

LIFE IN THE ADMINISTRATIVE TRACK: ADMINISTRATIVE ADJUDICATION OF CLAIMS AGAINST SAVINGS INSTITUTION RECEIVERSHIPS

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INTRODUCTION

In the modern financial services industry, thrifts¹ engage in an unprecedented range of complex and risky commercial transactions. Consequently, the receiver of a failed thrift, which in most cases is the Federal Savings and Loan Insurance Corporation (FSLIC) appointed by the Federal Home Loan Bank Board (FHLBB),² is likely to face a host of complex claims. These claims arise not only from the thrift's deposit liabilities but also from its investment transactions and the incidental disputes generated by such activities. The scene of a thrift failure is often already strewn with litigation, and the receivership itself is likely to generate still more.³ Even if litigation has not yet commenced, the receiver has to pay the thrift's valid credit obligations and so has to distinguish good claims from bad and quantify the former. In the process of accepting, settling or rejecting a diverse and complex range of creditor claims, disputes concerning their validity will have to be resolved informally or, if this cannot be done, either through the judicial process or by administrative adjudication. The latter process is the subject of this study.

The importance of this claims determination process has grown with the escalation of thrift failures in recent years.⁴ Although, with the assistance of the FSLIC, many insolvent thrifts can be restored to finan-

1. "Thrift" is used throughout this article to refer to federally chartered and state-chartered, federally insured building associations, savings and loan associations and savings banks. *See infra* notes 26-39 and accompanying text.

2. For a general discussion of the power to appoint receivers, *see infra* notes 165-75 and accompanying text.

3. *See infra* notes 228-43 and accompanying text.

4. *See infra* notes 77-87 and accompanying text.

cial health, sold or merged, a significant number have already proven so irretrievable that the FHLBB has had to place them into liquidation. As of July 1, 1988, the FSLIC was administering 84 liquidating receiverships involving \$8.2 billion in receivership assets and considerably more in uninsured creditor claims.⁵ Insofar as they help to avoid litigation, the claims determination procedures employed by the receiver are very important in expediting and reducing the cost of thrift liquidations. On the other hand, these procedures have to satisfy conflicting considerations. They must be capable of processing claims efficiently and resolving disputes between creditors and receivers. They should also remain fair to both parties and they must, of course, rest upon a sound legal foundation.

The FHLBB and the FSLIC have asserted exclusive jurisdiction to adjudicate claims against thrift receiverships. These agencies argue that their claims determinations are subject not to independent, *de novo* judicial determination, but only to the limited judicial review provided under the federal Administrative Procedure Act (APA).⁶ This view has become known as the "*Hudspeth* doctrine," after the Fifth Circuit decision in which it was first accepted.⁷ Yet, because of the enormous adjudicatory power that the *Hudspeth* doctrine concedes to these agencies, the doctrine has provoked controversy concerning the quality, fairness and efficacy, as well as the legal and constitutional validity, of the agencies' procedures. Although *Hudspeth* has been reaffirmed many times by the Fifth Circuit, and has attracted a large following in the district courts and some state courts,⁸ the Ninth Circuit has refused to follow it, holding that the FSLIC has no statutory authority to adjudicate claims to the preclusion of the courts.⁹ The Texas Supreme Court has taken the same view in affirming the decision of a state court of appeals that had ruled that the FSLIC has indeed been granted adjudicative authority by statute but that this authority is unconstitutional.¹⁰ The plethora of conflicting

5. Telephone interview with Judith L. Friedman, Associate General Counsel, FHLBB (Aug. 29, 1988). As of December 31, 1986 (the most recent date for which figures are available), creditor claims already exceeded \$8 billion. 1986 FHLBB ANN. REP. 27-35 (1987).

6. 5 U.S.C. § 706 (1982) (scope of judicial review for agency action); see *infra* text accompanying notes 498-509.

7. *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). For a discussion of *Hudspeth*, see *infra* notes 98-117 and accompanying text.

8. See *infra* notes 118-20 and accompanying text.

9. See *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1212 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); see *infra* notes 124-31 and accompanying text.

10. See *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 750 S.W.2d 757, 759 (Tex. 1988) (*per curiam*), *aff'g* 734 S.W.2d 374 (Tex. Ct. App. 1986) (discussed *infra* at notes 135-40 and accompanying text).

decisions has produced an unusual situation in which two circuits—the Fifth and the Ninth—are in direct conflict,¹¹ a third—the Seventh—is somewhat equivocal,¹² state courts within the territorial jurisdiction of the Fifth Circuit have either followed the ruling of the Ninth Circuit¹³ or gone even further,¹⁴ and state courts within the territorial jurisdiction of the Ninth Circuit have followed the Fifth Circuit,¹⁵ while district courts within the territorial jurisdiction of the Seventh Circuit have gone in opposite directions.¹⁶

This riotous state of affairs will be partly resolved this Term by the Supreme Court. Of four petitions for certiorari that have now been filed, the Court has chosen to hear the one—*Coit Independence Joint Venture v. FirstSouth, F.A.*¹⁷—that is couched in the broadest terms;¹⁸ the out-

11. See *supra* notes 7-9 and accompanying text.

12. See *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387 (7th Cir. 1987) (discussed *infra* at note 134). The decision in *Lyons* elicited a comment from District Judge Roszkowski that the Seventh Circuit is "never one to rush in where angels fear to tread." *Homestead Sav. v. Life Sav. & Loan Ass'n*, 668 F. Supp. 1121, 1124 (N.D. Ill. 1987) (opinion vacated and removed from bound volume, but appears in West's advance sheets, see *infra* notes 738-39 and accompanying text).

13. See *Glen Ridge I*, 750 S.W.2d at 759; *Summertree Venture III v. FSLIC*, 742 S.W.2d 446, 453 (Tex. Ct. App. 1987).

14. See *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374, 386 (Tex. Ct. App. 1986) (holding statutory grant of adjudicative authority to FSLIC unconstitutional), *aff'd on other grounds*, 750 S.W.2d 757 (Tex. 1988) (per curiam); *supra* note 10 and accompanying text.

15. See *Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 748 P.2d 251 (1987) (split decision); *FSLIC v. Superior Court*, 180 Cal. App. 3d 336, 225 Cal. Rptr. 422 (1986).

16. See *Homestead Sav.*, 668 F. Supp. at 1121. *Contra Rigali v. Life Sav. & Loan Ass'n of Am.*, No. 87-C-2543 (N.D. Ill. June 16, 1987) (Westlaw, 1987 WL 12677).

17. 829 F.2d 563 (5th Cir. 1987), *cert. granted sub nom. Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988).

18. The questions presented place in issue (i) the statutory authority of the FSLIC as receiver to adjudicate state-law causes of action asserted against failed thrifts; (ii) the acceptability of such a scheme under article III of the Constitution; (iii) the compatibility of such a scheme with the due process clause; and (iv) whether the scheme violates the seventh amendment right to a jury trial. See *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at i, Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1987) (No. 87-996).

A number of briefs have been filed in the *Coit* appeal. For those supporting the petitioner, see Brief for Petitioner; Petitioner's Reply Brief; Brief Amicus Curiae of Joseph M. Hudspeth in Support of Petitioner; Brief of Amicus Curiae United States League of Savings Institutions in Support of Petitioner; Brief Amicus Curiae of George S. Watson, A. Starke Taylor III and Watson & Taylor Realty Company in Support of Petitioner. For those supporting the FHLBB and the FSLIC, see Brief for the Respondent; Motion of the Federal Home Loan Bank of Dallas, Federal Home Loan Bank of San Francisco, and Federal Home Loan Bank of Topeka for leave to file Brief as Amici Curiae and Brief as Amici Curiae Supporting Affirmance; Brief of Amicus Curiae National Council of Savings Institutions in Support of Respondent. It is interesting to note the opposition of the two major thrift lobbies. Most surprising is the respondent's brief filed by the Solicitor General: notwithstanding the favorable holding in *Hudspeth*, the position consistently maintained by the FSLIC in subsequent litigation, and the FHLBB's publication of rules establishing an adjudicative process, the respondent's brief disavows any statutory authority on the part of the FSLIC to "adjudicate" claims and argues only that creditors are mandatorily required to exhaust the administrative

come of this case will have an automatic effect on the others.¹⁹ Meanwhile, the pending uncertainty makes it difficult to provide a coherent administrative law evaluation of the *Hudspeth* procedures, since they might not be constitutionally valid at all.

Yet it is unlikely that the Supreme Court's decision will be entirely dispositive. Its jurisprudence in the constitutional areas traversed by *Coit Independence* has become overtly pragmatic.²⁰ This suggests that, even where the Court is disposed to find a particular administrative scheme unconstitutional, there might be other ways of devising a scheme that would be constitutional. The Court is unlikely to declare unequivocally that creditor claims require primary adjudication by full-fledged article III courts alone.²¹ To the extent that the FHLBB's desire to avoid routine judicial resolution is dictated by severe financial and organizational constraints,²² the Board will probably still want to devise a primary administrative adjudication scheme that is acceptable from the constitutional and administrative law points of view. *Coit Independence* can provide guidance only as to the outer constitutional constraints on any such scheme. And if, as is possible, the Court declares that the FHLBB inerey lacks present statutory authority,²³ the FHLBB still has the option of seeking such authority from Congress. On the other hand, even if the Court rules that the FHLBB does have statutory authority and that this authority is constitutionally valid, many issues regarding the fairness and efficiency of the adjudicative process implemented by the Board are likely to remain in controversy. The fundamental question, then, of what would constitute a fair administrative procedure for adjudi-

claims process before resorting to the courts. Presumably this leaves it open for claimants to assert the right to de novo review after exhaustion of their administrative remedies. The amici briefs filed in support, on the other hand, adopt more fully the position of the FHLBB and FSLIC, which denies anything other than limited, APA review in the courts.

19. See *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3165 (U.S. Aug. 5, 1987) (No. 87-255); *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); *Murdock-SC Assocs. v. Beverly Hills Fed. Sav. & Loan Ass'n*, 624 F. Supp. 948 (C.D. Cal. 1985), *aff'd in part and rev'd in part*, 815 F.2d 82 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Murdock-SC Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-452). The claims in the *Morrison-Knudsen* case have now been settled. See Brief for the Respondent at 37 n.27, *Coit Independence* (No. 87-996).

These petitions raise only the question "[w]hether claims against the assets of an insolvent, federally insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims." *Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at I, Murdock-SC Assocs.* (No. 87-452).

20. See *infra* text accompanying notes 510-657.

21. See *infra* text accompanying notes 545-600.

22. See *infra* text accompanying notes 91-92.

23. See *infra* text accompanying notes 325-429.

cating creditor claims in thrift receiverships is likely to remain important for as long as the crisis in the thrift industry persists and the present system of thrift regulation survives.²⁴

This article seeks to provide some general answers to this basic question by drawing upon general constitutional and administrative law principles. Part I describes the background to the *Hudspeth* controversy by tracing the emergence and evolution of federal thrift regulation, the changing market environment, the attempts by the FHLBB to adapt to the escalation in thrift failures while coping with the rapid depletion of the federal deposit insurance fund, and the recent conflict in the courts concerning the validity of the FSLIC's assertions of adjudicatory jurisdiction. Part II describes the general receivership process and, more particularly, the *Hudspeth* process as it has now been developed by the Bank Board. Part III turns to examine the constraints by which the *Hudspeth* procedures must be judged. This involves an investigation of the statutory authority supporting the adjudicatory scheme, the applicability of the APA, and the constitutional principles that should inform the drafters of the scheme. Part IV evaluates the existing *Hudspeth* procedures according to the criteria identified in Part III, and this in turn leads to the recommendations, in the Conclusion, for clarifying the FHLBB's mandate and for improving its adjudicatory structure and claims resolution procedures.

24. It is, of course, conceivable that the industry might stabilize and that thrift failures might decline. If this were to happen, the FHLBB might find it more practical to rely on judicial resolution of disputed creditor claims in the few receiverships that remained.

It should also be emphasized that the entire problem might be the product of the present regulatory system. For example, it has been argued that the system of federal deposit insurance, the price of which is not risk-related, has become a major contributor to thrift (and commercial bank) failure because, in the competitive world of modern banking, it removes market disciplines. In other words, it eliminates the incentive for depositor scrutiny that would restrain industry entrepreneurs from engaging in bad-risk activities, and it transfers the costs of risk-taking from the entrepreneurs to the insurance funds and, ultimately, the general public. See, e.g., E. KANE, *THE GATHERING CRISIS IN FEDERAL DEPOSIT INSURANCE* 7-15 (1985); Barth, Brumbaugh, Sauerhaft & Wang, *Insolvency and Risk-Taking in the Thrift Industry: Implications for the Future*, *CONTEMP. POL'Y ISS.*, Fall 1985, at 1; Fischel, Rosenfield & Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 *VA. L. REV.* 301, 312-18 (1987); Garten, *Banking on the Market: Relying on Depositors to Control Bank Risks*, 4 *YALE J. ON REG.* 129 (1986) (concluding that depositors generally are not able to control the level of their bank's risk-taking); Garten, *Still Banking on the Market: A Comment on the Failure of Market Discipline*, 5 *YALE J. ON REG.* 241 (1988) (same); Isaac, *The Role of Deposit Insurance in the Emerging Financial Services Industry*, 1 *YALE J. ON REG.* 195, 204 n.30 (1984); Macey & Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 *YALE J. ON REG.* 215 (1988); O'Driscoll, *Deposit Insurance in Theory and Practice*, in *THE FINANCIAL SERVICES REVOLUTION* 165 (C. England & T. Huertas eds. 1988); Scott & Mayer, *Risk and Regulation in Banking: Some Proposals for Federal Deposit Insurance Reform*, 23 *STAN. L. REV.* 857 (1971). This article assumes no fundamental reforms to the present system.

I. EMERGENCE OF THE HUDSPETH DOCTRINE

The present system of federal thrift regulation is the product of hastily enacted New Deal legislation that has been modified in a reactive, piecemeal fashion during the last half century. The model created by the Home Owners' Loan Act and the National Housing Act did not fully address the problem of liquidating thrifts in receivership; instead the legislators, to the extent that they thought about the problem at all, seemed concerned with the receiver's power to dispose of thrift assets rather than the method by which the validity of creditor claims should be handled. Claims determination was not directly addressed at all.²⁵

To gain a full perspective, it is helpful to place the thrift industry within the broader context of the financial services industry and to describe the manner in which federal thrift regulation has evolved. We then need to examine the ways in which the thrift industry has developed since the inception of federal regulation. It is these developments that have created a need for an administrative claims settlement procedure.

A. Thrifts and the Banking Industry.

Liquidation procedures are not uniform throughout the banking industry, and we should take some account of the special position that thrifts occupy within banking. Thrifts are one of the three principal kinds of depository institutions, all of which are still governed by structures devised during the New Deal.²⁶ The other components are commercial banks and credit unions.²⁷ Together, thrifts—savings and loan associations and savings banks—account for approximately 20% of the private assets held by all financial intermediaries,²⁸ and for a little more than 35% of those held by depository institutions.²⁹

25. See *infra* text accompanying notes 363-87.

26. The relevant legislation for present purposes is the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128 (codified as amended at 12 U.S.C. §§ 1461-1470 (1982)), the National Housing Act of 1934, ch. 847, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750g (1982)) (governing the FHLBB and the FSLIC), the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 1811-1832 (1982)) (governing the Federal Deposit Insurance Corporation), the Banking Act of 1935, ch. 614, 49 Stat. 684 (codified as amended at 12 U.S.C. §§ 1811-1832 (1982)) (same), and the Federal Credit Union Act of 1934, ch. 750, 48 Stat. 1216 (codified as amended at 12 U.S.C. §§ 1751-1795 (1982)) (governing the National Credit Union Administration).

27. See generally 1 M. MALLOY, *THE CORPORATE LAW OF BANKS* § 1.2, at 4-21 (1988).

28. See 2 *id.* app. at 923 chart 1.1. "Financial intermediaries" include insurance companies, real estate investment trusts, mutual, state and local government retirement funds, etc., in addition to the three sets of depository institutions. *Id.*

29. See *id.* at 924 chart 1.2. The actual breakdown among depository institutions (as of December 31, 1983 and excluding international liabilities) was: savings and loan associations—28.7%; mutual savings banks—6.75%; commercial banks—61.0%; and credit unions—3.55%. *Id.*

Thrifts, like commercial banks and credit unions, can be chartered as state or federal institutions. Even if chartered by a state, a thrift can be federally insured.³⁰ Various components of the industry are regulated by different authorities. Federally chartered and federally insured, state-chartered savings and loan associations are subject to the regulatory jurisdiction of the FHLBB and the FSLIC. Federally chartered savings banks are subject to the supervision of the FHLBB and the Federal Deposit Insurance Corporation (FDIC). Commercial banks are subject to the separate regulatory jurisdiction of the Federal Reserve Board (the "Fed"), the Comptroller of the Currency (the "Comptroller"), and the FDIC. Federal credit unions are regulated by the National Credit Union Administration Board (NCUAB).³¹

Although originally formed to serve different functions,³² savings and loan associations and savings banks have come increasingly to resemble commercial banks in their services, investment patterns, and in the conduct of their business activities.³³ Nevertheless, despite calls for the establishment of a unitary system of regulatory machinery,³⁴ they continue to be regulated by separate agencies and according to separate regulatory principles and procedures. This structure has facilitated the development of thrift liquidation procedures that differ from those employed by the FDIC when the latter liquidates banks. For example, except when appointed by the FHLBB as receiver of a savings bank,³⁵ the FDIC has not attempted to adjudicate the validity of creditor claims; instead, it relies upon judicial determination in the courts. When acting as receiver of state-chartered banks, the FDIC is also subject to the jurisdiction of the relevant local state law in its conduct of each receivership.³⁶

Having once been fairly narrowly confined, the business transactions in which the thrift industry has more recently become involved have exposed thrifts to a broader range of creditor claims than was the case before 1980. The size and complexity of claims have greatly increased,

30. The overwhelming majority of thrifts are federally insured, with only Massachusetts-chartered thrifts retaining a significant level of independence from federal regulation. See W. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS LAW* 237-38, 251 (2d ed. 1988) (Massachusetts state insurance system is only significant remaining state insurance system for savings banks; by 1981, savings and loan associations insured by FSLIC represented 98% of all savings and loan assets).

31. On the structure, jurisdiction and powers of these agencies, see generally 1 M. MALLOY, *supra* note 27, § 1.3, at 21-72.

32. See *infra* note 52 and accompanying text.

33. See *infra* notes 53-68 and accompanying text.

34. See generally, e.g., 1 M. MALLOY, *supra* note 27, § 1.4, at 72-79.

35. See *infra* text accompanying notes 167-68.

36. See *infra* text accompanying notes 448-52.

simultaneously magnifying the potential for disputes concerning their validity. These developments have rendered inadequate the traditional liquidation processes employed by the FSLIC. They have created financial pressures that have induced the FHLBB and the FSLIC, in an attempt to contain the costs of liquidation, to devise new strategies for handling failed thrifts and for processing the claims of creditors administratively. At the same time, the complexity of many creditors' claims seems to have spurred attempts by creditors to litigate their claims in the courts.³⁷

With the convergence of thrift and commercial bank business, and the kinds of claims in receivership that this business tends to generate, the differences between the in-house, administrative claims determination procedures employed by the FHLBB and the FSLIC, on the one hand, and the external, judicial procedures relied upon by the FDIC, on the other, have begun to appear anomalous. It is not surprising, therefore, that those opposing the *Hudspeth* doctrine have argued that if the FDIC can rely on judicial settlement of creditors' claims, so too should the FSLIC.³⁸

Yet one should not overlook the historical differences between commercial bank and thrift regulation, or the differences that still remain. The notion of a separately regulated thrift industry is premised upon the long-standing American concern for the protection and encouragement of private home ownership. It has been thought important that funds should always be channeled in the direction of private home purchasers, and the concept of joint commercial bank/thrift regulation carries with it the danger that the private home buyer would be unable to compete for credit in the commercial marketplace.³⁹ This concern has tended to promote a paternalistic outlook on the part of the thrift regulators, one that perhaps contributes to the desire to maintain an internal, self-sufficient and inexpensive liquidation process.

B. *Development and Structure of the Regulatory Framework.*

Before 1932 the federal government had no involvement in the thrift industry. State chartering and regulation of thrifts had existed, however, in a number of states since the early nineteenth century.⁴⁰ Thrifts, bear-

37. For an indication of the scale of recent litigation, see *infra* notes 228-43.

38. See *infra* text accompanying notes 430-46.

39. See, e.g., Gray, *The Role of Regulation in the Thrift Industry*, 6 ANN. REV. BANKING L. 235, 236-37 (1987); Wallace, *Home Ownership Drives the Thrift System*, OUTLOOK, Sept.-Oct. 1986, at 9.

40. See generally W. LOVETT, *supra* note 30, at 232-35; E. SYMONS & J. WHITE, BANKING LAW 51-52, 54-56 (2d ed. 1984); UNITED STATES BLDG. & LOAN LEAGUE, HISTORY OF BUILDING AND LOAN IN THE UNITED STATES 123-32 (H. Bodfish ed. 1931) [hereinafter HISTORY OF BUILDING AND LOAN]; Barth & Regalia, *The Evolving Role of Regulation in the Savings and Loan Indus-*

ing various titles such as "building associations," "savings and loan associations," and "savings banks," were chartered under the laws of the various states and were usually confined to narrowly localized operations.⁴¹ They were also subjected to increasingly intensive regulation and supervision, especially during the latter quarter of the nineteenth century.⁴²

Federal regulation of the thrift industry came in the wake of major legislation governing commercial banks,⁴³ and commenced with the creation of the Home Loan Bank System in 1932.⁴⁴ More important was the enactment of the Home Owners' Loan Act of 1933,⁴⁵ which empowered the recently created FHLBB⁴⁶ to charter federal savings and loan associations and subject them to the FHLBB's regulation. A year later Congress established the FSLIC to provide federal deposit insurance for, exercise supervision over, and act as conservator or receiver in respect of, federal thrifts. At their option or that of their chartering state, state-chartered building associations, savings and loan associations, homestead associations and cooperative banks could also apply for FSLIC insurance. The insurance fund was to be self-financing and replenished from premiums levied on the deposits of insured thrifts. The FSLIC was to act under the direction of the FHLBB.⁴⁷

During the ensuing four decades the powers and jurisdiction of the FHLBB and FSLIC were extended in various directions (often together with those of the FDIC in respect of commercial banks). The FHLBB, for example, was granted powers to issue cease and desist orders, appoint the FSLIC as receiver for state-chartered thrifts, charter savings banks,

try, in *THE FINANCIAL SERVICES REVOLUTION*, *supra* note 24, at 113, 115-24; Lockwood, *Thrift Industry Passes Its 170th Anniversary*, *OUTLOOK*, Sept.-Oct. 1986, at 20. For a fuller discussion of the directly relevant legislative history, see *infra* notes 355-419 and accompanying text.

41. National institutions, which operated through branch offices and the mail, were driven out of business by opposition, largely from local thrifts and their lobby, the U.S. Savings and Loan League, during the economic depression of the 1890s. See W. LOVETT, *supra* note 30, at 246-47; *HISTORY OF BUILDING AND LOAN*, *supra* note 40, at 105-15; Barth & Regalia, *supra* note 40, at 120.

42. See *HISTORY OF BUILDING AND LOAN*, *supra* note 40, at 123-29; W. LOVETT, *supra* note 30, at 247.

43. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 1811-1832 (1982)). This legislation created the FDIC and, adding § 12(B) to the Federal Reserve Act, ch. 6, 38 Stat. 251 (1913), established a system of federal deposit insurance for banks. Section 12(B) was later designated as a separate act, known as the Federal Deposit Insurance Act. See Act of September 21, 1950, ch. 967, § 1, 64 Stat. 873 (codified at 12 U.S.C. § 264 (1982)).

44. Federal Home Loan Bank Act of 1932, ch. 522, § 17, 47 Stat. 725, 736-37 (codified as amended at 12 U.S.C. § 1437 (1982)) (creating the Federal Home Loan Bank Board and twelve home loan bank districts); see also *infra* text accompanying notes 357-60.

45. Ch. 64, 48 Stat. 128 (codified as amended at 12 U.S.C. § 1464 (1982)).

46. See *supra* note 44 and accompanying text.

47. National Housing Act of 1934 § 402, 12 U.S.C. § 1725 (1982) (current section includes minor amendments to original section 402).

and convert state thrifts to federal charter. The FSLIC was given powers to terminate federal insurance, extend financial assistance to troubled thrifts, and borrow money to replenish its insurance fund.⁴⁸

The picture that emerges is that of the FHLBB exercising chartering and directory powers over two insuring agencies, the FSLIC and the FDIC (in the limited case of federal savings banks), each of which in turn exercises extensive regulatory powers over the thrifts insured by them and each of which is appointed in a separate institutional capacity as the receiver of any such thrifts when they fail.

Concern for protecting small investors has not been the only force driving the growth of federal thrift regulation. Thrifts are an important element in the maintenance of the public supply of money,⁴⁹ and the maintenance of public confidence in the thrift system is thought to be an essential national concern.⁵⁰ It is not surprising, therefore, that "the financial industry, particularly the depository institutions segment, is one of the most heavily regulated industries in America."⁵¹

C. *Transformation of the Thrift Industry.*

The original function of savings and loan associations was the narrow one of receiving deposits from would-be home owners and providing loans to depositors for the purpose of building or acquiring real property, particularly housing. Only at a later stage did savings and loan associations begin lending to borrowers who were not also their depositors. Savings banks, on the other hand, were philanthropic, being originally designed to provide financial services for the small saver. The only significant creditors of both savings and loan associations and savings banks, traditionally, were their depositors.⁵²

In recent years, however, savings and loan associations and savings banks have not only tended to converge, both structurally and functionally,⁵³ but they have become exposed to a novel range of concerns. From

48. See *infra* text accompanying notes 388-419 (describing some of the relevant legislation).

49. See M. FRIEDMAN & A. SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES 1867-1960*, at 662-72 (1963).

50. See, e.g., Barth, Brumbaugh, Sauerhaft & Wang, *supra* note 24, at 2-3; Note, *The "Brokered Deposit" Regulation: A Response to the FDIC's and FHLBB's Efforts to Limit Deposit Insurance*, 33 UCLA L. REV. 594, 603-04 (1985).

51. Barth & Regalia, *supra* note 40, at 114; cf. *Fahey v. Mallonnee*, 332 U.S. 245, 250 (1947) (Jackson, J.) ("Banking is one of the longest regulated and most closely supervised of all public callings." (referring to the regulatory powers of the FHLBB)).

52. See generally *FEDERAL HOME LOAN BANK SYSTEM, A GUIDE TO THE FEDERAL HOME LOAN BANK SYSTEM* 5-6 (5th ed. 1987) [hereinafter *FHLB GUIDE*]; *HISTORY OF BUILDING AND LOAN*, *supra* note 40, at 11-18; Barth & Regalia, *supra* note 40, at 115-16; Gray, *supra* note 39, at 238-40; Lockwood, *supra* note 40, at 20.

53. See, e.g., E. SYMONS & J. WHITE, *supra* note 40, at 57-58.

the early 1960s, a series of developments completely altered the economic environment within which thrifts function. The most important of these developments were: (i) increasing competition between thrifts and banks; (ii) the deregulation and volatility of interest rates; and (iii) the decline in inflation and the collapse of the oil boom.⁵⁴

In the 1960s, thrifts found themselves under increasing competition from commercial banks for small savers. The Fed permitted banks to pay higher interest rates on certain popular kinds of deposits, and thrifts suffered severe disintermediation (loss of funds). The Act of September 21, 1966,⁵⁵ which permitted thrifts to offer slightly higher rates on savings deposits than commercial banks, restored some protection for thrifts.⁵⁶ But, with the passage of the Housing and Urban Development Act of 1968,⁵⁷ which gave thrifts broader investment powers, thrifts entered into direct competition with banks in the provision of many financial services.

By the late 1970s both banks and thrifts were facing external competition from money market funds. This development induced Congress to enact the Depository Institutions Deregulation and Monetary Control Act of 1980,⁵⁸ the purpose of which was to phase out ceilings on maximum interest rates. But one effect was to plunge thrifts into a "trial by interest rates"⁵⁹ as they competed for deposits while finding themselves locked into long-term mortgages that bore much lower rates of return.⁶⁰

Attempting to resolve this dilemma, Congress enacted the Garn-St Germain Depository Institutions Act of 1982.⁶¹ The Act allowed thrifts to diversify and expand their portfolios into other investments, subject to a limitation that these new assets not exceed 10% of their total assets. Some states, including California and Texas, went further and lifted all asset limitations from their state-chartered thrifts.⁶² Deregulation paved the way for thrifts to enter whole new areas of business activity and,

54. See generally F. BALDERSTON, *THRIFTS IN CRISIS* 4-9 (1985); A. CARRON, *THE FLIGHT OF THE THRIFT INSTITUTIONS* 11-21 (1982); FHLB GUIDE, *supra* note 52, at 13-23; W. LOVETT, *supra* note 30, at 227-32; Kriz, *The Sick Get Sicker*, 1987 NAT'L J. 874, 875-76; Pfeiler, *FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?*, 53 LEGAL BULL. 433, 433 n.1 (1987); Note, *supra* note 50, at 608-12.

55. Pub. L. No. 89-597, 80 Stat. 823 (codified in scattered sections of 12 U.S.C.) (amending the Federal Reserve Act, Federal Deposit Insurance Act, and Federal Home Loan Bank Act).

56. See, e.g., Lockwood, *supra* note 40, at 23.

57. Pub. L. No. 90-448, 82 Stat. 476 (codified in scattered sections of 12 U.S.C. ch. 13).

58. Pub. L. No. 96-221, 94 Stat. 132 (codified at 12 U.S.C. §§ 3501-3524 (1982)).

59. FHLB GUIDE, *supra* note 52, at 18.

60. See F. BALDERSTON, *supra* note 54, at 5-6; A. CARRON, *supra* note 54, at 12-13.

61. Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.).

62. For a recent survey of the extensive difficulties currently confronting state-chartered and state-regulated thrifts, see Bancroft, *Banking on Deregulation Can Be Hazardous to Your State's Financial Institutions*, GOVERNING, Jan. 1988, at 44.

through high-risk business ventures accompanied by the ability to offer automatic federal insurance to potential depositors,⁶³ to grow at "astronomical rates" until the FHLBB placed caps on growth rates in 1983.⁶⁴

The next blow came from the decline in the inflation rate and the sudden slump in oil-driven economic prosperity, particularly in the Southwest. Anticipating exponential increases in the value of real estate, thrift managers had often grossly overextended themselves.⁶⁵ When the oil boom ended, the poor asset quality of their investments threw well over 100 thrifts into difficulties with the FHLBB's minimum asset requirements, and dozens immediately became insolvent.⁶⁶ Hence the primary cause of thrift failure had shifted by the mid-1980s from the interest rate squeeze of the late 70s and early 80s to imprudent investment strategies,⁶⁷ and a major contribution to the difficulties in which thrifts have found themselves has been the relative inexperience of thrift managers in the new areas of enterprise into which deregulation has so rapidly thrust them.⁶⁸

Finally, the Tax Reform Act of 1986,⁶⁹ which adversely affected the value of real estate development, has probably also had a significant impact on the asset portfolios of the more fragile thrifts.⁷⁰

D. *Escalation of Thrift Failures and Depletion of the FSLIC's Insurance Fund.*

To cope with the ailing state of the industry, Congress has given the FHLBB broader powers for dealing with failed or failing thrifts,⁷¹ and

63. On the distortions produced by the deposit insurance "subsidy," see E. KANE, *supra* note 24, ch. 5.

64. See Kriz, *supra* note 54, at 875-76.

65. See *id.* at 877; Note, *supra* note 50, at 611-12.

66. See Kriz, *supra* note 54, at 877.

67. "In [1982], most of the thrift problems stemmed from interest rate risk (spread problems), whereas in 1986 the cases were almost exclusively related to credit risk (bad-asset cases)." 1986 FHLBB ANN. REP. 26-27 (1987).

68. Speaking on the diversification permitted thrifts as a result of the Garn-St Germain Depository Institutions Act, the former general counsel of the FHLBB, Harry Quillian, has remarked, "You had 4,500 institutions at that time that were suddenly thrown into, or thought they must jump into, business activities that they were not used to and not really prepared for, to make more money to recoup their positions." . . . Kriz, *supra* note 54, at 875.

Managerial incompetence, however, is not confined to ailing thrifts. According to the Comptroller of the Currency, citing a study of the causes of bank failures from 1979 to 1987, "banks continue to fail the old-fashioned way: through managerial incompetence . . ." *Bank-Failure Causes Cited*, N.Y. Times, Jan. 21, 1988, at D9, col. 5 (city ed.).

69. Pub. L. No. 99-514, 100 Stat. 2085 (codified in scattered sections of 26 U.S.C.A.).

70. For an analysis of the Act's likely impact on real estate and mortgages, see Johnson, *Financial Impact of the 1986 Act on Real Estate Investments—A View from the Spreadsheets*, 36 TAX NOTES 309 (1987).

71. See *infra* text accompanying notes 407-19.

the FHLBB has taken various forms of action itself. For example, in 1976 it promulgated a regulation permitting federal thrifts to incorporate "due-on-sale" clauses in their loan instruments as a device for escaping their commitments on sales of the mortgaged property.⁷² In 1985 the FHLBB issued a rule requiring supervisory approval of direct investment by FSLIC-insured thrifts in excess of certain specified thresholds.⁷³ A "management consignment program," designed to enable the FSLIC to take control and improve the health of troubled thrifts before they become too great a burden on the FSLIC, has been instituted,⁷⁴ and, in an effort to improve the quantity and quality of its regulatory supervision force, the Board has transferred its examination functions and examiners to the twelve District Banks.⁷⁵

These and other measures,⁷⁶ while helping to contain the problem, have not proven enough to stem the tide. The number of "brain dead" and "terminally ill" thrifts⁷⁷ that are so irretrievable as to compel their liquidation has grown rapidly in recent years. Whereas during the entire period from 1934 to 1980 the FHLBB put only 13 thrifts into liquidation, in 1987 alone it put 25 into receivership and liquidated 17,⁷⁸ and the

72. 12 C.F.R. § 545.34(a) (1988); see *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) (upholding the validity of the regulation over state law prohibiting such clauses). Express preemption, under certain circumstances, of due-on-sale provisions was incorporated in the Thrift Institutions Restructuring Act, Pub. L. No. 97-320, § 341, 96 Stat. 1496, 1505 (1982) (codified at 12 U.S.C. § 1701j-3 (1982)).

73. See 1985 FHLBB ANN. REP. 17 (1986). This measure was bolstered by the Thrift Industry Recovery Act, Pub. L. No. 100-86, § 406, 101 Stat. 604, 614 (1987) (codified at 12 U.S.C.A. § 1464 (West Supp. 1988)), which empowers the FHLBB to establish minimum capital requirements and to treat the failure to observe these requirements as an unsound or unsafe practice.

74. See 1986 FHLBB ANN. REP. 17, 28 (1987). But see *infra* note 152.

75. See 1985 FHLBB ANN. REP. 21 (1986); Gray, *supra* note 39, at 242-44.

76. See, e.g., Pfeiler, *supra* note 54, at 434 n.4 (restructuring and increasing staff size).

77. See Kriz, *supra* note 54, at 875.

78. The number of receiverships during the life of the FSLIC is as follows:

1934-39	— 0
1940-41	— 7
1942-65	— 0
1966-71	— 6
1972-80	— 0
1981	— 1
1982	— 1
1983	— 6
1984	— 9
1985	— 11
1986	— 21
1987	— 25
1988 (to July 1)	— 30

See 1986 FHLBB ANN. REP. 31-35 (1987); FHLB GUIDE, *supra* note 52, at 18, 21-22; Grant, *The FSLIC: Protection Through Professionalism*, FHLBB J., Feb. 1981, at 9; telephone interview with Judith L. Friedman, Associate General Counsel, FHLBB (Aug. 29, 1988). In addition, 24 thrifts were placed into the management consignment plan in 1987 and one more added as of July 1, 1988. *Id.*

Board's present chairman recently estimated that the agency will close one thrift a week in 1988.⁷⁹ In Texas alone the FHLBB plans to close or merge 104 thrifts during 1988.⁸⁰

The potential magnitude of receivership claims is evident from the fact that approximately 340, and perhaps as many as 510,⁸¹ thrifts—representing 10% of the industry—are currently estimated to be insolvent.⁸² The pressure of depositor payouts drove the federal insurance fund itself into a \$6.3 billion deficit by the beginning of 1987.⁸³ A congressional/executive compromise culminated in the Competitive Equality Banking Act of 1987,⁸⁴ title III of which authorized the FSLIC to recapitalize its insurance fund (thereby enabling a fresh batch of moribund thrifts to be put into receivership).

Yet even this measure has proved inadequate. Healthy thrifts have protested their obligation to support, through the emergency special insurance assessments levied on their deposits, the mismanagement of their ailing counterparts. Those eligible to do so have embarked upon a "silent run," electing to leave the FSLIC insurance system and seek FDIC insurance.⁸⁵ Some thrift industry experts believe a second bailout, possibly involving an appropriation of taxpayer funds, will soon be required.⁸⁶ And the General Accounting Office recently reported to the Senate

79. See Day, *More Hard Times for S & Ls*, Wash. Post, Dec. 21, 1987, at 22, cols. 1, 4 (weekly ed.). By late July, 44 thrifts had actually failed in 1988, as compared with 48 for the whole of 1987. See Hilder, *Shaky Coverage*, Wall St. J., July 27, 1988, at 1, col. 6, 16, col. 2.

80. See Hayes, *Bank Board Plan Near on Texas Savings Units*, N.Y. Times, Jan. 16, 1988, at 21, col. 5 (national ed.) (Texas's "troubles represent about half of our problems nationwide." (quoting M. Danny Wall, Chairman, FHLBB)). In the space of six weeks the FHLBB recently had to double the estimate of its costs in closing or merging insolvent Texas thrifts, from \$7 billion to \$15.2 billion. See Nash, *Bank Board Doubles Texas Cost Estimate*, N.Y. Times, July 8, 1988, at 23, col. 4 (national ed.).

81. The amount varies according to whether generally accepted accounting principles, which the thrift industry will have to use beginning in 1989, or regulatory accounting principles, which produce lower figures, are used. See Nash, *Record Loss for Savings Industry*, N.Y. Times, March 25, 1988, at D1, cols. 3, 5 (city ed.).

