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BANKING LAW

by

Peter G. Weinstock and Christopher T. Klimko***

THE savings and loan crisis is a national catastrophe that already has cost the American taxpayer tens of billions of dollars¹, resulted in hundreds of people being sentenced to prison² and either precipitated or contributed to the collapse of real estate values in many parts of the country. The economic ramifications of these events shaped much of the litigation in Texas courts, and thus, the development of Banking Law in 1990. This survey article explores such developments.

I. SUPERPOWERS

A. Procedural Superpowers

A significant amount of litigation during the survey period concerned procedural questions raised when the Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation (RTC) becomes involved in a case following its appointment as receiver for an insolvent financial institution.

1. Removal

a. *Time Limits on Removal.* *MTech Corp. v. FDIC*³ addressed the question of the amount of time the Federal Deposit Insurance Corporation, as receiver of an insolvent bank (FDIC-Receiver), has to remove a state court case to federal court.⁴ FDIC-Receiver had been appointed receiver of the defendant bank in this action on July 13, 1989, and had removed the case to federal court on September 8, 1989.⁵ *MTech Corp.* (*MTech*) challenged the

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1. The anticipated cost to the United States Treasury to resolve the nation's failed thrift institutions seems to change with each transaction. At November 12, 1990, the administration estimated that the savings and loan bailout would cost \$130 billion dollars without interest. See *House Banking Loses Senior Republican; No Changes to Senate Banking Committee*. 55 *Banking Rep.*, Nov. 19, 1990, at 775.

2. According to the November 5, 1990 issue of *Fortune*, 331 "S&L felons" have been convicted during the past two years and "scores await trial." Farnham, *The S&L Felons*, 122 *FORTUNE*, Nov. 5, 1990, at 90.

3. 729 F. Supp. 1134 (N.D. Tex. 1990)

4. *Id.* at 1135-36.

5. *Id.* at 1135.

removal on the grounds that it was untimely and sought remand of the case to state court. The *MTech* court agreed with *MTech*, holding that the statute governing removal by FDIC-Receiver, 12 U.S.C. section 1819⁶, was subject to the time periods contained in the general removal statute found at 28 U.S.C. section 1446.⁷ The court found that FDIC-Receiver had received several "papers" within the meaning of section 1446(b)⁸ from which it was ascertainable that the case was removable on July 18, 1989, and, as a result, FDIC-Receiver's 30-day removal period under section 1446 commenced on that date, rendering the removal on September 8, 1989 untimely.⁹ In so holding, the court rejected FDIC-Receiver's argument that the amendment of section 1819 by the Financial Institutions Reform, Recovery and Enforcement Act of 1989¹⁰ (FIRREA) made the time periods of section 1446 inapplicable to section 1819 removals and, in their place, imposed a reasonableness standard upon the timing of such removals.¹¹ The court stated that if Congress had sought to insulate FDIC-Receiver from the time limits of section 1446 it would have explicitly so stated.¹² Further, the court

6. 12 U.S.C. § 1819(b)(2) provides:
FEDERAL COURT JURISDICTION.-
 (A) In General

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

12 U.S.C.A. § 1819(b)(2) (1989). Subparagraph (D) provides for exceptions to the deeming provisions of subparagraph (A) in cases where the FDIC is a party other than a defendant; in cases where the only issues involve preclosing rights against the institution for which the FDIC is receiver, or involving obligations owed to depositors, creditors, or stockholders of such institution; or where only interpretation of state law is involved. *See* 12 U.S.C.A. § 1819(2)(D) (1989). These exceptions did not apply in this case.

7. 729 F. Supp. at 1137. *See infra* note 8.

8. 28 U.S.C. § 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .

28 U.S.C. § 1446(b) (1988).

9. 729 F. Supp. at 1135-37.

10. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 209, 103 Stat. 183, 216-217 (1989) (amending 12 U.S.C. § 1819 (1988)).

11. 729 F. Supp. at 1136. Prior to the passage of FIRREA, 12 U.S.C. § 1819 had allowed FDIC-Receiver to remove cases "by following any procedure for removal now or hereafter in effect. . . ." U.S.C. § 1819 (1988) (current version at 12 U.S.C.A. § 1819 (1989)). Following amendment by FIRREA, 12 U.S.C. § 1819 allows FDIC-Receiver to remove "any action, suit, or proceeding from a state court to the appropriate" federal district court. *See supra* note 6.

12. 729 F. Supp. at 1136.

observed that nowhere in section 1819 was a reasonableness standard set forth.¹³ FDIC-Receiver's argument was also undercut by the fact that the argument's logical extension was that no requirement of section 1446 applied to a section 1819 removal and by the fact that FDIC-Receiver itself acknowledged that section 1446 governed some aspects of the case.¹⁴

The *MTech* case should be contrasted with *Resolution Trust Corporation v. Key*¹⁵, which concerned, in part, the applicability of the time requirements of section 1446 to removals of suits by the RTC. The defendant in *Key* alleged that the RTC's removal of the case after its appointment as receiver for the plaintiff savings association was untimely because the removal occurred after the expiration of the 30-day time limit of section 1446.¹⁶ The court rejected the defendant's contention, noting that the statute authorizing removal¹⁷ by the RTC contained no reference to general removal procedures (*i.e.*, section 1446) and, furthermore, spelled out its own specific time limits for removal.¹⁸ Thus, the time limits applicable to removal of a state court case by the RTC when acting as a conservator or receiver are the 90-day/30-day limits stated in the RTC removal statute rather than those found in section 1446.¹⁹ The *Key* court recognized that it was applying a different time frame to RTC removals than is applied when FDIC-Receiver seeks to remove a case. Nonetheless, the court found such a result to be mandated by the difference in language between section 1819 and that contained in the RTC removal statute.²⁰

*Matrix Ski Corp. v. FDIC*²¹ affirmed the distinction between the removal provisions governing FDIC-Receiver and the RTC.²² *Matrix Ski* filed suit in state court on January 12, 1990, against an insolvent savings and loan for which the RTC had been appointed as receiver. The petition was served on

13. *Id.*

14. *Id.* The FDIC acknowledged filing its notice of removal pursuant to 12 U.S.C. § 1446. *Id.*

15. 733 F. Supp. 1086 (N.D. Tex. 1990).

16. *Id.* at 1088. See *supra* note 8.

17. 12 U.S.C. § 1441a(l)(3) provides in part:

The Corporation [RTC] may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted—

(A) not later than 90 days after the date the Corporation is substituted as a party, or

(B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after the date of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

The Corporation may appeal any order of remand entered by a United States district court.

12 U.S.C. § 1441a(l)(3) (Supp. 1990).

18. 733 F. Supp. at 1089-90.

19. *Id.* at 1090.

20. *Id.* n.6. See also *supra* note 11.

21. 734 F. Supp. 763 (N.D. Tex. 1990).

22. *Id.* at 765.

January 16, 1990, and the RTC removed the case on February 16, 1990.²³ Under the RTC removal statute, removal of the case was required within 30 days of filing of the suit,²⁴ which 30-day period the RTC exceeded. The RTC argued, however, that it was able to remove cases pursuant to both section 1819, which governs removal by the FDIC, and the RTC removal statute. The RTC reasoned that the FDIC is the statutory manager of the RTC, and section 1819(b)(2)²⁵, by its terms, is applicable to all suits to which the FDIC is a party in any capacity.²⁶ If section 1819 had governed in this case, the time limits of section 1446 would have been applicable,²⁷ and the 30 day time limit of section 1446 would not have begun to run until the RTC's receipt of the original pleading. Consequently, the RTC's removal would have been timely.²⁸ The *Matrix Ski* court rejected the RTC's position, holding that removals by the FDIC and RTC are governed by separate and substantially different statutes that yield different results.²⁹

MTech, *Key* and *Matrix Ski* demonstrate that successful removal of a case involving a failed financial institution in receivership hinges in large part upon the identity of the receiver seeking removal. These cases also demonstrate a fairly strict adherence by the courts to the literal provisions of the removal statutes and their reluctance to expand removal powers beyond those granted by Congress.

b. *Removal After State Court Decision.* In *FDIC v. Meyerland Co. (In re Meyerland Co.)*³⁰ a divided panel of the Court of Appeals for the Fifth Circuit addressed the ability of the FDIC to remove a state court appellate proceeding. In analyzing this question, the majority first noted that, although infrequently exercised, Congress has the power to provide for the removal of cases on appeal in state courts.³¹ The majority also noted that neither history nor the bare language of section 1819 clearly indicated whether removal of state appellate cases was permissible under section 1819(b)(2)(B).³² The majority then analogized the case before it to *In re Savers Federal Savings & Loan Association*,³³ in which the Court of Appeals for the Eleventh Circuit permitted removal by the Federal Savings and Loan Insurance Corporation (FSLIC) of a state court case in which a final judgment had been rendered by the state trial court and no appeal had been filed but the period for appeal had not yet lapsed.³⁴ The *In re Savers* court refused to confine removal to those actions in which no final judgment had

23. *Id.* at 764.

24. *See supra* note 17.

25. *See supra* note 6.

26. 734 F. Supp. at 764.

27. *See supra* text accompanying notes 3-14.

28. 734 F. Supp. at 764-65.

29. *Id.* at 765. The court cited *Resolution Trust Corp. v. Key* as authority. *See supra* notes 15-20 and accompanying text.

30. 910 F.2d 1257 (5th Cir. 1990) (Higginbotham, J., dissenting).

31. *Id.* at 1259.

32. *Id.* at 1261.

33. 872 F.2d 963 (11th Cir. 1989).

34. *Id.* at 965-66; *see* 910 F.2d at 1262.

been rendered and stated that if Congress had intended to so limit FSLIC's removal powers, it could have explicitly so stated.³⁵ The *Meyerland* majority noted that in the case before it, as in *In re Savers*, state appellate proceedings had not been exhausted when removal was sought; consequently, the majority concluded that the FDIC was entitled to remove the action.³⁶ The *Meyerland* majority also held that the removed proceeding must be treated as if it had originated in the federal district court to which the case was removed.³⁷ Further, the district court would be required to adopt the state court judgment as its own.³⁸ The removed case, as a result, would be on appeal within the federal court system.³⁹

In his dissent from the majority's holding in *Meyerland*, Judge Higginbotham argued that the only state appellate proceedings removable under section 1819(b)(2)(B) are those over which a federal district court may exercise some original jurisdiction, that is, proceedings that otherwise are removable under section 1819 and in which relief is available under Rule 60 of the Federal Rules of Civil Procedure (Rule 60).⁴⁰ The dissent reasoned that section 1819(b)(2) removal must necessarily be governed by the general removal provisions of section 1441(a)⁴¹ regarding matters with respect to which section 1819(b)(2) is silent.⁴² The dissent then observed that 28 U.S.C. section 1441(a) provides that a case is removable from state court if the district court has original jurisdiction over it, and argued that the district court's "rubber stamp" of the state trial court judgment required by the majority opinion does not constitute the exercise of original jurisdiction.⁴³ In the case of removals from a state appellate court governed by section 1819, the dissent contended that the original jurisdiction of a federal district court is limited to Rule 60 relief.⁴⁴

Unlike *MTech*, *Key* and *Matrix Ski*, *Meyerland* seems to indicate an expansive approach to analyzing the receivers' removal powers. It should also be noted that the Court of Appeals for the Fifth Circuit decided *Meyerland* while the other cases were decided by district courts. It may be possible to reconcile these apparently different approaches by noting that the question addressed by the *Meyerland* court could not be resolved by reference to the

35. See 872 F.2d at 966.

36. 910 F.2d at 1262.

37. *Id.* at 1263.

38. *Id.*

39. See *Id.* at 1262-63.

40. *Id.* at 1263 (Higginbotham, J., dissenting). FED. R. CIV. P. 60 provides that a judgment may be set aside on such grounds as mistake, inadvertence, surprise or excusable neglect.

41. 28 U.S.C. § 1441(a) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a) (1988).

42. 910 F.2d at 1264.

43. *Id.* at 1265.

44. See *id.* at 1267.

plain language of the governing statute and also had policy implications absent from the other cases.

c. Remand. A final decision concerning removal of cases by the receivers of insolvent financial institutions is *Pernie Bailey Drilling Co. v. FDIC*,⁴⁵ which involved an appeal by the FDIC of a federal district court's remand of the case to state court. Pernie Bailey Drilling Company (Pernie Bailey) sued First Republic Bank Houston, N.A. (FRBH) in state court on various lender liability claims, and FRBH counterclaimed for a deficiency remaining after foreclosure on the collateral securing Pernie Bailey's note. FRBH was subsequently declared insolvent and the FDIC was appointed receiver. FDIC-Receiver then transferred certain of the assets and liabilities of FRBH to a bridge bank,⁴⁶ which was later renamed NCNB Texas National Bank (NCNB), and agreed to indemnify NCNB with respect to certain potential liabilities associated with the transferred assets. FDIC-Receiver and NCNB removed the case to federal court, and the district court remanded the case to state court. The district court remanded on the basis that NCNB was the real party in interest to the exclusion of the FDIC and the claims involved were state law causes of action.⁴⁷

The Court of Appeals for the Fifth Circuit reversed the district court's decision to remand the case to state court.⁴⁸ The appellate court found that the FDIC was a proper party to the suit, in addition to NCNB, because of the FDIC's obligation to indemnify NCNB with respect to the suit and because the FDIC, as receiver of a failed bank, is the proper party to defend claims for damages against the failed bank.⁴⁹ As the FDIC was a proper party to the lawsuit, the federal district court had jurisdiction⁵⁰ and its remand of the case to state court was inappropriate.⁵¹

2. Statutes of Limitation

The case of *FDIC v. Howse*⁵² involved claims by the FDIC as successor in interest to Alliance Savings and Loan Association (Alliance), an insolvent savings and loan, against the former directors and officers of Alliance. The FDIC brought an action for damages sounding in tort and breach of contract for the officers' and directors' alleged breaches of their fiduciary duties.⁵³ The defendants argued that the FDIC's claims were barred by the Texas statutes of limitations.⁵⁴

45. 905 F.2d 78 (5th Cir. 1990) (per curiam).

46. 12 U.S.C. § 1821(i)(2) (1988) (current version at 12 U.S.C.A. § 1821(n)(1) (1990)) provided the FDIC with the authority to establish a bridge bank in order to facilitate the resolution of a failed bank.

47. 905 F.2d at 79.

48. *Id.* at 80.

49. *Id.*

50. *See supra* note 6.

51. 905 F.2d at 80.

52. 736 F. Supp. 1437 (S.D. Tex. 1990).

53. *Id.* at 1439, 1441.

54. *Id.* at 1439. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003, 16.004 (Vernon 1986) (statutes of limitations for certain tort actions and contract actions, respectively).

The first question addressed by the *Howse* court was whether the running of the time periods provided by the statutes of limitations was tolled while the directors accused of wrongdoing controlled Alliance's board. Although the FDIC admitted that it had contemporaneous knowledge of defendants' alleged injurious acts, the court held that the accrual of the FDIC's causes of action was tolled.⁵⁵ The court adopted the "adverse domination rule," which provides that a corporation's cause of action against its directors does not accrue as long as the culpable directors make up a majority of the board.⁵⁶ The court rejected defendants' argument that in place of the adverse domination rule the court should require the FDIC to demonstrate full, complete and exclusive control over Alliance by the defendants before finding that the accrual of the FDIC's causes of action were tolled.⁵⁷ The court reasoned that the adverse domination rule is in accord with Texas law, that the rule urged by defendants was accepted only in the Second and Ninth Circuits, and that the adverse domination rule more accurately reflects the reality of suing wrongdoing directors who control a corporation.⁵⁸

The court also rejected the defendants' argument that, although they remained as directors for a time afterward, they did not control Alliance once Alliance came under supervisory control and entered into consent agreements with federal and state thrift regulators.⁵⁹ The court stated that the defendants continued to control Alliance following these events, that the adverse domination rule tolled the accrual of the receiver's causes of action as long as the defendants constituted the majority of the board regardless of the consent agreements, and that the FDIC was powerless to pursue legal action against the defendants despite the agreements.⁶⁰ Thus, the court held that the FDIC's causes of action did not accrue until the defendants resigned as Alliance's directors, and, as a result, the limitations periods for the FDIC's claims had not expired before the receiver's appointment.⁶¹

Upon the appointment of a receiver for Alliance, the federal statute of limitations preempted the Texas statutes of limitations and became applicable to the FDIC's claims.⁶² The general federal statute of limitations, set forth in 28 U.S.C. section 2415,⁶³ provides for limitations periods that begin running from the time a cause of action accrues.⁶⁴ However, 12 U.S.C. sec-

55. 736 F. Supp. at 1441.

56. *Id.* at 1441-42. The court cited *Allen v. Wilkerson*, 396 S.W.2d 493, 500 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) as Texas authority for the adverse domination rule. *Id.* at 1441.

57. *Id.* at 1441-42.

58. *Id.*

59. *Id.* at 1442.

60. *Id.*

61. *Id.* at 1443-44.

62. *Id.* As long as the state limitations period does not bar a claim, the federal statute of limitations will apply when the FDIC is appointed receiver. *See id.* at 1440.

63. 28 U.S.C. § 2415 provides for a six-year limitations period from the time a contract cause of action accrues to an agency of the United States and a three-year limitations period from the time a tort cause of action accrues to an agency of the United States. *See* 28 U.S.C. § 2415(a), (b) (1988).

