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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)

Jeffrey R. Gleit

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NOTE


I. INTRODUCTION

On April 27, 1998, the United States Supreme Court declined to review an Eleventh Circuit decision holding that the federal common law D’Oench doctrine has not been abrogated by § 1823(e). This denial of certiorari preserved a circuit split in which the D.C. and Eighth Circuits have held that the federal common law D’Oench doctrine has been abrogated by § 1823(e), while the Fourth and Eleventh Circuits have held that it has not. For over half a century the D’Oench doctrine has impacted the field of banking law by barring certain claims and de-

1. See Motorcity of Jacksonville, Ltd. v. Southeast Bank, 39 F.3d 292 (11th Cir. 1994), vacated and reh’g granted, 58 F.3d 589 (11th Cir. 1995), aff’d on reh’g, 83 F.3d 1317 (11th Cir. 1996) [hereinafter Motorcity I], cert. granted, vacated sub nom. Hess v. FDIC, 519 U.S. 1087 (1997), on remand, Motorcity of Jacksonville, Ltd. v. Southeast Bank, 120 F.3d 1140 (11th Cir. 1997) [hereinafter Motorcity II] (reinstating its en banc decision in Motorcity I, the Eleventh Circuit held that the federal common law D’Oench doctrine is not abrogated by § 1823(e)), cert. denied sub nom. Hess v. FDIC, 118 S. Ct. 1559 (U.S. 1998). Section 1823 (codified at 12 U.S.C. § 1823(e)) will be referred to as § 1823(e)) throughout the remainder of this Note, both in the textual material and the footnotes.

2. See DiVall Insured Income Fund Ltd. Partnership v. Boatmen’s First Nat’l Bank, 69 F.3d 1398, 1402 (8th Cir. 1995) [hereinafter DiVall] (following the D.C. Circuit decision that the federal common law D’Oench doctrine has been supplanted by § 1823(e)); Murphy v. FDIC, 61 F.3d 34, 40 (D.C. Cir. 1995) (holding the federal common law D’Oench doctrine to have been supplanted by § 1823(e)).

3. See Motorcity II, 120 F.3d 1140 (11th Cir. 1997); Young v. FDIC, 103 F.3d 1180, 1187 (4th Cir. 1997) (following the Eleventh Circuit’s decision that the federal common law doctrine has not been preempted by § 1823(e)); see also FDIC v. Houde, 90 F.3d 600, 605 n.5 (1st Cir. 1996) (noting the split among the federal circuit courts). The Ninth Circuit has also added to the controversy by ruling that there is no federal policy behind applying the D’Oench doctrine to the FDIC acting as receiver. See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 829 (9th Cir. 1997).
fenses against the Federal Deposit Insurance Corporation ("FDIC"). The Supreme Court’s decision in *D’Oench, Duhme & Co. v. FDIC* ("D’Oench, Duhme") was based on the concern of protecting the FDIC and the depositors of an insolvent bank, a concern which continues to exist today. The issue of whether the D’Oench doctrine continues to exist, and if it does, its relationship to the transforming side agreement rule needs to be resolved.

In 1933, as a means of restoring confidence in the banking industry, Congress enacted the Banking Act of 1933 (also known as the Glass-Steagall Act), which created the FDIC. The FDIC provides deposit insurance to national banks, state chartered commercial banks, thrifts, savings and loans, and savings banks. When a bank fails, the FDIC has four primary options: (1) it can provide open bank assistance; (2) it can liquidate the bank; (3) it can perform a “purchase and assumption” transaction; and finally, (4) it can create a “bridge bank” or “new bank.” It is imperative that, when choosing one of these options,
the FDIC act "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services."\textsuperscript{13}

Since the creation of the FDIC a body of federal common law has developed based on the doctrine of estoppel.\textsuperscript{14} This doctrine protects the FDIC from side agreements not contained in the written records of a failed bank when it collects on an outstanding obligation.\textsuperscript{15} This body of federal common law has the ominous name "D'Oench doctrine" arising from the case of \textit{D'Oench, Duhme}.\textsuperscript{16} Although the D'Oench doctrine was partially codified by Congress in 1950,\textsuperscript{17} the statute and the common law have continued to co-exist for nearly fifty years.\textsuperscript{18}

In general, when the FDIC takes over for a failed bank, it will sue to collect on any outstanding obligations owed by the failed bank's debtors.\textsuperscript{19} If the debtor raises any defense to the repayment of the obligation, the FDIC will move for summary judgment arguing that the D'Oench doctrine and/or § 1823(e) preclude the debtor from raising these defenses.\textsuperscript{20} If the court finds the statute, the common law, or both, to be applicable then the FDIC will prevail, saving the cost of litigation.\textsuperscript{21} In some instances a court will find the statute inapplicable, and rely solely on the federal common law to preclude the debtor from asserting a defense.\textsuperscript{22} Therefore, if the Supreme Court holds the D'Oench doctrine to be supplanted by § 1823(e), the FDIC will lose some of the protection it has grown accustomed to over the last fifty years.\textsuperscript{23}

Part II of this Note reviews the 1942 case of \textit{D'Oench, Duhme},\textsuperscript{24} and the policy justification behind the Supreme Court's decision. It examines the 1950 enactment of § 1823(e) and the Financial Institutions to terminate operations within two years. At the end of the two year period, the bank terminates through either a purchase and assumption agreement with a solvent institution, or the sale of stock to private entities, or dissolution through receivership. \textit{See id.}

\textsuperscript{13} Langley v. FDIC, 484 U.S. 86, 91 (1987) (quoting Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir. 1982)).
\textsuperscript{14} \textit{See Marsha Hymanson, Note, Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail, 62 S. CAL. L. REV. 253, 255 (1988).}
\textsuperscript{15} \textit{See D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447, 460-62 (1942).}
\textsuperscript{16} \textit{See id. at 447.}
\textsuperscript{17} \textit{See infra notes 56-63 and accompanying text.}
\textsuperscript{18} \textit{See infra notes 56-87 and accompanying text.}
\textsuperscript{19} \textit{See Hymanson, supra note 14, at 256.}
\textsuperscript{20} \textit{See id.}
\textsuperscript{21} \textit{See id.}
\textsuperscript{22} \textit{See Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 31-32 (D.N.H. 1993).}
\textsuperscript{23} \textit{See infra notes 56-87 and accompanying text.}
\textsuperscript{24} 315 U.S. 447 (1942).
Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which was the Congressional response to the savings and loan crisis of the 1980s. Part II demonstrates how the statute and the common law co-exist to protect the FDIC from a host of affirmative claims and defenses.

Part III of this Note analyzes the creation of the circuit split. It examines the Supreme Court’s decision in *O’Melveny & Myers v. FDIC*, ("O’Melveny") and explains why the *O’Melveny* decision is not dispositive of whether Congress intended § 1823(e) to supplant the D’Oench doctrine. Thereafter, Part III discusses the D.C. and Eighth Circuit decisions, which relied on *O’Melveny* in holding the D’Oench doctrine to be abrogated by § 1823(e). Next, this Note briefly concentrates on *Atherton v. FDIC*, which the Supreme Court instructed the Eleventh Circuit to look to for guidance, when reconsidering *Motorcity of Jacksonville, Ltd. v. Southeast Bank* ("Motorcity I") on remand. Part III concludes by focusing on the Ninth Circuit’s decision in *Ledo Financial Corp. v. Summers*, which held that there is no federal interest in applying the D’Oench doctrine to the FDIC when it acts in its capacity as receiver.

Part IV of this Note explains why both Eleventh Circuit decisions holding that the D’Oench doctrine has not been abrogated by the statute are correct. It explains why the Eleventh Circuit correctly refused to rely on either *O’Melveny* or *Atherton* and instead properly looked to *United States v. Texas*, a 1993 Supreme Court case dealing with the abrogation of a federal common law rule after the passage of a federal statute. In looking to the Supreme Court’s decision specifically dealing with the abrogation of a federal common law rule by federal statute, the

26. See infra notes 64-87 and accompanying text.
28. See infra notes 91-108 and accompanying text.
29. See DiVall, 69 F.3d 1398, 1402 (8th Cir. 1995); Murphy v. FDIC, 61 F.3d 34, 35 (D.C. Cir. 1995).
32. 122 F.3d 825 (9th Cir. 1997).
33. See infra notes 173-236 and accompanying text.
34. 512 U.S. 79 (1994).
35. 519 U.S. at 213 (1997).
37. See id. (holding that the long-standing federal common law right to collect prejudgment interest on debts owed to the federal government by a state was not abrogated by the passage of the federal Debt Collection Act).
author of this Note believes the Eleventh Circuit was the only circuit to deal with the issue correctly.

