PANEL 4

Reflections and Looking Ahead

Introduction

Gail Patelunas, Deputy Director, Asset Management
Division of Resolutions and Receiverships, FDIC

In our second panel this morning, we're going to be looking at future events and what some of the future events might hold in the resolutions arena. Moderating this panel is Mitchell Glassman, who is a Deputy Director in the Division of Resolutions and Receiverships. Mitchell joined the FDIC in 1975 as a liquidator-at-large. He's worked on failures in Kansas, Illinois, California and Florida. In looking at his biography, one of the things that I noticed was that Mitchell was a liquidator-in-charge at the failure of the Metropolitan Bank & Trust in Tampa, Florida, which failed in 1982. If you can remember back to 1982, that was the largest failure to date and it was $250 million in total assets. So, that puts it all in perspective. In 1983, Mr. Glassman moved to Dallas to establish a liquidation office, and in 1984, he became the Deputy Regional Director of that regional office. In 1993, he moved to Washington, D.C. and became the Deputy Director in the then Division of Liquidation. He currently serves as the Deputy Director for the Operations Branch of this division. Mr. Glassman holds a business degree from the University of Missouri, and is a graduate of the Stonier Graduate School of Banking. Please join me in welcoming Mr. Glassman and his panel.

Mitchell Glassman, Deputy Director, Operations Division of Resolutions and Receiverships, FDIC

Thank you, Gail. The subject of this final panel of our symposium is to not only reflect upon the FDIC and RTC's most difficult challenges, but also their accomplishments during the past period of financial turmoil in the U.S. banking and thrift industry. As a long-term employee of FDIC who was deeply involved in resolving and managing the bank crisis, I've been looking forward to not only moderating this panel, but also to listen and learn from our panelists and guests, for we have to go on. There is a future.

Oliver Wendell Holmes once said that if you want to understand what is happening today or try to decide what will happen tomorrow, try looking back.

During the last day and a half, we have heard discussions relative to bank and thrift resolution strategies and methods, asset disposition and marketing strategies and techniques, application of deposit insurance and failed institutions, and also we heard at the luncheon from Director Neeley who mentioned that it wasn't just the FDIC and RTC corporate experience, but it was also a personal one for those who fought the battle. I have to admit that I'm one who fits in this category. The historic study of the bank and thrift crisis brought back many reflections for me. I would just like to share one very quickly.

You're not going to find this in the study or find this in any anecdotal information that may be provided later on, but it has to do with a small bank in east Texas. Again, it was like many other banks that we had dealt with. What was unique about this bank is that we were walking in and we had a closing crew, and this closing crew was on its fourth closing in six weeks, so they were tired, but the adrenaline was there, and they were ready to go to work. When we were walking into this bank, which was on a Friday at 6:00 p.m., we noticed an elderly gentleman, and in east Texas, it is not unusual to have people out on the street. But, this gentleman was obviously a rancher who had been in the community. He stayed outside for most of the weekend. We were very concerned and I asked the employees inside if everything was okay—was there anything we could do for him to reassure him that everything was going to be okay. They told us that his name was Jake and that he was a long-term community leader and that two weeks before, he had just deposited money in the bank and the money came from a failed S&L. So, Jake was worried obviously and had an anxious look on his face. But, he stayed there. He was able to peer through the windows and he watched our team work. At that time, we didn't have an assuming bank. There was a re-bidding process going and the FDIC always has to be prepared, as claim agents, to be paying deposit insurance. So, he saw this activity and we were working through the night.

Come Monday—good news. We did have an assuming bank. Jake came in, cashed his $20 check, and came over and said hello to the assuming bank, but he also came over to me and basically said thanks. Thanks for being there. When I asked why he stayed out there all night, he related the story that 50 years prior to that there was another institution in that bank—this was in the early 30s—and he said that bank was suspended. It was suspended. It was before deposit insurance. He said what made him feel good in looking through that window is that when the bank was suspended the last time, there was no activity, no work. The bank shut down and nobody came. So, it made him feel good.

So, not only did he thank the FDIC for being there, but he wanted to thank all those people and those entities who brought you here. For me, that really hit home because in his unique way, he sensed that the FDIC did not just appear at the bank to handle the crisis in his small community just out of the blue. Even though he witnessed first hand what FDIC was doing and the bank people that were there, a well-rehearsed militaristic type of way of getting the job done, he knew that there was something else to it.

I think what Jake really sensed, but really had no way of knowing, was that the FDIC and RTC had many employees who were passionately dedicated to the mission of maintaining public confidence and ensuring stability. In essence, as we heard from Director Neeley and what a lot of you will see in the literature is that we try to make the bank closing a non-event for the public, especially for the depositor, especially for Jake.

In addition, I don't want to forget that it wasn't just the FDIC employees that helped. It was all the bank and thrift employees who joined in with FDIC and RTC, who stayed on those Friday nights and weekends and worked with us side-by-side because they also had a sense of what it meant to protect depositors and to get the bank reopened. And for all of them who not only worked in our bridge banks and our conservatorships, but those who stayed and actually helped us do the payoffs, those I, also, do not want to forget.

It is for history and the study that we have recorded the FDIC and RTC experiences in managing the crisis. But, it should also be noted that our agencies' historic experiences in resolving and managing the massive numbers of bank and thrift failures in the United States, with our desire to maintain the public confidence in the financial system, would be incomplete without recognizing the enormous efforts of other significant parties and participants. One only has to look at our agenda and look at the participants in our symposium as to the variety of backgrounds of those who were participants in our efforts.

The private sector, the ones who provided the capital to purchase the banks and thrifts, and to refinance the borrowers, and to fund the asset purchases and all the contractor support, not only for those who managed the assets and helped at the closings, but also those who left their own employment in the private sector to help the FDIC and RTC in their efforts.

From the academic and media communities who studied, reviewed, and provided a perpetual comment of the economic and moral impact of the RTC and FDIC policies and procedures.

Last but not least, should we not forget the role of our federal government and our democratic form of government which allowed the U.S. financial crisis to not only be dealt with openly and directly through discussion and comment, but that provided funding so that action could be taken and of course lots of oversight that served as a check and balance.

As the country and financial sector moves forward into the new millennium, it is important that we reflect on our past and to learn the important lessons from our collective experiences. For the future does not hold any guarantees. Nobody ever indicated there is never going to be a guarantee that there will never be another bank failure or that the U.S. financial markets will never ever be in chaos. To help us reflect on this subject and to give us their insights, I'm very pleased to have with me three distinguished panelists—Jonathan Fiechter, Dr. Paul Horvitz, and Jack Ryan.

