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FDIC Telling Defense Lawyers: Give Up Corporate Records

Regulator's Demands for Lawyers' Records Could Be Legally Sound, Some Say

By Anna Scott

On a recent Friday evening, a pack of agents from the Federal Deposit Insurance Corp. filed into a small California bank and announced they were taking over. The bank, like hundreds of others in the past two years, had failed.

Within 48 hours, the FDIC had dispatched a deputy sheriff to seize copies of bank records from the institution's former CEO, and also did something that has shocked the defense:

An FDIC official e-mailed a stern warning to the CEO's lawyer, Jeffrey Tisdale, demanding he turn over thumb drives containing copied bank records obtained from his client, or face a lawsuit. "It was a very interesting weekend," said Tisdale, and one that reflects a developing controversy in the failed bank arena.



In recent months, the FDIC has aggressively pursued former officers and directors of failed institutions for the return of any and all copied bank records in their possession. The demands usually come informally, before any lawsuits are filed, so it is difficult to quantify how many times the issue has come up. But the FDIC has completed investigations of dozens of bank failures across the nation this year alone, and is in the midst of launching dozens more.

In some of those cases, FDIC lawyers demanded law firms return copied records obtained from their failed bank clients, or face lawsuits for privacy law violations.

The federal receiver for failed banks argued in court documents that it's seeking to protect sensitive customer information. Lawyers for former officers and directors complained the FDIC's policy is overly broad, and that it hinders their ability to defend clients against potential claims from regulators, borrowers and stockholders.

'This is old wine in a new bottle. [The FDIC has] done this before in other cycles, trying to get an advantage to maximize their recovery.'

Gordon Bava
Manatt, Phelps & Phillips

"How the heck do you protect yourself against claims of negligence or gross negligence if you don't have the tools to do it?" asked Harold Reichwald, a banking and finance attorney for Manatt, Phelps & Phillips.

An FDIC spokeswoman declined to comment on the issue, citing pending lawsuits.

In two closely watched cases being heard in Atlanta, Ga., the FDIC recently sued one law firm, and is being sued by another over the treatment of copied bank records.

The copied documents the FDIC seized included everything from loan files to board meeting minutes to underwriting guidelines. These records, which often contain confidential customer information, are key to reconstructing officers' and directors' actions leading up to the failure.

While privacy laws affecting such documents have tightened somewhat during the past decade, potentially giving the FDIC the upper hand, bank attorneys said early access to documents is necessary to ward off negligence claims or criminal charges.

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Securities

Hedge Fund Settles SEC Fraud Claims

A Bay Area hedge fund and three former officers including its general counsel will pay more than \$1 million to settle allegations they secretly used a \$100 million fund as their personal piggy bank.

Banking

Judge Set to Find Lender in Contempt

A federal judge will set a hearing to determine how much in damages a lender owes a homeowner who lost home in foreclosure.

International

Fake Miro Dealer Acquitted

Federal prosecutors came up short Tuesday in their quest to prove that an art gallery owner linked to an international fugitive knowingly sold fake Joan Miro prints to customers.

Banking

Ruling Makes Loan Ditching Harder

A Northern District judge has closed off one line of attack that has allowed some non-English speaking borrowers to abandon their loans.

Intellectual Property

Tessera Wins Patent Battle

A federal appeals court on Tuesday affirmed a U.S. International Trade Commission decision that several wireless chipmakers infringed two Tessera Technologies Inc. patents, sending the company's stock soaring.

Civil Rights

U.S. Owes \$2.5M in Wiretapping Case

A federal judge on Tuesday ordered the government to pay \$2.5 million in attorney fees in a case over the warrantless wiretapping program undertaken by then-President George W. Bush.

Entertainment & Sports

Net Neutrality Likely To Sour New Suits

Government regulation of the Internet that could jeopardize plans by major service providers to create first- and second-class web users took a step forward on Tuesday.

Corporate

Venture Expectations Rise for 2011

Venture capitalists say they're optimistic about venture investment in 2011.

Law Practice

Electronically Yours: Firms Opt for E-Cards

When it comes to holiday card trends, electronic is the new black. E-cards peppered clients' and contacts' email inboxes this month, and that old hand-signed snail-mail greeting became something of a relic.

Government

High Court Justices Won't Review Building Sale

The state Supreme Court has recused itself from hearing a last-resort petition from Gov. Arnold Schwarzenegger that seeks to lift a temporary

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"Information related to loans, the circumstances under which they were made, the adequacy of the documentation, are very material to allegations that they were improperly made," said Gordon Bava, chairman of the business, finance and tax division at Manatt. "Withholding that information makes it very difficult for directors to defend themselves."

More than 330 banks have failed nationwide since the onset of the credit crisis in 2008, including at least 30 in California. After taking over a bank, the FDIC typically conducts a one- or two-year investigation into what preceded the failure to determine whether the former officers and directors carry any civil or criminal liability. The tension between FDIC's obligations to protect customer information and the ability of the bank executives to defend themselves arises during this investigative period, before the FDIC files any complaint in court.

