Exhibit H-15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 09-22384-Civ-Jordan/McAlliley

BANK OF AMERICA, NATIONAL ASSOCIATION,	)
Plaintiff,	)
vs.	)
FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Colonial Bank, and JOHN DOES 1-10	)
Defendants.	)

Bank of America's Supplemental
Memorandum In Support of Motion for Preliminary Injunction

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TABLE OF CONTENTS

INTRODUCTION

Plaintiff, Bank of America, National Association ("Bank of America"), in its capacity as Collateral Agent, Indenture Trustee, and Custodian for the secured parties of Ocala Funding LLC ("Ocala"), files this supplemental memorandum of law in support of its motion for preliminary injunction to address three questions posed by the Court at the hearing held on August 28, 2009: (1) What are "assets" of the FDIC receivership and whether the Bank of America loan proceeds and loan documents (collectively, the "Loans") subject to the Bailee Letters are assets of the receivership estate; (2) Who gets to decide if Bank of America's bailed Loans are assets of the receivership; and (3) When can a court make that determination?

As the Court has observed, Bank of America has established all of the facts in support of its motion for preliminary injunction through competent evidence, including witness declarations and supporting exhibits, and the FDIC has not challenged any of that evidence. As the Court found in the TRO, Colonial maintained "only a temporary custodial interest" in the Loans; the Loans did "not belong to it in the first place." DE 6 at 3. The Court made those findings prior to the appointment of the FDIC as receiver. When the FDIC was appointed receiver, therefore, the Loans – which were not the property of Colonial – did not become an asset of the FDIC as receiver.

The Court has explicitly offered the FDIC an opportunity to continue the preliminary injunction hearing to allow it to present evidence to rebut the findings made in the TRO, but the FDIC has declined that opportunity. Accordingly, the evidence submitted in support of Bank of America's motion for preliminary injunction (DE 2) is undisputed, and the Court's findings in the temporary restraining order (DE 6) cannot be challenged.

STATUTORY AUTHORITY

The FDIC's powers in this case begin and end with the language set forth in the Federal Deposit Insurance Act ("FDIA"), as amended by the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA), codified at Title 12 of the United States Code, Section 1821.

FDIC's Statutory Powers and Functions as Receiver

Section 1821(d) sets forth the powers and duties of the FDIC as conservator or receiver and states that states that the FDIC shall "as conservator or receiver, and by operation of law" succeed to "all rights, title, powers, and privileges of the insured depository institution [in this case, Colonial] . . . *with respect to the institution and the assets of the institution*." 12 U.S.C. § 1821(d)(2)(A) (emphasis added). The statute further provides that in operating the failed institution, the FDIC may:

> (i) take over the assets of and operate the insured depository institution;
>
> ***
>
> (iv) preserve and conserve the assets and property of such institution

12 U.S.C. § 1821(d) (2)(B).

The statute further provides that the FDIC may:

> Place the insured depository institution in liquidation and proceed to realize *<u>upon the assets</u>* of the institution, having due regard to the conditions of credit in the locality.

12 U.S.C. § 1821(d)(2)(E)(3). Alternatively, the FDIC may merge the failed financial institution with another and "transfer any *asset* or liability *of the institution in default*." 12 U.S.C. § 1821(d) (G)(i)(II) (emphasis added).

<u>Limitation on Court's Power to Act</u>

The FDIC has cited three separate statutory provisions that it claims limit the Court's exercise of jurisdiction in this case.

First, it claimed that 12 U.S.C. § 1821(j) prohibited this Court from enjoining the FDIC. Section 1821(j) provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. 1821(j). However, "the bar imposed by § 1821(j) does not extend to situations in which the FDIC as receiver asserts authority beyond that granted to it as a receiver." *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). "Section 1821(j) 'shields only 'the exercise of powers of functions' Congress gave to the FDIC; the provision does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.'" *Id.* (citation omitted); *see also Cummings Props. Mgmt. v. FDIC*, 786 F. Supp. 144 (D. Mass. 1992), *vacated as moot upon settlement,* Case No. 92-1504, 1992 WL 366909 (1st Cir. Sept. 1, 1992) (holding that court had jurisdiction to enjoin FDIC from removing automatic teller machine (ATM) that was property of the lessor under the bank's

lease, *not* an asset of the receivership that passed to the FDIC).[1]

The FDIC also has asserted that the Court is barred from exercising jurisdiction at this stage, because Bank of America has not exhausted the administrative claims process. The only potentially relevant limitation on judicial review, section 1821(d)(13)(D), provides as follows:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over (i) any claim or action for payment from or any action seeking a determination of rights with respect to, <u>the assets of any depository institution for which the Corporation has been appointed receiver…</u>

12 U.S.C. § 1821(d)(13)(D) (emphasis added). The plain language of this provision indicates that the limitation only affects this Court's authority to review an action of the FDIC with respect to the *assets* of a failed institution.

At the August 31 hearing, the FDIC for the first time argued that 12 U.S.C. § 1821(d)(13)(C) prohibits the Court from exercising jurisdiction. That subsection provides that "No attachment or execution may issue by any court upon <u>assets</u> in the possession of the receiver." (emphasis added). On its face, this limitation only applies to a final judgment attaching or executing on assets. Thus, even if applicable (which it is not), it would not prevent the Court from entering a preliminary injunction. As importantly, the provision only applies to attachments upon "assets" of the failed institution. The Loans are not assets of Colonial and could not be used to satisfy a creditor's claim. Thus, this provision is inapplicable.

The FDIC has admitted throughout its papers that its powers as receiver apply only to the assets of the institution that existed when the FDIC took over as receiver. Motion to Dissolve, DE 20, at 3-4, 5; Reply at 2. At the August 31 hearing, the FDIC once again admitted that its powers as receiver only apply to the "assets" of Colonial. It made no attempt to demonstrate – legally or factually – that the bailed Loans were assets of Colonial or of the receivership.

<u>ANSWERS TO THE COURT'S THREE QUESTIONS</u>

I.

<u>What is an "Asset" of the Receivership?</u>

As both parties agreed at the August 31 hearing, FDIA does not provide a definition of

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[1] The Court is "free to give statements in a vacated opinion persuasive value if [it] think[s] they deserve it," particularly given the paucity of case law on the specific issue at bar. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009).

"assets" as that term is used specifically in § 1821(d)(13)(D)(i). When interpreting a term that is not defined by a statute, the Court must "look to its ordinary, everyday meaning." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008); *see also Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.* 51 F.3d 235, 237 (11th Cir. 1995) ("When interpreting the text, we give undefined terms their plain, ordinary, and most natural meaning."). As discussed further below, courts have taken this approach to define the term "asset" as used in FDIA.

A. FDIC's Admissions

The ordinary meaning of "asset" can be found in the FDIC's own words. In an FDIC publication entitled *FDIC Consumer News Summer 2008: "Get a Good Night's Sleep; Rest Assured, Your Money is Safe in an FDIC Insured Accounts,"* the FDIC states:

> Securities and other assets held in trust, fiduciary or custodial accounts at a bank are not assets of the failed bank and are not subject to claims by the failed bank's creditors. These assets will either be returned to you or arrangements will be made for another institution to become the new custodian or trustee of your accounts.

http://www.fdic.gov/CONSUMERS/consumer/news/cnsum08/index.html (Exhibit A).

In Advisory Opinion FDIC 87-7, dated Aug. 17, 1987, the FDIC opined that securities held by a bank in safekeeping are not aggregated with the bank's assets and must be returned to the customer. *See* Exhibit B.

In Advisory Opinion FDIC-88-14, dated February 4, 1988, the FDIC again spoke to what is and is not an asset of the failed institution, and thus, of the FDIC receivership estate. In that pronouncement the FDIC, referring to Treasury Bills, explained that "A payment by a client to a bank for the purchase of securities does not create a deposit relationship. The relationship which does result, *is in the nature of a bailment* rather than a debtor-creditor relationship. The Treasury bills remain the property of the client." The FDIC further conceded that "The receiver stands in the place of the bank which he represents, and has only such rights as it had . . . . In other words, he takes only such title to the assets as the bank itself had, subject to all equities which existed against the assets in the hands of the bank." *See* Exhibit C (emphasis added).

In a letter dated July 27, 2001 from the Comptroller of the Currency to the president of a national bank, the Comptroller's office recognized that when property is held in safekeeping or temporary custody, as was the case here with respect to Bank of America's Loans, "the bank is a bailee … and merely assumes … custody … without authority to use it." *See* Exhibit D at 7.

Likewise, the Comptroller's Handbook has a section dealing with Consigned Items and other customer services that include safe deposit boxes, safekeeping for customer's valuables, custody accounts for customer's property and the like, and clearly indicates that such property does "not affect the bank's general ledger" and is "segregated from the bank-owned assets." *See* Exhibit E at 1, 8.

