

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

RECEIVED
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: COIT INDEPENDENCE JOINT VENTURE, Petitioner V.
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS
RECEIVER OF FIRSTSOUTH, F. A.

CASE NO: 87-996

PLACE: WASHINGTON, D.C.

DATE: November 1, 1988

PAGES: 1 thru 57

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 COIT INDEPENDENCE JOINT VENTURE, :

4 Petitioner :

5 v. : No. 87-996

6 FEDERAL SAVINGS AND LOAN :

7 INSURANCE CORPORATION, AS :

8 RECEIVER OF FIRSTSOUTH, F.A. :
9 -----x

10 Washington, D.C.

11 Tuesday, November 1, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:01 o'clock a.m.

15 APPEARANCES:

16 ROBERT E. GOODFRIEND, ESQ., Dallas, Texas; on behalf of
17 the Petitioner.

18 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington,
20 D.C.; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

ROBERT E. GOODFRIEND, ESQ.

On behalf of the Petitioner

3

JEFFREY P. MINEAR, ESQ.

On behalf of the Respondent

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear arguments first this morning in No. 87-996, Coit Independence Joint Venture v. FSLIC.

Mr. Goodfriend, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT E. GOODFRIEND

ON BEHALF OF THE PETITIONER

MR. GOODFRIEND: Mr. Chief Justice, and may it please the Court:

This case involves the so-called Hudspeth Doctrine, a rule of law that was announced by the Fifth Circuit in 1985 and that effectively closes the courthouse door to creditors of insolvent savings and loans that have been placed in receivership by the Federal Savings and Loan Insurance Corporation, which I will refer to hereafter as FSLIC.

Under the so-called Hudspeth Doctrine, at least as it was originally conceived, a creditor's claim must first be presented to FSLIC, then any adverse ruling appealed to the Federal Home Loan Bank Board, and thereafter any adverse determination reviewed by the courts under a very limited standard of review under the Administrative Procedure Act.

1 This case began when Colt, a real estate
2 partnership, sued FirstSouth, a federal savings and
3 loan, in state court, suing FirstSouth for usury, breach
4 of fiduciary duty and breach of a duty of good faith and
5 fair dealing in connection with two real estate
6 transactions.

7 The case remained in state court for
8 approximately two months at which time FirstSouth became
9 insolvent and was placed in receivership by FSLIC.

10 Thereafter, FSLIC's move to dismiss the case
11 from federal court under the Hudspeth Doctrine, which
12 motion was granted, and Colt took an appeal to the Fifth
13 Circuit. The Fifth Circuit affirmed relying on its
14 prior decisions under the Hudspeth case. This Court
15 then granted a writ of certiorari.

16 A conflict presently exists between the Fifth
17 and the Ninth Circuits on the Hudspeth Doctrine, the
18 Ninth Circuit having rejected the Hudspeth Doctrine in
19 the Morrison-Knudsen case.

20 Now, the issue has changed somewhat from what
21 it was when this Court initially granted a writ of
22 certiorari. Initially this case involved the question
23 of whether Congress by statutes had ousted the federal
24 courts of subject matter jurisdiction to hear a broad
25 range of creditor claims against an insolvent savings

1 and loan association. In so ruling, the Fifth Circuit
2 relied on two statutory provisions: 12 U.S.C.
3 1464(d)(6)(C) which has the restrain or affect language,
4 and 12 U.S.C. 29(d) which makes FSLIC's appointment as
5 receiver "subject only to the regulation of the Federal
6 Home Loan Bank Board."

7 A recent Law Review article in the Western New
8 England Law Review, which we have sent the Court,
9 extensively reviews the legislative history of these
10 provisions and I think presents convincing legislative
11 history that neither of these provisions has anything to
12 do with the jurisdiction of the courts to hear creditor
13 claims.

14 The restrain or affect language was inserted
15 initially to limit challenges by the savings and loan
16 itself and by its directors to the appointment of FSLIC
17 as receiver limiting those challenges to a 30-day
18 period. And that's specifically in the statute.

19 And the subject only to the regulation of the
20 Board language was apparently inserted in response to a
21 special situation which arose in the State of Illinois
22 where a state court-appointed receiver ignored FSLIC's
23 request for information and FSLIC's monetary claims.

24 QUESTION: Mr. Goodfriend, FSLIC has retreated
25 substantially --

1 MR. GOODFRIEND: Yes.

2 QUESTION: -- in this Court from the doctrine
3 of the Hudspeth case. Has it not?

4 MR. GOODFRIEND: Yes, Your Honor, and I was
5 about to get exactly to that point.

6 Let me just say we've also argued on -- in
7 terms of the initial position of the Court that any
8 determination as to the amount and validity of a claim
9 has never been considered to be an interference with the
10 functions of the receiver at common law.

11 QUESTION: May I also inquire whether as of
12 this time the claim of your client has ever been acted
13 upon --

14 MR. GOODFRIEND: No, it has not, Your Honor.

15 QUESTION: -- administratively?

16 It's still in the so-called black hole?

17 MR. GOODFRIEND: Exactly, retained for further
18 review. It has now been 13 months since that claim was
19 originally filed and a little bit more than two years
20 since Coit originally sued in state court.

21 QUESTION: Now, do you take the position that
22 the statutes do not permit FSLIC, as you call it, to
23 adopt an administrative --

24 MR. GOODFRIEND: Yes, Your Honor.

25 QUESTION: -- exhaustion requirement?

1 MR. GOODFRIEND: We -- we reject both the
2 initial position of the Fifth Circuit, which was a
3 subject matter jurisdiction position, and we also reject
4 the revised position of the Solicitor General which
5 concerns agency-mandated exhaustion, which we wish to
6 clearly distinguish from court-mandated exhaustion,
7 which was referred to somewhat in the Morrison-Knudsen
8 case. We think the implications of agency-mandated
9 exhaustion are very different from judicial exhaustion.

10 The Solicitor General has revised the issue in
11 this case. He no longer takes the position that this is
12 a matter of subject matter jurisdiction, and he no
13 longer takes the position that FSLIC has the power to
14 adjudicate creditor claims.

15 What he does say -- and I think this is the
16 nub of the case -- is that the Federal Home Loan Bank
17 Board has the power to promulgate regulations under
18 section 5(d)(11) of the Homeowner's Loan Act to mandate
19 that creditors exhaust their administrative remedies
20 before FSLIC and the Board before seeking review in the
21 courts. We think that the Solicitor General contemplates
22 de novo review after completion of the exhaustion
23 process, but his position in this regard is not entirely
24 clear.

25 QUESTION: And if there is de novo review,

1 there wouldn't be any Article III problems.

2 MR. GOODFRIEND: Your Honor, I think -- we
3 think there still is. Initially that -- that was my
4 thought. But what we submit, Your Honor, is where the
5 delay in agency-mandated jurisdiction is undue, as it
6 has been in these cases, so that ultimate judicial
7 review may be ineffective or worthless to a litigant,
8 Article III concerns and Seventh Amendment concerns are
9 still in the case.

10 As for the due process question, the
11 constitutional due process question of the absence of a
12 disinterested tribunal, that is very definitely still in
13 the case because this Court has held in Gibson v.
14 Berryhill and in Ward v. Monroeville that a party is
15 entitled to a disinterested tribunal at the first level
16 even if he subsequently obtains de novo judicial review.

17 QUESTION: How has the delay hurt your client
18 in this case?

19 MR. GOODFRIEND: Your Honor, the delay we say
20 has hurt our client in a number of ways. The
21 significant thing is that this case involves a wasting
22 asset. The Solicitor General refers to it as a limited
23 pool of assets. It doesn't involve the -- the savings
24 and loan has long since gone. It has been -- but there
25 is a pool of money. That pool of money is wasting every

1 day. It is wasting in receivership expenses. It may be
2 diminished by interim distributions made to other
3 creditors.

