Fordham Law Review

Volume 63 | Issue 6 Article 10

1995

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Dierdre M. Roarty

RESOLVING PRE-RECEIVERSHIP CLAIMS AGAINST FAILED SAVINGS AND LOANS: AN UNNECESSARILY EXHAUSTING EXPERIENCE

DEIRDRE M. ROARTY

INTRODUCTION

In 1988, Davey Developer borrowed funds from the Risky Business Savings Association to finance his new project, the Hundred Acre Woods Housing Development. The Hundred Acre Woods was developed according to a master plan[1] and each deed contained a series of covenants and restrictions on the lots. The restrictions required Davey Developer to provide certain amenities such as a sewer system and a community golf course. Prior to completing his obligations under the covenants, Davey Developer experienced financial difficulties and was no longer able to make payments to Risky Business on his loan. As a result, Risky Business foreclosed on the unsold lots of Hundred Acre Woods, and Davey and Hundred Acre Woods filed for bankruptcy.

Risky Business subsequently acquired title to the unsold lots during the bankruptcy auction. When Risky Business failed to fulfill the covenants under the master plan restrictions, one of the land owners, Christopher Robin,[2] brought suit in state court against the savings association for damages or, in the alternative, for injunctive relief to enforce the covenants.

Risky Business, meanwhile, experienced some financial difficulties of its own.[3] In response, the Office of Thrift Supervision ("OTS")[4]

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1. Davey Developer created the master plan and imposed the restrictions on the property. The deed to each lot contained the covenants placed on the property, and each purchaser was aware that all lots were to be developed according to these restrictions.

2. Like Christopher Robin, who explored the Hundred Acre Woods in A. A. Milne's children's classic *Winnie-The-Pooh*, our Robin is about to enter into an "impenetrable thicket . . . a veritable jungle of linguistic fronds and brambles." Marquis v. FDIC, 965 F.2d 1148, 1151 (1st Cir. 1992). Unfortunately for Robin, he probably will not find such amiable playmates as Pooh and Eeyore during his adventure in litigation with the RTC. *See* A. A. Milne, Winnie-the-Pooh (1926).

3. For example, Risky Business may have taken advantage of changes in the banking law that allowed savings associations to lend to commercial real estate developers, thus changing their principal business from home mortgage lending to commercial real estate financing. *See* 12 U.S.C. § 1464(c) (1988 & Supp. V 1993) (setting forth the regulations and limitations governing the operations of federally insured thrift associations); *see also* Carl Felsenfeld, *The Savings and Loan Crisis*, 59 Fordham L. Rev. s7, s32 (1991) (commenting on the changes in thrift regulation in the early 1980s). Professor Felsenfeld wrote:

> [In 1982], Congress gave the federal S&Ls powers enabling them to engage in activities well beyond their basic and traditional business of making resi-

appointed the Resolution Trust Corporation ("RTC")[5] conservator[6] for Risky Business. Even under the guidance of the RTC, Risky Business continued its downward slide. Two months later, because Risky Business was unable to meet its obligations to its depositors, the RTC was appointed receiver.[7] The RTC assumed all of Risky Business' assets and liabilities, including Robin's lawsuit against Risky Business.[8]

As part of its duties as receiver, the RTC substituted itself as defendant in all lawsuits brought against Risky Business.[9] Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[10] the RTC sent Robin notice of its appointment and the cut-off date for submission of claims for RTC review.[11] Robin did not file his claim with the RTC, because he believed that his pending lawsuit against Risky Business provided the RTC with sufficient notice of the claim. Three months after the cut-off date, the RTC agreed to accept an amended service of process and filed various pre-

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dential real estate mortgage loans. Essentially, they were becoming more like banks. The powers granted by Congress in 1980 included authorization to make loans, up to twenty percent of their assets, on the security of first liens on commercial real estate .... In 1982 the new powers were expanded. The most noteworthy were the authorization to make secured commercial loans up to forty percent of assets, and to make unsecured commercial loans up to [10%] of assets.

Id. at s33. Thus, Congress attempted to meet the needs of the thrift industry by allowing savings and loans to diversify their loan portfolios.

Unfortunately, many high risk applicants who ought to have been rejected were approved for commercial loans. *See id.* at s33-34. When the real estate market collapsed in the late 1980s, many of Risky Business' commercial borrowers defaulted on their loans. Risky Business, which foreclosed on, and then acquired title to, many of these properties, quickly became financially unstable because, while it held a massive amount of property, little cash was coming in to replenish the amounts necessary to cover obligations to depositors.

4. 12 U.S.C. § 1462a(a) (Supp. V 1993) (establishing the OTS).

5. *See* Pub. L. 101-73, 103 Stat. 183, 369 (codified at 12 U.S.C. § 1441a(b) (Supp. V 1993)) (creating the Resolution Trust Corporation as an agency of the U.S. government to act as conservator and receiver for insured depository institutions).

6. A conservator is appointed to handle the day-to-day operations of a savings and loan. The RTC or FDIC may take whatever actions are necessary to make the savings and loan solvent and to conserve assets. *See* Barry S. Zisman, Banks & Thrifts: Government Enforcement and Receivership § 15.06 (6)(d) (1994).

7. A receiver is appointed to liquidate the assets and to resolve the affairs of a failed savings and loan. *See id.* § 15.07(2).

8. This hypothetical is based loosely upon the facts of Brady Dev. Co. v. RTC, 14 F.3d 998 (4th Cir. 1994).

9. Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, the RTC may intervene as a matter of right in actions involving a failed savings and loan for which it was appointed receiver. Fed. R. Civ. P. 24(a)(2). Furthermore, under 12 U.S.C. § 1441a(l)(2) (Supp. V 1993), the RTC may be substituted as a party in all actions in which the savings and loan was a party.

10. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.).

11. 12 U.S.C. § 1821(d)(3)(B) (Supp. V 1993) (requiring the RTC to notify claimants by either mail or publication of its appointment as receiver and the date by which claimants must submit proof of their claims for administrative review by the RTC).

trial motions in the lawsuit. The RTC agreed to this despite the fact that its current interpretation of FIRREA would bar Robin from asserting his claim, either administratively or judicially, due to his failure to submit his claim before the cut-off date. One year later, the RTC filed a motion to dismiss, stating that under FIRREA the court lacked subject matter jurisdiction over claims against a failed savings and loan when such claims had not first been submitted to the RTC for administrative review.

The scenario described above is a common one, and it raises a jurisdictional question unique to litigation in which either the RTC or the Federal Depository Insurance Corporation ("FDIC") acts as receiver. Recently, the circuit courts have split on whether FIRREA requires a pre-receivership claimant—someone in Robin's position—to exhaust administrative remedies[12] before continuing a claim in court. Under the RTC's interpretation, Robin is required to exhaust administrative remedies before a court may exercise subject matter jurisdiction. If he need not exhaust administrative remedies, as the Fifth Circuit has held, then he may continue in court, and the court may find that the RTC waived its right to an administrative remedy. The majority of courts have agreed with the RTC and concluded that because FIRREA permits the RTC to determine claims against it administratively, claimants must submit to the administrative process before courts can exercise subject matter jurisdiction.[13] The Fifth Circuit, however, has concluded that Congress merely provided the RTC with the option of determining claims administratively, and did not divest courts of subject matter jurisdiction over pre-receivership claims.[14] This Note concludes that the Fifth Circuit's interpretation of FIRREA's limitations on subject matter jurisdiction is most consistent with the intent of Congress.

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12. Exhaustion of administrative remedies requires a claimant to file a claim and a submission of proof with the RTC within a specified period of time prior to filing the claim in court. The claimant then must wait for the RTC to decide whether it will honor the claim. The claimant then may request agency review of an adverse decision, or may seek a judicial resolution of the claim. *Id.* § (d)(3)(B), (d)(5)-(d)(7).

13. *See* Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 39 F.3d 292, 295 (11th Cir. 1994); Brady Dev. Co. v. RTC, 14 F.3d 998, 1005-06 (4th Cir. 1994); Bueford v. RTC, 991 F.2d 481, 484 (8th Cir. 1993); Henderson v. Bank of New England, 986 F.2d 319, 320-21 (9th Cir.), *cert. denied*, 114 S.Ct. 559 (1993); Marquis v. FDIC, 965 F.2d 1148, 1151-52 (1st Cir. 1992); RTC v. Elman, 949 F.2d 624, 627 (2d Cir. 1991); RTC v. Mustang Partners, 946 F.2d 103, 106 (10th Cir. 1991); Rosa v. RTC, 938 F.2d 383, 391 (3d Cir.), *cert. denied*, 112 S.Ct. 582 (1991).

14. *See* Whatley v. RTC, 32 F.3d 905, 908 (5th Cir. 1994). *But cf.* Carney v. RTC, 19 F.3d 950, 958 (5th Cir. 1994) (holding that exhaustion of administrative remedies is required in actions for non-monetary relief).

The *Whatley* decision does not distinguish the type of relief sought in determining whether the statute requires exhaustion. This is the better approach because other sections of FIRREA explicitly prohibit courts from granting injunctive relief to claimants. *See* 12 U.S.C. § 1821(j) (Supp. V 1993). Consequently, the type of relief sought should not be a consideration in determining subject matter jurisdiction.

