Resolution, Orderly and Otherwise: B of A in OLA

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Since the recent collapse of Lehman Brothers, the problems associated with large, complex financial institutions have been front and center.[1] Questions remain about how best to handle insolvency, bankruptcy, or "resolution" of such an institution.[2]

The discussion is more difficult still because of the high political and financial stakes. For those steeped in the banking industry, maintaining the "specialness" of banks and financial institutions necessitates denigrating the bankruptcy system.[3] The

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[1] *E.g.,* Anna Gelpern, *Financial Crisis Containment,* 41 Conn. L. Rev. 1051 (2009); Adam J. Levitin, *In Defense of Bailouts*, 99 Geo. L.J. 435 (2011); Michael C. Macchiarola, *Beware of Risk Everywhere: An Important Lesson from the Current Credit Crisis*, 5 Hastings Bus. L.J. 267 (2009); Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. Rev. 183 (2009); Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 Harv. J.L. & Pub. Pol'y 671 (2010); William K. Sjostrom, Jr., *The AIG Bailout*, 66 Wash. & Lee L. Rev. 943 (2009); Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. Rev. 1 (2010); Arthur E. Wilmarth, Jr*., Reforming Financial Regulation to Address the Too-Big-to-Fail Problem*, 35 Brook. J. Int'l L. 707 (2010); Sarah Pei Woo, *Regulatory Bankruptcy: How Bank Regulation Causes Fire Sales*, 99 Geo. L.J. 1615 (2011).

[2] *See* Stephen J. Lubben, *Financial Institutions in Bankruptcy*, 34 Seattle U. L. Rev. 1259 (2011). As David Zaring explains:

> Resolution authority is the polite term for seizing failing financial institutions and either shutting them down or selling them off for the best possible price. Resolution is meant to be implemented before contagion sets in and the institutions' counterparties, including customers, traders, and even competitors, also fail, either through panic (which is not the fault of the counterparties) or poor risk management (which is, but still may exacerbate a crisis). It is a particular kind of instant bankruptcy, destroying the interests of some creditors quickly and unmercifully, while giving others, especially the bank's depositors, a fresh and happy start.

David Zaring, *A Lack of Resolution*, 60 Emory L.J. 97, 99 (2010).

[3] http:// www.pewfr.org/admin/project_reports/files/Cohen-Goldstein-FINAL-TF-Correction.pdf

FDIC,[4] keen to demonstrate its competency to wield the new powers given it under Dodd-Frank, rushed to produce a hypothetical resolution of Lehman that amused many by its naiveté.[5]

On the other hand, other commentators, in thrall to the healing powers of markets, have embraced the existing bankruptcy mechanisms as the best way to address the issue.[6] In the process, they tend to ignore the obvious differences between a corporation with tangible assets and one whose primary asset is the trust its counterparties place in it.[7] Unlike a manufacturing plant, trust is apt to be quite vaporous in times of financial distress.[8]

This paper takes a step back from this debate and considers the issue from a more practical level. What precisely does it mean to "resolve" financial distress in a complex financial institution?[9] What are the goals – liquidation, reorganization, or simple contagion avoidance?[10] And, more precisely, how might such a resolution look under realistic conditions? Embedded in these questions are larger questions of who gets to make these choices, and under what circumstances the choices might change.

I begin by examining the legal and financial structure of a specific, actual financial institution: Bank of America. The financial institution in question is one of the "really big" institutions in the United States, and is selected as a representative of its

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[4] http://www.ft.com/intl/cms/0a72e3a2-6948-11e0-9040-00144feab49a.pdf
[5] http://dealbook.nytimes.com/2011/04/29/the-f-d-i-c-s-lehman-fantasy/ and http://dealbook.nytimes.com/2011/05/03/no-fantasy-in-f-d-i-c-lehman-paper/ *See* The *Orderly Liquidation of Lehman Brothers Holdings Inc. Under the Dodd-Frank Act*, FDIC QUARTERLY , Vol. 5, No. 2 (2011).
[6] http://johnbtaylorsblog.blogspot.com/2011/05/how-to-avoid-new-bailout-authority.html
[7] *See*, e.g., Brent J. Horton, *How Dodd-Frank's Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution*, 36 J. Corp. L. 869 (2011).

[8] *See* Stephen J. Lubben*, Systemic Risk & Chapter 11*, 82 Temp. L. Rev. 433, 447 (2009) (arguing that Chapter 11 can be used to resolve systemically important firms like the automotive firms, to the extent they are systematically important); Ryan Lizza, *The Contrarian; Sheila Bair and the White House Financial Debate*, New Yorker, July 6, 2009, at 30, 34.
[9] *See* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 Mich. L. Rev. 1, 5 (2007) ("Bankruptcy offers three alternatives for addressing the problems of a large public company in financial distress. The debtor may reorganize the business, sell it as a going concern, or close the business and sell the assets piecemeal.").
[10] *Cf.* Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy,* 67 Ind. L.J. 951, 968-72 (1992).

type.[11] This institution is not presently – the best I know – in danger of default or in need of resolution, but someday it might be.[12]

If the FDIC were to resolve this institution under the new Orderly Liquidation Authority in Dodd-Frank,[13] it would first have to understand the business in question. It would be aided in this process by the resolution plans – or "living wills" – that Dodd-Frank requires such institutions to prepare and file.[14] The financial institution I examine in this paper has yet to file such a plan – it is not yet required to under recently enacted regulations – and when it does so, only parts will be public.[15] But it is possible to gain an honest understanding of the financial institution using existing regulatory reports and other information made public by the institution.

What this analysis reveals is that no matter how complex Lehman was, the remaining "too big to fail" financial institutions are infinitely more complex. Lehman involved myriad legal entities, across several key financial jurisdictions, but it largely involved a single line of business.[16] On the other hand, most of the remaining large financial institutions involve not only investment banking, but also commercial banking and sometimes insurance underwriting.[17] The commercial banking operations, in particular, mean that these institutions are integrated into the real economy to a far greater degree than Lehman, and are therefore likely to fail in even more disruptive ways.[18]

Moreover, all of these institutions have balances sheets that are much, much larger than Lehman's – which itself was the largest chapter 11 debtor ever.[19] For example, Lehman reported assets of $713 billion upon filing for bankruptcy, whereas the

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[11] http://www.rollingstone.com/politics/news/bank-of-america-too-crooked-to-fail-20120314

[12] http://dealbook.nytimes.com/2011/10/06/bank-stocks-get-a-boost-from-geithner/

[13] 12 USC §§ 5381-5394.

[14] 12 U.S.C. § 5365(d). This provision requires, among other things, "full descriptions of the ownership structure, assets, liability, and contractual obligations of the company."

[15] http://dealbook.nytimes.com/2011/09/16/the-problem-with-living-wills-for-financial-firms/. *See* 12 C.F.R. pt. 381.

[16] *See* Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, Working Paper (on file with author).

[17] Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 Harv. L. Rev. 507, 509 (1994).

[18] http://www.ft.com/intl/cms/s/0/f296cc8e-dedc-11e0-9130-00144feabdc0.html#axzz1Y7CM0c9G

[19] *See* Kristin N. Johnson*, From Diagnosing the Dilemma to Divining a Cure: Post-Crisis Regulation of Financial Markets,* 40 Seton Hall L. Rev. 1299, 1311 (2010).

institution I look at in this paper reported $2.3 trillion in assets at the end of 2010.[20] By way of context, the World Bank estimates the United States GDP was estimated at $14.6 Trillion in 2010.[21]

Once the relevant pieces of the institution are identified, in Part II of the paper I examine the relevant law that would apply to resolution of the financial institution's financial distress. I begin with the assumption that Dodd-Frank's Orderly Liquidation Authority will be invoked, but the fact that I have to make such an assumption itself reveals some basic uncertainty regarding how to anticipate and price financial distress in this context.

Even after I decide to invoke the OLA regime, the question of which law will apply to my targeted financial institution remains an issue. First, the OLA partially invokes other legal regimes to address parts of the financial institution. Second, OLA is incomplete in its preemption of other insolvency regimes.

And of course OLA only applies domestically. As will be seen, not only does the financial institution I examine conduct extensive operations abroad, but it also specifically targets investors in other jurisdictions. For example, it has extensive asset securitization operations in Canada and the United Kingdom. And recently it has issued several billion dollars of debt denominated in Australian Dollars, Swiss Francs, Canadian Dollars, Japanese Yen, and Euros. Many of these debt issuances also involve interest rates that float based on the movements of a local interest rate index. Presumably these indices are sensitive to local economic conditions.

While the FDIC, as a potential trustee of the financial institution in question, would have but a limited ability to change the legal outcomes in foreign jurisdictions, it must plan for the effects its actions will have worldwide, particularly if those actions will rebound into the United States. For example, when Lehman filed for chapter 11 in the United States, its London operations immediately entered administration in the United Kingdom. That had serious consequences for several US-based hedge funds that relied on Lehman's London operations for their prime brokerage accounts.[22]

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[20] The Lehman holding company Chapter 11 case is In re Lehman Brothers Holdings Inc., 08-13555, while the liquidation proceeding under the Securities Investor Protection Act for the brokerage operation is Securities Investor Protection Corp. v. Lehman Brothers Inc., 08-01420, both in U.S. Bankruptcy Court, Southern District of New York.

