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Financial Institution Insolvency: Federal Authority over Fannie Mae, Freddie Mac, and Depository Institutions

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Summary

On September 7, 2008, the Secretary of the Treasury announced that the Federal Housing Finance Agency (FHFA), the newly installed regulator of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), had been appointed conservator of the two enterprises. Until the enactment of the Housing and Economic Recovery Act of 2008 (P.L. 110-289), there was no clear statutory authority for dealing with the insolvency of either or both of these two mortgage giants. Among the reforms included in P.L. 110-289 were extensive provisions providing the FHFA with powers that substantially parallel those accorded the Federal Deposit Insurance Corporation (FDIC) to deal with every aspect of insolvencies of any bank or thrift institution that holds federally insured deposits.

The government's takeover of Fannie Mae and Freddie Mac is expected to have a great impact upon the mortgage market. Together they guarantee or own mortgages valued at more than $5 trillion. The powers that the FHFA will have to deal with the various assets and liabilities of the entities and how they exercise these powers are, therefore, expected to be the focus of congressional attention. There is also likely to be increased congressional oversight of the FDIC's activities resolving bank and thrift failures because the FDIC has had to close down ten banks during the first eight months of 2008, as compared with three in the first seven years of the 21st Century.

Because it is the model on which the FHFA's conservatorship and receivership authorities are based and because there has been sufficient experience with it to provide guidance as to how the FHFA is likely to operate, the FDIC's bank and thrift insolvency process is set forth in some detail. That is followed by an exposition of the authority given to FHFA in P.L. 110-289. The issues discussed include how the process is initiated; when a conservatorship is selected; when a receivership is selected; any differences between the two; when judicial review is available; what priorities are established for claims against a receivership; and what authority exists for repudiating claims.

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Overview of the U.S. Credit Crunch and Its Effect on Fannie, Freddie, Banks, and Thrifts

Introduction

On September 7, 2008, the Secretary of the Treasury announced that the Federal Housing Finance Agency (FHFA), the newly installed regulator of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), had been appointed conservator of the two enterprises.[1] Until the enactment of the Housing and Economic Recovery Act of 2008 (P.L. 110-289), there was no clear statutory authority for dealing with the insolvency of either or both of these two mortgage giants. Among the reforms included in P.L. 110-289 were extensive provisions providing the FHFA with powers that substantially parallel those accorded the Federal Deposit Insurance Corporation (FDIC) to deal with every aspect of insolvencies of any bank or thrift institution that holds federally insured deposits.

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[1] For more information on the economic conditions that likely played a large role in Fannie and Freddie's fall, *see* CRS Report RL34182, *Financial Crisis? The Liquidity Crunch of August 2007*, by Darryl E. Getter, Mark Jickling, Marc Labonte, and Edward Vincent Murphy.

priorities are established for claims against a receivership; and what authority exists for repudiating claims.

Background on Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are congressionally chartered, but privately owned financial corporations established to create and maintain a secondary mortgage market. Fannie Mae and Freddie Mac (also called government sponsored enterprises or GSEs) are not mortgage originators or direct lenders. Rather, they purchase mortgages from lenders and either securitize those loans or hold them in their own portfolios. The two enterprises have grown to be two of the largest financial institutions in the world.[2]

Early in the 20th Century, before the development of a secondary mortgage market, existing mortgage markets varied greatly by locality. Much of the lending industry was concentrated in large, metropolitan areas like New York and Chicago, leaving credit in short supply outside of those areas of concentration. These geographic barriers constrained the operation of supply and demand for the home mortgage market and spurred the need for a secondary market to create a national mortgage market. As a way to meet this goal, Congress enacted the National Housing Act of 1934, which created Fannie Mae as a purely public governmental agency. In 1954, Fannie Mae was re-chartered into a mixed private and public institution. Congress, in 1968, split Fannie into two distinct entities, one serving the secondary mortgage market function, which retained the Fannie Mae name, and the other, called Ginnie Mae (Government National Mortgage Association) to carry out government subsidy functions. This legislation transformed Fannie Mae into the privately owned GSE it is today. Congress originally chartered Freddie Mac in 1970 as subsidiary of the Federal Home Loan Bank System to serve a different purpose than Fannie. However, Congress, in 1989, turned Freddie into a privately owned corporation just like Fannie Mae and also aligned Freddie's mission to that of Fannie.[3]

In exchange for providing their public policy missions of stabilizing and correcting problems in the U.S. mortgage market, Fannie Mae and Freddie Mac receive a number of government benefits, most notably the presumption by investors of government backing. Prior to the passage of P.L. 110-289, the Housing and Economic Recovery Act of 2008 and the naming of the FHFA as their conservator on September 7, 2008, this government backing was merely presumed. Yet, the presumption of federal backing generally allowed these two GSEs to borrow money at rates just slightly higher than that of the federal government.

In response to widespread concern that the two enterprises were insolvent and a subsequent sharp downturn in their stock values in the second quarter of 2008, P.L. 110-289 made the government guarantee much more explicit by temporarily authorizing the Secretary of the Treasury the discretion to extend credit to or buy any

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[2] CRS Report RL33756, *Fannie Mae and Freddie Mac: A Legal and Policy Overview*, by N. Eric Weiss and Michael V. Seitzinger.

[3] For more general information on Fannie Mae and Freddic Mac, *see id*.

obligations of the two enterprises, subject only to the federal debt limit.[4] Basically, if Fannie or Freddie could not sell their debt securities or raise capital in the private market, this law authorizes the Treasury to buy unmarketable debt securities or recapitalize the firms by purchasing the GSEs' stock. Prior to the appointment of the FHFA as conservator, spokespersons for the Treasury had stated that there were no plans to use this authority, rather it "should be interpreted as a prudent preparedness measure and nothing more."[5]

However, the Treasury changed course upon Fannie and Freddie entering conservatorship. One response to the appointment of the FHFA as conservator made by the Treasury is:

> the establishment of a new secured lending credit facility which will be made available to Fannie Mae, Freddie Mac, and the Federal Home Loan Banks ... [which] is intended to serve as an ultimate liquidity backstop, in essence, implementing the temporary liquidity backstop authority granted by Congress in [P.L. 110-289]....[6]

To help recapitalize the firms, the Treasury purchased $1 billion of senior preferred stock in each of the enterprises.[7] The Treasury also unveiled plans to begin purchasing GSE mortgage-backed securities at such time and in such amounts as determined by the Treasury Secretary.[8]

In addition to authorizing the Treasury to support Fannie and Freddie in these ways, P.L. 110-289 dissolved the Office of Federal Housing Enterprise Oversight (OFHEO), the GSE's former regulator, and established the FHFA as their new regulator and afforded it greater authority to deal with a financially troubled Fannie or Freddie. In contrast to OFHEO's authority as conservator to resolve a failed Fannie or Freddie prior to the enactment of P.L. 110-289, the FHFA's authority is broader and more flexible, having been modeled on the Federal Deposit Insurance Act (FDI Act).[9] To understand the FHFA's new powers, the FDI Act is described in detail next.

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[4] P.L. 110-289 § 1117.

[5] *Morgan Stanley to Advise U.S. on Fannie and Freddie*, Louise Story, NY Times, August 5, 2008, [http://www.nytimes.com/2008/08/06/business/06morgan.html], quoting Brookly McLaughlin, a spokeswoman for the U.S. Department of Treasury.

[6] U.S. Dept. of Treasury, *Statement by Treasury Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers*, September 7, 2008, [http://www.treas.gov/press/releases/hp1129.htm].

[7] U.S. Dept. of Treasury, *Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement*, September 7, 2008, [http://www.treas.gov/press/releases/reports/pspa_factsheet_090708%20hp1128.pdf].

[8] U.S. Dept. of Treasury, *Fact Sheet: GSE Mortgage Backed Securities Purchase Program*, [http://www.treas.gov/press/releases/reports/mbs_factsheet_090708hp1128.pdf].

[9] 12 U.S.C. §§ 1811 - 1835a.

FDIC and Insolvent Banks and Thrifts

Background

The FDIC administers federal deposit insurance under the authority of the FDI Act. It is a federal agency that administers the deposit insurance fund, which is comprised of premiums assessed on the basis of the amount of insured deposits held by an institution.[10] If any bank or thrift with FDIC-insured deposits fails, the FDIC must see to it that insured deposits are protected (i.e., that any insured deposits in the failed bank or thrift are either paid off or transferred to another institution). This process generally requires significant disbursements from the deposit insurance fund and results in the FDIC being the largest creditor of the failed institution.

