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RTC Repudiation of Contracts Under FIRREA: A Broad Power to Achieve Broad Legislative Goals

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**RTC'S REPUDIATION OF CONTRACTS UNDER FIRREA:
A BROAD POWER TO ACHIEVE BROAD
LEGISLATIVE GOALS**

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*I dedicate this note to my parents, for their constant encouragement; to Peter Savage, for his heroic donation; and to RKS for teaching me the fun of both life and law school. I also thank Professor Winton Williams for his valuable advice and assistance.

I. INTRODUCTION

The failure of over five hundred¹ savings and loan institutions² during the 1980s prompted Congress to pass the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)³ in 1989.⁴ FIRREA is a comprehensive piece of legislation which revised and amended a substantial portion of the laws governing financial institutions.⁵ Through FIRREA, Congress sought to restructure the savings and loan industry to prevent another crisis.⁶ Additionally, Congress sought to provide a mechanism to effectively manage and resolve distressed savings institutions.⁷ To achieve these goals, Congress es-

1. Vicki O. Tucker et al., *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Trusts*, 25 U. RICH. L. REV. 1, 2 (1990).

2. The term "savings industry" will be used throughout this note to refer to the industry comprised of those state and federally chartered savings banks and savings and loan institutions whose deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC). The term "savings institution" will be used throughout this note to refer to state and federally chartered savings banks and savings and loan institutions.

3. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered provisions of 12 U.S.C. and 15 U.S.C. (Supp. II 1990 & Supp. III 1991)).

4. See S. REP. NO. 19, 101st Cong., 1st Sess. 2 (1989). The number of savings institutions which failed from 1980 to 1988 totals more than three and one-half times the bank failures in the previous 45 years combined. *Id.* Since September 30, 1989, the RTC has held more than 283 savings institutions in conservatorship. *Status and Activities of the RTC and the Oversight Board: Hearings Before the Subcomm. on Financial Institutions Supervision Regulation and Insurance and the Resolution Trust Corporation Task Force of the Committee on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 23 (1989) (statement of David Cooke, CEO, RTC). These institutions have total assets of over \$112 billion and liabilities of over \$124 billion. *Id.*

5. See Daniel B. Gail & Joseph J. Norton, *A Decade's Journey from "Deregulation" to "Supervisory Regulation": The Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1103, 1107 (1990). FIRREA amended various provisions of Titles 12 and 15 U.S.C. *Id.* FIRREA makes additions, modifications, and amendments to many acts including: the Federal Deposit Insurance Act, Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. §§ 1811-1834 (1988) (amended 1989)); the Home Owner's Loan Act of 1933, Pub. L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1988) (amended 1989)); the Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1447 (1988) (amended 1989)); the Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-1850 (1988) (amended 1989)); and the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1735 (1988) (amended 1989)).

6. See Tucker et al., *supra* note 1, at 3.

7. See H.R. REP. NO. 54(I), 101st Cong., 1st Sess. 307 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 103 [hereinafter H.R. REP.].

tablished the Resolution Trust Corporation (RTC), an organization given special powers to efficiently resolve and assist distressed savings institutions.⁸ These powers include the ability to repudiate contracts and leases into which the failed institution entered prior to conservatorship or receivership.⁹ Congress' broad legislative reforms in FIRREA and its resolution mechanisms affect many of America's financial institutions and have serious implications for professionals and organizations serving the financial institutions industry.¹⁰

Section II of this note examines the events leading to the enactment of FIRREA, the broad purposes of FIRREA, and the specific statutory authority of the RTC to repudiate contracts. Section III of this note examines the scope of the RTC's authority to repudiate contracts by addressing two issues raised by FIRREA: (1) whether the RTC can repudiate non-executory contracts and (2) what contracts the RTC may deem burdensome for the purpose of repudiation. Section IV of this note examines the RTC's exercise of repudiation powers, focuses on what factors the RTC evaluates in repudiating specific types of contracts and what mechanisms the RTC uses to express these decisions. This discussion also addresses statutory provisions governing the RTC's exercise of repudiation powers, policy statements in which the RTC asserts its repudiation powers, and regulations controlling the RTC's exercise of repudiation. Section IV concludes by discussing the timing of repudiation. Finally, Section V of this note discusses the damages a party may recover from the RTC for repudiation.

This note relies on several sources in interpreting the scope of the RTC's power under FIRREA. First, recent decisions interpreting the RTC's repudiation powers under FIRREA provide insight into the scope of these powers. Second, common law of receivership prior to FIRREA serves an important interpretive role in assessing the RTC's powers as receiver.¹¹ Third, cases decided under the Federal Savings and Loan Insurance Corporation (FSLIC) regulations preceding FIRREA are helpful because the regulations resemble FIRREA's provisions. Finally, an interpretation of the scope of the RTC's receivership

8. 12 U.S.C. § 1811 (Supp. II 1990).

9. *See id.* § 1821(e).

10. *See H.R. REP.*, *supra* note 7, at 308-12.

11. *See T. Ray Guy, Unsecured Creditors, in LITIGATING WITH THE FDIC AND RTC: ASSET-BASED CLAIMS 103, 139 (PLI Com. Law and Practice Course Handbook Series No. 559, 1990) (commenting that FIRREA essentially codifies a common-law receiver's power to repudiate contracts, with some modifications).*

powers takes into account FIRREA's mandates and objectives and the specific goals FIRREA establishes for the RTC.

II. THE SAVINGS AND LOAN CRISIS AND THE ENACTMENT OF FIRREA

The events preceding the failure of the saving and loan industry underlie the legislative goals of FIRREA and the objectives of the RTC.¹² Originally, Congress established the savings and loan industry to provide a funding mechanism for purchasing residential housing.¹³ Accordingly, savings institutions initially served the residential housing market¹⁴ and were limited to a narrower scope of financial activities than commercial banks.¹⁵ Congress enacted separate regulatory schemes to govern the commercial banking and the savings industries,¹⁶ established the Federal Home Loan Bank Board (FHLBB) to regulate savings institutions,¹⁷ and established the FSLIC to insure the savings institutions' deposits.¹⁸

During the late 1970s and early 1980s, the savings and loan industry suffered enormous losses due to an industry-wide liquidity crisis.¹⁹ In response, Congress, the FHLBB, and state regulatory authorities expanded the power of savings institutions beyond their traditional home financing activities.²⁰ These governmental actions gave savings institutions greater investment abilities and allowed these institutions to compete with commercial banks for funds.²¹ Using their new powers,

12. See Gail & Norton, *supra* note 5, at 1104-05.

13. See H.R. REP., *supra* note 7, at 292. Following the Great Depression, Congress passed the Federal Home Loan Bank Act of 1932, the Home Owners Loan Act of 1933, and the National Housing Act of 1934 to provide mechanisms for obtaining residential housing. *Id.* at 292-93.

14. Paul T. Clark et al., *Regulation of Savings Associations Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 45 BUS. LAW. 1013, 1016 (1990).

15. *Id.*

16. *Id.*

17. See 12 U.S.C. § 1437(a) (1988) (repealed by FIRREA, Pub. L. No. 101-73, § 301, 103 Stat. 183, 282 (1989)).

18. *Id.* § 1725 (repealed by FIRREA, Pub. L. No. 101-73, § 407, 103 Stat. 183, 363 (1989)).

19. Northeast Sav., F.A. v. Director, Office of Thrift Supervision, 770 F. Supp. 19, 20 (D.D.C. 1991) (liquidity crises due to high interest rates and inflation).

20. *Id.*

21. *Id.* In order to enhance the profitability of savings institutions, Congress in the late 1970s and early 1980s enacted legislation which broadened the authority of federal- and state-chartered savings institutions to lend and invest. Clark et al., *supra* note 14, at 1019-20. For example, the Garn-St. Germain Depository Institutions Act of 1982 permitted federal savings institutions

savings institutions aggressively entered the commercial real estate market and other speculative markets.²² During this period of significant restructuring, the federal government exercised little supervision over the burgeoning savings and loan industry.²³ Without supervision, savings institutions grew rapidly by acquiring poorly collateralized loan portfolios.²⁴ Shortly thereafter, many savings institutions engaging in speculative ventures failed due to poor economic conditions and portfolio mismanagement.²⁵ These failed savings institutions looked to the FSLIC to pay insured depositors²⁶ and quickly depleted the FSLIC's insurance fund.²⁷

Congress examined these historical events in attempting to devise a remedy for the past and present weakness in the savings and loan industry.²⁸ Because Congress determined that the industry's failure stemmed in part from inadequate supervision, Congress restructured the regulatory system governing savings institutions.²⁹ In doing so Congress abolished the savings and loan industry's primary regulator, the FHLBB,³⁰ and created the Office of Thrift Supervision to regulate both federal and state savings institutions.³¹ Congress remedied the FSLIC's insurance fund depletion by abolishing the FSLIC³² and shift-

to invest up to 10% of their assets in commercial and agricultural loans and increased the limits on loans secured by nonresidential real estate from 20% to 40% of the institution's assets. *Id.* at 1020-21.

22. Clark et al., *supra* note 14, at 1021.

23. See H.R. REP., *supra* note 7, at 301.

24. See *id.*; *Northeast Savings*, 770 F. Supp. at 20-21.

25. See Gail & Norton, *supra* note 5, at 1104-05. In enacting FIRREA, Congress assumed that the savings and loan industry and its insurance fund failed due to the ineptitude and fraud of savings institution management in dealing with new investment powers. *Id.* In reality, failure was due in part to adverse economic conditions and the legislature's increasingly restrictive approach to bank and savings institution regulation. *Id.*

26. See *Northeast Savings*, 770 F. Supp. at 20-21.

27. *Id.* During the first six months of 1988, the savings industry suffered losses greater than \$7.5 billion. 134 CONG. REC. S15,226-01 (1988) (statement of Frederick D. Wolf, Director, Accounting and Financial Management Division, the U.S. General Accounting Office).

28. See H.R. REP., *supra* note 7, at 291-302.

29. See Tucker et al., *supra* note 1, at 2-3.

30. See FIRREA, Pub. L. No. 101-73, § 401(a)(2), 103 Stat. 183, 354 (1989). The FHLBB was the governmental body responsible for chartering, examining, and supervising federally-chartered savings institutions which were insured by the FSLIC. See 12 U.S.C. § 1464(a) (1988). It also was responsible for administering the FSLIC. *Id.* § 1725(a).

