NOTE

THE *D'OENCH* DOCTRINE OF "COMMON-LAW EQUITABLE ESTOPPEL" AND 12 U.S.C. § 1823(e): REINTERPRETING THE FEDERAL POLICY DESIGNED TO PROTECT BANK REGULATORS TO THE DETRIMENT OF INNOCENT BORROWERS

I. INTRODUCTION

In the 1980s, Stan Baumann took out $9,750,000 in loans from Savers Federal Savings and Loan Association ("Savers Federal") to finance the development of a retail shopping center in Florida.[1] But only one year after construction began, he fell into default on the loans, could not pay his contractors, and sued Savers Federal in Florida State Court for breach of their loan agreement.[2] During the jury trial for his case, he demonstrated that Savers Federal had continuously delayed advancing his loan funds, resulting in work stoppages which ultimately led to his project's failure.[3] The jury returned a verdict in his favor, finding that Savers Federal had breached the loan agreement, and the court entered a final judgment, awarding him $15,400,000.[4]

Unfortunately for Baumann, eight months after his judgment was entered, the Office of Thrift Supervision[5] declared Savers Federal insolvent and appointed the Resolution Trust Corporation ("RTC") as its receiver.[6] The RTC then assumed control of Savers Federal's liabilities, including the judgment.[7] The RTC appealed the judgment to the Eleventh Circuit, arguing it was unenforceable under the doctrine of

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1. Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1508-09 (11th Cir. 1991).
2. *See id.*
3. *Id.* at 1509.
4. *Id.*
5. *See* 12 U.S.C. § 5581(b)(3). The Office of Thrift Supervision was an autonomous office within the U.S. Department of Treasury that was abolished in 2011 by the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Id.*; Removal of Office of Thrift Supervision Regulations, 82 Fed. Reg. 47083, 47083 (Oct. 11, 2017).
6. *Baumann*, 934 F.2d at 1510.
7. *Id.*

D'Oench, Duhme & Co. v. FDIC[8] because Baumann's trial testimony had focused on oral representations made during loan negotiations that went beyond the scope of the written loan agreement.[9] As such, by relying on an unwritten agreement as the basis for his lawsuit, Baumann had "lent himself to a scheme or arrangement whereby" the RTC "was likely to be misled."[10] The Eleventh Circuit agreed with the RTC and reversed the judgment, rejecting Baumann's argument that this issue was never raised in the trial court,[11] and holding that "a new trial, conducted in conformance with the *D'Oench* doctrine," was the only way to resolve his lawsuit.[12] The U.S. Supreme Court denied his petition for a writ of certiorari,[13] and the *D'Oench* doctrine prevailed, once again.[14]

The case of Mr. Baumann exemplifies one of many tactics that federal bank regulators, specifically the Federal Deposit Insurance Corporation ("FDIC") and the now-defunct RTC,[15] have used to deprive borrowers of failed financial institutions of their day in court.[16] The federal government has been doing this for eighty years.[17] It needs to stop.[18]

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8. 315 U.S. 447 (1942).

9. *See Baumann*, 934 F.2d at 1510, 1516.

10. *Id.* at 1517 (quoting *D'Oench,* 315 U.S. at 460).

11. *Id.* at 1512-13; *accord* Geri Zahn, Inc. v. Govaert (*In re* Geri Zahn), 25 F.3d 1539, 1545 (11th Cir. 1994) (holding that "the FDIC may assert *D'Oench* for the first time on appeal . . . notwithstanding its knowledge of an outstanding judgment at the time of takeover").

12. *Baumann*, 934 F.2d at 1518.

13. Baumann v. Savers Fed. Sav. & Loan Ass'n, 504 U.S. 908, 908 (1992).

14. *See* Chris Atkinson, Note, *Defensing the Indefensible: Exceptions to* D'Oench *and 12 U.S.C. § 1823(e)*, 63 FORDHAM L. REV. 1337, 1339, 1341 (1995) (noting that "[t]he *D'Oench* doctrine is 'expansive and perhaps startling in its severity'" and that "[t]he situations in which [*D'Oench*] may be applied are near infinite").

15. 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, 1340 n.73 (1996). The Resolution Trust Corporation ("RTC") ceased to exist in 1995 and all of its responsibilities were transferred over to the Federal Deposit Insurance Corporation ("FDIC"). 12 U.S.C. § 1441a(b)(4)(A) (2006) (repealed 2010). During its existence, the RTC had "the same powers and rights to carry out its duties with respect to institutions" as the FDIC. *Id.*

16. Galves, *supra* note 15, at 1327-31.

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

18. *See, e.g.*, Gregory S. Grossman & Daniel M. Coyle, *When a Lender Fails, a Borrower's Litigation Defenses May Be "(D'Oench) Duhmed,"* FLA. BAR J., Jan. 2013, at 19, 19-20 (discussing broad expansion of the FDIC's powers as a result of broad applications of the *D'Oench* doctrine since its creation in 1942); J. Michael Echevarria, *A Precedent Embalms a Principle: The Expansion of the* D'Oench, Duhme *Doctrine*, 43 CATHOLIC U. L. REV. 745, 812 (1994) ("Perhaps the only way to solve the inequities of *D'Oench* is for Congress to repeal, or at least amend, [§] 1823(e).").

Under current federal law, the FDIC can singlehandedly overturn a lawsuit between a borrower and a failed bank.[19] The FDIC can know, and does know, when banks are on the brink of failure.[20] Borrowers, on the other hand, are in no position to know this information.[21] The FDIC has no legal duty to notify all borrowers of an impending bank failure.[22] But it has vast rights, as receiver of federally-insured insolvent banks, to deprive borrowers of a right to judicial recourse when it later tries to collect their money.[23] Such is the inevitable result of the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1823(e).[24]

The *D'Oench* doctrine is a doctrine of common-law equitable estoppel born out of the U.S. Supreme Court's 1942 holding in *D'Oench, Duhme & Co. v. FDIC.*[25] The doctrine, together with § 1823(e),[26] operates to bar borrowers of federally-insured banks from asserting claims and defenses against the FDIC, which are based upon so-called "secret agreements" between the borrower and the bank that

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19. *See* Galves, *supra* note 15, at 1328-31 (discussing a case where RTC convinced the court to vacate borrower's four-million-dollar state court judgment against bank and enter $1.6 million judgment against borrower for the original loan).

20. *See* 12 U.S.C. § 1821(c)(4) ("[T]he [FDIC] may appoint itself as the sole conservator or receiver of any insured State depository institution."); § 1821(c)(5) ("The grounds for appointing a conservator or receiver . . . for any insured depository institution are . . . (A) . . . The institution's assets are less than the institution's obligations to its creditors and others.").

21. *Compare A Borrower's Guide to an FDIC Insured Bank Failure*, FDIC, https://www.fdic.gov/bAnk/individuAl/fAiled/borrowers/index.html (Feb. 28, 2019) (click "Communication with Borrowers during Interim Servicing" from dropdown) ("When a bank fails, the FDIC sends written notice with payment instructions and points-of-contact to the borrowers whose loans it has retained as a result of the bank closing."), *with Website Policies*, FDIC, https://www.fdic.gov/policies (Mar. 21, 2022) ("This website does not purport to authoritatively interpret current federal statutes, regulations, orders, or other federal authority, nor does it bind the FDIC or any other federal agency or entity with regard to the matters presented."). *See also Failed Bank Information for Almena State Bank, Almena, KS*, FDIC, https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/almenastate.html (last visited Apr. 23, 2022) ("[N]o advance notice is given to the public when a financial institution is closed.").

22. *See* 12 U.S.C. § 1821(d)(3)(B)(i) ("Notice requirements."). As receiver of an insured depository institution, the FDIC is required by law to "promptly publish a notice to the depository institution's creditors to present their claims" against the failed bank. *Id*. There is no legal requirement to notify all of the bank's debtors. *See, e.g.*, 12 U.S.C. § 1821(e)(10) (requiring the FDIC to notify parties to "qualified financial contract[s]," which include only certain defined contracts, by 5:00 p.m. on the business day following its appointment as receiver); *Failed Bank Information for Almena State Bank, Almena, KS*, *supra* note 21.

23. Atkinson, *supra* note 14, at 1339-41 (listing the vast situations in which *D'Oench* applies "one way or another").

24. *Id.* at 1339.

25. 315 U.S. 447 (1942); Atkinson, *supra* note 14, at 1339. *D'Oench* is pronounced "dench." Atkinson, *supra* note 14, at 1337 n.2.

26. 12 U.S.C. § 1823(e).

were not properly recorded in the bank's records.[27] The purpose of both the doctrine and the statute is to allow bank regulators "to rely on bank records to assess the worth and collectability of a bank's assets and to insulate [themselves] from secret agreements or defenses that do not appear on the face of banking instruments."[28]

Since the very beginning, *D'Oench* has always been called a doctrine of "common-law equitable estoppel."[29] However, it is neither "equitable" nor an "estoppel."[30] The doctrine was originally based on a statutory policy designed to protect the FDIC from "misrepresentation[s]," "scheme[s]," and "arrangement[s]" likely to hinder its ability to conduct bank examinations or administer the assets of failed banks.[31] But over the past eighty years, courts have interpreted the doctrine, together with § 1823(e), "to create an irrefutable presumption in favor of the FDIC that the documents in the records of the bank on the date of insolvency represent the true agreement between the parties."[32]

Prior to the 1980s, a handful of courts interpreted *D'Oench* narrowly and only applied it where the borrower knowingly entered into a "secret agreement" with the bank—such as an agreement that lacked consideration, or one that the borrower knew would contribute to a misrepresentation of the bank's assets.[33] These courts refused to apply

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27. FDIC v. Greenberg, 851 F. Supp. 15, 19 (D. Mass. 1994) ("The *D'Oench Duhme* doctrine operates to bar defenses or claims against the FDIC that are based on unrecorded or 'secret agreements' between the bank and the guarantors. The doctrine applies whether the FDIC is acting in its corporate capacity or as receiver.").

28. FDIC v. Ashmore, No. 3:13-cv-00519, 2015 U.S. Dist. LEXIS 176942, at *11 (M.D. Tenn. Oct. 21, 2015) (quoting FDIC v. Tennesseans for Tyree, 886 F.2d 771, 776 (6th Cir. 1989)).

29. *See, e.g.*, *D'Oench*, 315 U.S. at 459 ("Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced."); FDIC v. Timbalier Towing Co., 497 F. Supp. 912, 922 (N.D. Ohio 1980) ("Under the *D'Oench* equitable estoppel doctrine, the defense of fraud fails."); Brookside Assocs. v. Rifkin, 49 F.3d 490, 493 (9th Cir. 1995) ("*D'Oench* . . . is a principle of equitable estoppel."); Brandt v. FDIC (*In re* Equip. Acquisition Res., Inc.), 560 B.R. 501, 506 (Bankr. N.D. Ill. 2016) ("The *D'Oench* doctrine began as a variety of federal common law equitable estoppel . . . .").

30. Galves, *supra* note 15, at 1347-48 ("Estoppel and equity principles dictate that the *D'Oench* doctrine should apply only when the borrower, along with the bank, seeks to deceive bank examiners, because no injustice results therefrom. Unfortunately for many borrowers in the last decade, however, the *D'Oench* doctrine has become divorced from its original equitable underpinning.").

31. *See D'Oench*, 315 U.S. at 456-57, 460; *see also* 12 U.S.C. § 264(s) (1946) (transferred 1950).

32. *See* Warren L. Dennis & John R. Simon, *Litigation with the FDIC and the RTC: The Evolving* D'Oench *Doctrine Superpower Defense*, 47 BUS. LAW. (ABA) 1319, 1321-22 (1992) (quoting RSR Properties, Inc. v. FDIC 706 F. Supp. 524, 531 (W.D. Tex. 1989)).

33. FDIC v. First Nat'l Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978); FDIC v. Julius Richman, Inc., 80 F.R.D. 114, 117 (E.D.N.Y. 1978) ("[I]t is clear that the holding in *D'Oench* is

D'Oench where, for example, "[t]here was simply a failure of consideration of which the [borrower] was unaware until after the bank was closed and suit was filed by the FDIC."[34] By contrast, during the Savings and Loan Crisis in 1985, a bank could loan $12,000 to a customer to finance his stock purchase, and, unknown to the customer, could change the amount due to $60,000 and place his note in its records, and the customer would have to pay the full $60,000 if the FDIC ever acquired the note.[35] In 2013, tenants of a building in Savannah, Georgia had their fraud claims against a bank dismissed by the FDIC because they were based on a written letter from the bank's vice president, which was not "presented to, or approved by, [the bank's] board of directors" and therefore, did not satisfy § 1823(e).[36]

Currently, even when the FDIC knew or should have known about the unrecorded agreement;[37] or that the bank committed fraud against an innocent borrower;[38] or that the borrower had already obtained a judgment against the bank,[39] *D'Oench* and § 1823(e) deprive borrowers of the ability to defend themselves in a lawsuit against the FDIC.[40] In Mr. Baumann's case, he had not misrepresented Savers Federal or the RTC.[41] He had not lent himself to any "scheme" or "arrangement" likely to mislead the RTC.[42] He had already obtained a judgment against Savers Federal,[43] and the RTC could not "claim that it was unaware of [any] so-called side agreements."[44] But according to the Eleventh

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limited to those instances in which the maker of the note in question knowingly participates in or contributes to the misrepresentation as to the bank's assets."), *aff'd*, 666 F.2d 780 (2d Cir. 1981); FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974).

34. *First Nat'l Fin. Co.*, 587 F.2d at 1012.

