 (1987) (powers of receiver over federally chartered thrift); *id.* § 569a.6 (powers of receiver over state chartered thrift).

4. In 1982, § 122(d) of the Garn-St Germain Depository Institutions Act of 1982, amended § 406(c) of the NHA, Pub. L. No. 97-320, 96 Stat. 1469, 1482 (codified as amended at 12 U.S.C. § 1729(c) (1982 & Supp. IV 1986)) [hereinafter Garn-St Germain Act]. This provision enhanced the FHLBB's powers to appoint the FSLIC as receiver in the absence of state action and subjected the FSLIC as receiver to the exclusive authority of the FHLBB in all circumstances. *Id.* The amended language, however, expired on October 13, 1986, due to a sunset provision contained § 141(a)(6) of the Garn-St Germain Act. *See* 12 U.S.C. § 1729(c) (Supp. IV 1986). After October 13, 1986, the language of § 406 of the NHA, 12 U.S.C. § 1729 (1982 & Supp. IV 1986), reverted to the language existing prior to the amendment. Conse-

granted the receiver the power to settle or compromise claims against the association.

To effectuate settlement and compromise, the FSLIC as receiver evaluates the claims against an insolvent association and rejects those which are unsubstantiated.[6] Some creditors have challenged the FSLIC's determinations in court,[7] while others have sought to bypass the FSLIC entirely by filing court suits prior to presenting their claims to the FSLIC as receiver.[8] In the mid 1980's, the FSLIC began to challenge court jurisdiction to hear creditor claims[9] under section 5(d)(6)(C) of the Home Owners' Loan Act (HOLA)[10] which states that courts may not "restrain or affect the exercise of powers or functions of a conservator or receiver" except at the instance of the

---

quently, the FHLBB now may only regulate the FSLIC as receiver when appointed by the FHLBB. *See* NHA, Pub. L. No. 73-479 § 406, 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729 (1982 & Supp. IV 1986)).

Between 1982 and 1986, when most cases construing § 406(d) were decided, § 406(d) provided: "In connection with the liquidation of insured institutions, the [FSLIC] shall have power . . . to settle, compromise or release claims in favor of or against the insured institution, and do all things that may be necessary in connection therewith, *subject only to the regulation of the [FHLBB].*" 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)) (emphasis added). The last clause of this passage now reads: "subject only to the regulation of the *court or other public authority having jurisdiction over the matter.*" NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)) (emphasis added). The effect of the expiration of this provision is minimized by the language of § 406(c)(3) which provides that "court or other public authority" means the FHLBB when the FHLBB appoints the FSLIC as receiver. *See* Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (codified as amended by 12 U.S.C. § 1729(c) (1982 & Supp. IV 1986)).

5. 12 U.S.C. §§ 1701-50 (1982 & Supp. IV 1986). The NHA contains provisions creating the FSLIC and defining the powers and functions of the FSLIC. *See id.* §§ 1729-1730g (1982 & Supp IV 1986). Section 1729 authorizes the FSLIC to serve as receiver for the liquidation of insolvent savings and loan associations and broadly defines the powers and functions the FSLIC maintains in this capacity. NHA, Pub. L. No. 73-479 § 406, 48 Stat. 1246, 1259-60 (1934) (codified as amended by the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 249, 12 U.S.C. § 1729 (1982 & Supp. IV 1986)).

6. 12 C.F.R. § 549.4(b), (d) (1987) (the FSLIC as receiver of a federally chartered thrift shall pay all claims allowed by it or approved by the FHLBB); *id.* § 569a.8(b), (d) (the FSLIC as receiver for state chartered thrift shall pay all claims allowed by it or approved by the FHLBB); *see also* 12 U.S.C. § 1729(b)(1)(B) (1982) (the FSLIC "shall pay all valid credit obligations of the association").

7. *See, e.g.*, FSLIC v. Bonfanti, 826 F.2d 1391, 1394 (5th Cir. 1987), *petition for cert. filed sub nom.* Zohdi v. FSLIC, 56 U.S.L.W. 3165 (U.S. Aug. 5, 1987) (No. 87-255).

8. *See, e.g.*, FSLIC v. Florida 100 Dev. Group, 670 F. Supp. 1579, 1579 (S.D. Fla. 1987).

9. *See, e.g.*, North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1099 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *see also infra* notes 64-71.

10. 12 U.S.C. § 1464(d)(6)(C) (1982). The full text of § 5(d)(6)(C) provides: "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver." *Id.*

FHLBB.[11]

The United States Court of Appeals for the Fifth Circuit accepted the FSLIC's argument in *North Mississippi Savings & Loan Association v. Hudspeth.*[12] The court of appeals held that courts lack subject matter jurisdiction to hear creditor claims against insolvent institutions prior to the exhaustion of administrative remedies.[13] Affirming the lower court's dismissal, the Fifth Circuit held that only the FHLBB may regulate the actions of the receiver.[14] The court also concluded that initial jurisdiction over the receiver lies exclusively with the FHLBB.[15] The Fifth Circuit noted that Congress intended to permit the FSLIC to perform its statutory functions quickly and decisively without interference from the judiciary or regulatory authorities other than the FHLBB.[16]

The United States Court of Appeals for the Ninth Circuit, however, rejected the *Hudspeth* decision as logically flawed[17] and contrary to the true

11. *Id.*

12. 756 F.2d 1096, 1103 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986).

13. *See id.* The regulations governing FSLIC receiverships require creditors to present their claims to the FSLIC within 90 days after the FSLIC first publishes notice to the association's creditors. 12 C.F.R. §§ 549.4(a), 569a.8(a) (1987). The FSLIC will allow any claim submitted within the period and proved to its satisfaction. *Id.* §§ 549.4(b), 569a.8(b). In the event the FSLIC as receiver disallows a claim, the creditor, nevertheless, may request payment within 30 days of the disallowance. *Id.* § 549.4(b). The FSLIC as receiver shall submit to the FHLBB a complete list denoting the claims presented and the FSLIC's initial determination. *Id.* §§ 549.4(c), 569a.8(c)-(d). The FHLBB will direct the FSLIC to pay any claims that the FSLIC allowed or that the FHLBB approved. *Id.* §§ 549.4(d), 569a.8(d).

In 1985, the FHLBB proposed new regulations governing FSLIC receivership powers and claim procedures. Conservators and Receivers Proposed Rule, 50 Fed. Reg. 48,970 (1985) (to be codified at 12 C.F.R. pts. 547-549, 563, 569a-569c (proposed Nov. 8, 1985)). These rules define in greater detail the procedures a claimant must follow prior to seeking judicial review of the receiver's determination. *Id.* at 48,992-95 (to be codified at 12 C.F.R. § 569c.7-.9). Under the proposed rules, the claimant must appeal the receiver's initial determination to the director of the FSLIC to preserve the right of judicial review. *Id.* at 48,994 (to be codified at 12 C.F.R. § 569c.9(a)). The appeal to the director of the FSLIC will be based on the record established by the receiver; however, a claimant also may submit a separate statement including facts not considered in the initial determination. *Id.* (to be codified at 12 C.F.R. § 569c.9(a)(3)).

14. *Hudspeth,* 756 F.2d at 1101.

15. *Id.*

16. *Id.; see also* S. REP. NO. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539.

17. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1216 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3429 (U.S. Sept. 17, 1987) (No. 87-451). The *Morrison-Knudsen* court could not comprehend how initial adjudication of claims would delay the liquidation process given that claimants who seek judicial review of the final agency action also could delay the liquidation process by years. *Id.; see also infra* text accompanying notes 199-206.

intent of Congress.[18] In *Morrison-Knudsen Co. v. CHG International, Inc.*[19] the Ninth Circuit concluded that judicial resolution of creditor claims does not interfere with the FSLIC's receivership duties because the powers granted by Congress to the FSLIC as receiver do not include the power to adjudicate creditor claims.[20] Rather, the Ninth Circuit held that courts must exercise discretion to determine whether claimants should exhaust their administrative remedies prior to pursuing judicial remedies.[21] The court concluded that in the absence of statutory authority to adjudicate creditor claims, the FSLIC as receiver could not rely on the HOLA[22] to strip the court of jurisdiction.[23]

Several district courts outside of the Fifth and Ninth Circuits have addressed this issue since the *Morrison-Knudsen* opinion. The majority of these district courts adopted the *Hudspeth* analysis rather than the *Morrison-Knudsen* rationale.[24]

This Comment will analyze the two primary judicial pronouncements on FSLIC receivership power. First, the Comment will examine the development of the *Hudspeth* approach to the FSLIC and review the *Morrison-*

---

18. *Morrison-Knudsen*, 811 F.2d at 1217.

19. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

20. *Id.* at 1217.

21. *Id.* at 1223. The Ninth Circuit explained that the judicially created doctrine requiring exhaustion of administrative remedies does not limit jurisdiction but rather encourages efficient use of judicial resources by referring cases to the proper administrative agency. *Id.* (citing Wong v. Department of State, 789 F.2d 1380, 1384 (9th Cir. 1986)). The *Morrison-Knudsen* court would require the claimant to first present the claim to exhaust his administrative remedies by presenting his claim to the receiver for an initial determination of the claim's merits. *See supra* note 13. The presentation process provides the receiver with an opportunity to decide whether to negotiate a settlement to the claim or to deny the claim and defend its determination in a de novo review before the court. *See* Homestead Sav. v. Life Sav. of Am., No. 86 C 20,268, slip op. at 8 (N.D. Ill. July 1, 1987).

22. 12 U.S.C. § 1464(d)(6)(C) (1982); *see also supra* note 10.

23. *Morrison-Knudsen*, 811 F.2d at 1222.

24. Six courts adopted the *Hudspeth* approach: FSLIC v. Florida 100 Dev. Group, 670 F. Supp. 1577, 1582, 1583 (S.D. Fla. 1987); FirstSouth v. LaSalle Nat'l Bank, No. 86 C 10,247 (N.D. Ill. Sept. 4, 1987) (LEXIS, Genfed library, Dist file); York Bank & Trust Co. v. FSLIC, 663 F. Supp. 1100, 1103 (M.D. Pa. 1987); Rigali v. Life Sav. & Loan Ass'n of Am., No. 87 C 2543 (N.D. Ill. June 16, 1987) (LEXIS, Genfed library, Dist file); Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n, 659 F. Supp. 138, 140 (S.D. Fla. 1987); FSLIC v. Oldenburg, 658 F. Supp. 609, 611 (D. Utah 1987).

