

## September 29, 2011 – M. Perry’s Motion to Dismiss FDIC Complaint

We filed a Motion to Dismiss the FDIC’s complaint against me on September 15, 2011. You can access that document by going to the FDIC tab and scrolling down to the September 15, 2011 document entitled: “M. Perry’s Motion to Dismiss FDIC Complaint”, or by going to the BJR tab and scrolling to the link at the bottom of the page.

In order to succeed on a Motion to Dismiss, the defendant’s argument must assume that all of the plaintiff’s factual allegations are true (even though they are in fact not true). The argument is basically “*even if what they say is true, they still have no claim against me under the law.*”

This is the situation in the FDIC complaint against me. Even if you accept all the FDIC’s factual allegations against me as true, they have failed to state a claim for relief under the law, because I am protected by the Business Judgment Rule (also see the BJR tab), which as a matter of law prohibits imposing personal liability on directors or officers for ordinary negligence.

The policy behind the Business Judgment Rule is simple: Corporate Directors and Officers cannot effectively manage any business if they are going to be second guessed for every business decision they make. Business executives would be paralyzed if every affirmative decision they make can be second-guessed later. The Business Judgment Rule prevents this, by barring claims for simple negligence for management decisions. If directors or officers make a call and exercise their “business judgment” in good faith, then they will not have personal liability when things don’t work out.

If the court rules that I am protected by the Business Judgment Rule, I cannot be sued for ordinary negligence as a matter of law for the role I played as an officer or director of Indymac. Of course, I did not even commit ordinary negligence; as I said before I made prudent and appropriate business decisions with the facts available to me at the time.

The FDIC may bring actions pursuant to 12 U.S.C. 1821 (k), which states in part: “(a) director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by....the (FDIC)....acting as conservator or receiver of such institution....for gross negligence.....Nothing in this paragraph shall impair or affect any right of the (FDIC) under other applicable law.”

The FDIC is not suing me for gross negligence and they are not suing me for “bad faith”, “a conflict of interest”, “lack of adequate information”, or “fraud”; all exceptions to the Business Judgment Rule. The FDIC claims to be suing me as an *officer* (but not as a *director*) for ordinary negligence based on alleged errors of business judgment, because they incorrectly believe that my and Indymac’s home state of California has more onerous laws for corporate officers than it has for corporate directors. As my Motion to Dismiss shows, the FDIC is really suing me for alleged strategic judgments that I and other IndyMac directors made as members of the Board. The FDIC pretends to be suing me as an *officer* to try to get around the Business Judgment Rule. Even if the FDIC’s lawsuit really did concern my actions as an officer though, the Business Judgment Rule still should apply.

If accepted, the FDIC’s position (that the Business Judgment Rule does not apply to me as an officer of IndyMac) would erode the Business Judgment Rule protections that are available to

both officers and directors equally in every other State in the Union. Importantly, it's not just me who would be adversely affected, but also California's economy and jobs. What modern corporation would want to domicile itself in the only state in the nation where its CEO and other officers are not protected by the Business Judgment Rule? Over time, not many in my view, unless they had no other choice.

Also, if accepted, the FDIC's position would destroy modern corporate governance principles espoused by banking regulators and others. Beyond a shareholder vote or regulatory action, the board has the ultimate authority for the corporation, including the hiring and firing of the CEO, and revising its strategies and plans. Think about it....if directors, in EVERY State in the Union, are only liable for gross negligence or one of the exceptions to the Business Judgment Rule, but the CEO and other officers, who properly follow the Board's direction and advice and retain the board's trust and confidence, are held to a much higher standard of ordinary negligence, ONLY in California, then the corporate chain of command would break down. Modern corporate governance could no longer exist, because the CEO (and other officers) can no longer rely on the board of directors' direction and advice.

That wouldn't make much sense, would it? And yet, if my Motion to Dismiss is not granted, that is exactly what the courts would be saying for California-domiciled corporations.