





# The Year of the Bank Heist

Mortgage lenders will remember 2011 as a year for litigation, settlements, and billions doled out in expenses. But is this a heist for banks—or for the average American? **By Ryan Schuette**

**G**reat bank heist stories typically revolve around grand, street-smart strategies. Movie scripts chronicle the pains taken by an inner circle of deceitful, albeit clever, often charming, too-smart-for-school opportunists out to bilk honest people for unapologetically selfish reasons. Think George Clooney in *Ocean's Eleven*, Leonardo DiCaprio in *Inception* (a movie about dreams inspired by bank heists), and Ben Affleck in *The Town*.

Pick any of these narratives, and a banker, circa 2011, would probably relate—to the archetype of a defenseless bank. And the perpetrators? Private investors, federal agencies, and state attorneys general, all of whom claim some stake in any number of suits launched to recoup billions in losses over the mortgage mess.

If the nation's largest lenders frame the slew of court battles accordingly, then 2011 became the year for bank heists, with the Federal Housing Finance Agency (FHFA) stealing headlines with suits against 17 companies, lenders filing suit against each other, and a mega settlement under way for Bank of America—all while untold scores of private investors entered dockets nationwide.

Not that heists are a new thing for big lenders or even the big four in particular. Bank of America, Citigroup, and Wells Fargo reported seven-digit figures in pretax litigation expenses over the third quarter this year, overshadowed by \$1 billion for JPMorgan Chase.

Few in the Occupy Wall Street Movement could be happier, but the banks and trade groups tie their bottom lines to the nation's economy, suggesting that a big messy court case creates trouble for their capital positions—and thus for the broader economy.

Thad Bartholow, a partner with Armstrong Kellett Bartholow P.C., says differently: "Their litigation expenses may be

contributing to their bottom line, but to say that these suits are in any way a causal factor in their inability to lend is a bit much."

So who's the cop, and who's the robber? Is there a distinction between the two, or does the bank heist analogy help mask a grab-and-go in which the economy—and Americans—stand poised to lose big?

## The Costs

**V**iew litigators as heroes or villains, but the truth is as solid as gold bullion: Costs to lenders are substantial.

In filings and presentations this year, the big four revealed an astronomical leap for litigation expenses over the first quarter and last year. Citigroup reported leading the way with a first-quarter estimate near \$4 billion, and JPMorgan Chase followed with \$1.1 billion over the same time frame. Bank of America ranked third with some \$940 million during the first quarter—more than half a million more since 2009—as Wells Fargo reported putting down close to \$500 million.

No single source exists to show which plaintiffs dominate in the flurry of suits, but some dismiss headline-grabbing shows of force from the federal government as outliers in today's judicial system.

"The largest amount of litigation, at least in terms of claims, really comes from private parties against private parties," David Abromowitz, a senior fellow with the Center for American Progress, tells *MReport*.

"The thing that makes the headlines most often is the FHFA and government, but we tend to see more private parties trying to recover their assets, often alleging misrepresentation and other irregularities in mortgage originations," he adds.

Not unlike other lenders, Bank of America pointed fingers when the FHFA launched suits against it and 16 other defendants, including Goldman Sachs, Morgan Stanley, and others.

Spokesman Rick Simon attributed the suits to mistaken culpability, saying that Fannie Mae and Freddie Mac "claimed to understand the risks inherent in investing in subprime securities and continued to invest heavily



in those securities even after their regulator told them they did not have the risk management capabilities to do so.”

“Despite this,” he adds, “the GSEs are now seeking to hold other market participants responsible for their losses.”

### A Grand Strategy?

Several sources—some of whom associate themselves with conservative think tanks—describe suits like these as “transfers of wealth” from banks to investors and bank officials to Uncle Sam. Others dig in with the claim that massive lawsuits do nothing for the economic recovery and may actually hinder it.

“You have a lot of unintended consequences from these moves,” says Tim Rood, a managing partner with consultancy Collingwood Group, explaining that more mortgage banks could tilt toward insolvency as a result of litigation expenses. “If we go after these guys, we should be a bit more thoughtful about how this will help the economy.”

Rood and others chalk up the real bottom line to the most sought-after thing in America today: jobs. It isn’t hard to sympathize with the idea of a hurting bank, looking at the 30,000 Bank of America recently decided to let go alongside 3,000 for Citigroup. Add to this a gasping 80,000 in payroll numbers over October, as reported by the Commerce Department, and good economic sense seems to nod in the direction of job-creating financial institutions.

Market watchers accordingly complain of the absence of a grand strategy for those filing suit against big lenders.

“These very large losses, which are unavoidable and inevitable, raise the question about who gets to take the loss,” says Alex Pollock, a resident fellow with the American Enterprise Institute and former president of

“It’s virtual lawlessness right now. Everyone is going after anyone when they see any vulnerability.”

—Tim Rood, The Collingwood Group

the Federal Home Loan Bank of Chicago.

Adds Rood: “It’s virtual lawlessness right now. Everyone is going after anyone when they see any vulnerability.”

Translation: Federal agencies like the FHFA will take a blind stab at alleged wrongdoers to recoup their losses, forcing banks to sustain massive losses—even or especially in the absence of a grand strategy.

Critics will tell you to look no further than the suits launched by the FHFA against companies earlier this fall. In statements and congressional testimony, FHFA acting director Edward DeMarco stuck to his guns, repeatedly tying the effort to recoup more than \$40 billion in losses for Fannie Mae and Freddie Mac to his agency’s “conserve and preserve” mandate from Congress.

In testimony before the Senate Banking Committee in November, the de facto FHFA chief called

the moves “[c]onsistent with FHFA’s mission to preserve and conserve the Enterprises’ assets on behalf of taxpayers.”

Pollock describes the move by the FHFA and others as “a nationwide strategy, game, and debate about who we can pass the buck to” for all the mortgage-backed securities and related losses from the financial crisis.

### The Payoff

A number of analysts credited liabilities as a source of anxiety when lenders recently announced their leave-taking from the origination market. A restructuring strategy—and some considerable financial losses—inspired Bank of America to shut down its correspondent lending unit in October, following decisions by the mortgage company to exit wholesale and reverse mortgage originations.

Morgan Stanley and life insurer MetLife confronted the issue more directly on their way out of the servicing and originations business, respectively.

Some would say, the court battles and regulation leave more than a dent on bank ledgers.

“Who benefits from all of this?” asks Rood. “In the absence of a clear, articulated, and consistent housing plan, you’ve got all these different agencies that are working cross-purpose. And these agencies are going to do what is best for themselves.”

The easy answer is the plaintiff. The biggest banks often settle out of court to win the public relations battle with much of the litigation expenses ultimately boiling down to the money exchanged in an expensive court case or agreement obtained at the negotiation table.

Banks fall short over the matter of their payoff outside the court. Research firm Amplicate polled the posts of some 20,000 social media users to find that approximately 85 percent of people hated a list of 10 banks with Bank of America, Goldman Sachs, and Wells Fargo ranking in three of the top spots on the “hated” list.

And never mind that Occupy Wall Street protesters continue to rile the financial district in New York with multiple news outlets reporting that scores of protesters bore down on a Bank of America location in November.

“In the long run, this is actually a good thing for the economy,” Abromowitz says, speaking of forthcoming changes from the mortgage mess like the Dodd-Frank Act and caution signs for big banks that result from major court cases. “There is a short-term transition that will see disruption as we adjust and return to a home mortgage lending market, which is more like what it was before.”

Cue the charming actors with masks—but maybe without the strategy.