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Hope W. Olsson

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The RTC Intrusion into Bankruptcy: A Crisis Solution at the Expense of Equity?

HOPE W. OLSSON†

INTRODUCTION

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)[1] granted broad powers to the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) to resolve failed savings institutions. The Act provided for three separate entities with distinct responsibilities for dealing with the extraordinary crisis in this important segment of the financial industry. The Office of Thrift Supervision (OTS) was established as an office within the Department of the Treasury with the primary responsibility for regulating both federal and state-chartered savings associations.[2] Responsibility for insuring savings institutions remained with the FDIC,[3] and the RTC was established as a temporary agency, acting as conservator or receiver to manage and resolve insolvent savings associations.[4]

A significant component of this overall scheme was the granting of a broad range of powers to the RTC for use in its capacity as conservator or receiver. At the time of appointment as conservator or receiver, the agency gains several "superpowers" granted to further the overall goals of insuring a healthy banking system and minimizing the ultimate cost to taxpayers.[5] This Comment examines several of these broad grants of power, specifically as they relate to the scope and the methodologies of bankruptcy proceedings.

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† J.D., 1994, State University of New York at Buffalo School of Law.

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

2. 12 U.S.C. § 1462 (Supp. V 1993).

3. Paul T. Clark et al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW 1013, 1026-27 (1990).

4. 12 U.S.C. § 1441 (Supp. V 1993). This law grants the same powers of conservatorship and receivership to the RTC that are already held by the FDIC, but only for a temporary period. "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." Vicki O. Tucker et al., *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts*, 25 U. RICH. L REV. 1, 1-2 (1990).

5. For a summary of powers granted to the RTC, see Tucker et al., *supra* note 4, at 1-3, 24-30.

The first section explores the extension of RTC powers into areas normally governed by the bankruptcy framework and the implications for creditors of vulnerable organizations. The following section discusses the fact that the RTC has taken an aggressive approach to the implementation of FIRREA, using its powers to the fullest extent in the bankruptcy context. Part Three examines the anti-injunction provision of FIRREA,[6] which the RTC has implemented as a tool to avoid or resolve jurisdictional conflicts with bankruptcy proceedings. Finally, this Comment concludes that the expansion of RTC superpowers at the expense of the reliability of the bankruptcy system risks creating future problems as serious as the crisis FIRREA was implemented to resolve.

I. EXTENSION OF RTC POWERS INTO TRADITIONAL BANKRUPTCY FRAMEWORK

A. *Background*

The thrift industry, comprised of savings and loan associations, has traditionally served as the primary financing vehicle for residential housing.[7] Prior to 1980 thrift institutions were funded primarily through deposit accounts; other investments were generally limited to government securities.[8] The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA)[9] and the Garn-St. Germain Depository Institutions Act of 1982[10] significantly "deregulated" the thrift industry.[11] Savings institutions subsequently entered into more speculative ventures, such as commercial

6. 12 U.S.C. § 1821(j) (Supp. V 1993).

7. Clark et al., *supra* note 3, at 1016.

8. *Id.*

9. Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.) (removing constraints on interest rate ceilings on deposits, raising federal deposit insurance coverage from $40,000 to $100,000, and authorizing investment in open-end investment companies, corporate debt securities and commercial paper).

10. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.) (broadening the range of investment vehicles available to savings institutions and establishing a capital assistance program for augmenting net worth).

11. Clark et al., *supra* note 3, at 1019-21. Prevailing interest rates soared above ceilings set for savings associations, and many depositors shifted funds to money market mutual funds. DIDMCA phased out interest rate ceilings on deposits and raised deposit insurance coverage from $40,000 to $100,000. To remain competitive, institutions were forced to pay higher interest rates on deposits. With loan portfolios invested in long-term, fixed-rate mortgage loans, many savings associations experienced significant losses. Garn-St. Germain authorized savings association investment up to ten percent of assets in commercial and agricultural loans, permitted loans secured by nonresidential real estate to climb to forty percent of assets, and provided a program whereby associations could issue capital notes to the FSLIC to augment net worth. Many states also expanded lending and investment powers for state-chartered savings associations. *Id.*

real estate development.[12]

As the character of the industry changed and regulatory scrutiny diminished, thrift institutions became vulnerable to mismanagement, fraud, insider abuse and the vagaries of volatile interest rates and shifting economic policy.[13] Between 1980 and 1988, over 500 savings associations failed and the Federal Savings and Loan Insurance Corporation (FSLIC) became insolvent.[14] A Congressional attempt to recapitalize the FSLIC in 1987[15] was not successful in preventing a crisis, and by 1988 it was obvious that a comprehensive legislative approach to resolving the problems of the thrift industry would be required.[16] FIRREA was enacted in 1989 for the specific purposes of resolving failures of savings associations, recapitalizing the deposit insurance fund, "re-regulating" the thrift industry, and preventing future insolvencies.[17]

Since the enactment of FIRREA, the courts have found it necessary to more precisely define the RTC's powers as a conservator or receiver[18]—a role most commonly associated with the bankruptcy system. The intrusion of the RTC into the traditional bankruptcy sphere has created a jurisdictional conflict. The relationship between the RTC "superpowers" and the jurisdictional authority of bankruptcy courts has faced continuing challenge in the courts.

B. *Bankruptcy Proceedings*

Bankruptcy cases are essentially proceedings in equity, and traditionally bankruptcy courts have decided all issues in a case, whether legal or equitable. The United States Constitution provides for "uniform Laws on the subject of Bankruptcies throughout the

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12. *Id.* at 1021.

13. *Id.* at 1020-23.

14. *Id.* at 1013-14.

15. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (codified in scattered sections of 12 U.S.C.) (providing for recapitalization of FSLIC, regulatory authorization for capital forbearance for savings associations, and authorization for the purchase of capital certificates and warrants from undercapitalized institutions participating in a capital recovery plan).

16. Clark et al., *supra* note 3, at 1014-15.

17. *Id.* at 1015 (citing H.R. REP. NO. 222, 101st Cong., 1st Sess. 1 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432; S. REP. NO. 19, 101st Cong., 1st Sess. 2 (1989)).

18. 12 U.S.C. § 1821(d)-(e) (Supp. V 1993) specify the powers and duties of the RTC as conservator or receiver. The RTC is authorized to succeed to all rights and obligations of the institution and to take any action it deems in the best interest of the institution, the depositors, or the FDIC, to take such action necessary to put the institution in a sound and solvent condition, or to liquidate the institution and sell its assets. *Id.*

Of particular concern is the power to repudiate burdensome contracts or leases provided in 12 U.S.C. § 1821(e)(1); *see infra* note 94 and accompanying text.

