

Page 3443

SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF NEW YORK: TRIAL TERM PART 39
-----X
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,
INDEX NO.
651786/11

for an order, pursuant to CPLR §7701, seeking
judicial instructions and approval of a
proposed settlement.
-----X
60 Centre Street
New York, New York 10007
September 9, 2013

BEFORE:
HONORABLE BARBARA R. KAPNICK, Justice

APPEARANCES:

MAYER BROWN, LLP
Attorneys for the Petitioner
Bank of New York Mellon
1675 Broadway
New York, New York 10019-5820
BY: MATTHEW D. INGBER, ESQ.
CHRISTOPHER J. HOUPPT, ESQ.
KAYLAN LASKY, ESQ.
VIRGINIA PALITZ, ESQ.

- and -

DECHERT LLP
Attorneys for Petitioner
1096 Avenue of the Americas
New York, New York 10036
BY: HECTOR GONZALEZ, ESQ.
MAURICIO A. ESPAÑA, ESQ.
REBECCA KAHAN, ESQ.
JAMES M. McGUIRE, ESQ.

Page 3444

1
2 APPEARANCES: (Cont'd)
3
4 GIBBS & BRUNS, LLP
Attorneys for the Institutional Investors
1100 Louisiana, Suite 5300
Houston, Texas 77002
BY: KATHY D. PATRICK, ESQ.
ROBERT MADDEN, ESQ.
DAVID SHEEREN, ESQ.

- and -

8
9 WARNER PARTNERS, P.C.
950 Third Avenue, 32nd Floor
New York, New York 10022
BY: KENNETH E. WARNER, ESQ.
10 REILLY POZNER, LLP
Attorneys for AIG
11 1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
12 BY: DANIEL M. REILLY, ESQ.
MICHAEL ROLLIN, ESQ.
13 LARRY POZNER, ESQ.
14 KELLER ROHRBACK, LLP
Attorneys for Proposed Intervenor-Respondents
15 Federal Home Loan Bank of Boston,
Indianapolis and Chicago
16 1201 Third Avenue, Suite 3200
Seattle, Washington 98101
17 BY: DEREK W. LOESER, ESQ.
DAVID KO, ESQ.

18
19 MILLER & WRUBEL P.C.
Attorneys for Triaxx Entities
20 570 Lexington Avenue
New York, New York 10022
21 BY: JOHN G. MOON, ESQ.

22
23 - continued -
24
25
26

Page 3445

1
2 APPEARANCES: (Cont'd)
3 SCOTT & SCOTT, LLP
Attorneys for Proposed Intervenor-Respondents
4 Public Pension Funds
405 Lexington Avenue, 40th Floor
5 New York, New York 10174
BY: BETH KASWAN, ESQ.
6 MAX R. SCHWARTZ, ESQ.
7 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
ERIC T. SCHNEIDERMAN, ESQ.
8 Investor Protection Bureau
120 Broadway, 25th Floor
9 New York, New York 10271-0332
BY: THOMAS TEIGE CARROLL, ESQ.
10 ANITA T. BARRETT, ESQ.
ELIZABETH BLOCK, ESQ.
11 AMIR WEINBERG, ESQ.
12 WOLLMUTH MAHER & DEUTSCH, LLP
Attorneys for Respondent
13 Cranberry Park
500 Fifth Avenue
14 New York, New York 10110
BY: DAVID H. WOLLMUTH, ESQ.
15 MICHAEL C. LEDLEY, ESQ.
16 WACHTELL LIPTON ROSEN & KATZ, LLP
Attorneys for Bank of America
17 51 West 52nd Street
New York, New York 10019
18 BY: THEODORE N. MIRVIS, ESQ.
ELAINE P. GOLIN, ESQ.

19
20 SARAH LIEBER, ESQ.
Deputy General Counsel
CIFG Services, LLC
21 850 Third Avenue, 10th Floor
New York, New York 10022

22
23 VANESSA MILLER
BONNIE PICCIRILLO
OFFICIAL COURT REPORTERS

24
25
26

Page 3446

1
2 Proceedings
3 THE COURT: Okay. Good morning, everybody. I
4 hope everybody had a nice rest of the summer. Nice to
5 see everybody back.
6 A couple of things before we start. On the
7 record, yes. A couple of things before we start, I
8 guess, with a witness. I've been out for two weeks, but
9 I'm unaware of this order to show cause which was just
10 formally brought up to us this morning and the letters
11 that were received related to it. I haven't signed it
12 because we just got it today. I don't know if you want
13 to address that first, if you want to hold off on that or
14 what.
15 MR. REILLY: Your Honor, we've agreed to,
16 fundamentally, I think they wanted a couple of weeks to
17 respond, I think the Court had asked us to pull this
18 together so we weren't addressing it as a piecemeal. We
19 don't have any objection to them doing that. And it's
20 just a question I think of when that would be. I think
21 we filed it on a Friday a couple of weeks ago. So two
22 weeks from that would be this Friday --
23 THE COURT: Well, I didn't sign it yet and there
24 were holidays --
25 MR. REILLY: Sure.
26 All I'm saying is whatever it is, it's fine.
We'd like to get that submitted and get argument on it if

1 Proceedings
 2 the Court will do that.
 3 THE COURT: Well, obviously, we want to deal
 4 with that before you all leave again.
 5 MR. REILLY: Right.
 6 MS. PATRICK: Your Honor, I think, as we said
 7 in the letter, we believe that they have not met the
 8 standard for good cause and don't believe further
 9 briefing is required. If the Court wishes to receive
 10 further briefing in response to that, we're happy to
 11 provide it. Much of what they've said, as what was
 12 indicated in the trustee's response, is not accurate.
 13 But the fundamental point is that the Court has been very
 14 generous with its time and resources and there is no
 15 reason to grant a further continuance, after an
 16 additional two-and-a-half weeks of evidence, so that they
 17 could continue to move forward and put on more and more
 18 and more.
 19 THE COURT: Well, I will tell you what. How
 20 about if I take a look at it during part of the lunch
 21 hour and we'll talk about it this afternoon.
 22 MR. REILLY: Sure. That's fine.
 23 MR. INGBER: That's fine.
 24 THE COURT: The other thing is in looking at a
 25 list of motions that have been sitting around here for a
 26 while, there came to my attention something I guess I had

1 J. Fraga - By Petitioner - Direct/Espana
 2 MR. ESPAÑA: Yes, your Honor.
 3 Petitioner calls Jose Fraga.
 4 THE COURT: Please step up to the stand.
 5 J O S E F R A G A, called as a witness by and
 6 on behalf of the Petitioner, after having been first duly
 7 sworn, was examined and testified as follows:
 8 COURT CLERK: State your name and full business
 9 address for the record.
 10 THE WITNESS: Jose Fraga, F-R-A-G-A, and it's
 11 1985 Marcus Avenue, Lake Success, New York.
 12 THE COURT: Okay.
 13 MR. ESPAÑA: May I inquire?
 14 Mauricio España from the Dechert firm, Bank of
 15 New York Mellon.
 16 DIRECT EXAMINATION
 17 BY MR. ESPAÑA:
 18 Q Good morning, Mr. Fraga.
 19 A Good morning.
 20 Q Where are you currently employed?
 21 A At the Garden City Group.
 22 Q And what is your current title at the Garden City
 23 Group?
 24 A A senior director of operations.
 25 Q And what are your responsibilities as senior
 26 director of operations at the Garden City Group?

1 Proceedings
 2 forgotten about, maybe we talked about it once upon a
 3 time, but there was a notice of motion by a non party
 4 relating to a trial subpoena that I think was served upon
 5 them by your office, Mr. Reilly.
 6 MR. REILLY: Is it Greenwich? I think it's
 7 Greenwich Financial.
 8 THE COURT: No. It was a non party, William
 9 Frey.
 10 MR. REILLY: Okay. Sure. He's connected to
 11 the -- so we served the subpoena on him. We are still
 12 awaiting -- and I've got to get back to -- well, I've
 13 been trying to get a hold of his counsel to see where
 14 that stands, and I'll do that today and get back to you,
 15 you know, tomorrow morning.
 16 THE COURT: Sure. Just 'cause it's been -- we
 17 sort of put it in the box and just forgot about it.
 18 MR. REILLY: Right. Okay.
 19 THE COURT: So why don't you do that?
 20 Is there anything else that you want to deal
 21 with right now before we start with whoever would be the
 22 next witness?
 23 MR. REILLY: Nothing from us, your Honor.
 24 MR. INGBER: Nothing here, your Honor.
 25 THE COURT: Okay. So are we ready to call the
 26 next -- well, are you ready to call the --

1 J. Fraga - By Petitioner - Direct/Espana
 2 A I implement notice programs.
 3 Q And how long have you worked at Garden City Group
 4 implementing notice programs?
 5 A Since November of 2004, eight-and-a-half years.
 6 Q And prior to -- and was Garden City Group retained
 7 by Bank of New York Mellon in this proceeding?
 8 A Yes.
 9 Q And what did Bank of New York Mellon retain Garden
 10 City Group as part of this proceeding for?
 11 A We were retained to implement a notice program in
 12 connection with this proceeding.
 13 Q And who at Garden City Group was responsible for
 14 implementing that notice program?
 15 A I was primarily responsible.
 16 Q And as part of your role in implementing Bank of New
 17 York Mellon's notice program, did you prepare an affidavit
 18 that was filed with this court?
 19 A Yes.
 20 Q And I'm -- you have in front of you a document
 21 marked PTX 617. And we'll put it up on the screen for you.
 22 (Exhibit displayed.)
 23 Q Do you recognize PTX 617?
 24 A Yes.
 25 Q What is it?
 26 A It's my affidavit regarding the notice program.

Page 3451

1 J. Fraga - By Petitioner - Direct/Espana
 2 Q And if you could please turn to Page 3 of PTX 617.
 3 A Yes.
 4 Q Is that your signature on the bottom?
 5 A Yes.
 6 Q And Mr. Fraga, is PTX 617 a fair and accurate
 7 statement of Garden City Group's implementation of Bank of
 8 New York Mellon's notice program in this proceeding?
 9 A Yes.
 10 MR. ESPAÑA: I would offer PTX 617.
 11 MR. POZNER: No objection.
 12 (Whereupon exhibit was deemed marked into
 13 evidence.)
 14 Q And Mr. Fraga, we'll just walk through your
 15 affidavit. If you could please turn to Paragraph 2 on Page
 16 2. And, generally, what does Paragraph 2 state Garden City
 17 Group did in implementing Bank of New York Mellon's notice
 18 program?
 19 A It states that GCG established a website
 20 regarding -- to get potentially interested person's
 21 information with regard to the settlement included, at the
 22 time, posting of several documents as well as other
 23 information as listed in Paragraph 2.
 24 Q And did Garden City Group do the things listed in
 25 Paragraph 2?
 26 A Yes, it did.

Page 3452

1 J. Fraga - By Petitioner - Direct/Espana
 2 Q We turn to Paragraph 3.
 3 What does Paragraph 3 state Garden City Group
 4 did in implementing Bank of New York Mellon's notice
 5 program?
 6 A Paragraph 3 refers to GCG caused to be published in
 7 various newspapers for three business days in each
 8 publication.
 9 Q And did Garden City Group do the things listed in
 10 Paragraph 3?
 11 A Yes, it did.
 12 Q And what does Exhibit A refer to in Paragraph 3?
 13 A Exhibit A are affidavits confirming the publication
 14 of a notice by the relevant publications.
 15 Q And we turn to Paragraph 4. What does Paragraph 4
 16 state Garden City Group did in implementing Bank of New York
 17 Mellon's notice program?
 18 A Paragraph 4 refers to publication of the notice in
 19 various international newspapers for three business days.
 20 Q And did Garden City Group actually do those things
 21 listed in Paragraph 4?
 22 A Yes.
 23 Q And what does Exhibit B refer to in Paragraph 4 on
 24 Page 3?
 25 A Exhibit B are the affidavits and correspondence
 26 confirming those publications.

Page 3453

1 J. Fraga - By Petitioner - Direct/Espana
 2 Q Turning to Paragraph 5. What does Paragraph 5 state
 3 Garden City Group did in implementing Bank of New York
 4 Mellon's notice program?
 5 A Paragraph 5 refers to the issuance of the notice
 6 over three different wire services.
 7 Q And did Garden City Group do those things listed in
 8 Paragraph 5?
 9 A Yes.
 10 Q And what does Exhibit C refer to in Paragraph 5?
 11 A Exhibit C are the confirmations from those media
 12 distribution services that the press release were all issued
 13 on a business day.
 14 Q Okay. Let's turn to Paragraph 6.
 15 What does Paragraph 6 state Garden City Group
 16 did in implementing Bank of New York Mellon's notice
 17 program?
 18 A Paragraph 6 states that GCG purchased banner
 19 advertisements on various websites listed in Paragraph 6.
 20 Q And what does Exhibit D refer to in Paragraph 6?
 21 A Exhibit D are actual screenshots of the banner
 22 advertisements as they appeared on those websites.
 23 Q Turning to Paragraph 7. What does it state Garden
 24 City Group did in implementing Bank of New York Mellon's
 25 notice program?
 26 A It states that GCG mailed copies of the notice and

Page 3454

1 J. Fraga - By Petitioner - Direct/Espana
 2 the other relevant documents via registered mail to the
 3 addresses as they appeared on the certificate of register.
 4 Q And did Garden City Group do the things listed in
 5 Paragraph 7?
 6 A Yes.
 7 Q And Mr. Fraga, in the nine years you've been in
 8 Garden City Group, approximately, how many notice programs
 9 have you implemented or supervised the implementation of?
 10 A I don't have an exact count, but hundreds.
 11 Q And how do Bank of New York Mellon's notice program
 12 of this proceeding compare to the notice programs that you --
 13 THE COURT: Just keep your voice up at the end
 14 of your question.
 15 MR. ESPAÑA: Sure.
 16 You want me to repeat it?
 17 THE COURT: No.
 18 THE WITNESS: Could you repeat it again please?
 19 MR. ESPAÑA: Sure.
 20 Q How does the Bank of New York Mellon's program in
 21 this proceeding compare with other notice programs that you
 22 have implemented or supervised the implementation of?
 23 A In my experience, this is one of the most robust
 24 notice programs I've been involved in.
 25 MR. ESPAÑA: Nothing further.
 26 Pass the witness.

1 J. Fraga - By Petitioner - Cross/Pozner
 2 MR.POZNER: Would counsel mind if we brought
 3 the podium over? Thank you.
 4 It's a brief cross, perhaps I would cross from
 5 there and save time.
 6 THE COURT: Sure.
 7 CROSS EXAMINATION
 8 BY MR.POZNER:
 9 Q So Mr. Fraga, your company is in the business of
 10 informing people of what is going on in a case?
 11 A That's my responsibility. It's --
 12 Q But really --
 13 THE COURT: Wait, wait, wait. Let him finish.
 14 A I implement notice programs at my company.
 15 Q But you don't write the program; do you?
 16 A No.
 17 Q The program -- what will be given to the people who
 18 are to be informed is dictated to your company by others?
 19 A Correct.
 20 Q And in this case, what was dictated to your company,
 21 the information that would be given out to the certificate
 22 holders with billions of dollars investments, that was all
 23 dictated by Bank of New York Mellon?
 24 A Correct.
 25 Q If they said put it in, you put it in?
 26 A Correct.

1 J. Fraga - By Petitioner - Cross/Pozner
 2 they first contacted you; wasn't it?
 3 A Correct.
 4 Q Right. Bank of New York Mellon didn't make any
 5 contact with you in December 2010?
 6 A I don't think so, no.
 7 Q Now, in this program of notice and your affidavit,
 8 there's no mention of sending notice to the certificate
 9 holder of something called a forbearance agreement or series
 10 forbearance agreements?
 11 A That's correct.
 12 Q And the reason that the certificate holders don't
 13 get notice of any of the forbearance agreements is because
 14 the trustee did not instruct you to put that in the notice
 15 program?
 16 A We would carry out what the trustee asked us to
 17 carry out.
 18 Q To whatever limited extent the trustee is under?
 19 A Whatever the client decided to do, we do.
 20 Q And so when we see in your affidavit and in your
 21 notice sent out that there is no notice to the certificate
 22 holders that settlement negotiations are ongoing before June
 23 of 2011, that is because the trustee did not instruct your
 24 company, Let certificate holders know we are in negotiations?
 25 A Right. We were never instructed to do that.
 26 Q Because the Bank of New York Mellon could have come

1 J. Fraga - By Petitioner - Cross/Pozner
 2 Q And if they said don't put it in, you had no right
 3 to put information in?
 4 A Correct.
 5 Q So every time we see information that was omitted,
 6 it is because Bank of New York Mellon that hired you wanted
 7 it to be omitted?
 8 MR. ESPAÑA: Objection.
 9 THE COURT: Sustained. Don't answer that.
 10 Q It is because Bank of New York Mellon did not
 11 instruct your company, Put this in the notice program to the
 12 certificate holders?
 13 MR. ESPAÑA: Objection. Same objection.
 14 THE COURT: You can answer that.
 15 A We would put in the notice program whatever we were
 16 instructed to put in.
 17 Q And you would leave out of the notice program
 18 anything Bank of New York Mellon as trustee did not instruct
 19 you to put in the notice?
 20 A Right. We wouldn't put anything in that we were not
 21 instructed to put in.
 22 Q Now, your company had existed for many years before
 23 you were first contacted by Bank of New York Mellon?
 24 A Yes.
 25 Q And they waited to contact your company until
 26 December 2010 -- no, actually, it was the spring of 2011 when

1 J. Fraga - By Petitioner - Cross/Pozner
 2 to your company back in December of 2010 and said, Let's have
 3 a notice program that tells people about settlement
 4 negotiations before a settlement is signed?
 5 A I suppose they could've approached us.
 6 Q And you would have done it?
 7 A Correct.
 8 Q Now, things like amendments to governing agreements,
 9 you could have given notice to the certificate holders about
 10 the possibility that the settlement amends the governing
 11 agreements?
 12 A We could give notice upon any client -- upon client
 13 instruction.
 14 Q And when we see no mention in the documents of
 15 amendments to the governing agreements is because Bank of New
 16 York Mellon, as trustee, did not instruct you to give that
 17 kind of notice to the certificate holders?
 18 MS. PATRICK: Objection. Foundation. There's
 19 no evidence of an amendment to the governing agreements.
 20 MR. POZNER: Well, I think there's been
 21 testimony about that. It's for the Court to consider.
 22 THE COURT: Okay. Go ahead. You can answer.
 23 A Can you repeat the question?
 24 Q Sure.
 25 When your notice does not include any mention of
 26 potential amendments to the governing agreements, it's

1 J. Fraga - By Petitioner - Cross/Pozner
2 because Bank of New York Mellon's trustee didn't instruct
3 you to send that notice.

4 A If we were not instructed to mail a notice, we would
5 not mail a notice.

6 Q Now, nobody gave your company the proposed
7 settlement and said, You, as an expert, in running what you
8 call notice programs, you go through this settlement
9 agreement and you find the critical things to tell the
10 certificate holders?

11 A No.

12 Q Although you're capable of that?

13 A I don't know. In my experience, what we do is
14 implement notice programs that we're hired to carry out.

15 Q What you do is exactly what Bank of New York Mellon
16 tells you to do and no more.

17 MR. ESPAÑA: Objection asked and answered.

18 THE COURT: Sustained. Don't answer that.

19 Q Now, if we look at R-490 please --

20 MR. ESPAÑA: Excuse me. Do you have copies for
21 the witness?

22 MR. POZNER: Would you look up and tell me
23 which is easier for you, sir, the notebook or the board?

24 THE WITNESS: The notebook if...

25 (Handing.)

26 A Yes.

1 J. Fraga - By Petitioner - Cross/Pozner

2 A Anything that the client wants to put in the notice
3 can be in the notice.

4 Q You were not aware that there was an agreement that
5 the trustee would not advocate against the agreement but
6 would support the settlement agreement regardless of any new
7 information that came to light?

8 A Can you repeat the question?

9 Q Sure.

10 Bank of New York Mellon did not instruct you.

11 This settlement agreement that we're giving notice of
12 contains a provision that we, as trustee, must support
13 the settlement agreement regardless of new -- any
14 information that may come to light?

15 A They didn't -- we didn't discuss the details of
16 the --

17 Q And if they want -- if the Bank of New York Mellon
18 as trustee wants a real notice about the settlement
19 agreement, it could have instructed you, Let the certificate
20 holders know all of the things we are giving up in their
21 name, and that among them is the fact that the trustee will
22 support the settlement agreement regardless of any new
23 information that comes to light?

24 MS. PATRICK: Objection. Argumentative.

25 If the trustee wanted a real notice, this is
26 cumulative and argumentative.

1 J. Fraga - By Petitioner - Cross/Pozner

2 Q Exhibit #490, that's a copy of the notice that
3 Garden City disseminated?

4 A Correct.

5 Q That's the beginning of what you called a notice
6 program?

7 A Correct.

8 Q And the notice program, as you understood it, was to
9 give certificate holders important information about a
10 settlement agreement?

11 A I understood that we were supposed to carry out a
12 notice program that was set forth by the Court in connection
13 with this proceeding.

14 Q You think the Court dictated that no notice would be
15 given of forbearance agreements? Was that your
16 understanding?

17 A No. My understanding is we would carry out the
18 notice program our client instructed us to carry out.

19 Q And your client was Bank of New York Mellon?

20 A Correct.

21 Q The trustee?

22 A Correct.

23 Q And so if, in fairness to the certificate holders,
24 the trustee had said, Inform the certificate holders that in
25 contemplating this multi-billion-dollar settlement, no known
26 files were reviewed, that could've been in there?

1 J. Fraga - By Petitioner - Cross/Pozner

2 THE COURT: Counsel, would you please come up?
3 All of you.

4 MR. POZNER: Yes, your Honor.

5 (Whereupon a bench conference was held off the
6 record.)

7 Q Let us turn to another part of the notice of
8 program, a website.

9 You were instructed to create a website as
10 partnership of a notice program?

11 A Correct.

12 Q And the purpose of a notice program, as you
13 understand it, is to inform certificate holders about
14 important parts of the settlement?

