Congressional Research Service

Insolvency of Systemically Significant Financial Companies: Bankruptcy vs. Conservatorship/Receivership

David H. Carpenter
Legislative Attorney

April 20, 2009

Congressional Research Service
7-5700
www.crs.gov
R40530

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

One clear lesson of the 2008 recession, which brought Goliaths such as Bear Sterns, CitiGroup, AIG, and Washington Mutual to their knees, is that no financial institution, regardless of its size, complexity, or diversification, is invincible. Congress, as a result, is left with the question of how best to handle the failure of systemically significant financial companies (SSFCs). In the United States, the insolvencies of depository institutions (i.e., banks and thrifts with deposits insured by the Federal Deposit Insurance Corporation (FDIC)) are not handled according to the procedures of the U.S. Bankruptcy Code. Instead, they and their subsidiaries are subject to a separate regime prescribed in federal law, called a conservatorship or receivership. Under this regime, the conservator or receiver, which generally is the FDIC, is provided substantial authority to deal with virtually every aspect of the insolvency. However, the failure of most other financial institutions within bank, thrift, and financial holding company umbrellas (including the holding companies themselves) generally are dealt with under the Bankruptcy Code.

In March of 2009, Treasury Secretary Timothy Geithner proposed legislation that would impose a conservatorship/receivership regime, much like that for depository institutions, on insolvent financial institutions that are deemed systemically significant. In order to make a policy assessment concerning the appropriateness of this proposal, it is important to understand both the similarities and differences between insured depositories and other financial institutions large enough or interconnected enough to pose systemic risk to the U.S. economy upon failure, as well as the differences between the U.S. Bankruptcy Code and the FDIC's conservatorship/receivership authority.

This report first discusses the purposes behind the creation of a separate insolvency regime for depository institutions. The report then compares and contrasts the characteristics of depository institutions with SSFCs. Next, the report provides a brief analysis of some important differences between the FDIC's conservatorship/receivership authority and that of the Bankruptcy Code. The specific differences discussed are: (1) overall objectives of each regime; (2) insolvency initiation authority and timing; (3) oversight structure and appeal; (4) management, shareholder, and creditor rights; (5) FDIC "superpowers," including contract repudiation versus Bankruptcy's automatic stay; and (6) speed of resolution. This report makes no value judgment as to whether an insolvency regime for SSFCs that is modeled after the FDIC's conservatorship/receivership authority is more appropriate than using (or adapting) the Bankruptcy Code. Rather, it simply points out the similarities and differences between SSFCs and depository institutions, and compares the conservatorship/receivership insolvency regime with the Bankruptcy Code to help the reader develop his/her own opinion.

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Introduction

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In March of 2009, Treasury Secretary Timothy Geithner proposed legislation that would impose a conservatorship/receivership regime, much like that for depository institutions, on insolvent financial institutions that are deemed systemically significant.[4] In order to make a policy assessment concerning the appropriateness of this proposal, it is important to understand both the similarities and differences between insured depositories and other financial institutions large enough or interconnected enough to pose systemic risk to the U.S. economy upon failure, as well as the differences between the U.S. Bankruptcy Code and the FDIC's conservatorship/receivership authority.

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[1] 11 U.S.C. §§ 109(b)(2) and (d).

[2] The basic difference between a conservatorship and a receivership is that a conservatorship involves operating the institution as a going concern to protect its assets until it stabilizes or is closed and a receiver appointed. A receiver is charged with liquidating the institution and winding up its affairs. A conservatorship may indicate that the FDIC aims to restore the institution to solvency or that the FDIC had to act quickly without the usual lead time for investigation. In either case, a conservatorship may be followed by a receivership if a determination is made that the institution is not viable. For an in-depth analysis of the FDIC's conservatorship/receivership powers, *see* CRS Report RL34657, *Financial Institution Insolvency: Federal Authority over Fannie Mae, Freddie Mac, and Depository Institutions*, by David H. Carpenter and M. Maureen Murphy. Fannie Mae, Freddic Mac, and the Federal Home Loan Banks are subject to a conservatorship/receivership regime modeled after that for insured depositories.

[3] 11 U.S.C. § 109.

[4] The proposal is to be known as the "Resolution Authority for Systemically Significant Financial Companies Act of 2009). Text can be found at http://www.ustreas.gov/press/releases/reports/032509%20legislation.pdf. It is unclear exactly which financial firms would be considered "systemically significant." For a detailed analysis of the proposal, *see* CRS Report R40526, *Insolvencies of "Systemically Significant Financial Companies" (SSFCs): Proposal for Federal Deposit Insurance Corporation (FDIC) Resolution*, by M. Maureen Murphy.

authority is more appropriate than using (or adapting) the Bankruptcy Code. Rather, it points out the similarities and differences between SSFCs and depository institutions and compares the conservatorship/receivership insolvency regime with the Bankruptcy Code to help readers develop their own opinions.