31. See FIRREA, § 301, 103 Stat. 277, 278, 280 (codified at 12 U.S.C. §§ 1462a(a), 1463(a) (Supp. II 1990)).

32. *Id.* § 401(a)(1), 103 Stat. 354 (1989).

ing responsibility for insuring savings institutions to the Federal Deposit Insurance Corporation (FDIC).³³ Finally, Congress created the RTC to act as conservator or receiver of the failed savings institutions.³⁴

Although Congress abolished the federal insurer and the primary regulator of the savings and loan industry, Congress specifically intended to maintain the savings and loan industry as a separate and viable industry.³⁵ Congress intended that the savings and loan industry continue providing home financing³⁶ and through FIRREA, Congress also sought to restore public confidence in the savings and loan industry.³⁷

In addition to FIRREA's broad goals, Congress set forth specific goals to guide the RTC in resolving failed institutions and distributing the institutions' property. Congress requires that the RTC maximize returns from the sale and disposition of a failed institution or its assets,³⁸ minimize the impact of transactions on local real estate and financial markets,³⁹ minimize losses realized in the resolution of cases,⁴⁰ make efficient use of funds obtained from either the Resolution Funding Corporation or the Treasury,⁴¹ and maximize the preservation of available and affordable residential real property for low — and moderate-income individuals.⁴² Additionally, Congress requires the RTC to preserve and conserve the assets and property of the failed institutions⁴³ and to resolve claims in an effective and efficient manner.⁴⁴

33. See *id.* § 402(a), 103 Stat 357-58.

34. *Id.* § 501, 103 Stat. 363, 369 (codified at 12 U.S.C. § 1441a(b) (Supp. II 1990)). The RTC assumed the FSLIC's role as receiver of failed savings associations which were insured by the FSLIC and placed into receivership or conservatorship after January 1, 1989, but before August 9, 1989. *Id.* § 1441a(b)(3)(A)(ii)(I). The RTC also acts as receiver for savings associations insured by the FDIC and placed into receivership or conservatorship from August 9, 1989 to August 9, 1992. *Id.* § 1441a(b)(3)(A)(ii)(II). The RTC has no staff and all of its responsibilities are performed by the FDIC. *Id.* § 1441a(b)(9)(A). Additionally, 12 U.S.C. § 1441a(b)(4)(A) gives the RTC the same powers and rights to carry out its duties as the FDIC has under §§ 11, 12, and 13 of the Federal Deposit Insurance Act.

35. See H.R. REP., *supra* note 7, at 309.

36. *Id.*

37. *Id.* at 307.

38. 12 U.S.C. § 1441a(b)(3)(C)(i) (Supp. II 1990).

39. *Id.* § 1441a(b)(3)(C)(ii).

40. *Id.* § 1441a(b)(3)(C)(iv).

41. *Id.* § 1441a(b)(3)(C)(iii).

42. *Id.* § 1441a(b)(3)(C)(v).

43. *Id.* § 1821(d)(2)(B)(iv).

44. H.R. REP., *supra* note 7, at 419.

To achieve the specific goals of resolution, Congress gave the RTC special power as a receiver or conservator for savings institutions to repudiate contracts and leases the failed institution entered into prior to conservatorship or receivership.⁴⁵ The RTC's power of repudiation is not unprecedented. At common law, a receiver had the right to elect whether or not it would adopt and perform executory contracts made by the entity in receivership prior to the appointment of the receiver.⁴⁶ Thus, the receiver had the right to repudiate any executory contract it found burdensome to the entity.⁴⁷

Initially, receivers for failed banks exercised this common law power of repudiation only occasionally in connection with their general receivership responsibilities.⁴⁸ Receivers for FDIC-insured institutions exercised this common law repudiation power until FIRREA was enacted.⁴⁹ Additionally, conservators and receivers for FSLIC-insured savings institutions had express regulatory power to repudiate any contract or lease they considered burdensome.⁵⁰

Although savings institution receivers have authority to repudiate contracts under both common law and federal regulations, FIRREA provides these receivers with specific statutory authority to repudiate contracts and leases.⁵¹ Section 1821e(1) of Title 12, as amended by FIRREA, gives the RTC the general authority to repudiate contracts and leases made before its appointment as conservator or receiver, subject to three conditions:⁵² (1) the failed institution in receivership or conservatorship must be a party to the contract;⁵³ (2) the conservator

45. 12 U.S.C. § 1821(e) (Supp. II 1990).

46. 75 C.J.S. *Receivers* § 169 (1952).

47. *Id.*

48. *See People ex rel. Nelson v. West Town State Bank*, 25 N.E.2d 509 (Ill. 1940) (allowing receiver for banking corporation to disaffirm lease for bank premises).

49. Rex R. Veal, *Contract Repudiation Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, in *LITIGATING WITH THE FDIC AND RTC*, *supra* note 11, at 231, 233.

50. 12 C.F.R. § 549.3(l) (1968) (allowing the FSLIC as receiver for federally-chartered savings association to repudiate any lease or contract which it considers burdensome).

51. 12 U.S.C. § 1821(e)(1) (Supp. II 1990). FIRREA permits the RTC to "disaffirm or repudiate" a contract. *Id.* The terms disaffirm and repudiate have essentially the same meaning. The term "disaffirm" means "to repudiate; to revoke a consent once given. . . ." *BLACK'S LAW DICTIONARY* 462 (6th ed. 1990). The term "repudiate" means "to put away, reject, disclaim, or renounce a right, duty, obligation, or privilege." *Id.* at 1303.

52. 12 U.S.C. § 1821(e)(1) (Supp. III 1991).

53. *Id.* § 1821(e)(1)(A).

or receiver must determine that the contract or lease must be burdensome;⁵⁴ and (3) the repudiation must promote the orderly administration of the institution's affairs.⁵⁵ Part two of the section 11(e) discusses timing of the repudiation.⁵⁶ Part three sets forth damages recoverable for repudiation in general.⁵⁷ The next five sections expand on the general provisions above and relate to specific types of contracts. These sections four through eight specifically discuss leases in which the institution is lessee,⁵⁸ leases in which the institution is lessor,⁵⁹ and qualified financial contracts.⁶⁰

III. THE SCOPE OF THE RTC'S REPUDIATION POWERS

Section 1821e(1) of Title 12, entitled "Authority to repudiate contracts,"⁶¹ defines the general scope of the RTC's repudiation powers. This section indicates that "[i]n addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease."⁶² The provision establishes three requirements which the RTC must prove to repudiate a contract or lease: (1) the institution must be a party to the contract or lease;⁶³ (2) the contract or lease must be burdensome;⁶⁴ and (3) the repudiation must be beneficial to the orderly administration of the institutions' affairs.⁶⁵ This general repudiation provision raises important issues regarding the scope of the RTC's repudiation powers.

A. *The RTC's Ability to Repudiate Non-Executory Contracts*

FIRREA's statutory language confers broad repudiation powers on the RTC by giving the RTC the ability to repudiate "any contract."⁶⁶

54. *Id.* § 1821(e)(1)(B).

55. *Id.* § 1821(e)(1)(C).

56. *Id.* § 1821(e)(2).

57. *Id.* § 1821(e)(3).

58. *Id.* § 1821(e)(4).

59. *Id.* § 1821(e)(5).

60. *Id.* § 1821(e)(8); *see also id.* § 1821(e)(6) (contracts for the sale of real property); *id.* § 1821(e)(7) (provision applicable to service contracts).

61. 12 U.S.C. § 1821(e)(1) (Supp. II 1990).

62. *Id.*

63. *Id.* § 1821(e)(1)(A).

64. *Id.* § 1821(e)(1)(B).

65. *Id.* § 1821(e)(1)(C).

66. *See id.* § 1821(e)(1); *Gibson v. RTC*, 750 F. Supp. 1565, 1568 (S.D. Fla. 1990).

The plain language of section 1821(e)(1) suggests that the RTC can repudiate any contract, regardless of its nature, thus implying that the RTC can repudiate both executory and non-executory contracts.⁶⁷ Historically, common law and bankruptcy receivers had the ability to repudiate only executory contracts.⁶⁸ Therefore, the RTC's purported ability to repudiate non-executory contracts is a controversial extension of traditional receivership powers.

Commentators are divided on the issue of whether Congress intended FIRREA to extend a receiver's repudiation powers to non-executory contracts. Several commentators argue Congress merely intended to codify a receiver's common law repudiation right and, therefore, suggest limiting repudiation to executory contracts only.⁶⁹ Other commentators argue FIRREA's statutory language shows Congress' intent to allow the RTC to repudiate both non-executory and executory contracts.⁷⁰ Those who support extending the RTC's repudiation power to any contract cite the multiple and often unclear definitions of the term "executory."⁷¹ They reason that Congress intended

67. See 12 U.S.C. § 1821(e)(1) (Supp. II 1990).

68. See 11 U.S.C. § 365(a) (1988). The Bankruptcy Code indicates that a receiver can repudiate executory contracts. *Id.* However, bankruptcy law has limited application in the banking context and in the context of RTC receiverships. Congress expressly excluded banks from the scope of the Bankruptcy Code. *Unisys Corp. v. FDIC*, 724 F. Supp. 454, 457 (W.D. Tex. 1988) (citing 11 U.S.C. §§ 109(b), which states that "[a] person may be a debtor under Chapter 7 of this title only if such person is not . . . (2) a . . . bank, savings bank, cooperative bank, savings and loan association, . . . or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act"). Because the powers and goals of a bank receiver differ from those of a bankruptcy receiver, equitable principles developed in reorganization cannot always be applied to failed banks. *Corbin v. Federal Reserve Bank of New York*, 629 F.2d 233, 236 (2d Cir. 1980). Moreover, banking institutions and insurance companies are excluded from the Bankruptcy Code's liquidation provisions because alternate provisions for their liquidation are found under various regulatory laws. H.R. REP. NO. 595 to accompany H.R. 8200, 95th Cong., 2nd Sess. 318-20 (1977), reprinted in 1978 U.S.C.C.A.N. 5787.

69. Tucker et al., *supra* note 1, at 32; see also H.R. REP., *supra* note 7, at 331 (noting that FIRREA "confirms" the "historic right" of receivers to repudiate contracts); R. Neal Batson et al., *The Management and Liquidation of Failed Financial Institutions Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, in RESOLUTION TRUST CORPORATION: BANKRUPTCIES, LIQUIDATION, AND SALES OF ASSETS 11, 44 (PLI Com. Law and Practice Course Handbook Series No. 553, 1990) (suggesting that Congress most likely did not intend to give the RTC repudiation powers beyond what bankruptcy trustees have under the Bankruptcy Code — namely, the power to repudiate only "executory" contracts).

70. See Guy, *supra* note 11, at 137; Robert D. Barclay, *Repudiation of Contracts by the RTC: Is Your Contract Safe?*, FLA. B.J., May 1991, at 48.

