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An Identity in Disarray: the Federal Deposit Insurance Corporation's Government-Agency Status

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An Identity in Disarray: The Federal Deposit Insurance Corporation’s Government-Agency Status

Adam Shajnfeld

This article explores the question of whether the FDIC, when acting as a failed bank’s receiver, is considered an agency of the United States, or merely a private party.

In the last three years, the world has experienced one of the worst banking catastrophes in its history. In the United States alone, some 282 banks have failed since January 2008.1 This burgeoning devastation has catapulted the Federal Deposit Insurance Corporation (“FDIC”) to the forefront of crisis-management as it acts as receiver for each of these failed institutions.2 With high stakes, vast consequences, and little time to dither, the receivership process and its participants require stable, clear and predictable jurisprudence. One issue, however, continues to elude these jurisprudential virtues: is the FDIC, when acting as a failed bank’s receiver, considered an agency of the United States, or merely a private party? Surprisingly, the answer is far from clear, and the ramifications significant and numerous. Years of judicial analysis have produced cacophony, not chorus, and there is a startling absence of scholarly exposition. This article, after outlining the problem, delineates and critically evaluates two solutions.

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A BRIEF HISTORY OF THE FDIC

Calamity often begets reform. And so it was in 1933, in the midst of the spectacularly destructive Great Depression, that the FDIC was conceived. Established by the Banking Act of 1933 in the wake of the closure of some 4,000 banks, and the subject of substantial subsequent legislative development, the FDIC is dually tasked with insuring deposits and ensuring the smooth and successful liquidation of failed banking institutions.3

Among laity, the FDIC is best known in its capacity as insurer and regulator. During the Great Depression, a confluence of factors led depositors to question the security of their assets. A vicious and self-perpetuating cycle developed as depositors sought to withdraw assets from banks and thus further strained liquidity and institutional stability. The resulting massive and widespread fund withdrawals — known as “runs on the bank” — virtually assured insolvency. Reckoning this quasi-psychological phenomenon in part a failure of financial and regulatory policy, an insurance scheme was devised. The theory was that the government’s guarantee of expedient recompense in the event of a bank failure would reduce, if not eliminate, a worried depositor’s incentive to withdraw assets.4 The FDIC administers this deposit insurance, which comes at a price greater than its premium: the insured bank submits to the FDIC’s regulatory authority, in which capacity the FDIC governs “the performance and procedures of banks…and conducts banking examinations in order to minimize the risk to the [ ] deposit insurance funds.”5 There is little doubt that in its capacity as insurer and regulator, the FDIC is an agency of the United States.6

The FDIC, however, plays another vital role: receiver.7 When a bank fails, there is considerable substantive and temporal uncertainty. Will the bank’s assets be purchased by a solvent institution? Who will protect the bank’s cache of financial data and physical property? When can a depositor expect to receive its FDIC-insured assets and determine what the future holds for those assets that are uninsured? A typical corporate bankruptcy proceeding can persist in almost indefinite fashion and is fraught with the unknown — qualities that are antithetical to financial stability. Instead, when a bank fails and is placed in receivership, the FDIC is appointed as its receiver, tasked with expeditiously maximizing and distributing the bank’s assets. The FDIC
quickly takes possession of the bank’s premises and typically arranges a sale of its assets and a concomitant assumption (by the asset-purchasing institution) of the bank’s liabilities, including its deposits.8 Subsequently, the FDIC manages those assets that cannot immediately be sold, and engages in a process of adjudicating and often litigating claims lodged by the bank’s creditors. This receivership regime goes a long way toward ensuring that “[t]he liquidation of failed bank assets no longer disrupts local or national markets and a significant portion of a community’s assets are no longer tied up in bankruptcy proceedings when a bank fails.”9

The FDIC has yet a third role. In its “corporate” capacity, it “is permitted to purchase the assets of a failed institution.”10 It often does so when it cannot find a suitable purchaser for assets of poor quality.11

