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Legal Claims and Administrative
Enforcement Proceedings
2008–2013 Banking Crisis

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Legal Claims and Administrative Enforcement Proceedings 2008–2013 Banking Crisis

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Abstract

During the 2008–2013 banking crisis and its aftermath, the FDIC pursued and defended more legal claims in both its receivership and corporate capacities than during the savings and loan and banking crisis of the 1980s and early 1990s. As receiver for failed banks, the FDIC investigated and litigated numerous professional liability claims, engaged in large-scale income tax refund and other commercial litigation, and sought to enter and collect on criminal restitution and forfeiture orders related to failed banks. In its corporate capacity, the FDIC pursued a variety of enforcement claims and other actions related to both open and failed banks. This paper provides an overview of the more significant of these claims.

Claims Filed in Court and Administrative Enforcement Proceedings

Overview

The banking crisis that began in 2008 and continued until 2013 resulted in substantial litigation and other claims brought by and against the FDIC, in both its receivership and corporate capacities. Leading up to this crisis, banks and thrifts engaged in a greater variety of financial activities than had been the case in the savings and loan and banking crisis of the 1980s and early 1990s (S&L crisis). As a result, the FDIC as receiver pursued a wider range of professional liability claims arising from the 2008–2013 banking crisis. The FDIC as receiver also engaged in large-scale income tax refund litigation arising from a one-time change in federal tax law enacted in 2009 as part of the government’s response to the financial crisis. In its corporate capacity, the FDIC pursued administrative enforcement claims involving failed banks to a greater extent than it did during the S&L crisis. This paper reviews the more significant of these legal and enforcement claims.

I. Professional Liability Claims and Recoveries

Under the Federal Deposit Insurance Act (FDI Act), the FDIC as receiver acquires certain legal rights, titles, and privileges when an insured depository institution (IDI) fails. These include the right to pursue civil professional liability (PL) claims on behalf of the

¹ The views expressed are those of the authors and do not necessarily reflect the official positions of the Federal Deposit Insurance Corporation or the United States. The authors thank Brandi Jones for assistance in collecting supporting data.

receivership estate of the failed IDI. The FDIC pursues PL claims to recover funds and hold professionals accountable for losses caused by breaches of their legal duties to IDIs and to enhance industry awareness of sound corporate governance standards in the banking industry.

The FDIC Legal Division's Professional Liability and Financial Crimes Section (PLFCS) and the Investigations Department of the FDIC Division of Resolutions and Receiverships (DRR) identify and investigate potential PL claims and pursue claims that are both meritorious and expected to be cost-effective.² If these claims cannot be resolved pre-litigation, the FDIC as receiver will file a civil lawsuit. Lawsuits are filed only after the FDIC Board of Directors, or, for smaller cases, staff acting under delegated authority, authorize them. The recovery sources for PL claims typically are proceeds from liability, malpractice, and fidelity bond insurance, and the corporate or personal assets of defendants. Recoveries collected by FDIC receiverships are used to pay receivership claims in the priority specified by the FDI Act.

From 2007 through year-end 2020, PLFCS and DRR recovered \$4.4 billion in damages from PL claims. During the 2008–2013 banking crisis, some PL claim types pursued—director and officer (D&O) liability claims, fidelity bond claims, and professional malpractice claims against attorneys, accountants, appraisers, and others—were similar to those pursued following the S&L crisis. Three new and significant types of claims also were identified and pursued: (1) residential mortgage-backed securities (RMBS) claims; (2) antitrust and other claims for suppression of the U.S. Dollar (USD) London Interbank Offered Rate (LIBOR); and (3) residential mortgage malpractice and/or mortgage fraud (MMF) claims. Recoveries from RMBS claims were the largest (44.7 percent) single source of PL recoveries arising from the 2008–2013 banking crisis through 2020. D&O liability claims were the second-largest source (30.08 percent).

A. Responding to the 2008–2013 Banking Crisis³

D&O claims were by far the most common claim. The FDIC as receiver pursued D&O claims from 207 (38.4 percent) of the 539 IDIs that failed from 2007 through 2020. Table 1 shows the number and percentage of failed IDIs with PL claims pursued (by claim area) through year-end 2020.

² Where appropriate, PLFCS also refers matters to the FDIC Legal Division's Enforcement Section for administrative enforcement action by the failed IDI's primary financial regulator.

³ During this period, 489 IDIs failed. Unless otherwise stated, the statistics for the PL program include the years 2008 through the end of 2020 to account for the characteristic multi-year lag between an institution's failure and when the FDIC actually receives PL recoveries. This period more accurately reflects PL activity and recoveries attributable to institutions that failed during the 2008–2013 banking crisis.

Table 1: Failed Insured Depository Institutions With Professional Liability Claims, 2007–2020

	D&O	Fidelity Bond	USD LIBOR & Other Misc.	RMBS & Securities	Attorney	Insurance	MMF	Accountant	Appraiser	All Claims
<i>Number of IDIs With Claims Pursued</i>	207	51	47	33	20	18	14	13	13	262
<i>Percent of IDIs With Claims Pursued</i>	38.40%	9.46%	8.72%	6.12%	3.71%	3.34%	2.60%	2.41%	2.41%	48.61%

Source: FDIC.

Note: The “All Claims” column reflects the number and percentage of insured depository institutions (IDIs) with at least one claim pursued. Because a single bank failure may give rise to multiple claims, data in this column are not the sum of data in preceding columns. Of these 262 failed IDIs, multiple claims were pursued in 94. D&O is director and officer claims. RMBS is residential mortgage-backed securities claims. MMF is residential mortgage malpractice or mortgage fraud claims.

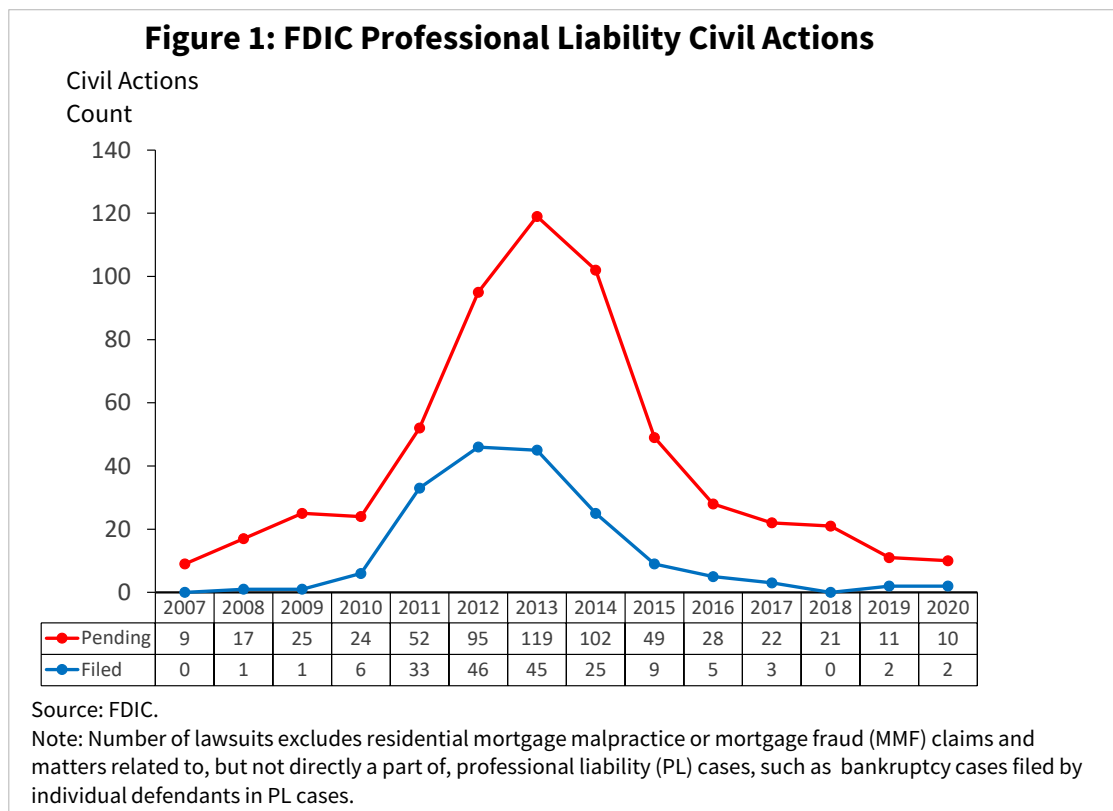
From 2007 through 2020, the FDIC filed 111 D&O lawsuits, 22 RMBS and RMBS trustee lawsuits, 23 fidelity bond lawsuits, 8 attorney lawsuits, 6 appraiser lawsuits, 5 insurance lawsuits, 4 accountant lawsuits, and 3 LIBOR suppression lawsuits.⁴

As of year-end 2020, the PL program had active matters for 106 failed IDIs (comprising 55 with active investigations or litigation and another 51 open solely for collection purposes), 18 pending PL lawsuits (8 of which were MMF lawsuits), open investigations in 53 claim areas arising out of 9 failed IDIs, and 90 collection matters arising out of 63 failed IDIs (51 were open for collection only and 12 had other active investigations or litigation). Figure 1 shows the number of non-MMF lawsuits pending and filed by PLFCS between 2007 and 2020.

As the crisis developed and the workload increased, PLFCS hired temporary in-house staff and retained outside counsel through competitive bidding to help with PL investigations and litigation. PLFCS in-house attorneys are responsible for managing outside counsel. DRR core investigations staff similarly hired in-house temporary staff and retained outside contractors through Receivership Assistance Contracts (RACs). By 2009, DRR integrated

⁴ The FDIC as receiver also continues to pursue lawsuits filed by an IDI before it failed if, after investigation, the FDIC determines that the case is meritorious and expected to be cost-effective. Settlement agreements entered into since 2007 to resolve PL claims are publicly available on the FDIC’s public website at <https://www.fdic.gov/foia/plsa/>.

contractors from eight RACs into the bank closing process and tasked them with providing complete closing and post-closing investigation functions under the supervision of in-house DRR staff.



