2005 ABN engaged in the systematic practice of "stripping" certain sanctioned country identifying information from payment messages to correspondent banks in the United States. As a result, the payments, which cleared through a U.S. entity, avoided the OFAC filtering mechanisms put in place by U.S. banks.[32] Other recent cases involving similar "stripping" practices have resulted in large fines (in some cases in excess of $500 million) levied against Lloyds TSB Bank, plc., Australia and New Zealand Bank Group, Ltd., and Credit Suisse AG. The Lloyds case is particularly notable because the bank "caused" non-affiliated entities to violate U.S. sanctions.

It is therefore important to recognize that European companies must be aware of U.S. economic sanctions laws and regulations and how they may impact their business. This is especially critical as U.S. sanctions programs continue to expand in response to various foreign policy goals. One significant step for companies to avoid deliberate or inadvertent violations of the U.S. economic sanctions laws is to implement compliance policies and procedures, even if the companies predominately conduct business through a European or other foreign entity. Companies may also chose to reassess the risks involved in conducting business in certain sanctioned countries such as Iran, particularly as the United States and the international community contemplate more extensive sanctions.

32 *See* DOJ Press Release, *Former ABM Amro Bank N.V. Agrees to Forfeit $500 Million in Connection with Conspiracy to Defraud the United States and with Violation of the Bank Secrecy Act* (May 10, 2010), available at http://www.justice.gov/PrintOut2.jsp.

*Peter E. Calamari** and *Peter Schantz***

Suing the Rating Agencies for Subrime Investment Losses: Recent Developments in the United States and a German Perspective

I. Introduction: A New Target in Subprime Litigation

The subprime crisis and subsequent market crash have given rise to substantial litigation by investors, with over 500 related lawsuits filed in the United States to date. But one group of key players, the credit rating agencies – although facing a chorus of criticism in public discussion[1] and increased scrutiny from government regulators in the United States as well as in Europe[2] – have largely watched this litigation unfold from the sidelines.

Until now. While plaintiffs have generally focused on wrongdoing by the entities that originated mortgages and sold financial products backed by those mortgages – alleging, for example, that mortgage originators fraudulently concealed their abandonment of underwriting guidelines from RMBS purchasers – investors are now turning their sights on the ratings agencies. The agencies have attracted attention given their integral role in structuring residential mortgage-backed securities ("RMBS") and collateralized debt obligations ("CDOs"), the high fees they earned for their ratings, and the drastic downgrades, often to junk levels, of subprime RMBS and CDO assets.[3] Recent disclosures of damaging internal emails also support the conclusion that the agencies fraudulently or negligently manipulated their ratings in order to generate repeat business and reap large fees.[4] Litigants have asserted claims against the agencies ranging from fraud and negligent misrepresentation to breach of contract and Securities Act violations.[5] While the ratings agencies have traditionally depended on the First Amendment's protection of freedom

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1 E.g. DER SPIEGEL, Trio Infernale, 47/2009 (Nov. 16, 2009), 72 ff.

2 *T. M. J. Möllers*, JZ 2009, 861 ff; United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Exhibits to Hearing on Wall Street and the Financial Crisis: The Role of Credit Rating Agencies, April 23, 2010, *available at* http://hsgac.senate.gov/public/_files/Financial_Crisis/042310Exhibits.pdf; United States Securities & Exchange Commission ("SEC"), Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies, July 2008, *available at* http://www.sec.gov/news/studies/2008/craexamination070808.pdf. The SEC has also implemented new regulations to control conflicts of interest in the ratings process, following the U.S. Congress's enactment of the Credit Agency Reform Act, which requires the rating agencies to implement procedures to manage conflicts of interest and gives the SEC broader oversight authority. 15 U.S.C. § 78o-7 (2006). *See* Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Credit Rating Agency Reform Act Release No. 34-55857, 17 C.F.R. §§ 240, 249b (June 5, 2007), *available at* http://www.sec.gov/rules/final/2007/34-55857.pdf, at 3.

3 "Ninety-one percent of the triple-A securities backed by subprime mortgages issued in 2007 have been downgraded to junk status, along with 93 percent of those issued in 2006 and 53 percent of those issued in 2005. On Jan. 30 of 2008 alone, Standard & Poor's downgraded over 6,300 subprime residential mortgage-backed securities and 1,900 C.D.O.'s." Editorial, What About the Raters, N.Y. TIMES, May 2, 2010.

