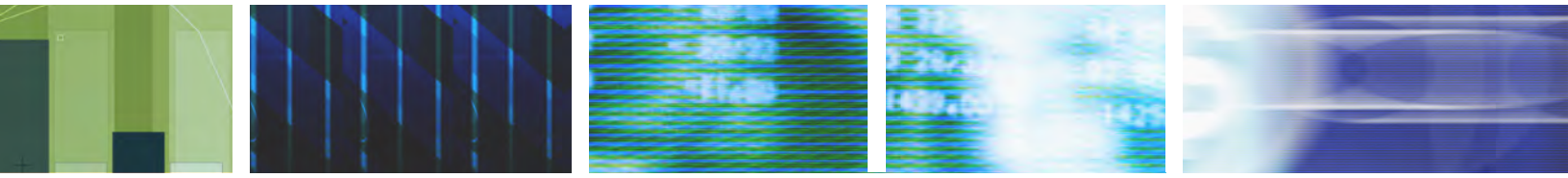
Characteristics of FDIC Lawsuits against Directors and Officers of Failed Financial Institutions



September 2013

CORNERSTONE RESEARCH

Report Summary

- At least 32 FDIC D&O lawsuits have been filed in 2013: 10 in the first quarter, 15 in the second quarter, and seven so far in the current quarter. The pace of filings in the second and third quarters of 2013 has exceeded the rate of new filings compared with any equivalent period in the previous three years. If the filing of new lawsuits in 2013 continues at the pace observed through August, 53 lawsuits will be filed this year—more than double the 26 filed in 2012. Since 2010, the FDIC has filed 76 lawsuits against the directors and officers of failed institutions.
- Financial institution failures were most common between the third quarter of 2009 and the third quarter of 2010. Given the three-year statute of limitations for tort lawsuits and the likely existence of tolling agreements allowing the FDIC additional time to determine if it will file a lawsuit, this year has seen, as expected, an increased amount of filing activity. Of the 32 lawsuits filed so far in 2013, nine were against institutions that failed in 2009 and the remaining 23 were against institutions that failed in 2010.
- Of the 76 filed lawsuits, 10 have settled and one has resulted in a jury verdict. Three settlements have occurred this year, with four in 2012, and three in 2011.
- Chief executive officers continue to be the most commonly named defendants. They have been named in 88 percent of all filed complaints and 28 of the 32 lawsuits in 2013. Chief financial officers, chief credit officers, chief loan officers, chief operating officers, and chief banking officers are also commonly named defendants. Outside directors have been named, frequently along with inside directors, in 75 percent of all filed complaints and 24 of the 32 lawsuits filed in 2013.
- To date, the FDIC has claimed damages of $3.6 billion in the 69 lawsuits that have specified a damages amount. The average damages amount has been $53 million, with a median value of $27 million. Lawsuits filed in 2013 have had a lower average claim than lawsuits filed in 2011 and 2012. In the aggregate, the largest claims have related to the failure of California institutions, while the largest number of D&O lawsuits have targeted failed institutions in Georgia.
- Of the failed financial institutions in 2009, the directors and officers of 57, or 41 percent, either have been the subject of an FDIC lawsuit or have settled claims with the FDIC prior to the filing of a lawsuit. For institutions failing in 2010, the comparable figure is 39, or 25 percent.
- FDIC seizures of financial institutions continued to decline in 2013 compared with 2012. After only four seizures in the first quarter of 2013, there were 12 in the second quarter and four in the third quarter through August 27, 2013. In total, 20 institutions have been seized so far in 2013 compared with 51 in 2012. Since 2007, 488 financial institutions have failed.

This is the sixth in a series of reports that analyzes the characteristics of professional liability lawsuits filed by the Federal Deposit Insurance Corporation (FDIC) against directors and officers of failed financial institutions (D&O lawsuits). The FDIC may also file lawsuits against other related parties, such as accounting firms, law firms, appraisal firms, or mortgage brokers, but we generally do not address such lawsuits here.

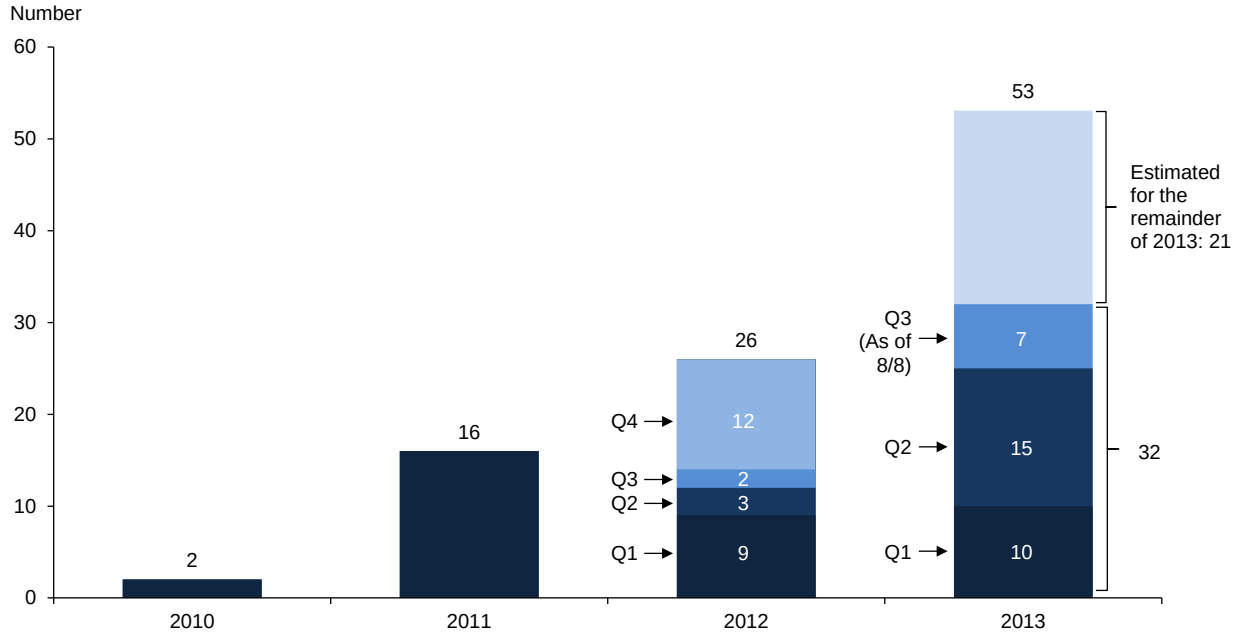
Characteristics of FDIC Lawsuits against Directors and Officers of Failed Financial Institutions

