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Survival of the Federal Common Law D'Oench Doctrine

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Survival of the Federal Common Law *D'Oench* Doctrine?

I. INTRODUCTION

Secret banking agreements, agreements between a financial institution and its customer that are not contained in the financial institution's documentation, pose a danger to government regulatory agencies during a financial institution's insolvency. These agreements are not as clandestine as the name implies. While some secret agreements are conscious efforts to defraud regulators, many are very innocent in nature. Secret bank agreements may be as simple as additional assurances made by the bank that are not contained in the bank records or oral modifications of loan terms or conditions. Despite this seeming simplicity, they can be important in the event of a bank insolvency because the Federal Deposit Insurance Corporation (FDIC) must act quickly to preserve the going concern of the bank and to protect depositors. Due to this need for expediency, the FDIC must be able to rely on the written records of the bank to plan its course of action. Any agreement not contained in the bank records impairs the ability of the FDIC to rely on these written records.

In 1942, the Supreme Court developed a federal common law doctrine to protect the FDIC from secret banking agreements in *D'Oench, Duhme & Co. v. FDIC*. This common law doctrine became known as the *D'Oench* doctrine, and it extended protection against secret agreements to the FDIC when handling the assets of an insolvent financial institution. The doctrine prohibited parties from raising defenses against the FDIC that were based on unwritten agreements when the FDIC brought suit to collect on the assets of an insolvent financial institution. Thus, any agreement between a financial institution and its customer would be interpreted according to the written terms contained in the bank records when the related asset was acquired by the FDIC during insolvency. Reference to the unwritten portion of the agreement was strictly barred. Over time, courts have expanded the protection afforded by the original doctrine and have applied the same protection to other regulatory agencies.

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1. 315 U.S. 447 (1942).
2. For a discussion of the expansion of the *D'Oench* doctrine, see infra notes 44-45 and accompanying text.
Eight years after *D'Oench*, Congress partially codified the common law in section 2(13)(e) of the Federal Deposit Insurance Act, which required agreements between a financial institution and its borrower to be in writing. During the next thirty-nine years, the common law *D'Oench* doctrine and its statutory counterpart were used in conjunction to provide protection against secret agreements for the FDIC. During this period, despite the expansion of the common law *D'Oench* doctrine to provide greater protection to the FDIC and other agencies, the statute codifying *D'Oench* remained true to the limited facts of the original case and underwent no significant changes until 1989. Congress, spurred by the crisis in the banking and thrift industry, enacted the Financial Institutions Reform, Recovery, and Enforcement Act (the FIRREA) in 1989. The FIRREA codified many of the significant developments in the common law *D'Oench* doctrine and extended the protection to, among others, the newly created Resolution Trust Corporation (the RTC).

While the FIRREA expanded statutory protection, the federal common law *D'Oench* doctrine itself is even broader than the FIRREA in its protection of federal regulatory agencies. For example, unlike the protection afforded by FIRREA, the protection of the *D'Oench* doctrine is not limited to claims that would defeat the FDIC's interest in a specific asset. The *D'Oench* doctrine also provides protection against claims sounding in tort. Thus, the blanket of protection afforded to federal regulators by the combined protection of the common law and the statutes would be jeopardized if the federal common law *D'Oench* doctrine were abolished, leaving only the FIRREA for protection.

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4. See infra note 46 and accompanying text.
7. See Brookside Assocs. v. Rifkin, 49 F.3d 490, 495 (9th Cir. 1995) (holding that the *D'Oench* doctrine is not limited to a specific asset); RTC v. Dunmar Corp., 43 F.3d 587, 594-95 (11th Cir. 1995) (en banc) (holding that, regardless of whether a specific asset is involved, the *D'Oench* doctrine applies to claims or defenses that relate to ordinary banking transactions); Inn at Saratoga Assocs. v. FDIC, 60 F.3d 78, 82 (2d Cir. 1995) (rejecting specific asset requirement for the *D'Oench* doctrine); Jackson v. FDIC, 981 F.2d 730, 734-35 (5th Cir. 1992) (holding that claims that do not diminish or defeat the FDIC's interest in a specific asset are still barred by the *D'Oench* doctrine).
8. See In re Geri Zahn, 25 F.3d 1539, 1543 (11th Cir. 1994); see also OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306, 310 (11th Cir. 1993).
In 1994, the Supreme Court cast some doubt on the future of the
*D'Oench* doctrine in *O'Melveny & Myers v. FDIC.* In *O'Melveny*,
the FDIC, in its capacity as receiver for a failed savings and loan, pe-
tioned the Court to create new federal common law that would
preempt a state statute disallowing a cause of action for negligence
and a breach of fiduciary duty suit against the law firm of the failed
savings and loan. The Supreme Court refused to create new com-
mon law favoring the FDIC; instead, the Court characterized the
FIRREA as a specific grant of powers to the FDIC and cited specific
provisions of the FIRREA, including the *D'Oench* statutory counter-
part, concluding "*inclusio unius, exclusio alterius*"—the inclusion
of one, the exclusion of another.

In recent decisions, both the United States Court of Appeals for
the District of Columbia Circuit (D.C. Circuit) and the United
States Court of Appeals for the Eighth Circuit (Eighth Circuit) inter-
preted the Supreme Court's holding in *O'Melveny* as a declaration
that the common law *D'Oench* doctrine was preempted by the
FIRREA. It is against this backdrop that the United States
Court of Appeals for the Eleventh Circuit (Eleventh Circuit), in
*Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, held that
the common law *D'Oench* doctrine had not been preempted and still
provided protection to the FDIC.

While the decision of the Eleventh Circuit was a sound and well
reasoned one, it was not accepted by the Supreme Court. The Su-
preme Court granted certiorari in the *Motorcity* case. The Court

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10. See id. at 82-83.
11. Id. at 86.
12. See id. at 85-86. The conclusions drawn from this by the D.C. Circuit and the
Eighth Circuit are that the grant of powers under the statute is exclusive. Because the
*D'Oench* doctrine was not specifically included, it is excluded; therefore, it was not avail-
able to the FDIC.
14. See DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank,
69 F.3d 1398 (8th Cir. 1995).
16. 83 F.3d 1317 (11th Cir. 1996), vacated, 117 S. Ct. 760 (1997). For a discussion of
the Supreme Court's instructions in their decision to vacate the judgment and remand
the case, see *infra* notes 231-33 and accompanying text. In vacating *Motorcity*, the Supreme
Court did not discuss the *D'Oench* doctrine and its application in *Motorcity*, thus, the
discussion of the *D'Oench* doctrine and the analysis set forth in this Note remain perti-
nent, if not essential, to the law surrounding secret banking agreements. For further
discussion, see notes 236-73 and accompanying text.
vacated the opinion of the Eleventh Circuit and remanded the case for further consideration in light of the Supreme Court's decision in Atherton v. FDIC. The Supreme Court's holding in Atherton is similar to its holding in O'Melveny, but Atherton has a more direct impact on the Eleventh Circuit's decision in Motorcity. In Atherton, the Supreme Court flatly rejected an existing federal common law standard of corporate governance for the officers of a failed, federally chartered financial institution. In doing so, the Supreme Court held that the corporate governance standard for the officers of a federally chartered financial institution was to be determined by the federal statute and augmented only by state law when the state law adopts a standard higher than that of the federal statute.

The Motorcity case is distinguishable from Atherton on several grounds, but these distinctions may not be sufficient to keep the federal common law D'Oench doctrine alive. Atherton and O'Melveny may establish a trend of the Court. This trend suggests that the federal statute is the primary source of protection for the FDIC and that the federal statute may be supplemented only by applicable state law. This analysis leaves no room for the federal common law.

