RED ALERT: The D’Oench Doctrine’s Expansion Can Cause Financial Ruin for Borrowers When Insured Lenders Become Insolvent
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Abstract

During the early 1930’s, legislation was passed which created the Federal Deposit Insurance Corporation (F.D.I.C.) and the Federal Savings and Loan Insurance Corporation.

KEYWORDS: financial, developments, expansion
dilutes the goal of assembling a jury comprised of a spectrum of community
together with the presumption that peremptory
of the Equal Protection Clause].
205. **Id.** at 433.
206. See *Humphrey*, supra note 1.

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**TABLE OF CONTENTS**

I. INTRODUCTION ................................................................. 1405
II. ORIGIN OF THE D’OENCH DOCTRINE .................................. 1408
III. CONSTRUCTION IN THE FEDERAL DEPOSIT INSURANCE
     ACT OF 1950 ................................................................. 1410
     A. The Outcome in Langley v. F.D.I.C. .......................... 1414
     C. Judicial Overruling: The Federal Holder in
        Due Course Doctrine .................................................. 1421
     D. Recent Developments .................................................. 1427
     E. *SUNBREEZE APARTMENTS V. SUNBELT SERVICE CORP.* ... 1429
        A. Facts ................................................................. 1429
        B. Analysis of the Court’s Decision ....................... 1432
     VI. RECOMMENDATIONS TO ALLEVIATE BORROWERS’
         WOES AND CURB FURTHER EXPANSION OF D’OENCH ...... 1434
     VII. CONCLUSION ................................................................. 1438

I. INTRODUCTION

During the early 1930’s, legislation was passed which created the
Federal Deposit Insurance Corporation (F.D.I.C.) and the Federal Savings
and Loan Insurance Corporation (F.S.L.I.C.) to restore public confidence in
the banking and thrift industries respectively. Each year, financial

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    and insured deposits became insured up to $5,000 to encourage the public to return
    to depository institutions).

2. The F.D.I.C. and F.S.L.I.C. both operate in three distinct capacities when a bank
    becomes insolvent. Both can act as receiver, conservator, or in a corporate capacity. In a
    receiver or conservator capacity, both can sue and be sued. 
institutions that have been approved for federal deposit insurance are
assessed premiums which theoretically function to restore any loss to these
insurance funds caused by member bank or thrift failure. 2

The viability of these funds critically depends on government
employees who perform bank "safety and soundness" examinations to
determine risks that particular banks pose to the fund. 3 Unnecessary risks
are avoided if these examinations reveal the true value or CAMEL rating of
the bank. 4 But effective examinations are not possible if the bank's official
files do not contain written documentation that discloses the true value of
assets and liabilities. 5 If resort to oral or written conditions outside the

During liquidation of a failed institution, each can act as receiver to collect and dispose
of bank assets. This sometimes involves litigation with debtors to collect on bad loans.
Typically, in a liquidation, general creditors are paid by the receiver if there are collected
funds available after payment is made to insured depositors. However, in a depositor
preference jurisdiction, uninsured depositors have priority over general creditors.

Only in a corporate capacity does each actually pay insured depositors. If the insolvent
institutions is purchased by another healthy institution, then any bad loans that were not part
of the sale are collected and litigated by these agencies in a corporate capacity. As a
conservator, the F.D.I.C and F.S.L.I.C assume the powers of the members, officers, and
directors in an attempt to preserve bank or thrift operations without liquidation. E.g., Barry
Zisman & Hugh Spears, F.D.I.C./R.T.C. Superpowers and Their Affect on Creditors and

funds to member institutions does not seem to be working. As of 1987, the Bank Insurance
Fund (B.I.F) had a balance of $18.3 billion. After three straight years of heavy loss, the
fund's ending balance in 1990 was a mere four billion. Id. at 1. To recapitalize the near
bankrupt fund, President Bush signed into law the Federal Deposit Insurance Reform Act
of 1991 which will increase the borrowing powers of the fund from government. E.g., Janet
Notovack, Son of Credit Crunch, FORBES, May 25, 1992, at 102.

3. See generally George French, Early Corrective Action for Troubled Banks, F.D.I.C
BANKING REV. 1 (1991). These examinations determine whether a bank or thrift is finan-
cially qualified to become a federally-insured member. They also serve the important
function of providing essential information necessary to determine the correct course of action
when a member bank or thrift is facing insolvency. An inaccurate examination can lead to
an unqualified bank gaining "insured" status or an improper course of action upon insolvency.
In either situation, an unnecessary burden or risk is placed on the public funds with the
danger that the ultimate bearers will be innocent taxpayers. See Langley v. F.D.I.C, 484

4. "CAMEL" is an acronym for capital, asset quality, management, earnings, and li-
quidity. Each of these five components is rated by the examiner and a composite rating of
the CAMEL rating, is assigned. French, supra note 3, at 5.

5. D'Oench, Duhaime & Co., 315 U.S. at 460 ("The genuineness of assets ostensively held
by a bank is certainly germane to a determination of solvency . . . . [A] secret agreement.

bank's records is needed to evaluate the health of an institution, the
constructive results of a thorough examination become impossible to
obtain. 6 The Court in D'Oench created a federal common law doctrine that
disciplined borrowers and lenders to memorialize their lending transactions. 7
Failure to include the material terms of a note in a bank's official files
constitutes an arrangement likely to mislead bank examiners. Under
D'Oench, when a bank becomes insolvent, the borrower is barred from
asserting any defense against the F.D.I.C. that is based on a secret
agreement. 8 Although the doctrine's origin was based on equitable
principles, judicial expansion during the recent banking crisis to further
public policy (protecting the federal insurance program and innocent
taxpayers) has ignored the concept of balancing the equities to see if the
borrower's claim or defense justifiably prevails. 9

In areas such as Texas and Florida, where the collapse of the real estate
market has caused a great number of banks and trusts to fail, the Fifth and
Eleventh United States Circuit Courts have imputed "federal holder in due
course" status to federal insurance agencies. 10 The federal holder in due
course doctrine, as applied to federal insurance agencies, either arose out of
an unwarranted alchemy of federal common law or a mututal interpretation
of the holding in Langley v. F.D.I.C., the Supreme Court's most recent
instruction on the codification of D'Oench. 11 In imputing this status, these
courts have disregarded two fundamental building blocks of democracy, the
separation of powers doctrine and the concept of federalism, in an officious
attempt to alleviate the drain on federal insurance funds. 12

This note first traces the history of the D'Oench doctrine and then
analyzes and delineates what constitutes proper and improper application
of this law. Section two discusses the seminal case, D'Oench, Duhaime & Co.
v. F.D.I.C. 13 Section three deals with the legislative intent and result of the
codification of D'Oench. Section four reveals the expansion and overexpansion
of the doctrine during the last ten years. The fifth section analyzes a

...will conceal the truth from the vigilant eyes of the bank examiners.) (emphasis added).

8. Id. at 461.
9. Martha Hymanson, Note, Borrower Beware: D'Oench, Duhaime and Section 1823
10. See Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1248 (5th Cir. 1990); Gunter
11. Hymanson, Note, supra note 9, at 302, 309.
12. Id. at 293.
et al.: RED ALERT: The D’Oench Doctrine’s Expansion Can Cause Financial R

... institutions that have been approved for federal deposit insurance are assessed premiums which theoretically function to restore any loss to these insurance funds caused by member bank or thrift failure. 2 The viability of these funds critically depends on government employees who perform bank “safety and soundness” examinations to determine risks that particular banks pose to the fund. 3 Unnecessary risks are avoided if these examinations reveal the true value or CAMEL rating of the bank. 4 But effective examinations are not possible if the bank’s official files do not contain written documentation that discloses the true value of assets and liabilities. 5 If resort to oral or written conditions outside the

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Only in a corporate capacity does each actually pay insured depositors. If the insolvent institution is purchased by another healthy institution, then any bad loans that were not part of the sale are collected and litigated by these agencies in a corporate capacity. As a conservator, the F.D.I.C. and F.S.L.I.C. assume the powers of the members, officers, and directors in an attempt to preserve bank or thrift operations without liquidation. E.g., Barry Zisman & Hugh Spears, F.D.I.C./R.T.C. Superpowers and their Affect on Creditors and Shareholders, in LITIGATING FOR AND AGAINST THE F.D.I.C. AND THE R.T.C. 1991 at 371, (PLI Com. Law and Practice Course Handbook Series No. 588, 1991).

2. 1990 F.D.I.C., ANNUAL REPORT (1991). The theory of distributing all loss to the funds to member institutions does not seem to be working. As of 1987, the Bank Insurance Fund (B.I.F.) had a balance of $18.3 billion. After three straight years of heavy loss, the fund’s ending balance in 1990 was a mere four billion. Id. at 1. To recapitalize the near-bankrupt fund, President Bush signed into law the Federal Deposit Insurance Reform Act of 1991 which will increase the borrowing powers of the fund from government. E.g., Jast Novack, Son of Credit Crunch, FORBES, May 25, 1992, at 102.

3. See generally George French, Early Corrective Action for Troubled Banks, F.D.I.C. Banker’s Rev. 1 (1991). These examinations determine whether a bank or thrift is financially qualified to become a federally-insured member. They also serve the important function of providing essential information necessary to determine the correct course of action when a member bank or thrift is facing insolvency. An inaccurate examination can lead to an unqualified bank gaining “insured” status or an improper course of action upon insolvency. In either situation, an unnecessary burden or risk is placed on the public funds with the danger that the ultimate bearers will be innocent taxpayers. See Langley v. F.D.I.C., 484 U.S. 86, 91 (1987).

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In areas such as Texas and Florida, where the collapse of the real estate market has caused a great number of banks and thrifts to fail, the Fifth and Eleventh United States Circuit Courts have imputed “federal holder in due course” status to federal insurance agencies. 10 The federal holder in due course doctrine, as applied to federal insurance agencies, either arose out of an unwarranted alchemy of federal common law or a mutant interpretation of the holding in Langley v. F.D.I.C., the Supreme Court’s most recent instruction on the codification of D’Oench. 11 In imputing this status, these courts have disregarded two fundamental building blocks of democracy, the separation of powers doctrine and the concept of federalism, in an officious attempt to alleviate the drain on federal insurance funds. 12

This note first traces the history of the D’Oench doctrine and then analyzes and delineates what constitutes proper and improper application of this law. Section two discusses the seminal case, D’Oench, Duhrme & Co. v. F.D.I.C. 13 Section three deals with the legislative intent and result of the codification of D’Oench. Section four reveals the expansion and overexpansion of the doctrine during the last ten years. The fifth section analyzes a

... will conceal the truth from the vigilant eyes of the bank examiners.”) (emphasis added).


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proper application of the D'Oench doctrine in Sunchase Apartments v. Sunbelt Service Corp. The sixth section recommends ways to tame the doctrine's overexpansion in the future and safeguards to protect borrowers in the present. Section seven concludes this note by finding that the D'Oench doctrine and its codification are ample protection to protect the banking and savings insurance funds without imputing federal holder in due course status to these agencies.

