

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
(Cite as: 901 F.2d 1244)



United States Court of Appeals,
Fifth Circuit.
CAMPBELL LEASING, INC., Eagle Airlines, Inc.
and G.A. Day, Plaintiffs-
Counter-Defendants-Appellants,
v.

FEDERAL DEPOSIT INSURANCE CORPORA-
TION, As Receiver of First RepublicBank Brown-
wood, National Association, and NCNB Texas Na-
tional Bank, Defendants-
Counter-Plaintiffs-Appellees.

No. 89-1542.

May 24, 1990.

Makers and guarantor of note sued payee bank after airplane securing note was seized, and bank counterclaimed for payment of note. Federal Deposit Insurance Corporation, as receiver, and subsequent holder of note removed case to federal court and moved for summary judgment. The United States District Court for the Northern District of Texas, Halbert O. Woodward, J., entered summary judgment in favor of FDIC and bank which had purchased note and guaranty and makers and guarantor appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) *D'Oench, Duhme* doctrine estopped makers and guarantor from asserting against the FDIC and holder any claims relating to alleged novation transaction; (2) *D'Oench, Duhme* doctrine does not violate due process or takings clause; and (3) federal holder in due course doctrine barred makers and guarantor from asserting, as setoff to liability on note, tortious interference with contract and breach of security agreement claims, but did not bar makers and guarantor from trying such claims, liquidating amount of damages, and receiving pro rata share of insolvent bank's remaining assets.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Banks and Banking 52 ⚡505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

The “*D'Oench, Duhme* doctrine,” which is common-law rule of estoppel precluding borrower from asserting against the Federal Deposit Insurance Corporation (FDIC) defenses based upon secret unrecorded side agreements that alter terms of facially unqualified obligations, covers even borrowers who are innocent of any intent to mislead banking authorities if such borrowers lend themselves to arrangement which is likely to mislead authorities, thus favoring interests of depositors and creditors of failed bank, who cannot protect themselves from secret agreements, over interests of borrowers, who can.

[2] Banks and Banking 52 ⚡505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

D'Oench, Duhme doctrine estopped makers and guarantor from asserting against the Federal Deposit Insurance Corporation (FDIC), as receiver, and subsequent holder of note a novation under which one maker allegedly executed note to predecessor of insolvent bank relieving other maker and guarantor of liability; absence of documentation was likely to mislead banking authorities as to value of first note.

[3] Banks and Banking 52 ⚡505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

Constitutional Law 92 ↪4413

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4413 k. Immunity in General. **Most Cited Cases**

(Formerly 92k299.2, 92k299(2))

Eminent Domain 148 ↪2.9

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.9 k. Banking. **Most Cited Cases**

(Formerly 148k2(1.1))

The *D'Oench, Duhme* doctrine, which precludes borrower from asserting against the Federal Deposit Insurance Corporation (FDIC) defenses based upon secret or unrecorded side agreements likely to mislead banking authorities, even if borrowers act innocently, does not violate the takings or due process clauses of the Fifth Amendment. **U.S.C.A. Const.Amend. 5.**

[4] Banks and Banking 52 ↪505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. **Most Cited Cases**

“Federal holder in due course doctrine” bars makers of notes from asserting various personal defenses against the Federal Deposit Insurance Corporation (FDIC) in connection with purchase and assumption transactions involving banks, and such protection extends to subsequent holders of notes.

[5] Banks and Banking 52 ↪505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in

General. **Most Cited Cases**

Claims by makers and guarantor of note that predecessor to insolvent bank tortiously interfered with efforts to lease airplane which was subject to security interest and delayed too long after seizure of plane before attempting to sell it, that note could have been completely discharged absent predecessor's wrongful actions, and that predecessor elected to keep airplane in full satisfaction of note and cause guarantor to suffer mental and emotional distress were “personal defenses” rather than real defenses, and thus, under federal holder in due course doctrine, the Federal Deposit Insurance Corporation (FDIC), as receiver, and subsequent holder acquired note free of such claims. **V.T.C.A., Bus. & C. §§ 3.302, 3.305.**

[6] Banks and Banking 52 ↪505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. **Most Cited Cases**

Federal holder in due course protection applies to Federal Deposit Insurance Corporation (FDIC) in its receivership capacity as well as in its corporate capacity.

