



W. Patten, Jules N. Greenblatt, Shannon C. Livengood, Karim W. Lawrence, and Jeffrey L. Levine (collectively the “Directors and Officers”).

## **I. NATURE OF THE ACTION**

1. This is an action by Progressive for a declaratory judgment with respect to Directors & Officers / Company Liability Insurance Policy for Financial Institutions No. 0038420-07 (the “Progressive Policy” or the “Policy”) issued by Progressive to, *inter alia*, Omni National Bank (the “Bank”). On March 27, 2009, the Office of the Comptroller of the Currency closed the Bank and appointed the FDIC as receiver. On information and belief, the Directors and Officers are former directors and officers of the Bank. Progressive seeks a declaration that there is no coverage under the Policy for the claim asserted against the Directors and Officers by the FDIC in a lawsuit filed in this Court on March 16, 2012, *Federal Deposit Insurance Corporation, as Receiver of Omni National Bank v. Klein, et al.*, No. 1:12-cv-00896-RLV (N.D. Ga., Atlanta Division) (the “Receiver’s Action”). A copy of the Progressive Policy, without the application, is attached hereto as Exhibit 1. A copy of the complaint in the Receiver’s Action is attached hereto as Exhibit 2.

## **II. JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331 because all suits to which the FDIC is a party are deemed to arise under the law of the United States.

3. Progressive brings this declaratory judgment action pursuant to 28 U.S.C. §§ 2201 and 2202. An actual controversy within the meaning of § 2201 exists between the parties regarding the coverage afforded under the Policy for the Receiver's Action.

4. Venue is proper in the Atlanta Division of the Northern District of Georgia pursuant to 28 U.S.C. § 1391 and L.R. 3.1 because a substantial part of the events or omissions giving rise to this action occurred in this district and division, and, upon information and belief, a majority of the Directors and Officers, and at least one of them, reside in this district and division.

## **III. THE PLAINTIFF**

5. Plaintiff Progressive is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Mayfield Village, Ohio.

#### **IV. THE DEFENDANTS**

##### **A. The Federal Deposit Insurance Corporation**

6. Defendant FDIC is an agency and body corporate organized and existing under the laws of the United States of America, established under the Federal Deposit Insurance Act, with its principal place of business in Washington, D.C. *See* 12 U.S.C. §§ 1811–1833(e). On information and belief, the Bank was a nationally chartered bank insured by the FDIC. Prior to its closure, the Bank was headquartered in Atlanta, Georgia. On March 27, 2009, the Office of the Comptroller of the Currency (“OCC”) declared the Bank to be insolvent, closed it, and appointed as receiver the FDIC pursuant to 12 U.S.C. § 1821(c). Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC succeeded to all rights, titles, and privileges of the Bank with respect to the Bank and the Bank’s assets and stands in the Bank’s shoes with respect to claims against the Bank’s former directors and officers. This action is brought against the FDIC in its capacity as receiver for the Bank.

##### **B. The Individual Director and Officer Defendants**

7. On information and belief, Defendant Stephen M. Klein is an individual who is a citizen of the State of Georgia and resides in Atlanta, Georgia.

8. On information and belief, Defendant Eugene F. Lawson III is an individual who is a citizen of the State of Georgia and resides in Atlanta, Georgia.

9. On information and belief, Defendant Irwin W. Berman is an individual who is a citizen of the State of Georgia and resides in Roswell, Georgia.

10. On information and belief, Defendant Constance E. Perrine is an individual who is a citizen of the State of Georgia and resides in Roswell, Georgia.

11. On information and belief, Defendant Benjamin J. Cohen is an individual who is a citizen of the State of Georgia and resides in Atlanta, Georgia.

12. On information and belief, Defendant Gregory W. Patten is an individual who is a citizen of the State of Michigan and resides in Attica, Michigan.

13. On information and belief, Defendant Jules N. Greenblatt is an individual who is a citizen of the State of Georgia and resides in Atlanta, Georgia.

14. On information and belief, Defendant Shannon C. Livengood is an individual who is a citizen of the State of Georgia and resides in Atlanta, Georgia.

15. On information and belief, Defendant Karim W. Lawrence is an individual who is a citizen of the State of Georgia and currently is incarcerated at USP Lee – Camp in Pennington Gap, Virginia.

16. On information and belief, Defendant Jeffrey L. Levine is an individual who is a citizen of the State of Georgia and currently is incarcerated at the Federal Prison Camp, Maxwell Air Force Base in Montgomery, Alabama.

