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Onward Banking Soldiers,
Marching as if to war,
With D'Oench, Duhme and Congress
We'll prevail for sure.
We needn't worry,
We will win the fight
Since we lack accountability,
We are always right . . .[1]

INTRODUCTION

For half a century, in common law or statutory form, the D'Oench doctrine[2] has provided protection to federal deposit insurers[3] after they have taken over failed banks.[4] In the wake of the spectacular crash of the thrift industry[5] and the rash of commercial bank failures

1. RTC v. Ocotillo W. Joint Venture, 840 F. Supp. 1463, 1467 (D.N.M. 1993) (Conway, J.) (RTC fight song to the tune of "Onward Christian Soldiers").

2. In this Note, the term "D'Oench" or "D'Oench doctrine" will refer to the doctrine in either its common law or statutory avatars. *See infra* notes 33-39. The doctrine is named for D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). "D'Oench" is pronounced "dench." American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1454 n.8 (D.D.C. 1992). "Duhme" is normally pronounced to rhyme with "room," leading to bad puns by all three branches of government. *See* Jones v. RTC, 7 F.3d 1006, 1013 (11th Cir. 1993) ("Duhme and Gloom"), *rev'd sub nom.* RTC v. Dunmar Corp., 43 F.3d 587 (11th Cir. 1995) (en banc); 139 Cong. Rec. S16,478 (daily ed. Nov. 19, 1993) ("time to eliminate the 'doom' in 'D'Oench Duhme' "); David Lawrence III, D'Oench *Spells Doom in Litigation Against Federal Banking Agencies*, Fla. B.J., Feb. 1994, at 36 (outside counsel for RTC/FDIC describes doctrine).

3. The term "insurer" is used in this Note in a broad sense embracing the insurer (or, pre-FIRREA, insurers) of depository institutions in their capacity as receivers or conservators of the institutions, the parties statutorily designated to act in such capacities on behalf of the insurer (i.e., RTC), and such insurer(s) in corporate capacity acting as insurer. *See infra* notes 17, 19-21. Where distinctions need be drawn between or among these roles, the appropriate role will be stated.

4. The term "bank" is used in this Note in a broad sense embracing both federally and state chartered commercial banks, savings banks and thrifts. The term is thus coextensive with "depository institution" as used in 12 U.S.C. § 1813(c)(1) (Supp. V 1993).

5. The collapse of the S&L industry at the hand of inflation, mismanagement, funny-money accounting, go-go lending practices, and asset/liability mismatch is a story too well known to be here retold. *See generally* Carl Felsenfeld, *The Savings and Loan Crisis*, 59 Fordham L. Rev. S7 (1991) (describing roots of the thrift crisis). Perhaps the best-known account of thrift mismanagement is Frank Capra's *It's a Wonderful Life.* This sordid tale of incompetence, lax accounting standards, and speculative real estate development lending, culminating in the entire populace being compelled to furnish large amounts of cash in aid of the hapless Bailey, eerily presages the even-

not seen since the Great Depression, the once-sleepy doctrine, formerly of interest only to students of the arcana of federal common law and the minutiæ of federal banking statutes, has begun to count again in dollars and cents.

These protections come at the expense of the rights of individuals who had dealt with the bank prior to its demise. Under D'Oench, a bank's debtor, such as a borrower or guarantor, who, before the bank failed, would be able to interpose defenses to collection or make claims or counterclaims against the bank may, after bank failure, lose its ability to protect itself or vindicate its rights. If the agreement from which the claim or defense arises is not documented so as to put regulators on notice of its terms, upon takeover, any claims and defenses based upon such secret treaties will not be entertained. As Judge Goldberg expressed the principle:

> Fundamentally, *D'Oench* attempts to ensure that FDIC examiners can accurately assess the condition of a bank based on its books. The doctrine means that the government has no duty to compile oral histories of the bank's customers and loan officers. Nor must the FDIC retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes. Spreadsheet experts need not be joined by historians, soothsayers, and spiritualists in a Lewis Carroll-like search for a bank's unrecorded liabilities.[6]

An example of the here-today, gone-tomorrow nature of defenses is made clear by a review of the *Adams v. Madison Realty & Development, Inc.* cases.[7] Borrowers claimed they had been defrauded and refused to pay their notes, which had been sold to a bank.[8] The Third Circuit determined that, because the separate paper bearing the original payee's indorsements had not been "so firmly affixed thereto as to become a part" of the notes, as the UCC requires for such an allonge indorsement to be effective, the bank was a mere assignee.[9] Thus the bank was subject to all the borrowers' defenses, and the court remanded the case for determination of those defenses.[10] While the case languished in the District Court, the bank became insolvent.[11] The borrowers attempted to interpose their fraud defenses, as the Third Circuit had said they could, only to be defeated upon a motion for summary judgment.[12] When the case returned to the Court of Ap-

tual destruction of the thrift industry in the 1980's. *See* It's a Wonderful Life (Liberty Films Inc. 1946).

6. Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990).

7. Adams v. Madison Realty & Dev., 937 F.2d 845 (3d Cir. 1991) [hereinafter *Adams II*]; Adams v. Madison Realty & Dev., 853 F.2d 163 (3d Cir. 1988) [hereinafter *Adams I*].

8. *Adams I*, 853 F.2d at 164.

9. *Adams I*, 853 F.2d at 166 (quoting, without attribution, U.C.C. § 3-302 (1978) (article withdrawn 1990)).

10. *Adams I*, 853 F.2d at 170.

11. *Adams II*, 937 F.2d at 851.

12. *Adams II*, 937 F.2d at 851.

peals, the defenses were summarily rejected: D'Oench had changed the rules of the game.[13]

The potential for unfairness is compounded by the fact that the application of the insurer's protections constitutes a complicated minuet between two inter-related "D'Oench" doctrines: statutory D'Oench, consisting primarily of 12 U.S.C. § 1823(e)[14] and common law D'Oench, the judge-made doctrine derived from the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC*.[15] The relationship between these doctrines is unclear, rendering their application inconsistent and unpredictable. Because both D'Oench doctrines promote the right of the insurers to rely on the written records of the bank, allocating the risk of the deal not being reflected in writing to those who would contract with the bank, "[o]ver the years, the case law surrounding *D'Oench* and the statute . . . has cross-pollinated such that it is very difficult to decide where the statute ends and *D'Oench* begins."[16]

Serving as dancing partners to that duo are the two bedrock concepts on which the D'Oench defenses rest: the concepts of asset and agreement. The threshold questions are whether the bank holds a note, a guaranty, or other asset, and whether the condition adverse to the insurer's interests arises from an agreement. This distinction inheres in both section 1823(e), which by its terms requires an "agreement" that diminishes the interest of an insurer in an "asset," and the implications of the *D'Oench* opinion, which requires a scheme or arrangement that misrepresents the value of the assets or securities in the hands of a bank. In practice, the definition of the term agreement has been so expanded that in the context of D'Oench it no longer possesses its accustomed meaning and the necessity for the presence of an asset is unclear under either the statutory or the common law doctrine.

The situations in which these doctrines may be applied are near infinite, because the D'Oench doctrine, in either of its forms, applies in one way or another throughout the realm of bank insolvency and to the acronymic creatures that inhabit it. D'Oench applied to the FSLIC,[17] before its extinction at the hands of FIRREA,[18] and it ap-

13. *Adams II*, 937 F.2d at 858-59.

14. 12 U.S.C. § 1823(e) (Supp. V 1993), *as amended by* The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223. This provision is referred to in this Note as "section 1823(e)." Its cousin 12 U.S.C. § 1821(d)(9)(A) (Supp. V 1993) will be referred to in this Note as "section 1821(d)(9)(A)."

15. 315 U.S. 447 (1942).

16. American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1457 (D.D.C. 1992).

17. The Federal Savings and Loan Insurance Corporation, or "FSLIC," was chartered in 1934 to insure deposits in savings and loan associations, and was done away with in 1989. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401, 1989 U.S.C.C.A.N. (103 Stat.) 183, 354-57. The pow-

plies to FIRREA's offspring, the RTC.[19] D'Oench has applied from its very beginnings to the FDIC.[20] D'Oench applies from the moment the bank is taken over and the insurers enter the scene. D'Oench applies when the insurers act as receiver, liquidating the bank, or in their corporate capacity, as insurers of deposits.[21] D'Oench applies

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ers of the RTC were taken, Burke and Hare fashion, from the remains, as were the FDIC's powers over thrifts.

18. "FIRREA" is the common acronym of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 1989 U.S.C.C.A.N. (103 Stat.) 183. This statute, generally known as the thrift bailout bill, comprehensively restructured the process of liquidating insolvent banks and now provides most of the legal framework for federal banking regulation and deposit insurance. *See generally* Anthony C. Providenti, Jr., Note, *Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 59 Fordham L. Rev. S323 (1991) (outlining key provisions of FIRREA). As will be seen in various discussions below, the statute is not devoid of ambiguity. One court has remarked that

> FIRREA is far from being a straightforward and simplistic statute. Indeed, it is a veritable Escher print set to words, complete with waterfalls that flow backwards. While originally intended to establish a procedure to dispose of the bulk of claims against failed financial institutions expeditiously and fairly, it has instead proven to be extremely nettlesome for courts and litigants alike. Its chaotic overgrowth of sections, subsections, paragraphs, and subparagraphs has caused one court to muse that it "makes the Internal Revenue Code look like a first grade primer."

Armstrong v. RTC, 623 N.E.2d 291, 295 (Ill. 1993).

19. The Resolution Trust Corporation, or "RTC," was established by FIRREA to take over thrifts placed into receivership during 1989 through 1992. The RTC is possessed of the same powers as the FDIC with respect to its charges. 12 U.S.C. § 1441a(b)(4) (Supp. V 1993). The RTC is not, per se, a deposit insurer, but has access to various funds to pay off depositors under a funding scheme apparently planned by Rube Goldberg. *See generally* Wayne M. Josel, Note, *The Resolution Trust Corporation: Waste Management and the S&L Crisis*, 59 Fordham L. Rev. S339 (1991) (describing RTC).

20. The Federal Deposit Insurance Corporation, or "FDIC," is a federal corporation that is now, in one capacity or another, the sole federal bank insurer in the United States. Originally solely the insurer of commercial banks, FIRREA gave the FDIC dominion over savings and loan associations as well, although the insurance funds are segregated into a bank insurance fund and a savings association insurance fund. *See generally* Anne M. Taylor, Note, *The FDIC's Enhanced Powers Over Savings Associations: Does FIRREA Make It "SAIF"?*, 59 Fordham L. Rev. S381 (1991) (providing an overview of the FDIC's powers over thrifts).

21. When a bank is declared insolvent, either by the federal or state regulatory authorities, power over the bank is given over to the applicable governmental corporation: the FDIC or RTC, or, formerly, the FSLIC. These government corporations may take over authority either as receiver or conservator. As conservator, the insurer is authorized to operate the bank as an ongoing business. As receiver, the insurer is to liquidate the bank and pay its creditors. 12 U.S.C. § 1821(c) (Supp. V 1993). The distinction is roughly similar to the difference between a trustee in Chapter 11 and a trustee in Chapter 7 bankruptcy.

When the bank is to be liquidated, the insurer acts in two capacities: one as the receiver of the bank, as "FDIC-Receiver," and the other as insurer *qua* insurer, or "FDIC-Corporate". FDIC-Corporate is an insurer of deposits, which pays out claims in the amount of insured deposits. 12 U.S.C. § 1821(f) (Supp. V 1993). "Both the FDIC's authorizing statutes and case law recognize the dual role that the FDIC often plays in respect to a failed bank. They provide the FDIC with two virtually separate, when a bank is liquidated by the receiver.[22] D'Oench applies when the receiver sells the assets to itself in its corporate capacity, in a purchase and assumption transaction.[23] D'Oench applies to the bridge banks and new banks the insurers create to smooth the process of liquidation or sale.[24] D'Oench applies, even after the insurers have left the scene, to those who purchase banks and assets from the insurers.

The D'Oench doctrine is "expansive and perhaps startling in its severity."[25] Some judges who must apply it admit it to be inequitable

legal identities . . . ." FDIC v. La Rambla Shopping Ctr., 791 F.2d 215, 218 (1st Cir. 1986) (Breyer, J.). In its capacity as receiver, the insurer may liquidate the bank, parceling out its proceeds to creditors, form a bridge bank, or enter into a purchase and assumption transaction.

22. When the bank is liquidated, the receiver pays out the funds received in accordance with applicable law, including making payments to the insurer in its corporate capacity, as subrogee of the insured depositors to whom it has made payments. 12 U.S.C. § 1821(g) (Supp. V 1993). The order of payment formerly varied by institution type. Thus, national bank depositors and general creditors alike were paid *pro rata.* 12 U.S.C. § 194 (1988). Other institution types followed the priority law set out in the state of domicile. 12 C.F.R. § 320.3(a)(6) (1994). This is all moot with respect to future liquidations, because there is now a national order of priority under which, after payment of secured creditors and administrative expenses, the depositors (and the insurer, as their subrogee) have first call on the funds. 12 U.S.C. § 1821(d)(11) (Supp. V 1993).

23. In a purchase and assumption transaction,

> the FDIC as receiver of the failed bank, sells the failing bank's "good assets" along with any remaining "good will" to a healthy insured bank in return for the healthy bank's promise to pay the failed bank's depositors. The FDIC, acting as the failed bank's receiver, also formally sells its remaining "bad" assets to the FDIC itself, acting in its corporate capacity. The FDIC, in its corporate capacity, pays the FDIC as receiver, which in turn pays the healthy bank enough money to make up the difference between what the healthy bank must pay the depositors (typically a large amount) and what the healthy bank was willing to pay for the "good" assets and the "good will" (typically a smaller amount). The FDIC, in its corporate capacity, then tries to realize as much money as possible from the "bad" assets that it holds; if it realizes less than what it paid the receiver, (which paid the healthy bank), it keeps the money; if it realizes more, it pays the excess to the receiver for payment to the failed bank's creditors.

FDIC v. La Rambla Shopping Ctr., 791 F.2d 215, 218 (1st Cir. 1986) (Breyer, J.).

24. A "bridge bank" is a *de novo* temporary institution created by the insurers to carry on the business of the defunct bank. It is exempt from most regulatory control, but has a statutorily limited lifespan. Bridge banks can be organized by the FDIC or RTC. 12 U.S.C. § 1821(n) (Supp. V 1993) (FDIC); 12 U.S.C. § 1441a(b)(10)(A)(v) (Supp. V. 1993) (RTC). Similar new banks or savings and loan associations can also be organized, either by the FDIC or RTC. 12 U.S.C. § 1821(d)(2)(F) (Supp. V 1993); 12 U.S.C. § 1441a(b)(10)(A)(iv) (Supp. V 1993). These banks or savings associations appear to function (in practice) in a manner similar to the bridge banks. Such institutions are normally placed immediately in conservatorship and serve essentially as holding tanks for assets and certain liabilities of the old institution until the insurer can determine what to do with them. In both purchase and assumption transactions and/or bridge bank transactions, the assets of the defunct institution are transferred, but only certain of the liabilities are assumed. The insurers may not, however, place the creditors of the institution in a worse position than they would have been had the institution been liquidated. 12 U.S.C. § 1821(i)(2) (Supp. V 1993).

25. Bowen v. FDIC, 915 F.2d 1013, 1015 (5th Cir. 1990).

and confess themselves unenamored of the doctrine or its results.[26] But the doctrine is here, and unless Congress relents or one of the intermittent Constitutional challenges to D'Oench succeeds,[27] it is here to stay.

D'Oench is not, however, a grant of absolute immunity to the insurers. While the insurers have treated D'Oench as the legionary treated his Eagle, a totem of victory eternal,[28] the doctrine does *not* state that "we're the FDIC and we always win." There are exceptions to D'Oench and, properly catalogued and placed in a rational framework, they allow the doctrine to be applied as a body of law, rather

26. FDIC v. Bathgate, 27 F.3d 850, 877 (3d Cir. 1994) ("In reaching our result, we have not overlooked that the *D'Oench Duhme* doctrine and section 1823(e) can lead to what might be considered a harsh result. Nevertheless, it seems to us that the federal precedents . . . have compelled our outcome."); FDIC v. Kasal, 913 F.2d 487, 492 (8th Cir. 1990) ("While we agree that the result in the instant case may appear harsh or inequitable to some, we nevertheless are constrained by both the statute and federal common law."), *cert. denied*, 498 U.S. 1119 (1991); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1476 (D.D.C. 1992) ("The court is not ignorant of the unusual results which the *D'Oench* doctrine generates, nor is the court enamored of them."); L & R Prebuilt Homes, Inc. v. New Eng. Allbank for Sav., 783 F. Supp. 11, 14 (D.N.H. 1992) ("The court has full empathy with the plaintiff's position and dilemma, but of course is powerless under the law to grant remedial relief. The court does not quarrel with the D'Oench doctrine, but it is appalled by the manner in which the FDIC reacts to situations such as these."); Webb v. Superior Court, 275 Cal. Rptr. 581, 589 (Cal. Ct. App. 1990) ("We sympathize with Webb. The *D'Oench, Duhme* doctrine is quite harsh and in this case, where he as the borrower has made a prima facie showing that he was not at fault, the severity of the rule is heightened. Nevertheless, we have no choice but to apply it.").

27. A plethora of such challenges have been mounted. Claims that D'Oench constitutes a violation of due process, an impairment of the obligation of contracts, a Fifth Amendment taking-without-compensation, or that the retroactive application of FIRREA's amendments to section 1823(e) constitutes such a taking, have all been summarily dismissed. *See, e.g.*, RTC v. Daddona, 9 F.3d 312, 320-21 (3d Cir. 1993) (taking, due process); North Ark. Medical Ctr. v. Barrett, 962 F.2d 780, 789-90 (8th Cir. 1992) (retroactive application of FIRREA); FSLIC v. Griffin, 935 F.2d 691, 698-99 (5th Cir. 1991) (contracts clause, due process, taking), *cert. denied*, 112 S. Ct. 1163 (1992); FDIC v. State Bank, 893 F.2d 139, 145 (7th Cir. 1990) (Easterbrook, J.) ("Congress does not violate the Constitution in holding commercial entities to the text of instruments they signed. The Due Process Clause is not an exception to the parol evidence rule."). *But see* Hood v. RTC (*In re* Hood), 156 B.R. 296, 298-99 (Bankr. D.N.M. 1993) (invoking takings clause to bar application of D'Oench where RTC had, post-insolvency, purchased asset from unrelated third party). The *Hood* decision appears to be an anomaly. *See* FSLIC v. Gordy, 928 F.2d 1558, 1560, 1564-65 (11th Cir. 1991) (allowing assertion of D'Oench rights under notes and guaranties acquired from a third party after insolvency).

The Constitutional arguments are discussed, and dismissed, in Stephen W. Lake, Note, *Banking Law: The* D'Oench *Doctrine and 12 U.S.C. § 1823(e): Overextended But Not Unconstitutional*, 43 Okla. L. Rev. 315 (1990).

28. *See, e.g.*, RTC v. Feldman, 3 F.3d 5, 8 (1st Cir. 1993) ("Nor does the RTC help matters when it presses, as usual, a reading of *D'Oench, Duhme* so broad that one is reminded of sovereign immunity claims made by independent nations."), *cert. denied*, 114 S. Ct. 1187 (1994).

than a means by which the federal bank insurers may prevail in any and all disputes.

This Note argues that only by examining the interaction of these doctrines and the concepts of agreement and asset can rules be derived allowing for logical application of D'Oench. This Note asserts that the question of what defenses are barred by D'Oench may be answered only by examining whether the asserted defense is merely an attempt to replead a forbidden agreement and determining whether or not the agreement is in fact forbidden. Further, this Note argues that only in situations where there is a discrete and identifiable asset that is not asserted to be void will the more rigorous documentation requirements of section 1823(e) apply and that in any event, the doctrine may not be used to rewrite the terms of the asset the insurer seeks to enforce.

Part I of this Note discusses the origins and development of these inter-related doctrines. Part I.A outlines the history of the doctrines, commencing with the *D'Oench* case itself and its Congressional codification at 12 U.S.C. § 1823(e). This part then examines the development of the common law doctrine to protect those excluded from the statutory shield, the extension of the statutory doctrine by FIRREA, and the persistence and expansion of the common law doctrine after FIRREA. This part concludes with an examination of two key decisions that have shaped the development of the doctrines. The *Gunter v. Hutcheson*[29] decision created the federal holder in due course doctrine, a separate, but related, protection for the insurers. The other, the Supreme Court's decision in *Langley v. FDIC*,[30] broadly construed the language of section 1823(e) and resulted in an expansion of both the statutory and common law doctrine. Part I.B. examines the elements of each of the common law and statutory doctrines, and the vexed question of the relation among the doctrines, and part I.C summarizes the concepts of asset and agreement defenses on which the remainder of this Note builds.

Part II discusses the nature of the agreements barred by the doctrines. Part II.A shows the breadth of contractual concepts that have been included in the definition of agreement and describes two exceptions that have limited the reach of D'Oench over the kingdom of contract: the limitation of D'Oench to ordinary banking transactions and the exclusion of the application of D'Oench from certain contracts taken by the bank as assignee. Part II.B describes the extension of D'Oench to cover not only contract defenses but affirmative claims against the receiver, including those sounding in tort or lying in equity.

Part III discusses the question of whether, and under what circumstances, the presence of a specific asset in the hands of the insurer is

29. 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).
30. 484 U.S. 86 (1987).

necessary for the application of the doctrines. Part III.A describes defenses arising from defects in contract formation creating an "asset" that is void *ab initio* and the effect of statutory violations on the existence of an asset. This subject continues with a discussion of voiding conditions arising after contract formation, discussing both agreements-to-void and performance as defenses to application of D'Oench. Part III.B examines whether under statutory or common law D'Oench an asset is truly a requisite, examining separately section 1823(e), section 1821(d)(9)(A), and common law D'Oench. Part III.C examines the extent to which limitations imposed by the terms of the asset itself, including unwritten terms and conditions imposed by the surrounding law, remain enforceable against the insurer. Part IV distills the cases shown in parts II and III to propose a convenient and consistent framework for the analysis of D'Oench questions.

I. History and Elements of the Doctrines

Whether or not it has spoken, a mouth does not seal anything.[31]

Among the sources of confusion surrounding D'Oench is that there are three intertwined doctrines—common law D'Oench, statutory D'Oench, and the federal holder in due course doctrine. Two of these are creatures of the courts, while the other is a creation of Congress. To understand common law or statutory D'Oench, one must understand its evolution in the Capitol and in the Court and the influence of the federal holder in due course doctrine.

The D'Oench doctrine had its origins in a Supreme Court case and was codified, at least in part, by a subsequent congressional enactment. But because the codified version did not reach all of the situations in which the insurers might find themselves in need of protection, the common law doctrine persisted. While many of the common law extensions of D'Oench were ratified, or made irrelevant, by FIRREA, a number of participants in the bank liquidation process remain unprotected. Thus, if for no other reason, the common law doctrine retains vitality, even in the face of arguments that jurisprudence has been preempted by legislative action.

The protections afforded the insurers were expanded considerably by two court decisions, each of which rendered the insurer immune to defenses grounded in fraudulent misrepresentation. The Eleventh Circuit, in its *Gunter v. Hutcheson*[32] decision, created an entirely new common law protection, rendering the insurer the equivalent of a holder in due course under negotiable instruments law. The Supreme Court answered the same problem by redefining the term "agreement" in section 1823(e) to include fraudulent misrepresentations. In

31. Kanuni i Lekë Dukagjinit, ch. LXXVI, § 524 (Shtjefën Gjeçov ed., 1933), *translated in* The Code of Lekë Dukagjini 118 (Leonard Fox trans., 1989) (Alb.).
32. 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

so doing, the Court not only expanded the reach of the statutory doctrine, but of the common law doctrine as well.

A. *D'Oench, Duhme & Co. v. FDIC and Section 1823(e)*

Common law D'Oench originated in the eponymous case of *D'Oench, Duhme & Co. v. FDIC*.[33] The Supreme Court held that a party that lends itself to a scheme likely to mislead the FDIC by means of "secret agreements" not shown on the records of the bank is forbidden to raise that secret agreement as a defense against the FDIC once the bank has been taken over.[34] The decision was based in estoppel—D'Oench, having by its acts misled first the state and then the federal banking authorities, was estopped to deny the validity of the note by which it had deceived them.[35] The only element of estoppel missing from this formulation was detrimental reliance—the regulators did not show they had been misled by the note.[36] Further, in dicta that were to have profound consequences for the development

33. 315 U.S. 447 (1942).

34. D'Oench, Duhme & Company, Inc., a Missouri bond house, had sold a bond to Belleville Bank & Trust Co., an Illinois bank, and the bond had gone into default. *Id.* at 454. The customer was, naturally, not pleased at having to write off the bond, and asked D'Oench to deliver to the bank a note in the amount of the bond to keep the bank's balance sheet artificially inflated. *Id.* at 462 (Frankfurter, J., concurring). In return, the bank delivered to D'Oench a receipt in which it promised not to enforce the note. The bank was insured by FDIC in 1934, and the D'Oench note was charged off in 1935. After the bank became insolvent, the bank pledged the D'Oench note to FDIC-Corporate. *Id.* at 454. When FDIC-Corporate sued, D'Oench asserted lack of consideration and the receipt agreement as a defense, averring that FDIC was not a holder in due course. *Id.* at 456. The district court found Illinois law to apply and found D'Oench liable. The circuit court affirmed, but on the basis of a determination under "general law" that Illinois law applied. Certiorari was applied for and granted on the question of whether the district court, being situated in Missouri, was required to apply the conflict of law rules of that state. *Id.* at 455.

What began as a case to define the contours of the then-new *Erie* doctrine became something else entirely. The concurring Justices fought over the *Erie* field. *Id.* at 463-65 (Frankfurter, J. concurring) (complaining that Court should not create federal common law without necessity); *Id.* at 465-75 (Jackson, J., concurring) (confining *Erie* solely to diversity suits). Mr. Justice Douglas and his majority wandered off elsewhere. The Court had already located in the criminal provisions of the Federal Reserve Act a "federal policy" to prevent misrepresentations as to the assets of banks, which had, in Deitrick v. Greaney, 309 U.S. 190 (1940), allowed the imposition of civil liability to the receiver against one who violated it. Extending the *Deitrick* precedent, the Court reasoned that, even in the absence of a penal offense (as there was in *Deitrick*), the principle of *Deitrick* and the reasoning of various state decisions relating to accommodation makers of notes to banks should be applied to bar D'Oench's defense. *Id.* at 457-58. The fact that injury could not be shown did not prevent estoppel against the defendant; indeed, the inconvenient fact that the FDIC did not come into existence until several years after the note was made was of no moment, the note being a continuing misrepresentation. *Id.* at 459-60. Therefore, without regard to the law of Illinois or Missouri, the defendant was estopped to deny the note.

35. *D'Oench*, 315 U.S. at 459-60.

36. Despite these amputations, the rule remains understood as one of estoppel. Hood v. RTC, No. 93-2260, 1994 WL 87232, at *2 (10th Cir. Mar. 17, 1994).

of the common law doctrine, the Court declared that not only would its rule of estoppel apply to intentional inflation of the value of bank assets, but also to those, no matter how ignorant or ill-informed, who lent themselves to a scheme to defraud the insurer, whether or not the insurer was in fact deceived.[37]

Common law D'Oench was soon joined by its statutory sibling. In 1950, Congress passed the Federal Deposit Insurance Act, section 2(13)(e) of which was codified at 12 U.S.C. § 1823(e).[38] Section 1823(e), in contrast to equitable D'Oench, was a rigid statute of frauds that applied stringent execution, approval, and recordation requirements to any agreement diminishing the right, title, or interest of FDIC-Corporate in any asset acquired by it. Despite their very differ-

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37. *D'Oench*, 315 U.S. at 458-59.

38. An act to amend the Federal Deposit Insurance Act, Ch. 967, § 2(13)(e), 64 Stat. 873, 889 (1950) (codified as amended in scattered sections of 12 U.S.C.). An account of the legislative history (such as it is) of the 1950-model section 1823(e) is provided in Marsha Hymanson, Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. Cal. L. Rev. 253, 275-79 (1988). As originally enacted, section 1823(e) was part of a provision allowing the insurers to engage in purchase and assumption transactions. In 1982, the purchase-and-assumption language was moved to 1823(c). *See generally* W. Robert Gray, *Limitations on the FDIC's* D'Oench *Doctrine of Federal Common-law Estoppel: Congressional Preemption and Authoritative Statutory Construction*, 31 S. Tex. L. Rev. 245, 256-57 & nn.70, 73 (1990) (discussing purchase and assumption transactions and the old 1823(e)). As will be discussed below, the act was significantly amended in 1989 as part of FIRREA, and, more recently, albeit more narrowly, in 1994. *See infra* notes 40 and 216. Section 1823(e), as in effect at the end of 1994, read as follows:

> (e) Agreements Against Interests of Corporation
>
> (1) In General
>
> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.
>
> (2) Public Deposits
>
> An agreement to provide for the lawful collateralization of deposits of a Federal, State or local governmental entity or of any depositor referred to in [section 1821(a)(2) of this title] shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.

12 U.S.C. § 1823(e) (Supp. V 1993), *as amended by* The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223.

ent natures, *D'Oench* and section 1823(e) have remained yoked together in the ensuing half century, section 1823(e) being viewed by the courts as *D'Oench* codified.

The protections provided by the statute were limited. If Congress codified the holding in *D'Oench* it did no more: the *D'Oench* decision applied to the FDIC in its corporate capacity as did the original section 1823(e). Many of the common law developments in the doctrine of *D'Oench* came as extensions of the doctrine's hegemony to fresh territory, to parties such as FDIC-Receiver or FSLIC, in any capacity, parties to which neither the Court nor the Congress had spoken.[39]

The passage of FIRREA in 1989 eliminated much of the impetus for these common law conquests. First, FIRREA extended section-1823(e)-type protections to FDIC-Receiver, RTC in either corporate or receivership capacity, and to bridge banks.[40] In addition, FIRREA

39. Thus, common law D'Oench is applicable to the FDIC-Receiver. *See, e.g.*, Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 49 (1st Cir. 1991) (citing cases). An argument has been made that common law D'Oench was born applicable to FDIC-Receiver, because much of the reasoning in that case was derived from Deitrick v. Greaney, 309 U.S. 190 (1940), which had involved FDIC in that capacity. Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 691 n.1 (10th Cir. 1993); FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986). Likewise, the common law doctrine applied to the FSLIC prior to its demise in 1989. *See, e.g.*, FDIC v. McCullough, 911 F.2d 593, 599 (11th Cir. 1990), *cert. denied*, 500 U.S. 941 (1991) (applying D'Oench to FSLIC); FSLIC v. Two Rivers Assocs., 880 F.2d 1267, 1274-75 (11th Cir. 1989) (same); FSLIC v. Musacchio, 695 F. Supp. 1044, 1051 (N.D. Cal. 1988) (same). It was also extended to bridge banks. Kilpatrick v. Riddle, 907 F.2d 1523, 1524, 1528 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); Bell & Murphy & Assocs. v. Interfirst Bank Gateway, 894 F.2d 750, 755 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990).

40. The extensions came by allowing section 1823(e)'s protections to FDIC-Receiver (and thus to the RTC under 12 U.S.C. § 1441a(b)(4) (Supp. V 1993), which grants RTC powers generally identical to those of the FDIC). FIRREA also deleted the words "right, title and" from before the word "interest" in the introductory paragraph of section 1823(e). Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, sec. 217, § 13(e), 1989 U.S.C.C.A.N. (103 Stat.) 183, 256 (codified as amended at 12 U.S.C. § 1823(e) (Supp. V 1993), *as amended by* The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223). Most circuit courts addressing the problem have come to the conclusion the FIRREA amendments to section 1823(e) apply retroactively to cases then pending. FDIC v. Longley I Realty Trust, 988 F.2d 270, 273-74 (1st Cir. 1993); FDIC v. Wright, 942 F.2d 1089, 1095-97 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992); FDIC v. Kasal, 913 F.2d 487, 493 (8th Cir. 1990), *cert. denied*, 498 U.S. 1119 (1991). The only Circuit to have decided otherwise is the Tenth. Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 695-96 (10th Cir. 1993). Section 1823(e) has since been narrowed by waiving the requirement that deposit agreements be executed contemporaneously with acquisition of collateral for collateralized deposits of governmental bodies. The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223.

FIRREA extended protections similar, although not identical, to those of section 1823(e) to bridge commercial banks. The difference lies in the fact that, because the bridge bank will be an ongoing operation, its "section 1823(e)" protections are limited to agreements of the predecessor institution. Financial Institutions Reform, Recovery, placed D'Oench-derived limitations on exceptions to the rights of the receiver to repudiate contracts.[41] Potentially more significant was the

and Enforcement Act of 1989, Pub. L. No. 101-73, sec. 214, § 11(n)(4)(I), 1989 U.S.C.C.A.N. (103 Stat.) 183, 249 (codified at 12 U.S.C. § 1821(n)(4)(1) (Supp. V 1993)). Apart from the time element, the two are twins and courts have held they are to be construed identically. Hanson v. FDIC, 13 F.3d 1247, 1250 n.5 (8th Cir. 1994); New Me. Nat'l Bank v. Seydler, 765 F. Supp. 770, 774 n.5 (D. Me. 1991).

These protections do not appear to have been extended to RTC- or FDIC-organized new savings associations, the functional equivalent of bridge thrifts. The courts have stepped into the breach left by Congress's omission. *See* Castleglen, Inc. v. RTC, 984 F.2d 1571, 1576-77 & n.3 (10th Cir. 1993); RTC v. Crow, 763 F. Supp. 887, 892 (N.D. Tex. 1991). One court has held that merely because 12 U.S.C. § 1821(n)(4)(I) expressly provides section-1823(e)-style protections to bridge banks does not mean that bridge thrifts similarly organized should not have the express (and broader) protections of section 1823(e), since the receiver of a bridge thrift takes by purchase for purposes of section 1823(e). Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 674 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993). Such a construction would, of course, render 12 U.S.C. § 1821(n)(4)(I) meaningless, because a bridge bank acquires by purchase just as much as does a bridge thrift. As a matter of strict statutory construction, it seems that section 1823(e) should not apply to a bridge thrift, but it appears that courts will generally do so, rendering 12 U.S.C. § 1821(n)(4)(I) so much superfluous verbiage. Adams v. Madison Realty & Dev., 746 F. Supp. 419, 430-31 (D.N.J. 1990), *aff'd*, 937 F.2d 845 (3d Cir. 1991). *But cf.* B.L. Nelson & Assocs. v. Sunbelt Sav., FSB, 733 F. Supp. 1106, 1112 n.11 (N.D. Tex. 1990) (happening upon problem but, constrained by Fifth Circuit precedent, ignoring it). Indeed, one court has gone so far as to state, without explanation, that 12 U.S.C. § 1821(n)(4)(I) does not apply to FDIC as receiver of a bridge bank, and that the proper provision is section 1823(e). Hanson v. FDIC, 13 F.3d 1247, 1250 n.5 (8th Cir. 1994).

Another governmental party may remain unprotected as well: conservators, who step in to assume the management of failing banks, although common law D'Oench may protect them. Germania Bank v. Brehm, 763 F. Supp. 1030, 1036-37 (E.D. Mo. 1991). *But see* Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 673 (D. Utah 1989) (insisting that section 1823(e) applies to conservator), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993); FSLIC v. Musacchio, 695 F. Supp. 1044, 1048, 1050-51 (N.D. Cal. 1988) (applying common law D'Oench). Further, the insurer must have taken possession of the assets in some capacity; a mere midwifing of a transaction does not implicate D'Oench. Rodriguez v. Banco Central, 777 F. Supp. 1043, 1065 (D.P.R. 1991), *aff'd*, 990 F.2d 7 (1st Cir. 1993).

41. The receiver of a bank has been given the authority to repudiate contracts it finds burdensome upon the estate, and to pay actual, compensatory damages therefor. 12 U.S.C. § 1821(e)(1), 1821(e)(3) (Supp. V 1993). These repudiation sections contain various provisions subjecting specified classes of contracts to some or all of the D'Oench requirements. 12 U.S.C. §§ 1821(e)(6), 1821(e)(8) (Supp. V 1993). This, of course, implies that other repudiated contracts are not subject to section 1823(e), else such language would be unnecessary.

Most of the few cases applying D'Oench to repudiated contracts have related to situations in which the bank's counterparty had engaged in setoffs against monies due the receivership estate, thus implicating an asset. FDIC v. Vienna Mortgage Corp., Nos. 92-1091 & 92-1092, 1993 WL 25459, at *2-3 (4th Cir. Feb. 5, 1993), *cert. denied*, 114 S. Ct. 74 (1993); RTC v. Management, Inc., No. 8:CV91-00185, 1993 WL 666700, at *5 (D. Neb. Apr. 22, 1993), *aff'd on other grounds*, 25 F.3d 627 (8th Cir. 1994). One case has, however, summarily held, based on common law D'Oench and section 1823(e), that resort to "side agreements" to prove that what appeared to be an ordinary lease, terminable without damages for future rent, was in fact part of a complex sale/leaseback would not be permitted. Dababneh v. FDIC, 971 F.2d 428, 436-37 (10th Cir. 1992).

addition by section 1821(d)(9)(A) of a shield, forged from the same steel as the sword of section 1823(e), to the insurers' armamentarium.[42]

Common law D'Oench continues to be applied, however. The common law doctrine is available to those still excluded from the statutory protections, such as bank subsidiaries and private asset purchasers.[43] Further, the extension of statutory protections has not stripped the ægis of common law D'Oench from its beneficiaries, and decisions have continued or expanded the coverage of common law D'Oench to almost any entity involved in the resolution of insolvent[44] banks.[45] Thus, the insurers are protected by both doctrines from the undocu-

42. 12 U.S.C. § 1821(d)(9)(A) (Supp. V 1993). *See infra* notes 210-19 and accompanying text (discussing section 1821(d)(9)(A)).

