A Financial Institution Claiming that a Possessor Bank Wrongfully Refused to Return Loans and Proceeds to which a Trustee had Legal Title must Utilize the Financial Institutions Reform, Recovery and Enforcement Act’s Administrative Claims Process Before Turning to the Federal Court for De Novo Judicial Review: Bank of America National Association v. Colonial Bank

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A FINANCIAL INSTITUTION CLAIMING THAT A POSSESSOR BANK WRONGFULLY REFUSED TO RETURN LOANS AND PROCEEDS TO WHICH A TRUSTEE HAD LEGAL TITLE MUST UTILIZE THE FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT’S ADMINISTRATIVE CLAIMS PROCESS BEFORE TURNING TO THE FEDERAL COURT FOR DE NOVO JUDICIAL REVIEW: Bank of America National Association v. Colonial Bank

Kiran K. Patel*

Banking Law – The Federal Deposit Insurance Corporation – Financial Institute Reform and Recovery Act – Administrative Claims Process – The Court of Appeals for the Eleventh Circuit vacated and remanded an injunction from the District Court holding that the anti-injunction provision of Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) deprived the District Court of jurisdiction to issue preliminary injunction.

I. Introduction

Fundamental to litigation concerning the Financial Institutions Reform, Recovery and Enforcement Act (“FIRREA”) is the provision which states, in part, that no court may restrict or restrain the Federal Deposit Insurance Corporation (“FDIC”) from acting in its receivership capacity.1 The United States District Court for the Southern District of Florida in this matter failed to interpret the statute correctly and on appeal, the United States Court of Appeals for the Eleventh Circuit limited its inquiry to whether the activity that the order that sought to enjoin the FDIC fell within the FDIC’s powers under FIRREA.2 The appellate court, in Bank of America National Association v. Colonial Bank, the case discussed below, considered whether the preliminary injunction issued against Colonial Bank and the FDIC by the trial court was lawful under FIRREA.3

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This case note will first discuss the facts and procedural history of Bank of America National Association v. Colonial Bank and the cases and law that were relied upon in rendering the appellate court’s opinion. Then, the case note will discuss the exhaustion of remedies under FIRREA and the construction and application of the anti-injunction provisions under FIRREA.

II. Bank of America National Association v. Colonial Bank

A. Facts and Procedural History

The Bank of America National Association (“Bank of America”) alleged that the defendant, Colonial Bank (“Colonial”), wrongfully refused to return thousands of mortgage loans and their proceeds, valued in excess of one billion U.S. dollars, to which Bank of America had legal title. The loans and proceeds arose out of mortgage loan agreements in June 2008, among LaSalle Bank N.A. (“LaSalle”), Ocala Funding, LLC (“Ocala”) and Taylor, Bean & Whitaker Mortgage Corp. (“Taylor Bean”). LaSalle, as custodian and collateral agent to secured parties, provided capital to Ocala to purchase mortgage notes originating from Taylor Bean for the benefit of the secured parties. Bank of America became LaSalle’s successor-in-interest and, as a result, became the trustee and collateral agent for the secured parties. Bank of America perfected the security interest by taking possession of the loans and documents.

During the period from June 2009 to August 2009, Bank of America sent transmittal letters to Colonial stating that it had an interest in these loans and would deliver them to Colonial and that Colonial would serve as a custodian, agent and bailee on behalf of the secured parties.

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Bank of Am.*, 604 F.3d at 1241.
9. *Id.*
The arrangement between Bank of America and Colonial also detailed Colonial’s duty to facilitate the sale of the loans to Freddie Mac within fifteen days of receipt. Colonial sold approximately six thousand of these loans to Freddie Mac, which remitted payment of over one billion U.S. dollars in proceeds to Colonial.

In August 2009, relations between Bank of America and Colonial soured when it came to light that Colonial was not in compliance with the Federal Reserve’s capital requirements and was on the verge of insolvency. As a result, Bank of America demanded return of its loans and accompanying proceeds, which Colonial refused to return. Bank of America issued a demand for documents and proceeds to Colonial, which would end Bank of America’s relationship with Colonial. Again, Colonial refused to return the loans and proceeds.