64. *See supra* note 63.

tion 1821(d)(14), as amended by FIRREA,⁶⁵ provides that the federal statute of limitations for a cause of action brought by FDIC-Receiver begins to run on the later of (i) the date of FDIC-Receiver's appointment as receiver or (ii) the date the cause of action accrues.⁶⁶ The *Howse* defendants argued that the more liberal time periods of section 1821(d)(14) were inapplicable because (i) the FDIC was suing in its corporate capacity and not as receiver, and (ii) the more liberal time periods made effective by the FIRREA amendment only applied prospectively and not to the subject lawsuit.⁶⁷ The court rejected the first argument by noting that 12 U.S.C. section 1823, as amended by FIRREA section 217,⁶⁸ grants the FDIC in its corporate capacity (FDIC-Corporate) all of the rights that the FDIC has as receiver under, among other provisions, 12 U.S.C. section 1821.⁶⁹ The court rejected the second argument by reasoning that statutory changes that relate only to procedure or remedy, as opposed to substantive rights, are usually held to be immediately applicable to pending cases.⁷⁰

3. *Mandatory Stay of Action*

The decision in *Prince George Joint Venture v. Sunbelt Savings, F.S.B.*⁷¹ involved a challenge to a stay of proceedings previously granted by the district court to the RTC,⁷² which was a party to the proceedings by virtue of

65. 12 U.S.C. § 1821(d)(14) provides:

(A) In General

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

- (i) in the case of any contract claim, the longer of—
 - (I) the 6-year period beginning on the date the claim accrues; or
 - (II) the period applicable under State law; and
- (ii) in the case of any tort claim, the longer of—
 - (I) the 3-year period beginning on the date the claim accrues; or
 - (II) the period applicable under State law.

(B) Determination of the Date on Which a Claim Accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—

- (i) the date of the appointment of the Corporation as conservator or receiver; or
- (ii) the date on which the cause of action accrues.

12 U.S.C.A. § 1821(d)(14) (1989).

66. *Id.*

67. 736 F. Supp. at 1445.

68. 12 U.S.C. § 1823(d)(3)(A) provides: "With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title." 12 U.S.C.A. § 1823(d)(3)(A) (1989).

69. 736 F. Supp. at 1445.

70. *Id.* at 1446.

71. 744 F. Supp. 133 (N.D. Tex. 1990).

72. 12 U.S.C. § 1821(d)(12) provides:

(12) SUSPENSION OF LEGAL ACTIONS

(A) In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed -

its being appointed conservator and then receiver of one of the defendants.⁷³ The *Prince George* court found the granting of a stay upon the RTC's request following its appointment as receiver to be mandatory.⁷⁴ The court noted that other courts had reached a different conclusion by considering such factors as the harm that would result to the other parties to an action from the granting of a stay⁷⁵ and the amount of time that had passed following the receiver's appointment before a stay was requested.⁷⁶ The *Prince George* court rejected these holdings by stating that each imposed requirements not found in 12 U.S.C. section 1821(d)(12) and that a plain reading of the statute revealed an absence of Congressional intent to impose any such requirements on the granting of a stay.⁷⁷ The *Prince George* court therefore denied the motion before it for reconsideration of the granting of the stay.⁷⁸

The *Prince George* case raises the question of whether the northern and southern districts of Texas will continue to disagree regarding the granting of a receiver's request for a stay. The northern district in the *Prince George* decision declined to follow the holding of the southern district in *FDIC v. Taylor*,⁷⁹ which held that a receiver's request for a stay is subject to a time requirement. A decision by the Court of Appeals for the Fifth Circuit may be necessary to resolve the difference between the district courts on this issue.

4. Mootness

*Village South Joint Venture v. FDIC*⁸⁰ addressed a common procedural question arising in lawsuits against insolvent financial institutions. The plaintiff had filed a lawsuit against Vista Savings Association (Vista), a savings and loan that was subsequently declared insolvent by the Federal Home Loan Bank Board (FHLBB), and for which the FSLIC was appointed receiver. The FDIC became the successor to the FSLIC as receiver following the passage of FIRREA. At the time of the insolvency, the FHLBB determined that under the Texas depositor preference statute⁸¹ Vista's assets were

-
- (i) 45 days, in the case of any conservator; and
 - (ii) 90 days, in the case of any receiver,
- in any judicial action or proceeding to which such institution is or becomes a party.
- (B) Grant of stay by all courts required
- Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

12 U.S.C.A. § 1821(d)(12) (1989).

73. 744 F. Supp. at 134.

74. *Id.* at 135.

75. See *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 729 F. Supp. 1508, 1509-10, *superseded on other grounds*, 737 F. Supp. 18 (D.N.J. 1990).

76. See *FDIC v. Taylor*, 727 F. Supp. 326, 327-28 (S.D. Tex. 1989).

77. 744 F. Supp. at 135.

78. *Id.* at 136.

79. See 727 F. Supp. 326, 327-28 (S.D. Tex. 1989).

80. 733 F. Supp. 50, 51-52 (N.D. Tex. 1990).

81. The Texas depositor preference statute provides a classification scheme for the pay-

insufficient to allow any recovery to Vista's unsecured creditors if Vista were liquidated. The FDIC argued that its maximum liability to the plaintiff in this case was zero, citing 12 U.S.C. section 1821,⁸² which limits the FDIC's liability in a case of this type to the amount the claimant would have received had the insolvent institution in question been liquidated, and the FHLBB's determination that unsecured creditors would have received nothing if Vista had been liquidated. The court agreed with the FDIC's reasoning, stating that the FHLBB's determination of the value of Vista's assets and liabilities was conclusive and that a court was neither permitted to disregard such a determination nor empowered to examine it in this type of proceeding.⁸³ The court granted the FDIC its motion for summary judgment.⁸⁴

*Cox v. Sunbelt Savings Association of Texas*⁸⁵ contrasts with *Village South Joint Venture* in the degree of deference the Court of Appeals for the Fifth Circuit was willing to grant a regulatory agency's determination of the value of an insolvent thrift's assets and liabilities. *Cox* involved lender liability claims filed against Sunbelt Savings Association of Texas (Sunbelt), which was subsequently declared insolvent. Upon Sunbelt's failure, the FHLBB determined that Sunbelt's assets were insufficient to allow any recovery by Sunbelt's unsecured creditors.⁸⁶ After overturning the original basis of the district court's dismissal of this lawsuit,⁸⁷ the *Cox* court refused to affirm the lower court's dismissal on the alternative basis of mootness.⁸⁸ The court observed, citing its holding in *Triland Holdings & Co. v. Sunbelt Service Corp.*,⁸⁹ that the assertion that a savings and loan in receivership lacks assets to satisfy a judgment does not render a claim against the insolvent institution moot as long as it is possible that the claimants might be able to collect on a judgment at some point.⁹⁰ The court then noted that no evidence had been offered to the district court that Sunbelt would never have sufficient assets to satisfy a judgment, which evidence would justify a finding of mootness.⁹¹

ment of claims against deposits of a failed financial institution and requires that all valid claims in a class be paid in full before consideration of claims in the next class. The claims of secured creditors and depositors rank ahead of the claims of general creditors. See TEX. REV. CIV. STAT. ANN. art. 852a, § 8.09(g) (Vernon Supp. 1991).

82. 12 U.S.C. § 1821(i)(2) provides:

Maximum Liability

The maximum liability of the Corporation [FDIC], acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution without exercising the Corporation's authority under subsection (n) of this section or section 1823 of this title.

12 U.S.C.A. § 1821(i)(2) (1989).

83. 733 F. Supp. at 51-52.

84. *Id.* at 52.

85. 896 F.2d 957, 958-60 (5th Cir. 1990).

86. See *supra* note 81 and accompanying text.

87. 89 6 F.2d at 958-9.

88. *Id.* at 960.

89. 884 F.2d 205, 208 (5th Cir. 1989).

90. 896 F.2d at 959.

91. *Id.* at 959-60.

The court remanded the case to the district court for further proceedings.⁹²

The *Cox* holding raises a question about the evidence required to obtain dismissal of lawsuits against insolvent financial institutions on the grounds that the receivership estate possesses insufficient assets to satisfy a judgment. The FHLBB's determination concerning the value of Sunbelt's assets and liabilities at the time of insolvency was presumably on the record submitted to the *Cox* court and yet the court stated that the record was insufficient to determine whether assets would eventually be available to pay a claim.⁹³ The *Cox* holding contrasts with the holding in *Village South Joint Venture*, which was based solely on the value of the institution's assets and liabilities at the time of insolvency.⁹⁴ The difference between these two cases may be explained by the fact that *Village South Joint Venture* involved a statute specifically addressing the receiver's liability in this situation while *Cox* involved the general concept of prudential mootness.⁹⁵ The statute analyzed in *Village South Joint Venture* fixed the relevant time for valuing the assets and liabilities of the insolvent institution — at failure, while the *Cox* mootness analysis inquired whether the receivership would ever have sufficient assets to satisfy a judgment.⁹⁶ Presumably, the FDIC now will receive greater deference under section 1821 than was the case under the prudential mootness test.

B. Substantive Superpowers

1. *D'Oench Duhme* and 12 U.S.C. Section 1823(e)

Initially, the *D'Oench Duhme* doctrine precluded a customer of a failed bank, who "lent himself to a *scheme or arrangement*"⁹⁷ designed to mislead the regulatory authorities supervising that bank, from raising certain common law defenses against FDIC-Receiver.⁹⁸ In 1950, Congress adopted 12 U.S.C. section 1823(e), which provided that "[n]o *agreement* which tends to diminish or defeat the right, title or interest of the Corporation [the FDIC] in any asset acquired by it . . . shall be valid against the Corporation, unless"

92. *Id.* at 960.

93. *Id.* at 959-60.

94. 733 F. Supp. at 52.

95. 896 F.2d at 959-60.

96. 733 F. Supp. at 51-52; 896 F.2d at 959-60. *But see* *Gulley v. Sunbelt Savings, F.S.B.*, 902 F.2d 348 (5th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3460 (U.S. Jan. 8, 1991) (No. 90-537) in which the Court of Appeals for the Fifth Circuit seems to contradict its holding in *Cox*. In *Gulley*, the court held that the FHLBB's determination that the receivership estate of an insolvent thrift lacked the assets to satisfy a judgment was binding upon the court and supported the dismissal of the suit. *Id.* at 351 n.4. It is not clear whether the *Gulley* court's holding was based upon procedural considerations in the case (the plaintiffs had failed to challenge the FHLBB's determination in the district court that the receivership estate was insufficient to satisfy plaintiffs' claims and the case was collateral to a second case in which the plaintiffs sought to establish their claims) or was meant generally to prevent suits seeking recovery after a determination of a receivership's inability to satisfy judgments.

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

98. *Id.* at 460-61.

certain conditions are satisfied.⁹⁹ Significantly, the courts have held that the statute codified¹⁰⁰ but did not supplant the *D'Oench Duhme* doctrine.¹⁰¹ Thus, parties who could not raise section 1823(e) as a defense, because section 1823(e) was only available to the FDIC in its corporate capacity (FDIC-Corporate), as distinguished from its capacity as receiver,¹⁰² were still able to rely on *D'Oench Duhme*.

In recent years, the courts have reasoned that certain parties are similarly situated with FDIC-Corporate and, accordingly, should be provided with the protection of section 1823(e).¹⁰³ Hence, there has been a judicial trend to interpret section 1823(e) and *D'Oench Duhme* in *pari materia*, thereby broadening the availability of section 1823(e) to parties who were entitled to employ *D'Oench Duhme*. This trend was recognized by Congress when it adopted FIRREA. FIRREA explicitly extended the protections afforded by section 1823(e) to cover the FDIC-Receiver and the RTC.¹⁰⁴

99. Federal Deposit Insurance Act of 1950, Pub. L. No. 797, Ch. 967, 64 Stat. 873, 889 (1950) (emphasis added).

The original act has been amended and currently reads:

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

(1) is in writing,

(2) 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,

(3) 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

(4) has been continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823(e) (1989).

100. See *FSLIC v. Hsi*, 657 F. Supp. 1333, 1337 (E.D. La. 1986).

101. *FDIC v. McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (enactment of 12 U.S.C. § 1823(e) did not preempt *D'Oench Duhme* when FDIC acts in its capacity as receiver.)

102. Although, prior to FIRREA, § 1823(e) only applied to the FDIC-Corporate, *Beighley v. FDIC*, 868 F.2d 776, 783-84 (5th Cir. 1989), courts have extended the protection afforded by § 1823(e) to the FDIC-Receiver and the FSLIC by interpreting *D'Oench Duhme* to apply in the same manner as § 1823(e). See *Id.* at 782-83 (*D'Oench Duhme*, "which is the common law counterpart to § 1823(e)," barred Beighley's fraud claims against FDIC-Receiver because such claims were based on promises that were not reflected in the Board or committee minutes and were not contained in a contemporaneous document); *FSLIC v. Murray*, 853 F.2d 1251, 1254 (5th Cir. 1988) ("While neither Congress nor the Supreme Court has extended these protections [*D'Oench Duhme* and § 1823(e)] to FSLIC, we see no reason to treat these regulatory authorities [FDIC and FSLIC] differently.")

The *D'Oench Duhme* doctrine and § 1823(e) have continued to merge in recent years. See *Kilpatrick v. Riddle*, 907 F.2d 1523, 1526 n.4 (5th Cir. 1990) ("There are two *D'Oench, Duhme* doctrines, one statutory (12 U.S.C. § 1823(e)) and one of common law."). See also *infra* notes 139-173 and accompanying text (discussion and analysis of *Kilpatrick v. Riddle*).

103. *FDIC v. Murray*, 853 F.2d at 1254 (extending protection of § 1823(e) to FSLIC). See *supra* note 102.

104. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 217(e), 501(b)(4), 103 Stat. 183, 256-57, 370 (1989) (codified as 12 U.S.C. §§ 1823(e), 1441a(b)(4)). Presumably, § 1823(e) should be available to conservators because, under the Federal Deposit Insurance Act, the term "receiver" includes the term "conservator." 12 U.S.C. § 1813(j) (1988).

a. *Availability of D'Oench Duhme and Section 1823(e) on a Post-Judgment Basis.* The superpowers of the FDIC and the RTC, as enhanced by FIRREA, will often change the result in cases in which judgments are entered against financial institutions. Consequently, the courts have wrestled with the issue of whether the protections provided by *D'Oench Duhme* and section 1823(e) should be available in cases in which a decision was rendered prior to the appointment of a receiver.¹⁰⁵ In other words, can either the RTC or FDIC-Receiver raise section 1823(e) and *D'Oench Duhme* for the first time on appeal? The Court of Appeals for the Fifth Circuit in *Olney Savings & Loan Association v. Trinity Banc Savings Association*¹⁰⁶ held that FIRREA did not empower the former FSLIC¹⁰⁷ to raise *D'Oench Duhme* for the first time on appeal.¹⁰⁸ The Dallas Court of Appeals, however, in two cases¹⁰⁹ decided during the survey period, explicitly disagreed with the Fifth Circuit.¹¹⁰

In *FSLIC v. T.F. Stone — Liberty Land Associates*,¹¹¹ Tommy Stone and certain entities he controlled (collectively Stone) brought suit against Sunbelt Savings Association of Texas (Sunbelt) and its service corporation subsidiary—Sunbelt Service Corporation—asserting, among other things, breach of contract and fraudulent inducement. After the trial court rendered a decision in favor of Stone, Sunbelt was declared insolvent.¹¹² The FSLIC was appointed as receiver for Sunbelt (FSLIC-Receiver) and moved to vacate the decision of the trial court based on a number of alleged errors, the most significant of which concerned the application of *D'Oench Duhme* and section 1823(e).¹¹³

The *Stone* court first addressed whether the judgment involved any “assets” in which FSLIC-Receiver’s interests could be diminished making section 1823(e) available.¹¹⁴ The court concluded that assets of Sunbelt and its subsidiary, which were the subject of an adverse judgment, still remain as

105. Another question confronting the courts is whether the new powers contained in FIRREA may be applied retroactively to circumstances existing prior to the enactment of the statute. See Dennis, *Lender Liability Claims Against Insolvent Banks*, 2 LENDER LIABILITY NEWS, Nov. 29, 1989, at 9, 12. (“Significant questions exist . . . as to whether FIRREA even applies to receiverships that began prior to its date of enactment [Aug. 9, 1989].”). The cases that addressed the question of the availability of the superpowers for the first time on appeal also addressed the retroactivity issue. See *infra* text accompanying notes 132-34.

106. 885 F.2d 266 (5th Cir. 1989).

107. FIRREA dissolved the FSLIC. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401(a)(1), 103 Stat. 183, 354 (1989) (abolishing FSLIC and repealing 12 U.S.C. § 1725 (1988)).

108. 885 F.2d at 275.

109. The first case, *FSLIC v. T.F. Stone-Liberty Land Associates*, 787 S.W.2d 475 (Tex. App.—Dallas 1990, writ granted), is discussed *infra* in the text accompanying footnotes 111-135. The second case, *FDIC/Manager Fund v. Larson*, 793 S.W.2d 37 (Tex. App. — Dallas 1990, writ granted), which was decided by the same court that rendered the *Stone* decision and follows the analysis applied in *Stone*, is not discussed herein.

110. 787 S.W.2d at 483; 793 S.W.2d at 41-42.

111. 787 S.W.2d 475 (Tex. App.—Dallas 1990, writ granted).

112. *Id.* at 477-78.

113. *Id.* at 477.

