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COMMERCIAL LAW SURVEY

INTRODUCTION

During the 1993 survey period, notable Tenth Circuit commercial law decisions addressed banking and corporate law issues. Part I of this Survey examines recent banking law decisions. In 1993, the Tenth Circuit variously restricted and expanded federal banking regulators' powers under the *D'Oench* doctrine[1] and § 1823(e)[2] of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[3] In *Oklahoma Radio Associates v. FDIC*,[4] the court restricted federal superpowers by endorsing a complete innocence exception to the *D'Oench* estoppel doctrine and by refusing to give retroactive effect to FIRREA's extensions of § 1823(e). In contrast, *Castleglen, Inc. v. RTC*[5] enlarged federal superpowers by applying *D'Oench* and § 1823(e) to bar debtor defenses to liability based on affirmative tort claims as well as those based on unwritten agreements or verbal misrepresentations.

Part II of this Survey discusses a recent corporate law decision. *NLRB v. Greater Kansas City Roofing*[6] summarizes the Tenth Circuit's stance concerning piercing the corporate veil with the federal common law alter ego doctrine. While the decision adds little to the substantive law, it merits attention for its clairification and explanation of the alter ego doctrine.

I. BANKING LAW

In response to the savings and loan crisis of the eighties, Congress passed FIRREA.[7] FIRREA extensively revised federal regulation of the savings and loan industry to insure its integrity, safety and stability.[8] Among its specific purposes, FIRREA sought to improve federal supervision of financial institutions and to strengthen federal regulators' enforcement powers.[9] Towards these ends, Congress expanded the application of

1. The *D'Oench* doctrine was articulated in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1941), *reh'g denied*, 315 U.S. 830 (1942). See *infra* notes 16-29 and accompanying text for an explanation of the *D'Oench* doctrine.

2. 12 U.S.C. § 1823(e) (Supp. IV 1992) partially codifies the common law *D'Oench* doctrine. See *infra* notes 25-30 and accompanying text for an explanation of § 1823(e).

3. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.).

4. 987 F.2d 685 (10th Cir. 1993).

5. 984 F.2d 1571 (10th Cir. 1993).

6. 2 F.3d 1047 (10th Cir. 1993).

7. H.R. REP. No. 54, 101st Cong., 1st Sess., pt. 1 at 291-94 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 87-90 (discussing the history of the savings and loan industry and the genesis of the crisis). *See also* James F. Hogg, *Section 1823(e) and the D'Oench, Duhme Doctrine*, 16 HAMLINE L.REV. 55, 55-56 (1992).

8. *See* Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, § 101, 1989 U.S.C.C.A.N. (103 Stat.) 187.

9. *Id.* § 101(2), (9).

FIRREA's special enforcement provisions contained in section 1823(e).[10] FIRREA's special enforcement provisions prohibit debtors from asserting nearly every defense in a lawsuit by federal regulators to collect an institution's outstanding loan obligations.[11]

These statutory provisions, combined with the common law enforcement powers available to the FDIC and the RTC, give federal banking regulators a substantial advantage in debt collection litigation.[12] Some commentators, troubled by the magnitude of these prerogatives, and the manifest injustice they frequently work, have called upon courts to restrain their scope.[13] Recent decisions leave it uncertain whether the Tenth Circuit is prepared to answer this call.

A. *Scope of the D'Oench Estoppel Doctrine and FIRREA § 1823(e):* Oklahoma Radio Associates v. FOIL[14] *and* Castleglen Inc. v. RTC[15]

When the FDIC or the RTC takes over a failed financial institution's assets and sues to collect debts still owed to the institution, a growing body of statutory and common law strips debtors of most otherwise valid defenses or counterclaims against liability. These "superpowers" are designed to enhance federal regulators' ability to deal effectively with the failure of a financial insitution.[16] During the 1993 Survey period, the Tenth Circuit addressed two of the FDIC's and RTC's most commonly employed superpowers: the *D'Oench* estoppel doctrine and FIRREA § 1823(e).[17]

The Supreme Court articulated the D'Oench doctrine in *D'Oench, Duhme & Co. v. FDIC.*[18] In that case, the FDIC sued to collect on a promissory note obtained from a bank as collateral for a loan.[19] The maker of the note denied liability based on a written agreement by the bank promis-

10. 12 U.S.C. § 1823(e) (Supp. IV 1992). FIRREA specifically extended § 1823(e) to cover the FDIC and the RTC in their capacity as either conservator or receiver. Prior to FIRREA, § 1823(e) only applied to the FDIC in its receivership capacity. GREGORY PULLES ET AL., FIRREA: A LEGISLATIVE HISTORY AND SECTION-BY-SECTION ANALYSIS OF THE FINANCIAL INSTITUTIONS RECOVERY, REFORM AND ENFORCEMENT ACT 255 (1993).

11. *See infra* part II.A.