[7] Banks and Banking 52 ↪505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. **Most Cited Cases**

In its corporate capacity, the Federal Deposit Insurance Corporation (FDIC) is obligated to protect depositors of failed bank, while FDIC as receiver must also protect creditors and shareholders of bank; in each case, holder in due course doctrine enables FDIC to efficiently and effectively fulfill its role, minimizing harm to depositors, creditors, and shareholders.

[8] Banks and Banking 52 ↪505

52 Banks and Banking

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
(Cite as: 901 F.2d 1244)

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

Under the federal holder in due course doctrine, the Federal Deposit Insurance Corporation (FDIC) and subsequent noteholders can enjoy holder in due course status even if they do not satisfy technical requirements of state law.

[9] Banks and Banking 52 505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

Federal holder in due course doctrine did not prevent makers and guarantor from asserting claims against Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver, for tortious interference with contract, breach of security agreement, and intentional infliction of mental and emotional distress, liquidating amount of damages, and subsequently receiving a pro rata share of insolvent bank's remaining assets, along with bank's other creditors, although it did preclude assertion of such claims as setoff to liability on note. Federal Deposit Insurance Act, § 2[11](d)(6)(A), (d)(11)(A)(ii), 12 U.S.C.A. § 1821(d)(6)(A), (d)(11)(A)(ii).

[10] Banks and Banking 52 505

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k505 k. Powers, Functions and Dealings in General. [Most Cited Cases](#)

Constitutional Law 92 4420

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4418 Torts and Personal Injuries

92k4420 k. Immunity in General.

Most Cited Cases

(Formerly 92k299.2, 92k299(2))

Eminent Domain 148 2.9

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.9 k. Banking. [Most Cited Cases](#)

(Formerly 148k2(1.1))

Application of federal holder in due course doctrine to prevent makers and guarantor of note from asserting against the Federal Deposit Insurance Corporation (FDIC), as receiver, and subsequent holder of note setoff claims for tortious interference with contract, breach of security agreement, and intentional infliction of mental and emotional distress did not violate due process or amount to unconstitutional taking of property without just compensation; makers and guarantor could still assert claims for damages and receive pro rata share of insolvent bank's assets. Federal Deposit Insurance Act, § 2[11](d)(6)(A), (d)(11)(A)(ii), 12 U.S.C.A. § 1821(d)(6)(A), (d)(11)(A)(ii); U.S.C.A. Const.Amend. 5.

[11] Secured Transactions 349A 242.1

349A Secured Transactions

349AVII Default and Enforcement

349Ak242 Wrongful Enforcement

349Ak242.1 k. In General. [Most Cited Cases](#)

(Formerly 349Ak242)

Makers and guarantor of note secured by airplane failed to establish that Federal Deposit Insurance Corporation (FDIC), as receiver, and subsequent holder of note acted in commercially unreasonable manner with respect to sale of airplane or that they allowed airplane to deteriorate or to be damaged; evidence indicated that FDIC and holder reasonably waited to sell airplane until makers and guarantor came forward with maintenance records and flight logs, which were essential to obtain highest and best price, and that makers and guarantor also con-

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
 (Cite as: 901 F.2d 1244)

tributed to prolonging process by continuous litigation. [V.T.C.A., Bus. & C. § 9.506](#) comment.

*1246 [John E. Collins](#), Dallas, Tex., for plaintiffs-counter-defendants-appellants.

[Bert V. Massey, II](#), Massey & Shaw, Brownwood, Tex., for defendants-counter-plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, [WISDOM](#) and SMITH, Circuit Judges.

CLARK, Chief Judge:

I.

Appellants Campbell Leasing, Inc., Eagle Airlines, Inc., and George A. Day challenge the district court's entry of summary judgment on a promissory note in favor of the Federal Deposit Insurance Corporation (FDIC) and NCNB Texas National Bank (NCNB). We affirm in part, vacate in part, and remand for further proceedings.

*1247 II.

On February 16, 1984, Campbell Leasing, Inc. (Campbell Leasing) executed a promissory note in the amount of \$136,804.24, plus interest, payable to RepublicBank Brownwood (RepublicBank). To secure payment of the note, Campbell Leasing granted RepublicBank a security interest in a 1979 Piper airplane. RepublicBank also obtained the personal guarantee of George A. Day (Day).