On August 12, 2009, Bank of America filed a five count complaint in the United States District Court for the Southern District of Florida. The following day, the district court issued an ex parte temporary restraining order (“TRO”) which enjoined Colonial from disposing of the loans. The next day, the Alabama State Banking Department appointed the FDIC receiver for Colonial, and the FDIC motioned to become a defendant in this lawsuit. The FDIC made

10. Id.
11. Id.
12. Id.
14. Id.
15. Bank of Am., 604 F.3d at 1242.
17. Ex parte is “on or from one party only, usu[ally] without notice to or argument from the adverse party” BLACK’S LAW DICTIONARY 597 (8th ed. 2004).
18. TRO is “a court order preserving the status quo until a litigant’s application for a preliminary or permanent injunction can be heard.” BLACK’S LAW DICTIONARY 1477 (8th ed. 2004).
19. Bank of Am., 604 F.3d at 1242. “The district court … enjoined Colonial from selling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of the loans and loan proceeds related to the loans.” Id. at 1242.
20. Bank of Am., 604 F.3d at 1242.
an emergency motion to dissolve the TRO stating that it violated 12 U.S.C. 1821(j)\(^{21}\) and that, for Bank of America to resolve its claims, it must utilize the administrative claims procedure outlined in FIRREA.\(^ {22} \)

In opposition to the FDIC’s motion, Bank of America argued that because the loans never belonged to Colonial and were never part of the receivership estate, the statute was not applicable.\(^ {23} \) The district court rejected the FDIC’s argument and converted the TRO into a preliminary injunction.\(^ {24} \) Subsequently, the FDIC filed a notice of appeal of the preliminary injunction order and, on September 15, 2009, moved for a stay pursuant to FIRREA.\(^ {25} \) The district court granted the stay but left the preliminary injunction intact.\(^ {26} \) The FDIC then filed a petition for a writ of mandamus.\(^ {27} \)

**B. The Eleventh Circuit**

Judge Robert Lanier Anderson III delivered the opinion of the court. The appellate court’s examination of this case was limited to the question of subject matter jurisdiction.\(^ {28} \) The district court stated that the stay requested by the FDIC was mandatory regardless of how the FDIC uses the stay because the drafters of § 1821 explained that they included the stay provision to give the FDIC a chance to analyze pending matters and to decide how best to proceed.\(^ {29} \) The

\(^{21}\) 12 U.S.C. § 1821(j) (2008). “No court may take any action ... to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver.” *Id.*

\(^{22}\) *Bank of Am.*, 604 F.3d at 1242.

\(^{23}\) *Id.*

\(^{24}\) *Bank of Am.*, 604 F.3d at 1242. The district court “determining that ‘assets possessed by, but not belonging to, the failed bank are outside the receivership estate, and the FDIC’s attempts to dispose of these assets is therefore not protected by the jurisdiction-stripping provisions of FIRREA.’” *Id.* at 1242.

\(^{25}\) *Bank of Am.*, 604 F.3d at 1242.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.* at 1243.

\(^{29}\) H.R.Rep. 101st Cong., No. 54(I), at 331,
district court went on to say that the plain language of the section places no limitation on how the FDIC may use its stay. Bank of America argued in district court that because the FDIC in this matter was acting as a bailee and not as a receiver, a stay is not mandatory. Furthermore, Bank of America argued that the FDIC is judicially estopped from claiming that the funds in this case are assets of Colonial Bank because “bailed” funds are not assets of the FDIC. The district court further held that due to the broad language of the statute, the stay is to be mandatory because the statute does not differentiate between bailee and receiver. Furthermore, as Bank of America did not alleged any harm that would result in granting the stay, pending exhaustion of the administrative claims process, the district court granted the stay.

The appellate court stated that 12 U.S.C. § 1821(j) must be followed given these facts. This statute, as examined in Bursik v. One Fourth St. N., Ltd. and Nat’l Trust for Historic Pres. v. FDIC, has been interpreted broadly to prevent judicial interference in cases where the FDIC acts in a receivership position. Furthermore, in RPM Investments, Inc. v. Resolution Trust Corp. it can be seen that the exceptions carved out in this statute are limited. Judge Robert Lanier Anderson III of the Eleventh Circuit concluded in Bank of America that if the FDIC was acting within the scope of its receivership function then, according to the statute, the FDIC is immune from all court action that would limit its authority. The appellate court stated that the

30. Bank of Am., 604 F.3d at 1242.
31. Id.
32. Id.
33. Id.
34. Id.
35. Bank of Am., 604 F.3d at 1243.
36. 84 F.3d 1395 (11th Cir. 1996).
37. 995 F.2d 238 (D.C. Cir. 1993), rehe'g granted, judgment vacated, 5 F.3d 567 (D.C. Cir. 1993) and opinion reinstated in part on rehe'g, 21 F.3d 469 (D.C. Cir. 1994).
38. Bank of Am., 604 F.3d at 1242.
39. 75 F.3d 567 (1996). “The 'exceptions' to § 1821(j)'s jurisdictional bar are extremely limited.” Id. at 620.
40. Bank of Am., 604 F.3d at 1243.
41. Id. at 1243.
FDIC’s actions clearly fell within the authority granted to it by FIRREA, specifically 12 U.S.C. § 1821(d)(2)(G). Further, 12 U.S.C. § 1821(d)(2)(H), 12 U.S.C. § 1821 (d)(3-13), and 12 U.S.C. § 1821(d)(2)(J)(i) grant the FDIC the authority to act as it did. Judge Anderson iterated that all of the functions that the FDIC carried out in its capacity as Colonial’s receiver fell within the authority granted by FIRREA.

