

THE ORDERLY LIQUIDATION AUTHORITY: FRIEND OR FOE?

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The financial crisis of 2007-2009 challenged policy makers to produce a mechanism that protects the economy from another financial meltdown. That mechanism included an Orderly Liquidation Authority (“OLA”) receivership, whose legislative purpose was to replace the panic-facilitating bankruptcy regime with a stealthy, orderly receivership regime. Instead, it may have unintentionally created a structure that can lead to more financial bankruptcy panics. The author of this article discusses the OLA and its implications.

There is a saying attributed to Mark Twain that “[a] banker is a fellow who lends you his umbrella when the sun is shining, but wants it back the minute it begins to rain.”¹ Prior to the financial crisis of 2007-2009, banks were looking to expand their consumer base.² Yet, when the “shadow banking”³ storm blew in and caused the financial crisis, consumers holding subprime mortgages were unable to access bank funds to refinance, leading to widespread foreclosure.⁴ Compelled by the crisis, the United States Congress implemented sweeping changes to the banking sector, which are known as the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁵

Title II of Dodd-Frank created the Orderly Liquidation Authority (“OLA”), a government agency, and vested it with the power of placing a strug-

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gling, systemically important financial institution into Federal Deposit Insurance Corporation ("FDIC") receivership to maintain financial stability.⁶ The belief is that due to the "pervasive fragility" of the financial system, one key financial institution that fails can drag the entire system into a financial abyss.⁷

LEGISLATIVE HISTORY OF THE OLA

The legislative history of the OLA highlights how lawmakers, due to the 2007-2009 financial crisis, created a new insolvency regime to prevent financial distress and possible failure of systemically significant financial institutions. The Obama administration, in addressing the need of a new insolvency regime, submitted the following statement to Congress:

AIG highlights broad failures of our financial system. Our regulatory system was not equipped to prevent the buildup of dangerous levels of risk. Compensation practices encouraged risk-taking and rewarded short-term profits over long-term financial stability, overwhelming the checks and balances in the system. The U.S. government does not have the legal means today to manage the orderly restructuring of a large, complex, non-bank financial institution that poses a threat to the stability of our financial system...

As we have seen with AIG, distress at large, interconnected, non-depository financial institutions can pose systemic risks just as distressed banks can. The Administration proposes legislation to give the U.S. government the same basic set of tools for addressing financial distress at non-banks as it has in the bank context.

The proposed resolution authority would allow the government to provide financial assistance to make loans to an institution, purchase its obligations or assets, assume or guarantee its liabilities, and purchase an equity interest.

The U.S. government as a conservator or receiver would have additional powers to sell or transfer the assets or liabilities of the institution in question, renegotiate or repudiate the institution's contracts (including with its employees), and prevent certain financial contracts with the institution

from being terminated on account of the conservatorship or receivership.

This proposed legislation would fill a significant void in the current financial services regulatory structure with respect to non-bank financial institutions. Implementation would be modeled on the resolution authority that the FDIC has under current law with respect to banks.⁸

Using AIG as a backdrop, this statement stressed the need for a new insolvency regime to properly manage distressed, systemic risk-causing, interconnected financial institutions.

Then FDIC chairman Sheila Bair, in testimony before Congress, echoed the need for a new insolvency framework:

One action is to create or designate a supervisory framework for regulating systemic risk. Another critical aspect to ending too big to fail is to establish a comprehensive resolution authority for systemically significant financial companies that makes the failure of any systemically important institution both credible and feasible. A realistic resolution regime would send a message that no institution is really too big to ultimately fail.⁹

Similar to the above, Ms. Bair stressed the need for a new insolvency regime to manage the possible failure of systemically vital financial institutions.

In sum, the record shows that policy makers created the OLA to properly manage troubled financial institutions that may otherwise contribute to future financial crises.

SYSTEMIC RISK

The U.S. Commodities Future Trading Commission defines systemic risk as “[t]he risk that a default by one market participant will have repercussions on other participants due to the interlocking nature of financial markets. For example, Customer A’s default in X market may affect Intermediary B’s ability to fulfill its obligations in Markets X, Y, and Z.”¹⁰ Similarly, another commentator defines systemic risk as “the possibility of a series of correlated defaults among financial institutions — typically banks — that occur over a short period of time, often caused by a single major event.”¹¹ That is to say,

one consequential event can engender systemic risk.

