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National Depositor Preference: In an Attempt to Raise Revenue, Congress Completely Ignores a Potential Disaster

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David J. Ratway

Abstract

Until recently, the risk of a bank's insolvency was borne primarily by the Federal Deposit Insurance Corporation ("FDIC").'

KEYWORDS: Congress, disaster, revenue

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I. INTRODUCTION

Until recently, the risk of a bank's insolvency was borne primarily by the Federal Deposit Insurance Corporation ("FDIC").¹ However, the Omnibus Budget Reconciliation Act of 1993² includes the National Depositor Preference provision³ which, for the first time, places both

1.

A federal regulatory authority that began operating in 1934 and that supervises insured state banks and provides insurance protection to both commercial banks and thrifts for deposits of up to \$100,000 in separate insured funds: the Savings Association Insurance Fund (SAIF) for savings associations and the Bank Insurance Fund (BIF) for banks.

ALAN GART, REGULATION, DEREGULATION, REREGULATION: THE FUTURE OF THE BANKING, INSURANCE, AND SECURITIES INDUSTRIES 395-96 (1994). "The FDIC was created in 1933 in response to the Great Depression to 'preserve solvency of insured banks and thus to keep open the channels of trade and commercial exchange.'" Senior Unsecured Creditors' Comm. of First Republicbank Corp. v. FDIC, 749 F. Supp. 758, 767 (N.D. Tex. 1990) (quoting Weir v. United States, 92 F.2d 634, 636 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937)).

2. Pub. L. No. 103-66, 107 Stat. 312 (1993). The Omnibus Budget Reconciliation Act of 1993 is "[a]n act to provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994." *Id.*

3. *Id.* § 3001, 107 Stat. at 336 (amending 12 U.S.C. § 1821(d)(11) (1988 & Supp. V 1993)).

insured⁴ and uninsured⁵ depositors of FDIC insured depository institutions⁶ ("banks")⁷ ahead of unsecured (general) creditors⁸ in a bank liquidation.⁹

Prior to the passing of this legislation, depositors and unsecured creditors shared a bank's liquidated assets on a pro rata basis, except for those banks located in one of the twenty-nine states that already had depositor preference laws which applied only to thrifts and state-chartered banks.¹⁰ The National Depositor Preference provision applies to all banks, and state laws governing the distribution of a failed bank's assets will be preempted if they are inconsistent with the new federal law.¹¹ The risk of a bank's insolvency is now borne by the unsecured creditors, rather than depositors of the bank.

"Though it was sold merely as an alternative to levying federal examination fees on state-chartered institutions, depositor preference . . . will have many far-reaching and numerous unintended consequences."¹² This provision effectively relieves the burden carried by both the FDIC and taxpayers when a bank fails.

4. "Subject to paragraph (2), the term 'insured deposit' means the net amount due to any depositor for deposits in an insured depository institution" 12 U.S.C. § 1813(m)(1) (1988 & Supp. V 1993).

5. "The term 'uninsured deposit' means the amount of any deposit of any depositor at any insured depository institution in excess of the amount of the insured deposits of such depositor (if any) at such depository institution." *Id.* § 1813(m)(3). Depositors with accounts containing more than \$100,000 risk losing part of their principal and interest earned if the bank holding their account becomes insolvent and its assets are liquidated.

6. "The term 'insured depository institution' means any bank or savings association the deposits of which are insured by the Corporation pursuant to this Act." *Id.* § 1813(c)(2).

7. "The term 'bank' . . . means any national bank, State bank, and District bank, and any Federal branch and insured branch;

(B) includes any former savings association that—

(i) has converted from a savings association charter; and

(ii) is a Savings Association Insurance Fund member."

Id. § 1813(a)(1).

8. An general creditor is "[a] creditor at large . . . or one who has no lien or security for the payment of his debt or claim." BLACK'S LAW DICTIONARY 368 (6th ed. 1990). A creditor at large is "[o]ne who has not established his debt by the recovery of a judgment or has not otherwise secured a lien on any of the debtor's property." *Id.*

9. Liquidation is the "process of reducing assets to cash, discharging liabilities and dividing surplus or loss" among the banks' creditors. *Id.* at 931.

10. H.R. REP. NO. 213, 103d Cong., 1st Sess. (1993).

11. *Id.*

12. Bert Ely, *Surprise! Congress Just Enacted the Core Banking System*, AMERICAN BANKER, Sept. 21, 1993, at 24.

Before the National Depositor Preference provision was enacted, the FDIC paid insured depositors up to \$100,000¹³ per lost deposit,¹⁴ and attempted to recoup the depositor insurance payout through either liquidation of the failed bank's assets or by allowing the failed institution to be acquired by another bank.¹⁵ Both secured and unsecured creditors of the bank were reimbursed from the liquidated assets of the bank before the FDIC was fully reimbursed, causing the FDIC to suffer great losses. As a result, the FDIC deposit insurance fund¹⁶ was depleted and taxpayers were forced to pick up the tab.

With this in mind, part two of this article will discuss the recent history of bank failures in the United States, providing the reader with a better understanding of the impossible task that both the FDIC and Congress face in attempting to protect taxpayers as well as the integrity of the banking system. In part three, this article will provide an overview of the historical development of depositor preference. Part four will define national depositor preference and explain why it was included as part of the budget bill. Part five will analyze the possible effect depositor preference will have on unsecured creditors. In part six, the potential effect on the banking

13. "The net amount due to any depositor at an insured depository institution shall not exceed \$100,000" 12 U.S.C. § 1821(a)(1)(B) (1988 & Supp. V 1993).

14. The term "deposit" means:

the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank or savings association, or a letter of credit or a traveler's check on which the bank or savings association is primarily liable

....

Id. § 1813(l)(1).