35. *See* FDIC v. Hatmaker, 756 F.2d 34, 35-37 (6th Cir. 1985).

36. Lindley v. FDIC, 733 F.3d 1043, 1048-49, 1054-55 (11th Cir. 2013); *see* 12 U.S.C. § 1823(e)(1)(C).

37. *See* Langley v. FDIC, 484 U.S. 86, 93-94 (1987); Cadlerock III, LLC v. Wheeler, 779 F. App'x 519, 522 (10th Cir. 2019); Harrison v. Wahatoyas, LLC, 253 F.3d 552, 559 (10th Cir. 2001).

38. *Hatmaker*, 756 F.2d at 37-38; FSLIC v. Gordy, 928 F.2d 1558, 1561 (11th Cir. 1991) ("Conceding fraud on the part of [the bank], [bank regulator] argued that the doctrine precluded appellants from relying on [the bank's] misrepresentations as a basis for a defense or counterclaim.").

39. Sweeney v. RTC, 16 F.3d 1, 2-5 (1st Cir. 1994); Geri Zahn, Inc. v. Govaert (*In re* Geri Zahn), 25 F.3d 1539, 1545 (11th Cir. 1994); *see* Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1509, 1512-13 (11th Cir. 1991).

40. *See Hatmaker*, 756 F.2d at 37-38 (finding that borrower "lent himself to a deceptive scheme or arrangement" because he signed a blank note that allowed the bank to commit fraud).

41. *Baumann*, 934 F.2d at 1513-14.

42. *Id.* at 1513.

43. *Id.* at 1509.

44. *Id.* at 1513.

Circuit, Baumann had "misled" the RTC by operation of law.[45] "Although this result . . . seem[ed] unfair to [him]," the court stated, "he had the opportunity to include the entire agreement in writing."[46]

This Note argues that *D'Oench* and § 1823(e) should be interpreted consistently with the doctrine of equitable estoppel.[47] As originally developed under state common law, the doctrine of equitable estoppel requires a misrepresentation, and reasonable reliance on the misrepresentation to one's detriment.[48] The threshold inquiry for establishing an estoppel is whether a party—here, the FDIC—"reasonably relied" on the representations of another—here, the records of an insured bank—causing injury.[49]

Under current jurisprudence, the FDIC's knowledge of the unrecorded agreement between the borrower and the bank is "not relevant."[50] Under this view, the FDIC is not required to show that it actually, let alone reasonably, "relied" on the bank's records in order to prevail against the borrower.[51] In response, this Note argues that courts should not apply *D'Oench* in circumstances where the FDIC knew about the unrecorded agreement before it acquired the written asset from the bank, or could have inferred that an agreement existed through an examination of its records.[52] This Note argues that where the borrower was innocent and the agreement was altered due to fraud or a technical error committed by the bank, principles of equity, and fact-based analysis, should interpose to create a better solution.[53] Finally, this Note proposes amendments to § 1823(e) to require courts to adopt such a

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45. *Id.* at 1514, 1517 (finding Baumann "lent himself to a scheme or arrangement" by failing to include his entire agreement in writing; RTC's "knowledge" of agreement was "irrelevant" for purposes of analyzing § 1823(e)).

46. *Id.* at 1517.

47. *See infra* Part IV.

48. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 164-65 (1998); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 389 & n.42 (2008).

49. Andrew Robertson, *Reasonable Reliance in Estoppel by Conduct*, U. N.S.W. L.J., 2000, at 87, 89; *see also* Richard E. Flint, *Why* D'Oench, Duhme*? An Economic, Legal, and Philosophical Critique of a Failed Bank Policy*, 26 VAL. U. L. REV. 465, 486 n.61 (1992) ("In the strict and technical sense an equitable estoppel arises only when a misrepresentation of an existing fact prejudices another who justifiably relies upon the misrepresentation.").

50. *See, e.g.*, Langley v. FDIC, 484 U.S. 86, 94 (1987); FDIC v. Amos, 704 F. App'x 791, 795 (11th Cir. 2017) ("The FDIC's knowledge, or lack of it, is irrelevant to the *D'Oench* inquiry.").

51. KEITH R. FISHER, 2 BANKING LAW MANUAL § 16.04[3][e][ii] (3d ed. 2022) ("Although *D'Oench, Duhme* rests on the doctrine of equitable estoppel, it nevertheless departs from traditional estoppel law by eliminating any requirement of detrimental reliance.").

52. *See infra* Part IV.A–B.

53. *See infra* Part IV.A.

fact-intensive approach when the FDIC attempts to invoke the statute's protections.[54]

Part II provides an overview of the FDIC, the *D'Oench* doctrine, and § 1823(e).[55] It discusses the development and expansion of both laws as interpreted by courts over the past eighty years.[56] It concludes by showing that courts often adopt broader interpretations of *D'Oench* and § 1823(e) during periods of financial instability in the United States,[57] and they may do so once again in light of the widespread instability brought on by the COVID-19 pandemic.[58] Part III argues that *D'Oench* is not and has never really operated as a doctrine of "common-law equitable estoppel," because courts have failed to give greater weight to the factual circumstances of each case and the injustices caused to the borrower by the outcome.[59] Offering a solution, Part IV argues that courts should view *D'Oench* and § 1823(e) through the actual lens of equitable estoppel.[60] In other words, the borrower must have "participated in the misrepresentation" of the bank's assets, on which the FDIC must have "reasonably relied."[61] Section 1823(e) should be amended to reflect this interpretation.[62] In turn, these requirements will ensure that the doctrine bars only those claims and defenses in circumstances involving "secret," unrecorded agreements by which the FDIC actually was "misled."[63]

II. THE DEVELOPMENT AND EXPANSION OF *D'OENCH* AND SECTION 1823(e) OVER TIME

Part II begins by discussing the FDIC, the original *D'Oench* case, and § 1823(e).[64] Then, it discusses the roots of the *D'Oench* holding along with early interpretations of the *D'Oench* case, contrasting them with broader interpretations of *D'Oench* and § 1823(e) during the Savings and Loan Crisis of 1985–1991[65] and following the 2008

54. *See infra* Part IV.B.
55. *See infra* Part II.A.
56. *See infra* Part II.B–D.
57. *See infra* Part II.E.
58. *See infra* Part II.E.
59. *See infra* Part III.B.
60. *See infra* Part IV.
61. *See infra* Part IV.A–B.
62. *See infra* Part IV.B.
63. *See infra* Part IV.
64. *See infra* Part II.A.
65. *See infra* Part II.B–C; *see generally* Langley v. FDIC, 484 U.S. 86 (1987) (showing a landmark case decided during the Savings and Loan Crisis of 1985–1991).

financial crisis.[66] Finally, Part II discusses problems that these laws could potentially cause in the future in light of the current state of the U.S. banking industry.[67]

A. *The FDIC,* D'Oench*, and 12 U.S.C. § 1823(e)*

The FDIC is an independent federal agency that insures the deposits of U.S. banking and lending institutions, and serves as their receiver to collect their outstanding debts and to liquidate and assign their assets in the event of failure.[68] In 1933, Congress enacted the Banking Act[69] to create the FDIC as a means of restoring public confidence in the U.S. banking industry.[70] In the years leading up to the Great Depression, banks had engaged in excessive risk-taking, received insufficient funding from the federal government, and were inadequately regulated.[71] All of these defects culminated in a banking crisis in the United States, which created "panic of massive proportions" among the U.S. populace.[72] Following the FDIC's creation, the immediate crisis soon subsided.[73] For the first time since the 1920s, bank depositors throughout the country felt confident that the federal government stood behind their money.[74] But never once, since the very beginning, did borrowers ever truly feel that way.[75]

The FDIC operates in three capacities to carry out its administrative duties.[76] First, it operates as a corporation, to insure bank deposits of up to $250,000 per depositor.[77] Second, it operates as a conservator, to assist and operate troubled financial institutions.[78] Third, it operates as a

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66. *See infra* Part II.D; *see, e.g.*, C&C Inv. Props., LLC v. Trustmark Nat'l Bank, 838 F.3d 655, 657 (5th Cir. 2016).

67. *See infra* Part II.E; *see also* DAVID W. PERKINS ET AL., CONG. RSCH. SERV., R46422, COVID-19 AND THE BANKING INDUSTRY: RISKS AND POLICY RESPONSES 1 (2020).

68. *See generally About FDIC: What We Do*, FDIC, https://www.fdic.gov/about/what-we-do (May 15, 2020) (discussing FDIC's duties).

69. Banking Act of 1933, ch. 89, § 1, 48 Stat. 162.

70. 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).

71. Nicholas J. Colombo, Note, *The Flawed Explicit Safety Net: How Federally Sponsored Deposit Insurance Contributes to Financial Crisis*, 82 FORDHAM L. REV. 1237, 1243-44 (2013).

72. *Id.* at 1244.

73. *Id.*

74. *See id.* at 1244-45; Galves, *supra* note 15, at 1333-34.

75. *See* Galves, *supra* note 15, at 1333-34.

76. WARREN L. DENNIS & BARRY S. ZISMAN, BANKS AND THRIFTS: INTRODUCTION TO FDIC/RTC RECEIVERSHIP LAW § 11.02[3], at 16 (1992).

77. *About FDIC: What We Do*, *supra* note 68.

78. DENNIS & ZISMAN, *supra* note 76, § 11.02, at 14.

receiver, to marshal an insolvent bank's assets and to arrange for payment to its creditors.[79]

First developed as an equitable remedy in the English common law, "receivership" is the legal process by which an entity is appointed to administer and "receive" a failed institution's assets and to act as the representative for all parties claiming an interest in the institution's property.[80] A receiver "must act for the benefit of all the creditors of the receivership, the owner of the property, and all others claiming an interest in the property, alike."[81] In its receivership capacity, the FDIC succeeds to "all rights, titles, powers, and privileges" of a failed bank;[82] can "collect all obligations and money" owed to it;[83] and can place the failed bank into liquidation to pay off creditors and sell its remaining assets.[84]

The *D'Oench* doctrine and § 1823(e) apply to affirmative claims and defenses brought by borrowers against the FDIC in both its corporate and receivership capacity.[85] Where the FDIC assigns any failed bank's assets to a third party, that third party can also invoke the protections of *D'Oench* and § 1823(e).[86] Both also apply where the FDIC, as receiver, sells the assets to itself in its corporate capacity, through a purchase and assumption transaction.[87]

Over the course of the 20th century, Congress created two other agencies to regulate the U.S. banking industry: the Federal Savings and Loan Insurance Corporation ("FSLIC")[88] and the RTC.[89] These agencies

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79. *Id.*

80. PATRICK E. MEARS ET AL., RECEIVERSHIPS IN MICHIGAN §§ 1.1–1.2, https://www.icle.org/modules/books/chapter.aspx?chapter=1&book=2013551730&lib=creditor§ions=2&from=store (Jan. 21, 2022).

81. JAMES M. MCGEE & ROSS H. PARKER, BASIC RECEIVERSHIP LAW/CONCEPTS 2, https://www.munsch.com/portalresource/lookup/wosid/cp-base-4-6096/overrideFile.name=/basic_receivership_law_concepts_article_presentation_pdf.pdf (last visited Apr. 23, 2022).

82. 12 U.S.C. § 1821(d)(2)(A)(i).

83. *Id.* § 1821(d)(2)(B)(ii).

84. *Id.* § 1821(d)(2)(E).

85. JOHN L. DOUGLAS & JORDAN LUKE, LITIGATING WITH THE FDIC AND RTC: ASSET-BASED CLAIMS 27 (1990); *see also* 12 U.S.C. § 1823(e).

86. *See, e.g.*, Fed. Fin. Co. v. Hall, 108 F.3d 46, 49 (4th Cir. 1997), *cert. denied*, 522 U.S. 858 (1997) (holding that *D'Oench* applies to third-party assignees of the FDIC); *see also* United Cent. Bank v. Team Gowanus, LLC, No. 10 CV 3850, 2012 WL 5507307, at *15-16 (E.D.N.Y. Nov. 14, 2012) (applying § 1823(e) to third-party bank-assignee of FDIC to bar agreement with failed bank to reduce borrower's personal guarantee on loan).

87. *See* Atkinson, *supra* note 14, at 1341, 1346-47.

88. National Housing Act of 1934, ch. 847, § 402(a), 48 Stat. 1246, 1256 (repealed 1989 pursuant to 12 U.S.C. § 1821a(a)(5)(A)).

89. *See* 12 U.S.C. § 1441a(b)(1)(A) (2006) (repealed 2010).

no longer exist.[90] When they did exist, their duties were nearly identical to those of the FDIC.[91] Both could invoke, and have invoked, the protections of *D'Oench* and § 1823(e) extensively.[92] Thus, for purposes of this Note, references to the FDIC are equally applicable to both the RTC and the FSLIC when they existed.[93]

1. Origin of the *D'Oench* Doctrine: *D'Oench, Duhme & Co. v. FDIC*

The facts of *D'Oench* involved a scheme "concocted by the cooperative deceit of bank officers and customers."[94] Defendant D'Oench, Duhme & Co., a securities dealer, sold bonds to a bank, which later defaulted.[95] To help the bank cover up the past due bonds so that they would not appear among its assets, Defendant executed a series of promissory notes with the bank for no consideration,[96] the receipts for which stated: "This note is given with the understanding it will not be called for payment. All interest payments to be repaid."[97] Interest payments were made in order to keep the notes "as live paper."[98] The bonds were also charged off the bank's records.[99]

The FDIC insured the bank in 1934, after inspecting the bank's records and determining it was solvent.[100] At a later point, the FDIC,

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90. *Compare* 12 U.S.C. § 1821a(a)(5)(A) (transferring the Federal Savings and Loan Insurance Corporation's ("FSLIC") powers to the FDIC, "[e]ffective August 10, 1989"), *with* 12 U.S.C. § 1441a(m)(1) (2006) (repealed 2010) ("The [RTC] shall terminate not later than December 31, 1995 . . . [and] the Federal Deposit Insurance Corporation shall succeed the [RTC] as conservator [and] receiver.").

