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Enforcement

The authors write that the number of federal bank enforcement actions declined in 2014, continuing a trend that began in 2011. They note that notwithstanding this continued decline, federal banking agencies and the Department of Justice (DOJ) imposed historically large fines against financial institutions during the year.

BNA INSIGHTS: Enforcement Actions Decline But Fines Hit Historic Highs in 2014

By Thomas P. Vartanian, Robert H. Ledig, Kennan Castel-Fodor and Brian J. McGrady Jr.

During 2014, the number of enforcement actions brought by federal banking agencies[1] continued a downward trend that began in 2011. Federal banking agencies issued 661 formal enforcement actions,[2] representing more than a 55 percent reduction in enforcement actions since the high water mark in 2010. Notwithstanding this continued decline in enforcement actions, federal banking agencies and the Department of Justice (DOJ) imposed historically large fines against financial institutions in connection with certain enforcement actions during the year.

There were a number of trends that emerged from the enforcement actions issued by the federal banking agencies and the DOJ during 2014. First, the DOJ continued to be an active *de facto* regulator in the banking industry by bringing enforcement actions against large financial institutions related to the sale of mortgage-

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[1] "Federal banking agencies" refers to the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of Currency (OCC), the Consumer Financial Protection Bureau (CFPB), and the Board of Governors of the Federal Reserve System (FRB).

[2] These formal enforcement actions include cease and desist orders, consent orders, assessments of civil money penalties, prompt corrective actions, removal and prohibition orders, written agreements, adjudications, and section 19 orders (Formal Actions). These numbers do not take into account informal actions, which are not required to be disclosed to the public.

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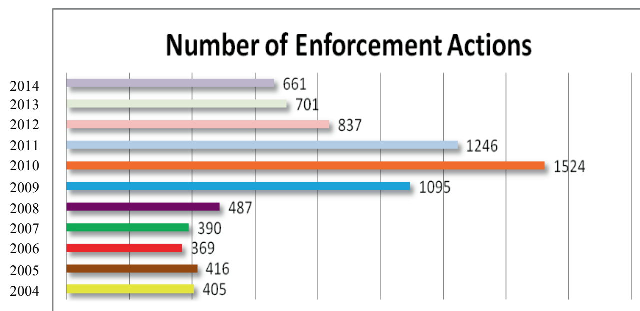
backed securities. Second, several enforcement actions addressed high-profile issues related to foreign currency exchange trading (FX Trading). Third, the Consumer Financial Protection Bureau (CFPB) continued to ramp up its enforcement efforts. Finally, the DOJ's ''Operation Choke Point'' continues to attract attention and controversy.

DOJ Continues Role as a De Facto Banking Regulator. In 2013, the DOJ emerged as a prominent *de facto* banking regulator through its use of a provision contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) (12 U.S.C. § 1833a) to pursue enforcement actions against banking organizations.[3] The DOJ continued this role in 2014 as it further entrenched its place as a significant regulator in the banking industry. The DOJ entered into two historic settlements with banking entities, both of which involved the sale of residential mortgage-backed securities (RMBS) over the course of the year.

Federal Bank Enforcement Actions[4]



On July 14, 2014, the DOJ announced a $7 billion settlement with a major bank holding company to resolve claims arising from alleged improper packaging, securitization, marketing, sale, and issuance of RMBS prior to January 1, 2009.[5] The settlement included a $4 billion civil penalty, which, at the time, represented the single largest penalty imposed by the DOJ under its FIRREA authority—only to be surpassed by the second DOJ action in 2014. In announcing the settlement, the assistant attorney general for the Civil Division commented that ''[t]oday, we hold [the bank] accountable for its contributing role in creating the financial crisis, not only by demanding the largest civil penalty in history, but also by requiring innovative consumer relief that will help rectify the harm caused by [the bank's] conduct.''[6]

