St. Mary's Law Journal

Volume 20 | Number 4 Article 3

1-1-1989

Asserting and Defending Claims Involving an FSLIC Relationship.

Joe Phillips

ASSERTING AND DEFENDING CLAIMS INVOLVING AN FSLIC RELATIONSHIP

JOE PHILLIPS*

I. INTRODUCTION

When a federally insured savings and loan association founders on unsound loans, slipshod management, or a lousy economy, the Federal Savings and Loan Insurance Corporation (the "FSLIC") may place and manage the association in a Receivership. For creditors of the association, the Receivership may mean pursuing claims against the association through a detailed, unfamiliar administrative claims process, and for debtors of the association, it means limited defenses

* Associate, Cox & Smith, San Antonio, Texas. B.A., University of Texas; J.D., University of California, Berkeley.

when sued by the FSLIC for collection on the debtors' obligations. This article is addressed to those who face that administrative process and limited defenses.

Section II of the article describes the statutory framework surrounding the FSLIC, and its parent agency, the Federal Home Loan Bank Board (the "FHLBB"), and the FSLIC's dual role and powers as a Receiver and as an independent Corporation, including the power to enter into, and the mechanics of, Purchase and Assumption Transactions ("P&A's"). Section III discusses the procedural rules and the priority of claims in an FSLIC Receivership. In Section IV, the article addresses the courts' role in the claims process, by explaining both the circumscribed defenses available to a debtor of the failed association when he is either sued by the FSLIC Receiver or by the FSLIC Corporation which has purchased the claim from the Receivership, and by discussing the rights of a creditor of the association to file an original court action against the FSLIC Receiver.[1]

---

1. This article does not describe the full array of statutes, regulations and case law relating to the savings and loan industry. Rather, it covers certain federal statutes and regulations and decisions of Texas and federal circuit courts regarding asserting claims against, or defending claims held by, a federally insured savings and loan which has entered an FSLIC Receivership. This article does not discuss how a depositor claims payment from the FSLIC Corporation as an insurer of accounts up to $100,000, for that, see 12 U.S.C. § 1728 (1982) and 12 C.F.R. § 564.1-564.11 (1988). The article also does not discuss the conservatorship or receivership of a federally insured bank or the roles of the United States Comptroller of the Currency [12 U.S.C. §§ 1-15 (1982)], the Federal Reserve System [12 U.S.C. §§ 221-522 (1982)], or the FDIC [12 U.S.C. §§ 1811-1832 (1982)], nor does it address Texas agencies and statutes regulating and providing for the conservatorship or receivership of a state chartered bank, (TEX. REV. CIV. STAT. ANN. arts. 342-201 to 342-951 (Vernon 1973 & Supp. 1989)) or savings and loan associations (TEX. REV. CIV. STAT. ANN. art. 852a (Vernon 1964 & Supp. 1989)). The article does address the adversarial situations between creditors and obligors of the insolvent association and the FSLIC, but it does not discuss either the actions taken by the FHLBB or the FSLIC to aid a troubled S&L short of Receivership or the aspects of a borrower attempting to work out a troubled loan with an association in Receivership. For a discussion of some of these other topics, see Macey & Miller, *Bank Failure Risk Monitoring, and the Market for Bank Control*, 58 U. COLO. L. REV. 1153 (1988); MacDonald & Mrofka, *Dealing with the FDIC, FSLIC and Other Financial Agencies*, in STATE BAR OF TEXAS 1987 ADVANCED REAL ESTATE LAW COURSE G1-29 (1987); Skillern, *Closing and Liquidating of Banks in Texas*, 26 SW. L.J. 830 (1972); Skillern, *Federal Deposit Insurance Corporation and the Failed Bank: The Past Decade*, 99 BANKING L.J. 233, 292 (1982). This article's comments apply to the receivership of federally chartered savings and loans, savings banks and interim federal association, and where noted, state chartered, but federally insured, savings and loans, building and loan associations, homestead associations, cooperative banks and interim state banks. *See* 12 C.F.R. §§ 500.4, 561.1 (1988)(defining "insured institution" and detailing scope of FSLIC coverage). These federally insured institutions are sometimes collectively referred to in the article as "S&L's."

II. THE FEDERAL REGULATION OF SAVINGS AND LOANS

A. *The Alphabet of Federal Regulation*

Federal regulation of the savings and loan industry began with the Federal Home Loan Bank Act ("Home Loan Act"),[2] the Home Owners' Loan Act of 1933 ("Home Owners' Act"),[3] and the National Housing Act ("Housing Act"),[4] which were congressional reactions to the savings and loan industry crisis caused by the economic depression of the 1930's.[5] Homeowners faced foreclosure and savings and loans confronted uncollectible debts. The collapsing savings and loan industry caused depositors to lose or close their accounts, exasperating the industry's weakened condition.[6] To alleviate the crisis, the Home Loan Act created the FHLBB,[7] which under the Home Owners' Act[8] and the Housing Act[9] chartered federal savings and loans and savings banks.[10] The FHLBB also required that these federal institutions pay low interest rates on deposits, which permitted the associations to charge lower interest on loans, thus making loans more

---

2. 12 U.S.C. §§ 1421-1449 (1982 & Supp. III 1985).

3. *Id.* §§ 1461-1470.

4. *Id.* §§ 1701-1750g.

5. *See* Coit Independence Joint Venture v. FSLIC, No. 23205 (U.S. Mar. 21, 1989) (WESTLAW) (brief history of statutory regulation of S&L's).

6. Bank Protection Act of 1968, S. REP. NO. 1263, 90th Cong., 2d Sess. 12, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2535-36 (savings and loan industry depends on public confidence). During the 1970's and 80's, the savings and loan industry again financially deteriorated, this time because of factors including an increase in interest rates paid on deposit accounts without the concomitant increase in interest received from existing loans, a shift from a home loan portfolio to commercial real estate lending, a decline in the value of both residential and commercial property, regional economic depression, and increased competition. *See* Biscayne Fed. Sav. and Loan Ass'n v. FHLBB, 572 F. Supp. 997, 1009 (S.D. Fla. 1983)(brief history of reasons industry again became financially troubled); *see also* Rosenberg & Given, *Financially Troubled Banks: Private Solutions and Regulatory Alternatives*, 104 BANKING L.J. 284 (1987)(discussing reasons for recent financial deterioration of banks).

7. 12 U.S.C. § 1437 (1982 & Supp. III 1985). Prior to 1955, the FHLBB was called The Home Loan Bank Board. 12 U.S.C. § 1422 (1982)(change of name). The FHLBB has its headquarters in Washington, D.C. with 12 district offices and additional area offices in Dallas and Houston, Texas. 12 C.F.R. § 500.32 (1988). The governing board of the FHLBB is composed of three persons, no more than two of whom can be members of the same political party, appointed by the President, with Senatorial advice and consent, for four year terms. The President designates the Chairman of the FHLBB. 12 U.S.C. § 1437 (1982 & Supp. III 1985); 12 C.F.R. § 500.10 (1988).

8. 12 U.S.C. §§ 1461-1470 (1982 & Supp. IV 1986).

9. *Id.* § 1701-1750(g).

10. 12 U.S.C.A. § 1464(a) (West Supp. 1988); 12 C.F.R. §§ 500.1-500.3 (1988).

readily available and recapitalizing the housing market.[11] Under these three acts, the FHLBB also regulates and examines federally chartered savings institutions, as well as certain state chartered savings institutions, to achieve good management and solvency.

The Housing Act also created the FSLIC which is under the direction of the FHLBB.[12] The FSLIC acts as a Receiver or Conservator of financially troubled S&L's[13] and, as the FSLIC Corporation, insures withdrawable or repurchasable shares, investment certificates, deposits, and other specified accounts in all federal and eligible state savings and loans and savings banks.[14] Most members or investors of the S&L are insured to an aggregate of $100,000, regardless of the number or amount of the customer's accounts or other investments.[15] The FSLIC can sue and be sued in any court of competent jurisdiction in the United States.[16]

A third federal agency is the Federal Asset Disposition Association (the "FADA") which is a stock federal savings and loan association organized under the authority of the FHLBB,[17] with a ten year charter, a board of directors, management officers, and its capital stock owned by the FSLIC.[18] Essentially, the FADA may manage and market the assets of a S&L in Receivership by contracting with the FSLIC Receiver to work out loans, care for repossessed property, and sell property for the greatest possible return. A claimant in a FSLIC Receivership may initially deal with the FADA. For example, if the

---

11. United States v. Kay, 89 F.2d 19, 22 (2d Cir. 1937); Prato v. Homeowner's Loan Corp., 24 F. Supp. 844, 844-45 (D.C. Mass. 1938).

12. 12 U.S.C. 1725(a), 1725(c) (1982); 12 C.F.R. § 500.4 (1988). A Director is head of the FSLIC, and the agency is divided into four divisions, including an Insurance Division responsible for payment in cash of all insured accounts. 12 C.F.R. § 500.20 (1988). Its principal office is in the District of Columbia. 12 U.S.C. § 17.25(a) (1980).

13. Unless otherwise stated in this article, "FSLIC" will refer to the agency in both its corporate and receivership capacities.

14. 12 U.S.C. §§ 1724, 1726(a), 1728(a) (1982 & Supp. V 1987); 12 C.F.R. §§ 500.4, 561.2, 561.3 (1988). When a state-chartered savings bank, insured by the FDIC, is converted to a federal savings bank, the FDIC continues to insure the accounts of the institution until relieved by the FSLIC. 12 U.S.C. § 1464(d)-(o) (Supp. V 1987).

15. 12 U.S.C.A. § 1728(a), (d) (West 1980 & Supp. 1988); 12 C.F.R. § 561.6 (1988).

16. 12 U.S.C. § 1725(c)(4) (1982). *See* Section IV, *supra*.

17. FHLBB Resolution No. 85-890; *see also* 12 U.S.C. § 1729 (Supp. V 1987).

18. The FADA's principal office is in Washington, D.C. and its administrative headquarters are in San Francisco, California with a Dallas, Texas regional office. *See generally* Liechty & Pettey, *Dealing with Failing Lending Institutions Prospective and Retrospective Views*, in STATE BAR OF TEXAS, EMERGING ISSUES IN REAL ESTATE LAW FOR LAWYERS AND LEGAL ASSISTANTS (1988).

claimant wished to foreclose on a lien on property repossessed by the S&L, and now managed by the FADA in an FSLIC Receivership, he may initially confer with the FADA on the condition of the property and FADA intentions regarding its disposal. The FADA, however, does not litigate or decide claims, and the FSLIC must approve many of its proposals regarding property.[19] While the FADA must disclose the limitations on its powers to make binding agreements and representations,[20] the practitioner should fully understand the FADA's powers in a particular Conservatorship or Receivership before negotiating and reaching any agreement regarding claims held by or against his client.

B. *The FHLBB's Regulatory Powers*

The FHLBB has invasive regulatory powers, including the authority, after notice and administrative hearing before that agency, to decree that a S&L or its directors, officers, employees, or any other person participating in the association's affairs not take an action which the FHLBB determines is an unsafe or unsound business practice or violative of a rule of law.[21] It may also issue orders to correct the results of such actions already taken.[22] In an emergency, such as imminent insolvency, the FHLBB may issue a temporary cease and desist order which is effective until set aside or limited by a court order, the dismissal of the charges by the FHLBB, or the effective date of a final cease and desist order.[23] When the acts of the S&L's directors, officers, employees or other persons involved in its affairs are sufficiently egregious, the FHLBB may suspend them from office or prohibit their participation in the S&L's affairs, hold a hearing on the matter, and issue a permanent order.[24] These acts by the FHLBB are subject to court review.[25]

---

19. *See id.*

20. 12 U.S.C. § 1464(d)(6)(E) (Supp. V 1987).