II. ORIGIN OF THE D'OENCH DOCTRINE

Approximately sixty-five years ago, a securities broker, D'Oench, Duhme and Co., sold the Belleville Bank and Trust Co. some bonds which later defaulted. So that the bank would not have to show any past due bonds on its books, D'Oench, Duhme and Co. agreed to execute demand notes to the bank. D'Oench, Duhme and Co. never received any consideration for the notes. This occurred because the receipts contained the statement, "This demand note is given with the understanding it will not be called for payment. All interest payments to be repaid." Subsequently, interest payments were made on the note by D'Oench, Duhme and Co. so the notes would appear "as live paper" in the bank's records. Shortly thereafter, state banking authorities examined the Belleville Bank and Trust Co.'s assets and qualified the bank to receive insurance on deposits from the newly created F.D.I.C. Then, financial trouble arose and the bank became insolvent. The F.D.I.C. acquired the notes during the insolvency proceeding and demanded payment from D'Oench. D'Oench asserted failure of consideration as their defense, offering the receipts as evidence. But the F.D.I.C. lacked knowledge of these receipts since they were never in the official bank files. Thus, the bank had misrepresented its assets to the examiners in order to be being qualified to receive federal insurance. Although the F.D.I.C. had not yet been created when the notes were originally executed, D'Oench's subsequent acquiescence in making the notes look "alive" by making false interest payments caused the F.D.I.C. to be misled when it approved the bank for insurance. At the time, it was a statutory violation for any party to knowingly or willfully overvalue any asset to the $100,000 limit by F.D.I.C. Corporate, and the corporation is subrogated to the depositor's claims against the failed institution's estate. The disadvantages of liquidation are the loss in market value of the bank as a going concern and erosion of public confidence due to cessation in banking operations. Gurner v. Hutcherson, 674 F.2d 862, 865-66 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

The second option is a purchase and assumption transaction. See Zisman, supra, at 637. The bank is closed only in form as the F.D.I.C. is appointed as receiver. Normally, the receivership accepts bids and then agrees to sell to the highest bidding bank the assets along with the liabilities of the failed bank. If there are two types of transactions. The "whole bank" purchase and assumption means the purchasing bank receives all bank assets and liabilities in "as is" condition usually at a discounted price. The second type is the "clean bank" purchase and assumption in which the purchasing bank only acquires the good assets from the receivership. The bad assets or loans are transferred from F.D.I.C.-receiver to F.D.I.C.-corporate for collection. Recently, a third hybrid has been utilized in which a "whole bank" transaction occurs with the purchasing bank having the option for "asset put-back" (giving non-performing loans back to the receivership within an agreed time period). F.D.I.C. 1988 ANN. REP. (1989). Under all types, the acquiring bank assumes full liability for all deposit amounts of the failed bank. This results in 100% "de facto" insurance on insured and uninsured deposits. See Hyman, supra note 9, at 261.

The third course of action is an "insured deposit transfer" in which all insured deposits are transferred to another bank which acts as an agent for the F.D.I.C. to pay insured depositors or convert the depositors' accounts to its own account. E.g., Zisman, supra, at 637. If conversion occurs, the F.D.I.C. will often charge a premium to the acquiring institution as it usually does in a purchase and assumption transaction.

The fourth option is open-bank assistance. To avoid closure, the bank presents a plan to the F.D.I.C. to restore the health of the institution based on private investment coupled with financial aid from the F.D.I.C. When an institution fails, the F.D.I.C. must quickly analyze, using a "cost test," which option will be the least expensive to the insurance fund. By statute, the least expensive option must be chosen unless it is essential that open bank assistance be pursued to maintain adequate banking services to the community. See 12 U.S.C. § 1821 (1981).

15. Id.
16. Id.
17. Id.
19. Id. at 454.
20. Id. The insolvency proceeding involved a purchase and assumption agreement whereby the F.D.I.C. secured the notes as collateral for a $1,000,000 loan to the bank in connection with another bank's assumption of the latter's deposit liabilities. Id. Typically, when an insured bank or thrift faces insolvency, the F.D.I.C. has four courses of action to choose between. See Barry Zisman, A Readiness of the Bankruptcy "Supercourts" to Collecting Banks, Indemnified Institutions, and Other Third Parties, in CV. & CIV. LITIG. IN THE 1990'S, at 637 (FL Con. Law and Practice Course Handbook Series No. 595, 1991) at 637. The first option is liquidation. Id. The institution is closed and the F.D.I.C. is appointed as receiver to sell off the assets and sue to collect on the bank's bad loans. Id. All insured deposits are paid up

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23. The fourth option is open-bank assistance. Id. To avoid closure, the bank presents a plan to the F.D.I.C. to restore the health of the institution based on private investment coupled with financial aid from the F.D.I.C. Id. When an institution fails, the F.D.I.C. must quickly analyze, using a "cost test," which option will be the least expensive to the insurance fund. Id. By statute, the least expensive option must be chosen unless it is essential that open bank assistance be pursued to maintain adequate banking services to the community. See 12 U.S.C. § 1821 (1991).
to the F.D.I.C. in an attempt to procure federal insurance.26 The Court had already announced a policy that any party that violates this statutory provision could not rely on his own wrongful act as a defense to defeat the obligation of the note as against the receiver of the bank.25

The Court in D'Oench drew from their power to create federal common law and held that a defendant's knowledge or willingness was no longer a prerequisite for estopping that defendant from asserting his wrongful act to defeat the obligation of the note as against the corporation.28 The Court found that the Federal Reserve Act revealed a federal policy to protect the F.D.I.C. The genesis of the D'Oench doctrine occurred as the Court stated:

The test is whether the note was designed to deceive . . . the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.29

In short, for the D'Oench doctrine to bar a defendant's wrongful act as a defense to an obligation on a note as against the corporation, three elements are required: there must be a secret arrangement; there must be a possibility that the corporation could suffer loss (but proof of such is not required); and the borrower need not have fraudulent intent, it is enough that his actions might cause the authorities to be misled.30

III. CODIFICATION IN THE FEDERAL DEPOSIT INSURANCE ACT OF 1950

In 1950, the Federal Deposit Insurance Act was enacted. Section 1823(e) of the act provides:

No agreement which tends to diminish or defeat the right, title, or interest of the Corporation [F.D.I.C.] in any asset acquired by it under this section . . . shall be valid against the Corporation unless such agreement (1) shall be in writing (2) shall have been executed by the bank and the . . . obligor contemporaneously with the . . . asset . . . (3) shall have been approved by the board . . . of the bank or its loan committee . . . reflected in the minutes . . . and (4) shall have been, continuously, from the time of its execution, an official record of the bank.30

The majority of jurisdictions view section 1823(e) as a codification of the D'Oench doctrine31 but not a preemption.32 The D'Oench doctrine can be asserted by any receiver or public banking authority against a secret arrangement by a bank;33 but section 1823(e) was enacted to apply only to the F.D.I.C. in its corporate capacity.34

A requirement of D'Oench is that a secret arrangement must exist.35 Unlike D'Oench, section 1823(e) places the focus on whether the "agreement" meets all four criteria and disregards an analysis of the "borrower's conduct or participation in a scheme likely to deceive the insurer."36 Furthermore, when an agreement violates any of the four criteria in section 1823(e), the F.D.I.C. can bar affirmative claims as well as defenses asserted by the defendant against the corporation.37 The holding in D'Oench barred

24. Id. at 456 (emphasis added).
25. Id. at 457 (citing Deitrick v. Greaney, 309 U.S. 190 (1936)).
27. Id. at 457.
28. Id. at 460 (emphasis added).
32. F.D.I.C. v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986); see also Hymanson, Note, supra note 9, at 270.
35. See supra text accompanying note 28.
36. Hymanson, Note, supra note 9, at 270-71. In Langley v. F.D.I.C., the Court interpreted the word "agreement" in a much broader fashion. It is now a rare occasion when a violation of § 1823(e) no longer exemplifies a scheme or arrangement likely to mislead banking authorities. Langley, 484 U.S. at 93.
to the F.D.I.C. in an attempt to procure federal insurance. The Court had already announced a policy that any party that violates this statutory provision could not rely on his own wrongful act as a defense to defeat the obligation of the note as against the receiver of the bank. The Court in D'Oench drew from their power to create federal common law and held that a defendant's knowledge or willfulness was no longer a prerequisite for enjoining that defendant from asserting his wrongful act to defeat the obligation of the note as against the corporation. The Court found that the Federal Reserve Act revealed a federal policy to protect the F.D.I.C. The genesis of the D'Oench doctrine occurred as the Court stated:

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The majority of jurisdictions view section 1823(e) as a codification of the D'Oench doctrine but not a preemption. The D'Oench doctrine can be asserted by any receiver or public banking authority against a secret arrangement by a bank, but section 1823(e) was enacted to apply only to the F.D.I.C. in its corporate capacity.

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24. Id. at 456 (emphasis added).
25. Id. at 457 (citing Distrik v. Ganemey, 309 U.S. 190 (1936)).
27. Id. at 457.
28. Id. at 460 (emphasis added).
only defenses. 38

Although the legislative history of section 1823(e) is sparse, Congress’ intent is readily apparent. 39 It was a last second amendment to the Federal Deposit Insurance Act which covered the entire scope of the F.D.I.C.’s function. There is no record of congressional intent that section 1823(e) was a preemption of D’Oench.40 The only mention of a limit on affording the F.D.I.C. protection came from Representative Francis E. Walter, a member of the House Judiciary Committee, who was motivated by one of his constituents that lost an earlier suit against the F.D.I.C. based on D’Oench.41

There was much opposition to Representative Walter’s bill and it never left the House Judiciary Committee. 42 Shortly thereafter, the House Banking and Currency Committee hearings were conducted on section 2822 which was the framework for the formation of the Federal Deposit Insurance Act. 43 As introduced, section 2822 did not contain the writing of section 1823(e). 44 But subsequent discussion ensued between Representative Mullen and F.D.I.C. Director H. Earl Cook concerning the earlier Judiciary Committee hearings. 45 From this discussion grew an intent to protect the

40. Hymanson, Note, supra note 9, at 269.
41. Representative Walter noted: It was never the intention of Congress to give the Corporation a stronger position than that of the bank and the adoption of my amendment is offered to prove that heretofore it was the intent of Congress that any agreement in the absence of fraud was binding on the corporation.

Hymanson, Note, supra note 9, at 277-78 (citing 96 Cong. Rec. 10,732 (1950)).
42. Brief for Respondent, supra note 39.
43. Id.
44. Id.
45. The following is what occurred:

Mr. Mullen: There has been considerable litigation through the years during the existence of the corporation in which contentions have been made that agreements between the banks and debtors have not been lived up to after the banks were closed down, and that the F.D.I.C., in collecting the assets of the bank, was put in a more favorable position than the bank itself would have been and that the F.D.I.C. could ignore the agreements with debtors. I think some legislation has been introduced in a hearing held before another committee of the House on the subject. Can you tell us briefly whether or not there is any objection to putting into this proposed law an amendment to require the F.D.I.C. to comply with any such agreements that have been made in good faith and

which are properly recorded between the debtors and the banks closed up, or taken over, or merged?