4 QUESTION: But would your be -- but would your
5 being able to get into court earlier than you have
6 effect that at all --

7 MR. GOODFRIEND: Absolutely.

8 QUESTION: -- because it's in still a
9 receivership.

10 MR. GOODFRIEND: Yes, Your Honor. But the
11 validity of our claim might have already been determined
12 in a state court. Indeed, the --

13 QUESTION: But supposing the validity of your
14 claim had been determined in a state court.

15 MR. GOODFRIEND: Yes, Your Honor.

16 QUESTION: Would it have advanced your
17 client's position so far as his dollars and cents are
18 concerned?

19 MR. GOODFRIEND: Well, what we say is we would
20 then be in line for a potential distribution from the
21 receiver depending upon the priority of our claims under
22 FSLIC's regulations, and we might receive substantially
23 more money, maybe 50 percent of the amount of our total
24 claim, instead of two or three years down the line,
25 maybe we might receive only 20 percent.

1 QUESTION: That's a -- that would be kind of
2 unusual for a receivership to distribute in that manner,
3 wouldn't it?

4 MR. GOODFRIEND: Well, my understanding is
5 that interim -- interim distributions from a
6 receivership estate are authorized.

7 Now, it does depend upon the priorities
8 whether I think you're on a higher level of priorities
9 or low level of priorities. And quite frankly, FSLIC's
10 priorities in this regard are not clear except for the
11 fact that in certain states they have promulgated a
12 regulation recently whereby they have placed themselves
13 in the position where they can recover on their
14 subrogation claims first ahead of every other creditor,
15 we think a very questionable ruling on their part.

16 We also say, Your Honor, that we are
17 potentially threatened every day by foreclosure on our
18 property. The situation there is that the receiver had
19 at one earlier point, in fact, about two weeks before
20 the Fifth Circuit ruled in this case, posted Colt's
21 property for foreclosure. We then petitioned the Board
22 under the expedited claims procedure to stay that
23 posting of the foreclosure, and before the Board could
24 act, FSLIC voluntarily withdrew its claim without
25 prejudice to reinstating it at any time.

1 So, I could leave this podium today, go back
2 to my office in Dallas and find out that FSLIC is
3 foreclosing on my client's property. And nothing
4 prevents them from doing that. The only thing I can do
5 is go back to the Board and ask them for discretionary
6 relief.

7 So, we say that that constant threat and the
8 wasting nature of this asset not only -- makes even the
9 constitutional claims ripe for review at this time.

10 I would like to make a number of points at the
11 outset, if I may. First --

12 QUESTION: Excuse me.

13 MR. GOODFRIEND: Yes, Your Honor.

14 QUESTION: I assume that you would have no
15 judicial remedy for that foreclosure?

16 MR. GOODFRIEND: Your Honor, as I understand
17 the Board's position, in its regulations they say that
18 when property is posted for foreclosure, a -- the owner
19 of that property has five working days to seek relief
20 from FSLIC -- excuse me -- from the Federal Home Loan
21 Bank Board, which is the supervisory agency over FSLIC,
22 from the foreclosure. And then, if he misses the five
23 working days, his right to seek judicial review is
24 waived. If he gets within that -- those five working
25 days, he may then appeal the Board's failure to give

1 that judicial relief into the courts. But he may not
2 initially go into a state court, which I submit almost
3 every litigant not familiar with these arcane procedures
4 would do and seek a temporary restraining order.

5 QUESTION: Being -- being deprived of your
6 property by foreclosure is not --

7 MR. GOODFRIEND: Absolutely.

8 QUESTION: -- is not an added threat unless
9 you miss the five days.

10 MR. GOODFRIEND: Yes, Your Honor.

11 QUESTION: Okay.

12 MR. GOODFRIEND: But it's easy to miss those
13 five days.

14 I would like to make a couple of points at the
15 outset. One is the tremendous breadth of the Hudspeth
16 Doctrine. This is not a doctrine which applies only to
17 a narrow range of claims as to which the Board might
18 claim some expertise. It applies to virtually every
19 conceivable state and federal cause of action against an
20 insolvent savings and loan. It covers antitrust claims,
21 securities claims, employment discrimination claims,
22 RICO, and under state law a breach of contract, fraud,
23 usury, even personal injury claims. If I left this
24 courtroom and was hit by a vehicle owned by a savings
25 and loans that was insolvent or one that became

1 insolvent, I would have to present my personal injury
2 claim to FSLIC.

3 Further, the Board has defined in its
4 regulations the concept of claims so broadly that it
5 includes compulsory counterclaims and even affirmative
6 defenses. If FSLIC goes into court and sues my client
7 on a note, which they could do in this case, foreclose
8 on the property and sue on the deficiency, or on a
9 contract, as they did in Mr. Hudspeth's case, he may not
10 -- the defendant may not counterclaim or set off his own
11 claims against FSLIC in -- in court, but must, according
12 to the Hudspeth Doctrine, raise his counterclaims or
13 even some courts have held his affirmative defense by
14 way of offset in the administrative proceeding. So,
15 what this does --

16 QUESTION: Is that --

17 MR. GOODFRIEND: -- is bifurcate.

18 QUESTION: Is that mandated by FSLIC
19 regulation now?

20 MR. GOODFRIEND: Yes, Your Honor. They have
21 -- I will read to the Court. They have defined the term
22 "claim" in -- in their -- I have the April regulations.
23 I understand from my co-counsel, Mr. Art Leibold, that
24 just yesterday FSLIC made these regulations final with
25 some additional prefatory language that I have not seen.

1 But under the term "claim," Your Honor, "Claim
2 includes but is not limited to demand for recoupment,
3 set-off, security, priority or preference."

4 QUESTION: But now we -- let's assume that
5 you're totally right on the meaning of the regulation.
6 We don't have that particular problem before us. I
7 mean, there's nothing in this case that requires us to
8 consider the validity of every single aspect of --

9 MR. GOODFRIEND: No.

10 QUESTION: -- FSLIC's regulations.

11 MR. GOODFRIEND: No, Your Honor. But -- but
12 you do have that issue before -- my client has been
13 threatened with foreclosure once. And the question of --

14 QUESTION: We -- we don't have before us -- or
15 correct me if I'm wrong. We don't have before us the
16 situation where FSLIC initiates a lawsuit against a
17 party. The party seeks to counterclaim. FSLIC says,
18 no, you should have filed a claim. You -- you can no
19 longer counter-claim. That isn't present in this case,
20 is it?

21 MR. GOODFRIEND: Your Honor, it hasn't
22 happened yet. It can happen on the facts here before
23 the Court because once FSLIC forecloses on the property,
24 they can sue my client on the deficiency on the note.
25 And then, when I raise our -- try to raise those as a

1 defense or offset in federal court, I will be referred
2 to the administrative track under Hudspeth. So, it
3 hasn't happened yet, but it's -- it is implicit in the
4 facts of the case.

5 QUESTION: If -- if we rule in -- generally in
6 your favor, should that include a declaration that
7 you're not required to submit claims at all even for
8 notice purposes?

9 MR. GOODFRIEND: You say for notice purposes.
10 Is this -- is your --

11 QUESTION: I mean, I -- I assume that you have
12 to submit notice of claims to FSLIC within 30 days under
13 the regulations.

14 MR. GOODFRIEND: That goes to the bar date,
15 Your Honor?

16 QUESTION: Yes.

17 MR. GOODFRIEND: That's I think a very
18 important point. What we say happens in this case is
19 that the combination of a mandatory exhaustion
20 requirement, together with the receiver's bar date,
21 which is usually 90 days after the receiver publishes
22 notice of the receivership to all creditors, actually
23 operates to modify substantive state and federal
24 statutes of limitation.