Part I of this Note introduces the sections of FIRREA that are the source of the exhaustion requirement controversy. This part first presents a brief history of savings and loan regulation. This part then examines the powers given to the RTC under FIRREA in its role as receiver. Finally, this part discusses the administrative claims process and the exhaustion requirement prior to the enactment of FIRREA. Part II discusses whether FIRREA, generally, provides for different treatment of pre- and post-receivership claims. This part reviews several cases that are representative of the analysis that both the RTC and a majority of courts used to determine that FIRREA does not allow pre-receivership claimants to proceed directly to judicial determination of their claims. Part II then discusses the decision in *Whatley v. RTC*,[15] in which the Fifth Circuit held that FIRREA does not require pre-receivership claimants to exhaust administrative remedies because the statute differentiates between pre- and post-receivership claims.[16] This part concludes that the Fifth Circuit's interpretation is correct and that FIRREA does create a dichotomy between pre- and post-receivership claimants. Part III offers an alternative analysis for determining that FIRREA does not require pre-receivership claimants to exhaust administrative remedies. This part examines the conflicting views on whether the RTC may waive its right to determine claims administratively. If the RTC's right to administrative review is waivable, the RTC may not assert a court's lack of subject matter jurisdiction over a plaintiff's claim when the RTC causes a plaintiff to fail to exhaust the administrative process. This part concludes that because FIRREA does not vest exclusive or primary jurisdiction in the administrative processes, the RTC's right to administrative review of claims is waivable. This Note concludes that FIRREA does not require pre-receivership claimants to exhaust administrative remedies to preserve a court's subject matter jurisdiction, but rather, the RTC must act affirmatively to delay judicial proceedings in favor of the administrative process.

In March, the RTC announced that it had sold the last group of savings and loan associations under its control.[17] Because the RTC is statutorily prohibited from accepting new savings and loans into its receivership program after July 1, 1995,[18] the agency is expected to quietly disappear within the next few months. The FDIC, however, will continue to act as receiver for all failed depository institutions. Although this Note focuses on those cases involving the RTC as re-

15. 32 F.3d 905 (5th Cir. 1994).

16. *Id.* at 910; *see infra* notes 156-72 and accompanying text.

17. Jack Mazzeo, *Thrift Agency Sells Last Group of S&Ls Under Its Control*, Wall St. J., March 14, 1995, at B12.

18. Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, 107 Stat. 2369 (codified at 12 U.S.C. § 1441a (Supp. V 1993)).

ceiver, the conclusions reached are equally applicable to lawsuits involving the FDIC.[19]

I. RTC AS RECEIVER

FIRREA represents the government's most ambitious attempt to regulate the commercial banking and thrift[20] industries since the 1930s. As the complex and painstakingly detailed nature of § 1821(d) demonstrates, Congress was attempting to address every potential problem the RTC or FDIC might encounter while resolving failed financial institutions. This part concludes, however, that the language of § 1821(d) shows that Congress did not take the opportunity when drafting FIRREA to make exhaustion a statutory requirement. Therefore, the courts must decide whether § 1821(d), which sets forth the claims process and the limitations on judicial review of claims,[21] implies an exhaustion requirement.

A. *History of the RTC's Powers*

At the time of the Great Depression, the primary business of savings and loans was providing financing to individual borrowers seeking to purchase homes.[22] When many of these borrowers lost the ability to repay their loans,[23] the savings and loans were faced with serious cash flow deficiencies, which led to an inability to meet their own obligations.[24] At the same time, commercial banks sought repayment of funds that had been lent to the savings and loans.[25] As a

19. 12 U.S.C. § 1821(d) applies to both the RTC and the FDIC. *See id.* § 1441a(b)(8) (Supp. V 1993).

20. The term "thrift" is a generic term for a savings bank or savings and loan association. The term will be used interchangeably with the term "savings and loan" for the purposes of this Note.

21. Section 1821(d) provides in pertinent part:

> [T]he claimant may request administrative review of the claim . . . or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(6)(A) (Supp. V 1993).

Section 1821(d)(13)(D) further states that, except as otherwise provided, "no court shall have jurisdiction over—(i) any claim or action . . . seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver." *Id.* § 1821(d)(13)(D).

22. Wayne M. Josel, Note, *The Resolution Trust Corporation: Waste Management and the S&L Crisis*, 59 Fordham L. Rev. s339, s340 (1991).

23. *See* Felsenfeld, *supra* note 3, at s7.

24. *See* Lucia J. Mandarino, Note, *Too Many Consonants and Not Enough Consonance: The Development of the S&L Regulatory Framework*, 59 Fordham L. Rev. s263, s267 (1991).

25. Felsenfeld, *supra* note 3, at s8. "In order to reverse this trend, S&Ls were forced to offer higher rates of interest on deposits than they were receiving on mortgage payments." *Id.* The savings and loans began to borrow from commercial banks to

result, many savings and loans became insolvent,[26] and by 1932, the industry was on the verge of complete collapse.[27] In response to this crisis, the federal government passed a host of regulatory measures designed to prevent the thrift industry from collapsing, as well as to renew consumer confidence in American business and industry.[28]

In 1932, Congress enacted the Federal Home Loan Bank Act ("FHLBA"), creating the federal savings and loan system.[29] One of the purposes of the FHLBA was to lend money to savings and loans and other mortgage lenders, thereby restoring much needed liquidity to the thrift industry.[30] Congress also created the Federal Home Loan Bank Board to oversee the operations of the branch banks.[31]

The Bank Board's powers under the Home Owners' Loan Act of 1933 ("HOLA")[32] included the general ability to "prescribe rules and regulations for the organization, consolidation, merger or liquidation" of federal savings and loan associations.[33] Among the specific powers granted to the Bank Board was the power to appoint receivers for troubled thrifts. In 1934, Congress passed legislation creating the Federal Savings and Loan Insurance Corporation ("FSLIC") to act as, among other things, the chief receiver under the direction of the Bank Board.[34]

These entities successfully supported the thrift industry for the next forty-five years.[35] In the late 1970s and throughout the 1980s, however, the savings and loan industry experienced a major period of cri-

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cover depositor withdrawals. These loans were to be repaid from incoming receipts. After the Stock Market Crash of 1929, commercial banks found themselves short of cash and called the loans to the savings and loans. Mandarino, *supra* note 24, at s267.

26. Felsenfeld, *supra* note 3, at s8 ("When the banks called the loans, they thereby reduced the liquidity of the S&Ls, and, consequently, the S&Ls ability to lend and finance."). This liquidation of the savings and loans caused depositors to panic and eventually caused a "run" on deposits. This led to a crisis in both the commercial banking and savings and loan industries. Mandarino, *supra* note 24, at s267.

27. *See* Felsenfeld, *supra* note 3, at s7; Mandarino, *supra* note 24, at s267.

28. Felsenfeld, *supra* note 3, at s8; Marjorie I. Stein, Note, *Resolution Trust Corporation*, 13 Ann. Rev. Banking L. 57, 57 (1994) (noting that in the 1930s, because of the failure of a large number of thrifts and lack of consumer confidence, Congress passed legislation to strengthen and regulate savings and loans).

29. Federal Home Loan Bank Act, Pub. L. No. 304, Ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988 & Supp. V 1993)); *see* Felsenfeld, *supra* note 3, at s8; Zisman, *supra* note 6, § 15.04.

30. *See* Zisman, *supra* note 6, § 15.04.

31. Federal Home Loan Bank Act, Pub. L. No. 304, Ch. 522, § 17, 47 Stat. 725, 736-37; *see* Zisman, *supra* note 6, § 15.04.

32. Home Owners' Loan Act of 1933, Pub. L. No. 43, Ch. 64, 48 Stat. 128 (codified as amended in 12 U.S.C. §§ 1461-1470 (1988 & Supp. V 1993)).

33. Zisman, *supra* note 6, § 15.04.

34. *See* National Housing Act, Pub. L. No. 479, Ch. 847, § 402(a), 48 Stat. 1246, 1256 (1934) (codified at 12 U.S.C. §§ 1724-1730i (1988) (repealed Pub. L. No. 101-73, § 401(a), 103 Stat. 354-63 (1989)) (codified at 12 U.S.C. § 1437 (Supp. V 1993))).

35. Felsenfeld, *supra* note 3, at s8.

sis.[36] During the 1980s almost two thirds of the nation's thrift institutions failed or merged because of insolvency.[37] There were several causes for this second crisis: the economic stagnation of the late 1970s, the deregulation of the 1980s, and widespread mismanagement and fraud.[38] In 1989, the federal government passed legislation in response to the savings and loan crisis—Congress enacted FIRREA[39] to address the growing problems of the thrift industry, which prior legislation seemed incapable of resolving.

FIRREA created the OTS to replace the Bank Board.[40] The OTS was to act as the "primary federal regulator of all federal and state savings associations."[41] FIRREA also formally dissolved the FSLIC,[42] which was insolvent by the time this new legislation was enacted.[43] The RTC assumed the FSLIC's role as receiver for failed savings and loans.[44]

Because of the large number of failed thrifts, FIRREA also created the RTC as a temporary agency to resolve the bulk of the savings and loan associations in receivership.[45] Congress charged the agency with the task of resolving the savings and loan crisis in the most efficient and cost-effective manner possible.[46] To accomplish this task, the RTC takes over insolvent thrifts, selling the thrift's assets so that it then may distribute the proceeds to creditors and shareholders.[47]

The RTC is under the general supervision of the FDIC,[48] and was originally scheduled to dissolve on August 9, 1992.[49] Due to the continuing problems within the thrift industry, as well as internal turmoil

36. *Id.* (noting that after 45 years of success, from the 1930s through the 1970s, the savings and loan industry collapsed and is "the dominant financial disaster of our—and perhaps any—time").

37. *Id.* at s20 (noting that by the early 1980s large losses replaced earnings, as the savings and loan industry's return on assets averaged -0.42% from 1980-82).

38. *See id.* at s38-49; Josel, *supra* note 22, at s340-42; Stein, *supra* note 28, at 58.

39. *See* Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 & 15 U.S.C.).

40. 12 U.S.C. § 1462a(a) (Supp. V 1993); *see* Pub. L. No. 101-73, § 401(a)(2), 103 Stat. 354 (1989) (codified at 12 U.S.C. § 1437 (Supp. V 1993)) (abolishing the Federal Home Loan Bank Board).

41. Vickie O. Tucker et al., *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts*, 25 U. Rich. L. Rev 1, 3 (1990); *see* 12 U.S.C. § 1462a(a).

