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ARTICLES

THE RTC: A PRACTICAL GUIDE TO THE RECEIVERSHIP/ CONSERVATORSHIP PROCESS AND THE RESOLUTION OF FAILED THRIFTS

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I. INTRODUCTION

In response to a growing crisis in the thrift industry,¹ Congress enacted the Financial Institutions Reform, Recovery, and Enforce-

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Authors' Note: The 102d Congress has pending before it several legislative proposals which, if enacted, would result in some restructuring of the current federal regulatory scheme for banks and savings associations. Each of the current proposals would provide for a single regulator of national banks and savings associations (in some of the proposals that regulator would be a new federal banking regulator which would replace the current national bank and savings association regulators). In each case, the Federal Deposit Insurance Corporation would remain the insurer of the deposits for banks and savings associations, and would be the receiver or conservator of such entities following the period, as described in this article, in which the Resolution Trust Corporation is authorized to act as receiver or conservator. It is difficult to predict whether any legislation will be adopted by this Congress or, if any new legislation is adopted, the extent to which it would have a significant effect on the receivership/conservatorship process described in this article.

1. The "thrift industry" has been described as including savings and loan associations, savings banks and credit unions. Clark, Murtagh & Corcoran, *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 Bus. Law. 1013 n.2 (1990) [hereinafter *Regulation of Savings Associations*]. The report accompanying the Senate's version of the Financial Institutions Reform, Recovery, and Enforcement Act, S.774, defines thrifts as "savings and loans" and "savings banks." S. REP. No. 19, 101st Cong., 1st Sess. 2 (1989) [hereinafter SENATE REPORT]. For purposes of this article, "thrift industry" and "thrifts" will refer only to savings and loan associations

ment Act of 1989 ("FIRREA" or "Act").² The crisis was evidenced by the failure of over 500 thrifts between 1980 and 1988—more than three and one-half times as many in the previous forty-five years combined. In 1988 alone, the Federal Savings and Loan Insurance Corporation ("FSLIC," which prior to FIRREA insured most of the thrift industry's deposits) merged or liquidated over 200 insolvent thrifts, and the U.S. Government's General Accounting Office ("GAO") estimated in 1989 that at least 338 additional thrifts were insolvent as of December 31, 1988.³ Despite the attempted recapitalization of the FSLIC through enactment of the Competitive Equality Banking Act of 1987,⁴ the insurance fund held by FSLIC was inadequate to allow the FSLIC and the Federal Home Loan Bank Board ("FHLBB" or "Bank Board")⁵ to close these insolvent thrifts. As a result, these thrifts continued to operate and to incur massive losses.⁶

During the passage of FIRREA, Congress considered numerous possible causes for the thrift crisis, including (1) loss of capital resulting from the increase in interest rates in the late 1970s and early 1980s; (2) forbearance and inadequate supervision by federal regulators; (3) flaws in the process by which Congress and the regulators deregulated the thrift industry in the early 1980s; and (4) purported inherent conflicts of interest between the FHLBB and the FSLIC.⁷ While it did not determine which of these factors

and savings banks the deposits of which were insured by the Federal Savings and Loan Insurance Corporation.

2. Pub. L. No. 101-73, 103 Stat. 183 (1989) [hereinafter FIRREA] (codified at scattered provisions of Titles 12 and 15 U.S.C.A.).

3. SENATE REPORT, *supra* note 1, at 2. In a 1981 case, the Illinois court noted that between 1941 and 1968 only five thrifts in the nation went into receivership. *Telegraph Sav. & Loan Ass'n v. FSLIC*, 564 F. Supp. 862, 871 (N.D. Ill. 1981), *aff'd on other grounds sub nom. Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). While this number seems extraordinarily low, the thrift industry was largely profitable from the 1930s through the 1960s. It was not until the 1970s and early 1980s that the industry began to experience significant losses. See *Regulation of Savings Associations*, *supra* note 1, at 1019-20. The Senate Report notes that "[a]lthough only 21 FSLIC-insured institutions reported negative net worth under generally accepted accounting principles ("GAAP") in June of 1981, by March 1988, the number had ballooned to 500 institutions." SENATE REPORT, *supra* note 1, at 9.

4. Pub. L. No. 100-86, 101 Stat. 552 (1987).

5. Before its abolishment by FIRREA, the FHLBB was responsible for administering the FSLIC and was the primary federal regulator of federally-chartered thrifts.

6. See *Regulation of Savings Associations*, *supra* note 1, at 1013-14.

7. SENATE REPORT, *supra* note 1, at 4-5. The FHLBB was responsible for chartering, examining and supervising federally-chartered thrifts. 12 U.S.C. § 1464(a) (1988) (amended by FIRREA). The FSLIC was responsible for examining and supervising all FSLIC-insured thrifts. *Id.* §§ 1726(b), 1730(m) (1988) (repealed 1989). The conflict of interest between the

caused the near failure of the industry, Congress attempted to remedy the system's flaws in FIRREA.⁸ This Congressional intent is reflected in the Act's "purposes clause," which states that FIRREA is intended to:

- (i) promote a safe and stable system of affordable housing finance;
- (ii) strengthen capital, accounting, and other supervisory standards to improve the supervision of savings associations;
- (iii) curtail investments and other activities of savings associations that pose unacceptable risks to the deposit insurance funds;
- (iv) strengthen the enforcement powers of federal regulators of depository institutions; and
- (v) strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.⁹

Among other things, FIRREA restructured the thrift regulatory scheme. It abolished the FHLBB and the FSLIC.¹⁰ In place of the FHLBB, Congress created the Office of Thrift Supervision ("OTS") as the primary federal regulator of all federal and state savings associations.¹¹ Congress also amended the Federal Deposit

FHLBB and the FSLIC is described in the House Report which accompanied FIRREA:

The new structure created by [FIRREA] would eliminate the concentration of powers and overlapping functions that characterize the current Bank Board. The Bank Board serves simultaneously as the chartering authority for Federal savings and loans and as the industry's chief regulator. The Chairman of the Bank Board is also the operating head of the [FSLIC]. Although the Bank Board controls the supervisory machinery that oversees the thrift industry, it has delegated much of this responsibility to the presidents of the 12 [Federal Home Loan Banks]. The [Federal Home Loan Bank] presidents, entrusted with the responsibility of examination and supervision, are themselves elected directly by the industry—the very industry being examined and supervised by the [Federal Home Loan Banks]. The [Federal Home Loan Banks] also serve as a credit facility making loans to member institutions.

The system is rife with legal and real and potential conflicts of interest which compromise the integrity of the regulatory, insurance and credit functions of the Federal Home Loan Bank System.

H.R. REP. NO. 54(I), 101st Cong., 1st Sess., at 424-25 (1989), *reprinted in* [1989] 2 U.S. CODE CONG. & ADMIN. NEWS 86 [hereinafter HOUSE REPORT].

8. SENATE REPORT, *supra* note 1, at 4.

9. 12 U.S.C.A. § 1811 note (West 1989); *see also* FIRREA, *supra* note 2, at § 101.

10. FIRREA, *supra* note 2, at § 401(a)(1),(2); *see also* 12 U.S.C. § 1437 (1988) (repealed 1989).

11. 12 U.S.C.A. § 1462a(a) (West Cum. Supp. 1990). The OTS has all of the powers which were vested in the FHLBB or its chairman on the day before enactment of the Act. *Id.* § 1462a(e). FIRREA also amended the Home Owners Loan Act of 1933 to define "savings

Insurance Act ("FDIA"),¹² transferring to the Federal Deposit Insurance Corporation ("FDIC") the FSLIC's responsibility of insuring the deposits of savings associations.¹³ The FDIC also is authorized under the Act to examine FDIC-insured savings associations,¹⁴ to regulate certain of their activities¹⁵ and to take enforcement action against such savings associations and certain of their affiliates.¹⁶

The Resolution Trust Corporation ("RTC") was created to manage and resolve most of the savings associations for which a conservator or receiver was or is appointed for the period beginning January 1, 1989 and ending on August 9, 1992.¹⁷ All of the responsibilities of the RTC are, however, actually performed by the FDIC, and the board of directors of the FDIC also serves as the board of directors of the RTC.¹⁸

In addition, Congress concluded that strong capital standards

association" to mean "a savings association, as defined in section 3 of the Federal Deposit Insurance Act, the deposits of which are insured by the [FDIC]." *Id.* § 1462(4). The Federal Deposit Insurance Act, as amended by FIRREA, defines savings associations as including: (1) "Federal savings associations" (any federal savings association or federal savings bank chartered under section 5 of the Home Owners Loan Act); (2) "State savings associations" (including building and loan associations, savings and loan associations, homestead associations and certain cooperative banks, each of which is chartered under and operating in accordance with the law of the state in which it is chartered or organized); and (3) any corporation (other than a bank) that the FDIC or the OTS jointly determine to be operating in substantially the same manner as a savings association. *Id.* § 1813(b) (West 1989). The OTS is, in addition, the federal regulator of savings institution holding companies. *Id.* § 1467a(b) (West Cum. Supp. 1990). For purposes of this article, the term "savings association" will have the same meaning as provided in FIRREA.

12. 12 U.S.C.A. § 1811 et seq. (West 1989).

13. *Id.* §§ 1814(a)(2), 1815. The FDIC also insures the deposits of commercial banks. *Id.* § 1814(a)(3).

14. *Id.* § 1820(b).

15. *See, e.g. id.* §§ 1828(m), 1831e, 1831f, 1831g.

16. *Id.* §§ 1818, 1828(m).

17. *Id.* § 1441a(b) (West Cum. Supp. 1990). *See also infra* note 44 and accompanying text. The Act also created the FSLIC Resolution Fund, which is to be managed by the FDIC. All assets and liabilities of the FSLIC other than those transferred to the RTC were transferred to the FSLIC Resolution Fund, including the assets and liabilities of thrifts for which the FSLIC had been appointed receiver prior to January 1, 1989. *Id.* § 1821a (West 1989). The FDIC succeeded the FSLIC as receiver or conservator of thrifts for which the FSLIC had been appointed prior to January 1, 1989, and will serve as either receiver or conservator for all savings associations placed into receivership or conservatorship by the OTS after August 9, 1992. *FDIC v. Gillard*, 740 F. Supp. 427, 428 (N.D. Tex. 1990) (in which the court concluded that, while FIRREA is not a model of clarity on this point, this conclusion is supported by the extensive receivership powers given to the FDIC, as well as the anomalous result of a contrary reading of FIRREA).

18. *Id.* §§ 1441a(b)(1)(C), 1441a(b)(8) (West Cum. Supp. 1990).

were essential to protect the safety of the deposit insurance system and, critical of the capital forbearances permitted by the FHLBB, provided a "benchmark" capital requirement in FIRREA below which the OTS standards generally cannot fall.¹⁹ FIRREA requires that the OTS prescribe capital standards for savings associations that are no less stringent than the capital standards applicable to national banks, including a risk-based capital requirement, a leverage limit or ratio of not less than 3% of core capital to assets, and a minimum level of tangible capital of not less than 1.5% of total assets.²⁰ The Act repealed the provision of existing law providing for regulatory forbearances to capital-weak but otherwise solvent institutions,²¹ but it nonetheless permits the OTS to exempt from the sanctions which it may otherwise impose for noncompliance with the capital standards those savings associations that meet certain requirements (provided that such exemptions pose no significant risks to the savings association deposit insurance fund). To qualify for the exemption, a saving association must: (1) have competent management, (2) be in substantial compliance with all other applicable statutes, regulations and orders, and (3) have management which has not engaged in activities jeopardizing the soundness and safety of the association or impairing its capital.²²

After much debate, Congress also limited the amount of supervisory goodwill that savings associations may include in calculating regulatory capital.²³ Supervisory goodwill represents a portion of

19. H.R. Res. 222, 101st Cong., 1st Sess. (1989) reprinted in FED. BANK. L. REP. (CCH) (Extra Ed. No. 1297, Aug. 14, 1989) at 406.

20. 12 U.S.C.A. § 1464(t) (West Cum. Supp. 1990). Core capital includes core capital as defined by the Comptroller of the Currency ("Comptroller") for national banks, less any unidentifiable intangible assets, plus certain mortgage servicing rights. Tangible capital is core capital minus certain intangible assets. *Id.* § 1464(t)(9). FIRREA also specifies that all regulations and policies of the OTS governing the safe and sound operation of savings associations, including those governing asset classifications and appraisals, be no less stringent than the regulations and policies established by the Comptroller for national banks. *Id.* § 1463(c).

21. *Id.* § 1464(t)(10) (amended 1989). The amendment does not, however, require termination of existing capital recovery plans so long as the associations subject to such plans continue to adhere to such plans and to submit regular progress reports to the OTS or the FDIC. FIRREA, *supra* note 2, at § 302; *see also* 12 U.S.C.A. § 1467a note (West Cum. Supp. 1990).

22. 12 U.S.C.A. § 1464(t)(7) (West Cum. Supp. 1990). An association seeking an exemption also must file with the OTS an acceptable capital plan. *Id.* § 1464(t)(7)(D).

23. *See id.* § 1464(t)(9)(B); *see also id.* § 1464(t)(3)(A). The House debate on the Hyde Amendment alone took up 18 pages in the Congressional Record for June 15, 1989. 135 CONG. REC. H2703 (daily ed. June 15, 1989). The Hyde Amendment, which was defeated by the House, would have permitted the OTS to include supervisory goodwill in required capi-

the consideration which thrifts acquiring failing or failed thrifts often received from the FSLIC. The FSLIC treated supervisory goodwill as a forbearance (generally equal to the amount by which the acquired assets exceeded the acquiring thrift's liabilities) from regulatory capital requirements. Goodwill generally is considered to provide little capital support to an association because its value is difficult to establish and because goodwill tends to decline during periods of financial difficulty.²⁴ Under FIRREA, qualifying supervisory goodwill in amounts ranging from 1.5% of total assets through 1991 to .375% of total assets in 1994 may be included in core capital.²⁵ After 1994, supervisory goodwill may not be used to satisfy a savings association's core capital requirement.²⁶ At the time of FIRREA's passage, it was anticipated that approximately 250 savings associations would not be able to meet regulatory capital requirements because of FIRREA's limitations on the use of supervisory goodwill.²⁷

In early 1991, the OTS reported that an estimated 240 savings associations likely will fall short of the OTS capital standards, and that another 276 capital-deficient savings associations currently are operating under business plans approved by the OTS.²⁸ Unless the OTS has approved, and the savings association remains in compli-

tal if a savings association otherwise met its capital requirement and the association had "a substantial claim that the exclusion of supervisory goodwill would violate either a contractual obligation of an agency of the United States or the Constitution." *Id.*

24. *Regulations of Savings Associations*, *supra* note 1, at 1044-45. The OTS's capital regulations issued pursuant to FIRREA define supervisory goodwill to mean goodwill resulting from the acquisition, merger, consolidation, purchase of assets, or other business combination occurring on or before April 12, 1989 of (1) a savings association where the fair market value of the assets acquired was less than the fair market value of the liabilities at the acquisition date or (2) a problem institution. 12 C.F.R. § 567.1(ee) (1989). A problem institution, as defined by the OTS, is a savings association which at the time of its acquisition by or with another savings association was subject to special regulatory controls or posed particular supervisory concerns to its regulators or failed to meet its regulatory capital requirement immediately before the transaction. *Id.* § 567.1(s).

25. 12 U.S.C.A. § 1464(t)(9)(B) (West Cum. Supp. 1990). "Qualifying" supervisory goodwill is the supervisory goodwill existing on August 12, 1989, amortized on a straightline basis over the shorter of 20 years or the remaining period for amortization in effect on such date. *Id.*

26. *Id.* § 1464(t)(3)(A).

27. See 135 CONG. REC. H2708 (daily ed. June 15, 1989) (remarks of Rep. Michel of Illinois). Some of these affected savings associations have sought to enjoin the OTS from applying the FIRREA-based capital requirements to them. See cases cited *infra* note 104.

