FDIC Federal Deposit Insurance Corporation

**MEMO**

**TO:** Board of Directors

**THROUGH:** Harrel M. Pettway
General Counsel

**FROM:** Melanie D. Coates
Assistant General Counsel
Professional Liability and Financial Crimes Section

**DATE:** March 7, 2023

**RE:** Professional Liability Annual Report for 2022

The Professional Liability and Financial Crimes Section (PLFCS) of the Legal Division of the Federal Deposit Insurance Corporation (FDIC) submits this report on the results of the professional liability program for 2022. The purposes of the professional liability program are to recover funds for FDIC receiverships and to hold accountable directors, officers, and professionals who caused losses to insured financial institutions that later failed and were placed in FDIC receivership. The program's existence also enhances industry awareness of sound corporate governance standards. On behalf of the FDIC in its receivership capacity, PLFCS and the Investigations Department of the Division of Resolutions and Receiverships (DRR) investigate potential professional liability claims arising from every financial institution failure but pursue claims only if they are both meritorious and expected to be cost-effective. PLFCS also assists DRR in obtaining criminal restitution from defendants convicted of banking crimes and, where appropriate, refers cases to the Legal Division's Enforcement Section for administrative enforcement action.

## Recoveries and Expenses

During 2022 PLFCS and DRR recovered $47,285,198 and incurred $16,804,833 in expenses for professional liability program activity. The recoveries were obtained from the following types of claims:

| Type of Claim | Recoveries—2022 | |
|---|---|---|
| Securities | | |
| Residential Mortgage-Backed Securities (RMBS) | $40,505,500 | (85.7%) |
| Other Securities | $2,152,228 | (4.6%) |
| Mortgage Malpractice and Fraud (MMF) | $3,779,712 | (8.0%) |
| Director and Officer (D&O) | $776,912 | (1.6%) |
| Financial Instruments | | |
| U.S. Dollar London Interbank Offered Rate (LIBOR) | $70,846 | (0.1%) |
| **TOTAL** | **$47,285,198** | **(100%)** |

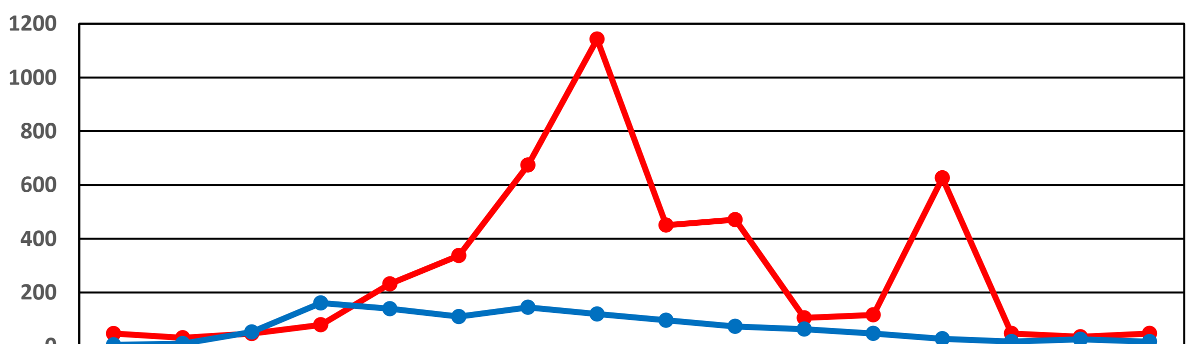
The $40.5 million in RMBS recoveries resulted from four settlements out of three receiverships and distributions from a class action lawsuit to two additional receiverships. The largest of the four settlements, $19.35 million, resolved the FDIC's securities law claims against underwriter Credit Suisse Securities (USA) LLC for violations of state and federal securities laws based on misrepresentations in the offering documents for two RMBS certificates that Colonial Bank (Colonial), Montgomery, Alabama, purchased before it failed. The second largest of the settlements, $12.25 million, resolved the FDIC's securities law claims against underwriter NatWest Markets Securities Inc. f.k.a. RBS Securities Inc. (RBS) for violations of federal securities laws based on misrepresentations and omissions in the offering documents for five RMBS certificates that Citizens National Bank (Citizens), Macomb, Illinois, and Strategic Capital Bank (Strategic), Champaign, Illinois, had purchased prior to failure. Colonial failed on August 14, 2009, with $25.5 billion in assets. Citizens and Strategic both failed on May 22, 2009, with $546 million and $439 million in assets, respectively.

