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ADMINISTRATIVE LAW—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION: EXCLUSIVE ADJUDICATION OF CREDITOR CLAIMS IN RECEIVERSHIP PROCEEDINGS

Sidney M. Jubien

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INTRODUCTION

Many of the nation's savings and loan associations, as well as the Federal Savings and Loan Insurance Corporation (FSLIC),¹ are currently under severe financial stress.² The Federal Home Loan Bank

1. FSLIC insures both state and federally chartered savings and loan associations. 12 U.S.C. § 1726(a) (1982). Since 1982, FSLIC insures certain federal savings banks as well. The Garn-St. Germain Depository Institutions Act of 1982 (GSDIA), permitted the conversion of any institution eligible for FSLIC insurance to a federal savings bank. Pub. L. No. 97-320, 96 Stat. 1471 (codified in scattered sections of 12 U.S.C.). In particular, see 12 U.S.C. § 1464(i) (1982). These federal savings banks are also insured by FSLIC. 12 U.S.C. § 1464 (1982). In this comment, "association," "institution," and "savings and loan association" refer to a FSLIC-insured institution. "Bank" refers to an FDIC-insured institution.

2. Almost one quarter of all savings and loan associations were merged out of existence between 1980 and 1983. S. KIDWELL & R. PETERSON, FINANCIAL INSTITUTIONS MARKETS AND MONEY 273 (3d ed. 1987). By the mid-1980's, many associations operated at dangerously low net worth, those operating with less than one percent net worth being considered on the verge of insolvency. Those operating with between one and three percent were operating below regulatory net worth requirements. *Id.* (citing Mahoney & White, *The Thrift Industry in Transition*, 71 FED. RESERVE BULL. 137 (1985)). Currently, there are "around 445 insolvent thrift institutions being sued by creditors nationwide for billions of dollars." Nat'l L.J., March 21, 1988, at 26, col. 4.

FSLIC also is facing a net worth crisis. FSLIC's primary reserves have fallen below the two billion dollar mark, yet FSLIC insures 3,234 institutions which have more than \$1.1 trillion in total assets and more than nine hundred billion dollars in deposits. Letter

Board (Board), the federal agency which supervises both the thrift industry and FSLIC, is authorized to appoint FSLIC as the receiver for insolvent associations.³ As receiver, FSLIC may liquidate the association, put it back on a sound footing, merge it with a solvent association, or create a new association.⁴

An insolvent savings and loan association, by definition, is unable to meet all of its liabilities. As the association defaults on its obligations, creditors become entitled to sue, typically on a contract claim.⁵ In many instances, an association already is in court defending claims when the Board appoints FSLIC as receiver and places the association in receivership.⁶ As receiver, FSLIC steps into the shoes of the association, takes control of the association's assets, and takes over the association's rights and obligations, including the association's obligations to its insured and non-insured creditors.⁷ If FSLIC liquidates the as-

from William J. Anderson (Assistant Comptroller General) to Representative Fernand J. St. Germain and Senator William Proxmire (Mar. 3, 1987) (appearing in GENERAL ACCOUNTING OFFICE, THRIFT INDUSTRY: THE TREASURY/FEDERAL HOME LOAN BANK BOARD PLAN FOR FSLIC RECAPITALIZATION, at 1-2 (1987)). According to the General Accounting Office's 1986 FSLIC audit, FSLIC "may have a negative net worth" of more than three billion dollars. *Id.* at 1.

3. 12 U.S.C. § 1464(d)(6)(D) (1982).

4. 12 U.S.C. § 1729(b)(1)(A) (1982). FSLIC's present financial status may be adversely affecting its ability to meet its statutory obligations. FSLIC reserves are so low that FSLIC is able to close and liquidate only the weakest associations. Brief of Appellant at 12 n.5, CHG Creditors Comm. v. FSLIC No. 86-3646 (consolidated with Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209 (9th Cir. 1987)) (citing Barth, Brumbaugh, Sauerhaft, & Wang, *Implications for Risk-Taking in the Thrift Industry*, CONTEMP. POL'Y ISSUES 1-6 (1985)). "The FSLIC is required to resolve every failure at a cost no greater than that of liquidation." Beesly & Tracy, *The Federal Savings and Loan Insurance Corporation*, 16 FED. HOME LOAN BANK BOARD J. 13 (April 1983). See also 12 U.S.C. § 1729(b)(1)(A)(v) (1982). Thus, if liquidation is the least costly alternative, FSLIC must pursue it. Liquidation, however, involves a substantial initial outlay of FSLIC funds because FSLIC must pay the insured accounts promptly. 12 U.S.C. § 1728(b) (1982). Other FSLIC options do not require such a substantial initial outlay of funds. For example, when FSLIC elects to merge an insolvent association with a solvent one, the depositors' accounts are transferred to the solvent association. 12 U.S.C. § 1728(b) (1982).

Since 1982, however, FSLIC may give assistance to troubled thrift institutions through loans and direct deposits. 12 U.S.C. § 1729(f) (1982) (enacted as part of the GSDIA Pub. L. No. 97-320, 96 Stat. 1480). As a result, FSLIC may be keeping some associations going by giving them cash infusions, because it does not have the large cash reserves to pay depositor claims if the associations were to close. If so, FSLIC and the Board may be violating their statutory mandates in two respects. First, the Board may not be placing associations in receivership that really should be, and second, FSLIC may be spending more money in the long run by keeping shaky associations going than it would by promptly closing and liquidating. See *infra* note 173 for statutory conditions which require the Board to appoint a receiver.

5. See Part II for the facts and discussion of the cases.

6. See *id.*

7. 12 U.S.C. § 1729(d) (1982). 12 C.F.R. § 569a.6 (1987).

sociation, it must first satisfy the insured creditors (the depositors),⁸ and then sell off the assets and satisfy the remaining uninsured creditors, including itself.⁹ To determine the validity of the uninsured creditors' claims, those claims must be adjudicated,¹⁰ and FSLIC has asserted that it has the exclusive authority to adjudicate them.¹¹ That is, all creditors must present their claims to FSLIC for adjudication, and courts must dismiss any ongoing litigation. Creditors have challenged FSLIC's assertion of exclusive adjudicatory authority, and two United States Courts of Appeals have decided the issue differently.

In *North Mississippi Savings & Loan Association v. Hudspeth*,¹² the Fifth Circuit Court of Appeals determined that Congress intended FSLIC to have exclusive authority to adjudicate creditor claims and that all creditor claims are thus "switched to the administrative track" once FSLIC is named receiver.¹³ According to the administrative claims procedure outlined and approved by the *Hudspeth* court, a creditor must first present any claim to FSLIC as receiver.¹⁴ If FSLIC disallows the claim, the creditor may appeal to the Board.¹⁵ Only after appeal to the Board is a creditor entitled to pursue its claim in court, and then only in the form of judicial review of the administrative decision under the Administrative Procedure Act (APA).¹⁶ If the creditor already is suing the association in court at the time that the

8. 12 U.S.C. § 1728(b) (1982). After FSLIC reimburses the depositors, it is subrogated to the depositors' rights. 12 U.S.C. § 1728(b) (1982).

9. FSLIC is often the single largest uninsured creditor. *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1215-16 (9th Cir. 1987).

10. *Id.* All obligations and assets must be determined in the liquidation context. *Id.*

11. *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1101-02 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). FSLIC assumes its role as adjudicator primarily in the liquidation context, because the validity of all claims must be determined. FSLIC contends, however, that once it has been appointed receiver, it has the authority to adjudicate all creditor claims whether it chooses to liquidate or not. *Id.*

Most creditor claims are not adjudicated if FSLIC resolves the receivership in one of the other authorized ways. For example, if FSLIC merges the insolvent association with a sound association, all of the association's obligations and rights become obligations and rights of the sound association. FSLIC may, however, freeze out a particular class of creditors by transferring all assets and debts of the insolvent association to the solvent association except for any debt owed to a member of the class of creditors to be frozen out, thus preventing this class of creditors from pursuing its claims against the solvent association. Although the creditors may pursue their claims against the insolvent association, there are no assets to satisfy the claims. This is illustrated in the discussion of *Hudspeth* at *infra* notes 77-106 and accompanying text.

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

13. *Id.* at 1103.

14. *Id.* at 1102-03.

15. *Id.* at 1102.

16. *Id.* at 1103. These three steps constitute the "administrative track" as outlined

association is placed in receivership, the *Hudspeth* ruling requires the court to dismiss the creditor's court case so that the claim may be first adjudicated administratively. Most courts that have been presented with similar facts—creditors bringing court actions against associations that are in receivership, or to be soon placed in receivership—have followed the *Hudspeth* approach and dismissed the court actions so that the claims may be resolved administratively.¹⁷

In *Morrison-Knudsen Co. v. CHG International, Inc.*,¹⁸ the Ninth Circuit Court of Appeals took an entirely different approach and held that Congress intended FSLIC not to have any adjudicatory power.¹⁹ Under the *Morrison-Knudsen* approach, some form of a FSLIC administrative claims procedure is legitimate, but that procedure does

by the *Hudspeth* court. The APA is codified at 5 U.S.C. §§ 551-559, 701-06, 1305, 3105, 3344, 7521 (1982).

According to the *Morrison-Knudsen* court, the standard of review under the APA for FSLIC adjudication (assuming it were authorized) is either the "arbitrary and capricious" or the "substantial evidence" standard, both of which are more deferential than the de novo standard. *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1222 (9th Cir. 1987). In a de novo proceeding, all the evidence is considered anew, without deference to previous findings of fact. R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 7.4.1, at 370 (1985) [hereinafter R. PIERCE]. Thus, the creditor, under the *Hudspeth* approach, never receives a de novo proceeding in a court of law.

17. See, e.g., *Coit Independence Joint Venture v. FirstSouth Sav. & Loan Ass'n*, 829 F.2d 563 (5th Cir. 1987), *petition for cert. granted*, 108 S. Ct. 1105 (1988); *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert. filed sub nom.*, *Zohdi v. FSLIC*, 56 U.S.L.W. 3165 (U.S. Sept. 9, 1987) (No. 87-255); *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387 (7th Cir. 1987); *Godwin v. FSLIC*, 806 F.2d 1290 (5th Cir. 1987); *Chupik Corp. v. FSLIC*, 790 F.2d 1269 (5th Cir. 1986); *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC v. Oldenburg*, 658 F. Supp. 609 (C.D. Utah 1987); *FSLIC v. Quality Inns Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Resna Assoc. v. Fin. Equity Mortgage Corp.* 673 F. Supp. 1371 (D.N.J. 1987); *First Fin. Sav. & Loan Ass'n v. FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986); *Colony First Fed. Sav. & Loan Ass'n v. FSLIC*, 643 F. Supp. 410 (C.D. Ca. 1986); *First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93 (W.D. Wash. 1986); *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 636 F. Supp. 576 (N.D. Ill. 1986); *Sunrise Sav. & Loan Ass'n v. LIR Dev. Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986); *Murdock-SC Assocs. v. Beverly Hills Fed. Sav. & Loan Ass'n*, 624 F. Supp. 948 (C.D. Ca. 1985), *aff'd in part and rev'd in part*, 815 F.2d 82 (9th Cir. 1987) (without opinion), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-452); *Keller v. Antioch Sav. & Loan Ass'n*, 492 N.E. 2d 937, 143 Ill. App. 3d 278, 97 Ill. Dec. 278 (1986); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tx. Ct. App. 1987); *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. Ct. App. 1986), *supplemental opinion on motion for rehearing*, 735 S.W.2d 244 (1987).

18. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub. nom.*, *FSLIC v. Stevenson Assoc.*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-451).

19. *Id.* at 1215, 1222.

not and cannot amount to adjudication.²⁰ While a court may, and often should, dismiss a creditor's court claim for failure to exhaust administrative remedies, that is a matter of judicial discretion.²¹ The *Morrison-Knudsen* court intimated that by permitting adjudication of private common law claims by a non-article III court, the *Hudspeth* approach may present serious constitutional problems which the *Morrison-Knudsen* court's contrary statutory construction avoids.²²

The issue presented in the *Hudspeth* and *Morrison-Knudsen* cases—whether FSLIC has the exclusive power to adjudicate creditor claims in its capacity as receiver for insolvent savings and loan associations²³—is presented in *Coit Independence Joint Venture v. FirstSouth Savings & Loan Association*²⁴ and will come before the Supreme Court in the 1988-1989 term. Both the approaches of the Fifth and Ninth Circuit Courts of Appeals present challenging statutory and constitutional questions concerning the legality of FSLIC's adjudication of creditor claims. The resolution of the statutory issue involves an analysis of congressional intent through an examination of the relevant statutes and their legislative histories. With respect to congressional intent, there are four possible interpretations: 1) Congress intended FSLIC to have exclusive power to adjudicate creditor claims (the

20. *Id.* at 1218.

21. *Id.* at 1223-24.

22. *Id.* at 1221-22. The *Morrison-Knudsen* court's approach, noting the unfairness of FSLIC adjudication of claims, avoids possible due process problems as well. *Id.* at 1215-16. FSLIC controls the assets, is often the largest creditor of the association, is struggling to remain solvent, and is the decisionmaker. *Id.* If the claims procedure is an adjudicatory one, the creditor is disadvantaged; he or she is denied a disinterested decisionmaker and, on subsequent judicial review, the court is likely to defer to FSLIC's determination. *Id.* at 1221-22. If the claims procedure is a non-adjudicatory one, the claimant, even if he or she is required to exhaust administrative remedies, would be entitled to a de novo judicial proceeding. *See id.* at 1221-24.

The *Morrison-Knudsen* approach also avoids conflict with the right to a jury trial under the seventh amendment. U.S. CONST. amend VII.

23. To clarify at the outset, the main issue addressed in this comment is whether FSLIC, in its capacity as receiver, has the exclusive power to adjudicate creditor claims against insolvent thrift associations. Generally, these claims do not depend on FSLIC's enabling statute or any regulation of the Board for their resolution. Rather, they are often state law claims, usually contractual in nature, and do not arise out of FSLIC's mishandling of the receivership. Any claim that arises out of FSLIC's handling of the receivership is a different type of claim, and its resolution will depend on FSLIC's enabling statute or a regulation of the Board. These two types of claims are analytically distinct, and FSLIC adjudication of them poses different problems. Although the main focus of this comment is the former, the latter are discussed at various points. *See infra* notes 68-73 & 475 and accompanying text.

24. 829 F.2d 563 (5th Cir. 1987), *petition for cert. granted*, 108 S. Ct. 1105 (1988). *Coit* presents no new analysis on the issue; the Fifth Circuit Court of Appeals' analysis is found in *Hudspeth*. *See infra* note 144 for the facts of *Coit*.

FSLIC-*Hudspeth* position), 2) Congress intended FSLIC to have concurrent adjudicatory authority with courts, 3) Congress took no position on the specific issue of granting FSLIC adjudicatory authority, and 4) Congress intended not to confer any adjudicatory authority on FSLIC (the *Morrison-Knudsen* approach).

In addition to the question of statutory construction, there are two related but distinct constitutional issues raised by exclusive FSLIC adjudication. The first, discussed in *Morrison-Knudsen*, is the propriety of a non-article III entity adjudicating claims that arguably can be adjudicated only in article III courts.²⁵ The second issue, not addressed by either the *Hudspeth* or *Morrison-Knudsen* courts, concerns a possible due process violation caused by the lack of a neutral decisionmaker in FSLIC adjudication.²⁶

Finally, in the event that there is no statutory basis for FSLIC adjudication, or alternatively, that there is statutory authority to adjudicate but constitutional problems prohibit exclusive FSLIC adjudication, the Board must explore alternative adjudicatory and non-adjudicatory administrative claims resolution procedures and select a procedure that is both constitutional and consistent with the needs of FSLIC. If the selected procedure is non-adjudicatory, courts will apply the doctrine of exhaustion of administrative remedies and require creditors to pursue their claims administratively in most cases.²⁷

Part I of this comment discusses the history and background of FSLIC and the Board, presents the key statutes on which the courts rely, and explains the current and proposed claims procedures. Part II presents the facts of the *Hudspeth* and *Morrison-Knudsen* cases, explains the holdings of both courts, and discusses the central policy considerations of the opinions. Part III presents the many statutory arguments for and against the existence of exclusive FSLIC adjudicatory power and subjects them to critical analysis. Then Part III explains how the Board might promulgate regulations that would establish FSLIC adjudicatory authority for FSLIC without an explicit congressional mandate. Part IV investigates two major constitutional problems and outlines alternative claims and appeals procedures that

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

26. The *Morrison-Knudsen* court noted this problem, but did not discuss it in constitutional terms. *Morrison-Knudsen*, 811 F.2d at 1216.

27. The *Morrison-Knudsen* court discussed the judicial doctrine of exhaustion of administrative remedies in the context of the current FSLIC claims procedure (which the court found to be non-adjudicatory). See *Morrison-Knudsen*, 811 F.2d at 1223-24. This comment examines the doctrine in the context of alternative adjudicatory and non-adjudicatory claims resolution procedures in Part V.

would pass constitutional muster. Finally, Part V discusses alternative adjudicatory and non-adjudicatory administrative remedies and the judicial doctrine of exhaustion of administrative remedies.

I. BACKGROUND

A. *History and Structure of the Board and FSLIC*

Congress created the Board in 1932 as part of the Federal Home Loan Bank Act (FHLBA).²⁸ The Board is an independent federal regulatory agency which supervises FSLIC and the regional Federal Home Loan Banks,²⁹ which are federally chartered institutions created by the FHLBA.³⁰ In addition, the Board charters and supervises federal savings and loan associations created by the Home Owners Loan Act (HOLA).³¹ Congress granted the Board considerable supervisory power, including rulemaking authority.³²

Created by the National Housing Act of 1934 (NHA),³³ and placed under the supervision of the Board,³⁴ FSLIC is a government-

28. Ch. 522 § 17, 47 Stat. 736 (1932) (codified at 12 U.S.C. § 1437(1) (1982)). The Board is an independent agency located in Washington, D.C. T. MARVELL, *THE FEDERAL HOME LOAN BANK BOARD* 38 (1969). Congress established the Board to stimulate the housing industry by providing loans to prospective home owners. *Id.* The Board consists of three members who are appointed by the President and confirmed by the Senate. *Id.* at 40. In addition to supervising FSLIC, the Board oversees the chartering of new associations and the merging of existing associations. *Id.* See also G. KAUFMAN, *THE U.S. FINANCIAL SYSTEM: MONEY, MARKETS, & INSTITUTION* 270-71 (1986).

29. 12 U.S.C. § 1423 (1982). There are twelve regional Federal Home Loan Banks, T. MARVELL, *supra* note 28, at 20, whose main purpose is to make funds available to savings and loan associations for home mortgage loans. *Id.* These banks are analogous to the regional Federal Reserve Banks in the Federal Reserve System. *Id.*

30. 12 U.S.C. § 1464(a) (1982).

31. Ch. 64, § 5, 48 Stat. 132 (1933) (codified at 12 U.S.C. §§ 1461-1470 (1982 and Supp. IV 1986)).

32. 12 U.S.C. §§ 1437(a), 1464(d)(11) (1982). Section 1437(a) provides in part: "The board . . . shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this chapter." *Id.* Section 1464(d)(11) provides in part: "The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations . . . insured by the Federal Savings and Loan Insurance Corporation . . ." *Id.*

33. Ch. 847, Title IV, § 402, 48 Stat. 1246 (codified at 12 U.S.C. §§ 1724-1730g (1982 and Supp. IV 1986)).

34. Congress enacted the NHA to provide home mortgage insurance to both savings and loan associations and banks. T. MARVELL, *supra* note 28, at 27. The Federal Home Administration (now the Department of Housing and Urban Development) administered the mortgage insurance program. *Id.* Congress, through the NHA, created FSLIC and placed it under the Board to insure the depositor accounts in savings and loan associations, thereby giving depositors of thrift institutions the same protection that depositors in other banks already had. *Id.* at 27-28. (Congress created the Federal Deposit Insurance Com-

owned insurance corporation insuring the deposits in both federally chartered savings and loan associations³⁵ and qualifying state associations.³⁶ In addition to its obligations as insurer, FSLIC has two related functions: first, to monitor state chartered savings and loan associations and enforce compliance with federal law and regulations;³⁷ and second, to act as conservator or receiver³⁸ for insolvent associations.³⁹

B. *Statutory Powers of FSLIC as Receiver*

Title 12, section 1729 of the United States Code prescribes FSLIC's duties and powers as a receiver generally.⁴⁰ Once the Board has named FSLIC receiver,⁴¹ FSLIC is authorized:

- (i) to take over the assets of and operate such association;
- (ii) to take such action as may be necessary to put it in a sound solvent condition;
- (iii) to merge it with another insured institution;
- (iv) to organize a new Federal association to take over its assets;

pany (FDIC) the previous year to insure bank deposits. *Id.* at 28. See *infra* notes 289-316 and accompanying text for further discussion of the FDIC and a comparison of FSLIC to the FDIC.) The NHA enabled savings and loan associations to compete with banks for depositor funds and to prevent panic runs on savings institutions that forced so many institutions to fail in the early 1930's. T. MARVELL, *supra* note 28, at 28. Congress, in enacting the federal deposit insurance system (FSLIC and FDIC), was responding to the banking crisis of the early 1930's when one half of all banking institutions failed. S. KIDWELL & R. PETERSON, *supra* note 2, at 124.

35. 12 U.S.C. § 1726(a)(1) (1982).

36. 12 U.S.C. § 1726(a)(2) (1982). See 12 U.S.C. § 1726(b) (1982) for the application procedures that apply to state chartered institutions, and 12 U.S.C. § 1726(c) (1982) for the reasons that an application may be rejected.

37. 12 U.S.C. § 1730 (1982). See section III B (2)(b)(iv) for the discussion of FSLIC enforcement powers over state chartered savings and loan associations. The Board has enforcement powers as well. 12 U.S.C. § 1464(d) (1982). See section III A for the discussion of Board enforcement powers over federally chartered associations.

38. The statutes do not distinguish between conservatorship and receivership powers, but the regulations do. Compare 12 C.F.R. § 548 with 12 C.F.R. § 549 (FSLIC is a conservator when it steps in and operates an association, and a receiver when it exercises one of its other options under 12 U.S.C. § 1729(b)). In this comment, the word "receiver" is used in place of the phrase "conservator or receiver."

39. Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1215 (9th Cir. 1987).

40. 12 U.S.C. § 1729 (1982).

41. For a description of the determinations that the Board must make before it appoints a receiver for an insured association, see *infra* note 173. If the association is state chartered, additional conditions must obtain. See *infra* note 225. Once the Board appoints FSLIC as receiver for a state chartered association, the Board and FSLIC have the same powers over the state association as they would over a federal association. See generally 12 U.S.C. § 1464(d) (1982). Some savings banks in the process of converting their charters may still be FDIC-insured, in which case the Board must appoint the FDIC receiver. 12 U.S.C. § 1464(a) (1982).

- (v) to proceed to liquidate its assets in an orderly manner; or
- (vi) to make such other disposition of the matter as it deems appropriate;

whichever it deems to be in the best interest of the association, its savers, and the Corporation; and

(B) shall pay all valid credit obligations of the association.⁴²

In the event of a default,⁴³ FSLIC must pay each depositor to the extent insured as soon as possible.⁴⁴ FSLIC then becomes subrogated to the rights of the paid-off depositors⁴⁵ and competes with other uninsured creditors for the remaining assets of the failed association.⁴⁶

Section 1729(d), entitled "Additional powers of Corporation," applies in the event that FSLIC liquidates an association and provides:

In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.⁴⁷

42. 12 U.S.C. § 1729(b) (1982).

43. An association is in default when the Board places it in receivership "for the purpose of liquidation." 12 U.S.C. § 1724(d) (1982).

44. 12 U.S.C. §§ 1728(b), 1729(b)(2) (1982). FSLIC may pay the depositor in cash or make available to the depositor an account in either a new insured association or in another insured association. 12 U.S.C. § 1728(b) (1982).

45. 12 U.S.C. § 1729(b)(2) (1982).

46. *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1215-16 (9th Cir. 1987).

47. 12 U.S.C. § 1729(d) (1982). The introduction of § 1729(d) refers to FSLIC's control of federal receiverships, or federalized state receiverships. The second part of § 1729(d) refers to state-controlled receiverships. See section III B (2)(a) for the complete analysis of this subsection. Section 1729(d) originally was enacted as § 406(d) of the NHA and read as follows:

In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

National Housing Act of 1934, ch. 847, title IV, § 406(d), 48 Stat. 1259.

Congress amended § 1729(d) when it passed the GSDIA. 12 U.S.C. § 1729(d) (1982). Although the amended language was slated for expiration three years after the October 15,

The *Hudspeth* court relied on section 1729(d) in finding that FSLIC had adjudicatory authority.⁴⁸ To establish that FSLIC not only has adjudicatory authority, but exclusive adjudicatory authority, the *Hudspeth* court relied on title 12, section 1464(d)(6)(C)⁴⁹ of the United States Code, in conjunction with section 1729(d). Section 1464(d)(6)(C) provides: "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver."⁵⁰ Part III of this comment discusses and analyzes in detail sections 1464(d)(6)(C) and 1729(d), their legislative histories, and the arguments advanced in both the *Hudspeth* and *Morrison-Knudsen* cases.

C. *Creditor Claims and Appeals Procedures*

The Board has promulgated rules governing FSLIC's handling of creditor claims against both insolvent state and federally chartered institutions.⁵¹ Those rules require FSLIC to notify all creditors that they must "present their claims, with proof thereof" to FSLIC.⁵² Once presented with a claim, "[t]he receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim . . . not so proved, and

1982 enactment (see sunset provisions of the GSDIA, 96 Stat. 1488), it did not expire until October 13, 1986. 12 U.S.C. § 1729 (Supp. IV 1986). This change was to have "no effect on any action taken or authorized" while such amendment was in effect. *Id.* (explanatory statement accompanying notice of expiration of the GSDIA amended language). Section 1729(d) now reads as originally enacted. 12 U.S.C. § 1729(d) (Supp. IV 1986).

The GSDIA's amended language controls all cases cited in this comment with the exception of *Coit Independence Joint Venture v. Firstsouth*, 829 F.2d 563 (5th Cir. 1987) (upholding the *Hudspeth* approach under the current version of § 1729(d)). See *infra* note 141 for the facts of *Coit*.

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

49. 12 U.S.C. § 1464(d)(6)(C) (1982).

50. 12 U.S.C. § 1464(d)(6)(C) (1982). Congress enacted § 1464(d)(6)(C) as part of the Financial Institutions Supervisory Act of 1966 (FISA), Pub. L. No. 89-695, 80 Stat. 1028, which considerably extended § 5(d) of the Home Owners Loan Act of 1933 (HOLA), ch. 64, § 5, 48 Stat. 132. The HOLA is codified as amended at 12 U.S.C. §§ 1461-1470 (1982 & Supp. IV 1986). As originally enacted, § 1464(d)(6)(C) only applied to receiverships of federally chartered associations, but the Bank Protection Act of 1968 (BPA) made § 1464(d) generally applicable to federalized state receiverships as well. See section III B (2)(a)(ii) for the legislative history of the BPA. See section III A (1) for the legislative history of the FISA.

51. 12 C.F.R. §§ 549.4, 569a.8 (1987). Section 549.4 applies to creditors of federally chartered associations and § 569a.8 applies to creditors of state-chartered associations.

52. *Id.*

shall notify the claimant of the disallowance"⁵³ These rules do not establish a decisionmaking procedure for the receiver to follow in determining the validity of creditor claims that are based on law other than FSLIC's enabling statute or Board-promulgated rule. The decisionmaking procedure is established by unpromulgated regulations of the Board.⁵⁴ The procedures replace the functions of a court, and the controlling law usually is state law.

53. 12 C.F.R. § 549.4(b) (1987). Section 569a.8(b) provides in part: "Any claim filed . . . and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part or reject in whole or in part any creditor claim . . . not proved to its satisfaction" 12 C.F.R. § 569a.8(b) (1987).

54. The Board has adopted a detailed claims procedure, but it has not yet promulgated the procedure as a regulation. See "Procedures for the Administration and Determination of Claims Filed with FSLIC as Receiver" [hereinafter "Procedures for Receiver"] (14 pages of printed material available from the Board, accompanied with 3 forms, a flow chart, and 2 pages of filing instructions, entitled "Instructions for Filing Claims with the FSLIC as Receiver" (hereinafter "Filing Instructions") (undated office-printed material available from the Board)).

According to the "Filing Instructions," once notice has been published pursuant to regulation, each non-depositor creditor must file a "Proof of Claim" on forms provided by FSLIC. The claimant must provide documentation in support of the "Proof of Claim" and all material must be received by FSLIC within 90 days of the first notice of publication. FSLIC then reviews the "Proof of Claim" forms to see that they are properly completed. Once complete, FSLIC determines within 180 days of receipt whether the claim is "reconcilable" (whether the claim "may be allowed based upon the books and records of the association") and thus allowed. If the forms are not properly completed, the receiver will notify the claimant, and the claimant may amend his or her application provided the 90-day deadline has not passed. Additional time may be given if good cause is shown. "Filing Instructions" at 1.