Avoiding systemic risk is particularly important because of its implications. Systemic risk due to bank failures triggered the Great Depression,¹² which was “in a league of its own in severity.”¹³ As a result, poverty and unemployment were widespread, fostering a significant increase in crime.¹⁴

Similarly, during the recent financial crisis, the unemployment rate and foreclosure rate more than doubled.¹⁵ Not surprisingly, the crime rate also increased.¹⁶ Hence, the need for a mechanism to control systemic risk.

CAN BANKRUPTCY SOLVE SYSTEMIC RISK?

A basic feature of the U.S. Bankruptcy Code (“Code”) is the automatic stay, which, upon filing, generally protects a debtor’s interest by halting creditor action from pre-petition debt.¹⁷ However, Section 560 of the Code provides a notable exception to the automatic stay:

[t]he exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365 (e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title.¹⁸

That is, non-debtor counterparties to swap agreements may enforce their contractual rights despite a debtor-counterparty’s bankruptcy petition. Code Section 561 provides a similar exception for securities contracts, commodity contracts, forward contracts, repurchase agreements, and master netting agreements (these exceptions are collectively referred to as “safe harbor protections”).¹⁹

Congress enacted the safe harbor protections to prevent the “insolvency of one commodity or security firm [from] spreading to other firms and possibly threatening the collapse of the affected market.”²⁰ In other words, Con-

gress effectuated the safe harbor protections to avoid systemic risk that may be caused by financial contracts.

Some academics agree with this rationale. Ohio State University economics Professor Rene M. Stulz argued that the derivatives exemption is necessary to maintain a non-debtor counterparty's liquidity during economic turmoil.²¹ Absent the safe harbor protections, "default on derivatives contracts would present a considerable problem since counterparties might have to wait, perhaps for years, for their claims to be adjudicated, leaving them with mostly unhedgeable risks."²² Thus, the safe harbor protections for financial derivatives may act to reduce systemic risk.

However, the safe harbor protections are not absolute and must be utilized in a way that prevents systemic risk. In 2007, Metavante Corporation ("Metavante") entered into an interest rate swap agreement, pursuant to an International Swap and Derivatives Agreement ("ISDA"), with Lehman Brothers Holding Inc. ("LBHI") and Lehman Brothers Special Financing ("LBSF").²³ Per Section 5(a) of the ISDA, the bankruptcy constituted a default, allowing Metavante to terminate the agreement despite the bankruptcy filing.²⁴ Eleven months after LBHI and LBSF filed for bankruptcy, Metavante, relying upon the safe harbor provisions of the code,²⁵ had not netted per the ISDA agreement.²⁶ The court, relying in part on the legislative history, held that the safe harbor protections only provide a non-debtor counterparty with the right to "liquidate, terminate or accelerate a swap," not to ride it out for a year, which would allow for systemic risk.²⁷

Moreover, Sheila Bair, in contrast to Professor Stulz, noted that the safe harbor provisions do not stem systemic risk during a financial crisis: "During periods of market instability — such as during the fall of 2008 — the exercise of these netting and collateral rights can increase systemic risks.²⁸ At such times, the resulting fire sale of collateral can depress prices, freeze market liquidity as investors pull back, and create risks of collapse for many other firms."²⁹

The preceding was only in regard to financial derivatives. It can be inferred that bankruptcy as a whole is not an effective tool to combat systemic risk. An example is the September 15, 2008 Lehman Brothers bankruptcy filing, which commentators believe triggered the financial crisis and spawned systemic risk as the crisis spread to other sectors of the economy.³⁰ As such, bankruptcy is an inadequate process to ward-off systemic risk.

Counter to the above, Professor Jean Helwege believes that the bankruptcy regime can avoid systemic risk. Federal Reserve Chairman Ben Bernanke stated:

Bear advised the Federal Reserve...that it would be forced to file for bankruptcy the next day unless alternative sources of funds became available. A bankruptcy filing would have forced Bear's secured creditors and counterparties to liquidate the underlying collateral and, given the illiquidity of markets, those creditors and counterparties might well have sustained losses. If they responded to losses or the unexpected illiquidity of their holdings by pulling back from providing secured financing to other firms, a much broader liquidity crisis would have ensued....³¹

Professor Helwege disputes Chairman Bernanke's assertion that a Bear Stearns bankruptcy would have led to creditors liquidating assets.³² She explains that the chairman's "description of the bankruptcy process highlights the idea that creditors of a failed firm are forced to liquidate assets, and to do so with haste."³³ However, bankruptcy law facilitates "the idea that creditors should be allowed to maximize the value of the assets now under their control," which includes the continued operation of the bankrupt debtor's business.³⁴ Professor Helwege also points out that "bankruptcy cascades," when bankruptcy spreads from one firm to another, are rare.³⁵ Therefore, Professor Helwege believes that the bankruptcy regime can be an effective tool to stem systemic risk.