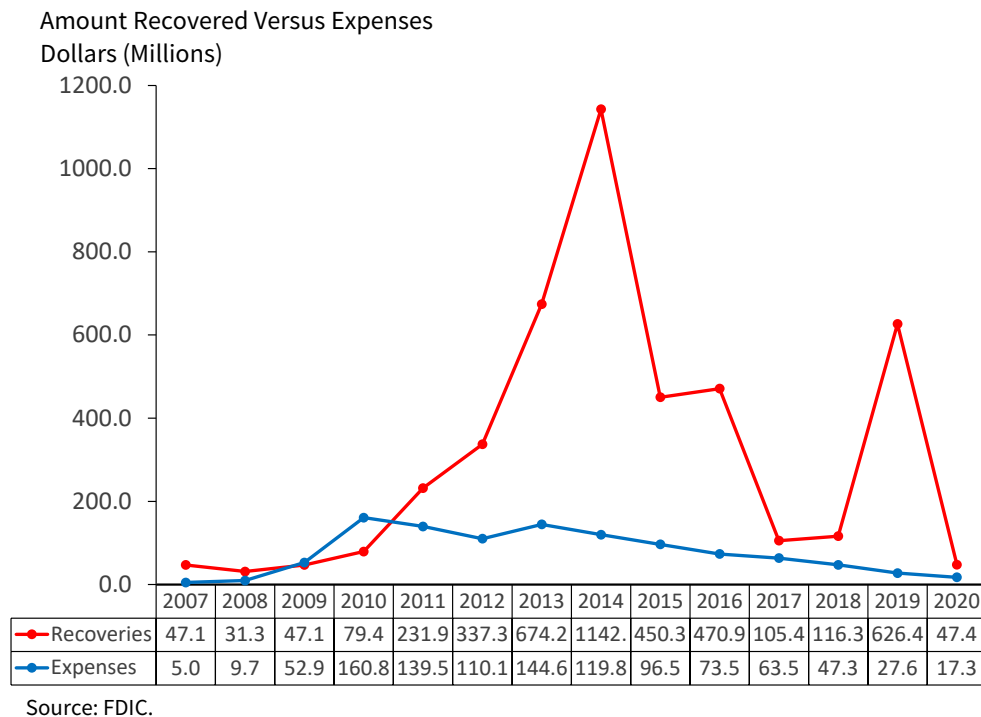
Between 2007 and 2020, PLFCS and DRR recovered \$4.4 billion and incurred expenses totaling \$1.07 billion for all PL activity. Table 2 lists the recoveries obtained from the various claim types.

Table 2: Professional Liability Recoveries by Claim Type, 2007–2020

Type of Claim	Total Recoveries 2007–2020	
Securities		
RMBS	\$1,969,488,409	(44.7%)
Other Securities Claims	\$62,850,022	(1.4%)
D&O Liability	\$1,325,717,105	(30.1%)
Accountant Malpractice	\$461,635,367	(10.5%)
MMF	\$237,439,706	(5.4%)
Fidelity Bond	\$203,729,058	(4.6%)
Appraiser Malpractice	\$45,738,132	(1.0%)
Attorney Malpractice	\$44,424,157	(1.0%)
Miscellaneous	\$34,400,065	(0.8%)
Insurance	\$22,478,837	(0.5%)
TOTAL	\$4,407,900,858	(100.0%)
Source: FDIC. Note: RMBS is residential mortgage-backed securities (RMBS) claims. D&O is director and officer claims. MMF is residential mortgage malpractice or mortgage fraud claims.		

Recoveries and expenses by year from 2007 through the end of 2020 are shown in Figure 2. From the inception of the PL program in 1986 through 2020, the FDIC has recovered more than \$10.43 billion and incurred expenses of \$2.47 billion, resulting in an overall recoveries-to-expenses ratio of 4.2 to 1.

Figure 2: FDIC Professional Liability Recoveries and Expenses



B. Types of Professional Liability Claims

1. New Claims Pursued as a Result of the 2008–2013 Banking Crisis

a. RMBS Claims

RMBS are a form of structured finance securities that became prevalent during the early 2000s. In a typical RMBS transaction, a special purpose entity known as a “depositor” acquires residential mortgage loans and sells them to a trust that securitizes the loans in a collateral pool. Loans from different originators may be included in a single collateral pool. To raise cash to buy the loans, the trust sells certificates, sometimes called bonds, to underwriters and broker-dealers, who resell them to investors. The underwriters prepare prospectus supplements that provide quantitative metrics, such as loan-to-value ratios and owner-occupancy statistics, regarding the collateral loans that are commonly understood to reflect the quality of the loans and to predict the likelihood of a loan’s default. The prospectus supplement also includes information about the standards used to underwrite the collateral loans. The prospectus supplement is the principal offering document for the RMBS and must be filed with the U.S. Securities and Exchange Commission (SEC) as part of the registration statement for the certificates. Payments to investors on the certificates depend on the payments from the loans in the collateral pool. The securitized collateral pool is divided into tranches with different payment priorities. Because repayment of the collateral loans is the sole source of payment on the certificates, the credit quality of the loans is critical to an investor’s decision to purchase a certificate. Beginning in the mid-2000s, as RMBS became more prevalent, financial institutions began purchasing RMBS as investments.

Following the 2008–2013 banking crisis, the FDIC as receiver investigated RMBS portfolios of failed IDIs. Often, the investigations revealed that RMBS portfolios suffered heavy losses because the credit quality of loans collateralizing the RMBS was much lower than the credit quality represented in the RMBS offering documents. The FDIC ultimately filed 19 lawsuits on behalf of eight receiverships seeking damages based on the IDIs’ purchases of RMBS. The FDIC also inherited one additional RMBS lawsuit filed by an IDI before it failed, for a total of 20 RMBS lawsuits. Other financial regulatory agencies also pursued RMBS claims. The Federal Housing Finance Agency (FHFA) filed suit against multiple financial institutions that sold RMBS to Fannie Mae and Freddie Mac. The National Credit Union Administration Board (NCUAB) also filed several lawsuits against financial institutions that sold RMBS to credit unions that subsequently failed.

In the RMBS lawsuits, the FDIC sued, among others, the sellers and underwriters of the RMBS, typically major investment banks, claiming that they violated state securities laws governing the registration, issuance, and sale of securities (i.e., “blue sky” laws) and Sections 11 and 12 of the federal Securities Act of 1933 by making material misrepresentations and omissions in offering documents and misleading investors about the riskiness of the RMBS. The FDIC also filed three lawsuits against RMBS trustees for breaches of their contractual duties. Eighteen of the twenty lawsuits against the sellers and underwriters have settled. The two remaining lawsuits are being actively litigated before a New York federal district court. The lawsuits against the RMBS trustees were dismissed.

An important issue that was the subject of substantial early litigation in the RMBS cases was whether the FDIC’s claims were time-barred by statutes of repose in state and federal securities acts or whether the FDIC’s Extender Statute, 12 U.S.C. § 1821(d)(14), preempted these statutes of repose and gave the FDIC additional time to file suit.⁵ All five appellate courts that have addressed the issue concluded that the FDIC’s Extender Statute and the materially identical extender statutes of the FHFA and the NCUAB supersede all other limitations periods, including state and federal statutes of repose, and thereby provide these agencies with additional time to file suit.⁶

⁵ Statutes of repose bar claims by plaintiffs unless they are brought within a certain period of time after the defendant’s action, even if the plaintiff is not yet injured. By contrast, a statute of limitations typically runs from the date of the plaintiff’s injury.

⁶ See *FDIC as Receiver for Citizens Nat’l Bank and FDIC as Receiver for Strategic Capital Bank v. Credit Suisse First Boston Mortgage Sec.*, 674 Fed. Appx. 86 (2d Cir. 2017), *reh’g denied*, No. 15-1037 (2d Cir. Mar. 27, 2017), *cert. denied*, 138 S. Ct. 501 (2017); *NCUAB v. RBS Sec.*, No. 13-56620, 2016 WL 4269897 (9th Cir. Aug. 15, 2016); *FDIC as Receiver for Colonial Bank v. First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016), *reh’g denied*, No. 14-3648 (2d Cir. July 28, 2016); *FDIC as Receiver for Guaranty Bank v. RBS Sec. Inc.*, 798 F.3d 244, 245-46 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1492 (2016); *NCUAB v. Nomura Home Equity Loans*, 727 F.3d 1246 (10th Cir. 2013), *vacated and remanded*, No. 13-576 (U.S. June 16, 2014), *aff’d on reh’g*, 764 F.3d 1199 (10th Cir. 2014); *FHFA v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013); and *FDIC as Receiver for Cmty. Bank of Nevada v. Rhodes*, 336 P.3d 961, 966 (Nev. 2014).

b. LIBOR Suppression Claims

LIBOR is a benchmark interest rate used by financial institutions around the world for setting short-term interest rates. Created by the British Bankers' Association (BBA) in 1986, LIBOR is a series of average interest rates that each member of a panel of major banks (panel banks) estimates it would be charged to borrow from other banks and is calculated daily in ten currencies for 15 borrowing periods ranging from overnight to 12 months. The BBA and the panel banks promoted LIBOR as a transparent benchmark calculated from competitive interest rates in the market for unsecured interbank loans.

On March 14, 2014, the FDIC as receiver for 38 failed IDIs that held assets tied to USD LIBOR filed a lawsuit styled *FDIC as Receiver for Amcore Bank, N.A. v. Bank of America Corp.* in the United States District Court for the Southern District of New York against 17 panel banks, 14 of their affiliates, and 3 BBA entities (LIBOR Lawsuit). A 39th IDI receivership for a bank that failed in 2015 was added as a plaintiff in 2018. The FDIC's complaint alleges that the defendants participated in a conspiracy to engage in sustained suppression of USD LIBOR from 2007 to at least mid-2011. By knowingly making artificially low LIBOR submissions, which resulted in suppressed USD LIBOR rates, the FDIC contends that the panel banks interfered with the competitive process in the markets for short-term wholesale funding, USD interest-rate benchmarks, USD over-the-counter interest-rate derivatives, floating-rate retail loans, and floating-rate mortgage-backed securities. In these RMBS cases, the FDIC asserts tort claims (fraud, negligent misrepresentation, tortious interference, aiding and abetting, and conspiracy) under state law, as well as state and federal antitrust, breach of contract, and unjust enrichment claims. It seeks compensatory damages, punitive damages, treble antitrust damages, attorney fees, and prejudgment interest. The LIBOR Lawsuit was consolidated for dispositive motions and discovery purposes in a multi-district litigation for LIBOR-based claims in the United States District Court for the Southern District of New York and remained pending as of the end of 2021. On March 10, 2017, the FDIC filed a lawsuit in the High Court of Justice in London, England, asserting claims by the receiverships for all 39 failed IDIs against seven panel banks and entities of the BBA based outside of the United States and that had been dismissed in whole or in part from the New York lawsuit for lack of personal jurisdiction. The London lawsuit is styled *FDIC as Receiver for Amcore Bank, N.A., and others v. Barclays Bank PLC, and others*.

