

Banking Litigation

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NEWSWIRE

Mortgage Lending Actions Against Countrywide Financial Are Settled

In an agreement announced in early October 2008, Bank of America settled claims arising out of the mortgage lending practices of Countrywide Financial, which Bank of America acquired in July. The mortgage lending settlement ends lawsuits filed by state attorneys general against Countrywide.

Background

Lawsuits filed by state attorneys general earlier this year alleged that Countrywide's mortgage origination and servicing businesses violated state consumer protection laws. In their complaints, the states focused on Countrywide's marketing of payment option

adjustable rate mortgage ("ARM") products, hybrid ARMs, no-interest ARMs, and home equity lines of credit, alleging that Countrywide lowered its underwriting and origination standards. Additionally, they alleged that Countrywide's marketing practices included emphasizing low initial payments and concealing later higher payment levels, misrepresenting the term of initial payment periods, and misrepresenting prepayment penalties.

Relying chiefly on state unfair and deceptive acts and practices statutes, the states argued that Countrywide's lending operations illegally misrepresented the true costs of the loans. The statutes vary by state, but generally prohibit deceptive statements or omissions of material facts, without requiring proof of

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Countrywide Financial

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actual inducement. *E.g.*, 815 Ill. Comp. Stat. 505/2. The California attorney general also claimed that Countrywide's cooperation with and payment of kickback fees to mortgage brokers who recommended unaffordable mortgages violated that state's unfair competition statute. Cal. Bus. & Prof. Code §17200. Illinois added claims against Countrywide's alleged equity-stripping refinancing loans under the state fairness in lending statute. 815 Ill. Comp. Stat. 120/1-6. Connecticut included claims under provisions of its state banking statute that prohibit material misstatements or fraud in the origination of mortgages. Conn. Gen. Stat. §§ 36a-50(b), 494, 517.

The Settlement

When Bank of America acquired Countrywide, it announced that Countrywide would cease certain lending practices. These commitments have been formalized as part of the settlement. As part of its agreement with the states, Countrywide agreed not to offer subprime mortgages, mortgages with negative amortization and, with certain exceptions, "no-documentation" or "low-documentation" loans. Countrywide also agreed to maintain programs to identify and contact homeowners in danger of delinquency.

The settlement further provides for a loan modification program. Depending on the form of loan, modifications may include writing down the principal balance to 95% of the current value of the property, converting to fixed-rate mortgages, cutting variable interest rates to as low as 2.5%, with limits on future rate increases, and extending interest-only or introductory-rate payment periods. Countrywide also agreed to waive prepayment penalties and fees for late payments, delinquency and loan modifications. Loan modifications are subject to the approval of investors in the mortgage securities, in cases where Countrywide does not have discretion to seek alternatives to foreclosure.

Those eligible for relief under the settlement are those seriously delinquent owner-occupiers with pay option ARMs or subprime loans, whose debt under the first lien mortgages are more than 75% of the value of the property's appraised value. The loan must have been originated before December 31, 2007, and be within Countrywide's servicing portfolio. Modifications under the settlement must be "affordable," meaning that the borrower's total payments and escrow in the first year must be less than 42% of annual income.

Under the agreement, Countrywide will offer relocation assistance to any borrowers who voluntarily depart their homes due to a foreclosure sale. In addition, Countrywide agreed to create a \$150 million Foreclosure Relief Payment Program. The program will compensate borrowers who have already lost their homes or who were more than 120 days delinquent at the time of the settlement, and who made six or fewer payments over the course of their loan — effectively, those who were offered unaffordable mortgages. The \$150 million will be distributed by the states.

Bank of America negotiated with a team of eleven state attorneys general, led by attorneys from California and Illinois; other states may join the settlement in the future. Participating states will release Countrywide and Bank of America from claims relating to Countrywide's origination and servicing activities, except for any claims arising out of a state's investment in Countrywide and any claims specifically identified by the state to Countrywide. Countrywide will also be released from claims by any borrowers who accept disbursements under the \$150 million Foreclosure Relief Payment Program. ☺

Obstacles to Securities Fraud Claims Against Financial Institutions for Misrepresentation Concerning Mortgage-Based Holdings

The implosion of the subprime mortgage industry has resulted in a dramatic increase in the number of private actions brought under the federal securities laws in the last year. Many of these actions involve securities fraud claims brought by shareholders of large commercial and investment banks, who have asserted that the banks misrepresented the value and quality of their mortgage-based holdings.

While these actions are certain to give rise to novel legal issues, it is equally clear that traditional obstacles to recovery in securities fraud claims, such as demonstrating scienter, reliance

and loss causation, will impose significant obstacles for shareholder plaintiffs asserting such claims against financial institutions. As discussed below, recent case law developments, coupled with unique characteristics of the subprime mortgage industry and the current economic downturn, will make it difficult for plaintiffs asserting securities fraud against banks to satisfy the traditional requirements to establish liability.

Scienter

The most ubiquitous conventional stumbling block for plaintiffs alleging securities fraud is the requirement, set forth in the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), that such plaintiffs plead facts evidencing scienter

the housing and mortgage markets began their rapid decline, resulting in losses to the bank’s investors. As evidence of the defendants’ awareness of the falsity of these statements, the plaintiffs cited confidential witnesses who allegedly had expressed concern over the bank’s hedging and underwriting operations and internal controls, and noted that the company had revised its financial statements during the class period to reflect increased losses resulting from its mortgage-based holdings.

Despite these allegations, the court dismissed the complaint on the ground that the plaintiffs had failed to adequately plead scienter. The court found that the plaintiffs had pleaded no facts suggesting that the defendants shared

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— i.e., an intent to deceive or defraud. Specifically, the PSLRA requires that plaintiffs plead “with particularity” facts giving rise to a “strong inference” that the defendant acted with an intent to deceive or defraud. 15 U.S.C. §78u-4(b)(2).

While most cases arising out of the subprime meltdown are still in their infancy, a survey of those cases that have reached the motion to dismiss stage reveals that plaintiffs in these actions have often struggled to plead scienter adequately. The difficulty derives in large part from the fact that until the dramatic collapse of the subprime market, mortgage-backed securities were widely accepted as reasonable investment opportunities. Thus, plaintiffs must plead with particularity facts showing that defendants deliberately misled investors regarding the quality of their mortgage-based holdings, despite the widespread belief in the investment community that such holdings were reasonably safe investments.

