



## Human Factor Risk: Mitigate or Litigate

October 2010

Banks are failing at an alarming rate and the number of problem banks continues to rise. Shareholders and taxpayers are shouldering the brunt of the losses and, as a matter of recourse, the FDIC and shareholders groups are suing the directors and officers of failed banks for negligence and mismanagement. In order to provide protection against the risk taking that has led to failed bank litigation, financial institutions must take sufficient steps to manage and mitigate the human factor risks that have contributed to the crisis.

Failed Bank  
Litigation  
Highlights  
Risk to Directors  
and Officers

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The white paper has been adapted from the author's Georgia Trial Lawyers Association presentation "New Frontiers in Expert Testimony: Quantifying Risk in Commercial Litigation" sponsored by the Institute of Continuing Legal Education on October 1, 2010.

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## About the Author



- Subject matter expertise gained at Oxford University
- 17+ years global business and entrepreneurship experience
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**T** Tyler D. Nunnally is Founder & CEO of Upside Risk Corporation, a risk management firm that helps financial institutions monitor, manage and mitigate financial risk taking. He is also Principal at Nunnally International, Inc., which provides risk management consulting services to the legal community. In this capacity, Tyler currently serves as a risk management consultant to the Gulf Oil Spill Litigation Group and has been interviewed by the Center for Public Integrity for commentary on the matter.

Tyler began his career in risk management when he joined the executive team of an Oxford University spin-off consultancy in England. Oxford Risk Research & Analysis Ltd. was founded in 2002 by a team of prominent academics to transfer behavioral economics and risk behavior research to industry. It is chaired by Lord John Krebs, Principal at Oxford's Jesus College and the former head of Britain's Food Standards Agency (and son of 1953 Nobel Prize laureate Hans Krebs).

Tyler was responsible for the commercialization of the company's intellectual property. He devised the concept and led the commercial development of a risk assessment that originated from Oxford University research. During this undertaking he gained expertise in behavioral economics and decision making under risk and uncertainty. Since returning to the U.S., Tyler built upon that knowledge and has developed new innovative ideas of how to apply the principles to practice. That knowledge and the realization of these ideas are the basis of Upside Risk.

As an expert in evaluating risk taking behavior, Tyler has led several research studies and is regularly invited to speak on the topics of behavioral economics, risk behavior profiling and decision making under risk and uncertainty. He was a recent guest lecturer at Emory University and at the Robinson School of Business at Georgia State University. He has also spoken on these topics to professional trade organizations such as the American Bankers Association, Virginia Bankers Association and the Georgia Trial Lawyers Association in the U.S., as well as the Institute of Actuaries and the Association of Insurance and Risk Managers in London.

Tyler was brought to Oxford for his entrepreneurial abilities. At age 24, he founded Nunnally International Trade, Inc., U.S. importer and distributor of Desna Crystal –a line of fine crystal glassware produced in the Czech Republic. In 1993, Tyler moved to Prague soon after the collapse of communism to establish international trade relations with

newly privatized glassware manufacturers. In 1994, he returned to the U.S. and over a ten year period expanded the business throughout the country, establishing a wholesale showroom presence in Atlanta, Chicago, Dallas, Kansas City, Los Angeles, New York, Seattle and San Francisco, and developed exports markets in over twenty countries.

He has also provided global business consultancy services to a portfolio of leading U.S. security technology companies, including Videolarm, which was recently acquired by Moog—one of the world's largest defense contractors. He established an office in Barcelona, Spain and consulted his clients on new market entry strategy, export finance and regulatory compliance issues. He led the companies' expansion into Europe and worked in cooperation with the U.S. Department of Commerce to identify sales channel partners in Britain, France and Italy.

Currently, Tyler resides in Atlanta with his Spanish wife and two young sons. He enjoys coaching his boys' soccer teams and dedicates his time to social entrepreneurship. He volunteers with a local YMCA program to help refugee children from Sudan adapt to their new life in America and he has served on the Board of Directors and as Co-President of Ulster Project Atlanta—a non-profit organization dedicated to peace and reconciliation in Northern Ireland.