15 A Correct.

16 Q And the reason there is a website is because the
17 Bank of New York Mellon directed that that exist?

18 A Correct.

19 Q And they picked a name for the website?

20 A Correct.

21 Q The website is CWRMBSETTLEMENT.COM?

22 A Correct.

23 MR. ESPAÑA: Okay. It's actually not the
24 accurate name of the website. CWRMB. It's a different
25 spelling.

26 MR. POZNER: CWRMBSETTLEMENT.

Page 3463

1 J. Fraga - By Petitioner - Cross/Pozner
2 THE WITNESS: Yes, that's correct. That's
3 correct.
4 THE COURT: That would make sense.
5 Q Now, there are steps in your profession to help
6 people who are on the internet looking for information about
7 their case to find the appropriate website.
8 A I guess.
9 Q You're looking in the notebook, sir, but this isn't
10 in the notebook.
11 A Okay.
12 Q Well, in fact, you're aware that there are paid
13 advertisements that can be taken out with the various search
14 engines to ensure that a web page turns up when people are
15 searching for the terms relating to their particular
16 settlement?
17 MR. ESPAÑA: Objection. This is outside of the
18 direct testimony.
19 THE COURT: I think he's allowed to do that
20 on --
21 MR. ESPAÑA: The one thing is, as he testified,
22 he implemented the Court-ordered notice program.
23 THE COURT: I understand that. So I'll allow
24 it to be outside the scope, but that doesn't mean you
25 can't object to particular questions.
26 A In this case, they purchased the banner

Page 3464

1 J. Fraga - By Petitioner - Cross/Pozner
2 advertisements referred to in the affidavit.
3 Q Yes. But my question is specific, you're aware that
4 Garden City Group, as professionals in the notice program
5 industry, that there are advertisements that are designed to
6 aid the search engine process so that a person looking for
7 information on their settlement is more likely to find
8 CWRMBSSETTLEMENT.COM?
9 A Right. There could be other ways to make it more
10 available other than banner advertisements.
11 Q And Bank of New York Mellon did not instruct your
12 company to engage in those kinds of efforts?
13 A No. We were asked to run the banner advertisements.
14 Q In the newspapers?
15 A No. On the website.
16 Q On the website itself?
17 A Yeah. We purchased banner advertisement on the
18 internet.
19 Q In the website?
20 A On the websites listed in the affidavit.
21 Q Now, there is a page for providing documents filed
22 with the court?
23 A Correct.
24 Q That was part of what was supposed to be what you
25 called a notice program?
26 A Maintenance of the website was part of the notice

Page 3465

1 J. Fraga - By Petitioner - Cross/Pozner
2 program.
3 Q And what happens is this notice program was
4 specifically supposed to include the ability of certificate
5 holders to access the Court's filings in this case?
6 MR. ESPAÑA: Objection, your Honor. That's
7 actually mischaracterizing the Court-ordered notice
8 program. The Court-ordered notice program only directed
9 that certain documents be added to the website.
10 THE COURT: Okay. I'm not sure if he's
11 familiar with that or no. You can ask him otherwise.
12 THE WITNESS: Can you repeat the question
13 please?
14 Q The website has a page for providing the documents
15 filed with the Court?
16 A It has a page -- yes. It has a page to post court
17 documents. Correct.
18 Q And that was, again, supposed to be part of this
19 notice program for the certificate holders?
20 A Correct. The website's part of the notice program.
21 Q And that notice program wasn't under the control of
22 Garden City. Again, the documents that would be posted to
23 the website were given to you, or directed to you by Bank of
24 New York Mellon, the trustee?
25 A Correct.
26 Q Although your company had the ability, did it not,

Page 3466

1 J. Fraga - By Petitioner - Cross/Pozner
2 to post everything posted with the court?
3 A I suppose we could access the docket, but we would
4 post what we're instructed to post.
5 Q So, again, we know that if it's not there, it is
6 because Bank of New York Mellon, as trustee, did not give you
7 the instruction, Put this document up on the website as part
8 of our notice program?
9 A I can answer that if the trustee requests that
10 something be posted on the website, it would be posted on the
11 website.
12 Q But the converse please, sir. No notice -- but no
13 request by Bank of New York Mellon as trustee equals no
14 notice gets posted?
15 A If it's not requested to be posted, we would not
16 have posted it.
17 Q Now, you gave your deposition in this case in
18 December 2012?
19 A Correct.
20 Q And Mr. Kotlarczyk took your deposition. You see
21 him over there?
22 A Oh, yes.
23 Q And he pointed out to you, in December of 2012, that
24 there had been no new documents from the court's filings
25 posted on the website for over six months?
26 MR. ESPAÑA: Objection. Outside the scope of

1 J. Fraga - By Petitioner - Cross/Pozner
 2 direct, your Honor.
 3 MR. POZNER: It's right on your deposition.
 4 THE COURT: If you discussed it in deposition,
 5 I'll allow it.
 6 MR. ESPAÑA: But this is outside the scope of
 7 direct. He's testified about the Court-ordered notice
 8 program and the affidavit he submitted in response to the
 9 Court's direction. This is outside the scope of that
 10 completely. The website and what gets added was a
 11 courtesy that was provided afterwards.
 12 THE COURT: I'll allow it. Thank you.
 13 A I'm sorry. Could you repeat the question?
 14 Q Sure.
 15 When Mr. Kotlarczyk took your deposition in
 16 December 2012, he showed you that there had been no new
 17 documents posted on the website for over six months of
 18 court activities in this case.
 19 A We discussed the documents that were posted on the
 20 website and documents I believe in the depositions that were
 21 not.
 22 Q I understand, but I'm asking you something much more
 23 specific. He pointed out to you that no new documents from
 24 the court filings had been posted on the website for over six
 25 months?
 26 A He would've pointed that out. I don't remember the

1 J. Fraga - By Petitioner - Cross/Pozner
 2 hundred filings with the court, is because Bank of New York
 3 Mellon as trustee did not instruct you to put them on the
 4 website?
 5 A Correct.
 6 MR. ESPAÑA: Objection. Calls for speculation.
 7 It would be other reasons --
 8 THE COURT: Well, if he knows, I'll let him
 9 answer. If he doesn't, then he'll say that.
 10 A We post what we're instructed to post.
 11 Q And so we can take from this if you're not
 12 instructed to post, you will not post?
 13 A We will not post something we were not instructed to
 14 post.
 15 (Continued on next page.)

1 J. Fraga - By Petitioner - Cross/Pozner
 2 exact question.
 3 Q If we can turn to your deposition, Page 81, Line 13.
 4 Tell me when you are there and have a chance to read to
 5 yourself from Line 13 to Line 18.
 6 A Okay. Now that I've read that, I don't remember the
 7 entire deposition, that's correct.
 8 Q And so he confronted you with the fact that, in
 9 December of 2012, the last document posted from the court was
 10 dated June 14th, 2012?
 11 A That's correct.
 12 Q Now, that website exists even to this moment; does
 13 it not?
 14 A Correct.
 15 MR. POZNER: Could we bring up the current state
 16 of the website please and put it on the screen for the
 17 Court and the witness? What we see is -- let's go back
 18 to the screen before please.
 19 What we see -- can you bring it down a little?
 20 (Exhibit displayed.)
 21 Q We skip from number 398 to number 481 on the
 22 website; right?
 23 A Correct.
 24 Q That's your website?
 25 A Correct. That's the website.
 26 Q And the reason we skip from #398 to #481, almost a

1 Fraga-Petitioner-Cross/Mr. Pozner
 2 Q Now, let's look at some of the things that were omitted
 3 in what you called a notice program.
 4 MR. POZNER: Document numbers 400, 413 and 430, I
 5 ask the Court to take judicial notice of its own records on
 6 those items, 400, 413 and 430.
 7 Q Now, that would be in the gap that we find is missing,
 8 right?
 9 A Yes.
 10 Q And, of course, you have no knowledge of what those
 11 documents are?
 12 A Correct.
 13 MR. POZNER: I ask the Court to take judicial
 14 notice that those documents within the Court's file are
 15 motions filed by the Steering Committee seeking from the
 16 Trustee.
 17 THE COURT: In the e-filing system of this court,
 18 is that what you're saying those document numbers?
 19 MR. POZNER: Yes, your Honor.
 20 THE COURT: Any opposition to that? It seems --
 21 MS. PATRICK: They're in the public record of this
 22 court, so we have no opposition to the Court taking notice
 23 of the public record.
 24 THE COURT: Okay.
 25 Q Now, let's look at what the Trustee did instruct you to
 26 post as part of this notice program. Documents 485, 488 and

Page 3471

1 Fraga-Petitioner-Cross/Mr. Pozner
2 491.
3 485, 488 and 491 are all on the website, are they
4 not?
5 A Correct.
6 MR. POZNER: I ask the Court to take judicial
7 notice of documents 485, 488 and 491 are the Bank of New
8 York Mellon's responses to the discovery motions filed by
9 the Steering Committee, those motions which were omitted
10 from publication as part of the notice program.
11 THE COURT: Okay.
12 MR. ESPAÑA: Your Honor, I object on the grounds
13 that that mischaracterizes what the notice program is.
14 None of this is required by the court order of this
15 program. The documents of this website was an additional
16 courtesy and not required by the Court order program.
17 THE COURT: Again, I don't know where you're
18 going. As I said, he's never been clear both in the
19 positive and negative that what he was supposed to post and
20 what he wasn't to post.
21 Other than that, I don't know how much we have to
22 ask him.
23 MR. POZNER: We don't. Thank you. No further
24 questions.
25 MR. KASWAN: Your Honor, I have less than five
26 minutes.

Page 3472

1 Fraga-Petitioner-Cross/Ms. Kaswan
2 THE COURT: Okay.
3 CROSS-EXAMINATION
4 BY MS. KASWAN:
5 Q Mr. Fraga, did Mayer Brown tell you that Bank of
6 America was one of its clients?
7 A I always understood that Mayer Brown's client was
8 the Bank of New York.
9 Q And did you understand that in other contexts that
10 Mayer Brown represented Bank of America?
11 MR. ESPAÑA: Objection, scope.
12 THE COURT: That's really far afield. What's the
13 point of this?
14 MR. KASWAN: Your Honor, it isn't; because it's my
15 understanding that it's common in notice programs to
16 disclose conflicts that counsel have in the notice.
17 THE COURT: To him?
18 MR. KASWAN: No, that he -- normally when you
19 have -- he didn't disclose the notice of the conflict
20 because he didn't know about it.
21 MS. PATRICK: Your Honor, Ms. Kaswan can call a
22 witness to testify to what her understanding is or what is
23 common practice.
24 This witness can testify what he did. It's beyond
25 the scope of the direct and not --
26 THE COURT: Again, as I said, I do allow certain

Page 3473

1 Fraga-Petitioner-Cross/Kaswan
2 things to be beyond the scope of direct; but I don't really
3 get that. I mean, if you want to ask him he didn't know
4 about it and he didn't obviously didn't disclose something
5 he didn't know about, I don't know where else he can go
6 with that.
7 MR. KASWAN: Your Honor, this witness testified
8 that he has been responsible for hundreds of notice
9 programs. He is in a position to testify that it is common
10 practice and in fact required --
11 THE COURT: Ask him the questions instead
12 of telling.
13 MR. ESPAÑA: Also, your Honor, he's here to
14 represent and testify regarding the notice, but not as an
15 expert.
16 THE COURT: I understand. Ask the question. Let
17 me hear what it is, and let's finish up with this witness,
18 please.
19 Q Mr. Fraga, you have worked on several notice programs
20 per class actions in derivative cases, is that that fair?
21 A Yes.
22 Q And it is common when giving a notice in those actions
23 to disclose any conflicts that the class counsel would have;
24 isn't that fair to say?
25 A I've seen notices that have discussed conflicts. I
26 don't know what the practice is. The text of a notice is

Page 3474

1 Fraga-Petitioner-Cross/Kaswan
2 determined by counsel, and we publish and carry out the
3 program. The text is determined by the attorneys on the
4 case.
5 Q Well, commonly, the Court reviews the content of the
6 notice. If the Court is aware of the conflict, it requires it
7 be disclosed; right?
8 A That is --
9 MR. ESPAÑA: Objection, foundation.
10 THE COURT: He can't answer that.
11 Q Do you know whether or not that's the practice?
12 MS. PATRICK: It's the same question, objection.
13 THE COURT: I really think that's -- I'm not going
14 to allow him to answer. It's outside.
15 Q Now, sir, it is true that the notices that your firm
16 published did not disclose any conflicts on the part of Mayer
17 Brown; is that true?
18 A The notice stated what Mayer Brown provided as
19 Dechert now provided us so the text would be -- what is the
20 text was determined by the attorneys. So if it doesn't say
21 anything to that point, that wasn't our company's job to
22 write the notice.
23 MR. KASWAN: I have no further questions.
24 THE COURT: Any redirect?
25 MR. ESPAÑA: Nothing, your Honor.
26 THE COURT: All right, thank you very much. Have

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 a nice day.
 3 THE WITNESS: Thank you, your Honor.
 4 (Whereupon, at this time the witness was excused.)
 5 MR. INGBER: Your Honor, the Petitioners call
 6 Professor Daniel Fischel.
 7 THE COURT: Doctor, please step up.
 8 PROFESSOR ROBERT DANIEL FISCHEL,
 9 called as a witness in behalf of the Petitioners,
 10 having been first duly sworn, was examined and testified as
 11 follows:
 12 THE CLERK: State your name and full business
 13 address for the record.
 14 THE WITNESS: My name is Daniel Robert Fischel,
 15 F-I-S-C-H-E-L. And my business address for this purpose is
 16 Compass Lexecon, 332 South Michigan Avenue, Chicago,
 17 Illinois, 60604.
 18 DIRECT-EXAMINATION
 19 BY MR. INGBER:
 20 Q Good morning, Professor Fischel.
 21 A Good morning.
 22 Q Where are you employed?
 23 A I'm employed both at the economics consulting firm
 24 that I just identified, and also at the University of
 25 Chicago.
 26 Q What is Compass Lexecon?

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 A Compass Lexecon is an economics consulting firm
 3 that specializes in the application of economics to
 4 primarily various types of legal and regulatory disputes.
 5 Q Can you give the Court a sense of Compass Lexecon's
 6 personnel and clients?
 7 A Yes, we have close to 400 professionals, as well as
 8 affiliations with numerous outside experts, including a
 9 number of Nobel prize winners in economics.
 10 We have fourteen offices in the United States,
 11 Europe and South America, and our clients include, really
 12 run the gamut from major agencies of the federal government,
 13 state and local governments, major corporations, law firms,
 14 groups of investors and miscellaneous others.
 15 Q And, Professor, what do you do at Compass Lexecon?
 16 A I do two things. One, I'm President of the firm so
 17 I have overall responsibility for the entire firm; and
 18 secondly, I have, I would say, an active consulting practice
 19 myself in the areas of my expertise.
 20 Q And you also mentioned the University of Chicago. What
 21 is your current position at University of Chicago?
 22 A Currently, I'm the Lee and Brena Freeman of law and
 23 business emeritus at the University of Chicago Law School.
 24 Q Have you held any other academic positions?
 25 A Yes, obviously, before I took emeritus status,
 26 which was the Lee and Brena Professor of the law and

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 business at the university, I've also held an appointment at
 3 the University of Chicago Business School. I was Dean of
 4 the law school for a number of years. I was director of the
 5 law and economics program, which is a university-wide
 6 program at the university for many years. And I've also
 7 held positions both at the law school and the business
 8 school at Northwestern University.
 9 Q Professor, can you describe your educational background
 10 beginning with college?
 11 A Yes. After going to Bronx High School of Science
 12 here in New York, I went to Cornell University where I got a
 13 Bachelor's of Arts degree with a major in history, a minor
 14 in economics. Then I went to Brown University and got a
 15 Master's degree in history, and then I went to the
 16 University of Chicago Law School where I graduated in 1977.
 17 Q And what did you do after law school?
 18 A After law school I clerked for two years, first for
 19 the Honorable Thomas Fairchild who was then Chief Judge of
 20 the 7th Circuit, and then I had the great privilege of
 21 clerking for the late Associate Justice Potter Stewart, the
 22 United States Supreme Court.
 23 Then I practiced law for a very short time,
 24 less than a year; and I again began my career as an academic
 25 at Northwestern University.
 26 Q As an academic, what types of courses have you taught

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 over the years?
 3 A I've taught primarily law and economics courses in
 4 the business area. Basic courses in corporations, business
 5 associations, a variety of advance courses applying
 6 principles of economics and finance to issues that arise in
 7 financial markets, as well as some miscellaneous matter of
 8 other courses.
 9 Q Have you taught courses that deal with any of the
 10 issues that have arisen in this case?
 11 A Yes. I taught courses dealing with the economics
 12 of voting rights, which is as I think I'll describe later is
 13 a big part of my testimony. I've taught subjects
 14 extensively including fiduciary relationships, conflict of
 15 interest transactions, principle of limited liability and
 16 piercing the corporate veil, successor liability, other ways
 17 to go beyond the assets of a corporate entity and again,
 18 other related as well.
 19 Q Are you a member of any professional organizations?
 20 A Yes. I'm a member of the American Economics
 21 Association and American Finance Association.
 22 Q What other -- do you have any other affiliations?
 23 A Yes. I'm a member of the Board of Governors of the
 24 Becker Friedman Institute at the University of Chicago. I'm
 25 a member of the advisory group of the Harvard program on
 26 corporate governance at Harvard University. I'm a former

Page 3479

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 Chair of the American Law School section on law and
 3 economics, as well as a former board member of the center of
 4 the -- on the economy of the state.
 5 Q Have you authored any publications?
 6 A Yes, I've authored several books. Particularly, a
 7 book called The Economics Structure of Corporate Law
 8 published by Harvard University Press, co-authored with now
 9 Judge Frank Easterbrook. He's been a frequent co-author of
 10 mine, and I've written approximately 50 articles.
 11 Q Have your books or articles ever been cited by courts?
 12 A Yes, hundreds of times, including numerous times by
 13 the United States Supreme Court and then courts of all
 14 levels, Federal and State courts below the Supreme Court.
 15 Q Have you ever been invited to lecture to different
 16 groups on your areas of expertise?
 17 A Yes. I've lectured extensively to various groups,
 18 to various legal and bar association groups, including the
 19 Bar Association in the City of New York, the American Bar
 20 Association on numerous occasions. I've lectured to various
 21 conferences of Federal and State judges. I've lectured at
 22 most of the major universities in the United States, and
 23 again, miscellaneous other groups, as well.
 24 Q Have you served as a consultant on economic issues to
 25 any government agencies or regulatory bodies?
 26 A Yes, extensively. Throughout my career, I've got a

Page 3480

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 close relationship with the -- particularly, the United
 3 States Department of Justice. I've also been a consultant
 4 or advisor or witness on economic issues to many other
 5 government agencies, including the Securities and Exchange
 6 Commission, many of the federal banking regulatory agencies,
 7 The Department of Labor, The Federal Trade Commission, also
 8 the New York Stock Exchange, The National Association of
 9 Securities Dealers, The Chicago Mercantile Exchange, some
 10 regulatory exchanges in other countries and, again,
 11 miscellaneous others.
 12 Q Professor Fischel, have you previously testified as an
 13 expert witness?
 14 A Yes, many times.
 15 Q Approximately, how many?
 16 A I think approximately -- in terms of testimony, at
 17 trial or arbitrations, trial-like proceeding, I think
 18 approximately fifty times over a 30-year period.
 19 Q Have you ever served as an expert in a judicial
 20 proceeding in which a settlement was being proposed and reviewed
 21 by the Court?
 22 A Yes. Last year there was a dispute in connection
 23 with a class action settlement between a class of investors
 24 and Mr. Hank Greenberg and AIG, and a settlement was
 25 reached. And then the New York Attorney General intervened
 26 and objected to the settlement, claiming that one of the

Page 3481

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 experts in the litigation had made a significant error; and
 3 as a result of that error, the settlement was too low and,
 4 therefore, should not be approved by the Court.
 5 And then the Court authorized a subsequent
 6 proceeding where a new expert could be retained to look
 7 independently at the merits of the settlement in light of
 8 the mistake, and I was chosen to do that.
 9 I filed the report. Then the judge approved
 10 the settlement, citing my report as one of the bases for
 11 approving the settlement.
 12 Q Now, with that program, Professor Fischel, what was
 13 your assignment in this case?
 14 A To take an independent look at the economic issues
 15 in connection with the reasonableness and adequacy of the
 16 settlement, as well as the Trustee's decision to enter into
 17 the settlement both as of the petition date and as of today.
 18 Q And did you summarize your analysis in a report or
 19 multiple reports?
 20 A I did.
 21 Q And based on your analysis, did you form any opinions?
 22 A I did.
 23 Q Have you prepared a demonstrative that summarizes your
 24 opinion and the bases for your opinion?
 25 A I have.
 26 MR. INGBER: Can we bring up PTX 621 for

Page 3482

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 demonstrative purposes.
 3 Q Professor Fischel, is this the demonstrative that you
 4 prepared?
 5 A Yes, it is.
 6 Q Can you describe for Justice Kapnick what your opinion
 7 is in this case and the bases for your opinion as described in
 8 this demonstrative?
 9 A My opinion, as I stated the settlement, the
 10 proposed settlement I should way was reasonable and adequate
 11 both as of the time of the petition date and for that matter
 12 as of today, both on its own terms and in terms of the
 13 Trustee's decision to enter into the settlement. And I
 14 afford different bases for that opinion, which I'll
 15 summarize very briefly, and then I'm sure I'll have a chance
 16 to explain further.
 17 My first basis is that the behavior of the
 18 Institutional Investors by itself supports the
 19 reasonableness of the proposed settlement, and let me just
 20 explain that for a second.
 21 In my opinion, the behavior of the
 22 Institutional Investors in light of their significant
 23 economics stake, their sophistication, the lack of any
 24 comparable opposition group, the absence of any conflicts of
 25 the Institutional Investors, as well as the Trustee's role
 26 in facilitating negotiations between the parties, by itself

Page 3483

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 supports the reasonableness and adequacy of the settlement
 3 as well as the Trustee's decision to enter into the
 4 settlement.
 5 Obviously, in this particular case, the
 6 Trustee went further and engaged in the process of hiring
 7 additional experts; but in my opinion, even if the Trustee
 8 had not done that, even if the Trustee had relied solely on
 9 the support of the Institutional Investors in light of the
 10 facts and circumstances of this case that I described, that
 11 would be sufficient.
 12 In fact, the Trustee being criticized for
 13 going beyond for what I believe what was necessary to
 14 support the reasonableness and adequacy of the settlement is
 15 really more an example of no good deed goes unpunished, and
 16 a justifiable basis for criticizing the behavior of the
 17 Trustee.
 18 My second basis for my opinion that the -- is
 19 that as stated in the -- on the screen, the proposed
 20 settlement is reasonable and adequate in light of the
 21 uncertainty about the value of the claim and the ability to
 22 recover in litigation, as well as the delay that litigation
 23 would cause.
 24 And, basically, what that opinion is, I think
 25 both the magnitude of the claim as well as the ability to
 26 collect on whatever ultimately the claim was demonstrated to

Page 3484

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 be, was very uncertain and is very uncertain.
 3 And I think it's useful to just imagine what
 4 would have happened had the Trustee rejected the
 5 \$8.5 billion settlement with the servicing remedy, with the
 6 document remedy and as a result, the parties got bogged down
 7 and what might have happened if that occurred, such as for
 8 example, Countrywide going bankrupt and of the 530 trusts
 9 instead of getting the \$8.5 billion and the related remedies
 10 got virtually nothing or were creditors in bankruptcy
 11 proceeding.
 12 And I think if you start to think of the
 13 alternatives of what could have happened in light of the
 14 uncertainty about collection as well as the magnitude of the
 15 claim, I think the Trustee's decision looks, at least to me,
 16 very good.
 17 The third basis for my opinion is that all of
 18 the claims in this case, about the conflicts of the Trustee,
 19 are fundamentally flawed. I've looked at all of them. I
 20 don't believe the Trustee had any conflicts. I believe from
 21 what I can tell, the Trustee acted ethically and honorably
 22 and in the best interest of the trust and the certificate
 23 holders at all points in time.
 24 And, finally, I looked at the consensus
 25 market's reaction to the announcement of the settlement;
 26 because one way to test whether Bank of America got

Page 3485

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 basically a windfall in this settlement, settlement for much
 3 less than what the settlement should be, is to look at how
 4 market participants, contemporaneous market participants who
 5 observed the settlement, observed the events leading up to
 6 the settlement, what their consensus judgment was.
 7 Again, it doesn't prove that the settlement
 8 was reasonable and adequate, but it gives some indication of
 9 what people in the marketplace, including the most
 10 sophisticated investors in the world thought about the
 11 reasonableness of the settlement.
 12 And based on my analysis, I've concluded that
 13 the market judgment of the settlement is completely
 14 consistent with my basic opinion that the proposed
 15 settlement was reasonable and adequate.
 16 Q Thank you, Professor.
 17 Now, before we get into the details of your
 18 opinions, would it be helpful for you to have a copy of your
 19 reports?
 20 A Sure.
 21 Q That we would talk about and you could refer to them?
 22 A Sure.
 23 MR. INGBER: Your Honor, may I hand these reports
 24 to Professor Fischel?
 25 THE COURT: Sure.
 26 (Handed)

Page 3486

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 A Thank you.
 3 Q Okay, Professor, let's focus on the first basis for
 4 your opinion that the proposed settlement was reasonable and
 5 adequate and that is the behavior of the Institutional
 6 Investors.
 7 Can you explain this opinion to the Court?
 8 A Yes. Basically, what I said before that I believe
 9 under the facts and circumstances of this case, the behavior
 10 of the Institutional Investors in light of their large
 11 economic stake, the absence of any conflict that they had
 12 with other certificate holders, the role of the Trustee, it
 13 being able to facilitate negotiations and observe that the
 14 negotiations were at arm's length, as well as in combination
 15 with other opinions that I mentioned, as I said by itself if
 16 there were nothing else would be sufficient for me to
 17 justify the reasonableness and adequacy of the settlement,
 18 as well as the Trustee deciding to enter into the
 19 settlement.
 20 Remember, that even though the Trustee has
 21 obligations to the trust and the certificate holders, the
 22 parties who are either paying the money or receiving the
 23 money are not -- do not include the Trustee. They are the
 24 certificate holders on the one hand represented by and the
 25 Institutional Investors represented by counsel and the Bank
 26 of America.

