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BANKING LAW DEVELOPMENTS

Peter G. Weinstock and Christopher T. Klimko***

I. INTRODUCTION

AS has been the case during the last several years, litigation arising from the insolvency of financial institutions dominated Texas banking law developments during 1991. The cases discussed in this year's survey primarily attempt to determine the limits to the powers of bank regulatory agencies in addressing insolvencies or near-insolvencies. The lower court decisions reflect a willingness by the courts to examine at least implicitly underlying issues of fairness and overreaching in the agencies' actions and a surprising willingness to hold against those agencies when a reasonable basis for doing so exists. In the majority of these decisions, the courts were not swayed by arguments of overarching public policy as a basis for broad interpretations of regulatory powers. In both of the Supreme Court cases¹ decided during the survey period, however, the justices unanimously ruled in favor of the regulatory agencies. Consequently, it would be surprising if the lower court decisions represent a trend in favor of litigants against the bank regulatory agencies.

II. CASE LAW

A. Receivership Litigation

1. Purchase and Assumption Transactions

*City of Arlington v. FDIC*² examined the liability of an institution to an account holder for the actions of a predecessor insolvent institution. Shady Valley West Joint Venture (Joint Venture) borrowed approximately \$30 million from First Texas Savings Association (First Texas) to finance a real estate development project in Arlington, Texas. Subsequently Joint Venture, First Texas, and the City of Arlington (Arlington) entered into an escrow agreement requiring that a deposit maintained by Joint Venture at First Texas be used to fund the construction of a thoroughfare through the project and giving Arlington the right to draw on such funds if Joint Venture were unable or unwilling to build it. Joint Venture defaulted on its loan from

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1. See *infra* text accompanying notes 48-66 and 94-121.

2. 752 F. Supp. 219 (N.D. Tex. 1990).

First Texas, and First Texas offset the escrow deposit against Joint Venture's debt to First Texas. Upon learning of the offset, Arlington sued First Texas to reinstate the account. First Texas was later declared insolvent and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed as receiver. The FSLIC transferred certain of First Texas' assets and liabilities to First Gibraltar Bank, FSB (First Gibraltar), including all of First Texas' liabilities to its depositors. The Federal Deposit Insurance Corporation (FDIC) was a party to this suit in its role as statutory successor to the FSLIC in its corporate capacity, which had been made a defendant following First Texas' failure.³

The district court determined that First Texas possessed actual knowledge that the escrowed funds were held for a particular purpose and for the benefit of Arlington and therefore that First Texas did not have the right to offset the escrowed funds against Joint Venture's debt.⁴ Given that First Texas did not have the right to offset, the offset was a nullity with respect to Arlington.⁵ The fact that the offset was void defeated the argument put forward by First Gibraltar and the FDIC that Arlington's claims were simply general unsecured claims against the receivership estate of First Texas.⁶ Rather, the district court concluded that Arlington was a depositor of First Texas at the time that institution was declared insolvent.⁷ In light of the fact that First Gibraltar had assumed a liability to each of First Texas' depositors for the full amount of each deposit, the district court held that First Gibraltar had a deposit liability to Arlington for the escrow deposit.⁸ The district court ordered First Gibraltar to reestablish the escrow deposit under the terms contained in the escrow agreement in an amount equal to the amount that had been wrongfully offset, plus interest from the date of offset to the date of reestablishment.⁹

It is interesting to note that *City of Arlington* resulted in the imposition of liability upon First Gibraltar despite the fact that First Gibraltar was not a corporate successor to First Texas. Rather, First Gibraltar had purchased certain of First Texas' assets and assumed certain of First Texas' liabilities, presumably in part to avoid the assumption of liability for a predecessor's wrongful acts that accompanies corporate succession. Yet, the *City of Arlington* court chose to characterize First Texas' wrongful act and First Gibraltar's limited assumption of First Texas' liabilities in a manner that resulted in First Gibraltar's unwitting assumption of First Texas' liability to Arlington. The view urged by the FDIC and First Gibraltar in this case, that Arlington's claim was a general claim for wrongful conduct against

3. *Id.* at 221.

4. *Id.* at 224-25.

5. *Id.* at 225.

6. The court stated that "[t]he real question is whether an institution can, by unilateral wrongful act, transform an insured account liability into a nullity, leaving the depositor with a general unsecured claim. The law is clear that the wrongful acts of a failed institution do not absolve the institution's successor from liability for insured deposits." *Id.*

7. 752 F. Supp. at 225.

8. *Id.* at 225-26.

9. *Id.* at 228.

First Texas' receivership estate, was reasonable and easily could have been adopted by the *City of Arlington* court. However, a comment made by the court¹⁰ suggests that it viewed its holding as the appropriate outcome because of the apparent unfairness of the result urged by the FDIC and First Gibraltar and because the liability in question could be characterized as a deposit liability instead of general liability for the acts of an entity that is not a predecessor. *City of Arlington* illustrates the potential importance of underlying questions of fairness and alternative means of framing liability questions in cases lacking clearly controlling statutory or case law authority.

2. FDIC Claims Against Third Parties

*FDIC v. Ernst & Young*¹¹ involved an attempt by the FDIC to recover \$560 million in damages from the accounting firm of Ernst & Young (E&Y) allegedly resulting from faulty audits of Western Savings Association (Western) conducted by a predecessor of E&Y, Arthur Young & Company. The FDIC was pursuing the claim as statutory successor to the FSLIC in its corporate capacity.¹² E&Y had been retained by Western to conduct audits of Western during the years 1984 and 1985.¹³ The FDIC alleged that the audits were negligently conducted and that if the audits had been accurate, Western's board of directors would have halted the lending practices that led to Western's insolvency and the injury for which the FDIC sought damages. The district court's decision was rendered in the context of E&Y's motion for summary judgment.¹⁴

The district court first examined whether the FDIC was subject to the same defenses as a typical assignee of Western. The FDIC argued that it should not be treated as a typical assignee of Western and pointed for support to its special status under the *D'Oench Duhme* doctrine¹⁵ and in certain

10. See *supra* note 6.

11. No. 3-90-0490-H, 1991 U.S. Dist. LEXIS 13955, (N.D. Tex. Sept. 29, 1991) [hereinafter *Ernst*].

12. *Ernst*, slip op. at 3.

13. *Ernst*, slip op. at 2-3.

14. *Ernst*, slip op. at 1.

15. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), codified at 12 U.S.C. § 1823(e), which provides:

(e) Agreements against interests of Corporation.

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section [1821 of this title], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.S. § 1823(e) (Law. Co-op. Supp. 1991).

cases seeking recovery under directors' and officers' liability insurance policies.¹⁶ The district court rejected this argument, noting that neither situation applied in this case and that the FDIC had not cited any statutory authority for treating the FDIC differently from other assignees under the circumstances of this case.¹⁷ Rather, the district court adopted the reasoning of *FDIC v. Cherry, Bekaert & Holland*,¹⁸ which stated that the FDIC is entitled to avoid defenses to which an assignee is typically subject when acting as a bank's receiver seeking to collect on a borrower's debts but not when acting in its corporate capacity as an assignee.¹⁹

The district court next rejected the FDIC's contention that a showing of detrimental reliance upon E&Y's audits by Western was not necessary to the FDIC's recovery upon its negligence claim. The district court noted that Texas courts have not expressly stated that reliance is a necessary element in an accounting malpractice suit, but they have recognized that a client's damages in such a suit stem from a reliance upon the accuracy of the accountant's work.²⁰ The court also noted that other jurisdictions have expressly held that reliance is a necessary element of an accounting malpractice suit asserting negligence.²¹

The final element of the court's holding addressed whether or not the actual knowledge of Jarrett Woods (Woods) of Western's true financial condition should have been imputed to Western. Woods had been Western's chairman of the board of directors, chief executive officer and sole stockholder.²² The court observed that the general rule is that the knowledge of individuals who exercise substantial control over a corporation's affairs is imputable to the corporation.²³ The FDIC asserted, however, that an exception to the general rule exists under circumstances in which the controlling individual's interests are adverse to the corporation's and that in this case Woods's interests were adverse to Western's.²⁴ The court replied that under Texas law, the determination of whether Woods's interests were adverse to Western's depended upon whether Western's stockholders were the beneficiaries or victims of Woods's fraudulent actions.²⁵ If the stockholders were beneficiaries, Woods's interests were not adverse to Western's; conversely, if the stockholders were victims, Woods's interests were adverse to Western's. Woods was Western's sole stockholder and he was also the beneficiary of his own fraudulent activity. Consequently, the court reasoned that Woods's interests were not adverse to Western's interests. As a result, the general rule

16. *Ernst*, slip op. at 6.

17. *Ernst*, slip op. at 7.

18. 742 F. Supp. 612 (M.D. Fla. 1990).

19. *Id.* at 614-15.

20. *Ernst*, slip op. at 9, citing *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 186 (Tex. App.—Waco 1987, writ denied).

21. *Ernst*, slip op. at 9, citing *E.F. Hutton Mortgage Corp. v. Pappas*, 690 F. Supp. 1465 (D. Md. 1988), *Delmar Vineyard v. Timmons*, 486 S.W.2d 914 (Tenn. Ct. App. 1972).

22. *Ernst*, slip op. at 11.

23. *Ernst*, slip op. at 10-11.

24. *Ernst*, slip op. at 11.

25. *Ernst*, slip op. at 12-13.

imputing Woods's knowledge of Western's true financial condition to Western was applicable.²⁶

The imputation of Woods's knowledge to Western meant that Woods's knowledge was also imputed to the FDIC because of the FDIC's status as Western's assignee, and therefore the FDIC could not recover because it could not prove detrimental reliance upon E&Y's audits. The court granted summary judgment to E&Y.²⁷

Ernst represents a significant threat to the FDIC's attempt to defray a portion of the cost of thrift and bank failures through recoveries from outside professionals engaged by the insolvent institutions. This case is the first such ruling against a federal bank regulatory agency, and could have application to a large number of similar suits filed or contemplated by the FDIC.²⁸ Although *Ernst* dealt with accounting malpractice and relied heavily in places upon prior cases dealing with such malpractice, the reasoning in the case could be extended to cases involving other types of outside professionals. It also remains to be seen how broadly *Ernst* is applied to situations other than those in which a single individual was the sole stockholder and had management control of an insolvent institution, such as situations involving ownership and control by a defined group of individuals and situations in which controlling stock ownership and management control were separated. The ultimate impact of *Ernst* will depend upon the extent to which the holding is applied to these differing circumstances. Nevertheless, the reasoning of the court could easily be applied by other courts and thus could undermine the FDIC's currently pending accounting and legal malpractice suits, as well as future suits resulting from the ongoing investigation of approximately 1,200 insolvent institutions, many of which were closely held.²⁹ The FDIC has indicated that it intends to file an appeal of the holding in *Ernst*.³⁰

3. Director's and Officer's Liability Insurance

*Fidelity & Deposit Co. of Maryland v. Corner*³¹ addressed the enforceability of a regulatory exclusion clause contained in a director's and officer's liability policy (the Policy) issued by Fidelity & Deposit Company of Maryland (Fidelity) to Northwest Commercial Bank, N.A. (Northwest).³² The regulatory exclusion clause denied coverage under the Policy for any claim made against a covered officer or director by any state or federal official or agency, including the FDIC.³³ Northwest failed and the FDIC was appointed as receiver. The FDIC subsequently sued certain of the former of-

26. *Ernst*, slip op. at 13.

