

John Langbein

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1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK

3 -----X

In the Matter of the)
4 Application of)

5 THE BANK OF NEW YORK MELLON)

(As Trustee under various)

Index No.

6 Pooling and Servicing)

651786/2011

Agreements and Indenture)

7 Trustee under various)

Indentures), et al.,)

8)

Petitioners,)

9)

for an order, pursuant to)

10 C.P.L.R. 7701, seeking)

judicial instructions and)

11 approval of a proposed)

Settlement.)

12 -----X

13

14

15 VIDEOTAPED DEPOSITION OF

16 JOHN LANGBEIN

17 Thursday, April 18, 2013

18 51 Madison Avenue

19 New York, New York

20

21

22 Reported by:

AYLETTE GONZALEZ, CLR

23 JOB NO. 60113

24

25

1 some of those documents would be referred to.

2 Q. Is it your opinion that Bank of New
3 York Mellon had a duty to offer all
4 potentially interested persons a full and fair
5 opportunity to make their views known to the
6 court concerning this proposed settlement?

7 MR. HOUPT: Objection to form.

8 A. Yes.

9 Q. Do you believe that Bank of New
10 York Mellon has a duty to offer all
11 potentially interested persons a full and fair
12 opportunity to object to the proposed
13 settlement?

14 MR. HOUPT: Objection to form.

15 A. Yes, as -- as regulated by whatever
16 the PSAs say. But in principal, that's --
17 that is what I understand to be the purpose of
18 the petition presently pending.

19 Q. Now, let's talk about the
20 settlement itself. Did Bank of New York
21 Mellon, in your opinion, have a duty to
22 undertake a factual and legal investigation
23 before entering the Settlement Agreement?

24 A. Yes.

25 Q. To whom did Bank of New York Mellon

1 owe that duty?

2 A. The beneficiaries of affected
3 trusts.

4 Q. Did Bank of New York Mellon owe a
5 duty to undertake a factual and legal
6 investigation before entering the trust in
7 behalf of all certificate holders in all 530
8 trusts?

9 MR. HOUPT: Objection to form.

10 A. I think you misstated something
11 there. Why don't you go back and start that
12 again?

13 Q. In answering that Bank of New York
14 Mellon had a duty to undertake a factual and
15 legal investigation before entering the
16 Settlement Agreement, did it have that duty to
17 all certificate holders in all 530 trusts?

18 A. Yes.

19 Q. Is it your opinion that Bank of New
20 York Mellon undertook a factual and legal
21 investigation before it entered the settlement
22 or is that an opinion you don't hold one way
23 or the other?

24 A. My understanding, from what I've
25 seen and from the recitals in the petition

1 A. I was not asked to find the facts.
2 I, obviously, have tried to come to understand
3 the facts in various details. I've cited
4 various deposition sources and documents --
5 transactional documents and the like. But it
6 is -- it is typically my role when people ask
7 me to serve in these matters, it is my role to
8 talk about the fiduciary and related duties of
9 the Trustee as opposed to -- to figure out
10 what happened or figure out the close
11 ramifications of particular factual matters.

12 Q. And that's what you've done, you've
13 looked at the fiduciary duties of Bank of New
14 York Mellon in this case?

15 A. Yes.

16 MR. HOUPPT: Objection to form.

17 Q. You found fiduciary duties of Bank
18 of New York Mellon in this case?

19 A. I found them?

20 Q. Yes. Do you have an opinion that
21 they had fiduciary duties in this case?

22 A. I've indicated a few, yes.

23 Q. Have you indicated all the
24 fiduciary duties you believe Bank of New York
25 Mellon owed to the certificate holders in the

1 530 trusts?

2 A. I think it would take many years to
3 identify all of them. So the answer is no.

4 Q. Have you identified the critical --
5 what you believe to be the critical fiduciary
6 duties owed to the certificate holders in this
7 case?

8 A. I have tried to indicate with
9 respect to the particular opinions I give, the
10 basis in fiduciary principal for those
11 opinions.