He received his B.A. degree from the University of Georgia and earned a Master's in International Business, graduating with Honors, from the University of St Andrews (founded in 1413, St Andrews is Scotland's first university and consistently ranked amongst the Top 5 in Britain). Tyler serves on the Board of Directors of the Technology Association of Georgia (TAG) International Business society.

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## 1.0 Introduction

The white paper will examine failed bank litigation and the human factor risks that contributed to the crisis. High concentrations of residential and commercial real estate loans have been the primary cause of failed banks, with Construction and Development (C&D) loans taking an especially high toll.<sup>1</sup> But it is important to understand that it is not the failed banks that are facing litigation but rather the people who chose these high risk growth strategies that face legal action. Furthermore, it is important to consider that a bank does not have to fail before litigation ensues. Directors and officers can also face legal action for risk taking that has led to a significant loss of shareholder value.<sup>2</sup>

Decision making and risk taking are human factor risks that play prominently in all failed bank litigation to date. The author will demonstrate how behavioral economics and a branch of study known as ‘decision making under risk and uncertainty’ is being used to quantify the human factor risks and explain why the science should be used by banks to mitigate the risks. The pending failed bank complaint below shall serve as a case study.

*Federal Deposit Insurance Corporation, as receiver for IndyMac Bank, F.S.B. v. Scott Van Dellen, Richard Koon, Kenneth Shellem, and William Rothman (hereinafter referred to as FDIC v. Van Dellen et al).*

In summary, the FDIC filed a complaint against the directors and officers of the Bank’s Homebuilder Division (“HBD”) of IndyMac, F.S.B. in the Central District of California on July 2, 2010. The current estimated loss to the FDIC stemming from IndyMac’s failure stands at \$12.75 billion.<sup>3</sup>

## 1.1 Disclosures

In a statement of full disclosure, the author wishes to acknowledge his role as consultant to the Gulf Oil Spill Litigation Group (GOSLG). He recently completed a report on behalf of the GOSLG that has been incorporated into the class action punitive damage complaint, Gallo et al v. BP, PLC. Furthermore, in addition to his role as consultant to the Gulf Oil Spill Litigation Group, the author is also Founder & CEO of Upside Risk—a risk management consultancy that helps financial institutions monitor, manage and mitigate risk taking.

The author therefore has a vested interest in risk litigation and has different incentives than most in advocating risk mitigation. None the less, the author has made every effort to substantiate comments with evidence and refrain from injecting personal opinion into the paper. The economic case for risk mitigation is that it is ultimately cheaper than risk litigation.<sup>4</sup> The ethical reasons speak for themselves.

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1 <http://www.fdic.gov/bank/individual/enforcement/index.html>

2 [http://www.huffingtonpost.com/2010/04/24/goldman-sachs-shareholder\\_0\\_n\\_550478.html](http://www.huffingtonpost.com/2010/04/24/goldman-sachs-shareholder_0_n_550478.html)

3 FDIC v. Van Dellen et al, pg 6.

4 <http://blogs.wsj.com/deals/2010/06/16/bp-oil-spill-costs-20-billion-try-63-billion/>

## 2.0 A Breakdown in the System

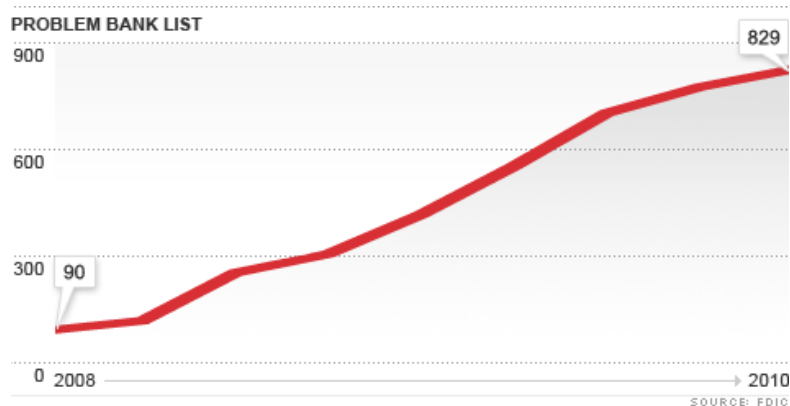
A familiar axiom in business school education is that the purpose of business is to make money. This is a hallmark of the capitalist system and it has traditionally worked very well. As a result, America has risen to become a great power and the country as a whole has generally prospered.

