Is the Power of the RTC Unlimited? -- Federal Preemption of State Banking Law

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On August 9, 1989, Congress passed the most sweeping thrift reform law in the history of United States, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.1 Commonly known as FIRREA, the law seeks to restore public confidence in the savings and loan industry and to reorganize the insolvent Federal Savings and Loan Insurance Corporation (FSLIC).2 FIRREA created the Resolution Trust Corporation (RTC) to resolve the cases of insolvent or closed thrifts.3 Congress gave the RTC broad powers to sell, merge, or consolidate failed thrifts.4

In early 1990, the RTC announced that it would override state bank branching laws for any financial institution that agreed to acquire a failed thrift.5 The effect of such an override would be to increase the value of the failed thrift because compliance with state branch banking law is both time-consuming and expensive. Furthermore, an RTC override would create a nationwide pool of potential buyers. State banking officials objected to the RTC's actions and argued that preemption of state law is beyond the RTC's statutory authority.6

This Comment examines the RTC's authority to override state law for the purpose of selling a failed thrift. It analyzes the emergency acquisition provisions of FIRREA, the RTC's authority to sell failed thrifts, state branch banking laws, and the policy arguments for enabling the RTC to sell failed thrifts quickly and efficiently. The Comment also examines recent case law in the area.

I. THE SAVINGS AND LOAN CRISIS

Before FIRREA, the Federal Home Loan Bank Board supervised the Federal Home Loan Bank system and the FSLIC.7 In addition, the

6. See infra notes 53-99 and accompanying text.
7. HOUSE REPORT, supra note 2, at 302.
Federal Home Loan Bank Board administered a number of federal laws. Among these was Title IV of the National Housing Act, which authorized the insurance of the deposits of savings associations and home financing institutions by the FSLIC.\(^8\)

FIRREA grew out of the massive financial crisis of the thrift industry and the insolvent FSLIC.\(^9\) The crisis was caused by several factors including regional economic collapse, fraud, and insider abuse.\(^10\) The purpose of FIRREA is to restore public confidence in the savings and loan industry and to ensure that the industry is safe and stable.\(^11\) The act also serves to provide a viable system for affordable housing finance. It was originally estimated that FIRREA would cost American taxpayers about $100 billion; however, recent estimates have ranged from a low of $500 billion to a high of over $1 trillion.\(^12\)

A. Creation of the RTC and Its Receivership Strategy

Section 501 of FIRREA created the RTC and the RTC Oversight Board to supervise it. The RTC was created, in part, to manage, merge, sell, or liquidate certain conservatorships and receiverships.\(^13\) The RTC is a wholly-owned government corporation subject to the normal oversight and controls of the Government Corporations Act.\(^14\) Furthermore, the RTC’s operations are financed by the Resolution Funding Corporation (REFCORP).\(^15\) The RTC and its Oversight Board are temporary governmental entities. The Oversight Board will be dissolved sixty days after it fulfills its responsibilities.\(^16\) Similarly, the RTC must be dissolved by December 31, 1996.\(^17\) If the RTC is still acting as conservator or receiver as of that date, the Federal Deposit Insurance Corporation (FDIC) shall assume those roles as its successor.\(^18\)

Congress intended that the RTC would develop a comprehensive and systematic approach to the liquidation of insured insolvent thrift institutions.\(^19\) Congress also wanted the RTC to develop a similar plan

\(^{18}\) *Id.* at 442.
\(^{19}\) *Id.* at 308.
to dispose of the assets held by those failed thrifts. Congress believed that the RTC would maximize proceeds on the sale of RTC receivership assets by selling complementary assets in pools. Thus, a failed savings association with several branches might be sold to another savings association or bank as a single asset. Congress found that selling assets in groups would be attractive to a broader group of investors. Accordingly, investors might be willing to pay more for such assets, and the RTC would be able to close failed thrift cases more quickly.

B. The RTC's Broad Authority

The RTC is charged with resolving cases of failed thrifts which are closed between January 1989 and August 1992. Section 217 of FIRREA adds to the Federal Deposit Insurance Act a new section (k). The new section applies to emergency acquisitions of failed or failing thrifts and grants the RTC broad authority to merge, consolidate, or transfer the assets and liabilities of a failed thrift to any other savings association or insured bank. An emergency acquisition is permitted when the RTC determines that severe financial conditions "threaten the stability of a significant number of savings associations, or of savings associations possessing significant financial resources." When the RTC finds that such emergency conditions exist, the statute permits the RTC to override state law in order to dispose of the failed thrift. Furthermore, Congress authorized the RTC to transfer the assets of failed thrifts "on such terms as the Corporation shall provide." In order to promote financial soundness, Congress prohibited the RTC from authorizing any transaction which presents a substantial risk to the savings association to be acquired or the acquiring entity.

If the RTC seeks to override state law, it must consult with the state official who has jurisdiction over the acquired institution. The official must be given at least forty-eight hours to object to the use of the override provisions in the statute. If the official objects to the over-

20. Id. at 353.
23. Id. § 1823(k)(1)(A).
24. Id. § 1823(k)(1)(A)(i).
25. Id.
26. Id. § 1823(k)(1)(A)(ii).
27. Id. § 1823(k)(1)(B)(i).
28. Id. § 1823(k)(1)(B)(ii).
ride, then the RTC may only override state law with a seventy-five percent or greater vote of the Board of Directors of the Corporation.\textsuperscript{30} As soon as the decision is made to override state law, the RTC is required to send the state official a written certification of its determination.\textsuperscript{31}

Section 217 also regulates branching restrictions in emergency acquisitions.\textsuperscript{32} It permits a savings association, after a merger or transfer, to retain and operate existing branches and facilities.\textsuperscript{33} Further, it provides that if the savings association continues to exist as a separate entity, it may establish and operate new branches.\textsuperscript{34}

Congress also granted broad rulemaking authority to the RTC to enable it to carry out its statutory mandate.\textsuperscript{35} It provides: "Subject to the review of the Oversight Board, the [RTC] shall adopt the rules, regulations, standards, policies, procedures, guidelines, and statements necessary to implement the strategic plan established by the Oversight Board under subsection (a)(14)."\textsuperscript{36} Furthermore, it requires the RTC to: (1) maximize the net present value return from the sale of insolvent thrifts; (2) minimize the impact of thrift transfers on local financial and real estate markets; and (3) minimize the amount of any loss in the resolution of cases.\textsuperscript{37} Section 1441a(b)(4) extends these broad powers to the RTC in its conservatorship and receivership functions.\textsuperscript{38} It provides that the RTC shall have the same powers and rights to carry out its duties with respect to institutions as those given to the FDIC in sections 11, 12, and 13 of the Federal Deposit Insurance Act.\textsuperscript{39} In other words, the Federal Deposit Insurance Act's state override powers are subsumed into section 1441a.

