

To be Argued by:
WILLIAM B. FEDERMAN

New York County Clerk's Index No. 651786/11

**New York Supreme Court
Appellate Division – First Department**

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), *et al.*,
Petitioners,

For an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions
and approval of a proposed settlement.

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and
Servicing Agreements and Indenture Trustee under various Indentures),
Petitioner-Appellant-Cross-Respondent,
(For Continuation of Caption See Reverse Side of Cover)

**BRIEF FOR RESPONDENT-RESPONDENT-CROSS-
APPELLANT AMERICAN FIDELITY ASSURANCE
COMPANY**

FEDERMAN & SHERWOOD
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New York, New York 10016

– and –

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*Attorneys for Respondent-Respondent-
Cross-Appellant American Fidelity
Assurance Company*

– and –

BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY, TRUST COMPANY OF THE WEST and affiliated companies controlled by The TCW Group, Inc., NEUBERGER BERMAN EUROPE LIMITED, PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, GOLDMAN SACHS ASSET MANAGEMENT, L.P., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, INVESCO ADVISORS, INC., THRIVENT FINANCIAL FOR LUTHERANS, LANDESBANK BADEN-WUERTTEMBERG, LBBW ASSET MANAGEMENT (IRELAND) PLC, DUBLIN, ING BANK FSB, ING CAPITAL LLC, ING INVESTMENT MANAGEMENT LLC, NATIONWIDE MUTUAL INSURANCE COMPANY and its affiliated companies, AEGON USA INVESTMENT MANAGEMENT LLC, authorized signatory for Transamerica Life Insurance Company, AEGON FINANCIAL ASSURANCE IRELAND LIMITED, TRANSAMERICA LIFE INTERNATIONAL (BERMUDA) LTD., MONUMENTAL LIFE INSURANCE COMPANY, TRANSAMERICA ADVISORS LIFE INSURANCE COMPANY, AEGON GLOBAL INSTITUTIONAL MARKETS, PLC, LIICA RE II, INC., PINE FALLS RE, INC., TRANSAMERICA FINANCIAL LIFE INSURANCE COMPANY, STONEBRIDGE LIFE INSURANCE COMPANY, WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, FEDERAL HOME LOAN BANK OF ATLANTA, BAYERISCHE LANDESBANK, PRUDENTIAL INVESTMENT MANAGEMENT, INC., and WESTERN ASSET MANAGEMENT COMPANY,

Intervenors-Petitioners-Appellants-Cross-Respondents,

– against –

THE RETIREMENT BOARD OF THE POLICEMEN’S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, CHARTIS PROPERTY CASUALTY COMPANY, CHARTIS SELECT INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, FIRST SUNAMERICA LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, SUNAMERICA ANNUITY AND LIFE ASSURANCE COMPANY, SUNAMERICA LIFE INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

(For Continuation of Caption See Last Page of Cover)

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF
NEW YORK, THE VARIABLE ANNUITY LIFE INSURANCE COMPANY,
WESTERN NATIONAL LIFE INSURANCE, UNITED STATES DEBT
RECOVERY VIII, LP, UNITED STATES DEBT RECOVERY X, LP
and AMERICAN FIDELITY ASSURANCE COMPANY,

