

Financial Services Report

D&O Litigation

Vedder Price Wins Dismissal of Two Actions Against Directors of Insolvent Bank

When the Office of the Comptroller of the Currency placed the \$1.9 billion asset-sized ANB Financial, National Association in receivership with the Federal Deposit Insurance Corporation (FDIC) on May 9, 2008, it was one of the largest bank insolvencies in recent years. In a matter of days, plaintiffs' attorneys were actively seeking future clients. Attorneys ran newspaper advertisements soliciting former employees, depositors and shareholders of the failed Bentonville, Arkansas bank and its holding company. Lawsuits, including putative class actions, were soon filed in Arkansas courts against the former directors of the bank and its holding company.

In *Clift v. Brannan*, a depositor of the bank who allegedly lost the uninsured portion of his deposit brought a purported class action against the former directors of the bank. The depositor alleged that the directors had failed to provide adequate supervision over the affairs of the bank, resulting in numerous unsafe and unsound banking practices and ultimately resulting in breaches of the fiduciary duty the directors owed the depositors. The plaintiff claimed the directors should be held liable for all the uninsured deposits, a sum totaling in excess of \$39 million.

In *Phillipy v. Brown*, a minority shareholder of the bank's holding company brought a shareholder derivative action against the individual directors. In this derivative action, the shareholder claimed the directors owed the shareholders a fiduciary duty. Through the failure of the directors to establish proper controls and management standards, the plaintiff claimed that the directors had breached

that fiduciary duty and that the directors had further engaged in negligent practices. In this claim, the plaintiff sought damages of \$300 million.

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Vedder Price won the dismissal of both cases on the basis that the claims could be brought, if at all, only by the FDIC. The FDIC agreed, intervened and removed both cases to federal court, which granted the directors' motions to dismiss. It is never a good time to be a banker defending a lawsuit. However, given the current economic climate, it is even worse than usual. If a director must be a defendant, particularly in a purported class action alleging losses by individuals, it is far better to be a defendant in federal court. *The Wall Street Journal* has described some state courts, particularly in the context of class action litigation, as forums for "jackpot justice."

In a matter of first impression in Arkansas, the federal court agreed with the directors that both of these claims, if in fact they existed at all, belonged to the FDIC as the receiver of the bank and not to any individual depositor or shareholder. To allow otherwise would be to encourage a chaotic and inefficient liquidation of the bank with competing plaintiffs trying to separately litigate their alleged

claims, forcing the defendant directors to litigate many of the same issues multiple times. The federal court accepted these arguments and dismissed both of these cases.

The litigation did not resolve the merits of the underlying claims. Yet, these outcomes were significant victories for the former directors of the bank. It is clearly in the best interests of the directors that any possible claim against them be considered by the FDIC as receiver and not the plaintiffs' bar. The FDIC does not pursue frivolous or sensational claims. When it last spoke on the issue, the FDIC stated that it only brought claims against directors

or officers in less than 25 percent of all insolvencies, and only after the completion of a thorough investigation and the satisfaction of a two-part test. Grievous circumstances must be presented. Unlike the plaintiffs' bar, the FDIC is not out to sensationalize the cases it brings. The chances for a rational disposition of director liability issues is far greater with the FDIC than with the plaintiffs' bar.

If you have any questions, please contact **James M. Kane** (312-609-7533), **Diane M. Kehl** (312-609-7664), **Chad A. Schiefelbein** (312-609-7737) or any other Vedder Price attorney with whom you have worked.

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