The $3.8 million in recoveries from MMF claims resulted from claims out of four receiverships, with the largest recovery of $1,583,711 resulting from a judgment against Chicago Title Insurance Company (Chicago Title). The FDIC as Receiver for Founders Bank sued Chicago Title in 2012 as escrow agent in closing four real-estate transactions that were the subject of same-day flips that artificially inflated the values of the subject properties. In July 2018, the U.S. District Court for the Northern District of Illinois entered a $1.45 million judgment in favor of the FDIC against Chicago Title, but in March 2020 reduced the judgment to $945,644 to, among other things, offset the FDIC's $500,000 settlement payment from another defendant in the lawsuit. The FDIC appealed, and in August 2021, the U.S. Court of Appeals for the Seventh Circuit reversed the district court directing it to modify the judgment to eliminate the $500,000 reduction. The district court entered final judgment in May 2022 and in June 2022, Chicago Title paid the judgment plus post-judgment interest. Founders Bank failed on July 2, 2009, with $889 million in assets.

In 2022 the Legal Division incurred $15,389,635 (91.5 percent) and DRR incurred $1,423,091 (8.5 percent) in total expenses, for a total of $16,812,726. Of those expenses, Legal Division expenses comprise $10,308,146 paid to outside counsel and consultants and $5,081,489 for other expenses (primarily in-house PLFCS salaries and travel expenses associated with the professional liability program). DRR expenses are entirely expenses for in-house staff. Total expenses in 2022, however, were reduced by $7,893 that other FDIC divisions and offices incorrectly had charged to the professional liability program in prior years. Program expenses for 2022 total a net $16,804,833 after the reduction for the prior period accounting error. The ratio of total recoveries to total expenses is 2.8 to 1, and the ratio of recoveries to outside counsel and consultant expenses only is 4.6 to 1.

Professional liability program expenses are primarily receivership funding expenses incurred by PLFCS and DRR to conduct professional liability investigations and litigation. Typically, program expenses are incurred years before associated recoveries are received because staff spends substantial time and money to investigate and develop claims before settlements or judgments are obtained. Program expenses also include substantial costs for investigations that do not ultimately identify meritorious and cost-effective claims and, as a result, produce no recoveries. Investigation expenses for a failed institution include these sunk costs while recoveries from more cost-effective claims from the same institution may not be obtained until years later. In addition, program recoveries result not only from settlements reached and judgments obtained in the current reporting period but also from collections from structured settlements reached in earlier reporting periods. Given this characteristic lag time between the incurrence of program expenses and the receipt of associated recoveries, the cost-effectiveness of the program is best assessed by relating recoveries to expenses over many years rather than in any single reporting period.

**FDIC Professional Liability Recoveries and Expenses**
**2007-2022 ($millions)**




| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Recoveries | 47.1 | 31.3 | 47.1 | 79.4 | 231.9 | 337.3 | 674.2 | 1142.7 | 450.3 | 470.9 | 105.4 | 116.3 | 626.4 | 47.4 | 35.1 | 47.3 |
| Expenses | 5 | 9.7 | 52.9 | 160.8 | 139.5 | 110.1 | 144.6 | 119.8 | 96.5 | 73.5 | 63.5 | 47.3 | 27.6 | 17.3 | 25.4 | 16.8 |

Recoveries Expenses

As shown in the attached historical table, from 1986 through 2022 the overall recoveries-to-expenses ratio for the professional liability program is 4.2 to 1.

FDIC Federal Deposit Insurance Corporation

Report on Total Recoveries and Expenses From 2007 Through 2022

Total amounts recovered from different claim types from January 1, 2007, through December 31, 2022, are shown in the following table.

