Justice and the Administrative State: The FDIC and the Superior Bank Failure

*Christian A. Johnson**

As society becomes more complicated and increasingly interrelated, the administrative state is forced to take a more active role to ensure justice in an environment of competing interests. For instance, promoting justice or equitable response during a bank failure can prove particularly difficult for the Federal Deposit Insurance Corporation ("FDIC") due to its assumption of multiple roles with respect to banks and other financial institutions. This article discusses the difficulties of promoting justice by assessing the FDIC's actions in resolving the insolvency of Superior Bank, FSB ("Superior"), a billion-dollar Illinois savings bank that failed in 2001—a failure that will end up costing the FDIC's insurance fund hundreds of millions of dollars.

The FDIC, a government agency, is responsible not only for the regulation and oversight of insured financial institutions, but also for their closure and liquidation in times of insolvency.[1] In closing and liquidating a financial institution, the FDIC acts in a "corporate capacity" in administrating and managing the Savings Association Insurance Fund ("Insurance Fund").[2] The Insurance Fund is used to pay-off insured deposits held in savings and loans, savings banks, or similar types of thrifts that have "failed."[3] In its resolution of the Superior insolvency, the FDIC entered into a highly unusual partnership with Superior's high-profile stockholders after Superior's closure, thus illustrating the issues of justice and fairness that result from the conflicts of interest arising from the FDIC's differing roles.

* Associate Professor of Law, Loyola University Chicago School of Law. The author can be reached at cjohns6@luc.edu.

1. *See* FDIC: FEDERAL DEPOSIT INSURANCE CORPORATION, INSURING AMERICA'S FUTURE, *at* www.fdic.gov (last visited Jan. 4, 2005) (noting that the FDIC is "[a]n independent agency created by Congress in 1933 . . . [to] insure" deposits and help "maintain stable and sound banking system").

2. The FDIC also manages a similar fund for commercial banks. 12 U.S.C. § 1821(a)(4)(A) (2000).

3. The FDIC will close a financial institution such as a thrift or a bank when the institution is either insolvent or such insolvency is imminent. 12 U.S.C. § 1821(c) (2000).

At its pinnacle, Superior, a federal savings bank headquartered in Hinsdale, Illinois, was one of the most aggressive financial institutions in the United States and held over two billion dollars in assets. Controlled by a partnership of the Pritzker family (of Hyatt Hotel fame)[4] and the Dworman family (known for aggressive real estate development), Superior failed in 2001. The FDIC estimated that the failure would ultimately cost over $500 million in payments to insured depositors.[5]

The Superior failure provides rare insight into how an administrative agency such as the FDIC metes out justice. In its analysis of the regulation and closure of Superior by the Office of Thrift Supervision and the FDIC, the government prepared three highly critical reports worthy of examination.[6] Moreover, there was significant litigation following the liquidation in which the FDIC in its corporate capacity brought an action for fraud, negligence, and malpractice against Ernst & Young, Superior's auditor.[7] Although the suit was unsuccessful, analysis of the action provides additional background and insight regarding the FDIC's resolution of Superior's insolvency.

On its most basic level, ensuring justice is generally thought of as being fair or right under a given set of circumstances. The Superior failure raised two distinct questions regarding the FDIC's administration of justice in its resolution of Superior's insolvency: (1) did the FDIC act unjustly or unfairly to other depositors and creditors when it gave preferential treatment to its wealthy stockholders; and (2) did the FDIC abuse its rights in pursuit of auditor Ernst & Young in its corporate capacity by rejecting contractual protections that would have

4. *See* Shane Tritsch, *Tremors in the Empire*, CHI. MAG., Dec. 2002, *available at* http://www.chicagomag.com/stories/1202pritzker.htm (last visited Jan. 4, 2005) (providing a detailed discussion of the Pritzker family).

5. Complaint of Plaintiff at 116, Fed. Deposit Ins. Corp. v. Ernst & Young, 256 F. Supp. 2d 798 (N.D. Ill. 2003) (No. 02 C 7914), *available at* 2003 WL 22717757.