Jonathan Fiechter serves as a Director of the Special Financial Operations for The World Bank. Prior to this position, he was Director of Financial Sector Development of The World Bank, which provided policy advice and technical assistance to client countries seeking assistance. Mr. Fiechter joined The World Bank from the Office of Thrift Supervision and while at the OTS, Mr. Fiechter held a series of progressively responsible positions, including serving as head of the agency from 1992 to 1996. Mr. Fiechter began his professional career at the U.S. Department of Treasury as an international economist in 1972, and in 1978 he joined the Office of the Comptroller of the Currency. Mr. Fiechter has also served as a Director of the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Neighborhood Investment Corporation, and is Chairman of the Financial Examination Counsel. Welcome Mr. Fiechter.

Dr. Paul Horvitz has been a Professor of Banking and Finance at the University of Houston since 1977. He received a B.A. degree from the University of Chicago, an MBA degree from Boston University, and in 1958, he received his Ph.D. in Economics from MIT. From 1957 to 1966, Dr. Horvitz worked for the Federal Reserve Bank, the OCC, and in 1967, he joined the FDIC as an Assistant Director of Research, becoming its Director of Research in 1969 and Deputy to the Chairman for Policy in 1976. Dr. Horvitz has authored and edited several books and numerous articles on banking and finance in professional and trade journals, and he is currently co-editor of the Journal of Financial Services Research. From 1983 to 1989, he was a Public Interest Director at the Federal Home Loan Bank of Dallas. Mr. Horvitz is a charter member and remains a member of the Shadow Financial Regulatory Committee. He was a Director of Pulse EFT from 1990 to 1996, and is a current Director of Bank United.

Jack Ryan is the Regional Director of the Office of Thrift Supervision, southeast region. The southeast region in Atlanta, which is also known as the Atlanta Regional Office of OTS, is responsible for 265 thrift institutions with aggregate total assets of more than $61 billion. During 1994 and 1995, Mr. Ryan was on leave of absence from the OTS and served as the Acting CEO of RTC. Before being appointed the Regional Director, Mr. Ryan served as Senior Executive Vice President and Chief Regulatory Officer of the Federal Home Loan Bank of Boston. He also served as the Acting President for a period of seven months in 1989. Mr. Ryan spent 25 years as a commercial bank and bank holding company regulator for the Federal Reserve System and for eight years Mr. Ryan served as Director of the Division of Bank Supervision and Regulation for the Federal Reserve Board in Washington, reporting directly to the board during the terms of Chairman Burns, Miller, and Volker.

I would like to note that at the end we will take questions, and I will ask since this is the last symposium panel, this is your last chance, so we expect a lot of questions to come from you. Without any further ado, I would like to ask Jonathan Fiechter to please start us off.

Jonathan Fiechter, Director, Special Financial Operations The World Bank

Thank you, Mitchell. It is great to be back. I also think the topic, managing crisis, is an excellent one. Often regulatory conferences such as this focus on how to prevent banking failures, and I think we probably spend too little time on how to manage them once they're upon us. So, I commend the FDIC for this effort.

I would agree with Mitchell that our objective ought to be to try to make bank failures a non-event, that arguably the better we are at managing bank failures in an effective and efficient fashion, and at minimum cost to the taxpayer, the more likely we are to embrace the notion that a healthy banking system that includes risk-takers will have the occasional failure. Our objectives should not be to prevent all bank failures.

Today, I want to touch upon three topics. First, I want to review the lessons that I learned in my time, at the Comptroller of the Currency and Office of Thrift Supervision starting in 1982 with Penn Square and going through the 90s with the thrift industry. Secondly, I'd like to touch upon some lessons related to the resolution process. And then third, conclude with a comment on the future and particularly the application of prompt corrective action, and what that might hold for us going forward.

In terms of the lessons of the 80s and 90s, first and foremost, I think that it is unlikely that any of the supervisory agencies are ever going to be able to predict and prevent major banking problems in the financial sector. They appear to arise almost like clockwork—the REIT problems, LDC, energy sector, the ag bank problem and the thrift industry. So, I think we're going to have to live with systemic crises. Everyone has a bit of myopia, so I think we're going to hold conferences like this long into the future.

Secondly, and this is related—agencies are going to be forced to operate with imperfect information for a variety of reasons, including lack of adequate resources. Predicting bank failures is always going to be more of an art rather than a science.

Third, supervisory agencies will make mistakes. Hopefully Congress will accept this and be reasonable in their natural tendency to second-guess agency decisions. When you've got major problems, swift action is often better than studying an issue and holding off making decisions for fear that a mistake will be made.

Fourth, I think that supervisory agencies in the future, as in the past, will always be tempted to take steps to avoid closing banks, to avoid a loss of credibility and to prevent criticism. Unfortunately, in our system, when a bank fails, particularly a major bank, it is often viewed as a failure on the part of the supervisor—where were they, why didn't they prevent it? In going back to my earlier comments, it would be wonderful if one day we got to the point where we just accept that failures will occur—it's part of a natural process, particularly in a market system.

Fifth, I think agencies have to assume that often, banking problems will turn out to be worse than initial estimates. Bill Seidman has said that when he took on the role of head of the RTC, he assumed the thrift problem was a golf ball, but it turned out to be a watermelon. When I joined the Federal Home Loan Bank Board in 1987, we were talking about a problem that was in the $5 to $10 billion range—that is late 1987. I think the estimate now for the cost of the thrift problem is around $150 billion, not including the interest payment. So, we were off by many multiples.

Based on at least the experience I had with the thrifts, I think once a systemic problem occurs, agencies are much better off if they get their best estimate of the size of the problem out in the public, publicize the heck out of how big the problem is, and bring the public along. I don't recall the banking agencies taking the same approach. At the OTS, we had press conferences every three months where we said, here are the number of 4 and 5 rated thrifts; here are the number of 3 rated thrifts; this is what their losses are. We inundated the public with information. In terms of the experience of the OTS, and part of our objective was to rebuild credibility, I think it was very successful.

Another obvious lesson is that postponing addressing problems raises the cost. Arguably, the thrift problem was a problem of the late 70s and yet it wasn't until the late 80s that we tackled it. And in the intervening decade, the cost of dealing with the problem rose dramatically.

Another thing that may be obvious but became quite apparent again in dealing with the thrift industry, where such a large block of a particular sector was in trouble, was that allowing non-viable thrifts to continue to conduct business really hurt everyone in the area. It was phenomenal how earnings of surviving thrifts improved as what were then called "zombies" were closed down. Having institutions with no return on equity constraints, and who could underprice loans and overpay for deposits—not only were they obviously raising additional costs vis-a-vis the FDIC or FSLIC, but they hurt everyone else in the local marketplace.

