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2005

When A Hundred Grand Just Isn't Enough: 50 Hypotheticals that Explore the Contours of FDIC Deposit Insurance Coverage

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WHEN A HUNDRED GRAND JUST ISN'T ENOUGH: FIFTY HYPOTHETICALS THAT EXPLORE THE CONTOURS OF FDIC DEPOSIT INSURANCE COVERAGE

TIMOTHY R. ZINNECKER*

I. INTRODUCTION

The stock market crash of the late 1920s, followed by the Great Depression of the early 1930s, triggered “an almost total collapse” of this country’s banking system.¹ In response, Congress enacted the Banking Act of 1933,² which—among other accomplishments³—created the Federal Deposit Insurance Corporation (“FDIC”).⁴ Congress hoped to restore the shattered confidence of customers in the safety of their deposits by offering, through the FDIC, deposit insurance to national banks and state-member banks.⁵ Congress

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1. See *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 354 (D.C. Cir. 1985); see also *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 432 (1986) (noting that “the Nation was in the throes of an extraordinary financial crisis” and observing that “[m]ore than one-third of the banks in the United States open in 1929 had shut their doors just four years later”); *Rauscher Pierce Refsnes, Inc. v. FDIC*, 789 F.2d 313, 315 (5th Cir. 1986) (observing that “[t]he stock market crash of 1929 and the Great Depression of 1930 focused the attention of Congress upon the need for a solid means of regulation in insuring the nation’s banking system”); JONATHAN R. MACEY ET AL., *BANKING LAW AND REGULATION* 20-22 (3d ed. 2001) (describing the banking crisis that occurred between 1929 and 1933).

2. Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in various sections of Title 12 of the United States Code).

3. The Banking Act of 1933, through selected provisions that became known as the Glass-Steagall Act, also erected a wall of separation between commercial and investment banking; the act restricted commercial banks from engaging in securities activities and prohibited investment banks “from engaging in the banking business.” LISSA L. BROOME & JERRY W. MARKHAM, *REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES: CASES AND MATERIALS* 50 (2d ed. 2004). But as one leading bank regulatory scholar noted, the limitations of the Glass-Steagall provisions “have been progressively eroded by administrative interpretation and court decisions.” MICHAEL P. MALLOY, *BANK REGULATION* § 5.24, at 166 (1999); see also MACEY ET AL., *supra* note 1, at 33 (“The once-formidable wall between commercial and investment banking has now fallen, after a long bombardment.”).

4. The Banking Act of 1933 made the FDIC a temporary federal agency; not until the Banking Act of 1935 did the FDIC become a permanent federal agency. See BROOME & MARKHAM, *supra* note 3, at 45.

5. As one author has written,
Congress created the Federal Deposit Insurance Corporation (FDIC) in order to stem the

offered similar deposit insurance to savings banks and other thrift institutions through its creation of the Federal Savings and Loan Insurance Corporation ("FSLIC") in 1934.⁶ But not until Congress passed the Federal Deposit Insurance Act in 1950⁷ was deposit insurance mandatory for national banks (and even then insurance remained voluntary for state banks).⁸

massive disintermediation caused by a cascade of bank failures in the early 1930s. Panics were pervasive and bank runs were proliferating. Deposit insurance was designed to make bank deposits as safe as government bonds in order to stem bank runs and protect communities from the economic shock of bank failures. The aim was to restore depositor confidence to prevent the withdrawal of funds from the banking system.

Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 543-44 (2003) (citations omitted). One of the sponsors of the Banking Act of 1933, Henry Steagall, offered similar remarks.

[T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of banks in the United States where citizens may place their hard earnings with reasonable expectation of being able to get them out again upon demand.

77 CONG. REC. 3837 (1933); see also *Philadelphia Gear*, 476 U.S. at 432 ("Congress' purpose in creating the FDIC was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings."); *Rauscher Pierce Refsnes*, 789 F.2d at 315 ("Congress established the [FDIC] as part of a system to restore public confidence and to safeguard bank deposits through a comprehensive deposit insurance program sponsored and regulated by the national government."); *FAIC Sec.*, 768 F.2d at 354 (observing that Congress created the FDIC "[t]o restore depositor confidence and stimulate economic growth"); Lissa Lamkin Broome, *Redistributing Bank Insolvency Risks: Challenges to Limited Liability in the Bank Holding Company Structure*, 26 U.C. DAVIS L. REV. 935, 942 (1993) ("Federal deposit insurance is intended to ensure customer confidence in banks and thereby eliminate destabilizing runs on troubled banks by their depositors . . ."); Alfred J. T. Byrne & Martha L. Coulter, *Safety and Soundness in Banking Reform: Implications for the Federal Deposit Insurer*, 69 WASH. U. L. Q. 679, 679 (1991) ("The primary purpose of federal deposit insurance is to promote public confidence in the banking system."); Edward L. Symons, Jr., *The United States Banking System*, 19 BROOK. J. INT'L L. 1, 11 (1993) ("The purposes of the FDIC have remained largely constant since 1933: to maintain confidence in the banking system, protect bank depositors, and promote safe and sound banking practices.").

6. Congress created FSLIC under the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended in various sections of Title 12 of the United States Code). The Federal Home Loan Bank Board managed and directed the FSLIC deposit insurance program until both agencies were abolished in 1989 as a result of the Financial Institutions Reform, Recovery, and Enforcement Act. See *infra* notes 9-11 and accompanying text.

7. Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified as amended in various sections of Title 12 of the United States Code).

8. See Thomas P. Vartanian et al., *A Survey of Selected Federal Regulatory and Legal Developments in Electronic Financial Services*, 53 BUS. LAW. 251, 252-53 (1997); MALLOY, *supra* note 3, § 1.11, at 29.

In response to the savings and loan crisis of the 1980s,⁹ Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").¹⁰ FIRREA dissolved the insolvent FSLIC and provided the FDIC with authority to provide both thrift deposit insurance (through a "Savings Association Insurance Fund") and bank deposit insurance (through a "Bank Insurance Fund").¹¹

Initially, the FDIC insured a customer's deposit up to \$2,500. But today a customer's deposit is insured up to \$100,000.¹² What does this mean for the

Under this country's dual banking system, a bank may apply for and receive its charter from a federal regulator (a "national bank") or a state regulator (a "state bank"). A national bank automatically becomes a member of the Federal Reserve System. A state bank may, but is not required to, opt into the Federal Reserve System. A state bank that does so is referred to as a state-member bank. Members of the Federal Reserve System automatically participate in the FDIC deposit insurance program. State-chartered banks may participate in the FDIC deposit insurance program without becoming members of the Federal Reserve System. Such state-chartered banks are referred to as non-member state banks. See generally Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3-8 (1977); Symons, *supra* note 5, at 20-21, 43.

9. One author described the national calamity as follows:

Between 1980 and 1994, 1,617 national banks closed or received FDIC financial assistance. During the same period of time, 1,295 S&Ls closed or received financial assistance from the Federal Savings and Loan Insurance Corporation. The bailout of the S&L industry totaled around \$145 billion The S&L crisis also came at huge taxpayer expense, with some cost estimates totaling \$1 trillion over the next several decades.

Nicole Sabado, *Adopting a Jurisdictional Approach to the Rights of Asset Purchasers from the FDIC*, 69 FORDHAM L. REV. 287, 291-92 (2000) (citations omitted); see also *Deposit Insurance-A Brief History*, 5 FED. BANKING L. REP. (CCH) ¶ 54-501, at 61,101, 61,101 (March 24, 2000) ("FIRREA grew out of the acute and massive financial crisis of the thrift industry, a situation caused by a number of factors that included a regional economic collapse and fraud and insider abuse."). Penn Square Bank, N.A., in Oklahoma, was one of the most significant bank failures during this period. See L. Robert Bracken et al., *Penn Square Bank—20 Years Later: An Examination with the Causes, Effects, Responses, and Continuing Consequences of the Banking and Deposit Insurance Crises of the 1980s*, 27 OKLA. CITY U. L. REV. 1067, 1067 (2002). It failed in 1982 with \$470.4 million in deposits; more than half of that amount was uninsured. See *id.* at 1070.

10. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in various sections of Title 12 of the United States Code).

11. Alvin C. Harrell, *Deposit Insurance Issues and the Implications for the Structure of the American Financial System*, 18 OKLA. CITY U. L. REV. 179, 216 (1993). As Professor Harrell noted, "both SAIF and BIF are 'funds' only in an accounting sense, as there is no segregated depository or other means to trace the actual cash flows within the federal government." *Id.* at 216 n.104. Congress has recently considered merging the two insurance funds. See Federal Deposit Insurance Reform Act of 2005, H.R. 1185, 109th Cong. § 2(a)(1) (2005) ("The Bank Insurance Fund and the Savings Association Insurance Fund shall be merged into the Deposit Insurance Fund.").

12. See 12 U.S.C. § 1821(a)(1)(B) (2000) ("The net amount due to any depositor at an insured depository institution shall not exceed \$100,000 . . ."). The amount of insurance

average bank customer? It means that if the customer deposits funds into a bank that later experiences a financial crisis from which it cannot recover, then "the FDIC will reimburse the depositor for lost deposits up to an amount of \$100,000. Thus, the FDIC provides a limited guarantee to depositors on the safety of their money."¹³

But does everyone with a claim against a financial institution have an insured claim? For example, does FDIC deposit insurance cover deposits in a U.S. bank made by a foreign citizen, a cashier's check issued by a failed financial institution, or the contents of a safe deposit box? And is a customer actually limited to only \$100,000 of FDIC deposit insurance protection? For example, may a customer increase the amount of aggregate coverage by maintaining multiple accounts at different branches of the same bank, or completely different banks? When calculating the \$100,000 cap, will a joint account be insured together with, or separately from, each co-owner's personal account? Is additional insurance available for a trust account? Does insurance availability depend upon who is named as a beneficiary or whether the trust is revocable or irrevocable? Does the FDIC deposit insurance program cover a self-funded or employer-sponsored retirement account?

This article answers these and other questions of interest to individual investors through fifty hypotheticals that explore the contours of the FDIC deposit insurance program.

coverage has increased over the years as follows: \$2,500 (1933); \$5,000 (1934); \$10,000 (1950); \$15,000 (1966); \$20,000 (1969); \$40,000 (1974); \$100,000 (1980). See EDWARD L. SYMONS, JR. & JAMES J. WHITE, *BANKING LAW* 547 (3d ed. 1991). Congress has considered increasing the amount of coverage in recent years. See Federal Deposit Insurance Reform Act of 2005, H.R. 1185, 109th Cong. § 3(a)(2) (2005) (increasing general coverage to \$130,000 per depositor, with subsequent inflation-indexed adjustments every five years). But see Henry B. Gonzalez, *Toward Deposit Insurance Reform*, 69 WASH. U. L.Q. 665, 673-74 (1991) (arguing, based on the statistical average amount of deposit account balances, that "[t]he overwhelming majority of depositors would be protected fully with far less insurance coverage than the law currently provides"). When he wrote this article, Henry Gonzalez was Chairman, Committee on Banking, Finance and Urban Affairs, United States House of Representatives, a position he held for five of the 36 years he served in Congress. See Jesse Jackson, Jr., U.S. Representative, *House Icon Henry Gonzalez Will Be Missed*, <http://www.jessejacksonjr.org/issues/i090597277.html> (last visited Oct. 11, 2005).