Every American citizen has a stake in the system and we support it through our tax dollars. To sustain the system we depend on our business leaders to make good decisions. The primary objective of any business leader is to maximize shareholder value. This is particularly true in public companies. The role of the board of directors is to establish risk management and business strategies. The job of the management team is to deliver it.

The global economic crisis has exposed a breakdown in this system. In the blind pursuit of greater profit, prudent risk management practices have been fully and wantonly disregarded. Many of the nation's financial institutions have either gone bust or been purchased by competitors at severely distressed prices, wiping out billions of dollars of shareholder value in the process. Directors and officers of financial institutions have a fiduciary responsibility to protect shareholder value and those who have not are now facing litigation as a consequence of their failures.

### 2.1 Risk Management Failures

The global economic crisis has clearly shown that financial institutions are not immune to risk management failures. As a result, the American public has been forced to bail banks out under the auspices of the U.S. government's Troubled Asset Relief Program (TARP). To date, 843 of the nation's banks have received a total of \$545,122,508,408 of taxpayer money.<sup>5</sup> In addition, 829 of the nation's banks are on the FDIC's "Problem Bank List"—nearly double the number from a year ago (see chart below).<sup>6</sup>



<sup>5</sup> <http://bailout.propublica.org/list/index>

<sup>6</sup> [http://money.cnn.com/2010/08/31/news/companies/fdic\\_problem\\_bank\\_list/index.htm](http://money.cnn.com/2010/08/31/news/companies/fdic_problem_bank_list/index.htm)

The judicial system will serve as the ultimate backstop to settle the resulting fallout of risk management failures. As the number of bank failures increases, the number of corresponding lawsuits will undoubtedly rise in relation. According to a recent report, around a quarter to half of all failed banks will likely see litigation brought against their directors and officers.<sup>7</sup> The FDIC is expected to target Directors & Officers (D&O) insurance policies held by the banks in many of the cases.

To end the cycle of bank failures and subsequent litigation, financial institutions must take steps to adequately monitor, manage and mitigate risk taking. The current risk management practices employed by many financial institutions are structurally deficient because they fail to account for the risk taking of their people. This is a human factor risk that too often goes unchecked. The proof to support that is evidenced by the failures themselves. If the human factor risks were properly mitigated then the global economic crisis could have been potentially averted in the first place. In this instance, there would be no need for the current failed bank litigation.

The comments of the former Fed Chairman, Alan Greenspan, help explain how failures in existing risk management practices contributed to the subprime crisis which is largely to blame for bank failures (critics will note that Mr. Greenspan's own economic policy decisions are likewise to blame). In an interview following the subprime meltdown, the former Fed Chairman wrote:<sup>8</sup>

"I do not say that the current systems of risk management or econometric forecasting are not in large measure soundly rooted in the real world... But these models do not fully capture what I believe has been, to date, only a peripheral addendum to business-cycle and financial modeling—the innate *human responses* that result in swings between euphoria and fear that repeat themselves generation after generation with little evidence of a learning curve"... This, to me, is the large missing 'explanatory variable' in both risk-management and macroeconomic models... Forecasters' concerns should be not whether human response is rational or irrational, only that it is observable and systematic".

As Mr. Greenspan points out in these comments, the "missing variable" in risk management is the failure to adequately account for human factor risks. Identifying the problem is a good start. Finding a solution to the problem it is made easier thanks to behavioral economics—a social science that helps to differentiate between "rational" and "irrational" decisions. Furthermore, behavioral economics research provides irrefutable evidence that irrational behavior is both "observable" and "systematic".

