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THE FDIC'S PREEMPTIVE POWER IN ACTIONS AGAINST INSIDERS OF INSOLVENT FINANCIAL INSTITUTIONS: A MATTER OF PRIORITY

INTRODUCTION

Twenty months after the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),¹ the House approved a compromise bill to provide $78 billion for the second round of the savings and loan cleanup.² "[O]ne of the worst financial mistakes of our century"³ had already cost roughly $167 billion.

Who should pay the final tab for the savings and loan debacle? Is there an acceptable alternative to sticking the taxpayer with the check? These questions were partially addressed by Congress when it provided enhanced criminal and civil enforcement powers in FIRREA.⁴ However, Congress' answer created a new dilemma: the Federal Deposit Insurance Corporation's (FDIC) pursuit of restitution and redress from directors, officers, and other related parties responsible for the insolvency of an insured financial institution⁵ brought into question its authority to preempt actions brought by institution shareholders against the same defendants for the same wrongs.⁶ Without such preemptive power, the FDIC risks finding pockets already emptied and unavailable to satisfy any judgments obtained or to replenish the deposit insurance fund.

Resolution of the priority issue involves fundamental questions of statutory interpretation and an assessment of the deference due the federal administrative agency responsible for assuring the security of citizens’ life savings held by the nation’s banks and savings associations. The financial stakes register in the billions, and the survival of the federal deposit insurance system is at risk. Should the FDIC be required to race shareholders to judgment in order to collect criminal restitution and civil penalties from thrift insiders? Or, is there a better solution?

This Comment discusses the FDIC’s right to priority in actions against insiders. Part I gives a historical perspective of the deposit insurance industry, the need for its reform, and FIRREA. Part II discusses the role of

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⁴. Pub. L. No. 101-73, Titles IX and X.
⁵. These parties are generally referred to as "insiders."
⁶. See Federal Deposit Ins. Corp. v. Jenkins, 888 F.2d 1537 (11th Cir. 1989).

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the FDIC in the savings and loan bailout. Part III addresses the existing law relating to priority: when the issue arises, what the stakes are, and how the courts have dealt with it. Part IV analyzes, through statutory interpretation, whether Congress intended to provide the FDIC with priority in its actions against insiders. Finally, this Comment concludes that priority is necessarily implicit in the directives given the FDIC with the enactment of FIRREA.

I. HISTORICAL PERSPECTIVE OF THE DEPOSIT INSURANCE INDUSTRY

A. The Birth of Federal Deposit Insurance

The Great Depression is perhaps most closely associated with the stock market crash of 1929, but it also marked the birth of the thrift industry structure. This structure carried the nation through multiple financing and housing cycles for over fifty years. Congress created the FDIC in 1933 for the “primary purpose of restoring public confidence in banks by establishing a system of federal deposit insurance.” Bank deposit insurance is primarily funded by the collection of an insurance premium from each commercial bank. Upon insolvency and liquidation of a member bank, the FDIC pays depositors the amount of each account up to the insurance ceiling.

A year after creating the FDIC, Congress established the Federal Savings and Loan Insurance Corporation (FSLIC) through the National Housing Act of 1934. The FSLIC’s purpose was to insure depositors of thrifts and thus facilitate a “stable, low-cost supply of housing funds.” Thrifts provided fixed-rate home mortgages for terms of twenty years or more, which were funded from insured simple passbook savings accounts.

B. Necessity for Reform

Extensive deregulation in the 1980s, “coupled with a severe economic

8. The insurance premium was first set at one-half of one percent of insured bank deposits but has since been reduced. Tammen, The Savings & Loan Crisis: Which Train Derailed-Deregulation or Deposit Insurance?, 6 J. L. & POL. 311, 316 (1990) [hereinafter S&L Crisis].
9. See infra Section II.A. for discussion of the FDIC’s possible actions upon a bank’s insolvency. The insurance cap was initially established at $2,500 per depositor. It now stands at $100,000 and has been broadly interpreted to apply to each account rather than each depositor. S&L Crisis, supra note 8, at 316.
10. S&L Crisis, supra note 8, at 313.
11. FSLIC insurance started at $5,000 per thrift depositor and stood at $100,000 per account in 1989. The initial FSLIC premium was levied at one-quarter of one percent on total deposits and creditor obligations but, as with the FDIC premium, it has been subsequently reduced. S&L Crisis, supra note 8, at 316.
downturn in the Southwest, left the [thrift] industry struggling for survival."\(^{12}\) Between 1980 and 1988, over 500 thrifts failed. This was more than three and one-half times as many as in the previous forty-six years combined.\(^{13}\) Factors credited with causing such a widespread failure included: poorly timed deregulation; dismal performance of thrift management; inadequate oversight, supervision, and regulation by government regulatory agencies and the Reagan Administration; a regional economic collapse; radical deregulation by several large states; and outright fraud and insider abuse.\(^{14}\) Poor thrift management decisions alone resulted in the failure of hundreds of FSLIC-insured thrifts and consequently the insolvency of the FSLIC.\(^{15}\)

By early 1989, when newly-elected President Bush publicly declared the financial institution problem a national priority,\(^{16}\) the situation was at crisis level.\(^{17}\) The House Banking Committee made the resolution of the savings and loan debacle its top priority in the 101st Congress and worked toward restoring public confidence in thrifts in order to "ensure a safe, stable, and viable system of affordable housing finance."\(^{18}\)

C. FIRREA and the Death of FSLIC

On February 22, 1989, President Bush offered a plan to resolve the FSLIC problem, introduced in the House as H.R. 1278.\(^{19}\) This plan, FIRREA, was the "most significant piece of financial institution legislation since the Great Depression...a solid first step toward a stronger thrift industry and

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14. LEGISLATIVE HISTORY, supra note 12, at 90.

15. Id. at 95. Newly established powers were not exercised safely. In many states a more subtle ethical hazard existed because the federally-backed deposit insurance made any negative results of deregulation appear inconsequential. Id. at 93. By 1984, more than one-third of all states had granted their state-chartered thrifts powers beyond those permissible for federally-chartered institutions. Id. As long as the federal government was responsible for picking up the tab for failed thrifts, there was no great incentive for state legislatures to deny sweeping demands for additional investment powers by the thrift industry. Id. at 90. Seventy percent of all FSLIC expenditures during 1988 went to pay for problems created by high-risk, ill-supervised, state-chartered thrifts in California and Texas. Texas and California thrifts also absorbed 54% of FSLIC expenditures in 1987. Id.