6. *Analysis of the Failure of Superior Bank, FSB, Hinsdale, Illinois: Before the Senate Comm. On Banking, Housing, and Urban Affairs,* 106th Cong. (2002) (statement of Thomas J. McCool, Managing Director, Financial Markets and Community Investment), *available at* http://www.gao.gov/new.items/d02419t.pdf [hereinafter *GAO Report*]; OFFICE OF THE INSPECTOR GENERAL, FED. DEPOSIT INS. CORP., AUDIT REP. NO. 02-005, ISSUES RELATED TO THE FAILURE OF SUPERIOR BANK, FSB, HINSDALE, ILL. (2002), *available at* http://www.fdicoig.gov/reports02/02-005.pdf [hereinafter FDIC REPORT]; OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF THE TREASURY, No. OIG-02-040, MATERIAL LOSS REVIEW OF SUPERIOR BANK, FSB (2002), *available at* http://www.treas.gov/inspector-general/audit-reports/2002/oig02040.pdf [hereinafter TREASURY REPORT].

7. Fed. Deposit Ins. Corp. v. Ernst & Young, 374 F.3d 579 (7th Cir. 2004), *modifying & aff'g* 256 F. Supp. 798 (N.D. Ill. 2003) (noting that the FDIC, in its corporate capacity, brought suit against Ernst & Young for fraud, negligence, and malpractice in its role as auditor of Superior Bank).

shielded the auditors from the FDIC in its role as receiver?

The answers to these questions should not hinge on the size of the monetary settlement or the amount of damages that the FDIC may have collected in its litigation with Ernst & Young.[8] In fact, if the size of a recovery (via settlement or judgment) becomes the principal consideration in dictating the actions of an administrative agency, any notion of justice or fairness is discarded. Instead, they are replaced by agency interpretation of arcane statutory and regulatory provisions, potentially skewed in its favor if an agency determines that it will maximize its power and potential monetary recovery.

By agreeing to the settlement among Superior's shareholders and suing Ernst & Young in its corporate capacity (as opposed to suing as the receiver of Superior), the FDIC lost sight of what it should have done, versus what it could and what it did do. The first part of this article will discuss the history of the Superior Bank failure and the actions of the FDIC in its closure. This part will focus in particular on the settlement agreement arranged by the FDIC with Superior's primary owners ("Pritzker Settlement"), as well as the subsequent litigation against Ernst & Young. The second part will discuss the regulatory framework created by Congress for the FDIC in resolving the failure of a financial institution. It will then address its impact on Superior, its creditors, and Ernst & Young, with particular respect to the Pritzker Settlement and subsequent litigation. In synthesis, the article concludes that agencies must not lose sight of what they *should* do when hundreds of millions of dollars are at stake.

THE SUPERIOR BANK FAILURE

The Superior Bank failure was one of the largest bank failures since the savings and loan crisis of the 1980s and early 1990s. The first section of this part will discuss Superior's business model and its eventual catastrophic failure. The second section will discuss the various roles that the FDIC balanced as it dealt with the complex failure. Finally, the last section will discuss the highly unusual and unique settlement that the FDIC reached with Superior's shareholders and the FDIC's eventual litigation with Superior's auditors, Ernst & Young.

8. In fact, Ernst & Young did finally settle with the FDIC on December 24, 2004, for a grand total of $125 million. Thus, the Pritzker's take, accounting for their negotiated twenty-five percent interest in the settlement, will be around thirty million dollars. *Pritzkers to Get Millions in Settlement*, at *www.forbes.com/associatedpress/feeds/ap/2004/12/28/ap1730436.html* (last visited January 25, 2005).

A. Overview

The Pritzker and Dworman families purchased Superior (formerly known as Lyons Bank) from the FDIC in 1989 for forty-two million dollars.[9] In 1994, Superior began using a risky strategy of lending to high-risk customers, making sub-prime mortgage and automobile loans at high interest rates. Superior then sold these loans in the form of large investment pools to outside investors in a process referred to as securitization. Superior would then use the proceeds from these sales to issue additional loans. Superior booked a profit on these sales and also earned large amounts of fees from these transactions.[10]

Superior was regulated and examined by the Office of Thrift Supervision ("OTS"), its primary federal regulator. The FDIC, in addition to guaranteeing the federally insured deposits held by Superior, was the secondary federal regulator. More importantly, the FDIC later became the banking regulator responsible for handling the insolvency of Superior and its eventual liquidation.

Superior engaged in its high-risk lending strategy for five years before the OTS and FDIC realized that Superior had suffered losses on its lending and securitization activities and buried them in its balance sheets throughout this period. To its credit, the OTS understood from the beginning that Superior's strategy was risky. However, it naively relied upon the expertise of Superior's managers and their representations that any serious problems that developed would be handled with additional capital directly from the Pritzkers and Dwormans.