71. Guy, *supra* note 11, at 137. Guy comments that "with the enactment of the FIRREA there is a more plausible argument that the regulatory authorities are trying to get away from

to avoid these definitional problems by allowing the RTC to make its repudiation decisions on a case-by-case basis.⁷²

As this disagreement illustrates, the RTC's power to repudiate "any contract" under FIRREA is undefined. Thus, courts may look to common law when interpreting the RTC's repudiation powers. Although common law specifies that receivers can repudiate only executory contracts,⁷³ common law provides no single definition of the term "executory contract."⁷⁴ Under common law, a contract is either executory or executed.⁷⁵ Generally, an executory contract has performance remaining by both parties.⁷⁶ However, when performance remains only

the historically litigatory quagmire of 'executory contracts' by establishing a new broad standard with greater flexibility, where semantics become less significant than effects and results." *Id.*

72. See Batson et al., *supra* note 69, at 43-44.

73. See 66 AM. JUR. 2D, *Receivers* § 222 (1973).

74. See 17 AM. JUR. 2D, *Contracts* § 6 (1991). In the bankruptcy context, the definition of the term executory also may dictate whether or not a receiver can reject a contract. Bankruptcy Code § 365(a) permits a trustee, subject to court approval, to assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a) (1988). However, the Bankruptcy Code has no definition of the term "executory contract." See *id.* Professor Vern Countryman set forth the most commonly accepted definition of the term "executory contract" in the bankruptcy context as follows: "A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contract in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). Countryman required an executory contract to have performance due on both sides, because he believed this requirement would best benefit the estate. See *id.* at 461. However, not all courts have adopted Countryman's definition or reasoning. For example, several courts have held that an executory contract requires substantial performance, other than the payment of money, by only one party to the agreement. See, e.g., *In re Oxford Royal Mushroom Prod., Inc.*, 45 B.R. 792, 794 (Bankr. E.D. Pa. 1985) (reasoning that contract is executory where one party grants an easement for construction of a pipeline and other party has agreed to supply the other party with water from its property through the pipeline, but has not yet done so); *In re Norquist*, 43 B.R. 224, 228-31 (Bankr. E.D. Wash. 1984) (finding that partnership contract containing non-competition clause is executory when the partnership performed by employing debtor, but debtor did not perform his obligation because he opened competing business). The *Norquist* court reasoned that rigid adherence to the Countryman definition in all cases fails to accommodate the purposes of the reorganization because it would not allow the receiver to reject burdensome contracts. *Norquist*, 43 B.R. at 226-28.

75. *Farrington v. Tennessee*, 95 U.S. 679, 683 (1878).

76. 14 TEX. JUR. 3D *Contracts* § 10 (1981). "An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties." *Farrington*, 95 U.S. at 682. Courts generally agree that if the object of the agreement has already been performed by both parties according to the terms of the contract, the contract is fully executed. *Id.* at 683.

on one side, some authority indicates that a contract can be executed as to one party and not the other.⁷⁷

The disparity between common law definitions of “executory contract” in the receivership context often arises where one of the parties has fully performed under the terms of the contract and only payment by the non-performing party remains. Some courts have held such a contract was executed⁷⁸ while other courts have indicated the non-performing party must complete payment to make the contract fully executed.⁷⁹ Thus, when one of the parties has done everything required under the contract, and nothing remains for him to do except receive the purchase price, the contract may be deemed executory.⁸⁰

At common law, when both parties had fully performed their contractual obligation, a receiver had no option to reject that fully executed contract.⁸¹ However, when only one party had fully performed its obligations, a court had discretion to classify the contract as executory for repudiation purposes, based on the ambiguity surrounding the term “executory contract.”⁸² In exercising this discretion, courts often limited the receiver’s powers, precluding repudiation of contracts in which one party had fully performed.⁸³

For example, in *Geddes v. Reeves Coal & Dock Co.*,⁸⁴ the court held a contract was fully executed where one party had fully performed.⁸⁵ In *Geddes*, a dock company contracted with an auditor and

77. See, e.g., *Wener v. Commissioner*, 242 F.2d 938, 946 (1957) (holding that agreement retiring certain partners from partnership is fully executed and absolute as to them, but partly executory as to other partners). When performance remains on only one side, courts divide on the contract’s classification. Some courts have indicated that a contract is executed if wholly performed on one side, whether or not the other party has performed. *Gugenheim v. Hancock*, 231 S.W.2d 935, 938 (Tex. Civ. App. 1950) (holding that contract for purchase of stock is executed when one party has done everything required of him by terms of contract and nothing remains but for him to receive the purchase price).

78. *Gugenheim*, 231 S.W.2d at 939; see also *North Dakota Pub. Serv. Comm’n v. Valley Farmers Bean Ass’n*, 365 N.W.2d 528, 543 (N.D. 1985) (reasoning the contract is non-executory if all acts giving rise to obligation to pay are performed and only payment remains).

79. See *Pratt Lab., Inc. v. Teague*, 160 F. Supp. 176, 180-81 (W.D. Ark. 1958).

80. See *id.*; *In re San Francisco Bay Exposition*, 50 F. Supp. 344, 347 (N.D. Cal. 1943) (holding that contract not subject to disaffirmance under California building and loan statutes when contract is fully performed by one party and performance gives rise to payment on part of other party).

81. 17 AM. JUR. 2D *Receivers* § 229 (1973).

82. See *Pratt Laboratories*, 160 F. Supp. at 180-81.

83. See *Geddes v. Reeves Coal & Dock Co.*, 20 F.2d 48, 50, 52-53 (8th Cir. 1927).

84. *Id.*

85. *Id.* at 50, 52-53.

agreed to pay the auditor for all refunds the auditor could find on freight bill overcharges.⁸⁶ The refunds were paid directly to the dock company.⁸⁷ The dock company was placed in receivership and the lower court denied the receiver's petition to continue the auditor's employment.⁸⁸ On appeal, the court found that the auditor had fully performed his obligations⁸⁹ and therefore had an equitable lien on the estate for the money due.⁹⁰ The appellate court held that the receiver took the estate subject to the auditor's rights under the contract and that the principles of equity forbade revocation of the contract and destruction of the equitable lien.⁹¹ Thus, the *Geddes* court required the estate to perform the contract.⁹²

Although the *Geddes* court narrowly construed the receiver's repudiation power, courts occasionally have taken broader view of this power.⁹³ For example, the decision in *Central Trust Co. v. Marietta & N.G. Railway*⁹⁴ implicitly classified a contract, fully performed on one side, as executory.⁹⁵ In *Central Trust*, a railway contracted with a marble company to transport the company's marble to an intermediate location for cutting, then to its final destination.⁹⁶ The marble company prepaid the freight for the entire excursion.⁹⁷ Thereafter, the railway company went into receivership and the receiver terminated the contract while the marble was at the intermediate location.⁹⁸

86. *Id.* at 49.

87. *Id.*

88. *Id.*

89. *Id.* at 50.

90. *Id.*

91. *Id.* at 53.

92. *Id.*

93. See Ellsworth E. Clark et al., *Adoption and Rejection of Contracts and Leases by Receivers*, 46 HARV. L. REV. 1111, 1111 n.5 (1933). "[C]ontracts and leases under which the obligations of the solvent party have been fully performed, but those of the insolvent remain executory, are liabilities and performance by the receiver would ordinarily be improper as a preference." *Id.* at 1111; see also *Whightsel v. Felton*, 95 F. 923 (C.C.S.D. Ohio 1899) (holding that even after employee, tort claimant, entered into agreement with employer not to bring suit in exchange for payment and continued employment, and employee completed his obligation not to bring suit, receiver for employer corporation properly refused to adopt contract to preserve property of the receivership estate).

94. 51 F. 15 (C.C.N.D. Ga. 1892).

95. *Id.* at 15-17.

96. *Id.* at 15.

97. *Id.* at 15-16.

98. *Id.* at 16.

The court found that the receiver had properly repudiated the contract, thus relieving the railway from completing performance under the contract.⁹⁹

In *Central Trust*, the marble company had completely performed its obligations by paying the full hauling price before the railway had completed its hauling obligations.¹⁰⁰ Thus, at the time of the receiver's appointment, one party to the contract had fully performed its obligations and one party had not. By permitting the receiver to repudiate the contract, the court implicitly found the contract executory for the purpose of repudiation.¹⁰¹ Relying on *Central Trust*, the RTC may conclude that it has authority to repudiate a contract fully performed on one side.¹⁰² If the RTC follows *Central Trust*, it can repudiate contracts fully performed by one party, regardless of the contract's semantic classification as executory or non-executory.¹⁰³ Thus, the RTC may claim broad repudiation powers that are arguably consistent with powers of a common law receiver.

Additionally, the RTC can further support a claim of broad repudiation powers by relying on federal banking regulations preceding FIRREA.¹⁰⁴ Prior to FIRREA, federal banking regulations entitled the FSLIC to repudiate "any . . . contract which it considers burdensome."¹⁰⁵ The FSLIC exercised this regulatory power to repudiate a contract in *Federal Savings & Loan Insurance Corp. v. Angell, Holmes & Lea*.¹⁰⁶ In *Angell*, Federal Savings and Loan Association (Federal) was in financial trouble and entered an agreement with Angell, Holmes & Lea for legal representation.¹⁰⁷ Under the agreement, the entire retainer fee paid to Angell, Holmes & Lea would be "deemed to have been earned upon payment," and the firm would return none of the fee to Federal "regardless of whether attorneys [were] for any reason prevented from performing any or all of the services to be performed by attorney under [the] agreement."¹⁰⁸

99. *Id.* at 16-17.

100. *Id.* at 15-16.

101. *Id.* at 15-17. The *Central Trust* court's decision implies the contract is executory because common law receivers can repudiate only executory contracts. See Clark et al., *supra* note 93, at 1111.

102. See *Central Trust*, 51 F. at 16.

103. See *id.*

104. See 12 C.F.R. § 569(a)(6)(c)(3) (1989).

105. *Id.*

106. 838 F.2d 395 (9th Cir.), *cert. denied*, 488 U.S. 848 (1988).

107. *Id.* at 396.

108. *Id.*

Shortly after the agreement was made, the FSLIC placed Federal in receivership.¹⁰⁹ The FSLIC fired Angell, Holmes & Lea, but the firm continued to provide legal services and attempted to keep the retainer fee.¹¹⁰ The *Angell* court held that as receiver the FSLIC had the right to dismiss counsel and repudiate any burdensome contract.¹¹¹ Therefore, the court ordered the firm to return the retainer, less payment for services provided before repudiation.¹¹²

The *Angell* court did not classify the contract at issue as executory or non-executory.¹¹³ By paying the retainer fee, Federal had fully performed its contractual obligations by the time of repudiation.¹¹⁴ The law firm's assertion that Federal had made final and completed performance was further supported by the contract's term making Angell, Holmes & Lea's fee "earned on payment" and non-refundable.¹¹⁵

Angell may indicate that the FSLIC's regulatory power to repudiate "any contract" includes only executory contracts. Alternatively, the decision may indicate that the FSLIC can repudiate non-executory contracts. This of course turns on whether a contract that is fully performed on one side is termed executory or non-executory.¹¹⁶ Regardless of whether Federal's contract falls within a given definition of executory, the court's decision seems to indicate that power to repudiate "any contract" includes contracts fully performed on one side.¹¹⁷

In light of the *Angell* court's broad interpretation of a financial institution receiver's power of repudiation,¹¹⁸ the RTC may rely on *Angell* to support repudiation of contracts fully performed by one party.¹¹⁹ The RTC can argue that the FSLIC regulation that authorizes the FSLIC receiver to repudiate "any contract"¹²⁰ closely resembles

109. *Id.*

110. *Id.* at 396-97.