114. See 787 S.W.2d at 482. See *supra* note 99 and accompanying text.

assets of the receivership estate until all appeals are exhausted.¹¹⁵ Thus, the protections provided by *D'Oench Duhme* and section 1823(e) were available to FSLIC-Receiver.¹¹⁶ In contrast, the Court of Appeals for the Fifth Circuit in *Olney* held that funds used to post a supersedeas bond were no longer assets of the insolvent institution.¹¹⁷ In addition, the *Olney* court determined that the decision of the trial court voided the loan participations at issue in *Olney*, the effect of which removed such assets from the receivership estate.¹¹⁸ Thus, the *Olney* court concluded that FSLIC-Receiver's interests could not be defeated or diminished because the receiver never acquired any assets related to the litigation.¹¹⁹

After concluding that FSLIC-Receiver did succeed to the assets that were the subject of the litigation, the *Stone* court next considered whether FSLIC-Receiver could raise *D'Oench Duhme* and section 1823(e) for the first time on appeal. The *Stone* court noted that Congress amended 12 U.S.C. section 1821 to provide that the FDIC as conservator or receiver retains all the rights and remedies that the insured depository institution enjoyed before the FDIC was appointed as conservator or receiver "in the event of any appealable judgment."¹²⁰ The *Stone* court reasoned that section 1821 provides FSLIC-Receiver, on appeal, with all of the rights and remedies available to FSLIC-Corporate, one of which is the right to avoid side agreements. Thus, section 1823(e) could be raised by FSLIC-Receiver for the first time on appeal.¹²¹ In contrast, the *Olney* court had stated that the purpose of the amendments to section 1821 was to provide FSLIC-Receiver with standing to pursue appeals because prior to FIRREA only FSLIC-Corporate had standing to pursue certain actions.¹²²

The *Stone* court acknowledged its disagreement with the Court of Appeals for the Fifth Circuit, but was convinced of the veracity of its own opinion for two reasons. First, it read the language of 12 U.S.C. section 1821(d)(13)(B) to concern rights and remedies — not standing.¹²³ Second, the *Stone* court reasoned that 12 U.S.C. section 1821(d)(13)(A),¹²⁴ which requires FSLIC-

115. 787 S.W.2d at 482.

The *Stone* court relied, in part, on interpretations of the term "final judgment" in 12 U.S.C. § 91 ("no attachment, injunction, or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action or proceeding, in any State, county, or municipal court." 12 U.S.C. § 91 (1988) (emphasis added)), as requiring exhaustion of all appeals before an institution's assets may be attached. 787 S.W.2d at 482.

116. 787 S.W.2d at 482.

117. 885 F.2d at 274.

118. *Id.* at 275.

119. *Id.*

120. *Id.* at 483 (quoting from FIRREA, Pub. L. No. 101-73, § 212, 103 Stat. 183, 232 (1989) (codified as 12 U.S.C. § 1821(d)(13)(B)) (court's emphasis)).

121. 787 S.W.2d at 483.

122. 885 F.2d at 275.

123. 787 S.W.2d at 484. See 12 U.S.C.A. § 1821(d)(13)(B) (1989).

124. 12 U.S.C. § 1821(d)(13)(A) provides that "[t]he Corporation [the FDIC] shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver." 12 U.S.C.A. § 1821(d)(13)(A) (1989).

Receiver to abide by unappealable judgments, supported its decision.¹²⁵ The *Stone* court stated that Congress distinguished between appealable and unappealable judgments in sections 1821(d)(13)(A) and (B) to clarify that the receiver could raise certain rights, such as section 1823(e), for the first time on appeal.¹²⁶

In reaching its conclusions, the *Stone* court also dismissed the decision of the Court of Appeals for the Tenth Circuit in *Grubb v. FDIC*,¹²⁷ which held that a judgment issued against a bank prior to the institution's closure eliminates an asset from the receivership estate.¹²⁸ The *Stone* court reasoned that a judgment might be reversed on appeal, thereby restoring the asset to the receivership.¹²⁹ Accordingly, until an unappealable decision has been entered, a latent asset with potential value still exists in the receivership estate. The *Stone* court also dismissed the holding of its sister court of appeals in *Federal Savings & Loan Association v. Kennedy*¹³⁰ because the *Kennedy* court reached its decision prior to the adoption of FIRREA.¹³¹

Stone argued that even if the amendments to 12 U.S.C. section 1821 extended the protection afforded by section 1823(e) to FSLIC-Receiver, such rights should not be applied "retroactively" in light of legislative history.¹³² The *Stone* court stated that there was no reason to rely on legislative history because the statute is unambiguous.¹³³ Moreover, the broad statements of one representative, which supported Stone's argument, were not entitled to much weight because they were inserted or appended to the record. The *Stone* court acknowledged that laws are generally presumed to have only prospective application. Nonetheless, the court decided to permit section 1821 to operate retroactively because the statute only clarified the procedures pursuant to which pre-existing rights would be enforced.¹³⁴

The decision in *Stone* provides the FDIC and the RTC whenever they are appointed receiver, post-judgment but before all appeals have run, with a Hobson's choice. Presumably, their first choice would be to seek to remove

125. 787 S.W.2d at 484-85.

126. *Id.* at 484.

127. 868 F.2d 1151 (10th Cir. 1989).

128. *Id.* at 1158.

129. 787 S.W.2d at 483-84.

130. *See* 732 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

131. 787 S.W.2d at 482.

132. *Id.* at 486. Stone quoted Representative Ortiz, who stated that "[t]he powers [of the FDIC] set forth in this bill [FIRREA] are, in many respects, new, and there is no intent that such powers be applied to receiverships that have been established prior to enactment of this bill," for the proposition that the legislative history rejected retroactive application of the expanded receivership powers. *Id.* (quoting 135 CONG. REC. H5003 (daily ed. August 3, 1989) (statement of Rep. Ortiz)).

133. It seems surprising that the *Stone* court would find its reading of 12 U.S.C. § 1821 to be unambiguous when three other courts reached an opposite interpretation to that of the *Stone* court. *See supra* notes 106-08, 116-18, 126-30 and accompanying text.

134. *Id.* at 487-88. In contrast, the Court of Appeals for the Fifth Circuit, in *Griffon v. United States Department of Health & Human Services*, employed a more exacting standard for retroactive application of subsequent statutory enactments. 802 F.2d 146 (5th Cir. 1986). The *Griffon* court held that legislation applies "prospectively absent unequivocal Congressional intent." *Id.* at 155.

to federal court a case originally filed in state court because the federal courts are thought to be more knowledgeable concerning federal claims and defenses, such as *D'Oench Duhme*. Under *Olney*, however, the federal court would leave intact the state court decision. Accordingly, the FDIC or RTC are better off leaving the case in the state system, even if the state courts are less knowledgeable, and having the lower state court decision vacated.

b. Availability of D'Oench Duhme and Section 1823(e) Outside the Lender-Borrower Relationship. In recent years, the parties who are entitled to rely on section 1823(e) and the boundaries of the term "agreement" have been expanded, both statutorily¹³⁵ by Congress and judicially, most notably by the U.S. Supreme Court in *Langley v. FDIC*.¹³⁶ Similarly, the jurisprudence concerning the circumstances encompassed within the terms "scheme or arrangement,"¹³⁷ and thus, the situations in which the *D'Oench Duhme* doctrine is applicable, have been marked by a continuous, albeit unsteady, expansion.¹³⁸ Several cases decided during the survey period addressed the scope of such terms.

(i) Securities Claims. In *Kilpatrick v. Riddle*,¹³⁹ the Court of Appeals for the Fifth Circuit held that *D'Oench Duhme* barred a suit alleging securities' law violations.¹⁴⁰ The plaintiffs were borrowers from one of the former First RepublicBanks (FRB) who used loan proceeds to purchase stock in Texas National Bank (TNB). The loans allegedly benefitted FRB by affording FRB with new collateral for the debts owed to it by two controlling shareholders of TNB who were promoting this investment. TNB was to use such funds to establish several new branches. The borrowers claimed that FRB defrauded them by failing to disclose: (i) the existence of a voting trust, pursuant to which the promoters maintained control over TNB, (ii) that the TNB stock was overvalued, and (iii) that the proposed branches were "doomed to fail from the outset."¹⁴¹

The Court of Appeals for the Fifth Circuit, in dispatching all of the plaintiffs' arguments, held that the plaintiffs' claims were barred by *D'Oench Duhme* and section 1823(e).¹⁴² The *Kilpatrick* court stated that the plaintiffs' claims, although couched in terms of the federal securities laws, were,

135. See *supra* note 104 and accompanying text.

136. 484 U.S. 86, 86-92 (1987) ("agreement" includes warranties made by bank regarding land financed by bank).

137. See *supra* notes 97 and 98 and accompanying text.

138. Gray, *Limitations on the FDIC's D'Oench Doctrine of Federal Common-Law Estoppel: Congressional Preemption and Authoritative Statutory Construction*, 31 S. TEX. LAW. REV. 245, 248 (1990) (Federal courts have applied *D'Oench Duhme* in an ever expanding manner); see also Sontag, *To Thrift Fraud Victims: Government Says 'Tough Luck'*, Nat'l Law. J., Sept. 24, 1990, at 3, col.1, 40, col.4. ("[I]n the past few years, the courts have given regulators more and more power to collect [from borrowers of failed financial institution].")

139. 907 F.2d 1523 (5th Cir. 1990) (Brown, J., dissenting), cert. denied, 111 S.Ct. 954, 59 U. S. L. W. 3548 (1991).

140. *Id.* at 1524, 1526.

141. *Id.* at 1525.

142. *Id.* at 1526.

in reality, claims of fraudulent inducement.¹⁴³ The U.S. Supreme Court in *Langley* made it clear that the requirements of section 1823(e) are applicable to agreements that parties are fraudulently induced to enter into as a consequence of the actions of a failed bank.¹⁴⁴ Accordingly, the claims of misrepresentation under the securities laws were tantamount to a side agreement, which did not survive *D'Oench Duhme* and section 1823(e) challenge.¹⁴⁵ The court considered its opinion to be only a minor extension of its earlier rulings, pursuant to which it had previously barred breach of duty and fraud claims arising under state law.¹⁴⁶ Thus, the *Kilpatrick* court held that *D'Oench Duhme* and section 1823(e) were broad enough to bar federal securities law claims based on alleged side agreements.¹⁴⁷

The plaintiffs also claimed that their cause of action should survive *D'Oench Duhme* and section 1823(e) on policy grounds. The plaintiffs asserted that the policy of protecting investors underlying the securities law should outweigh the competing policy of minimizing the cost to the insurance fund underlying the *D'Oench Duhme* doctrine. The *Kilpatrick* court disagreed for two reasons. First, the decision did not strip the plaintiffs of their securities law protections. The plaintiffs could still bring an action against the promoters directly.¹⁴⁸ Second, no policy exists for the federal government to compensate a person because his investments fail.¹⁴⁹

The *Kilpatrick* court acknowledged that one of its sister courts in *Gilman v. FDIC*¹⁵⁰ had indicated that investors might be able to rescind transactions

143. *Id.* at 1528.

144. *Langley v. FDIC*, 484 U.S. 86, 90-92 (1987); *see supra* note 136 and accompanying text.

145. 907 F.2d at 1528.

146. *Id.*

147. *Id.* at 1529.

148. *Id.*

149. *Id.* The *Kilpatrick* court is correct in recognizing that if the plaintiffs' securities law claims succeeded against the FDIC-Receiver, then the cost to the insurance fund of resolving FRB would have increased. The court's second statement, however, misconstrued the plaintiffs' contention. The plaintiffs were not asking the FDIC to compensate them "because [their] investments fail[ed]," but instead, claimed that they would never have made such investments but for the misrepresentations of the failed bank. *Id.* Accordingly, the plaintiffs were seeking to rescind the entire transaction.

150. 660 F.2d 688 (6th Cir. 1981); *see also*, *Gunter v. Hutcheson*, 674 F.2d 862, 874 (11th Cir. 1982) *cert. den.* 459 U.S. 826 (1982). The *Gunter* court stated that it was "less confident" that the policies behind section 1823(e) would outweigh "the strong policies of investor protection embodied in securities law." *Id.* Conversely, the Court of Appeals for the Sixth Circuit later rejected fraud in the inducement claims based on the securities laws in *FDIC v. Investors Assocs. X., Ltd.*, 775 F.2d 152, 156 (6th Cir. 1985) (Investors who signed blank promissory notes were estopped from raising securities fraud as a defense to payment on such notes). *See also* *FDIC v. Rockelman*, 460 F. Supp. 999, 1003 (E.D. Wis. 1978) (Claims based on bank officers' alleged misrepresentations to borrower concerning prospective dividend payments and future appreciation of stock could not be brought against the FDIC).

Although the *Kilpatrick* court was correct that these decisions all predated FIRREA, the Court of Appeals for the Eleventh Circuit in *Vernon v. RTC in dictum* stated that *D'Oench Duhme* does not preclude shareholders of an insolvent institution from bringing claims arising under the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act (RICO). *See* *Vernon v. RTC*, 907 F.2d 1101, 1108 (11th Cir. 1990). The *Vernon* court stated:

The expansion of the *D'Oench* doctrine suggested by New Freedom [the assignee of certain of the assets and liabilities of the former Freedom Savings and Loan

entered into based on violations of the securities laws.¹⁵¹ The court, however, noted that the *Gilman* ruling and certain other decisions predated *Langley*. On that basis, the court dismissed the precedential effect of such decisions.¹⁵²

Judge Brown, dissenting, would not have extended the reach of *D'Oench Duhme* and section 1823(e) to federal securities law claims.¹⁵³ According to the dissent, fraud under the securities law will render an entire transaction void, provided that the person acquiring the asset has actual knowledge of the securities law violation.¹⁵⁴ If the transaction is void, the FDIC never acquired the plaintiffs' notes.¹⁵⁵

The dissent also stated several reasons to treat claims arising under the federal securities laws differently from state and common law fraud claims. First, a violation of the federal securities laws, unlike state common law claims, renders the transaction void instead of voidable.¹⁵⁶ Second, the need for uniformity in resolving federal problems is preserved because the Securities Exchange Act of 1934, as amended,¹⁵⁷ is a federal statute.¹⁵⁸ Third, the FDIC will not be subject to a rash of securities lawsuits because the FDIC will only be liable if it actually participated in, or possessed actual knowledge of, the fraudulent transaction.¹⁵⁹ The dissent stated that its reasoning would craft only a limited exception to the bars of *D'Oench Duhme* and section 1823(e), for in most cases, the FDIC will not possess knowledge of the impropriety.¹⁶⁰

The dissent also distinguished a misrepresentation from an omission.¹⁶¹ The dissent agreed that FRB's unrecorded representations were barred by *D'Oench Duhme*,¹⁶² but stated that FRB violated the securities laws when it did not disclose what it knew regarding TNB's deteriorating financial condition.¹⁶³ If FDIC-Receiver knew of such a violation, the dissent would not

Association] might well further the background goal of favoring and facilitating the purchase and assumption of insolvent banks over liquidation. We decline to adopt such a rule, however, as we believe it would be both inappropriate and unnecessary in this appeal. . . .

. . . . The rule proposed by New Freedom would bar such claims [tort claims] from being successfully asserted when Congress has provided that such claims be paid. New Freedom's rule cannot prevail. (emphasis added).

Id.

151. 907 F.2d at 528. See 660 F.2d at 693-94.

152. *Id.*

153. *Id.* at 1530.

154. According to the dissent, fraud under the federal securities laws renders the entire transaction void, provided the person acquiring the asset has actual knowledge of the securities law violation. *Id.* at 1530 n.5 (quoting 15 U.S.C. § 78cc(b) (1988)).

155. *Id.* at 1531.

156. *Id.*

157. See 15 U.S.C. § 78 (1988).

158. 907 F.2d at 1531.

159. *Id.*

160. *Id.*

161. *Id.* at 1532.

162. *Id.* at 1533.

163. *Id.* at 1532.

have applied *D'Oench Duhme* to protect FDIC-Receiver from liability under the securities laws for FRB's omissions.

The dissent's distinction between omissions and misrepresentations would be difficult to apply. Often a statement made by an issuer of securities is a misrepresentation because the issuer fails to disclose certain other information. Thus, the same statement may be both a misrepresentation and an omission. Moreover, as was the case in *Kilpatrick*, misrepresentations are often made in conjunction with omissions. It may be impossible to determine whether it was the misrepresentations, the omissions, or a combination of both, that convinced the investor to purchase the securities.

The dissent stated that its reasoning would craft only a limited exception to *D'Oench Duhme* and section 1823(e) because the receiver typically does not have actual knowledge of the failed bank's improper conduct.¹⁶⁴ If the dissent is correct regarding the receiver's knowledge of the failed institution's allegedly wrongful behavior, then, presumably, permitting misrepresentations of which the receiver possesses actual knowledge, as well as all omissions, to survive *D'Oench Duhme* and section 1823(e) would not significantly expand such an exception.¹⁶⁵

The plaintiffs in *Kilpatrick* attempted to have the decision of the Court of Appeals overturned. Plaintiffs, in their Petition for a Writ of Certiorari (Petition)¹⁶⁶ to the Supreme Court, asserted that the majority essentially twice recast plaintiffs' contentions—first, by recasting plaintiffs' securities fraud claim as an "agreement," and second, by recasting plaintiffs' claim of a fraudulent issuance of securities under federal law as fraudulent inducement to enter into an agreement under common law.¹⁶⁷ The plaintiffs further averred that the majority's interpretation "stretches the meaning of the term 'agreement' beyond all reasonable limits."¹⁶⁸

According to the petitioners, the dissent correctly pointed out that the majority failed to recognize that fraud under the federal securities laws renders the transaction void.¹⁶⁹ The petitioners, like the dissent, also asserted that their analysis was supported by the Supreme Court's decision in *Langley* because under *Langley*, neither *D'Oench Duhme* nor section 1823(e) precludes a party from raising a claim or defense that would render a transaction void. Applying the federal securities laws also does not require the transaction to be recast.¹⁷⁰

164. *Id.* at 1533.

165. The receiver must possess actual knowledge. The receiver will not be deemed to possess knowledge of the misrepresentations or omissions from its examinations of the institution, or the existence of the litigation when the receiver is appointed. See *infra* text accompanying note 236.

166. Petition for Writ of Certiorari, *Rogers v. FDIC*, 59 U.S.L.W. 3346 (U.S. Oct. 24, 1990) (No. 90-692), reprinted in *Failed Bank & Thrift Litig. Rep.* (Andrews Publications) 12563 (Dec. 12, 1990) [hereinafter *Petition*]. Page references refer to the page numbers of the original petition as reprinted in the reporting service.