The DOJ followed this historic settlement with yet another record-setting settlement agreement with another major bank holding company. The DOJ announced on August 21, 2014 that it, along with other federal and state authorities, had entered into a $16.65 billion settlement agreement with the bank to resolve federal and state claims against the bank.[7] As a component of this total, the bank agreed to pay a $5 billion civil penalty to the DOJ under FIRREA. The DOJ's actions were aimed at settling ongoing civil investigations related to the ''packaging, marketing, sale, arrangement, structuring and issuance of RMBS, collateralized debt obligations (CDOs), and the bank's practices concerning the underwriting and origination of mortgage loans.''[8]

There are significant issues raised by these DOJ cases. For example, there are questions about whether the use of section 1833a is appropriate where the allegation is essentially that the bank defrauded itself.[9] Second is the appropriateness of so many regulators attempting to enforce alleged violations.[10] Jamie Dimon, the Chairman and CEO of JP Morgan Chase, had some choice words about this topic in his annual shareholders letter:

> Part of the issue around legal costs is that banks are now frequently paying penalties to five or six different regulators (both domestic and international) on exactly the same issue. This is an unprecedented approach that probably warrants a serious policy discussion – especially if those regulators (as at least some of them have acknowledged) don't take into account what is being paid to the others. For now, it's simply a reality for big banks, and certainly for us, that when one or more employees do something wrong, we'll hear from multiple regulators on the subject.[11]

Year Marked by Historic Civil Money Penalties. The Office of the Comptroller of the Currency (OCC) remained active in bringing enforcement actions against institutions and individuals in 2014. While the number and nature of OCC enforcement actions against individuals was on par with 2013 figures, the OCC brought over 50 percent more enforcement actions against institutions in 2014 than in the prior year.[12]

Bank Secrecy Act/Anti-money laundering (''BSA/AML'') continues to be a focus of enforcement efforts.[13] In 2013, the OCC and a large U.S. bank entered into a consent cease and desist order regarding the bank's

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[3] *See* Thomas P. Vartanian et al., *Enforcement Actions Continue Three-Year Decline; DOJ Emerges as a Major Player*, BNA's Banking Report 2-3, May 20, 2014, *available at* http://www.dechert.com/files/Uploads/Documents/FSG/PDFArtic.pdf.

[4] The totals included in this chart represent the Formal Actions brought by the federal banking agencies, but do not include actions brought by other non-banking agencies such as the DOJ.

[5] *See* DOJ Press Release (July 14, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

[6] *Id.* The bank was required, as part of the settlement, to ''provide relief to underwater homeowners, distressed borrowers and affected communities through a variety of means including financing affordable rental housing developments for low-income families in high-cost areas.'' *Id.*

[7] *See* DOJ Press Release (Aug. 21, 2014), *available at* http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[8] *Id.*

[9] *See* Thomas P. Vartanian, *How Many Bank Supervisors Do We Need*, American Banker, Mar. 17, 2014.

[10] *See id.*; Thomas P. Vartanian, *What the DOJ Wants When It Comes Knocking*, American Banker, Sept. 29, 2014.

[11] JP Morgan Chase & Co., 2014 Letter to Shareholders, Apr. 8, 2015, *available at* http://files.shareholder.com/downloads/ONE/15660259x0x820077/8af78e45-1d81-4363-931c-439d04312ebc/JPMC-AR2014-LetterToShareholders.pdf.

[12] OCC Annual Report 2014, *available at* http://www.occ.gov/publications/publications-by-type/annual-reports/2014/ar-2014-full.pdf.

[13] For an in-depth discussion concerning the bank enforcement focus on BSA/AML issues *see* Vartanian et al., *supra* note 4, at 5-6.

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BSA/AML compliance program.[14] The OCC's subsequent examinations alleged additional deficiencies in the bank's BSA/AML compliance program. On January 7, 2014, the OCC entered into a consent order for the assessment of a $350 million civil money penalty against the same bank based on allegations of numerous deficiencies in the bank's BSA/AML compliance program.[15] The OCC cited, among other allegations, the bank's failure to correct a previously reported problem and a failure to correct a previously reported BSA/AML compliance program violation related to its Suspicious Activity Report filings.