Mr. Cook: I think that statement of yours covered the ground entirely—where you are properly supported by such agreements and not dependent upon oral agreements that have no binding effect. If the bars are once let down on that, there would not be a safe bank in the United States today, because anybody could claim that so-and-so had happened and there would be no evidence to support it . . .

Mr. Mullen: I think the policy of your bank is to honor any such bona fide agreement.

Mr. Cook: We never back away from a bona fide agreement, and when the record is clear, we inherit that obligation to stand by it. We cannot be bound when there is no record.

Brief for Respondent, supra note 39 (quoting from Amendments to the F.D.I.C. Act, 1950 Hearings on 2822 before the House Committee on Banking and Currency, 81st Cong., 2d Sess. 41-42 (1950) (emphasis added)).
46. Id. (citing 96 Cong. Rec. 10,671 (1950)).
48. Langley, 484 U.S. at 95 (“The short of the matter is that Congress opted for the certainty of the requirements set forth in sec. 1823(e). An agreement that meets them prevails . . . and an agreement that does not meet them fails . . . “). The only recorded spot of congressional intent contrary to § 1823(e) was Representative Walter’s bill which never made it out of the House Judiciary Committee. (note that “isolated remarks (of members of Congress) are entitled to little or no weight in interpreting legislative history.” Murphy v. Empire of Am., FSA, 746 F.2d 931, 933 (2d Cir. 1984)).
49. See, e.g., RTC. v. McCrory, 951 F.2d 68, 69 (5th Cir. 1992) (borrower’s release of liability barred as a defense by § 1823(e) because the document was kept in bank attorney’s office rather than official bank file); R.T.C. v. Crow, 763 F. Supp. 887, 892 (N.D. Tex. 1991).
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F.D.I.C. beyond requiring just a writing between bank and borrower. Consequently, the bill that left the House Committee on Banking and Currency contained the provisions of section 1823(e). 46

It is a fundamental tenet of statutory construction that absent express legislative intent to the contrary, the plain literal meaning of an unambiguous statute must be given effect. 47 Thus, the four requirements of section 1823(e) must be stringently applied to protect the Corporation. 48

Strict application of some of the requirements of section 1823(e) seems to deny a sense of practicality. 49 The second requirement of section 1823(e) mandates a contemporaneous execution of all loan documents that constitute part of the overall agreement between bank and borrower. 50 If

which are properly recorded between the debtors and the banks closed up, or taken over, or merged?

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read literally, this invalidates all amendments and releases from guarantees since these are changes that typically occur after the execution of the original agreement.51

The fourth requirement of section 1823(e) requires that all loan documents to the agreement be continuously kept in the bank’s official files.52 Proving compliance with this requirement places an undue burden on a borrower asserting the validity of an agreement against the F.D.I.C. To compensate, some courts have created a presumption that the document has continuously been in the official bank files if the other three requirements of section 1823(e) are met.53 But most courts refrain from deviation and apply the provisions of section 1823(e) in their strict sense.54 Courts favor public policy protecting the F.D.I.C. because underlying this is a sense that the public benefits in a dual capacity, as depositor and taxpayer. Additionally, the Supreme Court has already shown a desire for strict compliance.55

IV. EXPANSION OF D’OENCH: A REFLEX TO THE BANKING CRISIS OF THE EIGHTIES

A. The Outcome in Langley v. F.D.I.C.

In 1987, the United States Supreme Court decided Langley v. F.D.I.C.56 Its analysis identified the congressional purpose behind section 1823(e) in order to define the scope of its application.57 The Langley purchased a tract of land through Planters Trust and Savings Bank (Planters). They borrowed $450,000 from Planters in consideration for which they executed a note, mortgage, and personal guarantees. Subsequent-


ly, the Langleys defaulted on the note and Planters filed suit. During litigation, Planters was declared insolvent and the F.D.I.C. was appointed receiver. The F.D.I.C., as receiver, arranged for a purchase and assumption agreement with another bank; however, Langley’s note was not included. Instead, the note was transferred from F.D.I.C.-receiver to F.D.I.C.-corporate who was substituted as plaintiff in this lawsuit. The district court granted summary judgment for the F.D.I.C. on the basis that section 1823(e) bars Langley’s defense of fraud in the inducement.58

- The Langleys alleged that Planters fraudulently induced them into purchasing the land by orally misrepresenting the number of acres and mineral leases on the property. Langley’s contention was that section 1823(e) bars only "agreements" and not warranted facts (the number of acres) that fail to meet the four requirements of section 1823(e). The Langleys argued that the word "agreement" in section 1823(e) encompasses only an express promise to perform an act in the future and not factual representations.59 However, the Court disagreed by stating:

One purpose of section 1823(e) is to allow the federal and state bank examiners to rely on a bank’s records in evaluating the worth of bank assets . . . . [N]either the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions [such as undisclosed warranted facts].60

To preserve the Congressional purpose of section 1823(e), the Court defined "agreement" as the "bargain of the parties in fact . . . ."61 The parties’ bargain consists of all its conditions (warranted facts) as well as its promises.62 The Court found that to define "agreement" as to exclude warranted facts would fail to serve the codified principle of D’Oench.63 D’Oench’s purpose is defeated if defenses from secret arrangements of undisclosed warranted facts are immune from the doctrine’s power.64 Langley’s fallback position was that assuming, arguing, misrepresented facts can constitute an "agreement," the presence of fraud and the F.D.I.C.’s knowledge of such a defense at the time it acquired the note.
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The fourth requirement of section 1823(e) requires that all loss documents to the agreement be continuously kept in the bank's official files.32 Proving compliance with this requirement places an undue burden on a borrower asserting the validity of an agreement against the F.D.I.C. To compensate, some courts have created a presumption that the document has continuously been in the official bank files if the other three requirements of section 1823(e) are met.33 But most courts refrain from deviating and apply the provisions of section 1823(e) in their strictest sense.34 Courts favor public policy protecting the F.D.I.C. because underlying this is a sense that the public benefits in a dual capacity, as depositor and taxpayer. Additionally, the Supreme Court has already shown a desire for strict compliance.35

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51. See F.D.I.C. v. Mosavi 922 F.2d 486, 488 (8th Cir.), cert. denied, 111 S. Ct. 2899 (1991) ("We do not reach the contemporaneously issue resolved by the district court, and, in fact, have serious misgivings about its interpretation . . . . "). But see R.T.C. v. Crest 70 F. Supp. 2d 765, 768 (N.D. Tex. 1999) (written proposals for work-out of defaulted loans were invalid for precisely failing to be contemporaneous with the note).

52. Langley, 484 U.S. at 90 (citing 12 U.S.C. § 1823(e) (1982)).


54. "These criteria are stringent and failure to show satisfaction of each and every requirement is fatal to any claim or defense." Talmo v. F.D.I.C., 782 F. Supp. 1230, 1240 (S.D. Ohio 1991) (citing Langley, 484 U.S. at 95).

55. See cases cited supra note 48.

56. See Langley, 484 U.S. at 86.

57. Id. at 91.

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One purpose of section 1823(e) is to allow the federal and state bank examiners to rely on a bank's records in evaluating the worth of bank assets . . . . [T]heir purpose is to prevent the F.D.I.C. from using state or federal bank authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions [such as undisclosed warranted facts].40

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Langley's fallback position was that assuming, arguendo, misrepresented facts can constitute an "agreement," the presence of fraud and the F.D.I.C.'s knowledge of such a defense at the time it acquired the note

58. Id. at 88.

59. Id. at 90.

60. Id. at 91.

61. Langley, 484 U.S. at 91 (citing U.C.C. § 1-201(3)).

62. Id. (citations omitted).

63. Id. at 92.

64. Id.
makes section 1823(e) inapplicable to this case. To bar agreements in violation of section 1823(e), the language requires that the agreement must "tend] to diminish or defeat the right, title, or interest" of the F.D.I.C. in the asset. If the F.D.I.C. acquires void title of an asset, then section 1823(e) is inapplicable because no "right, title, or interest" of the F.D.I.C. could be diminished. There are several real defenses that cause an asset to have void title. Fraud in the factum is one such defense. Langley's assertion of fraud involved reliance on factual misrepresentations or fraud in the factum. Fraud in the factum is a personal defense. Personal defenses result in voidable title, not void title. The Court found that Planters had voidable title which they transferred to the F.D.I.C. Nonetheless, voidable title constituted as amount of "title or interest" in the note sufficient to satisfy the requirement of section 1823(e). Furthermore, the Court stated that the F.D.I.C.'s knowledge of the alleged fraud during its acquisition of the note is irrelevant to whether section 1823(e) applies:

The F.D.I.C. is an insurer of the bank, and is liable for the depositors' insured losses. . . . The harm to the F.D.I.C. caused by the failure to record occurs no later than the time at which it conducts its first loan examination that is unable to detect the unrecording agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance.

65. Id. at 93.
66. Langley, 484 U.S. at 90 (citing 12 U.S.C. § 1823(e) (1982)).
67. Id. at 95-96 (citing RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a, c (E. Farnsworth, CONTRACTS § 4.10, at 235 (1992))).
69. Langley, 484 U.S. at 93 (citing U.C.C. § 3-305(2)(c)) (fraud in the factum occur when a person "purports to be a party's signature to an instrument without knowledge of its true nature or contents . . . .
71. Id.
72. Id.
73. Id.
74. Id. at 95 (emphasis added).

makes section 1823(c) inapplicable to this case. To bar agreements in violation of section 1823(c), the language requires that the agreement must "tend[] to defeat or diminish the right, title, or interest" of the F.D.I.C. in the asset. If the F.D.I.C. acquires void title of an asset, then section 1823(c) is inapplicable because no "right, title, or interest" of the F.D.I.C. could be diminished. There are several real defenses that cause an asset to have void title. Fraud in the factum is one such defense.