25 So, if you combine that with the mandatory

1 exhaustion requirement, I would dispute it. If you say
2 there is only a permissive exhaustion requirement, as
3 there is under the National Bank Act where a creditor
4 can file a claim, if he wishes, with the receiver, but
5 the bar date of the receiver -- this is the Queenan v.
6 Mays case -- does not prevent the creditor from going
7 into court even after the bar date has run and having
8 the validity of his claim determined there. Now, he
9 cannot execute on any judgment he obtains from a court.

10 QUESTION: But you would concede the
11 authority of FSLIC under either existing regulations or
12 the existing statute to require a notice of claim?

13 MR. GOODFRIEND: A voluntary claims procedure.
14 Is that the same as --

15 QUESTION: Suppose it's a -- would you concede
16 that they can require a mandatory claims procedure to
17 give them notice of the existence of the claim not for
18 adjudication purposes?

19 MR. GOODFRIEND: Let me ask this. Does that
20 contemplate that we cannot go into court until we --

21 QUESTION: No.

22 MR. GOODFRIEND: -- comply?

23 QUESTION: Yes. Yes, it means that before you
24 can go to court, you have to give them notice of your
25 claim.

1 MR. GOODFRIEND: Your Honor, that takes it --
2 I would say this, that there is no authority for that.
3 But if it does not entail any significant deferring of
4 federal court jurisdiction, yes. If it requires any
5 significant deferring of federal court jurisdiction
6 under express jurisdictional grants to -- to litigants,
7 I would say no.

8 QUESTION: Suppose it doesn't require
9 deferring, but it cuts it off. I mean, suppose if you
10 don't file, you can't bring a suit -- you can't bring a
11 suit in court, state or federal. You wouldn't like that.

12 (Laughter.)

13 MR. GOODFRIEND: I wouldn't like it.

14 QUESTION: But once you file, you can sue as
15 soon as you like.

16 MR. GOODFRIEND: There is no express authority
17 for this, Your Honor. I would say this, that if this
18 Court held that such a notice requirement were required,
19 but that a litigant, once he complied, could go
20 immediately to federal court, I would say there would be
21 no significant infringement on -- or it would not be a
22 significant abuse of the powers granted by Congress.

23 The problem here --

24 QUESTION: But you think we can't rule for you
25 and -- and have that regime. I mean --

1 MR. GOODFRIEND: It could have --

2 QUESTION: -- it's really all or nothing --
3 nothing at all.

4 MR. GOODFRIEND: Well, Your Honor, I think
5 it's a question of power. And what I think is that
6 really what is at stake here is the question of whether
7 an agency can by regulation with no express statutory
8 authority force a federal court to defer jurisdiction.
9 And I think that is probably the key question in this
10 case.

11 QUESTION: Is it arguable that the existing
12 regulations can be interpreted to provide that there
13 must be notice, or would those --

14 MR. GOODFRIEND: No, (inaudible) --

15 QUESTION: -- regulations have to be amended?

16 MR. GOODFRIEND: Well, Your Honor, I think
17 they would have to be amended. What it requires now is
18 that the creditor file a claim and then it sits -- he
19 cannot go to court, and it sits there until the special
20 representative either denies it or retains it for
21 further -- no -- either grants it, denies or retains it
22 for further review. And what we have shown in the
23 limited statistics we have available --

24 QUESTION: But --

25 MR. GOODFRIEND: -- is they're very large

1 claims.

2 QUESTION: I take it your position isn't that
3 once you get your judgment, if you get it, that you
4 don't have to go to the receiver.

5 MR. GOODFRIEND: No. That is not -- my
6 position, Your Honor, is you have to go to the receiver.

7 QUESTION: And you -- and I suppose that the
8 receiver would have to wait until he knew what the other
9 claims were before you divided up the pie.

10 MR. GOODFRIEND: Your Honor, that's what the
11 Fifth Circuit thought. And that seems contrary to all
12 prior receivership practice and contrary, for example,
13 to interim distributions which are authorized under the
14 Bankruptcy Code.

15 QUESTION: Well, I -- I take it that isn't --
16 I guess that issue isn't here anyway, but --

17 MR. GOODFRIEND: Well, it's here only in that
18 the Fifth Circuit felt that that was a restraint. And
19 he needed to know the -- he would say we need to know
20 the denominator of the equation, how much we're going to
21 pay out, before we can pay anything out.

22 QUESTION: But if -- if there's only 10,000
23 units available in the pool, and you have a judgment for
24 5,000 units, and yet there are claims ten times that, do
25 you think you should get a distribution for 5,000 units?

1 MR. GOODFRIEND: Well, what has happened, Your
2 Honor, first of all, sometimes claims of a certain
3 priority are all in and a receiver can make distribution
4 with --

5 QUESTION: Yes, yes.

6 MR. GOODFRIEND: -- without prejudicing --

7 QUESTION: But you -- you agree that -- that
8 all the claims of a certain class ought to be in before
9 anybody gets anything.

10 MR. GOODFRIEND: No, I don't, Your Honor. I
11 think you can set up a -- let me say under the
12 Bankruptcy Code there is a provision that contemplates
13 this where you can set up a reserve where there is
14 contested litigation. And you can make distributions to
15 creditors whose claims are liquidated while the receiver
16 sets up a reserve to cover the claims of those that are
17 not.

18 QUESTION: But is FSLIC required to borrow
19 from the bankruptcy statute that particular procedure?

20 MR. GOODFRIEND: No, Your Honor, I don't think
21 they are required. The point is this that the Fifth
22 Circuit's assumption that all the claims must be
23 litigated and therefore that the mere attempt to
24 liquidate a claim in court is a restraint is fallacious.

25 QUESTION: One can accept that I think without

1 going as far as you do in suggesting that the -- the
2 receiver would have to follow some provisions about
3 interim distributions that aren't at all clear from the
4 statute.

5 MR. GOODFRIEND: I agree, Your Honor. He does
6 not have to follow those provisions, but the point is it
7 is his voluntary decision to make or not make interim
8 distributions. He does not have to have all claims
9 liquidated before he can make any distribution.

10 What I'd like to address, if I may, is the --
11 what I think is the critical issue in this case, and
12 that is the question of whether -- whether or not --
13 what the standard of review is for determining the
14 validity of a regulation by a federal agency mandating
15 exhaustion where, as the Solicitor General admits in
16 this case, there is no express statutory authority for a
17 mandatory exhaustion requirement in the statute; and
18 secondly, where the Solicitor General has cited no
19 relevant legislative history concerning congressional
20 intent to require exhaustion.

21 Yet, in that context, the Solicitor General
22 proposes the most deferential standard of review as to
23 the validity of this exhaustion regulation. He proposes
24 that it be reviewed under the standard of whether it is
25 reasonably related to the purposes of the enabling

1 legislation. We discuss this in footnote 15 of our
2 brief. And he relies on Mourning v. Family Publications
3 and Weinberger v. Salfi, and a number of other cases
4 cited in a footnote.

5 Secondly, Hudspeth -- in the Morrison-Knudsen
6 case there was an oblique reference to the standard of
7 review of administrative regulations, and the court
8 there referred to the Chevron v. National Resource
9 Defense Council case by this Court. And also there's a
10 Duke law journal that has been sent to this Court which
11 uses the Chevron test which is also very deferential.
12 It is whether or not the regulations should be upheld
13 according to Chevron if it is not arbitrary, capricious
14 or manifestly contrary to the statute.

15 QUESTION: We're talking here about the
16 standard by which a court reviews FSLIC's regulations
17 not by which a court would review a FSLIC determination
18 that a claim wasn't any good. Is that right?