82. See Day, *supra* note 79, at 22, col. 3; Hayes, *supra* note 80; Nash, *supra* note 81, at D1, cols. 3-5. In a report to the Senate Banking Committee, the General Accounting Office recently noted that the FHLBB has identified more than 200 hopelessly insolvent thrifts and another 300 that are insolvent under generally accepted accounting principles. See Nash, *A Gloomy Report on F.S.L.I.C.*, N.Y. Times, May 20, 1988, at 27, col. 3, 28, col. 3 (national ed.).

83. See 1986 FHLBB ANN. REP. 25 (1987).

84. Pub. L. No. 100-86, 101 Stat. 552 (to be codified in scattered sections of 12 U.S.C.A.).

85. See Nash, *FSLIC's Second Bailout Is Studied*, N.Y. Times, Mar. 7, 1988, at 23, col. 6, 26, cols. 3-4 (national ed.).

86. See *id.* at 23, col. 6. This situation has led one of the nation's major thrift industry lobbies, the National Council of Savings Institutions, among others, to propose a contingency plan involving the merger of the FSLIC and the FDIC and their insurance funds. See *id.* at 26, col. 1; Statement by J. Morgan, Chairman of the National Council of Savings Institutions, Washington, D.C. (Mar. 2, 1988).

Banking Committee that at the end of 1987 the federal insurance fund deficit had grown to \$13.7 billion—more than twice the level at which it had stood only one year before.⁸⁷

Pressures on the insurance fund have been accompanied by an escalation in the costs of administering the increasing volume of receiverships. For example, in 1986 alone annual insurance settlement and administrative costs increased from \$31.2 million to nearly \$57 million.⁸⁸

E. *Reaction and Adaptation at the FHLBB.*

The financial difficulties of the Insurance Fund, and the rapid increase in the cost of assisting and liquidating failed thrifts, forced the FHLBB and FSLIC to investigate ways of reducing expenses and expediting its procedures. For those thrifts that are thought to be salvageable, the FHLBB and the FSLIC have developed various techniques designed to avoid either having to place a thrift in receivership⁸⁹ or, if this is unavoidable, having to liquidate it once it has been placed in receivership.⁹⁰ In these ways the FSLIC has been able to reduce significantly the actual and potential payouts from the insurance fund that it might otherwise have to make.

The agencies have also tried to contain the costs of receiverships by developing exclusive, internal claims adjudication procedures. The importance to the agencies of these procedures is expressed in a report, referring to the FSLIC's victory in the *Hudspeth* decision,⁹¹ by the Litigation and Special Projects Division of the FHLBB's Office of General Council:

The Division won a significant decision establishing the exclusivity of the FSLIC's procedures for administrative adjudication of creditors' claims against the assets of institutions in receivership. The decision confirmed that the FSLIC, as receiver, must make an initial determina-

87. See Nash, *supra* note 82, at 27, col. 3. A short while earlier the FHLBB itself announced that at the end of 1987 the federal insurance fund deficit had grown to \$11.6 billion. See Day, *Deficit Growing at FSLIC*, Wash. Post, Apr. 18, 1988, at A1, A8; Nash, *Fund to Insure Savings Industry in Critical State*, N.Y. Times, Apr. 19, 1988, at 1, col. 1 (national ed.). More recently, the chairman of the FHLBB and an undersecretary of the Treasury estimated that an amount of \$30 billion would be required to bail out the nation's thrift industry. See Nash, *Treasury Says Savings Aid Shouldn't Tax the Taxpayer*, N.Y. Times, Aug. 3, 1988, at 25, col. 4 (national ed.) (reporting on hearings conducted by the Senate Banking Committee). The following day the chairman of the FDIC disagreed, stating that in his view a sum of \$50 billion was required. See Hershey, *FSLIC's Need Put at \$50 Billion*, N.Y. Times, Aug. 4, 1988, at 25, col. 6 (national ed.).

88. See 1986 FHLBB ANN. REP. 25 (1987). According to one report, legal fees charged to the FSLIC by outside counsel rose to \$87 million for 1987, compared with \$37 million for 1986. See Brogan, *Bank Failures Spell Success for Firms*, Legal Times, June 6, 1988, at 4, col. 1.

89. See *infra* text accompanying notes 149-52.

90. See *infra* text accompanying notes 189-95.

91. See *infra* text accompanying notes 98-117.

tion concerning the validity and priority of a creditor's claim, with further administrative review by the Board, before the courts may intervene. This decision will promote the efficiency of the liquidation process and result in enormous savings in legal fees.⁹²

The administrative procedures existing when *Hudspeth* was decided were virtually nonexistent, however, so the Adjudication Division of the Office of General Counsel of the FHLBB has since been engaged in developing new procedures. This process remains incomplete: a series of proposed and interim rules amending existing procedures have been published since late 1985, but final rules have still not been published by the Board.⁹³ Meanwhile, however, the agencies have found themselves embroiled in litigation challenging both the statutory and the constitutional bases of their asserted adjudicative power.⁹⁴ Hence the procedures that have so far been instituted remain not only fluid and experimental but also of uncertain legal status.

F. *Conflict in the Courts.*

To establish and enforce its asserted power as receiver to adjudicate creditors' claims, the FSLIC has adopted the practice of seeking to have claims suits that have been initiated in state courts removed to the federal courts, where the FSLIC then moves for them to be dismissed for want of subject matter jurisdiction. The FSLIC's argument is that, as receiver, it has been vested with the power to determine for itself the validity of creditor claims,⁹⁵ and that the jurisdiction of the courts to make independent determinations has been precluded.⁹⁶

This strategy has often proved successful. Having secured some acknowledgement of its position from the federal district court in Hawaii,⁹⁷

92. 1985 FHLBB ANN. REP. 46 (1986). On the other hand, the motives underlying the agencies' propagation of the *Hudspeth* doctrine have been questioned by a former General Counsel of the FHLBB. See Leibold, *The Hudspeth Doctrine: Its Conception, Birth and Possible Demise* 1 (Oct. 6-7, 1988) (unpublished paper to be delivered at ALI-ABA Course of Study: Failing Financial Institutions, Washington, D.C.) ("The *Hudspeth* doctrine was conceived because, I believe, legal counsel for the FSLIC, not as receiver but as insurer-creditor, although counsel were wearing both hats, attempted to raise any possible legal argument to frustrate what they concluded to be 'black hat' creditors who had obtained verdicts or judgments in civil courts, usually prior to the appointment of a receiver for the association.").

93. See *infra* text accompanying notes 201-05.

94. See *infra* notes 97-148 and accompanying text.

95. The FSLIC relies on § 406(d) of the National Housing Act of 1934, 12 U.S.C. § 1729(d) (Supp. IV 1986). See *infra* text accompanying note 186 (quoting the subsection).

96. Here the FSLIC relies on § 5(d) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(d)(6)(C) (1982). See *infra* text accompanying note 178 (quoting the subsection).

97. See *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251, 255-56 (D. Haw. 1981); cf. *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988, 994, 996-97 (D. Haw. 1982). *Contra W-V Enters. v. FSLIC*, 234 Kan. 354, 372, 673 P.2d 1112, 1125 (1983)

the FSLIC's interpretation of the legislation was firmly endorsed by the Fifth Circuit in *North Mississippi Savings & Loan Association v. Hudspeth*,⁹⁸ which quickly became the leading case on the subject.

1. Hudspeth: *The "Administrative Track."* *Hudspeth* involved a dispute between a thrift (Old North) and its former president (Hudspeth). When in 1977 Mississippi law required all state-chartered thrifts to obtain FSLIC insurance, the FSLIC refused to approve insurance for Old North unless Hudspeth was replaced. He resigned and Old North began paying him a regular monthly amount, which Hudspeth claimed to be a deferred compensation agreement. This agreement was repudiated by Old North in 1982, when the thrift filed in Mississippi chancery court for a declaration that the agreement either did not exist or was terminable. Hudspeth filed a counterclaim for contractual damages and specific performance.

During these proceedings the State of Mississippi placed Old North in receivership and appointed the FSLIC as receiver. On the same day the FHLBB federalized the receivership and named the FSLIC as sole receiver.⁹⁹ The FSLIC, following one of its usual practices in liquidations,¹⁰⁰ then formed a new thrift (New North) and transferred to New North all of Old North's assets and liabilities except its liabilities to stockholders and any obligation owed to Hudspeth. The FSLIC then terminated payments to the former president.

After the FSLIC, as receiver for Old North, had unsuccessfully moved for dismissal of Hudspeth's counterclaim, Hudspeth filed an amended counterclaim joining New North as a party, the latter being an alleged transferee in interest. The FSLIC and New North then removed the action to a federal court and moved successfully to dismiss the counterclaim. Hudspeth's motion to remand to state court was denied. The

(FSLIC unsuccessfully argues for the dissolution of an attachment order on the grounds that the order "interfere[d] with its liquidation of [the defendant thrift]").

98. 756 F.2d 1096 (1985), *cert. denied*, 474 U.S. 1054 (1986). The scope of this decision is not clear. For example, the Fifth Circuit has declared *Hudspeth* inapplicable to the resolution of claims liabilities assumed by transferee thrifts in a purchase and assumption transaction. *See* *Bean v. Independent Am. Sav. Ass'n*, 838 F.2d 739, 742 (5th Cir. 1988). *Hudspeth* was also ignored in a case in which the FSLIC unsuccessfully asserted exclusive jurisdiction to determine whether certain deposits were insured. *See* *Jugum v. FSLIC*, 637 F. Supp. 1045, 1048 (W.D. Wash. 1986); *cf.* *Herbert v. National Credit Union Admin. Bd.*, 663 F. Supp. 833, 839-44 (E.D. Mo. 1987) (doubting *Hudspeth*'s applicability in the case of insured deposits). On the justiciability of insurance claims, see *infra* text accompanying notes 468-72.

99. For the conditions under which this is permissible, see *infra* text accompanying notes 170-75.

100. *See infra* text accompanying note 193.

case then took a remarkable course: a panel of the Fifth Circuit¹⁰¹ first upheld Hudspeth's appeal in part,¹⁰² then a few weeks later dismissed it altogether.¹⁰³

In its withdrawn opinion, the court had agreed that the presence of New North and the FSLIC rendered the action removable to the federal court, and the panel agreed that the district court had "properly dismissed all of Hudspeth's claims against New North and much of his action against Old North."¹⁰⁴ The court accepted that Hudspeth's assertion that the FSLIC was not authorized to set aside his contract was, as a result of the operation of 12 U.S.C. sections 1464(d)(6)(C) and 1729(d),¹⁰⁵ "route[d] to the administrative process."¹⁰⁶ But the court concluded that Hudspeth's claim against Old North for payment of past services rendered was not barred and should be remanded to the state court.¹⁰⁷ The panel agreed with Hudspeth that neither section 1464(d)(6)(C) nor section 1729(d) barred the judicial determination of the validity of Hudspeth's claim against Old North. Relying upon Supreme Court decisions,¹⁰⁸ the court took the view that "the adjudication of claims against a debtor, as opposed to the allocation of assets to

101. Judge Higginbotham wrote the panel's opinion, with Judges Thornberry and Reavley concurring.

102. The court's initial opinion, dated April 5, 1985, was reported in West's advance sheets as *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) [hereinafter *Hudspeth*, withdrawn]. The opinion is reprinted as Appendix A to Pfeiler, *supra* note 54, app. at 471-75.

103. The second opinion is contained in West's bound volume. See *North Miss. Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986) [hereinafter *Hudspeth*].

104. *Hudspeth*, withdrawn, *supra* note 102, 756 F.2d at 1098.

105. See *supra* text accompanying notes 95-96.

106. See *Hudspeth*, withdrawn, *supra* note 102, 756 F.2d at 1101.

107. See *id.* at 1098-99, 1103. The court had been briefed on the possible unconstitutionality of the FSLIC's claimed adjudicative powers and on the question whether the statutory authority to adjudicate existed; in its opinion, however, the court, chose to address only the issue of statutory adjudicative authority. The constitutional questions raised were whether the claimed adjudicative power violated article III of the U.S. Constitution, whether the administrative procedures available for determining the claim were inadequate when measured against the requirements of procedural due process, and whether the FSLIC's conflict of interest in determining claims while being one of the creditors violated due process. Telephone interview with Wylene W. Dunbar, counsel for Hudspeth (Mar. 18, 1988).

108. *Underwriters Nat'l Assur. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 711 n.19 (1982); *Morris v. Jones*, 329 U.S. 545 (1947); *Richle v. Margolies*, 279 U.S. 218 (1929); cf. *Tcherepnin v. Knight*, 389 U.S. 332, 346 (1967) (determination of *existence* of a "security" is distinct from question of the *priority* of claims in receivership, and is a justiciable issue); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60, 61 (2d Cir. 1934) (determination, or "liquidation," of creditor claim is a proceeding in personam against insolvent debtor, and does not directly deal with receivership assets or receivership itself); *Tocci Corp. v. Yaukie Bank for Fin. & Sav., FSB*, No. Civ. A. 87-3121-K (D. Mass. 1988) (Westlaw, 1988 WL 70344) ("At common law, receivers have no power to adjudicate claims.").

satisfy those claims, is not a receivership function.”¹⁰⁹

The FSLIC then petitioned for rehearing, arguing that the effect of the court’s decision would be to place in further jeopardy the already precarious insurance fund. The FSLIC referred to the legislative history of the 1966 and 1968 amendments to the powers of the FHLBB and FSLIC in support of its argument that, as receiver, it possessed the exclusive power to adjudicate creditor claims.¹¹⁰ Hudspeth was not called upon to respond to the petition.¹¹¹ The court decided to revise its decision, this time accepting the FSLIC’s arguments in their entirety, and the Supreme Court subsequently denied Hudspeth’s petition for certiorari.¹¹²

In its revised opinion, the panel adopted the view that legislative history¹¹³ indicated that “Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution,”¹¹⁴ and that the legislation expressed “the overriding Congressional purpose of expediting and facilitating the FSLIC’s task as receiver.”¹¹⁵ Hence, Judge Higginbotham opined, “resolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets”¹¹⁶ and, in violation of section 1464(d)(6)(C), would constitute a restraint of the receivership. He concluded:

In short, all of Hudspeth’s claims are switched to the administrative track by section 1464(d)(6)(C). Hudspeth can challenge the FSLIC’s actions before the FHLBB, and, if unsatisfied, can seek judicial review under the APA.¹¹⁷

The revised *Hudspeth* decision was a major victory for the FHLBB and the FSLIC. It was rapidly followed in a host of district court deci-

109. See *Hudspeth*, withdrawn, *supra* note 102, 756 F.2d at 1102. The court’s conclusion is worth noting, since it rests upon a long-standing distinction between the recognition of pre-receivership claims and the exercise of general receivership powers. The court concluded:

When read in concert, 12 U.S.C. §§ 1464(d)(6)(C), 1729, and 1730(k)(1) construct an orderly scheme. In suits against a state savings institution in a federalized receivership, where the relief requested would interfere with or overturn the effect of any exercise of receivership power, the suit must be dismissed in favor of administrative proceedings before the FHLBB. If, however, an action is based on the pre-receivership conduct of the failed institution, the debt due may be judicially established.

Id. at 1103. On the distinction, see *infra* text accompanying notes 347-53. On subsection 1730(k)(1), see *infra* text accompanying notes 449-52.

110. On this legislative history, see *infra* text accompanying notes 395-412.

111. Telephone interview, *supra* note 107.

112. *Hudspeth v. North Miss. Sav. & Loan Ass’n*, 474 U.S. 1054 (1986).

113. On the court’s use of the legislative history, see *infra* notes 381-410.

114. *Hudspeth*, *supra* note 103, 756 F.2d at 1101.

115. *Id.* at 1102.

116. *Id.*

117. *Id.* at 1103.

sions,¹¹⁸ in those of a significant number of state courts,¹¹⁹ and has been reaffirmed in a series of subsequent Fifth Circuit decisions.¹²⁰ It was also followed in a somewhat equivocal decision of the Seventh Circuit.¹²¹ In addition, a panel of the Ninth Circuit, dealing with the special case¹²² of a claim brought by an insolvent thrift against the FSLIC for having alleg-

118. See *Blakely Airport Joint Venture II v. FSLIC*, 678 F. Supp. 154 (N.D. Tex. 1988); *Peoples' Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104 (D. Kan. 1988); *Vernon Sav. & Loan Ass'n v. Homes Int'l Dev. Corp.*, 676 F. Supp. 247 (S.D. Fla. 1988); *Resna Assocs. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987); *FSLIC v. Florida 100 Dev. Group*, 670 F. Supp. 1577 (S.D. Fla. 1987); *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987), *vacated and remanded*, 851 F.2d 637 (3d Cir. 1988); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC v. Oldenburg*, 658 F. Supp. 609 (D. Utah 1987); *FSLIC v. Hall Whispartree Assocs.*, 653 F. Supp. 148 (N.D. Tex. 1986); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986); *Baer v. Abel*, 649 F. Supp. 25 (W.D. Wash. 1986); *Baer v. Abel*, 648 F. Supp. 69 (W.D. Wash. 1986); *Colony First Fed. Sav. & Loan Ass'n v. FSLIC*, 643 F. Supp. 410 (C.D. Cal. 1986); *FSLIC v. Sajovich*, 642 F. Supp. 74 (C.D. Cal. 1986); *Sunrise Sav. & Loan Ass'n v. Lir Dev. Co.*, 641 F. Supp. 744 (S.D. Fla. 1986); *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93 (W.D. Wash. 1986); *Rembold v. Gibraltar Sav. & Loan Ass'n*, 624 F. Supp. 1006 (W.D. Wash. 1985), *rev'd sub nom. Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); *Murdock-SC Assocs. v. Beverly Hills Fed. Sav. & Loan Ass'n*, 624 F. Supp. 948 (C.D. Cal. 1985), *aff'd in part and rev'd in part*, 815 F.2d 82 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Murdock-SC Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-452); *Gibraltar Bldg. & Loan Ass'n v. State Sav. & Loan Ass'n*, 607 F. Supp. 722 (N.D. Cal. 1985); *cf. First Fin. Sav. & Loan v. FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987) (*Hudspeth* decision recognized but FSLIC held estopped from reconsidering merits of claims already determined in state court). Unreported decisions have been omitted to save space.

119. See *Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 748 P.2d 251 (1987) (split decision); *Keller v. Antioch Sav. & Loan Ass'n*, 143 Ill. App. 3d 278, 492 N.E.2d 937 (1986); *FSLIC v. Superior Court*, 180 Cal. App. 3d 336, 225 Cal. Rptr. 422 (1986), *cert. denied*, 107 S. Ct. 949 (1987); *Union County Bank v. Knox Capital Corp.*, No. C/A 657 (Tenn. Ct. App. Apr. 18, 1986) (Westlaw, 1986 WL 4598); see also *FSLIC v. Kemiedy*, 732 S.W.2d 1 (Tex. Ct. App. 1986) (recognizing the general proposition enunciated in *Hudspeth*, but rejecting the argument that the FSLIC is entitled to redetermine the validity of claims that a court and jury have already adjudicated).

120. See *Red Fox Indus. v. FSLIC*, 832 F.2d 340, 341-42 (5th Cir. 1987); *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563, 564 (5th Cir. 1987), *cert. granted sub nom. Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988); *FSLIC v. Bonfanti*, 826 F.2d 1391, 1393-94 (5th Cir. 1987), *petition for cert. filed sub nom. Zohdi v. FSLIC*, 56 U.S.L.W. 3196 (U.S. Aug. 5, 1987) (No. 87-255); *Chupik Corp. v. FSLIC*, 790 F.2d 1269, 1270 (5th Cir. 1986); see also *Godwin v. FSLIC*, 806 F.2d 1290, 1292-94 (5th Cir. 1987) (affirming decision of district court to deny motion for reconsideration of order granting dismissal of depositors' claim that their deposit was insured). But *cf. Northshore Dev. v. Lee*, 835 F.2d 580 (5th Cir. 1988). In *Northshore*, the court held that when a judgment has already been entered prior to receivership, FSLIC can, on the basis of the *Hudspeth* doctrine, remove the action to federal court and have it dismissed. *Id.* at 593. The court, however, then noted that this does not imply that the district court must also vacate the judgment—FSLIC must choose between pursuing an appeal or securing dismissal and accepting the judgment. *Id.* (district court's denial of motion to vacate held not an abuse of discretion).

121. *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387 (7th Cir. 1987); see *infra* note 134.

122. See *infra* text accompanying notes 241-43.

edly transferred its assets negligently to a buyer, has held that section 1464(d)(6)(C) strips the district courts of jurisdiction to hear the action.¹²³

2. *Morrison-Knudsen: No Statutory Authority.* After a year and a half of uncritical acceptance in federal courts, the *Hudspeth* doctrine received its first major setback at the hands of a panel of the Ninth Circuit in *Morrison-Knudsen Co. v. CHG International, Inc.*¹²⁴ The case involved an insolvent, federally chartered thrift, Westside Federal Savings and Loan Association (Westside), for which the FSLIC had been appointed receiver. Westside was involved in five pre-receivership claims¹²⁵ that the FSLIC, once it had been appointed Westside's receiver, sought to have dismissed by the respective adjudicating and supervising district courts. The FSLIC's motions in the first four claims had been granted on the basis of the *Hudspeth* doctrine, but the supervising court in the motion involving the fifth claim had denied the FSLIC's motion. The Ninth Circuit ruled that there was no appellate jurisdiction in two of the claims, but reversed the orders of dismissal in the other three.

The court was faced with challenges to both the FSLIC's statutory authority to adjudicate claims and its constitutional authority to do so given the provisions of article III of the United States Constitution.¹²⁶ It engaged in an extensive analysis of the statutory framework and legislative history of the FSLIC, its powers under sections 1464(d)(6)(C) and 1729(d), and the regulations promulgated by the FHLBB for processing claims in receiverships, and concluded that the legislation was not intended to confer adjudicatory powers on the receiver.¹²⁷ While acknowledging that the FSLIC has been vested with full receivership powers, the Court rejected the assumption in the second *Hudspeth* opinion that these included adjudication.

123. See *Fidelity Fin. Corp. v. FSLIC*, 834 F.2d 741 (9th Cir. 1987).

124. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451). The Ninth Circuit opinion was written by Judge Sneed, joined by Judges Kennedy and Beezer. For a criticism of *Morrison-Knudsen*, see Huber, *Enforcement Powers of Federal Banking Agencies*, 7 ANN. REV. BANKING L. 123, 160-61 (1988) (describing the case as "a decision for the home team").

125. In the first claim it had been impleaded as a third-party defendant, having allegedly guaranteed repayment of a loan in default for which another thrift was being sued. In the second claim, a developer (CHG), to whom Westside had lent \$6.5 million, had declared bankruptcy; a co-participant in a loan agreement sought declaratory orders against Westside regarding the validity of the agreement, as well as damages and an order quieting title. The third and fourth claims against Westside involved contractual damages and equitable relief arising out of the bankruptcy of CHG. The fifth claim was filed by Westside itself in CHG's bankruptcy proceedings. *Morrison-Knudsen*, 811 F.2d at 1213.

126. See *infra* note 538 (quoting U.S. CONST. art. III, § 1 in full).

127. See 811 F.2d at 1222.

The rock upon which FSLIC's arguments break is that a receiver's ordinary functions do not include adjudication. Judicial adjudication . . . does not restrain or affect a receivership; it simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets.¹²⁸

The court buttressed its statutory interpretation by addressing the constitutional challenge as well. While declining to go so far as to hold the FSLIC's assertions of adjudicatory jurisdiction to be in violation of article III, the court was not persuaded that "the powers [the FSLIC] seeks easily survive *Northern Pipeline* scrutiny."¹²⁹ This apprehension induced the court to read sections 1464(d)(6)(C) and 1729(d) so as to avoid the constitutional difficulty. Though the court recognized that Congress might, "with careful limitations like those governing FSLIC's adjudication of regulatory violations . . . have crafted an adjudicatory jurisdiction for FSLIC in its receivership capacity that would pass constitutional muster," it found itself "convinced" that Congress had "not attempted to do so."¹³⁰ In other words, the court, anticipating serious article III difficulties, read the statutory provisions upon which the FSLIC had relied narrowly and rejected the FSLIC's assertion that they conferred an adjudicatory jurisdiction.¹³¹

The strict interpretive approach of the Ninth Circuit has subsequently been followed in a number of federal and state courts¹³² includ-

128. *Id.* at 1217 (citing, as did the first *Hudspeth* opinion, *Morris v. Jones*, 329 U.S. 545 (1947)); see *supra* note 108.

129. 811 F.2d at 1221 (referring to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court had ruled the bankruptcy court scheme established by the 1978 Bankruptcy Act to be a violation of article III); see *infra* text accompanying notes 545-59.

130. 811 F.2d at 1222. Here the court was, in effect, merely applying the well-established principle that a statute should be construed, if possible, so as to save it from constitutional infirmities. See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2614 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

131. The court did, however, recognize that a creditor might be required to exhaust her administrative remedies, and the three claims were remanded for the district court to address this issue. In deciding whether to require the exhaustion of administrative remedies, the panel thought the trial court should consider whether: (i) resort to the administrative process would be futile; (ii) the administrative process was well-understood and well-developed; (iii) a prompt decision as to all of the contested issues in the case was likely; (iv) an exhaustion requirement would be fair to the parties in light of their resources; (v) it would be fair to other parties in the case whose interests might be affected; (vi) the interests of judicial economy would be served by requiring exhaustion; and (vii) the agency demonstrates that not requiring exhaustion would unduly interfere with its functioning. See 811 F.2d at 1223-24.

132. See, e.g., *Murdock-SC Assocs. v. Beverly Hills Sav.*, 815 F.2d 82 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Murdock-SC Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-452); *Hoinstead Sav. v. Life Sav. & Loan Ass'n*, 668 F. Supp. 1121, 1124 (N.D. Ill. 1987) (opinion vacated and removed from bound volume, but appears in West's advance sheets, see *infra* text accompanying notes 738-39); *FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405, 1416 (D. Utah 1987); *Suminertree Venture III v. FSLIC*, 742 S.W.2d 446, 453 (Tex. Ct. App. 1987); cf. *FSLIC v. Frumenti Dev. Corp.*, 676 F. Supp. 957, 964 (N.D. Cal. 1988) (applying *Morrison-Knudsen* reason-

ing, most recently, the Supreme Court of Texas.¹³³ On the other hand, *Morrison-Knudsen* has also been expressly rejected in favor of the *Hudspeth* doctrine by a number of other courts.¹³⁴

3. Glen Ridge: *A Violation of Article III*. Even if statutory authority to adjudicate does exist, neither the *Morrison-Knudsen* decision nor the decisions that have followed it have directly addressed the question whether such authority would be constitutional. The Constitution did, however, play a decisive role in the Texas court of appeals' decision in *Glen Ridge I Condominiums, Ltd. v. Federal Savings & Loan Insurance Corporation*.¹³⁵ The court, in two carefully reasoned opinions,¹³⁶ concluded that the FSLIC had been granted statutory authority to adjudicate claims and that such authority was a violation of article III. Although the Texas Supreme Court declined to reach the constitutional issue,¹³⁷ the court of appeals' decision is worth considering since it is the only one to date that has directly addressed underlying constitutional concerns.

ing in remanding to a state court a claim involving only state-law rights and obligations, even though the FSLIC was a party); *Peninsula Fed. Sav. & Loan Ass'n v. FSLIC*, 663 F. Supp. 506, 509-11 (S.D. Fla. 1987) (distinguishing *Hudspeth* and partially applying principles enunciated in *Morrison-Knudsen* relating to exhaustion of remedies).

133. See *FSLIC v. Glen Ridge I Condominiums*, 750 S.W.2d 757 (Tex. 1988) (per curiam), *aff'd on other grounds* 734 S.W.2d 374 (Tex. Ct. App. 1986). The decision of the court of appeals is discussed *infra* in text accompanying notes 135-40.

134. The Seventh Circuit, in *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387, 391-95 (7th Cir. 1987), decided, in the absence of fuller argument, to follow *Hudspeth*. A number of district courts have expressly chosen *Hudspeth* over *Morrison-Knudsen*. See, e.g., *Peoples' Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104, 1106 (D. Kan. 1988); *Vernon Sav. & Loan Ass'n v. Homes Int'l Dev. Corp.*, 676 F. Supp. 247, 249 (S.D. Fla. 1988); *Resna Assocs. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371, 1377 (D.N.J. 1987); *FSLIC v. Florida 100 Dev. Group*, 670 F. Supp. 1577, 1580 (S.D. Fla. 1987); *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987), *vacated and remanded*, 851 F.2d 637 (3d Cir. 1988); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138, 140 (S.D. Fla. 1987); *FSLIC v. Oldenburg*, 658 F. Supp. 609, 611 (D. Utah 1987).

135. 734 S.W.2d 374 (Tex. Ct. App. 1986), *aff'd on other grounds*, 750 S.W.2d 757 (Tex. 1988) (per curiam).

136. In the court of appeals there were two motions for rehearings. The first was granted and the court withdrew its initial order affirming the trial court's dismissal of the claims against the FSLIC as receiver for Empire Savings and Loan. It reversed the judgment of the trial court and filed an opinion on December 30, 1986. Then, through a new panel in which only one of the original three judges remained, the court denied the second motion for rehearing and, on June 25, 1987, filed a supplemental opinion in support of its earlier decision, taking into account the opinions in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the most recent Supreme Court decision on the application of article III to administrative agencies. See *infra* text accompanying notes 589-95.

137. See *FSLIC v. Glen Ridge I Condominiums*, 750 S.W.2d at 758-59 (affirming the court of appeals' decision on the ground that statutory authority was lacking).

The Empire Savings and Loan Association (Empire) had partly financed real estate investment by Glen Ridge. When Empire went insolvent and the FSLIC was appointed its receiver, the FSLIC posted Glen Ridge's property for executive foreclosure pursuant to the relevant deeds of trust. Glen Ridge sued the FSLIC, Empire and the various trustees in state court for cancellation of the deeds of trust, damages, injunctive relief, and attorneys fees. Some claims were based on state law and others on federal law. The FSLIC, relying upon *Hudspeth*, had secured dismissal by the trial court of Glen Ridge's claims.

The court of appeals reversed the decision of the trial court insofar as the state-law claims were concerned, but affirmed the dismissal of the federal law claims.¹³⁸ Confining itself to the state-law claims, the Texas court went even further than the Ninth Circuit had done in *Morrison-Knudsen*, ruling that sections 1464(d)(6)(C) and 1729(d) did indeed purport to grant adjudicatory jurisdiction and that, insofar as this jurisdiction included state-law claims, it violated article III.¹³⁹ Motivating the court was the view that the adjudicatory scheme established by the FHLBB and the FSLIC fell far short of the criteria laid down by the United States Supreme Court for permissible departures from the literal provisions of article III.¹⁴⁰

Prior to *Glen Ridge* a district court had rejected an article III challenge on the basis that "*Northern Pipeline* does not apply to administrative claims procedures,"¹⁴¹ a conclusion that seems clearly wrong. The holding in *Glen Ridge* itself has apparently not yet been fully considered in subsequent decisions involving the FSLIC. The article III question has, however, been raised in a few other cases, including two currently pending before the Supreme Court.¹⁴² In each case the lower courts have treated the article III issue as not yet ripe for decision.¹⁴³

138. 734 S.W.2d at 387.

139. See *id.* at 385-87.

140. See *infra* text accompanying notes 568-73, 582, 590-95 (discussing these criteria).

141. See *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 636 F. Supp. 576, 581-82 (N.D. Ill. 1986), *aff'd*, 828 F.2d 387 (7th Cir. 1987).

142. See *Thomes v. Equitable Sav. & Loan Ass'n*, 837 F.2d 1317, 1318 (5th Cir. 1988); *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563, 564-65 (5th Cir. 1987), *cert. granted sub nom.* *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988); *American Fed. Sav. & Loan Ass'n v. Westside Fed. Sav. & Loan Ass'n*, No. C-85-323-C, slip op. (W.D. Wash. Feb. 4, 1986), *reprinted in* *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 38a, FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451) [hereinafter *Stevenson Petition*], *rev'd sub nom. Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. at 3249.

143. In *Thomes v. Equitable Sav. & Loan Ass'n*, 831 F.2d 558 (5th Cir. 1987), a panel of the Fifth Circuit, while applying the *Hudspeth* doctrine insofar as the appellant's non-constitutional challenges were concerned, took note of the Ninth Circuit opinion in *Morrison-Knudsen* and as-

4. *Other Constitutional Issues.* Various other constitutional challenges to the FHLBB and FSLIC procedures have also been raised (unsuccessfully so far). Of the most important, it has been argued that the grant of adjudicatory power to the FSLIC constitutes a violation of the *nondelegation doctrine*,¹⁴⁴ that it violates the *seventh amendment* by denying the right to a jury trial,¹⁴⁵ and that it constitutes a violation of *due process*, either because it deprives the creditor-claimant of a constitutionally adequate hearing or because the FSLIC, as both receiver and insurer, has conflicting interests when adjudicating creditors' claims.¹⁴⁶

In less important challenges, a litigant has contended that the effect of applying the FSLIC's argument, in this case so as to nullify a prior attachment order in the creditor's favor, constitutes an unconstitutional *taking* of a compensable property right,¹⁴⁷ and the question of *sovereign immunity* has been invoked several times, sometimes with success, by the FSLIC in order to buttress its assertion of exclusive jurisdiction to determine claims.¹⁴⁸ The takings and immunity questions will not be examined in this article.

signed for oral argument the appellant's article III challenge to the FSLIC's exercise of adjudicatory jurisdiction. See *id.* at 559. But the court subsequently dismissed the constitutional challenges as unripe because the plaintiffs had not exhausted their administrative remedies. *Thomes*, 837 F.2d at 1318.

144. See *Baer v. Abel*, 648 F. Supp. 69, 78 (W.D. Wash. 1986); *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 100 (W.D. Wash. 1986); *American Fed. Sav. & Loan Ass'n*, No. C-85-323-C, slip op., reprinted in *Stevenson Petition*, *supra* note 142, at 49a-50; see also *infra* text accompanying notes 520-37.

145. See *Coit Independence Joint Venture*, 829 F.2d at 565; *Baer*, 648 F. Supp. at 77-78; see also *infra* text accompanying notes 638-57.

146. See *Coit Independence Joint Venture*, 829 F.2d at 564-65; *FSLIC v. Florida 100 Dev. Group*, 670 F. Supp. 1577, 1583 (S.D. Fla 1987); *Baer*, 648 F. Supp. at 78; *First Am. Sav. Bank*, 639 F. Supp. at 100; *Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 205, 748 P.2d 251, 257-58 (1987); see also *infra* text accompanying notes 601-37.

147. See, e.g., *FSLIC v. Superior Court*, 180 Cal. App. 3d 336, 343, 225 Cal. Rptr. 422, 425-26 (1986) (issue not ripe for review), *cert. denied*, 107 S. Ct. 949 (1987).

148. The contexts within which the claims of immunity have been made have varied, and the response of the courts has been mixed. See, e.g., *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214-15, 1222-23 (9th Cir. 1987) (FSLIC's sovereign immunity held waived by 12 U.S.C. § 1729(b)(1)(B)), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); *FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405, 1417 (D. Utah 1987) (FSLIC's claim of adjudicatory power under 12 U.S.C. § 1729(d) rejected along with claim of sovereign immunity); *Baer v. Abel*, 649 F. Supp. 25, 26-27 (W.D. Wash. 1986) (court declared that it had no subject matter jurisdiction to hear counterclaims against FSLIC where FSLIC acted as receiver and defendants had not exhausted administrative remedies); *Baer*, 648 F. Supp. at 75-77 (FSLIC held immune from suit where FSLIC acted as receiver and plaintiffs did not bring claim in administrative forum); *Colony First Fed. Sav. & Loan Ass'n v. FSLIC*, 643 F. Supp. 410, 414-15, 417-18 (C.D. Cal. 1986) (FHLBB held immune from suit challenging its appointment of a conservator; claims against individual officers banned where they acted in their official capacities); *Modern Supply Co.*, 50 Wash. App. at 194, 748 P.2d at 251 (state court lacked jurisdiction over claim against FSLIC in its capacity as receiver); *Summertree Venture III v. FSLIC*, 742 S.W.2d 446,

II. THE LIQUIDATION PROCESS

A. *Options for Dealing With Troubled Thrifts.*

1. *Sales and Financial Assistance.*¹⁴⁹ Thrifts are continuously monitored for safety and soundness by the examinations staff of the District Banks and the FHLBB's Office of Regulatory Policy, Oversight and Supervision. A primary concern is to try to prevent thrifts from failing in the first place; to this end the FSLIC has been granted extensive statutory powers to obviate outright receivership by lending assistance to troubled thrifts.¹⁵⁰

When the FHLBB's Office of Regulatory Policy, Oversight and Supervision believes that a thrift is in imminent danger of default, it calls upon the FSLIC's Mergers and Acquisitions Division to determine if some method short of receivership can be devised to rehabilitate the thrift or dispose of it in a manner that would protect all the parties involved. The FSLIC can provide loans or contributions to the troubled thrift, acquire its assets or liabilities, financially assist its merger with another institution, consolidate it with others, or convert it from mutual to stock ownership in order to infuse it with new capital.¹⁵¹ The FSLIC has also developed a Management Consignment Program, under which the thrift's management is replaced, pending the arrangement of a merger.¹⁵²

454 (Tex. Ct. App. 1987) (FSLIC not, in this instance, a court-appointed receiver, and enjoys no judicial immunity); *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374, 384 (Tex. Ct. App. 1986) (case held not to involve automatically a "public right," thus justifying an administrative tribunal, simply because Congress waived FSLIC's immunity), *aff'd*, 750 S.W.2d 757 (Tex. 1988) (per curiam); *cf.* *FHLBB v. Hague*, 664 F. Supp. 245, 251 (W.D. La. 1987) (FSLIC and FHLBB enjoy sovereign immunity from suits sounding in tort and contract, and thus may not be sued directly), *aff'd*, 840 F.2d 14 (5th Cir. 1988); *Kohlbeck v. Kis*, 651 F. Supp. 1233, 1235 (D. Mont. 1987) (federal court jurisdiction over claims against FSLIC as receiver precluded until administrative procedure complete); *Colony First Fed. Sav. & Loan Ass'n*, 643 F. Supp. at 416-17 (dealing with immunity under Federal Tort Claims Act).

149. See generally FHLB GUIDE, *supra* note 52, at 49-53; W. LOVETT, *supra* note 30, at 131-44; E. SYMONS & J. WHITE, *supra* note 40, at 600-03 (bank regulation context).