September 2013

Overview of Litigation Activity

FDIC litigation against directors and officers of failed financial institutions has continued at an increased pace in 2013 compared with prior years. As of August 8, 2013, the FDIC has filed 32 lawsuits, six more than in 2012. Seven lawsuits have been filed so far in the third quarter of 2013. The FDIC filed more lawsuits in the second quarter than it had in any prior quarter since the current wave of FDIC D&O lawsuits began in 2010. If this year's pace of new filings persists for the remainder of 2013, 53 lawsuits will be filed in 2013. In total, 76 lawsuits have been filed since 2010 against the directors and officers of 75 institutions.

Number of FDIC Lawsuits against Directors and Officers of Failed Financial Institutions
2010–2013



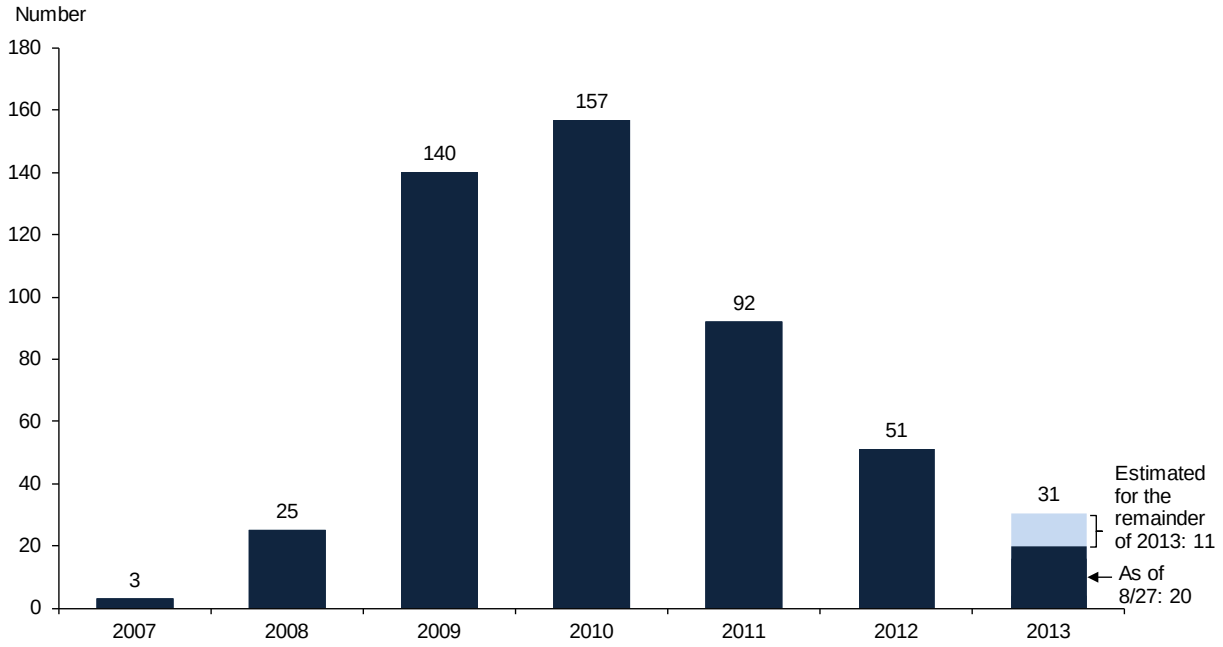
Source: FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/)

Note:
1. Financial institutions include commercial banks, savings banks, and savings and loans (thrifts).
2. The FDIC has released information about lawsuits it filed between January 1, 2007, and August 8, 2013. Estimated numbers for 2013 assume that the FDIC will file lawsuits at the same rate observed between January 1, 2013, and August 8, 2013.

Financial Institution Failures

Seizures of banks and thrifts by the FDIC have continued at low levels following a peak in 2010. So far in 2013, 20 institutions have failed—four in the first quarter, 12 in the second quarter, and four in the third quarter through August 27, 2013. If this rate of failure continues during the remainder of the year, 11 additional institutions will be seized, resulting in 31 failed financial institutions for 2013. Since the beginning of 2007, 488 financial institutions have failed.

Number of Failed Financial Institutions
2007–2013



Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html)

Note:
1. Financial institutions include commercial banks, savings banks, and savings and loans (thrifts).
2. For 2013, data for failed institutions are through August 27, 2013. Estimated numbers for 2013 assume institutions will fail at the same rate observed between January 1, 2013, and August 27, 2013.

Characteristics of Director and Officer Lawsuits

Timing of Lawsuits

Since mid-2012, the FDIC has consistently waited to file lawsuits until approximately three years after the failure of a financial institution. Most lawsuits have been filed just prior to the expiration of the three-year statute of limitations for tort lawsuits. So far in 2013, 21 lawsuits have been filed within the three-year statute of limitations. Eleven lawsuits were filed more than three years after the institutions failed, presumably due to the existence of tolling agreements that provided the FDIC with additional time to file. While the length of a typical tolling agreement is unknown, no D&O lawsuits in 2013 have been filed more than four years after an institution's failure (See Appendix I).