17. On information and belief, the Directors and Officers are all former members of the Bank's board of directors and/or former officers of the Bank.

## **V. FACTUAL ALLEGATIONS**

### **A. The Policy**

18. Progressive issued Directors & Officers / Company Liability Insurance Policy for Financial Institutions No. 0038420-07 to the Bank and other Named Insureds for the claims-made Policy Period from June 9, 2007 to June 9, 2008 (the "Progressive Policy" or the "Policy"). (Ex. 1, Policy, Declarations, Items 1 & 2).

19. The Policy was not renewed upon its expiration, and the Bank was entitled to a 30-day Automatic Discovery Period. (*Id.* Endorsement Form No. 8790D (01/05) GA). Additionally, the Bank purchased a one-year optional extended reporting period, or Discovery Period. (*Id.* Endorsement Form No. 2254 (12/06) and § III.B.). The Discovery Period ran from the expiration of the Automatic Discovery Period on July 9, 2008 to July 9, 2009.

20. Subject to all Policy terms, conditions, and exclusions, the Policy provides certain coverage for Claims that are first made against Insured Persons during the Policy Period, the Automatic Discovery Period, or the Discovery Period. The Insured Persons Liability Coverage Insuring Agreement (the “D&O Coverage”) provides:

The Insurer will pay on behalf of the Insured Persons, Loss resulting from Claims first made during the Policy Period or the Discovery Period against the Insured Persons for which the Insured Persons are legally obligated to pay for Wrongful Acts, except for Loss the Company pays as indemnification.

(*Id.*, § I.A.).

21. The Policy has a Total Policy Limit of \$10 million “for each Policy Year during the Policy Period for all Insuring Agreements, regardless of whether such Insuring Agreement is provided as a sublimit or separate limit . . . .” (*Id.*, Declarations, Item 3). The Limit of Liability applicable to the D&O Coverage is \$10 million, (*Id.*, Declarations, Item 8), which is part of, and not in addition to, the \$10 million aggregate Total Policy Limit applicable to all Claims first made during each Policy Year of the Policy. (*Id.*, Declarations, Item 3). Moreover, the Limit of Liability for Claims made during the Automatic Discovery Period or the Discovery Period is part of, and not in addition to, the \$10 million Limit of Liability for D&O

Coverage for all Claims made during the immediately preceding Policy Year. (*Id.*, § III.E. (as amended by Endorsement Form No. 8790D (01/05) GA)).

22. The Policy is not a “duty-to-defend” policy. (*Id.*, § IX.A.). Rather, it provides, in pertinent part, that “[i]t shall be the duty of the Insured and not the duty of the Insurer to defend Claims. The Insured shall only retain counsel that is mutually agreed upon with the Insurer, consent for which shall not be unreasonably withheld.” (*Id.*, § IX.A.(1)).

23. The Policy further provides that “the Insurer, if requested by the Insured, shall advance covered Defense Costs on a current basis, except when advancement of Defense Costs is prohibited by law or regulation. The Insured shall repay any advanced Defense Costs to the Insurer in the event it is established that the Insurer has no liability under this Policy for such Defense Costs.” (*Id.*, § IX.B.(1)). Defense Costs are part of Loss under the Policy, (*Id.*, § IV.N.), and advancement of Defense Costs erodes the limit of liability. (*Id.*, “Important Notice”).

**B. The FDIC’s June 8, 2009 Letter**

24. On or about June 8, 2009, during the Policy’s Discovery Period, the FDIC sent a letter (the “2009 Letter”) addressed to seven individuals, including the following four individuals later named as defendants in the Receiver’s Action:

Irwin W. Berman, Stephen M. Klein, Eugene F. Lawson III, and Jeffrey L. Levine. The 2009 Letter was not sent to six of the ten individuals who have been named as a defendant in the Receiver's Action: Jules N. Greenblatt, Benjamin J. Cohen, Shannon C. Livengood, Constance E. Perrine, Karim W. Lawrence and Gregory W. Patten. A copy of this letter is attached as Exhibit 3.

25. The 2009 Letter is captioned a "Demand for Payment of Civil Damages," (Ex. 3 at 1), and states, in part: "By this letter, the Federal Deposit Insurance Corporation as Receiver for Omni National Bank ('FDIC') makes a demand for payment of civil damages on [the recipients of the letter], all of whom are former directors and/or officers of [the Bank], for the breach of their fiduciary duties related to certain loans made by the Bank and/or to the rehabilitation and leasing of certain residential properties owned by the Bank." (*Id.* at 2).