THE PROBLEM TAKES SHAPE

In 1994, the Supreme Court’s confounding decision in *O’Melveny & Myers v. Federal Deposit Insurance Corporation*12 must have taken some in the banking community by surprise. Only five years prior, the Seventh Circuit — in an opinion written by Judge Richard Posner and joined by Judges Frank Easterbrook and Kenneth Ripple — had asked, rhetorically: “What is ‘the Federal Deposit Insurance Corporation as receiver’ other than part of the United States? To sue FDIC-Receiver is to sue those officials of the federal government who happen to be responsible for winding up the affairs of failed banks.”13 To this sagacious panel of appellate judges, and to many others, the matter of the FDIC’s agency status was strikingly clear. Yet, Justice Scalia’s majority opinion in *O’Melveny* contained the startlingly broad statement that, in its capacity as receiver, “the FDIC is not the United States.”14

In *O’Melveny*, the FDIC, acting as receiver of a failed bank, sued the bank’s former legal counsel for neglecting to uncover fraud that had been perpetrated by the bank’s controlling officers. The bank’s former counsel argued that under California law, knowledge of the controlling officers’ conduct must be imputed to the bank and, by succession, the FDIC, thus estopping the FDIC from pursuing its claims. The FDIC contended that federal common law, not California law, governed the issue of imputation, and cited as support *U.S. v. Kimbell Foods, Inc.*, which iterated that “federal law governs
questions involving the rights of the United States arising under nationwide federal programs.” O’Melveny found Kimbell Foods inapplicable because “the FDIC is not the United States, and even if it were [it] would be begging the question to assume that it was asserting its own rights rather than, as receiver, the rights of the [failed bank].” Accordingly, the Supreme Court declined the FDIC’s entreaties to create a federal common law governing imputation of knowledge to the FDIC.

The subsequent reaction of lower courts has been as curious and confusing as O’Melveny’s statement itself, and three approaches may be discerned. A number of courts have taken O’Melveny at face value. In Federal Deposit Insurance Corporation v. Flagship Auto Center, Inc., a Northern District of Ohio court held that “[w]hen acting in its receivership capacity, the FDIC is not an agency of the United States.” The very same statement can be found in the Court of Federal Claims’ decision in Perpetual Financial Corporation v. United States.

Other courts have equivocated. In United States v. Sweeney, the First Circuit noted that “the question of whether the FDIC, as receiver of a failed state-chartered bank, is acting ‘in the name of, or on behalf of, the United States’” for purposes of a criminal contempt statute was “an open one.” The First Circuit expressed similar uncertainty in Schock v. United States, characterizing as “difficult,” and refusing to answer, the question “whether the FDIC as receiver acts as an agency of the United States” for purposes of the Equal Access to Justice Act. In neither instance did the First Circuit attempt to grapple with, or even mention, O’Melveny.

A final set of courts has explicitly rejected a broad reading of O’Melveny, though their reasoning — constrained by binding precedent they could hardly openly and candidly criticize — is necessarily flawed. In Auction Company of America v. Federal Deposit Insurance Corporation, the D.C. Circuit held that the FDIC, acting as receiver, counted as “the United States” for the purpose of 28 U.S.C. § 2401(a), the catch-all federal statute of limitations for any “civil action commenced against the United States.” The D.C. Circuit minimized the import of O’Melveny, stating that “the O’Melveny Court was not interpreting 28 U.S.C. § 2401(a), or indeed any other federal statute.” The D.C. Circuit proceeded to claim that
Immediately after the [O’Melveny] Court’s declaration that the FDIC was not the United States, it twice discounted the significance of the remark, noting that: (1) even if the FDIC were the United States, it would be begging the question to assume that it was asserting its own rights rather than those of the [bank]; and (2) even if federal law governed in the sense explained in [Kimbell], i.e., a sense that includes federal adoption of state law rules, that would "not much advance the ball." 23

These claims, however, are unconvincing. First, while O’Melveny was not interpreting a federal statute, nothing in the decision’s text limits its broadly worded statement to a single context. Second, those pronouncements that the D.C. Circuit believed “discounted the significance” of the broadly worded statement do no such thing; instead, they merely provide additional support for the Supreme Court’s conclusion in a manner that courts immemorial have engaged in: demonstrate that even if a rule were otherwise, the end result would not change.