II. THE FIRST OVERRIDE CASE

When Mesa National Bank sought to acquire Valley Federal and Mesa Federal, the State of Colorado filed the first challenge to section 1823(k).\textsuperscript{40} Both Valley Federal Savings and Loan and Mesa Federal

\textsuperscript{30} Id. § 1823(k)(1)(B)(iii).
\textsuperscript{31} Id.
\textsuperscript{32} Id. § 1823(k)(4).
\textsuperscript{33} Id. § 1823(k)(4)(A).
\textsuperscript{34} Id.
\textsuperscript{35} Id. § 1441a(b)(12).
\textsuperscript{36} Id.
\textsuperscript{37} Id. § 1441a(b)(3)(C).
\textsuperscript{38} Id. § 1441a(b)(4).
\textsuperscript{39} Id. Sections 11, 12, and 13 of the Federal Deposit Insurance Act are codified at 12 U.S.C.A. §§ 1821, 1822, 1823 (West 1989).
Savings and Loan were mutual associations in RTC conservatorship. In addition to their respective principal offices, Valley Federal had four branch offices and Mesa Federal had three branch offices. At the time of the acquisition Mesa National Bank was not yet chartered by the Comptroller of the Currency, the head of the federal agency responsible for the chartering and supervision of all national banks.41

The agreement between the RTC and Mesa National Bank required the bank to purchase certain assets and assume certain liabilities of Valley Federal and Mesa Federal.42 In addition, part of the agreement provided that the newly-chartered Mesa National Bank would operate preexisting branches of Valley Federal and Mesa Federal as its own branches.43

Colorado's state law prohibited branch banking except under limited circumstances.44 When the State Banking Board learned of the RTC's proposed override of Colorado's branch banking laws, it sought a temporary restraining order in the United States District Court of Colorado.45 The Independent Bankers of Colorado, a non-profit trade association, also joined the action on behalf of the state.46

The court, in a ruling by Judge Rita Weinshienk, granted the state's temporary restraining order.47 The court found that section 36 of the National Bank Act permitted a national banking association to establish and operate branches, but only if branch banking is expressly authorized by state law.48 Furthermore, a literal reading of section 1823(k)(4)(A) led the court to conclude that the section only authorized a savings association, and not a bank, to retain and operate any existing branches or other facilities of acquired failed thrifts. The court reasoned that if the acquired thrift branches were to be operated as branch banks, Congress would have had to repeal section 36 of the National Banking Act. Because FIRREA did not repeal section 36 of the National Bank Act, the court found that the state was likely to succeed on the merits; therefore, the temporary restraining order was appropriate.49

41. Id. slip op. at 1.
42. Id.
43. Id.
44. Id. (citing COLO. REV. STAT. § 11-6-101 (1987)).
45. Id.
46. Id.
47. Id. at 2.
48. Id. at 1; see McFadden Act, § 7, 12 U.S.C. § 36 (1988).
49. Colorado v. RTC, No. 90-Z-190, slip op. at 1-2.
III. The Override Regulation—RTC's Response

After the RTC was enjoined from using the branching provisions of section 1823(k)(4) in Colorado v. Resolution Trust Corp., the RTC published for comment a proposal to permit insured banks acquiring branches of failed or failing thrifts to retain and operate such branches as branches of the bank.

In its final regulation, the RTC adopted a rule that permitted insured banks to retain and operate branches of insolvent thrifts acquired pursuant to section 1823(k). In adopting the rule, the RTC considered comments in thirty-seven letters sent by state banking regulators, bankers, and trade associations. "The comment letters opposed the proposal on three principal grounds: (1) the proposed rule would undermine the dual banking system and the right of states to determine their own bank branching policies; (2) FIRREA does not permit the override of state bank branching law and does not grant the RTC the authority to do so; and (3) the proposed rule violates the procedural requirements of the Regulatory Flexibility Act by failing to address the rule's impact on small entities."

A. Dual Banking System

The letters addressing the dual banking system were presumably sent by small banks because the override regulation encouraged large banks to expand into state bank markets by purchasing branches of insolvent thrifts. With respect to the dual banking system, the RTC recognized that the federal provisions in section 1823(k) might be in direct conflict with state interests. However, the RTC found that the emergency acquisition provisions contained in section 1823(k) expressed Congress's policy decision to override state interests in this narrow and limited area, i.e., the sale of thrifts in conservatorship or receivership with the RTC.

B. Statutory Basis for the Regulation

The letters also contained several contentions that the RTC was exceeding its statutory authority by promulgating the regulation. First,

50. No. 90-Z-190.
54. 55 Fed. Reg. at 22,324.
55. Id.
some letters argued that section 1823(k) did not expressly authorize the RTC to override state bank branching restrictions. Second, statements by members of Congress were presented as evidence that Congress did not intend to allow state branching laws to be preempted by the emergency acquisition provision. Third, some parties argued that because section 1823(k) does not expressly override the McFadden Act, the RTC does not have the authority to permit national banks to retain branches not authorized under state law. Fourth, some letters disputed the RTC's claimed authority to fill the statutory silence in section 1823(k) on the proper treatment of banks resulting from an emergency acquisition. These letters argued that the RTC lacked rule-making authority to propose regulations for emergency acquisitions in which banks acquire failed savings associations.\(^\text{56}\)

1. Whether Section 13(k) Authorizes an Override of State Bank Branching Laws

In its proposal, the RTC took the position that section 1823(k) expressly provides an override of state bank branching laws in order to promote emergency acquisitions of failed thrifts.\(^\text{57}\) In pertinent part, section 1823(k) states:

(4) If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a savings association may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same State.\(^\text{58}\)

In its proposal, the RTC noted that the second sentence of the subparagraph "sets out the future branching rights of an acquired savings association that continues to exist as a separate entity following its acquisition by a banking firm."\(^\text{59}\) It continued: "By contrast, the first sentence can most reasonably be read as addressing retention of branches existing at the time of the emergency transaction."\(^\text{60}\) Thus, the issue presented by this section arose from the two plausible mean-

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56. Id. at 22,324-22,325.
60. Id.
ings of the term "savings association" in the second clause. The first interpretation of the clause was a literal reading that when a savings association was the entity resulting from a merger, then only the acquired savings association, and not a bank, could operate the acquired branches. This was the interpretation followed by the Colorado District Court in *Colorado v. RTC*.

