

# A Comparison of the Treatment of Real Estate Interests Under FIRREA and the Bankruptcy Law

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## I. INTRODUCTION.

In the present economy, it is not unlikely that an owner, tenant, landlord or other party with an interest in real property may resort to relief under the United States Bankruptcy Laws ("Bankruptcy Law").<sup>1</sup> It is also not unlikely that a lender or other entity with whom such a party was involved is an institution for which the Office of Thrift Supervision will appoint the Resolution Trust Corporation ("RTC") to act as conservator or receiver or the Comptroller of the Currency will appoint the Federal Deposit Insurance Corporation ("FDIC") to act as conservator or receiver.<sup>2</sup> If the institution is a savings association taken over by the RTC or a bank taken over by the FDIC, two substantial bodies of federal law will be implicated: the Bankruptcy Law and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as amended by the Comprehensive Crime Control Act of 1990 and the Federal Deposit Insurance Corporation Improvement Act of 1991.<sup>3</sup>

A complete comparison of these bodies of law and the interaction and the potential areas of conflict between them, both substantive and procedural, is beyond the scope of this article.<sup>4</sup>

The primary focus of this article is to compare a selected group of provisions of the Bankruptcy Law and FIRREA with respect to their treatment of real estate interests and to analyze potential conflicts. This article will address the following issues: (i) contract repudiation under FIRREA<sup>5</sup> and contract assumption or rejection under the Bankruptcy Law<sup>6</sup> with respect to real property sales contracts, real property leases and real property finance transactions, (ii) lien avoidance,<sup>7</sup> (iii) the treatment of preferences and fraudulent transfers,<sup>8</sup> (iv) the *D'Oench Duhme* and related doctrines,<sup>9</sup> (v) the relationship between the FIRREA anti-injunction provisions<sup>10</sup> and the application of the automatic stay provisions of the Bankruptcy Law as applied to real property foreclosures,<sup>11</sup> and (vi) the requirements for RTC consent to a real property foreclosure.<sup>12</sup>

## II. REPUDIATION AND REJECTION.

### A. General Analysis.

Section 1821(e)(1) of FIRREA grants to the FDIC or the RTC, as conservator or receiver of a financial institution, the right to repudiate any contract or lease to which the institution is a party, if (i) the conservator or receiver determines, in its sole discretion, that performance by the institution will be burdensome and (ii) repudiation will promote the orderly administration of the institution's affairs. Section 1821(e)(2) requires that the decision to exercise the right to repudiate be made within a reasonable period of time following the appointment of the conservator or receiver.

Under Section 1821, the conservator's or receiver's powers of repudiation are applicable to any contract and are not limited to executory contracts or unexpired leases. Presumably, therefore, a contract may be repudiated under FIRREA even after one party to the contract has fully performed. To date, no reported case has addressed a contract that was fully executed.<sup>13</sup> The most significant decisions concerning repudiation have addressed the timeliness of the repudiation, the burdensomeness requirement, and the basic constitutionality of the statute.<sup>14</sup>

The Bankruptcy Law provisions governing the rejection of contracts are set forth in Section 365. Unlike FIRREA, the bankruptcy provisions apply only to executory contracts and unexpired leases.<sup>15</sup>

While FIRREA only applies a "reasonableness" standard<sup>16</sup> to the timing of repudiation, the Bankruptcy Law sets forth specific time periods within which the assumption or rejection decision must be made.<sup>17</sup> A further distinction between the two bodies of law relates to the standard for exercise of the decision: FIRREA imposes a "burdensomeness" test while the Bankruptcy Law has generally been interpreted to impose a "business judgment" test on the bankruptcy trustee.<sup>18</sup> The FIRREA standard may be interpreted to impose a higher

burden; however, FIRREA allows the receiver or conservator to exercise its sole discretion in determining whether a contract is burdensome.

Finally, both statutes contain what have come to be known as "*ipso facto*" clauses, which permit enforcement of contracts despite provisions in the contracts for termination or acceleration of the contract in the event of the filing of a bankruptcy petition or appointment of a receiver.<sup>19</sup>

Two significant areas of difference between the two bodies of law with respect to repudiation and rejection, discussed below, relate to (i) the differing specific measure of damages for rejection or repudiation of leases and sales contracts and (ii) the absence of any significant provisions on assignment and assumption rights of the conservator or receiver under FIRREA.

### B. Real Property Leases.

#### 1. Damages and Remedies.

FIRREA provisions addressing damages for the repudiation of a lease are set forth in Sections 1821(e)(4) and (e)(5),<sup>20</sup> while Bankruptcy Law provisions addressing damages for the rejection of a lease are found in Sections 365 and 502 of the Bankruptcy Law.

With respect to leases where the financial institution is the lessee seeking to repudiate or reject its lease, FIRREA, in Section 1821(e)(4), and the Bankruptcy Law, in Sections 502(b)(6) and (g), are consistent in allowing the lessor a claim for unpaid rent due as of the date of appointment (under FIRREA) or the date of filing the bankruptcy petition if earlier than the date of repossession or surrender of the property (under the Bankruptcy Law).<sup>21</sup>

FIRREA also appears to grant the lessor a right similar to the right of the bankruptcy debtor's lessor to receive rent as an administrative expense for use of the premises after the filing of the bankruptcy petition.<sup>22</sup> This conclusion is reached because under FIRREA, the Lessor is permitted to claim for contractual rent accruing before the

later of (i) notice of disaffirmance or repudiation or (ii) the effective date of disaffirmance or repudiation.<sup>23</sup>

The significant difference between the Bankruptcy Law and FIRREA with respect to leases lies in the treatment of lessors' claims for loss of future rental income. FIRREA expressly provides that a lessor has no claim for damages under any acceleration clause or other penalty provisions in the lease.<sup>24</sup> FIRREA also expressly disallows damages for lost profits.<sup>25</sup> In contrast, the Bankruptcy Law gives the lessor whose lease has been rejected without prior assumption a claim for rent equal to the *lesser* of the amount that would be allowed under either (i) state law, or (ii) the rent reserved by the lease. Furthermore, the allowable rent reserved by the lease is the greater of (i) rent due for one year, or (ii) 15% of the remaining term of the lease, not to exceed a three-year rental value. In addition, the date to begin calculating is the earlier of (i) the date of the filing the petition, or (ii) the date of repossession or surrender of the property.<sup>26</sup> Under the Bankruptcy Law, therefore, rent can be obtained for some period after the filing of a bankruptcy petition, while under FIRREA, damages are fixed as of the date of appointment of the conservator or receiver.<sup>27</sup>

Where the financial institution is the lessor, the rejection and repudiation rights appear to be similarly treated under both bodies of law. Under both bodies of law, the tenant, if not in default, may elect to remain in possession and pay contractual rent as it becomes due.<sup>28</sup>

A recent case arising under Section 1821(e)(5) of FIRREA, *Resolution Trust Corporation v. Diamond*,<sup>29</sup> suggests that the two bodies of law will probably be interpreted similarly with respect to interests known as "statutory tenancies," and that policy considerations may affect the exercise of rejection or repudiation powers. In the *Diamond* case, the district court for the Southern District of New York held that statutory tenancies, created under New York's rent control and rent stabilization laws, are created by state laws and therefore are not pre-empted by FIRREA. Because the tenancies are created by statute, the RTC could not repudiate those tenancies and evict the tenants. The court stated that its interpretation was analogous to and consistent with the holding in *In re Friarton Estates Corporation*.<sup>30</sup> In *Friarton*, the bankruptcy court held that a trustee could not remove rent-regulated tenants under Section 365 of the Bankruptcy Law because those tenants held statutory tenancies.

## 2. *Separate Rights to Repudiate as Conservator and as Receiver.*

The cases that have arisen under FIRREA in the lease context have also raised the issue of whether the RTC or the FDIC has separate, independent powers of repudiation as conservator and, subsequently, as receiver of a financial institution. The courts have reached different results on this question.<sup>31</sup> The leading case addressing this issue upheld these separate powers based upon its analysis of the differing roles of the RTC or the FDIC acting as conservator or as receiver. In *Resolution Trust Corporation v. Cedarminn Building Limited Partnership*,<sup>32</sup> the RTC succeeded the Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator of Midwest Savings Association ("Midwest"), upon the enactment of FIRREA in August 1989. FSLIC had been appointed conservator on May 4, 1989. On October 5, 1990, the RTC was appointed receiver of Midwest. On October 29, 1990, the RTC repudiated leases that had been entered into by Midwest's predecessor institution in a sale/leaseback transaction. The entire economic burden of the sale/leaseback transaction rested with the institution as seller/lessee. The buyer/lessor partnerships argued that the repudiation was not timely because the "reasonable period" for repudiation began when the RTC was first appointed as a conservator. The Court of Appeals for the Eighth Circuit reversed the lower court and found that separate, independent time periods applied. The *Cedarminn* court based its decision on statutory interpretation, statutory history and an interpretation of the distinct missions of RTC as conservator and as receiver. The court noted that the purpose of a conservator was to maintain the institution as a going concern, whereas a receiver is empowered to liquidate the institution:

[T]he requirement that RTC make the repudiation decision once and for all shortly after its first appointment as conservator would put RTC in the untenable position of trying to operate the business as an ongoing concern with one hand, while at the same time calculating the lease repudiation issue as if it were shutting the business down.<sup>33</sup>

The conservatorship role under FIRREA can be compared to the Chapter 11 reorganization under the Bankruptcy Law; the receivership role under FIRREA to Chapter 7 liquidation under the Bankruptcy Law.

An independent right to affirm or reject an executory contract also arises upon conversion from a Chapter 11 proceeding to a Chapter 7 proceeding.<sup>34</sup>

## C. *Real Property Sales Contracts—Damages and Remedies.*

FIRREA and the Bankruptcy Law both address what is commonly known in California as an installment land sale contract. FIRREA provisions addressing the measure of damages for repudiation of a real property sales contract are set forth in Section 1821(e)(6) of FIRREA,<sup>35</sup> and the Bankruptcy Law provisions addressing the measure of damages for rejection of a real property sales contract are in Section 365(i) of the Bankruptcy Law.

As in the lease context, FIRREA is more restrictive than the Bankruptcy Law with respect to permissible remedies when the conservator or receiver repudiates a real property sales contract.

If a seller wishes to repudiate or reject a sales contract, both FIRREA<sup>36</sup> and the Bankruptcy Law<sup>37</sup> allow the purchaser, at its option, to remain in possession or treat the contract as terminated. If the purchaser remains in possession, it must continue to make all payments due under the contract. Any damages incurred by the purchaser will be limited to a right of offset against such payments. The conservator or receiver may also assign the contract and sell the property subject to the contract.<sup>38</sup>

If the purchaser elects to treat rejection as a termination of the contract, the Bankruptcy Law goes further than FIRREA and gives the purchaser a lien on the property for the recovery of any portion of the purchase price it paid.<sup>39</sup> FIRREA does not grant such a lien. Moreover, FIRREA does not explicitly state whether the purchaser would have an administrative claim for the purchase price paid, although it would seem that the purchaser should have such a claim for that amount.

## D. *Real Property Finance Transactions.*

As stated in Section II.A of this article, both the Bankruptcy Law, in Sections 365(b)(2) and 365(e)(i), and FIRREA, in Section 1821(e)(12)(A), contain *ipso facto* clauses.