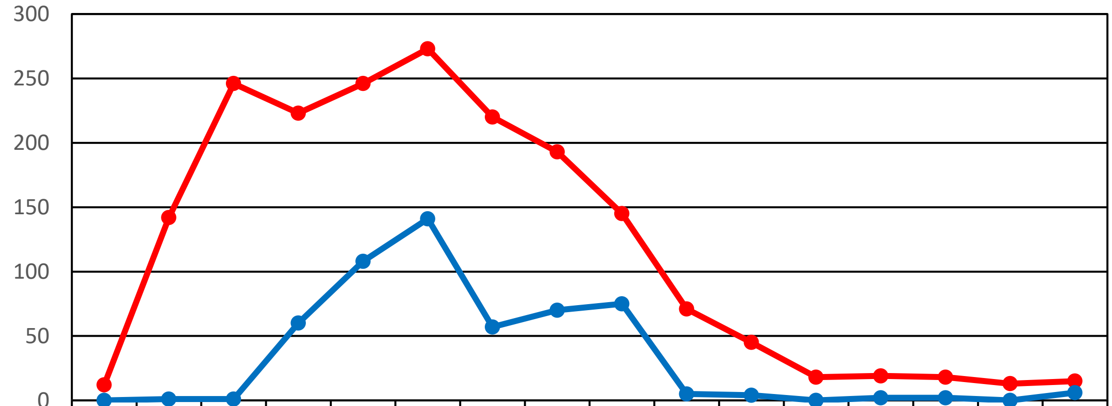
| Type of Claim | Total Recoveries – 2007-2022 | |
|---|---|---|
| Securities | | |
| RMBS | $2,043,643,910 | (45.5%) |
| Other | $65,002,496 | (1.4%) |
| D&O Liability | $1,326,494,017 | (29.5%) |
| Accountant Malpractice | $461,635,367 | (10.3%) |
| MMF | $241,442,946 | (5.4%) |
| Bond | $204,239,458 | (4.6%) |
| Appraiser Malpractice | $45,738,132 | (1.0%) |
| Attorney Malpractice | $44,424,157 | (1.0%) |
| Other Professional Claims | $34,413,216 | (0.8%) |
| Insurance Issuer | $22,478,837 | (0.5%) |
| Financial Instruments - LIBOR | $767,300 | (0.0%) |
| **TOTAL** | **$4,490,279,836** | **(100.0%)** |

Authorized and Pending Lawsuits

In 2022 the FDIC Board of Directors authorized one MMF lawsuit against Ark-La-Tex Financial Services LLC d/b/a Benchmark Mortgage (ALT) based on 72 defective loans that ALT had brokered to Washington Mutual Bank (WaMu), Henderson, Nevada. On August 10 the FDIC as Receiver for WaMu filed a complaint in the U.S. District Court for the Central District of California against ALT seeking contractual indemnification plus attorneys' fees and pre-judgment interest for losses related to the 72 loans. In addition to this one MMF case approved by the FDIC Board, delegated authority approved 11 additional MMF cases. In total, the FDIC filed five MMF lawsuits during the year. WaMu failed on September 25, 2008, with $307 billion in assets. As of year-end, 15 professional liability lawsuits were pending, 6 of which were MMF lawsuits.

The following graph shows pending professional liability lawsuits from 2007 through year-end 2022. (Pending actions include claims that the FDIC as Receiver itself filed as well as claims that institutions filed before they failed and that the FDIC inherited as Receiver.)

**FDIC Professional Liability Lawsuits, 2007-2022**[1]




| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| FDIC Pending | 12 | 142 | 246 | 223 | 246 | 273 | 220 | 193 | 145 | 71 | 45 | 18 | 19 | 18 | 13 | 15 |
| FDIC Filed | 0 | 1 | 1 | 60 | 108 | 141 | 57 | 70 | 75 | 5 | 4 | 0 | 2 | 2 | 0 | 6 |

Significant Developments During 2022

During 2022 the FDIC as Receiver for multiple failed banks and thrifts continued to litigate in the U.S. District Court for the Southern District of New York and in the High Court of Justice in London, England, claims alleging that 34 defendants wrongfully suppressed U.S. Dollar LIBOR causing damages to the failed banks and thrifts. In the New York lawsuit, the FDIC's claims against all foreign defendants that had previously been dismissed on personal jurisdiction grounds were reinstated in 2022 or are expected to be reinstated in 2023, except for claims against the British Bankers' Association defendants (BBA). In addition, discovery in the New York case, which essentially has been stayed since 2019, commenced in 2022. Discovery regarding liability is scheduled to conclude by mid-2024. The FDIC also continues to litigate claims against the BBA and eight Panel Bank defendants in the London Lawsuit. The London court set a discovery schedule for three of the FDIC's plaintiff receiverships and scheduled trial for October 2025.

