IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor to RESOLUTION TRUST CORPORATION In Its Capacity As Receiver For Atlantic Financial Savings, F.A. v. PARKWAY EXECUTIVE OFFICE CENTER	:	CIVIL ACTION NO. 96-121
FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor to RESOLUTION TRUST CORPORATION In Its Capacity As Receiver For Atlantic Financial Savings, F.A. v. RICHARD L. EVANS and HELENE EVANS	:	CIVIL ACTION NO. 96-122

M E M O R A N D U M

Padova, J. August 15, 1997

Plaintiff, the Federal Deposit Insurance Corporation ("FDIC"), statutory successor to the Resolution Trust Corporation ("RTC") in its capacity as Receiver for Atlantic Financial Savings, F.A. ("Atlantic"), brings this action to collect on promissory notes extended to Parkway Executive Office Center, a Pennsylvania General Partnership ("Parkway"), which were guaranteed by Richard Evans and Helene Evans (hereinafter referred to collectively as "Defendants"). Defendants have filed various Counterclaims and affirmative defenses. FDIC currently submits, for the Court's consideration, its Motion to Dismiss the Counterclaims, its Motion to Strike Defendants' Affirmative Defenses, and its Motion for Summary Judgment.

For the following reasons, FDIC's Motion to Dismiss Defendants' Counterclaims shall be granted. The Court will deny FDIC's Motion to Strike Defendants' Affirmative Defenses. The Court will grant in part and deny in part FDIC's Motion for Summary Judgment.

I. Background

A. Loan Agreements

Richard Evans is Parkway's general partner. In 1985, Parkway purchased a building located at Five Logan Square, 20th and Race Streets, in Philadelphia, Pennsylvania. ("Five Logan"). Five Logan is a five story office building spanning approximately 150,000 square feet. Both Atlantic and Provident National Bank ("Provident") financed the purchase. Provident supplied $8,500,000 through a first mortgage, and Atlantic loaned $2,000,000 through a "Promissory Note," executed by Parkway in favor of Atlantic. Under the Promissory Note, Parkway "hereby promise[ed] to pay to the order of ATLANTIC FINANCIAL FEDERAL . . . the principal amount of $2,000,000." (Def.s' Mem. Opp. Pl.'s Mot. App. at 1 ("Def.s' App."); Pl.'s Mot. Summ. J. Ex. A1 ("Pl.'s Mot.")). In addition to repayment of the principal, Atlantic received an "Enhancement Interest" entitling it to (1) 15% of net cash flow from Five Logan until the Promissory Note was paid in full and (2) at least 15% of the net proceeds of any sale of Five Logan. (Def.s' App. at 4-5).

Parkway also obtained $3,000,000 in letters of credit from Atlantic designed to serve as further collateral for the Provident loan. (Aff. of Richard L. Evans, M.D. Opp. Pl.'s Mot. ¶ 3) ("Evans Aff.")).

Four years after purchasing the building, Parkway decided to renovate Five Logan. (Evans Aff. ¶ 5). On August 24, 1989, Parkway signed two new agreements designed to finance the renovation: (1) the Note Modification Agreement ("Modification"), and (2) the Construction Loan and Security Agreement ("Construction Loan"). Parkway, Provident, and Atlantic were parties to the Construction Loan. As of August 24, 1989, (1) the outstanding principal owed to Provident by Parkway pursuant to the 1985 mortgage was $5,425,153.80, and (2) Parkway owed Atlantic $4,245,272.65 on the Promissory Note. (Def.s' App. at 43).

Under the Construction Loan, Provident agreed to lend Parkway up to $4,290,000, and Atlantic agreed to lend Parkway $7,410,000 "to renovate the existing improvements and develop [Five Logan]." (Def.s' App. at 15). The Construction Loan imposed the following obligations on Atlantic and Provident:

> [s]o long as there has occurred no Event of Default or any event or condition which, with the passage of time of giving notice or both could become an Event of Default, Provident shall be obligated to advance (40%) of the Funds (against the Second Note), and Atlantic shall be obligated to advance sixty percent (60%) of the Funds (against the Atlantic Note).

(Def.s' App. at 30).

The Construction Loan also required Richard Evans and his wife Helene Evans to personally guarantee the repayment of monies Atlantic loaned Parkway. (Def.s' App. at 25; Evans Aff. ¶ 8 (stating "Atlantic Federal also required my wife to execute the 1989 Guaranty and Suretyship Agreement, even though she was not an officer, partner, or principal in Parkway, and she had not co-signed on any of the prior loans. No reason was given . . . . ")). Specifically, the Evans executed a Guaranty and Surety Agreement ("Guaranty") which provided, in part:

> Guarantors hereby absolutely, irrevocably, and unconditionally guarantee to Lender, its successors, endorser, and assigns, and become surety for (a) the full, faithful and punctual payment when due (and not merely the collectibility), of any and all sums required to be paid by Borrower, its successors and assigns under the note and the other Loan Documents . . . .
>
> This Guarantee is an absolute and unconditional guaranty of prompt and full payment and performance and not merely of collection with Guarantors intending to be bound hereunder in the same manner and to the same extent as Guarantors would have been had they executed the Loan Documents . . . .
>
> Guarantors hereby waive . . . (b) all defenses, offsets and counterclaims which Guarantors may at any time have jointly or severally to any of the obligations of Borrower.

(Def.s' App. at 115-16).

The Modification, entered into between Atlantic and Parkway, set forth repayment terms, listed Parkway's balance as $12,045,272.65, and imposed a maturity date of February 24, 1991. (Def.s' App. at 103-05; Pl.'s Mot. Ex. A2). As of January, 1990, Atlantic had disbursed approximately $1,500,000 of its share of the $7,400,000 called for under the Construction Loan. (Evans Aff. ¶ 11).

B. Atlantic's Demise

"On January 11, 1990, the Director of the Office of Thrift Supervision, Department of the Treasury ("OTC"), declared that Atlantic Financial Federal was in an unsafe and unsound condition to transact business and ordered it closed." (Aff. of Richard S. Greenberg Supp. Pl.'s Mot. ¶ 2 ("Greenberg Aff.")). When Atlantic was closed, it immediately stopped funding its share of the loans, causing a massive budget shortfall on the project to renovate Five Logan. (Evans Aff. ¶¶ 13-14). The RTC was appointed as Receiver for Atlantic and thereby took possession of Atlantic's assets. (Greenberg Aff. ¶¶ 3-4).[1]

Parkway unsuccessfully demanded that Atlantic and RTC continue funding, asserting the project could not be completed without the full loan amounts. (Evans Aff. ¶ 15; Def.s' App. at 133-41). On May 22, 1990, the RTC repudiated the undisbursed balance of the $12,045,272 loan commitment. (Greenberg Aff. ¶ 14;

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1. The RTC entered into a "Purchase and Assumption Agreement" with Atlantic Financial Savings, F.A. ("Atlantic Savings"), a newly chartered institution, whereby Atlantic Savings purchased the Promissory Note, the Modification, and the Guaranty. On January 11, 1990, however, the OTC took possession of Atlantic Savings and appointed the RTC as Conservator. On November 15, 1991, the OTC appointed the RTC as Receiver for Atlantic Savings. The RTC terminated on December 31, 1995, and the FDIC became its statutory successor.