Two courts adopted the *Morrison-Knudsen* approach: Homestead Sav. v. Life Sav. of Am., No. 86 C 20,268, slip op. at 8 (N.D. Ill. July 1, 1987); FSLIC v. Provo Excelsior Ltd., No. C86-0423G (D. Utah Apr. 24, 1987) (LEXIS, Genfed library, Dist file).

One court declined to adopt either approach but refused to dismiss a claim against the failed thrift on the grounds that the claims represented an admixture of prereceivership and post-receivership activities requiring judicial resolution. *See* Peninsula Fed. Sav. & Loan Ass'n v. FSLIC, 663 F. Supp. 506, 508-11 (S.D. Fla. 1987).

Knudsen response. Then, the Comment will analyze the statutory provisions in light of the legislative history behind the amendments to the HOLA and the NHA. This Comment will also address some of the constitutional implications that the *Hudspeth* approach raises. The Comment will conclude that the interpretation of the *Hudspeth* court, requiring claimants to exhaust their administrative remedies prior to seeking judicial review, more closely adheres to congressional intent to preserve the financial integrity of the FSLIC.

I. The Development of the Jurisdictional Defense to Creditor Claims

A. *Pre-*Hudspeth *Adjudications of Creditor Claims*

When the FHLBB appoints the FSLIC as receiver for either state chartered thrifts[25] or for federal thrifts[26] the provisions of section 5(d)(6) of the HOLA[27] expand the FHLBB's authority over the receivership.[28] The first judicial interpretations of section 5(d)(6)(C) of the HOLA primarily involved the jurisdiction of the courts to challenge the power of the FHLBB to appoint the FSLIC as receiver for a state chartered thrift.[29]

25. Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (codified as amended at 12 U.S.C. § 1729(c)(2) (1982 & Supp. IV 1986)); *see also supra* note 4.

26. 12 U.S.C. § 1464(d)(6)(A) (Supp. IV 1986).

27. *Id.* § 1464(d)(6) (1982 & Supp. IV 1986). Section 5(d)(6) established the FHLBB's jurisdiction over the appointment and regulation of receivers for federal thrifts. *Id.* Section 406(c)(3)(A) of the NHA, amended by the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (codified as amended at 12 U.S.C. § 1729(c)(3)(A) (1982 & Supp. IV 1986)), applies the provisions of § 5(d)(6) of the HOLA to FSLIC receiverships of state chartered associations. *Id.; see also supra* note 4.

28. Congress expanded the FHLBB's authority to regulate failed state chartered thrifts in two acts. The Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 (codified as amended at 12 U.S.C. §§ 1729(c), 1851-1884 (1982 & Supp. IV 1986)), granted the FHLBB exclusive power to appoint the FSLIC as receiver of a state chartered thrift under certain circumstances not relevant for purposes of this Comment. *Id.* § 1729(c)(2). The Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.), further liberalized the procedures for the FHLBB's appointment of the FSLIC as receiver of state chartered thrifts. 12 U.S.C. § 1729(c)(1)(B) (1982 & Supp. IV 1986)); *see also supra* note 4.

When the state appoints the FSLIC as receiver of a state chartered thrift and the FHLBB declines to federalize the appointment pursuant to its authority under § 406(c) of the NHA, state law, rather than federal law, defines and regulates the receivership's powers and functions. *See* Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (codified as amended at 12 U.S.C. § 1729(c)(1) (1982 & Supp. IV 1986)). For examples of the application of state law to FSLIC receiverships, see Hancock Fin. Corp. v. FSLIC, 492 F.2d 1325, 1327 (9th Cir. 1974) and Baker v. F & F Inv. Co., 489 F.2d 829, 837 (7th Cir. 1973).

29. *See* First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 547 F. Supp. 988, 994-96 (D. Haw. 1982); First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 531 F. Supp. 251, 253 (D. Haw. 1981).

In *First Savings & Loan Association v. First Federal Savings & Loan Association,*[30] a former state chartered savings and loan association sued the FSLIC and the purchaser of the association's assets alleging conspiracy to place the association in receivership.[31] The court held that the plaintiffs could not challenge the appointment of the receiver because the plaintiffs failed to name the FHLBB as a defendant.[32] Because Congress had granted the FHLBB exclusive jurisdiction to appoint the receiver,[33] the court reasoned that it could not remove the receiver without the FHLBB as a party in interest.[34]

The plaintiffs also requested injunctive relief to restore the association's assets.[35] The court determined that judicial restriction of the sale of receivership assets would interfere with the FSLIC's duties as receiver and, therefore, violate section 5(d)(6)(C) of the HOLA.[36] Interpreting the language of section 5(d)(6)(C), which states that the court shall not interfere with the actions of the receiver except at the instance of the FHLBB,[37] the court stated that the power to invoke the court's jurisdiction to insure proper execution of the receivership lies exclusively with the FHLBB.[38] According to the court, an affected individual must seek initial redress for his grievance from the FHLBB.[39] The claimant, thereafter, may seek judicial review of the FHLBB's disposition under the Administrative Procedure Act (APA).[40]

The plaintiff later refiled the case naming the FHLBB as an additional defendant.[41] The district court dismissed the complaint for lack of subject

30. 531 F. Supp. 251 (D. Haw. 1981).

31. *Id.* at 252.

32. *Id.* at 253.

33. The court erroneously noted that the FHLBB appointed the FSLIC as receiver of First Savings & Loan Association pursuant to its authority under § 5(d)(6)(A) of the HOLA, 12 U.S.C. § 1464(d)(6)(A) (Supp. IV 1986). *See First Sav. & Loan Ass'n*, 531 F. Supp. at 253. The appointment of the FSLIC as receiver of a state chartered thrift falls within the purview of § 406(c) of the NHA. *See* Bank Protection Act of 1968, § 6, 12 U.S.C. § 1729(c)(2) (1982 & Supp. IV 1986).

34. *First Sav. & Loan Ass'n,* 531 F. Supp. at 253.

35. *Id.*

36. *Id.* at 253-54.

37. 12 U.S.C. § 1464(d)(6)(C) (1982).

38. *First Sav. & Loan Ass'n,* 531 F. Supp. at 254 n.4.

39. *Id.* at 254.

40. *Id.* The judicial review under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982 & Supp. IV 1986)) [hereinafter APA], provides that federal courts may review final agency actions upon the whole agency record. *Id.* § 706. The court will sustain an agency's factual findings unless unsupported by substantial evidence. *Id.* Otherwise, the court will confine its review to matters of law. *Id.*

41. First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 547 F. Supp. 988, 991 (D. Haw. 1982).

matter jurisdiction based upon section 5(d)(6)(C) of the HOLA,[42] and because the statute of limitations had expired for challenging the appointment of the FSLIC as receiver.[43] Using strong language, the court indicated that the statute provides that no court could entertain an action challenging the exercise of the powers and functions of the FSLIC as receiver.[44]

These cases established that section 5(d)(6)(C) imposes a jurisdictional limitation on the courts' ability to entertain challenges to the FSLIC as receiver. The *First Savings* cases, however, involved an insolvent association challenging the appointment and actions of the FSLIC as receiver.[45] Thus, the question of whether creditors' claims required a similar disposition remained unanswered.

B. North Mississippi Savings & Loan Association v. Hudspeth

In 1985, the United States Court of Appeals for the Fifth Circuit applied the *First Savings* interpretation of section 5(d)(6)(C) of the HOLA in its dismissal of a creditor claim.[46] In *North Mississippi Savings & Loan Association v. Hudspeth,*[47] the court held that it lacked jurisdiction to entertain a creditor's suit against an insolvent thrift in FSLIC receivership prior to the claimant's exhaustion of administrative remedies.[48]

Hudspeth arose from a disputed deferred-compensation agreement between North Mississippi Savings & Loan Association (North) and Hudspeth, a former president of the association.[49] In 1982, North sought a declaratory judgment to terminate the agreement and Hudspeth counterclaimed for specific performance and breach of contract.[50] The FHLBB subsequently appointed the FSLIC as receiver for North.[51] The FSLIC as receiver removed Hudspeth's counterclaim to federal district court and moved the court to dismiss the counterclaim for lack of subject matter juris-

42. *Id.* at 994.

43. *Id.* at 995; *see also* 12 U.S.C. § 1464(d)(6)(A).

44. *First Sav. & Loan Ass'n,* 547 F. Supp. at 994. *"[I]t can be said without any fear of dispute* that Section 1464(d)(6)(C) of Title 12 . . . makes it absolutely clear that no suit can be entertained and no relief affecting the powers and functions of a receiver may be sought or accorded . . . ." *Id.* (emphasis added). The court's opinion never addressed the issue of judicial review of administrative action or the exhaustion of administrative remedies.

45. First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 531 F. Supp. 251, 252-53 (D. Haw. 1981).

46. North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1103 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986); *see also supra* note 10.

47. *Hudspeth,* 756 F.2d at 1096.

48. *Id.* at 1099.

49. *Id.*

50. *Id.*

51. *Id.*

diction.[52] The district court, relying on section 406(d) of the NHA[53] and section 5(d)(6)(C) of the HOLA[54] held that it lacked jurisdiction to hear the case because adjudicating the claim would "restrain or affect" the powers of the receiver.[55]

The Fifth Circuit affirmed, holding that the FHLBB, rather than the courts, maintained exclusive jurisdiction to entertain challenges to the conduct of the receiver.[56] The Fifth Circuit cited the legislative history of the Bank Protection Act of 1968 (BPA)[57] to support its conclusion that courts lacked jurisdiction.[58] The court reasoned that Congress intended the FSLIC to act "quickly and decisively" to liquidate insolvent thrifts.[59] Consequently, any judicial resolution on the merits would delay the distribution of the assets of the receivership.[60]

The Fifth Circuit approached the issue from the perspective of primary jurisdiction. The court relied on section 406(d) of the NHA, which granted the FHLBB exclusive jurisdiction to regulate the FSLIC as receiver, and concluded that the FSLIC derived its power to adjudicate claims from FHLBB regulations.[61] The court, therefore, did not analyze the scope of the receiver's powers and functions to determine whether judicial adjudications actually would interfere with the exercise of such powers and functions.

The *Hudspeth* decision requires, as a prerequisite for judicial review, that creditors submit their claims against a failed thrift to the receiver for an initial determination of whether the receiver will pay, settle, or disallow the claim.[62] Pursuant to FHLBB regulations, the FSLIC as receiver must submit all disputed claims to the FHLBB for approval or reversal.[63] The claimant may seek judicial review of the FSLIC's determination only upon exhausting these administrative procedures.[64]

---

52. *Id.* at 1100.