Respondents-Respondents-Cross-Appellants,

– and –

STERLING FEDERAL BANK, F.S.B., BANKERS INSURANCE COMPANY,
BANKERS LIFE INSURANCE COMPANY, FIRST COMMUNITY INSURANCE
COMPANY, BANKERS SPECIALTY INSURANCE COMPANY, FEDERAL HOME
LOAN OF PITTSBURGH, AMICI ASSOCIATES, LP, AMICI FUND
INTERNATIONAL LTD., AMICI QUALIFIED ASSOCIATES, CEDAR HILL
CAPITAL PARTNERS LLC, CEDAR HILL MORTGAGE FUND GP LLC, CEDAR
HILL MORTGAGE OPPORTUNITY MASTER FUND LLP, DECLARATION
MANAGEMENT & RESEARCH LLC, DOUBLELINE CAPITAL LP, FIRST BANK,
FIRST FINANCIAL OF MARYLAND FEDERAL CREDIT UNION, FIRST
NATIONAL BANK & TRUST CO. OF ROCHELLE, ILLINOIS, FIRST NATIONAL
BANKING COMPANY, FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
KERNDT BROTHERS SAVINGS BANK, LEA COUNTY STATE BANK, LINCOLN
LIFE & ANNUITY COMPANY OF NEW YORK, LINCOLN NATIONAL
REINSURANCE COMPANY (BARBADOS) LIMITED, LL FUNDS LLC,
MANICHAEAN CAPITAL, LLC, NEXBANK, SSB, PEOPLES INDEPENDENT
BANK, RADIAN ASSET ASSURANCE INC., THE COLLECTORS' FUND LP, THE
LINCOLN NATIONAL LIFE INSURANCE COMPANY, THOMASTON SAVINGS
BANK, VALLEY NATIONAL BANK, MORTGAGE BOND PORTFOLIO LLC,
FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY, LIBERTY VIEW,
PLATINUM UNDERWRITERS BERMUDA, LTD., PLATINUM UNDERWRITERS
REINSURANCE, INC., RELIANCE STANDARD LIFE INSURANCE COMPANY,
SAFETY NATIONAL CASUALTY CORPORATION, SUN LIFE INSURANCE
COMPANY OF CANADA, CA CORE FIXED INCOME FUND, LLC, CA CORE
FIXED INCOME FUND, LTD., CA HIGH YIELD FUND, LLC, CA HIGH YIELD
FUND, LTD., STRATEGIC EQUITY FUND, LLC, STRATEGIC EQUITY FUND,
LTD., SAND SPRING CAPITAL III MASTER FUND, LLC, CIFG ASSURANCE
NORTH AMERICA, INC., BANKERS TRUST COMPANY, PINE RIVER FIXED
INCOME MASTER FUND LTD., PINE RIVER MASTER FUND LTD., SILVER
SANDS FUND LLC, TWO HARBORS ASSET I LLC, GOOD HILL PARTNERS LP
and BALLANTYNE RE PLACE,

Respondents-Respondents,

– and –

THE KNIGHTS OF COLUMBUS,

Intervenor-Respondent-Respondent.

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TABLE OF AUTHORITIES

No Authorities Cited.

Respondent/Cross-Appellant American Fidelity Assurance Company (“American Fidelity”), by its counsel, Federman & Sherwood, hereby submits its Opening Brief in connection with its Cross-Appeal. American Fidelity asserts that the trial court’s decision should be reversed to the extent that the trial court approved the Settlement Agreement, and the decision should be affirmed on its reversal of the loan modification claims.

I. PROCEDURAL HISTORY

American Fidelity, an insurance company based in Oklahoma City, Oklahoma, is a certificateholder in certain of the Trusts covered by the proposed settlement, including the following: CWALT 2004-29CB; CWALT 2004-2CB; CWALT 2004-30CB; CWALT 2004-4CB; CWALT 2005-21CB; CWALT 2005-4; CWALT 2005-J2; CWALT 2007-15CB; CWALT 2007-1T1; CWALT-6; CWALT 2007-9T1; CWALT 2007-J2; CWHL 2005-28; CWHL 2004-10; CWHL 2004-21; CWHL 2004-8; CWHL 2005-12; CWHL 2005-15; CWHL 2005-30; CWHL 2007-3; CWHL 2007-5; CWHL 2007-8; CWHL 2007-J2; and CWHL 2007-J3. American Fidelity was not involved in the settlement negotiations between the Bank of New York Mellon (“BNYM”) and Bank of America and its related entities (including Countrywide Financial Corporation and Countrywide Home Loans, Inc.), and did not receive prior notice thereof. American Fidelity timely filed its

Objection to the Proposed Settlement on August 30, 2011, and has participated in the proceedings since that time.

II. ARGUMENT

American Fidelity adopts and incorporates by reference as if fully restated herein the arguments of Respondents/Cross-Appellants the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, the City of Grand Rapids General Retirement System, and the City of Grand Rapids Police and Fire Retirement System (the "Public Funds"). As ably argued by the Public Funds, the trial court correctly determined that the loan modification claims could not be approved because BNYM wholly failed to evaluate and assess the merits of those claims. Moreover, not only was BNYM's counsel hopelessly conflicted, BNYM should not have been permitted to release the claims of certificateholders such as American Fidelity while denying any fiduciary duty to those same certificateholders. The trial court also erred by applying an incorrect standard to the evidence presented at trial, which established by a preponderance of the evidence that the settlement was substantively unreasonable and unfair to the certificateholders.

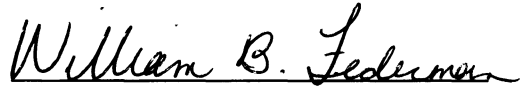
III. CONCLUSION

American Fidelity respectfully requests that the determination of the trial court to approve a portion of the Settlement Agreement be reversed, and the trial

court's determination to reject the Settlement Agreement as to the loan modification claims be affirmed by this Court.

