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CLOSING AND LIQUIDATION OF BANKS IN TEXAS

by

Frank L. Skillern, Jr.*

THE RECENT publicity over the closing of the Sharpstown State Bank has caused attorneys and the general public to become aware of the impact of a bank closing upon a community. In the Sharpstown case this impact has been widely felt, directly and indirectly affecting Texas politicians, as well as former depositors of the Sharpstown State Bank. Hundreds of lawsuits have been filed as a result of the closing of the bank, most of them in Texas, but others in such far removed places as Florida and Oregon. Such a wide impact might be expected, as Sharpstown State Bank involved the largest payoff of insured deposits in the history of the Federal Deposit Insurance Corporation (FDIC).¹

It is not as widely known that the closing of the Sharpstown State Bank in January 1971 was the fifteenth bank closing in Texas since 1964, an average of almost two per year. This fact is not particularly surprising, since Texas has more banks than any other state in the nation,² largely due to the prohibition of branch banking in Texas.³

This Article is written from the vantage point of an attorney who has represented the FDIC, in whole or in part, in connection with the receivership and liquidation of the fifteen banks which have closed in Texas since 1964.⁴ The following table lists each of these banks, with pertinent statistics:⁵

Year of Closing	Name of Bank and location	Number of Depositors	Amount of Deposits (rounded to thousands)
1964	First National Bank Marlin, Texas	2,215	\$ 3,459,000
1964	First State Bank Dell City, Texas	719	1,082,000
1965	Winona State Bank Winona, Texas	498	435,000
1965	Malone State Bank Malone, Texas	695	525,000
1965	First State Bank Covington, Texas	759	447,000
1966	Blanket State Bank Blanket, Texas	1,556	1,183,000
1966	First State Bank Tuscola, Texas	2,398	3,081,000
1967	Sacul State Bank Sacul, Texas	617	724,000

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¹ Deposits at the time of the closing were \$66,903,000. FDIC, ANNUAL REPORT (1971).

² As of Dec. 31, 1971, Texas had 1,215 banks; the state with the next largest number was Illinois with 1,134, and Minnesota was next with 732. By comparison, New York had only 431 banks (with 2,939 branches) and California had 152 banks (with 3,176 branches). FDIC, ANNUAL REPORT (1971).

³ TEX. CONST. art. XVI, § 16.

⁴ The writer is in no way speaking for or on behalf of the FDIC.

⁵ FDIC, ANNUAL REPORTS (1964-1971).

1968	Lorenzo State Bank Lorenzo, Texas	2,179	5,612,000
1969	Citizens State Bank Alvarado, Texas	2,343	2,300,000
1969	First State Bank Dodson, Texas	688	1,085,000
1969	State National Bank Lovelady, Texas	2,030	3,814,000
1969	Big Lake State Bank Big Lake, Texas	2,642	4,426,000
1969	First State Bank Aransas Pass, Texas	6,459	10,472,000
1971	Sharpstown State Bank Houston, Texas	27,403	66,903,000

An examination of this list reveals that, except for Sharpstown State Bank, all of the closed banks have been relatively small banks located in small towns.

I. THE CLOSING

The FDIC has no authority to close any bank. A bank may be closed only by its chartering authority, which would be the Comptroller of the Currency in the case of a national bank or the Banking Commissioner of Texas in the case of a state bank in Texas.

A. National Banks

The procedure for appointment of a receiver of a national bank is provided by statute.⁶ The only requirement of the statute is that the Comptroller "become satisfied" of the bank's insolvency. It has long been held that the Comptroller has this power without a previous judicial finding of the necessity for such appointment. In *Bushnell v. Leland*⁷ the Supreme Court specifically held that such a procedure did not vest judicial power in the Comptroller in violation of the United States Constitution. Thus, it is not whether the Bank is insolvent, but whether the Comptroller is satisfied that it is insolvent.⁸ Neither the bank nor its shareholders "in the absence of fraud charged and proved" are entitled to a judicial determination on the question of solvency.⁹ A similar result was reached in *United States Savings Bank v. Morgenthau*, in which the bank contended that it was solvent, but the court rejected the bank's argument,

⁶ 12 U.S.C. § 191 (1970).

⁷ 164 U.S. 684 (1897).

⁸ The strongest statement of the Comptroller's powers in this regard is found in *Liberty Nat'l Bank v. McIntosh*, 16 F.2d 906 (4th Cir.), cert. denied, 273 U.S. 783 (1927). The case involved an action to declare void the appointment of a receiver by the Comptroller, in which the court stated:

It will be observed that by the first section of the amended act . . . there is placed apparently no limitation to what [the Comptroller] may do when the proper conditions arise for the exercise of the authority and discretion reposed in him. . . . The convenience of large numbers of the public perhaps affected by what is to be done, and the serious disturbance of business conditions liable to be involved, would seem to justify and warrant this grant of power to an official of the dignity and importance of the Comptroller of the Currency.

Id. at 908.

⁹ *Id.* at 909.

stating that it would not substitute its judgment for the judgment of the Comptroller, "unless it appears by convincing proof that the Comptroller's action is plainly arbitrary and in bad faith."¹⁰ Likewise, in *B. V. Emery & Co. v. Wilkinson* the court stated that the acts of the Comptroller in finding the insolvency of a national bank and appointing a receiver are "quasi judicial" in character and "may only be voided by a court in a direct proceeding for clear error of law, fraud, or mistake."¹¹

In one instance in Texas, the stockholders of a national bank brought suit to enjoin the liquidation of the bank and return control of the bank to its officers, directors, and employees.¹² The stockholders sued in the name of the bank and named as defendants the Secretary of the Treasury of the United States, the Comptroller of the Currency, the FDIC, and the employee of the FDIC designated as liquidator of the bank. The complaint alleged that the bank was not insolvent, and that the determination of the insolvency by the Comptroller was arbitrary and capricious, and an abuse of discretion. The defendants moved to dismiss; the court granted the motion holding, as a matter of law, that the court lacked "jurisdiction to review the Comptroller of the Currency's satisfaction that the State National Bank of Lovelady was insolvent and the subsequent appointment of a receiver for such national banking association."¹³

B. State Banks

The Banking Commissioner of Texas has the authority to close a state bank and liquidate its assets under the Texas Banking Code if he finds that it is insolvent or in danger of becoming insolvent.¹⁴ If the Commissioner finds that the bank is conducting its affairs in an unsafe manner, he has the power to require that the board of directors take the steps necessary to correct the situation. If the directors fail to comply with his request within ten days, the Commissioner must certify the facts of the situation to the state Banking Board. The Board must then hold a hearing, and has the power to order the bank's assets liquidated.¹⁵ The Banking Code specifically gives a state bank which has been closed by the Commissioner the right to bring suit in the district court of the bank's domicile to enjoin the Commissioner from liquidating the bank.¹⁶ Such suit must be brought within five days from the closing of the bank. In view of the fact that the Commissioner retains possession of the assets of the bank pending a trial on the merits and appeal, it is not surprising that there are no reported cases in which such a suit has been instigated. In connection with the closing of the Sacul State Bank by the Banking Commissioner in 1967, a majority of the members of the board of directors of the bank brought suit against the Banking Commissioner and Deputy

¹⁰ 85 F.2d 811, 814 (D.C. Cir.), cert. denied, 299 U.S. 605 (1936).