Size of Institutions Subject to Litigation

To date, 15 percent of financial institutions that have failed since 2007 have been the subject of FDIC D&O lawsuits. These lawsuits generally have targeted larger failed institutions and those with a higher estimated cost of failure. Of the 75 institutions that are the subjects of FDIC lawsuits, 58 had total assets greater than $217 million, the median total asset size of failed institutions since January 2007. The institutions targeted in the first and second quarters of 2013 had median total assets of $644 million and $1.1 billion, respectively. However, the institutions targeted so far in the third quarter of 2013 have been smaller, with median total assets of $402 million.

The 75 institutions that are the subjects of D&O lawsuits had a median estimated cost to the FDIC of $158 million at the time of seizure. The seven institutions that have been the subject of lawsuits so far in the third quarter of 2013 had a median estimated cost of failure of $115 million, compared with the median estimated cost of $50 million for all failed financial institutions.

Comparison of Asset Size and Failure Cost
All Financial Institutions with Those That Failed and
Those Subject to FDIC D&O Lawsuits

	Number of Institutions	Median Total Assets (Millions)	Median Estimated Cost of Failure (Millions)
Institutions Subject to FDIC Lawsuits			
1/1/07–12/31/11	17	$735	$158
Q1 2012	9	$1,182	$355
Q2 2012	3	$492	$131
Q3 2012	2	$136	$27
Q4 2012	12	$187	$75
Q1 2013	10	$644	$149
Q2 2013	15	$1,114	$216
Q3 2013 (through 8/8)	7	$402	$115
All Institutions (1/1/07–8/8/13)	75	$630	$158
Failed Institutions (1/1/07–8/27/13)	488	$217	$50
Active Financial Institutions (as of 12/31/12)	7,151	$166	N.A.

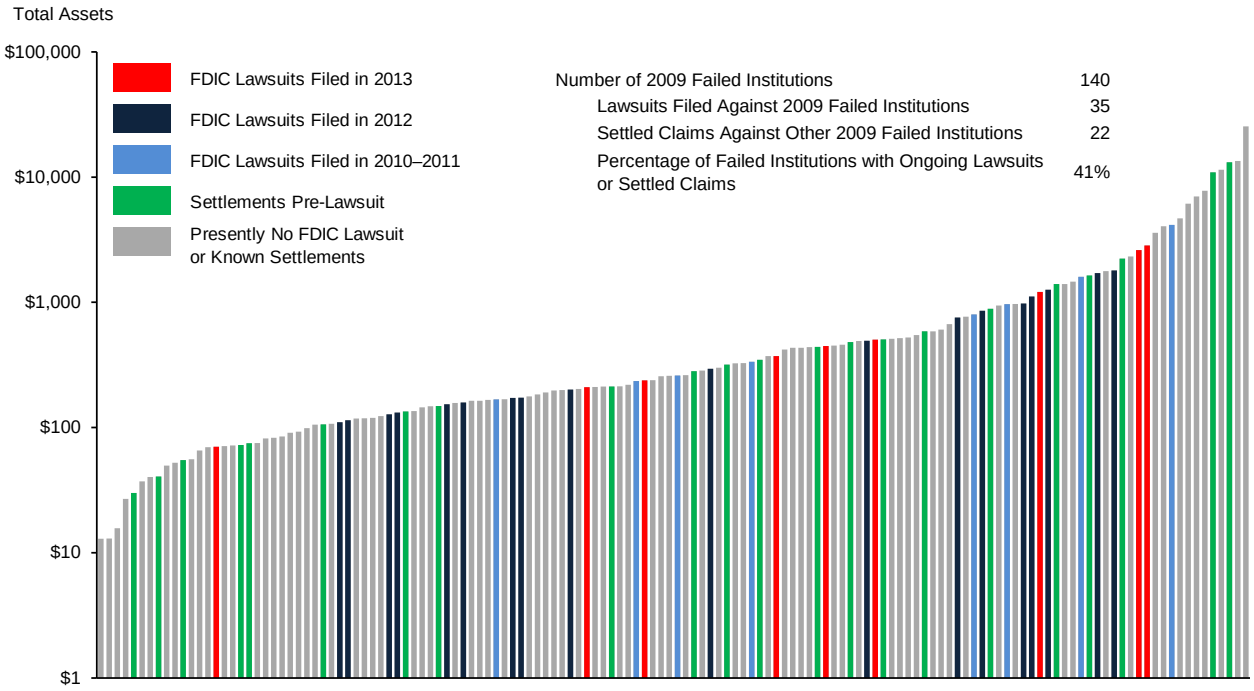
Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); Highline Financial Intelligence based on regulatory filings

Note:
1. Financial institutions include commercial banks, savings banks, and savings and loans (thrifts).
2. Total assets as of the last reporting period prior to seizure by the FDIC.
3. Institutions that are the subject of multiple FDIC lawsuits are counted only once.
4. Cost of failure is the FDIC's estimate of the cost to the Deposit Insurance Fund at the time of seizure of the failed institution, when available. Otherwise, the cost of failure is based on FDIC estimates from December 31, 2010.

Financial institution failures were most common between the third quarter of 2009 and the third quarter of 2010. Given the three-year statute of limitations for tort lawsuits and the likely existence of tolling agreements allowing the FDIC additional time to determine if it will file a lawsuit, this year has seen, as expected, an increased amount of filing activity. Of the 32 lawsuits filed so far in 2013, nine were against institutions that failed in 2009 and the remaining 23 were against institutions that failed in 2010.

