

2d Cir. Reverses \$1.3B Penalty, Finding That Countrywide Did Not Defraud Government

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On May 23, 2016, the United States Court of Appeals for the Second Circuit reversed a \$1.3 billion civil penalty imposed against Countrywide Home Loans, Inc., Bank of America, N.A., and related defendants (collectively, “Countrywide”) under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”). Although the decision rebuffed the government’s case against Countrywide, it did not address the government’s novel interpretation that FIRREA permits civil penalties against financial institutions whose criminal conduct is “self-affecting.” FIRREA permits civil penalties against a defendant if it commits certain unlawful acts “affecting a federally insured financial institution.” Over a month-long trial, the government presented evidence that Countrywide sold poor-quality mortgages to the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”). But the Second Circuit held that the government did not prove that Countrywide entered those contracts with intent to defraud, thus failing to show a violation of the mail or wire fraud statutes as FIRREA requires. By reversing on those grounds, the Second Circuit avoided important questions regarding FIRREA’s reach.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Greg D. Andres

+1 212 450 4724
greg.andres@davispolk.com

Martine M. Beamon

+1 212 450 4262
martine.beamon@davispolk.com

Angela T. Burgess

+1 212 450 4885
angela.burgess@davispolk.com

Neil H. MacBride

+1 202 962 7035
neil.macbride@davispolk.com

Denis J. McInerney

+1 212 450 4477
denis.mcinerney@davispolk.com

James P. Rouhandeh

+1 212 450 4835
rouhandeh@davispolk.com

Linda Chatman Thomsen

+1 202 962 7125
linda.thomsen@davispolk.com

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