Page 3487

1 Fischel-Petitioners-Direct/Mr. Ingber
2 And to simplify for a moment, imagine if there
3 was only one certificate holder and the Bank of America. If
4 you had an arm's-length settlement between two sophisticated
5 commercial parties, then from the Trustee's perspective,
6 absent the most extraordinary circumstances, that would be
7 enough if the parties in interest, in terms of their
8 economic stake, concluded that they were both well served by
9 the settlement.
10 Now, obviously, with thousands of certificate
11 holders, it's impossible to get unanimity. There's also
12 going to be some group that supports and doesn't support.
13 But, in this case the fact that there are
14 twenty-two Institutional Investors who hold a large economic
15 stake, close to 25 percent, no comparable opposition group;
16 that coupled with the absence of any plausible claim of
17 conflict between the Institutional Investors and the other
18 certificate holders, approximates the situation of a single
19 certificate holder and the Bank of America and I think the
20 Trustee was perfectly entitled -- in fact, I'd go beyond
21 that. I'd say the Trustee would be derelict if the Trustee
22 did not give deference to the conclusion of a negotiation
23 between the parties who are the real economic parties in
24 interest in terms of who is going to pay the money and who
25 is going to receive the money.
26 Q And so along those lines, in your opinion to what

Page 3488

1 Fischel-Petitioners-Direct/Mr. Ingber
2 extent could the Trustee take into account the views of the
3 Institutional Investors?
4 A I think, again, particularly coupled with all the
5 other facts and circumstances that I mentioned, the absence
6 of any plausible claim of any conflict of interest or
7 divergence of interest between the Institutional Investors
8 on the one hand and the certificate holders, the fact that
9 they were contentious negotiations at arm's length, which
10 the Trustee was able to facilitate and observe, combining
11 all those factors as well as the absence of any significant
12 opposition group, again confirmed after the settlement by
13 the relatively small holdings of the objectors in comparison
14 with the Institutional Investors in my opinion, as I've said
15 several times, that by itself without more would be
16 sufficient to justify the reasonableness and adequacy of the
17 settlement as well as the Trustee's decision to enter into
18 the settlement.
19 (Continued on the next page.)
20
21
22
23
24
25
26

Page 3489

1 Professor D. Fischel - By Petitioner - Direct/Ingber
2 Q Can we bring up PTX 622 for demonstrative purposes
3 please?
4 (Exhibit displayed.)
5 Q Professor Fischel, you had mentioned the large
6 economic stake of the institutional investors. First, at the
7 risk of being a bit redundant, can you explain why -- can you
8 explain the significance of the large economic stake that the
9 institutional investors had in these 530 trusts?
10 A Because the larger the economic stake, again,
11 particularly absent any plausible claim of conflict, the
12 better incentives of that group with a large economic stake
13 to make the right decision because they get a disproportional
14 benefit from making a good decision and they bear
15 disproportional costs from making a bad decision. So,
16 therefore, they have the right incentive or the better
17 incentive to invest resources in figuring out what the
18 magnitude of the possible claim is, what the risks are, what
19 the downsides are. And when they reach a decision, in terms
20 of what they're willing to accept, because of their large
21 economic stake, in my opinion, that's entitled to particular
22 deference.
23 Q Okay. So Exhibit #622 is an exhibit that was
24 attached to your expert report; is that correct?
25 A Correct.
26 Q Okay. Could you describe Exhibit #622 and explain

Page 3490

1 Professor D. Fischel - By Petitioner - Direct/Ingber
2 for the Court how it's relevant to your opinion?
3 A Yes. This is just a list of the institutional
4 investor group on the left-hand side, and on the right-hand
5 side is a corresponding list of what their unpaid principal
6 balance was, the outstanding loans as of July 30, 2012 based
7 on interrogatory answers that were provided in dollar terms.
8 And then it's summed up at the bottom where the institutional
9 investors in total owned a little bit more than \$34 billion
10 out of an unpaid principal balance total of almost \$142
11 billion, which was, approximately, 24 percent of the total.
12 I also checked to make sure that that number was
13 roughly the same as existed in the comparable time
14 period, June/July 2011, and also 2013. And that
15 24-percent number, give or take a percent or two, is the
16 same at all points in time from the time of the
17 settlement, the proposed settlement, entering into the
18 proposed settlement until today.
19 Q And what's the relevance of that fact to your
20 opinion?
21 A Well, again, 24 percent, in a situation where it's
22 impossible to get unanimity, and there is no -- at the time
23 of the proposed settlement, there is no opposition group with
24 any percent, so it's 24 percent versus zero. And then after
25 the settlement, there are objectors and the objectors, I
26 think, maybe total seven or eight percent, so, again, a much

1 Professor D. Fischel - By Petitioner - Direct/Ingber
2 smaller figure. But, basically, the point is that the
3 parties with the biggest economic stake support the
4 settlement, no plausible claim of conflict, no credible
5 opposition group with anything comparable in terms of a
6 stake. And as I've said, I believe that is powerful economic
7 evidence supporting the reasonableness and adequacy of the
8 settlement and supporting the trustee's decision to enter
9 into the proposed settlement.

10 MR. INGBER: Can you bring up PTX 623 please?
11 (Exhibit displayed.)

12 Q Professor, is this also an exhibit that was attached
13 to your expert report?

14 A Yes.

15 Q And can you walk the Court through this
16 demonstrative exhibit and explain its relevance to your
17 opinion?

18 A Yes. I also said that the institutional investors
19 were very sophisticated. These are not people off the
20 street. These are the entities that are the most
21 sophisticated financial participants, or at least among them
22 in the world. And given their large economic stake, when
23 they make a judgment as to what's an adequate settlement,
24 when they're leaving money on the table, if they think they
25 can do better, again, that's powerful economic evidence. So
26 I can't measure, you know, how many courses they took in

1 Professor D. Fischel - By Petitioner - Direct/Ingber
2 economic stake?

3 A I have.

4 Q And what was your finding?

5 A I found that the institutional investors held at
6 least a 25-percent stake, I think, in, approximately, 35
7 percent of the trusts held in economic stake, smaller than
8 25 -- or 25 percent and under in over 90 percent of the
9 trusts and even a lot in which they didn't hold 25 percent,
10 they held 10 percent.

11 Q And how is that relevant?

12 A Again, it's really the same point. That even though
13 the -- because of the particular 25-percent requirement of
14 the governing agreements, that that percentage has a
15 particular significance for declaring inventive
16 non-performance possibly triggering an event of default. In
17 economic terms, what really matters is the economic stake
18 that the institutional investors have in the trusts. There's
19 nothing magic to a 25 percent number, and it turns out that
20 they have a significant economic stake in virtually all of
21 the trusts. And, again, that again just supports, relying on
22 their judgment as a significant basis, powerful economic
23 evidence for supporting the reasonableness and adequacy of
24 the settlement and the trustee's decision to give some
25 deference to their judgment in entering into the proposed
26 settlement.

1 Professor D. Fischel - By Petitioner - Direct/Ingber
2 school or anything else in terms of how much sophistication
3 they had, but, again, I can look at evidence in the
4 marketplace about how much money they managed or controlled.
5 And this, again, is the same list of the institutional
6 investors with a dollar amount of assets owned or managed.

7 You'll see that in the middle column, "as of"
8 date, where there's a date, either we can get data or if
9 no data was available, there is an "NA", which means that
10 the numbers in the last column are an underestimate
11 because there's a lot of additional assets which we just
12 couldn't get data for. But even with that caveat, even
13 recognizing that the numbers here are significantly
14 understated, these institutional investors control over
15 \$8 trillion of assets. And, again, if you just think of
16 what that means in the marketplace, that means that they
17 have sufficient status, reputation and track record of
18 success that individual entities, pension funds are
19 willing to place their economic future with these
20 particular institutions and I think that's a very good
21 proxy for their sophistication. So I think their
22 sophistication coupled with their large economic stake, I
23 think, is powerful economic evidence supporting the
24 reasonableness and adequacy of the settlement.

25 Q Okay. Now, have you also analyzed the percentage of
26 the 530 trusts in which these institutional investors held an

1 Professor D. Fischel - By Petitioner - Direct/Ingber

2 Q Now, I'd like to follow up on one point that you
3 just made and that is that the objectors in this case hold,
4 approximately, seven percent, seven to eight percent of the
5 holdings in the 530 trusts; what specifically is the
6 significance of that?

7 A I think it confirms and supports the trustee's
8 decision to enter into the proposed settlement because if it
9 were the case that -- again, I don't believe it's the case,
10 but, hypothetically, if it were the case that the
11 institutional investors sold out the certificate holders as a
12 favor to Bank of America as it's been alleged, or that they
13 were stupid and they didn't realize how much money they could
14 get in a settlement, or they had different interests for one
15 reason or another, then you would expect there to be a tidal
16 wave of opposition. You would expect there to be a huge
17 number of objectors saying that These institutional
18 investors, they don't represent us, We have different
19 interests and we think that the settlement should be
20 different, We think there should be no settlement, We think
21 the settlement should be higher. And the fact that that
22 didn't happen, that the percentage ownership of the objectors
23 is relatively low, I think, again, supports the
24 reasonableness and adequacy of the settlement and the
25 trustee's decision to enter into the proposed settlement.

26 Q Now, continuing to focus on this first basis for

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 your opinion, and that is the institutional investors'
 3 behavior, did you also consider the trustee's role in the
 4 settlement negotiations?
 5 A Yes.
 6 Q Okay. And how did the trustee's role in the
 7 settlement negotiations affect your opinion?
 8 A Well, the trustee had a role in facilitating
 9 negotiations. I believe there's been a fair amount of
 10 testimony in the trial about what the trustee did from Mr.
 11 Smith and Mr. Waterstredt. And the trustee not only
 12 facilitated negotiations but had an opportunity to hear
 13 presentations from both sides, analyze from perspective of,
 14 again, the real parties in interest who were paying the money
 15 and receiving the money, what they thought the strengths and
 16 weaknesses of the case were, the rebuttal to those
 17 presentations, had an opportunity to observe that the
 18 negotiations were at arm's length, they were hard fought,
 19 both sides put their best foot forward. And so that, again,
 20 to me was relevant in negating any inference that this was
 21 done in the back of an envelope or was collusive or in any
 22 way was anything other than an arm's length negotiation
 23 between sophisticated commercial parties.
 24 Q Now, Professor, you mentioned earlier in your
 25 testimony that there was no plausible claim that
 26 institutional investors were conflicted; do you recall that?

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 benefit Bank of America?
 3 I mean, again, it's just implausible on its
 4 face. But then beyond that, I've also analyzed all of
 5 the specific allegations of conflicts to the extent there
 6 are specifics.
 7 Q Well, there was -- there's one specific allegation
 8 of conflict that I'd like to ask you about, and that is that
 9 BlackRock, which is one of the institutional investors was
 10 conflicted because Bank of America is a shareholder of
 11 BlackRock; do you have a reaction to that claim?
 12 A I do. Again, first of all, BlackRock was one of the
 13 institutional investors. And, again, if BlackRock was trying
 14 to do Bank of America a favor, would it have been one of the
 15 signatories of the October 18th letter starting the process
 16 for declaring an event of default causing Bank of America to
 17 lose billions of dollars?
 18 Also, from what I've been able to tell, there's
 19 no evidence, at any point in time, that BlackRock, as one
 20 of the institutional investors, acted any differently,
 21 tried to get the institutional investors to give Bank of
 22 America a sweetheart deal. And even if it did, which
 23 again, at least as far as I'm unaware, there's zero
 24 evidence that it did, but even if it tried, it's one of
 25 22 institutional investors, the other 21 have their own
 26 economic interest at stake. Why would they defer to

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 A I do.
 3 Q Are you aware that the objectors have claimed in
 4 this case that, in fact, the institutional investors were
 5 conflicted?
 6 A I'm unaware of it and I've analyzed that issue as
 7 well as analyzing the reports of the objectors' experts who
 8 make that claim.
 9 Q And what's your reaction to that claim?
 10 A I think it's ridiculous, frankly, for starters.
 11 First of all, think of how this whole settlement process
 12 began; of institutional investors represented by counsel
 13 sending a letter on October 18th, 2010 claiming that there
 14 were breach in warranty as well as servicing violation
 15 starting the clock running for a potential triggering of an
 16 event of default. That particular event was widely
 17 publicized in the media, caused Bank of America's stock price
 18 to plummet as a result. And without getting into the
 19 specifics of the claims of conflict, which I will address,
 20 does it make any sense for people who are alleged to trying
 21 to help Bank of America to send a letter alleging that their
 22 performance -- that Bank of America and Bank of America's
 23 performance was so defective that there were -- that there
 24 should be a declaration of an event of default which caused
 25 Bank of America to lose billions of dollars of value? Does
 26 that sound like a conflict of interest of people trying to

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 somebody, an entity that was conflicted when, again, I
 3 don't think there's any basis that I'm aware of for any
 4 suggestion that BlackRock didn't push as aggressively as
 5 any of the other institutional investors to get a good
 6 result.
 7 Q Professor, I'd like to get your reaction to the
 8 opinion to one of the objectors' experts, Professor Levitin,
 9 on the issue of the role of the institutional investors.
 10 MR. INGBER: Can we pull up R-929, Paragraph 68
 11 please?
 12 (Exhibit displayed.)
 13 Q And, Professor, I'd like you to take a look at this
 14 excerpt from Professor Levitin's report, and I bring it up
 15 here for the aid of the witness and also for the benefit of
 16 the Court, to give context to your testimony. And Professor
 17 Levitin here gives his view on why he believes the
 18 institutional investors are not representative of other
 19 certificate holders. Can you walk us through your view on
 20 Professor Levitin's discussion about the role of the
 21 institutional investors and his criticism, implicit or
 22 explicit of your opinion?
 23 A Sure. As I've said, I've also looked at the claims
 24 of the objectors' experts on the issue of alleged
 25 institutional investor conflict, and this particular
 26 paragraph as -- if you just look at the introduction to the

Page 3499

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 paragraph, even within the covered trust, "the inside
 3 investors" -- and I just want to emphasize, "are not
 4 representative of other certificate holders in the following
 5 ways." So before going through the reasons, this is a claim
 6 that the institutional investors, in contrast with what I
 7 said, are not representative of the other certificate
 8 holders, and he lists a series of reasons. And what I want
 9 to do is go through those reasons and see what the support is
 10 in the reasons for the bold claim that is made at the outset
 11 that the institutional investors are not representative.
 12 So let's look at first, "the particular 189
 13 covered trusts in which the inside investors have 25
 14 percent of the voting rights may have." First of all
 15 underline "may have", "a different collateral makeup than
 16 the other 341 covered trusts. To wit, the trusts in
 17 which the inside investors have 25 percent of the voting
 18 rights, may have" -- and again underline "may have"
 19 again, "more subprime or Alt-A collateral or vice versa,"
 20 under line "vice versa." So this is supposedly a basis
 21 for why the inside institutional investors are not
 22 representative --
 23 Q Okay. Professor, let me interrupt for a second.
 24 I'd like you to respond to this first bullet
 25 point, and before you move onto the second, I think we
 26 are going to have a short morning break.

Page 3500

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 A Okay. First of all, as I think it's clear just from
 3 the language, there's a complete disconnect between the
 4 statement of what's going to be shown and the supposed
 5 evidence. The evidence in this first bullet point doesn't
 6 demonstrate anything. It's just pure speculation about the
 7 relationship between the collateral makeup of the 189 trusts
 8 versus the other trusts, it doesn't establish anything about
 9 whether or not representative.
 10 But if you go further than that, and the reason
 11 you go further than that is that this is something that's
 12 easy to verify. You can look at the interrogatory
 13 responses, the CUSIP numbers in connection with
 14 particular trusts, go to well-recognized widely-used
 15 databases, ABS Net, and actually look at the relationship
 16 between the collateral makeup of the 189 trusts versus
 17 the other trusts. And if you did that, which anybody can
 18 do based on the information that was provided to them,
 19 you would see that there's not much difference at all.
 20 So it's not just speculation that proves nothing, it's
 21 speculation that's wrong and speculation that can be
 22 easily demonstrated to be wrong by looking at obvious
 23 sources that anybody who is familiar with the data in
 24 this field would be able to analyze.
 25 MR. INGBER: Okay. Thank you.
 26 On that note, I think, your Honor, we'll --

Page 3501

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 THE COURT: Yeah. We're going to take a
 3 ten-minute break.
 4 And you can step down and then we'll continue.
 5 THE WITNESS: Thank you, your Honor.
 6 THE COURT: Thank you.
 7 (Recess taken.)
 8 THE COURT: Okay. Mr. Ingber, you may
 9 continue.
 10 MR. INGBER: Thank you, your Honor.
 11 Q Professor Fischel, right before the break, you were
 12 taking us through Professor Levitin's analysis of the role of
 13 the institutional investors and you had given your reaction
 14 your response to Bullet #1. Can you proceed to bullet point
 15 #2 please?
 16 A Yes. And maybe I'll be a little briefer with bullet
 17 point #2 because it's basically the same point as bullet
 18 point #1. But this is supposedly the second basis in
 19 Professor Levitin's opinion as to why the institutional
 20 investors are not representative.
 21 So if you begin just with the first sentence,
 22 "the institutional investors may not be", again, the same
 23 speculation, "invested in similarly supposed tranches of
 24 the covered trusts." And then he goes through an example
 25 of what would happen if the institutional investors had,
 26 for example, senior tranches and other certificate

Page 3502

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 holders in the 530 trusts did not, rather than read the
 3 whole thing. But if you just go to the last sentence and
 4 just highlight that, "if that were the case, their
 5 interests would not be representative of many other
 6 certificate holders." So, again, he doesn't say that is
 7 the case, he just speculates as to what might happen if
 8 it were the case. But, again, it turns out that this is
 9 something that can be checked and it's not the case. You
 10 can look at the CUSIP numbers for the certificate holders
 11 of the various trusts that were provided by the
 12 institutional investors interrogatories, look at a
 13 standard database, ABS Net, and compare the tranches held
 14 by the institutional investors with all the other
 15 certificate holders in all the different trusts.
 16 And so it's not just speculation, again, it's
 17 incorrect speculation. Speculation that can be refuted
 18 by checking, and certainly provides no support for the
 19 basic claim that the institutional investors are not
 20 representative of the other certificate holders. If
 21 anything, if you did the checking, you would conclude the
 22 opposite. But, again, there's a basic reality check
 23 which is that there's been ample time to object after the
 24 settlement. If it were the case that there was -- if
 25 there were huge numbers of other certificate holders who
 26 did not feel their interests were represented because

Page 3503

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 they were invested in certificates, were different
 3 collateral, different tranches, whatever reason, they
 4 would object. And, again, the absence of any comparable
 5 opposition group in terms of economic stake, I think, is
 6 also inconsistent with these particular claims.
 7 And just moving to the third point, again, the
 8 first sentence, the third, "if the institutional
 9 investors accumulated all or part of their positions in
 10 the covered trusts at distressed prices, they would have
 11 different incentives regarding the proposed settlement
 12 from an investor that purchased at par." And here, I
 13 would say again that, not only speculation, but there's
 14 basically a fundamentally economic error that's embedded
 15 in this particular sentence because it's presuming that
 16 the prices that the certificate holders pay will dictate
 17 how much they're willing to accept. In other words,
 18 implicit in this statement is that if a certificate
 19 holder purchased at a lower price, they're willing to
 20 leave huge amounts of money on the table because they
 21 purchased at a low price as opposed to for themselves,
 22 for their clients that they have a fiduciary obligation
 23 to as opposed to trying to get as much as they can.
 24 So, again, it's not just speculation, but it's
 25 speculation that's incorrect. In fact, there's a term in
 26 economics that describes this kind of error, it's

Page 3504

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 referred to as a sunk cost fallacy --
 3 THE COURT: Would you like to spell that or
 4 would you mind spelling that?
 5 THE WITNESS: Yeah. It actually may be
 6 simpler --
 7 THE COURT: I say it for her, but for me too.
 8 THE WITNESS: It's S-U-N-K, sunk, second word
 9 cost, C-O-S-T, fallacy. And what the term implies is
 10 exactly the way it sounds. Is that what you did in the
 11 past is sunk, it's over, it's gone, and it's not going to
 12 influence trying to do as well as you can going forward.
 13 But, again, but it's not just an abstract
 14 principle of economics, there is a similar reality check
 15 here. If there were other certificate holders -- if this
 16 claim were correct, if this pure speculation were
 17 correct, if there are other certificate holders who
 18 purchased at high prices and had greater losses, assuming
 19 the speculation is correct, and felt that the
 20 institutional investors were selling them out because
 21 they purchased at lower prices, there's an obvious
 22 solution; they could've registered their objections to
 23 the Court and stated that they don't believe that the
 24 institutional investors were adequately representing
 25 their interests because of the difference in the purchase
 26 prices as opposed to what the reasonable amount that

Page 3505

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 could be gotten in a settlement. And then you wouldn't
 3 have had this disparity between 25 percent versus eight
 4 percent that currently exists, you'd have 25 percent
 5 versus 50 percent, or something that would really call
 6 into question how representative the institutional
 7 investors were in negotiating what led up to the proposed
 8 settlement.
 9 Q And what's your understanding of how costly it
 10 would've been for a certificate holder to object in this
 11 case?
 12 A Well, particularly, having heard the testimony this
 13 morning and basically what I'm familiar with from my own
 14 background, my understanding is anybody could object. There
 15 is no ownership -- no minimum ownership requirement, no
 16 filing fee, no hundred-page form to fill out or anything else
 17 that would -- and plus there's enough money at stake that if
 18 there was any serious issue about whether the institutional
 19 investors, their role was adequate in being, in effect, a
 20 proxy for all the certificate holders, that you would expect
 21 that there were a serious issue, there would be a lot more
 22 objections.
 23 MR. INGBER: PTX 621.
 24 (Exhibit displayed.)
 25 Q Professor, I'd like to go back to the bases -- the
 26 four bases for your opinion that the settlement was

Page 3506

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 reasonable and adequate, and let's focus on #2 here, that
 3 "the proposed settlement is reasonable and adequate in light
 4 of the uncertainty about the value of the claim and the
 5 ability to recover in litigation and also the delay that
 6 would accompany litigation." And I'd like to start by asking
 7 a few questions about what you referred to in your expert
 8 report as the economics of this settlement decision. Could
 9 you explain that term to Justice Kapnick?
 10 A Yes. Certainly. It's the basic decision process
 11 that a party, in this case the trustee, has to go through,
 12 either explicitly or implicitly, when confronted with the
 13 possibility of settling a claim. There's always the
 14 possibility that the perception is that the settlement offer
 15 is too low and you could do better by going further in the
 16 litigation process and that happens all the time. Settlement
 17 offers are rejected and the parties go forward in the hope
 18 that they can do better. But on the other hand, going
 19 forward is not costless. There's not just the time and the
 20 expense of further litigation, but, more importantly, there's
 21 no guarantee that going further in the litigation guarantees
 22 a better outcome. Sometimes, the bird in the hand is the
 23 best deal you can get. And if you go further, you not only
 24 waste time, waste money, but the outcome is worse as a
 25 result.
 26 So the tradeoff for a party faced with a

1 Professor D. Fischel - By Petitioner - Direct/Ingber
 2 litigation decision is exactly that; how likely it is
 3 that you'll be able to do better if you go forward versus
 4 the risks of what could happen if you go forward, that
 5 you might not do better and you're going to waste time
 6 and money in the process particularly if you don't do
 7 better. And that's a general, well-accepted litigation
 8 dynamic that's well understood in the economics
 9 literature. And I think those principles have particular
 10 applicabilities to the facts and circumstances of this
 11 case.

12 (Continued on next page.)
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 years of litigation.

3 During that litigation, Countrywide could go
 4 bankrupt. There could be adverse legal rulings on the
 5 possible direct claims against Bank of America and what
 6 could have occurred had the Trustee not accepted the
 7 proposed settlement is the certificate holders could have
 8 wound up with next to nothing. That no matter how
 9 meritorious the claims, because Countrywide could have gone
 10 bankrupt.

11 As I said, alternatively the claims could have
 12 found to be much less meritorious than the certificate
 13 holders and the Institutional Investors represented by
 14 counsel believed.

15 So there's all these uncertainties, some could
 16 be better, some could be worse; but there's no way to know
 17 and the Trustee has to make a decision. And given what I've
 18 already testified about in the first basis for my opinion, I
 19 think there was more than sufficient basis for the Trustee
 20 to decide wasn't worth taking the risk of the certificate
 21 holders getting next to nothing as opposed to \$8.5 billion
 22 and a document remedy and a servicing remedy, not to even
 23 without as I said hiring any additional experts, even though
 24 they did do that.

25 Q Now there's been a suggestion in this case that the
 26 Trustee should have done to get maximum leverage and the best

1 Fischel-Petitioners-Direct/Mr. Ingber

2 Q Thank you. You anticipated my next question, which is
 3 what is the applicability of those principles to the facts and
 4 circumstances here?

