

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**

**A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS**

Vol. 26 No. 7 July 2010

CLAIMS AGAINST BANK OFFICERS AND DIRECTORS ARISING FROM THE FINANCIAL CRISIS

The financial crisis has spawned many bank closures and the FDIC, as receiver, has begun making claims against former bank officers and directors to recover civil damages for losses. With the savings and loan crisis of 20 years ago in mind, the authors discuss the FDIC's process for investigating and asserting claims, the liability standard in such cases, and possible claims by other stakeholders. They also suggest measures to prepare for such claims, including steps to preserve the bank's D & O insurance coverage.

By Mary C. Gill, Mark C. Kanaly, Michael J. Hartley, and Robert R. Long *

The current financial crisis is unparalleled since the savings and loan crisis, when 1,813 financial institutions failed.¹ Since 2008, there have been 246 banks closed, with projections indicating that many more bank closures are on the very near horizon.² There were 140 bank closures in 2009, with the Federal Deposit

Insurance Corporation projecting that an even higher number of banks will close in 2010. Accordingly, recent figures suggest that the current financial crisis will ultimately overshadow the experience 20 years ago.

As a director or officer of a distressed bank, navigating through these troubled waters can be treacherous and, unfortunately, the risk of litigation is high. With a clear view of the horizon, however, there are steps that can be taken to help bank officers and directors prepare for claims and litigations.

FINANCIAL INSTITUTIONS REMAIN IN DISTRESS

Although the condition of the financial markets has marginally improved in recent months, many community banks still face significant short-term challenges. Loan quality for both small and large banks has continued to deteriorate as real estate prices have remained severely

¹ Between 1988 and 1992, there were 794 bank failures and 1,019 savings and loan failures. *Recent Bank Failures and Regulatory Initiatives*, Before The Committee on Banking and Financial Services, U.S. House Of Representatives (Testimony of Donna Tanoue, FDIC Chairman), February 8, 2000, available at <http://www.fdic.gov/news/news/speeches/archives/2000/sp08Fc b00.html>.

² The FDIC announced on March 31, 2010 that the number of financial institutions on the "Problem List" had increased from 702 to 775 during the first quarter of 2010. See FDIC Quarterly Banking Profile, First Quarter 2010, March 31, 2010, at 3.

* MARY C. GILL, MARK C. KANALY, MICHAEL J. HARTLEY, and ROBERT R. LONG are partners in Alston & Bird LLP's Atlanta and Los Angeles offices, and are part of the firm's national Officers & Directors of Distressed Financial Institutions team. Their e-mail addresses are mary.gill@alston.com, mark.kanaly@alston.com, michael.hartley@alston.com, and robert.long@alston.com.

IN THIS ISSUE

• CLAIMS AGAINST BANK OFFICERS AND DIRECTORS
ARISING FROM THE FINANCIAL CRISIS

depressed when viewed in light of recent periods.³ While losses on acquisition, development, and construction loans continue to build, especially in the residential real estate arena, commercial real estate loans have also become a concern.⁴ According to a recent Congressional Panel Report, between 2010 and 2014, about \$1.4 trillion in commercial real estate loans will come to the end of their terms. Nearly half of these loans are under water, with borrowers owing more on their loans than the property currently is worth.⁵ The Congressional Panel anticipates that the wave of commercial real estate loan losses over the next four years will jeopardize the viability of many banks, particularly community banks.⁶

In most instances, the closure of a bank is preceded by a variety of regulatory mandates. These include informal, or “heightened supervisory” initiatives, such as a board resolution or a memorandum of understanding, as well as more substantive formal enforcement initiatives, such as consent orders (formerly known as cease and desist orders) that mandate steps the bank must take to attain financial soundness and prompt

corrective actions if the bank continues to fail to comply with prior directives. In general, these directives impose additional reporting requirements on the banks, require the banks to raise capital, and place restrictions on certain of their lending and other activities. If efforts to raise capital are unsuccessful and the financial soundness of the bank continues to deteriorate, then the bank may ultimately be closed by the bank’s primary regulator.