53. *Id.* at 1101 (citing 12 U.S.C. § 1729(d) (1982)); *see also supra* note 4.

54. *Id.* (citing 12 U.S.C. § 1464(d)(6)(C) (1982)).

55. *See id.* (citing 12 U.S.C. § 1464(d)(6)(C) (1982)).

56. *Id.*

57. Pub. L. No. 90-389, 82 Stat. 294 (codified as amended at 12 U.S.C. §§ 1729(c), 1881-1884 (1982 & Supp. IV 1986)).

58. *Hudspeth,* 756 F.2d at 1101. The Senate report from the Committee on Banking and Currency stated that the FHLBB would maintain exclusive jurisdiction over the regulation of the FSLIC as receiver. S. REP. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539.

59. *Hudspeth,* 756 F.2d at 1101.

60. *Id.* at 1102.

61. *Id.* at 1101-02 & n.5; *see also* 12 C.F.R. §§ 549.4, 569a.8 (1987)).

62. *See* 756 F.2d at 1102; *see also* 12 C.F.R. §§ 549.4(b), 569a.8(b) (1987).

63. 12 C.F.R. §§ 549.4(d), 569a.8(d) (1987); *see also supra* note 13.

64. *Hudspeth,* 756 F.2d at 1103. The Fifth Circuit reaffirmed the *Hudspeth* decision in several subsequent opinions. *See, e.g.,* Red Fox Indus. v. FSLIC, 832 F.2d 340, 341-42 (5th

Numerous district courts within the Third,[65] Fourth,[66] Seventh,[67] Eighth,[68] Ninth,[69] Tenth,[70] and Eleventh[71] Circuits have adopted the *Hudspeth* holding. Most of these decisions fail, however, to further explain the Fifth Circuit's rationale. Instead, the early decisions routinely adopt the *Hudspeth* decision due to the lack of contrary precedent. The majority of

---

Cir. 1987); Coit Independence Joint Venture v. FirstSouth Fed. Ass'n, 829 F.2d 563, 564 (5th Cir. 1987), *cert. granted sub nom.* Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-996); FSLIC v. Bonfanti, 826 F.2d 1391, 1393 (5th Cir. 1987), *petition for cert. filed sub nom.* Zohdi v. FSLIC, 56 U.S.L.W. 3165 (U.S. Aug. 5, 1987) (No. 87-255); Godwin v. FSLIC, 806 F.2d 1290, 1292 (5th Cir. 1987); Chupik Corp. v. FSLIC, 790 F.2d 1269, 1270 (5th Cir. 1986). None of these opinions expand upon the substantive analysis of the *Hudspeth* decision. Numerous district courts in the Fifth Circuit have followed the *Hudspeth* precedent. *See, e.g.*, FSLIC v. Serpas, No. 87-0973 (E.D. La. Oct. 27, 1987) (LEXIS, Genfed library, Dist file); FSLIC v. Hickey, No. 86-3091 (E.D. La. Sept. 17, 1987) (LEXIS, Genfed library, Dist file); FSLIC v. Villard, No. WC 86-51-S-D (N.D. Miss. Jan. 15, 1987) (LEXIS, Genfed library, Dist file); Quackenbush v. Audubon Fed. Sav. & Loan Ass'n, No. 86-2470 (E.D. La. Jan. 12, 1987) (LEXIS, Genfed library, Dist file); FSLIC v. Hall Whispertree Assocs., 653 F. Supp. 148, 150 (N.D. Tex. 1986); Glen Ridge I Condominiums, Ltd. v. FSLIC, No. 3-85-1709-R (N.D. Tex. Sept. 27, 1985) (LEXIS, Genfed library, Dist file).

65. *See* York Bank & Trust Co. v. FSLIC, 663 F. Supp. 1100, 1103 (M.D. Pa. 1987).

66. *See* FSLIC v. Quality Inns, Inc., 650 F. Supp. 918, 922 (D. Md. 1987).

67. *See* FirstSouth v. LaSalle Nat'l Bank, No. 86 C 10,247 (N.D. Ill. Sept. 4, 1987) (LEXIS, Genfed library, Dist file); Rigali v. Life Sav. & Loan Ass'n of Am., No. 87 C 2543 (N.D. Ill. June 16, 1987) (LEXIS, Genfed library, Dist file); Baskes v. FSLIC, 649 F. Supp. 1358, 1365 (N.D. Ill. 1986); Politser v. Rosch, No. 86 C 0776 (N.D. Ill. June 25, 1986) (LEXIS, Genfed library, Dist file); Lyons Sav. & Loan Ass'n v. Westside Bancorporation, 636 F. Supp. 576, 580 (N.D. Ill. 1986), *aff'd*, 828 F.2d 387 (7th Cir. 1987). *But see* Homestead Sav. v. Life Sav. of Am., No. 86 C 20,268, slip op. at 8 (N.D. Ill. July 1, 1987) (adopting the *Morrison-Knudsen* opinion).

68. *See* First Fin. Sav. & Loan v. FSLIC, Nos. LR-C-86-724, LR-C-86-725 (E.D. Ark. Jan. 21, 1987) (LEXIS, Genfed library, Dist file).

69. *See* Kohlbeck v. Kis, 651 F. Supp. 1233, 1235 (D. Mont. 1987); Baer v. Abel, 649 F. Supp. 25, 26 (W.D. Wash. 1986); Baer v. Abel, 648 F. Supp. 69, 73 (W.D. Wash. 1986); Colony First Fed. Sav. & Loan Ass'n v. FSLIC, 643 F. Supp. 410, 415 (C.D. Cal. 1986); First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n, 639 F. Supp. 93, 96 (W.D. Wash. 1986); Rembold v. Gibralter Sav. & Loan Ass'n, 624 F. Supp. 1006, 1007 (W.D. Wash. 1985), *rev'd sub nom.* Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); Murdock-SC Assocs. v. Beverly Hills Fed. Sav. & Loan Ass'n, 624 F. Supp. 948, 954 (C.D. Cal. 1985), *rev'd*, 815 F.2d 82 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Murdock-SC Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-452).

70. *See* FSLIC v. Oldenburg, 658 F. Supp. 609, 611 (D. Utah 1987). *But see* FSLIC v. Provo Excelsior Ltd., No. C86-0423G (D. Utah Apr. 24, 1987) (LEXIS, Genfed library, Dist file) (adopting the *Morrison-Knudsen* opinion).

71. FSLIC v. Florida 100 Dev. Group, 670 F. Supp. 1577, 1582-83 (S.D. Fla. 1987); Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n, 659 F. Supp. 138, 140 (S.D. Fla. 1987); Sunrise Sav. & Loan Ass'n v. LIR Dev. Co., 641 F. Supp. 744, 746 (S.D. Fla. 1986). *But see* Peninsula Fed. Sav. & Loan Ass'n v. FSLIC, 663 F. Supp. 506, 511 (S.D. Fla. 1987) (distinguishing both *Hudspeth* and *Morrison-Knudsen* because claims represented admixture of prereceivership and postreceivership claims.)

the later opinions, having a choice of competing rationales, adopted the *Hudspeth* decision as well.

In 1986, the United States District Court for the Western District of Washington offered one of the few opinions to expound upon the *Hudspeth* rationale. In *Baer v. Abel,*[72] shareholders of Westside Federal Savings & Loan Association (Westside) brought a suit against Westside for violation of state and federal securities laws, the federal Racketeer Influenced and Corrupt Organizations Act (RICO),[73] and consumer protection laws.[74] Shortly thereafter, the FHLBB appointed the FSLIC as receiver for Westside.[75] The FSLIC as receiver moved the district court to dismiss the suit on the grounds that the court lacked jurisdiction to interfere with its powers and functions as receiver.[76] The court adopted the *Hudspeth* holding and dismissed the complaint.[77] In its analysis, the court addressed several statutory and constitutional challenges to the FSLIC's authority to adjudicate claims against the insolvent thrift.[78]

The *Baer* court reasoned that section 406(d) of the NHA[79] subjects the FSLIC as receiver to the exclusive regulation of the FHLBB.[80] The regulations established by the FHLBB require creditors to submit their claims to the receiver for initial determination.[81] The receiver then allows all claims proved to its satisfaction.[82] However, the FHLBB, upon a showing of cause, may approve claims the receiver disallowed.[83]

The court held that the plain meaning of these regulations requires claimants to present their claims to the receiver and appeal adverse decisions to the FHLBB prior to seeking judicial resolution of their claims.[84] According to the court, the regulations establish an administrative procedure for adjudicating creditor claims which constitutes a power or function of the receiver

72. 648 F. Supp. 69 (W.D. Wash. 1986).

73. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

74. *Baer,* 648 F. Supp. at 71.

75. *Id.*

76. *Id.* at 71-72.

77. *Id.* at 77.

78. *Id.* at 72-78.

79. *Id.* at 73 (citing 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

80. 648 F. Supp. at 73.

81. *See* 12 C.F.R. §§ 549.4(a), 569a.8(a) (1987).

82. *Baer,* 648 F. Supp. at 73 (citing 12 C.F.R. § 549.4(b) (1987)); *see also* Conservators and Receivers Proposed Rule, 50 Fed. Reg. 48,970, 48,992 (1985) (to be codified at 12 C.F.R. § 569c.7) (proposed Nov. 8, 1985); *supra* note 13 (discussing proposed rule).

83. *See Baer,* 648 F. Supp. at 73 (citing 12 C.F.R. § 549.4(d) (1987)). Conservators and Receiver Proposed Rule, 50 Fed. Reg. 48,970, 48,994 (1985) (to be codified at 12 C.F.R. § 569c.9) (proposed Nov. 8, 1985).

84. *Baer,* 648 F. Supp. at 73.

within the meaning of section 5(d)(6)(C) of the HOLA.[85] Because section 5(d)(6)(C) precludes judicial interference with the powers and functions of the receiver, the court reasoned that claimants must exhaust their regulatory administrative remedies before seeking judicial review.[86]

The *Baer* court also addressed several statutory and constitutional challenges to the FSLIC's claims procedures. The plaintiffs in *Baer* asserted that section 407(k)(1) of the NHA expressly established federal court jurisdiction over claims against FSLIC receiverships.[87] For several reasons, the *Baer* court rejected the argument that section 407(k)(1) demonstrated Congress' intention that the FSLIC defend creditor claims in court. First, the court held that this provision merely established whether judicial review of creditor claims should be heard in federal courts or in state courts.[88] Second, the court reasoned that section 407(k)(1) granted general jurisdiction to hear claims against the FSLIC in federal courts, but section 5(d)(6)(C) of the HOLA limits the jurisdictional grant of section 407(k)(1) by prohibiting judicial interference with the exercise of the powers and functions of the receiver.[89]

The *Baer* court also rejected three constitutional challenges to FSLIC adjudications. The plaintiffs asserted that FSLIC adjudication violated article III of the United States Constitution by placing adjudicatory powers in a nonarticle III tribunal.[90] The court found this argument without merit because the FSLIC as receiver lacks the authority to render final judgments.[91] The court concluded, therefore, that agency determinations subject to judicial review[92] do not violate article III.[93] The court also dismissed arguments

85. *Id.* (citing 12 U.S.C. § 1464(d)(6)(C) (1982)).

