

Fortifying Your Work-Out Against Future Bank Failure



- Joshua Glazov
- Beer With A Construction Lawyer
- www.bwacl.com

Bank Failures



- No Bankruptcy - FDIC Receiver and Insurer
- Failures:
 - 2007: **2** Failures
 - 2008: **25** Failures
 - 2009: **124** Failures So Far
- Troubled Banks: 552 For Now, Most Since 1993
- 2009 Q3 Charge Offs: \$50.8B, 2.71% of Assets
- FDIC Insurance Fund Balance: -\$8.2B
- 3 Year Premium Prepayment: +\$45B
- Failure Cost: \$100B Over Next 5 Years

- Extending Maturity Date
- Reducing Interest Rate
- Suspending, Deferring, Reducing Principal and Interest Payments
- Waiving Fees and Other Payments (e.g., Prepayment Premiums, Exit Fees)
- Waiving Defaults (Monetary and Non-Monetary)
- Waiving or Reducing Default Interest
- Releasing or Reducing Guaranties
- Subordination to New Money (Full or Partial)

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



- St. Louis Securities Dealer Note to Belleville Bank
- “Understanding” On Receipt Bank Won’t Collect – “Good Guys”
- Banks Fails, FDIC is Receiver
- FDIC Tries to Collect
- Supreme Court Says No Collection Is “Secret Agreement”
- “Secret Agreements” Aren’t Enforceable Against FDIC
- FDIC Can Collect on Original Note Terms

1950 – D’Oench, Duhme Statute



- Section 13(e) Federal Deposit Insurance Act, 12 U.S.C §1823(e)

Work-Out “Agreement” Requirements



- Written
- Contemporaneous with Bank’s Asset (Note) Acquisition
- Bank Board/Loan Committee Approval
- Continuously in Bank’s Official Records

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



- Agreements Are More Than You Think
- Borrowers Buy Land
- Sue Bank - Bank Representatives Misled About Size and Minerals
- Bank Fails
- FDIC Acquires Loan and Tries to Collect
- Borrower's Defense: Bank Rep Misrepresentations
- Unanimous Supreme Court: Misrepresentations Are "Agreements"

1997 FDIC Policy Statement



- Limits Using *D'Oench, Duhme* and §13(e)
- Requires Washington Approval:
 - Vendors – Contractors and Landscapers
 - Diligent Parties: No Board/Loan Committee Approval
 - Extrinsic Documents
 - Non-Lending Claims
 - Mechanics Liens
- Executive Discretion
 - Not Law
 - Doesn't Affect Loan Buyers

~~Casual
Agreements~~



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FDIC's D'Oench, Duhme Doctrine: Don't Let It Doom Debt Work-Outs and Restructurings



In the [last bank insolvency post](#) we talked about how the [Federal Deposit Insurance Corporation](#) (the "FDIC") can revive [limitations periods](#) even after they expire. Today we'll talk about another of the FDIC's extraordinary powers - the *D'Oench, Duhme* doctrine and its companions.

D'Oench, Duhme gets its name from the 1942 U.S. Supreme Court decision in *D'Oench, Duhme & Co., Inc. v. FDIC*. After the FDIC takes over as [receiver](#) of a failed [bank](#), that decision, along with many that follow it, spells doom for many a borrower.

In a nutshell, after the FDIC gets appointed as receiver for a failed bank, the *D'Oench, Duhme* doctrine and its companions allow the FDIC to ignore *select* pre-[Appointment Date](#) agreements and deals between bank representatives on one side and their borrowers and guarantors on the other. Agreements that commonly fall victim are debt work-outs and restructurings that often include features like:

- Extending a promissory note's maturity date
- Reducing an interest rate
- Suspending, deferring, or reducing principal payments, and even interest payments
- Waiving fees and other payments (e.g., prepayment premiums)
- Waiving non-money defaults
- Waiving or reducing so-called "default interest" at higher than original rate
- Releasing guaranties

The FDIC refusing to honor these kinds of agreements can doom borrowers, guarantors, and the projects they're working on. It doesn't matter if they're an owner under a construction loan or a contractor subcontractor, material supplier, or design professional under a working capital loan or line of credit.

As you learn about what *D'Oench, Duhme* can do, you'll recognize that it's a [boon](#) for whomever buys the affected loans from the FDIC. It's meant to work that way. More on that in future posts.

Pronunciation

D'Oench and *Duhme* aren't words you hear every day. For years I wondered how to pronounce them. Those years started around 1996 when bank failure litigation was waning and those words were on fewer lips. With plenty of other urgent things to do, confirming the correct pronunciation of *D'Oench* and *Duhme* stayed on my back-burner until last year. If you've been wondering like I was, you're in luck. You don't have to wait because I'll give you the proper pronunciations right now.

D'Oench is pronounced "dench". It rhymes with "bench". And it sounds just like the name of the British actress, [Dame Judi Dench](#), who currently portrays [James Bond's boss "M"](#).

Duhme is pronounced "doom", as in "we're doomed!!" and [Thulsa Doom](#), [Arnold's](#) antagonist in [Conan The Barbarian](#).

And when the *D'Oench, Duhme* doctrine, or one of its companions, sticks it to a borrower, guarantor, or the like, it's called getting "**D'Oenched**". And now to the story of the first people who got D'Oenched...



The *D'Oench, Duhme* Backstory:

- D'Oench, Duhme & Company, Inc. (the "**securities broker**") was a St. Louis securities broker and dealer. In the 1920's they sold bonds to the Belleville Bank & Trust Company of Belleville, Illinois (the "**bank**")
- After the bond issuers defaulted on their payments, the bank asked the securities broker to sign a \$5,000 promissory note (the "**Note**") so the bank could avoid showing the bonds as a non-performing "asset" on the bank's books. \$5,000 was a lot of money in 1926
- The bank promised to credit any payments that came in on the past due bonds against the outstanding balance of the Note
- The securities dealer's President signed the Note
- The bank gave the securities dealer a receipt for the Note. The receipt included special terms that said:

This note is given with the understanding it will not be called for payment. All interest payment so be repaid.

- The President of the securities dealer knew that (a) he was signing the Note to help the bank keep the defaulted bonds from dragging down the of the bank's assets, and (b) the purpose of the periodic interest payments on the Note was to "to keep the Note alive"
- Regardless of the periodic interest payments, the bank "charged-off" the Note in 1935
- In 1938 the bank got into serious financial trouble that forced them to borrow money from the FDIC in order to stay in business. The Note was among the collateral the bank pledged to the FDIC as security for repayment of that loan
- But the loan from the FDIC was in vain. Before the Note was paid-off, then the bank failed and the FDIC stepped in as receiver for the bank
- Then the FDIC - in its "corporate" capacity as the insurer of bank deposits, as opposed to its role as the bank's receiver - acquired the Note in a [Purchase and Assumption Transaction](#)
- Even though the bank charged the Note off in 1935, the FDIC still demanded payment from securities dealer
- The securities dealer responded, arguing that the special terms on the receipt for the Note were a complete defense to payment
- The dispute wound its way through the courts until it arrived at the [U.S. Supreme Court](#) in late 1941

The Supreme Court's Decision:

In their decision, the Justices:

- Agreed with the FDIC and rejected the securities dealer's argument that the special terms on the receipt made the Note unenforceable
- Emphasized specific language in the National Banking Act (the law initially creating the FDIC) prohibiting misrepresentation of bank assets. Based on that prohibition, the Justices recognized a general Congressional policy of protecting the FDIC. And one of the things the FDIC needs protecting from most is *secret agreements* that:
 - Banking regulators wouldn't usually notice during regular bank examinations (and the FDIC wouldn't easily notice after being appointed as a failed bank's receiver), and
 - Could undermine the value of a bank's assets (e.g., promissory notes, other loans papers and documents) because, if enforced, a secret agreement makes it more difficult to enforce the loan and collect principal and interest



These "secret agreements" are suspect because they could mislead banking regulators into thinking a bank is solvent when it really isn't or more solvent than it really is. And they could also mislead the FDIC, and post-Appointment Date potential loan purchasers, into over-valuing loans that the FDIC inherits as receiver of a failed bank.

- Explained that the special terms on the receipt qualified as a prohibited secret agreement and that by giving the Note and accepting the receipt, the securities dealer lent itself to a scheme that had the effect of misleading banking regulators. Their indulgence in allowing the bank to maintain the Note as an asset amounted to continuing permission to mislead state bank-examining authorities, and the FDIC as both the bank's insurer and lender.
- Decided that the the securities dealer should *not* be able to use the special terms on the Note receipt as a defense against the FDIC's efforts to collect on the Note
- Allowed the FDIC to go ahead and collect on the Note against the securities dealer. As bad as this decision was for the securities dealer, they were still a lot better off in March 1942 owing \$5,000 in St. Louis than fighting under [General MacArthur on Bataan](#). There's *D'Oenched*, and then there's *Doomed*.

In the Wake of *D'Oench, Duhme*

The rule emerging from the *D'Oench, Duhme* decision is that secret agreements that may mislead banking regulators or the FDIC when they respectively examine an operating bank or take stock of the assets in a failed one, don't apply against the FDIC. But the *D'Oench, Duhme* decision was just the first step in a series of judicial decisions and new federal statutes that would refine and expand the FDIC's extraordinary powers. We'll talk about many of them in upcoming posts, including:

- Codification of the *D'Oench, Duhme* doctrine in [Section 13\(e\)](#) of the Federal Deposit Insurance Act
- What qualifies as a "secret agreement" that may mislead banking regulators. And how what qualifies as a secret agreement has expanded over the years to include a lot more than what you probably think of as an "Agreement"
- How borrowers, guarantors, and the like can get *D'Oenched* regardless of:
 - Whether they intended to mislead banking regulators, the FDIC, or anyone else
 - Whether they had any idea there was anything wrong with what they did
 - Whatever someone from the bank said or promised them and how reasonably they relied
- How buyers and assignees of loans from the FDIC may also use *D'Oench, Duhme* and its companions against borrowers, guarantors, and the like
- Suggestions on how, when working-out or restructuring a loan, you can lower the odds that you, or someone you know, gets *D'Oenched*

September 29, 2009

Posted by Josh Glazov | [Permalink](#) | [Email This Post](#) | [Comments \(0\)](#)

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November 25, 2009

U.S. Fund for Bank Deposit Insurance Falls Into the Red

By [ERIC DASH](#)

The government-administered insurance fund that protects depositors fell into the red for the first time since the fallout from the savings-and-loan crisis of the early 1990s as the pace of bank failures accelerated.

The fund had a negative balance of \$8.2 billion at the end of the third quarter, [federal regulators said Tuesday](#). Bank customers, however, should remain confident that their deposits would be protected since most of the amount reflects money Federal Insurance Deposit Corporation has already set aside to cover the losses from future bank failures.

Officials of the F.D.I.C. said in October that the deposit insurance fund had been depleted, but Tuesday's third-quarter report card on the banking industry marked the first time that hard numbers had been released. Even amid early signs that the economy is recovering, the report suggested that the country's 8,100 lenders remain in fragile condition.

In its state of the industry report, the F.D.I.C. reported that banks posted a \$2.8 billion gain in the third quarter, after a \$3.7 billion loss in the previous period. Meanwhile, the number of "problem banks" that run the biggest risk of collapse increased to 552, from 416 in the second quarter. Bad loans of virtually every stripe — credit cards, mortgages, small business and commercial real estate — continue to grow, albeit at a slower pace.

"The credit adversity we have been discussing for some time remains with us, and we expect it will be a couple of more quarters before we see a meaningful improvement in that trend," [Sheila C. Bair](#), the F.D.I.C. chairwoman, said. "I am optimistic that if we address these problems head on, we will see clear signs of improvement in bank earnings and lending in 2010.

Even so, the number of bank failures will probably keep climbing. So far, the F.D.I.C. has seized and sold 124 banks in 2009, and analysts expect hundreds more to collapse in the months ahead. That has put significant pressure on the F.D.I.C. fund, which posted a negative balance for the first time since 1992 when regulators cleaned up the carnage from hundreds of failed thrifts and other commercial lenders.

Federal officials have also taken action to replenish the fund. The agency recently approved plans calling for industry to lend money to the insurance fund by ordering banks to prepay annual assessments that would otherwise have been due through 2012.

That move is expected to add about \$45 billion to the fund, which stood at \$34.6 billion a year ago, but should avoid straining bank earnings thanks to favorable accounting treatment. It also averts the political risk of tapping an emergency credit line from the [Treasury Department](#), though some banking experts

believe such action may still be necessary. The industry report card also showed how the banks troubles have spread. Two years ago, the problems seemed to be contained to a handful of big banks, which took large markdowns on the value of complex mortgage assets and other securities.

