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### Federal Judge Rejects First Amendment Defense for Rating Agencies



Federal judge Shira A. Scheindlin in New York City has rejected arguments by Moody's and S&P that the First Amendment protects them from suit for over-rating notes issued by a SIV. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.* ([here](#)). Judge Scheindlin's decision will be an influential precedent in other cases pending against rating agencies around the country.

Two purchasers of notes in Cheyne SIVs sued Morgan Stanley, The Bank of New York, Moody's, and S&P for fraud, negligent misrepresentation, breach of contract, and various other violations of law in their sale of the Cheyne notes. The rating agencies asked Judge Scheindlin to dismiss the complaint against them because they are protected by the First Amendment and because their ratings are "opinions," and one cannot be liable for expressing an opinion.

Judge Scheindlin rejected both arguments. She concluded that the First Amendment does not apply when ratings are "disseminated ... to a select group of investors rather than to the public at large." As to the argument that ratings are opinions, Judge Scheindlin noted that one can be liable for expressing an opinion if one "does not genuinely and reasonably believe" the opinion or "if the opinion is without basis in fact." The complaint by the two investors alleged that the rating agencies did not genuinely or reasonably believe that the ratings they assigned the Cheyne notes were accurate.

In her opinion, Judge Scheindlin described the "integral role" the rating agencies played in "structuring and issuing" the SIV notes. Although she did not rule on the issue, other courts have decided that rating agencies do not act as journalists when rating transactions that they helped to structure. *In re Fitch* ([here](#)). And if a rating agency was not acting as a journalist, it has no defense under the First Amendment, whether its ratings were circulated to the public or not. *Not "The World's Shortest Editorial": Why the First Amendment Does Not Shield the Rating Agencies From Liability for Over-Rating CDOs* ([here](#)).

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