43. D'Oench in its various forms has been held to be available for purchasers of assets from the insurers, whether as purchasers of a bridge bank, under a purchase and assumption or in individual asset sales. NCNB Tex. Nat'l Bank v. Johnson, 11 F.3d 1260, 1268 (5th Cir. 1994); Community Bank v. FDIC, 984 F.2d 254, 256-57 (8th Cir. 1993); Newton v. Uniwest Fin. Corp., 967 F.2d 340, 347 (9th Cir. 1992); FSLIC v. Cribbs, 918 F.2d 557, 560 (5th Cir. 1990); CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 93 (E.D. Va. 1992); Fleet Bank v. Steeves, 785 F. Supp. 209, 213-14 (D. Me. 1992); Santopadre v. Pelican Homestead & Sav. Ass'n, 782 F. Supp. 1138, 1141-42 (E.D. La.), *aff'd*, 977 F.2d 577 (5th Cir. 1992); Alarcon v. Williams, 772 F. Supp. 334, 342-44 (E.D. Mich. 1991); Adams v. Walker, 767 F. Supp. 1099, 1105-06 (D. Kan. 1991). *But see* FDIC v. Dixon, 681 F. Supp. 408, 414 (E.D. Mich. 1988) (stating, in dictum, that "[i]n the hands of any party other than the FDIC that is not a holder in due course, Dixon's assumption agreement may be subject to recission based on fraud in the inducement"). The federal holder in due course doctrine is also available to private asset buyers. FDIC v. Newhart, 892 F.2d 47, 50-51 (8th Cir. 1989); B.L. Nelson & Assocs. v. Sunbelt Sav., FSB, 733 F. Supp. 1106, 1112-13 (N.D. Tex. 1990).

A number of cases have determined that D'Oench protections should be extended to subsidiaries. Oliver v. RTC, 955 F.2d 583, 585-86 (8th Cir. 1992); Victor Hotel Corp. v. FCA Mortgage Corp., 928 F.2d 1077, 1083 (11th Cir. 1991); Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 730 (D.N.J. 1993); Glenborough N.M. Assocs. v. RTC, 802 F. Supp. 387, 394-95 (D.N.M. 1992); Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc., 433 S.E.2d 759, 766-67 (N.C. Ct. App. 1993). This has even embraced subsidiaries of subsidiaries. Robinowitz v. Gibraltar Sav., 23 F.3d 951, 956 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 725 (1995); Alexandria Assocs. v. Mitchell Co., 800 F. Supp. 1412, 1423 (S.D. Miss. 1992), *rev'd on other grounds*, 2 F.3d 598 (5th Cir. 1993).

Some extensions have been somewhat extreme. One court has permitted the RTC's title insurer to assert, albeit unsuccessfully, the D'Oench defenses of its insured. RTC v. Ford Mall Assocs., 796 F. Supp. 1233 (D. Minn. 1992). Another court has allowed a bank that had purchased a 90% participation in loans to be sheltered by D'Oench and section 1823(e) on the whole amount when it purchased the remaining 10% from the receiver. Alarcon v. Williams, 772 F. Supp. 334, 343-44 (E.D. Mich. 1991). Others have extended D'Oench protection to former employees of banks. FDIC v. Bathgate, 27 F.3d 850, 875 (3d Cir. 1994) (dismissing slander claims against directors under D'Oench-barred agreement thus holding, by implication, directors were protected by D'Oench; one judge dissenting in n.13). *But see* Crowe v. Smith, 848 F. Supp. 1248, 1254-55 (W.D. La. 1994) (denying that D'Oench protected former officers).

44. D'Oench does not protect the quick, only the dead. First Interstate Bank v. First Nat'l Bank, 928 F.2d 153, 156 (5th Cir. 1991) ("The *D'Oench, Duhme* doctrine protects the FDIC, not a solvent bank.").

mented agreements of their predecessor banks, if not their own errors.[46]

The continued vitality of common law D'Oench after its codification is doctrinally troubling. Federal common law is supposed to be a limited, interstitial remedy to protect only the most vital of federal interests,[47] and ought fade away should the legislature turn its attention to the subject.[48] Nonetheless, arguments that common law D'Oench has been preempted by its statutory kin have been unsuccessful in stemming the tide of expansion.[49] The trend seems unlikely

45. Thus, the RTC has inherited common law D'Oench protection from its intestate, the FSLIC. RTC v. Hunters Ridge Income Investors, L.P., 796 F. Supp. 1261, 1263 (E.D. Mo. 1992); RTC v. Jet Stream, Ltd., 790 F. Supp. 1130, 1135 (M.D. Fla. 1992); Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 662-63 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993). Likewise, FDIC-Receiver is not deprived of these protections by the extension of section 1823(e) to it. Carico v. First Nat'l Bank, 734 F. Supp. 768, 770 (E.D. Tex. 1990).

46. The statement that the insurer is not protected has primarily come in dictum. FDIC v. Massingill, 24 F.3d 768, 779 (5th Cir. 1994); FDIC v. Byrne, 736 F. Supp. 727, 731 (N.D. Tex. 1990); *cf.* RTC v. Thompson, 989 F.2d 942, 943 (7th Cir. 1993) (Posner, J.) (noting, with evident approval, FDIC's concession that D'Oench did not apply). *But see* Gertner v. FDIC, 814 F. Supp. 177, 179 (D. Mass. 1992) (holding D'Oench barred claim that FDIC official had agreed that bank would honor pre-insolvency loan commitment). Further, the insurer not being absolved, its successor can have no greater rights. FDIC v. Perry Bros., Inc., 854 F. Supp. 1248, 1276 (E.D. Tex. 1994). This may also apply to pre-receivership actions of the insurer. Agri-Tech, Ltd. v. North Am. Bank, No. 1 CA-CV 89-145, 1990 WL 210645, at *3 (Ariz. Ct. App. Dec. 20, 1990). The insurer obviously will not be liable for breach of a D'Oench-barred agreement. Franklin Asaph Ltd. Partnership v. FDIC, 794 F. Supp. 402, 408-09 (D.D.C. 1992); RTC v. Crow, 763 F. Supp. 887, 893-95 n.8 (N.D. Tex. 1991).

The insurer may apparently evade all liability by doing its dirty work in the guise of a bridge-bank conservator, and then denying all liability if the bridge bank is put into receivership, or when it acts as a bridge bank receiver *ab initio*. *See* RTC v. Dunmar Corp., 43 F.3d 587, 590-91 (11th Cir. 1995); FDIC v. Greenberg, 851 F. Supp. 15 (D. Mass. 1994); Hill v. Imperial Sav., 852 F. Supp. 1354, 1368 (W.D. Tex. 1992). This proposition is dubious, at least as to section 1823(e) and bridge banks because the extension of section 1823(e) protections to bridge banks would render 12 U.S.C. § 1441(n)(4)(I) redundant, a result forbidden to statutory construction.

47. O'Melveny & Myers v. FDIC, 114 S. Ct. 2048, 2055 (1994).

48. *Id.* at 2054.

49. Courts have summarily rejected arguments that common law D'Oench has been pre-empted in 1950 with the passage of the Federal Deposit Insurance Act of 1950, in 1989 by FIRREA, or in general. *See, e.g.*, FSLIC v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991) (in general), *cert. denied*, 112 S. Ct. 1163 (1992); FDIC v. Betancourt, 865 F. Supp. 1035, 1039 n.1 (S.D.N.Y. 1994) (FDIA); Adams v. Madison Realty & Dev., 746 F. Supp. 419, 425-26 (D.N.J. 1990) (FIRREA), *aff'd*, 937 F.2d 845 (3d Cir. 1991). Only one (Article I) court has wholeheartedly bought into the argument, and then in mere dictum. *In re* Woodstone Ltd. Partnership, 133 B.R. 678, 686 (Bankr. E.D.N.Y. 1991), *rev'd*, 149 B.R. 294 (E.D.N.Y. 1993). On appeal, Judge Raggi reached out to swat down this seditious speculation. *In re* Woodstone Ltd. Partnership, 149 B.R. 294, 299 (E.D.N.Y. 1993). Another court seemed to accept that deference to the legislature required that affirmative claims against the receivership were governed by section 1821(d)(9)(A) and not by common law D'Oench. Fox & Lazo-Atl. Commercial Group v. RTC, 862 F. Supp. 1233, 1241 (D.N.J. 1994). The argument for preemption is made in Gray, *supra* note 38.

to change despite the Supreme Court's recent manifestation of a hostile attitude toward federal common law protections for the insurers.[50]

In the Eighties, the protections available to the insurers were considerably expanded by two courts wrestling with the meaning of the term "agreement" in section 1823(e). These courts came to similar solutions, but by radically different roads. One solution, the federal holder in due course doctrine, is a result of the legislative genius of the common law judge, the other, the Supreme Court's construction of section 1823(e), a result of Justice Scalia's determination to seek the true meaning of the word "agreement" in that statute. In construing section 1823(e), courts took the term agreement to mean "covenants to be performed in the future." It followed that an oral misrepresentation made by a bank would fall outside the scope of the statute and yet, as a fraud in the inducement, render the obligation voidable by the debtor.[51]

One solution to the "agreement"/"misrepresentation" problem required the creation of an entirely new doctrine to protect the insurers. In *Gunter v. Hutcheson*,[52] the Eleventh Circuit strained to the limit the feeble and interstitial "legislative" powers retained by the judiciary. Seeking justification in the Congress's desire to encourage purchase and assumption transactions, and precedent in the hoary law of bills, notes, and drafts, the *Gunter* court created a fusion of the principles of D'Oench and negotiable instruments law.[53] Under later

50. The Supreme Court's recent decision in O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994), advocates a less expansive view of the federal common law rights of the FDIC and, by extension, the RTC. In that decision, the Court determined that the Ninth Circuit's creation of a federal common law rule barring a law firm from imputing the knowledge of officers of the bank to the receiver in defense of a malpractice action was permitted neither before nor after FIRREA. The receiver stepped into the shoes of the bank and had no better rights than the bank would have, except where Congress otherwise expressly prescribed. Furthermore, deference to the legislative branch forbade freelance judicial lawmaking. Most of the courts that have addressed the impact of *O'Melveny* on D'Oench/federal holder in due course dabbled with the decision for choice-of-law purposes within the federal common law framework, effectively ignoring the implications of the Court's pronouncements on preemption. *See* FDIC v Massingill, 30 F.3d 601 (5th Cir. 1994) (dictum); RTC v. Maplewood Invs., 31 F.3d 1276 (4th Cir. 1994); FDIC v. O'Flahaven, 857 F. Supp. 154 (D.N.H. 1994) (dictum). One court has held that *O'Melveny* has overruled the federal holder in due course doctrine, but went on to determine case under "the *D'Oench, Duhme Doctrine* and 12 U.S.C. § 1823(e)." RTC v. A.W. Assocs., 869 F. Supp. 1503, 1510 (D. Kan. 1994) (emphasis added). It is worthy of note that the Ninth Circuit, in deriving the federal common law rule negatived by the Court, had located its authority in *D'Oench*. FDIC v. O'Melveny & Meyers, 969 F.2d 744, 751 n.9 (9th Cir. 1992), *rev'd*, 114 S. Ct. 2048 (1994).

51. Gunter v. Hutcheson, 674 F.2d 862, 867 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

52. 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

53. In *Gunter*, defrauded securities purchasers sought to rescind their notes, which had been acquired by FDIC-Corporate in the course of a purchase and assumption transaction. *Id.* at 866. The *Gunter* court first rejected the proposition that fraud in the inducement was an "agreement" under section 1823(e). *Id.* at 867. The court then

interpretations of *Gunter*, as a buyer of assets in a purchase and assumption agreement, the insurer receives that most coveted of statuses, that of a holder in due course. This is a distinction of which, under ordinary principles of law, it is utterly undeserving.[54] As a federal holder in due course, the insurer is immune from all "personal" defenses to the enforcement of the instrument, remaining vulnerable only to a residuum of "real" defenses.

The federal holder in due course doctrine is more constrained than D'Oench. Federal holder in due course status is generally confined to the insurers in their corporate rather than their receivership capacity.[55] Reflecting its genesis in negotiable instrument law, application

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went on to use a *Kimbell Foods* analysis to make federal common law to protect the FDIC. As described in *Gunter*, the Court had, in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), set out a multi-factor test to determine whether, when federal common law applies (as it does to the FDIC under *D'Oench*), such law would adopt state law as the rule of decision or create a federal rule. The first factor is the need for national uniformity, the second the extent to which a state rule would frustrate statutory objectives, and the third whether a distinct federal rule would disrupt commercial relations. *Gunter*, 674 F.2d at 868. Weighing these factors, the *Gunter* court determined that the FDIC, needing to act in haste to carry out purchase and assumption transactions, would be hampered by a need to research individual state law. Further, allowing a defense of fraud would frustrate the statutory objective of promoting purchase and assumptions by making it impossible to evaluate the costs of a purchase and assumption versus a liquidation. Finally, the court determined that because a note could always be transferred to a holder in due course, cutting off the defense of fraud, no disruption of commercial expectations would ensue. *Id.* at 869-73. The court thus held that when the FDIC acquires a note in a purchase and assumption transaction for value, in good faith and without actual knowledge of defenses it takes the note free of state and common law fraud defenses and is an innocent transferee for purposes of § 29 of the Securities Exchange Act of 1934. *Id.* at 873-75. While the rule in *Gunter* is often applied on the basis of state law holder-in-due course principles, the *Gunter* court itself appears to have tailored the rule to mesh not with state law, but rather with the requirements of § 29. *Id.* at 876 (distinguishing UCC's notice test).

54. The FDIC takes the instruments in a bulk sale of the entire insolvent bank and, because most of the notes it takes are nonperforming, it takes the instruments with notice of their dishonor. FDIC v. Percival, 752 F. Supp. 313, 325 (D. Neb. 1990). These would prevent the FDIC from achieving holder in due course status. Under §§ 3-302(3)(c) and 3-302(1)(c) of the UCC, a holder who takes the instrument in a bulk sale not in the ordinary course of business of the transferor or with notice that the instrument is overdue or has been dishonored is disabled from being a holder in due course. Interestingly, the drafters of the UCC believed that § 3-302(c) "applies to a purchaser at . . . a sale by a state bank commissioner of the assets of an insolvent bank." U.C.C. § 3-302 cmt. 3 (1978) (article withdrawn 1990). Claims that an insurer or its assignee as bulk transferees with notice of delinquency could not take as holders in due course have explicitly been rejected. FSLIC v. Cribbs, 918 F.2d 557, 559 (5th Cir. 1990); FSLIC v. Hsi, 657 F. Supp. 1333, 1336-37, 1338 n.2 (E.D. La. 1986). One court has gone so far, in dictum, as to waive these *and* the requirement that the transferee be unaware of the claims of third parties. Sunbelt Sav., FSB v. Montross, 923 F.2d 353, 355-56 (5th Cir. 1991). There is even some authority that the insurer need not even prove itself a holder. *See* RTC v. Maldonado, 595 So. 2d 774, 776 (La. Ct. App. 1992) (Lobrano, J., dissenting).

55. Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1352-53 (1st Cir. 1992); FDIC v. Laguarta,

of the federal holder in due course doctrine is normally limited to instruments that are negotiable.[56] Similarly, the insurer's knowledge of defenses may be relevant, because a holder in due course must take the instrument without knowledge of third-party claims or borrower defenses.[57] The question of the operation of the federal holder in due

939 F.2d 1231, 1239 n.19 (5th Cir. 1991); Beitzell & Co. v. FDIC (*In re* Beitzell & Co.), 163 B.R. 637, 645 (Bankr. D.D.C. 1993); Gallant v. Kanterman (*In re* Kanterman), 97 B.R. 768, 777 (Bankr. S.D.N.Y.), *aff'd*, 108 B.R. 432 (S.D.N.Y. 1989). *But see* Firstsouth, F.A. v. Aqua Constr., Inc., 858 F.2d 441, 443 (8th Cir. 1988) (according FSLIC-Receiver federal holder in due course status). Even in circuits that do not normally permit the extension of federal holder in due course status to receivers, an exception may exist for receivers of institutions that acquired the asset in question in a purchase and assumption transaction. Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1351 n.14 (1st Cir 1992) (parsing, and following, Fifth Circuit cases).

56. Under the UCC, an instrument is negotiable if it "contain[s] an unconditional promise . . . to pay a sum certain in money and no other promise, order, obligation or power . . . ." UCC § 3-104(1)(b) (1978) (article withdrawn 1990). Various instruments that are, by their nature, beyond the pale of commercial paper are excluded from the corresponding federal protections. The most typical example is a guaranty, which is a contingent obligation rather than unconditional obligation to pay. FDIC v. Payne, 973 F.2d 403, 408 (5th Cir. 1992) ("The FDIC is no alchemist and thus has no philosopher's stone with which to transform . . . [a] guaranty into a negotiable instrument."); FDIC v. Percival, 752 F. Supp. 313, 324 (D. Neb. 1990). *But see* FDIC v. Turner, 869 F.2d 270, 273 (6th Cir. 1989); Firstsouth, F.A. v. Aqua Constr., Inc., 858 F.2d 441, 443 (8th Cir. 1988); FDIC v. Morrison, Nos. 85-5272 & 85-5273, 1987 WL 37065, at *5 (6th Cir. Apr. 14, 1987). Recitals that the note is subject by its terms to other agreements, thus containing promises, orders or obligations not authorized by the UCC, have also precluded according federal holder in due course status to the insurer. RTC v. Fox, No. CIV. A. 91-1457, 1993 WL 189494, at *3-4 (E.D. Pa. June 2, 1993); RTC v. 1601 Partners, 796 F. Supp. 238, 240-41 (N.D. Tex. 1992).

Notes are excluded if they do not provide for payment of a sum certain and are thus non-negotiable. This includes notes bearing a variable interest rate, to the extent excluded from negotiability by relevant state statute law or precedent. Sunbelt Sav., FSB v. Montross, 923 F.2d 353, 356 (5th Cir. 1991); Desmond v. FDIC, 798 F. Supp. 829, 840-41 (D. Mass. 1992); 1301 Conn. Ave. Assocs. v. RTC (*In re* 1301 Conn. Ave. Assocs.), 126 B.R. 823, 831 (Bankr. D.D.C. 1991). Likewise, notes also may be excluded if they allow for advances from time to time. RTC v. Oaks Apartments Joint Venture, 966 F.2d 995, 1001-02 (5th Cir. 1992); 1301 Conn. Ave. Assocs. v. RTC (*In re* 1301 Conn. Ave. Assocs.), 126 B.R. 823, 831 (Bankr. D.D.C. 1991).

57. The courts have continued to follow *Gunter's* '34-Act-derived "actual knowledge" test rather than the UCC's notice requirement. FDIC v. Turner, 869 F.2d 270, 273 (6th Cir. 1989). *But see* FDIC v. Orrill, 771 F. Supp. 777, 779-80 (E.D. La. 1991) (implying even possession of actual notice is irrelevant), *aff'd sub nom.* American Bank & Trust v. Orrill, 978 F.2d 711 (5th Cir. 1992). Actual knowledge presents a high hurdle for borrowers to leap. Notice may not be imputed to the insurer because information sufficient to charge it with knowledge of the defense could be found in the bank's files. FDIC v. Gilbert, 9 F.3d 393, 395 & n.5 (5th Cir. 1993); FDIC v. Binion, 953 F.2d 1013, 1017 (6th Cir. 1991); *see also* FDIC v. Caledonia Inv. Corp., 725 F. Supp. 90, 95 (D.P.R. 1989) (dictum). *But see* Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1008-09 (La. Ct. App. 1993). Similarly, the mere filing of an action prior to takeover of the institution is insufficient to charge the insurer with knowledge. RTC v. Jet Stream, Ltd., 790 F. Supp. 1130, 1138 (M.D. Fla. 1992).

Further, courts have reversed the normal rule under the UCC and held that such forbidden knowledge is for the defendant to plead and prove. *Compare* U.C.C. § 3-

course doctrine is beyond the scope of this Note, although the doctrine cannot pass unremarked given its influence on the statutory and common law D'Oench doctrines and the defenses available against them.

In *Langley v. FDIC*[58] the Court solved, in Gordian-knot fashion, the "agreement" problem that had consumed so much jurisprudential ingenuity in *Gunter*. Justice Scalia, writing for a unanimous Court, held that the term "agreement" in section 1823(e) should be construed to include fraudulent misrepresentations that induced the execution of the contract. Because the plain meaning of the word "agreement" might not seem to include a fraudulent luring into contract,[59] Justice Scalia reached this conclusion by reasoning that fraud was the functional equivalent of an unwritten warranty on which performance was conditioned, and thus an "agreement."[60] Looking be-

307(3) (1978) (article withdrawn 1990) *and* Thomas M. Quinn, 1 Quinn's Uniform Commercial Code Commentary and Law Digest ¶¶ 3-307[A][6], 3-307[B][6] (2d ed. 1991) (discussing burden of proof of lack of knowledge and providing case annotations) *with* RTC v. Jet Stream, Ltd., 790 F. Supp. 1130, 1138 (M.D. Fla. 1992) (insisting that knowledge is defendant's proof) *and* B.L. Nelson & Assocs. v. Sunbelt Sav., FSB, 733 F. Supp. 1106, 1109 (N.D. Tex. 1990) (same). *But see* Lassiter v. RTC, 610 So. 2d 531, 538 (Fla. Dist. Ct. App. 1992) (placing burden on insurer).

This absence of knowledge may apply only to the insurer, and not the bank. The court in St. Bernard Savings & Loan Ass'n v. Cella, 826 F. Supp. 985 (E.D. La. 1993), held that where the defunct bank took with notice of dishonor, the RTC could not become a federal holder in due course. *Id.* at 987. This opinion is, however, somewhat casuistical in its reasoning generally: it held that because the note itself did not comply with section 1823(e) and because the note, having matured, tended to diminish the interest of the RTC in the note, the note was therefore invalid as to the RTC, thus precluding the RTC from holder in due course status. *Id.* at 986.

58. 484 U.S. 86 (1987). The Langleys had purchased land from Planters Trust & Savings Bank of Opelousas, Louisiana, and had given in payment their note and certain guarantees. The note was repeatedly renewed, and after the last renewal, the Langleys refused to pay any more. Claims and counterclaims were brought, the complaint of the Langleys being that Planters had misrepresented the size of the parcel and the unencumbered nature of its mineral rights. The FDIC learned of these claims during its examination of the bank. The FDIC transferred the liabilities and certain of the assets to another bank in a purchase-and-assumption transaction, keeping for itself, *inter alia*, the Langley note. The case reached the Court after the District Court had granted summary judgment in favor of FDIC and was affirmed, the Fifth Circuit holding that a misrepresentation was an "agreement" for purposes of section 1823(e). *Id.* at 88-90.

59. *See* RTC v. Ehrenhaus, 34 F.3d 441, 442 (7th Cir. 1994) (Posner, C.J.) (laying at the feet of *Langley* "[t]he fiction that a contract induced by fraud is an 'agreement' within the meaning of section 1823(e) but that a forged contract is not (or, we daresay, one induced by a threat)"); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1462 (D.D.C. 1992) ("There is no question that *Langley* expands the definition of 'agreement' in § 1823(e) beyond the traditional meaning of the word.").

60. *Langley*, 484 U.S. at 90-93. Prior to *Langley*,

> courts [had] distinguished between two types of fraud in the inducement: (1) promissory fraud—an oral promise by the bank to perform a duty in connection with the execution of a note that the bank does not intend to perform—which [could not] be asserted against the FDIC; and (2) factual fraud—a

yond a narrow definition of the word "agreement," Justice Scalia examined the intention of the legislature in imposing the restrictions of section 1823(e). In so doing, the Justice construed *D'Oench*, much as one might examine a legislative history, to determine such intent, a stratagem that led to revisions in the lower courts' views of the common law doctrine as well as the statute.[61] Further, he reasoned that, because section 1823(e) spoke of the FDIC's interest in an *asset*, only if there was an infirmity in the asset that rendered it utterly void could the FDIC be defeated; a mere voidability was insufficient.[62] Thus the insurers, like a holder in due course, were to be protected from any defenses that would render the instrument merely voidable. Extending the estoppel argument from *D'Oench*, Justice Scalia also stated that not only is a showing of reliance on the validity of the note unnecessary, but even knowledge by the FDIC of misrepresentations that would render the note voidable is irrelevant.[63]

B. *The Two Doctrines*

The common law and statutory doctrines are directed to the same evils and share the same principles. Under the common law doctrine, a party must have lent itself to a scheme that could deceive the banking authorities. Statutory D'Oench fossilizes this principle by setting out a series of execution, approval, and record retention requirements. If an agreement fails even one of these tests, it is barred. The relationship between the two doctrines is somewhat unclear. Often courts will borrow requirements from the statutory provision as if the common law and statute were one. Other courts will recognize that the two are distinct and that to utilize Congress's formulations in situations in which the legislature did not mandate that the statute apply

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> factual misrepresentation by the bank not involving the undertaking of any contractual duty—which [could] be asserted against the FDIC.

FDIC v. Amberson, 676 F. Supp. 777, 780 (W.D. Tex. 1987). *See also* FDIC v. Galloway, 856 F.2d 112, 113-15 (10th Cir. 1988) (illustrating operation of distinction and effect of *Langley*). Commentators have attempted to criticize or confine the scope of Scalia's construction by claiming that it is limited by the sources it cited. *See* Gray, *supra* note 38, at 266-68, 285-86; Hymanson, *supra* note 38, at 308. This has not been followed in the courts, which have read Justice Scalia to mean that Congress intended the word "agreement" not be read with the scrivener's parsing of conditions precedent, concurrent, and subsequent, of representations or of warranties, of covenants, and pious wishes. *See infra* notes 92-113 (discussing various contract defenses barred by D'Oench).

61. *See infra* note 80 (discussing incorporation of *Langley* into common law D'Oench).

62. *Langley*, 484 U.S. at 93-94. It should be noted that the fraud in the factum exception is actually grounded in a concession by Mr. Taranto, counsel for the FDIC. *Langley*, 484 U.S. at 93-94.

63. *Langley*, 484 U.S. at 94-95. This was not new; a number of lower courts had also so held. *See, e.g.*, FDIC v. MM & S Partners, 626 F. Supp. 681, 684 (N.D. Ill. 1985) (citing cases); FDIC v. Gardner, 606 F. Supp. 1484, 1488 (S.D. Miss. 1985) (holding knowledge irrelevant).

is not to apply the common law, but to rewrite the statute. In many cases, the distinctions are irrelevant, because in principle the animating spirit of the two doctrines is the same, and in practice, in cases in which the requirements of neither is met, it is irrelevant which is employed. The remaining distinctions appear to lie in the less formal documentation requirements of common law D'Oench and the requirement of section 1823(e) that an asset be implicated by the barred agreement.

1. Elements of Common Law D'Oench and Section 1823(e)

Common law D'Oench embodies not so much a rule as a principle. As the Court stated in *D'Oench*,[64] "It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled."[65] Lending oneself to a scheme or arrangement merely refers to any unwritten arrangement of which the insurer would not have been immediately aware; "[s]imply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either."[66] Furthermore, the deception need not be advertant or even actual. The potential that "the banking authority . . . was likely to be misled,"[67] is sufficient to render a claim vulnerable to common law D'Oench.[68] In

64. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

65. *Id.* at 460.

66. Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990). To borrow from the language of the criminal law, D'Oench is an offense of general rather than specific intent. The mere act of entry into an unshriven agreement with a bank is sufficient to trigger liability under D'Oench. McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 368-69 (5th Cir. 1993); Adams v. Madison Realty & Dev., 937 F.2d 845, 852 (3d Cir. 1991); Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 49 (1st Cir. 1991); FSLIC v. Gemini Management, 921 F.2d 241, 245 (9th Cir. 1990); FSLIC v. Two Rivers Assocs., 880 F.2d 1267, 1274 (11th Cir. 1989). *But see* FDIC v. Bravo Leather Corp., [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,151, at 96,488 (S.D.N.Y. May 15, 1990) (Kram, J.), *vacated on motion for reconsideration sub nom.* FDIC v. Engel, 746 F. Supp. 1223 (S.D.N.Y. 1990); New York v. Harris Home Design, Inc., [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,807, at 95,462 (S.D.N.Y. Aug. 2, 1989) (Kram, J.).

67. *D'Oench*, 315 U.S. at 460.

68. The "tending to deceive" element is viewed from an objective, FDIC-centric perspective; the question is not whether the FDIC's opponent intended to deceive. Bell & Murphy & Assocs. v. Interfirst Bank Gateway, 894 F.2d 750, 753-54 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990). It is not even whether the opponent did in fact deceive. FDIC v. Investors Assocs. X., Ltd., 775 F.2d 152, 155-56 (6th Cir. 1985). *But see* Bradford v. American Fed. Bank, 783 F. Supp. 283, 285 (N.D. Tex. 1991) (stating that where documents in file and board approval showed usurious arrangement, actual knowledge by FDIC would preclude enforcement of note). Knowledge by the insurer that the agreement existed, whether actual or constructive, is thus utterly irrelevant. Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 50-51 (1st Cir. 1991); Shuler v. RTC, 757 F. Supp. 761, 766 (S.D. Miss. 1991); Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 669-70 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993). Before *Langley*, there was support for the proposition that knowledge of the defense would take it out of the

sum, while the courts use the language of schemes, secrets, and deceit, under recent precedents, the sole element of common law D'Oench is simply that the party, however innocently, has entered into an agreement not explicitly reflected in the records of the bank.[69]

In contrast, section 1823(e) is a statute of frauds, to be strictly construed.[70] Any agreement, to be enforceable, must be in writing, and must have been executed[71] by the bank and the party claiming the adverse interest thereunder contemporaneously[72] with the acquisition

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ambit of common law D'Oench if it did not arise from a collateral agreement. *See* FDIC v. MM & S Partners, 626 F. Supp. 681, 684-85 & n.2 (N.D. Ill. 1985) (citing cases but holding otherwise). The act is culpable if it had the potential, at the time done, to deceive. A white-hands-empty-head defense is not available. FSLIC v. Griffin, 935 F.2d 691, 698-99 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1163 (1992); Twin Constr., Inc. v. Boca Raton, Inc., 925 F.2d 378, 382 (11th Cir. 1991) ("Neither the intent to deceive nor fraud are requisites for the application of D'Oench."); FDIC v. Investors Assocs. X., Ltd., 775 F.2d 152, 155 (6th Cir. 1985) ("[The borrower's] good faith is simply irrelevant.").

69. Certain cases, particularly older ones, have implied that intent or at least recklessness was required. Buchanan v. FSLIC, 935 F.2d 83, 85-86 (5th Cir.), *cert. denied*, 502 U.S. 1005 (1991); FSLIC v. Murray, 853 F.2d 1251, 1254-55 (5th Cir. 1988); FDIC v. McClanahan, 795 F.2d 512, 516 (5th Cir. 1986); New York v. Harris Home Design, Inc., [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 87,807, at 95,462 (S.D.N.Y. Aug. 2, 1989). This no longer appears necessary. Bowen v. FDIC, 915 F.2d 1013, 1017 (5th Cir. 1990).

70. Langley v. FDIC, 484 U.S. 86, 95 (1987).

71. Execution has been held to include the bank's preparation of a document and its presentation to the borrower for execution simultaneously with the note. FDIC v. Cremona Co., 832 F.2d 959, 963 (6th Cir. 1987), *cert. dismissed sub nom.* Gonda v. FDIC, 485 U.S. 1017 (1988). *But see* FDIC v. Allen, 801 F.2d 863, 864-65 (6th Cir. 1986) (insisting guaranties were barred because unexecuted by the bank). Nor need the documents executed by the bank and the borrower be a single document. *See* Bank One Tex. Nat'l Ass'n v. Morrison, 26 F.3d 544, 550 (5th Cir. 1994). Similarly, where actual execution by a party would be "nonsensical," one court has held execution by the appropriate parties sufficient, notwithstanding the wording of the statute. RTC v. Ocotillo W. Joint Venture, 840 F. Supp. 1463, 1478 (D.N.M. 1993). *But see* Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 732 (D.N.J. 1993) (holding non-execution of agreement by purported third-party beneficiary renders it unenforceable by such party). An even more extreme view was taken by the Second Circuit, which has held that signature by a party's agent is insufficient to show compliance with the execution requirement. FDIC v. Giammettei, 34 F.3d 51, 56 (2d Cir. 1994) (holding that, even where general partners executed on behalf of limited partnership, limited partners had not executed).

Execution is viewed in the sense of signing of documents not performance of the contract, and arguments based in execution-by-performance or execution-by-detrimental-reliance have been rejected. Twin Constr., Inc. v. Boca Raton, Inc., 925 F. 2d 378, 384 (11th Cir. 1991); Franklin Asaph Ltd. Partnership v. FDIC, 794 F. Supp. 402, 405 & n.2 (D.D.C. 1992). *But cf.* RTC v. J.B. Centron Dev. Co., 637 N.E.2d 23, 28 (Ohio Ct. App. 1993) (noting that since agreement was neither signed nor performed, exact meaning of execution need not be reached).

72. "Contemporaneously" has never been adequately defined. Periods of mere weeks have been deemed to have failed this prong of the test. Cardente v. Fleet Bank, 796 F. Supp. 603, 611 (D. Me. 1992) (18 days); Fleet Bank v. Prawer, 789 F. Supp. 451, 456 n.7 (D. Me. 1992) (two weeks), *aff'd on different grounds*, 991 F.2d 786 (1st Cir. 1993); RTC v. Dubois, 771 F. Supp. 154, 155-56 (M.D. La. 1991) (two weeks). *But see* Lassiter v. RTC, 610 So. 2d 531, 536-37 (Fla. Dist. Ct. App. 1992) (11 days). Indeed,

of the asset by the bank. The agreement must have been approved by the board of directors or loan committee and recorded in its minutes,[73] and the writing must have been kept continuously[74] as an offi-

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one court has required that, even where the asset was pledged to a bank, it is the time of that pledge that controls. FDIC v. Friedland, 758 F. Supp. 941, 944 (S.D.N.Y. 1991).

Other courts have, however, adopted a standard of contemporaneity that takes into account commercial reality. RTC v. Midwest Fed. Sav. Bank, 36 F.3d 785, 797-98 (9th Cir. 1993). Another court has held that, even if a document was created (and signed) prior to the closing of the loan, if it is incorporated by reference and physically appended to the final loan documents, it will be deemed "executed" contemporaneously for purposes of section 1823(e). Erbafina v. FDIC, 855 F. Supp. 9, 12 (D. Mass. 1994).

This is one of the few section 1823(e) problems on which legislative history may shed any light. (Such resort is legitimate given that the exact meaning of "contemporaneously" is opaque.) What became section 1823(e) originally required simultaneity rather than contemporaneity. The provision was altered at the instance of Representative Walter, on the grounds that legitimate transactions would be barred if exact simultaneity were required. "Under the . . . bill, this agreement must be entered into simultaneously with the recording and other conditions. It is quite obvious that is impossible. Bank directors usually meet once a week. . . . This language contemplates that . . . these agreements . . . may be approved contemporaneously . . . at a time approximating when they were entered into." FDIC v. Blue Rock Shopping Ctr. 766 F.2d 744, 753 n.26 (3d Cir. 1985) (quoting 96 Cong. Rec. 10,731 (1950)). While Representative Walters was laboring under a misapprehension of the language of section 1823(e) (contemporaneity not being required for board approval), it appears the word "contemporaneously" was deliberately selected to embody a "rule of reason" with respect to execution.

The contemporaneity requirement has recently been narrowed to allow the security interest of governmental units in collateral underlying collateralized deposits to survive notwithstanding a non-contemporaneous acquisition of collateral. The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223. This was intended to overturn the specific holding of North Arkansas Medical Center v. Barrett, 962 F.2d 780 (8th Cir. 1992). H.R. Conf. Rep. No. 103-652, 103d Cong., 2d Sess. 174 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1977, 2004.

73. Mere knowledge of the transaction by the board is irrelevant. Belsky v. First Nat'l Life Ins. Co., 653 F. Supp. 80, 84 (D. Neb. 1986), *aff'd*, 818 F.2d 661 (8th Cir. 1987). Likewise, mere unrecorded approval by the board members is generally held to be insufficient. FDIC v. Krause, 904 F.2d 463, 466 (8th Cir. 1990). One court has, however, allowed actions by the bank that are consistent with approval having been obtained to substitute for minutes. *See* Bank One Tex. Nat'l Ass'n v. Morrison, 26 F.3d 544, 550-51 (5th Cir. 1994).