The court of appeals stated that Bank of America’s fear that the FDIC would make a poor decision with regard to the loans was immaterial. Based upon the statutory power afforded to the FDIC, acting in receivership, the district court’s broad injunction against the FDIC violated the statute, because it would have left the FDIC merely to possess the loans without any ability to exercise the authority granted to it under FIRREA’s anti-injunction provision.

Bank of America further argued that, as Colonial never owned the loans and merely acted as a custodian, the FDIC was not entitled to dispose of the loans as it pleased. Judge Anderson stated that Colonial’s relation to the loans was immaterial. Assuming for the sake of argument that Colonial did not own the loans, the statute would still allow the FDIC to act as long as the FDIC was within its receivership capacity. Judge Anderson refused to carve out an exception for non-owning assets, because the words of the statute are to be interpreted in their ordinary

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42. 12 U.S.C. § 1821(d)(2)(G) (2006). “Grants the receiver the power to ‘transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.’” Id.
43. 12 U.S.C. § 1821(d)(2)(H) (2006). This statute grants the receiver the power to “pay all valid obligations” of the failed financial institution. Id.
44. 12 U.S.C. § 1821(d)(3-13) (2006). This statute grants the receiver the power to determine all claims against the institution in accordance with the comprehensive administrative claims procedures. Id.
45. 12 U.S.C. § 1821(d)(2)(J)(i) (2006). FDIC has “such incidental powers” that are necessary to carry out those powers expressly granted by statute.” Id.
46. Bank of Am., 604 F.3d at 1243.
47. Id. at 1243.
48. Id. at 1244. “Selling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of the loans and loan proceeds related to the Ocala loans.” Id. at 1244.
49. Id. at 1243.
50. Bank of Am., 604 F.3d at 1244.
51. Id. at 1244.
52. Id.
meaning that express the statute’s legislative purpose.\textsuperscript{53} Furthermore, Judge Anderson indicated that no circuit court has ever limited the application of the statute to non-owned assets of a failed institution.\textsuperscript{54}

Judge Anderson also rejected Bank of America’s argument that 12 U.S.C. § 1821(d)(13)(D)\textsuperscript{55} need be involved, since 12 U.S.C. § 1821(j)\textsuperscript{56} was sufficient to conclude that the district court was deprived of the requisite jurisdiction to issue a preliminary injunction against the FDIC.\textsuperscript{57}

Bank of America is not without recourse, as the type of claim that it has presented must be adjudicated through the administrative claims process.\textsuperscript{58} Judge Anderson stated that, historically, as seen in Merrill Lynch Mortgage Capital, Inc. v. FDIC,\textsuperscript{59} claims similar to Bank of America’s have been adjudicated through that process.\textsuperscript{60} Bank of America argued that these loans are held in special accounts and are, therefore, not subject to the administrative claims process.\textsuperscript{61} Judge Anderson rejected this argument, because no evidence was presented to support this assertion, and, further, the holding in Merrill Lynch demonstrated that even loans held in special accounts are subject to the administrative claims process in FIRREA.\textsuperscript{62} For example, in McCarthy v. FDIC,\textsuperscript{63} Freeman v. FDIC,\textsuperscript{64} Bueford v. Resolution Trust Corp.,\textsuperscript{65} Henderson v. Bank of America, 604 F.3d at 1245-46.

\begin{thebibliography}{9}
\bibitem{53} Id.
\bibitem{54} Id.
\bibitem{56} 12 U.S.C. § 1821(j) (2006). No court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver. \textit{Id}.
\bibitem{57} \textit{Bank of Am.}, 604 F.3d at 1245-46.
\bibitem{58} \textit{Id} at 1246.
\bibitem{59} 293 F.Supp.2d 98 (D.C. Cir. 2003).
\bibitem{60} \textit{Id}.
\bibitem{61} \textit{Bank of Am.}, 604 F.3d at 1246.
\bibitem{62} \textit{Id}.
\bibitem{63} 348 F.3d 1075 (9th Cir. 2003). “Claims by debtors of a failed bank arising out of acts of the receiver, as opposed to the failed bank, are subject to FIRREA’s administrative claims process.” \textit{McCarthy}, 348 F.3d at 1077.
\end{thebibliography}
Bank of New England, Meliezer v. Resolution Trust Co., and Resolution Trust Corp. v. Elman, all kinds of claims have been adjudicated through the FIRREA administrative claims process. The appellate court also stated that FIRREA has remedied some of the deficiencies in the administrative claims process, specifically the appropriate time limitations on a receiver’s consideration of whether to allow the administrative claims process.

