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Liability of credit rating agencies: regulatory changes and tendencies in case law following the financial crisis

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***I.C.C.L.R. 87 Introduction**

Incorrect ratings of structured products contributed to the collapse of the subprime mortgage market in the US, which eventually led to the 2008 global financial crisis.¹ Investors are currently trying to hold credit rating agencies (CRAs) liable for their role in the crisis. However, imposing liability upon CRAs has not been straightforward for a long time. CRAs, for example, argue that ratings are only predictive opinions and thus protected speech under the First Amendment of the Constitution of the US. Furthermore, CRAs often invoke disclaimers accompanying their ratings to refute any liability towards investors.

Following the 2008 financial crisis, several changes have occurred in financial legislation and case law dealing with the liability of CRAs. This article sheds light on some of these changes. For instance, courts do not any longer accept that CRAs can always invoke the "traditional defences" to dismiss liability claims (in the third part of the article). The EU and the US have also adopted legislation which introduces a private cause of action against CRAs (fourth part). The article subsequently takes a comparative approach and briefly examines some issues often at stake in cases dealing with the liability of CRAs. More specifically, it seems that CRAs will only incur liability towards a select class of (qualified) investors who reasonably or justifiably relied on the rating (fifth part). Prior to that analysis, the role of CRAs is briefly discussed (second part).²

The role of CRAs as financial intermediaries in capital markets

CRAs evaluate the creditworthiness of financial instruments or the issuers of such instruments.³ They examine the risk that the payment of interests and capital will not or not completely take place at the promised time.⁴ CRAs thus predict the ability of an entity to meet its financial obligations with regard to the financial instruments it issues.⁵ CRAs such as Standard & Poor's (S&P), Moody's or Fitch issue ratings in the form of a letter or alphabetic symbol. The higher the given rating, the lower the credit risk for investors. The highest rating on long-term debt securities is generally AAA (triple A), followed by ratings descending to BBB or below (junk rating).⁶

By rating financial instruments, CRAs help to reduce informational asymmetries between lenders and investors on one side and borrowers or issuers on the other side.⁷ Investors, who in most cases do not have the capacity or time to examine and evaluate the quality of financial instruments or the creditworthiness of the issuer of such instruments, use the ratings issued by the CRAs to make investment decisions. ***I.C.C.L.R. 88**⁸

The use of traditional defences against the liability of CRAs

First Amendment protection for rating "opinions"

Rating reports generally stipulate that ratings are no absolute assurances of credit quality or exact

measures of the probability that an issuer or financial products will default. Ratings are forward-looking and predictive opinions about the ability and willingness of an issuer to meet his financial obligations. Ratings do not recommend purchasing or selling securities.⁹ Therefore, CRAs consider themselves as members of the financial press and ratings as opinions, which do not contain any provably false facts. According to them, ratings are the "world's shortest editorials" ever written on the creditworthiness of a company.¹⁰ As a consequence, CRAs often argue that they should be given full First Amendment protection.¹¹

Courts do not, however, always qualify ratings as non-actionable opinions fully protected by the First Amendment.¹² First Amendment protection is not absolute or unconditional only because a rating is labelled "opinion". Ratings can imply an assertion of an objective fact that may be false or that can be coupled with false factual assertions.¹³ The court in *California Public Employees' Retirement System (CalPERS) v Moody's Corp*, for example, agreed with the plaintiffs that ratings are not mere predictions of the future value of structured investment vehicles (SIVs). Rather, they are affirmative representations¹⁴ regarding the present state of the SIVs' financial health and capacity to provide payments to investors as promised.¹⁵

If the falsity of the rating can be demonstrated, CRAs often claim that their ratings are protected by the actual malice standard under the First Amendment.¹⁶ The actual malice standard implies that CRAs are only liable if the plaintiff (e.g. issuer or investor) is a public figure and the rating a matter of public concern issued "with knowledge that it was false or with reckless disregard of whether it was false or not".¹⁷

A rating is a matter of public concern the moment CRAs make it available to the benefit of the public at large¹⁸; in other words, when it is distributed "to the world" (internal quotation marks omitted).¹⁹ A rating is thus protected under the actual malice standard if it involves a strong interest in the free flow of commercial information.²⁰ Ratings are on the other hand a matter of private concern and not protected by the actual malice standard if they are issued "solely in the individual interest of the speaker and its specific business audience".²¹ This is the case when credit ratings are privately contracted between the CRA and a "select group of qualified investors" or intended for use in private placement **I.C.C.L.R. 89* offerings to only a very limited number of persons, rather than for publication in the interest of the general investing public.²²

Two other factors also shape the boundaries of the First Amendment protection given to ratings, namely the involvement of CRAs in structuring securities and the extent to which they have been paid by the issuer to rate the securities.²³ In *In re Fitch*,²⁴ the Court of Appeals for the Second Circuit upheld a lower court decision,²⁵ according to which the dissemination of the rating was not based on a CRA's judgment about newsworthiness but on the needs of its client. The court considered that it was the issuer and not the subscribers who had to pay for the rating. Moreover, Fitch was actively involved in structuring the securities and planning the transaction. Such communication revealed a level of involvement by the CRA in the transactions of its client that is not typical for the relationship between a journalist and the activities upon which the latter reports.²⁶

Ratings of structured finance leading to the financial crisis are and will thus be protected by the First Amendment if they have been made available to the benefit of the general public, if CRAs have not been involved in creating the securities which they subsequently rate and if they have not received rating fees "contingent upon the receipt of desired ratings [for such securities] and only in the event that the transaction closed with those ratings".²⁷

The Bathurst case—lack of reasonable grounds to issue the rating

The question whether a rating is an opinion or (actionable) advice was also at stake in the Australian *Bathurst* case.²⁸ The court held that a rating is an opinion on the creditworthiness of a financial product. It is issued by a professional entity which claims and represents itself as having expertise in assessing the creditworthiness of financial products. It is neither a guarantee, nor a statement of fact or advice whether or not to invest.²⁹ This does, however, not mean that CRAs can always invoke the "mere opinion-argument". Rather, the *Bathurst* decision underlined that CRAs knew that the intended recipients of the rating, namely the investors to whom the securities were sold, would rely on it when making decisions. The rating conveyed an "extremely strong" representation that S&P believed that the securities were capable to meet their financial commitments.³⁰ Moreover, the assignment of the highest rating carried with it a "representation that S&P has a genuine and reasonable basis, formed following the application of its expertise, for reaching the conclusions that it reached".³¹ As such, a

rating, whether or not qualified as opinion, will be actionable if it is not based on reasonable grounds and the result of a CRA's lack of reasonable care and skill.

Disclaimers in rating agreements and reports

Besides relying on the First Amendment, CRAs often invoke disclaimers in rating reports or agreements to refute liability towards deceived investors. However, a comparative analysis of case law shows that disclaimers excluding the liability of CRAs are not always opposable towards investors or per se valid only because CRAs claim they are.