### 3.0 Behavioral Economics

The study of behavioral economics combines the scientific disciplines of psychology and economics, and it encompasses over half a century of empirical evidence. For several

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7 Hinton, Paul J. (2010), "Failed Bank Litigation", NERA Economic Consulting, March 16, 2010.

8 Greenspan, Alan. "We will never have a perfect model of risk", Financial Times, March 16, 2008.

decades, behavioral economists have been researching the human decision making process and have uncovered a number of underlying biases that cause people to make errors in judgment (hereinafter referred to a “judgment biases”). Researchers have discovered that all people are susceptible to judgment biases to varying degrees. Moreover, behavioral economists know that judgment biases adversely influence decision making under a variety of different circumstances.

Behavioral economics was first introduced by Carnegie Mellon University professor Herbert Simon in the 1950’s.<sup>9</sup> In 1978, Dr. Simon received a Nobel Prize in Economics for his life-long work that introduced the notion of “bounded rationality”—the fact that people are not preconditioned to always make perfectly rational economic decisions. Bounded rationality was a departure from traditional economic thinking. Economists had traditionally assumed that people always behave rationally and that people consistently make optimal economic decisions that derive maximum value.

The groundbreaking research of Daniel Kahneman and Amos Tversky expanded the work of Herbert Simon. Kahneman and Tversky lifted behavioral economics to greater heights and helped the study gain widespread acceptance throughout the scientific community. In 2002, Kahneman earned a Nobel Prize in Economics for his work in behavioral economics and a branch of study known as ‘decision making under risk and uncertainty’ (unfortunately Tversky passed away beforehand). Many other behavioral economists have since risen to prominence including, but certainly not limited to, Richard Thaler, Paul Slovic and Robert Shiller. Behavioral economics has now reached the mainstream. Several books on the subject made the New York Times Best Business Book Sellers List in 2009 (e.g. Nudge, Sway, Predictably Irrational, Freakonomics).

### 3.1 Quantifying “Negligent” Decisions

Poor business decisions are often derived from the same judgment biases that have been uncovered in behavioral economics research. For instance, judgment biases cause people to resist change, even when it is in their own best interest to do so (think American auto industry). They cause people to focus on the short-term without considering the long-term consequences of their actions (think subprime lenders).



Judgment biases are also responsible for making people misjudge risk, ignore warning signs and take risks that they would have been better off avoiding (think... too many to mention). These catastrophic examples show that business leaders are not immune to judgment biases.

By their very nature, judgment biases can lead to negligent behaviors. When others are harmed as a result of negligent acts people often rely on the judicial system for remedy of

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<sup>9</sup> Simon, Herbert (1957). "A Behavioral Model of Rational Choice", in *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting*. New York: Wiley.



the wrong and compensation for loss. This is certainly the case in failed bank litigation. In commercial litigation of this nature, behavioral economics expert testimony is critical because it helps to quantify “bad” or “negligent” economic decisions. The next section of the paper will explain how by highlighting examples found in the aforementioned complaint, *FDIC v. Van Dellen et al.*<sup>10</sup>

### 3.1.1 Time Discounting

The judgment bias known in behavioral economics as ‘time discounting’ is the tendency for people to discount the long-term for short-term gain.<sup>11</sup> It can lead to negligent behavior when people focus exclusively on the short-term benefits and fail to account for the possible long-term consequences of a decision. Below are examples of how it applies to accusations of neglect in the failed bank complaint:

- **FDIC v. Van Dellen et al**

61. HBD’s compensation of its account officers rewarded risk taking and encouraged production without regard for loan quality. Taken together with HBD’s other underwriting practices, HBD’s compensation of its account officers further worsened its situation. In essence, HBD encouraged “adverse selection” through underwriting and loan pricing practices and compensation of its account officers that rewarded account officers who brought the riskiest loans to HBD, and made it possible for those loans to be approved as long as customers were willing to pay a higher price. Of course, only customers rejected by other banks were willing to pay HBD’s prices.

