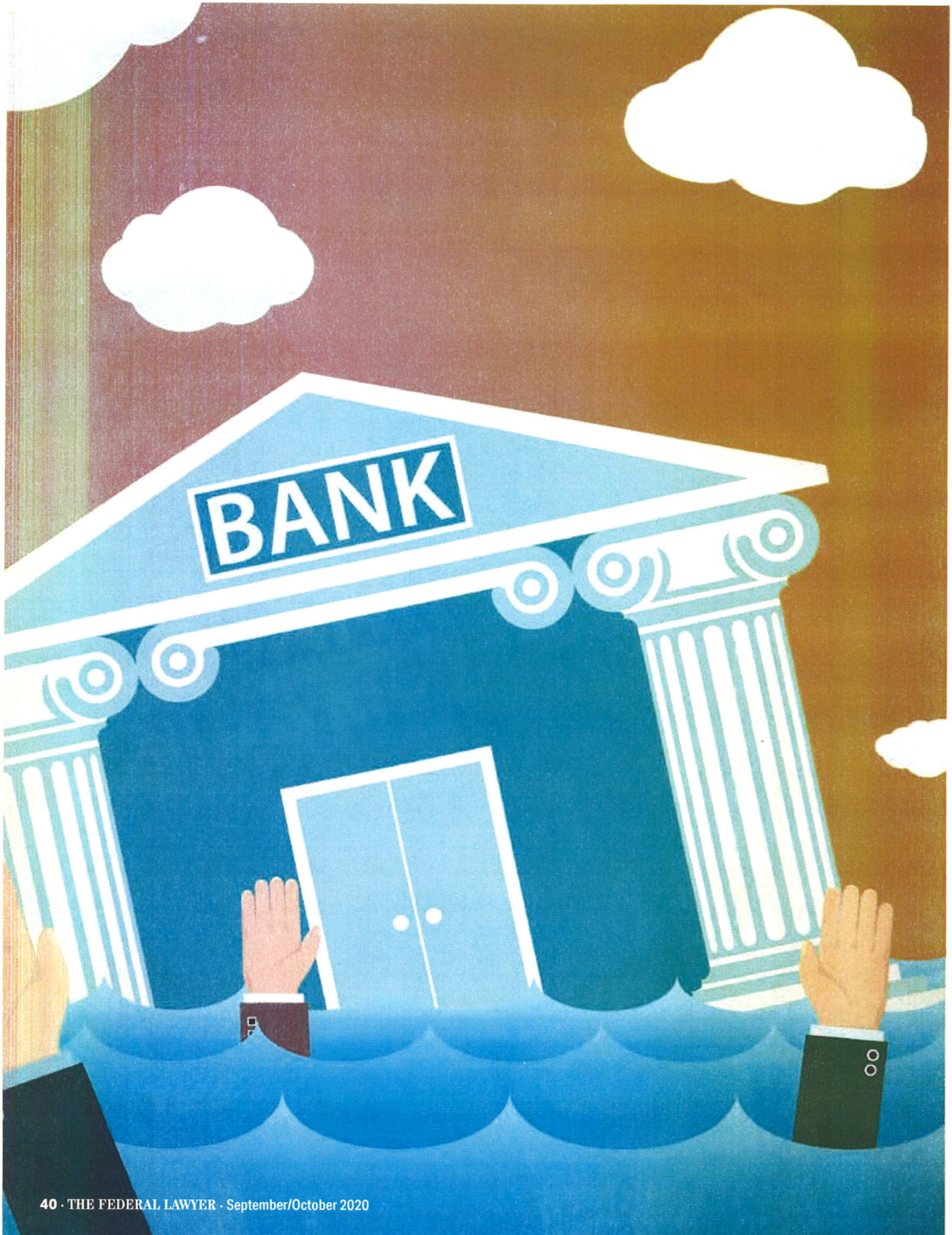
BANK

Supreme Court Nixes Another FDIC-Friendly Federal Common-Law Rule: Only Agency Restraint Has Saved the *D'Oench* Doctrine From *"Duhme"*

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Since the S&L crisis of the late 1980s and early 1990s and the more recent Great Recession that began in earnest in September 2008, the Federal Deposit Insurance Corporation (FDIC), acting in its receivership capacity or as corporate liquidator, has resolved the affairs of thousands of insured depository institutions. Thanks to the FDIC's resolution process in which a failing bank typically is closed on a Friday afternoon and reopens the next day under new ownership, the country has weathered both crises quite well, despite the too-big-to-fail moral hazard made glaringly obvious in the Great Recession. All one needs to do is look at what happened to banks during the Great Depression before the creation of the FDIC and federal deposit insurance to understand the critical role the FDIC plays in maintaining confidence in the nation's financial system.