Another lesson—agencies really have to fight the temptation to come up with quick fixes. It has to be accepted that fixing a broken banking system is a very difficult process. The old Federal Home Loan Bank Board tried a whole bunch of quick fixes, most of which ended up making problems worse rather than better.

In terms of the process, as I just mentioned, I think it has to be recognized that dealing with failed institutions is much more complicated, particularly when you have major organizations, than one thinks at first glance. Again, I think that the effort that went into putting this conference together, really looking at techniques, has a tremendous payoff over the long run. One of the silver linings of creating the RTC was that at least within the U.S., it created a second opportunity for smart individuals to come together and figure out how to tackle failed institutions. Interestingly there were differences in the approach taken by the RTC versus the FDIC, and I think it was great that when the RTC was folded into the FDIC, a lot of effort was taken looking at which agency had the better approach.

Once a problem is acknowledged, once you've taken over an institution, the quicker you get it back into private hands, the better. I think that with the RTC (and I don't think there was much of a choice), the extended conservatorships of institutions that were taken over by the RTC, ultimately raised the cost of the final resolution. Certainly some of the Bank Board's efforts, of merging weak institutions (what was called the

Southwest Plan), in hindsight turned out not to have been a great success. In that respect, to the extent one has the capacity, simply taking the institution over and getting the good assets back into private hands as quickly as possible is the way to go.

Another lesson we learned in the mid-90s in the thrift industry was that political support for what you're doing is fleeting. Political support is very strong when the problem is first made public. We identified our poster boys who were primary culprits to generate public support for the effort—the Mr. Keatings of the world. But that lasts 24–36 months, and then you begin to have hearings on, are you being too tough, why are you doing this to these people who in fact, never intended to do wrong and simply didn't understand their obligation as a bank or thrift director. So, as strong as the political support may be in the midst of the crisis, one needs to take advantage of it, and not take for granted that it will be there over the long term.

In terms of the resolution process, and I don't want to get into what Jack Ryan might say after me, the more orderly and predictable the process is, with absolute transparency, the better it will go and the more likely you are to retain political support for the process. Resolutions are necessarily complex. There is lots of money involved. But I think one clear lesson between the way the FDIC and the RTC handled 747 failed institutions versus what the Bank Board went through with the thrift resolutions in 1988, relates to openness and transparency. The Bank Board chose to move very quickly to resolve institutions to take advantage of some tax provisions but they acted in secret. In hindsight, a more open and orderly process, even when you've got lots of institutions, is a much better approach.

Something that the RTC did, more so than the FDIC, was getting the private sector involved in the solution in the beginning. As I recall, it was a statutory mandate of the RTC that they use the private-sector to the greatest extent possible. Notwithstanding some of the difficulties of using the private sector (e.g., how much was charged for xeroxing), this private sector involvement was quite successful. We brought in outside expertise and when you are faced with major tasks of the type faced by the RTC, that is a worthwhile lesson to remember.

Auctions of assets from failed institutions—and this is something that at The World Bank we run into in a lot of countries—when you start selling assets, the early birds really do get some pretty good deals. People are unfamiliar with the processes when you first begin selling assets. There are some very good deals and some good assets and some great profits can be made by the people coming in early. We have to accept the fact that for the market to work, you have to have an attractive profit up front. That's what brings lots of bidders for subsequent auctions.

The difficulty we're facing overseas is that those initial bidders tend to be foreigners and that makes it particularly difficult for the countries to have the foreigners picking up assets at very low costs. The presence of foreigners is even more difficult than simply the fact that the private sector is coming in and making money.

I saw Jim Montgomery (Former Chairman of Great Western Bank) here—I don't know whether he is still here or not, but one of the lessons in terms of the way the SAIF was funded was that explicitly imposing the costs of resolution on the remaining open institutions turns these institutions into ultra-conservatives. During the early part of the thrift crisis, you did not have the U.S. League out there rooting for the Bank Board to close more institutions. Rather it argued the regulators were being far too harsh. It argued we were overestimating the size of the problem. “Forebear and in a couple of years they’ll turn around,” was the position taken by the thrift industry trade group.

As the SAIF premiums began to rise, however, and particularly as the process of shifting the cost of resolving the thrifts to the SAIF was occurring, at OTS we began getting calls from the industry saying, go back, look again, make certain there is no one out there among our thrift institutions that is unsafe and unsound. It was the thrift industry that became the biggest fan of ensuring that you had a healthy industry because they began to say, if you at OTS make a mistake, if an institution closes and costs the SAIF $100 million, that’s our money. It was an interesting turn of events.

In terms of the next crisis, whenever that may be, two things have struck me. First, the number of people in the audience who I had worked with who were very experienced in this business, have retired and gone on to other and better things. I think that is true across-the-board. All of the banking agencies have experienced a fairly major drain of experienced staff. I certainly worry that three or four years down the pike when we run into this problem again, I hope a lot of the lessons will not have to be re-learned by staff who were not part of dealing with the problems of the past.

Secondly, we now have prompt corrective action. I’m not quite certain how these old lessons will apply in this new world. Certainly we were able to manage the thrift resolution process much more smoothly because of our ability to deal with these institutions in an orderly fashion. We had a long list of problem institutions. We closed those institutions in close coordination with the RTC in an orderly fashion to avoid indigestion. With prompt corrective action, if one has a systemic problem of the type we had with the ag banks where you had a collapse in farm real estate prices and all of a sudden there are a whole bunch of institutions that are not able to meet the various capital requirements, I’m not quite certain what kind of flexibility we will have. We may find ourselves in the same boat that the FDIC found itself in early 1989, when they took on a couple hundred thrifts pre-RTC legislation, and you had a major case of indigestion.

I think prompt corrective action is great on an institution-by-institution basis because it creates tremendous incentives for owners to deal with problems early. But, if we run into a systemic problem, I worry about the ability of the FDIC and the banking agencies to deal with such a problem.

This is particularly worrisome with the addition of risked-based deposit insurance premiums. When institutions run into trouble under the risk-based premium system, their after-tax costs start going up rapidly as their earnings are falling. So, risk-based insurance premiums can contribute to a rapid drop in capital.

Thank you very much.

Paul Horvitz, Professor of Banking and Finance
University of Houston

I am impressed with much of what I have read and heard here about the FDIC/RTC resolution process. Over time, and as a result of its own analyses and a push from FDICIA, the FDIC has developed the ability to handle failures efficiently and effectively. I want to focus my comments on one aspect of the process that has been solely within the province of the lawyers, but in which I believe that economists have something to contribute. I am referring to FDIC and RTC efforts to recover losses due to the actions of those with special responsibilities for bank soundness—accountants, lawyers, directors and management. Obviously, I am not going to give legal advice. My comments relate to the economics of the professional liability issue, and to public policy considerations.