The *Abu Dhabi* court held that ratings were actionable opinions. The plaintiffs sufficiently pled that the CRAs did not genuinely or reasonably believe that the ratings were accurate and had a basis in fact. Disclaimers stipulating that a "rating represents a [CRA's] opinion regarding credit quality and is not a guarantee of performance or a recommendation to buy, sell or hold any securities" are therefore "unavailing and insufficient to protect [CRAs] from liability for promulgating ***I.C.C.L.R. 90** misleading ratings" (internal quotation marks omitted).³² The *CalPERS* court held that the investor could recover his losses unless his conduct, in the light of his own information and intelligence, was "preposterous and irrational". The effectiveness of disclaimers has to be assessed in light of these principles as well. The court held that the mere presence of broad disclaimers in rating reports does not necessarily render an investment decision preposterous or irrational.³³ This has to be determined by taking into account the conduct of the investor and especially whether he justifiably relied on the rating.

The Australian *Bathurst* court also rejected the reliance by S&P on disclaimers to refute liability. Disclaimers stipulating that investors should not use ratings when making investment decisions are inconsistent with the very purpose why CRAs are paid to provide ratings. The model for rating structured products depends on investors who expect issuers to obtain a rating. The court held that investors use ratings because they believe, and CRAs are aware thereof as their business model depends on such belief, that a rating represents "the best independent evidence available about the risk of loss on the investment".³⁴ Disclaimers can be used to ensure that investors understand that CRAs do not give advice on the purchase of securities. That is because CRAs are often not aware of the particular circumstances why the purchaser wants to buy securities. Disclaimers should, however, not be interpreted as clauses excluding any exercise of care and skill when CRAs issue ratings. That would make ratings "futile and selfdefeating".³⁵ Moreover, if CRAs want to exclude their liability, they should at least display the disclaimer in a prominent and visible way. They must make sure that the disclaimer is sufficiently ("far more prominent[ly]"³⁶) brought to the attention of investors.³⁷

Regulatory reforms on the liability of CRAs after the financial crisis

Regulatory reforms in the EU and the liability of CRAs

Besides changes in case law, the financial crisis also triggered regulatory changes, both in the US and the EU. [Regulation 1060/2009 on CRAs](#) was adopted by the European Parliament and the Council on 16 September 2009.³⁸ The Regulation has been amended on several occasions and especially [art.35\(a\)](#), inserted in 2013, is of particular interest as it deals with the liability of CRAs.³⁹ CRAs can only be held liable when they commit intentionally or with gross negligence any of the infringements listed in [Annex III to the Regulation](#).⁴⁰ CRAs will thus not incur liability for simple negligence or merely because they have issued an incorrect rating.⁴¹ The infringement of the Regulation must also have (had) an impact on the rating.⁴² Furthermore, the investor has to establish that he reasonably relied on the rating either in accordance with [art.5\(a\)\(1\) of the Regulation](#), or otherwise with due care for a decision to invest into, hold on to or divest from a financial instrument covered by the rating.⁴³

If all these requirements are met, investors may claim compensation from the CRA for the loss they have incurred.⁴⁴ Several problems, however, remain with regard to the application of the Regulation. In addition to the high threshold of proof for investors, the Regulation refers to national law for the interpretation and application of essential concepts such as "reasonably relied", "gross negligence" or "due care". Moreover, matters concerning the liability of CRAs which are not covered by the Regulation, including causation and liability for ordinary negligence, are governed by national law.
***I.C.C.L.R. 91** ⁴⁵

Regulatory reforms in the US and the liability of CRAs

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was passed by the US Congress in July 2010.⁴⁶ Prior to the changes introduced by the Dodd-Frank Act, r.436(g) of the Securities Act stipulated that credit ratings from a nationally registered statistical rating organisation (NRSRO)⁴⁷ assigned to public offerings were not considered as an expert-certified part of the registration statement. Contrary to auditors, CRAs could thus not be held liable if the registration statement contained an incorrect rating.⁴⁸

The Dodd-Frank Act repealed r.436(g) of the Securities Act. As a consequence, the issuer has to seek the written consent of an NRSRO before including a rating in the registration statement. The NRSRO giving its consent can thus incur liability as expert for the material misstatements or omissions concerning the credit rating which is included in the registration statement.⁴⁹ However, considering the threat of potential liability, NRSROs refused to give their consent. This led to the freezing and the collapse of the asset-backed securitisation market because issuers were no longer able to offer securities.⁵⁰ The US Committee on Financial Services, therefore, approved the removal of expert liability for CRAs ("no-action relief") in July 2011.⁵¹

Section 933(b) of the Dodd-Frank Act lessened the pleading requirements in private actions for securities fraud under s.10(b) of the Securities and Exchange Act of 1934⁵² and the thereunder adopted SEC r.10b-5.⁵³ Prior to the enactment of the Dodd-Frank Act, a plaintiff had to plead with particularity facts giving rise to a strong inference that CRAs misrepresented or omitted to disclose material information with scienter.⁵⁴ Scienter has been defined as a "mental state embracing intent to deceive, manipulate or defraud".⁵⁵ Following the changes introduced by s.933(b), plaintiffs must now only establish particular facts giving rise to a strong inference that a CRA knowingly or recklessly failed to (1) conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its methodology for evaluating the credit risk; or (2) obtain reasonable verification that such an investigation was done by a source independent of the issuer or underwriter.
*I.C.C.L.R. 92 ⁵⁶

Tendencies in case law after the 2008 financial crisis

Brief overview of the grounds of liability in the US

Investors have filed claims against CRAs on different grounds in the US. These grounds include securities and common law fraud,⁵⁷ negligent misrepresentation⁵⁸ and third-party beneficiary protection for CRAs under the rating contract.⁵⁹ Although an indepth discussion of these grounds does not fall within the scope of this article, the following paragraphs shed light on two elements often at stake in cases of negligent misrepresentation and (common law) fraud.

First, claims for negligent misrepresentation in certain US states require a "privity-like special relationship" (internal quotation marks omitted) between the CRA and investors.⁶⁰ The Southern District of New York in *King County*, for example, held that the relationship was privity-like because the CRAs (1) intended that the rating would be used by the plaintiffs to evaluate the SIV; (2) intended that the plaintiffs, who were members of a select group of qualified investors, would rely on the rating to evaluate the SIV; and (3) prepared the rating with the "end and aim" to induce investors to invest in the SIV (because the rating was designed to meet their needs).⁶¹ In this regard, claims for negligent misrepresentation have already been dismissed because there was no direct contact or communication between the investors and the CRA establishing a (special) relationship which approaches privity.⁶² In other states, plaintiffs have to show that the rating was supplied with the intent to influence the investors or a particular class of investors to which they belong in a specific transaction, without explicitly requiring a special or privity-like relationship.⁶³

A common feature in claims of negligent misrepresentation against CRAs seems that the investor who uses the rating has to be part of a limited class or select group of (qualified) investors whose reliance on the rating was foreseeable to the CRA.⁶⁴ Actual knowledge of the identity of each particular investor is, however, not necessary as long as the rating is created to target a select group of qualified investors instead of the "faceless"⁶⁵ investing public at large.⁶⁶ Investors are not part of a limited class if the allegations suggest both a widespread availability of the securities and a widespread reliance on the ratings (e.g. because the securities were not offered through private placement to *only* a certain type of investor).⁶⁷