¹¹ 72 F.2d 10, 12 (10th Cir. 1934). See also *Munro v. Post*, 102 F.2d 686 (2d Cir. 1939); *Crawford v. Gamble*, 57 F.2d 15 (6th Cir. 1932); *Port Newark Nat'l Bank v. Waldron*, 46 F.2d 296 (3d Cir. 1930).

¹² *State Nat'l Bank v. Kennedy*, Civil No. 4999 (E.D. Tex., filed June 24, 1969).

¹³ *Id.*, Conclusions of Law.

¹⁴ TEX. REV. CIV. STAT. ANN. art. 342-803 (1959).

¹⁵ *Id.*

¹⁶ *Id.* art. 342-805 (1959).

Commissioner, alleging that these officials had arbitrarily and capriciously closed the bank without giving the directors sufficient opportunity to correct its problems. Interestingly, the plaintiffs did not allege that the bank was solvent, but alleged that "under valid theories of both accounting and banking . . . the Bank is not insolvent or hopelessly broke . . . but at worst is only in the position of needing temporary infusion of additional capital, all of which is a minor matter . . ." ¹⁷ After hearing testimony, the trial court denied plaintiffs' request for a temporary injunction restraining the defendants from liquidating the assets of the bank. This ruling was not appealed. There has been no other contest of the closing of a state bank in Texas during the period since 1964.

II. ACTIVITY OF FEDERAL DEPOSIT INSURANCE CORPORATION

A. *Receiverships*

Appointment. If the Comptroller of the Currency appoints a receiver of a national bank, such receiver must be the FDIC.¹⁸ The FDIC is also authorized to act without bond as receiver of a state bank located in Texas whose deposits are insured to any extent by the FDIC and which has been closed "on account of inability to meet the demands of its depositors."¹⁹ Under federal law, a bank is deemed to have been closed "on account of inability to meet the demands of its depositors in any case in which it has been closed for the purpose of liquidation without adequate provision being made for payment of its depositors."²⁰ The mechanism set out in the Texas Banking Code for such appointment is a tender by the Banking Commissioner and acceptance by the FDIC (both usually by telegram). The statute further states that upon the acceptance of the appointment by the FDIC "the possession of and title to all the assets, business and property of such banking institution of every kind and nature shall pass to and vest in said Corporation and without the execution of any instruments of conveyance, assignment, transfer or endorsement."²¹

Pursuant to these provisions, the FDIC has acted as receiver for all state banks closed in Texas in recent years.

Court Supervision. In both state and national bank receiverships, the receiver must secure authority from an appropriate court for certain of its actions.

National Banks. The receiver of a national banking association is directed by statute to "take possession of the books, records and assets of every description of such association" and "to collect all debts, dues and claims belonging to it."²² The same statute provides that the receiver "upon order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all real and personal property of such association,

¹⁷ *Gordon v. Falkner*, Civil No. 14,208 (145th Jud. Dist. of Nacogdoches County, filed June 29, 1967).

¹⁸ 12 U.S.C. § 1821(c) (1970).

¹⁹ TEX. REV. CIV. STAT. ANN. art. 489b, § 3 (1959); 12 U.S.C. § 1821(e) (1970).

²⁰ 12 U.S.C. § 1821(b) (1970).

²¹ TEX. REV. CIV. STAT. ANN. art. 489b, § 7 (1959).

²² 12 U.S.C. § 192 (1970).

on such terms as the Court shall direct"²³ The United States district court where the insolvent bank is located has been held to be the court of competent jurisdiction, referred to in the statute.²⁴

It has been held that the statute does not contemplate notice to interested parties.²⁵ Although the receiver cannot sell the bank's assets without court approval, the court, in acting on such a request, is not adjudicating a judicial controversy or determining the rights of adverse parties, but is acting in an administrative or supervisory capacity.²⁶ In *Roth v. Hood* the court fully discussed its role in considering an application for authority to sell assets of a bank:

The action of the receiver is purely administrative and the provisions of the act that he shall obtain an order of a court of competent jurisdiction before selling does no more than make the court a superior and advisory agent in the administrative field. Its order adjudicates no rights. It is merely a condition precedent to the receiver's power to sell. It is the exercise of a visitatorial power, given to the court by the statute and limited to that function. It is an administrative check upon the otherwise uncontrolled powers of the Comptroller.²⁷

Thus, the court's order in acting upon such application is not reviewable by an appellate court.²⁸

State Banks. The Texas Banking Code provides that the court receivership of a state bank is initiated by the filing of an inventory of assets of the bank in the office of the district clerk of the county of the bank's domicile.²⁹ The assets of the bank are deemed to be in the custody of the court in which the proceeding is pending. This court has "exclusive jurisdiction" over all suits and orders provided in this chapter of the Banking Code.³⁰

The receiver may take the following steps pursuant to the order of the state district court: (1) sell any of the assets of the bank; (2) borrow money and pledge all or part of the assets to secure the debt; (3) compromise or compound any bad or doubtful claim held by or asserted against the bank; (4) enter into "any other kind or character of contract or agreement on behalf of such bank which he deems necessary or proper to the management, conservation or liquidation of its assets;"³¹ and (5) pay dividends to depositors and creditors who have established their claims.³² In addition, the expenses of

²³ *Id.*

²⁴ *Whelan v. Blankenbeckler*, 87 F.2d 81 (5th Cir. 1936); *Wier v. Texas Co.*, 79 F. Supp. 299 (W.D. La. 1948), *aff'd*, 180 F.2d 465 (5th Cir. 1950).

²⁵ *Dugger v. Cox*, 110 F.2d 834 (6th Cir. 1938).

²⁶ *Griggs v. Baumer*, 130 F.2d 899 (3d Cir. 1942); *Rooth v. Hood*, 106 F.2d 616 (6th Cir. 1939); *Hulse v. Argetsinger*, 18 F.2d 944 (2d Cir. 1927); *Reibman v. FDIC*, 66 F. Supp. 409 (E.D. Pa. 1945), *aff'd*, 156 F.2d 371 (3d Cir. 1946).

²⁷ 106 F.2d 616, 618 (6th Cir. 1939), quoting *Hulse v. Argetsinger*, 18 F.2d 944, 945 (2d Cir. 1927).

²⁸ *Griggs v. Baumer*, 130 F.2d 899 (3d Cir. 1942); *Mitchell v. Joseph*, 117 F.2d 253 (7th Cir. 1941); *Whelan v. Blankenbeckler*, 87 F.2d 81 (5th Cir. 1936); *Fifer v. Williams*, 5 F.2d 286 (9th Cir. 1925).