86. *Id.*

87. *Id.* at 74 (citing § 407(k)(1) of the NHA, 12 U.S.C. § 1730(k)(1) (1982)). Section 407(k)(1) expressly vests federal courts with federal question jurisdiction over all actions involving the FSLIC as receiver except those actions involving only questions of state law where the state appoints the FSLIC as receiver of a state chartered thrift. 12 U.S.C. § 1730(k)(1) (1982); *see also* 28 U.S.C. § 1331 (1982) (federal question jurisdiction).

88. *See Baer,* 648 F. Supp. at 74.

89. *Id.* at 75.

90. *Id.* at 77. The plaintiffs relied on the Supreme Court plurality in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). According to the *Baer* court, the Supreme Court has interpreted *Northern Pipeline* as only precluding Congress from "vest[ing] in a non-article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action under state law, without consent of the litigants, and subject only to ordinary appellate review." *Id.* (quoting Thomas v. Union Carbide, 573 U.S. 568, 585 (1985)).

91. *Baer,* 648 F. Supp. at 77.

92. The *Baer* court asserted that judicial review would be available under the APA. *Id.* (citing 5 U.S.C. §§ 701-706 (1982)). The court, however, failed to offer an opinion as to what standard of review the courts would apply to the receiver's determination.

93. *Id.*

that the procedures violated the plaintiffs' rights to a jury trial guaranteed by the seventh amendment,[94] and their due process rights provided by the fifth[95] and fourteenth[96] amendments.

C. Morrison-Knudsen Co. v. CHG International, Inc.

In *Morrison-Knudsen Co. v. CHG International, Inc.*,[97] a consolidation of five appeals arising from claims against the insolvent Westside Federal Savings and Loan Association, the United States Court of Appeals for the Ninth Circuit rejected the *Hudspeth* analysis.[98] The Ninth Circuit reversed and remanded the dismissal of three of the five appeals, holding that section 5(d)(6)(C) of the HOLA[99] did not divest courts of jurisdiction to entertain creditor claims against insolvent thrifts.[100]

The Ninth Circuit reasoned that section 5(d)(6)(C) of the HOLA[101] restricted the jurisdiction of the court only with respect to those powers or functions explicitly derived from the statutes governing FSLIC operations.[102] Because the court concluded that neither the statute nor FHLBB regulations empowered the FSLIC to adjudicate claims, it found that section 5(d)(6)(C) of the HOLA does not restrict a court's jurisdiction.[103] The Ninth Circuit did not, however, completely reject the exhaustion of administrative remedies doctrine.[104] The court remanded the cases to the district courts with instructions to balance the agency's interests in maintaining an efficient administrative system against the claimants' interests in seeking redress.[105]

---

94. U.S. CONST. amend. VII (right to jury trial in civil suits). The court rejected the plaintiffs' assertion of a right to a jury trial because it found the action to be against an agency of the federal government; the FSLIC. *Baer*, 648 F. Supp. at 77. The court stated that longstanding precedent excludes actions against the federal government from the seventh amendment right to a jury trial. *Id.* (citing Lehman v. Nakshian, 453 U.S. 156, 160 (1981)).

95. U.S. CONST. amend. VI (due process rights).

96. U.S. CONST. amend. XIV (due process rights). The court rejected arguments that adjudication by the FSLIC as an interested party violated plaintiffs' due process rights. *Baer*, 648 F. Supp. at 78. The court held that unless the plaintiffs show immediate harm or danger of immediate harm in the administrative scheme, due process claims must await the exhaustion of administrative remedies. *Id.* (citing Poe v. Ullman, 367 U.S. 497, 503-05 (1961)).

97. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

98. *Id.* at 1212.

99. 12 U.S.C. § 1464(d)(6)(C) (1982); *see also supra* note 10.

100. *Morrison-Knudsen*, 811 F.2d at 1217.

101. 12 U.S.C. § 1464(d)(6)(C) (1982).

102. *Morrison-Knudsen*, 811 F.2d at 1217.

103. *Id.*

104. *Id.* at 1223.

105. *Id.* The court recognized four valid agency interests. "The district court must balance the agency's interest in applying its expertise, correcting its own errors, making a proper

The Ninth Circuit based its conclusion that the FSLIC lacks adjudicatory powers on two arguments. First, traditional receivers lack the authority to adjudicate claims.[106] The court noted that the Federal Deposit Insurance Corporation (FDIC), a receiver for insolvent banks, is regulated by statutes[107] similar to the FSLIC's. The FDIC as receiver had never asserted the authority to adjudicate claims against insolvent banks.[108] According to the court, the regulations permitting the receiver to disallow claims not proved to its satisfaction[109] establish little more than the powers and functions of traditional receivers.[110] In the court's opinion, the receiver's rejection of a claim does not rise to the level of adjudication[111] but merely informs the claimant that the FSLIC refuses to recognize the claim's validity. Thus, the FSLIC as receiver does not have the power to resolve the dispute with the force of law.

Second, the Ninth Circuit also asserted that, by definition, the FSLIC's power to "settle and compromise"[112] claims is distinctly different from the power to adjudicate claims.[113] The court reasoned that the power to adjudicate eliminates the necessity of settlement and compromise.[114] Settlement and compromise imply negotiation toward a nonjudicial resolution of a claim between the two parties involved.[115] In contrast, adjudication denotes the reliance on an independent third party to weigh the facts and apply the findings of fact to principles of law and render a binding determination of the rights and duties of the parties involved.[116] The decision rendered

record, and maintaining an efficient, independent administrative system." *Id.* For a discussion of the exhaustion doctrine, see generally B. SCHWARTZ, ADMINISTRATIVE LAW §§ 8.23-.31 (1984); Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases,* 53 GEO. WASH. L. REV. 1 (1984-1985).

106. *Morrison-Knudsen,* 811 F.2d at 1217. The court distinguished the traditional receivership function of determining the priority of claims and distributing the assets from the adjudication of claims which "simply determines the existence and amount of claims that a receiver is to honor." *Id.* (citing Morris v. Jones, 329 U.S. 545, 549 (1947)).

107. Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1832 (1982 & Supp. 1986); National Bank Act, § 50, 12 U.S.C. §§ 191-194 (1982).

108. *Morrison-Knudsen,* 811 F.2d at 1218. *But see* Baer v. Abel, 648 F. Supp. 69, 76 (W.D. Wash. 1986) (the Federal Deposit Insurance Corporation (FDIC's) enabling statute lacks a provision comparable to HOLA, § 5(d)(6)(C), which limits the court's jurisdiction to interfere with the powers or functions of the receiver).

109. 12 C.F.R. §§ 549.4(b), 569a.8(b) (1987).

110. *Morrison-Knudsen,* 811 F.2d at 1217-18.

111. *Id.* at 1218.

112. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

113. *See Morrison-Knudsen,* 811 F.2d at 1219.

114. *Id.*

115. *See* BLACK'S LAW DICTIONARY 260 (5th ed. 1979) (compromise and settlement).

116. *See id.* at 39 (adjudication).

through adjudication thus carries the force of law.[117] The court reasoned that if the FSLIC as receiver had the power to reject a claim, it would have little need to settle or compromise.[118] Therefore, the Ninth Circuit concluded that the language of the statute demonstrates Congress' intention that the FSLIC defend creditor claims in court rather than adjudicate the claims itself.[119]

The FSLIC also argued that section 406(d) of the NHA[120] permits administrative adjudication because the statute states that the FSLIC may do all things "necessary" for orderly liquidation.[121] The court rejected this argument, reasoning that the FSLIC overburdened the meaning of the word "necessary" with its assertion of adjudicatory powers.[122] The provision merely authorizes the FSLIC to do all things necessary and within its express or implied powers to insure an orderly liquidation of the thrift.[123] The Ninth Circuit determined that Congress never intended the FSLIC to adjudicate claims and, therefore, held that the FSLIC could not rely on section 406(d) of the NHA to create the power as necessary for orderly liquidation.[124]

The Ninth Circuit noted additional problems with the FSLIC's assertion of adjudicatory authority. The HOLA contains several provisions granting the FSLIC and the FHLBB adjudicatory authority over thrifts in their supervisory capacities.[125] The Act, however, does not confer similar adjudicatory authority to the FSLIC as receiver.[126] The absence of such authority, the court stated, is evidence that Congress did not intend to permit the FSLIC to adjudicate creditor claims.[127]

The Ninth Circuit also expressed concern that FSLIC adjudication might

---

117. *See Morrison-Knudsen*, 811 F.2d at 1219.

118. *Id.*

119. *Id.*

120. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

121. *Morrison-Knudsen*, 811 F.2d at 1219.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1219-20; *see, e.g.*, 12 U.S.C § 1464(d)(2) (1982) (procedures for the issuance of cease-and-desist orders); *id.* § 1464(d)(3) (1982) (procedures for issuance of temporary cease-and-desist orders); *id.* § 1464(d)(4), (5) (1982) (procedures for removal of officers and directors of a thrift); *id.* § 1464(d)(6) (1982 & Supp. IV 1986) (procedures for judicial review of appointment of a receiver or conservator). All administrative hearings called for in § 1464(d) are conducted in accordance with the APA, 5 U.S.C. §§ 551-576 (1982 & Supp. IV 1986). 12 U.S.C. § 1464(d)(7)(A) (1982).

126. *Morrison-Knudsen*, 811 F.2d at 1220.