Part V of this Note explains why it was not the intent of Congress to abrogate the D’Oench doctrine with the passage of § 1823(e). This Part argues that holding the D’Oench doctrine to have been abrogated by the statute is incorrect and will explain why courts should consider FIRREA as Congress’s approval of the interaction between the statute and the common law. This Part also explains why the extra protection provided by the D’Oench doctrine is still needed in light of the fact that the statute is often narrower than the common law. Finally, Part V promotes one of Professor Fred Galves’ solutions to the harsh results that sometimes occur with both the D’Oench doctrine and § 1823(e).

This Note concludes by explaining why, in light of its decision in United States v. Texas, the Supreme Court should hold that the D’Oench doctrine has not been abrogated by § 1823(e).

II. THE ORIGIN OF THE CONTROVERSY

A. D’Oench, Duhme & Co. v. FDIC

In 1942, the Supreme Court decided the case of D’Oench, Duhme. In D’Oench, Duhme, the petitioner, a securities dealer, defaulted on bonds it had sold to Belleville Bank & Trust Company. So the bank would not have to carry the past due bonds among its assets, D’Oench, Duhme & Co. executed a $5,000 note payable to be carried in place of the bonds. The receipt for this note stated, “[t]his note is given with the understanding it will not be called for payment. All interest payments to be repaid.” When the bank failed, the FDIC acquired the note as collateral for a $1,000,000 loan made to the bank and demanded payment.

38. See infra notes 237-46 and accompanying text.
39. See infra notes 237-47 and accompanying text.
40. See infra notes 248-74 and accompanying text.
41. Professor Fred Galves is an Assistant Professor of Law, McGeorge School of Law, University of the Pacific, Sacramento, California.
42. See infra notes 274-83 and accompanying text.
44. See infra notes 284-89 and accompanying text.
45. 315 U.S. 447 (1942).
46. See id. at 454.
47. See id.
48. Id.
49. See id.
The petitioner defended the FDIC's actions seeking repayment by claiming that there was a side agreement that the note was not to be repaid. In determining whether this side agreement was a valid defense to the repayment of the note, the Supreme Court first had to decide on the applicable law. The Supreme Court created a federal common law doctrine of estoppel, holding that a secret side agreement not contained in the bank's records could not operate as a defense against a suit by the FDIC on the note.

The Court found in the Federal Reserve Act, a public policy to protect the FDIC "and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." The Court also noted that it was irrelevant whether the maker of a note designed the note "to deceive the creditors or the public authority, or would tend to have that effect." Therefore, an obligor would be precluded from a side agreement defense regardless of his motives and whether or not the insurer was deceived. Based on this policy of enabling the FDIC to rely on the official records of an insolvent bank, the D'Oench doctrine has existed for over half a century, and only recently has its survival come into question.

50. See id. at 456.
51. See id. at 455. Both the district court and the circuit court of appeals applied Illinois contract law and found the petitioner liable. However, the petitioner argued that a federal court in Missouri should apply Missouri conflict of law rules. Because Illinois law was not pleaded or proved, the petitioner argued that a Missouri court would presume that Illinois law was the same as Missouri law and that the district court should follow the same course. See id.
52. See id. at 461.
53. Id. at 457.
54. Id. at 460.
55. See id. at 459-61; see also Chris Atkinson, Note, Defending the Indefensible: Exceptions to D'Oench and 12 U.S.C. § 1823(e), 63 FORDHAM L. REV. 1337, 1346 (1995) (explaining that an obligor would be barred from a side agreement defense whether or not the FDIC was in fact deceived); Robert B. Markworth, Note & Comment, Survival of the Federal Common Law D'Oench Doctrine?, 1 N.C. BANKING INST. 436, 440 (1997) (stating that regardless of an obligor's motives, based on the D'Oench doctrine, an obligor would be barred from asserting the side agreement defense).
56. See DiVall, 69 F.3d 1398, 1402-04 (8th Cir. 1995) (holding the federal common law D'Oench doctrine to be preempted by § 1823(e)); Murphy v. FDIC, 61 F.3d 34, 35 (D.C. Cir. 1995) (leading the circuit court of appeals in being the first to hold the D'Oench doctrine to be preempted by § 1823(e)).
B. 12 U.S.C. § 1823(e)

Section 1823(e), as originally enacted in 1950, provided:

No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] 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.

For years, federal courts considered § 1823(e) as D'Oench, Duhme codified, the “statutory analogue” to the D’Oench doctrine, and “as an adjunct to the federal statutory policy embodied in D’Oench, Duhme.” This understanding of D’Oench Duhme is consistent with the


58. Id. In response to the S&L crisis of the 1980s, Congress expanded the scope of § 1823(e). The significance of this expansion will be discussed later in this Note. However, for purposes of accuracy, 12 U.S.C. § 1823(e) (1994), as amended, reads:

(1) In general

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,
(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.

Id.

59. See FDIC v. Singh, 977 F.2d 18, 21 (1st Cir. 1992); FSLIC v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991); Savers Fed. Sav. & Loan v. Amberley Huntsville, Ltd., 934 F.2d 1201, 1206 (11th Cir. 1991); Bowen v. FDIC, 915 F.2d 1013, 1015 n.3 (5th Cir. 1990); Mainland Sav. Ass'n v. Riverfront Assocs., Ltd., 872 F.2d 955, 956 (10th Cir. 1989); RTC v. Heinhold Commodities, Inc. 803 F. Supp. 1342, 1347 (N.D. Ill. 1992); In re C.P.C. Dev. Co. No. 5 v. FSLIC, 113 B.R. 637, 640 (Bankr. C.D. Cal. 1990).


61. Griffin, 935 F.2d at 698.
intent of Congress, since the legislative history contains no suggestion of any intent to abrogate D'Oench, Duhme. Furthermore, for the last fifty years the courts appear to have applied the D'Oench doctrine to cover situations that are not within the statute's narrower coverage; those not related to a specific asset acquired by the FDIC. In the past, courts have even expanded the common law when needed, as long as it was within the original policy concerns of D'Oench, Duhme.

Due to the flexibility of the federal common law D'Oench doctrine, the FDIC was well protected from virtually any defense to the repayment of an outstanding obligation not preserved in the bank’s records. Although the FDIC almost always prevailed before the 1980s, there was little reason to question the doctrine because bank failures were few. Therefore, the courts did not decide many substantive issues relating to the federal common law D'Oench doctrine until the savings and loan crisis of the 1980s.

In response to the savings and loan crisis, Congress enacted FIRREA. In the late 1970s, high interest rates and record inflation seriously damaged many savings and loans, which were stuck with lower yielding mortgages. In 1982, to help combat the problem, the Garn-St. Germain Depository Institutions Act was signed into law, allowing thrifts to invest in a variety of high return investments. Eventually,


63. See Atkinson, supra note 55, at 1347; Markworth, supra note 55, at 443 (discussing the court’s utilization of both the statute and the ever-expanding federal common law D'Oench doctrine); see also In re NBW Commercial Paper Litig., 826 F. Supp. 1448, 1460-61 (D.D.C. 1992) (describing the D'Oench federal common law doctrine as a “safety net,” which remains to cover situations that fall through the cracks of the statute).

64. See infra notes 221-33 and accompanying text; see, e.g., FDIC v. First Nat’l Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978) (expanding the federal common law D'Oench doctrine to the FDIC when it acts as a receiver).

65. See generally MACEY & MILLER, supra note 6, at 24-25 (commenting on the tranquil period in the banking industry between 1934 and 1980).


risky investments, poor management, fraud and insufficient regulation led to a record number of thrift failures.  

The passage of FIRREA greatly increased the FDIC’s abilities to deal with the problems of an insolvent banking institution. FIRREA was passed with the intention of giving the FDIC the “power to take all actions necessary to resolve the problems posed by a financial institution in default.” FIRREA extended § 1823(e) to cases in which the FDIC acquires an asset as receiver, to the Resolution Trust Corporation (“RTC”) in both receivership and corporate capacities, and to bridge banks. This tripled the potential use of the D’Oench doctrine and § 1823(e). Both the statute and the D’Oench doctrine became available when disputes arose out of any of the following situations: “(1) a failed S&L (by the RTC); (2) a failed commercial bank (by the FDIC-receiver); and, (3) a commercial bank in financial trouble (by the FDIC in its corporate capacity).” FIRREA not only retained the § 1823(e) sword power, but, with the inclusion of § 1821(d)(9)(A), provided shield protection to the FDIC under § 1823(e).

70. See Josel, supra note 69, at S341; see also Bailey, supra note 62, at 1263 (explaining how the expanded investment power of thrifts and the easing of capital requirements coupled with poor management led to the thrift crisis); Tsimbinos, supra note 68, at 453 (discussing how the new legislation allowed savings and loans to invest in more speculative ventures which the regulators did not have sufficient expertise to monitor).


73. See id. § 1441a(b)(4)(A).

74. See id. § 1821(n)(4)(I).

75. See Galves, supra note 66, at 1359-60 (noting that, as a result of FIRREA, the availability of the federal common law D’Oench doctrine and § 1823(e) for use in litigation tripled).