27. *Ernst*, slip op. at 14.

28. Sherry R. Sontag, *Audit Ruling May Portend Other Losses*, THE NAT'L L.J., Oct. 28, 1991, at 3.

29. *Id.* at 26, col. 3.

30. *Id.* at 26, col. 2.

31. No. H-89-0872, 1991 U.S. Dist. LEXIS 11874, (S.D. Tex. May 31, 1991) [hereinafter *Corner*].

32. *Corner*, slip op. at 1.

33. *Corner*, slip op. at 7-8.

ficers and directors of Northwest for their failure to manage Northwest in a proper and prudent manner. Following a demand by most of the defendant officers and directors that Fidelity provide a defense against the FDIC lawsuit, Fidelity filed a declaratory judgment action seeking a ruling that the regulatory exclusion clause excepted the FDIC's claims from coverage under the Policy.³⁴ The FDIC then intervened in Fidelity's lawsuit.

The FDIC asserted that the Policy's regulatory exclusion clause was void and unenforceable because it conflicted with public policy and federal law.³⁵ The district court stated that for contractual provisions to be void for public policy reasons they typically must induce criminal conduct or contradict statutory law. The court then noted that the only case decided in Texas that had previously considered the validity of a regulatory exclusion clause of a director's and officer's liability policy had held that such a clause did not violate public policy because it did not meet this standard.³⁶ The district court next observed that the statute³⁷ entitling the FDIC as receiver to enforce contracts of an insolvent institution despite such contracts' terms to the contrary specifically excepts director's and officer's liability insurance from its coverage.³⁸ Furthermore, the legislative record demonstrated that in adopting this statute Congress did not intend to legislate with regard to the validity of regulatory exclusion clauses contained in director's and officer's liability policies.³⁹ The district court also rejected the FDIC's contention that the regulatory exclusion clause infringed upon the FDIC's statutory right as receiver of an insolvent institution to marshal and collect the assets of Northwest. The district court reasoned that any proceeds of the Policy were an asset of Northwest's officers and directors, not of Northwest. Therefore, the FDIC did not have any statutory right to collect Policy proceeds that could be infringed.⁴⁰ Without further elaboration, the district court held the Policy's regulatory exclusion clause to be valid and enforceable.⁴¹

As is the case with the holding in *Ernst*,⁴² *Corner* represents a threat to the

34. *Corner*, slip op. at 3.

35. *Corner*, slip op. at 7.

36. *Corner* slip op. at 8-9, citing *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088, 1098-99 (N.D. Tex. 1989).

37. 12 U.S.C. § 1821(e)(12)(A), which provides:

(12) Authority to enforce contracts

(A) In general

The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of a conservator or receiver.

12 U.S.C.S. § 1821(e)(12)(A) (Law. Co-op. Supp. 1991).

38. *Corner*, slip op. at 11.

39. *Corner*, slip op. at 11, n.5, citing 135 Cong. Rec. S10198 (daily ed. Aug. 4, 1989) (statement of Sen. Garn).

40. *Corner*, slip op. at 12.

41. *Corner*, slip op. at 13.

42. See *supra* notes 11-30 and accompanying text.

FDIC's attempt to defray a portion of the cost of thrift and bank failures through recoveries from third-party sources. Unlike *Ernst*, however, the question addressed in *Corner* has been examined by a number of courts throughout the country, with some courts finding the regulatory exclusion clause enforceable⁴³ and others finding it void as against public policy.⁴⁴ It appears that the trend is toward enforcement of the regulatory exclusion clause.⁴⁵ The FDIC, the U.S. Treasury Department and the U.S. Justice Department released a joint study on September 13, 1991, urging Congress to adopt legislation precluding the enforcement of regulatory exclusion clauses against the FDIC as receiver of insolvent financial institutions on public policy grounds.⁴⁶ The joint study argues that Congressional action is needed in order to overcome the trend in the courts to enforce such clauses.⁴⁷ It is an open question whether such legislation would have retroactive effect.

B. Sovereign Immunity

The Supreme Court in *U.S. v. Gaubert*⁴⁸ considered the scope of the government's immunity under the Federal Tort Claims Act (FTCA).⁴⁹ Thomas Gaubert (Gaubert) was the chairman of the board and largest shareholder of Independent American Savings Association (IASA). The Federal Home Loan Bank Board (the FHLBB) and the Federal Home Loan Bank of Dallas (the FHLB-Dallas) desired for IASA to merge with Investex Savings (Investex), a savings and loan association that was failing. The FHLBB and the FHLB-Dallas were concerned regarding the nature of Gaubert's activities. Accordingly, the FHLBB and the FHLB-Dallas asked Gaubert to execute a "neutralization agreement" effectively eliminating his authority over IASA's affairs. They also asked Gaubert to guarantee that IASA's capital would exceed the regulatory minimum levels and to secure such guarantee with an interest in real estate with a value of \$25 million. Gaubert agreed to these conditions. Consequently, the FHLBB and the FHLB-Dallas approved the merger.

After the merger was effected, the FHLB-Dallas threatened to declare

43. *E.g.*, *American Casualty Co. v. FDIC*, 944 F.2d 455 (8th Cir. 1991); *FDIC v. Zaborac*, 773 F. Supp. 137 (C.D. Ill. 1991); *St. Paul Fire and Marine Ins. Co. v. FDIC*, 765 F. Supp. 538 (D. Minn. 1991); *Finci v. American Casualty Co.*, 323 Md. 358, 593 A.2d 1069 (1991).

44. *E.g.*, *Branning v. CNA Ins. Cos.*, 721 F. Supp. 1180 (W.D. Wash. 1989); *FSLIC v. Oldenburg*, 671 F. Supp. 720 (D. Utah 1987).

45. An area of litigation presenting similar issues concerns the enforceability of provisions contained in bankers' blanket bonds that automatically terminate the bonds' coverage upon the taking over of the insured financial institution by a receiver or other liquidator or by state or federal officials. It appears that the trend is toward enforcement of these automatic termination provisions as well. *See California Union Ins. Co. v. American Diversified Savings Bank*, 948 F.2d 556 (9th Cir. 1991); *FDIC v. Aetna Casualty and Surety Co.*, 903 F.2d 1073 (6th Cir. 1990).

46. *D&O Study Says Legislative Action Needed to Address Court Decisions Against FDIC*, 57 BANKING REP. 511 (Sept. 30, 1991).

47. *Id.*

48. 111 S.Ct. 1267 (1991).

49. 28 U.S.C.S. § 2680(a) (Law. Co-op. 1990).

IASA insolvent unless IASA's directors resigned. The FHLB-Dallas then recommended individuals to serve as directors and officers, which individuals IASA then elected and appointed. Thereafter, the FHLB-Dallas became even more involved in IASA's affairs. The FHLB-Dallas provided advice concerning IASA's hiring of a consultant, placing its subsidiaries in bankruptcy, mediating employment disputes, and drafting of litigation pleadings. The FHLB-Dallas also recommended that IASA convert to a federal charter. IASA uniformly followed the FHLB-Dallas's advice.

Prior to the election of new directors, it was believed that IASA possessed a significant net worth. Subsequently, the new board announced that IASA was insolvent. Ultimately IASA was closed. In response, Gaubert filed suit against the FHLBB, the FHLB-Dallas, and the FSLIC seeking damages of \$75 million for the lost value of his shares of IASA stock and \$25 million for his interest in real estate that had secured his guarantee of IASA's solvency. The regulators contended that Gaubert's claims were barred by the discretionary function exception (the Discretionary Function Exception) of the FTCA.⁵⁰ The Court of Appeals for the Fifth Circuit held that the Discretionary Function Exception did not protect the FHLB-Dallas' involvement in IASA's day-to-day affairs.⁵¹ The Court of Appeals reasoned that the Discretionary Function Exception applied to policy decisions and not operational issues. The Supreme Court reversed.⁵²

Justice White, writing for the unanimous Court, stated that when Congress provides the Executive Branch or an administrative agency with the authority to achieve a social, economic, or political objective, the decisions concerning the means to achieve such goals are protected by the Discretionary Function Exception.⁵³ Justice White then discussed provisions that mandate conduct as compared to those that provide regulatory agencies with discretion. If a regulation requires a government official to take a particular action and the individual does so, then that conduct is protected.⁵⁴ Conversely, if the government official acts contrary to the specific mandate of a regulation, then that individual and the government are subject to liability for such conduct.⁵⁵ When statutes, regulations, or agency guidelines or other agency pronouncements provide employees of such agencies with dis-

50. The Discretionary Function Exception protects the government for liability in connection with:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.S. § 2680(a) (Law. Co-op. 1990).

51. 885 F.2d 1284 (5th Cir. 1989). For a discussion of the decision by the Court of Appeals for the Fifth Circuit see Peter G. Weinstock, *Banking Law Developments 1990*, 44 Sw. L.J. 709 (1990).

52. 111 S.Ct. 1267.

53. 111 S.Ct. at 1274.

54. *Id.*

55. *Id.*

cretion in forwarding the goals embodied in a government prescription, a tort claim will be barred unless it alleges that the conduct was not within the scope of the purpose the administrative program was developed to achieve.⁵⁶ The Court rejected the Fifth Circuit's policymaking/operational issue dichotomy because discretionary conduct is not limited to formulation of policy. The Court then applied these standards to the actions of the FHLB-Dallas in *Gaubert*.

The Court determined that the FHLB-Dallas's conduct was not controlled by statutory or regulatory mandates.⁵⁷ Instead, the relevant statutes and the FHLBB's policies vested broad discretion in both the FHLBB and the FHLB-Dallas to respond to unsafe practices.⁵⁸ The Court noted that the agency conduct was intended to safeguard the solvency of, and to preserve public confidence in, the thrift industry, as well as to maintain IASA's assets.⁵⁹ Both of these objectives were consistent with the purposes reflected in the FHLBB Policy and the relevant statutes. The FHLB-Dallas's conduct, in turn, attempted to forward these purposes.