12. *See* Fred Galves, *FDIC and RTC Special Powers in Failed Bank Litigation,* 22 COLO. LAW. 473 (1993).

13. *See generally* Richard E. Flint, *Why D'Oench, Duhme? An Economic, Legal and Philosophical Critique of a Failed Bank Policy,* 26 VAL. U. L. REV 465 (1992) (arguing for the repeal of § 1823(e) and the overruling of *D'Oench* and its progeny); Hogg, *supra* note 5, at 56 ("[w]ith Congress' enthusiasm for reform, it is not surprising that the reform pendulum . . . may have swung too far in favor of the federal banking agencies.").

14. 987 F.2d 685 (10th Cir. 1993).

15. 984 F.2d 1571 (10th Cir. 1993).

16. The best known of the FDIC's and RTC's superpowers are the *D'Oench* doctrine, 12 U.S.C. § 1823(e), and the federal Holder in Due Course Doctrine. Galves, *supra* note 12, at 473.

17. Between 1989 and 1992, 12 U.S.C. § 1823(e) was cited in over three hundred cases. *See* Hogg, *supra* note 7, at 56 (describing the level of citation as "extraordinary . . . compared to other FIRREA sections"). Likewise, *D'Oench* and its extensions are "uniformly accepted in failed bank litigation." *See* Galves, *supra* note 12, at 474.

18. 315 U.S. 447 (1941), *reh'g denied,* 315 U.S. 830 (1942).

19. *Id.* at 454.

ing that the note would not be enforced.[20] The FDIC lacked knowledge of the agreement until after demand for payment.[21] The Supreme Court deemed the maker to have participated in a scheme to misrepresent the bank's assets to the FDIC by executing a facially unqualified note.[22] Noting that federal legislation reflected a strong policy in favor of protecting the FDIC and the public funds it administers from such misrepresentations, the court estopped the maker from asserting the agreement as a defense to liability.[23]

Justice Douglas' majority opinion specifically provided that the FDIC is not required to prove either intent to deceive or specific injury.[24] It would suffice that the maker had "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled."[25] Schemes subject to estoppel under *D'Oench* have expanded well beyond oral agreements to encompass defenses such as failure of consideration,[26] fraud in the inducement,[27] and unconscionability,[28] among others.[29]

Section 1823(e) of FIRREA partially codifies the *D'Oench* doctrine.[30] The section also adds specific requirements prohibiting assertion of agreements tending to diminish or defeat the interest of the FDIC in any asset it acquires unless the agreement is: (1) in writing, (2) executed by the bank and the obligor, (3) established as approved in the board or loan committee minutes and (4) continuously part of official records.[31] Section 1823(e) essentially bars the same defenses as *D'Oench*.[32]

Courts have recognized a narrow set of potential exceptions to both *D'Oench* and section 1823(e). These exceptions include fraud in the factum,[33] forgery or material alteration,[34] and defenses based on breach of

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20. *Id.*
21. *Id.*
22. *Id.* at 459-61.
23. *Id.* at 457, 461.
24. *Id.* at 461.
25. *Id.* at 460. *See also* Langley v. FDIC, 484 U.S. 86 (1987). Although decided under § 1823(e), *Langley* held that neither fraud in the inducement nor the FDIC's knowledge of the agreement bars section 1823(e)'s applicability. *Id.* at 94-95.
26. Taylor Trust v. Security Trust Fed. Sav. & Loan Ass'n, 844 F.2d 337, 342 (6th Cir. 1988).
27. Mainland Sav. Ass'n v. Riverfront Ass'n, 872 F.2d 955, 956 (10th Cir.)(per curiam), *cert. denied*, 493 U.S. 890 (1989).
28. Clay v. FDIC, 934 F.2d 69, 72-73 (5th Cir. 1991).
29. *D'Oench* bars most tort claims used either affirmatively or defensively. For a comprehensive listing, see PULLES ET AL., *supra* note 1012, at 256.1-256.4(2).
30. Authorities conflict on whether § 1823(e) represents a parallel authority to the *D'Oench* doctrine, a codification of the doctrine, or a partial codification of the doctrine. PULLES ET AL., *supra* note 10, at 256.
31. 12 U.S.C. § 1823(e)(1988 & Supp. IV 1993).
32. *See, e.g.*, Langley v. FDIC, 484 U.S. 86, 94 (1987) (using section 1823(e) to bar defense of fraudulent inducement). It is uncertain whether or not section 1823(e), like *D'Oench*, bars defenses based on failure of consideration. The Sixth Circuit, at least, finds that it does not. FDIC v. Leach, 772 F.2d 1262, 1266 (6th Cir. 1985) (failure of consideration is not barred by § 1823(e), since the statutory bar applies only to unwritten agreements, and the defense was based on the lack of any enforceable agreement).
33. *See Langley*, 484 U.S. at 92-93 (recognizing possible exception for fraud in the factum as there would be no agreement to enforce in the first place).
34. *See* FDIC v. Turner, 869 F.2d 270 (6th Cir. 1989) (discussing a material alteration).