127. *See id.*

encroach upon the jurisdiction of article III courts.[128] The court found plausible the argument that FSLIC's attempt to adjudicate creditors claims violated the Supreme Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[129] by representing an attempt to litigate private rights.[130] The Ninth Circuit, however, found it unnecessary to declare the FSLIC's asserted adjudicatory authority unconstitutional under article III in light of its holding that agency adjudication violated congressional intent.[131]

The Ninth Circuit, therefore, concluded that the statutory schemes of the NHA and the HOLA did not strip the courts of jurisdiction to hear creditor claims. Rather, courts should exercise discretion in determining whether to dismiss or stay cases pending exhaustion of remedies or whether to proceed to the merits of a case.[132] Thus, the *Morrison-Knudsen* decision differed from the *Hudspeth* decision on two points. Under *Hudspeth,* courts may not entertain any action until the claimant has exhausted all administrative remedies, whereas the *Morrison-Knudsen* opinion holds that courts, in their discretion, may hold the courthouse door open to claimants prior to exhaustion of remedies. The second impact of the *Morrison-Knudsen* holding provides claimants with a de novo hearing to adjudicate claims upon exhausting administrative remedies, unlike *Hudspeth*, where APA review procedures apply.[133]

The *Morrison-Knudsen* opinion overturned a long line of district court cases in the Ninth Circuit which followed the *Hudspeth* approach.[134] The Ninth Circuit reaffirmed its *Morrison-Knudsen* decision in *Murdock-SC Associates v. Beverly Hills Savings & Loan Association,*[135] reversing a lower court's dismissal of a plaintiff's action to foreclose on a vendor's lien.[136] The *Murdock-SC* opinion deferred to the analysis in *Morrison-Knudsen* without adding any new analysis.

---

128. *Id.* at 1221.

129. 458 U.S. 50, 69-70 (1982); *see also infra* text accompanying notes 259-62.

130. *Morrison-Knudsen,* 811 F.2d at 1221.

131. *Id.* at 1222.

132. *Id.* at 1223.

133. Although the *Morrison-Knudsen* court never explicitly stated that judicial review of the receiver's determination would be de novo, this result follows from the court's holding that the receiver lacks the authority to adjudicate creditor claims. *Id.* at 1212. Under the Ninth Circuit's interpretation, the administrative process terminates prior to the adjudicatory process. *Id.* at 1218. The claimant, therefore, would be entitled to de novo trial. *See id.*; *see also* Homestead Sav. v. Life Sav. of Am., No. 86 C 20,268, slip op. at 8 (N.D. Ill. July 1, 1987).

134. *See* cases cited *supra* note 69.

135. 815 F.2d 82 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Murdock-SC Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-452).

136. *Id.*

D. Lyons Savings & Loan Association v. Westside Bancorporation

The United States Court of Appeals for the Seventh Circuit declined, on narrow grounds, to adopt the *Morrison-Knudsen* analysis.[137] In *Lyons Savings & Loan Association v. Westside Bancorporation,*[138] the petitioners conceded the FSLIC's power to adjudicate claims and, therefore, never presented the *Morrison-Knudsen* argument to the court.[139] The Seventh Circuit expressed its hesitation in approving one approach over the other without the benefit of proper presentation of the issues.[140]

Nevertheless, the Seventh Circuit upheld a lower court decision that adopted the *Hudspeth* approach.[141] The court of appeals identified the regulations governing FSLIC receivership powers and functions as the source of the FSLIC's adjudicatory power.[142] The Seventh Circuit refused to invalidate summarily such an important agency power authorized by longstanding regulations.[143]

The Seventh Circuit's acceptance of the FSLIC's adjudicatory powers provides little precedential value in light of the claimants' concession that the FSLIC maintains exclusive jurisdiction to adjudicate certain creditor claims.[144] The district courts within the Seventh Circuit disagree on *Lyons'* precedential value. In *Rigali v. Life Savings & Loan Association of America,*[145] the court interpreted *Lyons* as affirming the FSLIC's adjudicatory power.[146] The court failed to mention that the Seventh Circuit assumed

---

137. Lyons Sav. & Loan Ass'n v. Westside Bancorporation. 828 F.2d 387, 395 (7th Cir. 1987).

138. *Id.*

139. *Id.* at 391. The court pointed out that, "at oral argument counsel for the [claimants] repeatedly maintained that they were not challenging the FSLIC's exclusive jurisdiction to adjudicate claims, but rather believed that their claim was distinguishable from those before the Fifth Circuit in *Hudspeth.*" *Id.* at 391 n.5.

140. *Id.* at 391-92.

141. *Id.* at 395. The district court reasoned that the legislative history of the Financial Institutions Supervisory Act of 1966 (FISA), Pub. L. No. 89-695, § 101(a), 80 Stat. 1028 (codified as amended at 12 U.S.C. § 1464(d) (1982 & Supp. IV 1986)), indicated that Congress intended to channel creditor claims against the receivership through the administrative process. Lyons Sav. & Loan Ass'n v. Westside Bancorporation, 636 F. Supp. 576, 580 (N.D. Ill. 1986) (citing H.R. REP. No. 2077, 89th Cong., 2d Sess. 4-6 (1966)), *aff'd,* 828 F.2d 387 (7th Cir. 1987).

142. *Lyons,* 828 F.2d at 392 ("[R]egulations have contained a provision for the adjudication of claims since 1956."); *see also* 21 Fed. Reg. 4548, 4553 (June 26, 1956) (codified at 12 C.F.R. § 549.4 (1987)).

143. *Lyons,* 828 F.2d at 392.

144. *Id.* at 391 n.5.

145. No. 87 C 2543 (N.D. Ill. June 16, 1987) (LEXIS, Genfed library, Dist file). The *Rigali* court inadvertently misnamed the *Lyons* opinion as "Lyons Sav. & Loan Ass'n v. Alabama Fed. Sav. & Loan Ass'n." *See id.*

146. *Id.*

that the FSLIC maintained exclusive jurisdiction only because of the failure of the claimants to argue the issue.[147]

In contrast, the court in *Homestead Savings v. Life Savings of America*[148] noted that the Seventh Circuit failed to settle this issue and, therefore, adopted the *Morrison-Knudsen* analysis that the regulations and statutes failed to bestow adjudicatory power on the FSLIC.[149] The case involved the FSLIC's attempt to overturn a judgment against Life Savings of America, which was placed in receivership after the court issued the judgment.[150] The *Homestead* court argued that at some point the administrative procedure ends and the adjudicative procedure begins.[151] The court asserted, in dicta, that the statutory and regulatory scheme requires creditors to present their claims to the FSLIC for initial agency determination to pay, settle, or disallow the claims.[152] According to the court, upon completion of this presentation process, the claimant may freely pursue adjudication of his claims in court as a matter of general jurisdiction.[153]

In *Homestead,* where the trial and judgment preceded the appointment of the receiver, presenting the claim to the FSLIC would serve no meaningful purpose.[154] The FSLIC subsequently settled with Homestead Savings and withdrew its challenge to the district court's jurisdiction rather than suffer from the adverse application of the *Homestead* rule.[155] The court agreed to annul its ruling as a result of the FSLIC's decision to drop its challenge to the court's jurisdiction.[156]

E. Post Morrison-Knudsen *Opinions*

With the advantage of the competing opinions in *Hudspeth* and *Morrison-Knudsen,* several district courts, have addressed the issue of the FSLIC's adjudicatory powers. None, however, has added substantial analysis to either approach. Two district courts outside the Ninth Circuit[157] adopted

147. Several other Seventh Circuit district courts also dismissed creditor claims against the FSLIC as receiver for lack of subject matter jurisdiction. *See, e.g., supra* note 67.

148. No. 86 C 20,268 (N.D. Ill. July 1, 1987).

149. *Id.* slip op. at 8.

150. *Id.* at 1-2.

151. *See id.* at 9.

152. *Id.* at 8.

153. *Id.*

154. *See id.* at 9.

155. Weiner, *FSLIC Accepts Judgment Against Bankrupt Thrift,* Am. Banker, Dec. 8, 1987, at 14, col. 1.

156. *Id.* at 14, col. 2.

157. At the time of this writing, no Ninth Circuit district court opinion had been published addressing the issue of the FSLIC's adjudicatory power over creditor claims.

the *Morrison-Knudsen* analysis.[158] The district court in *FSLIC v. Provo Excelsior Ltd.*,[159] after restating the arguments made in *Hudspeth* and *Morrison-Knudsen*, adopted the *Morrison-Knudsen* analysis in holding that Congress intended the FSLIC to serve as receiver, not adjudicator.[160] Likewise, the district court in *Homestead Savings v. Life Savings of America*[161] adopted the *Morrison-Knudsen* analysis.[162]

One district court declined to adopt either the *Hudspeth* or the *Morrison-Knudsen* approach. In *Peninsula Federal Savings & Loan Association v. FSLIC*,[163] the court found that the claims against the thrift arose both prior to the receivership and during the receivership.[164] The court held that the administrative procedures could not address claims arising directly from the actions of the receiver and, therefore, the court retained subject matter jurisdiction to address these claims.[165] The court adopted, however, the *Morrison-Knudsen* criteria of exhaustion to determine whether the court should exercise its discretion to permit the receiver to determine the validity of the claims.[166] Utilizing this criteria, the court refused to refer the claims to the receiver for exhaustion of administrative remedies.[167]

Several district courts outside the Fifth Circuit preferred the analysis in *Hudspeth* to that in *Morrison-Knudsen*. In *FSLIC v. Florida 100 Development Group, Inc.*,[168] the court relied on the Supreme Court opinion in *Katchen v. Landy*,[169] to uphold the FSLIC's adjudicatory powers.[170] The

158. *See* Homestead Sav. v. Life Sav. of Am., No. 86 C 20,268, slip op. at 8 (N.D. Ill. July 1, 1987); FSLIC v. Provo Excelsior Ltd., No. C86-0423G (D. Utah Apr. 24, 1987) (LEXIS, Genfed library, Dist file).

159. No. C86-04238G (D. Utah Apr. 24, 1987) (LEXIS, Genfed library, Dist file).

160. *Id.*

161. No. 86 C 20,268 (N.D. Ill. July 1, 1987).

162. *Id.* slip op. at 8. See *supra* text accompanying notes 148-56 for the discussion of the *Homestead* opinion.

163. 663 F. Supp. 506 (S.D. Fla. 1987).

164. *Id.* at 509-10. The claimant in *Peninsula* alleged that after the FHLBB placed Sunrise Savings & Loan Association in FSLIC receivership, the FSLIC, through its agents, renegotiated the terms of a loan participation agreement. *Id.* at 507-08. The reorganized thrift subsequently failed, and the FSLIC sought to subject the claims arising from this renegotiated agreement to the administrative claims process. *Id.*

165. *Id.* at 510-11.

166. *Id.; see also* Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3259 (U.S. Sept. 17, 1987) (No. 87-451); *supra* note 105 (discussing the factors the court considers in its determination to require exhaustion of administrative remedies).