63. Account officers’ commission plans also were administered in a way that encouraged them to take additional risks. For example, account officers received an additional 1% of the net income after tax for loans that produced ROEs of 24% or more. Higher ROEs were typically available on riskier loans with lower credit scores.

### 3.1.2 Confirmation Bias

‘Confirmation bias’ is when people seek out information that supports or re-affirms their existing beliefs and avoid information that may contradict it.<sup>12</sup> This judgment bias causes people to align themselves with like-minded individuals or “yes men” and to shun those who may question the conventional wisdom of the group. Confirmation bias is prominent in failed bank litigation because the defendants are accused of ignoring warning signs, disregarding dissenting advice and failing to conduct due diligence. Below are examples that can be found in the complaint:

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<sup>10</sup> It should be noted that some negligent decisions found in the Complaints involve one or more judgment biases. That is not uncommon.

<sup>11</sup> Laibson, D. (1997). "Golden Eggs and Hyperbolic Discounting". *The Quarterly Journal of Economics*, MIT Press, vol. 112(2), pages 443-77.

<sup>12</sup> Oswald, Margit E.; Grosjean, Stefan (2004). "Confirmation Bias", in Pohl, Rüdiger F., *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory*, Hove, UK: Psychology Press.

- **FDIC v. Van Dellen et al**

31. ...Van Dellen also directed credit officers to report to a single head credit administrator, Camp, who in turn was reporting to the CLO and lead Production officer, Rothman. This reorganization of HBD created the very blurring between credit and production functions that existed when Van Dellen first arrived at HBD in 2002, and about which regulatory agencies had previously complained. Both Koon and Shellem described Van Dellen's reorganization as having created a serious conflict of interest.

55. Hasty loan committee meetings left committee members little time to properly discuss complicated multi-million dollar transactions or thoroughly question account officers and credit officers about the details of the transactions.

59. ...Over time, HBD continually increased its ROE targets. Koon noted that this priced HBD out of the market for lower risk borrowers. Nonetheless, HBD kept increasing its ROE targets throughout its existence despite Koon's concerns.

### 3.1.3 Status Quo Bias

'Status quo bias' is a tendency for people to resist change—even if change is in their own best interest to do so.<sup>13</sup> Status Quo Bias is prominent in failed bank litigation because the defendants are accused of lowering their underwriting standards to meet growth targets. This led to a risk culture at HBD where rubber stamping loan applications and ignoring their own risk mitigation policies became the status quo way of doing business. Below are examples that can be found in the complaint:

- **FDIC v. Van Dellen et al**

44. HBD disregarded many of its own internal credit policies and regulatory guidance in approving loans...

45. Policies designed to reduce the Bank's overall risk exposure were often ignored...

47. ...For larger projects, this requirement could compel a borrower to seek multiple construction loans, limiting the Bank's exposure and requiring careful underwriting of each phase of the project. This requirement too was frequently waived.

48. HBD's policy recognized condominium financing as exceptionally risky. ...The policy further specified that condominium conversion loans must include re-margining requirements at origination if the DCR (excluding construction or rehabilitation costs) was less than 1.0. This policy also was frequently waived.

50. HBD also ignored regulatory guidance in its underwriting as much as it ignored its own internal credit policies...

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13 Kahneman, D., Knetsch, J. L. & Thaler, R. H. (1991). Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias. *Journal of Economic Perspectives*, 5, 1, pp. 193-206.

### 3.2 Decision Making under Risk and Uncertainty

In addition to uncovering and scientifically quantifying new judgment biases, Kahneman and Tversky also pioneered a branch of behavioral economics called ‘decision-making under risk and uncertainty’. In 1979, Kahneman and Tversky introduced ‘Prospect Theory’—a scientific breakthrough that explains the irrational way in which people behave when they are faced with economic conditions that involve risk.