We cannot project how many directors and officers of financial institutions that failed in 2009 or 2010 may possibly be sued going forward, in large part because we do not have data on the existing number of tolling agreements. The current data indicate that 35 institutions, or 25 percent of the 2009 failures, have already been subject to FDIC D&O lawsuits. The FDIC has also published settlement agreements with directors and officers that reflect the settlement of claims that had not resulted in the filing of a lawsuit. These settlements generally resolved disputes with the FDIC before a lawsuit was filed. The directors and officers of another 22 institutions that failed in 2009 settled these types of claims with the FDIC. In total, the directors and officers of at least 41 percent of the failed institutions in 2009 have been the target of claims by the FDIC.

Financial Institutions That Failed in 2009
Ordered by Ascending Total Asset Size
Dollars in Millions

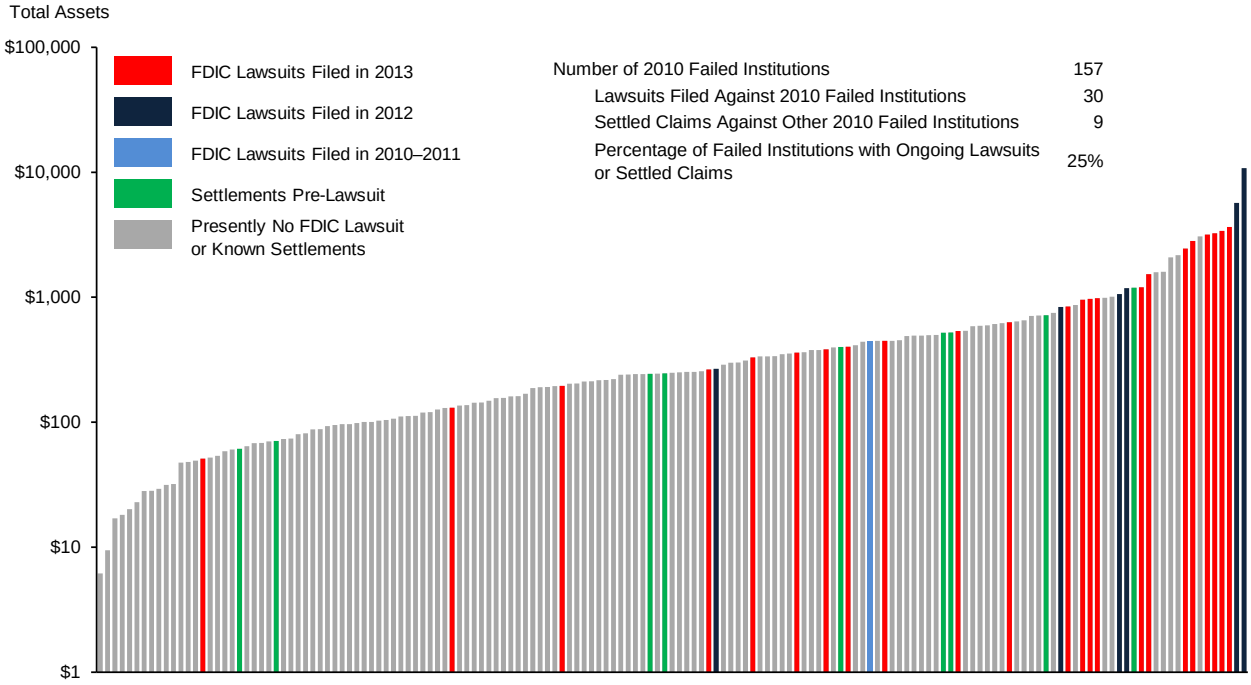


Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Historical Statistics on Banking (http://www2.fdic.gov/hsob/index.asp); Highline Financial Intelligence based on regulatory filings

Note:
1. Total assets are presented on a logarithmic scale.
2. Settlements data are updated through the end of May 2013.

For institutions that failed in 2010, the current data indicate that 30 institutions, or 19 percent, have already been subject to FDIC D&O lawsuits. The FDIC's D&O lawsuits in 2013 have been particularly focused on the largest institutions that failed in 2010. The directors and officers of another nine institutions that failed in 2010 settled claims with the FDIC before the filing of a lawsuit. In total, the directors and officers of at least 25 percent of the failed institutions in 2010 have been the target of claims by the FDIC.

Financial Institutions That Failed in 2010
Ordered by Ascending Total Asset Size
Dollars in Millions



Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Historical Statistics on Banking (http://www2.fdic.gov/hsob/index.asp); Highline Financial Intelligence based on regulatory filings

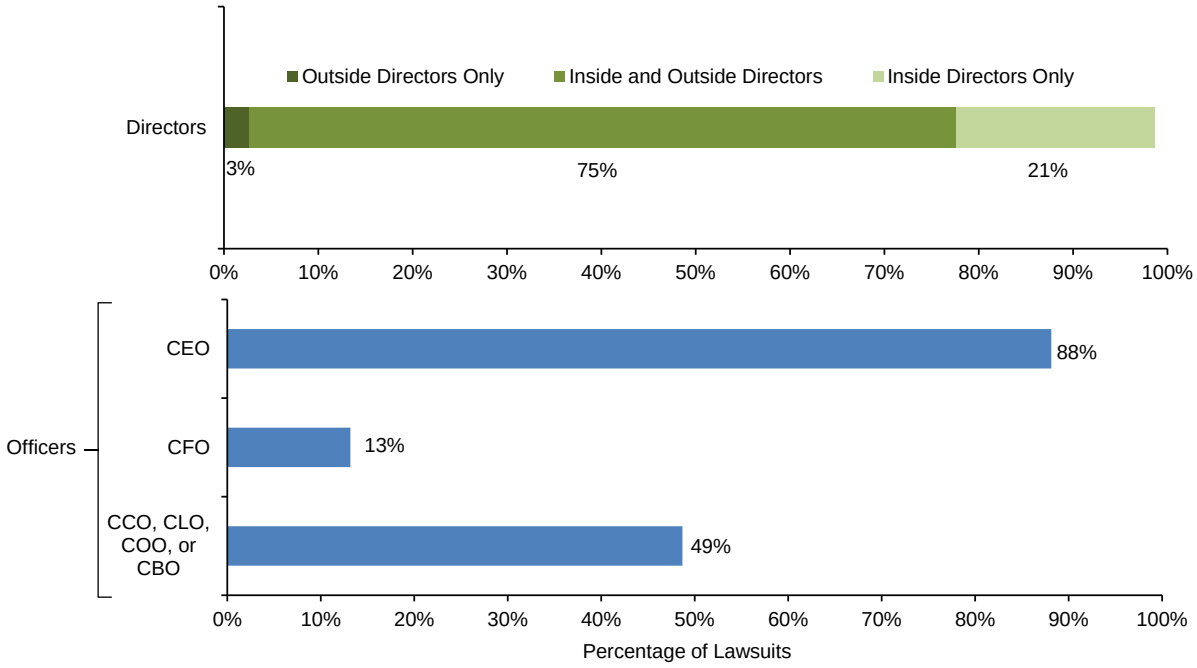
Note:
1. Total assets are presented on a logarithmic scale.
2. Settlements data are updated through the end of May 2013.