91. *See* 12 U.S.C. § 1441a(b)(4)(A) (2006) (repealed 2010) ("[T]he [RTC] shall have the same powers and rights to carry out its duties with respect to institutions . . . as the [FDIC]."); FDIC v. McCullough, 911 F.2d 593, 599 (11th Cir. 1990) ("[S]ince the FSLIC has parallel duties and power with respect to savings and loans as the FDIC has with banks, the federal policy should protect the FSLIC to the same extent it protects the FDIC.") (quoting FSLIC v. Two Rivers Assocs., Inc., 880 F.2d 1267, 1274-75 (11th Cir. 1989)).

92. *See, e.g.*, Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1509, 1516-18 (11th Cir. 1991) (overturning verdict for borrower in favor of RTC under the protections of *D'Oench*); *see also* FSLIC v. Gordy, 928 F.2d 1558, 1559-60 (11th Cir. 1991) (affirming judgment in favor of FSLIC under the protections of *D'Oench*).

93. *See* DENNIS & ZISMAN, *supra* note 76, § 11.03, at 21 nn.1, 3 (using "FDIC," "RTC," and "FSLIC" interchangeably).

94. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472-73 (1942) (Jackson, J., concurring).

95. *Id.* at 453-54 (majority opinion).

96. *Id.* at 454.

97. *Id.*

98. *Id.*

99. *Id.*; Echevarria, *supra* note 18, at 764.

100. *D'Oench*, 315 U.S. at 454, 460 ("Respondent was authorized to insure such a bank only on a certificate from the state authority that the bank was solvent. We assume that such a certificate

acting in its corporate capacity, loaned over $1,000,000 to the bank and acquired a $5,000 note, executed by Defendant, as part of the collateral securing the loan.[101] The FDIC then sued Defendant to collect on the note.[102] It was undisputed that the FDIC had no knowledge of the receipts or the statement thereon prior to bringing the suit.[103]

In its answer, Defendant asserted that the note was unenforceable because it was given without consideration.[104] In reply, the FDIC argued that Defendant was estopped from asserting that defense because it had executed the note "for the purpose of permitting the bank to avoid having its records show any past due bonds."[105] As such, Defendant had "participated in [a] misrepresentation"[106] to deceive the FDIC, the creditors of the bank, and the state banking authorities.[107] Defendant knew the purpose of executing the notes and of making the interest payments.[108] The FDIC, conversely, was an innocent holder of the note who had given value and acted in good faith.[109]

On appeal, the U.S. Supreme Court sided with the FDIC.[110] The Court interpreted then-existing Section 12B of the Federal Reserve Act, 12 U.S.C. § 264(s),[111] to "reveal a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets . . . which [the FDIC] insures or to which it makes loans."[112] "The test," the Court held, "is whether the note was designed to deceive the creditors or public authority, or would tend to have that effect."[113] Although Defendant had executed the note before the FDIC insured the bank, it was "sufficient" that Defendant had "lent [itself] to a scheme or arrangement whereby" the FDIC "was or was likely to be misled" by the records on which it relied in insuring the

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was given, for to assume otherwise would be to infer that respondent did not discharge its statutory duties."); *see infra* note 111 and accompanying text.

101. *D'Oench*, 315 U.S. at 454.
102. *Id.* at 453-54.
103. *Id.* at 454.
104. *Id.* at 456.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.* at 460-61.
111. 12 U.S.C. § 264(s) (1946) (transferred 1950). The Court also relied on § 264(y) to show that the bank was insured "on 'certification'" by a supervising authority that the bank was "in solvent condition" and "with the approval of" the FDIC following an examination of the bank. *D'Oench*, 315 U.S. at 457.
112. *D'Oench*, 315 U.S. at 456-57.
113. *Id.* at 460.

bank.[114] The Court then concluded, given the federal policy evidenced in § 264(s) and its broad purpose of protecting the FDIC against misrepresentations, "[T]he fact that creditors may not have been deceived or specifically injured is irrelevant."[115] Instead, the Court wrote, it was "the 'evil tendency' of the acts to contravene" the statutory policy which lay "at the root of the rule" that it created.[116]

2. 12 U.S.C. § 1823(e)

Subsection (e) of United States Code § 1823 ("Corporation Monies") provides, in relevant part:

> (e) Agreements Against Interests of Corporation
> (1) In general. No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
> (A) is in writing,
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.[117]

Section 1823(e) is commonly referred to as a banking-law statute of frauds.[118] In 1989, as part of the Financial Institutions Recovery, Reform, and Enforcement Act ("FIRREA"), Congress amended § 1823(e) to apply to the FDIC in its receivership capacity.[119] In its current version, the statute sets forth four requirements for determining the validity of any "agreement" which "tends to diminish or defeat the interest of" the FDIC in an "asset" of a failed bank.[120] These four

114. *Id.* at 460-61.
115. *Id.* at 459.
116. *Id.*
117. 12 U.S.C. § 1823(e).
118. *See, e.g.*, Gleit, *supra* note 70, at 251.
119. Financial Institutions Recovery, Reform, and Enforcement Act, Pub. L. 101-73, § 217(4)(e), 103 Stat. 183, 256 (codified as amended at 12 U.S.C. § 1823(e) (1989)).
120. 12 U.S.C. § 1823(e).

requirements are not easily met, however, and they have caused many cases to turn on slight technical errors in the borrower's agreement which rendered it void under the statute.[121]

In one case, for example, a bank representative inadvertently failed to mark a promissory note "paid" after reaching an agreement with the borrower to settle his remaining balance due on the note.[122] As a result, the borrower was forced to pay the FDIC the full amount when the bank later failed, because the settlement agreement "was not reflected in the minutes of the bank's board of directors" as required by subsection (e)(1)(C).[123] The court found no issues of fact.[124] The affidavit of the bank representative, submitted by the borrower, was "not sufficient to establish a factual dispute in view of the FDIC liquidation assistant's affidavit."[125]

Although § 1823(e) is not identical to the common-law *D'Oench* doctrine,[126] many courts have found their aims identical.[127] Courts have thus construed § 1823(e) and *D'Oench* "in tandem,"[128] finding that they have "cross-pollinated to the degree that it is difficult to determine where the statute ends and *D'Oench* begins."[129] Some courts have even chosen to apply *D'Oench* where § 1823(e) does not apply, or vise-versa.[130]

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121. *See, e.g.*, FDIC v. Krause, 904 F.2d 463, 464-66 (8th Cir. 1990).

122. *Id.* at 464-65.

123. *Id.* at 464, 466.

124. *Id.* at 466.

125. *Id.*

126. *Compare* Am. Fed'n of State, Cnty & Mun. Emps. v. FDIC (*In re* NBW Com. Paper Litig.), 826 F. Supp. 1448, 1469 (D.D.C. 1994) ("*D'Oench* is a principle of equitable estoppel which requires some passive (including negligent) or active act by a party whose claims and defenses are then barred."), *with* Langley v. FDIC, 484 U.S. 86, 91-92 (1987) (holding that § 1823(e) "allow[s] federal and state bank examiners to rely on a bank's records in evaluating the worth of a bank's assets" and "ensure[s] mature consideration of unusual loan transactions by senior bank officials").

127. Lindley v. FDIC, 733 F.3d 1043, 1051-52 (11th Cir. 2013); *see* Landcastle Acquisition Corp. v. Renasant Bank, 465 F. Supp. 3d 1329, 1341 & n.6 (N.D. Ga. 2020).

128. *Lindley*, 733 F.3d at 1051-52; *see Landcastle Acquisition Corp.*, 465 F. Supp. 3d at 1341 & n.6.

129. Acciard v. Whitney, No. 2:07-CV-00476, 2011 WL 4552564, at *7 n.5 (M.D. Fla. Sept. 30, 2011) ("In light of the facts of the case before the Court, the statute and common law doctrine may be considered interchangeably."); *see also In re NBW Com. Paper Litig.*, 826 F. Supp. at 1457.

130. *See, e.g.*, Winterbrook Realty, Inc. v. FDIC, 820 F. Supp. 27, 28, 31-32 (D.N.H. 1993) (applying *D'Oench* to bar enforcement of oral representations made by bank which authorized plaintiffs to sell foreclosed condominium units, even though the FDIC never acquired an "asset" and § 1823(e) did not apply); *In re NBW Com. Paper Litig.*, 826 F. Supp. at 1470 ("It is only when [a] party's failure to specify the terms of the agreement or the party's own affirmative acts that would mislead the bank examiners founds the claim or defense that the *D'Oench* doctrine bars their claim or defense. Similarly, [§] 1823(e) . . . only bar[s] a party's recovery or defense when the party asserts an agreement which does not fulfill the statute's requirements.").

The federal circuits are currently divided over whether or not § 1823(e) supersedes *D'Oench*.[131] The Seventh Circuit has declined to even consider this issue.[132] Some lower courts have held that Congress did not intend to preempt *D'Oench* by enacting FIRREA.[133] Rather, "the continuing vitality" of *D'Oench* "counsels against" preemption.[134] Either way, both the doctrine and the statute are still used today in a near-infinite variety of circumstances.[135] As even the FDIC recognizes, since courts are still holding that the aims of *D'Oench* and § 1823(e) are "identical," and they continue to construe both "in tandem," § 1823(e) should be analyzed consistently with the "aims" of the original *D'Oench* case.[136]

B. The Early Years (1940–1980)

In *D'Oench*, decided in 1942, the U.S. Supreme Court relied on then-existing statutory and common law to fashion the doctrine of equitable estoppel used today in suits between borrowers and the

131. *See* Brandt v. FDIC (*In re* Equip. Acquisition Res., Inc.), 560 B.R. 501, 508-10 (Bankr. N.D. Ill. 2016) (discussing the circuit split). The Supreme Court's decision in *O'Melveny & Myers v. FDIC* left open the question of whether § 1823(e) displaces *D'Oench* when it concluded that the Financial Institutions Recovery, Reform, and Enforcement Act's ("FIRREA") provisions "precluded courts from fashioning their own common law exceptions" to FIRREA's comprehensive statutory scheme. 512 U.S. 79, 86-87 (1994); 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. STATE L.J. 1259, 1267-68 (1996). In *O'Melveny*, the FDIC, as receiver, brought suit against a law firm alleging professional negligence and breach of fiduciary duty arising from the firm's prior handling of two real estate offerings for the insolvent bank. Bailey, *supra*, at 1266. The issue that the Court had to decide was whether a new federal common law rule should be created to supplement FIRREA's provisions, and whether such a rule should preempt the corresponding state law rule. *Id.* at 1269-1270; *O'Melveny*, 512 U.S. at 85-86. While the Court ultimately answered "no" to both questions, commentators have pointed out that the *O'Melveny* Court never addressed the continuing vitality of an established federal common-law doctrine. Bailey, *supra*, at 1267, 1269. Because of *D'Oench*'s longstanding importance, some have argued that Congress "intended to leave *D'Oench* intact 'to fill in the inevitable gaps left by the statutory language' of 1823(e)." *Id.* at 1272 & n.122.

132. John v. RTC, 39 F.3d 773, 776 (7th Cir. 1994).

133. *See, e.g.*, *In re NBW Com. Paper Litig*., 826 F. Supp. at 1460.

134. *Id.*

135. *See* Petition for Writ of Certiorari, at 16-18, Morris v. Branch Banking & Tr. Co., 139 S. Ct. 122 (2018) (No. 17-1619) (citing numerous cases from 1998–2018 where *D'Oench* was still invoked); *see also supra* note 23 and accompanying text.

136. *See* 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, 5984 (Feb. 10, 1997) [hereinafter FDIC Policy Statement] (advising that § 1823(e) "be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine").

FDIC.[137] The Court relied primarily on two sources: *Deitrick v. Greaney*,[138] a case decided by the Court in 1940, and Section 12B of the Federal Reserve Act, 12 U.S.C. § 264(s).[139] A look at these two sources will reveal the original aims of the doctrine and clarify the reasoning that drove the Court's holding in the original case and led to the doctrine's eventual creation and subsequent expansion.[140]

1. *Deitrick v. Greaney*

"[T]he root" of the *D'Oench* holding lays in the "evil tendency" of "acts" to contravene a statutory policy governing banking transactions,[141] which acts were the subject of the Court's decision in *Deitrick* two years earlier.[142] *Deitrick* was one of many cases arising out of the failure of the Boston-Continental National Bank in 1931.[143] Prior to its failure, that bank had engaged in a scheme allowing it to purchase shares of its own stock, in violation of a federal statute.[144] To conceal the bank's ownership of the stock from bank examiners, Defendant, one of the bank's directors, had his co-defendant, Karnow, execute an accommodation note with the bank as a substitute for the illegally held shares.[145] The proceeds of the note were deposited in another bank and credited to Defendant, who used them to purchase the shares from the bank which were then transferred to Defendant "on the books of the bank."[146] Defendant and the bank agreed that the bank would retain its interest in the stock and that the note would not be paid.[147] Defendant had indisputably executed the note for the purpose of concealing the

137. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 456-58 (1942); *see also* 12 U.S.C. § 264(s) (1946) (transferred 1950).

138. 309 U.S. 190 (1940).