The Ninth Circuit attempted an equally but necessarily feeble repudiation of O’Melveny. In Battista v. Federal Deposit Insurance Corporation,24 it held that sovereign immunity barred the assessment of prejudgment interest against the FDIC. In so holding, the Ninth Circuit distinguished O’Melveny, which it claimed “noted merely that [federal statute] ‘places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law’ …[and] did not suggest that the FDIC was like a private enterprise for purposes of sovereign immunity.” 25 As with the D.C. Circuit’s interpretation, the breadth of O’Melveny’s statement is difficult to reconcile with the Ninth Circuit’s narrow reading.

The FDIC has itself exhibited the symptoms of identity crisis in its inconsistent litigation positioning. For instance, in In re Motivation Resources, Inc., the FDIC, “hoping to circumvent the expansive jurisdictional implications” of a statute giving the bankruptcy court an independent basis for jurisdiction over any governmental unit that has waived its sovereign immunity by filing a formal bankruptcy proof of claim, “maintained that when it is acting as a receiver it is not a governmental unit.” 26 However, in BankUnited Financial Corporation v. Federal Deposit Insurance Corporation, the FDIC, in its receivership capacity, characterized itself as an agency of the United States. 27 There,
the FDIC, which had failed to act within a purportedly mandatory deadline, sought the protection afforded by a judicially created doctrine that statutory time periods are not mandatory as to a government agency unless they both expressly require an agency to act within a particular time and specify a consequence for failure to do so. Like any litigant, the FDIC has sought, without much regard for consistency, to exploit the prevailing judicial confusion.

Together, the farrago of decisions regarding the FDIC’s identity — even without O’Melveny’s statement — are not conducive to distillation of any coherent rule. Further complicating matters, it is unclear what effect O’Melveny should be given. How is one to determine when, if ever, the FDIC, acting as receiver, should be considered an agency of the United States?

SOLUTIONS

There are two principal solutions to the FDIC’s identity crisis — analytic devices that courts and market participants can use to determine the FDIC’s agency status. The first looks only to the text of federal statute, while the second considers the nature and singularity of the action the FDIC is taking.

The Statutory Directive Approach

The easiest solution is that the FDIC, acting as receiver, is to be considered an agency of the United States only when expressly directed by Title 12 of the United States Code, the FDIC’s governing legislation. Specifically, Section 1819 of Title 12, which delineates the FDIC’s powers, states that the FDIC, “in any capacity, shall be an agency of the United States for purposes of section 1345 of Title 28,” a provision granting federal district courts original jurisdiction over suits involving the United States or its agencies. The First Circuit advanced such an approach in Bank of New England Old Colony, N.A. v. Clark, refusing to find the FDIC an agency of the United States for purposes of the Tax Injunction Act:

The relevant legislation does not indicate that Congress intended to accord the FDIC federal instrumentality status for the purposes of the [Tax Injunction] Act. We note that § 1819(b)(1), titled “Status,” only grants
the FDIC agency status for the purposes of § 1345, not for all purposes…. It is apparent that Congress knew how to make an agency a federal instrumentality in the present context. We therefore must assume that Congress chose not to do so with the FDIC, as the pertinent language is missing from the statute. 28

This interpretation seems even more compelling when Section 1819 is contrasted with the now-defunct Federal Savings and Loan Insurance Corporation’s agency-status statute, which, before its repeal, directed that the FSLIC should be deemed an agency of the United States for all purposes. 29 Obviously, Congress knew how to grant broad agency status. According to the Statutory Directive Approach, Congress’s decision to confer agency status for only one purpose should be read to preclude such status in any other circumstance. Insofar as O’Melveny expresses the default rule that the FDIC is not the United States, it is generally consistent with the Statutory Directive Approach.