Justice Scalia concurred with the judgment in *Gaubert*, but he would have applied a different test concerning application of the Discretionary Function Exception. Justice Scalia proffered a two part test: (i) should "social, economic or political" policy considerations be evaluated in making the decision and (ii) whether the official's responsibilities encompass analysis of such considerations.⁶⁰ Under Justice Scalia's test, even if policy considerations appropriately should be examined by the government in pursuing an action, the government still may be liable if the official taking the action does not possess the authority to weigh such issues. Accordingly, the Discretionary Function Exception might apply differently to the same conduct depending upon the scope of the official's authority.⁶¹

56. *Id.* at 1274-75.

57. *Id.* at 1277.

58. The FHLBB adopted a policy governing when it would adopt administrative actions governing savings and loan associations. 111 S.Ct. at 1277 quoting, FHLBB Resolution No. 82-381 (May 26, 1982), reprinted in Brief for Respondent 4a-6a (hereinafter "FHLBB Policy"). The FHLBB Policy stated:

[t]he Board recognizes that supervisory actions must be tailored to each case, and that such actions will vary according to the severity of the violation of law or regulation or the unsafe or unsound practice, as well as to the responsiveness and willingness of the association to take corrective action. The following guidance should be considered for all supervisory actions.

In each case, based upon an assessment of management's willingness to take appropriate corrective action and the potential harm to the institution if corrective action is not effected, the staff must weigh the appropriateness of available supervisory actions. . . .

Thus, the FHLBB Policy provided wide latitude in fashioning an administrative response to perceived problems. *Id.* at 1277.

59. 111 S.Ct. at 1278.

60. *Id.* at 1280.

61. Justice Scalia used the circumstances at issue in *Indian Towing Co. v. United States*, 350 U.S. 61 (1956), to illustrate the application of his test. In *Indian Towing*, the government was held liable because Coast Guard maintenance workers failed to inspect lighthouse equipment. *Id.* at 69. Justice Scalia observed that there can be economic policy justifications for conducting only cursory inspections, but such a decision was not within the responsibilities of

In *Gaubert*, the regulators advised IASA to take certain actions; otherwise, the FHLBB would appoint a conservator or receiver. Justice Scalia observed that the decision whether to place a bank in conservatorship or receivership is the type of determination that should be based on an evaluation of policy considerations.⁶² Under Justice Scalia's test, such a decision will only be protected if it is made by people charged with examining such considerations. Justice Scalia implicitly determined that the FHLBB and the FHLB-Dallas officials were of a level authorized to make the policy choices at issue in *Gaubert* because he held that the Discretionary Function Exception protected the actions in question.

The *Gaubert* decision severely limits the ability of shareholders and other aggrieved parties to recover damages for negligent government actions. The government contended that such a limitation on tort actions was necessary in order to avoid a torrent of such suits arising out of the precipitous state of the savings and loan industry.⁶³ Even if the Supreme Court affirmed the decision of the Court of Appeals in *Gaubert*, however, it is difficult to imagine that many tort claims against the government would survive summary judgment. In order to avoid dismissal of the complaint, shareholders of an insolvent institution would need to allege that they suffered a particularized injury, such as the interest in real property pledged to the FHLBB by *Gaubert*, which was not shared by shareholders generally.⁶⁴

The *Gaubert* decision will have a significant impact on the ability of shareholders to contest the regulatory determination that an institution is insolvent or otherwise should be closed. Congress, in the Federal Deposit Insurance Corporation Improvement Act of 1991,⁶⁵ mandated that regulators must take certain actions, including closure of an institution, even before the institution's net worth is exhausted. One effect of the *Gaubert* decision will be to shield such actions from liability.⁶⁶

the maintenance personnel who made it. Thus, the Discretionary Function Exception did not shield their conduct. 111 S.Ct. at 1280.

62. 111 S.Ct. at 1281-82.

63. The government contended that it was defending 132 tort actions in which an aggregate of \$3.3 billion in damages was claimed. *Court's Thrift Ruling Is No Surprise Victory*, THE NAT'L L.J., April 8, 1991, at 27. The *Gaubert* decision is already resulting in dismissals of such suits. See, e.g., *FDIC v. Stuart*, 761 F. Supp. 31 (W.D. La. 1991) (The Discretionary Function Exception of the FTCA barred the former officers and directors of an insolvent bank from raising the alleged negligence of the FDIC as receiver as a defense to a breach of duty action).

64. See Peter G. Weinstock, *Directors and Officers of Failing Banks: Pitfalls and Precautions*, 106 BANKING L.J. 434, 444 (1989).

65. Pub. L. No. 102-242, 105 Stat. 2235 § 131(h)(3) (hereinafter FDIC Improvement Act). See also Kenneth H. Bacon, *Cracking Down: The New Banking Law Toughens Regulation, Some Say Too Much*, WALL ST. J., Nov. 29, 1991, at A1 (new banking legislation authorizes the regulators to close banks with positive net worths under certain conditions).

66. *Because of Supreme Court's Gaubert Ruling Regulators Have Immunity in Early Intervention Actions*, THE THRIFT REGULATOR, April 12, 1991, at 1 (Hal Levi, a former FHLBB attorney, believes the *Gaubert* decision allows regulators to take control of a solvent financial institution without such action being an impermissible "taking" under the U.S. Constitution); See also *FDIC v. Irwin*, 916 F.2d 1051, 1052 (5th Cir. 1990) (decided prior to the Supreme Court's decision in *Gaubert*) (the determination by the Comptroller of the Currency that a national bank is insolvent is protected by the Discretionary Function Exception of the FTCA).

C. Enforcement

1. Civil Money Penalties

*Amberg v. FDIC*⁶⁷ involved an appeal from an assessment of civil money penalties upon the directors of a state chartered bank. The directors filed a request for hearing thirteen days after the documents giving notice of the civil money penalties were first served, and an answer twenty four days after those documents were first served. The FDIC moved for entry of a default order against the directors on the basis that their answer was not timely, which motion was denied by the administrative law judge conducting the hearing but later granted by the Board of Directors of the FDIC (the Board) on appeal. The directors then filed for review of the Board's decision with the Court of Appeals for the Fifth Circuit.

In considering whether the late filing of the directors' answer justified the Board's entry of a default judgment, the appeals court turned to the Federal Rules of Civil Procedure (the Federal Rules), from which the FDIC explicitly borrowed in developing its own rules of procedure.⁶⁸ The appeals court observed that Rules 55(c)⁶⁹ and 60(b)⁷⁰ of the Federal Rules clearly indicate that strict enforcement of defaults is to be avoided and, if good cause for excusing a technical default exists, the default should be excused.⁷¹ The appeals court noted that there were considerable factors to warrant a finding of good cause in this case, including the directors' timely request for a hearing, the directors' actual (although late) filing of an answer prior to the FDIC's motion for default, and the directors' alleged oral notification to the FDIC that they intended to contest the assessment. The appeals court stated that within the Fifth Circuit a motion to set aside a default judgment is evaluated under Rule 60(b)(1)⁷² of the Federal Rules on the basis of (i) prejudice to the plaintiff, (ii) the merits of the defendant's asserted defense, and (iii) the culpability of the defendant's conduct.⁷³ The court determined that all three

67. 934 F.2d 681 (5th Cir. 1991).

68. *Id.* at 685.

69. FED. R. CIV. P. 55(c) provides:

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

70. FED. R. CIV. P. 60(b) provides in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

71. 934 F.2d at 686.

72. See *supra* note 70.

73. 934 F.2d at 686.

factors were in the directors' favor.⁷⁴ Given the FDIC's reliance upon the Federal Rules in the formulation of its rules of procedure, the relevant provisions of the Federal Rules and the standards established by the Fifth Circuit in interpreting those provisions, the Board's entry of the default was an abuse of discretion and therefore was reversed.⁷⁵

The appeals court went on to explain that in arriving at its conclusion it also considered the appropriateness of the FDIC's regulation requiring the directors to file an answer within twenty days of receiving notification of the assessment of penalties.⁷⁶ The court noted that deference is due to the rules and regulations promulgated by an agency to carry out the provisions of an enabling statute when the rules and regulations are reasonably related to the statute's purpose.⁷⁷ However, the appeals court seemed troubled by the fact that nowhere in the statute providing for hearings in conjunction with the assessment of civil money penalties⁷⁸ was there a requirement that an answer be filed in order for the directors to obtain a hearing. Although the discussion is unclear on this point, the court appears to have concluded that the absence of a statutory requirement for the filing of an answer and the fact that Congress had recently acted to extend the deadline for filing a request for hearing from ten to twenty days brought the directors' automatic default and the FDIC procedural rules on which it was based into conflict with the enabling statute.⁷⁹ This reasoning provided an additional basis for the reversal of the Board's action by the appeals court.

2. *Net Worth Maintenance Agreements*

In *RTC v. Tetco*,⁸⁰ the Resolution Trust Corporation (RTC), as conservator for Bexar Savings Association (Bexar) brought suit against Bexar's parent, Tetco, Inc. (Tetco) to enforce the provisions of a net worth maintenance agreement. In 1985, Tetco acquired all of the shares of Bexar. Subsequently, Bexar applied to the FSLIC requesting insurance of its deposit accounts. The FHLBB, as a prerequisite for such insurance, required Tetco to register as a savings and loan holding company. The FHLBB approved Tetco's holding company application on the condition that Tetco agree that if Bexar's net worth were to fall below regulatory minimum levels, Tetco would restore Bexar's net worth or cause it to be restored. Tetco agreed to the FHLBB's terms. Thereafter, Bexar suffered significant losses, with the

74. *Id.* at 687.

75. *Id.*

76. *Id.* at 687-89.

77. *Id.* at 687.

78. 12 U.S.C. § 1828(j)(4)(F), which provides:

(F) Hearing. The nonmember insured bank, savings association, or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such nonmember insured bank, savings association, or other person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section [1818(h) of this title] shall apply to any proceeding under this paragraph.

12 U.S.C.S. § 1828(j)(4)(F) (Law. Co-op. Supp. 1991).

79. *Id.* at 688.

80. 758 F. Supp. 1159 (W.D. Tex. 1990).

result that it was declared insolvent and the FSLIC was appointed as conservator. The RTC succeeded to the FSLIC's position as conservator.

The RTC brought a cause of action against Tetco seeking to enforce the net worth maintenance agreement. In response, Tetco contended that it already controlled Bexar when it submitted its application to become a savings and loan holding company. Tetco argued that it was lawfully entitled to register as a holding company without making any commitments. Accordingly, the FHLBB did not provide any consideration in exchange for Tetco's net worth maintenance commitment.