28. 241 *More S&Ls Short of Capital Under '91 Rules*, Am. Banker, Jan. 9, 1991, at 1, col. 1. The OTS did not indicate how many of those savings associations are capital-deficient due to the limitations on the use of supervisory goodwill.

ance with, an acceptable business plan,²⁹ the failure to maintain capital at or above the required minimum levels may be treated by the OTS as an unsafe or unsound practice³⁰ and may result in the appointment of a receiver or conservator for the association.³¹ Still other savings associations may fail for reasons other than insolvency or failure to meet the mandated regulatory capital requirements.³²

Since FIRREA's enactment, the RTC has assumed control over some 500 failed savings associations in an estimated 38 states, and the RTC presently owns more than 31,000 parcels of improved and unimproved real estate.³³ Because of the number of savings associations and the volume of assets under the RTC's control, lawyers, creditors, borrowers and other financial institutions who are dealing or have dealt with savings associations need to have an understanding of the receivership/conservatorship process.

This article is intended to be a practical guide to the receivership/conservatorship process and the methods by which the RTC resolves failed savings associations. It is not intended, however, to be an exhaustive analysis of the many issues that have arisen or that may arise in the course of a savings association's receivership or conservatorship. Part II of this article will describe how conservatorships and receiverships are commenced. Part III describes the conservatorship and receivership powers of the RTC, and Part IV discusses the RTC's liquidation and resolution process.

II. COMMENCEMENT OF CONSERVATORSHIPS AND RECEIVERSHIPS

A. *Statutory Appointment Powers*

As the primary federal regulator for savings associations, the OTS, like the FHLBB before it, has the exclusive power to appoint

29. 12 U.S.C.A. § 1464(t)(6), (7) (West Cum. Supp. 1990).

30. *Id.* § 1464(s)(3).

31. See *infra* text accompanying note 37. The FDIC also may temporarily suspend insurance coverage if an insured savings association has insufficient capital. 12 U.S.C.A. § 1818(a)(8) (West 1989).

32. As will be discussed in Part II below, insolvency and inability to meet capital requirements are not the only criteria for placing a savings association into conservatorship or receivership. See *infra* note 37 and accompanying text.

33. Saft, *The Basics of FIRREA and the Resolution Trust Corporation*, REAL EST. FIN. J. 48 (Winter 1991).

a receiver or conservator³⁴ for a federal savings association.³⁵ The OTS may appoint a receiver or conservator *ex parte*, without a hearing or notice,³⁶ for a federal savings association if one or more of the following conditions exist:

(i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members;

(ii) substantial dissipation of assets or earnings due to any violation or violations of law or regulations, or to any unsafe or unsound practice or practices;

(iii) an unsafe or unsound condition to transact business, including having substantially insufficient capital or otherwise;

(iv) willful violation of a cease-and-desist order which has become final;

(v) concealment of books, papers, records, or assets of the savings association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the [OTS];

(vi) the association is not likely to be able to meet the demands of its depositors or pay its obligations in the normal course of business;

(vii)(I) the association has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and (II) there is no reasonable prospect for the replenishment of the capital of the association without [f]ederal assistance; or

(viii) a violation or violations of laws or regulations, or an unsafe or unsound practice or condition which is likely to cause insolvency or substantial dissipation of assets or earnings, or is likely to weaken the condition of the association or otherwise seriously prejudice the interests of its depositors.³⁷

A receiver or conservator for a federal savings association also may be appointed by the OTS, without any notice, hearing or other action, if the savings association, by resolution of its board of directors or of its members, consents to such appointment, if the

34. As discussed in Part III, a conservator is appointed to operate or dispose of an association as a going concern. A receiver is appointed to liquidate the assets and windup the affairs of a failed savings association. See *infra* notes 110-11 and accompanying text.

35. 12 U.S.C.A. § 1464(d)(2)(E) (West Cum. Supp. 1990).

36. *Id.*

37. *Id.* § 1464(d)(2)(A).

savings association is removed from membership in any Federal Home Loan Bank or if the FDIC terminates the savings association's status as an insured depository institution.³⁸

The OTS has the power to appoint a receiver or conservator for an insured state savings association upon the existence of one or more of the grounds enumerated in clauses (i) through (iii), (vii) and (viii) above for federal savings associations.³⁹ The FDIC has similar appointment powers, which extend both to state-chartered, FDIC-insured banks and to FDIC-insured state savings associations.⁴⁰

The OTS cannot appoint a conservator or receiver for an insured state savings association without the written approval of the association's state regulator. However, the OTS may proceed without written approval after thirty days, provided it has responded in writing to the state regulator's written reasons, if any, for withholding approval.⁴¹ On the other hand, the FDIC's power to appoint a receiver or conservator for a state savings association is conditioned not upon the state regulator's consent but upon a find-

38. *Id.* § 1464(d)(2)(B). The board of directors or members of a savings association might consent to such appointment in recognition that grounds exist for the appointment of, and that the OTS is likely to appoint, a receiver or conservator for the association. A Federal Home Loan Bank may remove a savings association from membership in such Bank if the association (1) has failed to comply with the Federal Home Loan Bank Act or regulations promulgated thereunder, (2) is insolvent or (3) has management or home-financing policies inconsistent with sound and economical home financing or with the purposes of the Federal Home Loan Bank Act. *Id.* § 1426(e). The FDIC may terminate a depository institution's insured status on grounds similar to the grounds for appointment of a receiver or conservator. *Id.* § 1818(a)(2) (West 1989).

39. *Id.* § 1464(d)(2)(C) (West Cum. Supp. 1990).

40. *See id.* § 1821(c)(5) (West 1989). As noted below, however, the FDIC may not exercise its appointment powers with respect to a state-chartered depository institution unless the institution's state regulatory authority has placed the institution into receivership or conservatorship or has closed it. *See infra* note 42 and accompanying text. Perhaps an oversight by Congress, the FDIC has two additional grounds upon which to base the appointment of a conservator or receiver that are not available to the OTS with respect to state savings associations. The FDIC also may appoint a conservator or receiver if (1) an association willfully violates a cease and desist order which has become final or (2) the association conceals any books, papers, records or assets or refuses to submit such items or its affairs to examination by the OTS or the association's state regulator. 12 U.S.C.A. § 1821(c)(5)(D),(E) (West 1989). FIRREA authorizes the OTS to examine all savings associations. *Id.* § 1463(a)(1) (West Cum. Supp. 1990). In the course of any such examination, the OTS may examine the books, records and documents of an association. *Id.* § 1464(d)(1)(B). The OTS also is empowered to issue cease and desist orders with respect to both federal and state savings associations. *Id.* § 1464(d)(1)(A). In view of such powers, it is unlikely that Congress would have intentionally withheld these additional appointment grounds from the OTS.

41. *Id.* § 1464(d)(2)(D).

ing by the FDIC either that: (1) a conservator, receiver or other legal custodian has been appointed for a state savings association for a period of at least fifteen days and that one or more depositors is unable to withdraw any amount of any insured deposit, or (2) the association has been closed by or under the laws of any state.⁴² Thus, the FDIC cannot independently determine to place a savings association into receivership or conservatorship.

A savings association may contest the appointment of a receiver or a conservator by the OTS or the FDIC by bringing an action within thirty days after such appointment in the United States district court in which the home office of the association is located or in the United States District Court for the District of Columbia. The court must dismiss such action on the merits or direct the OTS or the FDIC, as appropriate, to remove such appointee.⁴³

The OTS must appoint the RTC as receiver in the case of any savings association whose deposits were insured by the FSLIC prior to enactment of FIRREA and for which a receiver or conservator had been or is appointed during the period beginning January 1, 1989 and August 9, 1992. The FDIC must be appointed the receiver by the OTS in all other cases.⁴⁴ Either the FDIC or the RTC may serve as a conservator for a federal or state savings association.⁴⁵ In the exercise of its appointment powers, the FDIC may appoint itself to be the sole conservator or receiver of a failed state savings association, except in the case of those savings associations for which FIRREA mandates appointment of the RTC.⁴⁶

42. *Id.* § 1821(c)(4)(A) (West 1989). The FDIC must determine that one or more of the grounds for appointment existed at the time the conservator or receiver was appointed or at the time the association was closed, or exist at any time during such appointment or closure. *Id.* § 1821(c)(4)(B). The FDIC also has the discretion to accept an appointment as receiver or conservator when such appointment is tendered by a state regulator. *Id.* § 1821(e)(4)(A).

43. *Id.* § 1464(d)(2)(E) (West Cum. Supp. 1990); *id.* § 1821(c)(7) (West 1989).

44. *Id.* § 1464(d)(2)(H)(iii) (West Cum. Supp. 1990); see also Gail & Norton, *A Decade's Journey from "Deregulation" to "Supervisory Regulation:" The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 *BUS. LAW.* 1103, 1134 (1990) (RTC must be appointed "prior to August 9, 1992"); *Regulation of Savings Associations*, *supra* note 1, at 1024 (RTC must be appointed receiver or conservator between January 1, 1989 and August 9, 1992).

45. Although the statute does not expressly authorize the OTS to appoint a third party to serve as a conservator, the statute's use of the word "may" in respect of conservatorship appointments in contrast to the use of the word "must" when specifying a receiver, suggests that the OTS may appoint a person other than the FDIC or the RTC to serve as a conservator. Compare the first sentence of 12 U.S.C.A. § 1464(d)(2)(H)(ii) (West Cum. Supp. 1990) with the second sentence of the same section.

46. 12 U.S.C.A. § 1821(c)(6) (West 1989).

Completing the statutory scheme, FIRREA provides that, except for judicial review of the appointment of a receiver or conservator, no court may take any action to remove any conservator or receiver. Moreover, a court may not restrain or affect the exercise of the powers or functions of any conservator or receiver except at the request of the OTS or the FDIC, as the case may be.⁴⁷

B. *Judicial Interpretations*

There have been few cases interpreting the appointment powers of the FDIC and the OTS as set forth in the Act.⁴⁸ However, since FIRREA generally preserves the pre-FIRREA receivership and conservatorship appointment powers of the FHLBB and the FSLIC,⁴⁹ the judicial interpretations of the pre-FIRREA appointment powers remain valid precedent and are instructive when considering whether to take any action challenging a conservatorship or receivership appointment.

1. Due Process

FIRREA carries forward the existing statutory scheme of the Home Owners Loan Act of 1933⁵⁰ ("HOLA") and the National Housing Act of 1934,⁵¹ which permitted the appointment of a receiver or conservator *ex parte*, without prior notice and hearing, but authorized subsequent judicial review at the request of the affected savings association. The constitutionality of the *ex parte* nature of the appointment process has been addressed many times. In the earliest case in which a thrift challenged the scheme as a seizure of the thrift without due process of law in violation of the

47. *Id.* § 1821(j); *id.* § 1464(d)(2)(G) (West Cum. Supp. 1990).

48. As of September 11, 1990, approximately 20 lawsuits had been filed in the federal courts by savings associations against the OTS challenging FIRREA's limits on the capital treatment of supervisory goodwill, deferred loan losses and other forbearances and, as a consequence, the OTS's ability to place such associations into receivership or conservatorship. *Judge Dismisses Challenge to Capital Rule on Goodwill*, Am. Banker, September 11, 1990, at 2, col. 3. *See also infra* note 104 and accompanying text. Several of the cases are on appeal, and it is expected that the issues will be decided by the U.S. Supreme Court. *OTS Suffers Major Setback on Supervisory Goodwill*, The Thrift Regulator, February 8, 1991, at 2, col. 2.

49. *See infra* notes 50, 51, 56 and accompanying text.

50. 12 U.S.C.A. § 1464(d)(6)(A) (West Cum. Supp. 1990) (amending 12 U.S.C. § 1464(d)(6) (1988)).

51. 12 U.S.C. § 1729(c)(3) (1988) (repealed 1989) (which incorporated by reference the provisions of § 1464(d)).

United States Constitution,⁵² *Fahey v. Mallonee*,⁵³ the Supreme Court held that there was no constitutional requirement that an association be given an adjudicatory hearing prior to the FHLBB's appointment of a conservator. In *Fahey*, the Supreme Court construed section 5(d) of the HOLA as enacted in 1933, which simply authorized the FHLBB to prescribe by regulation the terms and conditions upon which a conservator or receiver could be appointed. The FHLBB's regulations contained grounds resembling those set forth in FIRREA (and the pre-FIRREA statutory scheme) and provided for ex parte appointment and a post-appointment administrative hearing. In reviewing the regulations, the Court noted that the grounds for appointment of a receiver or conservator "are the usual and conventional grounds found in most state and federal banking statutes."⁵⁴ In upholding the statutory scheme, the Court held that the post-possession hearing is a drastic procedure:

[b]ut the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in light of the history and customs of banking we cannot say it is unconstitutional.⁵⁵

Since *Fahey*, the ex parte nature of the appointment powers of FIRREA and its predecessor statutes have been consistently upheld on the grounds that the government's interest in preserving depositor confidence and minimizing loss to the insurance fund outweigh the interests of the association.⁵⁶ Consequently, the post-

52. U.S. CONST. amend. V.

53. 332 U.S. 245 (1947).

54. *Id.* at 253 (citations omitted).

55. *Id.* at 253-54 (footnote omitted).

56. See *Haralson v. FHLBB*, 837 F.2d 1123 (D.C. Cir. 1988); *Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Franklin Sav. Ass'n v. Director, OTS*, 742 F. Supp. 1089 (D. Kan. 1990); *Shemonsky v. Director, OTS*, 733 F. Supp. 892 (M.D. Penn. 1990); *Haralson v. FHLBB*, 721 F. Supp. 1344 (D.D.C. 1989); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988 (D. Haw. 1982). In *Woods v. FHLBB*, the Fifth Circuit observed that:

The government interest in this case is obvious. Savings and loan associations derive the principal part of their fiscal strength from FSLIC insurance. Without this insurance, associations would be unable to secure the guarantee of the government for individual deposits. With the deposits this security attracts, institutions make investments, acquire property, and extend loans. The risk of failure with respect to these

deprivation court review generally satisfies due process requirements.

2. Standard of Review

FIRREA does not define the scope of the district courts' review of the regulators' action in appointing a receiver or conservator, but merely provides, like the predecessor statutes, that the court "shall *upon the merits* dismiss [the action contesting the appointment] or direct the [OTS or the FDIC] to remove such conservator or receiver."⁵⁷ Most of the cases involving a challenge to the appointment of a conservator or receiver discuss the applicable standard of review. While not unanimous, the prevailing view is that the statutes do not provide for *de novo* review, but instead require the court to uphold an appointment decision unless the OTS or its predecessor acted arbitrarily and capriciously. Under the arbitrary and capricious standard, a court will review the administrative record and determine whether one or more of the statutory grounds for appointment existed at the time of such appointment. If one or more of the grounds relied upon by the regulator in fact existed at such time, then the court's inquiry must end and the appointment must be upheld.⁵⁸ Thus, a savings association generally will have

transactions falls most heavily upon the FSLIC as insurer. Congress thus granted the Bank Board and the FSLIC the strongest powers constitutionally possible in order to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds.

Woods' and Western's private interests are obviously subordinate to those of the government. When Woods acquired Western, he was aware of the extensive regulatory system and the possibility of continuous, in-depth supervision by Bank Board examiners. He had to know this supervision would be acute in the case of an institution which increased its assets from approximately \$34 million to almost \$2 billion in a period of just over four years. . . . While plaintiffs' interests cannot be destroyed by arbitrary or capricious actions, the process that is due is to be assayed by considerations which account for all interests in their context.

The method provided—a court review of agency action under the arbitrary or capricious standard—is adequate to assure against the risk of mistaken deprivations. If the record before the Bank Board is properly compiled and demonstrates it properly followed its Congressional mandate and its own regulations, and gave fair and reasoned consideration to all relevant factors before determining that one or more of the statutory grounds for appointment of a receiver existed, its decision will survive review in the district court. That congressionally provided standard of review is all the process an FSLIC-insured savings and loan association and its owners are constitutionally due in this case.

826 F.2d at 1411-12.

57. See *supra* note 43 and accompanying text.

58. See, e.g., *Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987); *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d 1339 (8th Cir. 1986); *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*,

the burden of proving that the regulator's decisions to appoint a receiver or conservator was arbitrary and capricious. In addition, the association must overcome a presumption of regularity the courts afford the regulators' decisions regarding receivership/conservatorship appointments.⁵⁹

3. Jurisdiction

Any challenge by a savings association to the appointment of a receiver or conservator must be brought within thirty days of such appointment.⁶⁰ The analogous pre-FIRREA provision of the HOLA has been construed by the courts to be a jurisdictional requirement.⁶¹ Thus, if a savings association fails to contest an appointment within the thirty-day period following such appointment, a court may no longer have jurisdiction to review the appointment of the receiver or conservator.