But as the big banks have regained their swagger from big trading profits over the last three quarters, the problems afflicting the bulk of the industry's lenders — soured loans made to consumers and property developers — have grown considerably worse. Over all, banks charged off \$50.8 billion in the third quarter, or 2.71 percent of assets. That is the highest charge-off rate in any quarter since the government began collecting data in 1984.

More banks have also collapsed because of the bad debts. Federal regulators seized 50 banks in the third quarter, including regional players like Colonial Bank of Alabama, Guaranty Financial of Texas and Corus Bancshares of Chicago. That was roughly the twice the total number of banks that failed in 2008.

The high cost of the failures has strained the deposit insurance fund, which thousand of banks support by paying quarterly premiums. As of the end of the third quarter, its balance stood at negative \$8.2 billion. The bulk of the fund's losses stem from money that regulators set aside to cover future failures, allowing it to operate in the red.

F.D.I.C. officials expect that bank failures will cost the insurance fund \$100 billion over the next five years. More than half of that cost has already been accounted for, while the new prepayment plan is expected to cover the rest. If losses grew considerably worse, officials might have to impose additional special assessments on banks or draw on the Treasury's backup credit lines.

In September, Ms. Bair said she did not anticipate having to immediately tap that line of credit, although she did not rule it out. "I never say never," Ms. Bair said at the time.

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THE WALL STREET JOURNAL

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BUSINESS | NOVEMBER 25, 2009

Lending Declines as Bank Jitters Persist

By DAMIAN PALETTA

U.S. lenders saw loans fall by the largest amount since the government began tracking such data, suggesting that nervousness among banks continues to hamper economic recovery.

Total loan balances fell by \$210.4 billion, or 3%, in the third quarter, the biggest decline since data collection began in 1984, according to a report released Tuesday by the Federal Deposit Insurance Corp. The FDIC also said its fund to backstop deposits fell into negative territory for just the second time in its history, pushed down by a wave of bank failures.

The decline in total loans showed how banks remain reluctant to lend, despite the hundreds of billions of dollars the government has spent to prop up ailing banks and jump-start lending. The issue has taken on greater urgency with the U.S. unemployment rate hitting 10.2% in October, even as the economy appears to be stabilizing.

"There is no question that credit availability is an important issue for the economic recovery," FDIC Chairman Sheila Bair told reporters Tuesday. "We need to see banks making more loans to their business customers."

She said large banks -- which account for 56% of industry assets and received a large share of the government's bailout funds -- accounted for 75% of the decline.

James Chessen, chief economist at the American Bankers Association, an industry trade group, said, "It's a very risky time for any lender because the probability of loss is greater, and they are being prudent in their approach to lending. Their regulators are demanding it."

The FDIC's quarterly banking profile, which analyzed data from 8,099 federally insured banks, reported that 552 financial institutions, with combined assets of \$345.9 billion, were on the government's problem list at the end of September, up from 416 with \$299.8 billion of assets at the end of June. That means roughly 7% of all U.S. banks are on the list and face a higher probability of failure.

FDIC officials don't disclose the names of banks on the list, in part because it could lead to bank runs.

Many banks on the problem list are expected to return to health, but the FDIC is seeing a jump in the number of failures. Fifty banks failed in the third quarter, the most in a single quarter since the fourth quarter of 1992. Three new banks were chartered in the third quarter, the lowest quarterly number since World War II.

The FDIC said its deposit-insurance fund, which backstops trillions of dollars in deposit accounts, fell to a negative \$8.2 billion at the end of September, an \$18.6 billion drop from the end of June. The FDIC said one reason for the decrease was that the agency shifted \$21.7 billion from the fund into reserves for bank failures over the next 12 months.

Even though the FDIC's fund balance was negative, it still had reserves of cash. The FDIC said it had \$23.3 billion in cash at the end of September to help resolve future bank failures.

FDIC officials recently agreed to require banks to prepay three years' worth of government insurance fees, which is expected to bring in an additional \$45 billion by the end of the year.

The decrease in loan balances reported Tuesday likely reflects a decline in demand for loans among economically anxious businesses and consumers, as well as a reduced willingness by banks to lend.

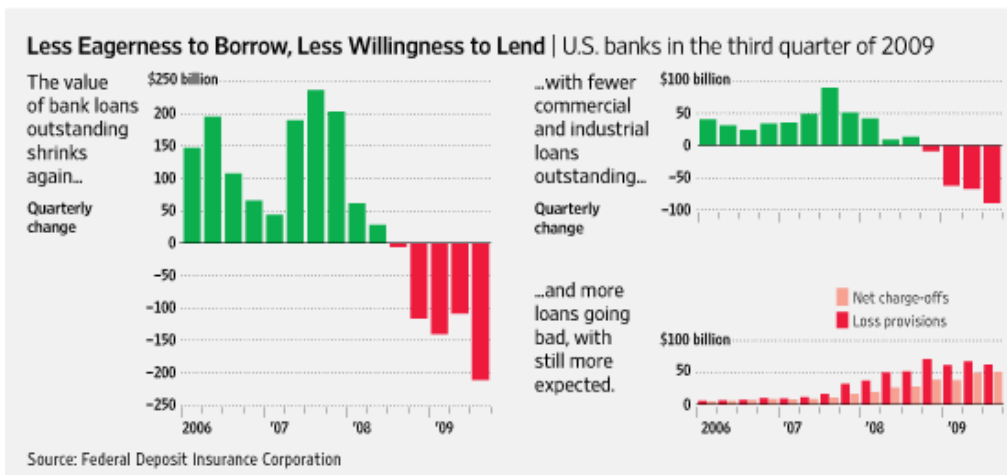
The total of commercial and industrial loans, a category that includes business loans, fell to \$1.28 trillion at the end of September, from \$1.36 trillion at the end of June. The outstanding total of construction loans, credit cards and mortgages also fell.

Government officials have stepped up pressure on banks to make more loans in recent weeks.

The banking industry recorded a net profit of \$2.8 billion for the third quarter, compared with a \$4.3 billion loss in the second quarter, according to the FDIC report. Banks wrote off \$50.8 billion in bad loans in the third quarter, \$22.6 billion more than they did in the third quarter of 2008.

Ms. Bair said the industry wasn't likely to be profitable in the fourth quarter, in part because banks are expected to write off more bad loans before year-end.

—David Enrich contributed to this article.



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Wichita Business Journal - November 30, 2009
[/wichita/stories/2009/11/30/daily4.html](#)

Wichita Business Journal

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Former FDIC chair blasts handling of banking crisis

Wichita Business Journal - by [J. Scott Trubey](#)

A former chairman of the FDIC blasted federal regulators Monday for their handling of the nation's banking collapse, and turning what could have been a much less severe situation into a financial maelstrom.

Bill Isaac, the chairman of the **Federal Deposit Insurance Corp.** during the Savings & Loan crisis, said the S&L Crisis and the real estate collapse of the 1970s were each worse than the current banking mess, which has helped plunge the U.S. into a deep recession.

But "wrongheaded" policy, including the implementation of mark-to-market accounting rules, and inconsistent actions toward failing financial institutions contributed to the collapse and continuing woes of the nation's banks, Isaac said in Atlanta Monday.

The Wichita area has had a one bank failure this year. In February the Bank of Anthony was shut down by FDIC regulators and its assets were taken over by **Bank of Kansas**.

Nationally, mark-to-market wiped out value and eroded bank capital, while regulators being inconsistent with their implementation of policy allowed fear to shake consumers, Isaac said.

"You can't keep going back and forth on policy, you have to have a clear view," said Isaac, who was appointed to the FDIC board by President Carter and made chairman under President Reagan.

Fair Value Accounting and mark-to-market have ignited a firestorm of debate among bankers, developers, business leaders, CPAs and auditors, about the impact of these rules on companies and financial institutions left reeling from the fallout of the real estate sector and the collapse of the capital market.

The rule changes, developed over 30 years to protect investors from malfeasance, were designed to promote transparency for investors and to bring the U.S. standards in line with the international community. Some charge that the rule changes, which require companies and banks to use current market factors to assign value to real assets and financial instruments, such as securities, if they were sold or resolved as a liability, have tied an anchor to a sinking economy.

"We destroyed, by mark-to-market accounting, \$500 billion in capital," Isaac said. Considering banks leverage each dollar of capital into \$10 worth of lending, Isaac said the full effect was a \$5 trillion reduction in lending capacity.

Isaac said Congress decided to rely more heavily on market conditions, and turned away from regulators after the S&L Crisis. But regulation based on cyclical market factors will not prevent them from cropping up, and instead make the good years look better and downturns deeper, he said.

Instead of fixing what he called systemic problems, Congress is now focused on executive compensation and other less important regulatory fixes.

Greed, Isaac said, should be checked by regulated, but it is an essential part of capitalism.

"Blaming greed for a bank failure is like blaming gravity for the crash of a plane," he said.

The nation is not facing the same set of economic hurdles it faced during the S&L crisis or the real estate collapse of the 1970s, he said. In those years, thousands of lenders were literally insolvent, but currently there are 551 banks on the FDIC watchlist of endangered banks.

During the S&L Crisis, more than 3,000 lenders folded. Since 2008, fewer than 150 banks have failed nationwide, including a nation-leading 26 in Georgia.

But fear was allowed into the system, the stock market collapsed and consumers stopped spending.

Isaac also said the government is not doing enough to help small community banks, and instead, is unfairly assisting bigger banks now deemed too big to fail.



Supreme Court of the United States.
 D'OENCH, DUHME & CO., Inc.,
 v.
 FEDERAL DEPOSIT INS. CORPORA-
 TION.
No. 206.

Argued Jan. 9, 1942.
 Decided March 2, 1942.
 Rehearing Denied March 30, 1942.

See [315 U.S. 830](#), [62 S.Ct. 910](#), [86 L.Ed. --](#).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action on a note by the Federal Deposit Insurance Corporation against D'Oench, Duhme & Company, Inc. To review a judgment of the Circuit Court of Appeals, [117 F.2d 491](#), affirming a judgment for plaintiff, defendant brings certiorari.

Affirmed.

West Headnotes

[1] Federal Courts 170B **407.1**

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk407 Bills, Notes, and Bonds; Mortgages, Pledges and Liens

170Bk407.1 k. In General.
Most Cited Cases

(Formerly 170Bk407, 106k361)
 Where maker alleged in its answer in Federal Deposit Insurance Corporation's action

on demand note under Federal Reserve Act that note was given without consideration and with understanding that no action would be brought thereon and that corporation was not a holder in due course, and corporation in its reply alleged that maker was estopped to assert those defenses on grounds that note was executed to permit a state bank to avoid having its records show any past due bonds, that that constituted a misrepresentation which would deceive bank's creditors, state banking authorities, and corporation, and that maker participated in misrepresentation, maker's liability on note involved decision of a "federal question" and not "state question". Federal Reserve Act s 12B(j), as amended, [12 U.S.C.A. s 264\(j\)](#); [28 U.S.C.A. s 42](#).

[2] Banks and Banking 52 **502**

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k502 k. Statutory Provisions. **Most Cited Cases**

(Formerly 52k15)

The provisions of the Federal Reserve Act providing for the insurance of a state bank certified to be solvent after examination by and with the approval of the Federal Deposit Insurance Corporation, and providing for the punishment of anyone who makes a false statement or willfully overvalues any security for purpose of obtaining any loan from corporation or of influencing corporation's action in any way reveal a federal policy to protect the corporation and the public funds which it administers against misrepresentations with respect to securities or other assets in the portfolios of banks which corporation insures or to which it makes loans. Federal Reserve Act § 12B(s, y), as amended, [12 U.S.C.A. § 264\(s, y\)](#).

[3] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration. [Most Cited Cases](#)

The reach of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receiver or creditors is not delimited to those instances where he has committed a statutory offense, but he is not allowed that defense as against the receiver and bank's creditors, or at times even as against bank itself, where his act contravenes a general policy to protect the bank from secret agreements not to enforce a note.

[4] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration. [Most Cited Cases](#)

The evil tendency of acts to contravene the policy governing banking transactions lies at the root of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receiver or creditors, and fact that creditors may not have been deceived or specifically injured by a secret agreement not to enforce the note is irrelevant.