16. Id. at 101.


18. LEGISLATIVE HISTORY, supra note 12, at 101-03.

19. Id. at 100.
a sounder deposit insurance system."\(^{20}\)

The purposes of FIRREA, as outlined in House Conference Report No. 101-222, ranged from promoting "a safe and stable system of affordable housing finance" and putting the "Federal deposit insurance funds on a sound financial footing, . . ." to creating a new corporation to deal with failed thrift institutions, and expanding civil and criminal enforcement powers of the financial institutions' federal regulators.\(^{21}\) The FSLIC was abolished and its function as primary insurer of thrifts was assumed by the FDIC.\(^{22}\) Title II of FIRREA established the FDIC's role and amended the Federal Deposit Insurance Act (FDI Act) to cover all insured depository institutions.\(^{23}\)

II. THE FDIC'S ROLE IN THE S&L BAILOUT

It is necessary to have a clear understanding of what the FDIC must do, as well as its permissible means of accomplishing the goals of the federal deposit scheme, to comprehend the significance of whether Congress intended to grant the FDIC the power to preempt other claims on the assets of insiders in satisfying judgments.

The FDIC has dual roles when dealing with an insolvent insured institution. It has power in its corporate role as insurer (FDIC/Corporate) and power in its role as either conservator or receiver (FDIC/Receiver).\(^{24}\) Under section 212(a) of FIRREA, the FDIC must be appointed and must accept appoint-

\(^{21}\) LEGISLATIVE HISTORY, supra note 12, at 432.
\(^{22}\) Pub. L. No. 101-73, § 401, 103 Stat. 183, 354 (1989). FIRREA created an "off-budget, government sponsored entity," the Resolution Funding Corporation, to fund the resolution of the crisis through issuance of securities, interest on which was to be paid out of "proceeds from resolving failed thrifts, from Bank Board contributions, and from Treasury appropriation." LEGISLATIVE HISTORY, supra note 12, at 104. The legislation also established the Resolution Trust Corporation (RTC) to "manage and dispose of the assets acquired from failed thrifts." Id. The regulatory and insurance functions of the thrift industry were separated: regulatory and chartering functions to newly created Office of Thrift Supervision (OTS) under the Dept. of Treasury; and insurance to the FDIC. This was due to the recognition that many of the problems of the thrift industry stemmed from "the potential for conflicts of interest which may arise because of close ties between the [Federal Home Loan] Bank Board and the thrift industry." Id. at 106.


The FDIC is exclusive manager of the RTC, the mixed-ownership government corporation responsible for resolving cases involving FSLIC-insured institutions which failed or will fail between January 1, 1989, and three years from the enactment of FIRREA. Pub. L. No. 101-73, § 212, 103 Stat. 183, 212 (1989). The FDIC will be directly responsible thereafter. In dealing with these institutions, the RTC exercises FDIC's conservatorship and receivership powers and has the same status as the FDIC acting in such capacity. Once the RTC's existence ends on December 31, 1996, any remaining assets will be assumed by the FSLIC Resolution Fund. LEGISLATIVE HISTORY, supra note 12, at 449-50.

ment “whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution or District bank by the appropriate Federal banking agency.” As discussed below, the right to priority directly affects how the FDIC chooses to deal with an insolvent thrift, the extent of potential losses to the deposit insurance funds, and the methods available to recoup those losses.

A. FDIC Actions and the Use of Deposit Insurance Funds

When a thrift’s failure appears likely, the FDIC has several options for discharging its obligations as both insurer of the deposits and as likely receiver of the thrift. First, it may make direct assistance payments. The FDIC will rarely use this method to keep the failing institution running. Under 12 U.S.C. section 1823(e), the FDIC may only make direct assistance payments when such continued operation is essential to provide adequate banking service in the community.

If direct assistance is not made, the FDIC may operate the institution, as its conservator or receiver, with all powers necessary to conduct business and “preserve and conserve the assets and property of such institution.” The FDIC’s powers as receiver include the authority to (1) place the institution in liquidation; (2) organize a new Federal savings association to take over the failing institution; or (3) merge the insured institution with another solvent institution, transferring assets and liabilities through a purchase and assumption agreement. Placing the institution in liquidation requires selling off the institution’s assets, paying depositors their insured amounts, and covering any shortfall with insurance funds. Liquidation is the most costly and therefore least desirable of these alternatives. Plus, in a liquidation, the bank’s offices are closed, accounts are frozen, checks are returned unpaid, and depositors are prevented from receiving deposit insurance checks until after the reconciliation of accounts. Finally, the going

25. Id.

No assistance shall be provided under this subsection in an amount in excess of that amount which the Corporation determines to be reasonably necessary to save the cost of liquidating, including paying the insured accounts of, such insured depository institution, except that such restriction shall not apply in any case in which the Corporation determines that the continued operation of such insured depository institution is essential to provide adequate depository services in its community. In calculating the cost of assistance, the Corporation shall include (i) the immediate and long-term obligations of the Corporation with respect to such assistance, including contingent liabilities, and (ii) the Federal tax revenues foregone by the Government, to the extent reasonably ascertainable.
concern value of the bank as a viable enterprise is irretrievably lost. The ripple effect on other banking institutions and the economic community in general can cause extensive disruption and an erosion of public confidence in other banks.\(^{30}\)

Many of the significant problems of a direct liquidation can be avoided by the frequently used “purchase and assumption” transaction.

The chief advantage of the Purchase and Assumption transaction is that, with FDIC’s financial assistance, a sound, insured bank provides uninterrupted banking services to the community previously served by the failed bank. FDIC’s ability to structure and to effect Purchase and Assumption transactions quickly and smoothly provides the greatest protection to our monetary system and to individual depositors.\(^{31}\)

A failing institution will likely have many acceptable assets: cash, securities, buildings, a network of branch offices, and going concern value. To optimize these valuable assets, and thus reduce the demands on the insurance fund, the FDIC will accept bids from solvent financial institutions to take over the insolvent institution. This allows the institution to be reopened without interrupting banking operations and with no loss to the depositors. But, the value of the assets and the premium the purchasing institution is willing to pay for the going concern value is always less than the amount of the deposit liabilities which it will be assuming.\(^{32}\) FDIC/Corporate pays to FDIC/Receiver, the difference between the price paid for purchased assets and the assumed liabilities. FDIC/Receiver, in turn, transfers FDIC/Corporate’s payment to the purchasing bank.\(^{33}\) FDIC/Corporate, in exchange for this payment, receives the assets not acceptable to the assuming bank through FDIC/Receiver. FDIC/Corporate then proceeds to liquidate these retained assets. If and when the FDIC “has been made whole through the liquidation of the failed bank assets for the cash it expended from its insurance fund for the purchase of assets . . . any excess recoveries or unliquidated assets are returned for distribution to the failed bank’s remaining creditors, including subordinated capital note holders, if any, and stockholders.”\(^{34}\)

\(^{30}\) *P & A Transactions, supra* note 7, at 1153.

\(^{31}\) *Id.*

\(^{32}\) *Id.* at 1155.


