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Banks Under Siege: The Civil, Criminal, Regulatory and Insurance Fallout from Mortgage Foreclosures and Bank Failures

FDIC Bank Failure Litigation: Understanding and Navigating the FDIC's Professional Liability and Mortgage Fraud Suits

Donna L. Wilson
BuckleySandler LLP
Los Angeles, CA

Kristopher Knabe
BuckleySandler LLP
Washington, DC

While the pace of bank failures from this current financial crisis may or may not be slowing down, depending on whom you ask, it appears that the efforts of the Federal Deposit Insurance Corporation ("FDIC") to recover losses from bank directors and officers, among others, is just ramping up. Since 2007, the number of failed banks has climbed to over 400, with seven failing in January 2012 alone.[1] However, in many instances the bank's end simply marks the beginning of the exposure to litigation risks for the directors, officers, and third parties that have done business with the failed institution. When insured depository institutions fail, typically they embark upon the lengthy receivership process of the FDIC. Throughout this process, the FDIC investigates the reasons for the bank's failure, determining whether to recover claims paid to depositors out of its Deposit Insurance Fund ("DIF").

Often, the FDIC focuses its investigation as to why the bank failed on the conduct of the bank's directors and officers. As of January 18, 2012, the FDIC has authorized suits against 391 individuals connected with 44 failed institutions for director and officer liability, seeking a total of at least $7.7 billion.[2] Increasingly, however, the FDIC has shifted its attention from these traditional targets, and has started pursuing mortgage fraud claims against individuals and entities that did business with the institution. Currently, the FDIC has 189 residential mortgage malpractice and fraud lawsuits pending, consisting of lawsuits filed and inherited.[3]

This focus on mortgage fraud by the FDIC is part of a larger anti-fraud initiative. Federal and state enforcement agencies are becoming more aggressive in their efforts to address mortgage fraud, targeting the full-spectrum of industry participants. This heightened focus on fraud began in November 2009, when President Obama established the inter-agency Financial Fraud Enforcement Task Force. Led by the Department of Justice ("DOJ") and comprised of a broad coalition of agencies, including the FDIC, this task force was designed to improve and coordinate investigations of mortgage fraud.[4] The most notable of the Task Force's initiatives has been "Operation Stolen Dreams," which led to 191 civil enforcement actions and the recovery of more than $196 million.[5] Most recently, the Obama administration announced another task force—the Residential Mortgage-Backed Securities Working Group—aimed at investigating abusive practices in the mortgage industry.[6] Paralleling the efforts at the federal level, many states have created their own mortgage fraud task forces and have announced joint efforts to pursue mortgage-related civil and criminal investigations.[7]

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[1] *Bank Failures in Brief*, FDIC, http://www.fdic.gov/bank/historical/bank/index.html (last visited February 6, 2012).

[2] *Professional Liability Lawsuits*, FDIC, http://www.fdic.gov/bank/individual/failed/pls/ (last visited February 6, 2012).

[3] *Id.*

[4] Pursuing claims of mortgage fraud has been a stated priority of Attorney General Holder. *See* Eric Holder, U.S. Att'y Gen., Remarks at the Financial Fraud Enforcement Task Force Press Conference (Nov. 17, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-091117.html ("We will investigate you, we will prosecute you, and we will incarcerate you.").

[5] Press Release, U.S. Dep't of Justice, Coinciding with One-Year Anniversary of "Operation Stolen Dreams," Three Loan Officers and a Title Agent Charged in $2.5 Million Reverse Mortgage and Loan Modification Scheme (July 6, 2011), http://www.justice.gov/opa/pr/2011/July/11-civ-884.html.

[6] Press Release, U.S. Dep't of Justice, Attorney General Holder Speaks at the Announcement of the Financial Fraud Enforcement Task Force's New Residential Mortgage-Backed Securities Working Group (Jan. 27, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120127.html.

[7] For example, California's Attorney General announced the creation of the "Mortgage Fraud Strike Force" in May 2011. Press Release, California Department of Justice, Attorney General Kamala D.

Directors, officers, and other professionals should monitor the FDIC's professional liability and mortgage fraud actions. By understanding the FDIC's receivership process, how the FDIC evaluates claims against directors and officers, and the types of claims the FDIC has pursued in the aftermath of the financial crisis, bank and other financial services professionals may take prudent and proactive steps to mitigate the risk of becoming the next FDIC investigation and litigation target.