Secondly, claims for negligent misrepresentation or common law fraud can be dismissed if investors did not justifiably or reasonably rely on the credit rating. The Abu Dhabi court concluded that the plaintiffs reasonably relied on the ratings because the market at large, including sophisticated investors, has come to rely on ratings issued by independent CRAs given "their NRSRO status and access to non-public information that even sophisticated investors cannot obtain".⁶⁸ Similarly, the *CalPERS* court held that, contrary to the corporate market, investors in **I.C.C.L.R. 93* the structured finance market cannot reasonably develop their own informed opinions because there is insufficient public information to do so. Reliance on credit ratings is thus justified if (sophisticated) investors are unable to conduct an own analysis or develop their independent views about potential investments.⁶⁹

The Bathurst decision and the duty of care for CRAs

In the Australian *Bathurst* case, 23 New South Wales Regional Councils suffered financial losses after the purchase of CPDO (constant proportion debt obligations) notes. The structured products were marketed by Local Government Financial Services (LGFS), created by ABN Amro Bank and given a "triple A" rating by S&P. The full Federal Court of Australia upheld the first instance decision which ruled that the rating contained false and misleading statements violating s.1041E of the Corporations Act. The assignment of the rating by S&P was also qualified as misleading and deceptive conduct under s.1041H of the Australian Corporations Act and s.12DA of the Securities and Investments Commission Act.⁷⁰ The rating was misleading and deceptive because it conveyed a representation that, according to S&P, the capacity of the structured products to meet their financial obligations was "extremely strong".⁷¹

More importantly, the *Bathurst* decision ruled that S&P had a duty to exercise reasonable care and skill in forming its opinion. CRAs must have reasonable grounds to issue the credit rating.⁷² The court held that S&P owed such a duty of reasonable care and skill towards "vulnerable" and "unsophisticated" investors with whom the CRA does not have a contract.⁷³ Investors are vulnerable if they are unable to assess the creditworthiness of the financial products or to "second-guess" the rating. This can occur if the only available information on the creditworthiness of the (issuer of the) securities is the rating.⁷⁴

The question was thus not whether S&P had to give another, more correct and appropriate rating.⁷⁵ Rather, the court concluded that S&P violated its duty of care because the CRA did not have reasonable grounds to assign the rating. The rating was not the result of reasonable care and skill.⁷⁶ S&P did not develop its own model for rating CPDOs but instead relied on the model created by ABN Amro. The CRA did also not give any consideration to the model risk when assigning the credit rating.⁷⁷ S&P adopted a 15% volatility figure which had been provided to it by ABN Amro. There was no evidence that S&P checked the 15% volatility figure itself. However, S&P could have easily calculated the volatility and would then have realised that the correct figure was around 28%. A reasonable and prudent CRA would have done its own calculations and surely not have adopted a volatility figure of 15%.⁷⁸ Against this background, the court held that the analysis of S&P did not comprise mere mistakes or errors of judgment. Rather, it

"involve[s] failures of such a character that no reasonable ratings agency exercising reasonable care and skill could have committed in the rating of the CPDOs".

In sum, the "[rating] analysis was fundamentally flawed, unreasonable and irrational in numerous respects".⁷⁹

The first instance court also held that it was reasonable for investors to rely on the rating. A rating is an opinion given by an expert in the field of structured finance who is assumed to exercise reasonable care and skill.⁸⁰ S&P claimed that imposing a duty of care would lead to potential liability to an indeterminate number of purchasers. Justice Jagot, however, found this argument unpersuasive. The class of persons to whom S&P owed **I.C.C.L.R. 94* a duty of care was ascertainable. More specifically, the class comprised of potential purchasers of the minimum \$500,000 subscription in the \$40 million issue of the notes. S&P also controlled several factors confining the scope of potential liability (e.g. the amount of issued products to which the rating relates, the conditions to impose on the communication of any rating and the ability to reduce or control its liability by downgrading or withdrawing the rating).⁸¹ On appeal, it was also decided that the liability was not indeterminate because S&P knew that the investors were members of a class, the essential characteristic of which was that each investor wanted to purchase the notes. For a duty of care to exist, CRAs are thus not required to know the precise identity of the recipient of the rating. S&P also knew the foreseeable type

of loss as it is the nature of the loss (e.g. losing "the money [investors] had invested in the notes") and not the precise amount that has to be taken into account.⁸² In other words, both the class of investors and the foreseeable loss were determined by the function that S&P undertook, which was "delineated by the purpose of the rating ... and the known reasonable reliance".⁸³

Finally, S&P alleged that it could not owe a duty of care because there were no direct dealings between or any contractual relationship with each investor. The decision on appeal, however, rejected this argument. The court ruled that S&P knew that the issuer obtained and paid for the rating only to communicate it to the "interested parties" so that they could use it in deciding whether or not to invest. A contractual nexus between the CRA and the investors was in such circumstances not required.⁸⁴

Concluding remarks

Investors have filed claims against CRAs on several grounds following the financial crisis. Based on the analysis of (recent) case law, it can at least be said that CRAs are no longer able to always successfully hide behind the traditional defences. There are currently pending cases against CRAs in the US⁸⁵ and in several EU Member States.⁸⁶ It remains thus to be seen how the liability of CRAs will evolve in the future.

Especially the question whether the acceptance of the duty of care in the *Bathurst* decision will have consequences in other jurisdictions is uncertain. English courts are, for example, reluctant to recognise that other "certifiers" such as auditors⁸⁷ and classification societies⁸⁸ have a duty of care towards third parties. Nonetheless, it remains unlikely that CRAs will incur liability in an "indeterminate amount for an indeterminate time to an indeterminate class" if a duty of care were to be accepted in other jurisdictions.⁸⁹ Following recent decisions in the US and especially the Australian *Bathurst*, CRAs will only be liable to a select class of (qualified) investors whose reliance on the rating was foreseeable or known to the CRA.⁹⁰ Moreover, investors need to establish that they reasonably or justifiably relied on the rating. This is the case if the rating is the only available information on the issuer or financial product or when the CRA has access to non-public (financial) information.

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1. See for a discussion on the role of CRAs in the financial crisis: N.S. Ellis, L.M. Fairchild and F. D'Souza, "Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis" (2012) 17(2) *Stanford Journal of Law, Business & Finance* 175, 192.