A number of high profile actions arose from the focus on bank conduct in the foreign exchange market. On November 6, 2014, the OCC alleged that a bank engaging in foreign exchange business exhibited alleged deficiencies and unsafe or unsound practices related to the bank's wholesale foreign exchange business in which it acted as principal. The OCC and the bank entered into a consent order[16] in which the bank agreed to pay a civil money penalty of $250 million.

The OCC's order alleged that, among other things, some of the bank's foreign exchange traders discussed engaging in potential misconduct with traders from other banks or market participants in attempts to manipulate foreign exchange rates. In addition to the civil money penalty, the bank consented to the issuance of a cease and desist order which included, among other stipulations, the (i) establishment of a compliance committee, (ii) establishment of a comprehensive action plan, (iii) submission of a written plan regarding board and management oversight and governance in FX Trading, and (iv) performance of periodic compliance testing.

In another FX Trading-related action, the OCC entered into a consent order with a large U.S. bank in which the bank agreed to a $350 million civil money penalty.[17] This consent order, entered into on November 11, 2014, involved similar allegations to those made by the OCC in its November 6, 2014 enforcement action discussed above. The bank additionally agreed to similar stipulations as the November 6, 2014 action through its consent to a cease and desist order.

The Federal Reserve Board (FRB) ordered a large foreign bank to pay a $508 million penalty for violations of U.S. sanctions law, which represented the single largest penalty ever assessed by the FRB.[18] According to the FRB, the bank engaged in unsafe and unsound practices because it lacked adequate transparency, risk management, and legal and compliance review policies and procedures to ensure that activities conducted at offices outside of the United States complied with applicable U.S. Treasury Office of Foreign Assets Control (OFAC) regulations.[19] In addition, the FRB asserted that the bank established and implemented policies and procedures for processing certain U.S. dollar denominated fund transfers through one of its U.S. branches and other unaffiliated U.S. financial institutions involving parties subject to OFAC regulations that omitted, falsified or otherwise concealed relevant information needed by these U.S. institutions to ensure compliance with U.S. sanctions law. Furthermore, the FRB issued a joint cease and desist order with the regulator in the bank's home country, which, among other things, required the bank to implement a program designed to ensure global compliance with U.S. sanctions law.[20]

CFPB Continues to Ramp Up Enforcement Efforts. Similar to 2013, the CFPB continued to ramp up its enforcement efforts during 2014 by bringing actions for violations related to, among other things, debt collection practices, mortgage origination activities, sales of credit card ''add on products'' and payday lending practices.[21]

Notably, the CFPB brought its first enforcement action for violations of the agency's new mortgage servicing rules, which took effect in January 2014. In that case, the CFPB ordered the bank to refund $27.5 million in damages to borrowers harmed by the bank's alleged unfair acts and practices under Section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[22] Although this was the first enforcement action brought under the CFPB's new mortgage servicing rules, it is noteworthy that the majority of the alleged unlawful activities took place prior to the effective date of the new rules.

Notably, the CFPB brought its first enforcement action for violations of the agency's new mortgage servicing rules, which took effect in January 2014.

The allegedly unfair and deceptive practices included, withholding critical information from borrowers that they needed to complete their loss mitigation applications, failing to review loss mitigation applications, improperly denying borrower requests for loan modifications and unjustifiably prolonging trial periods for loan modifications. According to the CFPB, the bank's practices harmed borrowers by depriving them of the opportunity to make informed decisions about how to save or otherwise dispose of their home. With

[14] *See* OCC Consent Order AA-EC-13-04 (Jan. 14, 2013), *available at* http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-8a.pdf.

[15] *See* OCC Consent Order AA-EC-13-109 (Jan. 7, 2014), *available at* http://www.occ.gov/topics/laws-regulations/enforcement-actions/bank-enforcement-actions/civil-money-penalties/ea-2014-001.pdf.

[16] *In re Bank of Am., N.A.*, OCC, No. 2014-171, *consent order entered*, 11/11/14.

[17] *See* OCC Consent Order AA-EC-14-101 (Nov. 11, 2014), *available at* http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-157c.pdf.

[18] FRB Cease and Desist Order 14-022-B-FB (June 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf.