United States,"[19] and the bankruptcy body of law has developed in an evolutionary fashion.[20]

In recent years, Congress has sought to promote reorganization as a preferable alternative to liquidation, in keeping with the underlying goals of bankruptcy policy.[21] The reorganization option has provided an equitable legal alternative for businesses in distress. The bankruptcy forum is a collective approach to negotiation and problem-solving that can benefit vulnerable organizations while providing predictability and confidence in the creditor community. The equitable bankruptcy doctrine has been effective in serving the dual policy objectives of a "fresh start" for the debtor and fair treatment of all creditors.

C. *Jurisdiction Overlap*

Historically, bankruptcy court jurisdiction has been difficult to define. Clearly establishing the limits of bankruptcy jurisdiction has proved an elusive task and has generated considerable litigation.[22] In an attempt to settle bankruptcy jurisdiction issues, the 1978 Bankruptcy Code created a comprehensive grant of jurisdiction to bankruptcy courts.[23] The Bankruptcy Code was amended in 1984,[24] creating a complex system which differentiates between "core" and "non-core" proceedings.[25] Actions which reach the property of an es-

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19. U.S. CONST. art. I, § 8, cl. 4.

20. For a discussion of the historical background and analysis of the development of bankruptcy law, see 1 COLLIER ON BANKRUPTCY ¶¶ 1.02-1.03 (15th ed. 1994).

21. Sandra E. Mayerson, *Reform Bill is Dangerous Electioneering*, NAT'L L.J., Aug. 31, 1992, at 14 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 230 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179).

22. Ronald W. Goss, *Defining The Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. CONTEMP. L. 1-2, 2 n.4 (1992) ("The entire history of bankruptcy law is filled with attempts to define the limits of the bankruptcy court's jurisdiction. Commentary on the scope of preconfirmation jurisdiction . . . became practically a cottage industry during the past decade.")(emphasis omitted); *see also* Philip J. Hendel & Joseph H. Reinhardt, *Attempting to Define the Scope of Bankruptcy Court Jurisdiction: No Miracle Drugs for the Patient*, 92 COM. L.J. 350 (1987); Melodie Freeman-Burney, *Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors*, 22 TULSA L.J. 167, 169-72 (1986).

23. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

24. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

25. 28 U.S.C. § 157(b)(2)-(4) (1988); *see generally* Ronald W. Goss, *Defining The Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. CONTEMP. L. 1, 7-9 (1992). The bankruptcy court is a unit of the district court, with conferral of jurisdiction on the district court entity. The district court may refer bankruptcy cases and proceedings to bankruptcy judges. A bankruptcy judge exercises complete adjudicatory powers over "core" proceedings, but has only the power to submit proposed findings and conclusions to the

tate when the bankruptcy case commences are core proceedings, over which a bankruptcy judge exercises complete adjudicatory powers.[26] With the enactment of this legislation, Congress clearly intended to "provide bankruptcy judges with the necessary tools to handle most matters arising in, under, or related to a bankruptcy case."[27]

The powers granted to the RTC in the 1989 FIRREA legislation have created an overlap with the scope of jurisdiction contemplated under the bankruptcy scheme. The difficulties caused by this overlap arise in the context of business organizations that are subsidiaries or affiliates of failed savings institutions. When such a business organization files a petition for protection in a bankruptcy court, the question becomes whether bankruptcy jurisdiction controls the administration of the case or is superseded by specific grants of power to the RTC.

The unresolved issues are priorities and overall goals. Should the RTC have access to these organizations as thrift assets, or should the business organization be permitted to proceed under Chapter 11 reorganization for the benefit of all creditors? Should the RTC have the power to retrieve assets from Chapter 11 protection? The answers will ultimately have a profound effect on the viability of such businesses, the manner in which they operate, and their relationships with creditors and other business concerns. The answers to these questions may have an even greater impact in future years. The lessons we learn while resolving the savings institution crisis may determine how we structure solutions to future crises.

Central to the jurisdictional problem is section 1821(j)[28] of FIRREA, the "so-called anti-injunction provision."[29] This provision presents a potential conflict with the bankruptcy system's broad grant of jurisdiction under § 1334[30] and the automatic stay provision of

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district court in "non-core," or related, proceedings. Core proceedings include matters such as "traditional bankruptcy proceedings[,] . . . matters concerning administration of the estate, [and] automatic stay litigation"; 28 U.S.C. § 157(b)(2) provides a non-exclusive list of core proceedings. *Id.* at 8-9. Non-core proceedings are "civil proceedings that, in the absence of a bankruptcy petition, could have been brought in a district or state court." *Id.* at 9.

26. 28 U.S.C. § 1334 (1988 & Supp. V 1993). This section provides that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *Id.*

27. Hendel & Reinhardt, *supra* note 22, at 365.

28. 12 U.S.C. § 1821(j) (Supp. V 1993).

29. Karen Donovan, *Courts Prop Up Receivers' Powers Under Bailout Law*, NAT'L L.J., Sept. 28, 1992, at 21.

30. 28 U.S.C. § 1334 (1988). Subsection (a) provides that "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdic-

§ 362.[31] FIRREA's § 1821(j) provides: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver."[32]

An example of this jurisdictional dilemma and the far-reaching impact of the conflict can be found in a 1992 case *In re Landmark Land Co. of Oklahoma.*[33] The principal assets in dispute were resorts owned by subsidiaries of the failed Oak Tree Savings Bank of New Orleans.[34] The failed bank was the sole shareholder in Clock Tower Place Investments, Ltd., which in turn owned the majority stock in five subsidiary Landmark Land companies.[35] Two days after

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tion of all cases under title 11." *Id.*

31. 11 U.S.C. § 362 (1988 & Supp. V 1993), which provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Id. The automatic stay is part of the very foundation of the bankruptcy structure, providing a breathing spell for debtors and an equitable treatment of all creditors. It encourages negotiation and the realistic assessment of the interests of all parties.

32. 12 U.S.C. § 1821(j) (Supp. V 1993).

33. 973 F.2d 283 (4th Cir. 1992).

34. *Id.* at 286.