The Bankruptcy Law sets forth an exception to the unenforceability of *ipso facto* clauses in Sections 365(c)(2) and (e)(2). Those sections permit a party to terminate a debtor's executory contract if the con-

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tract makes a loan or extends other debt financing to the debtor. Further, even if no default exists, under its terms, the bankruptcy trustee cannot assume the loan agreement. Therefore, a lender is not required to make additional advances under a pre-bankruptcy lending contract after the bankruptcy case commences.<sup>40</sup>

FIRREA does not contain an analogous limitation on the unenforceability of *ipso facto* clauses. Arguably, therefore, where a party has entered into a contract to lend to an institution that is later placed in conservatorship or receivership, that party can be obligated to perform under the loan commitment.

The question more likely to arise in this area, however, is whether a borrower can enforce a commitment to lend made by an institution that is later placed in conservatorship or receivership. To answer this question, one must consider the repudiation power and the provisions of FIRREA setting forth the requirements for enforcement of contracts against the FDIC or the RTC.<sup>41</sup>

If a decision to repudiate is made by the RTC or the FDIC, the issues of damages, as well as of timeliness and burdensomeness, must be addressed. To date, no published cases have decided the issue of allowable damages under FIRREA for breach of a loan commitment. Other non-FIRREA cases on the issue may be instructive as precedent.<sup>42</sup> It should be noted, however, that FIRREA's limitation to direct compensatory damages<sup>43</sup> would be applicable.

If the prospective borrower is a debtor in bankruptcy, it would appear that the repudiation power would not have to be invoked and the RTC, as receiver or conservator of an institution, would have the same protection as any other creditor in a bankruptcy against a preexisting obligation to fund a loan.

## E. Assumption and Assignment of Contracts and Leases.

### 1. Assumption.

The Bankruptcy Law sets forth specific

conditions for assumption of executory contracts and unexpired leases.<sup>44</sup> With respect to shopping center leases, specific requirements for adequate assurance of future performance are set forth.<sup>45</sup> Once a contract has been assumed, it must be fully performed as if it had been executed outside the bankruptcy.<sup>46</sup> FIRREA does not expressly address the issue of assumption of contracts and leases. However, Section 1821(e)(12) of FIRREA gives the conservator or receiver the right to "enforce" a contract despite the existence of *ipso facto* clauses.

### 2. Assignment.

Under the Bankruptcy Law, any provision of a lease or contract that purports to prohibit assignment is invalid.<sup>47</sup> In order to assign a contract, however, certain prerequisites must be met. These prerequisites are essentially the same as those for assumption of a contract. One difference, however, is that the assignee must provide adequate assurance of the future performance instead of the assuming trustee or debtor in possession.

Under Section 365(c) of the Bankruptcy Law, the two types of executory contracts that may not be assumed or assigned by the debtor or trustee are (i) contracts to make a loan, or otherwise provide debt financing or financial accommodation, and (ii) contracts in which, under applicable state law, the nondebtor contracting party would be excused from accepting performance from, or rendering performance to a party other than the debtor.

The *ipso facto* clause contained in FIRREA<sup>48</sup> does not expressly refer to contract provisions that purport to limit assignment. The reference to assignment of assets in FIRREA provides that, except for a transfer by specified types of depository institutions that requires approval of the appropriate federal banking agency, the FDIC or the RTC may transfer any asset or liability of the institution in default without any approval, assignment or consent with respect to such transfer.<sup>49</sup> The only reference to assignment of contracts in FIRREA in the repudiation section regarding sales contracts provides that the RTC or the FDIC may assign such a contract and sell the property subject to such a contract.<sup>50</sup> Neither section addresses any prerequisites for exercise of such rights.

## III. AVOIDANCE OF SECURITY INTERESTS.

Under FIRREA, the right to repudiate or

disaffirm contracts is not intended to allow the avoidance of a legally enforceable or perfected security interest in any of the assets of a financial institution, except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay or defraud the institution or the creditors of the institution.<sup>51</sup> If a secured obligation is repudiated under FIRREA, however, the FIRREA limitation on damages may limit the effect of the existence of the collateral.<sup>52</sup>

## IV. FRAUDULENT CONVEYANCES.

While the treatment of fraudulent conveyances is not of unique significance to real property law, it is clearly of major importance. Fraudulent transfers receive very different treatment under FIRREA and the Bankruptcy Law. This article does not purport to present a comprehensive analysis of fraudulent transfers under either body of law.

### A. Bankruptcy Law.

Transfers are voidable as fraudulent conveyances under the Bankruptcy Law if they are made within one year of the filing of the bankruptcy petition and with actual intent to hinder, delay or defraud creditors.<sup>53</sup> Transfers made within one year of the filing are also voidable, regardless of the intent of the transferor, if the debtor received less than a reasonably equivalent value for the transfer and the debtor (i) was or became insolvent as a result of the transfer, or (ii) was left with an unreasonably low level of capital to continue business, or (iii) intended to incur or believed it would incur debts beyond its ability to pay.

### B. FIRREA.

The FIRREA fraudulent transfer provision was added by the Comprehensive Crime Control Act of 1990 ("Crime Control Act").<sup>54</sup> The provision gives the RTC or the FDIC the power as conservator or receiver to avoid a transfer of any interest in property or any obligation incurred by an institution affiliated party<sup>55</sup> or any person who the RTC or the FDIC deems to be a debtor of the institution, if the transfer was made within five years of the appointment of the conservator or receiver of such party and was made or incurred voluntarily or involuntarily with the intent to hinder, delay or defraud the institution, the receiver or conservator or any other appropriate banking agency. To the extent a transfer is

avoided, the conservator or receiver may recover the property or its value from the initial transferee or any immediate or mediate transferee of such initial transferee. The receiver or conservator cannot recover from any transferee that takes for value, in good faith, or from any immediate or mediate transferee of such initial transferee. The provision specifically states that the rights granted thereunder are superior to the rights of a trustee or any other party under a Title 11 bankruptcy other than a federal agency party.

These provisions differ from the Bankruptcy Law provisions in several ways. First, the FIRREA provisions are applicable only in instances of actual intent and do not allow avoidance of "constructive fraudulent transfers." The Bankruptcy Law, on the other hand, permits avoidance of transfers for which the debtor receives less than a reasonably equivalent value and the debtor is or becomes insolvent.<sup>56</sup> A receiver or conservator under FIRREA is not required to prove insolvency.<sup>57</sup> Second, the "lookback" period under FIRREA (five years) is considerably longer than the one-year period contained in the Bankruptcy Law. Third, Section 1821(d)(17)(D) of FIRREA, which provides that a federal conservator's or receiver's right to pursue assets that are transferred contrary to its provisions is superior to the rights under a Title 11 Bankruptcy, does not have a parallel in the Bankruptcy Law. The provision can be seen as inconsistent with the asset recovery and disposition scheme of the Bankruptcy Law that is for the benefit of all creditors of the bankruptcy estate. Therefore, an RTC or FDIC receiver or conservator, on the one hand, and a bankruptcy trustee, on the other, may have independent, and perhaps competing, claims to the same assets because the Crime Control Act did not exclude from the definition of property of the bankruptcy estate set forth in Section 541 of the Bankruptcy Law, property that is subject to the reach of the receiver under Section 1821(d)(17) of FIRREA.

In 1991, the bankruptcy court in Connecticut addressed the issue of FIRREA's stated superiority. In *In re Colonial Realty Company*,<sup>58</sup> the court held that the superior rights granted by Section 1821(d)(17) of FIRREA did not permit the FDIC to avoid the bankruptcy automatic stay because Section 1821(d)(17) addressed the priority of substantive rights, whereas the bankruptcy automatic stay affected procedural or remedial rights. In the *Colonial Realty* case, a Chapter 7 trustee moved for an order enforcing the automatic stay against the

FDIC as receiver of five banks to prevent the FDIC from continuing actions it had commenced in district court to avoid and recover alleged fraudulent transfers. The FDIC argued that it was not prohibited by the automatic stay from prosecuting such actions for several reasons, including that Section 1821(d)(17) of FIRREA gave it greater rights in the assets than any other party, including the bankruptcy trustee. The court granted the bankruptcy trustee's motion. It construed the "priority" granted by Section 1821(d)(17) to be similar to the priority over trustees that may be granted to many parties (e.g., secured creditors). The existence of such priority, however, does not permit such parties to enforce their rights outside of the bankruptcy court, which has jurisdiction over all of the debtor's assets. The court also considered that the Crime Control Act did not amend Section 362 of the Bankruptcy Law to exclude its applicability to the FDIC receiver.

The *Colonial Realty* court further opined that a relief from stay hearing would allow examination of whether the actual intent standard of Section 1821(d)(17) had been met, and, to the extent that Section 1821(d)(17) is for the benefit of the FDIC alone, whether alternatives existed for satisfaction of the obligation that the FDIC sought to avoid.

In dicta, the *Colonial Realty* court noted that it may have been appropriate, as an alternative basis of relief, for the bankruptcy court to have entered injunctive relief under Section 105 of the Bankruptcy Law.<sup>59</sup> The relationship between the bankruptcy automatic stay, the bankruptcy court's injunctive powers under Section 105 of the Bankruptcy Law and the FIRREA anti-injunction statute<sup>60</sup> is addressed in Section VII of this article.

## V. PREFERENCES.

Preferences, like fraudulent conveyances, while not of unique significance to real property law, can nevertheless greatly impact real property interests.

### A. Bankruptcy Law.

Certain prepetition transfers are avoidable under the Bankruptcy Law, if such transfers are deemed to be preferences.<sup>61</sup> The Bankruptcy Law defines a preference in terms of six characteristics. A preference must involve a transfer (i) of property of the debtor; (ii) to or for the benefit of a creditor; (iii) for or on account of an antecedent debt owed by the debtor to the creditor before

the transfer was made; (iv) made while the debtor is insolvent; (v) made on or within 90 days before the date of the filing of the petition or between 90 days and one year before the date of the filing if the creditor at the time of the transfer was an "insider"; and (vi) made to enable the creditor to receive more than it would receive in a liquidation case under Chapter 7 of the Bankruptcy Law. Exceptions to the avoidance power exist with respect to transfers that are: (i) substantially contemporaneous exchanges for new value given to the debtor; (ii) made in the ordinary course of business; (iii) purchase money security interests that secure a loan made by the secured party after signing a security agreement given to enable and, in fact, used by the debtor to acquire the collateral and perfected within ten days after the debtor receives possession of the collateral; (iv) payments that are followed by the lender's giving of "new value"; (v) security interests acquired pursuant to a floating lien of the creditor, subject to certain time requirements; or (vi) the fixing of a statutory lien.<sup>62</sup>

### B. FIRREA.

FIRREA does not contain a preference concept. Thus, the analysis of the interaction of FIRREA and the Bankruptcy Law in this area involves a look at how transactions with institutions for which the RTC or the FDIC is receiver or conservator are treated in connection with preference litigation in bankruptcy court. Two major issues are raised. First, courts have examined the extent to which principal and interest payments made by a debtor to a financial institution are excepted under Section 547(c)(2) of the Bankruptcy Law as payments in the ordinary course of business. This issue is not unique to creditors affected by FIRREA. Second, courts have considered the extent to which the RTC or the FDIC can escape the bankruptcy trustee's avoiding powers as a transferee who takes in good faith for value and without notice of avoidability under Section 550(b) of the Bankruptcy Law. The Section 550(b) analysis would apply with respect to the trustee's preference and other avoiding powers.<sup>63</sup>

#### 1. Principal and Interest Payments.

The qualification of principal and interest payments as payments in the ordinary course has been decided by the United States Supreme Court in *Union Bank v. Wolas*.<sup>64</sup> In that decision, the Court held

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that interest and principal payments on long term debt may qualify for the ordinary course of business exception to the trustee's preference avoiding powers. Under the preference rules, factors to be considered include whether the loan was incurred in the ordinary course of the debtor's and the bank's business and whether the payments were made in the ordinary course of business or according to ordinary business terms.<sup>65</sup> It would not appear that the RTC or the FDIC would be treated differently than any other creditor for purposes of this analysis.

