



Home Top News
Bloomberg

BofA's Lewis Faces Squeeze by Cuomo Over Merrill Deal (Update1)

February 05, 2010, 12:37 PM EST

(Adds Fed's rejection of MAC, length of Moynihan's tenure as general counsel, starting in the 12th paragraph.)

By David Mildenberg and Karen Freifeld

Feb. 5 (Bloomberg) -- Kenneth D. Lewis, who presided over two bailouts at Bank of America Corp., now stands as the only chief among the biggest U.S. banks officially accused of wrongdoing during the financial industry's near collapse.

New York Attorney General Andrew Cuomo filed a civil fraud case yesterday against Lewis, the bank's chief executive officer until December, ex-Chief Financial Officer Joe Price and the company itself. They allegedly deceived investors and taxpayers in 2008 by not disclosing losses at Merrill Lynch & Co. before shareholders voted on the firm's pending takeover, and using those losses to extract more bailout funds from U.S. regulators, Cuomo said during a news conference and in court filings.

"Ken Lewis is the poster child -- or scapegoat -- for the excesses of the past," said Mark Williams, executive-in-residence at Boston University and a former bank examiner. While Lewis didn't push as deeply as some rivals into mortgage-backed securities, "he made bad strategic decisions" by overpaying for Merrill Lynch and subprime home lender Countrywide Financial Corp., Williams said.

Lewis, 62, retired after criticism of the Merrill takeover, joining more than half a dozen peers who left or lost their jobs amid \$1.7 trillion of losses tied to the global financial crisis. Among them were Citigroup Inc.'s Charles O. Prince, Merrill Lynch & Co.'s E. Stanley O'Neal, Lehman Brothers Holdings Inc.'s Richard S. Fuld and Wachovia Corp.'s G. Kennedy Thompson, none of whom faces legal action like Cuomo's.

'Misguided' Lawsuit

Lawyers for Lewis, Price and Charlotte, North Carolina-based Bank of America said Cuomo erred in bringing the 86-page complaint. New York's action is "badly misguided," said Mary Jo White, the former federal prosecutor who is defending Lewis, in a statement. "There is not a shred of objective evidence to support the allegations."

Industry CEOs previously singled out by enforcement officials included Angelo Mozilo, the former head of Countrywide. The U.S. Securities and Exchange Commission accused Mozilo of civil fraud in June 2009, saying he publicly reassured investors about Countrywide's loans while expressing doubts internally about their quality, and selling about \$140 million of shares.

Mozilo has said he didn't do anything improper, and the case is pending. Bank of America, ranked first in the U.S. by assets and deposits, bought Countrywide in 2008, and Mozilo didn't stay with the combined firm.

SEC Case

Cuomo moved against Bank of America as the SEC announced a separate settlement of claims that the bank misled shareholders about bonuses and losses at New York-based Merrill. The bank agreed to pay \$150 million and strengthen corporate governance; no executives were cited individually.

Cuomo's case concerns events leading up to the January 2009 purchase of Merrill Lynch, a deal that Lewis crafted in September 2008 as Lehman Brothers collapsed and regulators were trying to save the rest of the financial system.

According to Cuomo's complaint, the bank failed to tell its own stockholders that losses at Merrill Lynch were piling up before they voted to approve the deal in December, and didn't disclose plans for the brokerage to pay \$3.57 billion in bonuses covering "the worst year in Merrill's history."

The bank then pointed to those losses, which ultimately surpassed \$15 billion for the fourth quarter of 2008, and "manipulated" federal regulators into providing bailout funds, the complaint said. Lewis and Price did this with "an empty threat to terminate the merger," citing a clause that allowed the deal to be aborted if there were so-called material adverse changes, the complaint said.

MAC Attack

Lewis, Price, 48, and Brian Moynihan, 50, who has since become CEO, "calculated that if they threatened to call a MAC to get out of the deal, the federal government would counter with more taxpayer funds out of a concern for the greater economy," the complaint said. The bank knew it probably had no legal grounds to invoke the clause, according to the complaint.

Regulators weren't swayed by the MAC threat, according to testimony and documents given to Congress last year. Treasury Secretary Henry Paulson rejected the validity of a MAC and said the Federal Reserve might oust Lewis if the bank proceeded with that plan, Paulson testified last year. Fed

2/12/2010

BofA's Lewis Faces Squeeze by Cuomo...