Today, it is unclear how this judicial trend will affect the federal common law D'Oench doctrine. The Supreme Court appears to be chipping away at the FDIC federal common law protections, suggesting that the D'Oench doctrine is no longer valid. But, the D'Oench doctrine is on much firmer ground than the federal common law doctrine proposed in O'Melveny and abandoned in Atherton. For this reason, it is important to understand the history of the D'Oench doctrine, up to and including the Eleventh Circuit's opinion in Motorcity. Only then can the future of the federal common law D'Oench doctrine be properly evaluated and can judgment be passed on the logic and wisdom of the Supreme Court's policy of removing the FDIC's federal common law protection.

This Comment first traces the origins of the federal common law D'Oench doctrine, the Federal Deposit Insurance Act of 1950, and the Financial Institutions Reform, Recovery and Enforcement Act of 1989. Next this Comment reviews the Supreme Court's decision in O'Melveny and the decisions of the two circuits interpreting

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18. See id.
22. See Atherton, 117 S. Ct. at 667.
23. See infra notes 28-52 and accompanying text.
This Comment then describes the Motorcity decision with a focus on the Eleventh Circuit’s discussion of O’Melveny and D’Oench. Then, this Comment analyzes the Eleventh Circuit’s decision in comparison to Murphy and Divall and the interpretation of O’Melveny. Finally, this Comment examines the Supreme Court’s opinion in Atherton and analyzes its potential effect on Motorcity and the federal common law D’Oench doctrine.

II. BACKGROUND LAW

A. D’Oench, Duhme & Co. v. FDIC

In D’Oench, Duhme & Co., Inc. v. FDIC, the Supreme Court established a federal common law doctrine to protect the FDIC from secret banking agreements when the FDIC collected on the assets of an insolvent financial institution. D’Oench involved a note acquired by the FDIC following the insolvency of Belleville Bank & Trust Co. The petitioner in the case, a securities dealer, sold bonds to the bank. When the bonds became worthless, the petitioner signed a demand note in favor of the bank which was to be carried on the bank’s books in place of the worthless bonds. The note was executed on the understanding that it would not be called for payment. When the bank later became insolvent, the FDIC stepped in and acquired the assets of the bank. The FDIC sought payment of the note from petitioner, who defended on the basis of his oral agreement with the bank. The Court’s analysis centered on the applicable law governing the note. There was confusion as to whether the note was executed in Missouri or Illinois, and as to which state’s law would govern. Ultimately, the Supreme Court declined to apply the law of either state and held that federal common law would control.
The Court based its decision on the Federal Reserve Act, which revealed a federal policy “to protect the [FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which the [FDIC] insures or to which it makes loans.” While the case was a clear attempt to misrepresent the assets of the bank, the Court's holding was broader and the emphasis was not on whether the maker of the note knew that it will be used to defraud creditors and regulators, but that the note would have that effect. Therefore, when the FDIC acquired an asset from an insolvent financial institution, the obligor was precluded from defending his obligation on the basis of an oral agreement, regardless of the obligor's motives.

B. Federal Deposit Insurance Act of 1950

Eight years after the Supreme Court's decision in D'Oench, Congress codified the court's holding in section 2(13)(e) of the Federal Deposit Insurance Act of 1950. The statute bars the use of agreements against the FDIC unless the agreements are in writing, have been reviewed by bank officials, and are a part of the bank records. This protection was required by the FDIC because, in cases of insolvency, it has to operate quickly, basing decisions solely on the bank records, in order to preserve the value of the failed bank and prevent interruption of the bank services. The decisions based on the bank records would be compromised if the records did not accurately reflect the sum total of the bank assets and liabilities.

As originally fashioned, both the common law rule and its statutory counterpart operated as a bar to defenses raised against the FDIC in its corporate capacity, that is, only in its role as provider of

38. Id. at 457.
39. See id. at 460.
40. Pub. L. No. 81-797, ch. 967, § 2(13)(e), 64 Stat. 888. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement—(1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank. 64 Stat. 888 (1980), as amended, 12 U.S.C. § 1823(e) (prior to the 1989 amendment).
41. See Langley v. FDIC, 484 U.S. 86, 91-92 (1987) (quoting Gunter v. Hutchinson, 674 F.2d 862, 865 (11th Cir. 1982)).
42. When the FDIC takes over a failed financial institution, it operates in two capacities. In its receivership capacity, the FDIC steps in to sell the institution's assets to a
deposit insurance and purchaser of unwanted assets. As time went on and the need for additional protection increased, the D'Oench doctrine was expanded to meet these needs. The doctrine has since been expanded from its initial boundaries to extend protection to the FDIC in both its corporate and receivership capacities, other regulatory agencies, and private third parties. The doctrine has also expanded to preclude affirmative claims against federal regulatory agencies, as well as defenses, if they arose out of secret agreements.

For many years the courts used both the statute and the expanding common law doctrine to aid in the goal of protecting the FDIC against claims and defenses of borrowers.

C. Financial Institutions Reform, Recovery and Enforcement Act of 1989

The peaceful coexistence between the statute and the common law was shaken by the passage of the FIRREA in 1989. The act was passed “to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default.” The FIRREA codified many of the important developments of the common law D'Oench doctrine. The protection of 12 U.S.C. § 1823(e) was extended to the FDIC as receiver, to the RTC in both corporate and receiver capacities, and to bridge banks. One other significant codification was found at 12 U.S.C § 1821(d)(9)(A), which extended the protection of § 1823(e) to affirmative claims against the banking
authority. The relevant portion of the statute says that: "any agree-
ment which does not meet the requirements set forth in section
1823(e) of this title shall not form the basis of, or substantially com-
prise, a claim against the receiver or the Corporation."\(^{52}\)

**D. O'Melveny & Myers v. FDIC**

The Supreme Court decision in *O'Melveny & Myers v. FDIC*\(^ {53}\) has brought about the first significant post-FIRREA challenge to the
existence of the common law *D'Oench* doctrine. In *O'Melveny*, the
Supreme Court was faced with a suit brought by the FDIC, as re-
ceiver for a failed savings and loan, for legal malpractice and breach
of fiduciary duty against the former legal counsel of the savings and
loan.\(^ {54}\) The federal district court granted summary judgment to the
law firm on the ground that the FDIC, as receiver, stood in the shoes
of the failed savings and loan.\(^ {55}\) Therefore, knowledge of wrongdoing
by officers of the failed savings and loan was attributable to the
FDIC, and that precluded any suit against the law firm.\(^ {56}\) The Ninth
Circuit Court of Appeals reversed the lower court and held that even
if the officer's inequitable conduct was attributable to the savings and
loan, it was not imputed to the FDIC so as to preclude its legal mal-
practice action.\(^ {57}\) The Supreme Court granted certiorari.\(^ {58}\)

The central issue addressed by the Court was the matter of con-
trolling law.\(^ {59}\) The FDIC argued that federal common law, not
California law, should govern on the imputation of knowledge.\(^ {60}\) In
the alternative, even if California law governed the general question
of imputed knowledge, the FDIC posited that federal common law
should control the narrower question of whether such knowledge will
be imputed to the FDIC as receiver of the failed savings and loan.\(^ {61}\)
The Court soundly rejected the contention that federal common law
controlled the general subject of imputation and held that California

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54. See id. at 82 The FDIC as receiver for the insolvent savings and loan called for
the savings and loan to refund certain investments in fraudulent real estate syndicates.
See id. Petitioner law firm represented the savings and loan in two of these real estate
syndicates. See id.
55. See id. at 82
56. See id.
57. See id.
59. See *O'Melveny*, 512 U.S. at 83.
60. See id.
61. See id.
A more delicate issue was the status of the existing federal common law and its application to the FDIC as receiver. In making its decision, the Court looked to the underlying statutory scheme. Justice Scalia, writing for the court, stated "we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that [was] comprehensive and detailed; matters left unaddressed in such a scheme [were] presumably left subject to the disposition provided by state law." The Court's understanding of the FIRREA, as enunciated in *O'Melveny*, appeared to be that the language of the statute indicates that the FDIC as receiver steps into the shoes of the failed savings and loan. Therefore, under the Court's analysis, any California tort claim defense that was valid against the savings and loan by showing imputed knowledge was also valid against the FDIC as receiver.