[5] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration.

tion. [Most Cited Cases](#)

On question of maker's liability on demand note executed in 1933 and acquired by the Federal Deposit Insurance Corporation in 1938 as part of collateral securing a loan to payee state bank insured by corporation in 1934, where note was executed to permit bank to avoid having its records show any past due bonds, and it was agreed that note would not be called for payment, continuing, unrevoked permission which maker gave bank to carry note as a real asset must be presumed to have included authority for bank to treat note as genuine for purposes of examination at hands of public authorities as well as for general banking activities. Federal Reserve Act § 12B(y), as amended, 12 U.S.C.A. § 264(y).

[6] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration. [Most Cited Cases](#)

Where demand note payable to state bank was executed in 1933 to permit bank to avoid having its records show any past due bonds under agreement that note would not be called for payment, and the Federal Deposit Insurance Corporation insured bank in 1934 and acquired note in 1938 as part of collateral securing loan to bank, corporation was a member of "creditor" class which banking authorities, required by statute to certify to corporation that bank was solvent, were intended to protect, on question of maker's liability to corporation. Federal Reserve Act § 12B(y), as amended. 12 U.S.C.A. § 264(y).

[7] Evidence 157 ↪66

157 Evidence

157II Presumptions

157k66 k. Knowledge of Fact. **Most Cited Cases**

(Formerly 157k6)

One who gives a demand note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the bank examiners.

[8] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration. **Most Cited Cases**

The inability of an accommodation maker of a note to plead the defense of no consideration against a bank or its receiver or creditors does not depend on commission of a penal offense, but the test is whether the note was designed to deceive creditors or the public authority or would tend to have that effect, and where the note comes into the hands of the Federal Deposit Insurance Corporation, it is sufficient that the maker lent himself to a scheme or arrangement whereby the banking authority on which corporation relied in insuring bank was or was likely to be misled. Federal Reserve Act § 12B(s, y), as amended, 12 U.S.C.A. § 264(s, y).

[9] Bills and Notes 56 ↪98

56 Bills and Notes

56I Requisites and Validity

56I(E) Consideration

56k98 k. Estoppel to Deny Consideration or Allege Failure of Consideration. **Most Cited Cases**

(Formerly 56k8)

Where demand note payable to state bank was executed in 1933 to permit bank to

avoid having its records show any past due bonds, under agreement that note would not be called for payment, and the Federal Deposit Insurance Corporation insured bank in 1934 and acquired note in 1938 as part of collateral securing loan to bank, that note was given without consideration and with understanding that no action would be brought thereon could not be set up as a defense by maker in corporation's action on note, even though note was charged off by bank after corporation insured bank and before corporation acquired note, no damage was shown to have resulted, and maker did not participate in the particular transaction. Federal Reserve Act § 12B(s, y), as amended, 12 U.S.C.A. § 264(s, y).

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52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k502 k. Statutory Provisions. **Most Cited Cases**

(Formerly 52k15)

The federal policy expressed in the Federal Reserve Act to protect the Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentations with respect to securities or other assets in the portfolios of banks which the corporation insures or to which it makes loans is not dependent on proof of loss or damage caused by the fraudulent practice of making such misrepresentations. Federal Reserve Act § 12B(s, y), as amended, 12 U.S.C.A. § 264(s, y).

****677 *449** Messrs. John W. Giesecke, Harold C. Ackert, and Franklin E. Reagan, all of St. Louis, Mo., for petitioner.

***453** Mr. Francis M. Shea, Asst. Atty. Gen., for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.

****678** Respondent instituted this suit in the United States District Court for the Eastern Division of the Eastern ***454** District of Missouri on a demand note for \$5000 executed by petitioner in 1933 and payable to the Belleville Bank & Trust Co., Belleville, Illinois. Respondent insured that bank January 1, 1934; and it acquired the note in 1938 as part of the collateral securing a loan of over \$1,000,000 to the bank, made in connection with the assumption of the latter's deposit liabilities by another bank. Since 1935 the note had been among the charged off assets of the bank. The note was executed by petitioner in renewal of notes which it had executed in 1926. Petitioner who was engaged in the securities business at St. Louis, Missouri, had sold the bank certain bonds which later defaulted. The original notes were executed to enable the bank to carry the notes and not show any past due bonds. Proceeds of the bonds were to be credited on the notes. ^{FNI}

The receipts for the notes contained the statement, 'This note is given with the understanding it will not be called for payment. All interest payments to be repaid.' Respondent had no knowledge of the existence of the receipts until after demand for payment on the renewal note was made in 1938. Certain interest payments on the notes were made prior to renewal for the purpose of keeping them 'as live paper'. Petitioner's president who signed the original notes knew that they were executed so that the past due bonds would not appear among the assets of the bank, and that the purpose of the interest payments was 'to keep the notes alive'. The original notes were signed in St. Louis, Missouri, were payable at petitioner's office there, and were delivered to the payee in Illinois. The

evidence does not disclose where the note sued upon was signed, though it was dated at Belleville, Illinois, and payable to the bank there.

FN1 The bank sold some of the bonds in 1937 for \$100 and credited this amount to interest due on the note. This credit paid interest to May 1, 1933. No later payments were made on the note.

***455** The main point of controversy here revolves around the question as to what law is applicable. The District Court held that Illinois law was applicable and that petitioner was liable. The Circuit Court of Appeals applied 'general law' to determine that the note was an Illinois rather than a Missouri contract; and it decided that under Illinois law respondent was the equivalent of a holder in due course and entitled to recover. [8 Cir., 117 F.2d 491](#). Petitioner contends that under the rule of [Klaxon Company v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477](#), a federal court sitting in Missouri must apply Missouri's conflict of law rules; that if, as was the case here, Illinois law was not pleaded or proved, a Missouri court would have ascertained Illinois law from Missouri decisions since in such a case Illinois law would be presumed to be the same as the Missouri law; and that the District Court was bound to follow that same course. We granted the petition for certiorari, [314 U.S. 592, 62 S.Ct. 80, 86 L.Ed. 477](#), because of the asserted conflict between the decision below and [Klaxon Company v. Stentor Electric Mfg. Co., supra](#).

[1] We held in the latter decision that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules 'would do violence to the principle of uniformity within a state' upon

which *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, was based. 313 U.S. at page 496, 61 S.Ct. at page 1021, 85 L.Ed. 1477. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued 'in any court of law or equity, State or Federal.'^{FN2} Sec. 12B, Federal *456 Reserve Act, 12 U.S.C. s 264(j), 12 U.S.C.A. s 264(j), **679 48 Stat. 162, 168, 172, 49 Stat. 684, 692. And see 28 U.S.C. s 42, 28 U.S.C.A. s 42, 43 Stat. 941. Whether the rule of the *Klaxon* case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of *Deitrick v. Greaney*, 309 U.S. 190, 60 S.Ct. 481, 84 L.Ed. 694.

^{FN2} That subdivision of the Act further provides: 'All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: Provided, That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States.' And see S.Rep. No. 1007, 74th Cong., 1st Sess., p. 5.

Petitioner in its answer alleged that the note was given without any consideration whatever and with the understanding that

no suit would be brought thereon; and that respondent was not a holder in due course. Respondent in its reply alleged that petitioner was estopped to assert those defenses on the grounds that the note was executed for the purpose of permitting the bank to avoid having its records show any past due bonds; that this constituted a misrepresentation which would deceive the creditors of the bank, the state banking authorities and respondent; that petitioner participated in the misrepresentation not only by reason of its knowledge as to the purpose which the note would serve but also by reason of its payment of interest in order to make the notes appear as a good asset. The District Court held that respondent was an innocent holder of the note in good faith and for value and that petitioner was estopped to assert want of consideration as a defense.

[2][3] Sec. 12B(s) of the Federal Reserve Act, 12 U.S.C. s 264(s), 12 U.S.C.A. s 264(s), provides that 'Whoever, for the purpose of obtaining any loan from the Corporation * * * or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing*457 it to be false, or willfully overvalues any security, shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years or both.' Subdivision (y) of the same section provided, at the time respondent insured the Belleville bank,^{FN3} that such a state bank 'with the approval of the authority having supervision' of the bank and on 'certification' to respondent 'by such authority' that the bank 'is in solvent condition' shall 'after examination by, and with the approval of' the respondent be entitled to insurance.^{FN4}

^{FN3} These provisions of subdivi-

sion (y) were dropped when s 12B was amended by the Banking Act of 1935. 49 Stat. 684. See S.Rep. No. 1007, 74th Cong., 1st Sess., p. 9.

FN4 Subdivision (y) also gave respondent power to prescribe rules and regulations for the further examination of such bank. Though subdivision (y) was revised in 1935, as indicated in note 3, supra, subdivision (k)(2) of the amended Act gave respondent's examiners power 'to make a thorough examination of all the affairs' of such banks and in doing so 'to administer oaths and to examine and take and preserve the testimony of any of the officers and agents thereof'. They were directed to make a 'full and detailed report of the condition of the bank to the Corporation.' 12 U.S.C. s 264(k)(2), 12 U.S.C.A. s 264(k)(2).

These provisions reveal a federal policy to protect respondent and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans. If petitioner and the bank had arranged to use the note for the express purpose of deceiving respondent on insurance of the bank or on the making of the loan, the case would be on all fours with *Deitrick v. Greaney*, supra. In that case the defendant for the purpose of concealing a national bank's acquisition of its own stock had the shares held by a straw man and executed a note to the bank, it being agreed that the shares were to be held for the bank and that he was not to be liable on the note. We held as a *458 matter of federal law, based on the policy of the National Banking Act to prevent the impairment of a bank's capital re-

sources by prohibiting such acquisitions, that the defendant could not rely on his own wrongful act to defeat the obligation of the note as against the receiver of the bank. The defendant's act was itself a violation of the statute. 309 U.S. page 198, 60 S.Ct. page 484, 84 L.Ed. 694. But the reach of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receiver or creditors **680 is not delimited to those instances where he has committed a statutory offense. As indicated by the cases cited in the *Deitrick* case, 309 U.S. page 198, 60 S.Ct. page 484, 84 L.Ed. 694, an accommodation maker is not allowed that defense as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements. In some of those cases the accommodation maker was party to the scheme of deception in the sense that he had full knowledge of the intended use of the paper. *Putnam v. Chase*, 106 Or. 440, 212 P. 365; *Vallely v. Devaney*, 49 N.D. 1107, 194 N.W. 903; *Niblack v. Farley*, 286 Ill. 536, 122 N.E. 160; *Cedar State Bank v. Olson*, 116 Kan. 320, 226 P. 995; *Bay Parkway Nat. Bank v. Shalom*, 270 N.Y. 172, 200 N.E. 685; *German-American Finance Corp. v. Merchants & Mfrs. State Bank*, 177 Minn. 529, 225 N.W. 891, 64 A.L.R. 582. In others he had 'no positive idea of committing any fraud upon any one.' *Denny v. Fishter*, 238 Ky. 127, 129, 36 S.W.2d 864, 865; *Iglehart v. Todd*, 203 Ind. 427, 442, 178 N.E. 685; *Mount Vernon Trust Co. v. Bergoff*, 272 N.Y. 192, 5 N.E.2d 196. And see *Pauly v. O'Brien, C.C.*, 69 F. 460; *Williston on Contracts (Rev.Ed.)* s 1632. Yet he has not been allowed to escape liability on the note as against the receiver even though he was

‘very ignorant and ill-informed of the character of the *459 transaction’. [Rinaldi v. Young](#), 67 App.D.C. 305, 92 F.2d 229, 231. Indeed recovery was allowed by the bank itself in [Mount Vernon Trust Co. v. Bergoff](#), *supra*, where the court said (272 N.Y. page 196, 5 N.E.2d page 197): ‘The defendant may not have intended to deceive any person, but, when she executed and delivered to the plaintiff bank an instrument in the form of a note, she was chargeable with knowledge that, for the accommodation of the bank, she was aiding the bank to conceal the actual transaction. Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.’

[4] Furthermore, the fact that creditors may not have been deceived or specifically injured is irrelevant. As we held in the [Deitrick case](#), 309 U.S. page 198, 60 S.Ct. page 484, 84 L.Ed. 694 it is the ‘evil tendency’ of the acts to contravene the policy governing banking transactions which lies at the root of the rule. See 7 [Zollman, Banks & Banking](#) (1936) s 4783.

Those principles are applicable here because of the federal policy evidenced in this Act to protect respondent, a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans. Those principles call for an affirmance of the judgment below.

[5] Petitioner at the time it executed the renewal note in 1933 did not know that it was to be used to deceive respondent, as

the Act creating respondent was not passed until later. But the permission which it gave the bank to carry the note as a real asset was a continuing one and not revoked. That permission must be presumed to have *460 included authority for the bank to treat the note as genuine for purposes of examination at the hands of the public authorities as well as for its general banking activities.