21. *Id.* § 1464(d)(2).

22. *Id.* § 1464(d)(2)(a).

23. *Id.* § 1464(d)(3)(A).

24. *Id.* § 1464(d)(5); *see also* 12 C.F.R. § 509a (1988)(regarding FHLBB's powers and procedures to remove officer, director, employee or other person charged with certain crimes); 12 U.S.C. §§ 1464(d)(9), 1464(d)(10) (1980); 12 C.F.R. §§ 509.1-509.22 (1988)(regarding procedures for hearings before FHLBB on charges under 12 U.S.C. § 1464(d)). This article does not completely detail the FHLBB's regulatory powers.

25. 12 U.S.C. § 1464(d)(7) (1982); *see* Barrett, *Judicial Review of Agency Cease and Desist Orders: The Gains and Losses for Financial Institutions*, 100 BANKING L.J. 18, 19 (1983).

The FHLBB's most topical power is to appoint a Conservator or Receiver for any federal savings and loan[26] and, in certain cases, a state chartered institution where the accounts are insured by the FSLIC.[27] Conservators or Receivers may be appointed when (1) the S&L's assets are less than obligations to creditors and others; (2) its assets or earnings have been substantially dissipated by violation of law or rule or by unsafe business practices; (3) its condition is too unsafe or unsound to transact business; (4) there has been a willful violation of a final cease and desist order; (5) there is concealment of information or assets from the examiner or the FHLBB;[28] (6) the S&L consents to the Receivership or Conservatorship; (7) the S&L is removed from membership in any federal home loan bank; or (8) the S&L's insurance with the FSLIC or FDIC is terminated.[29] Normally, the FHLBB appoints the FSLIC as a Conservator, Receiver or other legal custodian.[30] While the FHLBB can rapidly place an S&L into Receivership and seize its assets,[31] an S&L may challenge the Receivership within thirty days by filing suit.[32] If the S&L's directors challenge the Receivership or Conservatorship,[33] any action which the FSLIC is prosecuting or defending on behalf of the S&L will be stayed pending a court ruling on the appointment.[34] The courts are split on the scope of their review of the FHLBB's decision to appoint a Conservator or Receiver, with some holding that the review is lim-

---

26. 12 U.S.C. §§ 1464(d)(6)(A), 1464(d)(11), 1729(b)(1) (Supp. V 1987); 12 C.F.R. § 500.3 (1988).

27. 12 U.S.C.A. § 1729(c)(1)-(2) (West Supp. 1988); *see, e.g.*, Guaranty Sav. and Loan Ass'n v. FHLBB, 794 F.2d 1339, 1340 (8th Cir. 1986)(where state gave approval, FHLBB appointed FSLIC as Receiver for federally insured, state chartered savings and loan); Telegraph Sav. and Loan Ass'n v. Schilling, 703 F.2d 1019, 1026 (7th Cir. 1983)(FHLBB could appoint FSLIC as Receiver of state chartered, federally insured, savings and loan where institution was closed under state law and holders of withdrawable accounts were unable to withdraw funds from account).

28. 12 U.S.C.A. § 1464(d)(6)(A) (West Supp. 1988); 12 C.F.R. § 547.1 (1988).

29. 12 U.S.C.A. § 1464(d)(6)(B) (West Supp. 1988); 12 C.F.R. § 547.3 (1988).

30. 12 U.S.C. § 1729(b)(1) (1982); 12 C.F.R. § 547.6 (1988).

31. 12 C.F.R. § 547.2 (1988). If any of grounds one through five exist, the FHLBB may act without notice. Fuentes v. Shevin, 407 U.S. 67, 97 (1972)(seizure of assets does not require notice or pre-seizure due process). For a receivership or conservatorship under grounds six or seven, a notice of appointment is mailed to the S&L and immediately filed for publication in the Federal Register. 12 C.F.R. § 547.4 (1988).

32. 12 U.S.C. §§ 1464(d)(6)(A),(D) (Supp. V 1987); 12 C.F.R. § 547.5 (1988).

33. 12 U.S.C. § 1464(d)(6)(A) (Supp. V 1987).

34. *Id.*

ited to one under the Administrative Procedure Act[35] as to whether the statutory basis for appointment existed[36] and others holding that, even where a statutory basis is present, the court may examine the wisdom of the FHLBB's decision.[37]

C. *The FSLIC as Conservator and Receiver*

FSLIC, as a Conservator or Receiver, may "do all things . . . desirable or expedient to carry on the [S&L's] business . . . and to conserve and preserve the [S&L's] assets . . . ."[38] Generally, the FSLIC as a Conservator takes the place of the members, directors, and officers of the S&L and assumes their powers[39] whereas, as a Receiver, the FSLIC completely becomes the S&L, succeeding to its rights, titles, powers, and privileges and those of its officers, directors, and members.[40]

The FSLIC, as Conservator or Receiver, may (1) take over the assets and operate the S&L; (2) take such actions as may be necessary to put the S&L in a solvent condition; (3) merge the S&L with another insured institution; (4) organize a new federal savings and loan association to take over the S&L's assets; (5) proceed to liquidate the assets of the S&L in an orderly manner; or (6) make such other dispositions as it deems appropriate.[41] It may also (1) discharge and pay off liens, charges and claims against the S&L, its assets, or the FSLIC as Conservator or Receiver; (2) preserve and rehabilitate the S&L's assets;

---

35. 5 U.S.C. §§ 500-576 (1977 & Supp. V 1987).

36. Telegraph Sav. and Loan Ass'n v. FSLIC, 564 F. Supp. 862, 870 (N.D. Ill. 1981), *aff'd*, Telegraph Sav. and Loan Ass'n v. Schilling, 703 F.2d 1019 (7th Cir. 1983). This limited review after appointment is consistent with Congress' intent that the FHLBB be able to swiftly, and without notice, aid an S&L.

37. *See, e.g.*, Biscayne Fed. Sav. and Loan Ass'n v. FHLBB, 572 F. Supp. 997, 1004 (S.D. Fla. 1983); Fidelity Sav. and Loan Ass'n v. FHLBB, 540 F. Supp. 1374, 1378 (N.D. Cal. 1982), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1983); Washington Fed. Sav. and Loan Ass'n v. FHLBB, 526 F. Supp. 343, 353-54 (N.D. Ohio 1981). See generally, 65 A.L.R. FED. 302, § 2 (1983), for a collection of cases on judicial review of the FHLBB's appointment of a Receiver or Conservator.

38. 12 C.F.R. § 548.2(a) (1988)(power of Conservator); 12 C.F.R. § 549.3(a) (1988)(power of Receiver); *see also* North Miss. Fed. Sav. and Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1102 (5th Cir. 1985); 12 U.S.C. § 1464(d)(6)(D) (Supp. 1987).

39. 12 U.S.C.A. § 1464(d)(6)(D) (West Supp. 1988); 12 C.F.R. §§ 547.7, 548.2(b) (1988).

40. 12 C.F.R. § 547.7 (1988). A Conservator may later surrender the S&L to a Receiver. *Id.* § 547.8. However, see section IV, discussing the Fifth Circuit's holding that the FSLIC Receiver, suing to collect obligation of the S&L, is immune from many of the defenses that could have been asserted against the S&L.

41. 12 U.S.C.A. §§ 1729(b)(1)(A), 1729(c)(1)(A)-(B) (West Supp. 1988).

(3) participate in legal proceedings brought by or against the Conservator, the Receiver, or the S&L or participate in proceedings in which any of these parties has an interest; (4) execute, acknowledge, and deliver documents which are necessary or proper for any purpose, with the same binding effect as if the document were executed by an officer of the S&L with board of director approval; (5) sell any mortgage, deed of trust, cause of action, note, contract, judgment, stock or debt owed to the S&L; (6) release S&L assets; (7) repudiate burdensome contracts; and (8) settle claims against or in favor of the Conservator, Receiver or S&L.[42] In performing these functions, the FSLIC as Conservator normally must first obtain the approval of the FSLIC Director or the FHLBB and, with regard to participation in lawsuits, act only under the supervision of the FHLBB's General Counsel. However, the FSLIC Receiver may perform many of these acts without such approval or supervision.[43] While courts cannot generally restrain or affect the exercise of these and other powers granted to the FSLIC as Receiver or Conservator,[44] the FSLIC's powers are always subject to the regulation of the FHLBB[45] and, where the FSLIC is appointed Receiver or Conservator of a federally insured state chartered savings and loan association by a court or public authority,[46] the FSLIC's powers are subject to the regulation of that court or public authority.[47]

1. Purchase and Assumption Transactions

In exercising its powers as Receiver for an insolvent S&L and as an independent corporation insuring the accounts of depositors, the FSLIC is concerned with protecting depositors and other creditors of the S&L, as well as maintaining the financial liquidity of the FSLIC Corporation. The FSLIC Receiver uses one of two methods to at least partially restore depositors financially: (1) a direct cash payment

42. 12 C.F.R. § 548.2 (1988)(powers of Conservator); 12 C.F.R. § 549.3 (1988)(powers of Receiver). Regarding the repudiation of burdensome contracts, see *Hudspeth*, 756 F.2d at 1102 and 50 Fed. Reg. 48,983 and 48,970 (1975)(FHLBB proposed regulations and comments on same regarding standard of burdensome contract). *See also* Liechty & Pettey, *Dealing with Failing Lending Institutions Prospective and Retrospective Views*, in STATE BAR OF TEXAS, EMERGING ISSUES IN REAL ESTATE LAW FOR LAWYERS AND LEGAL ASSISTANTS (1988).

43. 12 C.F.R. § 549.3(a) (1988).

44. 12 U.S.C. § 1464(d)(6)(C) (1982).

45. 12 U.S.C.A. § 1729(d) (West Supp. 1988).

46. *Id.* § 1729(c)(1)(A).

47. *Id.* § 1729(d).

to the depositor or (2) a Purchase and Assumption Transaction (a "P&A") which is a transfer of the depositor's account to a new association established by the FSLIC for the transfer or to an already existing association.[48] A direct payment involves the liquidation of the S&L and a cash disbursement to the depositor with any shortfall between the liquidated and the deposited funds covered by the FSLIC Corporation up to the $100,000 limit on insurance. The direct deposit payoff has several disadvantages: the failed S&L is permanently closed, its employees lose their jobs, accounts are frozen, and checks returned to the drawer.[49] The P&A is a more complicated but, from the perspective of the FSLIC and the depositor, a more desirable transaction. In a P&A, the FSLIC as Receiver sells the S&L's deposit accounts and more collectible debts to another S&L which may already exist or be created by the FSLIC for the P&A.[50] The remaining claims held by the S&L against other parties are usually sold to the FSLIC Corporation for a premium which is normally then included in the package transferred to the assuming S&L as consideration for entering into the transaction. The FSLIC Corporation attempts to collect the debts it purchased to offset the purchase price. A P&A benefits several parties: the FSLIC does not pay out insurance, depositors of more than $100,000 are fully protected, the assuming S&L expands its customer base, and industry trauma is lessened by the assuming S&L agreeing to immediately reopen the offices of the failed one.[51] However, creditors whose claims were not transferred to the solvent S&L are usually left with a cause of action against a Receiver-

48. 12 U.S.C.A. §§ 1728(b), 1729(a), 1729(f) (West 1980 & Supp. 1988).