Prospect Theory shows that people generally dislike loss twice as much as they like gains.<sup>14</sup> The abhorrence of loss often leads people to take greater risks in order to avoid loss. In the face of mounting losses, people will sometimes take on significantly greater risks to get back to a “reference point”. For example, if a person starts with \$1 million, and they lose \$500K of it, the individual will be prepared to take on significantly greater risk to get back to \$1 million they started with (e.g. “bet the farm”).

This risk propensity often leads people to take risks that they would have been better off avoiding and, in such cases, can lead to negligent risk taking. For instance, in the face of mounting losses people may decide to “double down” their bets (i.e. sunk costs) without fully considering the consequences of the actions, thereby increasing the magnitude of the losses— sometimes with catastrophic effect (think Barings Bank).

### 3.3 Quantifying Risk Appetite

Decision making under risk and uncertainty research also explains the roles that risk preferences and risk appetite play in deciding whether a risk is worth taking, and in determining how much people are willing to stake on it. This is very important in risk management, especially in cost and benefit analysis. The prudent risk management approach is to weigh the risks and rewards equally.

“Excessive” risk appetite and “reckless” risk taking often arise when risks are mismanaged, or ignored, in the pursuit of greater rewards. This is highly relevant in expert testimony because it enables the expert to analyze the decision making processes of a defendant and testify as to whether a defendant exercised proper due diligence and sound judgment when deciding how to manage and mitigate risk. It is also vital in helping to quantify what is an acceptable level of risk and what is not.



In the failed bank litigation, cost and benefit analysis expert testimony is critical because the defendants are accused of ignoring their fiduciary responsibilities in the pursuit of rapid growth, factors that ultimately led to the banks collapse. As a consequence,

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14 Kahneman, D., Tversky, A. (1979) “Prospect Theory: An Analysis of Decision under Risk”, *Econometrica*, XLVII: 263-291.

directors and officers are accused of negligently pursuing the benefits without exercising duty of care. Below are examples that are found in the Complaint:

- **FDIC v. Van Dellen et al**

33. Shortly after assuming command of HBD, Van Dellen announced a plan to grow HBD. Production goals increased for account officers every year under Van Dellen until the latter part of 2007. This was true despite a broad consensus amongst HBD production officers that production targets needed to be lowered...

35. Perry frequently forwarded news articles warning of deteriorating conditions in the home builder market and cautioning Van Dellen to “be careful.” In particular, Perry forwarded articles to Van Dellen such as the following:

a. March 3, 2006 article in The Wall Street Journal. Perry underlined portions of this article that discussed reduced sales in single-family homes and the highest level of unsold new homes in nearly a decade. Perry made a handwritten note on the article stating “Be careful, especially on our new construction projects.”

b. July 26, 2006 article in MBA NewsLink. Perry forwarded this article noting Weyerhaeuser’s plans to scale back its home builder unit. Perry cautioned Van Dellen to “err on the side of being ‘safe’ . . . as it is not a time to stretch for volume”...

38. As early as 2005, HBD’s management indicated repeatedly to the Bank’s board, the regulators, and outside consultants that it was taking steps to tighten underwriting, even though, as discussed following, it was not in practice doing so...

42. Despite the warnings detailed above, Van Dellen continued to push for growth, announcing his strategic initiative for 2007 in an October 20, 2006 e-mail. Van Dellen asserted that HBD needed to “grow, expand and diversify faster to keep up with the bank and leverage our very solid platform. Our competitors may be retreating or exiting. Now is the time to pounce...”...

43. Only five weeks later, on November 30, 2006 at a meeting of the Bank’s senior managers, which included Van Dellen, corporate management warned of the declining market, describing among other things, a decline of 9.7% in the median price of new homes since September 2005 and mentioning that home builder volumes and margins were “under pressure.” The presentation was entitled the “wall of worry.” Nonetheless, Van Dellen continued, as late as the first quarter of 2007, to push for HBD to “grow production at double digit rates over the next five years.”