Dated: July 17, 2014
Oklahoma City, OK

FEDERMAN & SHERWOOD



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Printing Specifications Statement

I, William B. Federman, attorney for the Respondent/Cross-Appellant American Fidelity Assurance Company, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 401 words counted by the word-processing program.

Dated: July 17, 2014

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

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In the matter of the application of :
 :
THE BANK OF NEW YORK MELLON, (as Trustee under various : NY County Clerk's
Pooling and Servicing Agreements and Indenture Trustee under : Index No. 651786/2011
Various Indentures, et al., :
 : **PRE-ARGUMENT**
 : **STATEMENT**
 :
Petitioners, :
 :
for an order, pursuant to C.P.L.R. § 7701, seeking judicial :
instructions and approval of a proposed settlement. :
----- X

PLEASE TAKE NOTICE that, Respondent/Cross-Appellant American Fidelity Assurance Company (the "Respondent"), by its counsel, Federman & Sherwood, hereby submits this Pre-Argument Statement in connection with its Cross-Appeal pursuant to 22 NYCRR § 600.17(b).

1. **Title of Action**

The full title of this action is as set forth in Item 1 of the Pre-Argument Statement of Petitioner The Bank of New York Mellon ("BNYM"), filed February 21, 2014 (the "BNYM Pre-Argument Statement").

2. **Full Name of Original Parties and Any Changes in the Parties**

The full names of the original parties to this action and any changes to those parties are as set forth in Item 2 of the BNYM Pre-Argument Statement.

3. **Name, Address and Telephone Number of Counsel for Appellant or Petitioner**

The names, addresses and telephone numbers of counsel for Petitioner BNYM (which has filed a separate Notice of Appeal and Pre-Argument Statement) are:

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The names, addresses and telephone numbers of counsel for Petitioners other than BNYM
are:

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4. **Name, Address and Telephone Number of Counsel for Respondent/Appellant**

The name, address and telephone number of counsel for Respondent/Appellant American
Fidelity Assurance Company is:

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The names, addresses and telephone numbers of counsel for the Respondents other than
American Fidelity Assurance Company are as set forth in Item 5 of the BNYM Pre-Argument
Statement.

5. **Court and County From Which Appeal is Taken**

This appeal is taken from the Decision/Order/Judgment of Supreme Court of the State of New York, County of New York (Hon. Barbara R. Kapnick), dated January 31, 2014, and entered in the office of the Clerk, County of New York, on February 21, 2014 (the "Judgment"). Attached hereto as Exhibit A is a true and correct copy of the Judgment.

6. **Nature and Object of the Cause of Action**

This is a proceeding under CPLR Article 77 to obtain judicial approval claimed to have been reached among some of the parties in interest with respect to approximately 530 trusts that issued mortgage-backed securities holding defective mortgages. American Fidelity Assurance Company was not consulted in connection with the settlement negotiations, and objects to the terms of the settlement on numerous grounds, including that BNYM reached the proposed settlement without investigating the strength of the trusts' claims regarding defective mortgage loans that were not repurchased by Countrywide as required by the governing documents.

7. **Result Reached in the Court Below**

After a hearing, the court below generally approved the Settlement Agreement except as to the loan modification claims, finding that the Trustee acted in good faith and within its discretion in settling the action and determining that the settlement was in the best interests of the trust. However, as to the loan modification claims, which involved the repurchase of approximately \$31 billion of mortgage loans, the court found that the Trustee acted unreasonably in settling those claims without investigating their potential worth or strength. American Fidelity Assurance Company is appealing the court's determination to approve the Settlement Agreement other than with respect to the loan modification claims, and is not appealing that portion of the court's Order.

8. **Grounds for Seeking Reversal**

The court below erred in approving only a portion of the Settlement Agreement. The court correctly determined that the loan modification claims could not be approved, and this determination should have precluded approval of the Settlement Agreement in its entirety. In addition, the court applied an incorrect legal standard in reaching its determination of whether the Settlement Agreement should be approved.

9. **Related Actions and Proceedings**

There is not a related action or proceeding pending in any court of this or any jurisdiction, except for a pending appeal by BNYM from the above Decision/Order/Judgment as to the loan modification claims (copies of BNYM's Notice of Appeal and Pre-Argument Statement, without Exhibits, are attached as Exhibit B). On March 6, 2014, a group of Petitioners referred to as the Institutional Investors filed an appeal on the same grounds (copies of that Notice of Appeal and Pre-Argument Statement, without Exhibits, are attached as Exhibit C).

Dated: March 24, 2014
Oklahoma City, OK

FEDERMAN & SHERWOOD

/s/ William B. Federman

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