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ADMINISTRATIVE LAW—RESCUING CREDITOR CLAIMS FROM THE “BLACK HOLE”. *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*, 109 S. Ct. 1361 (1989)\*

From 1983 to 1986, Coit Independence Joint Venture (Coit), a Dallas, Texas real estate concern, procured several loans and engaged in various other transactions with FirstSouth, F. A.,<sup>1</sup> a Pine Bluff, Arkansas-based, federally chartered savings and loan (S&L) association.<sup>2</sup> Following subsequent irreconcilable financial disagreements, Coit filed suit against FirstSouth in the 95th Judicial District Court of Dallas County, Texas in October of 1986.<sup>3</sup>

In the state court complaint against FirstSouth, Coit claimed that a “‘profit participation’ fee”<sup>4</sup> FirstSouth required Coit to pay as a condition of receiving certain loans constituted interest that, when added to the standard accrued interest rate, rendered the loans usurious under Texas law.<sup>5</sup> Coit also sought a declaratory judgment that FirstSouth was its partner in the joint venture by virtue of this profit sharing interest.<sup>6</sup> Finally, Coit claimed that FirstSouth, by violating a purportedly existing oral agreement which would have allowed Coit to access funds as needed to improve the property purchased by one of the loans in question, “breached its fiduciary duty and its implied duty of good faith and fair dealing”<sup>7</sup> and would further have required FirstSouth to extend the loan, “by executing any necessary renewal notes, for at least five years unless the property sold earlier.”<sup>8</sup>

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1. The Federal Savings and Loan Insurance Corporation (FSLIC) was appointed as receiver for FirstSouth on December 4, 1986, pursuant to Federal Home Loan Bank Board Resolution No. 86-1200P. Personal interview with Patricia J. Heritage, Asset Manager, the FSLIC, Little Rock, Arkansas (May 13, 1989); *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 109 S. Ct. 1361, 1364 (1989).

2. *Id.*

3. *Id.*

4. Coit alleged that FirstSouth required it to pay “‘profit participation’ interest” on any profits derived from sale of the property as a condition of receiving two loans of \$20 and \$30 million. *Id.*

5. *Id.* See also, TEX. CONST. art. XVI, § 11; VERNON’S ANN. CIV. ST. ART. 5069-1.02 et seq. (West Supp. 1989).

6. Coit also sought a declaratory judgment that any outstanding notes were unenforceable. 109 S. Ct. at 1365.

7. *Id.* Coit made this allegation with respect to the \$30 million loan.

8. *Id.* at 1364.

In December 1986 the Federal Home Loan Bank Board (Bank Board) declared FirstSouth insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver.<sup>9</sup> The FSLIC then removed the *Coit* case to federal court.<sup>10</sup> In February 1987 the district court, following Fifth Circuit precedent as handed down in *North Mississippi Savings and Loan Association v. Hudspeth*,<sup>11</sup> held that the applicable federal statutes and regulations required creditors to present claims brought against the FSLIC in its capacity as receiver first to the FSLIC.<sup>12</sup> Creditors then had to appeal to the Bank Board before finally seeking judicial review in the federal courts where their claims would be considered consistent with the procedures enumerated by the Administrative Procedure Act.<sup>13</sup> The Fifth Circuit affirmed and *Coit* appealed to the United States Supreme Court.<sup>14</sup>

In a unanimous decision written by Justice O'Connor, the Supreme Court reversed and remanded, holding that the FSLIC does not have the power to adjudicate creditor claims against the assets of a failed savings and loan association under FSLIC receivership.<sup>15</sup> Therefore, creditors are entitled to *de novo* consideration of their claims in court.<sup>16</sup> Moreover, all of the members of the Court except Justices Blackmun and Scalia held that creditors were not required, before filing suit in court, to exhaust the administrative remedies provided by the FSLIC's administrative claims procedure.<sup>17</sup> *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 109 S. Ct. 1361 (1989).

As one United States Congressman<sup>18</sup> so eloquently noted, the financially beleaguered savings and loan (S&L) industry is literally "hemorrhaging money."<sup>19</sup> According to the Bank Board, the indus-

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9. *Id.* at 1365. The Bank Board derived its power to appoint the FSLIC as receiver from 12 U.S.C. § 1464(d)(6)(A) (1982 and Supp. IV 1986).

10. 109 S. Ct. at 1365. The FSLIC, in its capacity as receiver, simply substituted itself for FirstSouth in *Coit's* state suit. The FSLIC then removed the case pursuant to authority granted by 12 U.S.C. § 1730(k)(2).

11. 756 F.2d 1096 (5th Cir. 1985).

12. *Id.* at 1103.

13. *Id.* See 5 U.S.C. §§ 551-706 (1982 and Supp. IV 1986).

14. *Coit Independence Joint Venture v. FirstSouth, F.A.*, 829 F.2d 563 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1105 (1988), *rev'd*, 109 S. Ct. 1361 (1989).

15. 109 S. Ct. at 1376.

16. *Id.*

17. *Id.*

18. Congressman Brown of Colorado, 135 CONG. REC. H975 (daily ed. July 24, 1989) (statement of Rep. Brown).

19. *Id.* For other excerpts from the oftentimes heated Congressional debate surrounding

try reported losses of \$2.3 billion for the fourth quarter of 1988, closing-out the worst year in thrift history with losses totalling \$12.1 billion.<sup>20</sup> Relatively meager industry profits of \$516 million<sup>21</sup> far from offset these enormous deficits, and profits are likely to remain decreased in 1989 as a result of the effects of rising interest rates on already troubled real estate investments.<sup>22</sup>

The bulk of the 1988 losses was concentrated in a small number of savings institutions.<sup>23</sup> For example, in Texas, seventy-seven insolvent thrift accounted for \$1.3 billion of these losses.<sup>24</sup> Of the twenty savings associations with the largest quarterly losses, nine were in Texas.<sup>25</sup> The vast majority of these losses originated from savings and loans that entered inflated valuations of since-defaulting real estate loans and other "bad" assets on their books.<sup>26</sup> Thus, this deficit merely reflects losses that actually occurred years ago when a number