111. *Id.* 12 U.S.C. § 1729(d) (1988) gives the FSLIC regulatory authority to hire counsel and 12 C.F.R. § 569(a)(6)(c)(3) (1989) provides that as receiver the FSLIC has power to reject any contract it considers burdensome.

112. *Angell*, 838 F.2d at 398.

113. *See id.*

114. *Id.* at 397.

115. *See id.* at 396.

116. See discussion of semantic distinction at *supra* notes 73-80 and accompanying text.

117. *See supra* notes 108-15 and accompanying text.

118. *See supra* notes 108-15 and accompanying text.

119. *Angell*, 838 F.2d at 396-98.

120. 12 C.F.R. § 569(a)(6)(C)(3) (1989).

the FIRREA regulation that authorizes the RTC to repudiate "any contract."¹²¹ Additionally, the RTC can point out that the FSLIC regulations and FIRREA give financial institution receivers repudiation power for essentially the same purpose. Both FIRREA and the FSLIC regulations direct the receiver to "preserve and conserve" the institution's assets and property.¹²² Thus, the RTC can claim that the receivers should have commensurate powers.

No court has ruled on whether the RTC can repudiate a non-executory contract pursuant to FIRREA. However, the recent case of *Gibson v. Resolution Trust Corp.*,¹²³ raised the issue in the context of a contract for services.¹²⁴ In *Gibson*, the RTC had been appointed as conservator of CenTrust Federal Bank, a Federal Savings Association, pursuant to FIRREA.¹²⁵ Prior to conservatorship, CenTrust contracted with a law firm, establishing an \$11 million fund for expenses associated with defending the institution's former officers.¹²⁶ The law firm was permitted to draw on the fund if CenTrust failed to pay the firm within the contractually specified time.¹²⁷

When the RTC became conservator for CenTrust, the RTC repudiated the contract pursuant to its statutory powers under section 11(e) of FIRREA.¹²⁸ At the time of repudiation, CenTrust had selected counsel and transferred the assets to the fund, and the law firm had provided partial services.¹²⁹ Thus, the law firm argued that CenTrust had fully performed under the contract, making the contract non-executory.¹³⁰ The law firm asserted that FIRREA did not empower the RTC to repudiate non-executory contracts.¹³¹ However, the RTC claimed that its statutory power to repudiate "any contract" extended to both executory and non-executory contracts.¹³² After defining an executory contract as one with "reciprocal remaining obligations," the court reasoned that CenTrust had not performed under the contract

121. 12 U.S.C. § 1821(e)(1) (Supp. II 1990).

122. *Id.* § 1821(d)(2)(B)(iv); 12 C.F.R. § 569a.6(a)(1) (1988).

123. 750 F. Supp. 1565 (S.D. Fla. 1990).

124. *Id.* at 1569.

125. *Id.* at 1568.

126. *Id.*

127. *Id.* at 1567-68.

128. *Id.* at 1568.

129. *See id.* at 1569.

130. *Id.* at 1568-69.

131. *Id.*

132. *Id.* at 1568.

because it had not paid the firm.¹³³ Additionally, the court reasoned that the firm had not performed because it had not provided all required legal services.¹³⁴ Accordingly, the *Gibson* court held that the RTC could repudiate the contract,¹³⁵ but declined to address the issue of whether the RTC could repudiate a non-executory contract.¹³⁶

Although *Angell* supports the RTC's asserted broad repudiation power,¹³⁷ the RTC's exercise of this broad power may defeat FIRREA's policy goals. The RTC must conduct its operations in a manner that restores public confidence in the savings and loan industry.¹³⁸ Yet, if the RTC repudiates obligations fully performed by one party, it is likely to further undermine the public's confidence and the viability of the savings industry as a provider of home financing. Individuals and businesses may become reluctant to enter contracts with savings institutions.¹³⁹ Contracting parties will fear that after they complete performance, the institution will become insolvent and the RTC will repudiate the contract.¹⁴⁰ Ultimately, the public will perceive the savings institution as an unreliable party with which to contract.¹⁴¹ The resulting harm to the institution could, when combined with other such cases, affect the health of the savings industry as a whole.

B. *The RTC's Power to Repudiate Burdensome Contracts*

After the RTC examines the executory nature of a contract or lease, the RTC must determine whether the contract is burdensome

133. *Id.* at 1569. The court found that the fund did not constitute payment. *Id.* Additionally, the fact that CenTrust did not have present ability to pay, which would have led firm to resort to the fund, did not affect the executory nature of contract. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. See text accompanying *supra* notes 118-22.

138. See 12 U.S.C. § 1821(d)(2)(D)(i) (Supp. II 1990).

139. Tucker et al., *supra* note 1, at 31-32.

140. *Id.*

141. See Barley, *supra* note 70, at 48. Parties wishing to contract with financial institutions should take precautions in structuring transactions with savings institutions to prevent loss if the institution becomes insolvent. See *id.* at 50. Contracting parties may design these transactions in a manner similar to transactions with a company anticipating bankruptcy. *Id.*; see also *The Non-Bankruptcy Alternative to Chapter 11*, 39 BUS. LAW. 1041 (1984) (A Program of the Committee on Commercial Financial Services, edited by Maury B. Poscover) (transcript of a panel discussion in which each of the panelists plays a role in a hypothetical meeting of a debtor's representative with the representatives of its creditors).

to the institution.¹⁴² The RTC may exercise its discretion and its sound business judgment in deciding which contracts are burdensome and when repudiation will promote the orderly administration of the institution's affairs.¹⁴³ Thus, if the RTC determines a contract is unprofitable or undesirable to the institution, the RTC may repudiate the contract.¹⁴⁴ The RTC assesses the burdensome nature of an institution's contracts on a case-by-case basis and uses no general standards in reaching its determinations.¹⁴⁵ Nevertheless, an examination of contracts repudiated by the RTC illustrates the scope of the RTC's discretionary powers.

The RTC may repudiate a contract to conserve the assets of an institution it holds in receivership.¹⁴⁶ Thus, the RTC can repudiate a service contract if the RTC can obtain similar services at a lower price.¹⁴⁷ Additionally, the RTC can repudiate a contract as burdensome, even when the contract will not diminish the institution's assets.¹⁴⁸ For example, the RTC has found an institution's bid pooling agreement burdensome because it would not generate a return to the institution on its underlying debt.¹⁴⁹

In some instances, courts require receivers to consider equitable issues in assessing a contract's burdensome nature.¹⁵⁰ One court required a bankruptcy receiver to consider whether repudiation served the Bankruptcy Code's policy of accomplishing a successful reorganiza-

142. 12 U.S.C. § 1821(e)(1)(B) (Supp. II 1990). *See, e.g.*, *Rexam Ltd. Partnership, S.E. v. RTC*, 766 F. Supp. 41, 45 (D.P.R. 1991) (finding that the RTC cannot claim that the loss of land supporting 16 provisional parking spaces will hinder the orderly administration of an institution's affairs).

143. 12 U.S.C. § 1821(e)(1)(B), (C) (Supp. 1990); *see Union Bank v. FSLIC*, 724 F. Supp. 468 (E.D. Ky. 1989) (citing *United States Trust Co. v. Wabach Ry.*, 150 U.S. 287, 288 (1893)). It is possible that market conditions may govern the receiver's decision to repudiate. For example, in a declining market, an executory agreement will be more valuable to the seller than the commodity covered by the contract. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357 (1982). In a rising market the executory contract has a special value for the buyer, who is assured delivery of the commodity and also can derive a profit from the price increase. *Id.* The RTC may use these principles to guide its repudiation decisions.

144. *Union Bank*, 724 F. Supp. at 471 (noting that there have been no cases reported that pass on the meaning of "burdensome").

145. *Atlantic Mechanical, Inc. v. RTC*, 772 F. Supp. 288, 291 (E.D. Va. 1991).

146. *See* 12 U.S.C. §§ 1821(d)(2)(B)(iv), (e)(1)(C) (Supp. II 1990).

147. *See Atlantic Mechanical*, 772 F. Supp. at 291 n.14.

148. *See Union Bank*, 724 F. Supp. at 471.

149. *See id.*

150. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984).

tion.¹⁵¹ In doing so, the court indicated that a successful reorganization included not only the debtor's interests, but also the interests of the debtor's employees and creditors.¹⁵²

Thus far, courts have not expressly required the RTC to consider competing policies in making repudiation decisions. One court has implied that the RTC's purposes of "preserv[ing] and conserv[ing]" an institution's assets overrides policy objectives of statutes conflicting with FIRREA.¹⁵³ In *Rosa v. Resolution Trust Corp.*,¹⁵⁴ employees of a failed savings institution attempted to enjoin the RTC from terminating an ERISA employee pension plan.¹⁵⁵ The employees argued that the RTC had a fiduciary duty under ERISA to continue payments to the plan.¹⁵⁶ The *Rosa* court did not express an opinion regarding the wrongfulness of the RTC's termination of the plan,¹⁵⁷ but held that the employees could not enjoin the RTC from exercising its conservatorship and receivership powers to terminate the plan.¹⁵⁸ Furthermore, the court held that FIRREA required the employees to exhaust the RTC's administrative claims procedure in pursuing a remedy.¹⁵⁹

Importantly, the *Rosa* court concluded that when ERISA and FIRREA provisions authorizing relief conflict, FIRREA's provisions con-

151. *Id.*

152. *Id.* In *Bildisco*, the Court concluded that a bankruptcy receiver could reject a collective bargaining agreement based on equitable considerations. *See id.* The rights that the National Labor Relations Act provides to the parties to a collective bargaining agreement resemble a priority right. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 111 (1986). This right has greater relative value than the rights of other unsecured creditors. *Id.* Additionally, labor law policy supports a continuation of a collective bargaining agreement, while no bankruptcy policy exists in reorganization to compete with the right of the parties to the collective bargaining agreement. *Id.* at 112-13.

153. *See Rosa v. RTC*, 938 F.2d 383, 397-98 (3d Cir. 1991).

154. *Id.*

155. *Id.* at 390.

