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Banktown: Assessing Blame for the Near-Collapse of Charlotte’s Biggest Banks

I. INTRODUCTION

In Banktown: The Rise and Struggle of Charlotte’s Big Banks, author and Charlotte Observer banking reporter Rick Rothacker tracks the remarkable growth of two Charlotte-based banks and their near-collapses amidst financial turmoil. Delving into the history of North Carolina’s banking industry, Rothacker highlights the expansion of Bank of America and Wachovia from their humble beginnings to their peak as financial powerhouses. Rothacker also sheds light on the recent struggles of the two banks during the financial crisis and the ensuing recession and highlights the root causes of their difficulties.

Banktown recounts the near-collapse of both of Charlotte’s iconic banks as a result of participating in one deal too many. Ill-timed mergers by Bank of America with Countrywide Financial and Merrill Lynch and by Wachovia with Golden West Financial, brought along toxic assets for both banks. Rothacker suggests that the acquisitions were the primary culprits for the struggles of both banks. However, Rothacker overlooks additional factors which shed light on the impact of the mergers on the two banks: (1) the potential insolvency of Wachovia, and (2) the benefits to Bank of America from Merrill Lynch’s business and profit potential. Part II of this Book Note summarizes the growth of the North Carolina

2. Id.
3. See id.
4. See id.
5. Id. at 21 (explaining that the FDIC blamed Wachovia for its near-failure because it bought Golden West at the top of the real estate bubble and continued making option-ARM loans thereafter).
6. See infra Part III.A-B.
7. ROTHACKER, supra note 1, at 21.
banks up to the time they became victims of the financial crisis. Part III highlights the additional factors that affected the banks after the mergers and their challenges during the financial crisis. Part IV concludes.

II. THE GROWTH OF CHARLOTTE'S BIG BANKS

Rothacker tracks the remarkable growth of Charlotte’s two largest banks, Wachovia and Bank of America, and their expansion into banking giants through mergers and acquisitions. At their peak, the two Charlotte-based banks were among the most powerful in the nation. Aggressive leaders, deal-making, and constant growth were emphasized as keys to building dominant banks with a national market. It was this growth-minded culture and competitive nature, Rothacker notes, which forged two of the nation’s most powerful financial institutions. Ultimately, the appetites of these two banks were also the primary cause of their financial distress.

A. History of North Carolina Banking

Rothacker chronicles the rise of Charlotte’s two banks from their historical roots to the market factors that led to their tremendous growth. Banks established in North Carolina had a distinct advantage over many other banks in the early years of the country; North Carolina permitted banks to establish branches

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8. See infra Part II.
9. See infra Part III.
10. See infra Part IV.
11. ROTHACKER, supra note 1, at 4.
13. ROTHACKER, supra note 1, at 3-4.
14. Id. at 3-4 (noting that it was the aggressive leaders “who pushed regulatory envelopes, jockeyed for acquisitions, and pursued an eat-or-be-eaten vision for the financial system”).
15. Id.
16. Id. at 6 (explaining that the banks grew in size due to the state's liberal branching laws and the regional compacts).
across the state. Permitting branch banking, Rothacker asserts, would “later allow the Charlotte banks and Winston-Salem’s Wachovia to expand across North Carolina, building up their size and expertise for later excursions outside the state.” However, as Rothacker notes, it was not until after the Civil War that North Carolina’s banks began their ascension to formidable financial institutions. Levies and losses from Confederate bonds and notes in the aftermath of the Civil War forced every North Carolina bank to cease operations, and new banks appeared across the state.

Both Winston-Salem and Charlotte successfully emerged from the Civil War as new key financial centers in both the state and the region. Charlotte, through its cotton trade, gained the reputation as a significant business hub in the post-war South. The Queen City further garnered respect as a major financial hub after the Federal Reserve Bank of Richmond established a Charlotte branch in 1927. Despite Charlotte’s early success, the Great Depression impacted the financial hub and forced many banks to close. Three Charlotte banks, American Trust, Commercial National, and Union National, survived the Depression and through mergers started the foundation for what would become two future financial behemoths. Mergers consolidated the three surviving Charlotte banks into two major players, First Union and North Carolina National Bank (NCNB).

17. Id. at 7 (stating that charter approvals for coastal North Carolina banks to establish branches served as the “foundation for statewide branching”).
18. Id.
19. ROTHACKER, supra note 1, at 8 (“North Carolina banks survived the Civil War but not the aftermath. Hit by levies and losses on Confederate bonds and notes, every bank in the state ceased operations. To fill the void, a new wave of nationally chartered and state-chartered banks gradually rose.”).
20. Id. at 9.
21. Id. at 10.
22. Id. at 11.
24. See ROTHACKER, supra note 1, at 11-12.
At the same time, Winston-Salem saw the rise of North Carolina's then largest bank, Wachovia. An early pioneer of branching, the Winston-Salem bank established locations across the state in the early 1900s. By the mid-1950s, Wachovia established itself as the first of North Carolina's large banks and one of the largest banks in the Southeast.