For instance, in *Tripp v. IndyMac Financial Inc.*, 2007 WL 4591930 (C.D. Cal. Nov. 29, 2007), a California district court dismissed a class action complaint that alleged executives of a hybrid thrift and mortgage banker had defrauded investors by claiming that the company was “well-positioned” even as

the opinions of the plaintiffs’ confidential witnesses regarding the soundness of the bank’s operations. The court further noted that while the restatement of the bank’s financials was some indication that defendants were aware of inaccuracies in those records, “an even stronger inference is that the Defendants were simply unable to shield themselves as effectively as they anticipated from the drastic change in the housing and mortgage markets and, once that inability became evident, IndyMac’s financials were changed accordingly.”

In reaching its holding, the district court relied heavily on the Supreme Court’s 2007 decision in *Tellabs, Inc. v. Makor*, 127 S. Ct. 2499 (2007), which clarified what is necessary to satisfy the “strong inference” of scienter requirement set forth in the PSLRA. The Court in *Tellabs* held that the inference of scienter “must be more than merely plausible or reasonable — it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” Where, as in *IndyMac*, the stronger inference is that defendants did not anticipate the drastic decline of their mortgage-based holdings, *Tellabs* demands dismissal.

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Securities Fraud Claims

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Reliance

Pleading and proving reliance on a defendant's fraudulent statement has typically presented a relatively low hurdle for plaintiffs in securities fraud actions. Even where plaintiffs cannot demonstrate actual reliance on the fraudulent statement, they may create a rebuttable presumption of reliance under the "fraud on the market" theory by showing that the fraudulent statements were communicated to an efficient market for the subject securities.

There is, however, reason to suspect that demonstrating reliance will pose a significant obstacle in securities fraud actions brought against financial institutions based on statements regarding their mortgage-based holdings. First, sophisticated institutional shareholders of large commercial and investment banks face a heightened burden of demonstrating actual reliance on fraudulent statements made by defendants, given that their understanding of the marketplace and access to information often rivals that of the defendants. Put differently, the sophistication of the plaintiff is a critical factor in determining whether the alleged reliance on the fraudulent statement was reasonable.

This principle is illustrated in *Banca Cremi, S.A. v. Alex Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997), a Fourth Circuit decision that upheld the dismissal of claims against a broker who sold collateralized mortgage obligations ("CMOs") to the plaintiff, a foreign bank. The court found that the plaintiff bank was a sophisticated investor, held \$5 billion in assets, had "extraordinary" investment experience, and had employees with business expertise and background in the industry. Noting that "[a] sophisticated investor requires less information to call a '[mis-]representation into question' than would an unsophisticated investor," the court found that plaintiff bank could not establish that it reasonably relied on defendants' allegedly fraudulent statements. Although the plaintiff argued that it had little experience with CMOs, the court noted that the plaintiff had access to market data other than the defendants' general statements promoting the securities, and chose to trade CMOs "aggressively" despite an awareness of the risks.

Furthermore, it is far from clear that plaintiffs will be able to satisfy reliance by invoking "fraud on the market." As the Supreme Court made clear in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the "fraud on the market" theory applies only to

material misrepresentations made into an efficient marketplace that would induce a reasonable investor to misjudge the value of the securities. Given the widely held belief that collateralized mortgage obligations and related investments were sound investment opportunities, courts may be reluctant to assume that general statements made by banks regarding the quality of their mortgage-based holdings were material statements affecting the value of the securities.

Indeed, defendant banks may have success asserting a "truth on the market" defense. This doctrine provides that the "fraud on the market" presumption does not apply where the "truth" allegedly obscured by defendant's fraudulent statements or omissions was otherwise credibly available to the market. *See In re Apple Computer Securities Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989) ("We conclude that in a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources."). Thus, defendants may be able to rebut the presumption of reliance resulting from the "fraud on the market" theory by establishing that the risks inherent to mortgage-based investments were known in the market, and particularly to sophisticated investors.

Loss Causation and Damages

Even if plaintiffs are able to demonstrate scienter and reliance, the general market downturn that has accompanied the collapse of the subprime market may significantly complicate efforts to establish loss causation and damages. For instance, in *Lucia v. Prospect Street High Income Portfolio, Inc.*, 769 F. Supp. 410 (D. Mass. 1991), investors sued a junk bond fund, alleging that the defendants misrepresented the risks of the high-yield bond market, and did not disclose other material information, such as the default rate of bonds in the defendants' portfolio. The court required the plaintiffs to amend their complaint to seek recovery only for those damages caused by the fund's alleged misrepresentations, as distinguished from losses caused by the collapse of the market for high-yield bonds.

Similarly, in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), the Supreme Court held that damages in a securities fraud case are calculated as the difference in fair value of what the plaintiff received and the fair value of all the plaintiff would have received, if not for the fraudulent conduct. This requires courts to calculate the cost attributa-

ble directly to the defendants' misrepresentations: "not all the market's depressant factors were so attributable to the defendants . . ." Thus, to succeed on securities fraud claims, plaintiffs will need to demonstrate that the losses they suffered resulted from the defendant's misrepresentations regarding their mortgage-based holdings rather than a general market decline.

Conclusion

There is no question that the wave of litigation resulting from the unprecedented collapse of the subprime mortgage industry will lead courts and litigants into uncharted legal territory. Nonetheless, defendants, and particularly defendant financial institutions, should take some comfort in the fact that traditional obstacles to recovery remain for plaintiffs asserting securities fraud claims based on statements regarding mortgage-based holdings. ☺

Funding Suspensions for Construction Projects Provoke Developer Backlash

Developers are claiming that they are the latest victims in the current financial crisis and place the blame squarely on their lenders. Many builders are chiding these lenders for refusing to release construction funds, causing many to halt construction work and consider bankruptcy. Moreover, several have gone to court demanding that their lenders release much needed funds, so that development work can continue.

Back in the 1990s real estate bust, lender liability suits were prevalent. At that time, in an effort to improve the prospects of repayment, many lenders aggressively stepped in and took effective control of construction projects, often-times dictating management decision. This control exposed lenders to liability where the borrower could establish that such control was exercised improvidently leading to otherwise preventable losses.

The memory of those legal battles, along with the recent added pressure from shareholders who want financial institutions to cut back on their real estate financing exposure,

has caused many lenders to operate with increased caution when dealing with similar projects. These days, instead of stepping in and assuming control of a project, lenders seem more inclined to cut their losses and suspend funding.

