FDIC D&O Actions and Agencies' Enforcement Actions Against Individuals

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A. Themes from D&O Suits

- **Common**
  - Gross negligence
  - Negligence
  - Breach of fiduciary duty
- **Less common**
  - Illegal dividends
  - Corporate waste
- **Most charges arise from allegations of**
  - Lax loan underwriting
  - Aggressive growth
  - Overconcentration in real estate lending (particularly acquisition, development, and construction ("ADC") and commercial real estate ("CRE"))
  - Weak credit administration
  - Regulation O / insider violations
  - "Rubber stamp" / under-qualified board
  - Failure to heed regulator criticisms

B. COMMON DEFENSES

- Standard of Care & Business Judgment Rule
- Exculpatory Clause
- Reliance on Management, Committees, or Advisors
- Failure to Mitigate Damages
- Lack of Proximate Causation/ Great Recession
- Statute of Limitations
- Comparative or Contributory Fault

Standard of Care: Ordinary or Gross Negligence?

- ***Atherton v. FDIC,* 519 U.S. 213 (1997)**
  - **Before *Atherton*: Courts were split as to whether the appropriate standard of care was prescribed by: federal common law, state common law, or 12 U.S.C. § 1821(k)**
    - **§ 1821(k): "**A director or officer of an insured depository institution may be held personally liable . . . **for gross negligence**, **including any similar conduct or conduct that demonstrates a greater disregard of a duty of care** (than gross negligence) including intentional tortious conduct . . . ."
    - Many state statutes severely limited liability for bank directors, and some extended to officers.
  - ***Atherton* Holding: FDIC may pursue simple negligence claims if state law permits.**
    - "The statute's 'gross negligence' standard provides only a floor – a guarantee that officers and directors must meet at least a gross negligence standard. **It does not stand in the way of a stricter standard that the laws of some states provide**." 519 U.S. at 227.
    - A state's definition of gross negligence controls the analysis.

BUSINESS JUDGMENT RULE

- Most states now apply the **Business Judgment Rule ("BJR")**, which is typically based on the gross negligence standard.
  - *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)
  - *FDIC v. Castetter*, 184 F.3d 1040 (9th Cir. 1999) (discussing California law).

- <u>Business Judgment Rule</u> – Applies if Directors / Officers:
  - Act in good faith;
  - Have no financial interest in the subject matter;
  - Have appropriate information about the subject matter; and
  - Rationally believe that the judgment is in the best interest of the company.

  Aronson, 473 A.2d at 812.

RECENT BUSINESS JUDGMENT RULE CASES

- **<u>North Carolina</u>**
  - ***FDIC as Receiver for Cooperative Bank v. Willetts,*** 48 F. Supp.3d 844 (E.D.N.C. 2014)
    - In August 2011, the FDIC brought suit against nine former officers and directors of Cooperative, seeking more than $33 million in damages for losses allegedly incurred from defaulted loans. The FDIC's complaint asserted claims for negligence, gross negligence, and breach of fiduciary duty in connection with the defendants' approval of 87 different commercial real estate and residential lot loans.
    - District Court granted summary judgment in favor of the directors and officers, holding that **"defendants are entitled to the business judgment rule's protection as a matter of law and indisputable fact."**
    - Specifically, Judge Boyle held that the **"substantial discovery produced in this case . . . fails to reveal any evidence that suggests any defendant engaged in self-dealing or fraud, or that any defendant was engaged in any other unconscionable conduct that might constitute bad faith."**
    - In determining that the defendants "both employed a rational process and acted with a rational business purpose," Judge Boyle highlighted the basic tenet of the business judgment rule: **"corporations are expected to take risks and their directors and officers are entitled to protection from the business judgment rule when those risks turn out poorly."**
    - The decision was appealed to the Fourth Circuit (***FDIC v. Rippy***, No. 14-2078).

