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## The Sixth Circuit Grants the FDIC Priority over Direct Shareholder Suits Against Officers and Directors of Banks in FDIC Receivership. *Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990), modified, 933 F.2d 400 (1991)

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THE SIXTH CIRCUIT GRANTS THE FDIC PRIORITY OVER DIRECT  
SHAREHOLDER SUITS AGAINST OFFICERS AND DIRECTORS  
OF BANKS IN FDIC RECEIVERSHIP

*Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990),  
*modified*, 933 F.2d 400 (1991)

In *Gaff v. FDIC*,<sup>1</sup> the Sixth Circuit established a uniform federal common-law rule that grants the Federal Deposit Insurance Company (FDIC) absolute priority over direct<sup>2</sup> shareholder claims against officers and directors of banks in FDIC receivership.<sup>3</sup>

Joel Gaff brought a direct shareholder action<sup>4</sup> against the officers and directors of the National Bank of Traverse City in Michigan state court.<sup>5</sup> Later, the bank became insolvent<sup>6</sup> and the FDIC took control as receiver.<sup>7</sup> After liquidating a portion of the bank's liabilities with its insurance fund,<sup>8</sup> the FDIC sold the insolvent bank's assets and unliquidated liabilities to a solvent national bank in a purchase and assumption agreement.<sup>9</sup> Under the agreement, the FDIC "bought back" the assets that the purchasing bank did not desire.<sup>10</sup> These assets included the insolvent bank's claim against its former officers and directors.<sup>11</sup> The FDIC maintained the claim through its corporate capacity for collection.<sup>12</sup> Thus, the FDIC obtained its claim against the bank's former officers and direc-

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1. 919 F.2d 384 (6th Cir. 1990), *modified*, 933 F.2d 400 (1991).

2. A direct shareholder claim is an "[a]ction by a stockholder to enforce a right of action existing in him as contrasted with a derivative suit in behalf of a corporation." BLACK'S LAW DICTIONARY 459 (6th ed. 1990). See generally DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS § 2:01 (1987) (distinguishing derivative from direct shareholder actions). See *infra* note 31.

3. 919 F.2d at 387, 396.

4. Gaff also brought a derivative suit, which the FDIC moved to dismiss. *Id.* at 386. The district court stayed Gaff's derivative claim until the FDIC resolved its claim. *Id.*

5. *Id.*

6. *Id.* at 385. The bank became insolvent due to alleged fraud and mismanagement by the bank's officers and directors. *Id.* See *infra* note 25 and accompanying text.

7. 919 F.2d at 385. The FDIC took over the bank as receiver pursuant to 12 U.S.C. § 1821(c) (1988), amended by 12 U.S.C.A. § 1821(c) (West 1989).

8. 919 F.2d at 385. The FDIC insurance fund paid out approximately \$47 million to depositors. *Id.* See *infra* notes 27-30 and accompanying text for a discussion of FDIC options in receivership.

9. 919 F.2d at 385. See *infra* note 29 and accompanying text regarding purchase and assumption agreements.

10. 919 F.2d at 386.

11. *Id.*

12. *Id.*

tors after Gaff had filed his claim.<sup>13</sup>

The FDIC, acting in its corporate capacity, intervened in Gaff's suit and removed the case to federal court.<sup>14</sup> The District Court for the Western District of Michigan dismissed Gaff's pendant claim with prejudice.<sup>15</sup> On appeal (*Gaff I*), the Sixth Circuit held that the district court should not have exercised its pendant jurisdiction and, consequently, should remand Gaff's direct claim to state court.<sup>16</sup> On reconsideration (*Gaff II*), the Sixth Circuit remanded Gaff's direct claim to the district court, holding that the district court should exercise its discretion to maintain pendant jurisdiction.<sup>17</sup> On remand, the district court dismissed Gaff's direct claims due to an insufficient showing of direct injury.<sup>18</sup> On Gaff's second appeal (*Gaff III*), the Sixth Circuit assumed that Gaff had suffered a direct injury, but nevertheless vacated and remanded the case,<sup>19</sup> holding that the FDIC has an absolute priority over direct shareholder claims against officers and directors of banks in FDIC receivership.<sup>20</sup>

Congress created the FDIC in 1933<sup>21</sup> in response to the virtual col-

13. *Id.*

14. *Id.* The FDIC had reached a settlement (contingent on this case) with the former officers and directors that would have depleted most of the bank's insurance coverage. *Id.* See *infra* note 81.

