No. 98-1953

In the Supreme Court of the United States

SEARCY M. FERGUSON, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly applied the principle that the federal government is not liable for unauthorized acts of its agents to conclude that a transaction in which petitioner paid off three promissory notes held by the Federal Deposit Insurance Corporation did not discharge petitioner's liability on six other notes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 164 F.3d 894. The opinions and orders of the district court (Pet. App. 14a-42a, 43a-48a, 74a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1999. A petition for rehearing was denied on March 8, 1999 (Pet. App. 76a-77a). The petition for a writ of certiorari was filed on June 7, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986 and 1987, petitioner obtained, for himself or as trustee of family trusts, more than $2 million in loans from Union Bank and Trust (the Bank), of which he was an officer, director, and major stockholder. Pet. App. 2a, 15a-16a, 56a. The loans were memorialized in a series of nine promissory notes (the Notes). *Ibid.* The Bank failed in 1988. *Ibid.*

On May 5, 1988, respondent, the Federal Deposit Insurance Corporation (FDIC), was appointed as receiver for the Bank. Pet. App. 2a, 89a. All nine of petitioner's loans were delinquent at that time. *Id.* at 2a. On the same date, the FDIC in its capacity as receiver transferred petitioner's Notes, and the collateral securing them, to itself acting in its corporate capacity. See *id.* at 2a; see also *id.* at 10a, 78a-80a.

In September 1988, petitioner agreed to sell more than 3000 acres of real property. Pet. App. 3a; see App., *infra*, 2a-3a. Of the property to be sold, one parcel of approximately 700 acres in Kaufman County, Texas, served as all or part of the collateral for seven of the nine Notes. *Ibid.* Petitioner sought to have the FDIC release its liens on that property, negotiating with FDIC liquidation assistant Ronald Bieker. Pet. App. 2a-3a. In November 1988, petitioner's escrow agent sent the FDIC three checks, in amounts equal to the principal and interest outstanding on three of the Notes, together with seven "standard Texas release of lien forms," each of which recited that "the 'holder of the note acknowledges its payment and releases the property from the lien.'" *Id.* at 3a. FDIC employee Anna Croteau signed the releases on behalf of the FDIC, thereby freeing the Kaufman County property from all liens associated with the Notes. *Id.* at 3a, 132a-

133a. Release of the collateral was specifically approved by the FDIC's Senior Credit Review Committee (the Credit Review Committee). App., *infra*, 1a-4a.[1]

2. Petitioner and the FDIC disagree about the intended effect of the November 1988 transaction. See Pet. App. 3a. In November 1991, petitioner sued the FDIC (naming it as a defendant in its capacity as receiver for the Bank). He contended, among other things, that his payments in 1988 settled his entire liability on all the Notes and that the FDIC should be precluded from any further recovery. *Id.* at 4a, 19a. The FDIC contended, to the contrary, that the 1988 transaction discharged petitioner's liability only on the three Notes corresponding to the three checks it received from the escrow agent, and it counterclaimed for all amounts outstanding on the remaining six Notes. *Ibid.* In 1993, the district court granted the FDIC's motion to correct the caption of the proceeding to indicate that the FDIC was properly sued (and counterclaimed) in its corporate capacity as liquidator of the

[1] Petitioner asserts (Pet. 8) that the 1988 transaction was subject to the "express condition" that the FDIC was "act[ing] as receiver" for the Bank. The escrow agent's letter (Pet. App. 132a-133a) and the releases signed by Ms. Croteau (see *id.* at 135a-157a) refer to the FDIC as receiver, but there is no indication that those references were considered material to, let alone an "express condition" of, the FDIC's acceptance of petitioner's payments on the three Notes in question (which were actually held by the FDIC in its corporate capacity). Petitioner also states (Pet. 3) that the FDIC memorandum recording the Credit Review Committee's approval of the release of collateral must have been "backdated" because it "contained a fact [of] which the FDIC had no knowledge until later." The transcript excerpt petitioner cites, Pet. App. 117a, provides no evident support for that assertion, which the FDIC disputes.