49. FDIC v. National Union Fire Ins. Corp., 630 F. Supp. 1149, 1153 (W.D. La. 1986); Burgee, *Purchase and Assumption Transactions Under the Federal Deposit Insurance Act*, 14 FORUM 1146, 1153 (1979).

50. 12 U.S.C.A. § 1729(f) (West Supp. 1988); *see also* Gunter v. Hutcheson, 674 F.2d 862, 865-66 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982); FDIC v. Eagle Properties, Ltd., 664 F. Supp. 1027, 1037 (W.D. Tex. 1985); Biscayne Fed. Sav. & Loan Ass'n v. FHLBB, 572 F. Supp. 997, 1000 (S.D. Fla. 1983). It has been held that the FSLIC need not give notice before engaging a P&A inasmuch as with notice depositors will withdraw their money and there will be little or nothing to transfer. Telegraph Sav. and Loan Ass'n v. Schilling, 807 F.2d 590, 591-92 (7th Cir. 1986). *See generally* Burgee, *Purchase and Assumption Transactions Under the Federal Deposit Insurance Act*, 14 FORUM 1140, 1153 (1979); Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 TEX. L. REV. 1429, 1431-33 (1986).

51. *Hutcheson*, 674 F.2d at 865; *Eagle Properties, Ltd.*, 664 F. Supp. at 1037; *National Union Fire Ins.*, 630 F. Supp. at 1153. *See generally* Telegraph Sav. and Loan Ass'n v. Schilling, 807 F.2d 590, 591 (7th Cir. 1986); Corbin v. Federal Reserve Bank of New York, 475 F. Supp. 1060, 1063-65 (S.D.N.Y. 1979), *aff'd*, 629 F.2d 233 (2d Cir. 1980); Burgee, *Purchase*

ship with no significant assets. Because federal law protects the FSLIC Corporation from certain defenses, P&A transactions may leave the debtor of the insolvent S&L, whose obligations were sold to the Corporation, without some of the defenses available if the FSLIC as Receiver were the claimant.[52]

III. THE ADMINISTRATIVE PROCESS BEFORE THE FSLIC AND FHLBB[53]

A. *Procedural Rules for Filing a Claim with the FSLIC*

If the FSLIC liquidates an S&L rather than performs a P&A, or if the P&A does not transfer the creditor's claims to the new association, the creditor has a claim against the FSLIC Receivership which may be pursued administratively, following procedural rules promulgated by the FHLBB in the United States Code of Federal Regulations[54] and those soon to be codified rules published by the FHLBB in the Federal Register.[55]

The claims process for creditors of the S&L,[56] begins with the FSLIC publishing and mailing, to the last known address of any creditor shown on the S&L books, a notice requiring him to present his claims[57] and supporting proof. The claimant has the burden to estab-

---

and Assumption Transactions Under the Federal Deposit Insurance Act, 14 FORUM 1146, 1153 (1979).

52. *See* section IV, *supra*. While the FSLIC Receiver is also immunized from many defenses that would have been available in a suit brought against the S&L, the FSLIC Corporation has somewhat greater protection.

53. This article does not discuss the procedure by which a depositor makes a claim from the FSLIC Corporation as an insurer of accounts. *See generally* 12 U.S.C.A. § 1728 (West 1980 & Supp. 1988); 12 C.F.R. §§ 564.1-564.11 (1988). Further, the described claims process does not apply to the receiverships of a deposit association or a federal savings bank, instead see 12 C.F.R. § 549.5-1 (1988), or to receiverships for insured state chartered institutions, see 12 C.F.R. §§ 569a.1-569a.11 (1988). While procedures for submitting and challenging claims in these receiverships are very similar to those for a FSLIC Receivership of a federally chartered savings and loan, the practitioner should consult closely the applicable regulations.

54. 12 C.F.R. § 549.4, 549.5-1 (1988).

55. 53 Fed. Reg. 43,850 (1988)(to be codified at 12 C.F.R. §§ 547, 548, 549, 563, 569a, 569b, 575, 576, 577)(proposed Oct. 24, 1988). For further information on these regulations and proposed regulations, contact Christopher Bellotto, (202) 377-7401, or Judith L. Friedman, (202) 377-7399, Adjudication Division, Office of General Counsel, FHLBB, 1700 C Street, N.W., Washington, D.C. 20552.

56. This process does not apply to account holders with claims for FSLIC insurance. 53 Fed. Reg. 43,850, 43,853 (1988)(to be codified at 12 C.F.R. § 575.2(h))(proposed Oct. 24, 1988).

57. The FSLIC will mail the claimant an official proof of claim form. 53 Fed. Reg.

lish his claim by a preponderance of the evidence.[58] The presentation must be made by the date specified in the notice which is at least ninety days after the notice was first published.[59] Claims filed after the specified date will be disallowed unless the FHLBB, in its discretion, approves whole or part payment from the S&L's assets remaining at the time of this approval.[60] The FHLBB defines a claim as "a right to payment or other relief against the Association or the Receiver [other than for deposit insurance or a request for expedited relief],"[61] including a request for or opposition to foreclosure on assets held in the S&L's receivership.[62] "Claimant" is similarly broadly defined as "any person or entity asserting a claim against the Association or the Receiver," including, but not limited to, holders of claims arising from the acts or omissions of the Receiver, owners of a participation interest in a loan, borrowers, guarantors, secured and unsecured creditors, and holders of mechanic's and materialmen's liens.[63]

A Special Representative of the Receiver, who is named in the FHLBB resolution appointing the FSLIC as Receiver in a particular insolvency, along with his appointed agents, reviews the claims to determine if they were correctly filed.[64] Defective claims are returned to the claimant along with a written explanation of deficiencies. Except in the discretion of the Special Representative, a corrected claim must be filed with the Receiver on or before the latter of thirty days from the date of mailing of the deficiency notice or the filing date set in the

---

43,850, 43,854 (to be codified at 12 C.F.R. § 575.3)(proposed Oct. 24, 1988). Uninsured depositors will also receive a Certificate of Claim in Liquidation for any uninsured amount on deposit. The Certificate is retained by the receiver who will pay their claim out of the Receivership's assets, *pro rata*, along with the distribution to general creditors. 53 Fed. Reg. 43,850, 43,854 (1988)(to be codified at 12 C.F.R. § 575.6)(proposed Oct. 24, 1988).

58. 53 Fed. Reg. 43,850, 43856 (1988)(to be codified at 12 C.F.R. § 575.15)(proposed Oct. 24, 1988).

59. 12 C.F.R. 549.4(a)(1988); 53 Fed. Reg. 43,850, 43,854 (1988)(to be codified at 12 C.F.R. § 575.4)(proposed Oct. 24, 1988).

60. 12 C.F.R. 549.4(a) (1988).

61. 53 Fed. Reg. 43,850, 43,853 (1988)(to be codified at 12 C.F.R. § 575.2(h))(proposed Oct. 24, 1988).

62. *Id.*

63. 53 Fed. Reg. 43,850, 43,853 (1988)(to be codified at § 12 C.F.R. § 575.2(i))(proposed Oct. 24, 1988).

64. 53 Fed. Reg. 43,850, 43,854 (1988)(to be codified at 12 C.F.R. § 575.9)(proposed Oct. 24, 1985).

notice originally published to all claimants.[65] After determining that the Proof of Claim is correctly filed, the Special Representative or his agent may seek an immediate decision or additional information from the claimant, pose written questions to him, hold a meeting with him, take a sworn statement, and request a legal memorandum on relevant issues.[66] The Receiver may disallow a claim if the claimant fails to comply with additional requests for information.[67] The Special Representative then compiles the administrative record consisting of information he has gathered and submitted by the claimant.[68] The claimant is given an opportunity to supplement the record before the Special Representative renders his proposed determination on the claim.[69] After reviewing the record, the Special Representative prepares a legal memorandum analyzing the issues and renders proposed findings of fact, conclusions of law, and a proposed determination.[70] If the claimant does not file a request for reconsideration, the proposed determination becomes the Determination of the Receiver, and the claimant can appeal this determination to the FHLBB and then obtain judicial review.[71] Should the claimant disagree with the proposed findings of fact and conclusions of law and the proposed determination, he may file a written Request for Reconsideration with the Receiver within thirty days from the date the Special Representative mails the proposed determination to the claimant.[72] The request must state the specific grounds for any objection.[73] The Receiver will

---

65. *Id.* Since a properly filed claim supercedes an improper one, the revised claim should contain all relevant information and not merely be an amendment. 53 Fed. Reg. 43,850, 43,854 (1988)(to be codified at 12 C.F.R. § 575.9(d))(proposed Oct. 24, 1988).

66. 53 Fed. Reg. 43,850, 43,855 (1988)(to be codified at 12 C.F.R. § 575.10, 575.13)(proposed Oct. 24, 1988). The claimant may inspect and copy all non-privileged documents in the Receiver's possession and relevant to his claim. 53 Fed. Reg. 43,850, 43,855 (1988)(to be codified at 12 C.F.R. § 575.13(d))(proposed Oct. 24, 1988).

67. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(h))(proposed Oct. 24, 1988).

68. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(i))(proposed Oct. 24, 1988).

69. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(j))(proposed Oct. 24, 1988).

70. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(l))(proposed Oct. 24, 1988).

71. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(m)-(n))(proposed Oct. 24, 1988).

72. 53 Fed. Reg. 43,850, 43,856 (1988)(to be codified at 12 C.F.R. § 575.13(o))(proposed Oct. 24, 1988).

73. *Id.*

then issue a determination.

Within sixty days after the date the Receiver determination is issued, the claimant may appeal the determination to the FHLBB.[74] The claimant files with the FHLBB, with a copy sent to the Receiver, a Request for Review of a Receiver's Determination, stating the facts and arguments upon which the appeal is based.[75] The request must also include a special description of the factual and legal errors in the Receiver's determination, citation to the applicable statutes, regulations, cases, and portions of the administrative record.[76] The claimant may submit additional facts that were not available to the Receiver.[77] After submission of the notice and any additional facts, the FHLBB will close the record and any additional materials may only be submitted at the FHLBB's discretion.[78] Within one hundred eighty days after the record is closed, the FHLBB will then either render a decision or entertain a supplemental proceeding, such as oral argument, in which case, a decision will be issued thirty days thereafter.[79] If the Director does not issue a decision within these time limits and there has been no formal extension, it shall be deemed that the FHLBB affirmed the Receiver's determination[80] and the claimant may obtain judicial review.[81] Similarly if the FHLBB explicitly denies the claim, judicial review may be sought.[82] If the FHLBB allows the claim, the claimant must promptly execute and deliver to the FHLBB a "Satisfaction of Claim," which is provided with the FHLBB's determination.[83] Allowed claims are paid as funds are

---

74. 53 Fed. Reg. 43,850, 43,857 (1988)(to be codified at 12 C.F.R. §§ 576.2-576.3)(proposed Oct. 24, 1988).