The Unique Power Approach

The Statutory Directive Approach — virtuous in its simplicity and predictability — is nonetheless deficient, reflecting an unrealistic expectation of congressional legislation, an imprecise and overly narrow reading of Section 1819, and an impoverished view of the FDIC’s role in the national economy.

First, given the plethora of instances in which the FDIC’s agency status bears significant consequence, it is hard to imagine that Congress could, by express statutory prescription, comprehensively and specifically address each potential scenario. Its understandable failure to do so should not be interpreted as an indication that the FDIC must, absent express statutory directive, be deemed a private party.

Second, no court has ever interpreted Section 1819 so as to strip the FDIC, acting in its capacity as insurer, of government-agency status. That is, while the Statutory Directive Approach could easily be applied to limit the FDIC’s agency status when it acts in its insurer capacity, courts universally look beyond statutory text to the important public function that the FDIC serves. There is no principled reason not to extend this functional view into
the receivership context.

Third, Section 1819 does not, by its own terms, foreclose agency status in other circumstances. It could have stated — but doesn’t — that the FDIC “shall be an agency of the United States only for purposes of section 1345.” The absence of such exclusive terminology suggests that Congress may have intended Section 1819 to confer a minimum of agency status without prejudice to a more expansive portion as might be contextually appropriate.

Fourth, there is good reason to think that when acting as receiver, the FDIC often transcends mere private concerns. Such reason can be gleaned by considering just one of a number of legislative efforts involving the FDIC and its receivership responsibilities. As numerous circuits recognize, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (the “FIRREA”) “to aid the FDIC in maintaining its immediate responsibilities of dealing with mounting bank failures in this country.”

“In so doing, Congress made pellucid that, in acting as a receiver of failed banks, the FDIC fosters important public policies relating to the avoidance of a national banking crisis.” Common sense compels a similar conclusion. In the wake of catastrophic banking failures (e.g., the Great Depression, the 1980s savings and loan crisis), Congress has created and empowered an entity composed of federal employees to resolve bank failures in a manner that assures minimal disruption of the country’s financial system. A spirit of vital public purpose permeates the FDIC’s receivership function and its statutory and historical foundations.

The failure to acknowledge and give due weight to this spirit is also O’Melveny’s myopia. And unlike the Statutory Directive Approach, which at least purports to do so, O’Melveny did not predicate its holding on Section 1819 or, for that matter, any other statute. Some may find relief — and room for maneuvering — in the belief that O’Melveny might not have intended to effect a principle as broad as its wording suggests. For others, this will not do. As its result was not compelled by legislation or the weight of precedent, and is insensitive to the spectrum of activities, from private to public, that the FDIC as receiver engages in, one can only hope that the Supreme Court soon has the opportunity to clarify — or reconsider — its position.

Given its public-private spectrum of activity, by what method might one ascertain the FDIC’s agency status, if not through express statutory direc-
tive? The Eleventh Circuit’s opinion in *Federal Deposit Insurance Corporation v. Harrison* suggests the rudiments of an alternative approach. In *Harrison*, the FDIC sought to recover on personal guarantees securing promissory notes it had, in its corporate capacity, purchased from a failed bank while (also) serving as the bank’s receiver. The defendants mustered compelling evidence in support of their argument that the FDIC should be equitably estopped from asserting its claim. Despite the Supreme Court’s “reluctance to apply equitable estoppel against the government,” the Eleventh Circuit held the doctrine applicable. Its reasoning — based on a qualitative assessment of the FDIC’s conduct — was highly contextual: “Activities undertaken by the government primarily for the commercial benefit of the government or an individual agency are subject to estoppel while actions involving the exercise of exclusively governmental or sovereign powers are not.” *Harrison*, however, neither involved nor explicitly addressed the FDIC’s character as receiver, concerning itself instead with the somewhat different corporate function. Anyone hoping to see *Harrison*’s analysis extended to the receivership context was certainly dismayed some four years later when the Eleventh Circuit seemed to foreclose the possibility, noting that “[a]s receiver of a failed bank…the FDIC is not pursuing a strong federal policy,” and “merely takes the place of any receiver that might be appointed under” applicable law.