The second plausible reading was explained in the proposed regulation. The RTC's position was that a "'[s]avings association’ will not necessarily be (and is highly unlikely to be) the result of a ‘merger’ or ‘consolidation’ of a bank and a thrift." Therefore, the RTC claimed that the term "savings association” should be “read as referring [to] the savings association that has been merged or consolidated with a bank, even though it is no longer a savings association." The RTC favored the second interpretation, arguing that it more closely followed the Congressional intent behind the emergency acquisition provisions. The RTC explained that "'[s]tate laws limiting bank branching create a significant impediment to emergency acquisitions’ of failed thrifts by banks or bank holding companies." It also noted that a banking firm is usually interested in acquiring the failed thrift's branches so that the bank can operate the failed thrift offices as branches of the bank. The RTC stated that "'[t]he thrift branches are a major asset’ because it is much more costly for a bank to expand by establishing and chartering separate banks in each geographic area it wishes to serve." By acquiring the existing branches of a failed thrift, the bank can expand by branching, an alternative that would otherwise be "foreclosed to it by State branch banking restrictions.” According to the RTC, banks are willing to pay a substantial premium for troubled thrifts if they can retain the failed thrift’s branching network.

The RTC cited a recent example where "a prospective acquiror of two troubled thrifts with seven branches was initially willing to pay a premium of $675,000 for the thrifts provided the branch network could be retained and operated as bank branches. However, the bank’s bid was reduced to a premium of $75,000 when it was required to convert the branches to seven separately chartered and individually

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61. *Id.*
62. *Id.*
63. *Id.* at 13,543.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
capitalized banks." The RTC pointed out that the money lost in this sale could have been applied to reduce the amount of taxpayer dollars necessary to resolve other failed thrift cases.

2. Legislative History That Section 1823(k) Does Not Override State Branch Banking Law

A number of those who wrote letters commenting on the proposed rule took the position that the legislative history of FIRREA does not sanction RTC override of state bank branching law. Specifically, these letters pointed to comments made in the Congressional Record between Senators Wirth and Riegle, and a statement by Congressman Leach during the debate on the Conference bill. The pertinent parts of the Congressional Record state:

Mr. Wirth: Mr. President . . . I would like to ask the distinguished chairman of the Banking Committee, Senator Riegle, to clarify provisions in the legislation concerning the conversion of thrift charters to bank charters.

Is it correct that the provisions of this act that permit thrifts to be converted to banks are not intended to allow banks resulting from such conversions to establish, retain, maintain or operate branches that do not comply with the laws relative to establishment and operation of bank branches or offices in the respective States where such banks are located?

Mr. Riegle: The Senator's statement is correct.

In the House debate Congressman Leach stated:

[T]he record should be clear on the following items: First, that provisions of this act that permit thrifts to be converted to banks [sic] are not intended to allow banks resulting from such conversions to establish, retain, maintain, or operate branches that do not comply with the laws relative to establishment and operation of bank branches or offices in the respective states where such banks are operated. In other words, the Douglas or McFadden Acts are not intended to be circumvented or modified by this statute.

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68. Id. at 13,544.
69. Id.
72. This word should probably be "banks" instead of "thrifts."
The RTC countered that although these statements appear to support the view that state branch banking laws should be respected, two factors indicate that they apply to non-emergency transactions. First, both of the statements expressly refer to provisions of the Conference Report that addressed charter conversions. Charter conversions were explained in the Conference Report at page 394. Although emergency acquisitions are a special type of charter conversion, the Conference Report addressed emergency acquisitions several pages later at page 398 under the caption "FDIC's Assistance and Default Prevention Authority." Therefore, the RTC reached the conclusion that if the legislators were speaking about the emergency acquisitions, they would not have referred to the Conference Report discussing charter conversions.74

The second reason the RTC found the legislative history non-persuasive was that the Senate Report to Senate Bill S. 77475 made it "very clear that the scope of the state law override authority in section 13(k) was intended to be very broad. The Report states that '[s]ection 13(k) can be used to override all State law (including State constitutions), with one exception: section 13(k) does not override State laws that restrict the activities of a savings association on behalf of any other entity.'"76 The RTC found the statutory language in section 1823(k) consistent with this report, especially in subparagraphs (1)(A)(i) and (ii) which provide that the RTC may permit emergency transactions "'[n]otwithstanding any provision of state law' and "'on such terms as the [Corporation] shall provide.'"77 Based on this analysis, the RTC concluded that Congress intended to allow the RTC to override state branch banking laws when the acquiring entity of a failed thrift is a bank.78

3. Whether the Proposed Rule Is Consistent with The McFadden Act

Some letters protesting the new rule contended that the RTC proposal was inconsistent with the McFadden Act.79 The McFadden Act generally provides that a national bank can establish and operate branches, but only if branch banking is expressly authorized by state

74. 55 Fed. Reg. at 22,326.
75. S. 774, 101st Cong., 1st Sess. (1989), is the source of section 1823(k).
78. Id.
law. The RTC stated that this argument assumes the McFadden Act is the *exclusive* source of branching authority for national banks. The RTC then discussed several federal provisions which show that the McFadden Act is not the sole authority for branch banking.80

First, the RTC pointed to section 13(f) of the Federal Deposit Insurance Act, which is codified as section 1823(f) of Title 12.81 This section "authorizes emergency interstate acquisitions of insured banks which are in danger of default,"82 and provides that banks resulting from emergency acquisitions "may retain and operate any existing branch or branches of the institutions merged with or acquired, but *otherwise* shall be subject to the conditions upon which a national bank may establish and operate branches in the State in which such insured institution is located."83 According to the RTC, section 1823(f) clearly establishes that the McFadden Act is not the sole authority for branch banking and that section 1823(f) provides additional branching authority. The RTC reasoned that, just as section 1823(f) of the Federal Deposit Insurance Act grants branching authority to the FDIC, section 1823(k) of FIRREA also grants similar authority to the RTC for branch banking in addition to the McFadden Act. Therefore, the RTC concluded "the matter of whether section 1823(k) overrides the McFadden Act is irrelevant."84

4. *The RTC's Authority to Fill the Statutory Silence*

In *Colorado v. RTC*, the district court granted a temporary restraining order against the RTC, concluding that section 1823(k)(4)(A) precluded a *bank* from retaining and operating thrift branches where an acquired thrift is merged into a bank. This case stemmed from a literal reading of section 1823(k)(4)(A), which section states in pertinent part: "If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a *savings association* may retain and operate any existing branch or branches or any other existing facilities."85

The district court in *Colorado* held that the section authorized only a resulting "*savings association*" to continue to operate existing

80. *Id.*
84. *Id.*
branches or other facilities. However, as discussed in this Comment, the RTC, in its regulation, took the position that it is unlikely for a savings association to result from the merger of a failed savings association and a national bank. Relying upon the court's literal reading of the statute, the RTC concluded that section 1823(k) is silent on the subject of failed thrifts merging with banks when the resulting entities are banks. The RTC asserted that because the statute is silent, it has the authority to promulgate a rule to fill the resulting void.