U.S. and foreign government agencies also investigated and pursued claims, regulatory actions, and criminal charges against the panel banks and others for LIBOR suppression. These agencies include the Commodities Futures Trading Commission, the United States Department of Justice (DOJ), the former Financial Services Authority in the United Kingdom (UK), its successor, the UK Financial Conduct Authority, the Switzerland Financial Markets Supervisory Authority, and the Netherlands Public Prosecution Service. At year-end 2020, seven panel banks had formally admitted that they had engaged in sustained suppression or inter-day manipulation of LIBOR and have paid fines for their admitted conduct. Law enforcement agencies in both the United States and the United Kingdom also have criminally prosecuted individuals for participating in manipulating LIBOR.

c. Residential MMF Claims

Residential MMF claims that the FDIC pursues typically are based on professional malpractice or intentional misrepresentations during the mortgage lending process. Defendants include mortgage brokers, appraisers, title insurance companies, closing agents, settlement agents, and borrowers (if they personally aided and abetted a fraud at issue). The main recovery sources for MMF claims are insurance policies and corporate and personal assets. Residential MMF cases are more numerous, but typically smaller, than other types of PL claims. PL investigations arising from the 2008–2013 banking crisis produced a large number of MMF claims from the portfolios of Washington Mutual Bank (WaMu), Downey S&LA, IndyMac Bank, AmTrust Bank, and BankUnited.

Some FDIC MMF claims involved breaches of closing protection letters (CPLs) issued by title insurance companies, which promise to indemnify the mortgage lender for any negligence or fraud by the closing agent in the closing of mortgage loans. CPL claims differ from title insurance claims in that CPLs provide protection for more than defects in title and generally transfer to a lender's successor, such as the FDIC as receiver. Mortgage lenders typically require title insurance at loan closings to protect the lender's interest in the collateral and to protect the lender from fraud or dishonesty by the title insurer's closing agent or from the agent's failure to follow the lender's closing instructions. The closing agent is generally responsible for insuring that the lender's closing instructions are followed and that lender funds are disbursed properly, and a CPL insures the lender from loss resulting from a closing agent's failures in these respects. The FDIC pursued seminal CPL cases arising from the failure of WaMu, which was one of the nation's largest residential lenders.

2. Traditional Claim Areas Pursued During the 2008–2013 Banking Crisis

a. D&O Liability

Since the FDIC PL program's inception almost 35 years ago, a major focus of the program has been D&O claims. D&O claims typically are brought against former officers and directors who caused losses by breaching their duties to their IDIs, primarily by approving poorly underwritten loans or other loss transactions that violated their IDIs' loan or investment policies.

If the holding company of a failed IDI files for bankruptcy, a bankruptcy trustee for the holding company may seek to pursue claims that legally belong to the FDIC as receiver for the failed IDI. If the claims are derivative (i.e., claims brought by shareholders on behalf of the IDI), rather than direct claims owned by the holding company, the FDIC as receiver will move to intervene to assert ownership of all such claims against former officers and directors of a failed IDI.

Directors and officers of an IDI owe duties to their institution, the most important of which are the duties of care and of loyalty. These duties require directors and officers to use the degree of care that ordinarily prudent and diligent persons would exercise under similar circumstances, and to administer the institution's affairs and to protect the interests of

depositors and shareholders with personal honesty and integrity, without advancing their own personal interests or those of others over the interests of the institution. D&O liability results from breaches of these duties, whether through negligence, gross negligence, or worse conduct. The FDIC and other regulators have published guidelines that describe the duties and responsibilities expected of IDI directors and officers.⁷ *FDIC Financial Institution Letter (FIL-87-92)*, dated December 3, 1992, in particular, discusses the factors that the FDIC considers in authorizing and filing civil D&O lawsuits.

While many states recognize a simple negligence standard to establish D&O liability, some states have adopted insulating statutes or have recognized business judgment rule presumptions that may sometimes increase the standard of liability to gross negligence or recklessness. The business judgment rule protects directors and officers from liability if business decisions are made in good faith, with due care, based on full information, within the scope of their authority, and free from personal interests or self-dealing.⁸ The scope of these protections varies depending on state law. They typically are available to directors only and not officers, and they rarely apply to breach of the duty of loyalty. Section 11(k) of the FDI Act, 12 U.S.C. § 1821(k), preempts any state law that provides a standard of liability greater than gross negligence.

As of year-end 2020, the FDIC had pursued D&O claims in 207 (38.4 percent) of the 539 IDIs that had failed by the end of 2020. During this same time period, the FDIC had reached settlements or other resolutions in connection with 204 of those claims and recovered \$1.325 billion. Of the 204 claims concluded by the end of 2020, verdicts were obtained in three D&O liability cases. The first case, *FDIC as Receiver for IndyMac Bank, F.S.B. v. Van Dellen*, CV 10-4915 (C.D. Cal.), was based on 66 poorly underwritten commercial real estate loans made to real estate developers by the Home Builder Division of IndyMac Bank, F.S.B. It resulted in a favorable judgment in favor of the FDIC for \$168.8 million in damages after a four-week jury trial. The case ultimately settled for \$41.975 million, avoiding the need to try claims on remaining loans not submitted to the jury. As part of the settlement, the defendants stipulated to the entry of final judgments against them.

The second and third D&O liability cases to go to trial involved two smaller community banks. These were *FDIC as Receiver for Buckhead Bank v. Loudermilk*, CV 12-4156 (N.D. Ga.), and *FDIC as Receiver for Butte Community Bank v. Ching*, CV 12-at-00939 (E.D. Cal.). The *Buckhead* case was based on poorly underwritten commercial real estate loans approved by the bank's loan committee and resulted in a judgment for the FDIC of \$5 million in damages after an eight-day jury trial. In July 2019, the U.S. Court of Appeals for the Eleventh Circuit affirmed the judgment in all respects, holding that the loan committee members were jointly

⁷ For example, during the 1980s and early 1990s, the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), and the FDIC developed several guides for directors: *The Director's Book*, first published by the OCC in 1987 and updated in 2016; the *Director Information Guidelines*, published by the OTS in 1989; *FDIC Financial Institution Letter (FIL-87-92)*, dated December 3, 1992; and the *FDIC Pocket Guide for Directors*, updated in December 2007.

⁸ Directors and officers of an IDI violate their duty of loyalty to the institution when they engage in self-dealing, which is conduct that takes advantage of their position in a transaction and serves their own interests instead of the interests of the institution.

and severally liable for all damages. The *Butte* case was based on the defendants' decision to pay themselves and other holding company shareholders dividends that resulted in the depletion of the bank's capital and resulted in a judgment for the FDIC of \$3.52 million after an 11-day jury trial. Both judgments have been fully satisfied.

The largest D&O liability recovery obtained during the 2008–2013 banking crisis arose from the failure of WaMu. Over time, the FDIC entered into multiple settlements with 15 former directors and officers of WaMu for a collective total face value of \$189.7 million, comprising insurance proceeds, personal asset contributions, and the right to proceeds from bankruptcy claims. The FDIC has received more than \$169 million from these settlements.

Since most D&O recoveries are paid by insurance, D&O insurance coverage was a substantial focus of litigation during the 2008 to 2013 banking crisis. Most notably, the FDIC challenged carrier claims that certain exclusions, originally intended to prevent insured parties from obtaining insurance coverage for lawsuits brought against other insureds under the same D&O policy, would preclude coverage for FDIC D&O claims. Carriers argued that the definition of “insured” in these exclusions, known as “insured v. insured exclusions,” included the FDIC as receiver for a failed IDI and thus barred coverage for claims brought by the FDIC against directors and officers insured under such D&O policies. Before the 2008 to 2013 banking crisis, approximately two-thirds of courts held that insured v. insured exclusions did not apply to the FDIC as receiver. However, leading up to the last crisis, certain insurance carriers added language to the insured v. insured exclusion that they then claimed excluded coverage for FDIC D&O claims. In particular, the term “insured” in the exclusion was defined to include not only the named insured but also those acting “on behalf of” insureds. This provision was extensively litigated in the 2008 to 2013 banking crisis, and every court to consider it (except one district court that was later reversed) ruled for the FDIC.⁹ Certain insurance carriers also sought declarations that, where the definition of “loss” excluded unpaid loans, coverage for FDIC claims would be precluded if the alleged wrongful conduct related to the bank's lending function. These “unrepaid loan” provisions were new. In every instance, however, courts rejected this novel argument and found in favor of coverage for FDIC claims.¹⁰

⁹ See *St. Paul Mercury Ins. Co. v. FDIC as Receiver for Pacific Coast National Bank*, No. 14-56830, 2016 WL 6092400, at *2 (9th Cir. Oct. 19, 2016); *St. Paul Mercury Ins. Co. v. FDIC as Receiver for Cmty. Bank & Trust*, 774 F.3d 702, 705, 710 (11th Cir. 2014); *Certain Underwriters at Lloyd's, London v. FDIC as Receiver for Omni Nat'l Bank*, Case No. 1:12-cv-01740-TCB, slip op. at 23 (N.D. Ga. Sept. 1, 2016); *FDIC as Receiver for Eurobank v. Arrillaga-Torrens, Jr.*, Case No. 3:13-cv-01328-PAD-BJM, slip op. at 62 (D.P.R. Aug. 26, 2016); *Progressive Cas. Ins. Co. v. FDIC as Receiver for Vantus Bank*, 80 F. Supp. 3d 923, 951 (N.D. Iowa 2015); *Progressive Cas. Ins. Co. v. FDIC as Receiver for Omni Nat'l Bank*, 926 F. Supp. 2d 1337, 1340 (N.D. Ga. 2013); *W Holding Co. v. Chartis Ins. Co. –P.R.*, 904 F. Supp. 2d 169, 183 (D.P.R. 2012). The only insured v. insured exclusion generally found to exclude claims by the FDIC acting as receiver during the 2008–2013 banking crisis were those in D&O liability policies underwritten by BancInsure Inc. (now known as Red Rock Insurance Company). BancInsure's insured v. insured exclusions are unique in that they explicitly include “receiver” among the entities for which coverage is excluded.