²⁹ TEX. REV. CIV. STAT. ANN. art. 342-806 (1959).

³⁰ *Id.*

³¹ *Id.* art. 342-812.

³² *Id.* art. 342-814.

liquidation are authorized to be paid out of the bank's assets, "subject to review and approval by order of the district court."³³

It is specifically provided that the receivership court may enter any such order with or without hearing and that all parties interested in the affairs of the bank are bound and precluded by the action of the receiver in actions taken pursuant to court orders.³⁴ Notice and hearing on an application is set by the court only "if it deems it advantageous or proper."³⁵ The law is not clear whether an order entered by the court in state bank receiverships is appealable. There are no cases considering this point under the present statute. However, in *In re Marietta State Bank*³⁶ the Texarkana Court of Civil Appeals specifically held that the court order approving or rejecting the expense account of the Banking Commissioner acting as liquidator of a state bank was a judicial act, rather than an administrative one, and appealable. The case was decided under a prior statute, which was similar to the present article 342-813.³⁷ The dissenting judge stated that the order was not a final judgment and, therefore, not appealable.³⁸ In a later case, *Gossett v. Griffin & Kimbrough*,³⁹ the San Antonio Court of Civil Appeals held that a judgment by the receivership court allowing a claim was a final judgment and appealable.

It is submitted that an order of the receivership court entered under article 342-812 would not be appealable due to the specific provision in the statute that "all parties interested in the affairs of such bank shall be bound and precluded by the action of the Commissioner." An appeal from the rejection of a claim is, by statute, a separate suit in the district court, and the statute provides that if no such suit is brought, "the action of the Commissioner shall be final and not subject to review."⁴⁰ No appeal has been taken from any order of a Texas receivership court in recent years, other than by separate suit on a rejected claim, and such appeals will probably not be allowed in the future.

Claims Procedure for National Banks. Upon the appointment of a receiver, the Comptroller is directed to give notice "by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who have claims against such association to present the same, and to make legal proof thereof."⁴¹ However, presentation of a claim to the receiver is not a prerequisite to suit on the claim.⁴²

Claims Procedure for State Banks. The receiver of an insolvent state bank is required to give notice to depositors and creditors by publication once a week for thirteen weeks, beginning with ten days after the closing of the bank,

³³ *Id.* art. 342-813.

³⁴ *Id.* art. 342-812.

³⁵ *Id.*

³⁶ 35 S.W.2d 767 (Tex. Civ. App.—Texarkana 1931).

³⁷ TEX. REV. CIV. STAT. ANN. art. 342-813 (1959).

³⁸ 35 S.W.2d at 769 (Wilson, C.J., dissenting).

³⁹ 107 S.W.2d 1115 (Tex. Civ. App.—San Antonio 1937), *error dismissed*.

⁴⁰ TEX. REV. CIV. STAT. ANN. art. 342-811 (1959).

⁴¹ 12 U.S.C. § 193 (1970).

⁴² *Queenan v. Mays*, 90 F.2d 525 (10th Cir.), *cert. denied*, 302 U.S. 725 (1937); *Schulenberg v. Norton*, 49 F.2d 578 (8th Cir. 1931).

requiring the depositors and creditors to file written proofs of claim.⁴³ Within thirty days after the first publication, the receiver must mail a similar notice to each depositor or creditor shown upon the books of the bank.⁴⁴ The Banking Code in this instance, as elsewhere, directs the Commissioner to take this action, but it is done by the FDIC pursuant to the statute authorizing the FDIC to act as receiver.⁴⁵

Depositors, creditors, and other persons "asserting any claim of any character against a state bank in the process of liquidation" are given eighteen months from the date of first publication of notice to creditors to present their claims.⁴⁶ The claim must be signed and sworn to by the claimant.⁴⁷ The receiver is given three months after receipt of a claim to approve or reject it in whole or in part, and, if the claim is rejected, the receiver must notify the claimant by registered mail.⁴⁸ The Banking Code then requires any claimant to sue the rejected claim within three months from the date of mailing of notice by the Commissioner; otherwise the action of the Commissioner is final and not subject to review.⁴⁹

Unlike national bank receiverships, the presentation of a proper claim against a state bank receiver is a condition precedent to the filing of suit on the same subject matter. In fact, an essential element of any cause of action against a state bank in liquidation is an allegation that the plaintiff has presented his claim to the liquidator and it has been rejected, or an allegation of facts which would excuse such a presentation. This rule was clearly stated in *L.G. Balfour Co. v. Gossett*⁵⁰ in which a suit was pending against a state bank at the time of its insolvency and the Banking Commissioner, as receiver for the bank, was made a party to the suit. The Commissioner contended, among other things, that no cause of action was stated because the pleading did not allege that the claim was presented to and rejected by the Commissioner before he was made a party defendant. The Supreme Court of Texas acknowledged that the general rule was that "no action can be maintained against the Banking Commissioner on a claim against an insolvent state bank unless and until such claim has been presented to and rejected by such Commissioner."⁵¹ The court pointed out that this rule was not contained within the statutes, and merely arose by implication from the provisions of the statutes. The court then held that such an implication was not necessary, and such a rule would not be applied to a claim already in litigation at the time the bank failed. This case, and others,⁵² were decided prior to the adoption of the present statute in 1943.⁵³ The terminology of the statute under which these cases were decided,⁵⁴ however, was

⁴³ TEX. REV. CIV. STAT. ANN. art. 342-808 (1959).

⁴⁴ *Id.* art. 342-802.

⁴⁵ *Id.* art. 489b.

⁴⁶ *Id.* art. 342-809.

⁴⁷ *Id.*

⁴⁸ The time may be extended by written agreement with the claimant. *Id.* art. 342-810.

⁴⁹ *Id.* Such a suit is tried de novo in the district court, and is subject to the rules of procedure and appeal applicable to civil cases. *Id.*

⁵⁰ 131 Tex. 348, 115 S.W.2d 594 (1938).

⁵¹ 131 Tex. at 353, 115 S.W.2d at 597.

⁵² See, e.g., *Brand v. Conner & McRae*, 78 S.W.2d 712 (Tex. Civ. App.—Eastland 1934), error ref.

⁵³ TEX. REV. CIV. STAT. ANN. arts. 342-801 to -816 (1959).

⁵⁴ Ch. 15, § 9 [1909] Tex. Laws 2d Spec. Sess. 408.

similar to the present statute, the principal difference being a six-months limitation period for filing suit after rejection of the claim, rather than a three-month limitation.

