REDACTED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

EXPERT REPORT OF PROFESSOR JOHN C. COATES IV

I. Introduction and Scope of Engagement

I have prepared this report at the request of Intervenor American International Group, Inc. (***AIG***) concerning (a) the methods and steps that were available to the Bank of New York Mellon (the ***Trustee***), as trustee or indenture trustee, to evaluate a proposed settlement (the ***Settlement***) of potential claims available to the mortgage-securitization trusts (***Trusts***) for which it is Trustee, which claims involve Countrywide Financial Corporation (***CFC***), Countrywide Home Loans, Inc. (***CHL***) and other wholly owned subsidiaries of CFC (***Other Subs***), as well as Bank of America Corporation (***BAC***) and various of its other wholly owned subsidiaries, particularly with respect to the position taken by CFC that it would be unable to pay a judgment equal to the amount included in the Settlement and the position taken by BAC and CFC that BAC would prevail on any successor liability claims the Trustee might bring against BAC, (b) the methods and steps that the Trustee did take to evaluate the Settlement, and (c) the information that the Trustee could have obtained before filing its petition in this action (the ***Petition***) but did not, and the relevance of that information to an evaluation of the Settlement.

II. Summary of Opinions

Based on my (i) prior practice experience as an attorney, (ii) my research and teaching of law at Harvard Law School, specializing in M&A of financial institutions, including banks and bank holding companies, (iii) my consulting experience, and (iv) my review and consideration of the documents listed in Exhibits B and C, it is my opinion that:

1. The Trustee has not presented evidence that it considered or took a number of steps that it could have taken to adequately evaluate the Settlement, including obtaining information about or pursuing:

    a. Fraudulent conveyance claims or claims based on violations of the fiduciary duties of relevant fiduciaries of the companies involved in certain transactions

(including the ***Red Oak Merger*** and the ***Asset-Stripping Transactions***, as defined in Exhibit C) among BAC, CFC and their subsidiaries,

b. Successor liability claims based on the provisions of the Pooling and Servicing Agreements (***PSAs***), including Section 6.02 of the PSAs and 6.04 of the PSAs, which provide that no resignation of the Master Servicer under the Trusts, i.e., Countrywide Home Loans Servicing LP (***CHLS***), would be effective unless a successor servicer assumed all of CHLS's liabilities under the PSAs, as well as the fact that CHLS has subsequently merged into a fully solvent subsidiary of BAC (Bank of America, N.A.),

c. How to arrive at estimates for quantified probability weightings to put on the possible outcomes of the possible fraudulent conveyance, contract, or successor liability claims that it might bring against BAC or CFC or their subsidiaries (the ***Claims***), or

d. The costs and benefits of commencing an action so as to obtain through the discovery process information about the facts relevant to the Claims, or to negotiate with BAC and CFC to obtain sworn statements from knowledgeable participants in transactions relevant to those Claims, or otherwise to test and verify the formal and informal representations made by the potential defendants to the Claims, who had every incentive to omit relevant information or deflect the Trustee's inquiries and prevent the Trustee from obtaining a materially true and complete understanding of the facts relevant to the Claims.

2. The evidence that the Trustee has presented as to the steps that it did take – such as obtaining a report from Capstone, and reports from Professor Robert Daines and Professor Barry Adler – shows that those reports were based on limited facts, were constrained by strong limiting assumptions that were not tested by the Trustee, and were [redacted] that prevented the providers of the reports from obtaining more than minimal information that was likely to have affected the nature of their analyses, particularly in regards to successor liability and the risks of [redacted]. Further, the choice of law analysis that the Trustee obtained did not adequately consider the customs and laws that would govern the likely choice of law that would apply to any successor liability claim that the Trustee might bring, or the choices that the Trustee might have in deciding among possible courts to bring such claims, or how those choices might affect the outcome of such a choice of law analysis, or address choice of law in respect of any Claim other than successor liability or veil-piercing claims.

3. Had the Trustee obtained a materially complete and accurate understanding of the facts relevant to the Claims, it would have learned – as other plaintiffs have learned through the customary discovery process in other proceedings involving CFC, BAC and their subsidiaries – that:

a. The Red Oak Merger and the Asset Stripping Transactions are inconsistent with M&A customs and practices for how a purchaser would customarily effect the acquisition of a stand-alone entity;

b. The Asset-Stripping Transactions had equivalent economic effects on CFC, CHL and the Other Subs and their business operations as if they had been *de jure* merged into BAC and its subsidiaries: CFC and its subsidiaries ceased operating a business while BAC (i) continued maintaining the ownership, management, personnel, physical location and the bulk of the assets and business operations through other BAC commonly controlled and owned subsidiaries and (ii) assumed those liabilities necessary for the operation of those businesses; and

c. The procedures by which the Asset-Stripping Transactions were approved were inconsistent with corporate governance customs and practices for economically similar transactions, and certainly inconsistent with "best practices," and were instead consistent with practices for transactions in which the parties did not face a conflict of interest, which did not represent a "last period" for CFC, CHL and the Other Subs, and which did not confront the parties with significant ongoing solvency concerns.

Had the Trustee sought to do more than simply accept BAC's word on crucial facts, and had it not imposed such strong limits on the efforts of its advisors, the Trustee would have discovered facts such as those reflected in Exhibit C, which would tend to show that the successor liability elements of the Claims had a materially greater chance of success than the Trustee appears to have believed, and further would have discovered additional categories of Claims (fraudulent conveyance, fiduciary duty, and contract-based servicing Claims) that warranted at least some evaluation.

The bases for these opinions are set out in Part V below.

III. Background and Credentials

A. Academic Experience

I am the John F. Cogan Professor of Law and Economics and Research Director of the Program on the Legal Profession at the Harvard Law School (***Harvard***). At Harvard, I teach, among other courses: the basic course on contracts; the basic course on corporations, partnerships, limited liability companies and other business organizations; and advanced courses on M&A, corporate control and governance, the regulation of financial institutions, and securities law and regulation, including basic principles of

accounting, economics and finance as they relate to corporate, securities or financial institutions law or the design and implementation of business transactions. I have also taught at Harvard Business School and the Harvard Kennedy School, including courses on corporate governance and M&A. Before joining the Harvard faculty in 1997, I taught M&A at New York University for five years, and at Boston University, where I taught courses on M&A and the regulation of financial institutions, including national banks, federal savings banks, and bank holding companies. A copy of my *curriculum vitae* is attached as Exhibit A.

B. Prior Work Experience

Before joining the Harvard faculty, I was a partner at the New York law firm of Wachtell, Lipton, Rosen & Katz. I worked at Wachtell Lipton from 1988 to 1997. I no longer practice law, and am not licensed to practice law in Massachusetts. In my practice at Wachtell Lipton, I represented bank holding companies and other large public companies and other firms involved in large financial transactions, including stock and asset purchases, corporate mergers, business combinations, joint enterprises, public offerings, private placements, recapitalizations and buyouts. I routinely advised parties as to their rights and obligations under transaction agreements and relevant banking, securities and corporate laws and regulations, as well as the customs and practices of the financial institution M&A bar with respect to such transactions. I was frequently involved in the preparation of documents filed by public companies under the US securities laws, and personally prepared numerous applications for regulatory approval of bank and bank holding company M&A transactions.