Federal deposit insurance is backed by the full faith and credit of the United States;[11] therefore, if the deposit insurance fund is exhausted, the funds of the federal government are at risk. This means that if there were multiple bank or thrift failures that exhaust the deposit insurance fund, federal appropriations would be necessary to supplement the deposit insurance fund and protect insured depositors.[12] Because of the possible threat to the federal fisc[13] and for other reasons,[14] depository institution insolvencies are not handled according to the procedures available in the case of other corporate bankruptcies.[15] They are subject to a separate regime prescribed in federal law, called a conservatorship or receivership, rather than being subject to bankruptcy court or state court proceedings. Under this regime, the

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[10] For a description of deposit insurance, *see* CRS Report RS20724, *Federal Deposit and Share Insurance: Proposals for Change*, by Walter W. Eubanks. The FDIC currently sets the Designated Reserve Ratio at 1.25 percent or $1.25 on every dollar of insured deposits. 72 *Fed. Reg.* 65576 (November 21, 2007).

[11] 12 U.S.C. § 1828(a)(1)(B).

[12] According to Timothy Curry and Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 FDIC Banking Rev. 26, 33 (2000), in the savings and loan crisis of 1985-1995, 1,043 thrifts failed with assets of over $500 billion, costing taxpayers $124 billion and the thrift industry, $29 billion.

[13] The FDIC has authority to borrow "for insurance purposes" up to $30 billion from the U.S. Treasury. 12 U.S.C. § 1824. FDIC's borrowing is limited to the sum of cash in the deposit insurance fund, the fair market value of assets held by the insurance fund, and the $30 billion Treasury borrowing limit. 12 U.S.C. § 1825.

[14] The general assumption has been that the pivotal role banks and thrifts play in mainstream economic life justifies government control of bank and thrift insolvencies. *See, e.g.*, David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 Tex. L. Rev. 723 (1998). (Hereinafter, Skeel). It has also been suggested that the risk of insider abuse is another primary reason for treating bank or thrift insolvencies under a special regime. *See*, Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 Duke L. J. 469 (1992).

[15] *See*, Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143 (2007), for a comparison of bank and other corporate insolvencies. (Hereinafter, Bliss & Kaufman).

conservator or receiver, which generally is the FDIC, is provided substantial authority to deal with virtually every aspect of the insolvency.

A conservator is appointed to operate the institution, conserve its resources, and restore it to viability. A receiver is appointed to liquidate the institution, sell its assets, and pay claims against it to the extent available funds allow and in accordance with priorities established in federal law. Receiverships are more common than conservatorships. In a receivership, the FDIC wears two hats. It functions both as receiver and in its corporate capacity as administrator of the deposit insurance fund. In its corporate capacity, it is generally the largest creditor of the institution because, from the deposit insurance fund, it will have either paid off the insured deposits directly or paid another bank or thrift to assume the deposit liabilities and, thus, have a claim against the receivership for the amount of the insured deposits.

When an insured bank or thrift becomes insolvent, the institution's charterer,[16] its primary federal regulator, or the FDIC is authorized to act *ex parte* (i.e., without notice or a hearing) to seize the institution and its assets and install the FDIC as conservator or receiver.[17] Unless time is of the essence, prior to taking such action, however, there is consultation between the institution's regulator and the FDIC concerning the imminent failure. This gives the FDIC time to investigate the situation and determine a resolution strategy before releasing information to the public of the looming insolvency. Generally, the FDIC chooses among three possible resolution strategies — a deposit payoff (closing the bank or thrift, assuming its assets and liabilities and paying off insured deposits); open institution assistance (providing some financial assistance in the form of a loan, assisted merger, or purchase of assets); or a purchase and assumption (P&A) (finding one or more institutions to take over part or all of the institution's assets and liabilities). The FDIC must choose the resolution strategy that is least costly to the deposit insurance fund.[18] For this reason, the P&A approach is chosen most often.[19]

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[16] State-chartered banks are chartered by state banking authorities. The primary federal regulator of a federally-chartered bank or thrift is its chartering authority. National banks are chartered by the Office of the Comptroller of the Currency (OCC); federal thrifts or savings associations are chartered by the Office of Thrift Supervision (OTS). The primary federal regulator of state-chartered banks is either the Board of Governors of the Federal Reserve System (Fed) or the FDIC, depending upon whether the institution is a member bank, i.e., a member of the Federal Reserve System (FRS).

[17] The FDI Act specifies judicial review for only one type of conservatorship or receivership appointment — FDIC's appointment of itself as receiver or conservator if depositors have been unable to access their funds 15 days after the appointment by the state of a receiver or conservator. 12 U.S.C. § 1821(c)(4). There are also other statutes that provide for post-seizure judicial review in certain instances. E.g. 12 U.S.C. § 203(b) (appointment of a conservator for a national bank). It has also been held that judicial review is available under the Administrative Procedure Act. James Madison Ltd. By Hecht v. Ludwig, 82 F. 3d 1085 (D.C. Cir. 1996).

[18] 12 U.S.C. § 1823(c)(4).

[19] Of the 40 resolutions from 2000 to August 1, 2008, 34 were P&As. Some of these involved the operation of the institution under government control between the date of

(continued...)

The powers conferred on the FDIC as conservator or receiver are broad. The FDIC may "take any action authorized by ... [the FDI Act], which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation."[20] The basic difference between a conservatorship and a receivership is that a conservatorship involves operating the institution as a going concern to protect its assets until it stabilizes or is closed and a receiver appointed.[21] A receiver is charged with liquidating the institution and winding up its affairs. A conservatorship may indicate that the FDIC aims to restore the institution to solvency or that the FDIC had to act quickly without the usual lead time for investigation. In either case, a conservatorship may be followed by a receivership if a determination is made that the institution is not viable. A bank or thrift in conservatorship remains subject to "banking agency supervision."[22] Otherwise, the FDIC as conservator or receiver is not subject to any other authority in exercising its powers.[23]

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[19] (...continued)
failure and the final resolution date in a bridge bank operated by the FDIC, a conservatorship operated by the Resolution Trust Corporation or the FDIC, or a management consignment program operated by the Federal Savings and Loan Insurance Corporation.

[20] 12 U.S.C. § 1821(d)(J)(ii).

[21] A pass-through conservatorship, as used for IndyMac Bank, is chosen because there is no provision for a bridge bank for a thrift institution. In a straight conservatorship, which is rarer than the pass-through version, the institution is operated on a temporary basis under its existing charter. Bliss & Kaufman, at 151, n. 20. *See also* Patricia A. McCoy, Banking Law Manual § 15.03 (Lexis Pub. (2d ed)) (hereinafter, McCoy).

[22] 12 U.S.C. §§ 1821(c)(2)(D) and 3(D). For example, the FDIC was named conservator of IndyMac Bank, F.S.B., Pasadena, California, closed by OTS on July 8, 2008. As conservator, the FDIC transferred all non-brokered insured deposit accounts and substantially all of the assets to a newly chartered federal thrift, seemingly serving the same function as a bridge bank. *See*, Failed Bank Information, Information for IndyMacBank, F.S.B., Pasadena, CA, [http://www.fdic.gov/bank/individual/failed/IndyMac.html]. Under 12 U.S.C. § 1821(d)(2)(F), the FDIC may organize and operate a new institution chartered by OCC or OTS, and transfer to it some or all of the failed institution's assets and liabilities. There is also authority for the FDIC to charter a bridge depository institution with a limited life of two years with the possibility of a one-year extension. 12 U.S.C. § 1821(n). Prior to enactment of the Housing and Economic Recovery Act of 2008, P.L. 110-289, § 1604(a), this authority was limited to creation of bridge banks. According to the FDIC's Resolution Handbook, the use of bridge banks is "generally ... limited to situations in which more time is needed to permit the least-costly resolution of a large or complex institution." FDIC, Resolution Handbook 90, [http://www.fdic.gov/bank/historical/reshandbook/index.html].

[23] 12 U.S.C. § 1821(c)(2)(C). This provision states: "When acting as conservator or receiver ..., the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges." *See also* 12 U.S.C. § 1821(j), which provides: "Except as provided in this section no court may take any action except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver."

Appointment of a Conservator or Receiver over Banks and Thrifts

Generally.