**C. The FDIC's October 18, 2011 Letter**

26. After a long period of silence, the FDIC sent a second letter on or about October 18, 2011 (the "2011 Letter") addressed to thirteen individuals, including the following nine individuals who have been named as a defendant in the Receiver's Action: Stephen M. Klein, Jeffrey L. Levine, Jules N. Greenblatt, Shannon C. Livengood, Constance E. Perrine, Karim W. Lawrence, Irwin W. Berman, Eugene F. Lawson III and Benjamin J. Cohen. The 2011 Letter

referenced Gregory W. Patten, who has been named as a defendant in the Receiver's Action, but he was not listed as an addressee on the letter and, upon information and belief, did not receive that letter. A copy of this letter is attached as Exhibit 4.

27. The 2011 Letter also is denominated a "Demand for Payment of Civil Damages," (Ex. 4 at 1), and "makes demand upon [the recipients] for payment of civil damages in the amount of \$44 million." (*Id.* at 2).

28. Only Klein, Berman, Levine, and Lawson received both the 2009 Letter and the 2011 Letter. (Compare Ex. 3 at 1 with Ex. 4 at 1).

**D. The Receiver's Action**

29. On March 16, 2012, the FDIC filed the Receiver's Action in this Court. (Ex. 2).

30. The FDIC brings the Receiver's Action "in its capacity as Receiver for Omni to recover over \$24.5 million in losses the Bank suffered on over two hundred Community Development Lending Division ('CDLD') loans on low-income residential properties [the 'Loan Losses'] and \$12.6 million in wasteful expenditures on low income Other Real Estate Owned ('OREO') properties [the 'OREO Losses']." (Ex. 2, ¶ 2).

31. The FDIC as receiver seeks to recover the Bank's Loan Losses from Klein, Berman, Cohen, Greenblatt, Lawrence, Lawson, Levine, Livengood, and Patten. (Ex. 2, ¶¶ 3–5, 44–61).

32. The FDIC as receiver seeks to recover the Bank's OREO Losses from Klein, Cohen, Perrine, and Lawson. (Ex. 2, ¶¶ 6–7, 62–71).

33. The complaint in the Receiver's Action contains five claims for relief: 1) Negligence Claim Against CDLD Defendants for Approving Loss Loans; 2) Gross Negligence Claim Against CDLD Defendants for Approving Loss Loans; 3) Negligence and Gross Negligence Claims Against Defendants Klein, Berman, Perrine and Cohen for Failure to Supervise; 4) Negligence and Gross Negligence Claims Against Lawrence for Mismanagement of OREO; and 5) Corporate Waste Claim Against Defendants Klein, Perrine, Cohen and Lawrence. (Ex. 2, ¶¶ 44–71).

#### **1. Loan Losses**

34. With respect to the alleged Loan Losses, the FDIC as receiver alleges that Cohen, Greenblatt, Lawrence, Lawson, Levine, Livengood, and Patten (the "CDLD Defendants") were negligent or grossly negligent in approving loans on low-income residential properties (the "Loss Loans"), which are listed in Exhibit A to the complaint in the Receiver's Action. (Ex. 2, ¶¶ 2–3, Ex. A).

35. The FDIC as receiver alleges that the CDLD Defendants approved the Loss Loans despite numerous, repeated and obvious violations of the Bank's loan policies and procedures, banking regulations and prudent and sound lending practices. (*Id.*, ¶ 4).

36. The FDIC as receiver alleges that Klein and Berman were negligent or grossly negligent in "failing to supervise the [Community Development Lending Division ('CDLD')] lending function and Levine, the Chief Redevelopment Lending Officer ('CRLO'), despite knowledge of prior misconduct by Levine, and other obvious 'red flags' of problems in the CDLD." (*Id.*, ¶ 5).

## **2. OREO Losses**

37. With respect to the alleged OREO Losses, the FDIC as receiver alleges that Klein, Cohen, and Perrine were negligent or grossly negligent "for approving, directing and/or permitting wasteful OREO expenditures after the OCC rated OMNI a composite CAMELS 5 on September 15, 2008." (*Id.*, ¶ 6).

38. The FDIC as receiver further alleges that Lawrence was negligent and grossly negligent "in his wasteful OREO expenditures after September 15, 2008." (*Id.*, ¶7).

