

**D’OENCH LIVES, BUT FOR HOW LONG?: THE
ELEVENTH CIRCUIT BREATHES LIFE INTO AN
AILING BANKING DOCTRINE**

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I. INTRODUCTION

For sixty years, the federal common law *D’Oench* doctrine¹ has protected the Federal Deposit Insurance Corporation (FDIC) from the costs and uncertainties of having to honor nonwritten agreements made by banks prior to their failure.² In its original form, the doctrine prevented banks and borrowers from making secret side agreements to their loans for the purpose of deceiving bank examiners like the FDIC³ and provided the FDIC with an important tool with which

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1. From *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

2. See *Murphy v. FDIC*, 208 F.3d 959, 967 (11th Cir. 2000) (stating that the *D’Oench* doctrine’s rationale is “to protect the FDIC from enforcement of oral agreements against failed financial institutions”).

3. *D’Oench*, 315 U.S. at 457; see also Fred Galves, *Might Does Not Make Right: The Call for Reform of the Federal Government’s D’Oench, Duhme and 12 U.S.C. § 1823(e) Superpowers in Failed Bank Litigation*, 80 MINN. L. REV. 1323, 1327-28 (1996) (describing the common law *D’Oench* doctrine’s original scope).

to protect the integrity of the country's banking system.⁴ In 1950, Congress included a provision in its Federal Deposit Insurance Act (FDIA) that was analogous to, but did not abrogate, the common law *D'Oench* doctrine.⁵ Together, the common law doctrine and its statutory counterpart, found at 12 U.S.C. § 1823(e), allowed the FDIC to rely on the records of insolvent banks and to evaluate those banks' assets and liabilities with greater accuracy.⁶ Working in tandem,⁷ they helped the FDIC boost the public's confidence in the banking industry.⁸

The banking crisis that began in the 1980s, however, threw the industry into turmoil and threatened to bankrupt the FDIC.⁹ In response, Congress and the courts expanded the scope of the statutory and common law versions of the *D'Oench* doctrine and provided the FDIC greater protection against defenses and affirmative claims made by borrowers or creditors of insolvent banks.¹⁰ The protective scope of the common law version of the *D'Oench* doctrine, in particular, extended beyond § 1823(e):¹¹ in effect, the common law *D'Oench* doctrine now bars the borrowers or creditors of failed banks from asserting any defense or affirmative claim without a written agreement, even in cases where the failed bank committed fraud or misrepresentation.¹²

Although the *D'Oench* doctrine's expansion prevented the drainage of millions of dollars from the FDIC's taxpayer-funded insurance

4. Michael Keeley & Toni Scott Reed, "Superpowers" of Federal Regulators: How the Banking Crisis Created an Entire Genre of Bond Litigation, 31 TORT & INS. L.J. 817, 853-54 (1996).

5. Federal Deposit Insurance Act, Pub. L. No. 81-797, ch. 967, § 2(13)(e)(1), 64 Stat. 889 (1950) (codified as amended at 12 U.S.C. § 1823(e) (2000)); see also John B. Shumadine, Comment, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the D'Oench Doctrine in Murphy v. FDIC and Motorcity of Jacksonville Ltd. v. Southeast Bank*, 51 ME. L. REV. 129, 144 (1999) (recognizing that the FDIA did not displace the common law *D'Oench* doctrine).

6. Langley v. FDIC, 484 U.S. 86, 91-92 (1987).

7. Motorcity of Jacksonville, Ltd. v. Southeast Bank, 83 F.3d 1317, 1326 n.7 (11th Cir. 1996) (en banc) (noting that courts employed §1823(e) and the common law *D'Oench* doctrine in tandem).

8. The FDIC has helped create a stable, trustworthy banking system in the United States; now, "a run on a bank has become an image from history." Marsha Hymanson, Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. CAL. L. REV. 253, 258 (1988).

9. Galves, *supra* note 3, at 1325-26, 1334 (stating that the decade from the mid-1980s to mid-1990s saw 1,315 national bank failures, costing the government from \$150 billion to \$1 trillion, and that the FDIC exhausted its entire insurance fund by 1991).

10. Barry S. Zisman & Hugh D. Spears, *Overview of Special Powers of the FDIC and RTC*, in BANKS AND THRIFTS: INTRODUCTION TO FDIC/RTC RECEIVERSHIP LAW 73, 75-76 (Warren L. Dennis & Barry S. Zisman eds., 1992).

11. See David F. D'Alessandris, *Murphy v. FDIC: Is the D'Oench Doctrine Doomed?*, 50 CONSUMER FIN. L.Q. REP. 3, 16 (1996) (suggesting that the common law *D'Oench* doctrine blocks claims that § 1823(e) does not).

12. Zisman & Spears, *supra* note 10, at 76-77.

system, it has been criticized for creating some undeniably unfair results.¹³ Starting in 1995, perhaps in response to increasing cries of unfairness, a number of circuit courts of appeals have ruled that Congress preempted the common law *D'Oench* doctrine when it enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).¹⁴ As a result, the FDIC's ability to bar secret side agreements has been significantly contracted in those circuits because it must now rely on § 1823(e)'s narrower protections.

Recently, in *Murphy v. FDIC*,¹⁵ the FDIC successfully defended the common law *D'Oench* doctrine's existence in the Eleventh Circuit, slowing the abrogation movement's momentum. Recognizing a classic circuit split,¹⁶ the United States Supreme Court granted certiorari.¹⁷ However, only days before oral arguments, the parties settled.¹⁸

The common law *D'Oench* doctrine's fate remains undetermined, and jurisdiction remains the key to success in the cases in which it is invoked.¹⁹ Part II of this Comment introduces the common law and statutory versions of the *D'Oench* doctrine, and Part III describes the nature and extent of their expansion. Part IV describes *Murphy*, which exemplifies the current circuit split because it was tried first in the D.C. Circuit and then in the Eleventh Circuit, with contrary outcomes. Part V argues that the Supreme Court will not resolve the issue soon, if ever. For the doctrine to survive until that day, the FDIC must retain *D'Oench*'s presence within as many circuits as possible. Part V also argues that, for policy reasons, the courts of appeals should recognize the common law *D'Oench* doctrine.

13. E.g., Richard E. Flint, *Why D'Oench, Duhme? An Economic, Legal, and Philosophical Critique of a Failed Bank Policy*, 26 VAL. U. L. REV. 465 (1992) (arguing that *D'Oench* is unfair to debtors); Galves, *supra* note 3, at 1333 (arguing that the common law *D'Oench* doctrine and § 1823(e) create inequities and should be scaled back).

14. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. The circuit courts of appeals that have held that FIRREA abrogated the common law *D'Oench* doctrine include the D.C., Third, Eighth, and Ninth Circuits. See *infra* notes 117-20.

15. 208 F.3d 959 (11th Cir. 2000).

16. The common law *D'Oench* doctrine still exists in the Eleventh and Fourth Circuits. See *id.*; Young v. FDIC, 103 F.3d 1180 (4th Cir. 1997).

17. *Murphy v. Beck*, 121 S. Ct. 30 (2000).

18. *Murphy v. Beck*, 121 S. Ct. 849 (2001). The case was dismissed pursuant to Supreme Court Rule 46.1, which applies to settlements.

19. Because of the circuit split, forum shopping may be frequent. Reply Brief for Petitioner at 3, *Murphy v. Beck*, 121 S. Ct. 30 (2000), *cert. dismissed*, 121 S. Ct. 849 (2001) (No. 00-46). The FDIC can be sued in the D.C. Circuit. *Id.* at 3 (citing 12 U.S.C. § 1821(d)(6)(A) (2000)). However, Atlanta and Charlotte, the two largest banking centers in the southern United States, are located in the Fourth and Eleventh Circuits, which continue to recognize the common law *D'Oench* doctrine. *Id.* at 3 n.3.