Comparison of Depository Institutions and Systemically Significant Financial Institutions

The idea of having a separate insolvency regime for banks goes back at least as far as 1837 when President Van Buren proposed such legislation. A special insolvency system for depositories has existed in some form in the United States since the enactment of the National Bank Act in 1864.[5]

The reasons for having special regimes may have evolved since the creation of federal deposit insurance in 1933. However, many of the justifications for a special regime relate specifically to the functions of and services provided by depositories, which hold true regardless of deposit insurance. Some of these justifications are:

- Large portions of American citizens' wealth are held by depositories;
- Banks and thrifts serve as financial intermediaries for individuals, businesses, and governments;
- Banks and thrifts are crucial to credit and payment systems;
- A large portion of depository assets are highly liquid, thus making depository institutions especially susceptible to runs and insider abuse;[6]
- "Some [banks and thrifts] are individually large relative to GDP ... [and] are closely interconnected through interbank deposits and loans."[7]

For these reasons, it is argued that the pivotal role banks and thrifts play in mainstream economic life exceeds that of most other commercial firms, thus justifying a special regime designed specifically for bank and thrift insolvencies.[8] The corporate bankruptcy code, rather than being tailored to a specific type of firm, applies to all non-exempt companies conducting business or having property in the country.[9] It serves as a one-stop shop for all firms, except for the minority of businesses expressly exempted.

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[5] Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 Duke L. J. 469 (1992).

[6] *See*, Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 Duke L. J. 469 (1992) and Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143 (2007).

[7] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143, 147-48 (2007).

[8] *See, e.g.*, Eva Hüpkes, *Insolvency: Why a Special Regime for Banks?*, CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW, Vol. 3, pp. 472-74 (2003) and David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 Tex. L. Rev. 723 (1998). However, some commentators believe a special insolvency regime for banks and thrifts is not justified. *See, e.g.*, Charles W. Calomiris, *Runs on Banks and the Lessons of the Great Depression*, CATO Regulation Magazine Vol. 22, No. 1 (Spring 1999) [http://www.cato.org/pubs/regulation/regv22n1/deplesson.pdf].

[9] 11 U.S.C. § 109.

This raises the question: Do SSFCs, as a result of their inherent traits, warrant a special insolvency regime modeled after that of depositories? While SSFCs do not hold insured deposits, it is entirely possible that large portions of individuals' wealth could be held by these institutions in other forms. While non-deposit financial products may not be explicitly insured like deposits, financial firms that are truly systemically significant arguably have an implicit backing by the federal government, which considers them too big or interconnected to fail, and thus would warrant federal financial investment to avoid their failure (at least under the current insolvency process).

Aside from the above differences, non-depository financial institutions seem to share other attributes often used to justify a special insolvency regime for banks and thrifts. Non-depositories, just like banks and thrifts, serve as financial intermediaries for individuals, governments, and businesses. They also serve an important role in the payment system, for instance by establishing a more liquid derivatives market from otherwise illiquid, long-term debts. A large portion of their assets can be highly liquid. Finally, SSFCs could hold assets that account for a proportionally large percentage of GDP and that are highly interconnected to other financial firms, including banks and thrifts.

Differences Between the FDIC's Conservatorship/Receivership Powers and the Bankruptcy Code

Overall Objectives of Each Regime

The FDIC is a federal agency that administers the deposit insurance fund, which is comprised of premiums assessed on the basis of the amount of insured deposits held by an institution[10] under the authority of the Federal Deposit Insurance Act (FDI Act).[11] The primary object of the FDIC when any bank or thrift with FDIC-insured deposits fails is to see to it that insured deposits are protected (i.e., that any insured deposits in the failed bank or thrift are either paid off or transferred to another institution). This process generally requires significant disbursements from the deposit insurance fund and results in the FDIC being the largest creditor of the failed institution.

Federal deposit insurance is backed by the full faith and credit of the United States;[12] therefore, if the deposit insurance fund is exhausted, the funds of the federal government are at risk. This means that if there were multiple bank or thrift failures that exhausted the deposit insurance fund, federal appropriations would be necessary to supplement the deposit insurance fund and protect insured depositors.[13] Because of the possible threat to the federal fisc,[14] one of the guiding

[10] For a description of deposit insurance, *see* CRS Report RS20724, *Federal Deposit and Share Insurance: Proposals for Change*, by Walter W. Eubanks. The FDIC currently sets the Designated Reserve Ratio at 1.25 percent or $1.25 on every dollar of insured deposits. 72 *Fed. Reg.* 65576 (November 21, 2007).