167. *Petition*, *supra* note 166, at 9-10.

168. *Id.* at 10 (citing 907 F.2d at 1532 (Brown, J., dissenting)).

169. *Petition*, *supra* note 166, at 11 (quoting 907 F.2d at 1531 (Brown, J., dissenting)).

170. *Petition*, *supra* note 166, at 11 (citing 907 F.2d at 1531-32 (Brown, J. dissenting)).

The petitioners also claimed that the *Kilpatrick* decision impermissibly elevates federal common law over federal statutory law.¹⁷¹ The federal securities laws provide a comprehensive system for redress of injury resulting from securities fraud. When a federal statute conflicts with federal common law, the judicial crafted provision must give way.¹⁷² Accordingly, the federal securities laws must take precedence over *D'Oench Duhme*. The petitioners also contended that even if section 1823(e) were applicable, the federal securities laws, which specifically address securities fraud, would override section 1823(e) when such statutory provisions conflict.¹⁷³ Despite the petitioners' contentions, the Supreme Court refused to grant their Petition.

(ii) *Discharge of Indebtedness*. In *In re Smith*,¹⁷⁴ the bankruptcy court considered whether to deny discharge of indebtedness owed by James Smith and Vernon Smith (the Smiths) and entities they individually or collectively controlled to FDIC-Receiver for Vernon Savings and Loan Association, F.S.A. (Vernon).¹⁷⁵ FDIC-Receiver alleged that the Smiths conspired with certain former officials of Vernon to defraud the insurance fund, and that such fraud should bar discharge of the Smiths' indebtedness. The *Smith* court, relying in part on *D'Oench Duhme*,¹⁷⁶ agreed. The basis for this decision, even though limited to situations in which actual deceit exists, may have significant consequences in light of the extent of fraud practiced on thrift institutions in recent years.¹⁷⁷

In December 1984, a Vernon subsidiary, Dondi Residential Property, Inc. (DRPI), sought to sell certain property, including a tract on Cedar Springs Avenue in Dallas, Texas. This property possessed an appraised fair value of less than DRPI's recorded investment. As an accommodation to Vernon,¹⁷⁸ the Smiths, through a limited partnership they created (Smith Springs Ltd.), agreed to purchase the Cedar Springs tract at a price equal to the "book value" of such property.

The purchase price was 100% financed by three notes: a \$4,340,000 first lien note, which was sold to San Jacinto Savings Association; a \$1,085,000 second lien note; and a \$170,000 unsecured note. The unsecured note was

171. *Id.* at 12. FDIC-Receiver, in *Kilpatrick*, relied on *D'Oench Duhme* and not on 12 U.S.C. § 1823(e) because *Kilpatrick* arose prior to FIRREA's extension of § 1823(e) to receivers.

172. Petition *supra* note 166, at 12-13.

173. *Id.* at 15.

174. *In re Smith*, (FDIC v. Smith), 113 B.R. 297 (Bankr. N.D. Tex. 1990).

175. 113 B.R. at 297-311. Title 11 U.S.C. § 523(a)(6) prohibits discharge of indebtedness when the debtor has caused "willful and malicious injury to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (1988).

176. See *infra* text accompanying notes 180-190.

177. *Ruling on S&L Fraudulent Loans Is Set*, Wall St. J., April 17, 1990, at B-8, col.1 ("The [Smith] ruling could have significant ramifications in Texas because so many fraudulent loans were obtained from Texas thrifts.").

178. Vernon's loan policy provided that customers who engaged in transactions with DRPI would be eligible for subsequent extensions of credit, provided the future loan was consistent with the standards of Vernon's underwriter.

used to conceal from the examiners that the sales price, and thus the loan amount, exceeded the property's appraised fair value.

In exchange for the Smith's purchase of the Cedar Springs tract from DRPI, Vernon later agreed to refinance a project at the corner of Celestial and Montfort Avenues in Dallas, Texas, and fund the purchase of property on New York Avenue in Arlington, Texas. James Smith applied to Vernon for a loan under the name Conworth Properties, Inc. (Conworth), a corporation formed by Smith and of which he was the sole shareholder. Conworth executed the Celestial/Montfort and New York Avenue loans. A portion of the loan proceeds was to be used to cover various expenses of James Smith's other companies and interests, which expenses included his salary. Although Vernon's management was aware of this use of loan proceeds, the loan documents did not disclose such use, nor was Vernon's underwriter aware of it.

At the time the Celestial/Montfort and New York Avenue loans were made, the Smiths' companies were experiencing significant cash flow problems, which problems were known to Vernon's management officials. Nonetheless, Vernon's underwriter determined that the proposed \$15,700,000 loan to purchase the New York Avenue property would be acceptable because such property had an appraised fair value of \$17,500,000. Conversely, the underwriter determined that the Celestial/Montfort refinancing was imprudent. Although the property had been appraised at \$8,900,000, the underwriter believed that the true fair value of the property was lower than the \$8,010,000 proposed loan amount. Nonetheless, Vernon funded both the Celestial/Montfort refinancing and the New York Avenue loan.

The FDIC sought to deny discharge of the Cedar Springs, Celestial/Montfort, and New York Avenue loans primarily under 11 U.S.C. section 523(a)(2)(A).¹⁷⁹ According to the *Smith* court, section 523(a)(2)(A) provides that a discharge under the Bankruptcy Code excludes indebtedness if the debtor: (i) obtained the indebtedness pursuant to false representations, (ii) made with the intent of deceiving the creditor, (iii) upon which the creditor reasonably relied, and (iv) as a result of which the creditor suffered a loss.¹⁸⁰ The *Smith* court evaluated all three loans under this test.

The *Smith* court denied discharge of the Cedar Springs loan.¹⁸¹ This loan was structured in three notes, with the third note being unsecured and omitted from the closing documents. The purpose of the third note was to conceal from the examiners that Vernon was financing in excess of 100% of the fair value of the property to enable DRPI to sell the property without experiencing a loss.¹⁸² The court noted that since Vernon conspired with the

179. 11 U.S.C. § 523 provides that a bankrupt debtor's discharge is to be denied for any debt obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A) (1988).

180. 113 B.R. at 304. See 11 U.S.C. § 523(a)(2)(A) (1988).

181. 113 B.R. at 306, 311.

182. *Id.* at 306.

Smiths, it could not reasonably rely on the false documents; thus, it could not have prevented a discharge.¹⁸³ The FDIC, however, was differently situated. Under *D'Oench Duhme*, the FDIC is assumed to have relied on the contents of loan files, loan applications and closing files to its detriment.¹⁸⁴ The *Smith* court also stated that the Smiths intended to and did harm the insurance fund.¹⁸⁵ Thus, under 11 U.S.C. section 523, the Smiths were not entitled to a discharge of the indebtedness arising from the Cedar Springs transaction.¹⁸⁶

Similarly, the *Smith* court refused to discharge the Celestial/Montfort debt.¹⁸⁷ Vernon's own underwriter concluded that the loan amount exceeded the value of the collateral securing the Celestial/Montfort debt. Moreover, James Smith and Vernon's representatives knowingly concealed from the examiners James Smith's use of a portion of the loan proceeds for unrelated working capital needs. Again, the examiners were entitled to rely on the veracity of the representations in the loan documents. Furthermore, James Smith intended to and did injure Vernon's deposit insurer. Thus, the test set forth in 11 U.S.C. section 523 was also met in the case of the Celestial/Montfort debt.¹⁸⁸

Conversely, the *Smith* court permitted the New York Avenue loan to be discharged.¹⁸⁹ The *Smith* court found that, at the time of the loan, the fair value of the collateral exceeded the loan amount.¹⁹⁰ In addition, Vernon retained the right to refuse any draws on the loan. Moreover, Smith was entitled to use the loan proceeds to pay the obligations of his companies and his own salary because the purpose statement for this loan was too vague to limit the use of the loan proceeds.¹⁹¹ The *Smith* court noted that the draw requests on the loan misrepresented the manner in which such funds were to be used.¹⁹² Nonetheless, the court deemed such misrepresentations immaterial because they did not cause the indebtedness.¹⁹³ Thus, FDIC-Receiver did not meet its burden of proof under 11 U.S.C. section 523.¹⁹⁴

The *Smith* court could have reached a different conclusion by stressing certain other facts. First, as the *Smith* court acknowledged, Vernon agreed to fund the New York Avenue loan and to refinance the Celestial/Montfort loans in exchange for Smith Springs Ltd.'s agreeing to purchase the Cedar Springs tract. Second, when Vernon financed the New York Avenue loan, the Smiths were experiencing severe cash flow problems. Third, the ap-

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 306, 311.

187. *Id.* at 308, 311.

188. *Id.*

189. *Id.* at 310, 311.

190. *Id.* at 308.

191. *Id.* at 308-09, 310.

192. *Id.* at 309.

193. *Id.*

194. *Id.* at 309-10. The *Smith* court stated that refusal of discharge is disfavored. *See id.* at 305.

praisal for the New York Avenue loan dramatically overvalued the collateral. The court noted that the appraisals on both the Cedar Springs tract and the Celestial/Montfort projects were significantly inflated. The court recognized that the appraisal on the collateral securing the New York Avenue loan was also inflated because the court even assumed a discount of the appraised value of the New York Avenue property. Thus, Vernon made a loan to a party in a deteriorating position, without cash flow to service the loan and secured by collateral with an overinflated value.

Surprisingly, however, the *Smith* court evaluated each of these loans in isolation. The *Smith* court noted that the Smiths assisted Vernon in concealing information from the examiners in connection with both the Cedar Springs and the Celestial/Montfort loans. Similarly, the draw requests on the New York Avenue project misrepresented the use of the proceeds of the draws. From the parties' course of dealing and the court's conclusions regarding the Cedar Springs tract and the Celestial/Montfort project, it would seem appropriate for the court to have inferred that the New York Avenue loan was part of an arrangement designed to defraud a financial institution.

(iii) *Lease Arrangements.* In *FDIC v. Zoubi*¹⁹⁵ the court barred a breach of fiduciary duty claim that a lessor raised against his lessee's lender. Originally, Zoubi leased a car wash to a lessee who obtained financing through Texas American Bank/Richardson, N.A. (TAB-Richardson). After the lessee defaulted, Zoubi considered selling the car wash, but TAB-Richardson advised him against selling because of the lack of creditworthiness of the prospective purchaser. Instead, two weeks later, TAB-Richardson's president informed Zoubi that Michael and Janice Caylor (the Caylors) desired to lease the car wash. Zoubi and the Caylors then entered into a lease.

TAB-Richardson provided financing for the Caylors to improve the property. Zoubi and the Caylors entered into an Assignment of Lease with TAB-Richardson. Zoubi also subordinated his lien in the car wash equipment to TAB-Richardson's lien. Lastly, Zoubi signed a letter pursuant to which he agreed to notify TAB-Richardson if the Caylors defaulted under the lease. In the letter Zoubi further agreed that the lease would remain in effect despite any default by the Caylors, provided TAB-Richardson honored the terms of the lease.

Shortly thereafter, the Caylors defaulted on the lease. TAB-Richardson sold the collateral and applied the proceeds against the Caylors' indebtedness. Zoubi contended that TAB-Richardson's officers had orally guaranteed the lease. Zoubi also contended that TAB-Richardson's actions to recover on the collateral breached its fiduciary duty to him.

FDIC-Receiver raised section 1823(e) and *D'Oench Duhme* as defenses to Zoubi's claims. Zoubi contended that such defenses were unavailable because he was not claiming an adverse interest in an asset acquired by a depository institution. Instead, Zoubi sought to enforce TAB-Richardson's

195. 792 S.W.2d 825 (Tex. App.—Dallas 1990, no writ).

guarantee of the lease. Accordingly, Zoubi concluded that the transactions in question did not involve an "agreement" for the purposes of section 1823(e).¹⁹⁶ Zoubi also asserted that he did not participate in any "scheme or arrangement" designed to deceive the banking examiners.¹⁹⁷ Instead, TAB-Richardson's officers had represented to Zoubi that TAB-Richardson guaranteed the Caylors' obligations under the lease.

The *Zoubi* court broadly interpreted the term "agreement" to apply to any claim of fraud or misrepresentation, regardless of whether such claim arose in the debtor-creditor context.¹⁹⁸ The court then applied section 1823(e) and *D'Oench Duhme* to bar Zoubi's claims because such claims did not meet the requirements of section 1823(e).¹⁹⁹

The *Zoubi* decision continues the trend of expanding the scope of the term "agreement."²⁰⁰ In a general sense, all claims, if successful, would have the effect of diminishing the receivership assets or the depository institution's assets. Consequently, the *Zoubi* court's expansive reading of the term "agreement" to encompass any fraud or misrepresentation even if made to noncustomers of the failed bank will result in few claims falling outside the scope of section 1823(e).²⁰¹

(iv) *Participations.* The case of *Royal Bank of Canada v. FDIC*²⁰² concerned another type of transaction outside the lender-borrower framework in which *D'Oench Duhme* applies. In 1981, RepublicBank Fort Worth, N.A. (RepublicBank) entered into an interbank credit agreement with two other banks, pursuant to which each bank committed to loan Pengo Industries, Inc. (Pengo), an oil and gas company, up to \$30,000,000. Soon thereafter, RepublicBank and the other lenders modified the agreement to increase Pengo's available credit to a maximum of \$40,000,000 per bank.

RepublicBank sold a participation of its additional \$10,000,000 credit obligation to Royal Bank of Canada (RBC). The participation agreement authorized RepublicBank, in its discretion, to request RBC to fund up to the full \$10,000,000. From March 25 to April 28, 1982, RBC advanced \$5,800,000. RepublicBank sold participations to its correspondent banks and used the proceeds of such sales to repay RBC. Shortly thereafter, Pengo began experiencing significant financial difficulties. On July 14, 1982, RepublicBank listed Pengo on its insolvent loan watchlist. In late 1982, RepublicBank called on RBC to fund the full \$10,000,000 participation, and RBC complied. Pengo defaulted and RBC brought suit asserting, among other things, that RepublicBank breached the terms of the participation

196. See *supra* note 99 and accompanying text.

197. See *supra* note 97 and accompanying text.

198. 792 S.W.2d at 829.

199. *Id.*

200. See *supra* notes 136-138 and accompanying text.

201. Section 1823(e) will bar a claim that is not based on a contemporaneous writing, approved by the institution's Board (or a delegated committee thereof) with such approval being reflected in the minutes and such writing being and continuously remaining an official record. 12 U.S.C.A. § 1823(e)(1)-(4) (1989).

202. 733 F. Supp. 1091 (N.D. Tex. 1990).

agreement. FDIC-Receiver for RepublicBank asserted that *D'Oench Duhme* and section 1823(e) barred RBC's claims.

RBC contended that RepublicBank had orally agreed that RBC's obligation to fund the participation would be on a last-in, first-out (LIFO) basis. FDIC-Receiver asserted that the tandem of *D'Oench Duhme* and section 1823(e) barred a claim based on an oral representation. RBC responded that: (i) cases interpreting section 1823(e) are inapplicable to the application of *D'Oench Duhme*, (ii) *D'Oench Duhme* is inapplicable outside the lender-borrower relationship, and (iii) the FDIC's knowledge of RBC's claim precluded the FDIC's use of *D'Oench Duhme*.

The RBC court stated that *D'Oench Duhme* and section 1823(e) are *pari rationae*.²⁰³ Accordingly, interpretations of section 1823(e) apply to *D'Oench Duhme*. The RBC court also stated that the capacity in which a party interacted with the failed institution is irrelevant in determining whether *D'Oench Duhme* applies.²⁰⁴ Instead, the issue is whether the party lent itself to a "scheme or arrangement" likely to deceive banking authorities.²⁰⁵ RBC's failure to obtain written representations from RepublicBank caused such a side agreement to be unenforceable. Lastly, the court, citing a litany of cases, held that the FDIC's prior knowledge of a claim will not preclude application of *D'Oench Duhme*.²⁰⁶ Thus, *D'Oench Duhme* barred RBC's claims of misrepresentation.

The court reached a different conclusion regarding RBC's alleged breach of contract claim. The participation agreement provided that RepublicBank "shall exercise the same care that [RepublicBank] exercise[s] in the making and handling of loans for [its] own account."²⁰⁷ RBC asserted that RepublicBank breached this contractual duty when it, among other things, requested RBC to fund its participation despite Pengo's deteriorating condition, and used such funds to repay RepublicBank's correspondent banks. FDIC-Receiver countered that RBC was alleging breach of specific duties that were not set forth in the participation agreement; thus, such obligations were barred by *D'Oench Duhme*.

The RBC court held that the participation agreement fully reflected RepublicBank's due care duty.²⁰⁸ Accordingly, it was irrelevant that RBC would need to resort to evidence that was not contained in the participation agreement in order to prove its case. *D'Oench Duhme* requires the representations, and not the evidence proving breach of such representations, to be in writing in the bank's files.²⁰⁹ Thus, *D'Oench Duhme* did not bar RBC's breach of contract claims.²¹⁰

The RBC decision affords some certainty to loan participants. The rela-

203. *Id.* at 1095.

204. *Id.* at 1096.

205. *Id.*

206. *Id.* at 1097.

207. *Id.* (bracketed material in original).

208. *Id.* at 1098.

209. *Id.*

210. *Id.*

tionship between a lead lender and a participant is contractual. After *RBC*, the relationship between the FDIC and a participant will be governed by the terms of the contract between the original parties. Consequently, the FDIC cannot escape liability for breach of the failed institution's duties under the participation agreement by relying on *D'Oench Duhme*.

c. *Availability of D'Oench Duhme and Section 1823(e) to Other Parties.* The parties armed with the tandem of *D'Oench Duhme* and section 1823(e) proliferated during the survey period primarily as a result of the provisions of FIRREA.