FDIC deposit insurance is funded by "premiums" assessed against bank participants. See Note, *Is the Cross-Guarantee Constitutional?*, 48 VAND. L. REV. 1742, 1745 n.16 (1995) (explaining how FDIC insured banks are assessed). Initially, the FDIC assessed a flat fee of \$.23 per every \$100 in deposits, but since 1993 the FDIC has based its assessment on bank capitalization and risk concerns. See *id.* See generally 12 C.F.R. pt. 327 (2005).

13. Mark E. Nance & Bernd Singhof, *Banking's Influence Over Non-Bank Companies After Glass-Steagall: A German Universal Comparison*, 14 EMORY INT'L L. REV. 1305, 1327 (2000). In addition to acting as an insurer in its corporate capacity, the FDIC also has the authority to act as a conservator or a trustee of a financially-troubled depository institution. See Sabado, *supra* note 9, at 289-90.

II. FDIC DEPOSIT INSURANCE COVERAGE

The following fifty hypotheticals that analyze the scope of FDIC deposit insurance fall into ten categories: (1) Hypotheticals 1-6 address whether a customer's particular claim is an insured claim; (2) Hypotheticals 7-10 examine whether multiple accounts, different branches, or separate banks affect the scope of coverage; (3) Hypotheticals 11-14 analyze insurance coverage of single ownership accounts; (4) Hypotheticals 15-19 analyze insurance coverage of joint accounts; (5) Hypotheticals 20-30 address revocable trust accounts; (6) Hypotheticals 31-33 examine irrevocable trust accounts; (7) Hypotheticals 34-39 address coverage of retirement accounts; (8) Hypotheticals 40-44 examine custodial accounts and fiduciary relationships; (9) Hypotheticals 45-46 analyze the impact of a bank merger on continued insurance coverage; and (10) Hypotheticals 47-50 discuss whether the FDIC deposit insurance program applies if the customer, the deposit, or the financial institution has a foreign connection.

A. Is That An FDIC-Insured Deposit?

The following six hypotheticals address whether a specific claim or asset held by an individual is eligible for FDIC deposit insurance coverage.

Hypothetical #1

Megan agreed to sell her grand piano to Sarah for \$23,000. Megan and Sarah agreed that Sarah would pay for the piano with a cashier's check. Sarah obtained a \$23,000 cashier's check from First National Bank three days ago and delivered the check to Megan yesterday.

Is the cashier's check covered by FDIC deposit insurance?

Answer: Yes. FDIC deposit insurance covers a cashier's check drawn on an insured financial institution.¹⁴ Therefore, Megan is adequately protected if First National Bank becomes a failed bank before the check is presented to it for payment.

14. See 12 U.S.C. § 1813(l)(4) (2000) (defining "deposit" to include a "cashier's check . . . issued in the usual course of business for any purpose"); see also *Metro County Title, Inc. v. FDIC*, 13 F.3d 883, 886 n.8 (5th Cir. 1994) (relying on 12 U.S.C. § 1813(l) to conclude that "unpaid cashier's checks are considered deposits for purposes of FDIC deposit insurance coverage"); *FDIC v. McKnight*, 769 F.2d 658, 662 (10th Cir. 1985) ("FDIC was required to [treat] debts represented by the cashier's checks as insured deposits in accordance with § 1813(l)(4) . . .").

Hypothetical #2

Bart maintains a safe deposit box at First National Bank. From time to time he places large amounts of cash into the box.

Is the cash covered by FDIC deposit insurance?

Answer: No. FDIC deposit insurance does not cover a safe deposit box or its contents.¹⁵ If Bart is concerned about loss from theft, fire, flood, earthquake, or other catastrophe, he should confirm protection through his contract with First National Bank or his homeowner's insurance policy.

Hypothetical #3

Janet purchased a \$50,000 U.S. Treasury Bill through First National Bank. Is the U.S. Treasury Bill covered by FDIC deposit insurance?

Answer: No. FDIC deposit insurance does not cover U.S. Treasury securities. "[T]hey are backed by the full faith and credit of the federal government."¹⁶ If First National Bank fails, Janet should request a proof-of-ownership certificate from the bank that acquires First National Bank (or the FDIC if there is no acquiring bank) and then redeem the U.S. Treasury Bill at any Federal Reserve Bank.¹⁷ Alternatively, Janet can wait for the U.S. Treasury Bill to mature "and receive a check from the acquiring institution, which may automatically become the custodian of the failed bank's [U.S. Treasury Bill] customer list (or from the FDIC acting as receiver for the failed bank when there is no acquirer)."¹⁸

Hypothetical #4

Willie maintains a \$35,000 savings account at Brookwood Federal Credit Union.

Is the savings account covered by FDIC deposit insurance?

Answer: No. The National Credit Union Share Insurance Fund ("NCUSIF"), not the FDIC, insures accounts maintained at credit unions.¹⁹ Willie's account is insured (generally up to \$100,000) by the NCUSIF, which "is similar to the deposit insurance protection offered by the Federal Deposit

15. See FDIC: Your Insured Deposit: FAQs About FDIC Insurance, <http://www.fdic.gov/deposit/deposits/insured/faq.html> (last visited Oct. 11, 2005).

16. See FDIC: Insured or Not Insured? A Guide to What Is and Is Not Protected by FDIC Insurance, <http://www.fdic.gov/consumers/consumer/information/fdiciorn.html> (last visited Oct. 11, 2005).

17. See *id.*

18. See *id.*

19. See National Credit Union Administration: Share Insurance, <http://www.ncua.gov/ShareInsurance/index.htm> (last visited Oct. 11, 2005).

Insurance Corporation (FDIC).”²⁰

Hypothetical #5

Fran sold, delivered, and installed several pieces of computer hardware for First National Bank several months ago. First National Bank has not yet paid the overdue contract balance of \$47,000.

Is Fran’s unpaid claim covered by FDIC deposit insurance?

Answer: No. Fran is a creditor holding an unpaid, non-deposit claim against First National Bank that is not covered by FDIC deposit insurance.²¹ Therefore, if First National Bank becomes the subject of a bank failure, then Fran must seek to have her claim paid according to traditional rules of commercial law.

Hypothetical #6

On the advice of his investment banker, Baxter purchased one thousand shares of First National Bank’s capital stock last month for \$85,000.

Is Baxter’s equity investment in First National Bank covered by FDIC deposit insurance?

Answer: No. FDIC deposit insurance does not cover equity investments sold by, or in, an insured financial institution.²² If First National Bank’s capital stock decreases in value or becomes worthless, Baxter cannot recover his losses under the FDIC deposit insurance program.

B. Multiple Accounts, Different Branches, and Separate Banks

The following four hypotheticals address the scope of basic FDIC deposit insurance coverage when the customer maintains multiple accounts at the same bank, different branches of the same bank, or separate banks.

Hypothetical #7

Robert banks at the Los Angeles branch of First National Bank. Robert’s savings account has a \$30,000 balance, his checking account has a \$15,000 balance, and he holds a \$60,000 certificate of deposit issued by First National Bank.

Are all three accounts fully insured?

Answer: No. As a general rule, deposit accounts maintained in the same capacity by a customer at the same financial institution are not insured

20. *See id.*

21. *See* FDIC: Your Insured Deposit: FAQs About FDIC Insurance, *supra* note 15.

22. *See id.*

separately.²³ Instead, the account balances are aggregated to determine the amount of FDIC deposit insurance coverage.²⁴ Therefore, Robert has an insured claim for \$100,000 and an uninsured claim for \$5,000. To alleviate this risk, Robert should withdraw some of his funds from First National Bank and deposit them with another insured financial institution.²⁵

Hypothetical #8

Helen maintains a \$35,000 savings account at the Dallas branch of First National Bank. She also holds a \$75,000 certificate of deposit issued by the Houston branch of First National Bank.

Are both accounts fully insured?

Answer: No. Deposit accounts at different branches of the same financial institution are not insured separately.²⁶ Instead, the account balances at the main office and all branch offices are aggregated to determine the adequacy of FDIC deposit insurance coverage.²⁷ Therefore, Helen has an insured claim for \$100,000 and an uninsured claim for \$10,000. Helen should consider moving some of her funds to a different insured financial institution.²⁸

Hypothetical #9

Ben maintains a \$35,000 savings account at First National Bank and a \$10,000 checking account at Second National Bank. He also holds a \$75,000 certificate of deposit issued by Third National Bank.

Are all three accounts fully insured?

Answer: Yes. Because deposits in different financial institutions are insured separately, rather than together,²⁹ each of Ben's three accounts is fully

23. See 12 C.F.R. § 330.3(a) (2005) ("All deposits in an insured depository institution which are maintained in the same right and capacity . . . shall be added together and insured in accordance with this part.").

24. See *id.*

25. See *infra* note 29 and accompanying text.

26. See 12 C.F.R. § 330.3(b) (2005) ("The deposit accounts of a depositor maintained in the same right and capacity at different branches or offices of the same insured depository institution are not separately insured; rather they shall be added together and insured in accordance with this part.").

27. See *id.*

28. See *infra* note 29 and accompanying text.

29. See 12 C.F.R. § 330.3(b) ("Any deposit accounts maintained by a depositor at one insured depository institution are insured separately from, and without regard to, any deposit accounts that the same depositor maintains at any other separately chartered and insured depository institution . . ."). But see Charles E. Schumer & J. Brian Graham, *The Unfinished Business of FIRREA*, 2 STAN. L. & POL'Y REV. 68, 77 (1990) ("[E]ach person should be limited to a total of \$100,000 in deposit insurance, regardless of the number of institutions in which their funds are invested."). Congressman Gonzalez wrote the following:

insured.

Hypothetical #10

Margo holds a \$60,000 certificate of deposit issued by First National Bank. She also maintains a \$75,000 savings account at Second National Bank. MegaBancorp, a bank holding company, owns and controls First National Bank and Second National Bank.³⁰

Are both accounts fully insured?

Answer: Yes. Although the two financial institutions are part of the same bank holding company, the general rule (deposits at different financial institutions are separately insured) still applies.³¹ Therefore, Margo has no uninsured risk.

C. Single Ownership Accounts

The following four hypotheticals examine the scope of FDIC deposit insurance coverage of accounts solely owned by one customer.³²

Hypothetical #11

Carol owns a \$75,000 certificate of deposit issued by First National Bank in her name. She also maintains a \$45,000 savings account at First National Bank.

Are both accounts fully insured?

Answer: No. The FDIC deposit insurance program treats each account as a “single ownership account.”³³ All single ownership accounts are insured collectively, rather than separately.³⁴ Therefore, Carol holds an insured claim

I also propose preventing multiple insured accounts. . . . [T]oday, not only can depositors have hundreds of thousands of dollars insured in differently styled accounts, all in a single institution, they can repeat the process in every single bank or savings and loan; this is a distortion and abuse of the insurance system.