The First Bank Lawsuit

One developer directly affected by this recent failure to fund, California developer John Thomas, along with his company Regent Hotel, LLC, recently filed suit against First Bank in state court in California. *Regent Hotel, LLC v. First Bank*, No. 09879 (2008). After having borrowed from First Bank for over ten years and on numerous projects, Regent Hotel relied on the bank once again to finance the construction of a new mixed-use hotel and condominium building. In October 2006, the bank entered into a \$40 million construction loan agreement ("CLA"), the proceeds from which were to be made available to fund the construction. By October 2007, with construction largely completed and the fair market value of the project in excess of \$55 million, First Bank refused to release the remaining funds, causing mechanics liens to be filed against the project.

In its lawsuit, Regent Hotel claims that First Bank breached its obligations under the CLA by refusing to release funds. Regent Hotel asserts that the bank required it to complete needless paperwork and submit to additional appraisals, all in an effort to stall funding. Finally, Regent asserts that First Bank indicated on multiple occasions that it would release the remaining funds when it knew all along that it was going to withhold the final installments.

The plaintiffs also brought a claim for breach of fiduciary duty. Regent claims that First Bank syndicated the loan to a group of several banks, an arrangement Regent allegedly did not authorize and became aware of only after it signed the CLA. By potentially subjecting Regent Hotel to the First Bank's relationship with the consortium, Regent argues the bank breached its duties to it.

The IndyMac Bank Lawsuit

In a strikingly similar case, another California developer claims that its lender used fraudulent techniques to avoid having to continue to fund a development project. J.P. Eliopoulos Enterprises, Inc. ("J.P. Enterprises") allegedly entered into a loan agreement with IndyMac Bank, F.S.B. ("IndyMac") providing for a \$50 million loan for the construction of a Ranch project in California. *J.P. Eliopoulos Enterprises, Inc. v. IndyMac Bank F.S.B.*, No. GC040588 (Cal. Super. 2008). As a

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Developer Backlash

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part of the loan underwriting process, IndyMac obtained an \$82 million appraisal of the development.

J.P. Enterprises claims that as a result of “subprime debacle and unrest in financial markets,” IndyMac demanded an audit of its financial books and records. The audit allegedly delayed construction by more than two months, but allegedly showed that all disbursed loan funds had been used for proper purposes. Six months later, IndyMac requested and obtained a second appraisal, which valued the development at \$17 million, a purported decrease of more than 80%, despite millions of dollars in improvements made to the property during the same time period. IndyMac then refused to continue funding and demanded that J.P. Enterprises provide it with a plan to pay off the existing loans.

After the bank rejected J.P. Enterprise’s repayment plan, the bank declared the loan in default and filed suit. In its counterclaim, J.P. Enterprises alleges breach of the implied covenant of good faith and fair dealing. Specifically, it claims that the bank unreasonably delayed the development of the project and misled it as to the likelihood that it would continue to fund. Moreover, J.P. Enterprises notes that rather than advise that it had decided to discontinue funding due to the subprime debacle, it fabricated excuses, in the form of the audit and appraisal requirements, that caused substantial delays to the project.

While it is uncertain how these cases will ultimately be resolved in court, it is clear there are many similar lender liability suits on the horizon.

The California Consortium

In response to increasing instances of lenders cutting off construction financing, a group of 30 California builders reportedly have begun meeting to examine ways to defend themselves against what they feel are increasingly unscrupulous practices by lenders. The group has been considering a number of possible tactics, including reaching out to state and national lawmakers. One such group member reportedly has said: “If banks want to get out of residential lending, that’s fine,” but he notes “that isn’t being done. The rug is literally being pulled out from under us and games are being played.” Michael Corkery, *Builders Sue Banks That Pull Financing As Construction Projects Lie Unfinished*, *Wall St. J.*, July 23, 2008, at C1. ©

Government Investigations of the Subprime Debacle: A Survey

With reports of new Government investigations spurred by the credit crisis appearing in the media seemingly every day, it can be difficult for observers to stay abreast of the Government’s activities. As the number and scope of Government investigations continue to expand, along with political pressure to identify and punish those allegedly responsible for the crisis, it is more important than ever for participants in the financial markets to stay informed.

To that end, we survey and summarize below publicly available information concerning the Government’s activities in this area. Because the Government does not typically publicize information concerning the status of its investigations, this survey is by definition limited. Nevertheless, the publicly available information does provide some insight into the scope and nature of the Government’s activities.

Overview

Before the subprime lending scandal began to unfold, Government investigations of mortgage fraud often focused on one player in the drama — the borrower, the individual or entity that allegedly made false statements in order to obtain a loan, and thereby defrauded the lender. The subprime scandal has changed that. The list of players currently subject to Government investigation is long and diverse, and includes representatives of almost every major facet of the American financial system.

In January of this year, for example, the FBI announced that it had opened criminal inquiries into 14 different companies involved in the subprime mortgage scandal. The agency declined to identify the companies under investigation, but said that the inquiry involved companies across the financial industry, including not only borrowers, but mortgage lenders, loan brokers and investment banks that packaged home loans into securities sold to investors around the world.

Events since January, which have shaken the financial world to its core, have expanded the FBI’s list, which now includes at least 26 companies. Among those under investigation, according to media reports, are entities such as Lehman Brothers, which itself was driven out of business by

the credit crisis, but which made statements to existing and potential investors on the eve of its demise which the Government intends to investigate for their truthfulness.

To date, the Department of Justice (DOJ) has not established a central task force to handle the subprime cases, such as the Enron Task Force established in the wake of the financial and accounting scandals that began the current decade. While DOJ has not formed a task force, it has recently begun to track the mortgage fraud cases brought by its United States Attorneys Offices (USAOs) around the country.

During the ten month period from October 2007 through July 2008, according to published reports, federal prosecutors around the country commenced a total of 151 criminal cases

subprime related investigations. Given the tumultuous events of the last eight months, there can be little doubt that today that number is significantly higher.

Specific Cases and Investigations

Because the great preponderance of cases being pursued by the Government are in the investigative phase, it is difficult to ascertain exactly what those cases entail. Media reports, however, and in some instances public disclosures by the subjects of the investigations, provide some insight.

As a broad generalization, the cases appear to fall into several categories. Some investigations focus on the mortgage lenders — often referred to as the “originators” — and

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involving mortgage fraud. A substantial portion of these cases, 69, were commenced in the Southern District of Florida, a jurisdiction which has been hit particularly hard by falling home prices. The Southern District of New York, along with several other jurisdictions — the Southern and Central Districts of California and the Northern District of Georgia — had approximately ten prosecutions each.