(i) *Bridge Banks.* In *Bell & Murphy & Associates, Inc. v. Interfirst Bank Gateway, N.A.*,²¹¹ the Court of Appeals for the Fifth Circuit extended the protections afforded by *D'Oench Duhme* to cover a bridge bank (NCNB Texas National Bank).²¹² The *Bell & Murphy* court reasoned that the failure to provide such protection to a bridge bank would undermine the efficacy of the bridge bank as a means of resolving insolvent banks.²¹³ The district court in *Fair v. NCNB Texas National Bank*²¹⁴ also concluded that *D'Oench Duhme* applies to bridge banks.²¹⁵

211. 894 F.2d 750 (5th Cir.) cert. denied, 111 S.Ct. 244 (1990). FIRREA expressly extended § 1823(e) to bridge banks. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-3, § 214, 103 Stat. 183, 249 (1989) (codified as 12 U.S.C. § 1821(n)(4)(l)). See 12 U.S.C.A. § 1821(n)(4)(l).

Curiously, the *Bell & Murphy* court believed that 12 U.S.C. § 1823(e) was not applicable to FDIC-Receiver. 894 F.2d at 753. Although § 1823(e) previously was only available to the FDIC-Corporate, Congress, when it adopted FIRREA, specifically extended the protections afforded by the statute to include FDIC-Receiver, among others. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat. 183, 231 (1989) (codified as 12 U.S.C. § 1821(d)(9)(A)) ("[A]ny agreement that does not meet the requirements set forth in section 1823(e) shall not form the basis of, or substantially compromise, a claim against the receiver or the Corporation [FDIC].") 12 U.S.C.A. § 1821(d)(9)(A) (1989)). Thus, the court apparently failed to recognize that the law had been changed.

212. 894 F.2d at 754-55. Congress authorized the FDIC to create a bridge bank to serve as a temporary receptacle for certain of the assets and liabilities of a failed bank until a permanent solution could be devised. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 214, 103 Stat. 183, 246-52 (1989) (codified as 12 U.S.C. § 1821(n)); See 12 U.S.C.A. § 1821(n) (1989).

213. 894 F.2d at 754.

214. 733 F. Supp. 1099 (N.D. Tex. 1990).

The *Fair* court's decision is not surprising after the decision reached by the Court of Appeals for the Fifth Circuit in *Bell & Murphy*. See *supra* text accompanying notes 211-213. The *Fair* court's interpretation of the terms of the purchase and assumption agreement (P&A Agreement) between the FDIC and NCNB Texas National Bank, N.A. (NCNB) that is more noteworthy. Under the terms of the P&A Agreement, the only relevant liabilities NCNB assumed were liabilities arising from any claims or "litigation brought by the Failed Bank [First RepublicBank Waco, N.A.] as of Bank Closing against third parties and related to any asset of the Failed Bank purchased by the Assuming Bank [NCNB]." *Id.* at 1102. The *Fair* court determined that the language of the P&A Agreement was effective to limit the liabilities NCNB assumed. *Id.* The *Fair* court's interpretation offers assignees from the FDIC or RTC, as receiver, broader protection from any claims whatsoever when the receiver and the assignee agreed that such claims would not be transferred.

215. 733 F. Supp. at 1102-03.

(ii) *Purchaser of Assets.* In *Porras v. Petroplex Savings Association*,²¹⁶ the Court of Appeals for the Fifth Circuit extended the protections provided by *D'Oench Duhme* to private assignees from the FDIC.²¹⁷ The *Porras* court reasoned that affording private purchasers of assets from the FDIC with the protections provided by *D'Oench Duhme* expands the pool of potential purchasers for the assets and liabilities of insolvent institutions and this competition enhances the prices such purchasers are willing to pay, thereby minimizing the cost to the insurance fund of resolving insolvent institutions.²¹⁸

(iii) *Subsidiaries.* The decision in *FSLIC v. T.F. Stone-Liberty Land Associates*,²¹⁹ discussed earlier,²²⁰ also held that defenses available to the FSLIC are available to wholly-owned service corporation subsidiaries of failed thrift institutions.²²¹ The *Stone* court reasoned that certain of the principles of *D'Oench Duhme*—reliance on the records of financial institutions and protection of the insurance fund—are equally applicable to claims against subsidiaries of insolvent thrifts.²²² Thus, the policies underlying *D'Oench Duhme* and section 1823(e) could be defeated if the court failed to extend such protections to subsidiaries of parent financial institutions in receivership.²²³

2. Federal Holder in Due Course Rule

a. *Prerequisites for Application.* In *Gunter v. Hutcheson*²²⁴ the Court of Appeals for the Eleventh Circuit gave birth to a federal common law defense of holder in due course (HDC) status.²²⁵ This defense was modelled on the HDC Rule contained in the Uniform Commercial Code (UCC).²²⁶ The federal HDC rule, however, differs in certain respects from its UCC counterpart. To be a HDC under section 3-302 of the UCC, a holder must acquire a negotiable instrument (a) for "value," and (b) in "good faith" and (c) "without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."²²⁷ The UCC also provides that a holder cannot be a HDC if it acquires the instrument by purchasing it at a judicial sale, taking it under legal process, acquiring it by taking over an estate or purchasing it in a bulk transaction outside the ordinary course of business.²²⁸ The *Gunter* court eliminated the requirement that a party must acquire an instrument in the ordinary course of business to attain HDC sta-

216. 903 F.2d 379 (5th Cir. 1990).

217. *Id.* at 381.

218. *Id.*

219. 787 S.W.2d 475 (Tex. App.—Dallas 1990, writ granted).

220. See *supra* text accompanying notes 111-134.

221. 787 S.W.2d at 488-89.

222. *Id.* at 489.

223. *Id.*

224. 674 F.2d 862, 873 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

225. 674 F.2d at 873.

226. See *infra* note 262 and accompanying text.

227. TEX. BUS. & COM. CODE ANN. § 3.302(a)(1)-(3) (Tex. UCC) (Vernon 1968).

228. *Id.* § 3-302(c).

tus when an instrument is acquired in a P&A transaction.²²⁹ Accordingly, the *Gunter* court afforded the FDIC with federal common law HDC status despite the FDIC's having acquired the assets of a failed bank in bulk. The cases decided during the survey period may significantly expand the applicability of federal HDC status by making it available without satisfying the UCC prerequisites.

In *B.L. Nelson & Associates v. Sunbelt Savings, FSB*²³⁰ Judge Fitzwater was called upon to interpret the federal HDC Rule. He was asked to determine whether the FSLIC acquired a note without knowledge of any personal defenses.²³¹ In 1983, Nelson Associates purchased raw land (Trophy Club) in Denton County, Texas with the proceeds of a loan from Independent American Savings Association (State Association) secured by the Trophy Club property and individually guaranteed by B.L. Nelson. Allegedly, State Association agreed to finance the development of Trophy Club. Nelson Associates, however, later learned that deed restrictions prevented the property from being developed as planned. In 1985, Nelson Engineering purchased certain property (Thornbush) with a loan from State Association, secured by the Thornbush property and guaranteed by B.L. Nelson.

In 1987, State Association failed, and the FHLBB created Independent American Savings Association, F.S.L.A. (Federal Association). Federal Association entered into a P&A transaction with State Association and acquired the Nelson entity notes and B.L. Nelson guarantees. The parties attempted to "work out" the Trophy Club note but the discussions collapsed, allegedly because Federal Association insisted that such negotiations include the Thornbush note.

The Nelson entities brought certain state common law claims against Federal Association. Federal Association later failed and Sunbelt Savings, F.S.B. (Sunbelt) acquired the notes and guarantees at issue pursuant to a P&A transaction. Sunbelt counterclaimed against B.L. Nelson on his guarantees and against the Nelson entities.

The *Nelson* court considered whether the claims and defenses of B.L. Nelson and the Nelson entities were barred by the federal HDC Rule.²³² The court dismissed Nelson's argument that the HDC Rule should not apply because State Association was under the FSLIC's control, and thus, the FSLIC participated in the allegedly inappropriate conduct.²³³

The court stated that the FSLIC is presumed to be a HDC.²³⁴ Mere allegations regarding the FSLIC's knowledge will not overcome this presumption. In addition, the FSLIC is not presumed to know of the borrower's

229. 674 F.2d at 873.

230. 733 F. Supp. 1106 (N.D. Tex. 1990).

231. *Id.* at 1110-12.

232. *Id.*

233. *Id.* at 1111. *Cf.* FSLIC v. Locke, 718 F. Supp. 573, 583 (W.D. Tex. 1989). (court rejected borrower's contentions that FHLBB, by chartering new thrift institution and installing institution's officers and staff, exercised sufficient dominion and control over thrift institution to preclude institution from being able to raise *D'Oench Duhme* as defense)

234. *Id.* at 1111.

personal defenses merely from the existence of litigation or the FSLIC's actions in examining the institution.²³⁵ The knowledge of an officer of State Association, Federal Association and Sunbelt generally cannot be imputed to the FSLIC because the FSLIC is an entirely separate entity.²³⁶ Thus, the FDIC, as successor to the FSLIC, was a HDC. The *Nelson* court held that Nelson's usury defense was a personal defense, which is unavailable against a HDC.²³⁷

In *Sunbelt Savings, FSB, Dallas, Texas v. Amrecorp Realty Corp.*,²³⁸ the court examined whether the FSLIC could be a HDC under the federal common law rule even if it had knowledge of the defenses of the maker of the instrument.²³⁹ Sherwood Blount and Amrecorp Realty Corporation (collectively, Amrecorp) had guaranteed certain notes made to Sunbelt Service Corporation, which, in turn, assigned such notes to Sunbelt Savings Association of Texas (Old Sunbelt). When the underlying obligor defaulted, Old Sunbelt sued Amrecorp to require payment on the guarantees. Amrecorp counterclaimed asserting Old Sunbelt had sought usurious interest.

Old Sunbelt was declared insolvent. Old Sunbelt entered into a P&A agreement with the newly chartered Sunbelt Savings, F.S.B. (New Sunbelt).²⁴⁰ New Sunbelt acquired the guaranty agreements but FSLIC-Receiver retained Old Sunbelt's obligations to general creditors. Amrecorp sought discovery from New Sunbelt and the FDIC (as successor to the FSLIC) regarding their knowledge of Amrecorp's usury claim against Old Sunbelt. The FDIC and New Sunbelt moved to quash Amrecorp's discovery motion.

The *Amrecorp* court held that the FDIC, to qualify as a HDC, must acquire an asset in good faith and without any knowledge of the maker's personal defenses.²⁴¹ The court reasoned that if lack of knowledge were not a prerequisite, then the federal HDC Rule would "swallow up" *D'Oench Duhme*.²⁴² Such an interpretation would have made it unnecessary for the Court of Appeals for the Fifth Circuit, in *FSLIC v. Murray*,²⁴³ to apply both *D'Oench Duhme* and the federal HDC Rule in combination. The *Murray* court would have been able to dispense with the entire matter by applying the HDC Rule. Thus, the *Amrecorp* court concluded that the knowledge of the FSLIC, when it was appointed receiver, was relevant to whether the

235. *Id.* at 1111 n.7.

236. *Id.* at 1111 n.8.

237. *Id.* at 1113.

238. 730 F. Supp. 741 (N.D. Tex.), *reconsider*, 742 F.Supp. 370 (N.D. Tex. 1990).

239. *Id.* at 745-46.

240. New Sunbelt was chartered by the former Federal Home Loan Bank Board. New Sunbelt then entered into a P&A transaction with Old Sunbelt. No third party investors were involved. New Sunbelt was equally as insolvent as Old Sunbelt because no new capital was added. One purpose of this transaction was to afford New Sunbelt with the FSLIC's superpowers and to interpose the FSLIC between Old Sunbelt's assets and Old Sunbelt's general creditors.

241. 730 F. Supp. at 745, 746.

242. *Id.* at 746.

243. 853 F.2d 1251 (5th Cir. 1988).

FDIC could claim HDC status.²⁴⁴ Nonetheless, the court granted the motion to quash Amrecorp's discovery requests.²⁴⁵

The court stated that Amrecorp's desire to take depositions and the documents sought were overly broad.²⁴⁶ Amrecorp was not entitled to discovery concerning possible personal defenses, which would be barred by HDC status, unless it provided an arguable basis for Amrecorp to overcome the presumption of HDC status.²⁴⁷ Instead, Amrecorp was only entitled to submit interrogatories tailored to the issue of the FSLIC's knowledge when it was appointed receiver.²⁴⁸ The FDIC contended that even such limited discovery was too broad. According to the FDIC, Amrecorp still would be estopped from raising a usury claim by *D'Oench Duhme* even if the FSLIC knew of such claim at the time it was appointed receiver. The court concluded that it was too early to determine whether *D'Oench Duhme* would defeat Amrecorp's usury claim.²⁴⁹ Accordingly, Judge Fitzwater held that Amrecorp was entitled to pursue limited discovery in an effort to overcome the presumption affording the FDIC with HDC status. Judge Fitzwater later reconsidered²⁵⁰ his *Amrecorp* decision in light of a subsequent opinion by the Court of Appeals for the Fifth Circuit.

In *Campbell Leasing, Inc. v. FDIC*²⁵¹ the Court of Appeals for the Fifth Circuit was asked to deny HDC status to the FDIC because the FDIC acquired assets (promissory notes) from a failed bank with notice that the notes were overdue. Although the *Campbell Leasing* court was only asked to address whether the FDIC was entitled to federal HDC status even if it acquired a note with notice of dishonor, the court held that the FDIC and its assignees enjoy HDC status irrespective of whether they meet the traditional requirements of state law.²⁵²

Judge Fitzwater had the first opportunity to interpret the scope of the language in the *Campbell Leasing* decision. New Sunbelt, as assignee from the FDIC, asked Judge Fitzwater to reconsider²⁵³ his earlier ruling in *Amrecorp*.²⁵⁴ Judge Fitzwater stated that the *Campbell Leasing* decision clearly purported to alleviate the FDIC from meeting "any traditional" prerequisite for HDC status.²⁵⁵ Judge Fitzwater then held that both New Sunbelt and the FDIC were entitled to federal HDC status.²⁵⁶ Upon

244. 730 F. Supp. at 746.

245. *Id.* at 747.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* But see *First City Nat'l Bank & Trust Co. v. FDIC*, 730 F. Supp. 501, 510-11 (E.D.N.Y. 1990) (irrelevant whether FDIC, when it was appointed receiver, knew of failed bank's oral misrepresentations because *D'Oench Duhme* would bar such misrepresentations).

250. See *infra* notes 253-257 and accompanying text.

251. 901 F.2d 1244 (5th Cir. 1990).

252. *Id.* at 1249 ("[T]he FDIC and subsequent note holders enjoy holder in due course status whether or not they satisfy the technical requirements of the state law.").

253. 742 F. Supp. 370 (N.D. Tex.), *reconsidering* 730 F. Supp. 741 (N.D. Tex. 1990).

254. See *supra* notes 238-249 and accompanying text.

255. 742 F. Supp. at 371 (emphasis in original).

256. *Id.* Judge Fitzwater also granted the FDIC's motion for a protective order because

reconsideration, Judge Fitzwater did not reiterate his initial misgivings, as expressed in his original *Amrecorp* ruling,²⁵⁷ that, if the traditional requirements for application of the federal HDC Rule were eliminated, then the federal HDC Rule would supplant *D'Oench Duhme* and section 1823(e). Judge Fitzwater, however, did note that the *Campbell Leasing* interpretation provided the FDIC with broader HDC protections than that applied by other circuits.²⁵⁸ Perhaps, Judge Fitzwater was implying that the reach of the *Campbell Leasing* decision might be narrowed by subsequent interpretation. Nonetheless, Judge Fitzwater concluded that there was no basis for distinguishing between the FDIC's alleged knowledge of notice of dishonor, which did not prevent the FDIC from being a HDC in *Campbell Leasing*, and the FDIC's alleged knowledge of Amrecorp's defenses.²⁵⁹

b. Extension to Subsequent Assignees. The *Nelson* court also considered whether Sunbelt was entitled to HDC status.²⁶⁰ The court noted that the Fifth Circuit had extended the availability of *D'Oench Duhme* to assignees from the FSLIC.²⁶¹ Thus, by analogy, federal HDC status is transferable as well.

The *Nelson* court stated that such a conclusion is also supported by the UCC. According to the court, the federal HDC Rule is modelled on the UCC.²⁶² Under the UCC, HDC status can be vested in a subsequent transferee, provided that the transferee was not either a prior holder of the instrument who had knowledge of personal defenses or a party to certain improprieties concerning the instrument.²⁶³

Nelson apparently contended that Sunbelt and Federal Association were the same holder of the instrument.²⁶⁴ *Nelson* also contended that Federal Association, and not the FSLIC, engaged in the P&A transaction with Sunbelt. *Nelson* apparently was arguing that Sunbelt never succeeded to the FSLIC's HDC status because the FSLIC never acquired the assets in question. The court, however, refused to ignore the separate legal existence of Sunbelt and Federal Association, or question whether FSLIC-Receiver transferred the assets.²⁶⁵ Thus, Sunbelt's status as a HDC estopped *Nelson*

the *Campbell Leasing* decision rendered Amrecorp's discovery requests, regarding the FDIC's knowledge, irrelevant. *Id.* at 371 n.2.

257. See *supra* notes 242-44 and accompanying text.

258. 742 F. Supp. at 371.

259. *Id.*

260. 733 F. Supp. at 1111. The *Nelson* court also determined whether FSLIC had HDC status without knowledge of any personal defenses. See *supra* notes 226-37 and accompanying text.

261. *Id.* at 1112 (citing *Bell & Murphy & Assoc. Inc. v. InterFirst Bank Gateway, N.A.*, 894 F.2d 750, 754-55 (5th Cir. 1990)).

262. *Id.* at 1112-13.