Prior to the 1990s, the courts were accommodative to the FDIC's efforts to develop federal common law to fill in the gaps of under-developed statutory bank receivership law. The FDIC's ability to liquidate the assets of failed banks and thrifts (collectively, banks) is vitally important to the replenishment of the Bank Insurance Fund. Over the last quarter of a century, however, as the S&L crisis began to crest in the early 1990s, the federal courts in general, and the Supreme Court in particular, began pushing back on federal common law favorable to the FDIC's resolution efforts. The Court's recent decision in *Rodriquez v. FDIC*[1] completes a sweep of federal common law favorable to the FDIC to the dust bin of history—with one important wrinkle. We explore here the extinction of these federal court-made rules and the potential impact on the FDIC's resolution and liquidation efforts in a future financial crisis.

The *D'Oench* Doctrine

In 1942, the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*[2] created a federal common-law rule in favor of the FDIC in its efforts to liquidate the affairs of failed banks. As the insurer of deposits, the FDIC requires banks to periodically file financial reports detailing their assets and liabilities. All too often, although a bank loan was reported to the FDIC as an asset, the loan (asset) was illusory because of a written or oral secret side agreement between a borrower and a bank insider stating that the note would never be called for payment. In the event the bank failed, the FDIC would seek to collect on the loan only to have the secret agreement raised as a defense. Although the Federal Reserve Act made it a crime for any person to mislead the FDIC about the value of a security, nothing in federal law rendered such agreements unenforceable in suits by the FDIC. In

D'Oench the Supreme Court created a federal common-law rule that rendered such secret agreements unenforceable based on the policy in the Federal Reserve Act.

Eight years later, in 1950, Congress amended the Federal Deposit Insurance Act (FDI Act) to codify the rule enunciated in *D'Oench.* But, 12 U.S.C. § 1823(e) applied only to the specific capacity in which the FDIC sought payment. In the facts of *D'Oench,* the FDIC in its capacity as the receiver (FDIC-Receiver) for the failed bank assigned the loan to the FDIC in its capacity as insurer of deposits (FDIC-Corporate) so that FDIC-Corporate could liquidate the loan and replenish funds used from its Bank Insurance Fund to resolve the affairs of the bank. Section 1823(e), therefore, applied only to cases where FDIC-Corporate was seeking to collect and did not apply when FDIC-Receiver itself sought to liquidate the asset. Section 1823(e) provided that no agreement which tends to diminish or defeat the interest of FDIC-Corporate in any asset obtained by assignment from FDIC-Receiver was valid unless it was in writing, executed by the bank, approved by the bank's board of directors, and held continuously in the bank's official record. From 1950 onward, FDIC-Corporate relied on § 1823(e) to defeat secret side agreements that fit the fact pattern in *D'Oench* and relied on *D'Oench* when the facts did not mimic the fact pattern in § 1823(e), but the policy identified in *D'Oench* was implicated. FDIC-Receiver relied on *D'Oench* to defeat side agreements. Therefore, § 1823(e) and *D'Oench* were applied in tandem to achieve the same federal policy objective.