Should the claim be unreconcilable, FSLIC may require the claimant to provide more information for further FSLIC review, and the claimant will be given additional time to provide this information. The receiver then must notify the claimant as to what documents have become part of the administrative record. The claimant has 30 days to request that the receiver include other documents as part of the administrative record. The record is then made available to the claimant. *Id.* at 1-2.

After reviewing all of the documents, the receiver prepares a "proposed determination" which includes proposed findings of fact and conclusions of law and mails a copy to the claimant. Within 30 days of the mailing date, the claimant may request FSLIC to reconsider the proposed determination. If this request is made, the receiver shall reply, stating whether or not it agrees with the claimant. If the claim is disallowed in full or in part, the receiver's statement includes notification that the claimant has the right to Board review. If the claimant does not request reconsideration, the proposed determination becomes final. *Id.* at 2.

Any appeals to the Board must be in accordance with the Board's appeals procedures, and filed within 60 days. For details of the appeals procedure, see *infra* note 56. Finally, the instructions include the statement that "Appeal of the Receiver's Determination is a Pre-requisite to Obtaining Judicial Review." *Id.*

FSLIC appoints "Special Representatives" who shall be the decisionmaker, and the Claims Counsel shall provide legal advice to the Special Representative. The Special Representative, in his discretion, may assign the tasks of review of claim to Claims Counsel or to other agents of the

The promulgated rules both permit and require Board review of claims disallowed by the receiver.⁵⁵ As with proceedings before the receiver, the regulations do not set forth any decisionmaking procedures for the Board to follow in reviewing appeals.⁵⁶

Special Representative, subject to the oversight and direction of the Director, OFSLIC, with the advice and consent of the General Counsel.

"Procedures for Receiver" at page 7. "Director, OFSLIC" refers to the "Director of the Office of the Federal Savings and Loan Insurance Corporation, as defined in 12 C.F.R. § 500.20 (1986)." "Procedures for Receiver" at 4. "General Counsel" refers to the "General Counsel to the Board, as defined in 12 C.F.R. § 500.17 (1986)." "Procedures for Receiver" at 4. "Special Representative(s)" refers to

individual(s) designated as Special Representative(s) for the FSLIC as Receiver for an association as stated in the Board Resolution appointing the FSLIC as Receiver. The Director, OFSLIC with the concurrence of General Counsel, shall designate the Special Representative(s) for each receivership The Special Representative(s) shall conduct the claims procedure, including the determination of the merits of claims.

Id. at 5.

55. The basis for Board review under 12 C.F.R. § 549.5(b) is found in the following sentence: "Unless . . . the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine."

Id. The basis for Board review of claims disallowed under 12 C.F.R. § 569a.8(d) is the following sentence: "The Receiver shall file with the Board . . . a list of creditor claims filed after the date fixed [deadline for the filing of claims] . . . and a list of claims disallowed by the receiver Any such claim may be allowed by the Board in its discretion upon good cause shown." *Id.*

56. The Board employs an appeals procedure which it has not yet promulgated in the form of rules entitled "Procedures for the Processing and Determination of Administrative Appeals From Decisions of the FSLIC as Receiver" (6 pages of undated office-printed material available from the Board) [hereinafter "Appeals Procedures"]

The Board has delegated final decisionmaking authority on appeals of FSLIC's final decisions to the Director, Office of the FSLIC (Director). "Appeals Procedures" at 1. The appeals procedures are for implementing 12 C.F.R. §§ 549.4, 549.5 and 549.5-1 under authority of 12 U.S.C. § 1437 (1982). "Appeals Procedures" at 1.

The creditor has 60 days to appeal FSLIC's final determination. To appeal, the creditor must send the following to the Director: (1) a copy of the administrative record, (2) a "clear and concise" statement of the facts and arguments on which appeal is based, and (3) appropriate citations to legal authority. *Id.* at 2-3. The burden of proof is on the claimant at all times. *Id.* at 4.

In most cases, the Director makes a preliminary review within 60 days. The Director then notifies the claimant that: 1) the record is complete, 2) more information is required, or 3) an additional 30, 60, or 90 days is required before completion of preliminary review. If the appeal is not timely, any objection to the receiver's final determination is waived. A timely appeal is necessary to obtain judicial review. If the claimant does not object to any portion of the receiver's determinations, that portion is not subject to appeal. *Id.* at 3.

On timely receipt of all appeals material, the Director makes a determination that the record is complete. The Director must issue a decision within 180 days from the date that the record is found to be complete. The Director will either make a decision on the merits with the concurrence of the General Counsel, or, with or without the concurrence of the General Counsel, submit the appeal to the Board for a decision on the merits. If the Director decides on the merits, the Director notifies the claimant in writing, setting forth the reasons for the determination. This is deemed final agency action for purposes of judicial

In November, 1985, the Board proposed rules that "would codify existing procedures and provide uniform and complete procedures for the presentation and determination of claims, as well as for appeals from claims determinations."⁵⁷ If adopted, the proposed regulations largely will codify the procedures currently in use.⁵⁸

There are weaknesses in both the current and proposed claims and appeals procedures. According to the FSLIC position accepted by the *Hudspeth* court, the FSLIC claims procedure is exclusive; the creditor loses both his or her independent right to pursue a claim in court and the constitutional right to a jury trial. The potential unfairness of this result is compounded by the deferential standard of review of administrative adjudications. According to *Hudspeth*, judicial review is available under the APA only after the creditor has exhausted the administrative claims and appeals procedures.⁵⁹ The standard of review under the APA is either the "arbitrary and capricious",⁶⁰ or the "substantial evidence" standard,⁶¹ both of which afford considerable deference to FSLIC's determination.⁶² Thus, the creditor loses not only the right to bring a court action in the first instance, but also the

review. *Id.* at 4-5. Unless the Director submits the appeal to the Board or notifies the claimant that additional time is needed, failure to issue a determination within 180 days also constitutes final agency action affirming FSLIC's final determination. *Id.* at 6.

If the Director submits the appeal to the Board, the Board will review the record and any advice of the Director. The Board, in its sole discretion, may permit the claimant to supply additional information in writing or may "entertain oral argument." The claimant receives written notice of the Board's determination, and that also constitutes final agency action. The Board also considers extensions of time and may grant them for good cause. *Id.*

57. 50 Fed. Reg. 48,970, 48,977 (1985).

58. 50 Fed. Reg. 48,993, 48,994 (to be codified at 12 C.F.R. §§ 569c.7, 569c.9 proposed November 27, 1985). The proposed regulations are still pending. Confirmed by telephone interview with Office of the General Counsel of the Board (Jan. 22, 1988).

59. *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1135 (9th Cir. 1987), *cert. denied*, 474 U.S. 1054 (1986). The APA is codified at 12 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 7521 (1982).

60. 5 U.S.C. § 706(2)(A) (1982).

61. 5 U.S.C. § 706(2)(E) (1982).

62. According to the *Morrison-Knudsen* court:

The "substantial evidence" test applies under the APA only to agency adjudications "required by statute to be determined on the record after opportunity for an agency hearing," or to an administrative "hearing provided by statute". 5 U.S.C. §§ 554(a), 706(2)(E). FSLIC's administrative process for handling creditor claims appears to involve no "hearing" at all. If that is true, the "arbitrary and capricious" standard would be controlling. This standard might be even more deferential than the "clearly erroneous" test found deficient in *Northern Pipeline*.

Morrison-Knudsen, 811 F.2d at 1222 n.5 (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982)).

opportunity to have a court evaluate the evidence anew.⁶³

Because FSLIC's claims procedure "appears to involve no 'hearing' at all,"⁶⁴ many of the traditional safeguards of a jury trial⁶⁵ are absent. For example, the claims procedure involves only the individual creditor and FSLIC, so that the creditor is denied the opportunity to rebut evidence that another creditor might bring.⁶⁶ The most significant weakness, however, is the lack of a neutral decisionmaker in FSLIC adjudication.⁶⁷ If the claims and appeals procedure were non-adjudicatory, the unfairness to the creditor would be minimized. If the creditor and FSLIC are unable to come to terms, the creditor could bring a court claim.

Because the claims procedure is designed to determine the validity of creditor claims against the insolvent association that do not depend on FSLIC's enabling statute, and to provide a means of review of that determination, there are additional problems with both the *Hudspeth* approach and the FSLIC regulatory scheme. *Hudspeth* requires the creditor to pursue *all* claims administratively. FSLIC as receiver has special receivership powers; for example, FSLIC has the power to repudiate certain contracts that are otherwise valid,⁶⁸ yet both the current and proposed regulations lack the procedural apparatus by which creditors may challenge FSLIC's decision to repudiate a contract. The current appeals procedure also does not accommodate such a challenge; that procedure involves review merely of FSLIC's final determination of the claim, and usually depends on state law, not FSLIC's enabling statute or Board regulation. There appears to be no alternative administrative procedure for handling these claims; therefore, *Hudspeth* requires all claims to be handled administratively when not all claims can be handled administratively. This is, perhaps, less a problem of the *Hudspeth* approach than it is a failing of the Board to promulgate regulations which would accommodate challenges to FSLIC's handling of a receivership.

63. This concern is discussed in Part IV A.

64. *Morrison-Knudsen*, 811 F.2d at 1222 n.5. See *supra* notes 54 & 56 for claims and appeals procedures.

65. See *infra* note 462 for the list of traditional safeguards of a jury trial.

66. See Appellant's Opening Brief at 9-12, *Stevenson Assocs. v. FSLIC*, (consolidated with *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987)) (86-2081).

67. These matters are discussed in Part IV B.

68. 50 Fed. Reg. 48,991 (1985) (to be codified at 12 C.F.R. § 569c.69(f)(3) (proposed Nov. 27, 1985)). Under the current regulations, FSLIC has the power to repudiate a contract in its capacity as receiver for state-chartered associations, 12 C.F.R. § 569a.6(c)(3) (1987); but not for federally chartered associations.

Furthermore, the creditor does not to have the opportunity to participate in a FSLIC decision to repudiate a contract, for example. Those decisions appear to be made without any kind of hearing. Any judicial review of the decision may come too late for creditor participation, for FSLIC is not liable for decisions it makes as receiver;⁶⁹ if the affairs of the association have been wound up, the party to the contract has no recourse.⁷⁰

Not only is there no administrative procedure available to challenge FSLIC's determinations as receiver, there are few substantive regulations which detail FSLIC powers. Thus, if a creditor seeks judicial review under the APA, a reviewing court may not be able to determine whether FSLIC acted properly as receiver because the regulations either fail to or inadequately address many substantive issues.⁷¹ Under the current regulations, for example, it appears that FSLIC does not have the power to freeze out a class of creditors,⁷² yet FSLIC froze out a class of creditors in the *Hudspeth* case.⁷³ Accordingly, FSLIC makes decisions which affect the interests of a creditor unilaterally, the creditor is unable to challenge the decision administratively, and courts will be unable to determine whether FSLIC acted properly.

To summarize, there are two types of claims: first, the initial determination of the validity of the claim where the controlling law is not FSLIC's enabling statute or Board regulation (usually it is state law); and second, challenges to FSLIC's receivership authority and

69. See S. REP. NO. 536, 97th Cong., 2d Sess. at 49, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3103; *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988, 996-97 (D. Haw. 1982).

70. For an example of this, see the discussion of *Hudspeth* in section II A.

71. See 50 Fed. Reg. 48,970 (1985).

72. See 12 C.F.R. §§ 549, 569.a (1987).

73. See *infra* notes 77-90 and accompanying text for facts of *Hudspeth*. A reviewing court would be unable to determine the propriety of a FSLIC decision to freeze out a class of creditors. The proposed rules also fail to provide FSLIC with the power to freeze out creditors.

The proposed regulations authorize FSLIC, in its capacity as receiver for either state or federally chartered associations, to repudiate a contract, yet the circumstances under which FSLIC may do so purposefully were left vague. The Board, in the comment section of the proposed rules, indicated that the power to repudiate a contract would be limited to executory contracts and leases. 50 Fed. Reg. 48,976 (1985). The Board did not define "executory contract." *Id.*

The current rules fail to provide a means for both determining which claims may be preferred and how participation interests in loan agreements are to be treated in the event of liquidation. 50 Fed. Reg. 48,970. The Board proposed the new rules in order to improve the claims procedures and provide "new rules of general applicability." *Id.* The proposed regulations provide rules for participation interests and priorities. 50 Fed. Reg. 48,995 (1985) (to be codified at 12 C.F.R. §§ 569c.10 and 569c.11).

determinations based on FSLIC's enabling statute or Board regulation. This comment primarily is interested in the former: the propriety of exclusive adjudication of creditor claims that are most often founded on state law. However, it is important to note the difference and to avoid any confusion between the two types of claims. With respect to the former type of claim, there is an administrative procedure for determining the validity of claims, but it has serious procedural weaknesses. With respect to the latter type of claim, there is no effective administrative procedure for challenging FSLIC's action. In addition, there are serious substantive problems as well, because the powers of FSLIC as receiver are not detailed in either the statutes or the applicable Board regulations.⁷⁴

This discussion has illustrated both the substantive and procedural unfairness inherent in the *Hudspeth* approach. The discussion of the two major cases in Part II elaborates many of these weaknesses. Part III then carefully scrutinizes the statutes and the courts' readings of those statutes.

II. THE CASES

The Fifth and Ninth Circuit Courts of Appeals each decided the issue of exclusive FSLIC adjudication differently. The Fifth Circuit Court of Appeals held that FSLIC has exclusive adjudicatory authority in receivership proceedings.⁷⁵ The Ninth Circuit Court of Appeals, on the other hand, held that FSLIC has no adjudicatory authority.⁷⁶ This section presents the facts of these two cases, explains the courts' reasoning, and discusses the policy implications of both decisions. With almost no case law on the matter, both courts relied on statutory construction and policy rationales inferred from the legislative histories of the various congressional acts amending the HOLA and NHA. The arguments themselves are presented and analyzed in Part III.

A. North Mississippi Savings & Loan Association v. Hudspeth⁷⁷

The dispute in *Hudspeth* began in 1977 when the State of Missis-

74. For more discussion of this problem, see *infra* note 475.

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

76. *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub. nom.*, *FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-451).

77. 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). The Fifth Circuit Court of Appeals revised and reversed an earlier, now withdrawn, opinion. Memorandum of Points and Authorities in Support of Motion by FSLIC to Dismiss

Mississippi passed a law requiring all state-chartered savings and loan associations to be FSLIC insured.⁷⁸ The Board refused to authorize FSLIC to insure the accounts of North Mississippi Savings & Loan Association (Old North) unless then-president Joseph Hudspeth resigned his position.⁷⁹ Joseph Hudspeth resigned only after he and Old North executed an agreement for Old North to pay him a "regular monthly amount."⁸⁰ In 1982, Old North brought suit in state court, asking the court to find that the compensation agreement was either voidable or did not exist.⁸¹ Hudspeth counterclaimed, asking for either specific performance or damages.⁸²

In 1983, Mississippi placed Old North in receivership, appointing FSLIC as receiver.⁸³ The Board then appointed FSLIC as sole receiver and "federalized" the receivership.⁸⁴ Proceeding under section 1729(b)(1)(A)(iv),⁸⁵ FSLIC created a new federal association, New North Mississippi Federal Savings and Loan Association (New North), and appointed a federal conservator to run it.⁸⁶ FSLIC transferred to New North all of Old North's assets, except that New North "agreed to reconvey to the FSLIC as receiver . . . any potential claim for malfeasance against Old North's officers or employees."⁸⁷ FSLIC also transferred all liabilities to New North, except for "any obligation owed by Old North under a compensation agreement such as Hudspeth's."⁸⁸ FSLIC, as receiver for Old North, stopped paying Hudspeth.⁸⁹ Hudspeth joined as parties both New North, as transferee in interest, and FSLIC, as receiver for Old North.⁹⁰ New North subse-

Claims for Lack of Subject Matter at 11-12, *Stevenson Assocs. v. FSLIC*, No. C85-7192 (N.D. Calif. February 7, 1986).

78. *Hudspeth*, 756 F.2d at 1099.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Under 12 U.S.C. § 1729(c)(1)(B)(i)(I) (1982), if the Board finds that certain conditions exist under 12 U.S.C. § 1464(d)(6)(A)(i), (ii) or (iii) (1982), it may appoint FSLIC as receiver of state-chartered associations. The receivership becomes "federalized" and FSLIC has the same control of the state association as it would have over a federal association. The state authority that initially appointed FSLIC receiver would, thereafter, have no control over the receivership.

85. 12 U.S.C. § 1729(b)(1)(A)(iv) (1982).

86. *Hudspeth*, 756 F.2d at 1099.

87. *Id.* at 1099 n.1.

88. *Id.* at 1099. FSLIC froze out certain creditors, including Mr. Hudspeth. Even if Hudspeth's contract claim were upheld, Old North would not have any assets to satisfy it.

89. *Hudspeth*, 756 F.2d at 1099.

90. *Id.*

quently removed the action to federal court.

According to the Fifth Circuit Court of Appeals, the district court “construed Hudspeth’s counterclaim as a challenge to the validity of the FSLIC’s termination of the compensation contract and its transfer of Old North’s assets and liabilities to New North.”⁹¹ The district court relied on sections 1464(d)(6)(C)⁹² and 1729(d)⁹³ and held that “‘original jurisdiction over the conduct of the FSLIC . . . lies with the . . . [Board],’ rather than any court.”⁹⁴ Because “Hudspeth’s sole remedy was a petition to the . . . [Board] with judicial review available under the Administrative Procedure Act,”⁹⁵ the district court dismissed Hudspeth’s claim.⁹⁶ The Fifth Circuit Court of Appeals affirmed,⁹⁷ finding that “any court ruling that New North bears a liability not assigned it by the FSLIC would modify the FSLIC’s distribution of assets, and would ‘restrain or affect’ the FSLIC’s powers as a receiver in violation of 12 U.S.C. section 1464(d)(6)(C).”⁹⁸ The court also stated that any court ruling that Old North owed Hudspeth a debt would likewise restrain or affect the powers of the receiver and thus “all of Hudspeth’s claims are switched to the administrative track.”⁹⁹

91. *Id.* at 1101. Because the district court in *Hudspeth* “construed Hudspeth’s counterclaim as a challenge to the validity of the FSLIC’s termination of the compensation contract,” the enforceability of the agreement as a matter of state law was no longer at issue. Rather, FSLIC’s authority to terminate the agreement was at issue, and the question was whether Board “regulations did not authorize the FSLIC here to set aside an otherwise-enforceable contract.” *Id.*

According to the regulations, FSLIC, as receiver for a state-chartered savings and loan, may “[r]eject or repudiate any lease or contract which it considers burdensome.” 12 C.F.R. § 569a.6(c)(3) (1987). Interestingly, there is no corresponding authority for FSLIC to repudiate a contract when it is receiver for a federally chartered association. Yet, FSLIC must “pay all valid credit obligations.” 12 U.S.C. § 1729(b)(1)(B) (1982). The regulations do not specify the circumstances under which FSLIC may find a contract burdensome. A reviewing court would have no basis for deciding whether FSLIC acted within its authority or not. See *supra* notes 59-73 and accompanying text for the discussion of the unfairness of the procedures and regulations.

The district court’s *Hudspeth* opinion was never officially published, and is unavailable. *North Miss. Sav. & Loan Ass’n v. Hudspeth*, W.C. 83-193-NK-P, slip op. (N.D. Miss. March 12, 1984).

92. 12 U.S.C. § 1464(d)(6)(C) (1982). See sections II A and III B (1) for the legislative history and analysis of this § 1464(d)(6)(C).

93. 12 U.S.C. § 1729(d) (1982). See sections III B (2)(a) for the legislative history and analysis of § 1729(d).

94. *Hudspeth*, 756 F.2d at 1101 (quoting unpublished district court opinion).

95. *Id.*

96. *Id.*

97. *Id.* at 1103.

98. *Id.* at 1102 (quoting, in part, § 1464(d)(6)(C)).

99. *Id.* at 1103. One criticism of the *Hudspeth* opinion that is not made by any other

The *Hudspeth* court inferred from the legislative history of the Bank Protection Act of 1968 (BPA)¹⁰⁰ that "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."¹⁰¹ In particular, the *Hudspeth* court used the policy rationale inferred from the BPA to interpret section 1729(d), which the court mistakenly believed was enacted as part of the BPA.¹⁰²

The *Hudspeth* court found the existence of regulations controlling FSLIC's claims procedure to be additional evidence of FSLIC's adjudicatory authority.¹⁰³ Those regulations permit FSLIC to "disallow claims 'not proven to its satisfaction.'"¹⁰⁴ Finally, the court relied on a similar but factually and legally distinct federal district court case¹⁰⁵ for the proposition that Hudspeth's "claims are switched to the ad-

court deserves mention: the Fifth Circuit Court of Appeals decided too much. The enforceability of Hudspeth's agreement as a matter of state law was no longer an issue in the case and the court's holding should be limited to the types of claims at issue in *Hudspeth* and not all claims. The only claims at issue in *Hudspeth* were claims pertaining to FSLIC's handling of the receivership, and the controlling law is FSLIC's enabling statute or Board regulation, yet the *Hudspeth* ruling applies to *all* claims. Subsequent opinions of the Fifth Circuit Court of Appeals have confirmed this reading of *Hudspeth* by requiring that state law-based questions be adjudicated administratively. See *infra* notes 143-44.

100. Pub. L. No. 90-389, 82 Stat. 294 (1968).

101. *Hudspeth*, 756 F.2d at 1101. The court quoted language from the Senate Report explaining the BPA: "FSLIC's authority '[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board . . .'" *Id.* (quoting S. REP. NO. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U. S. CODE CONG. & ADMIN. NEWS 2530, 2539).

102. See section III B (2)(a) for the legislative history and analysis of § 1729(d).

103. *Hudspeth*, 756 F.2d at 1102. The court cited 12 C.F.R. §§ 569a.8 and 549.4 (1987). See *supra* notes 51-72 and accompanying text for a discussion of the current regulations.

104. *Hudspeth*, 756 F.2d at 1102 (citing §§ 569.a8 and 549.4).

105. *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251 (D. Haw. 1981) (*First Savings I*). In *First Savings I*, state authorities placed the state-chartered First Savings & Loan Association (First Savings) in receivership on February 25, 1980, and the Board immediately appointed FSLIC as the receiver. *Id.* at 252. First Savings alleged that FSLIC and state banking authorities conspired with First Federal Savings & Loan Association (First Federal) to force First Savings into receivership so that First Federal could buy First Savings' assets. *Id.* The ousted directors of First Savings filed suit on February 28, 1980, against FSLIC, First Federal, and the state officer that placed the association in receivership. *Id.*

The plaintiffs sought three types of relief. First, they asked the court to remove FSLIC as receiver. *Id.* at 253. The court denied this request because First Savings failed to name the Board as a party to the action. *Id.* Under 12 U.S.C. § 1464(d)(6)(A), an association placed in receivership has 30 days to challenge the Board's appointment of the receiver. According to *First Savings I*, a court can remove FSLIC as receiver only by ordering the

ministrative track.”¹⁰⁶

B. *Morrison-Knudsen Co. v. CHG International, Inc.*¹⁰⁷

The *Morrison-Knudsen* case involved five consolidated appeals;¹⁰⁸ each of which concerned claims against the insolvent Westside Federal Savings and Loan Association (Westside), which the Board placed in receivership on August 30, 1985.¹⁰⁹

Board to do so, *First Savings I*, 531 F. Supp. at 253, because “no court may take any action for or toward the removal of any . . . receiver.” 12 U.S.C. § 1464(d)(6)(C) (1982).

Second, First Savings asked that its assets be restored. *First Savings I*, 531 F. Supp. at 253 (FSLIC had sold First Savings’ assets to First Federal). The court also refused this request because the Board was not a party to the action. *Id.* at 254. According to the court, it could not order FSLIC to return to First Savings the assets it sold to First Federal because that would constitute restraint of a receiver in a receivership function. *Id.*

Third, First Savings asked for damages in tort against FSLIC. *Id.* at 255. The court denied this relief because the action was not brought under the Federal Tort Claims Act. *Id.*

First Savings I does not require that all claims be switched to the administrative track, nor does it require that creditor claims against the association be adjudicated by FSLIC. *First Savings I* required that the Board be named a party to actions challenging FSLIC’s handling of the receivership and to any action removing FSLIC as receiver. However, any action for the removal of the receiver also must be filed within 30 days of FSLIC’s appointment as receiver. Any subsequent challenge to remove FSLIC as receiver must be brought directly with the Board. *Id.* at 254. The court also stated that “affected individuals may still request the Board to investigate the actions of a receiver and take whatever steps are necessary to insure compliance with the law. If the Board decides to take no action, judicial review of this decision may be available” under the APA. *Id.* (footnote omitted). *First Savings I* may require that all challenges to FSLIC’s handling of a receivership be pursued administratively, while saying nothing at all about how the adjudication of creditor claims against the receivership should be handled. If *Hudspeth* had read *First Savings I* in this way, the Fifth Circuit Court of Appeals could have dismissed *Hudspeth*’s challenges of FSLIC’s handling of the receivership without holding that FSLIC has exclusive adjudicatory authority. But the *Hudspeth* court’s holding encompasses all claims, as the Fifth Circuit Court of Appeals’ subsequent cases show.

The ousted directors of First Savings brought a subsequent action against First Federal, FSLIC, and the Board. *First Sav. & Loan Ass’n v. First Federal Sav. & Loan Ass’n*, 547 F. Supp. 988 (D. Haw. 1982) (*First Savings II*). The court in *First Savings II* refused to entertain the plaintiffs’ request to remove FSLIC as receiver because the 30 day statutory period which entitled the ousted directors to bring a court action to remove FSLIC as receiver had expired. *Id.* at 994-95. The *First Savings II* court found that it had no jurisdiction to entertain challenges to FSLIC’s handling of the receivership. *Id.* at 996-97. *First Savings II* might stand for the proposition that challenges of FSLIC actions as receiver which are based on FSLIC’s enabling statute or Board regulation are not reviewable by a court at all. However, neither *First Savings I* or *First Savings II* applied to state law-based creditor claims against the insolvent association.

106. *Hudspeth*, 756 F.2d at 1103.

107. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub. nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-451).

108. *Id.* at 1212.

109. *Id.* at 1212-13. FSLIC as receiver elected liquidation. *Id.* at 1216.

In *Rembold v. Gibraltar Savings & Loan Association*,¹¹⁰ an unnamed borrower brought suit in state court against Gibraltar Savings and Loan Association (Gibraltar), asking the court to void a two million dollar obligation. Gibraltar removed the action to federal district court and impleaded Westside.¹¹¹ FSLIC was appointed receiver and was substituted as party for Westside. FSLIC moved to dismiss for lack of subject matter jurisdiction and the court granted the motion, relying on *Hudspeth*.¹¹² Gibraltar appealed.¹¹³

In *American Federal Savings & Loan Association v. Westside Federal Savings & Loan Association*,¹¹⁴ American Federal Savings and Loan Association (American), sued Westside in federal district court, seeking "declaratory relief on the validity of the various agreements" included in a participation loan agreement that involved Westside loans to CHG International Corporation (CHG).¹¹⁵ FSLIC was appointed receiver and moved to dismiss for lack of subject matter jurisdiction. Again, relying on *Hudspeth*, the court sustained the motion, and American appealed.¹¹⁶

In *Stevenson Associates v. FSLIC*¹¹⁷ and *Morrison-Knudsen Company v. CHG International Inc.*,¹¹⁸ Morrison-Knudsen brought suit in California state court against CHG, Westside, and Stevenson Associates (Stevenson), seeking damages arising out of a condominium project. Stevenson cross-claimed against Westside. FSLIC was appointed receiver, and removed all claims to federal district court. FSLIC relied on *Hudspeth*, and successfully moved to dismiss for lack of subject matter jurisdiction. Stevenson appealed both the dismissal of its own claims and the dismissal of Morrison-Knudsen's claims.¹¹⁹

In *CHG Creditors Committee v. FSLIC*,¹²⁰ Westside filed a claim in CHG's bankruptcy proceeding. FSLIC was appointed receiver of Westside and made a motion to dismiss for lack of subject matter jurisdiction. The district court supervising the bankruptcy proceeding

110. 624 F. Supp. 1006 (W.D. Wash. 1985). *Rembold* was the only one of the five district court decisions appealed that was reported.

111. Gibraltar alleged that Westside had promised to repay the debt in the event that the borrower defaulted. *Morrison-Knudsen*, 811 F.2d at 1213.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

denied the motion, and FSLIC appealed.¹²¹

The Ninth Circuit Court of Appeals maintained jurisdiction in *Rembold*, *American Federal*, and *Stevenson*,¹²² and held that FSLIC had no adjudicatory authority.¹²³ The court, however, remanded to the district court the question of whether it should require exhaustion of administrative remedies before adjudicating the case.¹²⁴

The *Morrison-Knudsen* court, like the *Hudspeth* court, examined the key statutes and legislative history, but arrived at the opposite conclusion, finding that Congress intended FSLIC not to have any adjudicatory authority. The *Morrison-Knudsen* court refused to read sections 1464(d)(6)(C) and 1729(d) as empowering FSLIC with exclusive adjudicatory authority. The *Morrison-Knudsen* court found no evidence in the language or the legislative history of the statutes to indicate that Congress intended FSLIC to have adjudicatory power.¹²⁵

The *Morrison-Knudsen* court examined three policy arguments, two in criticism of the *Hudspeth* court, and one in support of its own holding. First, the *Morrison-Knudsen* court admitted that efficiency in winding up the affairs of an insolvent association in order to preserve FSLIC assets is sound policy,¹²⁶ but denied that Congress authorized FSLIC to have the unlimited power it needed in order to further this policy.¹²⁷ The court stated that FSLIC must comply with the statutory scheme that Congress enacted long before FSLIC's current difficulties arose,¹²⁸ noting that, until the 1980's, FSLIC never argued that it had exclusive adjudicatory power.¹²⁹ Second, granting FSLIC ex-

121. *Id.*

122. *Id.* at 1214. In *CHG Creditors Comm.* and *Morrison-Knudsen* (district court case), the court dismissed the appeals. *Id.* at 1213. In *CHG Creditors Comm.*, the court held that the district court's refusal to dismiss was not appealable because it was not a final order. *Id.* at 1214. In *Morrison-Knudsen*, the court stated that *Stevenson* had no standing to appeal the dismissal of *Morrison-Knudsen's* claims. *Id.*

123. *Morrison-Knudsen Co.*, 811 F.2d at 1212.