The RTC contended that the FSLIC's granting of deposit insurance to Bexar served as consideration for Tetco's commitment. Tetco responded that it did not make any commitments in Bexar's application for deposit insurance. Moreover, Tetco argued that the net worth maintenance commitment was not bargained for as part of an agreement, but instead, was given in response to a regulatory requirement in the application process.

The *Tetco* court assumed that Tetco was obligated to register as a holding company, and that the FHLBB was authorized to impose conditions on such registration. Nonetheless, the *Tetco* court determined that the FHLBB's requirement of a capital commitment was part of the approval process, and did not represent bargained for consideration. The parties never negotiated any terms of the agreement, and the FHLBB's regulations set forth all of the provisions of the net worth maintenance agreement. Thus, Tetco was fulfilling the FHLBB's prerequisites for approval.⁸¹

The *Tetco* court distinguished the circumstances involving Tetco and Bexar from other cases in which courts upheld capital maintenance agreements as enforceable contracts.⁸² In those cases, the parties engaged in extensive negotiations with the FHLBB, as a result of which the FHLBB granted forbearance from enforcement of certain capital requirements.⁸³ The *Tetco* court believed that it would be difficult to conclude a contract exists based on a reliance argument when the government does not materially alter its stance but instead mandates compliance with its existing regulations.⁸⁴

Tetco argued that there are no private causes of action to enforce a regulatory condition under the applicable banking statutes. Consequently, the RTC lacked standing to enforce Tetco's compliance with the FHLBB's capi-

81. *Id.* at 1163.

82. *Far West Federal, S.B. v. Director, OTS*, 746 F. Supp. 1042 (D. Or. 1990) (although the *Tetco* court referred to the district court decision, that case was subsequently reversed on appeal). The FHLBB solicited venture capitalists to acquire a savings and loan association, negotiated terms of a conversion agreement with them, and agreed to forebear from enforcement of capital requirements against them. *Id.* at 1045; and *Winstar Corp. and United States Federal Savings Bank v. United States*, 21 Cl. Ct. 112 (1990). *Winstar* agreed to acquire an ailing savings and loan association in exchange for the FHLBB's agreeing to treat the association's deficit capital as goodwill to be amortized over 35 years. The *Winstar* court determined that no purchaser would have acquired the institution absent the favorable accounting treatment of the deficit. *Id.* at 115.

83. 746 F. Supp. 1042 and 21 Cl. Ct. 112.

84. 758 F. Supp. at 1164.

tal maintenance regulations. The *Tetco* court not only agreed with Tetco, but stated that the RTC would have lacked standing even if Tetco's commitments were held to be part of a contract.⁸⁵ The *Tetco* court noted that the award requested by the RTC was almost identical to the administrative remedies that would have been sought to enforce compliance with the regulation.⁸⁶ Congress did not grant the regulatory agencies the right to enforce compliance with regulations in a private suit. Thus, the court concluded that the reasons to deny standing would be equally applicable to a contract action brought by the RTC.⁸⁷

The result in *Tetco* does not mean that the regulators lack a means to enforce capital maintenance commitments. The OTS, as the successor to the FHLBB, is empowered by FIRREA to take certain administrative actions, including the assessment of civil money penalties, for failure to comply with a commitment made to an administrative agency in the application context.⁸⁸ Although the issues the OTS would be required to consider in an administrative action⁸⁹ differ from those applicable to a private cause of action, the result from the standpoint of parties such as Tetco might be the same. (Such enforcement powers, however, do not apply to commitments made prior to the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)).⁹⁰

Recent legislation also diminishes the likelihood that a company can avoid capital maintenance commitments by resort to bankruptcy. The Comprehensive Thrift and Bank Fraud Prosecution Act and Taxpayer Recovery Act of 1990 (title XXV of the Crime Control Act of 1990)⁹¹ provides that the bankruptcy trustee or the debtor-in-possession is deemed to have assumed any capital maintenance commitment. Section 507 of the Bankruptcy Code was also amended to afford the regulators' claims based upon net worth maintenance agreements with priority in bankruptcy.⁹²

In an analogous area, parties have attempted to have courts enforce the FHLBB's "agreement" to treat "supervisory goodwill" (the capital deficit of an ailing institution acquired pursuant to a merger arranged by the FHLBB) as capital. Although the results are inconclusive, the OTS has had success in seeking to have courts determine that it is not bound by such "agreements."⁹³ In such cases, the OTS is effectively seeking a contrary determina-

85. *Id.* at 1165.

86. *Id.*

87. *Id.*

88. 12 U.S.C.S. § 1818(i)(2)(A)(iii) (Law. Co-op. Supp. 1991).

89. The OTS is required to consider the following factors in determining the amount of any civil money penalty: (i) financial resources, (ii) good faith, (iii) gravity of violation, (iv) history of previous violations and (v) such other matters as justice may require. See 12 U.S.C.S. § 1818(i)(2)(G) (Law. Co-op. Supp. 1991).

90. Pub. L. No. 101-73, 103 Stat. 183, 476 (1989) at § 907(l) (the amendments to the OTS' civil money penalty authority only apply prospectively.)

91. Pub. L. No. 101-647 § 2522(c), 104 Stat. 4789, 4859, 4866 (1990).

92. 11 U.S.C.S. § 507(a)(8) (Law. Co-op. Supp. 1991).

93. *Franklin Fed. Sav. Bank v. Director, OTS*, 927 F.2d 1332 (6th Cir. 1991) (holding that FIRREA permits the OTS to disregard capital forbearance agreements), *cert. denied* 112 S.Ct. 370 (1991). See also Debra Cope, *OTS Gaining Upper Hand on Goodwill?*, AM. BANKER

tion regarding the existence of an enforceable contract to that requested by the RTC in *Tetco*.

3. *The Source of Strength Policy*

In *Board of Governors of the Federal Reserve System v. MCorp*⁹⁴ the U.S. Supreme Court declined to rule on whether there is any statutory basis for the "Source of Strength" Policy.⁹⁵ Instead, the Court determined that the issues presented were not ripe for review.

The Board of Governors of the Federal Reserve System (Federal Reserve) alleged that MCorp violated the Source of Strength Policy. In response, the Federal Reserve commenced proceedings to issue cease-and-desist orders that, among other things, would require MCorp⁹⁶ to use all of its assets to increase the capital of its subsidiary banks. Thereafter, creditors filed a petition placing MCorp into bankruptcy. MCorp contended that the Federal Reserve's administrative proceedings were stayed under the Bankruptcy Code. The Court of Appeals for the Fifth Circuit held that the Federal Reserve lacked the statutory authority to promulgate the Source of Strength Policy.⁹⁷ Accordingly, any order promulgated based on the Source of Strength Policy could be enjoined.

The Supreme Court began its analysis by discussing certain of the statutes providing the Federal Reserve with authority over bank holding companies. The Court noted that 12 U.S.C. § 1818(C) authorizes the Federal Reserve to issue temporary cease-and-desist orders that take effect once they are served upon a bank holding company. The holding company may then seek judicial review of the temporary cease and desist order.⁹⁸ Similarly, 12 U.S.C.S. § 1818(h) permits courts to consider a final decision of the Federal Reserve.⁹⁹ The Court stated, however, that neither of these provisions were applicable to MCorp. Accordingly, 12 U.S.C.S. § 1818(i) governed the court's jurisdiction in *MCorp*. This statute provides that:

[E]xcept as otherwise provided in this section [§ 1818] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.¹⁰⁰

MCorp argued that the jurisdictional bar provided by 12 U.S.C. § 1818

May 17, 1991, at 1 (the tide of judicial decisions is turning in favor of the OTS's position that supervisory goodwill may not be treated as capital).

94. 112 S. Ct. 459 (1991).

95. *Id.* at 461. The Source of Strength Policy essentially requires a holding company to serve as a source of strength by providing financial and managerial assistance to its subsidiary banks. For a discussion of the origins of the Source of Strength Policy Statement, see Peter G. Weinstock, *Source of Strength Policy May Weaken Holding Companies*, 171 THE BANKERS MAGAZINE, May-June 1988, at 34.

96. The term MCorp includes two of MCorp's subsidiaries: MCorp Financial, Inc. and MCorp Management. 112 S. Ct. at 461 n.4.

97. *MCorp Financial Inc. v. Board of Governors of the Federal Reserve System*, 900 F.2d 852 (5th Cir. 1990).

98. 12 U.S.C. § 1818(c)(2) (Supp. I 1989).

99. 12 U.S.C. § 1818(h) (Supp. I 1989).

100. 12 U.S.C. § 1818(i)(1) (Supp. I 1989).

did not preclude an automatic stay under § 362 of the Bankruptcy Code¹⁰¹ or a bankruptcy court from prohibiting another party from exercising jurisdiction over a debtor's assets.¹⁰² The Court rejected MCorp's contentions.¹⁰³

The Court stated that the automatic stay does not apply to an action to "enforce a governmental unit's police or regulatory power."¹⁰⁴ MCorp contended that a court must evaluate the validity of the proposed police or regulatory action before deciding whether the automatic stay reaches such action. The Court stated that MCorp's approach would result in inappropriate bankruptcy court involvement in police and regulatory conduct.¹⁰⁵

MCorp also contended that the Bankruptcy Code prohibits parties from seeking the assets of a debtor other than through the bankruptcy proceeding.¹⁰⁶ The Court, however, stated that the Federal Reserve had merely commenced its proceeding.¹⁰⁷ Accordingly, the Federal Reserve had not yet attempted to exercise control over MCorp's assets. If the Federal Reserve were to issue a final order seeking MCorp's assets and sought judicial enforcement of such an order, then bankruptcy court concurrent jurisdiction may be appropriate.¹⁰⁸

Although the Court of Appeals for the Fifth Circuit reached the same conclusion concerning the application of the Bankruptcy Code provisions, it nonetheless asserted that the Supreme Court's decision in *Leedom v. Kyne*¹⁰⁹ authorized the Court of Appeals to consider whether any agency action exceeded its statutory powers.¹¹⁰ The Supreme Court stated that *Kyne*, which permitted judicial review of a National Labor Relations Board (NLRB) certification order, differed from the facts concerning MCorp in two material respects.

First, the NLRB in *Kyne* asserted that the courts never had jurisdiction to review NLRB determinations.¹¹¹ The Court stated that courts generally will not infer that Congress intended to bar access forever to a judicial forum to contest agency abuses. In contrast, MCorp is entitled to judicial review, but only if the Federal Reserve issues a final order concluding that MCorp violated the Source of Strength Policy.¹¹²

Second, in *Kyne* the NLRB asked the Court to infer that Congress in-

101. 11 U.S.C. § 362(a) (1988).