15. 919 F.2d at 386.

16. 814 F.2d 311, 319 (6th Cir. 1987).

17. 828 F.2d 1145, 1150 (6th Cir. 1987).

18. 919 F.2d at 386.

19. *Id.* at 397. The Sixth Circuit instructed the district court to stay Gaff's direct claim until the court resolved the FDIC claim against the officers and directors. The district court was then to remand Gaff's claim to state court for adjudication on the merits. *Id.* This mirrored the district court's previous ruling on Gaff's derivative claim. See *supra* note 4.

20. 919 F.2d at 387, 397. The Sixth Circuit's holding renders irrelevant the determination of whether a shareholder's claim is direct or derivative. In the Sixth Circuit, the FDIC now has absolute priority over both direct and derivative shareholder claims against officers and directors of banks in FDIC receivership. See *supra* notes 4 and 19.

21. Congress created the FDIC in the Banking Act of 1933, Pub. L. No. 73-66, § 8(12B), 48 Stat. 162. The FDIC was

established during the economic and banking crisis of the early 1930s when thousands of banks were forced to close their doors. It was created to restore and reinforce public confidence in the banking system, to promote safe and sound banking practices and the stability of banks, to obviate runs on banks by depositors, to safeguard deposits through deposit insurance, and to prevent the recurrence of the events of 1931 and 1932 which sapped banking strength and climaxed in the "bank holiday" of March 1933.

John C. Platt & Ricki S. Darby, *A Primer on the Special Rights and Immunities of the Federal Deposit Insurance Corporation*, 11 OKLA. CITY U. L. REV. 683, 683 n.1 (citing *FDIC v. Allen*, 584 F. Supp. 386, 397 (E.D. Tenn. 1984)). Congress created the federal deposit insurance program to "end the destruction of the medium of exchange and to preserve the existing structure of the in-

lapse of the national banking system during the Great Depression.<sup>22</sup> More banks failed in the FDIC's first decade than in the four subsequent decades combined.<sup>23</sup> However, in the second half of the 1980s, the number of bank failures steadily increased, setting post-depression records.<sup>24</sup> Nonfeasance, misfeasance, and malfeasance of bank officers and directors greatly contributed to this increase.<sup>25</sup>

Congress organized the FDIC so that its main component is the deposit insurance program, which insures bank depositors against potential losses from bank failures.<sup>26</sup> When the FDIC takes receivership of an insolvent bank, it has two basic options to cover depositors' insured accounts.<sup>27</sup> It may perform a straight liquidation<sup>28</sup> and/or execute a purchase and assumption agreement.<sup>29</sup> Both options provide the FDIC

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dependent unit banks." STAFF OF THE SUBCOMM. ON FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND INSURANCE OF THE HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 101ST CONG., 2D SESS., A BRIEFING PAPER ON DEPOSIT INSURANCE: HOW IT ORIGINATED AND HOW IT WORKS 34, 35 (Comm. Print 1990) [hereinafter BRIEFING PAPER].

22. Platt & Darby, *supra* note 21, at 683. See also BRIEFING PAPER, *supra* note 21; KENNETH SPONG, BANKING REGULATION: ITS PURPOSES, IMPLEMENTATION AND EFFECTS 13-25 (1985).

23. Platt & Darby, *supra* note 21, at 683-84. In the first decade 490 banks failed. Only 317 failed during the next four decades. *Id.* See also FDIC, 1989 ANNUAL REPORT 100-01 (1990) [hereinafter FDIC ANNUAL REPORT]. The House Subcommittee on Financial Institutions concluded that 495 banks failed from 1934 to 1943. BRIEFING PAPER, *supra* note 21, at 48. Of those, 283 were insured. PHILIP F. BARTHOLOMEW, CONGRESSIONAL BUDGET OFFICE, REFORMING FEDERAL DEPOSIT INSURANCE 142-43 (1990).