2. As such, the article does not discuss how the liability of CRAs is regulated in different EU Member States. See in this regard for Belgium: E. Weemaels, "La responsabilité des agences de notation: Des sociétés responsables comme les autres?" (2012) 7069 *Revue Pratique des Sociétés* 123; M. Kruithof and E. Wymeersch, "The Regulation and Liability of Credit Rating Agencies in Belgium" in E. Dirix and Y.H. Leleu (eds), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (Brussels: Bruylant, 2006), pp.351–419. See for the Netherlands: J.J. Aterna and S.M. Peek, "Credit rating agencies en civielrechtelijke aansprakelijkheid" in D. Busch (ed.), *Aansprakelijkheid in de financiële sector* (Deventer: Kluwer, 2013), pp.939–973; H.A. de Savornin Lohman and M.G. van 't Westeinde, "Control and Liability of Credit Rating Agencies under Netherlands Law" (2007) 11(1) *Electronic Journal of Comparative Law* 1. See for the UK: K. Alexander, "Tort Liability for Ratings of Structured Securities under English Law" (2015) 11(2) *International and Comparative Corporate Law Journal* 26.

3. J.C. Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (New York: Oxford University Press, 2006), pp.283–284; A. Darbellay, *Regulating Credit Rating Agencies* (Cheltenham: Edward Elgar, 2013), p.30.

4. Kruithof and Wymeersch, "The Regulation and Liability of Credit Rating Agencies in Belgium" in *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (2006), p.351; S.L. Schwarcz, "The Universal Language of Cross-Border Finance" (1998) 8(2) *Duke Journal of Comparative and International Law* 251, 252.

5. T.J. Dillon and C.T. Ebenroth, "The prospect for rating agency duty of care liability in England and the United States" (1994) 15 *Company Lawyer* 259.

6. S.L. Schwarcz, "Private Ordering of Public Markets: The Rating Agency Paradox" (2002) 2 *University of Illinois Law*

- Review 1, 6–9; F. Partnoy, "Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective" (2010) 25(4) *Journal of International Banking Law and Regulation* 189.
7. H. McVea, "Credit Rating Agencies: The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back" (2010) 59(10) *International Comparative Law Quarterly* 701, 706–707; F. Partnoy, "The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies" (1999) 77(3) *Washington University Law Quarterly* 619, 628; *Coffee, Gatekeepers* (2006), pp.1–5, 287–288.
 8. *Kruihof and Wymeersch, "The Regulation and Liability of Credit Rating Agencies in Belgium" in The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (2006), p.353; *Darbellay, Regulating Credit Rating Agencies* (2013), p.38.
 9. *Standard & Poor's, "Understanding Ratings"*. Available at: http://www.spratings.com/en_US/understanding-ratings#firstPage [Accessed 3 February 2016].
 10. G. Husisian, "What Standard of Care Should Govern the World's Shortest Editorials? An Analysis of Bond Rating Agency Liability" (1990) 75 *Cornell Law Review* 411, 446.
 11. This has been alleged by CRAs in different cases: *Abu Dhabi Commercial Bank v Morgan Stanley & Co Inc* 651 F. Supp. 2d 155, 175–176 (S.D.N.Y. 2009); *California Public Employees' Retirement System v Moody's Corp No.A134912*, 30–34 (Cal. Ct App. 2014); *In Re Enron Corp Securities Derivative* 511 F. Supp. 2d 742, 809–815 (S.D. Tex. 2005); *Genesee County Employee Retirement System v Thornburg Mortgage Securities Trust 2006-3 No.CIV 09-0300*, 2011 WL 5840482, 227–228 (D.N.M. 2011); *In re Merrill Lynch Auction Rate Securities Litigation* 2011 WL 536437, 11 (S.D.N.Y. 2011). See for a discussion: T. Nagy, "Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation" (2009) 94(1) *Minnesota Law Review* 140, 148–149. The court in *Compuware Corp v Moody's Investors Services Inc No.05-1851*, 7 (6th Cir. 2007) indeed held that a "rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors. We find no basis upon which we could conclude that the credit rating itself communicates any provably false factual connotation. Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation".
 12. See, for example: *First Financial Saving Bank Inc v American Bankers Ins. Co of Florida Inc* 1989 WL 168015, 5 (E.D.N.C. 1989), where the court held that the traditional First Amendment defence was without merit and that any further discussion on this matter would "be a waste of paper".
 13. A.R. Pinto, "Control and Responsibility of Credit Rating Agencies in the United States" (2006) 54(4) *American Journal of Comparative Law* 341, 352–353, with further references in n.66; C.H. Deats, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?" (2010) 110(7) *Columbia Law Review* 1818, 1833. This has been affirmed in *Jefferson County School District No.R-1 v Moody's Investor's Services Inc* 175 F. 3d 848 (10th Cir. 1999) at [26], [34]; *County of Orange v McGraw Hill Companies Inc* 245 B.R. 151, 154 (C.D. Cal. 1999); *Commercial Financial Services Inc v Arthur Andersen LLP* 94 P. 3d 106, 109 at [14] (Okla. Civ. App. 2004); *In Re Enron Corp Securities Derivative*, 511 F. Supp. 2d 742, 819 (S.D. Tex. 2005).
 14. An affirmative representation is a representation asserting the existence of certain facts pertaining to a given subject matter (as defined in the US Legal Dictionary available at: <http://definitions.uslegal.com/a/affirmative-representation> [Accessed 16 December 2015]).
 15. *CalPERS v Moody's No. A134912*, 18–19 (Cal. Ct App. 2014).
 16. See, for example: *In re Enron Corp Securities Derivative* 511 F. Supp. 2d 742, 810 (S.D. Tex. 2005); *Abu Dhabi Commercial Bank v Morgan Stanley & Co Inc* 651 F. Supp. 2d 155, 175–176 (S.D.N.Y. 2009).
 17. *New York Times Co v Sullivan* 376 U.S. 254, 297–280 (1964); *Dun & Bradstreet Inc v Greenmoss Builders* 472 U.S. 749, 755–763 (1985). This has also been acknowledged in several cases dealing with the liability of CRAs: *County of Orange v McGraw Hill Companies Inc* 245 B.R. 151, 157 (C.D. Cal. 1999); *First Equity Corp v Standard & Poor's Corp* 690 F. Supp. 256, 258–259 (S.D.N.Y. 1988); *In Re Enron Corp Securities Derivative* 511 F. Supp. 2d 742, 810–830 (S.D. Tex. 2005); *Genesee County Employee Retirement System v Thornburg Mortgage Securities Trust 2006-3 No.CIV 09-0300*, 2011 WL 5840482, 227–228 (D.N.M. 2011).
 18. J.W. Heggen, "Not always the world's shortest editorial: why credit-rating-agency speech is sometimes professional speech" (2011) 96(5) *Iowa Law Review* 1743, 1754–1758.
 19. *In Re Enron Corp Securities Derivative* 511 F. Supp. 2d 742, 820 (S.D. Tex. 2005); *Federal Home Loan Bank of Pittsburgh v J.P Morgan Securities LLC*, GD09-016892, 16–17 (Court of Common Pleas of Allegheny County, 29 November 2010); *Pan Am Corp v Delta Air Lines Inc* 161 B.R. 577, 581–586 (S.D.N.Y. 1993). Whether a rating is a matter of public concern is determined "by [its] content, form, and context ... as revealed by the whole record". See in this regard: *Connick v Myers* 461 U.S. 138, 147–148 (1983) as referred to in *Dun & Bradstreet Inc v Greenmoss Builders* 472 U.S. 749, 761 (1985). Also see the discussion in L. Freeman, "Who's Guarding the Gate? Credit-Rating Agency Liability as 'Control Person' in the Subprime Credit Crisis" (2009) 33(3) *Vermont Law Review* 606; K.C. Kettering, "Securitization and Its Discontents: The Dynamics of Financial Product Development" (2008) 29(4) *Cardozo Law Review* 1689, 1989–1693; Deats, "Talk that Isn't Cheap" (2010) 110(7) *Columbia Law Review* 1818, 1831–1833; Heggen, "Not always the world's shortest editorial" (2011) 96(5) *Iowa Law Review* 1743, 1754–1758.
 20. *Dun & Bradstreet Inc v Greenmoss Builders* 472 U.S. 750, 762, 792 (1985).

