IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2377

SRSB-IV, LTD., et al.,

Plaintiffs,

GERALD BROWN and BURTON STERMAN,

Plaintiffs-Appellants,

VERSUS

CONTINENTAL SAVINGS ASSOCIATION, et al.,

Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Manager of the FSLIC Resolution Fund,
as Statutory Successor to the FSLIC as
Receiver of Mainland Savings Association,

Intervenor-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-86-1827)

(August 18, 1994)

Before GARWOOD, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Brown, Sterman & Associates, Inc. ("BSA"), executed a promissory note guaranteed by two of its officers. FDIC, the current possessor of the note, won the right to seek a deficiency against the guarantors, who appeal, arguing that FDIC cannot prove that it is the holder or owner of the note and that the summary judgment was procedurally defective. Finding no error, we affirm.

I.

BSA, a Texas corporation, was engaged in the real estate business and, in 1982, executed a promissory note payable to Mainland Savings Association in the amount of $4,600,000. The principal was due on December 30, 1983. Pursuant to a security agreement, the note was secured by certain of BSA's real property.

Brown and Sterman, the officers and directors of BSA, executed separate guaranties on the same day as the note. As collateral for the guaranties, Brown and Sterman ("the guarantors") put up their one thousand shares of stock in BSA.

On December 30, 1983, Mainland and BSA extended the due date of the note to June 30, 1984. The note went into default on May 7, 1984, when two liens were filed against the real estate securing it. On June 29, 1984, BSA filed for bankruptcy under chapter 11;

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

BSA's bankruptcy was later converted to chapter 7.

Mainland seized the stock and real property and held a public auction to sell the stock. The only bid received was from Mainland, for $20,000, which Mainland applied to the principal.

II.

This suit was brought by the guarantors and several other plaintiffs against Continental Savings Association in Texas state court. Mainland intervened to assert the claim at issue in this appeal, arguing that it was entitled to collect the remaining balance of the note from the guarantors.

On April 4, 1986, the Federal Home Loan Bank Board declared Mainland insolvent and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver. FSLIC removed the case to federal court.

FSLIC moved for summary judgment. In response, the guarantors argued that the sale by Mainland was commercially unreasonable but did not dispute other issues.[1] The district court granted partial summary judgment for FSLIC on liability and scheduled a jury trial on whether the sale of stock was commercially reasonable.[2] On August 9, 1989, FDIC, as receiver for Mainland, succeeded to the

[1] Commercially unreasonability of a foreclosure sale bars a creditor from recovering any deficiency.

[2] The district court granted FSLIC's motion for partial summary judgment against three other parties, Bennett Rosenthal, Ralph Strader, and Gary Strader, on both liability and commercial reasonableness.

rights of FSLIC.[3] The jury found that the sale was commercially reasonable.

On appeal, a panel of this court held that the district court had contravened Greathouse v. Charter Nat'l Bank-Southwest, 851 S.W.2d 173 (Tex. 1992), by imposing the burden of proving commercial reasonableness on the guarantors.[4] The panel reversed and remanded for a new trial. SRSB-IV, Ltd. v. Continental Sav. Ass'n, 979 F.2d 39, 40 (5th Cir. 1992). The reversal included "all interlocutory and preliminary judgments on liability and/or damages upon which the final judgment rests." Id.

At the pretrial conference for the second trial, neither party indicated that any issue would be tried except commercial reasonableness, and the pretrial order mentioned only the issue of commercial reasonableness. At the beginning of trial, there arose a dispute as to whether liability or damages would be submitted to the jury. The district court ruled that the jury would determine only the issue of commercial reasonableness and not liability. The court stated that it would treat FDIC's previously filed motion for summary judgment as still pending and gave the guarantors until February 16, 1993, to file any new response to that motion.[5]

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[3] 12 U.S.C. § 1821a(a)(5) (providing that FDIC would succeed FSLIC as receiver with respect to pre-1989 savings and loan receiverships); see also FDIC v. Claycomb, 945 F.2d 853 (5th Cir. 1991), cert. denied, 112 S. Ct. 2301 (1992).