102. 11 U.S.C. §§ 362(a)(3),(a)(6) (1988).

103. 112 S. Ct. at 463.

104. *Id.* at 464 quoting 11 U.S.C. § 362(b)(4) (1988).

105. *Id.*

106. 11 U.S.C. §§ 362(a)(3),(a)(6) (1988).

107. 112 S. Ct. at 464.

108. 28 U.S.C. § 1334(b) (1988).

The Court stated that 28 U.S.C. § 1334 answers the question of jurisdiction as between a bankruptcy court and other courts but does not address jurisdiction between a bankruptcy court and an administrative agency proceeding.

112 S. Ct. at 464.

109. 358 U.S. 184 (1958).

110. 900 F.2d at 858.

111. *Id.* at 190.

112. 112 S. Ct. at 466.

tended to bar judicial review of NLRB determinations.¹¹³ Title 12 U.S.C. § 1818 clearly sets forth the scope of judicial review of agency conduct.¹¹⁴ In other words, a judicial inference concerning Congressional intent in adopting 12 U.S.C. § 1818 was unnecessary because the statute explicitly stated the Congressional mandate.

The Court stated that *Kyne* merely stands for the familiar proposition that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review."¹¹⁵ Title 12 U.S.C. § 1818 provides a "clear and convincing" statement that judicial review of the Federal Reserve's proceedings is not permissible until a final order is issued.¹¹⁶ Thus, the Court reversed the conclusion of the Court of Appeals.¹¹⁷

The Federal Reserve responded to the Court's decision by filing an emergency motion to delay confirmation of MCorp's reorganization plan.¹¹⁸ The Bankruptcy Court denied both the Federal Reserve's request and MCorp's plan.¹¹⁹ Currently, MCorp and the Federal Reserve are engaged in negotiations.

Even after the Supreme Court's decision, the issue of whether the Federal Reserve exceeded its statutory authority by adopting the Source of Strength Policy still has not been resolved.¹²⁰ Although the decision of the Court of Appeals for the Fifth Circuit is no longer effective, it was the highest court to address the issue, and it would have abrogated the Source of Strength Policy. Nonetheless, the issue may now have been mooted by a Congressional compromise.

The FDIC Improvement Act incorporates much of the Source of Strength Policy by statute.¹²¹ The FDIC Improvement Act requires "undercapitalized"¹²² financial institutions to adopt a capital restoration plan.¹²³ If the institution is owned by a holding company, then an agency may not accept the plan absent receipt of a holding company guarantee of the plan. Unlike the Source of Strength Policy, however, a holding company's guarantee is limited under the FDIC Improvement Act.¹²⁴ Moreover, a holding com-

113. 358 U.S. at 190.

114. 112 S. Ct. at 466.

115. *Id.* quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

116. 112 S. Ct. at 466.

117. *Id.*

118. *MCorp Remand, Bank Bailout*, LITIG. NEWS Jan. 23, 1992 at 3.

119. *Id.*

120. Kenneth Cline, *Top Court Backs Fed in MCorp Dispute*, AM. BANKER, Dec. 4, 1991, at 2. The Supreme Court's ruling does not resurrect the Federal Reserve's Source of Strength Policy. *Id.*

121. FDIC Improvement Act of 1991, sec. 131, § 38, 105 Stat. 2236, 2253 (1991).

122. The FDIC Improvement Act defines an "undercapitalized" financial institution as an institution that is not in compliance with any required capital ratio. *Id.* § 38(b)(1)(c), 105 Stat. at 2253.

123. *Id.* § 38(e)(2), 105 Stat. at 2256.

124. *Id.* § 38(e)(2)(E), 105 Stat. at 2257. The guarantee is limited to:

The lesser of:

- (i) an amount equal to 5 percent of the institution's total assets at the time the institution became undercapitalized; or

pany may elect not to guarantee the plan but instead opt for its financial institution subsidiary to fail. In light of the cross-guarantee provisions of FIRREA, however, the failure of one financial institution subsidiary could result in the FDIC billing the failed financial institution's sister institutions for the cost of resolution.¹²⁵

A broader effect of the *MCorp* holding will be to prevent judicial challenges to ongoing agency enforcement proceedings.¹²⁶ This will enable the regulators to act quickly when they deem it expedient to do so. Unfortunately, a private party's resources might be exhausted by the time the agency action would be ripe for a hearing, with the result that some agency abuses may go unchallenged.

D. Deposit Accounts

1. Depository Contracts

In *Stauffer v. Henderson*¹²⁷ the Supreme Court of Texas considered whether the language of a depository contract created a right of survivorship in favor of the cosignatory on a checking account. Marian Henderson and her sister, Mary K. Stauffer, established a joint bank account. The depository contract provided:

JOINT ACCOUNT - PAYABLE TO EITHER OR SURVIVOR

We agree and declare that all funds now or hereafter deposited in this account are and shall be our joint property, that either of us shall have power to act in all matters relating to such account, whether the other be living or dead, and that upon the death of either of us any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor. It is especially agreed that *withdrawal of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives*. . . . [The depository] is hereby authorized to act without further inquiry in accordance with writings bearing any [signature of Marian or Mary], and any such payment or delivery or a receipt or acquittance signed by [Marian or Mary] shall be a valid and sufficient release and discharge of [the depository].¹²⁸

Mrs. Henderson died and her sister withdrew the funds from the account, all of which Mrs. Henderson had deposited. Mrs. Henderson's husband, the executor of her estate, claimed such funds were community property, and thus, half of such funds belonged to him and the other half belonged to his wife's estate. Mary Stauffer responded that the funds in the account belonged to her by right of survivorship.

(ii) the amount which is necessary (or would have been necessary) to bring the institution into compliance with all capital standards applicable with respect to such institution as of the time the institution fails to comply with a plan. (emphasis added).

125. 12 U.S.C. § 1815(e)(Supp. 1990).

126. *Fed Wins on Jurisdiction in MCorp Case, but no Ruling on Source of Strength Rule*, 57 BANKING REP., Dec. 9, 1991, at 941, 942.

127. 801 S.W.2d 858 (Tex. 1990).

128. *Id.* at 859 (emphasis added).

The Texas supreme court, in considering title to the balance in the account, traced the development of joint tenancies with the right of survivorship. The *Henderson* court noted that section 46 of the Probate Code, as originally adopted, stated that the interest of a joint owner who dies:

shall descend to . . . the heirs . . . of such deceased joint owner . . . [p]rovided, however, that by agreement in writing of joint owners of property, the interest of any joint owner who dies *may be made to survive to the surviving joint owner or joint owners*, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.¹²⁹

Section 46 explicitly authorized joint owners to provide for the funds remaining in the bank account to pass to the surviving joint owner. The language of section 46, however, prohibited the courts from inferring a right of survivorship from the establishment of a joint account because individuals often established such accounts for convenience.¹³⁰ In other words, section 46 permitted joint tenancies with right of survivorship but did not permit courts to infer the existence of survivorship rights. Instead, courts needed to determine the parties' intent.

The *Henderson* court noted that the depository agreement is typically the only writing that reflects the parties' intent. The purpose of such agreements, however, is to permit the financial institution to pay funds at either cosignor's direction. Thus, courts in the State of Texas historically followed the decision of the Texas Supreme Court in *Krueger v. Williams*¹³¹ in permitting parole evidence to be admitted to assist the court in divining the parties' intent.

The Texas Probate Code was amended in 1979, when the legislature, among other things, added section 439(a).¹³² At that time, section 439(a) provided:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent if, by a written agreement signed by the party who dies, the interest of such deceased party is *made to survive to the surviving party or parties*. A survivorship agreement will not be inferred from the mere fact that the account is a joint account.¹³³

The Texas supreme court in *Henderson* determined that section 439(a) changed the law.¹³⁴ Consequently, after the enactment of section 439(a), a right of survivorship could only be created if the decedent executed a written agreement pursuant to which the decedent's interest was "made to survive to the surviving party or parties."¹³⁵ If the provisions of a written agreement are clear, then parole evidence is inadmissible to vary the terms of the

129. *Id.* at 860 quoting Law of Sept. 1, 1956, Ch. 55 § 46, 1955, TEX. Gen. Laws 88, 103 (emphasis added).

130. 801 S.W.2d at 861.

131. 163 Tex. 545, 359 S.W.2d 48 (1962).

132. Law of Aug. 27, 1979, ch. 713, § 31, 1979, Tex. Gen. Laws 1740, 1758.

133. *Id.* (emphasis added).

134. 801 S.W.2d at 863.

135. *Id.* at 862-63.

agreement.¹³⁶

The *Henderson* court then turned to the signature card, which was the "agreement" between Marian Henderson and Mary Stauffer. The signature card provided that upon the death of one accountholder, the funds on deposit may be withdrawn by the survivor, and that such withdrawal was binding upon the decedent's heirs.¹³⁷ The *Henderson* court implicitly decided that such language did not create a right of survivorship because the agreement lacked the words from the statute: "made to survive to the surviving party or parties."¹³⁸ As a result, the effect of the agreement was only to authorize the payment of funds by the depository to the survivor. Presumably, the *Henderson* court determined that the signature card permitted the bank to pay the balance to the survivor and made such payment binding on the decedent's heirs in order to protect the bank, but not to establish title to such funds.¹³⁹

The *Henderson* court, however, effectively prohibited introduction of evidence regarding the parties' actual intent in order to apply its own subjective beliefs regarding the parties' motivation.¹⁴⁰ The *Henderson* court's conclusion ignored the provision of the signature card that made any withdrawal by the survivor binding on the decedent's estate. Why would the agreement contain such language if not to create a right of survivorship? The Dissent recognized and rejected the formalistic analysis of the majority opinion.

The Dissent noted that the legislature, when it adopted section 439(a), intended to codify existing law and not to change it.¹⁴¹ Before the 1979 amendments, the "made to survive" phrase of section 46 had been interpreted to permit parole evidence of the parties' intent.¹⁴² Several decisions prior to section 439(a) had interpreted language that was more ambiguous than the provision of the signature card at issue in *Henderson* as creating a joint tenancy with right of survivorship.¹⁴³ Under *Krueger* and its progeny, the Dissent would have presumed that the signature card Mrs. Henderson executed created a right of survivorship unless parole evidence reflected a different intent.¹⁴⁴

136. *Id.* at 863-64.

137. *See supra* text accompanying note 123.

138. 801 S.W.2d at 865-66.

139. *Id.* at 861.

140. Interestingly, Mrs. Henderson left her estate to her sister, Mary Stauffer, and not to her husband. *Id.* at 872. Presumably, she would have desired for the balance in her account to be treated similarly.