To counter this, the FDIC asked the Court to read the statute as a non-exclusive grant of rights to the FDIC as receiver that can be supplemented or modified by federal common law. The FDIC posited that the FIRREA confirms the Court's authority to promulgate such common law by demonstrating a high federal interest in the area. The Court rejected this line of reasoning by characterizing certain provisions of the FIRREA as "specifically creat[ed] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." The Court then listed several provisions of the act, including the *D'Oench* counterpart, to illustrate the specific grants of power in the act. Justice Scalia then wrote, "Inclusio unius, exclusio alterius. . . . To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." This case was determined to be one in which a special federal rule

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62. See id. at 84-85.
63. See id. at 85-86.
65. See *O'Melveny*, 512 U.S. at 86.
66. See Id.
68. See *O'Melveny*, 512 U.S. at 86.
69. See id.
70. Id.
72. See *O'Melveny*, 512 U.S. at 86.
73. Id. at 86-87.
was not justified.\textsuperscript{74} The application of a special federal rule was limited to situations in which there was a "significant conflict between some federal policy or interest and the use of state law."\textsuperscript{75} The FDIC failed to identify a federal policy or interest that was in jeopardy.\textsuperscript{76} To apply a federal common law rule in this case would facilitate the FDIC's nationwide litigation, "but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, [the Court] would be awash in 'federal common-law' rules."\textsuperscript{77} The FDIC's only response was that failure to apply federal common law protection would act to deplete the deposit insurance fund.\textsuperscript{78} To this, Justice Scalia replied that "there is no federal policy that the [FDIC] should always win."\textsuperscript{79}

The actual holding in \textit{O'Melveny} does not claim an outright pre-emption of an existing common law doctrine, but only declares the court's unwillingness to establish a new federal common law rule. The closest the Court comes to the preemption issue with regard to existing common law is its discussion of the exclusivity of the grant of powers in the FIRREA and the characterization of the FIRREA as a comprehensive statutory scheme.\textsuperscript{80} Nonetheless, this decision has been the basis for two circuit court decisions in which the circuits concluded that the federal common law \textit{D'Oench} doctrine is dead.\textsuperscript{81}

E. Murphy v. FDIC

The first post-\textit{O'Melveny} decision to address this issue was \textit{Murphy v. FDIC}.\textsuperscript{82} The petitioner in \textit{Murphy} was a disgruntled investor in a real estate limited partnership.\textsuperscript{83} Southeast Bank acted as the primary lender for the partnership and was involved in the partnership's public bond offering.\textsuperscript{84} The partnership's financing plans fell through, resulting in a default on its loans to Southeast Bank, which subsequently foreclosed on the property.\textsuperscript{85} Soon thereafter, South-

\textsuperscript{74} See Id. at 87.
\textsuperscript{76} \textit{See O'Melveny}, 512 U.S. at 88.
\textsuperscript{77} \textit{Id.; see also} United States v. Yazell, 382 U.S. 341, 347, n.13 (1966).
\textsuperscript{78} \textit{See O'Melveny}, 512 U.S. at 88.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} See Id. at 85-86
\textsuperscript{81} \textit{See DiVall}, 69 F.3d 1398 (8th Cir. 1995); \textit{Murphy}, 61 F.3d 34 (D.C. Cir. 1995).
\textsuperscript{82} 61 F.3d 34 (D.C. Cir. 1995).
\textsuperscript{83} See \textit{id.} at 35.
\textsuperscript{84} See \textit{id.}
\textsuperscript{85} See \textit{id.}
east Bank was declared insolvent and the FDIC was appointed as receiver. The petitioner filed suit following the FDIC's appointment as receiver. The district court granted the FDIC's motion for summary judgment and the partnership appealed. The district court held that the D'Oench doctrine and the federal statute controlled because the plain language of the agreement with the bank plainly stated that the "lender is a lender only and shall not be considered a shareholder, joint venturer or partner of the borrower."

The petitioner reasserted his claims on appeal to the D.C. Circuit. Petitioner claimed that Southeast Bank controlled the partnership and thus assumed the role of a joint venturer or partner. From this relationship stemmed a list of allegations related to wrongful acts of the partnership's management. To support this position, the petitioner raised issues concerning the applicability of the D'Oench doctrine and its statutory counterpart. The first issue was that the statute should not apply to the substantive claims. The court concluded:

By their terms, the statutory provisions bar any claim that (1) was based upon an agreement that (was) either (a) unwritten or (b) if in writing, (did) not meet the stringent requirements of (the statute), and (2) would diminish or defeat the interest of the FDIC in an asset acquired by it in its

86. See id.
87. See id.
88. See id. at 34.
90. Murphy, 61 F.3d at 36.
91. See id. at 35.
92. The petitioner brought nine counts in all, seven of which were related to the partnership. See id. at 35-36. Count three was for failure to register securities. See id. at 35. Count four was for the unlawful offer and sale of securities. See id. Count five was for breach of fiduciary duty. See id. Count six was for breach of contract. See id. Count seven was for accounting improprieties. See id. Count eight was for fraud. See id. at 36. Count nine was for negligent misrepresentations. See id.
93. Counts one and two were directed at the FDIC's alternative dispute resolution (ADR) process. See id. In count one, Petitioner sought a declaratory judgment that the FDIC is required to establish ADR and apply it to his case. See id. at 40. In count two, the petitioner sought a Writ of Mandamus compelling count one. See id. Counts one and two will not be discussed in the text. It should be noted that at the time of the appeal, the FDIC had established ADR, so the declaratory judgment was rendered moot. See id. In addition, the FDIC has full discretion as to who may use ADR. See id. at 40-41.
94. See id. at 35.
95. See id. at 36.
capacity as receiver of a failed depository institution. 96

The court agreed with the Petitioner that even though Petitioner’s claims against the bank were based on an unwritten agreement, the claims did not meet the specific asset requirement of the statute, and therefore, were not barred by the statute. 97

Having conquered the statutory hurdle, the petitioner followed with the argument that the D’Oench doctrine was not applicable because it had been preempted by the Supreme Court in O’Melveny & Myers v. FDIC. 98 In defense of D’Oench, the FDIC argued that the validity of the doctrine was not directly before the Supreme Court in O’Melveny. 99 This argument was rejected by the court, in favor of a more general reading of the Supreme Court’s decision. 100 The court also rejected the FDIC’s attempt to draw support from cases decided prior to the O’Melveny decision and to distinguish O’Melveny as a prohibition on the creation of new federal common law. 101 In its final analysis, the court necessarily held that the D’Oench doctrine had been preempted by the FIRREA. 102

F. DiVall Insured Income Fund Limited Partnership v. Boatmen’s First National Bank of Kansas City

The second post-O’Melveny court to decide the issue of preemption was the Eighth Circuit in DiVall Insured Income Fund Limited Partnership v. Boatmen’s First National Bank. 103 The dispute in DiVall involved the validity of a promissory note acquired by Boatmen’s from the FDIC under a purchase and assumption agreement. 104 DiVall, obligor under the note, filed a declaratory judgment action claiming that it was not liable under the note for lack of consideration. 105 Boatmen’s argued that the defense raised by DiVall was barred because Boatmen’s was a holder in due course and the defense was barred by the D’Oench doctrine and its statutory