[21] http://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=ny_gdp_mktp_cd&idim=country:USA&dl=en&hl=en&q=us+gdp

[22] http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=2563

Having then provided a picture of the financial institution and the legal landscape that would apply upon financial distress, Part III of the paper considers the interaction of these two elements. This is the core of the paper, as it addresses the vital question of "what would happen?"

I assume that the FDIC and other key actors have learned from the recent crisis, but I try to avoid assuming the kind of perfection seen in the Corporation's recent Lehman exercise. After all, the French government learned the lesions of World War I, and it was well poised to act if Germany acted in the same manner as it had in 1914. Quite obviously that did not mean that France was ready to respond to a different, yet similar, threat in 1940.

In short, I assume that the FDIC is somewhat prepared, well intentioned, but not omnipotent.

In this section I also consider how the FDIC's efforts to prepare an institution for an OLA proceeding might decrease the time the FDIC has to actually make such preparations. This is the great paradox understood by reorganization professionals everywhere: the more preparation that is done for the filing, the greater the risk of an early or uncontrolled filing, because of premature disclosure of the debtor's plans. The FDIC has some experience hiding its preliminary work in the bank resolution context, but I also examine the ways in which OLA might be different.

Moreover, in the specific context of financial institutions, I explore how financial distress in the financial institution I am studying will likely result in doubts about the viability of other financial institutions (i.e., contagion), in varying intensity depending on the similarities between the respective institutions. Not only does this have a feedback effect with regard to the original financial institution, but it also limits the FDIC's ability to focus its efforts solely on the first institution.

At some point the preplanning inexorably gives way to an actual Dodd-Frank OLA proceeding. As explained more fully in Part III, this is the point at which FDIC will have to manage the main proceeding while also coordinating related insolvency proceedings at home and abroad. The liquidity needs of the distressed financial institution are apt to be extreme in these initial days, but providing such liquidity will be key to containing the financial distress within a single institution.

The FDIC will also have to be vigilant, ready to respond to unforeseen complications and the unforeseen actions of rogue counterparties who decide that their best course of action lies in self-help.

Once the financial institution is stabilized, the FDIC must be prepared to describe what will happen to the institution and must achieve that result in rapid fashion. At the same time, the Corporation will need to gain an understanding of the claims against the financial institution and implement plans for paying such claims. Throughout the key question will be, "can this be done quicker than it could under the Bankruptcy Code?" When the U.S. government conducted a similar exercise during the financial crisis with regard to AIG, it seems likely that it overpaid AIG's counterparties relative to what they would have obtained in a chapter 11 case.

Part IV then concludes by considering the implications of the story told in Part III. While Part III reveals some serious doubts about the ability of Dodd-Frank to perform as envisioned, it also shows how the Bankruptcy Code, at least as currently drafted, would be equally unsuited to the task. Moreover, I explain why adapting the Code to the resolution of large financial institutions would involved something far more substantial than a few "tweaks," as is often suggested. Ultimately it would involve adopting something that takes many features from both OLA and chapter 11, while applying the name bankruptcy to the resulting beast. I have argued elsewhere that greater integration of OLA and the Bankruptcy Code would be highly desirable, but we should not pretend it will be an easy task.

I. The Financial Institution

In this paper I examine Bank of America, a large universal bank – or as close to a universal bank as is possible in the United States – which is headed by the BankAmerica Corporation or Bank of America Corporation, a Delaware corporation originally called NationsBank (DE) Corporation.[23]

Already large, between 2006 and 2008 Bank of America acquired several other institutions, including Countrywide Financial, Merrill Lynch, MBNA, US Trust, and La Salle Bank. As of December 31, 2010, the entire bank had $2.3 trillion in assets and approximately 288,000 full-time equivalent employees.[24] Its broker-dealer units hold more than $2.2 trillion in client assets. The bank reports that in the United States alone it has more than 57 million consumer and small business banking relationships, and the bank held more than $1 trillion in banking deposits. The company has approximately 5,900 retail-banking locations and 18,000 ATMs throughout the United States.

The parent company's offices are located in Charlotte, North Carolina, and its shares are listed on the New York, London, and Tokyo stock exchanges.[25] It also has more than two-dozen types of preferred shares that are listed on the NYSE.

Table 1: Bank of America Capital (as of June 2011; millions of USD)	
+ Perpetual Preferred	16,562.20
+ Common Stock	101.33
+ Surplus	151,465.35
+ Undivided Profits	53,254.47
Total Capital	222,175.60

In a broad sense, Bank of America is comprised of two halves: the original Bank of America, and Merrill Lynch, the investment bank it acquired on the same day that

[23] Whether the parent company is Bank of America Corporation or BankAmerica Corporation is a bit unclear, since the certificate of incorporation uses both names. Paragraph one of certificate does state that "The name of the corporation is Bank of America Corporation," but the introductory paragraph and the title use the other name.

[24] 2010 Form 10-K, at page 23.

[25] All data in this initial discussion comes from Bank of America's 2010 Form 10-K. With regard to the discussion of the subsidiaries I recoded the data to correct obvious errors. For example, the list of subsidiaries includes separate categories labeled United Kingdom, England, and England & Wales, which have been combined in Table 1 under the United Kingdom category. Note, however, that Scotland remains a separate entry on the table, with five subsidiaries. I have assumed that references to Georgia refer to the American state.

Lehman filed its chapter 11 petition.[26] But the two halves of the bank have been somewhat integrated – for example, previously outstanding Merrill preferred shares were reissued by the Bank of America parent company on substantially the same terms, giving the holders a stake in the combined enterprise, rather than just the Merrill piece of the operation.

A. *Corporate Structure*

At the end of 2010 Bank of America, the parent company, had more than 2,000 subsidiaries worldwide, formed in 97 different jurisdictions.

About forty-five percent of the Bank of America subsidiaries are formed in Delaware. Just over thirty-eight percent of Bank of America's subsidiaries were formed under the law of a foreign jurisdiction.[27]

These subsidiaries conduct their business operations in 163 different cities around the world. And while the bank has its corporate headquarters in North Carolina, New York City is the location of the largest number of its companies.

Six hundred and thirty-one of the bank's more than two thousand subsidiaries, or about thirty-one percent, are operated from locations outside of the United States. When the one hundred and fifty companies located in London are combined with the other subsidiaries sprinkled about the UK – such as the two subsidiaries in Hertfordshire and the one in Manchester – it becomes clear that the United Kingdom is the single largest foreign jurisdiction with respect to Bank of America's overseas operations.

[26] *See* generally GREG FARRELL, CRASH OF THE TITANS (2010) (describing the events, particularly increasing investments in CDOs, that lead to Merrill's need for a takeover).
[27] Defined as another other than the fifty United States and the District of Columbia.

Table 2: Bank of America Key Operating Subsidiaries (as of June 2011)

	Description	*Location*	*Formation Jurisdiction*	*Outstanding Debt (named entity only)*
MBNA Canada Bank	Credit cards	Gloucester, Canada	Canada	0
Merrill Lynch Canada Inc.	Investment bank	Toronto, Ontario, Canada	Canada	0
Merrill Lynch Capital Services, Inc.	Derivatives	New York, NY	Delaware	0
Merrill Lynch Commodities, Inc.	*Unknown (energy trading?)*	Houston, TX	Delaware	0
Merrill Lynch Government Securities Inc.	US Government securities	New York, NY	Delaware	0
Merrill Lynch Professional Clearing Corp.	*Unknown*	New York, NY	Delaware	0
Merrill Lynch, Pierce, Fenner & Smith Incorporated	investment bank; holding co.	New York, NY	Delaware	0
Merrill Lynch International Bank Limited	Universal banking; f/x trading in London	Dublin, Ireland	Ireland	0
Merrill Lynch Japan Securities Co., Ltd.	Investment bank	Tokyo, Japan	Japan	0
Merrill Lynch S.A.	Investment bank	Luxembourg, Luxembourg	Luxembourg	3,285
Banc of America Securities Limited	*Unknown (investment bank?)*	London, U.K.	United Kingdom	0
MBNA Europe Bank Limited	Holding company -- consumer lending sub	Chester, England	United Kingdom	0
Merrill Lynch Commodities (Europe) Limited	Derivatives	London, U.K.	United Kingdom	0
Merrill Lynch International	Broker-dealer	London, U.K.	United Kingdom	0
Bank of America Rhode Island, National Association	Commercial bank	Providence, RI	USA	0
Bank of America, National Association	Commercial bank	Charlotte, NC	USA	6,659
FIA Card Services, National Association	Credit cards	Wilmington, DE	USA	1,000

Sources: http://investor.bankofamerica.com/ and Bloomberg *Dollars in Millions of USD*

The largest number of subsidiaries are located in obvious financial centers, and the banks' corporate headquarters, but there are some surprises too. With all due respect to Montevideo, six subsidiaries operating out of that city might give us pause.

Many of the companies among the thousands that make up Bank of America are likely to be of little significance. But in a world where a recent college graduate can incur $2 billion in losses at a major bank, we should not be too quick to dismiss any seemingly small piece of the overall picture.

With that proviso, in June of 2011 Bank of America identified seventeen subsidiaries as among its "major operating subsidiaries."[28] As shown on Table 2, these companies are located in a variety of jurisdictions in the United States, Canada, Japan, and Europe. These companies include three nationally chartered banks, which are subject to direct regulation by the Controller of the Currency and the FDIC.