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the S&L crisis and President Bush's legislative efforts to deal with it, see 135 CONG. REC. S10182 (daily ed. Aug. 4, 1989) (statement of Sen. Bentsen, *et al*); 135 CONG. REC. S9871 (daily ed. Aug. 3, 1989) (statement of Sen. Bentsen, *et al*); 135 CONG. REC. H4972 (daily ed. Aug. 3, 1989) (statement of Rep. Annunzio, *et al*); 133 CONG. REC. H6944 (daily ed. Aug. 3, 1989) (statement of Rep. Akaka, *et al*); 135 CONG. REC. E2731 (daily ed. July 28, 1989) (statement of Rep. Kaptur); 135 CONG. REC. H4358 (daily ed. July 27, 1989) (statement of Rep. Kaptur); 135 CONG. REC. H2601 (daily ed. June 15, 1989) (statement of Rep. Conyers); 135 CONG. REC. H2739 (daily ed. June 15, 1989) (statement of Rep. Rostenkowski); 135 CONG. REC. H2450 (daily ed. June 8, 1989) (statement of Rep. Bates); 135 CONG. REC. E2006 (daily ed. June 7, 1989) (statement of Rep. Dorgan); 135 CONG. REC. H2343 (daily ed. June 6, 1989) (statement of Rep. Wolpe); 135 CONG. REC. E638 (daily ed. Mar. 2, 1989) (statement of Rep. Pease); 135 CONG. REC. H2031 (daily ed. May 18, 1989) (statement of Rep. Lafalce); 135 CONG. REC. S4084 (daily ed. Apr. 18, 1989) (statement of Sen. Conrad, *et al*); 135 CONG. REC. S6439 (daily ed. June 9, 1989) (statement of Sen. Kerry); 135 CONG. REC. S4238 (daily ed. Apr. 19, 1989) (statement of Sen. Metzenbaum, *et al*); 135 CONG. REC. S3970 (daily ed. Apr. 13, 1989) (statement of Sen. Mack); 135 CONG. REC. E1192 (daily ed. Apr. 12, 1989) (statement of Rep. Laughlin); 135 CONG. REC. E1106 (daily ed. Apr. 6, 1989) (statement of Rep. Pease); and 135 CONG. REC. S5488 (daily ed. Jan. 3, 1989) (statement of Sen. Dole).

20. N.Y. Times, Mar. 22, 1989, at D1, col. 6 and D7, col. 1; Wall Street J., Mar. 22, 1989, at A2, col. 1 (SW ed.). This \$12.1 billion loss far exceeded the previous record deficit of \$7.8 billion in 1987. In 1988 the Bank Board took over, sold, or liquidated 223 savings and loan institutions with assets of more than \$100 billion. This resulted in an estimated cost to the federal government of at least \$39 billion.

21. *Id.* (both of the articles cited, *supra* note 20, contain different expressions of the same factual information).

22. Rising interest rates work to depress the real estate market because when interest rates are high, potential buyers simply cannot afford to pay the interest on loans necessary to purchase realty. N. PENNEY, R. BROUDE & R. CUNNINGHAM, LAND FINANCING at 25-31 (3d ed. 1985).

23. See *supra* note 20.

24. *Id.*

25. *Id.*

26. *Id.*

of risky real estate loans went into default.<sup>27</sup>

In February 1989 President George Bush introduced his "savings and loan bailout plan,"<sup>28</sup> the heart of which lies in the creation of a new governmental entity, the Resolution Trust Corporation (RTC), which exceeds in size all but three of the *Fortune* 500 industrial corporations.<sup>29</sup> Assets of \$300 to \$500 billion will make the RTC this nation's largest financial institution, more than twice the size of banking giant Citibank.<sup>30</sup> The RTC will have the unenviable task of selling or managing all of the real estate and other assets inherited from the hundreds of savings and loan associations that have failed since the beginning of the "S&L crisis."<sup>31</sup>

According to various estimates, rescuing the troubled S&L industry will cost between \$157 and \$183 billion.<sup>32</sup> On June 15, 1989, the United States House of Representatives passed a \$157 billion savings-and-loan bailout plan,<sup>33</sup> the largest financial rescue in United States history.<sup>34</sup> The House vote supported President Bush's demand for tough industry reforms while rejecting, on a largely party-line vote, the President's plan to finance the bailout plan through high-cost, thirty-year off-budget bonds rather than borrowing directly from the Treasury.<sup>35</sup> Thus, the House failed to prevent the bailout's costs

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27. *Id.*

28. 135 CONG. REC. S6439.

29. *Id.* *Fortune* magazine ranks the top 500 industrial corporations according to the size of their assets.

30. *See supra* note 28.

31. *Id.*

32. *Id.* HR 1278, the Finance Institutions Reform, Recovery and Enforcement Act of 1989, will cost the industry and taxpayers in excess of \$157 billion over the next 33 years. Under the Bush plan, the federal government, through the RTC, will liquidate or sell more than 700 insolvent or nearly insolvent savings institutions. *See* General Accounting Office Report found at 135 CONG. REC. E2731 (daily ed. July 28, 1989) (statement of Rep. Kaptur).