\(^{34}\) *P & A Transactions, supra* note 7, at 1155.
B. Replenishing the Insurance Fund

Section 212(d) of FIRREA provides that once the FDIC has determined the least costly manner of dealing with the insolvent institution and has acted to protect depositors, FDIC/Receiver succeeds to all the rights of the depository institution, stockholders, depositors, officers, and directors “with respect to the assets of the institution.”35 In a purchase and assumption transaction, FDIC/Corporate succeeds to these rights because it purchased some assets of the failed institution from FDIC/Receiver with money from the deposit insurance fund. FDIC/Corporate will then attempt to realize upon the assets in order to replenish the insurance fund. This may involve the sale of real estate or securities and other paper, or the pursuit of legal actions that belonged to the failed institution. Additionally, Title IX of FIRREA authorizes criminal and civil actions against those contributing to a federally insured institution’s insolvency, amending portions of the FDI Act to increase penalties and enforcement powers.36

The changes in the penalties and enforcement powers authorized by Congress are intended to reverse the historical reality that banking agencies as a group have not consistently or vigorously used the civil enforcement actions available to them.37 Before FIRREA, there was a general failure to pursue directors and officers, emanating from the attitude of FDIC Chairman Seidman that FDIC’s main role was to reform and help the industry.38 With the abolition of the FSLIC, assumption of its functions by the FDIC, and the projected inadequacy of the Bank and Savings Association Insurance Funds in handling the extent of expected financial institution failures, the FDIC has taken Congress’ mandates of enforcement and stabilization of the deposit insurance industry seriously.39 The emphasis on such actions increases the FDIC’s potential ability to replenish the deposit insurance

37. Insider Abuse, supra note 16, at 231 (citing a 1984 subcommittee conclusion that “the banking agencies often fail to take direct civil enforcement action against individuals engaged in insider abuse, notwithstanding a clear statutory responsibility to do so” HOUSE COMM. ON GOVERNMENT OPERATIONS, FEDERAL RESPONSE TO CRIMINAL MISCONDUCT AND INSIDER ABUSE IN THE NATION’S FINANCIAL INSTITUTIONS, H.R. DOC. No. 1137, 98th Cong., 2d Sess. 152 (1984)).
38. Insider Abuse, supra note 17, at 233 n.70. Also factoring into the poor record of pursuing directors and officers was the major difficulty experienced by the FDIC in collecting assessed civil money penalties. Id. at 233 n.69.
39. Immediately after enactment of FIRREA, the FDIC had ongoing cases and investigations involving 1250 failed banks and savings associations. 1989 FDIC ANN. REP. 33. In 1989 former officers, directors or borrowers at closed banks and thrifts paid more than $60 million in restitution payments to FDIC and FSLIC, after being convicted of embezzlement or other forms of bank fraud. Id. at 39.
funds. But the actual success of its actions often depends on whether the FDIC must fight off other litigants anxious to reach any funds available to redress their personal wrongs.

III. The Priority Issue

A. How Does the Priority Issue Arise?

At the same time that FDIC is actively pursuing the perpetrators of bank fraud or misconduct, both under Title IX of FIRREA and as owner of the failed thrift’s causes of action, uninsured depositors and other creditors may be attempting to collect from these same parties the difference between the amount received from the FDIC as receiver and the amount they were owed. In addition, shareholders may bring suit in their own right against directors and officers if they have a personal injury apart from the diminution in value of their stock.

For example, court actions were brought in Federal Deposit Insurance Corporation v. Jenkins regarding a state-chartered bank in Florida which was declared insolvent in February 1986 by the Florida Department of Banking and Finance. The FDIC was appointed receiver and a purchase and assumption agreement with Chase Bank of Florida was approved. Shareholders instituted lawsuits against several officers and directors, an accounting firm, and two law firms, alleging securities fraud, common law fraud, civil conspiracy, negligence, and civil theft. The FDIC, as sole owner of all claims, actions, and judgments of the failed bank, brought claims against substantially the same defendants sued by the shareholders, alleging negligence and breach of fiduciary duty, and seeking $30 million in damages. The FDIC found itself competing against the shareholders of the failed institution for the defendants’ assets. Based on the common law rule of “first in judgment, first in right,” the FDIC risked losing the ability to replenish the deposit insurance fund to the extent it had advanced funds in the purchase and assumption transaction. If it could not get to judgment before the shareholders received judgment, it was likely that the assets of the

40. There are up to seven potential claims that can be brought: “(1) fidelity bond, (2) director and officer or (3) accountants’ liability, (4) attorney malpractice, (5) appraiser malpractice, (6) securities fraud or broker malpractice or (7) criminal referral.” RTC OFF. INVESTIGATIONS PROGRESS REP. 3 (Sept. 30, 1990).


42. Id. at 435, 444.

43. 888 F.2d 1537 (11th Cir. 1989).

44. Id. at 1538.

45. Id.

46. See supra notes 28-31 and accompanying text, for discussion of the purchase and assumption transaction. See also Gaff v. Federal Deposit Ins. Corp., 919 F.2d 384 (6th Cir. 1990), modified, 933 F.2d 400 (1991) and Howard v. Haddad, 916 F.2d 167 (4th Cir. 1990).
parties responsible for the thrift's failure would be depleted. The FDIC brought an action for a declaration that “as general creditor of [the failed bank], the FDIC's claims against the officers, directors, and other defendants should have priority over the shareholders' claims against the parties.”

It also sought an injunction to stay recovery on shareholder actions until the FDIC had satisfied its claims.

In Jenkins, the FDIC claimed that Congress provided the agency with authority to pursue all means necessary to accomplish its goals. The FDIC insisted it had priority to the funds of directors and officers to maximize its recovery and to replenish the insurance fund. The shareholders claimed the right to pursue their own actions independent of the FDIC.

B. What Is At Stake?

Establishing a preemptive right to the assets of insiders responsible for the insolvency of a federally insured financial institution involves a major choice between conflicting interests. On the one hand, the utility of purchase and assumption transactions as a means of dealing with the S&L crisis, the reduced cost to the taxpayer of resolving the crisis, the deterrent effect of enhanced criminal and civil prosecutions, and, potentially, the survival of the federal deposit insurance system, will all be favored by recognition of FDIC priority.

On the other hand, the interests of shareholders and investors in the financial institution industry all oppose FDIC priority. Their means of recompense for the harms done them by thrift insiders may be eliminated by the FDIC's depletion of any assets available to redress their losses. The industry's ability to attract a sufficient number of investors may subsequently

47. Jenkins, 888 F.2d at 1539.
48. Id. at 1540.
49. Priority in these third party actions has been valued by the Congressional Budget Office at $95 million for 1993 through 1995. Letter from Congressional Budget Office to Hon. Donald W. Riegle, Jr. (Oct. 14, 1990) (discussing CBO-prepared cost estimate for budget reconciliation).
50. Jenkins, 888 F.2d at 1539.
51. "The bank insurance fund has steadily declined in recent years, as bank failures have risen. In 1985, the fund had $1.19 to cover every $100 of deposits. Currently, the fund stands at 17 cents per $100 of deposits. If the fund runs dry, then taxpayers get the tab for protecting depositors in failed banks . . . ." Wall St. J., March 22, 1991, at A2, col. 4.
52. "The S&L cleanup has already plowed through the $50 billion initially requested for failed thrifts, along with the $53 billion in temporary spending. Overall costs are expected to reach $200 billion, plus hundreds of billions more in interest costs over several decades." Id. at A16, col. 1.
53. As an additional example of the magnitude of the problem, the total cost of the failure, seizure and liquidation of Charles Keating's Irvine-based Lincoln Savings and Loan, the costliest thrift collapse to date, is estimated by the RTC at $2.6 billion. Id. at A2, col. 4.
be affected by the outcome.