4 U.S. Senate Subcommittee Exhibits, *supra* note 2; SEC's Summary Report, *supra* note 2.

5 Cases filed against ratings agencies arising from structured financial products – and resulting decisions – include, for example, *California Public Employees' Retirement System v. Moody's Corp.*, No. CGC-09-490241, 2010 WL 2286924/Cal. Super. Ct. May 24, 2010) *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group*, No. 08 Civ. 50932010 WL 1172964 (S.D.N.Y. March 26, 2010); *New Jersey Carpenters Health Fund v. DLJ Mortgage Capital, Inc.*, No. 08 Civ. 5653 2010 WL1473288 (S.D.N.Y. Mar. 29, 2010); *Connecticut v. Moody's Corp.* (Conn. Super. Ct. April 9, 2010) (complaint); *Connecticut v. The McGraw Hill Cos., Inc.*, No.3: 10CV00546 (Conn. Super. Ct. Mar. 10, 2010) (complaint); *Flynn ex rel. Moody's Corp. v. McDaniel*, No. 08-cv-11059, 2010 WL 624292 (S.D.N.Y. Feb. 23, 2010) (granting motion to remand); *Iowa Student Loan Liquidity Corp. v. IKB Deutsche Industriebank AG*, No. 09-cv-08822, 2009 WL 3476344 (S.D.N.Y., (complaint) Oct. 16, 2009); *Abu Dhabi Comm. Bank v. Morgan Stanley*, No. 08-cv-7508, 2009 WL 2828018 (S.D.N.Y. Sept. 2, 2009) (denying motion to dismiss fraud claims), 2009 WL 3346674 (S.D.N.Y. Oct. 15, 2009) (granting motion to dismiss contract claims but reaffirming fraud claims); *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Svcs. LLC*, No. 09-cv-1054 (S.D. Ohio Nov. 20, 2009) (complaint).

of speech to shield them from liability,[6] recent court decisions suggest that this defense may not be available to rating agencies in the context of RMBS and CDO litigation.

After a brief description of the role the rating agencies have played in the subprime crisis, this article focuses on recent disclosures about the agencies' wrongdoing and recent U.S. litigation involving the rating agencies, particularly recent decisions concerning their First Amendment defense. We conclude by outlining the uncertain question of rating agencies' liability under German law.

II. The Crucial Role of the Rating Agencies in the Subprime Securitization Industry

The ratings assigned to subprime-mortgage-backed securities such as RMBS and CDO notes were crucial to their sale and marketing. Rating agencies often collaborated with RMBS and CDO issuers and underwriters to structure investments in a manner that ensured each class of notes received the issuer's targeted credit rating.[7] Ratings were the cornerstone of securitization, since high credit ratings allowed the investment banks to market risky assets packaged into RMBS and CDOs. The rating agencies sometimes charged as much as three times more to rate RMBS or CDOs than a typical bond.[8] Such fees – which the agencies collected directly from issuers, not investors – not only caused the agencies' profits to soar,[9] but have also raised significant questions regarding conflicts of interest and collusion between agencies and the companies whose securities they rated.

On April 23, 2010, a Subcommittee of the United States Senate held hearings on the role of the rating agencies in the 2008 financial crisis. The Subcommittee released nearly 600 pages of exhibits related to the hearing, including hundreds of internal emails among Standard & Poor's and Moody's employees which collectively suggest that the rating agencies knew the securitizations they rated did not deserve their ratings.[10] The Subcommittee also made a series of startling findings of fact regarding the agencies' role in the financial crisis, as a result of its exhaustive investigation, including the following: 1) the rating agencies' models were inadequate to predict how risky mortgages would perform; 2) competitive pressures affected the agencies' ratings; 3) the agencies failed to reevaluate previously-rated RMBS and CDOs after instituting more accurate models; 4) the agencies failed to account for the increased credit risks from mortgage fraud, lax underwriting standards, and unsustainable housing price appreciation in their models; 5) the agencies failed to devote adequate resources to test their ratings; and 6) the agencies were pressured into providing AAA ratings to satisfy clients' contractual obligations.[11] We expect that these findings of fact will provide a roadmap for future litigation against the rating agencies.

The Securities and Exchange Commission ("SEC") previously investigated the rating agencies' role in the subprime crisis, issuing a report in July 2008.[12] The report concluded that "[t]he ratings agencies' performance ... raised questions about the accuracy of their credit ratings generally as well as the integrity of the ratings process as a whole."[13] The SEC found that, among other things, a conflict of interest exists where an issuer of a security pays a rating agency for a rating while, at the same time, the agency has an interest in generating business from the issuer. The report also concluded that significant aspects of the ratings process and ratings criteria are not always disclosed, and that rating agencies have weaknesses in monitoring "the accuracy of [their] ratings on an ongoing basis in order to change the ratings when circumstances indicate that a change is required."[14] Like the Senate report, the SEC report also revealed damaging internal emails from the agencies, including one where a ratings analyst expressed concern that the model being used did not capture "half" the deal's risk and noted that "it could be structured by cows and we would rate it."[15]

Other observers have been less measured than the United States government in suggesting wrongdoing by the rating agencies. As two commentators have written, "These oligopolies [the rating agencies], which are actually sanctioned by the S.E.C., didn't merely do their jobs badly. They didn't simply miss a few calls here and there. In pursuit of their own short-term earnings, they did exactly the opposite of what they were meant to do: rather than expose financial risk they systematically disguised it."[16] In May 2010, the *New York Times* ran an editorial calling on Congress to incorporate greater reforms for the rating agencies into the financial reform bills signed into law in July. The editorial stated that "It is not just that ratings agencies are incompetent, made wrong assumptions about the housing market and used flawed models to evaluate mortgage-backed securities. Their business is rife with conflicts of interest."[17]

III. Recent Lawsuits Against the Rating Agencies

A number of plaintiffs have recently filed complaints against the rating agencies arising from losses on RMBS and CDOs, with mixed success. Two New Jersey union benefit funds filed class actions in 2008 on behalf of investors in mortgage-backed securities, alleging in part that the ratings agencies violated section 11 of the Securities Act of 1933, which provides purchasers of securities with a private right of action for misrepresentations in registration statements.[18] But in both of these cases, and in other recent decisions, courts have rejected efforts to hold the rating agencies liabile as "underwriters" under section 11.[19] For example, the Southern District recently held in *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group* that rating agencies were not "underwriters," despite their alleged

6 For a doctrinal analysis that remains remarkably relevant, see *Ebenroth/Dillon*, 24 Law & Pol'y Int'l Bus. 783 (1993). Further *Husisian*, 75 Cornell L. Rev. 411, 437 ff. (1990); House Committee on Financial Services, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises Hearing: Approaches to Improving Credit Rating Agency Regulation, May 19, 2009, prepared testimony of Mr. Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA School of Law, *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/volokh.pdf.