[19] In addition, the bank entered into parallel settlement agreements with the DOJ, New York County District Attorney's Office, New York State Department of Financial Services, and OFAC.

[20] Joint Cease and Desist Order (June 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a2.pdf.

[21] However, some have questioned the CFPB's ability to sustain this trend due to resource availability and capacity issues. *See* Rachel Witkowski, *Backlog Forces CFPB to Slow Down New Investigations*, American Banker, Apr. 22, 2015.

[22] CFPB Consent Order 2014-0014 (Sept. 29, 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_consent-order_flagstar.pdf.

respect to the new mortgage servicing rules, the CFPB alleged that the bank's unlawful and deceptive practices continued after the effective date of the mortgage servicing rules. In addition, the CFPB alleged that the bank misrepresented borrowers' right to appeal the denial of a loan modification in violation of the new rules. Accordingly, the CFPB asserted that the bank's activities violated the loss mitigation requirements set forth under the mortgage servicing rules.

The CFPB settled enforcement actions with two large banks, resulting in approximately $1 billion in refunds to consumers that were allegedly harmed by misrepresentations made in connection with the sale of certain credit card ''add-on products'' and certain other sales practice violations. In the first of these two enforcement actions, the CFPB, along with the OCC, ordered a large bank to pay an estimated $727 million in relief to consumers as a result of deceptive marketing and unfair billing practices related to credit card ''add-on products.''[23] According to the CFPB, the bank's unfair billing practices allegedly included illegally charging approximately 1.9 million customer accounts for credit monitoring and other credit reporting services that customers did not receive. Moreover, the CFPB alleged that monthly fees resulted in certain customers exceeding their credit card account limits and owing in additional fees. The CFPB alleged that telemarketing scripts used by the bank contained material misstatements. Furthermore, the CFPB alleged that telemarketers deviated from their sales script to make sales pitches that were misleading and omitted pertinent product information. For example, telemarketers allegedly misled consumers about the enrollment process for credit protection products by providing false assurances to consumers that additional steps must be completed before they would be enrolled in credit protection products. The CFPB alleged, however, that despite assurances to the contrary, the bank enrolled consumers in these credit protection products during the telemarketing calls, which resulted in consumers being charged for these products.

In the second of these enforcement actions, the CFPB and the DOJ ordered a large bank to pay $225 million in refunds to consumers in the largest credit card discrimination settlement in history. According to the CFPB, consumers were harmed by the bank's illegal and discriminatory credit card practices. Of the $225 million in refunds, $56 million was attributable to the bank's alleged deceptive marketing practices.[24] According to the CFPB, the bank misrepresented the features of five different debt cancellation and ancillary products and marketed these products as providing debt cancellation of a certain percent of the consumers balance based on certain life events such as involuntary unemployment or disability. The remaining $169 million related to the CFPB's allegations that the bank excluded approximately 108,000 borrowers from certain debt relief offers because of their national origin. Specifically, the CFPB alleged that the bank failed to extend certain debt cancellation offers to consumers who requested that communications with the bank be in Spanish or provided the bank with a mailing address in Puerto Rico.

During 2014, the CFPB also pursued an enforcement action against a payday lender that it alleged had engaged in unfair, deceptive, or abusive acts or practices. In that enforcement action, the CFPB ordered the payday lender to pay $5 million in refunds as well as a $5 million fine for its illegal debt collection practices employed to collect overdue balances from consumers.[25]According to the CFPB, the payday lender harassed and threatened civil and criminal lawsuits against consumers to pressure consumers into taking out additional loans to satisfy their outstanding obligations, even after many consumers indicated that they could not afford such additional loans.