Evans Aff. ¶ 17; Def.s' App. at 142). Provident, initially recognizing that Atlantic was in default, then declared Parkway and the Guarantors in default and initiated a complaint for confession of judgment against Parkway and the Evans in the Court of Common Pleas of Philadelphia County. (Def.s' App. at 131 (letter from Provident to Parkway noting "[y]ou understand and acknowledge that the loan is in default due to Atlantic's failure to fund and that we may at any time refuse to make further advances of the loan"); 157 (Provident's Complaint in Confession of Judgment recognizing that "Atlantic has failed to fund its portion of certain advances of the Loan in accordance with the Loan Agreement")).

According to Defendants, both Atlantic and the RTC were aware of the state court litigation, but took no action. (Evans Aff. ¶¶ 20-21; Def.s' App. at 151-59). Provident eventually assigned its loan documents to a third party and initiated a mortgage foreclosure on its first lien. Five Logan was then sold at a Sheriff's sale to Provident's assignee. (Evans Aff. ¶¶ 22-23; Def.s' App. 160-65). The Provident litigation settled in 1994. (Evans Aff. ¶ 29).

C. Defendants' Proof of Claim

On August 17, 1990, Defendants submitted a proof of claim to the RTC in its capacity as Conservator for Atlantic Savings, claiming $29,658,863.00 in actual direct compensatory damages. (Aff. of Linda S. Palombizio ¶ 4 (FDIC Claims Specialist) Pl.'s Mot. Ex. A1 ("Palombizio Aff.")). Thereafter, the RTC and Evans counsel entered into a series of time extensions over a period of almost four years agreeing to give the RTC more time to adjudicate Defendants' claim. (Evans Aff. ¶ 25; Palombizio Aff. ¶ 5). By letter dated September 8, 1994, the RTC notified the Evans that their claim was disallowed. (Palombizio Aff. ¶ 6). According to Evans:

> By this time, no less earlier, Parkway, my wife and I had been entirely wiped out financially as a result of the failure of the project and we had told the RTC of our situation. As a direct result of the actions of Atlantic and RTC, we were financially unable to pursue our rights through the filing of a new lawsuit in federal court against Atlantic / RTC following the disallowance of the claim.
>
> Atlantic / RTC never declared Parkway, my wife or me in default prior to the filing of this lawsuit in January of 1996, which was six years after Atlantic defaulted on its obligation to fund the loan.

(Evans Aff. ¶¶ 31-32). The FDIC initiated the instant litigation against Parkway (to collect on the Construction Loan and Modification) and the Evans (to collect on the Guaranty) on January 10, 1996.

II. Discussion

A. Motions to Dismiss Counterclaims and Strike Affirmative Defenses

1. Standards of Review

FDIC moves to dismiss Defendants' Counterclaims and to strike Defendants' affirmative defenses. "When deciding a 12(b)(6) motion to dismiss, the counterclaims must be read in a light most favorable to the counter-claimant, and all of the factual allegations must be taken as true. However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." Government Guar. Fund of the Republic of Finland v. Hyatt Corp., 955 F. Supp. 441, 449 (D.V.I. 1997) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988); Fleming v. Lind-Waldock & Co., , 922 F.2d 20, 23 (1st Cir. 1990)).

Motions to strike under Fed. R. Civ. P. 12(f) are generally viewed with disfavor because of their potential to be used as a dilatory tactic. If there are either questions of fact or disputed questions of law, the motion to strike must be denied. However, a motion to strike is the primary procedure for objection to an insufficient affirmative defense." Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 305-06 (E.D. Pa. 1993). Motions to strike "do[, however,] serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues that would not affect the outcome of the case . . . . [T]he district court has broad discretion in disposing of motions to strike. United States v. Union Gas Co., 743 F. Supp. 1144, 1150 (E.D. Pa. 1990) (citations omitted). "An affirmative defense is insufficient if as a matter of law it cannot succeed under any circumstances." In re Sunrise Sec. Litig., 818 F. Supp. 830, 840 (E.D. Pa. 1993) (citation omitted).

2. Defendants' Defenses and Counterclaims

Defendants' Counterclaims allege generally that (1) Atlantic breached the Construction Loan agreement and Modification, (2) Atlantic defaulted on its obligations, and (3) the RTC wrongly repudiated those agreements. According to Defendants, the Five Logan project could not be completed because of the massive budget shortfall. Specifically, as of January, 1990, Atlantic had distributed only $1.5 million of its $7.4 million share of the Construction Loan and Modification. Defendants argue that Atlantic's failure to disclose its precarious financial condition destroyed the prospect that their real estate project would be successfully completed.

Defendants also put forth the affirmative defenses of (1) estoppel; (2) failure to give consideration; (3) statute(s) of limitations; (4) waiver; (5) failure to state a claim; and (6) laches. In addition, Defendants claim that "[a]s a result of Atlantic's default, Parkway has lost the property in foreclosure, it has been unable to pay its creditors, and it has suffered damages in excess of the amounts borrowed from Atlantic . . . . [Defendants lost their] investment, and [have] incurred liabilities to others." (Def.s' Am. Answer, Affirmative Defenses and Countercl. ¶¶ 15, 17). Attacking the Guaranty, Defendants claim "Atlantic's failure to disclose the facts concerning its true financial condition renders the Guaranty and Suretyship Agreement voidable, void and rescinded." (Def.s' Am. Answer, Affirmative Defenses and Countercl. ¶ 12).

Defendants' Counterclaims rest on the same theory, maintaining that "[a]s the successor to the RTC, Plaintiff FDIC is liable for all damages flowing from the RTC's repudiation and breach of Atlantic Financial Federal's obligations, and from Atlantic's defaults . . . . " (Def.s' Countercl. ¶ 4). In addition, Defendants assert that Atlantic's insistence on Helene Evans' executing the Guaranty violates the Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-1691e (West 1982 & Supp. 1997) ("ECOA") because it was done solely on the basis of Helene Evans' marital relationship with Richard Evans. According to Defendants, FDIC had actual or constructive knowledge of Atlantic's conduct when it acquired the Guaranty.

3. FDIC's Position

FDIC first moves to dismiss the Counterclaims, arguing the Court lacks subject matter jurisdiction because Defendants failed to file suit on the claim within 60 days from the date of notice of disallowance of the claim. FDIC points to 12 U.S.C.A. § 1821(d)(13)(D), which states that except as otherwise provided in this subsection, no court has jurisdiction over:

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C.A. § 1821(d)(13)(D) (West 1989 & Supp. 1997). Sections 1821(d)(6)(A) and (B) dictate the appropriate procedure for obtaining judicial review:

> **(6) Provision for agency review or judicial determination of claims**
>
> **(A) In general**
>
> Before the end of the 60 day period beginning on the earlier of-
>
> (i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or
>
> (ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),
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> the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district in which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).
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> **(B) Statute of Limitations**
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> If any claimant fails to--
>
> (i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or
>
> (ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),
>
> before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

12 U.S.C.A. § 1821(d)(6)(A), (B).

FDIC claims the Court may only exercise subject matter jurisdiction over a claim under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), if the claimant exhausts the statutory claim procedure, pointing to Rosa v. Resolution Trust Corp., 938 F.2d 383, 391 (3d Cir. 1991) (stating "we are satisfied that § 1821(d)(13)(D) . . . prevails with respect to the subject matter jurisdiction of the district court. That the bar is a statutory exhaustion requirement is indicated by the language"), cert. denied, 502 U.S. 981, 112 S. Ct. 582 (1991); Federal Deposit Ins. Corp. v. Shain, Schaffer & Rafanello, 944 F.2d 129, 132 (3d Cir. 1991) (stating the "FIRREA's claims procedure in section 1821(d) is exclusive. Congress expressly withdrew jurisdiction from all courts over any claim to a failed bank's assets that are made outside the procedure set forth in section 1821" and noting "the jurisdictional bar of § 1821(d)(13)(D) reaches (1) claims for payment from the assets of the failed bank, (2) actions for payment from those assets, and (3) actions for a determination of rights with respect to those assets").