7 *See Lowenstein*, Triple-A Failure, N.Y. Times, Apr. 27, 2008, *available at* http://www.nytimes.com/2008/04/27/magazine/27Credit-t.html (providing a detailed account of how a rating agency rates RMBS and CDOs backed by subprime assets).

8 See Canfield & Associates, Inc., The GSE Report (June 18, 2007), available at http://www.gsereport.com.

9 *Id.*; *see also Rating the Rating Agencies*, The Economist, May 31, 2007, *available at* http://www.economist.com/finance/displaystory.cfm?story_id=9267952.

10 U.S. Senate Subcommittee Exhibits, *supra* note 2.

11 *Id.* pp. 24-25 (Exhibit #1a, pp. 10-11).

12 SEC report, *supra* note 2.

13 *Id.*

14 *Id.* at 13, 21, 23.

15 *Id.* at 13.

16 *Lewis/Einhorn*, The End of the Financial World as We Know It, N.Y. Times, Jan. 3, 2009.

17 *Supra* note 3.

18 *New Jersey Carpenters Vacation Fund v. The Royal Bank of Scotland Group, plc*, No. 08-cv-5093 (HB) (S.D.N.Y. Mar. 26, 2010) (granting motion to dismiss in part and denying in part); *New Jersey Carpenters Health Fund v. DLJ Mortgage Capital, Inc.*, No. 08-cv-05653 (S.D.N.Y. Mar. 29, 2010) (granting motion to dismiss in part and denying in part).

19 *Id.*

pre-issuance involvement in structuring the deals, because they were not the conduit through which securities were sold.[20]

Other complaints have been more successful. For example, in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, several institutional investors asserted claims against the rating agencies for common-law fraud, negligent misrepresentation and breach of contract. As discussed in more detail below, a recent decision of the Southern District of New York dismissed the negligent misrepresentation and breach of contract claims against the agencies but allowed the fraud claims to proceed.[21]

State governments and agencies have also begun to file complaints against the rating agencies. The State of Connecticut filed suit against Moody's and S&P in March 2010, as did state pension funds in California and Ohio.[22] These opinions reflect a new development in litigation against the agencies by alleging claims solely against the rating agencies; most prior litigants sued the agencies in addition to other parties involved in a transaction, such as issuers and underwriters. The California action alleges that the ratings assigned to various structured investment vehicles were "wildly inaccurate and unreasonably high" and caused the fund to suffer over $1 billion in losses.[23] Similarly, the Ohio Attorney General has brought claims on behalf of Ohio pension funds alleging that the ratings agencies assigned "unjustified and inflated ratings in exchange for ... lucrative fees," causing hundreds of millions of dollars of losses to investors.[24] The Attorney General of Ohio was quoted as saying, "We believe that the credit rating agencies, in exchange for fees, departed from their objective, neutral role as arbiters."[25]

Investors seeking to impose liability on the rating agencies face a number of legal obstacles, though some courts have recently responded favorably to claims against them. In the past, rating agencies avoided liability by arguing, among other defenses, that ratings are merely forecasts, not actionable representations of fact, and that investors' reliance on the agencies' ratings is unreasonable given the host of disclaimers accompanying the ratings. For example, the Seventh Circuit rejected a investor's negligent misrepresentation claim against S&P with respect to a collateralized mortgage obligation rating, finding that disclaimers in the offering materials "should have alerted [the plaintiff] to the fact that he was responsible for doing his own homework about the risks he was assuming."[26] Rating agencies have also defeated negligent misrepresentation claims by arguing that they lacked privity with investors and thus had no duty of care.[27]

IV. The First Amendment: Cracks in the Ratings Agencies' Defensive Armor

The rating agencies have also traditionally argued that the First Amendment shields them from liability. This defense involves two distinct yet interrelated arguments: (i) the rating agencies' published ratings involve statements of opinion relating to matters of public concern and are thus protected expressions under the First Amendment, and (ii) to the extent the agencies made assertions of fact concerning a public issue, investors must show that these statements were made with "actual malice" (thus precluding recovery for mere negligence). Courts have historically been receptive to these arguments, dismissing claims against the rating agencies on the grounds that their ratings are non-actionable, constitutionally protected opinions.[28]

However, as the courts have begun to acknowledge, there is a significant distinction between the traditional rating agency function – rating public securities which are publicly disseminated and targeted to the investing public at large – and the ratings assigned to structured financial products, which are assigned in return for a hefty fee and targeted to a select class of private investors.[29] In *Abu Dhabi*, the Southern District of New York rejected the rating agencies' motion to dismiss plaintiffs' claims for common law fraud, holding that the First Amendment defense did not apply where "a rating agency has disseminated their ratings to a select group of investors rather than the public at large."[30]