The minutes must be the official minutes of the board not draft or unsigned minutes. RTC v. Ruggiero, 977 F.2d 309, 316 (7th Cir. 1992); American Sav. Bank v. Saleski Dev., Inc., 812 F. Supp. 28, 30-31 (S.D.N.Y. 1993).

The existence of the minutes is sufficient; if there is an ambiguity in their meaning, there will remain a factual question as to whether the transaction has been approved, precluding summary judgment. Park Club, Inc. v. RTC, 967 F.2d 1053, 1057 (5th Cir. 1992) (applying common-law D'Oench). One court has, however, held that the specifics of the agreement sought to be enforced must be found therein, which could tend to weaken such a rule. FDIC v. Gardner, 606 F. Supp. 1484, 1488 (S.D. Miss. 1985). Further, mere reference to a document in the minutes does not constitute approval. FDIC v. Giammettei, 34 F.3d 51, 56-57 (2d Cir. 1994).

In RTC v. Midwest Federal Savings Bank, 36 F.3d 785, 796-800 (9th Cir. 1993), the court considered the records of, execution by, and board approval on behalf of, the wholly-owned subsidiary from which the bank had purchased the loan in determining that the loan complied with section 1823(e). *See also* Lesal Interiors, Inc. v. RTC, 834 cial record[75] of the bank from the time of its execution. Failure to meet any one of the four requirements is fatal.[76]

2. Are the D'Oench Doctrines of One Substance?

What then is the relationship between common law and statutory D'Oench? If the doctrines differ and are solely of similar substance, then only claims expressly made subject to section 1823(e) are subject to its formalistic statute of frauds and claims subject to common law D'Oench are subject to the more flexible equitable principle originally promulgated by the Supreme Court.[77] If the statute is a codification

F. Supp. 721, 732 (D.N.J. 1993) (indicating, in dictum, that where section 1823(e) is to be applied to a subsidiary of a bank that the relevant approval is that of the board or committee of the subsidiary).

74. One court has crafted a presumption that, if the instrument is found in the files when the bank is closed, it will, in the absence of evidence to the contrary, be assumed to have continuously resided in such file. FDIC v. Cremona Co., 832 F.2d 959, 963 (6th Cir. 1987), *cert. dismissed sub nom.* Gonda v. FDIC, 485 U.S. 1017 (1988). If, however, bank officers play "hide-the-document" with the examiners, even though the document was originally placed in the file it will be ineffective against the insurer. FDIC v. Diamond C Nurseries, Inc., 629 So. 2d 157, 159-60 (Fla. Dist. Ct. App. 1993). The bank's counterparty thus becomes, in essence, a guarantor of the efficiency of the bank's file clerks and the honesty of its officers.

75. The definition of "official record" is also not clear; however, a document held in the draft documents file of the bank's outside counsel clearly falls without its ambit. RTC v. McCrory, 951 F.2d 68, 71-72 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992). It has been indicated in dictum that a bank president's personal files may also be excluded. FDIC v. Diamond C Nurseries, Inc., 629 So. 2d 157, 159-60 (Fla. Dist. Ct. App. 1993). Apparently, there is some unclear distinction between a bank's general records and its "official records." Inn at Saratoga Assocs. v. FDIC, 856 F. Supp. 111, 117 (N.D.N.Y. 1994). A similar distinction between the bank's general records and its loan files has been drawn in one common law D'Oench decision as well. RTC v. Oaks Apartments Joint Venture, 966 F.2d 995, 999-1000 (5th Cir. 1992).

76. FDIC v. Wright, 942 F.2d 1089, 1101 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992); FDIC v. Manatt, 922 F.2d 486, 488 (8th Cir.), *cert. denied*, 501 U.S. 1250 (1991); FDIC v. Mr. "T's", Inc., 764 F. Supp. 1087, 1090 (M.D. La. 1991); FDIC v. O'Malley, 618 N.E.2d 818, 829 (Ill. App. Ct. 1993), *aff'd*, No. 76106, 1994 WL 587659 (Ill. Oct. 27, 1994).

77. Such a view may be seen in separate analyses of common-law, or by explicit statements of the separateness of the doctrines. *See* Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 690-96 (10th Cir. 1993) (separate analyses); Hall v. FDIC, 920 F.2d 334, 339 (6th Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991); Beener v. LaSala, 813 F. Supp. 303, 307 n.3 (D.N.J. 1993); Stebbins Realty Corp. v. FDIC, Civ. No. 91-568-JD, 1994 WL 287742, at *2 (D.N.H. June 29, 1994); OPS Shopping Ctr. v. FDIC, No. 89-30142-RV, 1992 WL 489719, at *4 (N.D. Fla. Mar. 26, 1992) (separate analyses), *aff'd on different grounds*, 992 F.2d 306 (11th Cir. 1993); Agri Export Coop. v. Universal Sav. Ass'n, 767 F. Supp. 824, 833-34 (S.D. Tex. 1991); RTC v. Wellington Dev. Group, 761 F. Supp. 731, 735 (D. Colo. 1991); Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 749 F. Supp. 635, 642 (D.N.J. 1990); Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 662-64 (D. Utah 1989) (separate analyses), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993); Weber v. New W. Fed. Sav. & Loan Ass'n, 12 Cal. Rptr. 2d 468, 474-75 (Cal. Ct. App. 1992).

An extreme example is presented by two cases decided by Judge Kram in the Southern District: utilizing an pre-*Langley* understanding of common law D'Oench, she dismissed FDIC-Receiver's interposition of common law D'Oench because there of the *D'Oench* decision, then common law and statutory D'Oench are of one substance and a claim once brought within the ambit of the former becomes subject to the strictures of the latter.[78]

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was no showing of *scienter* on the borrower's part, but, upon FDIC's motion for reconsideration, she dismissed the same claims by retroactively applying the no-fault regime of the amended section 1823(e). *Compare* FDIC v. Bravo Leather Corp., [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,151, at 96,488-89 (S.D.N.Y. May 15, 1990) (Kram, J.), *vacated on motion for reconsideration sub nom.* FDIC v. Engel, 746 F. Supp. 1223 (S.D.N.Y. 1990) *with* FDIC v. Engel, 746 F. Supp. 1223 (S.D.N.Y. 1990). A learned discussion of the subject of common law and statutory D'Oench, the distinctions between them and the territory occupied by each was provided by Judge Lamberth in American Federation of State, County & Municipal Employees v. FDIC (*In re* NBW Commercial Paper Litigation), 826 F. Supp. 1448 (D.D.C. 1992).

A similar problem is presented by the federal holder in due course doctrine, which is seen by some courts to be distinct from the D'Oench doctrines. FDIC v. Byrne, 736 F. Supp. 727, 731 n.6 (N.D. Tex. 1990); FDIC v. Percival, 752 F. Supp. 313, 328-29 (D. Neb. 1990). Other courts treat the doctrines as identical. RTC v. Midwest Fed. Sav. Bank, 36 F.3d 785, 799 n.6 (9th Cir. 1993); Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400, 403-10 (S.D. Ga. 1991); FDIC v. Orrill, 771 F. Supp. 777, 780 (E.D. La. 1991), *aff'd sub nom.* American Bank & Trust v. Orrill, 978 F.2d 711 (5th Cir. 1992); FDIC v. Newhart, 713 F. Supp. 320, 323 (W.D. Mo.), *aff'd*, 892 F.2d 47 (8th Cir. 1989).

This conflict recalls that, occasioned by another triune mystery, between the *Homoousions* and the *Homoiousions* which so roiled the domestic tranquillity of the Asiatic and African provinces of the Empire. The former, and victorious, party urged that the Trinity was consubstantial, the latter that among the Three there was similarity rather than identity. 1 Edward Gibbon, The Decline and Fall of the Roman Empire 684-90, 716-22 (Modern Library 1932) (1788).

78. The courts have applied pieces of the statute, such as the contemporaneity or board-approval requirements, in common law cases, or have redrafted the statute wholesale. *See* FDIC v. Camp, 965 F.2d 25, 30-31 (5th Cir. 1992) (wholesale); Carteret Sav. Bank v. Compton, Luther & Sons, 899 F.2d 340, 343-44 (4th Cir. 1990) (contemporaneity); Firstsouth, F.A. v. Aqua Constr., Inc., 858 F.2d 441, 443 (8th Cir. 1988) (wholesale); Fleet Bank v. Steeves, 785 F. Supp. 209, 215 (D. Me. 1992) (contemporaneity); Oliver v. RTC, 747 F. Supp. 1351, 1354-55 (E.D. Mo. 1990) (wholesale), *aff'd*, 955 F.2d 583 (8th Cir. 1992); FSLIC v. Port Allen Dev. Corp., 684 F. Supp. 439, 440 (M.D. La. 1988) (board approval); *cf.* University Drive Professional Complex, Inc. v. FSLIC (*In re* University Drive Professional Complex, Inc.), 101 B.R. 790, 797-98 (Bankr. S.D. Fla. 1989) (noting, in dictum, that board approval should be required).

Courts appear to become mesmerized by the concept of codification, and treat section 1823(e) as if it had merely outfitted Justice Douglas' opinion with paragraphs, subparagraphs, and the other paraphernalia of statute law. Nonetheless, other observers have recognized the distinctions: "The often recited statement that § 1823(e) is a codification of *D'Oench, Duhme* does not bear analysis. The specific requirements of § 1823(e) are in no way provided, or even mentioned, in *D'Oench, Duhme*. . . . These are exclusively the work of Congress." Kilpatrick v. Riddle, 907 F.2d 1523, 1529-30 n.2 (5th Cir. 1990) (Brown, J. dissenting), *cert. denied*, 498 U.S. 1083 (1991). Chief Judge Posner has expressed similar sentiments.

> But the policy behind a statute and the statute itself need not be and in this instance are not identical. Often, legislators, to make assurance doubly sure, draft a statute that goes further than the goal they wanted to achieve; they overshoot the mark to make sure they won't undershoot it. This seems to be what happened in 1950 when Congress set about to codify *D'Oench, Duhme*

Because the principle enunciated in *D'Oench* and the intent animating the statute are the same, concepts leak from section 1823(e) jurisprudence to common law D'Oench decisions.[79] Thus, the common law doctrine has incorporated the definition of agreement and the irrelevance of notice propounded in *Langley*, although Justice Scalia had purported to do no more than construe the language of section 1823(e).[80]

In practice, the separation of the doctrines is irrelevant (and unanalyzed)[81] in many, or indeed most, cases. This can be seen in the fact that the analysis of any D'Oench problem normally commences with an examination of the presence or absence of a written agreement, which is *sine qua non* of compliance with either the statutory or common law D'Oench.[82] Similarly, section 1823(e), under the void/voidable distinction drawn in *Langley*, provides protections to the insurer that are at the least similar to the protections extended to a holder in due course.[83]

A distinction appears to remain in many cases as to the formality of documentation required. Common law D'Oench appears to require

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.... The statute makes the common law principle both more encompassing and more precise.

FDIC v. O'Neil, 809 F.2d 350, 353 (7th Cir. 1987).

79. Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 274 (5th Cir. 1989); Royal Bank of Can. v. FDIC, 733 F. Supp. 1091, 1095 (N.D. Tex. 1990); FSLIC v. Hsi, 657 F. Supp. 1333, 1338 (E.D. La. 1986). The same may be said of D'Oench and the federal holder in due course doctrine. Porras v. Petroplex Sav. Ass'n, 903 F.2d 379, 381 n.5 (5th Cir. 1990).

80. *See* FDIC v. Laguarta, 939 F.2d 1231, 1238 (5th Cir. 1991) ("The Supreme Court . . . decided . . . as a matter of strict statutory construction, and thus did not completely foreclose the argument that the result would be different under the federal common law doctrine of *D'Oench, Duhme*." (citation omitted)). Nevertheless, *Langley* has been seen as dispositive of the scope of the term "agreement" for purposes of common law D'Oench. *See, e.g.*, Century Centre Partners v. FDIC (*In re* Century Centre Partners), 969 F.2d 835, 838-39 (9th Cir. 1992) (looking to *Langley* for meaning of agreement), *cert. denied*, 113 S. Ct. 2997 (1993); Adams v. Madison Realty & Dev., 937 F.2d 845, 853-55, 858 (3d Cir. 1991) (same); FSLIC v. Lafayette Inv. Properties, Inc., 855 F.2d 196, 198 n.1 (5th Cir. 1988) (same). It has been applied to the question of whether fraud in the factum is a defense to common law D'Oench. Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1346 (1st Cir. 1992); FSLIC v. Maio, 736 F. Supp. 1039, 1041 (N.D. Cal. 1989). It has also been applied to the question of whether the knowledge of the insurer is relevant. Robinowitz v. Gibraltar Sav., 23 F.3d 951, 956-57 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 725 (1995); Twin Constr., Inc. v. Boca Raton, Inc., 925 F.2d 378, 383 (11th Cir. 1991); Oliver v. RTC, 747 F. Supp. 1351, 1354 & n.6 (E.D. Mo. 1990), *aff'd*, 955 F.2d 583 (8th Cir. 1992).

81. American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1457 (D.D.C. 1992).

82. RTC v. Murray, 935 F.2d 89, 93 n.3 (5th Cir. 1991); FDIC v. Perry Bros., Inc., 854 F. Supp. 1248, 1277 n.10 (E.D. Tex. 1994); Murphy v. FDIC, 829 F. Supp. 3, 6 n.5 (D.D.C. 1993); RTC v. Hunters Ridge Income Investors, L.P., 796 F. Supp. 1261, 1264 (E.D. Mo. 1992); RTC v. Ford Mall Assocs., 796 F. Supp. 1233, 1237 n.4 (D. Minn. 1992).

83. Newton v. Uniwest Fin. Corp., 967 F.2d 340, 343 n.3 (9th Cir. 1992).

only that documentation sufficient to have warned the insurers of the agreement be in the files of the bank; lack of the formal requisites of execution, contemporaneity, and approval will not necessarily permit the invocation of the common law doctrine.[84] Thus, for example, while resort to minutes of a board meeting may not be had to prove the terms of an agreement under section 1823(e), the same is not true of common law D'Oench.[85] An additional distinction may be found in the requirement of section 1823(e) that an "asset" be implicated, a subject this Note will explore later.[86] The distinction in documentation requirements seems necessary and appropriate if the judiciary is not to usurp the privileges of the legislature. While courts have accepted the idea that common law D'Oench has a life independent of its "codification," to impose the formalistic recording requirements imposed by the legislature on classes of transactions it did not see fit to include comes perilously close to rewriting rather than supplementing the statute.

C. *Asset and Agreement Exceptions*

Except for the widely discredited "innocent borrower" exception, all exceptions to D'Oench may be classed as either "asset" or "agreement" defenses. The innocent borrower defense, a creation of the

84. *See, e.g.*, Bradford v. American Fed. Bank, 783 F. Supp. 283, 284-85 (N.D. Tex. 1991) (looking to letters and other documents in file and minutes of board meetings to determine if D'Oench applied); Germania Bank v. Brehm, 763 F. Supp. 1030, 1036-37 (E.D. Mo. 1991) (denying concerns of common law D'Oench were implicated where letter agreement recorded in bank's files and RTC was mere conservator of assets); First Tex. Sav. Ass'n v. Comprop Inv. Properties Ltd., 752 F. Supp. 1568, 1574 (M.D. Fla. 1990) (including written records, correspondence and proposals as writings sufficient for common law D'Oench); Illinois *ex rel.* Hartigan v. Commonwealth Mortgage Corp. of Am., 723 F. Supp. 1258, 1262 (N.D. Ill. 1989) (proposing to inquire into generalized "written records" to determine compliance with common law D'Oench); Lassiter v. RTC, 610 So. 2d 531, 535-38 (Fla. Dist. Ct. App. 1992) (considering loan approval letter and escrow instructions to determine compliance with common law D'Oench; but to show compliance with section 1823(e) remand was necessary for further fact finding on status of loan approval letter); First Heights Bank v. Gutierrez, 852 S.W.2d 596, 608 (Tex. Ct. App. 1993) (looking to records of wire transfers as records of the type ordinarily contained in loan files). One decision has, however, required that the documents be contained in the loan file rather than general bank records in order to be given any effect under common law D'Oench. RTC v. Oaks Apartments Joint Venture, 966 F.2d 995, 999-1000 (5th Cir. 1992).

85. Armstrong v. RTC, 623 N.E.2d 291, 298-99 (Ill. 1993) (rejecting board minutes under section 1823(e) because unexecuted by the borrower and under common law D'Oench because contents were too ambiguous to put insurer on notice). *Compare* RTC v. Carr, 13 F.3d 425, 428 (1st Cir. 1993) (barring minutes that, not being executed by the obligor, did not satisfy section 1823(e)) *with* Cohen v. RTC, No. CIV. 90-1065-R(P), 1993 WL 282051, at *4-5 (S.D. Cal. May 10, 1993) (allowing resolution of board to defeat common law D'Oench).

86. *See infra* notes 156-231 and accompanying text (discussing whether presence of an "asset" is a requisite for application of section 1823(e) and common law D'Oench).

Ninth Circuit in its case *FDIC v. Meo*,[87] posits that D'Oench cannot be applied to bar defenses that arise against the insurer without fault on the borrower's part. The defense is either extinct[88] or so impossible of practical application[89] as to be irrelevant.

87. 505 F.2d 790 (9th Cir. 1974). In *Meo*, a borrower made a note to a bank for purchase of its stock. The bank actually issued voting trust certificates, and the borrower refused to pay, citing a failure of consideration. *Id.* at 791. The receiver sought to avoid the defense by interposition of common law D'Oench. The Ninth Circuit, looking to California law to give shape to the federal common law, determined that Meo was not negligent and was not a party to any deceptive scheme, so that the lack of consideration defense survived. *Id.* at 792-93 & n.4.

88. The defense has been expressly rejected as a pre-*Langley* relic in a number of Circuits, and its status is questionable in others. Dendinger v. First Nat'l Corp., 16 F.3d 99, 102 (5th Cir. 1994); Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1347-48 (1st Cir. 1992); FSLIC v. Gordy, 928 F.2d 1558, 1567 n.14 (11th Cir. 1991). Even the Ninth Circuit may no longer swear allegiance. *Compare* Falk v. Mt. Whitney Sav. & Loan Ass'n, 983 F.2d 156, 160 (9th Cir. 1993) (holding *Meo* barred invocation of D'Oench), *opinion amended and reissued* 5 F.3d 347 (9th Cir. 1993) *with* Falk v. Mt. Whitney Sav. & Loan Ass'n, 5 F.3d 347, 351 (9th Cir. 1993) (deleting all reference to *Meo*). The Circuit has stated that specific parties are ineligible for the exception, but this can hardly be taken as a holding that the exception still exists. *See* Ninth Circuit cases cited *infra* note 89. Further, the *en banc* decision in Murphy v. FDIC, 38 F.3d 1490 (9th Cir. 1994), while it cited *Meo* repeatedly, did so in the context of a transaction documented (albeit not to section 1823(e) standards) in the bank's files and a jury finding that the plaintiff had not lent himself to a scheme, and thus can stand for no more than the proposition that if D'Oench does not apply, then D'Oench does not apply. Certainly, *Murphy*'s discussion of the obligations of borrowers makes it clear that there is no such thing as an "innocent borrower" *qua* borrower in the Ninth Circuit.

In any event, the defense always has been inapplicable under the federal holder in due course doctrine. Gunter v. Hutcheson, 674 F.2d 862, 873 n.15 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

89. While the defense is frequently raised, because the failure to reduce *any* agreement or representation to writing is deemed to be fault, the facts are rarely found to reveal the requisite near-hagiographical degree of innocence. FDIC v. Bathgate, 27 F.3d 850, 867 (3d Cir. 1994); Century Centre Partners v. FDIC (*In re* Century Centre Partners), 969 F.2d 835, 839 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2997 (1993); FSLIC v. Gemini Management, 921 F.2d 241, 245 (9th Cir. 1990); Maniar v. Capital Bank, No. C-89-2774 MHP, 1993 WL 515880, at *6 (N.D. Cal. Dec. 6, 1993); Adams v. Walker, 767 F. Supp. 1099, 1108 (D. Kan. 1991); Adams v. Madison Realty & Dev., 746 F. Supp. 419, 427-28 (D.N.J. 1990), *aff'd*, 937 F.2d 845 (3d Cir. 1991); FSLIC v. Maio, 736 F. Supp. 1039, 1041 (N.D. Cal. 1989); Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 669 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993).

Before it became clear that there was no test of *scienter* in common law D'Oench, courts were more willing to entertain the defense in theory, although rarely in practice. Buchanan v. FSLIC, 935 F.2d 83, 85-86 (5th Cir.), *cert. denied*, 502 U.S. 1005 (1991); FDIC v. McClanahan, 795 F.2d 512, 516-17 & n.4 (5th Cir. 1986); FDIC v. Bravo Leather Corp., [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,151, at 96,488-89 (S.D.N.Y. May 15, 1990), *vacated on motion for reconsideration sub nom.* FDIC v. Engel, 746 F. Supp. 1223 (S.D.N.Y. 1990). In addition, a review of the cases purporting to apply the defense reveals that it is most often asserted as an additional justification in situations in which an "asset" or "agreement" defense has already been held available. *See* Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 690-95 (10th Cir. 1993); Kingsway Revocable Trust v. FSLIC (*In re* C.P.C. Dev. Co. No. 5), 113 B.R. 637, 641 (Bankr. C.D. Cal. 1990). Other courts have cited the case as

In contrast, such defenses as may be useful can be broadly grouped under the headings of agreement or asset. This analysis is derived in large part from the reasoning of Justice Scalia in *Langley*. In that opinion, the court undertook to analyze the fraud claims of the Langleys under two rubrics: whether the fraud asserted constituted an agreement that would need to comply with the recording scheme of section 1823(e) and whether the fraud was so fundamental as to render their note, the asset, non-existent and thus bar assertion of the section altogether. Thus, an agreement defense is one that seeks to assert that the defense or counterclaim is not an "agreement," or in the language of common law D'Oench, a "scheme." An asset defense, on the other hand, is one that asserts that D'Oench does not apply because there is no asset in the hands of the insurer. Thus, in the case of statutory D'Oench, the requisites of section 1823(e) are not met and, in the case of common law D'Oench, the public policy adverted to by Justice Douglas in *D'Oench*, that the assets of the bank are not misrepresented, may not be implicated.

II. Nature of Claims Barred As "Agreements"

"[T]he person who made the promise must keep it, since 'A promise is at the bottom of the bag.' "[90]

In its origins, the D'Oench doctrine was closely tied to contract and more specifically to defenses to liability under contract—"agreements" or "schemes." The expansive definition of "agreement" propounded by the Court in *Langley* has been thoroughly accepted by the lower courts, which have barred an extensive list of contract defenses as arising from forbidden agreements. Limitations on the definitions of contractual covenants as agreements do exist. One is the new concept of ordinary banking transactions, which limits the reach of D'Oench to those transactions that the insurers could reasonably expect to be recorded in the bank's files. Another limitation sporadically protects the interests of parties whose loans, unknown to them, were transferred to the bank after they were made.

Attempts to plead lead into gold by asserting defenses barred by D'Oench as affirmative counterclaims have led the courts to derive the "mirror-image" rule.[91] This prevents a party from asserting against the insurer as an affirmative claim that which would have been barred by D'Oench if denominated as a defense. The bar on counter-

weak or analogous support for their positions. Cote d'Azur Homeowners Ass'n v. Venture Corp., 846 F. Supp. 827, 840 & n.24 (N.D. Cal. 1994); Gallant v. Kanterman (*In re* Kanterman), 97 B.R. 768, 776-77 (Bankr. S.D.N.Y.), *aff'd*, 108 B.R. 432 (S.D.N.Y. 1989).

90. Kanuni i Lekë Dukagjinit, ch. LXXXIV, § 516 (Shtjefën Gjeçov ed., 1933), *translated in* The Code of Lekë Dukagjini 114 (Leonard Fox trans., 1989) (Alb.).

91. First City, Tex.-Beaumont, N.A. v. Treece, 848 F. Supp. 727, 742 (E.D. Tex. 1994).

claims applies not only to claims in contract, but to those that sound in tort as well. There is not, however, a blanket prohibition on tort claims, only those that constitute artful repleadings of barred contract claims. If the tort arises from an independent duty, it will not be barred by D'Oench. These principles also apply to the trustee's rights in bankruptcy and to requests for relief from the Chancellor as well.

A. *Contract Defenses*

D'Oench has barred, as forbidden agreements, a variety of claims and defenses arising from defects in contract formation or from alterations of the terms of contracts after formation. Thus, D'Oench, in its various forms, has been used to bar claims or defenses grounded in defects in contract formation, such as fraudulent inducement (by act[92] or omission,[93] including acts of parties other than the bank),[94] unconscionability,[95] mistake,[96] nondelivery,[97] failure[98] or want[99] of consider-

92. Langley v. FDIC, 484 U.S. 86 (1987); Randolph v. RTC, 995 F.2d 611, 615 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994); FDIC v. Cardinal Oil Well Servicing Co., 837 F.2d 1369, 1372 (5th Cir. 1988); RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994). The fraudulent inducements are normally, but need not be, oral, and may include separate written certifications of fact. FSLIC v. Gordy, 928 F.2d 1558, 1560, 1564-65 (11th Cir. 1991).

93. RTC v. Ehrenhaus, 34 F.3d 441, 442 (7th Cir. 1994) (Posner, C.J.) (insisting, in light of *Langley*, that fraudulent omissions are covered by section 1823(e), because to do otherwise would be to make of the law " 'a ass, a idiot' "); McCullough v. FDIC, 987 F.2d 870, 872 (1st Cir. 1993) (citing cases); FDIC v. State Bank, 893 F.2d 139, 144 (7th Cir. 1990) (Easterbrook, J.) ("If the debtor can't use the bank's lies to block repayment, it can't use material omissions either—for the half-truth is one form of lie."); FDIC v. Bell, 892 F.2d 64, 66 (10th Cir. 1989), *cert. dismissed*, 496 U.S. 913 (1990); FDIC v. Hudson, 800 F. Supp. 867, 870-71 (N.D. Cal. 1990). *But see* Grant County Sav. & Loan Ass'n v. RTC, 770 F. Supp. 1374, 1379-82 (E.D. Ark. 1991), *rev'd on other grounds*, 968 F.2d 722 (8th Cir. 1992); Kingsway Revocable Trust v. FSLIC (*In re* C.P.C Dev. Co. No. 5), 113 B.R. 637, 640-41 (Bankr. C.D. Cal. 1990); *cf.* John v. RTC, 39 F.3d 773 (7th Cir. 1994) (contending that where fraudulent omission is not inconsistent with written provisions of agreement, it is not an agreement under common law D'Oench); Desmond v. FDIC, 798 F. Supp. 829, 835-36 (D. Mass. 1992) (theorizing, in dictum, that where misrepresentation was both an omission and peripheral to the bargain of the parties, *Langley*'s inclusion of misrepresentation in "agreement" might not apply).

94. Adams v. Madison Realty & Dev., 937 F.2d 845, 857-58 (3d Cir. 1991); Bohm v. Forum Resorts, Inc., 762 F. Supp. 705, 710-11 (E.D. Mich. 1991); FDIC v. Dixon, 681 F. Supp. 408, 411-12 (E.D. Mich. 1988).

95. Clay v. FDIC, 934 F.2d 69, 72-73 (5th Cir. 1991).

96. FDIC v. Lands, No. 91-16335, 1993 WL 360781, at *2 (9th Cir. Sept. 15, 1993); First Nat'l Bank v. FDIC, Civ. A. No. 92-12222-Y, 1993 WL 443917, at *4 (D. Mass. Sept. 30, 1993).

97. Gulf Fed. Sav. & Loan Ass'n v. Mulderig, 742 F. Supp. 358, 361 (E.D. La. 1989); Opton, Inc. v. FDIC, 647 A.2d 1126, 1128-32 (D.C. 1994).

98. RTC v. Camp, 965 F.2d 25, 30 (5th Cir. 1992); FDIC v. Wright, 942 F.2d 1089, 1098 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992); FDIC v. Stith, 772 F. Supp. 279, 282 n.11 (E.D. Va. 1991) (citing cases); NCNB Tex. Nat'l Bank v. Goldencrest Joint Venture, 761 F. Supp. 32, 34 (N.D. Tex. 1990); FSLIC v. Maio, 736 F. Supp. 1039, 1041 (N.D. Cal. 1989); FSLIC v. Wilson, 722 F. Supp. 306, 312-13 (N.D. Tex. 1989);

ation, usury[100] or undue influence;[101] claims that contractual rights have been created by the acts of the bank, such as oral contracts evidenced by performance[102] or under theories of promissory estoppel[103] or unjust enrichment;[104] and claims that the contract has been varied after formation, by means of oral agreements,[105] side agreements,[106]

FSLIC v. Ziegler, 680 F. Supp. 235, 237 (E.D. La. 1988); FDIC v. Amberson, 676 F. Supp. 777, 778, 780 (W.D. Tex. 1987).

99. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); FDIC v. Lands, No. 91-16335, 1993 WL 360781, at *2 (9th Cir. Sept. 15, 1993) ("[T]he defense . . . is precluded as a matter of law."); FDIC v. Bernstein, 944 F.2d 101, 108 (2d Cir. 1991); CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 94 (E.D. Va. 1992); FDIC v. Fisher, 727 F. Supp. 1306, 1310 (D. Minn. 1989); *see also* RTC v. Juergens, 965 F.2d 149, 155 (7th Cir. 1992) (dictum). *But see* Community Bank v. McKenzie, No. 90-0621-CV-W-9, 1992 WL 457513, at *6 (W.D. Mo. Apr. 6, 1992) (indicating, in dictum, that "[i]f . . the agreement was not valid because there was no consideration at all . . . this defense . . . would render § 1823(e) inapplicable"), *aff'd on different grounds sub nom.* Community Bank v. FDIC, 984 F.2d 254 (8th Cir. 1993).

100. Porras v. Petroplex Sav. Ass'n, 903 F.2d 379, 380 & n.2, 381 (5th Cir. 1990); NCNB Tex. Nat'l Bank v. Goldencrest Joint Venture, 761 F. Supp. 32, 34 (N.D. Tex. 1990); FDIC v. Julius Richman, Inc., 80 F.R.D. 114, 117-18 (E.D.N.Y. 1978), *aff'd on different grounds*, 666 F.2d 780 (2d Cir. 1981).

101. FSLIC v. Maio, 736 F. Supp. 1039, 1041 (N.D. Cal. 1989); FSLIC v. Musacchio, 695 F. Supp. 1044, 1052 (N.D. Cal. 1988).

102. Community Bank v. FDIC, 984 F.2d 254, 257 (8th Cir. 1993).

103. Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975, 983 (5th Cir. 1992); Bowen v. FDIC, 915 F.2d 1013, 1014-15 (5th Cir. 1990); Krebs v. FDIC, 851 F. Supp. 430, 431-32 (M.D. Fla. 1994); RTC v. Miller, No. C 93-20205 JW, 1993 WL 315463, at *2 (N.D. Cal. July 30, 1993); Holden v. FDIC, Civ. A. No. 91-11737-Z, 1993 WL 81459, at *2-3, n.1 (D. Mass. Mar. 3, 1993).

104. FDIC v. Kisosoh Realty Corp., No. 90 CIV. 7900(PKL), 1994 WL 702026, at *4-5 (S.D.N.Y. Dec. 14, 1994) (unjust enrichment); Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 32 (D.N.H. 1993) (*quantum meruit* and unjust enrichment). *But see* FDIC v. Gulf Life Ins. Co., 737 F.2d 1513, 1516 (11th Cir. 1984) (*see infra* note 107).

105. Langley v. FDIC, 484 U.S. 86, 92 (1987).

106. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 451-52 (1942); RTC v. Toler, 791 F. Supp. 649, 652 (N.D. Tex. 1991).

waiver,[107] estoppel,[108] course of conduct[109] or custom,[110] release of liability,[111] accord and satisfaction,[112] or other settlement agreement.[113]

Nevertheless, the "agreements" barred by D'Oench do not comprehend every contract; restrictions seem to flow from limitations on the reliance interest of the insurer and protection of the reliance interest of the debtor. If a transaction is not of the sort one would expect to find memorialized in banking records, the doctrine may not apply. In a recent development, courts have begun to apply the doctrine, in both common law and statutory forms, to "ordinary banking transactions" only.[114] Thus, the class of agreements that would fall within the ambit of D'Oench are those that one would expect to be approved by a loan committee or for knowledge of which the banking records would be relied upon by the insurers and not every possible contract

107. Lake Forest Devs. v. FDIC, 989 F.2d 197, 200-01 (5th Cir.), *cert. denied*, 114 S. Ct. 385 (1993); FDIC v. MM & S Partners, 626 F. Supp. 681, 685-87 (N.D. Ill. 1985); *see also* Fleet Bank v. Matthews, 795 F. Supp. 492, 497-98 & n.15 (D. Me. 1992) (dictum). One commentator has argued that waiver and estoppel should fall outside of the scope of section 1823(e). *See* Gray, *supra* note 38, at 288-89 (hypothesizing that because waiver and estoppel are not based on mutual assent, the defenses should survive); *cf.* FDIC v. Gulf Life Ins. Co., 737 F.2d 1513, 1516 (11th Cir. 1984) (deprecating claims that waiver, estoppel, and unjust enrichment were "agreements" for purposes of section 1823(e), because, based on pre-*Langley* logic, like fraud in the inducement they lacked element of mutual asset; nonetheless claims were barred by federal common law).

108. FSLIC v. Musacchio, 695 F. Supp. 1044, 1052 (N.D. Cal. 1988).

109. RTC v. Wellington Dev. Group, 761 F. Supp. 731, 736 (D. Colo. 1991); FDIC v. Bowles Livestock Comm'n Co., 739 F. Supp. 1364, 1369-70 (D. Neb. 1990), *rev'd*, 937 F.2d 1350 (8th Cir. 1991).

110. Swedbank (Sparbankernas Bank) v. FDIC, No. 93-1338, 1994 WL 183542, at *4 (1st Cir. May 13, 1994); FDIC v. Hamilton, 939 F.2d 1225, 1229-30 (5th Cir. 1991); FSLIC v. Musacchio, 695 F. Supp. 1044, 1052 (N.D. Cal. 1988).

111. *See infra* note 203 and accompanying text.

112. *See infra* notes 198-202 and accompanying text.

113. FDIC v. Bezahler, No. 91-5313, 1992 WL 336988, at *1 (D.C. Cir. Nov. 10, 1992); Fleet Bank v. Matthews, 795 F. Supp. 492, 497 & n.12 (D. Me. 1992); Morgan v. Heights Sav. Ass'n, 741 F. Supp. 620, 622 (E.D. Tex. 1990).

114. The "non-banking transaction" limitation on statutory D'Oench arose in Thigpen v. Sparks, 983 F.2d 644 (5th Cir. 1993) and was expanded and extended to the common law doctrine in Alexandria Associates v. Mitchell Co., 2 F.3d 598, 602 (5th Cir. 1993). In *Thigpen*, a bank had sold an entire subsidiary. The purchaser had demanded a warranty that the charter of the subsidiary had never lapsed, which warranty was made in a separate officers' certification. The warranty was, in the event, untrue. When the purchaser sued the receivership estate for breach of the warranty, the FDIC defended on the basis of section 1821(d)(9)(A). *Thigpen*, 983 F.2d at 645. The *Thigpen* court determined that section 1823(e) "does not apply to a claim arising from a bank's sale of an asset in a nonbanking transaction." *Id.* at 646-47. As such, the claim did not fall within the scope of section 1823(e), and thus derivatively, of section 1821(d)(9)(A). *Id.* at 646-49. Although *Thigpen* had concentrated on the issue of the asset requirement for section 1823(e), the court in *Alexandria Associates* focused on the non-banking language of *Thigpen* in barring a claim against a third-generation bank subsidiary for fees payable in connection with a real estate syndication. *Alexandria Assocs.*, 2 F.3d at 599-600, 602-03.

into which the bank may enter.[115] Ordinary banking transactions appear to exclude both such ordinary-course-of-business matters as employment[116] and such non-banking activities as real estate sales and development ventures.[117] The exception has frequently been applied to transactions by bank subsidiaries.[118] Transactions that do constitute ordinary banking business include lending,[119] the purchase of fidelity insurance,[120] and the issuance of letters of credit.[121] Transactions where loans were made may be excluded if the primary focus of the deal was not lending.[122] The ordinary banking business rule may have the effect of limiting the reach of statutory D'Oench but also may result in both an expansion and limitation of common law D'Oench. Courts have utilized the ordinary banking transactions rubric to expand the reach of common law D'Oench to cases in which no asset is implicated and to tell D'Oench-barred torts from their more fortunate siblings.[123] Where the banking business rule is imposed as a limitation by courts who have already crossed the no-asset Rubicon, it is done for many of the same prudential reasons that cause other courts to limit the reach of D'Oench to cases involving assets.[124]

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115. Alexandria Assocs. v. Mitchell Co., 2 F.3d 598, 602 (5th Cir. 1993).