156. *Id.* The district court found that the RTC as conservator had assumed the plan, thus the RTC became an ERISA fiduciary, preventing the RTC as receiver from terminating the plan. *Rosa v. RTC*, 752 F. Supp. 1231, 1236 (D.N.J. 1990), *rev'd*, 938 F.2d 383 (3d Cir. 1991). Thus, the district court imposed an injunction requiring the RTC to make payments to the plan and enjoining the RTC from terminating the plan. *Id.* at 1240.

157. *Rosa*, 938 F.2d at 400.

158. *Id.* at 399-400. The circuit court did not directly cite FIRREA's repudiation provision, 12 U.S.C. § 1821(e), as authority for repudiation. *See id.* Instead, the court relied on 12 U.S.C. § 1821(j), which provides a court cannot take action which restrains or affects the powers of the RTC as conservator or receiver. *See id.*

159. *See id.* at 395.

trol.¹⁶⁰ The court noted that FIRREA gave the RTC broad statutory powers to promptly resolve claims for the purposes of preserving and conserving the assets of the institution.¹⁶¹ In so noting, the court found FIRREA's purposes more compelling than ERISA's policy objective of protecting employees and their dependents.¹⁶²

If other courts follow *Rosa*, parties entering contracts with the RTC will have difficulty arguing that alternate policy considerations justify enforcing a contract. Instead, FIRREA's broad goals of effectively resolving distressed institutions¹⁶³ and the RTC's objectives of preserving an institution's assets,¹⁶⁴ minimizing loss in the resolution of cases,¹⁶⁵ and resolving claims in a quick and efficient manner¹⁶⁶ will control.

IV. THE RTC'S EXERCISE OF REPUDIATION POWERS

The RTC encounters many types of contracts as receiver or conservator of savings institutions.¹⁶⁷ In some instances, the RTC must give special treatment to particular types of contracts pursuant to FIRREA¹⁶⁸ or federal regulations.¹⁶⁹ The RTC also may address an issue, unique to a particular category of contracts, in a policy statement¹⁷⁰

160. See *id.* at 397. FIRREA requires exhaustion of remedies through administrative claims procedure, while ERISA grants district court jurisdiction. See *id.* at 391, 397.

161. *Id.*

162. See *id.* at 397-98. *Contra Rosa*, 752 F. Supp. at 1240 (noting that ERISA's public policy of protecting the security of employees and their dependents supported requiring the RTC to continue funding the plan), *rev'd*, 938 F.2d 383 (3d Cir. 1991).

163. See H.R. REP., *supra* note 7, at 307.

164. 12 U.S.C. § 1821(d)(2)(B)(iv) (Supp. II 1990).

165. *Id.* § 1441a(b)(3)(C)(iv).

166. H.R. REP., *supra* note 7, at 419.

167. See, e.g., *FSLIC v. Quinn*, 922 F.2d 1251 (6th Cir. 1991) (employment contract); *Atlantic Mechanical, Inc. v. RTC*, 772 F. Supp. 288 (E.D. Va. 1991) (air conditioning service contract); *Jenkins-Petre Partnership One v. RTC*, 1991 WL 160317 (D. Colo. 1991) (lease contract); *D.M. Harris v. Western Best, Inc.*, 795 S.W.2d 347 (Tex. Ct. App. 1990) (agreement to provide future advances on loan).

168. See 12 U.S.C. § 1821(e)(3)(A) (Supp. II 1990) (qualified financial contracts); *id.* § 1821(e)(11) (secured contracts); *id.* § 1821(e)(1) (repudiation of leases).

169. See, e.g., 12 C.F.R. § 563.39(b)(5) (1992) (employment contracts regulation).

170. See, e.g., RESOLUTION TRUST CORPORATION, Statement of Policy Regarding the Payment of Interest on Direct Collateralized Obligations After Appointment of the Resolution Trust Corporation as Conservator or Receiver, 55 Fed. Reg. 14,368 (1990), available in WESTLAW, FFIN-NR database (included as an attachment to an RTC news release entitled "RTC Approves Policy on Payment of Interest on Collateralized Borrowings") [hereinafter *Collateralized Obligations Policy*].

or interpretive letter.¹⁷¹ Additionally, the RTC must repudiate each contract within a reasonable time period.¹⁷²

A. *Statutory Limitations on the RTC's Repudiation of
Qualified Financial Contracts*

The most prominent limitation on the RTC's exercise of repudiation power appears directly in FIRREA's statutory language. FIRREA places a limit on the RTC's abilities to repudiate qualified financial contracts (QFC) of failed institutions.¹⁷³ FIRREA defines QFCs as securities contracts,¹⁷⁴ commodities contracts,¹⁷⁵ forward contracts,¹⁷⁶

171. See, e.g., Self-Help Liquidation of Collateral by Second Claimants in Receiverships, FDIC Interpretive Letter (FDIC-89-49), [1989-1990 Transfer Binder], Fed. Banking L. Rep. (CCH) ¶ 81,265 (Dec. 15, 1989); Treatment of Deposits of Public Funds Pooled and Collateralized by Appropriate Securities When Bank Fails and FDIC is Appointed Receiver, FDIC Interpretive Letter (FDIC-90-71), [1990-1991 Transfer Binder], Fed. Banking L. Rep. ¶ (CCH) 81,359 (Nov. 27, 1990).

172. 12 U.S.C. § 1821(e)(2) (Supp. II 1990).

173. *Id.* § 1821(e)(8)(A), (E).

174. *Id.* § 1821(e)(8)(D)(i). The term "securities contract" has the meaning given to it in the Bankruptcy Code, except the term "security" includes mortgage loans, mortgage related securities, and any interest in any mortgage loan or mortgages-related securities. *Id.* § 1821(e)(8)(D)(ii). However, "security" does not include a participation in a commercial loan. *Id.* The Bankruptcy Code defines "securities contract" as a "contract for the purchase, sale or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group of index of securities (including any interest therein or based on the value thereof). . . ." 11 U.S.C. § 741(7) (1988).

175. 12 U.S.C. § 1821(e)(8)(D)(i) (Supp. II 1990). The term "commodities contracts" has the meaning given to it in the Bankruptcy Code. *Id.* § 1821(e)(8)(D)(iii). The Bankruptcy Code defines a commodities contract as follows:

(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(E) with respect to a commodity options dealer, commodity option.

11 U.S.C. § 761(4) (1988).

176. 12 U.S.C. § 1821(e)(8)(D)(i) (Supp. II 1990). The term "forward contracts" has the

repurchase agreements,¹⁷⁷ swap agreements,¹⁷⁸ and other similar agreements which the RTC determines by regulation to be a QFC.¹⁷⁹ Upon appointment of the RTC as receiver or conservator, FIRREA provides special protection to QCF parties. This protection may preclude the RTC from repudiating QFCs.¹⁸⁰

A QFC party¹⁸¹ retains any right to terminate or liquidate a QFC that arises on appointment of the RTC as receiver.¹⁸² The party can

same meaning given to it in the Bankruptcy Code. *Id.* § 1821(e)(8)(D)(iv). The Bankruptcy Code defines the term forward contract as:

[A] contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity . . . or any similar good, article, service right, or interest, which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon.

11 U.S.C. § 101(24) (Supp. II 1990).

177. 12 U.S.C. § 1821(e)(8)(D)(i) (Supp. II 1990). The term "repurchase agreements" has the same meaning given to it in the Bankruptcy Code. *Id.* § 1821(e)(8)(D)(v). Under FIRREA, however, the term also includes mortgage-related securities, any mortgage loan, and any interest in any mortgage loan, but will not include any participation in a commercial mortgage loan. *Id.* The Bankruptcy Code defines the term repurchase agreements as

an agreement . . . which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities . . . at a date certain not later than one year after such transfers or on demand, against the transfer of funds.

11 U.S.C. § 101(47) (1988).

178. 12 U.S.C. § 1821(e)(8)(D)(i) (Supp. II 1990). Under FIRREA, swap agreement is defined as

any agreement . . . which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchase or any other similar agreement.

Id. § 1821(e)(8)(D)(vi).

179. *Id.* § 1821(e)(8)(D)(i).

180. *Id.* § 1821(e)(8)(A), (E).

181. As used in this note, a QFC party is any party to a QFC contract.

182. 12 U.S.C. § 1821(e)(8)(A)(i).

exercise the right at any time after the RTC is appointed receiver.¹⁸³ If the RTC is appointed conservator of a savings institution, a QFC party can exercise any right to terminate, liquidate or accelerate the QFC based on a default under the contract that is enforceable under noninsolvency law.¹⁸⁴ Additionally, a QFC party retains rights under security arrangements relating to the QFC¹⁸⁵ and may obtain any termination values and payment amounts due under the QFC.¹⁸⁶

FIRREA's special QFC provisions recognize the critical role of these contracts in financial markets.¹⁸⁷ QFCs give savings institutions the liquidity and hedging abilities they need for portfolio and risk management.¹⁸⁸ Furthermore, FIRREA's specific QFC provisions send important signals to financial markets regarding enforceability of QFC contracts after the appointment of a conservator or receiver.¹⁸⁹ Thus, in light of FIRREA's QFC provisions, it appears that the financial markets can rely on these contracts.¹⁹⁰

B. *Policy Statements and Interpretive Letters Regarding Repudiation of Collateralized Contracts*

When issues arising under certain types of contracts are not addressed by specific statutory provisions, the RTC may resolve them by issuing policy statements.¹⁹¹ In these instances, the RTC has repudiated a particular type of agreement and subsequently issued a statement regarding the terms and conditions surrounding the repudiation.¹⁹² Additionally, the RTC has occasionally published letters that interpret FIRREA.¹⁹³ In these letters, the RTC has responded to specific hypothetical situations that might arise in the conservatorship or receivership of an institution.¹⁹⁴ The RTC's responses in these letters are merely advisory opinions and are not binding on the RTC as

183. *Id.*

184. *Id.* § 1821(e)(8)(E)(i).

185. *Id.* § 1821(e)(8)(A)(ii), (E)(ii).

186. *Id.* § 1821(e)(8)(A)(iii), (E)(iii).

187. FDIC, *FDIC Statement of Policy on Qualified Financial Contracts*, Dec. 12, 1989, reprinted in *LITIGATING WITH THE FDIC AND RTC*, *supra* note 11, at 184.