Similarly, in *In re National Century Financial Enterprises, Inc.*, the Court held that Moody's would not enjoy First Amendment protection against negligent-misrepresentation claims where credit ratings were not disseminated to the public at large but rather only to a limited number of potential investors. Moody's argued that "liability cannot be imposed on a financial publisher

20 No. 08-cv-5093 2010 WL 1473288 (S.D.N.Y. Mar. 26, 2010); *see also, e.g., In re Lehman Brothers*, No. 08-cv-5093, 2010 WL 1172964, at *6 (S.D.N.Y. Feb. 17, 2010) (rating agencies are not "underwriters" or "sellers" despite their alleged role in structuring mortgage-backed securities and influencing the selection of mortgage loans and credit enhancements, since they were not involved in purchasing securities from the issuer or selling the securities) and, most recently, *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, No. 08 Civ. 10841(JSR), 2010 WL 2175875, at *4 (S.D.N.Y. June 1, 2010) (following *In re Lehman Brothers* and arguing holding rating agencies responsible as "underwriters" under section 11 would render their exception from expert liability under this provision by SEC Rule 436(g)(1) "effectually nugatory").

21 Abu Dhabi Comm. Bank v. Morgan Stanley, No. 08-cv-7508, 2009 WL 2828018 (S.D.N.Y Sept. 2, 2009) (denying motion to dismiss fraud claims), 2009 WL 3346674 (S.D.N.Y. Oct. 15, 2009) (granting motion to dismiss contract claims but reaffirming fraud claims).

22 *Connecticut v. Moody's Corp.*, No. 3:10 CV 00546 (Conn. Super. Ct. April 9 10, 2010) (complaint); *Connecticut v. The McGraw Hill Cos., Inc.* (Conn. Super. Ct. March 10, 2010) (complaint); *California Pub. Employees' Retirement Sys. v. Moody's Corp.*, No. CGC-09-490241 (Cal. Super. Ct. July 9, 2009) (complaint); *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Svcs. LLC*, No. 09-cv-1054 (S.D. Ohio Nov. 20, 2009) (complaint).

23 *California Pub. Employees Retirement Sys.*, complaint, at 1.

24 *Ohio Police & Fire Pension Fund*, complaint, at 2.

25 *Segal*, Ohio Sues Rating Firms for Losses in Funds, N.Y. TIMES, Nov. 20, 2009.

26 *Quinn v. McGraw-Hill Cos.*, 168 F. 3d 331, 336 (7th Cir. 1999).

27 See, e.g., In re Enron Corp. Sec., Deriv. & ERISA Litig., 511 F. Supp. 2d 742, 826–27 (S.D. Tex. 2005) (finding that ratings agency defendants owed no duty of care to plaintiffs).

28 *See, e.g., Compuware Corp. v. Moody's Investors Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (finding that a "Moody's credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors," and therefore could not "communicate[] any provably false factual connotation"); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 853 (10th Cir. 1999) (dismissing claims for tortious interference, injurious falsehood, and antitrust violations because Moody's credit ratings are "protected expressions of opinion"); *In re Enron Corp.*, 511 F.Supp.2d 742; *County of Orange v. McGraw Hill Cos.*, 245 B.R. 151, 157 (C.D. Cal. 1999) ("[T]he First Amendment protects S&P's preparation and publication of its ratings.").

29 Cases declining to grant First Amendment defense: *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 762 (1985) (credit report published to five subscibers and intended only for a "specific business audience"); *Abu Dhabi*, 2009 WL 2828018 (common law fraud in rating of notes in structured investment vehicle comprised of asset backed securities, RMBS and CDOs); *In re Fitch, Inc.*, 330 F.3d 104 (2d Cir. 2003) (assertion of journalist's privilege in response to discovery reguests); *In re Nat'l Century Fin. Enterprises, Inc.*, 580 F.Supp.2d 630 (S.D. Ohio 2008) (negligent misrepresentation in ratings of notes secured over healthcare receivables); *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F.Supp. 1071 (S.D.N.Y. 1996) (securities fraud and negligent misrepresentation in ratings of bonds secured by healthcare receivables); *In re Taxable Mun. Bond Sec. Litig.*, No. MDL 863, 1993 WL 591418 (E.D. La. Dec. 29, 1993 (third-party contribution claims for securities fraud where ratings agencies hired to rate regular municipal bonds); *California Pub. Employees' Ret. Sys. v. Moody's Corp.*, No CGC-09-490241, 2010 WL 2286924 (Cal. Super. Ct. May 24, 2010); *Commercial Fin. Services, Inc. v. Arthur Andersen LLP*, 94 P.3d 106 (Okla. Civ. App. 2004) (auditor's third-party contribution claim against ratings agency for ratings of notes secured over pools of bad debt).