33. Wall Street J., June 16, 1989, at A3, col. 1.

34. Ark. Gazette, Aug. 5, 1989, at C1, col. 3.

35. *See supra* note 20 (both articles contain different expressions of the same factual information). The Bush bailout plan proposed to raise \$50 billion to close failing S&Ls. However, whether this cost should be made part of the federal budget was the subject of much heated debate on Capitol Hill. Under the Bush plan, none of the \$50 billion would have been carried on the government's books, while interest costs on this amount and any other necessary borrowings would have been included in the budget. This would, in effect, have allowed the S&L industry itself to pay off the ultimate cost of the bailout over thirty years. *Id.*

Many Democrats believed that the cost of keeping the \$50 billion off the federal budget was too great. They argued that, since the \$50 billion would not be financed by Treasury securities under the Bush plan, the President's proposed budget treatment would cost an additional \$7.5 billion over the life of the plan. These Democrats sought to finance the plan on the budget through the sale of Treasury bonds. This method of financing would have required the passage of an exemption to the Gramm-Rudman-Hollings budget-balancing bill. And, as Richard Darman, the director of the White House Office of Management and Budget and the

from swelling the already gargantuan federal deficit.<sup>36</sup> The bailout bill then went to a conference committee which resolved the differences from a Senate version approved in April.<sup>37</sup>

With S&L losses mounting at the rate of approximately \$33 million a day, \$1.4 million each hour, \$23,000 a minute,<sup>38</sup> the White House, recognizing the urgency of resolving the S&L crisis, insisted that Congress enact the bailout bill into law before recessing in August.<sup>39</sup> The Summer of 1989 was a long, hot one in Washington, D.C. The FSLIC and its parent agency, the Bank Board, played an integral role in, and were drastically affected by, landmark legislation which is to bring about the ultimate resolution of this unprecedented and potentially economically debilitating financial crisis.<sup>40</sup>

Both the FSLIC and the Bank Board were created by and empowered through a complex statutory framework enacted over a pe-

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Bush Administration's point man in the budget debate, warned, putting the S&L bailout costs on the federal budget could destroy the Gramm-Rudman process and tempt Congress to exclude other items, such as social security, from the budget. Mr. Darman also conjured up visions of "Black Monday," the stock market crash of the Fall of 1987, when he argued that such on-budget financing could unnerve participants in the financial markets. *Id.*

The conference committee compromise which led to the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (*see infra* note 40), provides for \$20 billion on-budget financing for fiscal year 1989, with borrowings of \$30 billion placed off-budget in future years. *See* 135 CONG. REC. H5300 (daily ed. Aug. 4, 1989) (statement of Rep. Gonzalez); *see also* Fed. Banking L. Rep. (CCH) No. 1298 at ¶¶ 501-03 (extra ed. Aug. 9, 1989).

36. N.Y. Times, Mar. 22, 1989, at D1 col. 6 and D7 col. 1 and Wall Street J., Mar. 22, 1989, at A2, col. 1 (SW ed.).

37. *Id.* The Senate version of the legislation was S774. *See* Banking Rep. (BNA) Vol. 52, No. 17 at 895-914 (Apr. 24, 1989).

38. 135 CONG. REC. H975.

39. *See* Ark. Gazette, June 16, 1989, at C1, col. 3; *see also* N.Y. Times, June 16, 1989, at A1, col. 1.

40. On August 4, 1989, Congress passed HR 1278, The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, P.L. 101-73, 103 Stat. 183. *See* Ark. Democrat, Aug. 10, 1989, at A1, col. 4. With the words, "I'm proud to sign this monster," on August 9, 1989, President Bush signed HR 1278 into law. *Id.* The principal features of the Act include, among other things, the dissolution of the Bank Board and the FSLIC, and creation of a new S&L insurance fund called The Savings Association Insurance Fund (SAIF, pronounced "safe"). *See* Ark. Democrat, Aug. 10, 1989, at A1, col. 5.

In February of 1989, the three-member Bank Board was reduced to a single member, leaving in place only Chairman M. Danny Wall. Effective October 1, 1989, the Bank Board was replaced by the Federal Housing Finance Board Office of Thrift Supervision. However, the twelve federal home loan banks remained intact. The Federal Housing Finance Board will continue the Bank Board's supervision of thrift receiverships. Telephone interview with Bill Stanley, Manager of Asset Financing, Eastern Regional Office (formerly the FSLIC as Receiver), Atlanta, Georgia (Aug. 10, 1989).

A principal purpose behind the passage of the FIRREA was to separate the insurance and regulatory functions of the FSLIC. The insurance function was transferred to the FDIC which will manage the SAIF. The regulatory function was transferred to the newly created

riod of fifty years.<sup>41</sup> Prior to the Great Depression of the 1930s, the states chartered and regulated savings and loan associations.<sup>42</sup> However, due to depositors' anxiety about the safety of their money and subsequent heavy withdrawals from savings accounts,<sup>43</sup> mortgage loan defaults, and limited funds for home mortgages during the Depression era, Congress passed the Federal Home Loan Bank Act of 1932.<sup>44</sup> The Act provided for the creation of as many as twelve federal home loan banks throughout the country which loaned money to savings and loan associations and certain other mortgage lenders.<sup>45</sup> The Act also created the Bank Board and charged it with the responsibility of overseeing these home loan banks and financing them through the sale of bonds.<sup>46</sup>

Among other things, the Bank Board administered and enforced the Home Owners Loan Act of 1933 (HOLA)<sup>47</sup> and Title IV of the National Housing Act.<sup>48</sup> The Bank Board possessed exclusive authority to appoint the FSLIC as receiver or conservator of a federal savings and loan association upon a finding that any one of five specif-

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Federal Housing Finance Board Office of Thrift Supervision. Personal interview with Harry A. Light, attorney at Friday, Eldredge & Clark, Little Rock, Arkansas (Sept. 5, 1989).

With its principal offices in Atlanta, Dallas, Kansas City, and Denver, the RTC will serve as receiver for all S&Ls declared insolvent after January 1, 1989. The receiver will be "the FDIC as Managing Agent for the FSLIC, Resolution Fund as Receiver for [name of insolvent S&L]." Telephone interview with Bill Stanley, *supra*. Taxpayer funds will only be used for those receiverships under the auspices of the RTC which are deemed insolvent subsequent to the enactment of HR 1278 (effective date Aug. 9, 1989). HR 1278 establishes a deadline for the S&L cleanup of January 1, 1993. However this sunset provision is subject to extension by Congress. *Id.*

For the complete text of the FIRREA, the accompanying Conference Committee Report, and an explanation of the Act, see Fed. Banking L. Rep. (CCH) No. 1298 (extra ed. Aug. 18, 1989). For an abbreviated analysis of the key provisions of the FIRREA, see Banking Report (BNA) Vol. 53, No. 7 (Special Supp. Aug. 28, 1989).