75. 53 Fed. Reg. 43,850, 43,857-58 (1988)(to be codified at 12 C.F.R. § 576.3-576.4)(proposed Oct. 24, 1988).

76. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.4(a))(proposed Oct. 24, 1988).

77. *Id.*

78. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.5)(proposed Oct. 24, 1988).

79. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.7)(proposed Oct. 24, 1988).

80. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.9)(proposed Oct. 24, 1988).

81. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.9)(proposed Oct. 24, 1988).

82. 53 Fed. Reg. 43,850, 43,858 (1988)(to be codified at 12 C.F.R. § 576.11(b))(proposed Oct. 24, 1988).

83. 53 Fed. Reg. 43,858, 43,850 (1988)(to be codified at 12 C.F.R. § 576.11)(proposed Oct. 24, 1988).

available and in the priority set by the FHLBB.[84]

A claimant may file a Request for Expedited Relief with the FHLBB, with a copy sent to the Receiver, seeking emergency relief from the decisions or threatened actions of the FSLIC Receiver.[85] The request must be filed with the FHLBB, and the copy sent to the Receiver, within five working days from the date of the notice of the Receiver's decision or threatened action. However, if the notice was mailed, three additional days are allowed.[86] The claimant must submit a signed statement to the FHLBB that the request was sent to the Receiver within the time limit.[87] The FHLBB may grant a waiver or extension of the deadline for good cause.[88] In order to obtain expedited relief, the claimant must establish that he has been or will be adversely affected by the Receiver's decision or threatened actions so as to justify this extraordinary relief. Accordingly, the request should contain a statement of the relevant facts and legal issues; errors by the Receiver; all relevant documents; citations to applicable statutes, regulations, and other legal authority; an assessment of the likelihood of the claimant's success in the merit; and a description of the harm if relief is not granted.[89] Only the need for emergency relief pending a final decision on the merits are determined at this point, not the merits of the claims.[90] The Receiver will file a response to the request,[91] and the FHLBB may request additional information.[92] The FHLBB may, upon motion of a party or on its own, issue a temporary stay order which prevents the Receiver from taking any action until there

---

84. 12 C.F.R. § 549.5(d) (1988); *see* Section III.B.

85. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.2)(proposed Oct. 24, 1988).

86. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.2(b))(proposed Oct. 24, 1988).

87. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. §§ 577.2(f), 577.3(a)(6))(proposed Oct. 24, 1988).

88. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.2(a))(proposed Oct. 24, 1988).

89. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.3(a))(proposed Oct. 24, 1988).

90. 53 Fed. Reg. 43,850, 43,859 (1988)(codified at 12 C.F.R. § 577.3(a))(proposed Oct. 24, 1988).

91. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.3(b))(proposed Oct. 24, 1988).

92. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.4(e))(proposed Oct. 24, 1988).

is a decision on the Request for Expedited Relief.[93] The stay will remain in effect during the period the FHLBB is considering the request and, after the FHLBB's decision denying the request, for a time period sufficient to allow the claimant to seek judicial review, which is at least five working days from the date of the FHLBB's decision, and eight days if the decision was mailed.[94] The decision by the FHLBB for expedited relief is a final action subject to judicial review.[95] This expedited relief procedure is particularly helpful when the claimant wishes to prevent the Receiver from foreclosing on a property lien.[96]

B. *The Priority of Unsecured Claims in a FSLIC Receivership*

The FHLBB has recently established the priority for unsecured claims in the FSLIC Receivership of an S&L.[97] The Receiver's administrative expenses are first priority,[98] followed by the administrative expenses of the S&L, provided the association's expenses were incurred within thirty days before the Receiver took possession of the association and excluding the wages or salaries of the association's employees.[99] Third in priority are the wages, salaries, vacation and sick leave pay, and contributions to employee benefit plans of the association's employees earned prior to the Receiver's appointment, but only if the Receiver decides to engage or retain the employee for a reasonable time.[100] If an association employee is not engaged or retained by the Receiver, then his claims for the items in category three,

---

93. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.4(g))(proposed Oct. 24, 1988). However, this order does not prevent the Receiver from making preparations legally required in advance of its threatened action, such as posting for foreclosure. *Id.*

94. *Id.*

95. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.4(d))(proposed Oct. 24, 1988).

96. 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 577.2(b))(proposed Oct. 24, 1988).

97. 53 Fed. Reg. 25,129 (1988)(to be codified at 12 C.F.R. §§ 549, 569a, 569c)(proposed June 23, 1988). These new regulations were effective as of August 4, 1988 and will replace the priority of claims stated in 12 C.F.R. §§ 549.5-1(b), 569a.7 (1988). They apply to the FSLIC Receivership of federally chartered savings institutions and state chartered institutions where the FSLIC is appointed Receiver. 53 Fed. Reg. 25,129, 25,130 (1988).

98. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(1))(proposed Oct. 24, 1988).

99. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(2))(proposed Oct. 24, 1988).

100. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(3))(proposed Oct. 24, 1988).

up to $3,000 per person, are fourth in priority.[101] Next are the claims by governmental units for taxes, other than federal income tax.[102] Sixth in priority are claims by depositors for the uninsured portions of their withdrawable accounts and all other claims not falling in a higher category, which have accrued or become unconditionally fixed by the date of default.[103] A claim based on the Receiver's rejection or repudiation of an unexpired lease or executory contract falls in category six.[104] If the association is state chartered and operates under the laws of a state which provides that depositors of withdrawable accounts have a higher priority than general creditors, then the Receiver will follow that priority in category six.[105] Seventh in priority are the general claims which have not accrued or become unconditionally fixed on or before the date of default,[106] including claims for interest earned after default on claims under category six.[107] Next are the United States' claims for federal income taxes,[108] then claims which have been partially or wholly subordinated to the claims of general creditors,[109] and finally the claims of holders of non-with-

---

101. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(4))(proposed Oct. 24, 1988).

102. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(5))(proposed Oct. 24, 1988).

103. 53 Fed. Reg. 25,133 (1988); 12 C.F.R. § 569c.11(a)(6) (1988). Default is defined as "an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation." 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.1(d))(proposed Oct. 24, 1988).

104. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,589 (1988)(to be codified at 12 C.F.R. 569c.11(c))(proposed Oct. 24, 1988).

105. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. 569c.11(c))(proposed June 23, 1988).

106. Claims based on an agreement for accelerated, stipulated or liquidated damages are in this category if the claim did not accrue *before* the date of the default. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (to be codified at 12 C.F.R. § 569c.11(a)(7))(proposed Oct. 24, 1988).

107. 53 Fed. Reg. 25,133 (1988). Interest on claims under category 6 is the average rate, during the preceding three months, for United States Treasury Bills with maturities of not more than 91 days. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(b))(proposed Oct. 24, 1988).

108. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(8))(proposed Oct. 24, 1988).

109. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(9))(proposed Oct. 24, 1988). These claims are given priority within this category as specified in the instruments evidencing the claims.

drawable accounts.[110]

All unsecured claims in any category must be paid in full or provision made for payment before any claim of a lesser category is paid, and if there are insufficient funds to pay all claims in a single category or class, distribution to the claimants in that category or class will be *pro rata*.[111] However, the Receiver may pay claimants in any of categories one through six out of order even though claimants in a higher priority category have not been fully paid, provided the Receiver determines that the distribution to the lower priority claimants is reasonably necessary to the effectiveness of the Receivership and adequate funds exist or will be recovered during the Receivership to pay in full all claims of higher priority.

IV. THE FSLIC AND THE COURT PROCESS

The FSLIC enters the court in different roles: as a Receiver collecting the S&L's debts or being sued by those with claims against the Association and as a Corporation collecting obligations purchased from an FSLIC Receivership.[112] The bad news for a plaintiff suing to collect the obligations owed to the S&L is that the FSLIC Corporation and Receiver are immune from several defenses normally available to the obligors. The good news is that with the Supreme Court's decision in *Coit Independence Joint Venture v. FSLIC*,[113] the FSLIC Receiver may be sued by the S&L's creditors in a federal court or state original action.

A. *The FSLIC's Common-Law Defenses*

When the FSLIC Corporation and the FSLIC Receiver sue to collect the S&L's obligations, federal common law immunizes the FSLIC from defenses that are based on the S&L's agreements with, or representations to, the obligor if those agreements and representations were

110. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(a)(10))(proposed Oct. 24, 1988). The priority of these claims within this category are also governed by the documents evidencing the claims.

111. 53 Fed. Reg. 25,133 (1988); 53 Fed. Reg. 43,850, 43,859 (1988)(to be codified at 12 C.F.R. § 569c.11(d))(proposed Oct. 24, 1988).

112. The FSLIC may also be sued in its corporate capacity by depositors claiming some wrong in the payment or nonpayment of FSLIC insurance of accounts. However, as noted in footnote 1, *infra*, the claims process for FSLIC insurance and the right to sue the FSLIC Corporation are not covered by this article.

113. No. 23205 (U.S. Mar. 21, 1989) (WESTLAW).

designed or tended to deceive creditors or the public authorities regulating the S&L, and if the obligor lent himself to this deception.[114] Further, the FSLIC Corporation, when suing to collect obligations purchased from the Receivership, is a holder in due course,[115] and consequently, has the additional HDC immunity from the obligor's defenses.[116]

1. The FSLIC's Immunity Under *D'Oench*

Federal common-law protection has developed from the United States Supreme Court's decision in *D'Oench, Duhme & Co., Inc. v. FDIC*,[117] the United States Congress' codification of *D'Oench* in 12 U.S.C. § 1823(e), the Supreme Court's interpretation of section 1823(e) in *Langley v. FDIC*,[118] and various lower court decisions applying the Supreme Court holdings and section 1823(3).[119] While *D'Oench*, section 1823(e), and *Langley* specifically deal only with the FDIC Corporation's immunity, the Fifth Circuit[120] and other courts[121] have extended the *D'Oench* holding to the FSLIC Corporation, and the Fifth Circuit held that the *D'Oench* holding applies to the FDIC and FSLIC Receiver.[122] Further, the Fifth Circuit and other courts heavily rely on the analysis of *Langley* and cases apply-

---

114. Langley v. FDIC, __ U.S. __, __, 108 S. Ct. 396, 401-402, 98 L. Ed. 2d 340, 347-48 (1987); FSLIC v. Murray, 853 F.2d 1251, 1254 (5th Cir. 1988). *But see* D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447 (1942); Robbins v. Robbins, 91 Bankr. 879 (W.D. Mo. 1988)(FDIC Receiver merely takes place of bank and does not have federal common law or statutory protection which FDIC has against defenses to bank's claims).

115. Hereafter "HDC."

116. *Murray*, 853 F.2d at 1256-57. The Fifth Circuit has not decided whether the FSLIC or FDIC Receiver enjoys the protection of an HDC. *See* FSLIC v. LaFayette Inv. Properties, Inc., 855 F.2d 196, 198 n.2 (5th Cir. 1988). While at least one Federal District Court within the Fifth Circuit concluded that the Receiver is not an HDC, this court stated in dicta that the Receiver has at least some of the protection of an HDC under federal common law. FSLIC v. Hsi, 657 F. Supp. 1333, 1337 (E.D. La. 1986). *But see* FirstSouth, F.A. v. Aqua Constr., Inc., 858 F.2d 441, 443 (8th Cir. 1988)(federal law evolving towards view that FSLIC receiver has HDC status); FSLIC v. Sandor, 684 F. Supp. 403, 405 (D.V.I. 1988)(FSLIC as Receiver excluded from HDC status).