[4] At the time of trial, this court had not yet ruled that the burden of proof is on the FDIC.

[5] The district court stated:

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At the close of FDIC's evidence, the guarantors moved for judgment as a matter of law, based upon FDIC's failure to prove liability and damages; the court denied the motion. At the end of the presentation of the guarantors' evidence, the court denied a similar motion.

The jury rendered a verdict in favor of FDIC on the issue of commercial reasonableness. After trial, the district court granted

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In January, 1989, the Court granted the FDIC's motion for summary judgment as to Gerald Brown and Burton Sterman's liability on the note and guaranties. The case then proceeded to trial on the remaining fact questions regarding the commercial reasonableness of the foreclosure sale of the Brown, Sterman & Associates stock, which was security for the debt. The Court ruled prior to the trial in January, 1992, that Brown and Sterman would bear the burden of proving that Mainland did not dispose of the collateral in a commercially reasonable manner.

In November, '92, the Fifth Circuit remanded this case for a new trial in accordance with the pleadings and proof requirements established by the Supreme Court of Texas in the Greathouse case. In the order of remand, the Circuit reversed "the final judgment" and then it goes on "including all interlocutory and preliminary judgments on liability and/or damages upon which the final judgment rests."

Brown and Sterman now wish to try the issue of liability as well as commercial reasonableness of the sale. At the pretrial conference on January 27th, 1993, neither party indicated a belief that any issue other than commercial reasonableness should be tried again. Further, neither party has filed supplements to the pretrial order, designated new witnesses or submitted new jury issues.

No apparent trial preparations have been made to try the issue of liability to the jury. Therefore, I'm ruling as follows. The trial will proceed as it's going right now only on the issue of commercial reasonableness of the foreclosure sale. The Court will consider the FDIC's original motion for summary judgment filed April 8th, 1987, as to Brown and Sterman. The Court will treat that motion as pending and the FDIC need not file a new motion.

Brown and Sterman may file a new response within 10 days of today's notice. In effect, today is February 2nd. They need to file it, let's say, on or before February 16th, since we have a long Federal weekend that time. Make it February 16th. If they do file a new response, then the FDIC may file a reply within 10 days after the response is filed.

FDIC's motion for partial summary judgment as to liability and damages and entered final judgment in favor of FDIC.

On appeal, the guarantors claim that the district court erred as a matter of law by denying their motion for summary judgment. Furthermore, the guarantors argue that the district court erred in granting partial summary judgment for FDIC on liability and damages.

III.

The guarantors say that the district court erred when it denied their motion for judgment as a matter of law. They contend that FDIC failed to prove three elements at trial: (1) the existence and validity of the note and guaranty agreement, (2) that the FDIC is the present owner and holder of the note and guaranties, and (3) that a certain balance is due and owing.

For purposes of argument only, we assume that at least one of three elements claimed by the guarantors is indeed a requirement for which there is no support in FDIC's trial evidence.[6] The failure of FDIC to produce evidence of these elements at trial would hardly be surprising, though, as the pretrial order called for trial of only the issue of commercial reasonableness.

We disagree with the guarantors' position that "it is elementary that the FDIC was obligated to prove all the elements of the case to the jury." A district court often disposes of issues

[6] We consider later whether these elements of FDIC's case are borne out on summary judgment.

before they can reach the jury. In this case, the court ruled on liability and damages after trial through the mechanism of summary judgment.

IV.

The guarantors argue that FDIC waived the issues of liability and damages because it failed to raise them at the pretrial conference and because it did not attempt to include them in the pretrial order. In the situation presented here, we disagree.