12 Q. Now, I want to make sure I
13 understand you were not asked to arrive at an
14 opinion whether Bank of New York had conducted
15 a sufficient legal investigation in this
16 before negotiating a settlement.

17 MR. HOUPPT: Don't answer whether
18 you were asked, but answer whether you
19 have arrived at that opinion.

20 A. Whether the investigation that they
21 conducted was sufficient?

22 Q. Yes.

23 A. Sufficient to what purpose?

24 Q. Well, when you say you were not
25 hired to conduct a factual investigation, I'm

1 fiduciary law firms in the country. Great
2 depth in this area. Jason, himself, is an
3 immensely distinguished figure in the
4 securitization branch of fiduciary matters.
5 And they said basically to these Mayer Brown
6 people, guide us. See what are our duties.
7 How should we act in this circumstance. And
8 that comes through loud and clear in Jason's
9 testimony, and to a lesser extent, in the
10 testimony of the line officers that you
11 deposed, Lundberg and -- I forget the others.

12 Q. You recognize that law firms are
13 retained by clients, don't you?

14 A. I think I'm hearing a tendentious
15 question. Would you care to --

16 Q. I don't know what that means and I
17 didn't intent it to be whatever it is.

18 I'm just saying sincerely, you
19 understand that they -- the law firm was hired
20 on behalf of the client, right?

21 A. Yes.

22 Q. And that the client was not the
23 beneficiaries of the trust. The law firm
24 wasn't there to represent the beneficiaries,
25 was it?

1 MR. HOUPT: Objection to form.

2 A. The law firm was there to advise
3 the Trustee about how best to discharge its
4 fiduciary duties to the beneficiaries of the
5 trusts.

6 Q. I want to make sure you're
7 comfortable with that understanding. It seems
8 to be important to your opinion that The Bank
9 of New York Mellon hired the law firm to give
10 it advice on how to serve the interests of the
11 beneficiaries.

12 MR. HOUPT: The question is; is
13 that important to his opinion?

14 Q. Is that your understanding?

15 A. That is a part of what the Trustee
16 hired Counsel for. Another part of what the
17 Trustee hired Counsel for is to make sure that
18 the trustee's conduct was appropriate so that
19 it would not have any liability for -- for
20 inappropriate conduct. I do not regard that
21 as separate from conduct oriented toward the
22 beneficiaries.

23 What you're trying to do is -- is
24 serve the beneficiaries. And if you were to
25 do it in some way which was liability

1 engendering, then it wouldn't be the best way
2 to do it. And, therefore, I think there's
3 very substantive alignment of interests in a
4 setting of this sort between the trustee's
5 wish to avoid liability and the trustee's wish
6 to honor its fiduciary duties.

7 Indeed, one of the central themes
8 of fiduciary law, one of the central
9 principals is that there's a deterrent purpose
10 to fiduciary law. We don't set up these rules
11 of prudence and loyalty for the purpose of
12 flacking trustees. We set them up in order to
13 incentivize trustees to act in the best
14 interest of the beneficiaries.

15 Q. As I understand your opinion
16 you're, looking at the process and trying to
17 view what process Bank of New York Mellon
18 engaged in as Trustee in attempting to settle
19 these 530 separate disputes -- potential
20 disputes.

21 A. I am looking at the process, yes.

22 Q. And in looking at the process, it
23 is important to your opinions, as expressed in
24 Exhibit 685, that The Bank of New York Mellon
25 retained appropriate Counsel to give it

1 advice?

2 A. Yes.

3 Q. And that it retained appropriate

4 Counsel to give it advice on how to fulfill

5 its -- its obligations to the 530 trusts.

6 A. And their beneficiaries, yes.

7 Q. And the beneficiaries. That that's

8 the advice that they were getting; is that

9 right, sir?

10 A. Yes. And as I've also said, they

11 were also being advised about liability

12 avoiding dimensions of that larger purpose.

13 And I've indicated to you that I think

14 attention to liability avoidance is

15 beneficiary serving.

16 Q. Let's examine that for a second

17 just to make sure I get it.