Neither the creditors of an institution nor its managers have the authority to declare the institution insolvent. The decision to appoint a receiver or conservator is at the discretion of the depository institution's regulators and is to be based on one or more grounds specified in section 11 of the FDI Act.[24]

Under section 11, the FDIC may be appointed conservator or receiver for any insured depository institution, i.e., any state- or federally-chartered bank or thrift, the deposits of which are insured by the FDIC. If a receivership of a *federally*-chartered bank or thrift is involved, the FDIC *must* be the appointed receiver.[25] Appointment of a conservator or receiver for a federally-chartered depository institution is generally at the discretion of the institution's chartering authority. In the case of a state-chartered depository institution, appointment of a conservator or receiver may be at the discretion of the state chartering authority, the primary federal regulator, or, in certain cases, the FDIC.[26]

Grounds for Appointing the FDIC as Conservator or Receiver over Banks and Thrifts.

Under the FDI Act, the appointment of a conservator or receiver need not wait until insolvency, i.e., when the institution has insufficient assets to meet its obligations. The regulators are given sufficient authority to intervene before a deteriorating situation worsens. Appointment of a conservator or receiver may be

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[24] 12 U.S.C. § 1821.

[25] The decision to appoint a receiver for a national bank is to be determined by the OCC "in the Comptroller's discretion." 12 U.S.C. § 191. OCC's decision is generally not subject to judicial review. United Sav. Bank v. Morgenthau, 85 F. 2d 811 (D.C. Cir. 1936), *cert. denied*, 299 U.S. 605 (1935). In addition to the grounds specified in the FDI Act, 12 U.S.C. § 1821(c)(5), the OCC may appoint a receiver upon determining that the bank's board of directors consists of less than five members. 12 U.S.C. § 191(2).

[26] 12 U.S.C. §§ 1821(c)(2) and (6) (appointment of the FDIC as conservator or of federally-chartered depository institution at the discretion of the chartering agency); 12 U.S.C. §§ 1821(c)(3), (4), (9), and (10) (appointment of the FDIC as conservator or receiver of state-chartered depository institution). The FDIC may appoint itself as receiver for a state-chartered, FDIC-insured depository institution upon determining that (1) a state-appointed conservator or receiver has been appointed and 15 consecutive days have passed and one or more depositors has been unable to withdraw any amount of insured deposit or (2) the institution has been closed under state law and the FDIC determines that one of the grounds specified in 12 U.S.C. § 1821(c)(4) exists or existed. If the FDIC acts to appoint itself conservator or receiver under any of those circumstances, the institution is provided with an opportunity for judicial review. 12 U.S.C. § 1821(c)(7). There is also authority for the FDIC to appoint itself as conservator or receiver for any insured depository institution "to prevent loss to the deposit insurance fund. 12 U.S.C. § 1821(c)(11).

based on any of the following grounds, none of which absolutely requires or mandates such an appointment:

- Insufficient assets to meet obligations.
- Dissipation of assets or earnings due to violation of statute or regulation or an unsafe or unsound condition.
- Unsafe or unsound condition to transact business.
- Willful violation of a cease-and-desist order which has become final.
- Concealment of the institution's books or refusal to submit to an inspection or examination.
- Inability to meet obligations.
- Incurring of losses or likelihood of incurring losses that will deplete capital with no reasonable likelihood of becoming adequately capitalized without federal assistance.
- Violation of law or regulation or an unsafe or unsound practice or condition likely to cause insolvency or weaken the institution's condition or seriously prejudice the interests of depositors or the deposit insurance fund.
- Consent — through a board of directors or shareholder resolution.
- Termination of deposit insurance coverage.
- Undercapitalization with no reasonable prospect of becoming adequately capitalized; failing to submit an adequate recapitalization plan; or materially failing to implement an accepted capital restoration plan.
- Critical undercapitalization[27] or substantially insufficient capital.[28]
- Conviction of a money laundering offense.[29]

FDIC's Conservatorship or Receivership Powers

Overview.

The FDI Act provides the FDIC with an array of powers when acting as either a conservator or a receiver. Supplementary powers are also provided for each of these capacities. The FDI Act contains provisions making it clear that the powers which it assigns to the FDIC acting as a conservator or receiver are not exclusive but are in addition to any other powers conferred on conservators or receivers of insured depository institutions, and that in exercising its conservatorship or receivership authority, the FDIC "shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the [FDIC's]

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[27] 12 U.S.C. § 1831*o*(b)(1)(E).

[28] Under 12 U.S.C. § 1821*o*(h)(3), the principal federal regulator of a critically undercapitalized institution must appoint a receiver or (with the concurrence of the FDIC) a conservator for the institution within 90 days after the institution becomes critically undercapitalized; other action may be taken provided the reasons are documented, the FDIC concurs, and the decision is renewed at the end of the 90-days.

[29] Grounds for appointing a conservator or receiver are specified in 12 U.S.C. § 1821(c)(5).

rights, powers, and privileges."[30] Generally, the powers conveyed to the FDIC as conservator or receiver for federally-chartered institutions are also available to it when it is acting as conservator or receiver for a state-chartered institution.[31]

FDIC's Rulemaking Powers of Conservatorships or Receiverships.

The FDIC is provided broad rulemaking authority to issue rules for the conduct of conservatorships or receiverships.[32] Its Resolution and Receivership Rules are found at 12 C.F.R., Part 360.

FDIC's General and Incidental Powers as Conservator or Receiver.

The powers provided the FDIC as conservator or receiver are broad in scope. As successor to the institution, the FDIC is authorized to operate the institution and endowed with "all the powers of the members or shareholders, the directors, and the officers of the institution" and may collect all the obligations due to the institution, perform its duties, and preserve and conserve its assets.[33] In addition to the explicit powers granted to the FDIC as conservator or receiver, the FDI Act contains a provision delegating to the Corporation as receiver or conservator "such incidental powers as shall be necessary to carry out such powers."[34]

FDIC's Explicit Powers as Conservator or Receiver.

Among the explicit powers provided to the FDIC as conservator or receiver are the powers to:

- Merge the institution with another institution.[35]
- Transfer any asset of the institution, including trust department assets.[36]
- Pay valid obligations of the institution.[37]
- Issue subpoenas.[38]
- Use private sector services if available and most cost effective.[39]

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[30] 12 U.S.C. §§ 1821(c)(2)(B) and (C), and (3)(B) and (C). The depository institution in conservatorship remains subject to "banking agency supervision." 12 U.S.C. §§ 1821(c)(2)(D) and 3(D).

[31] 12 U.S.C. § 1821(c)(13)(A).

[32] 12 U.S.C. § 1821(d)(1).

[33] 12 U.S.C. § 1821(d)(2).

[34] 12 U.S.C. § 1821(d)(2)(J).

[35] 12 U.S.C. § 1821(d)(2)(G)(i).

[36] 12 U.S.C. § 1821(d)(2)(G)(ii)

[37] 12 U.S.C. § 1821(d)(2)(H).

[38] 12 U.S.C. § 1821(d)(2)(I).

[39] 12 U.S.C. §§ 12 U.S.C. §§ 1821(d)(2)(K).

- Obtain temporary stays of judicial actions in which the institution is a party.[40]
- Exercise rights of the insured depository institution with respect any appealable judgment, including removal to federal court.[41]
- Contract with state housing finance authorities to sell mortgage related assets of a defaulting institution without having to secure any other approval, assignment, or consent.[42]
- Avoid certain fraudulent transfers made with the intent to "hinder, delay, or defraud the insured depository institution."[43]
- Repudiate contracts (with the exception of loans from the Federal Home Loan Banks or Federal Reserve Bank) or leases entered into by the institution, under certain conditions.[44]
- Obtain court-ordered attachment, i.e., asset freeze, of any of the assets acquired or liabilities assumed by the FDIC as conservator or receiver.[45]
- Enforce most of the institution's contracts.[46]
- Bring an action to hold a director or officer of an insured depository institution personally liable for gross negligence.[47]

Statutes of Limitations Available to Conservatorships or Receiverships of Banks or Thrifts.

Special statutes of limitations apply to actions brought by the FDIC as conservator or receiver.[48] For contracts, the statute of limitation is six years, beginning on the date the claim accrues, unless state law provides a longer period.

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[40] 12 U.S.C. § 1821(d)(12).

[41] 12 U.S.C. § 1821(d)(13).

[42] 12 U.S.C. § 1821(d)(16).

[43] 12 U.S.C. § 1821(d)(17).

[44] 12 U.S.C. § 1821(e)(1). The statute requires that the repudiation determination be within a reasonable time following the appointment of the receiver or conservator. 12 U.S.C. § 1821(e)(2). It limits damages to "actual direct compensatory damages," 12 U.S.C. § 1821(e)(3), and contains specific provisions relating to various types of contracts and leases. These include leases for which the institution is the lessee or lessor, 12 U.S.C. §§ 1821(e)(4) and (5); contracts for the sale of real property, 12 U.S.C.§ 1821(e)(6); service contracts, 12 U.S.C. § 1821(e)(7); and any certain securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or similar agreement that the FDIC determines to be "a qualified financial contract." 12 U.S.C. §§ 1821(e)(8) - (10). The exception for Federal Home Loan Bank and Federal Reserve Bank loans is found at 12 U.S.C. § 1921)(e)(13).