C. How Have the Courts Viewed the Priority Issue?

Given the stakes at risk and the importance of the competing interests, the ultimate question is whether Congress intended that a federal agency should have the power to jeopardize the interests of private investors in its attempt to best represent the taxpayers' interests. The courts are split and follow two different approaches to the priority issue. These approaches can be seen from the Eleventh Circuit Court of Appeals opinion in Jenkins and the Sixth Circuit Court of Appeals opinion in Gaff v. Federal Deposit Insurance Corporation.52

1. No FDIC Priority: Federal Deposit Insurance Corporation v. Jenkins. On November 27, 1989, only three and one-half months after the passage of FIRREA, the U.S. Court of Appeals for the Eleventh Circuit reversed a lower court decision which had created a priority for the FDIC over the claims of shareholders of a failed state-chartered bank in Florida.53 The lower court had based its decision granting FDIC priority on two public policy considerations. First, it would be inequitable for general creditors (i.e., FDIC/Corporate) to have to share equally in recovery with shareholders. Second, the lack of priority for the FDIC would be equivalent to the FDIC using its insurance fund to finance the investment risk assumed by shareholders.54

In contrast, the Court of Appeals found the FDIC was not entitled to a priority over the shareholders by virtue of its status as the insurer of the failed bank. The court refused to "create a priority which appears nowhere on the face of the Federal Deposit Insurance Act."55 The Court of Appeals relied heavily on its interpretation of the legislative history of FIRREA to answer FDIC's argument that absolute priority is a necessary element of a purchase and assumption agreement. First, the court found that "an amendment granting such priority was specifically rejected by the conference committee."56 Second, the legislative history better supported the argument

52. 919 F.2d 384 (6th Cir. 1990), modified, 933 F.2d 400 (1991).
53. Jenkins, 888 F.2d at 1546. Actions brought by shareholders against bank-related defendants for fraud, conspiracy, and negligence competed with the FDIC's actions for negligence and breach of fiduciary duty against substantially the same bank-related defendants. Id.
54. Id. (referencing lower court decision, Federal Deposit Ins. Corp. v. Jenkins, Case No. 86-00566-CIV-T-10, Order at 12-13 (M.D. Fla. May 24, 1988)).
55. Jenkins, 888 F.2d at 1544.
56. Even though not binding, the Jenkins court found it highly persuasive that the enacted legislation did not include the Senate amendment which "would have given the FDIC priority in claims against directors, officers, attorneys, and other third party agents of a failed savings institution over shareholders, depositors, and creditors." Id. at 1538 n.1 (quoting 135 CONG. REC. H4983 (daily ed. Aug. 3, 1989) (statement of Rep. Glickman)).
that “the establishment of an absolute priority would be a disincentive to private fraud suits and harm the enforcement scheme . . . because it would lead to more fraud and ultimately cost the taxpayer more money.” As to the FDIC’s arguments that it could not carry out its “alleged statutory mission” without an implied priority rule, the court agreed with the importance of preserving the insurance fund but not with “judicial expansion of the express powers and rights granted to the FDIC in the Act by Congress.”

The Court did not read the Federal Deposit Insurance Act as compelling “the FDIC to pursue claims to restore the deposit insurance fund against third-parties who may have harmed a failed bank.” Without such a directive the court was not “convinced that Congress considered collections against parties such as the bank-related defendants as a necessary part of the recovery to the deposit insurance fund.”

The Jenkins opinion did not analyze any other provisions of FIRREA nor its general purposes but was based, instead, on the absence of plain language directing priority for the FDIC, and the court’s interpretation of FIRREA’s legislative history. Although the court recognized the convenience of a priority rule, absent any case precedent to support the FDIC’s claim of priority, it concluded that “any such priority over third-party lawsuits will have to come from Congress, not this Court.”

The Jenkins court was at a slight disadvantage in its statutory interpretation because its consideration of the lower court decision was done while FIRREA was still in its pre-enactment and early post-enactment stages. Without a full contextual reading of FIRREA the court failed to give consideration and weight to the purposes and the legislative intent that might be implied therefrom.

2. FDIC Absolute Priority: Gaff v. Federal Deposit Insurance Corporation. The Gaff court had the benefit of another year under the revised structure and directives of FIRREA and possibly a better focus on its objectives. Fifteen months after FIRREA’s enactment, the U.S. Court of Appeals for the Sixth Circuit came to a decision opposite Jenkins by a different route: fashioning a federal common law rule. The court in Gaff v. Federal Deposit Insurance Corporation held that “in actions against officers and directors of a defunct bank, FDIC should receive a priority over the

57. This argument was presented in an amicus brief by the Securities and Exchange Commission. Jenkins, 888 F.2d at 1540 n.5.
58. Id. at 1541.
59. Id. at 1546. Even though previously citing to FIRREA, the court here appears content to cite only the FDI Act for governance of the FDIC.
60. Id.
61. Id.
62. Jenkins, however, has recently been relied on by the Fourth Circuit in Howard v. Haddad, 916 F.2d 167 (1990), reinforcing the need for resolution of the split in authority.
claims of stockholders. A stockholder had brought suit in Michigan state court against former directors and officers shortly before the bank's failure. The FDIC settled with the bank's directors' and officers' liability insurer but the settlement was contingent on the outcome of the FDIC's action for priority against the stockholder claims.

In upholding FDIC priority, the court reasoned that "the policies behind the national bank insurance system, bolstered by sections of the FIRREA Act, lead to the application of federal law and the creation of an appropriate federal rule of law." In arriving at a federal common law rule of absolute priority, the court based its conclusion on both a "general policy of allowing others to take from the estate of a dissolved corporation before stockholders" and on "the national policy of protecting the banking system through the FDIC." In contrast to the Eleventh Circuit in Jenkins, the Gaff court did not find the absence of the Senate priority amendment from the final legislation to be a conclusive rejection of priority by Congress. Instead, the Gaff majority concluded the best explanation was that Congress intentionally left the law of priorities in bank receiverships to be developed by the federal courts on a case-by-case basis.

The Sixth Circuit also gave little attention to the opposite decision of the Jenkins court. It briefly distinguished its facts: the source of the cause of action in Jenkins was statutory, unlike the common law basis in Gaff, and in Jenkins the bank was state chartered, not federal, perhaps creating different policy reasons for not applying federal law. The Gaff court summarily criticized the Jenkins court on its insufficient consideration of the policies behind the application of federal law to the FDIC.