18 You're saying that as an expert in

19 the field of trusts that when a Trustee

20 retains Counsel to advise it on how to take a

21 course of conduct that would avoid liability

22 to the beneficiaries, that that, too, is in

23 service to the beneficiaries?

24 MR. HOUP: Objection to form.

25 A. In -- in most settings, yes.

1 MR. HOUPPT: Objection to form.

2 Vague and ambiguous.

3 A. I think it -- I think we may be
4 having a little difficulty with what is meant
5 by expert opinion. And I think that the date
6 on -- on the written opinions is what you're
7 focusing on. And my understanding is that
8 these folks were being talked to before the
9 date of the opinion. And that, therefore, the
10 effort to consult experts and to learn from
11 them was incident to the negotiation process
12 as well as to the petition to approve the
13 settlement.

14 Q. Is it your expert opinion that Bank
15 of New York Mellon had a duty to evaluate the
16 strengths and weaknesses of the claims being
17 settled?

18 A. Yes.

19 Q. How would you characterize that
20 duty?

21 A. Don't pay for bogus claims.

22 Q. Is it a fiduciary duty?

23 A. Yes.

24 Q. Is the duty to evaluate the terms,
25 benefits and consequences of a proposed

1 settlement a fiduciary duty of behalf of Bank
2 of New York Mellon?

3 A. Yes.

4 Q. Did Bank of New York Mellon have a
5 fiduciary duty to undertake a factual
6 investigation before trying to negotiate a
7 settlement?

8 A. It had a duty to investigate in
9 ways appropriate to the steps it was taking at
10 the time it took those steps.

11 Q. When you say Bank of New York
12 Mellon had a duty to investigate, is that a
13 fiduciary duty to investigate?

14 A. Everything that a Trustee does in
15 the course of trust administration is
16 fiduciary administration, is fiduciary
17 conduct. You owe duties of loyalty and
18 prudence which means due care to your
19 beneficiaries as a matter of prudence. And,
20 therefore, all these little details, it's --
21 it's -- they're all fiduciary. What the
22 restatement third did in this latest revision
23 is quite fascinating on this point. What the
24 old restatement did was to have a bunch of
25 specific duties. For example, the duty to

1 contest claims, the duty settle claims, when
2 it's appropriate. You know, the duty to --
3 you know, the duty not to get the stock wet.
4 All these little fiduciary duties.

5 And what Ed Halbach did in this
6 latest round of restating in the restatement
7 of third was to flush all that stuff and say,
8 in a single powers section, which I think is
9 74, 75 is to say, you got -- you got a duty to
10 act a fiduciary. And by the way, there's all
11 these little applications.

12 So, they took it as a black letter
13 as a way of making the point that basically
14 anything you do is a fiduciary. Anything you
15 do in trust administration is fiduciary and is
16 always going to be subject to these two grand
17 duties of -- of loyalty and -- and prudence.

18 Q. Did -- it is it your opinion that
19 Bank of New York Mellon had a fiduciary duty
20 to negotiate any proposed settlement at arms
21 length?

22 MR. HOUP: Objection to form.

23 A. I'm a little unsure what you mean
24 by that question. Arms length is typically a
25 description of the relationship of parties to

1 saying a beneficiary should always obey the
2 law; that's self interest?

3 MR. HOUPT: Objection to form.

4 A. I think we're talking about Trustee
5 not beneficiary.

6 Q. Pardon me. Yes, sir, I'm sorry.

7 A. That is an example of the way in
8 way it is not fair to say that the Trustee may
9 never take its own interest into account. It
10 may. It may in the sense that it may do
11 exactly what was done in this case from time
12 to time, which was concern about not acting in
13 a way which would attract liability. And I've
14 told you why I regard that as beneficiary
15 serving.

16 Q. Did Bank of New York Mellon, as
17 Trustee, take into consideration its ongoing
18 business relationships with Bank of America?