[6][7][8][9][10] Respondent insured the bank in 1934. The loan was made in 1938 to satisfy respondent's liability to the depositors of the bank under that insurance agreement. Respondent was authorized to insure such a bank only on a certificate from the state authority that the bank was solvent. We assume that such certificate was given, for to assume otherwise would be to infer that respondent did not discharge its statutory duties. The genuineness of assets ostensibly held by a bank is certainly germane to a determination of solvency. Clearly respondent is a member of the creditor class which the banking authorities were intended to protect. Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the vigilant eyes of the bank **681 examiners. If the bank had wilfully padded the bank's assets with the spurious note in order to obtain insurance from respondent there seems no doubt but that s 12B(s) would have been violated. Moreover, as we have seen, the inability of an accommodation maker to plead the defense of no consideration does not depend on his commission of a penal offense. The test is whether the note was designed to deceive the creditors or 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 arrange-

ment whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled. As we have said, petitioner's authority to the bank to use this note was a continuing one. The use to which it was put was not unusual but within the normal scope of banking activities. The fact that the note was charged off by the bank subsequent to the time when respondent insured *461 the bank and prior to the time when it acquired the note under the loan is immaterial. A note may be nonetheless an asset though it is charged off. And respondent is suing here to protect its rights as an insurer, a relationship with the bank which was created prior to the time when the note was charged off. The fact that subsequently respondent learned that the note had been charged off certainly was not notice that the note was spurious. It is indeed clear that at no time prior to the demand for payment did respondent know that the note was not genuine. It needs no argument to demonstrate that the integrity of ostensible assets has a direct relation to solvency. And it is no more a defense here than it was in the Deitrick case that no damage was shown to have resulted from the fraudulent or unlawful act. The federal policy expressed in the Act, like its counterpart in state law, is not dependent on proof of loss or damage caused by the fraudulent practice.

Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practices should not bar its defense to the note. Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act

than were the criminal penalties imposed on the agreement in the Deitrick case. If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. The federal policy under this Act of protecting respondent in its various functions against such arrangements is *462 no less clear or emphatic than the federal policy of outlawing purchases by a bank of its own stock involved in the Deitrick case. Cf. *Rinaldi v. Young*, supra; [Federal Deposit Ins. Corp. v. Woods, D.C., 34 F.Supp. 296.](#)

Affirmed.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case. Mr. Justice FRANKFURTER. The CHIEF JUSTICE and I concur in the result on the ground that in the circumstances of this case respondent is entitled to recover, whatever law be deemed controlling. If Illinois law governs, respondent is admittedly entitled to recover as a holder in due course. If Missouri law governs, petitioner is estopped to assert the defenses on which it now relies. Whether the case is governed by the law of one state or the other, or by 'federal common law' drawn here from one state or the other, the result is the same.

When the original accommodation notes were executed in 1926, petitioner fully knew that the whole transaction was aimed at giving the bank an appearance of assets where there were none. Petitioner's representative admitted that the bank 'suggested that we issue a note to the Bank,' which would enable it 'to carry this note and not show any past due paper.' He had been in

the investment security business since 1910; he 'knew what the bank meant', and that it was subject to periodic **682 examinations by the state bank examiner, and he assumed the bank did not want past due paper. On these facts the trial judge held that petitioner is estopped to assert absence of consideration as a defense.

Nothing in Missouri statutes or decisions brought to our notice would warrant us in setting aside this ruling. A case decided in 1901, *463Chicago Title & Trust Co. v. Brady, 165 Mo. 197, 65 S.W. 303, might have called for a different result. There an accommodation maker was held not estopped to assert absence of consideration as a defense against the bank's receiver, even though he had known that the note was part of a scheme to deceive the state banking authorities by swelling the apparent assets of the bank. But in 1920 the Missouri Supreme Court made it clear that the Brady decision can no longer be taken to represent the law of that state. Such is the purport of Bank of Slater v. Union Station Bank, 283 Mo. 308, 320, 222 S.W. 993, 996:

'The facts in this case inevitably suggest the question (of estoppel) we have discussed in this paragraph. Counsel for respondent, however, have not raised it, being deterred, doubtless, by the decision in (Chicago) Title & Trust Co. v. Brady, 165 Mo. 197, 65 S.W. 303, where a contrary doctrine is countenanced, and we therefore refrain from ruling upon the proposition. We have touched upon it for the reason that if the Brady case, supra, is considered as announcing 'the Missouri rule' upon this topic, as some commentators have said, that rule is apparently in conflict with numerous and respectable authorities, and its soundness may admit of question.'

No subsequent decision was cited, nor have we found any, to show that the court has since reverted to the doctrine of the Brade case. It cannot be said, therefore, that in holding petitioner estopped the trial judge departed from Missouri law.

There is no federal statute to override either the Missouri law as to estoppel or the Illinois law which treats respondent as a holder in due course. Were this Court, in the absence of federal legislation, to make its own choice of law, compare United States v. Guaranty Trust Co., 293 U.S. 340, 55 S.Ct. 221, 79 L.Ed. 415, 95 A.L.R. 651; O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F.2d 539; and *464Hinderlider v. La Plata Co., 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202, decided the same day as Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, Illinois or Missouri law would furnish the governing principles. See Board of Com'rs v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313; Royal Indemnity Co. v. United States, 313 U.S. 289, 296, 61 S.Ct. 995, 997, 85 L.Ed. 1361; just v. Chambers, 312 U.S. 383, 387, 668, 61 S.Ct. 687, 690, 85 L.Ed. 903.

We are unable to find an estoppel created by federal statute. Reliance is placed upon Deitrick v. Greaney, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694. But that case rested on a plain violation of an explicit provision of a federal statute in force at the time of its occurrence. This is not true here. An accommodation note deposited in a bank before an act of Congress is on the books can hardly become a violation of the act after it is passed merely because the note remains in the bank. One cannot violate a statute before it comes into being. Insofar as the statute may apply to arrangements whereby the Federal Deposit Insurance Corporation

might have been misled to its detriment into insuring an insolvent bank, the record is barren of any indication that the \$5,000 note in question had any relation to the bank's solvency or to the Corporation's undertaking as an insurer.

The Federal Deposit Insurance Corporation is bringing this suit as pledgee. As to the note sued upon, it is in no different position than would be any other pledgee. Indeed, from the business point of view, its position is less favorable. For it became pledgee only in 1938, three years after the note had been charged off on the books of the bank. The Corporation had since 1934 been making a regular annual examination of the bank's books, which showed this fact; and the schedule of collateral given to respondent when it became pledgee made it perfectly clear that the note had been charged off.

We are not concerned here with liability based on any doctrine of 'equitable estoppel' evolved as a principle of *465 federal common law having no statutory roots. For we have put to one side, as unnecessary to **683 the disposition of this case, the duty of this Court to make law 'interstitially' (as Mr. Justice Holmes put it in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900) in controversies arising in the federal courts outside their diversity jurisdiction.

Of course the policy expressed by the Federal Deposit Insurance Act might be violated, as the National Bank Act was violated in the Deitrick case, wholly apart from any question of estoppel or proof of loss to the Corporation. Our difficulty is that the statute cannot be stretched to fit this case. And it seems unnecessary to force such a result when a solution according to settled

doctrines is available.

Mr. Justice JACKSON, concurring.

I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or in the concurring opinion of Mr. Justice FRANKFURTER. That question, as old as the federal judiciary, is met inescapably at the threshold of this case. It is the one which moved us to grant certiorari, and we could not resort to the rule announced without at least a tacit answer to it. The petitioner asserts that the decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477, govern this case. If they do, we would not be free to disregard the law of Missouri and Illinois and to apply a doctrine of estoppel actually-but not avowedly-drawn from common-law sources to effectuate the policy we think implicit in federal statutes.

The Rules of Decision Act^{FN1} provides that 'the laws of the several States, except where the Constitution, treaties, *466 or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Whether 'laws of the several States' as so used included non-statutory law embodied in judicial decisions of state courts was long a subject of controversy. After acting for half a century on the belief that it did, the Court in *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865, decided that it did not. Almost a century later that decision with its numerous and sorry progeny was overruled, and the Court answered that it did. *Erie R. Co. v. Tompkins*, supra. It later held that state decisions on conflicts of

laws were also binding on the federal courts. *Klaxon v. Stentor Electric Mfg. Co.*, supra. Thus, the Rules of Decision Act as now interpreted requires federal courts to use state law whether declared by the legislature or by the courts as rules of decision 'in cases where they apply,' except where federal law shall 'otherwise require or provide.' These recent cases, like *Swift v. Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality.^{FN2}

*467 The Court has not extended the doctrine of *Erie R. Co. v. Tompkins* beyond diversity cases.^{FN3}

^{FN1} s 34 of the Judiciary Act of 1789, 28 U.S.C. s 725, 28 U.S.C.A. s 725.

^{FN2} 'However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.' Chief Justice Marshall in *Bank of United States v. Deveaux*, 5 Cranch 61, 87, 3 L.Ed. 38. See also, *Dodge v. Woolsey*, 18 How. 331, 354, 15 L.Ed. 401; *Burgess v. Seligman*, 107 U.S. 20, 34, 2 S.Ct. 10, 21, 27 L.Ed. 359; *Lankford v. Platte Iron Works*, 235 U.S. 461, 478, 35 S.Ct. 173, 177, 59 L.Ed. 316. But com-

pare [Friendly, The Historic Basis of Diversity Jurisdiction](#), 41 *Harvard Law Review* 483.

^{FN3} Its effect even in such cases seems not to have been definitely settled. In an equity case it was said that 'the doctrine applies though the question of construction arises not in an action at law, but in a suit in equity.' *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 205, 58 S.Ct. 860, 861, 82 L.Ed. 1290. That case was in the federal courts by reason of diversity jurisdiction. In a later case in which a suit in equity was brought in federal court to enforce liability under a federal statute the Court said: 'The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U.S.C. 725, 28 U.S.C.A. s 725, directing that the 'laws of the several states' 'shall be regarded as rules of decision' in the courts of the United States, applies only to the rules of decision in 'trials at common law' in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. * * * In the circumstances we have no occasion to consider the extent to which the federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies.' *Russell v. Todd*, 309 U.S. 280, 287, 294, 60 S.Ct. 527, 531, 534, 84 L.Ed. 754. In any event, the estoppel here involved seems no more an equity matter than the issue of good-faith purchase involved in

[Cities Service Oil Co. v. Dunlap](#),
308 U.S. 208, 60 S.Ct. 201, 84
L.Ed. 196, where state law was held
to govern.

****684** This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions not important here, that: 'All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: * * *.'^{FN4} That this ***468** provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued 'in any court of law or equity, State or Federal.'^{FN5}

^{FN4} Paragraph Fourth of [12 U.S.C. s 264\(j\)](#), [12 U.S.C.A. s 264\(j\)](#) empowers the Corporation 'To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: Provided, That any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders and such State bank under State law shall not be deemed to arise under the laws of the United States.'

In a number of respects and with varying degrees of explicitness the Act elsewhere makes reference to state law. Specific federal criminal

sanctions are provided.

^{FN5} A similar provision without more is found in many federal statutes. E.g., [15 U.S.C. s 604](#), [15 U.S.C.A. s 604](#) (Reconstruction Finance Corporation); [12 U.S.C. s 24](#), [12 U.S.C.A. s 24](#) (National Banks); [12 U.S.C. s 341](#), [12 U.S.C.A. s 341](#) (Federal Reserve Banks); [12 U.S.C. s 1432](#), [12 U.S.C.A. s 1432](#) (Federal Home Loan Banks); [12 U.S.C. s 1716\(c\)\(3\)](#), [12 U.S.C.A. s 1716\(c\)\(3\)](#) (National Mortgage Associations). This is not to suggest, however, that questions not specifically dealt with in these statutes cannot be federal questions simply because of the absence of an express provision that suits 'shall be deemed to arise under the laws of the United States.'

Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, or put it bluntly, we may make our own law from materials found in common-law sources.

This issue has a long historical background of legal and political controversy as to the place of the common law in federal jurisprudence.^{FN6} As the matter now stands, it ***469** seems settled that the federal courts may not resort to the common law to punish crimes not made punishable by ****685** Act of Congress,^{FN7} and that, apart from special statutory or constitutional provision, they are not bound in other fields by

English precedents existing at any particular date. The federal courts have no general common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.