63. Gaff, 919 F.2d at 396.
64. Id. at 386.
65. Id. at 391. Even though the court found a congressional intent "to preempt state law by occupying the field of national bank insurance and the FDIC's rights," it went on to fashion a federal common law rule. Id.
66. Id. at 396. The Gaff court relied heavily on its reading of specific provisions of FIRREA, but did what it termed a common law analysis by analogizing to corporate and bankruptcy law. Id. at 390, 392. Nothing in the Gaff opinion discusses why the court did not base its holding strictly on its finding of congressional intent, which arguably would be sufficient without fashioning a common law rule, but it appears that the FIRREA sections cited differ contextually from the specific issue. Where competing shareholder claims derive from harm to the financial institution there is less opportunity to question whether the FDIC has succeeded to the right to prosecute the cause of action as derivative, preempting the shareholder on the basis of ownership of the claim. But, where the "shareholder's direct action may interfere with the FDIC's recovery" the causes of action, though stemming from the same insolvency, are separate and distinct. Id. The grey area delineating derivative and direct actions and Congress' failure to directly address it in FIRREA, may have motivated the Gaff court's formulation of the bright line rule.
67. Id. at 396.
68. The stockholders in Jenkins asserted causes of action based on state and federal securities law. Jenkins, 888 F.2d at 1538. In contrast, the stockholders in Gaff asserted direct actions under state law for fraud and mismanagement. Gaff, 919 F.2d at 366.
69. Gaff, 919 F.2d at 366.
IV. Resolution of the Priority Issue

The question of whether the FDIC should have priority over shareholder claims against thrift insiders is a question of statutory interpretation. As a federal administrative agency, the FDIC is a statutory creature and analysis of its powers must start with the interpretation of its enabling statute. An agency can exercise only such powers as are conferred on it expressly or impliedly by positive law.  

The FDIC, as illustrated in both Gaff and Jenkins, has interpreted FIRREA to grant it priority as a necessary means of accomplishing its legislative objectives. Since FIRREA amended and enhanced the powers and responsibilities of the FDIC, close attention must be directed to its provisions to determine whether Congress intended that FDIC would have priority. A full, step-by-step statutory interpretation involves evaluation of various resources, both intrinsic and extrinsic to the statute.

One authoritative treatise on statutory construction outlines three basic steps to interpretation. First, the evaluation of intrinsic materials considers the internal structure of the statute, both for express and implied provisions. Since a statute is passed as a whole, based on one presumed general purpose and intent, it should be construed as a whole. If Congress has directly and clearly spoken to the precise question at issue the court “must give effect to the unambiguously expressed intent of Congress.”

Second, extrinsic aids, such as the background of the text, legislative history, and related statutes are considered. The history of a statute can be broken down chronologically into pre-enactment, enactment, and post-enactment phases. Data may consist of legislative, executive, judicial, and even non-governmental sources.

Finally, as a unifying concept, all data must be viewed in light of public policy considerations. The legislature’s intent in enacting the statute and creating the agency is of overriding importance.

Following these rules of statutory interpretation leads to the conclusion that in enhancing the powers of the FDIC by enacting FIRREA, Congress intended to extend the FDIC’s powers to preempt third-party claims against the parties responsible for financial institution insolvency.

A. Intrinsic Aids to Statutory Interpretation

A search for specific language in the FDI Act and FIRREA yields no

70. SUTHERLAND, STATUTORY CONSTRUCTION § 65.01 (4th ed. 1987) [hereinafter SUTHERLAND].
71. See supra notes 50-66 and accompanying text.
72. SUTHERLAND, supra note 69, §§ 45-58.
answer to the question of priority. Both the Gaff and Jenkins courts at least implicitly agreed that the issue is not resolved in plain language. Therefore, the question is whether priority can be implied from other language in the statutes. If a statute is silent or ambiguous, the courts must determine "whether the agency's [interpretation] is based on a permissible construction of the statute." 74 An examination of FIRREA's purposes and a full contextual reading of the statute uncovers language and other provisions that strongly support priority.

1. Express Statutory Purposes. "It is ancient wisdom that statutes should be interpreted so that the manifested purpose or object can be accomplished." 75 An example of the U.S. Supreme Court's use of purpose language in statutory interpretation is United States v. Mississippi Valley Generating Co. 76

U.S. v. Mississippi Valley Generating Co. involved a suit for sums expended in connection with a contract for construction and operation of a steam power plant. The contract was cancelled by the government because the power was no longer needed. The Government defended the breach of contract action based "primarily on the ground that the contract was unenforceable due to an illegal conflict of interest on the part of Wenzell," the Vice President and Director of a major financial institution who advised and acted on behalf of the Government in negotiating the contract. 77 Since it was apparent at the time of Wenzell's employment that the financial institution was likely to benefit from the eventual contract, Wenzell was "directly or indirectly" interested in the contract he helped negotiate as an agent of the Government, "tainting the whole transaction and render[ing] the contract unenforceable." 78 The Government was allowed to avoid a contract under the federal conflict of interest statute, 18 U.S.C. section 434, even though the contracting party was guilty of no wrongdoing, because the protection intended as the primary purpose of the statute could "be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government." 79

The finding that Wenzell's actions violated the statute was alone sufficient to preclude Mississippi Valley Generating Co. from enforcing the contract since the Court reasoned that the obvious purpose of the statute was "to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from

74. Id. "The courts need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id. n.11.
75. SUTHERLAND, supra note 70, § 58.06.
77. Id. at 524.
78. Id.
79. Id. at 563 (emphasis added).
advancing their own interests at the expense of the public welfare." 80

"The statute was directed at an evil . . . [the seriousness of which] quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil." 81 Although the statute did "not specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition . . . that fact is not determinative, . . . for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment." 82

Therefore, the Court recognized that "the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuate the public policy embodied in [the statute]." 83 The primary purpose of the statute to protect the public could be fully achieved only with the sanction of nonenforcement of the contract, otherwise "the public [would] be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent." 84 Although it "may seem harsh in a given case, [nonenforcement] is required in order to extend to the public the full protection which Congress decreed by enacting [the statute]." 85

FIRREA's stated purposes give a perspective on what Congress wished to accomplish and the general tools which it was providing specifically to deal with its mandates. In particular, the purposes of FIRREA were:

(1) To promote, through regulatory reform, a safe and stable system of affordable housing finance . . . (3) To curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds . . . (5) To put the Federal deposit insurance funds on a sound financial footing . . . (9) To strengthen the enforcement powers of Federal regulators of depository institutions . . . (10) To strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors. 86

Following the logic of Mississippi Valley Generating Co., these directives alone can be interpreted to require authorizing the FDIC to assume the lead

80. Id. at 548. "In view of the statute's evident purpose and its comprehensive language, [the Court was] convinced that Congress intended to establish a rigid rule of conduct." Id. at 550-51. "[T]he statute was preventive in nature; [laying] down an absolute standard of conduct." Id. at 559.
81. Id. at 562.
82. Id. at 563 (emphasis added) (citing e.g., Miller v. Armon, 145 U.S. 421 (1892); Bank of United States v. Owens, 27 U.S. (2 Pet.) 527 (1829)).
83. Mississippi Valley, 364 U.S. at 563.
84. Id.
85. Id. at 566. Nonenforcement is required even though the conflict of interest was caused or condoned by high government officials. Id.
role in prosecuting parties responsible for thrift insolvency, criminally and civilly. Without such authority, the taxpaying public will be required to bear the full burden of supporting institutions' failures, a burden normally borne by investors, and a burden the statute was designed to prevent. 87

In contrast, Reps. Staggers and Glickman, members of the House Conference Committee, presented concerns that priority would go against the purposes of FIRREA. 88 They commented that the failure of the Senate proposed amendment for absolute priority was based, in part, upon the recognition that:

[A] priority would represent fundamentally bad policy . . . dramatically undercut enforcement efforts and lead to more fraud.