C. Consulting and Litigation Experience

Since joining Harvard, I have provided or am providing paid or unpaid consulting services to the Securities and Exchange Commission (***SEC***), the U.S. Department of Justice (***DOJ***), the U.S. Department of the Treasury, the Office of the White House Counsel, the New York Stock Exchange, members, subcommittees and staff of the U.S. Senate and House of Representatives, and organizations and individuals actively involved in corporate and financial transactions, including private equity funds, mutual funds, hedge funds, public and private companies, law firms, investment and commercial banks, regulatory agencies, trade organizations, and entrepreneurs.

In my consulting, I have served as an independent representative developing plans for and supervising the administration of Fair Funds established under the Sarbanes-Oxley Act, which distributed more than $350 million to investors. I have also served as an independent representative of individual and institutional clients of institutional trustees and money managers. As part of that work, I have developed plans for assessing potential litigation claims, the likelihood that they would result in successful recoveries, and considered the costs and benefits of commencing such litigation. I have also retained and supervised teams of attorneys charged with investigating facts relevant to potential claims, and relied on such investigations to inform recommendations as to which of several modifications to financial allocations would be best for dispersed investors. In addition, as a consultant and while at Wachtell Lipton, I am or was a principal advisor in more than 50 completed corporate transactions, including M&A transactions, each involving more than $100 million, including transactions involving AT&T; GE; IBM; Sara Lee; USAir; and Valero Energy. I have consulted with or advised an array of

commercial and investment banks and other financial institutions, in M&A transactions and financings, such as Goldman, Sachs & Co.; State Street; and Wells Fargo.

I have testified as an expert witness seven times at trial and more than twenty times by deposition, for both plaintiffs and defendants, in disputes involving contracts and contract law, corporate law, securities law, corporate governance and M&A, and have never been disqualified as an expert in these fields.

D. Publications

I have studied and written extensively about the law and economics of corporate transactions, such as M&A transactions, as well as the contracts and customs and practices of business persons and lawyers relevant to such topics, as well as financial regulation, contract law, and other legal topics. My articles have appeared or are forthcoming in top journals, both peer-reviewed and non-peer-reviewed, including *Harvard Business Law Review, Yale Journal on Regulation, Stanford Law Review, California Law Review, University of Pennsylvania Law Review, Texas Law Review, Journal of Corporation Law, Business Lawyer, Yale Journal on Regulation, Journal of Economic Perspectives, Journal of Legal Analysis, Journal of Accounting Research,* and *Journal of Empirical Legal Studies.* A list of all of my publications in the last ten years is included in Exhibit A.

IV. Compensation

AIG will pay my customary hourly fee of $1,250 for time spent on this litigation. I understand I may be asked to give further testimony or opinions in this case. My compensation is not dependent either on the opinions I express or the outcome of this case.

V. Opinions

I was asked by AIG to consider the steps that the Trustee had available to it to evaluate the Settlement, the steps that it did take, and the kinds of information that it could have obtained, whether through litigation or otherwise, that would be relevant to its evaluation of the Settlement. In particular, I was asked to focus on the steps available, steps taken, and information obtainable that was relevant to the position taken by CFC in its discussions with the Trustee, as described by the Trustee at paragraphs 79-81 of its Verified Petition, that "it, standing alone, would be unable to pay a judgment in the amount of the Settlement Amount," and the position taken by BAC and CFC, as described by the Trustee at paragraphs 82-92 of the Verified Petition, that BAC "would prevail" on any claims "based on theories of successor liability, veil piercing or similar legal theories." I have not conducted a complete study of the possible Claims, nor have I reached any bottom-line conclusions as to the outcome of such Claims were they to be brought. Nor have I conducted or had conducted for me any valuation of CFC's assets, or a choice-of-law analysis. However, based on my prior practice experience as an attorney, my research and teaching of law with a focus on M&A, my consulting experience, and my consideration of the documents listed in Exhibit B, I have formed the following opinions:

A. Steps Available but Not Taken

The Trustee had available to it a number of steps that it could have taken to evaluate the Settlement, but has presented no evidence that I have seen that shows that it took these steps, or even considered taking them. These steps fall into six general categories: (a) evaluation of fraudulent conveyance, (b) evaluation of fiduciary duty claims; (c) evaluation of successor liability claims based on the PSAs; (d) evaluation of

direct liability for servicing-related losses; (e) probability weightings; and (f) evaluation of the costs and benefits of obtaining ***verified*** information relevant to the steps that it did take, such as by negotiating with BAC and/or CFC or ***commencing*** litigation before reaching a settlement, in order to obtain discovery.

1. Fraudulent conveyance claims

I have seen no evidence that the Trustee ever considered the possibility that CFC or its subsidiaries may have had assets in the form of potential fraudulent conveyance claims related to the merger of CFC into the Red Oak Merger Corporation on July 1, 2008 (the ***Red Oak Merger***) or the subsequent series of transactions (the ***Asset-Stripping Transactions,*** described more fully in Exhibit C) through which BAC caused CFC to sell to BAC and its non-CFC subsidiaries substantially all of the operating assets of CFC and its subsidiaries, as well as transferring substantially of their employees to BAC and its non-CFC subsidiaries. If those transactions resulted in a fraudulent conveyance, the affected CFC entity could have had a basis to increase its assets by pursuing such a claim.

Nothing in the "valuation analysis" filed by Capstone Valuation Services, LLC (***Capstone Report***) considers the possibility that CFC or its subsidiaries could have increased their assets by bringing such a claim. While the possibility that fraudulent "underpayment" is discussed in the report of Professor Robert Daines (***Daines Report***) in his analysis of veil-piercing doctrine in Delaware and New York (at 18-22), the Daines Report does not undertake an analysis of possible fraudulent conveyance claims themselves. Because fraudulent conveyance claims can be premised on the ground of constructive fraud, they do not need to include proof of intent (or meet heightened pleading standards required in cases in which actual fraud is alleged). While constructive fraud claims would require proof that less than adequate consideration was paid in the

relevant transaction, there is no evidence in the record to suggest that the Trustee ever obtained and verified information about the consideration paid to CFC and its subsidiaries in the Asset-Stripping Transactions. The Capstone Report (at 5) expressly assumes (and states that they did not verify) that CFC and its subsidiaries were solvent and received reasonably equivalent value for any transfers in the Red Oak Merger and the Asset-Stripping Transactions. In fact, as discussed more below, even the directors and officers of CFC and its subsidiaries failed to obtain any sort of contemporaneous adequacy opinion, fairness opinion, solvency opinion, or other proof that the Asset-Stripping Transactions did not leave CFC and its subsidiaries insolvent and/or received less than fair value for their operating assets in those transactions, whether from an independent appraiser, investment bank or other party. Without investigating such claims, the Trustee had no way to test the "position" taken by CFC that its assets were less than the Settlement Amount or insufficient to satisfy a judgment or larger settlement amount.