FDIC RECEIVERSHIP: THE FUNDAMENTALS

The road to receivership begins when the bank's chartering authority closes the failing institution.[8] Following the closing, the chartering authority typically names the FDIC as receiver.[9] There are various grounds on which the FDIC may be appointed receiver, including among others, when the institution has insufficient assets to meet its obligations, is undercapitalized and has liquidity issues, operates under unsafe or unsound conditions, or when there are willful violations of cease and desist orders.[10]

The purpose of placing the insured depository institution in receivership is to allow for an orderly distribution and liquidation of the institution's assets.[11] Throughout this process, the goal of the FDIC is to protect the interests of all the insured depositors and provide them with access to their insured funds. Since the establishment of FDIC insurance in 1934, no depositors have lost any insured funds as a result of a failure.[12] To resolve failing institutions, the FDIC employs a wide-range of tools, including selling deposits and loans of the failed institution to another institution. Although the FDIC's goal is to minimize the losses to its insurance fund, the recent wave of bank failures has depleted the DIF's reserves by more than $80 billion since 2007.[13] One option available to the FDIC to recapture this loss is to increase the risk-based assessments banks must pay into the fund. Alternatively, the FDIC may seek to recover money by litigating against those individuals or companies it deems responsible for a particular bank's failure.

Harris Announces Creation of Mortgage Fraud Strike Force to Protect Homeowners (May 23, 2011), http://oag.ca.gov/news/press_release?id=2090. Also, on December 6, 2011 the Attorneys General for California and Nevada announced a joint effort to pursue mortgage-related civil and criminal investigations. *See* Press Release, California Department of Justice, Attorneys General of California and Nevada Announce Mortgage Investigation Alliance (Dec. 6, 2011), *available at* http://oag.ca.gov/news/press_release?id=2590.

[8] The chartering authority for state-chartered banks and savings associations is the state banking regulator. For national banks and federal savings associations the Office of the Comptroller of the Currency is the chartering authority.

[9] If certain circumstances apply, the FDIC also has self-appointment authority. *See* 12 U.S.C. § 1821(c)(10).

[10] 12 U.S.C. § 1821(c)(5).

[11] *See* 12 U.S.C. § 1821(d) (explaining the FDIC's receivership powers).

[12] *Who is the FDIC?*, FDIC, http://www.fdic.gov/about/learn/symbol/ (last visited February 6, 2012).

[13] Noah Buhayar, *FDIC Races Chubb to Silverton in Clash Over Failed-Bank Costs*, BLOOMBERG (Dec 16, 2011 12:00 AM), http://www.bloomberg.com/news/2011-12-16/fdic-races-chubb-to-silverton-in-clash-over-failed-bank-costs.html.

THE FDIC'S PRE-LITIGATION INVESTIGATION PROCESS

When the FDIC becomes a bank's receiver, it begins to assess the reasons for the bank's failure and initiates an investigative process that typically lasts eighteen months.[14] During this time the FDIC determines whether to pursue any litigation claims against officers, directors, or other third parties. The FDIC's evaluation of potential claims centers around two criteria—whether the claim has merit and whether pursuing the claim is cost-effective.[15] To assist its evaluation of whether to bring claims against company insiders, the FDIC often conducts various rounds of employee interviews.[16] In addition, the FDIC may issue investigative subpoenas to obtain documents or testimony.[17] Another component of the FDIC's pre-litigation efforts is the issuing of demand letters, which warn officers and directors of possible civil charges.[18] The agency's investigatory efforts also include a review of the factual circumstances underpinning the alleged misconduct by the FDIC Board of Directors, and often involve settlement discussions.[19]

By taking these steps, the FDIC places the investigated parties on notice that it may seek to recover losses from them. Directors and officers need to take precautions during this pre-investigation stage, including retaining counsel. Furthermore, directors and officers should recognize that even if the FDIC determines that it will not pursue a claim against them, the information the FDIC gathers may be used in other enforcement efforts and shared with other agencies.

THE UNIQUE STATUTE OF LIMITATIONS APPLICABLE TO THE FDIC

The FDIC has been criticized for failing to bring as many professional liability suits against officers and directors as it did following the Savings and Loan ("S&L") crisis.[20] In the aftermath of that crisis, the Resolution Trust Corporation ("RTC") and FDIC collected $4.5 billion from professional liability suits, including $1.3 billion from claims against officers and directors.[21] Bank and other financial services executives need to be aware that special statutes of limitations grant the FDIC additional time to bring claims when the agency becomes the institution's receiver.