To support its position, the RTC first argued that an agency's authority to preempt state law when promulgating rules need not be explicit. Notwithstanding, Lincoln Savings & Loan Association v. Federal Home Loan Bank Board, the RTC pointed to its branch rulemaking authority under FIRREA which permits the RTC to "issue such rules [and] regulations . . . as the Corporation considers necessary or appropriate to carry out this section." Furthermore, the RTC noted that section 501 also gives the RTC the power to issue such regulations "as it determines to be appropriate regarding the conduct of [failed thrifts]." Therefore, the RTC, under Mourning v. Family Publications Service, concluded that it could issue any rule which is "reasonably related to the purposes of its enabling legislation." The RTC explained:

Here, the RTC is issuing a regulation under broad rulemaking authority and pursuant to clear legislative intent that emergency acquisitions of thrifts not be frustrated by conflicting state law. Because its regulation is authorized, it can override a state law that either conflicts with the regulation or frustrates its purpose.

Based on the above, the RTC concluded its regulation was legitimate and should override conflicting state law.

86. See supra notes 57-67 and accompanying text.
89. 856 F.2d 1558.
92. Id.
94. Id. at 369 (quoting Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 280-281 (1969)).
See also 55 Fed. Reg. at 22,326-22,327.
C. The Regulatory Flexibility Act

The last objection to the proposed Rule was that it violated the Regulatory Flexibility Act. Generally, the Regulatory Flexibility Act requires that an administrative rule should not have a “significant economic impact on a substantial number of small entities.” The RTC interpreted this challenge as an argument that the proposed rule “would grant an ‘unfair competitive advantage to a select, limited number of banks.’”

The RTC, in its final regulation, quickly disposed of this objection; the final rule does not impose compliance requirements on depository institutions of any size. Accordingly, the rule would not adversely impact small institutions. Furthermore, the RTC stated that its rule imposed no reporting or recording requirements nor any other type of restriction which would harshly affect small entities. Therefore, it concluded that the rule would not have the type of economic impact addressed by the Regulatory Flexibility Act.

IV. Cases after the Override Regulation

Within three months after the RTC promulgated a final version of its proposed regulation, several cases were decided by the federal courts regarding section 1823(k) emergency acquisitions. Two district courts reviewed section 1823(k) emergency acquisitions and came to opposite results. In Independent Community Bankers of New Mexico v. Resolution Trust Corporation, the New Mexico District Court dismissed the Independent Bankers’ claim, giving deference to the RTC’s override regulation. However, in Arkansas State Bank Commissioner v. Resolution Trust Corporation, Judge Reasoner held that the RTC’s interpretation of section 1823(k) overstepped the authority granted to it by FIRREA. Seven weeks later the Arkansas district court decision was reversed and vacated by the Eighth Circuit Court of Appeals. The Eighth Circuit opinion included a strong dissent by Judge Heaney who would have affirmed the district court.

97. Id.
99. Id.
A. Independent Community Bankers of New Mexico v. RTC

In Independent Community Bankers, the District Court of New Mexico upheld the RTC override of state branching law. In that case, New Mexico Federal, a failed savings association in conservatorship with the RTC, had its main office in Albuquerque and branches in Santa Fe, Taos and Espanola, New Mexico. First National Bank of New Mexico made a bid to purchase New Mexico Federal expressly conditioned upon the RTC overriding the New Mexico branch banking statute. The New Mexico statute permitted branch banking only on a county-wide basis.103

As in Colorado, the RTC argued that First National's acquisition of New Mexico Federal would be an emergency acquisition under section 1823(k). Accordingly, under subsection (4), First National would be permitted to operate the four offices of New Mexico Federal as banking branches of First National Bank. The agreement was in direct contravention of the New Mexico bank branching statute because the branches would be operated outside of the county-wide restriction imposed by New Mexico banking law.104

Around May 30, 1990, the Executive Director of the RTC notified Kenneth Carson, New Mexico's chief banking regulator, of the RTC's intent to override New Mexico's branch banking statute. The next day Mr. Carson advised the RTC of the state's objection to the proposed override. Notwithstanding the state's objection, the RTC advised First National and the State of New Mexico that it intended to consummate the proposed purchase and assumption agreement with First National.105

On June 5, 1990, the RTC Board of Directors "unanimously authorized the override of New Mexico's branch banking laws and approved the bid" of First National for the acquisition of the assets and liabilities of New Mexico Federal.106 In accordance with the procedural requirements of section 1823(k), the Board found "severe financial conditions existed relative to the thrift industry nationwide and threatened the stability of a significant number of saving associations."107 Furthermore, the Board found that such savings associations possessed significant financial resources justifying the use of the authority granted to the RTC under section 1823(k). The Board also found that severe financial conditions threatened savings associations

104. New Mexico's branch banking statute is at N.M. STAT. ANN. § 58-5-3 (1978).
106. Id.
107. Id. at 2.
in New Mexico, especially those in Albuquerque. Last, the Board found that the purchase of New Mexico Federal by First National "would lessen the risk to the RTC and that such authorization would not present a substantial risk to the safety and soundness of the savings association to be acquired" or to First National Bank, the acquiring entity.\(^{108}\)

In its conclusions of law, the court recognized that the RTC possessed broad authority to dispose of any thrift in receivership or conservatorship. The court also noted that the RTC is required by Congress to maximize the net present value return from the disposition of failed institutions and to minimize any loss realized in the resolution of failed thrift cases. Further, the court held that the purchase of New Mexico Federal by First National "would lessen the risk to the RTC and that such authorization would not present a substantial risk to the safety and soundness of the savings association to be acquired" or to First National Bank, the acquiring entity.\(^{108}\)

The court then discussed the RTC's final regulation and concluded that the regulation was properly promulgated and adopted.\(^ {111}\) After concluding that the regulation was within the RTC's rulemaking power, the court stated that the test for a reviewing court was limited—the regulation must be upheld unless it is "beyond the outermost boundaries of the statute."\(^ {112}\) Furthermore, the court cited *Chevron U.S.A. v. Natural Resources Defense Council*\(^ {113}\) for the proposition that substantive regulations by an administrative agency are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."\(^ {114}\)

After delineating the tests above, the court applied them to the regulation and concluded that "the Override Regulation implementing the statute by permitting retention of branches as part of an emergency transaction is without question 'reasonably related to the purposes of the enabling legislation' and is valid. The Override Regulation is not 'out of harmony,' but is consistent with

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108. *Id.*
109. *Id.* at 3.
110. *Id.* at 2, (citing *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973)).
111. *Id.* at 3.
112. *Id.* (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 44-45 (1981)).
§ 1823(k)." The court bolstered its conclusion by finding that the legislative history of section 1823(k) evidenced Congress's intent to give the RTC broad powers to override state law to facilitate emergency acquisitions. Finally, the court upheld the override regulation and approved the RTC's statutory construction of section 1823(k)(4) regarding the term "savings association." Accordingly, because it found the regulation valid, the court dismissed the bankers' claim under rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted.