Gonzalez, *supra* note 12, at 674.

30. Federal banking law defines a “bank holding company” as “any company which has control over any bank or over any company that is or becomes a bank holding company . . .” 12 U.S.C. § 1841(a)(1) (2000).

31. See 12 C.F.R. § 330.3(b) (noting that the general rule of separate insurance is not affected “even if two or more separately chartered and insured depository institutions are affiliated through common ownership”; offering as an example the following: “[d]eposits held by the same individual at two different banks owned by the same bank holding company would be insured separately, per bank”).

32. For hypotheticals involving custodial accounts and fiduciary relationships, see Hypotheticals 40–44, *infra* Part II.H.

33. See generally 12 C.F.R. § 330.6 (2005).

34. See 12 C.F.R. § 330.6(a) (“Funds owned by a natural person and deposited in one

of \$100,000 and an uninsured claim of \$20,000. Carol should consider reducing the amount of funds on deposit at First National Bank to address her uninsured risk.

Hypothetical #12

Jennifer owns a \$75,000 certificate of deposit issued by First National Bank in her name. Jennifer also owns a \$60,000 certificate of deposit issued by First National Bank in the name of her sole proprietorship, "JLP Tax Services."

Are both certificates of deposit fully insured?

Answer: No. Funds deposited into an account held by a sole proprietorship are insured together with, rather than separately from, the proprietor's other single ownership accounts.³⁵ Therefore, Jennifer has an insured claim of \$100,000 and an uninsured claim of \$35,000.

Hypothetical #13

George owns a \$50,000 certificate of deposit issued by First National Bank.

Martha owns a \$75,000 certificate of deposit issued by First National Bank.

George and Martha are partners in "GM Enterprises." The partnership³⁶ maintains a checking account at First National Bank. The current balance is \$60,000.

Are all three accounts fully insured?

Answer: Probably. As long as the partnership is engaged in an "independent activity," the partnership accounts are insured separately from

or more deposit accounts in his or her own name shall be added together and insured up to \$100,000 in the aggregate.").

35. See 12 C.F.R. § 330.6(b).

Funds owned by a business which is a 'sole proprietorship' (as defined in § 330.1(m)) and deposited in one or more deposit accounts in the name of the business shall be treated as the individual account(s) of the person who is the sole proprietor, added to any other individual accounts of that person, and insured up to \$100,000 in the aggregate.

Id.; see also *Lambert v. FSLIC*, 871 F.2d 30, 31-32 (5th Cir. 1989) (aggregating balances in sole ownership account and engineering firm's account after concluding engineering firm was a sole proprietorship). A depositor's erroneous belief that individual accounts are insured separately from sole proprietorship accounts comes in at #9 on the FDIC's list of "Top 10 Mistakes That Cost Depositors Money." See *Employee's Guide to Deposit Insurance*, 5 FED. BANKING L. REP. (CCH) ¶ 55-005, at 61,413, 61,464-65 (Aug. 25, 1999) [hereinafter *Employee's Guide*].

36. The applicable bank regulation states that "[a] partnership shall be deemed to exist . . . any time there is an association of two or more persons or entities formed to carry on, as co-owners, an unincorporated business for profit." 12 C.F.R. § 330.11(b) (2005).

the accounts of the individual partners.³⁷ Therefore, George has a fully-insured \$50,000 single ownership account, Martha has a fully-insured \$75,000 single ownership account, and GM Enterprises has a fully-insured \$60,000 account.

Hypothetical #14

Six years ago, Nick purchased an \$80,000 certificate of deposit from First National Bank. The certificate of deposit has a ten-year maturity and pays 5% simple interest annually (\$4,000).

Is the account balance fully insured throughout its term?

Answer: No. Accrued interest is included when calculating the account balance to be insured.³⁸ After the fifth year, the balance of the certificate of deposit would be \$100,000 (\$80,000 of original principal, plus five years of interest at \$4,000 per year). When the \$4,000 interest payment is posted to the account at the end of year six, the account balance will exceed \$100,000. At that time, Nick would hold an insured claim for \$100,000 and an uninsured claim for \$4,000. The amount of the Nick's uninsured claim will increase \$4,000 each year (capping out at \$20,000 at the end of year ten) as the annual interest payment is posted to the account balance. If Nick is concerned about the financial health of First National Bank, he may consider paying a penalty, making an early withdrawal of the funds, and depositing some of the funds in another insured financial institution.

D. Joint Accounts

The following five hypotheticals discuss the scope of FDIC deposit insurance coverage of accounts co-owned by two or more customers.

37. See 12 C.F.R. § 330.11(b) ("The deposit accounts of a partnership engaged in any 'independent activity' . . . shall be added together and insured up to \$100,000 in the aggregate. Such insurance coverage shall be separate from any insurance provided for individually owned (single ownership) accounts maintained by the individual partners."); see also 12 C.F.R. § 330.1(g) (2005) (indicating that a partnership engages in an "independent activity" if the partnership "is operated primarily for some purpose other than to increase deposit insurance").

38. See 12 C.F.R. § 330.3(i) (2005). The total deposit is calculated as follows: the balance of principal and interest unconditionally credited to the deposit account as of the date of default of the insured depository institution, plus the ascertainable amount of interest to that date . . . which the insured depository institution in default would have paid if the deposit had matured on that date and the insured depository institution had not failed.

Id. A depositor's erroneous assumption that interest is separately insured is #6 on the FDIC's list of "Top 10 Mistakes That Cost Depositors Money." See *Employee's Guide*, *supra* note 35, at 61,464-65.

Hypothetical #15

Richard and Elaine jointly own an \$80,000 certificate of deposit issued by First National Bank. Ownership is reflected as "Richard W. Smith and Elaine I. Smith."

Elaine also maintains a \$45,000 savings account in her own name at First National Bank.

Are both accounts fully insured?

Answer: Yes, if the certificate of deposit qualifies as a "joint account." To be a joint account, each co-owner (i) must be a human being (rather than, for example, a business entity), (ii) must execute a deposit account signature card, and (iii) must have the same withdrawal rights³⁹ (which "shall be deemed equal, unless otherwise stated in the depository institution's deposit account records"⁴⁰). Assuming that the certificate of deposit is indeed a joint account, it is insured separately from each co-owner's single ownership accounts.⁴¹ Each co-owner's interest in each joint account is aggregated and insured up to \$100,000.⁴² As Richard and Elaine are the only co-owners of the certificate of deposit, each of them has a fully-insured joint account of \$40,000. Elaine also has a fully-insured single ownership account of \$45,000.

Hypothetical #16

Steve and Holly jointly own a \$60,000 certificate of deposit issued by First National Bank. Ownership is reflected as "Steve Smith and Holly Smith."

Steve and Holly also jointly own a \$90,000 certificate of deposit issued by First National Bank with ownership reflected as "S. Smith and H. Smith."

Steve and Holly also maintain an \$80,000 savings account at First National Bank. The name on the account is "H. and S. Smith."

Are all account balances fully insured?

39. See 12 C.F.R. § 330.9(c) (2005).

40. See 12 C.F.R. § 330.9(e) (2005).

41. See 12 C.F.R. § 330.9(a) (2005) ("Qualifying joint accounts . . . shall be insured separately from any individually owned (single ownership) deposit accounts maintained by the co-owners."); see also *Insurance Coverage of Husband/Wife Accounts*, FDIC Interpretive Letter (FDIC-88-66) [1988-1989 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 81,156, at 55,276-77 (Sept. 28, 1988) (stating in part that "if husband and wife co-own a joint account and, in addition, each owns individual and revocable trust accounts in favor of the other, the five accounts would *each* be separately insured up to \$100,000").

42. See 12 C.F.R. § 330.9(b) (2005). For a case in which the scope of deposit insurance coverage turned on whether two certificates of deposit were held by a brother and sister as joint accounts or separate single ownership accounts, see *Spawn v. Western Bank-Westheimer*, 925 F.2d 885 (5th Cir. 1991).

Answer: No. Changing the style or order of the names of the account holders or alternatively placing an “and” or “or” between the names does not increase the amount of insurance available for joint accounts.⁴³ Therefore, Steve and Holly each have a joint account balance of \$115,000,⁴⁴ of which \$100,000 is fully insured and \$15,000 is uninsured.

Hypothetical #17

Heather and Meredith are sisters who jointly own an \$80,000 certificate of deposit issued by First National Bank.

Heather and Meredith also jointly maintain a \$50,000 savings account at First National Bank. The terms of the account permit Heather and Meredith

43. See *Employee's Guide*, *supra* note 35, at 61,420 (“Rearranging Order of Names on an Account Does Not Increase Coverage”). This incorrect belief that deposit insurance coverage for joint accounts can be increased through changing the order of names or Social Security numbers or using some combination of “and” and “or” in the account caption appears as #2 on the FDIC’s list of “Top 10 Mistakes That Cost Depositors Money.” See *id.* at 61,464.

44. $50\% \times (\$60,000 + \$90,000 + \$80,000)$.

Historically, FDIC deposit insurance coverage was applied to joint accounts in a two-step process.

First, all joint accounts owned by the same combination of persons at the same insured depository institution are added together and insured to a limit of \$100,000. Second, the interests of each person in all joint accounts, whether owned by the same or some other combination of persons, are added together and insured to a limit of \$100,000.

Deposit Insurance Account Regulations; Joint Accounts and “Payable-on-Death” Accounts, 64 Fed. Reg. 15,653, 15,654 (Apr. 1, 1999) (codified at 12 C.F.R. pt. 330) [hereinafter *Deposit Insurance Account Regulations*]. To illustrate the first step in the process, a former version of 12 C.F.R. § 330.9(b) offered the following example:

A qualifying joint account owned by “A&B” would be added to a qualifying joint account owned by “B&A” and the insurable limit on the combined balances in those accounts would be \$100,000. Moreover, the insurable limit on a single qualifying joint account owned by “A&B” would be \$100,000. Thus, any qualifying joint account (or group of qualifying joint accounts owned by the same combination of persons) with a balance over \$100,000 will be over the insurance limit.

Simplification of Deposit Insurance Rules, 63 Fed. Reg. 25,750, 25,759-60 (May 11, 1998). But this two-step process was “misunderstood by bank employees as well as depositors” and created “widespread confusion [that] resulted in the loss by some depositors of significant sums of money.” *Deposit Insurance Account Regulations*, 64 Fed. Reg. at 15,654 (offering an example of three customers each holding individual interests of less than \$100,000 in three joint accounts; when the financial institution failed, the balances in the three joint accounts were aggregated and “[t]he amount in excess of \$100,000 was uninsured”). See generally *Sekula v. FDIC*, 39 F.3d 448 (3d Cir. 1994) (concluding, after analyzing the regulation in detail, that a balance of \$169,717.52 in six accounts co-owned by the same parties was insured for only \$100,000 rather than fully insured). “In order to simplify the coverage of joint accounts,” the FDIC revised 12 C.F.R. § 330.9(b) in 1999 by scrapping the first step in the two-step process. *Deposit Insurance Account Regulations*, 64 Fed. Reg. at 15,654, 15,656.

to withdraw up to 20% and 80%, respectively, from the account.