[11] 12 U.S.C. §§ 1811 - 1835a.

[12] 12 U.S.C. § 1828(a)(1)(B).

[13] According to Timothy Curry and Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 FDIC Banking Rev. 26, 33 (2000), in the savings and loan crisis of 1985-1995, 1,043 thrifts failed with assets of (continued...)

principles imposed upon the FDIC in resolving institutional failures is the "least-cost resolution" requirement. Under the FDI Act, the FDIC is prohibited from resolving failing institutions in any manner unless it determines that (1) the action is necessary to protect insured deposits and (2) the total to be expended will cost the deposit fund less than any other possible method. It may not take any action to protect depositors for more than the insured portions of their deposits or protect creditors other than depositors. There is, however, a provision that permits the FDIC to arrange purchase and assumption transactions in which the acquirer may take on uninsured deposit liabilities if the insurance fund does not incur any loss with respect to them that is greater than it would have been had the institution been liquidated.[15]

However, depositor protection is only one slice of the overall objective of the current depository insolvency regime. Another goal of resolving depository institutions is to limit the impact of failures on the overall economy and on local markets. This is achieved by authorizing the FDIC to waive the least-cost resolution requirement to prevent systemic risk, i.e., when complying with that requirement "would have serious adverse effects on economic conditions or financial stability" and when action or assistance under this provision "would avoid or mitigate such adverse effects."[16] In fact, one of the intents of establishing the least-cost resolution was to promote the early intervention of financially troubled depository institutions so as to limit the long-term costs of intervention and, thus, to avoid systemic risk.[17]

Corporate bankruptcy, on the other hand, does not have a systemic risk analog. Its primary objectives are to either liquidate a company's assets so as to maximize returns to creditor classes based on a statutorily-defined priority scheme[18] (liquidation, usually under Ch. 7[19]) or to reorganize a company's debts so that creditor classes receive more than they would have through liquidation while also maximizing the company's "going concern value" (reorganization, usually under Ch. 11[20]).[21] One commentator explained it this way:

(...continued)

over $500 billion, costing taxpayers $124 billion and the thrift industry, $29 billion.

[14] The FDIC has authority to borrow "for insurance purposes" up to $30 billion from the U.S. Treasury. 12 U.S.C. § 1824. FDIC's borrowing is limited to the sum of cash in the deposit insurance fund, the fair market value of assets held by the insurance fund, and the $30 billion Treasury borrowing limit. 12 U.S.C. § 1825.

[15] 12 U.S.C. § 1823(c)(4)(A).

[16] 12 U.S.C. § 1823(c)(4)(G)(i). Such a waiver requires a determination by the Secretary of the Treasury, in consultation with the President, and upon the recommendation of the FDIC and Board of Governors of the Federal Reserve System (with 2/3's vote from each). This section of the FDI Act also includes provisions requiring the FDIC to impose emergency special assessments on members of the insurance fund; the Secretary of the Treasury to document any determination; and the Comptroller General of the United States to review any determination to provide assistance with respect to, among other things, "the likely effect of the determination and such action on the incentives and conduct of insured depository institutions and uninsured depositors." 12 U.S.C. §§ 1823(d)(4)(G)(ii), (iii), and (iv).

[17] Under § 143 of the Federal Deposit Insurance Corporation Improvement Act of 1991, P.L. 102-242, there is a sense of Congress urging the FDIC to favor early resolution of troubled institutions when doing so involves the least possible long-term cost to the insurance fund. To achieve this end, the FDIC is exhorted to follow various practices: entering into competitive negotiation; requiring substantial private investment; requiring owners and holding companies of troubled institutions to make concessions; making sure that there is qualified management for resulting institutions; assuring FDIC participation in the resulting institution; and structuring transactions so that the FDIC does not acquire too much of a troubled institution's problem assets.

[18] 11 U.S.C. § 507.

[19] 11 U.S.C. § 701, *et seq.*

[20] 11 U.S.C. § 1101, *et seq.*

[21] Eva H.G. Hüpkes, THE LEGAL ASPECTS OF BANK INSOLVENCY: A COMPARATIVE ANALYSIS OF WESTERN EUROPE, THE (continued...)

> Bankruptcy law, in contrast, is not concerned with maintaining confidence in a certain system, but in promoting two fundamental goals. First, bankruptcy law gives debtors an opportunity to make a "fresh start" by granting them a second chance at becoming economically viable. Second, bankruptcy law stops the "race to the courthouse" by placing all similarly situated creditors on an equal footing such that all such creditors receive ratable recoveries.[22]

Insolvency Initiation Authority and Timing

The decision to appoint a receiver or conservator over a bank or thrift is at the discretion of the depository institution's regulators and is to be based on one or more grounds specified in section 11 of the FDI Act.[23] Neither the creditors of an institution nor its managers have the authority to declare the institution insolvent.