**B. Arkansas State Bank Commissioner v. RTC**

Within a month, the District Court of Arkansas, in *Arkansas State Bank Commissioner v. Resolution Trust Corporation*, reached the opposite conclusion when reviewing the RTC's override regulation. In that case, the RTC scheduled a meeting to solicit bids from potential purchasers of failed savings and loan associations in Arkansas. During this meeting, the RTC announced to potential bidders that section 1823(k) authorized the RTC to preempt Arkansas's branch banking statute. On June 21, 1990, Worthen Bank and Trust Company submitted a bid to purchase the assets and liabilities of Independence Federal Bank; Worthen's bid was expressly contingent on the RTC's ability to override state branching law so that Worthen could operate Independence's twenty branch offices, located in fifteen counties throughout Arkansas, as branches of Worthen.

In determining whether the RTC's override regulation was valid, the court looked to the statutory language in sections 1823(k)(1)(A)(i)(I) and 1823(k)(4). The court noted that section 1823(k)(1) spoke only of transferring a savings association's assets to a bank. It found that the statute was devoid of language pertaining to the operation of those assets as branches after the transfer.

Moreover, the court also analyzed section 1823(k)(4) and construed the meaning of "savings association" as it is used there. Following

115. *Id.* at 4 (citation omitted).
116. *Id.*
117. *Id.* at 4-5.
118. *Id.* at 6.
120. See *Ark. Stat. Ann.* § 23-32-1202 (West Supp. 1989). This statute provides that banking institutions may not operate branches outside the county in which the institution's principal banking office is located.
122. *Id.* at 553-554.
123. *Id.* at 553.
124. *Id.*
the approach of the court in *Colorado v. RTC*, the *Arkansas* court noted that the section spoke only of an acquired savings association being allowed to retain and operate its branches, not of a bank being allowed to do so. It stated that the statute "says nothing about a bank converting those branches to bank branches and so operating them." Based on his restrictive reading of those two subsections, Judge Reasoner disagreed with the New Mexico District Court’s construction of the term "savings association" in section 1823(k)(4). The *Arkansas* court found the RTC’s interpretation of sections 1823(k)(1) and (k)(4) implausible because such a reading would render useless the portion of the statute reading, "a savings association may retain and operate any existing branch or branches or any other existing facilities." The court held that the RTC had clearly overstepped its authority in issuing the override regulation. Because the RTC had exceeded its statutory authority, the court held that the override regulation was unlawful and therefore null and void. The court further enjoined the RTC from approving the establishment of branch banks in violation of state branch banking laws.

**C. Eighth Circuit Review of the Arkansas Case**

Judge Reasoner’s opinion declaring the RTC’s override regulation invalid had been on the books for seven weeks when it was reversed by the Eighth Circuit Court of Appeals. The case was heard before a three judge panel, with Judges Gibson and Magill comprising the majority. Senior Circuit Judge Heaney wrote a well-reasoned dissent directly contradicting the majority.

1. **The Majority Opinion**

The facts of the case were taken primarily from the district court order, with one important exception. On appeal, the court noted that

125. *Id.* at 554.

126. *Id.*

127. *Id.* (citing 12 U.S.C.A. § 1823(k)(4)(A) (West 1989)). This led the court to say:

It is obvious to this Court that Section (k)(4) means that after an acquisition, existing branches may be retained and operated if they are maintained and operated as branches of a savings association. This court agrees with the Colorado District Court that they cannot be retained and operated as branches of the acquiring bank.

745 F. Supp. at 555.

128. *Id.*

129. *Id.* at 556.

130. *Arkansas State Bank Comm’r v Resolution Trust Corp.*, 911 F.2d 161 (8th Cir. 1990).

131. *Id.* at 175 (Heaney, J., dissenting).
Worthen Bank's bid included a premium of $1.5 million for acquiring all of the branches of Independence Federal together. The majority concluded that Worthen's proposed acquisition of Independence and its twenty branches was authorized under the emergency acquisition statute, section 1823(k). The court stated that the issue was whether section 1823(k)(4) provides statutory authorization for the RTC to promulgate the override regulation.

The court adopted the standard for reviewing the RTC's regulation contained in *Chevron U.S.A. v. Natural Resources Defense Council.* The *Chevron* standard requires the court to first determine whether Congress has spoken to the question at issue. If Congress has spoken, then the court and the agency must give effect to Congressional intent. However, if the statute is silent or ambiguous with respect to the issue, then the court need only determine whether the agency's regulation is a permissible construction of the statute. The agency's construction of the statute is permissible unless it is arbitrary, capricious, or manifestly contrary to the statute.

The majority found that Congress had not spoken to the precise issue in question so the issue could not be disposed of by the first part of the *Chevron* inquiry. The court then considered whether the override regulation was a permissible construction of the statute.

In examining the override regulation, the court noted the three sections of FIRREA which defined the RTC's power in arranging emergency acquisitions. First, the RTC has the power to issue regulations to carry out its statutory purpose; second, section 1441a(b)(3) requires the RTC to maximize the value received for the failed thrift while minimizing any losses to the federal fisc; and third, the RTC has specific authority to arrange transfers of assets "on such terms as the [RTC] shall provide." The court also examined the Commissioner's arguments that the regulation was beyond the scope of the RTC's authority, but concluded "we are satisfied that the RTC could permissibly read these sections as authority to promulgate 12 C.F.R. § 1611.1 overriding branch banking law incident to such [emergency acquisition] transactions."
Although the court approved the RTC’s override regulation, it still felt compelled to interpret the term “savings association” in section 1823(k)(4).\textsuperscript{141} The Commissioner insisted that the second usage of “savings association” in the first sentence meant exactly what it said—“any corporation (other than a bank).”\textsuperscript{142} He argued that elsewhere in FIRREA, when Congress intended to refer to banks as well as savings associations, Congress used the term “an insured depository institution.”\textsuperscript{143} Therefore, the Commissioner’s position was that the statute meant that a savings association, and not a bank, may retain and operate the existing branches of the thrift.\textsuperscript{144}