Also, in an American Banker's Association publication entitled "Are My Trusts and Custody Accounts Safe" dated June 30, 2009, the American Bankers Association states that assets held in custodial and bailee accounts do not become the assets of the bank and are segregated from the bank's assets. These custodial and bailee accounts are not subject to claims of creditors. The bank's role is merely to hold these custodial and bailee assets for safekeeping:

> As a result, a failure of a bank will have no adverse affect on trust, fiduciary or custodial accounts: they remain the property of the account's owner(s).

See Exhibit F at 1.

The Bank of America Bailee Letters in this matter require Colonial to hold the Loans "in trust and to be the custodian, agent, and bailee" for the secured parties. Thus, Colonial had a duty to retain the bailed Loans only in a temporary custodial capacity without right of ownership. All of the foregoing authorities, including the FDIC's own documents, establish that the bailed Loans were not assets of Colonial Bank and therefore did not become assets of the receivership.

To the extent the FDIC has taken the position that Bank of America's bailed Loans were part of Colonial's assets, this position is contrary to the manner in which banks across the nation actually report their financial condition. The Federal Financial Institutions Examination Council (FFIEC), which prescribes uniform principles and report forms for the FDIC and other federal agencies,[2] mandates that all banks report their financial condition on a quarterly and yearly basis in a report known as the "Call Report." The purpose of these reports is for the agencies to be able to monitor the financial health of banks. With respect to the custodial or bailee relationship that Bank of America has with Colonial, the Call Report instructions provide:

> **Custody Account**: A custody account is one in which securities or other assets are held by a bank on behalf of a customer under a safekeeping arrangement. Assets held in such capacity are <u>not</u> to be reported in the balance sheet of the reporting bank nor are such accounts to be reflected as a liability.

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2 The FFIEC "is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by" several government agencies, including the FDIC. *See* http://www.ffiec.gov/.

See Exhibit G at. 9.

These instructions make it clear that funds maintained in a custodial or safekeeping arrangement are not *assets* of the bank, in order to permit government regulators to monitor whether the bank is complying with minimum funding requirements under banking laws. Thus, to the extent the FDIC takes the position that assets held in bailment or safekeeping are assets of the financial institution, it would be contrary to the government's own reporting instructions to banks, and the FDIC has not demonstrated that the Loans were reported as assets on Colonial's balance sheet.

B. Case Law Defining "Assets" Under FDIA

In addition to these specific admissions by the FDIC and related governmental agencies, the Bank of America bailed Loans do not qualify as "assets" under case law interpreting FDIA. In the absence of a specific definition, courts have referred to the ordinary meaning of the term "assets" in common usage and Black's Law Dictionary as:

> Property of all kinds, real and personal, tangible and intangible . . . The entire property of a person, association, corporation or estate ***that is applicable or subject to the payment of his or her or its debts***.

In re Washington Bancorporation, Civil Action No. 95-1340, 1996 WL 148533, at *4 (D.D.C. Mar. 19, 1996) (citing Black's Law Dictionary 117 6th Ed. 1990) (holding that claims by holders of commercial paper were not assets of defunct bank and therefore were not assets of receivership). Bank of America's bailed Loans do not meet this definition because, as this Court found in the TRO, the Loans did not belong to Colonial; thus, Colonial could not use them to pay its debts.

Some courts have employed a three-prong test in determining whether property is an "asset" of an estate: (1) does the property embody a future benefit that involves a capacity … to contribute directly or indirectly to future net cash flows; (2) can a particular entity obtain the benefit and control others' access to it; and (3) has the transaction or other event giving rise to the entity's right to or control of the benefit already occurred. *In re Scott*, 157 B.R. 297, 310 (Bankr. W.D. Tex. 1993), *opinion withdrawn as term of global settlement*, 162 B.R. 1004 (Bankr. W.D. Tex. 1994) (holding that collateral securing loan was not "asset" of lender). Bank of America's bailed Loans do not fit within the three-prong test for "assets," either.

First, Bank of America's bailed assets were being held by Colonial in its capacity as a custodian and bailee, solely for the specific purpose of facilitating Freddie Mac's purchase of the Loans and with no right of ownership or retention. Moreover, Colonial's right to custody of the Bank of America bailed Loans was revoked and terminated before Colonial fell into receivership. Thus, Colonial enjoyed no probable future benefit to the bailed Loans and the bailed Loans could not contribute to Colonial's future net cash flows. Second, under the Bailee Letter, Bank of America set the terms under which Colonial was to hold the Bailed assets in temporary custody solely "on the terms described in the letter." No entity, other than Bank of America, as trustee, could under the Bailee Letter obtain the benefit and control of the Loans. Third, no event has occurred that gave Colonial a right to control or a benefit over the Loans. To the contrary, Colonial's temporary custody was revoked, and Colonial no longer had any right to even possess the Loans at the time it fell into receivership. Thus, the Loans were not "assets" of Colonial and are not assets of the FDIC as receiver.

C. <u>Case Law Defining "Assets" in Similar Contexts</u>

Like the court in *Merrill Lynch Mortgage Capital Corp. v. FDIC*, 293 F. Supp. 2d 98, 103 (D.D.C. 2003) ("If a bank fails, special deposits do not become part of the receivership estate"), courts throughout the country that have reviewed the issue of what is property of an estate have held consistently that property which did not belong to the predecessor of the estate to begin with – such as property held in custody, trust, or as bailee – does not qualify as an asset or part of the estate. *See e.g., In re Haase* 224 B.R. 673, 678 (C.D. Ill. 1998) ("there is no dispute that Interstate entrusted the cattle to the debtor for the special purpose of fattening them for market. The substance of the agreement between the debtor and interstate was a bailment agreement. It follows that Interstate owned the cattle and that the cattle were not property of the debtor's estate"); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) ("it has become well-settled in bankruptcy practice that debtors do not own an equitable interest in property held in trust for another, and consequently, such funds do not amount to 'property of the estate' for bankruptcy purposes"); *T & B Scottdale Contractors, Inc. v. United States*, 866 F.2d 1372 (11th Cir. 1989) (funds held by debtor in joint account with another held not to be part of a debtor's bankruptcy estate because debtor did not own the funds, had obtained funds a specific purpose, and had no contractual right to exercise control over account where funds were held); *Bank of W. Orange v. Assocs. Discount Corp.* 197 So. 2d 858 (Fla. 4th DCA 1967); *Town of La Fayette v. Williams*, 168 So. 668, 672 (Ala. 1936) ("Where the depositor, at the time the deposit is made, enters into an agreement with the bank, or the bank receives and accepts the deposit with instructions from the depositor that the money so deposited is for a specific purpose . . . Title to the deposit remains in the depositor. Under such circumstances, therefore, the relation of debtor and creditor does not exist"); *Clow Gasteam Heating Co. v. Hixson*, 67 S.W.2d 619, 621 (Tex. App. 1934) ("A receiver has no right to property which does not belong to the individual or corporation over whose estate he was appointed, at the time of the appointment; the receiver can take no right or title which was extinguished before his appointment . . . . and he can acquire no other, greater, or better interest than the debtor had in the property"); *Van Wagoner v. Buckley*, 133 N.Y.S. 599, 601 (N.Y. App. Div. 1912) (finding that funds, which had been held by the company solely as bailee, did not pass to the receiver of the company because the funds were never the property of the company in the first instance).

In *Andrew v. Citizens State Bank*, 212 N.W. 745 (Iowa 1927), the court held with respect to bonds held in a bailee capacity by the bank when it was taken over by a receiver that "[t]he appointment of a receiver did not change the (bailment) relation between the bank and these claimants," *id.* at 746, because it would be unjust to increase the assets of the bank for creditors to submit claims, when the receiver acquired no title to the bailed assets. "No principle of equity or common fairness will permit the receiver to deprive these claimants . . . of their property." *Id.* at 746. Similarly, in *Moran v Judson*, 96 F 2d 551, 554 (D.C. Cir. 1938), the court held that the bailor of notes held by the bank did not become the property of the bank and she had a right to recover the notes because the receiver of the failed bank had no right to them.

In this case, the FDIC was appointed by the state of Alabama Banking Department. The relevant Alabama law makes it clear that the succession of title to a receivership is only to the assets, business and property of the failed bank. Ala. Code § 5-8A-25. Moreover, as stated earlier, FDIA provides that the FDIC succeeds to all "rights" and "titles" of the failed bank – no more and no less. 12 USC § 1821(d)(2)(A)(i).

D. Accounting Treatment of Bailed or Custodial Assets

General accounting principles further demonstrate that Bank of America's bailed Loans are not an asset of Colonial or the receivership. Banks, when reporting their financial condition, must do so by following Generally Accepted Accounting Principles (GAAP). *See* Exhibit H. Under GAAP, a financial asset includes the "right to future cash flows" and is "derived from the contractual provisions that underlie the asset." *See id*. Clearly, Bank of America's bailed Loans are not Colonial's assets under GAAP because Colonial had no right to use them as "future cash flows", nor did Colonial have a contractual right to the bailed Loans. "To be a financial asset, an asset must arise from a contractual agreement between two or more parties, not by an imposition of an obligation by one party on another". *See id*. Thus, under GAAP, the bailed assets cannot belong to Colonial Bank.