24. Platt & Darby, *supra* note 21, at 684. In the 1970s only 81 banks failed. In the mid-1980s the number of bank failures rose dramatically. FDIC ANNUAL REPORT, *supra* note 23, at 101 (1984: 79; 1985: 120; 1986: 138; 1987: 184; 1988: 200; 1989: 206).

25. Carol Galbraith & Joseph Seidel, *FDIC vs. Imprudent Banking Officials: The Enforcement Apparatus*, 104 BANKING L.J. 92 (1987). Some analysts consider fraud the most important risk depositories face. BARTHOLOMEW, *supra* note 23, at 70 (citing George J. Benston & George G. Kaufman, *Risk and Failures in Banking: Overview, History and Evaluation*, in DEREGULATING FINANCIAL SERVICES: PUBLIC POLICY IN FLUX 52 (G. Kaufman & R. Kormendi eds., 1986)). Insider abuse or criminal fraud was present in approximately one quarter of 1989's bank failures. FDIC ANNUAL REPORT, *supra* note 23, at 16.

26. *FDIC v. Jenkins*, 888 F.2d 1537, 1539 (11th Cir. 1989); 12 U.S.C. § 1821(a) (1988).

27. *Gunther v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). These basic options are not mutually exclusive. Platt & Darby, *supra* note 21, at 687 n.16. The FDIC combined its two options in *Gaff*. 919 F.2d at 385. See *supra* notes 8-9 and accompanying text. See also BARTHOLOMEW, *supra* note 23, at 63-67.

28. *Guntner*, 674 F.2d at 865. The FDIC liquidates a bank by making payments that cover depositors' accounts up to the statutory insurance limit. The sale of the bank's assets funds the liquidation with the FDIC's insurance fund making up any shortfall. This method has several disadvantages: first, a bank's closing negatively affects public confidence in the banking system; second, liquidation delays the paying of insured amounts to depositors; and third, the possibility exists that depositors could lose uninsured funds. *Id.*

29. *Id.* In a purchase and assumption agreement, the FDIC, in its capacity as receiver, sells the

the requisite standing to sue the insolvent bank's former officers and directors.<sup>30</sup> Accordingly, the FDIC frequently will have claims that compete with those of the bank's shareholders.<sup>31</sup>

Congress debated whether to give the FDIC priority over direct shareholder claims when it discussed and passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).<sup>32</sup> The Senate Judiciary Committee rejected an amendment to FIRREA<sup>33</sup> that expressly would have given the FDIC absolute priority over shareholders in claims against bank officers and directors.<sup>34</sup> The joint conference report, which called the provision "fundamentally unsound as a policy matter," indicated several concerns with the provision.<sup>35</sup> According to the report, the Senate amendment would have hindered fraud enforcement efforts,<sup>36</sup> been unjust to innocent plaintiffs,<sup>37</sup> and conflicted with

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assets and liabilities to a solvent bank, which then reopens the failed bank. The FDIC receiver next "buys back" any doubtful assets that the solvent bank does not desire, such as the original bank's cause of action against former bank officers and directors. The FDIC, in its corporate capacity, then attempts to collect these doubtful assets. In this preferred option the depositors get continued service, the FDIC incurs fewer expenses, and the purchasing bank receives a new low-risk investment. *Id.*; Platt & Darby, *supra* note 21, at 692. Therefore, the FDIC usually employs this option. *Id.* In 1988, the FDIC used purchase and assumption agreements in 82% of its bank-failure transactions; in 1989, the FDIC employed such agreements in 84% of bank-failure transactions. FDIC ANNUAL REPORT, *supra* note 23, at 12.