RECENT BUSINESS JUDGMENT RULE CASES (CON'T)

- **<u>Fourth Circuit</u>**
  - ***FDIC as Receiver for Cooperative Bank v. Rippy,*** Case No. 14-2078 (4th Cir. Aug. 18, 2015)
    - The Fourth Circuit **<u>upheld</u>** the District Court's grant of summary judgment for ***all defendants*** on the gross negligence counts, holding there was no genuine issue of material fact that the defendants did <u>not</u> act wantonly, with conscious or reckless disregard for the safety of others (N.C.'s definition of gross negligence). The Court cited Cooperative's favorable CAMELS ratings through 2007 as evidence that defeated a gross negligence charge.
    - The Fourth Circuit **<u>upheld</u>** the District Court's grant of summary judgment for Cooperative's ***directors*** on all counts, under an **exculpatory clause** theory. Cooperative Bank's articles of incorporation provided an exculpatory clause which shielded directors (but not officers) from liability for negligence and breach of fiduciary duty as long as there was no evidence of fraud or self-dealing.
    - The Fourth Circuit **<u>reversed</u>** the District Court's grant of summary judgment for Cooperative's ***officers*** on the claims of ordinary negligence and breach of fiduciary duty, holding that there was a dispute of material fact as to whether the officers acted within generally accepted banking practices when they approved many of the bank's loans.
    - The case will be remanded to the E.D.N.C. to resolve FDIC's claims of ordinary negligence and breach of fiduciary duty against the bank's officers.

Recent Business Judgment Rule Cases (con't)

- Georgia
  - ***FDIC as Receiver for Buckhead Community Bank of Atlanta v. Loudermilk***
    - District Court questioned whether or not the business judgment rule entitled the defendants to dismissal of the FDIC's negligence claims and certified the question to the Georgia Supreme Court. *FDIC v. Loudermilk*, 984 F.Supp.2d 1354 (N.D. Ga. 2013).
    - On July 11, 2014, the Georgia Supreme Court ruled that the common law of Georgia recognizes the business judgment rule and that it has not been superseded by Georgia statutory law. *FDIC v. Loudermilk*, 295 Ga. 579 (2014).
    - The Georgia Supreme Court arrived at a "more modest business judgment rule," that "precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith."
- Nevada
  - ***FDIC as Receiver for Carson River Community Bank v. Jacobs,*** Case No. 3:13-cv-00084-RCJ-VPC
    - On November 5, 2014, Judge Robert C. Jones of the District of Nevada declined to grant a former bank director's motion for summary judgment on the FDIC's claim of breach of fiduciary duty because the FDIC produced evidence "sufficient for a jury to find that Jacobs [the director defendant] did not act 'in good faith and with a view to the interests of the [Bank],' as required by Nevada's statutory definition of the business judgment rule."

Other Affirmative Defenses

Reliance on Management, Committees, or Advisors

- Rule of Reliance:
  - *In re Walt Disney Co. Derivative Action,* 907 A.2d 693, 770 (Del. Ch. 2005): **Directors will not be liable for negligence when they reasonably rely** on information, opinions, reports, or statements within the expertise of an expert selected with reasonable care, as long as the information is not so deficient as to give reason to question.
    - **Many state statutes codify this defense and some offer the defense to officers, as well as directors**.

- Limit of Reliance Protection:
  - *Atherton v. Anderson*, 86 F.2d 518 (6th Cir. 1936); *Rankin v. Cooper*, 149 F. 1010 (W.D. Ark. 1907): **However, directors cannot abdicate all of their supervisory responsibility** by allowing themselves to be dominated by management and act as "rubber stamps". Even outside directors must become more involved with the institution when warning signals arise.

FAILURE TO MITIGATE DAMAGES, AND VIABILITY OF THE "NO DUTY RULE"

- *O'Melveny and Myers v. FDIC*, 512 U.S. 79 (1994):
  - Before *O'Melveny*: **"No duty rule" precluded affirmative defenses** against federal receivers based on their conduct pre- and post-receivership.
  - *O'Melveny* Holding: **Receivers "'step into the shoes' of the failed institution**, and state tort law governs liability." 512 U.S. at 86.