¹⁰ See *St. Paul Mercury Ins. Co. v. FDIC as Receiver for Community Bank & Trust*, 774 F.3d 702, 711 (11th Cir. 2014); *St. Paul Mercury Ins. Co. v. Miller*, 968 F. Supp. 2d 1236, 1241 (N.D. Ga. 2013); *Progressive Cas.*

Personal asset contributions also may be a recovery source for FDIC D&O claims with insufficient D&O insurance or for which insurance coverage has been denied. Although the FDIC does not always have information regarding the individual source of personal asset recoveries, based on available information, between 2007 and 2020, the FDIC collected more than \$114 million through personal asset contributions in D&O liability settlements. During that period, the largest personal asset recovery for a single IDI, at \$20.762 million of a \$28.8 million total settlement, was obtained in 2020 in connection with the failure of R-G Premier Bank.

b. Malpractice Claims

i. Accounting Malpractice

Audits conducted by independent accountants must be completed according to applicable professional standards, including generally accepted auditing standards, generally accepted accounting principles, and other auditing standards, such as those issued by the American Institute of Certified Public Accountants. Accountant malpractice claims may arise when auditors breach their duties by not adhering to applicable professional standards. A plaintiff also must show that the audit failure was material and caused a loss to the IDI.

The FDIC has obtained large recoveries in connection with its accounting malpractice claims, the largest of which arose from a case that the FDIC as receiver for Colonial Bank (Colonial) filed in 2012 against PricewaterhouseCoopers LLP (PwC) and Crowe Horwath LLP (Crowe). PwC served as the independent external auditor for Colonial, and Crowe served as internal accountant. The FDIC alleged that PwC and Crowe breached their professional duties to Colonial by failing to detect a massive fraud perpetrated on Colonial by its largest customer, a mortgage originator named Taylor Bean & Whitaker Mortgage Corporation (TBW), resulting in more than \$2 billion in losses to Colonial. In December 2017, following a four-week bench trial, the United States District Court for the Middle District of Alabama ruled in favor of the FDIC in the liability phase of the lawsuit against PwC.¹¹ The court held that PwC committed professional negligence by failing to design its audits to detect fraud and by failing to obtain sufficient competent evidence to sign its unqualified audit reports in all of the audit years at issue in the case. That ruling is the first court decision since the enactment of the Sarbanes-Oxley Act to hold that auditors have a duty to design their audits to detect fraud. In a strongly worded opinion that received substantial coverage in the financial media, the court criticized PwC's audits as "unreasonable." Having found PwC liable to the FDIC, the court held a separate one-week bench trial on damages. In July 2018, the court awarded the

Ins. Co. v. FDIC as Receiver for Omni Nat'l Bank, 926 F. Supp. 2d at 1337; *Progressive Cas. Ins. Co. v. FDIC as Receiver for Michigan Heritage Bank*, No. 11-CV-14816, 2012 WL 8437693, at *3 (E.D. Mich. Sept. 24, 2012); see also *Progressive Cas. Ins. Co. v. FDIC as Receiver for Silver State Bank*, No. 2:12-CV-00665, 2012 WL 5418298, at *1-2 (D. Nev. Nov. 2, 2012); *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11-CV-00678, 2012 WL 3598274, at *2 (D. Nev. Aug. 20, 2012).

¹¹ *FDIC as Receiver for Colonial Bank v. PricewaterhouseCoopers LLP and Crowe Horwath LLP*, No. 2:12-cv-957-BJR, 2017 WL 8890271 (M.D. Ala. Dec. 28, 2017).

FDIC \$625.3 million on its claims against PwC. In March 2019, the FDIC settled its claims against PwC for \$335 million. Previously, in April 2018, the FDIC settled its malpractice claims against Crowe just before trial for \$60 million.

ii. Attorney Malpractice

Compared with the S&L crisis, attorney malpractice claims were not a substantial source of recoveries in the 2008–2013 banking crisis. Of the IDIs that failed during the 2008–2013 banking crisis, WaMu gave rise to the largest single attorney malpractice recovery. The law firm of Lathrop & Gage LLP (Lathrop) had failed to preserve certain key objections at a trial it handled, leading to a \$10.7 million judgment against Lathrop’s client, North American Mortgage Company (North American). Before it failed, WaMu acquired North American during the appeal of this judgment and became obligated to pay the judgment. Following WaMu’s failure in 2008, the FDIC as receiver for WaMu settled the claim against Lathrop for \$7.4 million.

Causation is one of the issues in any attorney malpractice case and was the key issue in the one attorney malpractice case arising from the 2008–2013 banking crisis that the FDIC brought to trial. The case was against the law firm of Icard, Merrill, Cullis, Timm, Furen & Ginsburg P.A., and attorney Robert E. Messick (collectively, Icard). In 2013, the FDIC as receiver for First Priority Bank (First Priority) obtained a favorable jury verdict against Icard in a lawsuit over a \$5.3 million acquisition loan that Icard closed for First Priority without delivering a required assignment of an option to purchase an adjoining land parcel. The loan subsequently resulted in a \$4.5 million loss, which the FDIC asserted would not have occurred but for Icard’s malpractice. Although the jury found the defendants liable to the FDIC for \$1.1 million in losses, the verdict was overturned in a split (2-1) decision by the United States Court of Appeals for the Eleventh Circuit, which held that the FDIC had not established causation by proving that First Priority would not have made the loan if Icard had properly performed its duties.

iii. Appraiser Malpractice

Appraisers provide a critical function in the loan approval process. Appraiser malpractice claims brought by the FDIC as receiver typically arise when appraisers fail to follow professional and industry standards in preparing appraisals of collateral property for loans. Examples include failures to inspect collateral property to verify its condition; to confirm issues related to the development potential of the property (e.g., the existence of required permits or variances); to identify contemporaneous sale prices for appropriate comparables based on size, location, and other features; to properly calculate the value of the property (e.g., relying on the as-built value instead of the as-is value before planned improvements); or to review or submit complete and accurate paperwork supporting the appraisal. The independence and integrity of an appraiser are necessary to ensure the credibility of the appraisals. These may be compromised when an appraiser is providing appraisals for an IDI in which there is a close relationship with management or improper reliance on information provided by IDI personnel instead of independently verified information gathered according to professional standards. When appraisals are improperly

inflated and the loan later defaults, the IDI may be unable to recover the full amount of the outstanding loan balance, leaving the IDI with a loss because the true value of the collateral property was less than the appraised value.

Appraiser malpractice recoveries from FDIC claims arising from the 2008–2013 banking crisis total nearly \$46 million. The recoveries stem primarily from settlements of two large claims based on services provided to WaMu. In these cases, the FDIC asserted both negligence and breach of contract claims against two large national real estate appraisal management companies.¹² The FDIC’s lawsuits against LSI Appraisal LLC (LSI) sought damages for breach of contract in providing 181 grossly inflated appraisals to WaMu. The FDIC’s lawsuit against CoreLogic Valuation Services LLC (CoreLogic) as successor to eAppraiseIT LLC sought damages for breach of contract in providing 108 grossly inflated appraisals to WaMu. The FDIC’s complaints alleged that LSI and CoreLogic caused \$258.6 million in losses to WaMu. In 2014, the FDIC as receiver for WaMu settled these claims and received \$30 million from LSI and \$12 million from CoreLogic.

c. Fidelity Bond Claims

A fidelity bond provides an IDI with insurance to cover losses discovered during the policy period from fraud or dishonesty by officers or other employees of the IDI. Fidelity insurers rely on several contractual defenses to defend against fidelity bond claims based on language in the underlying bonds. Typical defenses include alleged failures to submit a notice of loss or proof of loss within the timeframes provided in the bond, misrepresentations by officers or employees of the IDI in the bond application that result in rescission of the bond, or that the perpetrators of the fraud at issue are not covered “employees” under the bond.

The FDIC’s largest single recovery on a fidelity bond claim arising from the 2008–2013 banking crisis was \$27.1 million from the settlement of a claim against Federal Insurance Company (Chubb) under three fidelity bonds providing coverage for Colonial. The FDIC as receiver for Colonial and the bankruptcy trustee for Colonial’s holding company, Colonial Bancgroup Inc., jointly litigated against Chubb and reached a \$30 million settlement in 2014 subject to bankruptcy court approval. The bankruptcy court subsequently ordered \$27.1 million to be paid to the FDIC as receiver and \$2.9 million to be paid to the holding company trustee. The bond claims were based on the dishonest activities of Colonial employees who had conspired with the chief executive officer (CEO) of Colonial’s biggest customer, TBW, to fund thousands of fictitious loans resulting in losses to Colonial of more than \$2 billion.