30. Galbraith & Seidel, *supra* note 25, at 95.

31. The circuit courts agree that the FDIC has absolute priority over shareholders' derivative claims against officers and directors of banks in FDIC receivership. Because of this, the courts dedicate most of their opinions to the distinction between derivative and direct actions. *See, e.g., In re Sunrise Sec. Litig.*, 916 F.2d 874 (3d Cir. 1990); *Howard v. Haddad*, 916 F.2d 167, 168-69 (4th Cir. 1990); *FDIC v. Jenkins*, 888 F.2d 1537, 1541-42 (11th Cir. 1989). When a corporation fails to pursue a cause of action it possesses, a shareholder may bring a derivative suit on the corporation's behalf. *DEMOTT*, *supra* note 2. In a derivative lawsuit every shareholder's injury is identical and proportionate to her ownership interest. *Id.* When the FDIC obtains a bank's cause of action against officers and directors and decides to pursue the claim, a derivative shareholder's claim is subsumed within the FDIC's claim. 916 F.2d at 889. *See supra* note 2. In *Gaff*, the Sixth Circuit addressed whether the FDIC has an absolute priority over a shareholder's *direct* claims.

32. Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183; *FDIC v. Jenkins*, 888 F.2d 1537, 1538 n.1 (11th Cir. 1989). FIRREA constitutes the most important restructuring of the federal deposit insurance system in over 50 years. It increased the scope of both the FDIC's receivership authority and enforcement powers. Daniel B. Gail & Joseph J. Norton, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: Dealing with the Regulators*, 107 BANKING L.J. 196 (1990).

33. S. 774, 101st Cong., 1st Sess. § 214(o) (1989).

34. 135 CONG. REC. H4989 (daily ed. Aug. 3, 1989) (statement of Rep. Staggers).

35. *Id.* at H4985 (statement of Rep. Glickman).

36. *Id.* at H4989 (statement of Rep. Staggers). Private parties would stop bringing suits against officers and directors whose fraud was responsible for the bank's failure. These private actions are necessary for effective enforcement, since the Department of Justice does not have the resources to

the underlying purposes of the savings and loan legislation.<sup>38</sup>

The circuit courts disagree as to how much weight they should give this legislative history. In *FDIC v. Jenkins*,<sup>39</sup> the Eleventh Circuit refused to create a uniform federal common-law rule that would give the FDIC absolute priority over direct shareholder claims.<sup>40</sup> The FDIC had moved to stay several shareholders' direct claims against an insolvent bank's officers and directors until the FDIC resolved its competing claim.<sup>41</sup> The district court granted the FDIC's motion for summary judgment and the shareholders appealed.<sup>42</sup> The Eleventh Circuit, however, after analyzing the case law, did not find any authority to support the FDIC's argument that it had absolute priority over other claims.<sup>43</sup> The court relied on the Supreme Court's decision in *Langley v. FDIC*,<sup>44</sup> and refused to "engraft an equitable exception upon the plain terms of the statute."<sup>45</sup> Instead, the court examined the FDIC's need for a uniform federal common-law rule by applying the three criteria the Supreme Court developed in *United States v. Kimbell Foods, Inc.*<sup>46</sup>

In *Kimbell Foods*, the Supreme Court held that before a court establishes a uniform federal common-law rule it must consider: (1) whether the federal program by its nature must have national uniformity; (2) whether application of individual state's laws would interfere with the federal program's specific objectives; and (3) the degree to which application of a uniform federal common-law rule would disrupt commercial

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enforce the law on its own. *Id.* The SEC reported that an absolute FDIC priority would "have a serious adverse impact on enforcement efforts" and actually would encourage fraud. *Id.* at H4985 (statement of Rep. Glickman).

37. *Id.* at H4989 (statement of Rep. Staggers). It is unfair to allow the FDIC to intervene and stay a private plaintiff's case at any stage of litigation, especially if the private plaintiff has invested time and resources in the case. *Id.*

38. *Id.* There is no evidence that FDIC priority would benefit taxpayers, especially with the increased chance of fraud by officers and directors. *Id.* See *supra* note 36. Such a provision would be a disincentive to investors since they would have no recourse against fraudulent inducement to invest. 135 CONG. REC. H4989 (daily ed. Aug. 3, 1989) (statement of Rep. Staggers). Moreover, the FDIC netted only five million dollars in 1987 from bank-related defendants. *Id.* See also *FDIC v. Jenkins*, 888 F.2d 1537, 1540 n.5 (11th Cir. 1989).