116. Bender v. CenTrust Mortgage Corp., 833 F. Supp. 1525, 1529-32 (S.D. Fla. 1992) (refusing to extend D'Oench without further fact-finding and briefing); *see also* Cabarrocas v. RTC, 840 F. Supp. 888, 891-92 (S.D. Fla. 1993) (stating that contract for payment of architect is not an "agreement" for purposes of section 1823(e)).

117. John v. RTC, 39 F.3d 773 (7th Cir. 1994); Cote d'Azur Homeowners Ass'n v. Venture Corp., 846 F. Supp. 827, 840-41 (N.D. Cal. 1994); *cf.* Levy v. FDIC, 7 F.3d 1054, 1058 n.7 (1st Cir. 1993) (refusing to reach unbriefed issue of whether ordinary banking transactions exception would allow property purchaser to prevail on breach of warranty claim).

118. Alexandria Assocs. v. Mitchell Co., 2 F.3d 598, 602-03 (5th Cir. 1993); *In re* New Valley Corp., 168 B.R. 82, 84, 87-88 (Bankr. D.N.J. 1994). *But cf.* Robinowitz v. Gibraltar Sav., 23 F.3d 951, 957 (5th Cir. 1994) (denying the applicability of non-banking transactions exception to real estate development sub-subsidiary where the development project was financed by the ultimate-parent bank), *cert. denied*, 115 S. Ct. 725 (1995).

119. *Robinowitz*, 23 F.3d at 957; Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 731 & n.7 (D.N.J. 1993).

120. FDIC v. Oldenburg, 34 F.3d 1529, 1553 (10th Cir. 1994).

121. OPS Shopping Ctr. v. FDIC, 992 F.2d 306, 310-11 (11th Cir. 1993) (common law D'Oench).

122. *Compare In re* New Valley Corp., 168 B.R. 82 (Bankr. D.N.J. 1994) (holding that where bank subsidiary had sold non-banking business, transaction was M&A and not banking, and D'Oench did not apply to transaction, notwithstanding that note was given in payment) *with* Robinowitz v. Gibraltar Sav., 23 F.3d 951 (5th Cir. 1994) (stating that even though transaction was real estate development joint venture with subsidiary of bank and plaintiff owed no debt to bank, gravamen of complaint arose out of lending function and was *per se* banking transaction), *cert. denied*, 115 S. Ct. 725 (1995).

123. OPS Shopping Ctr. v. FDIC, 992 F.2d 306, 309-11 (11th Cir. 1993).

124. *Compare* Alexandria Assocs. v. Mitchell Co., 2 F.3d 598, 603 (5th Cir. 1993) (circumscribing scope of common law D'Oench to ordinary banking business because "[r]equiring bank boards or loan committees to consider, approve, and record every transaction . . . would make virtually impossible the performance . . . management

The reliance interest of borrowers who did not deal with the bank is also protected by excluding agreements not made with a bank from the scope of D'Oench. A bank may acquire assets that are subject to or created by agreements with parties other than the bank. Typical examples include the purchase of a note in the secondary market, the financing of a purchase from a third party, or the taking of a note as collateral. From the perspective of common law D'Oench, a party that is guilty of no more than a failure to prognosticate the future involvement of a bank in a transaction can hardly be said to have lent itself to a scheme to deceive unforeseen regulators. Courts also have been reluctant to read section 1823(e) to catch third-party agreements in its net. Most of the cases, despite broad language about "any agreement," seem to find an agreement only where the party made the note to a bank or was aware that the note would be sold or pledged to a bank.[125] Where, however, the involvement of a bank was unknown to the borrower, the courts might not impose liability.[126] Likewise,

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and policymaking functions") *with* Agri Export Coop. v. Universal Sav. Ass'n, 767 F. Supp. 824, 834 (S.D. Tex. 1991) ("Would the RTC have boards of directors operating *en banc* as tellers, approving and contemporaneously recording each and every bank transaction . . . ?").

125. *See* FDIC v. Giammettei, 34 F.3d 51 (2d Cir. 1994) (applying section 1823(e) where notes were made to partnership, but were to be assigned to a bank to secure further funding); Adams v. Madison Realty & Dev., 937 F.2d 845, 857-58 (3d Cir. 1991) (holding where notes were made to banks and then sold to defunct bank, misrepresentations by promoters of underlying securities constituted agreements under section 1823(e)); FDIC v. Friedland, 758 F. Supp. 941, 943-44 (S.D.N.Y. 1991) (mandating that where borrower executed estoppel letter in favor of bank, defense against liability based on agreement between the maker and the original payee referenced therein should be barred as not recorded in accordance with section 1823(e)); Bohm v. Forum Resorts, Inc., 762 F. Supp. 705, 710-11 (E.D. Mich. 1991) (barring interposition of defenses to note made to bank based on misrepresentations of promoters of securities); FDIC v. Dixon, 681 F. Supp. 408, 411-12 (E.D. Mich. 1988) (same).

126. RTC v. 1601 Partners, 796 F. Supp. 238, 240 (N.D. Tex. 1992); First Fin. Sav. Bank v. American Bankers Ins. Co., 783 F. Supp. 963, 967 (E.D.N.C. 1991); Park Tucson Investors Ltd. Partnership v. Ali, 770 F. Supp. 531, 536-38 (D. Ariz. 1991); Citytrust v. Clark & Fray Constr. Co., No. 58545, 1992 WL 98046, at *4 (Conn. Super. Ct. May 1, 1992); *cf.* RTC v. Liberty Homes, Inc., No. 90-2255, 1991 WL 163055, at *3 (10th Cir. Aug. 23, 1991) (allowing intentional interference with contractual relations claim, based on agreement between bank and third party to cut plaintiff out of deal, which was not an "agreement" for purposes of D'Oench). *But cf.* Blackman v. United Capital Invs., Inc., 12 F.3d 1030, 1032, 1033-34 (11th Cir. 1994) (stating that where notes were given to promoter of venture and then assigned to bank, fraud in the inducement defense would not stand; opinion does not specify whether the investors knew their notes would be pledged). The principle that section 1823(e) does not apply where the obligation was acquired by pledge has been explicitly expressed by one state court. Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1007 n.1 (La. Ct. App. 1993).

There are unfortunate exceptions to the rule, seemingly confined to land sales. Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400 (S.D. Ga. 1991) (holding that where plaintiffs had purchased land from a developer, who did not have title, title being in an affiliate of the developer that had mortgaged the land, bank was a "holder in due course" of land received at foreclosure and commenting that the RTC would not have been put on notice of the plaintiff's interest because the bank had not been involved where a non-signatory attempts to introduce an agreement for evidentiary rather than enforcement purposes, one court has held that this use of an agreement is excluded from the ambit of D'Oench.[127]

B. *Counterclaims, Claims and Claims Sounding in Tort*

D'Oench applies not only to defenses to, but also to affirmative claims against, the insurer. The courts have held that "[t]o allow a claim *against* the FDIC asserting the very grounds that could not be used as a defense to a claim *by* the FDIC is to let technicality stand in the way of principle."[128] Older cases allowed counterclaims relating to an asset to proceed, but only against the estate of the defunct bank.[129] The more modern trend is to disallow such counterclaims in

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in the transaction between the plaintiff and the seller of the land); Ajootian v. Lamont Lions Club (*In re* Ajootian), 119 B.R. 749 (Bankr. E.D. Cal. 1990) (holding that where local charity had donated land to builder on the condition, memorialized in unrecorded closing instructions, that the builder erect a clubhouse for charity and devote the remainder of the land to housing for the poor, transfer documents were "agreements" for purposes of section 1823(e), notwithstanding that the charity had no dealings with the bank).

127. RTC v. Ocotillo West Joint Venture, 840 F. Supp. 1463, 1477 (D.N.M. 1993). Even for those uninterested in the particulars of the case, it is well worth the attention of connoisseurs of judicial invective. *But cf.* Notrica v. FDIC, 2 F.3d 961, 964-66 (9th Cir. 1993) (repulsing claims by plaintiff second lienor that first lienor bank and property owner were engaged in joint venture as undocumented in bank's files and contrary to express term of loan agreement, and thus barred by D'Oench); Murphy v. FDIC, 829 F. Supp. 3, 6-8 (D.D.C. 1993) (rebuffing defrauded investor's claims that bank and promoter of limited partnership were joint venturers because joint venture was not documented in bank's files); FDIC v. Bodin Concrete Co., 869 S.W.2d 372, 381 (Tex. Ct. App. 1993) (refusing to entertain attempts by mechanics' lienors to assert that an agreement between a borrower and the bank was void, and thus improve their lien position, because "this party-nonparty dichotomy is a distinction without a difference because the federal policy underlying section 1823(e) would be violated if either a party or nonparty to an undocumented agreement were permitted to assert the agreement against the FDIC").

128. Beighley v. FDIC, 676 F. Supp. 130, 132 (N.D. Tex. 1987), *aff'd*, 868 F.2d 776 (5th Cir. 1989).

129. This approach was particularly common in federal holder in due course cases, displaying the continuing influence of negotiable instruments law: while the maker of a note is forbidden from asserting its defenses against the holder in due course, it remains free to assert them as claims against the party to whom the note was originally made. FDIC v. Byrne, 736 F. Supp. 727, 730-31 (N.D. Tex. 1990); FSLIC v. Smith, 755 F. Supp. 1432 (E.D. Ark. 1989). There appeared to be a split among Fifth Circuit panels as to whether a D'Oench-barred defense could be asserted against the receiver. *See* FDIC v. Texas Country Living, Inc., 756 F. Supp. 984, 989-90 (E.D. Tex. 1990) (discussing divergence). It now appears fairly well established that D'Oench bars the claim *in toto*. As a practical matter, being limited to a claim against the receivership was cold comfort indeed: even if the counterclaim succeeded, the obligor could expect to receive at most pennies on the dollar of its award, if anything at all. *Cf.* FDIC v. Rivera-Arroyo, 645 F. Supp. 511, 522-23 (D.P.R. 1986) (asserting that, with or without section 1823(e), where advance of further funds was not of such reciprocity as to give other party a right to cancel, or *rescindir*, its obligations upon nonperformance, i.e., was not a condition precedent of the obligation to repay prior loans, suit for damages on loan agreement could not be maintained against FDIC-Corporate, but only against receiver), *aff'd sub nom.* FDIC v. Bracero & Rivera, Inc., 895 F.

their entirety, so that they may not be asserted even against the receiver.[130] Courts barring such counterclaims express a reluctance to allow the rule of their decision to be determined by "artful pleading." A defense that would fail because of D'Oench will not be allowed to prevail under the heading "counterclaim."[131]

Such affirmative claims include those sounding in tort, as well as contract claims. Courts do not look with favor on attempts to evade the reach of D'Oench by rebottling breaches of contract as tort claims. Courts refuse tort claims if they are no more than artful repleadings of barred contractual claims.[132] Thus, claims of conversion,[133] fraud or

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2d 824 (1st Cir. 1990); RTC v. Dunmar Corp., 43 F.3d 587, 596-97 & n.6 (11th Cir. 1995) (calculating that if D'Oench were *not* to bar counterclaims, the defendant would remain liable to the RTC dollar-for-dollar, but could offset liability by a lesser amount equal to a pro-rated share of the estate, but setting aside such speculation on the ground that D'Oench *does* bar counterclaims); FDIC v. Brodie, 602 So. 2d 1358, 1360 (Fla. Dist. Ct. App. 1992) (permitting counterclaim for services rendered bank unrelated to note, and thus not barred by D'Oench or section 1823(e), to go forward, but only against receivership estate).

130. It is unclear why this sea change occurred. Certain courts seemed to feel that to allow the counterclaim to go forward was the same as permitting a defense. *See* Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 664 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993); Beighley v. FDIC, 676 F. Supp. 130, 132 (N.D. Tex. 1987), *aff'd*, 868 F.2d 776 (5th Cir. 1989). This appeared to imply that, in contrast to the counterclaims-payable-only-from-the-receivership approach, that a counterclaim could be offset dollar for dollar against an award of damages to the receiver. *Cf.* FDIC v. Bathgate, 27 F.3d 850, 872 (3d Cir. 1994) (refusing to reach issue as irrelevant, because all counterclaims were barred under D'Oench); Mainland Sav. Ass'n v. Riverfront Assocs., 872 F.2d 955 (10th Cir.) (denying under common law D'Oench affirmative claims brought by way of setoff), *cert. denied*, 493 U.S. 890 (1989).

131. FDIC v. Marine Midland Realty Credit Corp., 17 F.3d 715, 719 (4th Cir. 1994) (implying that, if based in an unwritten agreement, counterclaim would be barred by common law D'Oench); Abrams v. FDIC, 944 F.2d 307, 310 (6th Cir. 1991); RTC v. Murray, 935 F.2d 89, 94 (5th Cir. 1991); Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 49 (1st Cir. 1991); Kilpatrick v. Riddle, 907 F.2d 1523, 1528 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). *But see* Grubb v. FDIC, 868 F.2d 1151, 1159 (10th Cir. 1989) ("By its very terms, however, the D'Oench rule only prevents parties from raising defenses against the FDIC."). The Tenth Circuit has limited *Grubb*'s reach to cases where the agreement was voided by entry of judgment prior to takeover, although the original opinion contained no such limiting language. Castleglen, Inc. v. RTC, 984 F.2d 1571, 1578 (10th Cir. 1993).

132. If one is going to agree that D'Oench may serve as a shield as well as a sword, then *Langley* also compels the conclusion that fraud (there used as a shield by defendants) is equally unavailing when used as a sword by plaintiffs. *See* Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 50 (1st Cir. 1991) ("*D'Oench* is generally said to apply to tort claims. Although not decided under [common law] *D'Oench*, the Supreme Court's decision in *Langley v. FDIC* supports this conclusion by holding that § 1823(e) bars fraud claims that are premised upon an oral agreement." (citation and footnote omitted)). As Chief Judge Posner has pointed out, "[i]t is no doubt odd that the *D'Oench, Duhme* doctrine and its statutory codification, which say nothing about tort remedies, should extinguish borrowers' fraud remedies; but the Supreme Court crossed that bridge in *Langley*, and we must follow quietly." RTC v. Ehrenhaus, 34 F.3d 441, 442 (7th Cir. 1994).

negligent misrepresentation,[134] unjust enrichment,[135] negligence,[136] breach of a fiduciary duty,[137] or other business tort[138] will be barred as surely as the forbidden agreements from which they arose.[139]

The prohibition extends to statutory tort claims and defenses. D'Oench may defeat such federal heavyweights as the Securities Act

133. FDIC v. Giammettei, 34 F.3d 51, 57 (2d Cir. 1994); FDIC v. White, 820 F. Supp. 1423, 1428-29 (N.D. Ga. 1993); Holden v. FDIC, Civ. A. No. 91-11737-Z, 1993 WL 81459, at *2-3 & n.1 (D. Mass. Mar. 3, 1993); Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 799 F. Supp. 755, 774 & n.8 (E.D. Mich. 1992).

134. Vasapolli v. Rostoff, 39 F.3d 27, 35 (1st Cir. 1994) (negligent misrepresentation); Mainland Sav. Ass'n v. Riverfront Assocs., 872 F.2d 955, 956 (10th Cir.) (fraud), *cert. denied*, 493 U.S. 890 (1989); Inn at Saratoga Assocs. v. FDIC, 856 F. Supp. 111, 117-18 (N.D.N.Y. 1994) (fraud and negligent misrepresentation); FDIC v. Rusconi, 808 F. Supp. 30, 39 & n.19 (D. Me. 1992) (fraud); Torke v. FDIC, 761 F. Supp. 754, 755, 757 (D. Colo. 1991) (deceit and negligent misrepresentation).

135. Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 32 (D.N.H. 1993); AmWest Sav. Ass'n v. Farmers Mkt. of Odessa, Inc., 753 F. Supp. 1339, 1345 (W.D. Tex. 1990).

136. RTC v. Allen, 16 F.3d 568, 574 (4th Cir. 1994); RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994) (negligence and gross negligence). *But see* New Conn. Bank & Trust Co. v. Stadium Management Corp., 132 B.R. 205, 209-10 (D. Mass. 1991) (negligence).

137. Such claims have been bottomed on the terms of the loan, such as claims that an equity kicker in the underlying development created a joint venture. RTC v. Wellington Dev. Group, 761 F. Supp. 731, 737 (D. Colo. 1991); Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 749 F. Supp. 635, 646 (D.N.J. 1990). Others have attempted to show the existence of the relationship from the course of dealings between debtor and creditor. RTC v. Wellington Dev. Group, 761 F. Supp. 731, 736 (D. Colo. 1991); FDIC v. Delco Dev. Co., No. CV-90-303743, 1993 WL 343873, at *6 (Conn. Super. Ct. Aug. 30, 1993). Claims have been brought in the very teeth of the loan papers themselves. RTC v. Allen, 16 F.3d 568, 574-75 (4th Cir. 1994); Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1516 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); Savers Fed. Sav. & Loan Ass'n v. Amberley Huntsville, Ltd., 934 F.2d 1201, 1207-08 (11th Cir. 1991); RTC v. Jet Stream, Ltd., 790 F. Supp. 1130, 1137 (M.D. Fla. 1992); Torke v. FDIC, 761 F. Supp. 754, 757 (D. Colo. 1991). Even if there is a true breach of fiduciary duty, if it leads to execution of an agreement settling claims under the agreement creating that duty, the claim will be barred as an assertion of oral misrepresentations in derogation of the insurer's rights under the settlement agreement. Robinowitz v. Gibraltar Sav., 23 F.3d 951, 955 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 725 (1995).

138. FDIC v. Bathgate, 27 F.3d 850, 870-72 (3d Cir. 1994) (trade libel, slander of credit, slander of title, and unlawful interference with prospective economic advantage); Dahlstrom v. FDIC, No. 91-4006, 1992 WL 107354, at *1-2 (10th Cir. May 15, 1992) (estoppel, bad faith, duress, and conspiracy); RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994) (civil conspiracy); RTC v. Palmetto Fort, 831 F. Supp. 510, 516-17 (D.S.C. 1993) (defamation); NCNB Tex. Nat'l Bank v. Goldencrest Joint Venture, 761 F. Supp. 32, 34 (N.D. Tex. 1990) ("intentional tortious acts (of unknown variety)"); RSR Properties, Inc. v. FDIC, 706 F. Supp. 524, 530-32 (W.D. Tex. 1989) (negligent and grossly negligent breach of assorted duties to debtor); FSLIC v. Musacchio, 695 F. Supp. 1044, 1052 (N.D. Cal. 1988) (undue influence and breach of duty to renegotiate).

139. Here too, the distinction between D'Oench and section 1823(e) on the one hand, and the federal holder in due course doctrine on the other, may determine the outcome: if the defense arising from the non-agreement right, such as a lack of authority in the signatory, is deemed personal, it will not stand against the federal holder. First Fed. Bank v. Realty Capitol Assocs., No. CV90 304321, 1993 WL 524965 (Conn. Super. Ct. Dec. 8, 1993).

of 1933,[140] the Securities Exchange Act of 1934,[141] ERISA,[142] and even RICO.[143] Even other sections of the banking laws are not immune; an alleged tying agreement will not prevail as a defense against the insurer.[144] Thanks to the Supremacy Clause, D'Oench also trumps rights under state law, such as claims of consumer fraud or deceptive

140. Alexandria Assocs. v. Mitchell Co., 800 F. Supp. 1412 (S.D. Miss. 1992), *rev'd on other grounds*, 2 F.3d 598 (5th Cir. 1993); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1467-71 (D.D.C. 1992).

141. Kilpatrick v. Riddle, 907 F.2d 1523, 1525 n.2, 1528-29 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); Alexandria Assocs. v. Mitchell Co., 800 F. Supp. 1412 (S.D. Miss. 1992), *rev'd on other grounds*, 2 F.3d 598 (5th Cir. 1993); McCaugherty v. Siffermann, 772 F. Supp. 1128, 1133-34 (N.D. Cal. 1991); FDIC v. Hudson, 800 F. Supp. 867-871 (N.D. Cal. 1990).

142. Belsky v. First Nat'l Life Ins. Co., 653 F. Supp. 80, 85 (D. Neb. 1986) (dictum), *aff'd*, 818 F.2d 661 (8th Cir. 1987)

143. First City Nat'l Bank & Trust Co. v. FDIC, 730 F. Supp. 501, 510-11 (E.D.N.Y. 1990). This case is particularly notable in that, unlike many civil RICO suits, it involved actual mobsters. *See First City*, 730 F. Supp. at 505 ("On August 8, 1987, Irwin Schiff was assassinated while dining at the Bravo Sergio restaurant in New York City. An investigation into his murder peeled back layers of criminal fraud like the skin of an onion. One of these skins involved First Inter-County Bank of New York . . . ."). It may be that *First City* is not, in fact, a pure D'Oench case, as this Note discusses *infra* note 225, so the reader should see Bohm v. Forum Resorts, Inc., 762 F. Supp. 705 (E.D. Mich. 1991), and dicta in Mery v. Universal Savings Ass'n, 737 F. Supp. 1000, 1005 (S.D. Tex. 1990).

144. NCNB Tex. Nat'l Bank v. Johnson, 11 F.3d 1260, 1268 (5th Cir. 1994) (12 U.S.C. § 1972); NCNB Tex. Nat'l Bank v. King, 964 F.2d 1468, 1469-71 (5th Cir. 1991) (12 U.S.C. § 1972), *cert. denied*, 112 S. Ct. 2305 (1992); Newton v. Uniwest Fin. Corp., 967 F.2d 340, 345-46 (9th Cir. 1992) (12 U.S.C. § 1464(q)); Gustin v. FDIC, 835 F. Supp. 503, 510-11 (W.D. Mo. 1993) (12 U.S.C. § 1972); Diamond v. Union Bank & Trust, 776 F. Supp. 542, 543 (N.D. Okla. 1991) (12 U.S.C. § 1972); Yankee Bank for Fin. & Sav. v. Task Assocs., No. 88-CV-224, 1989 WL 87430, at *13 (N.D.N.Y. Aug. 4, 1989) (12 U.S.C. § 1464(q)). These provisions of the banking laws do for extensions of credit, sales or leases of property or provision of services by banks what § 3 of the Clayton Act does for more tangible commerce, disallowing conditioning extensions of credit on the taking of other goods or services. 12 U.S.C. § 1464(q) (Supp. V 1993) (thrifts); 12 U.S.C. § 1972 (1988 & Supp. V 1993) (commercial banks).

trade practices,[145] state securities law claims,[146] or claims for violations of state "Little RICO" statutes.[147]

Only claims that arise from artful pleading are barred. If an alleged breach of duty constitutes a "free standing tort,"[148] it is not an "agree-

145. FDIC v. Giammettei, 34 F.3d 51, 58 (2d Cir. 1994) (Connecticut Unfair Trade Practices Act); Sweeney v. RTC, 16 F.3d 1, 4-5 (1st Cir.) (Massachusetts deceptive trade practices law), *cert. denied*, 115 S. Ct. 291 (1994); Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 47, 49-50 (1st Cir. 1991) (same); Celtic Dev. Corp. v. FDIC, 836 F. Supp. 926, 936 (D. Mass. 1993) (same); Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 749 F. Supp. 635, 648 & n.12 (D.N.J. 1990) (New Jersey Consumer Fraud Act); Illinois *ex rel.* Hartigan v. Commonwealth Mortgage Corp. of Am., 723 F. Supp. 1258, 1259, 1262 (N.D. Ill. 1989) (Illinois Consumer Fraud and Deceptive Trade Practices Act and Uniform Deceptive Trade Practices Act). This remains true even if the state consumer law claims are asserted by the State itself or as *parens patriae*. Illinois *ex rel.* Hartigan v. Commonwealth Mortgage Corp. of Am., 723 F. Supp. 1258, 1259 & n.1, 1262 (N.D. Ill. 1989).

146. FDIC v. Giammettei, 34 F.3d 51, 58 (2d Cir. 1994) (Connecticut Uniform Securities Act); Murphy v. FDIC, 829 F. Supp. 3, 7 (D.D.C. 1993) (Virginia and Florida blue-sky laws).

147. RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994) (New Jersey RICO).

148. This phrase derives from Vernon v. FDIC, 981 F.2d 1230 (11th Cir. 1993) [hereinafter *Vernon II*]. Vernon sued the receivership (as opposed to the bridge bank claims disposed of in Vernon v. RTC, 907 F.2d 1101 (11th Cir. 1990) [hereinafter *Vernon I*], which is discussed *infra* note 223) for various securities law violations unrelated to a specific asset of the bank. The FDIC again attempted to defend on the basis of D'Oench, as it had in *Vernon I*. *Vernon II*, 981 F.2d at 1231-32. The claim was dispatched swiftly, the court pointing out that it had already determined in *Vernon I* that Vernon's claims survived D'Oench. *Vernon II*, 981 F.2d at 1233-34. The court did "not think the D'Oench doctrine operates to bar free standing tort claims that are not related to a specific asset." *Vernon II*, 981 F.2d at 1233-34. This fateful phrase was taken up in OPS Shopping Center v. FDIC, 992 F.2d 306 (11th Cir. 1993), when a beneficiary under a letter of credit attempted to assert that his was an affirmative claim unrelated to any asset. The court held that the liability was contractual and therefore not a free standing tort protected by the *Vernons*. The letter of credit was precisely the sort of ordinary banking transaction an examiner would expect to see memorialized in the bank's files, and there it must be memorialized if it is to have any effect. *OPS Shopping*, 992 F.2d at 309-11. The Eleventh Circuit has apparently imposed a relatedness test. In FDIC v. Govaert (*In re* Geri Zahn, Inc.), 25 F.3d 1539 (11th Cir. 1994), the court adopted a standard in which the tort must be one that is not intertwined with ordinary banking business such that one would expect its underpinnings to be reflected in the bank's records. *Govaert*, 25 F.3d at 1543-44 ("One obvious indicia [sic] of relatedness would be whether the oral representations were of matters that would generally be reflected in the records of ordinary banking transactions."). *See also* Motorcity of Jacksonville, Ltd. v. Southeast Bank, 39 F.3d 292 (11th Cir. 1994) (holding that where passive financial backers of auto dealership claimed that failure of bank to properly audit dealership and to report "out-of-trust" sales constituted breach of fiduciary duty and negligence, tort was sufficiently free-standing to survive D'Oench). This analysis has been ratified by the Eleventh Circuit *en banc* in RTC v. Dunmar Corp., 43 F.3d 587, 595 (11th Cir. 1995).

A peculiar variation on this theme was found in FDIC v. Rusconi, 808 F. Supp. 30 (D. Me. 1992). The court barred resort to tort claims under the state deceptive trade practices act, but only to the extent that the claims were in essence alternate pleadings of fraud in the inducement. Claims under the statute bottomed on actions asserted to be fraud in the factum were permitted to go forward. This seems to conflate the "asset" and "agreement" sides of the test. If there was a factual question as to the existence of an asset in the first instance, then all of the tort claims should be permit-ment" and is allowed to proceed.[149] The distinction between attempts to enforce barred contract claims under other rubrics and the enforcement of rights arising independently of agreements also applies to other non-tort rights and remedies. Examples of such rights are those of a trustee in bankruptcy with respect to voidable preferences and fraudulent conveyances.[150] These rights are held to arise indepen-

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ted to go forward, because, the asset being proven non-existent, the "agreements" plead in tort do not affect an interest in it and should not be barred.

149. Hanson v. FDIC, 13 F.3d 1247, 1251-52 (8th Cir. 1994); Garrett v. Commonwealth Mortgage Corp. of Am., 938 F.2d 591, 594-95 (5th Cir. 1991); FDIC v. Eltrex Int'l Corp., No. CIV. 91-434-JD, 1994 WL 258673, at *5 (D.N.H. Feb. 1, 1994); St. Bernard Sav. & Loan Ass'n v. Robin Seafood, Inc., CIV. A. Nos. 91-4655 & 92-38, 1993 WL 21328, at *3-4 (E.D. La. Jan. 25, 1993); New Bank of New Eng. v. Callahan, 798 F. Supp. 73, 76-77 (D.N.H. 1992); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1467-71 (D.D.C. 1992) (see discussion *infra* at notes 268-69); Claim of Citizens Bank (*In re* Liquidation of City & County Bank), 856 S.W.2d 137, 141-42 (Tenn. Ct. App. 1992) (holding that theft was not an "agreement" or "scheme"); RTC v. Cook, 840 S.W.2d 42, 47-49 (Tex. Ct. App. 1992) (noting that bank subsidiary's practice of calling pregnant debtor late at night and using racial slurs was not an "agreement"); *cf.* Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1008 (La. Ct. App. 1993) (stating that where land sellers failed to deliver legally-mandated disclosure documents, the fact that the statute rendered transaction merely voidable was irrelevant because the "statute clearly does not constitute an 'agreement' subject to the application of D'Oench, Duhme and § 1823(e)").

The importance of the determination of whether or not a breach of duty sounds in "agreement" may be seen in Desmond v. FDIC, 798 F. Supp. 829 (D. Mass. 1992). Here we enter the terrain of duress, which will become familiar in its status as a "real" defense negativing the existence of an asset. *See infra* notes 170-75 and accompanying text. Here there is a difference: the duress is asserted not to show an agreement void, but as an independent tort. Desmond was attempting to work out a settlement of his debt with the bank. On the eve of execution of the agreements, the bank suddenly demanded that Desmond's counsel (whose firm represented the bank on unrelated matters) withdraw from representing Desmond. Uncounselled and unfamiliar with the papers, Desmond mortgaged everything he owned. *Desmond*, 798 F. Supp. at 831. The court noted that the D'Oench inquiry is, in accordance with *Langley*, bifurcated. *Id.* at 837 n.4. While the duress asserted by Desmond was insufficient under state law to void his obligations under the "asset" prong, it was sufficiently peripheral to the terms of the parties' bargain as not to constitute an "agreement" for that prong of the inquiry, and thus survived D'Oench. *Id.* at 836-39. *But see* Gustin v. FDIC, 835 F. Supp. 503, 509-11 & n.13 (W.D. Mo. 1993) (rejecting *Desmond*).

150. Jobin v. RTC, 160 B.R. 161, 168-70 (D. Colo. 1993); Gallant v. Kanterman (*In re* Kanterman), 97 B.R. 768, 777 (Bankr. S.D.N.Y.), *aff'd*, 108 B.R. 432 (S.D.N.Y. 1989); First City Fin. Corp. v. FDIC (*In re* First City Fin. Corp.), 61 B.R. 95, 97 (Bankr. D.N.M. 1986); La Mancha Aire, Inc. v. FDIC (*In re* La Mancha Aire, Inc.), 41 B.R. 647, 648-49 (Bankr. S.D. Fla. 1984).

There is an exception to the power of the trustee to reclaim property, embodied in 11 U.S.C. § 550(b), which shields property held by an innocent purchaser for value from the trustee's reach. One bankruptcy court has held that, as a matter of law, the insurer is just such an innocent purchaser. Osherow v. First RepublicBank San Antonio, N.A. (*In re* Linen Warehouse, Inc.), 100 B.R. 856 (Bankr. W.D. Tex. 1989). *Contra* FDIC v. Wright (*In re* Still), 124 B.R. 24 (N.D. Tex. 1991), *aff'd*, 963 F.2d 75 (5th Cir. 1992); Thistlethwaite v. FDIC (*In re* Pernie Bailey Drilling Co.), 111 B.R. 565, 575-76 (Bankr. W.D. La. 1990); Gallant v. Kanterman (*In re* Kanterman), 97 B.R. 768, 776-77 (Bankr. S.D.N.Y.), *aff'd*, 108 B.R. 432 (S.D.N.Y. 1989). The difficulty with the *Linen Warehouse* reasoning is that, in contrast to the situation under dently of any agreement between the debtor and the bank and thus not to be subject to D'Oench. In contrast, the power of equitable subordination in bankruptcy prevails over D'Oench only if the inequitable conduct did not arise from a barred agreement.[151] This is consistent with the treatment of equitable subordination in non-bankruptcy courts[152] and of equitable remedies generally.[153] Likewise, liens and encumbrances and other interests in property created by mechanics' liens or other priority-setting statutes also survive D'Oench if they arise from independent rights under state law or not from forbidden agreements.[154] Even where the provision is couched

the "asset" prong of D'Oench, where determination of whether an innocent purchaser for value could take free and clear of a specified defense may determine whether D'Oench applies (*see infra* notes 178-181, 187), the rights of the trustee do not arise out of an "agreement" but rather from the mere fact of payment on an antecedent debt under the requisite circumstances.

151. Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1353-56 (1st Cir. 1992); Kingsway Revocable Trust v. FSLIC (*In re* C.P.C. Dev. Co. No. 5), 113 B.R. 637, 642-43 (Bankr. C.D. Cal. 1990); *see also* Holt v. FDIC (*In re* CTS Truss, Inc.), 868 F.2d 146, 149-50 (5th Cir. 1989) (dictum).

152. *Compare* Lawlor Corp. v. FDIC, 848 F. Supp. 1069, 1072-73 (D. Mass. 1994) (Young, J.) (permitting equitable subordination because, under Massachusetts equitable principles, equitable subordination may be invoked *only* where there is no agreement, and, as such, is not barred by D'Oench; if the officers of the bank acted inequitably so as to trigger the equitable subordination, D'Oench did not bar its application) *with* First Nat'l Bank v. FDIC, Civ. A. No. 92-12222-Y, 1993 WL 443917, at *4 (D. Mass. Sept. 30, 1993) (Young, J.) (holding that where claim for equitable subordination was grounded in "mistake" under unwritten agreement, claim was barred by D'Oench). *But cf.* First Heights Bank v. Gutierrez, 852 S.W.2d 596, 613 (Tex. Ct. App. 1993) (denying applicability of common law D'Oench to equitable subordination as "without merit as equitable subordination is a remedy and not a claim," but finding that grounds for remedy were, in any event, sufficiently documented in bank's files).

153. Such claims would be permitted where the wrongs to be righted by the conscience of equity have arisen from compliant agreements and barred where they did not. RTC v. Midwest Fed. Sav. Bank, 36 F.3d 785, 798-99 (9th Cir. 1993) (allowing reformation); Hanson v. FDIC, 13 F.3d 1247, 1251-52 (8th Cir. 1994) (indicating constructive trust could be imposed); Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 32 (D.N.H. 1993) (barring unjust enrichment and *quantum meruit*); McCaugherty v. Siffermann, 772 F. Supp. 1128, 1140 (N.D. Cal. 1991) (refusing constructive trust). Further, if the equitable right exists separate and apart from an artful pleading of a forbidden agreement, it will be allowed. Empire State Bank v. Citizens State Bank, 932 F.2d 1250, 1252-53 (8th Cir. 1991); FDIC v. Beam, No. CV92 29 13 52, 1993 WL 286636, at *2 (Conn. Super. Ct. July 16, 1993).

154. Such decisions have been grounded in the theories that the particular agreement was not an agreement for purposes of D'Oench or that the rights of the mechanic arise by operation of law and not agreements. Cabarrocas v. RTC, 840 F. Supp. 888, 892-93 (S.D. Fla. 1993) (holding agreement between bank and architect was not an agreement under D'Oench); RTC v. Ford Mall Assocs., 796 F. Supp. 1233, 1236-41 (D. Minn. 1992) (rejecting interposition of D'Oench on the ground that mechanic's liens arose from state law and were not agreements); Bascom Constr., Inc. v. FDIC, 777 F. Supp. 123, 125-26 (D.N.H. 1991) (finding right of mechanic to challenge price received at foreclosure sale did not arise from "agreement" and, FDIC's purported "federal" defense being inapposite, remand of case to state courts was proper); Citytrust v. Clark & Fray Constr. Co., No. 58545, 1992 WL 98046, at *4 (Conn. Super. Ct. May 1, 1992) (stating that agreement between mortgagor and con-

in terms of consent, in the absence of true agreement with the bank, state-law lien-setting priorities are apparently immune from D'Oench.[155]

Yet, in addition to the restrictions on D'Oench imposed by the broad outer limits of the term agreement, an additional genus of exception exists: the asset defenses. These are defenses based on the non-existence of an asset or the breach, not of a condition of an agreement affecting an asset, but of the very asset itself. It is to that second genus that this Note now turns.

III. Asset Defenses to the Application of D'Oench

"Plunder is not taken in repayment of a debt."[156]

The very words of section 1823(e) require the presence of an asset to be diminished by the forbidden agreement. Similarly, the principle located by Justice Douglas in the Federal Reserve Act requires a misrepresentation of the value of the assets in the hands of a bank. Claiming that the asset under which they appear obligated is no asset

tractor was between third parties and thus did not implicate D'Oench). *But cf.* L & R Prebuilt Homes, Inc. v. New Eng. Allbank for Sav., 783 F. Supp. 11, 12, 14-15 (D.N.H. 1992) (holding that where bank cozened contractor into continuing work, representations were an agreement and the resultant lien fell to D'Oench). Twin Construction, Inc. v. Boca Raton, Inc., 925 F.2d 378, 379-80 (11th Cir. 1991), is not authority to the contrary, because the construction company had already waived its statutory rights in favor of the lender long prior to (non-)execution of the letter agreement in issue in that case.