**E. Criminal Proceedings**

**1. Jeffrey L. Levine**

39. On December 22, 2009, the United States Attorney filed in this Court a Criminal Information against Jeffrey L. Levine, No. 1:09-CR-554, alleging that Levine “while Executive Vice President of Omni National Bank and head of Omni’s Community Redevelopment Lending Department, aided and abetted by others, did willfully and knowing[ly] make and caused to be made materially false entries which overvalued bank assets in the books, reports and statements of Omni National Bank . . . with the intent to deceive the Comptroller of the Currency, the [FDIC] and agents and examiners appointed to examine the affairs of said bank, all in violation of Title 18, United States Code, Sections 1005 and 2.” A copy of the information is attached as Exhibit 5.

40. On January 14, 2010, Levine pled guilty to this charge. A copy of his guilty plea and plea agreement is attached as Exhibit 6.

41. The Court entered judgment on May 5, 2011, a copy of which is attached as Exhibit 7, sentencing Levine to a sixty-month prison term and ordering him to make restitution in the amount of \$6,761,791.44.

**2. Karim W. Lawrence**

42. On November 12, 2010, the United States Attorney filed in this Court a Criminal Information against Karim W. Lawrence, No. 1:10-CR-476, alleging that Lawrence, “an officer and employee of Omni National Bank . . . knowingly and corruptly accepted hundreds of thousands of dollars in cash and other things of value for the benefit of himself and others, intending to be influenced and rewarded in connection with the award of Omni-funded renovation contracts on foreclosed properties then owned by Omni National Bank, in violation of Title 18, United States Code, Section 215(a) (2).” A copy of the information is attached as Exhibit 8.

43. On January 5, 2011, Lawrence pled guilty to this charge. A copy of his guilty plea and plea agreement is attached as Exhibit 9.

44. The Court entered judgment on June 3, 2011, a copy of which is attached as Exhibit 10, sentencing Lawrence to a twenty-one-month prison term and ordering him to make restitution in the amount of \$656,919.50.

## **VI. CLAIMS FOR RELIEF**

### **Count One**

#### **Claim for Declaratory Judgment (All Defendants)**

##### **The Insured vs. Insured Exclusion Bars Coverage for the Receiver's Action**

45. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 44 of this Complaint.

46. The Policy provides:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim by, on behalf of, or at the behest of the Company, any affiliate of the Company or any Insured Person in any capacity except where such Claim is brought and maintained:

- (1) in the form of a cross-claim or third-party claim for contribution or indemnity which is part of and results directly from a Claim which is not otherwise excluded by the terms of the Policy;
- (2) by an Insured Person solely as a customer of the Company; provided such Claim is brought independently of, and totally without the solicitation, assistance, participation, or intervention of any other Insured; or
- (3) by a security holder of the Company as a derivative action on behalf of the Company or such affiliate; provided such Claim is brought independently of, and totally without the solicitation, assistance, participation, or intervention of any Insured or any affiliate of the Company.

(Ex. 1, Policy, § V.J. (the "IvI Exclusion")).

47. The Policy defines Company, in pertinent part, as “the entity or entities set forth in Item 1 of the Declarations . . . .” (*Id.*, § IV.E. (as amended by Endorsement Form No. 2254 (12/06)). The Bank is one of the entities set forth in Item 1 of the Declarations. (*Id.*, Declarations, Item 1). Therefore the Bank is a Company, as that term is defined in the Policy.

48. The Bank was closed by the OCC on or about March 27, 2009, and the FDIC was appointed as receiver.

49. At that time, as a matter of law, the FDIC succeeded to all rights, titles, and privileges of the Bank with respect to the Bank and the Bank’s assets. 28 U.S.C. § 1821(d)(2)(A)(i).

50. As the FDIC has expressly acknowledged in its complaint in the Receiver’s Action, it brought suit against the Directors and Officers “in its capacity as Receiver for Omni,” and it seeks to recover “over [\$37.1] million in losses the Bank suffered” as a result of their alleged wrongful conduct. (Ex. 2, ¶ 2).

51. The Receiver’s Action, therefore, constitutes a Claim “by, on behalf of, or at the behest of the Company [i.e., the Bank].”

52. None of the carve-outs from the IvI Exclusion are applicable.

53. The IvI Exclusion precludes coverage under the Policy for the Receiver’s Action.

54. Accordingly, Progressive seeks a declaratory judgment that the Policy's IvI Exclusion applies to preclude all coverage under the Policy for the Receiver's Action.

**Count Two**

**Claim for Declaratory Judgment (All Defendants)**

**The Loan Loss Carve-Out Bars Coverage for the Bank's Alleged Loan Losses**

55. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 54 of this Complaint.