167. *Peninsula*, 663 F. Supp. at 511.

168. 670 F. Supp. 1577 (S.D. Fla. 1987).

169. 382 U.S. 323 (1966).

170. *Florida 100 Dev. Group*, 670 F. Supp. at 1582.

Landy Court held that the Bankruptcy Act,[171] authorizing bankruptcy referees to allow or disallow claims against a bankrupt estate, established an adjudicative procedure.[172] The *Florida 100* court held that "[u]nder this authority, the FSLIC's process of proof, allowance and distribution is an adjudicative process."[173] Other opinions merely relied on and reiterated the analysis supplied by *Hudspeth* and its progeny in adopting the *Hudspeth* approach.[174]

II. Resolving the Jurisdictional Questions to FSLIC Adjudication of Creditor Claims

The *Morrison-Knudsen* court identified two broad areas of conflict between its analysis of FSLIC adjudicatory powers and the *Hudspeth* analysis. First, the *Morrison-Knudsen* court found insufficient statutory authority to support the FSLIC's asserted power to adjudicate creditor claims. Second, the Ninth Circuit noted that FSLIC adjudication of creditor claims implicates potential constitutional limitations.

A. Receivership Powers and Functions

The FSLIC as receiver must derive its power to adjudicate creditor claims against failed thrifts from express or implied provisions of its enabling statute.[175] The FSLIC's enabling statute expressly authorizes the FSLIC to do all things necessary to liquidate the assets of a failed thrift in an orderly manner, subject only to FHLBB regulation.[176] Furthermore, Congress authorized the FHLBB to draft rules and regulations governing the liquidation of failed thrifts.[177]

The FHLBB interpreted the HOLA and the NHA to include FSLIC adjudication of claims. Courts will give an agency's interpretation of its enabling statute controlling weight unless the agency's regulations are arbitrary, ca-

171. Bankruptcy Act, ch. 575, § 2(a)(2), 52 Stat. 840, 842 (1938) (amended by 11 U.S.C. § 502 (1982 & Supp. IV 1986)).

172. *Landy*, 382 U.S. at 329-30.

173. *Florida 100 Dev. Group*, 670 F. Supp. at 1582.

174. *See, e.g.*, York Bank & Trust Co. v. FSLIC, 663 F. Supp. 1100, 1103 (M.D. Pa. 1987); Rigali v. Life Sav. & Loan Ass'n of Am., No. 87 C 2543 (N.D. Ill. June 16, 1987) (LEXIS, Genfed library, Dist file); Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n, 659 F. Supp. 138, 140 (S.D. Fla. 1987); FSLIC v. Oldenburg, 658 F. Supp. 609, 611 (D. Utah 1987).

175. *See* 3 N. Singer, Statutes and Statutory Construction § 65.01 (Sands 4th rev. ed. 1986).

176. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

177. 12 U.S.C. § 1464(d)(11) (1982).

pricious, or manifestly contrary to its enabling statute.[178] Thus, the determination of whether the FSLIC maintains the authority to adjudicate creditor claims depends on whether the FHLBB's interpretation exceeds the statutory authority Congress granted the FSLIC as receiver, and whether this interpretation is reasonable and necessary to effectuate the policies of the legislation.

The *Morrison-Knudsen* court held that neither the statute nor the FHLBB regulations establish the FSLIC's power to adjudicate creditor claims.[179] The court compared FSLIC receiverships to ordinary receiverships, noting that the powers of ordinary receivers traditionally exclude the adjudication of claims against the receivership.[180] The Ninth Circuit also compared the FSLIC to the FDIC, asserting that the FDIC's enabling statute closely corresponded to the FSLIC's.[181] The court pointed out that the FDIC has never asserted the authority to adjudicate creditor claims.[182]

The Ninth Circuit, however, erred in comparing the FSLIC as receiver with either ordinary receivers or the FDIC as receiver. Receivers derive their powers from one of two sources. Ordinary common law receivers derive their powers from the courts of equity.[183] At common law, a receiver passed upon the validity of claims presented to him, and protected the assets of the trust from questionable claims.[184] The receiver, however, allows or disallows claims subject to the order of the appointing court of equity.[185]

The FSLIC is a statutory receiver. Statutory receivers derive their powers from the express or implied statutory language creating the receivership.[186] Thus, the express and implied provisions of the HOLA and the NHA define the powers and functions of the FSLIC as receiver. As the *Morrison-Knudsen* court noted, neither the HOLA nor the NHA expressly authorizes the

178. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); *see also* Lyons Sav. & Loan Ass'n v. Westside Bancorporation, 828 F.2d 387, 391 (7th Cir. 1987).

179. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1215-17 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

180. *Id.* at 1217; *see also* 16 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7813 (rev. perm. ed. 1979).

181. *Morrison-Knudsen,* 811 F.2d at 1218. *But see* Baer v. Abel, 648 F. Supp. 69, 76 (W.D. Wash. 1986) (the FDIC's enabling statute lacks a provision comparable to the HOLA, § 5(d)(6)(C), 12 U.S.C. § 1464(d)(6)(C) (1982)); *see also infra* text accompanying notes 213-17 (discussing the effect of § 1464(d)(6)(C) on the court's jurisdiction).

182. *Morrison-Knudsen,* 811 F.2d at 1218, 1221.

183. 16 W. FLETCHER, *supra* note 180, § 7665.

184. *Id.* § 7814.

185. *Id.*

186. *Id.* § 7813.

FSLIC to adjudicate creditor claims.[187] The FSLIC as receiver relies upon implicit congressional intent for its adjudicatory power.

Examining the legislative history of the various amendments to the HOLA and the NHA reveals a statutory scheme that, over time, consistently expanded FSLIC and FHLBB powers.[188] Congress enacted these amendments in an effort to preserve public confidence in the savings and loan industry by preserving the financial integrity of the FSLIC deposit insurance fund.[189] The FHLBB and the FSLIC interpreted these amendments as implicit congressional authorization for the FSLIC to adjudicate creditor claims to effectuate the policies of these acts.

An examination of one of these amendments supports the FSLIC's proposition that Congress intended to permit administrative adjudication of creditor claims. In 1968, Congress enacted the Bank Protection Act of 1968 (BPA)[190] in an effort to strengthen the financial integrity of the FSLIC. The BPA extended the authority of the FHLBB to appoint and regulate the FSLIC as receiver to state chartered thrifts.[191] The Senate Committee on Banking and Currency expressed its concern that several state chartered thrifts experienced lengthy liquidations which tied up substantial portions of the FSLIC's insurance fund for years.[192]

The Committee expressed some concern over the scope of the powers the

187. Morrison-Knudsen Co. v. CHG Int'l, Inc. 811 F.2d 1209, 1217 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

188. *See, e.g.*, Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028 (codified as amended in scattered sections of 12 U.S.C.) (expanding the authority of the FHLBB to enjoin unsafe and unlawful practices); Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294 (codified as amended at 12 U.S.C. § 1729(c) (1982 & Supp. IV 1986)) (expanding the FHLBB's powers to appoint the FSLIC as receiver for state chartered thrifts); Garn-St Germain Act, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.) (further expanding the FHLBB's powers to appoint the FSLIC as receiver for state chartered thrifts); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (to be codified in scattered sections of 12 U.S.C.) (expanding the FSLIC's powers to aid troubled thrifts by purchasing assets and forcing mergers).

189. *See* S. REP. NO. 1263, 90th Cong., 2d Sess. 6, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2535.

190. Pub. L. No. 90-389, 82 Stat. 294 (codified as amended at 12 U.S.C. § 1729(c) (1982 & Supp. IV 1986)).

191. *See id.*

192. S. REP. NO. 1263, 90th Cong., 2d Sess. 7-8, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2536-37. When the FSLIC pays out insurance to depositors, the FSLIC becomes a general creditor of the association to the extent of the insurance payout. *Id.* at 7, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2536. The FSLIC becomes the single largest creditor, frequently entitled to more than 95% of the remaining assets due to the FSLIC's subrogation of the deposits for which it paid out deposit insurance. *See id.* Delay in the distribution of these assets places an inordinate burden on the FSLIC insurance fund. *Id.* at 7-8, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2537.

legislation granted to the FSLIC and the FHLBB, admonishing "the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association."[193] The Committee noted that the legislation granted the FHLBB exclusive authority over the regulation of the FSLIC as receiver.[194] The Committee's warning implies either that the FSLIC should not create a flood of litigation by unfairly denying creditor claims, or that the Congress intended to grant the FSLIC the additional powers to adjudicate claims against the receivership through administrative proceedings.

The caveat to treat creditors fairly would serve little useful purpose if creditors could freely retreat to the courts to adjudicate their claims because the FSLIC pays the litigation expenses out of the assets of the failed thrift.[195] Because the FSLIC maintains a claim on 95% or more of the assets,[196] the FSLIC would have little reason to litigate well founded claims and every reason to litigate unfounded ones. In addition, such litigation would delay the distribution of the assets of the thrift, thereby tying up a substantial portion of the FSLIC's insurance fund. Assuming the FSLIC acts in its own interest, the FSLIC would litigate only questionable claims and approve those that the courts would probably uphold. Thus, the Committee's admonishment to the FSLIC to avoid unnecessary litigation serves no useful purpose if the FSLIC acts in its own best interests, which are to preserve the insurance fund.

Another interpretation of the Committee's warning suggests the Committee intended that the FSLIC establish an administrative adjudicatory procedure to resolve creditor claims. The caveat maintains much more meaning and force in this context than it would if FSLIC could only make a perfunctory decision to allow a claim or litigate it. Furthermore, in admonishing the FSLIC to treat the interests of the claimants fairly, the Committee noted that section 5(d)(6)(C) of the HOLA[197] limits the jurisdiction of the courts to interfere with the exercise of the FSLIC's powers and functions as receiver to those instances where the FHLBB invokes the court's jurisdiction.[198]

The *Hudspeth* court held that the FHLBB's regulations establishing an administrative adjudicative procedure to resolve creditor claims furthers the congressional intent to instill confidence in the thrift industry by promoting

193. *Id.* at 10, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2530, 2539.

194. *Id.*

195. 12 U.S.C. § 1729(b) (1982 & Supp. IV 1986).

196. *See supra* note 192.

197. 12 U.S.C. § 1464(d)(6)(C) (1982); *see also supra* note 10.