FDIC admits that Defendants initially complied with the claims procedure when they submitted a proof of claim on August 17, 1990 to the RTC. Defendants did not, FDIC argues, file a lawsuit within 60 days of the RTC's response disallowing Defendants' claim -- dated September 8, 1994 -- as required by § 1821. FDIC contends that Defendants' failure to satisfy this statutory prerequisite precludes the Court from exercising subject matter jurisdiction.

4. **Defendants' Position**

Defendants assert that they fully exhausted their administrative remedies by submitting a timely claim, dated August 17, 1990, that was based on the same facts that give rise to the Counterclaims, i.e., the breach by Atlantic of the Construction Loan and Modification. The RTC, contend Defendants, had a full opportunity to consider the claim, thus satisfying the narrow purpose of the FIRREA's exhaustion scheme. "The purpose underlying [the] FIRREA's exhaustion scheme is to allow the RTC to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation." Rosa, 938 F.2d at 396.

As a result of the collapse of the project and the RTC's delay in adjudicating the claim (during which Defendants' financial condition deteriorated), Defendants maintain they had insufficient funds to litigate the matter in court and could not commence such an action. (Evans Aff. ¶ 31).

Defendants aim to distinguish the cases relied on by the FDIC that invoked the statutorily imposed 60 day deadline by arguing that the defendants in those cases either did not exhaust the remedy scheme set forth in the FIRREA or did not file a counterclaim. According to Defendants, the settled law is that a counterclaim arising out of the same transaction or occurrence is never time barred insofar as it seeks damages less than or equal to the amount of the FDIC's claim. Defendants maintain that their Counterclaims seek relief for breach of the very documents the FDIC issued, relate to the 'particular transaction' that is the subject of this litigation, and will at least reduce, if not eliminate, any judgment obtained by the FDIC.

5. Counterclaim and Affirmative Defense Conclusion

The Court concludes that the 60 day statute of limitations articulated in 12 U.S.C.A. § 1821(d)(6)(A), (B) precludes Defendants from asserting their Counterclaims but does not preclude Defendants from asserting their affirmative defenses.

With respect to the Counterclaims, the instruction from Resolution Trust Corp. v. W.W. Dev. & Management, Inc., 73 F.3d 1298 (3d Cir. 1996), is clear. There, Bell Savings Bank, PaSA ("Bell") extended a loan to W.W. Development and Management Company ("W.W."). Bell agreed to extend a second loan to W.W. designed to pay off the first loan. Bell, however, never extended the second loan. W.W. defaulted on the first loan, and Bell confessed judgment against W.W. Subsequently, the RTC took over Bell, and, thereafter, W.W. filed (1) a petition to strike or open W.W.'s confessed judgment and (2) a separate action alleging breach of contract. Shortly before the deadline for filing claims under the FIRREA, Bell's lawyer and the RTC exchanged correspondence regarding the formal filing of a proof of claim with the RTC in compliance with the administrative procedures under that statute. A formal proof of claim, however, was never filed.

The United States Court of Appeals for the Third Circuit ("Third Circuit") dismissed W.W.'s separate lawsuit.

> In this case, treating W.W.'s petition to reopen the removed case and its counsel's August 5, 1991 letter to RTC's counsel as together constituting a properly filed claim, W.W. failed to bring the federal case in the district court within the statutorily prescribed time period . . . . If the RTC is correct so that W.W.'s petition, either independently or accompanied by its letter of August 5, 1991, did not constitute a claim, the district court would have lacked jurisdiction because W.W. would not have followed the proper administrative procedures. Nevertheless, since we find that even if a pleading can constitute a claim under [the] FIRREA, the district court lacked jurisdiction over this claim, we need not address this issue.

Id. at 1305 & n.13. Defendants' assertion that W.W. Dev. does not provide support because W.W. did not file an administrative claim is unpersuasive. W.W. Dev. reached its conclusion assuming that W.W. complied with the administrative claims procedure. Thus, the instructional value of W.W. Dev. lies beyond situations where the debtor did not follow the administrative claims procedure and encompasses debtors who do file administrative claims but subsequently fail to file suit within the statutorily prescribed limitations period.

While W.W.'s separate lawsuit failed, its defenses in the lawsuit initiated by Bell to confess judgment were not subject to the jurisdictional bar:

> the defenses allege in the petition to open judgment are part of a pre-receivership action and thus under section 1821(d)(5)(F)(ii) and 1821(d)(13)(D) the district court may entertain them without regard for the jurisdictional bar in the latter section.
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> * * *

> While the defenses to Bell's confession of judgment action pertain to the assets of W.W., the counterclaim clearly asserts a claim over Bell's assets. If in addition to raising defenses to an action or a claim, a party also raises counterclaims, such counterclaims would also fall under section 1821(D)(13)(D)'s jurisdictional bar.
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> * * *
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> The counterclaim brought by W.W., in contrast to its defense to the confessed judgment, is a claim against a failed financial institution, precisely the kind of post-receivership claim that Congress wanted resolved expeditiously and fairly, through the administrative claims process.

Id. at 1309.

Resolution Trust Corp. v. Schonacher, 844 F. Supp. 689 (D. Kan. 1994) reached a similar result with respect to counterclaims, but employed different reasoning:

> [T]his court concludes that a two step process is required to determine which counterclaims and affirmative defenses are subject to the mandatory administrative claims procedure.
>
> The first step is to determine whether the claim embodied in the affirmative defense or counterclaim is of the type described in the statute. In Rosa v. Resolution Trust Corp., 938 F.2d 383 (3d Cir. 1991), the court undertook to define claims for which the administrative claims procedure is mandated under clause (i) of Section 1821(d)(13)(D): 'The bar embodied in clause (i) reaches (1) claims for payment from the assets of the failed financial institution], (2) actions for payment from those assets and (3) actions for a determination of rights with respect to those assets.' Rosa, 938 F.2d at 393. Clause (ii) of that section reaches claims 'relating to any act or omission of such institution or

> the Corporation as receiver.' 12 U.S.C. 1821(d)(13)(D).[2]
>
> If the claim is of the type included in the statute's language, the next step is to determine whether the claim could have been brought independently by the defendant against the institution or receiver. In making this evaluation, the determining factor is not whether a defendant labels his response as an affirmative defense or as a counterclaim. Instead, the court must evaluate whether an asserted defense or counterclaim could have been brought against the receiver or the institution independently.

Schonacher, 844 F. Supp. at 695 (citations omitted).