Defendants and Claims

Defendants named in the 76 filed lawsuits included 574 former directors and officers. Inside and outside directors were routinely named as defendants (24 of the 32 lawsuits filed in 2013). Outside directors were exclusively named as defendants in rare instances (two out of 76 lawsuits). Somewhat more common were lawsuits in which only inside directors were named (16 out of 76 lawsuits). CEOs were named as defendants in 88 percent of lawsuits, including 28 of the 32 lawsuits filed so far in 2013. Other officers commonly named as defendants included:

- Chief financial officers (13 percent of lawsuits—three additional instances in 2013)
- Chief credit officers (34 percent of lawsuits—eleven additional instances in 2013)
- Chief loan officers (14 percent of lawsuits—one additional instance in 2013)
- Chief operating officers (17 percent of lawsuits—four additional instances in 2013)
- Chief banking officers (3 percent of lawsuits—no change since end of 2012)

Percentage of FDIC D&O Lawsuits in Which Certain Parties Were Named as Defendants



Source: FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); complaints filed by the FDIC

Note: CCO refers to chief credit officer, CLO refers to chief loan officer, COO refers to chief operating officer, and CBO refers to chief banking officer.

All 32 lawsuits filed so far in 2013 included allegations of gross negligence. Twenty-nine of the 32 lawsuits included allegations of breach of fiduciary duty and 25 of the 32 lawsuits included allegations of negligence. Overall, of the 76 lawsuits filed since 2010, allegations of gross negligence, negligence, and breach of fiduciary duty were made in 73, 66, and 59 lawsuits, respectively.

Damages Claimed

In 69 of the 76 complaints against directors and officers, the FDIC explicitly stated damages amounts. In total, the FDIC claimed at least $3.6 billion in damages. The average damages claim was $53 million while the median was $27 million. The average damages claim has declined—from $87 million in 2011 to $33 million in 2013. This decline could be related to a combination of the FDIC pursuing the largest perceived claims first, a change in other characteristics of the failed institutions that are the subjects of lawsuits each year, or a change over time in the FDIC's approach to claimed damages.

Damages Claimed by Year of FDIC D&O Lawsuit and by Year of Failure of Financial Institution

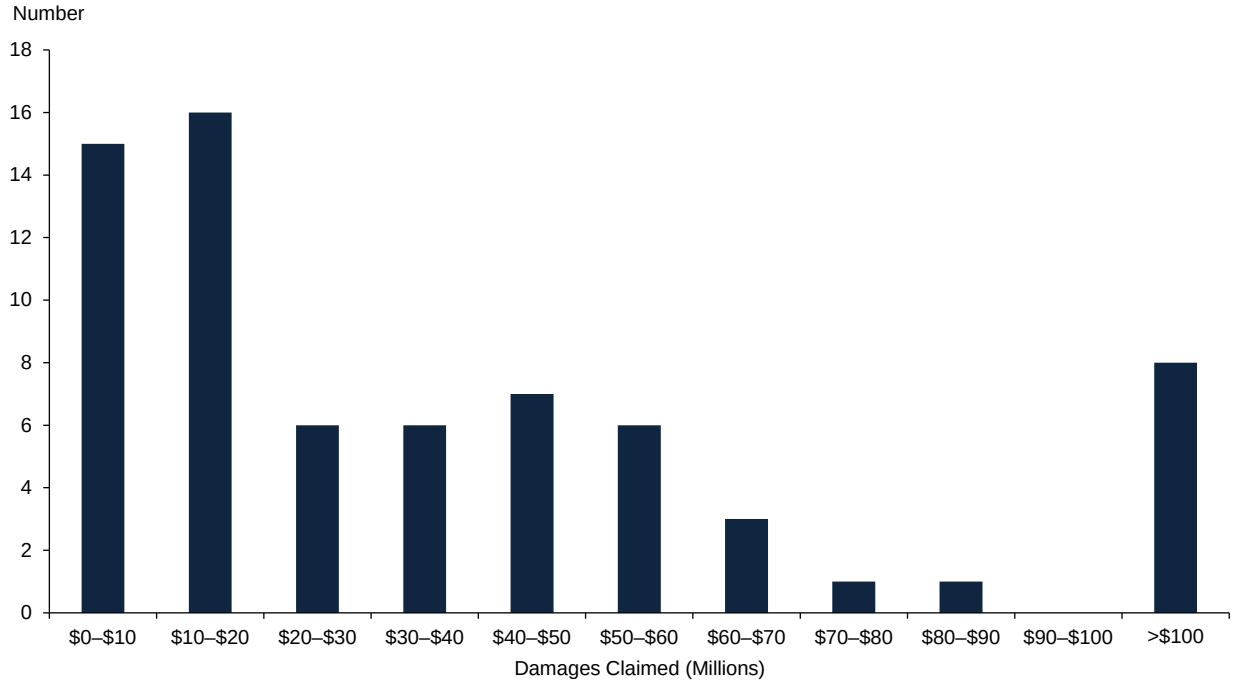
	Year of Lawsuit									
	2010		2011		2012		2013		Total	
Year of Failure	#	Damages Claimed [1] (Millions)	#	Damages Claimed [1] (Millions)	#	Damages Claimed [1] (Millions)	#	Damages Claimed [1] (Millions)	#	Damages Claimed [1] (Millions)
2008	1	$0	7	$979	2	$85	0	$0	10	$1,064
2009	1	$20	7	$294	18	$394	9	$244	35	$952
2010	0	$0	1	$22	6	$823	23	$781	30	$1,626
2011	0	$0	1	$7	0	$0	0	$0	1	$7
Total	2	$20	16	$1,302	26	$1,301	32	$1,025	76	$3,648
Annual Average for Lawsuits with Specified Damages		$20		$87		$59		$33		$53

Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); FDIC Historical Statistics on Banking (http://www2.fdic.gov/hsob/index.asp)

Note:
1. Damages claimed are not available for seven lawsuits. The complaints filed by the FDIC state that damages will be estimated at trial. These observations are excluded from the chart above.
2. Lawsuits filed between January 1, 2007, and August 8, 2013, have been included in the analysis.
3. Damages totals may not add due to rounding.

Claimed damages against directors and officers have ranged from $3 million to $600 million. Claimed damages have most commonly been for less than $20 million. The frequency of damages claims in excess of $20 million has been evenly distributed been $20 million and $60 million. Claims in excess of $60 million have been less common, although eight lawsuits have claimed damages in excess of $100 million.

Distribution of Damages Claimed by FDIC in Lawsuits Filed against Directors and Officers of Failed Financial Institutions



Source: FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); complaints filed by the FDIC

Note:
1. Lawsuits filed between January 1, 2007, and August 8, 2013, have been included in the analysis.
2. Damages claimed are not available for seven lawsuits. The complaints filed by the FDIC state that damages will be estimated at trial. These observations are excluded from the chart above.

The greatest number of FDIC D&O lawsuits have been against Georgia institutions, perhaps not surprisingly given that Georgia has experienced more financial institution failures since 2007 than any other state, followed by Florida, Illinois, and California. Of the 76 D&O lawsuits, 46 stem from failures in those four states. Claimed damages have been highest, however, in the D&O lawsuits stemming from failed California institutions. Approximately $931 million, or slightly more that 25 percent of the FDIC's total claimed damages, stems from such D&O lawsuits. Damages claims against three failed Puerto Rico institutions have also been sizeable and so far exceed all states other than California. The states with the next largest total claimed damages are Illinois, Georgia, Nevada, Florida, Utah, and Washington. The FDIC's aggregate claimed damages of $3.6 billion are 11 percent of the estimated cost of the failed institutions that are the subjects of the lawsuits, although there is wide variation for any given institution.

Geographic Distribution of Damages Claimed and Failed Institutions

	FDIC D&O Lawsuits				Failures	
State/Territory	Number of Lawsuits	Claimed Damages (Millions)	Estimated Cost of Failure [1] (Millions)	Claimed Damages/ Estimated Cost of Failure	Number of Failures	Estimated Cost of Failure (Millions)
Georgia	17	$403	$3,867	10%	88	$10,511
Illinois	10	$418	$1,905	22%	56	$6,801
California	10	$931	$12,864	7%	39	$21,411
Florida	9	$250	$2,888	9%	69	$10,721
Washington	4	$102	$1,860	5%	18	$3,558
Nevada	6	$303	$1,526	20%	12	$2,576
North Carolina	3	$51	$404	13%	7	$520
Puerto Rico	3	$683	$5,284	13%	3	$5,284
South Carolina	2	$12	$124	10%	9	$568
Arizona	1	$11	$26	43%	15	$515
Missouri	1	$16	$53	30%	16	$798
Michigan	1	$8	$71	12%	13	$1,581
Kansas	1	$52	$60	87%	9	$848
Utah	1	$219	$636	34%	6	$1,292
Oregon	1	$39	$173	23%	6	$432
Indiana	1	$42	$734	6%	3	$938
Nebraska	1	$40	$298	13%	3	$339
New Mexico	1	$8	$202	4%	3	$483
Iowa	1	$58	$168	35%	2	$180
West Virginia	1	$0 [2]	$42	0%	1	$42
Wyoming	1	$3	$27	9%	1	$27
All Other States	0	N/A	N/A	N/A	109	$16,549
Total	76	$3,648	$33,209	11%	488	$85,974

Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); FDIC Historical Statistics on Banking (http://www2.fdic.gov/hsob/index.asp)

Note:
1. The estimated cost of failure is only for those institutions that are the subject of an FDIC D&O lawsuit. IndyMac Bank, F.S.B. is subject to multiple FDIC lawsuits; however, its cost of failure is included only once in the total for California.
2. The complaint did not specify a damages amount. Of the 76 lawsuits filed by the FDIC against failed financial institutions, 69 lawsuits stated a damages amount.
3. Failed institutions are institutions that have failed between January 1, 2007, and August 27, 2013.
4. Lawsuits filed between January 1, 2007, and August 8, 2013, have been included in the analysis.
5. Presented in order of the states with the highest number of lawsuits.
6. Dollar totals may not add due to rounding.