2. Fiduciary duty claims

I have seen no evidence that the Trustee considered the possibility that CFC and its subsidiaries may have more assets than reflected in the Capstone report based on their having fiduciary duty claims against BAC or its subsidiaries. As discussed in Exhibit C, there is evidence that CFC and its subsidiaries were or may have been insolvent at the time of the Asset-Stripping Transactions. If they were insolvent, then the directors and officers of CFC and their subsidiaries at the time of those transactions owed a duty not just to the sole shareholder of CFC (i.e., BAC or one of its intermediate subsidiaries), but also to their creditors, including the Trusts. Because the Asset-Stripping Transactions involved BAC and its non-CFC subsidiaries purchasing stock and/or assets from CFC

and its subsidiaries, the interests of BAC and CFC were potentially divergent when it came to setting a price in those transactions. The more BAC had to pay, the more CFC stood to gain for itself (as a stand-alone entity) and for its creditors; the less BAC paid, the less CFC stood to gain, as a stand-alone entity and for its creditors. Therefore, any transaction between CFC and BAC's other subsidiaries, such as the Asset-Stripping Transactions, would have been a conflict-of-interest transaction.

The fiduciaries of CFC in approving such a transaction would ordinarily need to prove the transactions were "entirely fair," which would include not only a fair price – which could be more than the asset-by-asset value of the businesses being acquired, but might also need to include estimates of alternative uses for the assets, among other things – but also a fair process, including adequate notice to the beneficiaries of the fiduciary duties in question (which would include creditors, if CFC was insolvent), and, ordinarily, some effort by those fiduciaries to obtain the best reasonably available deal for CFC (which, again, might mean something more than an asset-by-asset valuation of CFC and its subsidiaries). None of this is even addressed in the evidence I have reviewed in this case. Without evaluating such claims, the Trustee had no basis for validly assessing CFC's assets, or capacity to pay more than the Settlement Amount.

3. Successor liability claims based on the PSAs

I have seen no evidence that the Trustee obtained information or evaluated successor liability claims based on the contract provisions of the PSAs. Specifically, the PSAs imposed obligations on CHLS that CHLS allegedly failed to perform. Liabilities arising from failure to perform those obligations were not subject to the defense that CFC had insufficient assets, for two reasons. First, Section 6.04 of the PSAs, which provides that no resignation of CHLS as Master Servicer under the Trusts would be effective

unless a successor servicer assumed all of CHLS's liabilities under the PSAs. Second, Section 6.02 of the PSAs required that any person into which CHLS may be merged would be that person's successor by operation of law, and CHLS has subsequently merged into a fully solvent subsidiary of BAC (Bank of America, N.A.), and is thus by operation of law successor to CHLS. I have seen no evidence that the Trustee considered these potential Claims or related facts in evaluating the Settlement, and Loretta Lundberg—a Bank of New York Mellon managing director and [redacted]—admitted that [redacted][1] Additionally, Professor Daines testified that he [redacted][2]

4. Direct liability for servicing-related losses

Loretta Lundberg also testified that [redacted][3] and I have seen no evidence that the Trustee evaluated the extent to which BAC and/or its subsidiaries may be liable for losses arising from their own improper servicing-related activities after the Red Oak Merger (in which BAC acquired CFC). Indeed, I understand that the institutional investor group represented by Gibbs & Bruns asserted in court pleadings that BAC servicing was the worst in the industry and identified how BAC's servicing caused harm to the Trusts. Any such claims would not be subject to corporate separateness defenses.

[1] Lundberg Dep. 428-29.

[2] Daines Dep. 194-95.

[3] Lundberg Dep. 332-33.

5. Probability weightings

I have seen no evidence that the Trustee itself developed probability weightings for the various possible Claims, even with respect to those Claims that it did consider, nor that it asked third parties to assist in doing so. In any rational decision analysis, it is important to translate qualitative judgments about likely outcomes of uncertain events into probability weightings, in order to adjust appropriately the related payoffs and reduce the probability-weighted payoffs to an expected value. This is basic to any economic (indeed, any rational) analysis of any uncertain set of events. Neither the Capstone report, nor the Daines Report, nor the Professor Barry Adler's report (***Adler Report***) on [redacted] included probability estimates associated with their analyses of the claims they analyzed. Rather, they provided bottom-line estimates that the claims they analyzed were "difficult to win" (Daines Report, at 38) and [redacted] (Adler Report, at 13). It is needless to point out that a Claim with "only" (say) a 55% chance of winning still has a 45% chance of losing, and so might be fairly characterized as "difficult to win" or "not … easily available". At the same time, a Claim with a 0.001% chance of winning could also be characterized as "difficult" or "not … easily available."

The Trustee could not, without more analysis, which is nowhere reflected in the record that I have seen, translate these vague and qualitative conclusions into anything useful for evaluating the Settlement. One might have thought that the Capstone Report would be a place to look for such quantitative estimates, or ranges, but none there appears. Instead, Capstone expressly disclaims having engaged in this task: "Capstone has not analyzed the probability of a positive outcome for the Trustee in litigating the Claims or attempted to quantify the amount of any potential Judgment." (Capstone

Report at 5.) Nor did internal personnel at the Trustee testify that they engaged in such analysis, but instead stated [redacted][4] Instead, the Trustee seems to have translated "difficult to win" or "not ... easily available" into zero, without reason or basis.

6. Obtaining verified information, through discovery or otherwise

I have seen no evidence to suggest that the Trustee did any analysis – quantitative or qualitative – of the costs and benefits of ***commencing*** an action so as to obtain through the discovery process information about the facts relevant to the Claims, as opposed to litigating the case all the way to trial. The Verified Petition makes reference to the costs of full-blown litigation, which of course would be significant for any multi-billion dollar claim against a well-funded organization like BAC. But there is nothing in the Petition to suggest that the Trustee attempted to estimate the costs of initiating litigation, and pursuing discovery, and Robert Griffin – a Bank of New York Mellon managing director – admitted that [redacted][5] Even though those steps would likely generate some non-trivial costs, the likely increase in the ability of the Trustee to make better estimates of the likely outcomes of any fully litigated Claim would have been enormously benefited by incurring those costs.