76. Galves, supra note 65, at 1360. The Resolution Trust Company (“RTC”) replaced the FSLIC, which was abolished in 1989 by FIRREA. See MACEY & MILLER, supra note 6, at 67-68. When the FDIC acts in its corporate capacity it is acting as an insurer: it pays the insured depositors and is then "subrogated" to the rights of the original depositors. Thereafter, the FDIC, along with any other creditors, has a claim against the receivership. As a receiver, the FDIC marshals the insolvent institution’s assets and distributes them to its creditors including the FDIC. See id. at 623.


(9) Agreement as basis of claim
(A) Requirements
   Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.
(B) Exception to contemporaneous execution requirement
   Notwithstanding section 1823(e)(2) [now 12 U.S.C. § 1823(e)(1)(B)] of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such
Due, in large part, to the thrift crisis, the 1980s saw a substantial increase in litigation involving the FDIC.78 The FDIC’s successful employment of the D’Oench doctrine and § 1823(e) during this period led to calls for either legislative reform or the overruling of the D’Oench doctrine.79 However, if the Supreme Court were to hold the D’Oench doctrine to have been abrogated by § 1823(e), the FDIC would become vulnerable to many claims and defenses that are currently barred. Currently co-existing together, the federal common law D’Oench doctrine and § 1823(e) protect the FDIC from a plethora of affirmative claims and defenses. The D’Oench doctrine and § 1823(e) not only protect the FDIC from contract claims and defenses, but also protect the FDIC from affirmative claims and defenses sounding in tort.

Currently, the D’Oench doctrine and § 1823(e) bar at least twenty-one contract defenses, including side agreements, defects in contract formation, and alterations after contract formation.80 The statute and its common-law counterpart also bar counterclaims recast as tort claims against the FDIC.81 Such tort claims have been termed “artful pleading.”

80. See Atkinson, supra note 54, at 1365. D’Oench, in its various forms, has been used to bar claims or defenses grounded in defects in contract formation, such as fraudulent inducement (by act or omission, including acts of parties other than the bank), unconscionability, mistake, nondelivery, failure or want of consideration, usury or undue influence; claims that contractual rights have been created by the acts of the bank, such as oral contracts evidenced by performance or under theories of promissory estoppel or unjust enrichment; and claims that the contract has been varied after formation, by means of oral agreements, side agreements, waiver, estoppel, course of conduct or custom, release of liability, accord and satisfaction, or other settlement agreement.

81. See Motorcity I, 83 F.3d 1317, 1336 (11th Cir. 1996) (stating that “the D’Oench doctrine bars all claims—even those sounding in tort—that are ‘sufficiently intertwined with regular banking transactions, such that exclusion of the alleged “secret agreement” accords with the underlying policies of D’Oench.’” (quoting OPS Shopping Ctr. v. FDIC, 992 F.2d 306, 310 (11th Cir. 1993)).
and the D'Oench doctrine and § 1823(e) bar at least seven such claims against the FDIC. Impressively, the D'Oench doctrine will even bar certain statutory tort claims and defenses.

In some instances, both the common law and the statute provide protection to the FDIC. However, in other instances the D'Oench common law doctrine is used where the stricter statute is inapplicable. Because the D'Oench doctrine is broader and more flexible than the statute, it almost always allows the FDIC to prevail when it is asserted.

Although this may appear too harsh a result for the debtors of insolvent banking institutions, the public policy of protecting the FDIC and its depositors is as valid today as it was fifty years ago. The depositors of a failed institution still need the protection of the FDIC and the FDIC still needs to be able to rely on the official records of a failed institution. Without evidence that Congress intended to supplant D'Oench with § 1823(e), courts should not hold the D'Oench doctrine to be abrogated.

Courts wrestling with the issue, however, have reached different conclusions.

82. See Atkinson, supra note 54, at 1371-72 (noting that the D'Oench doctrine and § 1823(e) bar tort claims such as "conversion, fraud or negligent misrepresentation, unjust enrichment, negligence, breach of a fiduciary duty, or other business tort") (internal citations omitted).
83. See id. at 1372-74 (remarking how the D'Oench doctrine and § 1823(e) bar statutory tort claims and defenses under the Securities Act of 1933, the Securities Exchange Act of 1934, ERISA, RICO, state statutes related to consumer fraud or deceptive trade practices, state securities law claims, and even "Little RICO" statutes).
84. See RTC v. Wilson, 851 F. Supp. 141 (D.N.J. 1994) (finding the D'Oench doctrine and § 1823(e) to bar a claim under the New Jersey Racketeering Act, a fraud in the inducement defense, and counterclaims for breach of duty of fair dealing and good faith, fraud, deception, misrepresentation, conspiracy, and gross negligence); In re Beitzell & Co. v. FDIC, 163 B.R. 637 (Bankr. D.C. 1993) (holding that both the federal common law D'Oench doctrine and its statutory counterpart, § 1823(e), barred a claim of breach of fiduciary duty based upon a duty which was not implied by law from the face of the contract).
85. See Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 31-32 (D.N.H. 1993) (finding § 1823(e) inapplicable, but still barring contract claims, misrepresentation claims, and equitable claims due to the policies underlying the D'Oench doctrine).
86. See In re NBW Commercial Paper Litig. v. FDIC, 826 F. Supp. 1448, 1466 (D.D.C. 1992) ("D'Oench remains to cover situations which fall through the cracks.").
87. See id. (stating that "D'Oench can best be described as a safety net"). In fact, between 1989 and 1995, out of the 5,145 instances in which the D'Oench doctrine was invoked the FDIC prevailed in 97 percent of the cases that went to final judgment. See D'Oench Duhme Reform Act, supra note 77, at 2.
88. See infra note 210 and accompanying text.
III. CREATION OF THE CIRCUIT SPLIT

A. O’Melveny & Myers v. FDIC

The Supreme Court’s decision in *O’Melveny* 99 was the decision relied on by both the D.C. and Eighth Circuits in their decisions holding the D’Oench doctrine to be supplanted by § 1823(e). 99 In *O’Melveny*, the FDIC stepped in as receiver for an insolvent bank. 91 After becoming receiver for the failed bank, the FDIC started to receive demands for refunds from investors who alleged that they had been deceived by the failed bank in relation to two real estate deals. 92 In response to these demands, the FDIC rescinded the two real estate investments in order to repay the disgruntled investors. 93 The FDIC then sued the law firm which handled those transactions, claiming malpractice and breach of fiduciary duty. 94 The issue in *O’Melveny* was whether California or federal common law was applicable in determining if the knowledge of disreputable bank officers would be imputed to the failed bank itself. 95 If California law was applicable, the ancillary issue of whether such knowledge would be imputed to the FDIC when it sues as receiver would arise. 96 The Supreme Court declined to create a new federal common law rule barring such imputation, holding that California law was controlling and remanded the case to the Ninth Circuit. 97

The Court stated its reluctance to “contradict an explicit federal statutory provision,” or to “adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.” 98 The Court then stated “[i]nclusio unius, exclusio alterius,” 99 holding that the FDIC stepped into the shoes of the

89. 512 U.S. 79 (1994).
90. See DiVall, 69 F.3d 1398 (8th Cir. 1995); Murphy v. FDIC, 61 F.3d 34 (D.C. Cir. 1995).
91. See *O’Melveny*, 512 U.S. at 82 n.1. In 1986 the Federal Savings and Loan Insurance Corporation (“FSLIC”) was appointed conservator of the failed bank and then appointed receiver in June, 1988. After FIRREA abolished the FSLIC, the FDIC, manager of the FSLIC fund, was substituted as receiver. See id.
92. See id. at 81-82.
93. See id. at 82.
94. See id.
95. See id. at 83.
96. See id.
97. See id. at 89.
98. Id. at 85.
99. Id. at 86. Inclusio unius, exclusio alterius means: “[t]he inclusion of one is the exclusion of another . . . [t]his doctrine decrees that where law expressly describes particular situation to
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failed bank. Accordingly, the FDIC was vulnerable to any defense that the bank would be vulnerable to under state law, unless FIRREA provided otherwise. Since FIRREA was silent on this issue, the Court reasoned that if it created additional federal common law exceptions it would be altering the statutory scheme, not supplementing it. Lastly, the Supreme Court found no “significant conflict between some federal policy or interest and the use of state law,” and therefore state law could be applied.

Significantly, there is no mention of the D’Oench doctrine in the O’Melveny decision. In O’Melveny, while the Court refused to create a new federal common law rule, it did not refuse to apply the D’Oench doctrine to the situation. Moreover, the Court had no occasion to discuss statutory abrogation of any long-standing federal common law rule, because there was no such issue in the case. Nonetheless, both the D.C. and Eighth Circuits subsequently found O’Melveny dispositive of the issue as to the abrogation of the D’Oench doctrine by § 1823(e).