When I was at the FDIC bank failures were rare events. Even in those days, there were incompetent and inattentive auditors, lawyers, bankers and directors. But the competitive and financial environment was such that bad luck or modest doses of incompetence were not sufficient to cause a bank to fail. A failure was generally the result of some sort of wrong-doing—fraud or self-dealing. It was routine in such cases to sue those responsible, and there was almost always an insurance company providing at least a potentially deep pocket. It is true that FDIC recoveries from bonding companies during that time were modest, but that is a different issue. I believe that those efforts at recovery of FDIC losses on grounds of professional liability were appropriate and reasonable.

The situation in the 1980s and 1990s is a different order. The FDIC and RTC have recovered $5 billion as a result of its pursuit of professional liability. That is not a number that can be easily dismissed, although most of that money came from a very small number of large firms. Nevertheless, the FDIC/RTC process has been badly conceived and poorly applied. I do not believe that those responsible for FDIC losses should be let off the hook, but the process of determining who is responsible was badly tainted—tainted by political and financial considerations at the expense of justice. For those who would question my credentials here, let me note that justice is not a concept that belongs solely to the realm of the lawyers. As an economist, I wish I had better data with which to explore this issue. Much of what I have to say is anecdotal, but it derives from my own experience as an expert witness in a fair number of cases. I have been retained as an expert by both the FDIC/RTC and defendants in this type of litigation (though only rarely in the same case).

It is important to distinguish criminal from civil actions. People who violate criminal laws should be prosecuted, whether they are rich or poor, and whether or not their violations caused losses to the FDIC. As an economist, I have little to say about the criminal prosecution of violators of banking law. But criminal prosecution should not be part of an extortion scheme or a protection racket. It has been frequently alleged, though I have no personal knowledge of this, that defendants in civil cases have inferred that refusal to cooperate with the FDIC could increase the likelihood of criminal prosecution. I am sure that we can all agree that any threats or promises by FDIC lawyers about criminal action as a means of gaining settlements in civil cases are not authorized and not consistent with FDIC policy. In fact, the *RTC Guide for Outside Counsel* states that "As a matter of policy, the settlement of civil litigation on behalf of the RTC may not, expressly or by implication, be related to or conditioned upon the disposition of any criminal charges or recommendations…."

My focus is on civil actions. These involve economic as well as legal judgments. Suing on the basis of professional liability involves three major components: a determination that the subject has done something wrong; that wrong has caused a loss to the FDIC; and the subject has assets that can satisfy a judgment against him. This last point is clearly important in civil actions. There is no point in winning a judgment that cannot be collected, but this consideration has frequently led to suits against outside directors while management directly responsible for actions costly to the FDIC escaped any legal action. It also led to suits against wealthy directors for actions that passed as "business judgments" for many of their poorer colleagues at other failed banks and thrifts. This inequity bothers me less if the actions or inaction of the wealthy directors caused losses. I am bothered by suits against those with deep pockets and only a tangential connection with the cause of the losses.

Bank and thrift failures in the 1980s and 1990s were different from those of my experience with the FDIC in the 1960s and 1970s. The economic environment was much more hostile. Many thrift institutions, run by competent managers in accord with traditional policies, failed in the early 1980s as a result of high interest rates. It would not have been appropriate for the FDIC or FSLIC to take legal action against management and directors of these institutions, and they didn't.

Later on in the 1980s, many thrift institutions run by managers who had been considered competent shifted their operations in the direction of assets involving significant credit risk, such as commercial real estate and construction loans. This shift was in accord with the thrust of DIDMCA and Garn-St Germain, and with the advice being given by consultants and regulators that thrift institutions should include such assets in their portfolio because they generally have adjustable rates and higher yields. Managements whose banks became insolvent because of losses on these assets have been subject to professional liability suits by the FDIC. Why do they deserve such action, when those who incurred similar losses from interest rate risk did not?

What has been the objective of FDIC and RTC professional liability suits? Based on my experience, I would say that the objective is to obtain the maximum amount of money possible from those connected with the failed institution. That is not good public policy. At risk of appearing naïve to this group, I would argue that the objective should be to collect an amount commensurate with the losses these people caused. The distinction is simple: the cost of litigation, particularly litigation with the government, is so great that many subjects of suits by the FDIC or RTC agreed to pay some amount even if they were not responsible for losses. I have seen cases without substantive merit in which the RTC made exorbitant damage claims based on rather outlandish theories. Because the defendant can not be sure that a court will reject the outlandish theory and the exorbitant amount, he may be willing to settle the suit. Whatever the merits of such legal tactics by private parties, it is unseemly when done by the government.

Such tactics do not seem to be in accord with stated FDIC policy. The FDIC's Historical Study states the "the collection process for PL claims is conducted in as consistent and as fair a manner as possible. Potential claims are carefully investigated after every bank and thrift failure. All potential claims are subject to multi-layered review by the FDIC's attorneys and investigators before a final decision on whether and how to proceed….At the FDIC the final decision whether to file suit typically rests with the Board of Directors….No claim is pursued unless it meets both components of a two-part test. First, the claim must be sound on the merits, with the receiver more than likely to succeed in any litigation necessary to collect on the claim. Second, any necessary litigation must likely be cost effective…." This is a good statement of policy.

The RTC policy was that "the Legal Division seeks to avoid extreme advocacy positions and coercive, delaying or obstructive tactics that are not likely to have a substantive impact on the outcome of litigation." I would interpret this statement positively as well, though it seems to suggest that extreme, coercive, delaying, and obstructive tactics are fine if they will affect the outcome. The problem is that these policy statements did not control the way the process worked. In practice, a number of cases with little merit have been pursued.

How do cases without merit get filed? In many cases the RTC (though not the FDIC) hired outside law firms to investigate potential professional liability claims and make a recommendation to the RTC. If the law firm recommended that no action be taken, it obviously was paid for its investigatory efforts. If, on the other hand, it recommended that the RTC pursue the case, the law firm was almost certain to be hired to handle the case (they know more about it than anyone else), and will earn very substantial fees. It is beyond even my naïveté to believe that the RTC always received objective advice. This was a low-risk strategy for the RTC, because cases with no merit rarely led to a loss for the RTC. In those cases, the law firm ultimately recommended a settlement sufficient to cover the legal costs. Because of the costs of a trial, the defendant was usually willing to settle on this basis.

The economic issue that most concerns me is the crucial linkage between actions taken by defendants and the losses. This is most frequently the place in which FDIC PL claims go astray. The FDIC/RTC cases I have been involved in invariably involve real losses suffered by a failed bank or thrift, allegations of mistakes, negligence or wrongdoing by some professionals, and a failure to connect the alleged acts with the losses. Many losses have been blamed on the lack of, or poor quality of, appraisals. If a $5 million loan results in a $3 million loss, and the appraisal was not done in accordance with the regulations, this does not mean that the loss would have been avoided if the appraisal had been up to snuff. In any case, the burden should be on the plaintiff to demonstrate that the inadequacy of the appraisal was responsible for the loss. That is simply not done in the cases I have seen.