19 A. Depends for what.

20 Q. What, sir?

21 A. Depends in what connection.

22 Q. In negotiating a settlement
23 favorable to Bank of America.

24 MR. HOUPT: Objection to form.

25 A. Bank of New York had a

1 responsibility to act in the best interest and
2 that's not just a slogan, it's a real value,
3 in the best interest. In other words, to
4 maximize the interest of the certificate
5 holders.

6 In the course of doing that, it may
7 have achieved incidental benefit for itself.
8 As, for example, reputational advantages in
9 doing a terrific job or earning its -- earning
10 its fees. These are professional service
11 providers. Somebody has to pay them. There
12 is always incidental benefit in Trustee
13 conduct.

14 Q. Did you ask to examine the
15 waterfall that would result from this
16 settlement and who it would benefit most?

17 MR. HOUPPT: Objection to form.

18 A. I have looked at it a little bit,
19 but I -- I have no particular view about it.
20 I understand it was the subject of a lot of
21 the negotiations that were ongoing.

22 Q. But I want to see your knowledge of
23 it. Did you ever ask to see when did the
24 institutional investors acquire these
25 certificates and how will they be benefited

1 A. I guess that's right, yes.

2 Q. So, Gibbs & Bruns does not
3 represent the certificate holders from the 341
4 trusts?

5 A. Yes.

6 Q. You understood --

7 A. Yes, I do.

8 Q. And so you're not --

9 A. I always tell students that trust
10 doesn't exist. It's a mere obligation on the
11 Trustee. So we're all talking shorthand here.

12 Q. Well, Gibbs & Bruns didn't have a
13 legal obligation then to protect the
14 certificate holders in the 341. It's legal
15 obligation was to protect its clients as best
16 it could; is that right?

17 A. It's fiduciary obligation as
18 Counsel as a matter of the law of professional
19 responsibilities to its clients.

20 Q. And so, in order to determine --
21 you call them sophisticated institutional
22 investors, right?

23 A. Yes.

24 Q. Whether these sophisticated
25 institutional investors had created a

1 structure where this settlement at this value
2 had a unique benefit to their holdings, that's
3 something you didn't investigate, right?

4 A. That is correct.

5 Q. That's something you have no
6 evidence that anyone investigated?

7 A. I have not looked into it.

8 Q. And if Gibbs & Bruns investigated
9 it and determined that this particular
10 settlement would have a unique benefit for its
11 clients, it would be well within its fiduciary
12 obligations to its clients to do what's best
13 for them even if it hurts the 341 other trust
14 certificate holders?

15 MR. HOUPPT: I'll object belated to
16 the last several questions as vague
17 and ambiguous.

18 A. It is the province of a law firm
19 representing a client to push for whatever it
20 wants. That doesn't mean it's going to get it
21 or that it did get it.

22 Q. But what I'm saying is accurate,
23 isn't it, that Gibbs & Bruns' obligations
24 would run to its clients?

25 A. That's a tautology, it's true of

1 MR. HOUPPT: Objection. Objection
2 to form.

3 A. It's hard to disagree with any
4 question that begins with can they engage in
5 willful blindness. I think the answer to that
6 is they cannot.

7 Q. Just some bookkeeping.

8 Do you send your bills to Mayer
9 Brown or to somebody else?

10 A. When I wrote this report, I sent my
11 bill to Mr. Ingber at Mayer Brown and he
12 hasn't paid it yet. Got to get after him.

13 Q. Were you aware that Bank of America
14 had agreed to pay all expenses of the experts
15 in this case?

16 A. I think I have been aware of that
17 through the indemnity provisions. My
18 understanding of this is that Bank of America,
19 whether it says Bank of New York or Bank of
20 America, that the ultimate pocket here is Bank
21 of America.

22 Q. And so Bank of America has agreed
23 to pay for Bank of New York Mellon's actions
24 in pursuing the Article 77 proceeding we're
25 in?

1 gives the Trustee its ownership interest and
2 its right to enforce the repurchase and its
3 right to require the seller to cure breaches
4 of representations and warranties.