B. Murphy v. FDIC

In Murphy v. FDIC, the appellee purchased one partnership unit in the Orchid Island Associates Limited Partnership, which was developing a Golf and Beach Club near Vero Beach, Florida. Southeast Bank, N.A. was the primary lender for the project and made several loans to the partnership. When financing for the project fell through, Orchid defaulted on its outstanding loans and the bank foreclosed on the


which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded.” BLACK’S LAW DICTIONARY 763 (6th ed. 1990).

100. See O’Melveny, 512 U.S. at 81-82.

101. See id. In coming to this conclusion the court looked at § 1821(d)(2)(A)(i) which states that “the [FDIC] shall, . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . .” Id. at 86.

102. See id. at 87.

103. Id.

104. See id. The FDIC argued its fund would be depleted if state laws of imputation were applied. The court rejected this argument and stated, “there is no federal policy that the [FDIC] should always win.” Id. at 88.

105. See id. at 89. The Supreme Court concluded “that this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted.” Id.

106. See id. at 79.

107. See Bailey, supra note 62, at 1269-70 (noting that the Eleventh Circuit recognized that the continued viability of an established common law doctrine was not at issue in O’Melveny).

108. See DiVall, 69 F.3d 1398 (8th Cir. 1995); Murphy v. FDIC, 61 F.3d 34 (D.C. Cir. 1995).

109. 61 F.3d 34 (D.C. Cir. 1995).

110. See id. at 35. Bruce Murphy paid $515,000 for the “partnership unit.” See id.

111. See id. The loans totaled approximately $50 million dollars. See id.
project. Murphy filed his suit after the bank had become insolvent and after the FDIC had taken over as receiver. In order for Murphy to survive a motion for summary judgment he had to bypass the statutory language of § 1823(e) and the D'Oench doctrine. In reaching its decision, the D.C. Circuit found that § 1823(e) did not bar Murphy’s claim because the FDIC failed to show that a specific asset would be diminished. The next hurdle Murphy had to overcome was the D'Oench doctrine. The D'Oench doctrine would bar Murphy’s claim that the bank, by its actions, assumed the liabilities of a joint venturer, because the written agreements explicitly stated that the bank “shall not be considered a shareholder, joint venturer or partner of the Borrower.” The D.C. Circuit, however, agreed with Murphy that the Supreme Court’s decision in O’Melveny set forth some principles which “ineluctably” lead to the conclusion that the D'Oench doctrine had been preempted in 1989 with the passage of FIRREA. The court concluded, citing to O’Melveny’s use of the canon of construction, “[i]nclusio unius, exclusio alterius,” that “the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute—of which the D'Oench doctrine is one.”

112. See id.
113. See id.
114. See id.
115. See id. at 34-36. The district court granted summary judgment against Murphy reasoning that the statute barred his claims. See id. at 36.
116. See id. at 38; see also Atkinson, supra note 54, at 1377-93 (explaining some of the different asset defenses available to a debtor).
117. Murphy, 61 F.3d at 36.
118. See id. at 38. The author of this Note would like to point out that the D.C. Circuit continuously used the term “preemption” when discussing whether § 1823(e) supplanted the federal common law D’Oench doctrine. The term “preemption” is defined as a “[d]ctrine adopted by [the] U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.” BLACK’S LAW DICTIONARY 1177 (6th ed. 1990); see also WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 281-86 (8th ed. 1996) (discussing preemption of state regulations by federal statutes). The author of this Note believes the proper term is “abrogation,” which is defined as “[t]he destruction or annulment of a former law, by an act of the legislative power, by constitutional authority, or by usage.” BLACK’S LAW DICTIONARY 8 (6th ed. 1990).
120. Murphy, 61 F.3d at 39.
In coming to the conclusion that the D'Oench doctrine had been supplanted by § 1823(e) the court noted that O'Melveny did not directly mention the D'Oench doctrine in its opinion. However, the court reasoned that a Supreme Court decision should be read generally and is not limited to its specific facts. Therefore, the D.C. Circuit concluded that since both parties in O'Melveny briefed and argued that the D'Oench doctrine would be affected, the Supreme Court intended to hold the D'Oench doctrine abrogated by § 1823(e) by expressly including § 1821(d)(9) in its decision because it was one of the "D'Oench-like statutory provisions" in FIRREA. What is troubling about the court’s decision is that one year before Murphy, in United States v. Texas, the Supreme Court explicitly dealt with the issue of the statutory abrogation of a long-standing federal common law rule. The author of this Note finds it disturbing that United States v. Texas was not raised in Murphy. If the principles of United States v. Texas had been raised, it seems that the outcome of Murphy would have been different.

C. DiVall Insured Income Fund Ltd. Partnership v. Boatmen’s First National Bank

The next circuit court to deal with the issue of preemption was the Eighth Circuit in DiVall Insured Income Fund Ltd. Partnership v. Boatmen’s First National Bank ("DiVall"). In DiVall, Boatmen’s National Bank had acquired the note at issue in a purchase and assumption agreement. DiVall filed a declaratory action claiming that the note was unenforceable due to lack of consideration. At issue in DiVall was whether the federal holder in due course doctrine and/or the D’Oench doctrine were applicable or whether the state holder in due course doctrine should be applied. In reaching its conclusion, the court relied heavily on the O’Melveny decision. In holding D’Oench to be preempted the court stated:

121. See id.
122. See id. at 39-40.
123. See id. at 39.
125. 69 F.3d 1398 (8th Cir. 1995).
126. See id. at 1400. In DiVall, the court stated, “[i]n a typical purchase and assumption agreement, the FDIC arranges for the sale of the bulk of a failed bank’s assets and liabilities to a healthy bank.” Id. at 1400 n.3 (citing Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir. 1982)).
127. See id.
128. See id.
129. See id. at 1401-03.
O'Melveny states that federal courts may not invoke federal common law to "supplement" the specific exceptions provided by FIRREA. When Congress enacted the comprehensive regulatory framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. Accordingly, we hold that O'Melveny removes the federal common law D'Oench Duhme doctrine and the federal holder in due course doctrine as separate bars to DiVall's defense.\textsuperscript{130}

The court then looked to FIRREA to see if FIRREA conferred holder in due course status to the FDIC.\textsuperscript{131} Because no specific provision in FIRREA was applicable, the case was remanded to the district court to determine whether failure of consideration was a valid defense.\textsuperscript{132}

\textbf{D. Atherton v. FDIC}\\

When the Supreme Court vacated and remanded the Eleventh Circuit's decision in Motorcity I, it instructed the Eleventh Circuit to take Atherton v. FDIC\textsuperscript{3} into consideration.\textsuperscript{133} Although one might think that Atherton v. FDIC\textsuperscript{3} would provide an express rejection of the D'Oench doctrine, it did not. In fact, D'Oench, Duhme was never even mentioned in the decision.

In Atherton, the RTC as receiver sued the officers and directors of City Federal Savings Bank, a federal savings association, for gross negligence, simple negligence, and breaches of fiduciary duty in relation to bad development, construction, and business acquisition loans.\textsuperscript{134} The district court granted petitioner's motion to dismiss on every claim, with the exception of the gross negligence claim, pointing to 12 U.S.C. § 1821(k),\textsuperscript{135} which provides a gross negligence standard of care in a civil suit concerning the personal liability of an officer or director of a federally insured bank.\textsuperscript{136} The Third Circuit reversed, concluding that since City Federal was a federally chartered savings institution, the RTC was free to assert any claim "for negligence or breach of fiduciary duty

\begin{itemize}
  \item \textsuperscript{130} Id. at 1402.
  \item \textsuperscript{131} See id. at 1403.
  \item \textsuperscript{132} See id. at 1404.
  \item \textsuperscript{133} See Hess v. FDIC, 519 U.S. 1087 (1997).
  \item \textsuperscript{134} 519 U.S. 231 (1997).
  \item \textsuperscript{135} See id. at 216. The RTC was eventually replaced by the FDIC as receiver. See id. at 213.
  \item \textsuperscript{136} See id. at 216. Section 1821(k) is also part of FIRREA. See 12 U.S.C. § 1821(k) (1994).
  \item \textsuperscript{137} See Atherton, 117 S. Ct. at 216.
\end{itemize}
available as a matter of federal common law.” Therefore, the Third Circuit read the statute as being supplemented by federal common law for a federally chartered bank and by state law for a state chartered bank. The Supreme Court disagreed.

In reaching its decision, the Supreme Court recognized that at one time there were federal common law corporate governance standards. However, the Court quickly concluded that these standards did not survive Erie R.R. Co. v. Tompkins and that the federal statute could not be supplemented by federal common law. The Supreme Court concluded by stating that state law sets the standard of conduct, while the federal statute merely sets a minimum standard of “gross negligence.”