139. 12 U.S.C. § 264(s) (1946) (transferred 1950).

140. *See D'Oench*, 315 U.S. at 456-58 (1942); 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, 945-46 (1998) ("Legislative action and judicial expansion have transformed this doctrine into one of the most powerful litigation mechanisms used by the [FDIC] to prevent depletion of the insurance fund when insolvent financial institutions proceed into receivership.").

141. *D'Oench*, 315 U.S. at 459.

142. *Id.*; *Greaney*, 309 U.S. at 196.

143. *Greaney*, 309 U.S. at 192; *see also* Deitrick v. Standard Sur. & Cas. Co., 303 U.S. 471, 472 (1938); Clark v. Deitrick, 105 F.2d 265, 265-66 (1st Cir. 1939); Bailen v. Deitrick, 84 F.2d 375, 375 (1st Cir. 1936); Deitrick v. Greenberg, 15 F. Supp. 290, 290 (D. Mass. 1936).

144. *Greaney*, 309 U.S. at 192; *see also* 12 U.S.C. § 83.

145. *Greaney*, 309 U.S. at 192.

146. *Id.*

147. *Id.* at 191-92.

bank's ownership of the stock by "removing the shares of stock from its assets" and allowing it to carry the note in their place as receivables.[148]

When the bank later became insolvent, Plaintiff Frederick S. Deitrick, a former Massachusetts Congressman,[149] was appointed receiver of the bank by the Comptroller of the Currency.[150] Deitrick then sued Defendant to collect on the note.[151] As in *D'Oench*, Defendant argued that the note lacked consideration.[152] But the Court ultimately found that Defendant could not assert that defense because "equity" would not allow a person "to rely on his own wrongful act" in contravention of the federal statute and its policy designed to protect creditors.[153] The Court described this rule as one "sometimes denominated an equitable estoppel."[154] But the rule was "not strictly that of estoppel as thus defined"; rather, it "derive[d] its force *from the circumstances* that [Defendant's] act" was itself a statutory violation, and Defendant could not "resort to the very acts" which the statute "condemn[ed]."[155]

The *Deitrick* decision turned on the nature of Defendant's acts.[156] The very "circumstances" underlying those acts were illegal and revealed an intent to conceal the insolvent bank's purchase of its own stock in violation of a federal statute.[157] The *Deitrick* rule did not create an estoppel in the "strict" sense *precisely* because Defendant had intentionally committed illegal acts.[158] As a matter of equity, the Court concluded there was no need to satisfy the elements of estoppel "by virtue of" Defendant's statutory violation.[159] The Court distinguished itself from earlier cases in which the receiver had failed "to allege any wrongful act for which the [borrower] was chargeable or which was

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148. *Id.* at 193.

149. *See* Clark v. Deitrick, 105 F.2d 265, 266 (1st Cir. 1938); *Rep. Frederick Deitrick: Former Representative for Massachusetts's 8th District*, GOVTRACK, https://www.govtrack.us/congress/members/frederick_deitrick/403354 (last visited Apr. 23, 2022).

150. *Greaney*, 309 U.S. at 192.

151. *Id.*

152. *Id.* at 193.

153. *Id.* at 196.

154. *Id.* at 196-97.

155. *Id.* at 198 (emphasis added).

156. *Id.* at 198-99.

157. *Id.* at 198.

158. *Id.* at 197-98; Echevarria, *supra* note 18, at 761-62 ("The [*Deitrick*] Court, however, correctly chose not to fashion an estoppel rule because the record was barren of any evidence that depositors or creditors had been damaged. Rather, the Court fashioned an illegality rule that made the agreement not to enforce the note unenforceable as a prophylactic way of preventing circumvention of the underlying capital impairment statute.").

159. *Greaney*, 309 U.S. at 196-98.

injurious to creditors."[160] Unlike in those cases, Defendant was "alleged and proved to [have been] a participant in the illegal transaction."[161] He could not "set up the defense of his illegal action to defeat the statutory policy aimed at the protection of creditors."[162]

Although the *Deitrick* Court grounded its holding in public policy, principles of equity, and the doctrine of equitable estoppel,[163] the rule that it created was ultimately a rule of illegality, designed to protect creditors and the public against the borrower's "wrongful act."[164] The rule was "not strictly that of estoppel" because, "by virtue of" Defendant's act in contravention of the policy, the receiver was not required to show that it was "deceived or specifically injured" in order to prevail against the borrower.[165] Because of the illegality of Defendant's conduct and the policy of the statute prohibiting it, the *Deitrick* rule aimed to overprotect the bank examiner; but in turn, ended up "breach[ing] the dam which has left modern borrowers in its flood waters."[166]

Prior to the 1940 decision, earlier Supreme Court decisions had required a factual showing of "the illegality of the transaction" between the borrower and the bank "or injury to creditors."[167] Absent such a showing, the Court allowed debtors of failed banks to assert claims and defenses against the bank's receiver under the view that the receiver had "merely 'stepped into the shoes' of a bank and was subject to the same claims and pleas which might have been asserted against the bank."[168] Later decisions arising out of the *D'Oench* holding have completely abandoned any idea of a "wrongful act" requirement,[169] and § 1823(e)

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160. *Id.* at 199-200 (discussing Deitrick v. Standard Sur. & Cas. Co., 303 U.S. 471 (1938)).

161. *Id.* at 200.

162. *Id.*

163. *Id.* at 196-98.

164. *See id.* at 198-99; Echevarria, *supra* note 18, at 762-63 ("[*Deitrick*] led to the creation of a rule that, while ostensibly phrased as estoppel, was actually more consistent with traditional contract rules regarding the enforceability of illegal bargains.").

165. *Greaney*, 309 U.S. at 198.

166. Flint, *supra* note 49, at 492-93.

167. *See id.* at 489-91, 493 (discussing Deitrick v. Standard Sur. & Cas. Co., 303 U.S. 471 (1938)).

168. *Id.*; *see also* Fourth St. Bank v. Yardley, 165 U.S. 634, 653 (1897). *Cf.* Tex. & Pac. Ry. v. Pottorff, 291 U.S. 245, 261 (1934) (imposing a duty on the receiver to "take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation was not in a position to do so").

169. *See, e.g.*, FDIC v. McClanahan, 795 F.2d 512, 516-17 (5th Cir. 1986) (stating that *D'Oench* applies even where the borrower "reckless[ly]" lent himself to a "scheme or arrangement"); FSLIC v. Gordy, 928 F.2d 1558, 1566 (11th Cir. 1991) (holding that *D'Oench* applies "even in the absence of bad faith, recklessness or negligence" by the borrower); *see infra* Part II.C.1, C.3.

makes no mention of an "act" at all.[170] In effect, the *D'Oench* decision did away with *Deitrick*'s illegality requirement and replaced it with a lower standard[171]—and ultimately, it construed *Deitrick* and § 264(s), "a statute embedded solely with economic values," to overprotect the FDIC insurance fund "to the detriment of potentially innocent debtors."[172]

2. Section 12B of the Federal Reserve Act, 12 U.S.C. § 264(s)

Just like the federal statute in *Deitrick*, in *D'Oench*, § 264(s) was found to reveal "a federal policy to protect" the FDIC "against misrepresentations" contained in the records of insured banks.[173] Section 264(s) was a criminal statute that punished, among other things, "false" statements made "knowing[ly]" and "for the purpose of influencing in any way the action of the [FDIC]."[174] The statute required proof of the defendant's mental state for a finding of guilt.[175] It was later transferred

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170. 12 U.S.C. § 1823(e); *see supra* Part II.A.2.

171. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460 (1942). Justice Douglas, writing for the *D'Oench* majority, wrote that the case "would be on all fours with *Deitrick*" had Defendant executed the note "for the express purpose of deceiving [the FDIC]." *Id.* at 457. However, following the holdings in a string-cite of state estoppel cases on page 458 of the opinion, he concluded that even borrowers who are "very ignorant and ill-informed of the character of the transaction" can still be held liable to the FDIC on a note acquired by it in its corporate capacity. *Id.* at 458-59 (citing, among other cases, Bay Parkway Nat'l Bank v. Shalom, 200 N.E. 685, 686-87 (N.Y. 1936), where the court, in enforcing an estoppel defense raised by a bank examiner against a borrower, found that the borrower knew that his note made without consideration was to be "treated as an asset of the bank" and thereby would deceive bank examiners; and Putnam v. Chase, 212 P. 365, 366-67 (Ore. 1923), where the court affirmed a new trial in favor of the bank examiner, holding that the borrower was estopped from asserting a defense for failure of consideration against the receiver, because, unlike actions brought by *solvent* banks against borrowers, where "both parties are equally in fault," actions brought by receivers of *insolvent* banks do not involve two parties "equally in fault," but instead are brought on behalf of depositors or creditors whose interests the receiver represents). The relevant inquiry in *D'Oench* was whether the borrower had lent itself to a "scheme or arrangement" that was *likely* to deceive bank examiners—whether the note was "designed to deceive" the examining authority, "*or would tend to have that effect*." 315 U.S. at 460 (emphasis added); *see also* Echevarria, *supra* note 18, at 767 ("In large measure, the Supreme Court's decision in *D'Oench* was based on the state common law estoppel precedents and was similarly framed in terms of a rule of estoppel. The estoppel rule was of course relaxed: there was no strict scienter requirement and no damage requirement.").

172. Flint, *supra* note 49, at 494.

173. *D'Oench*, 315 U.S. at 456-57; *see also* Deitrick v. Greaney, 309 U.S. 190, 192 (1940).

174. 12 U.S.C. § 264(s) (1946) (transferred 1950).

175. *Id.* Subsection (s) ("False statements regarding loans; penalties") provides:

> Whoever, for the purpose of obtaining any loan from the Corporation, or any extension or renewal thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Corporation to purchase any assets, or for the purpose of obtaining the payment of any insured deposit or transferred deposit or the allowance, approval, or payment of any claim, or for the purpose of influencing in any way the action of the Corporation under this section, makes any statement, knowing it to be false,

to 18 U.S.C. § 1007, which, in nearly identical language, punishes anyone who "knowingly makes or invites reliance on a false, forged, or counterfeit statement, document, or thing" for the "purpose of influencing in any way the action of the [FDIC]."[176] The Fifth Circuit has articulated a test for guilt under § 1007, requiring proof of mental state and a "purpose" to influence the FDIC.[177] Although § 1823(e) and *D'Oench* have never required such proof,[178] courts before the 1980s interpreted the *D'Oench* case to require at least a showing that the borrower knowingly entered into a "scheme or secret arrangement" contributing to a misrepresentation of the bank's assets.[179]

3. *FDIC v. Meo*: Keeping Equitable Principles in Mind

In the 1974 case of *FDIC v. Meo*,[180] the Ninth Circuit adopted a narrow construction of *D'Oench*, requiring the FDIC to show that the borrower had executed a "secret agreement" with the bank and had "lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled."[181] Defendant and three associates executed promissory notes with a bank for purchase of the

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> or willfully overvalues any security, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both.

Id.

176. 18 U.S.C. § 1007; *see id.* note (Historical and Revision Notes). Section 1007's fines are much heftier than § 264(s)'s ("not more than $1,000,000") and its jail time is much longer ("not more than 30 years"). *Id.* This is due to the enhanced criminal and civil penalties that came with the enactment of FIRREA in 1989, which have remained in place to this day. *See* Benton J. Campbell et al., *Understanding FIRREA: Revived Law Expands Government's Enforcement Options*, J. TAX & REG. FIN. INST., Jan. 2014, at 13, 14.

177. United States v. Burns, 162 F.3d 840, 850 (5th Cir. 1998) (holding that 18 U.S.C. § 1007 requires "(1) that defendant made a false statement; (2) that "defendant knew the statement was false; and (3) that the statement was made for the purpose of influencing, in any way, the FDIC's actions").

178. *See* 12 U.S.C. § 1823(e); *D'Oench*, 315 U.S. at 458-59 (discussing state estoppel cases where the borrower was not "allowed to escape liability on the note as against the receiver even though he was 'very ignorant and ill-informed of the character of the transaction'"); *see supra* note 171 and accompanying text.

179. FDIC v. Meo, 505 F.2d 790, 792-93 (9th Cir. 1974); *see* FDIC v. First Nat'l Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978); FDIC v. Julius Richman, Inc., 80 F.R.D. 114, 117 (E.D.N.Y. 1978), *aff'd*, 666 F.2d 780 (2d Cir. 1981); Galves, *supra* note 15, at 1348; *see also* FDIC v. Leach, 772 F.2d 1262, 1264, 1267 (6th Cir. 1985) (finding that district court misapplied *D'Oench* because borrowers did not know that either of their promissory notes would be pledged as collateral by creditors to secure a loan from a bank that later became insolvent). *But see* FDIC v. C&A Carbone, Inc., No. 77 Civ. 1191 (CMM), 1978 U.S. Dist. LEXIS 18400, at *3 (S.D.N.Y. Apr. 14, 1978) (holding that the FDIC "need not prove fraud or negligence to recover under the *D'Oench* . . . Doctrine").

180. 505 F.2d at 790.

