



Securities Litigation Group: Bank Directors and Officers Advisory

JANUARY 9, 2014

The Eleventh Circuit Rejects the Extension of the “No Duty” Rule: D&Os Allowed to Plead and Prove Defenses Based on the FDIC’s Conduct

Since 2010, in its role as receiver, the FDIC has filed actions against former directors and officers (D&Os) of 84 closed banks. In virtually every case, the FDIC has sought to strike affirmative defenses asserted by the D&Os and to avoid discovery requests based upon the so-called “no duty” rule. A recent ruling by the Eleventh Circuit has unequivocally rejected the “no duty” rule as grounds to strike affirmative defenses based upon FDIC conduct, which also confirms that discovery in this area is appropriate. *FDIC v. Skow*, No. 12-15878 (11th Cir. Dec. 23, 2013).

The “no duty” concept was developed by courts following the savings and loans crisis of the late 1980s. At that time, the FDIC persuaded a few district courts, through the creation of federal common law (judge-made law), to bar D&Os from asserting any affirmative defenses to its claims based on the FDIC’s conduct on the theory that the FDIC owed “no duty” to D&Os.

In the landmark 1994 decision *O’Melveny & Myers v. FDIC*, however, the United States Supreme Court rejected the premise of a body of federal common law that afforded special protection to the receiver. 512 U.S. at 83. Accordingly, the Supreme Court held that absent a controlling federal statute, state law determined whether D&Os could assert a defense against the FDIC. Thus, the *O’Melveny* Court held that “any defense good against the original party is good against the receiver.” *Id.* at 86. Notwithstanding this Supreme Court ruling, the FDIC continued to rely upon the “no duty” rule, arguing that the current post-financial crisis litigation provided an exception to the *O’Melveny* holding.

The *Skow* decision arises from claims brought by the FDIC as receiver for Integrity Bank. The District Court denied the FDIC’s motion to strike certain affirmative defenses based on the receiver’s conduct that were asserted by the former D&Os, including failure to mitigate damages, reliance and estoppel. *FDIC v. Skow*, No. 1:11-cv-111 (N.D. Ga. Feb. 27, 2012). The FDIC sought summary judgment on this issue from the District Court, which was also denied. *FDIC v. Skow*, No. 1:11-cv-111 (N.D. Ga. Aug. 14, 2012). On appeal to the Eleventh

Circuit, the viability of the FDIC's "no duty" argument turned on whether it was a "previously established and long-standing" rule of federal common law that predated enactment of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which governs claims by the FDIC against D&Os of closed banks. *FDIC v. Skow*, No. 12-15878, slip op. at *10 (11th Cir. Dec. 23, 2013).

In *Skow*, the Eleventh Circuit rejected the FDIC's argument that established precedent permitted striking affirmative defenses based on the "no duty" rule, and refused to independently recognize such a principle. The Court of Appeals held that under *O'Melveny* "[f]ederal common law is basically complete and closed," and the current bank litigation provided no exception to this. *FDIC v. Skow*, No. 12-15878 (11th Cir. Dec. 23, 2013). As a result, in the Eleventh Circuit at least (which includes federal courts in Alabama, Florida and Georgia), former D&Os of a failed bank that are sued by the FDIC have the right to plead and prove any affirmative defenses recognizable under state law based on FDIC's conduct, such as the failure of the FDIC to make reasonable efforts to mitigate its damages when it disposed of a bank's assets.

Supreme Court of Georgia to Decide the Standard of Liability Applicable to FDIC Claims Against Georgia Bank D&Os.

The Eleventh Circuit in *Skow* left unresolved the question of whether ordinary negligence is a viable claim by the FDIC against D&Os based on Georgia law. The vast majority of District Courts that have addressed this issue concluded that Georgia law foreclosed liability for ordinary negligence against former D&Os of Georgia banks. *See, e.g., FDIC v. Skow*, No. 1:11-cv-111 (N.D. Ga. Feb. 27, 2012), reconsideration denied (N.D. Ga. Aug. 14, 2012); *FDIC v. Blackwell*, No. 1:11-cv-3423 (N.D. Ga. Feb. 27, 2012); *FDIC v. Briscoe*, No. 1:11-cv-2303 (N.D. Ga. Aug. 14, 2012); *FDIC v. Whitley*, No. 2:12-cv-170 (N.D. Ga. Dec. 10, 2012); *FDIC v. Miller*, No. 2:12-cv-00042 (N.D. Ga. Dec. 26, 2012). *But see FDIC v. Adams*, No. 1:12-cv-00726-JOF (N.D. Ga. Mar. 21, 2013). The Eleventh Circuit concluded, however, that this "issue of state law has not yet been addressed definitively by Georgia's highest court," and therefore certified the questions to the Supreme Court of Georgia. *FDIC v. Skow*, No. 12-15878, slip op. at *2 (11th Cir. Dec. 23, 2013).

The *Skow* certification to the Supreme Court of Georgia is the second arising from FDIC claims of ordinary negligence against former D&Os of Georgia banks. Recently, Judge Thrash of the District Court for the Northern District of Georgia certified a question regarding the applicability of the Georgia business judgment rule to claims against former bank D&Os. *FDIC v. Loudermilk*, No. 1:12-cv-4156 (N.D. Ga. Nov. 25, 2013). The decision(s) by the Supreme Court of Georgia on these issues are anticipated later this year.

Alston & Bird's Distressed Financial Institutions Team represents and counsels more than 200 current and former D&Os in more than 40 distressed or closed financial institutions across the country. The team offers expertise and experience regarding regulatory enforcement actions and the unique fiduciary roles of bank directors in distressed bank situations, as well as providing advice on insurance coverage for bank D&Os. The team also represents former bank D&Os in 17 cases filed to date by the FDIC for civil money damages.

If you would like to receive future *Securities Litigation Advisories* electronically, please forward your contact information, to securities.advisory@alston.com. Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Lisa R. Bugni
404.881.4959
lisa.bugni@alston.com

Todd R. David
404.881.7357
todd.david@alston.com

Robert R. Long
404.881.4760
robert.long@alston.com

Gidon M. Caine
650.838.2060
gidon.caine@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

Craig Carpenito
212.210.9582
craig.carpenito@alston.com

Susan E. Hurd
404.881.7572
susan.hurd@alston.com

Brandon R. Williams
404.881.4942
brandon.williams@alston.com

Jessica Perry Corley
404.881.7374
jessica.corley@alston.com

John A. Jordak, Jr.
404.881.7868
john.jordak@alston.com

Dawn M. Wilson
212.210.9451
dawn.wilson@alston.com

Charles W. Cox
213.576.1048
charles.cox@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2014

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333