## 2. Status of the RTC or the FDIC Under Section 550(b).

Issues have arisen with respect to whether the RTC or the FDIC, acting as a receiver, can qualify as a transferee for value which in good faith takes without knowledge of avoidability under Section 550(b) of the Bankruptcy Law and thus, is protected from the trustee's avoiding powers. Decisions both prior and subsequent to the enactment of FIRREA that address the ability of the FDIC to qualify under Section 550(b) have distinguished between the FDIC, acting in its corporate capacity (in which it was held to qualify), from its receivership capacity (in which it was held not to qualify).<sup>66</sup> Contrary authority exists in *In re Linen Warehouse*,<sup>67</sup> in which the Bankruptcy Court for the Western District of Texas held that the same reasoning that qualifies the FDIC under Section 550(b) while acting in its corporate capacity should apply to the FDIC when it acts as receiver.

## VI. D'OENCH DUHME, RELATED DOCTRINES AND THE BANKRUPTCY LAW.

The holding of the United States Supreme Court in *D'Oench Duhme v. FDIC*,<sup>68</sup> and the provisions of Sections 1823(e) and 1821(d)(9) of FIRREA, preclude the assertion of defenses or affirmative claims by parties litigating with the RTC or the FDIC where such defenses or affirmative claims

are based on certain types of schemes, arrangements, representations or agreements not reflected in the books and records of the failed institution. Another significant federal common law doctrine, the federal holder in due course doctrine, protects the FDIC or the RTC against the assertion of personal defenses that may be raised with respect to assets acquired from failed institutions.<sup>69</sup> Because the RTC and the FDIC can invoke these doctrines, an understanding of them is essential in doing business with financial institutions and negotiating and litigating with the RTC or the FDIC when a financial institution has been placed into conservatorship or receivership.<sup>70</sup>

### A. *D'Oench Duhme*.

In *D'Oench Duhme*, a securities broker sold bonds to a bank. The issuer of the bonds defaulted, rendering the bonds worthless. Because the bank did not want to reflect the loss on its records, it requested that the broker issue a promissory note. The receipt given for the note stated, "This note is given with the understanding it will not be called for payment. All interest payments to be repaid."<sup>71</sup> The bank later failed and the FDIC, as receiver for the bank, brought suit on the note.

The broker defended the FDIC's lawsuit on the grounds that there was no consideration for the note and that the language of the receipt precluded enforcement. The Court held that the broker was estopped from raising these defenses. The Court formulated the following rule:

The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the... [FDIC]... was or was likely to be misled.<sup>72</sup>

The policy rationale of the decision is clear. The Court sought to protect the FDIC, and the public funds that it administers, against misrepresentations regarding the assets in the portfolios of the banks which the FDIC insures or to which it makes loans.<sup>73</sup>

The elements of the holding in *D'Oench Duhme*, as stated in the opinion and as subsequently interpreted by other courts, are essentially as follows:

(i) *Knowledge Irrelevant*. Whether the RTC or the FDIC knew of the existence of the agreement prior to its acquisition of the asset is irrelevant.<sup>74</sup>

(ii) *No Requirement of Intent to Deceive*. The obligor need not intend to deceive the banking authorities. The lending of oneself to the scheme or arrangement is the operative act.<sup>75</sup>

(iii) *Affirmative Claims for Relief Are Barred*. *D'Oench* bars affirmative claims or counterclaims and defenses to enforcement.<sup>76</sup>

(iv) *No Requirement for Actual Deception or Injury or Reliance*. Because of the "evil tendency" of acts contravening the policies governing banking transactions, actual deception or injury is not required.<sup>77</sup> Actual reliance is also not required and proof, for example, that an institution has charged off an obligation does not prevent application of the doctrine.<sup>78</sup>

(v) *D'Oench Applies to Writings Unrecorded in the Institution's Records and Oral Agreements*. *D'Oench* is not limited to oral agreements, but also applies to written agreements that are not properly recorded in the financial institution's files.<sup>79</sup> The doctrine applies to negotiable and non-negotiable instruments and other forms of writings.<sup>80</sup>

(vi) *Availability*. The *D'Oench* doctrine is available to the FDIC in its corporate capacity and in its capacity as receiver.<sup>81</sup> There is a question as to whether it is available to FDIC in its capacity as a conservator.<sup>82</sup> It is available to RTC in both its conservatorship and receivership capacities.<sup>83</sup> The doctrine has also been held applicable to other entities and transactions.<sup>84</sup>

### B. Sections 1823(e) and 1821(d)(9).

Section 1823(e) was originally enacted in 1950 and amended by FIRREA in 1989.<sup>85</sup> FIRREA also added Section 1821(d)(9), which requires that an agreement comply with Section 1823(e) to be enforceable against the RTC or the FDIC.<sup>86</sup>

Contrary to some statements of its scope, Section 1823(e) is not coextensive with *D'Oench* or its "statutory enactment." It also has not preempted *D'Oench*. *D'Oench* requires a scheme or arrangement, while Section 1823(e) requires only the existence of an agreement that would tend to diminish or defeat the interest of the RTC or the FDIC. The *D'Oench* doctrine is more of an estoppel doctrine, while Section 1823(e) is akin to a statute of frauds.

The leading case interpreting Section 1823(e) is *Langley v. FDIC*.<sup>87</sup> *Langley* in-

volved a suit for payment on a purchase money loan. The makers contended that they were not liable on the note because they were fraudulently induced to enter into the transaction based upon the alleged misrepresentations by the bank as to the amount of the gross acreage of the property, the amount of mineral acreage, and the existence of mineral leases. The United States Supreme Court held that these representations were in fact an "agreement" that did not satisfy the requirements of Section 1823(e) or *D'Oench*. The Court stated:

As a matter of contractual analysis, the essence of petitioners' defense against the note is that the bank made certain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. As used in commercial and contracts law, the term 'agreement' often has a wider meaning than... 'promise,'... and embraces such a condition upon performance.... Quite obviously, the parties' bargain cannot be reflected without including the conditions upon their performance, one of the two principal elements of which contracts are constructed.<sup>88</sup>

In order for an agreement to be enforceable under FIRREA, all of the statutory requirements of Section 1823(e) must be met.<sup>89</sup> There is some question, however, as to whether the requirement under Section 1823(e)(2), that the agreement be executed contemporaneously with the acquisition of the asset, must be complied with in the context of a renewal, modification or extension of a loan or other obligation. The greater weight of authority is that the requirement does apply.<sup>90</sup>

As with *D'Oench*, attempts have failed to avoid the applicability of Section 1823(e) based on an absence of intent to deceive, lack of borrower's knowledge, lack of actual deception or injury, and absence of reliance.<sup>91</sup>

Section 1823(e) is available to the RTC as receiver.<sup>92</sup> Whether Section 1823(e) may be asserted by the RTC as conservator has not yet been decided.<sup>93</sup> The doctrine applies to the FDIC in its corporate and receivership capacities.<sup>94</sup> Whether Section 1823(e) may be asserted by the FDIC as conservator, likewise, has not yet been decided.<sup>95</sup> The doctrine has been held to be available to other entities as well.<sup>96</sup>

### C. Claims and Defenses Barred by *D'Oench* and Section 1823(e).

Numerous defenses and claims have been

held to be precluded by *D'Oench* and/or Section 1823(e). These defenses and claims include the following:

- i. Breach of oral agreement to fund;<sup>97</sup>
- ii. Course of conduct/custom and practice;<sup>98</sup>
- iii. Usury;<sup>99</sup>
- iv. RICO;<sup>100</sup>
- v. Accord and satisfaction;<sup>101</sup>
- vi. Failure of consideration;<sup>102</sup>
- vii. Release;<sup>103</sup>
- viii. Alteration;<sup>104</sup>
- ix. Fraudulent inducement;<sup>105</sup>
- x. Breach of fiduciary duty;<sup>106</sup>
- xi. Breach of the duty of good faith and fair dealing;<sup>107</sup>
- xii. Mutual mistake;<sup>108</sup>
- xiii. Laches;<sup>109</sup>
- xiv. Promissory or equitable estoppel and waiver;<sup>110</sup>
- xv. Tortious interference;<sup>111</sup>
- xvi. Undue influence, duress and coercion;<sup>112</sup>
- xvii. Unclean hands;<sup>113</sup>
- xviii. Unjust enrichment;<sup>114</sup>
- xix. Nondisclosure.<sup>115</sup>

A few defenses and claims may not be barred by *D'Oench* and Section 1823(e). Generally, fraud in fact has been held to be a possible exception to the reach of Section 1823(e).<sup>116</sup> Other defenses generally considered to be real defenses, as opposed to personal defenses,<sup>117</sup> have been permitted notwithstanding *D'Oench* and Section 1823(e).<sup>118</sup>

An "innocent borrower" exception may also exist, but cases have questioned whether such an exception continues to exist after the *Langley* decision.<sup>119</sup>

An "exception" to *D'Oench* and Section 1823(e) has been created by several courts where a debtor or other party seeks to defend against the FDIC or the RTC enforcing loan or other documents establishing bilateral obligations.<sup>120</sup> In those cases, the debtor or other party has been allowed to assert defenses that would otherwise be precluded by *D'Oench* and Section 1823(e) when it is established that the institution breached its obligations under the same documents that form the basis of the agency's claims against the debtor or other party. The bilateral obligation "exception" may be seen as consistent with *D'Oench* because the financial institution's obligations arise out of the express terms of the agreement sought to be enforced, rather than out of a separate and undisclosed side agreement to an agreement that imposes only unilateral obligations on the maker or other party.<sup>121</sup> The doctrines also probably

do not apply with respect to claims or defenses arising out of the actions of the RTC or the FDIC themselves, as opposed to the claims or defenses based on the acts of the institution placed into conservatorship or receivership.<sup>122</sup>

### D. The Federal Holder In Due Course Doctrine.

The federal holder in due course doctrine, as a matter of federal common law, grants to the RTC and the FDIC holder in due course status as to negotiable<sup>123</sup> instruments acquired by the agency from a predecessor financial institution in a purchase and assumption transaction.<sup>124</sup> The doctrine is available without regard to whether the agencies would qualify for such treatment under the Uniform Commercial Code.<sup>125</sup> The doctrine is available to the FDIC in its corporate<sup>126</sup> and receivership<sup>127</sup> capacities, and has been held to be available to the RTC in its conservatorship<sup>128</sup> and receivership<sup>129</sup> capacities.

The doctrine may be invoked when either *D'Oench* or 12 U.S.C. Section 1823(e) may be inapplicable.<sup>130</sup>

### E. Interaction Between *D'Oench* and Section 1823(e) and the Bankruptcy Law.

For the most part, the special powers granted to the RTC and the FDIC, including those provided under *D'Oench* and Section 1823(e), apply to claims and defenses asserted by trustees and debtors-in-possession in bankruptcy proceedings. The specific issues that arise in the context of bankruptcy are equitable subordination, the FIRREA claims process, dischargeability of debts, and the effect of *D'Oench* and related doctrines on the trustee's avoiding powers.