. . .

[T]he Judiciary conferees did not believe that the limited evidence available supported the proposition that an FDIC priority [would] benefit the American Taxpayers [but instead] priority would be a disincentive to private fraud suits and harm the enforcement scheme. . . .

. . .

[E]nactment of a priority would be at cross purposes with the savings and loan legislation . . . [and] discourage, not encourage, investment. 89

It is difficult to understand how priority would lead to more fraud. Titles IX and X were specifically intended to "give a clear signal to those who would violate federal banking laws that such conduct will not be tolerated." 90 Congress recognized the magnitude of the insider abuse problem. It is doubtful that Congress would have considered shareholders' actions sufficient on their own to deter that fraud and negligence and yet would have gone on to enact such an extensive bill as FIRREA. Also, there is authority to believe that shareholder actions historically were not as pervasive as supposed:

As a practical matter, the risk of being sued by the FDIC for a breach of duty is much greater than the risk of such suit being brought by a private litigant. Private litigants are more likely to bring suit alleging violations of the securities [law] than to raise derivative claims for breach of duty. The FDIC has an established procedure for investigating potential claims against directors and officers of failed banks. A private litigant, on the other hand,

87. See supra note 51 for the potential impact on the taxpayers.
88. See supra note 56.
90. LEGISLATIVE HISTORY, supra note 12, at 107.
typically is not prepared to undertake the requisite extraordinary investigation, and must decide whether the expense of discovery eliminates any personal benefit. In addition, if a basis for suit exists, would-be litigants would expect the FDIC to bring it. 91

The incidence of shareholder actions is likely to increase in the wake of the crisis-level insider abuse. Even so, bringing the full weight and authority of the federal government to bear would serve as a much stronger deterrent to future misconduct than the threat of private shareholder actions. Congress is unlikely to have intended that the FDIC’s ability to put the deposit insurance funds on sound footing would be even partially dependent on racing the shareholders to judgment.

The criticism that priority would be a disincentive to private fraud suits and harmful to the statute’s enforcement scheme, is also not dispositive of Congress’s intent for priority. With the enactment of FIRREA, the FDIC was emphatically directed to pursue all actions against responsible parties. 92 Additionally, a clear resolution of the priority issue would eliminate the need to litigate it further, reducing litigation costs and yielding higher net recoveries. 93

The argument that “priority would be at cross purposes with the savings and loan legislation” 94 originated with a Securities and Exchange Commission amicus brief to the Court of Appeals in Jenkins. The basis for this argument is questionable. The SEC argued that industry investment would be discouraged because investors would not invest in thrifts if they were prevented from bringing actions against culpable officers and directors; thus the Commission argued that the goals of Congress for improving confidence and investment in the industry would be negated. 95 In reality, establishing FDIC priority, coupled with the FDIC’s active pursuit of the perpetrators and reestablishment of a safe, sound, banking system would have more favorable impact on investment in savings and loans than continued races to the courthouse. In the long run, public confidence in the system would have a more significant impact on investment decisions than whether shareholders could be first in line to sue negligent or culpable directors and officers if the bank fails.

The stated broad regulatory purposes of FIRREA are restoring public confidence in savings and loans and ensuring a safe and viable system of

91. D & O Pitfalls, supra note 41, at 445. Although nothing in the record indicates Congress knew of the lack of significant shareholder actions, it is clear from the record that Congress knew of the need to increase regulatory enforcement powers to accomplish the goals.
92. See notes 34-37 supra, and accompanying text.
93. In 1987, the FDIC recovered $59 million in lawsuits against costs of $54 million to litigate the cases. 135 CONG. REC. H4989 (daily ed. Aug. 3, 1989).
94. Id.
affordable housing finance. These purposes can best be achieved by elimination of the challenges to the FDIC’s efforts at obtaining monetary judgments from fraudulent and negligent institution-related parties in order to replenish the insurance fund. Replenishing the insurance fund will subsequently reduce the degree to which the taxpayer will be required to bear the burden of funding the losses resulting from the S&L debacle.

2. Other Provisions in the Statute. Although there is no specific language in FIRREA directly addressing the priority issue, there are sections which, when read in conjunction with its stated purposes, help support the finding of implied priority for the FDIC. First, section 212(a) vests in the FDIC “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder . . . with respect to the institution and the assets of the institution.”96 This section delineates the basic authorities of the FDIC in its conservatorship and receivership powers and names the Corporation as successor to the institution.97 Where shareholders are bringing derivative actions, actions that could be brought directly by the institution, this provision would automatically place FDIC in a position superior to shareholders. But, where shareholder action is against directors and officers with respect to individual private rights, not “with respect to the institution and assets of the institution,” the provision might not automatically control. The question is whether an as-yet unexercised right to sue abusive insiders is considered an “asset of the institution” that is transferred to FDIC/Receiver, or whether it is an action of the FDIC as insurer. There is no express answer in this section.

Second, the same section of FIRREA contains a provision for distribution of assets from any liquidation. This provision directs that amounts from subrogated claims should be paid to depositors and other creditors, net of amounts to which FDIC/Corporate may be entitled. Only after “all depositors, creditors, other claimants, and administrative expenses are paid”98 is the receiver to distribute remaining funds to shareholders or members. The intent is clear: FIRREA placed shareholders in the position of last recovery, consistent with FDIC priority in civil actions against insiders.

Third, FIRREA added a new section concerning the FDIC’s right of subrogation to the rights of depositors.99 The Gaff court found this a demonstration of “Congress’s intent to preempt state law by occupying the field of national bank insurance and the FDIC’s rights.”100 Since the

97. Id.
100. Gaff, 919 F.2d at 391.
depositors have priority over the shareholders and the FDIC has stepped into the shoes of the depositors, the FDIC should have priority over shareholders. It is unclear, however, where the FDIC is “subrogated to all rights of depositors against the institution,” whether actions against insiders are within these rights. The spirit of the statute implies that when damages are caused by insiders, FDIC priority is due.