Bank—the capacity in which it had held the Notes since May 1988—rather than as the Bank's receiver. See *id.* at 78a-80a.[2]

The district court granted the FDIC's motion for summary judgment on petitioner's claim that the 1988 transaction had extinguished any right to enforce the six outstanding Notes. Pet. App. 4a, 23a-25a. The court held that petitioner had failed to produce any evidence to rebut the FDIC's showings (i) that its Credit Review Committee did not approve settlement of all petitioner's obligations, and (ii) that Bieker and Croteau, the individual FDIC employees who respectively negotiated with petitioner and signed the release-of-lien forms, did not have independent authority to release petitioner's liability on the remaining Notes (even if they had purported to do so, which the FDIC denied). *Id.* at 17a, 19a, 24a-25a. After a jury trial on other issues, the court entered judgment for the FDIC for $520,797 in principal and interest on the outstanding Notes. *Id.* at 5a.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court first rejected (*id.* at 6a-11a) petitioner's argument that under *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), the district court should have applied Texas law to determine whether Bieker and Croteau had the authority to bind the FDIC to the global settlement petitioner claimed they had entered into with him in 1988. Noting that in this case "it is the action of the Government agents and their authority to so act that is at issue, rather than the impact on the FDIC, acting as

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[2] Petitioner states that the district court initially denied the motion to restyle the case. Pet. 3, 9. That is incorrect. The order petitioner cites (Pet. App. 74a-75a) denied the FDIC permission to enter the suit in its capacity as liquidator of *a different bank*.

receiver, of imputing the prior acts of agents of the failed bank" (Pet. App. 10a), the court explained that *O'Melveny* "did not purport to overrule case law holding that the Government is not bound by the actions of agents acting outside the scope of their authority" (*id.* at 8a-9a).[3] Applying that principle, the court observed that the "summary judgment evidence presented by the FDIC shows that the Credit Review Committee was solely responsible for the approval of settlements and that it did *not* approve a global settlement." *Id.* at 12a. Petitioner had presented neither any evidence that Bieker and Croteau had the authority to enter into a global settlement of all petitioner's obligations to the FDIC (even if they had purported to do so), nor "any evidence upon which [the court could] conclude that a *reasonable* person, exercising diligence and discretion, would have believed" that they had such authority. *Id.* at 12a-13a. The court accordingly affirmed the district court's summary judgment in favor of the FDIC. *Id.* at 13a.

ARGUMENT

1. We are informed that on June 30, 1999, the FDIC sold the right to recover on the judgment entered by the district court in this case (and transferred the underlying Notes) to SMS Financial L.L.C. (SMS). Under the terms of the contract of sale, SMS is

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[3] The court emphasized (Pet. App. 10a-11a) that this case was different from cases, like *O'Melveny*, where the FDIC was acting only as receiver of a failed institution, because in this case "the FDIC was acting in its *corporate* capacity as the holder of [petitioner's] notes." The court also noted (*id.* at 10a) that this case involved only the application of long-established federal law, rather than "the *creation* of a substantive federal common law rule of decision."

obligated to file appropriate papers with this Court seeking to remove the FDIC as the respondent in this case and to substitute itself as the real party in interest. Because no such substitution has yet taken place, and because the petition raises issues relating to the conduct of the FDIC as holder of the Notes, we submit this brief in opposition on behalf of the FDIC.[4]

2. As the court of appeals recognized (Pet. App. 8a-9a, 11a-12a), the federal government is not bound by unauthorized acts or omissions of its agents. See, *e.g.*, *OPM* v. *Richmond*, 496 U.S. 414, 419-424 (1990); *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 63 & n.17 (1984); *Costello* v. *United States*, 365 U.S. 265, 281 (1961); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Sutton* v. *United States*, 256 U.S. 575, 579-580 (1921); *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-737 (1824) (Story, J.). That principle applies to employees of the FDIC, transacting business on its behalf. *Hachikian* v. *FDIC*, 96 F.3d 502, 504-506 (1st Cir. 1996); cf. *Kershaw* v. *RTC*, 987 F.2d 1206, 1209-1210 (5th Cir. 1993) (applying same principle to employees of Resolution Trust Corporation). Congress created the FDIC and endowed it with important powers and responsibilities, to be exercised "by its Board of Directors, or *duly authorized* officers or agents." 12 U.S.C. 1819(a)(Seventh) (emphasis added). Judicial enforcement of *unauthorized* contracts would both "expand the power of federal officials beyond specific legislative limits," *Hachikian*, 96 F.3d at 506 (quoting *Falcone* v. *Pierce*, 864 F.2d 226, 229 (1st Cir. 1988)), and permit the

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[4] We have confirmed that petitioner's counsel is aware of the transfer of the judgment and Notes to SMS, and that counsel for SMS is aware that a petition is pending before this Court. We will provide counsel for SMS with a copy of this brief.

improper depletion of deposit insurance funds collected by federal authority and maintained for public purposes.

In this case, both courts below properly concluded that the FDIC's Credit Review Committee, the only body with the delegated authority to compromise petitioner's liability on the Notes, never authorized a global settlement with petitioner. Pet. App. 12a, 24a. The Committee authorized only the release of all the FDIC's liens on petitioner's Kaufman County property (which formed all or part of the security for seven of the nine Notes), in connection with petitioner's sale of that property and his payment of the largest outstanding Note. See *id.* at 3a, 12a, 17a, 24a; App., *infra*, 1a-4a.[5] Both courts also found that petitioner had failed to adduce any evidence that could rebut the FDIC's showing that the employees with whom he dealt had no power to conclude a global settlement with him, even if they had purported to do so. Pet. App. 12a, 24a. As both courts recognized (see *id.* at 5a, 8a, 13a, 25a), that conclusion disposes of petitioner's claim that the 1988 transaction bars enforcement of the remaining Notes in accordance with their terms.