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72. Id.
73. Langley, 484 U.S. at 94.
74. Id. at 95 (emphasis added).
locked into long term fixed mortgages when Paul Volcker, head of the Federal Reserve, switched from a policy of stabilizing interest rates to an anti-inflation policy of restricting the growth of the money supply.83 This caused interest rates to sky-rocket.82 As a result, the cost of funds (i.e., deposit interest rates) for thrifts increased dramatically.83 Thrift profit margins suffered because of this "negative interest rate."84

Second, the Depository Institutions Deregulation and Monetary Control Act of 1980 (D.I.D.M.C.) phased out Regulation Q which had historically allowed thrifts a twenty-five to fifty basis points differential on interest rates on times and savings deposits over banks.85 Without this statutory advantage, thrifts were forced to compete for funds on an equal basis with banks. This competition increased the cost of funds for thrifts as well as banks. Once again, profit margins were sliced.86

Third, the Garn-St. Germain Depository Institution Act of 1982 allowed thrifts far greater flexibility in investing their money, however, thrift managers lacked the investment expertise necessary to handle this new freedom.87 This resulted in a flux of unnecessary commercial loans destined to fail.86

Fourth, the Federal Home Loan Bank Board, which controlled the F.S.L.I.C., and was the regulating and chartering arm of the thrift industry, did little to prevent the future crisis since they were heavily influenced by private parties in the industry.88 It is unfortunate that up to forty percent of thrift failures during this crisis would involve some form of fraud and insider abuse.89

The Federal Home Loan Bank Board’s failure to require that thrifts operate under generally accepted accounting principles (G.A.A.P.) caused a false sense of security to be created. Through the use of Regulatory Accounting Principles (R.A.P.), thrifts were allowed to use accounting gimmicks to inflate their balance sheets which only aided this cover-up. This "masked the true magnitude of the thrift industry’s woes and the level of insolvency of the F.S.L.I.C."90 Finally, infrequent "safety and soundness" examinations of banks and thrifts (especially in Texas) set the course of what was to follow.92

Enter F.I.R.R.E.A. A primary purpose of the Act was to place federal deposit insurance funds in sound financial condition for the future.93 This objective called for expanding the enforcement powers of federal regulators.94 Step one abolished the Federal Home Loan Bank Board and the bankrupt F.S.L.I.C.95 The Office of Thrift Supervision was created and given F.H.L.B.B.’s regulatory and chartering function for the thrift industry.96 The Resolution Trust Corporation was formed to handle all thrift failures occurring after January 1, 1989.97 Management of thrift failures prior to January 1, 1989 was assigned to a new arm of the F.D.I.C., the F.S.L.I.C. Resolution Fund.98

It became the sole responsibility of the F.D.I.C. to insure thrift deposits as well as bank deposits of member institutions.99 To accomplish this mandate, the F.D.I.C. set up two funds, the Bank Insurance Fund (B.I.F.) and the Savings Association Insurance Fund (S.A.I.F.).100

Aside from defining the F.D.I.C.’s role as insurer, F.I.R.R.E.A. changed the scope of section 1823(e).101 Apparently, the Court’s broad interpreta-

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91. Id. at 94.
92. Id. at 97; see also F.D.I.C. 1990 ANN. REP. 31 (1991) (there was a 50% decrease in examinations of Texas Banks during the crucial years of 1983-85).
94. Id. at 107.
95. F.I.R.R.E.A., Pub. L. No. 101-73, § 401, 103 Stat. 183, 354 (1989) (although the F.S.L.I.C. was abolished, its rights and obligations were transferred to either the F.D.I.C. or the R.T.C.).
98. Id. § 215.
101. The amended § 1823(e) now reads:
No agreement which tends to diminish or defeat the interest of the 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 depository institu
locked into long term fixed mortgages when Paul Volcker, head of the Federal Reserve, switched from a policy of stabilizing interest rates to an anti-inflation policy of restricting the growth of the money supply. The resulting increase in interest rates caused interest rates to sky-rocket. As a result, the cost of funds (i.e., deposit interest rates) for thrifts increased dramatically. Thrift profit margins suffered because of this "negative interest rate." The D'Oench Doctrine's Expansion Can Cause Financial Risk.

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97. [at 99, 98. Id. § 215.
101. The amended § 1823(k) now reads: No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either in security for a loan or by purchase or as receiver of any depository institution.
 tion of section 1823(e) in *Langley v. F.D.I.C.* agreed with Congress, since the F.I.R.R.E.A. amendments effectuated a further expansion of the codification of *D’Oench.* Prior to F.I.R.R.E.A., section 1823(e) applied only to the F.D.I.C. in its corporate capacity. F.I.R.R.E.A. expressly extended the protection of section 1823(e) to "a receiver of any insured deposit institution." 103

Moreover, section 1823(e) was expanded to apply to the R.T.C. in either its corporate or receiver capacities. 104 Section 212 of F.I.R.R.E.A. expanded the F.D.I.C.’s powers as a conservator and assumingly conferred the protection of section 1823(e) to the F.D.I.C. as conservator. 105 This protection may also be claimed by the R.T.C. as conservator. 106 F.I.R.R.

E.A. also expressly extended section 1823(e)’s protection to "bridge banks" without conferring similar protection to "new banks." 107

The importance of F.I.R.R.E.A. is that it was Congress’ first response to the banking crisis. Congress made it clear that federal regulators were to

shall be valid against the Corporation unless such agreement
(1) is in writing,
(2) 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
(3) 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 committee, and
(4) has been continuously, from the time of its execution, an official record of the depository institution.


106. Lake, Note, supra note 69, at 324.

107. Id.

108. Bridge Banks and "New Banks" are temporary structural creations used by the FDIC to implement interim regulatory mechanisms to continue a failed institution until a final course of action is decided. See 12 U.S.C. § 1821 (1991). Unlike "New Banks", bridge banks may be treated as being in default for certain purposes. Id. One purpose that odly and Congress reiterated from granting § 1823(e) protection upon bridge banks. Id. It is an FDIC premise fully liable for all losses incurred by "New Banks" until its dissolution or termination. See 12 U.S.C. § 1821(m)(13) (1991).

109. This is contingent upon these claims or defenses arising from an agreement in violation of § 1823(e).

110. 674 F.2d 862, 873 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

111. Since then, other courts have expressly labeled the F.D.I.C. as a federal holder in due course. E.g., F.D.I.C. v. Wood, 758 F.2d 156, 158 (6th Cir.), cert. denied, 474 U.S. 944 (1985).

112. The pertinent §§ are U.C.C. 3-302 and 3-305. Section 3-302 states that a holder in due course is one who takes an instrument for value, in good faith, and without notice of any defense against or claim to it on the part of any person. U.C.C. § 3-302 (1992).

Section 3-305 describes the rights of a holder in due course as one who takes an instrument free from all claims to it on the part of any person, and all defenses of any party to the instrument with whom the holder has not dealt except infancy, and such other defenses as arise under the laws of the State in which the instrument is to be enforced. U.C.C. § 3-305 (1992).
tion of section 1823(e) in Langley v. F.D.I.C. agreed with Congress, since the F.I.R.R.E.A. amendments effectuated a further expansion of the codification of D'Oench. Prior to F.I.R.R.E.A., section 1823(e) applied only to the F.D.I.C. in its corporate capacity. F.I.R.R.E.A. expressly extended the protection of section 1823(e) to "a receiver of any insured deposit institution." 108

Moreover, section 1823(e) was expanded to apply to the R.T.C. in either its corporate or receiver capacities. 109 Section 212 of F.I.R.R.E.A. expanded the F.D.I.C.'s powers as a conservator and assumingly conferred the protection of section 1823(e) to the F.D.I.C. as conservator. 110 This protection may also be claimed by the R.T.C. as conservator. 111 F.I.R.R.E.A. also expressly extended section 1823(e)'s protection to "bridge banks" without conferring similar protection to "new banks." 112

The importance of F.I.R.R.E.A. is that it was Congress' first response to the banking crisis. Congress made it clear that federal regulators were to

shall be valid against the Corporation unless such agreement
(1) is in writing
(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the originator, contemporaneously with the acquisition of the asset by the depository institution
(3) 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
(4) has been continuously, from the time of its execution, an official record of the depository institution.

113. Lake, Note, supra note 60, at 324.
114. Bridge Banks and "New Banks" are temporary structural creations used by the F.D.I.C. These interim banks allow banking operations of the failed institute to continue until a final course of action is decided. See 12 U.S.C. § 1821 (1991). Unlike "New Banks", bridge banks may be treated as being in default for certain purposes. Id. One purpose that Congress expressed was to confer § 1823(e) protection upon bridge banks. Id. It is an oddity that Congress refused to grant § 1823(e) protection to "New Banks" since the F.D.I.C. remains fully liable for all losses incurred by "New Banks" until its dissolution/termination. See 12 U.S.C. § 1821(m)(13) (1991).
meaning interpretation of section 1823(e) that failed to reference the F.D.I.C. as a federal holder in due course. A proper analysis of the federal holder in due course doctrine involves a comparison with section 1823(e) and the D'Oench doctrine. Although void title nullifies the protections afforded to both a holder in the course and the F.D.I.C. under section 1823(e), the statute and the common law doctrine are otherwise distinct. According to Langley, the F.D.I.C.'s knowledge of the borrower's claim or defense at the time of acquisition of the asset is irrelevant to granting the F.D.I.C. protection under section 1823(e). However, all fifty states, in their adoption of the U.C.C.'s provision of "holder in due course," require that the holder take the instrument "without knowledge ... of any defense against or claim to it on the part of any person...." Unlike section 1823(e), holder in due course protection does not apply if the instrument was purchased as part of a bulk transaction outside the regular course of business of the transferor.

The federal holder in due course doctrine is also distinct from the common law D'Oench doctrine. In D'Oench, a scheme or arrangement likely to deceive banking authorities must exist. Under the federal holder in due course doctrine, a secret arrangement between bank and borrower is not a requirement. If the F.D.I.C. is a federal holder in due course, it can bar any personal defense asserted by the borrower, notwithstanding the absence of a scheme or arrangement to deceive the authorities. Thus, those courts that have imputed federal holder in due course status to the F.D.I.C. have enlarged the corporation's enforcement power against borrowers without Congress' consent or Supreme Court direction.

113. See Mayer & Kahn, supra note 29, at 9; see also Langley v. F.D.I.C., 484 U.S. 95 (1987) (Congress intended that § 1823(e) be given its literal meaning).
115. Langley, 484 U.S. at 93.
116. Id. at 94.
117. Hyman Son, Note, supra note 9, at 297 (citing R. Anderson, Anderson in the Uniform Commercial Code § 3-302 (3d ed. 1984)).
119. Id.
122. See Griffin, 955 F.2d at 697 n.3.
123. See supra text accompanying notes 112-16.

To analyze whether these courts have improperly created a federal common law doctrine, the test that the Supreme Court fashioned in United States v. Kimbel Foods, Inc., is the appropriate tool. In Kimbel, the Court announced three qualifying factors on whether a federal court should create or apply a federal common law doctrine to determine a case involving a federal program. The first factor is whether the federal program by its nature requires nationwide uniformity. The second factor is whether the adoption of state law would frustrate specific objectives of the federal program. Finally, the third factor is whether applying federal common law would disrupt commercial relations predicated on state law. As an example, the D'Oench doctrine is a federal common law creation that passes the muster of the Kimbel test. First, protection of federal deposit insurance funds requires nationwide uniformity. Bank examiners would be unable to assess the true value of bank assets to qualify a bank for insurance or terminate a bank's insurance if they were subject to borrowers' state law defenses arising out of a scheme or arrangement outside a bank's file. Second, to recognize a borrower's state law defenses would impair the valuation function of examiners and frustrate the federal objective of protecting the insurance program for the banking industry. Third, D'Oench does not disrupt commercial relationships predicated on state law. For all states, "it is standard and prudent banking practice to reduce all material conditions of a bank agreement to writing."219 In contradistinction, the "federal holder in due course" doctrine fails the three pronged Kimbel test. The Eleventh Circuit was the first to apply federal holder in due course status to the F.D.I.C. in Gunter v. Hutchinson. The court was overly concerned with enlarging the F.D.I.C.'s protection during a purchase and assumption transaction of a failed bank. True, purchase and assumption transactions are usually the preferred course of action upon bank failure. The public benefits from
meaning interpretation of section 1823(e) that failed to reference the F.D.I.C. as a federal holder in due course.\textsuperscript{111}

A proper analysis of the federal holder in due course doctrine involves a comparison with section 1823(e) and the D'Oench doctrine. Although voidable nullifies the protections afforded to both a holder in due course\textsuperscript{112} and the F.D.I.C. under section 1823(e),\textsuperscript{113} the statute and the common law doctrine are otherwise distinct. According to Lane v. F.D.I.C., the F.D.I.C.'s knowledge of the borrower's claim or defense at the time of acquisition of the asset is irrelevant to granting the F.D.I.C. protection under section 1823(e).\textsuperscript{114} However, all fifty states, in their adoption of the U.C.C.'s provision of "holder in due course,"\textsuperscript{115} require that the holder take the instrument "without knowledge . . . of any defense against or claim to it on the part of any person . . . ." Unlike section 1823(e), holder in due course protection does not apply if the instrument was purchased in part of a bulk transaction outside the regular course of business of the transferor.