#### **4.0 Human Factor Risk Mitigation and TARP Funds**

When risk appetite goes unchecked at the corporate level, individual acts of negligence often coincide. Lending, investing and trading are all elements of the banking business that entail human decision making and risk taking. As the previous section of the paper

makes clear, a lack of mitigation of these human factors risks plays a prominent role in failed bank litigation. It is critical to take sufficient steps to mitigate human factor risks in order to avoid litigation and protect shareholder value; this is particularly true for recipients of TARP funds (some exceptions not withstanding).

Acceptance of TARP funds may be construed as an explicit admission that a bank took risks that it would have been better off avoiding. Consequently, this could increase a bank's exposure to future negligence litigation. In the future, should the bank incur significant losses in the course of normal business operations involving risk taking, the directors and officers could be sued for acts of negligence and/or mismanagement if the bank cannot demonstrate that it has instituted adequate measures to mitigate their human factor risks in the interim (the author can personally attest to this linkage as it is being used in the aforementioned Gulf oil spill complaint, Gallo et al v. BP, PLC, where past risk management failures are alleged to show a pattern of negligent behavior).

While behavioral economics is very useful in failed bank and other kinds of commercial litigation, it is also very valuable in risk mitigation. Upside Risk has developed a portfolio of products and services that utilize behavioral economics to help financial institutions monitor, manage and mitigate financial risk taking at the individual and corporate levels.

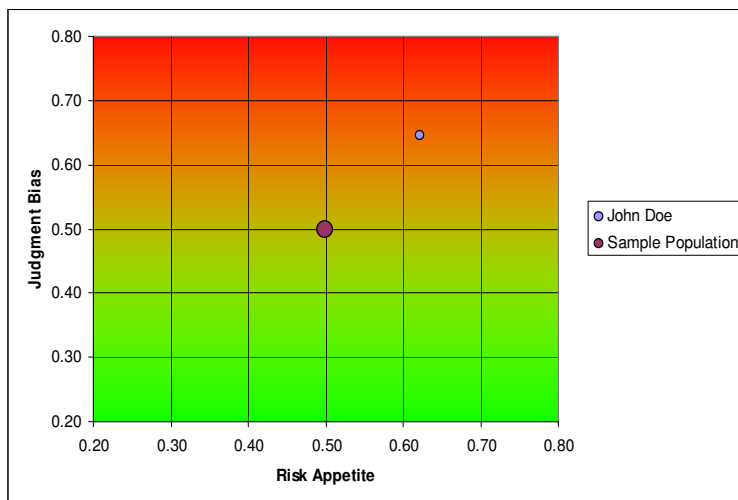
#### 4.1 Risk Mitigation at the Individual Level

Upside Risk has developed an innovative new psychometric risk assessment in collaboration with an Emory University behavioral economics professor that creates a person's risk profile.

The Judgment Risk Indicator assesses whether an individual is susceptible to judgment biases such as status quo bias, confirmation bias and time discounting. It also provides a measure of their risk appetite when spending company money. Together these determine whether a person is capable of taking good calculated risks that result in strategic advantages and uncovers risk characteristics in people that can lead to loss, litigation—or even catastrophe.

The Judgment Risk Indicator and corresponding report are delivered and scored online utilizing state-of-the-art algorithms and internet technologies. It is also used in training and development programs designed to mitigate risk and boost job performance.

JUDGMENT RISK INDICATOR results



It adds shareholder value in the following ways:

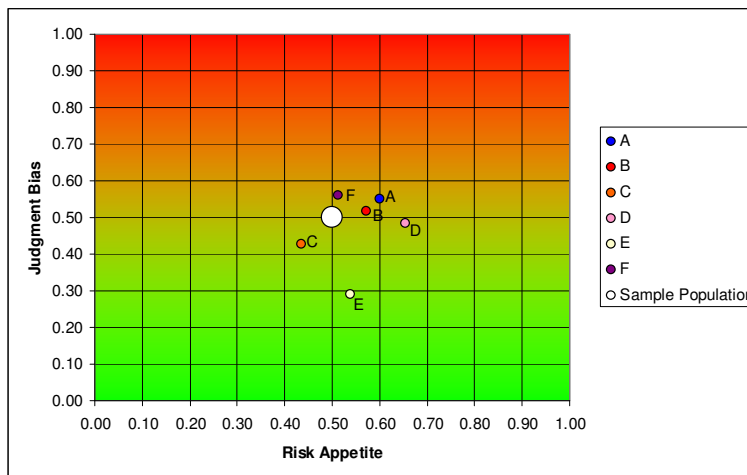
- First line of defense in an organizations hiring practices by raising red flags to individuals or groups of concern
- Identify the risk characteristics that are vital to success and failure
- A powerful new tool than can be used to identify and develop talent
- Shows due diligence and thus provides protection against litigation by demonstrating that sufficient defenses are place to mitigate human factors risks