42. *See* Pub. L. No. 101-73, § 401(a), 103 Stat. 183, 354 (codified at 12 U.S.C. § 1437 (Supp. V 1993)).

43. Josel, *supra* note 22, at s341-42 ("By the end of 1988, the General Accounting Office, Congress' investigatory agency, estimated that the FSLIC was insolvent by at least $56 billion.").

44. 12 U.S.C. § 1441a(b)(3)(A)(i) (Supp. V. 1993).

45. Tucker, *supra* note 41, at 4; *see* 12 U.S.C. § 1441a(b)(3); Stein, *supra* note 28, at 59.

46. 12 U.S.C. § 1441a(b)(3)(C) (Supp. V 1993); *see also* Josel, *supra* note 22, at s345-47 (discussing the process of resolving failed thrifts).

47. Stein, *supra* note 28, at 59.

48. 12 U.S.C. § 1441a(b)(8) (Supp. V 1993); Tucker, *supra* note 41, at 4.

49. *See* Pub. L. No. 101-73, § 501a(b)(3)(iii), 103 Stat. 183 (1989).

at the RTC,[50] however, Congress extended the term of the RTC until July 1, 1995,[51] at which time the FDIC is to resume responsibility for resolving the affairs of any savings and loan associations still in receivership.[52]

B. *The Receivership Process and The RTC's Power Under FIRREA*

The OTS has the exclusive power under FIRREA to appoint conservators and receivers for federal savings and loan associations.[53] The OTS may appoint a receiver without giving notice to the association, if any of the following conditions, among others, exist: the assets are less than obligations to creditors; there has been a substantial dissipation of assets or earnings due to violations of law or regulations, or to any unsafe or unsound business practice; the association is operating in an unsafe or unsound business condition, including having insufficient capital; or, the association is not likely to be able to pay its obligations or meet the demands of its depositors.[54]

A receiver is appointed to liquidate the assets and to resolve the affairs of a failed savings and loan.[55] FIRREA empowers the RTC to act as a receiver for failed savings and loan associations by allowing the RTC to exercise the powers available to the FDIC under the Federal Depository Insurance Act.[56] The RTC succeeds to all rights, ti-

50. While the RTC has now resolved all of the depository institutions in its receivership program, *see* Mazzeo, *supra* note 17 and accompanying text, the agency has been the subject of much criticism and some scandal. There have been serious allegations that waste and mismanagement within the agency have led to the extraordinary cost and delay in resolving the S&L crisis. For example, in 1993 it was reported that the RTC failed to properly monitor temporary workers from Price Waterhouse, which was under contract to audit Home Federal Savings, a failed S&L in San Diego. The RTC allegedly paid 67¢ per photocopy and paid the temporary workers $35 per hour. The average cost of photocopying was 12-15¢ per page, and RTC officials alleged that Price Waterhouse was billed only half of what it charged the RTC for the temporary labor. John Connor, *Price Waterhouse Copying Charges Stir RTC Review*, Wall St. J., Feb. 16, 1993, at B11A. In addition, for most of 1992 and 1993, the RTC received no federal funding. This lack of funding hampered its ability to sell the assets in its portfolio and resolve the remaining thrifts. Stein, *supra* note 28, at 59.

51. Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, § 7(b), 107 Stat. 2369 (1993) (codified at 12 U.S.C. § 1441a(m)(1) (Supp. V 1993)).

52. 12 U.S.C. § 1441a(m)(1).

53. 12 U.S.C. § 1464(d)(2)(B) (Supp. V 1993). For an in-depth discussion of the claims resolution process, see Tucker, *supra* note 41.

54. 12 U.S.C. § 1464(d)(2)(A)-(B) (Supp. V 1993); *id.* § 1821(c)(5).

55. *Id.* § 1821(c)(2)(A)(ii); Tucker, *supra* note 41, at 24.

56. *See* 12 U.S.C. § 1441a(b)(4)(A) (Supp. V 1993). The statute provides:

> Except as provided in paragraph (5) and in addition to any other provision of this section, the [RTC] shall have the same powers and rights to carry out its duties with respect to the institutions described in paragraph (3)(A) as the Federal Deposit Insurance Corporation has under sections 1821, 1822 and 1823 of this title [the Federal Deposit Insurance Act] with respect to insured depository institutions.

tles, powers, and privileges of the association[57] and takes possession of the association's assets subject to all rights, equities, liens, and encumbrances that existed prior to its appointment.[58] In other words, the receiver is said to stand in the shoes of the insolvent thrift and may assert all of the rights of that entity.[59]

Among the specific powers of the RTC as receiver are the following: to merge or transfer assets and liabilities;[60] to obtain a stay in judicial proceedings;[61] to litigate any appealable judgment in place of the association with all of the rights available to the association and the additional rights available to the RTC—including the right to remove litigation to federal court;[62] the right to evaluate claims of creditors of failed savings and loans;[63] and, the right to liquidate the assets of the thrift and distribute the proceeds to creditors and shareholders.[64] The powers at issue in this Note's analysis of the exhaustion question are the right of the RTC to obtain a stay, to litigate in place of the insolvent thrift and the right to evaluate claims against the failed savings and loan.

C. *Claims Procedure*

Even before the passage of FIRREA, courts questioned whether a plaintiff's exhaustion of administrative remedies was a condition precedent to their exercising subject matter jurisdiction. Prior to the enactment of FIRREA, the FSLIC claimed that it had exclusive authority under the banking laws to adjudicate claims against thrifts in receivership.[65] There are two pre-FIRREA cases addressing this issue: the first, a circuit court decision upholding the exhaustion requirement; the second, a Supreme Court decision rejecting the administrative exhaustion requirement. While Congress addressed some of the Court's concerns regarding the adequacy of the administrative procedures when drafting FIRREA, Congress did not use that opportunity to make exhaustion a statutory requirement.

In 1985, the Fifth Circuit held, in *North Mississippi Savings and Loan Ass'n v. Hudspeth*,[66] that trial courts lacked subject matter juris-

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Id. Thus, although § 1821 specifically refers only to the FDIC, the RTC acts under the provisions of the statute as well.

57. 12 U.S.C. § 1821(d)(2)(A)(i) (Supp. V 1993).

58. *See id.* § 1821(d)(2)(B) (empowering the RTC to take control of the assets and operations of failed savings and loans).

59. *See* Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561, 571 (1989).

60. 12 U.S.C. § 1821(d)(2)(G) (Supp. V 1993).

61. *Id.* § 1821(d)(12)(A).

62. *Id.* § 1821(d)(13)(B).

63. *Id.* § 1821(d)(3)(A).

64. *Id.* § 1821(d)(2)(E).

65. *See* Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561, 572 (1989); North Mississippi Sav. and Loan v. Hudspeth, 756 F.2d 1096 (5th Cir. 1985).

66. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985).

diction over claims against failed savings and loans.[67] Changes in Mississippi's banking laws forced the savings association involved to obtain FSLIC insurance.[68] The FSLIC refused to insure the thrift unless Hudspeth, the thrift's president, was replaced.[69] Hudspeth stepped down, and the savings association began making regular monthly payments—termed "deferred compensation"—to him.[70] After paying Hudspeth for almost five years, North Mississippi Federal Savings and Loan filed an action in state chancery court for a declaration that the contract either did not exist or was terminable.[71] One year after North Mississippi filed its action, the Bank Board named the FSLIC receiver for North Mississippi.[72] The FSLIC removed the action to federal court where its motion for dismissal was granted.[73]

The court in *Hudspeth* held that once North Mississippi was placed in receivership, "all of Hudspeth's claims [were] switched to the administrative track by § 1464(d)(6)(C)."[74] According to § 1464(d)(6)(C), "[E]xcept as otherwise provided in this subsection, no court may . . . except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver."[75] In reaching its decision, the court accepted the FSLIC's contention that "resolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets."[76] The court found that such a delay would amount to a restraint in violation of § 1464(d)(6)(C), and therefore, the lower court lacked subject matter jurisdiction over the claim.[77] According to the court, the viability of claims against failed thrifts was to be determined first through the administrative claims process, subject only later to judicial review.[78]

By 1988, the Bank Board had established an elaborate set of procedures for determining creditor claims.[79] These procedures required the FSLIC to notify potential claimants of their right to file a proof of claim within a specified period of time after receipt of notice.[80] After the claim had been properly filed, it was assigned to a Special Representative who was required, within six months of the receipt of the proof of claim, to notify each claimant of whether the claim would be

67. *Id.*
68. *Id.* at 1099.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1100.
74. *Id.* at 1103.
75. 12 U.S.C. § 1464(d)(6)(C) (1988).
76. *Hudspeth*, 756 F.2d at 1102.
77. *Id.*
78. *Id.* at 1103.
79. Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561, 580 (1989).
80. 12 C.F.R. 575.3-.4 (1989).

allowed in full, in part, disallowed or held for further review.[81] The procedures placed no limit on the period of time that claims could be held for further review.[82] If the FSLIC disallowed a claim, the claimant could request review by the Bank Board.[83] The procedures also stated that judicial review of any decision was available only after exhaustion of the procedures and review by the Bank Board.[84]

In *Coit Independence Joint Venture v. FSLIC*,[85] the Supreme Court rejected the Fifth Circuit's reasoning in *Hudspeth* and held that claimants were not required to exhaust administrative remedies. Between 1983 and 1986, the claimants in *Coit* borrowed money from FirstSouth, F.A., a federal savings and loan.[86] In 1986, they filed a state law complaint against FirstSouth, alleging that because of a "profit participation" condition placed on the loans, the loans were usurious under Texas law.[87] Two months after Coit filed the claim, the FSLIC was appointed receiver for FirstSouth.[88] When the FSLIC removed to federal court, the district court, relying on *Hudspeth*, dismissed the case for lack of subject matter jurisdiction because the claimants failed to exhaust the administrative claims process.[89]