117. 315 U.S. 447 (1942).

118. __ U.S. __, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).

119. *See* FSLIC v. Murray, 853 F.2d 1251, 1254 (5th Cir. 1988)(discussing *D'Oench* and *Langley*).

120. *Murray*, 853 F.2d at 1253-54, 1256-57.

121. Andrew D. Taylor Trust v. Security Trust Fed. Sav. and Loan Ass'n, 844 F.2d 337, 341 (6th Cir. 1988).

122. FSLIC v. Kroenke, 858 F.2d 1067, 1070 (5th Cir. 1988); FDIC v. Condit, 861 F.2d 853 (5th Cir. 1988)(*dicta*); FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986); *see*

ing section 1823(e) to define the scope of the FSLIC's common-law protection under *D'Oench*.[123] Accordingly, a discussion of *D'Oench*, section 1823(e), and *Langley*, and cases applying them to the FDIC, as well as those cases directly addressing the FSLIC's immunity, is useful.

During the early development of a federal regulatory and insurance framework for the banking industry, the United States Supreme Court in *D'Oench*[124] addressed the situation where the FDIC Corporation sues to collect the obligations it purchased from a FDIC Receivership and the obligor defends by relying on "secret agreements" entered into by the obligor and bank prior to the Receivership which the obligor argues relieve him of liability. In *D'Oench*, the defendant sold bonds to the bank and, in a scheme with the bank, executed notes payable to the bank so that if the bonds defaulted, the bank would not have to show this default on its books.[125] The receipts for the notes stated that they would not be called for payment.[126] The bonds defaulted, the bank entered an FDIC Receivership, and the FDIC Corporation, which was unaware of the receipts, acquired the defendant's obligation in a P&A and sued for payment.[127] The defendant asserted that his side agreement with the bank precluded the lawsuit. The Supreme Court held that federal common law applied[128] and under that law the defendant's participation in the scheme of deception estopped him from relying on his side agreement with the bank:

> The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled.[129]

---

also First Nat'l Bank of Andrews v. FDIC, MD-88-CA-274 (W.D. Tex. Jan. 17, 1989)(WESTLAW).

123. FSLIC v. Lafayette Inv. Properties, Inc., 855 F.2d 196, 198 n.1 (5th Cir. 1988); FDIC v. McClanahan, 795 F.2d 512, 516 n.3 (5th Cir. 1986); FSLIC v. Hsi, 657 F. Supp. 1333, 1337-38 (E.D. La. 1986).

124. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 447 (1942); *see also McClanahan*, 795 F.2d at 514-15 (discussing circumstances and policy considerations surrounding *D'Oench*).

125. *D'Oench*, 315 U.S. at 454.

126. *Id.*

127. *Id.* The FDIC actually sued on a note renewing the original notes executed by the defendant. *Id.*

128. *Id.* at 455-56. State law may supplant this federal law where it does not interfere with federal objectives. FDIC v. Armstrong, 784 F.2d 741, 744 (6th Cir. 1986).

129. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460 (1942).

It did not matter that the defendant had not executed the notes to deceive the FDIC, only that he had at least lent himself to a scheme whereby creditors and banking authorities could be misled.[130]

D'Oench allows federal and state examiners to safely rely on a financial institution's records.[131] Such reliance is important in determining solvency for regulatory purposes and particularly important when the Receiver is liquidating the institution and must decide whether to pay off depositors with federal insurance or perform a P&A.[132] In deciding whether to perform a P&A, the Receiver must value the failed institution's claims to determine if the Corporation's purchase price for those claims will provide enough money to entice a solvent bank into assuming the deposit accounts of the failed institution.[133] Similarly, the Corporation must quickly value the obligations to determine the purchase price.[134] Accordingly, the Receiver and Corporation have no time for a detailed investigation into all defenses to an obligation and, with *D'Oench*, the investigation is unnecessary.

Congress essentially codified the *D'Oench* holding as it applies to the FDIC in 12 U.S.C. § 1823(e) which sets out the standards a collateral agreement must satisfy to be a defense against the FDIC Corporation's enforcement of obligation acquired in a P&A.[135]

---

130. *Id.* at 461. The FDIC did not even exist when the defendant executed the original notes. *Id.* at 454; *see also* FSLIC v. LeFere, 676 F. Supp. 764, 769 (S.D. Miss. 1987)(even if obligor enters into side agreement in good faith he cannot rely on agreement if part of scheme to defraud). In the lower court, the Eighth Circuit Court of Appeals had held that the FDIC was a holder in due course and, as such, immune from a defense based on the receipt. The Supreme Court in *D'Oench* did not address this issue, but other courts have subsequently agreed with the Eighth Circuit. *See* Section IV.A.2, *supra*.

131. Langley v. FDIC, __ U.S. __, __, 108 S. Ct. 396, 401, 98 L. Ed. 2d 340, 347 (1987)(discussing policy considerations behind section 1823(e)); FSLIC v. Port Allen Dev., 684 F. Supp. 439, 440 (M.D. La. 1988); Beighley v. FDIC, 676 F. Supp. 130, 132 (N.D. Tex. 1987).

132. *Langley*, __ U.S. at __, 108 S. Ct. at 401, 98 L. Ed. 2d at 346-47.

133. Gunter v. Hutcheson, 674 F.2d 862, 870 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). As discussed *infra*, the Receiver includes funds from the sale of claims to the Corporation in the package offered to the assuming institution.

134. *Id.*

135. 12 U.S.C.A. § 1823(e) (West Supp. 1988) states in pertinent part:

> No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board

Generally, section 1823(e) requires that the agreement be written, signed by the bank and the obligor, be adopted by the bank's board of directors or loan committee, with this adoption reflected in the minutes of the board or committee, and remain part of the bank's official records from its execution.[136] It has been held that section 1823(e) does not deprive an obligor of his rights in violation of the due process and equal protection clauses of the federal constitution.[137] Presumably, the Court would have likewise held if *D'Oench* had been challenged on those constitutional grounds.

The Supreme Court's most important recent decision interpreting section 1823(e) is *Langley v. FDIC*[138] where the Court held that the standards of section 1823(e) must be met even when the obligor's defense is not based strictly on a side agreement with the bank but on the bank's misrepresentation or warranty. In *Langley*, the defendants borrowed money from a bank to finance the purchase of land.[139] The bank went into a FDIC Receivership and the Receiver performed a P&A, selling the defendants' notes to the FDIC Corporation which then brought suit.[140] The obligors defended that they were fraudulently induced to sign the notes by the bank's misrepresentations of the amount of total acres and mineral acres to be conveyed and misrepresentations that there was no outstanding mineral lease on the property.[141] The defendants argued that section 1823(e) did not preclude these defenses which were not based on an "agreement" but on representations and warranties by the bank.[142] The Supreme Court,

---

or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

136. *Id.* At least two district courts in the Fifth Circuit have held that if an "agreement" does not meet the requirements of section 1823(e) it not only cannot be the basis of a defense but also cannot be the basis for an affirmative action against the FDIC Corporation. RSR Properties, Inc. v. FDIC, MO-88-CA-200 (W.D. Tex. Jan. 18, 1989)(WESTLAW); Beighley v. FDIC, 676 F. Supp. 130, 132-33 (N.D. Tex. 1987). One district court has so stated in dicta. FDIC v. Amberson, 676 F. Supp. 777, 778, n.1 (W.D. Tex. 1987). However, if the Claimant obtains a judgment against an S&L prior to the FSLIC Receiver's takeover, that judgment is enforceable against the Receiver since *D'Oench* protects the FSLIC, not the S&L. Grubb v. FDIC, 86-1687, 86-1728 (10th Cir. Feb. 16, 1989)(WESTLAW) (discussing this rule as applied to the FDIC).

137. *Beighley*, 676 F. Supp. at 133.

138. __ U.S. __, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).

139. *Id.* at __, 108 S. Ct. at 399-400, 98 L. Ed. 2d at 345-46.

140. *Id.* at __, 108 S. Ct. at 399, 98 L. Ed. 2d at 345.

141. *Id.*

142. *Id.* at __, 108 S. Ct. at 401, 98 L. Ed. 2d at 346-47.

quoting *D'Oench*, rejected this distinction and held that "agreement" in section 1823(e) cannot be interpreted so narrowly as to disserve the purpose of *D'Oench*:

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench*) or of the truthfulness of a warranted fact.[143]

Since the defendants in *Langley* had signed a facially unqualified note which they contended was subject to an unwritten and unrecorded condition regarding certain characteristics of the land, they lent themselves to a scheme or arrangement that was likely to mislead the banking authorities.[144]

The Court in *Langley* further held that, under section 1823(e), it was not relevant whether the bank's representation or warranty was made to fraudulently induce the obligors into executing the notes,[145] nor was it relevant whether the FDIC had knowledge of the bank's misrepresentation prior to its acquisition of the note.[146] Similarly, it has been held by lower courts that the FDIC's actual or constructive knowledge of a defense does not preclude the application of *D'Oench*.[147]

The courts have applied *D'Oench* or section 1823(e) to protect the FDIC against several types of defenses, including those asserted by guarantors that the bank misrepresented that the obligor was a good

---

143. *Id.* at __, 108 S. Ct. at 402, 98 L. Ed. 2d at 348.

144. The Court's holding in *Langley* overruled those decisions which had held that *D'Oench* does not apply to "factual fraud," that is factual misrepresentation not involving an agreement. *See, e.g.*, FDIC v. Hatmaker, 756 F.2d 34, 36-37 (6th Cir. 1985); Gunter v. Hutcheson, 674 F.2d 862, 867 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982); FDIC v. Amberson, 676 F. Supp. 777, 780 (W.D. Tex. 1987).

145. Langley v. FDIC, __ U.S. __, __, 108 S. Ct. 396, 402-03, 98 L. Ed. 2d 340, 349-50 (1987).

146. *Id.* This latter holding was based on the statutory language of section 1823(e) which does not explicitly exempt a side agreement from the statute's standards if the FDIC is aware of the agreement. It is questionable whether under *D'Oench*, which is an equitable theory, such knowledge is relevant. However, at least one court has held that under *Langley* the FSLIC's knowledge of the agreement does not "necessarily" make *D'Oench* inapplicable. Andrew Taylor Trust v. Security Trust Fed. Sav. and Loan Ass'n, Inc., 844 F.2d 337, 342 (6th Cir. 1988).