The rule that the claim must be made or excused before initiation of the suit is applicable regardless of the nature of the claim. In *City of Harrisburg v. Austin*⁵⁵ plaintiff brought suit against the Banking Commissioner of Texas, as receiver of an insolvent state bank, seeking orders restraining and enjoining the Commissioner and other defendants from listing certain municipal bonds issued by the city of Harrisburg as an asset of the bank in liquidation, and from, in any manner, disposing of or encumbering the bonds. The complaint further contended that the plaintiff should be declared to have title to the bonds, and should be given possession of the bonds. The court held that the plaintiff was a claimant within the specific language of the statute concerning bank liquidation, and, thus, was required to present the claim to the Commissioner for approval or rejection before a suit could be maintained on the claim. The court explained that "the use of the words 'any claim' in [the statute] should, in view of the general dominant purpose of the act, be understood as including not only claims for money due by the bank, but also claims for personal property held by the bank under apparent titled claim of ownership."⁵⁶ Although this case was decided under the old statute,⁵⁷ the present statute refers to "any claim of any character,"⁵⁸ and the rule would appear still to apply.

Under some circumstances the filing of a claim may be excused. For instance, in *Gossett v. Green*⁵⁹ the Banking Commissioner, as receiver of an insolvent bank, brought suit against Green based on a promissory note allegedly signed by Green payable to the bank. Fifteen months later, Green filed a counterclaim against the Banking Commissioner for an amount allegedly due him from the bank. The Banking Commissioner filed a general demurrer, alleging that the counterclaim could not be maintained until Green had presented his claim and it had been rejected. The court acknowledged the general rule that the applicable statutes "contemplate that the claim be so first presented in order that the commissioner may be afforded the opportunity first to pass upon the claim and that the liquidation of the bank may be conducted in an orderly manner and, as far as possible, without the expense, complications and delay incident to litigation."⁶⁰ The court found, however, that by first filing suit against Green, it was apparent that the Commissioner "had been afforded the opportunity to consider, investigate and pass upon Green's claim,"⁶¹ and that the purpose of the requirement of presentation was accomplished. It is submitted that nothing short of the filing of a separate suit by the receiver on the same or related subject matter will excuse the requirement that

⁵⁵ 279 S.W. 498 (Tex. Civ. App.—Galveston 1926), *error ref.*

⁵⁶ *Id.* at 499-500.

⁵⁷ Ch. 15, § 9 [1909] Tex. Laws 2d Spec. Sess. 409.

⁵⁸ TEX. REV. CIV. STAT. ANN. art. 342-809 (1959).

⁵⁹ 137 Tex. 50, 152 S.W.2d 733 (1941).

⁶⁰ *Id.* at 55, 152 S.W.2d at 736.

⁶¹ *Id.* at 56, 152 S.W.2d at 737.

the claim be presented and rejected prior to suit unless the case was pending against the bank prior to its closing.

B. Assumption Transactions

After a bank is closed in Texas, the FDIC has two alternatives. It may accept the receivership and pay off depositors up to the insured limit;⁶² or, it may give financial assistance to another insured bank, either one in existence or a newly formed bank, to assume the deposit liabilities of the closed bank. The second alternative results in payment in full to all general creditors of the closed bank. The Board of Directors of the FDIC determines which alternative it will take; however, an assumption transaction is entered into only where the known facts indicate that the cost would be less to the FDIC. One key factor that goes into this decision is the presence or absence of contingent liabilities, such as lawsuits pending against the bank, the value of which cannot accurately be assessed by the Board of Directors. The existence of substantial contingent liabilities will usually dictate a receivership and payoff rather than an assumption transaction. Another factor taken into consideration is the amount of deposits in the bank in excess of the insured limit. Of the banks that have closed in Texas since 1964, the banks at Malone, Covington, Blanket, Tuscola, Lorenzo, Big Lake, and Aransas Pass involved assumption transactions; the other banks listed in the table at the beginning of this Article were receiverships.

The statutory authority for the assumption transaction is found in section 13(e) of the Federal Deposit Insurance Act.⁶³ The basic idea in an assumption transaction is that certain assets are transferred to the assuming bank, together with enough cash from the FDIC to equal the deposit liabilities being assumed by such bank. In exchange for the cash, the FDIC takes the other assets (primarily the assets which have created the problems in the bank) and liquidates them.

Procedure. The procedure employed in an assumption transaction is generally as follows:⁶⁴ (1) If the Regional Director of the FDIC believes that an assumption transaction is feasible, the Banking Commissioner of Texas, as statutory receiver of the closed bank, makes a formal application for financial assistance in the form of a loan secured by the assets of the closed bank or an outright sale of the assets. (2) The Board of Directors of the FDIC acts on the request. (3) Assuming that the request is granted, all parties who might have an interest are contacted and advised that the Banking Commissioner, as receiver of the closed bank, will present a petition to the district

⁶² Now \$20,000. 12 U.S.C. § 1813(m) (Supp. 1972).

⁶³ 12 U.S.C. § 1823(e) (1970). See also TEX. REV. CIV. STAT. ANN. art. 489b, § 5 (1959).

⁶⁴ This procedure is the one that has generally been followed in assumption transactions in Texas and does not purport to speak to the exact procedure followed in other jurisdictions. It assumes that the closed bank is a state bank rather than a national bank, as has been the case in all assumption transactions in Texas in recent years.

An assumption transaction is possible with a closed national bank. In such an instance, the FDIC in its corporate capacity would be dealing with itself in its capacity as receiver, or the transaction could be consummated with the bank prior to its closing when insolvency appears imminent. See 12 U.S.C. § 1823(d) (1970).

court of the county in which the bank is located, seeking authority to sell all of the assets of the closed bank. Depending on a number of factors, such as the size of the bank, size of the community, and the reason for insolvency, there may be many parties interested in assuming the deposit liabilities of the new bank, or there may be few or only one.

Bidding. A petition is filed by the Banking Commissioner, as statutory receiver of the closed bank, seeking authority to sell the assets of the insolvent bank, and a hearing date is set, usually within a few days after the petition is filed. All interested parties are invited to submit sealed bids to be opened by the court; usually, these bids must include the following information: (1) name of the party submitting the bid; (2) if it is on behalf of a new bank to be founded, the names of the organizers and the proposed capital strength of the new bank; and (3) the dollar amount, if any, that the bidder will pay as a premium. In many instances, the bidder is required to buy the bank building and its furniture and fixtures, and if so, the bid would also include the amount offered for such items.

The bidders are advised that the Banking Commissioner and the FDIC reserve the right to reject all bids. In this regard, any new bank would need a charter from the State Banking Board and deposit insurance from the FDIC. Thus, it would be possible that no bids would be acceptable.

The bids are opened by the judge and studied by representatives of the Banking Commissioner and the FDIC. If a bid is accepted, an announcement is made and the court enters its order authorizing the sale. If the acceptable bid is by an existing bank, such bank must immediately have a special meeting of its board of directors authorizing the assumption transaction and authorizing the execution of the various documents involved. If the acceptable bid is on behalf of a bank to be organized, the applicants must obtain their charter and then hold the board meeting.