35. *Id.* The five subsidiary companies were: Landmark Land Company of Oklahoma, Inc., Landmark Land Company of Carolina, Inc., Landmark Land Company of California,

Clock Tower and its subsidiaries asked for protection under Chapter 11 of the Bankruptcy Code, the Office of Thrift Supervision appointed RTC as Oak Tree's receiver and chartered a new institution (New Oak Tree), which purchased RTC's rights to all of Oak Tree's assets.[36]

The District Court of South Carolina determined that subsidiary business enterprises which have sought reorganization under Chapter 11 may be irreparably harmed if the RTC, as liquidating receiver, withdrew them from bankruptcy and sold the assets to the detriment of creditors.[37] The district court noted that it had jurisdiction to prevent interference with debtors' rights to reorganize and to protect the interests of other creditors.[38] Concluding that the proceedings constituted core proceedings under the Bankruptcy Code, the court determined that bankruptcy court "has exclusive jurisdiction and power over the disposition of all of the assets of Plaintiffs' estates, as debtors and debtors in possession."[39]

The ruling specifically concluded that "[t]his Court has a duty to protect Plaintiffs' property for the benefit of all creditors and other parties-in-interest, including the RTC-Conservator, in the reorganization process and to prevent interference with and control over the reorganization process of the Plaintiffs by any other party."[40] The district court issued an injunction, stating that the interests of all parties would be best served if Landmark continued to manage the assets under the supervision of the court, rather than allowing the RTC to exercise exclusive control over the assets.[41] The court's reasoning was that the RTC, in its role as creditor and shareholder, should not be in a position to control liquidation or reorganization to the detriment of other creditors.

The Fourth Circuit Court of Appeals reversed and allowed the

Inc., Landmark Land Company of Florida, Inc., and Landmark Land Company of Louisiana, Inc. *Id.* n.1. The subsidiaries' substantial estates had an aggregate value of approximately one billion dollars ($1,000,000,000) in assets. *In re* Landmark Land Company of Carolina, 1991 U.S. Dist. LEXIS 18145, at *4 (D.S.C. 1991). The major assets were six prime golf resort communities, including Palm Beach Polo and Country Club in Florida, PGA West in La Quinta, California, and Ocean Course at Kiawah Island in South Carolina. The five subsidiary companies developed, owned, and managed the resort residential communities. Along with golf courses, the developments included tennis and polo facilities to which memberships were sold. *Landmark of Oklahoma*, 973 F.2d at 286; Bill Atkinson, *Landmark Loses Control of Golf Courses to RTC*, THE AM. BANKER, Aug. 20, 1992, at 2.

36. *Landmark of Oklahoma*, 973 F.2d at 287.

37. *Landmark of Carolina*, 1991 U.S. Dist. LEXIS 18145, at *5.

38. *Id.* at *7.

39. *Id.*

40. *Id.* at *8.

41. *Id.* at *6. The injunction prevented the RTC from calling a shareholders' meeting to elect new directors to the subsidiaries' boards. *Id.* at *3.

RTC to invoke the statutory anti-injunction provision.[42] Paying minimal attention to the rights of other creditors, the court reasoned that Congress created injunctive protection for the RTC to prevent equitable interference with the exercise of RTC's full powers.[43] In the circuit court's opinion, parties aggrieved by RTC actions would have recourse through the administrative claims process of FIRREA.[44] The difficulty with this approach, however, is that the claims process applies only to receiverships, not to conservatorships.[45] The court "assum[ed] a remedy where none exists," and left "4,500 creditors and 18,000 homeowners and members of Landmark communities . . . [w]ithout access to the judicial system to protect their rights, they [were] left at the mercy of the RTC."[46]

The Fourth Circuit did not distinguish between ownership of the shares of subsidiaries (assets of the failed thrift) and ownership of assets of the subsidiaries (property of the debtors' estates).[47] The district court had specifically addressed this critical issue:

> The RTC-Conservator has no direct ownership of, or interest in, the Plaintiffs' estates. The RTC-Conservator enjoys no greater status as a shareholder than any other shareholder of a debtor in a Chapter 11 proceeding. The RTC-Conservator takes the ownership of the stock . . . as it found it on October 13, 1991; i.e., the common stock of an insolvent entity in Chapter 11 proceedings, the assets and business of which are subject to the jurisdiction of this Court.
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> . . . .
>
> This court is called upon to balance the rights, powers and duties of the OTS and the RTC to take over an insolvent savings and loan institution, and to carry out their respective statutory functions of collecting obligations and liquidating assets. The only asset subject to liquidation by the RTC-Conservator is the common stock of Clock Tower which, in all probability, has no value. These powers are to be balanced with the power of the Bankruptcy Court to oversee the affairs of the debtor, including the payment of creditors of these Plaintiffs in accordance with the provisions of the Bankruptcy Code. Congress has vested exclusive jurisdiction over

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42. *Landmark of Oklahoma*, 973 F.2d at 290.

43. *Id.*

44. *Id.* at 288.

45. 12 U.S.C. § 1821(d)(3)-(11) (Supp. V 1993); *see also* John L. Douglas, *RTC's Receivership Powers Reviewed*, NAT'L L.J., Oct. 12, 1992, at 16, 18 [hereinafter Douglas, *RTC's Powers*] (pointing out that the claims process was established for claims against a failed savings institution, not for claims against a subsidiary that is a business organization in conservatorship status involved in reorganization proceedings. There is no provision for claims against institutions in conservatorship. The administrative claims process provides only for monetary relief in receivership situations where the institution is undergoing liquidation).

46. Douglas, *RTC's Powers*, *supra* note 45, at 21.

47. Alan B. Miller & Jeffrey L. Tanenbaum, *How 4th Circuit Went Beyond MCorp*, NAT'L L.J., Nov. 16, 1992, at 16, 20 [hereinafter Miller & Tanenbaum, *Beyond MCorp*].

the affairs of corporate debtors with the bankruptcy court, not the OTS or the RTC. Similarly, Congress vested exclusive jurisdiction over the affairs of insolvent savings and loan institutions with the OTS and the RTC, not with the Bankruptcy Court.[48]

In contrast, the circuit court relied heavily upon congressional intent and broad policy objectives of the FIRREA legislation, examining the provision in light of its context within the entire legislative package:

> FIRREA is also intended to improve the distinction "between the regulatory and insurance functions of the thrift industry by (1) ensuring a well capitalized and independent thrift insurance fund, (2) enhancing thrift industry regulation by providing for stronger supervisory oversight of the industry under the Department of Treasury; establish stronger capital standards for thrifts; and, enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse."[49]