FED. R. CIV. P. 16(a) authorizes district courts to convene a pretrial conference[7] at which the parties may take actions to narrow the issues.[8] A pretrial order, to be drafted after the pretrial conference, provides the framework for the upcoming trial.[9]

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[7] FED. R. CIV. P. 16(a) provides,

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; [sic] (5) facilitating the settlement of the case.

[8] FED R. CIV. P. 16(c)(1) provides, "At any conference under this rule considerations may be given with respect to (1) the formulation and simplication of the issues, including the elimination of frivolous claims or defenses[.]"

[9] FED. R. CIV. P. 16(e) provides,

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

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In light of the pretrial order's purpose of narrowing the issues, this court has held that the party with the burden of proof waives any claims not included in the pretrial order. See Pacific Indem. Co. v. Broward County, 465 F.2d 99, 103 (5th Cir. 1972) ("The failure to indicate in the pre-trial order that an issue remains to be resolved at trial usually precludes the offer of proof on the issue at trial))to the detriment of the party who has the burden to prove the issue."); see also Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550, 554 (5th Cir. 1992). Under this principle, FDIC may have waived its right to a jury trial on liability and damages.

It does not follow, however, that in this case the FDIC had completely waived issues not included in the pretrial order. Given the facts that (1) the district court in the first trial had granted summary judgment on the issues of liability and damages, (2) the only issue that went to trial in the first instance was commercial reasonableness, and (3) the only issue addressed in our opinion on appeal was commercial reasonableness, the district court acted reasonably to assume that the only issue to be retried was the sole issue of commercial reasonableness.

Further, it seems that under these circumstances, it was not an abuse of discretion for the district court to require less than strict adherence to a pretrial order that appeared to be based upon a misunderstanding. In these circumstances, each party might

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reasonably have believed that the other party had accepted the district court's earlier disposition of these questions. When the plaintiff indicated otherwise, only after the pretrial conference, the district court did not abuse its discretion by ruling that the summary judgment motion was pending on these issues and that it would dispose of them after trial.

V.

As a threshold matter, the guarantors contend that FDIC should have refiled its motion in order for the district court to consider it in the context of the second trial. We reject this argument for two reasons. First, the summary judgment motion from the first trial was still pending before the district court. Although the appellate order reversed certain judgments and orders of the district court, it did not affect the validity of motions by the parties.

Second, the district court could have granted summary judgment even if FDIC had not moved for it. As the Court stated in Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986), "District courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." (Citations omitted.) See also RTC v. Ruggiero, 994 F.2d 1221, 1226 (7th Cir. 1993) ("The [Federal Rules of Civil Procedure] do not forbid a judge to grant summary judgment on his own initiative. Of course, he can grant summary judgment only if the conditions in Rule 56 are satisfied,

but those conditions do not include a requirement that a party have requested summary judgment.") (citations omitted).

VI.

The guarantors next argue that a court cannot consider a motion for summary judgment once a jury trial has begun. We reject this argument as well. The Federal Rules of Civil Procedure place no limits on the timing of a ruling on summary judgment, and we have found no authority against ruling on a motion for summary judgment after trial.

The district court determined, albeit after trial, that there were no genuine issues of material fact regarding liability and damages. The right to jury trial does not include a right to try matters about which there is no genuine issue of material fact. Therefore, it was not error for the district court to rule on summary judgment after a jury trial on an issue different from that tried to the jury.

The guarantors cite Estate of Smith v. Tarrant County Hosp. Dist., 691 F.2d 207, 208 (5th Cir. 1982), in which we held that a district court could not implicitly convert a motion to dismiss into a summary judgment motion by considering facts outside the pleadings, then rule on the motion without giving notice to the losing party. Estate of Smith is inapplicable to this case, however. The district court did not implicitly convert a motion to dismiss into a summary judgment motion. Furthermore, the guarantors had notice that the district court would rule on summary

judgment.

VII.

