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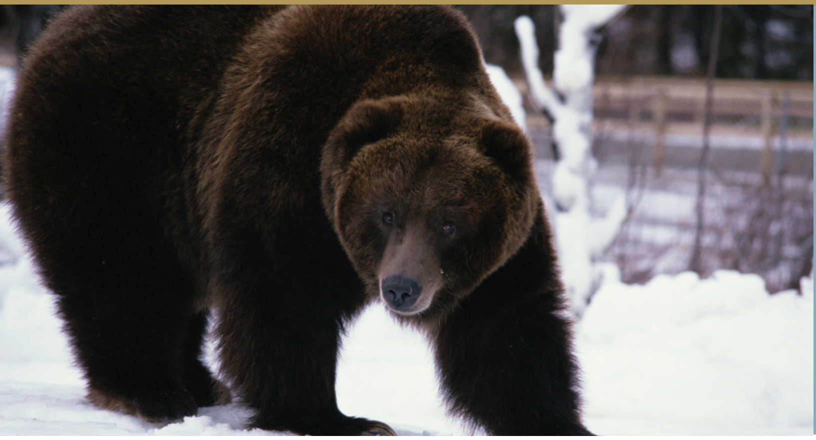
WINTER WARNING



Between a Rock and a Hard Place

In a CBS News/60 Minutes interview televised in October, 2008, journalist Leslie Stahl had this verbal exchange with former Bank of America President and Chief Executive Officer, Ken Lewis.

This writer has since reflected upon this interview many times and marveled how prophetic it was for Mr. Lewis' future.

"You always wanted Merrill Lynch," Stahl remarked.

"We've always thought that was the best thing for us," Lewis replied.

"You were drooling for Merrill Lynch," she stated.

"We have always felt it was," he emphasized.

"Do you think your job is secure?" Stahl asked.

Lewis laughed, "I don't think about that question."

"That doesn't enter your mind?" Stahl probed.

"No. No." Lewis insisted.

This interview occurred about a month after the Bank of America announced in late September, 2008, that it was taking over Merrill Lynch for about $30 billion (U.S.). At the same time, Merrill Lynch was continuing to suffer mounting losses which would eventually exceed $14 billion (U.S.) just prior to the December 5, 2008 shareholder meeting, convened to vote on the BOA Board of Directors' recommendation to approve the takeover. However, the Bank of America failed to disclose those significant and increasing losses to their to its shareholders prior to the December 5th.vote. Naturally, this begs the question why not? The only guess we can fathom is that, despite the Merrill losses, Mr. Lewis did not want to risk a B of A shareholder rejection of the merger. At this point, we suggest that Mr. Lewis' ego got the better of him. He had already stated: "Merrill Lynch was the strategic opportunity of a lifetime and its power and market share would be a thing of beauty over the longer term of one and a half years." Having scooped Merrill Lynch from under the noses of the big Wall Street bankers in New York, no longer would he be considered a second-tier banker in Charlotte, North Carolina. With this takeover coup, at least Mr. Lewis had become a banking legend in his own mind.

However, as the Merrill Lynch losses continued their inexorable climb, eight days after the merger was approved on December 5th. Mr. Lewis disclosed to regulators that the B of A had a legal basis to terminate the merger through a material adverse change (MAC) clause in the Merrill Lynch agreement and sought additional government funds to complete the takeover. Fearing more financial turmoil, not only did the regulators want see the Merrill deal completed, but they also verbally committed to supporting it with more taxpayer dollars. Moreover, the regulators (read Hank Paulson, Treasury Secretary and Federal Reserve Chairman Ben Bernanke) allegedly threatened Mr. Lewis with his job if he triggered the Merrill MAC clause and/or disclosed the Merrill losses. Ultimately, the 62-year-old Mr. Lewis retired on December 31, 2009. According to a recent securities filing by the Bank of America, Mr. Lewis is eligible for about $57 million (U.S.) in pension benefits, $11 million (U.S.) in deferred compensation and an additional $4.6 million (U.S.) in vested and invested company stock.

In a cryptic twist of fate, however, Mr. Lewis now finds himself 'between the devil and the deep blue sea.' Last month, New York Attorney General Andrew Cuomo launched a 90-page civil lawsuit under New York's Martin Act, against Mr. Lewis, for allegedly defrauding investors and the federal government when buying Merrill Lynch. Mr. Cuomo also sued Bank of America's then chief financial officer Joe Price and the B of A itself, for not disclosing about $16 billion (U.S.) in losses Merrill had incurred before it was bought by the Bank of America, in an effort to get the merger approved. Mr. Cuomo alleges that "Once the deal was approved, Bank of America's management manipulated the federal government into saving the deal with billions in taxpayer funds by falsely claiming that they intended to back out of the deal through a clause in the Merger Agreement. Ultimately, this was an enormous fraud on taxpayers who ended up paying billions for Bank of America's misdeeds. Throughout this episode, the conduct of Bank of America, through its top management, was motivated by self-interest, greed, hubris and a palpable sense that the normal rules of fair play did not apply to them. Bank of America's management thought of itself as too big to play by the rules and just as disturbingly, too big to tell the truth."

Concurrent with the above lawsuit, the Bank of America had agreed to pay $150 million (U.S.) in order to settle lawsuits by the Securities and Exchange Commission (SEC) over the Merrill takeover, pending court approval, without admitting any wrongdoing. In addition, the B of A agreed to bolster its corporate governance controls, including by retaining an independent auditor to determine its internal disclosure rules, retaining legal counsel to oversee its disclosures and giving shareholders a non-binding "say on pay" vote over executive compensation. In formulating his ruling, U.S. District Judge Jed Rakoff had requested material related to the termination in December, 2008 of the B of A general counsel, Timothy Mayopolous, and the "extent of participation" after November, 2008 by the bank's attorneys at Wachtell Lipton Rosen & Katz in evaluating the disclosure issues raised by reports of increased losses at Merrill Lynch prior to the merger approval date. In his ruling last week, Judge Rakoff harshly criticized, but approved the $150 million (U.S.) settlement between the Bank of America and the SEC, resolving claims the bank should have disclosed billions of dollars of losses incurred by Merrill before it was acquired by the bank. Judge Rakoff stated the fine was "paltry" when considering the Merrill merger "could have been a bank-destroying disaster if the U.S. taxpayer had not saved the day." The judge criticized the bank for "hiding material information from its shareholders" and soundly reprimanded the SEC for being "content with modest and misdirected sanctions."

According to informed sources close to the situation, if his case goes to trial, Mr. Lewis' legal defense team will call as witnesses former U.S. Treasury Secretary Hank Paulson and Federal Reserve Chairman Ben Bernanke hoping they will reveal that Mr. Lewis did not mislead the federal government concerning Bank of America's deteriorating financial condition, in the wake of the Merrill Lynch merger. Did Messrs, Paulson and Bernanke threaten Mr. Lewis with the loss of his job if the B of A exercised the Material Adverse Change (MAC) clause? Is Mr. Lewis being truthful when he contends that he didn't disclose the mounting Merrill losses on the advice of the bank's attorneys? The answers to these and many other questions surrounding the Merrill merger will likely be forthcoming from a courtroom venue, because at least for the present, according to a person close the defense team, Mr. Lewis does not want to settle.

Written By: Christopher Funston