5 Q. And the concomitants duties to
6 behave what prudently and without conflict or?

7 A. I said the duties of loyalties and
8 prudence purveyed all Trustee responsibility.

9 I don't have an exhaustive list of
10 these, but I would point to Section 2.04,
11 first paragraph, depositor warrants through
12 title and so forth. Second paragraph, assigns
13 and conveys to the Trustee, all of its rights
14 with respect to the loans including
15 representations and warranties of each seller
16 made in 2.03(a), together with all the rights
17 of the depositor to require the seller to cure
18 a breach or to repurchase.

19 And in 2.03(a) -- for the moment, I
20 think that's sufficient of the points I was
21 making.

22 Q. Thank you, sir.

23 Let's talk about 2.04 if we could.

24 Is it your understanding then that what
25 happens in 2.04 is Bank of New York Mellon, as

1 purpose. They're also free to consult with
2 their internal staff.

3 Q. Now, the Trustee, Bank of New York
4 Mellon, is attempting to get the maximum
5 reasonable recovery for its beneficiaries;
6 isn't that right?

7 A. Yes.

8 Q. That is the goal?

9 A. Yes.

10 Q. And so, the Trustee would have been
11 entirely within their rights to hire
12 consultants and experts to advocate in their
13 behalf that the settlement amount should be
14 greater than what it turned out to be?

15 A. Yes.

16 Q. In fact, that would be -- that
17 would be, what would you say, prudent -- a
18 prudent course of conduct for a Trustee to try
19 to retain experts that would give it the best
20 opportunity to create a bigger settlement pot?

21 MR. HOUP: Objection to form.

22 A. That is a step one could take.

23 Q. It would be a reasonable step;
24 would it not?

25 A. Depends on all the circumstances;

1 what you know -- what you -- what you know
2 about how likely you are to be able to improve
3 the settlement. What the reasons for the
4 settlement being -- taking the shape that it
5 has taken.

6 Q. There would be nothing wrong and
7 everything right with trying to advocate for
8 the largest possible recovery for your
9 beneficiaries?

10 MR. HOUPPT: Objection to form.

11 A. That's a different question. But,
12 yes, of course, you are attempting, in various
13 ways, to get the largest possible recovery
14 that you can.

15 Q. And, in fact, that was the duty of
16 Bank of New York Mellon in this case; was it
17 not?

18 A. Act in the best interest of your
19 beneficiaries with dual care, skill and
20 caution, yes.

21 Q. When we say act in the best
22 interest of the beneficiaries, what's going on
23 in this case is financial. That's what the
24 case is about. We agree?

25 A. Yes.

1 Q. And so what was in the best
2 interest of the beneficiaries is to maximize
3 the settlement amount?

4 A. Yes.

5 Q. Do you want to take a break now?
6 Is this a good time, Professor?

7 A. Tell me how much longer we'll be
8 going at this do you think.

9 Q. A while, sir, so I think a break.

10 THE WITNESS: We have to quit
11 when?

12 MR. HOUPT: I think we can
13 probably wrap it up by 5.

14 MR. POZNER: I make no commitment
15 one way or the other. Let me get
16 further into it.

17 I'm not saying it's going to go
18 beyond, but I'm not saying --

19 MR. HOUPT: Every other deposition
20 in this case we've been able to wrap
21 up by approximately 5.

22 MR. POZNER: I understand. We
23 started a little late.

24 Q. You want to take a break, sir?

25 A. Let's take a brief break, sure.

1 getting an answer to my question.

2 Do you agree there is no reference
3 whatsoever in the Pooling and Servicing
4 Agreement to the ability to take an event of
5 default and issue a Forbearance Agreement with
6 the master servicer?

7 A. I agree with you that the
8 Forbearance Agreement is the product of a
9 fiduciary exercise by the Trustee different
10 from -- which is not rested on an express term
11 of the instrument.

12 Q. And there is nothing in this
13 Pooling and Servicing Agreement that says the
14 Trustee can unilaterally waive the right of
15 the certificate holders to receive the notice
16 that an event of default has occurred and has
17 gone unremedied?