124. *Id.* at 1223. See *infra* text accompanying note 135 for the factors to be considered by a court in deciding whether to require exhaustion of administrative remedies.

125. *Id.* at 1215, 1222.

126. *Id.* at 1216. This policy motivated Congress to enact the Financial Institutions Supervisory Act of 1966 (FISA) and the Bank Protection Act of 1968 (BPA). See section III A (1) for the discussion of the legislative history of the FISA. See section II B (2)(a)(ii) for the discussion of the legislative history of the BPA.

127. The *Hudspeth* court interpreted the policy of the BPA as authorizing FSLIC to have whatever power it needed to advance this policy. See *Hudspeth*, 756 F.2d at 1101. The court found that exclusive adjudication furthered this end, and thus concluded that FSLIC has exclusive power to adjudicate creditor claims. *Id.* at 1101-03.

128. *Morrison-Knudsen*, 811 F.2d at 1216.

129. *Id.* The statutes on which FSLIC relied for exclusive adjudication were enacted in 1934 and 1966. See section III B (2)(a)(i) for the legislative history of the NHA. See section III A (1) for the legislative history of the FISA. Although FSLIC admitted that it

clusive adjudicatory authority does not necessarily serve this policy of efficiency. The court noted that judicial review under the Administrative Procedure Act is just as capable of producing delay in the winding up of the affairs of an insolvent association as is initial court adjudication.¹³⁰

The main policy consideration that influenced the *Morrison-Knudsen* court was fairness: the court questioned whether it was appropriate for FSLIC to have the power both to adjudicate money claims, and at the same time control assets and claim a major portion of them.¹³¹ The current financial problems of FSLIC¹³² only amplified this concern.¹³³

The *Morrison-Knudsen* court's concern with procedural and substantive fairness is apparent in the court's discussion of whether to require exhaustion of administrative remedies as a matter of judicial discretion.¹³⁴ Factors such as efficiency and cost are balanced against

never argued that it had such power until the 1980's, it stated that this was so because no federally chartered associations were liquidated between 1941 and 1980. See FSLIC's Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc at 7 n.6, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987) (86-2063) (86-2081) (86-3621) (86-3646) (86-3658). (Subsequent citations of this brief omit reference to the docket numbers.)

The *Morrison-Knudsen* court cited two examples of pre-1980's cases where FSLIC failed to assert the exclusive power to adjudicate. In *Baker v. F. & F. Investment Co.*, 489 F.2d 829 (7th Cir. 1973), black plaintiffs alleged that they were charged an excessive price for the homes that they purchased. FSLIC was successor in interest to the savings and loan association that made loans to the seller. The court held that claims for money damages on the contract should be dismissed as to FSLIC unless plaintiffs could prove compliance with the Illinois statute of limitations, but that plaintiffs' equitable claims should not be dismissed. *Id.* at 831-38. Presumably, if the plaintiffs could prove compliance with the statute of limitations, the court would have jurisdiction over the contract dispute. In addition, FSLIC never moved to dismiss for lack of subject matter jurisdiction due to exclusive FSLIC adjudication.

In *Hancock Fin. Corp. v. FSLIC*, 360 F. Supp. 1125 (D. Ariz. 1973), *aff'd*, 492 F.2d 1325 (9th Cir. 1974), creditor sought a declaratory judgment or a determination of ownership of receivership assets. The district court dismissed the action due to lack of federal question jurisdiction or diversity jurisdiction. *Id.* FSLIC never argued that it had exclusive authority to adjudicate claims, and, thus, the plaintiffs would have been able to bring an action in state court.

130. *Morrison-Knudsen*, 811 F.2d at 1216-17. The *Hudspeth* court failed to show how initial review would delay that liquidation process. *Id.*

131. *Id.* at 1216.

132. See *supra* note 2.

133. *Morrison-Knudsen*, 811 F.2d at 1216.

134. *Id.* at 1223. "[T]he district court must balance the agency's interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system, against the interests of private parties in finding adequate redress." *Id.*

fairness. According to the *Morrison-Knudsen* court, these factors include:

[1] whether resort to the administrative process would be futile, [2] whether the administrative process is well understood and well developed, [3] whether a prompt decision as to all of the contested issues in the case is likely, [4] whether an exhaustion requirement would be fair to the parties in light of their resources, [5] whether it would be fair to other parties in the case whose interests might be affected, [6] whether the interests of judicial economy would be served by requiring exhaustion, and [7] whether the agency demonstrates that not requiring exhaustion would unduly interfere with its functioning.¹³⁵

Were the district court to apply these factors to the facts of *Morrison-Knudsen* in light of the current FSLIC claims procedures,¹³⁶ the court could have maintained jurisdiction. First, the administrative process likely would have been futile because the claims, originally filed against Westside, became claims against FSLIC as receiver for Westside. Because FSLIC is an interested adjudicator, the claimants likely would not receive adequate redress, and thus exhaustion of administrative remedies would be futile.¹³⁷ Second, the claimants probably would have ended up in court for judicial review of their claims because FSLIC's claims procedure is not well developed. There is no capacity for handling complicated claims involving numerous parties and numerous legal issues.¹³⁸ The third factor also poses problems for FSLIC adjudication. Although the claims procedure is designed to

135. *Id.* at 1223-24.

136. See *supra* note 54 for current claims procedures.

137. See Appellant's (Stevenson) Opening Brief at 15, *Stevenson Assocs. v. FSLIC* (consolidated with *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987)) (86-2081) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 579 (1983)):

It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . [T]he financial stake need not be . . . direct or positive. . . . It has also come to be the prevailing view that 'most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'

Id.

The presence of an interested decisionmaker in an adjudicatory claims procedure is a more serious factor than the lack of a disinterested decisionmaker in a non-adjudicatory claims procedure. The discussion in the above text is merely illustrative.

138. For example, in *Morrison-Knudsen*, there were many claimants of Westside's assets, including FSLIC. In addition, there were counterclaims, cross-claims, and impleaded parties as well. See *supra* notes 107-24 and accompanying text for the facts of *Morrison-Knudsen*. FSLIC's claims procedure is designed to handle each creditor's claim individually, and does not provide a means to address other parties' claims. See *supra* note 54 for FSLIC's claims procedure.

result in a speedy determination, it probably would not have in this case because so many different claims and parties were involved. This problem also implicates the fifth factor.¹³⁹ In a complicated participation loan agreement like that involved in *Morrison-Knudsen*, a FSLIC judgment as to one party could affect the rights of another party and thus be unfair against the other party. As the parties had already gone to court and the claims involved were unlikely to have been settled through the administrative process because of the complicated agreement and the many parties involved, the concern of the sixth factor would also be raised, and it might well serve the interest of judicial economy for a court to maintain jurisdiction over the claims. Finally, FSLIC would not be able to demonstrate that not requiring exhaustion, in this instance, would unduly interfere with its functioning.¹⁴⁰ Applied to the facts of *Hudspeth*, these factors also would militate against requiring exhaustion of administrative remedies.¹⁴¹

Between the *Hudspeth* and *Morrison-Knudsen* decisions, many courts had an opportunity to decide the issue. Every court¹⁴² that entertained arguments on the issue followed the *Hudspeth* approach.¹⁴³

139. There was no evidence presented in the *Morrison-Knudsen* case which indicated that requiring exhaustion would have been unfair in light of the parties' resources, which is the fourth factor. It could have been unfair, however, because the parties had prepared their cases. It can only cost the parties more money if the case is dismissed and pursued administratively, especially if that procedure is likely to be futile, and thus the likelihood, at least, of unfairness is increased. It should be noted that all of these factors relate to each other—the existence of one factor makes another factor more likely.

140. FSLIC claimed that not requiring exhaustion would interfere with its exclusive adjudicatory authority. The *Morrison-Knudsen* court reasoned that judicial adjudication did not interfere with FSLIC's powers because FSLIC did not have exclusive adjudicatory authority. See *Morrison-Knudsen*, 811 F.2d at 1216-17. But see FSLIC's Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc 3-4, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), where FSLIC argued that exhaustion was critical to its functioning. Even if an exhaustion requirement is critical to FSLIC's function generally, that is insufficient to establish that not requiring exhaustion unduly interferes with FSLIC's functioning in a particular case.

141. The key factor would be the absence of an effective administrative procedure for challenges of FSLIC's decisions as receiver. Thus, requiring exhaustion would be futile.

142. The only exception is *CHG Creditors Comm. v. FSLIC*, in which the district court refused to grant FSLIC's motion to dismiss. *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1213 (9th Cir. 1987). See *supra* notes 107-24 and accompanying text for the facts of *Morrison-Knudsen*.

143. See Brief of Appellee (FSLIC) at 6-7, *Stevenson Assocs. v. FSLIC* (consolidated with *Morrison-Knudsen*, 811 F.2d 1209 (9th Cir. 1987)). The Fifth Circuit Court of Appeals reaffirmed its position in two subsequent cases: *Godwin v. FSLIC*, 806 F.2d 1290 (5th Cir. 1987) (action by depositors to recover the uninsured portion of deposits dismissed for failure to exhaust administrative remedies); *Chupik Corp. v. FSLIC*, 790 F.2d 1269 (5th Cir. 1986) (creditor's attempt to perfect a lien on receivership property dismissed according to *Hudspeth*). Among the many district courts that have followed the *Hudspeth* approach are: *First Fin. Sav. & Loan Ass'n v. FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987);

Since *Morrison-Knudsen*, the Fifth Circuit Court of Appeals has affirmed the *Hudspeth* approach twice.¹⁴⁴ The Ninth Circuit Court of Appeals has also affirmed the *Morrison-Knudsen* approach.¹⁴⁵ Even in light of the *Morrison-Knudsen* holding, however, the vast majority of courts which have addressed the issue of whether the FSLIC has exclusive power to adjudicate creditor claims in its capacity as receiver for insolvent savings and loan associations have chosen to follow *Hudspeth*.¹⁴⁶ Two recent state court cases embrace the *Morrison-Knudsen*

Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); *Baskers v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986); *Colony First Fed. Sav. & Loan Ass'n v. FSLIC*, 643 F. Supp. 410 (C.D. Ca. 1986); *First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93 (W.D. Wash. 1986); *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 636 F. Supp. 576 (N.D. Ill. 1986); *Sunrise Sav. & Loan Ass'n v. LIR Dev. Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986); *Murdock-SC Assoc. v. Beverly Hills Fed. Sav. & Loan Ass'n*, 624 F. Supp. 948 (C.D. Ca. 1985), *aff'd in part and rev'd in part*, 815 F.2d 82 (9th Cir. 1987) (without opinion), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-452).

144. In *Coit Independence Joint Venture v. FirstSouth Sav. & Loan Ass'n*, 829 F.2d 563, 564 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1105 (1988), *Coit* brought suit in state court against FirstSouth in October, 1986, alleging several state law claims, including "usury, breach of fiduciary duty, and breach of the duty of good faith and fair dealing." The Board placed FirstSouth in receivership in December, 1986, and FSLIC removed the action to federal district court. *Id.* The district court granted FSLIC's motion to dismiss, and the Fifth Circuit Court of Appeals affirmed. The *Coit* court indicated that, although courts disagree about the proper standard of review for FSLIC adjudications, any administrative review disposed of due process problems. *Id.* at 565 (citing *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987)). The court also ruled that *Coit's* other constitutional challenges—violation of separation of powers under article III and deprivation of the right to a jury trial under the seventh amendment—were not ripe for resolution. *Coit*, 829 F.2d at 565.

In *FSLIC v. Bonfanti*, 826 F.2d 1391, 1392 (5th Cir. 1987), *petition for cert. filed sub nom. Zohdi v. FSLIC*, 56 U.S.L.W. 3165 (U.S. Sept. 9, 1987) (No. 87-255), the plaintiffs brought suit alleging "fraudulent diversion of loan proceeds" and breach of contract, as well as "violations of federal law." The Fifth Circuit Court of Appeals affirmed the *Hudspeth* approach, holding that once FSLIC is appointed receiver, courts lose jurisdiction to entertain all claims against the receivership estate because "no end runs around the receiver's broad realm of authority" are permitted. *Id.* at 1394.

145. *Murdock-SC Assoc. v. Beverly Hills Sav. & Loan Ass'n*, 815 F.2d 82 (9th Cir. 1987), *aff'g in part and rev'g in part*, 624 F. Supp. 948 (C.D. Cal. 1985), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Oct. 6, 1987) (No. 87-452).

146. The Seventh Circuit Court of Appeals followed *Hudspeth* but indicated some willingness to reconsider its decision if arguments on exclusive FSLIC adjudication were presented to it. *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387 (7th Cir. 1987). In an attempt to evade the *Hudspeth* holding, the creditor claimants in *Lyons* amended their complaints to avoid asking for any affirmative relief. Thus, the court did not hear the arguments on the adjudication issue. The *Lyons* court found *Hudspeth* controlling and held that the claim must first be adjudicated administratively. The court decided that it could not follow the *Morrison-Knudsen* court without having the issue argued before it, and thus affirmed the district court's dismissal of the case. *Lyons*, 828 F.2d at 395.

Many district courts and state courts have continued to follow *Hudspeth*. See, e.g., *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987); *Acquisition Corp.*

approach in its entirety.¹⁴⁷ At least two other cases offer support for the *Morrison-Knudsen* approach without fully embracing it.¹⁴⁸ Finally, one court followed the *Hudspeth* court's statutory interpretation but found it unconstitutional.¹⁴⁹

of *Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC v. Oldenburg*, 658 F. Supp. 609 (D. Utah 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Resna Assoc. v. Fin. Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tx. Ct. App. 1987); *Glen Ridge I Condominiums, Ltd. v. FSLIC*, (supplemental opinion on motion for rehearing) (Tx. Ct. App. 1987).

147. *FSLIC v. Glen Ridge I Condominiums, Ltd.*, No. C-6776 slip op. (Tex. Sp. Ct. March 30, 1988); *Summertree Venture III v. FSLIC*, 742 S.W.2d 446 (Tx. Ct. App. 1987). The *Summertree* court refused to follow the Fifth Circuit Court of Appeals even though Texas is in the fifth circuit and there is state precedent on following the Fifth Circuit Court of Appeals on questions of federal law. *Summertree*, 742 S.W.2d at 450.

148. *Peninsula Fed. Sav. & Loan Ass'n v. FSLIC*, 663 F. Supp. 506 (S.D. Fla. 1987). The claimant in *Peninsula* brought suit against FSLIC in two capacities: on state law contract claims based on pre-receivership conduct of the association, and for conduct of FSLIC after receivership. *Id.* at 507. The *Peninsula* court denied FSLIC's motion to dismiss for lack of subject matter jurisdiction and maintained jurisdiction over all claims at issue. *Id.*

The court construed FSLIC power more narrowly than the *Hudspeth* court, yet more broadly than the *Morrison-Knudsen* court, and followed neither. The court distinguished the facts of *Peninsula* so as to avoid both the *Hudspeth* and *Morrison-Knudsen* approaches. The claims in *Peninsula* involved both pre- and post-receivership conduct. The court attempted to draw the distinction between contract claims against the insolvent association (pre-receivership) and claims against FSLIC's handling of the receivership (post-receivership) and found that FSLIC had no authority to adjudicate post-receivership claims. According to the *Peninsula* court, the claims in both *Hudspeth* and *Morrison-Knudsen* involved only pre-receivership conduct. *Id.* at 509-10. The *Peninsula* court erred on this point. All of the claims in *Hudspeth* involved post-receivership conduct; *Hudspeth* challenged FSLIC's decision to terminate his contract and the authority of FSLIC to freeze him out. See *supra* notes 77-90 and accompanying text for the facts of *Hudspeth*.

The *Peninsula* court found that Congress did not intend FSLIC to have the power to adjudicate all claims: if Congress intended FSLIC to hear all claims, Congress would have provided so expressly. *Peninsula*, 663 F.2d at 509-10. The *Peninsula* court did follow the *Morrison-Knudsen* court in one respect: if the case is one that can be brought in court or decided through an administrative process, exhaustion of administrative remedies is a matter of discretion for the court. *Id.* at 510-11. The *Peninsula* court then discussed some of the factors that might be involved in a decision to keep or relinquish jurisdiction. Among the factors discussed were: 1) the level of complexity of the case, 2) the fact that the administrative procedure is not well developed for processing mixed claims (claims involving pre- and post-receivership) conduct, 3) the possibility of unfairness to the claimant if the claims are resolved in an administrative process (a court proceeding may be more expensive for the creditor, in a complicated case, and the creditor does not get a chance for full presentation of evidence). *Id.*

In *FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D. Utah 1987), the court held that FSLIC did not have authority to adjudicate state law-based counterclaims against an insolvent association.

149. *Glen Ridge I Condominium, Ltd. v. FSLIC*, 734 S.W.2d 374 (supplemental opinion on motion for rehearing) (Tx. Ct. App. 1987) (Congress intended FSLIC to have the exclusive power to adjudicate creditor claims, but such delegation of power was unconstitutional.). The Texas Supreme Court affirmed the result of the Texas Appellate Court's

III. EXCLUSIVE FSLIC ADJUDICATION: STATUTORY CONSTRUCTION, LEGISLATIVE HISTORY AND BOARD RULEMAKING AUTHORITY

Part III presents and analyzes the courts' arguments for and against the statutory authority for exclusive FSLIC adjudication. Section A analyzes the position that FSLIC's authority, whether adjudicative or otherwise, is exclusive. Section B evaluates the argument that FSLIC has adjudicatory authority. Section C then discusses the possibility that the Board, through its rulemaking power, might establish FSLIC adjudicatory authority.

A. Section 1464(d)(6)(C): An Exclusive FSLIC Remedy

The *Hudspeth* court relied on section 1464(d)(6)(C)¹⁵⁰ in finding that FSLIC, as receiver, had the exclusive power to adjudicate creditors' claims against insolvent savings and loan associations.¹⁵¹ Careful analysis of the text and the legislative history, however, demonstrates that Congress neither provided for nor intended an exclusive FSLIC remedy for state law-based creditor claims. Enacted as part of the Financial Institutions Supervisory Act of 1966 (FISA),¹⁵² section 1464(d)(6)(C) reads: "Except as otherwise provided in this section, no court may take any action, for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver."¹⁵³

The Fifth Circuit Court of Appeals found that once the Board

holding that the trial court had jurisdiction over the claims, but disagreed with the appellate court's reasoning. See *FSLIC v. Glen Ridge I Condominium, Ltd.*, No. C-6776 slip op. (Tex. Sp. Ct. March 30, 1988). The Texas Supreme Court followed the *Morrison-Knudsen* court's statutory construction, finding that FSLIC had no adjudicatory authority, and thus found that the court of appeals "erroneously reached the Article III issue." *Id.* The Texas Supreme Court further stated that it "neither approve[s] nor disprove[s] the holding of the court of appeals that the exercise of adjudicatory power by the FSLIC as receiver violates Article III . . ." *Id.* See *infra* notes 421-25 and accompanying text for a discussion of the court of appeals' constitutional analysis.

150. 12 U.S.C. § 1464(d)(6)(C) (1982).

151. *Hudspeth*, 756 F.2d at 1103. FSLIC also argued that 12 U.S.C. § 1464(d)(6)(C), together with § 1729(d), is analogous to 11 U.S.C. § 362(a)(1)(1982). Under § 362(a)(1), the "filing of the bankruptcy petition operates to stay all judicial proceedings against the debtor." Brief of Appellee at 19, *Stevenson Assocs. v. FSLIC* (consolidated with *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987)) (86-2081). However, these sections provide only that certain proceedings can be stayed, as discussed *infra* at text accompanying note 177.

152. Pub. L. No. 89-695, 80 Stat. 1028 (codified as 12 U.S.C. § 1464(d) (1982)).

153. 12 U.S.C. § 1464(d)(6)(C) (1982).

appointed FSLIC as receiver, courts lose jurisdiction to adjudicate claims against the insolvent association.¹⁵⁴ Judicial “resolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function” of distribution of assets and thus constitute restraint of a receiver in violation of section 1464(d)(6)(C).¹⁵⁵ The *Hudspeth* court argued indirectly, reasoning that a receiver has the power to liquidate, and a lesser included part of that power is the right to “[fix] the time and manner of distribution.”¹⁵⁶ Any court ruling that a creditor was owed a debt would interfere with FSLIC’s power to fix the time and manner of the distribution of assets,¹⁵⁷ and would constitute impermissible restraint of a receiver under section 1464(d)(6)(C).¹⁵⁸

The *Morrison-Knudsen* court, on the other hand, reasoned that court adjudication of either the amount or the existence of a claim under FSLIC adjustment would not affect or restrain the receivership function because FSLIC as receiver did not possess adjudicatory authority.¹⁵⁹ The *Morrison-Knudsen* court criticized the *Hudspeth* court’s reasoning: “Judicial adjudication . . . does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets.”¹⁶⁰ The *Morrison-Knudsen* court faulted the *Hudspeth* court for

154. The *Hudspeth* court’s position is that §§ 1464(d)(6)(C) and 1729(d), taken together, establish exclusive FSLIC adjudication. See *Hudspeth*, 756 F.2d at 1101. The court does not analyze the statutory authority separately. For heuristic purposes, this comment examines the adjudicatory issue and the exclusive adjudicatory issue separately. First, this comment, in section III A, examines the extent to which 1464(d)(6)(C) establishes an exclusive remedy. Then, in section III B, this comment examines the extent to which 1464(d)(6)(C) and 1729(d) establish adjudicatory authority.

155. *Hudspeth*, 756 F.2d at 1102. Plaintiff *Hudspeth* argued that a determination by the court that the defunct savings and loan owed him a debt (as opposed to a fixed amount) did not restrain or affect the receivership function. *Id.* at 1102.

156. *Id.* (quoting *Morris v. Jones*, 329 U.S. 545, 549 (1947)).

157. *Id.*

158. *Id.*

159. *Morrison-Knudsen*, 811 F.2d at 1217. As the *Morrison-Knudsen* court noted, this section does not describe the powers of FSLIC as receiver; rather, it simply says that a court may not interfere with FSLIC’s powers. *Id.* Thus, if adjudication is one of FSLIC’s powers, then § 1464(d)(6)(C) would prohibit courts from interfering with FSLIC adjudication. This, however, would not amount to exclusive FSLIC adjudication because FSLIC would not have any authority to prevent courts from adjudicating.

With respect to FSLIC’s receivership powers, § 1464(d)(6)(C) does appear to prevent courts from interfering with them. For example, FSLIC decides whether to merge or liquidate an insolvent association. Section 1464(d)(6)(C) prevents courts from interfering with that decision.

160. *Morrison-Knudsen Co. v. CHG Int’l Inc.*, 811 F.2d 1209, 1217 (9th Cir. 1987) (citing *Morris v. Jones*, 329 U.S. 545, 549 (1947)).

flawed logic,¹⁶¹ asking “[i]f judicial review, which will delay—perhaps by years—the liquidation process, does not restrain or affect a receiver, then why does *initial* adjudication by a court of creditors’ claims do so?”¹⁶² If the *Hudspeth* court’s argument were valid, then judicial review also would restrain or affect the receivership function impermissibly, because it would delay the distribution of assets: either both initial adjudication and subsequent judicial review restrain a receivership function, or neither does so. Judicial review does not restrain a receiver impermissibly—indeed, judicial review is part of the *Hudspeth* approach. Thus, initial adjudication does not restrain a receiver.

Regardless of whether FSLIC has adjudicatory authority, section 1464(d)(6)(C) does not establish exclusive FSLIC adjudicatory authority. An examination of FISA’s legislative history supports the position that courts are not prohibited from adjudicating once the Board appoints FSLIC as receiver. None of the courts that addressed this issue properly utilized this legislative history in its statutory analysis.¹⁶³ The purpose of section 1464(d)(6)(C) was to prevent court intervention in FSLIC receivership proceedings in only two circumstances, neither of which is the adjudication of creditor claims.

1. Legislative History of FISA

The purpose of FISA was to “strengthen the *regulatory* and *supervisory* authority of the Federal agencies [the Board and FDIC] over insured . . . savings and loan associations.”¹⁶⁴ Prior to its enactment, the Board had only two enforcement powers: it could take over the savings and loan association by placing it in receivership, or it could terminate the association’s insurance.¹⁶⁵ Both powers seem to be drastic measures if the Board simply wanted to force a solvent savings and loan to comply with the law. FISA granted the Board new enforcement powers: 1) to issue permanent and temporary cease-and-desist orders requiring that the association stop certain specified conduct, 2) to remove dishonest officers and directors, and 3) to examine any corporation controlled by an officer of the savings and loan.¹⁶⁶

161. *Id.* at 1216.

162. *Id.* Under the *Hudspeth* approach, the creditor is entitled to judicial review under the APA once administrative remedies have been exhausted.

163. *Lyons Sav. & Loan Ass’n v. Westside Bancorporation*, 636 F. Supp. 576 (N.D. Ill. 1986), *aff’d*, 828 F.2d 387 (7th Cir. 1987), briefly discussed the legislative history of FISA, but only in a general way.

164. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 1204 (emphasis added).

165. T. MARVELL, *supra* note 28, at 32-33.

166. *Id.* These powers are codified at 12 U.S.C. § 1464(d) (1982).

Congress viewed these new powers as intermediate, less drastic powers to be used in order to prevent "violation of law or regulation and unsafe and unsound practices which otherwise might adversely affect the Nation's financial institutions."¹⁶⁷ Although FISA affected receivership powers, Congress' primary interest was to supplement the Board's and the FDIC's arsenal of regulatory and supervisory powers over their respective institutions.

Prior to FISA's enactment, the Board proceeded under section 5(d)(1) of the Home Owners Loan Act of 1933 (HOLA)¹⁶⁸ to force a savings and loan to correct violations of law or regulation. It was often a "long-drawn-out process . . . [and was] ill-suited to securing prompt correction of irregular practices or unsafe operation."¹⁶⁹ FISA replaced this process by channelling appeals of the Board's enforcement orders through an administrative procedure.¹⁷⁰ According to the Senate Report explaining the FISA, "[h]earings *provided for in section 5(d)* [1464(d)] would be held in the federal judicial district in which the home office of the association is located, . . . [and] conducted in accordance with the Administrative Procedure Act"¹⁷¹ The only hearings provided for in section 5(d) are for determining whether the Board's exercise of enforcement power against a savings and loan association is appropriate. FISA did not speak to the administrative adjudication or other resolution of creditors' claims.

Though it increased the Board's enforcement powers, FISA limited the Board's power to appoint a receiver. The legislative history

167. Senate Committee on Banking and Currency, S. REP. NO. 1482, 89th Cong., 2nd Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3533 (hereinafter S. REP. NO. 1482).

168. Home Owners Loan Act of 1933, Pub. L. No. 73-43, 48 Stat. 128 (codified at 12 U.S.C. §§ 1461-1470 (1982 & Supp. IV 1986)).

169. S. REP. NO. 1482, *supra* note 167, at 4-5, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3537. Section 5(d)(1) of the HOLA, prior to the enactment of the FISA, provided for an administrative hearing, and, in the absence of a special statutory review procedure, a party could have obtained initial court review of a final order of the Board in a federal district court, followed by an appeal to a court of appeals. However, within 30 days after service of notice upon it of alleged violations, the association could waive the administrative hearing and submit the controversy to a federal district court. Often, the ensuing trial de novo was a long, drawn out process; in one case, pre-trial discovery procedures lasted three years. *Id.*

170. For example, temporary cease-and-desist orders can be stayed by the local district court if appealed within 10 days of the issuance of the order. Permanent cease-and-desist orders, on the other hand, may be challenged in court only after a hearing is held under the Administrative Procedure Act. S. REP. NO. 1482, *supra* note 167, at 10-11, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3541-3542.

171. *Id.* at 15, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3546 (emphasis added).

shows that, under FISA, the Board could no longer appoint a receiver whenever it deemed it necessary,¹⁷² but only when certain circumstances obtained.¹⁷³ The statute granted a savings and loan association placed in receivership for any of the prescribed circumstances thirty days to bring an action in district court for removal of the receiver.¹⁷⁴ If any “proceeding such as an action to stay a temporary cease-and-desist order, or a petition by an association for judicial review of a cease-and-desist order”¹⁷⁵ is pending in court at the time that the savings and loan is placed in receivership, those proceedings would be stayed “pending the outcome of the association’s action to remove the conservator or receiver”¹⁷⁶

The Senate Report concluded by summarizing the bill as follows:

The provisions of *this subparagraph* [1464(d)] would, in effect, limit the jurisdiction of a court to order the removal of a conservator or receiver, except in an action for removal brought by an association under authority of paragraph (6)(A) [1464(d)(6)(A)] of the proposed amended section 5(d) [1464(d)], or, except at the instance of the Board, to restrain the exercise of the powers or functions of a conservator or receiver.¹⁷⁷

172. *Id.* at 13, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3544.