When looking at Atherton’s relation to the survival of D’Oench, Duhme it is important to note that Erie was decided in 1938, and that D’Oench, Duhme was decided in 1942. Therefore, the Supreme Court is unlikely to hold that D’Oench, Duhme did not survive Erie because it was decided four years after Erie. Second, as with the O’Melveny decision, there is no mention of the D’Oench doctrine in the Atherton opinion. Finally, and most significantly, in Atherton the FDIC was in a completely offensive position. The FDIC brought claims of gross negligence, simple negligence, and breaches of fiduciary duty against the officers and directors of City Federal. In D’Oench, Duhme, on the other hand, the FDIC was trying to collect on an outstanding obligation; the public policy of protecting the depositors of a failed institution was essential to the Court’s decision protecting the FDIC from a secret side agreement that was not in the bank’s records. When the D’Oench
doctrine is used to protect the FDIC from either an affirmative claim or
defense relating to a side agreement not in the bank’s records, the need
to rely on the written records of a failed institution is greater than when
it is acting in a completely offensive posture. When the FDIC’s posi-
tion is an offensive one, such as in Atherton, the public policy behind
the D’Oench doctrine is weakened because there is less of a need to rely
on the written records of the failed institution.

E. Ledo Financial Corp. v. Summers

Before discussing the Eleventh Circuit’s decisions in Motorcity I
and Motorcity II, it is important to analyze the Ninth Circuit’s decision
in Ledo Financial Corp. v. Summers. In Ledo, Ledo Financial Corpo-
ration (“LFC”) claimed to have orally agreed to loan Sun Savings and
Loan (“Sun”) $500,000 for ten days with no interest payments. LFC
claimed that Sun purchased 33,400 shares of Sun stock on behalf of
LFC, which was used to repay the loan. LFC filed suit, asserting state
securities claims, RICO violations, fraud, and constructive trust.
After certain procedural issues were resolved, the FDIC moved for summary
judgment, arguing that the only remaining claim, the fraud claim, was
barred by the D’Oench doctrine because it was undocumented. The
district court agreed with the FDIC and barred Ledo’s fraud claim.
The Ninth Circuit Court of Appeals, however, reached a different con-
clusion.

The Ninth Circuit gave a brief description and history of the
D’Oench doctrine and stated that if it were not for O’Melveny and Ath-
erton, it would apply the D’Oench doctrine to this case. The court
gave a summary of both cases and then concluded that because the
FDIC is “simply” acting as a receiver for Sun, there is no federal inter-
est in applying the common law rule. The court noted that the FDIC
“is not pursuing the interest of the United States . . . has not itself ac-

151. See Markworth, supra note 55, at 463 (noting that when the FDIC is in an offensive role
the need for protection is lessened).
152. See id.
153. See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 825 (9th Cir. 1997).
154. See id. at 827.
155. See id.
156. See id.
157. See id.
158. See id.
159. See id. at 826.
160. See id. at 828.
161. See id. at 829.
quired the note . . . [and] that simply because a bank is federally insured or federally chartered does not justify application of a common law doctrine." The Ninth Circuit cited to Atherton to support these conclusions. However, the court also acknowledged that it had not decided the issue of the statutory abrogation of the D'Oench doctrine. Instead, it held that it would be inappropriate to apply federal common law to the FDIC receiver.

The court's analysis may be considered incorrect for a number of reasons. First, in O'Melveny, the Court refused to create a new federal common law rule and did not refuse to apply the D'Oench doctrine to the situation. Second, in Atherton the Court began by stating that federal common law corporate governance standards did not survive Erie. Because D'Oench, Duhme postdates Erie, the D'Oench doctrine should still be considered good law until the Supreme Court explicitly overrules it. In Atherton, since federal common law corporate governance standards did not survive Erie, the Court was in a similar position to the one it was in O'Melveny. Thus, the Court only decided not to create a new federal common law rule when the FDIC is acting as receiver. It did not refuse to apply a long standing and accepted common law rule to the FDIC as receiver. Therefore, the Ninth Circuit should have agreed with the Eleventh Circuit and held that its past precedent dealing with the D'Oench doctrine was still applicable. By doing so, the Ninth Circuit would have recognized the limited holdings of O'Melveny and Atherton, and would also have provided the FDIC with the added protection it acquires when the doctrine is applied.

162. Id.
163. See id. "The federal interests involved in this case are not more substantial than the federal interests involved in O'Melveny and Atherton." Id.
164. See id. at n.2.
165. See id.
166. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994). "We conclude that this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." Id.
168. See Motorcity II, 120 F.3d 1140, 1143 (11th Cir. 1997).
169. See Atherton, 519 U.S. at 225.

[The FDIC is acting only as a receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer ... we can find no significant conflict with, or threat to, a federal interest. The federal need is far weaker than was present in what the Court has called the "few and restricted instances," in which this Court has created a federal common law.

Id. (citation omitted) (emphasis added).

170. This proposition is further supported by the fact that Congress extended FIRREA to the FDIC when it acts in its receivership capacity. See 12 U.S.C. § 1823(e) (1994).

A. Motorcity I

When the Eleventh Circuit was deciding Motorcity I, both the D.C. and Eighth Circuits had already held the D'Oench doctrine to have been abrogated by FIRREA. The Eleventh Circuit, however, in a well-reasoned opinion, held the D'Oench doctrine not to have been abrogated by § 1823(e).

In Motorcity I, the owners of a car dealership ("Motorcity") negotiated a floor plan financing agreement with Southeast Bank N.A. ("Southeast"). Under the agreement, the loan was to be repaid with the proceeds from the sale of each vehicle. Motorcity alleged in its complaint that Motorcity investors had "orally informed" Southeast that the group lacked experience with running auto dealerships and were going to be absentee owners. It was further alleged that Southeast "orally assured" Motorcity that they were experienced in floor plan financing and would watch for "out-of-trust" sales.

At the heart of the controversy between Motorcity and Southeast was the floor plan financing agreement which provided that Southeast had retained the right to audit Motorcity's records. Through these audits Southeast discovered a series of "out-of-trust" sales which the bank failed to disclose to Motorcity even though summary audit reports were provided to Motorcity. When Motorcity became aware that $400,000 was "out-of-trust," Southeast was instantly notified. Imme-

171. See Motorcity I, 83 F.3d 1317, 1327 (11th Cir. 1995) (noting that both the D.C. and Eighth Circuits had held the D'Oench doctrine to be preempted by § 1823(e)).
172. See id.
173. See id. at 1322. The appellants in both Motorcity I and II were Motorcity of Jacksonville, Ltd. (a limited partnership), Motorcity of Jacksonville, Inc. (the limited partnership's general partner), and David S. Hess (president and a shareholder of Motorcity of Jacksonville, Inc.). For the purposes of its decision, the Eleventh Circuit collectively referred to the parties as "Motorcity." See id. at n.1.
174. See id. at 1322.
175. See id.
176. See id.
177. See id.
178. See id.
179. See id. An "out-of-trust" sale occurs when a dealership fails to use proceeds from the sale of a vehicle to repay the loan designated for that vehicle. See id.
180. See id.
diately thereafter, Southeast demanded payment, which Motorcity was unable to provide. The bank then took possession of Motorcity’s collateral, including the dealership and $375,000 in certificates of deposit. All of Motorcity’s loans were repaid to Southeast by April 1990.

Motorcity originally sued Southeast in state court for breach of fiduciary duty, breach of oral contract, and negligence. In September 1991, Southeast became insolvent and the FDIC was appointed receiver. The FDIC then removed the action to federal court.

In the district court, Motorcity amended its complaint so it contained only the breach of written contract claim. The district court dismissed the suit, reasoning that Southeast only had a right, and not a duty, to audit Motorcity. It further concluded that both D’Oench and § 1823(e) barred any claim for breach of oral contract. Lastly, the D’Oench doctrine was held to foreclose Motorcity’s putative tort claims. Consequently, Motorcity moved for a rehearing and for leave to amend its complaint to add negligence and breach of fiduciary duty claims. These motions were denied because the district court stated that the D’Oench doctrine barred “claims recast as tort actions by ‘artful pleading.”

On appeal, a panel of the Eleventh Circuit held the state law tort claims to be free standing torts and not barred by the D’Oench doctrine. The FDIC petitioned the court for an en banc hearing, which was granted, thereby vacating the panel opinion. The Eleventh Circuit subsequently reviewed de novo the district court’s ruling that the tort claims were barred by the D’Oench doctrine and § 1823(e).