181. *Id.* at 792 (alteration in original) (quoting D'Oench, Duhme & Co, v. FDIC, 315 U.S. 447, 461 (1942)).

bank's stock.[182] But instead of executing their stock order, the bank directed its brokers to issue and transmit voting trust certificates in the name of Defendant and associates, and it held the certificates as security for the notes.[183] The associates eventually "became apprehensive over the affairs of the bank," so they sold their interest in the stock and discharged their debts.[184] Defendant, on the other hand, chose to retain his interest and signed a new note for his share of the balance due.[185] Subsequently, the bank failed and the FDIC was appointed receiver of the bank and sued Defendant to collect on the note.[186] Only after the litigation commenced did Defendant learn about the mis-execution of his stock order.[187]

The *Meo* court refused to apply *D'Oench* because it found, "on [those] facts," that Defendant was a bona-fide purchaser-borrower; he was "wholly innocent" of the bank's wrongful action; and he did not enter into any "scheme" or "secret agreement" with the bank.[188] Under this fact-based approach, the court reversed the district court's judgment in favor of the FDIC, holding that "*D'Oench* was decided on the very narrow ground that an accommodation maker who executes a *secret agreement* may not take 'advantage of an undisclosed and fraudulent arrangement which [public policy] condemns and which the maker of the note *made possible*.'"[189]

C. D'Oench *and Section 1823(e) During the Savings and Loan Crisis (1985–1991)*

From 1985–1994, a rash of commercial bank and Savings and Loan Association ("S&L") failures occurred.[190] S&Ls, also called "thrifts," were primarily long-term, fixed-rate home mortgage lenders that were regulated both by the FSLIC and the Federal Home Loan Bank Board ("FHLBB").[191] Under then-existing legislation, S&Ls were prohibited

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182. *Id.* at 791.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 792.
189. *Id.* at 792-93 (alteration in original) (quoting D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 461 (1942)).
190. Galves, *supra* note 15, at 1325; *see* FDIC v. McCullough, 911 F.2d 593, 594 (11th Cir. 1990) ("In the past decade an ever-increasing number of financial institutions have encountered significant difficulty maintaining solvency.").
191. KITTY CALAVITA ET AL., BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS 9-10 (1997) (stating that the Federal Home Loan Bank Board ("FHLBB") was an independent federal agency whose purpose was "to create a reserve credit system to ensure the

from making home mortgage loans at an adjustable interest rate and could only use a fixed rate.[192] Thus, when interest rates and inflation rose dramatically in the 1970s and early 1980s, during a period later called "The Great Inflation,"[193] the fixed-rate mortgages held by S&Ls lost a considerable amount of value and became much less profitable over time.[194] Eventually, this decrease in mortgage value, together with the FSLIC and FHLBB's lack of federally-funded resources to assist troubled S&Ls,[195] "essentially wiped out the S&L industry's net worth."[196]

During the resulting Savings and Loan Crisis ("S&L Crisis") and following the 1989 enactment of FIRREA and amendment of § 1823(e) thereunder,[197] courts began to adopt broader interpretations of the *D'Oench* doctrine.[198] The *Meo* court and other courts of the 1970s refused to apply the doctrine absent a showing that the borrower had entered into a "scheme or arrangement"; but courts during the S&L Crisis did not require a "showing" of anything and often applied the doctrine irrespective of the borrower's innocence or the existence of a "secret agreement" at all.[199] "To be sure," as one court put it, "the estoppel rule—even in its common law form—ha[d] been greatly enlarged since its comparatively modest genesis."[200]

1. *FDIC v. McClanahan*: Recklessly Lending Oneself to a "Scheme or Arrangement"

In the early 1980s, the "shady character" Orrin Shaid, a "charismatic 300-pound east Texan," masterminded an "elaborate bank-fraud scheme" for which he was later sentenced to thirty-five years

availability of mortgage money for home financing and to oversee federally chartered [Savings and Loan Associations ("S&L")]").

192. Kenneth J. Robinson, *Savings and Loan Crisis*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/savings_and_loan_crisis.

193. Michael Bryan, *The Great Inflation*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_inflation.

194. Robinson, *supra* note 192.

195. FDIC DIV. RSCH. & STAT., 1 HISTORY OF THE EIGHTIES – LESSONS FOR THE FUTURE 41 (1997).

196. Robinson, *supra* note 192.

197. Financial Institutions Recovery, Reform, and Enforcement Act, Pub. L. 101-73, § 217(4)(e), 103 Stat. 183, 256 (codified as amended at 12 U.S.C. § 1823(e) (1989)); *see* Galves, *supra* note 15, at 1334.

198. Galves, *supra* note 15, at 1349.

199. *Compare* FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974), *with* FDIC v. Hatmaker, 756 F.2d 34, 37 (6th Cir. 1985) (holding borrower liable to the FDIC under § 1823(e) on a note that the bank fraudulently altered to reflect a greater amount than that agreed to).

200. FDIC v. Smith (*In re* Smith), 133 B.R. 800, 808 (N.D. Tex. 1991), *aff'd*, 160 B.R. 549 (N.D. Tex. 1993).

in prison.[201] This scheme began when Shaid, posing as a financial consultant, purchased Ranchlander National Bank ("Ranchlander") using two $1,000 Certificates of Deposit from Ranchlander that he altered to $100,000 each and pledged as collateral to secure a $200,000 loan from another bank.[202] When he became owner, Shaid installed his "partner in crime,"[203] Ms. Jean Moon, as president of Ranchlander, and together they committed a number of financial crimes, including fraudulent lending to many of Ranchlander's customers.[204]

Defendant, a farmer, borrowed money from Ranchlander to purchase a tractor.[205] "[R]epresenting himself as the owner of the bank," Shaid "persuaded [Defendant] to sign a blank note with the understanding that the exact terms would be filled in later."[206] Later, Shaid told Defendant that his loan application was turned down, and Defendant secured financing elsewhere.[207] Unknown to Defendant, Shaid had filled in the blank note to reflect a $62,500 loan from Ranchlander to Defendant.[208]

After an accomplice turned Shaid in to the FBI, Ranchlander was declared insolvent, and the FDIC stepped in as its receiver and sued Defendant to collect the $62,500 reflected on the note.[209] Defendant "raised the affirmative defenses of failure of consideration and fraudulent inducement."[210] But the court held Defendant was estopped, under *D'Oench*, from raising those defenses because he had "lent himself to a scheme or arrangement" by signing the blank note.[211] There was no showing that Defendant committed a "wrongful act."[212] But even assuming he did not, the court nevertheless found he was "reckless" and exercised bad judgment in executing the blank promissory note with Shaid, a known criminal.[213]

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201. United States v. Shaid, 730 F.2d 225, 227 (5th Cir. 1984); FDIC v. McClanahan, 795 F.2d 512, 513 (5th Cir. 1986).

202. *Shaid*, 730 F.2d at 227-28.

203. *Id.* at 227 n.4.

204. *Id.* at 228, 231.

205. *McClanahan*, 795 F.2d at 513.

206. *Id.* at 513-14.

207. *Id.* at 514.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 517.

212. *See id.* at 516 ("Even assuming that McClanahan was not in complicity with Shaid, which would certainly have estopped him from defending this suit on the basis of failure of consideration or fraud in the inducement, his conduct can only be characterized as reckless."); FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974). *But see* Deitrick v. Greaney, 309 U.S. 190, 196, 198 (1940).

213. *McClanahan*, 795 F.2d at 516.

2. *Langley v. FDIC*: Knowledge of the Agreement by the FDIC Is "Irrelevant"

The plain language of § 1823(e) requires proof of an "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it" in its corporate or receivership capacity.[214] In the 1987 case of *Langley v. FDIC*,[215] the U.S. Supreme Court gave a broad interpretation to the word "agreement" under § 1823(e), holding it encompasses not only an "exchange of promises"[216] between contracting parties, but also "misrepresentations" made by one party to the other for the purpose of inducing execution of the transaction.[217] In addressing what it called Plaintiffs' "fallback position," the Court reiterated that "[a]n agreement that meets [the requirements of § 1823(e)] prevails even if the FDIC did not know of it; and an agreement that does not meet [the requirements] fails even if the FDIC knew."[218]

The Langleys (collectively "Plaintiffs") purchased land in Louisiana in 1980 and financed their purchase with a $450,000 loan from Planters Trust & Savings Bank ("Planters").[219] Only three years later, Plaintiffs sued Planters in district court, alleging that "the notes had been procured by misrepresentations" as to the amount of mineral acreage on the land.[220] Plaintiff's suit was pending for seven months when in 1984, the FDIC conducted an examination of Planters during which it learned about the lawsuit with Plaintiffs, including the allegations of Planters' misrepresentation.[221] One month later, Planters was closed and the FDIC took over as its receiver.[222] The FDIC was then substituted for Planters in the lawsuit and moved for summary judgment dismissing Plaintiffs' claims.[223] The District Court granted the motion, finding Plaintiffs' claims were barred under § 1823(e), and the Fifth Circuit affirmed.[224]

At oral argument before the Supreme Court, attorney William C. Shockey, arguing for Plaintiffs, urged the Court "to engraft an equitable exception upon the plain terms" of § 1823(e)[225]:

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214. *See* 12 U.S.C. § 1823(e).
215. 484 U.S. 86 (1987).
216. Transcript of Proceedings at 5-6, Langley v. FDIC, 484 U.S. 86 (1987) (No. 86-489).
217. *Langley*, 484 U.S. at 90-91.
218. *Id.* at 93, 95.
219. *Id.* at 88.
220. *Id.* at 88-89.
221. *Id.* at 89; Transcript of Proceedings at 12, *Langley*, 484 U.S. 86 (No. 86-489).
222. *Langley*, 484 U.S. at 89.
223. *Id.*
224. *Id.* at 88.
225. *Id.* at 94.

> The statute is mean. It is tough. It is not fair. It is really not fair to the Langleys because their suit was pending seven months prior to the time the bank was closed. Basically what this Court has got to determine is what is and what isn't beyond the scope of [§ 1823(e)]. . . . I think what you've got to do is picture in your mind W.T. Langley and Roy Caughfield standing in the lobby of the Planters bank in Opelousas, Louisiana, and think how this transaction went down, how—what must one have said to the other and in what context, gleaned from the allegations of the complaint.[226]

Justice Scalia, writing for the Court, rejected Shockey's argument and held that § 1823(e) barred Plaintiffs' claims because the alleged misrepresentations constituted an "agreement" which "did not meet the requirements of the statute."[227] He found that the Court not only lacked power to grant such an equitable exception,[228] but also that the equities Plaintiffs were trying to invoke were not those "the statute regards as predominant."[229] "Harm to the FDIC," he wrote, "is not avoided by knowledge at the time of acquiring the note."[230] Rather, "[t]he harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures."[231]

Citing to the Eleventh Circuit's 1982 decision in *Gunter v. Hutcheson*,[232] the Court held that § 1823(e) "allow[s] federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets."[233] Such evaluations usually happen "with great speed, usually overnight."[234] In *Gunter*, the bank examination did happen overnight, and the following morning that bank's assets were transferred to another bank.[235] But in *Langley*, the FDIC conducted an examination of the bank and learned of Plaintiffs' lawsuit one month before the bank was declared insolvent and closed down.[236] The FDIC even noted the

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226. Transcript of Proceedings at 12-13, *Langley*, 484 U.S. 86 (No. 86-489).
227. *Langley*, 484 U.S. at 96.
228. *Id.* at 94.
229. *Id.*
230. *Id.* at 94-95.
231. *Id.* at 95.
232. 674 F.2d 862, 865 (11th Cir. 1982).
233. *Langley*, 484 U.S. at 91.
234. *Id.* (quoting *Gunter*, 674 F.2d at 865).
235. *Gunter*, 674 F.2d at 866.
236. *Langley*, 484 U.S. at 89.

pendency of the suit in two examination reports made prior to bank's closing.[237]

3. *FSLIC v. Gordy*: Borrower's Innocence, Recklessness, or Negligence Are Irrelevant for Purposes of *D'Oench* and Section 1823(e)

In *FSLIC v. Gordy*,[238] the bank was *insolvent* throughout all of its negotiations with Defendant borrowers, who sought and procured financing from it in order to purchase and develop a hotel in Mississippi.[239] Defendants each executed guarantees in the amount of over $3,000,000 in the event of default.[240] The bank presented Defendants with a written statement, certified for its truth by a certificate "signed by a vice-president" of the bank, which falsely represented that the bank was in a sound and solvent financial condition.[241] When the FSLIC was later appointed receiver of the bank and made demands on the guarantees, Defendants defended and counterclaimed, arguing that the statement misrepresenting the bank's financial condition went to the heart of the transaction and that, thus, the guarantees were void.[242]

The Eleventh Circuit acknowledged, first, that the bank had fraudulently misrepresented its financial condition to Defendants[243] and, second, that Defendants were innocent and had acted in good faith.[244] But those findings had no impact on the court's decision.[245] All that mattered was that the bank's false statement of its financial condition was not properly memorialized in its records.[246] In light of *Langley*, the court held that *D'Oench* and § 1823(e) apply "even in the absence of bad faith, recklessness or negligence" by the borrower.[247] The typical *D'Oench* case involved at least some evidence of one of the three, but *Langley* could not be read to require such evidence, and therefore, in

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237. Transcript of Proceedings at 19, Langley v. FDIC, 484 U.S. 86 (1987) (No. 86-489) ("As the appendix will reflect, the suit was filed well before the bank was closed, and the pendency of the suit was noted in two examination reports by the FDIC and rendered prior to the time the bank closed.").

238. 928 F.2d 1558 (11th Cir. 1991).

239. *Id.* at 1560.

240. *Id.*

241. *Id.*

242. *Id.* at 1560-61.

243. *See id.* at 1565-66 (deciding whether the bank's misrepresentation constituted "fraud in the factum" or "fraud in the inducement," and concluding that the latter applied, and that, therefore, Defendants' counterclaims and defenses were barred under *Langley*).

244. *Id.* at 1566.

245. *Id.*

246. *Id.* at 1564.