Even assuming that Professor Helwege's theory is correct, public perception of bankruptcy and media speculation of market reaction can fuel financial chaos. History is full of large financial failures that caused bank runs and chaos, regardless of the bankruptcy regime.³⁶ Thus, as a practical matter, the use of bankruptcy protocol cannot solve systemic risk.

BANKS, THE FINANCIAL SERVICES INDUSTRY, AND BANKRUPTCY

In contrast to other countries,³⁷ U.S. insolvency law manages banks and non-banks differently.³⁸ Banks are not eligible for bankruptcy; non-banks are eligible for bankruptcy.³⁹ The term "bank" does not include all financial ser-

vices providers; rather, only banks that accept deposits are excluded from bankruptcy while other financial institutions, including bank holding companies ("BHCs"), may file for bankruptcy.⁴⁰

In general, banks receive special treatment because: "(1) banks offer transaction accounts; (2) banks are the backup source of liquidity for all other institutions; (3) banks are the transmission belt for monetary policy."⁴¹

First, banks offer transaction accounts, which are essential for public confidence.⁴² Banks incur liabilities that are payable on demand, resulting in a mismatch of assets and liabilities, making them vulnerable to "sudden drains on deposits that can jeopardize their solvency."⁴³ As such, a bank requires proper risk control so the public does not make a run on their deposits.⁴⁴

Second, banks provide liquidity for other institutions, so a bank's credit decisions affect the system as a whole.⁴⁵ A bank's ability to provide liquidity and elasticity, especially when other sources are unable to, is a vital part of the economic system.⁴⁶ Consequently, a bank's position as a standby institution to all sectors of the economy makes banks critical, both directly and indirectly, to the preservation and growth of the economy.⁴⁷

Third, a bank's link to the central bank, or "transmission belt," is a fundamental aspect of monetary policy.⁴⁸ A central bank's charge is to regulate the size of a nation's money supply, the availability and cost of its credit, and the foreign-exchange value of its currency.⁴⁹ Therefore, a bank, which acts as a conduit of central bank policy, is an important factor in implementing U.S. monetary policy.⁵⁰

Due to a bank's special role in the economy, Congress bifurcated the processes for bank and non-bank insolvencies. The purpose of bankruptcy law is to provide a debtor with a fresh start, which is accomplished through a discharge.⁵¹ The fresh start is a debtor's private interest.⁵² It follows that U.S. law provides non-banks with the ability to attain a fresh start through bankruptcy. Bank insolvencies, in contrast, are not private interests due to their special nature, so their insolvencies are not addressed through the bankruptcy process; instead, they are addressed through an FDIC receivership process.⁵³

Other financial institutions, including BHCs, can utilize the bankruptcy process to effectuate a fresh start.⁵⁴ Ostensibly, since BHCs, unlike banks, lack the above-mentioned properties that spawn special treatment,⁵⁵ Congress did not exclude BHCs from the bankruptcy regime.

In sum, the law equips non-banks with the ability to effectuate a fresh start through the bankruptcy process because non-banks have private interests. Banks, on the other hand, are excluded from the bankruptcy process because they are essential components of the monetary system.

FINANCIAL DISTRESS

News of a key financial institution's distress has a history of causing havoc. Therefore, in today's financial and economic environment, a financial institution that files for bankruptcy would likely trigger a financial tidal wave.⁵⁶ During the Great Depression, over 9,000 banks failed worldwide, causing panic and systemic risk.⁵⁷ The banking collapse, which post-dated the stock market crash of 1929, began when Creditanstalt, Austria's largest bank, filed for bankruptcy on May 11, 1931.⁵⁸ Though the Austrian government received an international loan to finance Creditanstalt's liquidity, the loan was insufficient.⁵⁹ The bankruptcy led to weaker central bank liquidity, triggering a tsunami of bank closures.⁶⁰

In 1984, rumors of Continental Illinois National Bank and Trust Company's ("Continental") financial distress and imminent failure prompted large foreign depositors to begin "a high-speed electronic deposit run on the bank."⁶¹ In total, foreign banks withdrew more than \$6 billion between May 8 and May 19 of 1984.⁶² In the U.S., the Chicago Board of Trade Clearing Corporation withdrew \$50 million on or about May 9.⁶³ When word of the withdrawal hit the wire services, a deposit run ensued.⁶⁴

The most recent financial crisis also caused panic, as large-scale withdrawals caused bank runs at major financial institutions. In 2008, due to the crisis, Washington Mutual depositors withdrew \$16.5 billion in 10 days and Wachovia depositors withdrew \$5 billion in one day.⁶⁵ Accordingly, history shows that information of possible financial distress creates panic.