15. When one bank acquires another, the two banks enter into a purchase and assumption agreement. Through a purchase and assumption transaction, all deposits and other liabilities of general creditors are assumed by a new or existing bank. *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 764 n.8 (10th Cir. 1989). Therefore, despite a bank failure, all depositors and other unsecured creditors are made whole instead of simply receiving a pro rata share of the liquidated assets. *Id.* "[Since] 1960 about three-fourths of all failed commercial banks and, until Penn Square Bank, all failures over \$100 million in size [had] been handled through purchase and assumption transactions (P & As)." *Id.* (citing FDIC, *DEPOSIT INSURANCE IN A CHANGING ENVIRONMENT* 6 (1983)).

16. The bank insurance fund is the "Federal Deposit Insurance Corporation ("FDIC") unit providing deposit insurance for banks other than thrifts." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 31 (3d ed. 1991).

industry will be discussed. Finally, this article will conclude that the National Depositor Preference provision is not the solution to the bank failure problem because it only treats a symptom, rather than the cause of the problem. A national depositor preference scheme, while saving the FDIC money in the short run, will do more harm than good, especially to smaller banks and small businesses, because of the attempt by unsecured creditors to protect themselves from the possibility of losing everything if their bank fails.

II. THE TROUBLED BANKING SYSTEM AND THE FDIC

Traditional banking functions consist of accepting deposits, offering checking privileges, and making loans.¹⁷ Until recently, banks were able to make a profit by concentrating strictly on traditional banking services because federal regulation gave them a monopoly¹⁸ in those services. However, this monopoly situation no longer exists because other financial institutions¹⁹ have entered traditional banking markets. Savings are now placed into a variety of investments other than bank accounts, such as corporate,²⁰ federal and municipal²¹ bonds, purchase money mortgages,²² and other investments that offer a greater return than deposit accounts at

17. 12 U.S.C. § 1841(c)(1)(B)(i)-(ii) (1988 & Supp. V 1993).

18. A monopoly is "control of the production and distribution of a product or service by one firm" *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 259 (3d ed. 1991).

19. A financial institution is "[a]n institution that uses its funds chiefly to purchase financial assets as opposed to tangible property. . . . Nondeposit intermediaries include, among others, insurance companies, pension companies, and financial companies. Depository intermediaries include commercial banks, savings banks, savings and loan associations, and credit unions." *GART*, *supra* note 1, at 396.

20. A corporate bond is a:

debt instrument issued by a private corporation . . . [that] typically [has] four distinguishing features: 1) [it is] taxable; 2) [it has] a par value of \$1000; 3) [it has] a term maturity—which means they come due all at once—and are paid for out of a sinking fund accumulated for that purpose; 4) [it is] traded on major exchanges, with prices published in newspapers.

DICTIONARY OF FINANCE AND INVESTMENT TERMS 87 (3d ed. 1991).

21. A municipal bond is a "debt obligation of a state or local government entity." *Id.* at 264.

22. A purchase money mortgage is a "[mortgage] given by a buyer in lieu of cash for the purchase of property." *Id.* at 345.

banks.²³ Additionally, money market funds²⁴ offer checking privileges.²⁵ Finally, loans are being made by a diversity of nonbank firms.²⁶ The bank's role as a financial intermediary, providing transaction services to customers, and making a profit doing so, has been diminished because of strong competition and advances in technology.²⁷ Heavy regulation of the banking industry, while attempting to diminish the risk of bank failure, is actually restricting the banking industry's ability to compete with nonbank institutions. Subsequently, heavy regulation may actually have the adverse effect of increasing the risk of bank failure.

Bank failures are attributable to many of the same causes which result in the failure of other businesses.²⁸ If a business becomes inefficient or obsolete, it will no longer profit, and over time, it will fail.²⁹ "An obsolete firm fails because consumer demand is too low to generate a price that is . . . high [enough] to cover the firm's . . . costs. . . ."³⁰ Nonbank financial institutions are offering not only the same services as banks, but also a wide variety of other services that attract depositors and borrowers away from banks. Therefore, to a great degree, banks are becoming obsolete.³¹

23. JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 37 (1992).

24. A money market fund is a mutual fund "that invests in commercial paper, banker's acceptances, repurchase agreements, government securities, certificates of deposit and other highly liquid and safe securities, and pays money market rates of interest Such funds usually offer the convenience of checkwriting privileges." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 258 (3d ed. 1991).

25. MACEY & MILLER, *supra* note 23, at 37.

26. *Id.* For example, insurance companies, mortgage companies, pension funds, and consumer finance firms. *Id.*

27. *Id.* Technology has eroded the banks' traditional informational edge that they once had over other financial institutions. Jonathan R. Macey & Geoffrey P. Miller, *Bank Failure: The Politicization of a Social Problem*, 45 *STAN. L. REV.* 289, 294 (1992). One of the reasons that banks profited was because they had a distinct informational advantage that enabled them to make highly informed credit decisions. *Id.* Technology has given everyone access to this same information. *Id.*

28. *Id.* at 290. The article is a summary and analysis of several recent books on the failure of bank regulation. Included are: JAMES R. BARTH ET AL., *THE FUTURE OF AMERICAN BANKING* (1992); LOWELL L. BRYAN, *BANKRUPT: RESTORING THE HEALTH AND PROFITABILITY OF OUR BANKING SYSTEM* (1991); HELEN A. GARTEN, *WHY BANK REGULATION FAILED: DESIGNING A BANK REGULATORY STRATEGY FOR THE 1990s* (1991); JAMES L. PIERCE, *THE FUTURE OF BANKING* (1991).

29. *Id.*

30. Macey & Miller, *supra* note 27, at 290.

31. *Id.*

Banks and banking regulatory agencies facilitated their own destruction by creating the monopoly banks enjoyed for so many years.³² When any industry enjoys abnormally high profits, new entrants will be attracted to it until it is no longer profitable to enter the market. When too many companies enter a market, supply becomes greater than demand and only the most cost-efficient firms that offer the most attractive products survive.

In the banking industry, the new entrants that compete directly with banks are financial institutions like insurance companies, investment banks,³³ pension funds,³⁴ and credit unions³⁵ which, unlike their bank counterparts, do not have to comply with costly regulations, such as those that restrict the banks' activities.³⁶ Although banks no longer enjoy a monopoly in their market, they continue to be regulated as though they were a monopoly.³⁷ This has the effect of burdening the banking industry with all of the costs associated with heavy regulation while simultaneously prohibiting banks from competing in many profitable ventures.³⁸ Thus, rising costs and lower profits have led to increased bank failures over the last several years.

