

# Eleventh Circuit Upholds Directors' Affirmative Defenses Based on Federal Deposit Insurance Corporation's (FDIC) Post-Receiver'ship Conduct

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The US Court of Appeals for the Eleventh Circuit recently issued the first appellate decision holding that, in actions brought by the **Federal Deposit Insurance Corporation (FDIC)**, the officers and directors of failed banking institutions can assert affirmative defenses relating to the FDIC's post-receivership conduct.

Integrity Bank (the Bank) was forced to close in 2008 after **incurring losses in excess of \$70 million** on certain acquisition, construction and development loans. The FDIC was appointed as the Bank's receiver and, in that role, the agency brought claims against the Bank's former officers and directors for ordinary negligence, gross negligence and breach of fiduciary duty. The FDIC alleged that the defendants were negligent in pursuing an unsustainable growth strategy, engaging in high-risk lending practices and approving the failed loans.

In response, the Bank's officers and directors asserted the affirmative defenses of failure to mitigate damages, reliance, and estoppel, all of which were based on the FDIC's post-receivership conduct (e.g., failure to collect on accounts, improper disposal of assets, etc.). The FDIC moved to strike these defenses on the ground that, under well-accepted principals of common law, it owed no duty to the officers and directors of a failed bank. The US District Court for the Northern District of Georgia denied the FDIC's motion.

On appeal, the Eleventh Circuit affirmed the lower court's denial. The court found that, to the extent any relevant federal common law existed, it stood "at most for the proposition that a bank's officers and directors cannot assert tort claims against the FDIC because the FDIC owes them no duty" and did not address the issue of affirmative defenses. The court declined "to extend a purported federal common law rule to a new and significantly different context."

*Fed. Deposit Ins. Corp. v. Skow et al.*, Case No. 12-15878 (11th Cir. 2013).

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