

Banking and Finance Law Daily Wrap Up, TOP STORY—Bank of America fined \$1.3B for “Hustle” mortgage fraud, (Jul. 31, 2014)

By John M. Pachkowski, J.D.

U.S. District Court Judge Jed S. Rakoff has imposed a nearly \$1.3 billion civil penalty against Bank of America for the role it, and its Countrywide mortgage unit, played in defrauding Fannie Mae and Freddie Mac. Judge Rakoff also imposed a civil fine of \$1 million dollars against Rebecca Mairone, a former manager at Countrywide ([U.S. v. Countrywide Home Loans, Inc., et al.](#), July 30, 2014, Rakoff, District Judge).

Hustle program. A jury had found the defendants liable under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 for their role in a loan origination process called HSSL—High Speed Swim Lane, referred to as the “Hustle.” Under the program, loans were processed at high speed and without quality checkpoints and eliminated underwriters from loan production, even for many high-risk loans. Instead, the program relied almost exclusively on loan processors, who were less experienced and knowledgeable, and also financially incentivized to put volume ahead of quality. Bonuses were based solely on loan volume. Throughout the Hustle, Countrywide and Bank of America sold thousands of loans to Freddie Mac and Fannie Mae that they knew did not meet their representations and warranties of quality. Bank of America did not make any effort to inform Fannie Mae or Freddie Mac of these issues (see [Banking and Finance Law Daily](#), Oct. 24, 2013).

“No easy task.” In assessing the penalty, Judge Rakoff noted that it was “no easy task” since the statute—[12 U.S.C. § 1833a\(a\)](#)—provided no guidance as to how to calculate a gain or loss or how to choose a penalty within the broad range permitted by section 1833a.

How many loans? To calculate the penalty the judge needed to determine how many HSSL loans were to sold Fannie Mae and Freddie Mac. The government claimed 28,882 loans were sold and the defendants argued only 11,481 were sold. The judge determined that the defendants sold 17,611 loans based on various testimony in the trial transcript.

“Loss” or “gain.” As for determining the amount of “loss” or “gain” on the sale of the 17,611 HSSL loans, Judge Rakoff noted that the “result varies hugely depending on how broadly or narrowly one construes these terms, and what purposes they are intended to serve.” He added that FIRREA itself does not provide an adjective to modify either gain or loss other than “pecuniary.” In the end, the judge concluded that both gain and loss should be viewed simply in terms of how much money the defendants fraudulently induced the victims to pay to them. Therefore, the amount of the victims’ loss and the defendants’ gain is identical, and consists of

the price that Fannie Mae and Freddie Mac paid to Countrywide for the fraudulently misrepresented loans which actually amounted to \$2,960,737,608.

Mitigation. This upper limit of damages was reduced to the \$1,267,491,770 since the judge found, through testimony, that 57.19 percent of the HSSL loans were not materially defective. Judge Rakoff refused to mitigate the damages any further noting that the “while the HSSL process lasted only nine months, it was from start to finish the vehicle for a brazen fraud by the defendants, driven by a hunger for profits and oblivious to the harms thereby visited, not just on the immediate victims but also on the financial system as a whole” and that the “HSSL fraud, simply by itself, more than warrants a penalty of \$1,267,491,770.”

Sends a message. Commenting on the fine, Michael P. Stephens, the Acting Inspector General for the Federal Housing Finance Agency (FHFA) [stated](#), “A financial penalty such as this clearly sends the message that none of the parties involved are above the law and are in fact responsible for their actions and the harm they caused the victims, namely Fannie Mae and Freddie Mac.” He added, “Uncovering mortgage fraud, whether criminal or civil, is a lengthy and meticulous battle and it is not over. Uncovering the evidence in these schemes can be like finding a needle in a haystack, however, the needles can and have been found. My office will continue to press for criminal charges against those who have perpetrated criminal fraud, and civil charges where we find civil fraud, whether it is an individual or an institution they can and should be held accountable.” The FHFA has been acting as a conservator for Fannie Mae and Freddie Mac since 2008.

Christy Romero, Special Inspector General for the Troubled Asset Relief Program (SIGTARP), [called](#) Bank of America’s mortgage fraud “brazen, but simple” and added “[t]he severity of this penalty against Bank of America should serve as a warning that SIGTARP and our law enforcement partners will continue to join forces to protect taxpayers’ TARP investments by aggressively investigating allegations of TARP-related crime and bringing perpetrators to justice.”

Finally, Preet Bharara, U.S. Attorney for the Southern District of New York, [said](#), the “jury verdict and subsequent imposition of penalties make clear that mortgage fraud cannot be viewed as simply another cost of doing business in the financial world. This Office will continue to investigate and vigorously prosecute mortgage fraud in all of its forms using all of the civil and criminal tools at its disposal.”

The case is [No. 12-cv-1422 \(JSR\)](#).