30 *Abu Dhabi*, 2009 WL 2828018 at *9.

who disseminates information to the investing public" and that "its credit ratings are a matter of public concern and therefore entitled to First Amendment protection."[31] The court, however, found that "the complaint does not allege that the ratings . . . were published to the investing public at large. Rather, the notes were issued by a privately-held company," to a select class of institutional investors, and the ratings only appeared in offering materials given to those investors.[32]

Courts have also recently rejected the argument that the agenies' ratings are non-actionable opinions. In a much-discussed April 2009 decision, a New York trial court upheld fraud claims against a CDO issuer and collateral manager (the agencies were not sued) and observed that "The ratings by Moody's and S&P are not just predictions of future valuation but a present analysis of current valuation. Such ratings have been highly regarded and eagerly sought for years. To characterize them merely as predictions or opinions would undercut the necessary reliability such ratings furnish in the world of credit."[33] The court in *Abu Dhabi* likewise rejected an argument that ratings constituted non-actionable opinions, finding that plaintiffs had sufficiently pled that the rating agencies "did not genuinely or reasonably believe that the ratings they assigned ... were accurate and had a basis in fact."[34] The court noted that "the market at large, including sophisticated investors, have come to rely on the accuracy of credit ratings and the independence of rating agencies because of their NRSRO status and, at least in this case, the Rating Agencies' access to non-public information that even sophisticated investors cannot obtain. Plaintiffs accordingly have adequately pled their reasonable reliance on the ratings."[35]

In *LaSalle National Bank v. Duff & Phelps Credit Rating Company*, the Southern District also rejected a rating agency's argument that its ratings were mere opinions, reasoning that the issuer had hired the agency "specifically to rate the Bonds with the 'AA' rating required by the Offering Memoranda."[36] And in *Arthur Andersen*, the court noted that "[w]hile the Rating Agencies gave 'opinions,' they did so as professionals being paid to provide their opinions to a client. If a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if [the sponsor] hired that journalist to write a company report about the bonds, a different standard would apply."[37] Other courts have also held that not all ratings are opinions relating to matters of public concern.[38]

V. *Abu Dhabi*: Opening the Floodgate for Fraud Claims?

The *Abu Dhabi* opinion is particularly significant because, in holding that plaintiffs had sufficiently pled all the necessary elements of their fraud claim, the decision opens the door to future fraud claims against the rating agencies arising from their ratings of CDOs and RMBS, also creates a guide for futute fraud claims. First, the Court pointed to the "conflicts of interest that arise when rating agencies rate entities in which they have a financial stake," finding that the "Rating Agencies had the motive and opportunity to communicate these allegedly false and misleading ratings to potential investors" because they knew that if they declined to assign the securities the high rating that the underwriter required, the underwriter would have taken its business elsewhere. The Court also noted that the compensation received by the rating agencies was more than three times their normal fees and increased in tandem with the growth of the structured product at issue. Finally, the Court found it significant that the rating agencies were paid only if they assigned the securities the desired ratings and only if the transaction ultimately closed with those ratings. These facts were sufficient to infer fraud on the part of the rating agencies even under the heightened pleading standard applicable to fraud claims.[39]

The factual allegations in *Abu Dhabi* are substantially similar to the Senate Subcommittee's findings of fact in its recent investigation of the rating agencies; those findings of fact also provide a guide to future allegations against the agencies.[40] Most courts previously rejected fraud claims against the rating agencies arising from their role in rating and structuring financial products,[41]

31 *In re Nat'l Century*, 580 F.Supp.2d at 639.

32 *Id.* at 640; *see also, e.g., In re Fitch*, 330 F.3d at 111 (rejecting Fitch's attempt to avoid third-party discovery on the basis of New York's journalist privilege because Fitch only reported on specific transactions when hired to do so, not because of "a judgment about newsworthiness," and because Fitch takes an active role in structuring the transactions it analyzes, which is inconsistent with the traditional journalistic role); *California Pub. Employees' Ret Sys. v. Moody's Corp.*, No CGC-09-490241, 2010 WL 2286924 (Cal. Super. Ct. May 24, 2010) (rejecting First Amendment protection because the SIV's rating were not "an issue of public concern. Rather, it is an economic activity designed for a limited target for the purpose of making money. That is not something that should be afforded First Amendment protection and the Defendants are not akin to members of the financial press.").

33 *M&T Bank Corp. v. Gemstone CDO VII, Ltd.*, No. 7064/08, 2009 WL 921381 (NY Sup. Ct. Apr. 7, 2009) (granting motion to dismiss in part and denying motion in part); 2009 WL 5127940 (4th Dept. Dec. 30, 2009) (upholding fraud claims).

34 *Abu Dhabi*, 2009 WL 2828018 at *9.

35 *Id.* at *13; *see also Pursuit Partners v. UBS AG*, No. X05CV084013452S, 2009 WL 3286011 at *1 (Conn. Super. Ct. Sept. 8, 2009) ("Ratings agencies are a vital part of the securities market, and their ratings greatly influence the market . . . . Markets react, often dramatically, to the increased or decreased likelihood of default when a rating changes."); *Arthur Andersen LLP*, 94 P.3d at 110 ("While the Rating Agencies gave 'opinions,' they did so as professionals being paid to provide their opinions to a client. If a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if [the sponsor] hired that journalist to write a company report about the bonds, a different standard would apply.").

36 *LaSalle Nat'l Bank*, 951 F. Supp. at 1085.

37 *Arthur Andersen LLP*, 94 P.3d at 110.

38 *See In re Taxable Mun. Bond*, 1993 WL 591418, at *5 ("foreclos[ing] any further pursuit" by S&P of its theory that its ratings are protected opinions); *First Fin. Sav. Bank, Inc. v. Am. Bankers Ins. Co. of Fla., Inc.*, No. 88-33-cv-5, 1989 WL 168015, at *5 (E.D.N.C. Aug. 4, 1989) (informing S&P that "any further discussion" of their argument that "its ratings are opinions, not representations of fact, and thus cannot be actionable, as well as its argument that its opinions are protected by the First Amendment . . . will be a waste of paper").