#### 1. Equitable Subordination.

The doctrine of equitable subordination, set forth in Section 510 of the Bankruptcy Law, allows a bankruptcy court to subordinate all or part of a lender's claims to those of other creditors or to order that any lien securing a subordinated claim be transferred to a debtor's estate.<sup>131</sup> The Bankruptcy Law does not set forth requirements for equitable subordination, instead, such delineation is left to the courts. The courts have employed a three-part test to determine if the creditor's claim should be equitably subordinated:<sup>132</sup> (i) the creditor must have engaged in some type of inequitable conduct; (ii) the misconduct must have

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resulted in injury to other creditors of the debtor, or conferred an unfair advantage on the subject creditor; and (iii) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Law. These conditions are qualified by holdings that the creditor's conduct need not relate to the acquisition or assertion of its claim and that the degree of subordination is to be measured by the extent of the harm.<sup>133</sup>

Many of the cases involving equitable subordination focus on the existence of fraud, although some cases have imposed equitable subordination in the absence of fraud.<sup>134</sup> Other cases have imposed equitable subordination where a loan would more aptly be described as a contribution of equity or where the debtor is subject to excessive control by the lender.<sup>135</sup>

The *D'Oench* doctrine and Section 1823(e), however, have been held to bar claims and defenses asserted by a debtor seeking to equitably subordinate claims of the FDIC to claims of other creditors under Section 510(e) of the Bankruptcy Law based upon alleged oral promises and inequitable conduct of the failed financial institution.<sup>136</sup>

## 2. Bankruptcy Claims Process.

The *D'Oench* doctrine has been held to bar defenses asserted by borrowers attempting to disallow claims made by the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver in a debtor's bankruptcy.<sup>137</sup>

## 3. Nondischargeability.

The United States District Court for the Northern District of Texas has held that the FDIC cannot rely on the *D'Oench* doctrine to replace proof of reliance in a nondischargeability action based on the alleged fraud of the debtor.<sup>138</sup> This holding reverses the holding of the bankruptcy court that applied the *D'Oench* doctrine to create a presumption of reasonable reliance on loan documents by the FDIC in bankruptcy

nondischargeability litigation that is brought under Section 523(a)(2) of the Bankruptcy Law.<sup>139</sup>

## 4. *D'Oench and Trustee / Debtor In Possession Avoiding Powers.*

In bankruptcy litigation, the FDIC has argued that *D'Oench* and Section 1823(e) prevent the assertion of fraudulent conveyance and preference claims against the FDIC arising out of actions of the financial institution. Each of the cases that have examined this issue,<sup>140</sup> with one exception,<sup>141</sup> have held that *D'Oench* does not preclude the assertion of fraudulent conveyance and preference claims against the FDIC. The courts have found that those avoiding powers do not arise out of an agreement or a condition to an agreement required in *D'Oench* and *Langley*; instead they arise by operation of law based on the trustee's powers granted by the Bankruptcy Law.

## VII. FORECLOSURE.

The analysis of the foreclosure remedy under FIRREA and the Bankruptcy Law requires an examination of the applicability of the automatic stay,<sup>142</sup> the applicability of the bankruptcy court's general injunctive powers,<sup>143</sup> and the effect of the FIRREA anti-injunction statute<sup>144</sup> on actions that might be undertaken by a bankruptcy court with respect to the RTC and the FDIC. A comparison of the two bodies of law demonstrates a similarity between the automatic stay in bankruptcy and the FIRREA requirement that the RTC or the FDIC consent to foreclosure sales of property in which the failed financial institution has an interest.

### A. The Applicability of the Automatic Stay to the RTC.

Section 362 provides an automatic stay upon the filing of a bankruptcy petition as to certain actions affecting the bankruptcy estate. The automatic stay applies to judicial proceedings and certain nonjudicial actions, such as foreclosures conducted pursuant to a power of sale.

FIRREA contains an anti-injunction statute which provides that, except as provided in Section 1821, no court may take any action to restrain or affect the exercise of powers or functions of the FDIC or the RTC as a conservator or receiver.<sup>145</sup>

The argument has been made that the automatic stay is not applicable to the federal banking agencies because the stay has

the effect of restraining or affecting the exercise of the powers or functions of the receiver or conservator.<sup>146</sup> The decisions rendered by several courts would lead to the conclusion, with respect to the conduct of foreclosure sales, that the RTC and the FDIC are subject to the automatic stay because the injunction created by the statute is one imposed by Congress while the Section 1821(j) prohibition only applies to judicial action.<sup>147</sup>

### B. Injunctions Against RTC Conduct of Foreclosure Sales.

Section 105 of the Bankruptcy Law also suggests itself as a source of authority to enjoin the RTC. This Section gives bankruptcy judges the authority to issue any appropriate or necessary order, process or judgment in connection with a bankruptcy proceeding. As a result, Section 105 provides a basis for the bankruptcy court to issue injunctive relief independent of the automatic stay. Unlike the automatic stay that results from an act of Congress, use of the Section 105 power directly conflicts with the FIRREA anti-injunction statute provision that "no court" may take any action to restrain or affect the exercise of powers of the RTC or the FDIC.

*Landmark Land Company of Oklahoma, Inc. et al. v. Resolution Trust Corporation as Conservator for Oaktree Federal Savings Bank*, is a relatively recent case of importance in the area of bankruptcy courts' injunctive power against the RTC.<sup>148</sup> In the *Landmark* case, real estate development companies (the "Landmark Companies") and their majority shareholder ("Clock Tower") filed Chapter 11 petitions. Oak Tree Savings Bank ("Oak Tree") was the sole shareholder of Clock Tower. The RTC, as conservator of Oak Tree's successor in interest ("New Oak Tree"), sought to call a shareholders' meeting and otherwise exercise its ownership rights. The RTC was unable to call such a meeting as a result of an injunction obtained by Clock Tower and the Landmark Companies prohibiting Oak Tree from holding a shareholders' meeting to elect new members to the boards of directors of the Landmark Companies.

The district court refused to dissolve the injunction as against the RTC. The court based its refusal on the need to protect shareholder rights and the debtor's right to reorganize. The court concluded that, if allowed to hold shareholders' meetings, the RTC would elect management that would withdraw the Landmark Companies from bankruptcy and sell the assets, to the detriment of creditors.

The appellate court held in favor of the RTC, based on its interpretation of FIRREA, and in particular Section 1821(j). The holding permitted the RTC to begin to take over real estate subsidiaries of the financial institution under the RTC conservatorship. The court stated that "[t]he comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC full rein to exercise its statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other proceedings."<sup>149</sup> The court also rejected a distinction that the Landmark Companies sought to make between the RTC's authority to manage the insolvent thrifts versus its authority over business corporations in Chapter 11 that were owned by the thrifts.<sup>150</sup>

The holding in the *Landmark* case, when compared to rulings and dicta in cases such as *In re Colonial Realty Company*<sup>151</sup> (discussed in Section IV.B of this article), demonstrates the conflicts that emerge in this area of the law. While the *Colonial Realty* court found that it did not need to reach the Section 105 issue, it noted in *dictum* that it may have been appropriate for the bankruptcy court to issue an injunction against the FDIC. This conclusion appears to run afoul of the FIRREA anti-injunction statute. The cases may be harmonized because the injunction obtained before appointment of the RTC in *Landmark* was deliberately obtained by the debtor in order to thwart later action by the RTC, and as such, fell more squarely within the purposes to be served by the FIRREA anti-injunction statute. These cases, however, present the fundamental dispute as to which body of law prevails in determining rights in the assets of an insolvent thrift or a debtor in bankruptcy.

### C. RTC and FDIC Consent to Foreclosure and Redemption Rights.

Since FIRREA's enactment, real property practitioners and title insurance companies have questioned the impact of Section 1825(b)(2) of FIRREA on real property foreclosures. Section 1825(b)(2) provides, in relevant part, that:

No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure or sale without the consent of the Corporation when it is acting in its receivership capacity.

Section 1825(b)(2) is thus analogous to the automatic stay in bankruptcy.

Concerns regarding the application of Section 1825(b)(2) were expressed among members of the real estate bar and the secondary mortgage market for several reasons, including the difficulty in (i) determining whether an institution was under federal supervision; (ii) ascertaining when there were assignments of interests in property or in liens resulting from pass-through receiverships; and (iii) determining whether liens held by a subsidiary of an institution were subject to the statute. The specific concerns focused on (i) the requirement for the RTC or the FDIC to consent to the foreclosure of liens that were senior to the lien possessed by the RTC or the FDIC; (ii) the meaning of the term "property of the Corporation"; and (iii) the lack of clarity in the procedure for obtaining the consent of the RTC or the FDIC to a foreclosure sale.

Additional concerns were raised respecting Section 2410(c) of the Federal Rules of Procedure, which provides that the United States has a one-year right of redemption with respect to any sale of real estate made to satisfy a lien prior to that of the United States.<sup>152</sup>

On May 7, 1992, the RTC issued a "safe harbor" interim rule with respect to Section 1825(b)(2).<sup>153</sup> This rule was supplemented by later publications establishing a central address for the giving of notices and a list of institutions in conservatorship or receivership.<sup>154</sup> The FDIC also issued a Statement of Policy on Foreclosure Consent and Redemption Rights, published on July 2, 1992.<sup>155</sup>

The RTC rule provides that the RTC will not assert Section 1825(b)(2) when it is acting in its conservatorship capacity or on behalf of subsidiaries of receiverships or conservatorships. Thus, the statute and the rule apply only when the RTC is acting in its corporate or receivership capacities as to financial institutions. The rule further provides for an automatic consent to foreclosure of interests represented by voluntary liens that are senior to the lien held by the RTC.

Consent to foreclosure is given where the RTC has a recorded title interest in the property sought to be foreclosed upon, provided that the holder of the interest to be foreclosed gives the RTC notice of its intent to foreclose. The holder of involuntary liens must obtain RTC consent to foreclosure, which consent may be granted or withheld in the discretion of the RTC. The safe harbor rule also addresses foreclosure of government guaranteed mortgages and RTC consent where requests are made by parties providing seller financing. A form of notice is contained in the rule. Failure to give notice when required, or to obtain

consent, does not make the foreclosure action void or voidable but following such foreclosure, the interest of the RTC will survive.

The FDIC rule takes essentially the same position as the RTC rule, but differs from the RTC rule in that no notice need be given of a foreclosure of a lien on property in which the FDIC has a title interest. Both the RTC and the FDIC rules waive the right of redemption under 28 U.S.C. § 2410(c).

## VIII. CONCLUSION.

The interaction between FIRREA and the Bankruptcy Law is complex and must be viewed carefully, keeping in mind the various capacities in which parties may act and the differing purposes of the laws. This article has focused on certain discrete areas of interaction between the laws. While statute or case law has resolved some of the issues that may arise in this clash of the titans, most of the issues have not been resolved, and the area is evolving rapidly.

One must be careful to structure transactions to comply with Section 1823(e) of FIRREA in the event of later appointment of the RTC or the FDIC as receiver or conservator, and parties in litigation must be aware of FIRREA's limits on defenses and damages.

In the bankruptcy forum, one must give careful consideration to both the interaction between the procedural provisions of the two bodies of law and the substantive issues raised by avoiding powers possessed by both the RTC or the FDIC, on the one hand, and trustees or debtors in possession, on the other.

