

THE LIABILITY REGIME OF BANK DIRECTORS AND OFFICERS FOR NEGLIGENCE IN UNSAFE OR UNSOUND BANKING PRACTICE IN NIGERIA

Prof. Obasi Maurice Ph.D*
and Igbokwe Victor O. Ph.D**

Abstract

The term "unsafe or unsound banking practices" serves as a statutory trigger for virtually every key administrative sanction available against bank directors. Given the potential breadth of the term, the banking agencies have the ability to seek administrative remedies in cases covering a broad range of director conduct. Thus; "unsafe or unsound banking practices" is a potent source of director liability. Nigerian banking sector struggle with challenges in the day to day running of their business activities, challenges are enormous and can either be market or operational challenges and regulatory or reforms challenges instituted by the regulatory agencies such as CBN, NDIC, SEC and CIBN etc. Therefore, this paper seeks to examine the liabilities facing the directors and also analyse the principles of safety and soundness which create a higher standard of care for bank directors than that imposed by the common law fiduciary duty of care. The result reveals that myriad of challenges and challenges exist in the Nigerian banking sector some of which are challenges both within and outside Nigeria. Banks are left behind in technological innovation aspect of banking transactions, movement of high volume of deposit or capital flight to foreign banks by the political class which reduce banks opportunity to expand their market base and the prevalent of fraud in the sector also hinders the banks progress, these challenges pose unhealthy banking resulting in unsafe or unsound banking practice in Nigeria. It is recommended that that government and relevant regulatory agencies should put heads together to render support and address those identified issues on unsafe and unsound banking practices of bank directors in Nigeria.

Introduction

The failure of banking institutions throughout the country during this period, deflated values and other securities, which has brought into prominence and is now developing that field of the law dealing with the liability of the directors and officers of defunct banking corporations¹. Thousands of bankers and "figure head directors" have fallen heir to civil litigation by virtue of their titular offices. The service of summons, to many of these, is a thunder-bolt from a clear sky and their first knowledge that the law imposes an affirmative duty upon them as bank officers and directors which that duty and the resultant civil liability under the regulatory laws and the neglect of same that forms the avowed purpose of this article². No field of the law can be approached as an exact science, and that part of the law dealing with director's liability is no exception, a general survey of the basic principles underlying those liability principles which should be matters of common knowledge and have been too infrequently called to the attention of our bankers and general public. The civil liability of bank directors for making bad loans may arise either under the common law or under special statute such as the excess loan statutes in force in many jurisdictions. It may be stated as a general proposition that there is a common law liability apart from statutory liability of

* **Prof. Obasi Maurice Ph.D, Head of Department Commercial Law, Faculty of Law Imo State University
Tel: 08032739251, Email: obasima Maurice@gmail.com**

** **Igbokwe Victor O. Ph.D., LLM Swansea University (UK), Senior Inspector in the Imo State Judiciary. Tel,
07088120647, Email: victorigbokwe715@yahoo.com**

¹ **Ralph Udegbunan I**, Examining the Causes of Bank Failure in Nigeria since Deregulation: Some Empirical Results and Implications of the Policy, *Journal of Business Perspective* 1999 vol 3

² Awenlimobor A. E. "Restructuring Insolvent Banks: Role of the Regulatory Authorities", *Nigeria Deposit Insurance Corporation (NDIC) (1992) Quarterly* Vol. 2, No. 2, June, pp. 25-30

bank officers and directors for failure and neglect in the performance of their duties³. 'The question of who may raise this liability and how it may be raised has led to a great diversity of opinion but the general rule seems to be, that no action at law can be maintained against bank directors by a creditor or depositor for mismanage merit and negligence that may be a wrong against the corporation and of consequent damage to the creditor.' The reason for the rule, as set out, is the lack of privity or contractual relation between the parties. The courts have reasoned that the duty to exercise diligence is one owed to the corporation and not to the creditors whose injuries are incidental. The above rule, also gives an additional reason for not permitting the depositor to bring an action at law for damages in his own right⁴:

Banking institutions and other corporations are essential to the welfare and prosperity of the country and these institutions cannot generally be operated save through the agency of directors, and if the directors of such institutions were held liable at law to the creditors thereof in damages for every act and negligence in the management and disposition of the moneys and property of the corporation, of which the corporation might lawfully complain, responsible men could not be found who would take upon themselves the perils and dangers of the position⁵."