Resolutions and Settlements

Earlier in 2013, the FDIC began to publish settlement agreements related to its professional liability claims. So far in 2013, three of the D&O lawsuits have settled. Our analysis of the agreements and other legal documents indicates that 10 of the filed lawsuits have settled since 2011.

Details of Resolutions of FDIC D&O Lawsuits by Settlement Date

Settlements

Name of Institution	State	Lawsuit Date	Settlement Date	FDIC Estimated Cost of Failure [1] (Millions)	Claimed Damages in Complaint (Millions)	Settlement Amount (Millions)	Number of D&Os Sued
United Security Bank	GA	10/23/12	7/9/13	$58	$6	$0 [2]	1
Bank of Wyoming	WY	4/23/13	6/15/13	$27	$2.5	$2.5	7
The Columbian Bank and Trust Company	KS	8/9/11	2/15/13	$60	$52	$5.2 [3]	6
IndyMac Bank, F.S.B. (Perry)	CA	7/6/11	12/17/12	$10,700	$600	$12.0 [4]	1
Westsound Bank	WA	11/18/11	11/15/12	$108	$15	$1.7	11
County Bank	CA	1/27/12	11/13/12	$135	$42	$0.5 [5]	5
Heritage Community Bank	IL	11/1/10	9/10/12	$42	$20	$3.2	11
Washington Mutual Bank	NV	3/16/11	12/13/11	$0	N.A.	$64.0 [6]	3
First National Bank of Nevada	NV	8/23/11	10/13/11	$862	$193	$40.0 [7]	2
Corn Belt Bank and Trust Company	IL	3/1/11	5/10/11	$100	$10	$0.7	4

Trial

Name of Institution	State	Lawsuit Date	Verdict Date	FDIC Estimated Cost of Failure [1] (Millions)	Claimed Damages in Complaint (Millions)	Verdict Amount (Millions)	Number of D&Os Sued
IndyMac Bank, F.S.B. (Van Dellen)	CA	7/2/10	12/7/12	$10,700	N.A.	$169	4

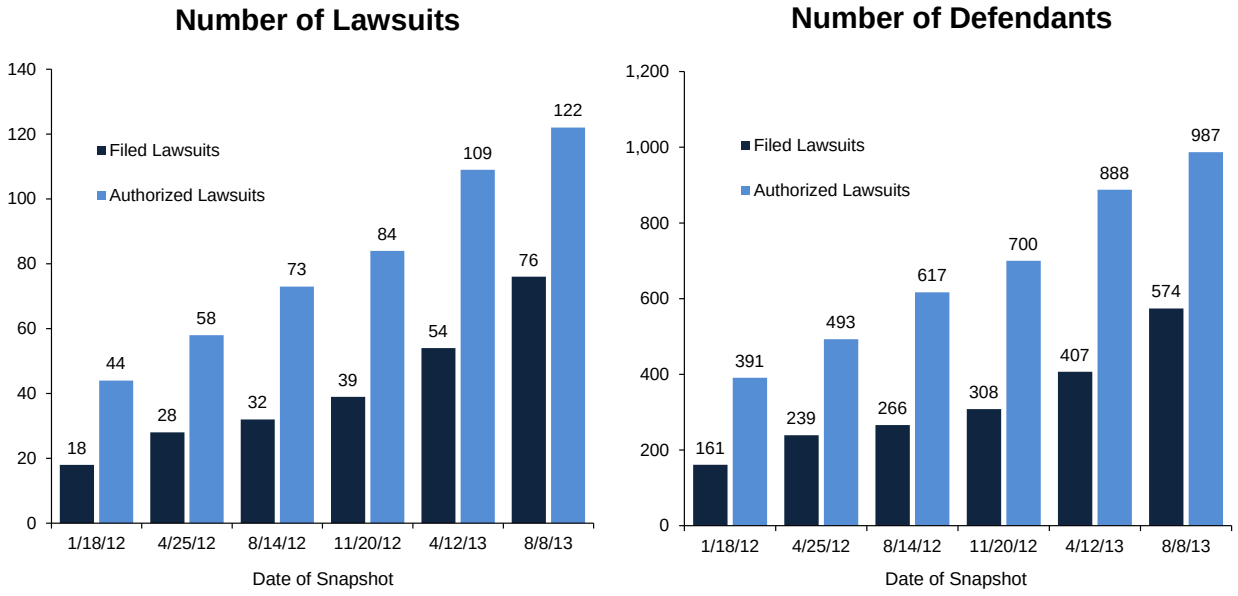
Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/); complaints filed by the FDIC; PACER; public press

Note:
1. Cost of failure is the cost estimated at the time of failure.
2. Both parties agreed to bear their attorney fees and costs.
3. Three of the six defendants settled with the FDIC in 2011 and 2012 for a combined amount of $210,000. The remaining three defendants settled with the FDIC on February 15, 2013, for $5 million.
4. Defendant Perry paid $1 million from his personal funds. The balance was paid by the D&O insurance providers.
5. The directors and officers settled for $500,000 by assigning their rights to the FDIC for their claims against the bank's bankrupt holding company and its insurance carrier. The settlement agreement also allowed for a final judgment that the FDIC could seek to recover from the insurance carrier. On April 1, 2013, the court awarded to the FDIC a final judgment of $48.5 million.
6. Comprising $39.575 million cash obtained from the D&O insurance policies, cash payments from the defendants of $425,000, and their agreement to pay the FDIC an additional cash amount based upon the amounts defendants actually receive, after tax, from certain of their claims pending in the Washington Mutual Inc. Chapter 11 proceedings (with a $24.7 million pretax face value).
7. In response to the joint motion, on October 13, 2011, the court entered a judgment in favor of the FDIC in the amount of $40 million. The amount collected from the bank's two insurance carriers is unknown.

