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FDIC SUES FORMER FLA. BANK DIRECTORS FOR GROSS NEGLIGENCE

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For the first time since the advent of the Great Recession, the FDIC has filed an action against former bank directors based only on theories of gross negligence. The lawsuit was filed against the former directors of Orion Bank ("Orion" or the "Bank") of Naples, FL, which failed and went into receivership in November 2009. A copy of the FDIC's complaint is available here.

The FDIC's central case theory focuses on the defendant directors' completely lack of oversight over Orion's President and CEO, Jerry Williams. According to the complaint, Mr. Williams became such a dominant decision-maker that the defendant directors generally approved any and all of his proposals with little, if any, scrutiny. Their alleged abdication of responsibility bled over into role as members of the Board Loan Committee, and they "blithely rubberstamped" any loan that Mr. Williams proposed without any meaningful review or deliberation. The FDIC contends that the director defendants continued to "rubberstamp" Mr. Williams' proposed loans *even after* banking regulators had specifically criticized their lack of oversight and had warned them to be personally and directly involved in reviewing, analyzing and independently evaluating loans presented for approval.

Apart from its allegations that the defendant directors failed to properly oversee management, the FDIC also alleges that the defendants routinely disregarded proper loan underwriting standards, the Bank's own loan policy, repeated warnings from regulators, and the rapidly declining real estate market. Worse yet, the defendant directors continued to approve ADC lending at an accelerated rate between 2005 and 2007 despite obvious signs that the real estate market was in steep decline. In total, the FDIC seeks to recover more than $53 million in connection with several bad loans approved by the defendants.

Although some of the allegations concerning the approval of imprudent loans are similar to prior FDIC lawsuits, this case is unique. It is the first occasion on which the FDIC has limited its theory of recovery to claims for gross negligence, which is a much more difficult standard to prove than the typical claims for ordinary negligence and breach of fiduciary duty. Why has the FDIC taken such a narrow approach? The answer is two-fold. First, the case was filed in the Middle District of Florida, which previously ruled in the *Florida Community Bank* case that Florida's statutory version of the

Business Judgment Rule shields directors from claims for ordinary negligence. (Our prior summary of that ruling is available here.) But that ruling has not stopped the FDIC from filing ordinary negligence claims in other D&O cases in the same judicial district. So what makes this case different? The difference lies in the FDIC's apparent belief that the facts in the Orion Bank case are so egregious that it can take the calculated risk of limiting its claims to gross negligence. We will monitor this case to see if the FDIC's legal gamble pays off.

MEET THE TEAM

W. Bard Brockman

Atlanta / Miami

bard.brockman@bclplaw.com
+1 404 572 4507