The Supreme Court reversed, however, reasoning that although "Congress [had] granted [the] FSLIC various powers in its capacity as receiver, . . . [they did] not include the power to adjudicate creditors' claims."[90] The Court rejected the reasoning of the *Hudspeth* decision for several reasons. First, the Court reasoned that § 1464(d)(6)(C)[91] did not add adjudication of claims to the FSLIC's powers, it merely prohibited courts from interfering with powers granted in other sections of the statute.[92] According to the Court, neither 12 U.S.C. § 1729(d)[93]—which gives the FSLIC the power to settle, compromise, or release claims in favor of or against a failed savings and loan—nor § 1729(b)[94]—requiring the FSLIC to pay all valid obligations of the

81. *Id.* at 575.9-.11.
82. *Id.* at 575.12.
83. *Id.* at 575.13(o).
84. *Id.* at 575.1(a).
85. Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561 (1989); *see* Tucker, *supra* note 41, at 34-38 (providing an in-depth discussion of the *Coit* decision).
86. *Coit*, 489 U.S. at 565.
87. *Id.*
88. *Id.*
89. *Id.* at 565-66.
90. *Id.* at 572.
91. The language of the statute provides, "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Bank] Board, restrain or affect the exercise of powers or functions or a conservator or receiver." 12 U.S.C. § 1464(d)(6)(C) (1988).
92. Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561, 574 (1989).
93. 12 U.S.C. § 1729(d) (1988).
94. *Id.* § 1729(b)(1)(B).

association—grant the FSLIC adjudicatory power.[95] Rather, the court held that these sections allow the FSLIC to pay claims proven to its satisfaction, much like an insurance company.[96] Second, the Court found that § 1464(d)(6)(A), when examined in its statutory context, does not apply to creditor claims against a thrift under FSLIC receivership.[97] According to the Court, this provision was intended to prohibit only untimely challenges to the appointment of a receiver or other actions attempting to restrain the receiver in its basic functions.[98] Finally, the Court noted that the *Hudspeth* decision failed to explain why the delay caused in waiting for a judicial determination of the claim would be any more of a restraint than would judicial review of an FSLIC administrative ruling.[99] The Court in *Coit* went on to address the FSLIC's contention that the " 'Bank Board and FSLIC plainly do have [the] power to require claimants first to present their claims to [the] FSLIC, and exhaust the administrative process' " before suing in court.[100] The Court found that the claimant was not required to exhaust administrative remedies because the procedures established by the Bank Board were inadequate in that they failed to protect the rights of claimants.[101]

According to the Court, the process established by the Bank Board was unfair to claimants.[102] It allowed the FSLIC to delay the processing of claims indefinitely, denying litigants their day in court by delaying until the statute of limitations had run.[103] Furthermore, the process enabled the FSLIC to coerce claimants into accepting unfair settlements out of fear that by the time a court made a determination on the claim, the receiver's assets might have been depleted by settlements with other claimants.[104] Consequently, the Court concluded that claimants could not be required to exhaust administrative remedies before proceeding in court.[105]

Furthermore, the Court found that the FSLIC's administrative procedures exceeded the Bank Board's authority.[106] The regulations attempted to confer adjudicatory authority to the FSLIC and the Bank Board to make binding conclusions of law, subject only to judicial review as opposed to *de novo* determination of the merits.[107] Moreover, the procedures failed to establish a reasonable time limit on the

95. *Coit*, 489 U.S. at 573.
96. *Id.*
97. *Id.* at 575.
98. *Id.*
99. *Id.* at 577.
100. *Id.* at 579 (quoting Brief for Respondent at 20 & n.13).
101. *Id.* at 587.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.*
107. *See id.*

FSLIC's consideration of claims, particularly those held for "further review."[108]

The *Coit* decision, issued in March 1989, clearly impacted Congress' subsequent drafting of FIRREA.[109] For example, FIRREA denies the RTC full adjudicatory authority.[110] The statute permits the RTC to make findings of fact for its own determination of whether to allow or disallow claims.[111] Because FIRREA explicitly prohibits a court from reviewing the RTC's determination to disallow a claim, however, FIRREA also ensures a claimant's right to a *de novo* judicial determination.[112] Furthermore, unlike the prior procedures, which permitted the FDIC to hold a claim indefinitely, FIRREA requires the RTC to make a determination within 180 days from the date a claim is filed.[113]

As is clear from the continuing litigation, however, FIRREA did not resolve all of the questions concerning the exhaustion requirement and pre-receivership claims against failed thrifts. Most importantly, FIRREA does not answer the threshold question of whether all claimants are required to resort to administrative procedures prior to seeking a judicial resolution of their claim. Congress could have taken the opportunity to make exhaustion of administrative remedies a condition precedent to vesting a court with subject matter jurisdiction, but it did not. Therefore, courts must determine whether FIRREA implies an exhaustion requirement.

D. *Introduction to § 1821(d) of FIRREA*

The RTC contends that a claimant's failure to exhaust administrative remedies results in disallowance of the claim by the RTC and prevents all courts from properly asserting subject matter jurisdiction over the claim.[114] This interpretation has been adopted by the majority of courts and commentators.[115] Under this view, a claimant who has previously filed a lawsuit must take additional measures to secure the right to judicial review after the RTC has been appointed receiver.

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108. *Id.* at 586-87.

109. *See* Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 453-54 (E.D.N.Y. 1990), *aff'd*, 931 F.2d 7 (2d Cir. 1991).

110. Tucker, *supra* note 41, at 37.

111. 12 U.S.C. § 1821(d)(5)(D) (Supp. V 1993).

112. *Id.* § 1821(d)(5)(E).

113. *Id.* § 1821(d)(5)(A)(i).

114. *E.g.*, Brady Dev. Co. v. RTC, 14 F.3d 998, 1002 (4th Cir. 1994) (arguing that the plaintiffs' failure to avail themselves of the administrative processes required by FIRREA prohibited the district court from adjudicating the claim).

115. *See id.* at 1005; Bueford v. RTC, 991 F.2d 481, 484 (8th Cir. 1993); RTC v. Mustang Partners, 946 F.2d 103, 106 (10th Cir. 1991); Chism v. RTC, 783 F. Supp. 361, 362 (N.D. Ill. 1991); Decrosta v. Red Carpet Inns Int'l, Inc., 767 F. Supp. 694, 696 (E.D. Pa. 1991); Jeffery S. Rosenblum, *The RTC's Quest for Exclusive Federal Court Jurisdiction Under FIRREA*, 24 Mem. St. U. L. Rev. 725, 729 (1994); Zisman, *supra*, note 6, § 23.04.

In contrast, the Fifth Circuit, in *Whatley v. RTC*,[116] held that FIRREA allows a pre-receivership claimant to "continue" an existing lawsuit after RTC appointment without exhausting administrative remedies.[117] Under this interpretation, in cases involving pre-receivership claims, the RTC must take action—that is, exercise its ninety-day stay option[118]—to preserve its right to determine claims administratively.[119] By requesting the ninety-day stay, the RTC delays the judicial proceedings and may commence the administrative claims procedures. If the RTC fails to do so, however, it loses its opportunity to work within its administrative processes and the lawsuit continues.

The provisions of 12 U.S.C. § 1821(d) set forth both the claims process and the limitations on judicial review of claims under FIRREA. Section 1821(d)(3) grants to the RTC, in its capacity as receiver, the option to determine claims against it. This section requires prompt notification to the creditors of the failed thrift of the RTC's appointment and of the date by which the creditors must file their claims for administrative determination.[120] Section 1821(d)(5) requires the RTC to notify a claimant within 180 days of its decision on the claim.[121] The only specific requirement for determining a claim is that the RTC "shall allow any claim received on or before the date specified in the notice . . . which is proved to [its] satisfaction."[122] Section (d)(5)(F)(ii) states that the claimant is not prejudiced by filing a claim with the RTC.[123]

Section 1821(d)(13)(D) states that no court shall have subject matter jurisdiction over any claim for either damages or injunctive relief except as otherwise provided in the statute.[124] Clearly, FIRREA vests a court with subject matter jurisdiction over claims that have been

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116. 32 F.3d 905 (5th Cir. 1994).

117. *See id.* at 910 (holding that the RTC may be deemed to have consented to continue the litigation if it fails to request a stay in the proceedings).

118. 12 U.S.C. § 1821(d)(12)(A)(ii). This section of the statute allows the receiver to request a ninety-day stay period in any judicial proceeding to which it becomes a party as a result of being appointed receiver for a failed thrift.

119. *Whatley*, 32 F.3d at 910.

120. The statute requires the RTC to "promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice." 12 U.S.C. § 1821(d)(3)(B)(i).

121. *Id.* § 1821(d)(5)(A)(i).

122. *Id.* § 1821(d)(5)(B).

123. The statute provides, in relevant part, that "subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver." *Id.* § 1821(d)(5)(F)(ii).

124. Section 1821(d)(13)(D) states:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from,or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

determined administratively.[125] The courts must determine whether there are any other exceptions to § 1821(d)(13)(D) within the statute. Many claimants rely upon § 1821(d)(6)(A) as the basis for their argument that FIRREA does not require pre-receivership claimants to exhaust administrative remedies prior to seeking a judicial resolution of their claims. This section of the statute sets forth the claimants' right to judicial determination of their claim. Section 1821(d)(6)(A) provides, in part, that

> the claimant may request administrative review of the claim . . . or file suit on such claim (*or continue an action commenced before the appointment of the receiver*) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (*and such court shall have jurisdiction to hear such claim*).[126]

Much of the controversy surrounding the meaning of this statute revolves around the interpretation of the language within the parentheticals of this section. The parenthetical language is the basis for the argument that FIRREA provides additional options for pre-receivership claimants in litigation against the RTC. In particular, it has been argued that pre-receivership claimants, unlike post-receivership claimants, may continue their lawsuit without first having to enter the administrative claims process.