The power of the Bankruptcy Code's automatic stay provision[50] was diluted as the court found that the RTC was "well within its statutory authority to take control . . . without interference by the bankruptcy or district court."[51] By invoking the anti-injunction provision, the RTC could immediately exercise its ownership rights, taking managerial control of the subsidiaries. The properties remained under the jurisdiction of the bankruptcy court, but the RTC was now in the position of approaching the bankruptcy court as owner and manager. Without managerial control, the RTC would have been recognized by the bankruptcy court as just another creditor that had a claim against the bankruptcy estate. The *Landmark* ruling is thus a "blow to creditors because it enables the RTC to take control of thrift subsidiaries' assets and sell them even if little or nothing is left over for creditors."[52]

II. THE RTC'S AGGRESSIVE STANCE

A. *In General*

As the FIRREA legislation is interpreted through litigation, the RTC is aggressively attempting to establish a line of cases expanding its powers in relation to bankruptcy proceedings. The foundation for this approach is the Supreme Court's 1991 decision in *Board of*

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48. *Landmark of Carolina*, 1991 U.S. Dist. LEXIS 18145, at *7-9.

49. *Landmark of Oklahoma*, 973 F.2d at 286 (quoting H.R. REP. NO. 54, Part 1, 101st Cong., 1st Sess. 291, 307-08 (1989), *reprinted in* 1989 U.S.C.C.A.N. 87, 103-04).

50. 11 U.S.C. § 362 (1988 & Supp. V 1993).

51. *Landmark of Oklahoma*, 973 F.2d at 290.

52. Atkinson, *supra* note 35, at 2.

Governors of the Federal Reserve System v. MCorp Financial.[53] MCorp., a bank holding company, voluntarily sought protection under Chapter 11 and obtained a preliminary injunction preventing the Board of Governors of the Federal Reserve System from prosecuting two pending administrative proceedings.[54] The Supreme Court affirmed the Fifth Circuit in holding that the plain language of § 1818(i)(1)[55] is not superseded by the automatic stay provision of the Bankruptcy Code because § 362(b)(4) "expressly provides that the automatic stay will not reach proceedings to enforce a 'governmental unit's police or regulatory power.' "[56]

There is, however, a crucial difference between *MCorp* and the position adopted in *Landmark*. In *MCorp* the Supreme Court upheld use of the blocking mechanism to preclude early intrusion by the judicial system in the administrative process, whereas in *Landmark* the Fourth Circuit withdrew the judicial system from any review of administrative action by assuming an alternate remedy where none exits.[57]

In the Fourth Circuit the RTC has also established that thrift holding companies cannot shield assets or avoid obligations by filing for Chapter 11 bankruptcy protection. This was accomplished in two related cases, both decided in 1992: *Carlton v. Firstcorp*[58] and *In re Firstcorp.*[59] Firstcorp was a holding company that owned two thrift institutions, the financially sound First Federal Savings and Loan Association of Durham and First Federal Savings and Loan Association of Raleigh, which was in federal receivership due to its insolvency.[60] When the Raleigh institution was placed in receivership, the Office of Thrift Supervision charged Firstcorp with responsibility for the $45 million capital requirement upon which its acquisition of Raleigh in 1985 had been conditioned.[61] In the first of two relevant

53. 112 S. Ct. 459 (1991).

54. *Id.* at 461.

55. 12 U.S.C. § 1818(i)(1) (Supp. V 1993). Although § 1821(j) is the provision generally referred to as FIRREA's anti-injunction provision, § 1818(i)(1) has been employed in a similar fashion, providing: "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order." *Id.*

56. *MCorp*, 112 S. Ct. at 464. 11 U.S.C. § 362(b)(4) provides: "The filing of a petition . . . does not operate as a stay—. . . (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *See supra* note 31 for the text of subsection (a)(1).

57. Douglas, *RTC's Powers, supra* note 45, at 19.

58. 967 F.2d 942 (4th Cir. 1992).

59. 973 F.2d 243 (4th Cir. 1992).

60. *Carlton*, 967 F.2d at 943.

61. *Id.*; *see also RTC Wins in Three Bankruptcy Disputes*, 3 RESOLUTION TR. REP., Aug. 24, 1992, at 10.

Firstcorp decisions the Fourth Circuit affirmed a district court's finding that FIRREA's § 1818(i)(1) superseded the Bankruptcy Code's automatic stay provision.[62] Building upon the foundation laid down by the Supreme Court in *MCorp*,[63] the court expanded the application of § 1818(i)(1) in determining that the bankruptcy automatic stay applies to neither a temporary cease and desist order nor an OTS enforcement action requiring Firstcorp to transfer assets of the bankruptcy estate.[64] The court stated that these FIRREA provisions "present a unified regulatory scheme which under *MCorp* is free from the intrusion of bankruptcy's automatic stay."[65]

In the latter of the two Firstcorp cases, the Fourth Circuit found that a holding company cannot escape its obligation under a capital maintenance agreement by filing for Chapter 11 bankruptcy.[66] The holding company, Firstcorp, was required to "forgive intercompany indebtedness owed [by the subsidiary] and to 'downstream' a valuable asset to its failing subsidiary"[67]—i.e., assets had to be used to satisfy capital maintenance obligations of a subsidiary in receivership before reorganization.[68]

In particular, the circuit court construed § 365(o) of the Bankruptcy Code.[69] This section provides:

> In a case under chapter 11 of this title, the trustee shall be deemed to have assumed, . . . and shall immediately cure any deficit under, any commitment by the debtor to . . . the Director of the Office of Thrift Supervision . . . or its predecessors . . . to maintain the capital of an insured depository institution . . . .[70]

The court examined the question of congressional intent, stating that "Congress sought 'to prevent institution-affiliated parties from using bankruptcy to evade commitments to maintain capital reserve requirements of a Federally insured depository institution,' "[71] and it specifically stated that the "assumption and obligation to cure occur

62. *Carlton*, 967 F.2d at 945-46.

63. 112 S. Ct. 459 (1991).

64. *Carlton*, 967 F.2d at 945-46.

65. *Id.* at 946.

66. *Firstcorp*, 973 F.2d at 244.

67. Miller & Tanenbaum, *Beyond MCorp, supra* note 47, at 16.

68. Alan B. Miller & Jeffrey L. Tanenbaum, *After MCorp, Decisions Favor Regulators*, NAT'L L.J., Nov. 9, 1992, at 18, 22 [hereinafter Miller & Tanenbaum, *After MCorp*].