19 MR. GOODFRIEND: What I'm talking about, Your
20 Honor, is the validity -- the SG has taken the position
21 that FSLIC has the power -- the Board has the power to
22 impose these regulations. And the question is, under
23 section 5(d)(11) of the Act, which is a general grant to
24 FSLIC of the power to set up receiverships -- and the
25 question is does the Board have the power to impose

1 mandatory exhaustion requirements under that general
2 grant of power and, if so, by what standard is the
3 validity of the exercise of that power to be determined.

4 And we reject both the Chevron test and
5 Mourning v. Family Publications and Weinberger v. Salfi.
6 And we do so because we believe that what is at issue
7 here is the validity of agency regulations which attempt
8 to limit the access of litigants to the courts.

9 And traditionally, when dealing with a
10 limitation on the right of access to the courts, this
11 Court has always subjected that kind of legislation or
12 regulation to a higher degree of scrutiny than other
13 types of legislation, and it has placed the burden of
14 showing that Congress intended to limit access on the
15 party asserting the limitation.

16 QUESTION: But every --

17 QUESTION: Didn't the -- didn't the
18 regulations in Salfi limit access to the courts?

19 MR. GOODFRIEND: Yes, Your Honor, but I
20 distinguished Salfi, Your Honor, because there the
21 statute expressly contemplated exhaustion. It said
22 you've got to go to the Secretary and then you can
23 appeal any final decision. The statute set up the
24 exhaustion mechanism. An agency did not by fiat with no
25 statutory authorization at all declare exhaustion.

1 And I have found no case -- and maybe the
2 Solicitor General can -- can advise the Court. I have
3 found no case from this Court which has determined
4 whether an agency can enact an agency-directed and
5 mandated exhaustion requirement with no statutory
6 authorization. And the question is when that happens,
7 what is the standard of review.

8 And we submit that under -- this Court has
9 used a heightened scrutiny in Johnson v. Robison and
10 Abbott Laboratories v. Gardner to review cases where
11 Congress tries to limit judicial review. And even in
12 the abstention area, Justice Brennan writing for the
13 Court in Colorado River Water Conservation District and
14 later the Court's decision in Moses Cohn where
15 abstention comes up, which is also a postponing of the
16 -- of jurisdiction, this Court has referred to the
17 virtually unflagging obligation of the federal courts to
18 exercise the jurisdiction given them.

19 We think Mourning is inapplicable. It does
20 not involve exhaustion. Chevron doesn't involve
21 exhaustion. Weinberger did, but it was expressly in the
22 statute.

23 QUESTION: Do you -- do you mean, Mr.
24 Goodfriend, if there's a statute that says the Secretary
25 can make a particular determination -- that's all the

1 statute says -- the agency can't -- doesn't -- and the
2 agency has rulemaking authority, just general rulemaking
3 authority, the agency cannot devise a -- a system by
4 which that determination will be made which requires the
5 applicant to apply first to one level with an appeal to
6 a second level --

7 MR. GOODFRIEND: Possibly if --

8 QUESTION: -- with an appeal to a third level?
9 And you -- you think we wouldn't hold that he had to
10 exhaust?

11 MR. GOODFRIEND: I think if it contemplated
12 action by the action by the Secretary, in some ways I
13 think the agency could flesh out the details of the
14 exhaustion requirement.

15 The point here is all you have is a general
16 grant to the agency to enact regulations dealing with
17 receiverships. Nowhere does it contemplate a priority,
18 who goes first.

19 QUESTION: But it does say that the
20 corporation shall have authority to liquidate the
21 institution in order -- in an orderly manner.

22 MR. GOODFRIEND: Yes, Your Honor, it does say
23 that.

24 QUESTION: That is a -- that is quite a grant
25 of power.

1 MR. GOODFRIEND: But, Your Honor, I think this
2 is the significant thing. Only creditors of savings and
3 loans have to go through this administrative process
4 which involves no -- no hearings, no -- no taking of
5 evidence, only one-way discovery basically. The
6 creditors of just about every other financial
7 institution, banks, credit unions, insurance companies,
8 in liquidation, when those financial institutions go
9 into litigation -- into liquidation, all those other
10 creditors get to have their claims determined in court.
11 Under the National Bank Act, since the 1800s, creditors
12 of banks have had the right to have their claims
13 determined in court.

14 QUESTION: We're not fighting about that
15 anymore I thought.

16 MR. GOODFRIEND: We're not fighting about
17 what, Your Honor?

18 QUESTION: The right to get it determined in
19 court. I gather that has been conceded.

20 MR. GOODFRIEND: Well, as far as I know, Your
21 Honor, under the National Bank Act, there is no
22 exhaustion requirement. In fact, as we have pointed out
23 in our brief, there is a voluntary claims procedure
24 before the FDIC, and a creditor who, say, has a small
25 claim and doesn't want to incur the expense of -- of

1 litigation can go there.

2 But the fact that that claims procedure exists
3 and the fact that the receiver may impose a bar date in
4 a bank liquidation does not prevent a creditor of a
5 national bank in receivership under FDIC from having his
6 claim determined in federal or state court. And that
7 discrimination I believe between creditors of savings
8 and loans and creditors of banks I think is going to
9 upset the careful balance that Congress has crafted
10 between savings and loans and banks and other financial
11 institutions.

12 And one of the reasons that the U.S. Savings
13 League, the trade association of the largest number of
14 savings and loans in this country, is here in this Court
15 filing an amicus curiae brief on behalf of Coit and
16 against the regulatory agency that regulates savings and
17 loans is that they fear that the Hudspeth Doctrine is
18 going to cause businessmen in the future to prefer banks
19 and other financial institutions over savings and loans
20 when it comes to engaging in new business transactions.
21 And we think savings and loans are going to be -- and
22 apparently they do to -- going to be seriously hurt by
23 the existence of the Hudspeth Doctrine.

24 We also think that the Hudspeth Doctrine
25 threatens the security of many homeowners in this

1 country who, because of the limited nature of review for
2 foreclosure proceedings, actually stand at risk if their
3 mortgages are held by savings and loans because if FSLIC
4 posts their home for foreclosure, even mistakenly, and
5 they don't meet that five-day window, their property can
6 be taken and no court in the land under the Judspeth
7 Doctrine can come to their aid.

8 So, we believe that this is a sweeping
9 doctrine. And we believe if that if the Board wishes to
10 contravene the rights of these litigants to avail
11 themselves of express jurisdictional grants from
12 Congress and to shorten federal and state statutes of
13 limitations, then the Board has the burden to show that
14 Congress intended to make an exception where insolvent
15 savings and loans are concerned. We believe if any
16 lesser standard were used, then every federal agency
17 could require exhaustion simply by adopting a regulation
18 to that effect.

19 QUESTION: Thank you, Mr. Goodfriend.

20 We'll hear now from you, Mr. Minear.

21 ORAL ARGUMENT OF JEFFREY P. MINEAR

22 ON BEHALF OF THE RESPONDENT

23 MR. MINEAR: Mr. Chief Justice, and may it
24 please the Court:

25 The savings and loan industry is presently

1 facing the worst financial crisis since the Great
2 Depression. The Federal Home Loan Bank Board estimates
3 that at least 400 federally insured savings and loan
4 institutions are insolvent. And the Bank Board, which
5 itself is facing serious financial constraints, has
6 already ordered the liquidation of 85 other hopelessly
7 insolvent institutions. The liquidation process is just
8 beginning, and already there are thousands of claims
9 seeking billions of dollars against just these 85
10 thrifts.

11 Those claims are pressed by a wide variety of
12 interests, including defaulting borrowers like Colt, who
13 claim that they are not obligated to pay back their
14 loans and that the lender, in fact, should pay them
15 damages.