In any event, that claim is without merit. As the FDIC has consistently maintained (see Pet. App. 3a-4a, 17a), no FDIC employee ever purported to enter into a global settlement with petitioner.[6] Thus, although the

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[5] Petitioner also used proceeds from the same sale to discharge two of the other Notes. See Pet. App. 3a.

[6] Petitioner states that in 1988 the "FDIC told the escrow holder that a settlement agreement covering all notes had been reached." Pet. 2. He cites no record support for that assertion, however, and we are aware of none. Similarly, although petitioner asserts that "[t]he documents stated that the payment was to be made * * * in full settlement of all nine notes" (*ibid.*), the escrow

courts below correctly held that the employees with whom petitioner dealt had no authority to bind the FDIC to any agreement other than that approved by the Credit Review Committee, even a different resolution of that question would not change the ultimate outcome of this case.[7]

3. Petitioner argues (Pet. 5-8) that the court of appeals' holding that federal law, rather than state law, governs the question of an employee's authority to bind the FDIC to an otherwise unauthorized agreement (Pet. App. 8a, 11a) conflicts with this Court's decisions in *Atherton* v. *FDIC*, 519 U.S. 213 (1997), *O'Melveny & Meyers* v. *FDIC*, 512 U.S. 79 (1994), and *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). As the court below explained (Pet. App. 6a-10a), however, *O'Melveny* applied *Erie*'s general principle that "[t]here is no federal general common law" (304 U.S. at 78) in the context of

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agent's letter that he cites (Pet. App. 132a-133a) contains no such statement and, indeed, rather clearly indicates that each of the three checks transmitted with the letter represented the "loan payoff due" on a specific loan. Moreover, as the FDIC argued below (see *id.* at 3a), petitioner's effort to settle his liability on the remaining Notes in early 1989 strongly suggests that at that time he shared the FDIC's understanding that the 1988 transaction had resolved his liability on only three of the nine Notes.

[7] Similarly, there is no substance to petitioner's accusations (Pet. 8-11) of unethical or otherwise improper conduct on the part of the FDIC and its employees. Whatever confusion there may have been, either at the time of the 1988 transaction or during the course of this litigation, about the capacity in which the FDIC held petitioner's Notes (see, *e.g.*, Pet. App. 9a-10a, 78a- 80a), the FDIC fully performed the agreement it actually made. The FDIC has never attempted to collect additional amounts on the three Notes discharged in 1988, or to give further effect to any of the seven liens on petitioner's former Kaufman County property that were validly released as part of the 1988 transaction.

litigation conducted by the FDIC as receiver, involving "primary conduct on the part of private actors that ha[d] already occurred" before the beginning of the receivership. See *O'Melveny*, 512 U.S. at 88. This case, by contrast, involves "primary conduct" by employees of the FDIC, in the course of their official duties, after the FDIC had acquired title to the Notes. See Pet. App. 10a ("Here, it is the action of the Government agents and their authority to so act that is at issue."). The legal effect of such conduct by federal employees, and particularly the question whether it can bind the FDIC (and, by extension, the federal government and the public), is properly a matter of federal law.[8]

Similarly, *Atherton* rejected the use of a federal common law standard of care to assess the private business conduct of bank officers. See 519 U.S. at 217-226. Nothing in that decision calls into question the strong federal interest in the application of federal law

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[8] Application of state law would not change the outcome in this case. Even apart from the point that no FDIC employee ever in fact agreed to (or ratified) a global settlement (see pp. 7-8, *supra*), the court of appeals' determination that petitioner failed to raise any genuine issue concerning Bieker's and Croteau's actual or apparent authority to agree to such a settlement (see Pet. App. 12a-13a) would be as fatal to petitioner's claims under state law as under federal law. Under Texas law, a principal may be bound by the acts of an agent with apparent authority, but apparent authority exists only when the principal's acts would lead a reasonably prudent person using diligence and discretion to suppose that the agent has the authority he or she purports to exercise. See *Southwest Title Ins. Co.* v. *Northland Bldg. Corp.*, 552 S.W.2d 425, 428 (Tex. 1977); *Southwest Land Title Co.* v. *Gemini Fin. Co.*, 752 S.W.2d 5, 7 (Tex. App. 1988, no writ). The court of appeals applied essentially the same standard under federal law, and concluded that petitioner could not meet it. Pet. App. 13a.