The rule that the depositor cannot bring an action at law in his own right against the directors of the bank for negligence is not without its exceptions, and there are a few cases that hold a contrary opinion. In those instances, actions have been maintained on the theory that the directors are trustees for creditors. Notable among those decisions played in the case of *Delano v. Case*⁶, which was an action by a general depositor against the directors of the bank for negligence. The court stated in opinion: "For the ordinary negligence of directors, they are responsible alone to their principal, but, for such gross negligence or incompetency as shows a reckless disregard of their duty to care for and protect the funds committed to their charge; we think they are directly responsible to the depositor."

The same conflict of opinion is found regarding suits in equity in the creditor's own name, but' it is generally conceded by the courts that depositors may bring a suit in equity in the nature of a creditors' bill to charge the directors with fraud, mismanagement and negligence⁷. The receiver of an insolvent bank, being the principal, no question of privity of contract or tort arises when he sues the directors of the defunct bank for their negligence or losses on negligent loans. Such suits are brought properly in equity and are usually in the nature of an accounting.

It may be concluded then that, apart from any statutory liability, there are other duties imposed upon bank directors, the neglect of which may result in a direct personal liability for the loss occasioned by mismanagement or negligence in handling of banking affairs, which liability may be extended to include losses on loans negligently made.

³ John. Skiles A, Individual Personal Liability of Bank Directors for Negligent and Excess Loans, 7 *Notre Dame L. Rev.* 185 (1932). Available at: http://scholarship.law.nd.edu/ndlr/vol_7_issue_2 Accessed on 21/12/2023

⁴ Barth J. R. *A Thrift Institution Failures: Causes and Policy Issues at Bank Structure and Competition*, Conference proceedings, Federal Reserve Bank of Chicago (1985) .

⁵ Edward F. R. "The Decline of Traditional Banking: Implications for financial stability and Regulatory Policy", Federal Reserve Bank of New York, *Economic Policy Review*, vol. 1, No. 2, July pp. 27–45 . (1995)

⁶ Ia. 588 (1912); *Smith v. Hurd*, 12 Met. (Mass) 371, 46 Am., Dec. 690 (1847); *Brown v. Orr*, 112 Pa. 233 (1886).

⁷ *New Mashonaland Ezploration Company* [1892] 3 Ch.D. 577, 585, per Vaughan Williams J.; *Re Forest of Dean Coal Mining Company* (1878) 10 Ch.D. 450. 453, per Jessel M.R.; *Re Faure Electric Accumulator Company* (1888) 40 Ch.D. 141, 152, per Esy J.; *Grimwade v. Mutual Socie!*? (1885) 52 L.T. 409, 416, per Chitty J

The concept of Director's duties

Directors are important officers of the company and constitute one organ of corporate administration. They have been regarded differently as trustees, agents and fiduciaries of the Company⁸. As trustees, directors have control of the company's funds, properties and assets, and thus must be responsible and accountable; they must exercise powers honestly in the interest of the company and not in their own interest. Section 305 of the Companies and Allied Matters Act, 2020 imposes on a company director fiduciary obligation in his relationship towards the company. He is obliged to observe the utmost good faith towards the company in any transaction with it or on its behalf. Much is forbidden to a director because he occupies a fiduciary position; the taking of remuneration not authorized by the articles of association; the making of contracts with the company without special authority and full disclosure⁹. It is thus imprudent as it is impossible to lay down any abstract definition of what a director's duties should be. The responsibilities of directors must vary with the nature of the company or their special position as defined by the articles of association¹⁰. A conscious act of wrongdoing as well as culpable and deliberate inadvertence to an obvious duty may so constitute a breach of duty and to this extent cases generically described as breaches of duty do fall within either the commission of a positive wrongful act or a remissness of a significant degree¹¹. To this end, directors' duties are a series of statutory, common law and equitable obligations owed primarily by members of the board of directors to the company that employs them. These duties are analogous to duties owed by trustees to the beneficiaries and agents to principals, respectively, and usually serve as controls over the wide-ranging powers vested in the board by the company. The duties of company's directors are broadly classified into two categories, namely; (i) general duties and (ii) statutory duties (i) General Duties, the general duties of directors are of two broad kinds, to wit; the fiduciary duty of good faith and the duty of care and skill. Both kinds of duties have fundamental differences and have charted different evolutionary courses in history, the one deriving from Equity and the other from Common Law¹².