With this framework, Schonacher found defendant's claims for set-off and recoupment were actually claims for payment from the assets of the failed institution and therefore within the scope of § 1821(d)(13)(D)'s jurisdictional bar. Schonacher also struck (1) the ECOA affirmative defense and (2) the affirmative defense that the guaranty sued upon was void for want of consideration, finding these affirmative defenses could have been brought independently prior to the action taken by the failed bank or RTC. The other affirmative defenses -- failure to join all necessary parties, waiver, estoppel, and failure to state a claim -- were all allowed because they had no independent basis.

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2. But see National Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 393 (3d Cir. 1994) (stating § 1821(d)(13)(D) bars jurisdiction over 4 categories of actions: "(1) claims for payment from assets of any depository institution for which the RTC has been appointed receiver; (2) actions for payment from assets of such depository institution; (3) actions seeking a determination with respect to assets of such depository institution; and (4) a claim relating to any act or omission of such institution or the RTC as receiver").

In National Union Fire Ins. Co. of Pittsburgh v. City Savs., F.S.B., 28 F.3d 376 (3d Cir. 1994), the Third Circuit remarked on Schonacher and Midwest but declined to take their approach. National did not involve a confession of judgment. Rather, National Union Fire Insurance Company ("National") commenced a declaratory judgment action against the RTC, as receiver for City Savings, F.S.B. ("City Savings"), asserting National had the right to rescind the insurance policies issued to City Savings. The RTC moved to dismiss the declaratory judgment action and filed a counterclaim.

National noted at the outset that National Union did not comply with the administrative claims procedure. In short, National found that the language of § 1821(d)(13)(D) bars declaratory judgment actions:

> 'No court shall have jurisdiction over -- (i) any claim or action for payment from, or any civil action seeking a determination of rights with respect to, assets of any depository institution for which the corporation has been appointed receiver' . . . . The term "any action" includes actions by debtors as well as creditors, and is not limited to actions asserting a right to payment . . . . [§ 1821(d)(13)(D)] bars National Union and Gulf's declaratory judgment action.

Id. at 385-89 (citations omitted). With respect to the affirmative defenses asserted by National in response to the RTC counterclaim, National found "[w]e believe that the plain meaning of the language contained in § 1821(d)(13)(D) indicates that the statute does not create a jurisdictional bar to defenses or affirmative defenses which a party seeks to raise in defending against a claim." Id. at 393. More specifically:

> We think it is plain enough that a defense or an affirmative defense is neither an 'action' nor a 'claim,' but rather is a response to an action or a claim, and that therefore defenses and affirmative defenses do not fall under any of the above four categories of actions.[3]
>
> * * *
>
> There is a conflict among courts concerning whether affirmative defenses are jurisdictionally barred by § 1821(d)(13)(D). See cases cited in RTC v. Schonacher, 844 F. Supp. 689, 692-94 (D. Kan. 1994). The only court of appeals to consider this issue has held that an affirmative defense of mutual mistake is not barred by § 1821(d)(13)(D). RTC v. Midwest Fed. Sav. Bank of Minot, 4 F.3d 1490, 1494-97 (9th Cir. 1993). We agree with the outcome of Midwest Federal, but, as suggested in supra at 386-92 and n.8, our analysis does not mirror the reasoning of the Court of Appeals for the Ninth Circuit.
>
> * * *
>
> The jurisdictional bar contained in § 1821(d)(13)(D) therefore does not apply to defenses or affirmative defenses.
>
> Of course, in addition to raising defenses or affirmative defenses to an action or claim, a party also raises counterclaims, such counterclaims would fall under § 1821(d)(13)(D)'s jurisdiction bar because a counterclaim is a 'claim.' . . . Therefore, unless counterclaims were properly submitted to the administrative claims procedure of [the] FIRREA, they would be subject to the jurisdictional bar of § 1821(d)(13)(D).

3. See supra note 2 (articulating four categories of actions barred by § 1821(d)(13)(D)).

> Whether an assertion is truly a defense, an affirmative defense, or a counterclaim is a question courts are competent to answer. As discussed above, a claim (or a counterclaim) is essentially an action which asserts a right to payment. Courts should not allow parties to avoid the procedural bar of § 1821(d)(13)(D) by simply labeling what is actually a counterclaim as a defense or affirmative defense.

Id. at 393-94 & n.24 (citations omitted).

The Court concludes that the jurisdictional bar articulated in § 1821 bars Defendants' Counterclaims. Specifically, § 1821 precludes Defendants from obtaining an affirmative recovery as set forth in the Counterclaims because Defendants failed to file suit appealing the adverse adjudication of their proof of claim within 60 days. The jurisdictional bar does not, however, defeat Defendants' ability to proceed with their affirmative defenses which seek to set-off or reduce the FDIC's claim by the amount of Defendants' claim. Defendants have no right to affirmative payment. They do, however, have a right to reduce the FDIC's claim.

Because the affirmative defenses aim only to reduce the FDIC's claim, they technically do not seek payment from the assets of a failed savings and loan (Atlantic). The jurisdictional bar within this context only occurs when a party asserts a right to payment from the assets of a failed savings and loan. Defendants' Counterclaims seek such payment and are barred. Defendants' affirmative defenses do not attempt to reach the assets of a failed savings and loan and are therefore not barred.

Accordingly, the Court will grant FDIC's Motion to Dismiss Defendants' Counterclaims and deny FDIC's Motion to Strike Defendants' Affirmative Defenses.

B. FDIC's Motion for Summary Judgment

1. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id. Rule 56(c) directs summary judgment "after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

2. Section 1823(e)(1), D'Oench, Duhme, and the Federal Holder in Due Course Doctrine

a. FDIC's Position

FDIC argues it has established a prima facie case for "money lent:" (1) the Notes are valid; (2) Atlantic funded $3,245,272 under the Promissory Note in 1985; (3) Atlantic disbursed an additional $2,316,620 under the Construction Loan; (4) Defendants admit Atlantic funded at least an additional $1,500,000; (5) the borrowers have defaulted and failed to make interest and payments from January, 1990 and thereafter; (6) the signatures are indisputably valid; (7) the Receiver has produced the relevant documents and modifications; and (8) the total due is $10,297,219.00. (Greenberg Aff. (disclosing loan history and amounts due)).

FDIC asserts that because this claim arises under federal law (12 U.S.C.A. § 1819(b)(2)(A) (West 1989 & Supp. 1997) ("Federal Court Jurisdiction -- In general")), federal common law controls, pointing to Central W. Rental Co. v. Horizon Leasing, Div. of Horizon Fin., F.A., 967 F.2d 832, 837 (3d Cir. 1992) (remarking that FDIC's defense "was brought pursuant to 12 U.S.C.A. § 1819(b)(2)(A). Accordingly, this suit 'arises under' federal law, and we will look to federal common law for guidance"). FDIC claims that Defendants' affirmative defenses are barred by D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 47, 62 S. Ct. 676 (1942) and its statutory equivalent:

> **(e) Agreements against interests of Corporation**
>
> **(1) In general**
>
> 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 as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) 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
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823(e).

FDIC also seeks to invoke the holder in due course doctrine. "A holder in due course takes an instrument for value, in good faith, and without notice of any defense against it or claims to it." Federal Savings and Loan Ins. Corp. v. Murray, 853 F.2d 1251, 1256 (5th Cir. 1988) (stating "[m]ost of the case law developed under D'Oench has in effect extended holder in due course status to federal banking regulators in purchase and assumption situations . . . . FDIC enjoys the rights of a holder in due course"). According to FDIC, as a holder in due course, Defendants cannot assert personal defenses on the note against the FDIC.