Judge Anderson concluded by stating that, as Bank of America had failed to show how the administrative claims process is insufficient to adjudicate its claim, the claim must proceed through that process. If Bank of America is unable to adjudicate its claims through that process, it has a statutory right to a de novo review in a federal district court.

Judge Anderson vacated the district court’s grant of a preliminary injunction against the FDIC and remanded with instruction to dismiss Bank of America’s motion for injunctive relief for lack of jurisdiction.

III. History

64. 56 F.3d 1394 (D.C. Cir. 1995). (Claims by debtors of a failed bank alleging the fraudulent restructuring of their home mortgage loan are subject to the administrative claims process). Id. at 1402.
65. 991 F.2d 481 (1993). (Employment discrimination claims by former employees of the failed bank are subject to the administrative claims process). Id. at 484.
66. 986 F.2d 319 (8th Cir. 1993). (Claims by a denied credit card applicant seeking damages and the right to discover derogatory credit card information are subject to the administrative claims process). Id. at 321.
67. 952 F.2d 879 (5th Cir. 1992). (Negligence claim by home mortgage owners against a failed bank for issuing a loan accompanied by insufficient fire and hazard insurance is subject to the administrative claims process). Id. at 883.
68. 949 F.2d 624 (2d Cir. 1991). (Claim by attorney of failed bank for the return of the bank’s files until bank’s satisfaction of the attorney's retaining lien is subject to the administrative claims process). Id. at 628.
69. Bank of Am., 604 F.3d at 1246.
70. Id. at 1247.
71. Id.
74. Bank of Am., 604 F.3d at 1247.
75. Id.
In 1989, FIRREA established a comprehensive scheme for conservatorships and receiverships of insured financial institutions in response to turmoil in the savings and loan industry in the 1980s. The powers and duties of the FDIC with regard to the operation of troubled institutions as conservator or receiver are set forth in the statute. FIRREA also established a detailed claims procedure that applies to claims against the FDIC in its role as a conservator or receiver.

The FDIC obtained its conservatorship and receivership powers primarily through the provisions of 12 U.S.C. §§ 1821, 1822 and 1823. In general terms, Congress has given the FDIC the power to act as conservator or receiver for any financial institution that has failed or is in danger of failing. In such capacities, the FDIC may operate the institution, liquidate its assets, arrange for a merger or consolidation, or sell its assets and arrange to have its liabilities assumed by another institution, pay off its depositors, and exercise all rights of the institution and its directors or stockholders in carrying out its functions.

A. History of Subject Matter Jurisdiction Provision under 12 U.S.C. § 1821(j)

To permit the FDIC as receiver or conservator, to perform its important functions in dealing with a bank crisis in a prompt manner, FIRREA includes an anti–injunction provision that prohibits a court, with specified exceptions, from taking any action that would restrain or

77. Id.
78. Id.
80. Id.
81. Id.
affect the exercise of powers or functions of the agency as a conservator or receiver. Essential to these enumerated powers is the FDIC's ability to carry out its basic functions as a receiver free from judicial restraint. To protect the jurisdiction of the agencies, Congress granted them broad discretion and generally precluded courts from interfering with the agencies as they carry out their mandated duties. This protection is not absolute and is subject to limitation as seen in the case of Ward v. Resolution Trust Corp. The limitation to this general anti–injunction rule is that FIRREA permits judicial determination of claims if the receiver has denied them according to the Act's administrative processes or if the receiver or conservator fails to determine the matter within 180 days.

In Ward, Judge Anderson examined the provision of 12 U.S.C. § 1821(j) and specifically why this provision has been interpreted broadly to bar judicial intervention when the FDIC is acting in its capacity as a receiver or conservator. Anderson pointed to two cases that have historically framed the interpretation of this statute broadly to bar judicial intervention, Bursik v. One Fourth Street North, Ltd. and National Trust for Historic Preservation v. FDIC.

In Bursik, the claim arose out of the alleged breach of an agreement to settle a foreclosure action. The defendants counterclaimed that plaintiff failed to carry out the settlement agreement and consequently went into receivership, which caused the defendant, as the receiver,
to assume the lawsuit.  