Suppose that a loan is made on a development project. The loan approval requires that a soil test be done, but management neglects to do so. Suppose the loan defaults for reasons that have nothing to do with the soil. Is that negligence by management? Probably it is. Is it the cause of a loss? No. Have the FDIC and RTC tried to collect from those responsible for the failure to get the test done? Yes.

Suits against auditors frequently suffer from this problem. Auditors did poor work in many savings and loan audits. But before the FDIC should be able to win a case against the auditor, it should be required to show that the audit flaws led to the losses. I was an expert witness in a case for the RTC in which there was evidence that the auditors had not insisted on appropriate reserves against some troubled commercial real estate loans. My testimony was to be to the effect that directors appropriately rely on the work of outside auditors, and that if the audit had indicated that increased reserves were necessary, and that earnings were overstated, the Board might well have changed its policies on real estate lending. Note that the auditors should not be held responsible for the losses on the loans they messed up on, because those loans were already on the books and the funds out the door. But losses on loans made after the audit might have been avoided if the audit had been done well. The FDIC must have reason to believe that is the case before it brings suit. It should not be able simply to assert that losses on loans made after a poorly-done audit were caused by the poor audit.

A similar problem of causation arises in some suits against lawyers. Law firms, like accounting firms, are prime targets for FDIC action because they usually have assets and insurance. Some of the cases I have seen indicate a real stretch by the FDIC to argue attorney responsibility for losses. In some cases, lawyers whose only role was to prepare closing documents for loans that ultimately went bad, were charged with responsibility for the credit quality of the loan. Do we really want lawyers to insist on reviewing an entire loan proposal and analysis before agreeing to prepare the closing documents? My experience suggests that lawyers will not do this for free.

At the same time that I was working for the FDIC on the case against the auditors, I was serving as an expert witness for the directors of a failed thrift that involved similar issues. I was actually giving the same testimony in both cases—that directors appropriately put heavy reliance on independent auditors. But in the second case the RTC was arguing that directors have a responsibility for seeing that appropriate loan loss reserves are maintained, and that they cannot rely on outside auditors. This position runs counter to current FDIC policy, as stated in a recent speech by FDIC General Counsel William F. Kroener, III, that "a corporate director is entitled to rely on reports, opinions, information, and statements of the corporation's officers, legal counsel, accountants, employees, and committees…." But even if there were no FDIC policy on this matter, I don't think the FDIC should argue both sides of an issue of this sort. I am not making a legal argument. I don't know whether there is any ethical or legal problem for a lawyer making an argument when he knows that his client is maintaining the exact opposite position in another courtroom. As a matter of public policy, the government shouldn't do that.

Many of the cases in which I have been retained involve matters of corporate governance. I believe that the FDIC has overreached in many of its suits against bank and thrift directors. Despite all of the books and articles written for directors that attempt to alert them to their responsibilities (all written by lawyers), they do not provide good, workable advice for real-life situations. The Board of Directors must set policies, and take reasonable steps to assure that policies are being followed. It is reasonable for directors to rely on outside auditors and on management. If loan policy requires current financial statements of borrowers, and management indicates that the policy is being followed, I do not expect directors to examine loan files to verify the presence of the financials.

More important, the directors are in their positions to represent stockholders. Their obligation is to do what is best for the stockholders. At least that is what we are teaching students in corporate finance courses. Directors have no fiduciary duty to protect creditors (including insurers), and if they can benefit stockholders by screwing creditors, that is what they should do. Creditors expect this, and have adequate means to protect themselves. That clearly applies to the FDIC. Obviously, directors must comply with law and regulation, but they have no obligation to disadvantage stockholders to benefit creditors (including depositors). This issue becomes significant, of course, when a bank is in a very weak financial condition. Directors of an insolvent bank may rationally decide to take extraordinary risks, on grounds that normal operations will not allow them to return to solvency. This is what Dan Brumbaugh has called "gambling for resurrection," and others have referred to as throwing the "Hail Mary" pass. These strategies may be better for stockholders than patiently waiting for the coming of the Messiah, because the odds are high that the examiners will come first. I recognize, of course, that this is not always the case. In the early 1980s, those thrift managers who simply prayed for lower interest rates came out better than those who took more activist strategies. The "business judgment" rule should apply to adoption of high risk strategies as well as to specific transactions, if they are carefully considered and adopted in a rational business-like manner.

I have seen several cases in which the FDIC has seemed to lack an understanding of the timing of losses. It is unreasonable to attempt to hold a director responsible for losses incurred on loans made before the director joined the Board, even if the recognition of the losses occurs during his term. This is so obvious a point that I would not bother to mention it, except that the FDIC has brought suits in such situations.

A related issue concerns workouts of problem loans, or loans made to facilitate the sale of REO. Bankers have always recognized that different considerations and loan terms are appropriate in dealing with these assets—assets that are already on the books—than with loans being originated. Suppose a bank makes a prudent loan of $10 million to enable the borrower to acquire an apartment project. As a result of economic and real estate declines, the loan defaults and the bank forecloses on the project, which is now worth only $8 million. It is not necessarily unsound to lend a new borrower $10 million on favorable terms to acquire the property from the bank, simply because the loan is greater than the current appraisal. Similarly, even if a bank has an explicit loan policy against cash-flow mortgages, or loans made without personal liability, it is often reasonable to make exceptions in workout situations. Again, this is obvious, but the FDIC and RTC often have included claims related to losses on such loans. These claims generally ignore the fact that the losses would be there even if the workout loans, or loans to facilitate, were not made.

I have a more serious charge to make against FDIC/RTC behavior in some of these professional liability suits. Many of these cases involve testimony by examiners or other supervisory personnel of the FDIC or OTS. I have seen several cases in which government employees have given untruthful deposition testimony. I do not know whether the lawyers were aware of this or not. I interpret this as a fear by current government employees that their careers will suffer if their testimony undermines the government's case. Any banker who has met with FDIC examiners, and is impressed with their knowledge and confidence, would be amazed to read depositions in which these capable people claim to know nothing about banking or bank supervision, claim a lack of knowledge of agency policies and procedures, and disavow the significance of examination findings that bankers take seriously. In a number of instances the inability of examiners and supervisory personnel to recall facts about specific cases—even when the case is the largest bank failure they have ever been involved with—is beyond belief. It is also surprising how often witnesses from the regulatory agencies turned out to occupy that unique position in the hierarchy of the agency so low that all significant decisions were made by their subordinates, which they simply rubber-stamped, yet were so low in the organization that all significant decisions were made by their superiors.