The first and most important argument made by Motorcity was that the D’Oench doctrine was abrogated by § 1823(e). Motorcity made
this argument because it repaid its loan to Southeast before the FDIC was appointed as receiver.\textsuperscript{196} If the D'Oench doctrine was found supplanted by § 1823(e), Motorcity was prepared to argue that the statute was inapplicable because "there is no longer any specific asset to which the alleged oral agreements relate."\textsuperscript{197}

The Eleventh Circuit began its analysis with a brief discussion of both pre and post \textit{Erie} federal common law.\textsuperscript{198} The court noted that the Supreme Court has only recognized limited areas where federal common law is needed.\textsuperscript{199} It went on to state that federal common law is used "to protect certain 'uniquely federal interests.'"\textsuperscript{200} The court pointed out that the original \textit{D'Oench, Duhme} case itself was a situation where a "uniquely federal interest" existed for the creation of federal common law.\textsuperscript{201} Lastly, the Eleventh Circuit held that a court needs to look at the congressional purpose behind a statute invading the common law to decide if that statute abrogates the common law.\textsuperscript{202}

In its decision, the Eleventh Circuit explicitly stated that it disagreed with the \textit{Murphy} court's reliance on \textit{O'Melveny}.\textsuperscript{203} The Eleventh Circuit reasoned that \textit{United States v. Texas} would be a better decision to look to for guidance as to whether or not Congress intended to abrogate the D'Oench doctrine with the passage of FIRREA.\textsuperscript{204}

In \textit{United States v. Texas}, the Supreme Court was asked to decide "whether Congress intended the Debt Collection Act of 1982 to abrogate the United States' federal common law right to collect prejudgment interest on debts owed to it by the States."\textsuperscript{205} The Court held that there is a presumption favoring a long-established federal common law unless congressional intent to the contrary is evident.\textsuperscript{206} The Court then further stated, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."\textsuperscript{207} Applying these principles, the Supreme Court found that Congress did not

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\textsuperscript{196} See id. at 1322.
\textsuperscript{197} Id. at 1334. This argument is one commonly used by one opposing against the applicability of § 1823(e). The "asset defense" will be discussed in Part V of this Note \textit{infra}, notes 245-71.
\textsuperscript{198} See id. at 1327-28.
\textsuperscript{199} See id. at 1327.
\textsuperscript{200} Id. at 1328.
\textsuperscript{201} See id.
\textsuperscript{202} See id. at 1329.
\textsuperscript{203} See id. at 1330.
\textsuperscript{204} See id.
\textsuperscript{205} 507 U.S. 529, 530 (1993).
\textsuperscript{206} See id. at 534.
\textsuperscript{207} Id.
\end{flushleft}
intend the Debt Collection Act of 1982 to supplant the federal common law right of prejudgment interest on debts owed by the States.208

With these principles in hand, the Eleventh Circuit then set out to decide whether it is "evident" that Congress intended to abrogate the D'Oench doctrine with FIRREA.209 The Court looked at the legislative history of both the 1950 and 1989 enactments of § 1823(e),210 finding nothing in either that indicated a congressional intent to abrogate the D'Oench doctrine with FIRREA.211 Furthermore, the Court did not read in the language of § 1823(e) any statutory purpose to abrogate the D'Oench doctrine.212 Instead, the court considered FIRREA as a recodification of the evolving common law which had survived harmoniously with the D'Oench common law doctrine for over forty years.213 The court opined that:

[v]hen Congress merely carried over the substance of the § 1823(e)(1) language ... the most reasonable reading of the congressional intent is that Congress codified parts of the evolving D'Oench common law, left the state of the law unchanged, and left in place both the statute and the federal common law D'Oench doctrine to fill in the inevitable gaps left by the statutory language.214

In accordance with the above stated reasons, the Motorcity I court failed to find any congressional intent indicating that FIRREA was to supplant the D'Oench doctrine.215

It is important to note that since the D'Oench doctrine was not held to be abrogated by FIRREA, the Eleventh Circuit did not have to decide whether the statute can be avoided by the repayment of an outstanding

208. See id. at 530.
209. See Motorcity I, 83 F.3d 1317, 1332 (11th Cir. 1995).
210. See id.
211. See id.
212. See id.
213. See id. This approach is logical. Just as the 1950 enactment of § 1823(e) may be considered a codification of the original D'Oench, Duhme case, so may FIRREA because caselaw had already expanded the protections of the statute and the common law to the FDIC receiver and bridge banks. See 12 U.S.C. § 1821(d)(9)(a) (1994); 12 U.S.C. § 1823(e) (1994); see also Bell & Murphy & Assocs. v. Interfirst Bank Gateway, 894 F.2d 750, 754 (5th Cir. 1990) (applying the D'Oench doctrine to a bridge bank); Beighley v. FDIC, 868 F.2d 776, 783 (5th Cir. 1989) (applying the D'Oench doctrine to the FDIC as receiver); FDIC v. First Nat'l Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978) (expanding the federal common law D'Oench doctrine to the FDIC as receiver).
214. Motorcity I, 83 F.3d at 1333.
215. See id. at 1333-34.
obligation before the FDIC steps in as receiver.\textsuperscript{216} The court not only seemed relieved that it did not have to decide the issue, but actually used it as further evidence that the statute was not meant to abrogate the common law. In dicta, the court stated that an absurdity would result if one could bring tort claims against the FDIC by repaying an outstanding obligation before filing suit.\textsuperscript{217} Furthermore, the court proclaimed that allowing this type of circumvention around the statute would undermine the policies behind the original \textit{D'Oench, Duhme} case.\textsuperscript{218}

By virtue of the D'Oench doctrine barring claims arising from secret side agreements that are not found in the bank's records, Motorcity argued that its tort claims were "free standing" torts and not related to the floor plan financing agreement.\textsuperscript{219} The court disallowed this argument and held that the oral agreement was so close to a regular banking transaction "such that exclusion of the alleged 'secret agreement' accords with the underlying policies of \textit{D'Oench}."\textsuperscript{220} Furthermore, because this claim arose out of an agreement which was likely to mislead the FDIC, it was barred by the D'Oench doctrine.\textsuperscript{221}

By holding the D'Oench doctrine not to be supplanted by FIRREA, the Eleventh Circuit created a split between itself and the D.C. and Eighth Circuits conjointly. On January 21, 1997, the Supreme Court vacated and remanded the Eleventh Circuit's decision "for further consideration in light of \textit{Atherton v. FDIC}."\textsuperscript{222} Although this may have seemed like the death of the D'Oench doctrine, the facts proved otherwise.

\textbf{B. Motorcity II}

On August 20, 1997, the Eleventh Circuit reinstated its prior decision in \textit{Motorcity I}.\textsuperscript{223} At the onset, the court indicated that the Fourth Circuit had recently held the D'Oench doctrine not to have been abro-

\begin{itemize}
\item \textsuperscript{216} See \textit{id.} at 1334. By repaying its loan to Southeast before the FDIC stepped in, Motorcity argued that there was no impairment of the FDIC's interest in a specific asset, thereby rendering the statute inapplicable. The asset defense will be discussed \textit{infra} notes 251-67 and accompanying text.
\item \textsuperscript{217} See \textit{id.} at 1335.
\item \textsuperscript{218} See \textit{id.}
\item \textsuperscript{219} See \textit{id.} at 1336.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} See \textit{id.} at 1336-37. The final argument asserted by Motorcity was based on state law. Because the D'Oench doctrine acts as a bar to oral agreements or representations, these state law claims were analyzed as "stripping away all reliance on oral agreements" \textit{Id.} at 1345. The court concluded that neither a fiduciary duty nor a negligence claim was viable after "stripping away" any reliance on oral agreements or representations. \textit{See id.}
\item \textsuperscript{222} Hess v. FDIC, 519 U.S. 1087 (1997).
\item \textsuperscript{223} See \textit{Motorcity II}, 120 F.3d 1140 (11th Cir. 1997).
\end{itemize}
gated by FIRREA.\textsuperscript{224} In its decision, the Eleventh Circuit quickly distinguished itself from \textit{Atherton}. The court noted that \textit{Atherton} "does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine."\textsuperscript{225} Instead, the court said that the issue in \textit{Atherton} was whether federal common law corporate governance standards survived \textit{Erie}, which they did not.\textsuperscript{226} Therefore, in order for the Eleventh Circuit to hold the D'Oench doctrine to be supplanted by § 1823(e), the Eleventh Circuit would have to overrule the Supreme Court's decision in \textit{D’Oench, Duhme}.\textsuperscript{227} Since a circuit court is bound by Supreme Court precedent, the court found that it would not be able to overrule the Supreme Court's holding.\textsuperscript{228}

Furthermore, the court found "no indications that D’Oench is ripe for overruling."\textsuperscript{229} The Eleventh Circuit noted that in the original \textit{D’Oench, Duhme} case, the Supreme Court identified one of the "‘few and restricted’" instances where a "federal interest and policy . . . warranted the creation of a federal common law rule."\textsuperscript{230} Therefore, the court stated that \textit{United States v. Texas} was the appropriate case to look to in deciding the issue at hand and held that Congress did not intend to supplant the D’Oench doctrine with FIRREA.\textsuperscript{231} Instead, the court found that Congress intended the statute to co-exist with the common law just as it had done for the previous forty years.\textsuperscript{232}

On December 18, 1997, David S. Hess petitioned the Supreme Court for certiorari.\textsuperscript{233} However, on April 27, 1998, the Supreme Court denied certiorari and preserved the circuit split.\textsuperscript{234}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{224} See \textit{id.} at 1141; see also \textit{Young v. FDIC}, 103 F.3d 1180 (4th Cir. 1997) (holding the D’Oench doctrine not to have been abrogated by FIRREA).
\item \textsuperscript{225} \textit{Motorcity II}, 120 F.3d at 1143.
\item \textsuperscript{226} See \textit{id}.
\item \textsuperscript{227} See \textit{id}.
\item \textsuperscript{228} See \textit{id}.
\item \textsuperscript{229} \textit{id}.
\item \textsuperscript{230} \textit{id}.
\item \textsuperscript{231} \textit{See id.} at 1144.
\item \textsuperscript{232} \textit{See id}.
\end{itemize}
\end{footnotesize}
V. Adhering to the Principles of United States v. Texas, and Taking the Body of D’Oench Federal Common Law and Its Interaction with § 1823(e), the Supreme Court Should Not Overrule the D’Oench Doctrine.