bilateral obligations where the payee's obligation clearly appears in the bank's loan files.[35] A few courts recognize the "wholly innocent maker" defense as an additional exception to *D'Oench* estoppel.[36] Courts generally cite *FDIC v. Meo*[37] as establishing this defense. In *Meo*, the Ninth Circuit held that *D'Oench* did not estop a debtor from asserting a defense where he was "neither a party to any deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense."[38] The exception is not uniformly recognized; some courts have characterized it as an outdated understanding of the *D'Oench* doctrine.[39]

D'Oench and § 1823(e) contribute towards FIRREA's overriding goal of maintaining confidence and stability in the banking system by ensuring the accuracy of the records of federally insured financial institutions under the FDIC's regulation.[40] The FDIC must be able to determine quickly which institutions are failing and how best to protect depositors once the institution has failed.[41] To this end, the FDIC must have accurate information regarding the financial condition of the institution.[42] "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions."[43]

The *D'Oench* doctrine and its statutory codification have expanded considerably in their application. Commentators have criticized the broad scope of both *D'Oench* and section 1823(e) as allowing the FDIC to impose draconian measures against unwary debtors who naively trust oral agreements made with lending institutions.[44]

1. Tenth Circuit Decision: *Oklahoma Radio Associates v. FOIL*[45]

The Comptroller of Currency closed Citizens Bank ("Citizens") and appointed the FDIC as receiver in August of 1986.[46] When the FDIC chose to liquidate the bank, it demanded payment of a $175,000 loan Citi-

35. Howell v. Continental Credit Corp., 655 F.2d 743, 746-47 (7th Cir. 1981).

36. *See, e.g.*, Oklahoma Radio Assoc. v. FDIC, 987 F.2d 685, 693-94 (10th Cir. 1993); Agri-Export Coop. v. Universal Sav. Ass'n, 767 F. Supp. 824, 832 (S.D. Tex. 1991).

37. 505 F.2d 790, 793 (9th Cir. 1974).

38. *Meo*, 505 F.2d at 793. The defendant had executed a promissory note to a bank in exchange for 1000 shares of the bank's stock. The bank issued 1000 voting trust certificates rather than stock. *Id.* at 791. The court found the defendant not negligent in failing to discover the misexecution of his order and wholly unaware of the failure of consideration until the FDIC, as receiver for the bank, filed suit to collect the note. *Id.* at 792.

39. FDIC v. Payne, 973 F.2d 403, 407 (5th Cir. 1992); Capital Bank & Trust v. 604 Columbus Ave. Realty Trust (*In re* Columbus Ave. Realty Trust), 968 F.2d 1332, 1347-48 (1st Cir. 1992); FSLIC v. Gordy, 928 F.2d 1558, 1567 n.14 (11th Cir. 1991).

40. Additionally, bars from statutory and common law safeguard federal insurance funds from depletion by preventing debtors from pleading participation in a deceptive scheme as a defense to their obligation to a failed financial institution. Hogg, *supra* note 7, at 57-60.

41. *Id.* at 59.

42. "One purpose of § 1823(e) is to allow federal . . . bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." Langley v. FDIC, 484 U.S. 86, 91 (1987).

43. *Id.* at 91-92.

44. *See supra* note 13 and accompanying text.

45. 987 F.2d 685 (10th Cir. 1993).

46. *Id.* at 688.

zens had made to Oklahoma Radio Associates ("ORA") which had come due.[47] ORA brought suit against the FDIC claiming that the FDIC's demand for repayment in full breached Citizens' agreement to renew that note over five years with a series of one-year notes.[48] As evidence of the agreement, ORA introduced a letter from Citizens' vice president confirming the terms of the agreement.[49] These terms mirrored those stated in ORA's loan application.[50] ORA countered the assertion that the renewal agreement constituted a secret side agreement by introducing an affidavit from Citizens' vice president indicating that he had ordered both the confirmation letter and the loan application to be placed in the bank's files.[51]

The FDIC counterclaimed for payment of the loan.[52] The FDIC argued that, under the *D'Oench* doctrine, ORA could not assert its secret side agreement with Citizens and avoid its obligation under a facially unqualified note.[53] As to ORA's contention that the confirmation letter was in Citizens' files at the time of failure, the FDIC presented evidence that its examiner had located ORA's loan application, but no qualifying letter, in the bank's loan files.[54]

The district court found the *D'Oench* doctrine applicable to ORA's defense.[55] The court emphasized that the promissory note, on which the FDIC relied, clearly indicated the instrument's maturity date.[56] The confirmation letter represented "[a]t best a secret agreement that Citizens would not enforce the note on its express maturity date."[57] The court held that *D'Oench* applied directly to these facts because such an agreement would tend to indicate deceptively to bank examiners that Citizens had committed its assets for one year while it had, in reality, committed them for five years.[58]

On appeal, ORA challenged the district court's ruling on two grounds. First, ORA asserted that the FDIC failed to establish that the renewal agreement was deceptive or would tend to deceive.[59] Second, ORA argued that the FDIC failed to establish in the record that ORA's conduct was even slightly culpable.[60]

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47. *Id.*

48. *Id.* at 688-89.