COURTS REJECTING "NO DUTY RULE"

- *FDIC as Receiver for Coop. Bank v. Willetts, et al.*, 882 F.Supp.2d 859 (E.D.N.C. 2012)*:*
  - Court denied FDIC's motion to strike affirmative defense of avoidable consequences / failure to mitigate damages. By virtue of "stepping into the shoes" of the failed institution, **[the FDIC] is then "subject to whatever defenses state law provides."** (*quoting Grant Thornton, LLP v. Fed. Deposit Ins. Corp.*, 435 F. App'x 188, 199 (4th Cir. 2011)).

- *FDIC as Receiver for Integrity Bank of Alpharetta, Georgia v. Skow, et al., 955 F.Supp.2d 1357* (N.D. Ga. 2012):
  - Court refused to adopt and apply the "no duty rule." Under Georgia law, **"the duty to mitigate appears to be a general duty and is not dependent on a duty owed by the FDIC to the defendants."** FIRREA "imposes a duty to minimize losses," which is "'entirely consistent with duty to mitigate.'" (*quoting FDIC v. Ornstein*, 73 F. Supp. 2d 277 (E.D.N.Y. 1999)).

- *See also RTC v. Mass. Mutual Life Ins. Co.*, 93 F. Supp. 2d 300, 306 (W.D.N.Y. 2000); *FDIC v. Gladstone*, 44 F. Supp. 2d 81, 89 (D. Mass. 1999); *FDIC v. Haines*, 3 F. Supp. 2d 1555 (D. Conn. 1997); *RTC v. Liebert*, 871 F. Supp. 370 (C.D. Cal. 1994).

COURTS APPLYING "NO DUTY RULE" POST-*O'MELVENY*

- *FDIC as Receiver of 1st Centennial Bank v. Appleton, et al.*, No. 11-cv-00476 (C.D. Cal. July 23, 2011)
  - Court ruled that the "**rule remains available to shield the FDIC** from liability for its conduct as a receiver," although the court qualified this as its "tentative opinion."

- *FDIC v. Van Dellen* (C.D. Cal. Sept. 27, 2011)
  - Court granted FDIC motion to strike the failure to mitigate damages defense because **mitigation could not have been asserted against the Bank.** Court also noted that under California law, equitable defenses valid against the Bank could not be raised against FDIC (*citing O'Melveny* at 19).

OTHER DEFENSES

- <u>Comparative and Contributory Fault</u>
  - ***FDIC v. Van Dellen*** (C.D. Cal. Oct. 5, 2012): Court held that joint and several liability applies, so this defense is not valid.

- <u>Causation</u>
  - ***FDIC v. Van Dellen*** (C.D. Cal. Oct. 18, 2012): Court ruled that "while evidence on the subject of the economic downturn is admissible, the downturn is not a 'superseding cause,'" because the "focus of this action is Defendant's conduct at the time loans were made."

- <u>Statute of Limitations</u>
  - ***FDIC v. Van Dellen*** (C.D. Cal. Oct. 5, 2012): Court held that "gravamen of the complaint here is breach of fiduciary duty, not professional or other negligence," thus the applicable statute of limitations is four years, rather than shorter period for negligence claims (*citing FDA v. McSweeney*, 976 F.2d 532, 535-36 (9th Cir. 1992).

- <u>Duplicate Breach of Fiduciary Duty / Negligence Counts</u>
  - ***FDIC v. Spangler*** (N.D. Ill. Dec. 22, 2011): Because the FDIC's complaint does not include any indication that the negligence and breach of fiduciary duty claims found in Counts II and III are alternative theories, nor has the FDIC even attempted to demonstrate that the claims are distinct, the Court dismisses Count III (breach of fiduciary duty) without prejudice.