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[14] *Professional Liability Lawsuits*, FDIC, http://www.fdic.gov/bank/individual/failed/pls/ (last visited February 6, 2012).

[15] *Id.*

[16] FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 268, *available at* http://www.fdic.gov/bank/historical/managing/history1-11.pdf.

[17] 12 C.F.R. § 308.146.

[18] *See* Joe Adler, *First the Failures, Then the Lawsuits*, AMERICAN BANKER, (July 1, 2010), http://www.americanbanker.com/usb_issues/120_7/first-the-failures-then-the-lawsuits-1021272-1.html, (noting that the FDIC has sent thousands of demand letters).

[19] *Professional Liability Lawsuits*, FDIC, http://www.fdic.gov/bank/individual/failed/pls/ (last visited February 6, 2012).

[20] *See e.g.*, Gretchen Morgenson, *Slapped Wrists at WaMu*, N.Y. TIMES, Dec. 17 2011, *available at* http://www.nytimes.com/2011/12/18/business/in-a-wamu-settlement-with-the-fdic-slapped-wrists.html?_r=1&ref=washingtonmutualinc.

[21] FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 285, *available at* http://www.fdic.gov/bank/historical/managing/history1-11.pdf.

Notably, these special provisions extend the statutes of limitation for contract, tort, and fraud claims. The FDIC has six years to bring contract claims and three years to bring tort claims after being appointed receiver. Alternatively, the agency may pursue such claims under the applicable state law limitations period if it is longer.[22] The receivership statutes of limitation further extend the time for bringing fraud claims. For tort claims involving fraud or intentional misconduct resulting in unjust enrichment or substantial loss to the institution, an expired statute of limitations can be revived.[23]

Collectively, these extended statutes of limitations provide the FDIC with a powerful investigatory tool, allowing the agency to search for misconduct without fear of running out of time to bring a claim. On the other hand, the prolonged limitations period creates extended uncertainty for directors and officers of the failed institution. The time delay also poses significant risks that documents and other records that may assist with the executive's defense may not be properly safeguarded. Most significantly, given that the bulk of costly bank failures occurred in 2008-09, the statute of limitations is beginning to run for the FDIC, which may trigger a wave of FDIC litigation.

EXAMINING THE FDIC'S CLAIMS AGAINST DIRECTORS AND OFFICERS

In its guidance materials, the FDIC states that it "will not bring civil suits against directors and officers who fulfill their responsibilities, including the duties of loyalty and care, and who make reasonable business judgments on a fully informed basis and after proper deliberation."[24] The FDIC has been aggressive in pursing lawsuits against failed bank executives, and as of January 18, 2012, the FDIC has filed 19 suits against 161 former officers and directors.[25] Bank executives and their counsel should monitor these cases, which often illustrate the FDIC's common theories of liability, the application of certain defenses to officers and directors, and the terms by which the agency is willing to settle cases. The following briefly highlights a few notable cases and recent developments.

On August 22, 2011, the FDIC acting as receiver for Silverton National Bank, N.A., filed a complaint in the U.S. District Court for the Northern District of Georgia against more than a dozen officers, directors, and their D&O insurance carrier.[26] Silverton, which began in 1986 as a banker's bank (an institution that provides financial services to community banks), obtained a national charter in 2007 and started opening satellite lending operations across the country. The FDIC alleged that this expansive growth combined with its risky lending practices contributed to Silverton's failure—one of the biggest Georgia banks to collapse during the financial crisis.[27] The FDIC is seeking to recover more than $70 million, approximately one-fifth of its estimated $386 million loss to the insurance fund.[28]

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[22] 12 U.S.C. 1821(d)(14)(A).

[23] 12 U.S.C. 1821(d)(14)(c).

[24] FDIC, FINANCIAL INSTITUTION LETTER, FIL-87-92 (Dec. 3, 1992), *available at*, http://www.fdic.gov/regulations/laws/rules/5000-3300.html.

[25] *Professional Liability Lawsuits*, FDIC, http://www.fdic.gov/bank/individual/failed/pls/ (last visited February 6, 2012).

[26] *FDIC as Receiver for Silverton Nat'l Bank, N.A. v. Bryan*, No. 1:11-cv-02790 (N.D. Ga. Aug. 22, 2011).

[27] Complaint at 15-18, *FDIC as Receiver for Silverton Nat'l Bank, N.A. v. Bryan*, No. 1:11-cv-02790 (N.D. Ga. Aug. 22, 2011).

[28] *Id.* at 10.