Resolution Trust Co. v. Brentwood Historic Assoc., No. 90-5742, 1991 WL 25586, at *4 (E.D. Pa. Feb. 26, 1991) (stating "because the RTC is a holder in due course with respect to the note, Brentwood is precluded from asserting personal defenses on the note") (citations omitted).

b. Defendants' Position

Defendants attack the applicability of D'Oench, Duhme to the affirmative defenses asserted in the instant case. According to Defendants, the loan documents satisfy all four requirements of § 1823(e), and D'Oench, Duhme does not apply. According to Defendants, the loans are valid written agreements which created bilateral obligations between Atlantic and Defendants, and D'Oench, Duhme does not apply.

c. Section 1823(e)(1)

Section 1823(e)(1), the statutory codification of D'Oench, Duhme, bars any claim that (1) is "based upon an agreement that is either (a) unwritten or (b) if in writing, does not meet the stringent requirements of §§ 1823(e)(1)(B)-(D), and (2) would diminish or defeat the interest of the FDIC in an asset acquired by it in its capacity as receiver of a failed depository institution." Murphy v. Federal Deposit Ins. Corp., 61 F.3d 34, 36 (D.C. Cir. 1995).

Section 1823(e)(1) does not apply in the instant case. This provision bars the invocation of unwritten agreements that were not recorded in a bank's records as defenses against payment of a promissory note. The loans, specifically the Promissory Note, Construction Loan, and Modification, are (1) in writing, (2) executed by the depository institution contemporaneously with the acquisition of the asset by the depository institution, (3) approved by the board of directors of the depository institution, and (4) continuously, from the time of their execution, official records of the depository institution.

Furthermore, the agreement on which the FDIC attempts to collect is the very same agreement Defendants allege Atlantic breached.

> [W]hen the asset upon which the FDIC is attempting to recover is the <u>very same agreement</u> that the makers allege has been breached by the FDIC's assignors, none of the policies that favor the invocation of § 1823(e) are present because the terms of the agreement that tend to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC seeks to enforce.
>
> * * *
>
> Section 1823(e) does not apply when the court determines if an asset is invalid for breach of bilateral obligations contained in that asset. In such cases the parties contend that no asset exists or an asset is invalid and that such invalidity is caused by acts independent of any understanding or a side agreement.

<u>Federal Deposit Ins. Corp. v. Bathgate</u>, 27 F.3d 850, 867 (3d Cir. 1994) (citations omitted). The financial instruments in question imposed obligations on both parties. Atlantic was obligated under the Promissory Note to disburse funds to Defendants. Defendants

had a concomitant obligation to make payments of interest and principal to repay those disbursements. Accordingly, § 1823(e)(1) does not apply.

d. D'Oench, Duhme and Federal Holder in Due Course Doctrine

"D'Oench, Duhme is a federal estoppel doctrine which prohibits borrowers or guarantors from using secret or unrecorded side agreements to defend against efforts by FDIC or its assignees to collect on promissory notes it has acquired from a failed bank." New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1502 (3d Cir. 1996) (citation omitted). D'Oench, Duhme teaches that:

> a debtor who lends himself to a scheme or arrangement tending to mislead bank examiners cannot raise any term or condition of that scheme or arrangement as a defense against the FDIC in a suit on a note. This doctrine is a rule of equitable estoppel which prevents those who give notes to federally insured institutions from asserting defenses based on side agreements with failed banks regarding the enforceability of promissory notes.

Resolution Trust Corp. v. Bentwood Historic Assocs., No. 1991 WL 25586, at *3 (E.D. Pa. Feb. 26, 1991). See also DiVall Ins. Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank of Kansas City, 69 F.3d 1398, 1400 (8th Cir. 1995) (noting that in D'Oench, Duhme, the Supreme Court "created a federal common law rule barring the invocation of 'secret agreements' which were not recorded in a bank's records as defenses against payment of a promissory note"); Resolution Trust Corp. v. Daddona, 9 F.3d 312, 316 (3d Cir. 1993) (stating "[t]he rule emerging from D'Oench, Duhme is that no agreement between a borrower and a bank which does not plainly appear on the face of an obligation or in the bank's official records is enforceable against the FDIC") (citation omitted).

The federal holder in due course doctrine "bars makers of promissory notes from asserting personal defenses against the FDIC and its successors even though the defenses are based on a written agreement." DiVall, 69 F.3d at 1401 (citations omitted).

The Court questions the ability of the FDIC to invoke D'Oench, Duhme and the federal holder in due course doctrine. The Court recognizes authority, supplied by FDIC, supporting the contention that the FDIC enjoys federal holder in due course status. In Federal Sav. and Loan Ins. Corp. v. Murray, 853 F.2d 1251, 1256 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit found:

> [the Federal Savings and Loan Insurance Corporation ("FSLIC")] does not meet the technical requirements of a holder in due course in this case because it acquired these notes in bulk through a purchase and assumption transaction, rather than in the normal course of business. Nonetheless, the sensitive federal interests implicated when FSLIC rescues an insolvent savings and loan lead us to conclude that FSLIC should enjoy at least holder in due course status as a matter of federal common law.
>
> Most of the case law developed under D'Oench has in effect extended holder in due course status to federal banking regulators in purchase and assumption situations. Many of these cases, however, have considered only whether the maker could assert a particular personal defense against FDIC without reference to a broader rule.

* * *

> But several other courts have either held or suggested that FDIC enjoys the rights of a holder in due course . . . . The courts recognize that banking regulators faced with rescuing a shaky institution can choose to: (1) liquidate the institution and pay the depositors their insured amounts; or (2) arrange a purchase and assumption transaction, under which another institution buys and reopens the failed one with no service interruptions and no depositor losses. Purchase and assumption transactions provide an attractive option because they operate quickly, usually at lower cost to the government, and with less damage to depositor confidence.

Id. at 1256.

More recent decisions, however, reached different conclusions. In O'Melveny & Meyers v. Federal Deposit Ins. Corp., 114 S. Ct. 2048 (1994), the FDIC, acting as Receiver of a federally insured bank, brought suit against the bank's former counsel, alleging legal malpractice and breach of fiduciary duty. O'Melveny assessed whether, in a suit brought by the FDIC "as receiver of a federally insured bank, it is a federal-law or rather a state-law rule of decision that governs the tort liability of attorneys who provided services to the bank." O'Melveny, 114 S. Ct. at 2051. O'Melveny found that:

> the FDIC as receiver 'steps into the shoes' of the failed S&L, obtaining the rights of the insured depository institution that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims of the S&L -- in this case California tort claims potentially defeasible by a showing that the S&L's officers had knowledge -- any defense good against the original party is good against the receiver.

* * *

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of [the] FIRREA provides otherwise. To create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it.

<u>Id.</u> at 2054 (citations omitted).

Cases decided subsequent to <u>O'Melveny</u> have extrapolated its holding to diminish the significance of the <u>D'Oench, Duhme</u> doctrine and preclude invocation of the federal holder in due course doctrine. In <u>DiVall</u>, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") concluded <u>O'Melveny</u>:

> removes the federal common law <u>D'Oench Duhme</u> doctrine and the federal holder in due course doctrine as separate bars to DiVall's defense. If DiVall's defense is to be barred, it must be barred either by a specific provision of [the] FIRREA or by state law.