VENABLE

OTHER DEFENSES (CONT.)

- Exculpatory Clauses in Bank Articles of Incorporation:
  - ***FDIC v. Skow*** (N.D. Ga. Feb. 27, 2012): Court refused to apply exculpatory provisions. The provision only applies to suits for the benefit of shareholders, while under Georgia law this suit is for the benefit of FDIC as receiver of the bank. ***But see, FDIC v. Rippy,*** *supra* (dismissing negligence counts against directors under exculpatory clause defense).

- Violation of Constitutional Due Process and Equal Protection
  - ***FDIC as Receiver of Heritage Cmty. Bank v. Saphir, et al.****,* No. 10-cv-07009 (N.D. Ill. Jan. 30, 2011): Defendant claimed violations by the FDIC for filing suit against officers and directors of community banks but ignoring similar alleged conduct in "too big to fail" institutions.

- Waiver / Ratification
  - ***FDIC v. Van Dellen*** (C.D. Cal. Oct. 5, 2012): Court ruled that ratification defense is not available under California law.

D. D&O LITIGATION: WHERE THINGS STAND TODAY

- We expect the number of lawsuits to decrease as the number of bank failures has decreased and FDIC is running up against the 3-year FIRREA statute of limitations for suits involving banks that were closed in the aftermath of the 2008 Great Recession.
- "Since January 2009, through August 20, 2015, the FDIC has authorized suits against 1,207 individuals in connection with 150 failed institutions. This includes 108 filed D&O lawsuits naming 826 former directors and officers." https://www.fdic.gov/bank/individual/failed/pls/ (updated monthly)

E. Settlements

- According to the FDIC's Industry Analysis, between January 1, 2009 and August 20, 2015, the FDIC filed 108 D&O lawsuits, **64** of which had been fully settled at the time of the FDIC's report.

- The FDIC has also settled a number of claims prior to filing suit.

- FDIC settlement agreements are publically available: https://www.fdic.gov/about/freedom/plsa/index.html

SETTLEMENTS (CON'T)

- FDIC's recovery compared to the damages sought:
  - Percentages vary widely:
    - *FDIC as Receiver for Florida Community Bank v. Price*: FDIC sought $62 million in damages and settled for $3 million (4% of damages sought)
    - *FDIC as Receiver for Alpha Bank v. Blackwell*: FDIC sought $23.92 million in damages and settled for $2.05 million (9% of damages sought)
    - *FDIC as Receiver for TierOne Bank v. Lundstrum*: FDIC sought $40 million in damages and settled for $6.5 million (16% of damages sought)
    - *FDIC as Receiver for Progress Bank of Florida v. Rummel*: FDIC sought $6.3 million and settled for $1.475 million (23% of damages sought)
    - *FDIC as Receiver of Michigan Heritage Bank v. Cuttle*: FDIC sought $8.2 million in damages and settled for $2.9 million (35% of damages sought)
    - *FDIC as Receiver for First State Bank v. Copenhaver*: FDIC sought $6.25 million and settled for $2.9 million (46% of damages sought)
    - *FDIC as Receiver for Omni National Bank v. Klein*: FDIC sought $37 million and settled for $17.8 million (50% of damages sought)

- Although D&Os have insurance, the FDIC has been requiring some defendants to pay a portion of the settlement from their personal assets:
  - *FDIC as Receiver for First Bank of Beverly Hills v. Faigin:* The FDIC settled for $13,700,000 (3% of the alleged loss to the Fund) but required at least $10,000,000 to be paid from the personal assets of the defendants
  - *FDIC as Receiver for Orion Bank v. Aultman:* The FDIC settled for $3,710,000 (less than 1% of the alleged loss to the Fund) but required the defendants to pay $1,225,000 from their personal assets
  - *FDIC as Receiver Wheatland Bank v. Spangler: The FDIC* settled for $2,833,693.71 (2% of the alleged loss to the Fund) but required the defendants to pay $1,000,000 from their personal assets

F. FDIC GUIDANCE ON D&O SUITS

- **1992 FDIC Statement of Policy**, regarding duties of bank directors and officers and the procedures and nature of suits by the FDIC against directors and officers:

Procedures to bring suit

1. Requires authorization by FDIC Board of Directors, who perform a "rigorous review" of the factual circumstances
2. Allow officers and directors to respond to proposed charges and discuss settlement
3. Lawsuit must be cost-effective

D&O Litigation: FDIC Guidance (cont.)