41. See 109 S. Ct. at 1366; see also Note, *Administrative Law—Federal Savings and Loan Insurance Corporation: Exclusive Adjudication of Creditor Claims in Receivership Proceedings*, 10 W. NEW ENG. L. REV. 227, 227-31 (1988); see generally, Annotation, *Appointment By Federal Home Loan Bank Board of Receivers or Conservators To Oversee Affairs of Savings and Loan Associations, Pursuant to § 5(d)(6) of Home Owners' Loan Act of 1933* (12 U.S.C.S. § 1464(d)(6)), 65 A.L.R. FED. 302 (1982).

42. See 109 S. Ct. at 1366.

43. This is strikingly similar to what is happening during the current crisis. Since May of 1988, S&L depositors have withdrawn a total of \$35.5 billion. 135 CONG. REC. H975.

44. 12 U.S.C. § 1421 (1982 & Supp. IV 1986).

45. 12 U.S.C. § 1423 (1982).

46. 12 U.S.C. § 1437 (1982 & Supp. IV 1986).

47. 12 U.S.C. §§ 1461-68 (1982 & Supp. IV 1986).

48. 12 U.S.C. §§ 1724-30f (1982 & Supp. IV 1986); see 12 C.F.R. § 500.1 (1988).

ically enumerated grounds existed.<sup>49</sup> Subsequent statutes extended the Bank Board's power to appoint the FSLIC as receiver of insolvent state-chartered thrifts.<sup>50</sup>

The FSLIC was a federal agency organized pursuant to Title IV of the National Housing Act (NHA) of 1934.<sup>51</sup> The FSLIC insured the accounts of eligible state-chartered savings and loan associations, various state banks, and all federal savings and loan associations.<sup>52</sup> The FSLIC had authority, both by statute and federal regulations promulgated by the Bank Board, to supervise and examine all thrifts under its auspices, to enforce all applicable laws, regulations or conditions against the insured institutions it oversaw, and to serve as conservator or receiver of an insured institution which was in default.<sup>53</sup> The FSLIC operated under the direction and control of the Bank Board.<sup>54</sup>

Once the Bank Board appointed the FSLIC as receiver for an insolvent savings and loan association, the FSLIC "stepped into the shoes" of the association, took control of its assets, and had authority to take any number of steps which it deemed necessary to salvage depositors' savings.<sup>55</sup>

49. The grounds for the appointment of a conservator or receiver for an association shall be 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 of practices;
- (iii) an unsafe or unsound condition to transact business;
- (iv) willful 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.

12 U.S.C. § 1464(d)(6)(A) (1982 & Supp. IV 1986).

50. See Bank Protection Act of 1968; 12 U.S.C. §§ 1729(c)(2)-(3) Garn-St. Germain Depository Institutions Act of 1982; 12 U.S.C. § 1729(1)(B) Competitive Equality Banking Act of 1987.

51. 12 U.S.C. §§ 1724-30f.

52. See 12 U.S.C. § 1726 (1982); see also 12 C.F.R. § 500.4 (1988).

53. See 12 U.S.C. §§ 1725(a), 1726(b), 1729(c), 1730 (1982); see also 12 C.F.R. § 500.4 (1988).

54. See 12 U.S.C. §§ 1725(a), 1437(b) (1982); see also 12 C.F.R. § 500.4 (1988).

55. Once appointed as receiver, the FSLIC is authorized among other things:

- (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 and 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.

If the FSLIC determined that liquidation was in order, 12 U.S.C. § 1729(d) authorized the FSLIC 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."<sup>56</sup> Additionally, 12 U.S.C. § 1464(d)(1) empowered the Bank Board to adopt rules and regulations governing associations in receivership, for the conduct of receivership, and for the reorganization, consolidation, liquidation, or dissolution of insured associations.<sup>57</sup> Moreover, the Bank Board had the express authority to enforce section 1464,<sup>58</sup> as well as all rules and regulations promulgated thereunder, arguably without judicial interference.<sup>59</sup>

In compliance with this legislative mandate, the Bank Board adopted comprehensive regulations governing the conduct of receiverships of insured institutions.<sup>60</sup> The regulations in 12 C.F.R. § 547.7 provide that, upon appointment, a receiver shall "succeed to the rights, titles, powers, and privileges of the association, and to the rights, powers, and privileges of its members, officers, and directors."<sup>61</sup> Sections 548.2 and 549.3 enumerate the powers and duties of a receiver. These duties are both diverse and extensive.<sup>62</sup>

The Bank Board also developed comprehensive regulations dealing with creditor claims made against receivership assets,<sup>63</sup> and the

12 U.S.C. § 1729(b)(1)(A)(i)-(vi) (1982); see 12 C.F.R. §§ 548, 549, 569a (1988).

56. 12 U.S.C. § 1729(d) (1982 & Supp. IV 1986).

57. 12 U.S.C. § 1464(d)(1) (1982).

58. Section 5(d) of the HOLA is identical to 12 U.S.C. § 1464.

59. 12 U.S.C. §§ 1464(d)(1), 1464(d)(6)(C) (1982).

60. See 12 C.F.R. §§ 547.1-8, 549.1-8, 569a.1-13 (1988).

61. 12 C.F.R. § 547.7 (1988).

62. 12 C.F.R. §§ 548.2 and 549.3 define the powers and duties of a receiver. Among other things, a receiver is empowered to:

- (1) Do everything he considers desirable or expedient to conserve and preserve the assets and property of the failed association (12 C.F.R. § 548.2(a));
- (2) Pay whatever sums he considers necessary or advisable to preserve, protect, improve, or rehabilitate the assets or property of the failed association (12 C.F.R. § 548.2(d));
- (3) Institute, maintain, defend, or otherwise participate in any legal proceeding by or against the failed association or in which either has an interest (12 C.F.R. § 548.2(f));
- (4) Execute, acknowledge, and deliver any instrument necessary for any purpose (12 C.F.R. § 549.3(b)(2));
- (5) Sell or dispose of any assets or property of the failed association for cause or on terms (12 C.F.R. § 549.3(b)(4));
- (6) Repudiate any lease or contract he considers burdensome (12 C.F.R. § 548.2(k)).