The guarantors assert that FDIC is not a holder or owner of the note. In order to recover on a guaranty, the FDIC must establish that (1) the guarantors signed the guaranty agreement, (2) the FDIC is the present holder or owner of the note; and (3) the note is in default. NCNB Texas Nat'l Bank v. Johnson, 11 F.3d 1260, 1264 (5th Cir. 1994).[10]

Article 3 of the Uniform Commercial Code ("UCC"), which has been adopted in Texas in the Texas Business and Commerce Code, governs negotiable instruments such as promissory notes. A person may not sue to enforce a note unless he is a holder or owner of the note. Jernigan v. Bank One, Texas, N.A., 803 S.W.2d 774, 775 (Tex. App.))Houston [14th Dist.] 1991, no writ).

The UCC provides that a party who signs a note as a guarantor must pay the note if it is not paid when due. TEX. BUS. & COM. CODE ANN. § 3.416 (Vernon 1968). The UCC does not govern a guaranty contained in a separate document from the note.[11] Even so, we have

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[10] As for the guaranty issue, the guarantors have admitted that they guaranteed the note. Both guarantors testified at trial that they had guaranteed the note. In their appellate brief in the previous appeal, the guarantors stated, "On June 30, 1982, Brown, Sterman & Associates, Inc., a Texas Corporation ("BSA"), executed a promissory note to Mainland in the principal amount of $4,600,000.00 (the "Note"). . . . Brown and Sterman, officers and directors of BSA, executed personal guarantees for the Note." In the guarantors' response to FSLIC's motion for summary judgment filed in May 1987, they referred to themselves as "guarantors of the . . . loan" and "debtors." As to the default element, the guarantors do not dispute that the note is in default.

[11] FDIC v. Nobles, 901 F.2d 477, 480 (5th Cir. 1990); Uniwest Mortgage
(continued...)

relied upon article 3 of the UCC and its interpretive caselaw to define the words "holder" and "owner" in guaranty enforcement cases, even when the guaranty was executed separately.[12]

The UCC defines a holder as "a person who is in possession of . . . an instrument . . . drawn, issued or indorsed to him or to his order or to bearer or in blank." TEX. BUS. & COM. CODE ANN. § 1.201(20) (Vernon Supp. 1994). Based upon the statutory definition, there are two requirements that must be fulfilled before a person is a holder of an instrument. First, he must prove he possesses the instrument.[13] Second, the instrument must be drawn, issued, or indorsed (1) to him, (2) to his order, (3) to bearer, or (4) in blank.

The note was issued to Mainland, not the FDIC, the FDIC's order, the bearer, or in blank. The note contains no indorsements.

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Co. v. Dadecor Condominiums, 877 F.2d 431, 434 (5th Cir. 1989).

[12] In RTC v. Marshall, 939 F.2d 274, 277 (5th Cir. 1991), we held that the plaintiff had to establish four elements in order to prevail in its motion for summary judgment:

> (1) that the note and the guaranty agreement exist and are valid, (2) that the [plaintiff] is the present holder or owner of the note, (3) that the [debtor] defaulted on the note, and (4) that the [defendant] is liable under the guaranty agreement. See, e.g., Delta Savings & Loan Ass'n, Inc. v. A.C.V., Inc., 730 [750] F. Supp. 759, 761 (M.D. La. 1990); FSLIC v. Atkinson-Smith Univ. Park Joint Venture, 729 F. Supp. 1130, 1132 (N.D. Tex. 1989).

[13] According to 5 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-201:5 (3d ed. 1984),

> In order to have the status of holder, the plaintiff must have possession of the paper. A transferee of a note who has not yet acquired possession of it is not the holder of the note and therefore does not have a holder's right to receive payment of the note.

(Footnotes omitted.)