The OTS finally recognized the extent of Superior's financial problems in 1999 and proceeded to take regulatory action. In 2000 and early 2001, the OTS, the FDIC, and Ernst & Young agreed that Superior's accounting for its lending and securitization practices was suspect and had resulted in write-offs of over a hundred million dollars. With the owners unwilling to deposit additional funds, the OTS and FDIC placed Superior into receivership in the spring of 2001.[11]

9. *See* TREASURY REPORT, *supra* note 6, at 48–54 (noting the chronology of significant events and actions taken before and after the failure of Superior Bank); *see also GAO Report*, *supra* note 6, at 25–27 (summarizing key events associated with the failure of Superior Bank).

10. For a general discussion of the Superior Bank business strategy of subprime lending and securitization, see FDIC REPORT, *supra* note 6, at 14–20; Christian Johnson, *The Failure of Superior Bank, FSB: Regulatory Lessons Learned*, BANKING L. J., Jan. 2004, at 47; *GAO Report*, *supra* note 6, at 4–8; TREASURY REPORT, *supra* note 6, at 8–16.

11. Melissa Allison & William Nelkirk, *Bank Closes as Pritzkers Back Out of Bailout Plan*, CHI. TRIB., July 28, 2001, at N1 (reporting on the failure of Superior Bank, resulting in estimated total losses to the FDIC of $500 million).

Unfortunately, approximately 1,400 uninsured depositors also suffered losses totaling approximately forty million dollars.

B. The Role of the FDIC

It is important to understand the capacity in which the FDIC acted with respect to Superior throughout its liquidation and during the accompanying litigation. First, the FDIC acted as the secondary federal regulator for Superior's operations. Second, the FDIC acted as the receiver of Superior upon its failure, much like a bankruptcy trustee. As the receiver, the FDIC administered Superior's estate, gathered and liquidated its assets, and paid creditors, as well as any stockholders, with the remaining assets. Third, the FDIC acted in a corporate capacity, managing, administering, and finally disbursing insurance funds to Superior's insured depositors.[12] After paying the insured depositors, the FDIC (as a creditor of Superior) had the same priority as the other uninsured depositors with respect to any recoveries from the liquidation of Superior's assets. The FDIC, in its corporate capacity, also pursued claims against the officers and stockholders of the failed institution;[13] in this capacity, it negotiated the Pritzker settlement.[14]

As the FDIC considered its options regarding Superior's failure, one course of action was to recover damages from Superior's managers and stockholders for their role in the bank's failure and to consider imposition of criminal penalties. The government reports issued in the aftermath of Superior's closing suggest several possible justifications for this action. The FDIC could have argued, at best, that Superior's management and board of directors were negligent and "asleep at the wheel." At worst, and depending upon the results of its investigation, the FDIC could have pursued the harsher remedies of criminal or racketeering prosecution of Superior's upper echelon and its shareholders. In fact, the uninsured depositors sued Superior's managers and directors under just such a theory (although the suit was recently dismissed).[15] Thus, the FDIC would have pursued such avenues in its capacity as the receiver of Superior under normal

12. 12 U.S.C. § 1821(g) (2000) (giving the FDIC subrogation interest in all the rights of a bank it takes over).

13. 12 U.S.C. § 1821(k) (2000) (stating that directors and officers can be held personally "liable for monetary damages in any civil action, by, on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation" acting as a conservator or a receiver).

14. *See infra* Part II.C (discussing the settlement agreement between the FDIC and the major owners of Superior Bank).

15. *Judge Dismisses Superior Bank Lawsuit*, KANE COUNTY CHRON., Sept. 29, 2004, *available at* http://www.kcchronicle.com/BusinessSection/285521254701870.

circumstances.

Although the Pritzker and Dworman families served as inviting targets given their deep pockets, they, along with the FDIC, had strong motivation to settle the matter. The FDIC was dreading years of expensive and contentious litigation against the Pritzkers and Dwormans with the strong possibility of negligible pay-off. The Pritzkers and Dwormans were wary of public scandal and the bad publicity that would accompany such a protracted fight.