263. 733 F. Supp. at 1113 citing TEX. BUS. & COM. CODE ANN. § 3-201(1) (Tex. UCC (Vernon 1968)). *Accord* *NCNB Texas National Bank v. Campise*, 788 S.W.2d 115, 118-19 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (determining that FDIC vested its HDC status in NCNB because under UCC's "Shelter Rule," UCC § 3-201, a transferee from a HDC can also assert HDC privileges).

264. 733 F. Supp. at 1113 n.13.

265. *Id.*

from asserting any personal defenses.

c. *No Protection Against Counterclaims.* In *FDIC v. Byrne*²⁶⁶ Byrne contended that he repaid his notes to the failed Vernon Savings & Loan Association (Vernon), and that FDIC-Receiver's claims were barred by, among other things, such payment. Byrne also raised certain lender liability theories as both defenses to the FDIC's action and as counterclaims. The *Byrne* court concluded that the FDIC's status as a HDC barred Byrne's defenses but not his claims.²⁶⁷ The court noted that the FDIC was involved in the litigation in two capacities.²⁶⁸ The FDIC was both the transferee of certain of the assets and liabilities of Vernon and the party that assumed certain of Vernon's liabilities, including any liability to Byrne. Byrne's claims against the FDIC survived HDC challenge because the FDIC had succeeded to the contingent claims that could have been raised against Vernon had it continued to exist.²⁶⁹ The federal HDC Rule does not prevent a party from raising personal claims against the alleged wrongdoer. In this case, the FDIC simply assumed the responsibility of the wrongdoer—Vernon—to a contingent claimant—Byrne.²⁷⁰

II. FAILED BANK LITIGATION

A. Purchase and Assumption Transactions

FDIC-Receiver contractually agrees to provide investors and other financial institutions with indemnification from certain claims in order to encourage such parties to "bid" to acquire failed banks in P&A transactions. The case of *Successor Trust Committee v. First State Bank*²⁷¹ considered the interplay between a fiduciary's duty under the Employee Retirement Income Security Act of 1974, as amended (ERISA),²⁷² and P&A transactions.

On October 30, 1983, the Comptroller declared the National Bank of Odessa (NBO) insolvent and appointed the FDIC as receiver. FDIC-Receiver then entered into a P&A transaction pursuant to which it transferred certain of the assets and liabilities of NBO to First State Bank of Odessa, N.A. (FSBO). FDIC-Receiver also entered into an indemnity agreement (the Indemnity Agreement) with FSBO, which provided that the FDIC would indemnify FSBO for any action FSBO pursued at the direction of FDIC-Receiver or FDIC-Corporate. Moreover, FDIC-Corporate agreed to indemnify FSBO for any claims based upon FSBO's failure to seek damages

266. 736 F. Supp. 727, 729 (N.D. Tex. 1990).

267. *Id.* at 730-31.

268. *Id.* at 730.

269. *Id.* at 730-31.

270. Although Byrne's claims were not barred by the federal HDC Rule, he was nonetheless estopped from raising them by *D'Oench Duhme*. *Id.* at 731. Byrne lent himself to a scheme designed to mislead the examiners by failing both to obtain his canceled promissory notes when he allegedly repaid them and to ensure that Vernon correctly credited his account. *Id.* at 732-33. Thus, the FDIC used the combination of the federal HDC Rule and *D'Oench Duhme* to defeat Byrne's claims and defenses.

271. 735 F. Supp. 708, 710-19 (W.D. Tex. 1990).

272. 29 U.S.C.A. §§ 1001 - 1461 (1985 & Supp. 1990).

for the actions engaged in by NBO or FDIC-Receiver prior to the closure of NBO.²⁷³

As a result of the P&A transaction, FSBO succeeded NBO as trustee under certain employee pension plans. NBO had caused such plans to loan funds secured primarily by real estate. FSBO quickly realized that, in light of certain self-dealing transactions in which NBO had engaged, such investments were prohibited transactions under ERISA. FSBO and its parent requested that FDIC-Corporate purchase such investments because they were made by NBO prior to the P&A transaction. The minutes of the March 20, 1984, FSBO Trust Committee meeting reflected that the FDIC refused to purchase the assets originally acquired by NBO, as trustee, in prohibited transactions. In addition, FDIC-Corporate sent FSBO a letter stating that FSBO, as the successor trustee to NBO, was responsible for administering accounts, and could do so without the need to obtain FDIC approval for its actions. Nonetheless, over the next five years, the parties continued to negotiate whether the FDIC would purchase such trust assets.

During this time, the borrowers stopped servicing the loans that served as trust assets and the real estate collateral securing these loans deteriorated. Between May 6, 1987, and May 2, 1989, FSBO foreclosed on the collateral securing all of the loans. FSBO did not notify beneficiaries of the estates that the assets in question were deteriorating or that such assets were acquired in prohibited transactions. On the contrary, according to the court, the statements sent to the beneficiaries were "highly misleading."²⁷⁴ Once the beneficiaries of the pension plans learned of the investment losses, they brought suit against FSBO.

The *Successor Trust* court concluded that FSBO was a fiduciary under ERISA for several reasons.²⁷⁵ First, the P&A agreement appointed FSBO substitute trustee.²⁷⁶ Second, FSBO acknowledged at its March 20, 1984, Trust Committee meeting that the FDIC deemed FSBO to be a fiduciary with respect to the pension plans.²⁷⁷ Third, FSBO charged a fee for its services and held investment authority for the plans.²⁷⁸

As a fiduciary, FSBO was required to act prudently.²⁷⁹ The court held that FSBO's failure to liquidate promptly the assets acquired in prohibited transactions constituted a breach of that duty.²⁸⁰ The FDIC's behavior did not excuse FSBO's inaction. Of course, FSBO was entitled to negotiate a settlement with the FDIC. FSBO, however, should have contemporaneously pursued actions to benefit the plans.²⁸¹

273. The Indemnity Agreement also protected FSBO from "[a]ny and all claims whatsoever . . . based upon any action by the Bank [NBO], its directors, officers, or agents . . . prior to the Bank Closing . . .". *Id.* at 711.

274. *Id.* at 714.

275. *Id.* at 715.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* (citing 29 U.S.C. § 1104(a)(1) (1988)).

280. *Id.* at 716.

281. *Id.*

The Indemnity Agreement protected FSBO for actions taken before the P&A transaction.²⁸² FSBO, however, did not assume liability on the day after the P&A transaction was consummated.²⁸³ Implicitly, the *Successor Trust* court gave FSBO some time to discern the existence of the prohibited transactions and to consider alternatives before liability for breach of duty attached. Although evidence was produced that indicated that FSBO knew of the prohibited transactions as of October 1, 1983 (the date of the P&A transaction), the court calculated the plans' damages from May 1, 1984 (the date of the Trust Committee meeting at which FSBO acknowledged that the FDIC had disclaimed responsibility for the administration of the plans).²⁸⁴ After this window period passed, however, FSBO became responsible for any losses incurred from its own inaction.

The *Successor Trust* court then considered whether the FDIC had agreed to indemnify FSBO for such losses. The Indemnity Agreement, by its own terms, did not protect FSBO for actions that occurred after consummation of the P&A transaction. FSBO contended that it had relied on the statements of various FDIC officials concerning the asserted willingness of the FDIC to purchase the assets at issue. The court stated that the representations and opinions of various FDIC employees were protected by the discretionary function exemption of the Federal Tort Claims Act.²⁸⁵ Thus, FSBO's indemnification claims were barred.²⁸⁶

Lastly, the *Successor Trust* court considered whether the members of FSBO's Trust Committee were personally liable for the fiduciary duty violations committed by FSBO.²⁸⁷ The court noted that these individuals acted exclusively in their official capacity. In addition, FSBO approved the course of conduct they pursued. Thus, the court did not hold these individuals liable.²⁸⁸

B. Insolvency

*Texas American Bancshares, Inc. v. Clarke*²⁸⁹ involved a challenge to the manner in which the Comptroller of the Currency (the Comptroller), the FDIC and the Banking Commissioner of Texas (the Commissioner) determined that twelve of the subsidiary banks of Texas American Bancshares, Inc. (TAB Holding) were insolvent.²⁹⁰ On July 20, 1989, the Comptroller declared ten of TAB Holding's subsidiary banks, including Texas American Bank/Fort Worth (TAB/FTW), insolvent and appointed the FDIC as re-

282. *Id.* The court found that "neither the FDIC nor FSBO shall be accountable for the wrongdoing of NBO prior to FDIC's takeover [appointment as receiver] of the failed bank." *Id.* *Accord* First Nat'l Bank of Andrews v. FDIC, 707 F. Supp. 265, 271 (W.D. Tex. 1989) (successor bank did not assume any liability for the failed bank's breach of fiduciary duty).

283. 735 F. Supp. at 716.

284. *Id.* at 718.

285. *Id.* at 716 & n.4 (citing 28 U.S.C. § 2680(a) (1988)).

286. *Id.* at 717.

287. *Id.*

288. *Id.*

289. 740 F. Supp. 1243 (N.D. Tex. 1990).

290. *Id.* at 1244-1254.

ceiver of those banks. The FDIC then entered into a P&A agreement transferring to a bridge bank (Bridge Bank)²⁹¹ certain of the assets and liabilities of the insolvent TAB Holding bank subsidiaries. Among the liabilities not assumed by the Bridge Bank pursuant to the P&A Agreement were TAB/FTW's obligations for federal funds purchased from the twelve TAB Holding bank subsidiaries that had not yet been declared insolvent (the Plaintiff Banks) and certain deposits placed with TAB/FTW by the Plaintiff Banks. FDIC-Receiver then notified the Comptroller and the Commissioner that the Plaintiff Banks would receive no more than 67% of the face amount of those liabilities owed by TAB/FTW and not assumed by the Bridge Bank, which percentage allegedly equalled the percentage that would have been recovered for those liabilities by the Plaintiff Banks upon a liquidation of TAB/FTW. The FDIC's notification resulted in the Comptroller and the Commissioner declaring the Plaintiff Banks insolvent. Both the Comptroller and the Commissioner admitted that, had the TAB/FTW liabilities owing to the Plaintiff Banks been paid or assumed in full, they would not have declared the Plaintiff Banks insolvent. TAB Holding and the Plaintiff Banks sued the Comptroller, the Commissioner, and the FDIC, both in its corporate capacity and as receiver of the Plaintiff Banks. The parties agreed that if TAB Holding and the Plaintiff Banks prevailed, their recovery would be limited to \$5,000,000, which would be paid by the FDIC.

The *Texas American* opinion first observed that section 194 of the National Bank Act of 1864, as amended (NBA),²⁹² requires that a ratable distribution of an insolvent bank's assets be made to its creditors, and that section 91 of the NBA²⁹³ provides that any preferential transfer is void.²⁹⁴ The court noted that when these provisions were written P&A transactions were unknown, but stated that these provisions nonetheless indicated a congressional intent that the governmental agencies charged with winding up a failed bank act fairly toward all of the failed bank's creditors and not give a preference to any creditor.²⁹⁵ The FDIC contended that the NBA merely required that a creditor of TAB/FTW receive a ratable distribution of the bank's assets as if the bank had been liquidated, and that the creditors whose claims had been transferred to the Bridge Bank had received "enhanced" payments from the FDIC that were not barred by section 91 of the NBA.²⁹⁶ The *Texas American* court rejected the FDIC's arguments, noting that every court that had addressed the question of distributions to failed banks' creditors had required parity in treatment among creditors.²⁹⁷ The court concluded that sections 91 and 94 of the NBA prohibited the FDIC from

291. See *supra* note 46.

292. 12 U.S.C. § 194 (1988) (made applicable to the FDIC by 12 U.S.C. § 1821(d) (1988)).

293. 12 U.S.C. § 91 (1988) (made applicable to the FDIC by 12 U.S.C. § 1821(d) (1988)).

294. 740 F. Supp. at 1249.

295. *Id.*

296. *Id.*

297. 740 F. Supp. at 1250-52; see *White v. Knox*, 111 U.S. 784, 786 (1884); *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542 (9th Cir. 1987); *First Empire Bank-New York v. FDIC*, 572 F.2d 1361, 1371 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978); *MBank New Braunfels, N.A. v. FDIC*, 721 F. Supp. 120, 123-24 (N.D. Tex. 1989).

preferring some creditors of TAB/FTW over others and that no authority existed for limiting the recovery of any of TAB/FTW's creditors to the liquidation value of their claims.²⁹⁸

The *Texas American* case was the first decision imposing liability on the FDIC for causing the insolvency of otherwise solvent banks belonging to the same holding company system. *MBank New Braunfels, N.A. v. FDIC*²⁹⁹ involved a challenge to FDIC actions that was similar to the challenge in *Texas American*, and the *MBank New Braunfels* court also stated that unequal treatment of different creditors violated the NBA.³⁰⁰ However, the *MBank New Braunfels* court did not grant the plaintiff the relief sought due to jurisdictional and procedural considerations in that proceeding.³⁰¹ The significance of *Texas American* is undercut by a provision of FIRREA that specifically provides that the liability of the FDIC to a creditor arising from a bank insolvency is limited to the amount that the creditor would have received upon a liquidation of the bank³⁰² and a second provision of FIRREA authorizing the FDIC to prefer one class of creditors over another.³⁰³ Thus, in light of these FIRREA provisions the importance of the *Texas American* holding for post-FIRREA failures is negligible. Given the foregoing, perhaps the most significant aspect of the *Texas American* opinion is the court's concern regarding the Comptroller's and the FDIC's observance of the rights of third parties affected by bank insolvencies. The court at one point declared the "appearance of impropriety" in the FDIC deciding in its corporate and receivership roles what each creditor will receive to be "quite worrisome."³⁰⁴ The court also stated that the Court of Appeals for the Fifth Circuit has been "wary of the FDIC's and Comptroller's claims of unbridled discretion" in addressing bank failures.³⁰⁵ The *Texas American* case may indicate the reluctance of the courts to agree readily with the actions of bank regulatory agencies, absent clear Congressional intent to the contrary, when those actions treat parties in the same position differently. This reluctance could be of considerable importance as the large amount of litigation generated by the accelerating deterioration of the nation's financial system proceeds through the courts.

C. Preferences

In *FDIC v. Goldberg*³⁰⁶ the Court of Appeals for the Fifth Circuit considered whether the actions of the Board of the former Century National Bank (CNB) and its principal shareholder, Billy B. Goldberg (Goldberg), constituted a preference under section 91 of the NBA.³⁰⁷

298. 740 F. Supp. at 1252-53.

299. 721 F. Supp. 120 (N.D. Tex. 1989).

300. *Id.* at 124.

301. *Id.* at 126-27.

302. 12 U.S.C.A. § 1821(i)(2) (1989). See *supra* note 83.

303. 12 U.S.C.A. § 1821(i)(3)(A) (1989).

304. 740 F. Supp. at 1253.

305. *Id.* at 1254.

306. 906 F.2d 1087, 1088-96 (5th Cir. 1990).

307. 12 U.S.C. § 91 (1988).

In September 1986, CNB's failure was imminent. CNB needed approximately \$2,500,000 in order to meet capital adequacy guidelines.³⁰⁸ The directors of CNB, recognizing the bank's plight, had authorized the preparation of an offering circular to be used to raise such funds.³⁰⁹ The offering circular was required to be reviewed by the Comptroller's Securities and Corporate Practices Division,³¹⁰ which review was usually at least a four- to six-week process. CNB did not have such time. The FDIC already had prepared a bid package to distribute to prospective acquirors.

To avoid CNB's insolvency, on September 19, 1986, Goldberg and certain other investors injected \$470,000 into CNB.³¹¹ Such funds were intended to restore CNB temporarily to solvency while the Comptroller completed its review of CNB's offering circular. According to the district court, the Comptroller represented that such a capital injection would remedy CNB's immediate problems, and that the Comptroller would expedite processing of CNB's offering circular.³¹² This capital injection, however, did not return CNB to solvency because certain of CNB's accounts payable had not been included in the calculations.

At a Board meeting on September 24, 1986, a representative of the Comptroller stated that CNB was again insolvent and immediate action was necessary.³¹³ According to the district court, the Comptroller also stated that it was suspending review of CNB's offering circular pending an examination of CNB.³¹⁴ Apparently, Goldberg determined that his efforts to save CNB were futile, and he asked the CNB Board to rescind the September 19, 1986, capital injection. The Board agreed and, among other things, directed management to credit part of the proceeds of the rescission to satisfy a loan Goldberg owed to CNB. Both CNB's President and Cashier resigned, rather than record the rescission of the stock sale and the credit to Goldberg's loan. The Comptroller subsequently closed the bank.

FDIC-Receiver brought suit to collect on Goldberg's loan to CNB. Goldberg contended that this loan had been satisfied with part of the proceeds of the rescinded stock sale. Goldberg also asserted that rescission was proper because the capital injection had been made based upon the Comp-

308. In 1986, the process for resolving a failed bank lasted three days. Typically, on a Tuesday, the FDIC-Receiver would convene a bidders meeting, accept bids, and declare a winning bidder. The winning bidder and the FDIC would execute the P&A agreement and other related contracts. The documents would be placed in escrow pending the bank closing at the end of the day on either Thursday or Friday. The next day, the doors would be opened under the charter of the successful bidder.

This process has changed in recent years. Now, before a bank is closed, the FDIC-Receiver schedules bidders to conduct a due diligence evaluation of the operations and condition of the failed bank. Accordingly, the resolution process for a failed bank usually requires four to six weeks, at a minimum, to complete.

309. Findings of Fact and Conclusions of Law, *FDIC v. Goldberg*, No. H-88-180 (S.D. Tex. filed Jan. 4, 1988) [hereinafter "Goldberg Order"].

310. See 12 C.F.R. 16 (1990).

311. Goldberg and a company he controlled supplied \$370,000 of the \$470,000 raised.

312. *Goldberg Order*, *supra* note 309, at 2.