16 This case presents an extraordinarily
17 important, albeit it narrow, question, namely, what is
18 the first step in the process for resolving these
19 thousands of claims. We submit that claims against an
20 insolvent thrift that has been placed in Federal
21 receivership must be presented to the receiver in the
22 first instance for allowance or disallowance before the
23 claimant can seek a judicial remedy.

24 The circuit courts that have toiled in this
25 vineyard all recognize the concepts of primary

1 jurisdiction or exhaustion of remedies apply, but they
2 have differed with respect to whether a claimant must
3 always participate in the administrative process before
4 seeking judicial review. The Third, Fifth and the
5 Seventh Circuits require a mandatory resort to the Bank
6 Board's claims procedure where the Ninth Circuit's
7 Morrison-Knudsen decision held that a trial court should
8 consider whether recourse to that process is appropriate
9 under the circumstances of the particular case.

10 We submit, based on the logic and language of
11 the relevant statutes, that a claim -- a claimant is
12 required to participate in the Bank Board's claims
13 process and that any other result would have disastrous
14 consequences for the orderly liquidation of a failed
15 thrift.

16 QUESTION: You say that there's a statute that
17 requires exhaustion?

18 MR. MINEAR: No, Your Honor, we do not say
19 that there's a statute that expressly requires
20 exhaustion. The exhaustion requirement, in fact, is
21 implicit in the statutory scheme that is set up by the
22 Homeowner's Loan Act and the National Housing Act.

23 Section 5(d)(6) of the Homeowner's Act gives
24 the Bank Board exclusive power to reorganize or
25 liquidate an insolvent thrift using FSLIC as receiver

1 for that purpose. Section 5(d)(11) then broadly states
2 that the Board shall have power to make rules and
3 regulations for the liquidation of associations and the
4 conduct of receiverships.

5 Congress, in short, gave the Bank Board broad
6 power to design and put into effect an administrative
7 process in lieu of the Title XI bankruptcy procedures
8 for liquidating failed thrift institutions. And here,
9 as in de la Cuesta, it would have been difficult for
10 Congress to have given the Bank Board a broader mandate.

11 QUESTION: The only issue is whether that
12 includes the power to cut off a claim. Do you think
13 that language fairly includes the power to cut off a
14 claim is what we're talking about --

15 MR. MINEAR: There's -- we're not asserting
16 that the Bank Board has the power to cut off a claim.
17 We're asserting that a -- that the claims process only
18 postpones judicial determination of that claim until
19 FSLIC, after review by the Bank Board, has had a
20 determination -- a chance to make a determination
21 whether to pay, settle or dispute that claim.

22 QUESTION: Aren't you -- aren't you claiming
23 that if -- if -- if a claim is not presented timely to
24 FSLIC, the claim is cut off?

25 MR. MINEAR: But that -- that really results

1 -- that result follows from failure to comply with the
2 administrative process.

3 QUESTION: Well, to be sure. But -- but the
4 power you're asserting is the right -- is the power to
5 cut off a claim if they don't do what you tell them to
6 do.

7 MR. MINEAR: But, Your Honor, I think the same
8 thing would happen under the Social Security Act, for
9 instance, if a party refused to comply with the
10 Secretary's regulations governing the -- the pursuit of
11 a claim in the administrative forum.

12 What we're asserting is that the claimant
13 does, in fact, have to comply with these rules and
14 regulations that FSLIC might -- might impose. Now,
15 whether those rules or regulations are fair, in fact,
16 can be reviewed by this Court.

17 QUESTION: Under the Social Security Act, the
18 claimant must establish his claim before the Social
19 Security Administration. You have conceded that the
20 claimant does not have to establish his claim before
21 FSLIC. He's entitled to establish it before the courts.
22 I there find it -- I, therefore, find it hard to imply a
23 power on the part of FSLIC simply to chop that claim
24 away if this individual doesn't follow what FSLIC wants,
25 or at least I -- you know, it seems to me there ought to

1 be more specific language in the statute.

2 MR. MINEAR: Your Honor, without that sort of
3 power, it would be impossible to conduct any sort of
4 liquidation procedure at all. If parties are not, in
5 fact, willing to comply with the -- the liquidation
6 scheme that Congress has set up, then the liquidation
7 scheme will simply not work. We think that this power
8 is implicit in the broad grant of authority to create a
9 liquidation scheme. Absent the power to require
10 creditors to comply with the liquidation provisions,
11 it's going to be -- it's going to be impossible to get
12 anyone to even participate in this liquidation scheme.

13 QUESTION: Mr. Minear, is it de novo judicial
14 review, if you want to call it judicial review, when a
15 person takes a claim to court after it has been passed
16 down by the Board?

17 MR. MINEAR: Well, Your Honor, first this
18 question isn't squarely presented here, and we think --

19 QUESTION: Well, but I -- I think it's very
20 useful. It would be very useful to me in deciding the
21 case because if the FSLIC determination means absolutely
22 nothing, turning down the claim is entitled to no weight
23 in court, there doesn't seem to be much point to the
24 whole procedure. And on the other hand, if the FSLIC
25 determination is entitled to some weight, then the --

1 you wonder whether an agency can by regulation cut off
2 the -- the right to process it in court ab initio.

3 MR. MINEAR: We submit as follows with respect
4 to that question, Your Honor. Once FSLIC has made a
5 determination whether to pay, settle or dispute a claim,
6 if it -- if its determination is to dispute the claim,
7 the parties go to court and they litigate that question.
8 And it, in fact, is a -- the beginning of a judicial
9 remedy. All we've really done is postponed the judicial
10 determination of that claim until the Bank Board has had
11 an opportunity to determine whether to allow it --

12 QUESTION: Well, that's where FSLIC, in
13 effect, denies the claim.

14 MR. MINEAR: Yes. Its denial of its claim is,
15 in essence, an assertion it's going to dispute that
16 claim in court.

17 QUESTION: Most claims are granted. Most
18 claims that have any basis for them --

19 MR. MINEAR: Yes, that's --

20 QUESTION: And it's very important to get
21 those out of the way.

22 MR. MINEAR: Exactly. And, in fact, FSLIC
23 often cannot make a wise litigation judgment on these
24 claims until it has an opportunity to see all the claims
25 that have been presented and sort out the relationship

1 between the creditors and the validity and nature of the
2 claims.

3 QUESTION: Because in the -- in the claims
4 process that's provided for by the regulations, it
5 doesn't contemplate any kind of a hearing, just a filing
6 and a paper -- a paper presentation.

7 MR. MINEAR: They can, in fact -- FSLIC can,
8 in fact, require an oral presentation.

9 QUESTION: I -- I know they can, but they --

10 MR. MINEAR: They can require it, but they do
11 not. It's not required.

12 QUESTION: But the -- but the claimant has no
13 right to an oral presentation.

14 MR. MINEAR: No, he does not have a right to
15 oral presentation.

16 QUESTION: So, it just -- it just contemplates
17 a -- a tentative decision about it. And if they're
18 going to grant it, it's final.

19 MR. MINEAR: Yes.

20 QUESTION: If they're not, why, you're going
21 to litigate.

22 MR. MINEAR: Yes. And with respect to that, I
23 think it's useful to point out how the -- the present
24 status of this receivership. There are over 1,700
25 claims that were filed in this particular receivership

1 that sought over \$800 million in damages from the
2 receivership estate. At this point approximately 570 of
3 those claims have been resolved, either allowed,
4 disallowed or settled. At present another 530 are under
5 negotiation under a global settlement plan. These 530
6 claims all arise from 67 related loans.

7 QUESTION: Mr. Minear, after FSLIC turns down
8 a claim, is its denial of the claim entitled to any
9 weight in the judicial proceeding?

10 MR. MINEAR: The Bank Board has argued in a
11 number of cases that it's subject to APA review, and the
12 Solicitor General disagrees with that position.

