

FIRREA PROTECTS PURCHASING BANKS AGAINST SOME CLAIMS DISGUISED AS AFFIRMATIVE DEFENSES

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As previously discussed on this blog, the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) creates a mandatory administrative claims process for claims against the assets of failed financial institutions. If a party with a claim against a failed bank does not comply with FIRREA’s requirements, then that party is generally barred from later raising the claim in state or federal court. This jurisdictional bar applies both to a defendant’s counterclaims and a plaintiff’s claims. This post examines whether FIRREA also deprives courts of subject matter jurisdiction over affirmative defenses.

In theory, an affirmative defense is not subject to the administrative claims process of FIRREA provided it merely attacks a purchasing bank’s legal right to bring an action. In practice, however, many so-called “affirmative defenses” are actually claims against the assets of failed banks. FIRREA may bar these types of claims even if a defendant labels them “affirmative defenses.”

Recognizing that claims against the assets of a failed bank are sometimes disguised as affirmative defenses, the Middle District of Florida in *BB&T v. S&S Development* recently said that courts should “look behind the nomenclature of a request for relief to ascertain whether it is a true affirmative defense or is, in actuality, a claim requiring exhaustion as a prerequisite to jurisdiction.” Accordingly, federal courts have refused to exercise jurisdiction over the affirmative defenses such as estoppel and setoff.

In Florida, the Fourth District Court of Appeals in *Kasket v. Chase Manhattan Corp.* developed a two-part test to decide whether an “affirmative defense” is actually a claim barred by FIRREA. First, a court should determine whether an affirmative defense is the type of claim that would normally go through the FDIC’s administrative claims process. These include claims for payment from the assets of failed banks and claims relating to alleged acts or omissions of failed banks. Second, if a claim would normally go through the FDIC’s administrative claims process, then courts should determine whether the claim could have been brought

independently by the defendant against the failed bank or the FDIC. If it can, then that defendant must exhaust the administrative claims process of FIRREA before raising the claim in court as an affirmative defense.