PURPOSE AND OPERATION OF THE OLA

Title II of the Dodd-Frank Act created the OLA, which acts as a new insolvency regime to prevent systemic risk.⁶⁶ Intended to end bailouts⁶⁷ and panic ensuing from too big to fail financial institutions, the OLA can ap-

point the Federal Deposit Insurance Corporation ("FDIC") as a receiver⁶⁸ to administer the orderly liquidation of a systemically-significant but distressed non-bank financial entity (or "covered financial company").⁶⁹

A Senate Committee on Banking, Housing and Urban Affairs report that accompanied a predecessor bill to the Dodd-Frank Act emphasized the OLA's importance:

Title II establishes an orderly liquidation authority to give the U.S. Government a viable alternative to the undesirable choice it faced during the financial crisis between bankruptcy of a large, complex financial company that would disrupt markets and damage the economy, and bailout of such financial company that would expose taxpayers to losses and undermine market discipline.⁷⁰

The goal of the OLA is threefold: (1) creditors and shareholders, not taxpayers, will bear the costs of the covered financial company; (2) management responsible for the distressed condition of the financial company will not be retained; and (3) the OLA and other appropriate agencies will take all necessary steps to assure that all responsible parties bear losses consistent with their responsibilities.⁷¹

Moreover, the OLA's purpose is in sharp contrast to the bankruptcy regime's purpose. As stated above, bankruptcy's purpose is to provide a debtor with a fresh start.⁷² The OLA, on the other hand, utilizes its receivership powers "for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company."⁷³ In other words, bankruptcy's primary goal is to protect the debtor; the OLA's primary goal is to insure U.S. financial stability, not the financial health of the distressed company.

The process for systemic risk designation includes the secretary of the treasury's determination that the systemically-important company in question is "in default or in danger of default."⁷⁴ To determine whether it is in default or danger of default, the law provides, among other factors, that "a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code."⁷⁵ That is, Title II OLA receivership action is pegged to a hypothetical bankruptcy filing.

Furthermore, a covered financial company cannot forestall OLA receivership by filing a bankruptcy petition.⁷⁶ Instead, upon notice to the bankruptcy court, a covered financial company in OLA receivership shall have its bankruptcy case dismissed.⁷⁷ Nor does the OLA have any apparent statutory limitation on how long after a case under Chapter 7 or Chapter 11 of the Bankruptcy Code is commenced to appoint the FDIC as receiver.⁷⁸ This process is conducted quickly and quietly. The secretary of the treasury is to present to the D.C. District Court all relevant findings and the recommendation made pursuant to § 5381(a)(11).⁷⁹ The scope of the district court's review is limited to whether the secretary's determination that the covered financial company satisfies the definition of a "financial company" and is in "default."⁸⁰ The secretary must also submit evidence that these findings are not "arbitrary and capricious."⁸¹ If the district court concludes that the secretary's determination satisfies the above factors, it is to issue an order authorizing the secretary to immediately appoint the FDIC as receiver.⁸² If no decision is rendered 24 hours after receipt of the petition, the petition is granted by operation of law, the FDIC will be appointed as receiver, and liquidation under Title II will commence.⁸³ The purpose for this stealth process is to avoid panic that would ensue from a systemically important financial bankruptcy filing.⁸⁴

Once in receivership, the OLA liquidates the corporation instead of allowing it to fail.⁸⁵ However, assets and services of the business in receivership may be parsed and, using those parsed assets, the OLA can create a bridge company.⁸⁶ The bridge company has a two year mandate with an option for three subsequent one year periods.⁸⁷ The bridge company acts as a bridge until the OLA finds a buyer.⁸⁸ Upon sale of the bridge company, the OLA uses the proceeds of that sale to satisfy the financial institution's creditors.⁸⁹

BANKRUPTCY AND INSOLVENCY

Although the OLA receivership default requirement hinges on a hypothetical bankruptcy,⁹⁰ not every non-bank financial institution that contemplates or files bankruptcy is susceptible to federal receivership.