49. *Id.* at 689. The letter confirmed that upon the original note's 90 day maturity "the note [would] be renewed on a 60 month basis with a series of one year notes." *Id.*

50. *Id.*

51. *Id.* at 688.

52. *Id.* at 689. There were actually two promissory notes relating to the loan in question. The first note carried a maturity date of October 15, 1985. Citizens later renewed ORA's note with a new one carrying a stated maturity date of no later than August 15, 1986. *Id.* at 688. The FDIC relied on the new note in its counterclaim against ORA. *Id.* at 689.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 692.

60. *Id.* at 693.

The Tenth Circuit agreed with ORA's first argument because the presence or absence of the confirmation letter in Citizens' files remained a disputed issue.[61] Establishing the letter's existence in Citizens' files would prevent the FDIC from asserting *D'Oench*, since the manifestation of both parties' obligations in the records would protect banking authorities from deception.[62]

The court also endorsed ORA's second challenge. While agreeing that the *D'Oench* doctrine did not require an intent to deceive, the Tenth Circuit observed that it did not bar all defenses to attempts to collect on promissory notes.[63] The court endorsed *Meo*'s "wholly innocent maker" rationale and found summary judgement based on *D'Oench* erroneous where the record failed to indicate any culpability on the part of the obligor.[64]

The Tenth Circuit dealt with one final issue in *Oklahoma Radio Associates*: whether to afford retroactive effect to FIRREA's extension of 12 U.S.C. § 1823(e). Throughout the district court proceedings, § 1823(e) covered the FDIC in its corporate capacity but not in its capacity as receiver.[65] While the case awaited appeal, FIRREA extended section 1823(e)'s protection to the FDIC as receiver.[66] FDIC argued that the court should give retroactive effect to FIRREA's extension of § 1823(e) and bar ORA's assertion of the alleged renewal agreement.[67] According to the FDIC, the renewal agreement's failure to comply with § 1823(e)'s strict requirements, prevented ORA from using the agreement as a defense to the FDIC's counterclaim.[68] Noting that its recent opinions refused to give retroactive effect to statutes and Supreme Court principles alike, the court declined to retroactively apply FIRREA's extension of § 1823(e).[69]

2. Analysis

Oklahoma Radio Associates is noteworthy for its adoption of the complete innocence exception to the *D'Oench* doctrine. As noted earlier, courts do not uniformly endorse this exception.[70] Recognition that *D'Oench* requires some showing of culpable conduct on the obligor's part narrows the doctrine's scope. Unfortunately, the Tenth Circuit provided little guidance for applying its precedent. The court furnished no indica-

61. *Id.* Both sides introduced conflicting evidence on this point. *See supra* notes 48, 49, and 51, and accompanying text.

62. *Oklahoma Radio Assocs.*, 987 F.2d at 692-93. The decision itself merely held that if ORA can establish that the renewal agreement was manifest in Citizens' records, *D'Oench* will not apply. *Id.* at 693. The court explained the basis for its holding while exploring defenses not barred by *D'Oench*. *Id.* at 691-92 (citing Howell v. Continental Credit Corp., 655 F.2d 743, 746 (7th Cir. 1981)).

63. *Oklahoma Radio Assocs.*, 987 F.2d at 693.

64. *Id.* at 694.

65. *Id.* at 695.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 695-96.

70. *See supra* note 39 and accompanying text.

tion of what type or degree of culpability would foreclose the complete innocence exception and invoke the *D'Oench* bar.

3. Tenth Circuit Decision: *Castleglen, Inc. v. RTC*[71]

The Tenth Circuit also addressed the scope of the *D'Oench* Doctrine and § 1823(e) of FIRREA in *Castleglen*. In that case, the court extended both doctrines' reach beyond contract defenses to preclude those based on affirmative tort claims.[72]

Castleglen, Inc. ("Castleglen") brought action against Commonwealth Savings ("Commonwealth") based on numerous affirmative state law tort claims.[73] These claims arose from Commonwealth's alleged misrepresentations regarding the profitability of an apartment project purchased by Castleglen. During the pendency of that action, Commonwealth was declared insolvent and the RTC, as conservator, was substituted as defendant.[74] The district court granted summary judgment in favor of the RTC, holding that both FIRREA § 1823(e) and *D'Oench* estoppel barred Castleglen's claims.[75]

On appeal, Castleglen challenged the district court's finding that both *D'Oench* and § 1823(e) barred affirmative tort claims.[76] Castleglen relied on the Tenth Circuit's holding in *Grubb v. FDIC*[77] in arguing that *D'Oench* prohibits contract claims based on misleading agreements, not affirmative claims of fraud.[78]

Because defenses sounding in tort have the same practical effect as those sounding in contract, the Tenth Circuit agreed with the district

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71. 984 F.2d 1571 (10th Cir. 1993).