173. *Id.* The Board must find that

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

12 U.S.C. § 1464(d)(6)(A) (1982).

174. S. REP. NO. 1482, *supra* note 167, at 14, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3545.

175. *Id.*

176. *Id.* If a court upheld the appointment of the receiver, judicial review of any cease-and-desist order would be moot, because the association must challenge the legality of the order administratively as prescribed by FISA. If not, the proceedings would resume.

177. *Id.* (emphasis added). One court quoted this language as evidence of Congress’ intent to channel creditor claims through the administrative process. *Lyons Sav. & Loan Ass’n v. Westside Bancorporation*, 636 F. Supp. 576, 580 (N.D. Ill. 1986). The court read the language broadly, much the same way that the *Hudspeth* court read § 1464(d)(6)(C). The *Lyons* court also quoted language from the House Banking and Currency Committee’s summary of the FISA: “The scope of judicial review shall also be in conformity with the provisions of Title 5 of the United States Code relating to judicial review of administrative action, The purpose of the new language is to safeguard the right of individuals and institutions from arbitrary and capricious agency action.” *Id.* (quoting from H. REP. NO. 2077, 89th Cong., 2d Sess. 6 (1966)). This language does not support the *Lyons* court’s holding because it is referring to challenges to Board supervisory orders as discussed above in the text.

This legislative history demonstrates that section 1464(d) does not provide an administrative procedure for resolving creditor claims, and limits the jurisdiction of a court in only two respects. First, a court may not remove a receiver after thirty days from the time of appointment. Second, if a court were entertaining an association's challenge to a Board cease-and-desist order, and the association were subsequently placed in receivership, then the court action would be stayed. Read together with the specific statutory language, the history shows that, in enacting FISA, Congress contemplated only the limitation of jurisdiction in these two specific respects, and not the wholesale elimination of the court's jurisdiction. Further, and directly undermining the *Hudspeth* court's conclusion, neither of the two jurisdictional limitations intended by Congress has anything to do with FSLIC adjudication of creditor claims. FISA simply does not address the creditor claims issue, and thus establishes neither adjudicatory authority nor exclusive adjudicatory authority. Support for FSLIC's authority to adjudicate such claims must come, if at all, from some other source.

B. *Statutory Authority for FSLIC Adjudication*

This section examines the many statutory arguments that have been used to justify FSLIC's adjudicatory authority. Subsection III B (1) explores section 1464(d)(6)(C), in the general context of the HOLA. Subsection III B (2) explores several statutes in the NHA, with primary emphasis on section 1729(d). Subsection III B (3) discusses the current regulations. Then, subsection III B (4) compares FSLIC to the FDIC. Finally, section III C explores whether the Board may use its rulemaking power to authorize FSLIC adjudication.

1. The HOLA and FSLIC Adjudication

FSLIC argued, and the *Hudspeth* court agreed, that section 1464(d)(6)(C)¹⁷⁸ established FSLIC adjudicatory authority.¹⁷⁹ Section 1464(d)(6)(C) is part of the HOLA.¹⁸⁰ Under the HOLA, the Board is authorized to charter and oversee federal savings and loan associations.¹⁸¹ In addition, the Board has the power to appoint FSLIC as receiver for state and federally chartered institutions.¹⁸² Section

178. 12 U.S.C. § 1464(d)(6)(C) (1982). See *supra* text accompanying note 153 for the language of § 1464(d)(6)(C).

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

180. 12 U.S.C. §§ 1461-1470 (1982 & Supp. IV 1986).

181. See *id.*

182. 12 U.S.C. §§ 1464, 1729 (1982 & Supp. IV 1986).

1464(d)(6)(C) is but one provision of a complicated section 1464(d).¹⁸³ As discussed in section III A of this comment, section 1464(d), which Congress enacted as part of FISA, prescribes Board powers, not FSLIC powers. The HOLA, in general, does not prescribe the powers and duties of FSLIC as receiver.

According to the *Hudspeth* court, as explained in section III A, 1464(d)(6)(C) prohibits courts from adjudicating claims against the receivership once FSLIC is appointed as receiver. Therefore, since courts are prohibited from adjudicating, FSLIC must adjudicate.¹⁸⁴

The *Morrison-Knudsen* court read section 1464(d)(6)(C) as a provision which prohibits courts from interfering with FSLIC's receivership powers, but not as establishing what those powers are.¹⁸⁵ Under the *Morrison-Knudsen* approach, section 1464(d)(6)(C) would preclude a court from interfering with FSLIC adjudication of creditor claims if FSLIC had adjudicatory authority, but section 1464(d)(6)(C) does not establish such authority. Because adjudicatory authority is not among the traditional powers of a receiver,¹⁸⁶ the *Morrison-Knudsen* court reasoned that such authority must come from some other statutory source.¹⁸⁷ Even if the power to adjudicate was among the traditional powers of a receiver, relevant statutes would define FSLIC

183. 12 U.S.C. § 1464(d) (1982) is entitled "Proceedings to enforce compliance with law and regulations; cease and desist proceedings; temporary cease-and-desist orders; suspension or removal of directors or officers; appointment and removal of conservator or receiver; hearings and judicial review; regulations for reorganization, dissolutions, etc.; penalties; definitions; application to other institutions."

184. The *Hudspeth* court's position is that § 1464(d)(6)(C), together with § 1729(d), establishes exclusive FSLIC adjudication. The court does not explain how adjudicatory authority is established, except by the inference that FSLIC must adjudicate because courts cannot.

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

186. *Id.*

187. The *Morrison-Knudsen* court stated that a receiver's functions do not ordinarily include the power to adjudicate, and relied on *Morris v. Jones*, 329 U.S. 545, 549 (1947): "The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." *Morrison-Knudsen*, 811 F.2d at 1217 (quoting *Morris*, 329 U.S. at 549). *Hudspeth* also cited *Morris* as authority for the proposition that the receiver has the right to fix the "time and manner of distribution" of the assets of the receivership. *Hudspeth*, 756 F.2d at 1102 (quoting *Morris*, 329 U.S. at 549). *Hudspeth* argued that court adjudication of claims constituted impermissible restraint of this receivership function. *Hudspeth*, 756 F.2d at 1102. *Morrison-Knudsen's* use of the *Morris* opinion is much more in keeping with the context of the *Morris* opinion.

The Court was describing the "two-fold" liquidation process. *Morris*, 329 U.S. at 549. One aspect of this process involves the distribution of property. "No one can obtain part of the assets or enforce a right to specific property in possession of the liquidation court [or receiver] except upon application to it." *Id.* The other aspect involves the "proof and

powers because FSLIC is a statutory receiver.¹⁸⁸

2. The NHA and FSLIC Adjudication

Title IV of the National Housing Act (NHA)¹⁸⁹ prescribes the duties and powers of FSLIC. Section 1729(d)¹⁹⁰ of that act describes FSLIC's powers upon the liquidation of an insured association. The *Morrison-Knudsen* court rejected FSLIC's argument that section 1729(d) authorized FSLIC adjudication,¹⁹¹ while the *Hudspeth* court relied on section 1729(d) as establishing FSLIC adjudication.¹⁹² Subsection (2)(a) explores section 1729(d) from its original enactment through its subsequent amendments and demonstrates that section 1729(d) alone does not establish adjudicatory authority. Subsection (2)(b) explores other statutes of the NHA, and concludes that section 1729(d) in the context of the NHA does not establish FSLIC adjudication.

allowance" of claims, which is "distinct from distribution." *Id.* Courts adjudicate the claims; the receiver distributes the assets.

The "right rule of decision" is that a "valid judgment in personam [as opposed to a judgment in rem over the assets] can not be ignored in another action." Beach, *Judgment Claims in Receivership Proceedings*, 30 YALE L.J. 674, 679-80 (1921). This view is consistent with the position the Supreme Court adopted in *Morris*, that is, courts may not interfere with the receiver's control of the assets, and court adjudication does not interfere with the receiver's control of the assets.

The *Morrison-Knudsen* court unearthed some evidence that Congress might have considered that the power to adjudicate was among the powers of a receiver. When Congress amended the Federal Credit Union Act, 12 U.S.C. §§ 1766, 1783 and 1787 (1982), to provide for receivership authority, the following comment was included in the legislative history: "[The provisions] are similar to those which are customarily prescribed in other types of liquidation and would authorize, for example, . . . the receipt and adjudication of claims." S. REP. NO. 1647, 79th Cong., 2d Sess. 2, reprinted in 1946 U.S. CODE CONG. SERV. 1323, 1324. *Morrison-Knudsen*, 811 F.2d at 1219 n.3. *Morrison-Knudsen* stated that Congress simply was mistaken, that "Federal receivers of insolvent banks have never had the power conclusively to adjudicate creditor claims. In any case, section 1766(b)(3) along with its legislative history is so remote from the cases at bar that it cannot affect our decision. Without more it is too slender a reed to support FSLIC's construction of its own statutory authority." *Id.* (citation omitted).

188. Powers of a statutory receiver are determined by statute. 66 C.J.S. *Receivers* § 184 (2d. ed. 1972). "The powers and functions of a statutory receiver are limited by the purpose of the statute under which he is appointed." *Id.* See e.g. Illinois Savings & Loan Act, ILL. ANN. STAT. ch. 32 para. 923 (Smith-Hurd 1970).

189. 12 U.S.C. §§ 1724-1730 (1982 & Supp. IV 1986).

190. 12 U.S.C. § 1729(d) (1982).

191. *Morrison-Knudsen*, 811 F.2d at 1218-19.

192. *Hudspeth*, 756 F.2d at 1101-02.

a. Section 1729(d)

In 1934, Congress enacted section 1729(d) as part of the NHA. Section 1729(d) read:

In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.¹⁹³

Though Congress did not alter the language of section 1729(d) when it enacted the Bank Protection Act of 1968 (BPA),¹⁹⁴ the BPA provided: "In connection with the liquidation of any . . . [state chartered savings and loan] the language 'court or other public authority having jurisdiction over the matter' . . . shall mean said Board."¹⁹⁵ In 1982, the Garn-St. Germain Depository Institutions Act (GSDIA) amended the language of section 1729(d). From the passage of the GSDIA in 1982 until October 15, 1986 when the language expired, section 1729(d) read:¹⁹⁶

In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, settle, compromise, or release claims in favor of or against the insured institutions, and to do all things that may be necessary in connection therewith, subject only to *the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.*¹⁹⁷

Both the *Hudspeth* and *Morrison-Knudsen* courts interpreted the GSDIA-amended language.¹⁹⁸

193. National Housing Act of 1934, ch. 847, Title IV, § 406(d), 48 Stat. 1259.

194. Pub. L. No. 90-389, 82 Stat. 294 (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 357 at 359.

195. *Id.*, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 357. This language, deleted in 1982 by the GSDIA, has been reinstated. 12 U.S.C. § 1729(c)(3)(B) (Supp. IV 1986).

196. *See* 12 U.S.C. § 1729(d) (Supp. IV 1986).

197. 12 U.S.C. § 1729(d) (1982) (emphasis added). Section 1729(d) now reads as originally enacted. 12 U.S.C. § 1729(d) (Supp. IV 1986).

198. The Fifth Circuit Court of Appeals decided *Coit Independence Joint Venture v. FirstSouth*, 829 F.2d 563 (5th Cir. 1987), *petition for cert. granted*, 108 S. Ct. 1105 (1988) under the reinstated original language of § 1729(d) and held that the difference did not

If Congress intended, through section 1729(d), to empower FSLIC with adjudicatory authority, it had three opportunities to do so, first when Congress enacted the NHA, or subsequently when it passed either the BPA or GSDIA. Before exploring section 1729(d) in the context of the NHA, the BPA, and the GSDIA to determine whether Congress authorized FSLIC adjudication, this subsection explains and criticizes the positions of the *Hudspeth* and *Morrison-Knudsen* courts.

The *Hudspeth* court looked to the language of section 1729(d) and the legislative history of the BPA to demonstrate that section 1729(d), in conjunction with section 1464(d)(6)(C), established FSLIC adjudication.¹⁹⁹ "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."²⁰⁰ Once again, the *Hudspeth* court reasoned that this policy prevents courts from adjudicating, thus inviting the inference that FSLIC as receiver has an implied power to adjudicate.

The *Hudspeth* court made two mistakes which limit the persuasiveness of its argument. First, the court stated that section 1729(d) originally was enacted as part of the BPA.²⁰¹ Congress, however, enacted section 1729(d) as part of the NHA some thirty-four years prior to the BPA. Second, the *Hudspeth* court employed the legislative history of the BPA to interpret the GSDIA language.²⁰² According to section 1729(d) at the time that Congress enacted the BPA, FSLIC was subject "only to the regulation of the court or other public authority having jurisdiction over the matter."²⁰³ The GSDIA changed this language, so that FSLIC was subject "only to the regulation of the Federal Home Loan Bank Board"²⁰⁴ The GSDIA language,

affect the *Hudspeth* approach that all claims were switched to the administrative track. *Id.* at 564.

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

200. *Id.* at 1101. "[T]he Senate confirmed that FSLIC's authority '[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board'" *Id.* at 1101 (quoting S. REP. NO. 1263, 90th Cong., 2d Sess. 10, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2539).

201. *Hudspeth*, 756 F.2d at 1101 n.2. Using legislative history to interpret a statute is a legitimate analytical tool. However, the legislative history referred to ought to be that of the statute in question, or the use of the different legislative history should be specifically noted and defended.

202. *Hudspeth*, 756 F.2d at 1101-02.

203. See *supra* text accompanying note 193 for the language of § 1729(d) as it existed in 1968.

204. See *supra* text accompanying note 197 for the GSDIA-amended language.

coupled with the legislative history of the BPA, provides support for the *Hudspeth* approach that no court may interfere with FSLIC, but the court's reliance on the BPA's legislative history is misplaced. The *Hudspeth* court relied on the legislative history of the BPA, enacted in 1968, in interpreting the GSDIA language of section 1729(d), enacted in 1982, when, in fact, Congress enacted the statute in 1934—thirty-four years prior to the BPA.

The *Hudspeth* court then compounded this error. The court concluded that Congress, in enacting the BPA, intended FSLIC as receiver to have unlimited power to facilitate the efficient and inexpensive winding up of the affairs of insolvent associations. The court reasoned that adjudication is such a power, and thus concluded that FSLIC had adjudicatory authority.²⁰⁵ While the BPA was enacted, in part, in order to facilitate efficiency and limit the costs of receivership proceedings, the BPA neither provided FSLIC with exclusive adjudicatory authority, nor with *carte blanche* to do whatever it deemed would further efficiency.

FSLIC argued in *Morrison-Knudsen* that the power to adjudicate was necessary and thereby included in the powers to “settle, compromise, or release claims . . . and to do all things that may be necessary”²⁰⁶ The *Morrison-Knudsen* court dismissed this argument as unduly burdening the word “necessary” and as being “incompatible” with the explicitly granted powers to settle, compromise, or release claims.²⁰⁷ According to the court, adjudicators do not settle, compromise, or release claims; they adjudicate, holding for one party or the other.²⁰⁸

i. Legislative History of the NHA

There is no evidence to suggest that Congress intended to establish FSLIC adjudication when it enacted the NHA in 1934.²⁰⁹ The main purpose of the bill was to provide home mortgage insurance that all banking establishments could offer their customers in order to ease the effects of the Depression.²¹⁰ The savings and loan industry and the Board opposed the legislation, fearing that other banking institutions

205. See *Hudspeth*, 756 F.2d at 1101.

206. *Morrison-Knudsen*, 811 F.2d at 1218, 1219 (quoting 12 U.S.C. § 1729(c)(3)(B) (Supp. IV 1986)).

207. *Id.* at 1219.

208. *Id.*

209. 12 U.S.C. §§ 1701-1750)(g) (1982 & Supp. IV 1986).

210. T. MARVELL, *supra* note 28, at 27.

would take away a portion of the home mortgage business.²¹¹ To appease the savings and loan industry, Congress created FSLIC through Title IV of the NHA²¹² to insure the accounts of savings and loan associations.²¹³ Congress copied FDIC²¹⁴ and made FSLIC part of the Board.²¹⁵ This enabled saving and loan associations to compete with other banking institutions.²¹⁶

There are two factors which support the conclusion that Congress did not intend to grant FSLIC adjudicatory powers in the 1934 Act. The first is the language of section 1729(d) itself.²¹⁷ As previously discussed, adjudication is not one of the specifically enumerated powers, and is, in fact, inconsistent with some of those powers. Second, Congress modelled FSLIC after the FDIC, a pre-existing government-owned insurance corporation which also acts as receiver for insolvent banks. The FDIC does not have adjudicatory authority.²¹⁸ To the extent that Congress intended to copy the FDIC, it probably did not intend to empower FSLIC with adjudicatory authority. Thus, if section 1729(d) establishes adjudicatory authority, it must do so by virtue of an amendment.

ii. Legislative History of the BPA

Though it did not alter section 1729(d), Congress did enact the cryptic phrase: "In connection with the liquidation of any . . . [state chartered savings and loan], the language 'court or other public authority having jurisdiction over the matter' in subsection (d) of this section shall mean said Board."²¹⁹ The question is whether Congress, by means of this enactment, altered the meaning of section 1729(d) to authorize FSLIC adjudication.

Congress enacted the BPA to solve a specific problem connected with state-chartered associations that arose in the 1960's. As of 1980, FSLIC had paid insurance claims to depositors of only thirteen sav-

211. *Id.* For this reason, Congress gave this job to the Federal Housing Administration (now part of the Department of Housing and Urban Development). *Id.*

212. 12 U.S.C. §§ 1724-1730(g) (1982 & Supp. IV 1986).

213. T. MARVELL, *supra* note 28, at 27.

214. *Id.* at 84.

215. *Id.* at 27.

216. *Id.*

217. See *supra* text accompanying notes 193 & 197 for the language of § 1729(d).

218. See *infra* note 303 and accompanying text.

219. Pub. L. No. 90-390, 82 Stat. 296, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 359. The GSDIA deleted this language in 1982, but Congress reinstated it on October 13, 1986. 12 U.S.C. § 1729(c)(3)(B) (Supp. IV 1986).

ings and loan associations.²²⁰ Six of the thirteen insolvencies occurred in the 1960's, and five of those six involved Illinois associations.²²¹ All five thrift institutions were state-chartered and FSLIC-insured. Prior to the BPA of 1968, which amended section 406(k) of the NHA,²²² FSLIC and the Board did not have the same powers over state-chartered savings and loan associations as they did over federally chartered associations. In the case of state-chartered thrift institutions, a state commissioner, and not the Board, had authority to appoint a receiver, yet FSLIC still was required to pay all of the depositors' insured accounts in the event of insolvency.²²³ In the Illinois cases, the state commissioner appointed a state receiver; the actions of this receiver put severe stress on FSLIC's assets.²²⁴

The purpose of the BPA was to assure that the Illinois situation did not recur. To effectuate this purpose, Congress gave the Board the power to appoint FSLIC as receiver for state-chartered associations placed in receivership under certain conditions, essentially "federalizing" the receivership.²²⁵

220. Note, *FSLIC Federal Receivership Appointments for Allegedly Insolvent State Savings and Loan Associations: A Plot to Federalize State Savings and Loans Against their Will?* 33 DE PAUL L. REV. 783, 791 n.47 (1984) (citing D. COHEN & R. FREIER, *THE FEDERAL HOME LOAN BANK SYSTEM* 11 n.6 (1980)) [hereinafter *Federalize State Savings*].

221. *Id.*

222. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified at 12 U.S.C. §§ 1701-1750(g) (1982 & Supp. IV 1986)).

223. See T. MARVELL, *supra* note 28, at 99-102 (description of the protracted receivership of Marshall Savings & Loan Association).

224. *Federalize State Savings*, *supra* note 220, at 791. See also S. REP. NO. 1263, 90th Cong., 2d Sess. 7, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2536 [hereinafter S. REP. NO. 1263]. In the case of the insolvent Illinois savings and loan associations, FSLIC paid out more than 216 million dollars. By the time that the BPA was passed in 1968, FSLIC had yet to recover any of the funds, even though one of the associations had been in receivership for five years. The state commissioner did not appoint FSLIC as receiver and refused to give FSLIC any information on the financial status of the association until the hearings on the BPA were held in 1968. FSLIC paid one thrift, Marshall Savings & Loan Association, 83 million dollars for the insured accounts. Marshall had the use of that money for three years, interest-free, while the association was in the hands of a state receiver. FSLIC lost the use of this money and the interest it would have earned, and recouped nothing in this three year period. *Id.* at 7-8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2537.

225. *Id.* at 9, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2538. Before the Board can appoint FSLIC receiver for a state-chartered association, the following conditions must be met: 1) the state must first place the association in receivership, 2) the Board must determine that the § 1464(d) grounds exist, and 3) the savings account holders must be unable to withdraw funds. *Id.* at 9-10, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2538-39. Once the Board appoints FSLIC as receiver, the receivership is handled in the same way as if the association were federally chartered. *Id.* at 10, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2539.

The Senate Report explained the enacted provision which affected section 1729(d):

Section 406(c)(3)(B) authorizes the FSLIC to liquidate the institution in an orderly manner or make such other disposition of the matter as the FSLIC might deem to be in the best interest of the institutions, its savers, and the FSLIC. In carrying out its receivership responsibilities, the committee expects the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, and association stockholders. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.²²⁶

This language must be interpreted in light of the history and purposes of the 1968 Act. To give FSLIC and the Board more control over the appointment of a receiver and the liquidation proceedings of state-chartered associations, Congress wrested both administrative and judicial power from the state and gave it to the Board and FSLIC. To allay fears that FSLIC would abuse its power and conduct liquidation proceedings in an arbitrary manner, Congress instructed FSLIC to give "due consideration to the interest of all of the claimants upon the assets of the association."²²⁷

The language of section 1729(d) as it existed at the time of the BPA can now be understood in the context of the BPA. It dealt solely with the particular problem of FSLIC control of state-chartered savings and loan associations. Pursuant to state law, a state authority could appoint whomever it wished as receiver for a state-chartered association. Until and unless the Board stepped in and appointed FSLIC receiver, the state-appointed receiver would be under the complete control of the state authority.²²⁸ Then, once the Board ap-

226. *Id.*

227. *Id.*

228. The powers of a state-appointed non-FSLIC receiver are established by state law. Those powers, at least in general, do not include the power to adjudicate. For example, in Illinois, a creditor may prove his or her claim "to the satisfaction of the receiver" or adjudicate it in a court. Illinois Savings & Loan Act, ILL. ANN. STAT. ch. 32 para. 923 (Smith-Hurd 1970). The powers of a receiver under Illinois law are analogous to the powers of the FDIC as receiver. The receiver may allow a claim, but does not have final authority to refuse a claim. See section III C for the discussion of the FDIC. Furthermore, the creditor may bring a claim in any court that has subject-matter jurisdiction; the creditor is not limited to the court supervising the receivership. See *FSLIC v. Krueger*, 435 F.2d 633, 636 (7th Cir. 1970) (An action in personam brought in a federal district court does not interfere with the state court's supervision of the receivership.).

pointed FSLIC, the state authority would lose all control over FSLIC. The language added by the BPA refers to FSLIC receiverships of federalized state-chartered savings and loan associations. In such cases, FSLIC shall have the power to act in the specified ways, "subject only to the regulation" of the Board.²²⁹ The language of the BPA thus had this specific purpose, and did not in any way establish FSLIC adjudication.

If section 1729(d) empowers FSLIC with adjudicatory authority, it must be by virtue of the GSDIA. Subsection (2)(a)(iii) explores the legislative history of the GSDIA to determine whether Congress intended to empower the FSLIC with adjudicatory authority through the 1982 Act.

iii. Legislative History of the GSDIA

Congress enacted the Garn-St. Germain Depository Institutions Act of 1982 (GSDIA) to "revitalize the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans."²³⁰ The GSDIA gave savings and loan institutions increased banking powers which enabled them to offer consumers more services and to compete more effectively with other banking institutions.²³¹ In addition, the GSDIA provided greater protection to depositors and creditors²³² and granted FSLIC and the FDIC greater flexibility to "deal with financially distressed depository institutions."²³³

In strengthening FSLIC's powers, section 122(a) of the GSDIA authorized FSLIC to make loans to insured depository institutions in order to prevent default or lessen FSLIC's risk, and to merge insolvent institutions with solvent ones.²³⁴ Section 122(b) increased FSLIC's powers over a defaulted federally chartered savings and loan associa-

229. 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986).

230. Pub. L. No. 97-320, 96 Stat. 1469 (1982).

231. S. KIDWELL & R. PETERSON, *supra* note 2, at 126. In the early 1980's, rising interest rates and unstable inflation rates seriously threatened savings and loan institutions. Consumers were taking their savings out of savings and loans and investing their money in money market funds. Most of the savings and loan investments were in long term home mortgages at fairly low interest rates. See Comment, *The "Brokered Deposit" Regulation: A Response to the FDIC's and FHLBB's Efforts to Limit Deposit Insurance*, 33 U.C.L.A. L. REV. 594, 610-14 (1985).

232. S. REP. NO. 536, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3055 [hereinafter S. REP. NO. 536].

233. *Id.*

234. Section 122(a) amended § 406(f) of the National Housing Act (codified at 12 U.S.C. 1729(f) (1982)). See S. REP. NO. 536, *supra* note 232, at 48-49, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 3102-3103.

tion in order to equal FSLIC's powers over state-chartered associations.²³⁵ Finally, the GSDIA gave the Board increased, but only temporary, authority over state-chartered savings and loan associations. Section 122(d) of the GSDIA authorized the Board to appoint FSLIC receiver for a state-chartered savings and loan association before the state authorized the receivership.²³⁶ The state remained free to appoint FSLIC receiver and, until and unless the Board intervened, the state authority controlled FSLIC and the receivership.²³⁷

The GSDIA-enacted language of section 1729(d) reflects the distinction between sections 1729(b) and (c). Between 1982 and 1986, when the GSDIA expired, the Board could have appointed the FSLIC receiver for state-chartered associations in either of two ways. First, the state could have placed the association in receivership, and then the Board could have stepped in and appointed FSLIC as receiver based on statutory grounds as established by the BPA. Second, under the GSDIA, the Board could have appointed FSLIC as receiver without waiting for the state to place the association in receivership. In either event, the Board controlled FSLIC, and the state authorities were without any control. After the emergency power to appoint FSLIC as receiver without prior state action expired,²³⁸ the language of section 1729(d) no longer needed to reflect this distinction, and thus the language of 1729(d) as amended by the GSDIA expired, and the

235. Section 122(b) amended § 406(b) of the National Housing Act (codified at 12 U.S.C. § 1729(b) (1982)). See S. REP. NO. 536, *supra* note 232, at 49, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3103. Prior to the GSDIA, "an anomalous situation exist[ed] whereby the ability of the FSLIC to make 'such other disposition' of a defaulted S&L as in the best interests of its insured members applie[d] only to State-chartered insured institutions, and not to Federal associations." *Id.*

236. 12 U.S.C. §§ 1729(c)(1)(B)(ii)(I) and (c)(1)(B)(ii)(II) (1982). See section III B (2)(a)(ii) for an explanation of when the Board could appoint FSLIC as receiver for state-chartered savings and loan associations prior to the GSDIA.

According to the Senate Banking, Housing and Urban Affairs Committee, the Board is allowed "to appoint the FSLIC as conservator or receiver of a State-chartered insured institution upon a determination that the institution is in an unsafe or unsound condition to transact business, has substantially dissipated its assets, or had assets less than its obligations. However, the Bank Board must seek written approval from the relevant State official prior to exercising such receivership authority, and FSLIC may act without such approval only if the state fails to act in a timely manner or FSLIC is appointed receiver by a public [sic] authority of an institution in default." S. REP. NO. 536, *supra* note 232, at 8, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3062.

The authority to appoint FSLIC in this fashion was a temporary authority; it expired on October 15, 1986. 12 U.S.C. § 1729(d) (Supp. IV 1986).

237. 12 U.S.C. § 1729(c)(2)(A) (1982).

238. This emergency power (codified at 12 U.S.C. § 1729 (c) (1982)) expired October 15, 1986. 12 U.S.C. § 1729(c) (Supp. IV 1986).

earlier language was reinstated.²³⁹

The GSDIA temporarily increased the Board's powers, expediting Board procedures for appointing FSLIC as the receiver for state-chartered thrift institutions.²⁴⁰ Like the BPA and the FISA, each of which also increased the Board's and FSLIC's authority over state-chartered associations, the GSDIA did not provide for the administration or adjudication of creditors' claims. Section 1729(d), as originally enacted, or as altered by the BPA or the GSDIA, does not establish FSLIC adjudicatory authority.²⁴¹

b. FSLIC Adjudication and Other Statutes in the NHA

The previous discussion has illustrated that adjudicatory authority for FSLIC cannot be derived from section 1729(d) alone. This subsection explores other statutes in the NHA's statutory scheme that may tend to prove or disprove the existence of authority for FSLIC adjudication. It concludes that Congress did not intend, through the NHA, to empower FSLIC with adjudicatory authority.

i. Section 1729(b)(1)(B): Power to Pay Valid Claims

Section 1729(b)(1)(B) provides: "In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such shall pay all valid credit obligations of the association."²⁴² FSLIC argued that the power to "pay all valid credit

239. 12 U.S.C. § 1729(d) (Supp. IV 1986).