The timing of the Supreme Court's decision in *D'Oench* is important because just four years earlier, the Supreme Court had held in *Erie Railroad Co. v. Tompkins,*[3] that there was no federal common law and that Congress has no power to declare rules of common law applicable in a state. The *Erie* Doctrine abrogated *Swift v. Tyson,*[4] which held that "federal courts ... need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be ...." Nevertheless, in *D'Oench,* the Supreme Court held that federal policy dictated the need to create a specific federal common-law rule to protect the FDIC. The Supreme Court did not articulate until sometime later that it would create similar special federal rules only in "few and restricted" circumstances where state law interfered with important federal policies.[5] The FDIC continued to advocate for a federal common-law rule whenever state law would interfere with its view of federal policy. Because the Court in *Erie* did not specifically address the fate of preexisting federal common law, the FDIC also continued to rely on a pre-*Erie* Supreme Court case from the 19th century holding that directors and officers of federally chartered financial institutions were subject to a simple negligence standard of care.[6]

O'Melveny & Myers v. FDIC (1994)

the federal courts' receptiveness to the creation of federal common-law rules to protect the interests of the FDIC began to wane after Congress enacted the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA). FIRREA represented a comprehensive overhaul of the nation's banking laws, with emphasis on the resolution of insured depository institutions placed into FDIC receiverships. Once FIRREA was enacted, and especially from 1993 onward when the S&L crisis began to subside, the golden era of federal common-law rules favoring the FDIC as receiver or liquidator was over.

In the early 1990s, FDIC-Receiver brought a professional malpractice case against O'Melveny & Myers in connection with two real estate syndications it handled for a bank at a time when its management was involved in fraudulently overvaluing the assets that were the subject of the transactions. The FDIC sued O'Melveny under California law for not conducting due diligence about the financial condition of the bank. O'Melveny moved for summary judgment arguing as a complete defense that the wrongdoing of the institution's insiders must be imputed to the FDIC because, as receiver, the FDIC stood in the shoes of the failed bank. The Ninth Circuit reversed summary judgment for O'Melveny. In rejecting O'Melveny's argument that any equitable defense under California law—including imputation—that could have been raised against the bank could be raised against the FDIC as the bank's receiver, the Ninth Circuit stated that "[t]he flaw in this argument is the law O'Melveny assumes applies."[7] The court continued: "It is beyond doubt that federal, not state, law governs the application of defenses against FDIC. While we may incorporate state law to provide the federal rule of decision, we are not bound to do so ... Thus, contrary to O'Melveny's argument, we are not bound by state law, but must instead establish federal law."[8]

The Supreme Court granted O'Melveny's petition for certiorari. The FDIC argued that federal common law—not California law—controlled whether the wrongdoing of the institution's insiders could be imputed to the bank and, even if California law applied to that issue, then federal common law controlled whether insider wrongdoing could be imputed to the FDIC as receiver representing the interests of innocent creditors—not the bank's shareholders. The Supreme Court would have none of it. An opinion written by Justice Scalia rejected both of the FDIC's arguments, stating flatly that "[t]here is no federal common law," citing *Erie R. v. Tompkins.*[9] The Court noted that the mere fact that an insured depository might go into federal receivership was not a "conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation."[10] The Court acknowledged that post-*Erie,* it had recognized federal common-law rules in "few and restricted" circumstances but there was no need for federal common law in this circumstance: The Court observed that the rules of decision at issue in the case "affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred."[11] The Court continued stating that uniformity of a rule of law on this issue might be desirable by the FDIC, but if that were the standard for a special common-law rule "we would be awash in 'federal common-law' rules."[12] The Court did not address how the issue on remand would be resolved under California law.[13]

In the concurring opinion, however, Justice Stevens, joined by Justices Blackmun, O'Connor, and Souter, observed that "[i]t would be entirely proper for a state court of general jurisdiction to fashion a rule of agency law that would protect creditors of an insolvent corporation from the consequences of wrongdoing by corporate officers even if the corporation itself ... would be bound by the acts of the agent."[14] It was not surprising, therefore, that on remand, the Ninth Circuit held that under California equitable principles the wrongdoing of the bank's insiders could not be imputed to the FDIC as receiver: "While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law."[15]