In an effort to make up lost profits resulting from the changing environment of the financial services industry, banks have increasingly invested in riskier assets. "If there is any reason the insured might prefer that an insured loss occur, or be inclined to be less careful to avoid the loss, there is said to be a *moral hazard*."³⁹ The protection of depositor funds by the FDIC has created a moral hazard that causes banks to take greater chances. If the risks pay off, the shareholders gain a great deal, and if the risks fail, the shareholders only lose up to their initial investment.⁴⁰ In

32. *Id.* Politicians created the banking cartel because of their need and desire to have banks at their disposal. *Id.* It was a very cozy arrangement.

33. An investment banker is a "firm, acting as underwriter or agent, that serves as intermediary between an issuer of securities and the investing public." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 210 (3d ed. 1991).

34. A pension fund is a "fund set up by a corporation, labor union, governmental entity, or other organization to pay the pension benefits of retired workers." *Id.* at 315.

35. A credit union is a "not-for-profit financial institution typically formed by employees of a company, a labor union, or a religious group and operated as a cooperative. Credit unions may offer a full range of financial services and pay higher rates on deposits and charge lower rates on loans than commercial banks." *Id.* at 93.

36. *Id.*

37. Macey & Miller, *supra* note 27, at 291.

38. *Id.*

39. SPENCER L. KIMBALL, *CASES AND MATERIALS ON INSURANCE LAW* 134 (1992).

40. MACEY & MILLER, *supra* note 23, at 37.

contrast, the FDIC has everything to lose and nothing to gain. Additionally, deposit insurance keeps banks viable because it enables them to attract the funds necessary for these risky investments at below market rates. Without insurance, a bank would be forced to increase the interest rate earned by depositors in order to compensate for the increased danger associated with these riskier investments. Not only are banks investing in riskier assets, but unlike nonbank financial institutions, whose assets are balanced by equity debt, a bank's assets (largely illiquid) are balanced against demand debts (highly liquid).⁴¹ Thus, if there is a run on a bank,⁴² due to a rumor of bad investments or a bank panic,⁴³ the bank will be unable to liquidate its assets to pay off its liabilities. Consequently, another bank will fail.

When a bank fails, the FDIC becomes the receiver of the failed institution and can either liquidate the bank's assets or allow another bank to enter into a purchase and assumption agreement with the failed bank.⁴⁴ If the first option is chosen, the failed bank is dissolved by the FDIC in an attempt to pay off the creditors of the bank.⁴⁵ If the assets are insufficient to satisfy the claims of creditors, insured depositors will receive up to \$100,000 per deposit, and uninsured depositors will receive a pro rata distribution of the remaining assets. After these payments are made, the unsecured creditors will be paid, if money is left.⁴⁶ Before the creation of depositor preference, unsecured creditors and depositors would receive payment, if any, from the bank's liquidated assets on a pro rata basis.

The overprotective treatment of banks by the FDIC has made the \$100,000 insurance coverage limit for insured deposits relatively unimportant.⁴⁷ "In 861 of the 1086 bank failures during the 1980s, the FDIC either found another bank to take over the operations of the failed bank through a P&A or provided financial assistance to give the bank time to recover or

41. Macey & Miller, *supra* note 27, at 296.

42. A run on a bank is a "[s]ituation in which a large number of depositors of a bank lose confidence in the safety of their deposits and attempt to withdraw their funds from the bank." GART, *supra* note 1, at 400. "A bank failure resulting from a bank run occurs when illiquid bank assets are sold at a loss to meet depositors' requests for funds." Rowena A. Pecchenino, *Risk-Based Deposit Insurance: An Incentive Compatible Plan*, 24 J. MONEY, CREDIT & BANKING 499, 501 (1992).

43. A bank panic is "[t]he simultaneous failure of many banks." GART, *supra* note 1, at 391.

44. *Id.* at 158.

45. *Id.*

46. *Id.*

47. *Id.*

arrange a merger.”⁴⁸ The result, in these instances, is that neither uninsured depositors or unsecured creditors lost any money.⁴⁹ “In the remaining 225 failures, insured deposits were transferred to another bank or were paid off up to the \$100,000 limit of coverage.”⁵⁰ Most of these banks were smaller institutions. Thus, uninsured depositors, unsecured creditors, and the FDIC suffered losses.⁵¹

Losses suffered by uninsured depositors and unsecured creditors, when a small bank fails, create a shift of funds to larger banks.⁵² Large banks are protected by the “too big to fail” doctrine, thus effectively making deposit insurance obsolete.⁵³ The underlying rationale behind the “too big to fail” doctrine is that by allowing a large bank to fail, problems would be created throughout the entire banking industry.⁵⁴ Therefore, all of the deposits at the largest banks are fully protected because if a large bank were headed toward insolvency, the FDIC would intervene.⁵⁵ Smaller banks, however, are not protected in such a manner.

In November 1990, Freedom National Bank, a relatively small, minority-owned, Harlem-based bank became insolvent as a result of numerous speculative loans that went bad. The FDIC decided to close and liquidate the bank . . . because the failure of the bank would not have any serious repercussions on the rest of the banking system. Large customers received about 50 cents on the dollar for deposits in excess of \$100,000. Charitable organizations, such as the National Urban League and the Negro College Fund, and several churches suffered losses. William Seidman, then FDIC chairman, testified before Congress that “My first testimony when I came to this job was that it’s unfair to treat big banks in a way that covers all depositors but not small banks. I promised to do my best to change that. Five years later, I can report that my best wasn’t good enough.” It is interesting to note that legislation was passed by Congress in late 1991 to eliminate “too big to fail” operations by the FDIC beginning in 1994.⁵⁶

48. GART, *supra* note 1, at 158.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 154-55.

53. GART, *supra* note 1, at 159.

54. *Id.* at 155.

55. *Id.*

56. *Id.* at 156-57.

