

# FDIC Super Stay: Does FIRREA Trump the Code?

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In August 1989, in response to the disastrous savings and loan crisis of the 1980s, Congress enacted Public Law 101-73: The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). FIRREA may best be remembered for creating the Resolution Trust Corporation (RTC) and the Office of Thrift Supervision (OTS). Less visible but perhaps a more significant legacy is 12 U.S.C. §1821(d)(12), the FDIC injunction or stay protection provision.



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In a recent unpublished decision from the U.S. Bankruptcy Court for the District of Colorado, *In re Garneau*,<sup>2</sup> Hon. Sidney B. Brooks addressed an interesting and potentially widely applicable argument

of the Federal Deposit Insurance Corp. (FDIC) that its appointment as a receiver for a local failed banking institution stayed all applicable bankruptcy deadlines and dates as to the FDIC for a period of 90 days under 12 U.S.C. §1821(d)(12). Specifically, the FDIC sought an automatic extension of the deadline for filing a complaint objecting to the debtor's discharge under Bankruptcy Code §727 or to file a §523 dischargeability complaint for 90 days. The FDIC had previously obtained a consensual 30-day extension of both deadlines from the debtor, who was unwilling to consent to any further extensions.

## Background

The FDIC's motion in *Garneau* broadly sought to stay the debtor's entire bankruptcy case by the special power granted the FDIC in 12 U.S.C. §1821(d)(12). The statute provides for the stay of *judicial actions or proceedings* as follows:

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed—

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- (i) 45 days, in the case of any conservator; and
- (ii) 90 days, in the case of any receiver, in any *judicial action or proceeding* to which such institution is or becomes a party.

Once the FDIC makes a request, 12 U.S.C. §1821(d)(12)(B) directs that "the court shall grant such stay as to all parties." The statute is generally seen to require three elements: (1) a request for a stay by the FDIC; (2) a judicial action or proceeding; and (3) that the FDIC is or becomes a party

## Feature

to the proceeding. In *Garneau*, the FDIC did not rely on the special protection already afforded it by Bankruptcy Code §523(c)(2), something that Judge Brooks nevertheless utilized in his decision, granting the motion as to the objection to discharge deadline only.

There are no published or unpublished opinions on the application of FIRREA and the stay provision of §1821 to an adversary proceeding, much less an entire bankruptcy case. The relevant statutory terms "*judicial action*" or "*proceeding*" and "*party*" thereto do not naturally fit in the bankruptcy context where a main bankruptcy case (chapter 7, 11, 13, *et al.*), adversary proceeding, or contested matter, are the statutory and rules-created framework under which we operate. Since bank failures and FDIC involvement are now on the rise, these issues may become the subject of more litigation.

## Scope of 12 U.S.C. §1821(d)(12)

It was argued in *Garneau* that the absence of reported decisions supports the plain-meaning interpretation of the statute—that the debtor's chapter 11 case was not a "judicial action," while an adversary proceeding would be if one had been filed. Further, the FDIC was neither a "party" within the context of a yet-to-

be-filed adversary proceeding objecting to discharge nor a "party" to the debtors' main bankruptcy case, although it is clearly a receiver for a creditor bank of the debtor and entitled to act on behalf of that institution.

Since there is no controlling case law, it was argued in *Garneau* that the starting point must be the language of FIRREA itself. Statutory construction is, ideally, a holistic endeavor, and provisions that might seem ambiguous in isolation are often clarified when read in conjunction with the entire statute. Justice Felix Frankfurter cautioned that courts should "listen attentively to what a statute says [but]...[o]ne must also listen attentively to what it does not say."<sup>3</sup>

Looking at the FIRREA statute, a number of courts have noted that those 80 pages express Congress' intent with painstaking detail, and there is no room to imply an unexpressed intent into FIRREA.<sup>4</sup> As one court noted in evaluating a similar argument made by

the FDIC to use FIRREA to override the automatic stay:

Given this careful attention to the harmonization of the new banking provisions with the existing Bankruptcy Code, it becomes especially implausible to conclude that a quite significant modification of the bankruptcy automatic stay was enacted by implication. Had Congress wished to effectuate the statutory scheme for which the FDIC contends on this appeal, it might have, for example: (1) exempted the FDIC in the exercise of its powers under §1821(d)(17)-(19) from the provisions of the automatic stay by amending §362(b); (2) excluded property which the FDIC seeks to recover under §1821(d)(17)-(19) from the property of the estate by amending §541; or (3) provided in §1821 that the automatic stay does not

<sup>3</sup> See Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Colum. L. Rev.* 527, 536 (1947). See also *In re Soderlund*, 197 B.R. 742 (Bankr. D. Mass. 1996) and cases cited therein. As the *Soderlund* court noted, in order to discover legislative intent the court must first look to the words of the statute itself, giving them their usual and ordinary meaning. *Id.* at 747 (citing *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)).

<sup>4</sup> See, e.g., *In re Colonial Realty Co.*, 980 F.2d 125, 133 (2d Cir. 1992); *In re Lane*, 136 B.R. 319, 321 (D. Mass. 1992).

<sup>1</sup> The author would like to acknowledge Andrew D. Johnson, an associate at Onsager, Staelin & Guyerson LLC, for his research efforts and thoughtful input.

<sup>2</sup> *In re Garneau*, Case No.06-30820-SBE, unpublished opinion dated July 29, 2009.

apply when the FDIC acts under §1821(d)(17)-(19). Congress chose none of these alternatives.<sup>5</sup>

Courts have rejected the FDIC's attempt to use FIRREA in other ways to circumvent the Bankruptcy Code. Courts have also rejected the FDIC's attempt to use this provision to prevent federal district courts and bankruptcy courts from exercising jurisdiction over bankruptcy cases. See *In re Lane*<sup>6</sup> (in construing §1821(j), the "FDIC asks this court to treat [the] FDIC as having a power that overrides both substantive and procedural law governing bankruptcy proceedings, simply because enforcement of those bodies of law places some constraints on [the] FDIC's power to foreclose under mortgages in which it has interests as successor to a failed bank. Such an extraordinary interpretation of the manifested intent of Congress cannot be sustained").<sup>7</sup>

Moreover, when Congress intended to protect the FDIC from discharge provisions of the Bankruptcy Code, it did so explicitly. Section 523(c)(2) specifically excuses the FDIC as a receiver or custodian of a financial institution from the impact of §523(c)(1) and the statutory discharge of certain kinds of debts described in §523(a)(2), (a)(4), (a)(6) or (a)(11) if the FDIC was not appointed in time to "reasonably comply" with the objection-to-discharge deadline of 60 days following the first meeting of creditors under §341 of the Code and as implemented by Bankruptcy Rule 4007(c). This was a key factor for Judge Brooks in his *Garneau* decision, for in his mind, §523(c)(2) occupies the entire field in this area, and FIRREA is not applicable and does not replace the Code. However, in *Garneau* the FDIC was formally appointed as receiver only 16 business days before the deadline for objecting to discharge was to expire. Even though the FDIC had used the same attorneys as the previously failed bank and had actually conducted a Rule 2004 exam of the debtor before the deadline was set to expire, the court felt that 16 days was not enough time to "reasonably comply" and granted the FDIC's request, not under FIRREA as sought by the FDIC, but under the more restrictive language of 11 U.S.C. §523(c)(2).

While the FDIC's motion sought to extend the §727 deadline as well, it is important to note that 11 U.S.C. §727 does not contain any mention of the FDIC or provide any special protections for the FDIC for the timing of filing a complaint to have the debtor's entire bankruptcy

discharge denied. Judge Brooks in *Garneau* did not address the application of FIRREA to §727 discharge issues or the broader application of FIRREA to the main case itself, since his ruling was narrowly focused on §523(c)(2). *This leaves a significant question unanswered:* Might another court find that FIRREA does indeed trump the Code where this is not a specific section such as §523(c)(2), which can be found to have occupied the entire field?