Under section 11, the FDIC may be appointed conservator or receiver for any insured depository institution, i.e., any state- or federally-chartered bank or thrift, the deposits of which are insured by the FDIC. If a receivership of a *federally*-chartered bank or thrift is involved, the FDIC *must* be the appointed receiver.[24] Appointment of a conservator or receiver for a federally-chartered depository institution is generally at the discretion of the institution's chartering authority.[25] In the case of a *state*-chartered depository institution, appointment of a conservator or receiver may be at the discretion of the state chartering authority, the primary federal regulator, or, in certain cases, the FDIC.[26]

Under the FDI Act, the appointment of a conservator or receiver need not wait until insolvency, i.e., when the institution has insufficient assets to meet its obligations. The regulators are given sufficient authority to intervene before a deteriorating situation worsens. For example, a conservator or receiver may be appointed if the depository has incurred, or is likely to incur, losses that will deplete capital with no reasonable likelihood of becoming adequately capitalized without federal assistance.[27]

(...continued)

UNITED STATES AND CANADA, pp. 17-20 (2000).

[22] John R. Ashmead, *In re Colonial Realty Co.*, 60 Brook. L. Rev. 517, 519 (1994).

[23] 12 U.S.C. § 1821.

[24] The decision to appoint a receiver for a national bank is to be determined by the OCC "in the Comptroller's discretion." 12 U.S.C. § 191. OCC's decision is generally not subject to judicial review. United Sav. Bank v. Morgenthau, 85 F. 2d 811 (D.C. Cir. 1936), *cert. denied*, 299 U.S. 605 (1935). In addition to the grounds specified in the FDI Act, 12 U.S.C. § 1821(c)(5), the OCC may appoint a receiver upon determining that the bank's board of directors consists of less than five members. 12 U.S.C. § 191(2).

[25] 12 U.S.C. §§ 1821(c)(2) and (6) (appointment of the FDIC as conservator or receiver of federally-chartered depository institution at the discretion of the chartering agency)

[26] 12 U.S.C. §§ 1821(c)(3), (4), (9), and (10) (appointment of the FDIC as conservator or receiver of state-chartered depository institution). The FDIC may appoint itself as conservator or receiver for a state-chartered, FDIC-insured depository institution upon determining that (1) a state-appointed conservator or receiver has been appointed and 15 consecutive days have passed and one or more depositors has been unable to withdraw any amount of insured deposit or (2) the institution has been closed under state law and the FDIC determines that one of the grounds specified in 12 U.S.C. § 1821(c)(4) exists or existed. If the FDIC acts to appoint itself conservator or receiver under any of those circumstances, the institution is provided with an opportunity for judicial review. 12 U.S.C. § 1821(c)(7). There is also authority for the FDIC to appoint itself as conservator or receiver for any insured depository institution "to reduce loss to the deposit insurance fund." 12 U.S.C. § 1821(c)(10).

[27] 12 U.S.C. § 1821(c).

The bankruptcy of firms subject to the Bankruptcy Code may be initiated either by management of the companies or by their creditors.[28] Involuntary bankruptcy initiated by creditors generally requires acts of default.[29] Management may strategically initiate bankruptcy proceedings in advance of default, but management may not have economic incentives to do so. Where corporate management does petition for bankruptcy protections in advance of default, it is likely to do so in order to remain in control of the reorganization process or maximize the firm's going concern, rather than for the benefit of the overall economy.[30]

Acceleration clauses and closeout agreements, which are common in derivative contracts and other short-term financing arrangements, that require a company to post collateral or capital upon a triggering event (e.g., credit rating downgrade) may precipitate default. Financial institutions are especially prone to being parties to these contractual arrangements. As will be discussed in greater detail in the *FDIC "Superpowers," Including Contract Repudiation Versus the Automatic Stay* section of this report, many of the short-term financing contracts that tend to include acceleration and closeout arrangements are given unique treatment under both the Bankruptcy Code and the banking laws.[31]

Oversight Structure and Appeal

The conservatorship/receivership regime for insured-depositories is almost entirely administrative in nature with only limited judicial appeal. When an insured bank or thrift becomes insolvent, the institution's charterer,[32] its primary federal regulator, or the FDIC is authorized to act *ex parte* (i.e., without notice or a hearing) to seize the institution and its assets and install the FDIC as conservator or receiver.[33] Unless time is of the essence, prior to taking such action, however, there is consultation between the institution's regulator and the FDIC concerning the imminent failure. This gives the FDIC time to investigate the situation and determine a resolution strategy before releasing information to the public of the looming insolvency.