Finally, section 1208 provides:

Funds appropriated to the Secretary of the Treasury pursuant to an authorization contained in this Act, and any amount authorized to be borrowed from the Secretary of the Treasury by any entity pursuant to this Act, may only be used as permitted by law, and may not otherwise be used for making any payment to any shareholder in, or creditor to, any insured depository institution.

This provision shows congressional intent to put not only depositors’ but also the taxpayers’ interests ahead of shareholders whenever the taxpayer is called upon, through fundings appropriated to the Secretary of the Treasury, to pay the losses of defunct institutions. Based on the inadequacy of the Savings Association Insurance Fund, and projections that losses will run over $200 billion, the shareholders must take a junior position to the FDIC’s attempts to replenish the insurance fund. It may be argued that this section could just as easily strengthen the idea that, since shareholders were not entitled to direct tax dollars, Congress would want to preserve lawsuits as a source for their recompense. It is more likely, however, intended to assure that shareholders would not be insured by the deposit insurance fund, which was established for the sole protection of depositors. Congress’ first duty is to the taxpayer, the most innocent party in the S&L debacle. Denying priority to the FDIC would be in direct conflict with section 1208 and with the intended preferred position of the FDIC implicit in the other FIRREA sections.

B. Extrinsic Aids to Interpretation

Courts also look to sources outside the text of the statute for indications of legislative intent in statutory enactment. There are three types of extrinsic sources relevant to interpreting intent. These are: (1) circumstances and events surrounding the introduction of the legislation (pre-enactment legislative history); (2) the history of the enactment process itself, including

other statutes that may be useful in recognizing policy choices made in similar contexts; and (3) contextual aids such as judicial common law and administrative implementation.103

1. Pre-enactment Legislative History. The circumstances leading to enactment of both the FDI Act and FIRREA involved extreme economic crises. The FDI Act was created as a result of the Great Depression. FIRREA was a response to the S&L crisis.104 The mischief at which FIRREA was aimed is clear from its stated purposes and from the enhancement of regulatory powers against criminal and civil misconduct of institution insiders in Titles IX and X. These circumstances and Congress’ response support the FDIC’s interpretation of its priority in the third-party actions.

2. Enactment Process History. The strongest argument against the FDIC’s priority was recounted by the Court of Appeals in Jenkins and falls under the rubric of legislative history. An amendment clearly establishing the FDIC’s priority was proposed initially in subcommittee, added to the Senate version of FIRREA that went into the Conference Committee, but did not survive markup of the bill.105 Despite the lack of publicly available reports to explain the amendment’s failure,106 the Jenkins court saw the rejection of the amendment as significant in the legislative history of FIRREA. The statements of Reps. Glickman and Staggers107 found in the Report of the Conference Committee on H.R. 1278 were footnoted in Jenkins as persuasive authority.108 Treatises on statutory construction agree that committee reports should be considered authoritative legislative history and given great weight.109 But, it is not clear from the Congressional Record whether these

104. See supra notes 6-8 and 11-22 and accompanying text.
105. The text of the proposed amendment was:

In any proceeding related to any claim acquired under section 11 or 13 of this Act against an insured financial institution's director, officer, employee, agent, attorney, accountant, appraiser, or any other party employed by or providing services to any insured financial institution, any suit, claim, or cause of action brought by the Corporation shall have priority over any such suit, claim, or cause of action asserted by depositors, creditors, or shareholders of the insured financial institution. . . . This priority shall apply to both the prosecution of any suit, claim, or cause of action, and to the execution of any subsequent judgments resulting from such suit.

Gaff, 919 F.2d at 395 (citing S. 774, 101st Cong., 1st Session § 214(o)(1) (1989)).
106. Telephone interview with Im Paull, Republican Counsel, Committee on Banking, Housing & Urban Affairs, U.S. Senate (Feb. 13, 1991).
107. See supra note 89 and accompanying text.
108. Jenkins, 888 F.2d at 1538 n.1.
The FDIC's Preemptive Power in Actions Against Insiders of Insolv

The Sixth Circuit in Gaff did not find the failure of the amendment dispositive against priority but did not address any of the specific justifications mentioned by Reps. Glickman and Staggers. Evaluation of these objections here and above supports the Gaff court's result. Besides the three reasons related to the purposes of FIRREA, as discussed above, 111 the failure of the amendment was also credited to the lack of "careful study of the priority proposal by Congress" and the manifest unfairness of the proposal "on its face . . . . No other Federal agency has been granted such broad power to prejudice the rights of individuals." 112

The lack of careful study of the priority proposal may be dispositive of why the specific amendment did not get included in the final bill, but not dispositive of Congress' intent to vest the FDIC with priority when it passed FIRREA. The stated objectives and the implied powers necessary to accomplish those objectives could have been considered sufficient and any additional language unnecessary. 113 Finally, the rejection of the language of the priority amendment may also be explained two other ways. Congress may have intentionally refused to do what "those with great expertise and charged with the responsibility for administering the provision would be in a better position to do . . . ." Or "perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." 114

The charge of unfairness and the representation that "no other Federal agency has been granted such broad power to prejudice the rights of individuals" 115 can be answered by examining corporation law and bankruptcy law, as the Court of Appeals did in Gaff.

The Gaff court recognized the basic premise that in the dissolution of a corporation, stockholders are last in line for the corporate assets. 116 Unlike lenders and depositors who do not have the chance of reaping profits if the corporation does well, the risk of a shareholder's investment is offset by

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110. Id. at 735.
111. See supra notes 86-95 and accompanying text.
113. See supra note 86 and accompanying text.
114. Chevron, 467 U.S. at 865.
potential for reward.\textsuperscript{117} Allowing first or equal basis recovery to shareholders against the assets of directors and officers would result in an "inequitable preference in favor of the stockholders."\textsuperscript{118}

The \textit{Gaff} court also analogized to the bankruptcy doctrine of equitable subordination, reasoning that the degree of priority given to a direct action by creditors or stockholders over action by a trustee in bankruptcy turned on whether the injury was greater to the individual creditor, stockholder, or corporation.\textsuperscript{119} The corporation is given priority unless the injuries can be shown to be unique or peculiar to the shareholders or creditors. The doctrine does not disallow shareholders' and creditors' claims, but subordinates them, allowing a court of equity to look at overall fairness of competing claims, subordinating those determined to be less fair.\textsuperscript{120} The court also noted the treatment of rescission claims in the Bankruptcy Code. The 1978 Code put investors who sued for rescission on equal standing with all investors. Previously rescission-seeking investors had been allowed recovery at the same level of preference as judgment creditors.\textsuperscript{121} The \textit{Gaff} court saw this as Congress' allocation of the "risk of business failure to stockholders and away from debt investors . . . to close a loophole that permitted stockholders to move up in line."\textsuperscript{122}

As relied on by \textit{Gaff}, analogy to corporate and bankruptcy law support priority. Both establish precedent for allowing first in right to be determined other than by first to judgment. But, as argued by Rep. Glickman, although Congress may be willing to trade off shareholders' rights vis-a-vis other private entities, it has not yet been willing to allow a federal agency to have priority. This quarrel with FDIC priority may be answered by noting the semi-private role the FDIC assumes in its capacity as receiver. The FDIC is "the designated statutory agent for marshalling and distributing the assets of the insolvent bank,"\textsuperscript{123} and, as such, is acting more as a private entity than a government agency. Therefore, the agency versus private party distinction can be considered less important.