The Circuit's Split Over Whether FIRREA Displaced *D'Oench*

Before the ink was dry on the *O'Melveny* opinion, several federal circuit courts of appeals began an assault on the federal common-law rule announced in *D'Oench*. In 1989, as part of FIRREA, Congress enacted 12 U.S.C. § 1821(d)(9)(A) and amended § 1823(e) to accomplish what the 1950 amendment to the FDI Act did not. As originally enacted, § 1823(e) was defensive in nature, i.e., it was raised to defeat unrecorded side agreements raised as a defense to liquidation of a failed bank asset. In contrast, § 1821(d)(9)(A) rendered unenforceable secret side agreements that formed the basis of a claim against the FDIC in either its receivership or corporate capacities. It provided that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC as] receiver or the [FDIC operating in its corporate capacity to liquidate an asset transferred from FDIC-Receiver to FDIC-Corporate]." In turn, § 1823(e) was amended to include FDIC-Receiver. After FIRREA enacted § 1821(d)(9), failed bank claimants began asserting that FIRREA had displaced the *D'Oench* doctrine. A split in the circuit courts of appeals developed.[16]

Atherton v. FDIC (1997)

While the battle over the survival of the *D'Oench* doctrine was ongoing in the circuit courts of appeals—as discussed later, this split would eventually work its way to the Supreme Court—the Supreme Court granted certiorari in another FDIC federal common-law case. For the first time, Congress in FIRREA addressed the standard of liability to be applied in suits by FDIC against the directors and officers of a failed bank alleging a breach of duty to the bank:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, on behalf of, or at the request or direction of the Corporation ... acting as ... receiver ... for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.[17]

This new section caused much confusion over the fate of *Briggs v. Spaulding* that held, pre-*Erie*, that directors and officers of federally chartered banks were governed by a simple negligence standard of care. It also caused confusion about whether state laws also imposing a simple negligence standard of care had been preempted in favor of a national gross-negligence standard applicable to all banks—state and federal. Relying on the last sentence of § 1821(k), FDIC argued that the simple negligence standard enunciated in the Supreme Court's 1897 decision in *Briggs* still applied to federally chartered banks and, further, that where a state's law imposed a simple negligence standard nothing in § 1821(k) precluded imposing that standard in liability suits by FDIC against the insiders of state-chartered institutions. In FDIC's view, § 1821(k) displaced state-law liability standards only to the extent that state law imposed a standard of care more lenient than gross negligence, *e.g.*, where a state's standard of care was intentional misconduct.

The meaning of § 1821 (k) came to a head in *Resolution Trust Corporation v. CityFed Financial Corp.*[18] FDIC as receiver for City Federal Savings Bank, a federally chartered thrift, sued the bank's directors and officers asserting that the simple negligence standard set out in *Briggs* applied. The officers and directors argued that § 1821(k) established a uniform federal standard of gross negligence for all depository institutions regardless of whether their charter was state or federal. On interlocutory review, the Third Circuit agreed with the FDIC. "We hold that Congress did not preempt existing state law or supplant federal common law."[19]

The Supreme Court granted certiorari and in *Atherton v. FDIC*,[20] disagreed with the FDIC as it had done in *O'Melveny*. The Court stated that the corporate governance standard enunciated in *Briggs* for federally chartered financial institutions did not survive the Court's decision in *Erie*. The Court noted that, after *Erie*, cases in which a special federal rule would be justified are "few and restricted."[21] To justify such a special federal rule, the Court explained, "'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law ... must first be specifically shown.'"[22] The Court rejected the FDIC's arguments that federal common law (1) was needed for purposes of uniformity, (2) would be consistent with the "internal affairs doctrine," and (3) would be consistent with the federal regulator's use of the *Briggs* simple-negligence standard in cease-and-desist administrative enforcement actions brought against directors and officers of operating insured depository institutions.[23] The Court found that these policy reasons were far weaker than what was presented in those "few and restricted" circumstances where the Supreme Court has created a federal common-law rule.[24]

The Court agreed with the FDIC, however, that those circuit cases holding that § 1821(k) imposed a uniform federal gross-negligence standard for all state and federal banks were incorrect.[25] Justice Breyer, writing for the Court, concluded that regardless of whether the bank was state or federally chartered, the relevant state law provided the standard of care so long as the applicable state's standard of care was not more lenient than gross negligence, *e.g.*, a state law could not impose liability only for intentional misconduct.[26]

The Supreme Court Vacates and Remands the Eleventh Circuit's *Motorcity* Decision