In May of 1986, Campbell Leasing defaulted on the note. RepublicBank accelerated the maturity of the note after Campbell Leasing failed to cure its default. On June 12, 1986, RepublicBank seized the airplane but did not gain possession of its maintenance records or flight logs. The seizure prompted appellants to file this lawsuit. RepublicBank counterclaimed for payment of the note, plus interest,

costs, and attorneys' fees.

On July 29, 1988, the successor to RepublicBank, First RepublicBank Brownwood, N.A. (First RepublicBank), was declared insolvent and closed. The Comptroller of Currency appointed the FDIC as receiver. The FDIC entered into a purchase and assumption agreement with a federally established bridge bank, which purchased the promissory note, security agreement, and guarantee at issue in this case. The bridge bank became NCNB Texas National Bank.

In August of 1988, the FDIC and NCNB removed the case to federal court and filed a motion for summary judgment. The district court subsequently permitted the parties to amend their pleadings. In their amended complaint, the appellants asserted: (1) that prior to seizing the airplane RepublicBank had agreed to a novation wherein Tex-Star Airlines, Inc. (Tex-Star) executed a note to RepublicBank for the purchase of the plane, thereby relieving Campbell Leasing and Day of their obligations under the Campbell Leasing note; (2) that RepublicBank was guilty of trespass and conversion in connection with the seizure of the airplane; (3) that after seizing the plane, RepublicBank failed to deal with the appellants fairly and in good faith and tortiously interfered with their attempts to lease the plane to a third party; (4) that RepublicBank failed to maintain the plane and dispose of it in a commercially reasonable manner; (5) that RepublicBank had elected to retain the plane in satisfaction of Campbell Leasing's debt, and (6) that RepublicBank had caused Day to suffer mental and emotional distress.

The district court granted summary judgment for NCNB and the FDIC, concluding that all of the appellants' claims and affirmative defenses were barred by the federal common-law doctrine announced in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942) and the holder in due course doctrine announced in *Federal Deposit Insurance Corporation v. Wood*, 758 F.2d 156 (6th Cir.), cert. denied, 474 U.S. 944, 106 S.Ct. 308, 88

L.Ed.2d 286 (1985). The court entered judgment against Campbell Leasing and Day jointly and severally for the amount due on the note, plus interest, and awarded the FDIC and NCNB costs and attorneys' fees. The court also foreclosed the lien on the plane and its attachments and directed the appellants to deliver the maintenance records and log books to the FDIC and NCNB. Finally, the court ordered the airplane sold and the amount of the judgment reduced by the proceeds.

The appellants now challenge the district court's entry of summary judgment. At oral argument, the appellants waived all but the following contentions: (1) the *D'Oench, Duhme* doctrine is unconstitutional; (2) the federal holder in due course doctrine does not bar their claims against RepublicBank, and if it does bar those claims it is unconstitutional; and (3) the FDIC and NCNB have not acted in a commercially reasonable manner regarding the maintenance and sale of the airplane. We affirm in part, vacate in part, and remand.

III.

A. *The D'Oench, Duhme Doctrine.*

The appellants concede that the *D'Oench, Duhme* doctrine bars their claim that the promissory note was extinguished *1248 in a transaction involving Tex-Star, because the transaction was not documented in RepublicBank's records. They argue instead that the *D'Oench, Duhme* doctrine violates their rights under the fifth amendment by depriving them of valuable property—their defense to liability on the note—without just compensation or due process of law. We disagree.

[1] The *D'Oench, Duhme* doctrine is “a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded ‘side agreements’ that alter[] the terms of facially unqualified obligations.” *Bell & Murphy & Assoc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.1990). Even borrowers

who are innocent of any intent to mislead banking authorities are covered by the doctrine if they lend themselves to an arrangement which is likely to do so. *Id.* at 753-54. The doctrine thus “favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can.” *Id.* at 754.

[2] In this case, the appellants were in a position to protect themselves by ensuring that the alleged Tex-Star transaction was adequately documented in RepublicBank's records. They failed to do so. Because the absence of documentation was likely to mislead banking authorities as to the value of the Campbell Leasing note, the appellants are estopped from asserting against the FDIC and NCNB any claims relating to the Tex-Star transaction. *Id.*

[3] The *D'Oench, Duhme* doctrine does not deprive the appellants of property without just compensation. The appellants have simply deprived themselves of certain defenses to liability by failing to protect themselves in the manner required by the *D'Oench, Duhme* doctrine. See *United States v. Locke*, 471 U.S. 84, 107-08, 105 S.Ct. 1785, 1799, 85 L.Ed.2d 64 (1985) (upholding a federal provision extinguishing mineral interests for failure to make a timely annual filing). The government has never been required “to compensate [property owners] for the consequences of [their] own neglect.” *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 102 S.Ct. 781, 792, 70 L.Ed.2d 738 (1982).