5 A Okay. Well, again, for all the reasons that I've
 6 already mentioned -- I'm not going to repeat them -- the
 7 Trustee was faced with a decision about whether to accept
 8 the proposed settlement that was negotiated between the
 9 Institutional Investors represented by counsel and Bank of
 10 America. I've already given all the reasons why I think
 11 that agreement is entitled to significant deference,
 12 including the Trustee's role in facilitating those
 13 negotiations.

14 So the Trustee had to decide if I accept the
 15 proposed settlement, I get \$8.5 billion for the certificate
 16 holders, I get servicing remedy, I get a document remedy. I
 17 can take that, or I can take the risk of what could happen
 18 if I reject that.

19 Now, if I reject that, obviously, it's very
 20 uncertain what could happen. And among the different
 21 possibilities that could occur, is it's possible that the
 22 parties could negotiate a higher settlement. It's possible
 23 that there could be litigation that resulted in a favorable
 24 verdict that could be collected.

25 But, it is also possible that exact opposite
 26 could occur. That the parties could get bogged down in

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 settlement was to file a lawsuit and begin discovery. You're
 3 aware of that?

4 A I am.

5 Q That suggestion?

6 A I am.

7 Q What's your reaction to that?

8 A Again, that's a possibility. We'll never know, but
 9 it's also the case that that strategy could have been a
 10 disaster. That litigation could have been sued, and then
 11 who knows what could have happened in litigation.

12 For example, if there was a filing of a
 13 complaint, it's likely that a response would have been a
 14 motion to dismiss and particularly dismiss all of the direct
 15 claims against Bank of America. And at least my own
 16 understanding is that a number of those claims have been
 17 dismissed by judges, including one fairly recently. I think
 18 Judge Felzer in California after an attempt to amend the
 19 complaint to attach the findings of the MBIA case.

20 So, again, there's no way to know, but I would
 21 say significant risk that that strategy could turn out very
 22 very poorly. And, more generally, if that claim were true,
 23 claims would never be settled in advance of litigation.
 24 That makes no sense. I know from my own business where we
 25 are asked all the time to evaluate potential claims which
 26 lead to settlements where litigation has never being filed.

Page 3511

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 The parties that are asking us to do that are not
 3 irrational. They're not stupid. They think that the best
 4 outcome they could get is to get a settlement prior to
 5 litigation and avoid all risks, the costs, delays of
 6 litigation.
 7 So I think in this case to suggest that the
 8 only viable strategy was to file a lawsuit and take all the
 9 risks of what would happen in a motion to dismiss, what
 10 would happen in discovery, what would happen to
 11 Countrywide's solvency during the period of after the
 12 rejection of the proposed settlement; at a minimum there's
 13 no way to know whether that would be an acceptable strategy,
 14 and I think a lot of reasons to believe that was not a wise
 15 strategy in light of all the factors I've already described.
 16 Q Now, Professor, I'd like to ask you about another one
 17 of the objector's experts, Professor Coates. And if we could
 18 bring up R824, 824, 25 please.
 19 Now, Professor Coates has expressed a view that
 20 the Trustee didn't engage in sufficient process before entering
 21 into the proposed settlement. I'd like to get your reaction to
 22 that claim we by Professor Coates.
 23 A All right, well, this is -- the summary of
 24 Professor Coates' opinion. Again, I'm not going to read the
 25 whole thing, but the basic gist of it is that the Trustee
 26 did not, as you stated, engage in sufficient steps in

Page 3512

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 sufficient process to adequately evaluate the claim.
 3 And maybe just highlight the middle sentence:
 4 Had the Trustee sought to do more than simply accept BAC's
 5 word on crucial facts and had it not imposed such strong
 6 limits on the efforts of its advisors, the Trustee would
 7 have discovered facts such as those reflected in Exhibit C,
 8 which would tend to show that the successor liability claims
 9 had a materially greater chance of success than the Trustee
 10 appears to have believed.
 11 So, I have a number of reactions to this
 12 paragraph, as well as what's highlighted.
 13 MR. INGBER: Just for the Court's benefit, your
 14 Honor, this is just an excerpt from Professor Coates'
 15 report, which we've put on the screen for the benefit of
 16 the witness and your Honor.
 17 A First of all, this completely ignores what the
 18 Trustee knew about the process by which the Institutional
 19 Investors represented by counsel and Bank of America, all
 20 the negotiating process that led to the proposed settlement.
 21 The Trustee knew all those things as well, as well as
 22 hearing the presentations of the different parties.
 23 So it is certainly inaccurate, misleading, a
 24 distortion to say that what the Trustee did was simply
 25 accept BAC's word on crucial facts as opposed to everything
 26 that the Trustee knew.

Page 3513

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 But I was also very curious by this reference
 3 to Exhibit C, because there's a suggestion here that if only
 4 the Trustee had looked at what was in Exhibit C, the Trustee
 5 would have realized something different from what it already
 6 believed about the reasonableness of the settlement.
 7 So I asked myself, what is Exhibit C? Let's
 8 take a look. Let's find Exhibit C and look at it. So,
 9 that's what I did.
 10 And is it possible to just put the cover page
 11 of what Exhibit C is? That's not Exhibit C.
 12 Exhibit C is Professor Coates' expert report.
 13 Q Well, go on. We'll see if we can bring it up.
 14 Describe what your understanding of what Exhibit C was?
 15 A Exhibit C is Professor Coates' expert report in a
 16 different case. So, if we can just put the original
 17 excerpt, maybe the testimony back up.
 18 That's fine.
 19 So, in other words, there's a suggestion that
 20 the Trustee really missed something, that there was some
 21 obvious source of quote, facts. Some information that the
 22 Trustee just overlooked.
 23 But when you look at what Exhibit C is, it's
 24 as I said, all it is is Professor Coates' expert report in
 25 another case. The MBIA litigation, which he took months or
 26 years to prepare. But, those aren't facts. Those are just

Page 3514

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 his opinions in another case, which as I understand it, it's
 3 not like the judge in the other case, in the MBIA case
 4 became aware of Professor Coates' opinions in his report in
 5 another case and said, Oh, okay, now I know that there's a
 6 solid strong indisputable claim against Bank of America.
 7 As I understand what happened in that case was
 8 the judge, considering all the different claims and
 9 contentions in that case, after many years of litigation,
 10 just decided that there were issues of fact that needed to
 11 be decided and then other judges took a different approach
 12 and dismissed the claims entirely.
 13 So, to suggest that if only the Trustee was
 14 aware of Professor Coates' opinions in a different case,
 15 that would change the calculus of the economics of the
 16 Settlement decision is I think silly because they didn't
 17 even change the calculus of what happened in the MBIA case,
 18 let alone what would have happened in this particular case.
 19 So, in addition to completely ignoring the
 20 role of the Institutional Investors and that whole process,
 21 the Trustee's involvement with the negotiating history, the
 22 really lack of any probative value of Professor Coates'
 23 opinion in a different case, there's one final reaction that
 24 I have which is in some sense the most important is that
 25 this conclusion, as well as all of Professor Coates' report,
 26 really fundamentally really misunderstands the Settlement

Page 3515

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 decision.
 3 Q How so?
 4 A Because all of his analysis is based on the
 5 assumption that if there was more process, there would have
 6 been a better outcome.
 7 If the Trustee had hired more experts. If the
 8 experts had more time. If the Trustee had done more
 9 investigation. If the Trustee has done -- had allowed for
 10 years of discovery. As in the MBIA case that there would be
 11 some guarantee that there would be a better outcome. But as
 12 I just described, the fundamental reality of the economics
 13 of the Settlement decision, it's not like you have a
 14 settlement offer and that's a flaw and you can only go above
 15 that. If you go for a longer period of time, it's quit the
 16 reverse.
 17 If you have an offer and you turn it down,
 18 then you have no idea what's going to happen, and that's the
 19 position that the Trustee was in. To take the \$8.5 billion,
 20 the servicing remedy, the document remedy, or basically roll
 21 the dice and see what might happen including the
 22 possibility, as I've said several times now, that the
 23 certificate holders would get nothing or next to nothing if
 24 Countrywide went bankrupt during the intervening period.
 25 Not to mention the delay that the certificate holders,
 26 including pension funds and other beneficiaries. Best case

Page 3516

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 would have a delay, possibly years delay in getting any
 3 proceeds if there were going to be any proceeds.
 4 Q With that background of the settlement decision,
 5 Professor, I'd like to come back to the second basis for your
 6 opinion that the settlement was reasonable and adequate and I'd
 7 like to get into some of the details.
 8 You say here in your demonstrative that "the
 9 settlement is reasonable and adequate in light of the
 10 uncertainty about the value of the claim and the ability to
 11 recover in litigation."
 12 Let's focus on the ability to recover in
 13 litigation.
 14 Why is that or how is that relevant?
 15 A Again, I discussed this already several times, but
 16 just very briefly.
 17 \$8.5 billion under any calculation was -- is a
 18 far greater amount than what Countrywide had the ability to
 19 pay. And not only that, there were many claims against
 20 Countrywide at the time. The value of Countrywide's assets,
 21 there's a major risk that those assets were going to erode
 22 further.
 23 The Institutional Investors had to hire
 24 bankruptcy counsel during the settlement negotiations to
 25 analyze exactly what could be learned about that particular
 26 risk. And so \$8.5 billion was more than Countrywide could

Page 3517

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 pay for sure.
 3 Whether or not an additional amount beyond
 4 what Countrywide could pay could be obtained against Bank of
 5 America would depend on the success of those claims in
 6 litigation.
 7 As I said, my understanding as, I said in my
 8 reports, as many courts have rejected those claims outright
 9 so there was certainly a big risk about whether or not those
 10 claims could be successfully prosecuted against Bank of
 11 America.
 12 But the long and short of it is there was no
 13 assurance, to put it mildly, to understate that if there was
 14 after litigation, there was any chance of getting anything
 15 close to \$8.5 billion that could be collected, regardless of
 16 how strong the merits of the claims were even though the
 17 claims, themselves, have various uncertainties associated
 18 with them.
 19 Q There's been a suggestion in this case that Bank of
 20 America has at times helped to fund certain Countrywide
 21 settlements.
 22 How, if at all, does that affect your opinion
 23 about the Trustee's ability to recover from Countrywide?
 24 A It doesn't affect it at all, because the fact that
 25 Bank of America is willing to fund certain settlements,
 26 including this one if the Court approves it, does not mean

Page 3518

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 that they're willing to fund any settlement.
 3 So if they're willing to fund this settlement
 4 at the \$8.5 billion level, doesn't mean that they're willing
 5 to fund a settlement at the \$10 million level or the
 6 \$15 million level. This is a discretionary act as any
 7 settlement is, that Bank of America has made. Taking into
 8 account all relevant factors, the risk of litigation, public
 9 relations, their relations with regulators, investors, all
 10 relevant factors that they took into account made the
 11 decision it's in their economic self-interest to settle at
 12 this level, assuming that the Court were to approve. But,
 13 again, that doesn't mean they're willing to settle at any
 14 level.
 15 Q By the way, does the \$8.5 billion settlement, does that
 16 take into account the possibility of reaching Bank of
 17 America's assets?
 18 A Yes, by definition because there's no claim that
 19 anybody has made or in anything that I've seen after
 20 reviewing I don't know how many countless numbers of pages
 21 of background in this case that Countrywide had the ability
 22 to write a check for \$8.5 billion.
 23 And so by definition, one of the factors that
 24 Bank of America may well have taken into account is that
 25 there is some risk that there would be some claim that could
 26 be asserted against it that would justify Bank of America

Page 3519

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 entering into a settlement requiring payment of more funds
 3 than Countrywide had the ability to pay.
 4 Q Professor, I'd like to ask you about another expert
 5 opinion that was submitted by the objectors, and that is
 6 Professor -- I'm sorry -- Dr. Cowan's opinion about loan file
 7 review.
 8 Trustee has been criticized in particular by Dr.
 9 Cowan for not conducting a loan file review.
 10 MR. INGBER: And if we could bring up an excerpt
 11 from Dr. Cowan's report, R750.
 12 Q I'd like -- go ahead. I'd just like to get your
 13 reaction to that.
 14 A I want to focus on this paragraph and the
 15 paragraph, at least the beginning part of the paragraph
 16 beneath it.
 17 This is in the context as the heading states
 18 of a criticism of the report by Mr. Lin. But it's really
 19 more general point about a critique of the proposed
 20 settlement, because the Settlement was entered into or the
 21 proposed settlement was entered into without conducting a
 22 loan file review.
 23 And that is what the paragraph suggests. And
 24 if you just look at it, Dr. Cowan apparently is a very
 25 experienced and credentialed expert, talks about his
 26 experience in identifying breaches of representations and

Page 3520

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 warranties of residential mortgages. And if you can
 3 highlight "in my experience" sentence.
 4 So, stating in his opinion that the most
 5 reliable method for establishing breaches of representations
 6 and warranties in the Covered Trusts is to review the actual
 7 loan files and other loan level information such as
 8 servicing records and data tapes.
 9 Again, I have several reactions to this,
 10 similar to the reactions I've just described about Professor
 11 Coates' report.
 12 First of all, this is really just second
 13 guessing the Institutional Investors who, again, have the
 14 most to gain as well as the most to lose by making a bad
 15 decision about how much information they need in order to
 16 make a reasonable settlement decision.
 17 The Institutional Investors did their own
 18 analysis of their exposure from breaches of representations
 19 and warranties. Bank of America did its own analysis of its
 20 exposure.
 21 Those claims were both presented, argued and
 22 the parties themselves with their own wealth at stake, own
 23 wealth and representations at stake, as well as obligations
 24 to their clients decided that they had enough information to
 25 enter into the settlement, the proposed settlement without a
 26 loan file review. And the Trustee went beyond that and

Page 3521

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 hired an expert to look at the issue, as well.
 3 But, beyond that, there's aspects of this
 4 quote that in my opinion are misleading, because it suggests
 5 that if you take the time and the effort to conduct this,
 6 what he refers to as the most reliable method for
 7 establishing actual breaches of representations and
 8 warranties by reviewing loan files and other loan level
 9 information that you discover the answer. And the reality
 10 is that you can see in case after case after case, that
 11 there is no answer from reviewing loan files.
 12 What you get is different answers based on the
 13 judgment of different experts representing different
 14 parties, frequently radically different conclusions as to
 15 the percentage of loans that have breaches and warr --
 16 breaches of representations and warranties associated with
 17 them.
 18 So there's no sense that there's some magic
 19 answer, some magic bullet that the Trustee could have
 20 discovered by commissioning a loan file.
 21 But apart from that, going back to the issue
 22 that we just talked about, regardless of what you could
 23 conclude from a loan file review; even if it was less
 24 uncertain than it has been proven to be in case after case,
 25 it wouldn't solve the issue.
 26 Let's say the loan file review,

Page 3522

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 hypothetically, demonstrated that there was \$50 billion
 3 worth of exposure. Again, there certainly would be no
 4 consensus on that, but for purpose of discussion let's just
 5 assume it. So what, if nobody can pay it.
 6 So from the Trustee's perspective, worrying
 7 about getting money to the certificate holders as well as
 8 the benefits of the servicing and the document remedy,
 9 doesn't really matter how much hypothetically some claims
 10 could be worth if there's no way to collect. And the
 11 Trustee was certainly well aware of that problem, as well.
 12 Plus, there's all kinds of potential time
 13 delays associated with loan file reviews. Let's say the
 14 Trustee commissioned a loan file review. Would they have to
 15 give Bank of America, for example, a chance to respond with
 16 their own expert? There would be disputes about sampling,
 17 the reasonableness of the sample.
 18 So "its just a potential morass which again is
 19 not to say that loan file reviews aren't worth doing, but
 20 context is important. And in this particular case with a
 21 bird in the hand, the tradeoffs involved in engaging in much
 22 more process, particularly given the uncertainty about the
 23 ability to collect on the claim I think, you know, again,
 24 particularly coupled with the judgment of the very parties
 25 who have the most to gain and the most to lose by making the
 26 decision about whether you need to conduct a loan file

Page 3523

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 review, I think it was reasonable for the Trustee to enter
 3 into the proposed Settlement based on the information that
 4 it had.
 5 Q Okay, so back to 621. We talked about the ability to
 6 collect?
 7 A Actually, can I just say one other thing about
 8 this?
 9 Q Of course.
 10 A Because I just want to look at the next paragraph,
 11 just the first sentence very briefly because this was
 12 another reaction that I had.
 13 Where Dr. Cowan says:
 14 "If a loan file review is impossible, an
 15 alternative methodology is to re-underwrite loans similar
 16 to those in the subject pools, such as the approach used by
 17 the investor group represented by Gibbs & Bruns."
 18 To me, this is a highly significant part of Dr.
 19 Cowan's opinion; because what he is saying is if a loan
 20 file isn't available, what the Trustee should have done was
 21 done something, quote, in his mind, similar to the approach
 22 used by the investor group.
 23 Now, again, I, myself, don't have an opinion on
 24 exactly what the investor group did or didn't do, but it's
 25 a little bit odd to say that the Trustee made a mistake by
 26 not doing what the investor group did when the investor

Page 3524

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 group is the very entity that's pushing in favor of the
 3 Settlement.
 4 So, that's backwards if the Trustee is going to
 5 rely on the position of the investor group and the approach
 6 that the investor group used to justify entering into the
 7 proposed Settlement on behalf of themselves and their
 8 clients, it's a little bit odd for the expert to say what
 9 the Trustee should have done was to do what the
 10 Institutional Investors did, but reach the opposite
 11 conclusion than the Institutional Investors did themselves
 12 in deciding to support the Settlement, proposed Settlement.
 13 Q Now, on 621, again back at the second bullet point we
 14 talked about the ability to recover in litigation, and I think
 15 we've talked briefly about uncertainties about the value of the
 16 claim.
 17 I want to make sure there's nothing else you need
 18 to add on your opinion about the Settlement was reasonable and
 19 adequate in light of the uncertainty about the value of the
 20 claim?
 21 A I think there would be issues about what the --
 22 what constituted a breach, what alleged breaches could be
 23 overcome by compensating factors. What breaches could be
 24 cured, what breaches had a material and adverse effect on
 25 certificate holders. Each of those issues would be hotly
 26 contested, disputed. Presumably, they would be in

Page 3525

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 litigation, experts for both sides reaching very different
 3 conclusions on all of these issues and who knows how it
 4 would turn out, but it's certainly no lay down on any of
 5 these issues that there would be a clear and obvious answer
 6 that the Trustee could have been able to figure out in a
 7 short period of time.
 8 Q Okay, and the final question I have on bullet point two
 9 relates to the third basis for this opinion that the Settlement
 10 was reasonable and adequate.
 11 And that is the delay that would accompany
 12 litigation. You touched on this, but could you briefly describe
 13 how the issue of delay is relevant to your opinion?
 14 A Yes, I mean, again, it's I think fairly obvious,
 15 but the Trustee has the ability to take a bird in the hand.
 16 And the alternative is potentially endless years of
 17 litigation with endless discovery, trials, appeals at least
 18 as a possible alternative outcome and that's a real delay
 19 particularly in terms of getting money to the certificate
 20 holders.
 21 Q Now, the third bullet point, that supports your opinion
 22 that the proposed settlement was reasonable and adequate is that
 23 the allegations is conflicted are fundamentally flawed. How do
 24 you begin your analysis whether the Trustee in this case was
 25 conflicted?
 26 A I looked at all of the different allegations filed

Page 3526

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 by the objectors as well as the objectors' experts
 3 concerning the indemnities, alleged extension of
 4 indemnities, supposed business relationship between the Bank
 5 of New York and Bank of America.
 6 I also looked to see if there was any claim
 7 that Bank of New York as Trustee got any financial benefit
 8 from any of the decisions that it made which, obviously, is
 9 the most typical type of conflict. I didn't see any such
 10 allegation. I'm not aware of any.
 11 So I focused on the other issues that I
 12 mentioned, the indemnities and extension of the alleged
 13 extension of the indemnities as well as the claims about the
 14 business relationship between Bank of New York and Bank of
 15 America.
 16 (Continued on the next page.)
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 Q Okay. Let's start with your analysis of the
3 indemnity.

4 Have you prepared an exhibit reflecting your
5 analysis of the indemnity provisions in the 530 trusts?

6 A I have.

7 MR. INGBER: You want to bring up PTX 624
8 please?

9 (Exhibit displayed.)

10 Q And is this the exhibit that was attached to your
11 original expert report?

12 A Yes, it is.

13 Q Okay. Can you explain for the Court what it is?

14 A Yeah. What we did was we went through all 530
15 trusts and we looked at whether or not -- if you just
16 highlight maybe the headings to -- yeah. We looked at, for
17 each of the 530 trusts, was there an indemnification in the
18 governing agreements, and if so, there was a "yes" and also
19 was there a carve-out for each of willful malfeasance,
20 misconduct, bad faith and negligence, meaning that the
21 indemnity would not cover the trustee if there was a finding
22 of either willful malfeasance, misconduct, bad faith or
23 negligence.

24 And if we can just go to the very end of the
25 exhibit, and there's too many pages to go through, but,
26 basically, there's a "yes" for every one of the 530

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 trusts in both columns, meaning that there was an
3 indemnification provided to the trustee and the governing
4 agreement for all of the 530 trusts. But the
5 indemnification did not cover any finding of willful
6 malfeasance, misconduct, bad faith or negligence.

7 Q And in your opinion, Professor, do these indemnity
8 provisions create a conflict of interest for the trustee?

9 A No. It's well understood that indemnification
10 provisions not only do not create a conflict of interest, but
11 they overcome a conflict of interest, particularly if there
12 are carve-outs for wrongdoing. And the reason for that is
13 trustees typically are compensated very modestly for the
14 services that they provide without the indemnification. In
15 economic terms, trustees might be overly risk averse. In
16 other words, they might be too cautious in making decisions
17 that might be in the best interest of their beneficiaries in
18 this case, the certificate holders. But with the
19 indemnification, it overcomes that cautiousness, which is
20 itself a kind of conflict of interest and gives the trustees
21 the ability to act in the best interest of the beneficiaries,
22 in this case the certificate holders. But at the same time,
23 there is a balance if there is a complete indemnification,
24 then that goes too far in the other direction because then
25 the trustee can do anything and be free from liability. So
26 every one of these 530 trusts have a carve-out, meaning that

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 the trustee can be liable if it's found to have engaged in
3 willful malfeasance, misconduct, bad faith and negligence.

4 And to me that's really significant because I thought to
5 myself is there anything that the trustee can justifiably be
6 criticized for, even negligence that would be protected by
7 the indemnity, and I think the answer is no, because almost
8 any kind of misconduct, bad faith or negligence, if the
9 trustee was found to be liable under any of those standards,

10 the trustee couldn't rely on the indemnity. So the
11 indemnity, in effect, protects the trustee for good faith
12 errors of judgment that do not rise to the level of
13 negligence, ministerial mistakes or just false claims or
14 non-meritorious claims because the indemnity covers expenses
15 for those. So there's a balance in terms of the indemnities
16 in terms of what's covered giving the trustee the freedom and
17 flexibility to act in the best interest of beneficiaries, but
18 any wrongdoing that the trustee engages in is not covered by
19 the indemnity. So if you put those provisions together, as I
20 said, not only does that not demonstrate a conflict of
21 interest, to me it demonstrates the opposite of the conflict
22 of interests. It demonstrates a balance of giving the
23 trustee flexibility to act in the interest of the
24 beneficiaries up to the point where it engages in any
25 wrongdoing, even bad faith or negligence, in which case the
26 indemnity doesn't help the trustee at all.

1 Professor D. Fischel - by Petitioner - Direct/Ingber

2 Q Have you also compared the scope of the indemnity
3 provisions in these 530 trusts, to the scope of indemnity
4 provisions provided to other trustees?

5 A I have and also prepared an exhibit on that.

6 MR. INGBER: Could you bring up PTX 625 for
7 demonstrative purposes please?

8 (Exhibit displayed.)

9 Q Now, Professor, was this another exhibit that was
10 attached to your original report?

11 A Yes.

12 Q And can you explain for Justice Kapnick what this
13 exhibit is and how it's relevant to your opinion?

14 A Yes. Again, just as a benchmark, I wanted to
15 compare the indemnification provisions for the 530 trusts
16 against the indemnification provisions in other
17 mortgage-backed trusts. And so there's a list of -- I think
18 it's 146 other trusts that we found and it has various
19 information about the trust, the type of collateral, the
20 year, the closing date, et cetera. But the last few columns
21 are the most important on the indemnification of the trustee.
22 And the first column is whether indemnification is provided
23 in the governing agreements. Again, if there's a yes, it
24 means that there is; whether the indemnification covers legal
25 proceedings again, a yes if there is; whether there's a
26 carve-out for wrongdoing, again, yes, if there is, and then

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 whether there is a carve-out for each of willful misfeasance,
3 misconduct, bad faith, negligence, which is similar to the
4 carve-out for the trustees for the 530 trusts.