313. 906 F.2d at 1089.

314. *Goldberg Order*, *supra* note 309, at 2.

troller's misrepresentations. In response, the FDIC asserted that the rescission was a preference under section 91 of the NBA.³¹⁵

The *Goldberg* court stated that a transfer to a creditor made in contemplation of a bank's insolvency is void as a preference.³¹⁶ The facts introduced at trial indicated that the CNB Board was well aware of CNB's precarious financial condition. Accordingly, the CNB Board knew or should have known that CNB's closure was imminent.³¹⁷

Goldberg contended that a transaction could not be a preference unless it was made with the intent to prefer. The *Goldberg* court stated that an intent to prefer can be inferred from the Board's conduct.³¹⁸ The court stated that one purpose of section 91 is to prevent insiders from benefitting at the expense of creditors generally.³¹⁹ The court deemed Goldberg to be an insider because, despite his lack of official status or authority, he was able to direct CNB's affairs.³²⁰ The court stated that insiders cannot be permitted to claim and realize an advantage available to them because of their positions with the bank.³²¹ Otherwise, the limited assets of the bank and confidence in the banking system would soon be exhausted. Thus, the rescission of the stock sale was void as a preference.

315. Title 12 U.S.C. § 91 provides:

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed [by this chapter], or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void

12 U.S.C. § 91 (1988).

316. 906 F.2d at 1091.

317. *Id.* at 1091-92.

318. *Id.* at 1093.

319. *Id.* at 1094.

320. Goldberg was neither an officer nor a member of CNB's board of directors; nonetheless, he appeared to exercise substantial control. *Id.* at 1094 n.21. Goldberg also would have been an insider under Regulation O. See 12 C.F.R. 215.2(j) (1990) (Goldberg was a "principal shareholder").

321. 906 F.2d at 1095.

The district court apparently concluded that the Comptroller misrepresented to Goldberg and the other directors of CNB that \$470,000 was sufficient to return the bank to solvency. Attorneys for Goldberg read the district court decision as "put[ting] the comptroller of the currency [sic] on notice that it will be responsible for representations it makes to investors . . ." Green, *Law: U.S. Judge Rules Regulators Misled Bank Shareholders*, WALL ST. J., Jan. 13, 1989, at B-2, col. 4 (Southwestern ed.). Effectively, the district court barred the FDIC's action in light of the Comptroller's allegedly impermissible conduct. In contrast, the Court of Appeals for the Fifth Circuit rejected Goldberg's claim that he should be entitled to a set-off under equitable principles in light of the Comptroller's allegedly false representations. The court stated that Goldberg did not plead or prove that the Comptroller engaged in fraud. 906 F.2d at 1095 n.24.

D. Disaffirmance of Contracts

The case of *Harris v. Western Best, Inc.*³²² involved a controversy over two notes payable to a bank that subsequently failed and for which the FDIC was appointed receiver. FDIC-Receiver transferred the notes to the FDIC-Corporate, which then transferred the notes to Western Best, Inc. (Western). Western refused to advance any additional funds on the notes despite provisions in the notes providing for such advances. Western sued to recover on the notes, which were past due, and the makers of the notes counterclaimed, alleging that Western had breached the terms of the notes. The trial court granted Western's motion for summary judgment, and the makers appealed.

The appeals court analyzed this case by addressing whether the FDIC, in either its receivership or corporate capacity, was under a legal duty to honor the failed bank's commitment to fund future advances.³²³ The court determined that the FDIC had no such duty.³²⁴ The court reasoned that the FDIC's function is to protect depositors' interests and liquidate an insolvent bank's assets, and analogized partially funded loans to executory contracts of an insolvent institution that may be repudiated by FDIC-Receiver.³²⁵ As the FDIC had no duty to advance funds, the appeals court concluded that Western, as the FDIC's assignee, was similarly situated; accordingly, the court affirmed the lower court's judgment.³²⁶

III. BANKERS' BLANKET BONDS

A. Standing

In *Warfield v. Fidelity & Deposit Co.*³²⁷ the Court of Appeals for the Fifth Circuit addressed the question of whether the majority shareholders of a failed bank possessed standing to pursue a cause of action against the issuer of the bank's blanket bond. The plaintiffs contended that the bank's insurer owed them a duty of good faith, which the insurer allegedly breached. The plaintiffs also relied on a provision of the Texas Insurance Code, which affords a cause of action to "any person" harmed by a person in the insurance business who engages in certain unfair or deceptive acts.³²⁸

The *Warfield* court stated that the term "any person" is limited to parties with a "direct and close relationship" to the wrongdoer.³²⁹ The court held that plaintiffs' nexus with the defendant was not sufficient to afford them with standing under the statute.³³⁰ Plaintiffs lacked standing for another reason, apart from the Insurance Code. This additional reason was not dis-

322. 795 S.W.2d 347, 348-49 (Tex. App.—Amarillo 1990, no writ).

323. *Id.* at 349.

324. *Id.*

325. *Id.* The ability of the FDIC to repudiate contracts in its receivership capacity is governed by 12 U.S.C. § 1821(e). See 12 U.S.C.A. § 1821(e) (1989).

326. 795 S.W.2d at 349.

327. 904 F.2d 322, 326-27 (5th Cir. 1990).

328. See TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1991).

329. 904 F.2d at 326.

330. *Id.*

cussed by the court. Shareholders do not possess standing to assert generalized injuries. Instead, any claim against the insurer should have belonged to FDIC-Receiver.³³¹

B. Interpretation

The Court of Appeals for the Fifth Circuit, in *Reliance Insurance v. Capital Bancshares/Capital Bank*,³³² was asked to interpret the provisions of Reliance Insurance Company's standard blanket bond. An individual named Bob Coats (Coats) caused certain stock certificates to be printed purporting to represent shares of common stock of American International Group, Inc. (AIG), which at that time was a publicly traded company on the over-the-counter (O-T-C) market. Coats assumed that AIG stock would possess the same characteristics as O-T-C stocks generally. Coats' fake certificates also reflected the correct par value and the correct names of AIG's President and Secretary. Nonetheless, the certificates Coats printed possessed many obvious differences from authentic AIG stock in such areas as the pictorial on the top of the certificate, CUSIP number, and sizes and coloring of the certificates; the certificates also lacked the same legends as authentic shares and the certificates included an inaccurate recitation of the number of shares authorized.

Capital Bank (Capital) and Sunbelt Bancorp. (Sunbelt) both extended credit to Coats secured by the fraudulent AIG stock. Reliance Insurance Company (Reliance) brought a declaratory judgment action asserting that any losses suffered by Capital and Sunbelt were not covered by the blanket bond Reliance had issued to them. Pursuant to the blanket bond, Reliance had agreed to indemnify both Capital and Sunbelt for any losses either of them suffered by, among other things, extending credit based upon original securities that bore forged or counterfeit signatures.³³³ The blanket bond defined the term "Counterfeit" as "an imitation which is intended to deceive and to be taken as an original" and the term "Forgery" as "the signing of the name of another with intent to deceive."³³⁴

The *Reliance* court affirmed the district court's judgment that the fraudulent stock certificates were not "counterfeit," as that term was used in the blanket bond, because they were not, and were not intended to be, imitations or copies of any genuine AIG stock certificate.³³⁵ The district court had reasoned that because no legitimate AIG certificates were ever issued to Coats, the fraudulent certificates could not be imitations of any original cer-

331. Weinstock, *Directors and Officers of Failing Banks: Pitfalls and Precautions*, 106 BANKING L. J. 434, 444-55 (Shareholder only may bring an action if he suffers a personal injury not experienced by all shareholders).

332. 912 F.2d 756, 757 (5th Cir. 1990).

333. The blanket bond provided coverage for losses incurred by extending credit "on the faith of . . . any original Security [which either] bears a signature of any maker, drawer, issuer . . . or any person signing in any other capacity which is a Forgery . . . [or] which is a Counterfeit." *Id.* at 762 (emphasis omitted).

334. *Id.*

335. *Id.* at 757.

tificate.³³⁶ The court then considered whether there had been a forgery that directly resulted in the losses. Coats had forged the names of AIG's President and Secretary on his fraudulent certificates. The loss, however, did not "result directly" from the forgery.³³⁷ Even if the signatures on the certificates were genuine, the certificates still would have been fake, and Capital and Sunbelt still would have suffered losses. Hence, neither Capital nor Sunbelt were entitled to recover from Reliance on the blanket bonds.³³⁸

IV. LENDER LIABILITY LITIGATION

A. *Usury and Tortious Interference with Contract*

*Victoria Bank & Trust Co. v. Brady*³³⁹ involved various lender liability claims made against Victoria Bank & Trust Company (Victoria). Fancher Cattle Company, Inc. (FCC) had entered into a partnership with Marlyn Brady (Brady), and the partnership executed a note to Victoria. A portion of the note proceeds was used as working capital for the partnership, and the balance was used to retire a pre-existing debt owed by Brady that was secured with a lien on Brady's ranch. Victoria had required that this pre-existing debt be retired so it could obtain a first lien on the ranch to secure the partnership note. Victoria's officers repeatedly assured Bill Fancher (Fancher), owner of FCC, that Victoria would not look to him or FCC for repayment of that portion of the partnership debt incurred to retire Brady's pre-existing debt. Approximately two years later, after calling the note, Victoria determined that foreclosure on Brady's ranch would not repay that part of the partnership debt representing Brady's pre-existing debt. Victoria subsequently refused to honor a draft presented by Fancher, which draft Fancher had obtained in a nonpartnership transaction, unless Fancher forfeited \$40,000 of the draft for application against that part of the partnership debt arising from Brady's pre-existing debt. Victoria claimed the right to do so under a security agreement Fancher had signed in connection with a nonpartnership note that had been fully repaid before presentation of the draft in question. Victoria had retained the security agreement despite the nonpartnership's note's repayment, contrary to Victoria's standard policy. When Victoria sued Brady, Fancher, and FCC to recover the deficiency on the partnership note, the defendants counterclaimed on various bases. The trial court found in favor of Fancher and FCC on all but two of their counterclaims, and Victoria, Fancher, and FCC all appealed.³⁴⁰

The appeals court first examined certain issues on which the trial court had found in Victoria's favor.³⁴¹ The appeals court reversed the trial court's

336. *Id.* at 764. The district court distinguished this case from a situation in which the wrongdoer copies a genuine certificate issued to him. The district court stated that the copies would be counterfeits.

337. *Id.* at 758.

338. *Id.*

339. 779 S.W.2d 893, 898 (Tex. App.—Corpus Christi 1989, writ granted).

340. *Id.* at 898-900.

341. *Id.* at 901, 902.

denial of Fancher's usury claim, citing *Alamo Lumber Co. v. Gold*³⁴² for the proposition that a lender that requires a borrower to assume a third party's debt as a condition to making a loan must include the amount of the assumed debt in its interest computations.³⁴³ The appeals court rejected Victoria's argument that this rule was inapplicable because the debt assumed by Fancher was owed to a lender other than Victoria, noting that an identity of lenders was not required by previous decisions and also noting that Fancher did not assume Brady's debt until it was owed to Victoria and thus an identity of lenders did exist.³⁴⁴ The court also rejected Victoria's argument that no usury occurred because no benefit accrued to Victoria from Fancher's assumption of Brady's debt.³⁴⁵ The court stated that the mere charging of excessive interest constitutes usury, and whether the lender benefits is immaterial.³⁴⁶

The court of appeals also examined several points of error alleged by Victoria with respect to the trial court's findings in favor of Fancher. The court held that a broad form release executed by Fancher in favor of Victoria in exchange for an extension of the partnership note and a cash payment did not bar Fancher's claims.³⁴⁷ The court concluded that Victoria obtained the release to cloak the usurious nature of the transaction while Fancher was unaware of his possible usury claim and that Fancher received no benefit to which he was not already entitled in exchange for the release.³⁴⁸ The relevant extension of the partnership note related only to that portion of the note that represented Brady's pre-existing debt and was, according to the jury, not Fancher's debt; the relevant cash payment was characterized as a "refund" at the time it was paid and was thus something to which Fancher was already entitled.³⁴⁹

The court of appeals also rejected Victoria's assertions that no evidence existed showing that Victoria had interfered with the business relationship between Fancher and the party who wrote the draft that Victoria had refused to honor.³⁵⁰ The court held that, on the facts presented, evidence existed to support the jury's finding that Victoria interfered with Fancher's business relationship without justification or excuse and with malice.³⁵¹

Victoria also challenged the amount of punitive damages awarded by the jury to Fancher. The jury awarded actual damages of \$495,000 and punitive damages of \$2,200,000.³⁵² A portion of the jury's award was based on the

342. 661 S.W.2d 926, 928 (Tex. 1983).

343. 779 S.W.2d at 900 (quoting 661 S.W.2d at 928).

344. *Id.* at 901.

345. *Id.*

346. *Id.* See also *Danzinger v. San Jacinto Sav. Ass'n*, 732 S.W. 2d 300, 304 (Tex. 1987) (whether borrower pays off loan is immaterial to usury claim since the mere charging of excessive interest is usury).

347. 779 S.W.2d at 904.

348. *Id.* at 903.

349. *Id.*

350. *Id.* at 906.

351. *Id.*

352. *Id.* at 911.

jury's finding that Victoria had violated the Texas Deceptive Trade Practices Act (DTPA),³⁵³ which limits punitive damage awards to three times actual damages.³⁵⁴ The appellate court noted that the jury had also found that Victoria had committed tortious interference with a business relationship, for which punitive damages may also be awarded.³⁵⁵ The court of appeals could not discern from the jury charge what portion of the punitive damages was attributable to the tortious interference claim and what portion was attributable to the DTPA claim.³⁵⁶ As Victoria had failed to object to the format of the question before its submission to the jury, the court overruled Victoria's point of error.³⁵⁷ The court also rejected Victoria's contention that the jury award was so excessive as to be manifestly unjust on the basis of the evidence presented and the jury's findings.³⁵⁸

B. Duty of Good Faith

The Texas Supreme Court in *FDIC v. Coleman*³⁵⁹ addressed the question of whether a secured party had owed a duty of good faith or fair dealing to the guarantors of a debt to the secured party.³⁶⁰ Judico Enterprises, Inc. (Judico) executed a promissory note to First National Bank of Midland (FNB Midland) secured by real estate during December 1981, and Coleman and Powell, two principals of Judico, guaranteed payment of the note. Shortly before the note matured, Judico filed for bankruptcy protection. Thereafter, FNB Midland was declared insolvent and FDIC-Receiver succeeded to FNB-Midland's rights against Judico, Coleman and Powell. On August 15, 1984, FDIC-Receiver obtained an agreed order from the bankruptcy court permitting it to foreclose on the real estate securing the note, and FDIC-Receiver sold the real estate in a foreclosure sale on June 7, 1985. A deficiency of approximately \$486,000 remained following the foreclosure sale, which deficiency FDIC-Receiver sought to recover from Coleman and Powell as guarantors. The trial court granted summary judgment to FDIC-Receiver in its suit against Coleman and Powell. The court of appeals reversed the trial court's judgment and remanded the cause for trial, finding that FDIC-Receiver had owed a duty of good faith to Coleman and Powell and that a factual question existed as to whether FDIC-Receiver had breached this duty through undue delay in foreclosing on the real estate security during a period of declining property values, resulting in a lower foreclosure sale price and a greater deficiency.³⁶¹

353. TEX. BUS. & COM. CODE ANN. §§ 17.01 - 17.826 (Vernon 1987 & Supp. 1991).

354. The DTPA provides that a consumer prevailing under § 17.50 may obtain the amount of actual damages suffered plus not more than three times the amount of actual damages in excess of \$1,000. TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1991).

355. 779 S.W.2d at 911.

356. *Id.*

357. *Id.*

358. *Id.* at 911-12.

359. 795 S.W.2d 706 (Tex. 1990) (Mauzy, J., dissenting).

360. *Id.* at 708-10.

361. *Coleman v. FDIC*, 762 S.W.2d 243, 245 (Tex. App.—El Paso (1988), *rev'd*, 795 S.W.2d 706, 710 (Tex. 1990).

The *Coleman* court characterized the issue before it as whether a secured creditor owes a guarantor of indebtedness a duty of good faith requiring the creditor to liquidate collateral promptly to minimize the guarantor's liability for any deficiency.³⁶² The *Coleman* court examined each of Coleman and Powell's asserted bases for the existence of such a duty and rejected each in turn.

Coleman and Powell first asserted that FDIC-Receiver had a duty of good faith under section 1.203 of the Texas Uniform Commercial Code,³⁶³ which provides that every contract subject to the Texas Uniform Commercial Code³⁶⁴ (UCC) imposes an obligation of good faith. The *Coleman* court observed that, assuming the UCC was applicable in this instance, the UCC defined good faith as honesty in fact.³⁶⁵ The court then rejected section 1.203 as a source of liability for FDIC-Receiver's alleged breach of a duty of good faith, noting that the guarantors' had not alleged that the FDIC was dishonest, but that it had failed to exercise diligence which, under the UCC, is not required for good faith.³⁶⁶

Coleman and Powell next asserted that FDIC-Receiver had a duty of good faith under Texas common law. The *Coleman* court rejected this assertion by noting that a duty of good faith is not imposed in every contract but only in special relationships marked by shared trust or an imbalance in bargaining power.³⁶⁷ The court stated that the relationship between a creditor and guarantor does not ordinarily create a duty of good faith and that Coleman and Powell had not asserted a special relationship that would give rise to such a duty in this case.³⁶⁸

Coleman and Powell's last asserted basis for FDIC-Receiver's duty of good faith was federal common law. The *Coleman* court observed that the case cited by Coleman and Powell to support this contention³⁶⁹ held that a creditor is required to conduct a foreclosure sale fairly, and then noted that Coleman and Powell's complaint was not that FDIC-Receiver's conduct of the foreclosure sale was unfair but rather than the sale did not occur quickly enough.³⁷⁰ The court concluded that FDIC-Receiver had no federal common law duty to foreclose its lien expeditiously under the authority cited.³⁷¹

The *Coleman* court also advanced several policy bases for not imposing a duty of good faith in this case. The court observed that as principals of Judico, Coleman and Powell were capable of protecting their interests by

362. 795 S.W.2d at 708.

