Federal Deposit Insurance Corporation

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[4.0] I. INTRODUCTION

The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA),[1] enacted on August 9, 1989, changed the responsibilities of the Federal Deposit Insurance Corporation (FDIC or the "Corporation"[2]) as receiver and conservator, abolished the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation (FSLIC) and created the Resolution Trust Corporation (RTC) to act in those capacities for certain depository institutions placed under federal supervision.

The Resolution Trust Corporation Completion Act of 1993,[3] among other things, terminated the existence of the RTC as of December 31, 1995 ("RTC Sunset"), and, by operation of law, transferred the RTC's functions, personnel and assets to the FDIC at RTC Sunset.[4] Assets held by the RTC at RTC Sunset in its corporate capacity were transferred, by operation of law, to the FSLIC Resolution Fund, to be managed by the FDIC. The FDIC's receiverships and conservatorships, and the transfer of assets from the RTC at RTC Sunset, bear directly on the marketability of title to assets under the FDIC's authority. In addition, the transfer of assets from the RTC at RTC Sunset was by operation of law, requiring no documentation or filings. Accordingly, gaps in record title created at RTC Sunset must be addressed upon the sale of former RTC assets by the FDIC to third parties.

Regardless of whether a receivership/conservatorship was created pre- or post-FIRREA, or pre– or post–RTC Sunset, the ownership and transfer of real property and mortgage loans by the various resulting federal regulatory agencies raise the usual corporate issues of corporate authority, delegation of authority, use of powers of attorney and managing agents and the authority of individuals to execute. Typical real estate issues also include breaks in the record chain of title, references in recorded instruments to unrecorded documents, transfers by operation of law and the requirements of the various local recorders and title insurers.

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1 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

2 The FDIC is referred to as the "Corporation" in 12 U.S.C. § 1811–1835a.

3 Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, 107 Stat. 2369 (1995).

4 For a general discussion of title issues concerning former RTC assets, see Lawrence J. Wolk, *Title Issues at RTC "Sunset,"* Title News, Jan./Feb. 1996.

[4.1] II. CAPACITY IN WHICH TITLE CAN BE HELD

There are three ways in which the FDIC can—and, prior to December 31, 1995, the RTC could—hold title to property: as a corporate entity, as a receiver or as a conservator. When a depository institution is placed under federal supervision, whether and in what capacity the FDIC holds title to that institution's assets depends on both the timing of the order placing the institution under federal control and the type of institution involved.

The capacity in which the FDIC acts affects the manner in which documents are executed. When the FDIC acts in its corporate capacity, documents are executed in that capacity. When the FDIC acts as a receiver, the title to real property is transferred to the Corporation by operation of law, and documents are executed by it as receiver for the insolvent institution. The situation is more complicated when the FDIC acts as conservator. Title to real property in those cases technically remains in the institution under control and is not transferred to the conservator corporation. All documents must therefore be executed by the institution acting through the conservator.[5] Finally, where the appointment of the FSLIC or RTC has been succeeded by appointment of the FDIC, the FDIC must execute documents as the succeeding receiver or conservator.

[4.2] A. National Banks

The comptroller of the currency can appoint the FDIC as receiver or conservator of any insured national bank. If the institution is to be liquidated, the FDIC will be appointed receiver. In nonliquidating cases, the FDIC will be appointed conservator to foreclose the assets.

[4.3] B. State Banks

When an appropriate state supervisor appoints a conservator or receiver for an insured state depository institution and tenders such appointment to the FDIC, the FDIC may accept such appointment.[6] When certain conditions exist primarily relating to insolvency or events leading to insolvency, the FDIC may also name itself sole receiver or conservator for an insured state depository institution for which a receiver or conservator has already

5 *See* Janice E. Carpi, *Real Estate Title Problems Created by the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, Title Insurance in Troubled Times, 375 P.L.I./Real 39, 72 (1991) ("Carpi").

6 12 U.S.C. § 1821(c)(3).

been appointed for at least 15 days.[7] Such an institution may challenge the merits of this appointment, however, by seeking an order removing the FDIC as conservator or receiver within 30 days of the appointment.[8]

[4.4] C. Federal Savings Associations

Prior to August 9, 1989, the Federal Home Loan Bank Board had the authority to appoint the FSLIC as receiver or conservator for insured federal savings associations. Pursuant to its authority as manager of the FSLIC Resolution Fund, the FDIC succeeded the FSLIC when the appointment occurred before January 1, 1989. If the FSLIC's appointment occurred between January 1, 1989, and August 9, 1989, the RTC was its successor in that capacity. After August 9, 1989, the RTC was appointed receiver or conservator of these institutions by the Office of Thrift Supervision and, at RTC Sunset, the FDIC succeeded the RTC in that role.