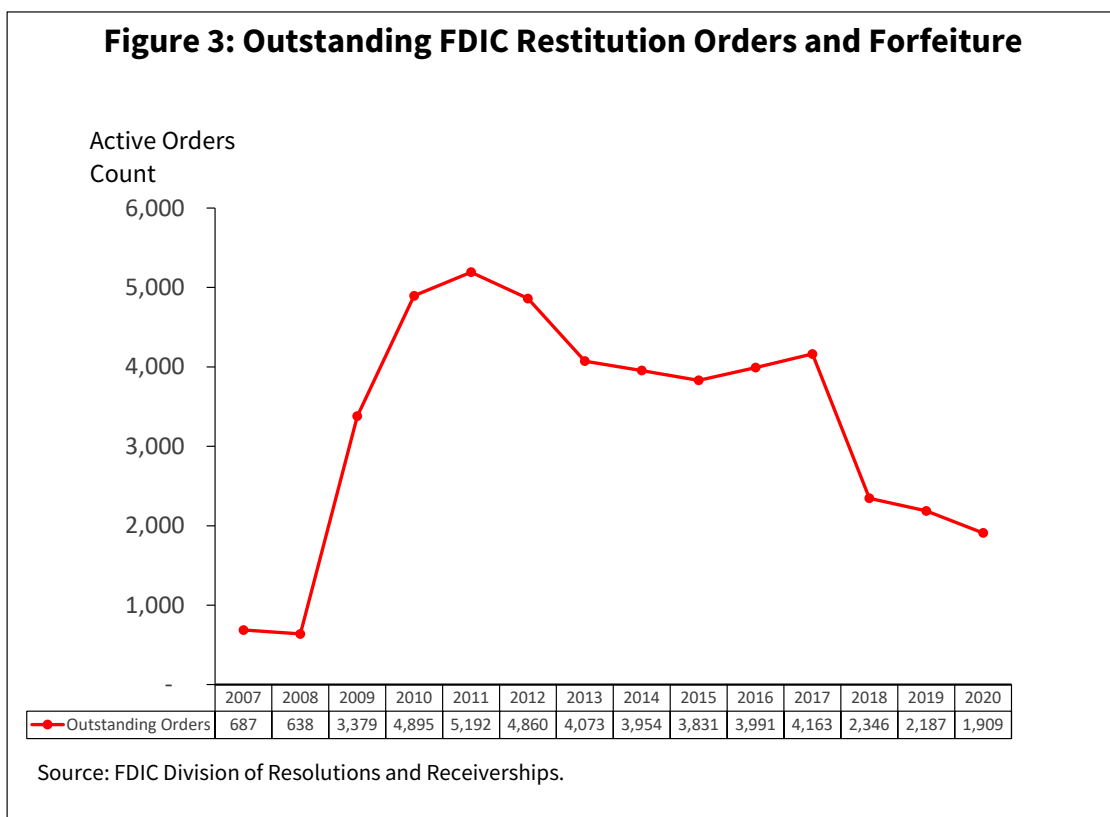
II. Criminal Claims and Recoveries

The FDIC working with DOJ plays a major role in protecting the safety and soundness of the banking and thrift communities by identifying and deterring financial crimes. For failed insured financial institutions, the DRR Investigations Department and PLFCS work together and coordinate with other business and legal units in the FDIC to identify and monitor

¹² *FDIC as Receiver for WaMu v. LSI Appraisal, LLC* (C.D. Cal.) No. 8:11-cv-00706-DOC-AN; *FDIC as Receiver for WaMu v. CoreLogic Valuation Serv., LLC* (C.D. Cal.) No. 8:11-cv-00704-DOC-AN.

criminal prosecutions involving failed banks and thrifts and to obtain and collect restitution and forfeiture orders in favor of FDIC receiverships. They also collaborate with law enforcement agencies and other bank regulatory agencies and facilitate communication, coordination, and cooperation among federal, state, international, and private sector groups and regulatory agencies in pursuit of their common mission to detect and deter bank fraud and other criminal activity.

Restitution and Forfeiture Orders and Collection. The FDIC does not have authority to prosecute crimes directly. That authority lies with DOJ and state and local law enforcement authorities. However, DRR and PLFCS provide substantial assistance to DOJ and state authorities in this regard by facilitating the investigation, prosecution, and monetary recovery from crimes committed against IDIs that later fail and are placed in FDIC receivership. When a criminal defendant pleads to or is found guilty of a crime that caused loss to an IDI, a court may order that the defendant pay restitution and also award forfeiture to the FDIC as receiver for the IDI. DRR and PLFCS ensure that FDIC receiverships are properly identified as victims in criminal restitution and forfeiture orders, which entitle the receiverships to *pro rata* distributions of restitution recoveries with other victims. They coordinate with prosecutors and probation officers throughout the country in filing Victim Impact Statements that quantify and provide proof of the damages that the FDIC receiverships are entitled to recover. When it becomes the receiver for a failed IDI, the FDIC also inherits restitution orders awarded to the IDI before it was closed. As of year-end 2020, the FDIC had 1,909 remaining active restitution orders with a face value of \$4.63 billion (Figure 3).



Once a restitution or forfeiture order is entered, the process of collecting the order begins, since few criminal defendants pay their order before or at the time of sentencing. While restitution may be ordered in either a federal or state case, federal cases are the only source of forfeiture awards to the FDIC. DOJ is primarily responsible for collecting federal criminal restitution ordered in favor of the FDIC, and PLFCS actively supports DOJ for the purpose of collecting restitution and forfeiture owed to the FDIC, including seeking to have its financial crimes attorneys serve as Special Assistant United States Attorneys. DRR and PLFCS also help DOJ identify assets available to satisfy federal restitution and forfeiture orders. In particular, the FDIC seeks to identify offenders after release from prison, monitors the offender throughout the life of the restitution payments, regularly conducts asset and property searches, and identifies fraudulent conveyances. For state-ordered restitution, DRR and PLFCS aggressively pursue collection of these orders to the extent permitted by state law. Between 2007 and 2020, the FDIC collected a total of \$83.1 million in restitution and forfeiture—\$65.1 million in restitution and \$18 million in forfeitures.

Responding to Information Requests. When state and federal prosecutors and government agencies investigate and prosecute financial crimes, they need documents and witnesses to support their prosecutions. Between July 2012 and the end of 2020, the FDIC in its receivership capacity received more than 1,084 requests for information related to criminal matters made by DOJ, United States Attorney offices, state prosecutors, the Office of the Comptroller of the Currency (OCC), the SEC, the Internal Revenue Service (IRS), the Special Inspector General for the Troubled Asset Relief Program, and the Federal Reserve Board (FRB). Criminal defendants also have a right to, and issued numerous subpoenas for, failed IDI records relevant to allegations made against them. PLFCS and DRR facilitated the production of millions of pages of documents in criminal matters and identified and authorized witnesses to testify at trials.

Policy Expertise, Working Groups, and Training. PLFCS coordinated FDIC policy and practice in the financial crimes program area both domestically and internationally. PLFCS financial crimes attorneys have expertise in a wide range of issues related to financial crimes, including fraud recognition and prevention, restitution, forfeiture, cybercrime, money laundering, phishing, terrorist financing, domestic and foreign asset tracing, E-Discovery, and computer forensics. They coordinated with law enforcement and the financial institution regulatory community in working groups that address these wide-ranging and important issues, and also conducted significant training on financial crimes matters for FDIC personnel, DOJ and law enforcement agencies, court clerks, and other financial institution regulatory agencies.

III. Income Tax Refund Litigation

Because of a one-time change in federal tax law in 2009, part of the government's response to the 2008 to 2013 banking crisis, the FDIC as receiver engaged in substantial litigation over the ownership of additional income tax refunds that the federal government paid as a result of the new law. The Worker, Homeownership, and Business Assistance Act of 2009 (WHBAA), which became law on November 6, 2009, allowed certain businesses, including banks and their holding companies, a one-time irrevocable election to carry back

2008 and 2009 net operating losses to prior-year tax returns for up to five years rather than just two years. The WHBAA more than doubled the amount of income tax refunds that otherwise would have been paid. As a result of the Act, the total amount of tax refunds paid out as a result of consolidated tax returns involving failed banks was \$4.4 billion. Through settlements, court decisions, and otherwise, the FDIC as receiver received \$3.6 billion of this amount, and bank holding companies received \$800 million.¹³

Bank holding companies typically file consolidated corporate income tax returns as the procedural agent for their consolidated group of companies. In consolidated tax returns, each member of the consolidated group calculates its income and losses as if it were a stand-alone taxpayer. The results are then consolidated in one tax return as if the members were a single taxpayer. A principal advantage of filing consolidated tax returns is that losses of one member may offset income of another member to reduce the consolidated group's overall tax liability.

When the consolidated group owes taxes, the holding company—the “common parent” under IRS regulations—pays the taxes to the IRS as agent for the group. When a refund is owed to the group, the IRS generally sends it to the common parent. IRS regulations provide that the common parent is the “sole agent” with respect to the consolidated tax return, but that all members of the consolidated group are jointly and severally liable for any tax liability.¹⁴ The regulations do not explicitly state which entity within a consolidated group actually owns the refund.

In most instances, the consolidated group incurred large net operating losses in 2008 and 2009, which under the WHBAA could be carried back and applied against taxes paid during the previous five years. The refunds typically were paid based on the subsidiary bank's income in earlier good years, although many of these banks failed during the crisis from substantial losses. Because consolidated tax return regulations do not explicitly state whether the subsidiary bank or its holding company owns a tax refund, members of a consolidated group generally entered into a tax allocation agreement specifying procedures for allocating tax liabilities and distributing tax refunds among members of the group. Those tax allocation agreements typically did not explicitly address ownership of tax refunds distributed among members of a consolidated group and instead covered matters such as the requirement to calculate taxes on a separate entity basis, the amount and timing of paying taxes, reimbursement for tax losses, and matters related to a member leaving the group.

The FDIC litigated with bankrupt bank holding companies over the ownership of the substantial tax refunds that the WHBAA authorized. This litigation focused on the wording of tax allocation agreements and how they did or did not address the ownership of tax refunds paid to the bankrupt holding company as agent for the failed bank whose past income was

¹³ These amounts exclude tax refunds from the Washington Mutual receivership because they were sold to the assuming institution under the purchase and assumption agreement applicable to that receivership.

¹⁴ Treas. Reg. § 1.1552-77(a).

the basis of the refunds. The primary issue courts considered in determining ownership was whether a tax allocation agreement acknowledged an agency or trust relationship (as the FDIC argued) or created a debtor-creditor relationship (as the holding companies argued). To decide this question, courts applied inconsistent legal standards that resulted in different outcomes. If a court determined that the tax refund was paid to the bank holding company as an agent or trustee of the bank, the FDIC prevailed. If a court held that the holding company received the refunds as owner and was only indebted to the bank to pay the bank an allocable share, the holding company prevailed.

In 1973, the United States Court of Appeals for the Ninth Circuit in *Western Dealer Mgmt., Inc. v. England (In re Bob Richards Chrysler-Plymouth Corp.)*, 473 F.2d 262, 265 (9th Cir. 1973), held that a consolidated group's parent receives refunds only as agent and in trust for the member whose earnings generated the refund, unless the parties entered into a "differing agreement." *Id.* at 265.

In 1978, the FDIC, the OCC, and the FRB, followed by the Office of Thrift Supervision (OTS) in 1990, separately published policy statements addressing the allocation of income taxes by banks and thrifts that are members of a consolidated tax group. The policies all recognized the "separate entity" concept requiring that banks receive no less favorable treatment because of a consolidated return than they would have received had they filed separate tax returns.