198. S. REP. NO. 1263, 99th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539.

the financial integrity of the FSLIC insurance fund.[199] The court found the FSLIC's assertion of adjudicatory authority consistent with Congress' intent to enable the FSLIC to act expeditiously to liquidate insolvent thrifts.[200] The *Morrison-Knudsen* court rejected the *Hudspeth* assumption that the FSLIC could act more expeditiously through administrative adjudication than judicial adjudication.[201] The court asserted that judicial review of the administrative determination itself could delay the liquidation process for years, rendering illusory any perceived benefit administrative adjudication would serve.[202] Congress expressly addressed the delays in judicial review envisioned by the *Morrison-Knudsen* court in section 5(d)(7) of the HOLA[203] and section 408(j) of the NHA.[204] Congress intended these sections to provide for expedited judicial review of FHLBB and FSLIC actions in federal circuit courts rather than in district courts.[205] The *Morrison-Knudsen* decision would result in additional delays in the liquidation process by permitting claimants the opportunity to initially present their claims to the court for a determination of whether the claim should be presented to the FSLIC or adjudicated in court. The *Morrison-Knudsen* result also would add to the cost of the liquidation process by requiring the FSLIC to defend the claims in a de novo trial rather than in a less expensive APA administrative hearing.[206] FSLIC administrative adjudication, in light of the time and costs associated with de novo review, appears reasonable and necessary to effectuate the aims of the HOLA and the NHA. Therefore, courts should defer to FSLIC adjudication.

The FSLIC's interpretation, however, is not supported by express language in its enabling statute. The *Morrison-Knudsen* court rejected the FSLIC's assertion of adjudicatory authority for this reason. The court found the FSLIC's assertion of adjudicatory authority ultra vires in the absence of express congressional authorization. The court also rejected the assertion that Congress implicitly authorized the FSLIC to adjudicate claims.

199. *See* North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101-02 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986).

200. *Id.*

201. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1216-17 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

202. *Id.*

203. 12 U.S.C. § 1464(d)(7) (1982).

204. *Id.* § 1730(j).

205. *See* S. REP. NO. 1482, 89th Cong., 2d Sess. 15, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3546.

206. *See* Gelpe, *supra* note 105, at 12 ("Probably, administrative resolution is less expensive than judicial resolution because administrative proceedings are less formal . . . .").

The Ninth Circuit relied on *Morris v. Jones*[207] for the proposition that adjudication of claims in the courts does not interfere with the functions and powers of statutory receivers.[208] In *Morris,* the Supreme Court rejected the theory that the receivers appointed by authority of state statutes retained exclusive jurisdiction to hear claims against the receivership.[209] The Court, in *Morris,* held that a state may, through its police power, provide for exclusive administrative adjudication of claims as long as such procedures do not conflict with the Constitution.[210] The *Morris* Court found the state procedures unconstitutional because the procedures failed to accord full faith and credit to the adjudication of a claim by another state's courts.[211] No such infirmity affects FSLIC adjudication because it acts as a federal agency pursuant to congressional authority.[212]

The Ninth Circuit also compared the powers of the FSLIC to those of the FDIC.[213] In *Baer v. Abel,*[214] the court pointed out that the FDIC's enabling statute lacks the functional equivalent of section 5(d)(6)(C) of the HOLA.[215] Section 5(d)(6)(C) limits the court's jurisdiction to interfere with the powers or functions of the FSLIC as receiver.[216] Without this provision, the court would retain discretionary jurisdiction to proceed with creditor claims, notwithstanding FHLBB regulations establishing administrative procedures to adjudicate creditor claims. Thus, the FSLIC could not maintain exclusive jurisdiction to adjudicate creditor claims without section 5(d)(6)(C).[217]

---

207. 329 U.S. 545 (1947).

208. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1217 (9th Cir. 1987) (citing Morris v. Jones, 329 U.S. 545, 549 (1947)), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

209. 329 U.S. at 549.

210. *Id.* at 552-53.

211. 329 U.S. at 553. Denying enforcement of the sister states' adjudication violated the full faith and credit clause. U.S. CONST. art. IV, § 1.

212. U.S. CONST. art. VI, cl. 2 (supremacy clause).

213. Morrison-Knudsen Co. v. CHG Int'l, Inc. 811 F.2d 1209, 1216, 1221 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

214. 648 F. Supp. 69 (W.D. Wash. 1986).

215. *Id.* at 76. The FDIC's enabling statute is the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1832 (1982 & Supp. IV 1986). The duties of the FDIC as receiver are defined in the National Bank Act, § 50, 12 U.S.C. §§ 191-194 (1982). This Act explicitly authorizes the FDIC as receiver to pay out, from the assets of the insolvent bank, the ratable portion of any claim "proved to [its] satisfaction or *adjudicated in a court of competent jurisdiction.*" 12 U.S.C. § 194 (1982) (emphasis added).

216. 12 U.S.C. § 1464(d)(6)(C) (1982).

217. *See* First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n, 639 F. Supp 93, 99 (W.D. Wash. 1986) ("12 U.S.C. § 1729(d) (1982) removes all claims against the receivership to a single forum, and 12 U.S.C. § 1464(d)(6)(C) (1982) effectively stays judicial action with respect to those claims in any other forum.").

Longstanding rules of statutory construction grant agencies great deference in interpreting their governing statutes.[218] FSLIC and FHLBB interpretations of the statutes in question might well pass the arbitrary and capricious standard of agency review[219] given the overriding policy considerations that led Congress to enact these statutes.

B. Compromise and Settlement

The *Morrison-Knudsen* court presented several additional arguments rebutting the FSLIC's assertion of adjudicatory power. The court held that the language of the statutes demonstrates that the FSLIC's interpretation clearly violates congressional intent.[220] The Ninth Circuit asserted that Congress' express authorization of the FSLIC to compromise or settle claims against insolvent thrifts[221] implies that the FSLIC lacks the authority to adjudicate claims.[222] The Ninth Circuit reasoned that the power to compromise and settle suggests a process of negotiation.[223] The power to adjudicate, however, denotes the much stronger authority to determine the merits of claims with the force of law.[224] The court held that such powers imply that the FSLIC would pass on the merits of each claim as a judge, jury, and party in interest.

In *Homestead Savings v. Life Savings of America,*[225] the court agreed with the Ninth Circuit in holding compromise and settlement inconsistent with adjudication.[226] The court held that the claimant must exhaust his administrative remedies by presenting the claim to the receiver for an administrative determination of whether FSLIC will negotiate a settlement of the claim or disallow the claim.[227] The court concluded that at this point, the administrative process ends and the adjudicative process begins.[228]

The *Hudspeth* court, however, never distinguished between compromise and settlement, and adjudication because it viewed the FHLBB as the focal

218. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1215 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

219. *See Chevron U.S.A.*, 467 U.S. at 844.

220. *Morrison-Knudsen,* 811 F.2d at 1215.

221. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

222. *Morrison-Knudsen,* 811 F.2d at 1219-20.

223. *See id.*

224. *See id.*

225. No. 86 C 20,268 (N.D. Ill. July 1, 1987).

226. *Id.* slip op. at 8.

227. *Id.*

228. *Id.*

point.[229] The court found the adjudication of claims reasonably necessary to liquidate the failed thrift expeditiously and decisively.[230] Because the court found it lacked jurisdiction to interfere with the actions of the receiver except at the instance of the FHLBB,[231] the court reasoned that the FHLBB had sole jurisdiction over the receivership.[232] The *Morrison-Knudsen* court, however, focused primarily on the portion of section 406(d) of the NHA[233] authorizing the FSLIC to settle or compromise claims without granting much deference to Congress' directive for the FSLIC to do everything necessary to liquidate the thrift in an orderly manner. The *Morrison-Knudsen* court dismissed this directive, claiming that the FSLIC placed too much weight on the meaning of "necessary."[234]

Congress authorized the FSLIC as receiver to do all things necessary to effectuate the liquidation of insolvent thrifts subject to the regulation of the FHLBB.[235] The FHLBB drafted rules and regulations concerning the conduct of receivers and conservators pursuant to its rulemaking authority in HOLA, section 5(d)(11).[236] A well-established principle of statutory construction holds that an agency's expertise in determining what may be reasonably necessary to effectuate the provisions of its enabling statute exceeds that of the court.[237] The FHLBB regulations authorize the FSLIC as receiver to pay claims allowed by the receiver or approved by the FHLBB.[238] These regulations created an administrative adjudicatory process[239] which deserves deference from the courts.

The *Morrison-Knudsen* court acknowledged that these regulations pass the arbitrary and capricious standard and recognized the validity of the reg-

229. *See* North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The court concluded that the FSLIC derives its power to adjudicate creditor claims from the regulations drafted by the FHLBB. *Id.* at 1102 n.5; *see also supra* note 13.

230. *Hudspeth*, 756 F.2d at 1101.

231. 12 U.S.C. § 1464(d)(6)(C) (1982); *see also supra* note 10.

232. *Hudspeth*, 756 F.2d at 1101.

233. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)); *see also supra* note 4.

234. 811 F.2d 1209, 1219 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

235. NHA, Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)).

236. *Id.* § 1464(d)(11).

237. Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3255 (1986).

238. 12 C.F.R. §§ 549.4(d), 569a.8(d) (1987).

239. *See* North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1101 n.5 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *see also supra* note 13.

ulations.[240] The court refused, however, to concede that the regulations established an adjudicatory procedure.[241] Thus, the court substituted its own interpretation of the FHLBB's regulations for that of the FSLIC and the FHLBB, both of which clearly favored the FSLIC's assertion of adjudicatory powers.

Although the *Morrison-Knudsen* finding that compromise and settlement are inconsistent with adjudication seems determinative at first glance, the policy concerns behind the larger statutory scheme favor the FSLIC's assertion of adjudicatory powers. The FSLIC's experience indicates that administrative adjudication facilitates the resolution of the vast majority of claims to the satisfaction of the parties without need for judicial review.[242] The FSLIC's experience in effectuating statutory policies weighs heavily in favor of its position.

C. *The Amenability of the FSLIC as Receiver to Suit*

The *Morrison-Knudsen* court maintained that FSLIC adjudication violates clear congressional intent because the FSLIC's enabling statute provides jurisdiction in federal courts for suits by or against the FSLIC.[243] Furthermore, the statute exempts from federal question jurisdiction any suit against the FSLIC as receiver or conservator for a state chartered thrift involving issues controlled only by state law.[244] The *Morrison-Knudsen* court found this provision to represent further evidence that Congress intended the FSLIC to defend creditor claims in court.[245] The court concluded that Congress never intended to create a disparate situation, withholding court jurisdiction over federalized receiverships but permitting jurisdiction over state receiverships.[246]

In *Baer v. Abel,*[247] the court dismissed this argument[248] when it found that NHA section 407(k)(1)[249] established a general grant of jurisdiction which must overcome other provisions of the law.[250] Section 5(d)(6)(C) of

240. 811 F.2d 1209, 1217 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

241. *Id.*

242. Brief for the FSLIC at 15-16, Zohdi v. FSLIC, 56 U.S.L.W. 3165 (U.S. petition for cert. filed Aug. 5, 1987) (No. 87-255).