E. <u>Tax Treatment of Bailed Assets</u>

Tax law also supports Bank of America's argument and rejects the notion that the bailed property was an asset of Colonial or the receivership estate. For federal income tax purposes, the tax owner of an asset is the party who "enjoy[s] all benefits and bears all burdens" incident to the asset. *Frank Lyon Co. v. Commissioner*, 435 U.S. 561, 571 (1978). Agents and custodians who hold property on behalf of their principals are not treated as the owners of such property for tax purposes. *See Brittingham v. Commissioner*, 57 T.C. 91 (1971).

F. <u>Safe Deposit Boxes</u>

The Court presented the FDIC with a number of analogies regarding what could and could not be an asset of a failed financial institution, asking whether the Court could enjoin the FDIC if it refused to allow a customer to retrieve her car from the parking lot when the bank was placed into receivership or family jewelry placed in the bank's safe deposit box. As to every situation the Court presented, the FDIC stated that such assets were the assets of the FDIC receivership and it was solely up to the FDIC to decide what to do with them.

However, the position of the FDIC at oral argument is inconsistent with the FDIC's own public pronouncements. The FDIC itself has publicly conceded that the property in a safe deposit box is not the property of an FDIC Receivership. In a document on the FDIC's web site entitled: Failed Bank Information - Questions and Answer Guide for <u>Colonial Bank</u>, as to the issue of Safety Deposit Boxes it states:

> Safe Deposit boxes: How can I claim the contents of my safe deposit box? Answer: It is business as usual. You can go to your local branch and access your safe deposit box; no action on your part is required because of this transaction.

See Exhibit I.

Similar pronouncements have been made by the FDIC that the contents of a safe deposit box do not become assets of the receivership and can be obtained at any time in other general FDIC notices about failed banks. *See* Exhibit J.

The FDIC's own pronouncements are consistent with case law that the property in a safe deposit box is not the property of the bank. *See Camerer v. Cal. Savings & Comm'l Bank of San Diego*, 4 Cal. 2d 159 (Cal. 1935); *Seitz v. Lemay Bank & Trust Co.*, 959 S. W. 2d 458 (Mo. 1998). In fact, even when a safe deposit box holder gave the president of the bank access to the box and the president used the bonds in the safe deposit box to inflate the assets of the bank, the receiver of the ultimately failed bank was ordered to turn the bonds over to the safe deposit box holder, even though they were then listed as assets of the bank. *See Camere*, 4 Cal. 2d at 170-71.

II.

The Court has Jurisdiction to Decide
What Constitutes an Asset of the Receivership Estate

The threshold issue in every action is whether the court has jurisdiction to adjudicate the claims before it. It is "familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. Mine Workers*, 330 U.S. 258, 291 (1947)). A court's determination of its own jurisdiction is one of the most basic and fundamental functions of an Article III court. *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 580 (1989). The Court must determine whether it has jurisdiction at the outset, rather than allowing an agency to determine this issue in the first instance. *See Whitaker v. American Airlines, Inc.*, 285 F.3d 940, 946 (11th Cir. 2002) (rejecting union's argument that board of adjustment should be allowed to determine its own jurisdiction initially).

With respect to the FDIC's argument that the Court lacks jurisdiction because Bank of America has not exhausted administrative remedies, a court applying FDIA has explained:

> [T]he proper analysis for courts to use when confronted with a statute purporting to restrict their jurisdiction over matters submitted for an initial administrative determination, is to first ascertain whether Congress intended to limit jurisdiction over the matter *sub judice*, and then to determine whether the alternative remedies are adequate. If the court concludes that either inquiry is in the negative, then it should decline to withhold the exercise of its jurisdiction.

All Season's Kitchen, Inc. v. FDIC, 145 B.R. 391, 394 (Bankr. D. Vt. 1992).

The Court in this case can, and should, determine whether the bailed Loans are assets of the receivership estate in order to decide whether it has jurisdiction to adjudicate this matter. If the Court finds (as it found in the TRO) that the Loans did not belong to Colonial and therefore are not part of the receivership estate, it can exercise jurisdiction to enjoin the FDIC from taking action which would destroy, dissipate or transfer Bank of America's interests, as such would clearly be outside the FDIC's statutory power and authority as a receiver of Colonial's assets.

Section 1821(d)(13)(D) only limits judicial review of "any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver." Thus, the Court first must determine whether the Loans were an "asset" of the receivership estate and, if not, whether the jurisdictional bar even applies when the issue does not involve an "asset" of the receivership.

Since the bailed loan documents and proceeds clearly are not the assets of Colonial, those funds could never have been the assets of the Colonial Receivership estate. Thus, the language of the judicial bar does not apply. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.* 28 F.3d 376, 384 (3d Cir. 1994) ("If the insurance policies are not assets of the bank, then National Union and Gulf's declaratory judgment action for and affirmative defenses of rescission of those insurance policies would not be barred under § 1821(d)(13)(D)(i)"); *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (court has jurisdiction to enjoin FDIC when acting outside scope of its duties as receiver); *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 384-85 (6th Cir. 2005) (finding in a securities receivership action that court could decide whether life policy proceeds were rightly the property of a receivership estate and that the receiver cannot take and dispose of proceeds that do not belong to the receivership estate).

In *Cummings Properties Management v. FDIC*, the FDIC argued that the court lacked jurisdiction to enjoin it from removing an ATM from a bank in receivership. 786 F. Supp. 144 (D. Mass. 1992), *vacated as moot upon settlement*, Case No. 92-1504, 1992 WL 366909 (1st Cir. Sept. 1, 1992). The court concluded it had jurisdiction to determine whether the ATM belonged to the receivership estate and belonged to the lessor rather than the bank under the bank's lease agreement. Relying on some of the same cases it cites here, the FDIC argued that 12 U.S.C. § 1821(j) barred the court "from making any attempt to enjoin the exercise of the FDIC's receivership powers." 786 F. Supp. at 145. The court aptly observed that the FDIC's position "begs the question of whether FDIC's statutorily defined powers include those which the FDIC wishes to exercise in any particular case." *Id.* The court concluded that the Supreme Court's decision interpreting a similar provision in a prior law, held that the judicial bar provision: "prevents courts from interfering with the functions of the FSLIC as receiver, but not from *adjudicating* whether a particular act is within the powers of the FSLIC as receiver." *Id.* at 145 (citing *Coit*, 109 S. Ct. at 1369-70). The court concluded that section 1821(j) "does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts." *Id.* at 146. The court granted a preliminary injunction. The FDIC appealed, but then settled the case, apparently to avoid the existence of binding precedent against it. Given the dearth of case law in this area, which the Court has recognized, the Court should rely on *Cummings* despite that the fact that it became moot on appeal. *See Friends of Everglades*, 570 F.3d at 1218 (The Court is "free to give statements in a vacated opinion persuasive value if [it] think[s] they deserve it").

The case of *In Re Scott*, 157 B. R. 297 (Bankr. W. D. Tx 1993), *opinion withdrawn as term of global settlement*, 162 B. R. 1004 (1994), is another case in which the FDIC lost on a jurisdictional argument, then settled to avoid setting precedent. In *Scott*, the plaintiff pledged certain real estate for a loan that he defaulted on. Some 18 months later, it was determined that part of the property that the bank took as collateral was not covered by the collateral documents. Scott sued the bank to recover the tract of land not covered by the collateral documents. Six months later, the financial institution which ended up with his collateral failed and the RTC took over as receiver. Scott went into bankruptcy and the debtor in possession took over the law suit. Despite recognizing the mistake in the documents, the RTC refused to turn over the property and instead argued that the federal court had no jurisdiction to adjudicate the matter on the same premise that the FDIC relies on here. The court found that the proper analysis was for the court to first determine if it had jurisdiction. *Id*. at 310.

The court then held, as this Court should, that: (1) an action to recover property wrongfully in the possession of the RTC is not a "claim" under FDIA; (2) "claims" under FDIA only apply to creditors and not to situations where the failed institution exercises control over property it had no right to; and (3) FDIA's jurisdictional bar did not apply since the property sought was not an "asset" of the failed institution. *Id.* at 313. The court also held that the claims process was not properly invoked to determine whether the property in question is an asset within the meaning of the statute, since the statute bars a court's jurisdiction *only* over the *assets* of a failed bank. *Id.* at 313. Because the debtor-in-possession was not making a "claim" regarding an "asset" of the bank, administrative exhaustion was not required, and the jurisdictional bar did not prevent the court from proceeding. *Id.*

As in *Cummings* and *Scott*, this Court has the authority to interpret the bailee letters as a matter of law, which it has already done; determine whether Colonial had an ownership interest in Bank of America's Loans, which the Court has already determined; and, if the assets did not belong to the failed institution, then they do not belong to the receivership. This is consistent with the precedent allowing courts to act, when a trustee or receiver is acting outside its authority when it takes or retains property that is not property of the receivership estate. *See Liberte Capital Group*, 421 F.3d at 385. In such a case, the Court is not enjoining the FDIC in its role as receiver, since the property in question is not part of the receivership estate. Moreover, the Court is not acting contrary to the statutory bar since that only applies to receivership estate's assets.