72. *Id.* at 1577. The Tenth Circuit's decision in *Castleglen* also dealt with several other issues. Among the most important, to the scope of § 1823(e) and *D'Oench*, the court struck down Castleglen's attempt to take the case beyond the reach of the common law and the statutory doctrines by characterizing the transaction as a "credit enhancement transaction" rather than a loan. *Id.* at 1581. Regardless of appellation, *D'Oench* and § 1823(e) bar any oral agreement which contradicts what the bank has told banking authorities, or which forms any part of an effort to mislead banking authorities as to the bank's financial condition. *Id.*

73. Castleglen v. Commonwealth Sav. Ass'n, 728 F.Supp. 656 (D. Utah 1989). Castleglenn's state law tort claims included: fraud, misrepresentation, negligent misrepresentation, negligence, breach of fiduciary duty, and breach of an implied covenant of good faith and fair dealing. *Id.* at 659-60.

74. The events unfolded as follows. The Federal Home Loan Bank Board ("FHLBB") declared Commonwealth insolvent and appointed the FSLIC as conservator. *Id.* at 660. FHLBB then replaced the FSLIC as conservator with the FSLIC as receiver. *Id.* FSLIC chartered a new institution, Commonwealth Federal Savings ("Commonwealth Federal"), which it placed under its conservatorship. The FSLIC then caused Commonwealth Federal to purchase Commonwealth's assets. *Id.* The passage of FIRREA abolished the FSLIC and replaced it with the RTC. *Id.* at 660-61. Thus, the RTC as conservator for Commonwealth Federal was substituted as a defendant in this action for the insolvent Commonwealth. *Id.* at 661.

75. *Id.* at 678.

76. *Castleglen*, 984 F.2d at 1575.

77. 868 F.2d 1151 (10th Cir. 1989).

78. *Castleglen*, 984 F.2d at 1577. While *Grubb* did involve an affirmative fraud claim, the court in *Castleglen* denied that *Grubb* subjects the RTC (or FDIC) to such claims. *Id.* at 1578. Rather, the misrepresentation claim in *Grubb* resulted in a judgment invalidating notes held by the bank before the FDIC took over. *Id.* Hence, the invalidated notes failed to constitute FDIC assets in the first place. *Id.*

court that the *D'Oench* doctrine barred tort claims as well as contract defenses.[79] "If the *D'Oench* doctrine is to have any force, courts cannot permit debtors to evade its prohibitions simply by recasting their contract defenses as affirmative tort claims."[80]

Moreover, the court noted that while fraud in the factum provides a defense not subject to either *D'Oench* or § 1823(e), fraud in the inducement does not.[81] Castleglen's claim that Commonwealth's misrepresentation of the venture's profitability induced Castleglen to enter the agreement sounded in fraud in the inducement, as the misrepresentation did not prevent Castleglen from understanding the nature of the agreement.[82] The court concluded that in either a contract defense or an affirmative tort claim, *D'Oench* bars the obligator from asserting fraud in the inducement.[83]

Castleglen next argued that the district court drew improper inferences against it in granting summary judgment.[84] Castleglen pointed to several documents in Commonwealth's official records which supported an inference that a written agreement existed which guaranteed the venture's profitability.[85] With such an agreement allegedly manifested in Commonwealth's records, both parties' obligations would be apparent and banking authorities would not be deceived.[86] Absent deception, Castleglen concluded that it should prevail irrespective of whether *D'Oench* and § 1823(e) bar affirmative tort claims.[87]

While acknowledging that the evidence could suggest that Commonwealth expressed a certain belief regarding the venture's profitability, the court concluded that such evidence did not amount to a valid written agreement.[88] Noting that § 1823(e) and *D'Oench* serve to promote certainty in bank records, the court found that "[s]cattered evidence in corporate records from which one could infer the existence of an agreement" fails to promote certainty.[89]

4. Analysis

Unlike *Oklahoma Radio Associates*, which restrained *D'Oench* through a strict construction of the doctrine, *Castleglen* reflects an expansion of both *D'Oench* and § 1823(e). While *Oklahoma Radio Associates* indicates that

79. *See id.* at 1578.
80. *Id.* at 1577.
81. *Id.* at 1577-78.

> [V]oid contracts are not "assets" at all and so do not fall under the scope of § 1823(e)'s prohibition against side agreements "which tend to diminish or defeat the interest of the Corporation in any asset," while voidable contracts are true agreements and as such invoke the full force of the statute.

Id. at 1577.