Heather, Meredith, and their brother, Gerald, jointly own a \$60,000 certificate of deposit issued by First National Bank.

Meredith maintains a \$70,000 certificate of deposit issued by First National Bank in her name only.

Are all account balances fully insured?

Answer: No. The \$50,000 savings account does not enjoy the status of a joint account because Heather and Meredith have different withdrawal rights.⁴⁵ Instead, the account balance is allocated to Heather and Meredith according to their respective withdrawal rights and added to their other single ownership account balances.⁴⁶ Therefore, each of them has a fully-insured joint account balance of \$60,000 (each with half of the \$80,000 certificate of deposit, plus one-third of the \$60,000 certificate of deposit).⁴⁷ Gerald has a fully-insured joint account balance of \$20,000 (one-third of the \$60,000 certificate of deposit).⁴⁸ Heather has a fully-insured \$10,000 single ownership account balance (withdrawal rights of 20% in the \$50,000 savings account).⁴⁹ Meredith has a \$110,000 single ownership account balance (\$70,000 certificate of deposit, plus withdrawal rights of 80% in the \$50,000 savings account), of which \$100,000 is fully insured and \$10,000 is uninsured.⁵⁰

Hypothetical #18

Hank and Wendy jointly own a \$60,000 certificate of deposit issued by First National Bank.

Hank maintains a \$75,000 checking account, in his name only, at First National Bank.

Wendy maintains a \$90,000 savings account, in her name only, at First National Bank.

Hank and Wendy live in a community property state. Under applicable state law, savings accounts and the checking accounts are considered community property.

Are all account balances fully insured?

Answer: Yes. Community property laws do not impact FDIC deposit

45. See 12 C.F.R. § 330.9(c)(iii) (2005) (requiring, as a condition to joint account status, that each co-owner possesses identical withdrawal rights).

46. See 12 C.F.R. § 330.9(d) (2005) ("A deposit account held in two or more names which is not a qualifying joint account . . . shall be treated as being owned by each named owner . . . and the actual ownership interest of each individual . . . in such account shall be added to any other single ownership accounts of such individual" and insured accordingly.).

47. See *supra* note 42 and accompanying text.

48. See *supra* note 42 and accompanying text.

49. See 12 U.S.C. § 1821(a)(1)(B) (2000).

50. See *id.*

insurance coverage.⁵¹ Therefore, notwithstanding applicable state law, Hank's checking account is fully insured as a single ownership account, and Wendy's savings account is fully insured as a single ownership account. Each of them holds a fully-insured \$30,000 joint account balance in the certificate of deposit.

Hypothetical #19

Audra is a limited partner in ABC, L.P. Audra and ABC, L.P. are equal co-owners of a \$60,000 certificate of deposit issued by First National Bank.

Audra holds a \$40,000 certificate of deposit issued by First National Bank.

ABC, L.P. maintains an \$80,000 checking account at First National Bank. Are all three account balances fully insured?

Answer: No. To enjoy the status of a joint account, all co-owners of the account must be "natural persons."⁵² Because ABC, L.P. is a limited partnership, and not a human being, it is not a "natural person."⁵³ Therefore, the \$60,000 certificate of deposit is not insured as a joint account. Instead, the account is allocated to Audra and ABC, L.P., as a single ownership account to the extent of their respective actual ownership interests, and added to their other single ownership accounts.⁵⁴ Therefore, Audra has a \$70,000 single ownership account that is fully insured (\$40,000 certificate of deposit plus half of the \$60,000 certificate of deposit), and ABC, L.P. has a \$110,000 single ownership account (\$80,000 checking account plus half of the \$60,000 certificate of deposit), of which \$100,000 is insured and \$10,000 is uninsured.

E. Revocable Trust Accounts

The following eleven hypotheticals discuss the scope of FDIC deposit insurance coverage of accounts created under the terms of a revocable trust.⁵⁵

51. See 12 C.F.R. § 330.3(h) (2005) (noting that "while ownership under state law of deposited funds is a necessary condition for deposit insurance, ownership under state law is not sufficient for, or decisive in, determining deposit insurance coverage" and acknowledging "the interest of uniform national rules for deposit insurance coverage"); see also *Employee's Guide*, *supra* note 35, at 61,420 ("Funds deposited in one owner's name are insured as the single ownership funds of that owner, regardless of whether the account contains funds that qualify as community property under state law.").

52. See 12 C.F.R. § 330.9(c)(i) (2005).

53. See 12 C.F.R. § 330.1(k) (2005) (defining "natural person" as "a human being").

54. See 12 C.F.R. § 330.9(d) (2005).

55. One web site defines a "revocable trust" as "[a] trust that may be altered or terminated during the grantor's lifetime. . . . [A revocable trust] is considered part of the grantor's estate and is subject to taxation." Investorwords.com, http://www.investorwords.com/4272/revocable_trust.html (last visited Feb. 12, 2006). The same web site defines an "irrevocable trust" as

Hypothetical #20

Greg maintains a \$35,000 savings account at First National Bank.

Greg also owns a \$75,000 certificate of deposit issued by First National Bank. Under the terms of a revocable trust, the funds are payable to Greg's biological son, Martin, upon Greg's death. The account is styled "Greg Smith, payable on death to Martin Smith."

Martin owns a \$50,000 certificate of deposit issued by First National Bank.

Are all three account balances fully insured?

Answer: Yes. Greg holds a \$35,000 single ownership account that is fully insured.⁵⁶ Martin holds a \$50,000 single ownership account that is fully insured.⁵⁷ For the \$75,000 certificate of deposit account to be treated as a "revocable trust account" that is insured separately from any other accounts held by Greg (the owner) or Martin (the beneficiary), the certificate of deposit must meet minimum statutory requirements.⁵⁸ Here, the certificate of deposit meets the minimum requirements as follows: Greg's biological son is a "qualifying beneficiary,"⁵⁹ Greg has manifested his intent that the funds pass

[a] trust which cannot be changed or canceled once it is set up without the consent of the beneficiary. contributions [sic] cannot be taken out of the trust by the grantor. Irrevocable trusts offer tax advantages that revocable trusts don't [sic], for example [sic] by enabling a person to give money and assets away even before he/she dies.

Investorwords.com, http://www.investorwords.com/2647/irrevocable_trust.html (last visited Feb. 12, 2006). For a case when the amount of FDIC deposit insurance turned on whether three trusts were revocable or irrevocable, see *Suzan Tantleff Trusts v. FDIC*, 938 F. Supp. 14, 15 (D.D.C. 1996).

56. See 12 U.S.C. § 1821(a)(1)(B) (2000).

57. See *id.*

58. See 12 C.F.R. § 330.10(a) (2005).

Funds owned by an individual and deposited into an account with respect to which the owner evidences an intention that upon his or her death the funds shall belong to one or more qualifying beneficiaries shall be insured in the amount of up to \$100,000 in the aggregate as to each such named qualifying beneficiary, separately from any other accounts of the owner or the beneficiaries.

Id.; see also *Insurance Coverage of Account Maintenance by Trustees of Revocable Trust*, FDIC Interpretive Letter (FDIC 88-60) [1988-1989 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 81,150, at 55,272-73 (Sept. 12, 1988) (opining that revocable trust accounts are insured separately from any individual or joint accounts).

59. See 12 C.F.R. § 330.10(a) (including the owner's "children" within the definition of "qualifying beneficiaries"). Martin also would be a qualifying beneficiary if he was an adopted child or a step-son. See 12 C.F.R. § 330.10(e) (2005) (defining "children" as "biological, adopted and step-children of the owner"); see also *Step-children as Qualifying Beneficiaries for Insured Testamentary Trust Accounts*, FDIC Interpretive Letter (FDIC 89-39) [1989-1990 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 81,255, at 55,450 (Nov. 7, 1989) (confirming that a step-child is a "child" and a "qualifying beneficiary").

on his death to Martin through the “payable on death to” language in the account name,⁶⁰ and the beneficiary is specifically named in the bank records (in this case, the certificate of deposit).⁶¹ Therefore, the \$75,000 certificate of deposit is fully insured separately from the other two fully-insured accounts.

Hypothetical #21

Randall maintains a \$30,000 checking account at First National Bank.

Under the terms of separate revocable trust agreements, Randall owns three certificates of deposit issued by First National Bank.

The funds of a \$75,000 certificate of deposit are payable to Randall’s mother, Emily, upon Randall’s death. The account is styled “Randall Smith POD Emily Smith.”

The funds of a \$55,000 certificate of deposit are payable to Randall’s sister, Karen, upon Randall’s death. The account is styled “Randall Smith POD Karen Smith.”

The funds of a \$40,000 certificate of deposit are payable to Randall’s granddaughter, Brittany, upon Randall’s death. The account is styled “Randall Smith POD Brittany Jones.”

Are all four accounts fully insured?

Answer: Yes. A “qualifying beneficiary” includes the owner’s spouse, children, grandchildren (e.g., Brittany), parents (e.g., Emily), brothers, and sisters (e.g., Karen).⁶² Each of Randall’s revocable trust accounts is separately insured for \$100,000 per qualifying beneficiary.⁶³ Therefore, each of Randall’s three certificates of deposit is fully insured as a revocable trust account, as is his single ownership account for \$30,000.⁶⁴

Hypothetical #22

Leslie maintains a \$65,000 savings account at First National Bank.

Leslie also owns a \$50,000 certificate of deposit issued by First National

60. See 12 C.F.R. § 330.10(b) (2005).

The required intention in paragraph (a) of this section that upon the owner’s death the funds shall belong to one or more qualifying beneficiaries must be manifested in the title of the account using commonly accepted terms such as, but not limited to, ‘in trust for,’ ‘as trustee for,’ ‘payable-on-death to,’ or any acronym therefor.

Id.

61. See *id.* (“In addition, the beneficiaries must be specifically named in the deposit account records of the insured depository institution.”).

62. See 12 C.F.R. § 330.10(a).

63. See *id.* (insuring revocable trust account funds “in the amount of up to \$100,000 in the aggregate as to each such named qualifying beneficiary”).

64. See *id.* (insuring revocable trusts “separately from any other accounts of the owner or beneficiaries”).

Bank. Under the terms of a revocable trust agreement, the funds are payable to Leslie's niece, Amber, upon Leslie's death. The account is styled "Leslie Smith POD Amber Jones."

Are both accounts fully insured?

Answer: No. Because a niece is not a "qualifying beneficiary,"⁶⁵ the \$50,000 certificate of deposit is not insured as a revocable trust account.⁶⁶ Instead, it is added to the other single ownership accounts of the owner, Leslie.⁶⁷ Therefore, the \$50,000 certificate of deposit and the \$65,000 savings account are aggregated to yield a single ownership account balance of \$115,000, of which \$100,000 is fully insured and \$15,000 is uninsured.

Hypothetical #23

Lowell maintains a \$75,000 savings account at First National Bank.