The statute also provides the RTC with an optional ninety-day stay period that allows the RTC to delay judicial proceedings whenever it enters a lawsuit as a receiver.[127] The Fifth Circuit relied upon this provision to determine that the RTC may be held to have waived its right to determine claims administratively.

Although in *Coit*[128] the Supreme Court rejected the exhaustion requirement under the pre-FIRREA procedures, the requirement has been upheld in cases where Congress explicitly establishes or intends to make administrative remedies a condition to subject matter jurisdiction.[129] Thus, the question before any court in interpreting FIRREA is whether Congress made or intended the requirement. Both the RTC and the *Whatley* court, while espousing opposing views, rely

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(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Id. § 1821(d)(13)(D).

125. *Id.* § 1821(d)(6)(A).

126. *Id.* § 1821(d)(6)(A) (emphasis added).

127. The statute provides, "[A]fter the appointment of a . . . receiver for an insured depository institution, the . . . receiver may request a stay for a period not to exceed . . . (ii) 90 days . . . in any judicial action or proceeding to which such institution is or becomes a party." *Id.* § 1821(d)(12)(A)-(A)(ii).

128. 489 U.S. 561 (1989). For a discussion of *Coit*, see *supra* text accompanying notes 85-114.

129. Patsy v. Board of Regents, 457 U.S. 496, 501-02 (1982).

on the language of § 1821(d) and the general intent of Congress to create a fair and efficient means of claims resolution to reach their respective conclusions. This Note concludes that the language of the statute supports the *Whatley* court's interpretation.

II. SEPARATE TREATMENT FOR PRE-RECEIVERSHIP CLAIMS?

In the administrative exhaustion cases, the circuit courts have disagreed over whether pre-receivership claims should be treated differently from post-receivership claims.[130] The majority of courts conclude that *all* claimants are required to exhaust administrative remedies before seeking judicial determination of their claims. The Fifth Circuit, however, has determined that *pre-receivership* claimants are not required to exhaust administrative proceedings.

The Sixth Circuit and several state courts have also been forced to determine whether § 1821(d) makes the pre- versus post-receivership dichotomy relevant to the decision of whether under § 1821(d) there is exclusive federal subject matter jurisdiction. Courts deciding whether FIRREA ousts state courts of subject matter jurisdiction over pre-receivership claims have determined that FIRREA provides different options for pre- and post-receivership claimants.[131] In light of the need for clarity and consistency in interpreting FIRREA, the statute ought to be interpreted as creating additional options for pre-receivership claimants that do not require the claimant to exhaust administrative remedies.

A. *Majority View*

The majority of courts, in deciding that FIRREA does not provide a separate claims resolution process for pre- and post-receivership claims, stress the importance of a strict reading of § 1821(d)(13)(D) that denies any court jurisdiction over claims involving the RTC except as otherwise provided in the statute.[132] Under this interpretation, courts are prohibited by the statute from taking any action with respect to any claim against the RTC as receiver until the claimant has complied with the administrative claims process. The reasoning behind the majority's interpretation is best illustrated by those decisions requiring exhaustion.

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130. *Compare* RTC v. Mustang Partners, 946 F.2d 103, 106 (10th Cir. 1991) (concluding that all claimants, both pre- and post-receivership, are required to exhaust administrative remedies) *with* Whatley v. RTC, 32 F.3d 905, 907-09 (5th Cir. 1994) (finding that the language of § 1821(d) indicates that pre- and post-receivership claimants are to be treated differently).

131. *See infra* notes 172-221 and accompanying text.

132. *See, e.g.*, RTC v. Mustang Partners, 946 F.2d 103, 106 (10th Cir. 1991) (stating that the language of FIRREA requires each creditor to file a claim).

In *RTC v. Mustang Partners*,[133] the claimant argued that the district court erred in granting summary judgment to the RTC. Mustang Partners claimed that their lawsuit, which was pending against the failed institution at the time of the RTC's appointment as receiver, provided ample notice to the RTC and negated the requirement that they engage in the administrative claims process.[134] The district court concluded that the claimants were required to exhaust administrative remedies and that their failure to do so deprived the court of subject matter jurisdiction. The Tenth Circuit upheld the district court's decision, noting that nothing in a "thorough reading" of FIRREA supported an interpretation that would dispense with the claims procedures where a suit was filed pre-receivership.[135]

In evaluating the claimant's arguments, the court focused on the language of the statute. The Tenth Circuit found that § 1821(d)(3)(B)(i) "clearly requires that each creditor file a claim."[136] The court reasoned that this requirement was unchanged by the "continue" parenthetical of § 1821(d)(6)(A),[137] which offers claimants who followed the administrative claims process two options—to file an action in court for the first time or to continue an action that had been stayed during the administrative proceedings.[138] Mustang Partners was denied the right to continue its pending lawsuit for failure to comply with the FIRREA claims provisions because, according to the court, neither option is available unless administrative remedies have been exhausted.[139]

In *Brady Development Company v. RTC*,[140] the Fourth Circuit followed the holding of *Mustang Partners*.[141] In *Brady*, the Fourth Circuit rejected the argument that pre-receivership claimants were not required to exhaust administrative remedies.[142] The circuit court found that Congress intended to place jurisdictional limits on the power of the federal courts to review matters involving failed thrifts.[143] According to the court, § 1821(d)(13)(D), in conjunction with subparagraph (d)(6)(A), which grants jurisdiction in cases involving the RTC, established these limits. The court interpreted these subsections as prohibiting federal courts from hearing claims until these claims have been rejected by the RTC in the administrative claims process or until the RTC has allowed its 180-day review period to

133. 946 F.2d 103 (10th Cir. 1991).
134. *Id.* at 106.
135. *Id.*
136. *Id.*
137. *See supra* text accompanying note 126.
138. *See Mustang Partners*, 946 F.2d at 106.
139. *Id.*
140. 14 F.3d 998 (4th Cir. 1994).
141. *Id.* at 1005.
142. *Id.* at 1005-06.
143. *Id.* at 1003.

lapse without making a determination on a claim. Thus, only those claims previously filed that have gone through the administrative review process could continue after the review period expired.[144]

In addition to its reliance on the language of the statute, the *Brady Development* court credited the legislative history of FIRREA in holding that all claimants must first submit their claims for administrative review.[145] The court stated that the legislative history of FIRREA indicated that the purpose of the exhaustion requirement was to allow the RTC to resolve the bulk of claims against it quickly and without further proceedings.[146] Thus, the court held that all creditors must exhaust administrative remedies because allowing concurrent jurisdiction before exhaustion would defeat the purpose of the procedures.[147]

In both *Mustang Partners* and *Brady Development*, the claimants argued that the jurisdictional bar in § 1821(d)(13)(D)[148] was inapplicable to pre-receivership claimants because applying it to pre-receivership claims would create a conflict with § 1821(d)(5)(F)(ii).[149] Section (d)(5)(F)(ii) provides that the filing of a claim with the receiver does not prejudice the right of the claimant to continue actions filed prior to the RTC's appointment.[150] The court in *Brady Development* interpreted this section of the statute to mean that a "pre-receivership claim is essentially tolled or suspended rather than fully dismissed without prejudice during the administrative claims process."[151] Thus, according to this interpretation, § 1821(d)(5)(F)(ii) merely ensures a claimant's right to continue an action after the RTC has exercised its optional ninety-day[152] and mandatory 180-day[153] stay periods under the administrative claims procedure.[154]

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144. *Id.*

145. *Id.* at 1005 n.1.

146. *Id.*

147. *Id.* at 1006; *see* Circle Indus. v. City Fed. Sav. Bank, 749 F. Supp. 447, 454 (E.D.N.Y. 1990) ("As is clearly indicated in the legislative history of FIRREA, Congress intended that a district court not have subject matter jurisdiction of state law claims . . . until those claims are first presented to and adjudicated by the RTC . . . ." (citation omitted)).

148. 12 U.S.C. § 1821(d)(13)(D); *see supra* note 124 for text of this statute.

149. *Mustang Partners*, 946 F.2d at 106; *Brady Dev. Co.*, 14 F.3d at 1002.

150. 12 U.S.C. § 1821(d)(5)(F)(ii); *see supra* note 123 for the text of this statute.

151. *Brady Dev. Co.*, 14 F.3d at 1004.

152. *See* 12 U.S.C. § 1821(d)(12)(A)(ii).

153. *Id.* § 1821(d)(5)(A)(i). This section states: "[B]efore the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim." *Id.*

154. *See Brady Dev. Co.*, 14 F.3d at 1004-05.

B. *Minority View*

The minority view argues that although "FIRREA contains no provision granting federal jurisdiction over claims filed after a receiver is appointed but before administrative exhaustion,"[155] jurisdiction over pre-receivership actions continues after appointment. Thus, pre-receivership claimants have two options upon the appointment of a receiver: to file a claim administratively or to continue with their existing lawsuit.