[4.5] D. State Savings Associations

Appointments for insured state savings associations are similar to those made for their federal counterparts. The FDIC succeeds the FSLIC where the latter had been acting as receiver prior to January 1, 1989. Receiverships and conservatorships ordered after that date were supervised by the RTC until RTC Sunset, when the FDIC succeeded the RTC.

[4.6] III. COVERAGE UNDER EXISTING TITLE INSURANCE POLICIES

The continuation of title insurance coverage on properties taken over by the FDIC as conservator or receiver of an institution depends upon a number of factors, including the structure used to manage the institution and the terms of the existing policies. Since most of the property held by the FDIC is real estate acquired by an insolvent institution by foreclosure or other workout arrangement, title coverage will depend upon the terms of the institution's mortgagee policy. Generally, if the institution had an ALTA mortgagee's policy of title insurance insuring the lien of its mortgage on the property, its coverage continues even after it has foreclosed upon its interest.[9]

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7 12 U.S.C. § 1821(c)(4).

8 12 U.S.C. § 1821(c)(7).

9 Carpi, *supra* note 5, at 69–70.

If the institution is subsequently placed into receivership, the FDIC "steps into the shoes of the lender, and succeeds to all of its right, title and interest in all the assets of the institution."[10] The FDIC is vested with possession of all assets of the failed institution, and the respective title transfers to the corporation by operation of federal law and *not* by conveyance. Consequently, the FDIC (as receiver) also succeeds to coverage under the original title policy. When the FDIC sells the lender's assets to a newly chartered thrift institution[11] or to another purchasing bank, however, this is a *conveyance* of real estate and *not* a transfer by operation of law. Therefore, the acquiring bank is not insured under the insolvent institution's original title policy.[12]

[4.7] IV. FEDERAL RIGHT OF CONSENT

[4.8] A. Statutory Grant of Power

The FDIC has an automatic stay from any lien or foreclosure on property held in its receivership capacity: "When acting as a receiver . . . (2) No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation."[13] This right of consent was extended to the FDIC when acting in its corporate capacity.[14] The FDIC is not, however, entitled to the right of consent when acting as conservator.

Consequently, where the FDIC acts as receiver for an insolvent depository institution and involuntary liens (including tax, judgment or mechanic's liens) are involved, its practice is to avoid paying state and local real estate taxes, for example, absent the threat of foreclosure or liens. Any subsequent sale of the real estate in effect conveys the relevant property subject to an involuntary lien for the unpaid taxes. Because the lien, although temporarily unenforceable pursuant to the statutory provisions in 12 U.S.C. § 1825(b)(2), attaches to the property upon the vesting of title in the pur-

10 *Id.* at 70.

11 Prior to RTC Sunset, the RTC used a procedure called a pass-through receivership in which an insolvent thrift institution was placed into receivership and a new entity was then chartered and placed under the RTC's supervision as conservator. The assets of the original institution were transferred to the new entity, and subsequent property sales were made by the RTC in its conservatorship capacity.

12 Carpi, *supra* note 5, at 70–71.

13 12 U.S.C. § 1825(b)(2).

14 12 U.S.C. § 1823(d)(3).

chaser, the purchaser can either take the property subject to the lien, require the receiver to pay the delinquent taxes or reduce the sale price by an equivalent amount.[15]

[4.9] B. Adopted Policy Statement

Because 12 U.S.C. § 1825(b)(2) affects the FDIC's ability to convey marketable title and the secondary mortgage market in general,[16] the corporation has adopted a similar policy statement that takes into account the section's impact. The policy reiterates that, as a general rule, when a thrift institution is placed into receivership by the FDIC, a third party cannot foreclose or levy upon the institution's assets without the FDIC's consent.[17]

[4.10] 1. Recorded Interests

The FDIC requires holders of involuntary liens to obtain the corporation's consent to foreclose upon property in which the corporation has a recorded interest. However, with regard to holders of voluntary liens (such as mortgage liens or deeds of trust), the FDIC's policy statement provides blanket consent to foreclosures in certain instances:

- Where the FDIC holds a recorded voluntary lien interest in real property, the corporation consents to a foreclosure by the holder of any bona fide mortgage or other voluntary security instrument which is senior to the interests of the corporation.