In its attempt to make a profit, the bank may not be as concerned with the risks it takes since the FDIC bears all of the risks of any bad investments. If deposit insurance is to remain in place, insured banks must be forced back to their “traditional” role of accepting deposits and making loans.

The goal of regulation is to force banks to protect the deposits of individuals by requiring them to accumulate low-risk, marketable assets.⁵⁷ If this goal were accomplished, insured deposits and creations like the National Depositor Preference provision would not be necessary to protect deposits or to maintain people’s confidence in the banking industry.

III. THE ROAD TO DEPOSITOR PREFERENCE

Throughout the modern era of banking in the United States, “[o]ne of the objects of the national bank system [has been] to secure, in the event of insolvency, a just and equal distribution of the assets of national banks⁵⁸ among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure.”⁵⁹ The National Bank Act’s⁶⁰ policy in a bank liquidation is to achieve “equity of equality among creditors.”⁶¹ The rule against preferences was codified in the National Bank Act at 12 U.S.C. §§ 91, 194.⁶²

57. John A. Deangelis, *Riches Do Not Last Forever: Real Estate Investment by National Banks*, 1991 U. ILL. L. REV. 777, 785 (1991).

58. A national bank is a:

commercial bank whose charter is approved by the U.S. Comptroller of the Currency rather than by a state banking department. National banks are required to be members of the FEDERAL RESERVE SYSTEM and to purchase stock in the FEDERAL RESERVE BANK in their district They must also belong to the FEDERAL DEPOSIT INSURANCE CORPORATION.

DICTIONARY OF FINANCE AND INVESTMENT TERMS 269-70 (3d ed. 1991).

59. *Mechanics Universal Joint Co. v. Culhane*, 299 U.S. 51, 55 (1936).

60. “[The] *National Banking Act of 1864* [c]reated Comptroller of Currency, which provided for the granting of federal banking charters and examination and supervision of national banks.” GART, *supra* note 1, at 387.

61. *Scott v. Armstrong*, 146 U.S. 499, 511 (1892).

62. 12 U.S.C.S. §§ 91, 194 (Law. Co-op. 1984 & Supp. 1994); *Mcorp & Mcorp Fin., Inc. v. Clarke*, 755 F. Supp. 1402, 1407 n.11 (N.D. Tex. 1991). If greater distributions are made to some creditors over others, and there are insufficient assets in the receivership to provide full payment to the intrabank creditors, the agreements are void as fraudulent transfers under 12 U.S.C. § 191, and violate the ratable distribution requirements of 12 U.S.C. § 194. *Senior Unsecured Creditors’ Comm.*, 749 F. Supp. at 774.

Section 91 prohibits the transfer of assets after the commission of an act of insolvency made “with a view to the preference of one creditor to another.”

Historically, the courts have rejected the notion of depositor preference.⁶³ The courts have interpreted the National Bank Act as not permitting depositor preference. It is only in the past several years that both state and national banks have had depositor preferences in bank liquidations. Accordingly, when the FDIC is involved in its capacity as receiver, the National Bank Act must be read in conjunction with the Federal Deposit Insurance Act.⁶⁴

In *Downriver Community Federal Credit Union v. Penn Square Bank*,⁶⁵ the plaintiffs, certain uninsured depositors in the insolvent Penn Square Bank, disputed the priority of the depositors' claims against the insolvent bank's assets. The court reversed the district court's imposition of a constructive trust upon Penn Square's assets in favor of the plaintiff-depositors, stating that "federal law limits these depositors' recovery to their pro rata share of the assets held by the receiver."⁶⁶ Unsecured creditors of a failed bank are entitled to only their pro rata share of liquidated bank assets under the relevant provision of the National Bank Act.⁶⁷

The district court imposed a constructive trust in favor of plaintiffs because it applied state law, rather than federal law, in deciding the case. Prior to the insolvency of a national bank, state law generally governs the nature of the relationship between a national bank and its depositors.⁶⁸ The creditor rights of a depositor of a national bank are determined by the law of the state of the deposit, assuming there is no conflicting federal

Section 194 provides in part that "the comptroller shall make a ratable dividend of the money so paid over to him by the receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." These statutory provisions were originally enacted in 1866 as part of the NBA. Early decisions construing these laws arose in the context of bank liquidations and characterized the purpose of the requirements as ensuring equality of treatment among creditors in the distribution of assets of a failed bank.

Id.; see, e.g., *White v. Knox*, 111 U.S. 784, 786 (1884); *National Bank v. Colby*, 88 U.S. 609, 613 (1874).

63. See, e.g., *Downriver*, 879 F.2d at 754 (holding that federal law limits a depositor's recovery, in a bank liquidation, to a pro rata share of the assets held by the receiver).

64. *FDIC v. McKnight*, 769 F.2d 658, 662 (10th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

65. *Downriver*, 879 F.2d at 756 (including the FDIC, in its capacity as receiver of Penn Square Bank, in this dispute).

66. *Id.*

67. *Id.* (citing 12 U.S.C. § 194 (1993)).

68. See *Reno Nat'l Bank v. Seaborn*, 99 F.2d 482, 483 (9th Cir. 1938).

statute.⁶⁹ However, the role that state law plays in determining the rights of national banks is limited by the paramount authority of Congress to regulate national banks.⁷⁰

Since national banks are instrumentalities of the federal government, it is federal law that ultimately determines the liquidation preferences of unsecured creditors in a bank failure. In fact, any attempt by a state to define or control the liquidation process of national banks and any other FDIC insured banks is absolutely void.⁷¹ In addition, national banks are under federal control in a bank liquidation and the liquidation of all other FDIC insured banks is governed by the Federal Deposit Insurance Act, with liquidation preferences specifically provided for by the depositor preference provision.⁷²

Before the National Depositor Preference provision was enacted, the distribution of an insolvent bank's assets was controlled, in the case of national banks, by the National Bank Act.⁷³ The most relevant provisions of the Act were section 91, precluding payments by a bank that prefer some creditors over others, and section 194, requiring a pro rata distribution of assets among all general creditors entitled to share in the receivership estate.⁷⁴ All state laws inconsistent with the equal distribution scheme among general creditors, established by the National Bank Act, were preempted.⁷⁵

The National Bank Act was created to achieve, in case of a bank failure, "a just and equal distribution of the assets of national banks among all unsecured creditors"⁷⁶ "This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act."⁷⁷ There must be a ratable distribution of an insolvent bank's assets among all unsecured creditors, not a preference of some

69. *Downriver*, 879 F.2d at 758.