II. THE FEDERAL COMMON LAW *D'OENCH* DOCTRINE AND ITS STATUTORY COUNTERPART, § 1823(e)

A. *The FDIC*

As the United States languished in the Great Depression and confidence in its banking industry lulled, Congress enacted the Banking Act of 1933²⁰ to restore confidence in the country's banking industry.²¹ The Act created the FDIC, which regulates and insures deposits in all federally chartered banks and in many state chartered banks.²²

The FDIC acts in two capacities. In its "corporate" capacity, the FDIC acts as a deposit insurer.²³ It can either pay the depositors of a failed bank directly or transfer depositors' money to other insured banks.²⁴ In its "receiver" capacity, the FDIC has broad authority to merge part or all of the failed bank with a healthy bank, assume operations of the bank, or both.²⁵ Purchase and assumption transactions are the FDIC's most commonly used tool for handling failed banks.²⁶ In a typical purchase and assumption transaction, the FDIC, in its receivership capacity, sells all of the failed bank's acceptable assets to a healthy bank, then sells the remaining unacceptable or problematic assets to the FDIC in its corporate capacity.²⁷ The FDIC's corporate side then tries to collect on those problematic assets to protect the insurance fund's coffers.²⁸

B. *D'Oench, Duhme & Co. v. FDIC*²⁹

Amidst the post-Depression atmosphere, the FDIC insured an Illinois bank, Belleville Bank & Trust Co.³⁰ *D'Oench*, a securities dealer based in St. Louis, sold Belleville bonds that later defaulted.³¹ To relieve Belleville from having past-due bonds on its books, *D'Oench* agreed to borrow \$5,000 from Belleville.³² In its receipts for

20. Pub. L. No. 73-66, § 12B(a), 48 Stat. 162, 168.

21. See Jeffrey R. Gleit, Note, *The Reports of the Demise of the D'Oench Doctrine Have Been Greatly Exaggerated: The Continuing Coexistence of the D'Oench Doctrine and Section 1823(e)*, 28 HOFSTRA L. REV. 225, 226 (1999).

22. 12 U.S.C. § 1828 (2000) (allowing the FDIC to regulate banks); *id.* § 1821(a) (allowing the FDIC to insure banks); JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 61 (1992).

23. D'Alessandris, *supra* note 11, at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. 315 U.S. 447 (1942).

30. *Id.* at 454.

31. *Id.*

32. *Id.*

the demand notes, however, Belleville promised D'Oench that it would never call in the loan.³³ These dealings effectively swept the worthless bonds from Belleville's books and replaced them with a credible asset: the loan.³⁴

In 1938, Belleville Bank failed. The FDIC acquired D'Oench's \$5,000 demand note as part of the collateral for a \$1 million loan to resuscitate the bank.³⁵ The FDIC sued D'Oench for repayment of the note, as well as for allegedly violating § 12B(s) of the Federal Reserve Act (FRA), which levied fines for knowingly making misstatements to the FDIC about the value of securities.³⁶ D'Oench argued that the note was executed without consideration and that Belleville orally agreed never to bring suit for nonpayment.³⁷ In response, the FDIC argued that D'Oench violated the FRA by knowingly misrepresenting its true purpose for borrowing from Belleville: to enhance the bank's balance sheet.³⁸ These misrepresentations, the FDIC argued, estopped D'Oench from asserting any defenses.³⁹

The Court held that D'Oench, Duhme & Co. could not use its oral side agreement with Belleville Bank as a defense against the FDIC:

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 arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.⁴⁰

Essentially, the Court created a new federal common law rule⁴¹ that prevented banks and borrowers from making secret side agree-

33. *Id.* Specifically, the note said: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid." *Id.* D'Oench kept the loan alive by making periodic interest payments. *Id.* at 454, 456.

34. Cherie Stephens Bock, Comment, *Alive, But Not Quite Kicking: Circuit Split Illustrates the Progressive Deterioration of the D'Oench, Duhme Doctrine*, 42 ST. LOUIS U. L.J. 945, 952 (1998).

35. *D'Oench*, 315 U.S. at 454.

36. *Id.* at 456-57. Interestingly, the main issue on appeal did not involve the loan. Rather, the Supreme Court granted certiorari to resolve a dispute between the District Court and the Eighth Circuit Court of Appeals over whether Illinois or Missouri choice of law rules applied. *Id.* at 455-56. The Court quickly sidestepped the issue, holding that D'Oench's liability was a federal question thanks to the FDIC's Federal Reserve Act claim. *Id.* at 456. This distraction aside, Justice Douglas and the Court proceeded to create a federal common law doctrine that has survived for sixty years.

37. *Id.* at 456. D'Oench also argued that FDIC was not a holder in due course. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 460.

41. Ironically, only four years earlier the Supreme Court had announced "There is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In *D'Oench*, Justice Frankfurter was aware of the Court's previous pronouncement and argued for resolving the dispute between D'Oench and the FDIC using state law. *D'Oench*,

ments to their loans for the purpose of deceiving bank examiners like the FDIC.⁴² The Court cited a federal public policy under the FRA to protect the FDIC from misrepresentations, intentional or not,⁴³ regarding the types or amounts of securities or other assets listed in the portfolios of insured banks.⁴⁴ Over time, the common law *D'Oench* doctrine has come to be seen as serving two principal public policies: maintaining the public's confidence in the banking system, especially in times of crisis; and allowing the FDIC to quickly and accurately determine a failed bank's financial status and decide whether to liquidate the bank or sell its assets.⁴⁵

C. Expansion of Common Law Doctrine

In the sixty years since *D'Oench*, the common law *D'Oench* doctrine has expanded to protect "virtually all claims and defenses against [the FDIC's] interests."⁴⁶ Prior to the 1980s, when the country's banking industry experienced relative calm, courts rarely invoked the common law doctrine⁴⁷ and usually only against fraudulent borrowers.⁴⁸ In the few instances when courts invoked the doctrine, they stayed within the boundaries of the *D'Oench* Court's original holding.⁴⁹ However, the 1980s saw an increase in bank failures during the savings and loan crisis.⁵⁰ To protect the FDIC, courts began increasing the *D'Oench* doctrine's scope.⁵¹ Today, the common law doctrine is much broader than the version crafted by the Supreme Court in 1942.⁵²

For example, some courts expanded the common law doctrine's scope to include open, non-secret side agreements.⁵³ Also, in an expansion of the *D'Oench* doctrine that critics view as contrary to

315 U.S. at 463-65 (Frankfurter, J., concurring). However, Justice Jackson countered and prevailed, saying "Were we bereft of the common law, our federal system would be impotent." *Id.* at 470 (Jackson, J., concurring).

42. Galves, *supra* note 3, at 1327-28.

43. *D'Oench*, 315 U.S. at 458-59. Also, the Court held that it is irrelevant whether the misrepresentation deceives or specifically injures creditors like the FDIC. *Id.* at 459.

44. *See id.* at 457-58.

45. Galves, *supra* note 3, at 1346-47 (citing *Oversight of the FDIC and the RTC's Use of D'Oench Duhme: Hearings Before the Subcomm. on Oversight of Gov't Mgmt. & the D.C. of the S. Comm. on Governmental Affairs*, 104th Cong., 1st Sess. 141, 143 (1995) [hereinafter *Oversight Hearings*]).

46. D'Alessandris, *supra* note 11, at 5; *see also* Galves, *supra* note 3, at 1344-45.

47. Bock, *supra* note 34, at 958.

48. Galves, *supra* note 3, at 1348-49.

49. Bock, *supra* note 34, at 958.

50. *Id.*

51. *Id.*; Galves, *supra* note 3, at 1349.

52. Bock, *supra* note 34, at 958.

53. Galves, *supra* note 3, at 1349; *see also, e.g.*, *FDIC v. Merchant's Nat'l Bank*, 725 F.2d 634, 640 (11th Cir. 1984) (determining that bank examiners' discovery of an unwritten agreement is irrelevant).