82. *Id.* at 1578.
83. *Id.*
84. *Id.*
85. *Id.* at 1578-79 & 1578 n.4.
86. *See id.* at 1578.
87. *Id.*
88. *Id.* at 1579.
89. *Id.*

D'Oench requires some proof of culpability, *Castleglen* counters that the level of culpability need rise no further than allowing oneself to be fraudulently induced into an agreement. This result is consistent with the Supreme Court's decisions in *D'Oench* and *Langley*. An obligor "can be very ignorant and ill-informed of the character of the transaction"[90] and yet be precluded from using that ignorance to defeat the FDIC's or RTC's claim. Where an obligor fails to comprehend the terms of an agreement through no negligence on his part, however, neither an agreement nor an asset exists for *D'Oench* to shield.

Oklahoma Radio Associates also indicates that where a bilateral agreement may be shown to exist in a bank's records, a court cannot grant summary judgment to the FDIC based on *D'Oench* estoppel. *Castleglen* cautions that the written documents in a bank's files must unambiguously show the agreement rather than merely infer one. These holdings are consistent with the *Langley* and *D'Oench* purposes of upholding the reliability and certainty of financial institution records.

5. Conclusion

The Tenth Circuit's decisions in *Oklahoma Radio Associates* and *Castleglen* reflect the pro-regulatory bias inherent in both *D'Oench* and its statutory counterpart. That bias appears most vividly when prohibiting affirmative tort claims under the legal fiction that they represent agreements tending to deceive regulatory officials or to diminish assets in which either the FDIC or RTC has an interest. Only that rare debtor who qualifies as "wholly innocent" appears capable of eluding the *D'Oench* bar.

II. Corporate Law

Despite the Supreme Court's broad proclamation in *Erie Railroad v. Tompkins*[91] that "there is no federal general common law,"[92] a growing body of federal common law governs piercing the corporate veil ("PCV") in areas of federal preeminence.[93] During the survey period, the Tenth Circuit addressed piercing through the alter ego doctrine in a case involving federal labor law issues. *NLRB v. Greater Kansas City Roofing*[94] adds to the quantity of federal PCV precedent in the circuit but does not appreciably alter the state of the law.

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90. Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 693 (quoting D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 458-59 (1942)).

91. 304 U.S. 64 (1938).

92. *Id.* at 78.

93. *E.g.*, United Elec., Radio & Mach. Workers v. 163 Pleasant Street Corp., 960 F.2d 1080 (1st Cir. 1992) (ERISA); NLRB. v. Fullerton Transfer & Storage Ltd., 910 F.2d 331 (6th Cir. 1990)(federal labor dispute); Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105 (9th Cir. 1979) (suit to enforce labor contract under federal labor statute). *See generally* 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.90 (perm. ed. rev. vol. 1990) (discussing federal common law).

94. 2 F.3d 1047 (10th Cir. 1993).

A. *Federal Common Law of Piercing the Corporate Veil and the Alter Ego Doctrine:* NLRB v. Greater Kansas City Roofing[95]

A corporation is a legal entity, separate from its shareholders.[96] Among other things, this separateness—a fundamental principle of American corporate law—permits the limitation of shareholder liability to the amount of their investment in the corporation and consequently encourages individual investment in enterprise where it would otherwise fail for risk.[97] When use of this corporate form is sufficiently improper, however, the court may pierce the corporate veil to hold individual shareholders personally liable for the corporation's obligations.[98] Federal common law governs when a PCV issue arises in association with an area of federal preeminence.[99] State law may be used for guidance but does not control the outcome.[100]

The alter ego doctrine provides one formulation for piercing the corporate veil.[101] The term alter ego generally signifies that a corporation is merely an indistinguishable conduit for the shareholder's affairs.[102] Most federal courts agree that the alter ego doctrine permits piercing where: (1) there is such unity of ownership and interest among the shareholder and the corporation that the corporation no longer has a separate existence[103] and (2) recognition of the corporation's separate existence would sanction fraud or otherwise promote injustice.[104] Some circuits divide this last element into two parts, requiring proof of both fraud and injustice.[105]

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95. *Id.*

96. 18 C.J.S. *Corporations* § 8 (1990); 1 FLETCHER, *supra* note 91, § 41.

97. Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. U. L. REV. 1, 1-2 (1978).

98. 1 FLETCHER, *supra* note 93, § 41.

99. *See* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990).

100. *Id.*

101. While it is uncertain whether the alter ego doctrine forms part of PCV law or exists as an independent ground for holding a shareholder personally liable, numerous commentators and courts have considered the doctrine in the context of PCV law and this survey shall follow the same convention. *See, e.g.*, Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

102. *Greater Kansas City*, 2 F.3d 1047, 1052 (10th Cir. 1993); 18 C.J.S. *Corporations* § 12 (1990).

103. The rationale behind this element is that if the shareholder disregards the separate identity of the corporation, the law likewise disregards the corporation's separateness to the extent necessary to protect the corporation's creditors. Faithfulness to corporate formalities "is the price paid for the corporate fiction, a relatively small price to pay for limited liability." Labadie Coal Co. v. Black, 672 F.2d 92, 97 (D.C. Cir. 1982).