FN6 Judicial opinions discussing various aspects of the question include: *Wheaton v. Peters*, 1834, 8 Pet. 591, 658, 8 L.Ed. 1055; *Kendall v. United States*, 1838, 12 Pet. 524, 621, 9 L.Ed. 1181; *Smith v. Alabama*, 1888, 124 U.S. 465, 478, 8 S.Ct. 564, 569, 31 L.Ed. 508; *Bucher v. Cheshire R.R. Co.*, 1888, 125 U.S. 555, 583, 584, 8 S.Ct. 974, 977, 978, 31 L.Ed. 795; Justice Field, dissenting in *Baltimore & O.R.R. Co. v. Baugh*, 149 U.S. 368, 394, 395, 13 S.Ct. 914, 924, 37 L.Ed. 772; Justices Holmes and Pitney, dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 222, 230, 37 S.Ct. 524, 531, 534, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900. See also, George Wharton Pepper, *The Border Land of Federal and State Decisions* (1889); Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 *Cornell Law Quarterly* 499; Warren, *New Light on the History of*

the Federal Judiciary Act of 1789, 37 *Harvard Law Review* 49; von Moschzisker, *The Common Law and our Federal Jurisprudence*, 74 *University of Pennsylvania Law Review* 109, 270, 367.

FN7 The research of Charles Warren, leaned on heavily in *Erie R. Co. v. Tompkins* to discredit *Swift v. Tyson*, led that scholar to conclude that *United States v. Hudson*, 7 *Cranch* 32, 3 L.Ed. 259, and *United States v. Coolidge*, 1 *Wheat*, 415, 4 L.Ed. 124, establishing the above proposition, were probably wrongly decided. Warren, *History of the Federal Judiciary Act of 1789*, 37 *Harvard Law Review* 49, 73. The error, if it be one, comports, however, with the present tendency to constrict the jurisdiction of federal courts, and I think is likely to survive.

I do not understand Justice Brandeis's statement in *Erie R. Co. v. Tompkins*, 304 U.S. 64, at page 78, 58 S.Ct. 817, at page 822, 82 L.Ed. 1188, 114 A.L.R. 1487, that 'There is no federal general common law,' to deny that the common law may in proper cases be an aid to or the basis of decision*470 of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except 'where the Constitution, treaties, or statutes of the United States (so) require or provide.'^{FN8} Indeed, in a case decided on the same day as *Erie R. Co. v. Tompkins*, Justice Brandeis said that 'whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes

nor the decisions of either State can be conclusive.' [Hinderlider v. La Plata Co.](#), 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202.

FN8 Similarly, Mr. Justice Holmes's statement that there is no 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute' was made with reference to 'matters that are not governed by any law of the United States or by any statute of the State.' See [Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.](#), 276 U.S. 518, 533, 48 S.Ct. 404, 409, 72 L.Ed. 681, 57 A.L.R. 426.

Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

The contract clause, article 1, s 10, which prohibits a state from passing any 'Law impairing the Obligation of Contracts' is an example of the part the common law must play in our system. This provision is meaningless unless we know what a contract is. The Constitution wisely refrains from saying. We have very recently held upon a long line of authority that in applying this clause we are not bound by the state's views as to whether there is a contract. [Irving Trust Co. v. Day](#), 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 452. Take the case where the question is whether a promise made without consideration comes within the protection of the contract clause. Is there any doubt as to where we must go for the answer that we do not find in the Constitution itself? This Court has

not hesitated to read the common-law doctrine of consideration into the contract clause, and to restrict the protection of that clause to promises supported by consideration. [Durkee v. Board of Liquidation](#), 103 U.S. 646, 648, 26 L.Ed. 598; [Pearsall v. Great Northern Ry. Co.](#), 161 U.S. 646, 667, 16 S.Ct. 705, 710, 40 L.Ed. 838; [Grand Lodge v. City of New Orleans](#), 166 U.S. 143, 146, 17 S.Ct. 523, 524, 41 L.Ed. 951. Compare [Allegheny College v. National Chautauqua County Bank](#), 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980.

Other recognitions of our common-law powers abound in the Constitution. FN9

FN9 Thus, the Judiciary Article provides that 'the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties' made under their authority. Article 3, s 2. It does not give any definition of what are cases in law and equity; it simply assumes the existence of a jurisprudence from which the courts can ascertain the meaning of those terms.

Particularly in the clauses dealing with the rights of the individual, the Constitution uses words and phrases borrowed from the common law, meaningless without that background, and obviously meant to carry their common-law implications. Thus, we find in it the following: 'convicted'; 'Indictment'; 'Treason, Felony, and Breach of the Peace'; 'Piracies and Felonies'; 'Privilege of the Writ of habeas Corpus'; 'Bill of Attainder or ex post facto Law'; 'Bribery'; 'original

Jurisdiction'; and 'appellate Jurisdiction' both as to Law and Fact'. In the Bill of Rights Amendments, the necessity for resort to the common law for constitutional interpretation is even more obvious. Here we find: 'unreasonable searches and seizures'; 'Warrants'; 'presentment or indictment of a Grand Jury'; 'due process of law'; 'right to a speedy and public trial by an impartial jury'; 'in Suits at common law'; and 'no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'.

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law *472 is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them.^{FN10} Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners v. United States*, 308 U.S. 343, 350, 60 S.Ct. 285, 288, 84 L.Ed. 313.

^{FN10} For example, the common-law doctrines of conflict of laws worked out in a unitary system to

deal with conflicts between domestic and truly foreign law may not apply unmodified in conflicts between the laws of states within our federal system which are affected by the full faith and credit or other relevant clause of the Constitution.

The law which we apply to this case consists of principles of established credit in jurisprudence selected by us because they are appropriate to effectuate the policy of the governing Act. The Corporation was created and financed in part by the United States^{FN11} to bolster the entire banking and credit structure. The Corporation did not simply step into the private shoes of local banks. The purposes sought to be accomplished by it can be accomplished only if it may rely on the integrity of banking statements and banking assets. In this case the Corporation attempted to realize on a note that was a part of the assets at the time it insured the bank. It is met by the plea that the note was a sham knowingly given to enable the bank to conceal the worthlessness of certain bonds which it had bought from the maker, a broker. This deception was not for the single day on which the note was delivered; its purpose and its effect was to *473 operate as a continuing inducement to existing creditors and to those who might become creditors to rely on this note as a \$5,000 item counting towards its solvency. It may not have contemplated the then unborn Federal Deposit Insurance Corporation as the particular object of its deception, but its purpose was to conceal a **687 loss from then unknown and unidentified persons who might be or become creditors or banking supervisors on behalf of the public. Under the Act the Corporation has a dual relation of creditor or potential creditor and of supervising authority toward insured banks.^{FN12} The im-

munity of such a corporation from schemes concocted by the cooperative deceit of bank officers and customers is not a question to be answered from considerations of geography. That a particular state happened to have the greatest connection in the conflict of laws sense with the making of the note involved or that the subsequent conduct happened to be chiefly centered there is no enough to make us subservient to the legislative policy or the judicial views of that state.

FN11 12 U.S.C. s 264(d), 12 U.S.C.A. s 264(d).

FN12 12 U.S.C. s 264(i), (k), (l), 12 U.S.C.A. s 264(i, k, l).

FN13 Compare *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433, Ann.Cas.1916B, 252; *Southern Express Co. v. Byers*, 204 U.S. 612, 36 S.Ct. 410, 60 L.Ed. 825, L.R.A.1917A, 197; *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117; *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315, 40 S.Ct. 167, 64 L.Ed. 281; *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094; *Western Union Telegraph Co. v. Priester*, 276 U.S. 252, 48 S.Ct. 234, 72 L.Ed. 555; *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U.S. 44, 52 S.Ct. 45, 76 L.Ed. 157; *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230, 93 A.L.R. 195; *Jenkins v. Kurn*, 313 U.S. 256, 61 S.Ct. 934, 85 L.Ed. 1316; *Royal Indemnity Co. v. United States*, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; *O'Brien v. Western Union Tele-*

graph Co., 1 Cir., 113 F.2d 539.

I concur in the Court's holding because I think that the defense asserted is nowhere admissible against the Corporation and that we need not go to the law of any particular state as our authority for so holding.

I hardly suppose that Congress intended to set us completely*474 adrift from state law with regard to all questions as to which it has not provided a statutory answer. An intention to give persuasive or binding effect to state law has been found to exist in a number of cases similar in that they arose under a law of the United States but were not governed by any specific statutory provision. FN14 No doubt many questions as to the liability of parties to commercial paper which comes into the hands of the Corporation will best be solved by applying the local law with reference to which the makers and the insured bank presumably contracted. The Corporation would succeed only to the rights which the bank itself acquired where ordinary and good-faith commercial transactions are involved. But petitioners' conduct here was not intended to confer any right on the bank itself, for as to it the note was agreed to be a nullity. Petitioners' conduct was intended to and did have a direct and independent effect on unknown third parties, among whom the Corporation now appears. FN15 The policy of the federal Act does not seem *475 to me to leave dependent on local law the question whether **688 one may plead his own scheme to deceive a bank's creditors and supervising authorities as against the Corporation. Even though federal criminal sanctions might not be applicable to these facts, and even though the doctrine of *Deitrick v. Greaney*, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694, may not fully comprehend the present case, I think we now may

borrow a doctrine of estoppel from the same source from which the Court borrowed it in that case, and to reach the same result.

FN14 *Campbell v. Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280; *McClaine v. Rankin*, 197 U.S. 154, 25 S.Ct. 410, 49 L.Ed. 702, 3 Ann.Cas. 500; *Chattanooga Foundry v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241; *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980; *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664; *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171; *United States v. Guaranty Trust Co.*, 293 U.S. 340, 55 S.Ct. 221, 79 L.Ed. 415, 95 A.L.R. 651; *Board of Commissioners v. United States*, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313; *Rawlings v. Ray*, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605; *Just v. Chambers*, 312 U.S. 383, 668, 61 S.Ct. 687, 85 L.Ed. 903.

FN15 The reasons given by the opinion of Mr. Justice Frankfurter for declining to apply the doctrine of equitable estoppel seem inadequate. To insist that the \$5,000 note in question does not appear from the record to have had 'any relation to the bank's solvency or the Corporation's undertaking as an insurer' is to part company with the realities of the period in question when small banks-and large ones as well-were operating on perilously narrow margins of solvency, if any. To hold that the Corporation is to be judged as a mere private pledgee

of a particular piece of paper is to ignore the comprehensive public character of its function. And the wrong to it was sustained when it became committed to insure the bank-not later when as a step to working its way out of loss it took assets already equitably its own as a pledge and put up money for a plan to continue banking facilities to the community. To say that the note had been charged off is to stress the irrelevant. This was admittedly long after the Corporation had become bound as the bank's insurer. It also attributes to the 'charge-off' an unwarranted significance. The classification of this paper as inadmissible for a commercial bank would have been justified by its obvious 'slow' character, or may have been due to mere lack of information as to the ability of a nonresident debtor to meet it. It is no acknowledgment or notice of a legal defect in the paper.

U.S. 1942.
D'Oench, Duhme & Co. v. Federal Deposit Ins. Corporation
315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956

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Supreme Court of the United States
W.T. LANGLEY, et ux., Petitioners
v.

FEDERAL DEPOSIT INSURANCE CORPORATION.
No. 86-489.

Argued Oct. 14, 1987.

Decided Dec. 1, 1987.

Bank brought action against makers for nonpayment of promissory note. Makers asserted defense that bank president had made oral misrepresentations concerning loan terms and property to be purchased. The Federal Deposit Insurance Corporation was appointed receiver and substituted for bank. The United States District Court for the Western District of Louisiana, [615 F.Supp. 749](#), John M. Duhe, Jr., J., entered summary judgment for FDIC, and makers appealed. The Court of Appeals for the Fifth Circuit, [792 F.2d 541](#), affirmed. Makers' petition for certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) "agreement," which cannot diminish FDIC's interest in acquired assets, is not limited to express promise to perform act in future, but includes entire bargain of parties; (2) makers who alleged that bank had procured note by oral misrepresentations could not assert defense of fraud in the inducement against FDIC; and (3) FDIC's knowledge of misrepresentation was not relevant to whether statute requiring alleged agreement to be in writing applied.

Affirmed.

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**

"Agreement," which is not valid to diminish Federal Deposit Insurance Corporation's interest in acquired assets, is not limited to express promise to perform act in future, but includes parties' bargain as reflected in implied and express conditions upon their performance. Federal Deposit Insurance Act, § 2[13](e), [12 U.S.C.A. § 1823\(e\)](#); [U.C.C. § 1-201\(3\)](#).