Statutory Duties Apart from the fiduciary duties and duties of care and skill which are well clearly spelt out by the Act, there are other numerous statutory duties which are imposed on company's directors. They include disclosure of director's shareholding¹³, general duty to give notice of some personal matters¹⁴, particulars of directors in trade catalogues, trade circulars, show-cards and business letters on which the company's name appears¹⁵, file return of allotment¹⁶, prepare and place at the annual general meeting along with the balance sheet and profit and loss account a report on the company's affairs including the report of the board of directors¹⁷, make a declaration of solvency in the case of members' voluntary winding up¹⁸, substantial property transactions involving directors¹⁹ and prohibition of secret payments, gifts or bribes to directors²⁰. It is safe to state that the statutory duties of directors to keeping of registers and books of accounts, making

⁸ Section 309 of CAMA 2020, also the case of *Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd* (1990) 4 NWLR (Pt. 145) 422, per Nnaemeka-Agu, JSC.

⁹ Section 305, 293, 301, 313(1) of CAMA 2020.

¹⁰ O. Akanki, "Abuse of Power and Breach of Duty by Company Director" (1975) 6 *Nigerian Journal of Contemporary Law*,

¹¹ *Adebayo v. Johnson* (1969) 1 All NLR 176, 186 per Coker JSC.

¹² Akanki E.O. *Essays on Company Law*. (Lagos. University of Lagos Press, 1992) pp. 130 at 140.

¹³ Section 301 of CAMA 2020

¹⁴ Section 302 of CAMA 2020

¹⁵ Section 304 of CAMA 2020

¹⁶ Section 149 of CAMA 2020

¹⁷ Section 385(1) of CAMA 2020

¹⁸ Section 625(1) of CAMA

¹⁹ Section 310 of CAMA 2020

²⁰ Section 313 of CAMA 2020

returns to the Register of Companies, duties relating to meetings and notices as well as duties relating to prospectus, issue of shares. Some of these duties are penal, others in addition to being penal create personal liability to third party, and hence there are penalties for their breach. For this reason, the statutory duties act as a powerful restraining influence on the activities of the directors starts off with an emphatic statement that a director stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf. This statement proposes that the director's fiduciary duty is one owed the company only. This follows from the issue of enforceability of which only the company can enforce the duties its director owes it²¹. Also, *Section 305(2)* states that: "A director shall also owe fiduciary relationship with the company in the following circumstances: (a) where a director is acting as agent of a particular shareholder; (b) where, even though he is not an agent of any shareholder, such a shareholder or other person is dealing with the company's securities." From the above provision, the director's fiduciary duty to the company has never been questioned, but the extension of this duty to others, has. Doubtless, a director as agent of a particular shareholder would stand in a fiduciary relationship towards that shareholder, even without company law stating so. This would be the natural assumption under the general law of agency. However, where the director is not in fact an agent to a shareholder, any fiduciary duties to him may rightly be called to question. In *Percival vs. Wright*²², a group of shareholders in a company approached the directors with a request that the directors purchase their shares. Some of the directors did so without disclosing that a purchase of the company's undertaking was imminent, this being a piece of information which was known to them and to the other members of the board, though not to the shareholders concerned. No firm offer was ever made, and the negotiations ultimately proved abortive and the court was not satisfied that the board ever intended to sell.

A shareholder brought this action against the directors asking for the sale of his shares to be set aside for nondisclosure. *Eady J.* held that the directors are not trustees for the individual shareholders and may purchase their shares without disclosing pending negotiations for the sale of the company, and even though the price being offered for the undertaking was substantially more than they paid on the purchase. To hold otherwise would mean that they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. There was no unfair dealing under the circumstances. Accordingly, the shareholder could not have the transaction set aside for non-disclosure. However, it is important to note that were a situation such as that in *Percival vs. Wright*²³ to occur in Nigeria, it is likely to be decided in much the same way, for it would not amount to insider dealing which would have quite easily been addressed under *Section 111* of the Investment and Securities Act 2007²⁴. This is because the case of *Percival* involved private dealings in shares, while the latter section is relevant only where the securities of the company are offered to the public for sale or subscription. Under that law, a director qualifies as insider and is therefore subject to the restrictions stated therein, when he deals in securities. It can be strongly argued that owing a duty to the company is in fact owing a duty to 'its members' collectively, for, although the company is considered as having a separate and distinct personality from those of its members²⁵, it is in fact for the ultimate benefit of the members collectively, whose 'association' initially formed the company, that the company exists. According to *Berle and Means*²⁶,

²¹ *Section 305(9)* CAMA

²² (1902) 2 Ch. 421

²³ *Ibid*

²⁴ Act No. 29, 2007.