Let me be clear about my criticism of FDIC handling of professional liability cases. Many failed banks and thrifts suffered losses because of the negligence or wrong-doing of managers, directors, accountants, lawyers, or appraisers. It is reasonable for the FDIC to pursue suits against the people responsible. That is not the issue. My point is that the RTC (and to some extent the FDIC) filed and pursued such suits virtually indiscriminately in most cases of failure. The reason is obvious. The FDIC, RTC, and OTS feared Congressional criticism that they were too easy on the S&L crooks. Rather than explain to a Congressional Committee just why a bank failed, and how the regulators missed picking up the problem early enough, it is easier to blame it on professional negligence and file a suit. The attitude seemed to be "let's sue them all, and let the courts sort them out." After all, a loss in court can be blamed on the judges or the juries, but the agencies cannot be criticized for failing to make every effort to recover its losses. Some of the actions taken by the agencies have been so egregious, that it cannot be believed that they didn't understand the situation. It is much more likely that the explanation lies in the lack of political courage. This desire to avoid responsibility exists at lower levels in the organization as well. I quoted earlier from the FDIC's Historical Study about the FDIC's "multi-layered review." Think about how this would work in practice. An examiner or investigator or lawyer recommends that a PL action be filed. This recommendation is reviewed by the next layer of management. The supervisor will never be criticized for going along with the recommendation, even if the case is a loser in court. However, a decision to reverse the recommendation, and not take action, might be damaging to one's career, particularly if it turns out that the subject of the proposed PL suit is truly a bad guy, or if the losses from a particular failure turn out to be very great.

Some limited evidence on this issue can be found in the Annual Report of the Professional Liability Section for 1997, which notes that following an invitation in a speech to bankers made by the FDIC General Counsel, defense counsel in more than 20 cases contacted the General Counsel to report that their settlement proposals were not receiving appropriate attention at lower levels. The Annual Report notes that "This high level focus and involvement enhanced the settlement process in a number of cases that were the subject of these communications." That is fine, of course, for those whose cases were settled, but what about those who faced similar problems before the General Counsel's invitation and intervention? By 1997 the number of outstanding cases may have been small enough to make the General Counsel's involvement feasible, but that was not the case earlier.

I recognize that there is no simple way of determining which actions of professionals warrant legal action and which don't. I have found, however, that self-dealing is a pretty good criterion to use. This goes to basic corporate governance issues. The primary obligations owed by directors are a duty of care and a duty of loyalty. Self-dealing clearly raises flags about the duty of loyalty, except that bank directors are expected to generate business for the bank (often, that is why they are on the board). But lack of self-dealing is a reasonable indication that the director is not taking personal advantage of his position. My experience suggests that the FDIC does not give this sufficient weight. That is, I think it should be hard to make a negligence case against a bank director for loans that turn out badly when that director has not received any personal benefit from the loan.

A poor record of success in the courts would provide support for the criticisms I am making here. The absence of such evidence does not mean I am wrong, because the FDIC has the ability to drop cases, or accept nominal settlements, when it believes that the outcome at trial will be adverse. It is interesting to note that the FDIC's Historical Study does not cite any statistics on its record in court, despite a plethora of other statistical data. Virtually none of the cases I have worked on has gone to trial, so I have no personal knowledge of such results. I have read occasional stories of a judge blasting the FDIC, but I don't know how common such results are. The FDIC has an obligation to present this data in its Historical Study. I am surprised at the lack of such data in the Historical Study or in the FDIC's Annual Reports of the Professional Liability Section. An economist would routinely expect to see data on the results of cases that have gone to trial, and hence are uninfluenced by the willingness of defendants to pay money to avoid or end a lawsuit.

The Chapter on Professional Liability Claims refers several times to "developing legal doctrines," and "evolving standards of liability for director and officer claims." This is probably a matter for the lawyers, but it seems questionable to me. It appears that much litigation represented attempts by the FDIC to change the legal standards, or at least to establish that the standards for bank officers and directors should be different than those that apply to corporate officials generally. Apart from the legal aspects of that, I don't see the economic logic of a higher standard for bank officers and directors. The FDIC is better able to protect itself than the ordinary creditor or stockholder. Yet at one time the Director of the Office of Thrift Supervision argued that thrift institution directors owe a fiduciary duty to the federal deposit insurance system. Without opining on the law, I cannot see any economic basis for such a position. Yet, as far as I know, that position has never been disavowed by the OTS or FDIC.

I have put this discussion in terms of RTC and FDIC, though I recognize that these criticisms are more applicable to RTC than to FDIC. In view of the history of the organizations and the closeness of their operations, I think it is reasonable to combine them for this purpose. In any case, if there were substantive differences, the FDIC had the opportunity to impose its (presumably) more appropriate standards when it took over the RTC caseload at the sunset of the RTC. It is not clear how many RTC cases were dropped for lack of merit. If the FDIC believes that its behavior has been better than the RTC, it should be able to cite a significant number of such cases. A rather damning comment on this issue is found in a 1997 speech to the Assembly for Bank Directors by then-FDIC Chairman Ricki Helfer. Chairman Helfer stated (I think proudly) that "In one instance the FDIC refused to bring a case that had been authorized…by the RTC, and decided to forego a $200,000 settlement offer that was on the table because the case lacked merit." If there truly is only one such case, then the FDIC cannot claim that its standards differ significantly from those used by the RTC.

I am sure that the FDIC has heard these criticisms from defendants and their counsel. I am not an advocate for defendants in general or for those who have retained me. I hope that criticism of this sort can spark a reconsideration of its position by the FDIC. Incidentally, responses that demonstrate that the FDIC has the legal authority to take every action and every position that it has taken in professional liability matters are not really relevant. What is relevant is an indication that FDIC actions constitute good public policy. Respect for government is in short supply today. The IRS presents an example of how arbitrary actions by an agency, even though consistent with its mission of collecting taxes, can go too far, resulting in loss of public respect and, ultimately, adverse Congressional action.

Jack Ryan, Acting Executive Director of Supervision
Office of Thrift Supervision

It's somehow fitting that I bring up the end here, having performed that function before.

I was listening earlier and heard all those bouquets being thrown at the RTC, but Dr. Horvitz has brought us back to reality and it feels like we've been transported back into 1994 and 1995.

I, for one, am pleased to talk about the RTC and the resolution process in the past tense, not because it wasn't a challenging and rewarding experience, it clearly was. And, not because I didn't have the opportunity to work with some very talented and dedicated people, because I did. But, mainly, because it is a whole lot more fun and interesting in hindsight than it was when the RTC was being criticized from every quarter.