[2] Banks and Banking 52 ↪501

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k501 k. In General; Nature and Status. **Most Cited Cases**

Banks and Banking 52 ↪502

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k502 k. Statutory Provisions. **Most Cited Cases**

Purpose of statute invalidating agreements which tend to diminish or defeat interest of Federal Deposit Insurance Corporation in acquired assets unless agreement is in writing, executed by bank and persons claiming adverse interest thereunder, has been approved by bank's board of directors or loan committee, and is included in official record of bank is to allow federal and state bank examiners to rely on bank's records in evaluating worth of bank's assets, to ensure mature consideration of loan transactions by senior bank officials, and to prevent fraudulent insertion of new terms. Federal

Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[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](#) Bank's alleged representations regarding amount of land conveyed in land purchase and outstanding mineral leases on property constituted "agreement" which makers of note were required to put in writing in order to be able to raise defense of fraud in the inducement in collection action maintained by Federal Deposit Insurance Corporation after it acquired promissory note executed in connection with land purchase. Federal Deposit Insurance Act, § 2 [13](e), 12 U.S.C.A. § 1823(e).

[4] Banks and Banking 52 ↪508

52 Banks and Banking

52XI Federal Deposit Insurance Corporation

52k508 k. Actions. [Most Cited Cases](#) Makers who alleged that bank had procured promissory note by orally misrepresenting property conveyed in land purchase could not assert defense of fraud in the inducement in collection action maintained by Federal Deposit Insurance Corporation after it acquired note. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[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](#)

Federal Deposit Insurance Corporation's knowledge of maker's alleged defense to promissory note based on oral misrepresentations concerning loan transaction was irrelevant to applicability of statute requiring that agreements against interest of FD-IC be in writing. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[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](#) Bank, which allegedly committed fraud in the inducement by misrepresenting to borrowers acreage and mineral interest in property, had voidable title to promissory note executed in connection with loan transaction which was transferable to Federal Deposit Insurance Corporation. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e); U.C.C. §§ 3-201(1), 3-305(2)(c).

[7] Bills and Notes 56 ↪318

56 Bills and Notes

56VIII Rights and Liabilities on Indorsement or Transfer

56VIII(C) Assignment or Sale

56k314 Equities and Defenses Against Assignee

56k318 k. Defenses Existing Before Transfer or Notice Thereof. [Most Cited Cases](#)

Voidable interest in note is transferable whether or not transferee knows of misrepresentation or fraud that produces voidability. U.C.C. §§ 3-201(1), 3-305(2)(c).

[8] 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** Harm to Federal Deposit Insurance Corporation caused by makers' failure to record alleged agreement with bank occurs no later than time at which FDIC conducts its first bank examination that is unable to detect unrecorded agreement and to prompt invocation of available protective measures, including termination of bank's deposit insurance, and harm is not avoided by FDIC's knowledge at time it acquires note. Federal Deposit Insurance Act, §§ 2[8], 2 [11](f), 2[13](e), 12 U.S.C.A. §§ 1818, 1821(f), 1823(e).

**398 *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*86 To finance the purchase of land in Louisiana, petitioners borrowed money from a bank insured by the Federal Deposit Insurance Corporation (FDIC) and, in consideration for the loan, executed a note, a collateral mortgage, and personal guarantees. When petitioners failed to pay an installment due on a renewal of the note, the bank filed suit for principal and interest in a Louisiana court, which suit was removed on diversity grounds to Federal District Court. Petitioners alleged, as a defense against the bank's claim, that the land purchase and their note had been procured by the bank's misrepresentations overstating the amount of land and mineral acres in the tract, and falsely stating that there were no

outstanding mineral leases on the property. No references to the alleged representations appeared in the documents executed by petitioners, in the bank's records, or in the minutes of the bank's board of directors or loan committee. While the suit was pending, a Louisiana official closed the bank because of its unsound condition and appointed the FDIC as receiver. The FDIC ultimately acquired petitioners' note and was substituted as a plaintiff in this lawsuit. The District Court granted summary judgment for the FDIC, and the Court of Appeals affirmed, holding that the word "agreement" in a provision of the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e), encompassed the kinds of material terms or warranties asserted by petitioners in their misrepresentation defense and, because § 1823(e)'s requirements were not met, the defense was barred. Section 1823(e) provides that no "agreement" tending to diminish or defeat the FDIC's "right, title or interest" in any asset acquired by the FDIC under the section shall be valid against the FDIC unless it shall have been (1) in writing, (2) executed contemporaneously with the bank's acquisition of the asset, (3) approved by the bank's board of directors or loan committee and reflected in the minutes of the board or committee, and (4) continuously, from the time of its execution, an official record of the bank.

Held: A condition to payment of a note, including the truth of an express warranty, is part of the "agreement" to which the requirements of § 1823(e) attach. Because the representations alleged by petitioners *87 constituted such a condition and did not meet the statute's requirements, they cannot be asserted as a defense here. Pp. 401-403.

**399 (a) The word "agreement" in §

1823(e) is not limited to an express promise to perform an act in the future. The essence of petitioners' defense is that the bank made certain warranties regarding the land, the truth of which was a condition to performance of their obligation to repay the loan. As used in commercial and contract law, the term "agreement" often has a wider meaning than a promise, and embraces such a condition upon performance. This common meaning of the word "agreement" must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes of allowing federal and state bank examiners to rely on a bank's records in evaluating the bank's assets, ensuring mature consideration of unusual loan transactions by senior bank officials, and preventing fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Cf. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956. Pp. 401-402.

(b) There is no merit to petitioners' argument that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement covered by § 1823(e), it at least does not do so when the misrepresentation was fraudulent and the FDIC had knowledge of the asserted defense when it acquired the note. Neither fraud in the inducement nor the FDIC's knowledge thereof is relevant to the section's application. No conceivable reading of the word "agreement" in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent. The bank's alleged misrepresentations here did not constitute fraud in the factum, which would render the note void and take it out of § 1823(e), but instead constituted only fraud in the inducement, which rendered the note void-

able but not void. The bank therefore had and could transfer to the FDIC voidable title, which was enough to constitute "title or interest" in the note for the purpose of § 1823(e). Even if this Court had the power to engraft an equitable exception upon the statute's plain terms, the equities petitioners invoke are not the equities the statute regards as predominant. Pp. 402-403.

792 F.2d 541 (CA5 1986), affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

William C. Shockey argued the cause and filed a brief for petitioners.

Richard G. Taranto argued the cause for respondent. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Wallace*, *John C. Murphy, Jr.*, and *Ann S. DuRoss*.

Justice SCALIA delivered the opinion of the Court.

Petitioners W.T. and Maryanne Grimes Langley seek reversal of a decision by the United States Court of Appeals for the Fifth Circuit granting the Federal Deposit Insurance Corporation (FDIC) summary judgment on its claim for payment of a promissory note signed by petitioners. 792 F.2d 541 (1986). The Fifth Circuit rejected petitioners' contention that a defense of misrepresentation of existing facts is not barred by 12 U.S.C. § 1823(e) because such a representation is not an "agreement" under that section. We granted certiorari to resolve a conflict in the Courts of Appeals. 479 U.S. 1028, 107 S.Ct. 871, 93 L.Ed.2d 826 (1987). Compare *Gunter v. Hutcheson*, 674 F.2d 862, 867 (CA11), cert. denied, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); *FDIC v. Hatmaker*, 756 F.2d 34,

37 (CA6 1985) (dictum).

I

The Langleys purchased land in Pointe Coupee Parish, Louisiana, in 1980. To finance the purchase, they borrowed \$450,000 from Planters Trust & Savings Bank of Opelousas, Louisiana, a bank insured by the FDIC. In consideration for the loan, they executed a note, a collateral mortgage, and personal guarantees. The note was renewed several times, the last renewal being in March 1982, for the principal amount of \$468,124.41.

****400** In October 1983, after the Langleys had failed to pay the first installment due on the last renewal of the note, Planters brought the present suit for principal and interest in a Louisiana state trial court. The Langleys removed the suit, on grounds of diversity, to the United States District Court for the Middle District of Louisiana, where it was consolidated with a suit by the Langleys seeking more than \$5 million in damages from Planters and others. The Langleys alleged as one of the grounds of complaint in their own suit, and as a defense against Planters' claim in the present suit, that the *89 1980 land purchase and the notes had been procured by misrepresentations. In particular, they alleged that the notes had been procured by the bank's misrepresentations that the property conveyed in the land purchase consisted of 1,628.4 acres, when in fact it consisted of only 1,522, that the property included 400 mineral acres, when in fact it contained only 75, and that there were no outstanding mineral leases on the property, when in fact there were. ^{FN1} No reference to these representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board

of directors or loan committee.

FN1. The Langleys also alleged certain other misrepresentations by Planters, including that the Langleys would have no personal liability on the notes, that Planters would provide another purchaser for the land as soon as the sale to the Langleys was closed, and that no payments would be due until the property was resold. The Langleys concede that 12 U.S.C. § 1823(e) bars these other misrepresentations from being asserted as defenses to FDIC's suit on the note because they were promissory in nature. Brief for Petitioners 12.

In April 1984, the FDIC conducted an examination of Planters during which it learned of the substance of the lawsuits with the Langleys, including the allegations of Planters' misrepresentations. On May 18, 1984, the Commissioner of Financial Institutions for the State of Louisiana closed Planters because of its unsound condition and appointed the FDIC as receiver. The FDIC thereupon undertook the financing of a purchase and assumption transaction pursuant to 12 U.S.C. § 1823(c)(2), in which all the deposit liabilities and most of the assets of Planters were assumed by another FDIC-insured bank in the community. Because the amount of the liabilities greatly exceeded the value of the assets, the FDIC paid the assuming bank \$36,992,000, in consideration for which the FDIC received, *inter alia*, the Langleys' March 1982 note.

In October 1984, the FDIC was substituted as a plaintiff in this lawsuit, and moved for summary judgment on its claim. The District Court granted the motion, *90615 F.Supp. 749 WD La.1985), and was sus-

tained on appeal. The Fifth Circuit held that the word “agreement” in 12 U.S.C. § 1823(e) encompassed the kinds of material terms or warranties asserted by the Langleys in their misrepresentation defenses and, because the requirements of § 1823(e) were not met, those defenses were barred. 792 F.2d, at 545-546. We granted the Langleys' petition for certiorari on the issue whether, in an action brought by the FDIC in its corporate capacity for payment of a note, § 1823(e) bars the defense that the note was procured by fraud in the inducement even when the fraud did not take the form of an express promise.

II

The Federal Deposit Insurance Act of 1950, § 13(e), 64 Stat. 889, as amended, 12 U.S.C. § 1823(e), provides:

“No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) **401 shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.”

A

Petitioners' principal contention is that the

word “agreement” in the foregoing provision encompasses only an express promise to perform an act in the future. We do not agree.

[1] As a matter of contractual analysis, the essence of petitioners' defense against the note is that the bank made certain*91 warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. See 1 A. Corbin, Contracts § 14, p. 31 (1963) (“[T]ruth [of the warranty] is a condition precedent to the duty of the other party”); accord, 5 S. Williston, Contracts § 673, pp. 168-171 (3d ed. 1961); J. Murray, Contracts § 136, pp. 275-276 (2d rev. ed. 1974). As used in commercial and contract law, the term “agreement” often has “a wider meaning than ... promise,” *Restatement (Second) of Contracts* § 3, Comment *a* (1981), and embraces such a condition upon performance. The Uniform Commercial Code, for example, defines agreement as “the bargain of the parties in fact as found in their language or by implication from other circumstances....” *U.C.C. § 1-201(3)*, 1 U.L.A. 44 (1976). Quite obviously, the parties' bargain cannot be reflected without including the conditions upon their performance, one of the two principal elements of which contracts are constructed. Cf. E. Farnsworth, *Contracts* § 8.2, p. 537 (1982) (“[P]romises, which impose duties, and conditions, which make duties conditional, are the main components of agreements”). It seems to us that this common meaning of the word “agreement” must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes.

[2] One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of

the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, see 12 U.S.C. §§ 1817(a)(2), 1820(b), and when the FDIC is deciding whether to liquidate a failed bank, see § 1821(d), or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank, see §§ 1823(c)(2), (c)(4)(A). The last kind of evaluation, in particular, must be made “with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.” *Gunter v. Hutcheson*, 674 F.2d, at 865. Neither the FDIC nor *92 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.

A second purpose of § 1823(e) is implicit in its requirement that the “agreement” not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank record “contemporaneously” with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Neither purpose can be adequately fulfilled if an element of a loan agreement so fundamental as a condition upon the obligation to repay is excluded from the meaning of “agreement.”