Closing. At the closing, the following documents are generally executed: (1) an agreement between the FDIC and the Banking Commissioner of Texas, as receiver of the insolvent bank, transferring the so-called unacceptable assets to the FDIC, either as an outright transfer or as security for a loan; (2) a separate assignment from the Banking Commissioner as receiver to the FDIC, which includes any claim against the bank's officers, directors, or employees arising out of the performance or manner of performance of their duties and all claims under any fidelity bonds issued to the bank; (3) power of attorney from the Banking Commissioner as receiver of the insolvent bank to the FDIC; (4) an agreement between the assuming bank and the FDIC; and (5) an agreement between the Banking Commissioner of Texas as receiver of the insolvent bank and the assuming bank, under which the assuming bank agrees to assume and pay certain stated liabilities of the insolvent bank, including all deposit liabilities, and the receiver transfers the appropriate assets to the assuming bank.⁶⁵

⁶⁵ Such assets would usually include the bank building and furniture and fixtures, cash due from banks, and securities. If the assuming bank has had an opportunity to examine the

The assumption transaction has been extensively used by the FDIC throughout the years and, in such instances, depositors in the insolvent bank are paid in full, even if the deposit is in excess of the insured limit.

III. LITIGATION

A. *Jurisdiction*

Any suit by or against the FDIC in its corporate capacity is deemed by statute to arise under the laws of the United States, without regard to the amount in controversy.⁶⁶ The only type of case which is specifically deemed not to arise under the laws of the United States is one to which the FDIC is a party "in its capacity as receiver of a state bank and one which involves only the rights or obligations of depositors, creditors, stockholders and such state bank under state law."⁶⁷ It has long been held, however, that the federal courts have jurisdiction over cases by or against a receiver of a national bank.⁶⁸ Thus, federal courts have jurisdiction of all cases filed by or against the FDIC as receiver of a national bank or in its corporate capacity as assignee of a state bank in an assumption transaction.

With respect to litigation involving the FDIC as receiver of a state bank, the Texas Banking Code provides that the assets are deemed to be in the custody of the court in which liquidation proceedings have been initiated (by filing an inventory of assets) and "all suits and orders provided for under this chapter shall be deemed to be in the nature of interventions or orders in said proceedings, of which suits and orders said court shall have exclusive jurisdiction."⁶⁹ Under a prior statute, the Texas Supreme Court held that the district court of the county where the bank was located was the court "in which all actions for the establishment of rejected claims against the insolvent bank must be brought, regardless of contractual venue or jurisdictional amount."⁷⁰ The statutes then in effect were generally similar to the ones in effect today, and this holding would appear to be the law under the present Banking Code.⁷¹

In the event there is more than one district court in a county, the case may be transferred from the receivership court to any other district court of that

loan portfolio, the assuming bank could purchase certain of the insolvent bank's notes, although usually it later purchases such notes directly from the FDIC.

⁶⁶ 12 U.S.C. § 1819 (1970). However, there is no jurisdiction provided in § 1819 for a suit directly against the FDIC which is based on tort. A plaintiff must bring a tort action against the United States under the Federal Tort Claims Act. *Freeling v. FDIC*, 221 F. Supp. 955 (D. Okla. 1962), *aff'd*, 326 F.2d 971 (10th Cir. 1963).

⁶⁷ 12 U.S.C. § 1819 (1970). For a discussion of the distinction between the FDIC in its capacity as receiver of a state bank and as insurer of deposits in such a bank, and the effect of this distinction on federal court jurisdiction, see *Freeling v. Sebring*, 296 F.2d 244 (10th Cir. 1961).

⁶⁸ 28 U.S.C. § 1348 (1970) provides that the district courts shall have original jurisdiction of any civil action to wind up the affairs of a national banking association. See *International Trust Co. v. Weeks*, 203 U.S. 364 (1906); *Larabee Flour Mills v. First Nat'l Bank*, 13 F.2d 330 (8th Cir.), *cert. denied*, 273 U.S. 727 (1926).

⁶⁹ TEX. REV. CIV. STAT. ANN. art. 342-806 (1959).

⁷⁰ *Kidder v. Hall*, 113 Tex. 49, 251 S.W. 497 (1923).

⁷¹ See *Innes v. State Banking Bd.*, 113 Tex. 300, 254 S.W. 116 (1923); *Brand v. Hood*, 85 S.W.2d 347 (Tex. Civ. App.—Texarkana 1935), *error dismissed*; *Chapman v. Seabury*, 263 S.W. 1107 (Tex. Civ. App.—San Antonio 1924); *Hall v. Eastland County*, 254 S.W. 1113 (Tex. Civ. App.—El Paso 1923).

county for trial; the judgment is then certified back to the court in which the bank is being liquidated for enforcement.⁷²

Two cases seem to be in conflict with these seemingly clear holdings. In *Ogden v. Edwards*⁷³ suit was brought against the Banking Commissioner, as receiver of an insolvent bank, and others on a debt and to foreclose vendors' liens on real property located in Yoakum County. The suit was filed in Yoakum County though the closed bank was located in Lubbock County. The case was tried on the merits and judgment was entered foreclosing the liens as against all defendants, but no personal judgment was entered against any of them. The land was sold by the sheriff pursuant to an order of sale, and purchased by the creditor and plaintiff in the case, Edwards. Later, one of the defendants brought a separate suit to set aside the previous judgment of foreclosure, contending that it was void, the court being without jurisdiction to hear the case, as it involved property of an insolvent state bank located in Lubbock County. The court of civil appeals held that the District Court of Yoakum County had jurisdiction to hear the case, relying on the general receivership statute which provides that a receiver may sue or be sued in any court having jurisdiction of the cause of action.⁷⁴ The court further held that the general venue statutes were applicable to a suit against the Banking Commissioner as receiver of an insolvent bank, and venue was proper in Yoakum County as the land being foreclosed was located there. Likewise, in *Gossett v. First Trust Joint Stock Land Bank*⁷⁵ it was held that the district court of the county where the land was located had jurisdiction of a suit against the receiver of an insolvent bank located in another county. The court stated that the judgment must then be presented to and enforced by the court in which the receivership was pending.

It is submitted that these two decisions are not the law at the present time and were probably incorrect when decided. The words "exclusive jurisdiction" in the statute can have but one meaning. The only question in any case against the receiver is whether it is a suit provided for under the chapter on bank liquidations.⁷⁶ Under the rationale of *City of Harrisburg v. Austin*,⁷⁷ any claim affecting property in the hands of the receiver would require a formal claim and rejection as a condition precedent to maintaining suit; therefore, any suit on such claim would be "one provided for" under chapter VIII of the Banking Code and the district court of the bank's domicile should have exclusive jurisdiction of the action.

B. Rights of Receiver or Assignee

The general statement that the receiver of a bank has no greater rights than the bank itself is often made.⁷⁸ However, this rule is not entirely true in cases

⁷² *L.G. Balfour Co. v. Gossett*, 131 Tex. 348, 115 S.W.2d 594 (1938).

⁷³ 108 S.W.2d 675 (Tex. Civ. App.—Amarillo 1937).

⁷⁴ TEX. REV. CIV. STAT. ANN. art. 2310 (1971).