147. FDIC v. Investors Associate X, Ltd., 775 F.2d 152 (6th Cir. 1985); RSR Properties, Inc. v. FDIC, MO-88-CA-200 (W.D. Tex. Jan. 18, 1989)(WESTLAW).

credit risk[148]; that the bank would obtain additional collateral from the note maker[149]; that the bank would complete an executed blank guaranty so that the guarantors would collectively be responsible for only 25 percent of the debt[150]; and that the bank misrepresented that if the guarantor had to pay the debt he would receive the collateral.[151] *D'Oench* and section 1823(e) have been applied to defenses by note makers that the bank misrepresented that it would complete a blank promissory note so as to limit the obligor's liability[152]; that the bank waived any right to accelerate the note upon default by prior acceptance of late payments[153]; that the bank completed a blank note given by the defendant with the incorrect amount[154] or incorrect terms[155]; that the bank agreed it would not seek a deficiency against the borrower[156]; that the leader had agreed to provide the borrowers further financing[157]; that the failed bank's wrongful conduct should be imputed to the FDIC Corporation under the bankruptcy rule of equitable subordination[158]; and that the obligor and bank had entered into an accord and satisfaction.[159]

D'Oench similarly has been applied to immunize the FSLIC Corporation against many defenses, such as that the association fraudulently induced the obligor to sign the note by promising that his endorsement would be released when the document evidencing security for the loan was "completed"[160]; that the association misrepre-

148. FDIC v. Galloway, 856 F.2d 112, 116-17 (10th Cir. 1988)(applied section 1823(e)).

149. FDIC v. Amberson, 676 F. Supp. 777 (W.D. Tex. 1987)(applied section 1823(e)).

150. FDIC v. Castle, 781 F.2d 1101, 1107-08 & n.3 (5th Cir. 1986)(applied section 1892(e), however, court strongly indicated that *D'Oench* would also prohibit defense); FDIC v. Powers, 576 F. Supp. 1167, 1169 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1076 (7th Cir. 1984)(applied both section 1823(e) and *D'Oench* to prohibit this defense).

151. Malone v. FDIC, 611 S.W.2d 855, 858 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

152. FDIC v. Armstrong, 784 F.2d 741, 744-45 (6th Cir. 1986)(applied section 1823(e)).

153. FDIC v. Caledonia Inv. Corp., 862 F.2d 378, 383-84 (1st Cir. 1988)(applied section 1823(e)).

154. FDIC v. Hatmaker, 756 F.2d 34, 36-37 (6th Cir. 1985)(applied section 1823(e)).

155. FDIC v. McClanahan, 795 F.2d 512, 515 (5th Cir. 1986)(applied *D'Oench*).

156. FDIC v. Hoover-Morris Enters., 642 F.2d 785, 787-88 (5th Cir. 1981)(applying section 1823(e)).

157. Chatham Ventures, Inc. v. FDIC, 651 F.2d 355, 361 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); FDIC v. Lattimore Land Corp., 656 F.2d 139, 144 (5th Cir. 1981).

158. 11 U.S.C. § 510(c) (1982); *see also* CTS Trust, Inc. v. FDIC, 859 F.2d 357, 362 (5th Cir. 1988)(applied section 1823(e)).

159. FDIC v. Manatt, 688 F. Supp. 1327, 1329-30 (E.D. Ark. 1988).

160. FSLIC v. Lafayette Inv. Properties, Inc., 855 F.2d 196, 198 (5th Cir. 1988).

sented its solvency and that the notes would be extended when due[161]; that the association entered into an accord and satisfaction with the obligor[162]; that the association orally modified the terms of the obligation[163]; and that the obligors' representative had executed the notes on behalf of the obligors in violation of the representatives' side agreements with the obligors.[164]

However, *D'Oench* does not completely protect the FSLIC or FDIC from the obligor's defenses. If the obligor was completely innocent and had not even lent himself to a scheme of deception, *D'Oench* does not apply.[165] *D'Oench* does not preclude a defense based on "fraud in the factum," such as if the obligor's signature had been forged, nor does it apply if the note imposed bilateral obligations on the parties and the bank breached its obligation under the note.[166] It does not apply if a judgment extinguished the obligation before it was purchased by the FSLIC Corporation.[167]

V. THE FSLIC AS AN HDC

In recent years, as the courts continued to develop the FSLIC's and

---

161. FSLIC v. Hsi, 657 F. Supp. 1333, 1338 (E.D. La. 1986).

162. FSLIC v. Port Alan Dev. Corp., 684 F. Supp. 439, 440 (M.D. La. 1988)(applied *D'Oench* and *Langley*).

163. FSLIC v. Kroenke, 858 F.2d 1067, 1070 (5th Cir. 1988).

164. McLemore v. Landry, 687 F. Supp. 1038, 1041 (M.D. La. 1988)(applied *D'Oench* and *Langley*).

165. FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974)(where defendant completely innocent and not negligent, estoppel rule of *D'Oench* would not be applied to prevent reliance on defense of failure of consideration).

166. *E.g.*, Langley v. FDIC, __ U.S. __, __, 108 S. Ct. 396, 402, 98 L. Ed. 2d 340, 348 (1987); FDIC v. McClanahan, 795 F.2d 512, 515 (5th Cir. 1986); Howell v. Continental Credit Corp., 655 F.2d 743, 745-46 (7th Cir. 1981); FDIC v. National Union Fire Ins., 630 F. Supp. 1149, 1154 (W.D. Ca. 1986); Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305, 313 (M.D. Tenn. 1978). It is important to note that section 1823(e) has a no fault requirement, that is, if the side agreement does not meet the criteria of section 1823(e), it cannot be the basis of a defense to the obligation even if the obligor was wholly innocent. Given the Court's frequent reliance on section 1823(e) in defining the scope of *D'Oench*, *D'Oench* also may apply regardless of the obligor's fault; however, the author has not found a case so holding.

167. Grubb v. FDIC, 86-1687, 86-1728 (10th Cir. Feb. 16, 1989)(WESTLAW); *see also* FDIC v. Merchants Nat'l Bank, 725 F.2d 634, 639 (11th Cir.), *cert. denied*, 469 U.S. 829 (1984)(section 1823(e) not applicable when parties assert no asset exists or asset invalid and such invalidity caused by acts independent of any side agreement); FDIC v. Prann, 694 F. Supp. 1027, 1037 (D.P.R. 1988)(section 1823(e) inapplicable when debt that formed basis of asset claimed by FDIC was satisfied before FDIC acquired failed bank's assets); FDIC v. Nemecek, 641 F. Supp. 740, 742-43 (D. Kan. 1986)(settlement of bank's suit against obligor cancelled note before FDIC acquired it, making section 1823(e) inapplicable).

FDIC's protections under *D'Oench* and section 1823(e), they also created a separate body of federal common law which classifies the FDIC and FSLIC Corporations as HDCs[168] with the accompanying protections against defenses to the enforcement of negotiable notes. The FDIC and FSLIC Corporations qualify as HDCs if they take a negotiable instrument in a P&A, for value in good faith and without knowledge of any defense against it.[169] To deny the Corporation HDC status, they must have actual knowledge of the defenses at the time they take the notes, and the Corporations cannot be charged with constructive notice of defenses.[170]

The policy reasons behind the decision to cloak the FDIC and FSLIC Corporations with HDC protections are similar to those behind *D'Oench* and section 1823(e). The Receiver and Corporation cannot make the necessarily quick valuations of the S&L's loans in a P&A without having to guess at potential defenses available to the obligor.[171] Further, the obligor is not unfairly prejudiced since he should anticipate that an HDC may purchase his note, denying him certain defenses.[172] The courts also considered that without HDC status, the FSLIC and FDIC would not collect many obligations owed to the failed financial institution at the expense of the institution's depositors, other creditors and the taxpayers.[173] The courts created a federal common law rather than merely relying on the law of the state where the claim arose, to ensure national uniformity and predictability of the FSLIC's and FDIC's protection against certain

168. The Fifth Circuit has not decided whether the FSLIC or FDIC Receiver enjoys the protection of an HDC. FSLIC v. LaFayette Inv. Properties, Inc., 855 F.2d 196, 198 n.2 (5th Cir. 1988). While at least one federal district court within the Fifth Circuit concluded that the Receiver is not an HDC, this court stated in dicta that the Receiver has at least some of the protection of an HDC under federal common law. FSLIC v. Hsi, 657 F. Supp. 1333, 1337 (E.D. La. 1986); FirstSouth, F.A. v. Aqua Constr., Inc., 858 F.2d 441, 443 (8th Cir. 1988)(federal law evolving towards view that FSLIC Receiver has HDC status). *But see* FSLIC v. Sandor, 684 F. Supp. 403, 405 (D.V.I. 1988)(FSLIC as Receiver excluded from HDC status).

169. FSLIC v. Murray, 853 F.2d 1251, 1254 (5th Cir. 1988); FDIC v. The Cremora Co., 832 F.2d 959, 964 (6th Cir. 1987); FDIC v. Wood, 758 F.2d 156, 159-61 (6th Cir. 1985); FDIC v. Eagle Properties, Ltd., 664 F. Supp. 1027, 1036-37 (W.D. Tex. 1985).

170. FDIC v. Armstrong, 784 F.2d 741, 745 (6th Cir. 1986); *Wood*, 758 F.2d at 161-62; FDIC v. Manatt, 688 F. Supp. 1327, 1331 (E.D. Ark. 1988); *Eagle Properties, Ltd.*, 664 F. Supp. at 1045-46.

171. *Murray*, 853 F.2d at 1256; Gunter v. Hutcheson, 674 F.2d 862, 869-70 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

172. *Murray*, 853 F.2d at 1256; *Wood*, 758 F.2d at 158-59; *Gunter*, 674 F.2d at 872.

173. *Murray*, 853 F.2d at 1257; *Wood*, 758 F.2d at 158.

defenses.[174] Because the HDC status of the FSLIC and FDIC is a product of federal law, the practitioner cannot solely rely on state commercial codes or related case law to determine if the FSLIC or FDIC is an HDC as to a particular defense. However, state law will be used by the federal courts to the extent it does not conflict with the federal policies that generated the federal common law.[175]

The Fifth Circuit, in *FSLIC v. Murray*,[176] held that the FSLIC corporation held notes which it acquired in a P&A as an HDC and was protected from the maker's defense of material alteration.[177] Courts have also held that the FDIC corporation, as an HDC, is protected from the defenses of failure of consideration,[178] fraud in the inducement,[179] material alteration of the instrument,[180] usury,[181] security fraud,[182] common-law fraud,[183] waiver, estoppel, unjust enrichment,[184] and mental incapacity of the maker.[185] These decisions should control when similar defenses are asserted against claims brought by the FSLIC Corporation.

VI. SUING THE FSLIC RECEIVER IN COURT

Creditors of a S&L in receivership may not want to pursue their

---

174. *Murray*, 853 F.2d at 1257.

175. FDIC v. The Cremora Co., 832 F.2d 959, 963 (6th Cir. 1987); *Wood*, 758 F.2d at 159.

176. *Murray*, 853 F.2d at 1251.

177. *See id.* at 1257.

178. FDIC v. Armstrong, 784 F.2d at 741, 745 (6th Cir. 1986); FDIC v. Leach, 772 F.2d 1262, 1266 (6th Cir. 1985); FDIC v. Wood, 758 F.2d 156, 160-61 (6th Cir. 1985); FDIC v. Hatmaker, 756 F.2d 34, 38 n.5 (6th Cir. 1985)(*dicta*).

179. *Armstrong*, 784 F.2d at 745.

180. *Id.*

181. *Leach*, 772 F.2d at 1266; *Wood*, 758 F.2d at 160-61.

182. Gilman v. FDIC, 660 F.2d 688, 695 (6th Cir. 1981)(quoting *Gunter v. Hutcheson*, 492 F. Supp. 546, 555-56 (N.D. Ga. 1980)). *But see* Gunter v. Hutcheson, 674 F.2d 862, 874 (11th Cir. 1982)(questioning whether FDIC's status as HDC protects it from defense based on securities fraud).