Importantly, the FDIC's "Statement Concerning the Responsibilities of Bank Directors and Officers," states:

> ***"The FDIC 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."***

- FDIC Financial Institution Letter, FIL-87-92 (Dec. 3, 1992)

D&O LITIGATION: FDIC GUIDANCE (CONT.)

Three principal categories for FDIC D&O suits:

1. Dishonest conduct or approved / condoned abusive transactions with insiders
2. Responsibility for failure of institution to adhere to applicable laws, regulations, internal policies, supervisory agreements, or other safety or soundness violations
3. Failure to establish or monitor adherence to proper underwriting policies or knowledge or reason to know of improper underwriting policies

Claims Letter: The FDIC's decision on when to send a claims letter is typically guided by the expiration date of a D&O insurance policy or an applicable statute of limitations. The claims letter preserves the FDIC's rights, and an investigation will continue after that point while the FDIC determines whether to file suit.

ENFORCEMENT ACTIONS AGAINST INDIVIDUALS

A. Authority of Regulators to Bring Enforcement Actions Against Individuals

- Under 12 USC 1818, the **FDIC**, **OCC**, **FRB**, have the authority to pursue enforcement actions against officers, directors, employees, controlling shareholders, agents and certain other categories of individuals (institution-affiliated parties) associated with such institutions for violations of laws, rules, or regulations, unsafe or unsound banking practices, breaches of fiduciary duty, and violations of final orders, conditions imposed in writing or written agreements.

- **FinCEN**: "Under the Bank Secrecy Act (BSA), 31 U.S.C. 5311 et seq., and its implementing regulations at 31 C.F.R. Chapter X (formerly 31 C.F.R. Part 103), FinCEN may bring an enforcement action for violations of the reporting, recordkeeping, or other requirements of the BSA." http://www.fincen.gov/news_room/ea/

B. Formal Actions

- Cease and Desist Order (C&D)
- Removal/Suspension of Institution Affiliated Party (IAP)
- Civil Money Penalties (CMPs)

Personal Cease and Desist Orders

- Cease & Desist Orders (C&Ds) may be issued against an "institution-affiliated party" as defined by 12 U.S.C. § 1813(u).
- "Issued to halt violations of law as well as to require affirmative action to correct any condition resulting from such violations." FDIC Compliance Manual (June 2009) II-8.1.
- May be issued upon consent ("Consent Order"), or involuntarily, after service of a Notice of Charges and an administrative hearing resulting in a final agency Order.
- A temporary C&D may be issued "in the most severe situations to halt particularly egregious practices pending a formal hearing" on a permanent C&D. FDIC Compliance Manual (June 2009) II-8.1; 12 U.S.C. §1818(c)-(d). A temporary C&D is subject to review by a U.S. District Court within 10 days of issuance.

Removal/Suspension of Institution Affiliated Party – 12 U.S.C. 1818(e)

- Institution Affiliated Party (IAP): generally, "any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution," can also include "any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly" engages in misconduct. 12 U.S.C. § 1813(u).
- The prohibition may apply to specific activities, but more typically bans the IAP from participating in the affairs of any insured depository institution or industry.
- An IAP may be temporarily suspended pending a hearing on an order of removal if the "individual's continued participation poses an immediate threat to the institution or to the interests of the institution's depositors." FDIC Compliance Manual (June 2009) II-8.1.
- An IAP may be suspended when charged with felonies involving dishonesty or breach of trust. Id.