[28] http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTk3OTF8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1

Table 3: Bank of America Assets by Location (2010)

	USD	*%*
Total Assets	2,264,909.00	100
Domestic	1,938,417.00	85.58
Total Foreign excluding North America	310,392.00	13.7
Europe, Middle East and Africa	186,045.00	8.21
Asia	106,186.00	4.69
Latin America and the Caribbean	18,161.00	0.8
Canada	16,100.00	0.71

MBNA Canada Bank is a major credit card issuer in Canada, which Bank of America sold to TD Bank in late 2011.[29] Merrill Lynch Capital Services, Inc. is primary derivatives counterparty in the Merrill Lynch part of Bank of America.

Merrill Lynch Canada Inc. is an investment-banking arm of Merrill Lynch & Co. Canada Ltd., which itself is a subsidiary of Merrily Lynch Canada Holdings Co., Merrill's top level Canadian holding company. This makes Merrill Lynch Canada similar to Merrill Lynch SA, which is Merrill's continental European investment banking arm.

Interestingly, some of the entities listed by Bank of America as key subsidiaries do not appear in Bloomberg or other key financial databases. For example, Merrill Lynch Commodities, Inc. is a subsidiary of MLCI Holdings, Inc., which itself is a subsidiary of Merrill Lynch Capital Services, the derivatives trader noted earlier. What precisely Merrill Lynch Commodities does is apparently unknown to Bloomberg. I hazard a guess that this entity is involved in energy related trading, given its place in the overall corporate structure and its location in Houston, but we can hope that the FDIC will have better information than Bloomberg on points like these.

Even more interesting is how little of Bank of America's balance sheet appears on Table 2. For example, the bank reports more than $800 billion in total outstanding debt. Just under $11 billion of that appears on the table. But this is consistent with prior research that the late Sarah Woo and myself previously conducted on Lehman: much of the debt was issued by relatively insignificant subsidiaries, created to take advantage of regulatory or tax advantages of a particular jurisdiction.[30]

Similarly, subsidiaries like Merrill Lynch UK Holdings Limited do not appear on Table 2, despite reporting more than $155 billion in risk-weighted assets.[31] As it

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29 Canadian Big Deals, Am. Law., Dec. 2011 at p. 41.
30 *See* Lubben & Woo, *supra* note 16. *See also* http://www.ft.com/cms/s/0/098ac1ec-882d-11de-82e4-00144feabdc0.html.
31 http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-basel

turns out, this makes sense in the strictly literal sense that Merrill Lynch UK Holdings is a holding company, with no independent operations.

But given that Table 3 shows that Bank of America has but $188 billion of assets in the whole of Europe, the Middle East, and Africa, Merrill Lynch UK Holdings' subsidiaries must carry a particular degree of risk (as defined in the Basel accords) or significance.[32]

In fact, Merrill Lynch UK Holdings is the holding company for Merrill Lynch International ('MLI') and Merrill Lynch Commodities (Europe) Limited ('MLCE'), two of the key subsidiaries identified on Table 2. As reported by Bank of America, MLI acts as a broker/dealer in financial instruments and provides "corporate finance services." MLCE is a trader of natural gas, electricity, coal, emissions and weather derivatives.[33]

Table 4: Bank of America Revenues by Location (2010)

	USD	*%*
Net Revenues	110,220.00	100
Domestic	87,179.00	79.1
Total Foreign Excluding North America	21,541.00	19.54
Europe, Middle East and Africa	12,369.00	11.22
Asia	6,115.00	5.55
Latin America and the Caribbean	3,057.00	2.77
Canada	1,500.00	1.36

Taken together, Tables 2 through 4 provide a picture of a bank whose key subsidiaries are spread across the globe, while much of its assets and revenues are still associated with the United States.

That is, even though many Bank of America entities operate oversees, they often facilitate trading with American counterparties. The following table, reproduced from the Basel II Pillar 3 Report on MLI, best illustrates this. Recall that MLI is a London-based broker-dealer, yet more than half of its credit exposure relates back to the "Americas," a rather vague term to be sure.

And it is possible that the location of the assets – see Table 3 – may be something of a mirage, once the risk of rehypothecation is taken into account.[34] Rehypothecation of collateral involves the reuse of client assets in a new transaction, as if a pawnshop could grant its own lenders a lien or similar rights in items left at the store by

[32] *See*, *infra* Table __, for more on MLI.

[33] http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NzUwMjB8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1

[34] http://www.imf.org/external/pubs/ft/wp/2010/wp10172.pdf

customers. Many of Lehman's prime brokerage customers claimed to be surprised that their assets had moved to Europe. While contracting will address that specific problem, other related issues remain.

Table 5: Merrill Lynch International Counterparty Exposure

Exposure Value - Geographical Distribution

	Merrill Lynch International							
	2009				2008			
$ millions	**Asia**	**Americas**	**EMEA**	**Total**	**Asia**	**Americas**	**EMEA**	**Total**
Central governments or central banks	39	270	1,259	1,568	146	6,021	1,059	7,226
Corporates	1,704	41,299	22,523	65,526	2,306	70,881	27,416	100,603
Institutions	3,025	24,559	42,193	69,777	3,433	23,760	51,699	78,892
Total Exposure Value	4,768	66,128	65,975	136,871	5,885	100,662	80,174	186,721

B. *Capital Structure*

While a potential debtor's capital structure is important in all types of insolvency proceedings, in the insolvency of a financial institution understanding the capital structure is even more important since such a company is rooted in its balance sheet.[35] And financial institutions are quite often more dependent on short-term borrowing than other firms, which leaves them exposed to extreme liquidity needs upon the onset of financial distress.[36]

Table 6 sets forth balance sheet information for Bank of America, which shows this typical pattern of borrowing for a financial institution.[37] Just over 90% of this bank's capital structure is comprised of debt. The key implication for present purposes is that both the preferred and common shareholders can be quickly dismissed if we assume more than a 10% decline in asset values, as might occur when a financial institution experiences financial distress.[38]

Table 6: Bank of America Balance Sheet (USD Millions)

		FQ2 2011
Balance Sheet - Assets		
	+ Cash and Due from Depository Institutions	138,389.21
	+ Trading Account Assets	253,123.18

[35] *See* Sarah Pei Woo, *Simultaneous Distress of Residential Developers and Their Secured Lenders: An Analysis of Bankruptcy & Bank Regulation*, 15 Fordham J. Corp. & Fin. L. 617, 666-68 (2010).
[36] *See* Macchiarola, *supra* note 1, at 297-98.
[37] John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 Colum. L. Rev. 795, 815 (2011).
[38] *See* Fahey v. Mallone, 332 U.S. 245, 250 (1947); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L.Rev. 775, 792 (1987).

	+ Total Securities	351,463.11
	+ Federal Funds & Reverse Repos	259,708.37
	+ Net Loans and Leases	923,898.92
	+ Bank Premises and Fixed Assets	13,792.69
	+ Other Real Estate Owned	3,915.80
	+ Goodwill and Other Intangibles	92,891.39
	+ All Other Assets	194,135.15
	Total Assets	2,264,435.84
Balance Sheet - Liabilities		
	+ Total Deposits	1,040,171.86
	+ Federal Funds & Repurchase Agreements	239,520.83
	+ Trading Liabilities	128,299.95
	+ Other Borrowed Funds	406,814.47
	+ Subordinated Debt	45,678.69
	+ All Other Liabilities	154,843.60
	Total Liabilities	2,041,102.95
Balance Sheet - Equity		
	+ Perpetual Preferred	16,562.20
	+ Common Stock	101.33
	+ Surplus	151,465.35
	+ Undivided Profits	53,254.47
	Total Capital	222,175.60

The bank reports $420 billion in short term borrowing, including about $50 billion in money market borrowing and $250 billion in repo related borrowing, and more than $1 trillion in deposits, divided between almost $950 billion in domestic deposits and $90 billion in foreign deposits.

These sources of funding are apt to be the unstable when a financial institution encounters financial distress.[39] For example, the foreign depositors do not benefit from FDIC insurance, and thus might be especially likely to flee at the first signs of stress. And a "run" in repo financing is widely blamed for Lehman's ultimate collapse.[40]

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[39] http://www.reuters.com/article/2012/02/09/financial-regulation-triparty-fed-idUSL2E8D9HJU20120209

[40] *See generally* GARY GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007 (2010); Actions by the New York Fed in Response to Liquidity Pressures in Financial Markets: Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs, 110th Cong. (Apr. 3, 2008) (testimony of Timothy F. Geithner, President and Chief Executive Officer, Fed. Reserve Bank of N.Y.).

Even more importantly for purposes of this paper, these unstable short term sources of funding show the potential liquidity needs of the bank during a resolution process. As noted in the bank's 2010 Form10-K:

> If Bank of America Corporation's or Bank of America, N.A.'s commercial paper or short-term credit ratings … were downgraded by one or more levels, the potential loss of short-term funding sources such as commercial paper or repurchase agreement financing and the effect on our incremental cost of funds would be material.[41]

As of September 2011, Bank of America had exactly one thousand different types of debt traded, with an average (median) duration of just over 5.6 (5.0) years.[42] Much of the longer dated debt was issued in the mid to late 1990s.