Lowell also owns a \$150,000 certificate of deposit issued by First National Bank. Under the terms of a revocable trust agreement, the funds are payable in equal shares to Lowell's twin daughters and Lowell's nephew. The account is styled "Lowell Johnson POD Monica Johnson, Mercedes Johnson, and Malcolm Johnson."

Are all funds fully insured?

Answer: No. Lowell's daughters are "qualifying beneficiaries" but Lowell's nephew is a "nonqualifying beneficiary."⁶⁸ Therefore, two-thirds of the \$150,000 certificate of deposit are insured as a revocable trust account (up to \$100,000 per qualifying beneficiary), but the remaining one-third of the \$150,000 certificate of deposit is added to Lowell's other single ownership accounts.⁶⁹ Therefore, one-third of the \$150,000 certificate of deposit is insured as a revocable trust account for the benefit of Monica, and one-third of the \$150,000 certificate of deposit is insured as a revocable trust account

65. See *id.* (defining "qualifying beneficiaries").

66. Naming a non-qualifying beneficiary of a revocable trust account is #4 on the FDIC's list of "Top 10 Mistakes That Cost Depositors Money." See *Employee's Guide*, *supra* note 35, at 61,464.

67. See 12 C.F.R. § 330.10(c) (2005).

If a named beneficiary of an account . . . is not a qualifying beneficiary, the funds corresponding to that beneficiary shall be treated as individually owned (single ownership) accounts of such owner(s), aggregated with any other single ownership accounts of such owner(s), and insured up to \$100,000 per owner.

Id.

68. See 12 C.F.R. § 330.10(a) (2005).

69. See 12 C.F.R. § 330.10(c) (using, as an example, an account payable on the owner's death to the owner's spouse, son, and nephew and concluding that "two-thirds of the account balance would be eligible for POD coverage up to \$200,000 corresponding to the two qualifying beneficiaries" but the other one-third attributable to the non-qualifying beneficiary (the nephew) "would be deemed to be owned by [the owner] in her single ownership capacity and insured accordingly").

for the benefit of Mercedes. The remaining one-third of the \$150,000 certificate of deposit is added to Lowell's \$75,000 savings account to yield an aggregate single ownership account balance of \$125,000, of which \$100,000 is fully insured and \$25,000 is uninsured.

Hypothetical #24

Joseph and Esther have purchased a \$600,000 certificate of deposit from First National Bank for the equal benefit of their four sons under a revocable trust. The account is styled "Joseph Smith and Esther Smith POD Matthew Smith, Mark Smith, Luke Smith, and John Smith."

Is the account fully insured?

Answer: Yes. A revocable trust account maintained by co-owners, such as Joseph and Esther, is insured as if each co-owner maintains a separate testamentary account for each eligible beneficiary.⁷⁰ Absent contrary evidence, co-owners are deemed to own equal shares and beneficiaries are deemed to receive equal shares.⁷¹ For FDIC deposit insurance purposes, Joseph and Esther have created eight revocable trust accounts, each with a fully-insured balance of \$75,000.⁷²

Hypothetical #25

Drew and Rachel have purchased a \$360,000 certificate of deposit from First National Bank for the equal benefit of their son, Dorian, and their niece, Paulette, under the terms of a qualifying revocable trust agreement. The account is styled "Drew Smith and Rachel Smith POD Dorian Smith and Paulette Jones."

Drew maintains a \$35,000 savings account in his own name at First National Bank.

Are both accounts fully insured?

70. See 12 C.F.R. § 330.10(d) (2005).

Where an account described in paragraph (a) of this section is established by more than one owner and held for the benefit of others, some or all of whom are within the qualifying degree of kinship, the respective interests of each owner . . . held for the benefit of each qualifying beneficiary shall be separately insured up to \$100,000.

Id.

71. *Id.* (noting that the respective interests of each joint owner "shall be deemed equal unless otherwise stated in the insured depository institution's deposit account records"); <http://www.fdic.gov/deposit/deposits/insured/ownership4.html#revocable> (last visited Dec. 20, 2005) ("[I]f there are multiple beneficiaries [of a POD account], the FDIC will assume the beneficiaries' interests are equal unless otherwise stated in the deposit account records.").

72. The eight accounts are identified by matching each parent with each son (Joseph-Matthew, Joseph-Mark, Joseph-Luke, Joseph-John, Esther-Matthew, Esther-Mark, Esther-Luke, and Esther-John). The value of the certificate of deposit (\$600,000) divided by the number of accounts (8) yields a \$75,000 balance per account.

Answer: No. The certificate of deposit is treated as if it comprises four equal \$90,000 accounts. Dorian, the son, is a qualifying beneficiary,⁷³ so the Drew-Dorian account and the Rachel-Dorian account are fully insured as separate revocable trust accounts.⁷⁴ But Paulette, the niece, is not a qualifying beneficiary.⁷⁵ Therefore, the Drew-Paulette account is treated as Drew's single ownership account, and the Rachel-Paulette account is treated as Rachel's single ownership account. Drew's single ownership accounts aggregate to \$125,000 (\$90,000 from the Drew-Paulette certificate of deposit and \$35,000 from his savings account), of which \$100,000 is fully insured and \$25,000 is uninsured. Rachel's single ownership account for the \$90,000 Rachel-Paulette certificate of deposit is fully insured.

Hypothetical #26

Bert has created, and owns, a living trust account maintained at First National Bank.⁷⁶ The balance in the account is \$360,000. The trust agreement provides that upon Bert's death, Bert's wife, Alice, and three sons, Craig, Jeremy, and Aaron, will each receive equal shares of the account balance. Under the terms of the living trust agreement, however, no son is entitled to any distribution unless he receives a law degree from an Ivy League institution.

Is the living trust account balance fully insured, notwithstanding the law degree contingency?

Answer: Yes. Living trust accounts are insured as revocable trust accounts on a per-qualifying-beneficiary basis.⁷⁷ Bert's wife and three sons

73. See 12 C.F.R. § 330.10(a).

74. See *supra* notes 58-61 and accompanying text.

75. See 12 C.F.R. § 330.10(a).

76. One web site defines a "living trust" as

[a] trust created for the trustor and administered by another party while the trustor is still alive. A living trust can be either revocable or irrevocable. A living trust avoids probate and therefore gets assets distributed significantly more quickly than a will does. It also offers a higher level of confidentiality, as probate proceedings are a matter of public record. Additionally, trusts are usually harder to contest than wills. On the downside, a living trust takes longer to put together than a will, and requires more ongoing maintenance. Although both a will and a living trust can be modified or revoked at any time before death, such changes are slightly more time-consuming for a living trust. Additionally, assets that a person wants to move to a living trust, such as real estate and bank or brokerage accounts, have to be retitled.

Investorwords.com, http://www.investorwords.com/2851/living_trust.html (last visited Feb. 12, 2006).

77. See 12 C.F.R. § 330.10(f)(1) (2005) (noting that the general rules pertaining to revocable trust accounts also apply to living trust accounts and "[i]f a named beneficiary in a living trust is a qualifying beneficiary . . . then . . . the living trust [account] is eligible for the per-qualifying-beneficiary coverage described in paragraph (a) of this section"); see also 12

are qualifying beneficiaries;⁷⁸ the living trust account is fully insured as four separate revocable trust accounts of \$90,000. The law degree contingency is ignored for the purpose of FDIC deposit insurance coverage.⁷⁹

Hypothetical #27

Ramona has created and owns a living trust account maintained at First National Bank. The balance in the account is \$400,000. The trust agreement provides Ramona's husband with a life estate in the trust assets and Ramona's four children with equal shares in the remaining trust assets upon her husband's death.

Is the living trust account balance fully insured?

Answer: Yes. Absent contrary terms in the trust agreement, the holder of the life estate, Ramona's husband, and the four remaindermen, Ramona's children, are "deemed to have equal interests in the trust assets for [FDIC] deposit insurance purposes."⁸⁰ Ramona's spouse and four children are qualifying beneficiaries,⁸¹ so each of their respective \$80,000 interests⁸² is insured up to \$100,000.⁸³ Therefore, the entire \$400,000 account is fully insured.⁸⁴

Hypothetical #28

Paul has created and owns a living trust account maintained at First National Bank. The balance in the account is \$400,000. Under the terms of the trust agreement, the trust account balance passes to Paul's wife, Carmen, if she survives Paul; otherwise, the trust account balance passes to their four children in equal shares.

Is the living trust account balance fully insured?

Answer: It depends. If Carmen is alive when First National Bank fails,

C.F.R. § 330.10(f)(4) (2005) (requiring, as a condition to deposit insurance coverage, the title of the living trust account to "reflect that the funds in the account are held pursuant to a formal revocable trust" but not requiring "the deposit accounts records of the depository institution [to] indicate the names of the beneficiaries of the living trust and their ownership interests in the trust").

78. See 12 C.F.R. § 330.10(a).

79. See 12 C.F.R. § 330.10(f)(1) (stating that "coverage . . . shall be irrespective of any other conditions in the trust that might prevent a beneficiary from acquiring an interest in the deposit account upon the account owner's death," and offering as an example a living trust that pays two children "only if the children graduate from college by age twenty-four").

80. See 12 C.F.R. § 330.10(f)(3) (2005).

81. See 12 C.F.R. § 330.10(a).

82. The \$80,000 interest is calculated by dividing the account balance (\$400,000) by the number of parties claiming an interest (5).

83. See 12 C.F.R. § 330.10(f)(3).

84. See *id.* (Example 1).

then she is the only beneficiary of the trust. She would become the owner of the trust assets upon Paul's death, and the account balance would be insured for only \$100,000.⁸⁵ But the account balance is insured for \$100,000 per living child if Carmen is dead when First National Bank fails.⁸⁶ Therefore, the trust assets are fully insured if, at the moment of bank failure, Carmen is dead and the four children are living.⁸⁷

Hypothetical #29

Blaire owns a \$75,000 certificate of deposit issued by First National Bank. Under the terms of a revocable trust, the funds are payable to Blaire's son, Merrick, upon Blaire's death. The account is styled "Blaire Smith POD Merrick Smith."

Merrick maintains a \$30,000 savings account at First National Bank. Blaire dies.

Are both accounts fully insured following Blaire's death?

Answer: Yes, at least for a brief period of time. Under the terms of the trust, ownership of the certificate of deposit will pass from Blaire to Merrick when Blaire dies. When added to his \$30,000 savings account, the \$75,000 certificate of deposit gives Merrick an aggregate single ownership account of \$105,000, of which \$5,000 appears to be uninsured. The certificate of deposit, however, remains insured as a separate testamentary account for six months following Blaire's death.⁸⁸ During this grace period, Merrick should restructure his accounts at First National Bank in a manner that results in full deposit insurance coverage for all of his single ownership accounts.

Hypothetical #30

Husband and wife, Ken and Kim, purchased a \$160,000 certificate of deposit, under a revocable trust, from First National Bank. The certificate of

85. See 12 C.F.R. § 330.10(f)(1) (2005) (Example 2).

86. See *id.*

87. Under the same rationale, if Carmen is dead and (i) only three children are living, then the trust assets are insured for \$300,000 and \$100,000 is uninsured, (ii) only two children are living, then the trust assets are insured for \$200,000 and \$200,000 is uninsured, and (iii) only one child is living, then the trust assets are insured for \$100,000 and \$300,000 is uninsured.