Nor have the appellants been denied due process. The *D'Oench, Duhme* doctrine is a federal common law rule of general applicability that was established long before the appellants' claims arose. Because the appellants had “a reasonable opportunity both to familiarize themselves with [its] general requirements and to comply with those requirements,” due process has been satisfied. *Locke*, 471 U.S. at 108, 105 S.Ct. at 1799. We conclude that the *D'Oench, Duhme* doctrine does not violate the takings clause or the due process clause of the fifth amendment.

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
(Cite as: 901 F.2d 1244)

B. The Federal Holder In Due Course Doctrine.

[4] The federal holder in due course doctrine bars the makers of promissory notes from asserting various “personal” defenses against the FDIC in connection with purchase and assumption transactions involving insolvent banks. *Wood*, 758 F.2d at 161; see also *FSLIC v. Murray*, 853 F.2d 1251, 1256 (5th Cir.1988). The protection extends to subsequent holders of the notes. See *id.*

This doctrine is grounded in the federal policy of “bringing to depositors sound, effective, and uninterrupted operation of the [nation's] banking system with resulting safety and liquidity of bank deposits.” S.REP. NO. 1269, 81st Cong., 2d Sess., reprinted in 1950 U.S.CODE CONG. & ADMIN.NEWS 3765, 3765-66. The most effective way for the FDIC to implement this policy when a bank becomes insolvent is by arranging a purchase and assumption transaction rather than by liquidating the bank. *Wood*, 758 F.2d at 160-61; see also *Murray*, 853 F.2d at 1256-57. If the FDIC were required to determine the value of the bank's notes in light of all possible “personal” defenses, a purchase and assumption transaction could not take place in the timely fashion necessary to ensure “uninterrupted operation” of the bank and the “safety and liquidity of deposits.” Thus, *1249 the FDIC as a matter of federal common law enjoys holder in due course status in order to effectively perform its congressionally mandated function.

[5] In this case, the appellants assert various defenses and counterclaims to liability on the note. They contend that RepublicBank tortiously interfered with their efforts to lease the Piper airplane to a third party and delayed too long after the plane's seizure before attempting to sell it. They maintain that the note could have been completely discharged absent RepublicBank's wrongful actions. They also claim that RepublicBank elected to keep the airplane in full satisfaction of the note and caused Day to suffer mental and emotional distress. Because these are “personal” rather than “real” defenses to liability on the note, see *TEX.BUS. &*

COM.CODE § 3.305, the FDIC and NCNB as holders in due course acquired the note free of these claims. See *Murray*, 853 F.2d at 1256; *Wood*, 758 F.2d at 160.

The appellants challenge this conclusion, contending that the federal holder in due course doctrine does not apply to this case because the FDIC was not acting in its corporate capacity. See *Wood*, 758 F.2d at 161. They also argue that the FDIC and NCNB do not qualify as holders in due course under Texas law because they acquired the note in a bulk transaction by legal process and had notice that the note was overdue. See *TEX. BUS. & COM. CODE* § 3.302. We reject these contentions.

[6][7] We find no logical reason to limit federal holder in due course protection to the FDIC in its corporate capacity, to the exclusion of its receivership function. In its corporate capacity, the FDIC is obligated to protect the depositors of a failed bank, while the FDIC as receiver must also protect the bank's creditors and shareholders. *Gilman v. FDIC*, 660 F.2d 688, 690 (6th Cir.1981); see generally 12 U.S.C. § 1821. In both cases, the holder in due course doctrine enables the FDIC to efficiently and effectively fulfill its role, thus minimizing the harm to depositors, creditors, and shareholders. See *Wood*, 758 F.2d at 160-61; *Murray*, 853 F.2d at 1256. For example, the doctrine prevents note makers from gaining absolute priority over a failed bank's assets, by asserting “personal” claims as defenses or setoff to their notes, to the detriment of the bank's other creditors and potentially its depositors. *Wood*, 758 F.2d at 160-61; see also *Murray*, 853 F.2d at 1256-57. We conclude that the FDIC enjoys holder in due course status as a matter of federal common law whether it is acting in its corporate or its receivership capacity. See *Wood*, 758 F.2d at 160.