In *Whatley v. RTC*,[156] the plaintiff filed suit against Continental Savings for breach of fiduciary duty, breach of contract and tortious interference with contractual relations.[157] One month later the RTC was appointed conservator and substituted as party-defendant.[158] Six months after that, the RTC was appointed receiver and filed pleadings to reflect its capacity as receiver.[159] The RTC did not request a stay in proceedings under § 1821(d)(12)(A)(ii).[160] The RTC also failed to meet its notice obligation under § 1821(d)(3)(C), which requires the RTC to notify claimants either by publication or direct mail of its appointment. In fact, the RTC failed to communicate with the plaintiff at all until it filed a motion to dismiss for failure to exhaust administrative remedies.[161] The district court granted the RTC's motion for dismissal on the grounds that because the plaintiff failed to exhaust administrative remedies, the court lacked subject matter jurisdiction.[162]

The Fifth Circuit reversed the district court, however, and held that the claimant's failure to file an administrative claim with the RTC did not deprive the court of subject matter jurisdiction over pre-receivership claims.[163] According to the court, subject matter jurisdiction is determined at the time of the filing of the complaint,[164] and subsequent events cannot divest a court of its jurisdiction once it has been properly invoked.[165] Thus, where a claimant, prior to the appointment of the RTC, has filed a claim in a court that properly exercised subject matter jurisdiction over the action, the appointment of the RTC as receiver would not divest that court of jurisdiction.[166]

Moreover, the court noted that several sections of FIRREA supported the finding that courts retained jurisdiction over pre-receiver-

155. Meliezer v. RTC, 952 F.2d 879, 882 (5th Cir. 1992).
156. 32 F.3d 905 (5th Cir. 1994).
157. *Id.* at 906.
158. *Id.*
159. *Id.*
160. 12 U.S.C. § 1821(d)(12)(A)(ii); *see supra* note 127 for text of this statute.
161. *Whatley*, 32 F.3d at 907-08.
162. *Id.* at 908.
163. *Id.* at 910.
164. *Id.* at 907.
165. *Id.*
166. *Id.*

ship claims.[167] In particular, the court stated that § (d)(5)(F)(ii)—which ensures the right of claimants to continue an action without prejudice after the appointment of a receiver subject to a ninety-day stay period[168]— offers an exception to the general provision denying courts jurisdiction over claims involving the RTC.[169] Thus, the Fifth Circuit clearly recognized a different statutory scheme for post-receivership actions (over which there was no jurisdiction until the claims procedures had been exhausted)[170] and pre-receivership actions (over which the court may continue to assert jurisdiction).

Furthermore, the court found that a separate scheme for determining pre- and post-receivership claims did not, as the majority of courts claimed, undermine the purposes of the administrative claims process—efficiency and expediency. The Fifth Circuit stated that such a system for determining claims protected the interests of creditors who had "invoked the proper procedures for protecting their rights . . . [and had] expended time, money, and energy in properly asserting their claims."[171]

C. *Separating Pre- and Post-Receivership Claims in the Concurrent Jurisdiction Issue*

Cases addressing the issue of whether § 1821(d) requires administrative exhaustion are analogous to those deciding whether § 1821(d) divests state courts of concurrent jurisdiction because, in both instances, the RTC argues that FIRREA requires pre-receivership claimants to follow the same procedures for claim resolution as other claimants. In the concurrent jurisdiction cases, however, the courts have unanimously rejected the RTC's reasoning, and their interpretation of the statute with respect to the concurrent jurisdiction issue is instructive in determining whether FIRREA requires pre-receivership claimants to exhaust remedies before proceeding judicially. The only federal decision on the question of exclusive jurisdiction under FIRREA is *Holmes Financial Associates v. RTC*.[172]

1. Interpreting Jurisdiction

Generally, unless Congress has specifically provided for exclusive federal jurisdiction, state courts are presumed to have concurrent subject matter jurisdiction.[173] The test currently used to determine

167. *Id.*

168. 12 U.S.C. § 1821(d)(5)(F)(ii); *see supra* note 123 for the complete text of the statute.

169. *Whatley*, 32 F.3d at 907.

170. *Id.* at 907 (citing Meliezer v. RTC, 952 F.2d 879 (5th Cir. 1992). "FIRREA contains no provision granting federal jurisdiction to claims filed after a receiver is appointed but before administrative exhaustion." Meliezer, 952 F.2d at 882.

171. *Whatley*, 32 F.3d at 908.

172. 33 F.3d 561 (6th Cir. 1994).

173. Rosenblum, *supra* note 115, at 727-28.

whether state court jurisdiction has been withdrawn was developed by Justice Scalia in his concurring opinion in *Tafflin v. Levitt*.[174] Justice Scalia stated that it "takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction."[175] This view was adopted by the Court in *Yellow Freight System, Inc. v. Donnelly*.[176] The Court held that the absence of "language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction" is sufficient evidence that Congress did not intend to confer exclusive federal jurisdiction.[177] The *Yellow Freight* Court held that in order to divest state courts of jurisdiction, Congress must do so affirmatively within the text of the statute.[178] Thus, the critical issue in deciding whether FIRREA vests the federal courts with exclusive jurisdiction is whether the language of FIRREA expressly denies jurisdiction to state courts.

Prior to 1994, no federal court had decided the question of exclusive federal jurisdiction under FIRREA.[179] In September 1994, the Sixth Circuit became the first federal court to render a decision on this issue in *Holmes Financial Associates v. RTC*.[180] The Sixth Circuit, following the majority of prior state court decisions,[181] rejected the RTC's contention that FIRREA grants exclusive federal jurisdiction in all cases that involve the RTC.[182] Rather, it held that pre-receivership claim-

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In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), the Supreme Court developed a three-prong test to determine whether the presumption of concurrent jurisdiction is valid in a given case. First, the court must look to the statute to determine whether it explicitly requires exclusive federal jurisdiction. If exclusive federal jurisdiction is not expressly required, then the court must determine whether it is implied from clear and direct legislative history. The third prong of the test requires the court to assess whether the statute would place federal and state interests in conflict. *Id.* at 473. For a complete discussion of whether FIRREA provides for exclusive jurisdiction under this test, see Rosenblum, *supra* note 115, at 735-38.

174. 493 U.S. 455 (1990).

175. *Id.* at 470.

176. 494 U.S. 820 (1990).

177. *Id.* at 823.

178. *Id.*

179. Holmes Fin. Assoc. v. RTC, 33 F.3d 561, 562 (6th Cir. 1994).

180. *Id.* at 561.

181. *Id.* at 567 n.6.

182. *Id.* at 567.

According to the Sixth Circuit's decision, the Florida Court of Appeals has been the only court to decided in favor of the RTC's position that FIRREA grants exclusive federal jurisdiction over all RTC litigation. *Id.* at 567 n.6. In FDIC v. Fleet Credit Corp., 616 So. 2d 488 (Fla. Dist. Ct. App. 1993), the Florida Court of Appeals held that claims against a failed bank, after the RTC has been appointed receiver, " 'must be commenced or continued in United States District Court' " pursuant to 12 U.S.C. § 1821(d)(6)(A). *Id.* at 488-89 (quoting Department of Ins. v. FDIC, 610 So. 2d 695, 696 (Fla. Dist. Ct. App. 1992)). The Florida Court apparently relied on the reasoning used to determine whether FIRREA requires pre-receivership claimants to exhaust administrative remedies to decide this issue. *Department of Insurance*, 616 So. 2d 695 (Fla. Dist. Ct. App. 1992), held that the court could not exercise subject matter jurisdiction over a post-receivership claim because the statute requires that such claims, once exhausted through the administrative claims process, be brought in federal

ants had the additional option of continuing their lawsuit in state court, placing the burden on the RTC to exercise its removal powers to bring the case into federal court.

a. *Language of the Statute*

In *Holmes*, he RTC contended that FIRREA's jurisdictional limitations divest state courts of concurrent jurisdiction both over future actions in which the RTC will be involved in its capacity as receiver and also over actions that are pending at the time of the RTC's appointment as receiver.[183] The RTC based its interpretation on the language of § 1821(d)(13)(D),[184] which states that, unless otherwise provided, no court will have jurisdiction over any action against a failed savings and loan for which the RTC is appointed receiver. The RTC also relied on § 1821(d)(6)(A), which sets forth a claimant's options when bringing a claim against the RTC as receiver.[185] The RTC argues that these sections, when read together, clearly rebut the presumption of concurrent jurisdiction.[186] According to the RTC, because § 1821(d)(6)(A) refers only to certain federal courts, and because Congress did not expressly distinguish between pre- and post-receivership actions, Congress intended the RTC's appointment as receiver to automatically divest state courts of jurisdiction.[187]

The Sixth Circuit rejected the RTC's interpretation. Relying on the test set forth in *Tafflin*,[188] the court held that because FIRREA does not expressly withdraw state court jurisdiction, concurrent jurisdiction continues to exist over pre-receivership claims.[189] The court stated, "[N]ot only does the plain language of the relevant statutes not 'affirmatively divest' states of their concurrent jurisdiction, it affirmatively permits state courts to continue to assert jurisdiction over cases against the RTC which were filed prior to its appointment as receiver."[190]

The starting point for the circuit court's analysis was the language of the same two sections of 12 U.S.C. § 1821(d) upon which the RTC relied.[191] The RTC argued that because post-receivership actions must be filed in federal court, where a claim has been filed in state

court. *Id.* at 696. While the *Department of Insurance* decision does not mention pre-receivership claims, the reasoning in *Fleet* indicates that the Florida Courts do not recognize any distinction between pre- and post-receivership claims in either context.

183. *Holmes*, 33 F.3d at 565.

184. 12 U.S.C. § 1821(d)(13)(D); *see supra* note 124 for text of this statute.

185. *Id.* § 1821(d)(6)(A); *see supra* text accompanying note 126.

186. *Holmes*, 33 F.3d at 566; Rosenblum, *supra* note 115, at 730.

187. Rosenblum, *supra* note 115, at 732.

188. *See supra* notes 173-78 and accompanying text.

189. *Holmes*, 33 F.3d at 569-70.

190. *Id.* at 569.