3. Agency Deference—Post-enactment Phase. Evidence of later congres-

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\textsuperscript{117} \textit{Gaff}, 919 F.2d at 392. "The gains and losses from abnormally good or bad performance are the lot of the shareholders, whose claims stand last in line [because] shareholders are the residual claimants to the firm's income . . . [they have the] appropriate incentives . . . to make discretionary decisions." Easterbrook & Fischel, \textit{Voting in Corporate Law}, 26 J.L. \& ECON. 395, 402-04 (1983).

\textsuperscript{118} \textit{Id}. "Allowing shareholders to get their money first allows them to step over the depositors on the way up the totem pole. \textit{This is unfair.}" 137 CONG. REC. S1309 (daily ed. Jan. 30, 1991) (comments of Sen. John Heinz upon introduction of S. 293, a bill to reduce the cost of the savings and loan crisis and his third attempt to correct the confusion on priority by enactment of a specific provision) (emphasis added).

\textsuperscript{119} \textit{Gaff}, 919 F.2d at 393.

\textsuperscript{120} \textit{Id}.

\textsuperscript{121} \textit{Id}. at 394 (citing 11 U.S.C. § 510(b)).

\textsuperscript{122} \textit{Id}. at 394.

\textsuperscript{123} \textit{Id}. at 392.
\end{flushleft}
sional intent does not generally bear on the intent behind earlier congressiona-

nal enactment, but "[i]nterpretations and application of regulations by

directors, administrative agencies, departmental heads and others officially

charged with the duty of administering and enforcing a statute have great

weight in determining the operation of a statute." The Supreme Court

explained the deference due an administrative agency's statutory interpreta-

tion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:

Sometimes the legislative delegation to an agency on a particular

question is implicit rather than explicit. In such a case, a court

may not substitute its own construction of a statutory provision for

a reasonable interpretation made by the administrator of an

agency.

... We have long recognized that considerable weight should be

accorded to an executive department's construction of a statutory

scheme it is entrusted to administer, and the principle of deference
to administrative interpretations

"has been consistently followed by this Court whenever
decision as to the meaning or reach of a statute has
involved reconciling conflicting policies, and a full
understanding of the force of the statutory policy in the
given situation has depended upon more than ordinary
knowledge respecting the matters subjected to agency
regulations.

"If this choice represents a reasonable accommodation
of conflicting policies that were committed to the
agency's care by the statute, we should not disturb it
unless it appears from the statute or its legislative
history that the accommodation is not one that Congress
would have sanctioned." Analogizing to the FDIC's interpretation on the priority issue, the two

conflicting policies left to the agency's care are protecting the taxpayer

through the insurance fund by collecting losses from responsible third parties,

and allowing shareholder actions against corporate insiders responsible for
damage done them. Stated another way, the competing interests are

124. SUTHERLAND, supra note 70, § 49.05.
126. Id. at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)) (citation
omitted).
taxpayers versus private investors. It is not a stretch to say that these are both within the province of the FDIC. Since shareholders are also regulated parties as owners of the insured thrifts, the shareholders should be governed first by the regulators of the insurance fund and then given recovery rights under the SEC rules.

The FDIC’s position on priority is fully consistent with the policy concerns, as identified by the legislative history, that motivated the enactment of FIRREA. In both Jenkins and Gaff the FDIC maintained it had right to priority. Although this may appear self-serving, as insurer the FDIC has the duty to protect the taxpayer as well as the depositors in its management of the deposit insurance funds. Based on the supportive provisions of FIRREA, and its clear purposes and objectives, it would be illogical and inconsistent for the FDIC to support a contrary position. To the extent congressional intent is discernible, FIRREA was most likely intended to enlarge rather than confine the scope of the FDIC’s power.

C. Public Policy as a Source of Statutory Interpretation

In the legislative history accompanying FIRREA, the Conference Committee recognized that restoring “the strength of the thrift industry and deposit insurance fund would require more than legislation,” it would also require the vigilance and responsiveness of regulators. A strong banking system, worthy of confidence in the safety of its deposits and providing a source of funding for home ownership, is best served by adhering to the implied power inherent in FIRREA.

First, as the Gaff court indicated, a race to the courthouse should not be the means of determining such an important and basic issue. Where the alternative is to allow the innocent taxpayer to bear the cost of the S&L debacle so that shareholders might recover their investments, the decision must be for the innocent taxpayer. Shareholders are held to know the risks of investing and can spread those risks by diversifying. It would be inequitable to allow shareholders unearned preference over taxpayers.

Second, under general theories of deterrence, efforts must be made to pursue the perpetrators in the savings and loan debacle. FIRREA Titles III, IX, and X all contain provisions aimed at deterring the ongoing abuse of the financial institutions. Congress enhanced “the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse.” Only by actively pursuing such claims

127. In effect, the Jenkins court gave no deference to the agency, contrary to the U.S. Supreme Court holding in Chevron.
128. Legislative History, supra note 12, at 87.
129. Gaff, 919 F.2d at 394.
130. See supra note 86 and accompanying text.
131. Legislative History, supra note 12, at 103-104.
with the strength and resources of government can the rampant abuse be stopped. The public policies of minimizing the taxpayer’s burden for the savings and loan debacle, and deterring any further insider abuses of financial institutions are both met by recognizing the FDIC’s priority over third party actions.

Congressional intent is apparent by combining the implied intent from specific statutory provisions of FIRREA and its broad regulatory purposes and by legitimately deferring to the administrative agency’s interpretation. Add to that the broad public policy considerations of deterrence, recovery, and restoration of confidence in the financial industry, and priority belongs to the FDIC.

CONCLUSION

Congress gave the FDIC strong directives with the enactment of FIRREA. The savings and loan crisis had grown out of hand and required major revision of the entire deposit insurance industry. The FDIC had been given a large portion of the responsibility for stopping the cancer of abuse in the nation’s savings and loans. To accomplish this goal, Congress provided the FDIC authority to enforce enhanced corrective and deterrent measures. This authority must extend to the FDIC’s ability to effectively pursue restitution and damages from the parties responsible for the insolvency of the failed institutions. Without priority over the claims of third parties, the FDIC will be reduced to racing to judgment, an unacceptable and costly requirement.

The federal deposit insurance industry is seriously ailing and further changes can be expected before its survival is assured. The reestablishment of a strong, safe, national banking industry will be closer to achievement by enforcing the legislative intent to provide the FDIC with all the necessary powers to accomplish its purposes.

Linda D. Fox*