At the time the Supreme Court decided *Atherton*, the split in the circuit courts regarding *D'Oench* made its way to the Supreme Court. After the Court decided *Atherton*, it granted Motorcity's petition for certiorari, vacated the Eleventh Circuit's en banc decision holding that Congress did not intend to displace *D'Oench* in enacting FIRREA, and remanded the case for reconsideration in light of its decision in *Atherton*. Upon reconsideration, the Eleventh Circuit—once again—held that Congress, in enacting FIRREA, did not intend to displace the *D'Oench* doctrine: "We continue to believe that the analysis set forth in our prior en banc opinion reflects the most reasonable reading of Congress's intent, *i.e.*, that Congress did not intend FIRREA to displace the *D'Oench* doctrine, but rather intended to continue the harmonious forty-year existence of the statute and the *D'Oench* doctrine."[27] The court of appeals relied on *United States v. Texas*,[28] where the Supreme Court held that there is a presumption that when Congress legislates in an area where federal common law exists, it does not intend to displace federal common law "unless a statutory purpose to the contrary is evident."[29]

The Eleventh Circuit found that *Atherton* was inapposite. The court explained that the issue in its en banc decision in *Motorcity* was whether Congress intended FIRREA to supplant a previously established and long-standing federal common law *D'Oench* doctrine.[30] "*Atherton* does not address the question of whether a federal statute abrogates a previously established and long-standing federal common law doctrine."[31] In contrast, the court noted that the issue before the Supreme Court in *Atherton* was whether "the use of state law constitutes a significant conflict with federal policy or interest such that the creation of a federal common law would be appropriate."[32]

FDIC's Policy Statement Restraining Its Reliance on the *D'Oench* Doctrine

The Eleventh Circuit noted that, between its en banc decision in *Motorcity* and the Supreme Court's grant-vacate-and-remand order in *Motorcity*, the FDIC issued a statement of policy explaining that §§ 1821(d)(9)(A) and 1823(e) "should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine" and "[a]ccordingly ... these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine."[33]

The Policy Statement explained that § 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC "because the function of that section is to bar certain defenses to FDIC's collection of such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC" based on alleged agreements that do not meet the recording requirements of § 1823(e).[34] The Policy Statement noted that, prior to the enactment of FIRREA in 1989, "the Supreme Court in *Langley v. FDIC*[35] held that it would disserve the policy recognized in *D'Oench* to interpret § 1823(e) in a more restricted manner than *D'Oench* itself: 'We can safely assume that Congress did not mean 'agreement' in section 1823(e) to be interpreted so much more narrowly than its permissible meaning so as to disserve the principle of the leading cases applying that term to FDIC-acquired notes.'"[36] The Policy Statement continued: "In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases."[37]

Despite the Policy Statement's affirmation of the FDIC's belief that *D'Oench* can be interpreted more broadly than its statutory corollaries, FDIC stated that "as reflected in the [attached] Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1821(e)) only in accordance with the Guidelines."[38] In short, the Policy Statement agreed with the reasoning of the Eleventh Circuit's en banc decision in *Motorcity* but announced as a matter of policy that the FDIC would carefully monitor those circumstances in which *D'Oench* would be asserted. Thereafter, FDIC relied predominantly on the statutory corollaries to *D'Oench*, arguing that they should not be interpreted more narrowly than *D'Oench* jurisprudence. Although after the issuance of the Policy Statement, the FDIC restrained its reliance on the *D'Oench* doctrine, nowhere in the statement did the FDIC state that it agreed with those circuit court cases holding that FIRREA displaced the *D'Oench* doctrine. Nor did anything in the Policy Statement address what the FDIC's position would be in the future if the circuit courts failed to interpret *D'Oench*'s statutory corollaries as expansively as *D'Oench* jurisprudence. Although there is no way to know whether the Policy Statement had an impact, the Supreme Court denied the second *Motorcity* petition for certiorari after the Policy Statement was issued.[39]

Rodriguez v. FDIC (2020)

On Feb. 25, 2020, the Supreme Court in *Rodriguez v. FDIC*[40] kayoed another federal common-law rule favorable to the FDIC. Most banks today are owned by bank-holding companies whose profit center(s) are one or more banks they own as subsidiaries. These holding companies file consolidated tax returns with the IRS. The IRS in turn requires the bank-holding company to designate itself or one of its entities as the agent to receive any tax benefits that might be forthcoming. Once the IRS delivers the tax refund, it has no interest in how the refund is distributed among the holding company and its subsidiaries. There is nothing in the tax code or its regulations that compels the conclusion that a tax savings inure to a bank subsidiary whose activities generated the refund or the losses leading to a tax savings. Because subsidiary banks typically are the profit center for holding companies, when those banks fail, the holding company in many cases ends up in bankruptcy. And, when there is no tax-sharing agreement between the holding company and its subsidiaries, the matter often ends up as an adversary proceeding in bankruptcy court.