141. *Id.* citing *Interim Study Report on Nontestamentary Transfers Presented to Houston Judiciary Committee: Recommendation No. 36*, 66th Leg. R. S. (1979).

142. 801 S.W.2d at 867.

143. *Id.*

144. *Id.* at 870.

The Probate Code has now been amended to provide that an agreement containing substantially the following language creates survivorship rights: "On the death of one party to a joint account, all sums . . . vest in . . . the surviving party as his or her separate property and estate." TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1988). The Dissent advised practitioners to use the language of the statute in light of the majority's emphasis on "magic words" in *Henderson*. 801 S.W.2d at 872 n.7.

2. Insurance of Accounts

*Spawn v. Western Bank-Westheimer*¹⁴⁵ involved a challenge by a depositor of an insolvent bank to the FDIC's denial of insurance coverage. The plaintiff and his sister owned two \$100,000 certificates of deposit at Western Bank-Westheimer. The signature cards for the certificates of deposit each bore the names of both plaintiff and his sister and indicated that each certificate was held by plaintiff and his sister jointly with right of survivorship. The FDIC determined that both of the certificates of deposit were joint accounts and that the two together were insurable in a total amount of only \$100,000.¹⁴⁶ Plaintiff maintained that despite the signature cards, one certificate of deposit consisted of his solely owned funds and the other consisted of his sister's solely owned funds. Plaintiff maintained that each certificate of deposit was separately insurable and that together they were insurable in a total amount of \$200,000.¹⁴⁷

The appeals court noted that both plaintiff and his sister personally executed a signature card and possessed withdrawal rights with respect to each certificate of deposit, and that these facts meant that each certificate of deposit met the general standards for a joint account.¹⁴⁸ However, the appeals court also noted that section 330.9(b) contained additional language that stated that the signature card and withdrawal rights standards were not applicable to certificates of deposit.¹⁴⁹ The court interpreted this additional language as requiring only that a certificate of deposit in fact be jointly owned in order for the certificate of deposit to be deemed jointly owned for

145. 925 F.2d 885 (5th Cir. 1991).

146. The court notes that FDIC's determination was made under FDIC's deposit insurance regulations in effect before the adoption of FIRREA (*see supra* note 90). Following the adoption of FIRREA, those regulations were extensively revised in 55 Fed. Reg. 20,111 (1990). The pre-FIRREA regulation on which FDIC based its determination that each of the certificates of deposit was a joint account of plaintiff and his sister was 12 C.F.R. § 330.9(b), which provided:

(b) Qualifying joint accounts. A joint deposit account shall be deemed to exist, for purposes of insurance of accounts, only if each coowner has personally executed a deposit account signature card and possesses withdrawal rights. The restrictions of this paragraph shall not apply to coowners of a time certificate of deposit or to any deposit obligation evidenced by a negotiable instrument, but such a deposit must in fact be jointly owned.

12 C.F.R. § 330.9(b) (1990). The \$100,000 limitation on joint accounts held by the same individuals was the result of 12 C.F.R. § 330.9(d), which provided:

(d) Same combination of individuals. All joint deposit accounts owned by the same combination of individuals shall first be added together and insured up to \$100,000 in the aggregate.

12 C.F.R. § 330.9(d) (1990). For a comparison with current deposit insurance regulations, *see infra* notes 158-159 and accompanying text.

147. Prior to the revision of FDIC's deposit insurance regulations (*see supra* note 146), 12 C.F.R. § 330.2(a) provided:

(a) Individual accounts. Funds owned by an individual (or by the community between husband and wife of which the individual is a member) and deposited in one or more deposit accounts in his own name shall be insured up to \$100,000 in the aggregate.

12 C.F.R. § 330.2(a) (1990).

148. 925 F.2d at 888; *see supra* note 146.

149. *Id.*

deposit insurance purposes.¹⁵⁰ Thus, the question of joint ownership of a certificate of deposit was determined in this case by the facts of the situation, not by reference to the bank's records. The FDIC contended that 12 C.F.R. section 330.1(b)(1)¹⁵¹ required that bank records be the sole reference in determining deposit insurance coverage and precluded examination of any other source, such as state law, to determine insurance coverage.¹⁵² The appeals court rejected this contention on three grounds. First, the appeals court stated that section 330.1(b)(1) was meant to address the problem of a claimed interest in a deposit by a claimant whose interest does not appear in the insolvent bank's records, a different problem from the one in this case.¹⁵³ Second, section 330.1(b)(1) addressed the establishment of the existence of a relationship rather than the nonexistence of a relationship.¹⁵⁴ Third, section 330.9(b) controlled section 330.1(b)(1) because the former was more specific than the latter, making section 330.9(b) an exception to the general rule of section 330.1(b)(1).¹⁵⁵ The appeals court required that plaintiff be given the opportunity to prove that the certificates of deposit were not in fact jointly owned.¹⁵⁶

Although decided pursuant to deposit insurance regulations no longer in effect,¹⁵⁷ *Spawn* is relevant because of the similarity between current deposit insurance regulations and former sections 330.9(b) and 330.1(b)(1). Current 12 C.F.R. section 330.7(c)¹⁵⁸ excepts certificates of deposit from the signature card requirement and also requires that a certificate of deposit be, in fact, jointly owned in order to qualify as a joint account, as did section 330.9(b). Current 12 C.F.R. section 330.4(a)¹⁵⁹ refers solely to a failed

150. 925 F.2d at 888.

151. Former 12 C.F.R. § 330.1(b)(1) provided:

(b) Records. (1) The deposit account records of the insured bank shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian or executor. No claim for insurance based on such a relationship will be recognized in the absence of such disclosure.

12 C.F.R. § 330.1(b)(1) (1990).

152. 925 F.2d at 888.

153. *Id.* at 888-89.

154. *Id.* at 889.

155. *Id.*

156. *Id.*

157. *See supra* note 146.

158. 12 C.F.R. § 330.7(c) provides in part:

(c) Qualifying joint accounts. A joint deposit account shall be deemed to be a qualifying joint account, for purposes of this section, only if:

(1) All co-owners of the funds in the account are natural persons; and
(2) Each co-owner has personally signed a deposit account signature card;
and
(3) Each co-owner possesses withdrawal rights on the same basis.

The requirement of paragraph (c)(2) of this section relating to account signature cards shall not apply to certificates of deposit, to any deposit obligation evidenced by a negotiable instrument, or to any account maintained by an agent, nominee, guardian, custodian or conservator on behalf of two or more persons, but all such deposits must, in fact, be jointly owned.

12 C.F.R. § 330.7(c) (1991).

159. 12 C.F.R. § 330.4(a) provides in part:

bank's account records in determining deposit insurance without discussing apparent exceptions contained elsewhere in the insurance regulations, as did section 330.1(b). Although the language of the current regulations is not identical to the language of the previous regulations, the language and apparent purpose of the relevant sections appears sufficiently similar to make *Spawn* applicable under the revised regulations.

The *Spawn* court also discussed¹⁶⁰ whether the appropriate standard for the court's review of the FDIC's deposit insurance determination was the de novo standard of *Coit Independence Joint Venture v. FSLIC*¹⁶¹ or the arbitrary and capricious standard set forth in the Administrative Procedure Act.¹⁶² The Court of Appeals for the Fifth Circuit in *Spawn* applied the same reasoning in deciding this issue as it used in *Patrick A. Hymel, CLU & Assoc. v. FDIC*.¹⁶³ *Hymel* also involved a depositor's challenge to a determination regarding insurance coverage. In *Hymel* the Fifth Circuit noted that *Coit* dealt with determinations made by a federal deposit insurer (FSLIC) acting as receiver of an insolvent institution in adjudicating state law claims.¹⁶⁴ *Hymel* distinguished *Coit* from depositors' challenges to insurance determinations by stating that courts have long recognized a difference between the authority of a federal deposit insurer acting as receiver of an insolvent financial institution and acting as an insurer of deposits, making the more rigorous review of *Coit* inapplicable to challenges of actions undertaken as an insurer of deposits.¹⁶⁵ *Hymel* also observed that *Coit* involved an attempt by the FSLIC to adjudicate a variety of claims arising under state law and not, as in *Hymel*, the determination by a deposit insurer of deposit insurance claims arising under a federal statutory program administered by

(a) Recognition of deposit ownership -

(1) Evidence of deposit ownership. In determining the amount of insurance available to each depositor, the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution. If the FDIC, in its sole discretion, determines that the deposit account records of the insured depository institution are clear and unambiguous, those records shall be considered binding on the depositor, and no other records shall be considered, as to the manner in which the funds are owned. If the deposit account records are ambiguous or unclear as to the manner in which the funds are owned, then the FDIC may, in its sole discretion, consider evidence other than the deposit account records of the insured depository institution for the purpose of establishing the manner in which the funds are owned.

12 C.F.R. § 330.4(a) (1991).

160. 925 F.2d at 887.

161. 489 U.S. 561 (1989), which held in part that FSLIC's adjudication of creditor claims against a failed savings and loan was subject to de novo judicial review because FSLIC lacked legislative authority to exercise exclusive jurisdiction over such claims.

162. 5 U.S.C. § 706(2)(A) provides that a court reviewing an agency action pursuant to the Administrative Procedure Act may set aside any agency action, findings or conclusions found by the court to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A) (Law. Co-op. Supp. 1991).

163. 925 F.2d at 887, citing *Patrick A. Hymel, CLU & Assoc. v. FDIC*, 925 F.2d 881, 883 (5th Cir. 1991).

164. 925 F.2d at 882-83.

165. *Id.* at 883.

a federal agency.¹⁶⁶ The Fifth Circuit determined that *Coit* did not control *Hymel* and that the proper standard of review remained the Administrative Procedure Act's arbitrary and capricious standard, as determined by a pre-*Coit* Fifth Circuit case.¹⁶⁷

E. Bank Crimes

Two cases decided by the Court of Appeals for the Fifth Circuit flesh out the scope of 18 U.S.C. § 1344 — the Bank Fraud statute.¹⁶⁸ In 1984, 18 U.S.C. § 1344 provided as follows:

(a) [w]hoever knowingly executes, or attempts to execute, a scheme or artifice

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be [fined or imprisoned].¹⁶⁹

In *U.S. v. Hooten*,¹⁷⁰ the court considered whether the actions of Larry Hooten, an Assistant Vice President of San Antonio Credit Union (SACU), were actionable under the Bank Fraud Statute.