THE POST-RECEIVERSHIP INVESTIGATION AND PRE-LITIGATION PROCESS

The officers and directors of a closed bank face scrutiny by one or more of the bank’s former regulators, but the most likely threat of litigation is from the FDIC. When a federally insured bank is closed, the FDIC typically is appointed as a receiver and the FDIC’s insurance fund bears the losses resulting from the bank’s failure. In that capacity, the FDIC conducts an investigation of each closed bank to determine whether there are grounds to assert claims against the officers and directors, among others. The FDIC typically adheres to an 18-month timeline to investigate such claims, although generally the FDIC will have at least three years after the date of the bank closure to bring most claims.⁷

As in the savings and loan crisis, the FDIC is focused on gathering evidence of (i) dishonest conduct or abusive insider transactions; (ii) violations of internal policies, law, or regulations that resulted in a safety or soundness violation; or (iii) failure to establish, monitor, or follow proper underwriting procedures, or heed warnings from regulators or advisors.⁸ In circumstances

³ *Commercial Real Estate*, Before the Congressional Oversight Panel, Atlanta Georgia Field Hearing (Statement of Jon D. Greenlee, Associate Director Division of Bank Supervision and Regulation, Board of Governors of the Federal Reserve System), January 27, 2010, available at <http://www.federalreserve.gov/newsevents/testimony/greenlee20100127a.pdf>.

⁴ *Commercial Real Estate Losses and the Risk to Financial Stability*, Congressional Oversight Panel, February Oversight Report, February 10, 2010 (*Congressional Panel Report*). The performance of loans that have commercial real estate properties as collateral typically lags behind economic cycles. *The Commercial Real Estate Market*, Before the Congressional Oversight Panel (testimony of Doreen R. Eberley, Acting Director of Atlanta Regional Office FDIC), January 27, 2010, available at <http://cop.senate.gov/documents/testimony-012710.eberley.pdf>.

⁵ Approximately 48% of banks (2,988 of 8,100) have a commercial real estate concentration with these loans at least 300% of total capital, or construction and land loans that exceed 100% of capital. *Congressional Panel Report*, *supra* note 4, at 23, 46.

⁶ *Id.* at 19-20.

⁷ 12 U.S.C. § 1821(d)(14).

⁸ See *Statement Concerning the Responsibilities of Bank Directors and Officers*, FDIC Financial Institution Letter (FIL-87-92), December 3, 1992. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”) established gross negligence as a minimum standard for officer and director liability in claims brought by the FDIC for civil money damages. 12 U.S.C. § 1821(k). This statute, however, permits the FDIC to pursue claims against officers and directors under a stricter standard for liability (simple negligence), if permissible under state law.

that indicate potentially criminal conduct, the FDIC's Office of Inspector General will also refer the matter to, and work with, the Justice Department.

The FDIC's Professional Liability Section (PLS) is responsible for the investigation and recovery on civil claims against bank officers and directors. The FDIC's investigatory process includes a number of steps that are taken well before a lawsuit is actually filed. Through its broad investigatory powers, this process involves interviews and sworn testimony of the officers and directors, which the FDIC uses to build a record to support its claim.⁹

When a bank is closed and the FDIC is appointed as receiver, members of the PLS are among the group of individuals that appear at the bank on the day of its closure. The PLS staff will remain at the bank for a period of time, typically three weeks or more, conducting interviews of senior management and other key individuals. These individuals may request to have counsel present during these interviews, which typically is counsel for the individual directors and officers, rather than bank counsel.