"It's most important as a pre-filing issue," said Joel Athey of Corbin, Fitzgerald & Athey in Los Angeles who represents former executives with the failed IndyMac Bank. "Post-filing, the defendants being sued would have access to normal discovery procedures. But of course nobody wants to get sued if they can help it."

To date, the FDIC board has authorized civil suits against at least 80 former bank executives, an agency spokeswoman said, seeking to recoup \$2 billion in losses to the nation's deposit insurance fund. The agency is reportedly also investigating at least 50 cases of possible criminal charges, including some in California.

The regulator has filed only two of those lawsuits so far, including one against the formerly Pasadena-based IndyMac, seeking \$300 million in damages from four former executives in the Homebuilding Division for alleged negligence in giving out construction loans.

Many of the authorized cases are expected to settle before reaching a courtroom, and bank attorneys said they are at a disadvantage in negotiations without access to the documents being examined by the FDIC.

"This is nothing more than an aggressive litigation strategy to put the defendant at a distance, to maximize the ability to recover money from the [bank's] insurance carrier," said Bava. "If they were truly concerned about privacy, they would have much more stringent rules for when loans are securitized, for example, and all this information goes along with it."

Last month, the FDIC sued the business and litigation firm Bryan Cave in federal court in Atlanta over its retention of copied documents from former executives of the Kansas-based Hillcrest Bank. The complaint alleges the firm's acquisition of the documents violated various state and federal laws, including the federal Computer Fraud and Abuse Act.

Bryan Cave has sought to resolve the case by providing sworn declarations and facilitating forensic computer inspections to detail how the documents were handled and stored.

After getting a similar threat from the FDIC, the law firm McKenna Long & Aldridge took a different tack; it sued the bank regulator. The law firm in that case, also filed in Atlanta federal court last month, is seeking a court order allowing it to keep documents provided by failed bank clients.

"I think the McKenna Long action is going to end up being a referendum on what the FDIC's appropriate authority is," said Athey. "It's a gray area right now, but it's a very important gray area because the FDIC is being very aggressive."

In Tisdale's case, the managing partner of Tisdale & Nicholson in Century City ultimately gave in and turned over the tiny computer drives of bank records that the FDIC demanded.

"I tried to negotiate an agreement that the law firm would retain the thumb drives only for the purposes of defense, to address the privacy concern - which is a legitimate concern - that they were overly fixated on, but they would hear none of that," he said. "We sent them back, with the understanding that if the FDIC sues my client, they will retain the drives intact and we will have access to it in discovery."

The law seems to be on FDIC's side, Tisdale said. Recent measures have bolstered the regulator's privacy arguments. For example, he said, the 1999 federal Gramm-Leach-Bliley Act, which the FDIC cited in the Bryan Cave case, prohibits banks from sharing customer information with non-affiliates.

Yet longtime banking lawyers also said the FDIC has employed similar tactics during other downturns.

injunction blocking the governor's administration from selling off 11 state-owned office complexes.

New Long Beach Courthouse Planned
Unusual public-private partnership will replace crowded facility.

Law Practice
Milbank Guides Financing For Largest Solar Plant

Milbank, Tweed, Hadley & McCloy in Los Angeles, New York and Washington D.C., and Winston & Strawn in San Francisco assisted Abengoa Solar Inc. in its \$1.45 billion financing round, announced Tuesday.

Entertainment & Sports
Disney Denied New Trial Against Celador

A federal judge has denied the Walt Disney Co.'s post-trial motion seeking to overturn a verdict in a profit dispute involving the show "Who Wants to be a Millionaire," leaving intact the \$319 million in damages and interest a jury awarded the show's creator.

Health Care & Hospital Law
Pharmaceutical Marketing: A Year of Interesting Times

New disclosure rules target conflicts of interests between drug providers and the industry. By **Bryan A. Liang** and **Tim K. Mackey** of the California Western School of Law.

Environmental
Using the Courts to Fight Climate Change: Taking a Page From the Civil Rights Playbook

Legislative gridlock means that courts must play a leading role in the battle against climate change. By **Jennifer K. Berg**.

Labor/Employment
What Didn't Happen in 2010 for California Wage-and-Hour Laws

In 2010, significant wage-and-hour cases have resulted in insignificant changes to or reaffirmation of existing law. By **Joshua Dale** and **Tamara Rider** of Michel & Associates.

Law Practice
Five Tips for Turning Introductions Into Opportunities

Tips for attorneys on how to leave a lasting impression. By **Jonathan R. Fitzgarrald** of Greenberg Glusker and **Deborah Shames** of Eloqui.

Corporate
For GCs Only: How to Go From Functional Specialist to Indispensable Business Partner

Do you feel confined by your role as corporate counsel? Then read this! By **Mark Goulston** of Steele Partners and **John Ullmen** of UCLA Anderson School of Management.

Judicial Profile
Ernest M. Hiroshige
Superior Court Judge
Los Angeles County (Los Angeles)

Government
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their lawyers. Some have complied, others fought back. Two lawsuits are pending.

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