There is no code provision requiring a debtor to be insolvent.⁹¹ A debtor only needs to show that it may in the future be unable to meet its obligations.⁹² In fact, from 2003-2007, statistics indicate that bankrupt companies

had on average six percent more assets than liabilities.⁹³

In 2011, American Airlines (“AA”) filed for bankruptcy as a strategic move, not necessarily to discharge debt.⁹⁴ Although AA had good financial health, it had lost approximately \$5 billion over the previous three and a half years and was looking to cut costs.⁹⁵ It had been negotiating with labor unions without success, so AA filed for bankruptcy to lower employee paychecks and benefits, thereby cutting costs.⁹⁶

In the context of the OLA, Dodd-Frank empowers the OLA to place a covered financial company in receivership when, among other things, the company is in “default,” which is pegged to a likely or actual bankruptcy filing.⁹⁷ Although the OLA has not yet acted upon its authority,⁹⁸ the events leading up to and legislative history of Dodd-Frank suggest that it would not have authority over solvent or financially healthy corporations that, like AA, would strategically file for bankruptcy. As mentioned, the legislative history and events leading to the creation of the OLA suggest that it is mandated to manage a distressed, non-bank financial institution that is or will soon fail.⁹⁹ It follows that systemically important non-banks that are not in distress and not failing, even if they would otherwise file or have filed bankruptcy for strategic purposes, do not fall under the OLA’s mandate.

THE OLA AS SELF-DEFEATING LEGISLATION

There are many examples of self-defeating legislation,¹⁰⁰ and the OLA may be an additional example. Although the legislative history and statutory language suggest that policy makers were well-intentioned in creating the OLA, the OLA might actually increase systemic risk and financial instability.

The OLA acts as a government watchdog, not as a default mechanism for winding up a failed financial institution’s business.¹⁰¹ As such, covered financial companies are leery of the OLA’s ability to place the company in receivership and remove its management. Therefore, a financial institution that believes it may be systemically vital will want to fly under the OLA’s radar.

Consequently, a covered financial company that is experiencing some financial difficulty, but not distress, may file for Chapter 11 bankruptcy to strategically avoid possible OLA receivership. The covered financial company can utilize the bankruptcy to restructure debt. And, as mentioned, insolvency

is not a bankruptcy pre-requisite, which allows corporations to utilize Chapter 11 for strategic purposes.¹⁰² Although a bankruptcy filing does not preclude the OLA from flexing its muscle,¹⁰³ the OLA can only place a covered financial company into receivership when it is in “default,” which is pinned to bankruptcy.¹⁰⁴ And, as mentioned above, the legislative history suggests that “bankruptcy” in this context refers to financial distress and economic failure, not “strategic” bankruptcy.¹⁰⁵ Therefore, strategically filing for Chapter 11 bankruptcy would likely be a preferred method for a covered financial company to avoid the OLA.

Historically, large institutional bankruptcy filings have caused financial panic.¹⁰⁶ Most recently, the Lehman Brothers bankruptcy panic was an earthquake that gave rise to a financial tsunami because it was systemically significant and was an interconnected financial institution.¹⁰⁷ Although Lehman Brothers’ creditors were not forced into bankruptcy and its profitable assets were managed by new owners, the bankruptcy still caused widespread panic.¹⁰⁸ An explanation for the bankruptcy panic is that the public perceived possible bank runs.¹⁰⁹ As such, historical data reveals that systemically important financial bankruptcies breed panic, even if the panic is not in-line with reality.

Here too, the OLA could be generating panic, which contravenes its purpose.¹¹⁰ It seems that Dodd-Frank did not account for strategic bankruptcies and their ability to produce financial hysteria. It also seems that Dodd-Frank did not contemplate how the OLA might be viewed as a predator, causing covered financial companies to assume preemptive defensive measures. And because the financial system is interconnected, the ripple effect can potentially be enormous.

All considered, not only does the Dodd-Frank mandated OLA have gaps, it may also create the financial frenzy it seeks to avoid. The OLA may have been seeking to circumvent the bankruptcy regime in regard to covered financial companies, but instead may have breathed new life into financial bankruptcies and possible subsequent panics.

CONCLUSION

The financial crisis of 2007-2009 challenged policy makers to produce a mechanism that protects the economy from another financial meltdown.