104. *See, e.g., Greater Kansas City*, 2 F.3d at 1052; Pepsi-Cola Metropolitan Bottling Co., 754 F.2d 10, 16 (1st Cir. 1985); John Mohr & Sons v. Apex Terminal Warehouses, Inc., 422 F.2d 638, 642 (7th Cir. 1970); *see also* 1 FLETCHER, *supra* note 91, § 41.10. One author attacks this standard as a mere rehash of state law and suggests a particularized test for cases involving federal law. Note, *supra* note 101, at 865-66.

105. United Elec., Radio and Mach. Workers v. 163 Pleasant Street, 960 F.2d 1080, 1093 (1st Cir. 1992); United Steel Workers v. Conners Steel Co., 855 F.2d 1499, 1507 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

1. Tenth Circuit Decision: *NLRB v. Greater Kansas City Roofing*[106]

The Greater Kansas City Roofing Company ("GKC") operated as a sole proprietorship until November of 1985.[107] Labor law violations and financial difficulties contributed to the business' eventual demise. In 1983, the National Labor Relations Board ("NLRB") found GKC guilty of unfair labor practices and entered a monetary judgement of $133,742.47 against GKC.[108] Adding to its predicament, GKC had borrowed a significant amount from the proprietor's sister in law, Tina Clarke, to cope with its monetary troubles.[109]

Convinced that GKC would fail, Tina Clarke accepted business assets in lieu of foreclosure.[110] In October of 1985, she incorporated The New Greater Kansas City Roofing Company ("New GKC") in order to continue the business operations of GKC.[111] At the time she formed New GKC, Tina Clark did not know that GKC had committed unfair labor practices,[112] nor did she know that the NLRB had an outstanding judgment against GKC.[113] GKC's unfair labor practices came to haunt Tina Clark when New GKC substantially continued GKC's business and when she failed to adhere to corporate formalities in operating New GKC.[114]

In 1988, the NLRB General Counsel attempted to collect on the judgment from New GKC and its sole shareholder, Tina Clarke. An administrative law judge (ALJ) found that New GKC, as the alter ego of its predecessor, should assume GKC's obligations but refused to pierce New GKC's veil to hold Tina Clarke personally liable.[115] The NLRB General Counsel filed exceptions, and a three-member NLRB panel overturned the ALJ's refusal to pierce New GKC's veil.[116] Declaring itself not "limited to piercing the corporate veil only in cases where the corporate status is used to perpetrate fraud,"[117] the NLRB based its decision to pierce on Tina Clark's intermingling of her affairs with those of New GKC[118] and her failure to follow corporate formalities.[119]

106. 2 F.3d 1047 (10th Cir. 1993).
107. *Id.* at 1049.
108. *Id.* at 1049 & n.3.
109. *Id.* at 1050. At one point, GKC had borrowed $48,000 from Tina Clark. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* The ALJ saw no justification for piercing New GKC's veil as he concluded that Tina Clarke did not sufficiently intermingle her affairs with those of New GKC and did not use New GKC's corporate form " 'to perpetrate fraud, evade existing obligations, or circumvent a statute.' " *Id.* (quoting the ALJ without citation).
116. *Id.* at 1051.
117. *Id.* (citing Supplemental Decision & Order, at 3).
118. For example, Tina Clarke paid the corporate payroll using personal funds, without making a formal loan agreement, and received corporate funds in repayment of that informal loan. *Id.* at 1050. Moreover, she intermingled the business affairs of New GKC with her escort service, Affaire d'Amour. *Id.*
119. New GKC apparently had no bylaws, accounts, stock, or corporate records and held no meetings. *Id.* The NLRB based its decision on its precedent in NLRB v. Concrete Mfg. Co., 262 N.L.R.B. 727, 729 (1982). While that case cited intermingling of affairs to the point

The case came before the Tenth Circuit on application for enforcement of the NLRB order.[120] After noting that federal law governed the issue,[121] the court overruled the NLRB decision.[122]

Piercing the veil under the alter ego doctrine required proof of two elements. The first element considered was whether there existed "such unity of interest and lack of respect given to the separate identity of the corporation that the personalities and assets of the corporation by its shareholders and the individual are indistinct."[123] The second element inquires if "adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations."[124]

After announcing the appropriate test, the court provided instructions for its application. The court broke the first element down into two further considerations: (1) the degree to which shareholders have observed corporate formalities and (2) the degree to which shareholders have commingled their assets and affairs with those of the corporation.[125]

Regarding the second prong, the court explained that the requisite showing of inequity must "flow from the misuse of the corporate form."[126] Moreover, the individual sought to be held personally liable "must have shared in the moral culpability or injustice that is found to satisfy the second prong of the test."[127]