[8] In addition, the FDIC and subsequent note holders enjoy holder in due course status whether or not they satisfy the technical requirements of state law. The court in *Wood* assumed that the FDIC did not qualify as a holder in due course under state law,

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
 (Cite as: 901 F.2d 1244)

yet it still held that the FDIC was entitled to the protections of a holder in due course as a matter of federal common law. *See* 758 F.2d at 158. We reached the same conclusion with respect to the FSLIC. *Murray*, 853 F.2d at 1256. This rule “promotes the necessary uniformity of law in this area while it counters individual state laws that would frustrate [basic FDIC objectives].” *Id.*

[9] However, the district court erred in granting summary judgment against the appellants on all their claims. The appellants have a statutory right to continue their action against the FDIC as receiver for First RepublicBank on their claims of tortious interference with contract, breach of the Campbell Leasing security agreement, and intentional infliction of mental and emotional distress. 12 U.S.C. § 1821(d)(6)(A). While the holder in due course doctrine prevents the appellants from asserting these claims as a set-off to liability on the note, it does not prevent the appellants from trying these claims to the district court, liquidating the amount of damages, and subsequently receiving a pro-rata share of First RepublicBank's remaining assets along with the bank's other creditors. *See id.* § 1821(d)(11)(A)(ii). We therefore must vacate that part of the district court's judgment dismissing the appellants' breach of contract and tort claims and remand for additional proceedings.

[10] In light of these statutory provisions, we reject the appellants' further contention that application of the holder in due course doctrine violates due process or amounts to an unconstitutional taking of property without just compensation.

A negotiable instrument is subject to transfer at any time, and the maker must always be aware that the transferee may be a holder in due course. From the maker's view, there is no difference between his bank failing and the note going to the ... FDIC, and his bank failing after selling the note to a holder in due course.

Wood, 758 F.2d at 161. The appellants have not been denied the opportunity to assert their claims

because they may pursue them against the FDIC as receiver for First RepublicBank. The appellants have “therefore suffer[ed] no prejudice.” *Murray*, 853 F.2d 1256-57; *see also Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 362-63 (5th Cir.1981), *cert. denied*, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982); *Hardy v. Gissendaner*, 508 F.2d 1207, 1209 (5th Cir.1975).

C. The Actions of the FDIC and NCNB.

[11] Appellants' final contention is that the FDIC and NCNB have not acted in a commercially reasonable manner with respect to the aircraft. They claim that the FDIC and NCNB allowed the airplane to be damaged and that efforts to sell it delayed too long. Appellants argue alternatively that there are genuine issues of material fact with respect to the commercial reasonableness of the FDIC's and NCNB's actions. We reject these contentions.

The summary judgment proof amply demonstrates that the FDIC and NCNB have acted in a commercially reasonable manner with respect to the aircraft. Nothing in the Texas Uniform Commercial Code establishes a set time limit for disposing of repossessed collateral, except for consumer goods. *See TEX.BUS. & COMM.CODE § 9.506*, official comments. The FDIC and NCNB have reasonably waited to sell the airplane until the appellants come forward with the maintenance records and flight logs. These records are essential in order to obtain the highest and best price for the aircraft. The appellants have also contributed to prolonging the process by keeping the FDIC and NCNB in continuous litigation on this matter. We reject as disingenuous appellants' suggestion at oral argument that they at all times desired that the FDIC and NCNB sell the airplane. Finally, the appellants produced no evidence to support their allegation that the FDIC and NCNB have allowed the airplane to deteriorate or to be damaged. The district court properly granted summary judgment in favor of the FDIC and NCNB on this issue.

901 F.2d 1244, 12 UCC Rep.Serv.2d 138
(Cite as: 901 F.2d 1244)

IV.

We vacate that part of the district court's judgment dismissing the appellants' claims against the FDIC as receiver for First RepublicBank for tortious interference with contract, breach of the security agreement, and infliction of emotional distress, and we remand for further proceedings consistent with this opinion. We affirm the judgment in all other respects.

AFFIRMED in part, VACATED in part, and REMANDED.

C.A.5 (Tex.),1990.

Campbell Leasing, Inc. v. F.D.I.C.

901 F.2d 1244, 12 UCC Rep.Serv.2d 138

END OF DOCUMENT