A. FIRREA Can be Considered an Approval of the Relationship Between the D’Oench Doctrine and § 1823(e).

FIRREA can easily be compared to the original 1950 enactment of § 1823(e), which has been considered by many courts as the codification of the D’Oench doctrine. After the original enactment of § 1823(e), the courts continued to use both the statute and the D’Oench doctrine co-extensively. Through this use of both the D’Oench federal common law and the statute, the federal common law extended the use of the D’Oench doctrine to the FSLIC, to the FDIC-receiver, to bridge banks, and to affirmative claims relating to an agreement.


236. See FDIC v. Hoover-Morris Enters., 642 F.2d 785, 787 (5th Cir. 1981) (“Apart from the protection against side agreements provided by § 1823(e), FDIC is protected under federal common law as announced in D’Oench . . . .”); In re NBW Commercial Paper Litig., 826 F. Supp. 1448, 1466 (D.D.C. 1992) (“D’Oench can best be described as a safety net; § 1823(e) and § 1821(d)(9)(A) are Congress’s attempts to codify, at least in part, the policy represented by D’Oench, but D’Oench remains to cover situations which fall through the cracks.”); FDIC v. Galloway, 613 F. Supp. 1392, 1402-03 (D. Kan. 1985) (analyzing both § 1823(e) and the D’Oench doctrine in determining whether defenses were barred against the FDIC).

237. See Lupin v. FSLIC, Nos. CIV.A.85-5896, 86-828, 86-1126, 1987 WL 9106, at *2 (E.D. La. Mar. 31, 1987) (“the common law rationale and policy enunciated in the D’Oench decision . . . survives as an independent basis for protecting both the FDIC and the FSLIC”); FSLIC v. D & D Partnerships, No. CIV.A.85-5790, 1986 WL 11755, at *1 (E.D. La. Oct 15, 1986) (utilizing the D’Oench doctrine to bar defenses against the FSLIC receiver); FSLIC v. Hsi, 657 F. Supp. 1333, 1338 (E.D. La. 1986) (applying the D’Oench doctrine to the FSLIC). The FSLIC was created in 1934. Its purpose was to insure the depositors of savings and loan institutions. The FSLIC was abolished with the enactment of FIRREA. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256 (1989). The RTC was created by FIRREA to act as receiver and conservator in place of the FSLIC. The insurer responsibilities, however, were given to the FDIC and not the RTC.

238. See FSLIC v. Two Rivers Assocs., 880 F.2d 1267, 1277 (11th Cir. 1989) (holding that the D’Oench doctrine protects the FSLIC as well as the FDIC in its capacity as a receiver); FDIC v. McClanahan, 795 F.2d 512, 516 (5th Cir. 1986) (applying the common law D’Oench doctrine to the FDIC receiver, but refusing to apply the statute).

239. See Newton v. Uniwest Fin. Corp., 967 F.2d 340, 347 (9th Cir. 1992) (applying the D’Oench doctrine to a private bank); Kilpatrick v. Riddle, 907 F.2d 1523, 1528 (5th Cir. 1990) (applying the D’Oench doctrine to a bridge bank).

Similarly, FIRREA extended the statute to the RTC, the FDIC receiver, the bridge banks, and affirmative claims against the FDIC. Therefore, FIRREA can be viewed as Congress's approval of the co-extensive use of the statute and common law. Furthermore, FIRREA can be seen as a clarification of the existing law, not as an abrogation of a long-standing common law rule. This view makes sense, through FIRREA, Congress not only carried over the same language as the original § 1823(e), but also maintained instances in which the statute can be avoided.

B. The D'Oench Doctrine is Needed to Protect the FDIC from Claims and Defenses Which Do Not Fit into the Hypersensitive Requirements of § 1823(e).

The D'Oench doctrine is based on the public policy of protecting the FDIC from side agreements not documented in the records of a bank. The main element of the D'Oench doctrine is that a party, whether innocently or not, has lent itself to a scheme or arrangement whereby the FDIC was, or was likely to be, misled. Section 1823(e), on the other hand, can be viewed more as a statute of frauds. For an "agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it . . ." to be enforceable against the FDIC, it must satisfy the four elements of the statute. One common defense to the statute is the asset defense.

In the case of Inn at Saratoga Associates v. FDIC ("Saratoga Associates"), the asset defense was raised. There, the plaintiffs sued Berkshire Bank & Trust Company ("Berkshire") alleging that Berkshire reneged on a loan. Berkshire had loaned Saratoga Associates

242. See id. § 1823(e).
243. See id. § 1821(n)(4)(I).
244. See id. § 1821(d)(9)(A).
245. See FSLIC v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991) (rejecting, generally, the argument that the D'Oench doctrine is abrogated by statute); FDIC v. Betancourt, 865 F. Supp. 1035, 1039 n.1 (S.D.N.Y. 1994) (rejecting the argument that the D'Oench doctrine is abrogated by the FDIA).
247. See Atkinson, supra note 55, at 1357-59.
249. See Atkinson, supra note 55, at 1357-59.
250. 60 F.3d 78 (2d Cir. 1995)
251. See id. at 81.
252. See id. at 79. The Inn at Saratoga Associates was a limited partnership. Monia Rynder-
$375,000; however, Saratoga Associates contended that this was an installment payment for a loan of $1.3 million.\textsuperscript{253}

Saratoga Associates sued Berkshire in state court.\textsuperscript{254} After this suit was filed, Berkshire was acquired by the Bank of New England, which was declared insolvent on January 6, 1991. Consequently, the FDIC was appointed receiver.\textsuperscript{255} The FDIC removed the case to federal district court where summary judgment was granted.\textsuperscript{256} Although the plaintiffs did produce three writings, the district court found that none of these writings satisfied the statute.\textsuperscript{257} On appeal, the plaintiffs argued that the statute was inapplicable because an identifiable asset acquired by the FDIC was not involved.\textsuperscript{258} The Second Circuit agreed with the plaintiff's argument and held that the statute's requirement of an asset was not satisfied, thereby rendering the statute inapplicable.\textsuperscript{259} Although the appeals court found the statute to be inapplicable, they still affirmed the lower court's decision, relying on the D'Oench doctrine as a bar to the plaintiff's claim.\textsuperscript{260}

The court acknowledged that the common law is not limited by the asset requirement, and in fact this requirement "undercuts" the doctrine.\textsuperscript{261} The court further stated that the D'Oench doctrine looks at "whether the agreement, at the time it was entered into, would tend to mislead the public authority."\textsuperscript{262} Because the agreement being asserted by the plaintiffs conflicted with the terms of the written loan, the court held the plaintiffs' claims to be barred by the D'Oench doctrine.\textsuperscript{263}

The Second Circuit's analysis demonstrates the significance of the D'Oench doctrine. The D'Oench doctrine is "a safety net which Congress has left to insure that the specific wording of the statute does not...

\textsuperscript{253} See id. at 80.
\textsuperscript{254} See id.
\textsuperscript{255} See id.
\textsuperscript{256} See id.
\textsuperscript{257} See id. at 81. The three writings were: the minutes of meetings of Berkshire's board of directors, the unexecuted loan commitments drafted by Berkshire, and a letter from an officer of the bank to one of the limited partners discussing the possible loan. See id.
\textsuperscript{258} See id.
\textsuperscript{259} See id. The court cited two cases to support the proposition that the statute requires an identifiable asset. See E.I. du Pont de Nemours & Co. v. FDIC, 32 F.3d 592, 597 (D.C. Cir. 1994); John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994).
\textsuperscript{260} See Saratoga Assocs., 60 F.3d at 81-82.
\textsuperscript{261} See id. at 82.
\textsuperscript{262} Id. (Quoting Brookside Assocs. v. Rifkin, 49 F.3d 490, 496 (9th Cir. 1995), which in turn quoted Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 50 (1st Cir. 1991)).
\textsuperscript{263} See Saratoga Assocs., 60 F.3d at 82.
prevent the true application of Congress’ policies.” Other circuits have agreed with the Second Circuit’s approach of utilizing the D’Oench doctrine to protect the FDIC against claims not barred by the statute. It is worthwhile to note that the Eleventh Circuit seemed relieved that it did not have to decide whether the repayment of the loan prior to filing suit negated the asset requirement of § 1823(e) or 1821(d)(9)(A), therefore, leaving the FDIC open to suit.