The RTC’s position was stated in the override regulation. It argued that the term “savings association” in the second clause referred to the “savings association” as it existed prior to the consummation of the emergency transaction even though it might no longer be a savings association\textsuperscript{143} because “if the clause is not read this way, merger and consolidation are effectively read out of the statute.”\textsuperscript{146} The majority also found the RTC’s interpretation of the statute more persuasive:

We could at this point simply conclude that the second usage of “savings association” is ambiguous, and that the RTC reached a permissible construction of the statute in adopting section 1611.1 as did the district court for the district of New Mexico in Independent Community Bankers of New Mexico v. Resolution Trust Corp. We are convinced, however, that the arguments asserted by the RTC have more compelling force than those to the contrary, giving strong support to the construction of the statute by the RTC, and that the district court erred in its ruling on this issue.\textsuperscript{147}

The court took particular notice of the illogic in the Commissioner’s argument that if a bank cannot retain and operate the branches as

\textsuperscript{141} Id. at 171. For purposes of clarity, this subparagraph is set out again:
If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a savings association may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same State.
\textsuperscript{142} 911 F.2d at 171. See 12 U.S.C.A. § 1813(b) (defining “savings association”).
\textsuperscript{143} 911 F.2d at 171. See, e.g., 12 U.S.C.A. §§ 1817, 1818, 1821.
\textsuperscript{144} 911 F.2d at 171.
\textsuperscript{145} Id. (citing 55 Fed. Reg. 13,543-13,544).
\textsuperscript{146} Id.
\textsuperscript{147} Id. (citations omitted).
bank branches, then no merger or consolidation can occur. Therefore, the majority held that the RTC reached a permissible interpretation of section 1823(k) as statutory authority to promulgate the override regulation.\textsuperscript{148}

2. Judge Heaney's dissent

Judge Heaney wrote a strong dissent criticizing nearly every one of the RTC's arguments in the case.\textsuperscript{149} In essence, he would have affirmed the district court because the statute contains no ambiguity. In his opinion, section 1823(k)(4) does not permit a bank which acquires more than one savings and loan association to convert the acquired association into branches of the acquiring bank. He emphasized the following language of the statute: "a saving association may retain and operate any existing branch or branches or any other existing facilities."\textsuperscript{150} He believed that this language fit the Worthen transaction exactly—Worthen Bank was permitted to acquire the assets of Independence Federal, but could only operate the branches of Independence "to the extent that the acquired association retains its identity" as a savings association.\textsuperscript{151} Therefore, he concluded that Worthen could not operate Independence's branches as bank branches. Judge Heaney emphasized that Congress could have authorized an acquiring bank to convert acquired savings associations into branches, but did not. Therefore, he reasoned, neither the RTC nor the court had the authority to re-write the statute to accomplish a goal not permitted by the statute itself. Furthermore, neither the court nor the RTC had a right to create an ambiguity where none existed.\textsuperscript{152}

Judge Heaney's dissent became more compelling when he introduced the tortured history surrounding the Comptroller of the Currency's many attempts to thwart the McFadden Act in order to permit national banks to branch across state lines, thereby avoiding state branch banking laws.\textsuperscript{153} He asserted that, as early as 1920, the Comptroller of the Currency was attempting to circumvent state branch banking laws so that national banks could expand into areas where state banks traditionally predominated. Indeed, one such early attempt was rejected by the United States Supreme Court when it "held that national banks did not have the implied power to branch."\textsuperscript{154} The

\textsuperscript{148} Id. at 172.
\textsuperscript{149} Id. at 175 (Heaney, J., dissenting).
\textsuperscript{150} Id. (citing 12 U.S.C.A. § 1823(k)(4)(A) (West 1989)) (emphasis deleted).
\textsuperscript{151} Id. (emphasis in original).
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 179.
\textsuperscript{154} Id. at 176-177 (citing First Nat'l Bank v. Missouri ex rel Barret, 263 U.S. 640 (1924)).
year before this decision, the Comptroller argued that if state banks were to continue to practice unlimited branch banking, it would eventually destroy the national banking system. 155

Judge Heaney asserted that the Comptroller since that time has regularly certified national banks to open branch facilities in states where such action was in contravention of the state branch banking laws and cited nine cases in which the Eighth Circuit or the Supreme Court had overruled the Comptroller’s decisions to establish national bank branches in states where branch banking was restricted. 156 These cases and the Comptroller’s past efforts “offer a historical perspective from which much can be gleaned.” 157 Thus, he concluded that the RTC rule was yet another attempt by the Comptroller, aided by the RTC, to circumvent the branch banking provisions of the McFadden Act. As such, the rule should be declared invalid. 158

Judge Heaney also argued that Congress did not intend for banks to operate acquired savings associations as branches, citing the conference committee report on the bill. Specifically, he highlighted the following passage:

The amendments also remove the procedures under current law that give priority to in-State thrift acquirers of failing thrifts. The acquisition of failing thrifts by banks or bank holding companies is authorized. A thrift subsidiary of a bank or bank holding company may branch in the same manner as a savings association (not affiliated with a bank holding company) that has its home office in the same state as the home office of such thrift subsidiary. 159

Judge Heaney asserted that this passage suggests that if Worthen Bank had acquired Independence as a subsidiary, then Worthen could have operated the acquired branches in the same manner as Independence Federal operated the branches before the acquisition. In other words, Worthen could only operate Independence’s branches if it retained the Independence name and identity. 160

Finally, he disagreed with the majority’s reliance on the Chevron inquiry and rulemaking arguments because he found that the statute contains no ambiguity. Judge Heaney agreed that Chevron is applica-

155. Id. at 176. See also H.R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924).
156. Id. at 176-77.
157. Id. at 177.
158. Id. at 179.
160. Id.
ble when a statute is either silent or ambiguous on the issue in question. Equally so, an agency can only promulgate a rule when the agency has been given authority and there is an ambiguity or silence in the statute. However, because section 1823(k)(4) is not ambiguous, neither the RTC nor the court should be able to bootstrap itself into a position where it can fill a gap or resolve an ambiguity where none exists. Accordingly, the dissent concluded that *Chevron* was inapplicable to the case and that the RTC was powerless to promulgate a rule in contravention of congressional intent.