C. The Settlement Agreement

The Pritzkers, acting on behalf of both families, entered into a settlement agreement with the FDIC with respect to the families' roles in the failure of Superior. In the agreement, the FDIC released the families, directors, and key employees from any and all possible damages, lawsuits, controversies, causes of action, and any other potential claims relating to the Superior failure.[16] The agreement expressly required no admission of guilt and required confidentiality from all parties involved.[17]

In exchange, the Pritzkers agreed to make an immediate payment of $100 million and future payments in aggregate of $360 million over the next fourteen years, with no interest.[18] The FDIC, in its press release, noted this as the largest payment ever collected by the FDIC from the shareholders of a failed financial institution.[19] Although the gross payment was quite large, the total payments discounted to present value were only equivalent to $300 million.

The most extraordinary part, however, was the requirement that the FDIC share any potential recovery in the Ernst & Young litigation with the Pritzkers and Dwormans. Specifically, the FDIC was required to pay the families twenty-five percent of any of its recovery from Ernst & Young related to Superior's accounting work.[20] Additionally, the Pritzkers and Dwormans were entitled to a share of any civil monetary penalties collected by the FDIC from Ernst & Young. The FDIC signed

16. *See* Press Release, FDIC, OTS Announce Agreement With Holding Companies of Superior Bank (Dec. 10, 2001), *available at* http://www.fdic.gov/news/news/press/2001/pr9001.html (providing a link to the settlement agreement).

17. "Under the terms of the agreement, the Superior holding companies and their owners (the Pritzker and Dworman interests) admit no liability and agree to pay the FDIC $460 million and other consideration." *Id*.

18. *Id*.

19. *Id*.

20. *Id*. ("The parties also agreed to share in recoveries from certain litigation relating to Superior Bank and for the FDIC to provide for indemnification on certain matters.").

the settlement agreement in its corporate capacity, as the receiver and conservator of Superior, and as the manager of the insurance fund.

In pursuit of its claims against Ernst & Young, the FDIC, in its role as receiver, faced a debilitating contractual limitation. The agreement between Ernst & Young and Superior provided that any controversy or claim had to be settled via arbitration. As the receiver and conservator of Superior, the FDIC effectively stepped into Superior's shoes, and thus was required to arbitrate. The arbitration agreement also eliminated any possibility of the FDIC—as the receiver for Superior—to collect punitive damages.

In an effort to avoid the arbitration restriction, the FDIC sued Ernst & Young in its corporate capacity and as manager of the insurance fund.[21] Acting in its corporate capacity, the FDIC was not bound by the contractual agreement between Ernst & Young and Superior. The FDIC argued that the actions of Ernst & Young, specifically, the payments made by the insurance fund to insured depositors, damaged the fund.[22] The FDIC requested compensatory damages in excess of $500 million and $1.5 billion in punitive damages.[23] In the event that the FDIC recovered two billion dollars, the Pritzkers and the Dwormans would have been entitled to a payment of approximately $500 million under their settlement agreement with the FDIC.

Ultimately, the FDIC was unsuccessful in its efforts to sue Ernst & Young outside of arbitration.[24] The Federal Court for the Northern District of Illinois granted Ernst & Young's motion to dismiss, finding that the FDIC, in its corporate capacity, lacked standing to sue Ernst & Young.[25] The Seventh Circuit Court of Appeals modified and affirmed the decision as modified, holding that the FDIC, in its corporate capacity, could not sue Ernst & Young.[26] In its analysis and application of Illinois state law as required by federal law in this area, the Seventh Circuit found that the FDIC could only pursue litigation in its capacity as receiver.[27] Additionally, the court quoted the statutory depositor

21. Plaintiff's Complaint, Fed. Deposit Ins. Corp. v. Ernst & Young, 256 F. Supp. 2d 798 (N.D. Ill. 2003) (No. 02 C 7914), *available at* 2003 WL 22717757.

22. *Id*.

23. *Id*.

24. *Ernst & Young*, 256 F. Supp. 2d at 806 (finding that the FDIC lacked standing in its corporate capacity to sue Ernst & Young).

25. *Id*.

26. Fed. Deposit Ins. Corp. v. Ernst & Young, 374 F.3d 579, 582 (7th Cir. 2004) (reasoning that the FDIC cannot pursue an action in its corporate capacity that is allocated to its role as receiver solely for the purpose of avoiding contractual provisions between Ernst & Young and the failed bank).