96. Murphy, 61 F.3d at 36.
97. See id. at 37.
99. See Murphy, 61 F.3d. at 39.
100. See id. (relying on Cowin v. Bresler, 741 F.2d 410, 425 (D.C. Cir. 1984)).
101. See id. at 39-40.
102. See id. at 40.
103. 69 F.3d 1398.
104. See Id. at 1399.
105. See Id. The basis for this claim was that the proceeds from the loan were not disbursed to the partnership account, per the loan agreement, but to a different account where they were taken by the general partners for other uses. See id.
counterpart.\textsuperscript{106} The federal holder in due course doctrine bars the maker of a promissory note from asserting personal defenses against the FDIC and its successors even though the defense was based on a written agreement.\textsuperscript{107} The district court granted summary judgment for Boatmen's, holding that the defense was not barred by state holder in due course law, but was barred under the federal common law holder in due course doctrine.\textsuperscript{108} The district court also held that the \textit{D'Oench} doctrine and its statutory counterpart were inapplicable, as the case was based on a written agreement.\textsuperscript{109}

On appeal to the Eighth Circuit, DiVall argued that the state holder in due course law should control.\textsuperscript{110} The court of appeals examined the federal common law holder in due course and \textit{D'Oench} doctrines.\textsuperscript{111} In reaching its holding, the court relied on the Supreme Court's recent decision in \textit{O'Melveny}, which characterized the FIRREA as a comprehensive regulatory scheme and specifically created federal rules governing claims by and defenses against the FDIC.\textsuperscript{112} The court held that the federal holder in due course and the \textit{D'Oench} doctrines were preempted by the FIRREA.\textsuperscript{113} The court went on to hold that because no specific provisions of the FIRREA applied, state holder in due course law would control.\textsuperscript{114} The case was remanded to the district court for further proceedings.\textsuperscript{115}

III. \textit{Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.: Statement of the Case}

The Eleventh Circuit was the third circuit after \textit{O'Melveny} to address the issue of preemption of the \textit{D'Oench} doctrine. In its decision, the Eleventh Circuit refused to follow the holding of the D.C. and Eighth Circuits. Instead, the court reached a different conclusion regarding the interpretation of \textit{O'Melveny} and the continued viability

\begin{enumerate}
\item[106.] See id. at 1400.
\item[107.] See id. at 1401.
\item[108.] See id. at 1400.
\item[109.] See id.
\item[110.] See id. at 1399.
\item[111.] See id. at 1400-01.
\item[112.] See \textit{O'Melveny}, 512 U.S. at 85-86.
\item[113.] See DiVall, 69 F.3d at 1402.
\item[114.] See id. at 1404.
\item[115.] See id. The Eighth Circuit instructed the district court to apply state holder in due course law. See id. at 1404. Under State law, the note was non-negotiable due to its variable interest rate terms. See id. at 1403. The note was executed prior to the inclusion of variable rate instruments in the statutory definition of negotiable notes. See id. Thus, Boatmen's was not a holder in due course and DiVall's defense was valid. See id.
\end{enumerate}
THE D'OENCH DOCTRINE

of the D'Oench doctrine.

A. Facts

The Motorcity case stemmed from a financing arrangement between Motorcity and Southeast Bank, N.A. (Southeast Bank). Motorcity, which was forming an automobile dealership, entered into a floor plan financing agreement with Southeast Bank to finance its vehicle purchases. Under this agreement, the proceeds of sale of each vehicle sold by Motorcity were to be used to repay the loan designated for that vehicle. Motorcity informed Southeast Bank that the investors were inexperienced in the business of selling used vehicles and planned to operate the venture as absentee owners. Motorcity expressed particular concerns regarding out-of-trust sales, in which the sales proceeds were not used to repay the loan designated for that particular vehicle. Southeast Bank orally assured Motorcity that it was experienced in this type of financing arrangement and that it would watch for out-of-trust sales.

In June 1987, a written floor plan financing agreement was executed. Included in the terms of the written agreement was a provision granting Southeast Bank the right to periodically audit Motorcity's records. Southeast Bank hired an independent auditor to conduct the periodic audits. In the course of these audits, a pattern of out-of-trust sales was discovered. Southeast Bank failed to notify Motorcity's investors of these out-of-trust sales despite its oral assurances that it would do so. In February 1989, Motorcity, during a change in managers, discovered out-of-trust sales of more than

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116. Motorcity is actually comprised of Motorcity of Jacksonville, Ltd., a limited partnership engaged in the business of selling used vehicles. Motorcity of Jacksonville, Inc., a Florida corporation was the general partner for the Limited partnership. David S. Hess, a Jacksonville physician, was the president and principal shareholder of Motorcity of Jacksonville, Inc. See Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 83 F.3d 1317, 1322 n.1. (1996).
117. See id. at 1321-22.
118. See id. at 1322.
119. See id.
120. See id.
121. See id.
122. See id.
123. See id.
124. See id.
125. See id.
126. See id.
127. See id.
$400,000. The discovery was promptly disclosed to Southeast Bank, which called for immediate repayment of any and all out-of-trust amounts. Because Motorcity was unable to meet its obligations to Southeast Bank, the bank took possession of the dealership and a $375,000 certificate of deposit. Motorcity repaid all of its loans to Southeast Bank in April 1990.

B. District Court

Motorcity filed an action against Southeast Bank in state court in Florida alleging breach of a fiduciary duty, breach of an oral contract, and negligence. In September 1991, the Comptroller of the Currency declared Southeast Bank insolvent and appointed the FDIC as receiver for the failed institution. The FDIC was substituted as the defendant in the state court action, and it removed the case to federal court.

Motorcity amended its complaint to state a claim only for breach of a written contract. This amended complaint was dismissed by the district court for failure to state a claim upon which relief could be granted. In dismissing the amended complaint, the court ruled that the floor plan financing agreement gave Southeast Bank the right to audit the records of Motorcity, but not the duty to do so. Therefore, Southeast Bank was under no contractual obligation to inform Motorcity of any discovered out-of-trust sales. The district court went on to hold that the D'Oench doctrine and the federal statute required any agreement between a failed financial institution and its customer to be in writing. Consequently, any claim for breach of an oral contract was barred. Finally, the court held that Motorcity's putative tort claims were also barred by the D'Oench

128. See id.
129. See id.
130. See id.
131. See id.
132. See id.
133. See id.

See Motorcity, 83 F.3d at 1323 n.3.
135. See id. at 1322
136. See id.
137. See id.
138. See id.
140. See Motorcity, 83 F.3d at 1322.
141. See id.
Motorcity moved for a rehearing and leave to amend its complaint to include tort claims for negligence and breach of a fiduciary duty to notify. The district court denied both motions and reiterated that the *D'Oench* doctrine barred all oral contract claims, including those recast as tort claims through artful pleading.

C. Eleventh Circuit

Motorcity appealed the decision of the district court. The Eleventh Circuit Court of Appeals ruled that Motorcity's state law tort claims for negligence and breach of a fiduciary duty to notify were free standing and therefore, not barred by the *D'Oench* doctrine. The FDIC's petition for an en banc hearing was granted, vacating the decision of the appellate court's panel.

Motorcity's sole basis for appeal to the Eleventh Circuit Court of Appeals, sitting en banc, was the district court's denial of its motion to amend its complaint to add tort claims for negligence and breach of fiduciary duty. The denial of Motorcity's motion to amend by the district court was based on the *D'Oench* doctrine. The Eleventh Circuit Court of Appeals, sitting en banc, reviewed the applicability of the *D'Oench* doctrine and the Federal statute as a bar to Motorcity's tort claims *de novo*.