- Where the FDIC holds record title to real property, the corporation consents to a foreclosure by the holder of any bona fide mortgage or other voluntary security instrument that encumbers the FDIC's title.

- Where the FDIC holds either title to or a recorded lien interest in personal property, the corporation consents to any foreclosure by the holder of a bona fide pledge, security agreement or similar instrument.

- Where the FDIC holds recorded title to real property encumbered by a bona fide government guaranteed mortgage (i.e., a mortgage insured by

15 Carpi, *supra* note 5, at 68.

16 *Statement of Policy on Foreclosure Consent and Redemption Rights*, 57 Fed. Reg. 29,491 (1992) (FDIC statement of policy).

17 It should be noted that the RTC was prohibited from selling real property assets in "distressed areas" at a price less than 95 percent of the property's market value. Also, FIRREA § 501(c) limited the RTC's ability to sell property that was held by the RTC in its corporate capacity. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73.

a federal administration), the corporation consents to any foreclosure by the mortgage holder.

[4.11] 2. Unrecorded Interests

Where the FDIC holds title to or a lien interest in property that is not of record, the corporation consents to any foreclosure by the holder of a bona fide security instrument or other voluntary or involuntary lien.

[4.12] V. FEDERAL RIGHT OF REDEMPTION

[4.13] A. Corporate Capacity

The FDIC's junior interest in property is in theory protected by 28 U.S.C. § 2410(c). This section allows the FDIC in its *corporate* capacity a one-year right of redemption where a sale of real estate is "made to satisfy a lien prior to that of the [FDIC]." As a result, where the FDIC is a junior lienholder on property and such lien is subject to cancellation by the foreclosure of a superior lien, the corporation by law has one year to redeem the property after foreclosure.

Although this statute is still in effect, the FDIC has had a policy since August 17, 2002, that it will not assert any right to redeem property under this statute.[18]

[4.14] B. Receivership and Conservatorship Capacities

The right of redemption also affected the FDIC in its capacity as receiver or conservator for insolvent depository institutions. Case law holds that where an insolvent thrift institution holds a junior lien subject to cancellation by the foreclosure of a senior lien, it too qualifies for the federal right of redemption.[19] Because junior liens held by depository institutions under the FDIC's supervision are subject to cancellation by foreclosure, this federal redemption right had the potential, prior to August 2002, of significantly affecting the marketability of title to the relevant property.

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18 The FDIC still has the statutory power to redeem, but its waiver is still in force and has not been withdrawn.

19 *FDIC v. Bennett*, 898 F.2d 477 (5th Cir. 1990); Carpi, *supra* note 5, at 69 & n.19.

[4.15] VI. FEDERAL RIGHT TO REJECT CLAIMS

The FDIC has the right to enforce obligations pursuant to their written terms and to disregard an obligor's oral side agreements if they fail to comply with certain statutory requirements. As with the other "super powers"[20] of the FDIC, this right will impact the conduct of an insuring title company.

[4.16] A. The Doctrine

The precedent set by the U.S. Supreme Court in *D'Oench, Duhme & Co. v. FDIC*[21] has become widely known as the *D'Oench, Duhme* doctrine. In general, the doctrine prohibits parties contracting with a federally insured institution from asserting claims and defenses based on side agreements, whether oral or an undisclosed writing, with the failed bank. These alleged agreements do not reflect the documentation in legitimate bank records. In effect, they may misrepresent the assets of an insured bank and lead to imperfect assessments by federal regulators of the institution's financial condition. Accordingly, the *D'Oench, Duhme* doctrine allows the FDIC to enforce notes and obligations solely according to their written terms.

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20 The other "super powers" are the Federal Holder in Due Course Doctrine, *FDIC v. Wood*, 758 F.2d 156 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985); the power to repudiate contracts or leases deemed burdensome within a reasonable period, 12 U.S.C. § 1821(e); and the power to set aside fraudulent conveyances, 12 U.S.C. § 1821(d)(17)(A). The federal common-law doctrine providing the FDIC with holder-in-due-course status is no longer widely accepted. *See Atherton v. FDIC*, 519 U.S. 213 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994); *FDIC v. Deglau*, 207 F.3d 153, 170–71 (3d Cir. 2000); *Sun NLF Ltd. P'ship v. Sasso*, 313 N.J. Super. 546, 560, 713 A.2d 538, 545 (1998).