There are so many issues that should be addressed in a forum such as this, and I have time to touch only on a few. I will try not to duplicate what has already been discussed concerning the various resolution techniques, some that worked and some that didn't. Instead, I will focus on the RTC as a resolution concept.

Although not entirely germane to the topic of this symposium, it is important to put some of the issues in an historical perspective. In the early 1980s, the thrift industry was caught in the fight against inflation with a portfolio of long-term fixed mortgages financed with short-term interest sensitive funds. When market interest rates rose to historically high levels, operating losses in the S&L industry escalated, and failures threatened to wipe out the FSLIC Fund. Instead of facing up to the problem at that time, the decision was made to prop up insolvent S&Ls through the use of regulatory forbearance and let them grow out of the problem. The result was a much bigger problem that threatened the economy.

The first lesson we should take away from this experience is perhaps the most difficult one in a political environment; i.e., admitting there is a problem for which existing systems do not provide viable solutions. We did not do that. The other lesson learned is that the solution has to be real and has to be fashioned in a way that does not double the bet. We did not do that either and we paid the price.

In late 1988 and early 1989, when it became obvious that the financial crisis was going to take extraordinary steps, the concept of the Resolution Trust Corporation was announced. I must confess my initial reaction to the RTC part of that proposal was negative. It just didn't make sense to take assets that were under active management by the private sector and turn them over to government bureaucrats for disposition. This seemed to be a sure way to maximize the loss and perpetuate the problem.

I suspect the RTC decision was made because of what was probably a false premise; i.e., that the entire thrift industry was out of control and, therefore, a government solution was the only viable alternative. Except for a handful of rogue institutions, that simply was not the case. However, that decision was not unlike the one regulators make in dealing with troubled institutions. Do they leave management that created the problem in place because they are the most familiar with the assets and are therefore in the best position to deal with them, or do they bring in fresh talent? For reasons of credibility and honesty in the assessment of the problems, it is almost always preferable to opt for new talent and a fresh approach. That was what was done when the RTC was created.

But, how did the RTC avoid the problems that are so often encountered when government agencies are created to deal with a short-term problem and, instead, grow and perpetuate their mission? I don't have a complete answer. Clearly, much of the credit goes to the early management of the RTC and the oversight of Chairman Seidman, who continually pushed for aggressive asset disposition goals. Much of the credit also goes to a very dedicated and professional staff that kept focused on completing the task at hand. The definite statutory sunset of the RTC, coupled with giving the FDIC responsibility for resolving any remaining business, provided an added incentive to complete as much of the work as possible.

As everyone knows, there were no big incentive bonuses for staff and no pot of gold at the end of the rainbow. As a matter of fact, many of the dedicated staff were working hard to put themselves out of a job and the nation owes them a great deal of gratitude.

Finally, I believe that luck and the improving economy brought about by lower rates and the improving real estate market, which in turn was brought about by the RTC's disposition of assets to the private sector, aided in the process. As I'm sure you've heard here today, it was quite an accomplishment. In just six and a half years, the RTC took possession of some 747 failed thrifts, paid off over $200 billion in insured deposits, and sold over $400 billion in assets.

When I was preparing these remarks, I didn't have access to the precise numbers, but taxpayer costs for the RTC were in the neighborhood of $90 billion. The question many have struggled with is whether that cost might have been lower if more of those assets, clearly not all of them, had been left in private hands. Although we will never know whether the cost would have been lower, the answer may well depend on how cost is defined. It is my observation that the private sector tends to hold assets rather than dispose of them at distressed prices, even when the economics of holding is unclear. Their bias tends to tip more toward recovery rates than disposition goals. Moreover, many of the institutions that would have been judged capable of managing those assets were undercapitalized and were distorting the deposit markets by driving up the cost of funds for both banks and thrifts.

I believe that if a significantly larger portion of the assets had been held by government propped up S&Ls, the overhang in the real estate markets would have been extended over a longer period of time and the restoration of a healthy thrift industry would have been delayed. By utilizing all the techniques reported here by the other panels, the RTC removed non-viable institutions from the market and disposed of their assets at the then-prevailing market rates over a fairly short-time horizon. This helped create the environment that led to the sustained period of economic growth that we now enjoy.

The topic of this panel also deals with the future. The RTC developed valuable resolution techniques and we have learned that these techniques have to be dynamic and keep pace with the changing markets. These lessons should help deal with the inevitable future financial crisis. I sincerely hope we have learned enough to avoid problems that would require another RTC. The RTC model may not be the right one for every situation, but it was clearly the ideal one for dealing with the S&L crisis in the U.S.

Thank you very much.

Glassman: I would like to move to the question and answer period and I would like to get started. If I can ask a question, with the rapid changes in the U.S. financial markets and financial U.S. banking system and the role of the global economy, and especially the role of technology in banks, what do you feel banking is going to look like as we get to the new millennium, and what lessons that we have been describing will be able to be applied to them? I'm thinking also of the fact that banks no longer have to have a brick and mortar office anymore. They can just have a web site. How do we take those lessons and apply them to the banks that we may see in the future?

Horvitz: Banking will be different in the future and crises will be different in the future. We never have the luxury of there being exactly the same crisis repeating itself the next time around, so that in a sense, narrow lessons that are learned may not be applicable to the next crisis. I think the way John described the lessons that have been learned have broad applicability. I have a high degree of confidence that the sort of skills that have developed, the approaches that have been taken, and I think the help of the legislation pushing things into a recognition that minimizing cost is the key element, gives me confidence that the next crisis, whether it is the year 2000 problem or some other kind of crisis, that the FDIC is set up to be able to deal with it as well as to be expected.

Fiechter: Just to change your question a little bit, as you describe technology and web sites, I have a view of a basement filled with computers with these blinking lights. Yes, that would be a different type of institution. But, we also have another type of institution, which will also be a challenge—the too big to fail type. There are huge financial organizations being formed in the market and should one of those be closed, it will pose very different challenges than what was faced by the FDIC in the past. I don't know what the biggest liquidation by the FDIC ever was, but I don't know how you find a partner for a $250 billion bank. I suspect that Paul is right that there will be some new challenges going forward should one of these mega-banks ever get into trouble.

Ryan: On the subject of too big to fail, I worked very closely on recapitalization of Continental Illinois when it was in financial trouble. Since then there has been a lot of debate about whether too big to fail is a doctrine to be followed in the United States, given how it undercuts market discipline. I think that "fail" has to be defined. The repercussions of shutting one of these big institutions down and risking the kind of disruptions that could occur in the markets around the world, is a risk that I don't believe policy makers are going to be willing to take. I would assume that wiping out the equity holders' interests and reconstituting the institution through the private sector or through a combination of the private sector and the insurance funds in order to preserve the marketplace, will be something that the policy makers will be driven to regardless of whether they like it or not.