18 MR. HOUP: Objection to form.

19 A. There is no such provision.

20 Q. Now, a certificate holder who has
21 millions of dollars at stake in these
22 trusts -- and you agree that is the situation,
23 the certificate holders really combined had
24 tens and hundreds of billions of dollars at
25 stake, did they not?

1 letter is, yes.

2 Q. Now, at that point, Bank of America
3 is -- is sharply adversarial to what the
4 beneficiaries are alleging, are they not?

5 A. Bank of America has an interest
6 adverse to the beneficiaries in the sense that
7 Bank of America would like to pay out as
8 little as it can to discharge the alleged
9 liabilities.

10 Q. And the Trustee is there to
11 represent the interest of the beneficiaries
12 only?

13 A. Yes.

14 Q. It is not there in any way to guard
15 the interests of Bank of America?

16 A. That is correct.

17 Q. And every action it takes it must
18 be an action that shows loyalty and prudence,
19 fiduciary loyalty and prudence to the
20 beneficiaries?

21 A. Yes.

22 Q. That would include the Trustee
23 hiring its own counsel to advise it?

24 A. Yes.

25 Q. And its counsel would be helping

1 the Trustee ensure that it maximizes leverage
2 to recover for the beneficiaries as much as it
3 can?

4 MR. HOUPT: Objection to form.

5 A. Yes.

6 Q. And that lawyer would not be
7 serving the Bank of America at the same time?

8 MR. HOUPT: Objection to form;
9 vague.

10 A. Unless the negotiations had
11 proceeded in such a way that Bank of America
12 had agreed to a settlement that the -- that
13 the Bank of New York regarded as -- as
14 achieving its purpose.

15 Q. You have no evidence that in
16 October, November of 2010 that state of
17 affairs applied, Bank of America was working
18 cooperatively to pay billions of dollars to
19 beneficiaries; is that correct?

20 A. It is correct that the -- the
21 Settlement Agreement that ultimately emerged
22 had not yet been negotiated.

23 Q. And you're not taking the position
24 as a person skilled in the law that two
25 adversaries stopped being adversaries if they

1 Q. Bank of New York Mellon as Trustee
2 had not only the ability, but the fiduciary
3 duty to try to determine the full extent of
4 Bank of America's liability?

5 MR. HOUPT: Objection; asked and
6 answered.

7 A. Yes.

8 Q. Yet Bank of New York Mellon allowed
9 Bank of America to pay for the experts?

10 MR. HOUPT: Objection;
11 argumentative.

12 A. That's the structure of the
13 indemnification arrangements in this industry.

14 Q. And Bank of New York Mellon, the
15 Trustee, allowed Bank of America to pay for
16 the lawyers who were advising the Trustee with
17 regard to the fairness of the settlement?

18 A. Let me just say that I think the
19 right expression is not allowed Bank of
20 America to pay, but forced Bank of America to
21 pay. That is to say, Bank of New York had the
22 right to carry out its fiduciary duties and to
23 send the bill to Bank of America.

24 Q. Now, Bank of New York Mellon as
25 Trustee had initiated a lawsuit against Bank

1 I understand why they were
2 concerned that the language could be read that
3 way and, therefore, why they would wish to
4 object to it and why, therefore, the bank
5 agreed not to persist in it.

6 Q. In your opinion as an expert in
7 this field, the language that the Trustee was
8 requesting would have created a conflict of
9 interest for the Trustee if it had not been
10 removed?

11 A. Certainly might have -- might have
12 done in the sense that it was -- it was
13 language that was broader than the immediate
14 transaction, which it was meant to cover. And
15 as I say, I just think that's sloppy drafting.

16 Q. You concluded in your expert report
17 that the Trustee acted prudently?

18 A. Where are we?

19 Q. We should be in Exhibit 13 --
20 pardon, 685 under the "Due Care" section on
21 page 7.

22 "In my opinion, the trustee's
23 actions in entering into the settlement
24 demonstrated a prudent exercise of its Trustee
25 functions."