39 *Abu Dhabi*, 2009 WL 2828018 at *11-12. However, the Court dismissed plaintiffs' negligent misrepresentation claim, finding this cause of action was preempted by New York's Martin Act, and dismissed the breach of contract claims, finding that plaintiff investors were not third-party beneficiaries of the services contract between the ratings agencies and the issuer or the underwriter. *Id.* at 13-14.

40 *Supra* note 2.

41 *See, e.g., In re Lehman Bros.*, No. 09MD2017, 2010 WL 545992, at *4 (S.D.N.Y. Feb. 17, 2010) (failure to disclose, in part, that the rating agencies structured the loan pools underlying securities is not actionable; no obligation to disclose the possible conflict of interest from the rating agencies' payment by issuers because the fee relationship "has been known publicly for years"); *In re Nat'l Century*, 580 F.Supp.2d at 642-44 (finding the element of scienter to be lacking and holding that the complaint "fails to allege that [the rating agency] knew or recklessly disregarded that its note ratings were not factually well-grounded"); *In re Enron Corp.*, 511 F. Supp. 2d at 816 (finding that "generally the courts have not held credit rating agencies accountable for alleged professional negligence or fraud and that plaintiffs have not prevailed in litigation against them"); *In re Republic Nat'l Life Ins.*, 387 F. Supp. 902, 905 (S.D.N.Y. 1975) (plaintiff did not assert he knew of or relied on S&P's publications in deciding to purchase; no allegation that S&P had any greater access to information than the public did, or that it actually participated in the fraud). *But see In re Moody's Corp.*, 599 F. Supp. 2d 493 (S.D.N.Y. 2009) (upholding fraud claims against Moody's, in part, based on conflicts of interest and actionable misstatements about independence and methodology; sufficient circumstantial evidence of scienter against CEO); *LaSalle Nat'l Bank*, 951 F. Supp. 1071 (sustaining fraud claims against a rating agency where there was a relationship between the agency and the rated company, the rating

but *Abu Dhabi* may signal a new era of expanded liability.[42] While this decision represents an important precedent, the case law remains uncertain regarding the scope of the rating agencies' liability, and the case law on this issue will continue to evolve as cases are resolved.

VI. Liability of Rating Agencies under German Law

Under German law, the question of the liability of rating agencies to investors is largely unsettled at the moment.[43] However, constitutional rights such as freedom of speech and the press do not provide the rating agencies with a liability shield under German law as impermeable as the First Amendment has been in the United States, at least historically. First of all, the Basic Law *(Grundgesetz)* itself enables the legislature to limit the freedom of speech and the press by means of general laws (Art. 5 (2)) such as tort or contract law. Secondly, German constitutional law tends to apply the approach of balancing conflicting legal interests, while the U.S. Supreme Court prefers clear-cut limitations of the First Amendment in order to prevent an unnecessary deterrent effect on the speaker.[44] Therefore, in Germany the liability of rating agencies towards investors is not an issue of constitutional law but of civil law.

The new Regulation on Credit Rating Agencies enacted by the EU in November 2009 remains silent on the crucial question of the agencies' liability and leaves the answer to the Member States.[45] Since securities regulations (such as § 34 b of the Securities Trading Act [WpHG] concerning financial analysts[46] or §§ 44, 45 Stock Exchange Act [Börsengesetz]) are not applicable to rating agencies,[47] their liability towards investors is an issue of non-contractual liability for pure economic loss and expert liability.[48] Scholarly approaches to the topic have searched for a "third way" between tort and contract law based on reasonable reliance, which now may find a statutory basis in § 311 (3) of the German Civil Code (BGB). However, in cases of expert liability, the Federal Court of Justice (BGH) prefers a contractual solution. If the purpose of a representation by an expert who has been contractually engaged is to guide third parties, then the courts define these parties as third-party beneficiaries, to whom the expert is liable for negligent misrepresentation. In a recent decision, the Federal Court of Justice affirmed the liability of an expert who gave an opinion on the value of a real estate project, which was financed by issuing securities, towards the bondholders.[49] As the role of rating agencies in subprime securitization is not dissimilar, an action based on these rulings might seem to be promising.[50] The rating agencies will most likely respond by referring to their extensive and detailed disclaimers[51] and by denying the applicability of German Law.[52]

In the only court decision available to date, the Higher Regional Court of Berlin *(Kammergericht)* ruled on an action brought by an investment corporation that defended itself against a bad rating for one of its mutual funds. However, the rating concerned did not evaluate the creditworthiness of the fund, but rather its quality.[53] The Court drew an analogy to the German consumer organization *Stiftung Warentest* in defining the standard of care as comprising neutrality, objectivity and expertise. However, the crucial questions of liability towards investors remain untouched by the judiciary. Fearing to open the floodgates to unlimited liability on the part of an unlimited class of plaintiffs, many commentators are still hesitant to favor rating agencies' liability towards investors.[54] This makes the recent American rulings all the more important, since they may help to allay these fears.