Bursik held that the defendants are estopped from raising their equitable counts against the FDIC.

National Trust involved the FDIC acting as a liquidator with the powers of a receiver, including the sale of property. The suit arose out of the plaintiff’s motion to enjoin the transaction through a motion for a TRO. The appellate court relied on 12 U.S.C. § 1821(j) to deny the motion and to dismiss the action. The majority held that, by its terms, § 1821(j) shields only the proper exercise of powers that Congress gave to the FDIC; the provision does not bar injunctive relief when the FDIC has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.

B. History of Powers and Duties of a Corporation as Conservator or Receiver: Provision under 12 U.S.C. § 1821(d)

FIRREA authorizes the FDIC to take over failed banks as receiver or conservator upon the occurrence of certain enumerated events. While serving as a receiver, the FDIC is given the additional power to place the failed bank in liquidation and dispose of the institution’s assets. Upon the FDIC's appointment, FIRREA grants the FDIC substantial powers to facilitate the bank's orderly liquidation, dissolution or asset sale.

90. Bursik, 84 F.3d at 1396.
91. Id.
92. Nat'l Trust, 995 F.2d at 240.
93. Id.
94. Id.
95. Id.
98. Id.
In *Bank of America*, Judge Anderson pointed to one case that historically illustrates that a court’s injunctive relief order would significantly interfere with the heart of FIRREA’s anti-injunction provision:99 *Sharpe v. FDIC.*100

In *Sharpe*, the transferees to whom the bank tendered cashier’s checks in lieu of wire fund transfers required by the settlement agreement brought an action against the FDIC, as the bank’s receiver, for declaratory, injunctive, and monetary relief.101 The bank sought to enjoin the FDIC from recording the instrument that they gave to the bank pursuant to the settlement agreement and requested that the agreement be rescinded.102 Judge Robert R. Beezer held, in relevant part, that the statute allowed the FDIC to act as receiver or conservator of a failed institution for the protection of depositors and creditors.103 Furthermore, Congress granted the FDIC broad powers in conserving and disposing of the assets of the failed institution.104

**C. History of Authority of Receiver to Determine Claims under 12 U.S.C. § 1821(d)(3) – (13)**

Courts across the circuits have held that all manner of claims must be adjudicated through the administrative claims process under 12 U.S.C. § 1821(d)(3) – (13).105 Claimants who wish to adjudicate their claims are required first to use the administrative claims procedures of the receivers before a federal court obtains subject matter jurisdiction over the claims.106

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100. 126 F.3d 1147 (9th Cir. 1997).
101. *Sharpe*, 126 F.3d at 1153.
102. *Id.* at 1152.
103. *Id.* at 1155.
104. *Sharpe*, 126 F.3d at 1154. (“To enable the FDIC to move quickly and without undue interruption to preserve and consolidate the assets of the failed institution, Congress enacted a broad limit on the power of courts to interfere with the FDIC’s efforts.”) Telematics Int’l v. NEMLC Leasing Corp., 967 F.2d 703, 705 (1st Cir. 1992).
106. *Id.*
makes participation in the administrative claim review process mandatory, regardless of whether the claims were filed before or after the FDIC was appointed receiver of the failed institution.\(^\text{107}\)

In *Bank of America*, Judge Anderson identified five cases, among the circuits, in which the court held that all manner of claims are historically subject to FIRREA’s administrative claims: *McCarthy v. FDIC*,\(^\text{108}\) *Freeman v. FDIC*,\(^\text{109}\) *Bueford v. Resolution Trust Corp.*,\(^\text{110}\) *Henderson v. Bank of New England*,\(^\text{111}\) and *Meliezer v. Resolution Trust Co.*\(^\text{112}\) These five cases show that circuit courts nationwide have held that all manner of claims are subject to FIRREA’s administrative claims procedures.

In *McCarthy*, the court held that claims by debtors of a failed bank arising out of acts of the receiver, as opposed to the failed bank, are subject to FIRREA’s administrative claims process.\(^\text{113}\) The court in *Freeman* held that claims by debtors of a failed bank alleging the fraudulent restructuring of their home mortgage loans are subject to the administrative claims process.\(^\text{114}\) In *Bueford*, the court held that employment discrimination claims by former employees of the failed bank are subject to the administrative claims process.\(^\text{115}\) The court in *Henderson* held that claims by a denied credit card applicant seeking damages and the right to discover derogatory credit card information are subject to the administrative claims process.\(^\text{116}\) Finally, the court in *Meliezer* held that negligence claims by home mortgage owners against a