D'Oench's equitable origin, courts have allowed the FDIC to invoke *D'Oench* in cases in which the failed bank defrauded the borrower.⁵⁴ Courts have also been criticized for allowing the FDIC to bar claims by the failed banks' creditors and contractors.⁵⁵

In its original form, the common law *D'Oench* doctrine applied to the FDIC only in its corporate capacity.⁵⁶ However, the courts have broadened *D'Oench* to protect the FDIC in its role as a receiver.⁵⁷ The common law *D'Oench* doctrine has also broadened to include agreements made by borrowers and subsidiaries of failed banks;⁵⁸ to protect the FDIC's third-party assignees, transferees, and successors-in-interest;⁵⁹ and to provide the FDIC with holder-in-due-course status relating to fraud claims that stemmed from the FDIC's purchase and assumption transactions.⁶⁰ Furthermore, courts extended the *D'Oench* doctrine to protect the Federal Savings and Loan Insurance Corporation (FSLIC), in both its corporate and receivership roles.⁶¹ Each time the courts expanded the common law *D'Oench* doctrine's scope, they invoked the *D'Oench* Court's original policy rationale.⁶²

D. *D'Oench's Statutory Analogue: 12 U.S.C. § 1823(e)*

1. *Federal Deposit Insurance Act of 1950*

Within the FDIA, Congress enacted a statutory provision paral-

54. Galves, *supra* note 3, at 1350 (citing *FDIC v. Hatmaker*, 756 F.2d 34 (6th Cir. 1985), in which the borrower signed a blank note, but the bank inserted an amount five times greater than the amount the borrower orally agreed to).

55. *Id.* These cases often involve fact patterns in which the FDIC declines to pay subcontractors, like roofers and janitors, who complete work on an asset of the failed bank. *Id.* Perhaps recognizing these cases as public relations disasters, e.g., Peter A. Brown, *Workers Holding Bills Owed by Failed Banks Left Holding the Bag*, SCRIPPS HOWARD NEWS SERVICE, Weekend Release, May 7-8, 1994, the FDIC issued a policy statement instructing its lawyers not to use *D'Oench* against vendors when clear evidence exists that the vendors supplied the goods or services promised. FDIC 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, 62 Fed. Reg. 5984, 5986 (Feb. 10, 1997).

56. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460 (1942).

57. E.g., *FDIC v. First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (9th Cir. 1978).

58. *Oliver v. Resolution Trust Corp.*, 955 F.2d 583, 585 (8th Cir. 1992).

59. *Newton v. Uniwest Fin. Corp.*, 967 F.2d 340, 347 (9th Cir. 1992) (protecting successors-in-interest of the FDIC); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990) (protecting the FDIC's bridge bank assignees); see also Barbara A. Bailey, Comment, *Giving D'Oench its Due: A Comment on the D'Oench, Duhme Doctrine After O'Melveny & Myers v. FDIC*, 28 ARIZ. ST. L.J. 1259, 1264-65 (1996) (describing judicial expansion of the common law *D'Oench* doctrine).

60. Galves, *supra* note 3, at 1351-52.

61. *FSLIC v. Kearney Trust Co.*, 151 F.2d 720 (8th Cir. 1945); see also D'Alessandris, *supra* note 11, at 6 (discussing the expansion of the *D'Oench* doctrine to the FSLIC).

62. Gleit, *supra* note 21, at 232.

leling the *D'Oench* doctrine.⁶³ Section 13(e),⁶⁴ codified at 12 U.S.C. § 1823(e),⁶⁵ disavowed any agreement by a bank and its borrowers that affected assets acquired by the FDIC, unless that agreement was in writing,⁶⁶ contemporaneous;⁶⁷ approved by the bank's management;⁶⁸ and officially recorded by the bank.⁶⁹ Like the common law *D'Oench* doctrine, § 1823(e) allowed the FDIC, in its corporate capacity, to rely on a failed bank's records without concern for possible secret side agreements with borrowers or clients.⁷⁰ In 1987, the Supreme Court found that the purposes behind § 1823(e) reflected those espoused in the original *D'Oench* case.⁷¹

Importantly, however, the Act's legislative history does not expressly address whether Congress meant to codify and abrogate the common law *D'Oench* doctrine or simply supplement it.⁷² Nothing in the FDIA's legislative history implies that Congress intended to abrogate *D'Oench*.⁷³ In fact, Congress never even mentioned the *D'Oench* doctrine.⁷⁴ Furthermore, the FDIC never indicated to Con-

63. Bock, *supra* note 34, at 954 (stating that § 1823(e) echoed the common law *D'Oench* doctrine); Gleit, *supra* note 21, at 231 (characterizing § 1823(e) as an "adjunct" to the common law doctrine).

64. Federal Deposit Insurance Act, Pub. L. No. 81-797, ch. 967, § 2(13)(e), 64 Stat. 889 (1950) (codified as amended at 12 U.S.C. § 1823(e) (2000)).

65. As enacted in 1950, § 1823(e) read:

No agreement which tends to diminish or defeat the right, title or interest of the Corporation 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) 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.

Federal Deposit Insurance Act, ch. 967, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. § 1823(e) (2000)).

66. 12 U.S.C. § 1823(e)(1)(A).

67. *Id.* § 1823(e)(1)(B).

68. *Id.* § 1823(e)(1)(C).

69. *Id.* § 1823(e)(1)(D).

70. Bock, *supra* note 34, at 954-55.

71. *Langley v. FDIC*, 484 U.S. 86 (1987). The Court found that § 1823(e) allowed the FDIC to rely on failed banks' records and scrutinize unusual transactions. *Id.* at 91-93.

72. D'Alessandris, *supra* note 11, at 8.

73. Galves, *supra* note 3, at 1354.

74. Hymanson, *supra* note 8, at 277. The language that would become § 1823(e) was contemplated just once in testimony before the House, and then only briefly. *Amendments to Federal Deposit Insurance Act, 1950: Hearings on S. 2822 Before the House Comm. on Banking and Currency*, 81st Cong. 41-42 (1950) (statement of John F. Bovenzi, Director of FDIC's Division of Depositor & Asset Services).

Furthermore, when 13(e) was added to the FDIA, only one amendment was proposed, changing the language in 13(e) to make it clear that the statute and the common law *D'Oench* doctrine would not give the FDIC greater rights than banks. 96 CONG. REC. 10731-32 (1950). Congress ignored the amendment. *Id.* at 10770.

gress that it thought § 1823(e) was needed to cure any perceived faultiness or ineffectiveness within the *D'Oench* doctrine.⁷⁵ But once Congress enacted § 1823(e), the FDIC used it in tandem with the common law doctrine in litigation.⁷⁶ Section 1823(e) arguably “was an afterthought to a complex bill and one which received virtually no public debate or congressional analysis.”⁷⁷ As such, it should be construed narrowly.⁷⁸

2. *Congress Expands § 1823(e): FIRREA*

In the 1980s, the United States became embroiled in another banking crisis as record numbers of banks became insolvent.⁷⁹ To help the FDIC cope with these failed banks and restore public confidence in the savings and loan industry, Congress enacted a number of laws,⁸⁰ including the Garn-St. Germain Depository Institutions Act of 1982,⁸¹ and then the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),⁸² which abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and put the deposit insurance functions of savings and loans and savings banks in the FDIC's hands.⁸³ FIRREA expanded the scope of § 1823(e) and increased the FDIC's protection against claims arising from oral, non-contemporaneous, unapproved, and unofficial agreements between failed banks and borrowers.⁸⁴

Before 1989, the common law *D'Oench* doctrine was significantly broader and more protective of the FDIC than its statutory counterpart, § 1823(e). Congress's enactment of FIRREA narrowed this gap. The statute reads:

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

75. Hymanson, *supra* note 8, at 276.

76. D'Alessandris, *supra* note 11, at 8.

77. Hymanson, *supra* note 8, at 279.

78. *Id.* at 279-80.

79. *Id.* at 258-59.

80. See *DiVall Insured Income Fund P'ship v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1401 n.6 (8th Cir. 1995) (noting that Congress enacted FIRREA in response to the country's banking and savings and loan crises).

81. Pub. L. No. 97-320, 96 Stat. 1469. The legislative history of the Garn-St. Germain Act shows Congress's intent to make it easier for the FDIC to arrange bailouts as well as purchase and assumption agreements. Hymanson, *supra* note 8, at 281.

82. Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256 (codified as amended at 12 U.S.C. § 1823 (2000)).