21. *Dun & Bradstreet v Greenmoss Builders* 472 U.S. 749, 762, 792 (1985). Also see F. Partnoy, "How and Why Credit Rating Agencies Are Not Like Other Gatekeepers" in Y. Fuchita and R.E. Litan, *Financial Gatekeepers: Can They Protect Investors?* (Baltimore: Brookings Institution Press, 2007), pp.85–86.
22. *Lasalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1093–1094, 1096–1097 (S.D.N.Y. 1996); *Abu Dhabi Commercial Bank v Morgan Stanley* 651 F. Supp. 2d 155, 175–176 (S.D.N.Y. 2009); *In re National Century Financial Enterprise Inc* 580 F. Supp. 2d 630, 639–640 (S.D. Ohio 2008). More recently, the California Court of Appeals affirmed a lower court decision according to which "the issuance of these SIV ratings is not, however, an issue of public concern. Rather, it is an economic activity designed for a limited target of making money". See in this regard: *California Public Employees' Retirement System v Moody's Corp No.CGC-09-490241*, 8 (Cal. Super. 2010), affirmed in *CalPERS v Moody's No.A134912*, at [30]–[34] (Cal. Ct App. 2014).
23. Jones concludes in this regard that courts rely on four elements to determine the First Amendment protection given to ratings, namely whether CRAs "(1) rate debt which they are not paid to rate; (2) distribute the ratings through their publications; (3) have independence in gathering and evaluating information used for the rating; and (4) fulfill the general public function of providing information to the financial market". See for discussion: R. Jones, "The Need for a Negligence Standard of Care for Credit Rating Agencies" (2010) 1(1) *William & Mary Business Law Review* 201, 213.
24. *In Re Fitch Inc: American Savings Bank FSB v UBS PaineWebber Inc* 330 F. 3d 104, 109 (2d Cir. 2003).
25. *American Savings Banks FSB v UBS PaineWebber Inc No.M8-85, Part II* (S.D.N.Y. 2002).
26. *In Re Fitch Inc* 330 F. 3d 104, 109–111 (2d Cir. 2003). See for similar conclusion: *Commercial Financial Services Inc v Arthur Andersen LLP* 94 P. 3d 106, 108, 110–112, at [13]–[19] (Okla. Civ. App. 2004).
27. *Abu Dhabi Commercial Bank v Morgan Stanley* 651 F. Supp. 2d 155, 167 (S.D.N.Y. 2009). Several commentators argue that First Amendment protection should, therefore, not apply to CRAs in cases brought following the subprime-mortgage crisis: D.J. Grais and K.D. Katsiris, "Not 'The World's Shortest Editorial': Why the First Amendment Does Not Shield the Rating Agencies from Liability for Over-Rating CDOs", *Bloomberg Law Reports* (2007), p.44; P. Haghshenas, "Obstacles to Credit Rating Agencies' First Amendment Defense in Light of Abu Dhabi" (2010) 8 *First Amendment Law Review* 452; Heggen, "Not always the world's shortest editorial" (2011) 96(5) *Iowa Law Review* 1743, 1764–1766; Freeman, "Who's Guarding the Gate?" (2009) 33(3) *Vermont Law Review* 606; Jones, "The Need for a Negligence Standard of Care for Credit Rating Agencies" (2010) 1(1) *William & Mary Business Law Review* 201, 213.
28. Federal Court of Australia, *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No.5) [2012] FCA 1200*, affirmed in *ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65*.
29. *Bathurst Regional Council v Local Government Financial Services (No.5) [2012] FCA 1200* at [2808].
30. *Bathurst Regional Council v Local Government Financial Services (No.5) [2012] FCA 1200* at [1459], [2156], [2510], [2808], [2846]; *ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65* at [12]; R. Harding-Farrenberg and K. Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt: Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)" (2013) 14(2) *Business Law International* 185, 190–193.
31. *Bathurst Regional Council [2012] FCA 1200* at [2437], [2820]–[2836], [2979], [3105]. Also see: Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 192–193; L. McKenna, "An Uncertain Forecast for Credit Rating Agencies: Liability for Negligent Misrepresentation after Bathurst" (27 November 2012), *Columbia Business Law Review Online*. Available at: <http://cblr.columbia.edu/archives/12449> [Accessed 16 December 2015].
32. *Abu Dhabi Commercial Bank v Morgan Stanley* 651 F. Supp. 2d 155, 175–178 (S.D.N.Y. 2009). See for a similar conclusion: *Federal Home Loan Bank of Boston v Ally Financial Inc No.11-10952-GAO*, 3 (D. Mass. 2010); *King County, Washington v IKB Deutsche Industriebank AG No.09-08387*, 49 (S.D.N.Y. 2012). Also see Jones, "The Need for a Negligence Standard of Care for Credit Rating Agencies" (2010) 1(1) *William & Mary Business Law Review* 201, 228, referring to *Milkovich v Lorain Journal Co* 497 U.S. 1, 18–19 (1990). Nagy writes in this regard that disclaimers should not protect CRAs from liability because this is also not the case for other providers of information. She refers to the example of lawyers who do not receive an automatic exemption from liability when issuing a title opinion only because they call it an opinion. See Nagy, "Credit Rating Agencies and the First Amendment" (2009) 94(1) *Minnesota Law Review* 140, 161. This reasoning has been acknowledged in *Commercial Financial Services Inc v Arthur Andersen LLP* 94 P. 3d 106, 110 (Okla. Civ. App. 2004), where it was held that CRAs were paid to give professional opinions to their clients. Such a relationship of privity between the CRA and the issuer is analogous to that between a company and the latter one's accountant.
33. *CalPERS v Moody's No.A134912*, 28–29 (Cal. Ct App. 2014).
34. *Bathurst Regional Council [2012] FCA 1200* at [2524].
35. *Bathurst [2012] FCA 1200* at [2525]; *ABN AMRO Bank v Bathurst [2014] FCAFC 65* at [771]. See for a discussion A. Banton and D. Theodorou, "Holding ratings agencies to account—The Federal Court's landmark decision in *Bathurst Regional Council v Local Government Financial Services*" (February 2013), p.5, *Piper Alderman's e-Bulletin*. Available at: http://www.piperalderman.com.au/_files/f/4454/PB007%200213.pdf [Accessed 5 January 2016]; Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 192. Similarly: J.P. Hunt, "Credit Rating Agencies and the 'Worldwide Credit Crisis': The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement" (2009) 1 *Columbia Business Law Review* 109, 158–159.