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## Endnotes

1. 11 U.S.C. §§ 101-1326; provisions of the Bankruptcy Law are also found in Titles 18, 28 and other Titles of the United States Code and in federal and local rules.
2. 12 U.S.C. § 1464 (d) (2) (Supp. 1993). The

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primary roles of the RTC and the FDIC that will be addressed in this article are as conservator and as receiver. Each agency also has a separate corporate capacity. Regulatory control of financial institutions prior to the appointment of a conservator or receiver is beyond the scope of this article.

3. FIRREA, Pub. Law No. 101-73, 103 Stat. 183 (1989); Comprehensive Crime Control Act of 1990, Pub. Law No. 101-647, §2522, 104 Stat. 4789 (1990); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. Law No. 102-242, 105 Stat. 2236 (1991).
4. A complete comparative analysis of the Bankruptcy Law and FIRREA would examine, among other issues, the following: (a) suspension of legal actions under 12 U.S.C. § 1821(d)(12) as compared to the automatic stay imposed by 11 U.S.C. § 362; (b) FIRREA statute of limitations as set forth in 12 U.S.C. § 1821(d)(5)(F), (6)(B) and (14) as compared to 11 U.S.C. §§ 108(a) and (c) and 546(a); (c) the exhaustion of the administrative claims requirement under 12 U.S.C. § 1821(d)(3), (5), (6), and (8) as compared to bankruptcy court jurisdiction over claims determinations as set forth in 11 U.S.C. § 501, 28 U.S.C. § 157(b) and Bankruptcy Rules 3001-3008; (d) FIRREA's powers with respect to avoidance of security interests under 12 U.S.C. §§ 1821(d)(17), 1821(e)(11) and 1823(e) as compared to the avoidance power of a bankruptcy trustee under 11 U.S.C. §§ 544, 547 and 548; (e) FIRREA's treatment of Qualified Financial Contracts under 12 U.S.C. §§ 1821(e)(8)-(10) as compared to the Bankruptcy Law's treatment of securities contracts, commodities contracts and repurchase agreements under 11 U.S.C. §§ 555, 556 and 559; (f) the doctrines set forth in *D'Oench Duhme v. FDIC*, 315 U.S. 447 (1942) and its progeny as compared to the doctrine of equitable subordination in bankruptcy; and (g) those doctrines used as "swords" under FIRREA as compared to affirmative defenses available in bankruptcy litigation, including relief from stay motions.

An examination of roles the RTC undertakes might lead to an analogy of the conservatorship role to a Chapter 11 reorganization and the receivership role to a Chapter 7 liquidation.

A look at some of the conflicts would involve an examination of the (a) conflicts between the FIRREA claims procedure and the jurisdiction of the bankruptcy court. See *In re General Development Corp.*, 143 B.R. 792 (Bankr. S.D. Fla. 1992); see also *In re Parker North American*, 131 B.R. 452 (Bankr. C.D. Cal. 1991) (debtor must first comply with the FIRREA claims process before it could raise, in an adversary proceeding, issues that it claimed constituted a preference); cf. *In re Continental Financial Re-*

*sources, Inc.*, 149 B.R. 260 (D. Mass. 1993) (FDIC submitted to bankruptcy court's jurisdiction by filing a claim, even when the debtor had not complied with the FIRREA claims process); (b) conflicts that arise with respect to jurisdiction either in bankruptcy court or in the district court where, in varying chronological order, one may have a debtor in bankruptcy court, a financial institution for which the RTC or the FDIC is appointed as receiver or conservator and/or the filing of a case in a state court (the concepts involved in such disputes, including withdrawal of the reference, abstention, removal and remand, while not novel, are noted for their applicability in the FIRREA/Bankruptcy Law context); and (c) conflicts that arise as to injunctions issued in bankruptcy court against the RTC or the FDIC, savings institution subsidiaries of holding company debtors and other parties.

A look at the ways in which each separate body of law specifically addresses the other would lead primarily to a look at the Crime Control Act, pursuant to which new sections were added to the Bankruptcy Law to address depository institutions. Those sections address (a) executory contracts (deemed assumption by bankruptcy trustee of financial institution capital maintenance contracts) (see 11 U.S.C. § 365(o)); (b) non-dischargeability of debt arising out of malicious or reckless failure to fulfill commitments to maintain the capital of an insured depository institution (see 11 U.S.C. § 523(a)(12)); (c) non-dischargeability of a debt provided for in a judgment or other order arising out of fraud or defalcation while acting in a fiduciary capacity (see 11 U.S.C. § 523(a)(6)); (d) exclusion from exemption and imposition of liability for a debt of an "Institution-affiliated person" arising out of designated misconduct while acting in a fiduciary capacity or arising out of a designated financial crime (see 11 U.S.C. § 522(c)(3)); and, (e) extension of time to file a complaint to determine dischargeability of debt where the agency had insufficient time, as designated (see 11 U.S.C. § 523(c)).

It should also be noted that the purely real estate specific aspects of FIRREA, including the effect of FDIC and RTC activities on title, the exemption of the FDIC and the RTC from *ad valorem* property taxes, appraisal requirements, affordable housing requirements and real property disposition activities, will not be addressed in this article.

5. See 12 U.S.C. § 1821(e)(1)(1989).
6. See 11 U.S.C. § 365 (1993).
7. See 12 U.S.C. § 1821(e)(11)(1989)(FIRREA); 11 U.S.C. §§ 544, 547, and 548 (1993)(Bankruptcy Law).
8. See 11 U.S.C. § 548 (1979 & Supp. 1993) (Fraudulent Transfers - Bankruptcy Law); 12 U.S.C. § 1821(d)(17)-(19) (Supp. 1993) (Fraudulent Transfers - FIRREA); 11 U.S.C. § 547 (1979 & Supp. 1993) (Preferences - Bankruptcy Law).
9. See *D'Oench Duhme v. FDIC*, 315 U.S. 447 (1942), and its progeny. See also 12 U.S.C. § 1823(e)(1989).
10. See 12 U.S.C. § 1821(j)(1989).
11. See 11 U.S.C. § 362 (1993).
12. See 12 U.S.C. § 1825(b)(2)(1989). See also authorities cited in notes 152-154 *infra*.
13. Cases addressing the situation where performance was due on the part of both parties include

*Gibson v. Resolution Trust Corporation*, 750 F. Supp. 1565 (S.D. Fla. 1990); *Resolution Trust Corporation v. Abrams*, 773 F. Supp. 597 (S.D.N.Y. 1991); and *Union Bank v. FSLIC*, 724 F. Supp. 468 (E.D. Ky. 1989). One case addressing the situation where performance was due on the part of only one party was *The IBJ Schroder Bank and Trust Company v. RTC*, 803 F. Supp. 878 (S.D.N.Y. 1992).

14. See, e.g., *RTC v. Cedarminn Building Ltd. Partnership*, 956 F.2d 1446 (8th Cir. 1992), cert. denied, 113 S.Ct. 94 (1992) (timeliness); *Howerton v. Designer Homes by Georges, Inc.*, 950 F.2d 281 (5th Cir. 1992) (timeliness); *701 NPB Associates v. FDIC*, 779 F. Supp. 1336 (S.D. Fla. 1991) (timeliness); *Monument Square Associates v. RTC*, 792 F. Supp. 874 (D. Mass. 1991) (timeliness); *RTC v. United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991) (timeliness); *Union Bank v. Federal Savings and Loan Insurance Corporation*, 724 F. Supp. 468 (E.D. Ky. 1989) (timeliness and burdensomeness); *Bayshore Executive Plaza Partnership v. FDIC*, 943 F.2d 1290 (11th Cir. 1991) (constitutionality of statute); *Rexam Ltd. Partnership v. RTC*, 766 F. Supp. 41 (D. Puerto Rico 1991) (burdensomeness). See also *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13 (1st Cir. 1993) (constitutionality of *ipso facto* clause contained in statute).
15. See 11 U.S.C. § 365(a)(1993). See also, e.g., *In re Seymour*, 144 B.R. 524 (Bankr. D. Kan. 1992) (executory contracts); *In re Pyramid Operating Authority, Inc.*, 144 B.R. 795 (Bankr. W.D. Tenn. 1992) (executory contract and unexpired leases); *In re Joseph C. Spiess Co.*, 145 B.R. 597 (Bankr. N.D. Ill. 1992) (court-approved rejection of unexpired, non-residential lease was retroactive to date of notice of motion requesting rejection); *In re Philbeck*, 145 B.R. 870 (Bankr. E.D. Ky. 1992) (coal lease does not constitute an unexpired lease); *In re Independent American Real Estate, Inc.*, 146 B.R. 546 (Bankr. N.D. Tex. 1992) (integrated construction agreements are executory contracts).
16. See 12 U.S.C. § 1821(e)(2)(1989).
17. See 11 U.S.C. § 365(d)(1993). See also *In re Ham Consulting Company/William Lagnion/JV*, 143 B.R. 71 (Bankr. W.D. La. 1992); *In re Child World, Inc.*, 146 B.R. 89 (S.D.N.Y. 1992).
18. See *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U.S. 523 (1943); *In re Stable Mews*, 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984); *Johnson v. Fairco Corp.*, 61 B.R. 317, 320 (Bankr. N.D. Ill. 1986).
19. See 11 U.S.C. § 365 (b)(2) (1993); 12 U.S.C. § 1821(e)(12) (1989).
20. See 12 U.S.C. § 1821 (e)(4) (1989 & Supp. 1993) and (e)(5) (1989).
21. See 11 U.S.C. § 502(b)(6)(B) (1993) and 12 U.S.C. § 1821(e)(4)(B)(iii) (1989).
22. A number of undecided timing issues exist in this area of the Bankruptcy Law relating to time periods for trustee performance of obligations, time of payment of rent and priority of the obligation to pay rent. See, e.g., *In re Appliance Store, Inc.*, 148 B.R. 234 (Bankr. W.D. Pa. 1992); *Paul Harris Stores, Inc.*, 148 B.R. 307 (Bankr. S.D. Ind. 1992); *In re Joseph C. Spiess Co.*, 145 B.R. 597 (Bankr. N.D. Ill. 1992); *In re Virginia Packaging Supply Co. Inc.*, 122 B.R. 491 (Bankr. E.D. Va. 1990); *In re Telesphere*