Even where the right arises from a forbidden agreement, if the same effect would be had in its absence, the right's invocation is permitted. Thus, where encumbered swine were sold and the proceeds remitted to the borrower under a tacit agreement between the auctioneer and the bank, the auctioneer could not be held for conversion, as state law also gave him the right to sell free and clear. *Compare* FDIC v. Bowles Livestock Comm'n Co., 937 F.2d 1350, 1353-56 (8th Cir. 1991) (holding that under Nebraska law, incorporated in federal common law, that auctioneer could sell free and clear) *with Bowles Livestock*, 937 F.2d at 1356-57 (Gibson, John R., J, dissenting) (complaining that his brother judges ignored the fact that the bank's consent to the sale of its pigs was unwritten and thus section 1823(e) should impose liability) *and* FDIC v. Bowles Livestock Comm'n Co., 739 F. Supp. 1364, 1368-1375 (D. Neb. 1990), *rev'd*, 937 F.2d 1350 (8th Cir. 1991) (imposing liability for conversion based on section 1823(e) and rejecting defendant's claim of non-liability under Nebraska law, because the case was controlled by federal common law imposing strict liability for conversion). *But cf.* Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 32 (D.N.H. 1993) (denying statutory right to recover brokers' fees).

155. Bateman v. FDIC, 970 F.2d 924 (1st Cir. 1992) (Breyer, C.J.) (holding that mechanics' lien arose from state priority of lien requirements, which one would not expect to see memorialized in bank files, and did not arise from an agreement, notwithstanding provision for "consent" in statute, where consent had been construed to constitute mere constructive notice). *See also* Villafane-Neriz v. FDIC, 20 F.3d 35, 41 (1st Cir. 1994) ("Here, the state law mechanism whereby the certificate of deposit was created, assigned to the Commissioner, and further protected from levying by creditors is similar to the state mechanic's lien system in *Bateman*.").

156. Kanuni i Lekë Dukagjinit, ch. CXIV, § 800 (Shtjefën Gjeçov ed., 1933), *translated in* The Code of Lekë Dukagjini 158 (Leonard Fox trans., 1989) (Alb.).

at all, parties have attempted to avoid the application of D'Oench by raising "real" defenses. Such defenses assert that a quondam asset in the hands of the insurer is no asset at all because it was void *ab initio*. Such defenses have included fraud in the factum, duress, insanity, and illegality. In addition, various statutory provisions may render an asset void. Thus, a violation of statute law requires the violator to pay damages, or where the violation makes an asset voidable rather than void, the asset remains viable and D'Oench will apply. If the asset is in fact void, while statutory D'Oench may not apply, common law D'Oench will.

A. *"Asset" Defenses Claiming that an Asset was Void at Takeover*

1. Assets Void *Ab Initio*

In *Langley* the Court indicated, albeit on the basis of a concession by FDIC counsel, that a defense based on fraud in the factum might defeat section 1823(e).[157] Fraud in the factum would defeat the interests of the insurer because where the agreement is void, there is no asset and thus nothing in which the insurer may have an interest to be " 'diminsh[ed] or defeat[ed].' "[158] A variety of other defenses based on voidness have also been asserted, and the "no asset" exception is generally recognized by the courts.[159] Given the broad definition of

157. The Court, responding to the Langleys' claims that an intentionally fraudulent misrepresentation should take the agreement out of section 1823(e), pointed out that, while a fraudulent misrepresentation was an "agreement" for purposes of section 1823(e),

> [t]he presence of fraud could be relevant, however, to . . . the requirement that the agreement in question "ten[d] to diminish or defeat the right, title or interest" of the FDIC in the asset.
>
> [The FDIC] conceded at oral argument that the real defense of fraud in the factum—that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents—would take the instrument out of § 1823(e), because it would render the instrument entirely void, thus leaving no "right, title or interest" that could be "diminish[ed] or defeat[ed]." Petitioners have never contended . . . that the alleged misrepresentations . . . constituted fraud in the factum. It is clear that they would constitute only fraud in the inducement, which renders the note voidable but not void. The bank therefore had and could transfer to the FDIC voidable title, which is enough to constitute "title *or* interest" in the note.

Langley v. FDIC, 484 U.S. 86, 93-94 (1987) (citations omitted).

158. *Langley*, 484 U.S. at 94 (quoting 12 U.S.C. § 1823(e) (1982)).

159. Courts have occasionally noted that this alleged exception is rooted in a concession at oral argument by Mr. Taranto, counsel for the FDIC, and is "[t]hus, an acknowledgment of what one party in the case conceded [which] certainly does not rise to the level of a dispositive holding, and arguably does not even rise to the level of indicating, however tentatively, the Court's views on the issue." Templin v. Weisgram, 867 F.2d 240, 242 (5th Cir.), *cert. denied*, 493 U.S. 814 (1989). The *Templin* court appears to been the only court to have actually held the "no asset" exception to be myth. *Templin*, which actually involved not fraud in the factum but a lien void under the Texas homestead laws, is discussed below. In any event, the Fifth Circuit has apparently backed away from this position. *See infra* notes 182 and 187.

"asset" under D'Oench,[160] it is in these defenses that refuge for those litigating against the insurers may be found. It is, however, important to note that the asset defenses are not the only ones available against D'Oench, despite certain ill-considered language in the reports.[161]

The real defenses are one form of the no-asset exception. A number of so-called "real" defenses exist, arising from defects in contract formation so severe that a contract may not be said to have been formed at all. Here the statutory and common law doctrines work in relative unison. Each of these defenses may render an obligation void, barring resort to statutory D'Oench under *Langley*'s dictum. Nor can a person who signs in excusable ignorance, with a knife to his throat, or because so ordered by voices in his head, properly be said to have lent himself to a "scheme" under common law D'Oench. It is in these defenses that the similarities between common law and statutory D'Oench on the one hand and the federal holder in due course doctrine on the other reach their apex.

Other courts have expressed similar sentiments, but have been willing to assume the existence of the exception for argument's sake or as the basis for an alternate holding. FSLIC v. Gordy, 928 F.2d 1558, 1565 (11th Cir. 1991); McLemore v. Landry, 898 F.2d 996, 1002 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990); RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994); Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400, 407 (S.D. Ga. 1991); FSLIC v. Wilson, 722 F. Supp. 306, 314-15 (N.D. Tex. 1989).

160. Courts have, for purposes of common law and statutory D'Oench, found a variety of types of contracts to be assets. *See, e.g.*, FDIC v. Oldenburg, 34 F.3d 1529, 1552-53 (10th Cir. 1994) (fidelity bond); FDIC v. Payne, 973 F.2d 403, 406 (5th Cir. 1992) (guaranty agreement); Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 671 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993) (reimbursement obligation for draws under letter of credit); Cutler v. FDIC, 796 F. Supp. 598, 603 (D. Me. 1992) (real property); FDIC v. Dixon, 681 F. Supp. 408, 412-13 (E.D. Mich. 1988) (assumption of liability agreement). Likewise, claims that common law or statutory D'Oench applies only to classes of obligation, such as negotiable instruments or notes, have been rejected. FDIC v. P.L.M. Int'l, Inc., 834 F.2d 248, 254-55 (1st Cir. 1987) (negotiable instruments); FDIC v. Dixon, 681 F. Supp. 408, 412-13 (E.D. Mich. 1988) (notes). *But cf.* FDIC v. Aetna Casualty & Sur. Co., 947 F.2d 196, 205 n.9 (6th Cir. 1991) (arguing section 1823(e) should be confined to negotiable instruments or instruments that resemble them). The case is, of course, different with respect to federal holder in due course, which may be so confined. *See supra* note 56.

Similarly, claims that because an asset had been written off or down on the books of the bank, D'Oench did not apply are summarily rejected. FDIC v. Kratz, 898 F.2d 669, 671 (8th Cir. 1990); FDIC v. Fisher, 727 F. Supp. 1306, 1310 (D. Minn. 1989); Stiles v. RTC, 831 S.W.2d 24, 28 (Tex. Ct. App. 1992), *rev'd on other grounds*, 867 S.W.2d 24 (Tex. 1993). Such claims are particularly risible, in that in *D'Oench* itself the note had been written off years before the bank was taken over. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 454 (1942). Some of these attempts have been quite creative. *See* FDIC v. Powers, 576 F. Supp. 1167, 1169 (N.D. Ill. 1983) ("[Defendants] cite an old Wisconsin case which holds that uncollectible loans are not assets for purposes of determining whether a bank's assets exceed its liabilities. Observing that they have refused to make payments under the guarantees, the [defendants] conclude that their . . . guarantees should not be considered assets under § 1823(e)."), *aff'd*, 753 F.2d 1076 (7th Cir. 1984).

161. RTC v. Colorado 126 Partnership, 746 F. Supp. 35 (D. Colo. 1990).

The defenses that might prevail against a holder in due course have been recognized under common law and statutory D'Oench. The real defenses asserted tend to follow those set out in the UCC: fraud in the factum, duress, and mental incapacity.[162] Similarly, the defense of forgery has been recognized as efficacious against the insurer, as it would be against a holder in due course,[163] but, as with a holder in due course, fraudulent alteration in the agreement has not prevailed, as being occasioned by the negligence of the maker.[164] The defenses of lack or limitation of agent authority have also been recognized,[165]

162. U.C.C. § 3-305 (1978) (article withdrawn 1990). Note that the UCC remits the question of whether or not infancy, insanity or duress will constitute a real defense to the contract law of the signatory state. UCC § 3-305 cmt. 5 (1978) (article withdrawn 1990). Everything that is not a "real" defense is denominated personal and will not stand against a holder in due course, or, under *Langley*, the insurers. "The real defenses are few in number and can be readily listed in 3-305(2)(a) to 3-305(2)(c). *All other defenses* are 'personal' . . . . Simply put, they include most defenses . . . since *any* defense available in an action on a simple contract will suffice. All are severed . . . ." Quinn, *supra* note 57, at ¶ 3-305[A][3].

163. U.C.C. §§ 3-403, 3-404 (1978) (article withdrawn 1990). That forgery would be a defense against D'Oench has been frequently recognized in dictum. RTC v Ehrenhaus, 34 F.3d 441, 442 (7th Cir. 1994) (Posner, C.J.); FDIC v. McClanahan, 795 F.2d 512, 515 (5th Cir. 1986); FSLIC v. Doyle, No. CIV. A. 87-3979, 1988 WL 59852, at *3 (E.D. La. June 6, 1988); FDIC v. Powers, 576 F. Supp. 1167, 1171 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1076 (7th Cir. 1984); FDIC v. Jahner, 506 N.W.2d 57, 61 (N.D. 1993). In one case the issue has been confronted directly, and it indeed appears that forgery will stand against D'Oench and section 1823(e), because it renders an instrument void *ab initio*. Commonwealth Land Title Co. v. Nelson, No. A14-92-01204-CV, 1994 WL 531267, at *8-10 (Tex. Ct. App. Sept. 29, 1994) (opinion not yet released for publication). Dictum indicates that the same rule might apply to a federal holder in due course. FDIC v. Adam, 803 F. Supp. 1225, 1228 (S.D. Tex. 1992).

164. U.C.C. § 3-407(2)(a) & cmt. 4 (1978) (article withdrawn 1990). The D'Oench cases seem to treat signature of blank instruments or pages as being negligent *per se*. FDIC v. Plato, 981 F.2d 852, 858 (5th Cir. 1993); FDIC v. Caporale, 931 F.2d 1, 2 (1st Cir. 1991); FSLIC v. Murray, 853 F.2d 1251, 1254-55 (5th Cir. 1988); FDIC v. Investors Assocs. X., Ltd., 775 F.2d 152, 154-56 (6th Cir. 1985); FDIC v. Powers, 576 F. Supp. 1167, 1170-72 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1076 (7th Cir. 1984); National Loan Investors, L.P. v. Martin, 488 N.W.2d 163, 166-67 (Iowa 1992); FDIC v. Central Wine & Liquor, 589 N.Y.S.2d 166 (N.Y. App. Div. 1992). Other courts have gone so far as to apply this without reference to whether the alteration was facilitated by the borrower or no. AmWest Sav. Ass'n v. Farmers Mkt. Market of Odessa, Inc., 753 F. Supp. 1339, 1345 (W.D. Tex. 1990).

165. U.C.C. § 3-403 (1978) (article withdrawn 1990). *See* McLemore v. Landry, 898 F.2d 996, 1000-02 (5th Cir.) (holding that where mandates, or powers of attorney, were referenced in operative documents and such documents were signed in representative capacity, defenses grounded in lack of authority were not barred by D'Oench), *cert. denied*, 498 U.S. 966 (1990); FSLIC v. Port Allen Dev. Corp., 684 F. Supp. 439, 440-41 (M.D. La. 1988) (stating that executing officer had authority to execute note, and *therefore* guarantors of corporation's debt were liable); *see also* Andrew D. Taylor Trust v. Security Trust Fed. Sav. & Loan Ass'n, 844 F.2d 337, 342-43 (6th Cir. 1988) (indicating, in dictum, that act of trustee in excess of authority would be a real defense, taking transaction outside of common law D'Oench); First Fed. Bank v. Realty Capitol Assocs., No. CV90 304321, 1993 WL 524965, at *2 (Conn. Super. Ct. Dec. 8, 1993) (stating defenses based on lack of authority of partner were not based in agreements and thus not barred by D'Oench or section 1823(e), but were barred by federal holder in due course). The reverse has also been held to be true, as one court has

although other courts have barred the organic documents or resolutions of borrowers' as forbidden side agreements.[166]

Fraud in the factum is fraud so severe that the very intention to contract is justifiably absent.[167] Given the stringency of the test for fraud in the factum, it is a rare case in which it will be found, and thus even courts willing to credit the *Langley* dictum will rarely have occasion to implement it.[168] Nonetheless, the defense has succeeded under both common law D'Oench and section 1823(e).[169]

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denied limited partners, as non-signatories, standing to assert an agreement entered into with the bank on behalf of the partnership. FDIC v. Giammettei, 34 F.3d 51, 56 (2d Cir. 1994).

166. FDIC v. Cremona Co., 832 F.2d 959, 962 (6th Cir. 1987) (partnership agreement), *cert. dismissed sub nom.* Gonda v. FDIC, 485 U.S. 1017 (1988); FDIC v. Allen, 801 F.2d 863, 864-65 (6th Cir. 1986) (same); First City, Tex.-Beaumont, N.A. v. Treece, 848 F. Supp. 727, 737-38 (E.D. Tex. 1994) (corporate resolutions).

167. Fraud in the factum, as distinguished from fraud in the inducement, is fraud so severe that the very existence of the contract, as opposed to its incidents, can be said to have been tainted. It is important to distinguish mere fraud in the inducement, which is barred by D'Oench. As one commentator has described it: "A classic illustration of fraud in the inducement is had with the poor dummy who is conned into buying the Brooklyn Bridge and writes out a check in payment," while fraud in the factum is "where some poor dummy is induced to sign what purports to be a mere receipt or some other innocuous sort of document which is, in fact, a negotiable instrument." Quinn, *supra* note 57, at ¶ 3-305[A][6][b]. The test is similar outside of the realm of negotiable instruments as well. E. Allan Farnsworth, Contracts 249-50 (2d ed. 1990). Not only must the defrauded party be clueless, there must also be no way, in the reasonable exercise of diligence, he could have procured a clue.

168. Vasapolli v. Rostoff, 39 F.3d 27, 35-36 (1st Cir. 1994); FDIC v. Lands, No. 91-16335, 1993 WL 360781, at *1 (9th Cir. Sept. 15, 1993); Castleglen, Inc. v. RTC, 984 F.2d 1571, 1577-78 (10th Cir. 1993); Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (*In re* 604 Columbus Ave. Realty Trust), 968 F.2d 1332, 1346-47 (1st Cir. 1992); FDIC v. O'Flahaven, 857 F. Supp. 154, 160 (D.N.H. 1994); RTC v. Davies, 824 F. Supp. 1002, 1012 (D. Kan. 1993); Alten v. T.A.E.I., Inc., No. CIV. A. 87-8343, 1993 WL 53566, at *4 (E.D. Pa. Mar. 3, 1993); Simms v. Biondo, 816 F. Supp. 814, 824-25 (E.D.N.Y. 1993); Washington Properties Ltd. Partnership v. RTC, 796 F. Supp. 542, 548-49 (D.D.C. 1992); Covell v. Photo Images, Inc., 768 F. Supp. 308, 312 (D. Kan. 1991); National Loan Investors, L.P. v. Martin, 488 N.W.2d 163, 167-68 (Iowa 1992); FDIC v. Jahner, 506 N.W.2d 57, 61 (N.D. 1993).

This is the case with fraud in the factum generally, not just in D'Oench cases. Quinn, *supra* note 57, at ¶ 3-305[A][6][b]; Farnsworth, *supra* note 167, at 250.

169. In FDIC v. Rusconi, 808 F. Supp. 30 (D. Me. 1992), the defendant guarantors asserted that they had been assured by the bank that liability under the guaranty would be limited to liability under a single note (although the guaranty was actually continuing), and that they had not intended to execute a guaranty. *Id.* at 35 n.7. They also asserted that the bank failed to supply them copies of the closing documents, including the guaranty, at the closing and for some considerable period of time thereafter. *Id.* at 39 n.20. Under these circumstances, the District Court found that an issue of material fact sufficient to survive summary judgment was presented. *Id.* at 40.

The defense has also succeeded in a federal holder in due course decision, with implications that it would have succeeded under D'Oench. In FDIC v. Turner, 869 F.2d 270 (6th Cir. 1989), Turner had executed a guaranty in blank, which was fraudulently completed by a bank officer, and used the guaranty for a transaction utterly unrelated to Turner's loans. *Id.* at 272. The court chose to analyze the case under the federal holder in due course doctrine, extending, without analysis, prior cases relating to notes to the contingent obligations of a guarantor. *Id.* at 273 (citing Tenn. Code

Duress also has been asserted as an asset-voiding defense to D'Oench. Typically, claimants have tried to use an "economic duress" defense, claiming that they were pressed so hard by the bank that they had no choice but to sign the agreement the insurer now seeks to enforce. As a general "hornbook" matter, however, only duress by physical compulsion rather than duress by threat to person or property would render a contract void.[170] These claims have succeeded (at least to the extent of surviving summary judgment) but rarely. They have been barred as a matter of law by courts holding duress to be a personal defense.[171] Other courts have barred such defenses as a matter of fact in the particular circumstances.[172] Nonetheless, if proven as a matter of fact and permitted as a matter of law, the defense will prevail against statutory and common law D'Oench.[173] Other courts have demanded that duress, not specified as to whether by compulsion or by threat, be documented and approved in the records of the bank in order to survive D'Oench.[174] This insistence on documentation is

Ann. § 47-3-305(2)(c)). The court also noted that Turner had not engaged in conduct likely to mislead banking authorities, and distinguished his conduct from that which had imposed liability in a number of cases invoking D'Oench and section 1823(e). *Id.* at 275-76. Although *Turner* was decided two years after *Langley*, and involved an obligation subject to section 1823(e), nowhere in the majority opinion is the *Langley* dictum addressed. The dissenting judge, while he disagreed with the majority's conclusion that Turner was not negligent and thus not liable to the federal holder, would have dismissed the D'Oench defenses on the basis that D'Oench barred only personal defenses and Turner's was a real defense. *Id.* at 277 n.1 (Ryan, J., dissenting). Judge Ryan did not cite any cases for the proposition that common law D'Oench does not bar "real" defenses, but it is likely that *Langley* was meant.

170. *Compare* Farnsworth, *supra* note 167, at 272 ("[D]uress by physical compulsion results in no contract at all or in what is somewhat anomalously described as a 'void contract.' ") *with* Farnsworth, *supra* note 167, at 282 ("Duress by threat . . . makes the resulting contract voidable at the instance of the victim.").

171. Vasapolli v. Rostoff, 39 F.3d 27, 34 (1st Cir. 1994); First City, Tex.-Beaumont, N.A. v. Treece, 848 F. Supp. 727, 738 (E.D. Tex. 1994); Gustin v. FDIC, 835 F. Supp. 503, 509-11 (W.D. Mo. 1993); FDIC v. Rusconi, 808 F. Supp. 30, 40-41 (D. Me. 1992); Diamond v. Union Bank & Trust, 776 F. Supp. 542, 543 (N.D. Okla. 1991); FDIC v. Meyer, 755 F. Supp. 10, 12-14 (D.D.C. 1991); B.L. Nelson & Assocs. v. Sunbelt Sav., FSB, 733 F. Supp. 1106, 1108, 1111-13 (N.D. Tex. 1990) (federal holder in due course); FSLIC v. Maio, 736 F. Supp. 1039, 1041 (N.D. Cal. 1989).

172. RTC v. Ruggiero, 756 F. Supp. 1092, 1095 (N.D. Ill. 1991), *aff'd*, 977 F.2d 309 (7th Cir. 1992).

173. In Thistlethwaite v. FDIC (*In re* Pernie Bailey Drilling Co.), 111 B.R. 565 (Bankr. W.D. La. 1990), the court determined that a defense of economic duress raised issues of material fact for trial. The court determined that the defense was not barred by section 1823(e), because the defense went to the underlying validity of the agreement. Nor was it barred by common law D'Oench, because one signing under duress may not be lending himself to a scheme. The court also held the defense effective against the federal holder, because duress was a defense available against a holder in due course under state law, summary judgment was unavailable on this ground. *Id.* at 573.

174. Without the slightest explanation, in FDIC v. Gettysburg Corp., 760 F. Supp. 115 (S.D. Tex. 1990), *aff'd without opinion sub nom.* Unitedbank v. Gettysburg Corp., 952 F.2d 400 (5th Cir.), *cert. denied*, 113 S. Ct. 70 (1992), the court stated that under D'Oench and section 1823(e), the defense of duress "cannot be used against the

utterly inconsistent with the statements of Justice Scalia in *Langley*;[175] the Court did not insist that unless the bank had somehow recorded that its borrowers had been hornswoggled, fraud in the factum would not be an effective defense.

There have been few cases in which the obligor has attempted to avoid his debt on the grounds of his own madness. Of these few cases, all have been determined under federal holder in due course principles, rather than under common law D'Oench or section 1823(e).[176] In all cases, the defense has been found to be barred as a matter of law as a personal defense unavailing against a holder in due course. Illegality is another of the "real" defenses, although it has been little used.[177]

FDIC unless Defendant can show, in writing from the Board of Directors or Loan Committee minutes evidence which supports the validity" of the defense. *Id.* at 117. Presumably, a minute authorizing officers of the bank to make the debtor an offer he couldn't refuse would be necessary to pass this test. The court appears to have confused these committees with the Commission of the Five Families. The court went on to hold that "[t]he claim of economic duress is also barred" by *Langley*. *Id.* The court did not clarify exactly how a claim of economic duress would be barred by *Langley*, although one may presume its status as a personal defense was meant.

175. *See supra* note 157 (quoting *Langley*).

176. One of the cases, FDIC v. Ohlson, 659 F. Supp. 490 (N.D. Iowa 1987), was decided before *Langley*. The court held that the defenses of fraud in the inducement, as in Gunter v. Hutcheson, 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982), and of mental incapacity were indistinguishable defenses to contract formation. *Ohlson*, 659 F. Supp. at 491. The court did mention in a footnote that a contract made by an incompetent being merely voidable under state law, but solely as a means of justifying its federal common law rule as not upsetting settled commercial expectations. *Id.* at 492 & n.3. In FSLIC v. Wilson, 722 F. Supp. 306 (N.D. Tex. 1989), the court held that not only need the incompetent "prove his complete 'innocence' in incurring the obligation . . ., he must also establish that the basis of his innocence is a defense available against a holder in due course." *Id.* at 317. The court went on to point out that a holder in due course takes free of the defense of incapacity, citing *Ohlson*, the Texas version of the UCC and Texas case law. *Id.* at 318. FSLIC v. Smith, 755 F. Supp. 1432 (E.D. Ark. 1989), is even more inconclusive. The court admitted that the defense of incapacity might be available against FSLIC as a federal holder in due course, but refused to determine the issue because neither party had briefed the issue. *Id.* at 1441.

177. The normal example in the treatises is a gambling debt, which is void in certain states. Quinn, *supra* note 57, at ¶ 3-305[A][7]. The "rule" is so riddled with exceptions, however, as to hardly be a rule at all. Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 671 (D. Utah 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993) (Utah law). Some courts have held that a violation of statute, even one that merely creates a right of recision or to damages in the borrower, may be sufficient illegality to void the instrument for purposes of D'Oench or the federal holder in due course doctrine. FDIC v. Allen, No. CIV-88-361-W, 1988 WL 361044, at *2-3 (W.D. Okla. Nov. 3, 1988); Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1007-08 (La. Ct. App. 1993). These appear to be isolated cases, as will be seen below. The theory that an underlying illegality would prevail over D'Oench is not uniformly held. Notrica v. FDIC, 2 F.3d 961, 964-65 (9th Cir. 1993) (insisting, in dictum, that even if failure of bank to be licensed in California rendered all of its transactions void, D'Oench would still bar illegality defense).

Statute law has been interposed as a defense to D'Oench. The remedy provided by the statute is what determines whether it survives D'Oench. It is clear that where a statute merely permits a victim to mulct the violator in damages, as in the case of the Equal Credit Opportunity Act,[178] D'Oench will bar resort to the defense.[179] Similarly, where an act creates a right of recision, rendering the underlying contract voidable, generally[180] D'Oench will bar the defense. This is true even if the statute speaks in terms of "void" obligations, if the words of the law have received a judicial gloss allowing mere voidability. Such is the lesson of the better-founded decisions on section 29 of the '34 Act,[181] although other courts have provided more dubious reasoning in deciding that section 29's protections do not survive D'Oench.[182] Decisions also have been handed down under laws actu-

178. 15 U.S.C. § 1691 (1988).

179. CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 94-97 (E.D. Va. 1992); *see also* Diamond v. Union Bank & Trust, 776 F. Supp. 542, 543-44 (N.D. Okla. 1991) (dictum). *But see* FDIC v. Allen, No. CIV-88-361-W, 1988 WL 361044, at *2-3 (W.D. Okla. Nov. 3, 1988) (holding violation of ECOA rendered contract void); FDIC v. Notis, 602 A.2d 1164, 1166 (Me. 1992) (holding ECOA claim, as a matter of law, survived 12 U.S.C. §§ 1821(n)(4)(I) and 1823(e)). One court has held that because the complaining spouse had signed the note her claim was not based on an unwritten agreement. Thus, her counterclaim for violation of ECOA, and a parallel state statute, were not barred by D'Oench. FDIC v. Piccolo, No. CV94-0310755S, 1994 WL 324488, at *5 (Conn. Super. Ct. June 28, 1994). Other cases have also allowed the counterclaim to survive, in contrast to the normal "mirror-image" rule. CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 94-97 (E.D. Va. 1992).

180. *But see* Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1008 (La. Ct. App. 1993) (holding that even though violation of consumer protection laws rendered note merely voidable, statute was not an "agreement" and defense would prevail against D'Oench).

181. 15 U.S.C. § 78cc(b) (1988). FDIC v. Giammettei, 34 F.3d 51, 58 (2d Cir. 1994); FDIC v. Hudson, 800 F. Supp. 867, 871 (N.D. Cal. 1990). In Kilpatrick v. Riddle, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991), the dissent quite strongly pointed out that the "voidability" of these void agreements ran only in favor of the defrauded party to prevent a wrongdoer, having accidentally made a contract favorable to his victim, from asserting his own sin and profiting by his own wrong. *Kilpatrick*, 907 F.2d at 1531-32 & n.11 (Brown, J., dissenting). This seems to ignore that all voidable contracts give the defrauded a put against the fraudfeasor; the same argument could be made of fraud in the inducement.

182. In Kilpatrick v. Riddle, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991), the Fifth Circuit ignored a similar argument, treating fraud in the inducement in a sale of securities as identical with fraud in the inducement in the sale of land. *Kilpatrick*, 907 F.2d at 1527-29. The Circuit more explicitly rejected the argument four years later in Dendinger v. First National Corp., 16 F.3d 99 (5th Cir. 1994), when the borrowers asserted that by filing suit prior to the failure of the bank they had elected to void their note and thus that the receiver took no asset. *Dendinger*, 16 F.3d at 101 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)). In response, the court stated that

> [t]he Supreme Court in *Langley* did conclude that the FDIC does not take title to void obligations, but it explained that *a transaction is void only if a plaintiff successfully asserts a fraud in the factum defense* . . . . In contrast, Appellants assert that . . . [the bank] fraudulently induced them to execute the promissory notes, a defense that makes the notes merely voidable.

Dendinger, 16 F.3d at 101 (citations omitted) (emphasis added).

ally rendering obligations void,[183] most notably the homestead provisions of the Texas Constitution.[184] While the Fifth Circuit's homestead decisions are not entirely consistent, they do suggest a rule. If the voidness is intentionally created by an "agreement to void," statutory D'Oench will apply and the insurer will prevail; however, a simple misrepresentation will not trigger the statute's application.[185] Common law D'Oench may provide a defense even if the

Similar sentiments had been more obliquely expressed by the *Kilpatrick* court. Kilpatrick v. Riddle, 907 F.2d 1523, 1527 n.6 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). In fine, we have a third version of the Fifth Circuit's view of voidable obligations; that voidness may arise only from fraud in the factum. *Compare Kilpatrick* (implying only fraud in the factum survives section 1823(e)) *with* Templin v. Weisgram, 867 F.2d 240, 242 (5th Cir.) (implying not even fraud in the factum survives section 1823(e), see *infra* note 185), *cert. denied*, 493 U.S. 814 (1989) *and* Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990) (allowing application of statute rendering obligations void to bar invocation of section 1823(e), see *infra* note 185).

183. Brogdon v. Exterior Design, Inc., 781 F. Supp. 1396, 1398-1400 (W.D. Ark. 1992).

184. Because perhaps the most comprehensive meditation on the void has been provided in cases relating to the homestead right under the Texas Constitution, a swift review of its provisions is in order. The constitution renders void liens against the homestead, unless such lien is for purchase money, home improvements or the payment of taxes. *See* Patterson v. FDIC, 918 F.2d 540, 543-44 (5th Cir. 1990). Even an affirmative misrepresentation by the borrower will not always remove its paternalistic protections. Nonetheless, the Fifth Circuit has located a few exceptions to the rule: representations that the property is not homestead, when the facts are such as to support the representation, where the lien is created by means of a sham sale, and when an owner represents that a mechanics' lien note is properly secured. *See* Smith v. United Nat'l Bank-Denton (*In re* Smith), 966 F.2d 973, 976-77 (5th Cir. 1992).

185. Templin v. Weisgram, 867 F.2d 240 (5th Cir.), *cert. denied*, 493 U.S. 814 (1989), held that the no-asset dictum of *Langley* would not be applied to liens void under the Texas constitution. *Templin*, 867 F.2d at 242. The case involved the sham sale of the residence of Templin and her then-husband, Billy Bob Biggs, to one Nelson, who then mortgaged it to a bank which had been involved in the whole rotten scheme. *Templin*, 867 F.2d at 240. The effect of these machinations was that the loan appeared to be a valid lien. *Templin*, 867 F.2d at 241 n.2. Templin sought to defend the foreclosure action on grounds that the lien, as a void obligation, could not be trumped by section 1823(e). *Templin*, 867 F.2d at 241-42. After rejecting *Langley*'s dictum, the court went on that, even if the dictum were granted some effect, it should be read not to create a blanket exception for void agreements but only when the proof of voidness would not rest, as it did in *Templin*, on secret agreements openly connived at. *Templin*, 867 F.2d at 242.

Templin's rejection of the "no asset" dictum was in its turn rejected by another panel in Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990). A borrower had executed a deed of trust containing an untrue recital that the encumbered property was not her homestead. *Patterson*, 918 F.2d at 541-42. The court held that the voiding provisions of the constitution prevailed because the homestead right " 'exist[s] independent of any agreement between the parties.' " *Patterson*, 918 F.2d at 543. *Templin* was distinguished because the borrower's claim was not based on any "scheme or bank representation." *Patterson*, 918 F.2d at 545. The idea that an "agreement to void" is invalid remains alive and well. (Nonetheless, as a sop to *Templin*, the court did refer to fraud in the factum as an "alleged" defense, in its later analysis of Patterson's fraud in the factum claim. *Patterson*, 918 F.2d at 546.)

asset is void, if there is some form of culpable conduct.[186] Further, consistent with the '34 Act cases, where the law creates exceptions to the rule of voidness, if the facts are consistent with such exception, the "void" contract is not void at all, and the insurer will prevail.[187]

186. In Buchanan v. FSLIC, 935 F.2d 83 (5th Cir.), *cert. denied*, 502 U.S. 1005 (1991), the *Templin* treatment was given common law D'Oench. The debtor had executed an agreement for improvements, that represented that the work had commenced after the signing of the contract, although such was not the case. *Id.* at 84. This, if true, would have taken the lien outside of the homestead laws. *Id.* at 84 & n.2. The court held that a borrower who executed a contract containing a false representation was sufficiently reckless to trigger liability under common law D'Oench, avoiding expressly, but without explanation, the application of section 1823(e). *Id.* at 85 & n.4, 86. The court, in contrast to other Fifth Circuit decisions, seemed to focus on borrower culpability as a determinative factor. *Id.* at 85-86. It is certainly worthy of note that, in contrast to *Patterson*'s insistence that an agreement containing a misrepresentation was not sufficient to take a void contract out of section 1823(e), the absence of a technical asset was insufficient to protect from common law D'Oench.

187. This seems to be the response of the bankruptcy courts to the welter of rulings on the homestead exemption. The courts have determined that the rulings in *Templin*, *Patterson*, and *Buchanan* may be best understood as extensions of traditional exceptions to the homestead law, although none of those decisions had rested itself on those exceptions, apart from a reference to "simulated sale" in *Patterson*'s explication of *Templin*. *Patterson*, 918 F.2d at 545. Thus, in Napier v. FDIC (*In re* Napier), 144 B.R. 719 (Bankr. W.D. Tex. 1992), the judge pigeonholed the *Templin* and *Buchanan* decisions into sham sale and mechanic's lien exceptions to the homestead law. *Napier*, 144 B.R. at 724-25 & nn.5, 6. Having done so, the court held the lien void under *Patterson*. In Stephens v FDIC (*In re* Stephens), 149 B.R. 414 (Bankr. E.D. Tex. 1992), the court confronted the tension among the precedents head on and determined that it was Texas law that made the decisions comprehensible. In *Patterson*, the court pointed out, the disclaimer of homestead had absolutely no effect under Texas law. *Stephens*, 149 B.R. at 418-19. In contrast, the representation of Buchanan as to the time her improvements had been completed would, if true, have taken the lien out of the homestead exemption, and in fact estoppel from assertion of homestead under the circumstances was recognized in Texas caselaw. *Stephens*, 149 B.R. at 418.

A similar approach, in which presumptions crafted in favor of the insurers in the D'Oench context are brought to bear on state law precedent to protect the insurers was adopted by the Fifth Circuit in another decision which did not, at least nominally, involve D'Oench. In Smith v. United National Bank-Denton (*In re* Smith), 966 F.2d 973 (5th Cir. 1992), the court found itself faced with yet another case of invalid mechanics' liens. The homeowners had entered into an agreement with a bank and a contractor under which a loan, facially appearing to be for improvements to their homestead was made. In fact no work was done or ever intended to be done. The lower courts determined that D'Oench barred any defense based on the voidness of the lien. *Smith*, 966 F.2d at 975. In contrast, the Fifth Circuit chose to determine the case solely on the basis of state court precedents under which a party who had assisted in the creation of a facially valid mechanics' lien was estopped to assert its invalidity against a subsequent good faith purchaser. In determining that the FDIC and United National were innocent assignees, the court relied on a state court federal holder in due course case. *Smith*, 966 F.2d at 977-78 (citing NCNB Tex. Nat'l Bank v. Campise, 788 S.W.2d 115, 118 (Tex. Ct. App. 1990)); *cf.* FDIC v. McCullough, 911 F.2d 593, 602 (11th Cir. 1990) (holding that where document was defectively notarized, because a holder in due course would have taken free under Alabama law, D'Oench applied), *cert. denied*, 500 U.S. 941 (1991); Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400, 407-09 (S.D. Ga. 1991) (following *McCullough* in holding that a voidable deed was no defense to the RTC).