88. See 12 C.F.R. § 330.3(j) (2005) ("The death of a deposit owner shall not affect the insurance coverage of the deposit for a period of six months following the owner's death unless the deposit account is restructured."); see also *Death of Depositor*, 5 FED. BANKING L. REP. (CCH) ¶ 54-622, at 61,165-66 (May 28, 1999) (noting that a contrary rule, which may possibly reduce deposit insurance, penalizes the survivors of deceased depositors, overlooks some state laws under which ownership does not automatically change upon the death of a depositor, and assumes (perhaps erroneously) that immediate restructuring of accounts is both practicable and viewed by grief-stricken survivors as a matter of urgency).

deposit is for the equal benefit of their two married daughters. The account is styled "Ken Smith and Kim Smith POD Abby Smith Jones and Erica Smith Johnson."

Abby Smith Jones and her husband, Terry Jones, are co-owners of a \$60,000 savings account at First National Bank.

Ken and Kim both die on the same day from injuries suffered in a car accident.

Are both accounts fully insured following the deaths?

Answer: Yes, at least for a brief period of time. Because the revocable trust names both Abby and Erica as beneficiaries of the trust assets, the certificate of deposit becomes the joint account of Abby and Erica following the death of their parents.⁸⁹ Abby also has a joint account interest in the savings account that she and Terry maintain. For FDIC deposit insurance purposes, Terry has a fully-insured joint account balance of \$30,000 (half of the \$60,000 savings account), Erica appears to have a fully-insured joint account balance of \$80,000 (half of the \$160,000 certificate of deposit), and Abby has a joint account balance of \$110,000 (half of the \$160,000 certificate of deposit and half of the \$60,000 savings account), of which \$10,000 appears to be uninsured.⁹⁰ The certificate of deposit, however, remains insured for six months from the date of death as if it were a separate testamentary account owned by Abby and Erica's parents.⁹¹ During the six-month grace period Abby should restructure her accounts at First National Bank so that all of her joint accounts will be fully insured after the grace period expires.

F. Irrevocable Trust Accounts

The following three hypotheticals examine the scope of FDIC deposit insurance coverage of accounts created under the terms of an irrevocable trust.⁹²

Hypothetical #31

Victor maintains a \$45,000 savings account at First National Bank.

Victor also owns a \$75,000 certificate of deposit issued by First National Bank. Under the terms of a revocable trust, the funds are payable upon Victor's death to his son, Alex. The account is styled "Victor Smith POD Alex Smith."

Victor acquires another \$60,000 certificate of deposit issued by First

89. See *Employee's Guide*, *supra* note 35, at 61,423 (noting that when a revocable trust names multiple beneficiaries, the funds are insured as joint ownership funds when both grantors die).

90. See 12 U.S.C. § 1821(a)(1)(B) (2000).

91. See sources cited *supra* note 88.

92. See *supra* note 55 for definitions of "revocable trust" and "irrevocable trust."

National Bank and transfers ownership to an irrevocable trust created for Alex's benefit.

Alex maintains a \$50,000 savings account at First National Bank.

Are all four accounts fully insured?

Answer: Yes. Irrevocable trust accounts are insured separately from other accounts.⁹³ Therefore, Victor has a fully-insured \$45,000 single ownership account, a fully-insured \$75,000 revocable trust account, and a fully-insured \$60,000 irrevocable trust account. Alex has a fully-insured \$50,000 single ownership account.

Hypothetical #32

Emma maintains a \$25,000 savings account at First National Bank.

Emma acquires an \$80,000 certificate of deposit issued by First National Bank and transfers ownership to an irrevocable trust created for the benefit of her niece, Jane.

Jane owns a \$30,000 certificate of deposit issued by First National Bank.

Are all three accounts fully insured?

Answer: Yes. Unlike a beneficiary of a revocable trust account, a beneficiary of an irrevocable trust account need not satisfy any kinship eligibility requirement.⁹⁴ Therefore, Emma holds a fully-insured \$25,000 single ownership account and a fully-insured \$80,000 irrevocable trust account. Jane owns a fully-insured \$30,000 single ownership account.

Hypothetical #33

Diana acquires a \$75,000 certificate of deposit issued by First National Bank and transfers ownership to an irrevocable trust created for the benefit of her niece, Grace.

Diana's sister, Catherine, acquires a \$50,000 certificate of deposit issued by First National Bank and transfers ownership to an irrevocable trust also created for the benefit of Grace.

Are both accounts fully insured?

Answer: Yes. The scope of insurance coverage for irrevocable trust accounts is determined by examining both the settlor/grantor and the

93. See 12 C.F.R. § 330.13(a) (2005) (stating that deposit insurance of \$100,000 for irrevocable trust accounts "shall be separate from the coverage provided for other accounts maintained by the settlor(s), trustee(s) or beneficiary(ies) of the irrevocable trust(s) at the same insured depository institution").

94. Compare 12 C.F.R. § 330.10(a) (2005) (providing separate deposit insurance coverage for revocable trust accounts established for "qualifying beneficiaries"), with 12 C.F.R. § 330.13(a) (placing no kinship or other eligibility requirements on beneficiaries of irrevocable trust accounts).

beneficiary, rather than focusing on just one of the parties.⁹⁵ Therefore, the \$75,000 irrevocable trust account is insured separately from the \$50,000 irrevocable trust account, both of which are fully insured.

G. Retirement Accounts

The following six hypotheticals address issues concerning the scope of FDIC deposit insurance coverage of retirement accounts.

Hypothetical #34

Jackson owns a \$75,000 certificate of deposit issued by First National Bank.

Jackson also maintains an individual retirement account ("IRA") at First National Bank with a current balance of \$55,000.

Are both accounts fully insured?

Answer: Yes. Retirement accounts, such as traditional IRAs and self-funded Keogh plans,⁹⁶ are insured separately from non-retirement accounts.⁹⁷ Therefore, Jackson's \$75,000 certificate of deposit and \$55,000 IRA are fully insured.

Hypothetical #35

At First National Bank, Suzanne maintains a \$35,000 savings account, a traditional IRA with a current balance of \$40,000, and a Roth IRA⁹⁸ with a

95. See 12 C.F.R. § 330.13(a) ("Funds . . . of a beneficiary deposited into one or more deposit accounts established pursuant to one or more irrevocable trust agreements created by the same settlor(s) (grantor(s)) shall be added together and insured up to \$100,000 in the aggregate.").

96. One web site defines "Keogh Plan" as "[a] tax-deferred qualified retirement plan for self-employed individuals and unincorporated businesses." Investorwords.com, http://www.investorwords.com/2692/keogh_plan.html (last visited Feb. 12, 2006).

97. See 12 C.F.R. § 330.14(c)(2)(i)(A) (2005) (providing separate deposit insurance "of up to \$100,000 per participant [for a]ny individual retirement account described in section 408(a) of the Internal Revenue Code of 1986"); 12 C.F.R. § 330.14(c)(2)(i)(C) (2005) (providing FDIC deposit insurance coverage for "any [retirement] plan described in section 401(d) of the Internal Revenue Code of 1986"); FDIC: Financial Institution Employee's Guide to Deposit Insurance, <http://www.fdic.gov/deposit/deposits/financial/categories2.html> (last visited Oct. 11, 2005) (including, within the scope of coverage provided by 12 C.F.R. § 330.14(c)(2) (2005), "[s]elf-directed Keogh plans that qualify under section 401(d) of the Internal Revenue Code of 1986").

Congress has considered doubling the amount of coverage of selected retirement accounts in recent years. See Federal Deposit Insurance Reform Act of 2005, H.R. 1185, 10th Cong. 3(c) 2005.

98. Like traditional IRAs and self-directed Keogh plans, Roth IRAs receive separate

current balance of \$75,000.

Are all three accounts fully insured?

Answer: No. Self-directed retirement accounts at the same financial institution are insured on an aggregate, rather than per account, basis.⁹⁹ Therefore, Suzanne has a \$35,000 single ownership account that is fully insured, and a \$115,000 retirement account, of which \$100,000 is fully insured and \$15,000 is uninsured.

Hypothetical #36

Ethan maintains a traditional IRA at First National Bank with a current balance of \$55,000.

A few years ago, Ethan opened an Education IRA for the benefit of his daughter, Sarah, that is maintained at First National Bank and has a current balance of \$30,000.

Ethan also has established an account for Sarah's benefit at First National Bank under the terms of an irrevocable trust. The account has a current balance of \$75,000.

Are all three accounts fully insured?

Answer: No. Because an Education IRA¹⁰⁰—now replaced by the

FDIC deposit insurance coverage as retirement accounts. The applicable federal regulation refers to "[a]ny individual retirement account described in section 408(a) of the Internal Revenue Code of 1986." 12 C.F.R. § 330.14(c)(2)(i)(A). One might argue that Roth IRAs are not separately insured as retirement accounts because Roth IRAs are addressed not in 26 U.S.C. § 408(a) (2000) but in 26 U.S.C. § 408A (2000) (captioned "Roth IRAs"). There are, however, two responses to this argument. First, the FDIC itself has stated that Roth IRAs receive separate deposit insurance coverage as retirement accounts. *See* FDIC: Financial Institution Employee's Guide to Deposit Insurance, *supra* note 97 ("IRAs are accounts that qualify under Section 408(a) of the Internal Revenue Code of 1986. Both traditional and Roth IRAs are included in this definition."). Second, 26 U.S.C. § 408A (2000) describes a "Roth IRA" as "an individual retirement plan (as defined in section 7701(a)(37))." An "individual retirement plan" is "an individual retirement account described in section 408(a)." 26 U.S.C. § 7701(a)(37)(A) (2000) (emphasis added).

One author noted that "[t]he critical difference between the Roth IRA and the traditional IRA . . . is the sequence of taxation. Instead of the tax pattern of a conventional IRA (deduction on contribution, tax-free earnings, taxation on distribution), a Roth IRA uses the alternative sequence (no deduction on contribution, tax-free income during the accumulation phase, tax-free distribution)." Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 499 (2004).

99. *See* 12 C.F.R. § 330.14(c)(2)(i) (stating that deposits "in connection with the [aforementioned] types of retirement plans shall be aggregated and insured in the amount of up to \$100,000 per participant"); *see also* *Employee's Guide*, *supra* note 35, at 61,426 ("Important! A depositor's interests in IRAs and self-directed Keoghs are not separately insured from each other. A depositor's IRA and self-directed Keogh deposits in the same insured institution are aggregated when determining deposit insurance coverage.").

100. One web site describes an "Education IRA" as

Coverdell Education Savings Account¹⁰¹—is neither an IRA nor a retirement account,¹⁰² it is not separately insured as a retirement account. Instead, the account is insured as an irrevocable trust account.¹⁰³ Therefore, Ethan has a fully-insured \$55,000 retirement account and a \$105,000 irrevocable trust account, of which \$100,000 is insured and \$5,000 is uninsured.