142. *See id.*
143. *See id. at 1323.*
144. *See id.*
145. *See id.*
149. *See id. at 1323.*
151. The standard of review of a district court's denial of a motion to amend a complaint is that of abuse of discretion. *See Zenith Radio Corp. v. Hazleton Research, 401 U.S. 321, 330 (1971); Shipper v. Eastern Air Lines, 868 F.2d 401, 407 (11th Cir. 1989). In other words, there must be a substantial reason for the district court to exercise its judgment in the denial of a motion to amend. *See Shipper, 868 F.2d at 407; see also Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. 1993) (holding that a justifying reason must be apparent for the denial of the motion to amend). The futility of a claimant's proposed amendment may be a justifiable reason for denying leave to amend. *See Foman v. Davis, 371 U.S. 178, 182 (1962); Moore, 989 F.2d at 1131. As a general rule, when the basis for the district court's denial of the motion to amend is futility of the amendment, the review of the decision is *de novo*. *See Keweenaw Bay Indian Community v. State of Florida, 11*
Motorcity presented four arguments in its attempt to prevent the D'Oench doctrine from acting as a bar to its claims against the FDIC. First, the federal common law D'Oench doctrine was statutorily preempted, thus leaving the FDIC to rely only on the statutory counterparts. Second, Motorcity argued that the statutory counterparts of the D'Oench doctrine should act as a bar only to claims that impair the FDIC's interest in a specific asset. Therefore, because Motorcity repaid its loan prior to the FDIC's appointment as receiver, Motorcity argues that the statutory provisions would not apply. Third, Motorcity argued that its tort claims were free standing and should not be barred even if the D'Oench doctrine were given effect. Finally, notwithstanding the D'Oench doctrine's prohibition on reliance on oral agreements or representations, Motorcity's state law tort claims for negligence and breach of fiduciary duty were still viable. The court addressed each of Motorcity's arguments in turn.

In support of its claim that the D'Oench doctrine had been preempted by statute, Motorcity relied upon recent decisions of the D. C. Circuit in Murphy v. FDIC and the Eighth Circuit in DiVall Insured Fund Ltd. Partnership v. Boatmen's First National Bank. Both of these decisions, in turn, based their holdings on the Supreme Court decision in O'Melveny & Myers v. FDIC, which they interpreted as preempting the D'Oench common law doctrine. The Motorcity court, sitting en banc, disagreed with the analysis of the D. C. Circuit and Eighth Circuit and held that the D'Oench doctrine had not been preempted.

The court began with an analysis of federal common law beginning with Swift v. Tyson. Following Swift, federal common law

F.3d 1341, 1348 (11th Cir. 1993); see also In re Geri Zahn, Inc., 25 F.3d 1539, 1542 (11th Cir. 1994) (holding that application of the D'Oench doctrine is a question of law subject to de novo review).

152. See Motorcity, 83 F.3d at 1327.
153. See id.
154. See id.
155. See id.
156. See id.
157. See id.
158. 61 F.3d 34 (D.C. Cir. 1995); see also, Motorcity, 83 F.3d at 1327.
159. 69 F.3d 1398 (8th Cir. 1995); see also, Motorcity, 83 F.3d at 1327.
161. See Murphy, 61 F.3d at 40; DiVall, 69 F.3d at 1402.
162. See Motorcity, 83 F.3d at 1327.
163. 41 U.S. (16 Pet.) 1 (1842) (holding that in the absence of state statutory or constitutional provisions, federal courts sitting in diversity should not apply state court common law.
THE D'OENCH DOCTRINE

developed alongside state law for nearly one hundred years. In 1938, the Supreme Court flatly rejected the federal common law regime in the landmark decision *Erie R.R. Co. v. Tompkins*. But, *Erie* was not the end of the federal common law issue.

The Supreme Court "has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.'" Federal common law has been necessary to protect uniquely federal interests. The Court described federal common law as a means to "fill the interstices of federal legislation." Thus, having recognized a need to establish federal common law in areas of uniquely federal interest, the question remained as to the standard for statutory preemption of that common law.

Congressional intent is the central focus for statutory preemption of federal common law. Because federal lawmaking power is vested in Congress, the standard for federal common law preemption is lower than the clear and manifest purpose required to preempt state law. But, as the Supreme Court noted in *United States v. Texas*, "[s]tatutes which invade the common law... are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident." This presumption was adopted by the *Motorcity* court.

In *Murphy*, the D.C. Circuit failed to acknowledge the presumption of the retention of the federal common law. That court relied on the language of the Supreme Court in *O'Melveny & Myers v. FDIC* (law, but fashion their own common law by consulting general principles of jurisprudence).

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164. 304 U.S. 64 (1938).
170. 507 U.S. 529 (1993). In *Texas*, the Court faced a question regarding the Debt Collection Act of 1982. Prior to the act, the common law established that all parties, including state and local governments, who owed a contractual debt to the federal government were obligated to pay pre-judgment interest. The 1982 codification of the common law expressly excluded state and local governments from the definition of parties subject to the act. The Court looked beyond the language of the act and held that retention of the common law pertaining to states was necessary to uphold the purpose of the act, collection of government debt. *See id.*
171. *Id.* at 534 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (internal quotation marks omitted)).
and held that the *D'Oench* doctrine disappeared.\textsuperscript{173} The *Motorcity* court, however, distinguished *O'Melveny*.\textsuperscript{174} In *O'Melveny* the Supreme Court was asked to create a new federal common law doctrine in an area where Congress had not expressed any special concerns.\textsuperscript{175} *Motorcity* involved the retention of existing federal common law.\textsuperscript{176} In that respect, the *Motorcity* court felt that the Supreme Court’s decision in *United States v. Texas* provided better guidance than the decision in *O'Melveny*.\textsuperscript{177}

*Motorcity*’s next claim, based on the premise that the *D'Oench* doctrine was preempted, was that the federal statutes\textsuperscript{178} did not apply because *Motorcity* repaid its loan prior to the FDIC’s appointment as receiver for Southeast Bank.\textsuperscript{179} The argument was that both statutory counterparts to the *D'Oench* doctrine apply only when a claim would defeat the FDIC’s interest in a specific asset and that would have been avoided by the repayment of the loan.\textsuperscript{180} The court failed to comment on the specific asset requirement of the statutes due to its application of the *D'Oench* doctrine.\textsuperscript{181}

The court noted that the *D'Oench* doctrine is not limited to claims arising from specific assets, rather, it covers all claims arising from ordinary banking transactions.\textsuperscript{182} The court was concerned that allowing a claimant to circumvent the *D'Oench* doctrine by repaying a loan before filing suit would undermine the policies behind the doc-

\textsuperscript{173} See *Murphy*, 61 F.3d at 40.
\textsuperscript{174} See *Motorcity*, 83 F.3d at 1329.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} See id. at 330.
\textsuperscript{179} See *Motorcity*, 83 F.3d at 1334.
\textsuperscript{180} See *Murphy* v. FDIC, 61 F.3d 34, 37 (D.C. Cir. 1995) (holding that § 1823(e) applies only when the FDIC’s interest in a specific asset would be impaired by the alleged secret agreement); *John* v. RTC, 39 F.3d 773, 776-77 (7th Cir. 1994) (“Section 1823(e) requires an identifiable ‘asset’ which is acquired by the bank and then transferred to the regulatory agency, and to which the unenforceable agreement must relate.”); *Thigpen* v. Sparks, 983 F.2d 644, 648-49 (5th Cir. 1993) (concluding that both §§ 1821(d)(9)(A) and 1823(e) are limited to a specific asset requirement).
\textsuperscript{181} See *Motorcity*, 83 F.3d at 1334.
\textsuperscript{182} See *Brookside Assocs.* v. *Rifkin*, 49 F.3d 490, 495 (9th Cir. 1995) (holding that the *D'Oench* doctrine is not limited to a specific asset); *RTC* v. *Dunmar Corp.*, 43 F.3d 587, 594-95 (11th Cir. 1995) (en banc) (holding that, regardless of whether a specific asset is involved, the *D'Oench* doctrine applies to claims or defenses that relate to ordinary banking transactions), cert. denied sub nom; *Im* at *Saratoga Assocs.* v. *FDIC*, 60 F.3d 78, 82 (2d Cir. 1995) (rejecting specific asset requirement for the *D'Oench* doctrine); *Jackson* v. *FDIC*, 981 F.2d 730, 734-35 (5th Cir. 1992) (holding that claims that do not diminish or defeat the FDIC’s interest in a specific asset are still barred by the *D'Oench* doctrine).
The doctrine was designed “to protect the bank examiners who rely on the bank’s records in assessing the bank’s condition, to protect the FDIC’s ability to insure deposits, and to place the burden on borrowers to make sure that all of the terms of their loan agreements are in writing.” Because the D’Oench doctrine was not preempted and did not contain a specific asset requirement, Motorcity’s repayment of the loan did not validate its claims.