\[^\text{107}\text{Id.}\]
\[^\text{108}\text{348 F.3d 1075 (9th Cir. 2003).}\]
\[^\text{109}\text{56 F.3d 1394 (D.C. Cir. 1995).}\]
\[^\text{110}\text{991 F.2d 481 (8th Cir. 1993).}\]
\[^\text{111}\text{986 F.2d 319 (9th Cir. 1993).}\]
\[^\text{112}\text{952 F.2d 879 (5th Cir. 1992).}\]
\[^\text{113}\text{McCarthy, 348 F.3d at 1081.}\]
\[^\text{114}\text{Freeman, 56 F.3d at 1402.}\]
\[^\text{115}\text{Bueford, 991 F.3d at 484. “The requirement of 12 U.S.C.A. § 1821(d) of the administrative exhaustion of claims against a financial institution in receivership as a prerequisite to judicial review of such claims did not amount to a deprivation of the right to due process of the claimants under the United States Constitution.” Id. at 484.}\]
\[^\text{116}\text{Henderson, 986 F.2d at 321.}\]
failed bank for issuing a loan accompanied by insufficient fire and hazard insurance are subject to the administrative claims process.\textsuperscript{117}

Therefore, as a result of this consensus and on how and when to apply the administrative claims process, it is clear that it is the mechanism to evaluate claims against the FDIC acting within its receivership capacity.

\textbf{IV. Analysis}

The Eleventh Circuit’s reversal in \textit{Bank of America} of the district court’s decision to rule against the biggest lender in the United States, Bank of America, was consistent with decisions in sister circuits that have considered this issue: a bank cannot block the FDIC from disposing of the assets of a failed institution.\textsuperscript{118} The ruling involved an arrangement that is common in the industry, where loans are left in a bank for a short time until they can be sold and processed into the secondary market.

As the lender, Bank of America did not exhaust its administrative remedies. Therefore, it could not pursue legal claims for the more than one billion U.S. dollars in cash and loans.\textsuperscript{119} As noted above, when the FDIC is acting within its receivership capacity, the courts do not have jurisdiction to interfere or limit that exercise. The three-judge panel of the appellate court, including Associate Justice Sandra Day O’Connor sitting by designation, agreed.\textsuperscript{120} Other circuits have held that, if the bank’s role was “purely custodial,” it may be permitted, but Judge Anderson stated in response that even under such circumstances judicial restraint of the FDIC is

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\item\textsuperscript{117} \textit{Meliezer}, 952 F.2d 883. “There is no basis in 12 U.S.C.A. § 1821(d) for the contention that the failure of the Resolution Trust Corporation (RTC) as receiver for a failed financial institution to mail to a claimant the notice required by § 1821(d)(3) relieves the claimant of the obligation to exhaust the claims procedures of § 1821(d).” \textit{Id.} at 884.
\item\textsuperscript{118} \textit{Bank of Am.}, 604 F.3d at 1243.
\item\textsuperscript{119} \textit{Id.}
\item\textsuperscript{120} \textit{Id.}
\end{itemize}
still barred so long as the FDIC is acting within its receivership capacity. The court, however, did state that this protection is not limitless.121

In Bank of America, the FDIC acted exactly as it does each time it is appointed as a receiver. The FDIC assumed control of all of the assets that Colonial possessed at the time of the failure and is now maintaining custody of those assets. The FDIC is identifying and examining the assets, reviewing any claims to them, and finally disposing of them in accordance with the FDIC’s determination of rights to the assets in its possession. To that end, Congress has provided that complaints about the legality of the FDIC’s actions as receiver are to be determined not through injunctive action but only through a claim for damages made under the administrative claims process established by Congress in the Federal Deposit Insurance Act, 12 U.S.C. § 1821.

As a result of the decision from the Eleventh Circuit, Bank of America must work its way through the FDIC’s administrative claims process to salvage the more than one billion U.S. dollars in loans and loan proceeds that Colonial held for other parties.122 The instant case is distinguished from cases before it because the loans in question were only held, not owned, by Colonial.123 Nevertheless, the appellate court rejected the district court’s opinion and found for the FDIC, holding that the case remains under the provisions of 12 U.S.C. 1821(j), which allow the FDIC to make decisions about failed bank assets without judicial interference.124

A. Exhaustion of Remedies under FIRREA

121. Id.
123. Id.
124. Id.
FIRREA was enacted as amendments to the Federal Deposit Insurance Act because of the uncertain and trying times in the savings-and-loan industry in the 1980s. FIRREA granted, inter alia, the FDIC the power to act as receiver of failed financial institutions that were closed by the government. Among the powers granted to the FDIC through these amendments was the power to collect the assets of the failed institution, operate the institution, and settle claims against the institution. The proper procedure under FIRREA is for the receiver to publish notice to the creditors of the failed institution instructing them to notify the receiver of their claims, with proof, by the date specified in the notice. Upon receiving this notice, the FDIC may allow or disallow the claims. If the FDIC disallows the claim, the creditors must request administrative review of their claim and, if unsuccessful, may then file suit on the claim. FIRREA provides that courts do not have subject-matter jurisdiction over a claim until the administrative claims process has been exhausted.