Even without commencing litigation, moreover, the Trustee had at least some ability to obtain information from CFC and BAC through whatever leverage it had in the

[4] *See, e.g.*, Lundberg Dep. 143, 241-42, 332, 427, 452-54 and 469-74 [redacted] Griffin Dep. 282 [redacted] Bailey Dep. 200 [redacted]

[5] Griffin Dep. 219-20.

negotiations. Even a highly limited but specific request – focused, for example, on just the terms of the Asset-Stripping Transactions, or the degree to which those transactions might have resulted in a de facto merger of CFC into BAC – would have produced significant improvements in the ability of the Trustee or its expert advisors to probability-weight the likely outcomes of potential Claims, to negotiate with BAC and CFC to obtain sworn statements from knowledgeable participants in transactions relevant to those Claims, or otherwise to test and verify the formal and informal representations made by the potential defendants to the Claims, who had every incentive (as the potentially liable party) to omit relevant information or deflect the Trustee's inquiries and prevent the Trustee from obtaining a materially true and complete understanding of the facts relevant to the Claims.

Finally, if BAC and CFC's claims were in fact valid, then BAC and CFC, too, would have had an interest in allowing the Trustee to do more genuine factual investigation than the record suggests the Trustee did. The Trustee does not seem to have considered requesting sworn statements from percipient fact witnesses, from either CFC or BAC, as to the basis for BAC's and CFC's defenses. Had the Trustee obtained such statements and/or specific representations as to elements of the Asset-Stripping Transactions that were relevant to the likelihood of success on the fraudulent conveyance, fiduciary duty, contract, or direct and successor liability claims, the Trustee would have been able to make an informed judgment about the positions that BAC and CFC were taking in the Settlement discussions. Instead, the Trustee apparently decided to [redacted], BAC only represented in Section 13(b) of the Settlement Agreement that its representations were "not materially false or materially inaccurate," as opposed to "materially true and complete" or the

equivalent, which is commonly requested in settings where one party engages in limited or no verification of facts that are nevertheless important to its decision. In addition, it appears that the Trustee made no investigation into the accuracy of that representation and warranty.

B. Steps Taken

The evidence that the Trustee has presented as to the steps that it did take – such as obtaining a report from Capstone, and reports from Professor Robert Daines and Professor Barry Adler – shows that those reports were based on limited facts, were constrained by strong limiting assumptions [redacted] that prevented the providers of the reports from obtaining more than minimal information that was likely to have affected the nature of their analyses, particularly as regards successor liability and the risks of [redacted] and did not reflect an adequate choice of law analysis.

1. Limited Facts and Limiting Assumptions

The Daines Report states clearly at the outset that it is based on "the available factual record," and that because "veil-piercing and successor liability are fact-intensive legal theories[,] any ultimate judicial determination may turn on documents or testimony that would be produced at trial that [Professor Daines had not] seen" when he produced the report. The Daines Report states it is also based on "certain assumptions" (at 1), but there is no explicit discussion in the report that makes clear what those assumptions are, in aggregate. Further, the report recites that Professor Daines had not "independently verified the accuracy of any facts," and implies that Professor Daines did not receive any sworn testimony or do anything to build an understanding of the facts relevant to the case other than review public documents and hold "discussions" with BAC and legacy CFC

personnel. Specifically, Daines relied exclusively on limited facts and/or assumptions about the value paid in the Asset-Stripping Transactions, the relationship of that value to the value of the assets and business transferred from CFC to BAC and its subsidiaries, and the approval process for the transactions.

He did not independently verify these facts, nor consult BAC's books, records, and other relevant documents, nor does his report state that he interviewed the various directors and officers of CFC and its subsidiaries who approved the Asset-Stripping Transactions, nor that he reviewed any testimony by them (some of which had been taken at the time of the Daines Report). With respect to the question of "business purpose" for the Asset-Stripping Transactions, the Daines Report notes only that "BAC may well have had legitimate business purposes" for them, but the Daines Report states that Professor Daines did not do any investigation other than to have discussions with BAC representatives on this crucial question. He verified no information about commingling of assets as between BAC and its subsidiaries, on the one hand, and CFC and its subsidiaries, on the other hand. There is no analysis or recitation of facts relating to the merger of the successor to the CFC subsidiary that was party to the PSAs (***BACHLS***) into Bank of America, N.A. (***BANA***), or of Countrywide Bank, N.A. into BANA, or the implications of those mergers for his analysis, or for any contract-based claim that BANA thereby became liable for any part of the Claims by operation of law (or of BANA's assets or ability to pay any such liability).

Similar statements in the Capstone and Adler Reports show that they, too, are based on limited facts. For example, the Capstone Report states that the report was prepared by relying on specific, limited facts, "discussions with certain senior members of CFC management" but all "without independent verification." As noted above,

Capstone simply assumed two crucial facts relevant to any fraudulent conveyance, fiduciary duty or successor liability analysis – that CFC and its subsidiaries were solvent and received fair consideration for assets transferred to BAC and its non-CFC subsidiaries in the Asset-Stripping Transactions. Similarly, Professor Adler's report [redacted]

Of course, it is customary for outside advisors and experts to rely on specified facts and assumptions. But the person who retains such advisors or experts generally has the responsibility for deciding which of those facts and assumptions should be verified, and then carrying out the verification. Likewise, the person relying on outside advisors and experts must take into account the fact that assumptions limit the reliability of the analyses to that extent. Here, not only did the Trustee [redacted] at least as far as evident from the record I have reviewed, but then purported to [redacted] While no one would suggest that all facts relevant to an evaluation of a Claim need to be verified to allow for a reasonable decision to settle a claim, the number of ***verified*** facts on which the Verified Petition is based is strikingly small, relative to their potential importance in evaluating the merits and potential value of the Claims.

Further, the Trustee itself appears to have made other limiting assumptions, which constrained the relevance and reliability of the analyses reflected in its advisors' reports. First, the Trustee seems to have [redacted]

[redacted][6]

This is not a normal assumption to make if one is in fact attempting to estimate, as a first-stage matter, whether one has a good claim or not. Rather, one typically analyzes the best case, the worst case, and then arrives at rough estimate of the likely outcome. That likely outcome will often not be the same as the bottom end of the range that covers every possible outcome that is [redacted]

Second, the Trustee's counsel appears to have [redacted][7] In effect, the Trustee's counsel [redacted]

By constraining the information available to its advisors and the scope of their inquiries, the Trustee could not then reasonably rely on the product of a flawed process of which it was the architect.

A final telling example of the Trustee's strong limiting assumptions is that its Verified Petition summarizes the law of successor liability in a much more constraining way than even does the Daines Report, which analyzes that law at length. (I should note I do not agree with all of the analysis in the Daines Report, but that is not relevant here.) Paragraph 84 states that "to prevail on a traditional claim for successor liability, the

[6] *See* BNYM_CW-00273355 [redacted]

[7] Adler Dep. 102-05.

Trustee would have to demonstrate … [that BAC] is a continuation of [CFC], that CFC had ceased operations and dissolved, ***and*** that the sale was designed to disadvantage shareholders or creditors of [CFC]" (emphasis added). That summary is at variance from several of the possible successor liability tests discussed in the Daines Report. For example, the Daines Report notes (at 32) that there are four different bases for successor liability under New York law, only one of which is that a buyer is a "continuation" of the seller. A completely different test is the de facto merger doctrine, which as the Daines Report summarizes (at 35), has itself four subtests, none of which require that a plaintiff demonstrate the transaction in question "was designed to disadvantage shareholders or creditors." Further, not all four subtests have been required to be satisfied for the de facto doctrine to apply (see Daines Report at 35). Thus, the Trustee apparently assumed (without evident basis) that the law was significantly less receptive to a successor liability claim than did its own advisor.