D. Tenth Circuit Review of the Colorado and New Mexico Cases

On February 11, 1991, the Tenth Circuit rendered a decision reviewing the Colorado and New Mexico district court decisions in *State ex rel Colorado State Banking Board v. Resolution Trust Corporation*. The court was confronted with a split between the Colorado and New Mexico district courts in their interpretation of section 1823. The New Mexico district court had determined that the override regulation was a valid exercise of the RTC’s rulemaking authority while the Colorado district court had held that the regulation was void and contrary to FIRREA. The majority affirmed the New Mexico decision and reversed the Colorado decision. Judge Ebel wrote a long dissent criticizing the majority’s statutory construction and standard of review.

1. The Majority Opinion

The majority opinion was organized in five major sections. The first section discussed the majority’s standard of review; the second analyzed subsection (k)(1) of section 1823; the third analyzed the branching provisions under subsection (k)(4); the fourth applied the *Chevron* standard of review; and the fifth discussed the impact of the McFadden Act upon emergency acquisitions under FIRREA. The majority opinion was drafted by Circuit Judge Anderson, and was joined by Circuit Judge Baldock.

161. *Id.* at 179.
162. *Id.* (citing *Chevron*, 467 U.S. at 843 n.9 (courts must reject administrative constructions that are contrary to clear congressional intent)).
163. 926 F.2d 931 (10th Cir. 1991).
164. *Id.* at 948.
165. *Id.* at 948-55 (Ebel, J., dissenting).
166. The court opinion also contains a section addressing the Regulatory Flexibility Act; however, this is not considered a material portion of the opinion. *See id.* at 947.
167. *Id.* at 933.
In the first section the majority set forth the standard of review.\textsuperscript{168} Like the Eighth Circuit in \textit{Arkansas State Bank Commissioner},\textsuperscript{169} the Tenth Circuit adopted the \textit{Chevron} inquiry.\textsuperscript{170} Under that inquiry, the majority noted that if Congress has directly spoken to the precise issue, the court should effectuate Congress's clear intent. If, however, the court determines that Congress has not spoken to the precise issue, the court should decide whether the administrative agency's interpretation of the statute is permissible. If there is no direct congressional intent, the court must defer to the administrative agency's construction of the statute if that construction is permissible.\textsuperscript{171}

The court came to differing conclusions in its application of the \textit{Chevron} analysis to subsections (k)(1) and (k)(4).\textsuperscript{172} The majority found subsection (k)(4) intractably ambiguous and concluded that the section contains no clear expression of congressional intent. On the other hand, it found subsection (k)(1) clear and unambiguous and concluded that (k)(1) gave the RTC clear congressional authorization to override state branch banking law. Therefore, the court reasoned, the RTC's override regulation was a valid exercise of the RTC's statutory authority.\textsuperscript{173}

In the second section of the opinion the court rejected the states' argument that the RTC's authority under 1823(k)(1) extended only to the acquisitions themselves and not to the post-acquisition operation of the thrift branches.\textsuperscript{174} It found that the distinction between pre- and post-acquisition activities was not supported in the statute, focusing on a state's ability to impede an emergency acquisition.\textsuperscript{175}

The court found that post-acquisition state branch banking laws impede emergency acquisitions. Although it recognized that an acquiring bank has the option of operating the acquired offices as thrift subsidiaries or as independently chartered and capitalized banks, the court dismissed this point because "these choices are not the logical or likely result of the acquisition."\textsuperscript{176}

It reasoned that an interpretation of 1823(k)(1) that did not condition mergers between banks and failing thrifts upon subsequent dives-
titure of all the acquired thrift’s offices would rob the term “merger” of its most basic meaning. Therefore, when failing thrifts are absorbed into banks, they cease to exist as thrifts and their branches cannot continue to be operated as thrift branches; they must become bank branches.

The court rejected the states’ argument that “merger,” under FIRREA, is a term of art and does not carry its ordinary meaning, citing banking and case law to show that the term did not have a special meaning. Then it recognized that the emergency acquisitions in these cases were not mergers, but rather transfers of assets. The majority refused to read section (k)(1) to require banks to separately charter and capitalize these acquired assets or thrift branches.

The third section of the opinion addressed section 1823(k)(4), the branching provision. The court concluded that the subsection addressed the retention of existing offices and the creation of new branches after an emergency acquisition. It went on to disagree with both the states’ and the RTC’s interpretations of the provision. The exact meaning of “savings association” was the crux of the dispute.

The states’ position was that only a savings association which survived the merger as a subsidiary could operate the bank branches. Thus, a resulting bank would be precluded from operating the purchased thrift’s offices as branches of the bank. The court concluded that subsection (k)(4) did not clearly support this interpretation; therefore, Congress did not unambiguously express an intent that resulting banks could not retain existing thrift offices and operate them as bank branches.

The RTC argued that subparagraph (a)’s first sentence meant that “a resulting entity may retain and operate any existing branch . . .” Again, the court disagreed: “[W]hile it is possible that Congress intended this result, this construction requires even more gloss than does the States’ construction.” In the alternative, the RTC argued that the subsection was silent as to the subsequent

177. Id.
178. Id.
179. Id. at 938-39.
180. Id. at 939-41.
181. Id. at 941.
182. Id. at 942.
183. Id. at 942-44.
184. Id. at 942-43.
185. Id. at 943.
186. Id.
187. Id. at 943-44.
operation of thrift branches as bank branches. The court agreed with the RTC that the statute was either silent or ambiguous.188

The court applied the *Chevron* inquiry in section four of its opinion, noting first that the ambiguity of subsection (k)(4) would not affect the analysis of subsection (k)(1).189 With respect to subsection (k)(1), the court found that the statute expressly gave the RTC the statutory authority to override state law to accomplish the acquisition and that subsection (k)(4) contained no express language. Under the *Chevron* inquiry then, Congress's unambiguous intent must be given effect. Therefore, the court held that FIRREA authorizes the RTC to override state branch banking laws that preclude banks which acquire thrifts in emergency acquisitions from retaining and operating the thrifts' former offices as bank branches. The court held that the override regulation is a valid exercise of the RTC's authority.190

In the last major section of the majority opinion, the court discussed the impact of the McFadden Act191 on the override regulation.192 It noted that the purpose of the McFadden Act was "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned."193 The court recognized that the Act was a compromise in "maintaining restraints on national banks' branching while allowing them just enough flexibility to compete with state banks."194

The states had taken the position that the McFadden Act prevented the RTC from overriding state bank branching laws.195 However, the court stated that the McFadden Act was not assaulted by the override regulation because the regulation applied equally to both state and national banks. Indeed, the court concluded, the states' interpretation would effectively subvert competitive equality. It reasoned: "Thus, the Override Regulation would have the bizarre effect of requiring national banks to follow state branching restrictions that the state banks

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188. *Id.*
189. *Id.*
190. *Id.* at 945. The majority also noted that even if both provisions were silent regarding the specific issue of overriding state branch banking law, the majority would have still upheld the RTC's interpretation of FIRREA. The majority based its "statutory silence" holding on the RTC's explicit authority to issue rules, regulations and statements necessary to carry out FIRREA. *Id.* See 12 U.S.C.A. § 1441a(b)(12)(A) (West Supp. 1990).
193. *Id.* at 946 (quoting First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966)).
194. *Id.* (quoting Clarke v. Securities Industry Ass'n., 479 U.S. 388 (1987) (Stevens, J., concurring)).
195. *Id.*
were not required to follow." Therefore, the court held that the override regulation preserved the McFadden Act's motivating principle of competitive equality between state and national banking institutions.