Moreover, courts have examined the relationship between the thirty-day post-deprivation judicial review and the provision which

782 F.2d 490 (5th Cir.), *modified*, 790 F.2d 34 (5th Cir. 1986); Biscayne Fed. Sav. & Loan Ass'n v. FHLBB, 720 F.2d 1499 (11th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990); Haralson v. FHLBB, 721 F. Supp. 1344 (D.D.C. 1989); San Marino Sav. & Loan Ass'n v. FHLBB, 605 F. Supp. 502 (C.D. Cal. 1984); Washington Fed. Sav. & Loan Ass'n v. FHLBB, 526 F. Supp. 343 (N.D. Ohio 1981) (containing an extensive discussion of what should be included in the administrative record); Beacon Fed. Sav. & Loan Ass'n v. FHLBB, 162 F. Supp. 350 (E.D. Wis. 1958), *aff'd in part, dismissed in part*, 266 F.2d 246 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959).

Several cases purport to require a *de novo* (that is, a full adversarial and evidentiary) hearing. *See, e.g.*, Collie v. FHLBB, 642 F. Supp. 1147, 1152 (N.D. Ill. 1986) (rejects arbitrary and capricious standard; "upon the merits" means that the association must have had a meaningful opportunity to make a case in opposition to the appointment at some point in the process leading to the appointment and the FHLBB must be able to show a reasonable factual basis for its action); Fidelity Sav. & Loan Ass'n v. FHLBB, 540 F. Supp. 1374 (N.D. Cal. 1982) ("on the merits" means more in the nature of *de novo* than appellate review), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); Telegraph Sav. & Loan Ass'n v. FSLIC, 564 F. Supp. 862 (N.D. Ill. 1981) (full adversarial hearing "on the merits" required as to FHLBB's authority to appoint receiver), *aff'd on other grounds sub nom.* Telegraph Sav. & Loan Ass'n v. Schilling, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). The court in Woods v. FHLBB argued, however, that only the *Collie* and *Telegraph* courts actually applied a *de novo* standard. Woods v. FHLBB, 826 F.2d at 1407.

59. *See, e.g.*, Woods v. FHLBB, 826 F.2d at 1408-09; Guaranty Sav. & Loan Ass'n v. FHLBB, 794 F.2d at 1342.

60. 12 U.S.C.A. § 1464(d)(2)(E) (West Cum. Supp. 1990); *see also supra* text accompanying note 43.

61. *See, e.g.*, Womble v. Dixon, 585 F. Supp. 728, 733 (E.D. Va. 1983), *aff'd in part, vacated in part*, 752 F.2d 80 (4th Cir. 1984); First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 547 F. Supp. 988, 995 (D. Haw. 1982).

precludes judicial review except with respect to the appointment of a receiver or conservator.⁶² Aside from reviewing the appointment of a receiver or conservator, courts have concluded that they have no jurisdiction to take any action restraining or affecting the exercise of the powers of a receiver or conservator.⁶³ On that basis, one court refused to enjoin a conservator from liquidating the assets of an association during the pendency of litigation contesting the conservator's appointment.⁶⁴ Another court denied, on the same basis, the claims of members, directors and officers of an association for monetary damages and declaratory and injunctive relief unrelated to the association's contest of the receivership appointment.⁶⁵ Still another court refused to compel the RTC to answer interrogatories and to produce documents identifying the grounds for its appointment as receiver in a case brought by the RTC against the obligors on notes held by it as receiver.⁶⁶

C. *Grounds for Appointment*

FIRREA generally preserves the pre-FIRREA appointment grounds available to the FHLBB and the FSLIC (although transferring such powers to the OTS and the FDIC).⁶⁷ Importantly,

62. 12 U.S.C. § 1464(d)(6)(A), (C) (1988). Although these provisions were amended in 1989 by FIRREA, the identical provisions are continued as 12 U.S.C.A. § 1464(d)(5)(E),(G) (West Cum. Supp. 1990).

63. *See, e.g.*, *Haralson v. FHLBB*, 837 F.2d 1123, 1126 (D.C. Cir. 1998); *Shemonsky v. OTS*, 733 F. Supp. at 892, 894 (M.D. Penn. 1990) (court lacks jurisdiction to grant injunctive relief against enforcement of a receivership order not challenged under Section 301 of FIRREA (12 U.S.C.A. § 1464(d)(5)(E) (West Cum. Supp. 1990)); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988, 994 (D. Haw. 1982) ("it can be said without any fear of dispute that Section 1464(d)(6)(C) of Title 12 complements 12 U.S.C. § 1464(d)(6)(A) and 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 other than under the provisions of § 1464(d)(6)(A) of Title 12"). *But cf.* *Franklin Sav. Ass'n v. OTS*, 742 F. Supp. 1089, 1124 (D. Kan. 1990) (court's power to issue restraining orders is statutorily limited by § 1464(d)(6)(C), which prohibits court from taking action to restrain or affect the exercise of the receiver's power and functions).

64. *Haralson*, 837 F.2d at 1126.

65. *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. at 994.

66. *RTC v. Commerce Partners*, 132 F.R.D. 443 (W.D. La. 1990).

67. The HOLA authorized the FHLBB to appoint a receiver or conservator for a federally-chartered thrift upon the following grounds:

- (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members;
- (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices;
- (iii) an unsafe or unsound condition to transact business;
- (iv) willful violation of a cease-and-desist order which has become final;
- (v) concealment of books, papers, records, or assets of the association or refusal to

however, the appointment grounds for the first time expressly provide that the OTS and the FDIC may consider whether the savings association's capital is substantially insufficient or whether it can pay its debts or obligations as they become due. The new provisions reflect Congress's belief that the ability to consider such factors enables the regulators to intervene prior to a savings association's insolvency. In this way the regulators may act quickly and decisively in a situation where a savings association experiences a liquidity crisis, thereby preserving the resources of the insurance funds.⁶⁸ In addition, FIRREA added the last two grounds listed in Part A above, which also have the effect of permitting the regulators to intervene prior to actual insolvency.

Thrifts have litigated appointments based on the first three grounds (insolvency, dissipation of assets or earnings and unsound or unsound condition) for which receivers and conservators may be appointed. The holdings in these cases, which for the most part pre-date FIRREA, nonetheless show how the OTS and the courts may interpret these specific grounds for appointment.⁶⁹ The five remaining grounds have not, as yet, been the subject of significant reported litigation and will not be discussed further in this article.⁷⁰

submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board.

12 U.S.C. § 1464(d)(6)(A) (1988) (amended 1989). The National Housing Act of 1934 authorized the FSLIC to appoint a receiver or conservator for a state-chartered thrift on the same grounds by incorporating by reference § 1464(d)(6)(A). *Id.* § 1729(c)(3) (1988) (repealed 1989).

68. The HOLA provided for the appointment of a receiver or conservator where the association was in "an unsafe or unsound condition to transact business." 12 U.S.C. § 1464(d)(6)(A)(iii) (1988) (amended 1989). As amended by FIRREA, the clause "including having substantially insufficient capital or otherwise" now appears at the end of this ground. 12 U.S.C.A. § 1464(d)(2)(A)(iii) (West Cum. Supp. 1990). The House Report suggests, however, that at least the House Banking Committee intended to authorize appointment of a receiver or conservator only when the regulator determines that a lack of liquidity constitutes an unsafe or unsound condition. HOUSE REPORT, *supra* note 7, at 428 ("the Committee believes that it is essential that the appropriate Federal banking agencies have clear authority to determine when conditions such as . . . lack of liquidity constitute an unsafe and unsound condition").

69. The Act requires that only one ground for receivership need be shown by the OTS or the FDIC. *See infra* note 37 and accompanying text. The analogous pre-FIRREA law was construed narrowly to require the courts to confirm whether or not the grounds specified by the Bank Board in the notice of receivership existed. The Bank Board was not permitted in court to justify its decision on *ad hoc* rationalizations. *Telegraph Sav. & Loan Ass'n v. FHLBB*, 564 F. Supp. 862, 877 (N.D. Ill. 1981), *aff'd on other grounds, sub. nom.* *Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

70. In *Franklin Sav. Ass'n v. Director, OTS*, 742 F. Supp. 1089 (D. Kan. 1990), the OTS

1. Insolvency

Insolvency has long been a ground for which receivers and conservators could be appointed for thrifts,⁷¹ and it is the ground most commonly thought of as the basis for such an appointment. However, there has been little case law involving this appointment provision of FIRREA and its predecessor statutes even though such statutes provide little guidance as to what constitutes insolvency.

The relevant provisions of FIRREA and the pre-FIRREA statutes provide that a savings association is insolvent when its assets "are less than its obligations to its creditors and others, including members."⁷² The statutory scheme neither defines obligations nor explains how assets are to be valued. The FHLBB consistently computed insolvency by the book net worth method based on the monthly reports required to be filed by thrifts.⁷³ This method of valuing an institution was found to be valid under the HOLA's appointment provision.⁷⁴ In so doing, courts have rejected arguments that assets must be valued at fair market value and that obligations include only currently due liabilities,⁷⁵ and have upheld the loan loss reserves that were calculated by the FHLBB and de-

based its appointment of a conservator for Franklin on the three grounds enumerated as subparagraphs (iii), (vii) and (viii) above. *See supra* note 37 and accompanying text. The court simply concluded that the association had not engaged in any unsafe or unsound practices and, therefore, that the OTS had acted arbitrarily and capriciously in appointing the conservator. *See generally infra* note 96 and accompanying text. Because the court did not discuss the applicability of the grounds (vii) and (viii), further discussion of these grounds would not be helpful.

71. This ground, along with the two grounds discussed in more detail below and the concealment of books and records from the regulators, were among the grounds for appointment of a conservator or receiver in regulations of the FHLBB appearing in the first edition of the Code of Federal Regulations. 24 C.F.R. § 204.3 (1939).

72. 12 U.S.C.A. § 1464(d)(2)(A)(i) (West Cum. Supp. 1990); *id.* § 1821(c)(5)(A) (West 1989); *see* 12 U.S.C. §§ 1464(d)(6)(A)(i) (amended 1989), 1729(c)(1)(B)(i)(I) and (2)(B) (1988) (repealed 1989).

73. *Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d 1019, 1027 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). According to the book net worth method, an association's value is measured by the association's outstanding liabilities subtracted from its assets valued at book value. *Id.*

74. *Id.*; *see also* *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d 1339, 1345 (8th Cir. 1986); *Collie v. FHLBB*, 642 F. Supp. 1147, 1154 (W.D. Ill. 1986) ("as a matter of law the [Bank] Board defines insolvency and the accounting methods used to determine insolvency"). *But cf.* *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 919 (D.D.C. 1990) (where the court noted that an appraisal of assets by the conservator after its appointment supported the FHLBB's finding of insolvency). While book value generally is a historical value, an appraisal usually establishes the current value of an asset.

75. *See* *Telegraph Sav. & Loan Ass'n v. Schilling*, 703 F.2d at 1027.

ducted by it from an association's net worth to evaluate its insolvency.⁷⁶

These cases as a whole demonstrate judicial deference to the regulator's methodology for calculating insolvency. It should be noted, however, that courts also have rejected the argument that the insolvency of an association must always be established prior to the appointment of a conservator or receiver, since insolvency is but one of the grounds specified in the statutory scheme.⁷⁷

2. Substantial Dissipation of Assets

The second ground for appointment, substantial dissipation of assets or earnings due to violations of laws or regulations or unsafe or unsound practices, was a part of pre-FIRREA law and, as noted above, continues to be a ground under FIRREA.⁷⁸ While few courts have articulated a standard for what constitutes "substantial dissipation" of assets, one court has suggested, without elaboration, that substantial dissipation occurs when an association's "assets or earnings have been adversely affected to a significant degree as a result of such a violation or unsound practice."⁷⁹

Similarly, there is no clearly articulated standard for what constitutes an "unsafe or unsound practice." The legislative history of the FHLBB's cease and desist powers, which also incorporated an unsafe or unsound practices standard,⁸⁰ contains the following definition of "unsafe or unsound practice:"

76. See, e.g., *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d at 1345; *Collie v. FHLBB*, 642 F. Supp. at 1153-54.

77. See, e.g., *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*, 782 F.2d 490, 496 (5th Cir.), modified, 790 F.2d 34 (5th Cir. 1986) ("such a construction of § 1464(d)(6)(A) would render its subsections (ii) through (v) mere excess verbiage, a result which we refuse to reach"); *Beacon Fed. Sav. & Loan Ass'n v. FHLBB*, 162 F. Supp. 350, 353 (E.D. Wis. 1958), *aff'd in part, dismissed in part* 266 F.2d 246 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959) ("neither the statute nor common sense makes insolvency a prerequisite to action") (construing an earlier version of 12 U.S.C. § 1464(d)(2) which authorized the FHLBB to appoint a supervisory representative in charge if a ground for appointment of a receiver or conservator existed).

78. 12 U.S.C.A. § 1464(d)(6)(A)(ii) (West Cum. Supp. 1990); *id.* § 1821(c)(5)(B) (West 1989).

79. *Haralson v. FHLBB*, 721 F. Supp. 1344, 1354 (D.D.C. 1989).

80. 12 U.S.C. § 1464(a)(2)(A) (1988) (amended 1989). This section, amended in 1989, gave the FHLBB the power to issue cease and desist orders whenever it determined that an association was engaging in an unsafe or unsound practice or violating laws or regulations in conducting its business.

Generally speaking, an “unsafe or unsound practice” embraces any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.⁸¹

Some courts have interpreted this legislative history to limit the “unsafe or unsound practice” provision of the FHLBB’s cease and desist powers to those practices which could have a reasonably direct effect on an association’s financial condition.⁸² One of these courts also discussed the FHLBB’s power to issue cease and desist orders based on violations of law. The court noted that neither the statute nor the legislative history explained which laws, if violated, would have permitted the FHLBB to exercise its cease and desist power. The court suggested, but did not decide, that violations of law may well be subject to the same judicial limitation imposed on the FHLBB’s cease and desist powers based on unsafe and unsound practices (that is, violations of law which directly affect an association’s financial condition).⁸³

Although these cases do not arise in the context of appointment powers, the cease and desist powers and the appointment powers represent different points on the continuum of powers available to

81. 122 CONG. REC. 26474 (1966) (citing to a memorandum of John Horne, then chairman of the FHLBB) (cited with approval by the Fifth Circuit Court of Appeals in *MCorp Financial, Inc. v. Board of Governors, Federal Reserve System*, 900 F.2d 852, 863 (5th Cir. 1990) and in *Gulf Fed. Sav. & Loan Ass’n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982) (in which the court refers to the statement as the “authoritative definition” of “unsafe or unsound practice”). In *MCorp*, the Fifth Circuit concluded that MCorp’s failure to transfer assets to its troubled subsidiary bank was not, as the Federal Reserve Board had argued, an unsafe or unsound practice under the Bank Holding Company Act. In *Gulf*, the court held that a savings association’s policy of calculating per diem interest by a method differing from the method recited in its contracts did not constitute an unsafe or unsound practice warranting issuance of a cease and desist order by the FHLBB.

82. *Gulf Fed. Sav. & Loan Ass’n v. FHLBB*, 651 F.2d at 264, 265 (citing remarks of Rep. Wright Patman at 112 CONG. REC. 24984 (1966)). See *Northwest Nat’l Bank, Fayetteville, Arkansas v. OCC*, 917 F.2d 1111, 1115 (8th Cir. 1990) (unsafe and unsound banking practices are defined as “conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholders” (citations omitted)). In *Northwest*, the court refused to set aside a cease and desist order issued by the Comptroller as a result of unsafe and unsound practices engaged in by the bank. See also *Franklin Sav. Ass’n v. Director, OTS*, 742 F. Supp. 1089, 1126 (discussed *infra* at note 96 and accompanying text).