Removal/Suspension of Institution Affiliated Party for Certain Criminal Offenses – 12 U.S.C. 1818(g)

- An IAP may be suspended when subject to any information, indictment, or complaint, involving the commission of or participation in—
  - (i) a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, or
  - (ii) a criminal violation of section 1956, 1957, or 1960 of title 18 or section 5322 or 5324 of title 31, and
  - If, the appropriate Federal banking agency determines that continued service by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatens, or may threaten to impair public confidence in the depository institution.
- An IAP may also be permanently removed on the same grounds as above upon judgment of conviction or an agreement to enter a pretrial diversion or other similar program at such time as the judgment is not subject to further appellate review.

CIVIL MONEY PENALTIES 12 U.S.C. 1818(I)

- Violation of a law, rule, regulation, or a final Order may result in the imposition of CMPs. In certain circumstances, CMPs may be imposed as a result of a breach of fiduciary duty or unsafe or unsound banking practice.
- "Assessed to sanction an institution or IAP according to the degree of culpability and severity of the violation, breach, and/or practice and also to deter future occurrences." FDIC Compliance Manual (June 2009) II-8.1.
- Fines per day (Electronic Code of Fed. Regs.; Current as of Jan. 27, 2015)
  - 12 U.S.C. § 1818(i)(2)(A) Violation of Law or Unsafe or Unsound Practice—1st Tier $7,500
  - 12 U.S.C. § 1818(i)(2)(B) Violation of Law or Unsafe or Unsound Practice—2nd Tier $37,500
  - 12 U.S.C. § 1818(i)(2)(C) Violation of Law or Unsafe or Unsound Practice—3rd Tier $1,375,000

Civil Money Penalties 12 U.S.C. 1818(i) (cont.)

- Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies (63 Fed. Reg. 30227, June 3, 1998) provides guidance on the criteria used by the FBAs. Relevant factors include:
  - Whether the violation was intentional
  - Duration of the violation, history of prior violations, previous criticism
  - Failure to cooperate with regulator
  - Concealment of violation
  - Actual loss or threat of loss to institution
  - Financial gain by participant
  - Lack of compliance program

C. BSA-Related Enforcement Actions

- May take the form of Consent Orders, CMPs or both
  - C&D Orders are required in the case of Program Violations (i.e., failure to establish or implement any of the required components of a BSA Program)
  - Such Orders frequently include "Look Back" provisions requiring review of past transactions and the filing of SARs
- FinCEN has separate authority to assess CMPs for BSA-related violations. See 31 U.S.C. § 5321 & 31 C.F.R., Chapter X.
  - FinCEN BSA related enforcement actions can be found at http://www.fincen.gov/news_room/ea/
- Not unusual for CMPs to be assessed concurrently by federal banking agency and FinCEN.
  - For a more in depth discussion of FinCEN enforcement see Compliance Officer Liability: FinCEN and Regulators Increase the Pressure, by D.E. Wilson & Jonathan Pompan.
- If criminal money laundering is implicated, Department of Justice may also participate – generally by means of a deferred prosecution agreement.

D. DOJ FIRREA Authority

- FIRREA provides that the DOJ may seek civil penalties against individuals for violations of 14 different federal criminal laws, including mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343). Certain violations, such as mail and wire fraud, must affect federally insured financial institutions. See 12 U.S.C. §1833a.

- Under FIRREA, the DOJ need only prove that there was a violation of one of these 14 predicate criminal offenses "by a preponderance of the evidence," which is a civil evidentiary burden. 12 U.S.C. § 1833a(f).

- The scope of FIRREA is broad and growing.
  - *United States v. Menendez* (C.D.Ca.): the Justice Department brought a FIRREA civil suit against Menendez, a real estate broker, alleging that he committed bank fraud when he submitted a false certification on behalf of a homeowner to the United States Department of Housing and Urban Development (HUD) in connection with the homeowner's short sale of his property.