In an attempt to address concerns regarding the payday lending and vehicle title lending industry, the CFPB announced on March 26, 2015 that it was considering proposing rules for consumer loans made by these firms.[26] Despite the CFPB's existing express authority to regulate payday lenders, the proposals would be issued under the CFPB's Dodd-Frank Section 1031 authority, which prohibits unfair, deceptive or abusive acts or practices in connection with the offer or sale of consumer financial products. According to the CFPB's own estimates, the proposals would likely reduce the volume of total short-term loans by more than 60 percent, if enacted.[27]

Operation Choke Point Comes Under Scrutiny. In 2013, the DOJ began ''Operation Choke Point,''[28] which was aimed at limiting access to financial services and payment systems for businesses that are, in the DOJ's view, engaged in questionable business practices. The DOJ brought its first suit to settlement under Operation Choke Point in January 2014 against a community bank in North Carolina for processing payments for payday lenders through an unidentified third-party payment processor.[29] The DOJ brought charges against the bank under the Anti-Fraud Injunction Act and FIRREA, alleging that the bank ''knew or was deliberately ignorant of the use of its accounts and its access to the national banking system in furtherance of a scheme to defraud consumers.''[30] The bank settled with the DOJ one day after the agency brought its complaint, agreeing to a $1.2 million payment.

In the summer of 2011 a senior Federal Deposit Insurance Corporation (FDIC) official published a list of examples of merchant categories, including payday lenders, that he said warranted heightened attention by banks that processed transaction for these merchants.[31]

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[23] CFPB Consent Order 2014-0004 (Apr. 7, 2014), *available at* http://files.consumerfinance.gov/f/201404_cfpb_bankofamerica_consent-order.pdf.

[24] CFPB Consent Order 2014-0006 (June 19, 2014), *available at* http://files.consumerfinance.gov/f/201406_cfpb_consent-order_synchrony-bank.pdf.

[25] CFPB Consent Order 2014-0008 (July 8, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf.

[26] CFPB, *Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle Title and Similar Loans*, (Mar. 26, 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf.

[27] *Id.* at 45.

[28] For a further discussion of the origins of Operation Choke Point, *see* Vartanian et al., *supra* note 4, at 3.

[29] *See* Case No. 5:14-cv-00014, (E.D.N.C. Jan. 8, 2014).

[30] *Id.* at 1.

[31] Michael Benardo, Chief, Cyber-Fraud and Financial Crimes Section, Div. of Risk Management Supervision, Federal Deposit Insurance Corporation, et al., *Managing Risks in*

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Many have claimed that the purpose of this list was to pressure banks into restricting access to legitimate businesses simply because the FDIC viewed their respective industries to be of ''high-risk.''[32] Subsequently, several large banks have terminated their accounts with such lenders.[33] Trade associations have criticized the FDIC's participation in Operation Choke Point.[34] Following continuing public scrutiny, the FDIC withdrew the ''high-risk'' list in July, 2014.[35]

Operation Choke Point attracted further attention in 2014.[36] The House Committee on Oversight and Government Reform issued a series of staff reports analyzing the operation, including both the DOJ and FDIC's involvement.[37] The governmental scrutiny of Operation Choke Point centered on the impact of banks indiscriminately terminating relationships with legal and legitimate merchants.[38] However, certain House Democrats have voiced support for the DOJ and Operation Choke Point.[39] Under pressure from members of Congress, both the DOJ and FDIC agreed to launch investigations into Operation Choke Point.[40] In January 2015, the FDIC issued a press release encouraging banking institutions to evaluate their customer relationships on a case-by-case basis rather than on an industry basis.[41]

FDIC Lawsuits Against Directors and Officers of Failed Institutions. In its role as receiver for failed institutions, the FDIC may bring suits against directors and officers (D&Os) who may have contributed to the failure of a particular institution.[42] The FDIC was very active in 2012 and 2013 in bringing lawsuits against D&Os of failed institutions, but 2014 exhibited a substantial decline in the number of D&O lawsuits. In 2014, the FDIC brought 19 lawsuits. From January 1, 2009, through March 24, 2015, the FDIC has filed 106 D&O lawsuits against 800 former D&Os.[43]

Year	Number of D&O Suits Brought by the FDIC
2011	16
2012	26
2013	40
2014	19

Third-Party Payment Processor Relationships, 8 Supervisory Insights 3 (Summer 2011).