56. The Policy provides no coverage for amounts that do not constitute Loss. The Policy defines Loss, in pertinent part, as:

Defense Costs and any amount which the Insured Persons or the Company (if applicable) are legally obligated to pay resulting from a Claim, including damages, judgments, settlements, pre- and post-judgment interest, punitive or exemplary damages and the multiple portion of any multiplied damage award where insurable by law. Loss shall not include:

\* \* \*

(3) any unpaid, unrecoverable or outstanding loan, lease or extension of credit to any customer or any forgiveness of debt . . . .

(Ex. 1, Policy, § IV.N. (the "Loan Loss Carve-Out")).

57. In the Receiver's Action, the FDIC as receiver seeks to recover "over \$24.5 million in losses the Bank suffered on over two hundred [CDLD] loans." (Ex. 2, ¶ 2).

58. The FDIC as receiver lists the "Loss Loans" with respect to which it seeks to recover the Bank's Loan Losses in Exhibit A to its complaint in the Receiver's Action. (Ex. 2, Ex. A).

59. The Loan Losses suffered by the Bank on the Loss Loans identified by the FDIC constitute "unpaid, unrecoverable, or outstanding loan, lease or extension of credit to any customer or any forgiveness of debt."

60. Accordingly, Progressive seeks a declaratory judgment that the Policy's Loan Loss Carve-Out precludes coverage for the Bank's alleged Loan Losses sought by the FDIC in the Receiver's Action.

**Count Three**

**Claim for Declaratory Relief (Jules N. Greenblatt,  
Benjamin J. Cohen, Shannon C. Livengood, Constance E.  
Perrine, Karim W. Lawrence, Gregory W. Patten, and the FDIC)**

**No Claim Was First Made During the Policy Period,  
Automatic Discovery Period, or Discovery Period**

61. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 60 of this Complaint.

62. The Policy provides coverage, subject to all of its terms, conditions, and exclusions, only for Claims first made during the Policy Period, Automatic Discovery Period, or Discovery Period. (*See* Ex. 1, Policy, § I.A.). The Policy Period expired on June 9, 2008, the Automatic Discovery Period expired on July 9, 2008, and the Discovery Period expired on July 9, 2009. (*Id.*, Declarations, Item 2; Endorsement Form Nos. 8790D (01/05) GA and 2254 (12/06), § III.B.).

63. Of the 2009 Letter, the 2011 Letter and the Receiver's Action, only the 2009 Letter was a Claim first made before the expiration of all coverage under the Policy. The 2011 Letter was sent on or about October 18, 2011, more than two years after the expiration of the Discovery Period. (Ex. 4 at 1). The Receiver's Action was filed nearly five months later, on March 16, 2012. (Ex. 2 at 1).

64. The Receiver's Action is a continuation of the Claim first made in the 2009 Letter, but solely as to those individuals named as defendants in the Receiver's Action who were identified as recipients of the 2009 Letter. Six of the ten defendants in the Receivers Action were not identified as recipients of the 2009 Letter: Greenblatt, Cohen, Livengood, Perrine, Lawrence, and Patten. (Ex. 3 at 1).

65. Neither the 2011 Letter nor the Receiver's Action constitutes a Claim first made against these individuals during the Policy Period, Automatic Discovery Period, or Discovery Period.

66. Accordingly, Progressive seeks a declaratory judgment that the Policy provides no coverage for these individuals for the 2011 Letter or the Receiver's Action because they are not a Claim first made against them during the Policy Period, Automatic Discovery Period, or Discovery Period.

**Count Four**

**Claim for Declaratory Judgment  
(Stephen M. Klein, Benjamin J. Cohen,  
Constance E. Perrine, Karim W. Lawrence, and the FDIC)**

**The Alleged OREO Losses Arose From Alleged Wrongful Acts  
that Took Place After the Expiration of the Policy's Policy Period**

67. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 66 of this Complaint.

68. With respect to Claims first made during the Automatic Discovery Period or Discovery Period, the Policy provides:

The Automatic Discovery Period and the Discovery Period are not an extension of coverage, but rather an extended reporting period for Claims first made during the Automatic Discovery Period or the Discovery Period resulting from Wrongful Acts that occurred prior to the effective date of cancellation, nonrenewal or conversion and otherwise covered under this Policy.

(Ex. 1, Policy, § III.B. (as amended by Endorsement Form No. 8790D (01/05 GA)).

69. With respect to the OREO Losses, the FDIC alleges that Klein, Cohen, and Perrine were negligent or grossly negligent "for approving, directing

and/or permitting wasteful OREO expenditures after the OCC rated OMNI a composite CAMELS 5 on September 15, 2008” and that Lawrence was negligent and grossly negligent “in his wasteful OREO expenditures after September 15, 2008.” (Ex. 2, ¶¶ 6–7).