The powers conferred on the FDIC as conservator or receiver are broad. The FDIC may "take any action authorized by ... [the FDI Act], which the Corporation determines is in the best interests of

[28] 11 U.S.C. §§ 301, 303.

[29] 11 U.S.C. § 303.

[30] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143, 156-57 (2007).

[31] Robert R. Bliss and George G. Kaufman, *Derivatives and Systemic Risk: Netting, Collateral, and Closeout*, Federal Reserve Bank of Chicago (2005) [http://www.chicagofed.org/publications/workingpapers/wp2005_03.pdf].

[32] State-chartered banks are chartered by state banking authorities. The primary federal regulator of a federally-chartered bank or thrift is its chartering authority. National banks are chartered by the Office of the Comptroller of the Currency (OCC); federal thrifts or savings associations are chartered by the Office of Thrift Supervision (OTS). The primary federal regulator of state-chartered banks is either the Board of Governors of the Federal Reserve System (Fed) or the FDIC, depending upon whether the institution is a member bank, i.e., a member of the Federal Reserve System (FRS).

[33] The FDI Act specifies judicial review for only one type of conservatorship or receivership appointment—FDIC's appointment of itself as receiver or conservator if depositors have been unable to access their funds 15 days after the appointment by the state of a receiver or conservator. 12 U.S.C. § 1821(c)(4). There are also other statutes that provide for post- seizure judicial review in certain instances. E.g. 12 U.S.C. § 203(b) (appointment of a conservator for a national bank). It has also been held that judicial review is available under the Administrative Procedure Act. James Madison Ltd. By Hecht v. Ludwig, 82 F. 3d 1085 (D.C. Cir. 1996).

the depository institution, its depositors, or the Corporation."[34] A bank or thrift in conservatorship remains subject to "banking agency supervision."[35] Otherwise, the FDIC as conservator or receiver is not subject to any other authority in exercising its powers.[36]

Judicial review of the FDIC's actions as conservator or receiver is limited to a handful of situations. For instance, the FDI Act specifies judicial review for only one type of conservatorship or receivership appointment—FDIC's appointment of itself as receiver or conservator if depositors have been unable to access their funds 15 days after the appointment by the state of a receiver or conservator.[37] Additionally, disputes about claims for insured deposits are to be resolved first by the FDIC in accordance with its regulations, subject to judicial review under the Administrative Procedure Act.[38] Also, the FDIC has the power to repudiate certain contracts entered into by the institution, under certain conditions.[39] The statute limits damages to "actual direct compensatory damages."[40] Conflicts as to the amount of "actual direct compensatory damages" may be settled in court.

Even when judicial review is allowed, the only remedy generally available is damages. In other words, aggrieved parties usually cannot stop or reverse FDIC decisions.[41]

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[34] 12 U.S.C. § 1821(d)(J)(ii).

[35] 12 U.S.C. §§ 1821(c)(2)(D) and (3)(D). For example, the FDIC was named conservator of IndyMac Bank, F.S.B., Pasadena, California, closed by OTS on July 8, 2008. As conservator, the FDIC transferred all non-brokered insured deposit accounts and substantially all of the assets to a newly chartered federal thrift, seemingly serving the same function as a bridge bank. *See*, Failed Bank Information, Information for IndyMacBank, F.S.B., Pasadena, CA, http://www.fdic.gov/bank/individual/failed/IndyMac.html. Under 12 U.S.C. § 1821(d)(2)(F), the FDIC may organize and operate a new institution chartered by OCC or OTS, and transfer to it some or all of the failed institution's assets and liabilities. There is also authority for the FDIC to charter a bridge depository institution with a limited life of two years with the possibility of a one-year extension. 12 U.S.C. § 1821(n). Prior to enactment of the Housing and Economic Recovery Act of 2008, P.L. 110-289, § 1604(a), this authority was limited to creation of bridge banks. According to the FDIC's Resolution Handbook, the use of bridge banks is "generally ... limited to situations in which more time is needed to permit the least-costly resolution of a large or complex institution." FDIC, Resolution Handbook 90, http://www.fdic.gov/bank/historical/reshandbook/index.html.

[36] 12 U.S.C. § 1821(c)(2)(C). This provision states: "When acting as conservator or receiver ..., the Corporation shall not be subject to the direction or supervision of any other agency or department of the United States or any State in the exercise of the Corporation's rights, powers, and privileges." *See also* 12 U.S.C. § 1821(j), which provides: "Except as provided in this section no court may take any action except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver."