Table 7 shows the currency of each of these debt instruments. While none of the banks' significant operating companies were located in Australia or in Continental Europe, we can see from the table that these two jurisdictions are a substantial source of the banks' funds.

Table 7: Outstanding Bank of America Debt by Currency (September 2011)

	Freq.	*Percent*	*Cum. Percent*
USD	824	82.4	82.4
EUR	41	4.1	86.5
AUD	35	3.5	90
JPY	34	3.4	93.4
SGD	10	1	94.4
CHF	9	0.9	95.3
NZD	9	0.9	96.2
CAD	8	0.8	97
GBP	6	0.6	97.6
BRL	5	0.5	98.1
MXN	4	0.4	98.5
INR	3	0.3	98.8
SEK	3	0.3	99.1
NOK	2	0.2	99.3
TRY	2	0.2	99.5
ZAR	2	0.2	99.7
CZK	1	0.1	99.8
HKD	1	0.1	99.9
RUB	1	0.1	100

Source: Bloomberg

[41] Bank of America Corporation 2010 Form 10-K, at page 7.
[42] As reported on Bloomberg.

The bank also reports more than $354 billion in securities among its assets. Table 8 provides some further information about those securities.

Table 8: Bank of America Securities (June 2011)

+ US Government Securities	49,269.15
US Treasury Securities	46,571.54
US Govt Agencies	2,697.61
+ Municipals	7,645.96
+ Asset Backed Securities	8,048.56
+ Other Domestic Debt	3,624.13
+ Foreign Debt Securities	4,579.59
+ Equities	20,431.88
Total Securities	351,463.11

Source: Bloomberg

The purpose of this paper is not to identify what might cause Bank of America to fail, but rather to examine, assuming such failure, how such failure might be addressed. In that context, Table 8 is not so much relevant in identifying possible risk at the bank, but instead because which might assume that some of these assets could decline in value during a financial crisis that might accompany the failure of a major banking institution. That is, many of Bank of America's assets are apt to be correlated with its own financial condition, given its prominence in the financial markets.

Independent of whatever might cause the bank to experience financial distress, a more generalized decline in financial markets would hit this part of Bank of America's balance sheet. It does bear noting that the US Treasury portion of Table 8 will likely offset some of the downward movement in other parts of the banks securities holdings, given the typical flight to quality that occurs in times of financial stress.

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But this discussion of the Bank of America balance sheet has to this point considered the bank as a whole. Financial institutions fail as a whole, but are resolved in pieces. Even after the enactment of Dodd-Frank, and as will be discussed more fully in Part II, upon failure a financial institution will be deconstructed into its constituent parts. Thus, while the consolidated balance sheet can highlight the scope of the issue at hand, ultimately only the individual, company-by-company balance sheets of a financial institution are relevant.

And sometimes the focus on the traditional balance sheet can hide the realities of modern finance.

Both points are well illustrated by the final table in this section, which returns to MLI, the London-based broker-dealer discussed earlier. Table 9 again reproduces a table from the MLI Basel II report, this time disclosing MLI's credit default swap exposure.[43]

Table 9: Merrill Lynch International CDS Exposure (USD Millions)

Counterparty Credit Risk - Credit Derivatives	2009		2008	
	bought	sold	bought	sold
Credit derivative products used for own credit portfolio				
Credit default swaps	7,426	3,241	12,471	5,317
Total return swaps	1,316	3,496	1,351	16,170
Total notional value	8,742	6,737	13,822	21,487
Credit derivative products used for intermediation				
Credit default swaps	3,156,461	3,156,461	4,058,936	4,058,936
Total return swaps	-	-	-	-
Total notional value	3,156,461	3,156,461	4,058,936	4,058,936
Credit derivative products by credit exposure				
Institutions	1,383,470	1,478,807	1,827,995	1,929,053
Corporate	1,781,733	1,684,391	2,244,762	2,151,370
Total notional value	3,165,203	3,163,198	4,072,757	4,080,423

The bottom sub-table shows that MLI has bought $3.2 trillion of CDS protection – meaning MLI will get paid if there is a default on the relevant reference entity. Similarly, MLI has also sold $3.2 trillion in credit protection that it might someday have to pay out.

In good times these two amounts may cancel each other out, especially if MLI's "book" is largely balanced. In bad times, MLI sits in the middle of more than $6 trillion of total transactions, perhaps paying out on one side while facing a troubled counterparty on the other side.

As seen from Table 10, MLI apparently holds the bulk of Bank of America's CDS book. Overall, the bank has the second largest derivatives portfolio in the nation, comprised of more than $74 trillion (notional amount).[44] In the insured banking

[43] For background on CDS contracts, see Stephen J. Lubben, *Credit Derivatives & the Future of Chapter 11*, 81 Am. Bankr. L.J. 405, 423-24 (2007).

[44] On the balance sheet discussed above, Bank of America lists more than $66.5 billion of derivative contracts as assets. *See* Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. Colo. L. Rev. 167, 169-73 (2011);

part of Bank of America, OCC records show that the bank held just over $48 trillion of derivatives, of which about $45.5 trillion was held for trading purposes. Recent press reports indicate that Bank of America is facing increasing pressure to move derivatives trades to its insured banking affiliates, and out of Merrill Lynch entities, as the result of recent downgrades or threatened downgrades in the banks' credit ratings.[45]

In its oversees Basel II disclosure reports, Bank of America notes that

> At December 31, 2009, the amount of additional collateral and termination payments that would be required for such derivatives and trading agreements was approximately $2.1 billion if the long-term credit rating of BAC and its subsidiaries was incrementally downgraded by one level by all ratings agencies. A second incremental one level downgrade by the ratings agencies would require approximately $1.2 billion in additional collateral.

That is, there is a contingent liability or obligation associated with the bank's derivative trading, which turns on the status of Bank of America's credit rating. As seen in AIG, these sorts of collateral calls have the effect of draining desirable assets from a financial institution during the development of financial distress, potentially increasing the downward pressure on the institution.[46]

Table 10: Notional Amount of Derivative Contracts, Top 5 Holding Companies (June 2011, USD Millions)

Rank	Holding Company	Total Derivatives	Futures (EXCH TR)	Options (EXCH TR)	Forwards (OTC)	SWAPS (OTC)	Options (OTC)	Credit Derivatives (OTC)	Spot FX
1	JPMorgan Chase & Co.	78,977,450	1,693,438	2,164,699	11,569,472	47,598,956	9,845,448	6,105,437	469,152
2	**Bank of America Corporation**	**74,811,101**	**3,288,994**	**1,546,806**	**12,519,496**	**46,529,779**	**6,787,645**	**4,138,382**	**413,117**
3	Morgan Stanley	56,401,634	158,931	1,038,336	7,918,712	35,162,310	6,365,230	5,758,115	442,532
4	Citigroup Inc.	55,186,164	877,517	3,342,856	7,974,039	31,250,476	8,916,014	2,825,262	567,407
5	Goldman Sachs Group, Inc.	53,405,245	1,812,343	3,249,493	4,764,925	29,888,177	9,386,342	4,303,965	359,691

Source: OCC

The exchange of collateral in connection with derivatives trading and other transactions also exposes the bank and its counterparties to risks associated with the rehypothecation of the collateral. As Bank of America explains in its 2010 10-K

Stephen J. Lubben, *Derivatives and Bankruptcy: The Flawed Case for Special Treatment*, 12 U. Pa. J. Bus. L. 61 (2009).

[45] http://www.bloomberg.com/news/print/2011-10-18/bofa-said-to-split-regulators-over-moving-merrill-derivatives-to-bank-unit.html

[46] *See* CONG. OVERSIGHT PANEL, JUNE OVERSIGHT REPORT: THE AIG RESCUE, ITS IMPACT ON MARKETS, AND THE GOVERNMENT'S EXIT STRATEGY (2010).

> The Corporation accepts collateral that it is permitted by contract or custom to sell or repledge and such collateral is recorded on the Consolidated Balance Sheet. At December 31, 2010 and 2009, the fair value of this collateral was $401.7 billion and $418.2 billion of which $257.6 billion and $310.2 billion were sold or repledged. The primary sources of this collateral are repurchase agreements and securities borrowed. The Corporation also pledges securities and loans as collateral in transactions that include repurchase agreements, securities loaned, public and trust deposits, U.S. Treasury tax and loan notes, and other short-term borrowings. This collateral can be sold or repledged by the counterparties to the transactions.[47]

Rehypothecation of this sort can make it more difficult to unwind a financial institutions affairs in insolvency, as the debtor's assets will be subject to competing and conflicting claims.[48]

Returning to the specific case of MLI, importantly for purposes of this paper, upon the hypothetical failure of Bank of America, MLI has a substantial piece of the CDS market that will either have to moved to another financial institution with extreme haste, or the CDS market will experience significant dislocation as parties rush to terminate their MLI contracts and replace them with new trades.[49]

And as discussed in the next part of the paper, MLI will remain outside of any Orderly Liquidation Proceeding commenced with regard to Bank of America, as MLI is based in London and therefore not subject to the FDIC's or the US Congress' jurisdiction. This is an issue for the roughly thirty percent of Bank of America entities that operate outside the United States, but it is especially important with regard to entities like MLI that have significant operations.