21 315 U.S. 447 (1942). In this case, a borrower executed a promissory note in favor of a depository institution, claimed he had received no proceeds and allegedly agreed with the bank that there would be no enforcement of the note. Upon the bank's subsequent liquidation, the FDIC acquired the note and sued to collect. The Supreme Court barred the obligor's use of the side agreement as a defense to the corporation's suit. The Court decided that "the note was designed to deceive the creditors or the public authority, or would tend to have that effect," and that "the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." *Id.* at 460. The Court found that had the defendant been ignorant of the scheme and thus had no intention to defraud, he would nonetheless remain subject to liability because he executed the note and knew that it misrepresented the legitimate state of the transaction. *Id.* at 461. In *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 673 (1st Cir. 1999), the court, referring to the *D'Oench* doctrine, held:

> The doctrine and statute are only directed at protecting the FDIC from unrecorded or oral agreements not in the insured bank's records; they do not preclude every possible defense to a bank claim—e.g., that the loan was to an underage borrower who lacked capacity to contract—merely because it may depend on information that is not contained in bank files.

[4.17] B. Federal Codification

In 1950, a variation of the *D'Oench, Duhme* doctrine was legislated by Congress under 12 U.S.C. § 1823(e). The statute provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section [1821 of this title], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
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> (A) is in writing,
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> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
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> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
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> (D) has been, continuously, from the time of its execution, an official record of the depository institution.[22]

This statutory counterpart bars certain claims that tend to diminish or defeat the interests of the FDIC. If the claims are based on either oral side agreements or misrepresentations that do not comply with the statute's requirements, they can be set aside.[23] Thus, no agreement or action that in effect prevents the making of an accurate valuation of a bank's assets will be valid against the corporation. In fact, the Supreme Court has gone so

22 12 U.S.C. § 1823(e)(1). There is disagreement among the federal courts about whether section 1823(e) has completely preempted common law under *D'Oench. See, e.g.*, *Adams v. Zimmerman*, 73 F.3d 1164, 1168 n.2 (1st Cir. 1996) (recognizing the circuit split). *Compare Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir.), *cert. denied*, 522 U.S. 928 (1997) (FIRREA does not preempt *D'Oench) and Motorcity of Jacksonville, Ltd. v. Se. Bank, N.A.*, 83 F.3d 1317, 1327 (11th Cir. 1996), *vacated sub nom. Hess v. FDIC*, 519 U.S. 1087, *on remand sub nom. Motorcity of Jacksonville, Ltd. v. Se. Bank, N.A.*,120 F.3d 1140 (11th Cir. 1997), *cert. denied sub nom. Hess v. FDIC*, 523 U.S. 1093 (1998), *with DiVall Insured Income Fund Ltd. P'ship v. Boatmen's First Nat'l Bank*, 69 F.3d 1398. 1402 (8th Cir. 1995) *and Murphy v. FDIC*, 61 F.3d 34, 35, 38–39 (D.C. Cir. 1995) (after *O'Melveny*, 512 U.S. 79, *D'Oench* has been preempted by FIRREA).

23 *See Langley v. FDIC*, 484 U.S. 86, 93 (1987).

far as to recognize the FDIC's right to reject a claim or defense even where the corporation was aware of an alleged agreement or misrepresentation prior to a bank's insolvency and closing.[24]

The *D'Oench, Duhme* doctrine should significantly affect the manner in which the parties to a transaction structure their deal. This effect stems from the ability of the FDIC as receiver to reject any agreement or conduct (e.g., loan modification, repurchase or indemnity agreements) by a depository institution that does not comply with the standards of 12 U.S.C. § 1823(e).[25]

[4.18] VII. REAL ESTATE TAX TREATMENT

The ability of a local government to impose and collect real estate taxes on property held by the FDIC plays a significant role in the liquidation and administration of the real estate portfolios currently being held and acquired by the FDIC. If the FDIC is held liable for applicable real estate taxes, plus any penalties and interest that may accrue for unpaid taxes, such an expense will add to the cost of the bailout of failed insured depository institutions. Further, if federal funds are insufficient to pay real property taxes as they come due or if the FDIC is unable to pay for arrearages (plus penalties and interest) already due, then its portfolios will shrink as municipalities acquire properties through tax foreclosures. The increased time and energy involved in managing the assets of a smaller portfolio to prevent future losses leads to lengthy delays and greater costs in the liquidation process.