The federal holder in due course doctrine is also distinct from the common law D'Oench doctrine. In D'Oench, a scheme or arrangement likely to deceive banking authorities must exist.\textsuperscript{116} Under the federal holder in due course doctrine, a secret arrangement between bank and borrower is not a requirement.\textsuperscript{117} If the F.D.I.C. is a federal holder in due course, it can bar any personal defense asserted by the borrower, notwithstanding the absence of a scheme or arrangement to deceive the authority.\textsuperscript{118} Thus, those courts that have imputed federal holder in due course status to the F.D.I.C. have enlarged the corporation's enforcement powers against borrowers without Congress' consent or Supreme Court direction.\textsuperscript{119}

111. See Meyer & Kahn, supra note 29, at 9; see also Langley v. F.D.I.C., 484 U.S. 186 (1987) (Congress intended that § 1823(e) be given its literal meaning).
113. Langley, 484 U.S. at 93.
114. Id. at 94.
115. Id. at 94.
116. Hyman, supra note 9, at 297 (citing R. Anderson, Anderson on the Uniform Commercial Code § 3-202 (3d ed. 1943)).
118. Id.
120. See Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1246-49 (5th Cir. 1990).
121. See Griffin, 935 F.2d at 697 n.3.
122. See supra text accompanying notes 112-16.
information was in the bank's files. n144 Clearly, in F.D.I.C. v. Wood, there was no D’Oench type secret arrangement or 1823(c) violation; nonetheless, the court protected the F.D.I.C. with federal holder in due course status. At this time, the Fifth, Sixth, Eighth, and Eleventh Circuits have held that the F.D.I.C., the R.T.C., and its assignees are holders in due course. n145

To recognize the flaw in granting these agencies holder in due course status, one need only apply the Kimbell test. True, there must be a nationwide uniformity in protecting the F.D.I.C. But contrary to the contention of the Fifth, Sixth, Eighth, and Eleventh Circuits, added nationwide protection is unnecessary for purchase and assumption transactions.

Today, a large percentage of purchase and assumption transactions are "whole bank" transfers. n146 The purchasing bank places a bid which incorporates a standardized discounting method for bad loans. n147 This is because it is practically impossible for bank examiners to reach a precise value of all assets in one night. n148 The focus for the purchasing bank is on the other bank's market position and branch outlets rather than on the few personal defenses that might arise outside the scope of D’Oench. n149 Furthermore, the purchasing bank often negotiates for "asset put-back." n150 Those purchasers that negotiate for this option are rarely concerned about the few personal defenses that escape D’Oench when they place their bids.

Furthermore, allowing the few state law defenses against F.D.I.C./R.T.C that are not extracted out by D’Oench or section 1823(c) would not frustrate the federal objective of protecting the federal insurance funds. Section 1823(c) and D’Oench give the F.D.I.C. and R.T.C. enough protection. Why place a further burden on the borrowing community? The objective behind the federal insurance program was to assess premiums to member institutions to finance the fund. n151 A complete cancellation of borrowers' rights against the F.D.I.C. was never contemplated as the means to

100% "de facto" insurance on deposits and a continuation of banking service. Additionally, the F.D.I.C. is saved from the heavy administrative cost of a liquidation.

Notwithstanding, the D'Oench doctrine and section 1823(e) provide adequate protection to the F.D.I.C. without federal holder in due course status. However, the Eleventh Circuit believed that overnight valuation of a bank's assets was crucial to a purchase and assumption transaction. Therefore, because of the speed required for this type transaction, all personal defenses asserted by a borrower against the F.D.I.C. must be barred to encourage bidding and reach a reliable valuation of bank assets. This included barring personal defenses and affirmative claims that were not barred by D'Oench or section 1823(e). The Eleventh Circuit held that the F.D.I.C. is a federal holder in due course as long as it lacked knowledge of the borrower's defenses when the asset was acquired.

The Fifth Circuit expanded the federal holder in due course doctrine in F.D.I.C. v. Wood. In Wood, the court allowed the F.D.I.C. to bar a defense of usury that was evident on the face of the note acquired during a purchase and assumption transaction. The court held that the defense was barred because the F.D.I.C. was a federal holder in due course. The borrower argued that the F.D.I.C. had knowledge since the interest rate was written on the note.

The Fifth Circuit claimed that "the F.D.I.C. is under no duty, in either of its capacities, to examine the assets of a failed bank before it agrees to execute a purchase and assumption transaction." Furthermore, "the F.D.I.C. can't be charged with knowledge of a defense merely because the

<table>
<thead>
<tr>
<th>Year</th>
<th>Purchase and Assumptions</th>
<th>Total Bank Failures For the Year</th>
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<tbody>
<tr>
<td>1987</td>
<td>133</td>
<td>184</td>
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<td>1988</td>
<td>164</td>
<td>200</td>
</tr>
<tr>
<td>1989</td>
<td>174</td>
<td>206</td>
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<tr>
<td>1990</td>
<td>148</td>
<td>168</td>
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134. See sources cited supra note 20.


136. Gunter, 674 F.2d at 870.

137. Id. (emphasis added).

138. See id. at 869.

139. See id. at 873.


141. Id. at 160-61.

142. Id. at 161.

143. Id. at 162.

144. Clearly, in F.D.I.C. v. Wood, there was no D'Oench type secret arrangement or 1823(e) violation; nonetheless, the court protected the F.D.I.C. with federal holder in due course status. At this time, the Fifth, Sixth, Eighth, and Eleventh Circuits have held that the F.D.I.C. is a federal holder in due course status, one need only apply the Kimbell test. True, there must be a nationwide uniformity in protecting the F.D.I.C. But contrary to the contention of the Fifth, Sixth, Eighth, and Eleventh Circuits, added nationwide protection is unnecessary for purchase and assumption transactions.

Today, a large percentage of purchase and assumption transactions are "whole bank" transfers. The purchasing bank places a bid which incorporates a standardized discounting method for bad loans. This is because it is practically impossible for bank examiners to reach a precise value of all assets in one night. The focus for the purchasing bank is on the other bank's market position and branch outlets rather than on the few personal defenses that might arise outside the scope of D'Oench. Furthermore, the purchasing bank often negotiates for "asset put-back." Those purchasers that negotiate for this option are rarely concerned about the few personal defenses that escape D'Oench when they place their bids.

Furthermore, allowing the few state law defenses against F.D.I.C./R.T.C. that are not extracted out by D'Oench or section 1823(e) would not frustrate the federal objective of protecting the federal insurance funds. Section 1823(e) and D'Oench give the F.D.I.C. and R.T.C. enough protection. Why place a further burden on the borrowing community? The objective behind the federal insurance program was to assess premiums to member institutions to finance the fund. A complete cancellation of borrowers' rights against the F.D.I.C. was never contemplated as the means to


146. See French, supra note 3, at 3.

147. Id. at 11.

148. Wood, 758 F.2d at 161.

149. Zizzaro, supra note 20, at 637.

150. See sources cited supra note 20.

151. Hynson, supra note 20, at 303.
accomplish this objective.\footnote{152}

Moreover, application of the federal holder in due course doctrine to these agencies causes a disruption of commercial relations predicated on state law. State law requires that a holder in due course can not acquire the instrument in a bulk transaction or outside the transferor's ordinary course of business.\footnote{153} Typically, when a bank or thrift fails, the F.D.I.C. or R.T.C. acquires the bank's assets in a bulk transaction. It is also arguable that bank receivership is not within the bank's normal course of business.\footnote{154}

State law requires that a holder in due course take the instrument "without knowledge of any defense against or claim to it on the part of any person."\footnote{155} Certainly, this would disqualify a transferee who acquired a note where a usurious claim or defense against the transfer was evident on the instrument. However, this did not preclude the Sixth Circuit from imputing federal holder in due course status to defeat a borrower's defense against the F.D.I.C. when the borrower's note was usurious on its face.\footnote{156}

Likewise, the Fifth Circuit has held that "the F.D.I.C. . . . enjoy[s] holder in due course status whether or not they satisfy the technical requirements of state law."\footnote{157}

It is clear that creating federal holder in due course status for these agencies disobeys the test that the Court enunciated in \textit{Kimbell}. To ignore the \textit{Kimbell} test and create federal common law that is contrary to unanimous state law completely disregards the concept of federalism and the separation of powers doctrine.\footnote{158} If overturning state law is necessary, then let Congress be the one to do it. While the \textit{Kimbell} test allows the federal common law \textit{D'Oench} doctrine to be applied when a scheme to deceive is involved, absent this scheme, state law should not be ignored.

It is a fundamental principle of statutory construction that judicial interpretation of a statute should not void any section of that statute.\footnote{159} Courts that have interpreted \textit{Langley} as implying that section 1823 gives the F.D.I.C. holder in due course status, violate this principle.\footnote{160} Congress specifically set out the requirements of section 1823(e) when they codified \textit{D'Oench}.\footnote{161} No reference was made allowing these agencies holder in due course status.\footnote{162} It is a mutant interpretation of section 1823(e) to say that it authorizes holder in due course status, since this status would encompass all protections afforded by section 1823(e) making its specific provisions unnecessary.\footnote{163}

Therefore, courts should not allow these agencies to have federal holder in due course status. This overgloss the \textit{Kimbell} test, separation of powers doctrine, federalism, and basic tenets of statutory construction. Besides, \textit{D'Oench} and section 1823(e) provide ample protection for these federal insurance agencies without needing more.