150. See 12 U.S.C.A. § 1729(f) (West Supp. 1988).

151. See FHLB GUIDE, *supra* note 52, at 49; Williams, *Thrift Acquisitions and Mergers: Statutory and Regulatory Framework and Current Issues*, in OFFICE OF LEGAL EDUC., U.S. DEPT OF JUSTICE, FINANCIAL INSTITUTIONS SEMINAR 715, 981-93 (1987). As this article went to press, the FHLBB published guidelines regarding FSLIC's policy on financial assistance. See FSLIC Statement of Policy and Criteria on Assistance to Insured Institutions Absent a Requirement for an Immediate Merge Acquisition by a Third Party, 53 Fed. Reg. 30,714 (1988).

152. The Management Consignment Program is designed to minimize the ultimate cost of rehabilitation, merger or liquidation by facilitating FSLIC intervention where a thrift's assets are being dissipated. See FHLB GUIDE, *supra* note 52, at 51-52; 1986 FHLBB ANN. REP. 28 (1987); Williams, *supra* note 151, at 985-86. The program has been criticized by some observers as ineffective. See Stevenson, *A Good Idea Gone Sour: Savings Talent on Loan*, N.Y. Times, June 8, 1988, at D1, col. 4, D9, col. 2 (city ed.).

2. *Receivership.* If it is not feasible to rehabilitate or merge the insolvent thrift, the FHLBB places the thrift into receivership, and appoints, as appropriate, either the FSLIC or FDIC as receiver.¹⁵³

Because of the need to avoid loss of confidence in the thrift industry as a whole, large thrifts have tended to be treated more favorably than their smaller counterparts. An example is the highly publicized assistance given recently by the FSLIC to the American Savings and Loan Association.¹⁵⁴ Following the example of action taken the previous day by the FDIC to assist the subsidiary banks of the First Republicbank Corporation of Dallas,¹⁵⁵ and in order to prevent a crisis of public confidence, the FHLBB announced that all deposits in American, regardless of size, would be guaranteed by the FSLIC. The effect of such a measure is not only to provide unlimited deposit insurance¹⁵⁶ but also to keep open the doors of a thrift, thereby maintaining the ordinary legal rights of creditors. If the *Hudspeth* doctrine is valid, this means that the rights of creditors depend significantly on the decision whether to assist a thrift or place it into receivership.

3. *Federal Asset Disposition Association.* In the process of assisting or liquidating a troubled thrift, the FSLIC frequently takes over thrift assets with a view to managing and ultimately realizing them at their optimal value. To provide specialist attention to this function, the FHLBB chartered a private company, wholly owned by the FSLIC, in 1985. This is the Federal Asset Disposition Association, which has a ten-year charter.¹⁵⁷

153. See *infra* text accompanying notes 166-75.

154. See Nash, *U.S. Aids Financial Corp. Unit*, N.Y. Times, Mar. 19, 1988, at 17, col. 3 (national ed.).

155. See Nash, *Large Texas Bank to get \$1 Billion in Federal Rescue*, N.Y. Times, Mar. 18, 1988, at 1, col. 6 (national ed.).

156. Deposit insurance is limited by statute to \$100,000 per individual depositor. See 12 U.S.C. § 1724(b) (1982).

157. See FHLB GUIDE, *supra* note 52, at 53-54; 1986 FHLBB ANN. REP. 29 (1987). The FADA, which Congress recently placed under the audit authority of the Comptroller General, see Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 403, 101 Stat. 552, 609 (codified at 31 U.S.C.A. § 9105(a) (West Supp. 1988)), has been subjected to severe criticism for having failed to achieve its purposes and for becoming insolvent itself. The House Banking Committee has recommended its abolition. See H.R. 5094, 100th Cong., 2d Sess. § 703, *introduced*, 134 CONG. REC. H5887 (daily ed. July 26, 1988); H.R. REP. NO. 822, 100th Cong., 2d Sess., pt. 1, at 143 (1988); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 100TH CONG., 2D SESS., FEDERAL ASSET DISPOSITION ASSOCIATION: REPORT OF AN INQUIRY INTO ITS OPERATIONS AND PERFORMANCE (Comm. Print), *reprinted in* 134 CONG. REC. H2203-06 (daily ed. Apr. 21, 1988).

B. *Placing Thrifts into Receivership.*

1. *The Agencies Involved.* When a thrift is federally insured, two of three federal agencies are involved in its supervision and receivership.¹⁵⁸ The FHLBB exercises overall regulatory control. The FSLIC, which is always under the direction of the FHLBB,¹⁵⁹ acts as a receiver for the thrifts it insures. The FDIC, which is under the direction of the FHLBB when appointed the receiver of a federal thrift,¹⁶⁰ acts as receiver for federal savings banks.¹⁶¹

The three agencies deal with three categories of thrifts. First are federal thrifts: those savings and loan associations and savings banks chartered, or converted to federal charter, by the FHLBB under the Home Owners' Loan Act¹⁶² and insured by either the FSLIC or the FDIC. Second are those state-chartered thrifts that are insured by the FSLIC subject to the direction of the FHLBB. Third are state-chartered savings banks, which can be insured by the FDIC without any FHLBB involvement.¹⁶³ Because the FDIC has only adopted the *Hudspeth* doctrine when it has been appointed receiver by the FHLBB,¹⁶⁴ this article will consider only receiverships involving the first two categories.

2. *Power to Appoint Receivers.*

a. *Federally chartered thrifts.* In the case of federally chartered thrifts, the FHLBB has exclusive authority under the Home Owners' Loan Act to appoint a receiver.¹⁶⁵ If the thrift is insured by the FSLIC,

158. State-chartered savings banks are a narrow exception in that, even if insured by the FDIC, they are not subject to the regulation of the FHLBB.

159. See 12 U.S.C. § 1725(a) (1982).

160. See *infra* text accompanying notes 179-81.

161. See *infra* text accompanying notes 167-69.

162. See 12 U.S.C. § 1464(a) (1982).

163. See 12 U.S.C. §§ 1813(a), 1815(a) (1982).

164. See *infra* text accompanying notes 444-46.

165. See 12 U.S.C. § 1464(d)(6)(A)-(B). The grounds for appointing a receiver (or conservator) are one or more of the following:

(i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound conditions [sic] to transact business; (iv) willfull violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board[.] . . .

. . . [or] in the event that (i) the association, by resolution of its board of directors or of its members, consents to such appointment, or (ii) the association is removed from membership in any Federal home loan bank, or its status as an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation is terminated.

Id.

the FSLIC must be appointed receiver.¹⁶⁶ If, on the other hand, the thrift is a savings bank chartered under section 1464(o) and insured by the FDIC,¹⁶⁷ the FDIC must be appointed receiver.¹⁶⁸ Whereas the FHLBB has frequently appointed the FSLIC as a receiver, the FDIC has to date been appointed only once by the FHLBB.¹⁶⁹

b. State-chartered thrifts. In the case of state-chartered thrifts that are insured by the FSLIC, the FHLBB has exclusive authority under the National Housing Act to appoint the FSLIC as receiver if the thrift is in a state of insolvency, if it is losing assets due to violations of law or unsafe or unsound practices, or if it is in an unsafe or unsound condition to transact business.¹⁷⁰ The FSLIC then has all the receivership powers it enjoys as a receiver for a federal thrift.¹⁷¹

If, on the other hand, a *state* decides to place a state-chartered thrift into receivership and that thrift is insured by the FSLIC, the FSLIC *may* be appointed receiver by the state authority; if so, it possesses the same powers as those it enjoys as a federal receiver.¹⁷² The FHLBB will then "federalize" the receivership and assume supervisory control of the FSLIC as receiver.¹⁷³ The legislation also leaves open the possibility that the state authority could place a thrift into receivership and *not* appoint the FSLIC as receiver,¹⁷⁴ though in most cases the FHLBB would in any event be entitled to federalize the receivership and appoint the FSLIC.¹⁷⁵

c. Exclusivity of the FHLBB's power of appointment and removal. The Home Owners' Loan Act authorizes the Board to appoint receivers without notice,¹⁷⁶ but the association is entitled to challenge this appoint-

166. See 12 U.S.C. §§ 1464(d)(6)(D), 1729(b)(1) (1982).

167. The FDIC is required to insure the accounts of federal savings banks. See 12 U.S.C. § 1726(a)(1) (1982).

168. See 12 U.S.C. §§ 1464(d)(6)(D), 1821(c) (1982).

169. Telephone interview with Judith L. Friedman, Associate General Counsel, FHLBB (Mar. 21, 1988); see 52 Fed. Reg. 49,204 (1987) (appointing the FDIC as receiver for Yankee Bank for Finance and Savings, FSB).

170. See 12 U.S.C. §§ 1729(c)(1)(B), 1464(d)(6)(A)(i)-(iii).

171. See 12 U.S.C. § 1729(c)(1)(B)(i)(II).

172. See 12 U.S.C. § 1729(c)(1)(A).

173. See 12 U.S.C. § 1729(c)(1)(B)-(c)(2); see also *Fidelity Sav. & Loan Ass'n v. FHLBB*, 689 F.2d 803, 808-09 (9th Cir. 1982) (statutory requirements were satisfied for appointment of the FSLIC as federal receiver), *cert. denied*, 461 U.S. 914 (1983).

174. See 12 U.S.C. § 1729(c)(1). If the thrift is federally insured but the FSLIC is *not* appointed receiver, the FSLIC is required to pay the insurance and is entitled "(1) to bid for the assets of the insured institution in default, (2) negotiate for the merger of the insured institution or the transfer of its assets, or (3) make any other disposition of the matter as it may deem in the best interests of all concerned." *Id.*

175. See 12 U.S.C. § 1729(c)(2).

176. See 12 U.S.C. § 1464(d)(6)(A)-(B).

ment in a federal district court within thirty days.¹⁷⁷ Subject to this exception, section 1464(d)(6)(C) provides that

no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.¹⁷⁸

3. Powers Upon Appointment.

a. Powers conferred by statute. When the FHLBB was given regulatory responsibility over federal savings banks, the insuring and receivership role of the FDIC was retained. This created the possible anomaly that thrift receiverships might be governed, depending on which agency was appointed receiver, by two separate pieces of legislation: if the FSLIC were appointed, the National Housing Act would apply; if the FDIC were appointed, the Federal Deposit Insurance Act would apply. The FHLBB's rules relating to federal receiverships purport, however, to apply to both the FSLIC and the FDIC,¹⁷⁹ and there is statutory language to support this view.¹⁸⁰ Hence the powers of both the FSLIC and the FDIC acting under the supervision of the FHLBB will be treated as being the same.¹⁸¹ In any event, the general receivership practices of the FDIC are sufficiently similar to those of the FSLIC for present purposes to permit focus upon the FSLIC.¹⁸²

177. See 12 U.S.C. § 1464(d)(6)(A).

178. 12 U.S.C. § 1464(d)(6)(C); see *infra* text accompanying notes 394-403.

179. See 12 C.F.R. § 549.1(b) (1988); cf. Conservators and Receivers, 50 Fed. Reg. 48,970, 48,973 (proposed Nov. 8, 1985) (to be codified at 12 C.F.R. § 549.2) (extending the application of the FHLBB's *Hudspeth* procedures to the FDIC).

180. The receivership power (to buy at its own sale) conferred upon the FSLIC as receiver by 12 U.S.C. § 1464(d)(6)(D) is expressly stated to be applicable to the FDIC as receiver of a closed savings bank. And the powers conferred upon the FSLIC as receiver in 12 U.S.C. § 1729(b) are stated to be applicable to federal savings banks as well. *Id.*

181. In the only receivership in which it has been appointed by the FHLBB, see *supra* note 169, the FDIC has successfully secured the dismissal of at least one creditor's complaint from a federal district court on the basis of *Hudspeth* principles. See *Rivers v. Yankee Bank for Fin. & Sav.*, FSB, No. 88-0004-C (S.D. Ala. Mar. 21, 1988) (Westlaw, 1988 WL 81615) (single-page memorandum decision). On the other hand, a Massachusetts district court, in a fully reasoned opinion, has subsequently refused to recognize the FDIC's and FHLBB's claims to exclusive jurisdiction and has in effect rejected the *Hudspeth* doctrine for FDIC savings bank receiverships. See *Tocci Corp. v. Yankee Bank for Fin. & Sav.*, FSB, No. 87-3121-K (D. Mass. May 25, 1988) (Westlaw, 1988 WL 70344).

182. On FDIC receiverships, see generally FDIC, *THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933-1983* ch. 5 (1984); E. SYMONS & J. WHITE, *supra* note 40, at 600-707; Skillern, *Federal Deposit Insurance Corporation and the Failed Bank: The Past Decade* (pts. 1 & 2), 99 BANKING L.J. 233, 292 (1982); Note, *Failing Banks: Creditors' Rights and the Distribution of Bank Assets*, 7 AM. REV. BANKING L. 325 (1988); Comment, *Bank Failure and the FDIC: A Survey of Legal Rights and Relationships of the Client and the Insolvent Bank*, 18 TEX. TECH L. REV. 1193 (1987); Note, *The Modified Payoff of Failed Banks: A Settlement Practice to Inject Market Discipline into the Commercial Banking System*, 73 VA. L. REV. 1349 (1987); Note, *Creditors' Remedies Against the*

Under the National Housing Act, when the FSLIC is appointed as the receiver of a thrift, it is authorized as receiver

- (i) to take over the assets of and operate such association;
- (ii) to take such action as may be necessary to put it in a sound solvent condition;
- (iii) to merge it with another insured institution;
- (iv) to organize a new Federal association to take over its assets;
- (v) to proceed to liquidate its assets in an orderly manner; or
- (vi) to make such other disposition of the matter as it deems appropriate; whichever it deems to be in the best interest of the association, its savers, and the [FSLIC]¹⁸³

In addition, the receiver "shall pay all valid credit obligations of the association."¹⁸⁴

Section 1729 supplements these powers and duties by granting a wide range of powers to the FSLIC to contract, form new federal thrifts, and lend financial and managerial assistance to existing ones.¹⁸⁵ Subsection 1729(d) also provides that:

[i]n connection with the liquidation of insured institutions, the [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the [FSLIC] has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.¹⁸⁶

FDIC as Receiver of a Failed National Bank, 64 TEX. L. REV. 1429 (1986). For differences between the powers of the FDIC and the FSLIC, see *infra* text accompanying notes 447-52.

183. 12 U.S.C. § 1729(b)(1)(A). The legislation formerly required the FSLIC to act in the best interest of the "insured members of the association in default." National Housing Act of 1934, ch. 847, § 406(b), 48 Stat. 1246, 1260. The amendment was contained in the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(b), 96 Stat. 1469, 1481.

184. 12 U.S.C. § 1729(b)(1)(B).

185. See 12 U.S.C.A. § 1729(a), (f) (West 1980 & Supp. 1988).

186. 12 U.S.C. § 1729(d) (1982). The original section 1729(d) was amended in 1982 by the Garn-St Germain Depository Institutions Act, Pub. L. No. 97-320, § 122(g), 96 Stat. at 1482-83. Section 1729(d) had previously read:

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

National Housing Act, ch. 847, § 406(d), 48 Stat. at 1260. The Garn-St Germain Act therefore substituted a new final clause emphasizing the exclusive regulatory authority of the FHLBB when the FHLBB appoints the FSLIC as the receiver of a state thrift. The amendment was subject to an automatic sunset that came into effect on October 13, 1986, but it was restored in August 1987 by the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 509(a), 101 Stat. 552, 635 (1987). Whether the amendment makes any difference for our purposes is doubtful. Indeed, prior to

b. The Board's regulatory powers. The Home Owners' Loan Act also grants to the FHLBB a general power to regulate the conduct of receiverships:

The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship or receivership.¹⁸⁷

The FHLBB has promulgated rules under this section, including the rules governing the *Hudspeth* process.¹⁸⁸

4. *Strategies Developed by the FSLIC.*¹⁸⁹ When it has been determined that a receivership is necessary, responsibility for the troubled thrift shifts to the Insurance Division of the FSLIC. A team from the Division, acting on a written order of seizure of the FHLBB, moves to seize the institution in question.¹⁹⁰ The operation is performed secretly and quickly in order to avoid public panic or last-minute maneuvering by the thrift's management to improve their own financial positions. The senior management is relieved of its duties immediately, the institution's doors are sealed, and the Insurance Division arranges a direct or indirect payout to insured depositors.

To conserve the insurance fund, the FSLIC tries to avoid a direct payout and liquidation wherever possible. In most cases it now uses its powers under section 1729(b)(1)(A)¹⁹¹ to arrange "purchase and assumption transactions":¹⁹² either a simple transfer of insured accounts to an-

the Garn-St Germain Act, section 1729(c)(3) had stated that "[i]n connection with the liquidation of any [state-chartered] institution, the language 'the court or other public authority having jurisdiction over the matter' in subsection (d) of this section shall mean the said Board." Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 294, 296, *repealed by* Garn-St Germain Depository Institutions Act, Pub. L. No. 97-320, § 122, 96 Stat. at 1482; *see* *Summertree Venture III v. FSLIC*, 742 S.W.2d 446, 449 n.1 (Tex. Ct. App. 1987) (determination of which version of section 1729(d) applies is inconsequential); *see also infra* text accompanying notes 415-19.

187. 12 U.S.C. § 1464(d)(11); *see infra* text accompanying notes 404-06.

188. *See infra* text accompanying notes 203-05.

189. *See generally* FHLB GUIDE, *supra* note 52, at 52-53; Pfeiler, *supra* note 54, at 441-42 (discussing the FSLIC's adoption of "comprehensive administrative procedure for handling receiverships"); Williams, *supra* note 151, at 981-1002 (reviewing FSLIC techniques for resolving supervisory acquisitions and mergers).

190. *See* FHLB GUIDE, *supra* note 52, at 52.

191. *See supra* text accompanying note 183.

192. Though a well-established practice, *see, e.g.*, 12 C.F.R. § 569a.13 (1988), purchase and assumption transactions were first fully addressed and defined only in 1985, by the FHLBB's proposed rules relating to conservatorships and receiverships, *see infra* note 201.

other institution (which will have bid for these at a slight premium), or an asset-backed transfer of accounts to a newly created mutual thrift.¹⁹³ Where the transferee assumes all the liabilities of the failed thrift, the problem of processing the claims of creditors disappears since creditors continue to enjoy their ordinary rights against the transferee institution.¹⁹⁴ If some of the liabilities of the thrift in receivership are not transferred, however, the creditors will retain only a right of claim against the FSLIC as receiver for the failed thrift.¹⁹⁵ Hence it is only where the FSLIC decides on a direct payout and liquidation, or on a *partial* purchase and assumption transaction, that the claims of creditors require resolution, and it is in this context that we turn to examine the administrative process devised by the FHLBB for handling these claims.

5. Claims Procedures. Claims against failed thrifts are institutionally and procedurally separated at the FSLIC.¹⁹⁶ Those made by in-

193. In 1986, for example, 8 of the 10 completed liquidations involved transfers of accounts rather than direct payouts. 1986 FHLBB ANN. REP. 27 table 5 (1987).

194. See, e.g., *Bean v. Independent Am. Sav. Ass'n*, 838 F.2d 739 (5th Cir. 1988). In *Bean*, a panel of the Fifth Circuit, per Judge Higginbotham (who wrote the opinion in *Hudspeth*), refused to extend the *Hudspeth* doctrine to creditors whose claims have been assumed by a new thrift. "[B]y transferring a liability or asset the FSLIC has determined that claims related to it should not be switched to the administrative track . . ." *Id.* at 743.

195. When this happens, the remaining creditors are prejudiced in that they have to share in a distribution from a balance of assets that is, by virtue of the insolvency of the thrift, likely to be insufficient to meet their claims in full. See Pfeiler, *supra* note 54, at 442. Whether this preference is either authorized or fair is an open question.

Here, as in the initial decision whether to lend a thrift financial assistance or place it in receivership, see *supra* text accompanying notes 149-56, the decision is crucial to the rights of creditors.

The question of fairness to general creditors is also raised by the FHLBB's recent creation of an express depositor priority in certain purchase and assumption transactions and in the payment of claims from proceeds of certain thrift liquidations. The FHLBB has recognized the general principle that the claims of general creditors should rank equally with those of insured depositors. See *Conservators and Receivers; Priority of Claims*, 53 Fed. Reg. 25,129, 25,133 (1988) (to be codified at 12 C.F.R. § 569c.11(a)(6)). In the case of state-chartered thrifts chartered in states that have themselves enacted depositor-priority legislation, however, and in the case of claims against federally chartered thrifts that are competing with depositor claims booked or registered in states with such legislation, the FHLBB has now established its own depositor-priority system. See *Conservators and Receivers; Priority of Claims; Depositor Priority*, 53 Fed. Reg. 30,665, 30,667-68 (1988) (to be codified at 12 C.F.R. § 569c.11(a)(6)). Given the parlous state of many insolvent thrifts, this new priority is likely in effect to extinguish general creditor claims altogether. See, e.g., FHLBB Resolution No. 88-378P (May 18, 1988) (appointment of receiver for Lamar Savings Association, Austin, Texas) (finding "the Association's general creditors' claims . . . worthless" after applying the available proceeds to the satisfaction of the Association's secured and deposit liabilities). Not only does this action severely stretch the FHLBB's asserted statutory authority, but it also seems to cast further doubt on the agency's ability to act as a genuinely impartial adjudicator in the case of claims filed by general creditors.

196. Whereas it is governed by the FHLBB's *Hudspeth* procedures when processing the claims of uninsured creditors, the FDIC applies its own procedures in determining and paying the claims of insured depositors. Cf. *Conservators and Receivers*, 50 Fed. Reg. 48,992 (to be codified at 12 C.F.R.

sured depositors are handled by the Insurance Division of the Office of the FSLIC (OFSLIC),¹⁹⁷ and claims involving uninsured depositors and other creditors are processed by FSLIC as receiver of the failed institution in question, functioning through the FSLIC's Operations and Liquidations Division (with the assistance of a division of the Office of General Counsel). FSLIC Corporate would then itself become a claimant against the thrift in receivership (FSLIC Receiver).¹⁹⁸

Though the procedures for processing the claims of insured depositors are fairly well-developed and well-codified,¹⁹⁹ the procedures for processing uninsured and general creditor claims are still highly informal and in a state of development. This is partly because the increase in the range of creditor claims and the number of outright liquidations are fairly recent developments,²⁰⁰ and partly because judicial approval in *Hudspeth* for the administrative adjudication process came only in 1985. Late in 1985 the FHLBB published a set of proposed rules codifying the *Hudspeth* procedures,²⁰¹ but these have not yet been converted into final rules.²⁰² At present the procedures for processing claims are governed by an earlier set of rules,²⁰³ supplemented by a set of unpublished guidelines,²⁰⁴ which were formerly made available to individual claimants by

§ 569c.7(b)(4)) (proposed Nov. 8, 1985) (exempting the FDIC from the application of FHLBB rules governing the processing of depositor claims). See generally 12 U.S.C. § 1821 (1982).

197. See 12 C.F.R. § 500.20(a) (1988).

198. To avoid confusing these two capacities, the discussion will distinguish "FSLIC Corporate" and "FSLIC Receiver."

199. See generally 12 C.F.R. pt. 564 (1988).

200. See *supra* text accompanying notes 52-88.

201. Conservators and Receivers: Proposed Rule, 50 Fed. Reg. 48,970 (to be codified at 12 C.F.R. pts. 547, 548, 549, 563, 569a, 569b, 569c) (proposed Nov. 8, 1985).

202. The FHLBB recently gave notice that proposed rules published by it and upon which no action has been taken by the Board will automatically lapse after six months. Regulatory Review Procedures, 53 Fed. Reg. 13,156 (1988). The expiration date for the Board's 1985 proposed *Hudspeth* rules was, however, extended to October 11, 1988. See Extension of Time Period for Board Action on Certain Outstanding Proposals, 53 Fed. Reg. 13,282 (1988).

Meanwhile, agency staff are currently preparing a further, shortened notice of proposed rulemaking for consideration by the Board. Telephone interview with Judith L. Friedman, Associate General Counsel, FHLBB (May 2, 1988). The Board has subsequently published a Supplemental Notice of Proposed Rulemaking, see Federal Savings and Loan Insurance Corporation; Receivers, 53 Fed. Reg. 21,474 (to be codified at 12 C.F.R. pts. 575, 576, 577) (proposed May 26, 1988), which incorporates the modifications made to informal procedures that have been in effect since July 1, 1986. As this article was going to press, the Board apparently was planning to publish final rules that would conform with those published in the supplemental notice.

203. See 12 C.F.R. pts. 549, 569a (1988) (addressing federal thrift receiverships and state thrift receiverships). Section 549 applies to both the FSLIC and the FDIC. See *id.* § 549.1(b).

204. See Instructions for Filing Claims with the FSLIC as Receiver (Feb. 12, 1987) (FHLBB internal memorandum); Procedures for the Administration and Determination of Claims Filed with the FSLIC as Receiver (Feb. 12, 1987) (FHLBB internal memorandum); Procedures for the Processing and Determination of Administrative Appeals from Decisions of the FSLIC as Receiver (July 3, 1986) (FHLBB internal memorandum); Procedures for the Administration and Determination of

receivers and which have now been published in modified form as "Interim Procedures" and as revised proposed rules.²⁰⁵

C. Depositor Claims.

When an insured institution fails and the institution is placed in receivership, FSLIC Corporate is required to pay each insured account as soon as possible, either in cash or by means of a transferred account.²⁰⁶ In practice, depositors' claims, whether insured or not, are processed by the Insurance Division, OFSLIC. Depositors, to the extent that their claims are uninsured, receive certificates of claims in liquidation, copies of which are then provided directly to the FSLIC Receiver by the Insurance Division.²⁰⁷

1. *Notice to Potential Claimants.* Upon default of the insured institution, the FSLIC gives written notice to all insured members of the time and place of insurance payments and, if the failed institution has outstanding debts in the form of negotiable instruments, it must promptly publish a similar notice in a local newspaper.²⁰⁸ Insurance claims are processed by the staff of the Insurance Division.²⁰⁹

2. *Initial Determinations.* The FSLIC may require proof of claims and, where not satisfied as to the claim's validity, may require the insured member to secure a final determination of the claim in a court of competent jurisdiction.²¹⁰ The general principles governing the Director's determination as to the validity of a claim to insured status are codified.²¹¹ For those claims accepted as valid and insured, the FSLIC must

Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver (Mar. 1987) (FHLBB internal memorandum). The latter three sets of guidelines are reprinted in Pfeiler, *supra* note 54, apps. C-E, at 490-510.

205. See Conservators and Receivers; Interim Procedures, 53 Fed. Reg. 13,105 (1988). These consist of: Procedures for the Administration and Determination of Claims Filed with the FSLIC as Receiver, 53 Fed. Reg. at 13,105-10 [hereinafter Claims Procedures]; Procedures for the Processing and Determination on Review of Determinations of the FSLIC as Receiver, *id.* at 13,110-12 [hereinafter Review Procedures]; Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver, *id.* at 13,112-13 [hereinafter Expedited Relief Procedures]. The interim procedures have since been incorporated in Federal Savings and Loan Insurance Corporation; Receivers, 53 Fed. Reg. at 21,474-82 (to be codified at 12 C.F.R. §§ 575.1-577.5). See *id.* at 21,475 (to be codified at 12 C.F.R. § 575.1).

206. See 12 U.S.C. § 1728(b) (1982); see also 12 U.S.C.A. § 1729(b)(2) (West Supp. 1988) (obligating the FSLIC as receiver to pay the "insurance as provided in section 1728" (emphasis added)).

207. See 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.6); Claims Procedures, *supra* note 205, at 13,107 (para. II (D)).

208. 12 C.F.R. § 564.1(a) (1988).

209. 12 C.F.R. § 564.1(d) ("[t]he Director or Acting Director . . . or his or her designee").

210. See 12 U.S.C. § 1728(b).

211. 12 C.F.R. § 564.2.

either pay out in cash²¹² or transfer the account of the insured member to another insured institution.²¹³

If all or a portion of the accountholder's account is determined to be uninsured, the Director must give written notice of this determination and supply the accountholder with a "certificate of claim in liquidation" from the FSLIC "in its capacity as receiver." This enables the accountholder to share in the proceeds of the liquidation of the insured institution.²¹⁴

3. *Insurance Appeals ("Reconsiderations").* A dissatisfied accountholder may request reconsideration of the determination.²¹⁵ Failure to do so is deemed acceptance of the initial determination.²¹⁶ In practice, insurance reconsiderations are adjudicated by a member of the Adjudication Division of the Office of General Counsel.²¹⁷

If the procedural requirements are complied with, the Director must grant or deny the request²¹⁸ and, within a further 180 days, must issue a decision on the merits of the reconsideration (a "determination on reconsideration").²¹⁹ If a determination on reconsideration is not issued within this time the request for reconsideration is deemed to have been denied.²²⁰

Since the handling of these requests was taken over by the Adjudication Division, the reversal rate stands at 8.2%.²²¹

4. *Judicial Review.* Actions must be brought within three years of the date of default or, if the claim was presented to the receiver and

212. 12 U.S.C. § 1728(b).

213. That institution may either be one newly created in the same community, or an existing one. *Id.*

214. 12 C.F.R. § 564.1(d)(2). The surrender and transfer to the FSLIC of an insured account shall subrogate the Corporation with respect to such insured account, but shall not affect any right which the insured member may have in the uninsured portion of his account or any right which he may have to participate in the distribution of the net proceeds remaining from the disposition of the assets of such association.

12 U.S.C.A. § 1729(b)(2) (West Supp. 1988).

215. 12 C.F.R. § 564.1(d)(3).

216. *Id.* §§ 564.1(d)(2), (d)(3)(iv).

217. This responsibility was transferred from the Regulations and Legislation Division of OGC, effective November 1, 1986. See Adjudication Division: Processing of Initial Insurance Determination Reconsideration Requests (undated FHLBB internal memorandum).

218. See 12 C.F.R. § 564.1(d)(3)(ii)(c).

219. *Id.* § 564.1(d)(4).

220. *Id.*

221. That is, 34 cases of a total of 414, involving decisions in favor of claimants to a total value of \$1,848,353. Telephone interview, *supra* note 202.

denied, within two years of the date of denial.²²² According to the Board's rules, an accountholder must exhaust the remedies already described; an initial determination for which the accountholder does not request reconsideration is taken to have been accepted,²²³ so failure to request reconsideration in a timely fashion will effectively prevent the holder from seeking review.²²⁴

D. *Uninsured and Nondepositor Claims: The Hudspeth Process.*

1. *Types of Claims Involved.* The FHLBB's *Hudspeth* procedures are intended to encompass all types of claims that might be made against the thrift in receivership, with the exception of claims by insured depositors.²²⁵ Under the FHLBB's interim and proposed rules, a "claim" is defined as "the assertion of a right to payment or other relief" and includes demands for recoupment, setoff, security, priority, or preference, requests to foreclose or oppose foreclosure by the receiver on security property or assets, demands for interest, employee wages, etc.²²⁶ "Claimants" include, "but [are] not limited to," holders of claims that appear in the thrift's books or records, or otherwise are known to the Receiver, owners of participation interests, borrowers, guarantors, secured creditors, lien holders and "[a]ny person(s) or entities seeking to recover civil money damages or equitable relief against the association or the Receiver."²²⁷

This encompasses a breathtaking range and variety of claims. In order to appreciate the comprehensive coverage of the *Hudspeth* procedures and the potential complexity of the claims involved, it is worth reviewing some of the of the types of claims that have been asserted in recent cases.

222. 12 U.S.C. § 1728(c). As to the applicability of the *Hudspeth* doctrine to the claims of insured depositors, see *infra* text accompanying notes 390-91.

223. 12 C.F.R. § 564.1(d)(2).

224. *Id.* § 564.1(d)(5). In *Jugum v. FSLIC*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986), this limitation was rejected as invalid. See *infra* note 390 (discussing *Jugum*, which has been vacated as moot).

225. See Federal Savings and Loan Insurance Corporation; Receivers, 53 Fed. Reg. 21,474, 21,476 (to be codified at 12 C.F.R. § 575.6(a)) (proposed May 26, 1988); Claims Procedures, *supra* note 205, at 13,107 (para. II(D)). Depositors with other claims are also claimants for the purposes of the rules. See 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.6 (c)); Claims Procedures, *supra* note 205, at 13,107 (para. II(D)).

226. See 53 Fed. Reg. at 21,475 (to be codified at 12 C.F.R. § 575.2(h)); Claims Procedures, *supra* note 205, at 13,106 (para. I(B)(9)).

227. See 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.2(h)(3)); Claims Procedures, *supra* note 205, at 13,106 (para. I(B)(10)). Secured creditors and owners of participation interests might enjoy some exemption from the published procedures. See 53 Fed. Reg. at 21,475 (to be codified at 12 C.F.R. § 575.1); Supplementary Information, 53 Fed. Reg. at 13,105.

a. *Claims filed prior to receivership.* Prior to being placed in receivership, a thrift might have initiated litigation against a former officer with a view to repudiating claims being made against it for the continued payment of deferred compensation.²²⁸ Or it might have launched foreclosure proceedings against one of its mortgage holders.²²⁹ The thrift might have found itself embroiled with other thrifts in litigation involving a participatory loan agreement, litigation that could involve claims of breach of contractual or other obligations²³⁰ and perhaps even charges of securities fraud and racketeering,²³¹ antitrust violations,²³² or race discrimination.²³³

b. *Claims adjudicated prior to receivership.* The validity of a creditor's claim might already have been judicially determined, yet the claim might still be unpaid. A plaintiff might have secured an as yet unexecuted judgment against the thrift.²³⁴ The parties might have entered into and already partly implemented a judicially supervised settlement agreement.²³⁵

c. *Postreceivership litigation.* When the FSLIC or the FDIC is appointed receiver, the FSLIC Receiver steps into the shoes of the thrift itself. The situation can then become even more complex. The receiver will not only inherit the thrift's pre-existing litigation responsibilities but

228. See, e.g., *Hudspeth*, *supra* note 103, 756 F.2d at 1096; see also *supra* text accompanying notes 98-117.

229. See, e.g., *FirstSouth, F.A. v. LaSalle Nat'l Bank*, No. 86 C 10247 (N.D. Ill. Sept. 7, 1987) (Westlaw, 1987 WL 16895).

230. See, e.g., *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563 (5th Cir. 1987) (claims of usury, breach of fiduciary duty, and breach of duty of good faith and fair dealing), *cert. granted sub nom.* *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988).

231. See, e.g., *Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 828 F.2d 387 (7th Cir. 1987).

232. See, e.g., *Red Fox Indus. v. FSLIC*, 832 F.2d 340, 341 (5th Cir. 1987).

233. See, e.g., *Resna Assocs. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987).

234. See, e.g., *Homestead Sav. v. Life Sav. & Loan Ass'n*, 668 F. Supp. 1121 (N.D. Ill. 1987) (jury verdict for creditor of \$6.2 million, already paid over to clerk of court "in full satisfaction of the judgment" prior to thrift being placed in receivership) (opinion vacated and removed from bound volume, but appears in West's advance sheets, see *infra* text accompanying notes 738-39); *First Fin. Sav. & Loan v. FSLIC*, 651 F. Supp. 1289 (E.D. Ark. 1987) (letter opinion entered by state court judge but judgment order not yet signed; FSLIC held estopped from litigating claims); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tex. Ct. App. 1986) (affirming judgment entered in favor of creditor against thrift for recovery of certificate of deposit originally pledged as collateral in loan transaction subsequently breached by thrift); *Union County Bank v. Knox Capital Corp.*, C/A657 (Tenn. Ct. App. Apr. 18, 1986) (Westlaw, 1986 WL 4598) (decree in favor of plaintiff issued prior to receivership of defendant; judgment entered after receivership but nunc pro tunc to date of opinion).

235. See, e.g., *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert. filed sub nom.* *Zohdi v. FSLIC*, 56 U.S.L.W. 3196 (U.S. Aug. 5, 1987) (No. 87-255).

might also generate new ones. For example the FSLIC Corporate might find itself repudiating and defending claims by *depositors* to the payment of insurance.²³⁶ Or, as receiver, it might reject claims filed by *general creditors*, arising out of prior action by the failed thrift, and then have to defend a suit, or multiple suits, based on contract, tort or some other cause of action.²³⁷

The FSLIC Receiver might have to initiate or pursue litigation—for example, foreclosure proceedings, actions to recover receivership assets, or petitions to enjoin thrift directors from dissipating recoverable assets—as part of the liquidation proceedings.²³⁸ It might have to file claims, on behalf of the receivership, in other bankruptcy proceedings.²³⁹ Finally, the possibility of the FSLIC or the FDIC suing “itself” in two separate receivership capacities is not confined to the realm of the classroom hypothetical.²⁴⁰

d. Claims against the exercise of receivership powers. The FSLIC might even be sued in tort for the manner in which it has conducted the

236. See, e.g., *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987), *vacated and remanded*, 851 F.2d 637 (3d Cir. 1988); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986).

237. See, e.g., *FSLIC v. Provo Excelsior Ltd.*, 664 F. Supp. 1405 (D. Utah 1987) (multiple parties; securities fraud, federal and state RICO); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987) (multiple parties; fraud and deceit, state RICO, breach of contract, civil theft); *Kohlbeck*, 651 F. Supp. at 1233 (negligence, fraud and racketeering); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (counterclaim based on unjust enrichment and conversion of assets); *Keller v. Antioch Sav. & Loan Ass'n*, 143 Ill. App. 3d 278, 492 N.E.2d 937 (1986) (false representation, breach of contract).

238. See, e.g., *FSLIC v. Dixon*, 835 F.2d 554 (5th Cir. 1987) (preliminary injunction to prevent dissipation of possibly recoverable assets by directors); *FSLIC v. Ticktin*, 832 F.2d 1438 (7th Cir. 1987) (action against thrift directors for breach of fiduciary duties); *Red Fox Indus. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (action by borrower to enjoin collection of debt by thrift and subsequent receiver); *Blakely Airport Joint Venture II v. FSLIC*, 678 F. Supp. 154 (N.D. Tex. 1988) (foreclosure); *FSLIC v. Florida 100 Dev. Group*, 670 F. Supp. 1577 (S.D. Fla. 1987) (foreclosure); *FSLIC v. Hall Whispertrec Assocs.*, 653 F. Supp. 148 (N.D. Tex. 1986) (foreclosure); *FSLIC v. Oldenburg*, 658 F. Supp. 609 (D. Utah 1987) (complaint by assignment of rights from lead lender); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987) (action for recovery of receivership assets); *Baer v. Abel*, 649 F. Supp. 25 (W.D. Wash. 1986) (FSLIC intervention as plaintiff, asserting claims against former thrift officers for negligence, breach of fiduciary duty of care, breach of contract, violation of federal regulations, recovery of compensation, and contribution or indemnification); *FSLIC v. Sajovich*, 642 F. Supp. 74 (C.D. Cal. 1986) (action brought by FSLIC as conservator against thrift directors and independent corporations for breach of fiduciary duty, negligence, and money had and received); *Glen Ridge I Condominiums, Ltd., v. FSLIC*, 734 S.W.2d 374 (Tex. Ct. App. 1986) (foreclosure), *writ denied*, 750 S.W.2d 757 (Tex. 1988) (per curiam).