63. See 12 C.F.R. §§ 549.4, 549.5, 549.5-1, 569a.7, 569a.8 (1988).

administration of a claims process became one of the responsibilities of the FSLIC once it was appointed receiver by the Bank Board.<sup>64</sup> The administrative claims process consisted of two distinct phases: the initial consideration of claims by the FSLIC in its capacity as receiver followed by a review, either for an allowed payment or an appeal from a decision disallowing a claim, by the Bank Board.<sup>65</sup> Thus, by Bank Board regulation, the tasks of considering and paying, or of denying claims against the assets of a failed thrift, lay initially within the sole discretion of the FSLIC.<sup>66</sup>

Following the FSLIC's initial consideration of claims, the next step in the claims process involved the Bank Board. Once the Bank Board allowed a claim, the FSLIC was to pay it "to the extent funds are available, in such manner and amounts as the Board may direct."<sup>67</sup> On the other hand, if the FSLIC disallowed a claim, the claimant, as a matter of right, had thirty days in which to file "a written request for payment regardless of the disallowance,"<sup>68</sup> which was then considered and determined by the Bank Board.<sup>69</sup> If the claimant did not file within the thirty day period, this disallowance became final unless the Bank Board determined otherwise.<sup>70</sup>

The recent escalation of thrift failures<sup>71</sup> and the resulting depletion on the FSLIC's oft-tapped insurance fund, coupled with the rapid increase in the cost of assisting and liquidating failed thrifts,<sup>72</sup> forced the Bank Board and the FSLIC to find ways to expedite these administrative procedures.<sup>73</sup> One of the ways these agencies sought to contain the ever-increasing costs of receiverships was to develop the

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64. 12 C.F.R. § 549.4(b) provides: "The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor."

65. *Id.*

66. *Id.*

67. 12 C.F.R. § 549.4(d) (1988).

68. 12 C.F.R. § 549.4(b) (1988).

69. *Id.*

70. *Id.*

71. See Baxter, *Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships*, 1988 DUKE L.J. 422, 436-39. Between 1934 and 1980, the Bank Board liquidated only 13 thrifts. In 1987 alone, it put 25 into receivership and liquidated 17. Prior to 1988, the Bank Board's chairman estimated the rate of thrift closure at one per week. In fact, the Bank Board took over, sold, or liquidated 223 insolvent thrifts in 1988. In Texas alone, the agency planned to close or merge 104 thrifts during 1988. See Wall Street J., Mar. 22, 1989, at A2, col. 1.

72. For a breakdown and explanation of these costs, see General Accounting Office Report found at 135 CONG. REC. E2731 (daily ed. July 28, 1989) (statement of Rep. Kaptur).

73. See Baxter, *supra* note 71.

exclusive, internal claims procedure discussed above.<sup>74</sup>

To establish and enforce this asserted power as receiver to adjudicate creditor claims, the FSLIC, relying on both statutory and regulatory authority, adopted the practice of removing creditor claims initiated in state court to federal court.<sup>75</sup> The agency then moved for their dismissal due to lack of subject matter jurisdiction.<sup>76</sup> The federal judiciary met this strategy with two responses.

In *North Mississippi Savings & Loan Association v. Hudspeth*,<sup>77</sup> the court adopted the FSLIC's interpretation of the relevant federal statutes and regulations. In so doing, the Fifth Circuit firmly endorsed the agency's argument that, as receiver, Congress vested it with the power to determine for itself the validity of creditor claims, hence precluding the jurisdiction of the courts to make independent determinations.<sup>78</sup>

The court in *Hudspeth* held that the FSLIC had exclusive jurisdiction to adjudicate claims made against the assets of an insolvent savings and loan association placed in FSLIC receivership.<sup>79</sup> Any resulting FSLIC determination was then deemed subject to review by the Bank Board, followed by judicial review pursuant to the Administrative Procedure Act.<sup>80</sup> In *Chupik Corp. v. FSLIC*<sup>81</sup> the Fifth Circuit reaffirmed the "Hudspeth doctrine" and a number of courts followed the rule.<sup>82</sup>

However, after more than a year and a half of relatively unquestioned acceptance in the federal courts, the Ninth Circuit Court of Appeals in *Morrison-Knudsen Co. v. CHG International, Inc.*<sup>83</sup> examined the identical statutory and regulatory materials and rejected the *Hudspeth* rule, holding that the FSLIC had absolutely no power to adjudicate creditor claims.<sup>84</sup> Faced with challenges to both the FSLIC's statutory authority to adjudicate claims and the constitutionality of this purported power given the provisions of Article III of the United States Constitution,<sup>85</sup> the court in *Morrison-Knudsen* ex-

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74. *Id.* See *supra* notes 63-70 and accompanying text.

75. See Baxter, *supra* note 71, at 439-40.

76. *Id.*

77. 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

78. *Id.*

79. *Id.* at 1103.

80. *Id.* See *supra* note 13.

81. 790 F.2d 1269 (5th Cir. 1986).

82. See Baxter, *supra* note 71, at 443-45 and cases cited therein.

83. 811 F.2d 1209 (9th Cir. 1987).

84. *Id.* at 1222.

85. Article III provides: "The Judges, both of the supreme and inferior Courts, shall hold

amined the *Hudspeth* interpretation of the relevant federal statutes and Bank Board regulations and found the court's reasoning in *Hudspeth* attenuated and flawed.<sup>86</sup>

In arriving at its conclusion that the FSLIC did not have adjudicatory authority by Congressional delegation, the Ninth Circuit noted that Congress gave the same authority to the Federal Deposit Insurance Corporation (FDIC) as it gave to the FSLIC.<sup>87</sup> However, the FDIC never assumed adjudicatory authority in its capacity as a receiver of failed financial institutions.<sup>88</sup> Therefore, because of Congress' acquiescence in this long-standing FDIC interpretation of its receivership role, the court in *Morrison-Knudsen* was persuaded that the FSLIC did not possess the power to adjudicate creditor claims.<sup>89</sup>

The Ninth Circuit ultimately found that the entire statutory framework strongly suggested that Congress intended the FSLIC to function merely as a receiver, and not as an adjudicator.<sup>90</sup> The court reasoned that had Congress intended the FSLIC to be an adjudicator, it would have devoted substantial attention to both the substantive and procedural rights of creditors as well as the rights, duties, and responsibilities of the FSLIC in the adjudicatory process.<sup>91</sup>

Although Texas is in the Fifth Circuit, it is interesting to note

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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.