Finally, as discussed in the next part of this paper, different financial institutions are subject to different resolution procedures, even if the institutions in question are all subsidiaries of the same financial holding company. Accordingly, Table 11 identifies the domestic Bank of America subsidiaries that are subject to special regulatory treatment, and thus special resolution procedures.

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[47] 2010 10-K at page 142.

[48] Stephen J. Lubben, *The Bankruptcy Code Without Safe Harbors*, 84 Am. Bankr. L.J. 123, n.20 and text (2010).

[49] Lubben, *The Bankruptcy Code Without Safe Harbors*, *supra* note 48, at 123-24; *see also* Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 Conn. L. Rev. 1327, 1343-44 (2009); Michael Simkovic, *Secret Liens and the Financial Crisis of 2008*, 83 Am. Bankr. L.J. 253, 253 (2009).

The table is apt to be both over and under inclusive, since an outsider obviously may not correctly identify the purpose of all of Bank of America's myriad subsidiaries.[50] Also note that the table only includes domestic entities: there are clearly several foreign depository banks, insurance companies, and broker-dealers in the bank's corporate structure.[51]

Table 11: Bank of America Domestic Regulated Subs

	Location	*Formation Jurisdiction*	*Assets (if available; USD millions)*
Insurance Companies:			
Balboa Insurance Company	Irvine, CA	California	2,581.00
Balboa Life Insurance Company	Irvine, CA	California	43.25
Balboa Life Insurance Company of New York	Irvine, CA	New York	18.30
Meritplan Insurance Company	Irvine, CA	California	184.00
Newport Insurance Company	Irvine, CA	Arizona	146.10
Bank of America Reinsurance Corporation	Burlington, VT	Vermont	
CW Reinsurance Company	Burlington, VT	Vermont	
Investor Protection Insurance Company	Burlington, VT	Vermont	
General Fidelity Life Insurance Company	Columbia, SC	South Carolina	210.30
Independence One Life Insurance Company	Phoenix, AZ	Arizona	
RIHT Life Insurance Company	Phoenix, AZ	Arizona	
Summit Credit Life Insurance Company	Phoenix, AZ	Arizona	
Banks (depository and trust):			
Bank of America, National Association	Charlotte, NC	USA	1,454.05
Bank of America Oregon, National Association	Portland, OR	USA	8.82
Bank of America Rhode Island, National Association	Providence, RI	USA	17.81
Bank of America California, National Association	San Francisco, CA	USA	15.98
Bank of America National Trust Delaware	Wilmington, DE	USA	2.90
U.S. Trust Company of Delaware	Wilmington, DE	Delaware	
Broker-Dealers (active only, including all types of brokers and dealers):			
Merrill Lynch Government Securities Inc.	New York, NY	Delaware	
Merrill Lynch, Pierce, Fenner & Smith Incorporated	New York, NY	Delaware	297,900.00
Merrill Lynch Professional Clearing Corp.	New York, NY	Delaware	18,145.00
Banc of America Specialist, Inc.	New York, NY	New York	6,028.00

[50] For example, I have attempted to exclude insurance agencies from the list, but sometimes a particular subsidiary's function is less than clear.

[51] Likely examples include ML Insurance (IOM) Limited (incorporated in Douglas, Isle of Man), Merrill Lynch Credit Reinsurance Limited (Hamilton, Bermuda), Merrill Lynch Bank (Suisse) S.A. (Geneva, Switzerland), and Merrill Lynch Yatirim Bank A.S. (Istanbul, Turkey).

Sources: Bank of America Corporation 2010 10-K; OCC; FDIC Call Reports; SEC; FINRA; Texas Department of Insurance and NAIC Web Pages

II. Resolution Law for Financial Institutions

American regulation of financial institutions has historically focuses on a function-by-function approach, and this holds true for the insolvency law of financial institutions as well. Each specialized area of the financial institution is typically subject to its own special insolvency regime, meaning that a large financial holding company with myriad subsidiaries – like Bank of America – will be subjected to several different insolvency regimes. This reality has only partially improved with the enactment of Dodd-Frank's new Orderly Liquidation Authority.

Before discussing OLA, it is helpful to briefly sketch the pre-Dodd-Frank rules for financial institution insolvency, to get a better sense of what has changed. Table 12 summarizes this discussion.

Table 12: Financial Institution Resolution (Pre-Dodd Frank)

Banks	FDIC Receivership
Insurance Company	State court receivership
Broker-Dealer	SPIA Liquidation (Bankruptcy Court)
Financial Holding Companies	Chapter 11
Everything Else	Chapter 11

Banks, whether state or federally chartered, are subject to receiverships instituted by the FDIC, and overseen by a Division of Resolutions and Receiverships. The receivership is quite often centered around one or more purchase and assumption agreements, whereby the Corporation sells the failed banks assets and deposits to another bank. The sale may be facilitated by some sort of risk retention by the FDIC, but the key aim is to minimize disruption to the banking system and losses to the FDIC as creditor (by virtue of its role as deposit insurer). This stands in contrast with the typical goal of chapter 11, which is often stated as maximization of the debtor's overall value.

Because of the McCarran-Ferguson Act,[52] Congress has passed regulation of insurance to the states. Thus insurance company insolvencies are a matter of state law by virtue of the combined effects of McCarran-Ferguson and an express exemption from the Bankruptcy Code.[53] Unlike bank receiverships, insurance company receiverships typically feature court oversight.

As with banks, appointment of a receiver suspends the powers of management and places the control of the company in the hands of the receiver.[54] Claims are fixed as of the date of the appointment. An insurer's policies are typically deemed cancelled on appointment of a receiver. The estate is not liable for future losses, but policyholders have valid claims for losses incurred to that point. In many cases the policyholders will also have claims for breach of contract against the estate. And often policyholder claims have a priority over other unsecured creditor claims.[55]

SIPA is the final specialized resolution procedure relevant to this discussion. Enacted in the 1970s to deal with the failure of brokerage houses during the "back office crisis,"[56] SIPA provides for some basic insurance protection for customers of

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[52] 15 U.S.C. §§ 1011-1015.

[53] 11 U.S.C. § 109. The exemption may be important, given that the Bankruptcy Code is enacted under express Constitutional authority, and thus might trump the McCarran-Ferguson Act. *See* William Goddard, *In Between the Trenches: The Jurisdictional Conflict Between a Bankruptcy Court and a State Insurance Receivership Court*, 9 Conn. Ins. L.J. 567, 574 (2002).

[54]

http://www.delawareinsurance.gov/departments/berg/FederalMotor_Files/FederalMotors_StipLiqInjOrder-WithConvSignature-20110818.pdf

[55] Patrick Collins, Note, *HMO Eligibility for Bankruptcy: The Case for Federal Definitions of 109(b)(2) Entities*, 2 Am. Bankr. Inst. L. Rev. 425, 431 (1994).

[56] The back office crisis developed in the late 1960s, when securities trades were still processed in paper form, but the size of the stock market began to overtake brokers' ability to process the paperwork. Because of an underinvestment in infrastructure, several brokers failed and others came close to failing. *See* Thomas W. Joo, *Who Watches the Watchers? The Securities Investor Protection Act, Investor Confidence, and the Subsidization of Failure*, 72 S. Cal. L. Rev. 1071, 1076-78 (1999); *see also The Securities Investor Protection Act of 1970: An Early Assessment,* 73 Colum. L. Rev. 802 (1973).

securities brokers, but not commodities or futures brokers, and sets forth a special insolvency scheme for brokerages.[57]

SIPA specifically provides for the application of chapters 1, 3 and 5 and subchapters I and II of chapter 7 of the Bankruptcy Code to the extent such provisions are not inconsistent with SIPA.[58] Both chapter 11 and SIPA proceedings draw on the same general parts of the Bankruptcy Code to resolve claims and define the basic elements of the process.[59] But SIPA is strictly a liquidation procedure, which makes its outcome both more certain and less flexible than a chapter 11 case.

SIPA proceedings are commenced in district court and typically quickly removed to the local bankruptcy court.[60] A trustee is appointed by SIPC – or SIPC itself acts as trustee when a small brokerage is involved – and the trustee directed to distribute securities to customers to the greatest extent practicable in satisfaction of their claims against the debtor. Through such distributions, the customers of a broker-dealer receive a priority over other, general unsecured creditors who have to await a more bankruptcy-like distribution, if there are any assets to make such a distribution.[61]

SIPA typically applies to investment banks, or at least key parts of investment banks (i.e., the broker-dealer bits). Thus, while Lehman Brothers Holdings, Inc. famously filed a chapter 11 petition on September 15, 2008, one week latter its key broker-dealer subsidiary, Lehman Brothers, Inc., filed a SIPA petition to facilitate the Lehman Brothers Holdings' sale of assets to Barclay's Capital.