83. D'Alessandris, *supra* note 11, at 4.

84. Gleit, *supra* note 21, at 233.

(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.⁸⁵

Among its new protections, FIRREA applied § 1823(e) to the FDIC in its role as receiver.⁸⁶ Also, the Act protected bridge banks and new banks created by the FDIC to deal with institutions in default.⁸⁷ Perhaps most importantly, FIRREA created § 1821(d)(9)(A), which protected the FDIC from affirmative claims—including misrepresentation—arising out of any agreement not in compliance with § 1823(e).⁸⁸ Furthermore, FIRREA applied § 1823(e) to defenses raised against the FSLIC's successor, the Resolution Trust Company (RTC), in both its corporate and receivership capacities.⁸⁹ Much like the legislative history of § 1823(e)'s first incarnation in 1950, FIRREA's legislative history included "no significant debate" about the changes made to § 1823(e).⁹⁰

III. COMPARISON OF SCOPE

A. *The Common Law D'Oench Doctrine Provides Broader Protection Than § 1823(e)*

The common law *D'Oench* doctrine and its statutory analogue, § 1823(e), each provide the FDIC with protection from unwritten agreements made by the failed banks it deals with. However, the common law *D'Oench* doctrine has always provided broader protection than § 1823(e).⁹¹ When Congress passed the FDIA in 1950, the Act protected only the FDIC.⁹² In contrast, by 1945 the Supreme Court had already expanded the common law *D'Oench* doctrine to protect the FSLIC.⁹³ As time passed, the common law doctrine grew

85. 12 U.S.C. § 1823(e)(1) (2000).

86. Act of Aug. 19, 1989, Pub. L. No. 101-73, §§ 201, 217, 103 Stat. 187, 256.

87. 12 U.S.C. § 1821(n)(4)(I).

88. *Id.* § 1821(d)(9)(A). Essentially, § 1821(d)(9)(A) codified case law which allowed the FDIC to use the common law *D'Oench* doctrine to bar affirmative claims. *E.g.*, Langley v. FDIC, 484 U.S. 86 (1987).

89. 12 U.S.C. § 1441a(b)(4)(A). FIRREA abolished the FSLIC and replaced it with the RTC. Gleit, *supra* note 21, at 233 n.76.

90. D'Alessandris, *supra* note 11, at 9.

91. *Id.* at 8.

92. *Id.*

93. See FSLIC v. Kearney Trust Co., 151 F.2d 720 (8th Cir. 1945).

even broader.⁹⁴ Despite FIRREA's broadening of § 1823(e) in 1989, the common law *D'Oench* doctrine still provides broader protection to the FDIC than does FIRREA § 1823(e),⁹⁵ acting as a "safety net . . . to cover situations which fall through the cracks" of § 1823(e).⁹⁶ For example, § 1823(e) bars defenses based on an unwritten agreement related to specific *assets* acquired or assumed by the FDIC.⁹⁷ Thus, § 1823(e) does not protect *liabilities* acquired or assumed by the FDIC. In those frequent cases involving liabilities, however, courts have used the common law *D'Oench* doctrine to rescue the FDIC and bar borrowers' claims.⁹⁸ The common law *D'Oench* doctrine also provides the FDIC with other protections not covered by § 1823(e),⁹⁹ including protection of third parties involved in purchase and assumption agreements with the FDIC;¹⁰⁰ protection of assignees and successors-in-interest of the FDIC;¹⁰¹ and protection of failed banks' subsidiaries.¹⁰²

Generally, however, "it is very difficult to decide where the statute ends and *D'Oench* begins."¹⁰³ But courts, attempting to effectuate the legislative purpose of § 1823(e), continue to apply the common law *D'Oench* doctrine in cases not covered by § 1823(e).¹⁰⁴ As a result, the common law *D'Oench* doctrine gradually has been expanded into a federal holder-in-due-course doctrine.¹⁰⁵ Its breadth and flexibility "almost always allow[s] the FDIC to prevail when it is asserted."¹⁰⁶

94. See *supra* Part II.C.

95. DiVall Insured Income Fund P'ship v. Boatmen's First Nat'l Bank, 69 F.3d 1398, 1401 (1995) ("The common law *D'Oench Duhme* doctrine is roughly analogous to . . . [§ 1823(e)] but does provide the FDIC with broader protections in certain instances."); see also Bailey, *supra* note 59, at 1264 (noting numerous cases where the *D'Oench* doctrine provides "broader protection" than § 1823(e)); Gleit, *supra* note 21, at 232 (arguing that courts have applied *D'Oench* in situations not covered by § 1823).

96. *In re* NBW Commercial Paper Litig., 826 F. Supp. 1448, 1466 (D.D.C. 1992).

97. 12 U.S.C. § 1823(e)(1) (2000).

98. See Brookside Assocs. v. Rifkin, 49 F.3d 490, 495 (9th Cir. 1995); Inn at Saratoga Assocs. v. FDIC, 60 F.3d 78, 81-82 (2d Cir. 1995); John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994); see also Young v. FDIC, 103 F.3d 1180, 1188-89 (4th Cir. 1997) (stating in dicta that the common law *D'Oench* doctrine overcomes § 1823(e)'s "specific assets" limitation); E.I. du Pont de Nemours & Co. v. FDIC, 32 F.3d 592, 602 (D.C. Cir. 1994) (holding that the common law *D'Oench* doctrine overcomes § 1823(e)'s "specific asset" limitation).

99. Bailey, *supra* note 59, at 1265.

100. NCNB Tex. Nat'l Bank v. Johnson, 11 F.3d 1260, 1267-68 (5th Cir. 1994).

101. Newton v. Uniwest Fin. Corp., 967 F.2d 340, 347 (9th Cir. 1992) (protecting successors-in-interest of the FDIC); Kilpatrick v. Riddle, 907 F.2d 1523, 1528 (5th Cir. 1990) (protecting the FDIC's bridge bank assignees).

102. Oliver v. Resolution Trust Corp., 955 F.2d 583, 585 (8th Cir. 1992).

103. Warren L. Dennis, *The O'Melveny Decision: End of an Era*, 514 PRACTISING LAW INST./LITIG. 109, 126 (1994) (quoting *In re* NBW Commercial Paper Litig., 826 F. Supp. 1448, 1457 (D.D.C. 1992)).

104. Motorcity of Jacksonville, Ltd. v. Southeast Bank, 83 F.3d 1317, 1333 (11th Cir. 1996) (en banc).

105. Rankin v. Toberoff, No. 95-CIV. 10995(AGS), 1998 WL 370305, at *4 (S.D.N.Y. June 30, 1998); see also D'Alessandris, *supra* note 11, at 6.

106. Gleit, *supra* note 21, at 235.

For this reason, the FDIC continues to fight the growing circuit court schism.

B. *The FDIC's 1997 Policy Statement*

In 1997, the FDIC issued a policy statement directing its attorneys to curtail their use of the common law *D'Oench* doctrine in all cases originating after the enactment of FIRREA in 1989.¹⁰⁷ In the policy statement, the FDIC included guidelines describing seven situations in which FDIC attorneys might need approval from FDIC headquarters in Washington, D.C., before asserting the *D'Oench* doctrine.¹⁰⁸ Wanting to protect the core of the common law doctrine from judicial attack, the FDIC delivered a policy aimed at tempering unfair results in some cases:¹⁰⁹

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.¹¹⁰

But in its practical effects, the policy statement really only scales back *D'Oench's* use in cases of obvious unfairness. Washington has complete discretionary authority over cases involving close questions similar to *Murphy*.¹¹¹ In fact, the FDIC has continued to invoke the common law *D'Oench* doctrine even after issuing the statement.¹¹² Furthermore, the FDIC's policy statement does not affect the ability of bridge banks, transferees, or assignees to invoke the common law *D'Oench* doctrine. Despite its policy statement, the FDIC continues to

107. FDIC 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, 62 Fed. Reg. 5984, 5985 (Feb. 10, 1997) [hereinafter FDIC Policy Statement].

108. These types of cases included cases involving pre-closing vendors, *id.* at 5986; diligent parties, *id.*; documents indicating a borrower's claim, *id.* at 5987; transactions not recorded within the ordinary course of business, *id.*; bilateral obligations, *id.*; statutory defenses, *id.* at 5987-88; and cases involving § 1823(e)'s contemporaneous requirement, *id.* at 5988.