191. These sections are 12 U.S.C. § 1821(d)(6)(A) (text of the statute provided *supra* in the text accompanying note 126) and § 1821(d)(13)(D) (text of the statute provided *supra* note 124).

court prior to the RTC's appointment as receiver, the claimant must file for dismissal of the claim from state court and refile in federal court after the RTC takeover.[192] The *Holmes* court, however, interpreted this section to imply that pre-receivership actions could continue in state court and that, in pre-receivership actions only, state courts were permitted to exercise subject matter jurisdiction.[193]

Courts considering the exclusive/concurrent jurisdiction issue under FIRREA have generally rejected the RTC's interpretation because it ignores the language to the contrary in the parentheticals of § 1821(d)(6)(A).[194] The first parenthetical provides that a claimant may continue an action that was filed prior to the appointment of the receiver.[195] In *Holmes*, the RTC asserted that the term "continue" was meant to apply only to those actions that had been properly filed in the federal court specified in the statute.[196] Most courts have disagreed with this assertion and determined that this section permits claimants to go forward with the case in state court.[197]

In *Marc Development, Inc. v. FDIC*,[198] for example, the court stated that "[t]he term 'continue' implies that a party is proceeding forward in an ongoing case without an interruption in the court's jurisdiction. A claimant could not 'continue' an action over which the court had been deprived of subject matter jurisdiction."[199] Other courts also have rejected the RTC's interpretation, noting that if Congress had intended for this parenthetical to require dismissal and refiling, it would have provided some means for such a transition in the statute.[200] The Sixth Circuit in *Holmes* found that while the majority of claimants against the RTC have only two options—either to request an administrative review of the claim or to file suit in federal court for a *de novo* review of the claim on the merits—pre-receivership claimants have yet a third option.[201] According to the court, "[Section] 1821(d)(6)(A)'s first parenthetical explains that . . . those who ha[ve]

192. *Holmes*, 33 F.3d at 566.

193. *Id.* at 567-68.

194. 12 U.S.C. § 1821(d)(6)(A); *see supra* text accompanying note 126.

195. *Holmes*, 33 F.3d at 567-68.

196. *Id.* at 566-67. The statute specifies the United States District Court for the District of Columbia or the district court in which the failed thrift's primary place of business is located as having jurisdiction over cases involving the RTC or the FDIC as a receiver. 12 U.S.C. § 1821(d)(6)(A).

197. *Holmes*, 33 F.3d at 566-67.

198. 771 F.Supp. 1163 (D. Utah 1991), *vacated*, 12 F.3d 948 (10th Cir. 1993).

199. *Id.* at 1168-69; *see* Rosenblum, *supra* note 115, at 731-32; *accord* Marquis v. FDIC, 965 F.2d 1148, 1152-54 (1st Cir. 1992) (concluding that courts properly vested with subject matter jurisdiction prior to RTC appointment as receiver are not divested of that jurisdiction upon appointment); Guidry v. RTC, 790 F. Supp. 651, 654-56 (E.D. La. 1992) (relying on the term "continue" in several sections of FIRREA to conclude that FIRREA does not deprive the court of jurisdiction over pre-receivership claims).

200. Rosenblum, *supra* note 115, at 731 n. 33 and accompanying text.

201. *Holmes*, 33 F.3d at 567; Rosenblum, *supra* note 115, at 731.

filed pre-receivership lawsuits . . . [in state court may] continue those lawsuits."[202]

The *Holmes* court further determined that if it accepted the RTC's interpretation, it would render the second parenthetical, which grants the courts specified in § 1821(d)(6)(A) jurisdiction to hear a case, meaningless. The court reasoned that to state that the claim could continue only in federal court would be redundant because 12 U.S.C. § 1441a(*l*)(1) already grants original federal jurisdiction.[203] This statute gives the federal courts original jurisdiction over all cases in which the RTC is a party.[204] Thus, the court found that the only reading that gave the parenthetical meaning was one that acknowledged concurrent jurisdiction over pre-receivership claims.

b. *Permissive Nature of the RTC's Removal Power*

The Sixth Circuit went on to buttress its conclusion by examining other provisions in FIRREA that support concurrent jurisdiction over pre-receivership claims. The court relied on § 1441a(*l*)(3) to conclude that Congress had not granted exclusive federal jurisdiction in cases where the RTC was the defendant/receiver.[205] This section allows the RTC to remove any case in which it is involved as receiver to specified federal courts—either the district court in D.C. or the district court in the failed institution's primary place of business.[206] According to the court, the permissive nature of the language indicates that if the RTC chooses, it can litigate in state court. The court noted that if Congress had intended to establish exclusive jurisdiction, it would have mandated removal, not made it permissive.[207] This provision indicates that Congress understood that the RTC would be a party to pre-receivership suits filed in state court and decided it was best to allow the RTC to determine whether or not it wanted to continue in state court.[208]

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202. *Holmes*, 33 F.3d at 567.

203. *Id.*

204. Section 1441a(*l*)(1) states that "[n]otwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding." 12 U.S.C. § 1441a(*l*)(1) (Supp. V 1993).

205. *Holmes*, 33 F.3d at 568.

206. The statute provides that the RTC may remove any such action or proceeding from state court to the United States District Court for the District of Columbia or the district court where the institution's principal place of business is located. 12 U.S.C. § 1441a(*l*)(3) (Supp. V 1993).

207. *Holmes*, 33 F.3d at 566-67.

208. *Id.* at 567.

c. *Ninety-Day Stay Provision*

The court also relied on the ninety-day stay provision of § 1821(d)(12)[209] as a further indication of Congress' intent to retain both the state and federal court jurisdiction. The court reasoned that if the state court did not have jurisdiction, then no stay could be provided. Moreover, it found that the purpose of the ninety-day stay was to provide the RTC with a specific amount of time to choose whether it would defend in state court or remove to federal court.[210] According to the court, this interpretation is supported by the fact that the RTC has the same ninety-day period to exercise a right of removal under § 1441a(*l*)(3)(A)(i).[211]

d. *"No Prejudice" Provision*

Additionally, courts have relied on the "no prejudice" provision of § 1821(d)(5)(F)(ii)[212] as evidence of Congress' intent to create a dichotomy between pre- and post-receivership claims. The Tenth Circuit in *Marc Development v. FDIC*[213] read this paragraph as providing a different procedure to be followed by litigants with pre-receivership claims.[214] The RTC's interpretation would have required dismissal of a suit in state court and a subsequent refiling in federal court in order to continue. As one court noted, "[W]hat could be more prejudicial to a claimant's right 'to continue' a pending action than the outright dismissal of the action?"[215]

e. *Yellow Freight Test*

Furthermore, while not specifically addressed in the decision, the *Holmes* court noted unfavorably that the RTC had argued that because § 1821(d)(6)(A) only granted jurisdiction to certain federal courts, state courts were divested of jurisdiction.[216] To accept the RTC's argument would ignore the test set forth by the Supreme Court in *Tafflin v. Levitt*[217] and followed in *Yellow Freight System, Inc. v.*

209. 12 U.S.C. § 1821(d)(12)(A) (providing that after its appointment as receiver, the RTC may request a stay in the proceedings for a period of up to 90 days in any action to which it becomes a party). For the language of the statute, see *supra* note 127.

210. *Holmes*, 33 F.3d at 568-69.

211. *Id.*

212. 12 U.S.C. § 1821(d)(5)(F)(ii). The statute provides that "the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver," subject to an optional 90-day stay period invocable by the RTC. *Id.*

213. Marc Dev. v. FDIC, 771 F. Supp. 1163 (D. Utah 1991), *vacated*, 12 F.3d 948 (10th Cir. 1993).

214. *Marc Dev.*, 771 F. Supp. at 1168.

215. Rosenblum, *supra* note 115, at 733 (quoting Marquis v. FDIC, 965 F.2d 1148, 1153 (1st Cir. 1992)).

216. *Holmes*, 33 F.3d at 566.

217. 493 U.S. 455, 459 (1990).

Donnelly,[218] which requires express statutory language depriving the states of jurisdiction. Moreover, this interpretation fails to take into account that "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."[219] Thus, Congress' failure to expressly grant jurisdiction to state courts does not automatically oust them of jurisdiction.[220] Consequently, Congress' failure to expressly grant state court jurisdiction in FIRREA does not mean that all claims against the RTC must be brought in federal court.

f. *Congressional Intent*

Moreover, a finding of exclusive federal jurisdiction would mean that Congress ignored its objective of establishing a fair system for the resolution of claims. If federal court jurisdiction were exclusive, a litigant, wishing to protect her rights in the event that the RTC is appointed receiver before the resolution of the claim would be forced to file in both state and federal court. The claimant would then have to request a stay in federal court until she received a judgment in state court. Other provisions within the statute clearly refute the notion that Congress intended to create this obstacle to the resolution of pre-receivership claims. For example, Congress provided the RTC with liberal removal powers.[221] These permissive removal powers indicate that Congress recognized that pre-receivership claims would be pending in state courts at the time of the RTC's appointment and determined that it would be more efficient to permit the RTC to decide whether to exercise this right of removal, rather than to require the claimant to insure against all contingencies.

2. The Need for Clarity and Consistency

FIRREA has been described by various courts as some of the most complex and poorly drafted legislation ever enacted.[222] Thus, clarity and consistency in interpretation are critical. Courts have clearly recognized that Congress intended to treat pre-receivership claimants differently from other claimants in the concurrent jurisdiction context. There is no indication from the language of § 1821(d) that Congress meant for this dichotomy of claim schemes to be relevant only in certain contexts. Thus, this Note concludes that, to avoid further confusion in the lower courts and among claimants, courts should interpret

218. 494 U.S. 820, 823 (1990).

219. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 (1981).

220. *See* Rosenblum, supra note 115, at 732.

221. See discussion *supra* at text accompanying notes 206-09 on removal powers under 12 U.S.C. § 1441a.

222. *See, e.g.*, Marquis v. FDIC, 965 F.2d 1148, 1151 (1st Cir. 1992) (describing FIRREA as an "almost impenetratable thicket"); Guidry v. RTC, 790 F. Supp. 651, 653 (E.D. La. 1992) (stating that FIRREA "makes the Internal Revenue Code look like a first grade primer").

FIRREA as establishing a separate process for determining pre-receivership claims not only in the concurrent jurisdiction context, but also in the exhaustion situation.

III. Waiver of the Administrative Claims Process

A frequently litigated question in determining whether a court must dismiss a claim against the RTC for lack of subject matter jurisdiction is whether the RTC may be held to have waived its right to determine claims against it administratively. The majority of courts considering this issue have determined that the RTC may not be deemed to have waived its right to determine claims administratively and thereby have consented to a court's subject matter jurisdiction.[223] The Fifth Circuit, however, has held that where the RTC fails to take action to stay judicial proceedings, it waives its right to administrative review.