\textbf{D. Recent Developments}

Under commonly accepted principles of commercial and property law, the transfer of an instrument vests in the transferee all rights as the transferor has therein.\footnote{164} Aside from federal holder in due course status which fails as a right under the \textit{Kimbell} test, the protection of the \textit{D'Oench} doctrine should extend to successors in interest of assets sold by the F.D.I.C. or R.T.C. during a purchase and assumption transaction. Public policy favors extending \textit{D'Oench} to purchasers to protect federal insurance funds since it promotes higher bidding during a "purchase and assumption."\footnote{165} The majority of courts agree and therefore have held that the protection of the \textit{D'Oench} doctrine extends to F.D.I.C. or R.T.C. successors.\footnote{166} This includes "new banks," bridge banks, bridge savings associations,\footnote{167} and privately owned banks or thrifts acquiring assets through a "purchase and assumption."\footnote{168}

At the other end of the road, courts have extended the F.D.I.C.'s and R.T.C.'s protection under \textit{D'Oench} and section 1823(e) to assets of a wholly.

\begin{footnotesize}
\begin{itemize}
\item \textit{v.} Newhart, 892 F.2d 47 (8th Cir. 1989); F.S.L.I.C. v. Murray, 853 F.2d 1251 (5th Cir. 1988).
\item Id.
\item 156. Id.
\item 157. Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1249 (5th Cir. 1990).
\item 158. Hyneman, Note, supra note 9, at 293, 297.
\item 159. Id. at 279.
\item 160. See, e.g., F.D.I.C. v. State Bank of Virden, 893 F.2d 139 (7th Cir. 1990); F.D.I.C.
\item 162. Id.
\item 163. Hyneman, Note, supra note 9, at 305.
\item 164. U.C.C. § 3-201(6).
\item 165. Thomas B. Hudson, No Guarantees; The R.T.C. and F.D.I.C. use the D'Oench Doctrine to Wipe Out Claims by Parties Against Failed Banks and Thrifts, MAG. BANK.
\item 166. Mich., Mar. 1992, at 64.
\item 167. See, e.g., Pornas v. Petroplex Sav. Ass'n, 903 F.2d 379, 381 (5th Cir. 1990).
\item 169. Pornas, 903 F.2d at 381.
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It is clear that creating federal holder in due course status for these agencies disobey the test that the Court enunciated in *Kimbell*. To ignore the *Kimbell* test and create federal common law that is contrary to unanimous state law completely disregards the concept of federalism and the separation of powers doctrine.158 If overturning state law is necessary, then let Congress be the one to do it. While the *Kimbell* test allows the federal common law *D’Oench* doctrine to be applied when a scheme to deceive is involved, absent this scheme, state law should not be ignored. It is a fundamental principle of statutory construction that judicial interpretation of a statute should not void any section of that statute.159 Courts that have interpreted *Langley* as implying that section 1823 gives the F.D.I.C. holder in due course status, violate this principle.160 Congress specifically set out the requirements of section 1823(e) when they codified *D’Oench*.161 No reference was made allowing these agencies holder in due course status.162 It is a mutant interpretation of section 1823(e) to say that it authorizes holder in due course status, since this status would encompass all protections afforded by section 1823(e) making its specific provisions unnecessary.163

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D. Recent Developments

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At the other end of the road, courts have extended the F.D.I.C.’s and R.T.C.’s protection under *D’Oench* and section 1823(e) to assets of a wholly

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152. Id. at 297-99, 303.
153. Id. at 300 (citing R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-302(1)(e) (3d ed. 1984)).
154. See *Zisman & Spears*, supra note 1, at 371.
156. Wood, 758 F.2d at 156.
158. *Hymanson, Note, supra note 9, at 293, 297.
159. Id. at 279.
160. *See, e.g., F.D.I.C. v. State Bank of Virden, 893 F.2d 139 (7th Cir. 1990); F.D.I.C.*
owned subsidiary of a failed institution.169 These subsidiaries or "service corporations" are regulated since their activities have a major effect upon the soundness of the insured parent institution.170 Public policy demands that their assets be protected from borrowers’ claims or defenses arising from outside side agreements. This ensures protection of the federal insurance program.171

Today, it is generally accepted that D’OENCH bars affirmative claims as well as defenses arising from a scheme or arrangement likely to deceive bank examiners.172 This includes claims or defenses such as fraud in the inducement,173 failure of consideration,174 accord and satisfaction,175 negligence,176 breach of fiduciary duty,177 estoppel and waiver,178 smiting provisions,179 and securities law fraud.180 When the borrower’s claim or defense does not arise from an outside agreement or scheme, neither section 1823(e) nor D’OENCH bars these contentions from receiving a trial on their merits.181

The protection of D’Oench or section 1823(e) can now be raised for the first time on appeal when the F.D.I.C. or R.T.C. is substituted as a party for the bank subsequent to a trial court’s verdict favoring the borrower.182

171. Victor Hotel Corp., 928 F.2d at 1083.
178. See, e.g., Beihley v. F.D.I.C., 868 F.2d 776 (5th Cir. 1989).
179. See, e.g., Bowen v. F.D.I.C., 915 F.2d 1013 (5th Cir. 1990).
182. See, e.g., Garrett v. Commw. Mortg. Corp., 936 F.2d 591 (5th Cir. 1991) (mortgagee’s claims of breach of contractual and fiduciary duties not barred by D’Oench or § 1823(e) when failed bank had negligently undersinned plaintiff’s home which burned down).

This appellate privilege is proper for two reasons. First, the F.D.I.C./R.T.C. never had the opportunity at trial to assert D’Oench or section 1823(e). Second, the harm to the F.D.I.C./R.T.C. occurred during the first bank examination that they were misled, and the F.D.I.C.’s or R.T.C.’s knowledge of the lawsuit when they acquired the asset does little to alleviate this prior harm.184 Should the trial court determine that the bank has void title in the asset, then this appellate privilege is negated.185

The overwhelming majority of jurisdictions do not allow a solvent institution, as original lender, to assert the D’Oench doctrine to bar a borrower’s claims or defenses.186 Unlike the F.D.I.C. or R.T.C., the lender allegedly is a participant in creating an outside agreement with a borrower. Thus, under the doctrine of "in pari delicto" the solvent bank or thrift may be considered equally at fault.187 It is only fair that borrowers’ claims or defenses against solvent institutions receive a trial on their merits rather than face the procedural bar of D’Oench.

For the first time, a state, New Hampshire, has enacted law extending the federal statutory and common law protections of D’Oench to state chartered institutions that have never been closed but are under an open-bank assistance program.187 This promotes open-bank assistance as a viable alternative to closing the bank and proceeding with a "purchase and assumption" since private investors in such a program will now be protected by D’Oench.188

V. SUNCHASE APARTMENTS V. SUNBELT SERVICE CORP.

A. Facts

Prior to August 19, 1988, Sunbelt Service Corporation was a wholly-owned subsidiary of Sunbelt Savings Association of Texas, a state chartered savings and loan insured by the F.S.L.I.C.189 D.R.W. Property Co. went....

184. See Thurman v. F.D.I.C., 889 F.2d 1441, 1447 (5th Cir. 1989).
185. See, e.g., First Interstate Bank, N.A. v. First Nat’l Bank, 928 F.2d 153, 155 (5th Cir. 1991) (solvent bank could not use D‘Oench to bar contention of breach of contract).
186. Hymanson, Note, supra note 9, at 268.
188. Id.
owned subsidiary of a failed institution. These subsidiaries or "service
corporations" are regulated since their activities have a major effect upon the
soundness of the insured parent institution. Public policy demands that
their assets be protected from borrowers' claims or defenses arising from
outside side agreements. This ensures protection of the federal insurance
program.

Today, it is generally accepted that D'Oench bars affirmative claims as
well as defenses arising from a scheme or arrangement likely to deceive
bank examiners. This includes claims or defenses such as fraud in the
inducement, failure of consideration, accord and satisfaction, negligence,
breach of fiduciary duty, estoppel and waiver, anticipatory
provisions, and securities law fraud. When the borrower's claim or defense does not arise from an outside agreement or scheme, neither section 1823(e) nor D'Oench bars these contentions from receiving a trial on their merits.

The protection of D'Oench or section 1823(e) can now be raised for the
first time on appeal when the F.D.I.C. or R.T.C. is substituted as a party for
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examination that they were misled, and the F.D.I.C.'s or R.T.C.'s knowledge of
the lawsuit when they acquired the asset does little to alleviate this prior
harm. Should the trial court determine that the bank has void title in
the asset, then this appellate privilege is negated.

The overwhelming majority of jurisdictions do not allow a solvent
institution, as original lender, to assert the D'Oench doctrine to bar a
borrower's claims or defenses. Unlike the F.D.I.C. or R.T.C., the lender
allegedly is a participant in creating an outside agreement with a borrower.
This, under the doctrine of "in pari delito" the solvent bank or thrift may be
considered equally at fault. It is only fair that borrowers' claims or defenses
against solvent institutions receive a trial on their merits rather than face
the procedural bar of D'Oench.

For the first time, a state, New Hampshire, has enacted law extending the
federal statutory and common law protections of D'Oench to state
chartered institutions that have never been closed but are under an open-
bank assistance program. This promotes open-bank assistance as a
viable alternative to closing the bank and proceeding with a "purchase and
assumption" since private investors in such a program will now be protected
by D'Oench.

V. SUNCHASE APARTMENTS v. SUNBELT SERVICE CORP.

A. Facts

Prior to August 19, 1988, Sunbelt Service Corporation was a wholly-
owned subsidiary of Sunbelt Savings Association of Texas, a state chartered
savings and loan insured by the F.S.L.I.C. D.R.W. Property Co. went

184. See Thurman v. F.D.I.C., 889 F.2d 1441, 1447 (5th Cir. 1989).
185. See, e.g., First Interstate Bank, N.A. v. First Nat'l Bank, 928 F.2d 153, 155 (5th Cir. 1991) (solvent bank could not use D'Oench to bar contention of breach of contract).
186. Hymanson, Note, supra note 9, at 268.
188. Id.
to Sunbelt Service Corp., a lender, and executed a note and mortgage to purchase an apartment complex from another entity. D.R.W. Property Co. defaulted on the note to Sunbelt Service Corp. D.R.W. Property Co. entered into a contract to sell the subject property to Sunchase Apartments, a general partnership. This contract was conditioned on Sunchase Apartment's success in obtaining the lender's consent to a reduction in principal, or interest, or both on the outstanding debt so that the property could realize a positive cash flow.190

Evidently, the apartment complex was in a deteriorated state and had a high vacancy rate. The property needed $500,000 worth of capital improvements because of depreciation and tenant abuse. As it existed, the income from the property could not carry the debt service. Sunchase Apartments, G.P., and Sunbelt Service Corp. orally agreed that if Sunchase Apartments, G.P.: 1) completed the purchase from D.R.W. Property Co.; 2) made the necessary capital investments; and 3) kept the loan current for a period of four months, then Sunbelt Service Corp. would modify the principal, or interest rate, or both so that the subject property would at least break even.191 Sunbelt Service Corp. cited administrative reasons for not being able to document any reduction in debt until after the closing occurred.

Shortly thereafter, Sunchase Apartments, G.P. purchased the property from D.R.W. Property Co. Simultaneously, Sunchase Apartments, G.P. executed a replacement note and mortgage modification agreement with Sunbelt Service Corp. The mortgage documents contained a "merger clause." The merger clause provided that all modifications to this agreement must be in writing and signed by Sunbelt Service Corp.192

After the closing, Sunchase Apartments, G.P. made the necessary capital improvements and kept the loan current for the four month period. Then, Sunchase Apartments, G.P. requested that Sunbelt Service Corp. enter into good-faith negotiations to reduce the debt structure as orally agreed. Sunbelt Service Corp. delayed negotiations.193 As a result, Sunchase Apartments, G.P. stopped all payments on the note and failed to pay property taxes.