Because DOJ did not track mortgage fraud cases prior to this recent period, the statistics themselves do not indicate whether this rate of prosecutions represents an increase over prior periods. Also unclear is how DOJ has defined mortgage fraud for purposes of these statistics, and it would appear that many of the cases filed so far consist of the more traditional type prosecuted even before the credit crisis.

Still, the anecdotal evidence and the tremendous amount of DOJ resources directed at these investigations leave little doubt that the number of subprime prosecutions will increase dramatically. Indeed, media reports indicate that the FBI currently has over 1,400 open investigations. And in February 2008, Commissioner Christopher Cox of the Securities and Exchange Commission (SEC) informed Congress that the SEC already had opened over three dozen

whether those originators knowingly issued mortgages that they knew to be unsound, on the theory that they could simply transfer the risk to a third party through the securitization process. Other investigations focus on the investment banks, the entities that acquired, packaged and securitized subprime loans into securities sold to investors, and whether they adequately disclosed the risks presented by those securities. Finally, a number of investigations focus on the conduct of market participants and banks as the market for securities backed by subprime mortgages began to crumble, and whether in their efforts to avert financial disaster and obtain additional capital, those entities adequately disclosed their true financial condition to existing or potential investors.

Countrywide Financial Corp. Reportedly the country's largest mortgage lender and servicer, Countrywide (acquired in July by the Bank of America) is subject to investigations by at least two United States Attorneys Offices, the Southern District of New York and the Central District of California. The investigations focus among other things on alleged fraud in the origination of loans, and whether the company and its executives misrepresented the soundness of those loans in the company's securities filings.

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Government Investigations

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In addition to these criminal investigations, several State Attorneys General commenced civil suits against Countrywide this past summer. While those suits have recently been settled (see *Mortgage Lending Actions Against Countrywide Financial Are Settled*, *supra* at 1) the allegations made in those actions may nevertheless provide guidance as to the thrust of the criminal investigations.

In June 2008, for example, the Attorney General for the State of Illinois filed a civil suit against Countrywide, alleging that it defrauded borrowers by issuing them loans that they could not afford and that quickly went into foreclosure. In an effort to dominate the national mortgage market, the suit contends, Countrywide engaged in a number of unsound and deceptive lending practices, for example, relaxing its underwriting standards to place borrowers into so-called “reduced document loans” or “affordability” products that exposed borrowers to undue risk of foreclosure. One such affordability product specifically cited by the Attorney General was a hybrid adjustable rate mortgage (ARM) that would have a low two- or three-year fixed rate, followed by 27 or 28 years in which the rate would reset upward. According to the Attorney General’s suit, Countrywide qualified borrowers for these loans even though it knew they could not afford the higher interest payments due after reset.

New York State Attorney General Investigation. According to public reports, New York Attorney General Andrew Cuomo has focused his investigation primarily on the investment banks, and whether they adequately disclosed the nature and extent of the risks involved in the loans they were pooling for securitization. In addressing this issue, Cuomo has focused among other things on the work performed by due diligence firms — companies hired by investment banks to evaluate loans for possible acquisition, and to identify any loans (referred to as “exceptions”) that did not conform to the lenders’ underwriting standards — apparently with a view toward determining the circumstances under which investment banks acquired such exceptions and whether the banks made adequate disclosures concerning them to their investors.

In January 2008, in an apparent boost to Cuomo’s investigation, one of the largest and most prominent due diligence firms — Clayton Holdings, based in Shelton, Connecticut — entered into a cooperation agreement with the Attorney General’s office. Pursuant to that agreement, Clayton agreed

to provide documents and testimony in exchange for civil and criminal immunity. The Attorney General’s investigation, based on public reports, is ongoing.

Bear Stearns. In June 2008, two former hedge fund managers for Bear Stearns — Ralph Cioffi and Matthew Tannin — were arrested on securities fraud charges in a case prosecuted by the United States Attorneys Office for the Eastern District of New York. Prior to their departures from Bear Stearns in 2007, Cioffi and Tannin had managed hedge funds that were heavily invested in subprime investments. As the value of those investments began to plummet in the spring of 2007, the Government contends, Cioffi and Tannin misled their investors. Rather than disclose the funds’ increasingly dismal prospects, they presented an upbeat — and false — picture in an effort to prevent withdrawals. Cioffi and Tannin have pleaded not guilty, and await trial.

Lehman Brothers. At least three United States Attorneys Offices — the Southern and Eastern Districts of New York and the District of New Jersey — are reportedly conducting investigations related to the demise of Lehman Brothers. Prosecutors have issued at least a dozen grand jury subpoenas, including to Richard Fuld, the bank’s former CEO, Joseph Gregory, its former president, Erin Callan, its former chief financial officer and Mark Walsh, its former head of commercial real estate operations.

The Southern District of New York, according to reports, is focusing on the valuations Lehman assigned to its commercial real estate holdings. The District of New Jersey is reportedly focusing primarily on whether Fuld and other executives made misleading statements about the bank’s condition in June 2008, when the company was seeking a \$6 billion capital infusion from investors, at the same time that its business faced increasingly severe challenges. And the Eastern District of New York is reportedly focusing on comments made by Lehman executives during a September conference call just five days before the bank filed for bankruptcy. The investigations are ongoing.

Credit Suisse. On September 3, 2008, in a case reported to be the first criminal case involving auction rate securities, two former brokers from Credit Suisse were indicted in the Eastern District of New York on securities fraud charges. The brokers, Julian Tzolov and Eric Butler, allegedly solicited clients to purchase auction rate securities backed by conservative student loan issues, the underlying loans of which were guaranteed by the U.S. Department of Education.

But while the brokers did purchase some securities backed by student loan issues, they also bought far more dangerous investments without telling the customers. Those riskier securities were backed by more speculative investments such as collateralized debt obligations and subprime mortgages. The scheme began to unravel, according to the Government, when the credit markets seized up, and the market for auction rate securities backed by subprime mortgages collapsed. Credit Suisse discovered the scheme and, according to its spokesman, suspended the brokers and immediately reported them to regulators. Both defendants have pleaded not guilty, and await trial.

Auction Rate Security Investigations. Although distinct from the collateralized debt obligations at the heart of the subprime lending crisis, auction rate securities have nevertheless met a similar fate. Auction rate securities are preferred shares or debt instruments with interest rates that reset regularly, typically every week, in auctions overseen by the brokerages that sold them. They performed relatively well until the advent of the credit crisis, when the auctions began to fail, leaving investors with securities they could not sell. Regulators have been investigating, among other things, whether brokers fully disclosed the potential risks to buyers. To resolve the investigations, a number of major Wall Street firms have reportedly agreed to buy back roughly \$50 billion of auction rate securities from their customers. (See *Preliminary Settlement Reached In Auction Rate Securities Investigations, infra* at 15.)