83. *Gulf Fed. Sav. & Loan Ass’n v. FHLBB*, 651 F.2d at 265; see also note 5 and accompanying text.

the federal banking regulators to address unsafe and unsound practices and violations of law. What constitutes unsafe or unsound practices or violations of law should not vary with the power sought to be exercised, although a more stringent test—whether such activity results in a substantial dissipation of assets—must be passed before the OTS or the FDIC may take the more drastic step of appointing a receiver or conservator.⁸⁴

With those imprecise standards in mind, it is helpful to review the activities cited by the courts which have upheld receivership and conservatorship appointments on this ground. Those cases generally recite fact patterns including some combination of the following activities: making loans in repeated violation of FHLBB or FSLIC regulations;⁸⁵ funding loans with brokered or jumbo certificates of deposit having high interest rates;⁸⁶ having an undue concentration of loans in high-risk categories;⁸⁷ having inadequate loan underwriting policies and procedures;⁸⁸ underwriting speculative or imprudent loans;⁸⁹ repeated violations of cease and desist

84. See *Washington Fed. Sav. & Loan Ass'n v. FHLBB*, 526 F. Supp. 343, 392 (N.D. Ohio 1981).

85. See, e.g., *Woods v. FHLBB*, 826 F.2d 1400, 1409-10 (5th Cir. 1987) (repeated violations of appraisal regulations, loans-to-one-borrower regulations, growth regulations and regulations restricting transactions with affiliates); *Haralson v. FHLBB*, 721 F. Supp. 1344, 1354 (D.D.C. 1989) (violation of regulations concerning loan underwriting standards, appraisals and loans-to-one-borrower); *Collie v. FHLBB*, 642 F. Supp. 1147, 1153 (N.D. Ill. 1986) (violations of loans-to-one-borrower and appraisal regulations); *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. 502, 509 (C.D. Cal. 1984) (repeated violations of loans-to-one-borrower regulations). Among these cases, violations of the loans-to-one-borrower and appraisal regulations were the most frequently cited activity.

86. See, e.g., *Woods v. FHLBB*, 826 F.2d at 1409; *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d 1339, 1343 (8th Cir. 1986); *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*, 782 F.2d 490, 494-95, *modified*, 790 F.2d 34 (5th Cir. 1986). *But cf.* *Washington Fed. Sav. & Loan Ass'n v. FHLBB*, 526 F. Supp. at 392 (violation of regulation limiting outside borrowings by thrifts could be the basis for appointment of a receiver, but the FHLBB did not show that a violation of the regulation resulted in substantial dissipation of the thrift's assets).

87. See, e.g., *Woods v. FHLBB*, 826 F.2d at 1409 (high risk categories include acquisition, development and construction loans).

88. *Id.* (failure to require sufficient financial information to evaluate borrowers' repayment abilities); see also *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d at 1343 (lack of formal business objectives, plans and policies, including sound management policies); *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*, 782 F.2d at 494-95 (inadequate underwriting procedures and failure to verify borrowers' abilities to repay).

89. See, e.g., *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d at 1343 (large, speculative loans with the lender assuming all risk); *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*, 782 F.2d at 494 (speculative, imprudent loans).

orders or regulatory warnings;⁹⁰ and appraisal⁹¹ and loan loss reserve deficiencies.⁹² In contrast, the FHLBB failed to show that an association's "pledge of approximately \$60 million [of its assets as] collateral pursuant to mark to market agreements" and "engaging in standby commitments" constituted a dissipation of assets.⁹³ This resulted in the court returning control of the association to its former shareholders.

3. Unsafe or Unsound Condition to Transact Business

As in the case of the first two grounds for appointment (insolvency and substantial dissipation of assets) the third ground, an unsafe or unsound condition to transact business, is carried forward from pre-FIRREA law.⁹⁴ It is difficult to determine precisely the circumstances in which the regulators will apply this ground, since two other grounds also incorporate the concept of unsafe or unsound practices.⁹⁵ In addition, there have been few cases in which a receivership or conservatorship appointment rests on an unsafe or unsound condition to transact business.

One court faced with confirming the OTS's appointment of a conservator based upon this ground simply reconfirmed that an unsafe or unsound practice such as would permit the appointment of a conservator or receiver must be limited to those practices which have a reasonably direct effect on the savings association's financial condition. That court disagreed with the OTS's assertion that certain of the savings association's accounting techniques constituted unsafe and unsound practices and concluded that the OTS

90. See, e.g., *Woods v. FHLBB*, 826 F.2d at 1409; *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. at 509; *Collie v. FHLBB*, 642 F. Supp. at 1153.

91. See, e.g., *Guaranty Sav. & Loan Ass'n v. FHLBB*, 794 F.2d at 1343; *Alliance Fed. Sav. & Loan Ass'n v. FHLBB*, 782 F.2d at 495; *San Marino Sav. & Loan Ass'n v. FHLBB*, 605 F. Supp. at 509.

92. See, e.g., *Collie v. FHLBB*, 642 F. Supp. at 1153.

93. *Washington Fed. Sav. & Loan Ass'n v. FHLBB*, 526 F. Supp. at 393 (the court nonetheless upheld the appointment on the basis that the thrift was in an unsafe and unsound condition).

94. See 12 U.S.C. § 1464(d) (6)(A)(iii) (1988) (amended 1989); 12 U.S.C.A. § 1464(d)(2)(A)(iii) (West Cum. Supp. 1990); *id.* § 1821(c)(5)(iii) (West 1989).

95. The other two grounds are: (1) substantial dissipation of assets due to unsafe or unsound practice or practices (discussed above) (12 U.S.C.A. § 1464(d)(2)(A)(ii) (West Cum. Supp. 1990); *id.* 1821(c)(5)(B) (West 1989)); and (2) an unsafe or unsound practice or condition which is likely to cause insolvency or substantial dissipation of assets or earnings, or to weaken the condition of the association or seriously jeopardize its depositors' interests (*id.* § 1464(d)(2)(A)(viii) (West Cum. Supp. 1990); *id.* § 1821(c)(5)(H) (West 1989)). The latter ground was added by FIRREA. There has been one reported case in which the latter ground has been utilized by the OTS as the basis for appointment of a receiver or conservator, but the court did not explain this ground. See *supra* note 70.

had acted arbitrarily and capriciously in appointing a conservator.⁹⁶ Another court, however, construed this appointment ground somewhat differently:

An association is in an unsafe or unsound condition to transact business . . . when it is in a weakened financial condition and is controlled by individuals or management who have engaged in a pattern of regulatory violations or unsafe and unsound practices and who are unwilling or unable to conform to applicable rules or regulations, supervisory directives or safe and sound practices.⁹⁷

Applying that rationale, the court found that repeated insider transactions, together with the modification and extension of problem loans and the lack of confidence in the association's management, supported the FHLBB's determination that the association was in an unsafe or unsound condition to transact business.⁹⁸

Other cases support the notion that a principal focus of the third ground, although not found in its express language, is pervasive misconduct by the association's management. Thus, this ground was applied by the FHLBB and the OTS where management had engaged in interrelated unsafe, unsound, or unlawful transactions designed to finance the business interests of, and had diverted the association's assets to, the association's directors and their affiliates, and where management was found to be unsafe or unfit to manage the association.⁹⁹ It also has been applied where the association engaged in repeated imprudent transactions designed to improperly upstream monies to the association's parent, in effect "looting" the association,¹⁰⁰ and where imprudent practices per-

96. *Franklin Sav. Ass'n v. Director, OTS*, 742 F. Supp. 1089 (D. Kan. 1990). On appeal by the OTS, the Tenth Circuit Court of Appeals on September 6, 1990 stayed the district court's order overturning the conservatorship appointment. *Director, OTS v. Franklin Sav. Ass'n*, No. 90-3272, slip op. (10th Cir. Sept. 6, 1990).

97. *Haralson v. FHLBB*, 721 F. Supp. 1344, 1354 (D.D.C. 1989) (citation omitted).

98. *Id.* at 1344.

99. *Beacon Fed. Sav. & Loan Ass'n v. FHLBB*, 162 F. Supp. 350, 362-63 (E.D. Wis. 1958), *aff'd in part, dismissed in part*, 266 F.2d 246 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959).

100. *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990). In *Lincoln*, the OTS first appointed a conservator for the association after it concluded that the association was in an unsafe or unsound condition to transact business and that a substantial dissipation of its assets had occurred. The OTS later appointed a receiver after determining that Lincoln also was insolvent. On judicial review of the appointments, the court concluded without discussion that the association was in an unsafe or unsound condition to transact business. *Id.* at 906. The court also found that a tax-sharing agreement between Lincoln and its parent association, as well as bogus transactions designed to justify payments by Lincoln under that agreement, constituted unsafe or unsound practices which resulted in substantial

sisted over a four-year period despite numerous regulatory warnings, supervisory actions and cease and desist orders.¹⁰¹

As noted elsewhere in this article, FIRREA amended this appointment ground to expressly provide that insufficient capital constitutes an unsafe or unsound condition to transact business.¹⁰² A number of associations have entered into agreements with the FHLBB that permit the associations to include supervisory goodwill resulting from acquisitions of failing thrifts when calculating the associations' regulatory capital.¹⁰³ Fearing that FIRREA's limitation on the utilization of supervisory goodwill and the associations' resulting failure to meet the regulatory capital requirements would lead to the appointment of a receiver or conservator, some of these associations have asked the federal courts to enjoin the OTS from appointing conservators or receivers on the basis of insufficient capital.¹⁰⁴ Several cases have denied the requested relief based on jurisdiction or procedural grounds.¹⁰⁵ However, in a growing number of cases, courts have agreed with the associations, assertions that FIRREA did not abrogate their contracts with the FHLBB and that the OTS remains bound by these contracts.¹⁰⁶ It

dissipation of Lincoln's assets. *Id.* at 910-11.

101. *Woods v. FHLBB*, 826 F.2d at 1410. *But see* *Washington Fed. Sav. & Loan Ass'n v. FHLBB*, 526 F. Supp. at 387-88 (the association's inability to pay certain obligations due on the date of the receiver's appointment supported the FHLBB's receivership appointment on this ground).

102. *See supra* text accompanying note 68.

103. For a discussion of what constitutes supervisory goodwill, *see supra* text accompanying notes 23-26.

104. *See, e.g., Far West Fed. Bank, S.B. v. Director, OTS*, 746 F. Supp. 1042 (D. Ore. 1990); *Olympic Fed. Sav. & Loan Ass'n v. OTS*, 1990 U.S. Dist. LEXIS 11760 (D.D.C. Sept. 7, 1990); *Guaranty Fin. Servs., Inc. v. Director, OTS*, 742 F. Supp. 1159 (M.D. Ga. 1990); *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (Cl. Ct. 1990); *El Paso Sav. Ass'n v. Director, OTS*, No. EP-89-CA-426-H, slip op. (W.D. Tex. Jan. 8, 1990); *Flagship Fed. Sav. Bank v. Wall*, 748 F. Supp. 742 (S.D. Cal. 1990).

105. *Olympic Fed. Sav. & Loan Ass'n v. OTS*, 1990 U.S. Dist. LEXIS 11760 (D.D.C. Sept. 7, 1990) (only the U.S. Claims Court has jurisdiction over breach of contract actions against the United States); *Flagship Fed. Sav. Bank v. Wall*, 748 F. Supp. 742 (S.D. Cal. 1989) (court has jurisdiction, but OTS and FDIC letters directing Flagship to comply with the capital requirements, identifying the regulations the association may be in violation of, and the actions it could take, do not represent formal determinations of either agency; thus, the controversy is not ripe for review); *El Paso Sav. Ass'n v. Director, OTS*, No. EP-89-CA-426-H, slip op. (W.D. Tex. Jan. 8, 1990) (association must exhaust its administrative remedies before seeking injunction against OTS).

106. *See e.g., Far West Fed. Bank, S.B. v. Director, OTS*, 746 F. Supp. 1042 (D. Ore. 1990) (FIRREA did not abrogate preexisting contract granting capital forbearances, and attempted repudiation of contract constitutes an unconstitutional taking of the association's property interests); *Guaranty Fin. Servs., Inc. v. Director, OTS*, 742 F. Supp. 1159 (M.D. Ga. 1990) (OTS is bound by conversion agreement between association and FHLBB which

is anticipated that this issue will be resolved by the federal appellate courts.

III. CONSERVATORSHIP AND RECEIVERSHIP POWERS

A. Powers Generally

The powers of a conservator or receiver over failed federally-insured depository institutions are set forth primarily in sections 11, 12, and 13 of the FDIA.¹⁰⁷ Although the sections expressly convey authority only to the FDIC, the RTC is given corresponding powers over those savings associations for which it acts as conservator or receiver.¹⁰⁸

The conservator or receiver for a failed savings association succeeds by operation of law to all rights, title, powers, and privileges of the association and its stockholders, members, accountholders, depositors, officers, and directors and has the authority to take over the assets and operations of the association.¹⁰⁹ A conservator is appointed to operate or dispose of the association as a going concern and is specifically empowered to take any necessary steps to put the association in a sound and solvent condition, to carry on the business of the association, and to preserve and conserve the assets and property of the association.¹¹⁰ A receiver is appointed to liquidate the assets and to resolve the affairs of a failed savings association.¹¹¹

included capital forbearances based on "regulatory goodwill;" Congress could not have intended a result so inequitable as complete abrogation); *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (Cl. Ct. 1990) (the government agreed to allow association to amortize regulatory goodwill over a 35-year period, dismissing government's motion for summary judgment).

107. 12 U.S.C.A. §§ 1821, 1822, 1823 (West 1989).

108. *Id.* § 1441a(b)(4) (West Cum. Supp. 1990). The regulations of the FHLBB and the FSLIC in effect on the date of FIRREA's enactment are to continue in effect until such time as they are modified, terminated, or superseded. FIRREA, *supra* note 2, at § 401(h), (i); see also 12 U.S.C. § 1437 (1988) (repealed 1989). The FHLBB regulations governing the appointment of conservators and receivers for savings associations were transferred to the OTS, while those governing conservatorship and receivership powers were transferred to the FDIC. 54 Fed. Reg. 41349 (1989); 54 Fed. Reg. 42799 (1989). Following the transfer of such regulations, the OTS removed the regulations concerning the appointment of conservators and receivers. 54 Fed. Reg. 49411 (1989). The FDIC has also removed many of the regulations transferred to its authority governing the conduct of conservatorships and receiverships. 55 Fed. Reg. 46495 (1990).

109. 12 U.S.C.A. § 1821(d)(2) (West 1989).

110. *Id.* § 1821(d)(2)(D); see HOUSE CONFERENCE REPORT No. 101-222, 101st Cong., 1st Sess., at 396 (1989), reprinted in, [1989] 2 U.S. CODE CONG. & ADMIN. NEWS 432, 435.

111. *Id.* § 1821(d)(2)(E).

In addition to the foregoing general powers, the FDIA, as amended by FIRREA, enumerates specific powers available to both conservators and receivers.¹¹² These powers include the ability to:

(1) merge the association with another federally-insured depository institution;¹¹³

(2) transfer any asset or liability of the association with, in the case of a transfer to another depository institution, the consent of appropriate regulatory authorities;¹¹⁴

(3) pay all valid obligations of the association;¹¹⁵

(4) obtain a stay of legal proceedings to which the association is or becomes a party for a period not to exceed forty-five days in the case of a conservator and ninety days in the case of a receiver;¹¹⁶

(5) litigate any appealable judgment involving the association in place of the association, with all rights available to the association and the conservator or receiver in its corporate capacity, including

112. The statutory authority of conservators and receivers is set forth with greater specificity in FIRREA than under the federal banking laws in effect at the time of FIRREA's enactment. *See, e.g.*, 12 U.S.C. § 1464(d)(6)(1988) (amended 1989) (granting general authority to conservators to operate failed savings associations with all of the power of the members, directors and officers of those associations); 12 U.S.C. § 1729(b)(1988) (repealed 1989) (listing the powers of receivers of failed savings associations).

113. 12 U.S.C.A. § 1821(d)(2)(G) (West 1989).

114. *Id.*

115. *Id.* § 1821(d)(2)(H).