<u>Id.</u> at 1402. The United States Court of Appeals for the District of Columbia Circuit has also taken this approach. <u>See</u> <u>Murphy v. Federal Deposit Ins. Corp.</u>, 61 F.3d 34, 35-38 (D.C. Cir. 1995) (finding that in <u>O'Melveny</u> "the Supreme Court does not flatly state that <u>D'Oench</u> has been preempted by the FIRREA, but it does set forth some more general propositions that, we think, lead ineluctably to that conclusion"). At least two other United States Circuit Courts of Appeals, <u>including</u> the Third Circuit, have suggested the same result, without specifically adopting the conclusions reached in <u>DiVall</u> and <u>Murphy</u>. <u>See</u> <u>Federal Deposit Ins. Co. v. Houde</u>, 90 F.3d 600, 605 n.5 (1st Cir. 1996) (noting "the

continuing viability of the federal holder in due course doctrine is questionable"); DiMuzio v. Resolution Trust Corp., 68 F.3d 777, 780 n.2 (3d Cir. 1995) ("we need not apply the federal law doctrine of D'Oench, Duhme. Indeed, we note that the D'Oench, Duhme doctrine may no longer be a separate bar to plaintiff's claims") (citing O'Melveny and Murphy).

The United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") has taken a contrary approach. In Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A., 83 F.3d 1317 (11th Cir. 1996), vacated, 117 S. Ct. 760 (1997), the Eleventh Circuit found "[w]e disagree with the analysis of the D.C. and Eighth Circuits and hold that the federal common law D'Oench doctrine has not been preempted by statute." Id. at 1327. In reaching this conclusion, the Eleventh Circuit reasoned, inter alia, that (1) "Erie [R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)] did not destroy all types of common law;" (2) "federal courts have created and applied federal common law when necessary to protect certain uniquely federal interests;" (3) "federal common law is often merely a 'necessary expedient' in instances in which 'Congress has not spoken to a particular issue;'" "Murphy erred in relying on O'Melveny;" and (5) "federal courts are not free to contradict a congressional policy choice that 'speaks directly' to a particular question previously answered by federal common law." Id. at 1327-31 (citations omitted).

The differing conclusions reached in DiVall and Motorcity created a split among the United States Circuit Courts of Appeals.

See Houde, 90 F.3d at 605 n.5 (remarking "[a] circuit split has arisen as to whether the [federal holder in due course] doctrine is still valid after O'Melveny"); Adams v. Zimmerman, 73 F.3d 1164, 1168 n.2 (1st Cir. 1996) (noting "[a] circuit split appears to have developed over the question of whether § 1823(e) has preempted D'Oench").

The United States Supreme Court, however, appears to have resolved the conflict, at least indirectly. A recent decision, Atherton v. Federal Deposit Insurance Corp., 117 S. Ct. 666 (1997), reenforces and strengthens the legal precepts articulated in O'Melveny with respect to the diminishing significance of federal common law in the FIRREA context. Atherton involved an action brought by the FDIC against the former officers of a failed savings and loan, alleging negligence, breach of fiduciary duty, and gross negligence. Atherton focused on the appropriate legal "standard for determining whether or not [the officer's] behavior was improper, [asking] where courts should look to find the standard of care to measure the legal propriety of the defendants' conduct -- to state law, to federal common law, or to a special federal statute . . . that speaks of 'gross negligence'?" Id. at 669.

The Atherton Court concluded "state law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute. The federal statute nonetheless sets a 'gross negligence' floor, which applies as a substitute for state standards that are more relaxed." Id. This decision rested, in part, on the conclusion that "the federal common-law standards enunciated in [prior cases articulating corporate governance standards applicable to federally chartered banks] such as Briggs [v. Spaulding, 141 U.S. 132, 11 S. Ct. 924 (1891)] did not survive this Court's later decision in Erie R. Co. v. Tompkins. There is no federal common law that would create a general standard of care applicable to this case." Id. at 674.

The Supreme Court's Atherton decision compelled the reversal of Motorcity. Specifically, the Supreme Court granted the petition for writ of certiorari to the Eleventh Circuit in Motorcity and vacated that decision, citing Atherton. See Hess v. Federal Deposit Ins. Corporation, 117 S. Ct. 760 (stating "Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Atherton v. Federal Deposit Insurance Corporation, 519 U.S. __, 117 S. Ct. 666, __ L.Ed.2d __ (1997)"). By vacating Motorcity, the Supreme Court effectively resolved the split of authority among the United States Circuit Courts of Appeals.

Atherton dictates that neither D'Oench, Duhme nor the federal holder in due course doctrine applies in the instant case. Those cases which have already reached this conclusion, i.e., DiVall and Murphy, rested largely on O'Melveny. Atherton's instruction regarding federal common law augments O'Melveny's precedential value and increases the momentum with which this Court proceeds toward the conclusions reached in DiVall and Murphy.

The Court's decision also comports, as much as possible, with the direction suggested by the Third Circuit. See DiMuzio, 68 F.3d at 780 n.2 ("we need not apply the federal law doctrine of D'Oench, Duhme. Indeed, we note that the D'Oench, Duhme doctrine may no longer be a separate bar to plaintiff's claims") (citing O'Melveny and Murphy).

e. Conclusion

The Court holds, based upon the legal precepts articulated in the aforementioned cases, that federal common law is not applicable to the FIRREA issues presented in the instant case. There is no "federal" commercial code for negotiable instruments which would supply a federal holder in due course doctrine, and the Court refuses to extract a federal holder in due course doctrine from illusory federal common law. Recent decisions from the United States Supreme Court recognize state law, not federal common law, as the source for the standards to measure the validity of the affirmative defenses at issue. This direction rests, in large part, on a belief that there is no federal common law that would create a general standard of care applicable in a FIRREA case.

The FIRREA is a function of either statutory precepts or state common law. The Court will therefore examine whether FDIC is entitled to holder in due course status under Pennsylvania law. See DiVall, 69 F.3d at 1403 (noting Boatmen's "has not pointed to any specific provision of [the] FIRREA which confers holder in due course status on the FDIC. Accordingly, the holder in due course issue must be decided under state law").

3. **State Holder in Due Course Doctrine**

The critical question presented with respect to whether or not FDIC can assert holder in due course status under state law is whether the loan documents are negotiable or nonnegotiable instruments. The holder in due course doctrine only applies if the loan documents are negotiable instruments.

The Pennsylvania Uniform Commercial Code, Article 3, Negotiable Instruments, 13 Pa. Cons. Stat. Ann. §§ 3101-3120 (West 1984 & Supp. 1997) ("Article 3"), "applies to negotiable instruments." 13 Pa. Cons. Stat. Ann. § 3102(a). "Negotiable instrument" refers to:

> an unconditional promise or order to pay a fixed amount of money with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued . . . . (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

13 Pa. Cons. Stat. Ann. § 3104 (a) (West Supp. 1997). In order to be negotiable, the instrument must contain and <u>unconditional</u> promise to pay. A promise is unconditional <u>unless</u> it states:

> (1) an express condition to payment; (2) that the promise or order is subject to or governed by another writing; or (3) that the rights or obligations with respect to the promise or order are stated in another writing. A

> reference to another writing does not itself make the promise or order conditional.