[45] 12 U.S.C. § 1821(d)(18).

[46] 12 U.S.C. § 1821(e)(12).

[47] 12 U.S.C. § 1821(k).

[48] 12 U.S.C. § 1821(d)(14).

For tort claims, the statute of limitations is three years, unless state law provides a more lenient time frame.[49]

FDIC's Additional Conservatorship Powers .

The FDIC, as conservator, may take any action "necessary to put the insured depository institution in a sound and solvent condition ... and [any action which is] appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution."[50]

FDIC's Additional Receivership Powers.

The FDIC as receiver has authority to liquidate the institution and sell its assets, "having due regard to the conditions of credit in the locality."[51] The statute also specifies that as receiver of a state-chartered institution, the FDIC may "liquidate the institution in an orderly manner ... and ... make any other disposition of any matter concerning the institution, as the [FDIC] determines is in the best interests of the institution, the depositors of the institution, and the [FDIC]."[52]

Generally, the FDIC as receiver has powers not available to it when acting as a conservator. It may:

- Organize a new federal thrift or national bank or a bridge depository institution.[53]
- Merge the institution with another insured depository institution or transfer assets and liabilities to another insured depository institution.[54]
- Make rules for and determine claims against the receivership, subject to statutory prescriptions.[55]
- Assert immunity to attachment or execution upon assets of receivership and obtain insulation from judicial oversight of rights

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[49] 12 U.S.C. § 1821(d)(14). There is also a provision authorizing the FDIC to revive tort claims subject to a state statute of limitation if the claim has expired not more than five years before appointment of a conservator or receiver. 12 U.S.C. § 1821(d)(14)(C).

[50] 12 U.S.C. § 1821(d)(2)(D).

[51] 12 U.S.C. § 1821(d)(2)(E). This appears to mean "that the FDIC should consider whether depressed economic conditions advise delaying any sale in order to maximize recovery and avoid further depressing the economy through a glut of real estate sales." McCoy, at § 15.04[2], text surrounding n. 60.

[52] 12 U.S.C. § 1821(c)(13)(B)(ii).

[53] 12 U.S.C. § 1821(d)(2)(F).

[54] 12 U.S.C.§ 1821(d)(2)(G).

[55] 12 U.S.C. §§ 1821(d)(3) - (11).

in assets of the receivership or claims relating to acts or omissions of the institution or the FDIC as receiver.[56]
- Assert exemption from state and local taxes (except for real estate taxes), from tax penalties and fines, and from liens or foreclosure on its property without its consent.[57]
- Assert exemption from any requirement to post a bond.[58]
- Appoint agents.[59]
- Fix fees, compensation, and expenses of the liquidation and administration, and be paid for these out of receivership funds.[60]

FDIC's Options for Resolving Bank and Thrift Insolvencies

Least-Cost Resolution Requirement.

One of the guiding principles imposed upon the FDIC in resolving institutional failures is the least cost resolution requirement.[61] Under the FDI Act, the FDIC is prohibited from resolving failing institutions in any manner unless it determines that (1) the action is necessary to protect insured deposits, and (2) the total to be expended will cost the deposit fund less than any other possible method. It may not take any action to protect depositors for more than the insured portions of their deposits or protect creditors other than depositors. There is, however, a provision that permits the FDIC to arrange purchase and assumption transactions in which the acquirer may take on uninsured deposit liabilities if the insurance fund does not incur any loss with respect to them that is greater than it would have been had the institution been liquidated.[62] To determine which approach is least costly, the FDIC is required to evaluate alternatives on a present-value basis, document the underlying assumptions, and include forgone federal tax revenues as part of the cost.[63]

The least-cost resolution requirement may be waived to prevent systemic risk. Such a waiver requires a determination by the Secretary of the Treasury, in

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[56] 12 U.S.C. §§ 1821(d)(13)(C) and (D).

[57] 12 U.S.C. § 1825(b).

[58] 12 U.S.C. § 1822(a).

[59] *Id.*

[60] *Id.*

[61] Under § 143 of the Federal Deposit Insurance Corporation Improvement Act of 1991, P.L. 102-242, there is a sense of Congress urging the FDIC to favor early resolution of troubled institutions when doing so involves the least possible long-term cost to the insurance fund. To achieve this end, the FDIC is exhorted to follow various practices: entering into competitive negotiation; requiring substantial private investment; requiring owners and holding companies of troubled institutions to make concessions; making sure that there is qualified management for resulting institutions; assuring FDIC participation in the resulting institution; and structuring transactions so that the FDIC does not acquire too much of a troubled institution's problem assets.

[62] 12 U.S.C. § 1823(c)(4)(A).

[63] 12 U.S.C. § 1823(d)(4)(B).

consultation with the President, and upon the recommendation of the FDIC and Board of Governors of the Federal Reserve System (with 2/3's vote from each), that complying with that requirement "would have serious adverse effects on economic conditions or financial stability" and that action or assistance under this provision "would avoid or mitigate such adverse effects."[64]

Subject to the least-cost resolution requirement, the FDIC generally has three options for resolving bank or thrift insolvencies: a depositor payout; open institution assistance; or a purchase and assumption (P&A). The most common of these has been the P&A because it has usually been the least costly and least disruptive to the community. It generally involves the purchase of assets and assumption of liabilities of the failed institution by one or more healthy institutions. Whatever assets or liabilities remain are the responsibility of the FDIC as receiver. If no acquirer is found, the FDIC must undertake a depositor payoff and liquidate all of the failed institution's assets. A third option, open institution assistance, involves the FDIC providing financial assistance to improve the capital position of an undercapitalized institution and keep it from failing.

In exercising any of these options, the FDIC must consider the potential adverse economic effect of any resolution on the local community and the viability of other depository institutions in the same community, and issue guidelines and take certain actions to alleviate this impact.[65]

Cross-Guaranty and Holding Company Contribution Requirements.

The FDI Act provides for cross-guarantees by insured depository institutions under common control.[66] If the FDIC suffers a loss or anticipated loss from handling a defaulting institution or from providing assistance to prevent a default, other depository institutions in the same holding company are required to reimburse the FDIC up to the amount of any loss which it suffers or anticipates suffering. The FDIC must notify the institutions of the liability within two years of incurring the loss or it cannot hold them liable.[67] The FDIC must consult with the appropriate federal banking agency and decide on a case-by-case basis how to schedule reimbursement.[68] It has the discretion to waive reimbursements on the basis of what is in the best

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[64] 12 U.S.C. § 1823(c)(4)(G)(i). This section of the FDI Act includes provisions requiring the FDIC to impose emergency special assessments on members of the insurance fund; the Secretary of the Treasury to document any determination; and Comptroller General of the United States to review any determination to provide assistance with respect to, among other things, "the likely effect of the determination and such action on the incentives and conduct of insured depository institutions and uninsured depositors." 12 U.S.C. §§ 1823(d)(4)(G)(ii),(iii), and (iv).

[65] 12 U.S.C. § 1821(h).

[66] 12 U.S.C. § 1815(e)(1).

[67] 12 U.S.C. § 1815(e)(1)(C).

[68] 12 U.S.C. § 1815(e)(2)(B)(i).

interest of the deposit insurance fund.[69] A depository institution that has acquired control of another depository institution through a foreclosure of pledged stock granted to secure a debt incurred in good faith may not be held liable for such a cross-guarantee.[70]

Deposit Payoff.

The least used method for resolving a failed depository institution is the deposit payoff.[71] When a depository institution is closed, the FDI Act requires that the FDIC pay insured deposits "as soon as possible ... either by cash or by making available to each depositor a transferred deposit in a new insured depository institution in the same community or in another depository institution."[72] If the FDIC is unable to find an acquirer for the assets and liabilities of a closed institution, it may decide upon a deposit payoff. In such cases, the FDIC will calculate the amount of insured deposits for each customer and make those funds available to them either by direct payments from the FDIC or by transferring the deposit accounts and an equal amount of cash from the deposit insurance fund to a healthy institution. It will notify customers where their funds will be available to them. In a straight payoff, the checks will be written by the FDIC and available either at the closed bank or thrift or by mail. In an insured deposit transfer, the funds will be available at the healthy bank or thrift, which will be acting as the FDIC's agent.