In its complaint, the FDIC asserted that the directors and officers engaged in corporate waste, ordinary negligence and gross negligence, and breached their fiduciary duties of care and loyalty.[29] In particular, the FDIC alleged that the defendants were "reckless" and they "completely failed in discharging the duties they owed to Silverton causing substantial loss to the Bank and ultimately leading to its failure."[30] Furthermore, the FDIC asserted that the defendants failed to heed warnings from their bank examiners regarding their risky positions.[31] In response to these allegations, several parties have filed dispositive motions, which are still pending before the court.

In addition to its claims against the officers and directors, the FDIC is seeking to recover $5 million from the defendants' D&O insurance carrier. The complaint asserts that the carrier, after receiving a demand letter from the FDIC, denied coverage under the policy on the ground that an endorsement to the policy excluded coverage for claims brought by the FDIC (a so-called "regulatory exclusion").[32] The FDIC contends that the insurer amended the policy to include this endorsement just prior to the bank's failure in a last minute attempt to "unilaterally change the terms of the policy."[33] The carrier has responded that the failure to include and attach the endorsement was merely an administrative error.[34]

The FDIC's allegations in this case highlight several important issues for officers and directors. First, the bank management should proactively take corrective actions in response to their bank examiner's recommendations. Indeed, the FDIC emphasizes the importance of prompt responses to supervisory criticism, explaining that "[o]pen and honest communication between the board and management of the bank and the regulators is extremely important."[35] In addition, the case highlights that bank directors and officers should understand the scope of their D&O insurance policy, paying particular attention to whether it includes a regulatory exclusion. In many cases, FDIC suits against bank executives are geared to access these insurance policies.

Another professional liability suit directors and officers should monitor is *FDIC as Receiver of IndyMac Bank, F.S.B. v. Perry.*[36] After IndyMac closed in July 2008, the FDIC filed a complaint in July 2011 in the U.S. District Court for the Central District of California, alleging that the bank's chief executive officer negligently chose to invest in a $10 billion pool of high risk residential loans, a decision that generated losses to the institution in excess of $600 million.[37]

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[29] *Id.* at 87-93

[30] *Id*. at 11.

[31] *Id*. at 21.

[32] *Id*. at 78-79.

[33] *Id*. at 82.

[34] Federal Ins. Co.'s Answer at 28, *FDIC as Receiver for Silverton Nat'l Bank, N.A. v. Bryan*, No. 1:11-cv-02790 (N.D. Ga. Oct. 31, 2011).

[35] FDIC, FINANCIAL INSTITUTION LETTER, FIL-87-92 (Dec. 3, 1992), *available at*, http://www.fdic.gov/regulations/laws/rules/5000-3300.html. *See also FDIC v. Bierman*, 2 F.3d 1424, 1433 (7th Cir. 1993) (explaining that director's "[r]eliance arguments are especially weak when regulators have told directors to take action.").

[36] *FDIC as Receiver for IndyMac Bank, F.S.B. v. Perry*, No. 11-cv-05561 (C.D. Cal. Jul. 6, 2011).

[37] Complaint at 3, 97, 98, *FDIC as Receiver of IndyMac Bank, F.S.B. v. Perry*, No. 11-cv-05561 (C.D. Cal. Jul. 6, 2011).

Recently, the district court denied the defendant's motion to dismiss, holding that the business judgment rule under California law only applies to directors and not officers.[38] In general, the business judgment rule is a defense which prevents a court from substituting its judgment for those that manage the business and affairs of the corporation. The court noted that whether the business judgment rule defense extends to both officers and directors has been the subject of much academic debate.[39] Nonetheless, the court was not persuaded to follow the defendant's argument and concluded that under California law the business judgment rule does not apply to officers.[40]

The net impact of this holding for officers facing FDIC professional liability suits is mixed. The district court's holding may limit officer's ability to assert the business judgment rule defense in California, and expose officers to additional litigation risks in the state. Despite this, the court's ruling may not have as far-reaching of an impact as it appears. Other courts, including the Delaware Supreme Court, have held that "the business judgment rule . . . protect[s] corporate officers *and* directors and the decisions they make, and our courts will not second-guess these business judgments."[41] Furthermore, the defendant is seeking an interlocutory appeal of the court's decision, which may reverse the court's holding and realign California's business judgment rule with other states that extend the defense to officers and directors.[42]

In addition to these cases, the FDIC recently reached a settlement agreement in the case of *FDIC as Receiver for Washington Mutual Bank v. Killinger.*[43] When Washington Mutual collapsed in 2008 it was largest bank failure in American history. Approximately three years later in March 2011, the FDIC filed a suit in the U.S. District Court for the Western District of Washington against the former chairman and chief executive officer, Kerry K. Killinger, as well as bank executives Stephen Rotella and David Schneider. The FDIC also named the wife of Killinger and the wife of Rotella as defendants.