36. [Bathurst Regional Council \[2012\] FCA 1200 at \[2524\]](#).
37. [Bathurst Regional Council \[2012\] FCA 1200 at \[2524\], \[2541\]–\[2543\]](#). Also see *Banton and Theodorou*, "Holding ratings agencies to account" (February 2013), p.5, *Piper Alderman's e-Bulletin*. Available at: http://www.piperalderman.com.au/_files/f/4454/PB007%200213.pdf [Accessed 5 January 2016]; Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 192.
38. [Regulation 1060/2009 on credit rating agencies \[2009\] OJ L302/1](#). See for a discussion on the Regulation: I.H.Y. Chiu, "Regulating Credit Rating Agencies in the EU: In Search of a Coherent Regulatory Regime" (2014) 25(2) *European Business Law Review* 269; B. Haar, "Civil Liability of Credit Rating Agencies after CRA 3—Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence" (2014) 25(2) *European Business Law Review* 315.
39. [Regulation 462/2013 amending Regulation 1060/2009 on credit rating agencies \[2013\] OJ L146/1](#).
40. [Regulation 1060/2009 art.35\(a\)\(1\)](#), as amended by [Regulation 462/2013](#).
41. [Regulation 1060/2009, Recital 33](#), as amended by [Regulation 462/2013](#). Also see *Commission*, "New rules on credit rating agencies (CRAs) enter into force: frequently asked questions", MEMO/13/571 (18 July 2013); *European Commission*, "Overview of responses to public consultation on credit rating agencies". Available at: http://ec.europa.eu/internal_market/securities/docs/agencies/summary-responses-cra-consultation-20110704_en.pdf [Accessed 16 December 2015].
42. [Regulation 1060/2009 art.35\(a\)\(1\)](#), as amended by [Regulation 462/2013](#).
43. [Regulation 1060/2009 art.35\(a\)\(1\)](#), as amended by [Regulation 462/2013](#).
44. [Regulation 1060/2009 art.35\(a\)\(1\)](#), as amended by [Regulation 462/2013](#).
45. [Regulation 1060/2009 art.35\(a\)\(4\)](#) and [Recital 35](#), as amended by [Regulation 462/2013](#).
46. US Congress, Dodd-Frank Wall Street Reform and Consumer Protection Act, 21 July 2010, Pub. L.111–203, H.R. 4173. The Act contains several requirements concerning the regulation and liability of CRAs in Title XI, Subtitle C ("Improvements to the Regulation on Credit Rating Agencies"). The Act for instance requires greater transparency of rating procedures and methodologies, provides the Securities and Exchange Commission (SEC) with more efficient enforcement mechanisms and aims to reduce reliance on ratings and minimise conflicts of interest. See for an overview: D.B.H. Martin and M.C. Franker, "Rating Agency Regulation after the Dodd-Frank Act: A Mid-Course Review" (2011) 25(12) *Insights: The Corporate and Securities Law Advisor* 1.
47. CRAs may apply to be recognised by and registered with the SEC as an NRSRO. Ratings provided by NRSROs are often used by financial institutions or investors for regulatory purposes. In order to be considered an NRSRO, a CRA has to be nationally recognised in the US and provide credible ratings. See in this regard: s.3(62) of the Credit Rating Agency Reform Act of 2006, 29 September 2006, Pub. L. 109–291, 120 Stat. 1328.
48. Dodd-Frank Act s.939G. See in this regard also the discussion in A.M. Grinshteyn, "Horseshoes and Hand Grenades: The Dodd-Frank Act's (Almost) Attack on Credit Rating Agencies" (2011) 39(4) *Hofstra Law Review* 956, 967–975; O. Schmidt, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies" (2012) 3 *Columbia Business Law Review* 994, 1010–1014. Case law affirmed that CRAs do not fall within the definition of underwriter under s.11 of the Securities Act 1933: *In re Lehman Brothers Securities & ERISA Litigation* 681 F. Supp. 2d 495, 498–499 (S.D.N.Y. 2010); *New Jersey Carpenters Vacation Fund v Royal Bank* 720 F. Supp. 2d 254, 262–264 (S.D.N.Y. 2010).
49. Dodd-Frank Act s.939G. For discussion: B. Brownlow, "Rating Agency Reform: Presenting the Registered Market for Asset-Backed Securities" (2011) 15 *North Carolina Banking Institute Journal* 111, 128; Ellis, Fairchild and D'Souza, "Is Imposing Liability on Credit Rating Agencies a Good Idea?" (2012) 17(2) *Stanford Journal of Law, Business & Finance* 175, 209–210.
50. Brownlow, "Rating Agency Reform" (2011) 15 *North Carolina Banking Institute Journal* 111, 131–133.
51. *Committee on Financial Services*, "Committee Acts to Eliminate Provision in Dodd-Frank that Shut Down Segment of Economy" (20 July 2011). Available at: <http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=252949> [Accessed 16 December 2015].
52. US Securities Exchange Act of 1934, P. Law 73–291, 48 Stat. 881, codified at 15 USC ss.78a–pp.
53. SEC r.10b-5, codified at 17 CFR 240, 10b-5. Also see *E.C. Chaffee*, "Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement" (2008). Available at: http://works.bepress.com/eric_chaffee/1 [Accessed 16 December 2015].
54. 15 USC ss.78u–4(b)(2)(A). These requirements have been confirmed in several cases: *Superintendent of Insurance v Bankers Life & Casualty Co* 404 U.S. 6, 13–14 (1971); *Herman & MacLean v Huddleston* 459 U.S. 375, 380 (1983); *Helwig v Vencor Inc* 251 F. 3d 540, 554 (6th Cir. 2001); *In re IBM Securities Litigation* 163 F. 3d 102, 106 (2d Cir. 1998). It has also been established in cases on the liability of CRAs that in order to state a claim under s.10(b) and r.10b-5(b), the plaintiffs must allege in connection with the purchase or sale of securities: (1) a misstatement or