The former directors and senior officers (typically, the chief executive officer, the chief financial officer, chief credit officer, and senior loan officer) may then receive a letter from the FDIC with a demand for payment of civil money damages, which, based upon FDIC loss experiences, generally approximates one-third of the total assets of the bank. The individuals receiving the demand letter may also include former bank officers and directors who were no longer at the bank at the time of closure, but who were involved with the bank during the periods when the pertinent activities occurred. These demand letters generally allege that the officers and directors breached their fiduciary duties to the bank and acted in a negligent or grossly negligent manner in conducting the business of the bank. The demand letter often will include a list of classified or foreclosed loans and the estimated losses on those loans, which forms the basis of damages that the FDIC will seek against the officers and directors. The FDIC is required to keep these investigations confidential and demand letters are not filed by the FDIC with any court, posted, or otherwise made publicly available.¹⁰ This explains why,

although there is significant activity in this area, there have been few public reports on the subject.

The timing of the demand letter frequently coincides with the end of the directors and officers (D&O) insurance policy period and therefore may arrive several months after the bank closes and initial interviews have been concluded. In addition, the FDIC typically sends its demand letter directly to the D&O insurance carrier to provide notice under the policy to trigger insurance coverage as a potential source of recovery if liability is established. Although the demand letter is not a formal lawsuit, in many instances, and depending upon the language of the policy, the demand for civil money damages will constitute a "claim" under the D&O policy, thereby affording coverage to the directors and officers from that point forward.

The next step taken by the FDIC in the investigation of potential claims may be to issue subpoenas to the directors and officers and seek documents relating to the bank and to their personal financial affairs. As noted in the FDIC Policy Statement, "the FDIC brings suits only where they are believed to be sound on the merits and likely to be cost effective." Accordingly, in order to determine the ability of the FDIC to recover from an individual to pay a judgment on a claim, if the FDIC is successful, it is routine for the FDIC to seek personal financial information from the officers and directors as part of the investigation.

The subpoena may also direct the directors and officers to appear and testify at a deposition. The directors and officers are entitled to and should have their counsel present during the deposition. The FDIC, also represented by outside counsel, will have the benefit of the bank's documents and records upon which to conduct the examination of the officers and directors. Unlike the discovery process in litigation, there is no mechanism under the applicable investigatory regulations that empowers the former bank directors and officers or their counsel to compel production by the FDIC of these bank documents for review prior to the deposition.

Although there is no public source of information, officers and directors of roughly half of the banks that have been closed have received letter demands for civil damages from the FDIC. Officers and directors of

⁹ 12 U.S.C. § 1818(n); 12 U.S.C. § 1821(d)(2)(I).

¹⁰ 12 C.F.R. § 308.147. In certain cases, the recipients of the demand letter may file it with the court. *See, e.g., In re BankUnited Financial Corp.*, No. 09-19940-LMI, Order Denying the Federal Deposit Insurance Corporation's Motion to Enforce the Order Granting the Committee Derivative Standing to Investigate, Assert and Prosecute Claims Against

footnote continued from previous column...

Officers, Directors and Prepetition Professionals (DE#426) (Bankr. Ct. S.D. Fla. Jan. 6, 2010).

approximately a quarter of the closed banks have received FDIC subpoenas.

It is too early to determine how aggressive the FDIC will be in filing civil actions against officers and directors as a result of the current financial crisis. Whether the FDIC will actually file lawsuits against individual officers and directors after the investigation is determined at the highest levels of the FDIC. According to a report by the FDIC following the savings and loan crisis:

No claim is pursued by the FDIC unless it meets both requirements of a two part test. First, the claim must be sound on its merits, and the receiver must be more than likely to succeed in any litigation necessary to collect on the claim. Second, it must be cost-effective, considering liability insurance coverage and personal assets held by the defendant.¹¹

In the prior financial crisis, the FDIC initiated claims against the former officers and directors of 24 percent of the institutions that failed in the period between 1985 and 1992.¹² While we are still in the early stages of this financial fallout, it is expected that this percentage will prove to be much higher in this cycle. It is the practice of the FDIC, however, to attempt to resolve the claims through settlement before filing litigation.¹³

THE STANDARD FOR ESTABLISHING LIABILITY

In those instances in which the FDIC asserts claims for civil money damages against officers and directors of a closed bank, a threshold issue will be the applicable standard that the FDIC must meet to establish liability. In the midst of the savings and loan crisis, FIRREA was passed, which established gross negligence as a national minimum standard for officer and director liability.¹⁴

¹¹ Fed. Deposit Ins. Corp., *The FDIC and RTC Experience, Managing the Crisis* 266 (1998) (hereinafter *Managing the Crisis*).