Chairman Ben S. Bernanke concluded "the MAC threat is irrelevant because it's not credible," according to an e-mail from Richmond Fed President Jeffrey Lacker disclosed to Congress.

Moynihan's Status

Moynihan, who succeeded Lewis as CEO on Jan. 1, isn't under investigation in Cuomo's case and has been "candid" with the attorney general's office, according to David Markowitz, Cuomo's special deputy for investor protection. Moynihan was the bank's general counsel for six weeks in December 2008 and January 2009 as it negotiated with U.S. officials for \$20 billion of bailout funds. Price has since been named head of the consumer unit at Bank of America.

Bank of America spokesman Robert Stickler said Cuomo's office "has no intention" of targeting Moynihan. "They believe he was not complicit in their scenario, which is based on snippets of facts taken out of context and at times embellished," Stickler said.

The complaint said Bank of America was advised to tell investors about the losses as early as November by Timothy Mayopoulos, its original general counsel, as well as outside law firm Wachtell, Lipton, Rosen and Katz. Deloitte and Touche, Merrill's auditing firm, also suggested disclosure, according to the filing.

Counsel Departs

Price didn't tell Mayopoulos the full extent of Merrill's losses as they grew, and after Mayopoulos unsuccessfully sought to speak to Price about the increases in December, he was fired and replaced by Moynihan, the complaint said.

Corporate Treasurer Jeffrey Brown also "urged Price to make a disclosure to no avail," the complaint said. "When Price dismissed the Treasurer's advice, the Treasurer warned, 'I didn't want to be talking [about Merrill's losses] through a glass wall over a telephone.'" That's the method typically employed during visits to prison.

"Astonishingly, Price seemed to have forgotten this dramatic exchange," according to the lawsuit.

Brown later left the bank and was named corporate treasurer in 2009 at GMAC Inc., the auto and home lender.

Cuomo's allegation that Price improperly withheld information is "utterly false," according to a statement from Price's lawyers at Baker Botts LLP in Washington. Cuomo's case is "flatly contrary to the evidence and contrary to the conclusions of the Securities and Exchange Commission based on the same evidence," the statement said.

Martin Act

Cuomo, a possible candidate for governor in New York, based his civil case on New York's Martin Act, a securities law that permits civil and criminal penalties, and said the investigation was aided by Neil Barofsky, special inspector general for the Troubled Asset Relief Program, which dispensed federal bailout money.

"Ken Lewis doesn't live in New York, and if you are running for office like Mr. Cuomo, picking on a New Yorker such as Dick Fuld or someone else could be much more difficult," said Ray Groth, adjunct professor at Duke University's business school and a former First Boston Corp. investment banker. "Ken is very low on the schmooze factor and politicians love to be schmoozed, flattered and catered to."

Bank of America gained 2 cents to \$14.77 at 9:40 a.m. in New York Stock Exchange composite trading. The shares tripled in the past 12 months.

Merger's Aftermath

Analysts Richard Bove of Rochdale Securities Inc. and Betsy Graseck of Morgan Stanley have praised the Merrill acquisition for diversifying Bank of America's income and insulating the company from losses on consumer loans. Mark Calabria, director of financial regulatory studies at the Cato Institute in Washington, said Cuomo's complaint contradicts facts unearthed in other probes.

"There is an argument for saying investors were misled, but all evidence indicates the Fed and Treasury strong-armed Mr. Lewis into not saying anything," Calabria said.

The separate SEC settlement still has to be approved by U.S. District Court Judge Jed Rakoff. Last year, Rakoff called the SEC's initial settlement, which focused on the bank's bonus disclosures, neither fair nor reasonable and questioned why the bank's executives and lawyers weren't sued. The agency said it lacked evidence to bring claims against specific individuals.

--With assistance from Joshua Gallu in Washington and Margaret Popper in New York. Editors: Rick Green, Steve Dickson

To contact the reporter on this story: David Mildenberg in Charlotte at +1-704-331-6587 or dmildenberg@bloomberg.net;

2/12/2010

BofA's Lewis Faces Squeeze by Cuomo...

To contact the editors responsible for this story: Alec D.B. McCabe in New York at +1-212-617-4175 or amccabe@bloomberg.net; Rick Green in New York at +1-212-617-5804 or rgreen18@bloomberg.net.