69. 11 U.S.C. § 365(o) (Supp. IV 1992) (enacted as part of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Crime Control Act of 1990, Pub. L. No. 101-647, § 2522(c), 104 Stat. 4789, 4866-67). The legislation was a response to the savings-and-loan crisis. *See* 136 CONG. REC. S17,601 (daily ed. Oct. 27, 1990) (statement of Sen. Biden).

70. 11 U.S.C. § 365(o) (Supp. IV 1992).

71. *Firstcorp*, 973 F.2d at 246 (quoting H.R. REP. NO. 681(I), 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6585).

by operation of law, without review by or approval of the bankruptcy court."[72]

The court concluded that the obligation to cure capital reserve deficiencies is a prerequisite to reorganization under Chapter 11.[73] If an institution is unable to "satisfy its capital obligations, then § 365(o) denies it the opportunity to reorganize under Chapter 11, leaving liquidation under Chapter 7 as its only option."[74]

In contrast, the Second Circuit has refused to allow RTC superpowers to intrude into the bankruptcy process; the power of the bankruptcy stay over RTC powers was upheld in *In re Colonial Realty Co.*[75] In a consolidated action where the RTC attempted to recover alleged fraudulent transfers from debtors' estates, the court affirmed a district court finding that the automatic stay of bankruptcy overrides FIRREA's anti-injunction provision.[76] The court noted the fact that "this case raises issues of first impression concerning the interaction of certain provisions of the Federal Deposit Insurance Act, and the Bankruptcy Code."[77] The FDIC argued that the automatic stay had been partially repealed or limited by Congress in the Crime Control Act of 1990,[78] and the court examined this construction:

> It is also presumed that Congress " 'legislates with knowledge of former related statutes,' and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction". . . . Congress gave careful consideration to the coordination of the banking law amendments in that statute with the existing provisions of the Bankruptcy Code.
>
> Given this careful attention to the harmonization of the new banking provisions with the existing Bankruptcy Code, it becomes especially implausible to conclude that a quite significant modification of the bankruptcy automatic stay was enacted by implication.[79]

Quoting the district court opinion regarding the bankruptcy automatic stay, the Second Circuit stated that the stay did not constitute a right of a trustee, but a " 'congressionally-mandated restraint that springs into existence upon the filing of a bankruptcy

72. *Id.* at 247.
73. *Id.* at 248.
74. *Id.*
75. 980 F.2d 125 (2d Cir. 1992).
76. *Id.* at 127, 129-30.
77. *Id.* at 130 (citations omitted).
78. Pub. L. No. 101-647, 104 Stat. 4789 (codified in scattered sections of 11 U.S.C. and 12 U.S.C.).
79. *Colonial Realty*, 980 F.2d at 132-33 (citations omitted).

case.' "[80] Finally, in affirming the district court finding, the circuit court concluded:

> The stay imposed by § 362(a) is automatically "applicable to all entities" without any need for the intervention of any court or ruling. Rather, the statutory plan requires a court order for *relief* from the automatically imposed stay. We accordingly conclude that the § 1821(j) ban upon "*court* . . . action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver" does not inhibit the operation of the automatic *statutory* stay imposed by § 362(a).[81]

The District Court of Massachusetts has also been successful in preventing the FDIC from circumventing a bankruptcy stay. *In re Lane*[82] was a case in which the court ruled that the FDIC does not have power to foreclose on an asset while a bankruptcy stay is in effect. The FDIC, as a creditor, sought relief from the stay, conversion from Chapter 11 to Chapter 7, and foreclosure of the debtor's property, invoking the anti-injunction provision § 1821(j) as a bar to staying foreclosure sales.[83] The court stated that "[s]uch an extraordinary interpretation of the manifested intent of Congress cannot be sustained."[84]

In summary, while it appears that the Fourth Circuit has adopted a policy of expansion of RTC powers, the Second Circuit and some district courts have taken a more conservative approach to extending RTC powers into what is traditionally the arena of bankruptcy proceedings. It is still an open question as to whether the courts will continue an expansive trend in RTC superpowers as the agency pursues the enormous task of resolving the nation's failed thrifts.

B. *Priority Inconsistency*

In a Chapter 11 proceeding, the position and priority of creditor claims are clearly specified by statute.[85] Claims for capital mainte-

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80. *Id.* at 129 (quoting Matter of Colonial Realty Co., 134 B.R. 1017, 1021 (Bankr. D. Conn. 1991)).

81. *Id.* at 137 (emphasis in the original) (citation omitted).

82. 136 B.R. 319 (Bankr. D. Mass. 1992).

83. *Id.* at 319-20.

84. *Id.* at 321.

85. 11 U.S.C. § 507 (1988 & Supp. V 1993) provides in pertinent part (prior to the 1990 addition of an eighth priority):

> (a) The following expenses and claims have priority in the following order:
>
> (1) First, administrative expenses . . . and any fees and charges assessed against the estate . . . .
>
> (2) Second, unsecured claims allowed under § 502(f) . . . .
>
> (3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay . . . .

nance obligations[86] were assigned eighth, and lowest, priority by the Thrift and Bank Fraud Act in 1990.[87] However, the same legislation calls for immediate cure of capital maintenance deficits.[88] In the statutory bankruptcy priority scheme, claims for the cure of capital maintenance obligations assume a lower priority than creditors' claims, whereas the addition of § 365(o) requires an "immediate" cure, creating an apparent inconsistency within Title 11.

Acknowledging this inconsistency, the Fourth Circuit in *Firstcorp* speculated on the intersection between § 365(o) and § 507 regarding the appropriate priority to give claims for capital mainte-

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> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan . . . .
>
> (5) Fifth, allowed unsecured claims of persons . . . engaged in the production or raising of grain . . . or engaged as a United States fisherman . . . .
>
> (6) Sixth, allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.
>
> (7) Seventh, allowed unsecured claims of governmental units . . . .

Id.; see infra note 88 and accompanying text.

86. FIRREA provides for ongoing evaluation of the adequacy of an insured depository institution's capital structure, and failure to maintain an adequate capital structure results in restrictions and/or limitations on an association's activities. 12 U.S.C. § 1464(s) (Supp. V 1993) (minimum capital requirements); *id.* 1464(t) (Supp. V 1993) (capital standards); *id.* § 1464(t)(6) (Supp. V 1993) (consequences of failing to comply with capital standards). Capital maintenance is regulated by 12 C.F.R. § 325 (1992).

87. Crime Control Act of 1990, Pub. L. No. 101-647, § 2522(d), 104 Stat. 4789, 4867 (codified as amended at 11 U.S.C. § 507(a)(8) (Supp. V 1993) provides:

> (8) Eighth, allowed unsecured claims based upon any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution.