Therefore, FDIC is not a holder of the note. See Jernigan, 803 S.W.2d at 775-76 (holding that possessor of note is not holder if possessor is not the original payee and if the note had been indorsed to a third party).[14]

Even if the FDIC is not the holder, it can enforce the note if it is the owner. Waters v. Waters, 498 S.W.2d 236, 240-42 (Tex. Civ. App.))Tyler 1973, writ ref'd n.r.e.) (holding that owner can enforce note under the UCC).[15] For a party to prove that it is the owner of a note, it must prove the transaction through which the note was acquired. Jernigan, 803 S.W.2d at 777 (reasoning that in determining whether a party owns a note, "[a]bsent an indorsement . . . possession must be accounted for by proving the transaction through which the note was acquired"); Lawson v. Financial Am. Private Brands, Inc., 537 S.W.2d 483, 485 (Tex. Civ. App.))El Paso 1976, no writ).[16]

Ordinarily, an affidavit by the FDIC's custodian of records that the FDIC is the owner of the note is sufficient on a motion for summary judgment. A custodial affidavit is insufficient,

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[14] Although there is some authority that a federal receiver may automatically qualify for holder status under certain circumstances, see Bryan v. Bartlett, 435 F.2d 28, 34 (8th Cir. 1970) (SEC equity proceeding under the federal common law), we need not reach this issue, as the FDIC-receiver is an owner of the note under the UCC.

[15] Even though Tex. Bus. & Com. Code Ann. § 3.201(c) (Vernon 1968) provides that negotiation of a non-bearer instrument "takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner," a possessor of a non-bearer instrument without indorsement can still establish its right as owner. Waters, 498 S.W.2d at 242.

[16] See also Tex. Bus. & Com. Code Ann. § 3.201, comment 8 (Vernon 1968); id. § 3.307, comment 2.

however, when there is evidence in the record that there is a legitimate fear that the possessor of the note is not the owner and that some other entity might later demand payment. RTC v. Camp, 965 F.2d 25, 29 (5th Cir. 1992). Legitimate fear exists if the prior owner of the note sold unnamed assets to a third party before making the transaction through which the note was allegedly transferred to the party seeking to enforce the note, FDIC v. McCrary, 977 F.2d 192, 195 (5th Cir. 1992) (holding FDIC-corporate's custodial affidavit insufficient where FDIC-receiver sold unnamed assets to both FDIC-corporate and a third party), or if the note contains an indorsement to an entity other than the possessor. Selaiden Builders, 973 F.2d at 1253-54 (5th Cir. 1992); Jernigan, 803 S.W.2d at 776-77.

To prove the transfer of the note from Mainland to FSLIC, FDIC attached an affidavit by Leamon, FSLIC's custodian of records, stating,

> The FSLIC in its capacity as sole receiver for MSA [Mainland] has succeeded to and retained possession thereof all records and supporting documentation in conjunction with the operation of [Mainland]. The FSLIC is the current owner and holder of such records.
>
> I have read the Third Amended Petition in Intervention for Damages and Rescission, and the FSLIC's Motion for Partial Summary Judgment filed simultaneously herewith, and both of said instruments are true and correct based upon my personal knowledge and from information obtained from the books and records of MSA. Attached to both of such instruments are true and correct photocopies of promissory notes and unconditional guaranties, the originals of which are in the possession of the FSLIC.

In order to determine whether this custodial affidavit is sufficient to prove ownership, we must determine whether summary

judgment evidence establishes a legitimate fear that FDIC is not the owner of the note.[17]

A.

The guarantors argue that FDIC may not be the owner because only seven photocopied pages of the note have been entered into the record. The seventh photocopied page contains the signature of Gerald Brown as president of BSA. At the bottom of this page is the typewritten notation "Page 7 of 8 Pages," thus giving rise to the possibility that there is a missing eighth page containing an indorsement to a third party. Such an indorsement would destroy our faith in the Leamon affidavit as proof of ownership. Selaiden Builders, 973 F.2d at 1253-54; Jernigan, 803 S.W.2d at 776-77.