70. *Id.*

71. *See id.*

72. *See* 12 U.S.C. § 1821 (1988 & Supp. V 1993).

73. *Downriver*, 879 F.2d at 759.

74. *Id.*

75. *Jennings v. United States Fidelity & Guar. Co.*, 294 U.S. 216, 226 (1935).

76. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 284 (1896); *see also* *United States v. Lemaire*, 826 F.2d 387, 390 (5th Cir. 1987).

77. *Davis*, 161 U.S. at 284.

creditors over others.⁷⁸ The FDIC, therefore, in its capacity as receiver for the insolvent bank, must treat all unsecured creditors equitably.⁷⁹

Clearly, since the creation of the National Bank Act in 1864, the intent of Congress has been to provide equal treatment to all unsecured creditors in a bank liquidation.⁸⁰ However, with the ever increasing number of bank failures in the 1980s and early 1990s,⁸¹ the FDIC realized that treating all unsecured creditors of a failed bank equally was becoming an increasingly difficult endeavor. This is especially true now since most bank failures today no longer result in liquidation, as they did when the National Bank Act was first enacted.⁸²

Most recent bank failures are resolved through purchase and assumption agreements, rather than through the liquidation and distribution of the bank's assets contemplated by the National Bank Act.⁸³ A purchase and assump-

78. *Hibernia Nat'l Bank v. FDIC*, 733 F.2d 1403, 1407 (10th Cir. 1984).

79.

Unlike the FDIC, the Federal Savings and Loan Insurance Corporation ("FSLIC") was never subject to the ratable distribution requirements of the NBA [National Bank Act]. The FSLIC could, and indeed was obligated to, discriminate among creditors in distributing receivership assets by following the depositor preference statute set forth in federal regulations. FIRREA simply codified this result [§ 1821(i)(2)] with respect to thrifts, and did no more than preserve the status quo.

Senior Unsecured Creditors' Comm., 749 F. Supp. at 774 n.24.

80. See *Mcorp*, 755 F. Supp. at 1407.

81. Banking Failures:

<u>YEAR</u>	<u>NUMBER</u>	<u>DEPOSITS (Billions)</u>
1945-54	44	
1955-64	47	
1965-74	60	
1975-81	75	
1982	42	9.9
1983	48	5.4
1984	79	2.9
1985	120	8.1
1986	138	6.5
1987	184	6.3
1988	200	24.9
1989	206	24.1
1990	169	14.8
1991	127	53.8
1992	122	N.A.

GART, *supra* note 1, at 148.

82. *Senior Unsecured Creditors' Comm.*, 749 F. Supp. at 775.

83. *Id.*

tion agreement involves a solvent bank acquiring an insolvent bank. When a solvent acquiring bank assumes the assets and liabilities of a failed bank, with financial assistance from the FDIC, some, but not all of the failed bank's liabilities are assumed.⁸⁴ Consequently, the assumed creditors receive more on their claims than the unassumed creditors, thereby creating an unequal distribution of a failed bank's assets to creditors.⁸⁵ Thus, the courts were left to determine "whether the assumption and full payment of certain liabilities by an acquiring bank violates the rights vested by [sections] 91 and 194 in creditors whose liabilities are not assumed."⁸⁶

Most courts held that the FDIC was required to provide creditors of a failed bank with a ratable share of the bank's assets, regardless of whether the bank failure is resolved through a purchase and assumption transaction or a liquidation.⁸⁷ However, some courts did recognize "considerable force" in the FDIC's argument that purchase and assumption transactions were not contemplated under the National Bank Act, and therefore, the distribution requirements of sections 91 and 194 should be different for these transactions.⁸⁸ The FDIC argued that only the ratable distribution of the liquidated value of the unassumed creditor's claim should be required under sections 91 and 194.⁸⁹ With the creation of the National Depositor Preference provision, determining the applicability of sections 91 and 194 to purchase and assumption transactions became moot.

In 1986⁹⁰ and 1988,⁹¹ the FDIC had bills introduced in the Senate that would have created preference payments to depositors only for national bank failures, but Congress did not pass either bill.⁹² The bills were proposed because of the strain placed on the FDIC by the troubled banking industry. In the absence of a depositor preference provision, general

84. *Id.*

85. *Id.*

86. *Id.* at 775.

87. See, e.g., *FDIC v. United States Nat'l Bank*, 685 F.2d 270, 273-77 (9th Cir. 1982) (holding that a defrauded, subordinated note holder was entitled to receive a ratable distribution from assets transferred in a purchase and assumption transaction); *First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978) (holding that a purchase and assumption agreement which provided 100% payment to assumed creditors but lesser payment to unassumed creditors violated the provisions of sections 91 and 194).

88. *Senior Unsecured Creditors' Comm.*, 749 F. Supp. at 775-76.

89. *Id.* at 776.

90. S. 2592, 99th Cong., 2d Sess. § 1 (1986).

91. S. 2715, 100th Cong., 2d Sess. § 1 (1988).

92. *Mcorp*, 755 F. Supp. at 1419 n.36.

creditors normally receive full payment of their claims since the majority of bank failures are resolved by purchase and assumption agreements.⁹³

With the large number of bank failures that the FDIC handled, paying everyone in full, rather than simply a pro rata share, became a burden that the bank insurance fund was unable to bear. From 1986 through 1993, the FDIC, through the deposit insurance fund, paid out approximately \$31.93 billion for the resolution of failed banks.⁹⁴ It appears that during this same period, if depositor preference had been in effect, the deposit insurance fund would have actually grown because the assets of the failed banks, in most instances, would have been adequate to cover the deposit liabilities of the failed banks.⁹⁵

The natural step for the FDIC to take, since Congress created the agency for the protection of depositors and the integrity of the banking system, was to prefer depositors in the distribution of a bank's assets, thus granting much needed relief for the bank insurance fund. However, the FDIC's inclination to give preference to depositors, in an attempt to protect the deposit insurance fund against loss, is contrary to the congressional intent of equitable and ratable payment of all general creditors.⁹⁶ It became apparent to both Congress and the FDIC that something needed to change in order to relieve the burden placed on the deposit insurance fund while at the same time insuring the integrity of the banking system.