109. The FDIC most likely issued the statement in response to the D.C. Circuit's 1995 decision in *Murphy v. FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995), in which it held that FIRREA preempted the common law *D'Oench* doctrine.

110. FDIC Policy Statement, *supra* note 107, at 5986.

111. *Id.* at 5984.

112. See, e.g., *FDIC v. Noel*, 177 F.3d 911, 917-18 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 935 (2000); *Young v. FDIC*, 103 F.3d 1180, 1187-89 (4th Cir. 1997); *FDIC v. Frates*, 44 F. Supp. 2d 1176, 1220-21 (N.D. Okla. 1999).

use the common law *D'Oench* doctrine because its scope exceeds the scope of § 1823(e).

IV. MURPHY AND THE CIRCUIT SPLIT

For years, the common law *D'Oench* doctrine and its statutory counterpart, § 1823(e) of the FDIC Act, provided the FDIC with an almost unbeatable legal tool that acted both as a weapon and a shield.¹¹³ But in 1995, the Court of Appeals for the District of Columbia made *D'Oench* vulnerable in *Murphy v. FDIC*.¹¹⁴ Relying on a 1994 Supreme Court case, *O'Melveny & Myers v. FDIC*,¹¹⁵ which held that the judiciary could not create new federal common law that alters congressional legislation,¹¹⁶ the D.C. Circuit held that FIRREA preempted the common law *D'Oench* doctrine.¹¹⁷ Subsequently, the Eighth,¹¹⁸ Ninth,¹¹⁹ and Third¹²⁰ Circuits have issued similar holdings. Suddenly, the FDIC found one of its most effective litigation tools in jeopardy. However, after the D.C. Circuit remanded *Murphy v. FDIC*, the case was moved to the Eleventh Circuit, which upheld the common law *D'Oench* doctrine within its jurisdiction.¹²¹

A. Facts and Procedural History

In 1989, Bruce Murphy received a letter from a Florida developer, Orchid Island Associates Limited Partnership (Orchid), inviting Murphy to invest in a golf and beach club development.¹²² The letter included a statement by Arthur Andersen & Co. that projected a “6.1 multiple return on . . . investment.”¹²³ Emboldened, Murphy invested more than \$515,000 for a stake in the Orchid partnership.¹²⁴ The project's construction lender, Southeast Bank, loaned Orchid more than \$50 million; however, Orchid defaulted.¹²⁵ A short time later, Southeast Bank failed and went into FDIC receivership.¹²⁶

In August 1992, Murphy sued the FDIC in the United States District Court for the District of Columbia.¹²⁷ Murphy alleged that

113. D'Alessandris, *supra* note 11, at 5; *see also* Galves, *supra* note 3, at II.A.

114. 61 F.3d 34 (D.C. Cir. 1995).

115. 512 U.S. 79 (1994).

116. *Id.* at 87.

117. *Murphy*, 61 F.3d at 35.

118. *See* DiVall Ins. Income Fund Ltd. v. Boatmen's First Nat'l Bank, 69 F.3d 1398 (8th Cir. 1995).

119. *See* RTC v. Kennelly, 57 F.3d 819 (9th Cir. 1995).

120. *See* FDIC v. Deglau, 207 F.3d 153 (3d Cir. 2000).

121. *Murphy v. FDIC*, 208 F.3d 959 (11th Cir. 2000).

122. *Id.* at 961.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

Southeast's involvement in the development went beyond that of a construction lender and rose to the level of "joint venturer or partner."¹²⁸ Seeking damages and an order forcing the FDIC to release pertinent accounting statements, Murphy argued that Southeast caused the investment to fail.¹²⁹ He sued for breach of fiduciary duties, breach of contract, accounting improprieties, fraud, negligent misrepresentation, and failure to register securities.¹³⁰

The FDIC countered with the *D'Oench* doctrine, arguing that Murphy could not point to any written document stating that Southeast was a joint venturer or partner in the development.¹³¹ The FDIC moved to dismiss Murphy's claim under the common law *D'Oench* doctrine.¹³² The district court treated the FDIC's motion as a motion for summary judgment and dismissed Murphy's complaint for failure to state a claim.¹³³

On appeal to the Court of Appeals for the D.C. Circuit, Murphy faced the daunting task of overcoming both § 1823(e) and the common law *D'Oench* doctrine. However, shortly before Murphy's appeal, the Supreme Court released its *O'Melveny* opinion. Murphy seized on the Court's decision, in which it held that it would not create federal common law rules to supplement "comprehensive and detailed" federal statutes,¹³⁴ to argue that FIRREA preempted the common law *D'Oench* doctrine.¹³⁵

B. *The Supreme Court: O'Melveny and Atherton Threaten the Common Law D'Oench Doctrine*

In *O'Melveny & Myers v. FDIC*,¹³⁶ the Supreme Court limited the FDIC's ability to use federal common law doctrine in the litigation of failed banks.¹³⁷ In that case, the FDIC sued a law firm that represented a savings and loan (S&L) which later fell into FDIC receivership.¹³⁸ The FDIC alleged professional negligence and breach of fiduciary duty under California law.¹³⁹ Both claims arose out of the firm's alleged failure to tell the FDIC about illegal acts committed by the

128. *Murphy v. FDIC*, 61 F.3d 34, 35 (D.C. Cir. 1995).

129. *Id.* at 36.

130. *Id.* at 35-36. Murphy also complained that the FDIC failed to establish alternative dispute resolution (ADR) procedures. *Id.* at 36. The D.C. Circuit rejected this cause of action because FIRREA's ADR statute, 12 U.S.C. § 1821(d)(7)(B)(iii) (2000), gave the FDIC discretion to refer cases to ADR. *Murphy*, 61 F.3d at 40-41.

131. *Id.* at 36.

132. *Id.*

133. *Murphy v. FDIC*, 208 F.3d 959, 961 (11th Cir. 2000).

134. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88-89 (1994).

135. *Murphy*, 61 F.3d at 36.

136. 512 U.S. 79.

137. Bock, *supra* note 34, at 966.

138. *O'Melveny*, 512 U.S. at 81-82.

139. *Id.* at 82.

S&L's controlling officers.¹⁴⁰ The law firm asserted a state-law-based defense that imputed the officers' actions to the FDIC through the S&L.¹⁴¹ The FDIC asked the Supreme Court to create a federal common law rule to prevent such an imputation.¹⁴²

However, the Court held unanimously that FIRREA preempted the creation of federal common law regarding imputation.¹⁴³ The controlling law, it stated, must be found either in the federal statute or in state law.¹⁴⁴ The Court held that, absent a significant conflict between a government interest or policy and the use of state law,¹⁴⁵ it would not create federal common law rules to supplement "comprehensive and detailed" federal statutes like FIRREA.¹⁴⁶

For support, the Court cited § 1821(d)(2)(A)(i),¹⁴⁷ a new provision Congress added as part of FIRREA in 1989¹⁴⁸ that the Court characterized as "plac[ing] the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise."¹⁴⁹ The Court found that Congress's inclusion of new provisions like § 1821(d)(9),¹⁵⁰ a *D'Oench*-like provision requiring all claims to satisfy § 1823(e), granted rights to the FDIC as receiver that cannot be augmented or changed by federal common law.¹⁵¹ Congress's inclusion of these provisions excluded the existence of other provisions, including federal common law rules.¹⁵² The Court reasoned that to create common law exceptions above and beyond statutory exceptions does not supplement the law, but "alter[s]" it.¹⁵³

140. *Id.*

141. *Id.*

142. *Id.* at 83.

143. *Id.*

144. *Id.* at 85.

145. *Id.* at 87.

146. *Id.* at 85.

147. 12 U.S.C. § 1821(d)(2)(A)(i) (2000) (providing that the FDIC "shall . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution").

148. *O'Melveny*, 512 U.S. at 85-86.

149. *Id.* at 87. The Court limited the creation of federal common law only in those limited situations involving a "significant conflict between some federal policy or interest and the use of state law." *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

150. 12 U.S.C. § 1821(d)(9)(A). "[A]ny agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC]." *Id.*

151. *O'Melveny*, 512 U.S. at 86-87.

