

How Will the Mass of Failed Bank Litigation Finally Play Itself Out?

Posted by LaCroix, Kevin. "What to Watch Now in the World of D&O". *The D&O Diary*. 3 September 2013. Web. 04 October 2013. <http://www.dandodiary.com/2013/09>

The peak of the recent financial crisis is now nearly five years in the past. Though banks are still continuing to fail, we can hope that the worst of the bank failure wave is now behind us. Along those lines, in its most recent Quarterly Banking Profile, the FDIC reported that the number of "problem institutions" continues to decline -- although still troublingly high.

Though we can hope that the number of bank closures will continue to decline, the litigation that the FDIC is filing against the banks' former directors and officers continues to mount. As of the agency's latest report on August 8, 2013, the agency has filed 76 lawsuits against the directors and officers, including 32 so far this year. (By way of comparison, the agency filed 25 lawsuits during all of 2012.)

The number of failed bank lawsuits is likely to grow. As of August 8, 2013, the FDIC has also authorized suits in connection with 122 failed institutions against 987 individuals for D&O liability. The number of suits authorized is inclusive of 76 lawsuits that the agency has already filed naming 574 former directors and officers. In other words, there is a backlog of as many as 46 additional lawsuits yet to be filed. In addition, for some time now, the FDIC has increased the number of lawsuits authorized each month. There could be many more lawsuits yet to be authorized and filed.

The FDIC has already authorized lawsuits to be filed in connection with about 25% of all the 485 banks that have failed since January 1, 2008. (By comparison, during the S&L crisis, the agency filed D&O lawsuits in connection with about 24% of bank failures). With a total of 76 lawsuits actually filed, the agency has now filed suit in connection with about 15% of bank failures.

Given the litigation already filed and the lawsuits yet to come, there is and will continue to be a mountain of failed bank litigation to work its way through the courts. These cases are a burden for the courts and for the litigants. They also represent a challenge for the D&O insurers involved as these claims move toward resolution. The losses associated with these cases will continue to weigh on the insurers' financial results, which in turn will affect their premiums and their risk appetites.

A mass of D&O litigation was also one of the side-effects of the S&L Crisis. Insurance coverage disputes from those cases contributed many of the important judicial decisions applicable to the interpretation of D&O insurance policies. As illustrated above in connection with the IndyMac case, there likely will be significant judicial interpretations of the D&O policy language as a result of coverage disputes arising from the current bank failure litigation wave as well. In any event, the bank failure related litigation will be working its way through the courts for years.