240. Congress reasoned that early intervention might prevent a default, or, at a minimum, minimize a troubled association's loss of assets and minimize FSLIC payment from FSLIC's own fund. S. REP. NO. 536, *supra* note 232, at 8-9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3061-62.

241. In order to determine the force of any statute, a court must examine the statute against the background of the entire statutory framework. *Morrison-Knudsen*, 811 F.2d at 1219 (citing *Brown v. Duchesne*, 60 U.S.(19 How.) 183 (1857)).

FSLIC also argued that: 1) its rejection of a claim is "analogous to a trustee's rejection of a contract in a bankruptcy proceeding." *Hudspeth*, 756 F.2d at 1101-02. Section 365(a) of the Bankruptcy Code provides, in part, that a "trustee, subject to the court's approval, may assume or reject any executory contract." 11 U.S.C. § 365(a) (1982). Even though the court would be a bankruptcy court, § 365(a) does not give the trustee sole power to reject or assume a contract. *Id.* To extend FSLIC's analogy further, one could argue that the bankruptcy court's control over the trustee is analogous to the Board's control over FSLIC. However, the Board merely reviews FSLIC's conclusion. The bankruptcy court, on the other hand, "has full power to inquire into the validity of any claim asserted against the estate . . ." *In re Dean*, 460 F. Supp. 452, 456 (W.D.N.Y. 1978) (quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939)).

242. 12 U.S.C. § 1729(b)(1)(B) (1982). Section 1729(b) is entitled "Powers of Corporation on default of Federal Savings & Loan Association." Section 1729(b)(1)(A) lists the following additional powers: the receiver is authorized

(i) to take over the assets of and operate such association; (ii) to take such action

obligations" further evidenced Congress' intent to grant FSLIC power to adjudicate creditor claims.²⁴³ The *Morrison-Knudsen* court countered by observing that Congress used the word "valid" in the ordinary sense, to indicate that it does not want FSLIC to pay invalid claims, noting that "[w]ho determines 'validity' is not specified [by § 1729(b)(1)(B)]."²⁴⁴ The *Morrison-Knudsen* court's view is more consistent with the ordinary meaning of the language. Given that meaning of the term "valid," this section of the statute simply does not support the inference that Congress granted FSLIC the authority to *determine* the validity of such claims, let alone adjudicate them.

ii. Section 1728: Suits by Depositors

Section 1728(b) requires the Corporation,

[i]n the event of a default by any insured institution, [to pay] . . . each insured account in such insured institution *Provided*, That the Corporation . . . in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, . . . may require the final determination of a court of competent jurisdiction before paying such claim.²⁴⁵

"The language used indicates unambiguously that Congress anticipated judicial adjudication [of depositor claims] in the event of a disputed claim."²⁴⁶

Section 1728(c), a statute of limitations for depositors' suits, provides that: "No action against the Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default"²⁴⁷ The *Morrison-Knudsen* court viewed this as persuasive evidence that Congress "anticipated judicial adjudication" for depositors' claims.²⁴⁸

as may be necessary to put it in a sound solvent condition; (iii) to merge it with another insured institution; (iv) to organize a new Federal association to take over its assets; (v) to proceed to liquidate its assets in an orderly manner; or (vi) to make such other disposition of the matter as it deems appropriate; whichever it deems to be in the best interest of the association, its savers, and the Corporation

Id.

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

244. *Id.*

245. 12 U.S.C. § 1728(b) (1982).

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

247. 12 U.S.C. § 1728(c) (1982).

248. *Morrison-Knudsen*, 811 F.2d at 1220. The court relied on *Jugum v. FSLIC*, 637 F. Supp. 1045 (W.D. Wash. 1986), where depositors brought suit in federal district court to recover insurance on their deposits. The *Jugum* court held that: 1) plaintiffs were entitled

The *Morrison-Knudsen* court inferred from its analysis of the statute of limitations that “FSLIC may adjudicate neither *depositors’* nor *creditors’* claims.”²⁴⁹ According to the court, it does not make sense to “assume that FSLIC must litigate *depositors’* claims, with which it has great expertise, but may adjudicate *creditors’* claims against the institution in receivership, as to which its expertise is much less”²⁵⁰ FSLIC is part of a federal system of deposit insurance, the purpose and function of which is to insure deposits. Congress created the system and was obliged to detail depositors’ rights and FSLIC duties.²⁵¹ There is no corresponding statute detailing non-insured creditors’ rights. The *Morrison-Knudsen* court’s position is that Congress would not have given FSLIC power to adjudicate creditors’ claims, while denying such power over depositors’ claims.²⁵²

FSLIC could counter that because Congress neither provided that FSLIC may require a creditor to prove its claim in court before paying an uninsured creditor, nor provided a statute of limitations for uninsured creditor claims, Congress did not envision the judicial resolution of creditor claims. Furthermore, since Congress did not envision judicial resolution of such claims, it must have intended administrative resolution. This argument, however, is not persuasive. There are statutes of limitations covering all claims. The statutes in the NHA create a contractual relationship between the depositor and the insurer and enumerate the duties and rights of both. The rights of creditors are established by common law or other federal and state statutes. Congress provided for depositors’ rights in the NHA because it created FSLIC to insure depositor accounts. Congress was silent on the rights of creditors because their rights are determined by other law.²⁵³

to bring a court action, 2) the court was not limited to review of agency action under the Administrative Procedure Act (plaintiffs had first presented their claims to FSLIC who denied them in part), and 3) § 1728 was an independent source of jurisdiction that did not require exhaustion of administrative remedies (although plaintiffs had exhausted administrative remedies). *Id.*

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

250. *Id.*

251. See generally 12 U.S.C. § 1728 (1982).

252. *Morrison-Knudsen*, 811 F.2d at 1220. FSLIC is better equipped to deal with depositor claims than creditor claims. *Id.* There is limited potential for complicated depositor claims. On the other hand there is great potential for complicated creditor claims. *Morrison-Knudsen* is an example. See *supra* notes 107-124 and accompanying text for the facts of *Morrison-Knudsen*. FSLIC is hardly equipped to sort this out, given the nature of its claims procedures. See *supra* note 54 for details of FSLIC’s claims procedures.

253. One might contend that because Congress failed both to establish a contractual relationship between FSLIC as receiver and uninsured creditors and to preserve a creditor’s right to a court action, Congress intended to defer to agency control over all creditor

iii. Section 1730: Jurisdiction

Section 1730(k) provides, in part:

(B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, . . . and (C) the Corporation may, . . . remove any such action, suit, or proceeding from a State court to the United States district court for the district . . . by following any procedure for removal . . . in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, or receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.²⁵⁴

In arguing against FSLIC adjudicatory authority, the *Morrison-Knudsen* court contended that section 1730(k)(1) reflected "Congress's tacit assumption that claims against FSLIC's receivership assets would be amenable to judicial resolution,"²⁵⁵ and interpreted this section as "distributing between state and federal courts the jurisdiction over suits that must be brought in court."²⁵⁶

According to the *Morrison-Knudsen* court, the proviso clause keeps certain actions in state court.²⁵⁷ FSLIC argued, on the other

claims. It follows from this argument that Congress empowered FSLIC and the Board with more authority over uninsured creditors' claims than over depositors' claims. Considering the purposes of the NHA—to insure depositors' accounts—it is unlikely that Congress would have so intended.

254. 12 U.S.C. §§ 1730(k)(1)(B), 1730(k)(1)(C) (1982).

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

256. *Id.*

257. *Id.* (citing *Hancock Fin. Corp. v. FSLIC*, 492 F.2d 1325, 1327 (9th Cir. 1974)).

In a declaratory action to determine the ownership of the assets of a state-chartered association, the Ninth Circuit Court of Appeals affirmed the dismissal of the action for lack of subject matter jurisdiction because the proviso clause required that the action be brought in state court. *Hancock*, 492 F.2d at 1327. The *Hancock* court "assumed that, were it not for this proviso clause, § 1730(k)(1) would confer jurisdiction" on the federal courts. *Id.* at 1327 n.2 (citing S. REP. NO. 1482, 89th Cong., 2d Sess. 19, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3550). Furthermore, the *Hancock* court reached this conclusion "in spite of some dicta in recent opinions of the Court of Appeals for the Seventh Circuit suggesting that clause (B) relates solely to removal proceedings by the FSLIC in actions in which it has been made a party." *Hancock*, 492 F.2d at 1328 n.2 (citing *Katin v. Apollo Sav.*, 460 F.2d 422, 425 n.5 (7th Cir. 1971), cert. denied, 406 U.S. 918 (1972) (That section [1730(k)(1)] provides jurisdiction in suits in which FSLIC is plaintiff but denies jurisdiction where FSLIC as defendant removes the action to federal court.), and *FSLIC v. Krueger*, 435 F.2d 633, 636 (7th Cir. 1970) (proviso relates "solely to removal proceedings from state courts in actions wherein the corporation has been made a party"))).

hand, that the proviso clause applies only to receiverships of state-chartered, state-regulated associations, where FSLIC has been named receiver by the state and the Board has not yet appointed FSLIC receiver.²⁵⁸ So long as such a receivership has not been “federalized,”²⁵⁹ creditor actions against FSLIC as receiver of a state-chartered savings and loan association do not arise under federal law and cannot be removed to federal court.

The *Morrison-Knudsen* court found that section 1730(k)(1) does not limit a court’s jurisdiction, although other statutes may limit jurisdiction in particular ways.²⁶⁰ The *Morrison-Knudsen* court found no other statutory authority which limits the jurisdiction of a court with respect to creditor claims. Furthermore, the court stated that section 1730(k)(1) indicates that Congress contemplated that creditor claims would be resolved in federal court, so that the proviso provides an exception for a defined class of claims against state associations which have not been federalized.

FSLIC, on the other hand, contended that sections 1464(d)(6)(C) and 1729(d) limit a court’s jurisdiction with respect to creditor claims,²⁶¹ and thus section 1730(k)(1) simply does not apply. However, as previously discussed, section 1729(d) neither limits a court’s jurisdiction, nor establishes FSLIC adjudication,²⁶² and section 1464(d)(6)(C) only limits the jurisdiction of a court in two specific contexts.²⁶³ Thus, in the absence of any other statute limiting the jurisdiction of court adjudication of creditor claims, section 1730(k)(1) permits court adjudication.

iv. Section 1730: Powers as Supervisor and Receiver Compared

A comparison of FSLIC’s powers as supervisor of state-chartered thrift institutions with its powers as liquidator of insolvent associations confirms that Congress did not intend to empower FSLIC with adjudicatory authority in its receivership capacity. Section 1730,²⁶⁴ entitled “Termination of insurance and enforcement provisions,” is similar to

258. FSLIC’s Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc at 12-13 n.8 *Morrison-Knudsen Co. v. CHG Int’l, Inc.*, 811 F.2d 1209 (9th Cir. 1987).

259. See *supra* note 225 and accompanying text for an explanation of how a state receivership is “federalized.”

260. *Morrison-Knudsen*, 811 F.2d at 1220. As previously discussed, § 1464(d)(6)(C) limits the jurisdiction of a court in two contexts. See section III A (1).

261. See *First Amer. Sav. Bank v. Westside*, 639 F. Supp. 93, 97 (W.D. Wash. 1986).

262. This proposition is established in section III B (2)(a).

263. This proposition is established in section III A.

264. 12 U.S.C. § 1730 (1982).

section 1464(d),²⁶⁵ and grants FSLIC several enforcement powers. Section 1730(b) empowers FSLIC to withdraw an association's insurance coverage without the consent of the association.²⁶⁶ Sections 1730(e) and (f) provide FSLIC with the authority to issue permanent and temporary cease-and-desist orders.²⁶⁷ Finally, sections 1730(g) and (h) allow FSLIC to remove or suspend a director or officer.²⁶⁸ These subsections provide that challenges to FSLIC enforcement orders will be handled through an administrative procedure consisting of an administrative hearing followed by judicial review.²⁶⁹ The *Morrison-Knudsen* court correctly observed that Congress empowered FSLIC, through section 1730, and the Board, through section 1464, to adjudicate violations of federal law in their capacities as supervisors of the nation's savings and loan associations.²⁷⁰

Section 1729 is entitled "Liquidation of insured institutions."²⁷¹ Its subsections describe FSLIC's powers and duties as receiver for both state and federally chartered institutions.²⁷² Enforcement powers are not included in this section. No mention is made of any type of administrative procedure or judicial review, and no analogous statute to either section 1730(j) or section 1464(d)(7)(A) is included, detailing the manner in which hearings shall be held.

This comparison shows that Congress established different statutory programs for handling FSLIC enforcement actions and creditor claims. Congress explicitly empowered FSLIC to adjudicate challenges to its enforcement powers; Congress gave no such explicit adjudicatory authority for the closely-related area of resolving creditor

265. As discussed in section III A, § 1464(d) is entitled "Proceedings to enforce compliance with the law and regulations; cease and desist proceedings; temporary-cease-and-desist orders; suspension or removal of directors or officers; appointment and removal of conservator or receiver; hearings and judicial review" 12 U.S.C. § 1464(d) (1982). Part of the HOLA, this section gives the Board various enforcement powers over federally chartered associations and prescribes an administrative process for challenging any Board enforcement action under this act through an administrative procedure consisting of an initial hearing with subsequent judicial review. Section 1464(d)(7)(A), which defines the type of hearings and the manner in which they shall be conducted, makes no mention of creditor claims. See 12 U.S.C. § 1464(d)(7)(A) (1982).

266. 12 U.S.C. § 1730(b) (1982).

267. 12 U.S.C. §§ 1730(e) and 1730(f) (1982).

268. 12 U.S.C. §§ 1730(g) and 1730(h) (1982).

269. 12 U.S.C. § 1730(j) (1982). Section 1730(j) specifies the administrative procedure to be followed for challenges to FSLIC enforcement orders. *Id.* Section 1730(j) is analogous to 12 U.S.C. § 1464(d)(7)(A) (1982).

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

271. 12 U.S.C. § 1729 (1982).

272. See discussion of § 1729 in section III B (2)(a).

claims. In view of this lack of explicit authority, Congress did not intend to empower FSLIC to adjudicate creditor claims.

3. The Regulations

Whether Congress intended to empower FSLIC with adjudicatory authority or not, the current regulations governing creditor claims do not establish adjudicatory authority.²⁷³ The Board promulgated sections 549.4(a) and 569a.8²⁷⁴ for the administration of creditor claims. Together, they require FSLIC to notify all creditors that they must “present their claims, with proof thereof” to FSLIC as receiver.²⁷⁵ Once presented with a claim, “[t]he receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim . . . not so proved, and shall notify the claimant of the disallowance.”²⁷⁶

The *Hudspeth* court viewed these regulations as evidence that adjudication is a receivership function of FSLIC.²⁷⁷ Because an agency’s interpretation of its authority evidenced in part by its regulations is entitled to great weight,²⁷⁸ the *Hudspeth* court concluded that FSLIC’s interpretation must be upheld “unless demonstrably irrational.”²⁷⁹ On the other hand, the *Morrison-Knudsen* court recognized such deference, but reasoned that “deference will not save an agency interpretation that is contrary to clear congressional purpose.”²⁸⁰ Not only did the *Morrison-Knudsen* court find FSLIC’s interpretation to be contrary to “congressional purpose,” it also found that the regulations failed to support the FSLIC interpretation.²⁸¹

By their terms, the regulations permit FSLIC to allow or disallow

273. See section III C for a discussion of the scope of Board rulemaking authority. The Board may have the authority to empower FSLIC with adjudicatory authority even in the absence of specific statutory authority for FSLIC adjudication.

274. 12 C.F.R. §§ 549.4(a), 569a.8 (1987). Section 549.4(a) applies to creditors of federally chartered associations and 569a.8 applies to creditors of state-chartered associations.

275. 12 C.F.R. § 549.4(a) (1987). Creditors of state-chartered associations must also present their claims. See 12 C.F.R. § 569a.8 (1987).

276. 12 C.F.R. § 549.4(b) (1987). Section 569a.8(b) provides, in part: “Any claim filed . . . and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part or reject in whole or in part any creditor claim . . . not proved to its satisfaction” 12 C.F.R. § 569a.8(b) (1987).

277. *Hudspeth*, 756 F.2d at 1102 n.5.

278. *Id.* at 1103 (citing *Mattox v. FTC*, 752 F.2d 116, 123-24 (5th Cir. 1985) and *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1984)).

279. FSLIC’s Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc at 8, *Morrison-Knudsen Co. v. CHG Int’l, Inc.*, 811 F.2d 1209 (9th Cir. 1987).

280. *Morrison-Knudsen*, 811 F.2d at 1215 (citing *Chevron*, 467 U.S. at 843 n.9).

281. *Id.* at 1218.

a claim. The *Morrison-Knudsen* court found this power to be equivalent to “[p]aying or refusing to pay [a claim, which] . . . is not an adjudication of a claim,”²⁸² but merely an administrative decision.²⁸³ Further, while the regulations may enable FSLIC to determine “*whether a dispute exists,*” they do not empower FSLIC “to resolve disputes with the force of law.”²⁸⁴

To support its determination that the regulations do not establish adjudicatory authority, the *Morrison-Knudsen* court compared the language detailing the depositor claims procedure with the language detailing creditor claims procedure. Section 549.5-1(b)(2) provides in part: “The receiver shall approve any seasonably filed claim proved to its satisfaction. The receiver may wholly or partly disallow any claim . . . not so proved [D]isallowance shall be final, except as the Board may otherwise determine.”²⁸⁵ FSLIC does not have the power to adjudicate depositor claims.²⁸⁶ The language of section 549.5-1(b)(2) is almost identical to that of sections 549.4(b) and 569a.8(b) and (d) and thus cannot provide the basis for exclusive adjudicatory power.²⁸⁷ Furthermore, comparing sections 549.4(b), 569a.8(b) and 569a.8(d) to sections 509.1 through 509.22²⁸⁸ yields the inescapable conclusion that sections 549.4(b) and 569a.8(b) and (d) do not establish adjudicatory authority. Sections 509.1 through 509.22 occupy nine full pages in the Code of Federal Regulations and detail every aspect of trial-like proceedings for challenges to FSLIC’s enforcement orders. There is nothing remotely trial-like about the regulations applicable to depositor and creditor claims procedures.

4. Comparison to the FDIC

Subsections III B (1), (2), and (3) combine to show that Congress did not empower FSLIC with adjudicatory authority and thus that the *Hudspeth* court’s holding is incorrect. By comparing FSLIC to the FDIC, this subsection demonstrates that the *Morrison-Knudsen* court’s holding also is incorrect: although Congress did not empower FSLIC with adjudicatory authority, Congress did not prohibit FSLIC

282. *Id.*

283. *Id.*

284. *Id.*

285. 12 C.F.R. § 549.5-1(b)(2)(1987).

286. See the discussion in section III B (2)(b)(ii).

287. *Morrison-Knudsen*, 811 F.2d at 1218 n.2. The court wondered “how a single administrative process [could] . . . be adjudicative for creditors but non-adjudicative for depositors.” *Id.*

288. 12 C.F.R. §§ 509.1-509.22 (1987) (detailing procedures for FSLIC adjudications of challenges to its enforcement orders).

from adjudicating.²⁸⁹ The *Morrison-Knudsen* court's contention that Congress intended FSLIC and the FDIC to have parallel authority in all respects is not borne out by the facts: while a statute prohibits the FDIC from adjudicating, no statute similarly bars FSLIC from such undertakings.

Congress created the FDIC as part of the Federal Reserve Act of 1933.²⁹⁰ The FDIC insures banks established under the National Bank Act of 1864,²⁹¹ and other qualified banking institutions.²⁹² The Comptroller of Currency appoints the FDIC as receiver for insolvent banks.²⁹³ The *Morrison-Knudsen* court contended that:

[C]ongress has given the Federal Deposit Insurance Corporation (FDIC) the same powers by statute that the Board has given the FSLIC by regulation: to receive "legal proof" of creditors' claims and to pay only on "such claims as may have been proved to [its] satisfaction." . . . But the FDIC has never claimed, and no court has ever found, that these powers vest the liquidating agency rather than the district courts with the ultimate power to adjudicate creditors' claims.²⁹⁴

According to the *Morrison-Knudsen* court, because the FDIC never has asserted that it has the power to adjudicate creditor claims, Congress did not grant it that power. Because the Board gave FSLIC the same powers Congress gave the FDIC, FSLIC lacks adjudicatory power.²⁹⁵

This argument, however, is based on a false premise: Congress did not give the FDIC the same powers by statute that the Board gave FSLIC by regulation. The statute controlling the FDIC as receiver, section 193, provides that the "Comptroller shall, . . . cause notice to be given, . . . calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."²⁹⁶

289. The *Morrison-Knudsen* court held that Congress intended not to empower FSLIC with adjudicatory authority. *Morrison-Knudsen*, 811 F.2d at 1215, 1222. This comment has established that Congress did not intend to empower FSLIC with adjudicatory authority, a weaker position. See section II B for the discussion of *Morrison-Knudsen*.

290. Ch. 89, § 8, 48 Stat. 168 (codified at 12 U.S.C. § 1811 (1982 and Supp. IV 1986)).

291. Ch. 106, § 50, 13 Stat. 114 (codified as amended in scattered sections of 12 U.S.C. (1982 and Supp. IV 1986)).

292. 12 U.S.C. § 1814(b) (1982).

293. 12 U.S.C. § 1821(c) (1982).

294. *Morrison-Knudsen*, 811 F.2d at 1218 (quoting, in part, 12 U.S.C. §§ 193, 194, 1821(d) (1982)).

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

296. 12 U.S.C. § 193 (1982). The Comptroller of Currency is appointed by the President, along with two others, to constitute the three member board which oversees yet is

Section 194 provides that "the comptroller shall make a ratable dividend of the money so paid over to him . . . on all such claims as may have been proved to his satisfaction or *adjudicated* in a court of competent jurisdiction" ²⁹⁷ Finally, section 1821(d) provides that the "Corporation as . . . receiver, . . . may, in its discretion, pay dividends on proved claims" ²⁹⁸ The FDIC as receiver pays out claims proved to the FDIC board or "adjudicated in a court of competent jurisdiction." ²⁹⁹

In quoting section 194, the *Morrison-Knudsen* court failed to quote the entire text and, most notably, omitted the language "adjudicated in a court of competent jurisdiction." ³⁰⁰ There is no analogous language in FSLIC's enabling statute or in regulations 549.4 or 569.a(8), the Board-created rules for claim resolution. ³⁰¹ Under sections 549.4 and 569.a(8), FSLIC has the power to allow claims proved to its satisfaction, and to disallow any claim not so proved. ³⁰² Thus, the FDIC receivership powers are distinct from FSLIC's receivership powers.

It has been argued persuasively that the FDIC does not have the power to adjudicate creditor claims. ³⁰³ Sections 191 through 194, which govern the FDIC, ³⁰⁴ have been in existence since 1864. ³⁰⁵ Long before the FDIC was created, the Supreme Court held that a receiver appointed under these sections did not have final authority to refuse a

part of the FDIC. See S. KIDWELL & R. PETERSON, *supra* note 2, at 224, and 12 U.S.C. § 1812 (1982). While the FDIC's board is similar to the Board, the Board is separate from FSLIC. See section I A for the discussion of the structure of the Board and FSLIC. The FDIC is itself an independent agency. T. MARVELL, *supra* note 28, at 89.

297. 12 U.S.C. § 194 (1982) (emphasis added). Sections 193 and 194 originally were enacted as part of the National Bank Act, ch. 106, § 50, 13 Stat. 114 (1864) (codified as amended at 12 U.S.C. §§ 191-194).

298. 12 U.S.C. § 1821(d).

299. 12 U.S.C. § 194.

300. *Morrison-Knudsen*, 811 F.2d at 1218 (citing 12 U.S.C. § 194).

301. 12 C.F.R. §§ 549.4, 569.a(8) (1987).

302. *Id.*

303. Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 TEX. L. REV. 1429, 1433-34 (1986). In the event that the FDIC refuses to allow a creditor's claim, the creditor may bring a court action, and if the creditor succeeds on the merits, the court will order the FDIC as receiver to honor the creditor's claim. *Id.* at 1438. See also *Philadelphia Gear Co. v. FDIC*, 751 F.2d 1131 (10th Cir. 1984) (court ordered FDIC to allow claim), and *First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978), (frozen out creditors entitled to prove their claims against the receivership in court).

304. 12 U.S.C. §§ 191-200 apply to receiverships of national banks. Since 1934, the receiver for national banks has been the FDIC.

305. Ch. 106, § 50, 13 Stat. 114 (1864) (codified as amended in scattered sections of 12 U.S.C. (1982)).

claim, and thus had no adjudicatory authority.³⁰⁶

The *Morrison-Knudsen* court also contended that “Congress meant to give both agencies [FSLIC and FDIC] parallel authority over their respective institutions,”³⁰⁷ when it enacted the GSDIA.³⁰⁸ Congress intended through the GSDIA to enable the FDIC and FSLIC to better assist troubled banks and savings and loans.³⁰⁹ The GSDIA empowered both agencies, on a temporary emergency basis, with expanded “merger-related” powers and enhanced powers to assist banks in order to prevent their closing.³¹⁰ While Congress did intend to “give both agencies parallel authority over their respective institutions,”³¹¹ in this respect, the GSDIA did not alter any statute affecting the creditor claims procedure. The most sensible reading of the GSDIA is that it achieved “parallel authority” in a limited area but left other areas, and other differences, untouched.

The *Morrison-Knudsen* court then reasoned that because Congress failed to distinguish FSLIC and FDIC adjudicatory authority, Congress intended the agencies’ adjudicatory authority to be the same. Since the FDIC does not have adjudicatory authority, neither does FSLIC.³¹² This argument is fallacious. It also would be fallacious,

306. *White v. Knox*, 111 U.S. 784 (1884) (creditor claim originally refused by receiver was allowed by the court). See also *Schulenberg v. Norton*, 49 F.2d 578 (8th Cir. 1931) (court ordered the receiver to pay the claim after the receiver had refused the claim).

307. *Morrison-Knudsen*, 811 F.2d at 1221. The court intended “parallel authority” in the broadest sense: parallel authority in every respect. *Id.*

308. Pub. L. No. 97-320, 96 Stat. 1469 (1982). See section III B (2)(a)(iii) for the discussion of the legislative history of the GSDIA.

309. S. REP. NO. 536, *supra* note 232 at 1, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3054. Between January 1, 1981, and July 30, 1982, the FDIC closed twenty-six commercial banks and nine mutual savings banks, at a total cost of 1.7 billion dollars (only four cases involved direct payment to depositors), and the situation was expected to get worse. *Id.* at 4, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 3057-58. During this same period, FSLIC closed 281 saving and loan associations. Seventy-six were merged voluntarily, and 205 were merged under FSLIC supervision. Of these 205, sixteen required direct financial assistance. *Id.* at 3058. In 1981, 328 saving and loans associations were merged voluntarily and sixty-one were merged under FSLIC supervision. Of these, twenty-three required financial assistance. *Id.*

310. *Id.* at 5-6, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 3059. Compare 12 U.S.C. § 1823 (1982) (emergency powers of FDIC codified) with 12 U.S.C. § 1729 (1982) (emergency powers of FSLIC codified).

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

312. The *Morrison-Knudsen* court argued that Congress

easily could have distinguished FSLIC’s adjudicatory authority from that of the FDIC. It did not do so. . . . Because the FSLIC only recently has found itself defending controverted creditor claims in its receivership capacity, we regard the FDIC’s longstanding interpretation of the receiver’s role, acquiesced in by Congress, as very persuasive authority.

Id.

under these circumstances, to argue from the premise that Congress failed to clarify FSLIC adjudicatory authority, to the conclusion that Congress thereby acquiesced in FSLIC's interpretation of its adjudicatory authority. Both arguments ignore the context in which Congress acted. Congress had no reason to distinguish FSLIC and FDIC adjudicatory authority: the question of FSLIC adjudicatory power was not at issue in 1981 and early 1982.³¹³ Congress was concerned with keeping FSLIC and the FDIC solvent and preserving as many banks and savings and loan associations as possible; Congress was not concerned with FSLIC or FDIC creditor claims procedures.³¹⁴

If Congress had intended FSLIC not to have adjudicatory authority, it could have enacted a statute analogous to section 194.³¹⁵ Congress did not enact such a statute when it created FSLIC only one year after the FDIC and in many respects was modelling FSLIC after the FDIC. Thus, there is no basis for the *Morrison-Knudsen* holding that Congress intended FSLIC not to adjudicate.