¹² *Statement Concerning the Responsibilities of Bank Directors and Officers*, FDIC Financial Institution Letter (FIL-87-92), December 3, 1992.

¹³ *Managing the Crisis*, *supra* note 11, at 266.

¹⁴ 12 U.S.C. § 1821(k). To establish a claim against officers and directors of the bank under this standard, the FDIC must prove that: (i) each of the individual officers or directors was grossly negligent in approving the specific loans at issue; (ii) these grossly negligent decisions were the proximate cause of losses

This statute also permits the FDIC to pursue claims against officers and directors under a stricter standard for liability (simple negligence), if permissible under state law. For claims brought by the FDIC under 12 U.S.C. Section 1821(k), therefore, the standard for liability of officers and directors may vary depending upon state law.

Accordingly, analysis of the liability standard under applicable state law is a critical first step in representing officers and directors of closed banks. In most states, gross negligence remains the minimum standard for imposing liability upon bank officers and directors. Determining the standard for liability in a particular state, however, may not be straightforward. Some states have a clear statutory provision or judicial decision setting the threshold to establish liability. More often, the analysis is more complicated and requires reference to the applicable standard of care, the business judgment rule, each state's own legal idiosyncrasies, and perhaps other factors as well. This complexity creates potential pitfalls for practitioners, as well as opportunities for shaping the law, as these cases progress through litigation.

In the past, the FDIC followed an internal policy of pursuing only outside director claims based upon facts that demonstrated conduct that rose to the level of gross negligence or worse.¹⁵ Under this standard, "directors and officers are generally protected from liability if they have acted in good faith and with due care, and if they have made fully informed business decisions within the scope of their authority and without personal interest or self-dealing."¹⁶ In short, the business judgments of the board should not be subject to second-guessing by the

footnote continued from previous column...

to the bank, without any intervening cause, and which loss was foreseeable at the time that the loans were made; and (iii) the bank/FDIC has experienced actual losses (not simply an accounting write-off) as a result. In addition, the FDIC must rebut a variety of affirmative defenses that may mitigate these claims and damages.

Bank officers and directors may also be subject to claims for statutory violations and/or administrative actions under 12 U.S.C. § 1818, which is beyond the scope of this article. Under this section, FDIC may seek to impose civil money penalties, as distinct from civil money damages, on officers and directors of a bank. There are three tiers of civil money penalties under this statutory framework, each of which has an express standard that must be established for liability.

¹⁵ *Managing the Crisis*, *supra* note 11, at 275.

¹⁶ *Id.* at 276.

FDIC. Notwithstanding these policy statements, however, the pre-litigation demand letters for civil money damages sent by the FDIC during the recent financial crisis have included threatened claims for simple negligence. The distinction between a simple negligence standard and a gross negligence standard for imposing liability may be significant in this environment.

The recent report of the Examiner of Lehman Brothers provides a useful illustration of these principles in the current financial crisis. The Examiner was appointed by the bankruptcy court to investigate potential claims against the officers and directors of Lehman Brothers, among others, for the events that led to its demise. The Examiner concluded that Lehman Brothers' management had made "a series of business decisions that had left it with heavy concentration of illiquid assets with deteriorating values such as residential and commercial real estate." The Examiner noted that in pursuing its aggressive growth strategy, Lehman Brothers' management regularly disregarded the firm's risk controls. While these business decisions "may have been in error," the Examiner determined that they did not support claims against the officers and directors. "Ultimately, the Examiner concludes that while certain of Lehman's risk decisions can be described in retrospect as poor judgment, they were within the business judgment rule and do not give rise to colorable claims."¹⁷ Although the Examiner's conclusions are not binding upon any court, they provide a useful framework for analyzing and defending claims that the FDIC is poised to pursue against bank officers and directors.