2. Assets Voided After Contract Formation

Contracts may also be voided after their formation. It stands to reason that such should be so, otherwise the insurer would inherit not merely the assets of the bank as they existed at the time of takeover, but all loans ever made by that bank, even if the borrower had fully performed all of its obligations years before. At the same time, limitations must exist, else a borrower could, merely by exercising its option to void a voidable agreement, circumvent *Langley*.[188] A review of the cases reveals that they are congruent with the hypotheses developed in the context of contracts assertedly void *ab initio*. Assets may be voided by means of entry of judgment prior to the insolvency of the bank, frequently on grounds that could not have prevailed against D'Oench. The cases have recognized that the insurer takes nothing because it can have no right, title, or interest in the voided asset. Similar results have generally obtained where the "asset" has otherwise been voided prior to insolvency. Where the asset is purported to be voided by agreement, as with an accord and satisfaction or release of

188. It has been argued by a commentator that, should the defrauded party elect to rescind the transaction, there would then be no asset to be reached and the D'Oench doctrine and section 1823(e) thus evaded. *See* Michael J. Barry, Note, *Ways Around the Wrath: Exploring the Remaining Exceptions to the D'Oench, Duhme Doctrine and Section 1823(e)*, 54 U. Pitt. L. Rev. 1127 (1993). This ingenious approach, *pace* Mr. Barry, has been addressed, not least by his own circuit court years before he published, and has been found wanting. *Compare* Barry, *supra*, at 1147 ("The judgement does not render the note void, the manifestation of the election to assert to power [to rescind] does. Therefore summary judgement in favor of the FDIC in a case where it intervenes in a lawsuit in which a borrower has already elected recission . . . is not appropriate. The court must first determine whether the borrower had the right to rescind the note against the bank. If he did, the FDIC acquired nothing. *Currently, no court has recognized this distinction.*" (emphasis added)) *with* Dendinger v. First Nat'l Corp., 16 F.3d 99, 101-02 (5th Cir. 1994) (rejecting claim that because assets were voidable, and election to void made before insolvency FDIC took no asset and section 1823(e) did not apply); Adams v. Madison Realty & Dev., 937 F.2d 845, 855-56 (3d Cir. 1991) (using the *Kimbell Foods* analysis, described *supra* note 53, to determine that California law of recision was preempted by D'Oench and thus an asset remained to be reached) *and* Maniar v. Capital Bank, No. C-89-2774 MHP, 1993 WL 515880 (N.D. Cal. Dec. 6, 1993) (holding that recision does not void instrument until judgment is entered) *and* McCaugherty v. Siffermann, 772 F. Supp. 1128, 1133-34 (N.D. Cal. 1991) (holding claim for recision subject to D'Oench and section 1823(e)) *and* Grant County Sav. & Loan Ass'n v. RTC, 770 F. Supp. 1374, 1379-82 (E.D. Ark. 1991) (same), *rev'd on other grounds*, 968 F.2d 722 (8th Cir. 1992) *and* Shuler v. RTC, 757 F. Supp. 761, 767 (S.D. Miss. 1991) (same). *But cf.* Castleglen, Inc. v. RTC, 984 F.2d 1571, 1584 (10th Cir. 1993) (issue of whether legal recision was accomplished by tender of property prior to FDIC takeover not reached because it was raised for the first time on appeal).

Perhaps the best explanation for why this should be was provided in Maniar v. Capital Bank, No. C-89-2774 MHP, 1993 WL 515880 (N.D. Cal. Dec. 6, 1993), which rejected claims that unilateral recision accompanied by a tender of the consideration voided the asset on the grounds that "the recision is not irrevocable and the contract is not void until the court's final determination . . . In the instant case, '[t]he bank therefore had and could transfer to the FDIC voidable title, which is enough to constitute 'title or interest' in the note.' " *Maniar*, 1993 WL 515880, at *3 (citation omitted).

continuing guaranty, a more complex problem is presented. If the asset is void, then statutory D'Oench will not apply, but if statutory D'Oench applies, the asset will not be void. The Fifth Circuit has recently proposed a solution to this *koan* by performing an *in limine* review of the existence of an asset under the looser documentation requirements of common law D'Oench, a result consistent with cases on the defense of payment and also with the Texas homestead cases.

D'Oench has been held inapplicable to assets voided prior to insolvency by entry of judgment or other acts of the bank or others. For judgments, the question arises in the context of the availability of the D'Oench defenses for the first time on appeal. The results of these cases echo the classifications applicable to statutory violations described in part III.A.1 above. As an ordinary matter, if the bank has prevailed below, there is no bar to raising the D'Oench defenses on appeal.[189] Likewise, where the bank is merely mulcted in damages, but the asset remains, so too does the power to raise the defense on appeal.[190] If a judgment voids the asset, by granting recision, the judgment will prevail and D'Oench may not be raised on appeal.[191] The rule is not confined to voiding by judgment, because similar results have been seen where the borrower has asserted that other acts,

189. Metro N. State Bank v. Gaskin, 34 F.3d 589, 595 n.14 (8th Cir. 1994); McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 368 (5th Cir. 1993); 5300 Memorial Investors, Ltd. v. RTC (*In re* 5300 Memorial Investors, Ltd.), 973 F.2d 1160, 1164 (5th Cir. 1992); FDIC v. Hadid, 947 F.2d 1153, 1157 (4th Cir. 1991). *But cf.* Gray v. FDIC, 841 S.W.2d 72 (Tex. Ct. App. 1992) (holding that if the events rendering the instrument void befell before insolvency, regardless of the outcome below, then D'Oench may not be raised on appeal).

190. Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1514 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); RTC v. Foust, 869 P.2d 183, 195 & n.10 (Ariz. Ct. App. 1993).

191. Thurman v. FDIC, 889 F.2d 1441, 1445-47 (5th Cir. 1989); Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 275 (5th Cir. 1989); Grubb v. FDIC, 868 F.2d 1151, 1158-59 (10th Cir. 1989).

One court has, however, held that mere entry of an appealable judgment is insufficient to render the underlying agreement void for purposes of D'Oench. After all, even without D'Oench, the judgment could always have been reversed, and thus sufficient value remains in the asset for D'Oench to apply. FDIC v. Govaert (*In re* Geri Zahn, Inc.), 25 F.3d 1539, 1545 (11th Cir. 1994). More troubling, the same court held that the judgment constituted an "agreement" which was barred by section 1823(e) because it was not "executed" contemporaneously with the "asset" sued upon. *Govaert*, 25 F.3d at 1544-45. These propositions seem to misconstrue the nature of the "no asset" exception. While it is true, in some sense, that an appealable judgment is not without economic value, the key fact is that the judgment does not represent an "agreement" which diminishes the interest of the insurer in the underlying "asset," but rather an independent determination by a court as to the rights of the parties under that asset. The "contemporaneity" requirement applies to agreements affecting an asset, yet it is on the asset prong which the exception relies.

The other extreme may also be reached. One court has held that when it, itself, upon earlier motion rendered judgment in favor of the RTC, the note being reduced to judgment was no longer an asset. Thus D'Oench no longer provided a bar to counterclaims of fraud in connection with the making of the note. Abrams v. RTC, No. 89 C 3020, 1993 WL 276095 (N.D. Ill. July 21, 1993).

whether of the bank or a third party, have rendered the obligation void.[192]

Not all loans go unrepaid, even those made by failed banks, and borrowers will claim, often with justice, that they are being made to pay twice. A particularly egregious case was *FDIC v. Kasal*,[193] in which a bank officer filched money from a borrower's account, in the guise of applying payment to the borrower's loan and those of sundry of his relatives, whom he had convinced to sign the notes to allow the bank to comply with loans-to-one-borrower regulations.[194] The court held that the arrangement under which monies to be applied to pay-

192. An example is the *Prann* case, a puzzling maze of sloppy business practices and Roman law principles. FDIC v. Prann, 694 F. Supp. 1027, 1034-35 & n.12 (D.P.R. 1988), *aff'd sub nom.* FDIC v. Bracero & Rivera, Inc., 895 F. 2d 824 (1st Cir. 1990). A loan was assumed by a new borrower, who used the infusion of cash to pay off the note of the previous debtor, while pledging the paid off note to the bank, possibly in an attempt to give the bank security while avoiding the costs of closing and recording a new mortgage. *Id.* at 1032-38, 1033 n.10. When the FDIC sought to enforce the pledged note against the original debtor, it successfully interposed as a defense the fact that, as shown by the bank's own records, the second borrower had paid off the loan, and thus rendered the asset void. *Id.* at 1037-38. *See also* Centex-Simpson Constr. Co. v. Fidelity & Deposit Co., 795 F. Supp. 35, 41 (D. Me. 1992) (intercepting application of D'Oench where performing surety was subrogated to payment rights of defaulting subcontractor, because security interest of bank never attached to payments deposited in subcontractor's account and in the absence of an asset, D'Oench could not be invoked); FDIC v. Percival, 752 F. Supp. 313, 317, 321-22 (D. Neb. 1990) (holding that because bank failed to notify guarantor of impending disposition of collateral, guaranty was voided before FDIC takeover). *But cf.* FDIC v. Zook Bros. Constr. Co., 973 F.2d 1448, 1452-53 (9th Cir. 1992) (holding that because "federal common law" applied, Illinois precedents voiding guaranty in absence of notice to guarantor of alterations of terms of underlying debt did not apply). The court in *Zook Brothers* seemed to misconstrue the no-asset exception as requiring evidence of the voiding condition be contained in the loan file. *See Zook*, 973 F.2d at 1452-53. Thus, under the Ninth Circuit's thinking, the fraud in the factum exception would not apply, absent documentation. It does not appear that Justice Scalia would agree. *See supra* notes 157-59 and accompanying text (discussing fraud in the factum dictum).

The rule would, of course, be different for a federal holder in due course. *Compare Prann*, 694 F. Supp. at 1037-38 (allowing defense of payment against section 1823(e) where payment of loan was shown in bank records) *with* FDIC v. World Univ. Inc., 978 F.2d 10, 15-17 (1st Cir. 1992) (distinguishing FDIC v. Bracero & Rivera, Inc., 895 F. 2d 824 (1st Cir. 1990), the decision affirming *Prann*, where FDIC was holder in due course and alleged payment not documented in bank's files).

193. 913 F.2d 487 (8th Cir. 1990), *cert. denied*, 498 U.S. 1119 (1991). *But cf.* FDIC v. Sather, 488 N.W.2d 260, 261, 265-66 (Minn. 1992) (denying liability under D'Oench where bank officer embezzled monies by forging notes under line of credit; distinguishing *Kasal* in that officer left "paper trail" in bank records, and embezzlement was not an agreement for purposes of section 1823(e)). Other cases have similarly barred payment defenses, although in less outrageous circumstances. FDIC v. Wright, 942 F.2d 1089, 1100-01 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992); FDIC v. Houran Plaza Assocs., Civ. A. No. 91-7986, 1992 WL 158409, at *4 (E.D. Pa. June 30, 1992); *cf.* FDIC v. Betancourt, 865 F. Supp. 1035, 1041-43 (S.D.N.Y. 1994) (holding that where borrower asserted that check paid to bank over a year prior to making of notes was to be applied to all of borrowers indebtedness, and thus that notes had been paid, D'Oench and section 1823(e) barred defense).

194. *Kasal*, 913 F.2d at 488-89.

ment of the loans were netted from the borrower's account was a secret agreement, for purposes of both statutory and common law D'Oench, not only as to the relatives, but also as to the borrower himself.[195] The decision seems ill-founded. The court made no reference to any particular mode of payment being required by the terms of the notes, so that reference to payment by netting funds seems no less acceptable than any other means. Carried to its logical conclusion, the decision in *Kasal* implies that one could not pay one's loan by a check drawn on the creditor bank. After all, the check represents an order of the bank to net funds, as surely as did Kasal's arrangement. Other courts have, fortunately, recognized that payment is an *in limine* fact question of the continuing existence of the "asset."[196]

When an agreement to void an asset is implicated, the situation becomes more complex. The hypothesis derived from the Texas homestead cases that an agreement to void an asset is subject to D'Oench is reinforced by an examination of cases involving accords and satisfactions. An accord and satisfaction presents a peculiar variation on the problem of void assets under section 1823(e) and, by extension, common law D'Oench.[197] Clearly, an accord is an agreement that, at least in executory form, may adversely affect the interests of the insurer in an underlying asset.[198] Because the accord when performed results in the utter elimination of the asset, the satisfaction may provide a de-

195. *Kasal*, 913 F.2d at 490-92.

196. Commerce Fed. Sav. Bank v. FDIC, 872 F.2d 1240, 1244-46 (6th Cir. 1989) (holding that under section 1823(e), where a mortgage contained a "dragnet" clause subjecting the property to the lien of the bank with respect to all indebtedness of the borrower, if the original loan was, in fact and in the records of the bank, paid off before additional indebtedness was incurred, the mortgage was voided by performance and recourse to the property under the dragnet clause could not be had); FDIC v. Prann, 694 F. Supp. 1027, 1037-38 (D.P.R. 1988) (holding that where records of bank indicated that debt of assignor had been paid by assuming debtor, no asset is implicated and section 1823(e) does not apply), *aff'd sub nom.* FDIC v. Bracero & Rivera, Inc. 895 F.2d 824 (1st Cir. 1990); FDIC v. Kuang Hsung Chuang, 690 F. Supp. 192, 199 (S.D.N.Y. 1988) (stating that where defense of payment is raised under common law D'Oench, bank records and receipts in the hands of debtor may be examined to determine amount of liability). Indeed, the *Kasal* court itself implied that had the thief left a paper trail, common law D'Oench at least would not have applied. *Kasal*, 913 F.2d at 492.

197. Because it is not an effective defense against an ordinary holder in due course, accord and satisfaction has no parallel effect under the federal holder in due course doctrine. FDIC v. Manatt, 688 F. Supp. 1327, 1331-32 (E.D. Ark. 1988), *aff'd on different grounds*, 922 F.2d 486 (8th Cir.), *cert. denied*, 501 U.S. 1250 (1991).

198. Thus, courts have distinguished cases in which the accord remains a mere executory agreement adversely affecting the interests of the insurer from those in which the satisfaction has been performed. FDIC v. Longley I Realty Trust, 988 F.2d 270, 274 (1st Cir. 1993); RTC v. Teem Partnership, 770 F. Supp. 1439, 1445 (D. Colo. 1991), *rev'd on other grounds*, 977 F.2d 596 (10th Cir. 1992); RTC v. Crow, 763 F. Supp. 887, 893-94 & n.5 (N.D. Tex. 1991); Danbury Sav. & Loan Ass'n v. Natale, No. 30 54 10, 1992 WL 335754, at *3 (Conn. Super. Ct. Oct. 23, 1992); *cf.* FDIC v. Rouse, 859 F. Supp. 234, 237 n.6 (E.D. La. 1994) (indicating oral agreement to execute *dation en paiement* would fall afoul of D'Oench).

fense against section 1823(e). One older case held that a performed accord voided the asset and barred application of section 1823(e),[199] a result not superficially discordant with Justice Scalia's later statements in *Langley*.[200] Other courts have insisted that any accord and satisfaction, whether or not performed, must comply with section 1823(e)'s strictures.[201] This includes, in extreme cases, the requirement that the settlement be executed contemporaneously with the obligation it is intended to satisfy (thus effectively barring *any* accord and satisfaction).[202]

Is a performed agreement voiding an asset to be judged by the standards of section 1823(e), rendering the asset valid *in perpetuum*? A similar problem has been presented by the continuing guaranty.[203] In

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199. FDIC v. Nemecek, 641 F. Supp. 740, 742-43 (D. Kan. 1986). Even before *Langley*, courts denied that a performed satisfaction took the "asset" out of section 1823(e). Public Loan Co. v. FDIC, 803 F.2d 82, 85 (3d Cir. 1986). *Nemecek* has been rejected even in its own District. Premier Bank v. Cohen-Esrey Properties, Inc., 859 F. Supp. 1388, 1395-96 & n.8 (D. Kan. 1994); FDIC v. National Consumer Alliance, Civ. A. No. 93-2769-EEO, 1994 WL 326064, at *1 (D. Kan. June 20, 1994); FDIC v. Cover, 714 F. Supp. 455, 458 (D. Kan. 1988).

200. *See supra* notes 157-59 (discussing Justice Scalia's invocation of asset requirement).

201. FDIC v. Krause, 904 F.2d 463, 466 (8th Cir. 1990); FDIC v. Marina, 892 F.2d 1522, 1526-28 (11th Cir. 1990); FDIC v. Gulf Life Ins. Co., 737 F.2d 1513, 1515-16 (11th Cir. 1984); FDIC v. Fisher, 727 F. Supp. 1306, 1311 (D. Minn. 1989); Suffield Bank v. Berman, No. CV 900376564, 1993 WL 28891, at *5-6 (Conn. Super. Ct. Jan. 28, 1993).

202. RTC v. Crow, 763 F. Supp. 887, 893-95 (N.D. Tex. 1991); FDIC v. Manatt, 688 F. Supp. 1327, 1330 (E.D. Ark. 1988), *aff'd on different grounds*, 922 F.2d 486 (8th Cir.), *cert. denied*, 501 U.S. 1250 (1991); *cf.* FDIC v. Bathgate, 27 F.3d 850, 866 (3d Cir. 1994) (noting that workout agreement whereby new assets were to be given in satisfaction of old could well be barred by contemporaneity requirement, but finding it unnecessary to reach issue as agreement was too vague to be enforceable under D'Oench); FDIC v. Delco Dev. Co., No. CV-90-303743, 1993 WL 343873, at *7 (Conn. Super. Ct. Aug. 30, 1993) (noting that satisfaction agreement was not executed contemporaneously with underlying transaction).

Two members of the circuit court panel in *Manatt* affirmed on the grounds of lack of board approval, not of lack of contemporaneity, and expressed some distaste for the view that contemporaneity was required in the context of accord and satisfaction. FDIC v. Manatt, 922 F.2d 486, 488-89 & n.4 (8th Cir.), *cert. denied*, 501 U.S. 1250 (1991); *see also* RTC v. Shuffield, No. 92-1684, 1993 WL 4822, at *2 & n.3 (8th Cir. Jan. 13, 1993) (continuing reluctance to apply contemporaneity).

203. FDIC v. P.L.M. Int'l, Inc., 834 F.2d 248, 252-54 (1st Cir. 1987); FDIC v. Haupt (*In re* Estate of Thies), 463 N.W.2d 40 (Iowa 1990). If the asset is voided in accordance with the rights of the guarantor to do so by notice, under the express terms of the guaranty, the release should be given effect, because this is the invocation of an express right under the terms of the asset. FDIC v. Panelfab P.R., Inc., 739 F.2d 26, 29-30 (1st Cir. 1984); *see also* FDIC v. Venture Contractors, Inc., 825 F.2d 143, 150 & n.9 (7th Cir. 1987) (dictum); *cf.* FDIC v. O'Malley, 618 N.E.2d 818, 829 (Ill. App. Ct. 1993) (stating that general release which did not refer to guaranty was too vague to operate as a cancellation in accordance with the terms of the guaranty), *aff'd*, No. 76106, 1994 WL 587659 (Ill. Oct. 27, 1994). *But see* FDIC v. Virginia Crossings Partnership, 909 F.2d 306, 312-13 (8th Cir. 1990) (stating that even if cancellation notice had complied with terms of guaranties, it still would have been ineffective because it did not comply with section 1823(e)). How the *Virginia Crossings* court expected a

that context, the solution to the conundrum was recently propounded in *FDIC v. McFarland*.[204] The court examined the purported release under the less stringent documentation standard of common law D'Oench and, having satisfied itself that the release was documented in the bank's files, determined that under the "no asset" exception section 1823(e) did not apply.[205] Just as in the Texas homestead cases, the lesson is that while section 1823(e) may not apply in the absence of an asset, common law D'Oench may.

This use of common law D'Oench may also apply to cases involving sale or other transfer. The decisions are rather confusing, but apparently so long as the transaction is documented in the bank's files, the more rigorous requirements of section 1823(e) need not be met.[206]

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notice of cancellation to be executed contemporaneously with the acquisition of the asset is unclear. It appears a release by the bank, even if issued in accordance with the terms of the guaranty, must comply with section 1823(e). FDIC v. O'Malley, 618 N.E.2d 818, 827-28 (Ill. App. Ct. 1993), *aff'd*, No. 76106, 1994 WL 587659 (Ill. Oct. 27, 1994); *cf.* Bank One Tex. Nat'l Ass'n v. Morrison, 26 F.3d 544, 549-51 (5th Cir. 1994) (holding that where section 1823(e)-compliant loan documents evidenced that loan was not subject to "continuing" guaranty, D'Oench did not bar assertion that guaranty had been released).

204. 33 F.3d 532, 538 (5th Cir. 1994) (The *McFarland* case is discussed below at text accompanying notes 291-92.); *cf.* FDIC v. Box, No. 05-92-02747-CV, 1993 WL 480217, at *2-3 (Tex. Ct. App. Nov. 19, 1993) (allowing proof of satisfaction of note by reference to internal bank memoranda not compliant with section 1823(e)). *But see* FDIC v. Bravo Leather Corp., [1990-91 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,151, at 96,488 (S.D.N.Y. May 15, 1990) (holding common law D'Oench did not apply, because "*D'Oench* estops a defendant from basing a defense to a note on a secret 'side' agreement, not a subsequent agreement by an innocent defendant to cancel a guaranty in its entirety for consideration"), *vacated on motion for reconsideration sub nom.* FDIC v. Engel, 746 F. Supp. 1223 (S.D.N.Y. 1990). The issue is less pressing, of course, where the entire case is subject to a less rigorous documentation standard under common law D'Oench. *See* First Heights Bank v. Gutierrez, 852 S.W.2d 596, 607-08 (Tex. Ct. App. 1993).

205. *McFarland*, 33 F.3d at 538-39.

206. Apparently neither the retention of equitable or record title will suffice to bring the bank's former asset within the reach of section 1823(e) or D'Oench.

In Texas Commerce Bank v. United Savings Ass'n, 789 F. Supp. 848 (S.D. Tex. 1992), management of the bank had transferred funds to a trustee to be held to pay employee bonuses. The transaction was fully memorialized in the records of the bank, and had been approved by the board in the presence of regulatory officials. When the bank was taken over, the FDIC sought to retrieve the funds, claiming that the transfer was void under D'Oench. The court replied:

> [T]he alleged *D'Oench Duhme* doctrine is not relevant here. Only if the beneficiaries were trying to enforce the trust against [the bank] or the FDIC would *D'Oench Duhme* apply. Neither the trust nor the plan is an agreement that tends to diminish the right, title, or interest of the FDIC in any asset it acquired. The trust corpus is not an asset of the FDIC. Texas Commerce, as trustee, holds legal title to the funds.

Id. at 851 (citation omitted). The court was later willing to proclaim that the FDIC had an enforceable reversionary interest in the trust after the bonus funds had been paid. *Id.* at 853-54.

A similar situation was presented in Integon Life Insurance Corp. v. Southmark Heritage Retirement Corp., 813 F. Supp. 783 (N.D. Ala. 992). The bank had sold its interest in certain land to an affiliated company, but due to error, the deed was never

All the foregoing serve as *defenses*, as shields against attempts by the insurer to use D'Oench as a sword. Yet the situation being reversed and the bank the party defendant, the same courts turn away and state that no asset is required.

B. *Affirmative Claims in the Absence of an Asset*

Courts have confronted situations in which affirmative claims that are unrelated to a particular asset have been made against the insurer. One court has held that section 1823(e) applies not only to defenses and claims against a particular asset, but also to a diminution of the receivership estate generally. Similarly, courts have held that a subsidiary is an "asset" for purposes of section 1823(e), meaning that any affirmative claim against the subsidiary must comply with the statute. Neither of these approaches survives close examination of the language of the statute. FIRREA enacted section 1821(d)(9)(A), a provision subjecting affirmative claims against the receiver to the strictures of section 1823(e). The new provision has been little applied. Those courts examining the provision closely have concluded it is a codification of the mirror image rule, and thus an asset remains necessary for its application. Such assetless affirmative claims have also been allowed under common law D'Oench, although the majority of cases have dealt with agreements to lend or paid-off loans, where an asset was to have existed or formerly did exist.

1. Under Section 1823(e)

One court has taken the position that in affirmative claims against the bank, section 1823(e) is freed from the constraints imposed by the "no asset" exception. The court took the view that an agreement that increases the liabilities of the bank diminishes the insurer's interests in the bank's "assets" in aggregate.[207] The theory appears to be that the

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recorded, record title thus remaining in the bank, although the intention to sell the property was memorialized in a letter from the CEO of the bank to the regulators. The buyer made application to the insurer for a replacement deed, and the insurer, delighted at this found asset, defended its rights to the land on the basis of D'Oench and section 1823(e). *Id.* at 786, 788 n.15. The court denied the defense, because the property (having been sold) was not listed as an asset of the bank when the receiver took over. "The absence of the listing of the subject property as an asset precludes RTC from claiming the property." *Id.* at 790. Hoisting the insurer by its own statutory petard, the court noted that "[t]he property was not listed 'continuously . . . [as] an official record' of San Jacinto/Southmark Heritage because Southmark had sold it ." *Id.* at 790 (alterations in original). *See also* Falk v. Mt. Whitney Sav. & Loan Ass'n, 5 F.3d 347, 351 (9th Cir. 1993) (denying summary judgment to FDIC because where portion of property had been conveyed in error to mortgagor, and reconveyance of land executed, although not recorded, and without a showing of the absence of the request for reconveyance and supporting documentation from the bank files, FDIC had not demonstrated it had an interest in property at time of bank failure).

207. In Covell v. Photo Images, Inc., 768 F. Supp. 308 (D. Kan. 1991), in a series of complex and malodorous transactions, the plaintiff had lent money to Dinges, with the understanding that he was to use the monies to reduce his debt to the bank. In

insurer inherits a pie consisting of the "assets" of the bank, and any additional claim against the bank slices the pie more thinly. The agreement thus diminishes the insurer's slice and, therefore, its interest in each of the assets. Some courts have adopted a variation of this argument when confronting claims that section 1823(e) protects subsidiaries of banks. Their view is that a subsidiary is an asset of the bank, and an agreement diminishing that asset should lie within the ægis of the section.[208]

Neither expansion of the reach of section 1823(e) proves sustainable when measured against the language of the statute itself, because the results yielded are so bizarre that even Congress could not have intended them. It is true that section 1823(e) refers to assets and it is

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return, the bank was to lend a company controlled by Dinges and a bank officer a large sum of money, one-half of which was to be lent by the company back to the plaintiff. The plaintiff duly lent the money, and received nothing in return. *Id.* at 309-10. Covell asserted that because he was merely claiming against the receivership estate, his oral agreements did not diminish the interests of the FDIC in any particular asset, and thus that neither D'Oench nor section 1823(e) would apply. The court summarily rejected this argument, holding that because the return of Covell's money would increase the liabilities of the bank, both D'Oench and section 1823(e) should apply. *Id.* at 312 (citing Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656 (D. Utah 1989)), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993)). *Castleglen* is somewhat inapposite: there a bank was seeking reimbursement for draws made under a letter of credit. *Castleglen*, 728 F. Supp. at 671. Another case using broad diminution of "assets" language came in the procedural posture of the insurer opposing a motion to remand from federal to state court, in the context of a holding that the D'Oench and section 1823(e) defenses presented a colorable issue of federal law necessary to prevent remand. Reding v. FDIC, 942 F.2d 1254, 1259 (8th Cir. 1991) ("The debtors' claims . . . clearly tend to diminish the *assets* acquired by the FDIC." (emphasis added)).

One *sui generis* variation on this theme even stated that because banking regulations would have required collateral be set aside against an extension of credit by a bank to its affiliate, it was these "woulda, coulda, shoulda" assets that were diminished, permitting the invocation of section 1823(e). Murphy v. FDIC, 12 F.3d 1485, 1491-92 (9th Cir. 1993), *vacated*, 38 F.3d 1490 (9th Cir. 1994) (en banc). Fortunately, the Ninth Circuit, *en banc*, was able to distinguish an asset from a liability. Murphy v. FDIC, 38 F.3d 1490 (9th Cir. 1994).

Such a redefinition was rejected in Agri Export Cooperative v. Universal Savings Association, 767 F. Supp. 824 (S.D. Tex. 1991), where the RTC defended against liability under a letter of credit, "contend[ing] that section 1823(e) should shield the insuring entity from any types of claims against the failed financial institution, whether or not related to any particular asset, which do not meet the recording requirements of the statute—in other words, should apply to any claim against the 'the assets' of the corporation." *Id.* at 833. The court rejected this contention because precedent made it quite clear that the section did not apply in the absence of an "asset" to be diminished. *Id.* *See also* FDIC v. Bathgate, 27 F.3d 850 (3d Cir. 1994) (distinguishing *Agri Export*); Bender v. CenTrust Mortgage Corp., 833 F. Supp. 1525, 1530-32 (S.D. Fla. 1992) (refusing to hold employment contract subject to D'Oench without further fact-finding and briefing).

208. Poff v. Oak Tree Mortgage Corp., Civ. A. No. 91-4347, 1994 WL 144284 (E.D. La. Apr. 15, 1994); Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 729-30 (D.N.J. 1993); Alexandria Assocs. v. Mitchell Co., 800 F. Supp. 1412, 1422-23 (S.D. Miss. 1992), *rev'd on other grounds*, 2 F.3d 598 (5th Cir. 1993). *But see* Beener v. LaSala, 813 F. Supp. 303, 308-10 (D.N.J. 1993).

true that a claim may well diminish the assets of a receivership. Note, however, that the former section 1823(e)(2), now 1823(e)(1)(B), requires that to survive section 1823(e), any agreement must have been executed contemporaneously with the acquisition of "such asset." If section 1823(e) embraces the assets of the bank generally rather than a particularized asset only agreements executed simultaneously with each increase or alteration in the assets of the bank as a whole are valid against the insurer. Thus, each time a deposit was taken, a loan was made, or bond acquired by the bank, every person having business with the bank, whether borrower or creditor, would be required to troop down to the bank, all simultaneously to execute a novation of their respective agreements, else none of their agreements would be valid against a receiver. This does not, to put it mildly, seem to be a reasonable reading of the statutory provision.

The results of applying section 1823(e) to subsidiaries are similarly strange. In essence, no contract made with a subsidiary of a bank would be valid against that subsidiary unless it were entered into at the exact moment when the parent organized or acquired an interest in the subsidiary. Thus, unless one actually attended the meeting of incorporators and caused the subsidiary to execute one's agreement at the time the shares were handed over to the bank, one could never enforce one's agreement. Surely this cannot be taken to be a proper construction of the statute.[209]

2. Under Section 1821(d)(9)(A)

Another possible source of statutory D'Oench protection against affirmative claims unrelated to an asset is found in section 1821(d)(9)(A).[210] Under this section, no claim arising from or sub-

209. Nonetheless, in passing, the court in *Lesal Interiors* refused to even entertain a claim by the plaintiff that "section 1823(e)(2)[, now section 1823(e)(1)(B),] indicates that a failed institution cannot itself be considered an 'asset' under the statute." Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 730 n.6 (D.N.J. 1993). The court stated that "[s]ince this theory is not propounded by defendants, it need not be addressed further." *Id.* at 730 n.6.

210.

> (9) Agreement as basis of claim.
> (A) Requirements.
> Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.
> (B) Exception to contemporaneous execution requirement. Notwithstanding section 1823(e)(2)[, now 12 U.S.C. § 1823(e)(1)(B)], of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

12 U.S.C. § 1821(d)(9) (Supp. V 1993).

stantially comprised of an agreement is valid against the receiver of a bank unless the agreement complies with the requirements of section 1823(e). Most courts applying the provision have done so in situations covered by the mirror image and artful pleading rules, and have cited section 1821(d)(9)(A) as additional support for application of these rules.[211] Nonetheless, some courts have applied it where no asset was present. Courts have done this in conjunction with precedents permitting the extension of D'Oench to affirmative claims even without an asset, with section 1821(d)(9)(A) supplying additional grounds for the decision.[212] Certain courts have, however, applied section 1821(d)(9)(A) on its own bottom,[213] while other courts have held that the section has no application in the absence of an asset.[214] While it is

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211. FDIC v. Hulsey, 22 F.3d 1472, 1488-89 (10th Cir. 1994); RTC v. Murray, 935 F.2d 89, 94 (5th Cir. 1991); FDIC v. Adam, 803 F. Supp. 1225, 1233 (S.D. Tex. 1992); FDIC v. Orrill, 771 F. Supp. 777, 780-81 (E.D. La. 1991), *aff'd sub nom.* American Bank & Trust v. Orrill, 978 F.2d 711 (5th Cir. 1992); Alarcon v. Williams, 772 F. Supp. 334, 342 n.15 (E.D. Mich. 1991). Indeed, the Fifth Circuit has indicated that section 1821(d)(9)(A) was a codification of the mirror-image rule, still nascent at FIRREA's passage. Thigpen v. Sparks, 983 F.2d 644, 648 (5th Cir. 1993). *But see* Hawke Assocs. v. City Fed. Sav. Bank, 787 F. Supp. 423, 427-28 (D.N.J. 1991) (applying section 1821(d)(9)(A) without explicit reference to asset to leases which did not comply with section 1823(e)).

212. For example in Jackson v. FDIC, 981 F.2d 730 (5th Cir. 1992), a case in which a would-be borrower otherwise unobligated to the bank asserted breach of an agreement to lend, the court, while referencing "FIRREA" (by which it apparently meant section 1821(d)(9)(A)), relied primarily on Bell & Murphy and Associates v. Interfirst Bank Gateway, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990) and Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989), two common law D'Oench cases, to rebut Jackson's contention that there must be an asset somewhere involved in order for the invocation of D'Oench. *Jackson*, 981 F.2d at 732, 733-35; *see also* Covell v. Photo Images, Inc., 768 F. Supp. 308, 312 (D. Kan 1991) (holding that section 1823(e) had no asset requirement, and applying section 1821(d)(9)(A) to a pure creditor claim). *But see* Fox & Lazo-Atl. Commercial Group v. RTC, 862 F. Supp. 1233, 1241 (D.N.J. 1994) (holding that, because section 1821(d)(9)(A) expressly covered affirmative claims against the insurer, resort to common law D'Oench was no longer proper, as being in derogation of the powers of the legislature).

213. RTC v. Allen, 16 F.3d 568, 574-75 (4th Cir. 1994); Fox & Lazo-Atl. Commercial Group v. RTC, 862 F. Supp. 1233, 1242 (D.N.J. 1994); OPS Shopping Ctr. v. FDIC, No. 89-30142-RV, 1992 WL 489719, at *4 (N.D. Fla. Mar. 26, 1992), *aff'd on different grounds*, 992 F.2d 306 (11th Cir. 1993); McCaugherty v. Siffermann, 772 F. Supp. 1128, 1135-40 (N.D. Cal. 1991); *cf.* Carico v. First Nat'l Bank, 734 F. Supp. 768, 769-70 (E.D. Tex. 1990) (applying section 1821(d)(9)(A) to bar claims based on a bank's breach of an oral agreement to honor certain rubber checks, without any asset *in esse* being implicated).

It should be noted that the Eleventh Circuit in affirming the result of the District Court in *OPS Shopping* explicitly refused to reach the issue of whether or not section 1821(d)(9)(A) contained an asset requirement. OPS Shopping Ctr. v. FDIC, 992 F.2d 306, 309 n.3 (11th Cir. 1993).

214. John v. RTC, 39 F.3d 773 (7th Cir. 1994); E.I. Du Pont de Nemours & Co. v. FDIC, 32 F.3d 592, 597 (D.C. Cir. 1994); Thigpen v. Sparks, 983 F.2d 644, 648-49 (5th Cir. 1993); Stebbins Realty Corp. v. FDIC, Civ. No. 91-568-JD, 1994 WL 287742 (D.N.H. June 29, 1994); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1464-65 (D.D.C. 1992); Drexel Burnham Lambert, Inc. v. American Bankers Ins. Co., [1991-92 Trans-

clear that section 1821(d)(9) applies to the claims of *secured* creditors,[215] and has been so applied in one case,[216] it is equally clear that a secured creditor of a bank is, in the words of section 1823(e), claiming an interest in an identifiable asset. Resort to the maxims of statutory construction implies that an asset test should be implied in section

fer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,676, at 98,691-92 (E.D.N.C. Oct. 17, 1991); Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 749 F. Supp. 635, 646 (D.N.J. 1990) ("In most cases... 'the FDIC... asserted or defended the validity... a particular... obligation....' In these cases,... section 1821(d)(9)(A) bars all claims which are based on or substantially comprised of a 'side agreement'...."). Other courts seem to have assumed that an asset need be implicated. *See* Oliver v. RTC, 747 F. Supp. 1351, 1353 (E.D. Mo. 1990) (barring affirmative tort claims against RTC based on oral agreement because "[s]uch agreement falls within the scope of § 1823(e), i.e., it is an agreement that tends to diminish or defeat the interest of RTC *in the mortgage and loan.* By virtue of § 1821, then, this agreement cannot form the basis of or substantially comprise a claim" (emphasis added)), *aff'd*, 955 F.2d 583 (8th Cir. 1992).

215. This is based on 12 U.S.C. § 1821(d)(9)(B) (Supp. V 1993), which provides that section 1821(d)(9)(A) does not apply to federal reserve banks or federal home loan banks. Thus, section 1821(d)(9)(A) applies to at least some creditors, *exclusio unius est inclusio alterius*, so to speak. It is worthy of note, however, that parallel references in FIRREA exempting these two institutions from the operation of its provisions appear to relate to the secured nature of their lending activities. 12 U.S.C. § 1821(e)(13) (Supp. V 1993) (ability of receiver to avoid contracts does not affect loans and security interests of federal reserve banks or federal home loan banks). Thus, claims that section 1821(d)(9)(A) can apply to no class of creditors are clearly incorrect, and insofar as the *North Arkansas* case described in the following footnote merely states that a claim against an asset of a bank based on a lien is subject to at least some of the strictures of section 1823(e), it is clearly correct.