188. *Id.*

189. See 12 U.S.C. § 1821(e)(8)(A), (E) (Supp. II 1990).

190. See *id.*; *FDIC Statement of Policy on Qualified Financial Contracts*, *supra* note 187.

191. See, e.g., *Collateralized Obligations Policy*, *supra* note 170.

192. See *id.*

193. See, e.g., *Interpretive Letter Regarding Secured Contract*, *supra* note 171.

194. See *id.*

receiver or conservator.¹⁹⁵ Yet, the RTC provides them as guidance to parties entering contracts with potentially insolvent financial institutions.¹⁹⁶

The RTC has used both policy statements and interpretive letters to address repudiation of secured contracts.¹⁹⁷ In these statements and letters, the RTC delineates its proposed treatment of specific types of secured obligations.¹⁹⁸ For example, the RTC's "Statement of Policy Regarding Payment of Interest on Direct Collateralized Borrowings" (Collateralized Obligations Policy) interprets FIRREA's provision concerning repudiation of contracts involving security interests.¹⁹⁹ This security interest provision states that FIRREA's repudiation provisions "shall not be construed as permitting the avoidance of any legally enforceable or perfected security interest in any assets of any depository institution," but permits the RTC to avoid any security interest "taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or creditors of such institution."²⁰⁰ In a policy statement regarding this provision, the RTC concludes that although FIRREA generally protects the security interest of a contracting party, it does not prohibit the RTC from repudiating a contract secured by collateral.²⁰¹ Although a contracting party has collateral backing the repudiated contract, that party may not recover the full value of the collateral.²⁰² Instead, the party may only recover the statutorily limited damages for repudiation provided in FIRREA.²⁰³ Thus, the contracting party will receive the value of the collateral only to the statutory damages limit.²⁰⁴

The RTC, in its policy statement, applies its general powers regarding secured interests to repudiate collateralized borrowings.²⁰⁵ The RTC concludes that it can exercise its right of repudiation to call, redeem, or prepay collateralized borrowings.²⁰⁶ In exercising this right,

195. *See id.*

196. *See id.*

197. *See id.*; Collateralized Obligations Policy, *supra* note 170.

198. *See* Collateralized Obligations Policy, *supra* note 170; Interpretive Letter Regarding Secured Contract, *supra* note 171.

199. *See* Collateralized Obligations Policy, *supra* note 170.

200. 12 U.S.C. § 1821(e)(11) (Supp. II 1990).

201. Collateralized Obligations Policy, *supra* note 170.

202. *Id.*

203. *Id.*; *see* 12 U.S.C. § 1821(e)(3)(A)-(B) (Supp. II 1990).

204. *See* 12 U.S.C. § 1821(e)(3)(A)-(B) (Supp. II 1990).

205. *See* Collateralized Obligations Policy, *supra* note 170.

206. *Id.*

the RTC can repudiate these obligations by either making a cash payment directly to the secured party in exchange for the release of collateral or by expressly repudiating the borrowing contract and requiring a trustee to liquidate the collateral.²⁰⁷ Although FIRREA's statutory provisions appear to limit damages for repudiation of all secured contracts,²⁰⁸ the RTC has agreed in its policy statement to pay interest on the collateralized borrowing,²⁰⁹ and to pay this interest at the contract rate until redemption or payment of the obligation.²¹⁰

In addition to its policy statement addressing collateralized contracts, the RTC has issued a policy statement addressing the exercise of repudiation powers over collateralized letters of credit.²¹¹ In this statement, the RTC concludes that its Collateralized Obligations Policy also applies to collateralized letters of credit.²¹² Thus, the RTC can

207. *Id.*

208. See 12 U.S.C. § 1821(e)(3)(A)-(B) (Supp. II 1990).

209. Collateralized Obligations Policy, *supra* note 170.

210. *Id.*

211. Resolution Trust Corporation, *Statement of Policy Regarding Treatment of Collateralized Letters of Credit After Appointment of the Resolution Trust Corporation as Conservator or Receiver*, Sept. 25, 1990, reprinted in LITIGATING WITH THE FDIC AND RTC, *supra* note 11, at 42 [hereinafter Letter of Credit Policy]. The RTC's policy applies only to collateralized letters of credit utilized in capital markets financing transactions, and not to trade or other letters of credit. *Id.* The RTC has issued no policy statement about these other letters of credit. However, pursuant to FIRREA's general provision, the RTC can repudiate these obligations as well. See 12 U.S.C. § 1821(e)(1) (Supp. III 1991). The RTC's repudiation of these obligations raises special issues regarding payment of damages. In these cases, the RTC's repudiation denies the beneficiary of a letter of credit a claim for damages because the beneficiary's claim arises after insolvency and therefore is not provable. Lawrence F. Bates, *Bank and Thrift Liquidation Law and the Impact of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, in LITIGATING WITH THE FDIC AND RTC, *supra* note 11, at 7, 23-24. The RTC's ability to avoid payment of damages to a beneficiary alters past decisions requiring the FDIC as receiver to pay damages. See *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1367-69 (9th Cir.) (claim under standby letter of credit is provable if meeting three conditions: (1) claim exists before insolvency and does not depend on receiver's contractual obligations arising after insolvency; (2) total liability is certain at the time the beneficiaries bring suit against institution's receiver; and (3) claims are made in timely manner, before distribution of assets from receivership estate), *cert. denied*, 439 U.S. 919 (1978). *But see* Edgardo E. Colon, *Letters of Credit in Times of Business and Bank Failures*, 107 BANKING L.J. 6, 29-31 (1990) (arguing FIRREA only gives the RTC historical receivership powers which encompass the *First Empire* limitation regarding repudiation of letters of credit; also arguing that letters of credit are not formal contracts and therefore do not fall within the RTC's repudiation powers).

212. Letter of Credit Policy, *supra* note 211.

accelerate a letter of credit by paying the outstanding principal amount plus interest to the extent of the value of the collateral.²¹³

Overall, the RTC's asserted ability to repudiate collateralized borrowing contracts and collateralized letters of credit serves FIRREA's dual goals. The RTC's payment of interest helps perpetuate a reliable and strong savings and loan industry,²¹⁴ while the RTC's ability to repudiate collateralized contracts helps reduce the overall cost of operating the institution in receivership.²¹⁵

C. *Regulatory Provisions and Employment Contract Termination*

Regulatory provisions govern the termination of several types of contracts held by insolvent savings institutions.²¹⁶ When regulatory provisions call for the termination of a contract, the RTC cannot exercise discretion in applying its repudiation powers. One such regulation, 12 C.F.R. § 563.39, addresses termination of employment contracts.²¹⁷ Section 563.39 provides that an employment contract with a failed institution will automatically terminate when the RTC or the FDIC enters into an assistance agreement with the savings institution,²¹⁸ when the Office of Thrift Supervision Director approves a supervisory merger of the institution,²¹⁹ or when the Director finds the institution in an "unsafe or unsound" condition.²²⁰ When applied, section 563.39 terminates "all obligations"²²¹ of the institution under the employment contract — including, for example, severance pay.²²²

However, section 536.39 prohibits the RTC from terminating a contract necessary for the continued operation of the institution.²²³ In

213. *Id.*

214. Collateralized Obligations Policy, *supra* note 170.

215. *See, e.g.*, Resolution Trust Corporation, *RTC Announces Decision to Repudiate Six Collateralized Bond Issues of Franklin Savings Association, Ottawa, Kansas*, RTC Press Release, June 8, 1990, available in WESTLAW, FFIN-NR database (noting that the RTC's repudiation of six collateralized bond issues issued by Franklin would reduce the costs of operating Franklin).

216. *See, e.g.*, 12 C.F.R. § 563.39 (1992).

217. *Id.*

218. *Id.* § 563.39(b)(5)(i).

219. *Id.* § 563.39(b)(5)(ii).

220. *Id.*

221. *Id.* § 563.39(b)(5).

222. *See* *Rush v. FDIC*, 747 F. Supp. 575, 577 (N.D. Cal. 1990) (concluding that because savings and loan employee's right under an employment contract to termination pay had not vested, the right was not enforceable against the FSLIC as receiver).

223. 12 C.F.R. § 563.39(b)(5) (1992).

this instance, employees will retain benefits under these employment contracts. Additionally, section 563.39 provides that the RTC will not terminate benefits under a contract when the benefits are vested at the time the institution is declared insolvent.²²⁴ However, if a contract entitles an employee to receive benefits for termination without cause, the automatic termination on declaration of insolvency does not cause the contractual benefits to vest.²²⁵

The termination of employment contracts under section 563.39 appears consistent with FIRREA's goals. By permitting termination of excessive and long term benefits,²²⁶ the regulation preserves the institution's assets.²²⁷ The regulation's termination provisions also reflect the fact that some directors and officers receiving benefits under employment contracts have caused the institution's failure through mismanagement.²²⁸

Yet, in some instances section 563.39 poses equitable concerns based on the nature of the employment contract.²²⁹ In contrast to general receivership claimants which enter contracts with the savings institution for profit,²³⁰ employees of an institution act on behalf of that institution and receive no benefits from the institution's individual transactions.²³¹ Thus, employees have a unique status that may entitle them to special treatment by the receiver.²³²

Additionally, employees may be entitled to special contractual benefits under non-receivership law. For example, corporate directors and officers often enter indemnification contracts with institutions to cover litigation costs of suits brought against the directors or officers

224. *Id.*

225. *Rush*, 747 F. Supp. at 578 (holding that termination of employment contract as a matter of law on declaration that institution is insolvent does not constitute termination without cause).

226. *Id.*

227. 12 U.S.C. § 1821(d)(2)(B)(iv) (Supp. III 1991).

228. *FSLIC v. Quinn*, 922 F.2d 1251, 1257 (6th Cir. 1991) (noting in dicta that the FSLIC "should not have to fund golden parachutes" for negligent and corrupt officers of failed savings and loan institutions).

229. These concerns are illustrated in *In re THC Fin. Corp.*, 446 F. Supp. 1329 (D. Haw. 1977). Although this bankruptcy case was decided under the pre-1978 Bankruptcy Act, the discussion in this case applies as well to situations where the FSLIC or the RTC take over a troubled institution and seek to terminate employment contracts pursuant to 12 C.F.R. § 536.39 (1992).

230. *See In re THC Fin. Corp.*, 446 F. Supp. at 1332.

231. *See id.*

232. *See id.*

in their corporate capacity.²³³ These employees hold special rights under corporate law which enable them to act on behalf of the corporation without incurring personal liability.²³⁴ Terminating these employees' indemnification agreements through repudiation may conflict with the employees rights under corporate law.²³⁵

D. *Repudiation of Leases by the RTC*

FIRREA expressly provides that the RTC can repudiate leases.²³⁶ This repudiation power reaffirms the common law power of a receiver to reject leases.²³⁷ FIRREA also reaffirms the authority of receivers of failed savings institutions to repudiate leases under federal banking regulations.²³⁸ Since the RTC has quickly become the owner of a staggering amount of real property throughout the United States,²³⁹ the RTC's exercise of repudiation powers under FIRREA has the potential to affect thousands of lessors and lessees. Although the RTC has validly repudiated many commercial leases pursuant to FIRREA,²⁴⁰ the RTC's repudiation of residential leases has proven more controversial.