This part concludes that the RTC may be deemed to have waived its right to administrative review. This conclusion is consistent with the interpretation of the language of other statutes requiring exhaustion and with the *Whatley* court's ruling that FIRREA provides pre- and post-receivership claimants with different options. Because under the *Whatley* court interpretation FIRREA does not require exhaustion of administrative remedies, however, courts following that holding will rarely have the opportunity to address this issue. Where a court is reluctant to base its decision solely on the pre- versus post-receivership distinction, however, the waiver theory provides the court with an alternative means to allow a pre-receivership claimant to continue in court without entering the administrative claims process.

Claimants have attempted to circumvent the exhaustion requirement by arguing that the RTC has waived the requirement and consented to subject matter jurisdiction. For example, the plaintiff in *Bueford v. RTC*[224] claimed that the RTC's active participation in the underlying lawsuit (e.g. filing various pre-trial motions) estopped it from asserting lack of subject matter jurisdiction.[225] Bueford argued that the RTC's actions indicated its consent to the district court's jurisdiction.[226] The court, however, rejected the claimant's waiver argument. According to the court in *Bueford*, because FIRREA imposes an exhaustion requirement, but no means of waiving that requirement, the RTC's actions could not relieve the claimant from its obligation to comply with the administrative claims procedure.[227]

223. *See, e.g.*, Brady Dev. Co. v. RTC, 14 F.3d 998, 1007 (4th Cir. 1994) (stating that the doctrine of waiver does not apply to subject matter jurisdiction).

224. 991 F.2d 481 (8th Cir. 1993).

225. *Id.* at 485.

226. *Id.*

227. *Id.*

In *Brady Development Co. v. RTC*,[228] the RTC attended meetings with pre-receivership claimants despite the fact that the claimants failed to file an administrative claim within the ninety-day period.[229] When the RTC met with the claimants, not only did it not inform them that their claim was disallowed because of their failure to act within the ninety-day period, but it agreed to an amended service of process.[230] After being involved in the case for over one year, the RTC filed a motion for summary judgement on the grounds that the court lacked subject matter jurisdiction.[231] The district court granted the RTC's motion, holding that the court lacked jurisdiction under § 1821(d)(13)(D)[232] because the appellant failed to follow the administrative claims procedure.[233] Most courts considering waiver arguments have agreed with this conclusion.[234]

According to the majority view, black-letter law provides that either the litigants or the court itself may properly assert lack of subject matter jurisdiction at any time during the proceedings.[235] Because the court may raise the issue of lack of subject matter jurisdiction on its own, "[p]arties can neither create nor destroy subject matter jurisdiction"[236] through private agreements or actions. Furthermore, under the Federal Rules of Civil Procedure, a party may raise lack of subject matter jurisdiction at anytime during the proceedings.[237] Thus, it may be argued that the RTC's actions cannot prevent it from later raising the lack of subject matter jurisdiction as a defense.[238]

Where Congress has not given administrative procedures priority, however, courts are not required to defer the exercise of subject matter jurisdiction.[239] The Fifth Circuit, in *Whatley v. RTC*,[240] found that under FIRREA, unless the RTC requests a stay in the judicial proceedings, it waives its right to determine pre-receivership claims administratively. The Fifth Circuit's decision is based on the notion that

228. 14 F.3d 998 (4th Cir. 1994).

229. *Id.* at 1001-02.

230. *Id.* at 1002. The RTC also cooperated with the claimants to work out a security agreement to facilitate the sale of land upon which the appellants had a lien. *Id.*

231. *Id.*

232. 12 U.S.C. § 1821(d)(13)(D); *see supra* note 124 for the language of this statute.

233. *Brady*, 14 F.3d at 1002.

234. *See, e.g.*, *Brady*, 14 F.3d at 1006 (stating that the RTC's deposit of money to substitute for real property that was under a notice of lis pendens could not prevent the RTC from later asserting lack of subject matter jurisdiction as a defense); Bueford v. RTC, 991 F.2d 481, 485 (8th Cir. 1993) (rejecting the claimant's waiver and estoppel arguments because FIRREA the statute does not contain a waiver provision).

235. Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

236. *Brady*, 14 F.3d at 1006.

237. Fed. R. Civ. P. 12(h)(3).

238. *Bueford*, 991 F.2d at 485.

239. Patsy v. Board of Regents, 457 U.S. 496, 501-02 & n.4 (1982).

240. 32 F.3d 905 (5th Cir. 1994).

FIRREA does not make exhaustion of administrative procedures the exclusive remedy for claims against failed savings and loans. According to the court, "[C]ongress created a separate scheme for the handling of pre-receivership actions, giving the receiver the privilege, but not the duty, to request a stay of judicial proceedings so that it might first consider the pending claim administratively."[241] The court, looking to the language of the statute,[242] reasoned that Congress gave the RTC the option to request a stay, but that request, or lack of request, does not divest courts of jurisdiction;[243] the stay would simply delay the court proceedings because in a pre-receivership case, the court has already been properly vested with subject matter jurisdiction.[244] Thus, according to the court, the RTC has two choices: to request a stay and proceed administratively or to forego the stay and proceed judicially.[245]

The Fifth Circuit's "plain language" interpretation focused on the use of the word "may" in § 1821(d)(12)(A)(ii).[246] The court found that the term "may" indicated that the provision was discretionary; it neither indicated nor required an exclusive means of action. Furthermore, the term "shall" in other paragraphs[247] supported a finding that the use of administrative procedures was not mandatory.

The language in other federal statutes requiring exhaustion of administrative procedures supports this interpretation. For example, in the Federal Tort Claims Act ("FTCA"),[248] Congress explicitly requires claimants to submit their claims for agency review prior to a court exercising subject matter jurisdiction over the claim. The language of the FTCA states: "[A]n action *shall* not be instituted upon a claim against the United States for money damages for injury or loss of property . . . unless the claimant *shall* have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied . . . ."[249] Courts interpreting this statute have consistently upheld the exhaustion requirement as a condition precedent to vesting a court with subject matter jurisdiction.[250] Thus, it is a reasonable con-

241. *Id.* at 908.
242. *Id.* at 909.
243. *Id.* at 908-09.
244. *See supra* text accompanying notes 164-66.
245. *Whatley*, 32 F.3d at 908-09.
246. 12 U.S.C. § 1821(d)(12)(A)(ii); *see supra* note 127 for the text of this statute.
247. *Whatley*, 32 F.3d at 909 & n.24.
248. 28 U.S.C. §§ 2671-2680 (1988 & Supp. V 1993).
249. 28 U.S.C. § 2675(a) (1988) (emphasis added).
250. *See, e.g.*, Cotto v. United States, 993 F.2d 274, 280 (1st Cir. 1993) (holding that the plaintiff was barred from claiming a meritorious defense due to her failure to exhaust administrative remedies); Severtson v. United States, 806 F. Supp. 97, 98 (E.D. La. 1992) (stating that "[t]ort claims against the United States are forever barred unless they are . . . first presented in writing to the appropriate federal agency"); Ryan v. United States, 457 F. Supp. 400, 402 (W.D. Pa. 1978) (noting that "it is well-settled that the filing of an administrative claim is a jurisdictional prerequisite to a federal suit").

clusion that if Congress had intended to make exhaustion a prerequisite, it was well aware of how to make this requirement explicit within the statute.

Also, according to the *Whatley* interpretation, absent a request for a stay under § (d)(12)(A)(ii), no other provision of the subsection existed by which judicial proceedings could be stayed.[251] The court determined that if Congress had intended to make administrative review an exclusive remedy it would have been simple to provide for an automatic rather than a permissive stay.[252] Thus, for failure to request a stay within ninety days of appointment, the court held that the RTC waived its right to resolve the claim administratively and consented to jurisdiction.[253]

Furthermore, this determination supports and is consistent with the Fifth Circuit's determination that § 1821(d) provides for different treatment of pre- and post-receivership claims. In a pre-receivership claim, the claimant has properly invoked a court's jurisdiction prior to appointment, and the court continues to have jurisdiction after the RTC's appointment.[254] Thus, the RTC has the burden of acting to stay the judicial proceedings. In a post-receivership claim, however, the claimant must first comply with the administrative remedies procedures because no section of the statute vests a court with subject matter jurisdiction over post-receivership claims until after administrative remedies have been exhausted. Unlike a pre-receivership claimant, a post-receivership claimant does not have the additional options provided by the "continue" parenthetical of § (d)(6)(A).[255]

CONCLUSION

The power to administratively determine claims is one of the tools Congress provided to the RTC and the FDIC to aid them in efficiently resolving the savings and loan crisis. This grant of power, however, is not without limits. The language of FIRREA clearly supports the Fifth Circuit's determination in *Whatley* that Congress, aware of the special circumstances facing pre-receivership claimants, made exceptions to the usual procedures for claim resolution. Among these is the exclusion of pre-receivership claimants from the requirement of exhausting administrative procedures. Furthermore, the purpose of § 1821(d) is to provide the RTC and the FDIC with an efficient and effective means of resolving the massive number of claims against failed savings and loans. The Fifth Circuit's approach avoids the inef-

251. *Whatley*, 32 F.3d at 909.

252. *Whatley*, 32 F.3d at 909 & n.26 (citing as an example 11 U.S.C. § 362(a)(1), which imposes an automatic stay in the bankruptcy context).

253. *Id.* at 910.

254. *Id.* at 908.

255. 12 U.S.C. § 1821(d)(6)(A); *see supra* text accompanying note 126 for the language of this statute.

ficiency of requiring all pre-receivership claimants to halt ongoing litigation to enter into the claims process, only to return to court when the RTC rules against their claims. Moreover, requiring the RTC to take advantage of its optional ninety-day stay period to evaluate the claim and to decide whether it is willing to satisfy the claim or continue with the litigation saves claimants, as well as taxpayers, time and money in resolving claims against failed thrifts.