Morris Jaffe, Jr. borrowed \$1.5 million from SACU. Mr. Hooten served as the loan officer responsible for monitoring Mr. Jaffe's indebtedness. Mr. Jaffe received a series of anonymous letters offering to sell him the original note he executed payable to SACU. One letter included a copy of the note stamped "paid." Mr. Hooten subsequently admitted that he had sent the letters, but stated that he did not intend either to provide the note to Mr. Jaffe or to defraud SACU.

Mr. Hooten contended that his conduct did not represent bank fraud or attempted bank fraud. He stated that if his scheme had succeeded, he would have defrauded Mr. Jaffe and not SACU because even without the note SACU could have collected on Mr. Jaffe's obligation.¹⁷¹ The jury determined, however, that Mr. Hooten's plan was for Mr. Jaffe to employ the note to avoid his obligation to SACU.¹⁷² Thus, the *Hooten* court sustained the bank fraud conviction.

In contrast, the U.S. Court of Appeals for the Fifth Circuit in *U.S. v. Briggs*¹⁷³ determined that Susan Briggs did not commit bank fraud when she diverted in excess of \$5 million of her employers' funds to her own accounts

166. *Id.*

167. *Id.*, citing *Godwin v. FSLIC*, 806 F.2d 1290 (5th Cir. 1987).

168. 18 U.S.C. § 1344 (1984).

169. *Id.*

170. 933 F.2d 293 (5th Cir. 1991).

171. If SACU did not have possession of the note, however, it would not have been entitled to the protection afforded to holders of negotiable instruments. TEX. BUS. & COM. CODE ANN. § 3.104 (Vernon 1987) (prerequisites for negotiable instruments).

172. 933 F.2d at 295.

173. 939 F.2d 222 (5th Cir. 1991).

or accounts in the name of affiliated parties. Ms. Briggs was employed by Electronic Data Systems (EDS) and Southmark Corporation (Southmark). On several occasions, she initiated wire transfers from her employers' accounts to accounts for her benefit. The record reflected that EDS and a Southmark subsidiary incurred the losses from Ms. Briggs' scheme. The *Briggs* court noted that the record did not indicate that the bank experienced any loss as a consequence of Ms. Briggs' actions. The government did not contend that Ms. Briggs attempted to acquire bank funds, but instead, that "she attempted to obtain funds under the custody and control of the banks."¹⁷⁴ Accordingly, the government sought to convict Ms. Briggs under the second clause of 18 U.S.C. § 1344.¹⁷⁵

The *Briggs* court stated that a scheme or artifice to constitute bank fraud must seek to obtain funds by "false or fraudulent pretenses, representations or promises."¹⁷⁶ The government contended that by instructing the bank to wire funds, Ms. Briggs implied that she had the requisite authority over such funds to do so. The *Briggs* court responded that a wire transfer order is not an explicit false representation.¹⁷⁷

The *Briggs* court noted that the impermissibly obtained funds did not belong to a financial institution and the court seemed to be influenced by that fact.¹⁷⁸ Consequently, the court did not wish to interpret the bank fraud statute in an expansive manner. The court, however, also interpreted its own decision narrowly. The *Briggs* court stated that it was not holding that a misrepresentation can never be associated with a wire transfer order.¹⁷⁹ Instead, the court held that the act of instructing a bank to wire funds, without more, is not a misrepresentation.¹⁸⁰

174. *Id.* at 225.

175. *Id.* The second clause of 18 U.S.C. § 1344 now provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.S. § 1344(a)(2) (Law. Co-op. Supp. 1990).

176. 939 F.2d at 226 quoting 18 U.S.C. § 1344(a)(2) (1984).

177. 939 F.2d at 226. The *Briggs* court stated that it was following the decision of the U.S. Supreme Court in *Williams v. United States*, 458 U.S. 279 (1982). In *Williams*, the government sought to convict the defendant for making a false statement to a financial institution under 18 U.S.C. § 1014. The defendant had allegedly engaged in a "check kiting" scheme. The *Williams* court stated that neither the act of depositing checks nor the checks themselves are false statements because a check is not a statement of fact that can be either true or false. *Id.* at 284-85. In *Briggs*, the U.S. Court of Appeals for the Fifth Circuit analogized the wire transfer order at issue to the checks deposited by *Williams*. 939 F.2d at 226. *Cf.* *U.S. v. Falcone*, 939 F.2d 1455 (11th Cir. 1991) (shareholders and directors of an insurance company violated the Bank Fraud Statute when they used the company's facsimile signature stamp to obtain company funds in the possession of a bank).

178. 939 F.2d at 227 (The *Briggs* court observed that the conduct at issue fell "outside the core of concerns" of the Bank Fraud statute).

179. *Id.*

180. The *Briggs* court observed that if Ms. Briggs had stated that she possessed the authority to wire the funds to her account, then that statement would have been a misrepresentation. *Id.*

III. LEGISLATION

A. *Supervision of Insiders*1. *Leases with Insiders*

The legislature adopted an amendment to article 342-401 of the Texas Banking Code of 1943, as amended (the Banking Code),¹⁸¹ requiring a state bank to obtain the written consent of the Banking Commissioner (Commissioner) prior to entering into any "lease arrangement"¹⁸² with an executive officer, director, principal shareholder (collectively Insiders) of the bank or a company controlled by an Insider. The Texas Department of Banking (the Banking Department) perceived that the terms of such transactions were often the result of overreaching by Insiders.¹⁸³ Accordingly, the purpose of this legislation was to eliminate the potential for abuse that the Banking Department believed was inherent in such transactions.¹⁸⁴

The statute did not define the terms "executive officer," "director," "principal shareholder," or "control." Federal Banking regulations, most notably Regulation O,¹⁸⁵ however, do provide definitions of such terms. Accordingly, it is likely a court will refer to those regulations for guidance.

2. *Disclosure of Supervisory Information*

Senate Bill No. 523 (S.B. 523)¹⁸⁶ amended the Banking Code to authorize the Commissioner to disclose virtually any information concerning the financial condition of a state bank or its parent holding company to banking officials of other states. Previously, the Commissioner was only expressly permitted to provide such information to Texas officials and federal banking authorities. The purpose of this provision is to prevent individuals, who the Banking Department found to have caused problems for banks in the State of Texas, from starting with a "clean slate" by moving to another state.¹⁸⁷

S.B. 523 also permits individuals to furnish employment information to a financial institution¹⁸⁸ concerning the "known involvement" of a current or former officer or director (presumably of a financial institution) in a legal

181. TEX. REV. CIV. STAT. ANN. art. 342-418 (Vernon Supp. 1992).

182. The term "lease arrangement" includes renewals and extensions of existing leases. *Id.*

183. Graham, *1991 Legislative Recommendations*, 4th Annual Banking Law Conference, Jan. 31 and Feb. 1, 1991 (hereinafter "Banking Department Recommendations") (the speaker, who is the General Counsel for the Banking Department, asserted that the Banking Department had witnessed "significant abuse" as a result of leases between banks and their insiders.)

184. The FDIC promulgated regulations that if adopted will subject transactions between an insured state non-member bank and its insiders, including lease transactions, to certain procedural and documentation requirements. Peter Weinstock, *COMMENT/Insider Deals Face Closer Scrutiny* . . . , AM. BANKER, Oct. 4, 1991, at 4 col. 1.

185. 12 C.F.R. § 215 (1991). Regulation O sets forth procedures for and certain limits on extensions of credit by a bank to its insiders.

186. TEX. REV. CIV. STAT. ANN. art. 342-210 (Vernon Supp. 1992).

187. Independent Bankers Association of Texas, *1991 Regional Legislative Update Series* (1991) (hereinafter "Update Series") (the purpose of S.B. 523 is to "clean up bad apples in banking by making it difficult for them to skip to another state and resume a banking career.")

188. Senate Bill 523 defines the term "financial institution" to mean a state or federal savings association, a state or national bank or a savings bank with an office in the State of Texas. TEX. REV. CIV. STAT. ANN. art. 342-210(d) (Vernon Supp. 1992).

violation.¹⁸⁹ The bill further stated that no one may be held civilly liable for providing such information unless the information was false and was provided in disregard for the truth.¹⁹⁰

3. *Advisory Director Eligibility*

The legislature amended the Banking Code to prohibit an advisory director from serving with a state bank if the bank had charged off indebtedness owed to it by that individual or if that individual had been convicted of a felony.¹⁹¹ Previously, only directors were subject to disqualification on these bases.¹⁹² The Banking Department proposed this amendment because it desired to prevent individuals of "questionable character and integrity" from being involved in the affairs of state banks.¹⁹³

B. *Statewide Branch Banking*

1. *Branches*

The 1988 federal district court decision in *State v. Clarke*¹⁹⁴ permitted national banks located in the State of Texas to establish branches anywhere within the state. The Banking Department applied the "wild card" statute¹⁹⁵ to afford state-chartered banks with equivalent treatment. The legislature recognized the reality of state-wide branch banking by amending the Banking Code to provide explicit authorization for state banks to branch without geographic restriction.¹⁹⁶

The amendments also permit state banks to change their domicile or head office to any location within the State of Texas.¹⁹⁷ In contrast, national banks are only permitted to move their domicile to within thirty miles of the border of the town, county or city in which their domicile is currently located.¹⁹⁸ The legislature also authorized the Banking Department to establish emergency procedures to enable state banks, when they acquire assets and assume liabilities of failed savings banks and of savings and loan associations, to establish branches at the former locations of such institutions.¹⁹⁹

Perhaps most importantly, the amendment permits the Banking Department to reject a branch application if it has supervisory concerns regarding "affiliates"²⁰⁰ of the state bank, such as the bank's parent holding com-

189. TEX. REV. CIV. STAT. ANN. art. 342-210(b) (Vernon Supp. 1992).

190. TEX. REV. CIV. STAT. ANN. art. 342-210(c) (Vernon Supp. 1992).

191. TEX. REV. CIV. STAT. ANN. art. 342-404 (Vernon Supp. 1992).

192. TEX. REV. CIV. STAT. ANN. art. 342-405 (Vernon Supp. 1992).

193. Banking Department Recommendations, *supra* note 178, at 34.

194. 690 F. Supp. 573 (W.D. Tex. 1988).

195. TEX. Const. art. XVI § 16(c) (providing state banks the "same rights and privileges" as are or may be afforded to national banks).

196. TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1992).

197. TEX. REV. CIV. STAT. ANN. art. 342-314 (Vernon Supp. 1992).

198. 12 U.S.C.S. § 30 (Law. Co-op. Supp. 1991).

199. TEX. REV. CIV. STAT. ANN. art. 342-903 § 2 (Vernon Supp. 1992).

200. The statute defines the term "affiliate" to mean a company or similar entity that controls, is controlled by or is under common control with a state bank. TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1992).

pany.²⁰¹ Previously, it was questionable whether the Banking Department's jurisdiction extended to entities other than the bank itself.