2. Time Constraints

The evidence I have reviewed further undermines the credibility of the Trustee's evaluation of the Settlement because it obtained third-party reports only a short time before it filed its Verified Petition, despite having held discussions with BAC and CFC for "seven months" (Verified Petition at 35). The Capstone Report is dated June 6, 2011; the Daines Report is dated June 7, 2011; the Adler Report [redacted]. An email from counsel for the [redacted][8] [redacted]

[8] BNYM_CW-00273355.

[redacted]

3. Choice of Law Analysis

I have seen no evidence that the Trustee ever obtained a detailed and adequate choice-of-law analysis from a qualified expert who specializes in choice of law. Such an analysis is important in assessing the likelihood that a successor liability claim could successfully be brought against BAC. The reason such an analysis is important is demonstrated by the Daines Report, which correctly notes that there are different tests for successor liability in different jurisdictions.

While the Daines Report includes an appendix discussing choice of law, the Daines Report does not provide a detailed and adequate choice-of-law analysis that is consistent with the bottom-line of the report, including (for example) the fact that the Trustee (as plaintiff) would have had discretion as to where to bring a claim, including claims based on the PSAs, which would be governed by the choice of law clauses in the PSAs. Professor Daines even candidly stated at his deposition that he was [redacted] Thus, the record evidence that I have reviewed suggests that the Trustee had no choice of law analysis or information for other claims.

The Daines Report does note that the Trustee would have had a choice as to where to bring an action, on whatever basis, and thus could have brought Claims in New York courts. The Daines Report also provides a partial summary of the law governing

[9] Daines Dep. 271.

choice of law in New York. However, the bottom-line conclusion of that portion of the Daines Report (at page 41) is not easily reconciled with the Daines Report's own analysis (at 39-41). As the Daines Report correctly discusses, New York cases often apply "interest analysis" rather than simply applying the law of the state of incorporation. By the time the Petition was filed, one New York court had already concluded that it would apply New York law to successor liability issues in a similar case against BAC and CFC. Even a casual comparison of the choice of law analysis with the briefs in other cases pending where similar issues have been briefed by litigators who have focused specifically on choice of law suggests that there is considerably more that might have been analyzed for the Trustee's benefit in assessing the likelihood that a New York court would apply New York law to the varied claims that the Trustee might have brought.

Further, the policy reasons that lead many courts to apply the state of incorporation's law in some contexts – the so-called internal affairs doctrine – have no evident role in a case brought by creditors of the kind represented by the Trustee, as opposed to disputes involving boards, officers and shareholders, at least outside the context of fiduciary duty claims. Delaware, for example, is well-known and highly regarded for its case law regarding alleged fiduciary duty breaches in cases brought by shareholders. Delaware is not, however, a common choice of law or forum for resolving non-shareholder contract disputes involving private companies, such as would have been brought by the Trustee against CFC and/or BAC. Finally, the Daines Report notes that the PSAs were governed expressly by New York law. Despite all of this, the Daines Report concludes (with little explanation other than the value of a "bright line rule") that the internal affairs doctrine would be applied by New York courts in deciding the choice of law in a New York proceeding, even though there is no such bright-line rule reflected

in the New York choice of law cases. Even there, the conclusion in the choice-of-law appendix to the Daines Report (at 41, "I do not expect" that New York courts would apply Delaware law) is stated rather differently than the conclusion to the report itself (at 38, "New York law may not … apply").

In combination, these factors should have at least alerted the Trustee to the need for a more careful analysis from a person who spends their time analyzing choice of law cases generally, and not just those involving corporate law disputes. The Trustee should also have considered the choice of law analysis more carefully, by getting some more detailed sense of how often and when cases involving ***creditors*** led courts to use interest analysis rather than the internal affairs doctrine. Finally, the Trustee should also have, as discussed above, considered putting some probability estimate on the outcome of such a choice of law analysis. A 50% or even 30% weighting of New York as the outcome of the choice of law analysis would have resulted in a significantly different bottom-line to the successor liability analysis overall, particularly once the facts that were available to the Trustee to obtain – discussed next – are considered.

C. Information Obtainable but not Obtained

Had the Trustee obtained a materially complete and accurate understanding of the facts relevant to the Claims, it would have learned a variety of things relevant to the Claims, as other plaintiffs have learned through the customary discovery process in other proceedings in which CFC has taken the position that it lacks assets to pay its liabilities (i.e., that it is or may be insolvent) and/or in which BAC has taken the position that neither it nor its non-CFC subsidiaries are successors to, or are otherwise liable for, the liabilities of CFC and its subsidiaries. Such information includes evidence falling into at least three categories of evidence showing that: (a) the Red Oak Merger and the Asset-

Stripping Transactions were inconsistent with M&A customs; (b) the Asset-Stripping Transactions had economic effects equivalent to those of a de jure merger of CFC into BAC; and (c) those transactions were approved in non-customary means for transactions involving a potential conflict of interest for the relevant fiduciaries and companies that were or may well have been insolvent. Each of these sets of information is discussed at length in the public version of a report I prepared for a separate litigation involving BAC and CFC, attached as Exhibit C.

Exhibit C shows, among other things, that the Asset-Stripping Transactions are not consistent with efforts to continue the operation of two separate businesses. What BAC accomplished through the Asset-Stripping Transactions—the integration of all of CFC's lines of business into BAC's lines of business—could have been accomplished thru a *de jure* merger. However, in that scenario, BAC and its non-CFC subsidiaries would have formally assumed all of CFC's and CHL's legal liabilities. The Asset-Stripping Transactions, on the other hand, are consistent with an effort to achieve the same integration of operations and business that would typically be accomplished through a *de jure* merger while also attempting to leave contingent liabilities behind in shell entities – in this case, CFC and its subsidiaries.

CFC and its subsidiaries had the same owners as if *de jure* merged into BAC rather than engaging in the Asset-Stripping Transactions, and BAC transferred to its non-CFC subsidiaries substantially all of the operating assets, employees, physical plant, goodwill, customer lists, and funding capacity, leaving CFC and its subsidiaries without business operations, solely devoted to disputing and/or paying contingent liability claims. BAC continues to operate the businesses that it transferred through the Asset-Stripping Transactions, and the revenues associated with those operations inure to the benefit of

BAC, not CFC or CHL. Before and after the November Transactions, the directors and officers of each of CFC, CHL and the Other Subs reported to and were directed by management of BAC. BAC has chosen to inject sufficient capital into CFC to allow it and its subsidiaries and then caused them to pay some, but not all, of their liabilities.