In *Bank of America*, like many other cases before it, the claimant prematurely filed suit prior to exhausting its administrative claims remedies. Consequently, the courts have been burdened with the question of what constitutes “exhaustion of the administrative claims process.” Furthermore, the question has become whether particular types of claims are subject to the administrative claims process, such as counterclaims and third-party complaints – both are subject to the process. Finally, an issue has arisen as to whether defenses are subject to the

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126. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
process; the general notion is that they are not, with the caveat, however, that the defenses are often really “claims” under Section 1821(j).132

In response to the current turbulent economic situation, the failure of a financial institution is often a surprise, and, as a result, courts have been forced to decide whether pending litigation involving the failed financial institution should be subject to the administrative claims process.133 Generally, it is accepted that they are subject to the process, but there is a split of authority on that issue in the Second Circuit, with three different opinions on whether the process should apply to those claims.134 First, some courts permit stays of pending litigation to permit exhaustion of the administrative claims process; secondly, some courts require that the receiver request such stays within 90 days of being appointed receiver; and thirdly, some courts permit the stay to be of long duration, such as 180 days.135

As expected, courts have also had to review excuses offered by claimants for their failure to comply with the exhaustion requirements. In response, courts have answered that a failure of the receiver, the FDIC, to mail to the claimant the notice required under Section 1821(d) does not excuse the claimant’s failure to adhere to the exhaustion requirements.136 In such cases, however, the claimant is permitted additional time to file a claim.137 The one exception is if the mailed notice fails to comply with the requirements of Section 1821(d)(3)(a), in which event the claimant is excused from the requirement.138 Finally, a mere excuse or complaint that the administrative claims process is futile or inadequate will not justify failure to comply with it.139
It has been accepted that upon a claimant making a claim to the FDIC pursuant to the administrative claims process, it is difficult, practically, to allege every transaction on which the claim is based, especially when every transaction is not known to the claimant.\textsuperscript{140} Therefore, the administrative claims process allows claimants to allege general matters, based on the facts and to allege as many specific transactions as they are aware of at the time of the claim, but they must state that the claims are not limited to the specific transactions listed.\textsuperscript{141} One issue has surfaced concerning jurisdiction of claims which had not been initially stated in the administrative claim, but it was held that the claimant was allowed to supplement its claims because it was unaware of the specific transactions at the time the administrative claim was filled with the FDIC.\textsuperscript{142}

There have been instances in exhaustion of the administrative claims process where the administrative claimant has exhausted the process and seeks to have judicial intervention to resolve the problem, but adds additional legal theories and facts that were not previously encompassed in the original administrative claim submitted to the FDIC.\textsuperscript{143} Specifically adding more facts to the litigation than were added to the administrative claims process and in such an event, courts find that it is helpful and necessary to include statements made by the FDIC concerning the administrative claims process for transparency.\textsuperscript{144}

The administrative claims process imposes a harsh requirement upon claimants, because the powers of the receiver are broad and include allowing or disallowing all claims involving the failed financial institution. Therefore, all claimants must first exhaust the administrative claims process before the federal courts can obtain subject matter-jurisdiction over the issue.

\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Freitas, supra note 105, at 2.
\textsuperscript{144} Id.
B. Construction and Application of Anti-Injunction Provisions under FIRREA

The anti-injunction provision that prevents courts from enjoining actions by the FDIC prior to the administrative claims process being exhausted is not absolute. When an insured financial institution becomes insolvent, the powers and duties\textsuperscript{145} of the FDIC are provided in FIRREA. For the FDIC to exercise these powers and duties under FIRREA, the anti-injunction provision prevents any court from taking action against the agency that would restrain or affect its powers and/or duties.\textsuperscript{146} FIRREA permits judicial intervention if the receiver has denied the claims pursuant to the administrative claims process or if the receiver fails to make a final determination on the matter within 180 days of filing the claim.\textsuperscript{147}

There have been instances, such as in the case at hand, when a party resists the use of the administrative claims process and simply goes to court. In such instances, the anti-injunction provision has been broadly interpreted to prohibit such suits.\textsuperscript{148} To that end, some courts have taken the anti-injunction provision to the extreme by applying it to corporate circumstances and to situations in which, even though the claim is not subject to the administrative claims process, the claim is not adjudicated, because the action would have an adverse economic impact on the local community.\textsuperscript{149}