Article III vests the judicial power of the United States in courts staffed by judges with life tenure and irreducible compensation. Therefore, since the members of the Bank Board only serve for a limited period of years upon presidential appointment, it is argued that the FSLIC claims adjudication process violates this provision. Furthermore, for the FSLIC, which is generally the principal creditor of an insolvent S&L, to serve as an adjudicator of competing creditor claims, gives rise to significant conflict of interest questions and, hence, due process considerations. See generally Note, *The Adjudicatory Power of the FSLIC Over Claims Involving Savings and Loans in FSLIC Receivership*, 88 COLUMBIA LAW REV. 1325, 1347-61 (1988); Note, *Article III and Due Process Limitations on the FSLIC's Adjudicatory Role During its Receiverships*, 76 GEORGETOWN L.J. 1845, 1852-66 (1988). For a discussion of other constitutional issues raised by the Bank Board and FSLIC procedures, see Baxter, *supra* note 71, at 449.

86. *Morrison-Knudsen*, 811 F.2d at 1216-21.

87. Congress created the FDIC as part of the Federal Reserve Act of 1933. The FDIC insures banks established under the National Bank Act of 1864 as well as other qualified banking organizations. The Comptroller of Currency appoints the FDIC as receiver for insolvent banks. Note, *supra* note 41, at 279.

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

89. *Id.*

90. *Id.* at 1219.

91. *Id.* For an in-depth discussion and analysis of the *Morrison-Knudsen* opinion, see Comment, *Morrison-Knudsen Co. v. CHG International, Inc.: Does Judicial Adjudication Restrain the FSLIC as Receiver?*, 37 CATHOLIC UNIV. L. REV. 511 (1988) and Notes cited *supra* note 85.

that both the court of appeals and the Supreme Court of Texas in *Glen Ridge I Condominiums, Ltd. v. Federal Savings and Loan Insurance Corp.*<sup>92</sup> chose to follow the *Morrison-Knudsen* approach,<sup>93</sup> although basing their decisions on somewhat different reasoning.<sup>93</sup> Neither *Morrison-Knudsen* nor the decisions that followed it directly addressed the issue of the constitutionality of the FSLIC's adjudicatory authority (assuming that it existed). However, in *Glen Ridge I*, the court of appeals, in two carefully reasoned opinions,<sup>94</sup> concluded that Congress did intend to confer adjudicatory authority upon the FSLIC, but that such authority was indeed a violation of Article III.<sup>95</sup> Since the Texas Supreme Court refused to reach the constitutional issue,<sup>96</sup> the court of appeals decision represents the only opinion to date in which a court has directly confronted these underlying constitutional concerns.

The conflict among the circuits concerning whether the FSLIC could adjudicate creditor claims set the stage for the United States Supreme Court's holding in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*<sup>97</sup> In *Coit* the Court stated flatly that the FSLIC did not have the power, under 12 U.S.C. §§ 1464(d)(6)(C) and 1729(b) and (d), to adjudicate creditor claims against the assets of a failed savings and loan association under FSLIC receivership.<sup>98</sup> By so holding, the Court blasted away the very foundation of the Fifth Circuit's decision in *Hudspeth*.<sup>99</sup>

The Court emphasized that the "plain language" of section 1729(b) and (d) could not be read to confer upon the FSLIC the power to adjudicate creditor claims with the force of law.<sup>100</sup> The Court noted, as had the Ninth Circuit in *Morrison-Knudsen*,<sup>101</sup> that it is reasonable to infer that Congress would certainly have enacted more elaborate provisions governing both procedural and substantive rights of creditors and providing for judicial review of decisions if it

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92. 734 S.W.2d 374 (Tex. Ct. App. 1986), *aff'd on other grounds*, 750 S.W.2d 757 (Tex. 1988) (per curiam).

93. For a more detailed analysis of these opinions, see Baxter, *supra* note 71, at 447-49.

94. *Id.* These were two motions for rehearing in the court of appeals.

95. 734 S.W.2d at 386.

96. See *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 750 S.W.2d 757, 758-59 (1988) (affirming the court of appeals' decision on the ground that statutory authority to adjudicate did not even exist).

97. 109 S. Ct. 1361 (1989).

98. *Id.* at 1368.

99. *Id.* at 1369.

100. *Id.*

101. See *supra* note 91 and accompanying text.

intended to confer adjudicatory authority upon the FSLIC in its capacity as receiver.<sup>102</sup>

The Court next addressed whether state and federal courts may exercise jurisdiction over the claims of a creditor of an insolvent savings and loan association of which the FSLIC is appointed receiver. The Court found that, when read in its statutory context, 12 U.S.C. § 1464(d)(6)(A) did not divest either state or federal courts of subject matter jurisdiction to determine the validity of claims against such institutions.<sup>103</sup> Neither did judicial resolution of creditor claims, within the meaning of section 1464(d)(6)(C), "restrain or affect" the FSLIC's exercise of its statutorily mandated receivership function of distributing assets.<sup>104</sup> Furthermore, the Court noted that several other federal statutes<sup>105</sup> indicate that Congress clearly envisaged that the courts had subject matter jurisdiction over creditor suits against the FSLIC as receiver.<sup>106</sup>

Finally, the Court held that creditors need not exhaust the Bank Board's existing administrative claims procedure before filing suit in state court because the procedure was "inadequate."<sup>107</sup> According to the Court, the Bank Board's present regulations establishing the FSLIC claims procedure<sup>108</sup> exceeded its statutorily conferred authority in two respects.<sup>109</sup> First, by purporting "to confer adjudicatory authority on the FSLIC and the Bank Board to make binding findings of fact and conclusions of law which were subject only to judicial re-

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102. 109 S. Ct. at 1369. The Court noted that the statutory provisions that expressly empower the FSLIC and the Bank Board to adjudicate violations of federal law, to issue cease-and-desist orders, to remove officers and directors, and to impose civil sanctions precisely enumerate both the agency procedures to be followed along with the available remedies, making explicit reference to judicial review under the Administrative Procedure Act. See 12 U.S.C. §§ 1464(d)(7)(A), 1730(j)(2) (1982).