During 2022 the FDIC continued to pursue state and federal securities law claims in two RMBS cases—one out of Colonial and one in a consolidated case out of Citizens and Strategic. In May, the FDIC settled all remaining claims out of Strategic, leaving only claims out of Colonial and Citizens pending in the U.S. District Court for the Southern District of New York. In the Colonial case, discovery is complete and cross motions for summary judgment were filed in April and remained pending at year-end. In Citizens, discovery is stayed while the parties await resolution of a summary judgment motion that Deutsche Bank filed in May.

[1] In prior reports, the number of MMF cases was separately reported and not included in this graph. This report combines the total number of lawsuits, including MMF lawsuits, filed and pending during the years 2007 through the end of 2022.

On August 19 the U.S. Court of Appeals for the Eleventh Circuit issued a favorable decision reversing a district court judgment that had denied the FDIC as Receiver for Omni National Bank (Omni) prejudgment interest due from Certain Underwriters at Lloyd's, London (Underwriters). The claim for prejudgment interest arose in connection with a $10 million insurance policy that Underwriters had issued to Omni. In 2016, the district court entered a declaratory judgment that the Underwriters' insurance policy provided coverage for the FDIC's claims against former directors and officers of Omni. The Eleventh Circuit affirmed the ruling in 2018, and Underwriters ultimately paid the full policy limits of $10 million to the FDIC. Underwriters, however, refused to pay statutory pre-judgment interest. As a result, the FDIC filed suit against Underwriters to recover over $3 million of unpaid interest accruing from Underwriters' delayed payment of insurance proceeds. The district court held that the FDIC's demand for interest was untimely under Georgia law because it came after the entry of final judgment in the declaratory judgment action. On appeal, the Eleventh Circuit reversed the district court, holding that the FDIC's demand for interest was timely because Georgia law required only that the interest demand precede a coercive final judgment awarding damages, which the declaratory judgment was not. In October, the court remanded the case to the district court for a determination of when prejudgment interest began to run. The case remained pending at year-end. Omni failed on Mar 27, 2009, with $980 million in assets.

PLFCS Staffing and Workload at Year-End

As of year-end, PLFCS had 25 permanent staff, 21 of which worked primarily on professional liability matters and 4 of which worked primarily on financial crimes matters.[2] PLFCS also employed one part-time legal clerk. With regard to professional liability workload, there were 58 open institutions[3] (comprising 26 with active investigations or litigation and another 32 open solely for collection purposes[4]) at year-end. The activity on the 58 open institutions includes 15 pending professional liability lawsuits, open investigations in

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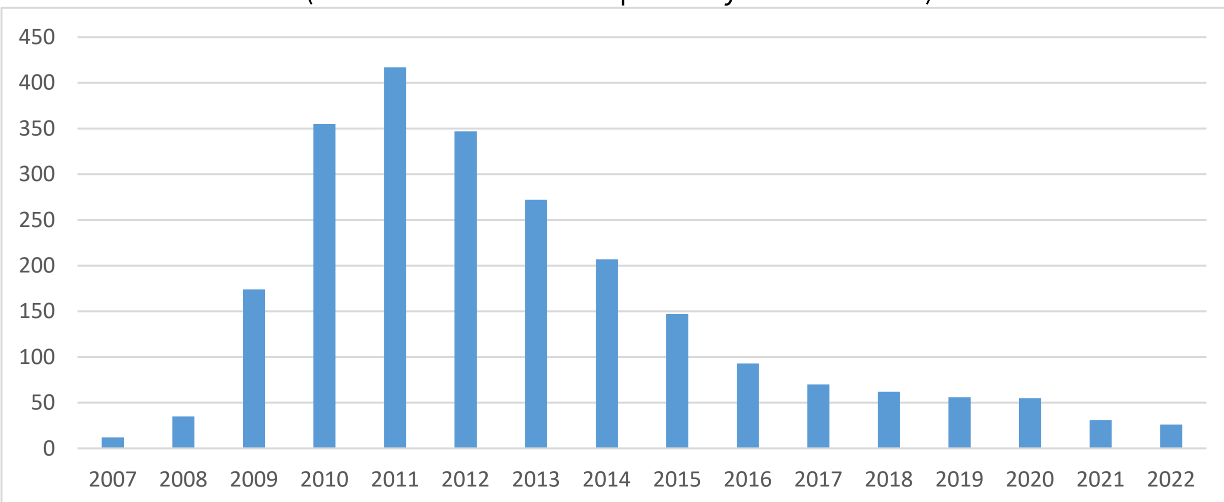
[2] As of year-end, 2 of the 21 attorneys who worked primarily on professional liability matters were on details supporting the Legal Division on assignments outside of PLFCS.