239. See, e.g., *In re Miller Dev. Corp.*, 71 Bankr. 460 (Bankr. M.D. La. 1987).

240. See *FDIC v. United States Nat'l Bank*, 685 F.2d 270, 271 (9th Cir. 1981) (FDIC, as receiver for lending bank, brought action against itself as receiver for borrowing bank); see also Skilern, *Federal Deposit Insurance Corporation and the Failed Bank: The Past Decade* (pt. 2), 99 BANKING L.J. 292, 325 (1982) (discussing case in which bank that had failed and was placed under FDIC receivership sued another FDIC receivership).

receivership.²⁴¹ In these circumstances one should bear in mind that the exercise of the FSLIC's *statutory powers* are under challenge and not the validity of creditor claims against the thrift itself. The Federal Tort Claims Act²⁴² and questions of sovereign immunity become relevant.²⁴³

2. *Structures and Procedures Developed by the FHLBB.*

a. Internal receivership arrangements. When the FHLBB resolves to appoint the FSLIC as receiver, the Director, OFSLIC,²⁴⁴ with the concurrence of the General Counsel,²⁴⁵ designates a "Special Representative" to bear primary responsibility for the administration of the claims procedure, conduct the claims procedure, and determine the merits of claims.²⁴⁶ The Special Representative may then designate "Agents" "to perform certain functions, which include but are not limited to maintaining a tracking system of the claims filed with the Receiver and performing an initial review of the Proofs of Claim submitted to the Receiver."²⁴⁷ The Special Representative, with the consent of the General Counsel, will also designate legal counsel, known as "Claims Counsel," "to represent the Receiver . . . [and] to perform specified tasks" (set out in the Claims Procedures).²⁴⁸

In practice,²⁴⁹ the United States has been divided into five receiver-

241. See, e.g., *Fidelity Fin. Corp. v. FSLIC*, 834 F.2d 741 (9th Cir. 1987) (First Savings and Loan Association, which had been placed into receivership, brought action in state court against FSLIC, which had been appointed as receiver, challenging the transfer of assets); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *Colony First Fed. Sav. & Loan Ass'n v. FSLIC*, 643 F. Supp. 410 (C.D. Cal. 1986) (FSLIC sued for damages it allegedly caused when thrift was placed in receivership); *Glen Ridge I Condominiums*, 734 S.W.2d at 387 (debtor of failed thrift brought action to enjoin FSLIC, as receiver of failed thrift, from foreclosing on its property).

242. Title IV, 28 U.S.C. §§ 2671-2680 (1982) (current sections include minor amendments to original title IV).

243. For cases in which the FSLIC has attempted to argue that it enjoys sovereign immunity insofar as ordinary creditor claims are concerned, see *supra* note 148.

244. See 12 C.F.R. § 500.20 (1988). This structure is currently undergoing reorganization: the position formerly held by the Director, OFSLIC, will be held by an Executive Director of the FSLIC. Telephone interview, *supra* note 202.

245. See 12 C.F.R. § 500.17. This may be an attorney in the Office of General Counsel designated by the General Counsel. See 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.2(q)); Claims Procedures, *supra* note 205, at 13,107 (para. I(B)(18)).

246. See 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.2(z)); Claims Procedures, *supra* note 205, at 13,107 (para. I(B)(26)).

247. See 53 Fed. Reg. at 21,475 (to be codified at 12 C.F.R. § 575.2(c)); Claims Procedures, *supra* note 205, at 13,106 (para. I(B)(4)).

248. See 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.2(j)); Claims Procedures, *supra* note 205, at 13,107 (para. I(B)(11)); see also 12 C.F.R. § 549.3(b)(1) (1988) (receiver may employ any attorney(s) for legal advice and assistance).

249. The information that follows was obtained during an interview with Judith L. Friedman, Director of the Adjudication Division of the Office of General Counsel, FHLBB, on October 21, 1987, and from internal FHLBB memoranda that Ms. Friedman made available to the author.

ship regions: the Northwest, West, South, Central and East. Each of these regions has a "Claims Coordinator" who manages the claims for receiverships within that region. Claims Coordinators are nonlawyer auxiliaries who provide administrative services to the Special Representatives and who bill each receivership for their time. In order to avoid premature agreement on payouts to creditors, they are presently required to be assisted by Claims Counsel from the moment a thrift is seized. In addition, the lead attorney from the Adjudication Division of the FHLBB's Office of General Counsel meets with Claims Counsel immediately prior to the takeover in order to explain the procedures and ensure the proper implementation of the claims process. The lead attorney remains available for consultation throughout the takeover process and is frequently available on site. In order to minimize conflicts of interest, Division attorneys are instructed not to discuss the particulars of any transaction that might give rise to a claim against the receivership and to absent themselves from any debriefing of the thrift officers by Claims Counsel and the FSLIC.

It is common for a team of Special Representatives to be appointed for each receivership. The team is headed by a Chief Special Representative, who is also referred to as the "Managing Officer." This officer internally reviews and supervises the initial determination of claims, though the degree of centralization varies from region to region. For example, the Southern region is very centralized, whereas the Western region is very decentralized. Special Representatives need not be lawyers, and in practice usually are not.

It is important to appreciate the informal, non-adversary and administrative quality of the claims determination process at the receivership level. Even Claims Counsel play the role of often confidential legal advisers to the Claims Coordinators and Special Representatives. They are private, fee counsel, occupying no formal adjudicative position in the receivership. It is also important to note that the FHLBB does not now regard the receiver, or any of its officers, as performing an "adjudicative" role at the initial claims determination phase; rather, the claims determination process assumes an adjudicative posture only at the administrative "review" stage.²⁵⁰

b. Notice to potential claimants. Promptly after the date of appointment, the receiver must publish a notice directing all potential claimants to present their claims promptly.²⁵¹ In the notice a final date

250. See *infra* note 275.

251. See 12 C.F.R. § 549.4(a); 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.3); Claims Procedures, *supra* note 205, at 13,107 (para. II(A)). Claimants must be provided at least 90

for the filing of proof of claims must be stipulated.²⁵²

c. *Determinations by the receiver.* The regulations require the receiver "[t]o allow any claim seasonably received and proved to its satisfaction."²⁵³

The interim Claims Procedures make provision for an "initial review" of claims.²⁵⁴ This review is performed by claims agents who enter the claims in a control log²⁵⁵ and review them for proper filing.²⁵⁶ If a claim is not properly filed the claimant must be sent a "deficiency notice"²⁵⁷ and be given an opportunity to correct the deficiencies.²⁵⁸ Once this has been done the claim is reviewed on the merits²⁵⁹ and the claimant must be notified whether the claim has been allowed or retained for further review.²⁶⁰

If the claim is "retained for further review," the Special Representative will decide, according to the "nature of the task," the "issues involved in the claim" and, "where no significant legal issue is presented, the cost-savings involved," whether to assign reviewing responsibilities to an Agent, an Agent acting under the direction of a Claims Counsel, and/or to a Claims Counsel.²⁶¹

When conducting further review of the claim, the Special Representative may require the claimant to file additional information or documentation, make nonprivileged documents available for inspection and

days from the date of first publication of notice to present their claims, and the notice must be republished 30 and 60 days after first publication. See 12 C.F.R. § 549.4(a) (1988); 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. §§ 575.4, 575.5); Claims Procedures, *supra* note 205, at 13,107 (paras. II(B), (C)).

252. 12 C.F.R. § 549.4(a) (1988); 53 Fed. Reg. at 21,476 (to be codified at 12 C.F.R. § 575.4); Claims Procedures, *supra* note 205, at 13,107 (para. II(B)). This date must not be less than 90 days after the date of the first notice.

253. 12 C.F.R. § 549.4(b).

254. See 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. §§ 575.7-575.11); Claims Procedures, *supra* note 205, at 13,107-08 (paras. III(A)-(E)).

255. See 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.8); Claims Procedures, *supra* note 205, at 13,107 (para. III(B)).

256. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.9); Claims Procedures, *supra* note 205, at 13,107-08 (para. III(C)).

257. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.9(a)); Claims Procedures, *supra* note 205, at 13,108 (para. III(C)(1)).

258. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.9(a), (b)); Claims Procedures, *supra* note 205, at 13,108 (paras. III(C)(1), (2)).

259. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. §§ 575.9(d), 575.10); Claims Procedures, *supra* note 205, at 13,108 (paras. III(C)(4), (D)).

260. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.11); Claims Procedures, *supra* note 205, at 13,108 (para. III(E)).

261. 53 Fed. Reg. at 21,477 (to be codified at 12 C.F.R. § 575.12(b)); Claims Procedures, *supra* note 205, at 13,108 (para. IV(A)(2)).

copying, and file sworn responses to written questions.²⁶² He may also review "documents or other written information relevant to the claim in the custody of or subject to the control of any person or entity, including the writing from any persons including the claimant or his employees, and may obtain sworn statements" ²⁶³ These form part of the administrative record²⁶⁴ and, to the extent that they are not privileged, may be inspected and copied by the claimant.²⁶⁵ The Special Representative may grant requests by the claimant to appear before an Agent, may require such an appearance, or may require the claimant to give statements, discuss the claim, and negotiate, subject to the Special Representative's approval, compromises of the claim.²⁶⁶ The claimant's oral statements must be reduced to writing, sworn to, and made part of the administrative record, but statements by both parties during settlement negotiations do not constitute part of the receiver's record.²⁶⁷ The Special Representative may require the claimant to submit a written legal memorandum on the issues; in such cases, this memorandum also becomes part of the record.²⁶⁸ An indexed record must then be compiled and made available to the claimant for inspection and copying.²⁶⁹

Claims Counsel then consults with the Special Representative in order to provide "confidential, privileged legal advice as may be necessary to assist the Special Representative to reach a proposed determination with respect to the claim."²⁷⁰ The Special Representative must then prepare a memorandum of proposed findings of fact and conclusions of law, an analysis of the issues and a recommended proposed determination (proposed determination memorandum), as well as a proposed determination of claim in the form of proposed findings of fact and conclusions of law (proposed determination). Claims Counsel assists in this process, but any proposed determination memorandum he prepares that is super-

262. See 53 Fed. Reg. at 21,477-78 (to be codified at 12 C.F.R. § 575.13(b)); Claims Procedures, *supra* note 205, at 13,108 (para. IV(B)(2)).

263. 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(c)); Claims Procedures, *supra* note 205, at 13,108 (para. IV(B)(3)).

264. *Id.*

265. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(d)); Claims Procedures, *supra* note 205, at 13,108-09 (para. IV(B)(4)).

266. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(e), (f)); Claims Procedures, *supra* note 205, at 13,109 (paras. IV(B)(5), (6)).

267. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(f)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(6)).

268. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(g)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(7)).

269. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(i), (j)); Claims Procedures, *supra* note 205, at 13,109 (paras. IV(B)(9), (10)).

270. See 53 Fed. Reg. at 21,478 (to be codified at 12 C.F.R. § 575.13(k)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(11)).

seded does not constitute part of the record.²⁷¹ The proposed determination is then mailed to the claimant²⁷² and, if no request for reconsideration is filed, it becomes the "receiver's determination."²⁷³

The proposed determination must advise the claimant of his right to file (within thirty days) a written "request for reconsideration." Such request must state the grounds of objection and may present proposed alternative findings and conclusions. The Special Representative must then promptly reply in writing, stating agreement or partial or complete disagreement. The request and reply become part of the administrative record.²⁷⁴ After consideration of the record, the receiver must issue a "receiver's determination,"²⁷⁵ signed by the Special Representative,²⁷⁶ and a "record of claim" stating the amount of the claim recognized.²⁷⁷

271. See 53 Fed. Reg. at 21,478-79 (to be codified at 12 C.F.R. § 575.13(l),(m)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(12)).

272. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(n)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(13)).

273. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(o)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(14)) (formerly "initial determination").

274. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(p)(5)); Claims Procedures, *supra* note 205, at 13,110 (para. IV(B)(15)(e)).

275. Formerly known as a "final determination." The term "final determination" came to be regarded as a misnomer because it suggested greater formality in the claims determination by the receiver than is really the case in practice. The alternative term, "receiver's determination," is thought to convey the nature of the receiver's decision more accurately. Interview with Judith L. Friedman, Associate General Counsel, FHLBB, in Washington, D.C. (Oct. 21, 1987).

276. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(d)); Claims Procedures, *supra* note 205, at 13,110 (para. IV(B)(15)(f)).

277. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(s)); Claims Procedures, *supra* note 205, at 13,110 (para. IV(B)(18)).

There is no rigid limit on the permitted time lapse between a creditor's initial filing of a claim and the determination by the receiver. The stipulated (and unstipulated) time limitations are as follows:

<u>Action</u>	<u>Days</u>	<u>To Be Codified at</u>
Deficiency notice	30	12 C.F.R. § 575.9(a)
Notice of allowance or retention	180	<i>Id.</i> § 575.11
Further review:		
• Further filing	30	<i>Id.</i> § 575.13(b)(1)
• Written response	30	<i>Id.</i> § 575.13(b)(3)
• Response to request	30	<i>Id.</i> § 575.13(g)
• Additional documents	30	<i>Id.</i> § 575.13(j)
• Receiver's memorandum	"prompt"	<i>Id.</i> § 575.13(l)
• Request for reconsideration	30	<i>Id.</i> § 575.13(p)
• Special representative's reply	"prompt"	<i>Id.</i> § 575.13(p)(4)
• Determination	?	<i>Id.</i> § 575.13(p)(6)

Assuming that where maximum times are not specified the receiver's agents comply within 30 days, the total time lapse might be as long as 15 months. It appears that some determinations are taking even longer. See *infra* text accompanying notes 722-28. The interim and proposed rules permit a claimant to request expedited processing of a claim, but such processing is available only upon a showing of good cause, and even after such a showing, expedited processing remains a matter "in the sole discretion of the Receiver." See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.14); Claims Procedures, *supra* note 205, at 13,110 (para. IV(C)).

d. *Administrative reviews.* The FHLBB regulations contemplate “approval” by the Board of claims disallowed by the receiver.²⁷⁸ Interim provisions for “reviews” (formerly referred to as “appeals”) of decisions of the receiver have been established.²⁷⁹ Though formally directed to the Board, the authority to hear these appeals has been delegated by the Board to the Director, OFSLIC,²⁸⁰ who has, in turn, subdelegated the authority to the Director of the Adjudication Division of the Office of General Counsel.²⁸¹ Review determinations recommending the reversal, in whole or in part, of decisions by the receiver on the merits disallowing claims in excess of \$5 million must, however, be submitted to the Board itself for final determination,²⁸² and the Adjudication Division will, in practice, submit other determinations to the Board that it believes merit the Board’s personal attention.²⁸³

When, on reconsideration, a receiver’s determination has been issued,²⁸⁴ or if the claimant does not request reconsideration,²⁸⁵ the claimant is entitled to—and must, in order to preserve the right to judicial review—seek review of the determination by the Bank Board.²⁸⁶ Notice of the right to seek review must be given to the claimant with the proposed determination by the receiver.²⁸⁷

Written notice of a request for review must be filed with the Board within sixty days,²⁸⁸ and the request must contain a statement of the facts and arguments on which the request is based, a statement of the alleged factual and legal errors, references to the record and statement of

278. See 12 C.F.R. § 549.4(b), (d) (1988).

279. See 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576); Review Procedures, *supra* note 205, at 13,110-12 (paras. A-L).

280. FHLBB, Resolution No. 86-1161 (Nov. 17, 1986).

281. Delegation of Authority from the Director, Office of the Federal Savings and Loan Insurance Corporation to the Associate General Counsel for Adjudication to Perform Routine Procedural and Ministerial Functions Respecting the Implementation of Interim Claims Procedures. (Jan. 15, 1987) [hereinafter Delegation of Authority].

282. FHLBB, Resolution No. 86-1161, *supra* note 280.

283. Interview, *supra* note 275.

284. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(q)); Claims Procedures, *supra* note 205, at 13,110 (para. IV(B)(16)).

285. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(o)); Claims Procedures, *supra* note 205, at 13,109 (para. IV(B)(14)).

286. In practice, extensive legal support is provided to the Board by the General Counsel and the Director of the Adjudication Division. See *supra* text accompanying note 281.

287. See 53 Fed. Reg. at 21,479 (to be codified at 12 C.F.R. § 575.13(q)); Claims Procedures, *supra* note 205, at 13,110 (para. IV(B)(16)); 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.2); Review Procedures, *supra* note 205, at 13,111 (para. B(1)).

288. See 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.3(a)); Review Procedures, *supra* note 205, at 13,111 (para. C(1)).

any new facts upon which the request is based.²⁸⁹ Unless more information is required,²⁹⁰ the request will be subjected to a "preliminary review" within 60 days.²⁹¹ Further evidence may only be introduced on a showing of good cause.²⁹²

The record is then reviewed to determine whether it constitutes a sufficient basis for decision. If so, notice is given that the record is complete, and the record is closed.²⁹³ Within 180 days of closure of the record a decision on the merits of the review will be issued by the Board.²⁹⁴

e. Board review. In more complex cases, the Board, on the advice or request of the General Counsel, and "in its sole discretion," "may entertain oral argument, or other supplementary proceedings."²⁹⁵ Failure on the part of the Board to take such action, or failure to make a decision within the 180-day period, renders the receiver's determination the "decision of the Board." The Board will provide a written decision accompanied by its reasons²⁹⁶ and, to the extent that the claim is recognized, will provide the claimant with a "satisfaction of claim certificate."²⁹⁷

f. Judicial review. The Board's decision or inaction constitutes final agency action for the purpose of judicial review.²⁹⁸ The Review Procedures purport to be a mandatory prerequisite to the availability of

289. See 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.4(a)); Review Procedures, *supra* note 205, at 13,111 (para. D).

290. If so, more time may be required. See 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.4(b)(2), (3)); Review Procedures, *supra* note 205, at 13,111 (para. D(2)).

291. See 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.4(b)); Review Procedures, *supra* note 205, at 13,111 (para. D(2)).

292. 53 Fed. Reg. at 12,481 (to be codified at 12 C.F.R. § 576.5(b)); Review Procedures, *supra* note 205, at 13,111 (para. E).

293. See 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.5(a)); Review Procedures, *supra* note 205, at 13,111 (para. E(4)). The Board, however, reserves the right to "make its own findings of fact and conclusions of law based on the Administrative Record." 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.5(e)).

294. 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.7); Review Procedures, *supra* note 205, at 13,111 (para. G(1)). The decision is given in the name of the Board.

295. 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.7); Review Procedures, *supra* note 205, at 13,111 (para. G). This must be done within 30 days of closure of the record, in which case the 180-day period is suspended until the supplementary proceedings are complete.

296. See 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.8); Review Procedures, *supra* note 205, at 13,111 (para. H).

297. See 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 576.11); Review Procedures, *supra* note 205, at 13,112 (para. K).

298. See 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. §§ 576.8, 576.9, 576.11(b)); Review Procedures, *supra* note 205, at 13,111-12 (paras. H, I, K(2)).

judicial review.²⁹⁹

3. “*Expedited Relief.*” Entirely independent of the claims procedures just described are the provisions for expedited relief from decisions or threatened actions of the receiver.³⁰⁰ This procedure is designed to enable the FHLBB, through its delegate, to grant appropriate forms of equitable relief. Since its inception the remedy has expanded into a form of general injunctive relief available and applicable to both claimants and to the receiver itself (most frequently for correcting procedural irregularities).³⁰¹ In practice requests for expedited relief are adjudicated, as in the case of creditor appeals and insurance appeals, by the Director of the Adjudication Division, under subdelegation from the Director, OFSLIC.³⁰²

Any person affected by “[a]ny decision or threatened action by the FSLIC as Receiver” may seek “extraordinary intervention by the Board outside of the routine claims process” by filing a “request for expedited relief.”³⁰³ An example of such a situation would be threatened foreclosure.³⁰⁴ The rules state that a request for expedited relief does not involve the merits of any claim and is solely a request to the Board to intercede on behalf of the petitioner.³⁰⁵

The request must contain a statement of the facts and issues, alleged factual and legal errors or omissions made by the receiver, legal analysis, relevant documentation, an assessment of the likelihood of success on the merits of the underlying claim, and a statement of the probable imminent and irreparable harm that would occur if relief were not granted. Notice of the request must be given simultaneously to the receiver.³⁰⁶

299. 53 Fed. Reg. at 21,480 (to be codified at 12 C.F.R. § 576.3(g)); Review Procedures, *supra* note 205, at 13,111 (para. C(7)).

300. See 53 Fed. Reg. at 21,481-82 (to be codified at 12 C.F.R. § 577); Expedited Relief Procedures, *supra* note 205, at 13,112-13.

301. Interview, *supra* note 275; see also Pfeiler, *supra* note 54, at 446-47.

302. Delegation of Authority, *supra* note 281.

303. See 53 Fed. Reg. at 21,481 (to be codified at 12 C.F.R. § 577.2(b)); Expedited Relief Procedures, *supra* note 205, at 13,112 (para. A(2)). This must be done “within five work days from the date of the Receiver’s decision or action.” The Board may extend the time limits for any expedited relief proceedings. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.5); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. D).

304. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.5); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. D).

305. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.3(a)); Expedited Relief Procedures, *supra* note 205, at 13,112 (para. B(1)).

306. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. §§ 577.2(e), 577.3(a)(7)); Expedited Relief Procedures, *supra* note 205, at 13,112 (paras. A(5), B(1)(vii)).

The receiver must file a response within five days³⁰⁷ and this response, together with the request and accompanying documentation, forms the basis for the administrative record on which the Board will make its determination.³⁰⁸ Any additional information required by the Board must be supplied "by a date certain."³⁰⁹ The Board will issue a temporary restraining order, if necessary, instructing the receiver to stay its threatened action pending resolution of the request for expedited relief.³¹⁰

The Board then issues a final decision with reasons, "as soon as practicable."³¹¹

E. *Overview of the Adjudicatory Structure.*

The overall picture that emerges is as follows:

- At the primary decisionmaking level there is one agency, acting in two separate institutional capacities. For determinations involving insured deposits, the Insurance Division of FSLIC Corporate is responsible. For determinations involving uninsured deposits and general creditor claims, an agent of the FSLIC Receiver is responsible.
- At the Board level, the Director of the Adjudication Division of the FHLBB is in practice responsible for adjudicating disputes over both insurance and other claims, with the possibility of direct review and oral hearings by the Board.
- Finally, according to the *Hudspeth* doctrine, the determinations of the Board, with the possible exception of those involving insured depositor claims,³¹² are subject to limited judicial review under the APA.

307. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.3(b)); Expedited Relief Procedures, *supra* note 205, at 13,112 (para. B(2)).

308. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.3(c)); Expedited Relief Procedures, *supra* note 205, at 13,112 (para. C(5)).

309. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.4(e)); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. C(5)).

310. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.4(g)); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. C(7)). The stay will remain in effect "for a period of time sufficient to enable the party requesting relief to be provided with the Bank Board's Decision and an opportunity to seek judicial review of that Decision." See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.4(g)); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. C(7)).

311. See 53 Fed. Reg. at 21,482 (to be codified at 12 C.F.R. § 577.4(d)); Expedited Relief Procedures, *supra* note 205, at 13,113 (para. C(4)).

312. The courts are divided on the question whether insured depositors are entitled to full, de novo judicial review or only *Hudspeth*, APA-type review. See *infra* note 390 and accompanying text.

III. CONSTRAINTS UPON AGENCY ADJUDICATION

In order to provide a framework for evaluating the general *Hudspeth* procedures, it is necessary to review the statutory, constitutional and administrative law constraints within which the FHLBB must operate. Though not always recognized, these constraints share a subtle interdependency. For example, where questions of constitutionality do not arise, it is enough that an agency's authority to act be merely implied in its governing legislation.³¹³ But where the exercise of its powers appears to encroach upon the prescriptions of article III, it may be necessary for the agency's authority to be stated in fairly explicit terms.³¹⁴ Second, a broad delegation of agency authority, which might once have been regarded as unconstitutional,³¹⁵ will be accepted if there are adequate procedural safeguards in, and judicial scrutiny of, the exercise of that authority.³¹⁶ Third, the courts might be more willing to tolerate agency authority that encroaches upon the preserve of article III if the exercise of that authority is subjected to the standards of due process³¹⁷ and if there is adequate judicial scrutiny of the agency's action.³¹⁸ Yet adequate judicial scrutiny might mandate the observance by the agency of stricter procedural standards than might ordinarily be required, either by the APA or by the requirements of procedural due process.³¹⁹ And the application of the due process requirement of an impartial decisionmaker will vary according to the internal structural arrangements of the agency.³²⁰ Finally, if the courts are satisfied that Congress has not violated article III in allocating decisionmaking power to an agency, they are also likely to accept that the seventh amendment requirement of a jury trial is inappropriate in the context of agency adjudication.³²¹

This interdependency suggests that Congress and the FHLBB, in devising a claims adjudication system, must take account of a whole network of statutory and constitutional restraints, none of which should be seen in isolation from the others. At the same time, the Board has the advantage of being able to secure a system of adjudication during a period in which the Supreme Court has been extraordinarily deferential toward agencies. In the field of statutory interpretation, the Court has initiated an era of deference toward the construction by agencies of their

313. See *infra* text accompanying notes 325-36.

314. See *infra* text accompanying notes 596-98.

315. See *infra* note 514.

316. See *infra* text accompanying notes 533-36.

317. See *infra* text accompanying notes 560, 573.

318. See *infra* text accompanying notes 555, 573.

319. See *infra* text accompanying notes 681-84.

320. See *infra* text accompanying notes 617-37.

321. See *infra* text accompanying notes 638-52.

congressional mandates.³²² In considering the role of agencies within the constitutional framework, it has settled upon an ad hoc balancing test for determining whether constitutional constraints have been breached.³²³ And in considering the application of the APA, it has been reluctant to enforce directly the observance of procedural standards beyond those expressly stipulated in the Act.³²⁴

A. *Legislative Constraints: The Authority to Adjudicate.*

1. *Statutory Interpretation in Modern Administrative Law.* In 1984 the Supreme Court, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³²⁵ firmly indicated that courts were to defer to the construction by agencies of their statutory mandates whenever those mandates were not expressed in clear terms. Justice Stevens enunciated a two-stage test:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.³²⁶

In determining whether the FSLIC and the FHLBB possess statutory authority to adjudicate creditor claims, the *Chevron* analysis dictates that we should first ask whether the relevant legislation clearly addresses the issue. If this is the case then the inquiry is answered automatically and the adjudication power either exists or does not. If, on the other hand, the legislation is "silent or ambiguous," then we should defer to the agencies' view, provided this is "based on a permissible construction of the statute."

The trouble is that this two-stage test is deceptively simplistic and it should come as no surprise that subsequent application by the Court it-

322. See *infra* text accompanying notes 325-36.

323. See *infra* text accompanying notes 510-18.

324. See *infra* text accompanying notes 489-92.

325. 467 U.S. 837 (1984).

326. 467 U.S. at 842-43 (footnotes omitted).

self of the *Chevron* analysis has generated confusion and controversy.³²⁷ It is not immediately obvious how we might determine whether “the intent of Congress is clear.” Will this depend upon whether Congress has expressed itself in “plain” and “unambiguous” language?³²⁸ Or will it depend upon whether, applying the traditional principles of statutory construction, the meaning of otherwise unclear language becomes “clear”?³²⁹ If the words are “clear,” must the court’s analysis be confined to the “purely linguistic level,”³³⁰ or can one resort to legislative history in order to demonstrate that ostensibly clear words are in fact unclear, so that one should defer to the agency that has chosen to disregard them?³³¹ As one commentator has recently observed, “one judge’s plain meaning may be another’s ambiguity.”³³²

The *Hudspeth* court relied on *Chevron* in accepting the FHLBB’s construction of the FSLIC’s powers under the Home Owners’ Loan Act

327. See Hochberg, *‘Two-Step’ Method of Analysis: Still in Transition After Chevron*, Nat’l L.J., May 16, 1988, at 22, col. 1. But see Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988) (*Chevron* amounts to simple approach in complicated area); Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283-84 (1986) (*Chevron* eliminated ambiguity in Clean Air Act Amendments of 1977); Starr, Sunstein, Willard, Morrison & Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 360 (1987) (*Chevron* provides clear, analytical framework for analysis); Note, *Judicial Review of the Federal Banking Regulatory Agencies*, 7 ANN. REV. BANKING L. 365 (1988).

328. This is the view taken by the Court in *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (Burger, C.J.) (“no amount of agency expertise—however sound may be the result—can make the words ‘legal right’ mean a right to do something ‘as a matter of practice;’” the intent of Congress was therefore “clearly expressed”). Justice Scalia expressed a similar view in his concurrence in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (criticizing the Court for engaging in an “ill advised” analysis of legislative history where the language of the law was “clear”). Cf. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 426-27 (1987) (Scalia, J., concurring) (case was correctly decided “only because ‘the statute is silent or ambiguous’ with respect to an issue relevant to the agency’s administration of the law committed to its charge”).

329. Cf. *Cardoza-Fonseca*, 107 S. Ct. at 1220-22 (examining legislative history of statutory provisions in question in determining a “pure question of statutory construction”).

330. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The Court sensibly characterized this approach as “simplistic.” *Id.*

331. See *Chemical Mfrs. Ass’n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985). In *Chemical Mfrs.*, the majority, after examining the legislative history of a statutory prohibition on “modifying” the requirements of the statute at issue, concluded that the prohibition was ambiguous enough to warrant deference to the construction placed upon it by the agency. *Id.* at 126-29. The dissent thought that the statute expressed the “clear intent of Congress.” *Id.* at 135 (Marshall, J., dissenting).

332. Bregger, *Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation—Introductory Remarks*, 1987 DUKE L.J. 362, 370. Of course, an investigation of legislative history does not guarantee that clarity will emerge. For a recent debate on the well-known difficulties associated with the use of legislative history, see *Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation*, 1987 DUKE L.J. at 361-86.

and the National Housing Act.³³³ But *Chevron* has probably failed to simplify the task of identifying whether statutory authority for administrative claims adjudication exists or even whether the assumption that it does is a "permissible" construction of the legislation. The decision is better understood for present purposes as merely signaling a general, perhaps even necessary,³³⁴ disposition of deference toward agencies under circumstances in which there is no reason to mistrust their judgment.³³⁵ The courts have proven accommodating in allowing significant reinterpretations of banking regulatory statutes (though not always in favor of the agencies) as the appropriateness of the legislation has changed over time.³³⁶ Hence, though we still need to examine the origin and evolution of the statutory provisions upon which the FHLBB and the FSLIC rely for their asserted jurisdiction, we should also bear in mind that statutory construction will be influenced by the fact that the courts are likely to display a benevolent attitude toward the banking agencies in their current difficulties.

2. *Sections 1464(d)(6)(C), 1464(d)(11) and 1729(d): History, Context and Application.* The FHLBB and the FSLIC rely upon three statutory provisions as constituting combined authority for administrative claims adjudication. Section 1464(d)(11) supplies the general authority to enact rules governing the adjudication of claims.³³⁷ Section 1729(d)

333. See *Hudspeth*, *supra* note 103, 756 F.2d at 1103; see also *Peoples' Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104, 1106-07 (D. Kan. 1988); *Keller v. Antioch Sav. & Loan Ass'n*, 143 Ill. App. 3d 278, 285, 492 N.E.2d 937, 941 (1986). In *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1215 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451), the court recognized that the FHLBB was entitled to *Chevron* deference but found that this deference could "not save an agency interpretation that is contrary to clear congressional purpose." For a discussion of the *Hudspeth* and *Morrison-Knudsen* courts' conflicting applications of *Chevron*, see Note, *supra* note 327, at 395-96.

334. See Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). Strauss suggests that the Court has two good reasons for commanding deference to agencies' construction of their statutory mandates: the national responsibility of the agencies has a centralizing effect on the application of the law, and conflicts arising from independent review of legal questions in the circuits cannot be adequately resolved by the Supreme Court, given the limitations on its resources. *Id.*

335. Cf. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985) (advocating a presumption of deference toward agencies' construction of their governing statutes); Gerwin, *The Deference Dilemma: Judicial Responses to the Great Legislative Power Giveaway*, 14 HASTINGS CONST. L.Q. 289 (1987) (reviewing and criticizing the current mood of, and the inconsistencies associated with, deference in all aspects of judicial review of agency action).

336. Cf. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987) (studying the behavior of courts faced with dilemma of interpreting obsolete statutes governing banking).

337. See *supra* text accompanying note 187 (quoting § 1464(d)(11) in full).

supplies the FSLIC's power as receiver to adjudicate claims.³³⁸ And section 1464(d)(6)(C) precludes the courts from "restraining" or "affecting" the receivership, thereby according to the FHLBB and, in turn, the FSLIC, exclusive authority to determine the disposition of creditor claims.³³⁹

In what follows, an attempt will be made to place these provisions in their proper context by tracing their genealogy.³⁴⁰ The conclusion will be that it is unlikely that either section 1464(d)(6)(C) or section 1729(d) was intended to confer claims adjudication authority on either the FHLBB or the FSLIC. On the other hand, it will be recognized that if the FHLBB were able to satisfy the many *constitutional* concerns involved,³⁴¹ the general regulatory authority possessed by the FHLBB under section 1464(d)(11) might be sufficiently broad to provide *statutory* authority for the creation by the FHLBB of an administrative adjudication scheme.

a. Early practices. There were no federally chartered thrifts before 1933.³⁴² State regulatory arrangements varied widely, though a fairly common feature was the vesting of receivership responsibility in the state agency responsible for the general supervision of thrifts, and the exemption of thrifts from the ordinary provisions pertaining to bankruptcy.³⁴³ On the other hand, it was also common practice to subject the liquidation and claims determination process to the supervision of a state court;³⁴⁴ indeed, this remains the case.³⁴⁵

During the nineteenth century there had, however, developed two forns of receivership applicable to financial institutions. The first was the traditional "equitable," or court-directed receivership, and the second was the statutory, or agency-managed receivership.³⁴⁶ The latter model reflected conscious efforts by particular states to impose a colier-

338. See *supra* text accompanying note 186 (quoting § 1729(d) in full).

339. See *supra* text accompanying note 178 (quoting § 1464(d)(6)(C) in full).

340. The most thorough judicial analysis to date is that contained in *Summertree Venture III v. FSLIC*, 742 S.W.2d 446, 450-52 (Tex. Ct. App. 1987).

341. See *infra* text accompanying notes 658-84.

342. See *supra* text accompanying notes 40-42.

343. See HISTORY OF BUILDING AND LOAN, *supra* note 40, at 129.

344. See Pfeiler, *supra* note 54, at 466 n.119 (citing California, Minnesota and Pennsylvania statutes).

345. See, e.g., ILL. ANN. STAT. ch. 17, ¶ 3310-5 (Smith-Hurd 1981 & Supp. 1988); IND. CODE ANN. § 28-1-3.1-10 (Burns 1986); MASS. ANN. LAWS ch. 167, §§ 28-29 (Law. Co-op. 1987); MD. FIN. INST. CODE ANN. §§ 9-702, 9-708 (1986); N.Y. BANKING LAW §§ 623-624 (McKinney 1971); TEX. REV. CIV. STAT. ANN. arts. 342-811 (Vernon 1973); VT. STAT. ANN. tit. 8, § 1660 (1984).

346. See, e.g., *In re Union Bank*, 176 A.D. 477, 481-82, 163 N.Y.S. 485, 488-89 (1917). See generally Note, *Statutory Control over the Dissolution of Building and Loan Associations*, 35 COLUM. L. REV. 265 (1935).

ent scheme of banking regulation on financial institutions, and it was designed to replace any traditional equitable receivership that might otherwise be instituted in the event of a bank or thrift failure.

The evolution of the statutory receivership placed in question the supervisory jurisdiction of the courts that would otherwise have retained control over the receivership. The courts soon recognized that, as in other areas where the legislature had vested statutory powers in an officer or agency, it was not for them to gainsay the exercise of those powers by the legislature's delegate. So, for example, when the Comptroller of the Currency was empowered to appoint receivers for failed national banks, the federal courts emphasized that, in the absence of abuses of power,³⁴⁷ the discretionary actions of the receiver (for example, decisions as to the realization and distribution of receivership assets) could not be modified by the courts.³⁴⁸ A plurality of the New York Appellate Division emphasized that the receivership decisions of the New York Superintendent of Banks were not automatically subject to judicial proceedings.³⁴⁹

But this deference extended only to the *discretionary* statutory powers vested in receivers: where, on the other hand, the nondiscretionary question of the *existence* of a valid claim was concerned, the courts seemed to have no doubt that the decisions of statutory receivers, unlike those of some equitable receivers,³⁵⁰ were subject to de novo review.³⁵¹ For example, it was recognized that creditors of national banks in receivership could establish the validity of their claims in court,³⁵² and one

347. Review for abuse of power has always been contemplated. See, e.g., *United States v. Knox*, 102 U.S. 422, 425 (1880); *Hulse v. Argetsinger*, 12 F.2d 933, 936 (W.D.N.Y. 1926); *Fifer v. Williams*, 5 F.2d 286, 289 (9th Cir. 1925); *Union Bank*, 176 A.D. at 485, 163 N.Y.S. at 490-91.

348. See, e.g., *Earle v. Pennsylvania*, 178 U.S. 449, 454-55 (1900); *Bushnell v. Leland*, 164 U.S. 684, 685-86 (1897); *Casey v. Galli*, 94 U.S. 673, 677, 681 (1876); *Kennedy v. Gibson*, 75 U.S. (8 Wall.) 498, 505 (1869); *Argetsinger*, 12 F.2d at 935-36; *In re Earle*, 92 F. 22, 22 (C.C.E.D. Pa. 1899); *Merrill v. First Nat'l Bank*, 75 F. 148, 152-53 (5th Cir. 1896); *Altman v. McClintock*, 20 F.2d 226, 231, 233 (D. Wyo. 1927); see also Barse, *A Summary of the Procedure and Principles Relating to the Liquidation of National Banks in Receivership*, FED. B.A.J., Oct. 1932, at 3, 4 ("Such liquidation is not subject to the supervision of either the state or federal courts, and is purely administrative in character.").