363. TEX. BUS. & COM. CODE ANN. § 1.203 (Tex. UCC) (Vernon 1968).

364. See TEX. BUS. & COM. CODE ANN. §§ 1.101-2.725 (Tex. UCC) (Vernon 1968 & Supp. 1991), §§ 3.101-6.111 (Tex. UCC) (Vernon 1968 & Supp. 1991), §§ 7.101-9.507 (Tex. UCC) (Vernon 1968 & Supp. 1991).

365. 795 S.W.2d at 708 (citing, TEX. BUS. & COMM. CODE ANN. § 1.201(19) (Vernon 1968)).

366. 795 S.W.2d at 708 ("The guarantors' complaint in this case is not that the FDIC was dishonest, but that it was not diligent. The UCC does not require diligence for good faith.").

367. *Id.* at 708-09.

368. *Id.* at 709.

369. *Frederick v. United States*, 386 F.2d 481, 487 (5th Cir. 1967).

370. 795 S.W.2d at 709.

371. *Id.*

having Judico sell the real estate security before it declined further in value, thereby eliminating or greatly reducing the resulting deficiency. Given their ability to protect themselves, the court reasoned that Coleman and Powell should not be permitted to required FDIC-Receiver to protect their interests.³⁷² The court also stated that to impose a duty of good faith in this type of situation would create an impossible burden, noting “[i]t is difficult enough to determine when it is best to foreclose to protect one’s own interests; it is virtually impossible to know when it is best to protect others’ interests.”³⁷³ Last, the court asserted that the imposition of a duty of good faith under these circumstances would raise material issues of fact in nearly all deficiency suits, precluding summary judgment and necessitating a full trial on the merits in most actions to recover deficiencies. The court stated that commercial transactions require more predictability and certainty than such a rule would afford.³⁷⁴

In their dissent from the *Coleman* holding,³⁷⁵ three justices argued that the majority had mischaracterized the duty that Coleman and Powell claimed was owed to them by FDIC-Receiver. The dissent stated that the claimed duty was one of commercial reasonableness in the disposition of the collateral, not one of good faith and fair dealing.³⁷⁶ The dissent asserted that, while FDIC-Receiver was not required to proceed against the collateral before seeking to recover from Coleman and Powell, once it undertook to do so it was obligated to act in a commercially reasonable manner.³⁷⁷ The dissent found that Coleman and Powell had presented sufficient evidence at the summary judgment hearing to put the question of FDIC-Receiver’s violation of this duty before a jury.³⁷⁸

The *Coleman* case is significant in that the court refused to recognize any generalized duty of good faith and fair dealing in the banking transaction examined. In *Coleman*, the Texas Supreme Court took a general view of the existence of such a duty that contrasts with the position taken by Texas courts of appeals in two cases within the last several years.³⁷⁹ Although the *Coleman* decision in no manner overruled these other cases, *Coleman* does illustrate the reluctance of the Texas Supreme Court to find a duty of good faith and fair dealing, at least in the context of a banking relationship in which the parties have relatively equal bargaining power. The probable result of *Coleman* will be to decrease the willingness of Texas courts to find such a duty in most, if not all, banking relationships.

372. *Id.*

373. *Id.* at 710.

374. *Id.*

375. *Id.* at 710-12 (Mauzy, J., dissenting).

376. *Id.* at 710-11.

377. *Id.* at 712.

378. *Id.*

379. *Cf. Olney Sav. & Loan Ass’n v. Farmers Mkt. of Odessa, Inc.* 764 S.W.2d 869, 871 (Tex. App.—El Paso 1989, no writ) (secured lender had duty to make effort to reduce loan and any resulting deficiency as much as possible by securing fair price for any collateral); *Plaza Nat’l Bank v. Walker*, 767 S.W.2d 276, 278 (Tex. App.—Beaumont 1989, no writ) (special relationship between bank and its depositor imposes implied duty of good faith and fair dealing toward depositor upon the bank).

V. REGULATORY ISSUES

A. Subject Matter Jurisdiction

The case of *Executive National Bank v. Board of Governors*³⁸⁰ presented the Court of Appeals for the Fifth Circuit with an unusual jurisdictional issue arising out of the proposed acquisition of a failing bank, Executive National Bank (ENB), by a Mexican banking corporation Bancomer, S.N.C. (Bancomer).

On February 27, 1989, Bancomer filed an application with the Federal Reserve Bank in San Francisco requesting approval to acquire ENB. On March 16, 1989, the Board of Governors of the Federal Reserve System (the Federal Reserve) informed Bancomer that its application would not be processed under the Federal Reserve's emergency powers because a protest had been filed.³⁸¹ The Federal Reserve continued to request information concerning Bancomer's operations.³⁸² On September 28, 1989, Bancomer's representatives and Alan Greenspan, the Federal Reserve's Chairman, among others, held a meeting at which the Federal Reserve allegedly promised to take action within 30 days.³⁸³ On October 18, 1989, Robert Hermann, the Senior Deputy Comptroller of the Currency, contacted the Federal Reserve, and was allegedly informed that Bancomer's application would be addressed at one of the Federal Reserve's October Board meetings.³⁸⁴ Bancomer had still not heard from the Federal Reserve when ENB filed a motion for a declaratory judgment on November 6, 1989.³⁸⁵

ENB contended that the Federal Reserve's inaction was tantamount to a denial of Bancomer's application. Accordingly, ENB requested the court of appeals to deem Bancomer's application to be approved under the Federal Reserve's "91-day rule."³⁸⁶ The Court of Appeals for the Fifth Circuit held that it lacked jurisdiction to consider the Federal Reserve's inaction.³⁸⁷

380. 889 F.2d 556, 557-59 (5th Cir. 1990).

381. Motion for Emergency and Expedited Review on Petition for Review and Request for Declaratory Judgment at 8-9, *Executive Nat'l Bank v. Board of Governors*, 889 F.2d 559 (5th Cir. 1990) [hereinafter *Emergency Motion*].

One protest, allegedly on behalf of independent bankers, claimed that the acquisition would be anticompetitive because Bancomer was owned by the Mexican government, and thus, was able to "draw on Mexico's hard currency reserves to capitalize its U.S. subsidiary." *Texas Bankers Fight Mexican Bid for Bank*, *Am. Banker*, May 22, 1989, at 1, 48, col. 1. The protest also questioned the ability of "regulators to evaluate the financial condition of a state-owned Mexican institution." *Id.* This latter concern was apparently shared by the Federal Reserve because the Federal Reserve devoted considerable time in an effort to determine Bancomer's financial condition.

382. *Emergency Motion supra* note 381, at 10-12.

383. *Id.* at 12-13.

384. *Id.* at 13.

385. 889 F.2d at 557.

386. Title 12 U.S.C. § 1842(b)(1) provides:

In the event of the failure of the Board [the Federal Reserve] to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

12 U.S.C.A. § 1842(b)(1) (1989).

387. 889 F.2d at 558.

ENB responded that the court possessed jurisdiction, under 12 U.S.C. section 1848.³⁸⁸

In response, the court stated that the Board's conduct did not constitute a reviewable order.³⁸⁹ If the Federal Reserve had denied the application, then the court would have possessed jurisdiction. Until the Federal Reserve reached a decision, however, ENB's (and Bancomer's) only course of action was to request the district court to grant a declaratory judgment deeming the application to be approved. Thus, the court dismissed ENB's action for lack of jurisdiction.³⁹⁰

B. Insurance of Accounts

*Abdullah Fouad & Sons v. FDIC*³⁹¹ involved funds in an account opened by Allied International Sales Corporation (Allied) in a bank that failed. The signature card for the account and the corporate resolution attached to it did not indicate that any party other than Allied had an interest in the account. The FDIC presumably combined the account with another account or accounts maintained by Allied at the insolvent bank and denied the account in question independent coverage. Abdullah Fouad & Sons (Fouad) sued the FDIC, claiming that the account had been opened by Allied as agent for Fouad thus entitling the account to deposit insurance coverage separate from any accounts maintained by Allied on its own behalf at the insolvent bank. The issue addressed by the *Fouad* court was whether the FDIC's determination regarding coverage was arbitrary, capricious or an abuse of discretion.³⁹²

The court first noted that both statute³⁹³ and FDIC regulations³⁹⁴ provide

388. 12 U.S.C. § 1848 states:

[A]ny party aggrieved by an order of the Board [the Federal Reserve] . . . may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business . . . by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order . . . be set aside.

12 U.S.C.A. § 1848 (1989).

389. 889 F.2d at 558.

390. ENB failed on November 16, 1989.

391. 898 F.2d 482, 483 (5th Cir. 1990).

392. *Id.*

393. 12 U.S.C. § 1822(c) provides:

Except as otherwise prescribed by the Board of Directors, neither the Corporation nor such new bank or other insured depository institution shall be required to recognize as the owner of any portion of a deposit appearing on the records of the depository institution in default under a name other than that of the claimant, any person whose name or interest as such in default owner is not disclosed on the records of such depository institution in default as part owner of said deposit, if such recognition would increase the aggregate amount of the insured deposits in such depository institution in default.

12 U.S.C.A. § 1822(c) (1989).

394. 12 C.F.R. § 330.1(b)(1) provides:

The deposit account records of the insured bank shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian or executor. No claim for insurance based on such a relationship will be recognized in the absence of such disclosure.

that deposit account records are conclusive in establishing ownership of funds deposited in an insured bank.³⁹⁵ While regulations allow the details of a deposit relationship to be ascertained from other records of the bank or depositor,³⁹⁶ the existence of the relationship itself must be discernible from the account records.³⁹⁷ Fouad argued that the FDIC had acted arbitrarily and capriciously in refusing to make an exception and accept evidence regarding the depository relationship when the written records of the bank were incomplete or inaccurate.³⁹⁸ The court rejected Fouad's contention, stating that the FDIC had properly rejected Fouad's attempt to demonstrate its ownership of the account with evidence from the failed bank's credit files and statements from the failed bank's former account officers.³⁹⁹ The court observed that the exception advocated by Fouad would require the FDIC to go beyond a failed bank's deposit records in determining insurance coverage, which requirement would contradict both the relevant statute and regulations.⁴⁰⁰

VI. CRIMINAL LAW

Increasingly, there seems to be an unfortunate tendency on the part of courts to impose criminal penalties for violations of civil statutes. The decision of the Court of Appeals for the Fifth Circuit in *United States v. Cordell*⁴⁰¹ continues this trend. Douglas Cordell (Cordell) was President of the former American National Bank (ANB), Tyler, Texas. In 1985, ANB extended credit to Joseph McMurrey (McMurrey) in the aggregate amount of \$150,000. ANB's capital subsequently deteriorated, and the extensions of credit to McMurrey became "nonconforming"⁴⁰² with ANB's legal lending limit. ANB's Board, to avoid any violations of the bank's lending limit, instituted a system to monitor loans, including overdrafts, to borrowers whose accounts were near the limit.

On April 16, 1987, McMurrey sought to purchase a cashier's check from ANB funded with the balance of his account at ANB and a check drawn on Bank of Longview (BOL). Cordell spoke with McMurrey who assured him

12 C.F.R. § 330.1(b)(1) (1990).

395. 898 F.2d at 484.

396. 12 C.F.R. § 330.1(b)(2) provides:

If the deposit account records of an insured bank disclose the existence of a relationship which may provide a basis for additional insurance, the details of the relationship and the interests of other parties in the account must be ascertainable either from the records of the bank or the records of the depositor maintained in good faith and in the regular course of business.

12 C.F.R. § 330.1(b)(2) (1990).

397. 898 F.2d at 484.

398. *Id.* at 485.

399. *Id.*

400. *Id.*

401. 912 F.2d 769, 778 (5th Cir. 1990) (Gee, J., dissenting).

402. A nonconforming loan is not a violation of a bank's legal lending limit because, at the time that loan was made, it was permissible. Accordingly, it is effectively grandfathered. Until the loan becomes conforming, however, a bank may not extend additional credit to that borrower without violating the legal lending limit. See 12 U.S.C. § 84 (1988).

that BOL was processing the draw on McMurrey's BOL account. Cordell then spoke with the secretary to BOL's President who confirmed McMurrey's statement. Cordell agreed to approve McMurrey's cashier's check request only after he received this confirmation.

The next day, however, BOL determined that McMurrey's account did not contain sufficient funds to cover the check and notified ANB. According to the court, if ANB gave effect to BOL's action, McMurrey's account would have reflected an overdraft.⁴⁰³ The court stated that Cordell attempted to avoid a lending limit violation by returning several checks drawn by McMurrey. Cordell directed that the proceeds from these checks be withdrawn from the accounts of the payees and returned to McMurrey's account. Subsequently, McMurrey paid all of the returned checks. Consequently, ANB never suffered a loss.

The next month an examiner determined that ANB should have reflected an overdraft in McMurrey's account. The examiner believed that Cordell attempted to conceal the lending limit violation by reversing the five checks. The reversal of these checks, however, could not have prevented the lending limit violation because the violation was complete when the cashier's check was drawn. Subsequently, Cordell was convicted and charged with misapplication of bank funds⁴⁰⁴ and making false entries in bank records.⁴⁰⁵

403. 912 F.2d at 773-74. The court incorrectly stated that this overdraft caused a lending limit violation. In reality, a lending limit violation already had occurred when ANB permitted McMurrey to draw (the cashier's check) on uncollected funds (the BOL draw). See Weinstein, *The Legal Lending Limit — A Trap for the Unwary*, 50 Banking Rep., Feb. 2, 1989, at 430 ("The OCC [Comptroller] considers overdrafts and advances of funds against uncollected balances to be extensions of credit.") (author's emphasis).

404. 18 U.S.C. § 656 provided:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or *willfully misapplies* any of the moneys, funds or credits of such bank or any money, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both

18 U.S.C. § 656 (1988) (emphasis added).

18 U.S.C. § 656 was amended by FIRREA in 1989 to increase the maximum fine from \$5,000 to \$1,000,000 and the maximum imprisonment penalty from five years to 20 years. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 961, 103 Stat. 183, 499 (1989); 12 U.S.C.A. § 656 (Supp. 1990).

405. 18 U.S.C. § 1005 provided:

[W]hoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System — shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1005 (1988).

18 U.S.C. § 1005 was amended by FIRREA in 1989 to increase the maximum fine from \$5,000 to \$1,000,000 and the maximum imprisonment penalty from five years to 20 years. See

The *Cordell* court stated that a material omission can support prosecution for making a false entry.⁴⁰⁶ The court held that Cordell's failure to book an overdraft was such an omission.⁴⁰⁷ Similarly, the court determined that Cordell misapplied bank funds when he made the late returns on the checks in an effort to avoid or conceal a lending limit violation.⁴⁰⁸ According to the court, these late returns misapplied funds entrusted to ANB.

The dissent noted that the five checks were correctly posted and were not recorded in a manner designed to avoid detection by the examiners.⁴⁰⁹ Cordell made no effort to conceal these entries from the examiners. According to the dissent, it was not a material omission for Cordell to record these transactions as late returns.⁴¹⁰ Certainly, Cordell's actions were ill-considered but they were not criminal.⁴¹¹

The majority placed great weight on Regulation J (expedited funds availability),⁴¹² pursuant to which ANB already had become responsible for the five checks when Cordell had them returned. The dissent stated that the evidence produced at trial concerning the violation of this civil regulation prejudiced Cordell.⁴¹³ Moreover, the dissent disagreed that there had been a misapplication of bank funds even if ANB were responsible for the checks, under Regulation J, when the checks were returned.⁴¹⁴ The dissent would have overturned the convictions.

Usually, bank officers who are convicted for misapplication of bank funds received the proceeds of the extension of credit involved. As the dissent noted, Cordell did not benefit from his actions,⁴¹⁵ nor did he conspire with McMurrey. In addition, ANB never lost any funds.⁴¹⁶ Cordell violated a civil statute (legal lending limit), for which there are civil enforcement remedies. Admittedly, Cordell's actions were ill-advised, but, as the dissent recognized, that does not make such actions criminal. The extension of federal bank crime statutes to situations like those in this case is a troubling development.

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 961, 103 Stat. 183, 499-500 (1989); 12 U.S.C.A. § 1005 (Supp. 1990).

406. 912 F.2d at 773 n.8.

407. *Id.* at 773-74.

408. *Id.* at 774.

409. *Id.* at 778.

410. *Id.* at 778-79.

411. *Id.*

412. See Regulations J, 12 C.F.R. §§ 210.1-210.38 (1990).

413. *Id.* at 779.

414. *Id.*

415. *Id.* at 779-80. On first blush it might appear that Cordell was attempting to obtain a benefit by avoiding a lending limit violation. As discussed earlier, however, the lending limit violation occurred when Cordell allowed McMurrey to draw on uncollected funds to purchase the cashier's check. Even if the BOL draw arrived and was deposited, a lending limit violation had occurred. Accordingly, Cordell did not benefit from the transactions that formed the basis of the misapplication of bank funds conviction because the lending limit violation was already complete. See *supra* note 403.

416. 912 F.2d at 779.

VII. CONCLUSION

As is evident from this survey, the substantial deterioration of the nation's financial system experienced during the last several years and the federal government's response, principally in the form of FIRREA, were responsible for the preponderance of developments in Banking Law in the State of Texas during the survey period. This trend will likely continue as the nation's financial institutions remain under stress and the powers made available by FIRREA are both exercised by the banking authorities and challenged by parties affected by such exercise.