- omission; (2) of a material fact; (3) made with scienter; (4) justifiably relied on by plaintiffs; and (5) proximately causing them injury. See, for example: *In re Moody's Corp Securities Litigation* 599 F. Supp. 2d 493, 514–516 (S.D.N.Y. 2009); *LaSalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1082–1083 (S.D.N.Y. 1996); *In re National Century Financial Enterprise* 580 F. Supp. 2d 630, 637–638 (S.D. Ohio 2008).
55. *Tellabs Inc v Makor Issues & Rights* 551 U.S. 308, 319 (2007); *Ernst & Ernst v Hochfelder* 425 U.S. 185, 193–194 (1976). See on the requirement of scienter in the context of federal securities litigation: A. Horwich, "An Inquiry into the Perception of Materiality as an Element of Scienter under SEC Rule 10b-5" (2011) 67 *Business Lawyer* 1, 5–9. Plaintiffs have proven in several cases that CRAs acted with scienter: *In re Moody's Corp Securities Litigation* 599 F. Supp. 2d 493, 514–516 (S.D.N.Y. 2009); *LaSalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1086–1088 (S.D.N.Y. 1996). See however: *In Re National Century Financial Enterprise* 580 F. Supp. 2d 630, 640–644 (S.D. Ohio 2008).
56. Dodd-Frank Act s.933, codified in 15 USC ss.78u–4(b)(2)(B). See for a discussion: G.A. Fernicola and J.B. Goldstein, "Credit Rating Agencies", in *Skadden Commentary on the Dodd-Frank Act* (2010); Ellis, Fairchild and D'Souza "Is Imposing Liability on Credit Rating Agencies a Good Idea?" (2012) 17(2) *Stanford Journal of Law, Business & Finance* 175, 209–210; Brownlow, "Rating Agency Reform" (2011) 15 *North Carolina Banking Institute Journal* 111, 129–130; E.S. Pendergraft, "Section 933(b): Nimble Private Regulation of the Capital Market Gatekeepers" (2012) 39(2) *Florida State University Law Review* 511.
57. See, for example: *In re Moody's Corp Securities Litigation* 599 F. Supp. 2d 493, 507–516 (S.D.N.Y. 2009); *LaSalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1082–1088 (S.D.N.Y. 1996); *In Re National Century Financial Enterprise* 580 F. Supp. 2d 630, 637–645 (S.D. Ohio 2008); *Abu Dhabi Commercial Bank v Morgan Stanley* 651 F. Supp. 2d 155, 175–181 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v Ally Financial Inc* No.11-10952-GAO, 2-3 (D. Mass. 2010); *Tolin v Standard & Poor's Financial Services* 950 F.Supp.2d 714, 721–723 (S.D.N.Y. 2013).
58. See, for example: *Quinn v McGraw-Hill Companies* 168 F. 3d 331, at [9]–[18] (7th Cir. 1999); *LaSalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1091–1096 (S.D.N.Y. 1996); *In re National Century Financial Enterprise* 580 F. Supp. 2d 630, 646–649 (S.D. Ohio 2008); *CalPERS v Moody's Corp* No.A134912, 14–30 (Cal. Ct App. 2014); *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 31–50 (S.D.N.Y. 2012); *Anschutz Corp v Merrill Lynch & Co* 690 F. 3d 98, 114 (2d Cir. 2012); *Ohio Police & Fire Pension Fund v Standard & Poor's Fin. Services LLC* No.11-4203, 2012 WL 5990337 (6th Cir. 2012); *In Re Enron Corp Securities Derivative* 511 F. Supp.2d 742, 809–827 (S.D. Tex. 2005).
59. See, for example: *Quinn v McGraw-Hill Companies* 168 F. 3d 331, at [6]–[8] (7th Cir. 1999); *Abu Dhabi Commercial Bank v Morgan Stanley* 651 Supp. 2d 155, 173, 184–186 (S.D.N.Y. 2009).
60. This is the case under New York law: *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 43 (S.D.N.Y. 2012); *Credit Alliance Corp v Arthur Andersen & Co* 65 N.Y. 2d 536, 551 (1985), elaborating on the requirements to establish a "special relationship" (e.g. the use of information for a particular purpose, a known party that would rely on the information and a linking conduct between the supplier of information and the party relying on it). Other states allow recovery if the CRA could reasonably foresee that the investors would rely on the rating. Most states have, however, adopted the negligent misrepresentation standard of the s.522 of the Restatement (Second) of Torts. See for discussion and references to case law: J.M. Feinman, "Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology" (2003) 31 *Florida State University Law Review* 17, 17–65; M.P. Gergen, "Negligent Misrepresentation as Contract" (2013) 101 *California Law Review* 953, 954–989.
61. *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 40–43 (S.D.N.Y. 2012). Also see: *In re National Century Financial Enterprise* 580 F. Supp. 2d 630, 647 (S.D. Ohio 2008) holding that "though a special relationship is not an express element of a negligent misrepresentation claim, it is an apt characterization of the requirements that the defendant supply false information in a business transaction for plaintiffs guidance and that the plaintiff be the person or part of a limited class for whom defendant intended to supply the information"; *Ohio Police & Fire Pension Fund v Standard & Poor's Fin. Services* 2012 WL 5990337, No.11-4203, 15 (6th Cir. 2012) finding that there was no "special relationship" because the investors lacked privity or a similar close relationship with the CRAs.
62. *Anschutz Corp v Merrill Lynch & Co* 690 F. 3d 98, 114 (2d Cir. 2012); *Federal Home Loan Bank of Boston v Ally Financial Inc* No.11-10952-GAO, 3 (D. Mass. 2010); *Ohio Police & Fire Pension Fund v Standard & Poor's Financial Services* 2012 WL 5990337, No.11-4203, 14 (6th Cir. 2012).
63. *CalPERS v Moody's Corp* No.A134912, 24–25 (Cal. Ct App. 2014); *Quinn v McGraw-Hill Companies* 168 F. 3d 331, at 9–12 (7th Cir. 1999).
64. *In re National Century Financial Enterprise* 580 F. Supp. 2d 630, 646–648 (S.D. Ohio 2008); *LaSalle National Bank v Duff & Phelps Credit Rating Co* 951 F. Supp. 1071, 1092–1096 (S.D.N.Y. 1996); *CalPERS v Moody's Corp* No.A134912, 22–25 (Cal. Ct App. 2014); *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 40–43 (S.D.N.Y. 2012).
65. *Ohio Police & Fire Pension Fund v Standard & Poor's Fin. Services* 2012 WL 5990337, No.11-4203, 15 (6th Cir. 2012).
66. *LaSalle National Bank v Duff & Phelps Credit Rating C.* 951 F. Supp. 1071, 1093–1094 (S.D.N.Y. 1996); *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 40–43 (S.D.N.Y. 2012). Also see: *In re National Century Financial Enterprise* 580 F. Supp. 2d 630, 647 (S.D. Ohio 2008), holding that misrepresentations to the (general) investing public at large are not actionable because this is not a limited class of persons whom the speaker or supplier of information (namely the CRA) intends to benefit or guide.