III.

The Court's Determination Should be Made Now

As to the question of timing, the Court's threshold determination as to whether it has jurisdiction should be made at this point rather than at the conclusion of the claims process. Under the claims process set forth in 12 USC § 1821, it is clear that only creditors of the failed institution must participate in the claims process. *See e.g.* 12 U.S.C. §§ 1821(d)(3)-(6) (requiring that (a) the receiver post notice of the depository institution's failure in a newspaper and mail notices to *creditors*; (b) *creditors* file claims within approximately ninety days of the notice; (c) the receiver make a determination with regard to the claim within 180 days of the date of filing (unless there is an extension); and (c) *creditors* seek administrative review or file suit in district court within sixty days of the receiver's denial of their claims or the receiver's failure to make a determination as required). 12 U.S.C. § 1821(d)(3)-(6).[3]

By definition, a custodial or bailee relationship, according to the FDIC's pronouncements and the overwhelming case law, a bailed asset does not create a debtor-creditor relationship. Bank of America is simply not a creditor to Colonial and therefore the claims process does not apply to it. The Court's determination of whether Bank of America's bailed agreement with Colonial creates a "claim" as an "asset" of the receivership estate must be made now, at the outset of this litigation, rather than after the Receiver's administrative claims process has ended. The object of the claims process is to assess all of the creditors' claims against the remaining

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[3] Based on the plain language of section 1821(d), only creditors are required to exhaust the claims process. *See All Season's*, 145 B.R. at 397; *In re Parker N. Am. Corp.*, 24 F.3d 1145, 1152 (9th Cir. 1994) ("FDIA applies only to claims of creditors against the RTC"); *In re Continental Fin. Resources, Inc.*, 154 B.R. 385, 388 (D. Mass. 1993) ("The language of FDIA repeatedly refers to the FDIC's creditors and yet omits any reference to its debtors, indicating that FDIA was intended to apply only to creditors' claims").

assets of the bank and then make a distribution of the remaining assets to the creditors. Just like the holder of a safe deposit box is not a claimant because the contents of the safe deposit box were merely held for safekeeping – so too, the bailed assets of Bank of America are not subject to this claims process. This process is not applicable to Bank of America.

Courts have routinely rejected the FDIC's contention that claims against it as a receiver must go through the claims process upon finding that the plaintiff's claims do not pertain to "assets" of the receivership, and accordingly have allowed the plaintiffs to pursue their causes of action in federal court. *See, e.g., In re Scott*, 157 B. R. at 313-16 (discussed above); *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 868 F. Supp. 135, 139-40 (D.S.C. 1994) (denying RTC's motion to dismiss for lack of subject matter jurisdiction, finding that claim to funds deposited by suspended real estate attorney in failed bank, based on a converted attorney's client trust account, was not claim by creditor of bank and was not subject to FDIA administrative claims procedure); *FDIC v. Source One Mortg. Servs. Corp.*, 844 F. Supp. 40, 44 (D. Mass. 1994) (denying FDIC's motion for summary judgment; "This court disagrees with the FDIC's position, and concludes that because Source One did not have a 'claim' against the FDIC, compliance with the mandatory administrative claims process was unnecessary"). In all of these cases, it was the court, not the FDIC, that made the initial determination of whether a claim was subject to administrative exhaustion, and the determination was made *before* the administrative process had been initiated or completed.

In oral argument, the FDIC suggested that the Court lacks jurisdiction at this juncture because the FDIC needs to determine whether the Bank of America loan proceeds, which are not assets of the receivership, are commingled with funds that are assets of the receivership. The FDIC has presented no authority for this novel position, nor has it presented any evidence that Colonial violated its contractual obligation to hold the Loans in a segregated account by commingling the funds. When this Court entered the TRO on August 13, 2009, it did so in order to, among other things, prevent the commingling or dissipation of the Loans. DE 6 at 3.

The FDIC's argument fails for two additional reasons. First, commingling would not render the Loans assets of the estate. In *Camerer v. California Savings*, 4 Cal. 2d 159 (Cal. 1935), Camerer deposited certain bonds in a bank safe deposit box, to which he gave the bank president, Irwin, access. Irwin improperly used these bonds to inflate the assets of the bank. The California Supreme Court ordered the receiver (who took over for failed bank), to return

Camerer's bonds, holding that, despite the fact that the Camerer's bonds were comingled with the assets of the bank, the bonds were not the assets or property of the bank or the receiver, and should therefore be returned to Camerer. *Id.*

Similarly, in *People v. City Bank of Rochester*, 96 N.Y. 32 (N.Y. 1884), the court held that commingling of funds that were to be held in a separate account did not render such funds assets of the failed bank's receivership estate: "If a man mixes trust funds with his own, the whole will be treated as the trust property. . . . The funds having been committed to the bank in trust for a specific purpose, it had no right so long as it remained in possession of its assets, whether solvent or insolvent, to devote it to the payment of its creditors. . . . The receiver takes all the property and funds which he finds in possession of the bank, subject to the same equities and impressed with the same trusts under which they were held by it." *Id.* at 37.

Following the court's holding in *City Bank of Rochester*, the court in *Merrill Lynch*, 293 similarly recognized that commingling of funds cannot change the nature of title to, or ownership of the funds. 293 F. Supp. 2d at 109-10 (rejecting the proposition that the bank's internal accounting or categorization of deposits changes the nature of the deposit, and instead finding that "[t]he controlling factor is what a bank was contractually obligated to do with funds in an account"); *see also, e.g.*, *Bergstresser v. Lodewick*, 59 N.Y.S. 630, 631 (N.Y. App. Div. 1899) (following *City Bank of Rochester* and finding that where the bank was only a bailee, the funds should be returned to the plaintiff, despite the fact that they were considered by the failed bank to be its assets). The Eighth Circuit also recognized this proposition in *National Corp. for Housing Partnership v. Liberty State Bank*, 836 F.2d 433 (8th Cir. 1988), holding that commingling of security deposits with the landlord's operating funds did not render them assets of the landlord, and therefore they remained property of the bailor, redeemable by the bailor. *Id.* at 436-38.

Here, like in the above-cited cases, even if the Loans were comingled with the funds of Colonial (a point on which the FDIC has provided no evidence), they cannot be considered assets of Colonial, or of the FDIC. The bailment letters made clear that Colonial's only rights with respect to the Loans was as a bailee, to hold the Loans in a segregated account. Accordingly, even if Colonial or the FDIC has comingled these Loans, it has done so without authority, and these actions do not render the Loans assets of the estate. Moreover, Colonial's status as bailee had been terminated prior to the FDIC becoming receiver of the estate. As such, Colonial had, and now the FDIC has, no rights whatsoever with respect to the Loans. The FDIC's argument, that commingling could somehow render the Loans "assets" of the estate, must be rejected by the Court.

In addition, contrary to the FDIC's unsupported assertions, Bank of America does not have the burden of demonstrating that Colonial actually held the funds in a segregated account, or to trace the funds through Colonial's accounts, because Bank of America has asserted a civil theft claim, and the Court entered the TRO on that basis. Florida's civil theft statute provides:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

See Fla. Stat. 812.014 (2009).

Case law interpreting the statute has held that a civil theft claim is proper even where there is a contractual dispute, if the dispute is over certain and identifiable accounts or properties. *See Escudero v. Hasbun*, 689 So. 2d 1144, 1147 (Fla. 3d DCA 1997). Bank of America has amply demonstrated that the property at issue is certain and identifiable, through: (1) the bailee letter with the attached schedule, appended to Bank of America's complaint as Schedule A and the declaration of Tammy Spriggs, which show the specifically identifiable notes, mortgages, and assignments of mortgages related to the mortgage loans and proceeds at issue; and (2) documentation from the FDIC and OCC that specifically required Colonial Bank to segregate the Loan proceeds and documents that belong to Bank of America. The FDIC has not provided any evidence to challenge Bank of America's proof.

In *Tambourine Comercio Internacional SA v. Solowsky*, 312 F. App'x 263, 273 (11th Cir. 2009), the Eleventh Circuit reversed the dismissal of a civil theft claim where the district court held plaintiff's evidence insufficient because it did not "trace the funds 'from the start of a paper trail to its deposit in the Defendant's account.'" Indeed, the appellate court held that:

> [T]o establish that funds are "specific and identifiable," a detailed tracing of the money is not required. . . . funds are "specific and identifiable" if the claimant can prove that the defendant had an obligation to deliver a fund of money and that fund of money actually exists to pay a specific debt owed.