70. Therefore, all of the alleged Wrongful Acts by Klein, Cohen, Perrine, and Lawrence with respect to which the FDIC seeks to recover the Bank’s OREO Losses took place after the expiration of the Policy’s Policy Period on June 9, 2008. (Ex. 1, Policy, Declarations, Item 1).

71. Thus, the Policy provides no coverage for the Receiver’s Action as it relates to the Bank’s alleged OREO Losses.

72. Accordingly, Progressive seeks a declaratory judgment that the Policy provides no coverage for Klein, Berman, Cohen, and Lawrence for that portion of the Receiver’s Action related to the Bank’s alleged OREO Losses.

### **Count Five**

#### **Claim for Declaratory Judgment (Jeffrey L. Levine and the FDIC)**

#### **The Fraud/Violation of Law Exclusion Bars Coverage for Loss, Other Than Defense Costs, Incurred by Jeffrey L. Levine in Connection With the Receiver’s Action**

73. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 72 of this Complaint.

74. The Policy provides:

The Insurer shall not be liable to make any payment for Loss, other than Defense Costs, in connection with any Claim arising out of or in any way involving any fraudulent, dishonest or criminal act or any willful violation of any civil or criminal statute, regulation or law by the Insured, provided a final judgment or final adjudication establishes such fraudulent, dishonest, or criminal act or such willful violation of statute, regulation or law.

(Ex. 1, Policy, § V.G. (the “Fraud/Violation of Law Exclusion”)).

75. Levine pled guilty to violating 18 U.S.C. §§ 1005 and 2. (Exs. 5 & 6).

76. In doing so, Levine admitted to “willfully and knowing[ly] mak[ing] and caus[ing] to be made materially false entries which overvalued bank assets in the books, reports and statements of Omni National Bank . . . .” (Ex. 5).

77. Levine’s guilty plea and the ensuing judgment, (Ex. 7), constitute a final judgment or final adjudication of the type referenced in the Fraud/Violation of Law Exclusion establishing Levine’s “fraudulent, dishonest or criminal act[s]” or “willful violation of statute, regulation or law.”

78. Thus, the criminal matter against Levine arises out of or in any way involves “any fraudulent, dishonest or criminal act or any willful violation of any civil or criminal statute, regulation or law by [Levine].”

79. On information and belief, the Receiver’s Action, as it is directed at Levine, arises out of or in any way involves the same wrongdoing.

80. Therefore, the Fraud/Violation of Law Exclusion precludes coverage for Levine under the Policy for Loss incurred by Levine, other than Defense Costs, in connection with the Receiver's Action.

81. Accordingly, Progressive seeks a declaratory judgment that the Fraud/Violation of Law Exclusion applies to preclude all coverage under the Policy for Loss incurred by Levine, other than Defense Costs, in connection with the Receiver's Action.

### **Count Six**

#### **Claim for Declaratory Judgment (Jeffrey L. Levine)**

##### **The Uninsurability Carve-Out Bars Coverage for Defense Costs Incurred by Jeffrey L. Levine**

82. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 81 of this Complaint.

83. Subject to all of its terms, conditions, and exclusions, the Policy provides coverage only for amounts that constitute Loss. (Ex. 1, Policy, §§ I.A., IV.N.).

84. The Policy provides that "Loss shall not include . . . any matters which are uninsurable under the law pursuant to which this Policy shall be construed." (*Id.*, § IV.N.(8) (the "Uninsurability Carve-Out")).

85. On information and belief, the 2009 Letter, the 2011 Letter and the Receiver's Action arise out of the same criminal wrongdoing to which Levine has pled guilty.

86. Accordingly, any defense costs incurred by Levine in connection with the 2009 Letter, the 2011 Letter or the Receiver's Action are uninsurable under Georgia law.

87. Progressive seeks a declaratory judgment that any defense costs incurred by Levine in connection with the 2009 Letter, the 2011 Letter and/or the Receiver's Action do not constitute Loss under the Policy and that Progressive has no obligation to indemnify Levine for such defense costs or advance them on his behalf.

### **Count Seven**

#### **Claim for Declaratory Judgment (Karim W. Lawrence and the FDIC)**

##### **The Fraud/Violation of Law Exclusion Bars Coverage for Loss, Other Than Defense Costs, Incurred by Karim W. Lawrence in Connection With the Receiver's Action**

88. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 87 of this Complaint.