- Communications, Inc.*, 148 B.R. 525 (Bankr. N.D. Ill. 1992); *In re Child World, Inc.*, 150 B.R. 328 (Bankr. S.D.N.Y. 1993); *In re Ames Department Stores, Inc.*, 150 B.R. 107 (Bankr. S.D.N.Y. 1993).
23. See 12 U.S.C. § 1821(e)(4)(B)(i) (1989).
  24. See 12 U.S.C. § 1821(e)(4)(B)(ii) (1989).
  25. See 12 U.S.C. § 1821(e)(3)(B)(ii) (1989).
  26. See 11 U.S.C. § 502(b)(6) (1993). See also *In re Nob's Sea Ray Boats, Inc.*, 143 B.R. 229 (Bankr. D.N.D. 1992); *In re Ultimate Restaurant Group, Inc.*, 144 B.R. 291 (Bankr. W.D. Pa. 1992); *In re Allegheny Int'l, Inc.*, 145 B.R. 823 (Bankr. W.D. Pa. 1992); *In re Farley, Inc.*, 146 B.R. 739 (Bankr. N.D. Ill. 1992).
  27. See *Bayshore Executive Plaza Partnership v. FDIC*, 750 F. Supp. 507 (S.D. Fla. 1990), *aff'd*, 943 F.2d 1290 (11th Cir. 1991) (addressing the measure of damages following repudiation by FDIC).
  28. See 11 U.S.C. § 365(h) (1993) (FIRREA); 12 U.S.C. § 1821(e)(5) (1989) (Bankruptcy Law).
  29. 801 F. Supp. 1152 (S.D.N.Y. 1992).
  30. 65 B.R. 586 (Bankr. S.D.N.Y. 1986).
  31. See, e.g., *Resolution Trust Corporation v. Cedarmin Building Limited Partnership*, 956 F.2d 1446, *cert. denied*, 113 S.Ct. 94; *701 NPB Associates v. FDIC*, 779 F.Supp. 1336 (S.D. Fla. 1991); *Resolution Trust Company v. United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991). See also *Howell v. FDIC*, 986 F. 2d 569, 574 (1st Cir. 1993).
  32. 956 F.2d 1446.
  33. *Id.* at 1453.
  34. See 11 U.S.C. § 348(c) (1993).
  35. See 12 U.S.C. § 1821(e)(6) (1989).
  36. See 12 U.S.C. § 1821(e)(6)(A) (1989).
  37. See 11 U.S.C. § 365(i) (1993).
  38. See 12 U.S.C. § 1821(e)(6)(C) (1989).
  39. See 11 U.S.C. § 365(j) (1993).
  40. *In re Easebe Enterprises, Inc.*, 900 F.2d 1417, 1419 (9th Cir. 1990).
  41. See 12 U.S.C. §§ 1821(d)(9) (1989) and 1823(e) (1989).
  42. See generally the discussion in 1 California Real Property Financing, §§ 2.10-2.11 (California Continuing Education of the Bar 1988).
  43. See 12 U.S.C. § 1821(e)(3) (1989).
  44. See 11 U.S.C. § 365 (1993). In order to assume an executory contract or unexpired lease, the debtor in possession or trustee must, if the contract is in default, promptly cure or provide adequate assurance that the default will be promptly cured. The debtor or trustee must also compensate, or provide adequate assurance of prompt compensation, for "actual pecuniary loss" to the nondebtor party resulting from such default. Finally, the debtor or trustee must provide adequate assurance of future performance under the contract.
  45. First, assumption of a shopping center lease in the bankruptcy scenario under 11 U.S.C. § 365(b)(3) requires adequate assurance of the source of rentals and other charges. Second, if assignment to a third party is to follow assumption, the debtor or assignee will be required to comply with terms similar to the existing arrangement and be in at least as good financial condition as the debtor at the time of entering the lease. Third, when the lease is a net lease, the debtor must provide adequate assurance that the percentage rent will not substantially decline. Fourth, the debtor must show that all covenants in the lease regarding radius, location, use or exclusivity will be honored. Fifth, the debtor must show that as a result of the assumption or assignment of the lease, the "tenant mix or balance" in the shopping center will not be destroyed.
  46. Section 365(g) of the Bankruptcy Law addresses the issue of subsequent rejection of a contract that had previously been assumed.
  47. See 11 U.S.C. § 365(f)(1)(3) (1993).
  48. See 12 U.S.C. § 1821(e)(12)(A) (1989).
  49. 12 U.S.C. § 1821(d)(2)(G)(i)(II) (1989).
  50. 12 U.S.C. § 1821(e)(6)(C) (1989).
  51. See 12 U.S.C. § 1821(e)(11) (1989).
  52. See *Unisys Finance Corporation v. RTC*, 979 F.2d 609 (7th Cir. 1992); *LB Credit Corporation v. RTC*, 796 F. Supp. 358 (N.D. Ill. 1992).
  53. 11 U.S.C. § 548 (1979 & Supp. 1993).
  54. 12 U.S.C. § 1821(d)(17) (1989 & Supp. 1993).
  55. The term "institution-affiliated party" is defined in section 1813(u) of FIRREA.
  56. 11 U.S.C. § 548 (a)(2) (1979 & Supp. 1993).
  57. See 12 U.S.C. § 1821(d)(17) (1989 & Supp. 1993); *FDIC v. Cafritz*, 762 F. Supp. 1503, 1508 (D.D.C. 1991) (no apparent requirement of insolvency). See also *RTC v. Cruce*, 972 F. 2d 1195, 1201-02 (10th Cir. 1992) (fraudulent intent was shown by evidence that property was transferred for little or no consideration, officer was insolvent at time of transfer and by other indicia).
  58. 134 B.R. 1017 (Bankr. D. Conn. 1991).
  59. *Id.* at 1023-24.
  60. 12 U.S.C. § 1821(j) (1989).
  61. See 11 U.S.C. § 547 (1979 & Supp. 1993).
  62. See 11 U.S.C. § 547(c) (1979 & Supp. 1993).
  63. See 11 U.S.C. § 550(a) (1979 & Supp. 1993).
  64. 12 S.Ct. 527 (1991).
  65. *Id.* at 533-34.
  66. See, e.g., *In re Instrument Sales and Service, Inc.*, 99 B.R. 742 (Bankr. W.D. Tex. 1987); *Thistlewaite v. FDIC (In re Pernie Bailey Drilling Company)*, 111 B.R. 565 (Bankr. W.D. La. 1990); *Matter of Still*, 967 F. 2d 75 (5th Cir. 1992).
  67. 100 B.R. 856 (Bankr. W.D. Tex. 1989).
  68. 315 U.S. 447 (1942).
  69. The federal holder in due course doctrine generally looks to the definition of holder in due course and the distinction between real and personal defenses set forth in Uniform Commercial Code Sections 3-302, 3-305 and 3-306. However, as discussed in Section VI.D of the text, the federal holder in due course doctrine, created specifically for the banking agencies in failed banking litigation, is not coextensive with the Uniform Commercial Code holder in due course doctrine.
  70. A full discussion of the scope of these doctrines is beyond the scope of this article and much has already been written about them. Recent articles include Lille, *Federal Superpowers in Failed Banking Litigation: The D'Oench Duhme Doctrine*, 20 Colo. Lawyer 427 (1991); *Limitations on the FDIC's D'Oench Doctrine of Federal Common Law Estoppel*, 31 So. Tex. L.J. 245 (1990); Dennis, W.L. and Simon, J.R., *Litigation With the FDIC and the RTC*, 47 The Business Lawyer 1319 (May 1992).
  71. *D'Oench*, 315 U.S. at 454.
  72. *Id.* at 460.
  73. *Id.* at 457.
  74. See, e.g., *Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 383 (11th Cir. 1991); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 954 (1991).
  75. See *D'Oench*, 315 U.S. at 460. The *D'Oench* doctrine also applies without regard to malfeasance, recklessness or negligence. See, e.g., *Bowen v. FDIC*, 915 F.2d 1013, 1016-17 (5th Cir. 1990); *Baumann v. Savers Federal Savings & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1936 (1992); *Timberland Design, Inc. v. First Service Bank for Savings*, 932 F.2d 46, 48 (1st Cir. 1991); *Twin Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991).
  76. See, e.g., *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989); *Bell & Murphy & Associates, Inc. v. InterFirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 244 (1990).
  77. See *D'Oench*, 315 U.S. at 459. See also, e.g., *Deitrick v. Greaney*, 309 U.S. 190 (1940); *Mount Vernon Trust Co. v. Bergoff*, 5 N.E.2d 196 (N.Y. 1936).
  78. See *D'Oench*, 315 U.S. at 460-61. See also, e.g., *Bryan v. Bartlett*, 435 F.2d 28 (8th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971) (that notes were not carried on the books does not bar application of *D'Oench*); *FDIC v. First Nat'l Fin. Co.*, 587 F.2d 1009 (9th Cir. 1978) (finding of reliance by FDIC not necessitated by federal law).
  79. See, e.g., *FSLIC v. Gemini Management*, 921 F.2d 241, 245 (9th Cir. 1990); *Mainland Sav. Ass'n v. Riverfront Ass'n Ltd.*, 872 F.2d 955 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 235 (1989) (written side agreement not part of note or accompanying security partnership agreements not contained in promissory notes and other noncontemporaneous written agreement subject to *D'Oench* doctrine); *FDIC v. O'Neil*, 809 F.2d 350 (7th Cir. 1987) (side agreement evidenced by writing, referred to in note but not in bank records, held unenforceable); *In re Valentine*, 93 B.R. 219 (Bankr. C.D. Cal. 1988) (side agreement purporting to limit liability on notes barred); *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982) (*D'Oench* bars assertion of oral side agreements that reduce value of assets formerly held by failed bank); *FDIC v. MM&S Partners*, 626 F. Supp. 681 (N.D. Ill. 1985) (unwritten side agreements not enforceable under the *D'Oench* doctrine).
  80. See, e.g., *Twin Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991). See also *Castleglen, Inc. v. Commonwealth Savings Association*, 728 F. Supp. 656 (D. Utah 1989) (letter of credit); *Royal Bank of Canada v. FDIC*, 733 F. Supp. 1091 (N.D. Tex. 1990) (loan participation agreement); *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369 (5th Cir. 1988) (*D'Oench* applied to enforcement of guaranty); *FDIC v. PLM Int'l, Inc.* 834 F.2d 248 (1st

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- Cir. 1987) (nonnegotiable letter of guaranty); *FDIC v. Van Laanen*, 769 F.2d 666 (10th Cir. 1985) (suit to collect on assumption agreement).
81. *D'Oench*, 315 U.S. 447 (1942). See also, e.g., *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986) (applying *D'Oench* and §1823(e) for the benefit of FDIC as receiver); *FDIC v. Van Laanen*, 769 F.2d 666 (10th Cir. 1985) (applying *D'Oench* and §1823(e) for the benefit of FDIC as receiver).
  82. See, e.g., *FSLIC v. Aubin*, No. 3-87-2776-H (N.D. Tex. Sept. 2, 1988) (*D'Oench* applied to FSLIC as conservator); *Germania Bank v. Brehm*, 763 F. Supp. 1030 (E.D. Mo. 1991) (*D'Oench* does apply to RTC as conservator).
  83. See, e.g., *Baumann v. Savers Federal Savings & Loan Ass'n*, 934 F.2d 1506 (11th Cir. 1991), cert. denied, 112 S.Ct. 1936 (1992) (RTC as receiver); *Oliver v. RTC as Receiver of Sooner Federal Savings & Loan*, 955 F.2d 583 (8th Cir. 1992); *RTC as Receiver of Delta Savings & Loan Ass'n, Inc. v. Murray*, 935 F.2d 89 (5th Cir. 1991); *Savers Federal Savings & Loan Association v. Amberly Huntsville, Ltd.*, 934 F.2d 1201 (11th Cir. 1991) (RTC as conservator); *Shuler v. RTC*, 757 F.Supp. 761 (S.D. Miss. 1991) (applying *D'Oench* doctrine for RTC as receiver).
  84. See, e.g., *FSLIC v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991), cert. denied, 112 S.Ct. 1163 (1992) (transferees); *Porras v. Petroplex Savings Association*, 903 F.2d 379 (5th Cir. 1990) (private parties who purchase institution's assets from receiver); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989) (private parties purchasing assets of insolvent institutions); *Castleglen, Inc. v. Commonwealth Savings Association*, 728 F. Supp. 656 (D. Utah 1989) (RTC substituted for FSLIC); *Bell & Murphy and Associates Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990), cert. denied, 111 S.Ct. 244 (1990) (bridge bank authorized by RTC to acquire failed institution's assets and liabilities); *Victor Hotel v. FCA Mortgage Corporation*, 928 F.2d 1077 (11th Cir. 1991) (subsidiaries). See also *Winterbrook Realty, Inc. v. FDIC*, 820 F. Supp. 27 (D.N.H. 1993) (*D'Oench* applied to claims of real estate broker).
  85. Section 1823(e) provides as follows:
 