13 QUESTION: What does the Solicitor General --

14 MR. MINEAR: The Solicitor General's position
15 is that the party begins his claim anew. It's, in
16 essence, a de novo determination of that claim.

17 Now, there are -- I think it's important to
18 point out at the same time, however, that there are --
19 that the receivership determination can, in fact,
20 constrain as a practical matter this claim in various
21 ways. For instance, the receivership's determination
22 might be admissible in court under a hearsay exception.
23 For instance, 803(c)(8) I think would allow admission of
24 that. It also might lead to stipulations among the
25 parties as a practical matter. The net effect of the

1 receivership procedure is to narrow the issues in these
2 cases.

3 Oftentimes it will allow for a summary
4 judgment determination of these claims once the parties
5 find through the receivership process that there, in
6 fact, is no factual issues in dispute.

7 QUESTION: What about time? What about time?
8 The claimant has to wait until there's a decision by
9 FSLIC.

10 MR. MINEAR: Yes, generally, but there's also
11 an APA remedy in the -- in the event --

12 QUESTION: Well, can't -- do you -- can't the
13 party just file a suit? Let's assume he files with the
14 receiver. May he also file a suit in court and then
15 have that stayed?

16 MR. MINEAR: We submit that he cannot, that
17 simply the receivership process will not work under --

18 QUESTION: Well, how does he avoid the statute
19 of limitations?

20 MR. MINEAR: There's a couple of ways. First
21 of all, these claims are often resolved long before
22 statute of limitations --

23 QUESTION: Well, they often aren't.

24 (Laughter.)

25 MR. MINEAR: Well, in this respect, Your

1 Honor, that there has been a claim here that this claim
2 has lingered for 13 months, and I do have to clarify the
3 record on that.

4 QUESTION: Well, let's --

5 MR. MINEAR: When this --

6 QUESTION: You don't have to do that till you
7 answer this question.

8 MR. MINEAR: Sure.

9 QUESTION: What about the statute of
10 limitations?

11 MR. MINEAR: Certainly, Your Honor.

12 The statute of limitations problems can be
13 dealt with in several ways. First of all, if it appears
14 that the statute of limitations is going to run, FSLIC
15 can allow the party to file its suit subject to a stay
16 pending the determination of the receiver whether or not
17 to go forward with that plan.

18 QUESTION: Well, but FSLIC you say may --

19 MR. MINEAR: Yes.

20 QUESTION: Why would it do that? I mean,
21 it's --

22 (Laughter.)

23 QUESTION: It's the person owing the money.

24 MR. MINEAR: But, Your Honor, the -- the --
25 FSLIC's interest here is in a fair resolution of these

1 claims. And FSLIC does not have any interest in forcing
2 people to, in fact, default on their claims through a
3 statute of limitations. That is simply not what FSLIC
4 is interested in doing.

5 In any event, if the claim is delayed, the
6 party can go to court and seek a remedy under the APA
7 for agency action unduly delayed. There is a remedy
8 there that would preclude any of these problems.

9 QUESTION: What -- what if you want to go to
10 state court and sue?

11 MR. MINEAR: Well, there's still the APA
12 remedy in those circumstances for, in fact, obtaining --

13 QUESTION: So, you bring a separate APA suit
14 in federal court against FSLIC for unlawfully delaying
15 your claim before you can go into state court and file a
16 claim on the merit.

17 MR. MINEAR: Yes, Your Honor, but that --
18 first of all, these -- these threats are all rather
19 hypothetical. In fact, as I pointed out already, in one
20 year the FirstSouth receivership has resolved 550 of the
21 1,380 non-shareholder claims.

22 QUESTION: Yes, but it hasn't resolved the
23 claim that your opponent is fighting about.

24 MR. MINEAR: And there's a reason for that,
25 Your Honor. And if I can point out, when they -- when

1 Coit filed its claim, it also included a letter, and
2 this letter states: "Claimant's claims are presently on
3 appeal in the United States Court of Appeals for the
4 Fifth Circuit. The Claimant will supply additional
5 factual material in support of the attached proof of
6 claim at the appropriate time, but in order to save cost
7 to all parties, all information is not being presented
8 at this time."

9 As a result of that --

10 QUESTION: Yes, but of course, you probably
11 have read the complaint, and you're a party to the
12 litigation. So, it's not exactly a mystery what the
13 lawsuit is all about, is it?

14 MR. MINEAR: Well, yes, your -- but, Your
15 Honor, there is still -- in order for -- these
16 determinations are made by separate parties. The
17 receiver is not the same person as the person who is, in
18 fact, litigating this claim in a different court. For
19 the receiver and his special representative to determine
20 this claim, he has to acquire certain information that
21 is going to be necessary for him to pass on that
22 judgment.

23 QUESTION: Well, who is in --

24 MR. MINEAR: Until he receives that --

25 QUESTION: Who is in control of the defense of

1 state court litigation?

2 MR. MINEAR: The Bank Board is in control of
3 that; the Department of Justice is not.

4 QUESTION: But -- and FSLIC can't get the
5 information from the Bank Board? They don't know what
6 the case is all about?

7 MR. MINEAR: Well, it can, but again, Your
8 Honor, remember there are 1,700 claims here, each of
9 which can be a potential lawsuit. And this is just one
10 receivership.

11 QUESTION: Well, this is not a potential
12 lawsuit; this is an actual lawsuit. It started even
13 before the receivership was started.

14 MR. MINEAR: Yes, Your Honor, that's true.
15 And when FSLIC steps into the shoes of the savings and
16 loan in these circumstances, it has the difficulty of
17 learning about the claims, learning about what those
18 claims are about, whether they're meritorious or not,
19 whether or not to defend the claim, whether or not to
20 settle the claim, whether or not to pay the claim.

21 QUESTION: Well, Mr. Minear, the -- the
22 Petitioner alleges that in actuality the small claims
23 are dealt with by FSLIC and resolved, and the claims
24 that amount to substantial sums of money go into the
25 so-called black hole and just aren't acted on.

1 How is the administrative scheme adequate
2 under this Court's holdings if there is no time limit
3 and if there is no reasonable mechanism by which the
4 creditors can expect to see action in a timely fashion
5 on their claims?

6 MR. MINEAR: Your Honor, when a claimant, in
7 fact, can point to undue delay in the administrative
8 process, then that is the time to review that question.
9 But we don't have that in these circumstances. FSLIC
10 has not been provided with the information necessary to
11 act on Colt's claim. And until it does, it's very
12 disingenuous for the party to claim that this claim has
13 disappeared into a black hole.

14 As for the size of the claims that are
15 disputed here --

16 QUESTION: But there is nothing in the
17 administrative regulations that even purports to set any
18 kind of time limit for action by the FSLIC.

19 MR. MINEAR: Well, if that is the only --

20 QUESTION: I would find it very difficult to
21 think that's an adequate administrative remedy frankly.

22 MR. MINEAR: Your Honor, if that is the only
23 deficiency in these regulations -- and I'm sure that the
24 Bank Board could enact a regulation that would require
25 action on those claims within a certain time. But you

1 must remember that these claims are oftentimes very
2 complex, they're interrelated, they cannot be resolved
3 immediately.

4 Mr. Hudspeth's claim -- they point to the --
5 the supposed nightmare of Mr. Hudspeth. He settled his
6 claim this summer. In fact, these claims are being
7 resolved. Hundreds of them are being resolved.
8 Thousands of them are being resolved.

9 I think it's also important in terms of --

10 QUESTION: Of course, some people may have
11 settled because they're worn down not being able to --

12 MR. MINEAR: Well, Your Honor, of course.

13 QUESTION: -- go into state court. Sure.

14 MR. MINEAR: But they might also have settled
15 because FSLIC has, in fact, given them a fair deal on
16 their claims once they determine how little is, in fact,
17 in the assets of the receivership estate.