5 So, again, if we go to the end here, I think the
6 end would be helpful rather than going through every
7 page. If we can highlight the very bottom, the number,
8 number of deals with "yes", percentage of -- see that's
9 good enough. But you can see that 100 percent of the
10 deals have indemnification provisions. Okay. Great. 98
11 percent of the deals have indemnification that cover
12 legal proceedings, 100 percent of the deals have
13 carve-outs for wrongdoing. But the last column I think
14 is revealing. These are other carve-out provisions for
15 other trusts, not the 530, but other ones. But what you
16 see is that only 34 percent have carve-out provisions
17 that also allow the trustee to be liable for willful
18 misfeasance, misconduct, bad faith and negligence,
19 meaning that for the other 66 percent, having looked at
20 them in almost every case, possibly every case, the
21 trustees in the other trusts are only liable if they're
22 found to be grossly negligent, not just negligent.

23 So, in other words, the scope of liability for
24 the 530 trusts for the trustee, and the 530 trusts is
25 broader, the trustee can be liable for conduct in the 530
26 trusts that it cannot be liable for in the typical

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 officers and directors to be liable for negligence for
3 example, sometimes gross negligence, sometimes even a higher
4 standard than that.

5 So, again, indemnification provisions are
6 common, they're typical, but the indemnification
7 provisions in this case are particularly narrow in the
8 sense that they protect the trustee less than
9 indemnification provisions in other trusts as well as in
10 corporate -- in the corporate context for officers and
11 directors.

12 Q And is there economic literature on the effect of
13 indemnification provisions either for trustees or corporate
14 officers and directors?

15 A Yes. Particularly in the corporate context, there
16 is economic literature I've cited in my report, and the
17 general finding is that beneficiaries, investors are
18 benefitted by indemnification provisions precisely because
19 they overcome what I refer to as the risk of grossness
20 problem, the overcautiousness problem that prevents
21 fiduciaries or agents from taking actions on behalf of
22 beneficiaries unless they think they have some protection if
23 they do the right thing.

24 Q Now, focusing on the side letter to the settlement
25 agreement, the confirmation of the indemnity; you've read
26 that document?

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 trusts, suggesting that the indemnification provisions,
3 the protections afforded by the indemnification
4 provisions for the trustee in the 530 trusts are narrower
5 than in trusts generally, at least based on this sample.

6 Q Professor, have you also compared the scope of the
7 indemnities in this case to indemnities that are typically
8 provided to corporate officers and directors?

9 A Yeah. Same.

10 Q And why did you do that?

11 A Because, again, the concept of indemnification for
12 fiduciaries doesn't only exist in this context, it's a very
13 common phenomenon, it's a very well understood phenomenon,
14 it's a very well-studied phenomenon, something which I myself
15 teach and have analyzed in my academic work. And because
16 there's a rich body of learning and literature on
17 indemnification provisions for corporate officers and
18 directors, I wanted to compare the indemnification provisions
19 for the trustee in this context for the 530 trusts with this
20 other context of corporate officers and directors.

21 Q And what did you find?

22 A Again, indemnification provisions are universal for
23 corporate officers and directors, but, again, they tend to
24 provide more protection for corporate officers and directors
25 than the indemnifications, in this case, corporate officers
26 and directors. Indemnification provisions rarely allow

1 Professor D. Fischel - by Petitioner - Direct/Ingber

2 A I have. It's attached to the settlement agreement.

3 Q And you understand there is a claim in this case
4 that that confirmation of the indemnity created a conflict of
5 interest for the trustee?

6 A I'm aware of that claim.

7 Q What's your response to that claim?

8 A My response to that claim is whether the side letter
9 is a continuation of the existing indemnification provision
10 or a new indemnification provision, for my purposes it
11 doesn't matter. That that side letter fits the paradigm of
12 overcoming a conflict of interest because it enabled the
13 trustee to enter into the proposed settlement with some
14 protection against being accused of wrongdoing but with the
15 understanding that if wrongdoing were demonstrated, the
16 indemnification would not protect the trustee because of the
17 carve-outs.

18 Q And does this same analysis apply with respect to
19 the indemnity, the confirmation of the indemnity that was
20 entered into in connection with the trustees entering into
21 the forbearance agreement?

22 A Exactly the same analysis. The forbearance
23 agreement was a followup to the letter that the institutional
24 investors represented by counsel sent to Bank of America on
25 October 18th 2010, to the extent that both the institutional
26 investors and Bank of America deemed that was in their best

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 interest to enter into the forbearance agreement, the
3 indemnity provided to the trustee in connection with the
4 forbearance agreement served exactly the same function of
5 enabling the trustee to act on behalf of the beneficiaries,
6 the certificate holders, while at the same time not
7 protecting the trustee if it were found that, for some
8 reason, the trustee was engaged in misconduct, bad faith,
9 negligence.

10 Q Okay. Now, Professor, one of the objectors' expert,
11 Professor Frankel, has criticized your opinion about the
12 absence of a trustee conflict on the ground that, quote, you
13 ignored ample evidence to the contrary closed quote. I'd
14 like to ask you some questions about this supposed evidence
15 to the contrary that's come up with the rebuttal reports or
16 at trial and, specifically, ask whether it affects your
17 opinion, in any way.

18 First, Professor, there's been a claim in this
19 trial that the trustee entered into a forbearance
20 agreement in part to avoid triggering a prudent person
21 standard and that that created a conflict of interest for
22 the trustee; you're aware of that claim?

23 A I'm aware of that claim.

24 Q And what's your response to that?

25 A A couple of responses. First, from my review of the
26 actions taken by the trustee, apart from the legal term

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 A Well, you know, again, in order for there to be a
3 conflict, somebody has to be harmed. There has to be some
4 sense in which the trustee or the fiduciary or the agent is
5 doing something that's inconsistent with the best interest of
6 the beneficiaries, in this case, the certificate holders.

7 But since this was a follow up to a letter that the
8 certificate holders sent and the certificate holders
9 themselves decided, as represented by counsel, that they
10 wanted to enter into the forbearance agreement and did enter
11 into the forbearance agreement, it's hard for me to
12 understand how there could be a claim that an action which
13 facilitated the institutional investors doing what they
14 wanted to do and concluded was in their economic self
15 interest was a conflict. If anything, again, it's the
16 opposite. It overcomes a conflict or overcomes a potential
17 conflict, I should say.

18 Q But focusing again on Professor Frankel's
19 criticisms, there's been a claim in this trial that the
20 trustees request for a broader borrower in a proposed final
21 order and judgment also created a conflict of interest for
22 the trustee; do you have a reaction to that claim?

23 A I do, only in the sense that my understanding is
24 that the request wasn't granted and, therefore, didn't go
25 anywhere, and as a result an action that is rejected and has
26 no consequence doesn't create a conflict, doesn't harm

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 prudent person's standard, I believe the trustee behaved
3 prudently at all times. But apart from that, the forbearance
4 agreement was a followup to the letters, as I just said a
5 minute ago, sent by the institutional investors represented
6 by counsel on October 18. Both the parties, the
7 institutional investors and Bank of America have determined
8 that it was in their economic best interest to postpone, at
9 least temporarily, the issue of whether or not an event of
10 default had occurred and enter into settlement negotiations.
11 There were various associated features of that agreement not
12 just forestalling the issue of whether or not an event of
13 default occurred, but also a tolling of the statute of
14 limitations. And to the extent that the parties
15 themselves -- the parties, as I said several times now,
16 through the economic parties in interest, in terms of who was
17 paying the money and who was receiving the money, to the
18 extent that they determined for themselves that the
19 forbearance agreement was in their economic best interest.
20 An action providing the trustee with an indemnity to
21 facilitate the parties doing what they themselves concluded
22 what they wanted to do, again, can only be described as
23 overcoming a conflict, not creating a conflict.

24 Q And, in your opinion, what's the significance, if
25 any, of specifically the institutional investors entering
26 into the forbearance agreement?

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 anybody.

3 Q Okay. I want to ask you about a few other
4 allegations that have come up in trial, and in particular
5 whether they affect your opinion, in any way, that the
6 objectors' claims of conflict are fundamentally flawed?

7 First, there's been a claim in this trial about
8 a provision in the settlement agreement, the parties in
9 the case have referred to further assurances clause that
10 binds the parties to support the settlement even if they
11 learn of facts inconsistent with those they knew at the
12 time of the proposed settlement. In your opinion, did
13 that provision create a conflict for the trustee? And
14 does it affect your opinion in any way that the trustee
15 was not conflicted?

16 A I don't believe it creates a conflict and it doesn't
17 affect my opinion in any way because it's a reciprocal
18 opinion. And what it means is that if the parties themselves
19 determine that it's in their economic interest to enter into
20 the proposed settlement, then they want that proposed
21 settlement to be durable, they don't want it to be so fragile
22 that any party can back out at any time if they claim that
23 they have new information if they want to second-guess their
24 earlier action.

25 But, again, there is a basic reality test here,
26 which is that that provision doesn't bind everybody else.

Page 3539

1 Professor D. Fischel - by Petitioner - Direct/Ingber
 2 And if there was any sense that with the benefit of
 3 hindsight, with the benefit of information that's come
 4 out, that the settlement is not a good deal for the
 5 certificate holders, that there was something wrong with
 6 the trustee's decision or the settlement process, again,
 7 there would've been an outpouring of objections from all
 8 the different parties that are not bound by that
 9 particular agreement. That hasn't happened. So I would
 10 say the agreement itself is very understandable as
 11 increasing the probability that the proposed settlement
 12 that the parties with a economic stake themselves
 13 determined what was in their best interest would last, be
 14 durable. In the absence of any significant objector
 15 reaction I think makes clear that there's nothing that
 16 has occurred that would cause the bulk of the certificate
 17 holders to second-guess the judgment to enter into the
 18 proposed settlement with or without the assurance clause.
 19 Q On that note, Professor, I think we're going to
 20 break for lunch.
 21 MR. INGBER: And, your Honor, for planning
 22 purposes, I have about I think 30 or 45 minutes remaining
 23 in the examination.
 24 THE COURT: Okay. So it's about one o'clock
 25 now. Why don't you come back at ten after and we'll get
 26 going in the afternoon.

Page 3540

1 Professor D. Fischel - by Petitioner - Direct/Ingber
 2 Have a nice lunch.
 3 (Whereupon the luncheon recess was taken.)
 4 (Continued on next page.)
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26

Page 3541

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 AFTERNOON SESSION
 3 * * * * *
 4 (Whereupon, the witness, Professor Daniel Fischel,
 5 having been previously duly sworn by the Clerk of the
 6 Court, resumed the witness stand and testified as follows:
 7 DIRECT-EXAMINATION
 8 BY MR. INGBER: (Continued)
 9 THE COURT: Okay, Mr. Ingber.
 10 MR. INGBER: Thank you, your Honor.
 11 Q Professor Fischel, before the break we were going
 12 through a number of allegations of conflict that have come up
 13 either in the objectors' expert reports or during this trial,
 14 and I asked you questions about whether those allegations of
 15 conflict impact your opinion in any way that the allegations of
 16 conflict generally are fundamentally flawed.
 17 Two more I want to ask you about before we go on
 18 to the fourth basis for your opinion on whether the Settlement
 19 was most reasonable and adequate.
 20 Professor, there's been a claim in this trial that
 21 the Trustee was conflicted because its counsel in the
 22 negotiations hadn't received a waiver allowing it to represent
 23 the Trustee in actual litigation against Bank of America.
 24 You're aware of that allegation or claim that's
 25 been made?
 26 A I am.

Page 3542

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 Q And what's your reaction to that?
 3 A Again, I don't think that creates a conflict or
 4 changes my opinion if the Trustee chooses to have one
 5 counsel for settlement negotiations and different counsel if
 6 litigation is necessary.
 7 And, again, I just cannot emphasize enough
 8 that the economics of the Settlement were negotiated between
 9 the parties in interest of the party paying the money and
 10 the party receiving the money.
 11 And to the extent that the Trustee and the
 12 Trustee's counsel participated in that process and decided
 13 to go forward and accept the proposed settlement seems to me
 14 to be completely above board, in the best interest of the
 15 certificate holders. I don't see any conflict whatsoever.
 16 Q Now, Professor, are you aware that one of the
 17 objectors' experts, Professor Levitin has referred to the
 18 Trustee in this case as a quote, pocket Trustee, close quote.
 19 Because according to Professor Levitin the Trustee gets
 20 two-thirds of its private-label residential mortgage
 21 securitization business from Bank of America. You're aware of
 22 that argument by Professor Levitin, are you not?
 23 A I am.
 24 Q And what's your reaction to that?
 25 A My first reaction I was a little taken a back
 26 because that's a very serious allegation, very serious

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 charge to accuse a reputable financial institution of being
 3 a quote, pocket Trustee in somebody's pocket.
 4 So I wanted to see what the basis was that
 5 Professor Levitin offered in support of such a serious
 6 allegation. And what he stated as you summarized in your
 7 question was that Bank of New York was a pocket Trustee
 8 because it gets two-thirds of its securitization business
 9 from Bank of America.
 10 So my first reaction was even if that were
 11 true, it would not support the allegation; but as I
 12 discussed with some of Professor Levitin's other
 13 allegations, it turns out to be factually incorrect.
 14 In particular, for the two years before the
 15 Settlement, proposed Settlement in this case, in 2009 and
 16 2010 Bank of New York got virtually no securitization
 17 business from Bank of America. The data that Professor
 18 Levitin is relying on is historic data if it's accurate at
 19 all, but it's certainly not accurate in the contents of the
 20 period several years prior to the proposed Settlement.
 21 But I also looked at the relationship between
 22 Bank of America and Bank of New York in terms of
 23 securitizations after the Settlement; because if Professor
 24 Levitin were correct and more generally if the claim of the
 25 objectors were correct, that basically Bank of New York
 26 somehow took a dive to benefit Bank of America, you'd expect

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 because there's certain proficiencies associated with that
 3 relationship. Trustee becomes familiar with the nature of a
 4 particular sponsor securitizations, gets familiar with
 5 particular clients who want to invest, become certificate
 6 holders in particular securitizations.
 7 So, a long-term course of dealing by itself,
 8 again, wouldn't demonstrate the existence of a conflict even
 9 if it occurred; but in this particular case, in the years
 10 prior to the settlement, in the years subsequent to the
 11 settlement, at least in terms of securitization business for
 12 mortgage-backed securitizations, there is no such
 13 relationship. So making, again, the scurrilous allegation,
 14 referring to Bank of New York as a pocket Trustee I think is
 15 particularly unjustified and uncalled for.
 16 Q Professor, have you considered the consequences of
 17 finding a conflict based on the relationship between
 18 securitization Trustee on the one hand and on the other hand the
 19 loan seller or sponsor?
 20 A I think it would have adverse ripple effects
 21 through the entire securitization industry, because it would
 22 disrupt many longstanding relationships. But it would also
 23 make settlements like the Settlement in this case impossible
 24 if every time a Trustee involved in such a relationship with
 25 a sponsor wanted to enter into a proposed settlement based
 26 on the joint mutual self-interest of the parties if they

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 some kind of quid pro quo, some kind of reward in some sense
 3 for not arguing as aggressively as possible on behalf of the
 4 certificate holders.
 5 And what I found in the years since 2011, that
 6 there had been a series of residential mortgage-backed
 7 securitizations, most of them re-securitizations but at
 8 least I think one new one, and those securitizations have
 9 gone from Bank of America to a completely different bank, US
 10 Bank. And I don't believe Bank of New York has gotten any
 11 of the RMBS securitizations.
 12 So again, if anything, the evidence that I've
 13 been able to analyze is not only not supportive of Professor
 14 Levitin's, you know, I would say scurrilous allegation, but
 15 completely inconsistent with it.
 16 Q And, more generally, do you believe that having the
 17 existence of a business relationship between Bank of New York
 18 Mellon and Bank of America creates a conflict of interest for
 19 the Trustee?
 20 A No, it may very well be in the best interest of all
 21 the parties, not just Bank of America, Bank of New York, but
 22 also the certificate holders to the extent that such a
 23 business relationship existed, perhaps in different years.
 24 Because it's in fact very common for there to
 25 be relationships between particular sponsors and particular
 26 Trustees, something I analyzed and discussed in my reports

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 could be accused of a conflict of interest and it would
 3 taint their decision-making process in entering into the
 4 proposed settlement, wouldn't be any settlements.
 5 Q Could you bring up PTX 621, please.
 6 Professor Fischel, let's move on to the fourth
 7 bullet on your demonstrative.
 8 You say here the market reaction to the
 9 announcement of the proposed Settlement is inconsistent with the
 10 objectors' claim that Bank of America received a windfall in the
 11 proposed Settlement.
 12 Why did you consider the market's reaction to the
 13 proposed Settlement?
 14 A Because in my opinion it's another type of reality
 15 check. There are claims in this case that the Settlement
 16 amount was too low. That there are all these conflicts,
 17 among between the Institutional Investors and the
 18 certificate holders, conflicts of the Trustee, all these
 19 things the Trustee should have done and claims that the
 20 settlement's inadequate, too low.
 21 So one reality check that could be performed
 22 that I did perform was to analyze the market's reaction to
 23 the Settlement, the consensus judgment of market
 24 participants because when the Settlement was announced after
 25 the close of trading on June 28th, 2011, a lot of
 26 information was known.

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 There was a press release by Bank of America.
 3 There was a securities filing with the Settlement attached.
 4 There was a conference call that Bank of America's
 5 executives had with analysts. So all the terms of the
 6 Settlement were known, a lot of questions were answered
 7 about the types of loans that were involved in the
 8 Settlement. Prior to the Settlement there was extensive
 9 public awareness of the existence of the claim of
 10 non-performance. Many news stories about the existence of
 11 Settlement negotiations.

12 Just as an aside of having been in court this
 13 morning, about here all the question about notice, obviously
 14 I have no opinion about notice; but in terms of publicity,
 15 there was extensive publicity throughout the Settlement
 16 negotiation process, about the possible claims being
 17 asserted, the possible liability of Bank of America as a
 18 result of those claims, the existence of settlement
 19 negotiations, the Forbearance Agreements. All of those
 20 things were extensively publicly discussed in the popular
 21 financial press.

22 And in light of all of that information,
 23 including the information about the Settlement itself and
 24 the terms of the Settlement, that was obviously a big deal
 25 in the financial world. And it generated many, many analyst
 26 reports on July -- I'm sorry on June 29th and June 30th as

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 event on prices.

3 In this particular case, that was I thought
 4 especially appropriate because there was a cascade of
 5 analyst reports that first came out on June 29th. Then came
 6 out on June 30th analyzing the terms of the Settlement.

7 Q Professor, did you prepare an exhibit that summarizes
 8 the findings of your investigation?

9 A I did.

10 MR. INGBER: Can we bring up PTX 626.

11 Q Professor Fischel, this was an exhibit that was
 12 attached to your report; correct?

13 Can you describe what this exhibit is and its
 14 significance to your opinion?

15 A Yeah, maybe we can enlarge the panel. That would
 16 be great. This is a little bit technical, but I'll explain
 17 it as simply and as quickly as I can.

18 So, on June 29th, which is the first day that
 19 I analyzed, the closing price of Bank of America was \$11.14.
 20 There is the volume number, and that represented a
 21 2.96 percent increase over the closing price the day before,
 22 which if I remember correctly was 10.82 I believe it was.

23 But you can't -- the whole purpose of a
 24 statistical analysis of stock prices is that you can't just
 25 look at whether a stock price goes up or down; because, for
 26 example, if a stock goes up by one percent, but the whole

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 well as subsequently extensive press coverage of the
 3 Settlement. And so I wanted to consider whether or not the
 4 market -- meaning the consensus judgment of market
 5 participants making decisions about Bank of America stock
 6 price, whether the Settlement was good or bad news for the
 7 investors of Bank of America, considered that Bank of
 8 America basically got a windfall. That the settlement was
 9 so low, that Bank of America was in effect a huge
 10 beneficiary of the settlement.

11 So, there's a well-known technique in
 12 financial economics for analyzing the relationship between
 13 stock prices and particular events called an event study,
 14 which is a kind of a regress analysis. Something that's
 15 been used in thousands of economic studies and now routinely
 16 used in litigation. Something I've testified about many,
 17 many times and that's what I did. Analyze the stock
 18 market's reaction, Bank of America investors to the
 19 announcement of the Settlement as a reality check of
 20 everything I described so far.

21 Q What dates did you pick for your event study?

22 A I picked June 29th and June 30th, particularly
 23 because June 29th was the first trading day after the
 24 disclosure of the Settlement. And June -- I also picked
 25 June 30th, first because it's very common in event studies
 26 to use a two-day window to look at the effect of particular

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 market or its industry peer group goes up by three percent,
 3 the one percent which looks by itself to be a good result
 4 turns out to be a bad result relative to what you'd expect.

5 So the whole purpose of a regression analysis,
 6 an event study is to control for in this particular case
 7 what happened in the overall market and what happened to
 8 bank stocks, particularly the bank stocks in the KBF index
 9 which is the index that Bank of America compared itself to.

10 So, if you look at the next column, the
 11 predicted return, based on my statistical analysis, Bank of
 12 America was even though it went up by 2.96 percent on the
 13 29th, it was expected to go up by 2.65 percent and let me
 14 explain why that is.

15 Because if you look at the bank index that
 16 Bank of America compared itself to, there are 23 firms in
 17 that index; and if you exclude Bank of America, there's 22
 18 firms in that index. 21 of the 22 firms also went up on
 19 June 29th, and the other one stayed flat. A number of the
 20 firms in the index went up more than Bank of America.

21 Now, as I stated in my report, a couple of
 22 those bank stocks you have to interpret with some caution
 23 because they were also -- the ones that had breach of
 24 warranty exposure, representations and warranty exposure
 25 that there's some overlap between what happened with the
 26 Settlement and how the market reacted to those stocks.