2. Automatic Teller Machines

The changes to the Banking Code provisions governing automatic teller machines (ATMs) also reflect the reality of statewide branching.²⁰² When the State of Texas was a "unit" bank state, banks were only permitted to operate ATMs in their city or county of domicile. Now many banks have branches in communities other than where their headquarters is located. The amendment to the Banking Code permits banks to operate ATMs in any locality within the state.²⁰³

C. Appraisals

Congress believed that inflated and otherwise improper appraisals were a material contributing factor to the savings and loan crisis. Consequently, Congress decided to establish minimum standards for both appraiser qualifications and appraisals. Thus, when Congress adopted FIRREA,²⁰⁴ it mandated, among other things, that appraisals, in connection with "real estate-related financial transactions,"²⁰⁵ be performed by licensed or certified appraisers. Congress provided for the states to determine the specifics of testing and regulation, but established the Appraisal Subcommittee of the Federal Financial Institutions Examination Council to oversee such efforts.²⁰⁶

The Appraiser Licensing and Certification Act (the Licensing and Certification Act)²⁰⁷ brought the State of Texas into compliance with FIRREA by providing a system for licensing and certification of appraisers and by creating the Texas Real Estate Appraiser Board (the Board) to regulate the appraisal industry in the State of Texas. To become a licensed appraiser, a person must pass a written examination, complete 75 hours of class, including 15 hours relating to the Uniform Standards of Professional Appraisal Practice, and possess 2,000 hours of experience regarding appraisals.²⁰⁸

201. TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1992).

202. TEX. REV. CIV. STAT. ANN. art. 342-903(a) (Vernon Supp. 1992).

203. TEX. REV. CIV. STAT. ANN. art. 342-903(a) § 1 (Vernon Supp. 1992).

204. Pub. L. No. 101-73, § 1101, 103 Stat. 183 (1989).

205. FIRREA defines a "real estate-related financial transaction" as:
any transaction involving

(A) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof;

(B) the refinancing of real property or interests in real property; and

(C) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

Id. § 1121(5), 103 Stat. at 517.

206. FIRREA amended The Federal Financial Institutions Examination Council Act of 1978, 12 U.S.C. § 3301-3308, to require the creation of a subcommittee to implement FIRREA's dictates concerning appraisals. *Id.* § 1102, § 1022, 103 Stat. at 511-12.

207. TEX. REV. CIV. STAT. ANN. art. 6573a.2 (Vernon Supp. 1992). The Licensing and Certification Act abolished the previous requirement that appraisers had to be licensed real estate brokers. *Id.* § 18.

208. TEX. REV. CIV. STAT. ANN. art. 6573a.2 § 9(b) (Vernon Supp. 1992). The Licensing

Similarly, to obtain the designation of certification, an individual must also pass an examination, which is presumably more rigorous than the licensing examination, complete the number of hours of class specified by the Appraiser Qualifications Board, and possess 2,000 hours of experience regarding appraisals.²⁰⁹ It is a misdemeanor under the Licensing and Certification Act for an individual to represent himself or herself as having obtained a license or certification when he or she does not possess such qualifications.²¹⁰

The Licensing and Certification Act also created the Board as an independent agency to oversee the appraisal industry.²¹¹ The Board is charged with appointing a Commissioner to administer the Licensing and Certification Act.²¹² The Board is also empowered to apply sanctions for violation of the Licensing and Certification Act.²¹³ The only sanction stated in the Licensing and Certification Act, however, is the power to revoke a license or certification. Accordingly, it is unclear what other enforcement powers the Board possesses.

D. Safe Deposit Boxes

An additional piece of legislation adopted by the legislature during its 1991 Regular Session was House Bill No. 41 (H.B. 41) governing the relocation of safe deposit boxes.²¹⁴ H.B. 41 prohibits the relocation of a safe deposit box or the opening of a safe deposit box for the relocation of its contents unless conducted in the lessee's presence or with the lessee's written permission or following the giving of notice to the lessee or as otherwise permitted by law.²¹⁵ H.B. 41 permits a relocation if at least thirty days' notice by certified mail, return receipt requested, is provided to each lessee of the safe deposit box.²¹⁶ If relocation occurs without the personal supervision or written authorization of the lessee, notice to the lessee containing the new box number or location is required within thirty days after the date of relocation.²¹⁷ In addition, if such a relocation occurs and the box is opened, an inventory of the box's contents must be conducted by two bank employees, at least one of whom must be an officer or manager and a notary public.²¹⁸ H.B. 41 contains two specific exceptions to its requirements, allowing relocation without the permission or presence of and without notice to the lessee if relocation is necessitated by natural disaster or other unforeseeable circumstances beyond the bank's control or if the safe deposit box rental is

and Certification Act provides that service as a real estate lending officer may be used to meet the experience requirement for a license or certification, provided a real estate lending officer regularly reviews appraisals as part of his or her job responsibilities. *Id.* § 9(c).

209. *Id.* § 9(a) (1991).

210. *Id.* § 21.

211. *Id.* § 5.

212. *Id.* § 6(k).

213. *Id.* § 12.

214. TEX. REV. CIV. STAT. ANN. art. 342-906 (Vernon Supp. 1992).

215. TEX. REV. CIV. STAT. ANN. art. 342-906(c) (Vernon Supp. 1992).

216. *Id.*

217. *Id.*

218. *Id.*

delinquent.²¹⁹

The legislature also adopted House Bill No. 1598 (H.B. 1598) concerning the imprinting of safe deposit box keys.²²⁰ H.B. 1598 requires that all keys issued to a safe deposit box by a bank after September 1, 1992, be imprinted with the bank's routing number or have a tag attached bearing the bank's routing number.²²¹ If a bank believes that the routing number on a safe deposit box key or attached tag has been altered or defaced, the bank is required to notify the Department of Public Safety.²²² A bank that complies with the imprinting requirements of H.B. 1598 and that follows applicable law and its established security procedures in permitting access to a safe deposit box is not liable for any damages arising because of access given to any individual or the resulting removal of the box's contents.²²³

H.B. 1598 is somewhat ambiguous as to whether it requires the imprinting of all safe deposit box keys that have been issued as of September 1, 1992, and are issued thereafter or the imprinting of only those safe deposit box keys that are issued thereafter.²²⁴ However, the legislative history of the bill, together with testimony before the House Financial Institutions Committee and statements by H.B. 1598's author indicate that the bill was intended to require that all keys issued prior to or after September 1, 1992, be imprinted.²²⁵ It should be noted that the obligation to imprint a key arises only when a bank rents or permits access to a safe deposit box,²²⁶ thus sparing banks from the obligation to imprint keys issued prior to September 1, 1992, unless the holder desires access to the box.

The purpose of H.B. 1598 is to aid law enforcement officials in locating, tracing, or identifying proceeds from illegal activities.²²⁷ Imprinting of safe deposit box keys is intended to allow law enforcement officials who have recovered a safe deposit box key in the course of an investigation to identify the bank at which the relevant box is located.²²⁸ Currently the possession of a safe deposit key by itself does not provide much assistance to law enforcement officials, because such keys are generally very similar in appearance and do not identify the bank where the box is located.²²⁹

It is interesting to note that both H.B. 1598 and H.B. 41 amend the same statute and that H.B. 1598 restates the relevant statute without incorporating the changes contained in H.B. 41. As H.B. 1598 was passed after H.B.

219. *Id.*

220. TEX. REV. CIV. STAT. ANN. art. 342-906 (Vernon Supp. 1992).

221. TEX. REV. CIV. STAT. ANN. art. 342-906(d) (Vernon Supp. 1992).

222. *Id.*

223. *Id.*

224. The relevant language of H.B. 1598 provides that a bank "shall imprint all keys issued to the box after September 1, 1992." TEX. REV. CIV. STAT. ANN. art. 342-906(d) (Vernon Supp. 1992).

225. Texas Bankers Association Legal Briefs, No. 91-08, at 1 (Sept. 10, 1991).

226. TEX. REV. CIV. STAT. ANN. art. 342-906(d) (Vernon Supp. 1992).

227. Banking Department Recommendations, *supra* note 183, at 77.

228. *Id.*

229. *Id.*

41, it is unclear as to whether this presumably inadvertent omission repealed H.B. 41.

E. Petroleum Storage Tanks

H.B. No. 1214 (H.B. 1214) was an important bill adopted by the legislature to modify provisions of the statute governing the petroleum storage tank remediation fund.²³⁰ The petroleum storage tank remediation fund is a fund administered by the Texas Water Commission from which owners and operators of petroleum storage tanks can be reimbursed for a portion of the costs of correcting contamination caused by their tanks.²³¹ H.B. 1214 provides that a bank's security interest in a petroleum storage tank, in real property on which a tank is located or in personal property located on such real property does not in itself make the bank liable under the Texas Water Code as an owner or operator for contamination caused by the tank.²³² H.B. 1214 also provides that a lender that exercises the control of a mortgagee-in-possession over property in which it has a security interest is not liable under the Texas Water Code as an owner or operator for contamination caused by tanks on the property unless the bank's actions cause or exacerbate the contamination.²³³ H.B. 1214 further provides that, if a lender forecloses upon a security interest in real or personal property or acquires real property by a deed in lieu of foreclosure, the lender is not liable under the Texas Water Code as an owner or operator for contamination caused by tanks associated with the property if the lender removes the tanks from service and takes such corrective action with respect to existing contamination as is required by the Texas Water Commission's rules.²³⁴ Lastly, H.B. 1214 provides that a lender with a security interest in property contaminated by petroleum storage tanks or with an ownership interest in such property as a result of foreclosure or a deed in lieu of foreclosure is eligible for reimbursement from the petroleum storage tank remediation fund for costs incurred in taking corrective action with respect to the contamination.²³⁵

IV. CONCLUSION

In response to the savings and loan crisis, Congress has provided the federal banking agencies with an extraordinary degree of discretion. Many of the cases decided during this Survey period explore the limits of such latitude. We expect the courts will be grappling with such issues for the foreseeable future.

230. TEX. WATER CODE ANN. § 26.3524 (Vernon Supp. 1992).

231. TEX. WATER CODE ANN. § 26.3573 (Vernon Supp. 1992).

232. TEX. WATER CODE ANN. § 26.3514 (Vernon Supp. 1992).

233. TEX. WATER CODE ANN. § 26.3514(c) (Vernon Supp. 1992).

234. TEX. WATER CODE ANN. § 26.3514(d) (Vernon Supp. 1992).

235. TEX. WATER CODE ANN. § 26.3571 (Vernon Supp. 1992).