These facts are all relevant to any fair evaluation of the successor liability components of the Claims. Further facts analyzed in Exhibit C show the conflict-of-interest nature of the Asset-Stripping Transactions, and many facts relevant to fiduciary duty Claims arising out of those transactions, including the fact that the Asset-Stripping Transactions were approved with a cursory process that did not adhere to customs and practices for such transactions. Exhibit C also reflects evidence tending to show that CFC was or may have been insolvent at the time of the Asset-Stripping Transactions, raising the possibility that the Asset-Stripping Transactions were or included fraudulent conveyances. The Trustee does not appear to have reviewed any of these facts in detail, and while the Daines Report and the Capstone Report do contain a general description of some of these facts, considerably more detail even as to those would have been available had the Trustee attempted to verify information supplied by BAC that was relevant to the Claims.

VI. Conclusion

In conclusion, it is my opinion, based on my experience, research, consulting, and teaching, that the Trustee had available to it many steps that would have enabled it to engage in an adequate evaluation of the Claims, many of which it did not take at all, and some of which it did take but in such a constrained and limited fashion as to undermine significantly their value for arriving at an objective understanding of the potential value of the Claims, and thus for an objective evaluation of the Settlement. Had the Trustee

sought to do more than simply accept BAC's word on crucial facts, and had it not imposed such strong limits on the efforts of its advisors, the Trustee would have discovered facts such as those reflected in Exhibit C, which would tend to show that the successor liability elements of the Claims had a materially greater chance of success than the Trustee appears to have believed, and further would have discovered that additional categories of Claims (fraudulent conveyance, fiduciary duty, and contract-based servicing Claims) that warranted at least some evaluation.

Dated: February 28, 2013

Exhibit A

JOHN C. COATES IV

647 Commonwealth Avenue
Newton, Massachusetts 02459
(617) 496-4420 (office tel)
(617) 496-5156 (office fax)
jcoates@law.harvard.edu (email)

EXPERIENCE

Harvard Law School, Cambridge, MA

John F. Cogan Jr. Professor of Law and Economics	6/06 – Present
Research Director, Program on the Legal Profession	6/07 - Present
Professor of Law	6/01 – 6/06
Assistant Professor of Law	6/97 - 6/01

Teaching Corporations, Corporate Governance and Boards of Directors, Mergers & Acquisitions, Contracts, Financial Institutions Regulation, Legal Profession and advanced seminars

Securities and Exchange Commission, Washington, D.C.

Independent Distribution Consultant	5/04 – 9/11

Wachtell, Lipton, Rosen & Katz, NYC

Partner	1/96 - 5/97
Associate (Full- or Part-Time)	3/88 - 12/95

Specialized in corporate, securities, M&A, and financial institutions law and regulation

Managed legal work for large corporate mergers and acquisitions, recapitalizations, buyouts, freezeouts, and public offerings

Advised participants in proxy fights, auctions, and hostile takeovers

Managed disclosure and compliance "crises" at public companies, particularly financial institutions

New York University School of Law, NYC

Visiting Professor	7/05 – 12/05
Adjunct Assistant Professor	1/93 -5/97
Lecturer	1/92 - 12/93

Boston University Law School, Boston, MA

Lecturer	1/95 – 6/97

MEMBERSHIPS / AFFILIATIONS
PRESENT OR PAST

American Law Institute	Member
New York Stock Exchange	Member, Legal Advisory Board
American Bar Association	Member, Section on Business Law
American Law and Economics Association	Member, Board of Directors
Association of American Law Schools	Member
European Corporate Governance Institute	ECGI Research Associate
National Bureau of Economic Research	Invited Speaker / Researcher
Harvard Business School / Harvard Law School Ad Hoc Group on Corporate Governance	Founding Member
Harvard Center on Lawyers and the Professional Services Industry	Research Director
Committee on Capital Market Regulation	Task Force Member and Primary Author

EDUCATION

New York University School of Law	J.D. Cum Laude, May 1989
New York University Law Review 1987-88—Staff Member	1988-89—Editorial Board, Articles Editor
Law Review Alumni Association Award	Third in Class
George P. Foulk Memorial Award	Scholarship
Pomeroy Prize	Outstanding Academic Performance
Order of the Coif	
American Jurisprudence Awards (contracts, procedure, securities)	
University of Virginia	B.A. (History), Highest Distinction, May 1986
Thesis: "Christianity, Kingship and a Carolingian Lord"	
Younger Prize	Distinction in American History
Jefferson Scholar	Four-year Merit-Based Scholarship
Echols Scholar	Academic and Leadership Merit

PUBLICATIONS

Recent Publications

Managing Disputes Through Contract: Evidence from M&A, *Harvard Business Law Review* (2012) (forthcoming)

Corporate Politics, Governance, and Value Before and After *Citizens United*, *Journal of Empirical Legal Studies* (2012) (forthcoming)

Hiring Teams, Firms and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market, 36 *Law & Social Inquiry* 999-1031 (2011) (with Michele DeStefano Beardslee, Ashish Nanda and David B. Wilkins)

Corporate Purchasing Project: How S&P Companies Evaluate Outside Counsel (A White Paper), Harvard Law School Program on the Legal Profession (2011) (with Michele DeStefano Beardslee, Ashish Nanda, Erik Ramanathan and David B. Wilkins)

M&A Break Fees: U.S. Litigation versus U.K. Regulation, Regulation versus Litigation: Perspectives from Economics and Law, Daniel Kessler, ed. Chicago: University of Chicago Press (2011)

Other Major Publications

Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis, 1 *J. Legal Anal.* 591 (Summer 2009)

Competition in the Mutual Fund Industry: Evidence and Implications for Policy, 33 *J. Corp. L.* 151 (2008) (with R. Glenn Hubbard)

The Goals and Promise of the Sarbanes-Oxley Act, 21 *J. Econ. Persp*. 91 (Winter 2007)

Ownership, Takeovers and EU Law: How Contestable Should EU Corporations Be?, in Company and Takeover Law in Europe, eds. E. Wymeersch & G. Ferrarini (Oxford University Press 2004)

The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy, 54 *Stan. L. Rev.* 887 (2002) (with Lucian A. Bebchuk and Guhan Subramanian), selected as one of 10 best corporate law articles published during 2002 by academics surveyed

Explaining Variation in Takeover Defenses: Blame the Lawyers, 89 *Cal. L. Rev.* 1301 (2001), selected as one of 10 best corporate law articles published during 2002 by academics surveyed, reprinted in Mergers and the Market for Corporate Control, ed. Fred S. McCheney (Edward Elgar 2010)

Private vs. Public Choice of Securities Regulation: A Political Cost/Benefit Analysis, 41 *Va. J. Int'l L.* 531 (2001), selected as one of 10 best securities law articles published during 2001 by academics surveyed

A Buy-Side Model of M&A Lockups: Theory and Evidence, 53 *Stan. L. Rev.* 307 (2000) (with Guhan Subramanian)

Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence on Takeover Defenses, 79 *Tex. L. Rev.* 271 (2000), reprinted in 43 *Corp. Practice Commentator* 1 (2002) as one of 10 best corporate law articles published in 2001-02 by academics surveyed

Measuring the Domain of Mediating Hierarchy: How Contestable Are US Public Corporations?, 24 *J. Corp. L.* 837 (1999)

"Fair Value" as a Default Rule of Corporate Law: Minority Discounts in Conflict Transactions, 147 U. Penn. L. Rev. 1251 (1999), reprinted in 41 Corp. Practice Commentator 1 (2000) and selected as one of 10 best corporate law articles published in 1999-2000 by academics surveyed

Annual Survey of Developments in Mergers and Acquisitions of Financial Institutions 1990-1998 (with Herlihy et al.) (co-authored leading annual survey for eight years; privately published)

State Takeover Statutes and Corporate Theory: The Revival of an Old Debate, 64 *N.Y.U. L. Rev*. 806 (1989)

Other Publications

Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity, 2011 (with Taylor Lincoln)

The Downside of Judicial Restraint: The (Non-) Effect of *Jones v. Harris*, 6 Duke J. of Constitutional Law and Public Policy 58 (2010)

Corporate Governance After the Financial Crisis, Proceedings of the 2010 Annual Symposium: Legal Aftershocks of the Global Financial Crisis, 6 *NYU J. of Law & Business* 171 (2010)

Lowering the Cost of Bank Recapitalization, 26 *Yale J. Reg*. 373 (Summer 2009) (with David Scharfstein)

The Keynote Papers and the Current Financial Crisis, 47 *J. Acctg. Res.* 427 (May 2009)

The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants, 55 *Stan L. Rev.* 885 (2003) (with Lucian A. Bebchuk and Guhan Subramanian), selected as one of 10 best corporate law articles published during 2003 by academics surveyed

The Trouble With Staggered Boards: A Reply to Georgeson's John Wilcox, Corporate Governance Advisor (2002) (with Lucian A. Bebchuk and Guhan Subramanian)

Second-Generation Shareholder Bylaws: Post-*Quickturn* Alternatives, 56 *Bus. Law*. 1323 (2001) (with Bradley C. Faris)

Empirical Evidence on Structural Takeover Defenses: Where do We Stand?, 54 *U. Miami L. Rev*. 783 (2000)

Freezeouts, Management Buyouts and Going Private, in *Takeovers & Freezeouts* (eds. M. Lipton & E. Steinberger, Law Journal Seminars-Press 1998)

Reassessing Risk-Based Capital in the 1990s: Encouraging Consolidation and Productivity, in *Bank Mergers and Acquisitions* (eds. Y. Amihud & G. Miller, Kluwer Academic Publishers 1998)

Purchase Accounting Deals: A Look at Pricing Formulas and Allocation Procedures, 15 Banking Policy Report 1 (Nov. 18, 1996) (with Herlihy, et al.)

Acquisitions of Financial Advisory and Investment Management Businesses, 17 *Bank & Corp. Gov. L.* Rep. 8 (Sep. 1996) (with Herlihy et al.)

New Guidance for Freezeouts and MBOs—Negotiation Strategy Privileged from Disclosure, Corp. Rep. (Aspen Law & Business (June 1996) (with Rowe)

M&A Strategies, 9 Bank Accounting and Finance 40 (Winter 1995-96) (with Herlihy, et al.)

Bank M&A Preparedness, 66 Corp. Rep. 1 (Aspen Law & Business Nov. 15, 1995) (with Herlihy, et al.)

Mergers and Acquisitions of Financial Institutions – 1995: An Unprecedented Year of Consolidation, Securities Activities of Banks, Fifteenth Annual Institute (1995) (with Herlihy, et al.)

Deal Developments Update, Corporate Control Alert (August 1995) (with Herlihy et al.)

Updating the Use of Special Committees in Freeze-Outs and Other Conflict Transactions, Corp. Rep. (Aspen Law & Business Aug. 15, 1995)

Banking on Nonbank Acquisitions, The Community Banker 46 (Second Quarter 1995)

Fundamental Rules For Bank Merger Transactions Remain Unchanged After Paramount, in Banking Expansion Institute, Thirteenth Annual (Aspen Law & Business 1995) (with Herlihy, et al.)

Bank and Thrift Mergers and Acquisitions -- 1994, in Securities Activities of Banks, Prentice-Hall Law & Business, Fourteenth Annual Institute (1994) (with Herlihy, et al.)

Stock Buybacks: Strategic, Legal and Fiduciary Issues, 8 Insights 10 (Nov. 1994) (with Herlihy et al.)

Concentration Limits: New Interstate Moves Still Face Minefield of Deposit Cap Statutes, in a Special Report on Interstate Banking, 13 *Banking Policy Rep*. 23 (Aug. 15, 1994) (with Neill)

Mergers of Equals: Achieving a Delicate Balance of Control, 13 *Banking Policy Report* 1 (Oct. 3, 1994) (with Herlihy et al.)

Banking Developments, Banking on Non-Bank Acquisitions and Current Issues in Bank Acquisitions, in Bank Mergers and Acquisitions, Practicing Law Institute (1994) (with Herlihy, et al.)

Current Issues in Bank Acquisitions, 7 Bank Acct'g & Fin. 44 (Spring 1994) (with Herlihy et al.)

Recent Deals Feature New Pricing Formulas, 13 Banking Pol. Rep. 2 (Apr. 4, 1994) (with Herlihy et al.)

M&A Strategies, 7 Bank Accounting & Finance 48 (Winter 1993- 94) (with Herlihy et al.)

Assessing the Current Bank Merger Environment: A Preparedness Checklist, 12 Banking Policy Report 1 (Oct. 18, 1993) (with Herlihy et al.)

Bank Mergers and Acquisitions -- 1993: A Year of Increasing Franchise Consolidation, in *Securities Activities of Banks*, Prentice-Hall Law & Business, 13th Annual Institute (1993) (with Herlihy, et al.)

Hostile Acquisition Overtures At Smaller Banks and Thrifts, 11 Bank & Corp. Gov. L. Rep. 47 (1993) (with Herlihy et al.)

Flexibility on Safety and Soundness, 3 Bank Director 3 (Third Quarter 1993) (with Wasserman)

Designing Bank Governance Structures, 12 Bank Policy Report (Apr. 19, 1993) (with Herlihy et al.)

Capital and Compliance Strategies in the Era of Prompt Corrective Action, in *The New Implementing Regulations Under FDICIA* (Prentice Hall 1992) (with Wasserman et al.)

1992 -- A Year of Continuing Financial Industry Consolidation: Current Trends and Various Considerations in Bank Mergers and Acquisitions, in Securities Activities of Banks, Prentice-Hall Law & Business, Twelfth Annual Institute (1992) (with Herlihy, et al.)