On November 23, 1998, these same agencies issued an "Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure" (IPS).¹⁵ The core point of the IPS was that a subsidiary bank should be treated no less favorably than if it were a separate taxpayer. It states:

Regardless of the treatment of an institution's tax loss for regulatory reporting and supervisory purposes . . . an organization's tax allocation agreement or other corporate policies should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent.

The IPS also encourages banks and thrifts and their holding companies to enter into comprehensive tax allocation agreements addressing these issues.

During the 2008 to 2013 banking crisis, courts had different views on the significance of *Bob Richards*. Some, like the Ninth and Third Circuits, concluded that the *Bob Richards* "differing agreement" requirement is satisfied by the mere existence of a tax allocation agreement, which should then be reviewed to determine how the parties intended to allocate tax refunds.¹⁶ These cases often held that if the tax allocation agreement provides that the

¹⁵ 63 Fed. Reg. 64757 (November 23, 1998).

¹⁶ *Cantor v. FDIC as Receiver for Downey Savings and Loan Assoc.*, 2015 WL 307013 (3d Cir. Jan. 26, 2015); *FDIC as Receiver for IndyMac Bank FSB v. Siegel*, 554 Fed. Appx. 668 (9th Cir. Apr. 21, 2014).

holding company will “reimburse” or “pay” refunds to a subsidiary bank and does not contain any express agency language, the tax allocation agreement establishes that the parties have agreed that the holding company owns the refund and the bank’s claim to the refund is merely as an unsecured creditor of the bankrupt bank or thrift holding company. This was true even if the tax refund was solely attributable to the bank’s income and losses and even if the bank had provided the funds to the holding company to pay the taxes. These courts placed a heavy burden on the FDIC as receiver to prove an explicit agency relationship between the bank holding company and the subsidiary bank and generally held that tax refunds were property of the bank holding company.

Other courts, particularly the Sixth and Eleventh Circuits, did not address *Bob Richards* and found tax allocation agreements to be ambiguous on the issue of ownership.¹⁷ In these cases, the courts applied state law to determine whether the parties intended a debtor-creditor relationship or an agency relationship with respect to the receipt of IRS tax refunds. The courts in these cases generally held that the tax refunds were property of the subsidiary bank or thrift.

Ultimately, the U.S. Supreme Court in *Rodriguez v. FDIC as Receiver for United Western Bank*, 140 S.Ct. 713, ___ U.S. ___ (2020), held that the decision in *Bob Richards* was not a legitimate exercise of federal common lawmaking. In *Rodriguez*, the Supreme Court instructed that moving forward, courts should analyze whether tax allocation agreements create an agency/trust or debtor-creditor relationship purely under applicable state law.¹⁸

In response to the inconsistent court decisions issued before *Rodriguez*, the banking agencies issued an Addendum to the IPS on June 19, 2014, clarifying the IPS and recommending that tax allocation agreements between banks or thrifts and their holding companies:

- expressly acknowledge the existence of an agency relationship,
- use express language sufficient to maintain an agency relationship, and
- clarify that holding companies are required to immediately transmit refunds to their subsidiary bank or thrift.

The Addendum further encourages all consolidated groups to amend their tax allocation agreements to include the following (or substantially similar) paragraph:

The [holding company] is an agent for the [IDI and its subsidiaries] (the “Institution”) with respect to all matters related to consolidated tax returns and refund claims, and nothing in this agreement shall be construed to alter or

¹⁷ *FDIC as Receiver for AmTrust Bank v. AmFin Fin. Corp.*, 757 F.3d 530 (2014); *FDIC as Receiver for NetBank v. Zucker*, 729 F.3d 1344 (2013); *Zucker v. FDIC as Receiver for BankUnited FSB*, 727 F.3d 1100 (3d 2013).

¹⁸ Upon remand to the Tenth Circuit, the Court strictly applied Colorado state law and held that the FDIC was the owner of the disputed tax refunds because the tax allocation agreement created an agency relationship. *Rodriguez v. FDIC as Receiver for United Western Bank*, 959 F.3d 1269, 1277 (10th Cir. 2020).

modify this agency relationship. If the [holding company] receives a tax refund from a taxing authority, these funds are obtained as agent for the Institution. Any tax refund attributable to income earned, taxes paid, and losses incurred by the Institution is the property of and owned by the Institution, and shall be held in trust by the [holding company] for the benefit of the Institution. The [holding company] shall forward promptly the amounts held in trust to the Institution. Nothing in this agreement is intended to be or should be construed to provide the [holding company] with an ownership interest in a tax refund that is attributable to income earned, taxes paid, and losses incurred by the Institution. The [holding company] hereby agrees that this tax allocation agreement does not give it an ownership interest in a tax refund generated by the tax attributes of the Institution.

The Addendum states that tax allocation agreements including this language comply with Sections 23A and 23B of the Federal Reserve Act (FRA) and that allocation agreements that do not clearly acknowledge the existence of an agency relationship or require the prompt transmittal of tax refunds may subject the parties to supervisory actions under Sections 23A and 23B of the FRA. Tax refunds retained by a holding company with an allocation agreement that does not clearly acknowledge an agency relationship may constitute a loan or extension of credit from its subsidiary bank or thrift, which may be subject to the collateralization and other requirements of Section 23A of the FRA. In addition, tax allocation agreements that do not require a bank holding company to promptly forward tax refunds due to its subsidiary bank and instead allow the bank holding company to hold the tax refunds are inconsistent with Section 23B of the FRA. Section 23B generally requires affiliate transactions to be on terms substantially the same, or at least as favorable to the subsidiary institution, as comparable transactions involving non-affiliated companies. Failure to comply with these requirements may subject the holding company and subsidiary bank or thrift to supervisory action.

IV. Administrative Enforcement Proceedings

The FDIC is the primary federal regulator of federally insured state-chartered banks that are not members of the Federal Reserve System, commonly referred to as state nonmember banks and state-chartered savings associations (FDIC-supervised institutions). As the primary federal regulator, the FDIC has enforcement authority under the FDI Act to address violations of law, including consumer protection laws, breaches of fiduciary duty, and unsafe or unsound practices.¹⁹ These powers became especially important during and after the 2008–2013 banking crisis.

Between January 1, 2008, and December 31, 2014, the FDIC completed 3,430 formal administrative enforcement actions against open FDIC-supervised insured institutions and

¹⁹ In addition to the FDI Act, certain other statutes provide separate enforcement action authority to the FDIC. For example, the Flood Disaster Protection Act, as amended (Flood Act), requires the FDIC to assess civil money penalties for certain pattern or practice violations of the Flood Act.

their institution-affiliated parties (IAPs), defined at 12 U.S.C. § 1813(u).²⁰ This included 110 formal investigations and 134 notices of charges (notices). Most IAPs are directors, officers, employees or shareholders of insured depository institutions.²¹

The FDIC may initiate informal or formal enforcement actions to correct identified deficiencies, ensure compliance with applicable laws and regulations, address harm to consumers, and penalize and deter misconduct. Informal enforcement actions represent a supervisory action by the FDIC under which an insured institution agrees to take corrective action.²² Formal enforcement actions include formal orders issued against a bank or IAP either by consent or after litigation.

Enforcement actions generally arise from bank examinations—whether risk management or consumer compliance—along with consumer complaints, suspicious activity reports, or referrals from law enforcement or other agencies. The 3,430 final formal enforcement actions completed between January 1, 2008, and December 31, 2014, arose from the joint efforts of the Legal staff in Washington, DC, and the regional offices and examiners from the FDIC’s Division of Risk Management Supervision (RMS) and Division of Depositor and Consumer Protection who worked together to uncover and investigate potential misconduct by the banks and their officers, directors, employees, and other IAPs, such as vendors and third-party service providers.

1. Types of Enforcement Actions

1. Informal Enforcement Actions

²⁰ The 3,430 figure includes the following actions that were either initiated by a Notice of Charges, adjudicated after an administrative hearing, or agreed to between the FDIC and a Respondent by Stipulation: Consent or Cease and Desist Orders under Section 8(b) of the FDI Act; Restitution under Section 8(b)(6) of the FDI Act; Civil Money Penalties under Section 8(i) of the FDI Act or under the Flood Act; Removal or Prohibition under Section 8(e) of the FDI Act; Prompt Corrective Action under Section 38 of the FDI Act, Cross-Guarantee Liability under Section 5(e) of the FDI Act, and other types of enforcement actions that were based on other statutory authority. This figure also includes Section 10(c) Orders of Investigation. See Enforcement Decisions & Orders website, <https://orders.fdic.gov/s/> and FDIC Annual Reports, <https://www.fdic.gov/about/financial-reports/reports/index.html> (reporting 3,430 formal enforcement actions between 2008 and 2014). Unlike the professional liability claims described in the preceding section that were pursued in the wake of bank failures, the enforcement actions described in this section were largely taken against open banks and their IAPs in an effort to address and correct unsafe or unsound practices, breaches of fiduciary duty, and violations of law. As such, different review periods have been selected for the sections on professional liability matters and administrative enforcement actions.

²¹ An IAP can also be a consultant, joint venture partner, or any other person who participates in the affairs of a bank. In addition, any independent contractor, including an attorney or accountant, who knowingly or recklessly participates in any violation, breach of fiduciary duty, or unsafe or unsound practice that caused or is likely to cause more than a minimal loss to, or a significant adverse effect on, a bank is considered an IAP. See 12 U.S.C. § 1813(u).

²² FDIC Risk Management Manual of Examination Policies, April 2016, 13.1-2; FDIC Compliance Examination Manual, December 2018, II-9.1.

Informal enforcement actions are part of the FDIC's supervisory authority. These actions are designed to correct identified deficiencies and ensure compliance with federal and state banking laws and regulations. Informal actions are not publicly disclosed, but they represent a joint effort between the FDIC and supervised institutions to correct certain issues before turning to a formal enforcement action.

The most common informal enforcement actions used by the FDIC are the Board Resolution and the Memorandum of Understanding (MOU). A Board Resolution is an agreement by a bank's board of directors to take certain corrective actions. The FDIC is not a party to the resolution, but it does approve and accept the resolution. By contrast, an MOU is an agreement between the FDIC and a bank that addresses and corrects identified weaknesses, such as risk management failures or problems with the bank's compliance program. MOUs are typically used when the FDIC has determined that a Board Resolution would not adequately correct the bank's deficiencies.