While the *Garneau* decision dodged the bullet of directly facing the FIRREA super-stay issue as it pertains to the main bankruptcy case and other common deadlines, a 90-day stay of the whole case or other general deadlines could have much more serious consequences. The finality of bar dates for filing proofs of claim are immediately suspect if the FDIC is appointed during the pendency of the bankruptcy case. Dates and deadlines for chapter 11 plan solicitation and voting may be stayed or nullified as they pertain to the FDIC. Chapter 11 and 13 plan objections and confirmation deadlines could be stayed or nullified as to the FDIC. Could we end up with one set of deadlines for the FDIC and one set for everybody else?

### ***Is a Bankruptcy an Action or Proceeding under 12 U.S.C. §1821?***

One need only imagine the consequences of the FDIC's assertion of a §1821(d)(12)(B) global stay in a case like *In re United Airlines Inc.* or *In re General Motors Corp.* The results of the FDIC's interpretation would create chaos in many a case and cannot be what Congress intended. The commencement of any bankruptcy case must be distinguished from the filing of an adversary proceeding. An adversary proceeding is commenced by the filing of a complaint under Rule 7003, which incorporates Rule 3 of the Federal Rules of Civil Procedure and in turn provides that a "civil action is commenced by the filing of a complaint with the court." This is much different than the commencement of a bankruptcy case itself, which is accomplished by the filing of a petition as provided for in Bankruptcy Rule 1002(a) and §§301-303 of the Bankruptcy Code.<sup>8</sup>

The lack of any specific tie or interface between the Code and FIRREA creates ambiguity and disconnect, and thus a potential problem for practitioners and the courts. Certain definitions are contained at 12 U.S.C. §1813, but there is no definition for "judicial action or proceeding" or "party." These terms are

also not defined in the Bankruptcy Code or Rules. The definition of "civil action" appears in Bankruptcy Rule 9002(1) as follows: "'Action' or 'civil action' means an adversary proceeding or, when appropriate, a contested petition, or proceeding to vacate an order for relief or to determine other contested matter." There is no corresponding definition of judicial action or proceeding in the Rules or the Code. "Proceeding" is an arguably broader term: *Black's Law Dictionary* defines it as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."<sup>9</sup>

Notably, the definition contains a separate entry for what a proceeding means in the context of a bankruptcy: "A particular dispute or matter arising within a pending case—as opposed to the case as a whole."<sup>10</sup> Thus, a "proceeding" is not the main bankruptcy case, but a specific dispute or matter *within* a bankruptcy case. In summary, a bankruptcy case itself would not appear to be an "action" under the narrower definition, but could be an action under the broadest reading. As shown from the definition of "proceeding," however, the terms apply differently to a bankruptcy. In other words, FIRREA may or may not apply depending on a particular court's interpretation.

### ***Conclusion***

It seems that the FDIC's use of FIRREA to assert a super-stay ignores the already special protections given it in 11 U.S.C. §523(c)(2) and the uniform nature of the Code. Moreover, the application of the 90-day stay provided for under FIRREA to bankruptcy proceedings, defeats a debtor's primary purpose in filing bankruptcy—the timely discharge of debts and the fresh start. If broadly applied to an entire case and not just an adversary proceeding, the administration of the bankruptcy process becomes hopelessly cumbersome and untenable. Both the certainty and finality of the bankruptcy process are jeopardized.

Hopefully, future courts that address this issue will concur with Judge Brooks that §523(c)(2) occupies the field and further conclude that the Bankruptcy Code cannot be overwritten by another statute, in this case FIRREA, unless clearly intended by Congress. As a final note, the FDIC never did take any action in *Garneau*, letting its extensions of both the §§523 and 727 deadlines expire. ■

<sup>5</sup> *In re Colonial Realty Co.*, 980 F.2d 125, 133 (2d Cir. 1992).

<sup>6</sup> 136 B.R. 319, 321 (D. Mass. 1992).

<sup>7</sup> *Id.* at 321.

<sup>8</sup> See 10 *Collier's on Bankruptcy*, ¶7003.02 (Lawrence King, 15th ed. 2008).

<sup>9</sup> *Black's Law Dictionary*, 1241 (8th ed. 2005).

<sup>10</sup> *Black's Law Dictionary*, 1241 (8th ed. 2005).