190. Id. at 124.
191. Id. at 125.
192. Id. at 122.

On August 19, 1988, Sunbelt Savings Association of Texas was declared insolvent and placed under F.S.L.I.C. receivership. On the same day, the Federal Home Loan Bank Board chartered a "new bank," Sunbelt Savings, F.S.B. The "new bank" entered into a purchase and assumption transaction with the F.S.L.I.C. receiver transferring all the stock of the "old" Sunbelt Savings Association to the new bank. Thus, Sunbelt Service Corp. became a wholly-owned subsidiary of the new Sunbelt Savings, F.S.B. The new bank remained under the supervision of the F.S.L.I.C. until F.I.R.R.E.A. abolished the F.S.L.I.C. Pursuant to this Act, supervision of the new bank succeeded to the F.D.I.C.194

In June, 1989, Sunbelt Service Corp., now under federal regulation, filed a foreclosure action against Sunchase Apartments, G.P. Sunchase Apartments, G.P. filed their response asserting several affirmative defenses and a counterclaim. The affirmative defenses included estoppel, waiver, fraudulent misrepresentation, and failure of consideration. All were based on the oral misrepresentations of Sunbelt Service Corp. The counterclaim sought in the alternative damages for fraudulent misrepresentation; or rescission, reformation, or cancellation based upon the same misrepresentations.195

Sunbelt Service Corp. responded to the counterclaim by asserting two affirmative defenses. One, the presence of a "merger clause" in the mortgage documents prevents any oral side agreement from having effect. Two, Sunbelt Service Corp., a wholly-owned subsidiary of a federal savings bank under F.D.I.C. supervision, is entitled to use the D'Oench doctrine to bar any agreement outside the bank's files that was likely to have misled banking authorities.196 Sunbelt Service Corp. filed for partial summary judgment on the foreclosure action. The trial court granted summary judgment in favor of Sunbelt Service Corp. on both the foreclosure action and the counterclaim. The trial court based their decision on the "merger clause" which served to prevent oral side agreements from having effect.197 A rehearing was denied. Subsequently, Sunchase Apartments, G.P., appellants and defendants below, filed an appeal to the First District Court of Appeal of Florida.198

194. See supra text accompanying notes 93-98.
195. Sunchase Apartments, 596 So. 2d at 121.
197. Sunchase Apartments, 596 So. 2d at 122.
198. Id. at 119.

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194. See supra text accompanying notes 93-98.
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198. Id. at 122.
B. Analysis of the Court's Decision

The First District Court of Appeal of Florida affirmed the trial court's decision but not on the same theory. The appellate court recognized that a "merger clause" does not bar oral evidence offered to prove that the "merger clause" was procured through fraud. Nevertheless, the appellate court affirmed absent a genuine issue of material fact regarding appellee's assertion of D'Oench.200

The court's opinion outlined the scope of D'Oench's application. The court correctly acknowledged that D'Oench extends to wholly-owned subsidiaries of federally insured institutions201 as well as purchasers or transferees of a purchase and assumption transaction.202 The appellate court recognized that D'Oench applied to the F.D.I.C., F.S.L.I.C., and the R.T.C.203

Citing D'Oench, Duhme & Co. v. F.D.I.C., the court reiterated that neither fraudulent intent to deceive regulators, nor the fact that regulators were not deceived was a prerequisite to use the D'Oench doctrine.204

"The rule emerging from D'Oench, Duhme is that no agreement between a borrower and a bank which does not plainly appear on the face of an obligation or in the bank's official records is enforceable against the F.D.I.C."205 This comports with the original language used in D'Oench, Duhme & Co. that "it would be sufficient . . . that the maker lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled."206 Since appellants failed to memorialize all of the material terms in their replacement note and mortgage modification agreement with appellee, appellants lent themselves to an arrangement likely to mislead bank examiners. Thus, the court correctly concluded that D'Oench bars appellants from asserting claims or defenses based on oral representations that tend to defeat or diminish any interest of the F.D.I.C. or its transferee.

The only flaw in the court's analysis was by omission. The court acknowledged that section 1823(e) was the codification of D'Oench but not a preemption.207 Citing Hall V. F.D.I.C., the court stated that D'Oench has broader application than section 1823(e),208 but failed to define how section 1823(e) was limited. The court failed to explain why section 1823(e) was not a basis for their decision.

The court cited Victor Hotel Corp. v. F.C.A. Mortgage Corp. as having material facts substantively indistinguishable from the instant case.209 The court compared the two cases and decided that D'Oench bars appellant's claims and defenses based on oral representations. In Victor Hotel Corp., the court found that both D'Oench and section 1823(e) protect the wholly-owned subsidiary of a "new bank" transferee of a purchase and assumption transaction.210 Yet, in the instant case, the First District Court of Appeal of Florida never explained why section 1823(e) was not a basis for their decision.

The overwhelming majority of jurisdictions protect the F.D.I.C./R.T.C. through both section 1823(e) and D'Oench.211 But transfers/purchasers of a purchase and assumption transaction are typically protected solely by D'Oench.212

In Victor Hotel Corp., a "new bank" transferee, pursuant to an acquisition agreement, entered into a purchase and assumption with the F.S.L.I.C. to acquire a failed bank.213 A provision in this acquisition agreement required the F.S.L.I.C. to reimburse the "new bank" for any net loss on bad loans that were purchased (i.e., asset "put back").214 It's likely the court acknowledged, perhaps improperly, that section 1823(e) protection

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199. Id. at 122 (citing Nobles v. Citizens Mortg. Corp., 479 So. 2d 822 (Fla. 2d Dist. Ct. App. 1985)).
200. Id. at 126.
201. Id. at 124 (citing Victor Hotel Corp. v. F.C.A. Mortg. Corp., 928 F.2d 1077 (11th Cir. 1991)).
202. Sunchase Apartments, 596 So. 2d at 124 (citing F.S.L.I.C. v. Griffin, 935 F.2d 491 (5th Cir. 1991)).
203. Id. (citing Bauman v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1510 (11th Cir. 1991)), cert. denied, 112 S. Ct. 1936 (1992)).
204. Id. at 123 (citing 315 U.S. 447, 459 (1942)).
205. Id. (quoting Adams v. Madison Realty & Dev., Inc., 397 F.2d 845, 852 (5th Cir. 1969)).
207. See supra text accompanying notes 31-32.
208. The court, in dicta, stated that unlike § 1823(e), the D'Oench doctrine can be applied absent an interest or title in an asset by the F.D.I.C. 920 F.2d 334, 339 (6th Cir.), cert. denied, 111 S. Ct. 2852 (1991). However, this dicta is contrary to the commonly accepted principle in D'Oench ("a federal policy to protect respondent and the public funds against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures") D'Oench, Duhme & Co., 315 U.S. at 457 (emphasis added).
209. Sunchase Apartments, 596 So. 2d at 126.
210. See Victor Hotel Corp., 928 F.2d at 1083.
211. See, e.g., R.T.C. v. McCroey, 951 F.2d 68 (5th Cir. 1992).
212. See, e.g., Porras v. Petroplex Sav. Ass'n, 903 F.2d 370 (5th Cir. 1990).
213. Victor Hotel Corp., 928 F.2d at 1080-81.
214. Id.
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was available to the "new bank" transferee on account of the F.S.L.I.C.'s ongoing liability. But this reimbursement is statutorily granted to all "new banks" under 12 U.S.C. § 1821(m).253

Since 12 U.S.C. § 1821(e)(4)(Y) expressly extends the protection of section 1823(e) to bridge banks,254 Congress' failure to include a similar provision extending section 1823(e) protection to "new banks" shown the Congress never intended section 1823(e) protection to extend to "new banks." Unlike the court in Victor Hotel Corp., the First District Court of Appeal of Florida was correct in basing their final decision solely on D'Oench. But steps in their decision making analysis were omitted.255

VI. RECOMMENDATIONS TO ALLEVIATE BORROWERS' WOES AND CURB FURTHER EXPANSION OF D'OENCH

Recently, the United States Fifth Circuit Court of Appeals held the section 1823(e) barred a borrower's defense of a written release from liability.256 In R.T.C. v. McCroy, bank officers testified that they had executed the written release. The release was kept in the files of the bank's outside attorney in the same building and on the same floor as the bank. Notwithstanding two documents in the bank's official files that referred to this release, the court held that the R.T.C., as conservator, could bar the written release because of section 1823(e). This stunned the borrower as he became liable for an additional four million dollars. Because the written release was not in the official bank files, the borrower failed to meet the requirements of section 1823(e) and was barred from asserting his defense. Although the attorney was an agent for the bank, the court opted to apply section 1823(e) in its strictest sense.257

This result is one example of the seemingly inequitable and unconstitutional burden that section 1823(e) and D'Oench place on borrowers' rights. But courts have consistently upheld the constitutionality of section 1823(e) and D'Oench against alleged violations of the Fifth and Fourteenth Amendments.258 In equity, courts automatically tend to impute "clean

banks" status upon the F.D.I.C./R.T.C.;259 unlike borrowers who's "clean bank" status depends on requirements beyond their control.260 A true equitable analysis has been compromised to satisfy Congress' and the judiciary's thirst for policy which alleviates the drain on federal insurance funds.

Recommendations to reduce the burden on borrowers' rights fit into two categories. The first category involves precautionary measures that a borrower can take to prevent the scorns of D'Oench or section 1823(e). The second category suggests different ways that Congress could restore health to the federal deposit insurance system. This would ease the burden on borrowers' rights since courts would be less likely to jump onto the "public policy" bandwagon.

Under the first category, proper documentation can level the "playing field between the borrower and the F.D.I.C./R.T.C."261 Banks and thrifts should help inform borrowers that oral agreements are unenforceable against the F.D.I.C./R.T.C. if the institution becomes insolvent. A standard clause revealing this risk should be included in the loan agreement. Often times, borrowers can prevent a bad situation from developing if they have adequate representation advising them on the intricacies of banking law.

Since it is not the bank attorney's responsibility whether a borrower complies with the requirements of section 1823(e),262 the borrower must

254. See supra note 103.
255. Perhaps the court's conclusion of a § 1823(e) analysis was due to the absence of any mention of § 1823(e) in the appellant's brief.
256. R.T.C. v. McCroy, 951 F.2d 68 (5th Cir. 1992).
257. Id.
258. Id.
259. Id.
261. Sacks, supra note 193.
262. Banks and thrifts are responsible although the F.D.I.C./R.T.C. exhibited, ratified, or acquiesced in conduct which was the basis for a borrower's claim or defense. F.D.I.C. v. M.M. & S. Partners, 426 F. Supp. 681, 685 n.3 (N.D. Ill. 1985).
263. Whether a loan document is continuously kept in the official bank files is beyond the borrower's control.
was available to the "new bank" transferee on account of the F.S.L.I.C.'s ongoing liability. But this reimbursement is statutorily granted to all "new banks" under 12 U.S.C. § 1821(m).215

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This result is one example of the seemingly inequitable and unconstitutional burden that section 1823(e) and D'Oench place on borrowers' rights. But courts have consistently upheld the constitutionality of section 1823(e) and D'Oench against alleged violations of the Fifth and Fourteenth Amendments.220 In equity, courts automatically tend to impute "clean hands" status upon the F.D.I.C./R.T.C.221 Unlike borrowers who's "clean hand" status depends on requirements beyond their control.222 A true equitable analysis has been used to satisfy Congress' and the judiciary's thirst for policy which alleviates the drain on federal insurance funds.