[3] All institutions in PLFCS's inventory are failed institutions and are considered "open" while PLFCS is working on any professional liability matter relating to that failed institution. An "open investigation" is an investigation that has not yet been settled or otherwise resolved.

[4] Collection matters are those for which recoveries are obtained as a result of judgments, structured settlements, or claims submitted in bankruptcy proceedings, probate estates, or class action lawsuits.

2 claim areas out of 2 institutions, and 59 collection matters.[5] No FDIC-insured financial institutions failed in 2022. The following graph shows PLFCS's open professional liability investigations and lawsuits workload from 2007 through 2022.

**Institutions With Open Investigations or Lawsuits at Year-End**
(Excludes Institutions Open Only for Collection)




Conclusion

During 2022, the FDIC's professional liability program continued to operate cost-effectively, recovering $47,285,198 and expending $16,804,833. Overall, from 1986 through the end of 2022, the program remains cost-effective with total recoveries of $10.5 billion and total expenses of $2.5 billion.

[5] For each institution that fails, PLFCS opens 11 different types of investigations, although most are soon closed once it becomes clear that no viable claims exist. The 11 categories of investigations, which were updated on January 1, 2022, are: (1) D&O, (2) MMF, (3) bond (formerly fidelity bond), (4) accountant, (5) attorney, (6) appraiser, (7) securities including RMBS, (8) financial instruments (formerly commodities), (9) insurance issuer, (10) digital assets/technology, and (11) other professional claims.