[3] That “agreement” in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in this area prior to enactment

of § 1823(e) in 1950. In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the FDIC **402 acquired a note in a purchase and assumption transaction. The maker asserted a defense of failure of consideration (that is, the failure to perform a promise that was a condition precedent to the maker's performance), based on an undisclosed agreement between it and the failed bank that the note would not be called for payment. The Court held that this “secret agreement” could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. *Id.*, at 460, 62 S.Ct., at 681. The Court stated that when the maker “lent himself to a scheme or arrangement whereby the banking authority ... was likely to be misled,” that scheme or arrangement could not be the basis for a defense against the FDIC. *Ibid.* (emphasis added). We can safely assume that Congress did not mean “agreement” in § 1823(e) to be interpreted so much more narrowly than its *93 permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes. Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

B

[4][5] Petitioners' fallback position is that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement covered by § 1823(e), it at least does not do so when the misrepresentation was fraudulent and the FDIC had know-

ledge of the asserted defense at the time it acquired the note. We conclude, however, that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application.

No conceivable reading of the word "agreement" in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent. Petitioners effectively acknowledge this when they concede that the fraudulent nature of a *promise* would not cause it to lose its status as an "agreement". See *supra*, at 400, n. 1. The presence of fraud could be relevant, however, to another requirement of § 1823(e), namely, the requirement that the agreement in question "ten[d] to diminish or defeat the right, title or interest" of the FDIC in the asset.

[6] Respondent conceded at oral argument that the real defense of fraud in the factum—that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents, see U.C.C. § 3-305(2)(c), Comment 7, 2 U.L.A. 241 (1977)—would take the instrument out of § 1823(e), because it would render the instrument entirely void, see *Restatement (Second) of Contracts* § 163 and Comments *a, c*; Farnsworth § 4.10, at 235, thus leaving *94 no "right, title or interest" that could be "diminish[ed] or defeat[ed]." See Tr. of Oral Arg. 24-25, 27-30. Petitioners have never contended, however, nor could they have successfully, that the alleged misrepresentations about acreage or mineral interests constituted fraud in the factum. It is clear that they would constitute only fraud in the inducement, which renders the note voidable but not void. See U.C.C. § 3-201(1), 2 U.L.A. 127; *Restatement (Second) of Contracts* § 163, Comment *c*; Farnsworth § 4.10, at 235-236. The

bank therefore had and could transfer to the FDIC voidable title, which is enough to constitute "title *or* interest" in the note. This conclusion is not only textually compelled, but produces the only result in accord with the purposes of the statute. If voidable title were not an "interest" under § 1823(e), the FDIC would be subject not only to undisclosed fraud defenses but also to a wide range of other undisclosed defenses that make a contract voidable, such as certain kinds of mistakes and innocent but material misrepresentations. See *Restatement (Second) of Contracts* §§ 152-153, 164.

**403 [7][8] Finally, knowledge of the misrepresentation by the FDIC prior to its acquisition of the note is not relevant to whether § 1823(e) applies. Nothing in the text would support the suggestion that it is: An agreement is an agreement whether or not the FDIC knows of it; and a voidable interest is transferable whether or not the transferee knows of the misrepresentation or fraud that produces the voidability. See Farnsworth § 11.8, at 780-781; cf. U.C.C. § 3-201(1), 2 U.L.A. 127. Petitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant. While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. Harm to the *95 FDIC (and those who rely upon the solvency of its fund) is not avoided by knowledge at the time of acquiring the note. The FDIC is an insurer of the bank, and is liable for the depositors' insured

losses whether or not it decides to acquire the note. Cf. 12 U.S.C. § 1821(f). The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance. See § 1818 (1982 ed. and Supp. IV). Thus, insofar as the recording provision is concerned, the state of the FDIC's knowledge at that time is what is crucial. But as we discussed earlier, see *supra*, at 401, § 1823(e) is meant to ensure more than just the FDIC's ability to rely on bank records at the time of an examination or acquisition. The statutory requirements that an agreement be approved by the bank's board or loan committee and filed contemporaneously in the bank's records assure prudent consideration of the loan before it is made, and protect against collusive reconstruction of loan terms by bank officials and borrowers (whose interests may well coincide when a bank is about to fail). Knowledge by the FDIC could substitute for the latter protection only if it existed at the very moment the agreement was concluded, and could substitute for the former assurance not at all.

The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise. Such a categorical recording scheme is of course not unusual. Under Article 9 of the U.C.C., for example, a filing secured creditor prevails even over those unrecorded security interests of which he was aware. See, e.g., *Rockwell*

Int'l Credit Corp. v. Valley Bank, 109 Idaho 406, 408-409, 707 P.2d 517, 519-520 (Ct.App.1985); *96*Bloom v. Hilty*, 427 Pa. 463, 471, 234 A.2d 860, 863-864 (1967); 9 R. Anderson, Uniform Commercial Code § 9-312:74, p. 298 (3d ed. 1985); J. White & R. Summers, Uniform Commercial Code § 25-4, p. 1037 (2d ed. 1980).

3

A condition to payment of a note, including the truth of an express warranty, is part of the "agreement" to which the writing, approval, and filing requirements of 12 U.S.C. § 1823(e) attach. Because the representations alleged by petitioners constitute such a condition and did not meet the requirements of the statute, they cannot be asserted as defenses here. The judgment of the Court of Appeals is

Affirmed.

U.S., 1987.

Langley v. Federal Deposit Ins. Corp.
484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340, 56 USLW 4026, 5 UCC Rep.Serv.2d 1

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FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Statement.

SUMMARY: The FDIC has adopted a statement of policy which sets forth when the FDIC will assert the federal common-law doctrine enunciated by the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and when the FDIC will assert the statutory protections set forth in 12 U.S.C. 1821(d)(9)(A) and 1823(e).

EFFECTIVE DATE: February 4, 1997.

FOR FURTHER INFORMATION CONTACT: Charlotte Kaplow, Counsel (202-736-0248), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

Introduction

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: (1) The statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and (2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections.

Background

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protecting FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The

Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, Section 2[13](e), 64 Stat. 889 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, Section 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

In August 1989, as part of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA), Public Law 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

- (A) Is in writing,
- (B) Was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (C) Was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (D) Has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e)

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)(9)(A))), which states, in relevant part, that "any agreement which does not meet the requirements set forth in

section 1823(e) * * * shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,¹ these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: (1) Allows federal and state bank examiners to rely on an institution's records in evaluating its worth; and (2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley v. FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the

¹ The Guidelines have been in effect since late 1994.

principle of the leading case applying that term to FDIC-acquired notes.” *Langley*, 484 U.S. at 92–93. In the same way, it would disserve the policies recognized in *D’Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D’Oench* has been applied in so-called no-asset cases.²

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e). To that end, the FDIC will continue to assert the protections of the *D’Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court’s decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA’s enactment.³

No provision within FIRREA addresses the temporal reach of section 1821(d)(9) or section 1823(e) (as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed by the parties to such agreements.⁴ Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to have intended for those provisions to apply

²Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. See *John v. RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen v. Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

³See *Oklahoma Radio Assocs. v. FDIC*, 987 F.2d 685, 695–96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994) (*en banc*) (noting FDIC’s concession in that regard).

⁴Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likely to mislead bank examiners. *D’Oench*, 315 U.S. at 460.

only with respect to agreements made after the enactment of FIRREA.⁵ Thus, because the statutory provisions establish “a categorical recording scheme” (see *Langley*, 484 U.S. at 95) and *D’Oench* is an equitable doctrine (*id.* 93–95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D’Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D’Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

FDIC Statement of Policy

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D’Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC’s Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, DC, this 4th day of February, 1997.

Federal Deposit Insurance Corporation.
Jerry L. Langley,
Executive Secretary.

Addendum—FDIC Guidelines for Use of *D’Oench* and Statutory Provisions

1. *Purpose*. To set forth guidelines for the use of the *D’Oench* doctrine and in

⁵The retroactivity of FIRREA, however, is not determined on an all-or-nothing basis. There is no “reason to think that all the diverse provisions of the [statute] must be treated uniformly for” purposes of the retroactivity analysis. *Landgraf v. USI Film Prods.*, 511 U.S. at 280, 114 S. Ct. at 1505. Moreover, “[t]he conclusion that a particular rule operates ‘retroactively’ comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

12 U.S.C. 1821(d)(9)(A), 1823(e) (statutory provisions).

2. *Scope*. This directive applies to all Service Centers and Consolidated Offices, to all future Servicers and, to the extent feasible, to all current Servicers.

3. *Responsibility*. It is the responsibility of the FDIC Regional Directors of the Division of Resolutions and Receiverships (DRR) and Regional Counsel of the Legal Division (Legal) to ensure compliance with applicable directives by all personnel in their respective service centers.

4. Background

a. *D’Oench* Doctrine

In an effort to protect the federal deposit insurance funds and the innocent depositors and creditors of insured financial institutions (institution(s)), the Supreme Court in the case of *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) adopted what is commonly known as the *D’Oench* doctrine. This legal doctrine provides that a party who lends himself or herself to a scheme or arrangement that would tend to mislead the banking authorities cannot assert defenses and/or claims based on that scheme or arrangement.

b. Sections 1821(d)(9)(A) and 1823(e)

In 1950, Congress supplemented the *D’Oench* doctrine with 12 U.S.C. 1823(e) which bars any agreement which “tends to diminish or defeat the interest of the [FDIC] in any asset” unless the agreement satisfies all four of the following requirements: (1) It is in writing; (2) it was executed by the depository institution and any person claiming an adverse interest under the agreement contemporaneously with the acquisition of the asset; (3) it was approved by the board of directors of the institution or its loan committee as reflected in the minutes of the board or committee; and (4) it has been continuously an official record of the institution.

In FIRREA, Congress added 12 U.S.C. 1821(d)(9)(A) which protects the FDIC against all claims which do not meet the enumerated requirements of section 1823(e).

c. Policy Considerations

The *D’Oench* doctrine and the statutory provisions embody a public policy designed to protect diligent creditors and innocent depositors from bearing the losses that would result if claims and defenses based on undocumented agreements could be enforced against a failed institution. The requirement that any arrangement or agreement with a failed institution must

be in writing allows banking regulators to conduct effective evaluations of open institutions and the FDIC to accurately and quickly complete resolution transactions for failed institutions. This requirement also places the burden of any losses from an undocumented or "secret" arrangement or agreement on the parties to the transaction, who are in the best position to prevent any loss.

Although the *D'Oench* doctrine and the statutory provisions generally promote essential public policy goals, overly aggressive application of the specific requirement of these legal doctrines could lead to inequitable and inconsistent results in particular cases. In order to ameliorate this possibility, the FDIC has undertaken development of these guidelines and procedures to promote the exercise of sound discretion in the application of *D'Oench* or the statutory provisions.

5. Guidelines

These guidelines are intended to aid in the review of matters where the assertion of *D'Oench* or the statutory provisions is being considered. The examples given are intended to give clear direction as to when particular issues must be referred. In particular, if the use of *D'Oench* or the statutory provisions is proposed in a DRR—Operations matter within the categories set forth below, the matter and recommendation must be referred to the Associate Director—Operations for approval through the procedures contained in section 6.

In the great majority of cases, however, it is anticipated that no resort to Washington should be necessary. It is only in the categories of cases highlighted in the guidelines that Washington approval must be obtained.

a. Pre-Closing Vendors

D'Oench or the statutory provisions shall not be used as a defense against claims by vendors who have supplied goods and/or services to failed institution pre-closing when there is clear evidence that the goods/services were received. In such case, *D'Oench* or the statutory provisions shall not be asserted whether or not there are written records in the institution's files confirming a contract for the goods and/or services.

This does not mean that *D'Oench* or the statutory provisions may never be asserted against a vendor, but only that each claim must be examined carefully on its facts. When there is no evidence that goods or services were received by the failed institution or in other appropriate circumstances, the defenses

may be asserted after approval by Washington.

Examples Requiring Washington Approval:

1. Landscaping service filed claim for planting trees around the institution's parking lot. There is no contract for planting trees in the books and records of the institution, but there are trees around the parking lot and no record of any payment. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A contingency fee attorney is unable to produce any contingency fee agreement, but there is evidence in the files that this attorney has been paid for his collection work for the past 20 years and his name appears on the court records for collection matters for which he has not been paid. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. Contractor has construction contract with institution to renovate any property owned by the institution. At the time the institution fails, the contractor has completed 90% of the contract and is owed about 50% of the contract price. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

b. Diligent Party

D'Oench or the statutory provisions may not be asserted without Washington approval where the borrower or claimant took all reasonable steps to document and record the agreement or understanding with the institution and there is no evidence that the borrower or claimant participated in some activity that could likely result in deception of banking regulators, examiners, or the FDIC regarding the assets or liabilities of the institution. In particular, Washington approval is required before *D'Oench* or the statutory provisions may be asserted where the agreement is not contained in the institution's records, but where the borrower or claimant can establish by clear and convincing evidence that the agreement was properly executed by the depository institution through an officer authorized by the board of directors to execute such agreements, as reflected in the minutes of the board. Cases involving "insiders" of the depository institution require particularly careful review because of the greater opportunities of such parties to manipulate the inclusion of "agreements" within the institution's records.