⁷⁵ 138 S.W.2d 904 (Tex. Civ. App.—Dallas 1940).

⁷⁶ See TEX. REV. CIV. STAT. ANN. art. 342-806 (1959).

⁷⁷ 279 S.W. 498 (Tex. Civ. App.—Galveston 1926), *error ref.*

⁷⁸ *In re Anjopa Paper & Bd. Mfg. Co.*, 269 F. Supp. 241 (S.D.N.Y. 1967); *Chapman v. Clark*, 276 S.W. 197 (Tex. Comm'n App. 1925), *judgment adopted*.

involving the FDIC. In *D'Oench, Dubme & Co. v. FDIC*⁷⁹ the FDIC sued on a promissory note which it had acquired from a closed bank in an assumption transaction. The note had been executed by the defendant in renewal of previous notes to enable the bank not to show any past due bonds. The receipt for the notes contained the following statement: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid."⁸⁰

The defendant alleged that the note sued upon had been given without any consideration, with the understanding that no suit would be brought, and that the FDIC was not a holder in due course. The FDIC alleged that it was a holder in due course and that the defendant was estopped to assert the defenses alleged. The district court held that the FDIC was an innocent holder of the note in good faith and for value and that the defendant was estopped to assert want of consideration as a defense.⁸¹ The Supreme Court of the United States affirmed the district court judgment, not on the basis that the FDIC was a holder in due course, but on the basis of a federal public policy protecting the institution of banking.

"These provisions [sections 264(s) and (y) of 12 United States Code] reveal a federal policy to protect respondent and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans."⁸² The Court explained that the test to be applied was "whether the note was designed to deceive the creditors or the public authority or would tend to have that effect."⁸³ The Court specifically found that the defendant was not aware of the use the bank made of the notes, but held that this fact was immaterial, because the defendant "was responsible for the creation of a false status of the note in the hands of the Bank."⁸⁴ The position of the FDIC under *D'Oench, Dubme* when a secret agreement is involved was emphasized by the Third Circuit in *FDIC v. Alker*:

Assuming that the Trust Company was negligent in failing to carry forward some notation of the legends upon its records, it is clear that such negligence may not be imputed to FDIC. The fact is that there was no record of any agreement not to foreclose the collateral on the books of the Trust Company when FDIC took possession of the consolidated note and of its collateral. The agreement not to foreclose, assuming its existence, would still be a 'secret agreement' within the purview of the *D'Oench, Dubme* decision.⁸⁵

⁷⁹ 315 U.S. 447 (1942).

⁸⁰ *Id.* at 454.

⁸¹ 117 F.2d 491, 492 (8th Cir.), *aff'd*, 315 U.S. 447 (1941).

⁸² 315 U.S. at 457.

⁸³ *Id.* at 460.

⁸⁴ *Id.* at 461.

⁸⁵ 164 F.2d 469, 470 (3d Cir. 1947), *cert. denied*, 334 U.S. 862 (1948). A similar result was reached in a case recently decided in federal court in Lubbock, Texas. *FDIC v. Vineyard*, 346 F. Supp. 489 (N.D. Tex. 1972), involved a suit on a promissory note conveyed to the FDIC in an assumption transaction. The court noted that under § 3.302(c) (i) of the Texas Business and Commerce Code the FDIC would not be a holder in due course. The court, however, cited *D'Oench, Dubme* as directly in point on two issues. First, federal, rather than state, law is applicable to suits by the FDIC. (*See also* *FDIC v. Rectenwall*, 97 F. Supp. 273 (N.D. Ind. 1951).) Second, the defendant's pleas of no consideration and an agreement by the bank that the note would never be called were not available as a matter of law. The court also noted that knowledge of guilt is not a prerequisite to liability.

After the *D'Oench, Dubme* decision, some of the rights of the FDIC were codified:

No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.⁸⁶

The principle announced in *D'Oench, Dubme* has been followed in a number of cases involving national and state bank receiverships. For example, *FDIC v. Motorlease, Inc.*⁸⁷ concerned a contention by a guarantor and endorser of a note that the note was executed and delivered to the maker's agent with the understanding between the bank, himself, and the agent that the note was to be used only under certain conditions. The guarantor also claimed lack of consideration. The New York court, on the authority of *D'Oench, Dubme*, held that this defense was legally insufficient.

Though such a result has never been reached in a state court receivership in Texas involving the FDIC as receiver, the result would appear to be consistent with Texas case law. *Brand v. Korth*⁸⁸ involved a suit whereby the Banking Commissioner, as receiver of an insolvent bank, brought suit on a note which was originally executed by defendant payable to himself and endorsed by him. The defendant contended that the note was executed without consideration solely for the purpose of lending his credit to the bank while it was in a condition of financial distress. The trial court found for the defendant and the court of civil appeals affirmed. The Texas Commission of Appeals in an opinion adopted by the supreme court, reversed and rendered judgment in favor of the Banking Commissioner: "Even conceding that the note was purely an accommodation note, without consideration to defendant, we are of the opinion that defendant, as against the Banking Commissioner in his capacity as representative of the depositors and creditors of the insolvent bank, was estopped to deny the legal obligations thereof."⁸⁹ *Brand* did not involve an actual agreement on the part of the defendant with bank officials to deceive the bank examiners, as was present in *Shaw v. Borchers*,⁹⁰ but the court found that the mere placing of the note with the bank and allowing it to remain there as an apparent asset had the same effect.⁹¹

⁸⁶ 12 U.S.C. § 1823(e) (1970).

⁸⁷ 288 N.Y.S.2d 356 (Sup. Ct. 1967).

⁸⁸ 128 Tex. 488, 99 S.W.2d 285 (1936).

⁸⁹ *Id.* at 491, 99 S.W.2d at 286.

⁹⁰ 46 S.W.2d 967 (Tex. Comm'n App. 1932), *judgment adopted*.

⁹¹ See *First Nat'l Bank v. Boxley*, 129 Okla. 159, 264 P. 184 (1927); *West Rutland Trust Co. v. Houston*, 104 Vt. 204, 158 A. 69 (1932). The Supreme Court of Texas quoted with approval the description in the latter case of a transaction to deceive the bank examiners as an illegal one, with its being against public policy to permit a party to such a transaction to rely on it as a defense. See Annot., 64 A.L.R. 588 (1929). See also *First Nat'l Bank v. Brownson*, 106 S.W.2d 1076 (Tex. Civ. App.—San Antonio 1937).

In *Farmers State Bank v. Largent*⁸³ the court extended this rule to protect the purchaser of assets from the Banking Commissioner of an insolvent bank. In that case Largent had executed a note in renewal of a note for Grimes at the request of the president of the bank so that the bank examiner would be satisfied, with the express understanding and agreement that Largent would not be called upon to pay the note. The payee bank became insolvent and the notes were sold to the plaintiff bank by the Banking Commissioner as receiver of the payee bank. The court held that the plaintiff bank succeeded to the rights of the Banking Commissioner, having acquired the note for a valuable consideration and that the defense of failure of consideration was not available to the defendant.