[37] 12 U.S.C. § 1821(c)(4). There are also other statutes that provide for post-seizure judicial review in certain instances. *See, e.g.*, 12 U.S.C. § 203(b) (appointment of a conservator for a national bank). It has also been held that judicial review is available under the Administrative Procedure Act. James Madison Ltd. By Hecht v. Ludwig, 82 F. 3d 1085 (D.C. Cir. 1996).

[38] 12 U.S.C. §§ 1821(f)(3) and (4).

[39] 12 U.S.C. § 1821(e)(1). The statute contains specific provisions relating to various types of contracts and leases. These include contracts for the sale of real property, 12 U.S.C.§ 1821(e)(6); service contracts, 12 U.S.C. § 1821(e)(7); and any certain securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or similar agreement that the FDIC determines to be a "qualified financial contract." 12 U.S.C. §§ 1821(e)(8) - (10). Contracts with a Federal Home Loan Bank and the Federal Reserve Bank may not be repudiated. 12 U.S.C. § 1921)(e)(13).

[40] 12 U.S.C. § 1821(e)(3).

[41] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency: An Economic Comparison and Evaluation*, Federal Reserve Bank of Chicago (2006) [http://www.chicagofed.org/publications/workingpapers/wp2006_01.pdf].

Bankruptcy proceedings are judicial. They are performed under the supervision of a federal court with individual parties having their own legal representation. Bankruptcy proceedings are coordinated by a court-appointed representative (e.g., a trustee in Ch. 7 or the firm's management in Ch. 11), with the approval and oversight of a bankruptcy judge. Most decisions affecting the bankruptcy estate may be appealed to a higher court, and some decisions may not go into effect until such litigation is settled.[42]

Management, Shareholder, and Creditor Rights

As successor to the institution, the FDIC is authorized to operate the institution and endowed with "all the powers of the members or shareholders, the directors, and the officers of the institution."[43] As a result, the FDIC usually removes and replaces senior management of a failed depository and eliminates shareholders' rights and powers.[44] These decisions are not subject to judicial review. Creditors also have no say in the decisions made by the FDIC as conservator or receiver. Instead, decisions are primarily guided by the least-cost resolution.

In contrast, creditors and management wield control over major decisions during corporate reorganizations. During reorganization proceedings, management generally remains in control of a firm, for instance, disposing of property in the ordinary course of business.[45] Creditors and management, as well as shareholders, can play a role in adopting a reorganization plan. As one scholar explains:

> All creditors have "standing" to be represented in the proceedings, although the dynamics of voting [based on creditor classes] may lead to certain minority blocks being effectively frozen out. Each creditor group, and in reorganizations also management and shareholders, must vote to approve the plans proposed by management, receiver, or trustee.[46]

When creditors cannot agree to a reorganization plan, the bankruptcy court has "cram down" authority, i.e. the authority to approve a plan over creditor objections as long as it meets certain statutory standards.[47] As previously mentioned, decisions made or approved by a bankruptcy court are appealable to a higher court.

FDIC "Superpowers," Including Contract Repudiation, Versus Bankruptcy's Automatic Stay

A "stay" is a power by which creditors are, at least temporarily, prevented from pursuing their claims against a default entity. As one commentator explains:

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[42] *Id*.

[43] 12 U.S.C. § 1821(d)(2).

[44] Eva H.G. Hüpkes, THE LEGAL ASPECTS OF BANK INSOLVENCY: A COMPARATIVE ANALYSIS OF WESTERN EUROPE, THE UNITED STATES AND CANADA, pp. 64-66 (2000).

[45] 11 U.S.C. § 363.

[46] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency: An Economic Comparison and Evaluation*, Federal Reserve Bank of Chicago (2006) [http://www.chicagofed.org/publications/workingpapers/wp2006_01.pdf].

[47] 11 U.S.C. § 1129(b).

> Stays permit the resolution authority [the time to] collect and validate claims, to determine the best way to dispose of assets in an orderly, non-fire-sale manner, and to treat all like-priority creditors equally. Stays prevent creditor runs and keep contracts in force – the counter party is bound by the contract; claims on the insolvent firm remain pending; and collateral may usually not be liquidated. This facilitates the coordination of creditor claims.[48]

The stay is an important tool under the U.S. Bankruptcy Code, especially for reorganizations. The Code establishes a general stay automatically upon petitioning for bankruptcy.[49] However, the Code provides a number of exceptions to the automatic stay, including for many securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and netting arrangements.[50] These contracts that are exempted from the automatic stay are very similar to "qualified financial contracts," which, as discussed below, are provided special protections under the bank and thrift insolvency regime, as well. As previously mentioned, it is especially common for financial institutions to be parties to these contractual arrangements, making special protections provided for them all the more important in case of a financial institution's insolvency.