183. *Gunter*, 674 F.2d at 868-73; FDIC v. Amberson, 676 F. Supp. 777, 781 (W.D. Tex. 1987); FDIC v. Eagle Properties, Ltd., 664 F. Supp. 1027, 1036-37 (W.D. Tex. 1985). The *Gunter* court actually held that the FDIC Corporation was not an HDC because it acquired the note in a P & A which is not in the ordinary course of business. *Gunter*, 674 F.2d at 872. However, the court nonetheless essentially held that the corporation has the status of an HDC if the other requirements of HDC status are met. *Id.*

184. FDIC v. Gulf Life Ins. Co., 737 F.2d 1513, 1516-17 (11th Cir. 1984). Because this is an Eleventh Circuit case following *Gunter*, the court does not strictly hold that the FDIC is an HDC but it does have HDC protection. *Id.*

185. FDIC v. Ohlson, 659 F. Supp. 490, 491-92 (N.D. Iowa 1987).

claims against the failed institution through FSLIC and FHLBB administrative territory but instead may prefer the more familiar trek through an original court action.[186]

With the United States Supreme Court's decision in *Coit Independence Joint Venture v. FSLIC*,[187] the claimant may bring an original de novo court action against the FSLIC or continue one previously brought against the S&L prior to the Receivership. *Coit* is best understood with a history of those cases leading to this decision. Before *Coit*, the law of the Fifth Circuit as stated in *North Mississippi Savings & Loan Association v. Hudspeth*[188] was that the claimant could not bring or continue to maintain an original court action against an S&L in an FSLIC Receivership without first exhausting those administrative remedies. Further, upon exhaustion of those administrative remedies, the claimant was limited to a court review of the administrative decision.[189]

In *Hudspeth*, an S&L sought a declaratory judgment that no deferred compensation agreement existed between it and its former president, Hudspeth, or, if the agreement existed, it was terminable at will.[190] Hudspeth counterclaimed for enforcement of the agreement.[191] The S&L was placed into a FSLIC receivership, and the FSLIC transferred all assets and most liabilities to a newly created S&L, but retained Hudspeth's agreement in the receivership and then terminated that contract.[192] Hudspeth joined the new S&L in his counterclaim as a "transferee in interest."[193] The FSLIC, as Receiver, and the new S&L removed the case to federal court[194] where it was dismissed for lack of subject matter jurisdiction because Hudspeth had not first pursued his claim through the FSLIC and FHLBB

186. For a discussion of a claimant's right to bring an original court action against the FSLIC Corporation, see *York Bank & Trust Co. v. FSLIC*, 851 F.2d 637, 638-39 (3d Cir. 1988).

187. No. 23205 (U.S. Mar. 21, 1989) (WESTLAW).

188. 756 F.2d 1096 (5th Cir. 1985).

189. *Id.*

190. *Id.* at 1099.

191. *Id.*

192. *Id.*

193. *Id.* at 1101.

194. Concerning when cases involving an FSLIC receivership can be removed to federal court, see 12 U.S.C. § 1730(k)(1); see also *Carrollton-Farmers Branch Independent School District v. Johnson & Craven*, 858 F.2d 1010, 1014-15 (5th Cir. 1988); *Bean v. Independent American Savings Association*, 838 F.2d 739, 7422 (5th Cir. 1988).

administrative process.[195]

The Fifth Circuit, affirming the dismissal, primarily referenced two statutory provisions. Section 1464(d)(6)(c) of the Home Owners' Act states that: "[e]xcept as otherwise provided in this subsection, no court may . . ., except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver."[196] Section 1729(d) of the Housing Act states that:

> In connection with the liquidation of insured institutions [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions and to do all other things that may be necessary in connection therewith, subject only to the regulation of the [FHLBB] . . .[197]

The Court explained that the statutes' legislative history indicated that Congress wanted the FSLIC to "act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities."[198] The Court held that the FSLIC's decision to set aside the compensation contract was "unquestionably an exercise of . . . [its] . . . powers as a receiver, analogous" to the power of a bankruptcy trustee to reject a contract, and a challenge to that decision initially must be made in the administrative process, with only a court review of the administrative decision under the Administrative Procedure Act.[199]

---

195. North Miss. Sav. & Loan Ass'n v. Hudspeth, 756 F.2d 1096, 1099-1100 (5th Cir. 1985).

196. 12 U.S.C. § 1464(d)(6)(C) (1982).

197. *Id.* § 1729(d).

198. *Hudspeth*, 756 F.2d at 1099-1100.

199. 5 U.S.C. § 701-06 (1982); *see also Hudspeth*, 756 F.2d at 1101-03. The Fifth Circuit did not clearly described how limited this judicial review would be. Bean v. Independent Am. Sav. Ass'n, 838 F.2d 739, 741 n.3 (5th Cir. 1988); Coit Independence Joint Venture v. First-South, F.A., 829 F.2d 563, 565, n.3 (5th Cir. 1987), *rev'd*, No. 23205 (U.S. Mar. 21, 1989) (WESTLAW). The Court also held that Hudspeth's claim against the new S&L must be dismissed because the FSLIC Receiver, by deciding not to transfer that obligation to the new S&L, had determined the allocation of receivership assets to competing claimants and determined that Hudspeth's claim must be satisfied out of the assets remaining in the receivership after the transfer of some assets to the new institution. *Hudspeth*, 756 F.2d at 1101-02. If the court held the new S&L liable for a debt not assigned by the FSLIC, the court would modify the FSLIC's distribution of assets and, accordingly, restrain or affect the FSLIC's receivership powers in violation of the Homeowner's and Housing Acts. *Id.* at 1102-03. However, if the liability had been transferred, then *Hudspeth* does not preclude an original court action against the assuming S&L. *Bean*, 838 F.2d at 742. A full discussion of a creditor's right to sue the

The *Hudspeth* decision is best understood as interpreting the quoted portions of the Housing Act and Home Owners' Act to create a claim system similar to that in federal bankruptcy proceedings; all claims against the S&L are centralized in one forum and any adjudication outside that forum is stayed.[200] *Hudspeth* applied either when the claimant initially filed suit against the Receiver or when suit was originally filed against the S&L which then goes into a Receivership.[201]

Hudspeth was not, however, a magic wand with which the FSLIC could relegate any claim involving the failed S&L to the administrative process. A limitation on the FSLIC's powers was stated in *FSLIC v. Kerr*,[202] where the FSLIC, as Receiver for an S&L with a second lien on real property, attempted to enjoin the first lienholder's nonjudicial foreclosure.[203] The lower court denied injunctive relief and the Fifth Circuit affirmed, distinguishing *Hudspeth* since, before foreclosure, the property was not in the Receivership but was held by the debtor and there was no dispute on priority of liens or anything else which required administrative or other adjudication.[204]

The Fifth Circuit repeatedly reaffirmed *Hudspeth*[205] and the decision has been followed by several other courts.[206] One case where

---

financial institution which assumes the failed one's liabilities in a P&A or merger is beyond this article's scope.

200. *See* First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n, 639 F. Supp. 93, 98-99 (W.D. Wash. 1986).

201. *See id.* at 97.

202. 859 F.2d 1226 (5th Cir. 1988).

203. *Id.* at 1227.

204. *Id.* at 1228. The Fifth Circuit also concluded that public policy supported the superior lienholder's right to foreclose inasmuch as an indefinite freeze on foreclosure unfairly burdens the superior lienholder and places the FSLIC in a better position than the S&L would have been in had it remained solvent.

205. Sandia Fed. Sav. & Loan Ass'n v. Vernon Sav. & Loan Ass'n, 860 F.2d 608, 610 (5th Cir. 1988); Carrollton-Farmers Branch Indep. School Dist. v. Johnson & Craven, 858 F.2d 1010, 1015-16 (5th Cir. 1988); Thomas v. Equitable Sav. & Loan Ass'n, 837 F.2d 1317, 1317-18 (5th Cir. 1988); FSLIC v. Bonfanti, 826 F.2d 1391, 1394 (5th Cir. 1987); Coit Independence Joint Venture v. FirstSouth, F.A., 829 F.2d 563, 564 (5th Cir. 1987), *rev'd*, No. 23205 (U.S. Mar. 21, 1989)(WESTLAW); Red Fox Indus., Inc. v. FSLIC, 832 F.2d 340, 341-42 (5th Cir. 1987); Chupik Corp. v. FSLIC, 790 F.2d 1269, 1270 (5th Cir. 1986).

206. Lyons Sav. & Loan v. Westside Bank Corp., 828 F.2d 387, 394-95 (7th Cir. 1987); FSLIC v. Oldenburg, 658 F. Supp. 609 (D. Utah 1987); York Bank & Trust v. FSLIC, 663 F. Supp. 1100, 1103 (M.D. Pa. 1987); First Fin. Sav. & Loan v. FSLIC, 651 F. Supp. 1289, 1290-91 (E.D. Ark. 1987); First Am. Sav. Bank v. Westside Fed. Sav. & Loan Ass'n, 639 F. Supp. 93, 97-100 (W.D. Wash. 1986). In *Gibraltar Building & Loan Association v. State Savings & Loan Association*, 607 F. Supp. 722, 723 (N.D. Ca. 1985), the court relied not only on *Hud-*

Hudspeth was followed demonstrated that administrative preemption can affect parties who have indirectly obtained claims against the insolvent S&L. For example, in one case a corporation retained Quality Inns, Inc. to provide services to and buy goods for a construction project.[207] The FHLBB placed the S&L that financed the project into receivership and appointed the FSLIC Receiver.[208] The FSLIC, as Receiver, foreclosed on and purchased corporation property which was part of the project and sued Quality Inns for breaches of contract and fiduciary duty and conversion.[209] Quality Inns counterclaimed that the FSLIC was unjustly enriched because it owned the property benefited by Quality Inns' services without paying for those services, and the FSLIC had converted the property provided by Quality Inns for the project without paying.[210] The court dismissed the counterclaims under *Hudspeth*.[211] Quality Inns was not initially a customer or creditor of the S&L, and its claims were against the corporation, but because of the foreclosure, insolvency, and receivership, it faced the FSLIC and its administrative process.

Though *Hudspeth* was widely followed, the Ninth Circuit Court of Appeals, in *Morrison-Knudson Co. v. CHG International, Inc.*,[212] sharply disagreed with the Fifth Circuit's analysis. The Ninth Circuit held that no statute grants the FSLIC the power, much the less the exclusive power, to adjudicate claims against the Receivership, and accordingly, a creditor of the failed S&L may bring an original action in court.[213] The court argued that common-law receivers have never

---

speth to deny a writ of attachment against receivership assets but also on 12 U.S.C. § 1730(k)(1) (1982) which states that: "No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any state or of the United States or any territory, or any other court." 12 U.S.C. § 1730(k)(1) (1982). The *Gibraltar* court rejected the plaintiff's argument that "Corporation" in section 1730(k)(1) applied only to the FSLIC acting as a Corporation and not acting as a Receiver. *See Gibraltar*, 607 F. Supp. at 723 n.2. *See generally* Coward, *The Adjudicatory Power of the FSLIC Over Claims Involving Savings and Loans in FSLIC Receivership*, 88 COLO. L. REV. 1325 (1988); Note, *The Federal Deposit Insurance Corporation's Amenability to Suit Under the Federal Tort Claims Act for Preferential Distributions of Assets of an Insolvent Bank*, 1981 WIS. L. REV. 593.