Another option available to the FDIC to handle a closed depository institution is to create a temporary national bank or federally chartered thrift[73] and transfer the failed institution's insured deposits to it. To do so, the FDIC must calculate the amount owed to each account holder based on a standard maximum deposit insurance amount of $100,000.[74] Disputes about claims for insured deposits are to be resolved

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[69] 12 U.S.C. § 1815(e)(5).

[70] 12 U.S.C. § 1815(e)(7).

[71] According to the FDIC, "[d]eposit payoffs occur more often in smaller banks rather than in large banks," and "[f]rom 1980 through 1994, the FDIC managed 120 straight deposit payoffs out of a total of 1,617 failed and assisted banks." FDIC, *Resolution Handbook*, at 43, [http://www.fdic.gov/bank/historical/reshandbook/index.html]. From 1980 through August 1, 2008, the FDIC used the deposit payoff option 248 times out of 3,001 "closings and assistance transactions"; from 2000 through August 1, 2008, there were 5 payouts out of 40 "closings and assistance transactions," [http://www4.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30].

[72] 12 U.S.C. § 1821(f)(1).

[73] Until the passage of the Housing and Economic Recovery Act of 2008, P.L. 110-289, § 1604(a), the FDIC had authority to create a deposit national bank but no corresponding authority for thrifts. With the passage of that law, there is authority to create a temporary thrift depository institution with limited powers. 12 U.S.C. 1821(m). Such an institution may exist for a maximum of two years unless the FDIC authorizes it to issue stock, and it subsequently qualifies for national bank or federally chartered thrift status.

[74] The FDI Act bases deposit insurance coverage on the ownership rights and capacities in which accounts are maintained. The "standard maximum deposit insurance amount" is set

(continued...)

first by the FDIC in accordance with its regulations, subject to judicial review under the Administrative Procedure Act.[75]

The FDIC uses the deposit insurance fund to pay depositors up to the insurance limit or to transfer deposit liabilities to another insured depository institution. It, therefore, steps into the shoes of the depositors and, by virtue of what is known as subrogation, assumes their claims against the receivership.[76] Under the National Depositor Preference Statute,[77] depositor claims against the receivership are superior to all other unsecured claims against the receivership.[78]

Neither the FDIC nor any new bank or other insured depository institution is required to recognize as owner of a deposit account anyone other than a person whose name or interest as owner is on the failed bank's records if the recognition would increase the aggregate amount of insured deposits.[79]

There is also a provision permitting the FDIC to withhold payment of "such portion of the insured deposit of any depositor ... as may be required to provide for the payment of any liability of such depositor to the depository institution in default or its receiver, which is not offset against a claim due from such depository institution, pending the determination and payment of such liability...."[80]

Depositors have 18 months to claim their deposits from the FDIC or the transferee depository institution, provided that the FDIC has followed the specific procedures for notifying deposit holders. After 18 months, unclaimed deposits are turned over to the appropriate state; if unclaimed after 10 years, they revert to the FDIC. If a state refuses to accept the unclaimed property, it will remain with the FDIC, and the depositors will be able to claim it until the receivership is terminated. Thereafter, depositors' rights will be barred.[81]

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[74] (...continued)
at $100,000 per account, per institution subject to being adjusted for inflation after March 31, 2010. 12 U.S.C. §§ 1821(a)(1)(C), (E), and (F). The FDIC regulations governing deposit insurance coverage are found at 12 C.F.R., Part 330. The capacity in which accounts are held makes a difference in deposit insurance coverage. Single ownership accounts and joint accounts are insured separately. *See* the FDIC's explanations at [http://www.fdic.gov/deposit/deposits/insuringdeposits/index.html].

[75] 12 U.S.C. §§ 1821(f)(3) and (4).

[76] 12 U.S.C. § 1821(g)(1).

[77] 12 U.S.C. § 1821(d)(11).

[78] Although administrative expenses of the receivership have senior status to depositor claims, by paying insured depositor claims in its corporate capacity out of the deposit insurance fund in exchange for a claim against the receivership, the FDIC effectively provides insured depositors superior status.

[79] 12 U.S.C. § 1822(c).

[80] 12 U.S.C. § 1822(d).

[81] 12 U.S.C. § 1822(e).

Open Institution Assistance.

Section 13(c) of the FDI Act provides the FDIC with discretion to provide assistance to an institution to prevent default, to restore an institution in default to normal operations, or to deal with conditions which threaten the stability of "a significant number of insured depository institutions or of insured depository institutions possessing significant financial resources."[82] The assistance, which is designed to keep the institution or institutions from failing, may take the form of loans, deposits, asset or security purchases, or assumption of the liabilities of an insured institution.[83] This method of resolution protects uninsured depositors and, at least to some extent, shareholders. It was used in the 1980s, but is less likely to be used today.[84] One reason for this is the enactment of the least-cost resolution requirement, which was enacted with the passage of the Federal Deposit Insurance Corporation Improvement Act of 1991.[85] Another is the elimination of previously existing favorable tax treatments.[86] A third is a statutory prohibition on the use of the deposit insurance fund to benefit any shareholder of failed or failing institutions, which, like the least-cost resolution requirement, may be waived to avert systemic risk.[87] Before providing assistance to keep a failing institution open, the FDIC must determine, among other things, that the deterioration in capital has not been the result of management abuses or incompetence.[88]

Purchase and Assumptions (P&As).

In a P&A, a healthy bank or thrift buys some of the assets and assumes some of the liabilities of the failed institution. There are several types of P&As, including the following:

- Basic P&A — assumption of insured deposits and purchase of cash and cash equivalent assets (and if bid

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[82] 12 U.S.C. §§ 1823(c)(1)(A),(B), and (C).

[83] 12 U.S.C. § 1823(c)(1). Subject to the least-cost resolution requirement, the FDIC has discretion and authority to facilitate a merger or consolidation of an insured institution in default or in danger of default with another insured depository institution, including authority to purchase assets and assume liabilities of the distressed institution by purchasing the assets and assuming the liabilities of distressed banks. 12 U.S.C. § 1823(c)(2)(A).

[84] There were no assistance transactions between January 2008 and August 2008, [http://www4.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30]. According to McCoy, open institution assistance is the method favored by the banking industry, but is criticized as raising "fears of government nationalization of the banking sector," and is seen as rewarding inefficiency and risk and inhibiting market discipline. McCoy at 15.05[3][c].

[85] P.L. 102-242.

[86] Section 1401 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, modified the special tax rules for transactions involving federal financial assistance to banks and thrifts that had been in existence from 1981 for thrifts and 1988 for banks.

[87] 12 U.S.C.§ 1821(a)(4)(B).

[88] 12 U.S.C. § 1823(c)(8).

is high enough, assumption of uninsured deposits and bank premises).[89]

- Loan purchase P&A — purchase of a portion of the loan portfolio, such as installment loans.[90]
- Whole bank P&A — purchase of all of an institution's assets and assumption of all of its liabilities.[91]
- Loss sharing P&A — assumption of deposit liabilities and FDIC transfer of a fixed pool of assets to the acquirer at a discounted price with the FDIC agreeing to share in future losses that the acquirer experiences on the fixed pool of assets.[92]

P&A appears to be the leading method that the FDIC uses to resolve institutional failures.[93] There is, however, what appears to be a movement away from what was once the predominant form of P&A, transferring all deposit liabilities

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[89] For an overview of the bidding process, *see* FDIC, *Resolution Handbook*, at 81-82. The FDIC markets the bank as widely as possible, meets with potential bidders, and provides each the with the same information. Bids consist of two parts: (1) premium for the franchise value of deposits to be transferred; and (2) amount for any or all of the institution's assets. The FDIC finds that the basic P&A benefits insured depositors who will have ready access to their accounts at a new bank or thrift, reduces the FDIC's costs and initial outlays, and offers the new bank new customers. *Id.* at 24.

[90] According to the FDIC, a loan purchase P&A has all the benefits of the basic P&A plus relieving the FDIC of "a large number of small balance loans that are time-consuming." *Id.* at 25.

[91] This method "[s]eldom proves to be the least cost method in comparison to other types of resolutions." FDIC, *Resolution Handbook* at 27-28, [http://www.fdic.gov/bank/historical/reshandbook/index.html].

[92] In the typical agreement, the FDIC agrees to absorb 80 percent of the credit loss on commercial loans and real estate loans. *Id*. at 30.