13 Pa. Cons. Stat. Ann. § 3106(a)(1)-(3) (West Supp. 1997).

The original Promissory Note constituted a negotiable instrument where Parkway "hereby promise[ed] to pay to the order of ATLANTIC FINANCIAL FEDERAL . . . the principal amount of $2,000,000." (Def.s' App. at 1). At first blush, the Modification also appears to be a negotiable instrument: "[m]aker hereby promises to pay to the order of Payee at the office of Payee or at such other place as Payee shall designate in writing, the principal amount . . . ." (Def.s' App. at 103 ¶ 1).

The Court finds, however, that the Modification cannot be negotiable because it is subject to the other loan documents which contain additional rights and obligations with respect to the promise, making it conditional. Specifically, the Modification provides: "WHEREAS, Maker and Payee now desire to amend the Note in the fashion hereinafter set forth." (Def.s' App. at 103). Disbursements under the Modification depend on other agreements: "[t]his note is to be disbursed pursuant to a construction loan and security agreement of even date herewith among Maker, Payee and Provident . . . . " (Def.s' App. at 104 ¶ 2).

A panoply of other provisions in the Modification incorporate the separate loan documents. These provisions include (1) paragraph 4, "Maker shall also pay to Payee additional interest upon a sale of the Mortgaged Property or any portion thereof or any interest therein . . . in accordance with the following formula .

. . ."; (2) paragraph 7, listing as an event of default, inter alia, the "occurrence of any default . . . under the Mortgage, Loan Agreement or under any other Loan Documents;" (3) paragraph 8, authorizing the Payee to exercise "any right, power or remedy permitted by law or as set forth herein or in the Mortgage, Loan Agreement or in any other of the Loan Documents;" and (4) paragraph 9, making the Payee's rights and remedies "as provided herein and in any other Loan Document . . . cumulative and current. (Def.s' App. at 105-06 ¶¶ 4, 7, 8, 9). The Modification also contains additional promises that depend on the other loan documents: "Maker promises to pay on demand any additional monies required to be paid or advanced by Maker or paid or advanced on behalf of Maker by Payee pursuant to the terms of the Loan Agreement, the Mortgage and the other Loan Documents." (Def.s' App. at ¶ 5.1).

The accompanying comment to 13 Pa. Cons. Stat. Ann. § 3106 expands on how other writings destroy negotiability and supports the Court's finding that the loan documents are nonnegotiable:

> a promissory note is not an instrument defined by Section 3-104 [Negotiable instrument"] if it contains any of the following statements: 1. 'This note is subject to a contract of sale dated April 1, 1990 between the payee and maker of this note.' 2. 'This note is subject to a loan and security agreement dated April 1, 1990 between the payee and maker of this note' 3. 'Rights and obligations of the paries with respect to this note are stated in an agreement dated April 1, 1990 between payee and maker of this note.' It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a

> negotiable instrument should not be required to examine another document to determine rights with respect to payment. But subsection (b)(i) permits reference to a separate writing for information with respect to collateral, prepayment, or acceleration.

13 Pa. Cons. Stat. Ann. § 3106 cmt. 1 (West Supp. 1997). In the instant case, the Modification does more than merely "reference" the other loan documents for record keeping purposes. Rather, it incorporates those documents and the rights articulated therein. The holder of the Modification must examine the other loan documents in order to determine obligations, rights, and responsibilities.

> [W]henever an instrument requires that reference be made to a separate agreement in order to determine whether there is a condition to payment, the instrument is not negotiable. The mere existence of the requirement that another agreement be consulted is sufficient to destroy negotiability; it is irrelevant that examination of the other agreement does not reveal a condition precedent to payment. No instrument can, therefore, be negotiable which (1) is subject to another agreement, (2) refers to another agreement for the rights of the parties, or (3) incorporates another agreement. But the existence of another agreement on the same sheet of paper as the instrument does not make the instrument conditional unless the instrument is expressly made subject to the attached agreement. By the same token, an instrument which lacks an essential element of negotiability cannot be made negotiable by reference to a separate agreement which contains the requisite element.
>
> * * *
>
> While an instrument which is expressly made subject to another agreement is nonnegotiable, an instrument which merely

> refers to the existence of another agreement is negotiable. As long as reference need not be made to the other agreement to determine the whether payment is due, the instrument is not deemed to be conditional. No condition to payment will be implied by the reference. Thus, a party may refer to another agreement for record keeping purposes without destroying its negotiability. An instrument may, therefore, be negotiable if it states that (1) it arises out of a separate agreement, (2) is drawn under a letter of credit, or (3) it is executed 'as per' or pursuant to another agreement.

4 Hawkland & Lawrence UCC Series § 3-105:02 (Rev Art 3) (1996) (citing cases).

Accordingly, the Court finds the loan documents at issue are nonnegotiable instruments. This conclusion applies equally to the Guaranty. See 5A Anderson UCC 3d § 3-104:34 (1994) ("[a] continuing guaranty is not a negotiable instrument and therefore is not governed by Article 3 of the Code. A separate written guaranty does not satisfy the requirements of UCC § 3-104 and therefore is not governed by Article 3").

FDIC cannot invoke holder in due course status because the notes sued upon are nonnegotiable instruments. "There cannot be a holder in due course of a nonnegotiable instrument." 6A Hawkland & Lawrence UCC Series § 3-302:01 n.1 (Rev Art 3) (1996). See Federal Deposit Ins. Co. v. Barness, 484 F. Supp. 1134, 1145 (E.D. Pa. 1980) ("[o]ur threshold task is to determine whether to use the Uniform Commercial Code or the common law of assignment in analyzing the issues in this case . . . . [T]he common law of assignment must be applied, for Barness' note to the Centennial

Bank is not a negotiable instrument"); Morgan Guar. Trust Co. of New York v. Staats, 631 A.2d 631, 636 (Pa. Super. Ct. 1993) ("[e]very holder of a negotiable instrument is deemed, prima facie, a 'holder in due course'") (citation omitted), appeal discontinued, 637 A.2d 288 (Pa. 1994); Stevwing v. Western Pennsylvania Nat'l Bank, 359 A.2d 793, 796 (Pa. 1976) ("at trial the parties stipulated that WPNB was not a holder in due course. In light of the fact that the note was not separately negotiable, this stipulation was unnecessary"); Cheltenham Nat'l Bank v. Snelling, 326 A.2d 557, 560 (Pa. Super. Ct. 1974) ("[a]ppellant contends, however, that Cheltenham cannot be a holder in due course because the instrument assigned to it . . . [was] a non-negotiable note . . . . Under the law of this Commonwealth, the note assigned to Cheltenham was nonnegotiable and Cheltenham took it subject to any defenses appellant could assert against Goodway"), cert. denied, 421 U.S. 965, 95 S. Ct. 1955 (1975); 5A Anderson UCC 3d § 3-302:4 (1994) ("[b]y definition there cannot be a holder in due course unless the paper is negotiable").

Finally, the Court finds factual issues surrounding whether the FDIC took the loan documents in good faith without notice of any defenses against them or claims to them. Factual questions exist regarding whether the FDIC knew of Defendants' claims and defenses when it purchased the loan documents, especially in light of the fact that Defendants submitted a proof of claim. In addition, factual questions arise regarding whether the FDIC is actually the holder of the documents in question.

