

Report'), and to consider issues raised by the Lin Report and other matters bearing on the quantification of damages to the Covered Trusts.”³ Among other things, Dr. Cowan criticizes Mr. Lin and the Trustee because they did not: review loan files for the loans at issue in this case; accept the Institutional Investors’ claims of breach rates which were based on data allegedly derived from loans “similar to those in the subject pools”; or “use and properly apply an alternate methodology.”⁴ Dr. Cowan then applies an alternative methodology which he claims is “a scientifically valid approach to the use of the limited information provided to Mr. Lin” and “conclude[s] that the estimated average total repurchase liability is \$56.34 [billion].”⁵

3. I have been asked by counsel for the Trustee to review and respond to the Cowan Report.⁶ I have been assisted by Compass Lexecon’s staff. Based on my review of the Cowan Report and the materials and analysis in the Fischel Report, I have concluded that the Cowan Report is fundamentally flawed for the reasons described below. Consequently, the Cowan Report does not affect my conclusions.

II. DR. COWAN NOWHERE STATES LET ALONE DEMONSTRATES THAT THE SETTLEMENT PAYMENT SHOULD HAVE BEEN ANY MORE THAN \$8.5 BILLION

4. Dr. Cowan’s report is critical of Mr. Lin and the Trustee and is full of directives of what they should have done.⁷ Dr. Cowan also devotes a substantial portion of his report to a “simulation study” of Countrywide’s repurchase liability related

3. Cowan Report at 1.

4. *Id.* at 1, 5 & 15.

5. *Id.* at 24.

6. I am being compensated at my usual rate of \$1250 per hour. My compensation in no way depends on the content of my opinions or the outcome of this proceeding.

7. Cowan Report at e.g. 15.

to the Trusts.⁸ But notwithstanding all of his criticisms and calculations, Dr. Cowan nowhere demonstrates or even asserts that the Settlement Payment should have been higher or that the actual Settlement Payment was too low. As such, his report is irrelevant in answering the critical question of whether the Trustee acted reasonably in entering into the Settlement.

III. DR. COWAN IGNORES THE ECONOMICS OF THE SETTLEMENT DECISION

5. Moreover, Dr. Cowan's criticisms are unpersuasive on their own terms because he ignores the economics of the Trustee's settlement decision. As I explained in the Fischel Report:

... there is no guarantee that an additional expenditure of resources and time will produce a more favorable outcome – it may produce the opposite result. In such a case, the decision to reject a settlement offer and engage in additional information gathering and investigation produces the dual bad outcome of wasted time and money only to get a worse outcome as a result.⁹

6. Dr. Cowan's failure to take the economics of the settlement decision into account is highlighted by his criticism of the Trustee for not commissioning a loan file review. He claims an analysis across the 530 Trusts could have been performed with 4,630-6,470 loan files and an analysis of each Trust could have been performed with approximately 50,000 loan files.¹⁰ But a single party's re-underwriting of 4,630 to 6,470 loan files would require approximately 10,000 to 20,000 hours.¹¹

8. *Id.* § IV. See also *infra* ¶ 9.

9. Fischel Report ¶ 15.

10. Cowan Report at 4.

11. As quoted in Fischel Report Note 70, a court stated that the plaintiff in another matter represented that the re-underwriting of a single loan file requires at least 2-3 hours of work. 4,630 x 2 hours = 9,260 hours; 6,470 x 3 hours = 19,410 hours.

Similarly, one party's re-underwriting of 50,000 loan files would require 100,000 to 150,000 hours.¹² The delay could be even longer since the Trustee and each party may well want to respond to conclusions reached by others as discussed more fully below. During the time needed for the massive loan file review undertaking Dr. Cowan advocates, any number of adverse developments could have occurred (including, for example, erosion of the value of Countrywide's assets and/or a decision by Bank of America to withdraw from settlement discussions altogether) that would have reduced the amount recoverable by the Trusts, in the extreme case to zero. Dr. Cowan ignores these possibilities but the Trustee would very much be entitled to consider them.

7. In addition to these costs, the Trustee could properly consider that a loan file review would not resolve the uncertainty about which loans a court would require Countrywide to repurchase. Analyzing and re-underwriting loan files to determine the existence of breaches, whether apparent violations of underwriting guidelines are offset by permissible compensating factors in the loan file, whether breaches are likely susceptible to cure, and whether any such breaches have a material and adverse effect on Certificateholders, all require the exercise of judgment. For these reasons, it is possible that different experts reviewing the same loan files will reach

12. $50,000 \times 2 \text{ hours} = 100,000 \text{ hours}$; $50,000 \times 3 \text{ hours} = 150,000 \text{ hours}$. *See supra* Note 11. One analyst estimated that a re-underwriting staff of 50 people could re-underwrite approximately 1,000 loans per week, implying re-underwriting 50,000 loans would require approximately one year. RBS, "Non-Agency MBS Loan Repurchases: Practical Considerations," September 17, 2010 at 3.