In a 1991 policy statement, the RTC asserted its powers to repudiate residential leases subject to rent control.²⁴¹ In this policy statement, the RTC also indicated that it would not repudiate leases of lower- or moderate-income tenants.²⁴² This policy statement has captured the attention of state and local officials who impose the rent controls and of the affected tenants. Consequently, these parties have

233. *See id.*

234. *See id.* at 1331-32.

235. *See id.* at 1332.

236. 12 U.S.C. § 1821(e)(1) (Supp. III 1991).

237. *See* 66 AM. JUR. 2D *Leases* § 232 (1973).

238. *See* *Argonaut Sav. & Loan Ass'n v. FDIC*, 392 F.2d 195, 197 (9th Cir. 1968) (holding that the FDIC as receiver of lessee, a national bank, can disaffirm institution's lease for real property).

239. *See* *Tucker et al.*, *supra* note 1, at 7.

240. *See, e.g.*, *Bayshore Executive Plaza Partnership v. FDIC*, 943 F.2d 1290, 1292 (11th Cir. 1991).

241. *Resolution Trust Corporation, RTC Board Approves Policy for Disposition of Residential Properties Subject to Rent Control*, RTC News Release, Feb. 25, 1991, available in WESTLAW, FFTN-NR database (1991 WL 22039 (R.T.C.)).

242. *Id.* (defining low- and moderate-income tenants as those with family or individual incomes not exceeding 115% of the area median income).

challenged the RTC's authority to disregard state statutory schemes regulating the rights of residential tenants.²⁴³

Although these challenges have not yet been resolved, the court in *Resolution Trust Corp. v. Diamond*²⁴⁴ implied that the RTC's repudiation powers in the residential lease context will depend on the facts surrounding the repudiation.²⁴⁵ The *Diamond* court further implied that in order to issue a broad policy statement on residential tenancies, the RTC must first consider the repudiation's effects on all institutions and rent-controlled residential tenants.²⁴⁶ Moreover, the controversy surrounding repudiation of rent-controlled residential leases also has engendered congressional action. Two bills were introduced in 1991 which sought to preclude the RTC from repudiating residential leases regulated by state and local law.²⁴⁷

The RTC's difficulty in making decisions regarding residential leases has stemmed in part from the RTC's conflicting mandates under FIRREA. FIRREA directs the RTC to maximize return on equity from the sale of assets in its inventory without disrupting real estate markets and to ensure a stable economic climate.²⁴⁸ At the same time, FIRREA directs the RTC to use those same assets to maximize opportunities for affordable housing.²⁴⁹ The RTC's predecessors, the FDIC and the FSLIC, were not directed to provide affordable housing.²⁵⁰ Thus, unlike its predecessors, the RTC must consider these potentially conflicting policies and utilize the methods most consistent with those policies in the resolution of a savings institution.

E. *Timing of Repudiation*

FIRREA specifies that the RTC must exercise its repudiation powers within a reasonable time.²⁵¹ By not designating a specific time

243. See, e.g., *RTC v. Diamond*, 137 F.R.D. 634, 638 (S.D.N.Y. 1991).

244. *Id.*

245. See *id.* at 640.

246. See *id.*

247. H.R. 320, 102d Cong., 1st Sess. (1991) (entitled the "Tenant Protection Act of 1991" and amending FIRREA); H.R. 2244, 102d Cong., 1st Sess. (1991) (also entitled "Tenant Protection Act of 1991" amending the Federal Home Loan Bank Act).

248. See 12 U.S.C. § 1441a(b)(3)(C) (Supp. III 1991).

249. *Id.*

250. See 12 U.S.C. § 1811 (1988) (pre-FIRREA duties of the FDIC generally); *id.* § 1821(d) (pre-FIRREA duties of the FDIC as receiver); *id.* § 1725 (pre-FIRREA duties of the FSLIC generally); *id.* § 1729(b) (pre-FIRREA duties of the FSLIC as receiver).

251. 12 U.S.C. § 1821(e)(2) (Supp. III 1991).

limitation,²⁵² FIRREA allows courts to consider several factors in determining whether the RTC repudiated a contract within a reasonable time. If the contract involves large sums of money, the court will allow the RTC a longer period of time to repudiate.²⁵³ Additionally, if the decision to repudiate involves lengthy procedures, such as assessing the value of a complex contract, a court may lengthen the reasonable period for repudiation.²⁵⁴

In its policy statements, the RTC has established a time limitation for repudiation of certain types of agreements.²⁵⁵ For example, in its Collateralized Obligation Policy, the RTC has asserted that it must repudiate a collateralized borrowing agreement within sixty days of its appointment as receiver or conservator.²⁵⁶ If the RTC fails to repudiate such an agreement within the allotted time, the contract will automatically remain in effect as long as the institution remains in conservatorship or receivership.²⁵⁷ The RTC based this policy on the need to provide certainty and stability in financial markets,²⁵⁸ and noted that the price sensitivity of the collateral securing these loans requires the RTC to make its repudiation decision within the sixty day period.²⁵⁹

In another policy statement, the RTC indicated that it has 180 days to repudiate collateralized letters of credit.²⁶⁰ The RTC asserts that it requires this time to evaluate these highly complex transactions.²⁶¹ Furthermore, in addition to FIRREA's mandates and the RTC's own policy statements, the FDIC has established a time limit for the RTC's repudiation of collateralized put options.²⁶² In doing so

252. See *Union Bank v. FSLIC*, 724 F. Supp. 468, 470-71 (E.D. Ky. 1989).

253. See *id.* at 471 (reasoning that "the large sum of money involved" was one factor supporting a "reasonable" delay of four months between the appointment of receiver and repudiation of the contract under FIRREA).

254. See *id.*

255. See, e.g., Collateralized Obligations Policy, *supra* note 170.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Letter of Credit Policy, *supra* note 211.

261. *Id.*

262. FDIC, *Statement of Policy Regarding Treatment of Collateralized Put Obligations After Appointment of the FDIC as Conservator or Receiver*, 56 Fed. Reg. 36,152 (1991).

the FDIC specified that 180 days from the date of the RTC's appointment as conservator or receiver constitutes a reasonable time for repudiation of collateralized put options.²⁶³

It is not clear whether the RTC's failure to repudiate a contract within a reasonable period of time constitutes an adoption of the contract.²⁶⁴ Under common law, some courts found that a receiver's failure to repudiate a contract within a reasonable time made the contract binding.²⁶⁵ Yet under common law, receivers could proceed under a contract experimentally to assess its value without signaling intent to adopt the contract and still retain the power of repudiation.²⁶⁶ Under this doctrine, the RTC's inaction would not result in adoption. Alternatively, the receiver's failure to repudiate the contract within a reasonable time may affect the claim for damages.²⁶⁷

V. DAMAGES FOR REPUDIATION OF CONTRACTS AND LEASES

A. *Damages for Repudiation Generally*

FIRREA contains several provisions addressing the damages recoverable when the RTC repudiates a contract or lease. FIRREA's general damages provision states that a contract claimant can recover only "actual direct compensatory damages" when the RTC repudiates its contract.²⁶⁸ FIRREA also contains specific provisions which enumerate damages recoverable for repudiation of certain types of contracts, including: contracts for services,²⁶⁹ leases under which the institution is lessee,²⁷⁰ leases under which the institution is lessor,²⁷¹ contracts for the sale of real property,²⁷² and qualified financial con-

263. *Id.*

264. *See* Veal, *supra* note 49, at 234.

265. Crawford v. Gordon, 153 P. 363, 366 (1915).

266. Butterworth v. Degnon Contracting Co., 214 F. 772, 773 (2d Cir. 1914); *see also* Quincey, Mo. & Pac. Ry. v. Humphreys, 145 U.S. 82 (1892) (finding that a receiver can take possession of a leased railway line and operate it for more than one year, then exercise repudiation powers).

267. *See* Veal, *supra* note 49, at 234.

268. 12 U.S.C. § 1821(e)(3)(A) (Supp. III 1991). Ordinarily, repudiation of contract gives rise to damages for total breach of contract. RESTATEMENT (SECOND) OF CONTRACTS § 253(1) (1981). These damages include recovery for loss, including incidental or consequential loss caused by the breach. RESTATEMENT (SECOND) OF CONTRACTS § 347(b) (1981).

269. 12 U.S.C. § 1821(e)(7) (Supp. III 1991).

270. *Id.* § 1821(e)(4).

271. *Id.* § 1821(e)(5).

272. *Id.* § 1821(e)(6).

tracts.²⁷³ FIRREA's damages provisions significantly clarify the application of common law damage principles in the repudiation context.²⁷⁴

FIRREA's statutory provisions are general guidelines for assessing damages awarded for the RTC repudiations. FIRREA limits damages by precluding recovery of punitive and exemplary damages, damages for lost profits and opportunity, and damages for pain and suffering.²⁷⁵ Additionally, FIRREA's general damages provision specifies that damages will be calculated from the date the conservator or receiver is appointed.²⁷⁶ Because FIRREA's damage provisions significantly restrict recovery, in some instances a contract claimant will recover no damages for repudiation.²⁷⁷ Furthermore, FIRREA's damage provisions may preclude recovery of incidental or consequential damages resulting from the repudiation.²⁷⁸

B. Damages for Repudiation of Service Contracts

In addition to its general damages provisions, FIRREA contains special provisions addressing damages recoverable for repudiation of service contracts.²⁷⁹ If a party provides services to an institution prior to receivership, that party will be paid pursuant to general claims procedures.²⁸⁰ However, if the RTC accepts performance under a service contract subsequent to its appointment, it must pay for such services as administrative expenses.²⁸¹ Although the RTC must pay for

273. *Id.* § 1821(e)(3)(C).

274. Guy, *supra* note 11, at 140.

275. 12 U.S.C. § 1821(e)(3)(b)(i)-(iii) (Supp. III 1991).

276. *Id.* § 1821(e)(3)(A)(ii)(I).

277. *See, e.g.,* Union Bank v. FSLIC, 724 F. Supp. 468, 472 (E.D. Ky. 1989). In *Union Bank*, Fidelity Federal Savings Bank (Fidelity) and its loan participant, Hiawatha Savings & Loan Association (Hiawatha), made an agreement to pool funds to bid jointly on property secured by their note at a foreclosure sale. *Id.* at 470. The parties intended to keep the bidding price to the amount of two outstanding notes. *Id.* Before the sale, the FSLIC, later succeeded by the RTC, placed Fidelity in receivership. *Id.* The RTC repudiated the bid pooling agreement, and Hiawatha sought to recover damages. *Id.* The court cited the FIRREA provision limiting recovery to actual direct compensatory damages, and found that Hiawatha suffered no actual damages as of the date of the appointment of the conservator. *Id.* at 472. The *Union Bank* court applied FIRREA's damages provisions to preclude Hiawatha from recovering damages for the lost opportunity to bid jointly on the property. *See id.*

278. *See id.* (implying that Hiawatha would receive no incidental or consequential damages from repudiation).