²⁵ *Salomon vs. Salomon & Co. Ltd.* (1897) A.C.

²⁶ Berle, A.A., and Means C.G. *The Modern Corporation and Private Property.* (New York: The Macmillan Company, 1932), p. 274.

...where powers are conceded to the management...to act for the corporation as a whole, the obvious...assumption is that these powers are intended to be used only on behalf of all. They are distinctly not intended to be granted for the purpose of benefiting one set of participants as against another. To do so would be to violate every intendment of the whole corporate situation.

Thus, from the above it can be adduced that the members in a general meeting can set the motion for the company to enforce the director's duties.

The Common Law Duty of Bank Directors and Officers for Negligence in Unsafe or Unsound Banking Practice in Nigeria

The question of what the common law duty of bank directors is, and what constitutes a breach of it, becomes important to a discussion of the article. The duty imposed upon the director under the common law, the existence of which has been pointed out, is to act in good faith and with ordinary care and diligence as ordinarily prudent men would exercise with reference to the conduct of such a moneyed institution.

Thompson defines the duties of directors, in his *Commentaries on the Law of Private Corporations*, as follows:

"By accepting the position, they assume a capacity to manage the business of the corporation, and impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires, and to give the enterprise the benefit of their best care and judgment. They are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs, and the fact of the service without compensation. Directors must be diligent and careful in performing the duties they have undertaken, and which negligence cannot be excused on the ground of ignorance or inexperience, or the honesty of intention.

Regulatory Provisions

The CAMA 2020 prescribes the fiduciary duties and other duties of directors. The following are the general fiduciary duties of a director:

- To act in the best interests of the company at all times in a manner that a faithful, diligent and skilful director will act.
- Not to earn secret profits or any other unnecessary benefits from their position.
- To declare any conflict of interest when it arises.
- Not to delegate their powers in a way that may amount to abdication of duty.
- Not to misuse. This duty does not cease even after resignation or retirement.

A breach of the fiduciary duties is enforceable against a director by the company. The CAMA 2020 also imposes direct penalties on directors for certain breaches of statutory requirements by a company.²⁷

Non-Disclosure of Interest in Loans, Advance or Credit Facility Granted By the Bank

A director, manager or officer of a bank is duty bound to disclose his personal interest in any advance, loan or credit facility granted by the bank *section 17 (1)(a)* of the *Banks and Other*

²⁷ Gbenga Oyebode, Corporate Governance and directors duties in Nigeria May 2023 available at [https://uk.practicallaw.thomsonreuters.com/w-039-5016?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-039-5016?transitionType=Default&contextData=(sc.Default)&firstPage=true) Accessed at 26/12/2023

*Financial Institutions Act*²⁸ and *Section 303*²⁹ rightly prohibits the grants of loans, advances or credit facility in which a director, officer or manager of a bank has a personal interest and noncompliance with this provision of subsection (2) of *section 17* of the *Acts*³⁰ commits an offence and is liable on conviction to imprisonment for a term not less than 3 years or to a fine of not less than ₦5, 000,000 or to both and in addition any gain or benefit accruing to any person convicted under this section by reason of such contravention, shall be forfeited and vested in the bank³¹.

It shall be the duty of a director of a bank who is in any way, whether directly or indirectly interested in the grant of an advance, loan or credit facility by the bank to declare the nature of his interest at a meeting of the board of directors of the bank³² and also *section 303(1)*³³. Where a director fails to comply with the provisions of this section, he is said to have committed an offence and is liable to a fine in such amount as the commission shall specify in its regulation.³⁴ A director need not disclose his interest, if his interest is immaterial, a directors interest is immaterial where his interest consist only of being a person holding less than five percent of the shares of the company which is seeking an advance, loan or credit facility" directors should be made to disclose their interest once they have an interest no matter how minute it might be. A director who contravenes the provision of subsections (3), (6) or (9) commits an offence and is liable on conviction to fine of not less than N 5,000,000 or imprisonment for a term of 3 or both such fine and imprisonment.