That mechanism included an OLA receivership, whose legislative purpose was to replace the panic-facilitating bankruptcy regime with a stealth, orderly receivership regime. Instead, it may have unintentionally created a structure that can lead to more financial bankruptcy panics. When the gray clouds start covering a sunny financial day and a financial drizzle begins, a systemically important covered financial institution will be asking for its umbrella.

NOTES

¹ Quotesparade.com (citing Mark Twain (1835-1910)); others attribute the saying to Robert Frost (1874-1963) or Ralph Waldo Emerson (1803-1882). *Id.*

² Reuters, *Citigroup, Bank of America Profits Rise*, Jamaica-Gleaner (July 15, 2003), available at <http://jamaica-gleaner.com/gleaner/20030715/business/business1.html> (last visited July 22, 2013).

³ Zoltan Pozsar et al., *Shadow Banking*, Fed. Res. Bank of N.Y. 5 & fig. 1 (July 2010), (“[U]nregulated shadow banks fund themselves with uninsured commercial paper, which may or may not be backstopped by liquidity lines from real banks. Thus, the shadow banking system is particularly vulnerable to runs — commercial paper investors refusing to re-up when their paper matures, leaving the shadow banks with a liquidity crisis — a need to tap their back-up lines of credit with real banks and/or to liquidate assets at fire sale prices”) available at http://www.ny.frb.org/research/staff_reports/sr458_July_2010_version.pdf (last visited July 22, 2013).

⁴ See Katalina M. Bianco, *The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown*, available at http://www.business.cch.com/bankingfinance/focus/news/Subprime_WP_rev.pdf (last checked July 29, 2013).

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 (2010) (to be scattered throughout the U.S.C.).

⁶ *Id.*

⁷ See generally Jean Helwege, *Financial Firm Bankruptcy and Systemic Risk*, The Cato Institute: Regulation (2009), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2009/6/v32n2-4.pdf> (last checked July 22, 2013).

⁸ Treasury Secretary Tim Geithner, written testimony before the House Financial Services Committee Hearing (March 24, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg67.aspx> (last checked July 24, 2013).

⁹ *Regulating and Resolving Institutions Considered “Too Big To Fail”: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 12 (May 6, 2009) (hereinafter “crisis hearing”) (testimony of Sheila C. Bair, Chairman, FDIC), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_

id=4deb17aa-b8b8-4bc1-82ef-4c57388acf90 (last visited July 24, 2013).

¹⁰ U.S. Commodity Futures Trading Comm'n, CFTC Glossary, *available at* http://www.cftc.gov/educationcenter/glossary/glossary_s.html (last visited July 22, 2013).

¹¹ Nicholas Chan et al., *Systemic Risk and Hedge Funds* 1 MIT Sloan Sch. of Mgmt., Working Paper No. 4535-05 (2005), *available at* http://ssrn.com/abstract_671443.

¹² Steven L. Schwarz, *Systemic Risk*, Geo. L.J. 194, 200 (2008); *see infra* note.

¹³ Quoted in *How to control & reduce "Systemic Risk" to avoid future Financial Crisis?*, Deepak's blog, *available at* <http://deepakagrawalblog.wordpress.com/2010/03/08/how-to-control-reduce-%E2%80%9Csystemic-risk%E2%80%9D-to-avoid-future-financial-crisis> (last checked July 22, 2013).

¹⁴ See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. Col. L. Rev. 1, 11 (2002).

¹⁵ Kristen M. Finklea, *Economic Downturns and Crime*, CRS (December 19, 2011).

¹⁶ *Do Foreclosures Cause Crime?*, Furman Center Policy Brief (February 2013), *available at* <http://furmancenter.org/files/publications/DoForeclosuresCauseCrime.pdf> (last visited July 25, 2013).

¹⁷ 11 U.S.C. § 362 (2013).

¹⁸ 11 U.S.C. § 560 (2013).

¹⁹ *Id.* § 561 (2013).

²⁰ H.R. Rep. P.L. No. 97-420, 97-420 (1982).

²¹ Rene M. Stulz, *Should We Fear Derivatives?*, 18 J. Econ. Persp. 173, 188 (2004).

²² *Id.*

²³ Andrea J. Pincus, *The Metavante ruling — in a case of first impression, US bankruptcy court limits ISDA counterparty rights upon a bankruptcy event of default*, Lexology (December 3, 2009), *available at* <http://www.lexology.com/library/detail.aspx?g=bb5c0a1b-4c88-43fb-8b80-f4299542e975> (last checked July 23, 2009).

²⁴ See *In re Lehman Brothers Inc.*, case no. 08-13555.