VII. Conclusion and Outlook

The rating agencies' First Amendment defense has been eroded, as the recent rulings in the *Abu Dhabi* case and earlier cases have shown, while recently-disclosed internal emails from the rating agencies seem to confirm allegations that they were at least negligent, if not fraudulent, in issuing overly optimistic ratings on risky investments due to a self-interested desire to generate lucrative fees. We expect cases against the agencies will continue to be filed and that future successes in court are more likely, based on recent precedents, though the outcome of current and future litigation against the rating agencies is uncertain and hurdles remain.

The implications of recent legal successes against the rating agencies cannot be overstated. If investor suits against the agencies continue to experience success and proceed through the courts, Moody's, Standard & Poor's (together with its parent, McGraw Hill) and Fitch could each potentially be liable to investors for hundreds of billions of dollars in losses stemming from failed subprime-mortgage-backed structured investments. A successful suit against any of the rating agencies in the United States would also have serious ramifications on European perspectives on the agencies' legal accountability. Since European investors relied on the agencies' ratings when they purchased securities such as RMBS and CDOs, and given that other litigation trends have spread to Europe, such as securities fraud actions and damage claims against tobacco companies, we expect to see actions filed against the rating agencies in Germany. In June 2010, the first one has been brought before the *Landgericht Frankfurt* by retail investors who bought structured products issued by Lehman Brothers.[55] However, it is difficult to estimate the chances of success of such investor suits in Germany, since there have been no court rulings on the agencies' liability to investors thus far and commentators are divided on the question.

agency had access to inside information about the company, and the agency knew of wrongdoing or was reckless in not knowing; but distinguishing this case from those involving First Amendment concerns).

42 In this case the rating agencies had an unusually active role in the ratings, since they were involved in choosing collateral and "monitored the [structured interest vehicle's] portfolio and provided instructions on which types of assets [it] could acquire," *Abu Dhabi*, 2009 WL 2828018 at *3-4, but courts could adopt some or all of the reasoning of *Abu Dhabi* in circumstances where the agencies did not monitor the investment's portfolio or were otherwise less closely involved in the transactions.

43 *See, e.g. Emmerich*, in: Münchener Kommentar, BGB, 5th Ed., 2006, § 311, Rn. 259.

44 *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 342 (1974).

45 *See* Recital No. 69, Regulation (EC) No 1060/2009, Official Journal EU L 302/1 (17 November 2009).

46 *Findeisen*, DAJV-Newsletter 2008, 64, 66 ff.; *Göres*, in: Habersack/Mülbert/Schlitt, Handbuch der Kapitalmarktinformation (2008), § 25, Rn. 20; a.A. *Holzborn/Israel*, WM 2004, 1948, 1951.

47 *Göres*, in: Habersack/Mülbert/Schlitt, Handbuch der Kapitalmarktinformation (2008), § 31, Rn. 70; *Deipenbrock*, BB 2003, 1849, 1854; *Habersack*, ZHR 169 (2005), 185, 206; *Fleischer*, Gutachten zum 64. Deutschen Juristentag (2002), F 140.

48 For a comparative legal analysis, see *Coester/Merkesinis*, 51 Am. J. Com. L. 275 (2003).

49 BGH, 20. 4. 2004 – X ZR 250/02, BGHZ 159, 1.

50 *Habersack*, ZHR 169 (2005), 185, 207; *Göres*, in: Habersack/Mülbert/Schlitt, Handbuch der Kapitalmarktinformation (2008), § 31, Rn. 64 ff.

51 There are serious doubts about their validity, c.f. *Wildmoser/Schiffer/Langoth*, RIW 2009, 658, 662 f.; *v. Schweinitz*, WM 2008, 953, 957.

52 *Wildmoser/Schiffer/Langoth*, RIW 2009, 658, 666 ff.

53 KG, 12.05.2006 – 9 U 127/05, WM 2006, 1432.

54 *See, e.g. Fleischer*, Gutachten zum 64. Deutschen Juristentag (2002), F 141; *Vetter*, WM 2004, 1701, 1711; *von Randow*, ZBB 1995, 140, 150; *Hennrichs*, in: Festschrift für Hadding (2004), 890.

55 Handelsblatt, June 7, 2010.

Im Rahmen der Reihe zu den verschiedenen Programmen zur Ausbildung im US-amerikanischen Recht und der englischen Rechtssprache an deutschen Universitäten wird in dieser Ausgabe das Programm an der Julius-Maximilians-Universität Würzburg vorgestellt. Weitere Beiträge finden sich zu den Programmen der Heinrich-Heine-Universität Düsseldorf (DAJV-NL 2009, 191) und der Universität Osnabrück (DAJV-NL 2009, 135).

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Rechtsenglisch und anglo-amerikanisches Recht in Würzburg

Würzburg befindet sich seit ein paar Jahren in einer regelrechten Fachsprachenoffensive, um seine Würzburger Studierenden gezielt und mit großem Einsatz auf spätere Tätigkeiten auf internationalem Parkett vorzubereiten. So hat Würzburg seine Angebote auf dem Gebiet der Fachsprachen und der Vermittlung von Kenntnissen im englischen und US-amerikanischen Recht in den vergangenen drei Jahren fast vervierfacht.[1] Zusätzlich zu den theoretischen Grundlagen wurde die Ausbildung in Würzburg in enger Zusammenarbeit mit zwei internationalen Großkanzleien auch den Erfordernissen der Praxis angepasst. Würzburg zählt damit heute zu den Universitäten, die der Ausbildung im Bereich Fachsprache und ausländisches Recht herausragende Bedeutung zumessen.