Solowsky, 312 F. App'x at 273 (internal citations omitted). The appellate court further held that the fact that the defendant had commingled the plaintiff's identifiable funds with other investments, did not render those funds unidentifiable or unspecific. *Id.*[4] *See also Nooe v. State*, 892 So. 2d 1135, 1140 (Fla. 5th DCA 2005) (government was not required to directly trace money stolen from state agency into defendant's "own pockets" to prosecute him under Florida civil theft statute; it needed only show "that the defendant obtained the property . . . with the intent to either temporarily or permanently deprive that entity of its right to the property.").

As this Court has already found, Bank of America's property is specific and identifiable, and Colonial Bank had an obligation to deliver that property to Bank of America upon its request and upon termination of the bailment agreement. DE 6 at 1 ("As to each loan that was purchased, Colonial would hold the proceeds in a segregated and specifically identified trust account."). Colonial Bank was required to maintain Bank of America's property in a segregated account pursuant to the bailee letter ("Pending your purchase of each Mortgage Loan and until payment therefor is received . . . you shall hold possession . . . in trust and as custodian, agent, and bailee") and under FDIC and OCC pronouncements (*see* FDIC-87-7 "Securities held by a bank in safekeeping are not aggregated with the bank's assets"; Comptroller's Handbook at 8 "Items in Safekeeping . . . Items are segregated from bank-owned assets and maintained under dual control."). Regardless of whether Colonial did or did not segregate Bank of America's property, as it was required to do, Bank of America has shown a substantial likelihood of success on its claim for civil theft under the applicable law.

In addition, Bank of America will suffer irreparable injury if the Court allows the FDIC to exercise unbridled discretion to deal with the bailed Loans. The FDIC has evidenced a willingness to disburse funds from the Colonial receivership estate without first ensuring that the funds do not actually belong to Bank of America. At the hearing on its Motion to Dissolve, FDIC's counsel took the position that every claim against Colonial had to go through the claims process and that the FDIC was still in the process of determining what funds belong to whom. Yet, at the same time, the FDIC revealed in its Motion to Dissolve that it had disbursed funds –

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[4] Although this part of the *Solowsky* opinion is in the discussion regarding conversion, its reasoning applies equally to civil theft. *See Solowsky*, 312 F.App'x at 278 n.15 ("While this case addresses conversion, the same principle is applicable to a claim for civil theft."); *Bookworld Trade Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d. 1350, 1363 (difference between conversion and civil theft is requirement of "felonious intent" for civil theft); *Chisholm & Co. v. Bank of Jamaica*, No. 85-3656-CIV-DAVIS, 1989 WL 106524, at *4 (S.D. Fla. July 28, 1989) (same).

believed to be in the hundreds of millions of dollars – to Freddie Mac and Ginnie Mae. These preferential transfers, made without requiring the government to go through the claims process like everyone else, may have put at risk Bank of America's property, even while the Court's temporary restraining order was in effect, evidencing the need for a preliminary injunction to ensure the FDIC will take no further action to compromise Bank of America's property.

Moreover, granting preliminary injunctive relief will not, as the FDIC contends, result in a flood of claims against the assets of Colonial in federal court. Most claims against receiverships are filed by creditors of the failed institution and creditors must first exhaust the claims process before proceeding in federal court against the receivership estate. Bank of America's claim here is unique because (1) it involves a bailment relationship; (2) the bailed property has been identified; (3) the bailment agreement was terminated before Colonial collapsed, before the TRO was entered and before the FDIC took over as receiver; (4) Bank of America filed its claims prior to the FDIC receivership; (5) the court made findings and entered its TRO against Colonial prior to the receivership; (6) the claim involves property that do not implicate the assets of the receivership estate; and (7) Bank of America is not a creditor. These very specific and narrow circumstances will not cause a "run on the bank." Thus, Bank of America, unlike most plaintiffs, is in a unique position to seek and receive the injunctive relief at issue in this case.

THE AUTHORITIES CITED BY THE FDIC AT THE AUGUST 31 HEARING ARE INAPPOSITE

None of the authority cited by the FDIC at the August 31 hearing prevents the Court from exercising jurisdiction and entering a preliminary injunction to protect Bank of America's rights.

12 U.S.C. § 1821(d)(13)(C). This provision states only that "No attachment or execution may issue by any court upon assets in the possession of the receiver." There is no "execution or attachment" involved at this stage in the proceedings, only an injunction to protect assets that were only temporarily in the possession of Colonial under a bailment arrangement, where the bailment was terminated prior to the receivership and the assets were no longer rightfully in possession of the bailed assets. Moreover, this provision only pertains to the receivership ***assets***. By the FDIC's own pronouncements and case law cited above, this cannot be a reference to assets wrongfully held or that the FDIC does not rightfully possess.

Gross v. Bell Savings Bank, 974 F.2d 403 (3d Cir. 1992). In *Gross*, the Third Circuit held that the RTC was acting within its powers – and therefore could not be enjoined – when it withheld the plaintiffs' pension and profit sharing deposits, since the Purchase Agreement gave the bank the right to withhold distributions that were necessary to offset the Grosses' liabilities to the bank. The court repeatedly referred to the deposits as "assets" of the institution, *id.* at 404, 406 n. 7. The status of the deposits as assets apparently was not challenged. The FDIC at the hearing cited *Gross* for the proposition that it has the authority to dispose of "assets in its control," *id.* at 404, but the case does not address whether property held as bailment are assets of the institution or whether a court may enjoin a receiver from taking action with respect to property that are not the assets of the receivership.

Bender v Centrust Mortg. Corp., 51 F. 3d 1027 (11th Cir. 1995). This case involves the RTC's attempt to repudiate a contract between the failed institution and a former employee. The employee sought, among other things, to impose a constructive trust on a portion of the "proceeds from the sale of the assets" of the failed institution. *Id.* at 1029. The court held that a constructive trust cannot be imposed on the general assets of the bank under Florida law, and that "a constructive trust is inappropriate relief for the mere failure to pay a debt." *Id.* at 1030. The court concluded that the employee's claims would preclude the RTC from disposing of "receivership assets" and therefore were barred. *Id.* Here, by contrast, Bank of America is not seeking to recover a debt, nor is its claim directed at assets of the receivership.

RTC v Clarke, Civ. No. 90-7758, 1992 WL 245717 (E.D. Pa. Sept. 22, 1992). This case involved a claim for specific performance to compel the RTC to meet its obligations under a contract for the sale of land. *Id.* at *1. The court applied Third Circuit precedent to hold that because the property in question was an ***asset*** of the failed institution and thus an ***asset*** of the receivership, the court was barred from instructing the RTC how to handle the asset. Importantly, the court found that *Cummings*, though vacated, was properly decided, explaining that the *Cummings* court's holding that it could review "the threshold issue" of whether the action to be taken by the FDIC fell within its statutorily defined powers was "completely consistent with the approach taken [by the Third Circuit] in *Rosa*-as reaffirmed by *Gross, infra.*" *Id.* at *2 n.4. Likewise, here, this Court can determine whether the FDIC is acting within its powers.

CONCLUSION

For all of the foregoing reasons, the Court has jurisdiction and should enter a preliminary injunction to protect Bank of America's interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2009, the foregoing document was filed and served upon all counsel and parties of record via the Court's CM-ECF System.