In the absence of a statutory grant explicitly authorizing the adjudication of creditor claims, and the lack of evidence that adjudication is implicit in the statutory scheme, it is unlikely that Congress in-

313. Congress had no reason to be aware of FSLIC's position on adjudication. FSLIC stated that it never argued this point until the 1980's because no federally chartered association was liquidated between 1941 and 1980, and only seven state-chartered savings and loan associations were liquidated during that period. FSLIC's Petition and Suggestion for Appropriateness for Rehearing in Banc at 7 n.6, *Morrison-Knudsen*, 811 F.2d 1209 (9th Cir. 1987). The *Hudspeth* court was the first circuit court of appeals to hold that FSLIC had adjudicatory authority. *Hudspeth*, 756 F.2d at 1103. Thus, Congress had little reason to clarify FSLIC adjudicatory authority one way or the other when it enacted the GSDIA. If Congress had little reason to clarify FSLIC adjudicatory authority in 1982, it had no reason to clarify such authority when it enacted the BPA, the FISA, the NHA, or the HOLA. *But see* First Am. Sav. Bank v. Westside Fed. Sav., 639 F. Supp. 93, 98 (W.D. Wash. 1986) (FSLIC has been adjudicating claims for 30 years, Congress had at least three opportunities to clarify FSLIC and Board authority in this regard and did not, thus Congress intended that FSLIC adjudicate.).

314. It has been proposed that FSLIC and the FDIC merge. *See, e.g.*, S. KIDWELL & R. PETERSON, *supra* note 2, at 411. FDIC-insured banks have not been in favor of this proposal. *Id.* FDIC-insured institutions would end up paying higher premiums, "[b]ecause the FSLIC had higher losses, it accumulated fewer reserves than the FDIC, gave lower rebates and levied extra premiums." *Id.* There is at present a FSLIC re-capitalization plan. *See* GENERAL ACCOUNTING OFFICE, THRIFT INDUSTRY: THE TREASURY/FEDERAL HOME LOAN BANK BOARD PLAN FOR FSLIC RECAPITALIZATION (1987). Were a merger to occur, however, it is more likely that FSLIC would cease to exist than the FDIC. The FDIC received more capitalization to begin with, oversees more institutions, and has lost less money. For example, the FDIC made 280 payments totaling 160 million dollars in its first 35 years. FSLIC made only 12 payments in its first 34 years yet paid out almost 238 million dollars, over double what the FDIC paid out. *See* T. MARVELL, *supra* note 28, at 97-98.

315. 12 U.S.C. § 194 (1982).

tended FSLIC to have the power to adjudicate creditor claims, much less the exclusive power to adjudicate creditor claims. However, Congress, rather than detailing FSLIC claims procedures through statutes, gave the Board rulemaking authority to promulgate rules regulating receivership proceedings.³¹⁶ The next section explores an alternative theory for FSLIC adjudication: that Congress, by failing to prohibit FSLIC adjudication and by granting the Board rulemaking authority, has empowered the Board to authorize FSLIC adjudication by promulgating appropriate regulations.

C. *Board Rulemaking Power: FSLIC Adjudication and Exhaustion of Administrative Remedies*

Subsections III B (1), (2), and (3) of this comment surveyed several statutes and regulations for evidence that Congress intended to empower FSLIC with adjudicatory authority, and found no such evidence. This lack of any evidence does not dispositively refute adjudicatory authority, however, for two reasons. First, as subsection III B (4) demonstrated, Congress failed to prohibit FSLIC from adjudicating when it might reasonably have done so. Second, Congress granted the Board the “power to make rules . . . for the reorganization, consolidation, liquidation, and dissolution of associations.”³¹⁷ That rulemaking power might encompass the power to establish FSLIC adjudication, provided that such adjudication is: 1) not inconsistent with any established interpretation of a statute in the NHA or the HOLA, 2) consistent with some congressional policy that the NHA or the HOLA was intended to effectuate, 3) not inconsistent with any congressional policy that the NHA and the HOLA was intended to effectuate, and 4) constitutional.

Because exclusive FSLIC adjudication is probably unconstitutional,³¹⁸ the Board would be prohibited from promulgating an adjudicatory scheme that required exhaustion of administrative remedies. The Board may promulgate regulations that require exhaustion of administrative remedies if it were to adopt a non-adjudicatory claims procedure. Courts, however, may not be bound by those regulations.

Subsection III C (1) first examines the rulemaking statute for receivership proceedings, section 1464(d)(11),³¹⁹ by exploring its legislative history and meager case law and comparing it to the rulemaking

316. 12 U.S.C. § 1464(d)(11) (1982).

317. 12 U.S.C. § 1464(d)(11) (1982).

318. Section IV A argues that exclusive FSLIC adjudication is unconstitutional.

319. 12 U.S.C. § 1464(d)(11) (1982).

statute for the regulation of federal savings and loan associations, section 1464(a).³²⁰ Subsection III C (2) then explains the four necessary conditions for proper administrative rulemaking and evaluates, in an abstract way, whether the Board could promulgate FSLIC adjudication. Subsection III C (3) measures the current and proposed regulations against the four necessary conditions and suggests possible FSLIC adjudicatory schemes that would satisfy them. Subsection III C (4) concludes by discussing a Board-promulgated exhaustion of administrative remedies requirement and the extent to which courts would therefore be bound to require exhaustion.

1. Board Rulemaking Authority under Section 1464(d)(11)

Enacted in 1966 as part of the FISA, section 1464(d)(11) provides that "[t]he Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations"³²¹ The legislative history of section 1464(d)(11) fails to indicate the scope of delegation. The only recorded comment, the Senate Report accompanying the FISA, simply repeats the statutory language of section 1464(d)(11).³²² While section 1464(d)(11) bears a striking resemblance to the original section 5(d) of the HOLA,³²³ the legislative history of that section also is sparse.³²⁴

320. 12 U.S.C. § 1464(a) (1982).

321. Pub. L. No. 89-695, 80 Stat. 695 (codified at 12 U.S.C. § 1464(d)(11) (1982)).

322. S. REP. NO. 1482, *supra* note 167, at 15, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3546. "The Board would be authorized to make rules and regulations for the reorganization, consolidation, liquidation, dissolution, and merger of associations, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships." *Id.*

323. Ch. 64, § 5, 48 Stat. 132 (1933) (codified as amended at 12 U.S.C. § 1464(d)). As originally enacted, § 5(d) of the HOLA read: "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, . . ." *Id.*, 48 Stat. at 133.

324. See section III B (1) for the legislative history of the HOLA. See also *Fidelity Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 163 (1982); Note, *Due-on-Sale Clauses and Restraints on Alienation: Does Wellenkamp Apply to Federal Institutions?*, 11 PAC. L.J. 1085, 1102-04 (1980).

In 1954, Congress amended § 5(d) of the HOLA with section 503(2) of the Housing Act of 1954 (Housing Act). Pub. L. No. 83-560, § 503(2), 68 Stat. 590, *reprinted in* 1954 U.S. CODE CONG. & ADMIN. NEWS 675. Section 503 replaced the one paragraph § 5(d) of the HOLA with two very detailed sections 503(1) and (2). Section 503(2) read, in part: "The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships, and receiverships." *Id.*, *reprinted in* 1954 U.S. CODE CONG. & ADMIN. NEWS at 732. Congress enacted the Housing Act to provide "a means by administrative and court proceedings whereby the Board could enforce compliance with law and regulations by Federal savings and loan associations"

Section 1464(d)(11)'s case law is similarly unilluminating. Only five cases, including *Morrison-Knudsen*, cite section 1464(d)(11), and none of these cases give section 1464(d)(11) more than a passing reference.³²⁵

Basing its position on the language of section 1464(d)(11) and a case construing a different statute, *Fidelity Savings and Loan Association v. de la Cuesta*,³²⁶ the Board has contended that this provision grants the Board plenary power to make rules regulating the receivership of insolvent associations.³²⁷ At issue in *Fidelity* was the Board's power under section 1464(a) to make and enforce rules regulating federal savings and loan associations.³²⁸ Stating that the Board was "vested with plenary authority to administer the Home Owners' Loan Act of 1933,"³²⁹ the Supreme Court construed the Board's power under section 1464(a) broadly, and held that the Board's regulations were valid and preempted conflicting state law.³³⁰ In light of *Fidelity*, the Supreme Court probably would find that the Board's power under section 1464(d)(11) is as broad as the Board's power under section 1464(a).³³¹

S. REP. NO. 1472, 83d Cong., 2d Sess. 44, reprinted in 1954 U.S. CODE CONG. & ADMIN. NEWS 2723, 2766 (hereinafter S. REP. NO. 1472). Additionally, the Housing Act also provided a procedure for appointing a receiver and granted FSLIC the same power to terminate an association's insurance as the FDIC had over the banks it insured. *Id.* at 8, reprinted in 1954 U.S. CODE CONG. & ADMIN. NEWS at 2729-30. See *supra* notes 168-69 and accompanying text for a description of the enforcement procedure that the Housing Act put into effect and which the FISA later modified. The Senate Report to section 503(2) focused entirely on the new Board enforcement powers without indicating the scope of Board rulemaking power under section 5(d) of the HOLA. S. REP. NO. 1472, *supra* at 87-88, reprinted in 1954 U.S. CODE CONG. & ADMIN. NEWS at 2810-11.

325. See, e.g., *Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 422 F.2d 504, 598 n.2 (8th Cir. 1970) (unsuccessful challenge to the Board's authority to approve mergers); *Baer v. Abel*, 648 F. Supp. 69, 72 (W.D. Wash. 1986) (superseding *Baer v. Abel*, 637 F. Supp. 347, 350 (W.D. Wash. 1986)) ("The Board was also authorized to promulgate rules and regulations governing the liquidation of an association and the conduct of receiverships."); *Washington Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 526 F. Supp. 343, 396-97 (N.D. Ohio 1981) (unsuccessful challenge to the Board's power to promulgate regulations under § 1464(d)(11) which empower FSLIC to liquidate assets for cash); *Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F. Supp. 903, 910 (C.D. Cal. 1978).

326. 458 U.S. 141 (1982).

327. 50 Fed. Reg. 48,970 (1985).

328. 12 U.S.C. § 1464(a) (1982). Under § 1464(a), the Board is "authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations . . ." *Id.*

329. *Fidelity*, 458 U.S. at 144.

330. *Id.* at 152-54. The Board governs "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Id.* at 145 (quoting *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

331. If the Board was vested with plenary authority to administer the HOLA, *Fidel-*

2. Four Conditions for FSLIC Adjudication

Even with a broad delegation of power, there is some limit to the Board's power to promulgate regulations. The court will not sustain administrative rulemaking that "transcends the delegation."³³² Recent Supreme Court decisions suggest several factors to consider in order to determine whether the administrative rulemaking was legal: first, the administrative action must not be inconsistent with the well-established interpretation of a statute;³³³ second, the administrative action must serve or be consistent with a congressional policy behind the act that the agency is to administer;³³⁴ third, the administrative action must not be inconsistent with a well-defined congressional policy behind the enabling legislation;³³⁵ and fourth, the administrative action must be constitutional.³³⁶

The Board could promulgate regulations authorizing some form of FSLIC adjudication that would satisfy these four conditions. With

ity, 458 U.S. at 144, and § 1464(d)(11) is part of the HOLA, then the Board has plenary authority to administer § 1464(d)(11).

332. 1 J. STEIN, G. MITCHELL & B. MEZINES, *ADMINISTRATIVE LAW* § 3.03[5] (1987).

333. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986). The Board of Governors promulgated a regulation defining "bank" to include certain institutions specifically not included in the statutory definition of "bank." *Id.* at 363-64. The Court held that the Board of Governors went beyond its authority in promulgating the regulation, and struck it down. *Id.* at 374-75. *See also* *Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316 (1961) "[T]he fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *Id.* at 322.

334. The administrative act must "serve congressional will as evidenced in the statute it is empowered to administer." *Dimension*, 474 U.S. at 374. *See also* *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356 (1973). Congress authorized the Federal Reserve Board (FRB) to administer § 105 of the Truth in Lending Act. 82 Stat. 148 (codified at 15 U.S.C. § 1604). The FRB promulgated a regulation to enforce that statute by defining a credit sale to include any sale with four or more installments. *Mourning*, 411 U.S. at 358, 362. Congress clearly empowered the FRB to enact statutes that would prevent companies from disguising credit sales as non-credit sales. *Id.* at 367-68. The Supreme Court applied a very deferential standard to determine the validity of the regulation: it was valid because it was "reasonably related to the purpose of the enabling legislation." *Id.* at 369 (quoting *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969)).

335. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In *Porter*, the Supreme Court struck down a NLRB action ordering a company to agree to a certain term in a difficult contract negotiation setting because the policy behind the National Labor Relations Act was not to force labor and management to agree to terms, but to provide a context for fair negotiations. *Id.* at 102-09.

336. The respondent in *Mourning* argued that the FRB's regulation violated the fifth amendment. *Mourning*, 411 U.S. at 376-77. *Cf.* *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926) (taxing regulation violated the constitution); *accord* *Heiner v. Donnan*, 285 U.S. 312 (1932). *See also* 3 B. MEZINES, J. STEIN & J. GRUFF, *ADMINISTRATIVE LAW* § 13.01 (1987).

respect to the first condition, there is only a possible conflict, and it is not a serious one. Section 1729(d) grants FSLIC the power “settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith”³³⁷ While settling, compromising, and releasing claims is different from adjudicating them,³³⁸ this difference probably would not be viewed as unacceptable, and surely not as a contradiction of a stated congressional interpretation, because Congress has not made its interpretation of section 1729(d) known. Congress often enacts enabling statutes which survive despite containing potential inconsistencies.³³⁹

FSLIC adjudication also could satisfy the second condition. In enacting both the FISA and the BPA, Congress intended to give the Board and FSLIC more control over receivership proceedings, so that FSLIC could preserve its assets and wind up the affairs of insolvent associations as expeditiously as possible.³⁴⁰ FSLIC argued strenuously that exclusive FSLIC adjudication is necessary to effectuate that purpose.³⁴¹ The question then becomes whether non-exclusive FSLIC adjudication serves this congressional purpose.³⁴² FSLIC adjudication would serve this purpose, although perhaps not as well as exclusive FSLIC adjudication. FSLIC adjudication would provide creditors with an informal, less expensive, more efficient forum in which to present their claims. Any claim resolved by administrative adjudication would aid in serving the purpose of efficiency in winding up the affairs of the association.

The third condition already has been shown: Congress failed to prohibit FSLIC from adjudicating when it might reasonably have

337. 12 U.S.C. § 1729(d) (1982) (describing FSLIC powers in the liquidation context). See section III B (2)(a) for the legislative history and analysis of § 1729(d).

338. The *Morrison-Knudsen* court held that compromise and settlement is not adjudication; rather, adjudication is holding for one party or the other. *Morrison-Knudsen*, 811 F.2d at 1219.

339. See R. Pierce, *supra* note 16 at § 3.1, at 44.

340. The FISA significantly increased the Board's powers to enforce law and regulation in an efficient manner. See section III A (1) for the discussion of the FISA. The BPA increased the Board's powers to appoint a receiver for state-chartered savings and loan associations so that FSLIC could better protect its assets. See section III B (2)(a)(ii) for the discussion of the BPA.

341. *Hudspeth*, 756 F.2d at 1101-02. See also FSLIC's Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc at 2-6, *Morrison-Knudsen Co. v. CHG Int'l Inc.*, 811 F.2d 1209 (9th Cir. 1987).

342. Exclusive FSLIC adjudication, without judicial review, would, as a matter of common sense, best serve this congressional policy. This, however, would not be constitutional. Exclusive FSLIC adjudication with judicial review also fails to pass constitutional muster. See section IV A for the discussion of this problem.

done so.³⁴³ Thus, no express or implied congressional policy prohibits FSLIC adjudication. FSLIC adjudication, if properly designed, would be constitutional, and thus could satisfy the fourth requirement. Exclusive FSLIC adjudication, however, has insurmountable constitutional problems.

It is not clear whether these four factors constitute the necessary and sufficient conditions for proper agency rulemaking. If they do, the Board could empower FSLIC with non-exclusive adjudicatory authority if carefully prescribed. There is, however, no evidence that these conditions are sufficient, and there are no examples of an agency's acquiring adjudicatory authority in this manner. It is undisputed that Congress has the power to delegate legislative authority and judicial power to administrative agencies.³⁴⁴ Congress granted the Board legislative authority: it is questionable whether the Board may, as an exercise of its legislative power, delegate adjudicatory authority to FSLIC.

Adjudicatory authority is different from most powers that agencies acquire through rulemaking. Congress delegates general authority to administer an act which involves considerable technical expertise for which the agency is better equipped than the Congress to decide.³⁴⁵ There are examples of congressional delegation of authority to enforce an act where the agency is given free reign to determine the manner of enforcement.³⁴⁶ There are also examples of vague, open-ended delegations to agencies when it is impossible to determine exactly what problems will arise in the future; the intent is to leave to the agency the authority to make rules to handle whatever problems do arise.³⁴⁷ Finally, Congress may delegate a particular general function, leaving the agency free to fill in the blanks.³⁴⁸

Adjudication, arguably, is a reasonable means to effectuate the HOLA, but is otherwise different from the examples of agency delegation. Adjudication of creditor claims where the decisionmaker is,

343. See section III B (4).

344. 1 J. STEIN, G. MITCHELL & B. MEZINES, *ADMINISTRATIVE LAW* § 3.03[6] (1987) (citing *Federal Trade Comm'n v. Rubberoid Co.*, 343 U.S. 470 (1952)). See also *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986).

345. R. PIERCE, *supra* note 16, at § 3.4.3 at 58 (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Occupational Health and Safety Administration required to set exposure limits for toxic substances for employees)).

346. *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356 (1973). See *supra* note 334 for more details of *Mourning*.

347. *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1051 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Lichter v. United States*, 334 U.S. 742 (1948).

348. See *United States v. Grimaud*, 220 U.S. 506 (1911).

most often, applying state law does not involve special agency expertise; FSLIC is a regulator and an insurer, not a court. Although the Board and FSLIC have distinct enforcement powers, FSLIC adjudication is not a means for enforcing those powers, and thus the enforcement model is not a good analogy.³⁴⁹ The analogy of unforeseeable future problems prompting the Board to use its discretion and regulate accordingly, also is inappropriate. Congress gave the Board rulemaking power to regulate receiverships, and FSLIC adjudication surely would have been foreseeable. Finally, FSLIC adjudication is more like a general function rather than a particular function needed to justify some other specifically delegated general function. As a general function, it is the kind of power Congress would delegate directly to FSLIC, perhaps leaving it to the Board to fill in the exact procedures to be employed.³⁵⁰ Thus, the Court would have room to distinguish adjudicatory authority from other, more typical rulemaking exercises if it so chose. There is, however, no case law that would preclude Board delegation of adjudicatory authority to FSLIC.

3. Regulations: Current, Proposed and Possible

Even if one accepts the argument that the congressional grant of rulemaking authority to the Board empowers it to authorize FSLIC adjudication, the Board has not yet exercised its power. The current rules detailing FSLIC claims procedures fail to establish adjudicatory authority.³⁵¹ There is no evidence that the Board or FSLIC ever construed these regulations as being evidence of adjudicatory authority until quite recently.³⁵² Section 549.4(b) has been in existence for more than thirty years,³⁵³ and it describes an administrative procedure which is analogous to the non-adjudicatory administrative procedure for resolving depositor claims.³⁵⁴ It is unlikely that the regulation was promulgated to implement adjudicatory authority.³⁵⁵

349. Compare promulgated FSLIC adjudication with *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356 (1973) discussed *supra* at note 334.

350. This is, essentially, FSLIC's position, but as sections III B (2) and (3) show, Congress did not delegate adjudicatory authority to FSLIC.

351. See *supra* notes 54 & 56 for the current claims and appeals procedures. See section III B (3) for the discussion and analysis of the regulations.

352. *Morrison-Knudsen*, 811 F.2d at 1216.

353. 21 Fed. Reg. 4548, 4553 (June 21, 1956).

354. See *supra* notes 285-87 and accompanying text for the comparison of the depositor claims procedure with the creditor claims procedure.

355. *But see* *First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 98 (W.D. Wash. 1986) (the existence of regulations establishing adjudicatory authority for more than thirty years is evidence of FSLIC adjudicatory authority).

The proposed regulations, which detail FSLIC claims and appeals procedures,³⁵⁶ are based on the *Hudspeth* court's holding that Congress empowered FSLIC with exclusive adjudicatory authority, and the Board was thus merely filling in the details. This view has two serious problems: first, Congress did not empower FSLIC with adjudicatory authority;³⁵⁷ and second, exclusive FSLIC adjudication, as construed by the *Hudspeth* court, is not constitutional.³⁵⁸

The proposed regulations do not appear to establish FSLIC adjudicatory authority.³⁵⁹ That is, the claims procedure outlined at proposed rule section 569c.7 might be adjudicatory or non-adjudicatory, depending on what congressionally mandated power the regulation was designed to promote.³⁶⁰ Had Congress explicitly authorized FSLIC to adjudicate, the proposed administrative procedure would be adjudicatory. Congress, however, did not so authorize FSLIC, and thus there is no basis for regarding this administrative procedure as adjudicatory. Proposed rule section 569c.7 details separate notice procedures for depositors and creditors, but the same FSLIC decision-making process is described for both depositors and creditors.³⁶¹ As previously demonstrated, FSLIC does not have adjudicatory authority with respect to depositor claims.³⁶² Thus, there is no reason to infer that the described procedure is an adjudicatory one.

If the Board were to promulgate regulations which effectively establish FSLIC adjudication, those regulations should establish a scheme that is clearly adjudicatory. Because there is no specific congressional authority for FSLIC adjudication, the regulations will be the basis from which courts will infer that FSLIC has adjudicatory authority.³⁶³ Furthermore, that adjudicatory scheme must be constitutional and thus be non-exclusive and include a neutral

356. 50 Fed. Reg. 48,992 (1985) (to be codified at 12 C.F.R. § 569c.7) (claims procedures). *Id.* at 48,994-95 (to be codified at 12 C.F.R. § 569c.9) (appeals procedures).

357. See sections III B (2) and III B (3).

358. See Part IV.

359. Focusing on the proposed regulations, without referring to the lengthy discourse accompanying them, which clearly states that the proposed regulations are designed to implement exclusive FSLIC adjudication (see 50 Fed. Reg. 48,970-983 (1985)), it appears that the regulations do not establish an adjudicatory scheme.

360. The proposed rules would codify the existing claims resolution procedure. See *supra* note 58 and accompanying text.

361. See 50 Fed. Reg. 48,992 (to be codified at 12 C.F.R. § 569c.7(c)).

362. See section III B (2)(b)(ii).

363. In *Morrison-Knudsen*, the court found no statutory basis for FSLIC adjudication and no evidence that the administrative procedure was an adjudicatory one. Consequently, the court concluded that FSLIC was not an adjudicator. See *Morrison-Knudsen*, 811 F.2d at 1215-18.

decisionmaker.³⁶⁴

The proposed claims and appeals procedures attempt to mandate exhaustion of administrative remedies. The proposed regulation which details the appeals procedure clearly states that “[a] timely appeal filed with the Director FSLIC in accordance with the provisions of this section shall be mandatory to establish judicial review of an initial determination.”³⁶⁵ Proposed section 569c.7(e)³⁶⁶ states that FSLIC will pay dividends on FSLIC-allowed claims only. The following subsection evaluates the extent to which the Board, through regulations, can require courts to dismiss creditor claims for failing to exhaust administrative remedies.

4. Rulemaking and Exhaustion of Administrative Remedies

Perhaps more than the adjudicatory power, FSLIC wants creditors to exhaust administrative remedies prior to any court proceeding.³⁶⁷ That is, if the Board had to choose between promulgating regulations that established adjudication and regulations that established an exhaustion requirement, the Board more probably would elect the exhaustion requirement. This subsection explores the effectiveness of Board-promulgated regulations which would require the claimant to exhaust administrative remedies. The more difficult question is whether a court would be bound by the regulation and be required to dismiss a creditor’s claim for failing to exhaust administrative remedies, or whether a court would have discretion to hear the case provided certain conditions obtained.

The *Morrison-Knudsen* court stated that “[w]here there is no explicit statutory requirement of exhaustion of administrative remedies, the application of exhaustion rules is a matter committed to the discretion of the district court.”³⁶⁸ FSLIC, on the other hand, argued that

364. See Part IV.

365. 50 Fed. Reg. 48,994 (to be codified at 12 C.F.R. § 569c.9(a)(5)).

366. 50 Fed. Reg. 48,993 (1985).

367. FSLIC’s Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc 3-5 *Morrison-Knudsen Co. v. CHG Int’l, Inc.*, 811 F.2d 1209 (9th Cir. 1987).

By requiring a claimant to exhaust its administrative remedies, it is possible to achieve a more orderly and timely disposition of the receivership estate, which is one of FSLIC’s chief duties. . . . If exhaustion is not required, FSLIC receiverships will be seriously disrupted. . . .

Even more fundamental, if all claimants are required to submit claims to the administrative process before they can proceed in court, some— perhaps most— of those claims will be resolved without resort to the courts. This will conserve receivership assets and hasten the liquidation of the receivership estate.

Id. at 3-4 (footnote omitted).

368. *Morrison-Knudsen*, 811 F.2d at 1223 (citing *Wong v. Department of State*, 789

“[e]xhaustion of administrative remedies can be mandated either by statute or regulation.”³⁶⁹ There is no statutory prerequisite requiring exhaustion of administrative remedies prior to judicial review. The two positions can be reconciled. The Board may promulgate rules that purport to mandate exhaustion of administrative remedies, but a court, in the absence of a statutory requirement, may exercise its discretion. “[T]he exhaustion doctrine is a prudential rule created by the courts to enable them to allocate responsibilities efficiently between agencies and courts.”³⁷⁰ The Board, in promulgating an exhaustion requirement, would be attempting to deprive courts of their ability to allocate responsibilities, and thus the courts may not be bound by the regulatory requirement. Yet courts generally require a party to exhaust administrative remedies,³⁷¹ and it is only for good cause that a court would not require a party to exhaust.³⁷² Thus, the best way for the Board and FSLIC to require exhaustion is to put in place sound procedures that protect the interests of the claimant so that courts will require exhaustion.

IV. THE CONSTITUTIONAL PROBLEMS

Part IV^o discusses and evaluates two constitutional problems raised by FSLIC adjudication, the propriety of a non-article III entity adjudicating state law claims—the *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*³⁷³ issue—and due process concerns. As discussed in this section, a constitutionally sound FSLIC adjudicatory scheme must, at a minimum, be non-exclusive and employ a neutral decisionmaker. In addition, the Constitution may require that the losing party be offered more than “ordinary appellate review.”³⁷⁴ Section

F.2d 1380, 1385 (9th Cir. 1986); *Rodrigues v. Donovan*, 769 F.2d 1344, 1349 (9th Cir. 1985)).

369. FSLIC’s Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc at 8, *Morrison-Knudsen Co. v. CHG Int’l, Inc.*, 811 F.2d 1209 (9th Cir. 1987) (citing *Doria Mining and Engin’g Corp. v. Morton*, 608 F.2d 1255 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980)).

370. R. PIERCE, *supra* note 16, at § 5.7.3, at 190 (footnote omitted) (citing *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (Levanthal, J., concurring)).

371. *Id.*

372. See *supra* note 135 and accompanying text for factors courts balance when considering to require exhaustion. See also section IV A and IV B for further discussion of exhaustion of administrative remedies in the context of adjudicatory and non-adjudicatory claims procedures.

373. 458 U.S. 50 (1982).

374. *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 584 (1985). See *infra* note 390 for the facts of *Thomas*. *Northern Pipeline* rejected the deferential “clearly erroneous” standard, terming it “ordinary appellate review.” *Northern Pipeline*, 458 U.S. at 85.

A discusses the *Northern Pipeline* issue. Section B discusses the due process concerns.

A. *The Northern Pipeline Issue*

Article III of the Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.³⁷⁵

Taken literally, article III prohibits Congress from delegating any judicial authority to article I entities.³⁷⁶ The Supreme Court, however, has upheld the constitutionality of article I courts which are created to adjudicate "public rights."³⁷⁷

In *Northern Pipeline*,³⁷⁸ the Supreme Court held unconstitutional the Bankruptcy Act of 1978 (Act) which granted bankruptcy courts exclusive jurisdiction over "all civil proceedings arising under title 11."³⁷⁹ The Court reasoned that article III prevented Congress from establishing article I courts³⁸⁰ which would have jurisdiction over "all

375. U.S. CONST. art. III, § 1.

376. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986). "[F]rom its language, [article III] . . . appears to tolerate no exceptions to its requirements." Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 226 (1983).

377. *Northern Pipeline*, 458 U.S. at 67. The "Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.'" *Id.*

378. *Northern Pipeline*, 458 U.S. 50. *Northern Pipeline* filed for reorganization under the bankruptcy laws in January of 1980. *Id.* at 56. In March of 1980, *Northern Pipeline* brought suit against *Marathon Pipe Line* in the bankruptcy courts created by the Bankruptcy Act of 1978 on a breach of contract claim. *Id.* at 56-57. The Supreme Court held that the broad grant of jurisdiction in the 1978 Act, and thus the entire Act, was unconstitutional. *Id.* at 87. Justice Rehnquist, in a concurring opinion in which Justice O'Connor joined, agreed that "adjudication of *Northern's* lawsuit cannot be . . . sustained." *Northern Pipeline*, 458 U.S. at 91 (concurring opinion). However, Justice Rehnquist would have stricken only so much of the Act as permitted this case to be decided in bankruptcy court, rather than striking down the entire Act as unconstitutional. *Id.*

379. *Id.* at 50 (quoting 28 U.S.C. § 1471(b) (1982) (subsequently amended to read: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (Supp. IV 1986)).