Building on these rudiments, this article suggests the following simple formulation — the Unique Power Approach — to be used to determine the FDIC’s agency status in any given context in which it acts as receiver: when exercising powers ordinarily reposed in a bank or what would, in the absence of banking legislation, be its non-governmental successor (such as a bankruptcy trustee or receiver), the FDIC should be considered a private party; when, however, exercising unique statutorily or judicially conferred powers, the FDIC should be considered an agency of the United States. In principle, then, the D.C. Circuit was correct when it observed that, in connection with its receivership responsibilities, “[w]hether the FDIC should be treated as the United States depends on the context.”

This formulation helps explain — despite their failure to so articulate — how some courts have reached conclusions at odds with the Statutory Directive Approach, and why a number of these courts have nonetheless failed to correctly analyze and answer the agency question. Consider the following
In *Federal Deposit Insurance Corporation v. Wright*, the FDIC, in its capacity as receiver of a failed bank, sued a former director of the bank for amounts allegedly due under facially unconditional promissory notes she had signed. The former director contended that she had executed the notes in anticipation of a loan that was never made. At issue was whether the doctrine announced by the Supreme Court in *D’Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, later codified in 12 U.S.C. § 1823(e), applied retroactively. “To enable the FDIC to rely on a failed bank’s records, the *D’Oench* doctrine precludes a borrower who has participated in a scheme or arrangement likely to mislead banking authorities from asserting unrecorded side agreements to defeat the FDIC’s interest in any assets acquired from the bank.” Originally, Section 1823(e) applied only to the FDIC in its corporate capacity, but during the case’s pendency, Section 1823(e) was amended and made applicable in the receivership context. One of the factors considered in determining the retroactivity of a federal statute is the identity of the parties; “[n]ational concerns and public parties encourage retroactive application of the legislation at issue.” Applying the Unique Power Approach, the question of the FDIC’s identity in this regard is straightforward. The FDIC is exercising a unique and potent statutory power — the codified *D’Oench* doctrine — that is not available to the bank or its non-governmental successor. Accordingly, the FDIC is, for this purpose, the United States. The Seventh Circuit came to the same conclusion, though it made the point too broadly: “This is not simply a private case between individuals. It involves a federal agency appointed as a receiver of a failed bank in the midst of a national banking crisis.” Rather than give the impression that, as receiver, the FDIC is always the United States, the Seventh Circuit would have better served agency jurisprudence had it reached its conclusion by applying the more sensitive Unique Power Approach.

In *United States v. Sweeney*, the defendant was convicted of criminal contempt of a court order of eviction after refusing to vacate property that the FDIC, acting as receiver of a failed bank, had foreclosed. The defendant appealed his conviction, contending that the court abridged his constitutional rights by charging him pursuant to 18 U.S.C. § 401(3), which does not provide for a jury trial, rather than 18 U.S.C. § 402, which does so provide but
is only applicable if the contempt proceeding was “brought or prosecuted in the name of, or on behalf of, the United States.” The First Circuit, characterizing the question of the FDIC’s agency status as receiver “an open one,” affirmed the conviction on the ground that, without a conclusive answer to the question, the defendant could not demonstrate that the district court had committed plain error. The court certainly was not applying the Statutory Directive Approach, which would have unequivocally yielded the conclusion that the FDIC was not the government for such purposes. The Unique Power Approach is simple to apply in this instance, and also yields a conclusive answer. The power to foreclose on real property, and seek enforcement of the resulting eviction order, is one which banks and their non-governmental trustees or receivers ordinarily possess. It is decidedly private activity, implicating no significant or proprietary governmental concern. Acting in such a capacity, the FDIC is not the United States.