349. *Union Bank*, 176 A.D. at 483, 163 N.Y.S. at 490.

350. See, e.g., *State ex rel. Pitts v. Peter Cooper Bldg. & Loan Ass'n*, 74 Mo. App. 167 (1898) (refusing to conduct full de novo review of a court-appointed commissioner's determination of the validity of a creditor's claim, the commissioner being viewed as equivalent to a referee in chancery).

351. Execution of the claim, on the other hand, was not permitted. See, e.g., *Cosmopolitan Trust Co. v. Suffolk Knitting Mills*, 247 Mass. 530, 143 N.E. 138 (1924) (creditor could secure judgment as to the validity of its claim, but not set off); see also Barse, *supra* note 348, at 5.

352. See, e.g., *Earle*, 178 U.S. at 455; *Bank of Bethel v. Pahquioque Bank*, 81 U.S. (14 Wall.) 383, 401 (1871); *Kennedy*, 75 U.S. (8 Wall.) at 506 (1869) ("The claims of creditors may be proved before the comptroller, or established by suit against the association."); *Schulenberg v. Norton*, 49 F.2d 578, 580 (8th Cir. 1931) ("The statute provides an easy, speedy manner of determination of claims by permitting such to be presented to a receiver appointed by the Comptroller, but this is

state court even recognized that, notwithstanding its clearly established deference towards receivers where the latter were exercising discretionary receivership powers, the actual *priority* of a creditor's claim (let alone its mere validity) was a matter justiciable in the courts.³⁵³

Thus the principle of limited, deferential judicial review with regard to statutory receiverships was well established long before the imposition of federal thrift receiverships. On the other hand, this deference was not extended to the nondiscretionary decisions of statutory receivers. As we have already seen, the FSLIC and the FDIC are directed, when appointed as receivers of federal thrifts, to "pay all valid credit obligations"³⁵⁴—a formulation that does not obviously suggest discretion in the receiver. So prior financial receivership law, however progressive, offers little support to the FHLBB and the FSLIC in their efforts to establish exclusive authority to adjudicate the validity of creditor claims.

b. Inception of federal regulation and deposit insurance. The first federal involvement was in response to the drain on savings that occurred during the Great Depression.³⁵⁵ Although thrifts remained healthier than commercial banks, people were forced to draw on their savings as economic conditions deteriorated. This severely limited the flow of funds to housing.³⁵⁶ Congress therefore devised a scheme whereby a system of regional "home loan banks" would be established for the purpose of providing an alternative source of funds to state thrifts. The scheme was embodied in the Federal Home Loan Bank Act, signed by President Hoover on July 22, 1932.³⁵⁷ The Federal Home Loan Bank Board was created for the purpose of chartering and supervising the regional home loan banks,³⁵⁸ and state thrifts were eligible to become members of the system by purchasing stock in one of the home loan banks.³⁵⁹ The

quite different from limiting the ordinary and usual way of determining rights of creditors judicially."); *Merrill*, 75 F. at 153; *Altman*, 20 F.2d at 231-32; see also Barse, *supra* note 348, at 5:

If a claim is disallowed the creditor may file suit in either a state or a Federal court to establish his claim, but the judgment can do no more than establish the claim, and no execution can issue against the receiver, the time of payment being a matter vested in the administrative discretion of the Comptroller.

353. See *Huey v. Rinehart*, 116 W. Va. 309, 180 S.E. 263 (1935); see also *Allen v. United States*, 285 F. 678, 683-84 (1st Cir. 1923) (in a claim brought against an insolvent bank now run by the Commissioner of banks, federal court had jurisdiction to determine whether cash deposits created a trust in favor of the United States).

354. See *supra* text accompanying note 184.

355. For a valuable early account, see 5 FHLBB ANN. REP. 1-3 (1938).

356. See *Barth & Regalia*, *supra* note 40, at 124.

357. Ch. 522, 47 Stat. 725 (codified as amended at 12 U.S.C. §§ 1421-1449 (1982 & Supp. IV 1986)).

358. 12 U.S.C. § 1437(a) (1982 & Supp. IV 1986).

359. Where state law prohibited them from purchasing stock, they were nevertheless permitted to borrow from the home loan banks as nonmembers. 12 U.S.C. § 1426 (1982).

scheme provided thrifts with access to a greater pool of funds, but it also subjected them to federal regulation and supervision in that to remain eligible for membership in, or borrowing from, a home loan bank they had to comply with interest rate, liquidity and lending requirements imposed by the banks.³⁶⁰

As the economy deteriorated, however, increasing numbers of homeowners found themselves subjected to escalating interest rates and foreclosures. Moreover, numerous thrifts had failed and the availability of mortgage funds was drastically reduced or, in more than 1500 counties, had simply disappeared.³⁶¹ These circumstances prompted President Roosevelt, on April 13, 1933, to request emergency legislation from Congress, and this request was met, less than two months later, by the passage of the Home Owners' Loan Act of 1933.³⁶²

The Act created the Home Owners' Loan Corporation for the purpose of providing an emergency supply of mortgage funds in distress cases.³⁶³ It also facilitated, for the first time, the creation of federal savings and loan associations: the FHLBB was empowered to charter mutual thrift associations,³⁶⁴ to allow state-chartered members of a home loan bank to convert to federal charter,³⁶⁵ and to regulate and provide for the liquidation of these associations, "including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same."³⁶⁶ Federal thrifts were to be strictly confined in their operations to narrow geographic localities.³⁶⁷

At this stage no guidance was given by Congress as to how thrifts should be liquidated. The FHLBB was merely given the general authority already quoted. The legislative history is devoid of any reference to the FHLBB's power to liquidate federal thrifts, the primary concern of the legislators being the creation of the Loan Corporation and the provision of funds for home mortgages.³⁶⁸ This is hardly surprising: not only

360. See 12 U.S.C. § 1431.

361. See H.R. REP. NO. 55, 73d Cong., 1st Sess. 2 (1933); Barth & Regalia, *supra* note 40, at 124 & n.10.

362. Ch. 64, 48 Stat. 128; see *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 163 n.18 (1982).

363. Home Owners' Loan Act, ch. 64, § 4, 48 Stat. at 129-32, *repealed by* Act of June 30, 1953, ch. 170, § 21, 67 Stat. 126 (codified at 12 U.S.C. § 1463).

364. Home Owners' Loan Act, ch. 64, § 5(a), 48 Stat. at 132.

365. *Id.* § 5(i), 48 Stat. at 134.

366. *Id.* § 5(d), 48 Stat. at 133.

367. See *id.* § 5(c), 48 Stat. at 132 (confining thrifts to a 50-mile geographic limit, with limited exceptions).

368. See, e.g., S. REP. NO. 91, 73d Cong., 1st Sess. (1933); H.R. REP. NO. 55, 73d Cong., 1st Sess. (1933); H.R. CONF. REP. NO. 210, 73d Cong., 1st Sess. (1933).

was the legislation rushed through Congress,³⁶⁹ but the nature of the thrift industry as it was then would hardly have suggested complicated claims determinations. The overwhelming bulk of thrift creditors would have been depositors, for whom records would have been well-documented. Besides, the systems of state regulation provided ample precedents toward which a new federal agency might look for guidance as it developed its own system of regulation. Hence it is reasonable to assume that Congress would have regarded liquidation as a concern best left to the FHLBB.³⁷⁰

The provision of emergency, low-interest funds for home mortgages actually exacerbated the difficulties of many thrifts.³⁷¹ This induced Congress to enact the National Housing Act in 1934.³⁷² Title IV of the Act³⁷³ instituted a system of deposit insurance, largely along the lines of the system recently introduced for banks,³⁷⁴ and created the FSLIC as an agency to operate under the direction of the FHLBB.³⁷⁵ Congress had two objectives in passing the Act: first, to protect the small depositor;³⁷⁶ but, perhaps even more importantly, to serve the vital public, monetary function of restoring "to the community, as quickly as possible, circulating medium destroyed or made unavailable as a consequence of bank failures."³⁷⁷

c. *Introduction of section 1729(d).* In the National Housing Act Congress was a little more specific about liquidations: the FSLIC was required to pay out insured depositors or transfer their accounts, in the event of a thrift account,³⁷⁸ and was required to act as receiver if the defaulting thrift was a federal one.³⁷⁹ As receiver the FSLIC was re-

369. See *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 163 n.18 (1982).

370. See *infra* text accompanying notes 522-24; cf. *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (recognizing the constitutionality of broad delegation to FHLBB in view of the "accumulated experience of supervisors, acting for many states under various statutes" that "has established well-defined practices for the appointment of conservators, receivers and liquidators").

371. See Barth & Regalia, *supra* note 40, at 124.

372. Ch. 847, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750g (1982)).

373. *Id.* §§ 401-407, 48 Stat. at 1255 (codified as amended at 12 U.S.C. §§ 1724-1730(g)).

374. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 1811-1832 (1982)); see *supra* text accompanying notes 26, 43.

375. National Housing Act, ch. 847, § 402, 48 Stat. at 1255 (codified as amended at 12 U.S.C. § 1725 (1982)).

376. See, e.g., 80 CONG. REC. 11,200 (1934) (statements of Reps. Williams and Dirksen).

377. Golembe, *The Deposit Insurance Legislation of 1933: An Examination of its Antecedents and its Purposes*, 75 POL. SCI. Q. 181, 189 (1960). The author is referring to bank deposit insurance, but the same reasoning applies to thrift deposit insurance.

378. 12 U.S.C. § 1728(b) (1982).

379. 12 U.S.C. § 1729(b) (1982).

quired to pay "all valid credit obligations" of the failed thrift.³⁸⁰ And it was in this Act that the original provision codified at 12 U.S.C. section 1729(d) was first introduced.³⁸¹ Except for amendments clarifying the exclusive regulatory authority of the FHLBB over the FSLIC when the latter acts as receiver of a state thrift, the provision has remained basically unchanged.³⁸²

Once again, however, the legislative history adds little to the text of the Act. The overall plan of deposit insurance was obviously very close to that of the bank deposit insurance scheme that had been created exactly one year before.³⁸³ In hearings before the House Committee, the General Counsel of the FHLBB described the insurance payout options of the FSLIC as receiver as being "substantially the same thing as in the Bank Deposit Insurance Corporation legislation,"³⁸⁴ and in the House Committee Report the legislation is described as having made "[a]dequate provision . . . for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance."³⁸⁵ Beyond these sparse hints that the practice of the FDIC was to be the model,³⁸⁶ the legislative history casts no further light on the meaning of the words "settle, compromise or release," "do all other things that may be necessary in connection therewith," and "subject only to the regulation of the court or other public authority having jurisdiction over the matter," that have been used in section 1729(d).³⁸⁷

380. *Id.* The Act draws no distinction between FSLIC Corporate and the FSLIC Receiver, since the same provision also requires FSLIC Corporate to pay the failed thrift's insurance upon being appointed receiver. See 12 U.S.C. § 1729(b)(2) (Supp. IV 1986).

381. National Housing Act § 406(d), 12 U.S.C. § 1729(d) (1982) (quoted as originally enacted *supra* at note 186). The Fifth Circuit in *Hudspeth* incorrectly assumed that section 1729(d) had been introduced by the Bank Protection Act of 1968. For background on the Bank Protection Act, see *infra* text accompanying notes 407-12. See *Hudspeth*, *supra* note 103, 756 F.2d at 1101 n.2. The court thus wrongly assumed that this provision was introduced in the context of legislation concerned with reducing delay and minimizing costs in FSLIC receiverships. The effect of the 1968 Act was merely to extend section 1729(d) to receiverships involving state-chartered thrifts. See Pfeiler, *supra* note 54, at 440-41.

382. See *supra* note 186; see also *infra* text accompanying notes 415-19.

383. See *supra* note 43.

384. STAFF OF HOUSE COMM. ON BANKING & CURRENCY, 73D CONG., 2D SESS., HEARINGS ON H.R. NO. 9620, HOUSING ACT AMENDMENTS OF 1934, at 15, 18 (Comm. Print 1934) (statement of Horace Russell, General Counsel, FHLBB).

385. H.R. REP. NO. 1922, 73d Cong., 2d Sess. 4 (1934); see also 80 CONG. REC. 11,199 (1934) (statement of Rep. Williams) ("[t]his plan is analogous to the bank-deposit insurance provided at the last session").

386. See *infra* text accompanying notes 430-48.

387. Nor are the FSLIC's early reports much help. In its first annual report, the FSLIC merely describes its receivership duties as including the responsibility to "liquidate [federal savings and loan associations] in a normal manner." 3 FHLBB ANN. REP. 73 (Jan. 1-June 30, 1935). A perusal of the early annual reports reveals that the FSLIC has always attempted to avoid liquidation where

d. Judicial determination of disputed insurance claims. In the Housing Act of 1954³⁸⁸ Congress amended both the National Housing Act and the Home Owner's Loan Act. A statute of limitations was placed upon actions to enforce deposit insurance claims against the FSLIC.³⁸⁹ This is significant for our purposes because, though the FSLIC has made some headway with the *Hudspeth* doctrine even in this context,³⁹⁰ the statutory reference to judicial challenges would seem to indicate that, at least in the case of claims involving insured deposits—the most likely type of claim in a thrift liquidation, given the restricted nature of thrift business at that time—Congress did contemplate the judicial determination of claims where their validity was in dispute.³⁹¹

possible and, if liquidation is inevitable, to minimize the costs of liquidation. *See, e.g.*, 8 FHLBB ANN. REP. 101, 120 (July 1, 1939-June 30, 1940); 9 FHLBB ANN. REP. 128 (July 1, 1940-June 30, 1941). But references to the *process* of liquidation were always couched in vague terms.

On the other hand, some indication that the FHLBB and FSLIC regarded the judicial process as the appropriate means of resolving disputed creditor claims is evident from the fact that in early receivership litigation the FSLIC made no objection to the courts' jurisdiction to determine the validity of claims. *See, e.g.*, *Deep Rock Oil Corp. v. Salisbury*, 130 F.2d 387 (8th Cir. 1942) (deciding dispute between bankrupt oil corporation and savings and loan for which FSLIC had been appointed receiver); *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705 (8th Cir. 1942) (deciding employment contract dispute between employee and savings and loan for which FSLIC was the appointed receiver); *Town of Texhoma ex rel. Versluis v. Neild*, 9 F.R.D. 739 (W.D. Okla. 1943) (hearing motion to strike brought by FSLIC, receiver). In *Fields*, the receiver did object that the claimant had failed to "file" the claim with the receiver, but the court appears to have accepted that this had been done orally and that the claim had been rejected orally. 128 F.2d at 706-07. In any event, the court then proceeded to adjudicate the merits of the claim itself.

388. Ch. 649, §§ 501, 503, 68 Stat. 590, 633-37 (codified as amended at 12 U.S.C. §§ 1725, 1464 (1982)).

389. *Id.* § 501(2), 68 Stat. at 633 (codified as amended at 12 U.S.C. § 1728 (1982)) (adding § 405(c) to the National Housing Act).

390. The FSLIC's attempt to extend the *Hudspeth* doctrine to claims involving insured deposits by arguing that the claimant is entitled not to review *de novo*, but only to APA-type review, was rejected in *Jugum v. FSLIC*, 637 F. Supp. 1045, 1046-48 (W.D. Wash. 1986). The *Jugum* decision has now been vacated as moot. Telephone interview with David A. Felt, Assistant General Counsel, FHLBB (Apr. 28, 1988); *cf. Herbert v. NCUAB*, 663 F. Supp. 833, 839-44 (E.D. Mo. 1987) (NCUAB decisions pursuant to 12 U.S.C. § 1687(c)(1) are not subject only to arbitrariness review under the APA) (discussed *infra* in text accompanying notes 468-72).

On the other hand, the FSLIC has successfully secured the application of the *Hudspeth* doctrine in other cases involving insured depositors' claims. *See, e.g.*, *York Bank & Trust Co. v. FSLIC*, 663 F. Supp. 1100 (M.D. Pa. 1987) (holding that any claim arising from the FSLIC's power as a receiver is limited to remedies provided under the APA), *vacated on other grounds*, 851 F.2d 637 (3d Cir. 1988) (court divided 2 to 1 on this issue); *Baskes v. FSLIC*, 649 F. Supp. 1358, 1365 (N.D. Ill. 1986) (claim of negligence brought against FSLIC dismissed because administrative remedies not exhausted); *cf. Wyatt v. FSLIC*, 685 F. Supp. 196, 198 (E.D. Ark. 1988); *Berz v. FSLIC*, No. CA3-87-0681-R, slip op. at 4 (N.D. Tex. Feb. 15, 1988) (APA-type review applied in granting summary judgment to FSLIC on its determination of validity of insured depositors' claims).

391. This was one of the provisions of the National Housing Act that convinced the Ninth Circuit in *Morrison-Knudsen* that the judicial determination of other creditor claims could not have been precluded. *See Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1220 (9th Cir. 1987),

The Act also made provision for the FHLBB to secure enforcement orders, administratively and judicially, against delinquent thrifts as an alternative to placing them in conservatorship or receivership.³⁹² It enunciated specific grounds for, and required formal administrative hearings in the case of, the appointment of conservators, receivers and supervisory representatives.³⁹³ It is worth noting that here, where Congress specifically addressed the question of administrative adjudication, it prescribed detailed procedures and principles upon which decisions should be based.

e. Introduction of section 1464(d)(6)(C). In 1966, after the FHLBB had been experiencing difficulty in securing the cooperation of the managers of some delinquent thrifts,³⁹⁴ Congress, in the Financial Institutions Supervisory Act of 1966,³⁹⁵ granted the FHLBB power to issue and seek enforcement of cease and desist orders, as an alternative to the FHLBB's power to place thrifts in receivership and as an alternative to the FSLIC's power to terminate the insurance of a delinquent institution, both actions being considered sometimes too drastic.³⁹⁶ Most importantly, the Act also inserted for the first time subsection 1464(d)(6)(C), which forbids the courts from "restrain[ing] or affect[ing] the exercise of powers . . . of a . . . receiver," except at the instance of the Board.³⁹⁷ Subsection 1464(d)(6)(C) is one of the bases upon which the agencies assert exclusive claims adjudicatory power.

This preclusion of court jurisdiction is ambiguous. It was formulated within the context of a provision that is primarily concerned with the appointment and removal of, and not the discharge of functions by, conservators and receivers. Subsection (8) of the insertion made provision for court applications by the FHLBB, "in its discretion," for the enforcement of notices issued by it under its extended powers, including not only the issue of cease and desist orders but also the appointment and

petition for cert. filed sub nom. FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

392. Housing Act, ch. 649, § 503(2), 68 Stat. at 634-36 (codified as amended at 12 U.S.C. § 1464 (1982)) (amending § 5(d) of Home Owners' Loan Act of 1933).

393. *Id.* § 503(2), 68 Stat. at 635-36 (codified as amended at 12 U.S.C. § 1464).

394. *See, e.g.*, S. REP. NO. 1482, 89th Cong., 2d Sess. 5-6, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3532, 3537-38; HOUSE COMM. ON BANKING & CURRENCY, 89TH CONG., 2D SESS., FINANCIAL INSTITUTIONS SUPERVISORY AND INSURANCE ACT, HEARINGS ON H.R. 17899, at 33, 37 (Comm. Print 1966) (statement of John E. Horne, Chairman, FHLBB) [hereinafter Statement of John E. Horne].

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

396. *See, e.g.*, Statement of John E. Horne, *supra* note 394, at 36.

397. Financial Institutions Supervisory Act, Pub. L. No. 89-695, § 6(C), 80 Stat. at 1033 (codified as amended at 12 U.S.C. § 1464(d)(6)(C)).

removal of receivers.³⁹⁸ This would suggest that Congress was concerned, not with details such as the determination of valid creditor claims, but with the creation, responsibility, and termination of receiverships, and the need to subject these concerns to the authority of the FHLBB. What Congress appeared to have in mind in precluding courts from “restraining” or “affecting” receiverships was the possibility that a FHLBB-appointed receiver might be harassed in the exercise of its wide-ranging discretionary powers by injunctions issuing from state courts at the instance, for example, of aggrieved ex-directors. Viewed from this perspective, subsection 1464(d)(6)(C) seems little more than a strengthening and codification of the principle of deference toward discretionary receivership powers that had long before been developed by state and federal courts in relation to statutory financial receiverships,³⁹⁹ and the provision does not necessarily imply that the validity of the credit obligations that the receiver is bound to pay should not, when in dispute, be settled in court.⁴⁰⁰

Furthermore, wherever Congress expressly addressed the subject of adjudication, it again made provision for the conduct of hearings⁴⁰¹ and provided for judicial review under the APA.⁴⁰² If administrative claims adjudication and exclusion of the courts had been contemplated, one might expect Congress to have been more explicit in expressing such intent: after all, the Chairman of the FDIC had specifically stated when describing the purpose and contents of the House bill that “[t]here are

398. *Id.*, § 101(a), 80 Stat. at 1028 (codified at 12 U.S.C. § 1464(d)(8)) (adding new § 5(d)(8) to Home Owners’ Loan Act). The provision of this facility does indicate how much responsibility Congress has been prepared to entrust to the FHLBB: few other agencies have authority to prosecute enforcement actions without the participation of an independent prosecutorial agent. See Diver, *A Theory of Regulatory Enforcement*, 28 PUB. POL’Y 257, 287 (1980).

399. See *supra* text accompanying notes 347-53.

400. Cf. Statement of John E. Horne, *supra* note 394, at 38 (“As a matter of fact, there can be no doubt that the approach of this bill markedly increases the role of judicial review in the process of supervision of financial institutions. At the same time, the Board believes it essential for the supervisory agency that examines and is familiar with the developments in a financial institution to be able to judge when action is necessary and what action is appropriate, and to act promptly if the matter is urgent.”). If exclusive claims adjudicatory power had been sought by the Board, one would expect the General Counsel, whose office actually drafted the bill, to have requested it. There is no mention of the subject in the General Counsel’s statement.

401. See Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, §§ 101(a), 102, 80 Stat. 1028, 1028, 1036 (inserting § 5(d)(7) into the Home Owners’ Loan Act, 12 U.S.C. § 1464(d)(7) (1982), and amending § 407 of the National Housing Act, 12 U.S.C. § 1730(j)(2) (1982)).

402. See S. REP. NO. 1482, *supra* note 394, at 15, 25, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS at 3546, 3557 (section-by-section analysis). The House bill, H.R. 17899, provided for judicial review according to the “weight of the evidence” standard. See H.R. REP. NO. 2077, 89th Cong., 2d Sess. 6 (1966) (the standard of review should be a “weight of the evidence” rather than “substantial evidence” standard). But the Senate bill, S. 3158, was passed in lieu of the House bill and the modification was dropped. See also *infra* text accompanying note 504.

carefully drawn provisions with respect to administrative hearings and judicial review which fully protect the rights of individuals and insured institutions against whom action may be taken by the supervisory agencies."⁴⁰³

f. Introduction of section 1464(d)(11). On the other hand, the 1966 Act added more detail to the general power of the FHLBB to regulate the conduct of receiverships. It introduced the predecessor to the present section 1464(d)(11),⁴⁰⁴ which is expressed in very broad terms.⁴⁰⁵ The legislative history provides no indication as to the intention of Congress with regard to this provision,⁴⁰⁶ so it is quite plausible that the legislative intention was for the FHLBB to deal with claims adjudication as a matter of administrative detail and agency expertise.

g. Extension of receivership appointment powers. The Bank Protection Act of 1968⁴⁰⁷ extended the powers of the FHLBB to appoint the FSLIC as receiver of insolvent state thrifts. This was effected against a background of obstruction on the part of the Illinois authorities, who had refused to appoint the FSLIC as receiver in four cases even though the FSLIC was the insurer of deposits in those thrifts and by far the major creditor.⁴⁰⁸ The state authorities had for a number of months denied the FSLIC access to information concerning the thrifts; during this time their financial condition deteriorated rapidly, to the ultimate cost of the Insurance Fund.⁴⁰⁹ Congress was concerned that the FHLBB and the FSLIC should be able to act quickly in such cases,⁴¹⁰ so it extended the former's powers to appoint the FSLIC as receiver, and extended the operation of section 1464(d)(6)(C) to FSLIC receiverships involving state-

403. HOUSE COMM. ON BANKING & CURRENCY, 89TH CONG., 2D SESS., *supra* note 394, at 27 (statement of K.A. Randall, Chairman, FDIC).

404. Financial Institutions Supervisory Act, Pub. L. No. 89-695, § 101(a), 80 Stat. at 1028 (inserting § 5(d)(11) in the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(11) (1982)).

405. 12 U.S.C. § 1464(d)(11); *see also supra* text accompanying note 187.

406. *See* S. REP. NO. 1482, *supra* note 394, at 15, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS at 3546.

407. Pub. L. No. 90-389, 82 Stat. 294 (codified as amended at 12 U.S.C. §§ 1729, 1881-1884 (1982)).

408. *See* S. REP. NO. 1263, 90th Cong., 2d Sess. 6-7, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2530, 2536-37. The FSLIC was estimated to have a claim to at least 95% of the receivership assets, *see id.* at 2, 7, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2531, 2536, which again indicates how low a priority was given the concern for determination of other creditor claims.

409. *See id.*, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2531, 2536.

410. The Fifth Circuit in *Hudspeth* placed great emphasis on this concern, *see Hudspeth*, *supra* note 103, 756 F.2d at 1101, 1102, but did not explain the context in which the FHLBB and FSLIC powers were being extended to state thrifts.

chartered thrifts.⁴¹¹ Given the fact that the claims of creditors other than the FSLIC amounted to less than 5%,⁴¹² it is hardly likely that the claims determination process was within the contemplation of Congress.

The Garn-St Germain Depository Institutions Act of 1982⁴¹³ granted the FHLBB the emergency power exclusively to appoint the FSLIC as receiver for state-chartered thrifts in situations where the cooperation of state authorities had formerly been required, and it recodified the discretionary powers enjoyed by the FSLIC as receiver.⁴¹⁴

h. Modification of section 1729(d). Subsection 1729(d) was also temporarily modified by the 1982 Act to make clear the FHLBB's exclusive regulatory authority over the FSLIC as receiver of state thrifts.⁴¹⁵ The basic power to "settle, compromise, or release" claims, and to "do all other things as may be necessary in connection therewith" remained unaffected; the intention was that the receivership powers of the FSLIC over state thrifts should be "approximately equal to those which it now has with respect to Federal Associations."⁴¹⁶

Finally, the Competitive Equality Banking Act of 1987⁴¹⁷ made the emergency provisions of the Garn-St Germain Act, including the then-sunsetted amendments to section 1729(d),⁴¹⁸ permanent by deleting the

411. See Bank Protection Act, Pub. L. No. 90-389, § 6, 82 Stat. at 295 (modifying § 406 of the National Housing Act, 12 U.S.C. § 1729 (1982), and § 5(d) of the Home Owners' Loan Act, 12 U.S.C. § 1464(d) (1982)). The Senate Report described § 1464(d)(6)(C) as preventing the "appointment of the FSLIC as receiver by the Board" from being "subject to judicial attack." See S. REP. NO. 1263, *supra* note 408, at 10, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2539. The Report then emphasized that the Board's regulatory authority was to be substituted for that "of any State authority, administrative or judicial, which may previously have had regulatory authority," *id.*, and concluded that "[t]he effect of the legislation would be to enable the FSLIC to defend its appointment under Federal law instead of requiring it to defend the legality of the State savings and loan administrator's determinations under State law," *id.* at 11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2540. Claims adjudication seems not to have been contemplated.

412. See *supra* note 408.

413. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C. and 20 U.S.C.).

414. Garn-St Germain Depository Institutions Act § 122(b), 12 U.S.C. § 1729(f) (1982).

415. *Id.* § 122(g), 12 U.S.C. § 1729(d) (1982); see *supra* text accompanying note 186 (quoting the temporary (and now permanent) wording in full); see also *infra* text accompanying notes 417-19.

416. S. REP. NO. 536, 97th Cong., 2d Sess. 48, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3102. It is significant that Congress emphasized that the Insurance Fund would not be liable for the noninsured claims of creditors. See *id.* at 49, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 3103. This probably reflects awareness of the growing diversification of thrift business and the increasing importance of noninsured creditor claims. It also suggests that it is only at this point that legislators could have begun to address seriously the detail of creditor claims adjudication.

417. Pub. L. No. 100-86, 101 Stat. 552 (to be codified in scattered sections of 12 U.S.C.A.).

418. See *supra* text accompanying note 186 (quoting the final version of § 1729(d) in full).

sunset clauses in the 1982 Act.⁴¹⁹

This review highlights the ambiguity surrounding the receivership claims determination power. It is very unlikely that Congress at any stage directly addressed the matter, and neither section 1464(d)(6)(C) nor section 1729(d) can seriously be regarded as direct authority for exclusive administrative adjudication. The court in *Summertree Venture III v. Federal Savings & Loan Insurance Corp.*⁴²⁰ was surely correct in concluding:

The reasons the FSLIC can be appointed, the timing of the appointment, and the entity that is authorized to make the appointment have changed throughout the years, but the powers and functions of the receiver in connection with the liquidation have not been expanded since the original acts.⁴²¹

i. The irrelevance of sections 1464(d)(6)(C) and 1729(d). Not only do sections 1464(d)(6)(C) and 1729(d) provide a very dubious basis for the adjudicatory powers claimed by the FHLBB and the FSLIC, but reliance upon them also involves the agencies in self-contradiction, since, ultimately, section 1464(d)(6)(C) proves too much and section 1729(d) proves too little.

If section 1464(d)(6)(C) really does preclude the jurisdiction of the courts in matters relating to claims determination, then, contrary to the FSLIC's own arguments and the *Hudspeth* decision itself,⁴²² judicial review "under the APA"⁴²³ would not be available at all because the APA expressly denies judicial review where the applicable statute precludes it.⁴²⁴ Hence, to be consistent, the FSLIC should have argued, and the Fifth Circuit in *Hudspeth* should have held, that judicial review is denied altogether.⁴²⁵

On the other hand, section 1729(d) confers power on the *receiver* (i.e., the FSLIC), not the FHLBB. If the power to adjudicate lies therein, then the FHLBB, in creating a structure in which adjudication really takes place only at the level of the Adjudication Division of the

419. Pub. L. No. 100-96, § 509(a), 101 Stat. at 635.

420. 742 S.W.2d 446 (Tex. Ct. App. 1987).

421. *Id.* at 453.

422. See *Hudspeth*, *supra* note 103, 756 F.2d at 1103.

423. *Id.*

424. 5 U.S.C. § 701(a)(1) (1982).

425. This rule has some judicial qualifications, designed to avoid due process difficulties. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 372-73 (1974) (the no-review clause of laws administered by the Veterans' Administration, 38 U.S.C. § 211(a) (1982), was designed to proscribe courts from making benefit determinations, not to proscribe judicial cognizance of constitutional challenges to veterans' benefits legislation). But these are exceptions, and it would be misleading to assume that their effect is simply to reinstate "judicial review under the APA."

Office of General Counsel of the *Board*,⁴²⁶ has to that extent usurped a power conferred on the receiver. In other words, the FHLBB cannot, in claiming adjudicatory power for itself, rely on power conferred upon another agency, even if that agency is subject to its direction.

j. Section 1464(d)(11) as the best basis for the Hudspeth scheme. Yet it does not necessarily follow that there can be no administrative adjudication. Such a conclusion would ignore the broad power conferred on the FHLBB by section 1464(d)(11), which, under *Chevron*, would ordinarily create a strong presumption in favor of the Board's interpretation of the section.⁴²⁷ The Supreme Court has determined in certain contexts that "receivership" powers do not entail a claims adjudication power,⁴²⁸ but the receivership concept has been used in such widely varying contexts, and the thrift industry has been subjected to autonomous regulation for so long, that it would be an exercise in sterile conceptualism to conclude that claims adjudication is inherently precluded by the notion of receivership.

If the obfuscation of sections 1464(d)(6)(C) and 1729(d) is avoided, and constitutional concerns are left aside, the claim that the FHLBB, in the exercise of its general regulatory powers under section 1464(d)(11), can establish a claims adjudication scheme becomes much more plausible. A court could conclude that since Congress has not directly addressed the issue, as it plainly has not, the conclusion by the Board that it is empowered to establish a claims adjudication scheme is a "permissible" construction of its powers and therefore one that the court should accept.⁴²⁹

3. FDIC and NCUAB Analogues. Before leaving the question of statutory power it is helpful briefly to review two possible analogies, one of which might suggest that claims adjudication is not within the range of FHLBB and FSLIC powers, and the other of which tends to support the FHLBB's and FSLIC's claim. The first involves the FDIC, and the second the NCUAB.

a. The FDIC. The practice of the FDIC may be of assistance for a variety of reasons. First, the FSLIC insurance scheme was at least

426. See *supra* text accompanying note 250.

427. See *supra* text accompanying notes 325-36.

428. See *supra* text accompanying notes 108-09.

429. See *supra* text accompanying notes 326-27 (discussing the second stage of the *Chevron* analysis). In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-43 (1986), see *infra* text accompanying notes 576-88, the Court held that the CFTC had the power to create a reparations jurisdiction by rule, though there the statute seemed, in view of its direct reference to "reparation orders," more clearly to contemplate that the agency would do so.

partly modeled on that of the FDIC,⁴³⁰ and the techniques employed by the FSLIC to assist troubled thrifts are very similar to those employed by the FDIC.⁴³¹ Second, Congress has often amended and extended the receivership powers of the FSLIC and the FDIC in the same legislation.⁴³² Third, the activities of banks and thrifts are becoming increasingly similar.⁴³³ The overlap is highlighted by the fact that the FDIC is appointed by, and subject to the authority of, the FHLBB when it acts as receiver for a failed federal savings bank.⁴³⁴ The FDIC has indeed adopted the view that the *Hudspeth* doctrine applies to the determination of creditor claims when it is liquidating such banks.⁴³⁵ Fourth, the FDIC has had longer experience in dealing with the claims of non-insured depositors⁴³⁶ and faces similar problems regarding the escalation of failed banks and the depletion of its insurance fund.⁴³⁷ Finally, some judicial decisions, while fully acknowledging the controlling force of *Chevron*, have directly drawn on the analogies between the two agencies in rejecting the FHLBB's and FSLIC's interpretations of their statutory mandates.⁴³⁸

The FDIC must be appointed receiver of failed federal savings banks, in which case appointments are made by the FHLBB, and of failed national banks, in which case appointments are made by the Comptroller of the Currency.⁴³⁹ The FDIC may also accept appointment as receiver of an insured state bank if such appointment is tendered

430. See *supra* text accompanying notes 384-85.

431. See *supra* note 182.

432. See, e.g., Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 714(a), 101 Stat. 552, 654 (codified at 12 U.S.C.A. § 1787(a)(1)(B) (West Supp. 1988)); Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.); Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 (codified at 12 U.S.C. §§ 1729, 1881-1884 (1982)); see also *supra* notes 407-19.

433. See *supra* text accompanying notes 53-57.

434. See *supra* text accompanying notes 167-68.

435. See *supra* note 181.

436. See *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1221 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

437. See, e.g., Nash, *FDIC Faces a Texas-Size Drain*, N.Y. Times, Mar. 17, 1988, at D1, col. 3, D6, col. 4 (city ed.).

438. See, e.g., *Morrison-Knudsen*, 811 F.2d at 1221 (the FDIC's practice of litigating disputed claims in court supports the conclusion that the FSLIC did not have adjudicatory power); cf. *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 361-64 (D.C. Cir. 1985) (Scalia, J.) (applying *Chevron* analysis and relying upon the "clarity of congressional intent expressed with regard to the FDIA" in determining whether an inconsistent interpretation by the FHLBB of the "far from clear" National Housing Act was a "permissible" one; concluding that it was not). Although *FAIC* involved the definition of insured accounts, it is still relevant: the FDIC analogy was held to be guiding even at the second stage of the *Chevron* analysis.

439. 12 U.S.C. § 1821(c) (1982). On the rare case of federal savings bank receiverships, see *supra* text accompanying notes 167-69. For the grounds for appointing the FDIC as receiver of a national bank, see 12 U.S.C. § 191 (1982).

by the relevant state authority.⁴⁴⁰

Upon appointment, the FDIC is required to pay insured deposits, either by cash or by means of transferred accounts.⁴⁴¹ With respect to insured national banks, the FDIC has a wide range of powers to provide financial assistance to insured banks in order to avoid receivership,⁴⁴² and, upon receivership, may create new banks and "bridge banks" for the purpose of implementing purchase and assumption transactions.⁴⁴³

Here the similarities with the FSLIC end. In particular, the liquidation practice of the FDIC is very different: the FDIC, unlike the FSLIC, does not assert the power to adjudicate the validity of creditor claims, whether they be those of insured depositors or uninsured and general creditors. The FDIC relies instead upon the courts to resolve these claims.⁴⁴⁴ As a result, the FDIC makes informal, ad hoc arrangements in the case of each receivership;⁴⁴⁵ it lacks guidelines similar to those that have been created by the FHLBB for thrift receiverships.⁴⁴⁶

The practice of the FDIC might therefore suggest that the assumption of adjudicatory authority by the FHLBB and the FSLIC is unjustified. But there are a number of important differences in the regulatory and statutory contexts of each agency that might justify the difference.

First, while the FDIC, when acting as reviewer of a federal savings bank, stands in the same relationship to the FHLBB as does the FSLIC when acting as receiver of a thrift, the FDIC is no longer subject to the Comptroller's regulatory authority when it is appointed by the Comptroller to act as a receiver for a closed national bank.⁴⁴⁷ Hence the appellate structure created by the FHLBB under the *Hudspeth* doctrine is not available to the FDIC, except in the case of receiverships involving savings banks. The conflict of interest that would be involved were the FDIC to adjudicate claims in its receiverships is therefore even more intense because of the absence of institutional separation.

Second, whereas the FHLBB has long been given exclusive regulatory authority over the FSLIC's receiverships even in the case of federally insured state thrifts, the "rights, powers and privileges" of the FDIC

440. 12 U.S.C. § 1821(e).

441. 12 U.S.C. § 1821(f).