In summary, the majority opinion expressly held that FIRREA authorized the RTC to override any state branch banking law that would preclude banks that obtain failed or failing thrifts through emergency acquisitions from retaining and operating the thrifts' offices as bank branches. It further held that the override regulation did not violate the McFadden or Regulatory Flexibility Act.

2. Judge Ebel's Dissent

Judge Ebel respectfully dissented from the majority opinion. He found that after applying the traditional rules of statutory construction to subsections (k)(1) and (k)(4), the sections were unambiguous and did not need to be interpreted by the RTC. Furthermore, even if they were ambiguous, the RTC's interpretation was unacceptable under any standard of review.

Judge Ebel agreed that Chevron provided guidance for appellate review; however, he disagreed in the application of Chevron to the facts of the cases. Instead, before invoking the Chevron tests, Judge Ebel felt that the court should have first employed the traditional rules of statutory construction to discern congressional intent. Thus, Judge Ebel would not have invoked the Chevron tests until after he had applied the normal tools of statutory interpretation. He concluded that after applying the traditional tools of statutory interpretation, the statute's intent was no longer ambiguous.

Judge Ebel first looked to the McFadden Act. He noted that section 36(c) was the cornerstone branching authority for national banks and represented congressional response to the tensions of a dual banking system. Judge Ebel believed that the RTC's interpretation of subsections (k)(1) and (k)(4) directly conflicted with the McFadden Act and could not stand. He therefore concluded that the override regulation was also unacceptable.

196. Id.
197. Id.
198. Id. at 948.
199. Id.
200. Id. at 948-49.
201. Id. at 949.
203. Colorado State Banking Bd., 926 F.2d at 950.
After invalidating the regulation under the McFadden Act, Judge Ebel analyzed the override provision, section 1823(k)(1)(A)(i). He interpreted the section to allow the RTC to override any state law that precludes a merger of a savings and loan with a bank. He reasoned that this includes only state laws that straight out preclude such mergers. He noted that neither New Mexico nor Colorado has a law which per se prohibits mergers between banks and savings and loans. Accordingly, in his opinion, that was the end of the matter. The court need not look to the post-acquisition operation of the acquired thrift branches. He believed that Congress did not intend to give the RTC such broad powers, particularly via the tortured and subtle inferences upon which the RTC relied.

Nonetheless, Judge Ebel found that the RTC's reliance on the provision "notwithstanding any provision of state law" was misplaced. He noted that it is not the state law which prohibited the operation of the thrift branches as banks, but instead federal law, i.e., the McFadden Act. The McFadden Act incorporates state law by reference. Accordingly, because there is nothing in section 1823(k)(1)(A)(i)(I) that gives the RTC authority to override federal law, the RTC cannot allow banks to operate the failed thrift branches as branches of the bank.

Judge Ebel also criticized the majority's interpretation of the term "merger." He asserted that the term "merger" is defined only as the legal joinder of two entities and has nothing to do with the operation of the surviving entity. He argued that the RTC's definition is unsupported by case law, citing United States v. Connecticut National Bank, which found that a bank merger was considered a merger even though the banks intended to divest themselves of a number of branch offices.

Alternatively, Judge Ebel argued, it is irrelevant whether a forced divestiture is a merger, because state laws that prohibit branching do not require the post-acquisition bank to disgorge customer deposits or assets; instead, "the law simply prohibits it from operating the former savings and loan branch offices as bank offices."
The dissent also discussed the FIRREA branching provision. Judge Ebel felt that section 1823(k)(4) is the most relevant portion of FIRREA because it is the only section that expressly deals with branch banking. He found that the section provided independent authority to maintain branches in only two situations:

The first sentence provides that if the savings and loan is the survivor in a merger or it survives as a separate entity in a consolidation, transfer or acquisition, it may retain and operate its existing branches even though it may be owned by a bank holding company. The second sentence provides that if, after a merger, consolidation, transfer or acquisition, the savings and loan continues to exist as a separate entity, it may open new branches to the same extent as a savings and loan that is not affiliated with a bank holding company.

Therefore, because the section expressly gives authority to operate branches when they are part of an acquired savings and loan, then by negative implication, Congress did not intend for banks to operate branches if such activity would violate the McFadden Act.

Judge Edel noted that his interpretation was consistent with the long established policies of the McFadden Act and the legislative history of FIRREA; he would have held the override regulation invalid.

V. Conclusions

This author agrees with the conclusion of Judge Heaney that Congress should address this question clearly and unambiguously. Two important policy decisions need to be made in this area regarding the integrity of the dual banking system and the cost to taxpayers of the thrift bailout. First, if the RTC is to resolve cases of failed thrifts at the least cost to taxpayers, then the override regulation should be upheld because banks and bank holding companies will pay a premium to acquire an already existing branch banking network. However, the downside of enforcing the override regulation will be that large banks will take over the market share of smaller, locally owned state banks because the smaller banks may not be able to purchase entire branching networks. This may have the impact of forcing these smaller institutions out of business.

212. Id. at 953. See also supra note 141 (for text of branching provision).
213. Id. at 953-54.
214. Id. at 954.
215. Id. at 955.
Second, Congress has statutorily dictated banking law for most of the century. It has established an intricate set of laws which allow state chartered banks and national banks to coexist. At the time of publication of this Comment, nine federal judges have interpreted the emergency acquisition provisions. Five judges agree that the RTC's override regulation should be upheld, while four judges would reject the regulation. In addition, the two courts of appeals which have considered the issue have rendered split decisions. The majority of both circuits have upheld the regulation, but for different reasons. Therefore, Congress, not the courts or the RTC, should be setting policy and deciding whether banks and bank holding companies should be able to encroach upon markets traditionally held by state chartered banks at the expense of the dual banking system. Legislative guidance is needed in this important area.