

[{{8-31-97 p.TC-371}}](#)

[16,172] Docket No. FDIC 83-152e (6-18-97)

**In the Matter of
GERALD P. BRICKNER,
individually and as an institution-
affiliated party of
BANK OF HOVEN
HOVEN, SOUTH DAKOTA
(Insured State Nonmember Bank)
DECISION AND ORDER APPROVING
APPLICATION TO MODIFY THE
ORDER OF PROHIBITION FROM
FURTHER PARTICIPATION
FDIC-83-152E**

STATEMENT OF THE CASE

Introduction

On December 27, 1995, Gerald P. Brickner ("Respondent"), through a letter ("Application") addressed to the Executive Secretary of the Federal Deposit Insurance Corporation from his attorney, made application to the Federal Deposit Insurance Corporation ("FDIC") for written consent to become a director of the Bank of Hoven, Hoven, South Dakota ("Bank"), an institution regulated by the FDIC. This application arises under section 8(e)(7)(B) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. 1818(e)(7)(B), and section 8(j) of the Act, 12 U.S.C. 1818(j).

Background

Brickner served as a director and assistant cashier of the Bank from 1975 through 1982. On July 5, 1983, the FDIC issued a Notice of Intention to Prohibit From Further Participation (the "Notice") pursuant to section 8(e) of the Act, 12 U.S.C. 1818(e), against Brickner. The Notice alleged that Respondent had breached his fiduciary duties by failing to disclose to the entire board of directors of the Bank and Federal banking regulators the existence of unauthorized extensions of credit to a particular borrower and failing to prevent the continued extensions of credit to the borrower.

A formal administrative hearing was held before an administrative law judge from November 15 to November 23, 1983. On March 22, 1984, the administrative law judge issued a decision in which he recommended finding that Respondent had breached his fiduciary duty to the Bank by failing to disclose the unauthorized extensions of credit to the Bank's board of directors as well as to the Federal banking regulators and recommended the removal of Respondent as a director of the Bank.

After reviewing the recommended decision of the administrative law judge, the Board of Directors of the FDIC ("Board") on July 9, 1984, issued an Order of Prohibition from Further Participation ("Order of Prohibition") pursuant to section 8(e) of the Act, 12 U.S.C. 1818(e). The Board of Directors of the FDIC ("Board") found that Respondent Brickner's failure to report the illegal and unauthorized extensions of credit to the board of directors or to the regulators and his failure to take effective action to prevent another officer in the Bank from continuing to make illegal extensions of credit to a Bank customer constituted a breach of his fiduciary duties as a director and officer. The Order of Prohibition prohibited Respondent Brickner from participating in the conduct of the affairs of the Bank or any other FDIC insured institution without the prior written consent of the FDIC and the appropriate Federal banking regulator pursuant to

[{{8-31-97 p.TC-372}}](#) 12 U.S.C. § 1818(j) (amended by the Financial Institutions Reform Recovery and Enforcement Act of 1989 at 12 U.S.C. §§ 1818 (e)(7)(B) and 1818(j)). Respondent Brickner appealed the Board decision, but the United States Court of Appeals for the Eighth Circuit affirmed the Board decision in 1984 finding that Brickner's conduct constituted continuing disregard for the safety or soundness of the Bank. *Brickner v. Federal Deposit Insurance Corporation*, 747 F.2d 1198 (8th Cir. 1984).

Prior Applications

Respondent has filed several previous requests to obtain approval to re-enter banking. On June 19, 1985 and March 21, 1986, Respondent filed his initial two requests. These requests were both denied. Respondent filed on September 30, 1986, his third request to obtain written approval from the FDIC to

serve as an employee of the Bank. The Board denied his request on January 20, 1987, on the grounds that the extensive involvement of Respondent's family in the affairs of the Bank for a long period of time, combined with the proposed position which Respondent would occupy, would place Respondent in the position of having an opportunity of exercising substantial influence and control over the affairs of the Bank. See *Docket No. FDIC-83-153e*, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

On February 19, 1987, Respondent filed a request for reconsideration of the January 20, 1987 denial. The Board issued a denial of Respondent's request on August 9, 1988, on the grounds that Respondent's participation in the conduct of the affairs of the Bank would not be in the best interests of the Bank or its depositors in light of the financial condition of the Bank and the proposed position which Respondent would occupy. *Docket No. FDIC-83-153e*, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

The Present Application

By letter dated December 27, 1995, Respondent Brickner made application to the FDIC for written consent to a modification or termination of the Order of Prohibition. By his application, Brickner is seeking to become a director of the Bank. In support of his application to serve in this position, Respondent Brickner stated that he would not be directly involved in the making of loans since the board of directors does not originate loans. As was stated in the Application:

Rather, the Board approves loans to Bank officers and renewals and restructures of classified loans after preliminary approval from the loan committee. *The Board's participation in the lending function is therefore as an oversight committee rather than as originators.* (Emphasis supplied.)

Application at 2. Further, Respondent stated that the Bank no longer is considered a problem bank by the regulators and that his family only owns a total of twelve percent (12%) of the outstanding shares of stock in the Bank and those shares are subject to a voting agreement with other individuals who own a greater percentage of the shares of stock in the Bank.