Not Keeping Proper Books of Account

Every bank is mandated by law to keep, proper books of account with respect to all the transactions of the bank³⁵. Proper books of account shall be kept with respect to all transactions if such books are necessary to explain such transactions and give true and fair view of the state of affairs of a bank notes are kept by the bank and are in compliance with the accounting standard as may be prescribed for banks.³⁶If any person being a director, manager or officer of a bank fails to take all reasonable steps to secure compliance with the duty to keep proper books of accounts, such a person shall be liable to a fine less than ₦2,000,000.³⁷

Where the director, officer or manager has willfully acted, being the cause of any default by the bank, such director, manager or officer commits an officer and is liable on conviction to a term of imprisonment of not less than 5 years or to a fine of not less than N5,000,000 or to both such imprisonment and fine³⁸. The courts to decide what "reasonable" steps to secure compliance are. It appears that the test of what is reasonable will be what a reasonable man act and the director, manager or officer's position would have done, and taken relevant factors into consideration.

²⁸ *Section 17* Banks and Other Financial Institution Act 2020

²⁹ *Company and Allied Matters Act 2020*

³⁰ *Banks and Other Financial Institution Act 2020*

³¹ *Ibid*

³² *Section 17(6)* Banks and Other Financial Institution Act 2020

³³ *Company and Allied Matters Act 2020*

³⁴ *Section 303 (3)* *Company and Allied Matters Act 2020* as amended

³⁵ *Section 23(1)* *Banks And Other Financial Institution Act (2020)*

³⁶ *Section 23(2)* *Banks And Other Financial Institution Act 2020*

³⁷ *Section 23(5)(b)(i)* *Banks And Other Financial Institution Act 2020*

³⁸ *Section 23(5)(b)(ii)* *Banks And Other Financial Institution Act 2020*

Receipt of Commissions, Gifts and Property.

The Banks and other Financial Institution Act³⁹ prohibits the receipt of gifts, commissions, property and so on by bank directors, officers or employees from any other person receiving remuneration from bank, to whom the bank grants loan, an advance or credit facility. Any manager, director or employee of a bank who fails to comply with the provisions of this section shall be guilty of an offence and liable on conviction to pay the bank a fine of ₦5, 000,000 or imprisonment for a term of five years or to both fine and imprisonment and in addition any such gift or any other commission shall be forfeited to the federal government⁴⁰.

Unrecoverable Loan and Interest Thereon

The Failed Banks Recovery of Debts and Financial Malpractices in Banks Act⁴¹ provides that the court shall hold liable, for the outstanding loan and interest thereon, the directors, shareholders, partners, manager, officers and other employees of a failed bank who in the performance of their duties were found to have been connected in any way with the granting of the loan which has become irrecoverable. A loan is by virtue of the same subsection deemed irrecoverable where the information and details on the security pledged for the loan and filed before the court is impossible to locate, or no security is pledged at all, or the identity of the debtor is difficult to locate, or debtor is found to be non-existent, fake or fictitious or in any way unidentified.

This thesis posits that shareholders should be removed from this section, shareholders take part in decision making either through the directors or the shareholders themselves in a general meeting. The shareholders of a bank do not individually or collectively grant or approve the grant of loans or credit facilities.

Non Compliance with the Provision of the Act

The Act (BOFIA) provided general punishment for any director or manager of a bank who fails to observe its provisions; *section 50* of the Act⁴² which provides that any person who fails to take all reasonable steps to secure compliance by the bank with the requirements of the Act or fails to take all reasonable steps to secure the correctness of any statement submitted under the provisions of the Act is guilty of an offence and liable on conviction to a fine not less than ₦2,000,000.

