

Featuring content from WESTLAW

LEGAL

HOME | NEWS | INSIGHT | LEGAL MATERIALS

ALISON FRANKEL'S  
**ON THE CASE**

## Federal Home Loan Banks: Expert's wrong on \$8.5 bl BofA MBS deal

7/21/2011

 COMMENTS (0)

**David Grais** of **Grais & Ellsworth**, counsel to Countrywide investors challenging Bank of America's proposed \$8.5 billion settlement, isn't going away anytime soon.

Last week, supporters of the deal responded in force to Grais's filings on behalf of an [MBS investor group](#) called Walnut Place and [six Federal Home Loan Banks](#). **Kathy Patrick** of **Gibbs & Bruns**, who negotiated the BofA deal as counsel to 22 major institutional investors, [went on the road](#) to meet with Countrywide MBS holders and other interested parties with questions about the settlement. Meanwhile, Bank of New York Mellon, the Countrywide MBS trustee, [released the expert opinions](#) that it said supported the decision to settle with BofA. I said at the time that the expert reports "may not change anyone's mind about the fairness of the settlement proposal, but they answer a lot of the questions that challengers of the deal have raised."

In a filing late Wednesday, Grais confirmed my supposition that the expert reports hadn't changed his mind. The July 20 brief, nominally a response by the six FHLBs to filings by the trustee and the Gibbs & Bruns group, is really a vehicle for Grais to attack the BNY Mellon expert opinion on the cash portion of the settlement.

BNY's expert, Brian Lin of RRMS Advisors, came up with an estimate for what Countrywide investors' MBS claims are worth by first estimating the value of the underlying mortgages that would end up in default and then calculating the amount of money that would be lost to investors if defaulted mortgages went into foreclosure, a figure known as the severity rate. Lin then applied a number known as the breach rate, to reflect the percentage of defaulted mortgages in the underlying pool that breach Countrywide's representations to MBS investors. Finally, Lin considered the success rate—the percentage of improperly underwritten mortgages Bank of America would actually agree to buy back. Lin's assumptions about these numbers, based on his experience as a mortgage securitization consultant and presentations by BofA and the Gibbs & Bruns investor group, led him to conclude that holders of Countrywide mortgage-backed notes could get between \$8.8 billion and \$11 billion for their put-back claims.

Grais's new brief contends Lin's assumptions for breach and success rates are "quite controversial." Lin's 36 percent breach rate, Grais writes, "is difficult to understand. Mr. Lin did not do any independent analysis of this assumption. Instead, he simply adopted Bank of America's estimates of this percentage, which in turn appear to have been based on a completely different portfolio of loans that were subject to the underwriting standards imposed by Fannie Mae and Freddie Mac." The Grais brief asserts that "professional loan auditors" have posited much higher breach rates on Countrywide mortgage loans, ranging from 60 to 90 percent.

(Article continues on next page)

Lin's 40 percent success rate assumption is also flawed, according to the Grais brief. "This assumption similarly demands investigation. It is hard to imagine why a court would not require Countrywide and Bank of America to repurchase all loans, not just 40 percent of loans, that are both in default and have breached a representation or warranty," the brief says. If Lin eliminated the success rate discount, Grais argues, his valuation estimate of investors' claims would rise to \$22 to \$27.5 billion.

The six FHLBs still aren't on record as opposing the proposed \$8.5 billion settlement. But neither are they yet satisfied that the deal is fair, according to the brief-which snuffs out any hope by settlement supporters that the expert opinions would allay objections. "The expert reports that BNYM has now published do provide some additional information about the proposed settlement," the brief says. "[But] they raise many new questions and certainly do not enable any of the FHLBs to decide whether or not to oppose the settlement."

**Matthew Ingber** of **Mayer Brown**, who represents Bank of New York Mellon, declined to comment on Grais's brief.

(Reporting by Alison Frankel)

---