[93] According to McCoy:

> The FDIC generally favors purchase and assumption agreements over liquidation because P&As preserve the going concern value of bank franchises, reduce disruption to depositors and can minimize payouts from the deposit insurance fund. In the 1980s and early 1990s, however, those agreements came under fire because they were typically structured to extend full protection to uninsured depositors and general creditors, thereby reducing the incentives of those creditors to exert market discipline on banks. In response to that criticism, the FDIC has curtailed the coverage afforded by some purchase and assumption agreements to protect insured depositors alone.

McCoy at § 15.05[3][a] (internal citations omitted).

(insured and uninsured) to an acquirer.[94] This may be the result of the least-cost resolution test[95] combined with the depositor preference requirement.

FDIC's Claims Process as Receiver

Overview.

As receiver of a failed institution, the FDIC is responsible for settling claims against the institution. The funds for settling creditors' claims are the proceeds from the sale and liquidation of the institution's assets. Creditors are notified that they must present their claims within a certain time frame, which may not be less than 90 days from the date of the notice.[96] Within 180 days of receiving a claim, the FDIC must notify the claimant of whether or not it will allow the claim.[97] The FDIC has authority to disallow claims "not proved to the satisfaction of the receiver."[98] When a claim has been disallowed, the claimant has 60 days to seek administrative[99] or judicial review or the claim is deemed disallowed.[100]

Payment of Claims and Priority of Claimants

Overview.

Whatever resolution method the FDIC uses, including the establishment of a bridge depository institution, its liability to creditors is limited to what each would

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[94] According to the FDIC's *Report of Bank and Thrift Failures*, from 1980 to August 1, 2008 there were: 178 resolutions involving the transfer of some or all deposits, certain other liabilities and some or all assets; 1,427 where insured and uninsured deposits were assumed; and 131 where only insured deposits were assumed. Comparable figures for the period from 2000 through August 1, 2008 are: 40 total resolutions; 1 included the transfer of some or all deposits, certain other liabilities, and some or all assets; 10 included the transfer of insured and uninsured deposits; 23 included transfer of uninsured deposits. Comparable figures for the seven failures during from January 1 through August 1, 2008 (excluding IndyMac Bank which was in conservatorship as of August 2008) are: 0 transfers of some or all deposits, etc.; 4 assumptions of all deposits; and 3 assumptions of only insured deposits. FDIC, Bank and Thrift Failure Report, [http://www4.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30].

[95] *See* Bliss & Kaufman at 167, n. 80.

[96] 12 U.S.C. § 1821(d)(3)(B). Creditors who are suing the institution are also subject to this requirement to provide the FDIC with notice and proof of their claim, giving the FDIC the opportunity to seek a stay of the proceeding under 12 U.S.C. § 1821(d)(12).

[97] 12 U.S.C. § 1821(d)(5)(A)(i).

[98] 12 U.S.C. § 1821(d)(5)(D)(i).

[99] 12 U.S.C. § 1821(d)(7)(A). Administrative review is subject to the judicial review provisions of the federal Administrative Procedure Act, meaning that final agency action may be appealed on grounds specified in that legislation. 5 U.S.C. §§ 701-706.

[100] 12 U.S.C. § 1821(d)(6)(A).

have received had the institution been liquidated.[101] To the extent that funds are available, the FDIC as receiver will pay all claims of the same class on a pro rata basis.

Priorities.

In a receivership, secured claims take precedence over any unsecured claims and are to be paid to the extent of the security. Any liability beyond what is secured is handled as an unsecured claim.[102] The FDI Act mandates depositor preference, which means that depositors' claims, including those of the FDIC as subrogee of the insured depositors whom it has made whole, have priority over all other unsecured claims, except those involving administrative expenses of the receivership.[103] The FDI Act specifies the order in which uninsured and unsecured claims are to be discharged, i.e., paid, from the receipts of the liquidation.[104] The statute specifies the following priority for payment of unsecured claims that are proved to the satisfaction of the receiver:[105]

- Administrative expenses of the receivership.
- Deposit liabilities.
- Any other general or senior liability.
- Any obligation subordinated to depositors or general creditors which is not an obligation owed to shareholders as shareholders.
- Obligations owed to shareholders arising as a result of their status as shareholders.[106]

One of the effects of the depositor preference requirement is that, in combination with the least-cost resolution requirement, it limits the FDIC's resolution options. Prior to depositor preference, when deposits were paid on the same pro-rata basis as other unsecured claims, the FDIC's reimbursement from a deposit payoff was likely to be less than it would be under today's rule that requires all deposit claims (including that of the FDIC as subrogee for the insured deposits

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[101] 12 U.S.C. § 1821(i)(2).

[102] 12 U.S.C. § 1821(d)(11)(A).

[103] 12 U.S.C. § 1821(d)(11).

[104] State law is preempted "except to the extent of inconsistency," with inconsistencies determined by the FDIC, and subject to judicial review under the judicial review provisions of the federal Administrative Procedure Act (APA). 12 U.S.C. § 1821(d)(11)(B). The judicial review provisions of the APA are found at 5 U.S.C. §§ 702-706.

[105] 12 C.F.R. § 360.3.

[106] 12 U.S.C. §§ 1821(d)(11)(A)(i) - (v). If a commonly controlled insured depository institution, i.e., one in the same holding company, has contributed to an FDIC assistance package to the institution when it was in danger of default or had been required by the FDIC to pay a portion of the loss to the FDIC caused by the institution's default, its claim will have priority over shareholder claims and claims of affiliates of the institution (including the holding company and other depository institutions) but will be subordinated to depositor claims (except for deposits held for affiliates of the institution) and to secured obligations of affiliates. 12 U.S.C. § 1815(e)(2)(C).

that it has paid) have to be paid off before any other unsecured claims other than the administrative expenses of the receivership.[107]

Agreements Against the Interests of the FDIC.

One of the superpowers[108] given to the FDIC, both as receiver and in its corporate capacity, is the power to defeat claims against its interests in assets it has acquired in a receivership or through open institution assistance. To prevail on a claim that tends to defeat or diminish the FDIC's interest in such an asset, the claimant must show that there was a written agreement, executed contemporaneously with the institution's acquisition of the assets, approved by the institution's board of directors or its loan committee, and continuously reflected on the institution's books.[109]

Fannie Mae and Freddie Mac

Before P.L. 110-289: OFHEO's Powers as Conservator

One of the biggest issues with OFHEO's ability to help a financially troubled Fannie or Freddie was the dearth of explicit statutory authority. This section addresses the powers that were expressly provided to OFHEO and the legal uncertainty that would have arisen had OFHEO taken measures not expressly provided for in the code as a way to help a failed GSE.

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[107] *See* Skeel at n. 175.

[108] "Superpowers" is the term used for the tools available to the FDIC to deal with insolvent depository institutions, stemming from long-standing judicial decisions and from legislation enacted following the thrift crisis of the 1980s. These powers, in some respect, exceed the authority of a bankruptcy court. They include the power to reorganize the institution, to sell its assets, and repudiate certain claims, with little judicial oversight. *See*, e.g., Thomas C. Baxter, Jr., Joyce M. Hansen, and Joseph H. Sommer, *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 Am. Bankr. L. J. 57, 72 (2004); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, 328 (1986); Fred Galves, *Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Duhme and 12 U.S.C. 1823(e) Superpowers in Failed Bank Litigation*, 80 Minn. L. Rev. 1323 (1996); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, n.137 (1986).

[109] 12 U.S.C. § 1823(e). To some extent, this codifies and expands upon the common law doctrine emanating from the Supreme Court's decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942). Under the holding of that case, the FDIC's actions to collect on notes may not be defeated by defenses based on secret side agreements. Subsequently, the doctrine has been extended to cover "innocent understandings about regular bank transactions that never happened to be recorded," as well as fraudulent arrangements. McCoy at 16.04[1]. There also are statutory exemptions from the contemporaneous execution requirement — agreements lawfully collateralizing deposits or other loans by governmental entities, bankruptcy estate funds, extensions of credit from Federal Home Loan Banks and Federal Reserve Banks and "qualified financial contracts." 12 U.S.C. § 1823(e)(2).