Future Director and Officer Lawsuits

The number of lawsuits authorized has continued to exceed the number filed by the FDIC. As of August 8, 2013, the FDIC had authorized lawsuits against 987 individuals in connection with 122 lawsuits, while 574 individuals had been sued in connection with 76 filed lawsuits. The 413 former directors and officers who have not been named in a filed lawsuit either negotiated settlements with the FDIC before the lawsuit was filed or are still awaiting a decision on whether the FDIC will file a lawsuit against them. The difference between the number of lawsuits authorized and the number filed increased throughout 2012 and through the first part of 2013. This increase in backlogged lawsuits recently reversed. As of August 8, 2013, 46 lawsuits were authorized but not filed compared with 55 such lawsuits in April. The recent pace of newly authorized lawsuits has slowed somewhat while the pace of newly filed lawsuits increased. The reversal in backlogged cases may indicate that the FDIC is identifying fewer cases to pursue or it is having more success negotiating settlements before a lawsuit is authorized by the agency.

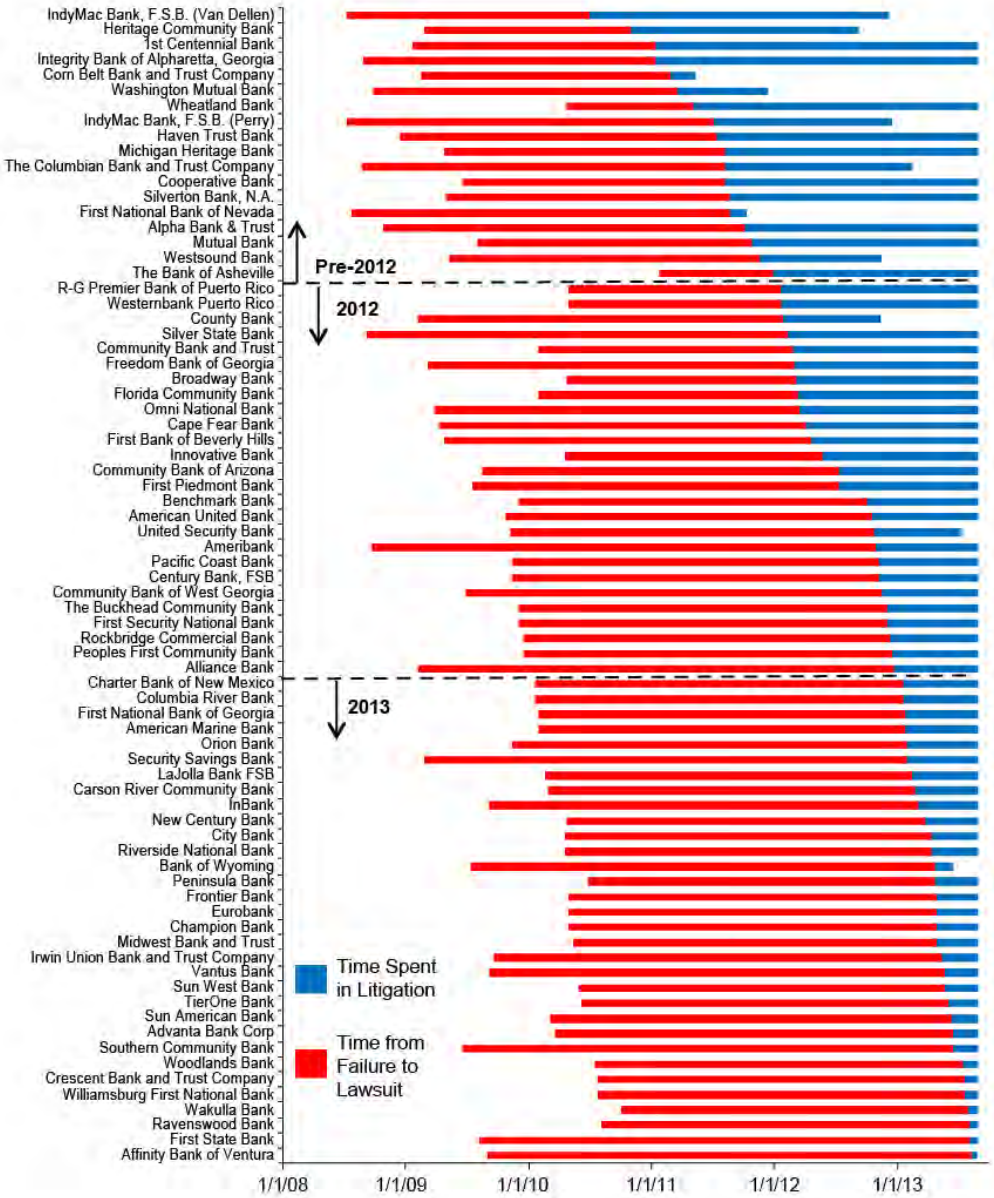
Difference between Filed FDIC D&O Lawsuits and Authorized FDIC D&O Lawsuits



Source: FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/)

Appendix I

FDIC D&O Lawsuits
Time from Financial Institution's Failure to Lawsuit and Time Spent in Litigation



Source: FDIC Failed Bank List (http://www.fdic.gov/bank/individual/failed/banklist.html); FDIC Professional Liability Lawsuits (http://www.fdic.gov/bank/individual/failed/pls/)

Note: Financial institutions are ordered based on the date of lawsuit. Lawsuits are deemed completed when a final judgment has been ordered.

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Sc.B., Brown University
Joe Schertler is a senior consultant in the firm's Menlo Park office. He has more than twenty years of experience in litigation related to financial institutions. He has worked on numerous breach of contract cases, collectively known as the Winstar Litigation, in the Court of Federal Claims. Mr. Schertler has examined multiple theories of damages related to breach of contract claims.

About Cornerstone Research

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