89. The Policy provides:

The Insurer shall not be liable to make any payment for Loss, other than Defense Costs, in connection with any Claim arising out of or in

any way involving any fraudulent, dishonest or criminal act or any willful violation of any civil or criminal statute, regulation or law by the Insured, provided a final judgment or final adjudication establishes such fraudulent, dishonest, or criminal act or such willful violation of statute, regulation or law.

(Ex. 1, Policy, § V.G. (the “Fraud/Violation of Law Exclusion”)).

90. Lawrence pled guilty to violating 18 U.S.C. § 215(a)(2). (Exs. 8 & 9).

91. In doing so, Lawrence admitted that he “knowingly and corruptly accepted hundreds of thousands of dollars in cash and other things of value for the benefit of himself . . . intending to be influenced and rewarded in connection with the award of Omni-funded renovation contracts . . . .” (Ex. 8).

92. Lawrence’s guilty plea and the ensuing judgment, (Ex. 10), constitute a final judgment or final adjudication of the type referenced in the Fraud/Violation of Law Exclusion establishing Lawrence’s “fraudulent, dishonest or criminal act[s]” or “willful violation of statute, regulation or law.”

93. Thus, the criminal matter against Lawrence arises out of or in any way involves “any fraudulent, dishonest or criminal act or any willful violation of any civil or criminal statute, regulation or law by [Lawrence].”

94. On information and belief, the Receiver’s Action, as it is directed at Lawrence, arises out of or in any way involves the same wrongdoing, at least in part.

95. Therefore, the Fraud/Violation of Law Exclusion precludes coverage for Lawrence under the Policy for Loss incurred by Lawrence, other than Defense Costs, in connection with the Receiver's Action to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty.

96. Accordingly, Progressive seeks a declaratory judgment that the Fraud/Violation of Law Exclusion applies to preclude coverage under the Policy for Loss incurred by Lawrence, other than Defense Costs, in connection with the Receiver's Action to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty.

### **Count Eight**

#### **Claim for Declaratory Judgment (Karim W. Lawrence and the FDIC)**

##### **The Illegal Profit/Payment Exclusion Bars Coverage for Loss, Other Than Defense Costs, Incurred by Karim W. Lawrence in Connection With the Receiver's Action**

97. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 96 of this Complaint.

98. The Policy provides:

The Insurer shall not be liable to make any payment for Loss, other than Defense Costs, in connection with any Claim arising out of or in any way involving:

- (1) any Insured gaining, in fact, any profit, remuneration or financial advantage to which the Insured was not legally entitled;
- (2) payment by the Company of inadequate or excessive consideration in connection with its purchase of Company securities; or
- (3) conflicts of interest, engaging in self-dealing, or acting in bad faith.

(Ex. 1, Policy, § V.H. (the “Illegal Profit/Payment Exclusion”)).

99. In pleading guilty to violating 18 U.S.C. § 215(a)(2), Lawrence admitted that he “knowingly and corruptly accepted hundreds of thousands of dollars in cash and other things of value for the benefit of himself . . . intending to be influenced and rewarded in connection with the award of Omni-funded renovation contracts . . . .” (Ex. 8).

100. Thus, the criminal matter against Lawrence arises out of or in any way involves his “gaining, in fact, any profit, remuneration or financial advantage to which [he] was not legally entitled.”

101. On information and belief, the Receiver’s Action, as it is directed at Lawrence, arises out of or in any way involves this same wrongdoing, at least in part.

102. Therefore, the Illegal Profit/Payment Exclusion precludes coverage for Lawrence under the Policy for Loss incurred by Lawrence, other than Defense

Costs, in connection with the Receiver's Action to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty.

103. Accordingly, Progressive seeks a declaratory judgment that the Illegal Profit/Payment Exclusion applies to preclude all coverage under the Policy for Loss incurred by Lawrence, other than Defense Costs, in connection with the Receiver's Action to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty.

### **Count Nine**

#### **Claim for Declaratory Relief (Karim W. Lawrence)**

##### **The Uninsurability Carve-Out Bars Coverage for Defense Costs Incurred by Karim W. Lawrence**

104. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 103 of this Complaint.

105. Subject to all of its terms, conditions, and exclusions, the Policy provides coverage only for amounts that constitute Loss. (Ex. 1, Policy, §§ I.A., IV.N.).

106. The Policy provides that "Loss shall not include . . . any matters which are uninsurable under the law pursuant to which this Policy shall be construed." (*Id.*, § IV.N.(8)).