116. *Id.* § 1821(d)(12). The legislative history indicates that the stay provision was included to give the newly appointed conservator or receiver an opportunity to analyze pending litigation in order to determine how best to proceed. HOUSE REPORT, *supra* note 7, at 331. In one case, a court denied the FDIC's request for a stay where the FDIC had been appointed as a receiver and a party to the litigation approximately three months prior to the enactment of FIRREA and six months prior to its request for a stay. *FDIC v. Taylor*, 727 F. Supp. 326, 327-28 (S.D. Tex. 1989). In another case, the RTC was denied its request for a stay where the case was commenced only eight days before the appointment of the receiver because the court did not believe the receiver needed additional time to become familiar with the case. *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 729 F. Supp. 1508, 1509-10 (D.N.J. 1990). *But see* *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 737 F. Supp. 18, 20 (D.N.J. 1990) (granting 180-day stay while plaintiff's claim was processed through receiver's ordinary claims procedure); *Circle Indus. v. City Fed. Sav. Bank*, 749 F. Supp. 447, 455 (E.D. N.Y. 1990) (dismissing plaintiff's claims because such claims had not been submitted to the receiver under the 180-day claims procedure); *see also* *Franklin Sav. Ass'n v. Victoria Sav. Ass'n*, 1989 U.S. Dist. LEXIS 15904 (D.Kan. 1989) (upholding RTC's right to exercise 45-day stay following its appointment as conservator); *Prince George Joint Venture v. Sunbelt Savings F.S.B.*, 744 F. Supp. 133, 135 (N.D. Tex. 1990) (holding that the grant of the 90-day stay is mandatory upon the receiver's request).

the right to remove the litigation to federal court;¹¹⁷

(6) bring civil actions against the officers and directors of the association for their gross negligence or intentional tortious misconduct in the operation of the affairs of the association;¹¹⁸

(7) disaffirm or repudiate any contract or lease to which the association is a party that the conservator or receiver determines to be burdensome to the association, provided that the repudiation will promote the orderly administration of the association's affairs;¹¹⁹ and

(8) exercise all incidental powers necessary to carry out the specific powers granted to the conservator or receiver.¹²⁰

In addition to the foregoing powers, the receiver also is authorized to organize new federal savings associations to take over the assets and liabilities of failed associations,¹²¹ liquidate failed associations and realize upon their assets,¹²² evaluate the claims of creditors of failed associations,¹²³ pay off insured deposits¹²⁴ and distribute the amounts received upon liquidation of an association to its depositors, other creditors, and stockholders.¹²⁵

In general, courts lack the authority to enjoin or otherwise restrict the conservator or receiver from exercising its powers or functions once appointed. With respect to the conservatorship/receivership powers of the FDIC and the RTC over federal and state savings associations, sections 212(j) and 301 of FIRREA provide

117. 12 U.S.C.A. § 1821(d)(13) (West 1989); *see also id.* § 1819(b); *In re Meyerland Co.*, 910 F.2d 1257, 1262 (5th Cir. 1990) (upholding the right of receiver to remove to federal district court a case on appeal in state court); *Piekarski v. Home Owners Sav. Bank*, 743 F. Supp. 38 (D.D.C. 1990) (upholding right of removal); *RTC v. Key*, 733 F. Supp. 1086, 1090 (N.D. Tex. 1990) (upholding right of conservator and receiver to remove state court litigation to federal court following the entry of final judgment and holding that the general removal provisions of 28 U.S.C. § 1446(b) governing the timing of removal are not applicable to litigation involving savings associations in conservatorship or receivership). *But see*, *MTech Corp. v. FDIC*, 729 F. Supp. 1134, 1137 (N.D. Tex. 1989) (holding that general removal provisions of 28 U.S.C. § 1446(b) are applicable to litigation involving banks in receivership).

118. The FDIC or RTC may also in certain circumstances bring such actions in its corporate capacity. 12 U.S.C.A. § 1821(k) (West 1989).

119. *Id.* § 1821(e).

120. *Id.* § 1821(d)(2)(I).

121. *Id.* § 1821(d)(2)(F).

122. *Id.* § 1821(d)(2)(E).

123. *Id.* § 1821(d)(3).

124. *Id.* § 1821(f).

125. *Id.* § 1821(d)(11).

that no court may take any action to restrain or affect the exercise of powers or functions of a conservator or receiver except at the request of the Board of Directors of the FDIC or the Director of the OTS.¹²⁶

B. *Repudiation of Contracts and Leases*

Section 212(e) of FIRREA, which by its terms provides authority to conservators and receivers to repudiate any contract or lease to which a failed association is a party, is among the most controversial provisions of the Act. The section provides:

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

(A) to which such institution is a party;

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

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.¹²⁷

The conservator or receiver is required to determine whether it should exercise this power with respect to any contract or lease within a "reasonable period" following its appointment, although reasonable is not defined in the statute.¹²⁸

The only damages to which a beneficiary of a repudiated con-

126. FIRREA, *supra* note 2, at §§ 212(j), 301, (codified at 12 U.S.C.A. § 1821(j)) (West 1989); 12 U.S.C.A. § 1464(d)(2)(G) (West Cum. Supp. 1989)); *see* Shemonsky v. OTS, 733 F. Supp. 892, 895 (M.D. Pa. 1990); *see also*, Gibraltar Bldg. & Loan Ass'n, Inc. v. State Sav. and Loan Ass'n, 607 F. Supp. 722, 723 (N.D. Ca. 1985); First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 531 F. Supp. 251, 253 (D. Haw. 1981) (construing substantially similar provision of pre-FIRREA law governing power of FSLIC as receiver).

127. FIRREA, *supra* note 2, at § 212(e) (codified at 12 U.S.C.A. § 1821(e) (West 1989)).

128. 12 U.S.C.A. § 1821(e)(2) (West 1989). In a policy statement issued on April 10, 1990, the RTC limited the time period for repudiation of collateralized borrowing agreements to 60 days following its appointment as conservator or receiver. 55 Fed. Reg. 14368 (1990) [hereinafter Collateralized Borrowing Policy Statement]. A 180-day period for repudiation of collateralized letters of credit issued by failed savings associations prior to the enactment of FIRREA in connection with capital market financings was announced by the RTC in an unpublished Policy Statement dated September 25, 1990 [hereinafter Collateralized Letter of Credit Policy Statement].

tract or lease are entitled are actual direct compensatory damages, determined as of the date of the appointment of the conservator or receiver (or the date of repudiation in the case of "qualified financial contracts"¹²⁹).¹³⁰ FIRREA precludes recovery for punitive or exemplary damages, damages for lost profits or opportunity, or damages for pain and suffering.¹³¹ In the case of repudiated qualified financial contracts, compensatory damages include normal and reasonable costs of cover or any other reasonable measure of damages generally used with respect to such contracts.¹³² Termination, acceleration, or default provisions included in contracts with savings associations that are triggered by the insolvency of the association or the appointment of a conservator or receiver are generally not enforceable, except in the case of qualified financial contracts. Therefore, they are ineffective methods for escaping the uncertainty of a conservatorship/receivership, or for accelerating damages.¹³³

Specific provisions in the Act concern the repudiation of leases, contracts for the sale of real property, service contracts, and qualified financial contracts.¹³⁴ With respect to any repudiated lease under which the association is the lessee, the lessor is entitled to receive the contractual rent accruing prior to the later of (1) the date on which the repudiation notice is mailed, or (2) the date on which the repudiation becomes effective, provided the lessor is not in default under the lease. The lessor is not, however, entitled to unpaid rent or damages due under any acceleration clause or penalty provision of the lease.¹³⁵

With respect to leases under which the association is the lessor, the lessee may elect to retain its leasehold interest for the term of the lease, notwithstanding repudiation of the lease by the conservator or receiver, as long as the lessee is not itself in default under the lease. If the lessee continues its possession of the property, it is required to make rental payments to the association, but is permit-

129. "Qualified financial contracts" include securities contracts, commodity contracts, forward contracts, repurchase agreements, and swap agreements. 12 U.S.C.A. § 1821 (e)(8)(D) (West 1989). Commercial loan participation agreements are expressly excluded from the statutory definition but may be incorporated by regulation. *Id.* § 1821(e)(8)(D)(ii).

130. *Id.* § 1821(e)(3).

131. *Id.*

132. *Id.*

133. *Id.* § 1821(e)(12).

134. *Id.* § 1821(e)(4)-(8).

135. *Id.* § 1821(e)(4).

ted to offset any damages that it suffers as a result of the association's non-performance under the lease against the amounts that it owes to the association.¹³⁶

Similar rights are provided to purchasers under repudiated contracts for the sale of real property who are in possession of the property at the time of repudiation and are not in default under the contract. Such purchasers may either treat the contract as terminated or remain in possession of the property.¹³⁷ If a purchaser elects to remain in possession of the property, the association is required to deliver title to the property to the purchaser in accordance with the terms of the sales contract but is not required to perform any other obligations of the contract.¹³⁸ The purchaser is required to continue to make scheduled payments of the purchase price due after the date of repudiation.¹³⁹ The purchaser may, however, offset against such payments any damages that it suffers due to the association's failure to fully perform its obligations under the contract.¹⁴⁰

With respect to service contracts, claims for services rendered prior to the appointment of a conservator are to be paid by the conservator or receiver in accordance with the claims procedures applicable to creditors generally.¹⁴¹ If the conservator or receiver accepts performance under a service contract after its appointment, it is required to pay for such services as an administrative expense of the conservatorship or receivership.¹⁴² The acceptance of such services does not, however, preclude the conservator or receiver from subsequently disaffirming the contract so as to prevent the performance of future services.¹⁴³

Special protections are also provided to the beneficiaries of qualified financial contracts to which a failed association is a party. For example, FIRREA preserves the contractual rights of the beneficiary of any qualified financial contract to terminate or liquidate the contract following the appointment of a conservator or receiver.¹⁴⁴ FIRREA also ensures the beneficiary's ability to enforce

136. *Id.* § 1821(e)(5).

137. *Id.* § 1821(e)(6).

138. *Id.* § 1821(e)(6)(B)(ii).

139. *Id.* § 1821(e)(6)(B)(i)(I).

140. *Id.* § 1821(e)(6)(B)(i)(II).

141. *Id.* § 1821(e)(7)(A)(i).

142. *Id.* § 1821(e)(7)(B)(i)-(ii).

143. *Id.* § 1821(e)(7)(C).

144. *Id.* § 1821(e)(8)(A)(i).

its rights under security arrangements with respect to the qualified financial contract,¹⁴⁵ and to offset against amounts due the association any "termination value," "payment amount," or "other transfer obligation" arising under the contract.¹⁴⁶ In addition, a conservator or receiver may not attempt to avoid any transfer of money or property to another depository institution that has been made in connection with a qualified financial contract,¹⁴⁷ provided such transfer was not made with the actual intent to hinder, delay, or defraud the association, its creditors, or the conservator or receiver for the association.¹⁴⁸ In addition, if the conservator or receiver transfers a qualified financial contract to another depository institution, it is required to transfer to the same depository institution all of the qualified financial contracts made with a single entity,¹⁴⁹ all the claims related to such contracts,¹⁵⁰ and all the collateral securing such contracts.¹⁵¹ The conservator or receiver is required to use its best efforts to notify all parties to any transferred qualified financial contract of the transfer on the following business day.¹⁵²

An additional limitation on the broad repudiation power granted in FIRREA appears in subparagraph 212(e)(11), which prohibits the avoidance of any legally enforceable or perfected security interest in the assets of any depository institution, except where such interest has been taken in contemplation of the institution's insolvency or with an intent to hinder, delay, or defraud the institution or its creditors.¹⁵³ The provision does not prevent the conservator or receiver from repudiating the obligations of a failed savings association secured by a perfected security interest in collateral. It does, however, ensure that the collateral is available to compensate the beneficiary of the security interest for any damages permitted in connection with such repudiation.¹⁵⁴

The repudiation power has received significant attention in the context of collateralized securities issued by savings associations

145. *Id.* § 1821(e)(8)(A)(ii).

146. *Id.* § 1821(e)(8)(A)(iii).

147. *Id.* § 1821(e)(8)(C)(i).

148. *Id.* § 1821(e)(8)(C)(ii).

149. *Id.* § 1821(e)(9)(A)(i).

150. *Id.* § 1821(e)(9)(A)(ii)-(iii).

151. *Id.* § 1821(e)(9)(A)(iv).

152. *Id.* § 1821(e)(10)(A).

153. FIRREA, *supra* note 2, at § 212(e)(11) (codified at 12 U.S.C.A. § 1821(e)(11) (West 1989)).

154. See Collateralized Borrowing Policy Statement, *supra* note 128.

and collateralized letters of credit used to provide credit support for securities issued by third parties because of the potential adverse effect of the repudiation power on the markets for such securities. The RTC has issued two policy statements concerning these obligations.¹⁵⁵ While reiterating the RTC's broad repudiation powers, the RTC indicated in its policy statement concerning collateralized securities that, rather than simply repudiating all future payment obligations, the repudiation power may be used to call, redeem, or prepay such securities. In such event, the collateral securing the obligations could be liquidated and the proceeds paid to or retained by the holders of the securities to the extent of the damages allowed by FIRREA. In the second policy statement, the RTC explained that in the case of collateralized letters of credit issued prior to the enactment of FIRREA in connection with capital market financing transactions the repudiation power could be used to accelerate the association's payment obligation, even if the beneficiary's right to draw on the letter had not accrued at the commencement of the receivership, with the collateral being used to satisfy the payment obligation. In both cases, the holders of the securities or the beneficiaries of the letter of credit would be unsecured creditors of the association if the proceeds of the collateral were insufficient to pay their claims in full. To the extent such proceeds exceed the secured obligations, excess proceeds would be included in the assets of the failed association and would be available to satisfy the claims of other creditors.

FIRREA's contract repudiation provision is controversial because of its apparent application to non-executory contracts. While the RTC has conceded that it is not empowered to repudiate contracts that have been fully performed by all parties, it maintains that it may repudiate contracts under which a savings association has outstanding obligations, notwithstanding completed performance by other parties to the contract.¹⁵⁶ It is undoubtedly to the government's advantage to be able to repudiate burdensome or costly obligations of a failed savings association. If, however, a conservator or receiver is allowed to repudiate contracts under which the other party has substantially performed its obligations, con-

155. Collateralized Borrowing Policy Statement, *supra* note 128; Collateralized Letter of Credit Policy Statement, *supra* note 128.

156. *Gibson v. RTC*, 750 F. Supp. 1565, 1568 (S.D. Fla. 1990); Corrected Memorandum of Law in Support of RTC's Motion for Summary Judgment, *Gibson v. RTC* No. 90-0498-CIV-MARCUS at 26 (S.D. Fla. 1990).

cerns will naturally arise over the wisdom of doing business with savings associations perceived to be financially vulnerable.

The traditional repudiation authority of common law receivers extends only to executory contracts.¹⁵⁷ Similarly, under the federal Bankruptcy Code, a bankruptcy trustee may only reject "executory contracts and unexpired leases."¹⁵⁸ Prior to FIRREA, federal banking laws did not specifically provide for the repudiation of contracts, although both the FDIC and the FSLIC exercised this power from time to time in connection with their general conservatorship/receivership powers.¹⁵⁹

The legislative history of FIRREA seems to indicate that in adopting section 212(e), Congress merely intended to codify the existing repudiation authority.¹⁶⁰ Unfortunately, the limits of the FDIC's and the FSLIC's historic repudiation powers are unclear.¹⁶¹ The FHLBB regulations governing the conduct of FSLIC conservatorships and receiverships for federal savings associations have, since 1958, authorized the conservator or receiver to "repudiate any contract or lease he considers burdensome."¹⁶² In 1985, the

157. 66 Am. Jur. 2d, *Receivers* § 229 (1973).

158. 11 U.S.C. § 365 (1988).

159. See, e.g., *FSLIC v. Angell, Holmes & Lea*, 838 F.2d 395 (9th Cir.), *cert. denied*, 488 U.S. 848 (1988); *FDIC v. Liberty Nat'l Bank & Trust Co.*, 806 F.2d 961 (10th Cir. 1986); *North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Philadelphia Gear Corp. v. FDIC*, 751 F.2d 1131 (10th Cir. 1984), *rev'd*, 476 U.S. 426 (1986); *Argonaut Sav. & Loan Ass'n v. FDIC*, 392 F.2d 195 (9th Cir. 1968), *cert. denied*, 393 U.S. 839 (1968); *UNISYS Corp. v. FDIC*, 724 F. Supp. 454 (W.D. Tex. 1988); *Savings Bank of Rockland County v. FDIC*, 668 F. Supp. 799 (S.D.N.Y. 1987), *vacated*, 703 F. Supp. 1054 (S.D.N.Y. 1988); *80 Pine Inc. v. European Am. Bank*, 424 F. Supp. 908 (E.D.N.Y. 1976).