That is what happened in *In re Bob Richards Chrysler-Plymouth Corp*.[41] A consolidated tax return was filed by Wester Dealer Management (WDM) and its wholly owned subsidiary, Bob Richards Chrysler Plymouth (Bob Richards). The tax return showed that the consolidated group was entitled to a refund resulting from a net operating loss which could be carried back for a refund of taxes paid by members of the group in prior years.[42] Bob Richards was placed into involuntary bankruptcy and the refund to the consolidated group, WMD and Bob Richards, was due entirely to the earnings history of Bob Richards. There was no tax sharing agreement and the IRS sent the refund to the accountant for both entities. The Ninth Circuit found that "[a]bsent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member."[43] The court of appeals continued stating that "[a]llowing the parent to keep any refunds arising solely from the subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent."[44] The court stated that WDM received the tax refund solely as the agent of Bob Richards, its subsidiary.[45]

In its two-page opinion, the Ninth Circuit reached its holding without conducting the analysis required by the Supreme Court to limit federal common-law rules to "few and restricted" circumstances where the application of state law would frustrate federal policy. Nor did the court of appeals cite any state law in support of its holding. Despite the absence of analysis, the decision of the Ninth Circuit was accepted by several other federal circuit courts of appeals.

In *Rodriguez*, the Supreme Court ended its reign. United Western Bank was placed into FDIC receivership and soon thereafter, as is often the case, its parent, United Western Bancorp. Inc., filed for bankruptcy. When the IRS issued a $4 million refund, both FDIC-Receiver and the holding company's trustee, Simon Rodriguez, laid claim to the refund. After litigation through the bankruptcy court and the district court, the Tenth Circuit ruled in favor of FDIC-Receiver, relying on *Bob Richards*.[46] The Supreme Court reversed. The Court observed that, although there are often onerous tax rules governing consolidated tax returns, nothing in tax law governs how a refund is to be divided among members of the consolidated group. It also noted that many corporate groups enter into tax-allocation agreements that specify which entity or entities will benefit from any tax return and that where there is no agreement or if there is a dispute about its meaning, the courts typically turn to state contract law. The Supreme Court stated that some federal courts "have chartered a different course" and "have crafted their own federal common law rule—one known to those who practice in the area as the *Bob Richards* rule ...."[47] The Court continued:

> [T]he *Bob Richards* rule provided that, in the absence of a tax allocation agreement, a refund belongs to the group member responsible for the losses that led to it ... With the passage of time, though, *Bob Richards* evolved. Now, in some jurisdictions, *Bob Richards* doesn't just supply a stopgap rule for situations when group members lack an allocation agreement. It represents a general rule always to be followed unless the parties' tax allocation agreement unambiguously specifies a different result.[48]

The Supreme Court remarked that, at the urging of the FDIC and consistent with circuit precedent, the Tenth Circuit employed the expansive *Bob Richards* rule. Because the parties had a tax-sharing agreement, the Tenth Circuit stated that "the question was whether the agreement unambiguously deviated from the *Bob Richards* Rule."[49] The Tenth Circuit concluded that the FDIC owned the tax refund.[50]

The Supreme Court disagreed, noting that not all circuits accepted the *Bob Richard's* rule, including the Sixth Circuit in *FDIC v. AmFin Financial Corp*.[51] The Sixth Circuit concluded that nothing in the Ninth Circuit's opinion in *Bob Richards* identified a conflict between state law and federal policy that would justify a federal common-law rule.[52] The Supreme Court agreed, explaining that under *Erie,* there was no general federal common law and that only limited areas exist in which federal judges may appropriately craft a federal rule of decision.[53] The Court continued that a federal rule was not necessary to protect uniquely federal interests.[54] The Court asked rhetorically: "what unique interest could the federal government have in determining how a consolidated corporate tax refund ... is distributed ...."[55] Finding none, the Supreme Court jettisoned the *Bob Richards* rule. The Court declined the FDIC's invitation to address the issue under state law, stating only that it "is a matter the court of appeals may consider on remand."[56]

Does the Virtual Extinction of the FDIC's Reliance on Federal Common Law Matter?