27. *Id.* at 583.

preference provisions and indicated that the FDIC should pursue any litigation against Ernst & Young solely in its capacity as receiver.[28]

RESOLVING THE CLAIMS OF JUSTICE

This part will discuss how the interests of justice and fairness appear to have been thwarted by the FDIC in its resolution of Superior's insolvency. The first section will discuss the statutory framework that should have helped govern the FDIC's decisions in its reaction to the Superior failure. The second section will discuss the justice and fairness issues inherent in the FDIC's participation in the Pritzker Settlement Agreement, as well as its election to pursue Ernst & Young in its corporate capacity. Finally, the third section will discuss the complete rejection of the FDIC's decisions by the Seventh Circuit Court of Appeals and the toll the FDIC's actions, if permitted, might have taken on Ernst & Young.

A. The Statutory Framework

To understand the various dilemmas encountered by the FDIC, and to assess its ultimate decisions, it is important to understand the goals of liquidating a financial institution. The first and foremost consideration is generally to maximize the recovery for the failed institution's creditors.[29] As in a more traditional bankruptcy of a non-financial institution, the shareholders of a financial institution only recover a portion of their stock value if any assets remain after paying off all of the creditors, which realistically never happens in the liquidation of a financial institution.

Congress, after the savings and loan crisis of the 1980s, updated procedures for the FDIC's liquidation of an insolvent financial

---

28. *Id.*

29. MICHAEL H. KRIMMINGER, DEPOSIT INSURANCE AND BANK INSOLVENCY IN A CHANGING WORLD: SYNERGIES AND CHALLENGES 2 (2004), *available at* http://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/mk.pdf.

> Recent analyses have identified a number of generally accepted principles for effective resolution of problem financial institutions. These principles are based on the normally complementary, but sometimes competing, goals of maximizing the value of the estate for the benefit of all creditors within an equitable, transparent, and predictable process while minimizing the cost of the resolution.

Id.; *see* STIJN CLAESSENS, EXPERIENCES OF RESOLUTIONS OF BANK CRISES 4-9 (1990) (outlining principles for resolving banking crises), *available at* http://www.worldbank.org/finance/assets/images/experience.pdf; *cf.* BLACK'S LAW DICTIONARY (8th ed. 2004) (Defining 'bankruptcy' as "a statutory procedure by which a debtor [usually insolvent] obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors").

institution's assets and the distribution of the remaining money to unsecured creditors and shareholders in its role as receiver of a failed institution.[30] Under this statutory scheme, the FDIC must first pay the insured depositors. With the remaining balance of the assets of the insolvent estate, the FDIC as receiver pays the secured creditors.[31] The FDIC then uses any remaining assets to cover expenses of the administration of the insolvent estate and to pay any remaining deposit liabilities.[32] The FDIC can subsequently pay general and senior creditors, subordinated creditors, and stockholders with any remaining funds.[33]

B. Justice and the Pritzker Settlement Agreement

As discussed, the FDIC made a calculated decision to favor shareholders and to abandon its traditional role as receiver when it entered into the Pritzker settlement and then filed its claims against Ernst & Young. By electing to sue in its corporate capacity, the FDIC shirked its duties and responsibilities as receiver, which would have prohibited its lawsuit against Ernst & Young. In particular, the FDIC appears to have prioritized the interests of the stockholders over those of other creditors by agreeing to share any Ernst & Young recovery with them. Also a cause for alarm, even if the FDIC had successfully pursued Ernst & Young in its corporate capacity outside of arbitration proceedings, it may not have had the statutory or regulatory authorization to share the windfall with any creditors.

Thus, by suing Ernst & Young in its corporate capacity, the FDIC made the decision to place the bank's stockholders ahead of other creditors with respect to their entitlement to Superior's assets. This contravened the spirit of its role as receiver, in which the FDIC was required to pay creditors before stockholders.[34] Per the Pritzker settlement, however, the FDIC was contractually obligated to pay the stockholders twenty-five percent of any settlement or damages incurred by Ernst & Young. Assuming the FDIC recovered the entire amount demanded in its complaint, the stockholders could have received up to $500 million; moreover, the agreement also entitled the FDIC to pay the shareholders an additional percentage of any civil penalties recovered

30. Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (amending the rules in 12 U.S.C. § 1821(d)(11) governing the FDIC's conduct while acting as a receiver for failed institutions within its scope).

31. *Id.*

32. *Id.*

33. 12 U.S.C. § 1821(d)(11)(A) (2000).

34. *Id.*

from Ernst & Young.

Regardless of the amount the FDIC could have recovered from Ernst & Young, the stockholders still would have enjoyed a guaranteed benefit over the creditors. Even if the FDIC were to collect only $100 million from Ernst & Young (versus the potential $2 billion), this amount is still $25 million more than the stockholders would have received in the absence of the settlement agreement. Normally, with a small recovery, the stockholders receive nothing. Here, the stockholders would always receive something, regardless of the availability of assets for the other creditors.