Fannie Mae/Freddie Mac. According to public reports, Fannie Mae and Freddie Mac recently received Grand Jury Subpoenas issued by the Southern District of New York seeking information related to their accounting, disclosure and corporate governance. The companies have indicated they are cooperating with the investigation.

AIG. According to media reports, the FBI has included AIG on its list of companies subject to criminal investigation. While the nature of that investigation has not been disclosed, it might well focus on the company's valuation of some of its credit-default-swap portfolios. AIG has indicated that it will cooperate with any investigation.

Washington Mutual. On October 15, 2008, the United States Attorney for the Western District of Washington, Jeffrey Sullivan, announced an investigation into the September collapse of Seattle-based Washington Mutual. The nature of the investigation has not been disclosed, but

presumably will focus on the company's origination of mortgage loans.

Conclusion

While this survey provides some guidance as to the scope and nature of Government investigations spawned by the subprime lending crisis, it is important to recognize that — given the confidential nature of such investigations — what observers see today is only the tip of the iceberg. As white collar investigations proceed, they often develop in unexpected ways and lead to unexpected results. What is nearly certain, though, in light of the magnitude of the credit crisis and the political pressure to identify and punish those allegedly responsible, is that these investigations will proceed forward aggressively and continue for some time — likely well into the next decade. ☺

Lender's Claim of Fraudulent Inducement to Lend Allowed to Proceed

In *DDJ Capital Management LLC v. Rhone Group LLC*, 601832/07, a New York court recently allowed the plaintiff lenders to proceed with a claim that they were fraudulently induced by their borrower's principals to make a \$40 million loan. The plaintiffs, DDJ Total Return Loan Fund, L.P., GMAM Investment Funds Trust II and Airlie Opportunity Master Fund, Ltd., alleged that controlling persons and companies of American Remanufacturers Holdings, Inc. ("ARI"), an auto parts company, conspired to falsify ARI's records and misrepresent their financial status. They alleged that such distortions and false representations ultimately induced plaintiffs to lend to an unsuccessful company.

Background

The alleged fraud began in late 2003, when the companies of Rhone and Quilvest, having formed ARI earlier that year, realized that the company needed additional financing to stay afloat. To obtain the requisite financing, ARI management allegedly formulated a plan which included the deception of possible lenders. The plaintiffs assert that ARI gave presentations to plaintiffs falsely representing the prosperity and sta-

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Fraudulent Inducement to Lend Claim

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bility of the business. Additionally, ARI replaced its CFO while still maintaining to the public and plaintiffs that there had been no change in management. In its 2004 financial statements, ARI allegedly reported that its EBITDA was positive \$16.9 million, when it was in fact negative \$24.78 million, a difference of over \$40 million.

In March 2005, only days after making the loan, plaintiffs were allegedly alerted to ARI's financial shortcomings. They were then led to believe that such inadequacies were due to mismanagement and had been unknown to ARI. After concluding that they had been purposefully misled, the lenders brought suit on a number of claims, including fraud and negligent misrepresentation.

Asserting a Viable Claim of Fraud

In ruling on the motion to dismiss the lenders' complaint, the court observed that to state a claim for fraud, the lenders must allege "misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." In addition to fraud perpetrated by the company, plaintiffs can allege that corporate officers are personally liable if they "participate in or have actual knowledge of the fraud."

The court found that, to state a claim of fraud, it is not necessary for a plaintiff to know and allege all times when such fraud was perpetrated or planned. A plaintiff similarly does not have to be able to identify all individuals who made misleading statements. To include the principals of the borrower as defendants, the complaint needs simply to allege that the persons named gave substantial assistance in facilitating the fraud and thereby that they can be sued as defendants under an aiding and abetting theory of liability.

If fraudulent concealment is alleged, the court found that the plaintiff must additionally show that there was a duty to disclose. This duty may arise from a contractual relationship, a superior knowledge possessed by the defendant and a reliance by the other party on such, or half-true statements or misrepresentations in the form of partial disclosures.

The court found that "the [plaintiffs'] pleadings describe a coordinated, conscious effort by defendants to manipulate ARI's records and to then mislead plaintiffs regarding the company's financial condition and prospects, and regarding the identity, competence, and tenure of its management."

The court further held that although fraud must be pled with particularity, this requirement should not make otherwise valid claims invalid due to an understandable inability to point to all specific instances and persons involved in perpetrating such a scheme.

Dismissal of Negligent Misrepresentation Claim

The court granted the defendants' motion to dismiss plaintiffs' claim for negligent misrepresentation. Such a claim requires that plaintiff allege: (1) a relationship of privity or duty between parties, (2) that information provided was false, and (3) that there was rational reliance on the information. Because the lenders did not plead the existence of a fiduciary relationship between the parties, this claim was dismissed.

Claims Against Auditor and Accountant

Plaintiffs' claims against the defendants' accounting firm and auditor, PricewaterhouseCoopers, for malpractice, fraud and negligence were dismissed. Because the complaint did not definitively allege that the accounting firm falsified records or that the plaintiffs' losses were the proximate cause of the firm's alleged misbehavior, the claims failed. The court noted that "liability will not attach absent a causal link between the malpractice and the damages." It further stated that the requirement in these claims of proximate causation is greater than a "but for" standard. Lastly, the court stated that the complaint failed to plead reliance by the plaintiffs on PricewaterhouseCoopers which would be sufficient to sustain the claims.

Conclusion

This case reaffirms the open door for deceived lenders to bring claims for fraudulent inducement to lend. The court recognized and articulated the difficulty of asserting every instance of fraud in a scheme fraught with a variety of long-standing misrepresentations. While it may be impossible to know all of the instances in which a fraud is perpetrated and all of the individuals involved, the court found that this alone should not cause a dismissal in the face of otherwise sufficient and particularized pleadings. While the lenders were unsuccessful in their claim of negligent misrepresentation and in claims against the defendants' accounting firm, their fraud claim has survived and will be pursued. ©

Fraudulent Conveyance Law: When Does the Transfer Occur Under a Revolving Credit?

The United States Bankruptcy Court for the Southern District of Florida recently issued an important ruling from the bench in *In re TOUSA, Inc.* (08-10928-JKO) on the issue of when an obligation is incurred for purposes of fraudulent conveyance claims under Section 548 of the Bankruptcy Code. In this case, Chadbourne represents the administrative agent of a \$700 million revolving credit facility.