103. 109 S. Ct. at 1369-70.

104. *Id.*

105. *Id.* at 1370-71. The National Housing Act of 1934, 12 U.S.C. § 1725(c)(4), provides that the FSLIC can "sue and be sued, complain and defend, in any court of law or equity, State or Federal." The Housing Act of 1954, 12 U.S.C. § 1728(c), amended the NHA by establishing a statute of limitations for suits against the FSLIC to enforce deposit insurance claims (the most common claim in thrift liquidations at that time). Most significantly, Congress expressly granted subject matter jurisdiction to state courts by its passage of 12 U.S.C. § 1730(k)(1) (1982) (the same statute that contains the "restrain or affect" language of 12 U.S.C. § 1464(d)(6)(C) (1982)). The proviso clause of 12 U.S.C. § 1730(k)(1) points out the types of suits Congress expected the FSLIC to defend in state courts, according to the Court. These suits include actions by creditors against the FSLIC as receiver of state-chartered thrifts.

106. 109 S. Ct. at 1371.

107. *Id.* at 1375-76.

108. See, e.g., 53 Fed. Reg. 43853, 43856, 43858 (1988) to be codified at 12 C.F.R. §§ 575.1, 575.13(o)(6), 576.5(e).

109. 109 S. Ct. at 1375.

view, presumably under the Administrative Procedure Act, the regulations deprived creditors of *de novo* judicial determination" of their claims.<sup>110</sup> Second, the Bank Board's regulations failed to "place a clear and reasonable time limit<sup>111</sup> on the FSLIC's consideration of whether to pay, settle, or disallow [creditor] claims."<sup>112</sup>

While Justices Blackmun and Scalia concurred in the majority's opinion that the FSLIC did not have adjudicatory authority, they shared differing views from both the majority and one another concerning the exhaustion of remedies issue.<sup>113</sup> Justice Blackmun felt that the majority's opinion on the exhaustion issue amounted to nothing more than an advisory opinion, based on a guess of what the Bank Board might someday conclude it must do pursuant to 12 U.S.C. § 1729(b)(1)(A)(v), to liquidate insolvent thrifts "in an orderly manner."<sup>114</sup>

Justice Scalia, on the other hand, expressed the view that *Coit* "is not about exhaustion, it is about preemption."<sup>115</sup> He opined that there existed neither any precedent nor any sound policy justification for using the doctrine of exhaustion as a basis for preempting state law and imposing upon the Bank Board the obligation to enumerate by rule a specific time period within which the FSLIC must act upon creditor claims.<sup>116</sup> Thus, while he joined "in the reversal of the decision below,"<sup>117</sup> Justice Scalia did so "on the more categorical ground that FSLIC's claim procedures cannot preempt the filing of suits

110. *Id.*

111. *Id.* The Court agreed with *Coit* that the FSLIC claims adjudication procedure "give[s] FSLIC virtually unlimited discretion to bury claims like *Coit*'s in the administrative process." 109 S. Ct. at 1375. As of the date of oral argument, *Coit*'s claim had been pending before the FSLIC for over 13 months, yet the agency had not even made its initial determination. In the words of Justice O'Connor: "Since the Bank Board itself can take six months to dispose of any appeal, *Coit*'s claim has essentially been relegated to a 'black hole' from which it may not emerge before the statute of limitations on *Coit*'s state law claims has run." *Id.*

Also, it is interesting to note in light of this portion of the Court's holding, that on March 22, 1989 (the day after the *Coit* decision came down), the Bank Board issued "a rule requiring that no person may sue the FSLIC as receiver for a savings institution unless the person has presented written notice to the receiver. . . and afforded the receiver 180 days in which to evaluate any potential claims." 54 Fed. Reg. 12414 (1989).

112. 109 S. Ct. at 1375.

113. *Id.* at 1376-78.

114. *Id.* at 1376. The majority, however, was of the opinion that "[i]n our view, it is incorrect to characterize our exhaustion analysis in this section as a ruling that the enabling legislation of FSLIC and the Bank Board 'preempts' state law." *Id.* at 1375.

115. *Id.* at 1376.

116. *Id.* at 1376-77.

117. *Id.* at 1378. Note that *Coit*'s claims were state law claims. See *supra* notes 4-8 and accompanying text.

under state law."<sup>118</sup>

The *Coit* decision may have created as many questions for the practicing attorney as it answered. For example, first, is the six month (180 day) time limit provided by the Bank Board in 54 Fed. Reg. 12414<sup>119</sup> "a reasonable time limit"<sup>120</sup> within the meaning of *Coit*? Second, does the Bank Board's promulgation of 54 Fed. Reg. 12414 resurrect the FSLIC's formerly "inadequate" claims procedure and mean that creditors must now exhaust the newly defined administrative remedies before filing suit in court? Third, does *Coit* mean that all those claims that have been lingering for more than six (6) months are now subject to judicial review if the plaintiff creditors desire to file suit?<sup>121</sup> Fourth, will *Coit* cause unprecedented administrative and financial hardship on the federal receiver<sup>122</sup> so that the agency will be unable to perform its most fundamental and important congressio-

118. *Id.* The Court failed to address the case in which a state statute of limitations expired during a "reasonable waiting period established by FSLIC." *Id.* at 1375.