In a world before Dodd-Frank, any part of the financial company not covered by one of the foregoing special insolvency regimes, including bank holding companies, was resolved under the Bankruptcy Code.[62] In theory many foreign parts of the financial

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[57] Richard Carlucci, *Harmonizing U.S. Securities and Futures Regulations*, 2 Brook. J. Corp. Fin. & Com. L. 461, 473 (2008); Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 Brook. J. Corp. Fin. & Com. L. 317, 326 (2007).
[58] 15 U.S.C. § 78fff(b)
[59] SIPA itself is only applicable to broker-dealers required to register under the 1934 Exchange Act, leaving small broker-dealers and certain foreign broker-dealers subject to certain specialized provisions of chapter 7 of the Bankruptcy Code. By all accounts, these exceptions are a small minority of broker-dealers.
[60] 15 U.S.C. § 78eee(b)(4). *See also* Peloro v. United States, 488 F.3d 163, 172 (3d Cir. 2007).
[61] 15 U.S.C. § 78fff-3(a).
[62] Until passage of the Dodd-Frank Act, a Bank Holding Company was subject to regulation by the Federal Reserve, but there was no specialized insolvency system for these entities. The Bank Holding Company Act defines "bank holding company" as any company that has control over any bank or over any company that is or becomes a bank holding company by virtue of the Act. Any company has control

institution could also file a bankruptcy petition, although there may be difficulties in getting such a petition respected, especially if the subsidiary in question was engage in significant activity in the foreign jurisdiction.

How does the creation of OLA change this?

Table 13 summarizes the change, but, in short, OLA potentially replaces chapter 11 as the resolution tool for bank holding companies and their non-regulated subsidiaries. It only potentially displaces chapter 11 because chapter 11 remains in place unless financial regulators decide to invoke OLA,[63] through a comically byzantine process that culminates with the D.C. District court having 24 hours to say "no" under very limited circumstances.[64]

And OLA does not supplant FDIC bank receiverships, state insurance receiverships, or SIPA liquidation procedures, although the story with regard to SIPA is not quite as clear that would suggest.[65] As explained below, OLA largely overrides the provisions of SIPA, without wanting to appear to do so.

In essence, OLA expands the FDIC's bank receivership powers to cover a greater part of the financial institution.[66] This allows the FDIC to conduct a purchase and assumption transaction with regard to non-bank parts of the institution, or transfer the institution to a newly created "bridge bank."[67] The latter allows the FDIC to split the good assets from the bad, in a process that is very much like that used in "363 sales" under chapter 11, widely publicized by the automotive chapter 11 cases.[68]

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over a bank or over any company if: (1) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25% per cent or more of any class of voting securities of the bank or company; (2) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or (3) the board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company. 12 USC §1841(a).

[63] 12 USCS § 5382(c)(1); *see* 12 USC §§ 5388, 5383(b)(2).

[64] 12 USC § 5382; *see also* 12 USC § 5383.

[65] 12 USCS §§ 5383(e); 5385; 5381(a)(8).

[66] 12 USCS § 5384(b).

[67] 12 USC § 5390.

[68] Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 Am. Bankr. L. J. 531 (2009). *See also* Stephanie Ben-Ishai & Stephen J. Lubben, *Sales or Plans: A Comparative Account of the "New" Corporate Reorganization*, 56 McGill L.J. 591 (2011).

The key distinction with chapter 11 is that the FDIC acts without court oversight or the need to give notice before it acts.[69] Thus, while the Lehman 363 sale happened after one week's notice to the stakeholders, the OLA equivalent could happen within seconds of the OLA proceeding's commencement.[70]

The FDIC is also granted a one-day stay on counterparties' ability to terminate their derivative contracts.[71] This contrasts with the Bankruptcy Code which, particularly after 2005, excepts a wide range of derivative contracts – and things that look like derivative contracts – from the normal operation of the Code.

And equally importantly, the OLA procedure can be self-funded by the FDIC.[72] This obviates the need to secure private DIP financing,[73] something that might be especially difficult to obtain during a financial crisis, especially if one considers the scale of the funding needs of most large financial institutions.[74]

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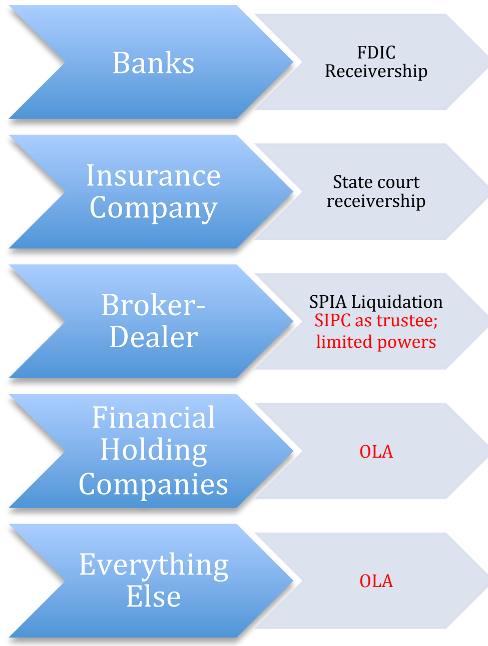
69 Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique - Part II*, 128 Banking L.J. 867, 899 (2011).
70 Mark A. McDermott & David M. Turetsky, *Restructuring Large, Systemically-Important, Financial Companies an Analysis of the Orderly Liquidation Authority, Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 19 Am. Bankr. Inst. L. Rev. 401, 421 (2011).
71 Douglas E. Deutsch & Eric Daucher, *Dodd-Frank's Liquidation Scheme: Basics for Bankruptcy Practitioners*, Am. Bankr. Inst. J., July/August 2011, at 54, 55.
72 Jamieson L. Hardee, *The Orderly Liquidation Authority: The Creditor's Perspective*, 15 N.C. Banking Inst. 259, 275 (2011).
73 11 U.S.C. § 364.
74 12 U.S.C. § 5384(d).

Table 13: Financial Institution Resolution (After Dodd-Frank)



Unfortunately, the FDIC must request that Treasury supply its funding, and the Treasury is authorized to impose conditions on such funding. Thus, the FDIC might not actually have access to funding if political considerations cause the Treasury to impose onerous conditions on the funding. But this concern, although raised in the literature, seems somewhat hypothetical, since the Secretary could just as easily avoid the entire issue by disallowing the OLA filing in the first instance.[75]

This funding also supplants the Federal Reserve's former ability to lend directly to non-banks in times of crisis.[76] Now the Federal Reserve and the Treasury only have the power to lend across industries, while any firm-specific lending must be done through the FDIC in the context of an OLA proceeding. FDIC's powers outside of OLA have also been greatly curtailed.[77]

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[75] *E.g.,* Morgan Ricks, *The Case for Regulating the Shadow Banking System*, October 2011 Working Paper (on file with author).

[76] Lissa Lamkin Broome, *The Dodd-Frank Act: Tarp Bailout Backlash and Too Big to Fail*, 15 N.C. Banking Inst. 69, 78 (2011).

[77] For example, during the financial crisis the FDIC announced a temporary Transaction Account Guarantee Program, giving depositors unlimited insurance coverage for non-interest bearing transaction accounts if their bank was a participant in the FDIC's Temporary Liquidity Guarantee Program. Non-interest bearing checking accounts include demand deposit accounts and any transaction account that has unlimited withdrawals and that cannot earn interest. Also included were other interest-bearing checking accounts, Money Market Deposit Accounts, savings accounts and Certificates of Deposit. This program was large than the

This might be problematic.[78] Obviously the cost of any bailout in terms of taxpayer costs, moral hazard, and reduced market discipline, will sometimes overwhelm the costs of allowing any particular institution to fail. But in the specific cases of depository banks, since the 1930s the general assumption has been that any bank failure might result in contagion, hence the need for system wide deposit insurance. And in times of market-wide dislocation, it has long been accepted that it can be socially useful for central banks to provide liquidity, and even recapitalization, to avoid the panic that would result from the failure of a specific financial institution.[79]

That such lending now can be done only after the failure of the institution is announced represents a bet that the announcement of an OLA proceeding will not itself overwhelm the benefits of the FDIC's lending to the institution. It seems equally likely that putting an institution into OLA will trigger a chain reaction of panic and failures throughout the system that could result in a severe contraction of money and credit in the financial system, which could result in the need to conduct several OLA proceedings in parallel.

There is also the question of whether the analogy that Dodd-Frank makes between bank receivership and financial institution failure holds up to careful scrutiny.[80] For example, the FDIC's technique of choice is to find a buyer to whom to sell the troubled bank, but in times of systemic crisis there might well be no buyers large enough or confident enough to perform a similar function with regard to a large financial institution.[81] At the very least there might be a need for FDIC to heavily subsidize the sale, a point in some tension with the notion that Dodd-Frank has ended bailouts. Moreover, given the limited number of buyers in even the best of times, arguably the market for very large financial institutions will never be competitive, and will always function as a "buyers' market."

Similarly, although the FDIC has considerable experience resolving banks under its bank receivership powers, it has no experience resolving a domestic or global diversified financial institution.[82] The FDIC could be added in the OLA process by

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controversial TARP program, and arguably played a key role in stabilizing the financial system.

[78] *See* Jeffrey Manns, *Building Better Bailouts: The Case for A Long-Term Investment Approach*, 63 Fla. L. Rev. 1349, 1382 (2011).

[79] http://krugman.blogs.nytimes.com/2011/10/09/financial-romanticism/

[80] Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique - Part I*, 128 Banking L.J. 771, 781 (2011).