107. On information and belief, the 2011 Letter and the Receiver's Action arise out of the same criminal wrongdoing to which Lawrence has pled guilty, at least in part.

108. Accordingly, any defense costs incurred by Lawrence in connection with the 2011 Letter or the Receiver's Action, to the extent they arise out of or in any way involve the same criminal wrongdoing to which he pled guilty, are uninsurable under Georgia law.

109. Progressive seeks a declaratory judgment that any defense costs incurred by Lawrence in connection with the 2011 Letter and/or the Receiver's Action, to the extent they arise out of or in any way involve the same criminal wrongdoing to which he pled guilty, do not constitute Loss under the Policy and that Progressive has no obligation to indemnify Lawrence for such defense costs or advance them on his behalf.

### **Count Ten**

#### **Reservation of Rights (All Defendants)**

110. Progressive adopts and incorporates herein by reference the allegations in Paragraphs 1 through 109 of this Complaint.

111. In addition to seeking a declaratory judgment, Progressive has reserved all of its rights under the Policy and applicable law. By seeking a judicial

determination based on the foregoing Policy provisions, Progressive does not waive its potential coverage defenses under other Policy terms. Developments in connection with the Receiver's Action may render additional defenses to coverage ripe for judicial determination. Progressive's reservation is based on, but not limited to, the Policy language discussed in Progressive's correspondence of July 16, 2009, November 17, 2009, April 12, 2010, November 2, 2011, and March 19, 2012. That correspondence, without enclosures, is attached collectively as Exhibit 11 and incorporated herein by reference.

## **VII. PRAYER FOR RELIEF**

WHEREFORE, Progressive Casualty Insurance Company prays for relief as follows:

1. A judicial declaration that the Policy's IvI Exclusion applies to exclude coverage for the Receiver's Action and that, therefore, the Policy provides no coverage for the Receiver's Action;
2. A judicial declaration that the Policy's Loan Loss Carve-Out precludes coverage for that portion of the alleged damages sought by the FDIC in the Receiver's Action consisting of alleged losses on the "Loss Loans" identified in the Receiver's Action and that, therefore, the Policy provides no coverage for that portion of the Receiver's Action;

3. A judicial declaration that the 2011 Letter and the Receiver's Action do not constitute a Claim first made during the Policy Period, Automatic Discovery Period, or Discovery Period against Jules N. Greenblatt, Benjamin J. Cohen, Shannon C. Livengood, Constance E. Perrine, Karim W. Lawrence, or Gregory W. Patten and that, therefore, the Policy provides no coverage for these persons for the 2011 Letter or the Receiver's Action;

4. A judicial declaration that the Policy provides no coverage for Stephen M. Klein, Benjamin J. Cohen, Constance E. Perrine, and Karim W. Lawrence for that portion of the Receiver's Action related to the Bank's alleged OREO Losses because the alleged wrongful acts alleged by the FDIC as giving rise to these losses were committed after the expiration of the Policy's Policy Period on June 9, 2008.

5. A judicial declaration that the Policy's Fraud/Violation of Law Exclusion applies to exclude coverage for Loss incurred by Jeffrey L. Levine in connection with the Receiver's Action, other than Defense Costs;

6. A judicial declaration that the Policy's Uninsurability Carve-Out precludes coverage for defense costs incurred by Jeffrey L. Levine in connection with the 2009 Letter, the 2011 Letter and/or the Receiver's Action;

7. A judicial declaration that the Policy's Fraud/Violation of Law Exclusion applies to exclude coverage for Loss incurred by Karim W. Lawrence in connection with the Receiver's Action, other than Defense Costs, to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty;

8. A judicial declaration that the Policy's Illegal Profit/Payment Exclusion applies to exclude coverage for Loss incurred by Karim W. Lawrence in connection with the Receiver's Action, other than Defense Costs, to the extent it arises out of or in any way involves the criminal wrongdoing to which Lawrence pled guilty;

9. A judicial declaration that the Policy's Uninsurability Carve-Out precludes coverage for defense costs incurred by Karim W. Lawrence in connection with the 2011 Letter or the Receiver's Action to the extent they arise out of or in any way involve the criminal wrongdoing to which Lawrence pled guilty;

10. A judicial declaration of the rights and obligations of Progressive and the Directors and Officers under the Policy related to the Receiver's Action; and

11. An Order awarding Progressive such additional declaratory and other relief as shall be found to be appropriate in the circumstances.

Respectfully submitted this 30th day of March, 2012.

**/s/ J. Matthew Maguire, Jr.**

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