93. *Id.* at 1419.

94. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, 1992 BANK RESOLUTIONS-FDIC CHOSE METHODS DETERMINED LEAST COSTLY, BUT NEEDS TO IMPROVE PROCESS 2 (May 10, 1994).

95. Bank Failures:

<u>YEAR</u>	<u>NUMBER</u>	<u>TOTAL ASSETS (Billions)</u>
1986	145	7.63
1987	203	9.23
1988	221	52.62
1989	207	29.40
1990	169	15.74
1991	127	63.40
1992	122	44.23
1993	42	4.06

Id. at 10.

96. *First Empire Bank*, 572 F.2d at 1371.

IV. WHAT IS DEPOSITOR PREFERENCE?

The solution chosen by Congress on August 10, 1993 was a national depositor preference scheme, which took effect on August 13, 1993.⁹⁷

[A]mounts realized from the liquidation or other resolution of any insured depository institution by any receiver . . . shall be distributed to pay claims (other than secured claims . . .) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution⁹⁸

Depositor preference was included in the Omnibus Reconciliation Act of 1993 "as a replacement for the administration's [unpopular] proposal to raise additional [federal] revenues by charging state-chartered banks for

97. *Banking, Depositor Preference Provisions May Have Impact on Foreign Creditors*, DAILY REP. FOR EXECUTIVES, Sept. 10, 1993, at 174.

98. 12 U.S.C. § 1821(d)(11)(A) (1988 & Supp. V 1993).

(11) Depositor preference

(A) In general

Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
- (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
- (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law

(i) In general

The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

Id. § 1821(d)(11)(A)-(B)(i).

examinations conducted by the FDIC.”⁹⁹ The Conference of State Banking Supervisors (“Banking Supervisors”) proposed depositor preference as an alternative to increased examination fees which would have caused fees for state-chartered banks to increase by one billion dollars over a four year period.¹⁰⁰ The Banking Supervisors estimate that a national depositor preference scheme “could save \$300 million in the first year, and \$1.6 billion over five years”¹⁰¹ This surpasses the Clinton administration’s goal of raising \$1.37 billion over five years, through increased fees, beginning in 1994.¹⁰² By choosing a national depositor preference scheme instead of increasing examination fees, Congress accomplished its intended goal of decreasing the losses to the Bank Insurance Fund and increasing revenues. Moreover, it accomplished these goals without placing the burden on already troubled state-chartered banks. “[T]he exam fee proposal could have cost over \$2 billion in potential loans [in the first year] . . . because every dollar in capital can support \$10 in new loans.”¹⁰³

Depositor preference amends the Federal Deposit Insurance Act and gives domestic depositors a liquidation preference over all other claims, except secured claims and administrative expenses of receivers.¹⁰⁴ Consequently, in most cases, the FDIC will be fully reimbursed for its payout to depositors, and unsecured creditors of the bank will receive little or no money. Prior to the enactment of this bill, the FDIC paid depositors on a pro rata basis with all other unsecured creditors.¹⁰⁵ Since depositor preference gives both insured and uninsured depositors an advantage in a bank liquidation, the FDIC will realize tremendous savings because it is subrogated to the claims of the depositors it has indemnified.¹⁰⁶ The FDIC will be able to recoup most of the money it pays out to depositors before the first unsecured creditor receives anything. It is estimated that giving depositors preference will save the insurance fund approximately \$.9

99. *Banking, Depositor Preference Provision May Pose Some Greater Risks, Banking Experts Warn*, DAILY REP. FOR EXECUTIVES, Sept. 21, 1993, at 181 [hereinafter *Banking, Depositor Preference*].

100. Bill Atkinson, *States Push Alternatives to Hitting Their Banks with Higher Fees*, AMERICAN BANKER, Mar. 30, 1993, at 7.

101. *Id.*

102. *Banks Hope Fed Heard Cue When House Rejected Exam Fees*, 5 THOMSON’S INTERNATIONAL BANKING REGULATOR, May 17, 1993, at 3.

103. *Senate Committees Approve Banking Plan for Reconciliation, Delay Direct Lending*, BNA WASH. INSIDER, June 10, 1993, at 105.

104. H.R. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993).

105. *Id.*

106. *Id.*

billion over the 1994-1998¹⁰⁷ period.¹⁰⁸ However, the increased risk to unsecured creditors will have a profoundly negative effect on both the banking industry and unsecured creditors.

Depositor preference applies to both insured and uninsured depositors and shifts the burden of paying off depositors from the FDIC to the failed bank. By shifting the risks associated with a bank's investments to the banks themselves rather than to the FDIC, the moral hazard associated with depositor insurance is virtually eliminated. This will cause banks to more carefully choose and monitor investments, thereby reducing the risks that lead to failure.

Historically, all creditors of a failed bank were generally able to recover seventy percent to eighty-five percent of the debts owed to them by the bank.¹⁰⁹ All creditors, other than secured creditors, shared equally in any loss when the bank's liquidated assets were insufficient to pay its liabilities.¹¹⁰ Depositor preference has changed this equality, giving both depositors and the FDIC an advantage over all other unsecured creditors of a failed bank.

V. EFFECT OF DEPOSITOR PREFERENCE ON UNSECURED CREDITORS

Prior to the enactment of the depositor preference statute, senior obligations, such as letters of credit,¹¹¹ were treated the same as uninsured deposits in a bank liquidation. Now, unsecured creditors of a bank, in order to protect themselves from risk, will be forced to either turn to other financial institutions for investment and business transactions, or will assume the risk of dealing with a bank only on a collateralized basis.¹¹² Since there may only be enough assets to satisfy the claims of secured creditors and depositors, unsecured creditors risk losing everything if a bank fails.