Hypothetical #37

BizCorp maintains a pension plan account at First National Bank. The current balance is \$2 million. Forty employees are the named beneficiaries, each with the same interest.

Sam, one of the named employees, holds a \$65,000 certificate of deposit issued by First National Bank. The account is insured as a single ownership account.

Is Sam's interest in the pension plan fully insured?

Answer: Perhaps. Rather than insuring deposits in pension plans on a per-plan basis (which, in this case, would leave \$1.9 million uninsured), the FDIC insures deposits on a "pass through" basis per plan participant.¹⁰⁴ The

a tax-deferred investment vehicle, set up on or after January 1, 1998, which has now been replaced by the Coverdell Education Savings Account. Such an account may contain funds to be applied to future education-related expenses. . . . Contributions are not tax-deductible but all deposits and earnings can be withdrawn without additional penalties or taxes.

See Investorwords.com, http://www.investorwords.com/1659/education_ira.html (last visited Feb. 12, 2006).

101. One web site describes the "Coverdell Education Savings Account" as [a]n investment vehicle designed to help parents fund their child's education. . . . Contributions to the account are taxed, but earnings used to pay education expenses are not. The account is transferable among family members. However, there are several restrictions attached to this account. The entire account has to be disbursed before the beneficiary's 30th birthday, and any withdrawals after this date or for expenses that do not qualify under the act will be subject to income taxes and a penalty.

See Investorwords.com, http://www.investorwords.com/5485/coverdell_education_savings_account.html (last visited Feb. 12, 2006).

102. Investorwords.com, *supra* note 100 ("The name is misleading, as an Education IRA is not actually an IRA and is not related to retirement in any way.").

103. See The East Carolina Bank, <http://www.ecbbancorp.com> (last visited Feb. 12, 2006) (advertising that Coverdell Education Savings Accounts are "FDIC insured up to \$100,000, separately from other non irrevocable trust deposits"); see also 12 C.F.R. § 745.9-1(b) (2005) (insuring a Coverdell Education Savings Account maintained at a federal credit union as an irrevocable trust account).

104. See 12 C.F.R. § 330.14(a) (2005) (insuring deposits in employee benefit plans "on a 'pass-through' basis, in the amount of up to \$100,000" per plan participant). But see Gonzalez, *supra* note 12, at 670 (advocating the elimination of "pass-through coverage for super accounts that money managers and pension funds bundle in amounts over \$100,000").

pension plan must meet the definition of "employee benefit plan"¹⁰⁵ or qualify as an "eligible deferred compensation plan,"¹⁰⁶ and only a participant's "non-contingent interest"¹⁰⁷ in the plan is eligible for pass-through insurance.¹⁰⁸ Therefore, if the pension plan satisfies the preceding requirements, Sam's pension benefits of \$50,000¹⁰⁹ are fully insured separately from his fully-insured \$65,000 single ownership account.

Hypothetical #38

Angela maintains a traditional IRA at First National Bank with a current balance of \$80,000.

BizCorp maintains a pension plan account at First National Bank. Angela is one of sixty employees named as beneficiaries. Angela's non-contingent interest in the plan is \$65,000.

Are both interests fully insured?

Answer: Yes. A depositor's individual retirement accounts are insured separately from her non-contingent interests in an employee benefit plan.¹¹⁰ Therefore, Angela's traditional IRA and her non-contingent interest in BizCorp's pension plan are fully insured.

Hypothetical #39

BizCorp maintains two pension plan accounts at First National Bank. Corey's non-contingent interest in Plan "A" is \$35,000. His non-contingent interest in Plan "B" is \$60,000.

Corey also has a non-contingent \$45,000 interest in a pension plan that his

105. See 12 C.F.R. § 330.14(g)(2) (2005).

106. See 26 U.S.C. § 457 (2000).

107. See 12 C.F.R. § 330.14(g)(4) (2005) (defining a "non-contingent interest" as "an interest capable of determination without evaluation of contingencies except those covered by the present worth tables and rules of calculation . . . in Federal Estate Tax Regulations . . . or . . . as may be published by the Internal Revenue Service"); see also 12 C.F.R. § 330.13(a) (2005) ("Funds representing the 'non-contingent trust interests' . . . of a beneficiary deposited into one or more deposit accounts pursuant to one or more irrevocable trust agreements created by the same settlor(s) (grantor(s)) shall be added together and insured up to \$100,000 in the aggregate.").

108. See 12 C.F.R. § 330.14(a); see also 12 C.F.R. § 330.14(d) (2005) (discussing how to determine the value of an employee's non-contingent interest in a defined contribution plan and a defined benefit plan).

109. This amount is calculated by dividing the value of the pension plan (\$2 million) by the number of employees (40); each employee has an equal interest.

110. See 12 C.F.R. § 330.14(a) (insuring deposits in an employee benefit plan "on a pass-through basis, in the amount of up to \$100,000 for the non-contingent interest of each plan participant"); 12 C.F.R. § 330.14(c)(2) (2005) (insuring deposits in eligible individual retirement accounts "in the amount of up to \$100,000 per participant").

previous employer, MegaCorp, maintains at First National Bank.

Are Corey's interests in all three pension plans fully insured?

Answer: Yes. A beneficiary's non-contingent interests are aggregated, but only when the pension plans are "established by the same employer or employee organization."¹¹¹ Therefore, Corey's non-contingent interests in the two pension funds funded by BizCorp, which aggregate to \$95,000, are fully insured, but they are insured separately from his non-contingent \$45,000 fully-insured interest in MegaCorp's pension plan.

H. Custodial Accounts and Fiduciary Relationships

The following five hypotheticals address issues concerning the scope of FDIC deposit insurance coverage of custodial accounts and fiduciary relationships.

Hypothetical #40

Claire owns a \$55,000 certificate of deposit issued by First National Bank.

Claire is the executor for the estate of her recently deceased mother, Tabitha. In administering the estate, Claire received funds that she deposited at First National Bank into an account styled "Claire Smith, Executor of the Estate of Tabitha Smith." The balance in the account is \$70,000.

At the time of her death, Tabitha had a savings account at First National Bank. The current balance is \$45,000.

Are all three accounts fully insured?

Answer: No. Funds managed by an executor or administrator of an estate are insured as funds owned by the deceased, rather than the executor or administrator.¹¹² Therefore, Claire has a fully-insured \$55,000 single ownership account, and Tabitha's estate has a \$115,000 single ownership account, of which \$100,000 is insured and \$15,000 is uninsured. To address this uninsured risk, Claire should consider withdrawing some of the estate's funds from First National Bank and depositing them with another insured

111. See 12 C.F.R. § 330.14(c)(1) (2005); see also 12 C.F.R. § 330.14(g)(3) (2005) (defining "employee organization").

112. See 12 C.F.R. § 330.3(a) (2005) ("Deposits maintained in different rights and capacities, as recognized under this part, shall be insured separately from each other."); 12 C.F.R. § 330.5(a)(1) (2005) ("[T]he FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution."). The regulations also note the following:

The FDIC will recognize a claim for insurance coverage based on a fiduciary relationship only if the relationship is expressly disclosed, by way of specific references, in the 'deposit account records' . . . of the insured depository institution. Such relationships include . . . relationships involving a trustee, agent, nominee, guardian, executor or custodian pursuant to which funds are deposited.

12 C.F.R. § 330.5(b)(1) (2005).

financial institution.

Hypothetical #41

Jordan maintains a \$35,000 savings account with First National Bank.

Jordan's legal guardian, Frank, maintains a \$45,000 checking account with First National Bank.

First National Bank issued a \$75,000 certificate of deposit in the name of "Frank Smith, as Guardian for Jordan Smith."

Are all three account balances fully insured?

Answer: No. The certificate of deposit is treated as part of Jordan's single ownership account rather than part of Frank's single ownership account or some other styled account.¹¹³ Therefore, Jordan presently holds a \$100,000 insured claim and a \$10,000 uninsured claim, and Frank presently holds a \$45,000 insured claim.

Hypothetical #42

Lisa maintains a \$30,000 savings account at First National Bank.

Last week, Lisa won a lawsuit. Yesterday, Lisa's attorney deposited the award of \$95,000 into a First National Bank account styled "Sue Smith, Agent for Lisa Johnson."

Are both accounts fully insured?

Answer: No. Funds that an agent deposits on behalf of another party are insured as the party's funds.¹¹⁴ Therefore, the lawsuit award is insured as Lisa's account rather than Sue's account. Lisa has a \$125,000 single ownership account, of which \$100,000 is fully insured and \$25,000 is uninsured. To avoid this uninsured risk, Lisa's attorney should have asked her client to identify the location of the client's accounts before depositing the lawsuit award and placed the funds with another insured financial institution.¹¹⁵

113. See 12 C.F.R. § 330.7(b) (2005) ("Funds held by a guardian . . . for the benefit of his or her ward . . . and deposited into one or more accounts in the name of the guardian . . . shall . . . be deemed to be agency or nominee accounts and shall be insured in accordance with paragraph (a) of this section."); see also 12 C.F.R. § 330.7(a) (2005) ("Funds owned by a principal or principals and deposited into one or more deposit accounts in the name of an agent . . . shall be insured to the same extent as if deposited in the name of the principal(s).").

114. See 12 C.F.R. §§ 330.3(a), 330.5(a)(1), 330.5(b)(1), 330.7(a) (2005). For a case in which the scope of FDIC deposit insurance turned on whether an account was maintained in an agency capacity, see *Abdulla Fouad & Sons v. FDIC*, 898 F.2d 482 (5th Cir. 1990).

115. A deposit made by "[a]n attorney, real estate agent or some other person" on behalf of a customer into an escrow account at a financial institution where the customer already maintains one or more accounts comes in at #5 on the FDIC's list of "Top 10 Mistakes That Cost Depositors Money." See *Employee's Guide*, *supra* note 35, at 61,464-65.

Hypothetical #43

Mason maintains a \$40,000 savings account with First National Bank.

Mason's parents, Stan and Allison, have deposited funds over several years into an account at First National Bank for Mason under the Uniform Gifts to Minors Act ("UGMA").¹¹⁶ The balance in that account is \$65,000.

Stan also holds a \$50,000 certificate of deposit issued by First National Bank.

Are all three account balances fully insured?

Answer: No. The balance in the account created under the UGMA is treated as Mason's single ownership account and is added to his other single ownership accounts for the purpose of calculating insured balances.¹¹⁷ Therefore, Mason presently holds a \$100,000 insured claim and a \$5,000 uninsured claim, and Stan presently holds a \$65,000 insured claim. To address this uninsured risk, Stan and Allison should consider relocating some of the UGMA funds to another insured financial institution.

116. As stated at one web site,

The Uniform Gifts to Minors Act (UGMA), superseded by the Uniform Transfers to Minors Act (UTMA) in some states, is simply a way for a minor to own property, such as securities.