In United States v. Schock, the heir of a failed bank’s depositor sued the FDIC, as receiver, for breach of contract, because an unauthorized signatory was permitted to withdraw funds from the depositor’s savings account. Having met with success in court, the heir sought an award of attorneys’ fees and costs pursuant to the Equal Access to Justice Act, which provides that a court “shall award to a prevailing party…fees and other expenses…incurred by that party in any civil action…brought by or against the United States…unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” Again, the First Circuit sidestepped the issue: “whether the FDIC as receiver acts as an agency of the United States for EAJA purposes or merely functions like a private-sector receiver or bank—is a difficult question…. We decline to reach the issue.” It’s not a difficult question under the Unique Power Approach. Defending a suit for breach of contract owing to a failure to adequately protect a depositor’s assets from unauthorized withdrawal is a function that any bank, or its non-governmental successor, ordinarily engages in.

CONCLUSION

Congress is certainly free to adopt the Statutory Directive Approach. Concededly, it is as simple and predictable a standard as may be applied.
Nonetheless, and in the absence of such adoption, the Unique Power Approach is preferable for its relative simplicity and its sensitivity to the FDIC’s varied and context-dependent roles. And, in the midst of the current banking crisis, it is as good a time as ever for the Supreme Court to revisit O’Melveny.

NOTES

2 Throughout this article, these institutions — which include commercial banks, savings and loans associations, savings banks and credit unions — are often referred to simply as “banks.” Their differences, though important, are not relevant to this article’s concern.
7 Prior to 1995, the now-dissolved Resolution Trust Corporation (“RTC”) was responsible for serving as the receiver for failed savings associations, while the FDIC served as receiver for failed commercial banks. Upon its dissolution, the RTC’s responsibilities were conferred on the FDIC. Heidi Mandanis Schooner, Refocusing Regulatory Limitations on Banks’ Compensation Practices, 37 B.C. L. Rev. 861, 862 n.6 (1996).
8 Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir. 1982) (“[T]he FDIC whenever feasible employs a ‘purchase and assumption’ transaction in which the Corporation attempts to arrange for another bank to ‘purchase’ the failed bank and reopen it without interrupting banking operations and with no loss to the depositors.”).
9 Federal Deposit Insurance Corporation, supra note 3, at 4.
14 O'Melveny, 512 U.S. at 85 (emphasis added).
16 O'Melveny, 512 U.S. at 85.
19 226 F.3d 43, 46 (1st Cir. 2000).
20 254 F.3d 1, 4-5 (1st Cir. 2001).
22 Id. at 748.
23 Id. at 748-49.
25 Id. at 1121 n.9.
27 Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint and Response to Motion for Summary Judgment on Count I (Docket Entry No. 17) at 6, BankUnited Financial Corporation v. Federal Deposit Insurance Corporation, No. 10-21307 (S.D. Fla. July 6, 2010).
28 986 F.2d 600, 603 (1st Cir. 1993).
31 U.S. v. Sweeney, 226 F.3d 43, 45 (1st Cir. 2000).
32 735 F.2d 408 (11th Cir. 1984).
33 Id. at 412.
34 U.S. v. Owens, 54 F.3d 271, 275 (6th Cir. 1995).
35 Harrison, 735 F.2d at 411.
37 Auction Co. of Am., 132 F.3d at 748.
38 Wright, 942 F.2d at 1090.
40 Wright, 942 F.2d at 1091.
41 Id. at 1094.
42 Id. at 1096 (quoting Seniors United for Action v. Ray, 675 F.2d 186, 189 (8th Cir. 1982)).
43 Id.
44 Sweeney, 226 F.3d at 44-45.
Id. at 45 (quoting 18 U.S.C. § 402).

Id. at 46. Since the defendant had not raised the issue in the district court, the First Circuit reviewed only for plain error. Id. at 45.

Schock, 254 F.3d at 2-3.

Id. at 4.


Schock, 254 F.3d at 5.