442. See 12 U.S.C. § 1823(c) (1982).

443. See 12 U.S.C.A. § 1821(h)-(i) (West Supp. 1988); see also *supra* note 182.

444. By July 1987, the FDIC was involved in approximately 27,000 lawsuits involving claims against its receiverships. Interview with Carroll Shiflett, Assistant General Counsel, FDIC, in Washington, D.C. (July 21, 1987).

445. Interview with Roger Hood, Assistant General Counsel, FDIC, in Washington, D.C. (Oct. 22, 1987).

446. See *supra* text accompanying notes 201-05.

447. 12 U.S.C. § 1821(d).

as receiver are entirely governed by the relevant provisions of state law when it is appointed receiver of a state bank.⁴⁴⁸ This means that the FDIC would have to abide by the claims adjudication provisions or practices of state law. Thrift receiverships stand in contrast: once under the regulatory authority of the FHLBB, the FSLIC as receiver of a state thrift is restricted only by the proviso to the jurisdictional provisions of 12 U.S.C. section 1730(k)(1).⁴⁴⁹ The section vests jurisdiction over suits involving the FSLIC in the federal district courts, and it makes federal law controlling. But it stipulates in its proviso

[t]hat any action, suit, or proceeding to which the [FSLIC] is a party in its capacity as . . . receiver . . . of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.⁴⁵⁰

Although it has been suggested that the proviso supports the argument against claims adjudicatory powers because it indicates a "tacit assumption" on the part of Congress that such claims would be amenable to judicial resolution,⁴⁵¹ the proviso addresses not the *powers* of the FSLIC or the FHLBB, but only the law governing the criteria by which claims should be resolved.⁴⁵²

The guidance provided by practice at the FDIC is therefore inconclusive. At most it casts doubt upon the plausibility of the FHLBB's assumption of powers, but, especially when one considers the jurisdictional differences between the FDIC on the one hand, and the FHLBB and the FSLIC on the other, the FDIC's general practice of litigating disputed claims in court is insufficient in itself to render the FHLBB's interpretation of its powers "impermissible."⁴⁵³

448. 12 U.S.C. § 1821(e).

449. See 12 U.S.C. § 1730(k)(1) (1982).

450. *Id.*

451. See *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1220-21 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

452. Section 1730(k)(1) is really analogous to the fourth power established in 12 U.S.C. § 1819 (1982), which prescribes the governing law and jurisdiction in disputes involving the FDIC. *Cf. In re FSLIC*, 837 F.2d 432, 435-36 (11th Cir. 1988) (citing section 1819 cases in support of section 1730(k)(1) issue); *FSLIC v. Ticktin*, 832 F.2d 1438, 1444 (7th Cir. 1987) (relying heavily on section 1819 caselaw in deciding § 1730(k)(1) issue), *petition for cert. filed*, 56 U.S.L.W. 3834 (U.S. May 12, 1988) (No. 87-1865); *Polk v. FDIC*, No. 87-C-9433 (N.D. Ill. Mar. 1, 1988) (Westlaw, 1988 WL 19575) (cases involving FDIC removal and FSLIC removal can be cited interchangeably). *But see FSLIC v. T.G. Partners, Ltd.*, 689 F. Supp. 683 (N.D. Tex. 1988) (stressing differences between section 1819 and section 1730(k)(1)).

453. The *FAIC* case, see *supra* note 438, can be distinguished in that it involved an interpretation of depositors' substantive rights and not the means by which disputes concerning those rights should be resolved—a concern that, in the absence of constitutional constraints and explicit legislative gui-

b. *The NCUAB.* The receivership powers of the NCUAB are something of a hybrid. The NCUAB is empowered to place federal credit unions into liquidation and appoint itself the "liquidating agent."⁴⁵⁴ It is also authorized to accept appointment as liquidating agent of an insured state-chartered credit union.⁴⁵⁵ As in the case of the FDIC, in such situations it possesses the "rights, powers, and privileges" granted by the applicable state law.⁴⁵⁶ The NCUAB, in section 1788(c), also enjoyed receivership powers that were framed, before the enactment of the Competitive Equality Banking Act of 1987,⁴⁵⁷ in terms identical to those possessed by the FSLIC under section 1729(d) before the latter provision was amended in 1982.⁴⁵⁸ In addition, the NCUAB, like the FDIC and the FSLIC, must pay insurance to insured depositors when a credit union is closed for liquidation and, like the FDIC and the FSLIC, can require claimants to insurance to prove the validity of their claims in court.⁴⁵⁹

Unlike the legislation governing thrift liquidations, however, the powers of an NCUAB liquidating agent were more explicitly articulated by the Act of July 31, 1946, which amended the Federal Credit Union Act.⁴⁶⁰ This legislation provides that a liquidating agent "shall have power and authority, subject to the control and supervision of the [NCUAB] and under such rules and regulations as the [NCUAB] may prescribe, . . . to receive, examine, and pass upon all claims against the Federal credit union in liquidation, including claims of members on member accounts."⁴⁶¹ The Senate Report accompanying this amendment stated that "[t]he provisions set out in this section . . . are similar to those which are customarily prescribed in other types of liquidations and would authorize, for example, the appointment of a liquidating agent, the receipt and *adjudication* of claims, and the distribution of dividends

dance, and in the presence of general regulatory authority (section 1464(d)(11)), might properly be regarded as the preserve of the agencies involved.

454. See 12 U.S.C.A. § 1787(a)(1)(A) (West Supp. 1988).

455. See 12 U.S.C. § 1787(b) (1982).

456. *Id.*

457. 12 U.S.C. § 1788(c) (1982) states:

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

458. On the 1982 FSLIC amendment, see *supra* text accompanying notes 415-19.

459. See 12 U.S.C. § 1787(c)(1).

460. Ch. 711, § 8, 60 Stat. 744, 745 (codified at 12 U.S.C. § 1766(b)(3) (1982)).

461. 12 U.S.C. § 1766(b)(3)(B) (1982).

thereon."⁴⁶²

The 1946 legislation and the accompanying Senate Report were considered by the court in *Morrison-Knudsen* in its review of the practices and legislation pertaining to the liquidation practices of other regulatory agencies.⁴⁶³ The panel concluded, however, that even if Congress had really intended to suggest that the other agencies had exclusive claims adjudicatory power (which is not at all clear from the wording used in the Report), then Congress "was mistaken."⁴⁶⁴ In any event, the court concluded, the NCUAB legislation and history was "so remote from the cases at bar that it cannot affect our decision."⁴⁶⁵

The *Morrison-Knudsen* court was surely correct to doubt that Congress intended to vest the liquidating agent with an *exclusive* adjudicatory power. The 1946 amendment had also inserted a provision that expressly recognized that claims might be established through the judicial process.⁴⁶⁶ The formulation employed was similar to that used in legislation governing the receivership of national banks prior to the creation of the FDIC, with respect to which there had been no doubt that creditors could resort to court to establish their claims.⁴⁶⁷ It is therefore most unlikely that Congress intended that liquidating agents should have exclusive power to adjudicate claims to the preclusion of the courts.

Soon after *Morrison-Knudsen*, in *Herbert v. National Credit Union Administration Board*,⁴⁶⁸ the exclusivity of the NCUAB's claims adjudicatory powers again became the subject of judicial scrutiny, this time within the context of determinations involving the validity of deposit insurance claims. The NCUAB argued that its determinations could not be challenged in court de novo, but were subject only to APA judicial review. In support of its argument the NCUAB invoked two cases that had expressly relied upon *Hudspeth*.⁴⁶⁹ In effect, the NCUAB argued for

462. S. REP. NO. 1647, 79th Cong., 2d Sess. 2, reprinted in 1946 U.S. CODE CONG. SERV. 1323, 1324 (emphasis added).

463. See *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1219 n.3 (9th Cir. 1987), petition for cert. filed sub nom. FSLIC v. Stevenson Assocs., 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

464. *Id.*

465. *Id.*

466. Section 1766(b)(4)(B), which was inserted by the 1946 Act, provides that the liquidating agent shall "make a ratable dividend on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." 12 U.S.C. § 1766(b)(4)(B) (1982) (emphasis added).

467. See, e.g., *Schulenberg v. Norton*, 49 F.2d 578, 580 (8th Cir. 1931) (applicable legislation required receiver to pay claims proven to his satisfaction or adjudicated in court of competent jurisdiction); see also *supra* text accompanying note 352.

468. 663 F. Supp. 833 (E.D. Mo. 1987).

469. *Godwin v. FSLIC*, 806 F.2d 1290 (5th Cir. 1987); *Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986).

an extension of the *Hudspeth* doctrine (concerning exclusive administrative claims adjudication) to the determination, in federal credit union liquidations, of the claims of *insured* depositors.

Finding no guidance in the relevant legislative history, and noting the provision of elaborate procedural prescriptions elsewhere in the Credit Union Act⁴⁷⁰ and the absence of detailed administrative rules like those promulgated by the FHLBB,⁴⁷¹ the court rejected the NCUAB's argument. Chief Judge Nangle was unimpressed by the references to *Hudspeth*, which, he noted, "[did] not in any way involve an FSLIC insurance claim."⁴⁷²

The decision in *Herbert* and the reference in *Morrison-Knudsen* to the NCUAB's powers assume some significance in view of subsequent legislation passed by Congress. *Morrison-Knudsen* was decided on February 25, 1987, and *Herbert* was decided on June 29, 1987. The Competitive Equality Banking Act, which amended the NCUAB's powers, was enacted on August 10, 1987. The Act modified the NCUAB's receivership powers in two ways. First, it added a new subsection to the receivership appointment power,⁴⁷³ providing for judicial challenge to the closure of a credit union, and adding a provision that serves as an analogue to section 1464(d)(6)(C).⁴⁷⁴ Second, the 1987 Act transferred section 1788(c) (the NCUAB's equivalent of section 1729(d)) to section 1787, and amended it in terms identical to those that were used to amend section 1729(d) by the Garn-St Germain Act of 1982.⁴⁷⁵

Congress had thus directly addressed one aspect of the receivership powers of the NCUAB, so the legislative history has particular significance. And in the Senate Report we find, tailor-made for the adoption of the *Hudspeth* doctrine, the following statement:

The Committee expects that liquidations conducted under this section shall be accomplished as expeditiously as possible in order to achieve minimal disruption to the financial system. Creditor, member and other claimants must be dealt with in a fair manner. *These amend-*

470. See *Herbert*, 663 F. Supp. at 839-40.

471. *Id.* at 842.

472. *Id.* (rejecting suggestions to the contrary in *Godwin*, 806 F.2d at 1292 n.4).

473. Competitive Equality Banking Act, Pub. L. No. 100-86, § 714(a), 101 Stat. at 654 (codified at 12 U.S.C.A. § 1787(a)(1)(B) (West Supp. 1988)).

474. "Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent." *Id.*

475. *Id.* § 714(b), 101 Stat. at 655 (codified at 12 U.S.C.A. § 1787(j) (West Supp. 1988)) (inserting the words "subject only to the regulation of the Board, or, in cases where the Board has been appointed liquidating agent solely by a public authority having jurisdiction over the matter other than the said Board, subject only to the regulation of such public authority"). On the Garn-St Germain amendments, see *supra* notes 186, 415-19 and accompanying text.

*ments clarify the NCUA's authority to adjudicate liquidation claims. Upon final agency action, a claimant may seek recourse in court under the provisions of the APA.*⁴⁷⁶

While one should not place too much weight on legislative history, much of which is manufactured,⁴⁷⁷ the wording emphasized in the passage just quoted invites speculation as to the possible motives underlying the amendments. Three possibilities suggest themselves.

First, the explicit reference to the APA as the statute governing the scope of judicial review could be taken as a renunciation of the law espoused in *Herbert*. This is an unlikely interpretation, however, since the amendments left completely unchanged section 1787(c)(1), which expressly provides for the judicial resolution of disputed insurance claims, and upon which the court in *Herbert* explicitly relied.⁴⁷⁸

Second, the NCUAB could have been concerned that the dicta in the *Morrison-Knudsen* opinion had cast doubt upon what the NCUAB believes to be the exclusive power of liquidating agents to adjudicate claims. The amendments may have been intended to clarify the situation.⁴⁷⁹ If such were the motivation, however, the NCUAB might not have been successful. The amendments address sections 1787 and 1788, and not section 1766(b)(3). Yet it is the latter provision that appears to furnish the power to "adjudicate" claims and to which *Morrison-Knudsen* had referred.⁴⁸⁰ Not only do the amendments fail to address the actual subsection interpreted by *Morrison-Knudsen* (i.e., section 1766(b)(3)), but it would also have been far simpler for Congress to have added an express provision to section 1777(b)(3) stating that the power to adjudicate claims was exclusive, or subject only to APA review. It is also difficult to understand why the NCUAB drafters chose to adopt the very terminology⁴⁸¹ that had been in issue in *Morrison-Knudsen* in the FSLIC context, and which the court had interpreted so as to *exclude* the

476. S. REP. NO. 19, 100th Cong., 1st Sess. 25, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 489, 515 (emphasis added).

477. Cf. Starr, *Conference on Statutory Interpretation: The Role of Legislative History in Judicial Interpretation—Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376-77 (describing the "virtual cottage industry" engaged in fashioning legislative history "so that the Congress will appear to embrace their particular view in a given statute").

478. See 663 F. Supp. 833, 843 (E.D. Mo. 1987). Staff at the NCUAB assert that the *Herbert* decision was not the motive for obtaining the amendment. Telephone interview with Leslie A. Conover, Staff Attorney, FDIC (May 11, 1988).

479. This is the explanation provided by staff at the NCUAB. Telephone interview, *supra* note 478.

480. See *supra* text accompanying notes 460-65.

481. The modification of the terminology to comport with the post-1982 wording of the FSLIC's section 1729(d) adds nothing of substance to the legislation. See *supra* notes 186, 415-16 and accompanying text.

power to adjudicate claims,⁴⁸² was adopted. Instead, the amendments could simply have incorporated the explicit terminology used in the Senate Report, thus avoiding the obscure and highly contentious verbiage of sections 1464(d)(6)(C) and 1729(d).

Given the similarity in wording and structure of the amended NCUAB provisions to those applicable to the FHLBB and FSLIC, a third possibility might be that the legislation and legislative history were unwisely framed under the influence of the chaotic jurisprudence spawned by the *Hudspeth* decision. This would explain why the drafters chose to focus on the analogues to sections 1464(d)(6)(C) and 1729(d).

In any event, because the 1987 amendments did address the NCUAB analogues to sections 1464(d)(6)(C) and 1729(d), and because the amendments reformulated the NCUAB provisions in terms that are virtually identical to pertinent parts of sections 1464(d)(6)(C) and 1729(d), the legislative history accompanying the amendments constitutes an endorsement of the contentions of the FHLBB and FSLIC. Yet the strength of this endorsement will depend on how seriously one should regard this legislative history and whether the reliance upon sections 1464(d)(6)(C) and 1729(d) as the sources of adjudicatory power has any merit at all.⁴⁸³

In conclusion, we can assume that, while it is doubtful that the FHLBB and the FSLIC enjoy exclusive claims adjudicatory authority by virtue of the provisions of sections 1464(d)(6)(C) and 1729(d), under section 1464(d)(11) the FHLBB could, *in the absence of constitutional difficulties*,⁴⁸⁴ enjoy authority, murky though it certainly would be, to establish an administrative claims adjudication scheme. In order to complete the analysis of the legislative constraints, and before examining the constitutional constraints, we need to consider the supplementary application of the APA.

4. *Application of the APA.* Given the wording of the FSLIC's statutory mandate, it is unlikely that any of the formal procedural requirements of the APA⁴⁸⁵ apply to the receiver when these claims are

482. The court in *Morrison-Knudsen* thought that Congress's failure to speak more explicitly in the 1982 amendments actually detracted from the force of the agencies' arguments. See *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1221 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

483. See *supra* text accompanying notes 422-26 (arguing that sections 1464(d)(6)(C) and 1729(d) are red herrings).

484. The principle of deference dictated by *Chevron* is balanced by the principle of strict construction when agency powers impinge upon constitutional protections. See *supra* text accompanying notes 129-30.

485. 5 U.S.C. §§ 554-557 (1982).

being adjudicated. *Hudspeth* adjudications are likely to be construed as informal adjudications, and thus the only procedural requirements beyond those dictated by the FHLBB in its rules would be those dictated by constitutional due process.⁴⁸⁶

As to judicial review, the courts applying *Hudspeth* have assumed that the standards articulated by the APA⁴⁸⁷ apply. The exact scope of review is probably governed by the "arbitrary and capricious" standard.⁴⁸⁸

a. Adjudicatory procedure. Must the receiver follow the formal adjudicative procedures of the APA? These are triggered only in the case of "adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . . a matter subject to a subsequent trial of law and the facts de novo in a court."⁴⁸⁹ Assuming the FSLIC is correct in asserting that creditors are not entitled to de novo judicial determination of the validity of their claims, we need to examine the statutory wording of the FSLIC's adjudicative authority in order to determine whether formal APA proceedings are triggered.

The FSLIC relies on section 1729(d) for authority to adjudicate creditor claims. Subsection 1729(d) contains no obvious terminology to trigger the APA's requirements for formal adjudication.⁴⁹⁰ There is no provision for an "agency hearing," nor is there a requirement that the determination be made "on the record." The Supreme Court has insisted upon a literal or very clear triggering in the analogous case of formal rulemaking⁴⁹¹ and, although it appears that the courts might be more willing to construe a requirement of formal procedures in the case of adjudication,⁴⁹² the complete absence in section 1729(d) of any reference to the form of procedure to be followed strongly suggests that formal proceedings are not contemplated; on the contrary, the words "settle, compromise, or release," and the preference for informal negotiation and

486. See *infra* notes 608-15 and accompanying text.

487. 5 U.S.C. § 706.

488. See *id.* § 706(2)(A).

489. *Id.* § 554(a)(1).

490. See *supra* text accompanying note 186 (quoting § 1729(d) in full).

491. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

492. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.) (holding formal adjudication proceedings applicable under statute that did not contain words "on the record," but did require the decision to be made "after opportunity for public hearing"), *cert. denied*, 439 U.S. 824 (1978). But cf. *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 536 (D.C. Cir. 1978) (holding that, in the absence of a requirement that a hearing be conducted "on the record," no formal adjudication was required by a statute that mandated "notice and hearing").

settlement on the part of thrift receivers,⁴⁹³ suggest that the receiver is not intended to be straightjacketed by formal adjudicative requirements.

Furthermore, the FHLBB has located the real adjudication of creditor claims above the level of the receiver.⁴⁹⁴ In doing so it must be relying upon its rulemaking authority under section 1464(d)(11),⁴⁹⁵ which itself contains no triggering terminology.⁴⁹⁶ Hence we can conclude that the procedural provisions of the APA are triggered by neither the FSLIC's adjudicative authority nor the FHLBB's rulemaking authority.⁴⁹⁷

b. Judicial review. The Home Owners' Loan Act and the National Housing Act are silent on the applicable scope of judicial review of the receiver's claims determinations. When endorsing the FSLIC's claim to exclusive adjudicatory jurisdiction, the court in *Hudspeth* noted that once the administrative process has been exhausted the claimant, "if unsatisfied, can seek judicial review under the APA."⁴⁹⁸ In fact, none of the courts that have applied the *Hudspeth* doctrine have carefully analyzed the exact nature of this assumed review jurisdiction.⁴⁹⁹

493. See *supra* text accompanying note 250.

494. See *supra* text accompanying notes 278-97.

495. See *supra* text accompanying notes 427-29.

496. See *supra* text accompanying note 187 (quoting section 1464(d)(11) in full). In its proposed, interim and supplemental rules, see *supra* notes 201, 202, 205, the Board has relied variously on sections 1437 (which establishes the FHLBB and states its general regulatory mission), 1464(a) (which confers on the FHLBB its general chartering and supervisory powers), 1464(d)(ii) and 1729(d). See 53 Fed. Reg. 21,474, 21,475 (1988); 53 Fed. Reg. 13,105, 13,106 (1988); 50 Fed. Reg. 48,970, 48,971 (1985).

497. Another possible trigger is the Constitution's due process clause. U.S. CONST. amend. V. The isolated precedent for this is *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), in which the Court held that the APA's requirement of formal adjudication was triggered if the hearings held by the agency (in this case, on deportation) were held "by compulsion" as opposed to "by regulation, rule, custom, or special dispensation." *Id.* at 50. This suggests that the FHLBB and FSLIC should conduct formal adjudicatory hearings. The trouble is that *Wong Yang Sung* is an unclear guide as to when the Constitution might trigger formal proceedings; moreover, it appears to have little precedential force, at least where personal liberty is not at stake. Cf. *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976) (refusing to extend the reasoning in *Wong Yang Sung* to prison disciplinary proceedings). As the authors of a leading casebook have observed, "[i]n practice . . . *Wong Yang Sung* appears to have fallen into obscurity." W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW 247 (8th ed. 1987); cf. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 870 (2d ed. 1985); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.4 (1985).

498. *Hudspeth*, *supra* note 103, 756 F.2d at 1103 (citing *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251, 254 (D. Haw. 1981) (stating that judicial review "may be available under section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976)").

499. More attention has been paid to the scope of review involved in judicial challenges to the appointment of conservators and receivers. In this context, judicial review is specifically provided for by the statute, 12 U.S.C. § 1464(d)(6)(A) (1982), which uses the phrase "upon the merits." See, e.g., *Woods v. FHLBB*, 826 F.2d 1400, 1406-09 (5th Cir. 1987) (asserting that Congress did not

The Ninth Circuit, in *Morrison-Knudsen*, took the view that, "[i]n the absence of specific congressional direction," the "arbitrary and capricious" standard "might well be applicable . . . or at best the 'substantial evidence' standard," which the court took to be more deferential than "weight of the evidence" review.⁵⁰⁰ Similarly, the Texas court of appeals in *Glen Ridge*,⁵⁰¹ ruling section 1729(d) to be an unconstitutional grant of adjudicative power partly because of the low level of judicial scrutiny on review, observed that neither of the APA's potentially applicable "arbitrary and capricious"⁵⁰² or "substantial evidence"⁵⁰³ standards were as intense as the common law "weight of the evidence" or de novo review standards.⁵⁰⁴

Since *Hudspeth* adjudications are not required by statute to be made "after a hearing on the record,"⁵⁰⁵ the scope of review is governed by the "arbitrary and capricious" standard of review and not the "substantial evidence" standard. This would follow from the express statement in the APA that the "substantial evidence" standard should only apply "in a case subject to sections 556 and 557 of this title [i.e., formal adjudication] or otherwise reviewed on the record of an agency hearing provided by statute."⁵⁰⁶ In practice, however, because the FHLBB has developed a recordkeeping requirement for *Hudspeth* adjudications,⁵⁰⁷ and, with the development of "hard look" review,⁵⁰⁸ the scope of review is likely to be as probing under the "arbitrary and capricious" standard as it would

intend for the district court to review the Bank Board's decision de novo, but rather that the decision be reviewed on the basis of the administrative record in accordance with the APA's "arbitrary and capricious" standard), *cert. denied*, 108 S. Ct. 1221 (1988).

500. 811 F.2d 1209, 1221 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

501. *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. Ct. App. 1986), *writ denied*, 750 S.W.2d 757 (Tex. 1988).

502. 5 U.S.C. § 706(2)(A) (1982).

503. 5 U.S.C. § 706(2)(E).

504. 734 S.W.2d at 380, 389. The district court in *Lyons* relied on legislative history in assuming that the standard of review intended by Congress is actually the "weight of the evidence" standard. *See Lyons Sav. & Loan Ass'n v. Westside Bancorporation*, 636 F. Supp. 576, 580 (N.D. Ill. 1986) (quoting H. REP. NO. 2077, *supra* note 402, at 6), *aff'd*, 828 F.2d 387 (7th Cir. 1987); *accord Peoples' Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104, 1107-08 (D. Kan. 1988). But *Lyons* is wrong in two respects. First, the legislative history referred to by the court related to a specific "weight of the evidence" provision in the House bill, whereas the Senate bill, which merely adopted the provisions of the APA, contained the review provisions that Congress eventually enacted. Second, in the legislative history cited by the *Lyons* court, the House committee was concerned only with the special adjudicatory procedures it had established in relation to cease and desist orders and appointment and removal of directors. *See supra* note 402.

505. *See supra* text accompanying notes 489-93.

506. 5 U.S.C. § 706(2)(E).

507. *See supra* text accompanying notes 262-69.

508. *See generally, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, supra* note 497, § 7.5, at 377-88.

have been under the “substantial evidence” standard.⁵⁰⁹

B. *Constitutional Constraints.*

Even if there is statutory authority for the *Hudspeth* scheme, the scheme will be invalid if it violates the Constitution. On the other hand, this article considers not only whether the existing scheme might violate the Constitution, but also with whether, if so, it can be modified so as to comply with the Constitution. If the scheme violates article III, for example, we should then consider whether there is a way in which the procedures might be structured so as to comply with its requirements. If there is not, then the FHLBB and the FSLIC must accept that the validity of creditor claims simply cannot be adjudicated administratively without judicial participation.

1. *Constitutionalism in the Administrative State.* The task of reconciling agency government with the constraints imposed by the Constitution has proven perplexing and recurrent. Something of a pattern has emerged during the course of the past six decades. The Supreme Court has first reacted against the presence of agency authority by vigorously reasserting formal constitutional doctrines. Then, perceiving that it has overreacted and thereby placed the orderly functioning of modern government in jeopardy, it has assumed a more pragmatic or “functional” approach that has ultimately rendered the formal doctrine virtually dominant.⁵¹⁰

This pattern of resistance, followed by acquiescence, has manifested itself in various contexts. The “constitutional fact”⁵¹¹ and “jurisdictional fact”⁵¹² doctrines, which once appeared to create insuperable obstacles to exclusive administrative decisionmaking, seem long moribund.⁵¹³ The

509. See *Association of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d 677, 681-86 (D.C. Cir. 1984). In *Data Processing*, Judge Scalia reasoned that the difference between the two standards was related not to the level of rationality that must be exhibited by an agency's decision, but to the material that may be considered by the court in its review: formal adjudications must be judged solely by the closed record that the agency was required to develop. Apart from this, the distinction between the standards is “largely semantic.” See also R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 497, § 7.3.3.

It is recommended, however, that judicial review be confined to the record, and therefore elevated to the “substantial evidence” standard, because of the fact-specific nature of creditor claims. See *infra* text accompanying note 748.

510. Cf. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (examining the dominant themes that emerge from an overview of the evolution of the federal regulatory system and the judicial response to each successive wave of regulatory change).

511. See, e.g., *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

512. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932).

513. See generally, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 497, § 5.2.2 (discussing the demise of the *Ben Avon* and *Crowell* doctrines).

nondelegation doctrine, which wrought such havoc with the first phase of the New Deal,⁵¹⁴ now functions as no more than a docile admonition against the expansive delegation of statutory power to agencies.⁵¹⁵ The restraints imposed upon agency adjudication by article III quite recently seemed formidable; yet, even at a time when the Court has taken an unusually strict view of the Constitution in its application to the first branch of government,⁵¹⁶ article III has subsequently proved remarkably flexible.⁵¹⁷ The application of procedural due process to agencies has evolved into ad hoc judicial judgments as to the fairness of specific procedures.⁵¹⁸

In relevant respects, the Court appears to have shifted from a formalistic approach to a functional one. When deciding on the constitutionality of administrative institutions and schemes, the Court has adopted an interest-balancing approach.⁵¹⁹ The new approach has made it necessary to attempt to predict the likely outcome of constitutional challenges by anticipating which interests the Court is likely to take into account when performing its balancing exercise, as well as the relative weight that each interest will receive. The results are likely to be heavily dependent on the facts in each type of case.

2. *The Network of Constraints.*

a. Delegation of powers. The power to adjudicate creditor claims could be challenged as an unconstitutional delegation on two levels. First, the basic authority to establish the claims determination scheme might be attacked as an unconstitutional delegation of power to the FHLBB. Alternatively, it might be claimed that, when adjudicating creditor claims, the FHLBB and the FSLIC exercise a standardless discretion and that this constitutes an unlawful delegation of power by Congress. The courts in which the delegation issue has been raised have not

514. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). See generally, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 497, § 3.4.2 (discussing the New Deal cases).

515. See *infra* notes 522-24 and accompanying text.

516. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976).

517. Cf. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 502-04 (1987); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

518. See *infra* notes 609-10 and accompanying text.

519. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (discussed *infra* in text accompanying notes 576-88). See generally Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

clearly distinguished between these two potential objections.⁵²⁰

The entire *Hudspeth* scheme has been implemented as part of the Board's general regulatory authority under 12 U.S.C. section 1464(d)(11).⁵²¹ Broad though this regulatory authority is, however, an attack upon its constitutionality has probably long been obviated by *Fahey v. Mallonee*,⁵²² in which such a challenge, made against the FHLBB's original authority to make rules governing thrift liquidations,⁵²³ was unsuccessful. The Court held that broad legislation enacted within the context of close and experienced regulation does not constitute an unconstitutional delegation of power:

The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields.⁵²⁴

Although *Fahey* was concerned with the appointment of a conservator, the Court's ruling on the constitutionality of the FHLBB's regulatory authority is probably dispositive in the present context as well, and has been so regarded by those district courts that have been presented with

520. See, e.g., *Baer v. Abel*, 648 F. Supp. 69, 78 (W.D. Wash. 1986); *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 100 (W.D. Wash. 1986); *American Fed. Sav. & Loan Ass'n v. Westside Fed. Sav. & Loan Ass'n*, No. C-85-323-C, slip op. (W.D. Wash. Feb. 4, 1986), reprinted in *Stevenson Petition*, *supra* note 142, at 48a-49a, *rev'd*, *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451).

521. 12 U.S.C.A. § 1464(d)(11) (West Supp. 1988); see *supra* text accompanying note 187 (quoting § 1464(d)(11) in full).

522. 332 U.S. 245 (1947).

523. See *supra* text accompanying note 366. Congress has subsequently addressed the scope of this regulatory authority more specifically. See 12 U.S.C.A. § 1464(d)(11) (West Supp. 1988) (FHLBB may regulate thrift liquidations); see also *supra* text accompanying notes 404-06.

524. 332 U.S. at 250. *Fahey* represents one of the Court's first attempts to pull back from its enforcement of the nondelegation doctrine established in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court was able to distinguish both cases easily. The Board's regulatory authority did not entail "a power to make federal crimes of acts that never had been such before," it did not enable the Board "to devise novel rules of law in a field in which there had been no settled law or custom," and it did not involve the delegation of governmental power "to private groups as well as to public authorities." *Fahey*, 332 U.S. at 249. On the contrary, the provisions were "regulatory," dealing "with a single type of enterprise and with the problems of insecurity and mismanagement that are as old as banking enterprise." *Id.* at 250.

this issue.⁵²⁵

The second line of attack seems equally futile and perhaps even misconceived. The argument here is that the adjudicatory power assertedly conferred by section 1729(d) is standardless. This objection has some credibility as a result of the decision in *Thomas v. Union Carbide Agricultural Products Co.*,⁵²⁶ in which nondelegation and article III challenges were mounted against the Environmental Protection Agency's arbitral jurisdiction under the Federal Insecticide, Fungicide, and Rodenticide Act.⁵²⁷ The appellees had argued that the Act's standard for compensation was so vague as to give "a significant case-by-case lawmaking function to the arbitrator in compensation disputes"⁵²⁸ and that this represented an unconstitutional delegation of legislative powers. While noting that the legislation, which "appears vague on its face[,] 'may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context,' "⁵²⁹ and that the legislative history of the legislation was "far from silent,"⁵³⁰ the Court left the issue open for determination on remand.

Apparently confronted by a similar argument in the present context, one district court has assumed, citing *Union Carbide*, that the nondelegation challenge is "inapposite"⁵³¹ since it more appropriately invokes article III than article I.⁵³² Nevertheless, the success of such a challenge would depend upon the absence of any regulatory tradition, guiding case law, or meaningful judicial review.⁵³³ The availability now of a growing body of published reports on *Hudspeth* adjudications⁵³⁴ tends to undermine the argument that there are no adjudicatory standards. In any event it is highly unlikely, given the reluctance of the Court to invoke the

525. See, e.g., *Baer v. Abel*, 648 F. Supp. 69, 78 (W.D. Wash. 1986); *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 100 (W.D. Wash. 1986); *American Fed. Sav. & Loan Ass'n*, No. C-85-323-C, reprinted in *Stevenson Petition*, *supra* note 142, at 50a.

526. 473 U.S. 568 (1985).

527. 7 U.S.C. §§ 136, 136a-136y (1982 & Supp. IV 1986).

528. 473 U.S. at 601-02 (Brennan, J., concurring).

529. *Id.* at 593 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (as modified)).

530. *Id.*

531. *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 100 (W.D. Wash. 1986); see also *American Fed. Sav. & Loan Ass'n*, No. C-85-323-C, reprinted in *Stevenson Petition*, *supra* note 142, at 48a-49a.

532. The court wrongly assumed that *Union Carbide* was concerned with an article III challenge alone, whereas in fact the Court in *Union Carbide* explicitly dealt with the nondelegation challenge. See *Union Carbide*, 473 U.S. at 593 ("Appellees raise article I as an alternative ground for sustaining the judgment . . .").

533. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746, 759-62 (D.D.C. 1971) (agency development of standards that facilitate public accountability and meaningful judicial review saves broad delegation of power).

534. See *infra* text accompanying note 705.

nondelegation doctrine, that such a challenge would succeed.⁵³⁵

On the other hand, one of the trade-offs for tolerating broad delegations of power has been the intensification of judicial review;⁵³⁶ hence the article I objection, even if unsuccessful in itself, might serve to buttress arguments in favor of formal adjudicatory structures and the maintenance of a reliable record for the purposes of judicial review.⁵³⁷

b. Article III. The major constitutional objection to the *Hudspeth* scheme so far is the charge that it violates the right of creditors to adjudication of their claims by an independent judiciary enjoying security of tenure and salary, as guaranteed by article III.⁵³⁸ This complaint played a decisive role, albeit in different ways, in *Morrison-Knudsen*⁵³⁹ and in *Glen Ridge*.⁵⁴⁰ In both cases the courts were aware of the recent Supreme Court applications of article III to administrative agencies.⁵⁴¹ Article III was also relied upon, without success, by litigants in some of the other cases,⁵⁴² including *Hudspeth* itself.⁵⁴³ The issue is now before the Supreme Court.⁵⁴⁴

535. As Professor Strauss has put it, "delegation arguments are desperation arguments in the current legal climate." Strauss, *supra* note 517, at 525.

536. See, e.g., *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986). In *Bowen*, Justice Stevens explained that "hard look" judicial review is necessary because

our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.

Id. at 627; see also *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). The *Ethyl* court held:

In the case of legislative enactments, the sole responsibility of the courts is constitutional due process review. In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. Nor is that envisioned judicial role ephemeral, as *Overton Park* makes clear.

Id. at 68 (Leventhal, J., concurring) (citation omitted).

537. See *infra* text accompanying notes 681-84.

538. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

539. 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); see *supra* text accompanying notes 124-31.

540. 750 S.W.2d 757 (Tex. 1988) (per curiam); see *supra* text accompanying notes 135-40.

541. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (discussed *infra* in text accompanying notes 545-88).

542. See *infra* text accompanying notes 545-88.

543. See *supra* note 107.

544. See *supra* note 18. It has long been settled that the discretionary power to place a financial institution in receivership and appoint receivers, as opposed to the power to determine the validity of

(i) *The evolution of an article III balancing test.* After being unexpectedly rejuvenated as a formidable constraint on agency adjudicative power in the early 1980s, article III has, since 1985 and with the emergence of a pragmatic majority in the Court, again lost much of its constraining force.⁵⁴⁵ *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁵⁴⁶ was the case in which a plurality of the Court⁵⁴⁷ gave the article its unexpected vitality; it was also the case in which the dissent⁵⁴⁸ espoused the pragmatic view that has subsequently attracted a majority in the Court.

In *Northern Pipeline* the Court declared unconstitutional a grant of jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11 of the 1978 Bankruptcy Act.⁵⁴⁹ This jurisdiction had been vested in bankruptcy judges who enjoyed neither life tenure nor protection from diminution of salary, both of which are required by article III. Justice Brennan, speaking for the plurality, held that the bankruptcy jurisdiction violated article III for two reasons. First, it did not fall within one of the three established exceptions recognized by the Court in its article III jurisprudence.⁵⁵⁰ Second, bankruptcy judges could not be regarded as mere "adjuncts" of article III courts.

In Justice Brennan's view, the only conceivably relevant exception to the application of article III was the enigmatic "public rights" exception: if the subject matter of bankruptcy court jurisdiction involved so-called "public," as opposed to "private," rights, then article III would not apply.⁵⁵¹ But, while Justice Brennan accepted that the restructuring

individual creditor claims, may be vested by statute in an agency without violating article III. *E.g.*, *Bushnell v. Leland*, 164 U.S. 684, 685 (1897).

545. For a critical analysis of the shift toward pragmatism in the Court's application of article III to administrative agencies, see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

546. 458 U.S. 50 (1982) (plurality opinion).

547. Brennan, J., joined by Marshall, Blackmun & Stevens, JJ.

548. White, J., joined by Burger, C.J. & Powell, J., dissented.

549. 458 U.S. at 84-85 (plurality opinion). It is important to note that the *Northern Pipeline* holding extended only to the jurisdiction to adjudicate "traditional" state common law actions "not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law." *Id.* at 92 (Burger, C.J., dissenting); *see also id.* at 90 (Rehnquist, J., concurring) (characterizing the suit in question (damages for breach of contract, misrepresentation) as "the stuff of the traditional actions at common law").

550. The exceptions identified by Justice Brennan were those relating to territorial courts, courts-martial, and the adjudication of "public rights." *See id.* at 64-67 (plurality opinion).