[32] *See, e.g.*, Javier Palomarez, *Choking Off Access to Credit*, Huffington Post, last visited May 12, 2015, *available at* http://stopthechoke.com/139; Kelly Riddell, *'High Risk' Label From Feds Puts Gun Sellers in Banks' Crosshairs, Hurts Business*, Washington Times, May 18, 2014, *available at* http://www.washingtontimes.com/news/2014/may/18/targeted-gun-sellers-say-high-risk-label-from-feds/?page=all.

[33] *See* Kevin Wack, *Fifth-Third, Capital One Cut Off Payday Lenders*, American Banker, Apr. 17, 2014.

[34] *See, e.g.*, Joe Adler & Kevin Wack, *Is FDIC Waging Stealth Crackdown on Online Lenders?*, American Banker, Sept. 20, 2013 (citing Lisa McGreevy, the president and chief executive of the Online Lenders Alliance, stating that ''[t]he people who are getting cut off from banking and payment-processing services include storefronts and [lenders] who are licensed in every state. . . . It's an across-the-board attack'').

[35] *FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors*, Financial Institution Letters, FDIC, July 28, 2014, *available at* https://www.fdic.gov/news/news/financial/2014/fil14041.html. *See also* Rob Blackwell, *FDIC Withdraws Alleged 'Hit List' of High-Risk Merchants*, American Banker, July 28, 2014.

[36] *See Timeline: Operation Choke Point*, American Banker, last visited May 12, 2015, *available at* http://www.americanbanker.com/gallery/timeline-operation-choke-point-1066360-1.html.

[37] *See, e.g.*, The Department of Justice's ''Operation Choke Point'': Illegally Choking Off Legitimate Businesses?, U.S. House of Representatives, Committee on Oversight and Government Reform, Staff Report, 113th Congress, May 29, 2014, *available at* https://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf; Federal Deposit Insurance Corporation's Involvement in ''Operation Choke Point,'' U.S. House of Representatives, Committee on Oversight and Government Reform, Staff Report, 113th Congress, Dec. 8, 2014, *available at* http://oversight.house.gov/wp-content/uploads/2014/12/Staff-Report-FDIC-and-Operation-Choke-Point-12-8-2014.pdf. These staff reports were critical of the effects that Operation Choke Point had on legitimate businesses, the transparency of the operation, and the legal authority to conduct the initiative.

[38] *Id.*

[39] Kevin Wack, *Congressional Dems Back DOJ on Operation Choke Point*, American Banker, Feb. 26, 2014, *available at* http://www.americanbanker.com/issues/179_39/congressional-dems-back-doj-on-operation-choke-point-1065915-1.html.

[40] *FDIC and DOJ Commit to Luetkemeyer and Members an Investigation into Operation Choke Point*, Press Release, Office of U.S. Congressman Blaine Luetkemeyer (Nov. 14, 2014), *available at* http://luetkemeyer.house.gov/news/documentsingle.aspx?DocumentID=398492.

[41] *FDIC Encourages Institutions to Consider Customer Relationships on a Case-by-Case Basis*, Press Release, FDIC (Jan. 28, 2015), *available at* https://fdic.gov/news/news/press/2015/pr15009.html (''Financial institutions that properly manage customer relationships and effectively mitigate risks are neither prohibited nor discouraged from providing services to any category of customer accounts or individual customers operating in compliance with applicable laws.'').

[42] In one notable recent instance the FDIC's allegations were met with some judicial skepticism. *See, e.g.*, FDIC v. Willetts, 48 F. Supp. 3d 844, 852-53 (E.D. N.C. Sept. 11, 2014) (''[T]he Court will briefly discuss the FDIC's claim that the 'Great Recession' was not only foreseeable, but was actually foreseen by the defendants. The Court discusses this claim only due to the absurdity of the FDIC's position. . . . [T]he FDIC claims that defendants were not only more prescient than the nation's most trusted bank regulators and economists, but that they disregarded their own foresight of the coming crisis in favor of making risky loans. Such an assertion is wholly implausible.'').

[43] *Professional Liability Lawsuits*, FDIC (Apr. 24, 2015), http://www.fdic.gov/bank/individual/failed/pls/.