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 But for most of the firms in the index, they
 3 didn't have breach of rep and warranty exposure, and they
 4 also went up because there are other events that affected
 5 bank stocks on that day.
 6 There was good news about the possible Greece
 7 bailout. There was good news about the transaction fees
 8 that banks would be able to charge on credit card
 9 transactions.
 10 So overall there was a big increase in the
 11 value of bank stocks. So if you compare what happened with
 12 Bank of America going up 2.96 percent as compared with what
 13 you'd predict, given Bank of America's historic relationship
 14 to the bank index and the overall market, it went up
 15 suggesting that it was a good day for Bank of America, but
 16 it was a good day for bank stocks as a whole.
 17 So if you ask the question was the Settlement
 18 by itself something that demonstrated that investors thought
 19 Bank of America was getting a windfall, the answer is no
 20 because the performance of Bank of America is not that
 21 different from what you'd expect from the performance of all
 22 the other bank stocks, and you can see that in the next two
 23 columns, the residual return, just the difference between
 24 the actual return and the predicted return.
 25 In the last column, is a t-statistic which is
 26 a measure of statistical significance. I'm not going to get

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 slight positive.
 3 So the residual return, the difference between
 4 the actual return and the predicted return was a negative
 5 two percent, 2.01 percent which measures statistical, that's
 6 slightly statistically significant.
 7 Then if you just combine the two days which is
 8 at the very bottom, you get Bank of America stock went up by
 9 a little over one percent, but the predicted return was a
 10 lot more than one percent. And so, therefore, the two-day
 11 residual return is negative and, therefore, if you ask the
 12 question did the consensus judgment of market participants
 13 demonstrate as the objectors and their experts claim that
 14 Bank of America received a windfall in this Settlement, the
 15 -- I think the best interpretation is that the market
 16 reaction to the announcement of the Settlement provides no
 17 support for the claim that Bank of America received a
 18 windfall. And, if anything, provides some contrary support,
 19 that the settlement was fair and reasonable.
 20 Now, the analysis is a little more complicated
 21 than I just described, because there's other information
 22 that's being announced on both days, on June 29th and 30th.
 23 Again, I could go through all the other information. I've
 24 investigated it, but my conclusion is basically the same
 25 after doing all that investigation that as a reality check,
 26 the results of the market's reaction to the announcement of

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 into a long explanation of what that means, but in bottom
 3 line shorthand, what that means is that Bank of America's
 4 return is so close to the predicted return that you can say
 5 that it was a good day for Bank of America, but not an
 6 especially good day relative to other bank stocks in the
 7 overall market.
 8 So there's no support for the claim, if you
 9 just look at June 29th, that investors thought that the
 10 reaction to the Settlement was big windfall for Bank of
 11 America. But then particularly if you look at June 30th,
 12 the other day when there's further analysis of the
 13 Settlement, more analyst reports and stories coming out, you
 14 see that Bank of America falls on that day, just looking at
 15 the price -- forget any statistical analysis -- from \$11.14
 16 to \$10.96.
 17 So, basically, over the two-day period for
 18 getting any statistics, Bank of America started at \$10.82.
 19 Ended up \$10.96. Went up one day, went down the next day.
 20 Then if you perform, go through the same
 21 statistical analysis that I have just described, the actual
 22 return meaning the change in price from the 29th to the 30th
 23 was Bank of America declined by 1.62 percent. That's why
 24 there's a negative sign there. But the predicted return,
 25 how you'd expect Bank of America to perform given
 26 performance of all the other bank stocks in the market was a

1 Fischel-Petitioners-Direct/Mr. Ingber
 2 the Settlement is fully consistent with my basic opinion
 3 that the Settlement was fair, reasonable and adequate; and
 4 the Trustee's decision to enter into the Settlement was also
 5 fair, reasonable and adequate.
 6 Q Now, following up on a point you just made about other
 7 information that might affect the stock price. In fact,
 8 Professor Levitin, the objectors' expert has criticized your
 9 event study in this case?
 10 A He has.
 11 MR. INGBER: Let's bring up R929, please.
 12 Q Professor Levitin offers other possibilities for why
 13 Bank of America's stock price might not have rallied following
 14 the announcement of the --
 15 THE COURT: Wait, wait, let him finish his
 16 question.
 17 THE WITNESS: I apologize.
 18 Q We'll take care of the quote in a second. But
 19 Professor Levitin offers other possibilities to why given a
 20 stock price might have rallied after the announcement of the
 21 proposed Settlement. And let's turn if we can to Paragraph 275
 22 of Professor Levitin's report.
 23 (Continued on next page.)
 24
 25
 26

Page 3555

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 Q Professor Fischel, I assume you have a reaction to
3 Professor Levitin's criticism of the event study?
4 A I do.
5 Q Okay. Could you take the Court through what you
6 understand the criticism to be and your response to it?
7 A Okay. Well, again, my basic point is that as a
8 reality check, there's no evidence to suggest that market
9 participants thought the settlement was a windfall, and we
10 know that because the stock price didn't rise, Bank of
11 America's stock price didn't rise dramatically in response to
12 the announcement. Again, it doesn't prove anything about the
13 reasonableness and adequacy of the settlement, but it's
14 certainly inconsistent with the objectors' claim and somewhat
15 supportive of the opposite claim. So there was reasonable
16 and adequate -- and Professor Levitin takes issue with my
17 conclusion and suggests that there were -- again, if you look
18 at the introduction to the bullet points, there are numerous
19 reasons why Bank of America's stock price would not have
20 rallied following the announcement of the proposed
21 settlement, two illustrative examples. So trying to suggest
22 that there's alternative explanations for why Bank of
23 America's stock price didn't rise.
24 And so, first, he claims that I don't
25 consider -- "my event study doesn't consider the
26 possibility that the market interpreted the proposed

Page 3556

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 settlement as an admission by Bank of America that it
3 would accept its legacy Countrywide mortgaged-backed
4 security liability." Again, this is just, again, more
5 speculation talking about possibilities as opposed to
6 what actually happened. I also don't quite know what it
7 means because Bank of America had settled a series of
8 cases prior to this one which involved allegations of
9 liability against Countrywide. Certainly, the
10 settlements were not an admission as he claims that they
11 are what they are and the market reacted appropriately.
12 But even more significantly, it looks like it's
13 second. And I just want to highlight the first two
14 sentences and I'll talk about the rest. Then he says,
15 "second, the participation of the inside investors in the
16 settlement could well have shaped market reactions. The
17 presence of the inside investors in the proposed
18 settlement could well be taken by uninformed analysts as
19 signaling that the proposed settlement is reasonable."
20 Now, again, this is just completely, in my opinion,
21 garbled economic thinking. Of course market participants
22 would take the presence with the parties with the biggest
23 economic stake in favor of the settlement as information
24 that, as he says, signaling that the proposed settlement
25 is reasonable. Why else would they agree to it if they
26 didn't think that the proposed settlement was reasonable?

Page 3557

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 And I really disagree with the claim that only uninformed
3 analysts would have that view. I think the most
4 sophisticated market participants in the world would
5 consider the fact that 22 institutional investors, as
6 sophisticated as they are, with economic stake that they
7 had were in support of the settlement. It would be
8 economically irrational not to consider their support of
9 the settlement. And, of course, it's shaped market
10 reactions. You couldn't imagine a scenario where that
11 would not be the case.
12 And then just continuing with his second,
13 "moreover, analysts interpretation of the proposed
14 settlement might well be colored by conversations with
15 employees of the inside investors." You know, again,
16 this is just the rankest form of speculation. But let's
17 assume it were true, let's assume they did talk to
18 employees of the institutional investors and the
19 institutional investors said, Yes, we evaluated these
20 claims in light of all the relevant considerations and we
21 thought it was a good deal given our trillions of dollars
22 of assets under our control, what would be wrong with
23 that? That, again, would be valuable economic
24 information.
25 And the last sentence about "the failure to
26 understand the dynamics surrounding the role of the

Page 3558

1 Professor D. Fischel - by Petitioner - Direct/Ingber
2 institutional investors in the settlement would mean that
3 Bank of America's share price might not properly reflect
4 a true valuation of the proposed settlement." Well,
5 Professor Levitin hasn't identified anything that the
6 market didn't understand about the institutional
7 investors. Market participants were, as I said,
8 perfectly justified to take that into account, and as I
9 said it would be economically irrational not to. So I
10 think this really is, as I said, fundamentally economic
11 error really garbled economic thinking.
12 Q The last question. Does this testimony that you
13 just gave about the second bullet point here bring us back to
14 the first basis for your opinion that the settlement is
15 reasonable and adequate, and that is the behavior of the
16 institutional investors?
17 A Yes. As I said at the outset, I believe that
18 without more would be sufficient to justify the
19 reasonableness and adequacy of the settlement and the fact
20 that market participants took that very same thing into
21 account in evaluating Bank of America after the announcement
22 of the settlement as perfectly consistent and supportive of
23 my opinions in this case.
24 MR. INGBER: Okay. Thank you Professor
25 Fischel.
26 At this time, I have no further questions.

Page 3559

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 THE COURT: Okay. Who is going to start cross
 3 examination?
 4 MR. LOESER: I am, your Honor.
 5 THE COURT: Mr. Loeser.
 6 MR. LOESER: Summer's over and here we are
 7 again, your Honor.
 8 THE COURT: So I see.
 9 CROSS EXAMINATION
 10 BY MR. LOESER:
 11 Q Mr. Fischel, I'm going to ask you a series of
 12 questions. I'm going to ask for yes or no answers, if
 13 possible, then I appreciate it if you can provide yes or no
 14 answers, if you can do so.
 15 A I'll do my best and if I feel I need to go further
 16 to put the answer in context, I'll do that as well.
 17 Q I appreciate that. Thank you.
 18 From your CV, it appears that between 2000 and
 19 2013, you authored four articles; does that sound
 20 correct?
 21 A Again, I haven't counted, but that's probably
 22 correct.
 23 Q And the last article that you wrote -- and by
 24 "article" I mean scholarship, was in 2006; is that correct?
 25 A I believe that's correct.
 26 Q And if my count is right, during the same time

Page 3560

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 period, you testified or provided reports about 120 times;
 3 does that sound about right to you?
 4 A Yes. Although you have to include all forms of
 5 testimony, depositions, affidavits, and trials. But seven
 6 years, yeah, may be a little on the high side if you ask me
 7 for a guess. But if you've counted, I'm happy to accept your
 8 representation.
 9 Q Now, you conclude, based on your review, that the
 10 settlement was reasonable and adequate; did I hear that
 11 right?
 12 A Yes, sir.
 13 Q And in direct, you said that was as of the petition
 14 date and that's also as of today; is that your testimony?
 15 A That's correct.
 16 Q You did not calculate the amount of losses incurred
 17 by the covered trusts as a result of breaches of
 18 representation and warranties in the covered trust; is that
 19 correct?
 20 A No, sir. I did not.
 21 Q And you did not calculate the amount of losses
 22 incurred by the covered trusts as a result of servicing
 23 failures and abuses by Countrywide and Bank of America in the
 24 years leading up to the date of the settlement; is that
 25 correct?
 26 A That's correct. I did not.

Page 3561

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 Q And you did not calculate the amount of losses
 3 incurred by the covered trusts as a result of the failure to
 4 repurchase modified loans in the covered trust by Countrywide
 5 or the master servicer; is that correct?
 6 A It's correct, but I don't want to accept the premise
 7 of the question that it's clear that there was such a
 8 failure. But whatever the obligation was, I didn't calculate
 9 it.
 10 Q And you didn't examine whether there was a
 11 requirement to repurchase modified loans; is that correct?
 12 A Well, I want to be a little bit careful. Certainly,
 13 it's ultimate a legal question for the Court and I don't want
 14 to offer any legal opinions, but I'm certainly aware of the
 15 competing contentions about whether or not such an obligation
 16 existed, and if it existed, who was it on behalf of.
 17 Q And to be clear, you didn't attempt to value
 18 economically what would be recovered if modified loans were
 19 repurchased; is that correct?
 20 A I did not. But, again, the question overlooks the
 21 contentions and the uncertainty about what the obligation is
 22 and who owes it, and you can't really calculate anything
 23 until those questions are answered and they're hotly
 24 disputed.
 25 Q You understand that the loans backing the covered
 26 trusts are Countrywide loans; is that correct?

Page 3562

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 A I do understand that.
 3 Q And before concluding that the settlement amount was
 4 adequate in this case, did you review court decisions that
 5 addressed the extent to which Countrywide abandoned its
 6 underwriting guidelines for loans in the covered trusts?
 7 A Not in any systematic way. I've been involved in
 8 other litigation involving Countrywide so I have a good deal
 9 of familiarity with the background of Countrywide. But as I
 10 said, I'm not here to offer any legal opinions and I did not
 11 conduct any specific legal research on the subject.
 12 Q And did you review the dockets in other cases
 13 against Countrywide so you could develop an understanding of
 14 the strength of underwriting claims against Countrywide?
 15 A I didn't do that, but I don't believe if you review
 16 dockets you would be able to form an opinion on the strength
 17 of the claims against Countrywide.
 18 Q Did you review the evidence discussed in the
 19 pleadings in other cases against Countrywide to see in
 20 particular what it showed about the extent to which
 21 Countrywide abandoned its underwriting guidelines?
 22 A Excuse me. Not in any systematic way. I'm not a
 23 fact finder either. But as I said, I have a lot of
 24 familiarity with Countrywide, the background of allegations
 25 against Countrywide, the relationship between the housing
 26 crisis and claims against Countrywide. But I did not form

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 any ultimate opinions on Countrywide's liability or the
3 magnitude of its liability because that's really for a jury
4 or a Court to determine.

5 Q All right. Well, did you look for statements by
6 Countrywide executives that would be binding admission with
7 regard to whether Countrywide abandoned its underwriting
8 guidelines?

9 A Again, the term "binding admission" is, you know, is
10 a legal term. I've seen some discussion of claims about
11 statements by Countrywide officials. As I said I myself am
12 really experienced in litigation regarding Countrywide, so
13 I'm not sure what you're referring to. But, in any event,
14 the existence or lack of existence of legally-binding claims
15 was not something that I would form an opinion on one way or
16 the other.

17 Q So the answer is you did not look at the testimony
18 of Countrywide executives in other cases; is that correct?

19 A It depends which cases. Again, I didn't
20 systematically look at all the testimony from Countrywide
21 executives in other cases, but I myself am personally
22 familiar with a good deal of litigation involving Countrywide
23 and the factual evidence in those cases.

24 Q Well, what cases did you look at to inform yourself?

25 A Well, our firm was involved, this is all public, as
26 experts in the Mazzillo litigation, in securities fraud

1 Professor D. Fischel - by Petitioner - Cross/Loeser

2 Q So you were paid by Countrywide?

3 A Our firm -- I'm not sure who paid us, but there was
4 an insurance company, or one of the entities. But as I said,
5 we were retained in other Countrywide litigation by counsel
6 for defendants.

7 Q Did you have access to loan file reviews in those
8 other cases?

9 A Did we personally? No, we did not analyze loan file
10 reviews in those.

11 Q Did you have access to loan file reviews?

12 A I don't know, because to the best of my knowledge we
13 never asked to see loan files.

14 Q Are you aware that the loan file reviews occurred in
15 those other cases?

16 A It wouldn't surprise me, but I don't have any
17 present recollection one way or the other.

18 Q Well, when you were working up your report on the
19 adequacy of this settlement, did you make any effort to
20 access the results of loan file reviews that had previously
21 been done of Countrywide loans?

22 A No, for the reasons that I stated in my direct
23 testimony.

24 Q So when you say this settlement is adequate, you are
25 not basing that opinion on any investigation that you did
26 into the extent to which Countrywide loans violated

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 litigation against Bank of America, Countrywide and Mazzillo,
3 those are the cases that come to mind. And we've done a lot
4 of work in those cases. Again, I didn't use any of my
5 background in those cases to form my opinions in this case,
6 but I'm very familiar with litigation involving Countrywide.

7 Q And that's work you did for the defense?

8 A In those cases, that was work we did -- correct, for
9 the defendants in litigation.

10 Q So you've been an expert for Countrywide and for --

11 A Actually, I've never testified as an expert for
12 Countrywide, but our firm was retained by Countrywide and
13 Bank of America in a variety of Countrywide-related
14 litigations.

15 Q And in that capacity, your job was to try and
16 minimize the extent to which Countrywide abandoned
17 underwriting guidelines; isn't that correct?

18 A I wouldn't characterize it that way, no.

19 Q Your job is to build a case against Countrywide; is
20 that correct?

21 A We are not advocates on either side. Our job was
22 to analyze the economic evidence and provide best judgment
23 about that economic evidence that we could to the parties
24 that were retaining us and to the extent that our analysis
25 became public to other participants in the litigation and
26 respective courts.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 underwriting guidelines; correct?

3 A Correct, apart from what the parties themselves
4 concluded about that issue, being the presentations that they
5 made during the settlement negotiations.

6 Q Your report discusses the economics of a settlement
7 decision?

8 A That's right.

9 Q And have you written any articles on the economics
10 of settlement decisions?

11 A I've written articles on what the duty to be
12 informed means, which is a more general analysis of the same
13 question but not in the context of the settlement decision.

14 Q So if I were trying to find Dan Fischel on
15 settlement economics, I couldn't find some article or some
16 treatise that you've written; is that correct?

17 A Correct. But you could find work that I've written
18 on what it is to be informed in the tradeoffs between making
19 a judgment, when you're adequately informed enough to make a
20 judgment, as to when you're able to make a decision and not
21 seek further information because of the potential delay cost
22 and possible adverse outcome from seeking further decisions.
23 I've written about that, I've taught that. And what I've
24 said about the economics of the settlement decision is just
25 an illustration of that same principle in the context and
26 facts and circumstances of this.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 Q So being informed is very, very important, wouldn't
 3 you say, in the context of settling a claim?
 4 A Yes. But the whole point is you can't be perfectly
 5 informed --
 6 Q Well --
 7 A -- but you have to be informed enough in order to
 8 make a reasonable decision as applied to the facts and
 9 circumstances of the case. But the whole point of my
 10 testimony as well as my academic writing is that becoming
 11 more informed frequently is not costless because you can have
 12 worse outcomes even if you have more information.
 13 Q Well, ignorance can be bliss?
 14 A I didn't say ignorance. I just said sometimes the
 15 best decision is a decision made based on imperfect
 16 information as opposed to perfect information, particularly
 17 since in this case as a perfect example, perfect information
 18 is impossible to get.
 19 Q And we'll get to this in more detail, but there's
 20 something different between no information and perfect
 21 information; right?
 22 A Yes, I would agree with that.
 23 Q And if I understand your report, what you're saying
 24 is that the decision to litigate instead of to settle may not
 25 increase the recovery; is that correct?
 26 A Correct.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 Q The case could go well or the case could go bad?
 3 A Correct.
 4 Q You could do better than an early settlement offer
 5 or you could do worse?
 6 A Correct.
 7 Q The evidence you gathered could be helpful or it
 8 could hurt?
 9 A Among other things. Correct.
 10 Q And it could cost you money to litigate that you
 11 might not get back if litigation doesn't go well?
 12 A Correct.
 13 Q And those platitudes are pretty much true for all
 14 litigations, wouldn't you say?
 15 A I don't know if they're true for all litigation, but
 16 I think it's -- the statements that you just asked me about,
 17 I think, are fairly general.
 18 Q And even though you might do better and you might do
 19 worse, legal disputes, nonetheless, often become lawsuits?
 20 A Correct.
 21 Q And you no doubt understand that if a lawsuit is
 22 filed, the plaintiff could get discovery?
 23 A I'm aware of that.
 24 Q And in discovery, the discovery process enables a
 25 plaintiff to force a defendant to produce relevant
 26 information?

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 A Subject to rulings by the Court, correct.
 3 Q Rulings on relevance, discoverability?
 4 A All those things.
 5 Q And that information that a plaintiff can get in
 6 discovery is often information the plaintiff does not have
 7 access to without discovery?
 8 A As a general statement, that's clearly true.
 9 Q And that information can be used by a plaintiff to
 10 build a case?
 11 A Potentially.
 12 Q In fact, that's the purpose of discovery, isn't it?
 13 For the parties to build a case?
 14 A One of the purposes.
 15 Q And if the information is favorable, the plaintiff
 16 can use that information to win the case?
 17 A Potentially.
 18 Q And the decision to litigate does not mean the
 19 parties can never negotiate again; does it?
 20 A It doesn't necessarily mean that, no.
 21 Q So the parties can go back to negotiating when they
 22 choose in advance of what you refer to as a final
 23 disposition; is that right?
 24 A I think you have to add a caveat to your statement.
 25 When they choose, if they choose.
 26 Q Okay. If the parties choose to go back to

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 negotiating, they can do so before the Court renders a final
 3 decision?
 4 A Correct. Or not.
 5 Q And, for example, a plaintiff can go back in
 6 negotiating if the plaintiff is successful on a motion to
 7 dismiss?
 8 A If -- yes, obviously, hypothetically, either party
 9 can attempt to negotiate at any point.
 10 Q And you're familiar, in all the abundant expert
 11 testimony you've provided, of the settlement and dynamics
 12 changing when a plaintiff receives favorable decisions on
 13 motions that have been filed?
 14 A Yes. Or the reverse.
 15 Q Or the reverse. So if a motion to dismiss is
 16 denied, that could be good for the plaintiff; right?
 17 A Generally speaking, yes.
 18 Q And that decision can provide leverage for the
 19 plaintiff?
 20 A Potentially, yes.
 21 Q And the same is true with any number of milestones
 22 that occur in litigation; right?
 23 A Yes. But the reverse is also true for every
 24 milestone of litigation.
 25 Q Right. And the point is that in this process of
 26 litigating, a plaintiff can obtain information that it can

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 use as leverage in negotiations?
 3 A Potentially. But, again, the existence of
 4 litigation can have exactly the opposite effect of killing
 5 leverage that the plaintiff had before.
 6 Q Right. To a prudent plaintiff when deciding whether
 7 to press forward, or give up or accept an early settlement,
 8 is to accept the probability of success on any number of
 9 different milestones of litigation; is that correct?
 10 A I think any settlement decision involves analyzing
 11 all the relevant considerations at that particular time,
 12 including the probability of success, the cost issues, delay
 13 issues, recoverability issues, defenses, legal rulings, the
 14 forum, the attractiveness or lack of attractiveness of the
 15 claim to a jury, if it's a jury trial, the credibility of
 16 witnesses, the existence of documents. At the level of
 17 generalities that you're asking me, there's really no limit
 18 to what possibly might be relevant in going into the
 19 decision-making process.
 20 Q Well, here today you've told this Court that your
 21 opinion is the settlement is adequate; right?
 22 A I did.
 23 Q But you have not undertaken any effort to determine
 24 the probability of success on any particular milestone that
 25 the trustee would face if it pressed forward with litigation?
 26 A That is correct, in terms of an independent opinion,

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 what the magnitude of the claims would be, how uncertain the
 3 resolution of the claims will be, as well as the major
 4 uncertainty about the collectability of any recovery based on
 5 those claims, including the very real prospect that recovery
 6 would be zero or close to zero because of Countrywide going
 7 bankrupt as a result of some potential extended legal
 8 proceeding if the settlement were not -- if the proposed
 9 settlement were not accepted by the parties and also by the
 10 trustee.
 11 Q And, sir, I'm sure it would be helpful for all of us
 12 and all sides of platitudes, and perhaps you can too. I'm
 13 not asking you for Dan Fischel's general idea of risks that
 14 might occur, that you might speculate on, that might come up,
 15 that might prevent recovery, I'm trying to find out your
 16 analysis of facts and what you did to figure things out. And
 17 you did not do any probability assessment specifically
 18 investigating anything that occurred in this matter so that
 19 you could decide what the probability was of success by the
 20 trustee on any particular hurdle the trustee could face;
 21 isn't that correct?
 22 A Again, it's partly correct. I did not assign any
 23 probability of success to any particular claim. That part is
 24 correct, if that's what you're asking.
 25 Q That is what I'm asking.
 26 A I agree. But I have done --

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 but it's misleading because what I relied on, in significant
 3 part, is the judgment of the parties themselves with the
 4 biggest economic stake, the parties with the most to gain by
 5 making a good decision and the most to lose by making a bad
 6 decision who went through exactly the exercise that you are
 7 describing in the presence of the trustee. And that, to me,
 8 as I stated several times during my testimony, is highly
 9 significant and powerful economic evidence justifying the
 10 fairness and adequacy of the settlement.
 11 Q Sir, I understand your opinion that just because the
 12 institutional investors entered into the settlement, the
 13 Court should interpret something from that. But I'm asking
 14 you about the basis of your opinion and the evaluation you've
 15 done of the probability of success on any particular issue.
 16 And the answer to that is that you have not done any analysis
 17 of the probability of any success of any of the things you
 18 identify in your report as speed bumps or hurdles that the
 19 trustee could face in litigation; is that correct?
 20 A It's partly correct. I haven't tried to figure out
 21 exactly what the probability of success is by assigning some
 22 number to the probability of success for a particular claims.
 23 Just generally, I'm highly suspicious of that exercise in any
 24 event. But what I have done is familiarize myself with the
 25 claims themselves, the competing contentions about the
 26 claims, the uncertainty about the claims both in terms of

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 Q Yeah.
 3 A -- the rest of what I described which also falls
 4 within the scope of your question, and that's why I don't
 5 want to give a misleading answer to your question.
 6 Q Well -- and I certainly don't want you to mislead
 7 anyone, sir. I just want to know what you did to form the
 8 basis of your opinion?
 9 A I tried to explain it as best I can.
 10 Q Now, you know in this case, the trustee did not file
 11 any lawsuit; right?
 12 A I'm aware of that, yes.
 13 Q And you know because the trustee did not file a
 14 lawsuit, it could not force Bank of America to provide
 15 information through the discovery process; right?
 16 A I don't know if they could force Bank of America if
 17 they did file a lawsuit. That's not something that's
 18 generally in the unilateral control of any particular party.
 19 Q Well, you understand that information isn't provided
 20 that a relevant party can file a motion to compel to get that
 21 information?
 22 A I understand all those things, but, ultimately, if
 23 there's a request for discovery and it's resisted, it's up to
 24 a Court to determine what the scope of permissible discovery
 25 is.
 26 Q And when you wrote your report, were you aware that

Page 3575

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 the only information that the trustee and the institutional
3 investors obtained from Bank of America was information that
4 Bank of America volunteered to provide?
5 A I don't know if that's true or not.
6 Q Well, would you agree that as a rational economic
7 actor, Bank of America was likely to provide information to
8 make the best case possible for Bank of America?
9 A Not necessarily, no. I think, again, if you're
10 asking hypothetically, I don't think what you said
11 necessarily follows. I think it's frequently an effective
12 negotiating technique not only to discuss your strong points
13 but to also analyze your weaker points. I think obviously,
14 in the context of an adversarial proceeding, you want to put
15 the relevant facts and circumstances in the most favorable
16 light for yourself, but that's the whole purpose of an
17 adversary proceeding with two parties who have different
18 perspectives making competing presentations in the presence
19 of the trustee analyzing the strengths and weaknesses of
20 their respective positions and ultimately reaching an
21 agreement.
22 Q What were the weak points that you thought Bank of
23 America discussed in these proceedings?
24 A I'm not sure I understand the question. I mean, the
25 weak points were the claims that I'm familiar with of the
26 institutional investors, starting from the original letter on

Page 3576

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 October 18th, about the claims about servicing breaches, the
3 claims about obligations to repurchase loans, the claims
4 about from the institutional investors' perspective, the
5 claims about breach and success rates and what they might
6 imply in terms of potential settlement value. And Bank of
7 America made its own presentation based on GSE data, and the
8 parties were able to assess for themselves the strengths and
9 weaknesses of the different positions and the trustee was
10 there to observe it as well.
11 (Continued on next page.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page 3577

1 Fischel-Petitioners-Cross/Mr. Loeser
2 Q Thank you. That's all very general, but you mentioned
3 that in negotiations expose the weak points.
4 So what were the actual weak points that you saw
5 Bank of America volunteer to the Institutional Investors?
6 A I didn't say that exactly.
7 Q What I said was that if you're asking, again, level of
8 generality of your question that a party will frequently not
9 only discuss the strong points, but also respond to claims about
10 the alleged weak points as well?
11 Q Sir, you can't identify for us today the actual weak
12 points that Bank of America discussed?
13 A Again, weak is in the eyes of the beholder.
14 Q Sir, I'm using your words. If the answer is no --
15 MR. INGBER: Your Honor, your Honor, please let
16 the witness answer the question before Mr. Loeser
17 interrupts.
18 A So --
19 MR. INGBER: I would just ask that Mr. Loeser not
20 interrupt the witness in the middle of his answer. He can
21 wait until Professor Fischel is done.
22 MR. LOESER: I heard some of that.
23 THE COURT: I think he just said would you let the
24 witness give an answer; and if you feel the need to make an
25 objection, not to interrupt him.
26 Why don't you go back to your question.