152. *Id.* The Court cited the legal adage "[i]nclusio unius, exclusio alterius," *id.* at 87, which means "to express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY 602 (7th ed. 1999). The D.C. Circuit later seized upon this language in *Murphy v. FDIC* as evidence that Congress purposely did not include the common law *D'Oench* provisions in FIRREA, and that FIRREA preempted the *D'Oench* doctrine. *Murphy v. FDIC*, 61 F.3d 34, 35 (D.C. Cir. 1995). See *infra* Part IV.C.

153. *O'Melveny*, 512 U.S. at 87.

In the view of some courts of appeals, the Court's language in *O'Melveny*—and its 1997 decision in *Atherton v. FDIC*,¹⁵⁴ which echoed *O'Melveny*—signaled the end of the common law *D'Oench* doctrine in its broad form.¹⁵⁵ In those circuits, the common law *D'Oench* doctrine no longer shields the FDIC beyond the protections provided in § 1823(e).

C. Murphy in the D.C. Circuit

O'Melveny provided Bruce Murphy with a stronger argument on appeal. Embracing it, Murphy argued that FIRREA preempted the common law *D'Oench* doctrine.¹⁵⁶ The FDIC countered, arguing that the Supreme Court in *O'Melveny* never explicitly mentioned the *D'Oench* doctrine and therefore did not alter its validity.¹⁵⁷ The D.C. Circuit rejected this argument, citing a rule that favors implementing Supreme Court rulings generally rather than to a limited set of facts.¹⁵⁸ The court also noted that both parties' briefs in *O'Melveny* advised the Supreme Court that its decision could affect the common law *D'Oench* doctrine.¹⁵⁹ Finally, the FDIC argued that although *O'Melveny* may have prohibited the judicial creation of *new* federal common law, it did not prohibit the application of a more than 50-year-old doctrine.¹⁶⁰ But the D.C. Circuit rejected this argument, holding that once Congress addresses an issue, the federal courts' "unusual exercise" of creating common law disappears and succumbs to the courts' "commitment to the separation of powers."¹⁶¹

Murphy argued, and the D.C. Circuit agreed, that Congress's inclusion of § 1821(d)(9),¹⁶² the *D'Oench*-like provision cited by the *O'Melveny* Court requiring that all claims satisfy § 1823(e),¹⁶³ "implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute—of which the *D'Oench* doctrine is one."¹⁶⁴ Furthermore, the D.C. Circuit found that the *O'Melveny* Court's statement that

"§ 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S & L . . ." [indicated that the Court] appears to have concluded that

154. 519 U.S. 213 (1997). In *Atherton*, the Court applied *O'Melveny*'s holding that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'" *Id.* at 218 (citing *O'Melveny*, 512 U.S. at 87).

155. *E.g.*, *Murphy*, 61 F.3d at 34.

156. *Id.* at 36.

157. *Id.* at 39.

158. *Id.* (citing *Cowin v. Bresler*, 741 F.2d 410, 425 (D.C. Cir. 1984)).

159. *Murphy*, 61 F.3d at 39.

160. *Id.* at 40.

161. *Id.* (citing *Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981)).

162. 12 U.S.C. § 1821(d)(9)(A) (2000).

163. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994).

164. *Murphy*, 61 F.3d at 39.

the Congress in the FIRREA did indeed address the question previously governed by *D'Oench*. It follows that the need for a body of federal common law under the rubric of *D'Oench* has now “disappeared”¹⁶⁵

The Court held that FIRREA preempted *D'Oench* and remanded to the district court.¹⁶⁶

The D.C. Circuit also examined whether § 1823(e) barred Murphy's claims.¹⁶⁷ Citing its 1994 holding in *E.I. du Pont de Nemours & Co. v. FDIC*,¹⁶⁸ the court characterized the statute as barring “anyone from asserting against the FDIC any agreement not properly recorded in the records of the bank that would diminish the value of an asset held by the FDIC.”¹⁶⁹ However, the court limited § 1823(e) to cases involving specific assets arising from “conventional loan transactions.”¹⁷⁰ Murphy embraced this language, arguing that unlike the plaintiff in *D'Oench*, he was not a borrower attempting to shirk repayment of a conventional loan.¹⁷¹ Rather, Murphy argued he was simply an *investor*—an investor in an investment gone sour because of Southeast Bank's ineptitude.¹⁷² The court, influenced by the FDIC's inability to identify any specific asset related to a conventional loan transaction, agreed with Murphy's argument and held that the statute's asset requirement was not met.¹⁷³ The court supported its decision by noting that agreements like the one between Murphy and Southeast did not involve an extension of credit and therefore did not require approval by Southeast's board.¹⁷⁴ Thus, it was not the type of agreement contemplated by § 1823(e)(1)(C).¹⁷⁵

As the first case to prohibit the FDIC's use of the broad protections provided by the common law *D'Oench* doctrine, the D.C. Circuit's ruling in *Murphy v. FDIC* did not go unnoticed.¹⁷⁶ In effect, the

165. *Id.* at 40. (citation omitted).

166. *Id.* at 40-41.

167. *Id.* at 36.

168. 32 F.3d 592 (D.C. Cir. 1994).

169. *Murphy*, 61 F.3d at 36 (citing *du Pont*, 32 F.3d at 596).

170. *Id.* at 37 (citing *du Pont*, 32 F.3d at 597) (emphasis added).

171. *Id.*

172. *Id.*

173. *Id.* The court found unconvincing an argument implicit from a footnote in the FDIC's brief that the loans made by Southeast Bank to Orchid were specific assets that may be diminished by Murphy's claim. *Id.*

174. *Id.*

175. *Id.*

176. *See, e.g.*, D'Alessandris, *supra* note 11, at 16 (arguing that the D.C. Circuit's ruling was correct); Michael B. Kent, Jr., *The Court Giveth, and Congress Taketh Away: Statutory Preemption and the Federal Common Law D'Oench Doctrine*, 116 BANKING L.J. 214, 246 (1999) (same). *Cf.* Bock, *supra* note 34, at 978-80 (arguing that the D.C. Circuit's ruling was wrong).

ruling narrowed the common law *D'Oench* doctrine to its original scope, rendering it useless in the D.C. Circuit.¹⁷⁷

D. Murphy in the Eleventh Circuit

The D.C. Circuit effectively wrested away a doctrine that had become one of the FDIC's most important weapons against borrowers' defenses, as well as one of its most protective shields against borrowers' affirmative claims. However, the FDIC refused to stand by and watch courts eviscerate the 50-year-old doctrine.

On remand to the United States District Court for the District of Columbia, the FDIC again moved for summary judgment.¹⁷⁸ More importantly, however, the FDIC asked that the case be transferred to the Southern District of Florida,¹⁷⁹ which, as part of the Eleventh Circuit, provided the FDIC with a much friendlier environment. Previously, the Eleventh Circuit Court of Appeals had staunchly defended the *D'Oench* doctrine, holding that the *D'Oench* doctrine "applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records."¹⁸⁰ The United States District Court for the District of Columbia concluded that Florida provided a "more convenient location" for the case because Murphy, the majority of witnesses, the development, and the now-defunct Southeast Bank were located there.¹⁸¹ This more favorable location paid off quickly for the FDIC.¹⁸² The district court substituted Jeffrey H. Beck¹⁸³ as successor agent for the FDIC and granted the FDIC's motion to dismiss, holding that the federal common law *D'Oench* doctrine barred Murphy's claim.¹⁸⁴

177. D'Alessandris, *supra* note 11, at 11.

178. Murphy v. FDIC, 208 F.3d 959, 962 (11th Cir. 2000).

179. *Id.*

180. OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306, 308 (11th Cir. 1993); *see also* Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1510 (11th Cir. 1991); FSLIC v. Two Rivers Assocs., Inc., 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989) (holding that the *D'Oench* doctrine applies in FDIC's receiver capacity).