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

    - (1) is in writing,
    - (2) was executed by the depository institu-
- tion and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (4) has been, continuously, from the time of its execution, an official record of the depository institution.
- A major revision made by the 1989 amendment was to make the doctrine applicable to FDIC in its capacity as receiver.
86. Prior to the addition of § 1821(d)(9) to FIRREA, it was often held that an asset was required to be at issue in order to invoke § 1823(e) because of the reference in § 1823 to acquisition of the asset. The addition of § 1821(d)(9) assured that no agreement of any kind could be enforceable unless it met the requirements of §1823(e).
  87. 484 U.S. 86 (1987).
  88. *Id.* at 91.
  89. *Langley*, 484 U.S. at 95. See also, e.g., *FDIC v. Wright*, 942 F.2d 1089, 1101 (7th Cir. 1991), cert. denied, 112 S.Ct. 1937 (1992); *FDIC v. Manatt*, 922 F.2d 486 (8th Cir. 1991), cert. denied, 111 S.Ct. 2889 (1991).
  90. See, e.g., *FDIC v. Manatt*, 922 F.2d 486, 488 n.4 (8th Cir. 1991), cert. denied, 111 S.Ct. 2889 (1991); *FDIC v. Virginia Crossing Partnership*, 909 F.2d 306, 309 (8th Cir. 1990); *RTC as Conservator of First Savings of Arkansas, F.A. v. Trammell Crow*, 763 F. Supp. 887 (N.D. Tex. 1991).
  91. See, e.g., *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355, 360-61 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982); accord, *FDIC v. Hoover-Morris Enterprises*, 642 F.2d 785, 787 (5th Cir. 1981); *In re Howard*, 65 B.R. 498, 509 (W.D. Tex. 1986); *FDIC v. First Nat'l Fin. Co.*, 587 F.2d 1009 (9th Cir. 1978); *FDIC v. Cremona Co.*, 832 F.2d 959 (6th Cir. 1987), cert. dis'd, 485 U.S. 1017 (1988); *FDIC v. Investors Assocs. X, Ltd.*, 775 F.2d 152 (6th Cir. 1985); *First State Bank v. City & Country Bank*, 872 F.2d 707 (6th Cir. 1989); *FSLIC v. Two Rivers Assoc., Inc.*, 880 F.2d 1267 (11th Cir. 1989); *FDIC v. Merchants Nat'l Bank*, 725 F.2d 634 (11th Cir. 1984), cert. denied, 469 U.S. 829 (1984); *Langley v. FDIC*, 484 U.S. 86 (1987); *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984).
  92. See 12 U.S.C. § 1823(e) (1989); 12 U.S.C. § 1441a(b)(4) (Supp. 1993); *Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990).
  93. Section 1823(e) expressly refers to acquisition by the FDIC of assets either as (a) security for a loan, (b) by purchase, or (c) as a receiver, thus referring solely to the corporate and receivership capacities. These provisions are made applicable to the RTC by 12 U.S.C. § 1441a (b)(4). However, no explicit reference to the conservatorship capacity is made. The purpose of the statute would seem to be served by having this section applicable to a conservator, and a number of courts have so held. See, e.g., *RTC v. McCrory*, 951 F.2d 68 (5th Cir. 1992). The courts that have dealt with this issue have afforded § 1823(e) protection where the assets in question were acquired by the RTC as conservator for a *de novo* institution from the RTC as receiver in a pass-through transaction. See, e.g., *Adams v. Madison Realty & Development, Inc.* 746 F.Supp. 419, 429-30 (D.N.J. 1990), *aff'd*, 937 F.2d 845 (3d Cir. 1991); *Castleglen, Inc. v. Commonwealth Savings Association*, 728 F. Supp. 656, 672-73 (D. Utah 1989). However, in *Germania Bank v. Brehm*, 763 F. Supp. 1030, 1036 (E.D. Mo. 1991), § 1823(e) was held inapplicable to the RTC as conservator where the assets did not first pass through the RTC as receiver.
  94. See 12 U.S.C. § 1823(e) (1989).
  95. As stated in note 93, *supra*, the express terms of § 1823(e) refer to the corporate and receivership capacities only.
  96. See, e.g., *Victor Hotel Corp. v. FCA Mortgage Corporation*, 928 F.2d 1077 (11th Cir. 1991) (subsidiaries); *Castleglen, Inc. v. Commonwealth Savings Association*, 728 F. Supp. 656 (D. Utah 1989); *FDIC v. Newhart*, 892 F.2d 47 (8th Cir. 1989) (private parties purchasing assets of insolvent institutions); *Fleet Bank of Maine v. Praver*, 789 F. Supp. 4541 (D. Me. 1992) (transferees and assignees).
  97. See, e.g., *Resolution Trust Corporation as Receiver of Delta Savings & Loan Ass'n, Inc. v. Murray*, 935 F.2d 89 (5th Cir. 1991); *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991), cert. denied, 112 S.Ct. 1163 (1992); *FSLIC v. Gemini Management*, 921 F.2d 241 (9th Cir. 1990) (*D'Oench*).
  98. See, e.g., *FDIC v. Hamilton*, 939 F.2d 1225 (5th Cir. 1991); *Black v. FDIC*, 640 F.2d 699, 701 (5th Cir. 1981), cert. denied, 454 U.S. 838 (1981); *FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378 (1st Cir. 1988); *FDIC v. MM & S Partners*, 626 F. Supp. 681 (N.D. Ill. 1985).
  99. See, e.g., *RTC as Conservator for Riverside Federal Bank v. Minassian*, 777 F. Supp. 385 (D.N.J. 1991); *Mery v. Universal Sav. Ass'n*, 737 F. Supp. 1000, 1004 (S.D. Tex. 1990); *FSLIC v. Dillon Construction Co., Inc.*, 681 F. Supp. 1359 (E.D. Ark. 1988).
  100. See, e.g., *Mery v. Universal Savings Ass'n*, 737 F. Supp. 1000, 1005 (S.D. Tex. 1990).
  101. See, e.g., *Stiles v. RTC*, 831 S.W.2d 24 (Tex. 1992); *FDIC v. Byrne*, 736 F. Supp. 727 (N.D. Tex. 1990); *FDIC v. Fisher*, 727 F. Supp. 1306 (D. Minn. 1989); *FSLIC v. Ziegler*, 680 F. Supp. 235, 237 (E.D. La. 1988); *FDIC v. Cover*, 714 F. Supp. 455 (D. Kan. 1988); *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984); *FDIC v. Eagle Properties, Ltd.*, 664 F. Supp. 1027 (W.D. Tex. 1985).
  102. See, e.g., *RTC v. Juergens*, 965 F.2d 149 (7th Cir. 1992); *FDIC v. Bernstein*, 944 F.2d 101 (2d Cir. 1991); *FDIC v. Stith*, 772 F. Supp. 279 (E.D. Va. 1991); *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991), cert. denied, 112 S.Ct. 1937 (1992); *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986); *FDIC v. Armstrong*, 784 F.2d 741 (6th Cir. 1986); *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988); *Taylor Trust v. Security Trust Fed. Sav. & Loan Ass'n, Inc.*, 844 F.2d 337 (6th Cir. 1988).
  103. See, e.g., *FDIC v. Rivera-Arroyo*, 907 F.2d 1233 (1st Cir. 1990); *FSLIC v. Lafayette Investment Property, Inc.*, 855 F.2d 196, 197-98 (5th Cir. 1988); *FDIC v. P.L.M. Int'l, Inc.*, 834 F.2d 248 (1st Cir. 1987).
  104. See, e.g., *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1988).
  105. See *Langley v. FDIC*, 484 U.S. 86 (1987); *In re 604 Columbus Avenue Realty Trust*, 968 F.2d