The provision of *section 17*⁴³ is very important. The section makes the bank directors or managers personally liable for non-compliance to the provision of the Act. A bank director or officer may be held liable for any act of Unsafe or Unsound banking practices committed by the bank. In *Lippitt v. Ashley*⁴⁴, the court held the directors of a bank liable for negligence in the failure of the bank due to the defalcations of its treasurer. The court stated that the directors had failed to exercise ordinary reasonable care in supervising the bank's officers, even though they had discharged their duty to select an operating officer, had diligently attended directors' meetings, had met often informally to discuss the bank's business, had selected competent auditors and reviewed their work, and had made inquiry of the dishonest officer as to the condition of the bank.

Section 36(12) of the constitution⁴⁵ provides that subject as otherwise provided by this Constitution, a person shall not be convicted of a Criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law is

³⁹ *Section 46 (1) Banks and Other Financial Institution Act 2020*

⁴⁰ *Section 46(1) (d) (i)(ii) Banks and Other Financial Institution Act 2020*

⁴¹ *Section 12 (I) Banks (Recovery of Debts) and Financial Malpractices in Banks Act Cap F2 Vol. 6 LFN 2004*

⁴² *Banks and Other Financial Institution Act 2020*

⁴³ *Ibid*

⁴⁴ 94 A. 995 (Conn. 1915)

⁴⁵ *Constitution of Federation Republic Nigeria, 1999 as Amended.*

refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provision of a law. The Implication of this section of the constitution is therefore for director or officer of bank to be punished for negligent or liabilities incurred in the course of their responsibility in Bank, the offence must be defined and the penalty written down in law prescribed law. In absence of any prescribed offence and penalty they will not be held liable for any recklessness incurred in the course of their responsibility to the Bank or any Financial Institution.⁴⁶ It is not out of place to submit here that *section 36(12)*⁴⁷ of the 1999 constitution has been contravened by *section 50* of bank and other financial Institution Act 2020 and *section 22* of the Failed (Recovery of debts) and financial mal-practices Act.

In discussing the various relevant pieces of legislations impacting on the Unsafe or Unsound Banking Practices among officers and Directors of bank in Nigeria, it is considered necessary to give the constitution a primacy of position under the scheme of things because of its watershed effect on all other laws enacted and targeted towards fraudulent practices among officers and Directors of bank

Remedies for Breaches of Duties of an Officer and Director

Under Nigerian law, once a director has been guilty of a breach of duty and has no grounds for relief from liability, one of the following remedies may be resorted to.

Injunction(s) or Declaration(s)

Injunction as a remedy may be primarily adopted to prevent a director from further breach or where a breach is threatened but has not yet occurred. Moreover, the prospect of being sued is in itself a substantial deterrent for many corporate executives or being enjoined for failure to perform ones duty. The court can use its injunctive power in imaginative way such as to improve the management of corporation either by removal of a fraudulent director or in pursuance of their inherent equitable powers. No removal of director except guilty of fraud. Therefore, suits for equitable relief can motivate a director to act prudently and in the best interest of the company.

Damages or Compensation

At common law, damages are for breach of duty of care, whereas compensation is the equitable remedy for breach of fiduciary duty. The distinction between these terms seems to be vague as indicated in *Barlett v. Barclays Bank Trust Co*⁴⁸ where the court held that the obligation of a fiduciary to restore the asset of which he had denied the beneficiary may involve payment of a considerable larger sum than what would normally be payable as damages for loss caused by a tort or breach of a contract. It is unlawful for a company to make to any director of the company, any payment by way of compensation for loss of office, or as consideration for or in connection with his retirement from office unless particulars, with respect to the proposed payment and the amount, have been disclosed to members and the proposal is approved by the company. Similarly, if in connection with the transfer of the undertaking or property of a company it is proposed to make any payment to a director by way of compensation for loss of office, or as consideration or in connection with his retirement from office, the payment will be unlawful unless particulars of the proposal and the amount have been disclosed to members of the company and approved by the company. Disclosure must be to all the members. If a director receives payment in contravention of this provision, the amount received by him will be in trust for the company. Where, in connection with a take-over bid, payment is to be made to a director as compensation for loss of office, or as consideration for his retirement from office, it is the duty of that director to do all

⁴⁶ *Ibid*

⁴⁷ Chapter two of the Constitution of the Federal Republic of Nigeria 1999 as Amended

⁴⁸ No (1 & 2)(1980)2 WLR 430

things reasonably necessary to ensure that particulars of the proposed payment are included in or sent with the notice of the offer made to the shareholders. Payments prohibited under this head do not include any bona fide payment by way of damages for breach of contract or by way of pension.