## 4.2 Risk Mitigation at the Corporate Level

Upside Risk provides an internal audit of the risk profiles of a financial institution's leadership, much like an internal audit of an organization's finances. This HRisk Analytical service enables financial institutions to benchmark the risk profiles of its key decisions makers, such as: directors, officers or a department (e.g. underwriting).

Benchmarking the risk profiles of business leaders helps to identify areas of concern and it uncovers points of strengths. Just as taking too much risk led to many of the problems faced by banks today, being too risk adverse leads to problems of their own—like falling profits. Finding the right balance between caution and a growth is critical to business success. Thus, having the right people to devise and deliver the strategy leads to competitive advantages that maximize shareholder value:

**GROUP BENCHMARK SCORECARD results**



- **Performance Ranking**
- **Team Optimization**
- **Talent and Leadership Development**
- **Optimal Risk Profiling**

Moreover, mitigating human factor risk at the corporate level protects against the kinds of negligence and mismanagement that lead to litigation. For instance, the defendants in the failed bank litigation are accused of following high risk growth and underwriting strategies. High risk business strategies correspond directly with the high risk appetites of the business leaders who devise and implement the strategy. The defendants in the

complaint FDIC v. Van Dellen et al may have difficulty pointing to any specific internal controls or policies that were in place to measure and monitor the risk appetites of the people who made the high risk decisions.

### 4.3 Protecting Shareholder Value

Upside Risk's services provide better assurances that directors and officers are exercising their fiduciary responsibilities and thereby protecting shareholder value:

#### GOVERNANCE:

- Places tighter internal controls on financial risk-taking across the organization
- Provides greater oversight on financial risk-taking of key decision makers
- Assurances of due diligence in employment practices
- Reduce liabilities associated with damaging decisions and risky behavior

#### CULTURE:

- Communicates an organization's risk appetite internally – and externally
- Aligns risk appetite of decision makers to the risk culture of organization

#### COMPLIANCE:

- Demonstrates to regulators, shareholders and other stakeholders that there is a process in place to monitor, manage and mitigate Judgment Risk



### 5.0 Conclusion

The key to avoiding litigation is implementing effective risk management practices. Failed bank litigation and the global economic crisis should serve as a wake up call that risk taking is a human factor risk that must be mitigated. Failure to do so has already come at a very high cost to directors, officers and shareholders alike—not to mention the global economy and society at large.

As the economy continues to struggle, the number of bank failures will undoubtedly increase. As failed bank litigation mounts, the testimony of behavioral economics and human factor risk experts will become an ever more important part of the legal process. A recent report on failed bank litigation notes:<sup>15</sup>

<sup>15</sup> Hinton, Paul J. (2010), "Failed Bank Litigation", NERA Economic Consulting, March 16, 2010, pg 25.

“As professional liability claims are litigated, it will be necessary to determine whether professional conduct was unusually risky or imprudent, to distinguish different contributing causes of bank failure, and to quantify the effect of negligence”.

Behavioral economics can work both ways. Supporting the status quo, with its known risk management deficiencies, is a recipe for continued failures. Learning from past mistakes and embracing change for a better future defines true leadership. Whether behavioral economics works for your organization or against it can be the difference between a “good” decision and a “negligent” one.

For further details visit **[www.Upside-Risk.com](http://www.Upside-Risk.com)** or call +1.404.320.6047