Between 1994 and 2020, either directly—*O'Melveny* (1994), *Atherton* (1997), and *Rodriguez* (2020)—or indirectly—FDIC *D'Oench* Policy Statement 1997—the Supreme Court weaned the FDIC from its reliance on federal common-law rules in favor of the application of state law. But, how much does it matter? Not as much as one might think. For example, on remand in *O'Melveny* the Ninth Circuit held that California law precluded imputation and, therefore, the FDIC achieved the rule against imputation it had sought under federal common law. And there is no reason to think that other state courts would not come to the same conclusion under each state's equitable powers.

The Supreme Court's refusal in *Atherton* to recognize a federal common-law rule that the standard of liability for officers and directors of banks is simple negligence is a bit more nuanced. Under *Atherton,* if the standard of liability in the relevant state is simple negligence, then that standard applies to both state and federally chartered banks, and if the standard of liability in the relevant state is gross negligence then that standard applies. But if the relevant state's standard is more lenient than gross negligence, then § 1821(k) displaces that state standard and imposes a gross negligence standard as a matter of federal statutory law. The FDIC lost the ability to apply a simple negligence standard of care under *Briggs* but can use a relevant state's simple negligence standard in suits against the directors and officers of failed federally chartered institutions; yet, it is relegated to a gross negligence standard where state law provides for gross negligence or a more lenient standard. However, the Court in *Atherton* explained that nothing precludes the Office of the Comptroller of the Currency—the charterer and primary federal regulator of federally chartered depository institutions—from displacing state gross negligence standards with a regulation imposing a simple negligence standard against officers and directors of federally chartered banks.[57] The OCC has not promulgated such a regulation.

The demise of the *Bob Richards* Rule in *Rodriguez v. FDIC* should not significantly hinder FDIC-Receiver in its efforts to corral tax benefits generated by a failed insured depository institution. State law in most cases should lead to the same result. As the Court in *Rodriguez* noted, "[t]he FDIC points out that the court of appeals proceeded to consult applicable state law—and the FDIC assures us—its result follows naturally from state law ...."[58]

That leaves for consideration the fate of the *D'Oench* doctrine. The FDIC Policy Statement set significant limits—but does not preclude entirely—the use of the *D'Oench* doctrine to the extent its statutory corollaries do not protect the interests of the FDIC. Even if in some future case, however, the Supreme Court were to hold that the *D'Oench* doctrine had been displaced by FIRREA, FDIC should be able to achieve the same result under state law. After all, in *D'Oench* itself, Justice Frankfurter, joined by Chief Justice Harlan Stone, concurred on the result but concluded that a federal common-law rule was unnecessary because the result would be the same under state law. "If Illinois law governs, respondent [FDIC] is admittedly entitled to recover as a holder in due course. If Missouri law governs, petitioner is estopped to assert the defenses on which it now relies. Whether the case is governed by the law of one state or the other, or by 'federal common law' drawn here from one state or the other, the result is the same."[59] There is no reason to think that Justice Frankfurter was incorrect and that federal courts applying state law would fail to protect FDIC's ability to rely on a failed bank's books and records in resolving the affairs of a failed bank.