²⁵ See *supra* notes 18 and 19.

²⁶ *In re Lehman Brothers Inc.*

²⁷ *Id.*

²⁸ See *supra* note 9.

²⁹ *Id.*

³⁰ Adam Shell, *Lehman Bros. Collapse Triggered Economic Turmoil*, USA Today, *available at* <http://abcnews.go.com/Business/lehman-bros-collapse-triggered-economic-turmoil/story?id=8543352> (last visited July 23, 2013).

³¹ Jean Helwege, *Financial Firm Bankruptcy and Systemic Risk*, The Cato Institute: Regulation (2009) (quoting Ben Bernanke's speech defending the Federal Reserve-organized sale of Bear Stearns assets to JPMorgan in 2008), *available at* <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2009/6/v32n2-4.pdf> (last visited

July 23, 2013).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *infra* notes 57, 61, and 65.

³⁷ See e.g. Rosalind L. Bennet, Failure Resolution and Asset Liquidation: Results of an International Survey of Deposit Insurers, 14 FDIC Bank. Rev. 1, 9 (2001) (“[o]utside the United States, most failed banks go through a regular corporate bankruptcy process”), available at <http://www.fdic.gov/bank/analytical/banking/2001sep/article1.html> (last visited July 23, 2013).

³⁸ See generally 11 U.S.C. §§ 109(b), (d) (2006).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Are Banks Special*, Fed. Res. Bank of Minn. Annual Rep. (1982), available at <http://www.minneapolisfed.org/pubs/ar/ar1982a.cfm?> (last checked July 23, 2013).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Encyclopedia Britannica, available at <http://www.britannica.com/EBchecked/topic/102342/central-bank> (last visited July 23, 2013).

⁵⁰ Federal Reserve Bank of Minnesota.

⁵¹ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“[i]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”); see also <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Process.aspx> (last checked July 23, 2013).

⁵² *Local Loan Co.* at 244 (citing *Stellwagen v. Clum*, 245 U.S. 605, 617; *Hanover National Bank v. Moyses*, *supra*; *Swarts v. Fourth National Bank*, 117 Fed. 1, 3; *United States v. Hammond*, 104 Fed. 862, 863; *Barton Bros. v. Texas Produce Co.*, 136 Fed. 355, 357; *Hardie v. Swafford Bros. Dry Goods Co.*, 165 Fed. 588, 591; *Gilbert v. Shouse*, 61 F. (2d) 398).

⁵³ See Richard M. Hynes and Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy*, 67 Wash. & Lee Law R. 3 (2010) (detailing the FDIC bank receivership process).

⁵⁴ See generally 11 U.S.C. §§ 109(b), (d) (the code only excludes “banks”); see *In re Wash. Mut., Inc.*, 442 B.R. 314, 344-45, 365 (Bankr. D. Del. 2011) (discussing the bankruptcy of Washington Mutual Inc., a BHC, while its subsidiary, Washington Mutual Bank, a deposit-accepting bank, was placed into FDIC receivership).

⁵⁵ See *supra* note 41.

⁵⁶ See *supra* note 30.

⁵⁷ Helwege.

⁵⁸ Markus K. Brunnermeier and Martin Oehmke, *Bubbles, Financial Crises, and Systemic Risk*, 2 Handbook of the Economics of Finance, 8 (2012), available at <http://www0.gsb.columbia.edu/faculty/moehmke/papers/BrunnermeierOehmkeHandbookSystemicRisk.pdf> (last checked July 23, 2013).

⁵⁹ Richhild Moessner and William A. Allen, *Banking crises and the international monetary system in the Great Depression and Now*, 333 BIS Working Papers 14 (2010), available at <http://www.bis.org/publ/work333.pdf> (last visited July 23, 2013).

⁶⁰ *Id.* at 29.

⁶¹ FDIC, Continental Illinois National Bank and Trust Company, available at <http://www.fdic.gov/bank/historical/managing/history2-04.pdf> (last checked July 25, 2013).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ E. Scott Reckard and Tiffany Hsu, *Feds seize, sell WaMu in biggest U.S. bank failure*, The L.A. Times (September 26, 2008); Rick Rothacker, *\$5 Billion withdrawn in one day in silent run*, [charlotteobserver.com](http://www.charlotteobserver.com) (October 11, 2008), available at <http://www.charlotteobserver.com/2008/10/11/246983/5-billion-withdrawn-in-one-day.html> (last checked July 25, 2013).

⁶⁶ 12 U.S.C. §§ 5381-94 (West 2011).