119. See *supra* note 111.

120. *Coit* could very well create a wave of complex and extended litigation. See Wall Street J., Mar. 22, 1989 at A8, col. 1. "It [the *Coit* decision] sounds like an administrative nightmare," said Ronald Glancz, a Washington-based banking attorney. "It's a free-for-all. Everybody goes to court." *Id.* For cases decided after *Coit*, see Sandia Fed. Sav. & Loan Ass'n v. FSLIC, 109 S. Ct. 2058 (1989); Zohdi v. FSLIC, 109 S. Ct. 1633 (1989); FSLIC v. Quality Inns, Inc., 876 F.2d 353 (4th Cir. 1989); FSLIC v. Bonfanti, 870 F.2d 1032 (5th Cir. 1989); NPSA Serv. Corp. v. Indep. Amer. Ass'n, FSLA, 868 F.2d 1415 (5th Cir. 1989); Buckner Dev. Group v. First Sav. & Loan of Burkburnett, Texas, 873 F.2d 858 (5th Cir. 1989); Tax Invs., Ltd. v. FSLIC, 1989 U.S. Dist. Lexis 8991 (N.D. Ill. 1989); Valley Ranch Dev. Co. v. Sunbelt Sav. FSB, 714 F. Supp. 817 (N.D. Tex. 1989); Michael Gulley v. Sunbelt Sav. FSB, 714 F. Supp. 819 (N.D. Tex. 1989); FSLIC v. Joseph Coleman, 1989 W.L. 65153 (D. Colo. 1989); FSLIC v. 52 Park Assoc., 710 F. Supp. 49 (S.D.N.Y. 1989); Shepherd Fin. Group v. FSLIC, 709 F. Supp. 735 (N.D. Tex. 1989); Continental Casualty Co. v. Allen, 710 F. Supp. 1088 (N.D. Tex. 1989); Woodlands II and the Creek Homeowners Ass'n, Inc. v. City Sav. & Loan Ass'n of San Angelo, 703 F. Supp. 604 (N.D. Tex. 1989); *In re* Hunter, 100 Bankr. 321 (Bankr. S.D. Tex. 1989); *In re* University Drive Professional Complex, Inc., 1989 Bankr. Lexis 916 (Bankr. S.D. Fla. 1989).

The FDIC, as the FSLIC's successor, is said to be "playing hardball" in attempting to keep creditor claims out of court. See S&L Resolution Report (BNA) vol. 0, no. 0 at 19-28 (Sept. 5, 1989). For example, on August 9, 1989, the Fifth Circuit Court of Appeals heard oral argument concerning whether plaintiffs' claims against S&Ls which have been placed in receivership are moot because there are no assets left to distribute. Triland Holdings & Co. v. Fed. Sav. & Loan Ins. Corp., No. 89-1026 (5th Cir. 1989). For a discussion of this and other cases articulating the federal receivers' desperate but ingenious new arguments, see *supra* this note, S&L Resolution Report.

FDIC General Counsel John Douglas estimated that the FDIC is currently involved in approximately 70,000 active lawsuits, including cases assumed from the FSLIC. *Id.* Speaking at an August 25, 1989 Federal Bar Association meeting in Washington, D.C., Douglas said he believes the FDIC can dispense with half of these cases within a year, by using already existing agency powers and powers granted to it by the FIRREA. *Id.*

121. See *supra* note 120 for post-*Coit* decisions.

122. See *supra* note 40.

nally mandated task of protecting thrift depositors from the loss of their savings?

*Coit* quite simply demands a legislative remedy. By its decision in *Coit*, the Supreme Court effectively usurped an admittedly procrastinating Congress' legislative responsibility. Although not specifically addressed in *Coit*, because of the vagueness and ambiguity inherent in the complex statutory scheme involved, the constitutional concerns<sup>123</sup> will continue to hover over any substantive receiver role in the creditor claims adjudication process.<sup>124</sup>

What effect *Coit* will have on President Bush's "S&L bailout plan" is unclear.<sup>125</sup> The Bush plan establishes a claims procedure similar to the one set up by the Bank Board prior to the *Hudspeth* decision, which gave the Bank Board considerably broader power.<sup>126</sup> Congress, through its approval of the Bush plan,<sup>127</sup> could very well have formulated a claims procedure that will avoid both the pitfalls that the high court found in the Bank Board and the FSLIC procedures,<sup>128</sup> as well as one which can survive a constitutional challenge.<sup>129</sup>

Both the ambiguity of the existing statutory scheme and the need to maintain the viability of the federal receiver<sup>130</sup> in light of the current thrift predicament accentuate the need for Congress to immediately clarify its intent as to the role of the receiver in the adjudication of creditor claims. A just and expedient resolution of the "savings and loan crisis," as well as the future of the federal receiver as a strong, efficient, and effective federal agency, depend upon it. In the meantime, *Coit* certainly promises to keep the courts jam-packed with

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123. See *supra* note 85 and accompanying text.

124. See 109 S. Ct. at 1371. Because it concluded that Congress never intended to empower the FSLIC with adjudicatory authority, it was unnecessary for the Court to reach any of the constitutional challenges raised by *Coit*. The Court did note, however, that both the usury and breach of fiduciary duty claims raised by *Coit* involved "private rights" which are at the "core" of "matters normally reserved to article III courts." *Id.*

125. See Wall Street J., Mar. 22, 1989, at A8, col. 1. See also N.Y. Times, Mar. 22, 1989, at D1, col. 6.

126. See Wall Street J., Mar. 22, 1989, at A8, col. 1.

127. See *supra* note 40.

128. *Id.* For a summary and explanation of the newly created claims procedure, see Banking Report (BNA) at 14, *supra* note 40. See also Fed. Banking L. Rep., *supra* note 40 at ¶ 2212, § 212. Whether this claims procedure can survive the *Coit* Court's scrutiny remains to be seen.

129. See Baxter, *supra* note 71.

130. See *supra* note 40.

both government receiver and S&L creditor attorneys.<sup>131</sup>

*J. Michael Pickens*

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131. To remain abreast of matters concerning all facets of the thrift crisis resolution, see BNAP's S & L Resolution Report, *supra* note 120.