After the D.C. Circuit's *Murphy* decision in 1995 but before the Eleventh Circuit's decision in 2000, the Eleventh Circuit continued to uphold the common law *D'Oench* doctrine. *E.g.*, Motorcity of Jacksonville, Ltd. v. Southeast Bank, 83 F.3d 1317, 1326 (11th Cir. 1996) (en banc), *vacated and remanded by* Hess v. FDIC, 519 U.S. 1087 (1997), *reinstated by* Motorcity of Jacksonville, Ltd. v. Southeast Bank, 120 F.3d 1140 (11th Cir. 1997) (en banc), *cert. denied*, Hess v. FDIC, 523 U.S. 1093 (1998).

181. *Murphy*, 208 F.3d at 962.

182. Murphy tried to transfer the case back to the D.C. Circuit, but was denied. *In re* Murphy, No. 98-5475, 1998 WL 929816 (D.C. Cir. Dec. 9, 1998).

183. Beck had been Southeast's Chapter 7 trustee and was appointed successor agent after the FDIC completed its receivership duties. Brief For Respondent at 2 n.1, *Murphy v. Beck*, 121 S. Ct. 30 (2000) (No. 00-46), *cert. dismissed*, 121 S. Ct. 849 (2001).

184. *Murphy*, 208 F.3d at 969. The district court offered two alternative grounds for its decision. *Id.* at 962. First, Murphy could not claim that Southeast Bank owed him a duty

Murphy appealed to the Eleventh Circuit, which reviewed the district court's summary judgment de novo.¹⁸⁵ Murphy made four different arguments as to why the *D'Oench* doctrine should not apply to the case.¹⁸⁶ First, in an attempt to regain the jurisdictional advantages of the D.C. Circuit, Murphy argued that the choice of law doctrine required the Eleventh Circuit to apply the D.C. Circuit's laws, not its own.¹⁸⁷ Second, Murphy argued that the ruling by the Court of Appeals for the D.C. Circuit should constitute the "law of the case."¹⁸⁸ Third, he argued that the *D'Oench* doctrine should not apply when a monetary surplus has been amassed during FDIC receivership.¹⁸⁹

Finally, Murphy argued that the Supreme Court's recent rulings in *O'Melveny* and *Atherton* invalidated the *D'Oench* doctrine.¹⁹⁰ From the outset of its opinion, however, the Eleventh Circuit positioned itself as a defender of the *D'Oench* doctrine. The court outlined the doctrine's scope:

In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.¹⁹¹

as joint venturer with Orchid, because a written agreement made by Orchid and Southeast Bank explicitly disclaimed the existence of any joint venture between the two parties. *Id.* Also, even if Murphy was not a party to the written agreement between Orchid and Southeast Bank, he had failed to prove the existence of any joint venture. *Id.*

185. *Id.* at 962.

186. *Id.* at 963.

187. *Id.* The Eleventh Circuit rejected this argument, choosing to follow the D.C., Second, Eighth, and Ninth Circuits, which had held that in cases involving federal issues, transferee courts must follow their own interpretations of law. *Id.* at 964-66.

188. *Id.* at 963. The law-of-the-case doctrine provides: "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id.* at 966 (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). However, courts have discretion to apply the law of the case doctrine, and the Eleventh Circuit chose not to. *Id.* (citing *Arizona v. California*, 460 U.S. at 618).

189. *Id.* at 963. Southeast's receivership generated a \$150 million surplus, which the FDIC distributed to Southeast's shareholders. *Id.* at 966-67. Murphy argued that those shareholders should not benefit from his \$500,000 loss. *Id.* at 967. The court rejected the argument and stated that *D'Oench's* rationale—to allow the FDIC to make quick and reliable evaluations of bank records—is not affected whether or not the failed bank generates a surplus. *Id.*

190. *Id.* at 963.

191. *Id.* (citing *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1326 (11th Cir. 1996) (en banc) [*Motorcity I*], vacated and remanded by *Hess v. FDIC*, 519 U.S. 1087 (1997), reinstated by *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997) (en banc) [*Motorcity II*]; *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 308 (11th Cir. 1993); *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1510 (11th Cir. 1991); *FSLIC v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989)).

Next, the court addressed the D.C. Circuit's finding that Congress preempted the common law *D'Oench* doctrine.¹⁹² The Eleventh Circuit cited previous cases in which it held that the doctrine applies "in virtually all cases" involving an undocumented agreement.¹⁹³ After highlighting its fundamental disagreement with the D.C. Circuit, the court addressed Murphy's argument that the Supreme Court's holding in *O'Melveny*, and also the Court's recent *Atherton* decision, worked to essentially kill the *D'Oench* doctrine.¹⁹⁴ Citing previous holdings, the Eleventh Circuit held that *O'Melveny* and *Atherton* involved the question of whether the judiciary can create *new* federal common law doctrines to supplement particular statutes.¹⁹⁵ The Supreme Court did not, the court explained, address the question of whether Congress intended FIRREA to replace the *D'Oench* doctrine.¹⁹⁶ The court argued that *United States v. Texas*,¹⁹⁷ rather than *O'Melveny* and *Atherton*, provided the applicable Supreme Court holding.¹⁹⁸ In *United States v. Texas*, the Supreme Court stated the "longstanding . . . principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose . . . is evident."¹⁹⁹ Therefore, the Eleventh Circuit held, Congress did not intend to abrogate the then nearly 50-year-old *D'Oench* doctrine.²⁰⁰ The court affirmed the district court's dismissal of Murphy's claims, injecting one final, unequivocal statement: "[T]he *D'Oench*, *Duhme* doctrine remains good law in this Circuit, and there is no sound reason not to apply the doctrine in this case."²⁰¹

Shortly after the Eleventh Circuit's decision, Murphy appealed to the Supreme Court, which granted certiorari.²⁰² It appeared as though the Court finally would resolve the circuit split over the *D'Oench* doctrine's existence. However, only five days before oral ar-

192. *Murphy*, 208 F.3d at 963.

193. *Id.*

194. *Id.* at 968-69.

195. *Id.* at 968 (citing *Motorcity II*, 120 F.3d at 1143, and *Motorcity I*, 83 F.3d at 1330).

196. *Id.* at 968-69.

197. 507 U.S. 529 (1993).

198. *Murphy*, 208 F.3d at 969.

199. *Id.* n.7 (citing *United States v. Texas*, 507 U.S. at 534 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

200. *Id.* at 969. The court stated:

We continue to believe that the analysis set forth in our prior *en banc* opinion reflects the most reasonable reading of Congress's intent—i.e., that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious, forty-year coexistence of the statute and the *D'Oench* doctrine.

Id.

201. *Id.*

202. *Murphy v. Beck*, 121 S. Ct. 30 (2000).

guments, Murphy and the FDIC settled their dispute, leaving the question unanswered.²⁰³

V. THE FUTURE OF THE COMMON LAW *D'OENCH* DOCTRINE

A. *The Supreme Court*

As exemplified in *Murphy*, the circuit courts of appeals remain split over whether Congress preempted the common law *D'Oench* doctrine.²⁰⁴ Barring the highly unlikely event that one view overcomes the other throughout the circuits, the Supreme Court must unify the circuits.²⁰⁵ However, the Court probably will not resolve the circuit split in the near future.

First, due to relative calm in the banking industry and the FDIC's 1997 policy statement,²⁰⁶ in which it agreed to resist invoking the common law *D'Oench* doctrine, the number of *D'Oench* cases litigated will probably decrease.²⁰⁷ However, the FDIC policy statement is discretionary, and whether the FDIC will follow it strictly or loosely is still uncertain.²⁰⁸

Perhaps most significantly, a *D'Oench* case will not likely get to the Court soon because the FDIC has an incentive to settle those cases before they reach the Court, as it did in *Murphy*. The FDIC's main objective may be to prevent the Court from completely wresting away the common law *D'Oench* doctrine. Presently, a significant possibility exists that the Court would do this, for a number of reasons: the *O'Melveny* and *Atherton* holdings, which say that legislation like FIRREA preempts federal common law rules, are persuasive and sensible;²⁰⁹ the common law *D'Oench* doctrine, acting as a de facto statute of frauds, produces unfair results in some cases;²¹⁰ and § 1823(e) may provide the FDIC with adequate protection, while the common law *D'Oench* doctrine overprotects in the relatively calm banking climate that currently exists.²¹¹ Also, the Court's 1997 *Hess* decision, which vacated and remanded the Eleventh Circuit's en banc

203. *Murphy v. Beck*, 121 S. Ct. 849 (2001).