216. The Eighth Circuit, in North Arkansas Medical Center v. Barrett, 962 F.2d 780 (8th Cir. 1992), applied section 1821(d)(9)(A) to the claims of a quondam secured creditor to its rights against its collateral, a bond owned by the bank. The Medical Center had deposited monies well over the federally insured limit, but required that the bank obtain collateral to secure the deposits, which was replaced at varying times, the final incarnation being the "November FHLMC certificate." This agreement was never approved by the board or loan committee. The FDIC refused to honor the security interest and treated the Medical Center as a general creditor, resulting in a large loss. *Id.* at 782-84. In answering the Medical Center's contention that statutory D'Oench did not apply to creditors, the court began with the plain language of the statute, and noted that "[t]he Medical Center's claim of a security interest in the November FHLMC certificate arises from an agreement that, if enforced, *would tend to diminish the FDIC's interest in the November FHLMC certificate, which it acquired as receiver of an insured institution.*" *Id.* at 787 (emphasis added and footnote omitted). The court thus grounded its opinion in the unexceptionable principle that a lien is an interest in an asset, although the case has been seen by some, with approval or disapproval, to stand for the proposition that section 1821(d)(9)(A) places the strictures of section 1823(e) on all creditors, without reference to an asset, or the broader proposition that D'Oench (in some form) applies to creditors. Hatten v. FDIC, No. 91-1008, 1992 WL 149904, at *1 (10th Cir. June 26, 1992); Cote d'Azur Homeowners Ass'n v. Venture Corp., 846 F. Supp. 827, 839 n.23 (N.D. Cal. 1994). In any event, the FDIC's victory in *North Arkansas* proved Pyrrhic. Outrage at the FDIC's use of D'Oench to deny payment of deposits to a local governmental hospital district resulted in an FDIC policy statement promising never to do it again, followed by Congressional action to make certain that word was kept. The Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 317, 1994 U.S.C.C.A.N. (108 Stat.) 2160, 2223; H.R. Conf. Rep. No. 103-652, 103d Cong., 2d Sess. 174 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1977, 2004.

1821(d)(9)(A).[217] Further, the absence of discussion of section 1821(d)(9)(A) in FIRREA's legislative history has discouraged courts from applying it to avoid all affirmative claims against the receivership.[218] It is also possible that Congress in fact may act on the question, retroactively reading an asset test into section 1821(d)(9)(A) and possibly back into section 1823(e) and common law D'Oench.[219]

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217. Essentially, claims that the language should be so read attempt to read the introductory paragraph of section 1823(e) out of the equation, and to enforce only "each subparagraph of section [1823(e)]," (or, to be utterly up-to-date, section 1823(e)(1)). 12 U.S.C. § 1821(e)(6)(A) (Supp. V 1993); *see* Fox & Lazo-Atl. Commercial Group v. RTC, 862 F. Supp. 1233, 1242 (D.N.J. 1994) ("This court agrees that subsection 1821(d)(9)(A)'s reference to 'the requirements set forth in section 1823(e) of this title' means that the four procedural requirements of section 1823(e)[currently section 1823(e)(1)] must be met for any agreement to form the basis of a claim. Even though the . . . contract at issue here is not an 'agreement which tends to diminish or defeat the interest of the [RTC] in any asset acquired by it . . . .' " (second alteration in original)). This is exactly what 12 U.S.C. § 1821(e)(6)(A) requires with respect to contracts for deed. 12 U.S.C. § 1821(e)(6)(A) (Supp. V 1993). In construing a statute, one must assume that Congress chose its language with care, and that when different language is chosen, it is chosen to express a different meaning.

218. Thigpen v. Sparks, 983 F.2d 644, 649 (5th Cir. 1993); American Fed'n of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1465 (D.D.C. 1992).

219. Legislation to this effect has been introduced in both houses. The twin bills are H.R. 4146, 103d Cong., 2d Sess. (1994), and S. 1725, 103d Cong., 1st Sess. (1993). Each of the bills would delete the current reference to "any agreement which does not meet the requirements set forth in [1823(e)]" and insert the words "any agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by the Corporation as security for a loan, by a purchase or as receiver of an insured depository institution, and which does not meet the requirements of [section 1823(e)]" after the word agreement in the introductory paragraph of section 1821(d)(9)(A). H.R. 4146, 103d Cong., 2d Sess. (1994); S. 1725, 103d Cong., 1st Sess. (1993). The intended scope of the legislation, as delineated by its House and Senate sponsors, appears to be broad, requiring the presence of an asset for section 1823(e) and common law D'Oench. 140 Cong. Rec. E-567, E-567-68 (daily ed. March 24, 1994) (statement of Rep. McCollum on introduction of H.R. 4146); 139 Cong. Rec. S16478, S16478-50 (daily ed. Nov. 19, 1993) (statement of Sen. Cohen on introduction of S. 1725). It does not appear to cover the separate bridge-bank D'Oench powers under 12 U.S.C. § 1821(n)(4)(I) (Supp. V 1993).

The legislation was introduced at the urging of "Citizens and Business for D'Oench Duhme Reform." This group, and Senator Cohen, one of the sponsors of the bill, appear to believe that the impact of the passage of the legislation would go well beyond requiring an asset for all D'Oench cases, permitting the assertion of counterclaims related to an asset. This may be seen by their championing of the cause of the Sweeneys. 140 Cong. Rec. S10,874, S10,874-75 (daily ed. Aug. 5, 1994) (remarks of Sen. Cohen on *Sweeney* case and S. 1725); *Interview with Dr. David Hess, President, Citizens and Business for D'Oench Duhme Reform* (WBSM, New Bedford, Mass. radio broadcast, June 28, 1994) (tape available from Citizens and Business for D'Oench Duhme Reform, 9417 Georgetown Pike, Great Falls, Virginia 22066). These were the plaintiffs in the convoluted case of Sweeney v. RTC, 16 F.3d 1 (1st Cir.), *cert. denied*, 115 S. Ct. 291 (1994). The Sweeneys were attempting to enforce a Massachusetts deceptive trade practices claim arising from an agreement to lend additional funds (or, possibly, a state court judgment on such claim) against the FDIC. *Sweeney*, 16 F.3d at 4-5.

Dr. Hess, having won his battle, has not ceased his war. *See* Motorcity of Jacksonville, Ltd. v. Southeast Bank, 39 F.3d 292, 298 (11th Cir. 1994); Telephone interview

In any case, the consequences of reading the specific asset requirement out of section 1821(d)(9)(A) are startling, and do not bode well for the insurers in their capacity as deposit insurers. The receiver is commanded by section 1821(d)(9)(A) that it should not pay any claim that does not comply with section 1823(e). Among the claims that the receiver is to pay are those of depositors. The FDIC, in its capacity as deposit insurer, is entitled, as subrogee, to receive the fruits of depositor claims to the extent of its deposit insurance claims payments.[220] Because we assume that the same word used in the same statute retains the same meaning in both places, the "claims" to which FDIC-Corporate is subrogated under 12 U.S.C. § 1821(g) are the same claims payment of which is limited by section 1823(e). So if Granny neglected to have her Christmas Club account ratified by the Board or a Loan Committee, she also should have no rights against the receivership estate. Not to worry, she will of course get her widow's mite from FDIC-Corporate as insurer of the bank's deposits.[221] But FDIC-Corporate, which would ordinarily get at least some of its money back from the receiver as subrogee of Granny's rights, will find itself without a farthing: its rights as subrogee are no better than Granny's.

3. Under Common Law D'Oench

Even if statutory D'Oench does not provide protection in the absence of an asset, common law D'Oench may. A number of courts have expressly so held,[222] and this seems to be the modern trend.[223]

with Dr. David Hess, President, Citizens and Business for D'Oench Duhme Reform (Jan. 19, 1995) (confirmation of interview on file with Fordham Law Review) [hereinafter "Telephone interview"]. Indeed, Dr. Hess is pressing for legislation to be introduced in the 104th Congress that would have broader scope, intended to cover not only "non-asset" cases, but also to codify the holdings of certain of the "ordinary banking business" cases exempting vendors from the reach of D'Oench, to codify the "free standing tort" exception for the nation not just that portion of it embraced by the 11th Circuit, and to reverse the specific holding of *Langley* that intentional fraud by the bank is an "agreement." Telephone interview. In addition, such legislation would rank protected claims *pari passu* with those of depositors, rather than subordinated as they would be under 12 U.S.C. § 1821(d)(11) (Supp. V 1993), and would, like H.R. 4146 and S. 1725, have retroactive effect. Telephone interview.

220. *See* 12 U.S.C. § 1821(g) (Supp. V 1993).

221. The claims for payment of deposits by FDIC-Corporate are governed by 12 U.S.C. § 1821(f) (Supp. V 1993), while 12 U.S.C. § 1821(d)(9) (Supp. V 1993) relates solely to the insurer in receiver capacity.

222. This approach was adopted by Judge Lamberth in his scholarly opinion in American Federation of State, County & Municipal Employees v. FDIC (*In re* NBW Commercial Paper Litigation), 826 F. Supp. 1448 (D.D.C. 1992). The court first decided that statutory D'Oench (both section 1823(e) and 1821(d)(9)(A)) contained an asset requirement. *Id.* at 1463-65. But, turning its attention to common law D'Oench, the court held that

> *D'Oench* can best be described as a safety net; § 1823(e) and § 1821(d)(9)(A) are Congress's attempts to codify . . . the policy represented by *D'Oench*, but *D'Oench* remains to cover situations which fall through the cracks. . . . [T]he same equitable principle that generated the original *D'Oench* case and . . . § 1823(e) demands that the investor not be able to

While the change seems to have been marred by an absence of analy-

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> assert . . . [undocumented] agreement[s unrelated to assets] against the FDIC.

Id. at 1466. The opinion determined that D'Oench was, at bottom, a risk-allocation device—the risk that oral agreements will go unperformed and oral representations prove false is to be placed on the bank's counterparty, who is in a position to insist that all be documented, rather than on the depositors and insurers, who are in no position to control the lies and broken promises of the debtor or insured. Thus the relevant test is whether the bank's counterparty could, by diligence, have protected itself from the consequences of the oral agreement. *See also* Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27 (D.N.H. 1993) (following *In re NBW* in denying claim for payment for real estate brokerage commissions based on unwritten agreement).

NBW is echoed by other cases. *See* Cote d'Azur Homeowners Ass'n v. Venture Corp., 846 F. Supp. 827, 836-40 (N.D. Cal. 1994); Cohen v. RTC, No. CIV. 90-1065-R(P), 1993 WL 282051 (S.D. Cal. May 10, 1993); Bartram v. FDIC, 1 Cal. Rptr. 2d. 614 (Cal. Ct. App. 1991); Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc., 433 S.E.2d 759, 766 (N.C. Ct. App. 1993); *see also* Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 799 F. Supp. 755, 774 n.9 (E.D. Mich. 1992) (dictum). A particularly thoughtful analysis of why D'Oench should not be limited by an asset requirement may be found in Hall v. FDIC, 920 F.2d 334, 339-40 (6th Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991).

223. Perhaps the best-known of these decisions is Vernon v. RTC, 907 F.2d 1101 (11th Cir. 1990) [hereinafter *Vernon I*], in which the court refused to extend D'Oench to affirmative securities law and RICO claims unrelated to any asset. *Id.* at 1103-04. The court reasoned that the invocation of the doctrine would be in derogation of the receiver's statutory duty to pay all valid claims of the institution, because many valid claims, such as tort claims, would be valid without necessarily being recorded. *Id.* at 1107-08. In its own Circuit, *Vernon I* has apparently been confined to "free standing tort claims," although the original decision made no such limitation. *See supra* note 148. Outside the Eleventh Circuit, other courts have grounded the refusal to extend the doctrine on similar concerns; not only valid tort claims, but also many valid contract claims would also be unrecorded. "The bank's gardener, window washer and garbage collector have a claim for services rendered whether or not they had written contracts." Ramins & Sons v. RTC, No. CIV. A. 92-4919, 1993 WL 210551, at *2 (E.D. Pa. June 15, 1993). Other judges have also refused to apply common law D'Oench to non-asset-related claims, in many cases in factual situations similar to those which would trigger other D'Oench exceptions. *See* Fletcher Village Condominium Assoc. v. FDIC, 864 F. Supp. 259, 262 (D. Mass. 1994); Beener v. LaSala, 813 F. Supp. 303 (D.N.J. 1993) (non-banking business); Topolnycky v. Ukrainian Sav. & Loan Ass'n, 799 F. Supp. 36 (E.D. Pa. 1992) (free-standing tort); Drexel Burnham Lambert, Inc. v. American Bankers Ins. Co., [1991-92 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 88,676, at 98,691-92 (E.D.N.C. Oct. 17, 1991) (third-party agreement); Central Nat'l Bank v. FDIC, 771 F. Supp. 161 (E.D. La. 1991) (free-standing tort); Agri Export Coop. v. Universal Sav. Ass'n, 767 F. Supp. 824, 832 (S.D. Tex. 1991); Thomka v. Financial Corp. of Am., 19 Cal. Rptr. 2d 382, 388-90 (Cal. Ct. App.) (non-banking business).

sis and some interesting use of precedent,[224] particularly in those cases involving loan participations,[225] it must now be taken as *fait accompli.*

224. The extension of the common law doctrine appears to have resulted, in many cases, from an application of a series of precedents in which claims did in fact involve assets to those which did not, with the mirror-image rule being the vector. Thus, claims that violation of agreements to lend further monies served as a defense to the obligation to pay monies already lent were extended to bar claims against the bank arising from oral promises to lend to parties not then obligated. In Bell & Murphy and Associates v. FDIC, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990), the court characterized Bell & Murphy's assertion that D'Oench did not bar its breach-of-agreement-to-lend claim because the claim did not diminish the right of the FDIC in a particular asset as "meritless in light of [its] recent holding in *Beighley* that the D'Oench, Duhme rule bars affirmative claims based upon unrecorded agreements to extend future loans." Note, however, that in *Bell & Murphy* there was concededly an existing asset and the plaintiffs were doing no more than mounting a preemptive strike and claiming that the agreement to lend did not "diminish the value of Bell & Murphy's admitted outstanding debt to [the defunct bank]." *Bell & Murphy*, 894 F.2d at 753. Because under common law D'Oench principles, it is the tendency to understate the value of an asset which is the focus of attention, this trick of pleading received deservedly short shrift. The case *Bell & Murphy* relied upon, Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989), had involved interposition of an agreement to make future loans by a party liable on a note. Beighley v. FDIC, 676 F. Supp. 130, 131 (N.D. Tex. 1987), *aff'd*, 868 F.2d 776 (5th Cir. 1989). Indeed, the *Beighley* panel had expressly described the rule of common law D'Oench as providing "substantial protection from oral side agreements, not reflected in a bank's records, that would diminish the FDIC's *interest in an asset*." *Beighley*, 868 F.2d at 784 (emphasis added). A further extension came in Bowen v. FDIC, 915 F.2d 1013 (5th Cir. 1990), another case in which borrowers brought suit claiming that a promise to lend further monies had been made. The court stated that "[t]he agreement need not implicate a specific obligation, such as a note or other asset held by the FDIC." *Bowen*, 915 F.2d at 1016. For this proposition the court cited *Bell & Murphy*, *Beighley*, and FSLIC v. Murray, 853 F.2d 1251 (5th Cir. 1988). A few lines earlier, however, the court had described the rule as being applicable to borrowers. *See Bowen*, 915 F.2d at 1015-16. Thus, *Bowen* can be read to mean no more than that the agreement to lend need not represent a direct attack on the note, for, if it followed the precedents it pretended to, the rule is one of looking through pleadings which studiously avoid mention of the asset in order to evade D'Oench. Nonetheless, the Fifth Circuit "followed" *Bell & Murphy* and *Beighley* in holding that there need be no asset in the hands of the receiver for common law D'Oench to apply, even where there was no pre-existing borrowing relationship, and thus no asset in the hands of the insurer. Jackson v. FDIC, 981 F.2d 730 (5th Cir. 1992).

225. The source of these precedents was a series of cases in which purchasers of participations in loans from a bank claimed that the participations were in some wise fraudulent, but in which an offset against assets of the defunct bank was claimed, or in which other policy reasons counseled against liability by the defunct bank. *See* Royal Bank of Can. v. FDIC, 733 F. Supp. 1091, 1096 n.9 (N.D. Tex. 1990) (citing FDIC v. State Bank, 893 F.2d 139 (7th Cir. 1990), and First State Bank v. City & County Bank, 872 F.2d 707 (6th Cir. 1989)). The cases cited are inapposite. *See* FDIC v. State Bank, 893 F.2d 139, 143 (7th Cir. 1990) (Easterbrook, J.) (denying right of bank which purchased fraudulent participation to offset its damages against assets of the defunct bank because, while setoff was not *per se* barred, "[a] *particular* setoff may encounter problems under § 1823(e) even though there is no absolute ban. The debt assertedly set off *against the FDIC's asset* may have come into being as a result of an 'agreement' not reflected in either bank's books. When that happens, § 1823(e) may interdict the *setoff*. . . ." (first emphasis in original, the remainder added)); First State Bank v. City & County Bank, 872 F.2d 707, 717 (6th Cir. 1989) (denying right of plaintiff to assert right to put participation to defunct bank on the grounds that, while not all oral agree-

This is not to state that entirely asset-berift claims are to be included. Before announcing an utter surrender of the principle of asset-relatedness, it should be observed that the vast majority of cases have related to an asset *in posse*, as in an agreement to lend, or where an asset formerly existed.[226] The courts have sometimes come to the conclusion that an agreement to lend itself constitutes an asset.[227] Not all cases subscribe to this theory, but, as to agreements to create an asset, whether agreements to make loans, reimbursement agreements under letters of credit or agreements to honor overdrafts, granting the protections of common law D'Oench is consistent with the treatment of voidness defenses. Perhaps this can best be seen as the alpha to the accord and satisfaction omega: if an agreement to destroy an asset cannot be enforced, then presumably neither can the breach of an undocumented agreement to create one.

The common law doctrine has not always been limited to such claims. In a small minority of cases, the courts have applied the doctrine to matters entirely unrelated to assets-*in-posse* or *-in-esse*, such as personnel matters.[228] The doctrine has even been applied, in ex-

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ments were barred by D'Oench, plaintiff First State had represented to the FDIC in regulatory reports that participations were non-recourse and thus that "the misleading nature of *First State's* behavior does serve as a proper basis for denying enforcement of the oral agreement" (emphasis added)); *see also* FDIC v. Texarkana Nat'l Bank, 874 F.2d 264, 267-68 (5th Cir. 1989) (holding D'Oench bars participating bank from setting off against funds of defunct bank on grounds that participation purchases were fraudulently induced), *cert. denied* 493 U.S. 1043 (1990). Nonetheless, courts have cited *First State* for the proposition that D'Oench applies to any agreement which increases the liabilities of a defunct bank. Torke v. FDIC, 761 F. Supp. 754, 756 (D. Colo. 1991). A D'Oench-*derived* prudential rule like that of *First State* seems to be at work in First City National Bank & Trust Co. v. FDIC, 730 F. Supp. 501 (E.D.N.Y. 1990), in which the court dismissed a RICO claim, at least partially on D'Oench grounds, but primarily because RICO treble damages would have come out of the hide of innocent depositors. Any claim that the decision was grounded in D'Oench is undercut by the fact that the court allowed the plaintiffs leave to replead against FDIC-Corporate, which should have been protected by D'Oench and section 1823(e) if the decision had truly been dependent upon those doctrines. *See First City*, 730 F. Supp. at 510-11

226. Motorcity of Jacksonville, Ltd. v. Southeast Bank, 39 F.3d 292, 298 n.7 (11th Cir. 1994); Robinowitz v. Gibraltar Sav., 23 F.3d 951 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 725 (1995); Hall v. FDIC, 920 F.2d 334, 339-40 (6th Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991).

227. Some of these decisions have apparently been grounded in the economic value of the breached agreement to lend. Hall v. FDIC, 920 F.2d 334, 339-40 (6th Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991); Inn at Saratoga Assocs. v. FDIC, 856 F. Supp. 111 (N.D.N.Y. 1994). Other cases have stated that an agreement to lend represents an asset without providing any clear rationale. Franklin Asaph Ltd. Partnership v. FDIC, 794 F. Supp. 402, 407 (D.D.C. 1992); *see also* American Fed. of State, County & Mun. Employees v. FDIC (*In re* NBW Commercial Paper Litig.), 826 F. Supp. 1448, 1464 (D.D.C. 1992) (dictum).

228. Poff v. Oak Tree Mortgage Corp., Civ. A. No. 91-4347, 1993 WL 144284 (E.D. La. Apr. 15, 1994); Pyle v. Meritor Sav. Bank, 821 F. Supp. 1072, 1076-77 (E.D. Pa. 1993) (holding that FDIC's D'Oench defense to claim of breach of employment contract created colorable issue of federal law allowing removal to federal court). *But see*

treme cases, to claims relating to deposits.[229] The federal policy, intended to protect depositors and creditors of the bank, has turned on its own.[230] Some of the deposit cases are, however, explicable as being asset based, as where the claim is wrongful setoff, because the funds of the borrower in the hands of the bank in essence constitute additional security for its loans.[231]

C. *Exceptions Grounded in the Written Text of an Asset*

D'Oench does not utterly bar claims that a bank breached written obligations under an agreement, although the insurer pleads its cases as if it did.[232] What D'Oench bars are not claims of breach of contract, but claims that the contract is other than that which is held in the files of the bank, and, in the case of section 1823(e), duly author-

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Bender v. CenTrust Mortgage Corp., 833 F. Supp. 1525, 1529-32 (S.D. Fla. 1992) (refusing, in the absence of factual record, to reach novel legal issue of application of doctrine to claim of breach of employment contract).

229. Claims have been brought sounding in tort, as in the fraud asseverated in Bruneau v. FDIC, 981 F.2d 175 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2413 (1993). The court dealt with claims of an uninsured depositor that she had been promised by a teller that all of her funds would be covered by pointing to D'Oench and section 1823(e) and refusing the claim. *Bruneau*, 981 F.2d at 177-78. Other courts in examining *Bruneau* have dealt with the claims for what they were: an attempt to plead tort to subvert the obligation of the receiver to make pro rata distributions of bank assets. *See* Branch v. FDIC, 825 F. Supp. 384, 416-17 (D. Mass. 1993). Not all deposit-related claims have been related to attempts to subvert the regime of deposit insurance. Hatten v. FDIC, No. 91-1008, 1992 WL 149904, at *1 (10th Cir. June 26, 1992) (holding that where depositor had ordered bank to liquidate CD and pay over proceeds to third parties in return for a note, and the note was never made, claim against bank for conversion of deposits was barred by D'Oench and section 1823(e), because no "asset" need be implicated). Other deposit related tort cases have involved funds purportedly held in trust for persons other than named depositors under undocumented arrangements. Tort claims arising from payment of the funds to the named owners have lead to mixed results. One circuit has held, almost without comment, that the claims were subject to section 1821(d)(9)(A). *See* RTC v. Allen, 16 F.3d 568, 574-75 (4th Cir. 1994). A neighboring circuit has held that the affirmative claims under an under-documented escrow arrangement would be covered, if at all, by common law D'Oench, which did not apply. *See* E.I. Du Pont de Nemours & Co. v. FDIC, 32 F.3d 592 (D.C. Cir. 1994).

230. "The FDIC's 'core' mission is to protect the interests of a failed bank's depositors. Both D'Oench Duhme and § 1823(e) are intended to serve this objective. . . . To invoke D'Oench Duhme as a bar to *depositors'* claims would defeat the very purpose of the doctrine." Fletcher Village Condominium Ass'n v. FDIC, 864 F. Supp. 259, 262 (D. Mass. 1994) (citations omitted).

231. *See* Hill v. Samuel Cabot, Inc., Civ. A. No. 92-11926-Z, 1993 WL 343673 (D. Mass. Aug. 26, 1993) (holding that where money was escrowed, but CD's were pledged in violation of escrow agreement, and liquidated, D'Oench was implicated whether by a claim against specific assets or general assets and, that as the taking of deposits was ordinary banking business, D'Oench would apply).

232. *See* FDIC v. Vernon Real Estate Invs. Ltd., 798 F. Supp. 1009, 1014 (S.D.N.Y. 1992) ("Plaintiff contends that '[n]one of the counterclaims . . . are reflected in the records of CITYTRUST'. . . . These claims arise not from any extrinsic or secret agreement but directly from the text of the . . . [c]ontract.").

ized and executed.[233] Thus, the focus of D'Oench is on contract formation, and, in the course of performance of contracts, on amendments, waivers, and assertions of estoppel, as these would change the provisions of the contract from those that the insurer knew. To do otherwise would be to alter the language of section 1823(e) from "no agreement shall be valid unless" to "no agreement shall be valid. Period." The terms of the agreement constituting the "asset" owned by the insurer define the contours of the asset and are not agreements adversely affecting the insurer's interest in such asset. The "exception" really provides that the insurer may not, by selecting those covenants it wishes to enforce and characterizing the others as barred, recast the asset.[234] As Chief Judge Posner has remarked, "One may doubt whether section 1823(e) ha[s] any application—that would be like arguing that the FDIC could ignore the due date in a promissory note it had bought from a troubled bank, and call the loan immediately."[235]

The principle has been honored in the bilateral agreement exception, which recognizes that the FDIC, in enforcing an asset, is bound by the terms of that asset. Exactly how explicit those terms must be is an open question. While it is clear that attempting to piece together or imply covenants out of isolated clauses in the contract is forbidden,

233. As the Eleventh Circuit made clear:

> [T]he *D'Oench* doctrine does not protect federal agencies where bilateral obligations are evident on the face of the documents at issue. . . . Bank examiners cannot be misled by documents that evidence the true obligations of the parties. . . . Examiners are fully aware that any agreement could be breached, and the likelihood of this occurring must be taken into account in an evaluation of an institution's assets and liabilities. Thus, the protections provided to the deposit insurance fund by the *D'Oench* doctrine would not be furthered by allowing financial institutions to breach valid agreements or to carry them out in bad faith.

Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1517 (11th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1936 (1992).

234. It has been implied by one court that this so-called "exception" may not have survived *Langley*, that the requirements of section 1823(e) as described in *Langley* are certain and categorical and that a covenant not complying would thus be barred. Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F. Supp. 656, 668-69 (D. Utah. 1989), *aff'd sub nom.* Castleglen, Inc. v. RTC, 984 F.2d 1571 (10th Cir. 1993).

235. FDIC v. O'Neil, 809 F.2d 350, 354 (7th Cir. 1987). A similar "shape of the asset" argument may be found in FDIC v. RepublicBank, Lubbock, N.A., 883 F.2d 427 (5th Cir. 1989). The FDIC was attempting to claim that its mortgage was senior to that of another lender on the grounds that a subordination agreement executed in connection with the same transaction was invalid under section 1823(e), even though the deed of trust it sought to enforce recited on its face that it was subordinated. The court refused to go along, stating that because the FDIC's lien had always been subordinate, the agreement did no more than define the contours of the asset. *RepublicBank*, 883 F.2d at 429; *see also* First Hartford Partners II v. FDIC, No. 93 Civ. 0933 (RPP), 1993 WL 426846, at *3 (S.D.N.Y. Oct. 18, 1993) ("[T]he . . . [a]greement does not 'tend to diminish or defeat the interest' of the FDIC . . . in any asset acquired by it as receiver, a prerequisite for the application of section 1823(e), but merely imposes affirmative financing obligations . . . and sets forth procedures governing the relationship between the parties.").

other courts have gone further, imposing a rule that requires absolute explicitness, or even further, excluding external evidence in explanation of ambiguity in contracts.

The mirror image of the debate over how written a written covenant must be is the fate of unwritten covenants implied by law in various sorts of contracts. A particular point of dispute has been the covenant of good faith and fair dealing. Many courts have, consistent with their treatment of other unwritten rights, recognized the covenant if, and so far as, it is not a means of artfully pleading a D'Oench-barred agreement.

1. The Bilateral Obligations Exception

This willingness to hold the insurer to the written terms of its asset is known as the bilateral obligations, or *Howell*,[236] exception. The *Howell* exception provides that the insurer remains subject to defenses grounded in the written terms of the asset it seeks to enforce, even if the asset (and those covenants it contains) does not technically comply with section 1823(e). This exception has been recognized fairly broadly[237] and has been applied to situations other than purely

236. This exception is normally associated with the decision of the Seventh Circuit in Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981), although that case actually derived the principle from Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305 (M.D. Tenn. 1978). *Howell*, 655 F.2d at 747. Howell entered into an agreement with Continental to lease equipment. Continental sold the leases to a bank in order to get the money to purchase the equipment, but dissipated the funds and never paid for what it purported to lease. The court rejected FDIC-Corporate's assertion that D'Oench and section 1823(e) barred Howell's defense that ownership of the property by Continental was an implicit condition precedent to her obligation to pay the rent. *Id.* at 744-45. The court distinguished cases in which the FDIC was attempting to enforce unilateral obligations to pay, as "inapplicable . . . where the document the FDIC seeks to enforce is one . . . which facially manifests *bilateral* obligations and serves as the basis of the lessee's defense." *Id.* at 746. " 'When, however, the asset upon which the FDIC is attempting to recover is *the very same agreement* that the makers allege has been breached by the FDIC's assignors, § 1823(e) does not apply.' " *Id.* at 747 (quoting *Riverside Park*, 465 F. Supp. at 313).

The term "bilateral obligations" is perhaps slightly misleading, because the distinction can also be seen even where the obligation of the maker is unilateral, as in a note. Where it is clear from the face of the note that the maker signed on behalf of a juridical person, neither D'Oench nor section 1823(e) would apply to impose personal liability. FDIC v. Tennesseans for Tyree, 886 F.2d 771, 777 (6th Cir. 1989).

237. FDIC v. McFarland, 33 F.3d 532, 537 (5th Cir. 1994); RTC v. Liberty Homes, Inc., No. 90-2255, 1991 WL 163055, at *1 (10th Cir. Aug. 23, 1991); FDIC v. Panelfab P.R., Inc., 739 F.2d 26, 30 (1st Cir. 1984) (indicating that where notice of termination of guaranty given in accordance with its terms, section 1823(e) did not apply); FDIC v. O'Flahaven, 857 F. Supp. 154 (D.N.H. 1994) (holding defense of failure of consideration grounded in breach of bank's obligations to disburse loan proceeds survives D'Oench); FDIC v. Eltrex Int'l Corp., No. CIV. 91-434-JD, 1994 WL 258673, at *5 (D.N.H. Feb. 1, 1994); First Hartford Partners II v. FDIC, No. 93 Civ. 0933 (RPP), 1993 WL 426846, at *3 (S.D.N.Y. Oct. 18, 1993); Holden v. FDIC, No. Civ. A. 91-11737-Z, 1993 WL 81459, at *3 (D. Mass. Mar. 3, 1993); FDIC v. Vernon Real Estate Invs., Ltd., 798 F. Supp. 1009, 1014-15 (S.D.N.Y. 1992); National Union Fire Ins. Co. v. FDIC, 837 S.W.2d 373, 381-82 (Tenn. 1992) (stating that representations in applica-

defensive actions.[238] The exception is similarly recognized in common law D'Oench,[239] although the scope of documents allowed to be introduced, encompassing so-called "integral loan documents," is perhaps broader than under the statutory analogue.[240] It is apparently untrue,

tion for insurance were incorporated in policy when issued, and that their truth was an express condition to payment under the policy, and insurer could defend liability based upon their falsity); *see also* FDIC v. Merchants Nat'l Bank, 725 F.2d 634, 639 (11th Cir.), *cert. denied*, 469 U.S. 829 (1984) (dictum). *But see* AmWest Sav. Ass'n v. Farmers Mkt. of Odessa, Inc., 753 F. Supp. 1339, 1345 (W.D. Tex. 1990) (indicating that D'Oench bars all claims, without distinguishing side agreements from post-contract-formation performance).

238. It has been applied even where the attempt to enforce is brought in separate and collateral proceedings, as where the RTC has sued under the agreement and lost and the RTC's opponent seeks reimbursement of legal fees under a loser-pays provision of the contract. RTC v. Heinhold Commodities, Inc., 803 F. Supp. 1342, 1344, 1347-48 (N.D. Ill. 1992). The rule has also been said to run in favor of third-party beneficiaries of a contract, who may rely on the written terms of the agreement as a source of rights. Yankee Bank for Fin. & Sav. v. Task Assocs., 731 F. Supp. 64, 68-69 (N.D.N.Y. 1990) (holding that rights of mechanic's lienors arose from failure of bank to comply with its own loan agreement, and thus were not barred by common law D'Oench). Nonetheless, the "bilateral agreement" exception is not a "get-out-of-D'Oench-free card;" parties seeking to avoid D'Oench by claiming that an oral contract imposed bilateral obligations will be bitterly and properly disappointed. Community Bank v. FDIC, 984 F.2d 254, 258-59 (8th Cir. 1993); Covell v. Photo Images, Inc., 768 F. Supp. 308, 311-12 (D. Kan. 1991).

239. FDIC v. Marine Midland Realty Credit Corp., 17 F.3d 715, 719 (4th Cir. 1994); FSLIC v. Mackie, 962 F.2d 1144, 1150-51 (5th Cir. 1992); Grant County Sav. & Loan Ass'n v. RTC, 770 F. Supp. 1374, 1379-82 (E.D. Ark. 1991) (holding that where omissions constituted breach of written warranty and expressly assumed fiduciary duty, recision and setoff were not barred by common law D'Oench or section 1823(e)), *rev'd on other grounds*, 968 F.2d 722 (8th Cir. 1992); Royal Bank of Can. v. FDIC, 733 F. Supp. 1091, 1098 n.13 (N.D. Tex. 1990); Yankee Bank for Fin. & Sav. v. Task Assocs., 731 F. Supp. 64, 68-69 (N.D.N.Y. 1990); FSLIC v. Hunter (*In re* Hunter), 100 B.R. 321, 326 (Bankr. S.D. Tex. 1989).

240. *See* Thigpen v. Sparks, 983 F.2d 644, 646 (5th Cir. 1993) (indicating that whether representation letter was part of the contract, and thus integral for purposes of common law D'Oench, was to be determined in accordance with state law principles); RTC v. Oaks Apartments Joint Venture, 966 F.2d 995, 999-1000 (5th Cir. 1992) (allowing court to consider, under common law D'Oench, effect of guaranty agreement making several the liability of partners if it was found to be an integral loan document kept in the loan file); FDIC v. Laguarta, 939 F.2d 1231, 1238-39 (5th Cir. 1991); FDIC v. Waggoner, 999 F.2d 826, 828 (5th Cir. 1993) ("The FDIC's argument that *D'Oench, Duhme* prevents consideration of the terms of the two original notes, is in effect, that *D'Oench, Duhme* is a parole evidence rule. This contention takes the doctrine too far."); FDIC v. Smith, 848 F. Supp. 1053, 1056-58 (D. Mass. 1994); Erbafina v. FDIC, 855 F. Supp. 9, 12 (D. Mass. 1994); *see also* Levy v. FDIC, 7 F.3d 1054, 1057-58 (1st Cir. 1993) (dictum); *cf.* Prudential Ins. Co. of Am. v. Allied Tower, Ltd., 874 P.2d 36, 39-40 (Okl. 1994) (holding that D'Oench and section 1823(e), while not limited to claims against an asset, were limited to agreements between banks and their customers which were in derogation of a preexisting contract, and refusing to apply doctrine to avoid effect of estoppel letter promising not to renegotiate lease given by bank to insurance company as lender to bank's landlord). *But cf.* Lassiter v. RTC, 610 So. 2d 531 (Fla. Dist. Ct. App. 1992) (requiring loan approval letter sufficient under common law D'Oench to pass section 1823(e) tests in order to provide defense). Nonetheless, what is "integral" remains a difficult hurdle; mere reference to the same subject matter is insufficient. Cardente v. Fleet Bank, 796 F. Supp. 603, 612

at least under common law D'Oench, that the bilateral obligation must be evidenced in exactly the same piece of paper. What is or is not "integral," however, is yet obscure, and has granted one court license to propose the subversion and overthrow of *Langley*.[241]

The bilateral obligations exception is subject to significant restrictions. These restrictions have developed significantly from their origins in holdings that an unsigned agreement not in file could be bootstrapped by incorporation-by-reference into D'Oench compliance and that obscure and cryptic references do not a covenant make.[242]

(D. Me. 1992). Courts have, in general, not read the exception expansively enough to allow in unreferenced scraps of paper linked by mere parol. *See* FDIC v. Plato, 981 F.2d 852, 856-57 (5th Cir. 1993). If a document merely represents a directive or notice under the asset, and does not vary its terms, it should be considered. *See* Swedbank (Sparbankernas Bank) v. FDIC, No. 93-1338, 1994 WL 183542 (1st Cir. May 13, 1994) (letter was not a disbursement directive, because it varied rights of bank under agreement, and therefore was an "agreement" subject to section 1823(e)).

The federal holder in due course doctrine permits no such defense, except, perhaps, in the limited situation posited by Chief Judge Posner, see *supra* note 235 and accompanying text, because the entire point of negotiable instruments is to create contracts payable without regard to defenses available on the underlying contract for which the promise to pay is given. *See* FDIC v. Adam, 803 F. Supp. 1225, 1228-29 (S.D. Tex. 1992); Burns v. RTC, 880 S.W.2d 149, 154 (Tex. Ct. App. 1994).