Background

When a company declares bankruptcy, the Bankruptcy Code permits the trustee of the estate to seek to avoid, as constructively fraudulent conveyances, obligations incurred by the debtor within two years of the petition date if the debtor was insolvent or otherwise undercapitalized at the time of the conveyance. But, as a conveyance can be fraudulent only if made at the time the company is insolvent, the time when the conveyance occurred itself can be a matter of dispute. In 1981, the Second Circuit held that borrowers and guarantors incurred an obligation of repayment each time they drew on a credit line, rather than the date they executed the agreement establishing the facility. *Rubin v. Manufacturers Hanover Trust Co.*, 61 F.2d 979 (2d Cir. 1981). Commentators since then have warned that this decision threatened severe consequences to lenders in revolving credit facilities, and imposed costly and perhaps prohibitive obligations to analyze the debtor's financial condition, not only when the loan agreement is executed, but with every subsequent draw on the credit line.

In his September 17, 2008 ruling in the *TOUSA* case, Judge John K. Olson refused to adopt *Rubin* and rejected the argument that a revolving credit line pledged when the borrower was solvent could retroactively become a fraudulent conveyance by virtue of borrowings allegedly made during a period of insolvency. This ruling is useful precedent for lenders in revolving credit facilities that are concerned about the effects of bankruptcy proceedings effect on their prioritized, secured loans.

The *Rubin* Case

The debtors in *Rubin* were an array of affiliated companies engaged in the business of selling money orders and cashing checks. The relevant parties included "USN" and "UMO" — two firms in the business of issuing money orders — and "National," "TWO" and "Propper" — three firms that operated check-cashing outlets which served as sales agents for USN's and UMO's money orders. The nature of the check-cashing business created unpredictable patterns in National, TWO and Propper's short-term liquidity needs, so the enterprise entered into a credit agreement with Manufacturers Hanover Trust ("MHT") beginning in 1964. National, TWO and Propper were the principal borrowers, while USN and UMO signed on as guarantors. Each of the parties pledged collateral to MHT as security for their obligations.

In early 1977, the enterprise collapsed with the borrowers several million dollars in debt to MHT, resulting in MHT's seizure of the collateral. The trustees of USN's and UMO's estates brought claims against MHT for fraudulent conveyance under Section 67(d) of the Bankruptcy Act in effect at the time, the predecessor to Section 548 of the current Bankruptcy Code. Following a bench trial, the district court dismissed these claims, holding that the trustees had failed to establish the guarantors' insolvency at the time they made their guarantees.

The Second Circuit vacated this judgment, holding that the district court should have determined the guarantors' solvency when the loans for which they were charged were made, not merely when the guaranties were made. Under the Second Circuit's reasoning, National, TWO and Propper incurred obligations of repayment (and the guarantors incurred contingent obligations) whenever they borrowed under the loan lines. As a result of this decision, even though USN and UMO had become guarantors outside the limitations period for fraudulent conveyance claims at a time when the enterprise was indisputably solvent, their trustees could bring such claims on the basis of borrowings made within the limitations period when the enterprise was arguably insolvent.

The Reaction to *Rubin*

Academic critics of *Rubin* identified several troubling practical consequences to the decision. For example, it would impose on lenders the duty of obtaining, with each draw on a credit facility, the same representations and warranties it

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Fraudulent Conveyance Law

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obtained on formation, and performing the same independent due diligence into those representations. Steven L. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 *Cardozo L. Rev.* 729, 741 (1987). This diligence is costly, typically requiring not only the lender's own investigation but the retention of an outside, independent auditor to issue a solvency opinion. Moreover, this significant transaction cost does not even serve the principal purpose of the fraudulent conveyance statute of preventing deceptive debtors from placing assets in friendly hands that debtors can reach but creditors cannot.

As a result of such consequences, fraudulent transfer statutes at the state level reacted to *Rubin* by overwhelmingly rejecting its holding and rationale. In 1984, the National Conference of Commissioners on Uniform State Laws promulgated an amendment to the Uniform Fraudulent Transfer Act ("UFTA") which was explicitly designed to "resolve uncertainty arising from *Rubin*." The amended version of the UFTA provides that an obligation is incurred when the writing evidencing it is executed. In situations like *Rubin's* where the writing is a guaranty agreement, this provision dictates that the obligation associated with the guaranty is incurred on the date the agreement is executed, not when funds are actually drawn on the credit line. Forty-four states have adopted the UFTA as their statutory regime. New York is in the process of doing so.

The *TOUSA* Case

In *TOUSA*, both the execution of the credit facility and the pledge of collateral had occurred before the date of alleged insolvency, but the debtors had proceeded to draw on it after they had allegedly become insolvent until shortly before the petition date. Relying on *Rubin*, the creditors' committee argued that with each such draw, the subsidiaries incurred new repayment and guaranty obligations that were therefore avoidable under Section 548. The administrative agent of the facility moved to dismiss this claim, and the Bankruptcy Court granted the motion (with leave to amend).

Ruling from the bench, Judge Olson stated:

I believe it to be the law that transfers under Section 548 occur when a lien granted becomes so perfected

that a bona fide purchaser for value could not acquire a superior interest. I am troubled by the notion that the transfer occurs at a time after the granting of the lien. . . . It certainly is the case that the vast majority of states [that] have adopted the Uniform Fraudulent Transfer Act, which Florida adopted in Chapter 726, intended to overrule *Rubin*. . . . The parties appear to be arguing only under Section 548 for purposes of this hearing, but Section 548 appears to me to be substantially similar to Florida's version of the Uniform Fraudulent Transfer Act.

Judge Olson proceeded to compare *Rubin* to an infamous decision employing similar reasoning in the context of letters of credit, *In re Twist Cap, Inc.*, 1 B.R. 284 (Bankr. D. Fla. 1979). In the *Twist Cap* case, the court enjoined a bank from honoring secured letters of credit — presuming that the payment on the letter of credit, rather than its issuance, was the relevant conveyance — in a holding which has since been uniformly criticized or ignored altogether by courts and commentators. In ruling in *TOUSA*, Judge Olson regretted that *Twist Cap* had "throw[n] financing into a cocked hat for awhile" and remarked that "it would have been better if that opinion hadn't been published."