2. Formal Enforcement Actions

Section 8 of the FDI Act provides the FDIC with enforcement authority over FDIC-supervised institutions and their IAPs. Generally, enforcement actions must be brought within five years from the date of the misconduct. Section 8(b) of the FDI Act permits the FDIC to require banks and IAPs to cease and desist from certain conduct and practices. In addition, Section 8(b) authorizes the FDIC to require banks and IAPs to take affirmative action to rectify unsafe or unsound conditions, correct violations of laws and regulations, or pay restitution to harmed parties, including banks or consumers. When an IAP harms an institution, the restitution is paid to the institution to compensate for the underlying loss. When a bank or IAP harms a consumer, restitution is paid to the consumer to compensate the consumer for the injury or loss or to disgorge unjust enrichment.

Section 8(e) of the FDI Act permits the FDIC to prohibit bank officers, directors, employees, or other IAPs from participating in the banking industry for life. The FDIC may seek a prohibition action when an IAP violates a law or regulation, engages in an unsafe or unsound practice, or breaches a fiduciary duty to a bank. This misconduct must also result in an actual or likely loss to the bank, gain to the IAP, or prejudice to the bank's depositors, and must also involve personal dishonesty or a willful or continuing disregard for the safety or soundness of the bank.

Section 8(i)(2) of the FDI Act allows the FDIC to seek civil money penalties (CMPs) from a bank or an IAP for three levels, or tiers, of misconduct. CMPs are punitive and paid to the United States Treasury. If a bank or IAP violated a law, regulation, or written order, the FDIC can seek a first-tier CMP. If a bank or IAP violated a law or regulation, recklessly engaged in an unsafe or unsound practice, or breached a fiduciary duty to the bank, and this misconduct was part of a pattern, caused more than a minimal loss to the bank, or resulted in pecuniary gain, the FDIC can seek a second-tier CMP. If a bank or IAP knowingly commits a violation of law, engages in an unsafe or unsound practice, or breaches a fiduciary duty, and knowingly or recklessly causes a substantial loss or pecuniary gain, then the FDIC can seek a third-tier CMP. Just as the level of required misconduct increases with each tier, so too does the potential penalty amount, with a tier-one CMP being the lowest and a tier-three CMP being the highest. In addition to the general authority provided under Section 8(i)(2) of the FDI Act, the FDIC is authorized to seek CMPs from a bank or an IAP under several other statutes for specific violations of laws or regulations, including for flood insurance violations.²³

²³ Federal Flood Disaster Protection Act of 1973, Pub.L. No. 93-234, 87 Stat. 975 (1973); Biggert-Waters Flood Insurance Reform Act of 2012 (increased civil money penalties for lenders that fail to ensure compliance with flood insurance purchase requirements from \$350 to \$2,000 per violation and removed the limit on annual penalties), Title II, Subtitle A of Pub. L. 112-141, 126 Stat. 405. CMPs assessed for flood insurance violations are paid to the FEMA National Flood Mitigation Fund.

In addition to the FDIC's primary authority over FDIC-supervised institutions, Section 8(t) of the FDI Act empowers the FDIC with backup enforcement authority pertaining to all insured depository institutions and IAPs. This power was expanded by the Dodd-Frank Act in 2010 to include all depository institution holding companies.²⁴ Under Section 8(t), the FDIC may recommend that the appropriate federal banking agency take an enforcement action against an institution or IAP under its jurisdiction.²⁵ If the appropriate federal banking agency does not take the recommended enforcement action or provide a plan to respond to the FDIC's concerns with the institution or IAP, the FDIC Board may authorize the FDIC to take the recommended action.²⁶

Section 10(c) of the FDI Act authorizes the FDIC to conduct a formal investigation of a bank, its IAPs, or third parties as an adjunct to the FDIC's examination authority. FDIC staff members are permitted to take sworn statements of individuals and issue subpoenas for documents to formally investigate potential misconduct by a bank or an IAP. Not all investigations into potential misconduct lead to a formal enforcement action. Orders of investigation and any potential respondents are confidential and therefore not made public, but the number of investigations is publicly reported each year.²⁷

2. FDIC Enforcement Response to the 2008–2013 Banking Crisis

1. Actions Taken Against Open FDIC-Supervised Banks and Their IAPs

a. Formal Enforcement Actions

Between January 1, 2008, and December 31, 2014, the FDIC completed 3,430 formal enforcement actions against open FDIC-supervised banks and their IAPs.²⁸ At the height of the crisis, RMS issued 1,170 Section 8(b) orders against banks—nearly every troubled bank under the FDIC's jurisdiction at the time. The Section 8(b) actions involved a variety of supervisory concerns but largely focused on declining commercial real estate loan portfolios and capital deficiencies. The orders required the banks to raise capital, develop a contingency plan to address a potential sale or merger, and improve risk-management practices.

The FDIC also issued 647 Section 8(e) prohibition orders, assessed 987 CMPs, and issued 44 restitution orders. The prohibition actions were based on individual misconduct that generally involved commercial real estate loan portfolios or self-dealing. Most of the

²⁴ See Section 172(B)(b), Dodd-Frank Act.

²⁵ See Section 8(t)(1); 12 U.S.C. 1818(t)(1).

²⁶ See Section 8(t)(2); 12 U.S.C. 1818(t)(2). To do so, the FDIC Board must determine that the institution is in an unsafe or unsound condition; the institution or IAP is engaging in unsafe or unsound practices, and the recommended enforcement action will prevent the continuation of the practices; or the conduct or threatened conduct (including any acts or omissions) poses a risk to the Deposit Insurance Fund or may prejudice the institution's depositors. This is considered a high legal standard.

²⁷ See 12 C.F.R. § 308.147.

²⁸ Prompt Corrective Action and Cross-Guarantee Liability are discussed below.

CMPs were companion cases to Section 8(b) and 8(e) cases and involved both banks and IAPs. While most of these actions were stipulated, some were taken after issuing a notice and going through the administrative hearing process.

b. Informal Enforcement Actions

In addition to these formal enforcement actions, the FDIC entered into 2,923 MOUs with banks and 1,224 banks adopted board resolutions, for a combined total of 4,147 informal enforcement actions.

c. Investigations

Finally, the FDIC conducted 110 Section 10(c) investigations. Some of these investigations resulted in enforcement actions.

d. FDIC Open-Bank Formal Enforcement Actions from 2008 to 2014

Table 3 summarizes the formal open-bank enforcement actions that the FDIC took between 2008 and 2014.

Table 3: Open-Bank Formal Enforcement Actions, 2008–2014

Year	Total Formal Enforcement Actions	Section 8(b) Order to Cease & Desist		Section 8(b)(6) Order of Restitution		Section 8(e) Order of Prohibition		Section 8(i) and Flood Act Order to Pay CMP		Section 10(c) Order of Investigation
		Orders	Notices	Orders	Notices	Orders	Notices	Orders	Notices	
2008	273	93	1	3	0	62	1	100	3	4
2009	551	302	8	4	0	65	1	160	1	11
2010	758	357	3	3	0	112	10	215	10	15
2011	557	186	6	7	0	100	19	195	17	30
2012	557	114	0	10	0	110	8	168	5	17
2013	414	70	3	10	1	99	14	80	14	17
2014	320	48	0	7	1	99	4	69	4	16
Total	3,430	1170	21	44	2	647	57	987	54	110

Source: FDIC.

Note: The figures under “Total Formal Enforcement Actions” include additional enforcement actions taken under other statutory authority. CMP is civil money penalty.

2. Examples of Open-Bank Enforcement Actions

In one case, for example, the FDIC issued CMPs against the directors of USA Bank for failing to comply with a deposit-insurance approval order. Although these actions were against IAPs of an open bank, the misconduct ultimately contributed to the bank’s failure.

Additionally, certain actions were taken for significant violations of consumer protection laws. For example, in October 2012, the FDIC and the Consumer Financial Protection Bureau (CFPB) reached a settlement with American Express Centurion Bank (American Express) for deceptive debt collection and credit card marketing practices, in violation of Section 5 of the Federal Trade Commission Act.²⁹

Jointly with the CFPB, the FDIC determined that American Express violated federal law prohibiting unfair and deceptive practices by misrepresenting to consumers that if they entered into an agreement to settle old debt (that was already no longer being reported to consumer reporting agencies), the settlement would be reported to consumer reporting agencies, which would improve consumer credit scores; and using settlement solicitations that implied that consumers who entered into settlement agreements to partially pay debts would have the remaining balance of their debts forgiven, when, in fact, the balance remained a debt owed to American Express.

Under the settlement agreement, American Express agreed to the issuance of Consent Orders, Orders for Restitution, and Orders to Pay Civil Money Penalties, which resulted in total restitution from all entities of approximately \$85 million to more than 250,000 affected consumers, and the imposition of CMPs totaling approximately \$27 million. In addition to restitution and CMPs, the Consent Order required American Express to correct all violations, provide clearly written disclosures on debt collection statements, and stop using deceptive credit card solicitations.

Another notable case is the settlement with Sallie Mae Bank (Sallie Mae), for Section 5 and Servicemembers Civil Relief Act (SCRA) violations, in May 2014.³⁰ The FDIC determined that Sallie Mae violated Section 5 for unfair and deceptive practices regarding student loan borrowers by failing to properly disclose its payment allocation practices and how to avoid late fees. In addition, service members were negatively affected by Sallie Mae's practices, with Sallie Mae incorrectly advising service members that they must be deployed to receive SCRA benefits, conditioning service member SCRA benefits on requirements not required by law, and failing to provide complete SCRA relief to service members.

The FDIC issued Consent Orders, Orders for Restitution, and Orders to Pay Civil Money Penalties (collectively, FDIC Orders). Sallie Mae was required to pay \$6.6 million in CMPs, to pay restitution of approximately \$30 million to the harmed borrowers, and to fund a \$60 million settlement fund with the DOJ to provide remediation to service members.³¹ In

²⁹ FDIC, "FDIC Announces Settlement With American Express Centurion Bank for Unfair and Deceptive Practices in Debt Collection and Credit Card Marketing," press release PR-114-2012, October 1, 2012, <https://www.fdic.gov/news/news/press/2012/pr12114.html>.

³⁰ FDIC, "FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act," press release PR-33-2014, May 13, 2014, <https://www.fdic.gov/news/news/press/2014/pr14033.html>.