Additionally, the Bankruptcy Code provides trustees the authority to avoid, i.e. claw-back or reverse, certain transfers (subject to certain limitations[51]) made by debtors if five conditions are met: (1) the transfer was made "to or for the benefit of a creditor"; (2) the transfer was for a debt owed before the transfer; (3) the transfer "was made while the debtor was insolvent"; (4) the transfer occurred "on or within 90 days" of the petition or within one year if the transfer was made to an "insider"[52]; and (5) the creditor received more from the transfer than it would have through bankruptcy proceedings.[53] The purpose of this avoidance power is to facilitate the equitable distribution of the bankruptcy estate's assets among credit classes and to limit the "race to the courthouse" problem.[54] Most securities contracts,[55] commodity contracts,[56] forward contracts,[57] repurchase agreements,[58] swap agreements,[59] and netting arrangements[60] are exempted from the trustees' general avoidance power. The Code also provides trustees the authority to avoid certain fraudulent transfers made within two years of petition under limited circumstances.[61]

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[48] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency: An Economic Comparison and Evaluation*, Federal Reserve Bank of Chicago (2006) [http://www.chicagofed.org/publications/workingpapers/wp2006_01.pdf].

[49] 11 U.S.C. § 362(a).

[50] 11 U.S.C. § 362(b).

[51] *See, e.g.*, 11 U.S.C. §§ 546, 547, 555, 556, 559, 560, 561.

[52] The term "insider" is defined at 11 U.S.C. § 101(31).

[53] 11 U.S.C. § 547(b).

[54] Collier on Bankruptcy § 5-547.01 (15th ed. rev.).

[55] 11 U.S.C. § 555.

[56] 11 U.S.C. § 556.

[57] 11 U.S.C. § 556.

[58] 11 U.S.C. § 559.

[59] 11 U.S.C. § 560.

[60] 11 U.S.C. § 561.

[61] 11 U.S.C. § 548.

Whereas the general rule under the Bankruptcy Code is the implementation of the automatic stay to provide time for similarly situated creditors to negotiate their claims, the FDIC as conservator or receiver is primarily focused on a seamless continuation of access to deposits and the administration of other bank affairs.[62] The FDIC has a number of tools, called "superpowers," to deal with insolvent depository institutions that stem from long-standing judicial decisions, many of which were later codified into law. These powers, in some respects, exceed the authority of a bankruptcy court. They include the power to reorganize the institution, to sell its assets, as well as to disaffirm and repudiate certain claims, with little judicial oversight.[63]

The FDIC, as conservator or receiver, may disaffirm or repudiate certain contracts if allowing performance would be "burdensome" and "disaffirmance or repudiation ... will promote the orderly administration of the institution's affairs."[64]

There are, however, statutory exceptions to the FDIC's broad repudiation/disaffirmance powers, including for "qualified financial contracts." A "qualified financial contract" is defined as "any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the ... [FDIC] determines by regulation, resolution, or order to be a qualified financial contract.... "[65] Counterparties to these contracts are given greater protection than other creditors.

The FDIC, as conservator or receiver, is free to repudiate and disaffirm qualified financial contracts, as long as the decision to do so is made within a reasonable time,[66] and only if the FDIC repudiates or disaffirms all qualified financial contracts with a particular counterparty and its affiliates.[67] In other words, the FDIC must either repudiate or disaffirm all qualified financial contracts with a particular party and its affiliates or may not repudiate or disaffirm any of them. Also, the damages available to counterparties of qualified financial contracts that are repudiated are more expansive than the "actual direct compensatory damages" available for the repudiation of other contracts. The damages available in such a situation would include "normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims."[68]

Counterparties to qualified financial contracts are granted additional protections under the FDIC's conservatorship/receivership powers. Counterparties to qualified financial contracts generally are free to exercise rights (to net, terminate, or liquidate) under such contracts that are triggered by

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[62] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143, 158-59 (2007).

[63] *See, e.g.*, Thomas C. Baxter, Jr., Joyce M. Hansen, and Joseph H. Sommer, *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 Am. Bankr. L. J. 57, 72 (2004); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, 328 (1986); Fred Galves, *Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Duhme and 12 U.S.C. 1823(e) Superpowers in Failed Bank Litigation*, 80 Minn. L. Rev. 1323 (1996); Robert W. Norcross, Jr., *The Bank Insolvency Game: FDIC Superpowers, the D'Oench Doctrine, and Federal Common Law*, 103 Banking L. J. 316, n.137 (1986).

[64] 12 U.S.C. § 1821(e)(1).

[65] 12 U.S.C. § 1821(e)(8)(D)(i).

[66] 12 U.S.C. §§ 1821(e)(1) and (8)(F).