The court held that application of the D’Oench doctrine barred all claims arising from oral agreements related to the written floor plan financing agreement. Any terms not contained in the agreement were not privy to the FDIC upon its examination of Southeast Bank’s records and, therefore, cannot be held against them. Motorcity, in an attempt to sidestep the contract issue, argued that its claims for breach of a fiduciary duty and negligence fell within the D’Oench doctrine’s narrow exception for free standing torts and were unrelated to the floor plan financing agreement. Again, the court barred this cause of action by applying the D’Oench doctrine.

The D’Oench doctrine acts as a bar to all claims, even those sounding in tort, that are “sufficiently intertwined with regular banking transactions, such that exclusion of the alleged ‘secret agreement’ accords with the underlying policies of D’Oench.” The free standing tort exception applies only to claims unrelated to ordinary banking transactions. Motorcity’s claims related to assurances made during the course of negotiating the floor plan financing agreement, and they were, therefore, related to ordinary banking transactions and should have been included in the terms of the written agreement. To hold otherwise would expose the FDIC to risks that it could not possibly have foreseen after a thorough examination of Southeast Bank’s records.

183. See Motorcity, 83 F.3d at 1335.
184. Id.
185. See id. at 1336.
186. See id.
187. See id.
188. See In re Geri Zahn, 25 F.3d 1539, 1543 (11th Cir. 1994).
189. See Motorcity, 83 F.3d at 1336.
190. See id.
191. Zahn, 25 F.3d at 1543; see also OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306, 310 (11th Cir. 1993).
192. See Zahn, 25 F.3d at 1543-44.
193. See Motorcity, 83 F.3d at 1338.
194. See id.
Finally, after stripping away reliance upon any oral agreements, the court addressed the validity of Motorcity's tort claims under state law. To establish a claim for breach of a fiduciary duty, Motorcity needed to show that Southeast Bank voluntarily assumed an obligation to act for the benefit of Motorcity. Under Florida law, a typical banking relationship does not give rise to a fiduciary duty by the bank. To create a duty from this relationship, Motorcity needed to show dependence and Southeast Bank must have assumed the duty. Because Motorcity could not rely on the oral agreement to notify, it could not use the oral agreement to prove Southeast Bank assumed a duty.

The court conducted a similar analysis for Motorcity's negligence claim. Before a defendant can be held liable for negligence under Florida law, that defendant must have a legal duty to protect the plaintiff from harm. A lender has no such duty unless voluntarily assumed. The audits conducted by Southeast Bank were for its own purposes. Summary reports sent to Motorcity were merely a courtesy. Therefore, the court determined that no tort duty had been implied. Finally, the court stated that the tort claim failed for an entirely independent reason—the economic loss rule, which bars pure economic recovery in a tort case unless it is distinguishable from

195. See id. at 1339.
196. See id.
198. See Motorcity, 83 F.3d at 1339 (relying on Cripe v. Atlantic First Nat'l Bank, 422 So.2d 820 (Fla. 1982); Willis v. Fowler, 136 So. 358 (Fla. 1931); Quinn v. Phipps, 113 So. 419 (Fla. 1927); Watkins, 622 So. 2d at 1065).
199. See id. at 1339-40.
203. See Motorcity, 83 F.3d at 1342.
204. See id.
205. See id. at 1342-43.
IV. SIGNIFICANCE OF THE CASE

The central tenet of the D'Oench doctrine has been the protection of the FDIC in its handling of the assets of an insolvent financial institution. The Supreme Court established the doctrine because it recognized a federal policy "to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans."207

This protection was recognized by Congress in the Federal Deposit Insurance Act of 1950—the statutory codification of D'Oench. The purpose behind the protection against secret banking agreements was that the FDIC had to quickly evaluate the assets of an insolvent bank in order to determine what course of action to take.208 The Supreme Court explained:

[This] evaluation in particular, must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' Neither the FDIC, nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.209

Such protection has been given for two reasons. The first reason was to induce banks to include all relevant terms and obligations in the bank records.210 The second was to place the risk of secret agreements on the parties that are in a better position to protect themselves.211 It is this blanket of protection for bank regulators that is now in jeopardy due to recent holdings by the D.C. Circuit and the Eighth Circuit.

The D.C. Circuit and the Eighth Circuit declared the D'Oench doctrine preempted by statute based on the Supreme Court's holding

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208. See Motorcity, 83 F.3d at 1324.
in *O'Melveny*. Instead of following their lead, the Eleventh Circuit decided the issue for itself. The Eleventh Circuit, in *Motorcity*, conducted a full analysis of the relevant law and came to its own conclusions regarding the *O'Melveny* decision. The *Motorcity* court went back to the roots of *D'Oench* as a common law protection for the FDIC.\(^{212}\) The history and interaction of the common law with its statutory counterpart\(^{213}\) were explored.\(^{214}\) The court noted that the common law and the statute were typically used together. When the statute fell short in its protection of the FDIC or other regulatory agency, the common law was available to fill gaps left by the statute.\(^{215}\)

The issue of statutory preemption in relation to the presumption of retention of long-established common law absent congressional intent to the contrary was not discussed by the *Murphy*\(^{216}\) or *DiVall*\(^{217}\) courts, nor by the Supreme Court in *O'Melveny*.\(^{218}\) Yet, this presumption was at the heart of the Supreme Court's holding in *United States v. Texas*.\(^{219}\) Because the Court did not address the presumption in *O'Melveny*, it should have been clear that their holding did not address the statutory preemption of long-established federal common law. Without such an analysis, it seems imprudent, in light of the Supreme Court's reliance on the presumption in *Texas*, to interpret the language of *O'Melveny* as holding that the *D'Oench* doctrine was preempted by statute.

The *Motorcity* court conducted a careful and well reasoned analysis of the preemption issue.\(^{220}\) Mindful of the presumption of the retention of long-established common law as set forth by the Supreme Court in *Texas*, the court examined the legislative histories of the 1950 and 1989 amendments. To preempt long-established common law, the intent of Congress must be evident.\(^{221}\) The 1950 and 1989 amendments were enacted by Congress in light of the existence of the *D'Oench* doctrine. The court found no evidence of Congres-
sional intent to preempt the *D'Oench* doctrine in the legislative histories of both the 1950 and 1989 amendments. The court concluded that the *D'Oench* was not inconsistent with the statute and the FIRREA amendments lacked the Congressional intent required to preempt long-established common law.