241. This exception is found in FDIC v. Aetna Casualty & Surety Co., 947 F.2d 196 (6th Cir. 1991). Aetna had issued a bankers blanket bond to a bank but when the bank failed the insurer refused to pay. It insisted that the insurance application contained misrepresentations and that in the absence of a truthful application, it was under no obligation to make the FDIC whole for the peculations of the bank officers. *Id.* at 199. Pointing out that the UCC sections cited by Justice Scalia in *Langley* related solely to negotiable instruments, Judge Guy held that "[w]hen extrapolated to the context of insurance bonds, the logic of the *Langley* decision unravels." *Id.* at 205. Thus section 1823(e) should be confined to negotiable instruments or "agreements which differ from negotiable instruments in only minor respects." *Id.* at 206 n.9. He went on to state that the insurance policy imposed bilateral obligations on the parties, one of which was not to lie on the application therefor, and that the case thus fell within the bilateral obligation exception to D'Oench even though the insurance contract did not on its face contain any provision providing it would be invalid if there had been misrepresentation in the application. *Id.* at 206-07. Interestingly enough, Judge Guy seemed to go out of his way to come to this conclusion, because the bond was arguably void *ab initio*. *Id.* at 205 n.7. His brother judges refused to join Judge Guy on this frolic, preferring to hold that the insurance application had complied with section 1823(e). *Id.* at 210-11 (Nelson, J., dissenting and concurring); *see also* National Union Fire Ins. Co. v. FDIC, 837 S.W.2d 373, 381 (Tenn. 1992) (following Judge Nelson's *Aetna* dissent). *But see* FDIC v. Oldenburg, 34 F.3d 1529, 1551-53 (10th Cir. 1994) (disagreeing with both *Aetna* opinions). Courts have attempted to explain away the *Aetna* decision as relying on the potential defense that the bond was void *ab initio* under Tennessee law. *See* RTC v. Townsend Assocs., 840 F. Supp. 1127, 1138 (E.D. Mich. 1993). A careful examination of the *Aetna* case, however, reveals this to be incorrect.

242. Limitations on the budding bilateral obligations exception were put in place by Judge Posner in FDIC v. O'Neil, 809 F.2d 350 (7th Cir. 1987). O'Neil claimed that because his note was by its terms made "subject to" an (unexecuted) agreement referenced in the note, and because the unexecuted agreement had (arguably) imposed certain duties on the lending bank, that the agreement had been incorporated by reference in the asset sought to be enforced, and that the duties of the bank implied in the incorporated agreement had not been performed, he fell within the *Howell* excep-

Many cases have held that the records of the bank must contain a written agreement, not merely writings from which an oral agreement could be inferred.[243] Likewise, where the writings express an intent, but not a covenant, an oral agreement to carry out the intent is not thereby transformed into a writing.[244]

These restrictions have continued to expand. The restriction on ambiguous covenants has grown to encompass a requirement that the covenant therein to be enforced must be manifest beyond peradventure[245] so that it would be detectable by Chief Judge Posner's incuri-

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tion. *O'Neil*, 809 F.2d at 352-53. Judge Posner was quick to distinguish the two cases: *Howell* involved clear obligations on the face of the very agreement sought to be enforced, not another agreement with ambiguous duties which, unexecuted, did not comply with section 1823(e).

> If we accepted [defendant's] argument, this would imply that when the appraiser came across the promissory note he would have had to conduct an inquiry into the whereabouts, status, and terms of the "certain agreement," mentioned in (but not a part of) the note. Yet even if he located the agreement it might not occur to him to inquire whether the bank's had . . . [performed the implied duties], because the agreement does not in terms require such [performance]. Maybe such a requirement is implicit, but this would be apparent only to one who had steeped himself in the negotiations leading up to the drafting of the agreement. The FDIC is not required to go so far.

O'Neil, 809 F.2d at 353-54.

The limitations on incorporation by reference have not been unanimously adopted. Indeed, one of the ironies of *O'Neil* is that *Riverside Park*, from which *Howell* derived its reasoning entire, rejected an FDIC claim that breach of an agreement incorporated by reference in the document FDIC sought to enforce was irrelevant to liability. Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305, 313 (M.D. Tenn. 1978); *see also* Commercial Properties Dev. Corp. v. RTC, Civ. A. No. 92-3194, 1993 WL 541851, at *3 (E.D. La. Dec. 20, 1993); Albuquerque Fed. Sav. & Loan Ass'n v. Deville, 615 So. 2d 1002, 1007 & n.1 (La. Ct. App. 1993). *But see* FDIC v. Friedland, 758 F. Supp. 941, 944 (S.D.N.Y. 1991). This principle applies where the incorporation is a result of contract law, as well as where a provision is explicitly inserted. FDIC v. Waggoner, 999 F.2d 826, 828-31 (5th Cir. 1993).

The bilateral agreement exception may also be purely defensive in character, at least where the asset has been acquired by FDIC-Corporate in a purchase and assumption transaction. The value of the asset lives after the bank at the Corporate level, while the liability remains interrèd with its bones in the receivership. *See* Trigo v. FDIC, 847 F.2d 1499, 1503 (11th Cir. 1988).

243. Castleglen, Inc. v. RTC, 984 F.2d 1571, 1579 (10th Cir. 1993); RTC v. Kolea, 866 F. Supp. 197, 205 (E.D. Pa. 1994); Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 799 F. Supp. 755, 773-74 (E.D. Mich. 1992); Torke v. FDIC, 761 F. Supp. 754, 757 (D. Colo. 1991); Beighley v. FDIC, 679 F. Supp. 625, 627 (N.D. Tex. 1988), *aff'd*, 868 F.2d 776 (5th Cir. 1989).

244. FDIC v. Bathgate, 27 F.3d 850, 864-65 (3d Cir. 1994); Sweeney v. RTC, 16 F.3d 1, 4-5 (1st Cir.), *cert. denied*, 115 S. Ct. 291 (1994); FSLIC v. Gemini Management, 921 F.2d 241, 245 (9th Cir. 1990); FSLIC v. Two Rivers Assocs., 880 F.2d 1267, 1275-76 (11th Cir. 1989).

245. FDIC v. Bay Street Dev. Corp., 32 F.3d 636, 639-40 (1st Cir. 1994); RTC v. Daddona, 9 F.3d 312, 319 (3d Cir. 1993) ("[T]he basic structure of that agreement—its essential terms—must also appear plainly on the face of [the] obligation."); Inn at Saratoga Assocs. v. FDIC, 856 F. Supp. 111 (N.D.N.Y. 1994); Armstrong v. RTC, 623 N.E.2d 291, 298 (Ill. 1993) ("[N]either document requires a bank examiner to conclude that the writings explicitly represented the actual agreement between the parties.").

ous drone, the "prudent bank examiner."[246] The insistence on absolute clarity can result in judges' refusal to follow the traditional rule in construing contracts: a clear contract is for the court and an ambiguous one for the trier of fact. Here, both are for the court: if the covenant is clear, its import will be determined by the judge, and if it is unclear, then it is eliminated.[247] Not all courts have followed this novel departure from traditional contract doctrine.[248] Further, D'Oench does not require that the judge construe the language of the contract favorably to the insurer, nor does it bar reference to outside evidence when the contract is blatantly self-contradictory.[249] This ap-

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This doctrine has been a particular favorite of the Ninth Circuit. *See* FDIC v. Ludwig Family Trust, No. 92-16842, 1993 WL 362273, at *1 (9th Cir. Sept. 17, 1993); Walden v. RTC, No. 91-16322, 1992 WL 354213, at *1 (9th Cir. Nov. 30, 1992); FDIC v. Zook Bros. Constr. Co., 973 F.2d 1448, 1452 (9th Cir. 1992). It may even have taken on a life of its own, separate and apart from D'Oench or section 1823(e). *See* FDIC v. Ludwig Family Trust, No. 92-16842, 1993 WL 362273, at *1 (9th Cir. Sept. 17, 1993) (Canby, J., concurring).

In addition, the principle has been applied to other bank records, such as board minutes, when they may be consulted under common law D'Oench. *See* Armstrong v. RTC, 623 N.E.2d 291, 299 (Ill. 1993).

246. Fair v. NCNB Tex. Nat'l Bank, 733 F. Supp. 1099, 1105 (N.D. Tex. 1990); *see also* RTC v. Camp, 965 F.2d 25, 30 (5th Cir. 1992) (dictum).

The argument can cut against the party invoking D'Oench. In a common law D'Oench case, the court upheld a "prudent bank examiner" jury instruction which allowed reference to all of the documents in file, against the insurer's claim that only the documents embodying the terms of the loan could be considered. First Heights Bank v. Gutierrez, 852 S.W.2d 596, 607-08 (Tex. Ct. App. 1993).

247. Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 731-32 (D.N.J. 1993), explicitly stated that an ambiguity in a contract renders it an insufficient writing for purposes of section 1823(e). *Cf.* Reisig v. RTC, 806 P.2d 397, 400 (Colo. Ct. App. 1991) (holding D'Oench bars admission of parol to explain ambiguity).

248. FDIC v. O'Flahaven, 857 F. Supp. 154 (D.N.H. 1994); FDIC v. Parker Equities, No. CIV 92-1437-FR, 1993 WL 391342, at *3 (D. Or. Oct. 1, 1993); Security Sav. Bank v. Green Tree Acceptance, Inc., 739 F. Supp. 1342, 1349 (D. Minn. 1990); Royal Bank of Can. v. FDIC, 733 F. Supp. 1091, 1098 n.13 (N.D. Tex. 1990); Centerbank v. Sachs, No. CV91-037054, 1994 WL 33630, at *4 (Conn. Super. Ct. Jan. 3, 1994). Indeed, *O'Neil* itself does not stand for the proposition that D'Oench is a principle of construction, as Chief Judge Posner noted that "[t]he fact that there was an interpretive issue in *Howell* could not defeat Mrs. Howell's claim; a written obligation does not become unwritten just because there is a question about its meaning." FDIC v. O'Neil, 809 F.2d 350, 354 (7th Cir. 1987).

This does not, however, give license to the insurer's opponent to *manufacture* ambiguity by resort to D'Oench-barred evidence in pursuit of a favorable construction. *See* Nutro Prods. Corp. v. NCNB Tex. Nat'l Bank, 35 F.3d 1021, 1027 (5th Cir. 1994); FDIC v. Merchants Nat'l Bank, 725 F.2d 634, 639-40 (11th Cir.), *cert. denied*, 469 U.S. 829 (1984); *cf.* FDIC v. Singh, 977 F.2d 18, 23-24 (1st Cir. 1992) (stating, in dictum, that where documents were clear on their faces, and could be harmoniously construed, spirit of D'Oench required that implications of ambiguity or extrinsic evidence of intent would not be entertained).

249. D'Oench cannot apparently be used to create a legal construction of unambiguous language favorable to the insurer. *See* FDIC v. White, 820 F. Supp. 1423, 1428 (N.D. Ga. 1993). Nor does it prevent the preservation of a fact question when the documents are blatantly self-contradictory. *See* Erbafina v. FDIC, 855 F. Supp. 9, 12 (D. Mass. 1994).

pears to carve the "asset" into two parts: the asset itself, which consists of the agreements manifest on its face, and the "agreement," which consists of those covenants that are imperceptible to a prudent bank examiner.

Such a view seems difficult to sustain. From the perspective of common law D'Oench, it seems difficult to equate poor draftsmanship with lending oneself to a scheme to deceive. While the harsh rule that a complete failure to record representations and agreements will debar their use against the bank is justifiable where a complete failure has occurred, the rule is harder to justify where the borrower has arguably made an attempt to alert the examiners. Perhaps the borrower could have written more clearly; but then again perhaps the bank examiner could have inquired. The proposition becomes even more absurd when section 1823(e) is applied: the rule, in essence, states that the asset has become an agreement that diminishes the insurer's interest in itself. The contours of the asset are what they are: if that is a question of fact rather than of law, it does not diminish nor increase the rights of the insurer. Indeed, that recourse to fact outside of an asset may be necessary to determine the very existence of an asset—a proposition inherent in the fraud in the factum rule—militates in favor of allowing proof of the assets extent to seek the same source.

2. Written Agreements, Unwritten Terms

Even prudent bank examiners are thought to know the law. A variety of unwritten clauses and covenants are implied into every agreement by the surrounding law.[250] Most typically, and least controversially, have been those relating to the lending against security, particularly personalty. Defenses based on impairment of collateral,[251] unreasonable liquidation,[252] and lack of notice of disposition of collateral[253] may survive D'Oench. Indeed, where a guarantor has waived the right to notification of disposition of collateral, but such right cannot lawfully be waived, the insurer may not insist the instrument controls; even in the context of D'Oench, law still overrides boil-

250. *See* John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994) (denying that where contract was silent on defects to house, but state common law required disclosure of known defects, silence was an agreement by fraudulent omission and common law D'Oench would be implicated).

251. New Conn. Bank & Trust Co. v. Stadium Management Corp., 132 B.R. 205, 207 (D. Mass. 1991).

252. The defense, while proof against D'Oench, is generally found to fail on state law or the facts. RTC v. Carr, 13 F.3d 425, 429-30 (1st Cir. 1993); FDIC v. Payne, 973 F.2d 403, 410 (5th Cir. 1992); Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975, 982-83 (5th Cir. 1992). The defense may even prevail against a federal holder in due course. Roquemore v. National Commerce Bank, 837 S.W.2d 212, 214 (Tex. Ct. App. 1992).

253. Lake Forest Devs. v. FDIC, 989 F.2d 197, 201-02 (5th Cir.), *cert. denied*, 114 S. Ct. 385 (1993); FDIC v. Percival, 752 F. Supp. 313, 317 (D. Neb. 1990).

erplate.[254] Far more troubling have been claims brought under the UCC or common law "covenants of good faith and fair dealing" implied in all contracts.[255] Plaintiffs have often sought to circumvent D'Oench by reference to these covenants, pleading that failure to abide by an unwritten agreement served as a breach of the unwritten covenant implied by law in a written agreement. These bootstrap attempts to enforce unrecorded understandings[256] or permit waivers or amendments in accordance with such understandings[257] have been dealt with harshly. Other cases have recognized good-faith claims, but only when they are founded on written agreements. The covenant is enforceable where the complaint is that the rights of the bank, as shown in the agreement, were exercised with improper purpose or so as to deny the fruits of the contract to the other party.[258] Other courts

254. *See* FDIC v. Payne, 973 F.2d 403, 408-09 (5th Cir. 1992); FDIC v. Percival, 752 F. Supp. 313, 327-28 (D. Neb. 1990).

255. U.C.C. § 1-203 (1990). As with all "personal" defenses, the federal holder in due course doctrine bars the claim from following the note to one who takes as a federal holder in due course. *See* AmWest Sav. Ass'n v. Farmers Mkt. of Odessa, Inc., 753 F. Supp. 1339, 1345 (W.D. Tex. 1990); FDIC v. Byrne, 736 F. Supp. 727, 730 (N.D. Tex. 1990).

256. FDIC v. Giammettei, 34 F.3d 51, 58-59 (2d Cir. 1994); Lake Forest Devs. v. FDIC, 989 F.2d 197, 201 (5th Cir.), *cert. denied*, 114 S. Ct. 385 (1993); Bowen v. FDIC, 915 F.2d 1013, 1014-15 (5th Cir. 1990); Inn at Saratoga Assocs. v. FDIC, 856 F. Supp. 111, 117-18 (N.D.N.Y. 1994); RTC v. Wilson, 851 F. Supp. 141, 144-45 (D.N.J. 1994); FDIC v. Villemaire, 849 F. Supp. 116, 121 (D. Mass. 1994); Washington Properties Ltd. Partnership v. RTC, 796 F. Supp. 542, 546 (D.D.C. 1992); New Me. Nat'l Bank v. Benner, 774 F. Supp. 36, 39-40 (D. Me. 1991); RTC v. Wellington Dev. Group, 761 F. Supp. 731, 733, 735-36 (D. Colo. 1991).

257. Savers Fed. Sav. & Loan Ass'n v. Amberley Huntsville, Ltd., 934 F.2d 1201, 1209 (11th Cir. 1991); Ostroff v. FDIC, 847 F. Supp. 270, 274-77 (D.R.I. 1994); New Me. Nat'l Bank v. Benner, 774 F. Supp. 36, 39-40 (D. Me. 1991); Demakes Enters., Inc. v. FDIC, 143 B.R. 304, 309 (Bankr. D. Mass. 1992).

258. FSLIC v. Mackie, 962 F.2d 1144, 1150-51 (5th Cir. 1992); Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1517-18 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); Morris v. Azzi, 866 F. Supp. 149, 155 (D.N.J. 1994); First Tex. Sav. Ass'n v. Comprop Inv. Properties Ltd., 752 F. Supp. 1568, 1573-75 (M.D. Fla. 1990).

An interesting variation on this theme may be found in Beitzell & Co. v. FDIC (*In re* Beitzell & Co.), 163 B.R. 637 (Bankr. D.D.C. 1993), in which the borrower alleged that the bank, in order to curry favor with the Teamsters Union, withdrew consent to sell certain inventory, refused to honor draws on the borrower's line of credit, and falsely declared the borrower to be in default on its debt. *Beitzell*, 163 B.R. at 644-45. The court held that claims of breach of UCC covenant of good faith could proceed because claims for refusal of consent were based on unreasonableness of act not withdrawal of unwritten agreement, and Washington Properties Ltd. Partnership v. RTC, 796 F. Supp. 542 (D.D.C. 1992), was distinguishable as the UCC was statutory rather than judge-made law. *Beitzell*, 163 B.R. at 649-52. The holding in *Beitzell* is distinguishable from that in *Swift v. Tyson* in that the court indicated that custom, which the memory of man runneth not to the contrary, would also fall before the federal common law. *Compare* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842) (Story, J.) *with Beitzell*, 163 B.R. at 651. Another approach was taken by the court in New Bank of New England v. Callahan, 798 F. Supp. 73, 77 (D.N.H. 1992), which stated that D'Oench covered only "agreements" and the covenant of good faith and fair dealing, being implied by state law, was not an agreement at all. The recognition of a right to sue on the duty of good faith may also trigger other rights, where breach of the covehave held that such claims are barred as a matter of law, without reference to whether they represent artful pleading, but such cases seem to have misapplied precedent.[259] The more specific good faith obligations on noteholders who seek to exercise rights of acceleration have also been recognized on the same basis as their more general relatives.[260] As with their contract counterparts, tortious acts constituting breaches of a duty imposed by compliant agreements have normally been allowed to survive D'Oench.[261]

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nant constitutes a violation of state deceptive trade practices law. Desmond v. FDIC, 798 F. Supp. 829, 844 (D. Mass. 1992).

259. The court in FDIC v. Rusconi, 808 F. Supp. 30 (D. Me. 1992), stated, in dictum, that such claims have been held as barred as a matter of law. *Rusconi*, 808 F. Supp. at 43 (citing Clay v. FDIC, 934 F.2d 69, 72-73 (5th Cir. 1991), Mainland Sav. Ass'n v. Riverfront Assocs., 872 F.2d 955, 956 (10th Cir.), *cert. denied*, 493 U.S. 890 (1989), RTC v. Colorado 126 Partnership, 746 F. Supp. 35 (D. Colo. 1990) and FSLIC v. Locke, 718 F. Supp. 573, 582 (W.D. Tex. 1989)). With one exception, the cases on which *Rusconi* relies do not bear out this sweeping statement. The exception, *RTC v. Colorado 126 Partnership*, is not a model of clarity. The court insisted that "good faith" as a personal defense, was barred by D'Oench. *Colorado 126*, 746 F. Supp. at 37. This is of course a correct statement of the law, *assuming that the defenses arose from a non-compliant agreement*. The *Colorado 126* opinion is somewhat terse. Nonetheless, the court quoted the defendant as stating that his claims arose from the fact that the bank "among other actions participated in the transaction at issue and failed to disclosed [sic] the true value of the property being acquired, related transactions, and [the bank's] profit and actual participation in the transaction." *Id.* at 36 (quoting motion of defendant). Thus it appears that the claim is based in fraud in the inducement constituting a breach of the covenant. *See also* FDIC v. Smith, 848 F. Supp. 1053 (D. Mass. 1994) (following *Rusconi*); McDonald v. Foster Mortgage Corp., 834 S.W.2d 573, 576 (Tex. Ct. App. 1992) (indicating, in dictum, that claims of breach of covenant are barred as a matter of law).

A similar principle may be at stake in NCNB Texas National Bank v. Goldencrest Joint Venture, 761 F. Supp. 32 (N.D. Tex. 1990), the court barred claims of the breach of the covenant as arising from "unrecorded actions and representations of employees of RepublicBank", and noted that "[n]o documents to substantiate these claims have been produced in response to the motion for summary judgement," without making clear whether the breach alleged was in formation or performance of the contract. *Goldencrest*, 761 F. Supp. at 34.

260. FDIC v. Bathgate, 27 F.3d 850 (3d. Cir. 1994); Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975, 981-82 (5th Cir. 1992). The reasonableness of acceleration is, of course, measured by the terms of the original notes, not those notes as amended by D'Oench-barred agreements. Savers Fed. Sav. & Loan Ass'n v. Amberley Huntsville, Ltd., 934 F.2d 1201, 1209 (11th Cir. 1991).

261. Hanson v. FDIC, 13 F.3d 1247, 1250-52 & n.10 (8th Cir. 1994); New Bank of New Eng. v. Callahan, 798 F. Supp. 73, 76-77 (D.N.H. 1992); RTC v. Wellington Dev. Group, 761 F. Supp. 731, 738 (D. Colo. 1991). This survival of torts rights would apply to statutory tort claims, state and federal. *See* FSLIC v. Mackie, 962 F.2d 1144, 1151 (5th Cir. 1992); Holden v. FDIC, No. 91-11737-Z, 1993 WL 81459, at *3 (D. Mass. Mar. 3, 1993); CMF Va. Land, L.P. v. Brinson, 806 F. Supp. 90, 94-95 (E.D. Va. 1992); Grant County Sav. & Loan Ass'n v. RTC, 770 F. Supp. 1374, 1379-82 (E.D. Ark. 1991), *rev'd on other grounds*, 968 F.2d 722 (8th Cir. 1992); Tuxedo Beach Club Corp. v. City Fed. Sav. Bank, 749 F. Supp. 635, 648 n.12 (D.N.J. 1990).

Perhaps the most celebrated statement of the rule is the case of Astrup v. Midwest Federal Savings Bank, 886 F.2d 1057 (8th Cir. 1989), wherein a finding of breach of fiduciary duty under a written agreement was affirmed where a bank subsidiary had breached its duty to its coventurer. *See Astrup*, 886 F.2d at 1058. It is clear that in the

IV. A CONSISTENT ANALYTICAL FRAMEWORK FOR D'OENCH CASES

Considerable confusion has been engendered by the application of the D'Oench doctrines. The volume of litigation attendant upon the thrift crisis, the lack of guidance from the Court or the Capitol, and the desire of the courts to pitch in and do their bit to protect the banking system[262] have all generated an inchoate body of law, the exact application of which unclear from circuit to circuit, district to district, and within the same district.[263] Whether the doctrine is equitable or unjust or good or bad public policy is beyond the scope of this Note. But any law, unclear in its application and incapable of producing consistent results, is in some sense incapable of producing justice.

This Note suggests that proper analytic framework for any D'Oench problem, whether it be under common law or statutory D'Oench, is based around the twin concepts of "asset" and "agreement."

First, the condition defeating the interests of the insurer must arise from an "agreement" or "scheme." Because the concepts of "agreement" under statutory D'Oench and "scheme" for purposes of common law D'Oench appear to have become coterminous, the "agreement" analysis may proceed identically.

Thus, in either case, the threshold inquiry is whether what is pled by the insurer's opponent, by way of offense or defense, constitutes an agreement or a scheme. The inquiry is not whether such-and-such a cause of action is barred by D'Oench. The doctrine is neither limited nor expanded by a "tyranny of labels":[264] all defenses and causes of

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context of these facts, the developer was asserting a claim under a partnership agreement, which was not asserted to be invalid under D'Oench, although the case contains broad language that D'Oench does not bar *any* tort claim. "That doctrine affords no protection against tort claims against a financial institution, whether for personal injuries to a motorist in a collision with an armored car bringing money to the S. & L. office, or for insider profits in a sale of securities violating Securities and Exchange regulations . . . ." *Id.* at 1059-60.

262. *See* FDIC v. Gemini Management, 921 F.2d 241, 245 (9th Cir. 1990) ("As the Savings and Loan crisis in which this nation is mired continues to unfold, regulators are discovering abuses the D'Oench Court could not have imagined or predicted. The FSLIC's ability to evaluate the financial condition of troubled thrift institutions depends, now more than ever, upon the protective shield of *D'Oench*."); Milligan v. Gilmore Meyer Inc., 775 F. Supp. 400, 410 (S.D. Ga. 1991) ("The result is harsh. Nevertheless, '[a]s pitiful as the Plaintiff's situation may be, a more compelling consideration, in view of the monstrous national debt burden imposed by the spate of recent bank failures, is the sanctity and uniform application of the D'Oench doctrine and [12 U.S.C. § 1823(e)].' ").

263. *Compare* Beener v. LaSala, 813 F. Supp. 303, 309 (D.N.J. 1993) ("*D'Oench*, however, is generally applicable only where a side agreement is inextricably intertwined with a particular loan or other asset.") *with* Lesal Interiors, Inc. v. RTC, 834 F. Supp. 721, 730 (D.N.J. 1993) ("[P]laintiff's contention that the instant case does not involve a specific asset, and therefore falls outside the scope of *D'Oench* and section 1823(e), fails.").

264. *See* FDIC v. O'Flahaven, 857 F. Supp. 154 (D.N.H. 1994).

action, contract[265] and tort alike,[266] and remedies, at law or in equity,[267] are barred and none are barred, depending on whether the cause of action is pled to give effect to a forbidden "agreement" or "scheme." The inquiry is properly whether the facts averred as supporting the cause of action would, were they pled in contract as a defense to liability, constitute an agreement for purposes of D'Oench. A party who affirmatively sues the receiver for fraud is barred, tort or no, because the facts, were they pled as a defense to the contract, would be barred as mere fraud in the inducement. On the other hand, a party who sues the receiver because he was run over by an armored car is not engaged in artful pleading, and the cause of action may proceed. Judge Lamberth provided a lesson in the subtleties of these principles in *American Federation of State, County & Municipal Employees v. FDIC (In re NBW Commercial Paper Litigation)*.[268] He allowed claims for failure to comply with the registration requirements of the '33 Act, yet barred claims for selling the securities by means of misrepresentations; the former claims arose independent of any agreement, while the latter arose from misrepresentations and were barred by the artful pleading rule.[269]

Once an agreement is found, the court must inquire as to whether the alleged agreement is in fact, an agreement/scheme for purposes of D'Oench. The inquiry has two faces: first, the agreement must relate to ordinary banking transactions of the type that one would reasonably expect to be recorded in the records of a loan committee or the board, in the case of statutory D'Oench or the loan files generally, in the case of common law D'Oench. Thus, for example, personnel matters[270] or matters relating to the sale of subsidiaries or securities[271] would not be expected to be so recorded and thus fall outside of the scope of D'Oench. If the goal of D'Oench is to allow the insurers to rely on bank records with respect to important transactions rather than to provide a mask for a right to disclaim any and all contracts of the bank, the rule should protect only the reasonable expectations of the insurers as to what should be in those files. This is certainly true for common law D'Oench, where the appeal to the reliance interest of

265. *See supra* notes 92-113 (discussing various contract defenses and causes of action which have been held barred by D'Oench).

266. *See supra* notes 133-47 (discussing various tort causes of action which have been held barred by D'Oench).

267. *See supra* notes 151-55 (discussing equitable subordination and other equitable remedies).

268. 826 F. Supp. 1448 (D.D.C. 1992).

269. *Id.* at 1467-70.

270. Bender v. CenTrust Mortgage Corp., 833 F. Supp. 1525 (S.D. Fla. 1992) (noting that section 1823(e) by implication relates to financial transactions, and refusing to extend the doctrine to an employment contract without further fact-finding and briefing).

271. *See supra* notes 114-24 (discussing "ordinary banking transactions" requirement).

the insurers is direct. Such was the conclusion of the Fifth Circuit in *Alexandria Associates, Ltd. v. Mitchell Co.*[272] A requirement that all transactions of the bank's subsidiaries be approved by the bank's board would render impossible that body's ability to set policy. The principle similarly extends to the D'Oench statutes, as is shown in the case of *Thigpen v. Sparks*,[273] in which the "agreement" required by section 1823(e), and thus by section 1821(d)(9)(A), was limited to agreements relating to assets, those that one would expect to be recorded in the loan files of the bank.[274]

Second, was the transaction entered into with a bank? If the so-called agreement was not entered into with the bank, or under such circumstances as to put the parties on notice that a bank would be involved, the agreement cannot be avoided merely because the underlying asset was assigned to the bank. Such was the conclusion of the court in *Park Tucson Investors Ltd. Partnership v. Ali*,[275] where notes were made to the promoter of a real estate venture and later, unbeknownst to borrowers, pledged to a bank. When the borrowers sought to avoid payment on grounds of fraud in the inducement, the court held that common law D'Oench did not bar the claim, because the borrowers could not have lent themselves to a scheme without knowledge of involvement of the bank.[276] Further, the agreement with the promoter was outside of the broad scope of section 1823(e), because it was impossible that the borrowers could have caused execution and approval of the promoter's representations.[277]

Even if an agreement is asserted, the court must determine if there was, at the time the bank was taken over, an "asset" to which it related. Here, the statutory and common law forms of the doctrine company. The statutory forms of the rule require it by their very terms. Regardless of how deeply the insurer may have been deceived, the absence of an asset should negate the application of the rule.[278] In the case of the common law doctrine, while case law does apply the doctrine in the absence of an asset, in the vast majority of cases the application is limited to situations in which there had been, was, or was to be an asset.[279] Such an approach serves to harmonize the approach to asset questions across the spectrum, and creates a uniform

272. 2 F.3d 598 (5th Cir. 1993). The case is discussed in more detail *supra* note 114.

273. 983 F.2d 644 (5th Cir. 1993). The case is discussed in more detail *supra* note 114.

274. *See Thigpen*, 983 F.2d at 649.

275. 770 F. Supp. 531, 536-38 (D. Ariz. 1991).

276. *Id.* at 537-38.

277. *Id.* at 538.

278. *See supra* notes 207-21 (discussing "asset" requirements of section 1823(e) and section 1821(d)(9)(A)).

279. *See supra* notes 222-31 (discussing cases in which common law D'Oench was applied in the absence of an asset).

rule for situations in which an asset is asserted to be void *ab initio* or to have been voided after creation.

The existence of an asset may be negated by defects in contract formation sufficiently serious to have rendered the asset void *ab initio*,[280] or by subsequent acts that have voided the asset. If it is the former that is averred, the court must examine the defect to determine whether it is sufficient to render the instrument uniformly and without exception void: if there is an exception, for innocent purchasers or the like, the asset is not, for purposes of D'Oench, void, and the defense must fail.[281] Further, where the voiding condition is intentionally created, while statutory D'Oench may fail, common law D'Oench should continue to protect,[282] as it does in situations in which the asset is asserted to be voided by later action.

If the asset is asserted to be void by actions after contract formation, the court must determine whether the alleged voidness is a result of an agreement between the borrower and the bank, as in the case of accords and satisfactions and releases of liability. In such case, the inquiry is *in limine* to determine if statutory D'Oench will apply: evidence, that might be excluded by statutory D'Oench were it to be applied, is competent to prove voidness. The inquiry remains limited by common law D'Oench. Thus, the courts will examine the files of the bank to determine if, under the common law rule's looser standards, an asset exists or not.[283] If the instrument is voided by the action of a third party, such as a state court or an assuming borrower, no agreement or scheme is implicated, and the doctrine cannot be invoked.[284] Such is the effect, when taken together, of the decisions of the Fifth Circuit in *Templin v. Weisgram*,[285] *Buchanan v. FSLIC*,[286] and *Patterson v. FDIC*.[287] Although the former case is better remembered for its rejection of the *Langley* dictum,[288] its statements relating to the existence of a scheme as permitting the invocation of D'Oench survived the implicit rejection of its anti-*Langley* language in *Patterson*.[289] Yet, as was shown in the *Buchanan* case, even in the absence of an asset, common law D'Oench will apply to block defenses to an asset that would otherwise apply. The application of the principle to voiding

280. *See supra* notes 157-77 (discussing "real" defenses).

281. *See supra* notes 181-87 (discussing statutes rendering assets "void").

282. *See supra* note 185 (discussing modification of *Templin v. Weisgram* by *Patterson*).

283. *See supra* notes 196, 204-06 and accompanying text (discussing cases in which resort to banking files was made to determine the existence of an asset).

284. *See supra* notes 183-87.

285. 867 F.2d 240 (5th Cir.), *cert. denied*, 493 U.S. 814 (1989). The case is discussed *supra* note 185.

286. 935 F.2d 83 (5th Cir.), *cert. denied*, 502 U.S. 1005 (1991). The case is discussed *supra* note 186.

287. 918 F.2d 540 (5th Cir. 1990). The case is discussed *supra* note 185.

288. *Templin*, 867 F.2d at 241-42.

289. *Patterson*, 918 F.2d at 545.

circumstances arising after contract formation may be seen in another Fifth Circuit case, *FDIC v. McFarland*,[290] in which the no-asset exception was held to apply to a release of liability on a guaranty found in the records of the bank, where the release was so documented in the bank's records as to put the insurer on notice of the release.[291]

A distinction must be drawn between "agreements" and covenants and conditions constituting the contours of an asset. D'Oench serves to protect the insurers from the consequences of defects in contract formation or documentation, not of performance. The doctrine does not protect from the risks that the bank will not perform its properly documented obligations, negating the obligation of its counterparty to perform thereunder.[292] Thus, in the case *Yankee Bank for Finance & Savings v. Task Associates*[293] the court rejected a claim that a bank's lien should not be subordinated to those of mechanics; the bank had covenanted to pay the mechanics and, having breached that obligation, was liable for the consequences, even to a third-party beneficiary. The court reasoned that

> [i]t would be incorrect to classify all failures by banks in FDIC receivership to comply with the terms of contracts to which they are parties as unwritten modifications to those agreements. If such were the case, the FDIC as a receiver could raise D'Oench as an effective defense to any claim by any party that the bank in receivership had breached a written agreement. Such an anomalous legal result does not arise from *D'Oench* and its progeny.[294]

This is the true lesson of the "bilateral obligations" exception. If the agreement is contained in or manifest on the face of the contract being enforced, it is not an agreement affecting the asset, it is a term of the asset itself. To hold otherwise is to permit the insurer to rewrite the terms of that which it holds, selecting those covenants that it finds advantageous and rejecting those that it finds inconvenient. Such reasoning renders it clear why those courts who reject their traditional duty to construe contracts and determine whether they are ambiguous are permitting the insurers a similar liberty. If the contract terms embodied are ambiguous, this does not render them forbidden side agreements, but rather results in a question of fact as to what are the exact provisions of the asset held by the insurer.[295] The courts, in substituting a "prudent bank examiner" standard for their own judgment are going entirely too far. Even Chief Judge Posner, from whose decision in *FDIC v. O'Neil*[296] this pernicious doctrine is alleged to have

290. 33 F.3d 532 (5th Cir. 1994).
291. *Id.* at 538-39.
292. *See supra* notes 232-41 (discussing bilateral agreement exception).
293. 731 F. Supp. 64 (N.D.N.Y. 1990).
294. *See Yankee Bank*, 731 F. Supp. at 69.
295. *See supra* notes 248-49 (discussing cases in which ambiguity of terms has not been held to invoke D'Oench).
296. 809 F.2d 350 (7th Cir. 1987).

sprung, noted that "a written obligation does not become unwritten just because there is a question about its meaning."[297] The views of the District Court in *Security Savings Bank v. Green Tree Acceptance, Inc.*[298] are more sound. There the court refused to read D'Oench as an absolute right of the insurer to impose its favored interpretation on ambiguous language; the question remained for the jury, and the exact contours of the asset held by the insurer awaited its verdict.[299] In the same vein, the rejection of duties imposed on contracting parties as a matter of law or covenants inherent in all contracts as constituting unwritten agreements, also rewrite the nature of the asset held.[300] Such covenants inhere in the asset itself, and the insurer may not avail itself of that which is agreeable in the law, and bar resort to that which it finds onerous.

Conclusion

The manner in which the D'Oenches interact is nothing if not opaque. Nonetheless, by recognizing the limitations of each: the asset restriction for section 1823(e), and section 1821(d)(9)(A), and the broader access to documentation allowed by the common law doctrine, it is possible to render principled decisions under these laws. If these statutes are to fulfill their purported purpose of encouraging parties to document their agreements and allow reliance by bank regulators on the records of the regulated, consistency must be the goal of decisions under both the D'Oenches.

297. *O'Neil*, 809 F.2d at 354.
298. 739 F. Supp. 1342 (D. Minn. 1990)
299. *Id.* at 1349.
300. *See supra* notes 251-54 (discussing duties of secured parties) and notes 255-60 (discussing covenant of good faith and fair dealing).