Page 3578

1 Fischel-Petitioners-Cross/Mr. Loeser
2 Q You can't -- you mentioned weak points in negotiations
3 as the general approach in negotiating. I'm asking if you know
4 of any weak points that Bank of America, any specific weak
5 points that Bank of America volunteered in this negotiation?
6 A Okay, well, what I started to say was weak points
7 are frequently in the eyes of the beholder. And just before
8 as an example, Bank of America relied on the GSE data from
9 its previous settlements. The Institutional Investors
10 relied on other data. Bank of America was in a position
11 where it had to respond to why the data that it was relying
12 on was reasonable. The Institutional Investors had to rely
13 on their presentations as to why their data was reasonable
14 and that's what a negotiation is.
15 Similarly, if you want more examples the
16 Institutional Investors took the position that Bank of
17 America had an obligation to repurchase loans regardless of
18 what the -- in any case where there was a loan modification.
19 Whether the modification was to minimize losses or for to
20 refinance a mortgage, and the Institutional Investors took
21 the position that the relevant documents created that
22 obligation.
23 Bank of America responded that they didn't
24 have that obligation because repurchases for loan
25 modifications only applied to loans that were modified for
26 financing purposes, not to avoid losses because of not just

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 the documents, but it would make no sense in light of the
 3 public policies in favor of minimizing losses to interpret
 4 the agreements to penalize Bank of America for acting to
 5 make loan repayments more efficient.
 6 So, I can give other examples, but that's,
 7 again, the give-and-take of negotiation. What's a weak
 8 point to one party triggers a response by the other party.
 9 Both parties can then assess all the relevant points that
 10 have been made as well as their own assessments about what
 11 litigation would entail relative to the alternative of
 12 settlement and make an appropriate decision.
 13 MR. LOESER: You know, your Honor, I would move to
 14 strike.
 15 Q Sir, I'm just asking if you can identify particular
 16 weak points. Instead you provided a five-minute summary of
 17 negotiations. So I'll move on, your Honor, but I think the
 18 point is made. We haven't heard any specific weak points that
 19 were volunteered, but I don't want to go back to that whirlwind.
 20 You would agree that as a rational economic actor,
 21 if Bank of America had other information that showed its
 22 liability was lower than what was suggested by the GSE data, it
 23 would have provided that information in settlement negotiations?
 24 A Possibly. Again, it's hard to know.
 25 Q So, for example, if Bank of America had results of loan
 26 file reviews done by plaintiffs in other cases that showed a

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 alternative.
 3 Q And wouldn't you agree that in Settlement negotiations
 4 it's important for the Trustee to be represented by counsel who
 5 can take that litigation step, if necessary?
 6 A Not necessarily, no. I would agree if there's
 7 litigation it's important for the parties litigating to have
 8 experienced and competent counsel. That much I would agree
 9 with.
 10 Q Okay. Is it fair to say that you could characterize it
 11 as economics of settlement 101 that you want to hire a
 12 negotiator that doesn't have a conflict?
 13 A Well, at least at the level of generality of your
 14 question, yes, I would agree. Depending -- excuse me.
 15 Depending on what you mean by conflict and how you're
 16 defining conflict. I think it is -- it would be
 17 economically irrational to hire counsel that you did not
 18 believe would do a good job representing your interests in
 19 the tasks that they are entrusted to represent your interest
 20 in.
 21 Q So, a conflict is one of those things that could skew
 22 negotiation; isn't that right?
 23 A Are you asking just hypothetically, any conflict in
 24 any situation?
 25 Q Yes?
 26 A Yes, conceivably if you're asking me any possible

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 breach rate that was lower than the rates suggested by the GSE
 3 data, you would expect Bank of America to provide that
 4 information?
 5 A Not necessarily. Potentially yes, but so many
 6 considerations that would go into that. I wouldn't have an
 7 expectation one way or another without knowing more about
 8 the relevant facts and circumstances.
 9 Q Well, the converse then if they had information loan
 10 files from other plaintiffs showing the losses were much higher
 11 than GSE data, you would expect them not to provide that
 12 information; right?
 13 A Probably, but, you know, again I think these kinds
 14 of decisions require a fuller understanding of the relevant
 15 facts and circumstances than is possibly learnable from your
 16 question.
 17 Q Now, would it be fair to say that to get information
 18 from Bank of America that undermine the bargaining positions
 19 taken by Bank of America, the Trustee would have to first ask
 20 for that information?
 21 A Possibly.
 22 Q And if Bank of America refused to provide information
 23 that a plaintiff thought could strengthen its hand a rational
 24 economic actor could then file a lawsuit and seek that
 25 information in discovery?
 26 A That's one alternative, but certainly not the only

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 state of the world with no context to the question, without
 3 defining what a conflict is; yes, I would agree a conflict
 4 can skew a negotiation.
 5 Q And if Bank of America knew that the person that it was
 6 negotiating with couldn't force it to turn over any information,
 7 don't you think that could skew the negotiation?
 8 A I'm sorry, can you repeat that question?
 9 Q Yeah, if Bank of America knew that the person that it
 10 was negotiating a resolution with could not force Bank of
 11 America to turn over any information, don't you think that could
 12 skew a negotiation?
 13 A Well, if you're alluding to the facts and
 14 circumstances of this case, I really don't understand what
 15 you mean because there are two parties to the negotiation.
 16 The Bank of America and the Institutional Investors
 17 represented by counsel.
 18 The Institutional Investors represented by
 19 counsel don't have to settle. If they feel that information
 20 that they need to make an informed decision is not something
 21 that they have or something that Bank of America is
 22 unwilling to provide, they can simply say, Fine, you're not
 23 willing to provide the information; we're not willing to
 24 settle.
 25 That's exactly the opposite of what happened
 26 in this case.

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 Q I'm only talking about the Trustee. The Trustee has
 3 the duty to all the certificate holders; isn't that right?
 4 A Yes, that's right, true based on my understanding.
 5 Q What I asked you is when the Trustee is negotiating
 6 with Bank of America, if Bank of America knows the Trustee, the
 7 person that's been designated by the Trustee to negotiate the
 8 deal, cannot force Bank of America to turn over any information,
 9 is that the kind of thing that can skew a negotiation?
 10 MR. INGBER: Objection, lacks foundation. If this
 11 is a hypothetical, Professor Fischel can answer. If it's
 12 based on the facts here, it lacks foundation.
 13 THE COURT: What is it?
 14 MR. LOESER: I'm happy to have it as a
 15 hypothetical, your Honor.
 16 THE COURT: Okay, then you can answer.
 17 THE WITNESS: I don't know what he means to force
 18 somebody to turn over documents in the context of a
 19 settlement negotiation. Either parties are willing to turn
 20 over documents in response to requests or they're not. If
 21 it's a matter of a settlement negotiation, and if either
 22 party is not satisfied with the information that they
 23 receive, if they feel they need it to make an informed
 24 decision, they can simply walk away from the negotiations.
 25 That happens everyday all over the country all the
 26 time, but that's exactly the opposite of what happened in

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 we'll comply because we want to further settlement
 3 negotiations, or we won't comply and we're going to walk
 4 away if the Trustee is not willing to continue settlement
 5 negotiations.
 6 But, again, that's exactly the opposite of what
 7 happened in this case.
 8 Q Well, you keep saying that, but we'll get to what the
 9 basis of that is.
 10 But you've done this review of the testimony and
 11 transcripts and are familiar with the record in this case?
 12 A That's a little strong. The record in this case is
 13 voluminous. I have not attempted to review the entire
 14 record. I've certainly reviewed parts of it. I've
 15 attempted to review what I needed to review in order to form
 16 the opinions that I've expressed, but I certainly would not
 17 represent that I've reviewed the entire record.
 18 THE COURT: Can we take just a really short break?
 19 I have to be in touch with someone. So can we do that now,
 20 is that all right? We'll take a really short break.
 21 * * * * *
 22 (Whereupon, at this time a short recess was
 23 taken.)
 24
 25 (Continued on the next page)
 26

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 this case.
 3 Q Well, I'm trying to ask the question in the context of
 4 this economics of settlement construct that you describe in your
 5 report. In that economics of settlement, you have Trustee
 6 negotiating with a defendant and it's a pretty simple question
 7 and maybe you can't answer it.
 8 But, if in that context, in that economics of the
 9 settlement, Bank of America is negotiating with someone that it
 10 knows can't say to Bank of America I'm going to sue you unless
 11 you give me the information we need, is that something that
 12 would skew the negotiation?
 13 MR. INGBER: Objection, lacks foundation. There's
 14 no basis for saying that the Trustee in negotiations
 15 couldn't say if you don't do X, we're going to do Y.
 16 THE COURT: You know, can I don't know, can you
 17 answer that question?
 18 THE WITNESS: Well, to me the question is
 19 incomplete, because it presumes -- first of all, it's only
 20 the Trustee and Bank of America. That's not the reality of
 21 the negotiation. But beyond that, I don't see why the
 22 Trustee couldn't say if you don't produce these documents,
 23 I'm not going to enter into a settlement. What's wrong
 24 with that?
 25 It seems like a perfectly plausible statement, and
 26 the party receiving the request could either say okay,

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 (Whereupon, at this time the witness, Professor
 3 Daniel Fischel, having been previously duly sworn,
 4 continued to testify as follows:)
 5 THE COURT: Okay, Mr. Loeser, you may continue.
 6 BY MR. LOESER: (Continuing)
 7 Q Professor Fischel, you indicated that you believed that
 8 it was contrary to the evidence that the Trustee had a conflict
 9 here. Did I hear you say that?
 10 A Yes, sir, did you.
 11 Q And I was talking to you about the chief negotiator for
 12 the Trustee, and you don't dispute that the chief negotiator for
 13 the Trustee in this case in fact did have a conflict; do you?
 14 A I'm not sure what you mean by a conflict, but I do
 15 dispute it. In terms of the task that they were performing,
 16 absolutely I dispute it.
 17 Q Let's be clear. You don't dispute that the chief
 18 negotiator's firm also represented Bank of America, and that
 19 that firm had to get a waiver from Bank of America in order to
 20 represent Bank of New York Mellon; right?
 21 MR. INGBER: To be clear, your Honor, represented
 22 Bank of America in other context, not including this
 23 transaction.
 24 THE COURT: Yes.
 25 Q Were you aware of that, sir?
 26 A I was aware of that.

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 Q And were you aware that Bank of America didn't say to
 3 the Trustee's chief negotiator have at it, instead they'll say
 4 I'll give you a limited waiver?
 5 A I have a general understanding. I think that's
 6 consistent with your --
 7 Q Have you read the limited waiver that Bank of America
 8 gave to the Trustee's chief negotiator?
 9 A No, I have not.
 10 Q And were you aware that under that limited waiver that
 11 the Trustee's chief negotiator had, it could not sue Bank of
 12 America?
 13 A I -- at least that's my understanding of what the
 14 waiver provided.
 15 Q Now, before the break I was asking you about the review
 16 you did of the record. Can you point me to where in the record
 17 the Trustee's negotiator ever said Bank of America, We demand
 18 you give us more information?
 19 A I don't have sufficient familiarity with everything
 20 that was said in every meeting to be able to answer one way
 21 or the other.
 22 Q In a dispute of this size, you would expect in
 23 negotiations of billions of dollars the Trustee must have said
 24 that to Bank of America; right?
 25 A Not necessarily. It just depends on the nature of
 26 the negotiations, the positions of the respective parties,

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 and circumstances, which can't be determined from your
 3 question.
 4 Q In your report, you describe what you see as the costs
 5 of rejecting an earlier settlement offer; correct?
 6 A Potential costs, yes.
 7 Q There are also potential costs of settling early
 8 without complete information, is that correct?
 9 A Yes. I say that as well. I mean, there's a
 10 judgment that has to be made. Some settlement offers are
 11 accepted, some are not.
 12 Q And when a party settles early, it can make an
 13 uninformed decision because of lack of discovery, right?
 14 A Potentially, yes.
 15 Q And a party can settle too cheaply because its
 16 adversary has withheld information that would show that the
 17 recoverable losses are much greater than what was estimated
 18 during the negotiation; right?
 19 A If you're asking me hypothetically, yes, of course
 20 that could happen.
 21 Q And in your report, you make no effort to quantify the
 22 amount of money that the Trustee may have left on the table by
 23 settling early in this case; do you?
 24 A I make no attempt to quantify it, because I don't
 25 think there's a basis for concluding that there wasn't.
 26 Q You don't analyze the question anywhere in your report?

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 what was provided, what was not provided. I don't think
 3 it's possible to answer that in the abstract.
 4 Q So you don't know; and if I told you that there was
 5 never any instance in which the Trustee said we demand you give
 6 us more information, you wouldn't know one way or the other?
 7 A And I wouldn't think it was significant one way or
 8 the other.
 9 Q Is your idea of this negotiation over billions of
 10 dollars, kind of get along and get the information they give you
 11 and that's good enough?
 12 A I think that's a mischaracterization of what I've
 13 said.
 14 Q You disagree with that statement?
 15 A I disagree with that as if you're purporting to
 16 characterize my opinion to this case. Yes, I disagree with
 17 that.
 18 Q And it would be wrong to take that approach, for the
 19 Trustee to take that approach in negotiations with Bank of
 20 America in a dispute of this magnitude?
 21 A If the approach is -- what did you say? We'll just
 22 get along, like hold hands in a circle? What are you
 23 talking about?
 24 Q Yeah, just take the information that was volunteered
 25 and not ask for anything else?
 26 A Again, I think that depends on the relevant facts

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 A I don't agree with that. I analyze it in the way
 3 that I described in my testimony, which mirrors what I said
 4 in my reports.
 5 Q You don't evaluate the probability that the losses here
 6 could be vastly greater than the information volunteered by Bank
 7 of America in negotiations?
 8 A What I do is I evaluate the uncertainties
 9 concerning the magnitude of the claim as well as the
 10 collectability of the claim, and I do that as well as focus
 11 on the negotiating process between the parties with the
 12 economic stake in terms of who's paying and who is receiving
 13 the money and their interchange with respect to those exact
 14 issues that you just referred to in your question.
 15 Q And the Trustee has duties that are independent of what
 16 the Institutional Investors have for their own certificate
 17 holders; isn't that right?
 18 A Yes, I think the Trustee's duties are separate and
 19 apart from counsel for the Institutional Investors. I agree
 20 with that.
 21 Q And if I understood your testimony, you don't believe
 22 the Trustee was actually a negotiating participant here; they
 23 were just a facilitator. Is that your understanding of their
 24 role?
 25 A Well, I don't know how to draw that line. They
 26 were a facilitator and an observer, and they made their own

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 decision to enter into the proposed settlement.
 3 So, that's my understanding of their role.
 4 Q You didn't see any evidence of them negotiating
 5 directly with Bank of America for a bigger number, for example?
 6 A I didn't see any evidence of that one way or the
 7 other.
 8 Q And in your report you discuss two costs of rejecting
 9 an early settlement offer. The first is the cost of litigating,
 10 is that correct?
 11 A Correct, potentially.
 12 Q And specifically you refer to costs performing loan
 13 file review, right? A solvency analysis, that's involved with
 14 Countrywide, right? And a more detailed review of asset
 15 transfers between Countrywide and Bank of America, right?
 16 A Among other things, correct.
 17 Q Now, when deciding whether it was worth incurring these
 18 costs, you agree that it was important for the Trustee to
 19 understand what in fact it would cost to do these
 20 investigations; right?
 21 A Well, I think all factors are relevant; but if you
 22 interpret costs broadly, to me not just the out-of-pocket
 23 costs, but also the opportunity costs of losing the bird in
 24 the hand, the settlement that was presented, the proposed
 25 settlement that was presented to the Trustee, I would agree
 26 that the Trustee needed to consider those factors.

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 but what I really focus on as I did in my testimony is the
 3 possibility that the ultimate outcome might be a lot worse
 4 than the settlement that -- proposed settlement that was
 5 entered into particularly given the collectability issues
 6 and the possibility that cause the Institutional Investors
 7 to hire bankruptcy counsel that Countrywide might have no
 8 assets.
 9 Q We'll get to that --
 10 A Just to finish my answer.
 11 Q Sure, I'm sorry.
 12 THE COURT: Yes.
 13 A And that's the real, the major cost, the
 14 possibility of an adverse outcome much worse than the
 15 settlement offer. Everything else also exists, all the
 16 time, all the aggravation, all the costs no matter who's
 17 bearing it; but the main issue, I think, with a settlement
 18 of this size, when you have a bird in the hand of
 19 \$8.5 billion, a servicing remedy and a document remedy is
 20 the possibility that those things all might vanish if you
 21 didn't take the bird in the hand and you rolled the dice
 22 about litigating particularly the real bankruptcy risk of
 23 Countrywide.
 24 Q So if we go back to my question which was simply where
 25 in your report do you identify the out-of-pocket costs, the
 26 answer that I gather from your answer is you didn't?

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 Q Okay. And with regard to the out-of-pocket costs in
 3 particular, can you direct me to where in the record the Trustee
 4 assessed the out-of-pocket costs to do these investigations that
 5 you've identified in the report?
 6 A No, as I think I said in my report, the delay and
 7 the opportunity costs are really the most relevant costs.
 8 Although, you know, clearly there's at least some
 9 out-of-pocket costs as well, even in the context of a
 10 situation where the Trustee would be indemnified for its
 11 expenses.
 12 Q So to answer my question, you can't identify any place
 13 in the record where the Trustee assessed the out-of-pocket costs
 14 for those investigations; right?
 15 A Not in terms of -- again, I haven't reviewed the
 16 entire record. I wasn't a participant at all these
 17 different negotiation sessions or phone calls or whatever;
 18 but I'm not aware of at least based on anything that I've
 19 seen of the Trustee coming up with a specific quantified
 20 dollar amount of what would be involved in litigating all
 21 these claims.
 22 Q And in your report you identify the cost of these
 23 investigations as a factor for approving the settlement. So
 24 where in your report do you identify what the out-of-pocket
 25 costs would be for these investigations?
 26 A I discussed the existence of out-of-pocket costs,

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 A No, that's not correct. I did identify
 3 out-of-pocket costs as a factor. I didn't quantify the
 4 out-of-pocket costs of what the costs would be of litigating
 5 all these claims for years into the future. But I've
 6 certainly identified the existence of out-of-pocket costs as
 7 one in factor, but not the main factor; but one factor that
 8 was a benefit of taking the bird in the hand and accepting
 9 the proposed settlement rather than litigating and going
 10 forward.
 11 Q And as to that particular factor, as you said, you
 12 didn't figure out what it actually would cost to do these
 13 investigations, right?
 14 A I did not come up with a dollar number. I'm not
 15 sure even if it would be possible to do it. Even if one
 16 tried to take into account everything that would have to be
 17 done through discovery, litigation, a trial, appeals, et
 18 cetera. Any attempt to do it would be very speculative and
 19 uncertain, but I did not attempt to come up with a specific
 20 dollar figure.
 21 Q Thank you. And when deciding whether it's worth
 22 incurring the investigation costs, these out-of-pocket costs,
 23 you agree it's also necessary to take into consideration the
 24 amount of the potential recovery that a party could obtain were
 25 it pressed forward with litigation; right?
 26 A Potential recovery including not just proving the

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 claim, but also the ability to collect on the claim.
 3 Q And it might not be worth spending a thousand dollars
 4 to pursue fifteen hundred dollars, but generally speaking it
 5 would be worth spending a thousand dollars to pursue a claim of
 6 a hundred thousand dollars; right?
 7 A You know, if you're asking me at the level of
 8 generality of your question, I would agree most people would
 9 think it was worth spending a thousand dollars to recover a
 10 hundred thousand dollars.
 11 Q And here we're dealing with a dispute that has billions
 12 of dollars at stake, right?
 13 A Billions of dollars on the upside, but also on the
 14 downside.
 15 Q So you wouldn't think it's irrational for the Trustee
 16 to say spend \$10 million to investigate the claims that were
 17 being compromised in this case?
 18 A Again, I think you'd have to put more content in
 19 your question with the expenditure of \$10 million. Did that
 20 involve in your question rejecting the existing settlement
 21 and doing something else for \$10 million beyond what the
 22 Trustee did, or are you talking about something else?
 23 Q Again, I'm really just trying to understand this
 24 economics of settlement in the report discusses. And in that
 25 context for which you're an expert, you factor in the economics
 26 of settlement what you could recover when deciding what you will

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 appropriate to spend?
 3 A I haven't figured it out; and as I said, I'm not
 4 sure it's possible to figure it out.
 5 Q You haven't analyzed that question?
 6 A Other than identifying it as one of the benefits of
 7 settlement as a component in the economics of the settlement
 8 decision, both generally and under the facts and
 9 circumstances of this case. Although under the facts and
 10 circumstances of this case I would say it's not a major
 11 factor.
 12 Q And in your discussion of costs to be expended on
 13 investigation, did you consider who would be required to pay
 14 those costs?
 15 A I did. That's one of the reasons why I don't think
 16 the out-of-pocket costs -- at least that's one of the
 17 reasons why I don't think that's one of the major reasons
 18 that avoiding those costs justify a Trustee entering into
 19 the settlement. Because depending on how the hypothetical
 20 lawsuit evolved, presumably the Trustee wouldn't be bearing
 21 the cost itself. It would either be indemnified by the
 22 Institutional Investors, or possibly I guess by the Master
 23 Servicer under the existing governing agreements.
 24 Q And you understand here that Bank of America did in
 25 fact indemnify the Trustee for the cost of any investigation?
 26 A I do understand that.

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 spend to pursue that recovery; right?
 3 A I think as I said there's a tradeoff, there's a
 4 cost benefit analysis. I don't think you could say in the
 5 abstract whether any expenditure is worthwhile without
 6 knowing all the relevant facts and circumstances.
 7 Q So, point me to where in the record the Trustee
 8 determined what it would be reasonable to spend to pursue the
 9 claims that were compromised in the settlement?
 10 A As I already indicated, I'm not sufficiently
 11 familiar with everything that was said in every meeting or
 12 every phone call or all the internal deliberations of the
 13 Trustee to know whether they engaged in that process at all.
 14 As I said, based on my own experience being
 15 asked for budgets all the time, I don't know if it would
 16 even be possible to try and come up with a dollar figure to
 17 litigate every single claim through discovery, through a
 18 trial, through appeals, et cetera.
 19 Q Again, but trying to get back to this case and these
 20 facts, you can't point me to where in the record and you're not
 21 aware of anyplace in the record where the Trustee evaluated what
 22 would be an appropriate amount to spend to pursue the claims
 23 that are being released in the settlement?
 24 A I haven't reviewed the record for that purpose. I
 25 have no opinion one way or the other.
 26 Q And again, you haven't figured out what would be

1 Fischel-Petitioners-Cross/Mr. Loeser
 2 Q And so you agree with me that the out-of-pocket costs
 3 are not a factor that the Trustee would take into account when
 4 deciding to press forward with these claims?
 5 A I wouldn't say they are not a factor; but as I
 6 said, I think they're relatively minor factors as compared
 7 to the other factors.
 8 Q And where in your report did you say that the
 9 out-of-pocket costs of investigation were a minor factor that
 10 should be taken into account?
 11 A I can't remember if I said that one way or the
 12 other.
 13 Q You're saying that here today?
 14 A I'm saying that of the costs -- and I think my
 15 report fairly read says the same thing. The major cost is
 16 the possibility that if you reject the bird in the hand, you
 17 may wind up with a worse outcome, including nothing which
 18 would be a disaster for the certificate holders.
 19 One can only imagine how the Trustee's conduct
 20 would be evaluated if they turned down the \$8.5 billion, the
 21 servicing remedy, the document remedy and the ultimate
 22 result was Countrywide going bankrupt, no direct recovery
 23 against Bank of America. And so many courts have concluded
 24 where the certificate holders being unsecured creditors in
 25 bankruptcy; how would the Trustee's decision look then?
 26 (Continued on the next page.)