- For a full discussion of Section 951, see FIRREA: The DOJ's Expansive (And Expensive) Tool of Choice, by Allyson B. Baker & Andrew Olmen.

E. CFPB

- Section 1031 of the Dodd-Frank Act provides that the CFPB may take action to prevent a covered person from itself "committing or engaging in an unfair, deceptive, or abusive act or practice."
- The term "covered person" includes any "related person" which means:
  - (i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;
  - (ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and
  - (iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—1. violation of any provision of law or regulation; or 2. breach of a fiduciary duty."
    - This section **does not apply to** related persons of bank holding companies, credit unions, or depository institutions.
- CFPB Suits Against Individuals:
  - On July 24, 2013, the CFPB filed suit against Castle & Cooke Mortgage LLC, its President, and its Senior Vice President of Capital Markets, alleging that the defendants paid bonuses in violation of the Truth in Lending Act's loan originator compensation rules. The defendants entered into a consent order with the CFPB, agreeing to pay $9.2 million for restitution and a $4 million civil penalty to resolve the allegations.
  - In January 2015, the CFPB brought an action against Wells Fargo, JPMorgan Chase, Elaine Oliphant Cohen, and Todd Cohen for taking illegal kickbacks for steering customers to a now-defunct title company. Wells Fargo and JPMorgan settled for a combined $35.7 million and the Cohen's were fined $30,000.

F. Recent Enforcement Actions Against Individuals

- **OCC**
  - 2013: 23 CMPs Assessed Against Individuals (ranging from $1,500 to $250,000)
    - ***In the Matter of Harold Connell,*** Former President, CEO, and Chairman of the Board of Security Bank, N.A. (Florida): The OCC imposed a CMP of $20,000 for bringing high-risk business to the bank, which he knew or should have known that the bank was not able to monitor or control.
    - ***In the Matter of James A. Regas,*** Former Chairman of the Board of Western Springs National Bank (Illinois): The OCC imposed a CMP of $250,000 for arranging for the Bank to make numerous loans for his benefit or the benefit of real estate investments that he controlled on behalf of his children and for mishandling more than ten checks from and for the benefit of Bank customers with whom he had a close financial connection.
  - 2014: 29 CMPs Assessed Against Individuals (ranging from $1,000 to $40,000)
    - ***In the Matter of Michael L. Flynn,*** Former Senior Loan Officer and Director of Citizens Commerce National Bank (Kentucky): The OCC imposed a CMP of $25,000 for failure follow prescribed loan approval processes; adequately monitor loans; appropriately recognize non-accrual status; assign accurate risk ratings; follow regulatory guidance and prudent banking practices regarding the capitalization of interest and charges; obtain current and adequate financial information on borrowers and guarantors; and obtain current collateral valuations, in violation of 12 C.F.R. Part 34.
  - 2015: 16 CMPs Assessed Against Individuals (ranging from $2,500 to $30,000)
    - ***In the Matter of James Barnes***, Former Director and Chairman of the Board of Ozark Heritage Bank, N.A. (Arkansas): The OCC imposed a CMP of $20,000 on Mr. Barnes for committing reckless, unsafe, or unsound practices and breaching his fiduciary duties to the Bank by misrepresenting his assets and liabilities when obtaining five loans from the Bank, which Mr. Barnes failed to repay. This resulted in the Bank having to charge-off losses related to four of the loans.