18 QUESTION: Well, Mr. Minear, I can see how
19 it's necessary for an orderly conduct of the
20 receivership to know what claims are out there and --
21 and maybe the -- the general language is enough to -- to
22 give you that authority. But why is it necessary for a
23 orderly conduct of the receivership to stop people from
24 commencing lawsuits which you have acknowledged will be
25 the determinative lawsuits? You've acknowledged that

1 ultimately the state or federal court determinations are
2 going to be what govern.

3 MR. MINEAR: Your Honor, for the very same
4 reasons that there's an automatic stay in bankruptcy,
5 that when the receiver or a trustee steps into the shoes
6 of an insolvent debtor, it must have an opportunity to
7 assess the legal situation and the financial situation
8 of the particular debtor. Without that breathing space,
9 there's simply going to be chaos. And that is the --
10 the prospect that we face right here.

11 QUESTION: Who is -- who is going to make the
12 ultimate determination in the bankruptcy case?

13 MR. MINEAR: In the bankruptcy case of the --
14 the claim itself would ultimately be made by the
15 Bankruptcy Court.

16 QUESTION: That's a big difference, isn't it?
17 I mean, that's the point. Here the ultimately -- the
18 ultimate determination is not going to be made by FSLIC.
19 It's going to be made by those courts anyway, as you --
20 as you've now told us.

21 Under the former theory that FSLIC had, it
22 made some sense. You could say, well, since ultimately
23 FSLIC is going to make the determination, subject to --
24 subject to arbitrary and capricious review, it makes a
25 lot of sense to say you have to come to FSLIC for, but

1 -- first.

2 But now you come before us and you say FSLIC
3 isn't the one that makes the determination; it's going
4 to be the state and federal courts. If that's the case,
5 I don't see any reason why -- I can see a reason why you
6 want to know what claims are out there, but why don't
7 you let the courts go ahead and tell you what -- it
8 actually helps you.

9 MR. MINEAR: Because the receiver --

10 QUESTION: You'll know that much sooner which
11 claims are good ones.

12 MR. MINEAR: The receiver also has to have an
13 opportunity to make a determination, not simply know
14 about the claim, know that someone submits a paper and
15 says that the receivership estate owes them \$100
16 million. They have to have an opportunity to evaluate
17 the legal significance of those claims whether or not
18 they're right on the law, whether or not the claim ought
19 to be settled because, in fact, there are no assets in
20 the receivership estate.

21 One of the anomalies that the -- the Court's
22 position creates here is tremendous litigation over an
23 empty bucket. There -- in fact, in many of these
24 receivership estates, there are no assets, and yet we
25 have parties that are going out and filing claims,

1 seeking discovery and, in fact, demanding litigation
2 when, in fact, there is no money there that would
3 ultimately pay the claims. The one --

4 QUESTION: People represented by lawyers?

5 MR. MINEAR: What?

6 (Laughter.)

7 QUESTION: Take a default.

8 MR. MINEAR: Surprisingly so, yes, Your Honor.

9 QUESTION: Take a default. It will serve them
10 right.

11 MR. MINEAR: Well, the government is not in a
12 position to be taking default judgments in these
13 matters. And this is a serious question, Your Honor,
14 that in fact should FSLIC, if there are no assets in the
15 receivership estate, simply take default judgments.
16 That's -- that would be a very peculiar situation.

17 What is also peculiar --

18 QUESTION: I take it, counsel, that FSLIC
19 could request a state or federal court to stay the
20 action at the court's discretion.

21 MR. MINEAR: Again, the courts -- the court --
22 the Bank Board and FSLIC can certainly do that. But if,
23 in fact, end up litigating over the question of
24 exhaustion itself -- and that is what is occurring in
25 the Ninth Circuit --

1 QUESTION: Well, it's not exhaustion; it's
2 just -- it's just a request for stay so that you can
3 evaluate your position.

4 MR. MINEAR: (Inaudible).

5 QUESTION: Any court would exercise its
6 discretion. You've been arguing that FSLIC has
7 discretion. Courts have discretion as well.

8 MR. MINEAR: But -- but, Your Honor, that
9 neglects the fact that oftentimes many of these claims
10 will all arise out of one piece of property, one or a
11 series of related transactions. Suits will be filed all
12 across the country all relating to that particular
13 property.

14 QUESTION: What is the experience in the Ninth
15 Circuit where they have a contrary rule?

16 MR. MINEAR: The -- what FSLIC tells me is, in
17 fact, they spend a good deal of time now litigating
18 whether or not the claims process ought to be exhausted.
19 And, in fact, they can spend thousands and, in some
20 cases, tens of thousands of dollars --

21 QUESTION: If we decide for the other side --

22 MR. MINEAR: -- (inaudible) determinations.

23 QUESTION: -- you won't be litigating that
24 (inaudible).

25 (Laughter.)

1 MR. MINEAR: No, we won't, but we'll be
2 litigating the -- certainly the litigation bills will be
3 even higher.

4 And it's important to remember that those
5 litigation costs are borne by the receivership estate.
6 And this is where we go again to the point of a need for
7 an orderly mechanism for litigating these claims.

8 All that FSLIC is asking for in this situation
9 is the opportunity to evaluate whether to pay, settle or
10 disallow a claim --

11 QUESTION: I can't imagine, Mr. Minear -- I
12 don't -- I don't know what your experience with district
13 judges is, state or federal, but I can't imagine if
14 FSLIC goes in when the suit is filed and says, you know,
15 Your Honor, we are in active settlement negotiations,
16 we're evaluating this thing. The court says, no, no,
17 I'm sorry. I want to go ahead with a trial. I want to
18 have a trial on my docket. I can't imagine that that's
19 what happens.

20 MR. MINEAR: But is this Court really --

21 QUESTION: If you were actively --

22 MR. MINEAR: Is this Court really willing to
23 rule on that decision based on its perception of what
24 hundreds, literally hundreds, of judges might do in
25 particular cases? There really is a need for a rule

1 here to restore order.

2 QUESTION: I can -- I can more accurately
3 predict a good result from what those judges will do
4 than a good result from leaving it with FSLIC to -- to
5 -- to decide how long it wants to act upon these things.

6 MR. MINEAR: Your Honor, I'd like to point out
7 that it has been treated as if this whole process is
8 truly unique or abnormal. But we only need to look to
9 Texas State procedures to see that, in fact, this is the
10 way that receiverships are often conducted.

11 Under Article 852(a) of the Texas Civil Code,
12 Section 8.09, Texas has established a receivership
13 proceeding -- and, in fact, they call it a liquidation
14 proceeding -- that is very similar to, in fact, what
15 FSLIC is advocating in this particular case. In that
16 case, the liquidating agency --

17 QUESTION: It's a shame I suppose that
18 Congress didn't enact a similar statute.

19 (Laughter.)

20 MR. MINEAR: Your Honor, this -- again let's
21 remember the context of these statutes. They were
22 enacted in 1933 at a time when there were thousands of
23 foreclosures taking place. There's very little
24 legislative history on this statute, and it's quite
25 clear that what Congress did in this particular statute

1 was delegate exceedingly broad authority to the agency
2 to create a liquidation scheme. They entrusted the
3 agency with that responsibility in lieu of the
4 bankruptcy procedures.

5 And, in fact, the result that -- that would
6 follow from Coit's argument here would be that there
7 would be less protection and far less protection than is
8 available under the bankruptcy scheme. And we can't
9 believe that Congress really wished that sort of
10 anomaly, that in the case of every other insolvent
11 debtor except thrifts --

12 QUESTION: Yes, but again you compare it to
13 the Bankruptcy Code. That's not a -- a one-line
14 document saying bankruptcy judges make up a lot of
15 rules. It's a rather elaborate legislative code that's
16 administered.