Prior to the effective date of P.L. 110-289, there was statutory only for the appointment of a conservator for a troubled Fannie or Freddie, not a reciever.[110] The Director of OFHEO could appoint a conservator if he or she determined that there was no other satisfactory alternative available and that

- "the enterprise is not likely to pay its obligations in the normal course of business";
- covering losses "would deplete substantially all of its core capital"[111] and would not likely be able to build the core capital back up in a reasonable amount of time;
- the enterprise hid "books, papers, records, or assets of the enterprise that are material to the discharge of the Director's responsibilities ... or refused ... to submit such [materials] for inspection to the Director upon request"; or
- there exists a willful violation of a cease and desist order.[112]

The conservator could have been the Director, any agency of the government, or any disinterested person that had the knowledge and expertise necessary to run the GSEs.[113] A review of the legislative history of this provision offered little by way of elaboration as to whom, other than the Director of OFHEO, Congress contemplated serving as conservator. Within 20 days of a conservator's appointment, Fannie and Freddie had a right to contest the appointment in federal district court.[114] Pursuant to the law in effect before enactment of P.L. 110-289, a conservatorship would continue until the Director deemed that its termination would be "in the public interest and [would] be safely accomplished" or until the enterprise reached its minimum capital requirements.[115]

Conservators were granted "all the powers of the shareholders, directors, and officers of the enterprise...."[116] The prior law also gave conservators the authority to "avoid any security interest taken by a creditor with the intent to hinder, delay, or

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[110] Formerly 12 U.S.C. §§ 4616 — 4621 (repealed by P.L. 110-289).

[111] Capitalizations standards were defined at 12 U.S.C. § 4614. P.L. 110-289 amends the capital requirements. P.L. 110-289, Subtitle C.

[112] Formerly 12 U.S.C. § 4619(a)(1) (repealed by P.L. 110-289). The Director also could have appointed a conservator upon a majority vote by an enterprise's Board of Directors. Formerly 12 U.S.C. § 4619(a)(2) (repealed by P.L. 110-289).

[113] Formerly 12 U.S.C. § 4619(a)(4) (repealed by P.L. 110-289).

[114] Formerly 12 U.S.C. § 4619(b) (repealed by P.L. 110-289). "A decision of the Director to appoint a conservator may be set aside ... only if the court finds that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable law." Judicial review was not provided when a conservator is appointed with the consent of a majority of an enterprise's Board of Directors.

[115] Formerly 12 U.S.C. § 4619(e) (repealed by P.L. 110-289).

[116] Formerly 12 U.S.C. § 4620(a) (repealed by P.L. 110-289).

defraud the enterprise or [its] creditors...."[117] Finally, a conservator had the ability to enforce certain contracts and seek a temporary stay of judicial proceedings to which the enterprise or the conservator was a party.[118]

That was basically the extent of the conservator's express statutory authority. This authority was far less expansive, and it provided far less guidance than that bestowed upon the FDIC to deal with troubled banks and thrifts. Some of the more notable differences are: (1) OFHEO was limited exclusively to conservatorship; (2) the circumstances in which a conservator could be appointed arguably would only arise when Fannie or Freddie was in a financial condition so dire that the only hope of saving the institution was with federal funding; and (3) a conservator for Fannie or Freddie had no authority to reorganize debt (i.e., pay only parts of debts or restructure payments over a longer period of time than the existing pay schedule).

The dearth of guidance provided was also troublesome. For example, the law prior to P.L. 110-289 did not list the priority of unsecured creditors and even did not make clear who could serve as conservator. Consequently, a conservator for Fannie or Freddie would have had difficulty returning an enterprise back to solid financial footing using only the powers it was explicitly given, and any actions taken outside of its explicit authority would have been wrought with legal uncertainty, which could have undermined the effectiveness of taking such actions.

New Powers Granted by P.L. 110-289 to Deal with a Failing Fannie or Freddie

Overview.

The Housing and Economic Recovery Act of 2008 alleviates many of the limitations with OFHEO's conservatorship powers. Among other things, it largely revamped the statutory authority for handling a financially troubled Fannie or Freddie by closely modeling the FDI Act and giving the FHFA largely the same powers over a failed Fannie and Freddie that the FDIC has over failed banks and thrifts, including the authority to act as a receiver. The following sections highlight some of the more important differences between the FDI Act and P.L. 110-289 and briefly describe and cite those provisions that are similar.

Notable Differences Between the FDIC's Authority and that of the FHFA.

The differences between the FDIC's authority and that of the FHFA primarily seem to stem from the variant roles performed by the two types of institutions being regulated. One of the main goals of a receiver or conservator of a failed bank or thrift is to protect its FDIC-insured deposits. As Fannie and Freddie are not lenders and do not hold deposits, the FHFA, as conservator or receiver, does not have to be concerned about FDIC-insured deposits. The lack of insured deposits held by Fannie

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[117] Formerly 12 U.S.C. § 4620(b) (repealed by P.L. 110-289).

[118] Formerly 12 U.S.C. §§ 4620(d) — (e) (repealed by P.L. 110-289).

and Freddie appears to account for the majority of the differences in the two regulatory regimes. For example, the FHFA does not have to adhere to a least-cost requirement like that imposed by the FDI Act. Consequently, the resolution strategies for dealing with a failed Fannie or Freddie likely would differ from the insured deposit focus of the strategies generally applied for failed banks and thrifts.

Another major difference is the fact that the Director of the FHFA, as Fannie and Freddie's sole regulator, is granted the exclusive authority to appoint a conservator or receiver over the enterprises. The authority to appoint a conservator or receiver over a failed bank or thrift, on the other hand, may rest in a state chartering authority, one of the multiple federal regulators, or the FDIC, depending on the type of bank or thrift and its charterer. Additionally, there are situations in which the Director of the FHFA *must* appoint the FHFA as receiver over Fannie or Freddie, whereas the appointment of a receiver over a failed bank or thrift is always discretionary.

Grounds for Appointing the FHFA as Conservator or Receiver

The discretionary grounds for appointing the FHFA as conservator or reciever over Fannie or Freddie are virtually identical to those provided to the FDIC for thrifts and banks. The only significant difference is that P.L. 110-289 does not include the termination of deposit insurance coverage as a ground for appointment, as it is inapplicable to the enterprises.[119]

In addition to the discretionary grounds, P.L. 110-289 does include two mandatory grounds for the appointment of the FHFA as receiver. One mandatory ground is if the enterprise's debts exceeds its assets during the previous 60 days. The other is if the enterprise generally has not been "paying the debts ... (other than debts that are the subject of a bona fide dispute) as such debts become due."[120] If the FHFA is appointed conservator or receiver under either the discretionary or mandatory grounds, the affected enterprise may challenge the appointment in court.[121]

FHFA Conservatorship or Receivership Powers

Overview.

Much like the FDI Act, the Housing and Economic Recovery Act provides the FHFA with a wide array of powers when acting as either a conservator or a receiver. Supplementary powers are also provided for each of these capacities. P.L. 110-289 makes clear the powers assigned to the FHFA as a conservator or receiver are not exclusive, but are in addition to any other powers conferred on conservators or receivers of the enterprises and that, in exercising its conservatorship or receivership authority it "shall not be subject to the direction or supervision of any other agency

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[119] P.L. 102-550 § 1367(a)(3), as amended by P.L. 110-289 § 1145(a).

[120] P.L. 102-550 § 1367(a)(4), as amended by P.L. 110-289 § 1145(a).

[121] P.L. 102-550 § 1367(a)(5), as amended by P.L. 110-289 § 1145(a).

or department of the United States or any State in the exercise of the [FHFA's] rights, powers, and privileges."[122]

FHFA's Rulemaking Powers as Conservator or Receiver.

The FHFA, just like the FDIC, is provided broad rulemaking authority to promulgate any "regulations [] the Agency determines to be appropriate regarding the conduct of conservatorships and receiverships."[123]

FHFA's General and Incidental Powers.

The general and incidental powers under the Housing and Economic Recovery Act of 2008 are virtually the same as those granted under the FDI Act. The powers provided the FHFA as conservator or receiver are broad in scope. As successor to the institution, the FHFA is authorized to operate the institution and endowed with "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of the regulated entity" and may collect all the obligations due the institutions, perform its duties, and preserve and conserve its assets.[124] In addition to the explicit powers granted to FHFA as conservator or receiver, P.L. 110-289 contains a provision delegating to the Corporation as receiver or conservator "such incidental powers as shall be necessary to carry out such powers."[125]

FHFA's Explicit Powers as Conservator or Receiver.

A few of the explicit powers granted to the FDIC are not included in P.L. 110-289. One is the ability to merge an enterprise with another institution. Another is the ability to use private sector services. Finally, the FHFA is not given express authority to contract with state housing finance agencies to sell the enterprise's mortgage related assets. The FHFA also is explicitly prohibited from repudiating contracts with the Treasury (this provision is not included in the FDI Act).[126]

Among the substantially similar explicit powers granted by P.L. 110-289 are the ability to:

- Transfer the enterprise's assets.[127]
- Pay the enterprise's valid obligations.[128]

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[122] P.L. 102-550 §§ 1367(a)(7), 1367(b)(2), as amended by P.L. 110-289 § 1145(a).