³¹ DOJ had separately investigated Sallie Mae regarding the treatment of servicemembers and took separate action against Sallie Mae for SCRA violations.

addition, the FDIC Orders required Sallie Mae to take affirmative steps to ensure that disclosures regarding payment allocation and late fee avoidance were clear to consumers and that service members were properly treated under the SCRA.³²

3. Prompt Corrective Action

In addition to its enforcement powers under Section 8 of the FDI Act, the prompt corrective action (PCA) provisions found in Section 38 of the FDI Act authorize the FDIC to enact various measures against banks whose capital falls below certain thresholds. PCA is carried out to minimize potential losses to the Deposit Insurance Fund (DIF). As an institution's capital decreases, it becomes subject to increasingly stringent restrictions. Some of the restrictions apply by operation of law, such as restrictions on brokered deposits, capital distributions, and management fees. Others are within the FDIC's discretion to impose through a supervisory directive, such as measures to require recapitalization, the dismissal of directors or senior officers, or restrictions on transactions with affiliates. Between 2008 and 2014, the FDIC issued 136 supervisory PCA directives.

4. Cross-Guarantee Liability

During the 2008–2013 banking crisis, the FDIC used cross-guarantee liability to reduce the number of bank failures, minimize losses to the DIF, and recover substantial sums for the DIF. A cross-guarantee is an arrangement between two or more companies that are often related, such as a parent company and its subsidiaries, to provide mutual promises or guarantees for each other's liabilities, fulfillment of promises, or obligations. A creditor of any one member of the group becomes the creditor of every other member of the group. Therefore, if one of the companies to the agreement cannot pay back its loan, the other companies will step in to make the repayment.

Section 5(e) of the FDI Act establishes cross-guarantee liability for “commonly controlled insured depository institutions” for losses incurred or anticipated by the FDIC in connection with the default of a commonly controlled insured depository institution. Its purpose is to make sure every insured depository institution owned by the same company is financially responsible for the failure or resolution costs of any affiliated insured institution.³³ The provision lessened the cost to the DIF. Generally, the amount of the cross-guarantee liability is equal to the estimated loss to the DIF for the resolution of the affiliated institution(s) in default. The FDIC will assess cross-guarantee liability only when the assessment is determined to result in the lowest cost to the DIF. The FDIC Board must approve the assessment of cross-guarantee liability.

The intent of Section 5(e) of the FDI Act is to induce bank holding companies to support each bank subsidiary. The FDIC was proactive in encouraging companies to identify strategies to prevent bank failures and the associated cross-guarantee liability. The FDIC was

³³ FDIC, “FDIC Cross Guaranty Provision,” press release, October 30, 2009, <https://www.fdic.gov/news/news/press/2009/pr09195b.html>.

also effective in using cross-guarantee authority to implement supervisory and resolution strategies that minimized the risk of loss to the DIF. In particular, the FDIC used cross-guarantee liability related to the failure of Commerce Bank of Southwest Florida to wind down the holdings of Capitol Bancorp and move several troubled institutions out from control of the company at minimal loss to the DIF. During the crisis, the FDIC issued 33 orders of cross-guarantee liability.

5. Actions Taken Against Failed FDIC Banks and Their IAPs

FDIC staff reviewed material related to more than 500 banks that failed between January 1, 2008, and December 31, 2014, to determine if enforcement actions were appropriate. In addition to FDIC-supervised institutions, these reviews included banks that were supervised by the OCC, OTS, and FRB. In total, staff reviewed every bank failure from the 2008–2013 banking crisis.

For each FDIC-supervised bank, staff performed a comprehensive red-flag review, which included analyzing materials from the FDIC Office of Inspector General (OIG), DRR, RMS, and the PLFCS. In 2014, the FDIC OIG co-published a report that analyzed the federal banking agency enforcement actions against former IAPs of failed banks. The report included Table 4.

Table 4: Enforcement Actions Against IAPs Pertaining to 465 Failed Institutions

Sanction	Regulator	EA Activity		Totals: All Regulators by EA Type (adjusted for duplication)
		IAPs	Associated Institutions	
Removal/ Prohibition Order	FDIC	86 ^a	53 ^a	128 EAs issued to IAPs associated with 75 institutions.
	FRB	4	2	
	OCC	19 ^b	14 ^b	
	OTS ^d	19	7	
Civil Money Penalty	FDIC	63 for \$4.1 million	26	120 EAs issued to IAPs associated with 42 institutions.
	FRB	0	0	
	OCC	28 for \$1.69 million ^b	12 ^b	
	OTS ^d	29 for \$195,500	5	
Administrative Restitution	FDIC	5 for \$284,000	2	8 EAs issued to IAPs associated with 5 institutions.
	FRB	0	0	
	OCC	3 for \$728,000	3	
	OTS	0	0	

Personal Cease and Desist Order Against an IAP	FDIC	0	0	19 EAs issued to IAPs associated with 6 institutions.
	FRB	0	0	
	OCC	15	5	
	OTS ^d	4	1	
Totals (adjusted for duplication)	All Regulators	There were a total of 275 EAs issued against 218 IAPs associated with 87 institutions.		

Sources: Generated by the FDIC Office of Inspector General (OIG) based on information from the FDIC, Board of Governors of the Federal Reserve System (FRB), and Office of the Comptroller of the Currency (OCC) management officials and the agencies’ public web sites.

Note: The data in the table are as of September 30, 2013. This table appears as Table 2 on page 15 of “Enforcement Actions and Professional Liability Claims Against Institution-Affiliated Parties and Individuals Associated With Failed Institutions,” July 2014, <https://oig.federalreserve.gov/reports/board-actions-claims-failed-institutions-jul2014.pdf>. OTS is Office of Thrift Supervision, EA is enforcement actions, and IAPs are institution-affiliated parties.

^a Includes removal/prohibition orders issued by the FDIC to five former officers and directors of two institutions formerly supervised by the OTS. In issuing these orders, the FDIC exercised its back-up enforcement authority.

^b Includes one removal/prohibition order and one CMP issued by the OCC to an institution formerly supervised by the OTS.

^c We were unable to locate information pertaining to any administrative restitution orders issued by the OTS.

^d OTS activity from January 1, 2008 through July 21, 2011, when the OTS was abolished.

The FDIC's supervisory oversight efforts ultimately led to enforcement actions involving several failed institutions, including two backup authority actions described below. These efforts held institutions and IAPs responsible for the harm they caused to consumers, the institutions, and the DIF.

For example, in 2011, the FDIC filed a notice against the former CEO and a former director of the failed First Bank of Beverly Hills. The FDIC alleged that the former president recklessly expanded the bank's acquisition, construction, and development lending portfolio, which contributed to the bank's failure. The FDIC also alleged that the former director failed to recuse himself from matters in which he had a conflict of interest. Before the hearing, the former director stipulated to a prohibition action and \$1,000 CMP. After the hearing, the FDIC Board issued a prohibition order and \$85,000 CMP against the former CEO.

The FDIC also exercised its backup authority on two occasions involving failed federally chartered thrifts for which the OCC, as successor to the OTS, was the primary federal regulator. In May 2012, the FDIC used its backup authority to issue Section 8(e) prohibition orders against four former officers and directors of Downey Savings and Loan Association (Downey), a failed thrift that the FDIC took over as receiver in 2008. The respondents failed to adequately manage Downey's Option Adjustable-Rate Mortgage (ARM) Program, a non-traditional loan program containing a variety of unacceptable risks, including a negative amortization option that, at its peak, was used by more than 95 percent of Option ARM

borrowers, which put consumers at significant risk; origination by independent mortgage brokers; insufficient documentation or verification of borrower income or assets; and deficient underwriting.³⁴ These actions were part of a global settlement with PLFCS that included payments by the respondents to the FDIC as receiver.³⁵

Later in 2012, the FDIC used its backup authority again to issue a Section 8(e) prohibition order against Michael Perry, the former CEO and chairman of the board of IndyMac Bank, FSB (IndyMac), another failed thrift, and the fourth largest bank failure in U.S. history.³⁶ Perry caused IndyMac to continue to originate and purchase Alt-A loans in the face of known risks without performing independent underwriting or establishing adequate internal controls.³⁷ Like Downey, this action was part of a global settlement with PLFCS that included a \$1 million payment by Perry to the FDIC as receiver.

Conclusion

As the nation's financial system continues to innovate and grow in complexity, the FDIC has adapted to continually fulfill its mission to safeguard the health and stability of the banking system. The FDIC utilized judicial claims and administrative actions to meet this challenge during the 2008–2013 banking crisis. As receiver, the FDIC recovered on PL claims, not only through the use of legal tools and strategies successfully used in the prior crisis, but also by pursuing new claims developed to address losses caused by novel financial practices and products. A one-time change in tax law in 2009 provided the FDIC as receiver with a basis to pursue litigation to recover income tax refunds owed to failed banks. Continuing efforts to collect restitution and forfeiture orders resulted in recoveries that advanced the goal of holding wrongdoers accountable for losses caused to failed banks. And the FDIC in its corporate capacity pursued administrative enforcement claims involving failed banks to a greater extent than during the S&L crisis and used legislative tools enacted during the 2008–2013 banking crisis more extensively to make it easier to hold financial institutions accountable. Through these efforts, the FDIC demonstrated its ongoing ability to build on its experience in resolution, enforcement, and recovery work to address new developments in the banking system.

³⁴ Amortization means paying off a loan with regular payments so that the principal balance that a borrower owes reduces with each payment. Negative amortization means that, even when a borrower makes a payment toward his or her loan, the amount the borrower owes will still increase because the payment is not enough to cover the interest.

³⁵ Settlement and Release Agreement, Downey Savings and Loans, May 31, 2012, <https://www.fdic.gov/foia/plsa/10023-downeysavingsandloan-mcalister-2012.pdf>.

³⁶ The collapse of IndyMac is considered one of the early events that ushered in the 2008–2013 banking crisis. The FDIC insurance fund paid \$10.7 billion following the IndyMac collapse. See FDIC, “FDIC Closes Sale of Indymac Federal Bank, Pasadena, California,” press release PR-42-2009, March 19, 2009, <https://www.fdic.gov/news/news/press/2009/pr09042.html>.

³⁷ Alt-A loans are those made under expanded underwriting guidelines to borrowers with marginal to very good credit. Alt-A loans are riskier than prime loans because of the underwriting standards of the loans, not necessarily the credit quality of the borrowers.