Id.

88. 11 U.S.C. § 365(o) (Supp. V 1993), providing in full:

> In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors, to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

Id.

nance breaches that occur during reorganization, but declined to resolve the issue.[89] However, it is clear under *Firstcorp* that the Fourth Circuit considers breaches of capital maintenance requirements existing at the time of Chapter 11 filing to be governed by § 365(o) and to require immediate cure.

C. *The Creditors' Position*

Unlike the Bankruptcy Code, FIRREA gives the RTC wide discretion in determining creditor claims. In addition, the strength of RTC's power to repudiate contracts makes it less than clear just what position a creditor holds in a resolution scheme.

Chapter 11 imposes on management additional fiduciary obligations to creditors, and the interests of shareholders become subordinated to the interests of creditors.[90] Chapter 11 equity policy includes the notion that senior claimants have rights to assets that are superior to shareholders' rights.[91] There is no equivalent provision or accommodation for creditors' rights in FIRREA. With the implementation of the Federal Deposit Insurance Reform and Taxpayer Protection Act of 1991 (FDICIA),[92] the FDIC and the RTC are required to adopt the least costly of possible resolution methods for a failed thrift.[93]

RTC is empowered to disaffirm or repudiate any burdensome contracts or leases entered into before appointment of a conservator or receiver,[94] and this authority is among the most controversial provisions because of its apparent application to non-executory contracts.[95] The receiver/conservator is "given broad discretion in decid-

89. *Firstcorp*, 973 F.2d at 248 n.4.

90. Martin J. Bienenstock, *Once in Bankruptcy, Whose Company Is It Anyway?*, *in* 2 CURRENT DEVEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 1991, at 667, 679 (PLI COM. L. & PRACTICE COURSE HANDBOOK SERIES NO. 573, 1991); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985) (observing that "bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors").

91. Bienenstock, *supra* note 90, at 684.

92. Pub. L. No. 102-242, 105 Stat. 2236 (codified in scattered sections of 12 U.S.C.).

93. 12 U.S.C. § 1823(c)(4) (Supp. V 1993); *see* Stephen K. Huber, *The Federal Deposit Insurance Corporation Improvement Act of 1991*, 109 BANKING L.J. 300, 302-03 (1992). Previously, the RTC could adopt any choice that was less costly than liquidation. *Id.*

94. 12 U.S.C. § 1821(e)(1) (Supp. V 1993); *see* Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Regulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1103, 1136 (1990).

95. Tucker et al., *supra* note 4, at 31:

> 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 as-

ing whether to repudiate a given contract."[96] If RTC has the power to repudiate non-executory contracts, as it apparently does, organizations will naturally have concerns about doing business with a troubled institution,[97] which could further inhibit an institution's ability to maintain solvency.

An even bigger question looms on the horizon regarding the capability of business organizations to operate profitably, should they happen to be a subsidiary or affiliate of a vulnerable savings institution. Reliable and permanent creditor relationships are essential to businesses in all industries. The repudiation threat is a worrisome problem for creditors of failed institutions and creditors of subsidiaries of institutions in precarious condition. Unfortunately, there has not yet been enough litigation to firmly establish the boundaries of the RTC repudiation powers.[98]

As a receiver, RTC has authority to determine claims[99] and express authority to disallow "any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver."[100] After a creditor's claim is filed, the RTC is required to approve or disapprove the claim within 180 days.[101] If denied, the claimant may pursue an administrative appeal or file a suit in federal court based on the claim.[102]

Liability for repudiation of contracts is limited to actual direct compensatory damages measured as of the date of the appointment of the conservator or receiver, and liability is expressly excluded for punitive or exemplary damages, lost profits or opportunity, or pain and suffering.[103]

FIRREA also codified the common law *D'Oench Duhme* doctrine[104] established by the Supreme Court in 1942,[105] which estops a

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sociation has outstanding obligations, notwithstanding completed performance by other parties to the contract.

Id. (citing Gibson v. RTC, 750 F. Supp. 1565, 1568 (S.D. Fla. 1990)).

96. Elizabeth C. Yen, *Banking Decisions: Contract Repudiation by the FDIC Following a Bank Closing*, 109 BANKING L.J. 373, 375 (1992).

97. Tucker et al., *supra* note 4, at 31-32.

98. Mark Simpson, *Scaling Back FIRREA: Federal Judges Begin to Place Limits on RTC's Conservatorship/Receivership Powers*, 25 GA. L. REV. 1375, 1393 (1991); *see generally* John L. Douglas, *Repudiation Powers Are at Issue Again*, NAT'L L.J., Jan. 11, 1993, at 20 (discussing RTC's power to repudiate secured obligations).

99. 12 U.S.C. § 1821(d)(3) (Supp. V 1993).

100. *Id.* § 1821(d)(5)(D). There is no statutory clarification of the standard of proof required, and the RTC has made disallowances subjectively. This approach is consistent with the overall grant of powers to the RTC, which includes a high degree of discretion in policy implementation.

101. *Id.* § 1821(d)(5)(A)(i).

102. *Id.* § 1821(d)(6)(A); *see* Simpson, *supra* note 98, at 1403-05.

103. 12 U.S.C. § 1821(e)(3)(A), (B); *see generally* Gail & Norton, *supra* note 94, at 1136.

104. 12 U.S.C. § 1823(e).

debtor from asserting defenses based on side or secret agreements. The statute establishes four requirements for a valid agreement: that it be (i) in writing, (ii) executed by the financial institution and the obligor contemporaneously with the acquisition of the asset by the financial institution, (iii) approved by the institution's board of directors or loan committee, and (iv) continuously a part of the institution's records.[106] The FIRREA anti-injunction provision[107] completes this comprehensive statutory scheme.[108]

The RTC as conservator or receiver succeeds by operation of law to all rights, titles, powers and privileges of the institution and its stockholders, members, account holders, depositors, officers and directors with respect to the assets of the institution.[109] Unlike the equitable approach employed in bankruptcy proceedings, judicial rulings such as *Landmark* could create significant problems for other creditors who will have to wait their turn behind the RTC. *Landmark* would seem to indicate that the Fourth Circuit has adopted the position that the RTC can take control of the assets of thrift subsidiaries and liquidate them even if nothing is left for creditors. However, the Second Circuit decision in *Colonial Realty* calls into question the validity of using FIRREA's anti-injunction provision as a tool to extract assets from the bankruptcy realm.

