

Official Committee of Unsecured Creditors of BankUnited Financial Corp. v. FDIC
(In re BankUnited Financial Corp., et al.)
10-03075-BKC-LMI

Only the FDIC as receiver for BankUnited, FSB (the “Bank”) may bring derivative claims against the Bank’s former officers and directors for breach of fiduciary duty. However, the Committee of Unsecured Creditors on behalf of the bankruptcy estate of the Bank’s Holding Company may bring direct claims against former officers and directors of the Holding Company even though these same persons were officers and directors of the Bank. In arriving at these conclusions, the Court set forth a two-part test to determine whether a claim brought by a bank holding company against officers and directors of the holding company, who also happen to be officers of a failed corporate subsidiary, is a direct or derivative claim. First, the Court will examine the complaint to see if the complaint states a cause of action for breach of fiduciary duty by the holding company officer or director to the holding company. Second, if the act or failure to act can be viewed as a breach of the duty to the subsidiary by the same person in his or her capacity as a director or officer of the subsidiary, then is the injury alleged one that could only occur at the parent level or is it injury shared with, or occurring solely at, the subsidiary level. If the answer to either of these questions is “yes,” then the claim is direct. If the answer to both these questions is “no,” then the claim is derivative.