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 Q And we'll get to all that, and I appreciate the
3 summary.

4 Your report talks about costs of investigation,
5 and, for example, you go on for some pages about the cost
6 of a loan file review; right?

7 A Correct.

8 Q But as you've just indicated, if Bank of America's
9 indemnifying the trustee for that cost, that's something the
10 trustee wouldn't have the burden of; right?

11 A Would not have to bear the out-of-pocket cost.

12 Q So the document -- a loan file review is not a
13 factor that supports approving the settlement as adequate;
14 right?

15 A As I said, I don't think -- if the out-of-pocket
16 costs were the only issue, I don't think that it would be as
17 significant as the actual cost that I've identified, broadly
18 defined.

19 Q And perhaps you understand my confusion. Your
20 report does not indicate these out-of-pocket costs are minor
21 or insignificant. It talks a lot about the out-of-pocket
22 costs. And I want to make sure we're clear that your
23 testimony today is that the out-of-pocket costs of a solvency
24 analysis, of a loan file review and the detailed review of
25 asset transfers, those are not factors that support approval
26 of settlement because Bank of America was required to

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 week; do you recall that part of your report?

3 A I don't exactly. But I'm happy to look at it if you
4 want, or I'm happy to accept your representation.

5 Q I'm fine with the latter.

6 So at that rate, 6500 loans would take
7 six-and-a-half weeks to review; right?

8 A I haven't done the math, but I'm happy to accept
9 your representation.

10 Q It's sometimes dangerous to accept math from me,
11 but --

12 A Right.

13 THE COURT: That goes with most of us, I think.

14 A Until it's proven to the contrary, I'll keep
15 accepting your representations.

16 Q So six-and-a-half weeks to review 6500 loan files,
17 and so that ends up -- so if it started today, that loan file
18 review would be finished by the third week of October?

19 A I'm happy to -- yeah. It's what? The second week,
20 beginning of the second week of September? So, yes. I
21 assume that's right.

22 Q So if Dr. Cowan's correct about the number of loans
23 that need to be reviewed, based on your own assessment of how
24 long it would take, it would take six-and-a-half weeks?

25 A Yeah. Again, but he wouldn't be the only one
26 talking. That's the problem. First of all, there would be

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 indemnify the trustee for those costs?

3 A As I said, I wouldn't say they're not a factor, but
4 they're not as important a factor particularly when you're
5 dealing with billions of dollars of a potential recovery plus
6 the related servicing and document provisions of the
7 settlement. The main risk is winding up with a much worse
8 outcome as I think my report states and I've identified in my
9 testimony today.

10 Q I want to be careful to go through your report
11 because your opinions are actually expressed in your report.
12 One of the other things you talked about is the time that it
13 would take to conduct a loan file review; correct?

14 A In the context of a loan file review, yes. I did
15 talk about that.

16 Q And you note that Dr. Cowan concluded that a
17 statistically significant sample could be done with between
18 4,630 and 6,470 loans; do you have that?

19 A I do.

20 Q And you do some math and you conclude it would take
21 between 10,000 and 20,000 hours to review that many loan
22 files; is that correct?

23 A Correct.

24 Q And you also note that an analyst that you cite in
25 your report estimates that a re-underwriting staff of 50
26 people can re-underwrite approximately a thousand loans per

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 the likelihood that his findings would be contested, other
3 experts would presumably, based on experience in other cases,
4 not agree with his conclusions about sampling on the results
5 that would come from his loan file review. And, again, no
6 matter what you came up with, even if you could get a
7 consensus, which at least based on my experience, you
8 wouldn't, there's still the issue of you have to be able to
9 collect the money, and that's a big problem in a case like
10 this in the absence of a settlement.

11 Q And we'll get to that. But you understand that in
12 loan file disputes, the parties often agree on a protocol for
13 a loan file review; right?

14 A You know, in my experience, agreements are rather
15 rare. And what's more common is you have competing experts
16 with radically different opinions and competing parties with
17 radically different opinions on whether sampling is
18 appropriate, if it is appropriate, what's the correct sample.
19 Even if you could agree on what the correct sample is, what
20 the loan file tells you in terms of breach rates, whether or
21 not there are compensating factors, whether or not the
22 breaches have a material and adverse effect on certificate
23 holders, there is no sense in which doing a loan file review,
24 if you spend the amount of time that you referenced that Dr.
25 Cowan describes, would lend some unambiguous answer that the
26 parties would agree on is highly unlikely to occur.

1 Professor D. Fischel - by Petitioner - Cross/Loeser

2 Q And we'll draw down a bit on your particular
3 expertise conducting loan file reviews --

4 A Okay.

5 Q -- but getting back to the cost issue, Dr. Cowan
6 indicated it would cost between two and three hundred dollars
7 per loan to review; do you have any reason to find that that
8 number is inaccurate?

9 A Actually, I don't have any expertise on loan file
10 reviews, but to short-circuit what you said you're going to
11 come back to. So I don't know one way or another how much it
12 would cost. I have experience seeing what happens in other
13 cases involving where loan file reviews are undertaken. But,
14 personally, I've never done a loan file review and I have no
15 expertise.

16 Q So that long explanation of all the things that
17 would be necessary and that would make a loan file review
18 unproductive, you don't actually have any experience doing a
19 loan file review?

20 A Not personally doing a loan file review, but I have
21 a lot of experience observing what happens with loan file
22 reviews when they're undertaken in particular cases.

23 Q You've watched?

24 A Not literally watched. And, actually, the truth is
25 we ourselves, meaning my firm, did do at least a modified
26 loan file review in response to particular claims by Dr.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 Cowan in combination with some other service providers who
3 have expertise that we don't have. But I don't claim to have
4 any expertise in conducting a loan file review.

5 Q And so we should take that into account on
6 evaluating your testimony about loan file reviews?

7 A I'm sure the Court will take everything that I say,
8 one way or the other, into account and give it whatever
9 weight the Court deems appropriate.

10 Q And getting back to the dollars, at two to three
11 hundred per loan and 6500 loans, that ends up, approximately,
12 being between \$1.3 and \$2 million to review 6500 loan files?

13 A I'm happy accepting your representations on your
14 arithmetic.

15 Q And in a claim worth billions of dollars, even if
16 the trustee had to pay that, you wouldn't consider 1.3 to two
17 million too much to pay to conduct an investigation; would
18 you?

19 A No. But, again, you have to take into account the
20 context of what the situation is. You can't analyze whether
21 an expenditure is worth it without analyzing the context of
22 the expenditure. And, again, just repeating what I said in
23 my direct testimony, here, the parties themselves, the party
24 paying the money and the party receiving the money were
25 willing to enter into an agreement, would both be fully aware
26 that no loan file review was undertaken. They both had

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 substitute methods for analyzing what the exposure was based
3 on pre-trade success rates, et cetera. They both used
4 alternative methods, reached the conclusions that they did,
5 entered into the settlement in the proposed settlement. So,
6 in that context, the question of whether it's worthwhile to
7 expend several million dollars is a different context than if
8 you didn't have this background between the parties with a
9 real economic stake in the litigation.

10 Q Now, sir, you understand that the analyses that were
11 done by the institutional investors and by Bank of America
12 were proxies for what you would get from actually reviewing
13 the loans at issue in this case; right?

14 A I'm not sure I would agree with that statement
15 because, again, it assumes that if you reviewed loan files,
16 you would get some clear answer, which I don't think is the
17 case based on historical experience. So I would just say
18 six-and-a-half weeks, there are alternative methods for maybe
19 not as good, maybe as good, for analyzing potential exposure
20 resulting from breaches of representations and warranties.

21 Q And by alternative methods, you mean proxies?

22 A You can call them proxies, but what I'm trying to
23 avoid is comparing what you're calling a proxy with something
24 that you're presuming is necessarily better. And I think
25 under the facts and circumstances of this case, they're just
26 alternatives and the parties chose the method that they

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 thought was in their best interest and all sides could
3 evaluate the reasonableness of the choices made and decide to
4 proceed or not proceed.

5 Q Okay. And, again, I just want to make sure what
6 your opinion is, and you've given an opinion on the adequacy
7 of the settlement, but you understand that nobody in this
8 group, in that group, actually looked at a single loan file
9 for the loans at issue in this case?

10 A I do understand that.

11 Q Okay. And no one made any effort to determine --

12 A Well, actually let me take that back. I don't know
13 what parties did themselves. But as far as the negotiating,
14 the presentations in the settlement negotiations, as far as
15 I'm aware, loan file review was not part of that process.

16 Q So in order to get a sense of the damages, they
17 looked at other loans, not these loans; right?

18 A They looked at data from other loans and tried to
19 project, based on the data from other loans, what potential
20 exposure was in this particular case.

21 Q And if a trustee had spent \$1.3 to \$2 million, the
22 trustee would've had data about these loans; right?

23 A Would've had data on these loans. But what that
24 data would have told the trustee or the participants to the
25 settlement negotiation, real economic parties in interest
26 about the merits of possibly settling or not settling is not

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 obvious. And, in fact, the willingness of these very
 3 sophisticated commercial entities to enter into an agreement
 4 knowing that there was no loan file review as part of the
 5 agreement and recognizing the potential problems and
 6 uncertainties with loan files demonstrated that, in their
 7 judgment, based on their own economic self interest, they
 8 didn't need a loan file review and a loan file review
 9 wouldn't help them to reach an agreement that they each
 10 determined from their respective positions was in their
 11 economic set of interest.

12 Q Now, you say that the results of loan file reviews
 13 would be uncertain, but you, Dan Fischel, have no idea what
 14 the loan file review would've shown; right? You don't know
 15 what the percentage of loans that are effective would be
 16 based on that loan file review?

17 A I think based on my experience, the percentage would
 18 be disputed.

19 Q But you don't know what that number is; right?

20 A There is no single number. That's the point.

21 Q You don't know what number an expert hired by the
 22 trustee to conduct a loan file review would show; right?

23 A Obviously I don't know that because, as far as I
 24 know, it didn't happen. But the whole point is, you know,
 25 this is not like sort of a treasure hunt, at the end you find
 26 the answer which tells you everything you've been looking

1 Professor D. Fischel - by Petitioner - Cross/Loeser

2 Q Finished?

3 A I am.

4 Q What I gather from that is that, in your opinion,
 5 loan file review is an exercise in judgment; right?

6 A I think based on my experience, there are
 7 circumstances where parties deem it to be worthwhile to
 8 engage in loan file review and some circumstances like this
 9 one where they don't.

10 Q And experts that each side would higher might come
 11 to different conclusions?

12 A Typically do come to different conclusions.

13 Q And for that reason, it was sensible for the trustee
 14 not to do any loan file at all in this case?

15 A I think that is a factor, but certainly not the only
 16 factor that --

17 Q Okay. As to that factor --

18 MR. INGBER: I'm sorry.

19 Your Honor, I don't believe Professor Fischel
 20 was finished with his answer. If he has, then I stand
 21 corrected.

22 THE COURT: Were you still answering?

23 THE WITNESS: I was your, Honor.

24 THE COURT: I think he was based upon --

25 THE WITNESS: Yeah.

26 THE COURT: You can continue.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 for. There are many cases where loan file reviews are
 3 undertaken, and in different facts and circumstances there
 4 may be good reasons to undertake loan file reviews. I've
 5 certainly seen a lot of litigation involving loan file
 6 reviews, but I have not seen litigation where loan file
 7 reviews are -- particularly when there are a lot of files at
 8 issue are simple and obvious and everybody agrees on what
 9 they show. The more typical result is the opposite. That
 10 you have different parties with different experts who reach
 11 radically different interpretations on how many loan files
 12 you need to look at, whether sampling is appropriate, if it
 13 is appropriate, what is an appropriate sample, and then once
 14 you get into the loan files, what they show. Each loan file
 15 is a voluminous amount of paper and there's all kinds of
 16 information in it, all kinds of subjective judgments that
 17 have to be made about what's in the loan file. Even if you
 18 know what's in the loan file, that also doesn't tell you what
 19 the ultimate answer is because you have to make judgments
 20 about what has a material and adverse effect on certificate
 21 holders. Frequently you can't tell that from the loan file
 22 review even if you conduct it.

23 So, you know, it's simply not the case that
 24 there was some easy answer that the trustee could have
 25 obtained by the magnitude of the claim, forget about
 26 collectability if it had engaged in the loan file review.

1 Professor D. Fischel - by Petitioner - Cross/Loeser

2 A I think the ambiguity and the uncertainty of the
 3 results of a loan file review was certainly a factor that the
 4 trustee could consider, but there are other factors as well
 5 that I also identified that I'm happy to repeat. But I'm
 6 happy to just say that it's one factor among many.

7 Q Okay. And as to that particular factor, experts
 8 coming to different conclusions based on their own exercise
 9 in judgment is not unusual in litigation; is it?

10 A Not unusual in litigation. Correct.

11 Q Experts are routinely hired in litigation?

12 A Correct.

13 Q And you've testified dozens and dozens of times;
 14 right?

15 A I have.

16 Q And I'm guessing that in most of those occasions,
 17 there was an expert that came to you that had a different
 18 opinion than you?

19 A Frequently.

20 Q And you probably knew that was going to happen when
 21 you got hired; right?

22 A Again, that frequently occurs.

23 Q And the person that hired you didn't say, You know
 24 what, I'm not going to hire you because the other side is
 25 going to hire an expert who is going to disagree with you and
 26 then where are we going to be?

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 A Are you asking my general opinion if that typically
 3 happens?
 4 Q Yeah.
 5 A No. That does not typically happen.
 6 Q The fact that experts may disagree does not
 7 generally cause litigants not to bother preparing expert
 8 reports; right?
 9 A If you're asking without any context, just
 10 generally, yes. I think the fact that experts disagree is
 11 part of litigation.
 12 Q And you conclude that the trustee, and this is a
 13 quote, "might well have reasonably concluded that the
 14 uncertain benefits of a loan file review were outweighed by
 15 the cost and therefore not worth the effort."
 16 A In the context of the facts and circumstances of
 17 this case, which I go through at length in my reports and I
 18 went through in testimony, which is not to say that loan file
 19 reviews are worthless, not to say that they're never worth
 20 engaging in, but in the facts and circumstances of this case,
 21 I concluded in my reports and in my testimony that the
 22 trustee had reasonable grounds not to reject the settlement
 23 that was offered in favor of doing a loan file review.
 24 Q And I'm sure you choose your words carefully. So
 25 when you say, "might well have reasonably concluded", are you
 26 saying that you don't actually know what they actually did?

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 You can answer.
 3 A No. I didn't think that was relevant. I think
 4 what's relevant is the facts and circumstances of this case.
 5 And I readily concede really I'm aware as I've stated, just
 6 as my own experience, loan file reviews are undertaken. It's
 7 not that they're worthless or never worthwhile, but I think
 8 under the facts and circumstances of this case, the parties'
 9 decision to enter into the settlement, based on their
 10 analysis of their potential recovery or exposure in light of
 11 all the circumstances that I've described, the alternative
 12 methodologies that they used and the risk of scuttling the
 13 entire settlement, not taking the bird in the hand by
 14 delaying things further and conducting what is likely to be a
 15 contentious and uncertain loan file review, that that
 16 decision by the trustee not to do that was reasonable.
 17 That's my opinion.
 18 Q So having never actually conducted a loan file
 19 review, your opinion is that, in this case, based on your
 20 experience observing other loan file reviews, that it
 21 wouldn't have been helpful?
 22 A To say wouldn't be helpful, that's a little bit too
 23 strong. You can't analyze the potential benefits without
 24 analyzing also the potential costs. And the issue is in
 25 light of all the relevant facts and circumstances, was it
 26 reasonable to rely on the parties who had the economic stake

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 A I don't know the trustees' subjective thought
 3 processes. I know that the trustee decided to enter into the
 4 proposed settlement and petition the Court for approval
 5 without conducting loan file review, that's what I know.
 6 Q And you're speculating about why the trustee might
 7 have done that, right, 'cause you don't know?
 8 A I don't know the trustees' subjective thought
 9 processes on that issue. Obviously, I'm familiar with some
 10 testimony in the case that preceded me, but I've not
 11 attempted to analyze the trustees' subjective decision-making
 12 process.
 13 Q Now, sir, are you aware of any loan file putback
 14 case that has been litigated and settled without any loan
 15 file review?
 16 A I'm not aware one way or the other.
 17 Q So no? Not aware?
 18 A I've not investigated that question.
 19 Q You didn't think it was worth going out and trying
 20 to find the answer to that question when you're testifying as
 21 an expert in the largest putback case that ever existed and
 22 not a single loan was reviewed, you didn't think it was worth
 23 going out and finding if any settlement had ever occurred
 24 without a loan file review?
 25 MR. INGBER: Objection. Argumentative.
 26 THE COURT: I'll allow it.

1 Professor D. Fischel - by Petitioner - Cross/Loeser
 2 in the outcome, that to rely on their judgment that they did
 3 not themselves need a loan file review in order to make an
 4 informed decision about the settlement in light of the
 5 uncertainties, delay that loan files entail, yes, I think
 6 that's a reasonable decision by the trustee.
 7 Q And are you aware of any loan file putback case in
 8 which the party putting the loans back, the plaintiff, has
 9 decided it's not worth conducting loan file review because
 10 the other side might disagree with the results?
 11 A Again, I don't think that is the issue, but I
 12 haven't investigated any other reasons why loan files were or
 13 were not conducted in any other case.
 14 Q In your report, you suggest that another risk the
 15 trustee faced was that the Court would not allow sampling and
 16 instead would require the review of every single loan in the
 17 covered trust; do you recall that part of your report?
 18 A I do.
 19 Q Are you aware of any mortgaged-backed securities
 20 related case where the Court concluded that it would not be
 21 appropriate to review a statistically significant sample of
 22 loans in order to evaluate the breach rate in the loan pool
 23 or the losses that resulted?
 24 MS. PATRICK: Objection. Foundation.
 25 The question needs to be narrowed to the
 26 appropriate context of putback claims for PLS holders.

Page 3615

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 I'm not aware of any case. If Mr. Loeser is aware of
3 one, he can advise the Court authorizing sampling for the
4 purpose of permitting a trustee in a PLS trust to putback
5 individuals.
6 MR. LOESER: Your Honor, if Ms. Patrick wants to
7 ask other questions --
8 THE COURT: Yeah. Can you ask that question
9 again?
10 Q Are you aware of any MBS related case, by MBS, I
11 mean mortgage-backed securities, in which a Court has
12 concluded that it would not be appropriate to review a
13 statistically sophisticated sampling of loans in order to
14 evaluate the breach rate in the loan pool or the losses that
15 resulted?
16 THE COURT: You can answer.
17 A Okay. I'm not aware of any ruling exactly like
18 that, but, again, I'd want to review it to be sure. But if I
19 remember correctly, in the MBIA case, what the Court ruled
20 was that one side, if it wanted to, can use sampling but the
21 other side was free to contest the use of sampling including
22 having its expert testify that it wasn't appropriate to
23 engage in sampling and it was necessary, in the other
24 expert's view, to analyze every single loan file which, in
25 this case, would be 800,000.
26 Q And that's a great example. The MBIA case.

Page 3616

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 Did MBIA say, Because this other expert's going
3 to challenge what I'm going to do, I'm just not going to
4 do a loan file review?
5 A No. But the point is that given the experience in
6 MBIA, and, again, I don't want to purport to be that familiar
7 with exactly what happened in that case to be able to be a
8 hundred percent confident with what I'm saying without
9 checking, but based on my recollection, what happened with
10 loan files in the MBIA case is exactly what the trustee could
11 reasonably conclude that it wanted to avoid, particularly
12 when the parties themselves, with their economic stake
13 themselves, concluded that they didn't need a loan file
14 review. Namely a ruling where the Court said that each party
15 could do whatever they wanted --
16 Q I'm sorry.
17 A -- that one party can do sampling, the other party
18 could insist on a loan file review for every single
19 individual loan. I mean, that's a morass and that is one
20 reason, one reason among many, that the trustee can conclude
21 that there is no magic to doing a loan file review both as to
22 consensus, as to what's entailed in terms of how many loan
23 files to look at as well as what the interpretation of what
24 the loan file review would be even if it's undertaken.
25 Q So, sir, direct me to any case, any case in the
26 United States in which a Court said you can't sample loan

Page 3617

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 files.
3 A I think what I've just told you is my understanding
4 of what courts have ruled, at least one Court has ruled, not
5 that no party can engage in sampling, but that both parties
6 can do whatever they want. One party could engage in
7 sampling, the other party cannot engage in sampling.
8 Q And how much money did Bank of America pay to MBIA
9 before MBIA evaluated the loan files?
10 MR. INGBER: Objection. Relevance.
11 THE COURT: Sustained.
12 Don't answer that.
13 We've got to end soon. So are we finished with
14 the loan file aspect of the questioning?
15 Q Are you familiar with the Assured V Flagstar case?
16 A Somewhat, yes.
17 Q And you're aware that case was tried with Judge
18 Rakoff here in the Southern District?
19 A I'm very aware of it.
20 Q Are you aware in that case, the plaintiff
21 re-underwrote a statistical significant sampling of loans?
22 A Yes, although I don't think that's the full context
23 of what happened in the case.
24 Q A loan file review occurred, right? You're aware of
25 that?
26 MS. PATRICK: Objection. Relevance.

Page 3618

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 Again, pointing to monoline cases where people
3 have fraud claims and are proving damages is not relevant
4 to the question of what the trustee would've had to prove
5 here. It's not relevant.
6 MR. LOESER: May I respond, your Honor?
7 THE COURT: Yeah. But I really think we've
8 kind of beat this, you know, as much as we can.
9 So what do you want to say?
10 MR. LOESER: I have a few more questions.
11 THE COURT: Yeah, but is it going to take like
12 more than two minutes?
13 MR. LOESER: No. Just to close out this rapidly
14 close line of inquiry.
15 THE WITNESS: You want me to answer?
16 THE COURT: No, no, no.
17 Just what do you want to ask?
18 Q You're aware that in the Assured V Flagstar case,
19 Judge Rakoff found in favor of the plaintiff based in part on
20 the re-underwriting sample --
21 THE COURT: Look. It's a very, very different
22 case and so -- really, what's --
23 MR. LOESER: Your Honor, the point is that a
24 loan file review is a loan file review. It's a question
25 of feasibility and whether it can be conducted or whether
26 it shows breaches and losses. So this idea that it's

1 Professor D. Fischel - by Petitioner - Cross/Loeser
2 because it's different, it's not --

3 THE COURT: But the thing is we have really
4 been through this for a very long time here, and he's not
5 the only witness. I mean, I guess you're trying to
6 convince me of certain things since that's sort of the
7 end result. I think I got what your point on this is
8 that I said earlier today. So I think you're just
9 overdoing it.

10 Look, I'm going to finish for today because we
11 have got to lock up the courtroom. It's almost 4:30. I
12 just think you can try to make your point and not overdo
13 it so much. I get it. I really do. I've been sitting
14 here all the days you have. So I get it.

15 MR. LOESER: Okay, your Honor.

16 THE COURT: Okay. Thank you.

17 Have a nice evening. You will be back again
18 tomorrow morning, Professor.

19 THE WITNESS: Yes, your Honor.

20 THE COURT: Okay. Thank you. Have a nice
21 evening, everybody. And see you tomorrow morning. Same
22 time same place.

23 (Whereupon the matter was concluded until
24 Tuesday, September 10th, 2013 at 10:00 a.m.)
25
26