The holding in *Motorcity* is not contrary to the Supreme Court's holding in *O'Melveny*. In that instance, the FDIC did not call upon the court to apply existing common law, but to create new common law. It was the creation of new common law that the Court looked upon with disfavor. In refusing to extend common law protection to the FDIC in an area of no particular federal interest, the Court held that the FIRREA was a comprehensive statutory scheme and an exclusive grant of powers to the FDIC as receiver. The *D'Oench* doctrine specifically addressed an area of particular federal interest, and therefore, the Court would have to apply a different standard for its preemption. But the Court did not address the presumption favoring the retention of long-established federal common law absent Congressional intent that it had relied upon just one year before in *Texas*. The Court's holding in *O'Melveny* may establish some guidelines for when it is or is not appropriate to create new federal common law in the area of federal regulatory protection, but it did not follow its own test for preemption of long-established federal common law as enunciated in *Texas*.

If the *Murphy* and *DiVall* courts had examined the presumption favoring retention of long-established common law absent congressional intent to the contrary, which is the proper standard under *Texas*, they might have interpreted the Court's holding in *O'Melveny* in line with the Eleventh Circuit. Under the Eleventh Circuit's holding, if the intent of Congress was not to preempt *D'Oench*, then the statutory scheme would be interpreted with the common law included as an integral part, much like what was done by courts prior to *O'Melveny*. The *O'Melveny* decision was not a

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222. See *Motorcity*, 83 F.3d at 1332 (citing FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (holding that the legislative history of the 1950 amendment does not mention *D'Oench* and deciding that Congress did not intend to preempt)).
223. See *id.* at 1333.
225. See *id.* at 86-87.
226. See *id.*
change in the Court's stance on the D'Oench doctrine, it was merely a refusal to create additional common law protection for the FDIC and to establish some guidelines for when it would do so.

The importance of the Motorcity decision has two separate aspects. The first is that it provides a well reasoned response to the D.C. Circuit and the Eighth Circuit cases, both of which held for the preemption of the D'Oench doctrine. The Eleventh Circuit used the appropriate test for examining the preemption of long-established federal common law, as set forth by the Supreme Court in Texas. It can serve as a valuable model in cases involving secret banking agreements and federal bank regulatory agencies. Until the preemption issue is fully addressed by the Supreme Court, the careful analysis of the Eleventh Circuit provides the strongest argument for the survival of the federal common law D'Oench doctrine.

The second reason that the Motorcity decision is important is based on the government's policy of protecting regulatory agencies. The reason for the protections extended in D'Oench and its statutory counterparts are still prevalent today. The soundness of the financial community is still of concern, as evidenced by Congressional action, including the FIRREA. Regulatory agencies must still act quickly in the event of insolvency, maybe even more so due to the increased technology of today's world. Change in the banking industry and the financial sector as a whole are occurring at a rapid pace. These changes may easily outdistance current regulatory schemes. Congressional response to immediate problems takes time. This time could have great costs to the federal deposit insurance pool, which in turn costs the public. Without the flexibility of a common law doctrine to fill in gaps left by the federal statutes, more parties will find ways to circumvent the statutory protections, as with the specific asset requirement, and take advantage of information to the detriment of government regulatory agencies, the banking system, and ultimately the public.

V. ACTION OF THE SUPREME COURT

The Supreme Court recently granted certiorari to the petitioner in Motorcity. The Court vacated the opinion of the Eleventh Cir-

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230. This concern was raised by the court in Motorcity. If parties were allowed to repay their loans prior to filing suit, they would defeat the specific asset requirement every time and invalidate the statutory protections. Motorcity, 83 F.3d at 1335.
cuit and remanded the case for further consideration in light of its decision in *Atherton v. FDIC.* This section will review the Court's decision in *Atherton.* It will then discuss the impact of *Atherton* on *Motorcity* and the federal common law *D'Oench* doctrine.

A. Atherton v. FDIC

In *Atherton v. FDIC,* the Resolution Trust Company (RTC) sued the former officers of a failed, federally chartered savings association for gross negligence, simple negligence, and breach of a fiduciary duty. The RTC was later replaced by the FDIC as receiver. The district court held that 12 U.S.C. § 1821(k) controlled, and it allowed only the action for gross negligence. The Court of Appeals for the Third Circuit (Third Circuit) reversed, holding that the statute was merely a minimum standard that could be supplemented by other applicable law. The Third Circuit went on to hold that the statute could be supplemented both by federal common law for federally chartered financial institutions and by state law for state chartered financial institutions.

In *Atherton,* the Supreme Court expressly rejected the Third Circuit's assertion that the statute could be supplemented by federal common law. The Third Circuit applied a governance standard for federally chartered financial institutions that derived from an 1891 Supreme Court decision. The Supreme Court held that the federal common law standard for corporate governance, as previously announced by the Court in *Briggs v. Spaulding,* did not survive the

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232. See id.
233. See id. (citing *Atherton v. FDIC*, 117 S. Ct. 666 (1997)).
234. See infra notes 236-55 and accompanying text.
235. See infra notes 256-73 and accompanying text.
237. See id. at 667.
238. See id.
239. This statute, like the statutes involved in *O'Melveny, Murphy, DiVall* and *Motorcity* was part of the FIRREA amendments.
240. See id.
241. See id.
242. See id.
243. See id. at 670.
244. See id. The Third Circuit relied on prior Supreme Court decisions establishing a federal common law corporate governance standard for officers of federally chartered financial institutions. See id. (citing *Briggs v. Spaulding,* 141 U.S. 132 (1891); *Martin v. Webb,* 110 U.S. 7 (1884); *Bowerman v. Hammer,* 250 U.S. 504 (1919)).
245. 141 U.S. 132 (1891).
Erie decision abolishing general federal common law. Rather, the Court held that the standard for corporate governance of a federally chartered financial institution was established by the federal statute and other applicable law. The Court also noted that the federal statute established gross negligence as a minimum standard for officers of a federally chartered financial institution. The Court found that this minimum standard may be supplemented by state law when state law establishes a higher standard.

In rejecting the arguments raised by the FDIC, the Court held that this was not an area of particular federal interest. It described the areas of particular federal interest as "narrow." Finally, the Court found that the federal statute can supplant a state law standard of care that falls below the gross negligence standard.

B. Impact of Atherton on Motorcity

The Supreme Court remanded Motorcity to the Eleventh Circuit for consideration consistent with its holding in Atherton. The Eleventh Circuit must now determine Atherton's impact on Motorcity. Atherton may be distinguished from Motorcity on several important grounds. The first distinguishing factor is the Supreme Court's reli-

246. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). "There is no federal general common law." Id. at 78.
247. See Atherton, 117 S. Ct. at 670.
248. See 12 U.S.C. § 1821(k) (1994); see also Atherton, 117 S. Ct. at 667 ("A director or officer of [a federally insured bank] may be held personally liable for monetary damages in any [RTC-initiated] civil action ... for gross negligence [or] similar conduct ... that demonstrates a greater disregard of a duty of care [than gross negligence]. ... Nothing in this paragraph shall impair or affect any right of the [RTC] under other applicable law." (quoting 12 U.S.C. § 1821(k)).
249. See Atherton, 117 S. Ct. at 669.
250. See id.
251. See id.
252. The FDIC raised four arguments in support of the federal common law. First, the FDIC argued a need for uniformity. See id. at 671. Next the FDIC argued that the federal common law standard should apply because the institution was federally chartered. See id. Third, the FDIC referred to a conflict of laws principle known as the internal affairs doctrine. See id. at 673. The doctrine seeks to avoid conflict by establishing a single point of legal reference. See id. The FDIC analogized the current case, and federal common law for federally chartered institutions, to one in which state law would govern a state chartered corporation. See id. Finally, the FDIC points to the Office of Thrift Supervision (OTS), an agency with certain statutory powers, which had spoken authoritatively on the subject of officer standards, similar to those espoused in Briggs. See id.
253. See id. at 674.
254. The federal statute in Atherton was 12 U.S.C. § 1821(k).
255. See Atherton, 117 S. Ct. at 674-76.
ance on *Erie* to overrule the federal common law standard of conduct for officers of a federally chartered financial institution.\(^{256}\) It is unlikely that *Erie* would be used to overturn the *D'Oench* doctrine because the *D'Oench* doctrine was established by the Supreme Court in a decision that came after the Court's holding in *Erie*,\(^{257}\) and this area was recognized by the Court as an area appropriate for federal common law.