Revision of Contract in which the Director is interested:

Where there has been an arrangement, which derogates from the rules regarding entering in to contract in which the director is interested, may be avoided at the instance of the company, provided restitution in *integrum* is possible and the right of a *bonafide* third party have not accrued.

The Effects of Unsafe or Unsound Banking Practices

The implications of Unsafe or Unsound banking practice is that it may result to the dissipation of assets of the bank, which may lead to the distress of the bank which may give rise to financial crises in the economy depending on the position of the bank concerned in the economy of the country⁴⁹. A distress of a major bank may lead to global financial crises depending on the strategic position of the country's economy and currency in the world. Therefore, the major implications of Unsafe or Unsound banking practices are distress in banks with its consequent implications on the economy and global financial crises.

Distress in Banks

The distress in early banks were attributable to a number of factors including the under capitalization of banks, weak management, inappropriate corporate governance structure, reckless use of depositors funds, excessive growth (over trading), lack of adequate regulation and supervision, and politicization⁵⁰.

Ordinarily, the word distress means unhealthy situation or state of inability or weakness, which can prevent the achievement of set goals and aspirations. Distress as it relates to the banking Sector can be defined as the inability of a bank to meet up with the daily obligations to their customers due to technical or total insolvency. From this definition it can be adduced that a distressed bank is one with severe financial, operational and managerial weakness which have rendered it difficult for it to meet its obligations to its customers, owners and the rest of the economy as and when due. Bank distress can also be viewed as a condition when a bank has negative capital and current profits are insufficient to cover losses to such an extent that the bank is unable to generate internally positive capital⁵¹.

Bank distress can be temporal, permanent, hidden or open. In the case of temporal distress, the bank closes its doors for a while because of financial difficulties⁵². It may take a loan from the Nigerian Deposit Insurance Corporation, or take other corrective measures and open its doors again, but in the case of a permanent distress, it goes completely out of business or is taken over by the Nigerian Deposit Insurance Corporation as a failing bank. Hidden distress is a case in which the bank is able to take a loan or make other arrangements to settle its deposit liabilities before its financial difficulty becomes apparent. It is open bank distress if such corrective measures can no longer conceal the financial difficulties from the eyes of its customers and the public. The characteristics of banks in distress are as follows:

- 1) Large volume of non-performing loans and advances

⁴⁹ Ologun, S.O "Bank Failures in Nigeria: Genesis, Effects and Remedies", *CBN Economic and Financial Review*, Volume 32 No. 2 . (1994),

⁵⁰ Alashi, S.O "Bank Failure Resolution: The Main Option", *NDIC Quarterly Vol. 3(2)*. (1993),

⁵¹ Ologun, S.O. "Bank Failures in Nigeria: Genesis, Effects and Remedies", *CBN Economic and Financial Review*, Volume 32 No. 2 (1994),

⁵² Wellman, C "The Language of Ethics", Cambridge: *Harvard University Press*, 8. . (1961),

- 2) Difficulty in paying its depositors and other creditors as and when due
- 3) Persistent liquidity deficiency
- 4) Accumulated losses, which have nearly or completely eroded the shareholders' funds.
- 5) Gross under capitalization in relation to level of operation
- 6) Weak management as reflected by poor credit quality, inadequate internal controls, high rate of fraud and forgeries, among others.

Distress in banks have been attributed to a number of Unsafe or Unsound banking practices and they include the flaunting of Central Bank of Nigerian guidelines/policies, poor loan monitoring, non-existent recovery of loan plans, hazardous or myopic investment decisions, granting of bad loans with the connivance of bank directors and officers and fraud by bank directors and officers. The distress of a bank may, depending on the banks liquidity and position in the economy, cause economic crisis in the country. This may equally cause a global economic crisis depending on the position of the country's economy and currency in the world.

Conclusion

In view of the above, it is apparent that the need to give more protection to individuals acting as officers of corporation to enable them carry out their duties as specified under the law appears not to have been adequately catered for, even with the proposed Bill. The current trend in other climes is to apply caution by taking out Directors and Officers insurance is conspicuously absent. Nigerian law makers should take the cue from other jurisdictions and make provisions for insurance of director and officers of corporations from liability.