67. *Ohio Police & Fire Pension Fund v Standard & Poor's Fin. Services* 813 F. Supp. 2d 871, 880–882 (S.D. Ohio 2011), affirmed in *Ohio Police & Fire Pension Fund v Standard & Poor's Fin. Services* 2012 WL 5990337, No.11-4203, 13–16 (6th Cir. 2012).
68. *Abu Dhabi Commercial Bank v Morgan Stanley* 651. F. Supp. 2d 155, 180–181 (S.D.N.Y. 2009); *Federal Home Loan Bank of Boston v Ally Financial Inc* No.11-10952-GAO, 3 (D. Mass. 2010).
69. *CalPERS v Moody's Corp* No.A134912, 28–30 (Cal. Ct App. 2014); *King County, Washington v IKB Deutsche Industriebank AG* No.09-08387, 49 (S.D.N.Y. 2012). See, however, *Quinn v McGraw-Hill Cos* 168 F. 3d 331, 336, at [17] (7th Cir.1999) affirming that Quinn could not show that he reasonably relied on the rating because he was an "experienced" banker who should have done "his own homework". It seems, nonetheless, that Quinn had access to inside information and "chose to take no action at that time; indeed, he let matters ride for a long time, until after S & P had downgraded its own rating".
70. *Bathurst Regional Council* [2012] FCA 1200, affirmed in *ABN AMRO Bank NV v Bathurst* [2014] FCAFC 65. See for comments on the decision on appeal: S. Clarke and H. Edwards, "Liability of Credit Rating Agencies Confirmed by Australian Appeal Court", *Herbert Smith Freehills Banking Litigation E-Bulletin* (10 June 2014).
71. *Bathurst Regional Council* [2012] FCA 1200 at [2154]–[2156], [2517], [2846]–[2849] and [2919]; *ABN AMRO Bank NV v Bathurst* [2014] FCAFC 65 at [12] and [723]–[773]. See Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 193.
72. *Bathurst Regional Council* [2012] FCA 1200 at [2437], [2820]–[2836], [2979] and [3105]; *ABN AMRO Bank NV v Bathurst* [2014] FCAFC 65 at [12], [503]–[579], [722] and [1250]. Also see: L. McKenna, "An Uncertain Forecast for Credit Rating Agencies" (27 November 2012), *Columbia Business Law Review Online*. Available at: <http://cblr.columbia.edu/archives/12449> [Accessed 16 December 2015].
73. *Bathurst Regional Council* [2012] FCA 120 at [2767]–[2778]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [580], [599], [890]–[891], [1211] and [1263]–[1269]. Also see H. Edwards, "Liability for the rating and sale of structured credit products: Australian cases and their (much) wider implications" (2013) 7(2) *Law and Financial Markets Review* 88, 90–91.
74. *Bathurst Regional Council* [2012] FCA 120 at [2767]–[2778]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [580], [599], [890]–[891], [1211] and [1263]–[1269]. Also see Edwards, "Liability for the rating and sale of structured credit products" (2013) 7(2) *Law and Financial Markets Review* 88, 90–91.
75. *Bathurst Regional Council* [2012] FCA 1200 at [2482]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [722], holding that CRAs do not have "a duty to be correct".
76. *Bathurst Regional Council* [2012] FCA 1200 at [2814]–[2836]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [12], [503] and [722]. See for discussion *Banton and Theodorou*, "Holding ratings agencies to account" (February 2013), p.4, *Piper Alderman's e-Bulletin*. Available at: http://www.piperalderman.com.au/_files/f/4454/PB007%200213.pdf [Accessed 5 January 2016]. Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 192.
77. *Bathurst Regional Council* [2012] FCA 1200 at [2547], [2555]–[2590].
78. *Bathurst Regional Council v Local Government Financial Services (No.5)* [2012] FCA 1200 at [2611]–[2669]. Also see Harding-Farrenberg and Donovan, "Duty of Care, Rating Agencies and the 'Grotesquely Complicated' Rembrandt" (2013) 14(2) *Business Law International* 185, 192.
79. *Bathurst Regional Council* [2012] FCA 1200 at [2836]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [12], [566]–[722]; *Banton and Theodorou*, "Holding ratings agencies to account" (February 2013), p.4, *Piper Alderman's e-Bulletin*. Available at: http://www.piperalderman.com.au/_files/f/4454/PB007%200213.pdf [Accessed 5 January 2016].
80. *Bathurst Regional Council* [2012] FCA 1200 at [2481] and [2517]; *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [581]. S&P also knew that the potential investors would rely on S&P's opinion as to the creditworthiness of the notes in deciding whether or not to invest. See in this regard: *Bathurst Regional Council* [2012] FCA 1200 at [2480], [2481], [2517] and [2781], and especially *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [580].
81. *Bathurst Regional Council* [2012] FCA 1200 at [2745]–[2766]. Also see discussion in *Banton and Theodorou*, "Holding ratings agencies to account" (February 2013), p.4, *Piper Alderman's e-Bulletin*. Available at: http://www.piperalderman.com.au/_files/f/4454/PB007%200213.pdf [Accessed 5 January 2016].
82. *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [585]–[595], [1257]–[1262]. Also see Clarke and Edwards, "Liability of credit rating agencies confirmed by Australian Appeal Court", *Herbert Smith Freehills, Banking Litigation E-Bulletin* (10 June 2014).
83. *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1260].
84. *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1270]–[1271]. Also see T. Werlen and Y. Gailani, "ABN AMRO Bank NV v Bathurst Regional Council: Rating Agencies' Duty of Care to Investors" (30 July 2014), *CapLaw*. Available at: <http://www.caplaw.ch/2014/abn-amro-bank-nv-v-bathurst-regional-council-rating-agencies-duty-of-care-to-investors/> [Accessed 22 December 2015]; Clarke and Edwards, "Liability of Credit Rating Agencies Confirmed by Australian

Appeal Court", *Herbert Smith Freehills Banking Litigation E-Bulletin* (10 June 2014).

85. See, for example: *U.S. v McGraw-Hill Companies CV 13-0779 DOC(JCGx)*, *Order Denying Defendant's Motion to Dismiss*, 11-12 (C.D. Cal. 2013); *In re Standard & Poor's Rating Agency Litigation*, 13-md-2446 (S.D.N.Y. 2014).
86. There is one pending case in Germany against S&P. It has been decided that German courts have jurisdiction to preside over this claim against S&P. See *Bundesgerichtshof*, 13 December 2012, III ZR 282/11, *OpenJur* 2013, 2764; *Oberlandesgericht Frankfurt/Main*, 28 November 2011, 21 U 23/11. Prosecutors in the Italian city of Trani have also indicted several managers and rating analysts from S&P and Fitch on charges of deliberately misleading financial markets with reports on Italy. See in this regard: S. Rame, "Inchiesta rating, a giudizio Standard & Poor's e Fitch" (28 October 2014), *Il Giornale*. Available at: <http://www.ilgiornale.it/news/economia/inchiesta-rating-giudizio-standard-poor-s-e-fitch-1063273.html> [Accessed 16 December 2015].
87. See, for example: *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL.
88. See, for example: *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] E.C.C. 120 HL.
89. *Ultramares Corp v Touche* 174 N.E. 441 (1932).
90. See in this regard also K. Alexander, "Tort Liability for Ratings of Structured Securities under English Law", *University of Oslo Faculty of Law Research Paper No.2015-06* (9 January 2015), SSRN. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547517 [Accessed 16 December 2015]. The author argues that following the *Bathurst* case, English courts could also conclude that a duty of care might arise between a CRA and the class of current or potential investors to whom the ratings are provided. That is because CRAs receive compensation to issue ratings and they are aware that those ratings are disseminated to potential investors.

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