/s/Patricia Acosta
Patricia Acosta

EXHIBIT A

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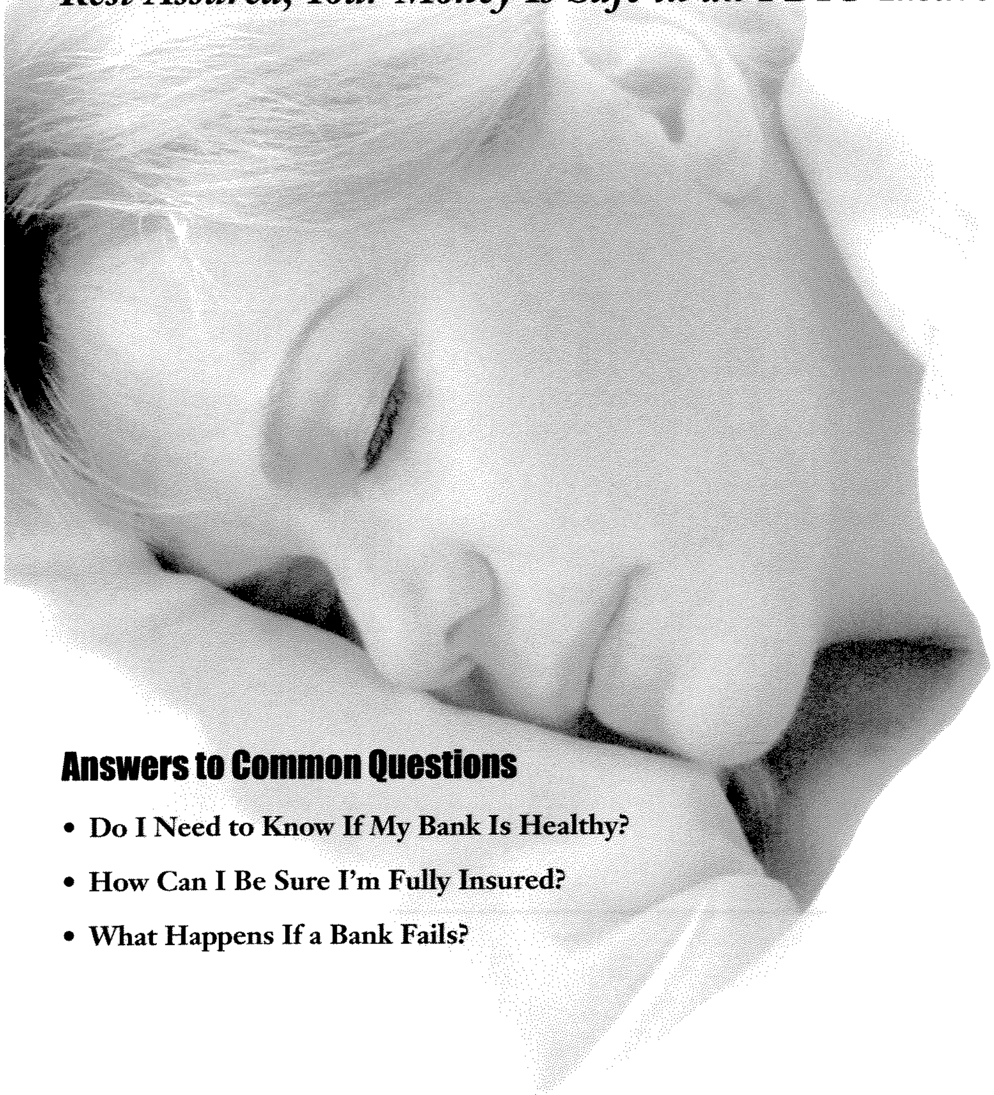
FDIC Consumer News

Summer 2008

Get a Good Night's Sleep

Rest Assured, Your Money Is Safe in an FDIC–Insured Account



Answers to Common Questions

- Do I Need to Know If My Bank Is Healthy?
- How Can I Be Sure I'm Fully Insured?
- What Happens If a Bank Fails?

Get a Good Night's Sleep

Rest Assured, Your Money Is Safe in an FDIC-Insured Account

Here are answers to common questions

Do I Need to Know If My Bank Is Healthy?

The FDIC's guarantee to protect insured deposits is ironclad, regardless of an institution's financial condition

If you've ever wondered about the health of your banking institution, here are answers to some common questions that can help give you peace of mind.

Should I be concerned about the health of an FDIC-insured bank or savings institution where I have deposits?

If your deposits are within the FDIC's insurance limits, as is the case for most bank customers, those deposits are safe regardless of the financial condition of your bank. Here's why.

First, the FDIC's guarantee — that we will protect against the loss of insured deposits if an FDIC-insured bank or savings associations fails — is ironclad. Since the creation of the FDIC 75 years ago, we have handled the failure of more than 2,200 insured depository institutions and "no one has ever lost so much as a penny of FDIC-insured deposits — not a single penny," said FDIC Chairman Sheila C. Bair.

Depositors at a failed bank also get quick access to their insured funds — usually by the next business day after the institution closes (see Page 4).

"The banking system in this country remains on solid footing through the guarantees provided by FDIC insurance," said Chairman Bair. "The overwhelming majority of banks in this country are safe and sound, and the chances that your own bank could fail are remote. However, if that does happen, the FDIC will be there — as always — to protect your insured deposits."

Added Kathleen Nagle, FDIC Associate Director for Consumer Protection, "The bottom line is that bank customers who keep all of their deposits within the federal insurance limits can rest assured with the knowledge that their deposits — principal and interest — are 100 percent safe."

What if some of my deposits are over the FDIC's insurance limits?

Deposits above the FDIC's coverage limits may be at risk if the bank fails. To make sure all your deposits are fully protected, consult with the FDIC or your bank and, if necessary, make adjustments to bring your accounts within the federal insurance limits. See the article the next page for more about your options.

"No one has ever lost so much as a penny of FDIC-insured deposits — not a single penny," said FDIC Chairman Sheila C. Bair.

For information about what depositors can expect if they have uninsured deposits at a failed bank, see Page 4.

If I want information about my bank's health, where can I go?

There are private companies that provide their own ratings and opinions of FDIC-insured banks and savings associations, often for a fee. The FDIC posts information about these private companies on our Web site at www.fdic.gov/bank/individual/bank/index.html as a public service and not as an endorsement or confirmation of the companies or their conclusions.

If you don't have access to the Internet at your home or office, your local library or a friend or relative with Internet access can print out the list for you.

FDIC Insurance: How Can I Be Sure I'm Fully Insured?

To be confident that your deposits at an insured institution are fully protected, it's important to understand how FDIC insurance works and how to get more help or information. Here's an overview.

What is covered by FDIC insurance?

If an insured bank or savings association fails, the FDIC protects deposit accounts — including checking and savings accounts, money market deposit accounts and certificates of deposit (CDs) — against any loss up to the federal limits. For a look at your rights as an FDIC-insured depositor, see Page 5.

What is *not* protected by FDIC insurance?

FDIC insurance doesn't protect against losses on non-deposit products — such as stocks, bonds, mutual funds, life insurance policies, annuities or municipal securities — even if they were offered by insured banks.

For more information about what is and is not covered by FDIC insurance, go to www.fdic.gov/deposit/investments/index.html or contact the FDIC (see Page 5).

How much coverage does the FDIC provide?

The basic insurance coverage is $100,000 per depositor per insured institution, but you may qualify for more than $100,000 in coverage at one insured bank if you own deposit accounts in different "ownership categories." For example, your deposits in:

- *Single accounts* (in one name only) are insured up to $100,000;
- *Joint accounts* (for two or more people) are protected to $100,000 per owner;
- *IRAs and certain other retirement accounts* are covered up to $250,000; and
- *Trust accounts* can be protected up to $100,000 for each named beneficiary provided that FDIC requirements are met. For example, if a mother has a $300,000 deposit account in connection with a living trust (a legal document for distributing her assets upon her death), and she is leaving all the deposits equally to her three children, that account would be insured in full up to $300,000 ($100,000 for each child).

Because of the separate insurance coverage for deposits in different categories, a family of four could have well over $1 million in deposit insurance coverage in one FDIC-insured institution. To learn how, see the FDIC publication "Your Insured Deposits," which is online at www.fdic.gov/deposit/deposits/insured.

How can I know that all my deposits are within the FDIC's insurance limits?

If you (or your family) have $100,000 or less in all of your deposit accounts at the same insured bank, you don't need to be concerned about the safety of your money. That's because the basic insurance limit is $100,000 per depositor per insured bank, plus an additional $250,000 per depositor for certain retirement accounts.

If you have questions about your insurance coverage, visit www.fdic.gov/deposit/deposits, which features our Electronic Deposit Insurance Estimator (EDIE), an interactive Web site that can be used to calculate your deposit insurance. You can also call FDIC deposit insurance specialists toll-free at 1-877-ASK-FDIC (1-877-275-3342).

What if some of my deposits are over the insurance limit? How can I get them fully insured?

In general, you have two options. One is to divide the funds among various ownership categories at the same institution. But this is an option you need to think about carefully because, for example, moving some money from a single account into a joint account with someone else means that you are giving that other person legal ownership of the money. Your second option is to move funds over the insurance limit to accounts at other insured institutions. This option works well for people who don't want, or don't qualify for, other ownership categories at their existing bank.

For more help or information, contact the FDIC (see Page 5) or your bank.

FDIC Advertising, Education Campaign Reminds Consumers About Deposit Insurance Limits

On June 16th, exactly 75 years after President Franklin Delano Roosevelt signed legislation creating the FDIC in 1933, Chairman Sheila C. Bair announced a public education campaign designed to raise consumer awareness about deposit insurance coverage limits.

"We at the FDIC are very proud to say that no depositor has ever lost a penny of insured funds at an FDIC-insured institution," she said. "As bank customers age and accumulate wealth in savings and retirement accounts, now more than ever, it's important for people to know their deposit insurance limits."

The education campaign includes national advertising in major newspapers and magazines, and a series of meetings around the country to bring FDIC officials and community leaders together to discuss deposit insurance coverage and other consumer protections, in areas such as mortgage lending.

For more information about the FDIC's 75 years of service and the public education campaign, visit www.fdic.gov/anniversary.

What Happens If a Bank Fails?

How the FDIC protects depositors, including providing quick access to insured funds

Here's important information about what the FDIC pays and when if an FDIC-insured bank or savings institution is closed by its federal or state government regulator.

How soon after a bank fails can I expect to have access to my insured money?