The *Landmark* decision should be worrisome to creditors of all thrift subsidiaries. Creditors of business concerns ordinarily assume they are engaged in normal business relationships that are governed by commercial laws and remedies,[110] and they could perceive a higher level of risk in doing business with an organization where their interests may not be protected by the traditional equity principles of bankruptcy policies.

Perceived increase in risk could result in creditors' unwillingness to deal with thrift subsidiary organizations or an adjustment to the terms of the relationship to reflect such risk. By giving inequitable preferential treatment to the RTC, courts may exacerbate the problem. This approach deals only with the "symptoms of the disease" by trying to reduce the costs associated with resolving the thrift crisis. It may have a modest budgetary impact but does not attack the fundamental problems which cause thrift failures.[111] In the long run, it may be even more dangerous to succumb to the

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105. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

106. 12 U.S.C. § 1821(d) (Supp. V 1993).

107. *Id.* § 1821(j).

108. Tucker et al., *supra* note 4, at 11.

109. 12 U.S.C. § 1821(d)(2)(A) (Supp. V 1993).

110. Douglas, *RTC's Powers*, *supra* note 45, at 19.

111. John L. Douglas, *Depositor Preference May Harm Banks*, NAT'L L.J., Aug. 23, 1993, at 18, 22.

temptation to fashion crisis solutions by dealing with symptoms instead of underlying problems.

III. ANTI-INJUNCTION PROVISIONS

Equitable relief in the form of injunctions have traditionally been employed to correct jurisdictional or procedural inadequacies in the judicial system. An analogous jurisdictional conflict exists between the Bankruptcy Code and the anti-injunction provision of the Internal Revenue Code.[112] The Eighth Circuit created a bankruptcy exception to the federal tax anti-injunction statute, reasoning that bankruptcy judges hold equity power over the federal tax system.[113] The court found that bankruptcy proceedings take precedence over general tax policy "inasmuch as Congress has evidenced an intention to enact a complete scheme governing bankruptcy which overrides the general policy represented by the 'anti-injunction' act."[114] Although the Eighth Circuit position has been both followed[115] and rejected,[116] it stands as a bankruptcy equity exception to the federal tax anti-injunction provision.[117] A similar bankruptcy equity exception to RTC's anti-injunction powers would do much to build confidence in the creditor community and assure the best chance of successful reorganization for business subsidiaries of savings institutions.

When injunctive relief is blocked, as in the FIRREA anti-injunction provision,[118] an effective means of dealing with jurisdictional deficiencies is lost.[119] In order to justify the necessity of anti-injunction provisions, "something special" must require an additional measure of protection.[120] Given the scope of RTC superpowers,

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112. I.R.C. § 7421(a) (1982) ("Except as provided . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.").

113. Bostwick v. United States, 521 F.2d 741 (8th Cir. 1975); *see generally* J. Wendell Bayles, *Jurisdiction in Bankruptcy to Contest Tax Liability and Arrest Collection Efforts*, 26 WASHBURN L.J. 423, 427-29 (1987).

114. *Bostwick*, 521 F.2d at 744.

115. *See In re* O.H. Lewis Co., 40 Bankr. 531 (Bankr. D.N.H. 1984); *In re* Datoin Sys., 37 Bankr. 690 (Bankr. N.D. Ill. 1983); *In re* Jan Co., 30 Bankr. 831 (Bankr. D.D.C. 1983); *In re* H & R Ice Co., 24 Bankr. 28 (Bankr. W.D. Mo. 1982); *In re* Major Dynamics, Inc., 14 Bankr. 969 (Bankr. S.D. Cal. 1981).

116. *See In re* Becker's Motor Transp., 632 F.2d 242 (Bankr. 3d Cir. 1980), *cert. denied,* 450 U.S. 916 (1981); *In re* Campbell Enters., 66 Bankr. 200 (Bankr. D.N.J. 1986).

117. *See* Bayles, *supra* note 113, at 427 nn.30 & 31.

118. 12 U.S.C. § 1821(j) (Supp. V 1993).

119. *See* Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1022 (1965).

120. *Cf.* Tax Injunction Act, ch. 646, 62 Stat. 932 (1948) (codified at 28 U.S.C. § 1341

there is some question as to whether FIRREA represents the extraordinary circumstances that demand the blocking of equitable injunctive relief. It is not at all clear that "something special" in the nature of overriding policy goals requires this additional measure of protection.

In addition to the explicit anti-injunction provision at section 1821(j), section 1818(i)(1) of FIRREA also operates as an anti-injunction provision.[121] The Supreme Court based its decision in *MCorp* on Section 1818(i)(1), holding that this specific provision was not superseded by the more general provision governing bankruptcy proceedings.[122]

The Third Circuit has ruled that district courts do not have the power to enjoin activity by the RTC where the Corporation is colorably acting within its enumerated powers. In *Gross v. Bell Savings Bank*,[123] the Gross brothers were former officers of Bell Savings Bank in Pennsylvania, for which RTC was appointed the receiver.[124] The district court determined that it had the power to consider injunctive relief requiring the RTC to release nearly $500,000 of pension and profit-sharing assets in its control.[125] The Third Circuit found that a federal court does not have power to enjoin RTC's behavior in its role as receiver or conservator;[126] however, federal courts do have the ability to restrain the RTC where the Corporation is acting clearly outside its statutory powers, stating "[o]f course, the RTC's power is not limitless."[127] The court determined that because Congress had crafted a damages remedy for those who allege harm from RTC's exercise of power,[128] "the district court does not have the ability to enjoin activity by the RTC where the Corporation is colorably acting within its enumerated powers."[129]

The Third Circuit has also denied injunctive relief when the RTC acted in accordance with its statutory powers, even where the RTC's action was in violation of another statutory scheme. In *Rosa v. RTC*,[130] beneficiaries of an ERISA pension plan brought an action

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(1988)) (establishing a federal policy of noninterference in matters of state taxation); Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289, 293 (arguing that the anti-injunction act protects the basic structure of federal/state relations).

121. 12 U.S.C. § 1818(i)(1) (Supp. V 1993); *see supra* note 55.

122. 112 S. Ct. 459, 465 (1991).

123. 974 F.2d 403 (3d Cir. 1992).

124. *Id.* at 404.

125. *Id.* at 404, 406.

126. *Id.* at 408.

127. *Id.* at 407.

128. *Id.* at 408.