39. 888 F.2d 1537 (11th Cir. 1989).

40. *Id.* at 1544-46.

41. *Id.* at 1538-39.

42. *Id.*

43. *Id.* at 1543. Several cases had addressed the issue, but the court found none dispositive.

*Id.*

44. 484 U.S. 86 (1987).

45. 888 F.2d at 1544.

46. 440 U.S. 715 (1979).

relationships grounded in state law.<sup>47</sup> In addition, the Court stated that courts developing a uniform federal common law should effectuate congressional policy by filling in statutory gaps that Congress has left.<sup>48</sup>

The *Jenkins* court held that the FDIC's structure did not meet the *Kimbell Foods* criteria.<sup>49</sup> It found that the Federal Deposit Insurance Act did not compel the FDIC to pursue claims against third parties to restore the deposit insurance fund.<sup>50</sup> Moreover, the court concluded that the FDIC did not have sufficient need to establish a uniform common-law rule.<sup>51</sup> In addition, the Eleventh Circuit held that the Act's legislative history clearly showed that Congress did not intend to grant the FDIC such a priority.<sup>52</sup>

In *Howard v. Haddad*,<sup>53</sup> the Fourth Circuit expressly followed *Jenkins*.<sup>54</sup> A shareholder sued an insolvent bank's directors for securities fraud, alleging that the directors misrepresented the bank's condition to secure a stock purchase.<sup>55</sup> The FDIC attempted to dismiss the shareholder's claim.<sup>56</sup> The court held that because the action arose from the stock's sale to the individual shareholder, and not from diminution of the stock's value, the claim was direct, not derivative.<sup>57</sup> Expressly adopting the *Jenkins* holding, the Fourth Circuit concluded that the FDIC does not have an absolute priority over direct shareholder claims against directors of banks in FDIC receivership.<sup>58</sup>

In *In Re Sunrise Securities Litigation*,<sup>59</sup> the Third Circuit approved of *Jenkins* and its reliance on legislative history.<sup>60</sup> Depositors sued the of-

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47. *Id.* at 728-29.

48. *Id.* at 738.

49. 888 F.2d at 1546. *But see* Gaff v. FDIC, 919 F.2d 384 (6th Cir. 1990), *modified*, 933 F.2d 400 (1991) (FDIC meets the requirements of *Kimbell Foods*).

50. 888 F.2d at 1546.

51. *Id.* The court stated that while "it would be convenient to the FDIC to have an arsenal of priorities . . . to maximize recovery to the insurance fund, . . . this does not require that courts must grant . . . these tools. . . . Any rule fashioned must have its base on the goal of effectuating congressional policy." *Id.*

52. The *Jenkins* court relied heavily on legislative history when it decided not to grant the FDIC an absolute priority. *Id.* at 1538 n.1. *See supra* notes 33-38 and accompanying text.

53. 916 F.2d 167 (4th Cir. 1990).

54. *Id.* at 170.

55. *Id.* at 168-69.

56. *Id.* at 169.

57. *Id.* at 171.

58. *Id.* at 170.

59. 916 F.2d 874 (3d Cir. 1990).

60. *Id.* at 876.

officers, directors, attorneys, and auditors of a failed savings and loan, alleging, *inter alia*, violation of the Racketeer Influenced and Corrupt Organizations Act.<sup>61</sup> The court held that the claims were derivative, and therefore, *Jenkins* did not apply.<sup>62</sup> However, the court stated in dicta that the FDIC would not have absolute priority over direct claims.<sup>63</sup> A district court in the Third Circuit subsequently has followed the *Sunrise Litigation* dicta and denied the Resolution Trust Corporation's (RTC) motion to stay a direct shareholder action.<sup>64</sup>