247. *Id.* at 1566.

light of the policy concerns underlying *D'Oench* and § 1823(e), summary judgment for the FSLIC was proper.[248]

D. *Continued Use of* D'Oench *and Section 1823(e) (2000–Present)*

A common thread among post-2000s cases applying *D'Oench* and § 1823(e) is a strict adherence to the creditor-favoring legal precedent created during the S&L Crisis and used throughout the 1990s.[249] Furthermore, although some courts now believe § 1823(e) preempts *D'Oench*,[250] many courts continue to construe them "in tandem," believing that *D'Oench* serves to fill in the gaps that § 1823(e) does not address, including claims and defenses based on agreements that involve no "asset."[251] One of the more drastic applications of *D'Oench* can be seen in the 2001 case of *Harrison v. Wahatoyas*,[252] where the court held:

> [I]nferences that an examiner could feasibly draw from a failed institution's written records are insufficient to preclude the operation of *D'Oench*. . . . In short, the [receiver] has no duty to scour a failed institution's documents for inferences and hidden duties supporting defenses or counterclaims that might prevent the [receiver] from collecting the full value of an otherwise facially valid instrument.[253]

In other words, *D'Oench* operates even when the agreement is in fact recorded in the bank's records, so long as the FDIC was unable to infer, from the apparently hasty bank examination courts believe it conducts, that there were any claims based on it.[254]

In *Harrison*, the agreement between two banks ("Bank 1" and "Bank 2") providing for the pro-rata distribution of all proceeds

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248. *Id.* at 1566-68.

249. *See, e.g.*, Harrison v. Wahatoyas, LLC, 253 F.3d 552, 558-59 (10th Cir. 2001) (relying on FDIC v. Noel, 177 F.3d 911, 918 (10th Cir. 1999), for the proposition that *D'Oench* will still operate even where the examiner could "feasibly" infer from the institution's records that the borrower had an agreement with the bank); Lespri Dev. Partners, LLC v. FDIC, No. 10-CV-059-D, 2011 U.S. Dist. LEXIS 160789, at *7 (D. Wyo. Jan. 26, 2011) (same); Caires v. JP Morgan Chase Bank, 745 F. Supp. 2d 40, 52 (N.D. Conn. 2010) (relying on three cases, from 1990, 1992, and 1998, to conclude that third-party assignees are entitled to the protections of *D'Oench*, even though neither the *D'Oench* case itself nor § 1823(e) mention anything about third-party assignees); FDIC v. Lockhaven Ests., LLC, 918 F. Supp. 2d 1209, 1236-37 (D.N.M. 2012) (relying on FDIC v. Oldenburg, 34 F.3d 1529, 1551 (10th Cir. 1994), for the proposition that the borrower bears the "burden of establishing that an applicable agreement satisfies the requirements of [§] 1823(e)").

250. Bock, *supra* note 140, at 946; *see supra* note 131 and accompanying text.

251. *Compare* 12 U.S.C. § 1823(e)(1) (applying only to "agreement[s]" tending to "defeat the interest" of the FDIC "in any asset" acquired by it in its corporate or receivership capacity), *with supra* note 130 and accompanying text.

252. *Harrison*, 253 F.3d at 552.

253. *Id.* at 559 (alteration in original) (citations omitted).

254. *Id.*

collected from Plaintiff borrower (the "Pro Rata Agreement") *was* in fact recorded in Bank 2's files when the RTC stepped in as its receiver.[255] The RTC sued Plaintiff to collect debts that Bank 1 could have satisfied at an earlier time, pursuant to the Pro Rata Agreement, by distributing to Bank 2 collection proceeds acquired from Plaintiff pursuant to a separate settlement agreement.[256] The court still refused to enforce the agreement, however, because it "provided no indication on its face that [Plaintiff] . . . could claim its benefits."[257] "Perhaps a close and careful study of the [Pro Rata Agreement] might have alerted the RTC to a potential claim," the court found.[258] But "the *D'Oench* doctrine does not require so much of bank examiners," it reasoned.[259]

1. *D'Oench* and Section 1823(e) During the 2008 Financial Crisis

The Great Recession, which began in 2007 and resulted in the downfall of the U.S. economy by the middle of 2009,[260] was sparked by a change in the home mortgage market from a "one size fits all" industry—where borrowers had to meet certain criteria to qualify for home mortgages—to an increase in "risk-based lending," where increased competition in the mortgage industry encouraged banks to give out mortgages "no matter how risky one's profile."[261] As a result, borrowers with low credit scores who were unable to afford these "subprime" mortgages in the first place had a difficult time paying them back, which eventually caused "unprecedented waves of mortgage default and foreclosure" and culminated in an economic collapse.[262] Over 100 banks failed in 2009, causing a rise in claims brought against the FDIC and, naturally, an increased use of *D'Oench* and § 1823(e) to bar debtors' claims and defenses.[263] One court even noted that bank failures "in the aftermath of the 2008 financial crisis" required it to once again consider the *D'Oench* doctrine.[264]

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255. *Id.* at 555-56, 559.

256. *Id.* at 556.

257. *Id.* at 559.

258. *Id.*

259. *Id.*

260. John Weinberg, *The Great Recession and Its Aftermath*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath.

261. JESSE DUKEMINIER ET AL., PROPERTY 618 (9th ed. 2018).

262. *Id.* at 618-19.

263. *See* Allan Wisk, *Spike in Bank Failures;* D'Oench Duhme *Returns*, CASETEXT (Nov. 10, 2009), https://casetext.com/analysis/spike-in-bank-failures-doench-duhme-returns.

264. C&C Inv. Props., LLC v. Trustmark Nat'l Bank, 838 F.3d 655, 657 (5th Cir. 2016) ("At the height of the [S&L] crisis, we considered a number of cases involving the [*D'Oench*] doctrine. . . . The failure of a Mississippi bank in the aftermath of the 2008 financial crisis requires us to again consider the doctrine.").

Since the 2008 crisis, and up until now, the focus remains on whether the FDIC could determine an agreement existed through a quick examination of the bank and without drawing any inferences from bank documents.[265] An agreement that requires such an inference will not meet the requirements of *D'Oench*, even if it otherwise meets all the requirements of § 1823(e).[266] The case discussed below serves as an example of the indefensible standard courts have adopted when applying the doctrine.[267]

2. *Cadlerock III, LLC v. Wheeler*: Are There Any Limits to the Doctrine?

Former husband and wife Dustin and Shana Wheeler were co-owners of Wheeler Chevrolet, a Chevrolet dealership, and Wheeler Rental, a business engaged in the sale and rental of mobile homes, until 2011, when they divorced.[268] During their marriage, Wheeler Rental "borrowed millions of dollars" from a bank, for which both Dustin and Shana "executed multiple promissory notes."[269] However, upon their divorce, Dustin and Shana executed a settlement agreement providing that all of Wheeler Rental's debts would be allocated to Shana.[270] Subsequently, Shana signed "six post-divorce guarantees of Wheeler Rental's debt" with the bank.[271] She also signed "four post-divorce promissory notes . . . on behalf of Wheeler Rental."[272] The bank's loan officers wrote two memoranda "summarizing Wheeler Rental's debt" and "list[ing] Shana as the sole guarantor."[273] All of these documents were contained in the bank's records when the bank failed in 2014 and

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265. *See* Cadlerock III, LLC v. Wheeler, 779 F. App'x 519, 522 (10th Cir. 2019) (finding that "[a]s the doctrine has evolved, its focus has shifted from the fraudulent, illegal, or secret character of the debtor's acts to the effect the acts have on the regulatory agency's ability to evaluate quickly and accurately a savings institution's assets") (alteration in original) (quoting Castleglen, Inc. v. RTC, 984 F.2d 1571, 1576 (10th Cir. 1993)). *But see* Norwood v. FDIC, No. CV 210-162, 2011 U.S. Dist. LEXIS 169000, at *11 (S.D. Ga. Sept. 2, 2011) (finding that *D'Oench* did not apply because (1) the FDIC did not allege that Plaintiff was "guilty of any scheme likely to mislead" it; (2) "there was no unusual loan transaction" involved; and (3) there was "no allegation of fraudulent collusion between" Plaintiff and the bank's employees).

266. *See* Harrison v. Wahatoyas, LLC, 253 F.3d 552, 559 (10th Cir. 2001) (noting that even though the subject agreement was recorded in the bank's files, it "provided no indication on its face that [Plaintiff] . . . could claim its benefits" and thus, Plaintiff's claim based on the agreement was barred under *D'Oench*).

267. *Cadlerock III*, 779 F. App'x at 519.

268. *Id.* at 520.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 520-21.

the FDIC took over as its receiver.[274] Also in the bank's records, however, were Dustin's old guarantees of the Wheeler Rental debt.[275]

When the FDIC assigned Dustin's guarantees to Plaintiff, Plaintiff attempted to collect on them.[276] In response, Dustin argued that the settlement agreement released his guarantee of the Wheeler Rental debt and that it met the requirements of *D'Oench* and § 1823(e) because it was contained in the bank's records when the FDIC took over.[277] After a bench trial, the district court found "clear and convincing, even overwhelming" evidence that the bank's records contained an agreement releasing Dustin from the guarantees, including documents presented to the FDIC at the bank's closing that were "easily sufficient" to apprise it of the release.[278] Nevertheless, the Tenth Circuit reversed because there was no "explicit" release of the Wheeler guarantees in the bank's records.[279] The "collection of documents" in the bank's records, from which the FDIC could "infer" the existence of an agreement, was not enough to satisfy § 1823(e).[280]

E. D'Oench*, Section 1823(e), and Financial Instability in the U.S.*

As highlighted in Subparts C and D, courts tend to broaden their interpretations of *D'Oench* and § 1823(e) during periods of financial instability in the United States, when bank failures are most likely to occur.[281] From 1989 to 1995, during and after the S&L Crisis, the *D'Oench* doctrine was invoked in 5,145 instances, ninety-seven percent of which resulted in dismissal of the claims filed by borrowers.[282] During the 2008 financial crisis, courts continued to adhere strictly to the requirements of § 1823(e), focusing solely on the FDIC's need to conduct quick and efficient bank examinations, and placing the burden on borrowers to demonstrate that the agreements at issue met the statute's requirements.[283]

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274. *Id.*
275. *Id.* at 520.
276. *Id.* at 521.
277. *See id.*
278. *Id.* at 521, 523-24.
279. *Id.* at 523, 528.
280. *Id.* at 524.
281. *See* Wisk, *supra* note 263; Galves, *supra* note 15, at 1349.
282. Galves, *supra* note 15, at 1325.
283. *See, e.g.*, Lindley v. FDIC, 733 F.3d 1043, 1048-49, 1054-55 (11th Cir. 2013) (rejecting claims by tenants based on written letter from the bank because it was neither "presented to, or approved by, [the bank's] board of directors" pursuant to § 1823(e)(1)(C)); FDIC v. Lockhaven Ests., LLC, 918 F. Supp. 2d 1209, 1236-37 (D.N.M. 2012); *see supra* note 249 and accompanying text.

Now, in the midst of the COVID-19 pandemic, financial analysts predict that bank failures in the United States could still be on their way.[284] Recent estimates by the Federal Reserve indicate that the U.S. banking industry is in a highly precarious position as a result of widespread unemployment caused by government-mandated business shutdowns.[285] From February 2020 to May 2020, the U.S. unemployment rate rose from 3.5 percent to 13.3 percent,[286] and studies from the Congressional Research Service predict that the pandemic could result in permanent closures of up to 7.5 million U.S. businesses.[287] Significantly, many of the assets held by smaller banks are loans to households and businesses, and these banks rely on repayment to keep themselves afloat.[288] The possibility of bank failures in the near future means that courts could experience an influx of *D'Oench* and § 1823(e) cases once again, and apply the doctrine consistently with the broad interpretations of *D'Oench* jurisprudence from the 1980s and 1990s.[289]

III. *D'OENCH* "ESTOPS" BORROWERS WHO ACTED IN GOOD FAITH AND DID NOT "MISLEAD" THE FDIC

Part III begins by explaining why the *D'Oench* doctrine, although referred to as a doctrine of "common-law equitable estoppel," is not and has never truly operated as a doctrine of "equitable estoppel."[290] This is because *D'Oench*, its blanket protections, and the situations in which it is used, bear no resemblance to the principles that make up the doctrine of equitable estoppel as developed under state common law.[291] Specifically, *D'Oench* and § 1823(e) apply in nearly all situations where the FDIC is confronted with an agreement not recorded in the records of an insured bank, notwithstanding the parties' conduct or the underlying

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284. *See* Rochelle Toplensky, *Banks Are Only as Sound as Their Models*, WALL ST. J. (May 14, 2020, 5:42 AM), https://www.wsj.com/articles/banks-are-only-as-sound-as-their-models-11589449375; PERKINS ET AL., *supra* note 67, at 1-2.

285. *See Assessment of Bank Capital During the Recent Coronavirus Event – June 2020*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/publications/assessment-of-bank-capital-during-the-recent-coronavirus-event-june-2020.htm (Sept. 4, 2020).

286. PERKINS ET AL., *supra* note 67, at 1.

287. *Id.*

288. *Id.*

289. *See supra* text accompanying note 281; Simmons First Nat'l Bank v. Lehman, No. C-13-02876, 2015 WL 632393, at *7-8 (N.D. Cal. Feb. 13, 2015) (relying on *D'Oench* jurisprudence from the 1980s to 1990s).

290. *See infra* Part III.A–B.