⁶⁷ *Id.* § 5394 (prohibition on taxpayer funding).

⁶⁸ See *Id.* § 5390(a)(1), the FDIC acts as “[s]uccessor to covered financial company — The Corporation shall, upon appointment as receiver for a covered financial company under this subchapter, succeed to — (i) all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director of such company; and (ii) title to the books, records, and assets of any previous receiver or other legal custodian of such covered financial company.”

⁶⁹ *Id.* § 5384(a).

⁷⁰ Christopher Dodd, The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, at 4 (2010).

⁷¹ 12 U.S.C. § 5384(a).

⁷² See *supra* note 52.

⁷³ 12 U.S.C. § 5386(1).

⁷⁴ *Id.* § 5383(b)(1).

⁷⁵ *Id.* § 5383(c)(4)(A).

⁷⁶ *Id.* § 5388(a).

⁷⁷ *Id.*

⁷⁸ Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime to Address Systemic Risk*, 45 Richmond Law R. 1143, 1154 (2011).

⁷⁹ 12 U.S.C. § 5382(a)(1)(A)(iii).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Randall D. Guynn, *The Financial Panic of 2008 and Financial Regulatory Reform*, The Harvard Law School Forum on Corporate Governance and Financial Regulation (November 20, 2010), available at <http://blogs.law.harvard.edu/corpgov/2010/11/20/the-financial-panic-of-2008-and-financial-regulatory-reform> (last checked July 25, 2013).

⁸⁵ 12 U.S.C. § 5390(a)(1)(D).

⁸⁶ *Id.* §5390(h).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *supra* note 75.

⁹¹ See generally 11 U.S.C. 105 (2010); the Code defines insolvent as “the sum of such entity’s debts is greater than all of such entity’s property.” *Id.* at 101(32)(A).

⁹² See Stephen Gandel, *American Airlines: Bankrupt Companies Are Healthier Than They Used to Be*, Time Magazine (November 30, 2011) available at <http://business.time.com/2011/11/30/american-airlines-bankrupt-companies-are-healthier-than-they-used-to-be> (last visited July 24, 2013).

⁹³ *Id.* (citing a 2008 study conducted by Professors Lynn LoPucki and Joseph Doherty).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* note 75.

⁹⁸ See *State National Bank of Big Spring et al. v. Wolin et al.*, No. 12-1032 (D.D.C. 2013).

⁹⁹ See *supra* notes 66 and 68.

¹⁰⁰ See e.g. H.R., Debate of Extending Most Favored Nation Status for China, 105th Congress, 1st Session, Vol. 143, No. 90, , June 24, 1997, "I urge the defeat of this self-defeating legislation." (statement of Jim Leach, Member of the House). E.g. studies reviewing Arizona's "show me your paper's law" estimated that Arizona sustained \$141 million in lost spending due to conference and event cancellations in the first seven months after the law passed; if fully implemented, employment would decrease by 17.2 percent, 581,100 jobs would be lost, Arizona's economy would contract by \$48.8 billion, with a tax revenue decrease of 10.1 percent. Omaid Zabih, *Arizona Law: Socially Toxic and Economically Self-Defeating*, Nebraska Appleseed, April 4, 2012.

¹⁰¹ See Thomas J. Fitzpatrick IV and James B. Thomson, *An End to Too Big to Let Fail? The Dodd-Frank Act's Orderly Liquidation Authority*, Fed. Res. Bank of Clev. (January 2011) ("[t]he [O]rderly [L]iquidation [A]uthority is meant to be an exceptional power and not the default procedure for winding up the affairs of large distressed nondepository financial firms.").

¹⁰² See *supra* note 91.

¹⁰³ See *supra* note 76.

¹⁰⁴ See *supra* note 75.

¹⁰⁵ See *supra* note 99.

¹⁰⁶ See e.g. History Box, *The Panic of 1893-Financial World*, (discussing the Philadelphia and Reading Railroad bankruptcy that stirred widespread financial panic); see also *Panic of 1873*, which was precipitated by the Jay Cooke & Company bankruptcy. *Id.* available at http://thehistorybox.com/ny_city/panics/panics_article10a.htm (last checked July 25, 2013).

¹⁰⁷ See *Diagnosing the Panic*, The Capital Spectator (January 28, 2010) (citing Prof. John Cochrane), available at http://www.capitalspectator.com/archives/2010/01/diagnosing_the.html (last visited July 25, 2013).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *supra* note 8.