Bank Regulators Turn Up Intensity in Examination of Racial Discrimination in Lending Practices, 9 Bank & Corp. Governance L. Rep. 758 (December 1992) (with Stern et al.)

Meeting the Challenge of Loan Bias Scrutiny, Am. Banker (August 21, 1992) (with Stern et al.)

Investment Company Act Exemption Proposed, 11 Int'l Fin. L. Rev. 41 (July 1992) (with Robinson)

Dealing with Market Risks in Stock Mergers: Collars and Walk-aways, 6 Insights 4 (July 1992) (with Herlihy et al.)

Market Risks in Bank Mergers, 1 Bank Governance L. Rep. 1114 (July 1992) (with Herlihy et al.)

Racial Discrimination in Lending Practices, 1 Bank Gov. L. Rep. 1114 (July 1992) (with Stern et al.)

Disclosure of the Analyses Underlying Investment Banker Fairness Opinions, 6 Insights 11 (March 1992) (with Herlihy et al.)

Federal Reserve Board Approval Criteria for Bank Mergers, 7 Bank & Corp. Governance L. Rep. 45 (1992) (with Herlihy et al.)

Consensus Needed on Early Resolution's Legal Issues, Am. Banker (Mar. 25, 1992) (with Wasserman)

An Overview of Current Trends and Various Considerations in Bank Mergers and Acquisitions, in Securities Activities of Banks, Prentice-Hall Law & Business, Eleventh Annual Institute (1991) (with Herlihy et al.)

Management Buyouts and the Duties of Independent Directors to Shareholders and Creditors, in Corporate Deleveragings and Restructurings, Practising Law Institute (1991) (with Lederman et al.)

Liabilities Under Sections 11, 12, 15 and 17 of the Securities Act of 1933 and Sections 10, 18 and 20 of the Securities Exchange Act of 1934, in Introduction to Securities Law 1990, Practising Law Institute (1990) (with Vizcarrondo et al.)

Advising the Board of Directors of a Target Company Regarding Defensive Strategies, in Dynamics of Corporate Control IV, American Bar Association National Institute (1989) (with Fogelson)

State Takeover Statutes: A Fifty-State Survey (privately published) (1989) (with Robinson et al.)

The Reorganization Plan: Statutory Framework and Commercial Realities, in Business Reorganizations and Workouts, Law Journal Seminars-Press (1988) (with Koplow)

<u>Working Papers</u>

The Link between the Acquisitions Market and the Market for CEOs (January 2011) (with Reinier Kraakman)

Corporate Governance and Corporate Political Activity: What Effect will Citizens United have on Shareholder Wealth?, Olin Center Discussion Paper No. 684 (November 2010)

The Powerful and Pervasive Effects of Ownership on M&A, Olin Center Discussion Paper No. 669 (June 2010)

An Empirical Reassessment of MBO Bids: Techniques, Outcomes, and Delaware Corporate Law, Working Paper (October 2005)

Why Are Firms Sold? The Role of the Target CEO's Age, Tenure, And Share Ownership, Working Paper (October 2005) (with Reinier Kraakman)

The Legal Origins of the Politically Puzzling U.S. "Market" for Corporate Charters, Working Paper (October 2004)

The Power of Defenses, National Bureau of Economics Research Working Paper (July 2003) (with Lucian Arye Bebchuk and Guhan Subramanian)

CEO Incentives and M&A Activity in the 1990s: Stock Options and Real Options, Working Paper (March 2002) (with Reinier Kraakman)

An Index of the Contestability of Corporate Control: Studying Variation in Legal Takeover Vulnerability, Working Paper (June 1999)

Congressional Testimony

Testimony of John C. Coates IV Before the U.S. Senate Subcommittee on Securities, Insurance and Investment on Proposed Securities Law Reforms (December 2011)

Testimony of John C. Coates IV before the Committee on House Administration, House of Representatives on the Disclose Act (H.R. 5175) (May 2010)

Testimony of John C. Coates IV before the Subcommittee on Securities, Insurance and Investment of the Committee on Banking, Housing and Urban Affairs, United States Senate, Harvard Law School Public Law & Theory Working Paper Series, Paper No. 09-56 (July 2009)

Case Studies, available at:

http://www.law.harvard.edu/academics/post-grad/case-studies/products/available-cases-online/index.html

In a Pickle: Barclays Capital and the Sale of Del Monte Foods (with Clayton Rose and David Lane)

Hilton's Hostile Bid for ITT

Emery Celli Brinckerhoff & Abady

Columns, op eds, and other short works

Bill To Help Businesses Raise Capital Goes Too Far, *Washington Post* (March 14, 2012) (with Robert Pozen)

Fulfilling the Promise of "Citizens United", Washington Post (September 6, 2011) (with Taylor Lincoln) (republished in Business Ethics (Sep. 2011)

A Costly Lesson in the Rule of 'Loser Pays', Financial Times (November 2, 2009)

The Bailout is Robbing the Banks, *New York Times* (February 18, 2009) (with David Scharfstein)

The Greatest American Shambles: An Exchange, 38 *N.Y. Rev. of Books* 59 (June 13, 1991)

Exhibit B

Materials Relied Upon:

PSA for CWALT 2005-35CB, Jul. 1, 2005 (BNYM_CW-00217617-857) (Dep. Ex. 13)

Email from Kravitt [redacted], Apr. 23, 2011 (BNYM_CW-00273353-57) (Dep. Ex. 138)

Adler causation opinion, May 27, 2011 (Dep. Ex. 11)

Capstone Valuation Services, LLC's valuation analysis, Jun. 6, 2011 (BNYM_CW-00249770-784) (Dep. Ex. 12)

Robert Daines Opinion, Jun. 7, 2011 (Dep. Ex. 10)

Settlement Agreement, Jun. 28, 2011 (Dep. Ex. 1)

Bank of New York Mellon's Verified Petition, Jun. 29, 2011 (Dep. Ex. 2) Bank of New York Mellon's Memorandum of Law in Support of Verified Petition, Jun. 29, 2011

AIG's Memorandum of Law in Support of Verified Petition to Intervene, Aug. 8, 2011

The Bank of New York Mellon's Consolidated Response to Objections, Oct. 31, 2011 (Dep. Ex. 131)

Stanley Deposition Transcript, Jan. 8, 2013

Kravitt Deposition Transcripts, Sept. 19-20, 2012.

Lundberg Deposition Transcripts, Oct. 2-3, 2012

Scrivener Deposition Transcript, Nov. 14, 2012

Adler [redacted] Opinion (Dep. Ex. 27)

Bailey Deposition Transcript, Dec. 3, 2012

Laughlin Deposition Transcript, Dec. 12, 2012

Adler Deposition Transcript, Dec. 13, 2012

Griffin Deposition Transcript, Jan. 3, 2013

Capstone Valuation Services LLC Deposition Transcript, Jan. 18, 2013

Daines Deposition Transcript, Jan. 24, 2013

Any and all documents referenced in this report, dated Feb. 28, 2013