Die Grundlagen: Rechtsenglisch und ILEC

Wo vor Jahren lediglich eingliedrige Veranstaltungen zur englischen Rechtssprache in das Curriculum integriert waren, bauen jetzt Rechtsenglisch I, Rechtsenglisch II und Rechtsenglisch III aufeinander auf und führen zur Teilnahme an der externen Cambridge Prüfung ILEC (*International Legal English Certificate*). Die Veranstaltungen zur englischen Rechtssprache werden für die Stärkung der schriftlichen und mündlichen Fähigkeiten der Studierenden von „Legal Writing" und „Discussing US Legal Issues" flankiert. In den vergangenen drei Terminen haben bereits 42 Würzburger Studierende erfolgreich die ILEC-Prüfung abgelegt. Das ILEC-Zertifikat attestiert ihnen damit je nach Leistung ein Niveau B2 oder C1 nach dem Europäischen Referenzrahmen für sprachliche Kompetenz.

Die Veranstaltung Rechtsenglisch I wird wahlweise semesterbegleitend verblockt in den Semesterferien und zu Beginn eines jeden Semesters angeboten. Da in Würzburg keine sprachlichen Einstufungstests durchgeführt werden, richtet sich letztere an Studierende, die bereits über überdurchschnittliche Englischkenntnisse verfügen und daher das Pensum der ersten Rechtsenglischveranstaltung zügiger bearbeiten können. Die Veranstaltung „Übung zum Übersetzen englischer juristischer Texte" greift die in den anderen Veranstaltungen gelegten Grundlagen des juristischen Übersetzens auf und arbeitet sie anhand verschiedener juristischer Originaltexte weiter aus.

Veranstaltungen zum englischen Recht

Bereits seit über zehn Jahren findet in Würzburg eine „Einführung in das englische Recht" statt. Sie baut sprachlich mindestens auf der Veranstaltung Rechtsenglisch I auf und kann auch in das Würzburger Begleitstudium im Europäischen Recht eingebracht werden. Im Anschluss an eine allgemeine Einführung stehen Veranstaltungen zu spezielleren Themen, wie z.B. „English Law of Torts" oder „English Constitutional Law".

Veranstaltungen zum US-amerikanischen Recht

Auch zum US-amerikanischen Recht wird in Würzburg eine 2-stündige Einführungsveranstaltung angeboten, die einen ersten Überblick bietet in die Verankerung des US-amerikanischen Rechts innerhalb des common law und seiner geschichtlichen Entwicklung, dessen Rechtsquellen und juristische Methoden. Darauf folgt eine Einführung in das US-amerikanische Verfassungsrecht, Gerichtsaufbau und gerichtliche Zuständigkeit in Zivil- und Handelssachen, sowie Vertragsrecht, Deliktsrecht und Kreditsicherungsrecht. Im Anschluss an diese Einführungsveranstaltung können die Würzburger Studierenden ihre Kenntnisse in den ein-stündigen „BT"-Veranstaltungen

- US Constitutional Law
- US Civil Procedure
- US Commercial Law und
- Transatlantic Litigation (ab WS 2010/11)

vertiefen. Vor allem in den für fortgeschrittene Studierende geeigneten Lehrveranstaltungen zum englischen und US-amerikanischen Recht werden Studierende für das im Folgenden beschriebene Programm „Law School meets Practice" ausgewählt.

Das Programm „Law School Meets Practice"

Eine weitere Besonderheit im Würzburger Angebot ist das Programm „Law School meets Practice". In Zusammenarbeit mit einer englischen und einer US-amerikanischen Großkanzlei haben wir uns hier seit 2008 das Ziel gesetzt, die akademische Ausbildung im Bereich des anglo-amerikanischen Rechts näher an die Praxis heranzuführen und unsere Studierenden auf die speziellen Erfordernisse für die Arbeit in der internationalen Großkanzlei vorzubereiten. Inhaltlich orientieren sich die Beiträge der beiden Kanzleien im Zeitraum WS 2009/10 bis WS 2010/11 an den Themen

- Negotiations (WS 2009/10)
- Compliance (SS 2010)
- ADR/Arbitration (WS 2010/11)

Beide Kanzleien halten jedes Semester in Würzburg jeweils einen Vortrag zum betreffenden Thema, woraufhin eine Gruppe ausgesuchter Würzburger Studierender in eines der Büros der Kanzleien fährt, um dort mit Hilfe so genannter Mock Cases das theoretisch Erlernte unter Anleitung der erfahrenen Anwälte an einem praktischen Fall (und in englischer Sprache) umzusetzen. Themen des vergangenen Semesters waren beispielsweise „Getting the Deal Done – Konstruktives Verhandlungsmanagement" oder „Banking & Bargaining across Borders". Im Anschluss an die beiden Vorträge wurden im Frankfurter Büro der einen Kanzlei ein M&A-Deal und ebenfalls im Frankfurter Büro der anderen Kanzlei Vertragsverhandlungen einer internationalen Projektfinanzierung simuliert.

1 Ebenfalls ausgebaut wurden die Würzburger Angebote zum französischen, italienischen, spanischen, russischen, polnischen und türkischen Recht und Rechtssprache.