291. *See infra* Part III.A–B.

circumstances of the case.[292] Furthermore, the FDIC's knowledge of the unrecorded agreement is irrelevant for purposes of *D'Oench* and § 1823(e); as such, it does not need to show that it "relied" on the bank's records or that it was deceived or specifically injured.[293]

A. The Doctrine of Equitable Estoppel

As originally developed under state common law, the doctrine of equitable estoppel requires that there be at least "some intended deception in the conduct or declarations of the party to be estopped . . . by which another has been misled to his or her injury."[294] Normally, an equitable estoppel consists of three elements: (1) a factual misrepresentation made by the party to be estopped; (2) reliance on the misrepresentation, often "reasonable" reliance, by the party seeking to assert the estoppel; and (3) injury caused by such reliance.[295] None of these elements are set in stone, however.[296] An estoppel is ultimately a factual determination that can arise in an "infinite variety" of circumstances, including when bank examiners are "misled" by "secret agreements" not recorded in the files of the bank being examined.[297] Because heavy emphasis is placed on factual circumstances, judicial discretion and principles of fairness and justice form the hallmark of the

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292. OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306, 308 (11th Cir. 1993) ("[T]he *D'Oench* doctrine has expanded beyond the factual background of the *D'Oench* case itself, so that it 'now applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records'") (citations omitted).

293. *See supra* notes 50-51 and accompanying text.

294. GA. CODE ANN. § 24-14-29 (LEXIS through 2021 Reg. Sess. of Gen. Assemb.); *see* N.D. CENT. CODE § 31-11-06 (2021); CAL. EVID. CODE § 623 (West 2019); WIS. STAT. § 706.04(3) (2021); Volkman v. DP Assocs., 268 S.E.2d 265, 267 (Ct. App. N.C. 1980); Wayne Farms LLC v. Primus Builders, Inc., No. 1190533, 2020 Ala. LEXIS 193, at *11 (Ala. Dec. 31, 2020); Callander v. Callander, No. 07AP-746, 2008 Ohio App. LEXIS 1961, at **17 (Ct. App. Ohio May 13, 2008); Prounis v. Koller (*In re* Koller), 424 P.3d 926, 932 (Ct. App. Utah 2018); *In re* Landry, 119 A.3d 455, 460 (Vt. 2015); Anenson, *supra* note 48, at 389 & n.42.

295. Anenson, *supra* note 48, at 389, 401; *see Wayne Farms*, 2020 Ala. LEXIS 193, at *11-12. *Cf.* Deitrick v. Greaney, 309 U.S. 190, 197 (1940).

296. Anenson, *supra* note 48, at 403 ("[I]t is important to remember that the beauty of equity is that there are rules declaring there are no rules. It is a wonderful paradox providing opportunities for attorneys to establish an equitable defense to ban an otherwise successful assertion against their client."); *see* Sassower v. Barone, 447 N.Y.S.2d 966, 971 (App. Div. 1982) (finding that, as settled in New York jurisprudence, the doctrine of equitable estoppel "rests largely on the facts and circumstances of the particular case" and that, consequently, "any attempted definition [of the doctrine] usually amounts to no more than a declaration of an estoppel under those facts and circumstances").

297. Anenson, *supra* note 48, at 404; *see* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 459-60 (1942) (finding it "sufficient" that Defendant had "lent [itself] to a scheme or arrangement whereby" the FDIC "was or was likely to be misled" by the contents in the bank's records).

equitable estoppel doctrine.[298] Above all else, "the primary principle governing equitable estoppel . . . is ethicality, i.e. morality."[299]

B. D'Oench *and Section 1823(e) Do Not Involve a Factual Determination—Only a Legal One*

The Supreme Court's decision in *D'Oench* turned on the fact that Defendant had "lent [itself] to a scheme or arrangement" by executing a promissory note with the bank for no consideration, causing the FDIC to be "misled" when it later acquired the note under the false belief that it was valid and enforceable.[300] But despite the unique factual circumstances of the original case, the broad language used by the Court in its decision made it nearly impossible to defeat application of the doctrine in future uses involving completely different situations.[301] Indeed, the doctrine does not require that the borrower have "lent [itself] to a scheme or arrangement" that "misled" the FDIC—only that the "scheme or arrangement" be "*likely to*" mislead the FDIC.[302] The note need not be "designed to deceive creditors or public authority"; instead, it need only "*tend to have that effect*."[303] This language, along with increasingly broad constructions of the doctrine over the past eighty years,[304] has allowed it to apply in many instances where, given the circumstances, application is just not fair to the borrower.[305]

Originally, the *D'Oench* holding was "root[ed]" in the "evil tendency" of "*acts*" to "contravene the policy" protecting the FDIC against "misrepresentations" in the bank's records.[306] These "root[s]" first "derive[d] [their] force," in *Deitrick*, "*from the circumstances*" that a bank's director had executed a note with the bank for no consideration, with the express purpose of concealing the bank's illegal purchase of its own stock.[307] The standard began with illegality, under *Deitrick*,[308] and evolved to "len[ding]" oneself "to a scheme or arrangement," under

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298. Anenson, *supra* note 48, at 381, 390-91.

299. *Id.* at 388 (citation omitted).

300. *See D'Oench*, 315 U.S. at 460.

301. Echevarria, *supra* note 18, at 768 ("In large measure, the current problems in the case law can be directly traced back to the sweeping language used by the [*D'Oench*] Court in its opinion.").

302. *D'Oench*, 315 U.S. at 460 (emphasis added).

303. *Id.* (emphasis added).

304. *See supra* Part II.C–D.

305. *See, e.g.*, Galves, *supra* note 15, at 1328-31 (discussing Sweeney v. RTC, 16 F.3d 1, 1-4 (1st Cir. 1994)); *see supra* Part II.C–D.

306. *D'Oench*, 315 U.S. at 459 (emphasis added).

307. Deitrick v. Greaney, 309 U.S. 190, 198 (1940) (emphasis added).

308. Echevarria, *supra* note 18, at 762; *see Greaney*, 309 U.S. at 198; *see supra* Part II.B.1.

D'Oench;[309] to "reckless[ly]" "len[ding]" oneself "to a scheme or arrangement," under *McClanahan*;[310] and then to application of the doctrine even "in the absence of bad faith, recklessness or negligence" by the borrower, under *Gordy*.[311] Even worse, § 1823(e) has nothing to do with "acts," only "agreements," and nothing to do with "circumstances," only "requirements."[312]

By placing all emphasis on the legal sufficiency of the "agreement" between the borrower and the bank, *D'Oench* and § 1823(e) prevent borrowers from arguing against their application on equitable grounds, in view of the underlying factual circumstances of the case.[313] They prevent borrowers from distinguishing their own situations from the situation in *D'Oench*, which involved, at least, "participat[ion]" in a "misrepresentation" by the borrower.[314] Finally, they assume that banks do not make mistakes,[315] and that banks do not have the power to alter the terms of the borrower's obligation once the accompanying documents have been handed over to them.[316] Contrary to what courts always say, borrowers *cannot* always protect themselves against banks and the FDIC.[317] After all, the person who takes out loans from the bank is usually not the one in charge of its records, nor should that person be.[318]

Currently, *D'Oench* and § 1823(e) apply even if the borrower did not "participate[]" in a "misrepresentation" that "was likely" to

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309. *D'Oench*, 315 U.S. at 460; *see supra* Part II.A.1.

310. FDIC v. McClanahan, 795 F.2d 512, 516-17 (5th Cir. 1986); *see supra* Part II.C.1.

311. FSLIC v. Gordy, 928 F.2d 1558, 1566 (11th Cir. 1991); *see supra* Part II.C.3.

312. *See supra* Part II.A.2; FDIC v. Lockhaven Ests., LLC, 918 F. Supp. 2d 1209, 1226, 1243-44 (D.N.M. 2012) (deciding only whether borrower's agreement met the requirements of § 1823(e) and noting that "[t]here is no equitable exception to the doctrine") (alteration in original).

313. *See* Marsha Hymanson, Note, *Borrower Beware:* D'Oench, Duhme *and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. CAL. L. REV. 253, 255-56 (1988).

314. *See id.* at 264-66; *D'Oench*, 315 U.S. at 456.

315. *See* FDIC v. Krause, 904 F.2d 463, 464-66 (8th Cir. 1990) (holding borrower liable to FDIC because bank representative accidentally failed to mark promissory note "paid" and therefore did not satisfy § 1823(e)(1)(C)).

316. FDIC v. McClanahan, 795 F.2d 512, 514 (5th Cir. 1986) (involving a notorious criminal bank owner who fraudulently altered borrower's note without borrower's knowledge).

317. *Compare* FDIC v. Noel, 177 F.3d 911, 918 (10th Cir. 1999) ("The design of the *D'Oench* doctrine . . . 'favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can.'") (citations omitted), *with* Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1512-13 (11th Cir. 1991). See the opening story in Part I of this Note: could Baumann really have protected himself against the RTC, which could raise *D'Oench* for the first time on appeal, and then use it to vacate a judgment from a breach of contract suit that he *already won*? *See id.* at 1512-13.

318. *See* West v. JPMorgan Chase Bank, 214 Cal. App. 4th 780, 794 (2013) (noting bank's "superior knowledge of who was responsible" for making mortgagor's loan documents and overall superior position vis-à-vis the borrower with respect to banking matters).

"mislead" the FDIC.[319] In fact, they apply even if the borrower did nothing at all.[320] The borrower can execute a properly recorded note with the bank; but the bank can still alter its terms in the interest of misrepresenting the value of its own assets.[321] In the unfortunate event the FDIC ever acquires that note, those altered terms are presumed to be "the true agreement between the parties" and will entitle the FDIC to collection.[322] Borrowers can sue their banks for fraud, and even win the lawsuit, but they will lose to the FDIC on appeal if the suit involved an agreement which did not satisfy *D'Oench* and § 1823(e)—which can both be raised on appeal for the first time in a case, by a successor-in-interest to an original party, here the FDIC.[323] Borrowers who are unaware of § 1823(e)'s technicalities can be lulled into the false belief that their duly executed settlement agreement, contained in the bank's records, released them from all debts owed to the bank—until the FDIC steps in and argues the agreement was not "explicit" enough,[324] and the bank's representatives chant victoriously once again: "Onward Banking Soldiers, marching as if to war, with *D'Oench, Duhme* and Congress we'll prevail for sure. We needn't worry, we will win the fight[.] [S]ince we lack accountability, we are always right."[325]

C. *Showing Reliance Is Unnecessary Under* D'Oench *and Section 1823(e)*

The element of "reliance" under the doctrine of equitable estoppel is essentially "a factual question, albeit one that necessarily involves a value judgment: did the representor cause the representee to adopt the assumption on which the estoppel is based?"[326] When confronted with an equitable estoppel question, courts often require that the representee's reliance be "reasonable," which entails more complex considerations than "reliance," such as the "blameworthiness of the conduct of the

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319. *See supra* note 292 and accompanying text.

320. *See Krause*, 904 F.2d at 464-66 (involving borrower who thought he settled debt with bank, did nothing, and was later liable to FDIC for the full amount owed).

321. *See supra* text accompanying note 35.

322. Dennis & Simon, *supra* note 32, at 1321-22.

323. *See* Geri Zahn, Inc. v. Govaert (*In re* Geri Zahn), 25 F.3d 1539, 1542, 1545 (11th Cir. 1994); *see also* Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1512-13 (11th Cir. 1991).

324. *See* Cadlerock III, LLC v. Wheeler, 779 F. App'x. 519, 523-24 (10th Cir. 2019); *see also* Harrison v. Wahatoyas, LLC, 253 F.3d 552, 559 (10th Cir. 2001).

325. Galves, *supra* note 15, at 1331 n.37 (quoting RTC v. Ocotillo W. Joint Venture, 840 F. Supp. 1463, 1467 (D.N.M. 1993)). Judge John E. Conway of the United States District Court for the District of New Mexico created this "'fight song' of the federal regulators" to criticize the federal government's use of the powerful *D'Oench* doctrine in failed bank litigation. *See id.*

326. Robertson, *supra* note 49, at 88.

representor and the representee, and whether the representee's reliance should be protected in the circumstances."[327] According to the Supreme Court, one purpose of *D'Oench* and § 1823(e) "is to allow federal and state bank examiners to *rely* on a bank's records in evaluating the worth of the bank's assets."[328] But if the doctrine were indeed a doctrine of "equitable estoppel," then courts would also be asking: did the FDIC actually "rely" on the bank's records or the borrower's conduct, to its detriment?[329] And if so, was its reliance "reasonable"?[330]

Unfortunately, courts have made clear that such inquiries are irrelevant.[331] The FDIC's conduct with respect to the agreement at issue, including any knowledge it had of the agreement before being appointed receiver, has no bearing on its ability to invoke *D'Oench* and § 1823(e).[332] But assuming, *arguendo*, that there were a reliance requirement—it would seem, to some extent, that if the FDIC knew of an unrecorded agreement, or of any claims based on it by the borrower, then it cannot be said to have truly "relied" on the bank's records, or at least should not be presumed to have done so.[333] If, as in *Langley*, the FDIC were aware of the "substance" of a borrower's lawsuit with the bank for *one month* before it took over as receiver,[334] then there would hardly be any reason to say, absent other evidence, that the FDIC was "misled" by anything at all.[335]

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327. *Id.*; *Cf.* West v. JPMorgan Chase Bank, 214 Cal. App. 4th 780, 794 (2013) ("[T]he question of whether . . . reliance is reasonable is a question of fact") (citations omitted).

328. Langley v. FDIC, 484 U.S. 86, 91 (1987) (emphasis added).

329. *See* Deitrick v. Greaney, 309 U.S. 190, 197-98 (1940) ("In the strict and technical sense an estoppel arises only when a misrepresentation has prejudiced another who has relied upon it.").