FINDINGS OF FACT

In his application for modification or termination of the Order of Prohibition, Respondent Brickner set forth several grounds for requesting such relief. First, Brickner states that with regard to his removal from banking in 1983, he was never directly involved in the unauthorized credit extensions approved by Mr. Seurer which resulted in substantial losses to the Bank. In addition, Respondent states that since his removal, he has been running an insurance agency in Hoven, South Dakota, and that he has been active in community affairs, serving on the local school board for seven years, presiding as president of the Hoven Community Development Association for ten years and participating in the Hoven Service Club.

Further, Respondent asserts that the Bank is no longer a problem bank and that the Bank's directors have served for many years on the Bank's board. With regard to his interest in the Bank, Brickner states that he owns 129 shares out of total of 2,100 shares of stock which are subject to a Buy-Sell Agreement ("Agreement"). The Agreement requires that the shares be voted as a block along with the other shares in the Agreement.

DECISION AND ORDER

Section 8(e)(7)(B) of the Act states in pertinent part:

(7) INDUSTRYWIDE PROHIBITION.— (B) EXCEPTION IF AGENCY PROVIDES WRITTEN CONSENT.—If, on or after the date an order is issued under this [{{8-31-97 p.TC-373}}](#) subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of —

(i) the agency that issued such order; and (ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent.

12 U.S.C. 1818(e)(7)(B).

To meet this burden, Respondent must demonstrate: (1) his fitness to participate directly or indirectly in the conduct of the affairs of an insured depository institution; (2) that his participation would not pose a risk to the institution's safety and soundness; or (3) that his participation would not erode public

confidence in the institution. See *In the Matter of Charles E. Floyd*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5177, A-1976 (1992); *In the Matter of Frederick M. Pfeiffer*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5193A, A-1656; *Docket No. FDIC-83-153e*, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

Respondent Brickner in a telephone interview with senior management in the Kansas City Regional Office on February 26, 1997, stated that he feels he has been rehabilitated. Respondent stated that he has served in positions of trust in the community for the past thirteen years. Respondent stated that evidence of this is the following: (1) serving as an elected member of the local school board for seven years where he was involved in setting tax rates, adopting and approving budgets, handling employee and personnel issues and ensuring that the school district functioned efficiently and effectively; (2) serving as an elected member of the Board of the Hoven Community Development Authority for ten years where his duties included selling a bond issue to obtain seed money to stimulate SBA loans to local businesses; (3) operating an insurance agency for the past eleven years; and (4) serving with the South Dakota Bankers Association Insurance Division approximately four years ago. Further, in the interview Respondent acknowledged his wrong-doing in the Bank fourteen years ago and expressed remorse at having caused so many problems for the Bank and his family.

Upon review of the record as a whole, the FDIC finds that Respondent Brickner has presented sufficient evidence to obtain consent from the FDIC to become an institution-affiliated party pursuant to section 8(e)(7)(B) of the Act, 12 U.S.C. 1818(e)(7)(B). First, Respondent and his family have sold most of their interest in the Bank and their present holdings of twelve percent of the total outstanding shares of stock are subject to a voting agreement and must be voted with other individuals who own a greater percentage of the shares of stock in the Bank. Further, the financial condition of the Bank is satisfactory and Respondent has stated that he does not intend to become involved in the daily operations of the institution. Finally, Respondent has acknowledged his wrongdoing and expressed remorse for all the problems he caused at the Bank. The conduct for which Respondent was removed occurred over fourteen years ago and in those intervening years, Respondent has served in positions of trust in the community as well as run his own insurance agency. Based upon the foregoing, the FDIC sees no reason to object to Respondent's request to serve as director of the Bank.

Respondent is reminded, however, that banking depends upon the commitment to the highest standards of fiduciary duty long required by law for bankers. See *Briggs v. Spaulding*, 141 U.S. 132 (1891); *Docket No. 85-191k* FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5072, A-964, A-975; *Docket No. 85-356e*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5112, A-1228, A-1235; See also American Bankers Association, *Focus on the Bank Director*, 97-125 (1984); Schlichting, Rice & Cooper, *Banking Law*, 6.04 (1984). Directors of a bank are required to exercise ordinary care and prudence in the administration of the bank's affairs. *Briggs v. Spaulding*, 141 U.S. at 165-166. They have a duty to manage the bank and it is negligence to leave the management of its affairs...up to others. See *Heit v. Bixby*, 276 F.Supp. 217 (E.D. Mo. 1967). As was [{{8-31-97 p.TC-374}}](#) stated by the Court of Appeals for the Sixth Circuit:

[I]t is not unusual for banks to meet disaster through malfeasance of trusted officials. This is one of the dangers to be apprehended and guarded against. For this reason the law requires and depositors have a right to expect that directors should retain and maintain a reasonable control and supervision over the affairs of the [b]ank. ...In the discharge of this duty the directors are required not only in the observance of their official oath but by common law...to use ordinary diligence; and by ordinary diligence is meant, that degree of care demanded by the circumstances. They have their own responsibilities which they may not put aside.

Atherton v. Anderson, 99 F.2d 883, 888 (6th Cir. 1938).

Accordingly, the request dated December 27, 1995, is hereby approved for Respondent to serve as director of Bank of Hoven, Hoven, South Dakota. The consent so granted is limited to Respondent's duties as director at the Bank and does not constitute consent to engage in any other conduct not specifically authorized by this order which may violate the Order of Prohibition or section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e) (7)(A).

Pursuant to delegated authority. Dated at Washington, D.C. this 18th day of June, 1997.