160. In the section-by-section analysis of Senate Bill 774, the Senate precursor to FIRREA which included a repudiation provision similar to that included in the Act, the legislation's sponsors explained that the repudiation provision was intended to codify "the FDIC's common-law right as a liquidating receiver to repudiate or disaffirm a contract or lease which the FDIC considers to be burdensome." 135 CONG. REC. S. 6907, 6911 (daily ed. July 19, 1989). The House Committee on Banking, Finance and Urban Affairs similarly explained that the receivership powers included in H.R. 1278 "essentially parallel those heretofore exercised by the FSLIC and the FDIC," and that the legislation "confirms the historic right of a conservator or receiver to disaffirm or repudiate contracts." See HOUSE REPORT, *supra* note 7, at 330.

161. The cases decided to date simply refer to the right of a conservator or receiver to repudiate or reject *any* contract. They do not address the question of whether the authority extends to non-executory contracts. *FSLIC v. Angell, Holmes & Lea*, 838 F.2d at 396 (concerning the FSLIC's repudiation power); *Gibson v. RTC*, 750 F. Supp. 1565 (S.D. Fla. 1990); *Union Bank v. FSLIC*, 724 F. Supp. 468, 471 (E.D. Ky. 1989).

162. 12 C.F.R. § 548.2(l), 23 Fed. Reg. 9878, 9908 (1958) (authorizing the FSLIC as conservator for federally chartered savings associations to "repudiate any lease or contract which it considers burdensome"), amended and redesignated as 12 C.F.R. § 548.2(k) at 44

FHLBB proposed significant revisions to its conservatorship/receivership regulations which would have expressly limited the repudiation power to "executory contracts and unexpired leases."¹⁶³ The proposed regulation limiting the repudiation power was never adopted. However, in 1988, one of the 1985 proposed amendments was adopted as a final regulation.¹⁶⁴ That regulation, which was repealed in 1990, provided a payment priority for repudiated executory contracts and unexpired leases.¹⁶⁵ The regulation was silent as to the priority of repudiated non-executory contracts. In addition, the introductory statement to the proposed 1985 amendments provided that "[t]he power to reject leases and executory contracts is an important traditional power of the receiver" and that in applying the repudiation provisions, the receiver would seek guidance from the court decisions rendered under the Bankruptcy Code, particularly in applying the term "executory" which was not defined in the proposed amendments.¹⁶⁶ In 1985, the FHLBB apparently viewed its repudiation power as limited to executory contracts.

Notwithstanding the arguments that can be based upon legislative history and historical interpretations of the receivership powers, the fact remains, however, that the plain language of 12 U.S.C.A. § 1821(e), as amended by FIRREA, provides that *any* contract may be repudiated. Moreover, the presence of the word "executory" in the repudiation provisions of the Bankruptcy Code demonstrates that Congress could have used the term had it intended to so limit the repudiation power under the federal banking

Fed. Reg. 39108, 39141 (1979), redesignated as 12 C.F.R. § 382.2(k) at 54 Fed. Reg. 42800-01, (1989); 12 C.F.R. § 549.3(l), 23 Fed. Reg. 9878, 9909 (1958) (authorizing the FSLIC as receiver for federally-chartered savings associations to "repudiate any lease or contract which it considers burdensome"), amended and redesignated as 12 C.F.R. § 549.3(a) at 44 Fed. Reg. 39108, 39142 (1979), redesignated as 12 C.F.R. § 383.3(a) at 54 Fed. Reg. 42800-01 (1989); *see also* 12 C.F.R. § 569a.6(c)(3) 33 Fed. Reg. 14366-67 (1968) (authorizing the FSLIC as receiver for state-chartered saving associations to "repudiate any lease or contract which it considers burdensome"), redesignated as 12 C.F.R. § 388.3(c)(3) at 54 Fed. Reg. 42800-01 (1989).

163. Proposed Reg. 12 C.F.R. § 569c.6(f)(3), 50 Fed. Reg. 48970, 48991 (1985).

164. 53 Fed. Reg. 25129, 25131 (1988) (codified at 12 C.F.R. § 389.11(c) (1990) formerly, 12 C.F.R. § 569c.11).

165. 12 C.F.R. § 389.11(c) (1990), removed, 55 Fed. Reg. 46495, 46496 (1990).

166. 50 Fed. Reg. 48976 (1985). In directing the receiver to look for guidance as to the meaning of "executory" to court decisions rendered under 11 U.S.C. § 365, the FHLBB acknowledged that such decisions had generally applied the "Countryman" definition, which the FHLBB explained to be "[a] contract under which the obligations of both the bankrupt and other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Id.*

laws. Critics of the power have raised questions as to whether repudiation of a non-executory contract is constitutional under the due process and takings clauses of the Fifth Amendment.¹⁶⁷ It is uncertain whether those espousing the constitutional arguments will prevail in federal court.

C. *Claims Procedures: Coit Independence Joint Venture v. FSLIC*

After a savings association is placed into receivership, the receiver is required to pay off the association's insured deposits as quickly as possible with cash or by making available to each depositor a transferred deposit account at another depository institution in an amount equal to the depositor's insured deposit.¹⁶⁸ One way in which this is accomplished is the organization by the OTS of a new federal association pursuant to section 11(d)(2)(F) of the FDIA following the establishment of a receivership and the subsequent transfer by contract of substantially all of the assets and certain of the liabilities, including deposit accounts, of the association in receivership to the new association. The RTC is then appointed as conservator for the new association and operates the new association until a purchaser can be found for substantially all of its assets and liabilities or for its deposit accounts. At the time of the sale of the assets or deposits of the new association, the new association is itself placed into receivership. Following the sale, the new association is liquidated or its affairs otherwise resolved.¹⁶⁹

As part of the liquidation or resolution process, the receiver is required to request,¹⁷⁰ by publication and direct correspondence,¹⁷¹ that the creditors of the failed association present their claims, together with evidence supporting the existence of such claims, to the receiver by a specific date not less than ninety days after the

167. See, e.g., *Gibson v. RTC*, 750 F. Supp. at 1568 n.2.

168. 12 U.S.C.A. § 1821(f) (West 1989).

169. The funding for an insured deposit payoff, in the case of a failed savings association, is supplied from the Savings Association Insurance Fund. *Id.* § 1821(f)(1)(B). The receiver is then subrogated to the rights of each depositor as against the failed association up to the amount paid to such depositor. *Id.* § 1821(g)(1). The receiver may require the depositors to prove their claims. *Id.* § 1821(f)(2). The FDIC and RTC are each authorized to develop administrative procedures for determination of disputed claims. *Id.* § 1821(f)(3)(A). Claims determined administratively are subject to judicial review. *Id.* 1821(f)(4).

170. *Id.* § 1821(d)(3)(B)(i).

171. *Id.* § 1821(d)(3)(C).

publication date of the request.¹⁷² The receiver must determine whether to allow or disallow claims presented within 180 days after the date on which each claim is filed or by a later date that is acceptable to the claimant.¹⁷³ Claims submitted after the cut-off date specified in the receiver's notification to creditors are to be disallowed¹⁷⁴ unless the claimant can demonstrate that it did not receive notification in time to file its claim before the cut-off date¹⁷⁵ and the claim is filed in time to permit payment of the claim, notwithstanding the late filing.¹⁷⁶ If a claim is disallowed, the claimant has the option of either (1) seeking administrative review of the receiver's decision, or (2) bringing suit on such claim in the United States District Court for the district in which the association's principal office is located or the District of Columbia.¹⁷⁷ The claimant must request administrative review or file suit on his claim within sixty days of the earlier of (1) the end of the 180-day period available to the receiver for determining the claim, or (2) the date of the notice of disallowance.¹⁷⁸ If the claimant fails to do so, the claim is disallowed and the claimant's rights with respect to the claim are terminated.¹⁷⁹ Administrative review of the receiver's decision will be provided by either the FDIC or the RTC. An on-the-record hearing may be provided at the claimant's request with the consent of the reviewing entity.¹⁸⁰ The decision of the reviewing entity is subject to judicial review under the Administrative Procedures Act.

A claimant who elects to file a suit on its claim following disallowance by the receiver is entitled to a *de novo* review of the merits of the claim. The proceeding does not constitute a review of the receiver's decision.¹⁸¹ This is advantageous to the claimant because the court is not required to give weight or deference to the re-

172. *Id.* § 1821(d)(3)(B)(i). The notice must be republished one and two months following the initial publication. *Id.* § 1821(d)(3)(B)(ii).

173. *Id.* § 1821(d)(5)(A)(i). An expedited, 90-day claims procedure is available to claimants who allege that they (i) have a valid and enforceable security interest, and (ii) will suffer irreparable harm under the 180-day procedure. *Id.* § 1821(d)(8)(i)-(ii).

174. *Id.* § 1821(d)(5)(C)(i).

175. *Id.* § 1821(d)(5)(C)(ii)(I).

176. *Id.* § 1821(d)(5)(C)(ii)(II).

177. *Id.* § 1821(d)(6)(A).

178. *Id.*

179. *Id.* § 1821(d)(6)(B).

180. *Id.* § 1821(d)(7)(A).

181. *Id.* § 1821(d)(5)(E).

ceiver's decision, as would be required if the claim were considered under the Administrative Procedures Act.¹⁸²

Prior to the Supreme Court's 1989 decision in *Coit Independence Joint Venture v. FSLIC*,¹⁸³ the FSLIC had successfully argued before many courts in which suits were pending against failed savings associations that, upon the appointment of the receiver, the court lost subject matter jurisdiction over the plaintiff's claims and that the FSLIC, as receiver, had exclusive jurisdiction over such claims.¹⁸⁴ The Supreme Court, after reviewing the statutory authority, found in *Coit* that Congress had not granted the FSLIC adjudicatory power over claims but rather that the FSLIC's power, "much like an ordinary insurance company, [is] to pay those claims proved to its satisfaction."¹⁸⁵ Because Congress had not granted adjudicatory authority to the FSLIC, a court's *de novo* consideration of the claims of creditors could not be viewed as a restraint on the exercise of the receiver's powers.¹⁸⁶ The Court's finding that Congress had not granted the FSLIC adjudicatory authority over creditors' claims allowed the Court to avoid consideration of the constitutional question raised by the plaintiff as to whether such a grant would violate Article III of the Constitution under the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹⁸⁷

The FSLIC also argued in *Coit* that it was necessary for a claim-

182. See, *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 576 (1989) (stating that "a receiver's distribution of assets need not be postponed pending the resolution of disputed claims in other courts: 'The power to fix the time for distribution may include the power . . . to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim.'" (quoting from *Riehle v. Margolies*, 279 U.S. 218, 224 (1929))).

183. 489 U.S. 561 (1989).

184. See *e.g.*, *Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987); *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Resna Assoc., Ltd. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371, 1372 (D.N.J. 1987); *Baer v. Abel*, 637 F. Supp. 343, 347 (W.D. Wash. 1986). In these cases the FSLIC had successfully relied on the provisions of 12 U.S.C. § 1729(b)(1), which provided the FSLIC, as receiver, with authority to liquidate the assets of failed thrifts in an orderly manner; 12 U.S.C. § 1729(d), which provided the FSLIC with the authority to settle, compromise, or release claims in favor of or against the insured institutions; and 12 U.S.C. § 1464(d)(6)(C) which provided that, subject to certain exceptions, no court take any action to restrain or affect the exercise of powers or functions of the conservator or receiver. *But see Morrison-Knudsen Co., Inc. v. CHG Int'l Inc.*, 811 F.2d 1209, 1215-22 (9th Cir. 1987) (holding that the FSLIC did not have exclusive subject matter jurisdiction over disputed claims following the appointment of a receiver), *cert. dismissed*, 488 U.S. 935 (1988).

185. *Coit*, 484 U.S. at 574-75.

186. *Id.* at 574-77.

187. *Id.* at 578-79 (citing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

ant to exhaust the administrative procedures for determination of claims prior to commencement of judicial proceedings.¹⁸⁸ With respect to the FSLIC's exhaustion of administrative remedies argument, the Court found that the administrative procedures in effect at the time were problematic. First, they clearly contemplated that the FSLIC would have adjudicatory power over the claims of creditors.¹⁸⁹ Second, they allowed the FSLIC to hold the claims indefinitely "for further review."¹⁹⁰ This effectively gave the FSLIC the ability to bury claims in the administrative process with no adequate remedy available to the claimant.¹⁹¹ The problem was exacerbated by the fact that while the FSLIC claim was pending, the statute of limitations with respect to the state law issues was running, thereby further depriving the claimant of recourse to the courts in cases in which the FSLIC's decision was delayed.¹⁹²

Congress was clearly mindful of *Coit* when it enacted FIRREA. Although the Act contemplates that state court proceedings will be delayed while the receiver considers the claims presented,¹⁹³ Congress did not elect to grant the receiver adjudicatory authority. In fact, the Act expressly denies courts the power to review the receiver's denial of a claim in cases brought pursuant to section 212(d)(5)(D), thus ensuring that courts will consider *de novo* the claims of plaintiffs. As a result, Congress avoided the Article III questions alluded to in *Coit*.

The claims procedure adopted in FIRREA is similar to the regulatory procedures that were in place at the time of the *Coit* decision with three important exceptions.¹⁹⁴ First, the statute does not require a claimant to exhaust the administrative remedies prior to litigating its claim in court.¹⁹⁵ Second, the Act provides that the receiver may not extend the 180-day period for determining claims

188. *Id.* at 585.

189. *Id.* at 586.

190. *Id.*

191. *Id.*

192. *Id.* at 586-87..

193. 12 U.S.C.A. § 1821(d)(6)(A), (B) (West 1989); *id.* § 1821(d)(8)(E).

194. Compare 12 U.S.C.A. § 1821(d)(3) (West 1989) with 12 C.F.R. §§ 575.3, 575.4 (1988); compare 12 U.S.C.A. § 1821(d)(5) (West 1989) with 12 C.F.R. § 575.11 (1989); compare 12 U.S.C.A. § 1821(d)(6) (West 1989) with 12 C.F.R. § 576.3 (1989); compare 12 U.S.C.A. § 1821(d)(8) (West 1989) with 12 C.F.R. § 577 (1989).

195. See 12 CFR § 575.1(a)(1989). *But see* Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 737 F. Supp. 18 (D.N.J. 1990); Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447 (E.D.N.Y. 1990). These cases hold that claimants must exhaust the initial 180-day claims procedure prior to judicial consideration of claims against an institution in receivership.

without the express written consent of the claimant.¹⁹⁶ Finally, the Act provides that statutes of limitation are tolled by the filing of claims with the receiver.¹⁹⁷ As a consequence of FIRREA, the federal banking laws now provide for an orderly administrative procedure for determining claims which also preserves the rights of claimants to obtain a judicial determination of the merits of their claims.

IV. HOW A THRIFT GETS RESOLVED

The remainder of this article will focus on how the RTC disposes of or "resolves" failed savings associations for which it acts as conservator or receiver.¹⁹⁸ The fundamental mission of the RTC is to carry out a program, under the general guidance of the RTC Oversight Board,¹⁹⁹ to manage and resolve institutions that come under its jurisdiction and to dispose of any residual assets in a manner that "(i) maximizes returns and minimizes losses; (ii) minimizes the impact on local real estate and financial markets; and (iii) maximizes the preservation of the availability and affordability of residential property for low and moderate income individuals."²⁰⁰

Once an association is placed in receivership, the RTC must, in accordance with its mission, determine the most cost effective way to resolve the association. In the case of failed associations with little going concern value, the RTC is likely simply to pay off the association's insured deposits and subsequently liquidate the association. If, however, an association is deemed to have a meaningful

196. Compare 12 U.S.C.A. § 1821(d)(5)(ii) (West 1989) with 12 CFR § 575.11 (1989).

197. 12 U.S.C.A. § 1821(d)(8)(D) (West 1989).