[123] P.L. 102-550 § 1367(b)(1), as amended by P.L. 110-289 § 1145(a).

[124] P.L. 102-550 §§ 1367(b)(2)(A) - (D), as amended by P.L. 110-289 § 1145(a).

[125] P.L. 102-550 § 1367(b)(2)(J), as amended by P.L. 110-289 § 1145(a).

[126] P.L. 102-550 §§ 1367(b)(5)(D), (b)(d)(1), as amended by P.L. 110-289 § 1145(a).

[127] P.L. 102-550 § 1367(b)(2)(G), as amended by P.L. 110-289 § 1145(a).

[128] P.L. 102-550 § 1367(b)(2)(H), as amended by P.L. 110-289 § 1145(a).

- Issue subpoenas.[129]
- Obtain temporary stays of judicial actions in which the enterprise is a party.[130]
- Exercise rights of the enterprise with respect any appealable judgment, including removal to federal court.[131]
- Avoid certain fraudulent transfers made with the intent to "hinder, delay, or defraud the regulated entity."[132]
- Repudiate contracts (with exception of loans from the Federal Home Loan Banks, Federal Reserve Bank, or the Treasury) or leases entered into by the enterprise, under certain conditions.[133]
- Secure court-ordered attachment, i.e., asset freeze, of any of the assets acquired or liabilities assumed by the FHFA as conservator or receiver.[134]
- Enforce most of the enterprise's contracts entered.[135]
- Bring an action to hold a director or officer of an enterprise personally liable for gross negligence.[136]

Statutes of Limitations Available to the FHFA as Conservator or Receiver.

Just as is the case under the FDI Act, the Housing and Economic Recovery Act of 2008 provides special statutes of limitation for actions brought by the FHFA as receiver or conservator. For contracts, the statute of limitation is six years beginning on the date the claim accrues, unless state law provides a longer period. For tort claims, the statute of limitations is three years, unless state law provides a more lenient time frame.[137]

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[129] P.L. 102-550 § 1367(b)(2)(I), as amended by P.L. 110-289 § 1145(a).

[130] P.L. 102-550 § 1367(b)(10), as amended by P.L. 110-289 § 1145(a).

[131] P.L. 102-550 § 1367(b)(11), as amended by P.L. 110-289 § 1145(a).

[132] P.L. 102-550 § 1367(b)(15), as amended by P.L. 110-289 § 1145(a).

[133] P.L. 102-550 §§ 1367(d)(1), (b)(5)(D), as amended by P.L. 110-289 § 1145(a). The act includes specific provisions relating to various types of contracts and leases. P.L. 102-550 § 1367(d), as amended by P.L. 110-289 § 1145(a).

[134] P.L. 102-550 § 1367(b)(16), as amended by P.L. 110-289 § 1145(a).

[135] P.L. 102-550 § 1367(d)(13), as amended by P.L. 110-289 § 1145(a).

[136] P.L. 102-550 § 1367(g), as amended by P.L. 110-289 § 1145(a). The Housing and Economic Recovery Act of 2008 also authorizes the Director of the FHFA, in certain circumstances, to limit or prohibit "golden parachute payments," "indemnification payments," as well as other forms of compensation to Fannie or Freddie's officers, directors, controlling shareholders, or agents. This power is not limited exclusively to when the FHFA is acting as conservator or receiver. "Golden parachute payment," as defined by the act, is similar to what is commonly referred to as a severance package. P.L. 110-289 §§ 1002 and 1114.

[137] P.L. 102-550 § 1367(b)(12), as amended by P.L. 110-289 § 1145(a).

FHFA's Additional Conservatorship Powers.

Just like the FDIC, the FHFA, as conservator, may take any action "necessary to put the regulated entity in a sound and solvent condition ... and [any action which is] appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."[138]

FHFA's Additional Receivership Powers.

The FHFA has the authority as receiver to liquidate the enterprise and sell its assets. This includes the ability to transfer the assets to a "limited-life regulated entity," which is basically a GSE-equivalent of a bridge-bank.[139] The Agency also may "organize a successor enterprise."[140] The FHFA may liquidate and sell assets without regard to local conditions (as is required for the FDIC by the FDI Act). However, the FHFA is not given the other express powers granted to the FDIC as receiver of a failed thrift or bank.[141]

FHFA's Options for Resolving Insolvencies and the Inapplicability of the Least-Cost Requirement

As previously mentioned, the FHFA is not bound by the least-cost to the insurance deposit fund requirement because the GSEs do not hold FDIC-insured deposits. As a result, the FHFA has greater flexibility in resolving insolvencies. That being said, the approaches taken by the FHFA in handling an insolvent enterprise likely would be similar to those that have been applied by the FDIC to resolve failed thrifts and banks.

For similar reasons, the cross-guarantee by commonly controlled insured depository institutions provisions that are required by the FDI Act are not applicable to Fannie and Freddie.

Claims Process

Overview.

The claims process is virtually the same for the FHFA as the process for the FDIC acting as a receiver of a failed bank or thrift, except that claimants are not given the right to administrative review,[142] and P.L. 110-289 does not include priority for deposits.

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[138] P.L. 102-550 § 1367(b)(2)(D), as amended by P.L. 110-289 § 1145(a).

[139] P.L. 102-550 § 1367(b)(2)(E), as amended by P.L. 110-289 § 1145(a).

[140] P.L. 102-550 § 1367(b)(2)(F), as amended by P.L. 110-289 § 1145(a).

[141] P.L. 102-550 § 1367(b)(2)(E), as amended by P.L. 110-289 § 1145(a).

[142] P.L. 102-550 § 1367(b)(5)(D), as amended by P.L. 110-289 § 1145(a).

As receiver of a failed enterprise, the FHFA is responsible for settling claims against the enterprise. The funds for settling creditors' claims are the proceeds from the sale and liquidation of the institution's assets. Creditors are notified that they must present their claims within a certain time frame, which may not be less than 90 days from the date of the notice.[143] Within 180 days of receiving a claim, the FHFA must notify the claimant of whether or not it will allow the claim.[144] The FHFA has authority to disallow claims "not proved to the satisfaction of the receiver."[145] When a claim has been disallowed, the claimant has 60 days to seek judicial review or the claim is deemed disallowed.[146]

Payment of Claims.

The amount of liability to claimants is limited to what the claimant would receive in liquidation, just like the maximum liability owed by the FDIC as receiver pursuant to the FDI Act.[147]

FHFA Priority.

The FHFA priority scheme is basically the same as that for the FDIC with the major exception that deposit liabilities are not given priority. Generally, secured claims are paid before unsecured claims and are to be paid to the extent of the security. Any liability beyond what is secured is handled with all other unsecured claims.[148] The legislation specifies the following priority for payment of unsecured claims that are proved to the satisfaction of the receiver:

- Administrative expenses of the receivership.
- Any other general or senior liability.
- Any obligation subordinated to general creditors which is not an obligation owed to shareholders as shareholders.
- Obligations owed to shareholders arising as a result of their status as shareholders.[149]

Shareholder claims are the lowest priority. While common and preferred stock may not be wholly eliminated by a conservatorship or receivership, they are likely to be substantially reduced in value.

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[143] P.L. 102-550 § 1367(b)(3), as amended by P.L. 110-289 § 1145(a). Creditors who are suing the enterprise are also subject to this requirement to provide the FHFA with notice and proof of their claim, giving the FHFA the opportunity to seek a stay of the proceeding under P.L. 102-550 § 1367(b)(10), as amended by P.L. 110-289 § 1145(a).

[144] P.L. 102-550 § 1367(b)(5)(D), as amended by P.L. 110-289 § 1145(a).

[145] P.L. 102-550 § 1367(b)(5)(A), as amended by P.L. 110-289 § 1145(a).

[146] P.L. 102-550 § 1367(b)(5)(D), as amended by P.L. 110-289 § 1145(a).

[147] P.L. 102-550 § 1367(e), as amended by P.L. 110-289 § 1145(a).

[148] P.L. 102-550 § 1367(b)(5)(D), as amended by P.L. 110-289 § 1145(a).

[149] P.L. 102-550 § 1367(c), as amended by P.L. 110-289 § 1145(a).

Agreements Against the Interests of the FHFA.

In similar fashion to the FDIC, the FHFA may defeat claims against its interests unless the claim is in writing and was "executed by an authorized officer or representative of the regulated entity."[150]

[150] P.L. 102-550 § 1367(b)(9)(B), as amended by P.L. 110-289 § 1145(a).