## FDIC PROFESSIONAL LIABILITY RECOVERIES AND EXPENSES ($ MILLIONS)

| | Recoveries* | In-House PLFCS Expenses | DRR Expenses | Outside Counsel Expenses | Total Expenses** | Ratio of Recoveries to Outside Counsel Expenses | Ratio of Recoveries to Total Expenses |
|---|---|---|---|---|---|---|---|
| 2022 | $47.3 | 5.1 | 1.4 | 10.3 | 16.8 | 4.6 to 1 | 2.8 to 1 |
| 2021 | $35.1 | $4.9 | $1.6 | $18.9 | $25.4 | 1.9 to 1 | 1.4 to 1 |
| 2020 | $47.4 | $5.1 | $1.7 | $10.5 | $17.3 | 4.5 to 1 | 2.7 to 1 |
| 2019 | $626.4 | $6.8 | $1.9 | $18.9 | $27.6 | 33.1 to 1 | 22.7 to 1 |
| 2018 | $116.3 | $9.4 | $2.1 | $35.8 | $47.3 | 3.3 to 1 | 2.5 to 1 |
| 2017 | $105.4 | $8.8 | $6.4 | $48.4 | $63.5 | 2.2 to 1 | 1.7 to 1 |
| 2016 | $470.9 | $9.2 | $5.5 | $58.8 | $73.5 | 8.0 to 1 | 6.4 to 1 |
| 2015 | $450.3 | $12.1 | $11.2 | $73.1 | $96.5 | 6.2 to 1 | 4.7 to 1 |
| 2014 | $1,142.7 | $13.3 | $16.3 | $90.1 | $119.8 | 12.7 to 1 | 9.5 to 1 |
| 2013 | $674.2 | $13.5 | $36.8 | $94.2 | $144.6 | 7.2 to 1 | 4.7 to 1 |
| 2012 | $337.3 | $12.6 | $29.3 | $68.1 | $110.1 | 5.0 to 1 | 3.1 to 1 |
| 2011 | $231.9 | $12.0 | $62.3 | $64.7 | $139.5 | 3.6 to 1 | 1.7 to 1 |
| 2010 | $79.4 | $10.1 | $102.5 | $47.2 | $160.8 | 1.7 to 1 | -0.5 to 1 |
| 2009 | $47.1 | $5.2 | $35.9 | $11.3 | $52.9 | 4.2 to 1 | -0.9 to 1 |
| 2008 | $31.3 | $2.0 | $5.3 | $2.4 | $9.7 | 13.0 to 1 | 3.2 to 1 |
| 2007 | $47.1 | $2.0 | $.7 | $2.3 | $5.0 | 20.5 to 1 | 9.4 to 1 |
| 2006 | $34.5 | $2.6 | $.9 | $3.7 | $7.2 | 9.3 to 1 | 4.8 to 1 |
| 2005 | $122.2 | $3.4 | $1.1 | $3.9 | $8.5 | 31.3 to 1 | 14.4 to 1 |
| 2004 | $79.0 | $4.0 | $3.1 | $9.0 | $16.2 | 8.8 to 1 | 4.9 to 1 |
| 2003 | $59.9 | $3.5 | $3.0 | $13.7 | $20.2 | 4.4 to 1 | 3.0 to 1 |
| 2002 | $49.1 | $3.2 | $2.8 | $13.1 | $19.1 | 3.8 to 1 | 2.6 to 1 |
| 2001 | $128.6 | $3.4 | $2.1 | $10.5 | $16.0 | 12.3 to 1 | 8.0 to 1 |
| 2000 | $54.4 | $4.0 | $2.7 | $14.0 | $20.7 | 3.9 to 1 | 2.6 to 1 |
| 1999 | $84.2 | $5.8 | $3.2 | $17.4 | $26.4 | 4.8 to 1 | 3.2 to 1 |
| 1998 | $186.5 | $5.8 | $4.2 | $21.9 | $31.9 | 8.5 to 1 | 5.8 to 1 |
| 1997 | $156.8 | $7.8 | $2.3 | $29.1 | $39.2 | 5.4 to 1 | 4.0 to 1 |
| 1996 | $195.9 | $15.8 | $4.0 | $48.1 | $67.9 | 4.1 to 1 | 2.9 to 1 |
| 1995 | $563.9 | $14.0 | $5.3 | $98.1 | $117.4 | 5.7 to 1 | 4.8 to 1 |
| 1994 | $909.9 | $17.7 | $11.2 | $135.5 | $164.4 | 6.7 to 1 | 5.5 to 1 |
| 1993 | $1,231.2 | $18.4 | $17.9 | $187.3 | $223.6 | 6.6 to 1 | 5.5 to 1 |
| 1992 | $972.6 | $15.7 | $16.6 | $179.3 | $211.6 | 5.4 to 1 | 4.6 to 1 |
| 1991 | $425.2 | $11.7 | $7.7 | $183.7 | $203.1 | 2.3 to 1 | 2.1 to 1 |
| 1990 | $374.3 | $6.1 | $5.2 | $94.8 | $106.1 | 4.0 to 1 | 3.5 to 1 |
| 1989 | $152.1 | $4.5 | $4.5 | $32.0 | $41.0 | 4.8 to 1 | 3.7 to 1 |
| 1988 | $90.0 | $1.4 | $3.7 | $20.8 | $25.9 | 4.3 to 1 | 3.5 to 1 |
| 1987 | $71.5 | $1.1 | $4.3 | $15.2 | $20.6 | 4.7 to 1 | 3.5 to 1 |
| 1986 | $83.3 | $1.0 | $3.0 | $10.9 | $14.9 | 7.6 to 1 | 5.6 to 1 |
| Total | $10,515.2 | $283.0 | $429.7 | $1,797.0 | $2,512.2 | 5.9 to 1 | 4.2 to 1 |

* Recoveries comprise all FDIC, RTC, and FSLIC recoveries, including RTC and FDIC Drexel-Milken recoveries of $1.143 billion.

** Expenses include Drexel-Milken expenses of $106.1 million. The following categories of expenses are unavailable: all FSLIC fees and expenses for 1986-1988; FSLIC in-house (legal and investigation) expenses for 1989; and RTC in-house expenses (1989-1995), and certain electronic data costs. DRR investigation expenses (shown in column 3) for all years before 1998 are staff compensation only (and exclude other direct costs). In-house expenses for all years shown exclude overhead.