[81] {cite to Zaring here}

[82] The new regime is also different from a bank resolution in that losses must be imposed on the unsecured creditors, even to the extent of clawing back payments previously made under the FDIC's liquidity powers. Any remaining losses after creditors have repaid their share are to be covered by ex post assessments on surviving large financial institutions. In short, unlike bank receivership where an ex

the requirement that financial institutions file resolution plans before the first signs of trouble, and the powers that regulators have to order financial institutions to rationalize their corporate structures. But some commentators have raised legitimate issues about whether regulators will have the long-term willpower to enforce these provisions to their fullest extent.[83]

The interface between OLA and FDIC bank receiverships, state insurance receiverships, or SIPA liquidation procedures is also somewhat problematic. As noted at the outset, OLA does not supplant any of these specialized procedures.[84]

And particularly with regard to bank and insurance company receiverships, the status quo prevails and the FDIC as OLA receiver will have to interact with the receivers of these pieces of the financial institution. Of course, in the case of a bank, the FDIC will be interacting with itself, but the FDIC as bank receiver operates under a different set of statutory instructions[85] than the FDIC as OLA receiver.[86]

In the case of broker-dealers, the process is somewhat more confused.[87] A close reading of the relevant provision actually suggests that the FDIC can be appointed receiver of a broker-dealer under OLA.[88] But the statute then instructs the FDIC to appoint SIPC as trustee for the broker-dealer. SIPC is then instructed to "promptly" file a SIPA petition with the "with any Federal district court of competent jurisdiction specified in section 21 or 27 of the Securities Exchange Act of 1934."[89]

Thus commences a SIPA case, with some notable exceptions. First, SIPC normally appoints an outside trustee in all but the smallest cases. Under OLA, SIPC, who lacks

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ante insurance fund exists to pay losses, Dodd-Frank rests on the premise that such a fund can be created ex post. Prefunding may have made OLA more usable, and one can surmise this is exactly why the argument that pre-funding would "institutionalize bailouts" was surfaced. One can also reasonably doubt Congress' will to impose ex post assessments on financial institutions in the face of concerted lobbying and general concerns about causing a new round of distress in the financial industry. *See generally* Jeffrey N. Gordon & Chris Muller, *Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund*, 28 Yale J. on Reg. 151 (2011). *Cf.* 12 USC § 5394.

[83] *See* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 Yale L.J. 1368, 1390 (2011).

[84] Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime to Address Systemic Risk*, 45 U. Rich. L. Rev. 1143, 1151 (2011).

[85] *E.g.,* 12 USC § 1823(c)(4).

[86] 12 USC § 5386.

[87] 12 USC § 5385.

[88] 12 USCS § 5385(a) ("Upon the appointment of the Corporation as receiver for any covered broker or dealer, the Corporation shall . . .").

[89] § 5385(b). Notably, this is not apt to be the D.C. District Court, who may have had the initial task of reviewing the OLA petition.

experience liquidating large broker-dealers, is placed in charge. But SIPC will not have the full powers of a normal SIPA trustee, instead its is powerless to interfere with the FDIC's decision to transfer assets to a new purchaser or bridge institution.

SIPC's role is primarily limited to dealing with the debris remaining after the FDIC takes charge of the broker-dealer. SIPC is placed in the difficult position. For example, they are told to essentially leave the FDIC to do its thing, while the statute also provides that SIPC should not do anything to "adversely affect the rights of a customer to customer property or customer name securities."[90] Fortunately for SIPC the statute also tells the district court to stand down once the SIPA petition is granted.[91]

Essentially Dodd-Frank uses the OLA process to ride over the existing SIPA process, without having the willingness to say so. In this light, the otherwise puzzling decision to appoint SIPC as trustee makes sense – since an outsider might find it difficult to be a "trustee" under the conditions imposed by Dodd-Frank.

OLA will give the FDIC strong powers over much of a financial institution, save for insurance companies and banks. Coordination of the bank resolution process with the OLA process should be possible – given the unitary identity of the OLA trustee and the bank receiver – but it will require the FDIC to gloss over its schizophrenic responsibilities under Dodd-Frank on the one hand, and the general banking statutes, on the other.

OLA is also somewhat less "global" than chapter 11 – most of its provisions are expressly limited to domestic entities, whereas chapter 11 potentially applies to any entity with assets in the United States.[92] Given the nature of modern financial institutions – there really is no such think as a purely domestic financial institution – coordination across borders is key, and that issue remains unresolved by Dodd-Frank.[93]

Thus we can expect that any cross-border coordination of resolution procedures will have to happen on an informal basis, among regulators. As seen in Lehman, however, sometimes the regulators are not fully aware of the global insolvency system. One can only hope that this improves in light of recent events.

But no matter what happens in this regard investors are unlikely to get the certainty they might have hopped for from Dodd-Frank.

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[90] §5385(d).
[91] §5385(c).
[92] 11 U.S.C. §109(a).
[93] *See* MATHIAS DEWATRIPONT, BALANCE THE BANKS: GLOBAL LESSONS FROM THE FINANCIAL CRISIS 122-29 (2010).

We should also remember that there is a lot that has changed in the past few years that might make financial institution failure less likely, or at least less traumatic. New regulations of financial institutions under Dodd-Frank, Basel III, and other initiatives all will influence how OLA operates, and whether it ever needs to be invoked. More broadly, the better the ex ante regulation, the less likely OLA will ever be needed.

III. Bank of America in OLA

Bank of America's entry into the orderly liquidation process would trigger state insurance receiverships in California, New York, Arizona, South Carolina, and Vermont. Six FDIC bank receiverships would commence. At least four SIPA brokerage liquidations would be filed.

And the holding company and any unregulated, domestic subsidiaries would enter OLA proceedings, where they would come under the control of the FDIC.

The assets in the foregoing entities would be immediately severed from the assets in key foreign subsidiaries, like Merrill Lynch S.A. or Banc of America Securities Limited.[94] Based on the experience in Lehman, this may result in these subsidiaries losing access to shared computer and cash management systems, threatening their ability to survive as independent entities. Thus, even if these companies are separately capitalized and otherwise viable, they will experience extreme business disruption unless contingency plans are in place well before the occurrence of financial distress.

Given that it was reported that a large part – approximately 85% -- of Bank of America assets are reportedly in the United States, it would be easy to assume that the FDIC in one of its capacities will quickly take charge of the bulk of the company.[95] But it is equally possible that foreign subsidiaries of the bank might have claims on those assets, no matter what their location. Moreover, the reporting of derivatives trades on a "net" basis means that assuming asset location correlates with importance may be extremely imprudent. In short, it is unclear precisely how much of Bank of America will fall under FDIC control, acting as either as OLA trustee or bank receiver.

But whatever part of the bank falls within the FDIC's jurisdiction, it will have to act fast to protect the value of the debtor, especially with regard to its derivatives trading book (assuming it is domestically held at the time of the OLA filing). As such, the path FDIC will follow seems relatively clear.

First, the FDIC will move the valuable and systemically important parts of the company to a bridge bank. Next, it will move the entire derivative portfolio – or at least the entire domestic derivatives portfolio – to the bridge bank as well. While here it might be tempting to only move the "good" or in the money trades to the bridge bank, Dodd-Frank's prohibition on splitting positions against any single counterparty, and the reality that the FDIC must act with 24 hours makes any deep analysis of derivative trades unlikely. This sort of wholesale transfer does, of

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[94] *See supra* Table 2 for a list of Bank of America's self-identified key operating subsidiaries.

[95] *See supra* Table 3.

course, amount to a windfall for some counterparties who suddenly get the benefit of a much more creditorworthy partner.

The third step would be to remove Bank of America's senior management. Dodd-Frank requires no less.

Finally, the FDIC would have to arrange a sensible liquidation of the remainder of the Bank of America. That is, the scraps left out of the new bridge bank would have to be financed to facilitate their liquidation. Eventually it seems likely that some sort of liquidating trust, as is often used in large chapter 11 cases, might be used to allow the creditors of the "bad bank" to manage their own recovery in some sort of collective sense. The trick here will be managing the tension between creditors who want rapid repayment, while avoiding fire sales of distressed securities, that might have further effects on an already depressed market.

That, at a very abstract level, is how OLA might be applied to Bank of America. Of course, each of these broad steps raises important concerns and questions.

Most fundamentally, will it be possible to cleanly separate Bank of America into its good and bad parts? This is the area where the FDIC, through the living wills provisions and its other oversight tools, must both understand and reformat Bank of America in a way that will facilitate the transfer to the bridge bank. At present, it seems highly unlikely that the bank, with its more than 2,000 subsidiaries, could be split into good and bad banks without serious disruption to the bank, and thus the entire financial system.

This is also an area where the international component of the bank should be addressed. In particular, the living will for any global financial institution should explain how the foreign pieces of the bank would be separated from the American bank.

As Richard W. Fisher, President of the Federal Reserve Bank of Dallas, stated recently, "there is scant chance that managers of $1 trillion or $2 trillion banking enterprises can possibly 'know their customer,' follow time-honored principles of banking and fashion reliable risk management models for organizations as complex as these megabanks have become."[96] This reality would become even more acute during a financial crisis, when the FDIC as receiver is even less likely to have such knowledge.

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[96] Richard W. Fisher, *Taming the Too-Big-to-Fails: Will Dodd–Frank Be the Ticket or Is Lap-Band Surgery Required?* Remarks before Columbia University's Politics and Business Club, November 15, 2011, available at http://bit.ly/vUPkmk. As a remedy, Fisher proposed "downsizing the behemoths over time into institutions that can be prudently managed . . . ."