Federal law requires the FDIC to make payments of insured deposits — all the money determined by the FDIC to be within the federal insurance limits — "as soon as possible" after the failure of an insured institution. In most cases, the FDIC makes insured funds available to depositors quickly, *usually on the first business day after the bank is closed.*

"The FDIC works very hard before a bank is closed, all very quietly and behind the scenes, to evaluate data and identify the amounts due to insured depositors," said Michael Spaid, who manages an FDIC section that develops policies for handling deposit insurance claims. "It's that advance preparation, followed by long hours of work after the closing, that enables the FDIC to provide insured depositors access to their funds so quickly."

The preferred way to pay insurance on deposits — and the most common one — involves finding a healthy bank to quickly buy the rights to assume the insured deposits and other business of the failed bank. Depositors automatically become customers of the assuming bank, and offices of the failed bank reopen under the name of the acquiring institution — usually by the next business day. Depositors will have full access to their insured funds at branch offices or by check, automated teller machine and debit card.

"The depositors would barely be affected," explained Spaid. "Their insured funds would be preserved and they could continue banking as usual or they could open a new account elsewhere."

If the FDIC cannot find another institution to buy the failed bank's insured deposits, one of two things can happen. The FDIC can transfer the insured deposits to a newly created bank that would be operated by the FDIC. This new bank, referred to as a "bridge bank" or "conservatorship," enables depositors to access their insured funds by the next business day and to maintain other banking services until the FDIC can find a buyer for the new bank. The other alternative is for the FDIC to issue checks directly to depositors, in amounts up to the federal insurance limit. That process can take longer than one business day but usually not more than three business days.

No matter how the FDIC resolves a failed bank, some types of deposits present special challenges that mean it may take the FDIC longer to obtain documentation that is needed to finalize the insurance payments. Examples include accounts linked to a formal written trust agreement, deposits placed by an administrator of an employee benefit plan, and bank certificates of deposit (CDs) sold to the public by deposit brokers. In the case of the latter, the bank's records often only note the name of the broker, not the individuals who made deposits, and it can take more time for the FDIC to gather documentation from the broker and make an accurate insurance determination.

What happens to my money that is over the FDIC's insurance limits?

Let's say you alone have one deposit account at a bank with a balance of $105,000, including interest earned. If your bank fails, you'll immediately be paid $100,000 covered by FDIC insurance and you'll receive a "claim" against the closed bank for the remaining $5,000 that is not FDIC-insured. The amount you recover on your uninsured deposits will depend on how much the FDIC recovers by selling the bank's assets. While that process can take several years, most payments to uninsured depositors are made within a year or two of the bank failure. In some cases, the FDIC is able to make an advance payment to uninsured depositors.

What about other bank services such as safe deposit boxes, loans, credit cards and securities held by the trust department?

Access to the contents of safe deposit boxes typically will be available the next business day after the bank closing.

A loan or credit card you have at the failed bank will either be sold to a healthy bank or retained temporarily by the FDIC, and you'll receive written instructions on where to send future payments. Either way, your use of these loans and your obligation to pay will continue until you are instructed otherwise, in writing, by the acquiring bank and the FDIC.

Securities and other assets held in trust, fiduciary or custodial accounts at a bank are not assets of the failed bank and are not subject to claims by the failed bank's creditors. These assets will either be returned to you or arrangements will be made for another institution to become the new custodian or trustee of your accounts.

How can I get more information about what happens if a bank fails?

You can find useful information, including the FDIC brochure "When a Bank Fails," at www.fdic.gov/bank/individual/failed. Or, call or write the FDIC (see the next page).

An FDIC-Insured Depositor's Bill of Rights

1. You have the right to automatic deposit insurance coverage when you open a deposit account at an FDIC-insured bank, with no additional cost or action on your part.

2. You have the right to separate FDIC insurance coverage for deposits held at different FDIC-insured banks.

3. You have the right to confirm that a bank is insured by using the FDIC's Bank Find service at www2.fdic.gov/idasp/main_bankfind.asp or by calling the FDIC toll-free at 1-877-275-3342.

4. You have the right to deposit insurance coverage of $100,000 for your deposits at an FDIC-insured bank — up to $250,000 for your IRA deposits.

5. You have the right to deposit insurance coverage of more than $100,000 at a single bank when deposits are held in different "ownership categories," such as single, joint and trust accounts.

6. You have the right to confirm that your deposits are within the insurance limits by using the FDIC's Electronic Deposit Insurance Estimator and other online resources at www.fdic.gov/deposit/deposits or by calling the FDIC at 1-877-275-3342.

7. You have the right to be informed when a financial product offered by your bank is not covered by FDIC insurance.

8. You have a right, if your bank fails, to prompt access to your insured deposits.

9. You have the right, if you are an uninsured depositor, to receive distributions from the receivership as the sale of assets permits.

10. You have the right to sleep well, knowing that since the creation of the FDIC 75 years ago, no depositor has ever lost one penny of insured deposits.

Insuring deposits up to

without anyone losing a

For More Help or Information from the FDIC about Deposit Insurance

Call toll-free 1-877-ASK-FDIC (1-877-275-3342) from Monday through Friday, 8:00 a.m. to 8:00 p.m., Eastern Time. For the hearing-impaired, the number is 1-800-925-4618.

Read or print consumer information online 24 hours a day, seven days a week, at www.fdic.gov. For brochures, videos and other information on FDIC insurance, go directly to www.fdic.gov/deposit/deposits. There you'll also find our interactive Electronic Deposit Insurance Estimator (EDIE), which you can use to calculate the insurance coverage of your accounts and generate a printable report that clearly states if your deposits are fully insured or not.

E-mail questions to the FDIC using our Customer Assistance Form at www2.fdic.gov/starsmail.

Mail us a letter by writing to the FDIC, Division of Supervision and Consumer Protection, 550 17th Street, NW, Washington, DC 20429-9990.

Tips for Trying to Fix a Clogged or "Frozen" Home Equity Line

For years, homeowners have turned to home equity lines of credit (HELOCs) as a way to borrow against their home's value to pay for college tuition, home improvements, medical bills and other major expenses. (A home's equity is the market value minus what is owed on the mortgage. If you owe $100,000 on your mortgage but your home is worth $250,000, your equity is $150,000.)

But now, with home values dropping, the collateral securing individual HELOCs is worth significantly less, and many lenders are responding by reducing the amount that can be borrowed or by "freezing" (suspending) access to these loans entirely, even for people who have been making their loan payments on time.

"Reducing or freezing credit lines may be a prudent response for lenders managing their risks," said Mindy West, Chief of Policy and Program and Development in the FDIC's Division of Supervision and Consumer Protection. "But for consumers who use home equity lines to pay for major purchases or to pay off higher-priced credit, having their source of funding reduced can result in significant financial hardship."

What can you do if your home equity line has been reduced or frozen?

Contact your lender if you're facing a major cash shortage as a result of its decision. The FDIC has urged the banks we supervise to work with customers who may experience financial hardship or significant inconvenience as a result of a reduction or suspension of their credit limits. For example, a borrower relying on a line of credit to fund a home renovation or make a college tuition payment may need some quick assistance finding an alternate source of financing.

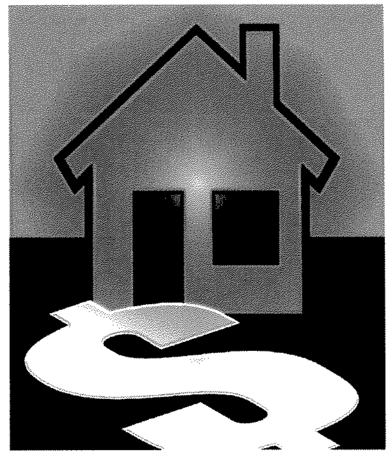
"We have told banks that, depending on a borrower's creditworthiness and overall financial circumstances, it may be possible to offer alternative types of credit or other arrangements that can minimize the negative effects of credit-line reductions or suspensions," added Luke Brown, FDIC Associate Director for Compliance Policy.

Ask the bank to reconsider if your home's value has declined less than other properties in your area. If, for example, the lender's decision relied heavily on information about property sales for your city, but your home's value has held up better than the average — and you can back that up, perhaps by paying for a new, independent appraisal of your home — you may be able to get the lender to reconsider. Be aware, however, that your appeal might not be successful.

Make sure your home equity lender knows if you have significantly reduced the balance on your first mortgage. If you made larger-than-usual payments on your first mortgage, you may be a lower risk to your home equity lender, who may not be aware of that development.

Shop around for a new line of credit, but be prepared for a challenge. You may find a lender willing to provide an attractive HELOC based on your credit rating and the equity you've built up in your home, but that could take longer than in the past, especially with mortgage foreclosures rising and real estate values falling in many areas.

Remember that home equity borrowers have rights under federal laws and rules. In particular, the Truth in Lending Act permits a lender to reduce or suspend a consumer's credit limit if there's been a significant decline in property value or a material change in the borrower's financial circumstances (such as a significant decrease in income). However, the law also requires the lender to provide written notice to each borrower not later than three business days after the action is taken and to include specific



reasons for the action. The letter should also provide information on how to appeal.