OTHER POTENTIAL LITIGANTS

If the bank stock was held by a holding company, in many instances, the holding company will file for a Chapter 7 bankruptcy at some point after the bank closes. The Trustee that is appointed by the bankruptcy court may also explore whether there are claims that may be asserted against the officers and directors of the bank and holding company in an attempt to recover assets for the benefit of creditors. These claims may be nearly identical to those asserted by the FDIC. As a result, the FDIC and the Trustee may become

adversaries and compete for the "ownership" of the claims and any recovery that may result.¹⁸

A further source of litigation risk for officers and directors of banks or holding companies is shareholder lawsuits. The number of shareholder class actions filed against publicly traded financial institutions in recent years has been at an all-time high.¹⁹ These shareholder plaintiffs typically allege that the bank or holding company's stock price was inflated by reports that falsely overestimated the financial condition of the bank, particularly the value of real-estate-backed assets. Several recent decisions, however, may dampen the interest in pursuing such claims as courts have recognized the illogical theories of some of the claims that have been filed in the wake of the financial crisis.²⁰

Many bank holding companies issue trust-preferred securities, which are hybrid securities with attributes of both debt and equity, as a means of raising capital. When a bank falls under stricter regulatory oversight, one of the limitations imposed on the bank is to suspend payment of dividends on the trust-preferred securities – often called a "regulatory deferral." If the bank is closed, these trust-preferred securities lose any value to the holder. Although there is litigation risk from these holders, this has not been an active litigation area. This phenomenon largely is attributable to the fact that trust-preferred securities of a particular bank generally are issued into a collateralized debt obligation or other pooling vehicle that owns trust-preferred securities of many different bank holding companies. The pool then issues to investors securities backed by the assets of that pool (*i.e.*, the trust-preferred securities). When a bank

¹⁷ *In re Lehman Brothers Holdings Inc.*, Chap. 11 Case No. 08-13555 (JMP), (Bankr. Ct. S.D.N.Y. Mar. 11, 2010), *Report of Anton R. Valukas, Examiner*, available at <http://lehmanreport.jenner.com/VOLUME%201.pdf>, at 22.

¹⁸ See, e.g., *Lubin v. Skow*, No. 1:09-CV-1155-RWS, 2009 U.S. Dist. LEXIS 112020 (N.D. Ga. Nov. 30, 2009), *aff'd*, No. 10-10011, 2010 U.S. App. LEXIS 12140 (11th Cir., June 14, 2010); *In re BankUnited Financial Corp.*, No. 09-19940-LMI, Order Denying the Federal Deposit Insurance Corporation's Motion to Enforce the Order Granting the Committee Derivative Standing to Investigate, Assert, and Prosecute Claims Against Officers, Directors, and Pre-petition Professionals (DE#426) (Bankr. Ct. S.D. Fla. Jan. 6, 2010).

¹⁹ Cornerstone Research, *Securities Class Action Filings – 2009: A Year in Review*, Jan. 5, 2010.

²⁰ For example, in dismissing plaintiffs' complaint, Judge William H. Pauley, III, noted, "It is nonsensical to impute dishonest motives to the individual defendants when each of them suffered significant losses in their stock holdings and executive compensation." *Plumbers & Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Commerce*, No. 1:08-cv-08143, Memorandum and Order Granting Defendants' Motion to Dismiss, at 17 (DE#42) (S.D.N.Y. Mar. 17, 2010).

fails, the trustee of the pool typically notifies the investors and seeks to determine if they are willing to fund the pursuit of claims against the failed bank or its officers and directors. Because most investors are not in communication with each other, and because they generally are unwilling to fund any claims, these parties and their trustees have not yet been active in bringing claims for losses on these securities.