380. When it creates an article I court, "Congress will usually employ one of its enumerated powers in article I, in combination with the 'necessary-and-proper' clause of

civil proceedings" under the Act, because some of those proceedings would involve "private rights" as opposed to "public rights."³⁸¹ Public rights "arise 'between the government and others.'"³⁸² "Private rights," on the other hand, involve the "'liability of one individual to another under the law as defined,'" and may not be removed from article III courts.³⁸³ The issue here presented is whether exclusive or non-exclusive FSLIC adjudication of creditors' "private rights" claims offends article III.

Morrison-Knudsen expressed concern that exclusive FSLIC adjudication might be unconstitutional because private rights were being adjudicated in non-article III fora.³⁸⁴ The court did not reach, and thus did not decide, the issue, but rejected FSLIC's statutory "interpretation because it raises these 'serious' constitutional difficulties, which the statute can quite 'fairly be read' to avoid."³⁸⁵

FSLIC contended that the Supreme Court modified the *Northern Pipeline* doctrine in decisions upholding agency adjudication of private rights in the face of article III challenges.³⁸⁶ Some courts have held that FSLIC adjudication is constitutional because judicial review is available under the Administrative Procedure Act.³⁸⁷ *Morrison-Knud-*

that same article, as the source of its authority to create these courts, they are referred to as 'article I' courts or 'legislative courts.'" Redish, *supra* note 376, at 198 (footnotes omitted). "[T]he category includes the territorial courts, the military courts, the court of the District of Columbia and the Tax Courts." *Id.* at 199 n.18. Congress attempted to establish an additional class of article I courts through the Bankruptcy Act of 1978. *Northern Pipeline*, 458 U.S. at 53. Although Congress establishes both article I and article III courts, these courts differ in that article I judges do not enjoy life tenure and protection against salary diminution (the bankruptcy judges were appointed for a term of 14 years and their salary was "subject to adjustment"). *Id.*

Administrative agencies, though not referred to as courts, "are analogous to legislative courts because, although they may and often do perform adjudicatory functions, their members do not receive the salary and tenure protections of article III." Redish, *supra* note 376, at 214 (footnote omitted). The Supreme Court has recognized that *Northern Pipeline* applies to agency adjudication as well. *See infra* notes 390-91 and accompanying text.

381. *Northern Pipeline*, 458 U.S. at 51.

382. *Id.* at 69 (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

383. *Id.* at 69-70 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

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

385. *Id.* at 1222 (quoting *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3252 (1986)).

386. FSLIC's Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc at 13, *Morrison-Knudsen Co., v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987). *See* *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568 (1985); *Schor*, 106 S. Ct. 3245.

387. *See, e.g.*, *First Am. Sav. Bank v. Westside Federal Sav. & Loan Ass'n*, 639 F. Supp. 93 (W.D. Wash. 1986) (investors' suit against Westside dismissed once the Board appointed FSLIC as receiver); *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 636

sen conceded that, with respect to the *Northern Pipeline* problem, a FSLIC adjudicatory scheme that passes “constitutional muster” is possible.³⁸⁸

Though it might have struck the death knell for much administrative agency adjudication,³⁸⁹ *Northern Pipeline* has not caused such drastic consequences. Recently, the Supreme Court upheld agency adjudication of private rights, or claims based solely on state law. Under current *Northern Pipeline* doctrine, as found in the two majority opinions written by Justice O'Connor in *Thomas v. Union Carbide Agricultural Products Co.*³⁹⁰ and *Commodity Futures Trading Commission v. Schor*,³⁹¹ a non-exclusive FSLIC adjudicatory scheme might pass con-

F. Supp. 576, 581-82 (N.D. Ill. 1986), *aff'd*, 828 F.2d 387 (7th Cir. 1987) (*Northern Pipeline* does not apply to administrative procedures because agencies neither “render final judgment” nor “issue binding orders.”).

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

389. *See* Redish, *supra* note 376, at 199-200.

390. 473 U.S. 568 (1985). The Court upheld a voluntary binding arbitration system for resolving compensation disputes under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (codified at 7 U.S.C. § 136 (1982 & Supp. IV 1986)). Under the FIFRA, the Environmental Protection Agency must license every insecticide, fungicide, and rodenticide. *Id.* at 571. In support of its application for a license, a firm must submit scientific data. *Id.* Any data which are not protected as trade secrets may be used by other firms seeking to license a chemically similar substance, provided that they compensate the original submitter. *Id.* at 571-72. If the parties fail to agree on the amount of compensation, the dispute is resolved through binding arbitration with limited judicial review for “fraud, misrepresentation, or other misconduct.” *Id.* at 573-74 (quoting § 3(c)(1)(D)(ii) of the Federal Pesticide Act of 1978, 92 Stat. 819 (codified at 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)). This arbitration system replaced judicial resolution of compensation questions. *Thomas*, 473 U.S. at 571-73.

Justice Brennan, in a concurring opinion in which two other justices joined, found that the statutory compensation question was a matter of “public rights,” and thus agency adjudication was appropriate. *Id.* at 594-602.

391. 106 S. Ct. 3245 (1986). The Supreme Court upheld agency adjudication, on a voluntary basis, of a narrow class of private, state law claims with judicial review. Congress created the Commodity Futures Trading Commission (CFTC) to implement the Commodity Exchange Act (CEA). *Id.* at 3250. One of the duties of the CFTC was to administer a “reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers’ violations of the Act or CFTC regulations.” *Id.* The CFTC employed formal adjudication procedures for claims alleging violations of the CEA or any CFTC regulation. *Id.* at 3250-51. The CFTC promulgated a regulation which allowed it to “adjudicate counterclaims ‘aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.’” *Id.* at 3250 (quoting 41 Fed. Reg. 3994, 3995, 4002 (1976) (codified at 17 C.F.R. § 12.23(b)(2)(1987)).

Schor was a customer and debtor of ContiCommodity Services, Inc. (Conti) at the time the dispute began. *Schor*, 106 S. Ct. at 3250. Schor brought suit in the administrative forum, alleging that his debt was due to Conti’s violations of the CEA. *Id.* Conti, prior to notice of the suit in the administrative forum, brought an action in federal district court for the balance due on Schor’s debt. *Id.* Schor moved to dismiss the district court proceeding so that all claims could be adjudicated in the administrative forum. *Id.* at 3250-51. Before

stitutional muster. Though not compelled by its recent decisions, the Supreme Court might require more than ordinary appellate review for FSLIC adjudications.³⁹²

In *Thomas* and *Schor*, the Supreme Court used the “public rights”/“private rights” distinction as an evaluative, but not determinative, guide in assessing whether a particular claim may be adjudicated in a non-article III forum.³⁹³ According to the Court, agency adjudication of public rights is less likely to encroach on the independence of the judicial branch than agency adjudication of private rights.³⁹⁴ Thus, “where private, common law rights are at stake, [the Court’s] . . . examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching.”³⁹⁵ Although no single characterization of the nature of the claims subject to FSLIC adjudication can be made,³⁹⁶ included among them are private rights claims, based solely on state law for their existence and resolution, and subject to “searching” review.³⁹⁷

A majority of the Justices in *Northern Pipeline* agreed that “Con-

the court ruled on *Schor*’s motion to dismiss the federal court action, Conti voluntarily withdrew the action. *Id.* at 3251.

The CFTC held in favor of Conti on both the claim and counterclaim. *Schor* then challenged the constitutionality of the CFTC power to decide the state law-based contract counterclaim. *Id.*

392. See *infra* notes 407-39 and accompanying text.

393. *Schor*, 106 S. Ct. at 3259 (citing *Thomas*, 473 U.S. at 586-88).

394. *Id.*

395. *Id.* (citing *Northern Pipeline*, 458 U.S. at 84 (Rehnquist, J. concurring)).

396. Under *Hudspeth*, all claims are switched to the administrative track. The creditor in *Hudspeth* sought to challenge FSLIC’s handling of the receivership. The creditors in *Morrison-Knudsen* and *Coit Independence Joint Venture v. FirstSouth Sav. & Loan Ass’n*, 829 F.2d 563 (5th Cir. 1987), asserted state law-based claims and sought court adjudication. See *supra* note 144 for facts of *Coit*.

397. The issue addressed in this comment is whether FSLIC has the exclusive power to adjudicate creditor claims. Those creditor claims are based primarily on contract, or other state law causes of action. As such, state law provides the rule of decision. “It is therefore a claim of the kind assumed to be at the ‘core’ of matters normally reserved to Article III courts.” *Schor*, 106 S. Ct. at 3259 (citing *Thomas*, 473 U.S. at 587; *Northern Pipeline*, 458 U.S. at 70-71, and n.25).

The argument might be made that FSLIC adjudication of creditor claims is a matter of public right: FSLIC is restructuring debtor-creditor relations. In his *Northern Pipeline* plurality opinion, Justice Brennan wrote: “But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.” *Northern Pipeline*, 458 U.S. at 71. Although granting the bankruptcy courts jurisdiction to adjudicate *Northern Pipeline*’s contract claim violated article III, the adjudication of claims against *Northern Pipeline* in the bankruptcy courts would not violate article III. Adjudication of claims against the entity in some stage of bankruptcy is a matter of restructuring debtor-creditor relations. Justice Rehnquist’s con-

gress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”³⁹⁸ Focusing on substance rather than form,³⁹⁹ the *Schor* court concluded that the underlying purposes of article III protection were to guard the independence of the judicial branch within the doctrine of the separation of powers,⁴⁰⁰ and to protect litigants’ “right to have claims decided before judges who are free from potential domination by other branches of government.”⁴⁰¹ According to *Schor*, this article III, section 1 protection was designed primarily to safeguard the personal interest, rather than the structural or institutional interest.⁴⁰²

The *Schor* Court held that the Commodity Futures Trading Commission’s (CFTC) adjudicatory scheme protected this personal interest in choice of forum, because the statute gave the claimant the choice to bring a claim for Commodity Exchange Act (CEA) violations in either a federal district court or the administrative forum.⁴⁰³ The CFTC ad-

curing opinion in *Northern Pipeline* is consistent with this view. See *supra* note 378 for Justice Rehnquist’s opinion.

FSLIC could argue by analogy that when it adjudicates claims against the insolvent savings and loan, it is restructuring debtor-creditor relations. The restructuring of debtor-creditor relations, however, is distinct from the adjudication of creditor claims. An article III court could, for instance, determine the validity of all claims against the bankrupt entity. FSLIC, as the federal agency which has been empowered by Congress to restructure debtor-creditor relations, would then decide how the assets of the bankrupt would be shared by the creditors. Creditors may argue that Congress intended FSLIC’s powers as receiver to be more like this model.

A plurality of the Supreme Court in *Northern Pipeline* viewed the entire Bankruptcy Act of 1978 as unconstitutional. In response, Congress restored most of the judicial power to the district courts. 28 U.S.C. § 1474 (Supp. IV 1986). As a result, the question of whether adjudication of claims against a bankrupt entity is a matter of public rights cannot now arise. Congress, by restoring most of the judicial power to article III courts, may be indicating that it regards adjudication of claims against the bankrupt as a matter of private right.

Furthermore, since the Supreme Court has abandoned the private right/public right test for determining when agency adjudication is proper, and upheld agency adjudication of private rights under certain conditions, the Court does not have to sacrifice its intuitions about what is and is not a private right. That is, the Court may uphold agency adjudication of state law contract claims, without finding them to be a matter of public right. The Court can find these rights to be private rights, without the result that agency adjudication is forbidden.

398. *Thomas*, 473 U.S. at 584 (citing *Northern Pipeline*, 458 U.S. at 84 (plurality opinion); *Id.* at 90-92 (concurring opinion); *Id.* at 92 (Burger, C.J., dissenting)).

399. *Schor*, 106 S. Ct. at 3256.

400. *Id.*

401. *Id.* (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).

402. *Id.*

403. *Id.* at 3250.

judicated the state law contract claim in *Schor* only with the consent of the parties.⁴⁰⁴ The absence of consent was a "significant factor" in the Court's rejection of the bankruptcy scheme in *Northern Pipeline*.⁴⁰⁵

Exclusive FSLIC adjudication of creditor claims cannot be sustained under this rationale because the creditor has no choice of forum.⁴⁰⁶ What offends the Constitution in this view is not FSLIC adjudication of claims, but rather the exclusive adjudicatory authority and consequent lack of personal choice. A non-exclusive FSLIC adjudicatory scheme would satisfy the personal interest aspect of the underlying article III concerns. FSLIC and the courts would have concurrent jurisdiction; the creditor could choose the forum.

With respect to the institutional interest of separation of powers, the Court recently stated that there are no hard and fast rules.⁴⁰⁷ If it were non-exclusive and afforded more than "ordinary appellate review,"⁴⁰⁸ FSLIC adjudication might very well be sustained.⁴⁰⁹ A non-exclusive FSLIC adjudicatory scheme with only "ordinary appellate review" also might be sustained. The *Schor* court employed a balancing test "with an eye to the practical effect that the congressional action [of empowering an agency with adjudicatory authority] will have on the constitutionally assigned role of the federal judiciary."⁴¹⁰

Among the factors upon which [the Court] ha[s] focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and conversely, the extent to which the

404. With respect to a state law counterclaim, the CFTC has jurisdiction over the counterclaim when it arises out of the same facts as the alleged CEA violation. In *Schor*, the parties consented to CFTC adjudication of the state law claim in two senses: 1) by bringing the action in the administrative forum, *Schor* consented to the adjudication of all of the facts of the controversy, and Conti consented when it voluntarily dismissed the state law contract claims; and 2) *Schor* actually agreed to have all the facts adjudicated in the administrative forum when he moved to have the district court dismiss Conti's claim in order that all claims be decided in one forum. See *supra* note 391 for facts of *Schor*.

405. *Schor*, 106 S. Ct. at 3256 (citing *Northern Pipeline*, 458 U.S. at 80 n.31 (plurality opinion); *Id.* at 91 (Rehnquist, J., concurring); *Id.* at 95 (White, J., dissenting)).

406. The *Glen Ridge* court agreed and held that exclusive FSLIC adjudication of creditor claims was unconstitutional. *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (supplemental opinion on motion for rehearing) (Tex. App. 1987), *aff'd on other grounds*, No. C-6776, slip op. (Tex. March 30, 1988). See *infra* notes 421-25 and accompanying text for the appeals court's constitutional analysis.

407. *Schor*, 106 S. Ct. at 3258.

408. See *supra* note 374.

409. Exclusive FSLIC adjudication probably would offend the Constitution on the institutional prong because it deprives courts of jurisdiction. See *infra* notes 421-25 and accompanying text.

410. *Schor*, 106 S. Ct. at 3258 (citation omitted).

non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III⁴¹¹

In *Schor*, the Court held that CFTC adjudication of state law contract claims did not “impermissibly intrude on the province of the judiciary.”⁴¹² CFTC’s initial jurisdiction depended on a violation of the CEA, a “particularized area of law,”⁴¹³ whereas jurisdiction given to the bankruptcy courts under the 1978 Bankruptcy Act was broad.⁴¹⁴ CFTC orders are enforceable only by the district court,⁴¹⁵ whereas the bankruptcy courts could issue final orders.⁴¹⁶ Judicial review of CFTC conclusions of fact was under the “weight of the evidence” standard,⁴¹⁷ and judicial review of CFTC conclusions of law was under the *de novo* standard,⁴¹⁸ “rather than the more deferential standard found lacking in *Northern Pipeline*.”⁴¹⁹ Finally, unlike the bankruptcy courts, the CFTC did not “exercise ‘all the ordinary powers of district courts.’”⁴²⁰

The Texas Court of Appeals in *Glen Ridge I Condominiums, Limited v. FSLIC*,⁴²¹ applied these factors to an exclusive FSLIC adju-

411. *Id.* at 3258 (citing *Thomas*, 473 U.S. at 582-84; *Northern Pipeline*, 458 U.S. at 84-86).

412. *Id.*

413. *Id.* (citing *Northern Pipeline*, 458 U.S. at 85).

414. See *supra* note 379 and accompanying text for a description of bankruptcy court jurisdiction under the Act.

415. *Schor*, 106 S. Ct. at 3259.

416. *Northern Pipeline*, 458 U.S. at 85-86.

417. *Schor*, 106 S. Ct. at 3259.

418. *Id.* Courts are the final arbiters on matters of law. 5 U.S.C. §§ 706(2)(B), 706(2)(C) (1982).

419. *Schor*, 106 S. Ct. at 3259 (citing *Northern Pipeline*, 458 U.S. at 85 (The standard of review for bankruptcy court judgments was the “more deferential ‘clearly erroneous’ standard.”)).

420. *Id.* (quoting *Northern Pipeline*, 458 U.S. at 85).

421. 734 S.W.2d 374 (supplemental opinion on motion for rehearing) (Tex. Ct. App. 1987). The *Glen Ridge* court followed the *Hudspeth* court’s statutory construction, finding that Congress empowered FSLIC with exclusive adjudicatory authority. *Id.* at 390. In an effort to convince the *Glen Ridge* court that FSLIC adjudication was constitutional, FSLIC contended that the proper standard of review for FSLIC determinations was *de novo*. *Id.* at 389. However, the *Glen Ridge* court followed *Morrison-Knudsen*, and found that the standard of review was either the “arbitrary or capricious” standard or the “substantial evidence test.” *Id.*

Interestingly, FSLIC has stated that the appropriate standard of review for its determinations was the “arbitrary and capricious” standard. FSLIC’s Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc at 14, *Morrison-Knudsen Co. v. CHG Int’l, Inc.*, 811 F.2d 1209 (9th Cir. 1987).

The Texas Supreme Court affirmed *Glen Ridge*, but on different grounds, following the

dicatory scheme with only ordinary appellate review, and held that such a scheme was unconstitutional. The *Glen Ridge* court reasoned that because section 1464 "proscribe[s] any judicial action over FSLIC whatsoever,"⁴²² and judicial review is limited to a fairly deferential standard, "FSLIC has usurped *all* the functions of article III courts."⁴²³ Balancing the right to an article III court with the governmental interest the legislature sought to achieve,⁴²⁴ the *Glen Ridge* court found that, due to the absence of any choice on the part of the creditor, the right to an article III court received no value in the equation, and thus exclusive FSLIC adjudication was unconstitutional.⁴²⁵

As *Glen Ridge* indicated, applying the various factors to non-exclusive FSLIC adjudication of contract claims is more difficult than the situation in *Schor* and does not yield a conclusive result.⁴²⁶ FSLIC's authority is neither as broad as the bankruptcy courts', nor as narrow as the CFTC's. FSLIC acquires jurisdiction only after a savings and loan association is in receivership and may only adjudicate claims against the association in receivership.⁴²⁷ Nevertheless, FSLIC adjudicates state law contract claims, not matters that depend on agency expertise in a specific area of law, as was the case in *Schor*.⁴²⁸ The contract disputes in *Coit Independence Joint Venture Inc. v. First-South Saving & Loan Association* and *Morrison-Knudsen* are at the

Morrison-Knudsen court's statutory construction and not deciding the constitutional issue. *FSLIC v. Glen Ridge Condominiums, Ltd.*, No. C-6776, slip op. (Tex. March 30, 1988) ("We neither approve nor disapprove the holding of the court of appeals that the exercise of adjudicatory power by the FSLIC as receiver violates Article III . . .").

422. *Glen Ridge*, 734 S.W.2d at 388.

423. *Id.* at 389. FSLIC has more power than an article III court; FSLIC acts as plaintiff, judge, and jury. *Id.*

424. This governmental interest, according to the *Hudspeth* approach, is to provide an efficient and inexpensive claims procedure so that the receivership can be resolved quickly in order to preserve FSLIC assets. See *supra* notes 100-02 and accompanying text.

425. *Glen Ridge*, 734 S.W.2d at 388-90.

426. In *Schor*, the right to an article III forum was given a high value in the equation because the claimant had a choice of forum. For purposes of this discussion, the standard of review in the non-exclusive FSLIC adjudicatory scheme would be "weight of the evidence" standard for findings of fact, and de novo review for findings of law. These standards were approved of in *Schor*, see *supra* text accompanying note 417.

427. Any right of the insolvent savings and loan to acquire assets must be adjudicated in court. FSLIC's Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc at 6-7 n.5, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987). "[T]he receiver must go to court or use whatever other process is available outside of the administrative receivership to assert claims on behalf of the receivership." *Id.*

428. CFTC adjudication of state law contract claims was ancillary to the CFTC's primary jurisdiction to adjudicate violations of the CEA.

“core” of “matters normally reserved to Article III courts,”⁴²⁹ and do not depend on any statute in either the NHA or the HOLA for the existence or the resolution of the legal issues. Additionally, FSLIC does not require a court to enforce its final orders. FSLIC actually holds the assets and thus has the power to give them up or refuse to give them up. On the other hand, a higher-than-ordinary standard of judicial review of a final FSLIC determination, as well as a provision permitting a choice of forum, suggests that article III courts would retain sufficient power to assure that FSLIC adjudication of some state law contract claims would not impermissibly threaten the separation of powers.

While the outcome of any balancing of these various factors is unpredictable, the trend in the post-*Northern Pipeline* cases is towards constitutionality. In *Schor*, the court upheld CFTC adjudication of a narrow class of private rights as incident to its primary adjudicatory function with consent of the parties and the availability of more than “ordinary appellate review,” finding that it did not impermissibly threaten the separation of powers, the institutional prong of article III analysis.⁴³⁰ An analogous FSLIC adjudicatory scheme is likely to pass constitutional muster. Further, in view of the Court’s recent statement that the primary purpose of the article III protection is personal,⁴³¹ a non-exclusive adjudicatory scheme with merely “ordinary appellate review” might also satisfy article III concerns.

Under a non-exclusive FSLIC adjudicatory scheme with only “ordinary appellate review,” the creditor’s right to court adjudication is preserved. Thus, the primary article III concern is satisfied. Once this concern is satisfied, the institutional concern of separation of powers is lessened substantially: first, no article III court is deprived of jurisdiction to hear a case; second, on review of a FSLIC determination, an article III court has the last word on matters of law;⁴³² and third, if the factual record is inadequate, the court may review any factual findings anew under the de novo standard.⁴³³ Provided that the factual record were adequate, the reviewing court would be limited to reviewing findings of fact under the deferential “arbitrary and capri-

429. *Schor*, 106 S. Ct. at 3259 (citing *Thomas*, 473 U.S. at 585-86; *Northern Pipeline*, 458 U.S. at 70-71 and n.25).

430. *Schor*, 106 S. Ct. at 3260.

431. *Id.* at 3256.

432. 5 B. MEZINES, J. STEIN & J. GRUFF, *ADMINISTRATIVE LAW*, § 43.02[6] (1987) (citing 5 U.S.C. § 706(2)(D) (1982)).

433. *Id.* (citing 5 U.S.C. § 706(2)(F) (1982)).

cious" standard.⁴³⁴ The Supreme Court has not decided whether this standard of review in a non-exclusive adjudicatory scheme infringes on the institutional concerns of article III.

The *Thomas* Court upheld a voluntary arbitration scheme with judicial review limited to circumstances involving "fraud, misrepresentation, or other misconduct,"⁴³⁵ a standard of review seemingly even more deferential than the "arbitrary and capricious" standard. The rights at issue in *Thomas*, however, are distinguishable from the rights involved with FSLIC adjudication of state law claims. *Thomas* upheld the arbitration scheme but limited its holding to "the proposition that Congress, acting for a valid purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."⁴³⁶ As the *Glen Ridge* court noted, FSLIC's regulatory scheme does not alter the rights of the parties with respect to the validity of the state law claim.⁴³⁷ Thus, the rights involved are distinguishable, and the *Thomas* holding does not reach FSLIC adjudication. *Schor*, dealing specifically with private state law claims, upheld non-exclusive adjudication of creditor claims with a lower deference "weight of the evidence" standard which was specifically prescribed by statute.⁴³⁸ Thus, *Schor* does not directly support the constitutionality of non-exclusive adjudication of state law claims with merely "ordinary appellate review."

Non-exclusive FSLIC adjudication with "ordinary appellate review," however, avoids the *Northern Pipeline* holding.⁴³⁹ In light of the post-*Northern Pipeline* trend towards finding agency adjudication schemes constitutional, it is likely that a non-exclusive adjudicatory scheme with only "ordinary appellate review" also would pass consti-

434. The "arbitrary and capricious" standard applies to review of informal adjudications. 5 U.S.C. § 706(2)(A) (1982). The "substantial evidence" standard applies to review of formal adjudications. 5 U.S.C. § 706(2)(E) (1982). Since there is no statute which requires FSLIC adjudication to be "on the record after opportunity for an agency hearing," FSLIC is not required to comply with APA standards for formal adjudication, and thus the "arbitrary and capricious" standard would apply. See section IV B (1) for arguments that FSLIC must adjudicate formally.

435. *Thomas*, 473 U.S. at 573-74.

436. *Id.* at 593-94.

437. *Glen Ridge*, 734 S.W.2d at 378-79.

438. *Schor*, 106 S. Ct. at 3259.

439. The *Northern Pipeline* problem can be stated as follows: exclusive agency adjudication of state law claims with only "ordinary appellate review" is unconstitutional. Thus, any non-exclusive adjudicatory scheme avoids the *Northern Pipeline* problem.

tutional muster, but the question remains open. A greater constitutional threat to FSLIC adjudication is that it offends due process.

B. *The Due Process Issue*

The Constitution requires that no individual shall be deprived of "life, liberty, or property, without due process of law."⁴⁴⁰ Court and formal agency adjudication⁴⁴¹ afford due process to the parties of an action.⁴⁴² As subsection B (1) shows, due process concerns are raised because there is no statutory requirement that FSLIC adjudication be formal. Subsection B (2) discusses due process requirements in the context of informal FSLIC adjudication and concludes that the lack of a neutral decisionmaker in FSLIC adjudication, as presently conducted, denies due process to the creditors. Finally, subsection B (2) suggests two possible solutions to this due process problem.

1. FSLIC Adjudication is Informal, not Formal

The APA divides adjudication into two categories: formal and informal. Formal adjudication under the APA is a trial-type proceeding with substantially the same safeguards afforded to the parties as are provided by court adjudication.⁴⁴³ Of particular importance is the requirement that a neutral decisionmaker, usually an Administrative Law Judge (ALJ), conduct formal adjudications.⁴⁴⁴ But the APA does not provide requirements for informal adjudications.

The APA requires formal adjudication only when "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing."⁴⁴⁵ While the *Hudspeth* court asserted

440. U.S. CONST. amends. V, XIV.

441. 5 U.S.C. § 554 (1982).

442. Formal adjudication under the APA exceeds the minimum requirements of due process under the Constitution. R. PIERCE, *supra* note 16, § 6.4, at 280-281.

443. *Id.* § 6.4.3, at 302.

[A] party to a formal adjudication is entitled to an unbiased decision-maker, notice of the proposed action and the basis for that action, right to counsel, opportunity to present evidence orally and to make arguments, opportunity to know the opposing evidence and to cross-examine opposing witnesses, resolution of factual issues based exclusively on evidence admitted at trial, and written findings and conclusions.

Id.

444. *Id.* § 6.4.3a, at 302. "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." 5 U.S.C. § 3105 (1982). Sections 556 and 557 prescribe how hearings are to be conducted in formal agency adjudication or rulemaking. 5 U.S.C. §§ 556-557 (1982).

445. 5 U.S.C. § 554 (1982).

that FSLIC adjudication is required by statute, this comment demonstrates that there is no statute or combination of statutes that explicitly requires FSLIC adjudication.⁴⁴⁶ Thus, in APA terms, not only is there no statutory requirement that the determination be "on the record after opportunity for an agency hearing,"⁴⁴⁷ there is not even a statutory requirement for a hearing.

Instances involving an interpretation of the formal adjudication provision of the APA fall into four categories. First, there are examples where "Congress explicitly indicated that the agency is not required to use formal adjudication," courts will not require formal adjudication.⁴⁴⁸ "Second, there are cases where Congress explicitly indicated its intent to require an agency to use formal adjudication by including in the statute the precise language that triggers the APA formal adjudication provision"⁴⁴⁹ Third, there are instances where the legislative history clearly indicated that Congress intended to require formal adjudication, but the statutory language is less than clear.⁴⁵⁰ Finally, in the fourth class, there are instances where both ambiguous language and legislative history are present.⁴⁵¹ The case for formal FSLIC adjudication does not fit into even the fourth class of cases. FSLIC adjudication, if required by statute at all, does so implicitly. It is not a question of vague language and legislative history. There is no statutory language, and at best only vague legislative history. There is no basis on which a court could decide that Congress required FSLIC to use formal adjudication.⁴⁵²

446. The *Hudspeth* arguments are based on the notion that Congress implicitly empowered FSLIC with adjudicatory authority.

447. 5 U.S.C. § 554 (1982).

448. R. PIERCE, *supra* note 16, § 6.4.2, at 299 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955)).

449. *Id.* § 6.4.2, at 299.

450. *Id.* (citing *Independent Bankers Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1206 (D.C. Cir. 1975)).