129. *Id.*

130. 938 F.2d 383 (3d Cir. 1991).

against the RTC as receiver/conservator challenging lack of contributions and wrongful termination of an ERISA plan on a retroactive basis without 100% vesting, in violation of the plan and ERISA.[131] The district court had enjoined termination of the plan and ordered payment of contributions due and owing.[132] While construing § 1821(j) broadly in *Rosa*, the Third Circuit discussed the possibility of narrower constructions:

> In reaching our conclusion that some portions of the district court's order were prohibited by § 1821(j), we emphasize that the effect of that section in this case is solely to prevent a particular remedy in the interest of allowing RTC as receiver or conservator promptly to perform its important functions in dealing with the savings and loan crisis. It does not deprive plaintiffs, if wronged, of any other remedy that would not "restrain or affect" the exercise of the receiver's or conservator's powers or functions. We naturally express no opinion as to the alleged wrongfulness of RTC's conduct.
>
> Moreover, we do not mean to be understood as saying that an order restraining or affecting RTC's exercise of its powers as receiver or conservator could never issue. Indeed, courts have recognized exceptions to provisions worded even more broadly than § 1821(j).[133]

Not all courts have construed the anti-injunction provision as broadly as the Third Circuit. In *Cummings Properties Management v. FDIC*, the District Court of Massachusetts successfully enjoined the FDIC from removing an automatic teller machine from a lessor's premises after determining that the lessor was likely to prevail on the merits and would be harmed irreparably if the machine was removed.[134] In its opinion, the court expressed the view that "Section 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts."[135] The court was troubled by the implications of a position that would allow the FDIC to pursue its mission without any accountability to the judicial system.[136]

The Southern District of New York has ruled that FIRREA does not give the RTC power to repudiate statutory tenancies and that FIRREA does not preempt New York's rent control law or rent stabilization law (i.e., the RTC cannot evict tenants from rent-con-

131. *Id.* at 390. The plaintiffs claimed the termination violated 29 U.S.C. §§ 1053 & 1082 (1988). *Id.*

132. *Id.*

133. *Id.* at 399-400.

134. 786 F. Supp. 144 (D. Mass. 1992), *vacated and appeal dismissed per parties' settlement*, 1992 WL 366909 (1st Cir., Sept. 1, 1992).

135. *Id.* at 146.

136. John L. Douglas, *FDIC's Powers Face Growing Challenge*, NAT'L L.J., July 5, 1993, at 18 [hereinafter Douglas, *FDIC's Powers*].

trolled apartments).[137] However, the RTC distinguishes this decision because RTC powers were construed under FIRREA's repudiation provisions, rather than the anti-injunction provision.[138]

The limits of FIRREA's anti-injunction provision will be defined by the courts. In the past, courts have granted injunctive relief in the face of similar anti-injunction statutes and have refused to allow agencies to run roughshod over the rights of aggrieved parties.[139] It is necessary to ascertain under what circumstances injunctive relief will become available. The agency is not authorized to act unlawfully. When it acts contrary to law and an adequate remedy is not available through the administrative claims process, the courts should intervene.[140]

CONCLUSION

Since the enactment of FIRREA in 1989 there has been a pattern of steady expansion of RTC superpowers. The savings and loan crisis which triggered the enactment of FIRREA is perceived to be a threat to the banking system, and it is generally acknowledged that the RTC must have enough power to deal effectively with the crisis. However, it is also critical to preserve the bankruptcy system as a robust and reliable method of dealing with ongoing business affairs. These two components of the economy do not operate independently and when they intersect, serious consideration must be given to the long-term consequences of specific crisis solutions that challenge jurisdictional boundaries.

With the complex and often redundant FIRREA, Congress has enacted "a regulatory structure for thrift and banking institutions that reacts to the immediate problems of the failed thrift industry and its federal insurance fund, rather than a more functional, efficient, and far-sighted structure."[141] As time goes on, the FDIC will continue to exercise and expand its powers, restructuring financial institutions and disposing of assets. The "regulator" has assumed the characteristics and functions of a business enterprise and is making operational, as well as regulatory, decisions in a significant segment of the banking industry. "FIRREA has transformed the FDIC and its related adjuncts into what will be the largest real estate corporation in the world, with vast powers to restructure troubled financial institutions and to dispose of their assets."[142]

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137. RTC v. Diamond, 801 F. Supp. 1152, 1160 & n.3, 1164 (S.D.N.Y. 1992).
138. Donovan, *supra* note 29, at 29.
139. Douglas, *FDIC's Powers*, *supra* note 136, at 21.
140. *Id.*
141. Gail & Norton, *supra* note 94, at 1224.
142. *Id.* at 1226.

The Fourth Circuit has extended RTC receivership powers over failed thrifts to their non-bank affiliates in Chapter 11.[143] At least in this circuit, the trend appears to be a body of law that is evolving at the expense of Chapter 11 creditors. The basic purpose of FIRREA, to protect the capital base of depository institutions, is overtaking the basic goals of bankruptcy—equitable distribution of debtors' assets to satisfy creditors' claims with an ultimate objective of rehabilitating debtors' businesses.[144] The expansion of RTC superpowers at the expense of the reliability of the bankruptcy system could create future problems as serious as the crisis currently being resolved through FIRREA.

The bankruptcy system is a vital part of the national economy, and there is some degree of risk in inhibiting its efficiency and effectiveness in the process of resolving a temporary crisis in the thrift industry. The orderly administration of bankruptcies has played an essential role in the evolution of our market economy. Bankruptcy is a proven framework within which the economy deals equitably and predictably with financial crises of individual entities, and Chapter 11 is a powerful tool for the orderly reorganization of businesses experiencing financial difficulties. The bankruptcy process should not suffer erosion of its powers in the struggle to deal with a systemic financial crisis in one segment of the economy. Effective institutional changes and remedies are unquestionably needed to resolve the thrift industry crisis. However, interference with an effective bankruptcy system designed to resolve individual crises is not necessarily a part of the ultimate solution to systemic deficiencies within the banking system.

We must look beyond the current crisis when fashioning solutions, even in the face of extraordinary problems. What might be the next crisis to precipitate an intrusion into the bankruptcy sphere? The autonomy and integrity of the bankruptcy system must be preserved, and the legislature and courts should be cautious in subordinating its authority to crises of the moment. It is at least questionable whether there is long-term benefit in undermining the bankruptcy system to save costs in treating the symptoms of failures in a sector of the banking industry.

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143. Miller & Tanenbaum, *Beyond MCorp, supra* note 47, at 20.

144. Miller & Tanenbaum, *After MCorp, supra* note 68, at 18.