107. *See id.*

108. *Senate Banking Committee Approves House Budget Reconciliation Package*, 60 BUREAU OF NAT'L AFFAIRS BANKING REP., June 14, 1993, § 24, at 872.

109. John L. Douglas, *Depositor Preference May Harm Banks*, THE NAT'L L.J., Aug. 23, 1993, at 19.

110. *Id.*

111. A letter of credit is a "credit instrument issued by a bank guaranteeing payments on behalf of its customer to a BENEFICIARY, normally to a third party . . . for a stated period of time and when certain conditions are met." *DICTIONARY OF BANKING TERMS* 34 (2d ed. 1993).

112. Ely, *supra* note 12, at 24.

Thus, depositor preference exposes unsecured creditors to risk that may be too great to bear.

For example, if a bank has liabilities totaling ten dollars and assets of nine dollars, the bank is insolvent and is considered a failed bank. If nine dollars of the bank's liabilities are deposits, depositors will receive nine dollars, while other unsecured creditors receive nothing. Before the creation of national depositor preference, the failed bank's assets would have been distributed on a pro rata basis. A pro rata distribution of the failed bank's assets would have resulted in all unsecured creditors receiving ninety cents on the dollar. The FDIC would have received eight dollars and ten cents, after paying out nine dollars to insured depositors (assuming all the depositors of the bank were insured), and the other unsecured creditors of the failed bank would have received ninety cents.

Adding uninsured depositors and secured creditors to the equation, under a pro rata distribution scheme, simply decreases the amount recovered by the FDIC and unsecured creditors. However, under the current depositor preference scheme, this virtually guarantees that there will be nothing left for unsecured creditors when a bank failure is resolved. Unsecured creditors have no choice but to react defensively to the new threat posed by depositor preference.

"Unsecured bank borrowings, such as uninsured bank notes, may begin to include 'acceleration clauses' that will [enable] the [creditor to] pull its money out of the bank before [the institution enters receivership]."¹¹³ Additionally, foreign depositors and unsecured creditors can: 1) "require collateral, to the extent legally allowed, to secure their extensions of credit; [2] shorten the maturity of their deposits or obligations[;] or [3] insert put options"¹¹⁴ that can be exercised when a bank's credit rating is downgraded by a rating agency. . . ."¹¹⁵

The negative impact that the depositor preference provision will have on unsecured creditors of banks will greatly affect the banking industry. Unsecured creditors of a bank will be wiped out before the FDIC and

113. *Id.* at 25.

114. A put option is:

[a] contract giving the holder the right, but not the obligation, to sell a security or financial instrument for a specified period of time at a specific price, called the EXERCISE PRICE OR STRIKE PRICE. Puts are bought by investors who believe the price of the underlying securities will go down, and they will be able to sell the securities at a higher striking price. The opposite is a CALL OPTION.

DICTIONARY OF BANKING TERMS 487 (2d ed., 1993) (emphasis omitted).

115. *Banking, Depositor Preference*, *supra* note 99, at 181.

uninsured domestic depositors suffer any loss.¹¹⁶ The most likely unsecured creditors of a bank are holders of banker's acceptances,¹¹⁷ federal funds¹¹⁸ sellers, unsecured lenders, landlords, and counterparties in swaps,¹¹⁹ options,¹²⁰ and futures¹²¹ transactions.¹²² In addition, banks are commercial enterprises that "acquire products, contract for services and deal with other financial institutions and their customers."¹²³ Commercial relationships cause a bank to "contract for various services and lease . . . equipment, . . . assume a number of contractual liabilities to employees . . . , [and] enter into long-term contracts to perform certain services. . . ."¹²⁴ All of these unsecured creditors face the increased risk placed upon them by the depositor preference scheme.

Foreign depositors are at great risk under depositor preference because the "FDIC [has] take[n] the position that foreign deposits payable only in overseas branches are not deposits for purposes of the depositor preference provisions."¹²⁵ Foreign depositors that fall into this category are lumped together with unsecured creditors and stand to lose all of their money when a bank fails, and its assets are liquidated. For this reason, foreign depositors must take the same precautions as other unsecured creditors of a bank.

116. 12 U.S.C. § 1821(d)(11) (1988 & Supp. V 1993).

117. A banker's acceptance is a "time draft drawn on and accepted by a bank With the credit strength of a bank behind it, the banker's acceptance usually qualifies as a MONEY MARKET instrument. The liability assumed by the bank is called its acceptance liability." *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 3 (3d ed. 1991).

118. Federal funds are "funds deposited by commercial banks at Federal Reserve Banks Banks may lend federal funds to each other on an overnight basis . . . [and] may also transfer funds among themselves or on behalf of customers on a same-day basis by debiting and crediting balances in the various reserve banks." *Id.* at 139-40.

119. A swap is the "exchange [of] one security for another." *Id.* at 451.

120. An option is a "right to buy or sell property that is granted in exchange for an agreed-upon sum. If the right is not exercised after a specified period, the option expires and the option buyer forfeits the money." *Id.* at 297.

121. Futures contracts are contracts involving an:

agreement to buy or sell a specific amount of a commodity or financial instrument at a particular price on a stipulated future date. The price is established between buyer and seller on the floor of a commodity exchange [T]he contract [may be] sold to another before settlement date, which may happen if a trader [wants] to take a profit or cut a loss.

Id. at 168.

122. Ely, *supra* note 12.

123. Douglas, *supra* note 109, at 23.

124. *Id.*

125. *Banking, Depositor Preference Provisions May Have Impact on Foreign Creditors*, *DAILY REP. FOR EXECUTIVES*, Sept. 10, 1993, at 174.

The larger, "too big to fail" banks are now much more attractive to both foreign depositors and general creditors. Consequently, there may be a shift of funds away from smaller banks. This potential shift in assets may cause an increased number of smaller banks to fail over the next several years, causing an adverse effect on small business, since smaller banks tend to cater to individual and small business financing. The potential repercussions of the depositor preference provision were ignored by Congress when it enacted the new budget bill.