In addition, the Equal Credit Opportunity Act and the Fair Housing Act prohibit lenders from discriminating on the basis of race, gender or other specified factors. And the Federal Trade Commission Act prohibits banks from engaging in unfair or deceptive practices in all aspects of a loan transaction, including servicing and collections.

If you think you're being treated unfairly and you can't resolve a problem directly with the institution, consider contacting its government regulator. The FDIC and other banking regulators may be able to help by providing information about your consumer rights or by contacting an institution that doesn't appear to be responding to your complaint. In addition, a regulator also can seek corrective action if an institution is in violation of a federal law or regulation.

While the FDIC insures deposits in nearly all banking institutions in the United States, we may not be the primary regulator of a particular institution. To find out who regulates an institution, you can call the FDIC toll-free at 1-877-ASK-FDIC (that's 1-877-275-3342) or check the FDIC's Bank Find directory at www2.fdic.gov/idasp/main_bankfind.asp.

Dialing for (Your) Dollars

Beware of fraud originating in phone messages and faxes

FDIC Consumer News has warned before about crooks who call or e-mail consumers and pretend to be legitimate companies or government agencies wanting people to "verify" or "resubmit" (divulge) confidential information such as bank account or credit card numbers as well as Social Security numbers, passwords and personal identification numbers. Here are variations to know about.

One involves pre-recorded phone messages, supposedly from a financial institution or a government agency, describing some "urgent" matter involving your bank account. If you return the call, you'll be instructed to answer a series of questions about yourself and your bank account using the touch-tone keypad on your telephone. Unfortunately, it's possible the sensitive information you provide can be used to gain unauthorized access to your bank account or commit identity theft.

"The incoming call and the recorded message may look and sound very legitimate, right down to the phone number appearing on your caller-ID screen," explained Michael Benardo, manager of the FDIC's Financial Crimes Section. "We're especially concerned that some people who think they're less vulnerable to fraud because they rarely or never use the Internet will let their guard down against phone fraud, especially when they hear convincing messages about some 'emergency' and that they must respond to right way."

Another fraud to beware of involves faxes. Recently, for example, the FDIC uncovered a scam in which fake FDIC notices were faxed to businesses and consumers in an attempt to collect confidential information.

What can you do to protect yourself?

Don't give out personal identification information over the phone unless you initiate the contact with the other party and you know it's reputable. "Scammers may even pose as government agencies such as the Social Security Administration, the Internal Revenue Service or the FDIC," said Jeff Kopchik, an FDIC Senior Policy Analyst for technology issues. "For the average consumer, there is no way to know for sure who is the actual caller or sender of a fax."

Remember that your bank, credit card company and the FDIC would never contact you asking for personal information. Assume any such unsolicited request — by phone, fax or e-mail — is fraudulent.

Don't rely on a phone number provided in an unsolicited call, e-mail or fax. Any time you want to call your bank, credit card company, a government agency or other organization regarding matters involving personal or financial information, use the phone number provided in the phone book or another resource you trust, not the number listed in a voice-mail message, e-mail or fax.

Reminder: Beware of Mortgage Rescue Frauds

Thieves posing as lenders or housing counselors continue to offer to "help" people at risk of losing their homes to foreclosure. Beware of anyone who charges a large upfront fee and "guarantees" (falsely) to save your home from foreclosure. Instead, seek help from a reputable housing counselor certified by the U.S. Department of Housing and Urban Development (HUD). Find one by contacting the nonprofit Homeowner's HOPE Hotline (1-888-995-4673 or www.995hope.org) or get a referral directly from HUD (1-800-569-4287 or www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm).

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For More Information from the FDIC

Go to www.fdic.gov or call toll-free 1-877-ASK-FDIC — that's 1-877-275-3342 — Monday through Friday 8:00 a.m. to 8:00 p.m., Eastern Time.

"Green" Banking: Saving the Environment as You Save and Borrow Money

You're probably already recycling paper, glass and plastic. But did you know you also may be able to help save the environment as you do your banking? Here are options that may be available from your bank.

Paperless statements. Receiving monthly bank statements and credit card bills electronically instead of in the mail can save a lot of trees, "particularly when inserts and envelopes are factored in," said Luke W. Reynolds, Chief of the FDIC's Community Affairs Outreach Section. But because old statements may prove helpful during tax time or help substantiate a previous transaction, find out how long electronic statements will be available online to view and perhaps download to your computer. Also ask about the fees you'd pay if you need a paper copy of an old statement.

Electronic banking and bill payments. This includes conducting transactions over the Internet, via a debit or credit card, or using your telephone or cell phone instead of writing and mailing checks. But make sure you know what fees may be assessed for using these options. Also be careful to record electronic withdrawals in your checkbook, so you don't inadvertently overdraw your account.

Automatic withdrawals and deposits. You may be able to pay utility bills and other routine, recurring transactions by having the funds automatically withdrawn from your checking account or charged to your credit card before the due date. Be sure, though, to review the bill each month for errors and record the transactions in your checkbook or personal finance software. Another option is to have your payroll or Social Security checks deposited directly into your bank account, which reduces paper and saves gas by cutting down on car rides to the bank or ATM.

Special financing. Some banks will offer a lower interest rate on a loan for energy-efficient cars or home improvements that will save energy. Why? "If the energy efficiencies can significantly lower a borrower's monthly expenses, the lender may see the loan as less risky," said Reynolds. "But don't let an offer of 'green' financing stop you from shopping for the best rate."

Buy less, save more. For example, consider new ways to reuse or borrow items instead of buying new ones. "You'll help the environment by consuming less," Reynolds explained. "But in addition, you can save more money that can go into a savings account for more important use." Added Janet Kincaid, Chief of the FDIC's Consumer Response Center, "Going green can help you save your green, silver and copper."

EXHIBIT B

FDIC Law, Regulations, Related Acts

4000 - Advisory Opinions

Insurance Coverage of Treasury Bills

FDIC-87-7

August 17, 1987

Valerie P. Lane, Regional Attorney

You contacted the Legal Division on August 13, 1987 to inquire about FDIC insurance coverage of treasury bills. You also inquire about the impact insolvency has upon safekeeping arrangements.

Please be advised that the insolvency of an insured bank does not in any way affect pre-existing safekeeping arrangements. As the successor in interest to the rights and responsibilities of a failed insured institution, the FDIC assumes all safekeeping obligations in effect as of the date the bank closes.

As you no doubt are aware, the insurance provided by the FDIC extends only to deposits and not to other assets held by an insured bank for safekeeping. A deposit is broadly defined as "the unpaid balance of money or its equivalent received . . . by a bank in the usual course of business and for which it has given or is obligated to give credit . . . to a . . . checking, savings, time or thrift account . . . ." 12 U.S.C. § 1813(1). A bank customer's assets which a bank holds for safekeeping purposes cannot constitute a deposit inasmuch as the bank is not obligated to give credit for them. The bank's obligation is limited to returning the specific assets to the customer. Thus, FDIC coverage applies only to cash balances on deposit at an insured bank, not to stocks, bonds or other non-cash assets held by an insured bank as trustee, custodian or in some other fiduciary capacity. Such non-deposit assets would be returned by the FDIC as receiver to the persons entitled thereto, provided such entitlement can be established to FDIC's satisfaction by appropriate evidence.

Likewise, deposit insurance does not extend to Treasury Bills (T-Bills) by the bank on the customer's behalf. T-bills are issued only in book-entry form either by the Federal Reserve Bank or branch, acting as fiscal agent of the United States, or by the Department of the Treasury. After their original issuance, T-bills may be purchased through financial institutions, brokers, and dealers in securities. With few exceptions, T-bills are not redeemable before maturity.

Securities held by a bank in safekeeping are not aggregated with the bank's assets. This letter does not address situations where the bank is not simply holding the non-cash asset in safekeeping but has some interest in the asset (for example the asset has been pledged to the bank). At the time the FDIC reopens the failed institution to implement the payoff process, the customer would present the safekeeping receipts to the FDIC Liquidator who, in turn, would provide the customer with a release which the customer could then present to the Federal Reserve to prove ownership. Alternatively, the FDIC as Receiver could hold all T-bills as safekeeping items. If the bank's failure resulted in a payoff of insured deposits, the FDIC would make a distribution upon maturity in the same manner and extent as the closed bank would have done.

If the failure results in a purchase and assumption transaction, the new or assuming bank would make a distribution upon maturity in the same manner and extent as the closed bank would have done.

Only when a security is treated by a bank as its own asset would there ever be a problem. In that case, the customer's safekeeping claim would conflict with the bank's ownership claim.

Please be advised that the opinions expressed herein are those of the FDIC Legal Division and not of the FDIC itself. The FDIC issues formal interpretations of its rules and regulations, but only pursuant to rulemaking proceedings. The FDIC does not issue formal interpretations in the form of letters on specific cases.