In the final analysis, because the states are the successors to the common law of England, including the law of equity, state law is well suited to fill-in the interstices of federal statutory law, as occurred in *O'Melveny* on remand and is likely to occur on remand in *Rodriguez*. As for the fate of the *D'Oench* doctrine, even if the Supreme Court were to hold in some distance case that *D'Oench* was displaced by FIRREA, there is no reason to think that state law—as noted by Justice Frankfurter in his concurring opinion, joined by Chief Justice Stone—would not protect FDIC's interests. And, if state law were applied adversely to the interest of the FDIC, Congress would be free to establish a statutory rule displacing state law. ⊙

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Endnotes

[1]140 S. Ct. 713 (2020).
[2]315 US 447 (1942).
[3]304 U.S. 64 (1938).
[4]41 U.S. (16 Pet.) 1 (1842).
[5]*See Texas Indust., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (stating that although the Court held in *Erie* that there is "no federal general common law," "the Court has recognized the need and authority in some limited areas to formulate what has become known as 'federal common law'" and explaining that "[t] hese instances are 'few and restricted' ... and fall into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests' ... and those in which Congress has given the courts the power to develop substantive law") (citations omitted).
[6]*Briggs v. Spaulding*, 141 U.S. 132 (1891).
[7]*FDIC v. O'Melveny & Meyers*, 969 F.3d 744, 751 (9th Cir. 1992).
[8]*Id.* (citations omitted).
[9]*O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994).
[10]*Id.*
[11]*Id.* at 88.
[12]*Id.* (citation omitted).
[13]*Id.* at 89.
[14]*Id.* at 90.
[15]*FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995).
[16]*Compare Murphy v. FDIC*, 61 F.3d 34, 40 (D.C. Cir. 1995) (holding that § 1821(d) and the amendment of § 1823(e) displaced the *D'Oench* doctrine); *DiVall Insured Income Fund Ltd. P'ship v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (following D.C. Circuit's decision in *Murphy*) and *Motorcity of Jacksonville, LTD v. Southeast Bank, N.A.*, 83 F.3d 1317 (11th Cir. 1996) (en banc) (holding the *D'Oench* doctrine was not displaced by FIRREA); *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (holding that FIRREA did not displace the *D'Oench* doctrine).
[17]12 U.S.C. § 1821(k).
[18]57 F.3d 1231 (3d Cir. 1995).
[19]*Id.* at 1249.
[20]519 U.S. 213 (1997).
[21]*Id.* at 218.
[22]*Id.* at 218 (quoting *O'Melveny*, 384 U.S. at 68).
[23]*Id.* at 219-25.
[24]*Id.* at 225.
[25]*Id.* at 231.
[26]*Id.*
[27]*Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140, 1144 (11th Cir. 1997).
[28]507 U.S. 529 (1993).
[29]*Motorcity*, 120 F3d. 1143.
[30]*Id.* at 1143.
[31]*Id.*
[32]*Id.* at 1142.
[33]*Id.* at 1144 n.6 (quoting *FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, against Unrecorded Agreements of Arrangements of a Depository Institution Prior to Receivership*, 62 Fed. Reg. 5984, 5984 (1997)).
[34]*FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, against Unrecorded Agreements of Arrangements of a Depository Institution Prior to Receivership*, 62 Fed. Reg. 5984, 5984 (1997)) at 5984.
[35]484 U.S. 86, 92-93 (1987).
[36]FDIC Policy Statement, supra note 34, at 5984-85 (quoting *Langley*, 484 U.S. at 92-93).
[37]*Id.* at 5985.
[38]*Id.*
[39]*Hess v. FDIC*, 118 S. Ct. 1559 (1998).
[40]140 S. Ct. 713 (2020).
[41]473 F.2d 262 (9th Cir. 1973).
[42]*Id.* at 263.
[43]*Id.* at 264.
[44]*Id.*
[45]*Id.*
[46]914 F.3d 1262, 1264 (10th Cir. 2019).
[47]140 S. Ct. 713, 716-17.
[48]*Id.*
[49]914 F.3d at ___
[50]*Id.*
[51]140 S.Ct. at 717 (citing 757 F.3d 530, 535 (6th Cir. 2014)).
[52]*Id.*
[53]*Id.*
[54]*Id.* (quoting *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981)).
[55]*Id.* at 717-18.
[56]*Id.*
[57]*Atherton*, 519 U.S. at 219, 221, 225 (noting OCC authorization to promulgate a simple negligence standard for national banks if it found state law too lenient).
[58]*Rodriguez v. FDIC*, 140 S. Ct. at 718.
[59]*D'Oench*, 315 U.S. at 462.