551. *Id.* at 69-70 (plurality opinion). Justice Brennan, recognizing the uncertain distinction between "public rights" and "private rights," referred to *Crowell v. Benson*, 285 U.S. 22 (1932), in which examples of "public rights" were given. Such rights involved the "exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell*, 285 U.S. at 51 (plurality opinion). For a comprehensive review of the development of the problematic public

of debtor-creditor relations itself "may well be a 'public right,' " public rights "obviously" did not include "state-created private rights, such as the right to recover contract damages."⁵⁵² Justice Brennan also declined the invitation to recognize bankruptcy jurisdiction as a special new exception. Bankruptcy judges had jurisdiction over too broad a range of questions, and the creation of further exceptions would erode the protection of article III. "Ad hoc balancing" was to be eschewed.⁵⁵³

As to the possible "adjunct" status of bankruptcy courts, the plurality believed that to possess this status the adjudicative scheme had to involve "congressionally created rights,"⁵⁵⁴ and that "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the article III court."⁵⁵⁵ Bankruptcy judges, however, had been given jurisdiction over all civil proceedings related to title 11 cases, they issued final, binding and enforceable judgments, and they were subject only to the deferential "clearly erroneous" standard of review. Hence, too many attributes of judicial power had been transferred to their hands.⁵⁵⁶

Justice White's dissent focused on the impracticality of trying to separate state and federal law claims in bankruptcy proceedings,⁵⁵⁷ and on the poverty of the "public rights/private rights" distinction.⁵⁵⁸ Justice White instead advocated a pragmatic balancing approach, involving a weighing of the interest of Congress in "pursuing in this manner one of its constitutionally assigned responsibilities" against the values preserved by article III, with the Court retaining "the final word on how that balance is to be struck."⁵⁵⁹

Justice White also adverted to an associated factor that is important for present purposes: namely, the interrelationship of article III with the due process clause. In his view, if a situation were to arise in which Congress might be tempted to influence the article I court, the due pro-

rights/private rights distinction, see Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFFALO L. REV. 765 (1986).

552. 458 U.S. at 71.

553. See *id.* at 72-74 & n.28.

554. *Id.* at 78. The relationship, if any, between "public" rights and "congressionally created" rights was not explained.

555. *Id.* at 81. For example, in *Crowell v. Benson*, 285 U.S. 22 (1932), where the Court had treated a workers' compensation commissioner as an "adjunct," the Court retained full authority to deal with matters of law.

556. See 458 U.S. at 84-86.

557. See *id.* at 96-98 (White, J., dissenting).

558. See *id.* at 107-10.

559. See *id.* at 113-16.

cess clause itself might then dictate the use of an article III court.⁵⁶⁰

The subsequent article III decisions, *Thomas v. Union Carbide Agricultural Products Co.*⁵⁶¹ and *Commodity Futures Trading Commission v. Schor*,⁵⁶² represent a major drift by a clear majority of the Court toward the position advocated in Justice White's *Northern Pipeline* dissent.

In *Union Carbide* an arbitration scheme established by the Environmental Protection Agency for the purpose of compensating the suppliers of data for use in subsequent registration proceedings was challenged. The scheme was compulsory and provided for judicial review only where the arbitrator's decision was alleged to be the result of "fraud, misrepresentation, or other misconduct."

The emphasis of the Court⁵⁶³ was upon the impossibility of applying article III in an absolute fashion and the consequent need to focus instead on the underlying *policies* of the article: the maintenance of judicial *independence* and *impartiality*.⁵⁶⁴ Turning to the "public rights/private rights" analysis employed by the *Northern Pipeline* plurality, the Court noted that the "public rights/private rights" analysis had failed to command majority support⁵⁶⁵ and emphasized the pragmatic nature of any test to be applied in the application of article III: "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of article III."⁵⁶⁶ Neither the extent of judicial

560. *Id.* at 117 (citing *Crowell v. Benson*, 285 U.S. 22, 87 (1932)). In *Crowell*, Justice Brandeis had said, in dissent:

If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell, 285 U.S. at 87.

On the other hand, this does not necessarily dictate de novo judicial review, since, as Justice Brandeis had also observed in a later case:

The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings [of fact] are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except on due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring).

561. 473 U.S. 568 (1985).

562. 478 U.S. 833 (1986).

563. O'Connor, J., wrote for the majority.

564. *See* 473 U.S. at 582-83.

565. *See id.* at 586.

566. *Id.* at 587.

In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that "could be conclusively determined by the Executive and Legislative Branches," the danger of encroaching on the judicial powers is reduced.

Id. at 589 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982)).

review nor the identity of the parties should, on their own, function as determinative factors.⁵⁶⁷

Turning to the case at hand, Justice O'Connor articulated a number of factors that, in combination, indicated that there had been no violation of article III. First, compensable use of the registrants' data "serves a public purpose as an integral part of a program safeguarding the public health," and in this respect the right to compensation bore "in many of the characteristics of a 'public' right."⁵⁶⁸ Second, the scheme represented "a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product," one that did "not diminish the likelihood of impartial decisionmaking."⁵⁶⁹ Third, given "the nature of the right at issue and the concerns motivating the Legislature," and in view of the "obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact that are peculiarly suited to examination and determination by an administrative agency specially assigned to that task,"⁵⁷⁰ the Court did "not think this system threatens the independent role of the Judiciary in our constitutional scheme."⁵⁷¹ Fourth, the scheme incorporated "its own system of internal sanctions," relying only tangentially upon the judicial branch for enforcement; in such cases the danger of Congressional or Executive encroachment was at a minimum.⁵⁷² Finally, there was some judicial review, "including whatever review is independently required by due process considerations."⁵⁷³ The combination of these factors led the Court to conclude that:

Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.⁵⁷⁴

567. *See id.* at 587-89.

568. *Id.* at 589.

569. *Id.* at 590.

570. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

571. *Id.*

572. *Id.* at 591.

573. *Id.* at 592-93. In this regard Justice O'Connor somewhat vaguely referred to "review of constitutional error," to the constitutional fact doctrine mentioned, equally vaguely, by Chief Justice Hughes in *Crowell*, 285 U.S. at 46, and to Justice Brandeis' dissent in *Crowell*, 285 U.S. at 87 (quoted *supra* note 559).

574. *Id.* at 593-94.

Although eight Justices agreed that the arbitral scheme did not violate article III, the number supporting the "public rights/private rights" analysis had dwindled to three.⁵⁷⁵ In the next case, *Commodity Futures Trading Commission v. Schor*,⁵⁷⁶ the balancing approach attracted the concurrence of Justice Stevens as well and was therefore embraced by an even greater majority of the Court.⁵⁷⁷

Schor involved agency adjudication of a state-law counterclaim and hence, unlike *Union Carbide*, where the claim was based on federal law, involved claims that fell squarely within the zone of "private rights" identified by the *Northern Pipeline* plurality. Justice O'Connor reiterated that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,"⁵⁷⁸ and that "bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries."⁵⁷⁹ The constitutionality of the adjudicative scheme should be "assessed by reference to the purposes underlying the requirements of Article III," namely, the preservation of the independence of the judiciary and assurance of an impartial adjudicator in specific disputes.⁵⁸⁰ A pragmatic judgment had to be made, one that involves weighing "a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."⁵⁸¹ More specifically, the Court articulated four factors to be weighed in the balance:

575. Justice Brennan (joined by Justices Marshall and Blackmun) was able to concur by employing his *Northern Pipeline* "public rights/private rights" analysis, concluding that the determinative feature of the claims in *Northern Pipeline* was the fact that they were created by *state law* and hence were clearly private rights protected by article III. See 473 U.S. at 597 (Brennan, J., concurring).

The claim in the *Union Carbide* case, on the other hand, involved a public right, since the dispute arose

in the context of a federal regulatory scheme that virtually occupies the field. . . . Although a compensation dispute under FIFRA ultimately involves a determination of the duty owed one private party by another, at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA's comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication.

Id. at 600-01 (Brennan, J., concurring). Justice Stevens concurred on other grounds. *Id.* at 602 (Stevens, J., concurring).

576. 478 U.S. 833 (1986).

577. Justice O'Connor again gave the opinion of the Court. Justice Brennan, joined by Justice Marshall, was this time forced to dissent.

578. 478 U.S. at 848 (quoting *Union Carbide*, 473 U.S. at 587).

579. *Id.* at 857.

580. *Id.* at 848. The former purpose was primarily structural and nonwaivable, being concerned with the constitutional scheme as a whole, and the latter primarily personal and waivable, being concerned with protecting the immediate parties to litigation. The Court found that *Schor* had in fact waived this latter right. See *id.* at 849-50.

581. *Id.* at 851.

[(i)] the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, [(ii)] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [(iii)] the origins and importance of the right to be adjudicated, and [(iv)] the concerns that drove Congress to depart from the requirements of Article III.⁵⁸²

Applying this weighing process, Justice O'Connor noted that the jurisdiction to adjudicate common law counterclaims involved only a “single deviation from the agency model,”⁵⁸³ that the CFTC deals only with a “particularized area of law”⁵⁸⁴ that the review of the CFTC by article III courts was closer than in *Northern Pipeline*, and that the range of jurisdiction and powers exercised by the CFTC was much narrower than that of the bankruptcy courts in *Northern Pipeline*.⁵⁸⁵ As to the nature of the claim itself, the fact that it fell squarely within the zone of “private rights” was not itself dispositive. Instead, the fact that it was a type of claim that historically would have been adjudicated by article III courts was merely an indication that the danger to the judicial power was greater than would be the case with “public rights.”⁵⁸⁶ The availability of a parallel article III jurisdiction invokable by the parties ameliorated the significant threat to the judiciary. Finally, the congressional purpose was honorable.⁵⁸⁷ Hence “the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*.”⁵⁸⁸

(ii) *Implications for the Hudspeth procedures.* The Court has thus articulated several factors that have to be weighed before coming to a final judgment on the constitutionality of the *Hudspeth* administrative scheme. The Texas court of appeals in *Glen Ridge*⁵⁸⁹ thought that the *Hudspeth* scheme simply fell short of meeting these requirements. The FSLIC failed to satisfy the criteria necessary to be regarded an “adjunct” of the courts.⁵⁹⁰ There were insufficient safeguards to justify a departure

582. *Id.*

583. *Id.*

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

585. *Id.* at 852-53.

586. *See id.* at 853-54.

587. “When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum . . .” *Id.* at 855.

588. *Id.* (emphasis in original).

589. *Glen Ridge I Condominiums, Ltd. v. FSLIC*, 734 S.W.2d 374 (Tex. Ct. App. 1986), *aff’d*, 750 S.W.2d 757 (Tex. 1988) (per curiam); *see supra* text accompanying notes 135-40.

590. *See* 734 S.W.2d at 385-86 (focusing primarily on the executive appointment and creation of FSLIC officers and offices, the absence of supervisory control by article III judges and the narrow scope of judicial review, the absence of contempt powers on the part of the FSLIC, the breadth of subject matter jurisdiction asserted by the FSLIC, and the nonstatutory nature of the rights in issue).

from normal article III requirements. Unlike *Schor*, creditors have no choice in selecting who will adjudicate their claims.⁵⁹¹ The allocation of powers between the FSLIC and the article III courts is lopsided, with the courts being totally precluded, if section 1464(d)(6)(C) is applicable,⁵⁹² from exercising any supervisory review.⁵⁹³ The limited judicial review recognized in *Hudspeth* is much narrower than had obtained in *Schor*.⁵⁹⁴ Finally, whereas in *Schor* the parallel availability of access to the courts had rendered fair the balance that had been struck between a proper respect for traditional "private" rights and the need for their expeditious adjudication, the compulsory preclusion of the courts under the *Hudspeth* doctrine rendered FSLIC adjudication constitutionally impermissible.⁵⁹⁵

To these considerations one might add the fact that in neither *Union Carbide* nor *Schor* was there serious dispute about the intention of Congress. The "concerns motivating the Legislature,"⁵⁹⁶ the "obvious purpose of the legislation,"⁵⁹⁷ and the explicit authority that Congress had provided to adjudicate counterclaims,⁵⁹⁸ were factors specifically relied upon by the Court in adopting the view that a departure from article III was justified. In the *Hudspeth* context, on the other hand, the legislative purpose of Congress is far from evident.⁵⁹⁹

The *Glen Ridge* court of appeals' analysis of the present *Hudspeth* scheme seems fair. Yet the determinative criteria are interdependent in the sense that subtle readjustments to the relevant procedures and structures might well produce a formula that, on balance, would satisfy the cumulative demands of article III. With clear statutory authority, and the provision of safeguards designed to ensure fair, impartial adjudication and adequate judicial supervision, it would be possible for Congress and the FHLBB to construct a constitutionally acceptable administrative claims adjudication scheme.⁶⁰⁰

c. *Due process.* The *Hudspeth* doctrine has been challenged under the due process clause for failure to provide an adequate hear-

591. *See id.* at 388.

592. *See supra* text accompanying notes 423-25.

593. 734 S.W.2d at 388-89.

594. *Id.* at 389.

595. *Id.* at 389-90.

596. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985); *supra* text accompanying note 570.

597. *See Thomas*, 473 U.S. at 590 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

598. *See supra* text accompanying notes 427-29.

599. *See supra* text accompanying notes 362-429.

600. This was recognized by the court in *Morrison-Knudsen*. *See supra* notes 126-30 and accompanying text.

ing,⁶⁰¹ and for violating the principle of an impartial hearing.⁶⁰² Both challenges have failed in the lower courts thus far,⁶⁰³ although it is possible that the Supreme Court will address them.⁶⁰⁴ In any event, many judges have only dismissed the due process claims on ripeness grounds, so it is likely that these questions will return to the courts again.

It is important to distinguish between the two kinds of due process challenge that have been made: the charge that the *Hudspeth* procedures are *inadequate* implicates quite different considerations from those implicated by the charge that the FSLIC suffers from a *conflict of interest* when determining the validity of creditor claims.⁶⁰⁵ Another general observation should also be made: as with the nondelegation doctrine and article III jurisprudence, the Court has adopted a pragmatic approach when judging these two facets of due process. The adequacy of adminis-

601. See *FSLIC v. Florida 100 Dev. Group*, 670 F. Supp. 1577, 1583 (S.D. Fla. 1987) (no opportunity to present testimony or cross-examine witnesses; claim dismissed as not being ripe); *Baer v. Abel*, 648 F. Supp. 69, 78 (W.D. Wash. 1986) (no opportunity to cross-examine witnesses or present testimony; claim dismissed as premature).

602. See *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563, 564-5 (5th Cir. 1987) (claim that FSLIC will act as party and judge disposed of by decision in *Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1221 (1988)), *cert. granted sub nom.* *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988); *Florida 100 Dev. Group*, 670 F. Supp. at 1583 (due process claim dismissed as not yet ripe); *Baer*, 648 F. Supp. at 78 (due process claim that FSLIC is an interested adjudicator dismissed as premature); *First Am. Sav. Bank, F.S.B. v. Westside Fed. Sav. & Loan Ass'n*, 639 F. Supp. 93, 99-100 (W.D. Wash. 1986) ("assertion that FSLIC is likely to prefer its own interests over their claims is rebutted by the presumption that FSLIC acts in the best interests of the whole estate"); *Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 205, 748 P.2d 251, 257-58 (Wash. Ct. App. 1987) (charge that "it is unfair if the FSLIC is empowered to hear claims where its interests are adverse to the claimant's" rejected because of existence of adequate administrative appeal to FHLBB and recourse to judicial review under APA).

603. *But cf.* *Tocci Corp. v. Yankee Bank for Fin. & Sav., FSB*, No. Civ. A. 87-3121-K (D. Mass. 1988) (Westlaw, 1988 WL 70344). The *Tocci* court stated:

The conclusion[] . . . [that the FDIC and FSLIC do not have exclusive jurisdiction to adjudicate creditor claims in savings bank receiverships is] reinforced by the observation that allowing any person or entity to adjudicate claims against itself is an extraordinary arrangement because of the inherent conflict of interest implicit in such a dual role. An interpretation of a statute that attributes to Congress a manifestation of intent to create powers in an agency so likely to lead to impairment of impartiality in adjudication is inherently suspect.

Id.

604. Certiorari has been granted in one case that presents these issues directly. *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563 (5th Cir. 1987), *cert. granted sub nom.* *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988) (discussed *supra* at notes 17-18).

605. This distinction was not drawn by the Fifth Circuit in its decision in *Coit*. See *id.* The court relied on a decision involving the adequacy of a hearing in dismissing *Coit's* complaint based upon conflict of interest. *Id.* at 565 (referring to *Woods*, 829 F.2d at 1410-13). Quite apart from the relevancy of the *Woods* decision to the statutory context in question (*Woods* involved the procedures governing the appointment of a receiver, whereas the present issue concerns the adjudication, by a validly appointed receiver, of creditor claims), *Woods* did not deal with the question whether the FSLIC's procedures required an impartial adjudicator. See *Petition for Writ of Certiorari* at 19 n.8, *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988) (No. 87-996).

trative procedures is judged by an ad hoc balancing test,⁶⁰⁶ and even in cases of alleged conflict of interest the Court has indicated that ad hoc evaluation is necessary in each case.⁶⁰⁷

(i) *Adequacy of the hearing.* Procedural due process, to the extent that it is triggered by the the kinds of claims filed by creditors,⁶⁰⁸ may well mandate certain procedural requirements even if the FSLIC's determinations are regarded as a species of informal adjudication. Under the balancing approach articulated by the Court in *Mathews v. Eldridge*,⁶⁰⁹ the requirements of procedural due process will vary from case to case, according to the private interest at stake, the efficacy of the existing procedures and the extent to which new procedures will produce more accurate decisions, and the cost to the government in implementing these procedures.⁶¹⁰

The *Mathews* three-part balancing test has often been criticized; it hardly suggests an obvious answer in each case. Instead, it dictates yet another ad hoc balancing test to determine exactly what an agency is required to do to meet constitutional requirements. Perhaps the most widely accepted set of guidelines are those articulated shortly before the *Mathews* decision by the late Judge Henry Friendly.⁶¹¹ He thought the following constitute, "roughly in order of priority,"⁶¹² the elements of a fair hearing: an unbiased tribunal; notice of proposed action and the grounds asserted for it; an opportunity to present reasons why the proposed action should not be taken; the right to call witnesses; the right to

606. See *infra* notes 609-10 and accompanying text.

607. See *infra* notes 622, 631-33 and accompanying text.

608. Claims grounded in contract would represent constitutionally protected property interests, see, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972) (holding that a person may be deprived of a right created by contract only if due process requirements have been met); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (holding that the requirements of procedural due process did not apply to teaching appointment that did not create a property interest), but it is not clear whether those grounded in tort would be sufficient to implicate either property or liberty interests. See, e.g., *Paul v. Davis*, 424 U.S. 693, 712 (1976) (common law defamation does not rise to level of a constitutional cause of action unless it results in a deprivation of "liberty" or "property" recognized by state or federal law). Nor, even if they are, is it clear whether anything more than a right of action in tort is required by due process. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 682-83 (1977) (right to bring action in tort deemed sufficient due process). Certainly those based on negligence would not. See *Davidson v. Cannon*, 474 U.S. 344 (1986) (due process protection only implicated where *intentional* government deprivation of protected interests involved); *Daniels v. Williams*, 474 U.S. 327 (1986) (same).

Given the sweep of the *Hudspeth* doctrine, however, the doctrine's coverage in relation to contractual claims alone justifies evaluation of the *Hudspeth* procedures against due process standards.

609. 424 U.S. 319 (1976).

610. *Id.* at 335.

611. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

612. *Id.* at 1278.

know the evidence against one; the right to have the decision based only on the evidence presented; the right to counsel; the making of a record; a statement of reasons; public attendance; and judicial review.⁶¹³

Judge Friendly also suggested a hierarchy of adverse governmental action,⁶¹⁴ from most to least severe, that would demand adherence to these procedures to a greater or lesser extent.⁶¹⁵ He ranked decisions such as those involving personal liberty (e.g., parole) at the most severe end of the spectrum, and decisions involving governmental benefits at the least severe end. We can assume he would have placed receivership decisions near the middle of the spectrum, alongside those involving professional and trade licenses. In other words, receivership decisions rank as inoderately severe government action, and this would suggest that a substantial proportion of the elements of procedural due process identified by Judge Friendly should be considered in applying the *Mathews* balancing test.

(ii) *Impartiality.* The agencies administering the *Hudspeth* scheme are subject to two possible conflicts of interest. The first is pecuniary, and the second stems from the receiver's active involvement in both the affairs of the receivership in general and the determination of claims against the receivership.

The FSLIC, in its corporate capacity as insurer of thrift deposits, is nearly always the largest creditor in any thrift receivership. Since the FSLIC is also the receiver, this suggests a serious conflict of interest on the part of the receiver when it is determining the validity of the claims of other creditors. The potential conflict is rendered all the more acute by the current pressure on the insurance fund.⁶¹⁶ Indeed, it is this very financial crisis that is offered as the prime justification for the administrative adjudicatory powers claimed under the *Hudspeth* doctrine.⁶¹⁷ Hence, even if adjudication only takes place at the FHLBB level, the financial pressures might be too great to allow for impartial adjudication.

Since *Dr. Bonham's Case*⁶¹⁸ at least, a financial interest, however small, in the outcome of one's decision has been regarded as a disqualifi-

613. *Id.* at 1279-95.

614. The rejection of a claim filed against a receivership would be "adverse governmental action."

615. *See id.* at 1295-304.

616. *See supra* text accompanying notes 81-88.

617. *See, e.g., Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1216 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Assocs.*, 56 U.S.L.W. 3249 (U.S. Sept. 17, 1987) (No. 87-451); *Peoples' Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104, 1108 (D. Kan. 1988); *see also supra* text accompanying notes 91-92.

618. 8 Coke's Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610).

cation from decisionmaking.⁶¹⁹ The general proposition was restated in *Tumey v. Ohio*,⁶²⁰ where Chief Justice Taft observed: "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule."⁶²¹ Nevertheless, the Court has always found it necessary to focus upon the "degree or nature of the interest"⁶²² and this necessarily involves a renewed assessment in each new set of circumstances in which a pecuniary interest is alleged to violate due process.

In *Tumey*, the Court found that the due process clause had been violated for two reasons: first, because a mayor, who was also the judicial officer in cases involving prosecutions for violations of the state prohibition law, would only receive compensation for trying cases from the fines levied upon conviction of the defendants.⁶²³ Second, and more important for our purposes (since there is no suggestion that members of the FHLBB or the FSLIC stand to gain in any personal way from the outcome of decisions made by thrift receivers), the Court found that there was a violation of due process because the legislative scheme had been deliberately constructed so as to "stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county."⁶²⁴ In the absence of safeguards such as trial by jury, opportunity for a retrial, or broad judicial review, and given the mayor's inevitable interest "in the financial condition of the village, and his responsibility therefor,"⁶²⁵ the defendant could justifiably claim that he had been denied due process.

The importance of this second basis for the decision in *Tumey* is illustrated by the Court's more recent decision in *Ward v. Village of Monroeville*.⁶²⁶ Here the Court held that, even though the mayor-adjudicator did not stand to benefit personally and directly from the outcome of

619. Even the decision of a Lord Chancellor was set aside on this ground. See *Dimes v. Grand Junction Canal*, 3 H.L. Cas. 759, 10 Eng. Rep. 301 (1852). Financial interest should be contrasted with other potential sources of bias, such as prejudice or generalized hostility; in the latter case it is much more difficult to establish a violation of due process. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (while a judge's general hostility toward the insurance industry would be insufficient to constitute a violation of due process, the advantage the judge would gain from participating in a decision that would enhance the prospects of success in his own litigation pending in other courts was enough to vitiate the decision).

620. 273 U.S. 510 (1927).

621. *Id.* at 522.

622. *Id.*

623. See *id.* at 531-32.

624. *Id.* at 532.

625. *Id.* at 533.

626. 409 U.S. 57 (1972).

his decisions, the financial benefit to his municipality was so great as to constitute "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."⁶²⁷

The fact that both *Tumey* and *Ward* involved criminal prosecutions is not a ground for distinguishing these cases. The Supreme Court has expressly stated that *Tumey* and *Ward* apply with equal force to situations involving administrative adjudication.⁶²⁸

A conflict-of-interest objection to the FSLIC acting as both "prosecutor" and "adjudicator" is more difficult to sustain. In *Withrow v. Larkin*,⁶²⁹ the Court again articulated a pragmatic approach for evaluating complaints that an agency has combined both investigatory and adjudicative functions. Though recognizing that a pecuniary interest is one of those situations "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,"⁶³⁰ Justice White noted that the problem of separating investigative from adjudicatory functions had been addressed by Congress in various ways⁶³¹ and that "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."⁶³² The test is whether the risk of bias or unfairness is "too high to be constitutionally tolerable."⁶³³

This pragmatism again requires an evaluation of the actual *Hudspeth* structures and suggests the possibility of devising a scheme that would satisfy constitutional constraints. The strictness with which the Court regards potential pecuniary conflicts of interest indicates that substantial adjudicative independence, and a meaningful separation between the receiver and adjudicator, are minimum requirements.⁶³⁴ These safeguards would also address the need to prevent a mixing of

627. *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532 (1927)). That the Court in *Tumey* expressly extended the basis of its decision beyond the personal financial benefit enjoyed by the mayor was overlooked by Justice White in his dissent in *Ward*.

628. See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

629. 421 U.S. 35 (1975).

630. *Id.* at 47.

631. One general solution is the APA's requirement in formal adjudications that employees engaged in investigating or prosecuting may not also participate or advise in the adjudication. See 5 U.S.C. § 554(d) (1982).

632. 421 U.S. at 52.

633. *Id.* at 47.

634. See *infra* text accompanying notes 700-08. The problem of striking the right balance when creating an internal separation of powers in an agency is perennial, and it requires fine adaptation to the circumstances of each case. See Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

"prosecutorial," or investigatory, and adjudicative functions. On the other hand, such safeguards are probably also *sufficient* requirements. In *Marshall v. Jerrico, Inc.*,⁶³⁵ the Court upheld the constitutionality of a scheme in which the Employment Standards Administration was reimbursed for its costs from the civil penalties levied by the Administration on child labor violators. Although the agency benefited financially from the determinations of its assistant regional administrator, no individual within the agency stood to benefit personally⁶³⁶ and alleged violators were provided with a full, de novo hearing before an independent administrative law judge. This procedure was deemed sufficient to satisfy the neutrality requirements of due process.⁶³⁷

d. Seventh amendment. The seventh amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Many of the claims filed against thrifts in receivership⁶³⁸ are plainly derived from "suits at common law," or are based upon statutes that have created "legal rights and remedies" normally "enforceable in an action for damages in the ordinary courts of law."⁶³⁹ Examples of the former are actions for breach of contract, negligent misrepresentation and civil fraud. Examples of the latter are civil RICO claims predicated upon crimes alleged to have been committed by the thrift or its agents. Both types would, in the absence of receivership, be tried to a judge and jury in state or federal courts having jurisdiction.⁶⁴⁰

Hence it is not surprising that creditors challenging the *Hudspeth* doctrine have charged that the doctrine violates their right to a trial by jury. The first reported case in which this challenge was addressed (and rejected) was *Baer v. Abel*.⁶⁴¹ More recently the challenge was raised in

635. 446 U.S. 238 (1980).

636. *Id.* at 250.

637. *Id.* at 247-50.

638. *See supra* text accompanying notes 225-37.

639. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

640. The seventh amendment applies only to federal proceedings. *See Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916). *See generally* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* 256-58 & n.12 (1986).

641. 648 F. Supp. 69 (W.D. Wash. 1986). Shareholders had commenced an action against a thrift, alleging violations of federal and state securities laws, RICO, and the Washington State Consumer Protection Act in the sale of the thrift's stock. The thrift was then placed into receivership by the FHLBB, and the FSLIC moved to dismiss the plaintiffs' claims. Judge Rothstein granted the motion, rejecting the charge that in so doing he was denying the plaintiffs their right to trial by jury. He reasoned that the amendment "does not apply in actions against the Federal Government," and that even if the United States had consented to be sued, it had not conceded the right to a jury trial. *Id.* at 77 (quoting *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981)). Furthermore, the judge reasoned, the Supreme Court "has frequently affirmed congressional authority to commit factfinding

*Coit Independence Joint Venture v. FirstSouth, F.A.*⁶⁴² The Fifth Circuit rejected the seventh amendment challenge in *Coit Independence* as not being ripe,⁶⁴³ and the question is now before the Supreme Court.⁶⁴⁴ It is unlikely, however, that this challenge will be successful, both because the Court has proved tolerant of administrative adjudication with which a jury would be incompatible, and because receivership claims are likely, in any event, to be treated as "equitable."

(i) *Supreme Court toleration.* The seventh amendment challenge appears, from the jurisprudential history of its application, to depend at least partly on the success of the article III challenge. In other words, if an adjudicative scheme could be devised that was authorized by Congress and satisfied the constraints of article III, it is unlikely that the Court would rule that it remained invalid because it denied the right to a jury trial.

This view is reflected in a recent dictum in *Tull v. United States*,⁶⁴⁵ where Justice Brennan remarked that "the Seventh Amendment is not applicable to administrative proceedings."⁶⁴⁶ For, although it was once conceded by the Court that the argument that "the right to a jury trial was never intended to depend on the identity of the forum to which Congress has chosen to submit a dispute" was "well put,"⁶⁴⁷ the fact is that where Congress has chosen to vest the adjudicative power in the hands of an agency, the Court has refused to apply the seventh amendment.⁶⁴⁸ Where, on the other hand, Congress has chosen to place adjudication of

functions and initial adjudications to an administrative forum without violating the seventh amendment." *Id.* at 77-78 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-55 (1977)).

642. 829 F.2d 563 (5th Cir. 1987), *cert. granted sub nom.* *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1988).

643. 829 F.2d at 565.

644. *See supra* note 18.

645. 107 S. Ct. 1831 (1987).

646. *Id.* at 1835 n.4 (echoing prior dicta to the same effect); *see, e.g., Atlas Roofing*, 430 U.S. at 450 ("at least in cases in which 'public rights' are being litigated . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible"); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) ("the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication"); *see also Curtis v. Loether*, 415 U.S. 189, 194-95 (1974); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 90 (1965) (observing that, even if to do so would satisfy the Constitution, it would not be feasible to attach juries to agencies because "the concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder").

647. *Atlas Roofing*, 430 U.S. at 457-58.

648. *See id.* at 460-61; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937); *Block v. Hirsh*, 256 U.S. 135, 158 (1921); *cf. Katchen v. Landy*, 382 U.S. 323, 336-40 (1966) (bankruptcy court).

the rights it has created in the hands of a district court, the Court has proved much more willing to find an infringement of the requirements of the seventh amendment.⁶⁴⁹

Various explanations have been offered for not requiring a jury trial in the case of agency adjudication. In *Block v. Hirsh* the Court thought that if a rent commission's statutory power was clear and constitutional, the seventh amendment objection "amounts to little. To regulate the relation [of landlord and tenant] and to decide the facts affecting it are hardly separable."⁶⁵⁰ In *National Labor Relations Board v. Jones & Laughlin Steel Corp.* the Board's power to order reinstatement of an employee and payment for time lost was described as "not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding" involving the recovery of damages only as "an incident to equitable relief."⁶⁵¹ In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* the Court relied on the "public rights/private rights" distinction as a justification: the power of the agency to determine violations of safety standards, to issue abatement orders, and to assess civil penalties, was described as involving "public rights" based upon newly created "statutory obligations" and not entailing a right to a jury trial.⁶⁵² These arguments probably also apply to an otherwise constitutional administrative claims adjudication scheme.

(ii) *Equitable nature of the proceedings.* The Court's relaxation of the literal requirements of the seventh amendment has been criticized as "seriously weakening the protection afforded by the seventh amendment."⁶⁵³ But even if the Court were to adopt a stricter approach it is unlikely that it would do so in the case of thrift receivership adjudications.

In *Katchen v. Landy*,⁶⁵⁴ a seventh amendment challenge was made against the summary jurisdiction of a bankruptcy court to order the surrender of voidable preferences asserted and proved by a trustee in response to a claim filed by the creditor who had received the preferences. The Court rejected the challenge, concluding that "there is no Seventh Amendment right to a jury trial for determination of objections to

649. See, e.g., *Tull v. United States*, 107 S. Ct. 1831, 1835-39 (1987); *Pernell*, 416 U.S. at 363; *Curtis*, 415 U.S. at 189.

650. 256 U.S. at 158.

651. 301 U.S. at 48.

652. See 430 U.S. at 449-61.

653. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1281 (1978).

654. 382 U.S. 323 (1966).

claims.”⁶⁵⁵ The Bankruptcy Act “converts the creditor’s legal claim into an equitable claim to a pro rata share of the *res*” and “the proceedings of bankruptcy courts are inherently proceedings in equity,” to which the right to a jury trial does not extend.⁶⁵⁶ It is therefore unlikely that the right to a jury trial would extend to the analogous situation of claims adjudications in thrift receiverships.⁶⁵⁷

3. *The Importance of Clear Statutory Authority, Standards, Internal Separation of Powers, Procedural Fairness and Adequate Judicial Scrutiny.* The thrift industry is so intensely regulated⁶⁵⁸ that the *Hudspeth* scheme might well pass the enigmatic “public rights/private rights” test even though creditors’ claims often involve rights created by state law.⁶⁵⁹ On the other hand, the *Hudspeth* scheme constitutes a sweeping assertion of jurisdiction over a very broad range of claims⁶⁶⁰ and therefore constitutes one of the most daring challenges to article III yet presented.⁶⁶¹ For this reason, Congress, the FHLBB and the FSLIC have to ensure that they take fully into account the cluster of concerns driving current Supreme Court jurisprudence on the constitutionality of agency adjudication.

Though the Court has dictated general deference to agencies in the construction of their statutory powers,⁶⁶² it has also relied upon the clarity of congressional purpose when accepting a departure from the requirements of article III.⁶⁶³ Statutory ambiguity has also explicitly and properly led the courts in *Morrison-Knudsen* and *Glen Ridge* to avoid the constitutional problems by adopting a narrow construction of the agencies’ powers.⁶⁶⁴ This supports the recommendation that, even if the

655. *Id.* at 337.

656. *See id.* at 336-37.

657. *Katchen* is something of an exception in a pro-jury line of cases. *See, e.g.,* *Ross v. Bernhard*, 396 U.S. 531, 538-40 (1970) (emphasizing that the distinction between law and equity is not itself determinative and that a jury trial might be available even where the procedural device employed was originally equitable). Nevertheless, since *Katchen* addresses bankruptcy, which is so closely analogous to financial receiverships, it is likely that the case would control in the present context.

658. *See supra* text accompanying notes 40-51, 342-419. As the Court once put it, the FHLBB “has promulgated regulations governing ‘the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.’” *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 145 (1982) (quoting *People v. Coast Fed. Sav. & Loan Ass’n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

659. *See supra* text accompanying notes 225-37.

660. *See id.*

661. *See supra* notes 554-56, 584-85 and accompanying text (emphasizing the breadth of administrative jurisdiction as an important criterion).

662. *See supra* text accompanying notes 325-36.

663. *See supra* text accompanying notes 596-98.

664. *See supra* text accompanying notes 129-31, 135-37.

FHLBB does have putative authority to establish the *Hudspeth* scheme,⁶⁶⁵ this authority, and the structure of the adjudicative scheme itself, should be stated in clearer terms by Congress.⁶⁶⁶

The absence of adjudicatory standards raises concern about the excessive delegation of powers⁶⁶⁷ and might lead the Court to construe the FHLBB's statutory mandate restrictively. Basic procedural fairness also requires clear notice of the procedures to be followed in determining claims.⁶⁶⁸ Together, these concerns suggest not only the publication of opinions arising out of *Hudspeth* adjudications (a practice that the FHLBB has already begun to address⁶⁶⁹) but also the desirability of detailed, final rules governing the detailed processes for creditor claims determinations.⁶⁷⁰

Although it is prepared to evaluate administrative arrangements on an individual basis,⁶⁷¹ the Court is concerned about the availability of an impartial adjudicator⁶⁷² and, in particular, potential conflicts of interest, both financial and functional.⁶⁷³ It is also concerned with the fairness of the adjudicative procedure.⁶⁷⁴ These concerns indicate that Congress or, in the absence of congressional action, the FHLBB itself, should ensure that there is a genuine internal separation of powers between the receiver and the claims adjudicator, that the claims adjudicator should enjoy significant insulation from the pressures, both financial and administrative, that might otherwise be brought to bear during the course of a receivership, and that creditors should not be prejudiced by ex parte material not on the record.⁶⁷⁵

With regard to article III, the Court has repeatedly expressed concern that there should be no attempt by Congress to aggrandize itself, through agencies, at the expense of the judicial branch.⁶⁷⁶ This militates strongly against the assertion by the FHLBB and the FSLIC that creditor claims that have already been adjudicated by a court should be sub-

665. See *supra* text accompanying notes 427-29.

666. See *infra* text accompanying notes 754-58 (Recommendation 1).

667. See *supra* text accompanying notes 526-35.

668. Cf. Friendly, *supra* note 611, at 1278 ("more elaborate specification of . . . [desirable procedural safeguards] may help to produce more principled and predictable decisions"). Judge Friendly's set of guidelines are set forth *supra* in text accompanying notes 612-13.

669. See *infra* text accompanying note 705.

670. See *infra* text accompanying notes 764-65 (Recommendation 4).

671. See *supra* text accompanying notes 622, 631-33.

672. See *supra* text accompanying note 564.

673. See *supra* text accompanying notes 618-37.

674. See *supra* text accompanying notes 608-15.

675. See *infra* text accompanying notes 759-62 (Recommendation 2).

676. See *supra* text accompanying notes 570-72, 588.

mitted to the receiver for adjudication de novo.⁶⁷⁷ The attempt by an agency not merely to assert primary jurisdiction but to place itself in an appellate position vis-a-vis the courts is surely a flagrant "aggrandizement" of power at the expense of the courts.⁶⁷⁸ Furthermore, the notion of a losing party having the opportunity to "readjudicate" the claim against it surely raises the apparent conflict of interest to an intolerable level.⁶⁷⁹ The assertion of such jurisdiction therefore seems to go beyond the constitutional limits of administrative adjudication.⁶⁸⁰

Finally, one consistent concern, arising in the context of the nondelegation doctrine,⁶⁸¹ article III,⁶⁸² and due process,⁶⁸³ is that there be adequate judicial review of agency adjudication. If the administrative adjudication scheme is valid, de novo judicial review would be wastefully duplicative. But meaningful judicial review to guard against abuses of power by the administrative adjudicator is a necessity. This entails the development of a coherent and reliable record and clarification as to the standard of judicial review.⁶⁸⁴

IV. EVALUATION OF THE *HUDSPETH* PROCESS

The basic contention of the FHLBB that an administrative adjudication process is preferable to the regular judicial process, has been accepted as a premise of this article. Yet this contention is itself a matter of controversy. For example, while it seems probable that administrative adjudication would ensure greater uniformity in the case of receiverships that are faced with claims from different judicial jurisdictions, there is no hard evidence to show that the *Hudspeth* process is indeed quicker, more efficient and less expensive than the judicial alternative. In the absence of public access to details concerning individual receiverships, which access the FHLBB and FSLIC have so far refused to grant,⁶⁸⁵ one is forced to rely on the opinions in the agency itself.