to determine whether the government may be bound by the unauthorized acts or omissions of its own agents. Furthermore, none of the lower-court cases cited by petitioner (Pet. 6-7) conflicts with the court of appeals' holding that federal law governs the question whether an employee can bind the FDIC to an unauthorized agreement. The lower courts' application of established principles to the facts of this case presents no issue warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999

APPENDIX

RELEASE OF COLLATERAL

DATE:	November 9, 1988
FDIC BOOK VALUE:	$1,010,000.00
DUE:	$ 270,921.00
MONTHS PAST DUE:	12

MEMORANDUM TO: G. Michael Newton
Regional Director

SUBJECT: LQMO-404, Addison Consolidated Office
2813, Union Bank and Trust
Dallas, Texas - In Liquidation
Asset Number: See Multi-Asset Line Sheet

OBLIGOR(S): Searcy M. Ferguson Jr. Revocable Trust, Searcy Ferguson Jr.

RECOMMENDATION: Release collateral for payment of $1,365,000.00 plus accrued interest of approximately $176,369.37 or 99% of net appraised value.

DESCRIPTION OF COLLATERAL BEING RELEASED: A 701.4 acre ranch located in Kaufman County, Texas containing various improvements including two wood frame homes and several barns.

	COLLATERAL BEING RELEASED
AVERAGE APPRAISED VALUE:	$1,548,000.00
LESS PRIOR LIENS:	$ -0-
NET APPRAISED VALUE:	$1,548,000.00
LESS EXPENSES TO BE PAID:	$ -0-
RESIDUAL VALUE:	$ N/A
COLLATERAL BEING REFINANCED BY OR SOLD TO:	Private Investors
AMOUNT OF REFINANCING OR SALES PRICE:	$6,170,000.00

(This sales transaction includes a total of 3,522 acres however, the FDIC has a security interest in only the 701.4 acres. The sales price on this land equates to $1,752 per acre however the FDIC negotiated a payment of $1,947 per acre for the 701.4 tract.)

VALUE DETERMINED BY:	
FDIC APPRAISAL DATED:	8-06-88
NADA BOOK DATED:	N/A
COST-DATE ACQUIRED:	N/A
OTHER:	N/A
NATURE AND AMOUNT OF PRIOR LIEN:	None
NATURE OF EXPENSES TO BE PAID:	None
ESTIMATED COST FOR FDIC TO FORECLOSE/REPOSSESS:	$50.00

ESTIMATED TIME FOR FDIC TO FORECLOSE/REPOSSESS: 3 Months

ESTIMATED TIME FOR FDIC TO MARKET AND SALE: 6 Months

ALL OBLIGOR(S) CONSENT TO RELEASE: YES x NO __
(If no, explain below)

BRIEF DESCRIPTION OF REMAINING COLLATERAL: Deed of Trust on approximately 480 acres in WillBarger County, Texas, Deed of Trust on approximately 10 acres in Kaufman County, Texas and security interest in 5,500 shares of Interfirst stock.

DISCUSSION AND JUSTIFICATION: Mr. Ferguson, an Attorney, was the former Chairman of the Board of Union Bank & Trust. Bank files reflected that Mr. Ferguson borrowed large sums from the failed bank to purchase real estate and "operating expenses" for his ranch and various ventures. The 701.4 acres held as collateral is the personal residence of the debtor. Direct communications between Mr. Ferguson, his attorney and the FDIC has culminated in the debtor arranging for the sale of this property in a market that has been extremely slow. This transaction will pay in full the outstanding principal and accrued interest on Asset Number 151066912 which is participated to five different banks. Net to the FDIC will be $365,000 plus accrued interest. Assets #151067282, 151067803, 151068538, 151068793, 151066623 and 151067126 are also secured by inferior liens (among other collateral - See

Multi-Asset Line Sheet for details) on the 701.4 acre tract.

The debtor has also made arrangements to retire two additional assets the week of November 14, 1988 and will be making a proposal addressing the balances due on the remaining assets from the failed Union Bank & Trust. A case will soon follow to address his proposal.

/s/ RONALD F. BIEKER 11/9/88
RONALD F. BIEKER Date
Liquidation Assistant
Real Estate A

/s/ STELLA G. MCANALLY 11/9/88
STELLA G. MCANALLY Date
Section Chief
Real Estate A

/s/ [Illegible] 11/9/88
Senior Credit Review Committee Date
Addison Consolidated Office

APPROVED UNDER DELEGATED AUTHORITY: #4

Dallas Regional Office
Senior Credit Review Committee

By: /s/ [Illegible] 11/9/88
G. MICHAEL NEWTON Date
Regional Director

[Attachments Omitted]