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In general, the statute provides that the FDIC, as conservator or receiver, succeeds to (1) all rights, titles, powers and privileges of the insured depository institution, and of any stockholder, member, account holder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and (2) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.
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\textit{Id.} at 10.
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\textsuperscript{146}Gallagher, \textit{supra} note 145, at 8.
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\textsuperscript{147}\textit{Id.}
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\textsuperscript{148}\textit{Id.}
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\textsuperscript{149}\textit{Id.}
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Even with these exceptions, it is clear that the purpose of the anti-injunction provision is to protect the FDIC from judicial intervention when acting in its capacity as receiver or conservator, even if their actions are illegal or show a lack of discretion. Clearly this provision is broad in nature and all encompassing.\(^{150}\) Therefore, this provision has been applied to stop court intervention in daily operational matters, such as collection of obligations due to the financial institution, the preservation of the bank's assets, and the liquidation of assets.\(^{151}\) Furthermore, courts have held that the following powers fall within the provision: execution of leases, withholding of pension deposits, termination of a pension plan, sale or transfer of bank assets, enforcement of promissory notes, repudiation of contracts, institution of arbitration proceedings, and assumption of control over a bank's subsidiaries.\(^{152}\)

Finally, the limitation of this provision will permit the grant of injunctive relief when specific circumstances warrant such a judgment. Courts have held that, if the receivers or conservators act outside of their statutory enumerated powers, the anti-injunction provisions are inapplicable, and judicial intervention is rightfully permitted.\(^{153}\) Further, the anti-injunction provision is not applicable to actions that require adjudication under state law by the receiver or conservator or actions that were commenced prior to the enactment of FIRREA.\(^{154}\) Finally, the provision does not apply during the seizure by a receiver of third party assets, in situations involving tax lien foreclosures, or determinations in commercial arbitration proceedings.\(^{155}\)

\(^{150}\) Id.
\(^{151}\) Gallagher, supra note 145, at 9.
\(^{152}\) Id.
\(^{153}\) Id.
\(^{154}\) Id.
\(^{155}\) Id.
While it is clear that the anti–injunction provision of FIRREA states that courts cannot restrain the exercise of the statutory powers or functions of a receiver, it is equally clear that this provision is not boundless and is subject to limitation.

V. Conclusion

The opinion in Bank of America was not surprising or unexpected in the Eleventh Circuit, as the opinion was consistent with how sister circuits have ruled regarding the application of the rules under FIRREA. Although the U.S. District Court for the Southern District of Florida issued the preliminary injunction against the FDIC, which was substituted as defendant matter when Colonial went into receivership, to prevent Colonial from controlling and disposing of loans and proceedings, this preliminary injunction was quickly vacated by the Eleventh Circuit. The court promptly acknowledged the powers afforded to the FDIC when acting within its receivership capacity on behalf of a failed financial institution.156

Bank of America sought to restrain the FDIC from acting within its receivership capacity without having first sought administrative relief in direct violation of FIRREA. FIRREA prohibits court intervention when the FDIC is acting within its receivership capacity.157 First, the Eleventh Circuit determined whether the activities of the FDIC were an exercise of its receivership power or function, and, if so, whether the FDIC was immune from judicial intervention.158 This opinion has affirmed and solidified the narrowness of FIRREA in its requirement that a claimant must utilize the administrative claims process prior to seeking judicial intervention. As a result, Bank of America’s attempt to gain judicial intervention against the FDIC when it was acting within its receivership capacity was not permitted.

156. Bank of Am., 604 F.3d at 1239.
157. Id.
158. Id.
The two major positions that Bank of America took against Colonial and the FDIC were the improper disposal of loans and proceedings by the FDIC and the failure of the judicial system to adjudicate the bank’s claims. To this, the Eleventh Circuit responded first that, under FIRREA, when acting within the scope of its receivership capacity, the FDIC cannot be subject to judicial intervention; and, secondly, that adjudication of claims against the FDIC must first exhaust the administrative claims process laid out in FIRREA before seeking judicial intervention.\(^\text{159}\)

Claimants must realize that courts will not enforce claims against the FDIC unless the FDIC is either acting outside the scope of its receivership function as defined under FIRREA or the claimant has un成功fully exhausted the administrative claims process resolution. *Bank of America* brings us one step closer to preventing the premature initiation of claims against the FDIC.

\(^\text{159.} \) *Bank of Am.*, 604 F.3d at 1241.