Other stakeholders who may assert claims include employees and customers (often borrowers) of the bank. Employees, who are participants in retirement plan vehicles that hold the bank or holding company's stock, typically bring Employee Retirement Income Security Act ("ERISA") actions involving allegations that the plan fiduciary breached his or her duties by improperly investing in the bank's stock due to the known risks, failure to diversify, and failure to disclose potential risks.²¹ Customers typically bring lender-liability claims asserting that the mismanagement of the bank resulted in the bank's failure and its resulting inability to continue to honor funding obligations that it had to the customer in respect of outstanding debt. That funding failure, in turn, caused harm to the customer's professional and personal endeavors. In other instances, counterclaims may be asserted by borrowers against officers or directors of the bank as a defensive measure in actions to collect outstanding loans. Again, these employee and customer claims have not yet become an active source of litigation.

PREPARING FOR POTENTIAL CLAIMS

With the heightened risk of litigation in the financial sector, there are certain steps that bank officers and directors may take to prepare for claims or litigation that may follow if the bank is closed. Counsel may meet with the board members and review the examination reports and other documents available while the bank remains open to provide insight into the specific issues that confront the board of directors and management. Moreover, it is important that documents pertaining to the bank are preserved and counsel may give guidance on specific document preservation procedures.

In this environment, it is especially important for bank officers and directors to have a clear understanding of the scope and potential limitations of their D&O insurance policies. There are a variety of clauses that may impact the availability of insurance coverage in these cases. With the risks inherent in the financial

sector, officers and directors will want to have the most effective D&O insurance coverage possible.

As an initial matter, officers and directors should pay close attention to when the D&O policy coverage expires. Most D&O policies are "claims made" policies, meaning that the coverage is triggered when a "claim" is asserted against an insured person or entity under the policy, rather than relating back to the event that is the basis for the claim. Under these policies, if claims are not made within the policy period, generally they will not be covered. For example, although claims asserted by the FDIC typically relate to the origination or renewal of loans by the bank during the height of the real estate boom (2002-2006), the insurance coverage for the directors and officers under a claims-made policy will be governed by the D&O policy that is in effect when the claim is made (for example, receipt of an FDIC demand letter), which generally occurs after the bank has been closed.

Since most D&O policies extend from one to three years, the terms of the bank's policy and the scope of coverage may have changed over the years. In the current environment, obtaining new coverage after a policy expires can be difficult. Officers and directors will want to determine when their D&O policy is due to expire and begin to seek new coverage well in advance of the current policy's expiration date. Negotiating new coverage is time consuming and as a policy gets closer to expiration the ability to obtain maximum coverage at an affordable price may decrease.²²

Directors and officers should also review whether their current policy offers a right to an extended discovery or "tail" period. If the insurer cancels or refuses to renew a policy, many policies afford the insured the right to purchase a 12-month "extended discovery" or "tail" period following the cancellation or nonrenewal. The right to purchase the tail coverage is a particularly attractive option if the policy affords protection against regulatory claims. Many policies offer the insureds a right to such coverage, for a price determined at the policy's inception. This will allow coverage under the policy to continue for claims that arise within the 12-month period following termination

²¹ See, e.g., *In re Colonial Bancgroup, Inc. ERISA Litigation*, No. 2:09-cv-792-MHT-WC, Amended Complaint (DE#99) (M.D. Ala. Jan. 11, 2010).

²² Obtaining robust D&O insurance coverage in the current environment is a challenge and carriers have begun to price their D&O policies in recognition of the risks of litigation. Coverage for claims by regulators against the directors and officers of a bank that is in moderate but not severe distress may be available, but will be expensive. If the bank is in severe distress, D&O coverage for claims by regulators simply may not be available.

of the policy, which may coincide with the period of the FDIC investigation and demand letter for civil money damages.

In the wake of the savings and loan crisis, insurance carriers began to include regulatory exclusions in D&O policies in an effort to reduce exposure to claims for civil damages sought by the regulators, and such regulatory exclusions are found in many current bank D&O insurance policies.²³ While most D&O policies exclude coverage for civil fines or penalties, a true regulatory exclusion affords no coverage for liability or even legal defense costs in claims asserted by the regulators, such as the FDIC. Accordingly, regulatory exclusions are of particular significance if the bank may be closed by the regulators, with the inherent risk of claims that may follow.