Applying the test to the facts of the case, the court found the evidence insufficient to establish the second element and on that basis alone refused to enforce the NLRB order.[128] While Tina Clarke may have failed to observe corporate formalities, her failure neither constituted fraud nor created injustice. Since she formed New GKC long after the unfair labor practices had occurred, the court found "no link between Tina Clarke's sloppy manner of conducting business under New GKC and any fraud, injury or injustice to the former employees of GKC . . . with regard to the unfair labor practices that gave rise to this back-pay order."[129]

2. Analysis

The Tenth Circuit's decision in *Greater Kansas City* does not depart from precedent. As noted in the decision, prior Tenth Circuit decisions

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of inseparableness as one instance in which the Board would disregard the corporate form, it listed numerous other instances involving fraud or injustice as well. The case turned on the defendants knowingly siphoning off corporate assets to avoid satisfying a back-pay judgement. *Id.*

120. *Greater Kansas City*, 2 F.3d at 1049.

121. *Id.* at 1051 (citing NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990)).

122. *Id.* at 1051.

123. *Id.* at 1052.

124. *Id.*

125. *Id.*

126. *Id.* at 1053.

127. *Id.*

128. *See id.* at 1055 & n.4.

129. *Id.* at 1055.

have utilized the two-part test for piercing the corporate veil under the federal common law alter ego doctrine.[130]

Greater Kansas City is notable for its emphasis of the test's second element. In support of its two prong test, *Greater Kansas City* cites *United States v. VanDiviner*[131] and *Milgro Electronics v. United Business Communications.*[132] These decisions provide detailed tests for determining "separateness" and make specific findings under those tests.[133] Neither decision, however, provides a similar test for evaluating fraud, unfairness, or evasion of a legal obligation.[134] Moreover, while *VanDiviner* makes specific findings regarding injustice,[135] *Milgro Electronics* holds that proof of fraud is unnecessary to establish injustice.[136]

Thus, *Greater Kansas City*'s reliance on the absence of fraud, injustice, or evasion of a legal obligation in refusing to pierce[137] emphasizes that these elements must be present in a successful cause of action under the federal common law alter ego doctrine. It also specifies the that the requisite showing under the second prong must prove a nexus between the improper use of the corporate form, the resultant injustice, the party sought to be charged, and the injured party.

Conclusion

Past commercial law Surveys have noted the Tenth Circuit's tendency to broadly construe federal banking regulators' authority in order to enhance their ability to remedy the savings and loan debacle.[138] While *Castleglen* continues this tradition, *Oklahoma Radio Associates* may signal a

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130. *See, e.g.*, Anderson v. Deere & Co., 852 F.2d 1244, 1247 (10th Cir. 1988); United States v. VanDiviner, 822 F.2d 960, 964 (10th Cir. 1987); Milgro Elec. Corp. v. United Business Communications, Inc., 623 F.2d 645, 659 (10th Cir. 1980), *cert. denied*, 449 U.S. 1066 (1980).

131. 822 F.2d 960 (10th Cir. 1987).

132. 623 F.2d 645 (10th Cir. 1980), *cert. denied*, 449 U.S. 1066 (1980).

133. *VanDiviner*, which addresses the application of the alter ego doctrine to a closely held corporation, provides an eight factor test for analyzing "separateness." *VanDiviner*, 822 F.2d at 965. These factors include:

> (1) whether the corporation is operated as a separate entity; (2) commingling of funds and other assets; (3)failure to maintain adequate corporate records or minutes; (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and (8) diversion of the corporation's funds or assets to non-corporate uses.

Id.

Milgro Electronics provides a similar test for application to parent-subsidiary relationships. *Milgro*, 623 F.2d at 660 (citing Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940)).

134. *VanDiviner*, 822 F.2d at 964-65; *Milgro Electronics*, 623 F.2d at 658-62.

135. *VanDiviner*, 822 F.2d at 965. No evidence supported finding that the defendant "misused or abused the corporate form in a way that would threaten injustice to the government." *Id.*

136. *See Milgro Electronics*, 623 F.2d at 662.

137. *See supra* notes 128-30 and accompanying text.

138. Timothy K. Jordan, Survey, Commercial Law, 70 DENV. U. L. REV. 685 (1993); Michelle Rabouin & Anthony M. Leo, Survey, Corporate and Commercial Law, 69 DENV. U. L. REV. 907 (1992).

restrictive trend. The Tenth Circuit's willingness to limit the FDIC's and RTC's enforcement powers, however, should not be overstated. Although *Oklahoma Radio Associates* endorsed the complete innocence exception to *D'Oench* estoppel, this exception applies to an extremely narrow category of debtors.

In the area of corporate law, the Tenth Circuit examined piercing the corporate veil under the alter ego doctrine. *Greater Kansas City* faithfully adhered to established precedent. The decision's primary contribution lies in its detailed instructions for applying the alter ego doctrine to PCV issues.

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