330. *See* Robertson, *supra* note 49, at 94.

331. *See, e.g.*, FDIC v. Amos, 704 F. App'x 791, 795 (11th Cir. 2017).

332. *Langley*, 484 U.S. at 94.

333. *See* Galves, *supra* note 15, at 1349 ("Side agreements of which the FDIC was aware . . . could not deceive or mislead the FDIC."). *Cf.* Echevarria, *supra* note 18, at 778 n.234:

> *D'Oench* could not be construed as a strict liability rule because it is grounded on a policy of preventing arrangements that tend to deceive the FDIC in its evaluation of the financial worth of the institution it takes over. Thus, to the extent that the FDIC may have prior knowledge as to the existence of an oral agreement (which might defeat or diminish its interest in an asset), *D'Oench* logically should not apply (a position later cases do not take, however). Section 1823, however, makes no mention of the FDIC's knowledge regarding the existence of such an agreement. The statute, rather mechanically, merely turns on whether or not the agreement was recorded as an official record of the bank. Thus, courts have consistently held that the FDIC's knowledge under the statute is irrelevant.

Id.

334. *Langley*, 484 U.S. at 89.

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

In *First State Bank v. City and County Bank*,[336] the court reasoned that if the FDIC had to show it did not know about the "secret agreement," then the "doctrine would be of no value" because "the parties could avoid its effect by making the FDIC aware of [the agreement] before a bank failure," which would "encourage less than truthful disclosure" by the parties and "last-minute lobbying regarding any inaccuracies" in the bank's records.[337] In the event something like this happens, the "reasonableness" of the parties' conduct should become an important consideration.[338] In *First State Bank*, the FDIC secured an agreement from the borrowers that they would reduce their oral agreement to writing, and it even issued a cease-and-desist order prohibiting them from performing on the agreement absent a written and "legally binding obligation."[339] The FDIC never got what it asked for, but it won the legal battle as a result, barring enforcement of Plaintiff's oral agreement.[340] Under those circumstances, perhaps the FDIC deserved to win.[341] Not so in every case.[342]

Curiously, under the broad language in *D'Oench*, cases like *First State Bank* are analyzed under the same general principles as cases like *In re Geri Zahn*.[343] In *In re Geri Zahn*, a wildly different case, borrowers obtained a judgment against a bank for common-law fraud, which the FDIC could later vacate on appeal, because, as per the policy, the court did not deem the judgment a "reliable record" of the bank.[344] Given that *D'Oench* and § 1823(e) apply in "nearly all" instances where the FDIC is confronted with an agreement not recorded in the bank's records, one would imagine that factual questions such as "reasonableness," "reliance," and the doctrine of equitable estoppel would be crucial to the outcome of the case.[345] But unfortunately they are not, nor have they ever been.[346]

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336. 872 F.2d 707 (6th Cir. 1989).

337. *Id.* at 717.

338. Robertson, *supra* note 49, at 88.

339. *First State Bank*, 872 F.2d at 711.

340. *Id.* at 717-18.

341. *See id.* at 717 (finding that both the "misleading nature" of Plaintiff's conduct and the fact that the alleged oral agreement was "in contradiction" with the financial records submitted to the FDIC "serve[d] as a proper basis for denying enforcement of the oral agreement").

342. *See supra* note 19 and accompanying text.

343. Geri Zahn, Inc. v. Govaert (*In re* Geri Zahn), 25 F.3d 1539 (11th Cir. 1994).

344. *Id.* at 1542, 1544-45. The fraud committed by the bank had caused the borrower's business to file for bankruptcy. *Id.* at 1541-42.

345. *See* Galves, *supra* note 15, at 1347.

346. *See, e.g.*, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 458-59 (1942) (holding that the policy applies even if the borrower was "very ignorant and ill-informed of the character of the transaction"); Motorcity of Jacksonville, Ltd. v. Se. Bank N.A., 120 F.3d 1140, 1144 n.5 (11th Cir. 1997) (finding that *D'Oench* should not be limited "to its narrow facts . . . to cases involving a

IV. COURTS SHOULD INTERPRET *D'OENCH* THROUGH THE LENS OF EQUITABLE ESTOPPEL AND CONGRESS SHOULD AMEND SECTION 1823(e) TO REFLECT THIS INTERPRETATION

Part IV proposes that *D'Oench* and § 1823(e) be interpreted through the actual lens of equitable estoppel.[347] In other words, courts should look deeper into the underlying circumstances behind each individual case, rather than only considering whether the agreement meets the four prongs of § 1823(e).[348] Keeping principles of equity in mind, courts should consider the FDIC's conduct with respect to the bank resolution at hand, and the borrower's conduct with respect to the agreement at issue.[349] Part IV concludes by proposing amendments to § 1823(e) to reflect a more equitable, fact-based approach.[350]

A. Fact-Intensive Inquiry

Pursuant to 12 U.S.C. § 1821(h)(3), the FDIC is required to "adopt and publish procedures and guidelines to minimize adverse economic effects caused by its actions on individual debtors in the community."[351] Significantly, the FDIC promulgated a policy statement in 1997, urging that § 1823(e) be "interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine."[352] The FDIC also stressed that the facts must be "carefully review[ed]" in each instance where "the assertion of *D'Oench* or [§ 1823(e)] is being considered."[353]

However, to truly "minimize adverse economic effects" to "individual debtors in the community," a fundamental part of *D'Oench* needs to change.[354] It is difficult to review each case carefully on its facts when *D'Oench* and § 1823(e) apply to nearly every set of facts involving the FDIC and an agreement not properly recorded in the records of the insured bank.[355] If the policy underlying *D'Oench* is to "protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets [which the FDIC]

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secret agreement . . . [because] it is clear from the *D'Oench* opinion that the Court applied a broader principle of law to the specific facts of that case").

347. *See infra* Part IV.

348. *See infra* Part IV.A.

349. *See infra* Part IV.A.

350. *See infra* Part IV.B.

351. 12 U.S.C. § 1821(h)(3).

352. FDIC Policy Statement, *supra* note 136, at 5984.

353. *Id.* at 5988.

354. 12 U.S.C. § 1821(h)(3). *Cf.* Echevarria, *supra* note 18, at 812 (proposing outright abandonment of the doctrine).

355. *See supra* note 292 and accompanying text.

insures or to which it makes loans,"[356] then courts should have to find two things: first, that the borrower, or whomever the FDIC seeks to enforce the policy against, did in fact "participat[e] in [a] misrepresentation" of the bank's assets.[357] Second, that as a direct result of the borrower's conduct, the FDIC was in fact "misled," under the standard of a reasonable examiner in its position at the time of the bank takeover.[358] Such determinations should be questions of fact, viewed in light of the complaint, the answer, and all other evidence.[359] Generally, the court should have discretion as to whether or not the doctrine be enforced.[360] By requiring the FDIC to have "reasonably relied" on the records of the bank under examination, the doctrine will not be enforced where it is clear from the circumstances that the FDIC knew of the borrower's agreement and had more than enough time "to prompt the invocation of available protective measures."[361]

B. Amendments to 12 U.S.C. § 1823(e)

Section 1823(e) should be amended to reflect the mode of analysis set forth in Subpart A, which combines an estoppel-based reasonableness approach with the approach taken in *Meo* that *D'Oench* only applies where the borrower "*made possible*" a "secret agreement" contributing to a misrepresentation of a bank's assets.[362] Therefore, an

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356. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 457 (1942).

357. *Id.* at 456; *see* FDIC v. Meo, 505 F.2d 790, 792 (9th Cir. 1974).

358. *See D'Oench*, 315 U.S. at 460; Robertson, *supra* note 49, at 88.

359. *See* Putnam v. Chase, 212 P. 365, 366 (Ore. 1923). Decades before the *D'Oench* decision, the trial court in *Putnam* was confronted with an action brought by the Bank Commissioner of the State of Washington to enforce an accommodation note executed between Defendant and an insolvent state bank. *Id.* at 365-66. The action went to trial, and the jury found for Defendant. *Id.* at 366. The Commissioner then moved for a new trial. *Id.* In its order granting the Commissioner's motion, the trial court wrote:

> I am inclined to the opinion that the defense alleging the facts that a note was given merely to make the assets of the bank appear better is not available where creditors of the bank would be adversely affected by such defense. *It is a question in pleading whether this fact should be negatived by the answer before it may be said a complete defense is tendered*. . . . It would seem that any fact which is to form an exception to the rule that the subject in controversy would ordinarily be subject to disposal as assets of the insolvent estate should be set forth in the answer.

Id. (emphasis added). The trial court granted the motion because there was sufficient evidence before the jury "to make it appear that the defense was unavailable." *Id.* The Oregon Supreme Court affirmed, but on different grounds, grounds on which the *D'Oench* Court ultimately relied in fashioning its rule. *See id.* at 367; *see supra* note 171 and accompanying text.

360. Anenson, *supra* note 48, at 381 ("[A] trial court has discretion in applying equitable defenses like estoppel. Such freedom of decisionmaking means a more lenient appellate review and a greater likelihood of safeguarding a favorable judgment.").

361. Langley v. FDIC, 484 U.S. 86, 95 (1987); Galves, *supra* note 15, at 1349-50.

362. *See supra* Part IV.A; *see also Meo*, 505 F.2d at 792; *see supra* Part II.B.3.

"equitable exception" should be allowed in cases where the borrower acted in good faith and took reasonable steps to properly document the agreement with the bank.[363] Section 1823(e) should also be amended to prevent the FDIC from barring any claims or defenses based on agreements of which it was aware, or which it could reasonably have inferred from the underlying factual circumstances, for at least thirty days before acquiring any "asset" from a bank in which such agreement "tends to diminish or defeat" its "interest."[364]

> (e) Agreements Against Interests of Corporation
> (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—
> *(A) for at least 30 days before acquiring such asset, the Corporation had knowledge of such agreement or could reasonably have inferred the existence of such agreement under the circumstances;*[365]
> *(B) a party asserting a claim or defense based on such agreement demonstrates that it acted in good faith and took reasonable steps to document such agreement in accordance with paragraph (C) below;*[366] *or*

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363. *But see Langley*, 484 U.S. at 94.

364. *See* 12 U.S.C. § 1823(e).

365. *See* Transcript of Proceedings at 19, Langley v. FDIC, 484 U.S. 86 (1987) (No. 86-489) (noting that well before the bank was closed, the FDIC was able to detect the unrecorded agreement and to note the pendency of Plaintiff's lawsuit based on it in two FDIC examination reports); Galves, *supra* note 15, at 1392-93 & n.323 (supporting proposed amendment to § 1823(e) providing that subsection (e)(1) does not apply if a claim or defense based on the agreement at issue was filed more than 90 days before the FDIC was appointed conservator or receiver of the insured bank). Regarding inferences of agreements which may be drawn from the bank's records, the FDIC advised the following in 1997:

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

FDIC Policy Statement, *supra* note 136, at 5987.

366. *See* FDIC Policy Statement, *supra* note 136, at 5986 ("*D'Oench* or the statutory provisions may not be asserted without Washington approval where the borrower or claimant took all reasonable steps to document and record the agreement or understanding with the institution and there is no evidence that the borrower or claimant participated in some activity that could likely

> *(C)* such agreement—
> *(i)* is in writing,
> *(ii)* 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,
> *(iii)* 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
> *(iv)* has been, continuously, from the time of its execution, an official record of the depository institution.[367]

V. CONCLUSION

The *D'Oench* doctrine and its statutory counterpart, § 1823(e), apply in nearly all instances where the borrower raises an unrecorded agreement with a bank as a claim or defense against the FDIC.[368] They apply even where the borrower was a victim of fraud; the FDIC knew about the agreement; the borrower had already obtained a judgment against the bank; or the agreement was simply insufficiently recorded in the bank's records.[369] Yet, the principles underlying *D'Oench* were rooted in "acts to contravene" the statutory policy protecting the FDIC against "misrepresentations."[370] Amid the current economic instability looming in the United States, it is imperative that courts begin to adopt a stricter interpretation of these words.[371]

For these reasons, the goals of *D'Oench* would be best served if the doctrine were interpreted consistently with the doctrine of equitable estoppel, and § 1823(e) were amended accordingly.[372] Such an interpretation would allow for a more equitable application of the doctrine, preventing it from applying in those narrow circumstances where the borrower did not actually "participate in a misrepresentation" of the bank's assets—but had acted in good faith and took reasonable steps to properly document the agreement made with the bank.[373] It would prevent the FDIC from prevailing when it was not actually "misled" in the course of a bank examination because it knew about the

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result in deception of banking regulators."); *see also Meo*, 505 F.2d at 792; FDIC v. First Nat'l Fin. Co., 587 F.2d 1009, 1012 (9th Cir. 1978).

367. 12 U.S.C. § 1823(e).
368. *See supra* Part III.B–C.
369. *See supra* Part II.C–D.
370. *See supra* Part II.A.1, B.1–2.
371. *See supra* Parts II.E., IV.A–B.
372. *See supra* Part IV.A–B.
373. *See supra* Part IV.A–B.

agreement and would have suffered no harm by honoring it.[374] *D'Oench* and § 1823(e) are, after all, "root[ed]" in the "evil tendency" of "acts," not "agreements" or technical requirements.[375] As such, they should operate only to bar misrepresentations actually participated in by the borrower, which actually "misled" the FDIC, as the circumstances may show.[376]

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374. *See supra* Part II.A–B.

375. *See supra* Part II.B.1–2; D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460 (1942).

376. *See supra* Part IV.A.

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