The Leamon affidavit states that the photocopy in the record is a true and correct copy of the actual note in the possession of FSLIC. We infer from this statement that either there is no eighth page or that the eighth page is completely blank. We therefore need not consider the possibility that the note was indorsed to a third party.

B.

The guarantors also contend that certain assets of Mainland were transferred to FDIC in its corporate capacity and to the

[17] The Leaman affidavit establishes that FSLIC was in possession of the note. Mere possession of a note payable to the order of another is not sufficient evidence to prove that one is the holder or owner. Camp, 965 F.2d at 29.

Allenpark Federal Savings and Loan Association ("Allenpark"). The guarantors, attempting to invoke the McCrary case, argue that there is a legitimate fear that FDIC as receiver is not the owner of the note. In McCrary, the FDIC, as receiver of the original payee, entered into contracts conveying certain unnamed assets to FDIC-corporate and certain unnamed assets to a third party. 977 F.2d at 193. The court held that the custodial affidavit offered by FDIC-corporate was insufficient to prove that FDIC-corporate was the owner of the note because the agreement to convey unnamed assets to a third party raised a legitimate fear that FDIC-corporate was not the owner. Id. at 195.

In this case, by contrast, there is no agreement transferring unnamed assets to a third party. The guarantors point us to a Federal Home Loan Bank Board memorandum authorizing FSLIC, as receiver, to enter into two agreements to transfer assets to the Allenpark and to FSLIC-corporate. But there is no evidence that the agreements were actually signed or that the agreements failed to specify the assets to be transferred. There being no evidence in the record creating a legitimate fear that FDIC is not the owner of the note, we conclude that the Leamon affidavit was sufficient to prove ownership.

VIII.

The guarantors argue that FDIC has provided no proof of the applicable rate of interest on the note. The interest rate on the note is "two percent (2%) per annum above the prime rate on ninety

(90) day loans to substantial and responsible commercial corporate borrowers in effect at Chase Manhattan Bank, New York, New York, from time to time." The guarantors cite FDIC v. Kralj, 968 F.2d 500, 507 (5th Cir. 1992), in which we held that a note is negotiable even if its interest rate is set at two percent above the prime rate charged by Chase Manhattan Bank. Because the guarantors cite to Kralj, and because Kralj concerned the issue of negotiability, we assume that the guarantors' position is that the note is nonnegotiable.

The guarantors' argument gets them nowhere. First, the guarantors do not explain why the nonnegotiability of the note would improve their legal position. Second, they do not distinguish the Kralj case, which involved an interest rate provision similar, if not identical, to the interest rate in the note guaranteed by the guarantors. The Kralj court held that the note was negotiable.

IX.

The guarantors challenge the admissibility of certain affidavits introduced by FDIC.[18] We have reviewed the guarantors' evidentiary challenges and find no error.

The judgment is AFFIRMED.

GARWOOD, Circuit Judge, specially concurring:

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[18] In addition to the Leamon affidavit, FDIC introduced an affidavit by Thomas F. Noons, a former assistant vice-president of Mainland, to verify the loan transaction between BSA and Mainland.

I concur. As to part VII of Judge Smith's opinion, I note that the FDIC appears in this suit purely in its capacity as sole receiver of Mainland Savings Association, the named payee in the note sued on. As such, the FDIC, wholly by operation of law, automatically succeeded to all right, title, and interest which Mainland had in the note. Once the FDIC proved, as it did here, that it was Mainland's duly appointed sole receiver under the relevant statutes, and that the note was payable to the order of Mainland, the FDIC, to establish it was the owner or holder of the note, had only to do what Mainland would have had to do had it not been put in receivership, namely prove its possession of the note unendorsed. Cases such as *FDIC v. McCrary*, 977 F.2d 192 (5th Cir. 1992), deal with the very different situation where the FDIC sues in its corporate capacity, claiming to be the transferee of the note from the FDIC in its capacity as receiver for the named payee in the note. *McCrary*'s concerns are not relevant in the present context.