[67] 12 U.S.C. § 1821(e)(11).

[68] 12 U.S.C. § 1821(e)(3)(C).

the appointment of a *receiver*,[69] except that counterparties whose rights are triggered either as a result of the appointment of a receiver or as a result of the financial condition of a depository for which a receiver was appointed shall be stayed (prevented) from exercising such rights until the counterparties are notified of a transfer of the qualified financial contract or until 5:00 p.m. of the business day after the appointment of the receiver.[70]

Counterparties to qualified financial contracts whose rights would be triggered by the appointment of a *conservator* or by the financial condition that results in the appointment of a conservator, *may not* exercise such rights.[71] However, counterparties are free to exercise rights under qualified financial contracts triggered by the default *of the contracts* (as opposed to the insolvency of the depository institution) when a depository is in *conservatorship*.[72]

The FDIC, as conservator or receiver, is free to transfer qualified financial contracts as long as certain notice requirements are met. But the FDIC must either transfer all qualified financial contracts with a particular party and its affiliates to a single financial institution, or it may not transfer any of them.[73]

Finally, the FDIC as conservator or receiver may not avoid (i.e., reverse or claw-back) any property transfer pursuant to a qualified financial contract unless the transfer was performed with the "actual intent to hinder, delay, or defraud."[74]

Another superpower given to the FDIC, both as receiver and in its corporate capacity, is the power to defeat claims against its interests in assets it has acquired in a receivership or through open institution assistance. To prevail on a claim that tends to defeat or diminish the FDIC's interest in such an asset, the claimant must show that there was a written agreement, executed contemporaneously with the institution's acquisition of the assets, approved by the institution's board of directors or its loan committee, and continuously reflected on the institution's books.[75] This power provides the FDIC protection "from unwritten or unrecorded agreements."[76] There also are statutory exemptions from the contemporaneous execution requirement—agreements lawfully collateralizing deposits or other loans by governmental entities, bankruptcy estate funds, extensions of credit from Federal Home Loan Banks and Federal Reserve Banks and "qualified financial contracts."[77]

In addition, the FDIC may acquire a court-issued temporary stay from "judicial actions or proceedings to which [a depository] institution is or becomes a party." The stay can last up to 45 days after the appointment of a conservator or 90 days after the appointment of a receiver.[78]

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[69] 12 U.S.C. § 1821(e)(8)(A).

[70] 12 U.S.C. § 1821(e)(10)(B)(i).

[71] 12 U.S.C. § 1821(e)(10)(B)(ii).

[72] 12 U.S.C. § 1821(e)(8)(E).

[73] 12 U.S.C. §§ 1821(e)(8)(F), (9), and (10).

[74] 12 U.S.C. § 1821(e)(8)(C).

[75] 12 U.S.C. § 1823(e)(1).

[76] Rebecca J. Simmons, *Bankruptcy and Insolvency Provisions Relating to Swaps and Derivatives*, NUTS AND BOLTS OF FINANCIAL PRODUCTS 2001: UNDERSTANDING THE EVOLVING WORLD OF CAPITAL MARKETS & INVESTMENT MANAGEMENT PRODUCTS, Corporate Law and Practice Handbook Series 937, 968 (2004).

[77] 12 U.S.C. § 1823(e)(2).

[78] 12 U.S.C. § 1821(d)(12).

Speed of Resolution

The U.S. insolvency regime for banks and thrifts is designed to provide the FDIC the ability to intervene early and resolve financially troubled banks and thrifts quickly. The FDIC is granted vast powers to make unilateral decisions, grounded in statutorily defined guidance, in an administrative setting with only limited judicial review, and where generally only ex post damages are available. The focus is primarily on protecting depositors, and little emphasis is placed on attempting to rehabilitate insolvent institutions.[79]

The Bankruptcy Code, on the other hand, is designed to give creditors and management in reorganizations a say in major decisions of bankruptcy proceedings. All bankruptcy proceedings are judicial in nature. Most decisions are reviewable by a higher court, and in some situations, decisions receive ex ante review. While the majority of corporate bankruptcies are liquidations, the Code puts much greater emphasis on rehabilitating default firms than the depository counterpart. As a result, complex bankruptcies can take years to complete.[80]

Author Contact Information

David H. Carpenter
Legislative Attorney
dcarpenter@crs.loc.gov, 7-9118

[79] Eva H.G. Hüpkes, THE LEGAL ASPECTS OF BANK INSOLVENCY: A COMPARATIVE ANALYSIS OF WESTERN EUROPE, THE UNITED STATES AND CANADA (2000).

[80] Robert R. Bliss and George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 Va. L. & Bus. Rev. 143 (2007).