198. See *id.* § 1441a(b) (West Cum. Supp. 1990); see also *supra* notes 17, 44, 45 and accompanying text.

199. 12 U.S.C.A. § 1441a(b)(4) (West Cum. Supp. 1990).

200. Strategic Plan for Resolution Trust Corporation, 54 Fed. Reg. 46574, 46578 (1989) [hereinafter Proposed Strategic Plan]; RTC, Strategic Plan for Resolution Trust Corporation at 2 (1989) (RTC Seminar Materials, Session A) [hereinafter Final Strategic Plan]. As of September 30, 1990, 287 institutions with approximately \$92 billion in assets were resolved by the RTC. *Conservatorship Caseload; Asset Inventory*, RTC Review, Sept. 1990, at 1; *Resolutions*, RTC Review, Sept. 1990, at 3. Another 493 associations with assets valued at \$142 billion remained in the RTC's inventory. *Who Will Prosper From the Savings and Loan Bailout?*, 7 Real Est. Fin. Update, Jan. 1991, at 3. By the end of 1990, the RTC had accumulated \$16.6 billion in property from 548 failed thrifts and sold less than a third of it. It is estimated that more than \$60 billion in real estate may come into the RTC's hands before the deadline established by FIRREA on August 9, 1992. *The RTC's National Monuments*, Wall St. J., Feb. 13, 1991, at A12, col. 1.

going concern value, the RTC most likely will attempt to sell the association as a going concern.²⁰¹

If a failed savings association is to be marketed, the OTS will organize a new federal savings association immediately following the commencement of the receivership and will transfer by contract substantially all of the assets and deposit liabilities of the old failed association to the new association.²⁰² Most of the non-deposit liabilities of the failed association will be retained by the old association.²⁰³ The RTC will then be appointed as conservator for the new association. The business of the old association will continue through the new association until a purchaser can be found.

In marketing the new association, the RTC will seek a purchaser who is willing to acquire a significant portion of the assets and liabilities of the new association through a purchase and assumption transaction or, if such a purchaser cannot be found, a depository institution that will purchase the insured deposits of the new association in an "insured deposit transfer."²⁰⁴ The RTC also may attempt to dispose of the branches of an association separately,²⁰⁵ although a single purchaser for the entire association appears preferable because of the expense and difficulty of allocating the assets and liabilities of an association among its branches. If the RTC attempts to dispose of branches separately, it will determine how the branches should be packaged.

A bidders conference will be held shortly after the organization of the new association at which potential acquirers, which include federally-insured depository institutions and depository institution holding companies, are provided with detailed financial information regarding the association being sold, as well as copies of the

201. *A Buyer's Guide: How to Purchase a Savings Association from the RTC*, [Current] Fed. Banking L. Rep. (CCH) ¶ 70,503, at 46,519 (Mar. 2, 1990) [hereinafter *Buyer's Guide*].

202. Miller, *The Effect of Thrift Receiverships, Conservatorships and FIRREA on Title to Real Property* at 2, in *Negotiating and Litigating with the Resolution Trust Corporation* (Aug. 1990) (ABA Seminar Materials). See *supra* notes 168, 169 and accompanying text.

203. Wilk, *Transactions By and With the Resolution Trust Corporation Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, at 5, in *Negotiating and Litigating With the Resolution Trust Corporation* (Aug. 1990) (ABA Seminar Materials). In some cases, however, leases and loan commitments are transferred to the new association.

204. *Buyer's Guide*, *supra* note 201, at 46,519.

205. *Id.*; see Proposed Strategic Plan, *supra* note 200, at 46576 discussing the factors to be evaluated by the RTC in determining whether to sell branches separately. The Final Strategic Plan eliminated the detailed discussion of branch sales found in the Proposed Strategic Plan, and merely mentions branch sales as one of a variety of resolution structures. Final Strategic Plan, *supra* note 200, at 37.

RTC's standard transaction documents.²⁰⁶ To expedite the process, relatively little time is provided for potential acquirers to conduct a physical inspection of the association being sold.²⁰⁷ Therefore, potential acquirers must be prepared to base their bids primarily on the financial information provided by the RTC. In addition, potential bidders must obtain all regulatory approvals necessary for the acquisition before submitting their bids.²⁰⁸ The RTC requires that all conditions to a bidder's proposal be included in its bid. Once a bid has been selected, the RTC will not engage in substantive negotiations over the terms of the transaction.

A. *The Preferred Resolution: The Purchase and Assumption Transaction*

In a typical purchase and assumption transaction, the acquiring depository institution or holding company purchases the cash, investment grade securities, consumer loans and the performing first mortgages on one-to-four family residential properties of the new association and assumes its deposit liabilities.²⁰⁹ The purchaser usually has the opportunity to assume the employee pension plans and existing leases of the new association as well.²¹⁰ The RTC provides sufficient cash to ensure that the liabilities assumed are not greater than the book value of the assets acquired.²¹¹ It will not, however, provide enough funds to fully capitalize the acquiring institution for regulatory purposes.²¹²

When an acquirer buys substantially all of the assets of the new association, the transaction is known as a "whole thrift" purchase.²¹³ If, however, the acquirer is only willing to purchase

206. *Buyer's Guide*, *supra* note 201, at 46,419.

207. See Proposed Strategic Plan, *supra* note 200; at 46576; Final Strategic Plan, *supra* note 200 at 12, 37; Goodman, *RTC Real Estate Sales, Just Do It*, REAL EST. REV. 26, 29 (Winter 1991).

208. *Buyer's Guide*, *supra* note 201, at 46,519.

209. See, e.g., *Buyer's Guide*, *supra* note 201 at 46,519.

210. RTC, How to Work with the RTC (June 21, 1990) (RTC Seminar Materials, Session A: Purchase and Assumption Agreement).

211. Proposed Strategic Plan, *supra* note 200, at 46576; Final Strategic Plan, *supra* note 200, at 35-36.

212. Proposed Strategic Plan, *supra* note 200, at 46576; Final Strategic Plan, *supra* note 200, at 35-36.

213. The RTC defines a whole thrift purchase as follows:

Whole Institution—An Acquirer purchases all or substantially all of the savings association's assets, including troubled or high risk assets, and assumes all or substantially all of the institution's deposits and certain other liabilities. In such cases, pur-

the good assets (*i.e.*, the cash, securities and performing loans), the transaction is known as a "clean thrift" purchase.²¹⁴ In either case, the assets that are not acquired will be retained by the new association and will eventually be disposed of when that association is liquidated or transferred to the RTC in its corporate capacity for subsequent disposition.²¹⁵

In the standard purchase and assumption transaction the acquirer may contract to acquire the assets of a failed association with a limited right to return or "put" the non-performing assets to the RTC a short time following the closing.²¹⁶ Other problem assets, such as those with a cloud on title or litigation liability, may also be returned.²¹⁷ Asset puts serve as an incentive to potential acquirers since the RTC does not generally provide those interested in acquiring a failed association sufficient time to inspect thoroughly the association's records.²¹⁸

The acquirer may also negotiate a "call" option which will permit it to acquire additional assets of the association within a period of time, usually 120 days, following the closing.²¹⁹ In addition, the RTC, in its corporate capacity, will provide a limited indemnification to the acquirer which will protect it against losses related to liabilities of the association that the acquirer has not assumed and from losses resulting from claims arising in connection with

chasers bid based on their estimate of the franchise value of the institution and the amount of cash they want from the RTC to offset the shortfall between the bidders' estimates of the value of the assets to be acquired and the liabilities to be assumed. The transaction is awarded to the qualified bidder requiring the least amount of cash from the RTC.

Buyer's Guide, *supra* note 201, at 46,519.

214. The RTC defines a clean thrift purchase as follows: "Clean Institution—An acquirer purchases only the good or low risk assets as well as cash from the RTC and assumes all or substantially all of the savings association's deposits and certain other liabilities. The transaction is awarded to the qualified bidder offering the highest premium." *Id.*

215. See *Wilk*, *supra* note 203, at 5.

216. Proposed Strategic Plan, *supra* note 200, at 46576; Final Strategic Plan, *supra* note 200, at 37. At the end of September, 1990, assets subject to "puts" totalled \$13 billion. This figure is net of puts previously exercised or expired. *Resolutions*, RTC Review, Sept. 1990, at 3.

217. Proposed Strategic Plan, *supra* note 200, at 46576. While the Proposed Strategic Plan specifically notes the type of assets that can be returned to the RTC, the Final Strategic Plan is silent with respect to the specific assets that are returnable to the RTC.

218. See Final Strategic Plan, *supra* note 200, at 12, 37; *Goodman*, *supra* note 207, at 29.

219. RTC, How to Work with the RTC (June 21, 1990) (RTC Seminar Materials, Session A: Purchase and Assumption Agreement). *But see Citing Weak Response RTC Ends Call Option*, *Am. Banker*, Sept. 14, 1990, at 12, col. 4.

purchased assets, provided such losses result solely from the action or inaction of the failed association.²²⁰

B. *The Override Rule*

An issue that has received much attention in connection with purchase and assumption transactions is the extent to which banks may operate the acquired branches of failed savings associations as bank branches. FIRREA authorizes the RTC to approve emergency acquisitions of failed savings associations or their assets by banks and bank holding companies, notwithstanding state law to the contrary. Before approving such an acquisition, however, the RTC must first determine that (1) severe financial conditions threaten the stability of a significant number of savings associations or savings associations with significant financial resources, (2) such acquisition would lessen the risks to the RTC, and (3) the acquisition will not present a substantial risk to the safety or soundness of the savings association to be acquired or the acquiring entity.²²¹ FIRREA also provides that, in connection with such acquisition, "a savings association may retain and operate any existing branch or branches or any other existing facilities."²²²

The RTC has adopted a regulation interpreting the preceding section of FIRREA to permit acquiring banks to operate as bank branches any savings association branches acquired pursuant to the emergency acquisition statute.²²³ The RTC rule is referred to

220. RTC, *How to Work with the RTC* (June 21, 1990) (RTC Seminar Materials, Session A: Indemnity Agreement).

221. 12 U.S.C.A. § 1823(k) (West 1989). Section 601 of FIRREA also amended the Bank Holding Company Act of 1956 to give the Board of Governors of the Federal Reserve System the authority to approve an application by a bank holding company to acquire a healthy savings association. FIRREA, *supra* note 2, at § 601 (codified at 12 U.S.C.A. § 1843(i) (West 1989)).

222. 12 U.S.C.A. § 1821(k)(3).

223. *Retention of Thrift Branches Acquired by Banks in Emergency Acquisitions*, 55 Fed. Reg. 22323 (1990) (to be codified at 12 C.F.R. § 1611.1) [hereinafter *Branch Retention*]. The rule became effective June 1, 1990. The RTC derives its authority to authorize such acquisitions and to promulgate regulations from 12 U.S.C.A. § 1441a(b)(4) (West Cum. Supp. 1990) (which gives the RTC the powers of the FDIC set forth in 12 U.S.C.A. § 1823(k) (West 1989)). Section 1823(k), as amended by the Act, authorizes emergency acquisitions to keep the industry stable and the cost of resolution down. Title 12 U.S.C.A. § 1823(k)(4)(A) (West 1989) provides that:

If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association . . . and a bank or bank holding company, a savings association may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the

as the "Override Rule" because it effectively overrides the laws of many states that restrict the establishment and operation of bank branches. The Override Rule is based on the RTC's belief that the provisions of 12 U.S.C.A. § 1823(k)(4)(A) must be read so as to allow banks to retain and operate as bank branches any thrift branches acquired pursuant to that section.²²⁴

Since the enactment of FIRREA, there have been at least two challenges to the RTC's Override Rule. In *Independent Community Bankers of New Mexico v. Resolution Trust Corp.*,²²⁵ the New Mexico federal court expressly upheld the validity of the Override Rule. The case involved the acquisition by a national bank located in Albuquerque, New Mexico, of a failed savings association with branches located throughout the state. The bank's bid was expressly conditioned on the override of a New Mexico statute limiting branch banking to a county-wide basis.²²⁶ The court concluded that the statutory provisions with respect to branching were ambiguous and that the RTC's interpretation of the statute should, therefore, be given deference. Because the court found the RTC's interpretation of the statute as set forth in the Override Rule to be neither arbitrary nor capricious, it upheld the regulation.²²⁷

In Arkansas State Bank Commissioner v. Resolution Trust

same State.

The RTC Override Rule provides as follows:

(a) Purpose. (1) Section 13(k) of the Federal Deposit Insurance Act (12 U.S.C. 1823(k)), made applicable to the RTC by section 21A(b)(4) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(b)(4)), grants to the RTC the power to authorize emergency acquisitions of failed or failing savings associations. Under section 13(k), the RTC may authorize such acquisitions notwithstanding any provision of State law, upon making a determination that severe financial conditions threaten the stability of a significant number of savings associations, or savings associations possessing significant financial resources, and a determination that such authorization would lessen the risk to the RTC. Authorizations of acquisitions of State-chartered savings associations are subject to prior RTC consultation with State officials and a vote of 75 percent of the voting members of the RTC Board of Directors to authorize such acquisitions over the objection of State officials.

(2) The regulations of this section provide for the retention and operation by acquiring banks of the offices of savings associations acquired pursuant to section 13(k).

(b) Each existing office or other existing facility of each savings association that is merged or consolidated with, or the assets and liabilities of which are transferred to, an insured bank pursuant to section 13(k) may be retained by the insured bank and operated by the bank as a branch or other facility.

Branch Retention, *supra*, at 22328.

224. Branch Retention, *supra* note 223, at 22324.

225. [Current] Fed. Banking L. Rep. (CCH) ¶ 88,220, at 96,730 (D.N.M. June 15, 1990).

226. *Id.* at 96,731; see N.M. STAT. ANN. § 58-5-3 (1978).

227. [Current] Fed. Banking L. Rep. (CCH) ¶ 88,220 at 96,732-34.

Corp., the Eighth Circuit also upheld the validity of the Override Rule.²²⁸ *Arkansas State Bank Commissioner* involved a national bank's bid to acquire twenty branch offices of a savings association located in fifteen Arkansas counties. The Arkansas Bank Commissioner sought to prevent the acquisition on the basis of state law provisions restricting branching by banks.²²⁹ In a decision that closely mirrored *Independent Community Bankers of New Mexico*, the Eighth Circuit upheld the RTC's Override Rule based on the court's conclusion that the provision of FIRREA was ambiguous and that the Override Rule was a permissible construction of the statute.²³⁰

Also at issue in the case was the question of whether the Override Rule and 12 U.S.C.A. § 1823(k) violated the McFadden Act,²³¹ which permits national banks to establish branches within their home states only to the extent that state banks in such states are allowed to branch.²³² The Eighth Circuit held that the McFadden Act is not the exclusive source of branching authority and that section 1823(k), as amended by FIRREA, also grants national banks branching authority not inconsistent with the McFadden Act.²³³

C. Resolution by "Insured Deposit Transfers"

A second method by which the RTC resolves failed savings associations is by "insured deposit transfers."²³⁴ An insured deposit transfer is a type of insured deposit payoff in which, instead of paying depositors their insured deposits directly, the RTC contracts with a depository institution to act as the RTC's paying agent. Using insurance payments it receives from the RTC, the paying agent establishes a new deposit account for each of the failed association's insured depositors. Those depositors are noti-

228. 911 F.2d 161 (8th Cir. 1990).

229. See ARK. STAT. ANN. § 23-32-1202 (Supp. 1989).

230. The Eighth Circuit discussed, but declined to adopt, the holding of an earlier case in which the Colorado district court concluded that, following an acquisition, section 1823(k) permits existing savings association branches to be retained and operated as savings association, but not bank, branches. 911 F.2d at 164. The Colorado court's analysis and holding had limited applicability, said the Eighth Circuit, because the Colorado court construed the statute and did not deal, as did the Eighth Circuit case, with the Override Rule itself. *Id.* at 172.

231. 12 U.S.C. § 36(c) (1988).

232. 911 F.2d at 173-74.

233. *Id.* at 173.