Assuming the FDIC was permitted by the Seventh Circuit to pursue Ernst & Young in its corporate capacity, it could be argued that all creditors would have received some benefit as the FDIC could have potentially recovered $1.5 billion in punitive damages; something it could not have done had it gone through arbitration as the receiver. However, it is unclear whether any of the other creditors actually would have benefited.

Although the FDIC, acting in its corporate capacity, had agreed to allocate any excess recoveries over the losses to the Insurance Fund to the FDIC as receiver, there appears to be no statutory or regulatory authority authorizing such an action. In fact, because punitive damages are intended to punish the wrongdoer and restore the plaintiff to his pre-wrongdoing condition, there would appear to be no reason to pass on such an award. In fact, other financial institutions that pay premiums to the Insurance Fund may have challenged such allocation on grounds that the FDIC was harming the insurance fund by making such a distribution to the FDIC acting as receiver.

Even if all depositors, other creditors, and stockholders were paid, permitting such actions by the FDIC sets a poor precedent as a matter of public policy. Solely for the purpose of collecting additional funds, the FDIC avoided the statutory settlement process established by Congress with respect to shareholders, thereby avoiding its statutory duties and its responsibilities to other creditors.

In response to this argument, the FDIC stated that there was no statutory reason why it could not proceed in its corporate capacity. However, the proper question is not whether the FDIC *could* go forward in its corporate capacity due to statutory silence and the prospect of a larger recovery, but whether, in the interest of fairness and justice, it *should have*, given its principal role as receiver of Superior. Even if the FDIC acted appropriately in the case against Ernst & Young and properly allocated any excess from the settlement to the FDIC as

receiver, there is no guarantee that it would act similarly in future financial institutional failures and subsequent litigation.

C. The Interests of Third Parties

The Seventh Circuit found that as a matter of statutory interpretation, "everything points to FDIC-Receiver as the right entity to pursue any claim against Superior Bank's accountants."[35] Despite this formulation, the FDIC's actions towards Ernst & Young raise questions of justice and fairness.

When Ernst & Young began rendering services to Superior, the two parties agreed to resolve any disputes and claims via arbitration and further agreed that neither party would be liable for punitive damages. In its role as receiver, the FDIC stepped into the shoes of management that had entered into the contractual agreement with Ernst & Young. The only way the FDIC could receive punitive damages was by litigating in its corporate capacity and discarding its contractual obligations as receiver of Superior.

If the FDIC had been permitted to sue Ernst & Young in its corporate capacity, any special contractual provision between management and a service provider would be at risk of being ignored by the FDIC in similar situations in the future. The FDIC would likely always elect to litigate against a failed institution's accountants or other professionals in its corporate capacity because it could choose not to be considered a party to the original contract, although its alter ego, the FDIC as receiver, would. This dual role would enable the FDIC to reap windfall damages such as those sought in the resolution of Superior's failure. Permitting the FDIC to pick and choose which contracts to honor by deciding between its different capacities is neither just nor fair. In this case, Ernst & Young was placed at risk of losing billions of dollars in damages and incurred huge legal bills to defend itself unnecessarily from the FDIC. In addition, the eventual settlement was put off several years as this unnecessary litigation was resolved.

CONCLUSION

As administrative agencies wield more and more power, they are, with growing frequency, not only regulating specific areas or industries, but often weighing questions of justice and fairness as they carry out these duties. The FDIC's actions and efforts to reconcile its different roles in the resolution of the Superior insolvency illustrate some of the

35. Fed. Deposit Ins. Corp. v. Ernst & Young, 374 F.3d 579, 583 (7th Cir. 2004).

pitfalls and difficulties that an administrative agency can encounter in the execution of its duties.

The opportunistic actions of the FDIC, illustrated by the highly questionable settlement agreement and its suit against Ernst & Young in its corporate capacity, suggest that an administrative agency can lose sight of what it *should* do when hundreds of millions of dollars are at stake. The FDIC's actions sublimated the fairness of the insolvency resolution process for the creditors of Superior and exposed Ernst & Young to liabilities well beyond what it had contracted for with Superior. Given that agencies will play increasingly important roles in the administration of justice to those they regulate, agencies must seriously ask what is just and fair for all involved in regulation, instead of what will simply maximize their power or potential economic recovery.