Conclusion

By consigning *Rubin* to the same ignominy as *Twist Cap*, Judge Olson's ruling signals that case law at the federal level may be catching up to the widespread legislative rejection of *Rubin* by the states and its negative reception in the academic literature. ☺

Bank Claims Fraud Over Securitization Transaction

In a suit that may be a harbinger for things to come, in late October 2008 the Bank of America brought suit against the asset management arm of Bear Stearns, alleging that a \$4 billion securitization structure which Bear Stearns managed and which Bank of America marketed, was a product of fraud. Bank of America contends that mortgage-backed assets that served as collateral for the transaction were owned by two hedge funds managed by Bear Stearns that, unbeknownst to Bank of America, were

in imminent danger of collapse at the time of the securitization. *Bank of America v. Bear Stearns Asset Management, Inc.*, 08 CV 9265 (S.D.N.Y.)

Background

According to the complaint, in June 2007 Bear Stearns managed two hedge funds that were suffering from substantial withdrawal requests from investors. Bank of America contends that the truth about the funds was concealed from it.

The funds invested principally in highly structured securities, including securities backed by sub-prime mortgages, many of which were collateralized debt obligations or CDOs. A CDO is a type of security collateralized by a pool of securities which themselves are backed by other assets such as mortgages. The complaint alleges that the defendants retained Bank of America to structure a securitization transaction, known as "CDO-squared," that involved forming a special purpose entity as the issuer that would acquire a portfolio of mortgage related securities, including CDOs, from the Bear Stearns funds. Bank of America would then sell tranches of securities backed by this collateral. Bear Stearns served as collateral manager for the issuer, meaning that it was responsible for acquiring, managing and monitoring the issuer's portfolio of collateral.

The structure required that Bank of America issue put options pursuant to which it was required to purchase up to \$3.2 billion of the securities issued in the event no purchasers were found. Shortly after the transaction closed in May 2007, the two funds collapsed which allegedly caused an enormous decline in the value of the collateral now in the issuer's portfolio. In accordance with the put option, Bank of America was required to acquire the issued securities which had lost substantial value due to the collapse of the funds.

The complaint alleges that two of the defendants, Ralph Cioffi and Matthew Tannin, have been indicted by a federal grand jury and sued by the Securities and Exchange Commission, in large part based on their deception regarding the financial condition, performance and assets of the two Bear Stearns hedge funds at issue. The indictment and SEC complaint charged them with wire fraud and securities fraud. Cioffi was purportedly a Senior Managing Director of Bear Stearns and a Senior Portfolio Manager for the two Bear Stearns hedge funds at issue. Tannin likewise was a Senior Managing Director and was allegedly the Chief Operating Officer of the two hedge funds.

The Claims

Bank of America's complaint asserts multiple claims. First, it asserts a claim for breach of contract against Bear Stearns. The complaint alleges that in the parties' engagement letter, Bear Stearns undertook to notify Bank of America of the occurrence of certain events. It is alleged that Bear Stearns failure to so notify Bank of America constitutes a breach of contract.

The complaint also asserts against all defendants claims for fraud, fraudulent inducement, aiding and abetting fraud and aiding and abetting fraudulent inducement. Prior to the time of the securitization, the defendants allegedly engaged in a concerted effort to gain liquidity by defrauding Bank of America, and to that end concealed material information concerning the funds' precarious financial condition.

Bank of America asserts a claim for breach of fiduciary duty, alleging that as the collateral manager of the securitization structure, Bear Stearns owed a fiduciary duty to the issuer and that the issuer purchased \$2.8 million of collateral without the defendants disclosing the true financial condition of the hedge funds and related assets. By so doing, it is alleged that Bear Stearns breached its fiduciary duties. ☺

Class Actions Not Available for Truth-in-Lending Mortgage Rescission Claims

In a 2-1 decision, the Seventh Circuit Court of Appeals has held that the Truth in Lending Act ("TILA"), 15 U.S.C. §1635, does not allow for class action treatment of mortgage rescission claims. *Andrews v. Chevy Chase Bank*, No. 07-1326, 2008 U.S. App., LEXIS 20153 (7th Cir. Sept. 24, 2008).

TILA is the federal law developed to protect consumers engaging in credit transactions by assuring "meaningful disclosure of credit terms" to the consumer. § 1601(a). TILA's most significant requirements concern information that must be disclosed to a borrower before extending credit, being the term of the loan, annual percentage rate and total costs to the borrower. In the case of non-compliance with these requirements, TILA allows the consumer to rescind the

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Mortgage Rescission Claims

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transaction, a process by which the lender terminates its security interest and returns payments made by the debtor in exchange for the debtor's return of all funds or property received. The rescission of a loan "requires unwinding the transaction in its entirety and thus requires returning borrowers to the position they occupied prior to the loan agreement." *Andrews*, 2008 U.S. App., LEXIS 20153, at *8.

The court ruled that while TILA's statutory damage remedy references class actions, its rescission remedy in Section 1635 does not. It is this omission, the court noted, along with the incompatibility between the statutory remedy and the class form of action, that precludes TILA rescission class actions as a matter of law.

Background

In June 2004, Susan and Bryan Andrews obtained a loan from Chevy Chase Bank, F.S.B. to refinance their home. The bank offered them an unusual "cashflow payment option" loan, that enabled them to vary their payments based on their monthly cash flow. This flexible mortgage option allowed them to pay a monthly minimum payment at a low interest rate for an initial term. While their interest rate was to adjust monthly, the minimum payments remained fixed at the low rate until the initial term expired or the outstanding balance exceeded 110 percent of the original loan (through negative amortization). After a time, the Andrews minimum monthly payment became insufficient to cover the accrued interest and the negative amortization feature (adding the unpaid interest to the principal) commenced.

In 2005, the couple filed a class action lawsuit against Chevy Chase Bank, alleging violations of TILA and seeking damages under Section 1640(a)(2) and rescission under Section 1635. The plaintiffs claimed that several of Chevy Chase's disclosures were misleading, particularly regarding whether the initial interest rate was fixed. Additionally, the couple claimed that the stamp used by the bank on its disclosure forms, which referred to the note as a "WS Cashflow 5-Year Fixed Note Interest Rate 1.950%," was similarly deceptive because the document could be understood to identify the note as having a fixed rate.

The district court granted summary judgment in plaintiffs' favor, authorizing rescission and awarding attorneys' fees. *Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612 (E.D. Wis.

2007). The district court granted class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure, allowing all class members the right to rescind their mortgages. The court held that the certified class would include any person who obtained an adjustable-rate mortgage from Chevy Chase on a primary residence between April 2004 and January 2007, and who received a Truth in Lending Disclosure Statement from Chevy Chase bank containing any of the language the court found deficient under TILA.