Special exemptions from such taxes for the FDIC, however, would unfairly remove a municipality's primary source of income. In poor economic periods like 1990, 1991 and 1992, during which lower income and sales tax figures resulted in decreased revenues on the local level, this issue becomes even more important to local governments and property owners who may be called upon to make up any shortfalls.

[4.19] A. Payment of Real Estate Taxes

The authority of a state or local government to impose real estate taxes on property owned by the FDIC, which is a federal agency, is found in 12 U.S.C. § 1825(b). Under this section, the FDIC is exempt from all state

24 Philip Trager & Paul E. Burns, *Litigating with the FDIC*, Conn. Law., June/July 1992 at 3, 5; *see Langley*, 484 U.S. at 93–94.

25 Carpi, *supra* note 5, at 78.

and local taxation, but real estate taxes are specifically excepted. The enactment of FIRREA had no effect on this authority.

[4.20] B. State and Local Governments' Right to Attach and Enforce Liens

Prior to FIRREA, the FDIC had no power to prevent the attachment of tax liens or the enforcement thereof. With the enactment of FIRREA, Congress amended the Federal Deposit Insurance Act by adding the following subsection to grant certain powers to the FDIC which it previously lacked.[26] Section 1825(b) provides, in pertinent part:

> (b) Other exemptions – When acting as a receiver, the following provisions shall apply with respect to the [FDIC]:
>
> (1) The [FDIC] including its franchise, its capital, reserves, and surplus, and its income, *shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority, except that any real property of the [FDIC] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed.*
>
> (2) *No property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [FDIC], nor shall any involuntary lien attach to the property of the [FDIC].*
>
> (3) The [FDIC] shall not be liable for any amounts in the nature of *penalties or fines*, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

26 Pub. L. No. 101-73, 103 Stat. 183, 261 (codified as amended at 12 U.S.C. § 1825(b)).

> This subsection shall not apply with respect to any tax imposed (or other amount arising) under the Internal Revenue Code of 1986 [emphasis added].

In *Irving Independent School District v. Packard Properties, Ltd.*,[27] a Texas federal district court was forced to interpret this statute and held that liens for unpaid taxes and related charges do not attach to real property while the property is owned by the FDIC acting in its capacity as a receiver of a failed institution. However, the court added that liens for unpaid taxes, penalties, interest and collection costs remain on the real property if they attached prior to (1) the FDIC's receivership, (2) the FDIC's ownership of the real property or (3) the effective date of FIRREA.

In *Irving,* the court examined tax liens that arose before or during the FDIC's ownership and before or after the passage of FIRREA.[28] The *Irving* court ruled that if liens for unpaid taxes arise *after* the effective date of FIRREA and the FDIC's ownership, then section 1825(b) prevents the attachment of any such liens and prevents any interest and penalties from being charged thereon. If tax liens attach *before* any one of these dates, the liens will remain on the property; however, the taxing authority will have no right to foreclose upon the property while it remains in FDIC receivership.

As noted, section 1825(b) does not grant the FDIC an exemption from real property taxes. Rather, it grants a safe harbor against the attachment of any involuntary lien for unpaid taxes during the period the FDIC owns the property. It also prevents the enforcement of any preexisting liens during the FDIC's period of ownership.[29] The purpose of section 1825(b) is to prevent a state or municipality from enforcing its liens, the enforcement of which would interfere with the management and liquidation of the FDIC's assets.[30] The statute does, however, exempt the FDIC from liability for any penalties or interest that may accrue for unpaid taxes and charges.

Section 1825(b) does not affect real estate taxes that become due and payable during the period the FDIC owns the property. Such taxes shall

27 762 F. Supp. 699 (N.D. Tex. 1991), *aff'd*, 970 F.2d 58 (5th Cir. 1992).

28 *Id.* at 703–705.

29 The RTC did not have any safe-harbor powers with regard to the attachment and enforcement of tax liens.

30 *See* Gregory Pulles et al., FIRREA, A Legislative History and Section-by-Section Analysis 278 (1990) ("Pulles et al.").

continue to accrue despite the fact that unpaid taxes cannot be enforced by liens. For taxes that accrue during the FDIC's period of ownership, the taxing authority is left with the option of suing the FDIC personally for payment or waiting until the property is sold to a third party. In addition, case law suggests that liens for unpaid taxes that do not attach during such periods, pursuant to section 1825(b), will attach to the property when it is sold to a third party.[31]

The role the FDIC assumes in a particular transaction may be crucial in determining its rights with respect to the payment of real estate taxes. FIRREA's legislative history suggests that the prefatory clause of section 1825—"when acting as receiver"—was added to clarify that the statute applies to whatever capacity in which the FDIC acts, but particularly when it functions as a receiver.[32]