Insurance carriers may also rely upon other clauses, such as the “insured v. insured” clause, to deny coverage when claims are made by the FDIC or Trustee. In these instances, the insurance company takes the position that the FDIC and Trustee have “stepped into the shoes” of the bank or holding company and that the policy therefore does not afford coverage for claims brought by one insured (FDIC or Trustee) against another insured (officers and directors). This is another area that was the subject of extensive litigation following the savings and loan crisis.²⁴ Since the D&O insurance policies are often the only source of recovery for claims by the FDIC or Trustee disputes and in some instances litigation over the “insured v. insured” clause and its applicability to the

current FDIC and Trustee claims against officers and directors should be anticipated. Thus, to the extent possible, bank directors and officers should seek to include language in their D&O policy that makes clear that claims by the FDIC and Trustee will be covered.

Other provisions of the insurance policy may require that certain action be taken to insure that coverage is afforded for subsequent claims. For example, many policies allow the insureds to furnish prior to the expiration of the policy a “Notice of Circumstances.” The Notice of Circumstances is a letter, typically prepared by counsel, which puts the carrier on notice of facts and circumstances that may give rise to claims under the policy. If the letter describes the facts and circumstances in adequate detail, subsequent claims arising from the described facts and circumstances may be treated by the carrier as being made within the policy period, even if the claim is made after the expiration of the policy.

Submitting the Notice of Circumstances may have the effect of extending a policy that is later cancelled or not renewed. Therefore, exercising the right to submit a Notice of Circumstances may be especially important if there is a possibility that the carrier may cancel or refuse to renew a policy that has broad coverage. Accordingly, the Notice of Circumstances may provide coverage under the current policy that the directors and officers may not have in subsequent policies.

CONCLUSION

The wave of bank closures with the invariable investigations that follow will, unfortunately, continue this year, if not beyond. In many instances, litigation against bank officers and directors will follow. Bank officers and directors and their counsel can take steps now to prepare for the investigations and potential litigation, by (i) gaining an understanding of the general risks to bank officers and directors from claims by all the relevant parties; (ii) informing themselves of the particular issues confronting the bank, through a review of the examination reports, third-party reports, and other documents available while the bank remains open; and (iii) evaluating the D&O insurance policies to ensure that the bank directors and officers have a reasonable amount of protection and taking appropriate actions such as the preparation and submission of a Notice of Circumstances. There may be other steps that are also appropriate, depending upon the particular facts and circumstances of the bank. ■

²³ The terms of these regulatory exclusions vary between policies and the specific terms of the policy should be reviewed carefully.

²⁴ See, e.g., *American Cas. Co. v. FDIC*, 791 F. Supp. 276 (W.D. Ok. 1992) (insured v. insured did not bar coverage for claims by FDIC as receiver); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 765 F. Supp. 538 (D. Minn. 1991) (insured v. insured provision was ambiguous and did not bar claims by the FDIC as receiver of the closed bank, although the express regulatory exclusion in the policy did exclude such claims); *American Cas. Co. v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991), *aff'd on other grounds*, 22 F.3d 880 (9th Cir. 1991) (same); *FDIC v. Zaborac*, 773 F. Supp. 137 (C.D. Ill. 1991) (insured v. insured clause did not apply because the FDIC did not stand in the shoes of the closed bank), *aff'd on other grounds*, 998 F. 2d 404 (7th Cir. 1993); *but see Powell v. Am. Cas. Co.*, 772 F. Supp. 1188 (W.D. Okla. 1990) (insured v. insured provision excluded claims by the FDIC because the FDIC stood in the shoes of the bank in prosecuting claims); *Mt. Hawley Ins. Co. v. Fed. Sav. & Loans Ins. Corp.*, 695 F. Supp. 469 (C.D. Cal. 1987) (same).