279. 12 U.S.C. § 1821(e)(7) (Supp. III 1991).

280. *Id.* § 1821(e)(7)(A).

281. *Id.* § 1821(e)(7)(B)(ii).

services it receives, the RTC's acceptance of a service contract does not guarantee that it will not later repudiate that contract.²⁸²

C. Damages for Repudiation of Leases

FIRREA also contains several specific provisions addressing damages recoverable for repudiation of leases.²⁸³ FIRREA's lease provisions both clarify and limit the damages recoverable at common law for lease repudiation. At common law, when a receiver of an insolvent lessee repudiated a lease, the receiver did not have to pay damages to the lessor of rent reserved but not yet due.²⁸⁴ However, in most instances, the receiver had to pay damages to the lessor for the remainder of the rental term, based on the present value of future rental payments.²⁸⁵

FIRREA places greater restrictions on damages recoverable for repudiation than common-law decisions. FIRREA allows the RTC to repudiate the lease as lessee,²⁸⁶ and contains a number of provisions which clarify and limit damages recoverable by the lessor.²⁸⁷ For example, upon repudiation the RTC is only liable to the lessor for contractual rent which accrued prior to either the date on which the notice of repudiation is mailed²⁸⁸ or the date on which the repudiation becomes

282. *See id.* § 1821(e)(7)(B).

283. *Id.* § 1821(e)(4)-(5).

284. *See Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 324 (1891) (implying that unaccrued rent is not a present obligation, but is payable in the future, and thus a lessor cannot claim damages for rent accruing after the disaffirmance by the receiver); *see also* *FDIC v. Grella*, 553 F.2d 258, 262-64 (2d Cir. 1977) (finding that the FDIC regulations allow a bank receiver as lessee to disaffirm a lease and deny any claim by a landlord for rent or damages not yet accrued). *But see* *Gardiner v. William S. Butler & Co.*, 245 U.S. 603, 604-05 (1918) (holding that a lessor can recover damages under express damages provision in lease).

285. *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433, 444 (1937). *But see* *First Nat'l Bank of Chicago v. First Nat'l Bank of Wheaton*, 78 F.2d 502, 503 (7th Cir.) (holding that absent a specific term in the lease, damages for remainder of the rental term cannot be recovered when a lease is repudiated), *cert. denied*, 296 U.S. 651 (1935). Additionally, the lessor could recover compensation from the estate of the lessee for use of the premises by the receiver prior to adopting or repudiating the lease. *Oscar Heineman Corp. v. National Levy & Co.*, 6 F.2d 970, 974 (2d Cir. 1925) (reasoning that compensation for use of the premises by the receiver prior to repudiation is based not on the rent in the lease but on reasonable value for the use). If the lease contained a provision for liquidated damages, some courts allowed the lessor to claim this amount. E.g., *William Filene's Sons Co. v. Weed*, 245 U.S. 597, 601-03 (1918).

286. 12 U.S.C. § 1821(e)(1) (Supp. III 1991).

287. *Id.* § 1821(e)(4)(A), (B).

288. *Id.* § 1821(e)(4)(B)(i)(I).

effective,²⁸⁹ whichever comes later.²⁹⁰ Additionally, the RTC is not liable for damages under an acceleration clause or penalty provision of the lease.²⁹¹

The RTC also can repudiate as lessor.²⁹² In these instances, after the RTC's repudiation, the lessee can either treat the lease as terminated²⁹³ or remain in possession of the leased property for the balance of the lease term.²⁹⁴ If the lessee remains in possession for the balance of the term, the lessee must make rental payments,²⁹⁵ but can offset against rent any damages it suffers as a result of the RTC's failure to perform under the lease.²⁹⁶

D. *Damages for Repudiation of Contracts for Sale of Real Property*

FIRREA limits damages recoverable for the RTC's repudiation of real property sales contracts.²⁹⁷ If the RTC repudiates such a contract, and the purchaser is in possession and not in default, the purchaser can either treat the contract as terminated by the repudiation,²⁹⁸ or it can remain in possession.²⁹⁹ If the purchaser remains in possession, the purchaser must continue to make payments due under the contract.³⁰⁰ A purchaser who continues payment will receive title from the RTC,³⁰¹ but cannot enforce specific performance of the contract.³⁰² Instead, the purchaser can offset against its payments any damages caused by the RTC's failure to fully perform under the contract.³⁰³

289. *Id.* § 1821(e)(4)(B)(i)(II). However, the RTC probably cannot send a post-insolvency notification of repudiation which retroactively disaffirms the lease effective on the date of insolvency. *Cf.* 80 Pine Inc. v. European Am. Bank, 424 F. Supp. 908, 909-10 (E.D.N.Y. 1976) (pre-FIRREA) (holding that the FDIC as receiver did not have the power to disaffirm a lease in a manner that would alter or affect the rights of other creditors by creating a claim to the landlord which did not exist at the time).

290. 12 U.S.C. § 1821(e)(4)(B)(i) (Supp. III 1991).

291. *Id.* § 1821(e)(4)(B)(ii).

292. *Id.* § 1821(e)(1).

293. *Id.* § 1821(e)(5)(A)(i).

294. *Id.* § 1821(e)(5)(A)(ii).

295. *Id.* § 1821(e)(5)(B)(i)(I).

296. *Id.* § 1821(e)(5)(B)(i)(II).

297. *Id.* § 1821(e)(6)(B)(ii).

298. *Id.* § 1821(e)(6)(A)(i).

299. *Id.* § 1821(e)(6)(A)(ii).

300. *Id.* § 1821(e)(6)(B)(i)(I).

301. *Id.* § 1821(e)(6)(B)(ii)(II).

302. *See id.* § 1821(e)(6)(B)(ii)(III).

303. *Id.* § 1821(e)(6)(B)(i)(II).

E. *Damages for Repudiation of Qualified Financial Contracts*

FIRREA specifically sets forth the damages recoverable for repudiation of certain qualified financial contracts.³⁰⁴ The damages awarded for repudiation of a QFC go beyond “actual direct compensatory damages” awarded for repudiation of contracts generally.³⁰⁵ Damages recoverable for repudiation of QFCs include the normal reasonable costs of cover or any other reasonable measure of damages generally awarded for repudiation of the type of contract involved.³⁰⁶ Damages accrue from the date of repudiation of the QFC.³⁰⁷ In some cases, the institution’s liquidated assets may be inadequate to cover the higher damages potentially afforded QFC beneficiaries. Thus, liquidity constraints may render the benefits of FIRREA’s QFC damage provisions irrelevant.³⁰⁸

VI. CONCLUSION

FIRREA permits the RTC to repudiate a wide variety of contracts³⁰⁹ and limits damages the RTC must pay to contracting parties.³¹⁰ FIRREA also gives the RTC great latitude over its repudiation powers³¹¹ by expressly permitting the RTC to exercise discretion in deciding whether a contract is burdensome.³¹² Furthermore, FIRREA appears to grant the RTC discretion to repudiate contracts often considered “non-executory” — those where one party has fully performed.³¹³

When the RTC exercises its repudiation powers, it often causes parties contracting with the institution to suffer substantial losses.³¹⁴ Nevertheless, the RTC’s exercise of repudiation power has generally

304. *Id.* § 1821(e)(3)(C).

305. Compare *id.* § 1821(e)(3)(C) (allowing damages for repudiation of a QFC to include “normal and reasonable costs of cover or other reasonable measures utilized in the industr[y]”) with *id.* § 1821(e)(3)(A)(i) (limiting damages for most other contracts to “actual direct compensatory damages”).

306. *Id.* § 1821(e)(3)(C)(i).

307. *Id.* § 1821(e)(3)(A)(ii)(II).

308. See Veal, *supra* note 49, at 236.

309. See *supra* note 167.

310. See *supra* notes 268-308 and accompanying text.

311. See *supra* notes 61-80 and accompanying text.

312. 12 U.S.C. § 1821(e)(1)(B) (Supp. III 1991).

313. See *supra* notes 102-03 and accompanying text.

314. See, e.g., *Rosa v. RTC*, 938 F.2d 383, 388-90 (3d Cir. 1991) (involving potential loss of pension plan benefits).

withstood judicial scrutiny.³¹⁵ Courts have found that the RTC has exercised its powers under FIRREA in a manner consistent with the overall purposes of FIRREA.³¹⁶ The RTC has repudiated contracts in the interests of maintaining a viable and independent savings and loan industry³¹⁷ and has conducted operations to quickly and efficiently resolve the institutions in receivership.³¹⁸

Additionally, the RTC has, for the most part, acted in accordance with its direct receivership mandates under FIRREA³¹⁹ by exercising its repudiation powers to “preserve and conserve” the assets of institutions.³²⁰ The RTC’s exercise of repudiation powers most often conflicts with its specific mandates under FIRREA when the RTC is dealing with residential properties.³²¹ In these instances, the RTC must balance FIRREA’s conflicting goals of providing affordable housing and maximizing return on the institution’s assets.³²² Moreover, in repudiating residential property contracts, the RTC must remain mindful of FIRREA’s broad goal of maintaining public confidence and trust in the savings industry as an industry committed to providing financing for home ownership.³²³ Proposed legislation may provide the RTC with needed guidance in this difficult area.³²⁴

When FIRREA’s congressional mandates do not conflict, courts will likely continue to support the RTC’s broad exercise of repudiation powers in furtherance of FIRREA’s broad policy goals. Congress intended to address the savings and loan crisis with strong, comprehensive legislation.³²⁵ In enacting FIRREA, Congress created the RTC and gave it repudiation power to efficiently resolve the problem of distressed savings institutions.³²⁶ In light of this, the RTC’s exercise of broad repudiation power is consistent with the spirit of FIRREA’s comprehensive legislative reforms and FIRREA’s goal of returning savings institutions to their position as strong providers of home financing.

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315. See *supra* notes 153-66 and accompanying text.

316. See, e.g., *Rosa*, 938 F.2d 383.

317. See *supra* text accompanying notes 36-37.

318. See *supra* text accompanying note 44.

319. See *supra* notes 153-66 and accompanying text.

320. See *supra* text accompanying note 43.

321. See *supra* text accompanying notes 248-50.

322. See *supra* text accompanying notes 248-50.

323. See *supra* text accompanying notes 248-50.

324. See *supra* note 247 and accompanying text.

325. See *supra* notes 5-7 and accompanying text.

326. See *supra* notes 34, 45 and accompanying text.