207. FSLIC v. Quality Inns, Inc., 650 F. Supp. 918, 918-19 (D. Md. 1987).

208. *Id.*

209. *Id.* at 918.

210. *Id.* at 918-19.

211. *Id.* at 920-22.

212. 811 F.2d 1209 (9th Cir. 1987).

213. *Id.* at 1215-19.

had the pervasive preemption powers which *Hudspeth* held that FSLIC receivers do and the FDIC Receiver never asserted such powers, at least in the Ninth Circuit.[214] However, the *Morrison-Knudson* court did hold that a trial court could exercise its traditional discretion to defer to the administrative process and abate court proceedings.[215] Accordingly, even under *Morrison-Knudsen*, a claimant did not have the absolute right to a court action against the Receivership.

The Texas Supreme Court followed *Morrison-Knudsen* in *FSLIC v. Glen Ridge I Condominiums, Ltd.*,[216] where the Receiver sought to foreclose on real estate securing defaulted loans made by the failed S&L. The borrowers filed a lawsuit in Texas district court seeking cancellation of the loans and an injunction against foreclosure because of violations of security and usury laws, breach of contract, and fraud.[217] The supreme court permitted the borrower's suit to go forward despite their failure to first administratively pursue their claims.[218]

The holding in *Hudspeth* was overruled by the United States Supreme Court in *Coit Independence Joint Venture v. FSLIC*,[219] where the plaintiff, Coit, sued an S&L for usury, breach of fiduciary duty, and breach of a duty of good faith and fair dealing.[220] The S&L entered an FSLIC Receivership and the court, following *Hudspeth*, dismissed the action for lack of subject matter jurisdiction because Coit had not yet exhausted his FSLIC and FHLBB administrative remedies.[221] The Fifth Circuit affirmed the dismissal and rejected Coit's argument that *Hudspeth* was no longer controlling because of a change in the language of 12 U.S.C. § 1729(d).[222] The Fifth Circuit

---

214. *Id.* at 1219-20.

215. *Id.* at 1223. The Court remanded the case to the trial court to determine whether it should exercise this discretion. *Id.*

216. 750 S.W.2d 757 (Tex. 1988).

217. *Id.* at 758.

218. *See id.* at 760. The Court of Appeals held that 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d) did give the FSLIC adjudicatory powers over claims against the failed S&L, however, this was an unconstitutional delegation of judicial authority in violation of Article III of the United States Constitution. *See* Glen Ridge I Condominiums v. FSLIC, 734 S.W.2d 374, 390 (Tex. App.—Dallas 1986, no writ). Because the Texas Supreme Court, like the court in *Morrison-Knudsen*, held that the statutes did not give adjudication rights to the FSLIC or FHLBB, it did not address the constitutional issues.

219. No. 23205 (U.S. Mar. 21, 1989)(WESTLAW).

220. *Id.*

221. *Id.*

222. *Id.* When *Hudspeth* was decided, Section 1729(d) granted the FSLIC the power to

pointed out that 12 U.S.C. § 1729(c)(3)(B) defines "court or other public authority" in subsection (d) as the FHLBB and concluded that the language change did not warrant overruling *Hudspeth*.[223]

Coit appealed the Fifth Circuit's decision and asked the Supreme Court to decide whether federal statutory and regulatory law requires a creditor of a S&L in Receivership to first exhaust the FSLIC and FHLBB administrative process and then be permitted only a court review of that decision, and if it does, whether such a requirement violates Article III of the United States Constitution as an unconstitutional delegation of judicial power, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to trial by jury.[224]

The Supreme Court held that Congress did not grant the FSLIC exclusive authority to adjudicate state law claims asserted against a failed S&L, and creditors of the S&L are entitled to a de novo consideration of their claims in an original court action.[225] The Court relied on both the explicit statutory language and the statutory context of section 1454(d)(6)(C) of the Home Owners' Act and section 1729(d) of the Housing Act.[226] The Court concluded that the FSLIC's power under section 1464(d)(6)(C) to "settle, compromise or release claims" was both distinguishable from, and to some extent inconsistent with, the power to adjudicate claims.[227] In this regard, the Court quoted the Ninth Circuit in *Morrison-Knudsen Co.*:

> Settlement and compromise strongly suggest the presence of the power of the other party to take the matter to court. Settlement and compromise are to avoid that result. A body with a power to say "yes" or "no" with the force of law has much less need to settle or to compromise.

---

settle, compromise, and release claims subject only to the FHLBB's regulation, but the statute was later amended to subject the FSLIC to the regulation "of the court or other public authority having jurisdiction over the matter." The statute was again amended effective August 10, 1987 and the original language was replaced. 12 U.S.C. § 1729(d) (Supp. 1988).

223. *See* Coit Independence Joint Venture v. First South, F.A., 829 F.2d 563, 564 (5th Cir. 1987).

224. The Fifth Circuit held that Coit did not yet have standing to assert these constitutional issues since, until the FSLIC decided Coit's claims, Coit was not harmed or immediately threatened with harm which the court held was necessary for a constitutional challenge. *Id.* at 565; *accord* Sandia Fed. Sav. & Loan Ass'n v. Vernon Sav. & Loan Ass'n, 860 F.2d 608, 610 (5th Cir. 1988); Thomas v. Equitable Sav. & Loan Ass'n, 837 F.2d 1317, 1318 (5th Cir. 1988).

225. Coit Independence Joint Venture v. FSLIC, No. 23205 (U.S. Mar. 21, 1989) (WESTLAW).

226. *Id.*

227. *Id.*

As to section 1729(d)'s prohibition against a court "restrain[ing] or affect[ing]" the Receiver's powers, the Court held that since the FSLIC does not have the power to adjudicate, an original de novo court proceeding will not restrain or affect the FSLIC's powers.[228] The Court further held that section 1729(b)(1)(B)'s directive that the FSLIC Receiver "shall pay all valid credit obligations of the association" merely gives the FSLIC the power, like that of an ordinary insurance company, to pay those claims proved to its satisfaction, but does not, on its face, prohibit a claimant from establishing the obligation in an original court action.[229]

The Court considered the context of these statutes. Within the statutory frame work of section 1729, Congress explicitly granted the FSLIC the power to adjudicate violations of federal law by the S&L's officers and directors, to issue cease and desist orders, to remove officers and directors, and to impose civil sanctions.[230] Since Congress precisely set forth this adjudicatory power, it is reasonable to infer that it would have similarly specifically stated the FSLIC's adjudicatory powers with regard to a creditor's claims against the FSLIC receiver.

As to the statutory context of section 1464(d)(6)(C), it appears after section 1464(d)(6)(A) which sets out the specific grounds for the FHLBB's appointment of a Receiver and authorizes the S&L to challenge that appointment within thirty days.[231] In this context, the Court concluded that the section 1464(d)(6)(C) prohibition against restraining or affecting the receiver's powers is no more than a prohibition against an untimely challenge to the FHLBB's appointment of a Receiver or against collateral attacks against the Receiver carrying out its basic functions.[232]

The Court also relied on the common law in effect when section 1464(d)(6)(C) was enacted, which did not hold that law suits to establish the existence or amount of a claims against an insolvent debtor interfered with or restrained the Receiver's possession of the insol-

---

228. *Id.*

229. *Id.*

230. 12 U.S.C. § 1464(d) (Supp. V 1987); *see* Section II, *infra*.

231. *See* Section II, *infra*.

232. Coit Independence Joint Venture v. FSLIC, No. 23205 (U.S. Mar. 21, 1989) (WESTLAW). While the court does not so hold in this portion of the opinion, it implicitly must be stating that the "basic functions" do not include the power to adjudicate a creditor's claims. *Id.*

vent's assets or its exlusive control over the distribution of those assets.[233] Nor were suits to establish the validity and amount of the claims against an insolvent national bank under a statutory receivership considered an interference with the power and function of the receiver.[234]

The Court pointed to provisions of the Housing Act which it held clearly showed that the courts would have jurisdiction over suits by creditors against the FSLIC Receivership.[235] The Housing Act provides that the FSLIC can sue and be sued in state or federal court.[236] Congress has established a statute of limitations for actions against the FSLIC Corporation to enforce deposit insurance claims,[237] and has provided an explicit grant to the courts of subject matter jurisdiction over claims involving the FSLIC.

The Court also addressed the argument that even though the FSLIC Receiver may not have excluded adjudicatory powers, a claimant should nonetheless be required to exhaust the administrative process before bringing suit in court.[238] The Court held that its past cases had generally recognized that an exhaustion of administrative remedies is required when Congress explicitly imposes the requirement when it is consistent with the applicable statutory scheme.[239] The Court held that although the language of the statutes governing the FSLIC and FHLBB do not explicitly mandate exhaustion of administrative remedies, the Housing Act does require the FSLIC to liquidate a failed S&L in an "orderly manner." It is reasonable to conclude that this could not be done unless the FSLIC had notice of all claims against the insolvent institution and initial opportunity to consider them in a centralized claim process.[240] Accordingly, the court stated that the traditional reasons requiring an exhaustion of administrative remedies would support a requirement that a claimant give the FSLIC notice of the claim and then wait for a reasonable time period before filing suit while the FSLIC decided whether to pay, settle, or

---

233. *Id.*

234. *Id.*

235. *Id.*

236. 12 U.S.C. § 1725(c)(4) (1982).

237. *Id.* § 1728(c).

238. Coit Independence Joint Venture v. FSLIC, No. 23205 (U.S. Mar. 21, 1989) (WESTLAW).

239. *Id.*

240. *Id.*

disallow the claim.[241] However, the Court reasoned that current FHLBB regulations permit the FSLIC to delay the administrative processing of a claim indefinitely, denying a litigant his day in court while the statute of limitations runs.[242] Additionally, this unlimited delay may enable the FSLIC to coerce a claimant into entering into an unfair settlement with the threat that unless the claimant settles, there may be no assets left in the Receivership when the FSLIC permits filing a court action.[243] Consequently, the Court concluded that because the current administrative remedies are inadequate, they need not be exhausted.[244] However, if the FHLBB revises its regulations to conform to the Court's requirements, an exhaustion may again be required. The open question would then be the extent of court review of the final administrative decision.

VII. CONCLUSION

The steady and not so slow unraveling of the savings and loan industry has thrust creditors and debtors of S&Ls, and their attorneys, into unfamiliar surroundings both in and out of court. However, with *Coit*, creditors may now choose whether to pursue their claims administratively or in an original court action. If the claimant chooses the administrative process, specific procedures must be followed and deadlines met to avoid loss of the claim. For the debtor of an S&L in a FSLIC Receivership, his situation is difficult and will probably worsen.

---

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* In his concurring opinion, Justice Scalia criticized the Court's argument that the FHLBB could suspend a claimant's right to file a lawsuit if it required a decision on the claim within a reasonable time period. *Id.* (Scalia, J., concurring). Justice Scalia points out that the statute of limitations could run even within this reasonable time period and, in any event, preclude a claimant from filing state law claims until they have first been acted on by the FSLIC, or until a specific time limit for such action is passed. Justice Scalia maintains this amounts to a pre-emption of state law and is an unprecedented interpretation of the exhaustion requirement. Justice Scalia argues that the claimant should rather be permitted to file his original court action and then the FSLIC could request the court to defer further proceedings for a reasonable time until the FSLIC determines whether to deny, pay, or otherwise settle the claim. *Id.*