Banking and Finance Law Daily Wrap Up, DIRECTORS, OFFICERS AND EMPLOYERS—U.S.: Supreme Court reverses Sixth Circuit in FDIC enforcement action, (May 22, 2023)

Banking and Finance Law Daily Wrap Up

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By Joe Cox, J.D.

The Court issued its opinion as a summary procedure while also declining to grant certiorari on a second basis of appeal.

The U.S. Supreme Court issued a rare summary ruling in the appeal of an FDIC enforcement action against a banker while simultaneously limiting the scope of its review. The appeal flowed from an FDIC enforcement action against the former CEO of Northwestern Bank, Henry C. Calcutt. Calcutt appealed from a Sixth Circuit Court of Appeals ruling affirming penalties against him despite the FDIC Board applying the wrong causation standard against Calcutt (see *Banking and Finance Law Daily*, June 13, 2022). The FDIC agreed that the Supreme Court should reverse the case and remand it to the FDIC Board for correction of this legal issue (see *Banking and Finance Law Daily*, April 5, 2023). The Supreme Court's ruling did exactly that, while declining to rule on the matter on the second issue raised by Calcutt, the failure to give him a new hearing in light of *Seila Law LLC v. CFPB's* ruling regarding Constitutional infirmity for the appointment of the CFPB Board. (*Calcutt v. United States*, May 22, 2023, *per curiam*).

Background. During Calcutt's tenure as the President, CEO, and Chairman of the Board of Directions at Northwestern Bank, the bank developed its large loan relationship, consisting of approximately $38 million in loan, with a group of companies controlled by the Nielson family. These loans were not cross-collateralized or personally guaranteed. In 2009, when the Nielsons had trouble paying, the Bank made an additional $760,000 loan to cover the loan payments in question, which itself was undercollateralized, but the Nielson companies eventually defaulted.

In 2013, the FDIC issued a notice of intention to remove Calcutt from office, prohibit him from further banking activities, and assess civil money penalties against him. A hearing was held, and an administrative law judge issued the removal and prohibition orders and a $125,000 civil money penalty, which was later affirmed by the FDIC Board.

However, in that FDIC Board review, the Board failed to meet a statutory requirement for the penalties imposed when it did not find that Calcutt had committed misconduct which had caused effects for the bank in question. The Board had also failed to establish proximate cause between Calcutt's misconduct and the alleged harm. But on appeal, the Sixth Circuit, while acknowledging the error, itself found that Calcutt had caused a $30,000 charge-off on the final $760,000 loan, and that there was substantial evidence that Calcutt's actions would cause probable future losses to the bank.

Petition and decision. Accordingly, Calcutt filed a petition for a writ of certiorari with the Supreme Court, arguing that the Sixth Circuit had erred in substituting its own judgment from a remanded ruling from the FDIC Board, which is proper procedure under the ordinary remand rule. This created the odd situation in which the FDIC itself agreed, asking the Supreme Court to overrule the Sixth Circuit to this extent and to remand the case to the FDIC Board with instructions to apply the correct standard of law.

Calcutt asked for a writ of certiorari on a second basis, which the FDIC did oppose. The original Administrative Law Judge who heard Calcutt's initial hearing was appointed by the FDIC. Under the ruling of *Seila Law LLC v. CFPB*, this appointment is defective in Constitutional terms. The remedy of such defect has been to provide a new hearing, pursuant to *Lucia v. SEC*. However, there have been differences of legal opinion as to whether

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the new hearing requirement mandates an entirely new proceeding or that a Constitutionally appointed ALJ may review the existing record and rule accordingly. Calcutt asked for review for his case on this basis as well, but the Supreme Court declined to grant certiorari, and thus to review it on that question at the present time.

The Sixth Circuit's ruling is reversed, and the case will be remanded to the FDIC Board to apply the proper legal standards to establish proximate cause between Calcutt's conduct and actual harmful effects to the bank, as well as to quantify exactly what those effects were.

The case is No. 22-714.

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Companies: Bedrock Holdings; Northwestern Bank

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