The use of the D’Oench doctrine as a safety net to fill in the gaps where the statute is insufficient is logical because the common law doctrine should be viewed more as a governing principle or policy, rather than as a rule. Due to the statute’s limitations, on account of its strict technical requirements, it will not always be sufficient to protect the FDIC from certain claims. This is not to say that the FDIC should always prevail. However, both the D’Oench doctrine and § 1823(e) are rooted in a policy of protecting the creditors, depositors, and insurers of a failed bank over those who could have protected themselves. Because the D’Oench doctrine is a policy based equitable estoppel principle, it seems fair that the onus be on the borrowers, who could better

265. See, e.g., Brookside Assocs. v. Rifkin, 49 F.3d 490, 495 (9th Cir. 1995) (holding that the D’Oench doctrine is not limited by the asset requirement of § 1823(e)); Jackson v. FDIC, 981 F.2d 730, 734-35 (5th Cir. 1992) (holding that since the “established purpose of the doctrine” is to protect the FDIC when it relies on the records a failed bank, the D’Oench doctrine, therefore, is not limited by the specific asset requirement); Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 49-50 (1st Cir. 1991) (per curiam) (holding that the D’Oench doctrine shields the FDIC from affirmative claims that are supported by an alleged oral agreement); Hall v. FDIC, 920 F.2d 334, 339 (6th Cir. 1990) (holding the D’Oench doctrine to be applicable “even where [the] FDIC does not have ‘an interest in an asset.’”).
266. See Motorcity I, 83 F.3d 1317, 1334 (11th Cir. 1996); see also RTC v. Dunmar Corp., 43 F.3d 587, 594-95, 597 (11th Cir. 1995) (en banc) (holding the D’Oench doctrine not to be limited by the specific asset requirement); OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306, 310 (11th Cir. 1993) (refusing to recognize the argument that the D’Oench doctrine is limited by the asset requirement).
267. See Atkinson, supra note 55, at 1356 (noting that the D’Oench doctrine is more of a principle than a rule).
268. See Kessler v. National Enters., Inc., 165 F.3d 596, 596, 598 (8th Cir. 1999) (holding that § 1823(e) only applies if there is a specific asset acquired by the FDIC and affirming its earlier decision in DiVall that the D’Oench doctrine has been supplanted by § 1823(e)).
269. See In re NBW Commercial Paper Litig., 826 F. Supp. at 1462; see also Langley v. FDIC, 484 U.S. 86, 94 (5th Cir. 1987) (“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.”).
protect themselves by getting all of the terms of their agreements in writing.\textsuperscript{270}

One must acknowledge that the D’Oench doctrine has been expanded greatly from its inception in the original 1942 case.\textsuperscript{271} However, one should also acknowledge that the protection provided by the doctrine is too important to be simply overruled by the Supreme Court. Reform of the D’Oench doctrine is better left to the legislative branch, since a worthy argument can be made that it was the legislative intent of Congress to keep the interaction of the D’Oench doctrine policies and the statutory requirements in tact.\textsuperscript{272}

C. Knowledge May Be The Key

Another reason the Eleventh Circuit’s decision is correct is that the D’Oench doctrine alone does not create injustice. Arguably, the lack of notice or knowledge of the D’Oench doctrine and its statutory counterpart should shoulder much of the blame for criticism of the doctrine.\textsuperscript{273} Thus, if we are going to say “the D’Oench doctrine applies where the only element of fault on the part of the borrower was his or her failure to reduce the agreement to writing,”\textsuperscript{274} we should at least make the borrower aware of the rule.

One proposal which is worthy of attention has been advocated by Professor Fred Galves.\textsuperscript{275} His approach involves two steps.\textsuperscript{276} The first step in his proposal requires a bank to provide a borrower or creditor with a “§ 1823(e) Disclosure Form.”\textsuperscript{277} This form would notify the creditor or borrower that any “side agreement” not in the bank’s records will be unenforceable against the FDIC if the bank fails.\textsuperscript{278}

\textsuperscript{270} See Langley, 484 U.S. at 94.
\textsuperscript{271} See Galves, supra note 66, at 1350-51 (providing a discussion of the expansion of the D’Oench doctrine from borrowers who participated in fraudulent schemes, to situations where the FDIC has knowledge of the “secret” side agreement, to instances where the bank commits fraud against an innocent borrower, and even to creditors, specifically a roofer, who sought payment of a contract).
\textsuperscript{272} See supra notes 205-17 and accompanying text.
\textsuperscript{273} The counter-argument is that many of the people who feel the brunt of the statute and its common law counterpart are represented by an attorney. However, this does not mean that the people were aware of the statute or the body of federal common law. Furthermore, many side agreements can be made after the making of the original contract.
\textsuperscript{274} Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46, 49 (1st Cir. 1991).
\textsuperscript{275} See Galves, supra note 66, at 1405-12.
\textsuperscript{276} See id. at 1406-07.
\textsuperscript{277} See id. at 1406. A copy of this form is provided in Professor Galves’ article. See id. at app. A.
\textsuperscript{278} See id. at 1406-07.
The second step is the "§ 1823(e) Filing Form." This form would be provided to the FDIC and the institution's primary federal regulator. The filing form will give the FDIC knowledge of the agreement. Therefore, it will not only ensure that the FDIC will enforce the agreement, but will provide the information necessary for the FDIC not to be deceived by a bank that it insures. Furthermore, it will allow the borrower to not have to rely solely on the record keeping of the bank.

This system may sound costly. However, the cost of prevention could outweigh the cost to the FDIC if the D'Oench doctrine was simply held to be abrogated by statute. It also gives an innocent borrower the tools necessary to protect himself from the D'Oench doctrine or the statute acting as a bar to his claim.

VI. CONCLUSION

On February 10, 1997, the FDIC issued a policy statement claiming that it would not assert the D'Oench doctrine in post-1989 litigation. Although one might conclude that this signals the end of the D'Oench doctrine, in reality it does not. There are still many lawsuits circulating throughout the circuit courts which are related to the D'Oench doctrine. If the issue of whether the D'Oench doctrine has been abrogated is not resolved shortly, there will be disunity and even
indecisiveness among the different circuits, which will lead to absurd results.  

It is also important to realize that the FDIC is not bound by its policy statement. If the issue as to whether or not the D'Oench doctrine has been supplanted is not resolved now, the FDIC could reassert the D'Oench doctrine in the circuits that have not overruled it. Furthermore, bridge banks and other third parties (particularly the transferees of assets that the FDIC has acquired through receiverships) are not bound by this policy statement. Therefore, they can still assert the D'Oench doctrine when needed.

Simply holding the D'Oench doctrine to have been abrogated by statute is not the answer either. By holding the D'Oench doctrine to have been supplanted by statute, the Supreme Court would be eliminating an important body of federal common law principles that have existed for over fifty years. In light of its decision in United States v. Texas, the Supreme Court should hold that the principles enunciated in the original D'Oench, Duhme decision continue to exist today. Congressional intent to abrogate the doctrine is not evident and the legislature did not 'speak directly' to whether it was its intent to abrogate the D'Oench doctrine. The Supreme Court should hold this way because the D'Oench doctrine gives the FDIC the protection that is needed when the statute is insufficient, i.e., protection from the asset defense.

By holding that the D'Oench doctrine continues to exist, the Supreme Court would not only bring unity among the different circuits, but would be promoting the same public policy concerns in existence today, just as they did over fifty years ago. Furthermore, by upholding the principles of the D'Oench doctrine, the Supreme Court would be leaving it to the Legislature to deal with the problems that can occur under both the statute and the common law. This makes sense because we are dealing with a complex interaction of federal common law principles and a statute that have co-existed for many years. The Legislature is the more appropriate branch of the federal government to deal with any changes in the D'Oench doctrine and the statute, because it can

286. See Ledo Fin. Corp. v. Summers, 122 F.3d 825, 829 (9th Cir. 1997) (finding the statute inapplicable because of the lack of a specific asset, but also finding there to be no “unique federal interest” to apply the common law when the FDIC acts as a receiver for a failed institution).
288. See id.
290. See id. at 534.
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conduct the necessary hearings and studies on the effect of any changes in the law.

Jeffrey R. Gleit*

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