Furthermore, even if it can be demonstrated that the *Hudspeth* process is more efficient and less expensive, this does not necessarily imply that it is as *fair* a process as that available in the courts. Without some

677. See *supra* notes 234-35 and accompanying text (citing cases in which the FSLIC attempted to avoid the effect of judgments already entered against thrifts).

678. See *supra* text accompanying notes 734-39.

679. See *supra* text accompanying note 630.

680. See *infra* text accompanying note 766 (Recommendation 5).

681. See *supra* note 536.

682. See *supra* text accompanying notes 556, 587.

683. See *supra* note 560.

684. See *infra* text accompanying note 767 (Recommendation 6).

685. See *infra* note 726.

substantial restructuring, along the lines suggested in this article,⁶⁸⁶ it is hard to accept that this can be possible.

As with any complex regulatory process designed to protect the public, there has to be some tradeoff between the demands of fairness and efficiency. This involves a fundamental policy judgment that in the present context, given the scale of thrift liquidations and the size, range and variety of creditor claims involved, is one of national import. It is a judgment that should be made by the originator of the deposit protection system itself, in other words, Congress. Hence the evaluation that follows in this article, and the recommendations for improvement to the existing arrangements, are based on the assumption that Congress actually would expressly decide to authorize an administrative claims adjudication process.

A. *Fairness and Flexibility.*

The *Hudspeth* procedures are partly intended to assist the receiver in maintaining a degree of flexibility when processing claims. Indeed, section 1729(d) seems clearly to envisage this goal where it refers to "settling, compromising, or releasing" claims. Hence the FHLBB is anxious to ensure that the FSLIC Receiver has an opportunity to accommodate disputed claims before the parties confront each other in litigation. In practice, many potentially complex claims are resolved at this level with a minimum of formality and expense.⁶⁸⁷ The receiver also needs time to investigate the thrift's activities, many of which might have been concealed from the regulatory examiners before the thrift was seized. The thrift's records might well be in disarray.

The FSLIC Receiver is carefully distinguished, both linguistically and institutionally, from the FSLIC Corporate. Hence it is misleading to assume that the FSLIC as insurer of deposits (and therefore as the major creditor in any receivership) is identical to the FSLIC Receiver itself.⁶⁸⁸ Nevertheless, the FSLIC Receiver still has the ordinary receivership responsibility of preserving the assets of the receivership for the optimal benefit of creditors. In practice the special representatives must surely interact with policy formulators at the FSLIC Corporate in deciding whether, as the best overall strategy, to participate in a purchase and assumption transaction⁶⁸⁹ or to transfer insured accounts.⁶⁹⁰ The potential size of creditor claims must inevitably weigh heavily in their deci-

686. See *infra* text accompanying notes 687-719.

687. Interview, *supra* note 275.

688. See *supra* text accompanying notes 196-98.

689. See *supra* text accompanying notes 189-95.

690. See *supra* text accompanying note 193.

sions. It is hard to accept, therefore, that the severe financial strictures under which the FSLIC as a whole has been placed, as a result of the depletion of its insurance fund and the escalation in administrative and liquidation costs,⁶⁹¹ do not have a very strong influence when the FSLIC Receiver's Special Representatives make their decisions to accept or reject claims.

1. *"Receiver's Determinations."* It is just these forms of prior involvement with the disputed claims that render the FSLIC Receiver virtually incapable of impartiality when it comes to adjudicating claims that remain in dispute after efforts to "settle" or "compromise" those claims have failed. To be sure, the mere fact that the FSLIC will inevitably fulfill the role of both creditor and receiver, if the agency is looked at as a unit, is not enough on its own to disqualify the FSLIC's appointment.⁶⁹² But the question is one of *degree*, and the degree of conflict at the receivership level is, in the present financial crisis, unacceptably high.⁶⁹³

Indeed, the whole character of the *Hudspeth* rules themselves suggests that the receiver is conceived of as having a partisan role in the claims determination process. The fact that fee counsel perform services as and where needed by the Special Representatives,⁶⁹⁴ the fact that they provide confidential advice concerning claims to these representatives,⁶⁹⁵ and the fact that the Special Representative is expressly charged to take "cost savings" into account in the selection of the persons assigned to review creditor claims,⁶⁹⁶ all suggest that at the receivership level the review of claims is likely to be partisan, often unsympathetic, and certainly not detached.

If genuine adjudication were to take place at the receivership level, the process could hardly be described as fair to creditors if they and the receiver had moved beyond an atmosphere of "settlement" and "compromise." This is recognized by the FHLBB, which has changed the description of the receiver's decisions from "final determinations" to "receivers' determinations."⁶⁹⁷ The alternative terminology conveys more accurately what really happens in claims determinations, where the

691. See *supra* text accompanying notes 76-88.

692. See, e.g., *Womble v. Dixon*, 585 F. Supp. 728, 733 (E.D. Va. 1983) (holding that the insufficiency of receivership funds to pay all claims did not constitute a sufficient conflict of interest to warrant removal of the FSLIC as receiver), *aff'd in part and vacated in part*, 752 F.2d 80 (4th Cir. 1984).

693. See *supra* text accompanying notes 621, 629-32 (discussing the due process test).

694. See *supra* text accompanying notes 248, 261.

695. See *supra* text accompanying notes 270-71.

696. See *supra* text accompanying note 261.

697. See *supra* note 275.

first real "adjudication" only takes place before the Adjudication Division itself.⁶⁹⁸

It would be much more compatible with the concept of independent adjudication and internal separation of powers to treat claims decisions at the receivership level not as a species of "adjudication," but as what they were probably always assumed to be, namely, the mere *acceptance* or *rejection* of claims, the validity of which is to be determined by an objective third party. This would help to reduce the importance of the conflicts of interest, real and perceived, under which the receiver labors. It would also liberate the receiver from the futile duty of trying to maintain an impartial posture in the administration of the receivership. And it would permit the receiver to represent more unequivocally the interests of the receivership as a whole when called upon to engage in some form of mandatory alternative dispute resolution⁶⁹⁹ or when opposing a creditor in a claims dispute before the Adjudication Division.

2. *Administrative Adjudications ("Reviews")*. The first real "adjudication" of creditors' claims takes place at the level of the Adjudication Division.⁷⁰⁰ This is also the first place at which significant institutional separation might be assumed to take place, though even here there is extensive prior and continuing involvement by staff of the Adjudication Division with the receivership team when a thrift is seized.⁷⁰¹ The staff are warned to avoid discussing any details that might bear directly upon individual claims,⁷⁰² but there is little in the *Hudspeth* procedures that can prevent internal communication between Adjudication Division staff and the adjudicator, ex parte contacts between the receiver's agents and the adjudicator, and pressure on the adjudicator from the Board itself, on the one hand, and from the Director, OFSLIC (from whom the adjudicator has received the delegated power to adjudicate), on the other.

Perhaps a de facto Chinese wall has been created within the Adjudication Division. For administrative appeals, at least,⁷⁰³ the initial rever-

698. Interview, *supra* note 275.

699. See *infra* text accompanying notes 715-17.

700. See *supra* text accompanying notes 278-97.

701. See *supra* text accompanying notes 249-50.

702. In particular, the attention of the Division's staff is drawn to *Baltimore Contractors, Inc. v. United States*, 643 F.2d 729 (Ct. Cl. 1981). In *Baltimore Contractors*, the court held that the continuing involvement by the Architect of the Capitol and his staff with the House board and its members created the appearance of unfairness and the possibility of improper influence in connection with the board's adjudication of a dispute between the architect and a contractor.

703. Requests for expedited relief, see *supra* text accompanying notes 300-11, have been granted in only 3% of the cases (i.e. 8 out of 304 cases, as of March 23, 1988). Letter from June O. Stewart to Lawrence A. Baxter (Mar. 23, 1988). One of the reasons given for this extremely low success rate

sal rate of receiver determinations seems to suggest that this has occurred. At present half of those receivers' determinations that have been taken on appeal have been reversed.⁷⁰⁴ The decisions of the Adjudication Division are now also accumulating and are becoming available in Westlaw and LEXIS databases.⁷⁰⁵ This development should aid in providing consistent guidance to the various receiverships and in subjecting the claims decisions to public scrutiny. In itself, the publication of their decisions should help to promote objectivity on the part of the adjudicators.

Yet even if improper influences have not, as a matter of practice, been brought to bear, it would still be appropriate to institutionalize the adjudicators' independence by elevating the office to the status of an administrative law judge⁷⁰⁶ in order to provide the security of tenure and insulation from external pressures that those officers enjoy.⁷⁰⁷ This might require specific statutory authorization.⁷⁰⁸

The record presented to the adjudicator on appeal is also open to criticism. The receiver is required by the Adjudication Division to assume an adversarial role in the appellate proceedings,⁷⁰⁹ but there is nothing to suggest that the privileged and confidential advice that she receives from fee counsel, for example, does not find its way into the office of the appellate adjudicator. If there is a possibility of this occurring, then there is a danger of unfairness to the creditor-claimant—who will not be fully apprised of the information upon which the adjudication will be based. Similarly, while internal staff memos might be acceptable

is that creditors have only the cost of a postage stamp to lose in filing such requests; as a result a very high proportion of frivolous requests are filed. Interview, *supra* note 275.

704. That is, 43 out of 85 cases, as of March 23, 1988. Letter from June O. Stewart, *supra* note 703.

705. These databases were added in 1988.

706. A model for this proposal is the West Virginia statute governing the regulation of failing financial institutions, which contains comprehensive provisions for the determination by receivers of the claims of creditors. W. VA. CODE § 31A-7-13 (1988). A person adversely affected by the complete or partial rejection of a claim is entitled to a formal hearing before an independent, qualified hearing examiner appointed by the commissioner. *Id.* §§ 31A-7-14, 31A-8-1. After this remedy has been exhausted, the claimant may seek judicial review. *Id.* § 31A-8-2.

707. See 5 U.S.C. §§ 3105, 3344, 5372 (1982) (procedures for appointing ALJs).

708. Although agencies are free to add to the procedural requirements of the APA, see, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), the Office of Personnel Management will only assign to the agency as many ALJs as "are necessary for proceedings required to be conducted in accordance with sections 556 and 557" of the APA. 5 U.S.C. § 3105. Since formal adjudication is not required by either the Home Owners' Loan Act or the National Housing Act, see *supra* text accompanying notes 489-97, it is likely that OPM would not approve the assignment of ALJs for *Hudspeth* purposes.

709. See *supra* text accompanying notes 284-311.

where they emanate from the same level as the adjudicator,⁷¹⁰ they surely constitute an improper influence where they emanate from an adviser to a *party* to the proceedings. The rules should therefore be drafted so as to ensure that only material disclosed in the record should form the basis of the decision on appeal.

On the other hand, it should be recognized that large numbers of creditor appeals can be, and have already been, resolved without full, trial-type, oral hearings. The written record is often a sufficient basis upon which to resolve the dispute.⁷¹¹ Hence it would seem unduly burdensome to insist on the invariable adoption of all the formal adjudication requirements provided for in the APA.⁷¹² A hybrid procedure, which would permit the administrative law judge (or perhaps a preliminary adjudication officer of lesser status) to make an initial, reviewable decision whether to order that the appeal be conducted on the basis of an oral, evidentiary hearing, seems appropriate. Such a "shortened" or "modified" procedure has long been applied at the Interstate Commerce Commission, where it appears to have successfully eliminated unnecessary formality and expedited decisions involving simple disputes.⁷¹³ The Civil Aeronautics Board also successfully experimented with "expedited" procedures.⁷¹⁴

Finally, on many occasions disputes between creditors and receivers might better be resolved through alternative dispute resolution techniques (ADR). A great variety of such techniques is available, ranging from arbitration, through mediation, to conciliation,⁷¹⁵ and many of these are already employed by federal agencies.⁷¹⁶ Their adoption is

710. Cf. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1210-16 (D.C. Cir.) (holding that there is no statutory basis in the APA for a separation-of-functions requirement in Occupational Safety and Health Administration rulemaking procedures, and that a staff advocate need not isolate herself from others within her agency), *cert. denied*, 453 U.S. 913 (1981).

711. Interview, *supra* note 275.

712. See 5 U.S.C. §§ 554-557 (1982).

713. See Edles, *The ICC Hearing Process: A Cost-Benefit Approach to Administrative Agency Alternative Dispute Resolution*, 16 TRANSP. L.J. 99 (1987). Some consideration would have to be given to the criteria by which the preliminary decision is to be made. The "material issue of fact" criterion is not always easy to apply at the initial decision stage, but placing a threshold on appealable claims according to the amount at issue carries its own potential for arbitrariness.

714. See *id.* at 103. Yet another illustration of the apparently successful use of multi-channel adjudicatory procedure is provided by recent developments at the Commodity Futures Trading Commission, where the agency employs three types of procedures for its reparations adjudications: voluntary, summary and formal. See Smythe, *The Reparations Program of the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudications*, 2 ADMIN. L.J. 39, 56-60 (1988).

715. See, e.g., Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141, 144-45 (1987) (suggesting that full range of ADR techniques be used to address the needs of the legislative process).

716. See Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L.J. 125, 137 (1987).

strongly advocated by the Administrative Conference as a means of expediting agency proceedings and reducing costs.⁷¹⁷ The receiver's powers under section 1729(d) are quite capable of accommodating ADR.

As argued in the previous section,⁷¹⁸ however, the receiver really holds the posture of a committed party and for ADR to work where attempts to "settle, compromise, or release" claims have already failed, it would have to be imposed by a superior authority. The adjudicator in the Adjudication Division would be well-placed to choose between arbitration or mediation, for example.⁷¹⁹ The rules should be drafted so as to create the power to appoint an arbitrator, for example, and to order that the receiver and claimant engage in compulsory arbitration, if such is the most appropriate means of ADR.

B. *Efficiency and Cost.*

The main motivation for developing the *Hudspeth* procedures has been to save costs and expedite the determination of creditor claims.⁷²⁰ Not only is this made possible by the informality of the claims processing procedure, in which the receiver is able to "settle, compromise, or release claims,"⁷²¹ but the adjudicatory procedure before the Adjudication Division of the Office of General Counsel at the FHLBB is also thought to be potentially quicker and less expensive than de novo judicial proceedings. Does the *Hudspeth* process fulfill this promise?

1. *The Receivership Level.* An embarrassment to the agencies' claim that FHLBB adjudication expedites claims determination is the progress of the *Hudspeth* case itself since the Fifth Circuit's decision. The court of appeals issued its final opinion on May 23, 1985, redirecting Hudspeth's claims "to the administrative track." Yet almost three years later Hudspeth had not been granted a *receiver's* determination of his claim.⁷²² It was only after approaching his local Congressman that Hudspeth's attorney received any formal response to Hudspeth's request for a

717. Administrative Conference of the U.S., Agencies' Use of Alternative Means of Dispute Resolution, Recommendation No. 86-3, 1 C.F.R. § 305.86-3 (1988). See generally *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987) (sponsored by the Administrative Conference).

718. See *supra* text accompanying notes 692-99.

719. The Director of the Adjudication Division is hospitable to the idea of using ADR. Interview, *supra* note 275.

720. See *supra* text accompanying note 92; see also Felt, *FSLIC Receivership Claims Procedure*, in ALI-ABA, FAILING FINANCIAL INSTITUTIONS 529, 531-34 (1987) (study materials).

721. 12 U.S.C. § 1729(d) (1982).

722. See *supra* text accompanying notes 273-77 (discussing "receiver's determinations").

determination of his claim.⁷²³ This came in the form of a proposed initial determination, dated December 24, 1987, denying his claims. Since Hudspeth's attorney has requested reconsideration, the matter has not even reached the Board, or "appellate," stage. Hudspeth's attorney estimates that the original proceedings in chancery court and any possible appeal "would surely have reached resolution long before 1988"⁷²⁴

If the *Hudspeth* case itself were to be taken as a guide to the speed and efficiency of the *Hudspeth* process, the agencies' arguments would not be cogent at all. On the other hand, the FHLBB was really only in a position freely to develop its procedures after its authority to do so was recognized in *Hudspeth*. Hence the case might merely be an unfortunate exception. Nevertheless, although statistical information is difficult to compile⁷²⁵ and not necessarily even available,⁷²⁶ there do seem to have been some considerable delays at the receivership level,⁷²⁷ at least in the

723. Telephone interview, *supra* note 107. The details are now more fully documented in Hudspeth's amicus brief in the *Coit* case. See Brief Amicus Curiae of Joseph M. Hudspeth in Support of Petitioner, *Coit Independence Joint Venture v. FSLIC*, 108 S. Ct. 1105 (1987) (No. 87-996); see *supra* note 18.

724. Brief Amicus Curiae of Joseph M. Hudspeth at 4 n.2. As this article went to press, the author was advised that the FSLIC had settled Hudspeth's claim. Telephone interview with Wylene W. Dunbar, counsel for Hudspeth (Aug. 18, 1988). It should also be noted that the claims in the *Morrison-Knudsen* group of cases have now been settled. Telephone interview, *supra* note 390.

725. Statistics are not easy to compile, partly because the performance of claims processors varies from region to region, Telephone interview, *supra* note 202, and partly because aggregate statistics do not reflect what happens in individual cases.

726. While I have experienced generous assistance from the Adjudication Division of the Office of General Counsel, FHLBB, it appears that there is in some quarters of the agency a predilection for secrecy. For example, an attempt by one attorney to use the Freedom of Information Act to compile statistics from information concerning the claims processed in specific receiverships was foiled because the FHLBB adopted the view that such information is not subject to disclosure under the FOIA, creditor claims being "against the receiver, not the FSLIC." Letter from Ella P. Allen to Sarah H. Comley (Apr. 8, 1988). The agencies' position in this regard sits somewhat awkwardly with the FSLIC's argument that, as receiver, it enjoys sovereign immunity. See *supra* note 148. Its legality is also debatable. Cf. *Rocap v. Indiek*, 539 F.2d 174, 175-76 (D.C. Cir. 1976) (Federal Home Loan Mortgage Corporation subject to disclosure requirements even though it is self-financing). The "governmental control" of the FSLIC, whether FSLIC Corporate or FSLIC Receiver, is surely even greater.

This refusal to disclose information concerning receiverships appears to be maintained even in the face of requests from congressional committees. See STAFF OF HOUSE COMM. ON BANKING, FINANCE & URBAN AFFAIRS, 100TH CONG., 2D SESS., FEDERAL ASSET DISPOSITION ASSOCIATION: REPORT OF AN INQUIRY INTO ITS OPERATIONS AND PERFORMANCE ch. XI (Comm. Print 1988), reprinted in 134 CONG. REC. H2228-30 (daily ed. Apr. 21, 1988).

727. Some of the attorneys I interviewed complained of indordinate delays in receiving responses from receivers. Cf. Memorandum of Law of Third-Party Defendants at 33, *FSLIC v. Greenbaum*, No. L-070020-87 (N.J. Super. Ct. 1988). This memorandum of law asserts that delays in the administrative process "can be extraordinary." It then cites *W-V Enters. v. FSLIC*, 234 Kan. 354, 673 P.2d 1112 (1983), as a case in which the FSLIC commenced an interpleader action to enjoin enforcement of a judgment and attachment order against a thrift in receivership two years after the Kansas Supreme Court had affirmed the judgment against the FSLIC as receiver.

processing of contentious claims.⁷²⁸ One probable source of this delay is the failure to subject receiver's agents, at some points in the process, to rigid time limits.⁷²⁹ This should be remedied.⁷³⁰

2. *The Board Level.* At the Board level it appears that the process is becoming more expeditious. As of March 23, 1988, the Adjudication Division had received 129 administrative appeals, 85 of which it had completed.⁷³¹ Almost half of these were completed in four weeks or less.⁷³² It might be reasonable to assume, therefore, that as a general rule the speed and informality of the *adjudicative* process, once fully implemented and staffed, would render the determination of claims less expensive and more efficient than it might be if the agencies had to rely on the courts. Agency staff insist that this is the case.⁷³³

3. *Previously Adjudicated Claims.* Considerations of efficiency and cost do not, however, justify the agencies' attempts to avoid the effects of judgments already entered against thrifts prior to their being placed in receivership.⁷³⁴ The agencies' view that preexisting but unappealed or unexecuted judgments should be vacated is dictated by their belief that section 1464(d)(6)(C) necessarily strips the courts of jurisdiction.⁷³⁵ As has been argued, however, this view of section 1464(d)(6)(C) is wrong.⁷³⁶ In any event, the agencies' position raises very serious article III problems.⁷³⁷

Furthermore, the agencies' view could also place a potential litigant in a hopeless position. For example, in *Homestead Savings v. Life Sav-*

728. As to overall efficiency, the Southern Region, for example, has greatly improved the speed of its claims processing: in 1985, prior to the development of the *Hudspeth* procedures, the average length of time for processing a claim was 494.6 days; this time had dropped, in January 1988, to 18.1 days. Telephone interview with Judith L. Friedinan, Associate General Counsel, FHLBB (May 6, 1988). Yet this information can tell us little about nonroutine, contentious claims.

729. *Cf. supra* note 277.

730. *See infra* text accompanying notes 764-65 (Recommendation 4); *cf.* Admin. Conference of the U.S., Time Limits on Agency Actions, *reprinted in* 1 C.F.R. § 305.78-3 (1988).

731. Letter from June O. Stewart, *supra* note 703.

732. *Id.*

733. *See, e.g.,* Felt, *supra* note 720, at 533.

734. *See supra* notes 118-20; *supra* text accompanying notes 234-35.

735. Telephone interview, *supra* note 390. An incidental argument is that a creditor with an adjudicated claim should still be required to resubmit the claim for fresh determination by the receiver, because if the receiver were obliged to accept the claim as valid this might, at least psychologically, impede the settlement and negotiation process. Interview with David A. Felt, Assistant General Counsel, FHLBB, and Mark Gabrellian, Trial Attorney, FHLBB, in Washington, D.C. (Oct. 22, 1987).

736. *See supra* text accompanying notes 394-403, 422-25.

737. *See supra* text accompanying note 589-99.

*ings & Loan Association*⁷³⁸ the plaintiff had been awarded a jury verdict against the defendant thrift of more than \$6.2 million, which amount had already been paid over to the clerk of the court. But the plaintiff then found itself in a Catch-22 situation: because the verdict effectively pushed the defendant into insolvency, the defendant was placed into receivership by the FHLBB, and the FSLIC Receiver moved that the court vacate the judgment and relinquish jurisdiction. The motion was denied. As Judge Roszkowski observed:

Accepting the FSLIC's argument [that the judgment should be vacated] would put plaintiffs like Homestead in an untenable position. With the defendant savings and loan in a shaky position, a verdict for the plaintiff would probably press the defendant into receivership. Of course, the plaintiff could not pursue its administrative remedy until it had actually forced the defendant into receivership. The plaintiff going to trial either would get a soon-to-be-invalid verdict, a receiver, and a de novo tour through administrative proceedings or the plaintiff would get a defendant's verdict that would likely remain valid and res judicata.⁷³⁹

Such circumstances create a potential temptation for the FHLBB to use receivership appointments as a means of denying litigants their just claims.

It is also difficult to understand why the receiver's ability to settle or negotiate the claim would be impeded by recognition of previous judgments. Once the thrift is placed in receivership, section 1464(d)(6)(C) effectively prevents the creditor from executing his judgment. He has no choice but to take into account the same strategic considerations as any other creditor with a valid claim. And the appellate process, even if incomplete, is unlikely to be more time-consuming or costly than readjudication of the claim by the receiver.

C. *Judicial Review.*

The jurisprudence relating to the nondelegation doctrine,⁷⁴⁰ article III,⁷⁴¹ and possibly even due process,⁷⁴² dictates that there should be meaningful judicial review of the adjudicator's and the FHLBB's final

738. 668 F. Supp. 1121 (N.D. Ill. 1987) (opinion vacated and removed from bound volume, but appears in West's advance sheets). In terms of a settlement order, *see* No. 86 C 20268 (Dec. 2, 1987), the FSLIC, as receiver for Life Savings and Loan Association, agreed to acquiesce in the order of the court and forgo all post-trial motions and appeals on the condition that the plaintiff stipulate to the vacating of the judge's opinion. Consequently, West Publishing withdrew from its final volume the original opinion issued by the court. Telephone interview with Jeffrey H. Hornstein, counsel for Homestead (May 2, 1988).

739. 668 F. Supp. at 1123.

740. *See supra* text accompanying note 520-37.

741. *See supra* text accompanying note 538-88.

742. *See supra* text accompanying note 601-37.

decisions. In view of the ambiguity created by section 1464(d)(6)(C),⁷⁴³ clear provision for judicial review should be made by Congress when clarifying the FHLBB's statutory powers.⁷⁴⁴

The value of judicial review, even under the "arbitrary and capricious" standard,⁷⁴⁵ will depend on the quality of the record before the court,⁷⁴⁶ so the exhortations made earlier⁷⁴⁷ are relevant in this context as well. It is suggested, however, that the "substantial evidence" standard of review is merited in the case of creditor claims. The reason is that the determination of the validity and amount of creditor claims is likely to involve "adjudicative facts," as opposed to "legislative facts,"⁷⁴⁸ inasmuch as the specific details of thrift/creditor transactions will be in issue, rather than more general questions of thrift regulatory policy. Hence it seems appropriate that the reviewing court should be able to evaluate the adjudicator's decision according to the evidence presented in the adjudication record. If proper recordkeeping procedures are observed, there is no reason why the agency could not accommodate this standard of review.

As review will take place with the benefit of a full record, jurisdiction to review should, in accordance with the recommendation of the Administrative Conference, be placed in the courts of appeals.⁷⁴⁹

D. *Procedural Rules.*

With the creation of a restructured claims adjudicatory process there arises the need for the implementation of detailed procedural rules. These are best devised by the agency, using a notice and comment rulemaking process.⁷⁵⁰ In the light of past experience,⁷⁵¹ the FHLBB

743. See *supra* text accompanying notes 394-403.

744. See *infra* text accompanying note 767 (Recommendation 6).

745. See *supra* text accompanying notes 498-509.

746. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (emphasizing the importance of a coherent record, even in informal rulemaking proceedings, to meaningful judicial review); see also 1 C.F.R. § 305.77-3 (1988).

747. See *supra* text accompanying notes 709-10.

748. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12.3 (1979) (discussing the distinction between adjudicative and legislative facts).

749. See Admin. Conference of the U.S., *The Choice of Forum for Judicial Review of Administrative Action*, reprinted in 1 C.F.R. § 305.75-3 (1988).

750. Because they deal with "procedure" and not substance, there may be doubt whether such rules must be published in the Federal Register in accordance with § 553(d) of the APA. See 5 U.S.C. § 553(b)(A) (1982). Even if publication is not required by the APA, the FHLBB could justifiably be criticized if it failed to publish the rules when so many creditors are affected. Dealing with interpretive rules and statements of general policy, the Administrative Conference has recommended that agencies voluntarily publish any rules that are "likely to have substantial impact on the public." See Admin. Conference of the U.S., reprinted in 1 C.F.R. § 305.76-5 (1988). One commentator has already noted the relevance of this recommendation to the procedures adopted by the FHLBB. See

should be particularly sensitive to the need for adequate public consultation and guidance on the administration of its adjudications.

If Congress were to create a claims adjudication process, or if the Court were in *Coit* to declare that the authority to do so already exists, the FHLBB should expeditiously set about the task of devising appropriate rules that incorporate the structural suggestions as well as the time and jurisdictional limitations urged in the preceding sections of this article.⁷⁵² In addition, the rules would have to be considerably more complex than those contained in the Interim and Supplemental Rules.⁷⁵³ As presently formulated, these make no provision for the consolidation of claims, joinder of third parties and counterclaims, or for meaningful discovery and subpoenas (to give a few examples). Given the complex nature of most of the disputes that have already arisen in the reported cases, it is hard to imagine how the FHLBB could adjudicate such claims efficiently without these devices. In any event, the requirements of procedural due process would seem to dictate the provision of at least some facilities whereby parties may adequately establish their claims and challenge adverse evidence.

CONCLUSIONS

In this article it has been argued that legislation upon which the FHLBB and the FSLIC rely for the *Hudspeth* scheme is very dubious, not only because of the vagueness and ambiguity of the statutory language concerned, but also because vague statutory authority is insufficient in the face of the numerous constitutional concerns that are raised by the *Hudspeth* scheme as it is presently constructed. I have also tried to show, however, that if Congress were to act unambiguously, it could establish an administrative claims adjudication scheme that would survive constitutional challenge. To achieve this objective, Congress and the FHLBB would have to institute a number of safeguards designed to provide the protections mandated by the Constitution. These safeguards are encapsulated in the following recommendations.

Pfeiler, *supra* note 54, at 461 n.102. In any event, to the extent that the rules might deal with such matters as the ranking of claims, *see supra* note 195, they would clearly have to be published in accordance with the APA's notice and comment procedures.

751. During the preparation of this article as a report for the Administrative Conference, the author encountered numerous complaints regarding the availability of, and reluctance on the part of the FHLBB to finalize, the procedural rules governing the *Hudspeth* claims process. The FHLBB has proven responsive to these complaints: it has published interim rules and supplemental proposed rules, and has virtually finalized its present procedures. *See supra* text accompanying notes 200-05.

752. The rules presently devised by the FHLBB fail to address any of the concerns expressed in the recommendations presented in this article.

753. *See supra* text accompanying notes 253-69.

A. *Recommendations.*

1. *Acquisition of Statutory Authority for Claims Adjudication.* While the FHLBB might have statutory authority under section 1464(d)(11) to create a claims adjudication system,⁷⁵⁴ if such is the intention of Congress, it should be stated in express terms. This is necessary for two reasons. First, notwithstanding the deference ordinarily shown by courts to the construction by agencies of their statutory mandates,⁷⁵⁵ vague statutory powers are interpreted restrictively where they infringe on constitutional rights.⁷⁵⁶ Secondly, in accepting deviations from the article III adjudicative model, the Supreme Court has relied partly on the fact that Congress has expressed a clearly stated legislative purpose to depart from the model.⁷⁵⁷ This reliance seems particularly apposite in the present context since, unlike the situation with receivership powers, Congress, when it has directly addressed the issue of administrative adjudication, has always prescribed fairly detailed procedural rules.⁷⁵⁸

To clarify the situation, the FHLBB should seek direct authority for an administrative claims adjudication process. While Congress need not go so far as to specify the detailed procedures, Congress should make a basic policy decision as to whether an administrative adjudication process is preferable to the regular judicial process. If Congress does reach such a conclusion, it should act to create adjudicative authority and an adjudicative process, clearly and unambiguously, and along the following lines.

2. *Formalization of the Adjudicative Process.* In order to meet due process and article III concerns of impartiality and fairness,⁷⁵⁹ Congress should establish a bifurcated process for adjudicating claims. Where hearings are required to resolve matters in dispute, administrative law judges should adjudicate. The necessary authority to engage administrative law judges should be granted by Congress.⁷⁶⁰ Where claims can be resolved on the basis of written documentation alone, the FHLBB should be permitted to use simplified, less formal procedures, independent of the receiver but not necessarily involving administrative law judges.⁷⁶¹

754. See *supra* text accompanying notes 427-29.

755. See *supra* text accompanying notes 325-36.

756. See *supra* text accompanying notes 129-31.

757. See *supra* text accompanying notes 596-98.

758. See *supra* text accompanying notes 393, 401-03.

759. See *supra* text accompanying notes 671-75.

760. See *supra* text accompanying note 708.

761. See *supra* text accompanying notes 711-14.

The statutory scheme should make it clear that receivers do not "adjudicate" claims, and the rules should treat receivers as parties who are on equal terms with claimants.⁷⁶²

3. *Procedures for Alternative Dispute Resolution.* In order to avoid unnecessary formality and delay, administrative law judges should be empowered to order that parties (including receivers) engage in Alternative Dispute Resolution where this is appropriate.⁷⁶³

4. *Procedural Rules.* Once the claims adjudications process has been authorized, the FHLBB should engage in a notice-and-comment rulemaking procedure, setting forth comprehensive and adequate rules of practice for claims adjudication.⁷⁶⁴

A probable source of delay in receivership determinations is the failure to subject receivers to fixed time limitations.⁷⁶⁵ The FHLBB's final rules should provide for strict, albeit reasonable, time limits that are applicable not only to claimants but also to receivers and their agents.

5. *Jurisdiction over Claims Already Adjudicated in Court.* In order to avoid agency aggrandizement at the expense of article III courts, and in order to prevent the temptation to use receivership decisions as a strategic device to the detriment of the creditors of thrifts, the FHLBB and the FSLIC Receiver should not be permitted to override judgments already given by federal and state courts, whether or not these remain appealable.⁷⁶⁶ The agencies' power to determine claims should not encompass judgments in favor of creditors if such judgments have already been entered by a court of competent jurisdiction before thrifts have been placed in receivership. The FSLIC Receiver should either acquiesce in these judgments or pursue its ordinary post-trial remedies.

6. *Judicial Review.* Congress should make adequate provision for judicial review of claims decisions by the FHLBB.⁷⁶⁷ To this end, Congress should specify that the courts of appeals have review jurisdiction and that the "substantial evidence" standard should apply.

762. See *supra* text accompanying notes 692-99.

763. See *supra* text accompanying notes 715-19.

764. See *supra* text accompanying notes 750-53.

765. See *supra* text accompanying notes 722-30.

766. See *supra* text accompanying notes 734-39.

767. See *supra* text accompanying notes 740-49.

B. General Observations.

It is important to conclude with a reminder of the limited scope of this article. The resolution of creditors claims in receiverships takes place within a much broader context that is itself controversial, or potentially so. No attempt has been made here, for example, to examine the underlying causes of thrift failure and whether the problems that have led to the adoption of the *Hudspeth* doctrine might be obviated altogether by a different system of thrift regulation.⁷⁶⁸

Also beyond the scope of this article is the question of the discretionary power exercised by the FHLBB and the FSLIC in determining whether to place a thrift in receivership and, once this has been done, whether to liquidate its assets or transfer the assets and liabilities to another thrift. As was noted earlier, the FHLBB and the FSLIC exercise an enormous amount of discretion, both when the FHLBB decides to appoint a receiver and when the FSLIC Receiver decides whether to engage in some form of purchase and assumption transaction or to liquidate the assets of the receivership. These agency decisions have a major impact on the rights of creditors. In the case of a partial purchase and assumption transaction, for example, a creditor might quite arbitrarily be omitted from the benefits of the transfer of assets and liabilities.⁷⁶⁹ These decisions are, of course, heavily laden with questions of policy, and so they are not easily susceptible to codification.⁷⁷⁰ Nevertheless, their significance strongly suggests that thought should be given to the means by which creditors might be protected,⁷⁷¹ whether in the courts⁷⁷² or per-

768. For a discussion of suggested reform in bank regulation, see J. Macey & G. Miller, *Bank Failures, Risk Monitoring, and the Market for Bank Control* (1988) (draft report to the ACUS); see also *supra* note 24.

769. See *supra* text accompanying notes 194-95. In addition to affecting the procedural rights of creditors and their prospects of fully recovering their claims, the decision to subject creditors to the *Hudspeth* procedures may have a direct impact on the substantive rights themselves. For example, the rights of parties to loan agreements may be significantly affected if these rights are determined by *Hudspeth* adjudicators. See Pfeiler, *supra* note 54, at 448-57.

770. Cf. *Getty v. FSLIC*, 805 F.2d 1050, 1054 (D.C. Cir. 1986). Considering pre-receivership action by the FSLIC, the *Getty* court said, "Congress recognized that in authorizing acquisition of distressed institutions FSLIC would need absolute discretion in some areas, e.g., determining who is qualified to bid . . . and calculating the cost of the bids." *Id.*

771. Some attention has been given to protecting the rights of the officers of thrifts. See, e.g., Malloy, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 1215, 1332-34 (1987) (recommending greater publicity of adjudications to help guide the officers of thrifts); *Student Project: Savings and Loan Insolvency in the '80's*, 15 AKRON L. REV. 441 (1982). The position of creditors has, however, been ignored.

772. Cf. *Getty*, 805 F.2d at 1057-62 (applying an "arbitrary and capricious" standard in setting aside award to competing bidder); *Hartigan v. FHLBB*, 746 F.2d 1300, 1310 (7th Cir. 1984) (reviewing FSLIC's calculation of cost of bids to ensure consistent application of economic methodology).

haps through the use of guidelines.⁷⁷³

773. The FDIC, for example, has published guidelines indicating when it will provide financial assistance to a failing bank. *See* Statement of Policy and Criteria on Assistance to Operating Insured Banks, 51 Fed. Reg. 44,122 (1986). As this article went to press the FHLBB published some guidelines with a similar purpose. *See supra* note 151.

APPENDIX 1

THRIFT LIQUIDATIONS

Year	Number
1934-1939	0
1940-1941	7
1942-1965	0
1966-1971	6
1972-1980	0
1981	1
1982	1
1983	6
1984	9
1985	11
1986	21

Sources:

FEDERAL HOME LOAN BANK BOARD, 1986 ANNUAL REPORT 31-35 (1987);
FHLB SYSTEM PUBLICATION CORPORATION, A GUIDE TO THE FEDERAL HOME
LOAN BANK SYSTEM 18, 21-22 (5th ed. 1987); Grant, The FSLIC:
Protection Through Professionalism, 14(2) FHLBB J., Feb. 1981, at
9.

APPENDIX 2

HUDSPETH STATISTICS
(As at March 23, 1988)

I. Total Number of Cases Received to Date:

- A. Administrative Appeals 129
- B. Requests for Expedited Relief 304

II. Total Number of Cases Completed to Date:

- A. Administrative Appeals 85
- B. Requests for Expedited Relief 241

III. Total Number of Cases Reversed/Granted:

- A. Administrative Appeals 43 (50%)
- B. Requests for Expedited Relief 8 (3%)

IV. Case Completion Rate:

- A. Completed within 1-3 weeks 25%
- B. Completed within 4 weeks 20%
- C. Completed within 5+ weeks 55%

V. Total Value of Assets:

- A. Administrative Appeals
 - 1. 1987 \$39,110,730
 - 2. 1988 (to 3/23/88) \$ 1,299,729
- B. Requests for Expedited Relief
 - 1. 1986 \$222,711,974
 - 2. 1987 \$427,259,788
 - 3. 1988 (to 3/23/88) \$ 75,903,332

Source:

Letter from June O. Stewart, Adjudication Division, FHLBB, dated Mar. 23, 1987.

APPENDIX 3

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