Horvitz: I think what it really means is too big to liquidate is clearly a correct comment for any of these very large institutions, even ones smaller than the mega banks. So, too big to liquidate is clearly part of it. No institution is too big to have stockholders wiped out and one of the parts of the progress that we've made as a result of the last problem is that essentially depositor preference makes it pretty clear that depositors of a mega bank really aren't at risk almost no matter what happens.

John Stone: I have a question for Dr. Horvitz. My name is John Stone—I'm unemployed. Dr. Horvitz, I really appreciated your talk and understood much of what you said of suits being wrongly brought, particularly those involving a director that wasn't even present when the loans were made. But one thing that did puzzle me and like yourself I'm not looking at this from a legalistic standpoint, but when a creditor of a normal corporation, a non-bank corporation, makes a conscious financial decision with its own due diligence and covenants to protect itself, what have you, I agree—directors of that corporation, their prime responsibility is in their stockholders' interests, and that creditor has protected its interest. But, in a financial institution with depositors not as sophisticated and not having the same extent of information available to them, and because of that putting their money into a corporation that has a much higher leverage ratio than a standard corporation, I see a distinct difference, and I think case law said because of that, there is a distinct difference that the directors do have an obligation to depositors much higher than a director would in a non-bank corporation to the creditors. Unless I missed something, is that your premise that they are the same regardless—there is no distinction?

Horvitz: The point is well taken that a depositor in a bank doesn't sit down and negotiate a set of covenants on the operation of the bank prior to the bank accepting the deposit. But, what we have is the regulators or the FDIC taking over that role for the depositor and hence the FDIC is protecting the depositor in doing what a creditor would in a normal situation. Given that, I would say that a director of a bank—and again I'm not opining on what the law is—I'm saying what I think public policy and efficient economics would be—if directors were concerned with a fiduciary duty to stockholders and an obligation obviously to obey the rules and regulations of the regulators. That takes care of the creditor obligation as I see it.

Don McKinley: Looking at the past resolution strategies that we've deployed—forbearance assistance, government intervention in a failed bank by taking over the assets and paying off depositors, and then taking a look at the year 2000 situation, not the large mega-banks but the community banks, and the possibility of those type of technological insolvencies or where a regulator finds that the banks are substantially in unsafe, unsound condition—does the panel have any assessment of what the role of the government ought to be in addressing those types of smaller bank insolvencies, or near insolvencies in terms of resolution strategies? I'm curious as to what that might be.

Ryan: I guess I drew the short straw here. There really isn't any clear answer. We're not really talking in most cases about an insolvency because of the year 2000. We're talking about the inability to conduct business. The issue about whether an institution can be taken over under those circumstances is one that I understand is being researched. But, it would seem to me that if you are a depositor in an institution and you cannot get access to your funds because of the inability of that institution to transact business because of a computer failure and there isn't any opportunity for them to correct that problem over any reasonable period of time, that the FDIC would probably step in and pay off, as it were, the depositors to make them liquid, and then take control of the assets—I would think.

Kolatch: I would like to ask Jack Ryan, as the person who headed the RTC for its final two years, what is your reaction to the claim by Paul Horvitz that it often filed professional liability suits indiscriminately?

Ryan: It seems to me that first of all, I have to look back on many of these suits and recognize that I came from a regulatory role at the OTS. I can tell you that many of the boards of directors of these institutions did not exercise what I would regard as even a low level of meeting their fiduciary responsibility to the institutions. Many of them were simply rubber stamping everything that management brought to them. I don't think that is the kind of board of directors that we want to see in an institution and to the degree that the suits that were brought by the RTC heightened the directors' awareness that they have a responsibility at least to ask reasonable questions and make sure they get a reasonable amount of information in order to fulfill their role as a director, that is a salutary thing in a number of ways. Clearly there are some directors who were sued who maybe shouldn't have been. I don't doubt that for a minute. But, I think we tried, with the information we had at hand, to deal with those people as fairly as we could.

Horvitz: I don't think that people were sued who did a good job as directors. That is not the point I was making. I think most of the people who were sued did fail to do their duty in one sense or another. The problem, however, is their failure was not really what was responsible for the losses and I think it is unreasonable as a civil suit matter to sue people for losses that were not due to their actions or inactions.

Bill Kroener: Just to add some statistics here—I'm Bill Kroener, General Counsel of the FDIC. We did have occasion to look at the professional liability programs pretty hard, particularly after RTC sunset, and we and the RTC both investigate every instance of a bank failure. Looking at the historical record, we end up at the FDIC bringing suits against either the directors or professionals in approximately 20 percent of the bank failures. The comparable RTC numbers were 40 percent. So there were differences. That may have to do with different policies. It may have to do with different behaviors of directors in the two types of institutions. But, I do think one of the things that is arising out of our experience, hopefully for everyone, is that a directorship of a financial institution is not an honorary position from which someone can do nothing. It requires care and attention. But, one of the important things that certainly former Chairman Helfer and I have been speaking out on is that it's very important that financial institutions do have careful, thoughtful directors, and it would be a disservice I think to financial institutions to leave the impression that serving as a director of an insured institution is per se "risky," because I don't believe the statistics bear that out and going forward it is very important to have high-quality directors.

Glassman: Okay. With that I would like to thank our panelists for the discussion and for the insight. And, in conclusion, I would like to ask John Bovenzi if he would come up and officially end our symposium. Thank you very much.

Closing Remarks

John Bovenzi, Director
Division of Resolutions and Receiverships, FDIC

The comments I've received from you over the past day and a half have indicated to me that this has been time well spent. I certainly believe that. I would like to thank our panelists in particular for making the program a success. I think it's been interesting and informative. The panelists have covered a wide range of issues and they've certainly given those of us at the FDIC food for thought as we go forward.

I would like to thank all of you as participants for your questions and your interaction over the last day and a half in helping make this a successful conference.

Finally, I would be neglecting my duties if I didn't mention one other group. Just as one of the objectives in managing a bank failure is to try to make it a non-event for the public, one of the objectives in managing a conference is trying to make things as convenient as possible for all of you so you can sit back and enjoy it. To the extent that has been done and I certainly believe it has been, I'd like to thank in particular Stan Ivie for coordinating the group that has managed the conference, and also Mike Spaid, Jim Gallagher, Bill Phipps, Shelby Heyn-Rigg, Ann Gay and Francine Gage. Also, I don't know all the names of everyone from our Division of Information Resource Management who've been providing the technical support. I understand that the video conferencing and the telecasting have gone very well. I would like to thank all of them as well.

So, if we could end by giving that group a hand, thank you.

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