(<u>Compare</u> Greenberg Aff. ¶ 19 ("I have knowledge of the matters contained in the payoff statement [-- sent from Knutson Mortgage Corporation to RPC-Mitchell/Titus, Inc. --]"), <u>with</u> Evans Aff. ¶ 34 ("[i]n addition to the loans at issue in this case, Atlantic Federal had made two other loans to Parkway which were unrelated to Five Logan Square. Following the takeover of Atlantic Federal, RTC sold these other loans to third parties")).

Accordingly, the Court denies FDIC's request for summary judgment based on holder in due course status.

4. Remaining Affirmative Defenses

a. Waiver and Estoppel

FDIC claims the defenses of equitable estoppel and waiver may not be asserted against either the RTC and FDIC as receivers. The cases relied on by FDIC, however, fail to substantiate that contention. <u>Hachikian v. Federal Deposit Ins. Corp.</u>, 96 F.3d 502, 506 n.4 (1st Cir. 1996) (emphasis supplied) states only that "estoppel as a means of binding the federal government to <u>unauthorized</u> agreements has been almost universally rejected." <u>Federal Deposit Ins. Corp. v. White</u>, 828 F. Supp. 304, 310 (D.N.J. 1993) rejected the assertion that no affirmative defense based on estoppel can be asserted against the FDIC, noting "that the many cases relied on by plaintiff do not hold that equitable defenses such as estoppel and waiver can <u>never</u> be asserted against the FDIC." <u>White</u> ultimately struck those defenses, but only because "public policy clearly militate[d] against the assertion of the equitable defenses." Id. at 311. Finally, Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 313 (E.D. Pa. 1993) remarked that "as a rule, courts have been reluctant to apply estoppel against the government . . . . based upon considerations of sovereign immunity, separation of powers and public policy." Farmer found, however, that "[f]or estoppel to be applied against the federal government, there must be at least some affirmative misconduct on the part of government upon which the defendant detrimentally relied." Id.

FDIC has failed to demonstrate that it is entitled to judgment as a matter of law on the estoppel and waiver defenses. Accordingly, those defenses proceed to trial.

b. Statute of Limitations & Laches

Defendants' statute of limitations defense and laches defense both fail. FDIC filed its lawsuit in a timely manner. The FIRREA prescribes the limitations period applicable to this action:

> **(A) In general**
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be --
> (i) in the case of any contract claim, the longer of --
>   (I) the 6-year period beginning on the date the claim accrues; or
>   (II) the period applicable under state law;
>
> * * *
>
> **(B) Determination of the date on which a claim accrues**

> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim . . . shall be the later of --
>
> (i) the date of the appointment of the Corporation as conservator or receiver;
>
> or
>
> (ii) the date on which the cause of action accrues

12 U.S.C.A. § 1821(d)(14)(A), (B). The FIRREA looks to the limitations period imposed under state law. The relevant Pennsylvania statute applies a 4 year limitations period <u>inter alia</u>:

> (7) An action upon a negotiable or nonnegotiable bond, note or other similar instrument in writing. Where such an instrument is payable upon demand, the time within which an action on it must be commenced shall be computed from the later of either demand or any payment of principal of or interest on the instrument.
>
> (8) An action upon a contract, obligation or liability founded upon a writing not specified in paragraph (7), under seal or otherwise, except an action subject to another limitation specified in this subchapter.

42 Pa. Cons. Stat. Ann. § 5525(7), (8) (Supp. 1997).

Because the 6 year period prescribed by the FIRREA is greater than the 4 year limitations period articulated by state law, the FIRREA controls. In the instant case, the RTC was appointed receiver on January 11, 1990. The six year statute of limitations begins to run on the later of (1) the date RTC becomes Receiver or (2) the date prescribed by state law. Here, the suits were filed on January 10, 1996, clearly within the six year period.

c. Failure of Consideration

The FDIC requests summary judgment with respect to the failure of consideration defense on the basis of the holder in due course doctrine, D'Oench, Duhme, and § 1823(e)(1). Since none apply in the instant case, the FDIC has failed to prove it is entitled to judgment as a matter of law with respect to the failure of consideration defense.

d. Repudiation

The FIRREA provides, with respect to repudiation:

> **(e) Provisions relating to contracts entered into before appointment of conservator or receiver**
>
> **(1) Authority to repudiate contracts**
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease --
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.
>
> **(2) Timing of Repudiation**
>
> The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.
>
> **(3) Claims for damages for repudiation**

(A) In general

Except as otherwise provided in subsection (C) [**Measure of damages for repudiation of financial contracts**] and paragraphs (4) [**Leases under which the institution is the lessee**], (5) [**Leases under which the institution is the lessor**], and (6) [**Contracts the for sale of real property**], the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be--

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of sub-paragraph (A), the term "actual direct compensatory damages" does not include --

(i) punitive or exemplary damages

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

12 U.S.C.A. § 1821(e)(1), (3).

This Court has already concluded that Defendants' failure to file suit within 60 days of the denial of their proof of claim precludes them from asserting Counterclaims for breach of contract and repudiation. Non-compliance with the administrative procedure, however, does not prevent Defendants from asserting repudiation as an affirmative defense. Defendants may off-set statutory damages for repudiation against the FDIC's recovery. The jurisdictional bar will not preclude repudiation damages which are actual, direct, compensatory damages -- to the extent of the claim asserted by the FDIC.

Moreover, whether the repudiation took place within a reasonable period presents a fact sensitive question more appropriate for jury resolution and better addressed under Fed. R. Civ. P. 50 than Fed. R. Civ. P. 56(c). Accordingly, Defendants' repudiation defense proceeds to trial.

III. Conclusion

FDIC's Motion to Dismiss Defendants' Counterclaims shall be granted. The Court will deny FDIC's Motion to Strike Defendants' Affirmative Defenses. The Court will grant in part and deny in part FDIC's Motion for Summary Judgment. The Motion is granted with respect to Defendants' statute of limitations and laches defenses. The affirmative defenses of estoppel, waiver, failure of consideration, and repudiation will proceed to trial.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor to RESOLUTION TRUST CORPORATION In Its Capacity As Receiver For Atlantic Financial Savings, F.A.	:	CIVIL ACTION
v.	:	
PARKWAY EXECUTIVE OFFICE CENTER	:	NO. 96-121
FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor to RESOLUTION TRUST CORPORATION In Its Capacity As Receiver For Atlantic Financial Savings, F.A.	:	CIVIL ACTION
v.	:	
RICHARD L. EVANS and HELENE EVANS	:	NO. 96-122

O R D E R

AND NOW, this 15th day of August, upon consideration of Plaintiff's Motion to Dismiss Counterclaims, Motion to Strike Affirmative Defenses, and Motion for Summary Judgment (Doc. Nos. 22, 23), Defendants' Brief in Opposition thereto (Doc. Nos. 26, 27), Plaintiff's Reply (Doc. No. 30), Defendant's Surreply (Doc. No. 32), Plaintiff's Supplemental Memorandum (Doc. No. 33), Defendants' Supplemental Brief (Doc. No. 34), and an Oral Argument held on December 11, 1996 (Doc. No. 32), **IT IS HEREBY ORDERED THAT**:

1. Plaintiff's Motion to Dismiss Counterclaims is **GRANTED.**

2. Plaintiff's Motion to Strike Affirmative Defenses is **DENIED**.

3. Plaintiff's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** with respect to Plaintiff's statute of limitations defense and laches defense. The Motion is **DENIED** in all other respects.

BY THE COURT:

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John R. Padova, J.