204. *See also infra* Part VI (noting that the D.C., Third, Eighth, and Ninth Circuits have held that Congress preempted the *D'Oench* doctrine, while the Fourth and Eleventh Circuits held the doctrine was not preempted).

205. *See, e.g.*, Bock, *supra* note 34, at 984.

206. FDIC Policy Statement, *supra* note 107, at 5986.

207. *But see* Petition for Writ of Certiorari at 11-12, *Murphy v. Beck*, 208 F.3d 959 (11th Cir. 2000) (arguing that the *D'Oench* doctrine continues to arise in litigation, even after the FDIC's policy statement).

208. *Id.* at 15; *see also* Bock, *supra* note 34, at 986.

209. For instance, they persuaded the Third, Eighth, and Ninth Circuits to adopt the view that § 1823(e) abrogated the common law *D'Oench* doctrine. *See supra* Part IV.B.

210. *See supra* Part III.B, Part I, and note 13.

211. *See* D'Alessandris, *supra* note 11, at 16.

decision in *Motorcity F*²¹² and upheld the *D'Oench* doctrine with instructions to apply *Atherton*, provides telling evidence that the Court may abolish the common law *D'Oench* doctrine.²¹³

In all likelihood, the FDIC will settle in unfriendly jurisdictions, including the D.C., Third, Eighth, and Ninth Circuits, in order to avoid court-imposed judgments. The FDIC will also settle in its friendly jurisdictions, the Eleventh and Fourth Circuits, to avoid continued appeals to the Supreme Court. The Court will not likely see a *D'Oench* case again until the FDIC becomes confident that, due to another banking crisis or a change of faces on the Court, the Court will protect the FDIC by upholding the common law doctrine. For now, however, the key to the doctrine's survival involves keeping its footing within as many circuits as possible.

B. *Cost vs. Fairness*

Undeniably, the common law *D'Oench* doctrine produces unfair results in cases where the failed bank acted fraudulently or made misrepresentations.²¹⁴ For example, borrowers defrauded by a bank officer's oral misrepresentations cannot raise traditional contract defenses that overcome *D'Oench*.²¹⁵ Commentators argue that *D'Oench*, as an equitable doctrine,²¹⁶ should not be used in those cases.²¹⁷ "In an era when, unfortunately, bank officers of failed banks often have acted to the detriment of their borrowers (sometimes criminally so), the borrowers, like the FDIC, deserve some protection."²¹⁸ The common law *D'Oench* doctrine's protection may fail to discourage troubled banks from engaging in fraud or misrepresentation, although it does not *encourage* those practices.

Commentators add that § 1823(e), unaided by the common law *D'Oench* doctrine, provides the FDIC with adequate protection.²¹⁹ Therefore, the added protection provided by the common law doctrine is unnecessary.

212. *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317 (11th Cir. 1996) (en banc), *vacated and remanded by Hess v. FDIC*, 519 U.S. 1087 (1997), *reinstated by Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997) (en banc).

213. *Hess v. FDIC*, 519 U.S. 1087 (1997), *reinstated by Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997) (en banc).

214. Galves, *supra* note 3, at 1328 (arguing that the *D'Oench* doctrine creates an "unfair windfall" to the FDIC).

215. J. Michael Echevarria, *A Precedent Embalms a Principle: The Expansion of the D'Oench, Duhme Doctrine*, 43 CATH. U. L. REV. 745, 803 (1994).

216. Galves, *supra* note 3, at 1347-48; Gleit, *supra* note 21, at 227.

217. *See, e.g.*, Galves, *supra* note 3, at Part III (calling for reform of the *D'Oench* doctrine that would continue to protect the FDIC, except in certain cases where *D'Oench* causes injustices to borrowers).

218. Hymanson, *supra* note 8, at 257.

219. D'Alessandris, *supra* note 11, at 16.

Although the common law *D'Oench* doctrine gives the FDIC protections that occasionally produce unfair results, the six circuits²²⁰ that have not directly decided *D'Oench's* fate should uphold the doctrine because it provides monetary and efficiency benefits that outweigh the costs created by unfair outcomes. The *D'Oench* doctrine has spared the FDIC from billions of dollars in claims made by borrowers alleging side agreements with failed banks.²²¹ First, the common law doctrine provides the FDIC's insurance fund broader protection than § 1823(e) does. Although this added protection becomes less significant in a calm banking climate, the FDIC will need this added protection in future banking crises.

Second, the common law *D'Oench* doctrine, as a de facto statute of frauds, provides the FDIC with crucial efficiency benefits. When a financial institution fails, the FDIC must quickly and accurately determine the institution's financial status.²²² This important decision includes whether to liquidate the institution's assets or sell them through purchase and assumption agreements.²²³ The accuracy of these decisions affects the solvency of the insurance fund and the public's confidence in the FDIC: if the FDIC must liquidate the institution, public confidence in the banking industry will weaken.²²⁴

As a result, the FDIC prefers purchase and assumption agreements.²²⁵ Purchase and assumption agreements allow the FDIC to sell the failed bank's healthy assets to other banks, which then assume payments owed to the failed bank's depositors.²²⁶ The FDIC, as receiver, then sells the failed bank's bad assets to the corporate arm of the FDIC.²²⁷ With the money made on this sale, the FDIC/receiver partially reimburses the banks that assumed the failed bank's liabilities.²²⁸

Time is a major factor in the FDIC's decision to liquidate or enter into purchase and assumption agreements because the execution of purchase and assumption agreements must occur almost immediately after an institution fails.²²⁹ The common law *D'Oench* doctrine allows the FDIC to quickly evaluate a failed bank's books and enter

220. The First, Second, Fifth, Sixth, Seventh, and Tenth Circuits.

221. For example, the common law *D'Oench* doctrine and § 1823(e) saved the FDIC more than \$1 billion from 1993 to 1994. *Oversight Hearings*, *supra* note 45, at 161.

222. *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987).

223. *Shumadine*, *supra* note 5, at 144 (citing *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 48 (1st Cir. 1991) (citations omitted)).

224. *Id.*

225. *Id.*

226. See *D'Alessandris*, *supra* note 11, at 4.

227. *Id.*

228. *Id.*

229. *Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir. 1982) (stating that a purchase and assumption agreement must be "consummated with great speed").

into purchase and assumption agreements. Without the doctrine, the FDIC's evaluation may take longer as it investigates claims against the failed bank by borrowers and creditors who aver nonwritten agreements.

The monetary and efficiency benefits provided by the common law *D'Oench* doctrine overcome the unfairness argument. The FDIC must deal with failed banks under considerable time constraints, without adequate time to recognize valid nonwritten agreements. The FDIC's priorities include the solvency of the insurance fund, bank depositors, and public confidence in the banking system—not borrowers who enter into nonwritten agreements with financial institutions. The common law *D'Oench* doctrine has never produced an unfair outcome in a case where a borrower brought a *written* agreement to court.

VI. CONCLUSION

The current circuit split seems to stem from each court's own opinion as to whether cost or fairness should be the fundamental consideration when deciding whether Congress abrogated the common law *D'Oench* doctrine. The Eleventh and Fourth Circuits view *D'Oench*'s cost savings and efficiency gains as being more important than preventing the inequities the doctrine sometimes causes. This is the correct view because the banking industry relies on a solvent and strong FDIC to insure it. On the other hand, the D.C., Third, Eighth, and Ninth Circuits assign paramount importance to equity. Abrogating the common law *D'Oench* doctrine provides one way for those courts to achieve that equity.

The split will not work itself out. The FDIC, banks, and their borrowers must wait for the Supreme Court to resolve the issue. However, as was the case in *Murphy*, the FDIC has an incentive to settle: it ensures the continued viability of the *D'Oench* doctrine in at least some jurisdictions. Until the Court resolves the split, the common law *D'Oench* doctrine, already long in the tooth, remains viable—even though it has lost some bite.