C. Bond Claim

One type of litigation that usually arises after a bank closing is a claim on the bank's fidelity bond.⁸³ In fact, in many instances the success of the liquidation is largely dependent upon recovery on the fidelity bond. Cases involving the banks at Marlin and Lorenzo, both of which resulted in opinions by the United States Court of Appeals for the Fifth Circuit, are illustrations of the special problems faced by a bank receiver in such cases.

The first case, *FDIC v. Aetna Casualty & Surety Co.*,⁸⁴ involved an elaborate scheme whereby two individuals, Morris and Garrett, purchased the controlling interest in the First National Bank of Marlin, Texas, through an agent, Steiner. Morris and Garrett caused Steiner to be elected as a director of the bank; however, he was not elected as an officer. Shortly after assuming control, Morris and Garrett caused Steiner to obtain a resolution of the bank's board of directors to accept two deposits of \$500,000 each (one from another Texas bank owned by Morris and Garrett) and to purchase a like amount of real estate notes. Shortly thereafter, Steiner advised the Deputy Comptroller of the Currency in Dallas that he was acting as a front for Morris and Garrett, who were the real owners of control of the bank. Steiner was instructed that no assets were to be purchased by the bank out of the Marlin trade area and that the bank was not to be involved in any transaction with Morris and Garrett. These instructions were never passed on to the minority members of the bank's board of directors. Approximately two weeks later, the bank's board authorized the purchase of \$1,000,000 in first lien real estate notes, subject to Steiner's approval. The board minutes stated that Steiner would handle the transaction. Steiner then purchased certain real estate notes for \$970,000 and the notes were delivered to the bank. Out of the \$970,000, \$189,186 was paid with Steiner's knowledge, to a company that was a front for Morris and Garrett. Upon a review of the notes purchased, it was apparent to the entire board that most of them were not in conformance with the statutory requirements, in that three were over the bank's legal limit of \$20,000, and sixty-four were for periods of time exceeding the bank's limit of twenty years. In February 1964 the Comptroller's office became aware of the notes, and the

⁸³ 132 S.W.2d 482 (Tex. Civ. App.—Eastland 1939), *error ref.*

⁸³ Of the banks listed at the beginning of this Article, only the ones at Tuscola and Big Lake did not involve bond claims.

⁸⁴ 426 F.2d 729 (5th Cir. 1970).

bank was declared insolvent on March 10, 1964, when the notes could not be sold.

The FDIC as receiver of the bank sold the notes for a net loss of \$408,362.97. Notice of loss was given to the bank's fidelity bond carriers shortly after the bank closed. The bonding companies denied liability on several grounds, including a denial of coverage on Steiner, who was not an officer or employee, but only a director; a denial of dishonesty on Steiner's part; and a claim that notice and proof of loss had not been filed within the time limit set out in the bonds.⁹⁵ The court had no problem in finding Steiner dishonest, as he specifically violated the instructions of the Deputy Comptroller of the Currency. As to coverage for Steiner's acts, the court held, in an opinion of first impression, that the so-called director's exclusion clause contained in the bond was applicable. This clause provided that the bond did "not cover . . . any loss resulting from the act or acts of any director of the Insured, other than one employed as a salaried, pensioned or elected official or an employee of the Insured, except when performing acts coming within the usual duties of an employee"⁹⁶ But the court found that in handling the purchase of the real estate notes, Steiner was performing acts "coming within the usual duties of an employee," *i.e.*, that he was "acting in an officer-like capacity for the bank."⁹⁷ The court had more difficulty with the notice provision. Over a strong dissent, the court found that the time for giving notice did not begin to run until the bank closed and Steiner's fraudulent conduct was discovered. The dissenting judge⁹⁸ argued that the bank knew of Steiner's fraudulent conduct when the non-conforming nature of the notes was discovered, approximately six months before the bank closed, pointing out that the non-conforming nature of the notes, which was disclosed on their face, made them illegal. It is certainly arguable that the bank itself, with the ownership still in the hands of Morris and Garrett, would have had a difficult time in making this recovery, whereas the receiver was in a position to take a different approach to the case.

Another example of a recovery by the FDIC on a fidelity bond in a case in which the bank, had it remained open, would have had a difficult time, is *FDIC v. Lott*.⁹⁹ Lott, the president of the Lorenzo State Bank, made loans in excess of the bank's legal limit and made loans, directly and indirectly, to a company in which he held a personal interest. The bonding company denied liability largely on two grounds: (1) that the directors knew of each of the dishonest acts shortly after they were committed and therefore notice was not timely given; and (2) that Lott, as controlling shareholder of the bank, was not an employee but the bank's alter ego and, therefore, his acts were not covered by the bonds. The bonding company relied largely on the two decisions in *Phoenix Savings & Loan Association v. Aetna Casualty & Surety*

⁹⁵ The pertinent bond provisions are quoted in the opinion. Generally the bonds covered losses due to dishonest, fraudulent, or criminal acts of any of the bank's employees. *Id.* at 731, 732.

⁹⁶ *Id.* at 762.

⁹⁷ *Id.* at 738.

⁹⁸ *Id.* at 739 (Godbold, J., dissenting).

⁹⁹ 460 F.2d 82 (5th Cir. 1972).

Co.,¹⁰⁰ which supported its second contention. To meet this defense, the FDIC, which had acquired the cause of action in an assumption transaction, sued the bonding company and the former directors of the bank in the alternative, alleging that the directors were liable for the loss if in fact they knew of Lott's dishonesty and failed to take any action thereon, or if they allowed Lott to become the alter ego of the bank and thus prevented recovery under the bonds. The jury found in favor of the directors and against the bonding company on all issues, though the evidence showed that the directors had not held a meeting for almost a year before the bank closed, and the examination reports reflected loans in excess of the bank's legal limit. The judgment further provided that any money to which Lott might be entitled as a stockholder should be paid to the surety.¹⁰¹

Part of the rationale of the *Phoenix* case was that recovery against the surety would allow a dishonest person to profit from his own dishonesty. Such a position would have been difficult, if not impossible, to rebut if *Lott* had involved the bank as a going concern. However, in a suit by the FDIC against the surety, such is not the case. As a result of this recovery, the FDIC recovered its entire disbursement made in the assumption transaction, and substantial sums were made available to pay to the bank's stockholders.