Dr. Cowan's own report makes clear the cost of such a large loan file review would also be substantial. Using his estimate of \$200-300 per loan file, such a review would cost \$10 million to \$15 million ($50,000 \times \$200 = \$10,000,000$; $50,000 \times \$300 = \$15,000,000$). Cowan Report at 4. Other estimates place the cost of such a review even higher. *See* Fischel Report Note 70.

radically different conclusions. Differences of opinion may also exist on whether sampling is appropriate as opposed to review of all loan files and if so, what constitutes adequate sampling. Ultimately, the Trustee, Bank of America and the Institutional Investors would likely not agree on how to interpret the results of any loan file review, and therefore the Trustee could not be confident that such a loan file review would provide definitive guidance on what constitutes a reasonable and adequate settlement. In sum, the Trustee might well have reasonably concluded that the uncertain benefits of a loan file review were outweighed by the costs and therefore not worth the effort.

IV. DR. COWAN IGNORES THE BEHAVIOR OF THE INSTITUTIONAL INVESTORS

8. Dr. Cowan also criticizes the Trustee for failing to accept the Institutional Investors' "reunderwriting results of similar loans."¹³ He claims the Institutional Investors "identified breach rates at or exceeding 60% and repurchase liability of approximately \$64 billion to \$95 billion."¹⁴ But these same Institutional Investors that Dr. Cowan is relying on in fact support the Settlement, making his criticism of the Trustee once again irrelevant.¹⁵

V. DR. COWAN ALSO IGNORES UNCERTAINTY ABOUT THE VALUE OF THE CLAIM INCLUDING THE AMOUNT RECOVERABLE IN LITIGATION

9. Dr. Cowan also "conclude[s] that the estimated average total repurchase liability is \$56.34 [billion]" purportedly "using a scientifically valid approach

13. Cowan Report at 1 & 15.

14. *Id.* at 1 & 5.

15. Fischel Report ¶ 26.

to the use of the limited information provided to [the Trustee's expert Brian] Lin ...”¹⁶ The relevance of this estimate is unclear, however, since he also states “[i]t is *not* my conclusion that \$56.34 billion represents the *actual* repurchase liability ...”¹⁷ In any event, this estimate cannot be used as a basis for determining what a reasonable settlement would be because it ignores many of the considerations that need to be weighed in reaching that decision.

10. For example, Dr. Cowan's estimate reflects all 530 Trusts.¹⁸ However, if the Settlement was rejected, hundreds of Trusts could not be guaranteed to recover anything because the Institutional Investors lack the voting rights necessary to direct the Trustee to pursue claims in those trusts.¹⁹ Without these Trusts, the amount recoverable in litigation would be far less than Dr. Cowan's calculation implies.

11. Moreover, even accepting Dr. Cowan's unsupported assumption that claims would be brought for all 530 Trusts absent the Settlement, his “estimated average total repurchase liability” ignores the risk that a court will rule against the Trusts on disputed legal issues, including whether currently performing loans are subject to repurchase and the meaning of the contractual requirement that a breach have a material and adverse effect on the interests of the Certificateholders.²⁰

12. Finally, Dr. Cowan ignores that regardless of the ultimate judgment, the Trusts would only be able to collect more than \$8.5 billion if they can

16. Cowan Report at 24.

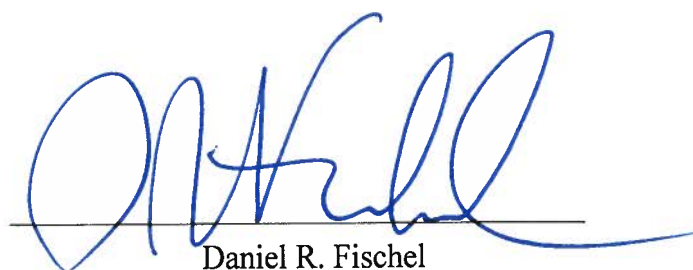
17. *Id.*

18. *Id.* at 16.

19. Fischel Report ¶ 34.

20. *Id.* ¶ 36.

reach the assets of Bank of America.²¹ The major uncertainty that the Trusts would be successful on this issue given the current state of the law is itself without more, as I stated in the Fischel Report, enough to conclude that the \$8.5 billion Settlement with Servicing Improvements and Document Remedy is reasonable and adequate.²²



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21. *Id.* ¶ 37. *See also Id.* at Note 62 and ¶ 17 (dealing with the lack of showing that Countrywide would be able to reach the assets of Bank of America).

22. *Id.* ¶¶ 37-38.