Recommendations to reduce the burden on borrowers' rights fit into two categories. The first category involves precautionary measures that a borrower can take to prevent the scorn of D'Oench or section 1823(e). The second category suggests different ways that Congress could restore health to the federal deposit insurance system. This would ease the burden on borrowers' rights since courts would be less likely to jump onto the "public policy" bandwagon.

Under the first category, proper documentation can level the "playing field between the borrower and the F.D.I.C./R.T.C."223 Banks and thrifts should help inform borrowers that oral agreements are unenforceable against the F.D.I.C./R.T.C. if the institution becomes insolvent. A standard clause revealing this risk should be included in the loan agreement. Often times, borrowers can prevent a bad situation from developing if they have adequate representation advising them on the intricacies of banking law.

Since it is not the bank attorney's responsibility whether a borrower complies with the requirements of section 1823(e),224 the borrower must


216. See supra note 108.

217. Perhaps the court's omission of a § 1823(e) analysis was due to the absence of any mention of § 1823(e) in the appealee's brief.

218. R.T.C. v. McCrory, 951 F.2d 68 (5th Cir. 1992).

219. Id.

220. Allegations that the procedural bar of § 1823(e) and D'Oench constitute a "taking" of property without just compensation have been consistently refuted. Lake, Note, supra note 69, at 329 (citing Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980)). Although a borrower's defense or claim may constitute a property right under a Fifth Amendment "takings clause" analysis, the borrower lacks reasonable investment-backed expectations in this property right. This is because the borrower has been on notice of D'Oench since 1942 and § 1823(e) since 1950. Id.

221. Since borrowers have had a "reasonable opportunity both to familiarize themselves with the general requirements and to comply with these requirements" of § 1823(e) and D'Oench, these procedural bars do not constitute a violation of due process. Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1248 (5th Cir. 1990) (quoting United States v. Locke, 471 U.S. 84, 107 (1985)). D'Oench and § 1823(e) are not procedural due process violations since they both pass constitutional muster of the Mathews test. Lake, Note, supra note 70, at 333 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). D'Oench and § 1823(e) are not "contract clause" violations since state law is not implicated. See F.S.L.I.C. v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991), cert. denied sub nom. Griffin v. First Gibraltar Bank, F.S.B., 112 S. Ct. 1163 (1992).

222. However, this is not true if the F.D.I.C./R.T.C. exhibited, ratified, or acquiesced in conduct that was the basis for the borrower's claim or defense. F.D.I.C. v. M.M. & S. Partners, 826 F. Supp. 681, 685 n.1 (N.D. Ill. 1993).

223. Whether a loan document in continuously kept in the official bank files is beyond the borrower's control.

224. Hudson, supra note 165, at 64.

225. The Supreme Court left standing a Fifth Circuit decision affirming a lower court decision which partially held that a thrift attorney was not liable for malpractice or

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make efforts to ensure that the entire written agreement is continuously kept in the bank's official files. Congress left it up to the courts to decide what constitutes the official files of a bank. Most likely, official records include corporate minutes and loan committee minutes. But accessible loan files that are subject to collusive restructuring of loan terms by loan officers may not constitute official bank files.

Until the definition of "official bank files" is clarified, borrowers should take the following steps: obtain approval for the loan agreement by the board of directors or the loan committee as reflected in their minutes; obtain an opinion by counsel if the loan approval was received from the loan committee that the loan committee was empowered to act; have the loan agreement state that it is an official record of the bank; have the minutes mention that the loan agreement is an attachment to the minutes; and request initial and periodic certificates from an officer of the bank that the loan agreement is being maintained as an official record. Borrowers must beware that for over forty years they have had "a reasonable opportunity both to familiarize themselves with [the] general requirements of section 1823(e) and to comply with these requirements."

In the second category of recommendations, there are numerous ways to deflate public policy concerns through restoration of federal insurance funds. However, an equilibrium must be achieved between bank regulation replenishing the funds and the adverse side effect of a "credit crunch" on the economy. Countries such as France and Italy have successfully implemented a risk based deposit insurance system. Each bank's insurance premium is adjusted according to the risk level of its asset portfolio. Unlike our flat-rate system, this promotes prudent consideration of all loan transactions. Consequently, the number of insolvent institutions and the drain on federal insurance funds is reduced. One implementation that Congress did make was to remove the annual cap on premium rate increases and allow the F.D.I.C. to make midyear adjustments. This will help replenish federal insurance funds.

Currently, bank dividends are based on equity capital. Equity capital is overstated because bank balance sheets need not recognize the banking industry's liability to the shortfall to the fund. To prevent excessive dividends from being paid, bank balance sheets should reflect a portion of the overall liability owed to the fund. This would improve banking capitalization and reduce the number of bank failures.

The Federal Deposit Insurance Improvement Act of 1991 heightened the standards for external auditing and examinations of institutions. Although this will contribute towards a reduction in bank failures, other provisions of this act have been labeled "regulatory overkill." On imposing a limit to asset base expansion and interest rate risk that institutions can incur, Congress slowed down any chance for a strong economic recovery.

Another concern involves bank mergers. As banks merge, they often become "too big to fail." If the megabank fails, few purchasers will be in the marketplace to acquire such a large bank through a purchase and assumption transaction. On the other hand, the bank is too large to liquidate as it has become essential for maintaining adequate banking services to the community. The result is a tremendous drain on federal insurance funds at the expense of the public and small and middled sized banks. Congress should strongly consider enacting legislation to limit bank mergers to prevent this situation from becoming worse.

Eventually, the banking crisis will be resolved. When it does end, courts will become more hesitant to apply D'Oench and section 1823(e) as a strict eradication of borrowers' rights. Until then, borrowers can still opt

222. See id.
223. See id.
226. See id.
227. Novack, supra note 2, at 102.
228. Id.
229. Id.
make efforts to ensure that the entire written agreement is continuously kept in the bank’s official files. Congress left it up to the courts to decide what constitutes the official files of a bank.225 Most likely, official records include corporate minutes and loan committee minutes.226 But accessible loan files that are subject to collusive restructuring of loan terms by loan officers may not constitute official bank files.227

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Countries such as France and Italy have successfully implemented a risk based deposit insurance system.230 Each bank’s insurance premium is adjusted according to the risk level of its asset portfolio.231 Unlike our flat-rate system, this promotes prudent consideration of all loan transac-

tions.232 Consequently, the number of insolvent institutions and the drain on federal insurance funds is reduced.233 One implementation of Congress did make was to remove the annual cap on premium rate increases and allow the F.D.I.C. to make midyear adjustments. This will help replenish federal insurance funds.234

Currently, bank dividends are based on equity capital.235 Equity capital is overstated because bank balance sheets need not recognize the banking industry’s liability to the shortfall to the fund. To prevent excessive dividends from being paid, bank balance sheets should reflect a portion of the overall liability owed to the fund. This would improve banking capitalization and reduce the number of bank failures.236

The Federal Deposit Insurance Improvement Act of 1991 heightened the standards for external auditing and examinations of institutions.237 Although this will contribute towards a reduction in bank failures, other provisions of this act have been labeled “regulatory overkill.”238 On imposing a limit to asset base expansion and interest rate risk that institutions can incur, Congress slowed down any chance for a strong economic recovery.239

Another concern involves bank mergers. As banks merge, they often become "too big to fail."240 If the megabank fails, few purchasers will be in the marketplace to acquire such a large bank through a purchase and assumption transaction.241 On the other hand, the bank is too large to liquidate as it has become essential for maintaining adequate banking services to the community. The result is a tremendous drain on federal insurance funds at the expense of the public and small and mid-sized banks.242 Congress should strongly consider enacting legislation to limit bank mergers to prevent this situation from becoming worse.

Eventually, the banking crisis will be resolved. When it does end, courts will become more hesitant to apply D’Oench and section 1823(e) as a strict eradication of borrowers’ rights. Until then, borrowers can still opt

222. See id.
223. See id.
226. See id.
227. Novack, supra note 2, at 102.
228. Id.
229. Id.
231. See id.
to bring suit against the insolvent institution and, upon a verdict in their favor, receive a pro rata share of the remaining estate along with the other general creditors.\textsuperscript{243}

\section*{VII. CONCLUSION}

The \textit{D'Oench} doctrine arose out of equitable principles to bar defenses against the F.D.I.C. where the borrower's conduct resulted in a scheme likely to mislead banking authorities.\textsuperscript{244} A borrower's failure to memorialize the material terms of an agreement with a bank constitutes a scheme likely to mislead authorities.\textsuperscript{245} Whether the borrower had fraudulent intent is irrelevant to an application of \textit{D'Oench}.\textsuperscript{246}

Through its expansion, \textit{D'Oench} was extended to protect the F.S.L.I.C., the R.T.C., wholly owned subsidiaries of insolvent institutions, and purchasers/transferes/assignees involved in a "purchase and assumption."\textsuperscript{247} The protection afforded by \textit{D'Oench} is available to federal regulators acting as receiver, conservator, or in a corporate capacity.\textsuperscript{248} Courts have extended \textit{D'Oench} to bar claims as well as defenses.\textsuperscript{249} As an example, the First District Court of Appeal of Florida in \textit{Sanchez Apartments v. Sunbelt Service Corp.} correctly applied \textit{D'Oench} to bar petitioner's claims and defenses that arose from a scheme likely to mislead authorities.\textsuperscript{250}

Congress partially codified \textit{D'Oench} in section 1823(e).\textsuperscript{251} Section 1823(e) protection is now available to the F.D.I.C., the F.S.L.I.C. (now abolished), the R.T.C., and bridge banks in their different capacities.\textsuperscript{252} This protection bars any claim or defense arising out of an agreement which fails to meet the four requirements of section 1823(e) regardless of whether the borrower lent himself to a scheme likely to mislead authorities.\textsuperscript{253}

\textsuperscript{243} \textit{Campbell Leasing, Inc.}, 901 F.2d at 1249.
\textsuperscript{244} \textit{D'Oench, Duhme & Co. v. F.D.I.C.}, 315 U.S. 447, 457-59 (1942).
\textsuperscript{245} \textit{Id.} at 461.
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{See supra} text accompanying notes 164-66.
\textsuperscript{248} \textit{See supra} text accompanying notes 104-07.
\textsuperscript{250} \textit{See supra} text accompanying notes 199-209.
\textsuperscript{251} \textit{See supra} text accompanying notes 31-32.
\textsuperscript{252} \textit{See supra} text accompanying notes 104-07.
\textsuperscript{253} Mayer & Kahn, \textit{supra} note 29, at 9.

\textsuperscript{254} \textit{See supra} note 108.
\textsuperscript{255} \textit{See supra} note 143.
\textsuperscript{256} \textit{Gunter v. Hutchenson}, 674 F.2d 862, 869 (11th Cir. 1982).
\textsuperscript{257} \textit{See supra} text accompanying notes 138-44.
\textsuperscript{258} \textit{See supra} text accompanying notes 146-57.
\textsuperscript{259} \textit{See supra} text accompanying notes 223-29.

\[\textit{Sacks}\]