Further, where it is clear that a borrower or claimant has been diligent in insisting on a written document in an apparently arms-length transaction, and had no control over the section 1823(e) requirement that the transaction be reflected in the Board of Directors' or

Loan Committee minutes, assertion of the statutory provisions solely because the transaction is not reflected in those minutes may not be appropriate. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Plaintiff sells a large parcel of land to the borrower of the failed institution and the property description in the failed institution's Deed of Trust mistakenly includes both the parcel intended to be sold and a parcel of property not included in the sale. Prior to the appointment of the receiver, the institution agrees orally to amend the Deed of Trust, and indeed sends a letter to the title company asking for the amendment. However, there is nothing in the books and records of the institution to indicate the mistake. The institution fails and the Deed of Trust has never been amended. The borrower defaults and the FDIC attempted to foreclose on both parcels. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A limited partnership applies for refinancing. A commitment letter is issued by the institution to fund a non-recourse permanent loan which requires additional security of \$1 million from a non-partner. The Board of Directors minutes reflects that approval is for a nonrecourse loan, however, the final loan documents, including the note, do not contain the nonrecourse provisions. The institution fails, the partnership defaults and it is determined that the collateral plus the additional collateral is approximately \$3 million less than the balance of the loan. In a suit by the FDIC for the deficiency, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. A borrower completes payment on a loan, and he has cancelled checks evidencing that his loan has been paid off. The institution's records, however, do not document that the final payment has been tendered. The institution fails and the FDIC seeks to enforce the note. Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if it is clear that the borrower or claimant participated in some fraudulent or other activity which could have resulted in deception of banking regulators or examiners, then *D'Oench* or the statutory provisions may be asserted without prior approval from Washington.

Examples Not Requiring Washington Approval:

1. Borrower signs a note with several blanks including the amount of the loan. An officer of the institution fills in the amount of the loan as \$40,000. Bank fails, loan is in default, the FDIC sues to collect \$40,000 and the borrower claims that he or she only borrowed \$20,000. There is nothing in the institution's books and records to indicate the \$20,000 amount, and, in fact, the institution's books and records evidence

disbursement of \$40,000. *D'Oench* or the statutory provisions may be asserted.

2. Guarantor, an officer of the borrower corporation, signs a guaranty for the entire amount of a loan to the corporation. At the time of the institution's failure, the loan is in default and the corporation is in Chapter 7 bankruptcy. FDIC files suit against the guarantor for the entire amount of the loan. The guarantor claims that he has an agreement with the institution that he is only liable for the first \$25,000. There is no record in the institution's files of such an agreement. Again, *D'Oench* or the statutory provisions may be asserted.

Where the specific facts of a case raise any question as to whether *D'Oench* or the statutory provisions should be asserted, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

c. Integral Document

If there are documents in the books and records of the institution which indicate an agreement under the terms asserted by the claimant or borrower, the use of *D'Oench* or the statutory provisions must be carefully evaluated. Particular care must be taken before challenging a claim or defense solely because it fails to comply with the 1823(e) requirement that the agreement be reflected in the minutes of the Board of Directors or Loan Committee. While any number of cases have held that the terms of the agreement must be ascertainable on the face of the document, in some circumstances it may be appropriate to consider all of the failed institution's books and records in determining the agreement, not just an individual document. Where the records of the institution provide satisfactory evidence of an agreement, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Note in failed institution's file is for one year term on its face. However, the loan application, which is in the loan file, is for five years renewable at one year intervals. The borrower also produces a letter from an officer of the institution confirming that the loan would be renewed on a sixty month basis with a series of one year notes. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. Debtor executes two notes with the proviso that there is no personal liability to the debtor beyond the collateral pledged. When the notes become due they are rolled over and consolidated into one note which recited that it is a renewal and extension of the original notes but does not contain the express disclaimer of personal liability. All three notes are contained together in one loan file. Here, all of the notes should be considered as part of the institution's

records. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

d. No Asset/Transactions Not Recorded in Ordinary Course of Business

The use of *D'Oench* or the statutory provisions should be limited in most circumstances to loan transactions and other similar ordinary banking transactions. If the ordinary banking transaction is not related to specific current or former assets, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases. The application of *D'Oench* or the statutory provisions also should be carefully considered before it is asserted in opposition to a tort claim, such as negligence, misrepresentation or tortious interference with business relationships, where the claim is unrelated to a loan or ordinary banking transaction or to a transaction creating or designed to create an asset.

Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases.

Examples Requiring Washington Approval:

1. Three years before failure the institution sells one of its subsidiaries. The institution warrants that the subsidiary has been in "continuous and uninterrupted status of good standing" through the date of sale. The buyer in turn attempts to sell the subsidiary and discovers that the subsidiary's charter has been briefly forfeited. The prospective buyer refuses to go through with the sale and the original buyer sues the institution for breach of warranty. FDIC is appointed receiver. This transaction does not involve a lending or other banking financial relationship between the institution and the buyer. In addition, the subsidiary is not an asset on the books of the institution at the time of the receivership. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. In the case described above in the diligent party section, where the property description in the failed institution's Deed of Trust mistakenly includes a parcel not included in the sale, the parcel at issue is not an actual asset of the failed institution and the assertion of *D'Oench* or the statutory provisions is not be appropriate. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if a claim arises out of an asset which was involved in a normal banking transaction, such as a loan, *D'Oench* or the statutory provisions would be properly asserted against such a claim despite the fact that the asset no longer exists. For example, collection on the asset does not preclude the use of *D'Oench* or the statutory provisions in

response to claims by the former debtor related to the transaction creating the asset.

Example Not Requiring Washington Approval:

1. A borrower obtains a loan from an institution, secured by inventory and with an agreement that allows the institution to audit the business. The business fails, the institution sells the remaining inventory, and applies the proceeds of the sale to the business's debt. Borrower sues the institution for breach of oral agreements, breach of fiduciary duty, and negligence in performance of audits of the business. Borrower then pays off remaining amount of loan and continues the lawsuit. The institution subsequently fails. Despite borrower's argument that there is no asset involved since the debt has been paid, assertion of *D'Oench* or the statutory provisions would be appropriate.

e. Bilateral Obligations

The facts must be examined closely in matters where the agreement which the FDIC is attempting to enforce contains obligations on both the borrower or claimant and the failed institution and the borrower or claimant is asserting that the institution breached the agreement. If the failed institution's obligation is clear on the face of the agreement and there are documents supporting the claimed breach which are outside the books and records of the institution, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

f. Statutory Defenses

The appropriateness of using *D'Oench* or the statutory provisions to counter statutory defenses should be evaluated on a case by case basis. Although many such defenses may be based on an agreement that is not fully reflected in the books and records of the institution, a careful analysis should be made before asserting *D'Oench* or the statutory provisions. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

The clearest examples of situations where assertion of *D'Oench* or the statutory provisions may be appropriate occur where the opposing party is relying on a statutory defense based upon some misrepresentation or omission by the failed institution. Examples of this type of statute are unfair trade practice statutes.

On the other hand, application of *D'Oench* or the statutory provisions may not be appropriate to oppose claims based on mechanics lien statutes or statutes granting other recorded property rights. The fact that all elements of those liens may not be

reflected in the books and records of the institution should not control the application of *D'Oench* or the statutory provisions.

In analyzing the propriety of asserting the *D'Oench* or the statutory provisions, at least the following three general factors should be considered in preparation for seeking approval from Washington:

* To what extent is the purpose of the statute regulatory, rather than remedial? If the statute simply imposes regulatory or mandatory requirements for a transaction, such as a filing requirement or maximum fee for services, assertion of *D'Oench* or the statutory provisions is unlikely to be successful.

* To what extent is the application of the statute premised upon facts that are not reflected in the books and records of the institution? If the state statute requires the existence and/or maintenance of certain facts, but those facts are not recorded in the institution's records, then *D'Oench* or the statutory provisions may be applicable.

* To what extent do the facts involve circumstances where the opposing party failed to take reasonable steps to document some necessary requirement or participated in some scheme or arrangement that would tend to mislead the banking authorities.

Examples Requiring Washington Approval:

1. A priority dispute arises involving a mechanic's lien against property on which the FDIC is attempting to foreclose. An attempt to persuade a court that the mechanic's lien is a form of secret agreement under *D'Oench*, which, if given priority over the interests of the FDIC, will tend to diminish or defeat the value of the asset may not be appropriate. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. State law requires insurance companies doing business in the state to deposit funds with the Commissioner of Insurance. Further, the law provides that the deposit cannot be levied upon by creditors or claimants of the insurance company. An insurance company purchases a certificate of deposit from an institution and assigns it to the Commissioner. At the same time a document is executed entitled "Requisition to the Bank" which states that the institution would not release the CD funds without authorization of the Commissioner. Subsequently the insurance company borrows money from the institution. After the loan goes into default, the institution does not roll the CD over, but rather credits the proceeds to the loan account. The institution then fails and the Commissioner files a proof of claim with the FDIC seeking payment on the CD. The FDIC may not defend the suit by claiming that the assignment documents did not meet the requirements of section 1823(e). In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. The FDIC attempts to collect on a note which the failed institution acquired from a

mortgage broker. The note is at a 15% interest rate and the mortgage broker charged six and one half points. State law provides that interest shall be no more than 13% and that no more than one point may be charged. The FDIC may not defend the borrower's counterclaim of a usurious loan by asserting *D'Oench* or the statutory provisions. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

g. Section 1823(e)'s Contemporaneous Requirement

This requirement of section 1823(e) may not be asserted to invalidate a good faith workout or loan modification agreement where the sole issue is whether the contemporaneous requirement of section 1823(e) is met. Where there is an agreement which otherwise satisfies the remaining requirements of the statute, but was not executed contemporaneously with the acquisition of the asset, in most circumstances the statutory provisions should not be asserted. This applies only to workouts or loan modifications done by the failed institution prior to receivership. The assertion of the section 1823(e) contemporaneous requirement should be considered principally where the facts demonstrate that the workout or restructure was entered into in bad faith and in anticipation of institution failure.

Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in these cases.

6. *Procedures To Obtain Washington Approval*

DRR Operations: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or statutory provisions requires Washington approval, as outlined above, prior approval must be received from the Deputy Director—Operations or his designee in Washington in all such cases. Such approval must be obtained by preparation of a memorandum identifying the facts of the case forwarded through Legal Division procedures to the Deputy Director—Operations or his designee.

DRR Asset Management: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or the statutory provisions requires Washington approval, as outlined above, Legal Division procedures should be followed for referral to Washington. Washington Legal will consult with Washington DRR where appropriate.

Legal: Each attorney must carefully review the facts of each instance where the assertion of *D'Oench* or the statutory provisions is being considered under revised Litigation Procedure 3 (LP 3). All cases requiring consultation or approval within these Guidelines and/or PS must be referred to Washington pursuant to LP3 procedures.

These Guidelines are intended only to improve the FDIC's review and management of utilization of *D'Oench* or the statutory provisions. The Guidelines do not create any right or benefit, substantive or procedural, that is enforceable at law, in equity, or otherwise by any party against the FDIC, its officers, employees, or agents, or any other person. The Guidelines shall not be construed to create any right to judicial review, settlement, or any other right involving compliance with its terms.

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FEDERAL MARITIME COMMISSION

[Docket No. 97-02]

McKenna Trucking Company, Inc. v. Maersk Incorporated; Notice of Filing of Complaint and Assignment

Notice is given that a complaint filed by McKenna Trucking Company, Inc. ("Complainant") against Maersk Incorporated ("Respondent") was served February 5, 1997. Complainant alleges that Respondent has violated sections 10(b)(1), (4), (6), (10), (11), and (12) of the Shipping Act of 1984, 46 U.S.C. app. sections 1709(1), (4), (6), (10), (11), and (12), by receiving rebates of intermodal trucking charges, thereby charging, demanding, collection and receiving greater compensation for the transportation of property than the rates shown in its service contracts, and subjecting complainant to an unreasonable refusal to deal, while continuing to charge shippers the higher, listed rate as a portion of the total through rate.

This proceeding has been assigned to the Office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on