Nonetheless, FDIC would have to operate the bridge bank, which contains the better parts of Bank of America. This will mean funding the bridge bank, with the idea that it will get back its costs from the industry at some point in the future.

Here I think we have to worry about FDIC's ability to run a major financial institution, markedly larger than any bank it has ever operated under its receivership powers. Moreover, market conditions are apt to be rather turbulent following the takeover of an institution of Bank of America's size.

Traditionally the FDIC has favored sales to other banks when it has had to deal with a big bank failure.[97] But will anyone be able or interested in buying Bank of America following its failure? Certainly it would seem to make little sense to add even the good bits of the bank to any of the existing, very large domestic banks.[98]

That leaves the second tier banks – think US Bancorp and PNC Financial Services Group – as potential suitors, or foreign financial institutions, like Barclay's, who bought Lehman out of chapter 11. The question is whether any of the second tier banks would want to join the top tier, and whether regulators should allow them to do so. A similar calculus will be at work with foreign entities, whose regulators must worry about recreating "too big too fail" problems in the buying institution.

And also remember that B of A has been somewhat dismembered at this point – both by the limited scope of OLA and by the international pieces being pulled out – so some of its attraction may be gone. Lehman had exactly one bidder for its assets, and now that bank has a U.S. broker-dealer. Who remains?

FDIC gets out of this problem in their Lehman hypothetical by assuming a buyer who is willing to pay book value – but the present exercise is aimed at a somewhat more realistic analysis.

As an alternative, FDIC could continue to fund the bridge bank until the markets stabilize and the bridge can then be recapitalized through an IPO.[99] This will expose FDIC to high degrees of market and political risk, but end in the best overall outcome. Nonetheless, this model looks much more like the model used in the GM case – which most people would not term a "liquidation," despite Dodd-Frank's putative rule that all future financial institutions should suffer that fate.

Ultimately, there may be many good reasons to break up the largest U.S. banks. In many respects, they are not unlike the conglomerates of the 1960s, pursuing several lines of business on the basis of purported economies of scale that may exist more in

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[97] http://www.fdic.gov/news/news/press/2012/pr12013.html

[98] And doing so would require waiver of Dodd-Frank's concentration limits.

[99] *See* Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 Ind. L.J. ____ (forthcoming 2013), available at http://ssrn.com/abstract=1924831.

the minds of their CEO than in reality.[100] But in any event, it seems unlikely that the ideal moment to break up these banks will be at the point of crisis. And it seems equally unlikely that these institutions will divide neatly along geographical lines – yet that is precisely what Dodd-Frank's OLA is premised on.

IV. Concluding Thoughts

Given OLA's admittedly shakiness, why not use the Bankruptcy Code? After all, chapter 11 benefits from decades of understanding about how to restructure a financially distressed company. And several extremely large companies, including financial institutions like Lehman and Drexel Burnham Lambert, have successfully used chapter 11.

The most prominent proposal to use the Code in place of OLA actually calls for a new chapter 14, proposed by members of the Resolution Project at Stanford University's Hoover Institution.[101] In short, proposed chapter 14 would apply to all financial institutions with assets of more than $100 billion.[102] Petitions could be filed either voluntarily (by the institution) or involuntarily (by regulators). Cases would be overseen by "a small … and specialized panel of district court judges and special masters."[103] Otherwise the cases would proceed under normal provisions of the Bankruptcy Code, subject to modified treatment of derivatives and repos, as outlined in a companion article by Skeel and Jackson.[104] The state goal is to take the government out of the insolvency process, as the proponents argue that involves political distortion of the market.

The key difficulty with any such use of the Bankruptcy Code rests on funding. The chapter 14 proposal supposes the use of a modified version of the present section 364 of the Bankruptcy Code, the statutory support for the well-known DIP loans in chapter 11 cases.[105]

Before the financial crisis, Lyondell Chemical received the largest commercial DIP loan on record: $8 billion. That loan was arranged by Merrill Lynch, Goldman

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[100] http://finance.fortune.cnn.com/2012/01/18/big-banks-break-up-bair/?iid=SF_F_Lead
[101] http://www.federalreserve.gov/SECRS/2011/June/20110620/OP-1418/OP-1418_061511_81311_544434921739_1.pdf
[102] 24 bank or financial holding companies fit that definition at the end of 2011, major regional banks like Union Bank of California and KeyCorp would not be covered.
[103] *Id.* at 1-6.
[104] David A. Skeel, Jr. & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 Colum. L. Rev. 152, 153-54 (2012).
[105] Jameson Rice, III. *Changes in Debtor-in-Possession Financing Following the Financial Collapse of 2008*, 29 Rev. Banking & Fin. L. 312, 313 (2010).

Sachs, Citigroup, and the Royal Bank of Scotland, and funded by thirteen financial institutions, including commercial banks, investment banks, hedge funds, and private equity funds.

General Motors received a $33 billion DIP loan, from the U.S. Treasury.[106] That remains the largest DIP loan ever.

The *total* value of the ten largest DIP loans in the 2011 was $3 billion, one third of which involved a single loan arranged by Bank of America. In 2010 the total value of the fifteen largest DIP loans was $7 billion, of which $725 million, comprising four loans, was arranged by Bank of America.

Bank of America currently has liquidity needs of more than $400 billion.

Relying on the commercial DIP market – especially during a financial crisis – for a DIP loan of anything near this size seems more than implausible. The number of financial institutions that would have to be involved would be massive – perhaps as many as 650, if the proportion were the same as the Lyondell DIP loan. There is no way a loan of this size could be arranged without starting a run on Bank of America.

Dodd-Frank solves this problem with the funding mechanism discussed earlier, and that mechanism or something like it is a prerequisite to a viable resolution authority.[107]

And once we concede the need for government funding, the notion that the government will not ultimately be in control of the process seems little more than naïve. After all, until the automotive cases, it was widely agreed that a private lender was entitled to "call the shots" in any case in which it provided the debtor's means to keep operating.[108]

Similarly, the chapter 14 proposal touts its benefit as a transparent, court-based process, it does little to address the speed needed to address financial distress in this context. The new OLA obtains most of its benefits from its rather limited

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[106] http://dealbook.nytimes.com/2009/06/25/gm-wins-final-approval-of-dip-financing/

[107] Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 Yale J. on Reg. 91, 101 (2012).

[108] Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 784-85 (2002); M. Todd Henderson, *Paying Ceos in Bankruptcy: Executive Compensation When Agency Costs Are Low*, 101 Nw. U. L. Rev. 1543, 1570 (2007); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. Pa. L. Rev. 917, 923 (2003). After the automotive cases, certain proponents of that view seemed to change their mind. *See* Lubben, *No Big Deal*, *supra* note 68. *See also* Mark J. Roe & David A. Skeel, *Assessing the Chrysler Bankruptcy*, 108 Mich. L. Rev. 727, 731-32 (2010)

version of due process, which is both troubling and necessary.[109] Lehman was able to use the ordinary bankruptcy process to achieve a sale of its broker-dealer within one week, but that only came about as a result of the Federal Reserve's willingness to support the sale process. Arguably the Fed no longer has that power, and the proponents of chapter 14 do not seem to provide any alternative.

More importantly, remember again that Lehman is comparatively small when measured against the likes of Bank of America. The financial markets need to know the plan, and they need to know it quickly when a major bank fails.[110] OLA clearly wins on this point, and, as noted above, many of the due process concerns will fade if FDIC can provide greater clarity on when OLA might be invoked.[111]

Finally, it would seem that the chapter 14 proponents wanted judicial expertise, but were unwilling to embrace that expertise when it came in the form of non-Article III bankruptcy judges.[112] If true restructuring experience is desired, the bankruptcy judges in Delaware and the Southern District of New York seem like the obvious choice, but the chapter 14 proposal instead goes with district court judges, who see chapter 11 cases on appeal, if at all.[113] As between a district judge and FDIC, it appears that there is little to be gain from replacing OLA with chapter 14.

In short, while a bankruptcy-based process would undoubtedly be preferable, given the gains in transparency and legitimacy, it would necessarily involve OLA-like funding and timing provisions.[114] This is something more than bankruptcy with a few tweaks.

And chapter 14 does nothing to solve the international component of the problem, which arguably is the biggest issue looming over the entire topic. After all, while Lehman is out of chapter 11, its New York broker-dealer and its London broker-dealer continue to fight over ownership of assets in both bankruptcy estates.

Given that all large financial institutions are international financial institutions, the failure to tackle the key issue leaves the biggest piece of the problem unaddressed.

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[109] Randall D. Guynn, *Are Bailouts Inevitable?*, 29 Yale J. on Reg. 121, 153 (2012).
[110] Alison M. Hashmall, *After the Fall: A New Framework to Regulate "Too Big to Fail" Non-Bank Financial Institutions*, 85 N.Y.U. L. Rev. 829, 851 (2010).
[111] Acknowledging that FDIC is only partially able to commit to any strategy in this regard, given the role of the Secretary.
[112] *See* Stern v. Marshall, 131 S. Ct. 2594 (2011).
[113] Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 781 (2010).
[114] *See* Adam J. Levitin, *In Defense of Bailouts,* 99 Geo. L.J. 435, 487 (2011).