In *Gaff v. FDIC*,<sup>65</sup> the Sixth Circuit split from the Third, Fourth, and Eleventh Circuits by granting the FDIC absolute priority over direct shareholder claims against officers and directors of banks in FDIC receivership.<sup>66</sup> The court expressly rejected the *Jenkins* interpretation of the relevant legislative history.<sup>67</sup> The Sixth Circuit noted the legislative history's silence as to why Congress excluded the proposal to give the FDIC priority.<sup>68</sup> The *Gaff* court interpreted this silence as indicating that Congress intended the federal courts to establish the law of priorities on a case-by-case basis.<sup>69</sup>

The *Gaff* court first determined that federal law governed FDIC priorities.<sup>70</sup> Next, the court examined the FDIC's need for a uniform federal common-law rule of priorities and concluded that the FDIC met the

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61. *Id.*; 18 U.S.C. §§ 1961-1968 (1988).

62. 916 F.2d at 889. See *supra* notes 2, 31 and accompanying text.

63. 916 F.2d at 889. The court stated that, "[t]o the extent . . . depositors assert individual, nonderivative fraud claims against the officers, directors, auditors, or attorneys of insolvent financial institutions, they may proceed on equal footing with FDIC." *Id.*

64. *In re Atlantic Fin. Fed. Sec. Litig.*, No. 89-0645, 1991 U.S. Dist. LEXIS 7439 (E.D. Pa. May 28, 1991). Shareholders sued the officers and directors of a bank in RTC receivership for negligent misrepresentation. The RTC moved to stay the shareholders' suit until the court resolved the RTC claim against the officers and directors. The district court held the shareholders' claim to be direct. The court then followed the *Sunrise Litigation* dicta and denied the stay. *Id.* This case is relevant in that the RTC and the FDIC have the same powers and rights. *Id.* at \*4 n.2; 12 U.S.C.A. § 1441a(b)(4) (West Supp. 1991).

65. 919 F.2d 384 (6th Cir. 1990), *modified*, 933 F.2d 400 (1991).

66. *Id.* at 396.

67. *Id.* See *supra* notes 33-38, 52 and accompanying text.

68. 919 F.2d at 396.

69. *Id.* However, Representative Harley Staggers, Jr. (D-W.Va.) charged that the FDIC "seriously misrepresented" congressional intent and claimed that the FDIC was "trying to rewrite the legislative history of FIRREA." *Congressman Says FDIC Misled Court; Staggers Blasts FDIC Over Priority Issue*, 54 BNA'S BANKING REPORT 446 (Mar. 12, 1990). Rep. Staggers "blasted" the FDIC, saying that Congress had debated and specifically rejected an FDIC priority. *Id.* (citing a letter from Rep. Staggers to FDIC Director L. William Seidman).

70. 919 F.2d at 388. No one disputes federal law's application. *United States v. Kimbell Foods*, 440 U.S. 715, 726 (1979); *FDIC v. Jenkins*, 888 F.2d 1537, 1545 n.14 (11th Cir. 1989).



three *Kimbell Foods* criteria.<sup>71</sup> First, the bank insurance system requires national uniformity.<sup>72</sup> The FDIC is unprepared to apply various state priority laws to its transactions. The agency is under severe time constraints when it closes a bank and the various state-law defenses would hinder a rapid closing between liquidation and purchase and assumption.<sup>73</sup> Second, the bank insurance program could not meet its objective of providing a strong national bank system that promotes public confidence if individual state laws could interfere with the FDIC's priority over shareholder claims.<sup>74</sup> Third, a uniform federal rule would not disrupt commercial expectations based on individual state laws because the possibility of bank failure does not affect those expectations significantly.<sup>75</sup> Bank shareholders' expectations revolve around the deposits received and loans made, not around any future rights they may have to sue directors and officers for mismanagement and fraud.<sup>76</sup>

After determining the need for a uniform federal priority rule under *Kimbell Foods*, the *Gaff* court addressed that rule's substantive requirements.<sup>77</sup> The court analogized the FDIC's need for priorities to the existing priorities found in both corporate dissolution law<sup>78</sup> and bankruptcy law.<sup>79</sup> In both, equitable subordination places the shareholders last in the priority line.<sup>80</sup> The *Gaff* court incorporated this concept and established a federal common-law rule that grants the FDIC absolute priority over shareholders' direct claims against officers and directors of banks in FDIC receivership.<sup>81</sup>

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Rather, the issue is whether the federal law should be *uniform* in nature, excluding state law, or whether it should incorporate state commercial law. 919 F.2d at 387.