17 MR. MINEAR: That's -- that is correct, Your
18 Honor.

19 QUESTION: It's quite different from --

20 MR. MINEAR: But that simply underscores the
21 difficulties of the problems that are faced here.

22 QUESTION: The Bankruptcy Court's decision
23 there is the operative decision. That's a big
24 difference from what -- what -- what -- the situation
25 here. Here the receiver does not make the decision.

1 MR. MINEAR: But, Your Honor, let's compare
2 this again to the Texas code that I was alluding to
3 simply a few minutes earlier. In that case a
4 liquidating agent is appointed. The liquidating agent
5 has authority to pass on claims. When he makes -- first
6 of all, all the parties are required to submit their
7 claims to the liquidating agent within a period of
8 time. It's longer than the -- than the FSLIC program.
9 But if a party does not submit his claim, he is
10 precluded from any participation in the distribution of
11 the receivership assets until all of the other claimants
12 who have timely filed have been paid off in full.

13 Now, after the party submits his claim to the
14 liquidating agent, the liquidating agent makes a
15 determination on that, on that claim. If he determines
16 to disallow the claim, the party is then entitled to
17 bring a suit in state court in a particular county, mind
18 you, in Travis County, to in fact litigate that claim.

19 Now, that's not far removed from what the
20 receiver is asking for here. And, indeed, it would be
21 quite anomalous if in the case of federal receiverships,
22 no such protection is given, but in the case of state
23 receiverships, that protection is available when they
24 are liquidated through the state proceedings.

25 There are other anomalies that result from

1 Coit's position that I must point out. Absent a
2 centralized process requiring presentation of claims,
3 FSLIC would have to wait until the expiration of the
4 longest period -- the longest possible statute of
5 limitations before it could even determine the total
6 amount of claims that face the receivership.

7 FSLIC, accordingly, would be unable to begin
8 even partial distribution of assets until that time.
9 Under these circumstances, it's clear that FSLIC would
10 have great difficulty in making even interim
11 distributions because it must wait until it has all the
12 claims before it.

13 QUESTION: A notification requirement would
14 stop that problem. You don't need an exhaustion
15 requirement --

16 MR. MINEAR: The notification would solve that
17 particular problem, but it wouldn't solve the problem
18 that courts could still become engaged in pointless
19 litigation.

20 As I pointed out before, some receiverships
21 have no assets. In other cases, individual claimants
22 are each pursuing their claim without regard to others
23 and, in fact, are exhausting the receivership assets.
24 Now, that certainly is not in the best interest of an
25 orderly liquidation. And it's not in the best interest

1 of the claimants in this situation either.

2 Now, Coit has raised several other objections
3 here to the -- to this process. And one of those is the
4 question of foreclosures. And the fact of the matter is
5 that FSLIC gives as much protection to foreclosures as
6 the states often give. A party is entitled upon
7 receiving notice of a foreclosure to seek a stay on an
8 expedited basis from the Bank Board. If the Bank Board
9 rejects that stay, the party then has an opportunity to
10 seek judicial review before the foreclosure takes place.

11 In this particular case, there was a notice of
12 foreclosure, and based on the -- the litigation, the
13 ongoing litigation, and other matters as well, FSLIC has
14 determined not to foreclose on that property. There's
15 no --

16 QUESTION: Does -- does FSLIC have authority
17 to foreclose without going to court?

18 MR. MINEAR: In -- in states where it's
19 operating under a deed of trust --

20 QUESTION: So, it depends on the deed of
21 trust-mortgage distinction basically.

22 MR. MINEAR: Yes, state law. They are looking
23 to state law. But in most states now, there are
24 nonjudicial procedures for foreclosure.

25 And as for the -- with respect to the

1 claim-counterclaim controversy, there is no reason to
2 believe that the administrative claims process will
3 inevitably lead to the resolution of FSLIC claims and
4 creditor counterclaims in different forums.

5 When FSLIC is litigating a claim against a
6 receivership claimant, it can agree to stay its action
7 pending the claimant's exhaustion of the administrative
8 remedy. Furthermore, a district court in appropriate
9 circumstances could order such a result.

10 In any event, the mere possibility that claims
11 and counterclaims might be decided in different forums
12 provides no reason for dispensing with the substantial
13 benefits that flow to every claimant from the
14 administrative claims process.

15 Finally, Colt has discussed the careful
16 balance between the bank statute, the National Bank Act,
17 and the thrift statute in this case. I think it's
18 important to point out that the states -- the banks and
19 thrifts operate under completely different statutes.

20 And in addition, it's important to point out
21 that there is a centralized procedure in the banking
22 context that does allow for -- for determination of
23 these claims; 12 U.S.C. 94 of the National Bank Act
24 provides, in fact, that all claims must be filed -- in a
25 receivership must be filed in a particular district.

1 And that, in effect, solves the centralized --
2 centralization problem that I've discussed so far.

3 Again, I think it's important -- we cannot
4 understate the importance -- or we cannot overstate the
5 importance of a centralized process resolving these
6 thousands of claims. And, again, this situation is only
7 likely to grow worse.

8 In short, the Bank Board's administrative
9 claims process is a lawful and sensible first step in
10 resolving creditor claims. The Bank Board can justly
11 require that claimants participate in this process
12 before seeking a judicial remedy. Any other result
13 would severely cripple the Bank Board's ability to deal
14 with the present savings and loan crisis, a crisis that
15 is widely expected to grow only worse in the coming
16 years.

17 QUESTION: (Inaudible) are you litigating this
18 issue in any courts of appeals now?

19 MR. MINEAR: I believe that the issue
20 continues to be -- to arise in courts of appeals. Many
21 courts are simply staying these actions pending your
22 decision in this case.

23 QUESTION: Has anyone -- this is a new
24 position that the -- that the FSLIC has taken.

25 MR. MINEAR: Yes, that is correct.

1 QUESTION: And are you presenting this to
2 courts of appeals now?

3 MR. MINEAR: Well, part of the problem here
4 is --

5 QUESTION: Or are you going on the -- down the
6 old road?

7 MR. MINEAR: The Bank Board, in fact, conducts
8 the litigation in the lower courts, and we've advised
9 them of our views on these matters. The Bank Board does
10 not necessarily agree with us on every point; however --

11 QUESTION: So, the litigation is going on
12 based on the jurisdictional --

13 MR. MINEAR: I'm not sure whether it is or
14 not. I think that the Bank Board is, in fact, trying to
15 dismiss these claims based on our theory, but I can't be
16 certain what --

17 QUESTION: Are there any other decisions on
18 this issue in the --

19 MR. MINEAR: The most recent decision that I'm
20 aware of is the O'Henry decision which, in fact, is not
21 squarely a Hudspeth decision but, in fact, does address
22 Hudspeth as a question of primary jurisdiction.

23 QUESTION: And where is that? Is that --

24 MR. MINEAR: We have filed a copy of that
25 opinion with the Clerk of the Court.

1 QUESTION: What -- what CA is that in?

2 MR. MINEAR: This is in the Fifth Circuit, and
3 there's a concurrence by Judge Higginbotham in which he
4 discusses his view of the Hudspeth decision as well.
5 So, in fact, there is -- there does continue to be
6 litigation here.

7 Judge Higginbotham does treat this as a matter
8 of primary jurisdiction, and he points out that
9 Hudspeth, in fact, did not address the issues of what
10 judicial relief or remedy would be available after the
11 administrative process is followed.

12 If there are no further questions.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 Minear.

15 The case is submitted.

16 (Whereupon, at 10:59 a.m., the case in the
17 above-entitled matter was submitted.)
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CERTIFICATION

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No. 87-996 - COIT INDEPENDENCE JOINT VENTURE, Petitioner V. FEDERAL SAVINGS AND LOAN
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