[4.21] C. Lien Priority

The safe-harbor powers can be invoked only when the FDIC is the fee owner of the property.[33] In *Irving*, the court acknowledged that liens that arose prior to the date of ownership attach and remain on the property. In that case, the FDIC obtained ownership as mortgagee at the foreclosure sale. The fact that the court allowed the foreclosure of liens that arose during the period the FDIC was the mortgagee suggests that section 1825(b) does not protect the FDIC in that capacity. Moreover, the interpretation of section 1825(b) in *Irving* clearly requires the FDIC to be the fee owner of the property to prevent the enforcement of involuntary liens. Therefore, liens that attach during the period when the FDIC is the mortgagee are valid and can be foreclosed. Further, the tax lien foreclosure can cut off the mortgage lien, provided local law permits such a result.[34]

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31 *Irving*, 762 F. Supp. at 703, n.12; *S & R Assocs. v. Lynn Realty Corp.*, 338 N.J. Super. 350, 360, 769 A.2d 413 (App. Div. 2001).

32 *See* Pulles et al., *supra* note 30, at 277–78.

33 As noted, FIRREA did not grant the RTC any safe-harbor powers regarding the enforcement of tax liens.

34 For an insightful discussion about the interplay between FIRREA and tax liens, see Christopher John Stacco & Paul J. Halasz, *FIRREA and Local Property Tax Liens: A Collision of Competing Government Interests*, 14 Prob. & Prop. 8 (2000); *see also 37 Huntington St., H, LLC v. City of Hartford,* 62 Conn. App. 586, 599, 772 A.2d 633, *cert. denied*, 256 Conn. 914, 772 A.2d 1127 (2001) (quoting 61 Fed. Reg. 65,056 (1996)); *Casino Reinvestment Dev. Auth. v. Cohen*, 321 N.J. Super. 297, 728 A.2d 868 (1998).

[4.22] D. Penalties and Interest

While the FDIC is acting as receiver and is the owner of the property, 12 U.S.C. § 1825(b)(3) expressly exempts the FDIC from being charged penalties and interest for the failure to pay any tax when due.[35]

Fortunately for local governments, the enactment of FIRREA did not create an exemption for the FDIC for real estate tax purposes. However, the FDIC was granted certain powers to prevent a taxing authority from instituting tax foreclosures to interfere with the liquidation of the FDIC's portfolio.

A municipality is prohibited from enforcing tax liens that attached prior to the FDIC intervention or prior to the date the FDIC obtained ownership. FIRREA also prevents any additional liens from attaching to property while the FDIC is acting as receiver. Further, penalties and interest cannot be charged on any unpaid taxes. As a result of FIRREA, where the FDIC is the owner of the property or the receiver or conservator of an institution that owns the property, the taxing authority must either sue the FDIC personally or wait until the property is sold to a third party. When a third party takes title from the FDIC, the taxing authority may foreclose preexisting liens and may attach new liens for unpaid taxes that have accrued during the FDIC's ownership.

[4.23] VIII. PRACTICE TIPS

To ensure receipt of marketable title, transferees of property from failed financial institutions placed under federal supervision can obtain certain documentation to establish the ownership chain:

1. a certified copy of the order appointing the FDIC, RTC or FSLIC as receiver or conservator;

2. a certified copy of the power of attorney from the FDIC, RTC or FSLIC appointing an individual attorney-in-fact;

3. a deed executed in the appropriate capacity (normally the execution on the deed must match the named attorney-in-fact, but a duly authorized officer of a financial institution under conservatorship may convey title as long as documents evidencing the delegation of authority are obtained);

35 The RTC, as noted, was not provided with this exemption.

4. where a pass-through receivership is adopted, the deed transferring the relevant real estate to the newly chartered financial institution; and

5. tax receipts marked "paid" for real estate taxes.

Prior to RTC Sunset, the general counsel for the FDIC and RTC issued a joint memorandum to FDIC and RTC field officers, which attempted to clarify the chain of title to RTC real estate at RTC Sunset. The product of a joint FDIC/RTC Transition Task Force, the memorandum adopted proposed standardized language to be included in all conveyancing documents from the FDIC to third parties. The FDIC/RTC joint memorandum required that, after RTC Sunset, conveyance documents from the FDIC to third parties must contain certain language, as applicable. These requirements are set forth in the appendix to this chapter.