Recent Enforcement Actions Against Individuals (con't)

- **FDIC**
  - 2013: 39 CMPs Assessed Against Individuals (ranging from $1,000 to $300,000)
    - ***In the Matter of Craig On,*** Former Controller, Deputy Chief Financial Officer, and Chief Financial Officer of United Commercial Bank (California): The FDIC assessed a CMP of $150,000 for engaging in unsafe and unsound practices and breaching his fiduciary duty by failing to disclose the deterioration in the Bank's loan portfolio
    - ***In the Matter of James E. Bishop,*** Former Chairman and Chief Executive Officer of Summit Bank (Washington): The FDIC assessed a CMP of $300,000 for engaging in unsafe and unsound practices and breaching his fiduciary duty by concealing from regulators the mounting number of loans that were in default. The DOJ also brought charges against Mr. Bishop for filing false call reports with the FDIC – he was sentenced to 3 years in prison in December 2013.
  - 2014: 23 CMPs Assessed Against Individuals (ranging from $1,000 to $485,000)
    - ***In the Matter of Chris Lee,*** Former Senior Vice President and Director of Commercial Real Estate of United Commercial Bank (California): The FDIC assessed a CMP of $40,000 for engaging in unsafe and unsound practices and breaching his fiduciary duty by making misrepresentations to regulators.
  - 2015: 16 CMPs Assessed Against Individuals (ranging from $5,000 to $175,000)
    - ***In the Matter of Larry Seastrom, Bob Brunner, Tim Thissen, and John Kammeier,*** former Directors of New Frontier Bank (Colorado): The FDIC levied penalties against the former directors for their role in the failure of New Frontier Bank. Larry Seastrom was fined $175,000; Bob Brunner was fined $175,000; Tim Thissen was fined $125,000; and John Kammeier was fined $70,000. Additionally, former chief lending officer Gregory Bell was convicted of bank fraud in 2013 and sentenced to two and a half years in federal prison.

Recent Enforcement Actions Against Individuals (con't)

- **FinCEN**
  - 2014: 1 CMP Assessed Against an Individual
    - ***In the Matter of Thomas Haider***, Former Chief Compliance Officer and Senior Vice President of Government Affairs at MoneyGram International Inc.: On December 18, 2014, FinCEN assessed a $1 million CMP against Thomas Haider, the ex-compliance chief at MoneyGram International Inc., for failing to ensure the cash-transfer firm had an effective anti-money-laundering program.

G. Enforcement Trends

- "As a civil regulator, we are taking action today not only to penalize the bank, but also expose and sanction individual BNPP employees for wrongdoing. In order to deter future offenses, **it is important to remember that banks do not commit misconduct – bankers do**." Benjamin Lawsky, Press Release, NYDFS, Cuomo Administration Announces BNP Paribas to Pay $8.9 Billion, Including $2.23 Billion to NYDFS, Terminate Senior Executives, Restrict U.S. Dollar Clearing Operations for Violations of Law, http://www.dfs.ny.gov/about/press2014/pr1406301.htm

- "The question I would pose from a risk management and corporate governance standpoint is whether it's time to require large complex banks to establish clear lines of accountability that make it possible to **hold senior executives responsible for serious compliance breakdowns** that lead to BSA program violations." Thomas Curry, Comptroller of the Currency, Remarks Before the Association of Certified Anti-Money Laundering Specialists (March 17, 2014).

- "Where appropriate, **individuals should face real, serious penalties and sanctions when they break the rules**. That can mean putting people in jail when they break the law in the context of criminal prosecutions. But it can also mean suspensions, firings, bonus claw-backs, and other types of penalties in the regulatory context." Benjamin Lawsky, Superintendent of Financial Services, Remarks on Financial Regulatory Enforcement at the Exchequer Club (March 19, 2014).

- "[T]here are **legitimate occasions where it is appropriate to pursue not only the company that was a party to the consumer's transaction, but also individuals who were decision-makers or actors relevant to that transaction** . . . Under the law, this includes not only a provider of consumer financial products or services, but also, in certain cases, anyone with 'managerial responsibility' or who 'materially participates in conduct of [its] affairs.'" Richard Cordray, Director of the CFPB, Remarks at the Federal Reserve Bank of Chicago (May 9, 2014).

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Ron Glancz is the Chair of Venable's Financial Services Group.

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Recognized in Super Lawyers Business Edition, Banking, Washington, DC, 2013

Selected for inclusion in Washington DC Super Lawyers, 2008 - 2014

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