- 1332 (1st Cir. 1992); *In re Century Centre Partners Limited*, 969 F.2d 835 (9th Cir. 1992); *FSLIC v. Gordy*, 928 F.2d 1558 (11th Cir. 1991); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991); *FDIC v. Virginia Crossings Partnership*, 909 F.2d 306 (8th Cir. 1990); *FSLIC v. Lafayette Inv. Properties, Inc.*, 855 F.2d 196 (5th Cir. 1988); *FSLIC v. Murray*, 853 F.2d 1251 (5th Cir. 1985); *FDIC v. Investors Assocs. X, Ltd.*, 775 F.2d 152 (6th Cir. 1985); *In re Century Centre Partners Limited*, 969 F.2d 835 (9th Cir. 1992).
106. *See, e.g., Oliver v. RTC as Receiver of Sooner Federal Savings & Loan*, 955 F.2d 583 (8th Cir. 1992); *Savers Federal Savings Ass'n v. Amberly Huntsville, Ltd.*, 934 F.2d 1201 (11th Cir. 1991); *RTC v. Wellington Development Group*, 761 F. Supp. 731 (D. Colo. 1991); *FSLIC v. Locke*, 718 F. Supp. 573, 582 (W.D. Tex. 1989); *FSLIC v. Two Rivers Assoc., Inc.*, 880 F.2d 1267 (11th Cir. 1989).
107. *See, e.g., FDIC v. Rusconi*, 796 F. Supp. 581 (D. Me. 1992); *Clay v. FDIC*, 934 F.2d 69, 72-73 (5th Cir. 1991); *Savers Federal Savings Ass'n v. Amberly Huntsville, Ltd.*, 934 F.2d 1201 (11th Cir. 1991); *RTC v. Wellington Development Group*, 761 F. Supp. 731 (D. Colo. 1991); *RTC v. Colorado 126 Partnership*, 746 F. Supp. 35 (D. Colo. 1990); *FSLIC v. Locke*, 718 F. Supp. 573, 582 (W.D. Tex. 1989).
108. *See, e.g., In re Griffith*, 47 B.R. 416 (Bankr. D. Ore. 1985); *Mount Vernon Trust Co. v. Bergoff*, 272 N.Y. 192, 5 N.E.2d 196 (1936).
109. *See, e.g., FDIC v. Farseca*, 795 F.2d 1102 (1st Cir. 1986); *British Columbia Inv. Co. v. FDIC*, 420 F. Supp. 1217 (S.D. Cal. 1976).
110. *See, e.g., FDIC v. Rusconi*, 796 F. Supp. 581 (D. Me. 1992); *Shuler v. RTC*, 757 F. Supp. 761 (S.D. Miss. 1991); *FDIC v. Engel*, 746 F. Supp. 1223 (S.D.N.Y. 1990); *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984); *Beighley v. FDIC*, 676 F. Supp. 130 (N.D. Tex. 1987).
111. *See, e.g., FDIC v. Morley*, 867 F.2d 1381 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 75 (1989).
112. *See, e.g., FDIC v. Morley*, 867 F.2d 1381 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 75 (1989); *FSLIC v. Musacchio*, 695 F. Supp. 1044 (N.D. Cal. 1988); *Gleasant v. Jones, Day, Reavis & Pogue*, 111 B.R. 595 (Bankr. W.D. Tex. 1989) and see discussion in note 118 *infra*.
113. *See, e.g., FDIC v. Morley*, 867 F.2d 1381 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 75 (1989).
114. *See, e.g., FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513 (11th Cir. 1984).
115. *See, e.g., McCullough v. FDIC*, 987 F.2d 870 (1st Cir. 1993).
116. *Langley*, 484 U.S. at 93; *FDIC v. Turner*, 869 F.2d 270, 273 (6th Cir. 1989) (*dicta*). The courts have carefully distinguished fraud in fact from fraudulent inducement, which merely renders the instrument voidable. *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332 (1st Cir. 1992); *FDIC v. Investors Associates X, Ltd.*, 775 F.2d 152 (6th Cir. 1985).
117. *See* Uniform Commercial Code §§ 3-302, 3-305 and 3-306. Note, however, that the courts in failed-bank litigation have not been consistent in following the Uniform Commercial Code or common law in their designation of real or personal defenses.
118. *See, e.g., FDIC v. Dalba*, No. 89-C-712-S, 1990 U.S. Dist. Lexis 3502 (W.D. Wis. Feb. 27, 1990) (illegality); *FDIC v. Allen*, No. Civ. 88-361-W, 1988 U.S. Dist. Lexis 17565 (W.D. Okla. Nov. 3, 1988) (illegality); with regard to duress, the cases have split as to whether physical duress only (and not economic duress) is a defense and as to whether the degree of economic duress is to be considered where economic duress is permitted as a defense. *Desmond v. FDIC*, 798 F. Supp. 829 (D. Mass. 1992); *RTC v. Ruggiero*, 756 F. Supp. 1092 (N.D. Ill. 1991); *FDIC v. Meyer*, 755 F. Supp. 10 (D.D.C. 1991); *Thistlewaite v. FDIC (In re Pernie Bailey Drilling Co., Inc.)*, 111 B.R. 565 (Bankr. W.D. La. 1990); *FDIC v. Gettysburg Corp.*, 760 F. Supp. 115 (S.D. Tex. 1990), *aff'd without op. sub. nom., Unitedbank v. Gettysburg Corp.*, 952 F.2d 400 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 70 (1992).
119. *See FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974); *In re Woodstone Limited Partnership*, 133 B.R. 678 (E.D.N.Y. 1991). *See also* *Baumann v. Savers Federal Savings & Loan Association*, 934 F.2d 1506 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1936 (1992); *FSLIC v. Gordy*, 928 F.2d 1558, 1566-67 (11th Cir. 1991); *Bowen v. FDIC*, 915 F.2d 1013, 1016-17 (5th Cir. 1990); *FDIC v. Payne*, 973 F.2d 403 (5th Cir. 1992).
120. *First Financial Savings Bank v. American Bankers Ins. Co.*, 783 F. Supp. 963 (E.D.N.C. 1991).
121. A discussion of the bilateral obligation exception is contained in Gray, *Limitations on the FDIC's D'Oench Doctrine of Federal Common Law Estoppel: Congressional Preemption and Authoritative Statutory Construction*, 31 South Texas L. R. 245, 291-92 (1990).
122. *FDIC v. Harrison*, 735 F.2d 408 (11th Cir. 1984); *FDIC v. Cherry, Bekaert & Holland*, 742 F. Supp. 612 (M.D. Fla. 1990).
123. Some courts have also extended the doctrine to nonnegotiable instruments. *See, e.g., FDIC v. PLM Int'l Inc.*, 834 F.2d 248 (1st Cir. 1987); *Firstsouth, F.A. v. Aqua Construction, Inc.*, 858 F.2d 441 (8th Cir. 1988). However, authority to the contrary exists in *Sumbelt Savings, F.S.B. v. Montross*, 923 F.2d 353 (5th Cir. 1991), *aff'd on reh'g in part, rev'd in part on other grounds*, 944 F.2d 227 (5th Cir. 1991) (per curiam); *FDIC v. Percival*, 752 F. Supp. 313 (D. Neb. 1990).
124. *See Gunter v. Hucheson*, 674 F.2d 862 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982); *FDIC v. Wood*, 758 F.2d 156 (6th Cir. 1985), *cert. denied*, 474 U.S. 944 (1985). *See also In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332 (1st Cir. 1992).
125. Section 3-302 of the Uniform Commercial Code provides that a holder in due course is one who takes a negotiable instrument (i) for value, (ii) in good faith, and (iii) without notice that it is overdue or has been dishonored or of any defense or claim to the instrument on the part of any person. Courts have granted the FDIC and the RTC holder in due course even when compliance with the Commercial Code or other provisions of state law have not been proven. *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir. 1990) (noncompliance with UCC bulk transfer provisions, knowledge and notice requirements of Section 3-302); *FDIC v. Cremona Co.*, 832 F.2d 959 (6th Cir. 1987), *cert. denied*, 485 U.S. 1017 (1988) (notice); *FDIC v. Wood*, 758 F.2d 156 (6th Cir. 1985), *cert. denied*, 474 U.S. 944 (1985) (notice). *See also Matter of Still*, 963 F.2d 75 (5th Cir. 1992) (RTC receiver did not give value).
126. *See, e.g., FDIC v. Armstrong*, 784 F.2d 741 (6th Cir. 1986); *FDIC v. Wood*, 758 F.2d 156 (6th Cir. 1985), *cert. denied*, 474 U.S. 944 (1985); *FDIC v. Leach*, 772 F.2d 1262 (6th Cir. 1985); *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 332 (1st Cir. 1992).
127. *See Campbell Leasing v. FDIC*, 901 F.2d 1244 (5th Cir. 1990).
128. *See, e.g., RTC v. Crow*, 763 F. Supp. 887 (N.D. Tex. 1991); *Antin v. RTC*, Nos. 88-3721, 90-0868 (E.D. La. Jan. 10, 1991) (1991 WL 6237).
129. *See, e.g., RTC v. Ruggiero*, 756 F. Supp. 1092 (N.D. Ill. 1991), *aff'd*, 977 F.2d 309 (1992).
130. A criticism of the expansive interpretation of the doctrine can be found in *In re Woodstone Partners*, 133 B.R. 678 (Bankr. E.D.N.Y. 1991).
131. *See* 11 U.S.C. § 510 (1993).
132. *See, e.g., In re Mobile Steele Co.*, 563 F.2d 692 (5th Cir. 1977).
133. *See, e.g., Id.* at 700, 701.
134. *See, e.g., Great American Insurance Company v. Bailey (In re Cutty's Gurnee, Inc.)*, 133 B.R. 934, 958-59 (Bankr. N.D. Ill. 1991); *Virtual Network Services Corporation v. U.S.A. (In re Virtual Network Services Corp.)*, 902 F.2d 1246, 1250 (7th Cir. 1990); *Miller v. Northern Indiana Public Services Co. (In re Vitreous Steel Products Co.)*, 911 F.2d 1223, 1237 (7th Cir. 1990).
135. *Anaconda-Ericsson, Inc. v. Hesser (In re Teltronics Services, Inc.)*, 29 B.R. 139, 170 (Bankr. E.D.N.Y. 1983); *Fruehauf Corporation v. T.E. Mercer Trucking Co. (In re T.E. Mercer Trucking Co.)*, 16 B.R. 176 (Bankr. N.D. Tex. 1981).
136. *In re De Makes Enterprises, Inc.* 143 B.R. 304 (Bankr. D. Mass. 1992); *In re CTS Truss Inc.*, 859 F.2d 357 (5th Cir. 1988), *vacated and modified*, 868 F.2d 146 (5th Cir. 1989). *See also In re CPC Development Corporation No. 5*, 113 B.R. 637 (Bankr. C.D. Cal. 1990) (*D'Oench* and Section 1823(e) do not preclude imposition of equitable subordination where there is no secret agreement or scheme). *Cf. In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332, 1353 (1st Cir. 1992) (equitable subordination may be available against FDIC receiver if claims are not barred by federal law and if misconduct fits classic patterns).
137. *In re Valentine*, 93 B.R. 219 (Bankr. C.D. Cal. 1989).
138. *In re Smith II*, 133 B.R. 800 (N.D. Tex. 1991).
139. 133 B.R. 800 (N.D. Tex. 1991), *rev'g, In re Smith*, 113 B.R. 297 (Bankr. N.D. Tex. 1990). The court in *In re Smith II* acknowledges that its holding is contrary to the weight of authority. 133 B.R. at 806.
140. *Gallant v. Kanterman (In re Kanterman)*, 108 B.R. 432 (Bankr. S.D.N.Y. 1989); *First City Financial Corporation v. FDIC (In re First City Financial Corporation)*, 61 B.R. 95 (Bankr. D.N.M. 1986); *La Mancha Aire v. FDIC (In re La Mancha Aire, Inc.)*, 41 B.R. 647 (Bankr. S.D. Fla. 1984). The one case addressing the availability of § 1823(e) after the enactment of FIRREA reaches the same result. *Thistlewaite v. FDIC (In re Pernie Bailey Drilling Company, Inc.)*, 111 B.R. 565 (Bankr. W.D. La. 1990).
141. *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986).
142. *See* 11 U.S.C. § 362 (1993).

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Continued from page 33

143. See 11 U.S.C. § 105 (1993).  
144. See 12 U.S.C. § 1821(j) (1989).

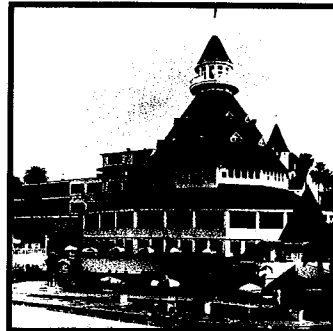
145. See 12 U.S.C. § 1821(j) (1989).  
146. See, e.g., *In the Matter of Colonial Realty Company*, 134 B.R. 1017 (Bankr. D. Conn. 1991); *In re Miller*, 71 B.R. 460 (Bankr. M.D. La. 1987).  
147. *In re Colonial Realty Company*, 134 B.R. 1017 (Bankr. D. Conn. 1991); *In re Miller*, 71 B.R. 460, 461-62 (Bankr. M.D. La. 1987).  
148. 973 F.2d 283 (4th Cir. 1992).  
149. *Id.* at 290.  
150. *Id.* at 289. Under 11 U.S.C. § 109, insolvent banks and thrifts are not eligible for relief under the Bankruptcy Law. However, a holding company or subsidiary of such an entity may seek such relief.  
151. 134 B.R. 1017 (Bankr. D. Conn. 1991).  
152. 28 U.S.C. § 2410 (c) (Federal Rules of Civil

Procedure: Rule respecting actions affecting property on which United States holds lien).

153. 57 F.R. 19651 (May 7, 1992) (Resolution Trust Corporation-Interim Statement of Policy on Foreclosure Consent and Redemption Rights).  
154. 57 F.R. 19651 (May 7, 1992) (Resolution Trust Corporation—Interim Statement of Policy on Foreclosure Consent and Redemption Rights); 57 F.R. 27990 (June 23, 1992) (Resolution Trust Corporation—Central Address for Filing Foreclosure Notices and Consent Requests); 57 F.R. 39715 (Sept. 1, 1992) (Resolution Trust Corporation—List of Institutions in Conservatorship and Receivership).  
155. 57 F.R. 29491 (July 2, 1992) (Federal Deposit Insurance Corporation-Statement of Policy on Foreclosure Consent and Redemption Rights). ■

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