Depositor preference will force foreign depositors, federal funds sellers, and other creditors to extend credit to a bank only if they can protect themselves from the risk of loss associated with a bank failure.¹²⁶ They can demand that any credit extended be fully secured, thus placing them ahead of depositors in a liquidation, or they could include acceleration clauses¹²⁷ in all of their loan documents.¹²⁸ If acceleration clauses are widely used, as soon as there is even a rumor that a bank is in trouble, unsecured creditors will demand and receive the balance of any outstanding debt owed to them by the bank. Consequently, depositors may follow the lead of the more informed unsecured creditors, possibly resulting in a run on the bank and another bank failure.

VI. EFFECT ON THE BANKING INDUSTRY

The public's interest lies in secure deposits.¹²⁹ Having banks FDIC insured and regulated is perceived as a key element of maintaining deposit security. The introduction of the National Depositor Preference statute virtually guaranteed depositors that all of their deposits would be returned in case of a bank failure. The tradeoff for depositor security, however, is the increased risk of all other unsecured creditors of insured banks.¹³⁰

The long-term repercussions of depositor preference on the banking industry are still unclear. "Because the [depositor preference] provision was

126. *Banking, Depositor Preference*, *supra* note 99, at 181.

127. An acceleration clause is a "provision, normally present in an INDENTURE agreement, mortgage, or other contract, that the unpaid balance is to become due and payable if specified events of default should occur. Such events include failure to meet interest, principle, or sinking fund payments; insolvency" *DICTIONARY OF FINANCE AND INVESTMENT TERMS* 2-3 (3d ed. 1991).

128. Ely, *supra* note 12, at 24.

129. Deangelis, *supra* note 57, at 777.

130. "The term 'insured bank' means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this Act" 12 U.S.C. § 1813(h) (1988 & Supp. V 1993).

a small amendment in a very large and complex non-banking act, it received . . . little . . . attention” from either Congress or the general public.¹³¹ Unsecured creditors will take protective actions, as discussed in part five, as a result of their increased risk. These protective measures will affect the risk position of the FDIC as insurer. The FDIC could possibly respond by:

redesign[ing] its calculation of deposit insurance premiums, to take [into] account . . . the amount of senior and junior claims as newly defined [under the depositor preference provision]; redesign[ing] its calculation of capital and capital requirements, for the same reasons; interven[ing] or clos[ing] banks more quickly, because of the greater likelihood of runs [on banks by federal funds] sellers or foreign depositor[s]; or . . . [delaying the closing of banks] because of the greater degree of insolvency necessary to inflict a loss on the insurance fund.¹³²

Additionally, banks will seek to restructure their contractual arrangements and organizations in order to reduce deposit insurance premiums that are greater than the risk to the insurance fund.¹³³ An individual bank, for example, could decrease the amount of federal funds and foreign deposits, thereby balancing the risk posed to the insurance fund and the insurance premiums charged by the FDIC. However, uninsured depositors may react to this restructuring by shifting their deposits to banks that have a greater proportion of foreign deposits and federal funds, since these banks are perceived as being safer for uninsured depositors in case of a failure.¹³⁴ Specifically, when a bank fails, uninsured depositors will be made whole before any unsecured creditors. Therefore, it is beneficial for uninsured depositors to bank where there is a large proportion of unsecured creditors. If uninsured creditors, banks, and the FDIC take reactive measures other, as yet undetermined, consequences may occur.¹³⁵

VII. CONCLUSION

The National Depositor Preference provision of the Omnibus Budget Reconciliation Act of 1993 was intended, by the Committee on the Budget, to be one part of an intricate plan to reduce the federal deficit and to raise

131. *Banking, Depositor Preference*, *supra* note 99, at 181.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

revenues.¹³⁶ Additionally, depositor preference was intended to save the insurance fund and taxpayers a great deal of money. "Only when all depositors have recovered 100 percent of losses [will] general creditors recover anything. Thus, we expect that receipts to the federal deposit insurance funds from asset sales [will] be higher, and insurance losses [will] be lower"¹³⁷ than under previous laws that divided the assets of a failed bank on a pro rata basis.

Since the enactment of the depositor preference statute, on August 10, 1993, the banking industry is healthier than it has been in thirteen years.¹³⁸ "[J]ust [thirteen] BIF-insured institutions, with \$1.6 billion in assets, failed [in 1994]."¹³⁹ In comparison, twenty-three banks were closed in the first half of 1993.¹⁴⁰ Further, the bank insurance fund is up to \$19.4 billion, which is an all-time record.¹⁴¹ Banks were earning record-high profits in 1994, with the number of problem banks "down to 383 with \$53 billion in assets, compared with 981 with \$535 billion in assets two years ago."¹⁴²

The banking industry is realizing an economic boom. One of the consequences of this, however, is that the depositor preference provision has had no impact on banks, the FDIC, or unsecured creditors. Because it has received very little attention, the negative impact that this provision will have on all parties concerned, once the rate of bank failures increases, will be immediate and dangerous. Unsecured creditors will shift to the larger "too big to fail" banks to insure the security of their money, and uninsured depositors will seek banks that have a proportionally large number of unsecured creditors to better guarantee a one hundred percent return on their deposits in case of a bank failure. This shift may create instability in the banking industry and cause even more banks to fail. Clearly, in an attempt to raise revenues in the short term, Congress has ignored the potentially devastating consequences of the depositor preference provisions.

David J. Ratway

136. H.R. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993).

137. *Id.*

138. *Banking*, L.A. TIMES, Aug. 10, 1994, at D2.

139. *The \$4 Billion Solution*, ABA BANKING JOURNAL, Feb. 1995, at 17.

140. *Banking*, *supra* note 138, at D2.

141. *See The \$4 Billion Solution*, *supra* note 139, at 17.

142. *Bank Profits Soar; Thrifts' Slip a Bit; Losses at Three Big S&Ls Hurt First-Quarter Earnings for the Nation's Thrifts. Commercial Banks Healthy*, ORLANDO SENTINEL, June 16, 1994, at C1.