Originally, the FDIC sought $900 million dollars from the defendants, alleging that they engaged in risky lending practices, were grossly negligent, and breached their fiduciary duties. However, in December 2011, the defendants and the FDIC reached a settlement for $64.7 million. The settlement amount is derived mostly from $39.575 million of insurance proceeds with the remainder coming from $425,000 in cash and $24.7 million from the face value of the defendants' bankruptcy claims pending in Washington Mutual's Chapter 11 case.[44] Notably, the settlement does not benefit the DIF fund because the fund did not lose money when Washington Mutual was partially sold to JPMorgan Chase & Company.[45]

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[38] Order at 7, *FDIC as Receiver for IndyMac Bank, F.S.B. v. Perry*, No. 11-cv-05561 (C.D. Cal. Dec. 13, 2011).

[39] *Id.* at 5.

[40] *Id.* at 7.

[41] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

[42] Def. Michael W. Perry's Notice of Motion and Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for a Stay Pending Certification and Appeal, *FDIC as Receiver of IndyMac Bank, F.S.B. v. Perry*, No. 11-cv-05561 (C.D. Cal. Jan. 6, 2012).

[43] *FDIC as Receiver for Wash. Mut. Bank v. Killinger*, No. 11-cv-00459 (W.D. Wash. Mar. 16, 2011).

[44] Press Release, FDIC, FDIC Announces Settlement with Washington Mutual Directors and Officers (Dec. 15, 2011), *available at* http://www.fdic.gov/news/news/press/2011/pr11192.html.

[45] Louise Story, *Ex-Bank Executives Settle F.D.I.C. Lawsuit*, N.Y. TIMES (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/business/ex-bank-executives-settle-fdic-suit.html?ref=washingtonmutualinc.

A review of this settlement reveals several interesting features. Although the FDIC's $64.7 million settlement may appear insignificant compared to its prospective damages of $900 million, settling for this amount may have been the FDIC's best option. If the agency continued to litigate the case, it might have simply depleted the remaining D&O insurance limits, effectively reducing the amount it could have recovered. Another notable component of the settlement is that while the face value of the defendants' bankruptcy claims is $24.7 million, it is uncertain whether the FDIC will be able to realize a recovery of the full value from the bankruptcy estate. Finally, the FDIC required the defendants to provide a significant amount of cash from their personal assets to settle the claims. This shows that while the FDIC's primary focus in professional liability claims is the availability of insurance proceeds, in certain circumstances the FDIC is unwilling to accept a settlement without reaching into the pockets of the officers and directors directly.

THE FDIC'S MORTGAGE FRAUD LITIGATION AND HOW TO DETECT AND PREVENT MORTGAGE FRAUD

In addition to its suits against officers and directors, the FDIC is pursuing 189 residential mortgage malpractice and fraud lawsuits, including lawsuits filed and inherited from failed institutions. These mortgage fraud suits involve the full-range of industry participants—borrowers, appraisers, attorneys, closing agents, title insurance companies, and mortgage loan brokers.

Bank executives should make detecting and mitigating their institution's exposure to mortgage fraud schemes a priority. Although it is hard to quantify the exact costs, one report has estimated that between 2005 and 2007 the industry suffered $112 billion in losses from fraud.[46] Exposure to loans obtained through fraudulent means poses significant risks to the institution's overall loan quality and may be a substantial contributing factor in its failure. Because of the detrimental impact of mortgage fraud on the institution's safety and soundness, it is unsurprising that the FDIC has made pursuing fraud claims a priority. Indeed, since the beginning of 2007 through March 2009, the FDIC's investigations of mortgage fraud claims increased from 0 to 4,375, and lawsuits filed increased from 0 to 113.[47]

FDIC as Receiver for Washington Mutual Bank v. United General Title Insurance Company is a case indicative of the types of claims the FDIC has been pursuing. In September 2011, the FDIC filed a complaint in U.S. District Court for the Eastern District of New York against several defendants for their alleged participation in a mortgage fraud scheme that caused the failed institution millions in losses.[48] Specifically, the suit alleges that Washington Mutual purchased mortgages that despite their appearance of full and accurate documentation were nothing more than a sham.[49] The details of the alleged scheme include the preparation of false title reports, insurance commitments, and other false representations suggesting that the mortgages were given to real mortgagors and funds were distributed to borrowers that

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[46] THE FIN. CRISIS INQUIRY COMM'N, FIN. CRISIS INQUIRY REPORT XXII (Jan. 2011).