The Majority Decision

On appeal, the Seventh Circuit initially noted that, while this was a matter of first impression in that Circuit, the First and Fifth Circuits, in addition to California's Court of Appeals, has held that rescission class actions are unavailable under TILA as a matter of law. *Andrews*, 2008 U.S. App., LEXIS 20153, at *7. The majority ruled that, because the TILA rescission remedy requires the return of borrowers to the position they occupied before the loan was signed, it is a purely personal remedy to be fashioned by individual creditors and debtors. Moreover, the court indicated that the personal nature of the rescission remedy makes it both procedurally and substantively unsuitable for class certification.

The court remarked that while the statute does not explicitly prohibit the use of a class action for rescission purposes, the lack of an explicit instruction in this area is not dispositive. In fact, the court wrote that TILA's rescission remedy "is written with the goal of making the rescission process a private one." *Andrews*, 2008 U.S. App. LEXIS 20153, at *9.

Finally, the majority pointed out that the TILA damage provision has a cap of the lesser of \$500,000 or 1% of the creditor's net worth for the total recovery in class actions. In contrast, the court ruled that because recoveries could possibly reach the hundreds of millions in this case and similar ones on a class basis, the notable absence of a similar provision in the TILA rescission provision suggests Congress did not intend to include class actions for rescissions.

The Dissent

In dissent, Judge Terrence Evans disagreed with the majority's view and proposed that, while the Congress may have written the law in an ambiguous fashion, it was not necessary to look beyond the statutory text to determine Congressional intent. He wrote that "[i]f Congress intended to preclude rescission class actions, it should amend the statute and correct the error

itself.” *Andrews*, 2008 U.S. App. LEXIS 20153, at *24. Moreover, he noted that although the individual nature of mortgage rescissions in the class action context may ultimately prove too complicated to satisfy class action requirements, it does not preclude class actions within the TILA context as a matter of law. Judge Evans synopsisized his argument by writing that when there is statutory ambiguity, courts should construe the statute in favor of the innocent victims and not the guilty.

Conclusion

Andrews v. Chevy Chase Bank is an important victory for lenders. By narrowly construing the TILA statutory-rescission remedy, the Seventh Circuit has barred individual consumers from maintaining class actions to rescind mortgage transactions that are found to violate TILA. ☺

Preliminary Settlement Reached in Auction Rate Securities Investigations

After the collapse of markets for auction rate securities in February, Bank of America and other broker-dealers faced investigations from federal and state regulators into the way they sold the securities to investors and whether they had propped up the markets. Regulators alleged that Bank of America subsidiaries told investors that the securities were safe and highly liquid, when many brokers created artificial demand by participating in the periodic resale auctions. Regulators further alleged that Bank of America failed to disclose potential credit downgrades to investors, and continued to sell the securities until the widespread failure of auctions made it difficult for investors to access their holdings.

Under a preliminary settlement announced on October 8, 2008, Bank of America will reportedly offer to repurchase at par value all auction rate securities acquired before February 11, 2008. Investors who would be eligible to accept the offer include individuals, trusts established by individuals for the benefit of natural persons, certain passive investment and retirement accounts, small businesses with Bank of America account values of less than \$15 million, and charities with accounts of less than \$25 million. The repurchase offer would remain open until December 1,

2009, and is expected to cost up to \$4.7 billion. Any such customers who sustained losses on auction rate securities acquired before February 13, 2008 and sold after that date would receive full compensation from Bank of America. The settlement also provides for arbitration for investors who claim consequential damages; alternatively, customers could elect to pursue their claims through any other administrative or judicial process.

If the settlement is finalized, Bank of America would be required to make best efforts to provide up to \$5 billion in liquidity to institutional customers and business and charity customers that are not eligible for the repurchase offer. Municipal issuers would be entitled to a reimbursement of refinancing fees for any auction rate securities issued after August 1, 2007 and refinanced after February 11, 2008. The settlement enjoins future manipulative, deceptive or fraudulent activity by Bank of America under Section 15(c) of the Securities Exchange Act of 1934, and prohibits Bank of America from liquidating its own holdings of any auction rate security before it has liquidated its institutional customers' holdings in that security.

The proposed agreement would settle all claims by the SEC, the Office of the New York State Attorney General, and regulators from twelve states represented by the North American Securities Administrators Association. Bank of America agreed to pay \$50 million in civil penalties to the states, and may pay another fine to the SEC when it has completed its settlement obligations. The Attorney General of Massachusetts negotiated a similar agreement with Bank of America in September, but the settlements do not affect class action lawsuits filed by investors earlier this year. Over a dozen other companies have also settled regulatory investigations into the manipulation of auction rate securities markets. ☺

Chadbourne Forms Financial Crisis Task Force

In October 2008, Chadbourne announced the formation of its Financial Crisis Task Force to provide interdisciplinary advice to clients working through the problems associated with global economic events affecting virtually all sectors of the economy. Senior partners in the task force represent key areas of litigation, bankruptcy and restructuring, corporate

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Chadbourne's Financial Crisis Task Force

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and securities, insurance and reinsurance, structured finance, real estate and tax.

Task force members include New York partners Howard Seife, Joseph Smolinsky and David LeMay (bankruptcy and financial restructuring), Thomas Hall, Thomas McCormack and Alan Raylesberg (financial institution and securities litigation), Andrew Coronios and Marian Baldwin (structured finance), Charles Hord and Marc Alpert (corporate and securities), Lawrence Plotkin (real estate), Richard Leder (tax) and John Sarchio (insurance and reinsurance), and special counsel Richard Liskov (insurance regulatory). The practice will also include the Firm's London bankruptcy and financial restructuring team, led by partner Adrian Harris. In addition, Governor George Pataki will advise state and local governments being adversely impacted by this crisis.

Chadbourne attorneys expect to advise clients on matters involving debt and other credit obligations, insolvencies, forced sales of secured assets, class action and securities litigation, restructurings in the financial and insurance sectors, as well as complications arising from increased regulation. The Firm currently is representing dozens of clients in connection with the Lehman bankruptcy. ☉

Et al.

Recent Client Alerts:

The following recent Chadbourne Client Alerts affecting the banking industry can be found at Chadbourne's website: <http://www.chadbourne.com/clientalerts>:

- ☉ Emergency Economic Stabilization Act of 2008.
- ☉ Credit Default Swaps Under Siege.

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