

THE REVIEW OF  
**BANKING & FINANCIAL  
SERVICES**  
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS  
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 27 No. 11 November 2011

## DEFENDING BANK OFFICERS AND DIRECTORS IN FDIC LITIGATION

*In the fallout from the financial crisis, the FDIC, as receiver, has authorized suits against 308 former directors and officers of 34 failed banks and has already filed 16 such suits. The authors discuss the obstacles to such claims and the availability of affirmative defenses after the Supreme Court's landmark O'Melveny & Myers decision.*

By Mary C. Gill, Robert R. Long, and Todd F. Chatham \*

In the three years since the onset of the financial crisis, the number of banks that have been closed is roughly half the number of financial institutions that failed after the savings and loan crisis of the late 1980s.<sup>1</sup> Although the number of problem institutions declined in the second quarter of 2011, there remain 865 institutions on the FDIC's "problem bank list," which indicates that bank closings will likely continue at a steady pace in the near term.<sup>2</sup> Whether the number of failed banks ultimately reaches the level of closings experienced in the post-savings and loan crisis remains to be seen.

The wave of litigation that has begun slowly and will continue in the wake of the bank closings also parallels the post-savings and loan crisis in many respects.<sup>3</sup> Significant developments in the law during the last decade, however, may yield strikingly different results in the claims that flow from the current financial crisis.

When a federally insured bank is closed, the Federal Deposit Insurance Corporation ("FDIC") is appointed as conservator or receiver. The FDIC investigates every closed bank to determine whether there may be claims that can be pursued in an effort to recoup losses to the bank.<sup>4</sup> The investigation of a closed bank by the FDIC

---

<sup>1</sup> Between 1988 and 1992, there were 794 bank failures and 1,019 savings and loan failures. *Speeches and Testimony, 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), <http://www.fdic.gov/news/news/speeches/archives/2000/sp08Feb00.html>.

<sup>2</sup> FDIC Quarterly Banking Profile, Second Quarter 2011, <http://www2.fdic.gov/qbp/2011jun/qbd.pdf>.

---

<sup>3</sup> The FDIC asserted professional liability claims against the former officers and directors of 24% of the banks that failed as a result of the savings and loan crisis from the late 1980s. Many of these claims were resolved, however, without litigation being filed by the FDIC.

<sup>4</sup> In an earlier article, the authors provided a full discussion of the FDIC investigation process, see Gill et al., *Claims Against Bank Officers and Directors Arising from the Financial Crisis*, 26 Rev. Bank. & Finan. Serv. 69 (July 2010).

---

\* MARY C. GILL and ROBERT R. LONG are partners and TODD F. CHATHAM is an associate with Alston & Bird LLP in Atlanta and part of the firm's Officers & Directors of Distressed Financial Institutions team. Their e-mail addresses are [mary.gill@alston.com](mailto:mary.gill@alston.com), [robert.long@alston.com](mailto:robert.long@alston.com), and [todd.chatham@alston.com](mailto:todd.chatham@alston.com).

---

### IN THIS ISSUE

• **DEFENDING BANK OFFICERS AND DIRECTORS IN FDIC LITIGATION**