[47] Martin J. Gruenberg, Vice Chairman, FDIC, Statement on Federal and State Enforcement of Consumer and Investor Protection Laws before the Financial Services Committee, U.S. House of Representatives (Mar. 20, 2009), *available at* http://www.fdic.gov/news/news/speeches/archives/2009/spmar2009.html.

[48] *FDIC as Receiver for Wash. Mut. Bank v. United Gen.Title Ins. Co.*, 11-cv-4610 (E.D.N.Y. Sept. 22, 2011).

[49] Complaint at 3, *FDIC as Receiver for Wash. Mut. Bank v. United Gen. Title Ins. Co.*, 11-cv-4610 (E.D.N.Y. Sept. 22, 2011).

purchased the property. Washington Mutual sold these mortgages to Fannie Mae and other purchasers but was subsequently required to repurchase the loans after the fraud was discovered.[50]

Another avenue the FDIC has pursued to recover fraud losses has been through seeking payment of financial institution bonds claims, which insure banks against employee dishonesty and fraud. An example of such a case is *Federal Deposit Insurance Corporation as Receiver for Colonial Bank, and the Colonial Bancgroup, Inc. v. Federal Insurance Corporation*.[51] In 2009, Colonial Bank filed for bankruptcy and entered receivership, and two Colonial executives have since pled guilty to conspiracy to commit bank, security, and wire fraud for a scheme that allegedly caused the bank to purchase valueless mortgage assets.[52] The FDIC has asserted that the losses sustained by the Bank "constitute recoverable losses under the [financial institution bonds] up to the full aggregate limits of liability of the [b]onds," and is pursuing a breach of contract claim against the insurer for failing to pay.[53]

DETECTING AND MITIGATING A BANK'S EXPOSURE TO MORTGAGE FRAUD

Financial institutions have been particularly susceptible to fraud schemes as these cases show. Accordingly, bank executives should employ a variety of methods and develop strong internal controls to detect and mitigate their exposure to fraud. While fraudulent schemes are not always apparent, there are many warning signs, such as when signatures on application documents do not match, the lender receives an abnormally high volume of loan applications from the same individual borrower, and when the borrower's income is inconsistent with his or her type of employment. Another proactive measure financial institutions may implement to uncover their exposure to fraud is to review samples of loans to identify recurring patterns among the losses.

Institutions should also do more than simply acknowledge that fraud is a problem, and make a real commitment to deter and detect fraud. This can be done through providing training to employees so they stay ahead of and are able to detect the latest fraudulent schemes. In addition, the company should provide comprehensive training to employees to reinforce its anti-fraud policies or procedures. By placing senior management in key positions to monitor fraud and instituting fraud-focused committees, officers and directors can take important strides toward showing regulators that they are committed to eliminating fraud within their institution. In addition to these internal safeguards, similar steps should be taken to monitor third parties. For example, lenders may guide the best practices during closing by requiring closing agents to verify the identifications of the parties and document closing funds.

CONCLUSION

The banking industry has faced numerous litigation risks throughout the financial crisis, and it is likely that the FDIC will continue its aggressive efforts to investigate and litigate claims against those it perceives to be responsible for a bank's failure. Bank executives must be able to anticipate FDIC investigations and mobilize their available resources in response to the agency's inquiries. In addition, bank executives of troubled, failing, and even sound institutions should monitor and stay informed

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[50] *Id.* at 8.

[51] *FDIC as Receiver for Colonial Bank, and the Colonial Bancgroup, Inc. v. Federal Ins. Corp.*, 11-cv-00610 (M.D. Ala. July 29, 2011).

[52] Complaint at 5-11, *FDIC as Receiver for Colonial Bank, and the Colonial Bancgroup, Inc. v. Federal Ins. Corp.*, 11-cv-00610 (M.D. Ala. July 29, 2011).

[53] *Id.* at 12.

regarding the FDIC's receivership actions, including professional liability and mortgage fraud claims. By doing so, these professionals may take prudent and proactive steps to mitigate the risk of becoming the next FDIC investigation and litigation target.