71. 919 F.2d at 388-90. *But see Jenkins*, 888 F.2d at 1545-46 (FDIC does not meet the *Kimbell Foods* requirements). *See supra* notes 49-51 and accompanying text.

72. 919 F.2d at 388-89.

73. *Id.* at 389.

74. *Id.*

75. *Id.* at 389-90.

76. *Id.*

77. *Id.* at 391-96.

78. *Id.* at 392-93.

79. *Id.* at 393-94.

80. *Id.*

81. *Id.* at 394. The Sixth Circuit has modified the *Gaff* decision and now allows district courts to lift an FDIC stay on direct shareholder actions to decide their legal sufficiency when doing so will facilitate settlement. *Gaff v. FDIC*, 933 F.2d 400 (6th Cir. 1991). This will benefit the FDIC. Without such a modification, officers and directors may be unwilling to settle with the FDIC since they would not know whether to reserve a portion of the insurance to cover possible shareholder claims. *FDIC Priority Over Shareholder Claims Revised*, 56 BNA'S BANKING REPORT 1210 (June 24, 1991). *See supra* note 14.

The Sixth Circuit's creation of an absolute FDIC priority is incorrect for several reasons. First, the court usurped Congress' function. Courts may create uniform federal common law to fill legislative gaps, while effectuating legislative intent.<sup>82</sup> In the situation that the *Gaff* court addressed, however, no gap existed because Congress had expressly rejected such a priority.<sup>83</sup> Furthermore, a court should not eliminate lightly an individual's right to redress in court. Such elimination should require legislative action or a court ruling based on clear legislative intent. Neither existed here.

Second, the analogies the Sixth Circuit drew between the FDIC's need for priorities and corporate dissolution and bankruptcy law are weak.<sup>84</sup> The analogies stand only if the shareholders' claim is derivative. First, unlike the risk of an enterprise failing, a direct shareholder suit against the directors and officers implies a wrong done to the shareholder individually, not as member of a group.<sup>85</sup> Second, in a direct action the shareholder sues bank-related third parties (the bank's directors and officers), rather than the bank, in an attempt to secure a place in line for distribution of the failed bank's director and officer insurance proceeds or the directors' and officers' personal assets.<sup>86</sup> Due to the inherent differences between direct and derivative shareholder claims, the analogies crumble when shareholders have direct claims against bank-related third parties, as was the case in *Gaff*.

Finally, the *Gaff* decision promotes counterproductive policies. Shareholders and depositors will no longer pursue direct legal claims against corrupt officers and directors, since they know the FDIC's interference will render both their time and resources meaningless.<sup>87</sup> Consequently, this will hinder the prosecution of fraudulent behavior by officers and directors, which will, in turn, increase the likelihood of such fraud and the cost to taxpayers.<sup>88</sup>

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82. See *supra* text accompanying note 48.

83. See *supra* notes 33-34 and accompanying text.

84. The court stated, "[a]s a general rule of equity, stockholders take last in the estate of a bankrupt corporation. Because, unlike creditors and depositors, stockholders stand to gain a share of corporate profits, stockholders should take the primary risk of the enterprise failing." 919 F.2d at 392 (emphasis added). See *supra* text accompanying notes 78-80.

85. *In re Atlantic Fin. Fed. Sec. Litig.*, No. 89-0645, 1991 U.S. Dist. LEXIS 7439, at \*5-6 (E.D. Pa. May 28, 1991).

86. *Jenkins*, 888 F.2d at 1545.

87. See *supra* note 37 and accompanying text.

88. See *supra* notes 36, 38 and accompanying text.

The *Gaff* decision is an unfortunate judicial expansion of FDIC powers at the expense of individuals' rights to pursue legal claims. Courts should not sacrifice shareholders' rights to pursue direct claims against third parties to achieve FDIC policies unless Congress explicitly so mandates.

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