234. *Buyer's Guide*, *supra* note 201, at 46,519.

fied of such transfer and are given the opportunity to withdraw their funds without penalty or to leave them on deposit in the new institution. The RTC insurance payments are reduced, however, by any "premium" paid by the paying agent for the accounts. The paying agent agrees to pay the premium because it expects to acquire the failed association's depositors as its own customers. As with purchase and assumption transactions, purchasers of insured deposits are selected by competitive bid.²³⁵

D. *Factors Affecting the RTC's Disposition of Receivership Assets*

Even where the RTC is able to find an acquirer to engage in a purchase and assumption transaction, a substantial portion of a failed association's assets often remain under RTC control. These may include: (1) marketable loans, servicing rights and securities; (2) high risk or otherwise undesirable, but performing loans; (3) real estate owned by the failed association; and (4) nonperforming loans, including loans in foreclosure.²³⁶ The RTC's objective is to dispose of these assets as quickly as possible. The RTC does this by a variety of methods, such as public and private auctions,²³⁷ securitization of assets for sale in the secondary mortgage market, bulk sales,²³⁸ and individual sales of assets. Asset sale transactions have proceeded slowly for a variety of reasons, including (1) lack of incentives, such as loss protection and yield maintenance guarantees on loans,²³⁹ (2) increased risk to the purchaser because of the RTC's limited representations and warranties,²⁴⁰ (3) cumbersome

235. *Id.*

236. Proposed Strategic Plan, *supra* note 200, at 46577; Final Strategic Plan, *supra* note 200, at 41-44.

237. There have been some auctions but the largest, an international satellite auction of \$300 million of distressed shopping centers, office buildings and hotels, scheduled for the Fall of 1990 was postponed twice and finally was canceled. *Who Will Prosper From the Savings and Loan Bailout?*, 7 Real Est. Fin. Update, Jan. 1991, at 3.

238. Proposed Strategic Plan, *supra* note 200, at 46577; Final Strategic Plan, *supra* note 200, at 43-44. In June, 1990, the RTC announced a plan to begin a program of bulk sales of assets, including both real estate and other assets. This program is intended to attract institutional investors. See Zax & Ledig, *The RTC and the Real Estate Industry*, REAL EST. FIN. J. 8, 11 (Fall 1990); RTC, Memorandum (July 9, 1990) (Recommendation by Oversight Board President to Members of Oversight Board Regarding Bulk Sales of the RTC Assets).

239. See Zax & Ledig, *supra* note 238, at 9; see also Proposed Strategic Plan, *supra* note 200, at 46576; Final Strategic Plan, *supra* note 200, at 37.

240. See Statement of Policy on Representations and Warranties Offered in Mortgaging and Servicing Rights Sales, 55 Fed. Reg. 23493 (1990); see also RTC, Memorandum (June 5, 1990) (Policy Recommendation for Representations and Warranties Offered in Mortgage

procedures for appraising and marketing real estate, typified by the RTC's affordable housing disposition program, (4) limited financing options, and (5) lack of a robust real estate market due to the recession.²⁴¹ In recent months, the RTC has attempted, as discussed below, to address some of these problems.

1. Lack of Loss Protection and Yield Maintenance Guarantees; Limited Representations and Warranties

FIRREA does not permit the RTC to offer the loss protection and yield maintenance guarantees that the FDIC and the FSLIC were able to offer in the past to attract purchasers for the assets of failed thrifts.²⁴² The best inducement the RTC has been able to offer purchasers is to permit them to return unsatisfactory assets within twelve to eighteen months following the acquisition of such assets.²⁴³ In addition, while the RTC originally refused to negotiate the substantive terms of its transaction documents, it has relaxed the restrictions on the types of representations and warranties that it will give in the sale of mortgage loans and mortgage loan servicing rights.²⁴⁴ The new policy, which became effective May 1, 1990, is designed to help the RTC sell loans and servicing rights more quickly and for a higher price. Under the new policy, the RTC extends to all purchasers the same representations and warranties it once provided only to government sponsored purchasers such as the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. In mortgage loan sales, the RTC will offer representations regarding its authority to sell the loans, as well as representations regarding the characteristics of individual loans. In both loan sales and mortgage servicing sales, certain representations, relating primarily to loan documentation and quality, provide for a five-year "discovery period."²⁴⁵ During this five-year period, the RTC will compensate buyers for actual losses incurred over the life of the loan resulting from breaches of these represen-

Loan and Servicing Sales).

241. *The RTC's National Monuments*, Wall St. J., Feb. 13, 1991, at A12, col. 1.

242. See Zax & Ledig, *supra* note 238 at 9.

243. See *id.* at 9.

244. Statement of Policy on Representations and Warranties Offered in Mortgage Loan and Servicing Rights Sales, 55 Fed. Reg. 23493 (1990). See RTC, Memorandum (June 5, 1990) (Policy Recommendation for Representations and Warranties Offered in Mortgage Loan and Servicing Sales).

245. 55 Fed. Reg. at 23493.

tations.²⁴⁶ In addition, the RTC in its corporate capacity will furnish credit protection to buyers for certain losses on Veteran's Administration loans.²⁴⁷ Given potential purchasers' reluctance to accept representations from RTC conservatorships or receiverships, the RTC either will provide the representations directly in its corporate capacity or will guarantee, in its corporate capacity, the representations and warranties made by RTC conservatorships or receiverships.²⁴⁸ With respect to a breach by the RTC of a representation or warranty made in connection with the sale of a mortgage loan, the RTC, at its option, will repurchase the defective mortgage loan, substitute a similar loan for the defective loan, or indemnify the holder of the defective loan for any loss resulting upon foreclosure of such loan.²⁴⁹ In connection with the breach of a representation or warranty with respect to the sale of mortgage servicing rights, the RTC will not repurchase any defective loan, but will compensate the purchaser for actual losses incurred on such loan.²⁵⁰

2. Determination of Price Based Upon Appraisal

Section 501(b)(12)(D)(ii) of FIRREA charges the RTC with establishing "an appraisal or other valuation method for determining the market value of real property" in distressed areas.²⁵¹ The Act further requires that real estate be sold for at least 95% of market value in distressed areas.²⁵² The sale price of any property that is

246. *Id.*

247. *Id.*

248. *Id.*

249. See RTC, Memorandum (June 5, 1990) (Policy Recommendation for Representations and Warranties Offered in Mortgage Loan and Servicing Sales). On June 8, 1990, the RTC published a policy statement in the Federal Register based upon the June 5, 1990 recommendations. 55 Fed. Reg. 23493. This policy statement is significantly less detailed than the June 5, 1990 recommendations as to the remedies available for breaches of representations and warranties made or guaranteed by the RTC.

250. See RTC, Memorandum (June 5, 1990) (Policy Recommendation for Representations and Warranties Offered in Mortgage Loan and Servicing Sales); see also *supra* note 249.

251. FIRREA, *supra* note 2, at § 501(b)(12)(D)(ii) (codified at 12 U.S.C.A. § 1441a(b)(12)(D)(ii) (West Cum. Supp. 1990)). "Market value" is defined as "the most probable price which a property should bring in a competitive and open market if—(I) all conditions requisite to a fair sale are present, (II) the buyer and seller are acting prudently and are knowledgeable, and (III) the price is not affected by any undue stimulus." 12 U.S.C.A. § 1441a(b)(12)(E)(iv) (West Cum. Supp. 1990).

252. *Id.* § 1441a(b)(12)(E)(i). The Act designates six states as distressed areas: Arkansas, Colorado, Louisiana, New Mexico, Oklahoma and Texas. *Id.* § 1441a(b)(12)(E)(iii). The RTC apparently may sell real estate in non-distressed areas for no less than 90% of market

not sold within six months of active marketing (or four months in the case of single family properties) may be reduced if no offers have been received or if the offers received are significantly lower than the appraised value of the property. Market value is generally based upon an appraisal provided by an independent appraiser, adjusted for holding and other verifiable costs.²⁵³ If it is necessary to reduce the asking price for a particular property, the RTC may rely upon broker's opinions as to market conditions as a justification for price reductions.

3. Affordable Housing Disposition Program

The Act requires the RTC to dispose of its acquired property as expeditiously as possible without causing any dislocation in the local market.²⁵⁴ Yet, the Act places restrictions on the RTC's ability to dispose of certain single-family and multifamily properties to ensure that these properties remain available to low and middle income families or individuals.

The Act requires that a single-family residence appraised for \$67,500 or less must be offered for sale for ninety days exclusively to individuals who intend to occupy the dwelling as their principal residence and whose adjusted income is less than 115% of the area's median income or to public agencies or nonprofit organizations that agree to rent the property only to lower-income families. If there are no purchasers who satisfy these criteria, the property can be actively marketed to the public.²⁵⁵

value. Zax, *Doing Deals with the RTC*, URBAN LAND 7, 8 (July 1990).

253. In reviewing the savings and loan crisis, Congress determined that one of the abuses that had to be avoided in the future was the manner in which real estate appraisals were handled in the past. Congress felt that associations made real estate loans in the past based, in part, upon inflated appraisals. Saft, *The Basics of FIRREA and the Resolution Trust Corporation*, REAL EST. FIN. J. 48, 54-55 (Winter 1991). FIRREA mandates the establishment of uniform appraisal standards by all federal regulatory agencies. 12 U.S.C.A. §§ 3339-42 (West 1989). FIRREA also requires states to develop licensing requirements so that all licensed appraisers are properly qualified. *Id.* § 3338. Commencing July 1, 1991, appraisals for all federally regulated real estate transactions must be prepared by individuals who are properly licensed or certified. *Id.* § 3348(a)(1). The term "federally regulated real estate transaction" generally includes any real estate transaction (including sales, purchases, leases, financings, or other investments in real property) in which the RTC, any insured depository institution, or any federal regulatory agency is involved. *Id.* §§ 3350(4), 3350 (5); see also Saft, *supra*, at 55.

254. 12 U.S.C.A. § 1441a(b)(3)(C)(ii) (West Cum. Supp. 1990); see also Saft, *supra* note 253, at 55.

255. 12 U.S.C.A. §§ 1441a(c)(2), 1441a(c)(9)(D) (West Cum. Supp. 1990); see also Saft, *supra* note 253, at 55. The term "lower-income families" means families and individuals

The sale of certain lower value multifamily property also is subject to restrictions. Such multifamily property must first be offered for sale for ninety days to purchasers who will accept a deed restriction that no less than 20% of the units be made available for occupancy by very-low income families and another 15% of the units be made available for occupancy for lower-income families.²⁵⁶

In order to qualify to purchase one or more eligible single-family properties, a public agency or nonprofit organization must certify to the RTC that it will make the property available for occupancy by, and thereafter maintain it as affordable housing for, lower-income families, or make the property available for purchase by lower-income families. To accomplish this, the RTC's conveyancing deeds for applicable single-family properties include this restriction (with the proviso that such properties may subsequently be sold to lower-income families without further restriction). In addition, the RTC is required to include a restriction in the conveyancing deeds for applicable multifamily properties that such properties be maintained as available and affordable housing for low-income families for the remainder of their useful lives.²⁵⁷

The RTC's failure to comply with these requirements may not be used by any person to attack or defeat title once it is conveyed by the RTC.²⁵⁸ However, the low income occupancy requirements may be judicially enforced by affected low-income families. It is unclear what the result would be if a purchaser of an eligible low-income property took title without the required deed restriction. Although the purchaser is seemingly protected from losing title to the property, the low-income occupancy provisions may nevertheless be specifically enforceable against any purchaser who acquires title to the property free of the restriction. In addition, it is possible that such provisions may be enforced against subsequent purchasers who acquire title without notice of the low-income status of the property.

whose incomes do not exceed 80% of area median income, as defined under 42 U.S.C. § 1437a(b)(2) and as determined by the Secretary of HUD, with adjustment for family size. 12 U.S.C.A. § 1441a(c)(9)(G) (West Cum. Supp. 1990).

256. 12 U.S.C.A. §§ 1441a(c)(2)(B), 1441a(c)(2)(D) (West Cum. Supp. 1990). The term "very low-income families" means families and individuals whose incomes do not exceed 50% of area median income, as defined under 42 U.S.C. § 1437a(b)(2) and as determined by the Secretary of HUD, with adjustment for family size. *Id.* § 1441a(c)(9).

257. See Affordable Housing Disposition Program, 55 Fed. Reg. 35564, 35571, 35573 (1990) (to be codified at 12 C.F.R. §§ 1609.7(a)(5) and (b)(9)).

258. 12 U.S.C.A. § 1441a(c)(11)(A) (West Cum. Supp. 1990).

4. Financing Options Offered by the RTC

The RTC Oversight Board's original strategic plan provided for only limited financing to purchasers of real estate assets held by the RTC.²⁵⁹ On March 8, 1990, the Board adopted policies which allow the RTC to loan purchasers up to 85% of the applicable purchase price provided that the RTC determines that it will be able to sell such loans on a nonrecourse basis within a reasonable period of time through private placements, public offerings or loan securitization programs and that the present value return to the RTC on such properties with RTC financing exceeds any existing cash offers.²⁶⁰ In determining the net present value return for which it has provided financing, the RTC considers the purchase price, the value of any concessionary financing terms, the value of any avoided holding costs, any enhanced asset value resulting from the purchaser's financial capabilities and any enhanced liquidity resulting from conversion of a real estate asset into a performing asset.²⁶¹

In order to provide such financing, the RTC must receive a first lien on the real estate asset, which lien may not be subordinated.²⁶² If private sector lenders are unwilling to finance a proposed purchase on terms as favorable to the purchaser as those offered by the RTC, the RTC will view its loan as a subsidy that it will expect to recover through a higher purchase price.²⁶³ The aggregate principal amount of such financing loans that the RTC currently may hold at any one time under this program is \$7 billion.²⁶⁴

This \$7 billion of financing includes financing for bulk sales of certain RTC assets.²⁶⁵ In bulk sales, the RTC assembles pools of receivership assets, including commercial loans (both performing and nonperforming), commercial properties, multifamily residential loans (both performing and nonperforming) and multifamily residential properties.²⁶⁶ Once the pool of assets is assembled, the

259. See Proposed Strategic Plan, *supra* note 200, at 46578; Final Strategic Plan, *supra* note 200, at 45.

260. RTC, Policy Statement No. 13, at 2 (Mar. 8, 1990).

261. *Id.*

262. RTC, How to Buy Real Estate 3 (Apr. 1990) (RTC Pamphlet).

263. Proposed Strategic Plan, *supra* note 200, at 46578; Final Strategic Plan, *supra* note 200, at 45.

264. Morse, *New RTC Policy Offers Liberalized Seller Financing*, Corridor Real Est. J., Feb. 1, 1991, at A-13, A-15.

265. *Id.*

266. *Id.*

RTC contracts with independent firms to review the assets included in the pool and to establish an Estimated Recovery Value ("ERV") for the pool.²⁶⁷ The RTC then offers the pool for sale through competitive bidding, at a modest discount based on the reduction in the RTC's sales costs per unit. The highest bidder is permitted to conduct its own limited asset review. Any RTC financing provided in connection with the sale of the pool will be repaid through collections from the asset pool over the term of the loan. Once the RTC loan is repaid and the ERV on the asset pool is achieved, the RTC will continue to receive a portion of any additional recoveries on the pool, even though the owner of those assets will receive a majority of such recoveries.²⁶⁸

V. CONCLUSION

The primary objectives of the Act include the establishment of a new federal regulator, the OTS, for savings associations and the creation of the RTC to resolve failed savings associations. The receivership/conservatorship process described in this article results from the interpretation by the OTS and the RTC of the powers granted them by FIRREA. The process will change as the OTS and the RTC develop new or different policies and procedures to implement those powers and to respond to new issues that arise in the receivership/conservatorship process. Consequently, the ultimate effect of the Act on the savings association industry remains to be determined.

The receivership/conservatorship process begins with a decision by the OTS to place a failed savings association into receivership or conservatorship. Ideally, the process ends when the RTC arranges for the purchase of most of the assets, and the assumption of the deposit and certain other liabilities, of the failed savings association by another depository institution or its holding company. Many times, however, the RTC is unable to find a buyer for a failed savings association and, whether or not it finds such a buyer, the RTC generally will be left with the assets that are not saleable. Thus, in addition to the large number of failed associations that it is charged with resolving, the RTC must find an efficient and effec-

267. RTC, Presentation (July 24, 1990) (Large Bulk Sales).

268. *Id.* at 5.

tive method for disposing of the sizeable volume of assets it has accumulated from failed associations. Until it does, the RTC's task will not have been accomplished.