Another distinction between *Atherton* and *Motorcity* is that in *Atherton*, the RTC, replaced by the FDIC as receiver, brought the claim against the former officers.\(^{258}\) In *Motorcity*, the FDIC is defending on a claim by a customer of an insolvent financial institution.\(^{259}\) In *Motorcity*, the FDIC is in a defensive posture, and in the course of assuming that posture, it had to rely on the written records of the bank. In *Atherton*, the FDIC is in an offensive role, seeking litigation. In that posture, the need for protection is not as great because the litigation was thrust upon them.

The major distinction is the recognition of a federally protected interest. In *Atherton*, the Supreme Court refused to recognize a federally protected interest that required the protection of the federal common law.\(^{260}\) The Court felt that it was proper to allow the federal statute\(^{261}\) and applicable state law to control.\(^{262}\) This was not the case in *D'Oench*, where the Court specifically recognized a federal policy to protect the FDIC.\(^{263}\) It would be difficult to argue that protection of the FDIC is not a uniquely federal interest. The FDIC acts to insure all of the country's financial institutions, both state and federally chartered. It is the only such agency that currently performs this function. By its very nature it is unique and operates to protect all depositors. It is inherently a federal institution that requires the protection of the federal common law in the area of secret banking agreements.

While it is readily apparent that *Motorcity* is distinguishable from *Atherton*, this may not be enough to prevent the demise of the federal common law *D'Oench* doctrine. The Supreme Court's deci-

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\(^{256}\) See *id.* at 670.

\(^{257}\) The *Erie* decision was issued by the Court in 1938, and the *D'Oench* decision was issued by the Court in 1942.

\(^{258}\) See *Atherton*, 117 S. Ct. at 669.

\(^{259}\) See *Motorcity*, 83 F.3d at 1322.

\(^{260}\) See *Atherton*, 117 S. Ct. at 673.


\(^{262}\) See *Atherton*, 117 S. Ct. 669.

\(^{263}\) See *D'Oench*, Duhme & Co. v. FDIC, 315 U.S. at 457 (1942).
sion in Atherton signals a trend by the Court that begins with the O'Melveny decision. In both of these cases, the Court rejects the use of federal common law in an area that is at least partially occupied by the FIRREA and allows only state common law to supplement the federal statute.

Presumably, it was this trend that the Supreme Court had in mind when it remanded the Motorcity case to the Eleventh Circuit with the instructions regarding Atherton.\textsuperscript{264} If on remand the FDIC were forced to rely only on the defenses provided in the FIRREA supplemented by the applicable state law, it would likely be unable to successfully defend against the claims of Motorcity. The Eleventh Circuit analyzed Motorcity's claims for negligence and breach of a fiduciary duty under state law and determined that they would not prevail.\textsuperscript{265} The state law claims also failed under Florida's economic loss rule.\textsuperscript{266} However, Motorcity would most likely prevail under the federal statute,\textsuperscript{267} which required the claim to defeat the FDIC's interest in a specific asset.\textsuperscript{268} Motorcity's repayment of its loan prior to trial would circumvent the FDIC's statutory protection.\textsuperscript{269} Motorcity would also be free to recast its contract claims as tort claims absent the federal common law D'Oench doctrine bar to such claims.\textsuperscript{270}

This potential outcome shows the FDIC's need for the protection of the federal common law provided by the D'Oench doctrine. The case for the federal common law protection is much stronger here than it was in O'Melveny or Atherton.\textsuperscript{271} It is difficult to conceive that the Supreme Court intends to eliminate the D'Oench doctrine when (1) the D'Oench doctrine does not have the weaknesses of the federal common law doctrines rejected in Atherton and O'Melveny;\textsuperscript{272} (2) without the D'Oench doctrine, the statutory protection can be easily circumvented;\textsuperscript{273} and (3) the Supreme Court has not squarely addressed the presumption of the retention of long-

\begin{footnotes}
\item[265] See supra notes 195-205 and accompanying text.
\item[266] See supra note 206 and accompanying text.
\item[268] See supra notes 178-85 and accompanying text.
\item[269] See supra note 183 and accompanying text.
\item[270] See supra notes 186-94 and accompanying text.
\item[271] In D'Oench, the Supreme Court found a federally protected interest, which was not present in O'Melveny or Atherton. O'Melveny involved the creation of new federal common law and Atherton involved federal common law developed prior to the Erie decision. Neither of these shortcomings were found in D'Oench.
\item[272] See supra note 271.
\item[273] See supra notes 178-94 and accompanying text.
\end{footnotes}
THE D'OENCH DOCTRINE

established federal common law absent Congressional intent to the contrary, as raised by the Court in Texas and relied on by the Eleventh Circuit in Motorcity.

V. CONCLUSION

The federal common law D'Oench doctrine was established by the Supreme Court in recognition of the FDIC's need for federal protection from secret banking agreements. Congress also recognized the FDIC's need for federal protection and codified the D'Oench doctrine in the Federal Deposit Insurance Act of 1950. The codification of the common law was not meant to preempt the developing D'Oench doctrine. For many years the D'Oench doctrine and the federal statute have worked together to provide protection against secret banking agreements to federal regulatory agencies.

Congress acted in this area again with the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which included a codification of the then existing federal common law D'Oench doctrine. As with the 1950 codification, there was no evidence that Congress intended to preempt the existing federal common law. The Eighth Circuit and the D.C. Circuit relied on the Supreme Court's interpretation of the FIRREA in O'Melveny, leading them to hold that the federal common law D'Oench doctrine was preempted by the FIRREA. The Eleventh Circuit distinguished O'Melveny and addressed the issue of statutory preemption of long-established federal common law, under the test utilized by the Supreme Court in Texas, and held that Congressional intent to preempt the D'Oench doctrine was absent; therefore, the federal common law doctrine was still viable.

Recent action by the Supreme Court casts some doubt on the strength of the analysis by the Eleventh Circuit in Motorcity. The Court instructed the Eleventh Circuit to vacate their opinion and

274. See D'Oench, 315 U.S. at 457.
275. See Motorcity, 83 F.3d at 1332 (citing FDIC v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986) (holding that the legislative history of the 1950 amendment does not mention D'Oench and deciding that Congress did not intend to preempt)).
276. See supra note 46 and accompanying text.
278. See Motorcity, 83 F.3d at 1333.
279. See Murphy, 61 F.3d at 40; DiVall, 69 F.3d at 1402.
280. For a discussion of the Eleventh Circuits analysis, see supra notes 163-77 and accompanying text.
consider the case in light of the Court’s decision in Atherton.\(^{281}\) Atherton is distinguishable from Motorcity in several important areas.\(^{282}\) However, the Supreme Court seems intent on establishing a practice of eliminating federal common law protection for the FDIC in favor of the FIRREA protection augmented only by applicable state law.

Therefore, while the Eleventh Circuit’s analysis of the preemption issue in Motorcity is thoughtful and well reasoned, it may prove to be an exercise in futility. It is quite possible that the Supreme Court is going to lay the D’Oench doctrine to rest without squarely addressing the issue of statutory preemption as brought forward by the Eleventh Circuit in Motorcity. This tactic by the Court, if successful, will likely draw much criticism for its lack of careful analysis and not fully addressing all relevant concerns.

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282. *See supra* notes 256-63 and accompanying text.