D. Directors' Liability

In each bank failure, the activities of the directors are carefully analyzed to determine if suit should be instituted against the directors. Under state law, directors and officers of state banks are liable for financial losses sustained by the banks "to the extent that directors and officers of other corporations are now responsible for such losses in equity and common law."¹⁰² The duties of directors of state banks are generally set out in articles 8 and 9 of chapter IV of the Banking Code.¹⁰³ These duties include the duty to supervise the conduct of the bank's business; to hold monthly meetings, and at each meeting to review and approve or disapprove each loan and investment made and item of expense incurred since the last meeting; and, to elect officers. Also, each director is required by the State Banking Department to sign a statement that he has carefully considered the report and is familiar with all items contained therein. In extreme instances, the directors are sent separate letters warning them of their potential personal liability, and receipt of this letter must be acknowledged. Thus, the Banking Department will have a record of warnings. The failure to heed these warnings can result in personal liability.¹⁰⁴

Under the National Bank Act, directors who "knowingly violate or knowingly permit" any of the officers or agents of the bank to violate any of the provisions of the Act are personally liable for all damages which the bank, its shareholders, or any other person sustains "in consequence of such violation."¹⁰⁵

¹⁰⁰ 381 F.2d 245 (4th Cir. 1967), and 427 F.2d 862 (4th Cir. 1970).

¹⁰¹ 460 F.2d at 87.

¹⁰² TEX. REV. CIV. STAT. ANN. art. 342-410 (1959).

¹⁰³ *Id.* arts. 342-408, -409.

¹⁰⁴ *See* Annot., 25 A.L.R.3d 941 (1969).

¹⁰⁵ 12 U.S.C. § 93 (1970). The scope of this Article does not include a discussion of the numerous cases decided under this statute.

IV. DIVIDENDS AND FINAL REPORT

In state bank receiverships, dividends may be paid, with the approval of the receivership court, to those depositors and creditors who have established their claims.¹⁰⁶ It is the general practice of the FDIC to pay several dividends throughout the course of the receivership as funds become available. All creditors who do not file their claims within eighteen months of the date of the first publication of notice to creditors¹⁰⁷ do not participate in any dividends until after full payment of all approved claims presented during such period.¹⁰⁸ The receiver of a national bank is not required to obtain a court order to pay a dividend.¹⁰⁹

In a receivership of a national or state bank, the FDIC in its corporate capacity is subrogated to all rights of depositors for any insurance payments.¹¹⁰ The FDIC must share dividends pro rata, along with other creditors and excess depositors, with no preference. There are generally no preferences or priorities (other than expenses of the receivership) in either national or state bank receiverships.¹¹¹

After a final dividend is paid in a state bank receivership, the FDIC, as receiver, files its final report in the receivership court; the court sets a hearing and directs such notice be given as the court deems proper.¹¹² If the court finds that the affairs of the bank have been administered properly and in accordance with law, the report is approved:

[T]he order of approval shall have the force and effect of forfeiting and cancelling the corporate charter of such bank, vesting title to the remaining assets, if any, in the stockholders of said bank, and releasing and discharging the Commissioner from any further duty, obligation or liability in connection with the administration of the affairs of such bank¹¹³

If assets are remaining, the court may designate a trustee to liquidate such assets for the benefit of the former stockholders of the bank.¹¹⁴

In national bank receiverships, the receiver is directed to pay over the remainder of the proceeds from liquidation, if any, to the shareholders of the

¹⁰⁶ TEX. REV. CIV. STAT. ANN. art. 342-814 (1959); *Innes v. State Banking Bd.*, 113 Tex. 300, 254 S.W. 117 (1923).

¹⁰⁷ TEX. REV. CIV. STAT. ANN. art. 342-809 (1959).

¹⁰⁸ *Id.* art. 342-814.

¹⁰⁹ 12 U.S.C. § 194 (1970) authorizes the receiver to pay ratable dividends on all claims "as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction" without reference to court authorization. For a full discussion of this provision, see *American Sur. Co. v. Bethlehem Nat'l Bank*, 314 U.S. 314 (1941).

¹¹⁰ 12 U.S.C. § 1821(g) (1970); TEX. REV. CIV. STAT. ANN. art. 489b, § 4 (1959).

¹¹¹ There are cases involving national banks that discuss preferences based on a trust theory, but it is generally held that the imposition of such a trust and preference is, in the words of Justice Cardozo, "plainly inconsistent with the system of equal distribution established by the federal law." *Jennings v. United States Fid. & Guar. Co.*, 294 U.S. 216, 226 (1935). A few cases have recognized the possibility of a preferential recovery against the receiver where the evidence proved that the property belonged to the claimant and not the bank. See, e.g., *FDIC v. Mademoiselle of Cal.*, 379 F.2d 660, 665 (9th Cir. 1967), in which the court held that to obtain such a preference, the claimant "must be able to identify a specific fund or payment in the possession of the receiver cognizable in equity" as the claimant's own property.

¹¹² TEX. REV. CIV. STAT. ANN. art. 342-815 (1959).

¹¹³ *Id.*

¹¹⁴ *Id.*

bank or their legal representatives, in proportion to the stock held by them.¹¹⁵ A formal final account is not required to be filed in the receivership court.

V. CONCLUSION

Bank liquidations in Texas during the past eight years have generally been successful. Dividends paid to depositors and creditors to date in receiverships are as follows:

Bank	Dividend to Date
First National Bank Marlin, Texas	100%
First State Bank Dell City, Texas	55% ¹¹⁶
Winona State Bank Winona, Texas	14.138%
Sacul State Bank Sacul, Texas	92.416%
Citizens State Bank Alvarado, Texas	100% ¹¹⁷
First State Bank Dodson, Texas	60% ¹¹⁸
State National Bank Lovelady, Texas	40% ¹¹⁹

In assumption transactions the FDIC made full recovery of its disbursement in connection with the banks of Covington, Lorenzo, and Big Lake, with the remaining assets left for transfer back to the shareholders in each instance. In addition, it is anticipated that there will be a full recovery in the Aransas Pass liquidation. A full recovery is usually dependent upon collection of the claims against the bonding company or the directors. In an assumption transaction, it may be dependent upon the payment of a substantial premium by the institution that originally assumed the deposit liabilities of the insolvent bank. It is interesting that considering the substantial amount of litigation in federal and state courts in Texas that has resulted from banks that have closed in recent years, very few appellate decisions have appeared in the books. For instance, no recent appellate cases have discussed the rights and duties of a receiver of a state bank under the Banking Code. It may be anticipated that, within the next few years, this situation will change, due to the numerous cases now pending involving the Sharpstown State Bank.

¹¹⁵ 12 U.S.C. § 194 (1970). See also 12 U.S.C. § 197 (Supp. 1972), which provides that after all creditors are paid a meeting of the shareholders of the bank is to be called by giving notice thereof for thirty days in a local newspaper; at the meeting, the shareholders determine whether the FDIC is to continue as a receiver to wind up the association's affairs, or whether an agent is to be elected for that purpose.

¹¹⁶ An additional dividend of 13% is expected. *Hearing on the Activities of the Federal Deposit Insurance Corporation Involving Closed Insured Banks Before the House Comm. on Banking and Currency*, 92d Cong., 1st Sess. 56 (1971).

¹¹⁷ *Id.* at 58.

¹¹⁸ An additional dividend of 10% is expected. *Id.*

¹¹⁹ An additional dividend of 54% is expected. *Id.*