451. *Id.* § 6.4.2, at 298 (citing *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978)). *Seacoast* was required to hold a public hearing but the statute was silent as to whether a record was required. *Seacoast*, 572 F.2d at 875. The court held that Congress required *Seacoast* to conduct its hearings as formal adjudications. *Id.* at 877-78.

Other courts have resolved ambiguous or vague language as evidence that Congress did not require formal adjudication. R. PIERCE, *supra* note 16, § 6.4.2, at 301-02 (citing *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978)).

452. There is a second argument, albeit attenuated, that Congress intended FSLIC adjudications to be in accord with the formal adjudication requirements. Under 12 U.S.C. § 1437(a) (1982), which is part of the Federal Home Loan Bank Act (FHLBA). Ch. 522 § 17, 47 Stat. 736 (1932) (codified at 12 U.S.C. § 1437 (1982)), the Board has the power to "adopt, amend, and require the observance of . . . rules, . . . and orders as shall be necessary

Even if a court held, as a matter of statutory construction, that FSLIC was not required to adjudicate formally, a court might nevertheless hold that FSLIC must adjudicate formally on due process grounds. The Supreme Court upheld formal agency adjudication of a narrow class of private law contract claims in *Schor*.⁴⁵³ That case might have been resolved differently, on due process grounds, if the agency had been adjudicating informally, because due process has different requirements depending on the context. Agency adjudication of private common law rights might require more due process protection than agency adjudication of public rights created by statute. In particular, agency adjudication of private rights might require formal adjudication in order to satisfy due process requirements, whereas informal agency adjudication of public rights would not. Section B (2) examines the particular requirements of due process in the context of informal FSLIC adjudication of creditor claims, and concludes that due process requires, at a minimum, that FSLIC use a neutral decisionmaker.

2. Due Process and Informal FSLIC Adjudication

FSLIC currently adjudicates claims on an informal basis. Claimants submit forms and accompanying documentation to FSLIC as receiver. FSLIC hires "special representatives" who are the decisionmakers.⁴⁵⁴ In this context, three questions arise: first, whether due process applies to FSLIC adjudication; second, whether the current procedures meet minimum due process requirements; and

from time to time for carrying out the purposes of the provisions of this chapter." Section 1437(a) continues:

Notwithstanding any other provision of law, the Board may from time to time make such provision as it deems appropriate authorizing the performance by any officer, employee, agent, or administrative unit thereof of any function of the Board (including any function of the Federal Savings and Loan Insurance Corporation), except with regard to promulgation of rules and regulations in accordance with section 553 of title 5, and adjudications subject to section 554 of title 5.

Id. This language appears to be of general application and not limited to powers and duties of the Board in the context of the FHLBA. Section 1437 is entitled: "Federal Home Loan Bank Board; powers and duties; independent agency; report to Congress."

FSLIC is a part of the Board; any FSLIC action is an action by the Board. If the Board empowered FSLIC with adjudicatory authority through rulemaking, § 1437(a) might mandate that those adjudications be conducted formally. However, still absent is any statutory requirement of a hearing or legislative history indicating that Congress required FSLIC to adjudicate 'creditor claims'.

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

454. For more detail of FSLIC's claims resolution procedures, see *supra* note 54.

third, if the current procedures do not satisfy due process, what changes must be made to satisfy due process.

Though not addressed explicitly in *Morrison-Knudsen*, there are serious due process concerns with a FSLIC adjudicatory scheme that allows FSLIC to be both a party to the proceeding and the decisionmaker.⁴⁵⁵ Stevenson Associates, one of the appellants in *Morrison-Knudsen*, contended that it would violate their right to due process to require them to pursue their claims administratively.⁴⁵⁶ In particular, Stevenson complained:

There is no opportunity . . . for Stevenson (1) to present other than documentary evidence; (2) to know, much less examine or cross-examine, the data on which FSLIC or the Board would deny a claim; (3) to subpoena witnesses or documents; (4) to conduct discovery; (5) to present any legal analysis of complex transactions which are the basis of the claim; or (6) for oral argument. . . . Moreover, . . . the FSLIC is, in effect, acting as both the respondent to the charges *and* as the adjudicator of the claim—an inherent and insurmountable conflict that creates a preordained result.⁴⁵⁷

The threshold question as to whether the constitutional requirement of due process applies to FSLIC adjudication must be answered affirmatively.⁴⁵⁸ Due process applies to adjudicative proceedings which affect particular individuals and threaten the loss of life, liberty, or property.⁴⁵⁹ A FSLIC adjudicative proceeding applies to individuals, as opposed to groups, and threatens the loss of property.

The next step is to determine the particular procedural safeguards that due process requires. Due process requires "some kind of hearing"⁴⁶⁰ with a neutral decisionmaker.⁴⁶¹ Thus, the most serious com-

455. The *Morrison-Knudsen* court's concern that FSLIC was both claimant and adjudicator may have been motivated by due process considerations. See *Morrison-Knudsen*, 811 F.2d at 1216. The court's holding avoided confrontation with due process just as it avoided the *Northern Pipeline* problem, by finding that FSLIC does not have the power to adjudicate.

456. Appellant's Opening Brief at 9-12, *Stevenson Assocs. v. FSLIC* (consolidated with *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987) (86-2081)).

457. *Id.* at 11-12. As FSLIC argued, the due process challenge may have been premature. Since a party must go through the claims procedure for there to be a due process violation, a challenge prior to a final determination would be "nothing more than speculation." FSLIC's Reply Memorandum in Support of the Motion to Dismiss at 15, *Stevenson Assocs. v. FSLIC*, No. C-85-7192 WHO (motion granted) (N.D. Cal. 1986).

458. See Note, *Decisionmaker Bias and the Procedural Due Process Rights of Withdrawing Employers Under the MPPAA*, 9 W. NEW ENG. L. REV. 227, 234 (1987).

459. R. PIERCE, *supra* note 16, § 6.3.1, at 227.

460. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975) (quoting Justice White in *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)).

plaint Stevenson makes is that it is denied a neutral decisionmaker.⁴⁶²

FSLIC as receiver is not a neutral decisionmaker. FSLIC institutionally, and the special representatives and FSLIC counsel appointed by FSLIC to adjudicate creditor claims personally, are potentially biased. FSLIC itself always is a creditor of the association in receivership.⁴⁶³ This situation would be problematic even if FSLIC were in sound financial condition. Because FSLIC is financially troubled,⁴⁶⁴

461. Judge Friendly placed the requirement for a neutral decisionmaker as the single most important factor. *Id.* at 1279. See also *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972) (“‘neutral and detached’ hearing body” was a minimum due process requirement); R. PIERCE, *supra* note 16, § 9.2.1, at 484; Note, *supra* note 458, at nn.199-200 and accompanying text. *But see Mathews v. Eldridge*, 424 U.S. 319 (1976) (The Court developed a balancing test to determine, in each instance, what due process requires. The Court did not require any particular safeguard in each instance.). Under the *Mathews* test, there are no absolute due process requirements. The test, however, has been criticized, and the Supreme Court has been reluctant to apply it even when it had the opportunity to do so. See Note, *supra* note 458, at 254-55 nn.184-85 & 193 and accompanying text.

The Fifth Circuit Court of Appeals, however, held that “administrative review of FSLIC receivership actions affords due process.” *Coit Independence Joint Venture v. FirstSouth Sav. & Loan Ass’n*, 829 F.2d 563, 565 (5th Cir. 1987), *petition for cert. granted*, 108 S. Ct. 1105 (1988) (citing *Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987)). The issue in *Coit* was whether FSLIC adjudication of state law-based claims violated due process. *Coit*, 829 F.2d at 565. The issue in *Woods*, however, was whether the procedure according to which the Board appointed FSLIC as receiver, thereby ousting the directors and placing an association in receivership, violated due process. *Woods*, 826 F.2d at 1411. The issues presented by the two cases are distinct: the *Woods* opinion does not, by itself, control *Coit*. The ousted directors in *Woods* were entitled to immediate judicial review in a federal district court of the Board’s administrative action of placing the association in receivership. The creditors in *Coit* are challenging the constitutionality of FSLIC acting as “both party and judge” of state law claims. *Coit*, 829 F.2d at 565. While administrative review of Board actions such as that in *Woods* may afford due process, it is far from automatic that administrative review of FSLIC adjudications of state law claims affords due process. The creditor is entitled to a neutral decisionmaker in the first instance. *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972).

462. The ten factors Judge Friendly singled out as the procedural safeguards of a hearing were, in order of importance:

- (1) An unbiased tribunal.
- (2) Notice of the proposed action and the grounds asserted for it.
- (3) Opportunity to present reasons why the proposed action should not be taken.
- (4) The right to present evidence, including the right to call witnesses.
- (5) The right to know opposing evidence.
- (6) The right to cross-examine adverse witnesses.
- (7) Decision based exclusively on the evidence presented.
- (8) Right to counsel.
- (9) Requirement that the tribunal prepare a record of the evidence presented.
- (10) Requirement that the tribunal prepare written findings of fact and reasons for its decision.

R. PIERCE, *supra* note 16, § 6.3.3, at 255-56 (citing Friendly, *supra* note 460, at 1267.)

463. Even if FSLIC did not have to reimburse depositors out of its own funds, FSLIC has borne the costs of the receivership, thereby becoming a creditor of the failed association. Every creditor claim allowed by FSLIC reduces the potential amount of recovery for FSLIC.

464. See *supra* note 2.

the potential for actual bias is far greater. There is a positive incentive for FSLIC to decide claims against the creditor in order to keep itself solvent,⁴⁶⁵ a dynamic which may create actual bias.⁴⁶⁶

FSLIC as adjudicator also presents the problem of apparent bias.⁴⁶⁷ FSLIC has a statutory duty to do "whichever it deems to be in the best interest of the association, its savers, and the Corporation."⁴⁶⁸ To be neutral, however, a decisionmaker must not owe a duty to one of the parties, let alone be one of the parties. This situation prevents, at a minimum, "the requisite appearance of fairness."⁴⁶⁹

In order to cure this unconstitutional bias, the interested decisionmaker must be removed from the claims procedure and an impartial process must be established which includes a neutral decisionmaker.⁴⁷⁰ This can occur in several ways. The most straight-

465. In *Ward v. Monroeville*, 409 U.S. 57 (1972), the Supreme Court held that having the mayor of the town preside over the town's traffic court violated due process because the proceeding lacked a neutral decisionmaker. The mayor was responsible for the town's finances and a large percentage of the town's finances came from the traffic court. The situation where FSLIC is an interested party and is also the adjudicator of creditor claims presents a similar and even more egregious violation: in *Ward*, there was no evidence that the town of Monroeville was in desperate straits, whereas the FSLIC is. See *supra* note 2.

466. See Note, *supra* note 458, at 258 nn.204-05 for an explanation of the notions of actual and apparent bias used by the Court as explicated in Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 492 (1986).

For an example of actual bias, see the facts of *Ward*, *supra* note 465. For an example of apparent bias, see *Federal Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n*, 295 F.2d 403 (9th Cir. 1961). In *Long Beach*, the Board conducted a formal administrative adjudication when the ousted directors of Long Beach Savings and Loan Association challenged the Board's appointment of FSLIC as receiver. *Id.* at 404. At the time of *Long Beach*, the Board did not have any permanent appointed Hearing Examiners (now known as Administrative Law Judges (ALJ's), 37 Fed. Reg. 16,787 (August 19, 1972)), and sought to borrow an examiner from the Security Exchange Commission. *Long Beach*, 295 F.2d at 407, 410. "[W]here an agency such as the Board does not have examiners of its own an examiner shall be selected by the Civil Service Commission." *Id.* (An agency is entitled to borrow ALJ's from other agencies if the agency either does not have any permanent ALJ's or is overburdened with adjudications temporarily. 5 U.S.C. § 3344 (1982).) In *Long Beach*, the court invalidated the use of the particular hearing examiner because he was selected by the Board, not by the Civil Service Commission. *Long Beach*, 295 F.2d at 410-11.

The court indicated concern over the appearance of "commingling" of the prosecutorial and adjudicatory functions creating an appearance of bias in that the Board had selected the hearing officer. *Id.* at 410. The court also noted that in enacting § 1010 (precursor to § 3344), which requires that the examiner be selected by the Civil Service Commission, Congress sought to prevent the appearance of bias in the decisionmaker. *Id.*

Congress' concern with providing disinterested decisionmakers for formal adjudications is another indication that Congress did not intend FSLIC to act as adjudicator.

467. See *id.*

468. 12 U.S.C. § 1729(b) (1982).

469. See Note, *supra* note 458, at 259 (footnote omitted).

470. A standard of de novo judicial review will not cure the constitutional defect.

forward alternative would be to use Administrative Law Judges (ALJ's), whose adjudicatory independence is protected by the APA, to preside over the hearings.⁴⁷¹ Alternatively, FSLIC may use a system of arbitration.⁴⁷² In any event, FSLIC must remove itself and its agents from the decisionmaking role in the adjudicatory process.

V. ALTERNATIVE ADJUDICATORY AND NON-ADJUDICATORY CLAIMS PROCEDURES

Part V of this comment evaluates adjudicatory and non-adjudicatory FSLIC claims resolution procedures for state law-based claims that do not arise under FSLIC's enabling statute or any Board regulation. Claims that arise as a result of FSLIC's handling of the receivership and depend on a FSLIC statute or Board regulation, on the other hand, should be resolved by means of a separate administrative procedure. Section A discusses the best adjudicatory procedure. Section B discusses the best non-adjudicatory procedure. Both sections discuss exhaustion of administrative remedies as applied to these adjudicatory and non-adjudicatory claims procedures. Section C compares the best adjudicatory procedure with the best non-adjudicatory procedure and evaluates which of them is better.

This part uses several terms which, for clarity and consistency, are defined in the following manner. An "adjudicatory procedure" is

The claimant is entitled to a neutral decisionmaker "in the first instance." *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972).

471. The Board is entitled to appoint "as many Administrative Law Judges as are necessary for proceedings required to be conducted in accordance with section 556 and 557 of the" APA; that is, formal adjudication. 5 U.S.C. § 3105 (1982). As *Long Beach* indicates, the Board conducts some formal adjudication, and thus, the Board has access to ALJ's. The Board is still without any permanent ALJ's of its own. 52 Fed. Reg. 49,151 (Recommendations of the Administrative Conference of the United States) (1987). Were FSLIC to conduct formal adjudications of creditor claims, the Board might be able to supply the ALJ's.

FSLIC, however, adjudicates informally, and the less formal the adjudicatory proceeding, the less expensive and more efficient the administrative process. As discussed previously, *supra* notes 2 & 367 and accompanying text, FSLIC is desperate to keep costs down and efficiency up. It would, therefore, be ideal if FSLIC could use ALJ's in place of the "special representatives" in informal adjudications. While there appear to be no examples of agencies' use of ALJ's in informal adjudication, there may not be any reason why the Board and FSLIC could not use an ALJ in this capacity.

472. If they agreed, FSLIC and the creditor could have their claims arbitrated under the Federal Arbitration Act, 9 U.S.C. §§ 1-208 (1982). Under the Act, a court could appoint the arbitrators, and thus the problem of institutional bias would be avoided.

The standard of review under the Act is quite deferential and may pose *Northern Pipeline* problems (arbitrators award may be overturned for corruption, fraud, impartiality, misconduct and exceeding his or her authority). 9 U.S.C. § 10 (1982). See section IV A for a discussion of the *Northern Pipeline* problem and various standards of judicial review.

a procedure where FSLIC determines the parties' legal rights apart from those that result from the receivership proceeding itself and therefore depend on a FSLIC statute or Board regulation.⁴⁷³ In a FSLIC adjudicatory claims procedure, FSLIC adjudication would take the place of court adjudication of those claims. A "non-adjudicatory procedure" is a procedure through which FSLIC may "settle" or "compromise"⁴⁷⁴ with a creditor any such claim, but failing settlement or compromise, the claimant would have the right to have his or her claim adjudicated in a court.⁴⁷⁵ The "best procedure" is the procedure optimally suited to effectuate the Board's and FSLIC's policy goals while preserving the constitutional rights of the parties involved.⁴⁷⁶

A. *The Best Adjudicatory Claims Procedure*

The best adjudicatory claims procedure would involve a procedure much like the one currently in use,⁴⁷⁷ but instead of FSLIC or its

473. For example, the parties in *Morrison-Knudsen* were in court litigating before the Board placed Westside in receivership. The legal issues that the parties sought to determine in *Morrison-Knudsen* had nothing to do with the receivership, or any FSLIC statute or Board regulation, because Westside was not yet placed in receivership.

474. See 12 U.S.C. § 1729(d) (1982).

475. Claims that arise from FSLIC's handling of the receivership and depend on a FSLIC statute or Board regulation (receivership claims) should be resolved by an administrative procedure. As previously discussed, the current and proposed claims procedures are not designed to handle challenges of FSLIC's determinations as receiver. An administrative procedure analogous to the process by which an association or a director of an association may challenge a FSLIC or a Board enforcement order would be appropriate. See section III A (1) for a description of the administrative procedure for challenging a Board enforcement order. The administrative procedure for challenges to FSLIC enforcement orders is analogous. Cf. 12 U.S.C. § 1730 (1982). Such a system would empower FSLIC with exclusive adjudication of receivership claims.

While exclusive FSLIC adjudication of state law-based claims raises the *Northern Pipeline* problem, exclusive FSLIC adjudication of receivership claims does not. Receivership claims are more naturally categorized as a matter of "public rights" as opposed to "private rights." The determination that FSLIC acted properly will depend on statutes and regulations that prescribe FSLIC's powers as receiver.

Exclusive FSLIC adjudication of receivership claims, however, does raise due process concerns. FSLIC is an interested party, and thus the administrative procedure must include a neutral decisionmaker.

Because a determination that FSLIC acted properly depends on statutes and regulations that prescribe FSLIC's powers, those powers must be described with particularity so that a decisionmaker or a reviewing court can measure FSLIC's conduct against them. As previously argued, this is an area in need of improvement. See *supra* notes 59-73 and accompanying text. In either an adjudicatory or non-adjudicatory claims procedure, as defined in this part, receivership claims might be handled in this manner.

476. Those policy goals are efficiency in winding up the affairs of insolvent associations and preservation of FSLIC's assets. The constitutional rights at issue are the right to have private rights adjudicated in a court and the right to a neutral decisionmaker.

477. See *supra* note 54.

agents acting as decisionmakers, a neutral decisionmaker would be introduced to FSLIC claims procedures. While FSLIC adjudication would not be exclusive,⁴⁷⁸ the Board or Congress could, nevertheless, require that once the creditor elected to have his or her claims adjudicated by FSLIC, the creditor would be required to remain in the administrative track. If the creditor chose FSLIC adjudication, any appeal would have to be made to the Board prior to judicial review under the APA.⁴⁷⁹ The creditor, however, would have the right to choose either court adjudication or FSLIC adjudication.

Because of the *Northern Pipeline* concern, and the litigant's right to choose between agency or article III court adjudication, no adjudicatory scheme can require a creditor to exhaust administrative remedies. If the creditor chooses court adjudication, and the court dismisses for failure to exhaust administrative remedies, the creditor is denied the right to court adjudication. In an effort to attract creditors to the administrative forum, the Board can promulgate fair and efficient procedures. A claims procedure similar to the one currently used is sufficient, however, to handle adjudication of the vast majority of cases.⁴⁸⁰ It would complicate the claims process significantly to provide procedures to handle the complicated legal relationships that exist in a case like *Morrison-Knudsen*.⁴⁸¹ It may be more efficient, for FSLIC and the litigants alike, for a court to sort out the legal tangles of particularly complicated claims. Thus, the best adjudicatory claims procedure would be fashioned after the scheme approved in *Schor* and would involve much the same procedures that currently are in use.

478. "Exclusive jurisdiction," as used in this comment, refers to the *Hudspeth* approach: all claims are switched to the administrative track once FSLIC is appointed receiver. This would deprive a creditor of the right to have his or her claims adjudicated in a court and deprive courts of their jurisdiction. See section IV A for a discussion of the *Northern Pipeline* issue.

479. This is the approach that the Supreme Court approved in *Schor*. See *supra* notes 391-405 and accompanying text for a discussion and analysis of *Schor*. See also 5 U.S.C. § 704 (1982) (APA requirement for final agency action prior to judicial review).

480. 50 Fed. Reg. 48,978 (1985). In explaining the proposed regulations, the Board stated that in FSLIC's experience "many claims can be described and presented without difficulty by submitting a simple claim form. . . . [I]n some cases involving more complex claims, a substantial amount of additional information is necessary Therefore, § 569c.7(c)(2) provides that the receiver may require submission of additional evidence in written form." *Id.* (citing proposed regulation § 569c.7(c)(2) (to be codified at 12 C.F.R. § 568c.7(c)(2))). See also *supra* note 54 for description of current claims procedures which the proposed regulation is to codify.

481. *Morrison-Knudsen* is an example of a complicated claim with all the many parties, original and impleaded, and many claims, counter-claims, and cross-claims.

B. *The Best Non-Adjudicatory Claims Procedure*

The best non-adjudicatory process would involve procedures that encourage FSLIC and the creditor to reach an agreement, whereby either FSLIC accepts the claim or FSLIC and the creditor settle or compromise. If the parties fail to agree, the creditor could appeal to the Board, giving the agency a chance to correct any errors itself. If the creditor and the Board still cannot reach an agreement, the creditor could file a court claim. This is how the *Morrison-Knudsen* court viewed the current claims and appeals procedures.⁴⁸²

Because the procedure is non-adjudicatory, it presents no due process or *Northern Pipeline* concerns. The doctrine of exhaustion of administrative remedies would apply.⁴⁸³ A court would require exhaustion unless there are factors present which would make this inappropriate. Those factors are:

whether resort to the administrative process would be futile, whether the administrative process is well understood and well developed, whether a prompt decision as to all of the contested issues in the case is likely, whether an exhaustion requirement would be fair to the parties in light of their resources, whether it would be fair to other parties in the case whose interests might be affected, whether the interests of judicial economy would be served by requiring exhaustion, and whether the agency demonstrates that not requiring exhaustion would unduly interfere with its functioning.⁴⁸⁴

Although most of these factors involve a case-by-case determination, regulations and procedures could limit the occasions where a court would not require exhaustion. The promptness of the decision is a matter that could be controlled completely by regulation. The Board could "demonstrate[] that not requiring exhaustion would unduly interfere with its functioning."⁴⁸⁵ FSLIC has argued forcefully that exhaustion is necessary to an orderly and efficient receivership proceeding.⁴⁸⁶ Furthermore, an exhaustion requirement serves judicial economy because only those cases that need to be litigated end up in court.⁴⁸⁷ By developing a separate administrative procedure for

482. *Morrison-Knudsen*, 811 F.2d at 1223-24.

483. *Id.* at 1223.

484. *Id.* at 1223-24. See *supra* notes 135-40 and accompanying text for a discussion of these factors as applied to the facts of *Morrison-Knudsen*.

485. *Id.*

486. FSLIC's Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc at 3-6, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987).

487. *Id.* at 4.

claims arising under FSLIC's enabling statute or Board regulation, the Board or Congress could improve considerably the administrative process, and increase understanding of it.⁴⁸⁸ The other factors are factually based, and no amount of regulation will prevent them from occurring.

In the vast majority of cases, courts should and would require exhaustion. The few situations where a court might not require exhaustion would involve cases where requiring exhaustion would either contravene the stated policy goals of FSLIC, or result in unreasonable unfairness to the creditor.⁴⁸⁹ The judicial doctrine of exhaustion of administrative remedies, if properly applied, would serve the interests of both the agency and the individual.

C. *The Best Claims Procedure*

The best claims procedure is a non-adjudicatory one. Although both the best adjudicatory and non-adjudicatory claims procedures would protect the constitutional rights of the parties effectively, the best non-adjudicatory claims procedure better serves the stated policy goals of FSLIC.⁴⁹⁰ Because it is non-adjudicatory, courts would require exhaustion of administrative remedies absent special and unusual circumstances. As argued previously, if FSLIC had to choose—

488. The *Hudspeth* court never acknowledged the distinction between state law claims and claims arising out of FSLIC's enabling statute or a Board regulation. Had the court acknowledged the difference, it might have confined its holding to the receivership claims at issue in *Hudspeth*, which were challenges to FSLIC's determination to repudiate Hudspeth's contract and freeze him out. See *supra* notes 77-90 and accompanying text for facts of *Hudspeth*. If the court had confined its holding to receivership claims, *Hudspeth* would not have controlled the courts' subsequent decisions involving state law-based claims like the ones at issue in *Coit*, and the court would have had to approach the issue of FSLIC exclusive adjudication of state law claims on the merits. See *supra* note 144 for the facts of *Coit*.

By developing different claim resolution procedures for the different types of claims, courts will be better able to determine when it is appropriate to require exhaustion of administrative remedies.

489. For example, suppose a creditor and a savings and loan association are in court nearly finished litigating a contract claim when the Board places the association in receivership and appoints FSLIC receiver. A court might be inclined not to require exhaustion for the following reasons: 1) there already was a failure to come to an understanding, which makes it less likely that the creditor and FSLIC would come to terms, and thus the administrative process is likely to be futile; 2) it would be a significant drain on the resources of both parties to dismiss a case so near its resolution; 3) it would be a waste of judicial resources, especially if the case is likely to reach a court once administrative remedies are exhausted; and 4) the court was near to deciding the contested issues. Requiring exhaustion in this case would not serve either the creditor's or FSLIC's interest.

490. Exclusive FSLIC adjudication best serves the stated policy goals of the FSLIC, but is unconstitutional. See section IV A for the discussion of the *Northern Pipeline* issue.

and it does—it should give up any adjudicatory power in exchange for the exhaustion requirement.⁴⁹¹ Under a non-adjudicatory claims procedure, FSLIC could settle most claims informally and inexpensively. Both sides would have an economic incentive to settle in order to avoid litigation, and only those claimants with real controversies would end up in court.

In an adjudicatory FSLIC claims procedure, FSLIC would have much less control over the receivership. With creditors free to bring a court action, FSLIC would be adjudicating some claims and defending other claims in court. Furthermore, a FSLIC adjudicatory scheme would be more expensive than a non-adjudicatory scheme. First, the required neutral decisionmaker is an added expense. Second, the legal costs involved in defending the receivership estate in court against claimants who select court adjudication might be significant. The receivership process in an adjudicatory claims procedure is likely to be a lengthy one. Presumably, more claims would be adjudicated in courts in an adjudicatory FSLIC claims procedure than would be adjudicated in a non-adjudicatory claims procedure. In a non-adjudicatory claims procedure, most claims first would be presented to FSLIC. FSLIC's initial claims procedure takes a maximum total of 270 days from the date notice is published to the date that FSLIC must make its determination.⁴⁹² The creditor must file a claim with the receiver within ninety days of notice.⁴⁹³ If the creditor in an adjudicatory claims procedure were permitted to either file a claim with the receiver for FSLIC adjudication or file a court claim within 90 days, the maximum total of days for FSLIC adjudication would still be 270 days, but the maximum number of days for court adjudication is indeterminate, and the average number of days certainly would be longer. Thus, a non-adjudicatory claims procedure is less expensive and more efficient than an adjudicatory procedure and better serves the stated policy concerns of FSLIC.

CONCLUSION

The *Morrison-Knudsen* court correctly determined that FSLIC does not have congressionally mandated adjudicatory authority; Congress did not explicitly or implicitly empower FSLIC with adjudica-

491. FSLIC placed failure to require exhaustion first on its list of "most troublesome errors" made by the *Morrison-Knudsen* court. FSLIC's Petition for Rehearing and Suggestion of Appropriateness for Rehearing in Banc at 2, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987). See also *id.* at 3-5.

492. See *supra* note 54 for FSLIC claims procedures.

493. *Id.*

tory authority, and such authority is not established by the current or proposed Board regulations. The *Morrison-Knudsen* court, however, incorrectly held that Congress intended FSLIC to have no adjudicatory authority. A better-reasoned conclusion is that Congress neither required nor forbade FSLIC adjudication. Accordingly, the *Hudspeth* court is incorrect in holding that Congress empowered FSLIC with exclusive power to adjudicate creditor claims, and is incorrect in holding that the regulations actually establish that authority.

According to *Morrison-Knudsen*, the Board does not have the power to promulgate rules that would establish FSLIC adjudication because Congress intended that FSLIC not adjudicate. Thus, while a constitutionally sound FSLIC adjudicatory scheme is possible, it must be authorized by an act of Congress. This comment has explored an alternative view that the Board may, through rulemaking procedures, empower FSLIC with adjudicatory authority without an act of Congress.

Whether congressionally-enacted or Board-promulgated, a FSLIC adjudicatory scheme must be constitutionally sound. Such a scheme must be non-exclusive, provide a neutral decisionmaker, and, perhaps, provide the claimant with more than ordinary judicial review. While an adjudicatory FSLIC claims procedure would remain largely intact, FSLIC would not have the exclusivity of remedy that FSLIC asserts is necessary. A non-adjudicatory claims procedure would serve FSLIC's interests more effectively. FSLIC would control the settlement procedure and have the chance to come to terms with the creditor prior to any court litigation. Under the judicial doctrine of exhaustion of administrative remedies, courts generally will require exhaustion. However, unless Congress provides through statutes that FSLIC has an exclusive remedy, a court may not require exhaustion of administrative remedies in particular cases. The more comprehensive the claims procedure is, the more probable a court will require exhaustion.

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