The UGMA/UTMA setup is commonly used to give monies to a minor. IRS regulations allows [sic] a person to give many thousands of dollars per year to any other person with no tax consequences. If the recipient is a minor, the UGMA provides a way for the minor to own the assets without involving an attorney to establish a special trust. When giving assets to a minor using a UGMA/UTMA, the donor must appoint a custodian (the trustee). An UGMA/UTMA is a trust like any other trust except that the terms of the trust are set in the state statute instead of being drawn up in a trust document. Should a trustee fail to comply with the terms of the UGMA/UTMA, this would expose the trustee to the same actions as a trustee who fails to comply with the terms of a special drawn-up trust.

Uniform Acts-Uniform Transfers to Minors Act Law and Legal Definition, http://www.uslegalforms.com/lawdigest/legaldefinitions.php/uniform_acts_uniform_transfer_s_to_minors_act.htm (last visited Oct. 11, 2005).

117. See 12 C.F.R. § 330.7(a), (b) (2005) (noting that funds held by a party "for the benefit of a minor under the Uniform Gifts to Minors Act" are insured as if deposited in the name of the minor). Most states have replaced the Uniform Gifts to Minors Act with the Uniform Transfers to Minors Act. See Appendix: UGMA and UTMA, http://www.complianceheadquarters/Deposit_Ops/Deposit_Research/Z_UTMA.pdf (last visited Oct. 11, 2005) (summarizing applicable state statutes). Although the regulation is silent on whether it applies to gifts made under the UTMA, the FDIC has said as much elsewhere. See *Employee's Guide*, *supra* note 35, at 61,427 ("Funds deposited for the benefit of a minor under the Uniform Gifts to Minors Act **(or the Uniform Transfers to Minors Act)** are considered the single ownership funds of the minor") (bold in original).

Hypothetical #44

Clarice owns a \$40,000 certificate of deposit issued by First National Bank.

Clark, Clarice's husband, owns a \$30,000 certificate of deposit issued by First National Bank.

Clarice and Clark sold their house yesterday, and their real estate agent deposited a \$180,000 cashier's check into an account at First National Bank styled "Title Company, Agent for Clarice and Clark Smith."

Are all three accounts fully insured?

Answer: Yes. Funds that an agent holds on behalf of joint owners are insured as the joint account of those owners.¹¹⁸ Joint accounts are insured separately from single ownership accounts.¹¹⁹ Therefore, Clarice has a fully-insured \$40,000 single ownership account and a fully-insured \$90,000 joint account, and Clark has a fully-insured \$30,000 single ownership account and a fully-insured \$90,000 joint account.

I. Bank Mergers

The following two hypotheticals address the impact that a bank merger may have on FDIC deposit insurance coverage.

Hypothetical #45

Last week, First National Bank merged with Second National Bank to create MegaBank.

Immediately prior to the merger, Hannah had a \$45,000 savings account at First National Bank and a \$75,000 savings account at Second National Bank.

Are both accounts fully insured after the merger?

Answer: Yes, temporarily. The general rule is that the deposits continue to be separately insured for six months after the merger.¹²⁰ Therefore, Hannah's two accounts are fully insured and will remain so for almost six more months. Once the six-month period ends, the two accounts will no longer be separately insured and Hannah will have an uninsured claim of

118. See 12 C.F.R. § 330.7(c) (2005) ("Funds held by an agent, . . . on behalf of two or more persons jointly, shall be treated as a joint ownership account and shall be insured in accordance with the provisions of § 330.9.").

119. See 12 C.F.R. §§ 330.3(a), 330.9(a) (2005).

120. See 12 C.F.R. § 330.4(b) (2005) (noting that when "the liabilities of one or more insured depository institutions for deposits are assumed by another insured depository institution" by merger, consolidation, or otherwise, then "[t]he separate insurance of deposits assumed continues for six months from the date the assumption takes effect").

\$20,000. To address this risk, Hannah should withdraw some funds from MegaBank and invest them elsewhere during the six-month grace period.

Hypothetical #46

Last week, First National Bank merged with Second National Bank to create MegaBank.

Immediately prior to the merger, Tim had a one-year \$60,000 certificate of deposit issued by First National Bank that will mature three months after the merger and a one-year \$75,000 certificate of deposit issued by Second National Bank that will mature eight months after the merger.

Are both accounts fully insured after the merger?

Answer: Yes, temporarily. The \$60,000 certificate of deposit that matures within the six-month period following the merger remains separately insured for at least that six-month period.¹²¹ If Tim renews that \$60,000 certificate of deposit for the same one-year term and for the same dollar amount (which can but need not include accrued interest posted to the account), then the certificate of deposit will remain separately insured until the first maturity date after the end of the six-month period following the merger.¹²² Should Tim elect to renew the \$60,000 certificate of deposit for a different term or a different amount, or if he decides not to renew the certificate of deposit and the proceeds are placed in a demand deposit account at MegaBank, then the certificate of deposit (or the demand deposit account) is separately insured only through the six-month period following the date of merger.¹²³

The certificate of deposit that initially matures after the six-month period following the merger date, the \$75,000 certificate of deposit, will be treated as a separate insured account until the stated maturity date.¹²⁴ Tim cannot extend the protection beyond the stated maturity date by renewing the certificate of deposit on the same terms and for the same amount.

121. *See id.*

122. *See id.*

In the case of time deposits which mature within six months of the date the deposits are assumed and which are renewed at the same dollar amount (either with or without accrued interest having been added to the principal amount) and for the same term as the original deposit, the separate insurance applies to the renewed deposits until the first maturity date after the six-month period.

Id.

123. *See id.* ("Time deposits that mature within six months of the deposit assumption and that are renewed on any other basis, or that are not renewed and thereby become demand deposits, are separately insured only until the end of the six-month period.").

124. *See id.* (noting that separate insurance continues for six months after the merger "or, in the case of a time deposit, the earliest maturity date after the six-month period").

J. Foreign Concerns

The following four hypotheticals address the scope of FDIC deposit insurance coverage when either the customer or the account raises a foreign concern.

Hypothetical #47

Hector Garcia is a Mexican citizen who resides in Mexico City. Because he frequently visits Texas for both personal and business reasons, he maintains a savings account at Texas National Bank in Brownsville. The balance in the account never exceeds \$15,000.

Is the balance in Hector's savings account covered by FDIC deposit insurance?

Answer: Yes. "The availability of deposit insurance is not limited to citizens and residents of the United States. Any person or entity that maintains deposits in an insured depository institution is entitled to the deposit insurance provided by [applicable federal law]."¹²⁵ Therefore, the balance in Hector's savings account is fully insured even though he is a citizen and resident of another country.

Hypothetical #48

Henri Courneyer, a citizen of Canada, lives in Toronto. He frequently deposits Canadian dollars into his savings account at the Detroit branch of Michigan National Bank. All account activity is reflected in terms of Canadian dollars, and the account agreement obligates Michigan National Bank to pay any balance at closing in Canadian dollars. The balance in the account never exceeds the equivalent of \$60,000 U.S. dollars.

Is the balance in Henri's savings account covered by FDIC deposit insurance?

Answer: Yes. Deposits denominated in a foreign currency are eligible for FDIC deposit insurance.¹²⁶ Absent a contrary agreement, deposit insurance coverage is calculated "in the amount of United States dollars that is equivalent in value to the amount of the deposit denominated in the foreign currency as of close of business on the date of default of the insured depository institution."¹²⁷ Therefore, the balance in Henri's savings account, even though denominated in a foreign currency, is eligible for FDIC deposit insurance coverage.

125. 12 C.F.R. § 330.3(c) (2005).

126. *Id.*

127. *Id.*; see also 12 C.F.R. § 330.1(c) (2005) (incorporating the definition of "default" found at 12 U.S.C. § 1813(x)).

Hypothetical #49

Eleanor Hopkins is a British citizen who lives in Boston, Massachusetts, with her sister. Eleanor maintains a savings account at the Boston office of Banque of London, a financial institution chartered under the banking laws of England. The balance in the account never exceeds \$35,000.

Is the balance in Eleanor's savings account covered by FDIC deposit insurance?

Answer: Yes, if the Boston office of Banque of London is an "insured branch."¹²⁸ To become an "insured branch," an office of a foreign bank must apply to, and receive approval from, the FDIC's board of directors.¹²⁹ Therefore, Eleanor's balance is protected by FDIC deposit insurance if the Boston office of Banque of London enjoys the status of "insured branch."

Hypothetical #50

Joshua's employer is transferring him from Atlanta, Georgia, to Brussels, Belgium. In anticipation of the relocation, Joshua deposits \$45,000 in the Atlanta branch of First National Bank. Both parties agree that First National Bank will pay the balance to Joshua solely at its office in Brussels.

Is the account balance covered by FDIC deposit insurance?

Answer: No. An obligation payable by a domestic financial institution solely at an office located outside the United States (or other United States territories) is not considered a "deposit."¹³⁰ Because First National Bank has agreed to pay the account balance to Joshua solely at its Brussels office, the

128. 12 C.F.R. § 330.3(d) (2005); *see also* 12 C.F.R. § 330.1(h) (2005) (defining "insured branch" as "a branch of a foreign bank any deposits in which are insured in accordance with the provisions of the [Federal Deposit Insurance] Act").

129. 12 U.S.C. § 1813(s)(3) (2000) (defining "insured branch" as a branch of a foreign bank in which deposits are insured under Chapter 16 of Title 12 of the United States Code); 12 U.S.C. § 1815(b) (2000) (summarizing factors that the FDIC and its board of directors will consider in determining whether to grant status of "insured branch"). Currently, a five-member board of directors governs the FDIC. One member is the Comptroller of the Currency; one member is the Director of the Office of Thrift Supervision; and three members are appointed by the President, with the advice and consent of the Senate, for a term of six years. *See* 12 U.S.C. § 1812(a)(1), (c)(1) (2000).

130. *See* 12 C.F.R. § 330.3(e) (2005); *see also* 12 C.F.R. § 330.3(a) (2005) ("The insurance coverage provided by the Act and this part is based upon the ownership rights and capacities in which *deposit* accounts are maintained at insured depository institutions.") (emphasis added); *Domestic Brokered Deposits of Foreign Bank Customer Funds; Recordkeeping Requirements*, FDIC Interpretive Letter (FDIC-90-40) [1990-1991 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 81,328, at 55,525 (Aug. 17, 1990) (citing 12 C.F.R. § 330.3(e) as authority for stating that "deposits payable solely outside the United States are not considered to be 'deposits' for purposes of the FDIC's insurance regulations and so, would not be entitled to insurance").

account balance is uninsured.

III. CONCLUSION

Many individuals have at least one bank account. Some bank customers have multiple accounts at the same branch, same bank, or different banks. One person may own those accounts or one or more persons may jointly own those accounts. Other accounts may have been created under the terms of a revocable or irrevocable trust. Perhaps an account is held in a custodial or fiduciary capacity. The account might represent retirement savings through self-directed or employer-sponsored contributions.

Knowing whether, and to what extent, the FDIC deposit insurance program adequately protects these account balances requires familiarity with several federal regulations. Hopefully, through its use of hypotheticals, this article fosters an improved understanding of that regulatory framework.