243. *Morrison-Knudsen,* 811 F.2d at 1220-21; *see also* 12 U.S.C. § 1730(k)(1) (1982); *supra* note 87.

244. 12 U.S.C. § 1730(k)(1) (1982).

245. *Morrison-Knudsen,* 811 F.2d at 1220.

246. *Id.* at 1220-21.

247. 648 F. Supp. 69 (W.D. Wash. 1986).

248. *Id.* at 75.

249. 12 U.S.C. § 1730(k)(1) (1982).

250. 648 F. Supp. at 75.

the HOLA[251] establishes an independent limitation on the jurisdictional grant of section 407(k)(1). The *Baer* court concluded that section 5(d)(6)(C) requires all creditor claims to pass through the administrative process.[252] Section 407(k)(1), therefore, imposes no independent limitation on administrative adjudication.[253]

The *Morrison-Knudsen* decision reads too much into section 407(k)(1) in support of its position that Congress intended the FSLIC to defend creditor claims in court. The *Morrison-Knudsen* position directly conflicts with section 5(d)(6)(C), which limits the jurisdiction of the court to hear certain cases. Thus, section 5(d)(6)(C) imposes the duty on courts to dismiss claims which section 407(k)(1) would otherwise permit. Section 407(k)(1) imparts no additional insight into congressional intent or the validity of the FHLBB regulations regarding the FSLIC's adjudicatory authority, nor does section 407(k)(1) impose any additional limitations on authority established otherwise.

D. Constitutional Implications of FSLIC Adjudications

The FSLIC's assertion of adjudicatory powers must also pass constitutional scrutiny. The courts have identified two constitutional issues which appear to pose the greatest threat to the FSLIC's adjudicatory powers. The first constitutional challenge to the FSLIC's adjudicatory power arises from the seventh amendment right to a jury trial in all suits at common law.[254] In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission,*[255] the United States Supreme Court held that Congress may commit the resolution of new statutory public rights to administrative adjudication without infringing upon the seventh amendment.[256] Statutory liquidation of an insolvent thrift, which converts the creditor's claim into a pro rata claim in the thrift, may create a new public right which Congress could submit to the FSLIC as receiver to adjudicate as a special court of equity without violating the seventh amendment.[257]

The second challenge derives from article III of the Constitution which requires vesting judicial power in judges granted life tenure.[258] In *Northern*

251. 12 U.S.C. § 1464(d)(6)(C) (1982); *see also supra* note 10.

252. 648 F. Supp. at 73-74.

253. *Id.*

254. U.S. CONST. amend VII.

255. 430 U.S. 442 (1977).

256. *Id.* at 455.

257. *See id.* at 454; Katchen v. Landy, 382 U.S. 323, 336 (1966) (Bankruptcy Code "converts creditor's legal claims into an equitable claim to a pro rata share of the res").

258. U.S. CONST. art. III.

Pipeline Construction Co. v. Marathon Pipe Line Co.,[259] the United States Supreme Court declared unconstitutional the Bankruptcy Act of 1978[260] because Congress vested adjudicatory powers over private rights in non-article III courts.[261] The jurisdiction of the bankruptcy courts, invalidated in *Northern Pipeline,* included all actions related to cases arising under the bankruptcy laws.[262]

The Supreme Court has established a balancing test to determine whether a particular administrative scheme violates article III.[263] Among the factors the Court weighed are the degree to which the nonarticle III tribunal assumes the plenary powers of article III courts, the origins of the rights sought to be adjudicated, and the concerns leading Congress to empower nonarticle III tribunals.[264]

The adjudicatory power the FSLIC asserts as receiver imposes far less on the functions of article III courts than does the power asserted by bankruptcy courts in *Northern Pipeline.* The FSLIC asserts only narrow adjudicatory authority over claims brought against the insolvent thrift and has consistently brought claims asserted on behalf of the failed thrift to article III courts for adjudication.[265] The determination of the validity and amount of claims against an insolvent thrift may plausibly involve matters of public rights for which the limitations of article III do not apply. Thus, the limited scope of FSLIC adjudications may impose minimally on the traditional powers of article III courts, thereby ensuring that administrative adjudication remains within the *Northern Pipeline* restrictions.[266]

III. Conclusion

Three circuits have addressed the issue of whether the HOLA and the NHA empower the FSLIC to adjudicate creditor claims against insolvent

259. 458 U.S. 50 (1982).

260. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

261. 458 U.S. at 87.

262. *Id.* at 85.

263. Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3258 (1986).

264. *Id.*

265. *See, e.g.,* FSLIC v. Quality Inns, 650 F. Supp. 918, 919 (D.C. Md. 1987) (the FSLIC brought action in federal court to recover receivership assets).

266. The Supreme Court recently granted certiorari to a case from the Fifth Circuit, agreeing to hear arguments on four issues discussed in this Comment: (1) whether the FSLIC maintains the statutory authority to adjudicate creditor claims; (2) whether FSLIC adjudications comport with due process; (3) whether FSLIC adjudications violate the seventh amendment right to a jury trial; and (4) whether FSLIC adjudication violates the article III separation of powers principle articulated in *Northern Pipeline.* Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-966).

thrifts. The Fifth Circuit held that the statutory language restricting judicial interference with the powers and functions of the FSLIC as receiver necessarily denies the court jurisdiction to resolve creditor claims. The FHLBB thus maintains exclusive jurisdiction over regulating the actions of the receiver and, therefore, appeals of FSLIC determinations must be routed through the FHLBB prior to judicial review under the APA. The Seventh Circuit concurred with the Fifth Circuit, finding that the claimant failed to carry the burden of establishing the invalidity of the FSLIC's adjudicatory powers.

The Ninth Circuit rejected the Fifth Circuit's interpretation of the FSLIC's enabling statutes, holding such an interpretation "contrary to clear congressional purposes."[267] Judicial resolution of creditor claims, according to the court, would neither restrain nor adversely affect the FSLIC in the performance of its receivership duties.

Viewing the HOLA and the NHA as a whole, Congress clearly intended to preserve the confidence and stability of the savings and loan industry through a financially sound FSLIC. The *Hudspeth* approach is the better approach to implement legislative intent in light of the current problems within the thrift industry. Because the industry depends upon a financially sound FSLIC, the FSLIC must have the power to liquidate thrifts in the most economical fashion, taking into account fairness to the shareholders, depositors, creditors, and the FSLIC itself. Administrative adjudications would expedite the liquidation process better than judicial adjudication because the former is less costly and more efficient than the latter. Claimants still would retain the right to challenge agency adjudications through judicial review under the APA, but only upon exhausting their administrative remedies.

IV. ADDENDUM

Since the completion of this Comment in February, the Supreme Court granted certiorari in a Fifth Circuit case that challenged the FSLIC's adjudicatory authority on statutory and constitutional grounds.[268] First, the petitioner challenged the statutory basis of the FSLIC's asserted power, claiming

267. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1215 (9th Cir. 1987), *petition for cert. filed sub nom.* FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

268. Coit Independence Joint Venture v. FirstSouth, 829 F.2d 563 (5th Cir. 1987), *cert. granted sub nom.* Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-996).

that Congress substantively amended section 406(d) of the NHA[269] in 1986 due to the expiration of the Garn-St Germain provisions.[270] The petitioner asserted that the new language does not grant the FSLIC the exclusive right to subject creditor claims to administrative adjudication.[271] Second, the petititoner asserted that administrative adjudication of creditor claims violates article III of the Constitution by permitting nonarticle III courts to adjudicate private rights.[272] Third, the petitioner argued that administrative adjudication by the FSLIC violates the petitioner's right to a jury trial, guaranteed by the seventh amendment to the Constitution.[273] Finally, the petitioner asserted that the administrative process violates due process rights guaranteed by the fifth amendment.[274] The Supreme Court agreed to hear arguments on all four issues.[275]

This Comment has already addressed the petitioner's first three issues but has not addressed the issue of whether FSLIC adjudication comports with due process. The petitioner asserts that the FSLIC as receiver violates due process by adjudicating claims in which it has a pecuniary interest.[276] The petitioner expresses concern that the FSLIC may place the financial stability of the insurance fund ahead of the interests of claimants to the assets of insolvent thrifts in adjudicating their claims.[277]

The petitioner's argument, however, overlooks the administrative reality of the claims process. Although the receiver renders an initial determination on the validity of a claim, the FHLBB reviews all aspects of the receiver's determination de novo.[278] Claimants continue to have the opportunity to provide additional facts and legal arguments to the FHLBB for its review after the receiver has issued its determination.[279] The FHLBB does not limit

269. Pub. L. No. 73-479, § 406(d), 48 Stat. 1246, 1259-60 (1934) (codified as amended at 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986)).

270. *See supra* note 4 and accompanying text.

271. Petition for Writ of Certiorari at 13-14, Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-996).

272. *Id.* at 17-18.

273. *Id.* at 20-21.

274. *Id.* at 18-19.

275. Coit Independence Joint Venture v. FirstSouth, 829 F.2d 563 (5th Cir. 1987), *cert. granted sub nom.* Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-996).

276. Petition for Writ of Certiorari at 18, Coit Independence Joint Venture v. FSLIC, 56 U.S.L.W. 3601 (U.S. Mar. 7, 1988) (No. 87-996).

277. *Id.* at 18-19.

278. *See* Alex Tucker Dev. Corp., FHLBB Docket No. 87-187, slip. op. at 6 n.7 (FHLBB Feb. 23, 1988).

279. *See* FHLBB, Procedures for the Processing and Determination of Administrative Appeals from Decisions of the FSLIC as Receiver §§ II.B.3.(ii), at 3, H., at 6 (1987) (available from FHLBB).

its review to procedural issues, but renders its decision on the merits of the claim.[280] Thus, the FHLBB, rather than the FSLIC, issues the final adjudication upon which judicial review will be based.[281] This system arguably provides sufficient safeguards to fully vindicate claimants' rights.

Michael R. Maryn

280. *Id.* § II.E.
281. *Id.* § II.H.