North Carolina's banks continued to grow through intrastate acquisitions, and by the 1970s, North Carolina had three players in the banking industry. In Charlotte, NCNB boasted assets of $2.9 billion, overtaking Wachovia and making it the Southeast's largest bank. First Union also grew in size and pioneered non-banking businesses in North Carolina by becoming the first bank holding company in the state and the second in the nation. Winston-Salem's Wachovia also grew at a more conservative pace to $2.7 billion in assets, second only to NCNB.

However, North Carolina's banks were limited by the state's borders. Neither interstate branching nor interstate banking, by a bank holding company acquiring a bank in another state, were permitted. While these laws protected North Carolina's banks from acquisition by northern banks, North Carolina's bank leaders understood the limitations posed by

25. Id. at 8. The name "Wachovia" was derived from the Wachau valley, the ancestral home of Moravian Settlers in Winston-Salem. See id. at 9.

26. See id. at 8 (noting that early Wachovia president Colonel Francis Fries established Wachovia as an early pioneer of branch banking in North Carolina with branches in Asheville, High Point, Salisbury, and Spencer).

27. See id. at 9.

28. See supra notes 23-24 and accompanying text.

29. See ROTHACKER, supra note 1, at 13 (noting that in the spring of 1972, NCNB's $2.9 billion in assets made it the largest bank in the Southeast).

30. Id.

31. Id.

32. Id. at 15 (explaining that North Carolina banks, including NCNB were limited to North Carolina's boundaries due to federal regulations).

constraining their business solely within the state. Despite the geographical limitations, NCNB was the first to foray into another state after utilizing a legal loophole to purchase Florida-based First National Bank of Lake City in 1982.35

Only a few years later in 1985, the United States Supreme Court upheld the legality of regional reciprocal interstate banking statutes.36 Adopted by states in various regions, including the Southeastern states, the statutes authorized interstate banking amongst banks within a designated region, consistent with the statutory exceptions to the Douglas Amendment.37 Within the Southeastern states, the reciprocal statutes became known as the Southeastern Regional Banking Compact.38 The statutes insulated regional banks from acquisitions by banks outside the region, such as those in New York.39 Rothacker notes that this was important for North Carolina's banks as they could now expand in the southeast without fear of acquisition or competition from Northern banks.40 Due to North Carolina's liberal intrastate branching laws, the state's banks had grown among the largest in the region, and these in-state acquisitions provided valuable experience for regional mergers and acquisitions.41 The North Carolina banks were poised to exploit the authority of the southeastern interstate banking statutes.42

The Southeastern Regional Banking Compact helped create two formidable Charlotte banks capable of large

34. ROTHACKER, supra note 1, at 15 (Bank of America CEO Hugh McColl said, "[w]e realized if we didn't leave North Carolina, we would never amount to anything, that we would not be important.").
37. See 12 U.S.C. § 1842; ROTHACKER, supra note 1, at 6 (noting that the regional compacts allowed regional banks to cross state lines while preventing incursions from banks outside the compact region).
39. Id.
40. Id. (highlighting the effect of Ne. Bankcorp, Inc. on interstate banking).
41. See ROTHACKER, supra note 1, at 20 (explaining that First Union and NCNB were among the nation's top thirty banks and competed for acquisitions around the Southeast).
42. Id.
acquisitions in the other Southeastern states. By 1991, NCNB, through acquisitions, transformed itself into NationsBank, the country's tenth largest bank. First Union continued to make deals, becoming the number two bank in Florida. The combination of North Carolina's bank branching laws and regional banking compacts, Rothacker notes, prepared Charlotte's banks to make acquisitions beyond the Southeast, venture into the rest of the nation, and to compete against their New York counterparts.

As Rothacker notes, the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal) of 1994 provided a new geographic frontier for Charlotte's banks. The interstate restriction of the Douglas Amendment to the BHCA, which required that a state statute specifically authorize an interstate acquisition, was repealed by Riegle-Neal. As a result, mergers and acquisitions were permitted between adequately capitalized institutions notwithstanding state law. Riegle-Neal also permitted bank holding companies to merge their bank subsidiaries in different states and operate interstate offices as branches of a single bank and allowed interstate branching as of 1997.

Now that banks were no longer limited to reciprocal interstate arrangements, the Charlotte banks could acquire banks or establish branches across the country. First Union expanded

43. Id. at 23 (“By the mid-1990s, the Southeastern banking compact had done its job. The merger frenzy unleashed in 1985 produced two Charlotte banks capable of competing with money-center institutions in New York.”).
44. Id. at 20-21 (explaining that NCNB's acquisition of First RepublicBank Corporation made NCNB the tenth largest bank).
45. Id. at 21 (highlighting that First Union's acquisition of Florida National Banks, Inc. made the Charlotte-bank the second largest bank in Florida).
46. Id. at 23 (“[T]he merger frenzy unleashed in 1985 produced two Charlotte banks capable of competing with money-center institutions in New York. Now they were ready for the next phase of interstate banking, which would extend beyond the Southeast to the rest of the country.”).
49. Id.
50. Id.
51. See ROTHACKER, supra note 1, at 23.
into the Northeast, purchasing First Fidelity Bancorp, CoreStates Financial Corporation, and Signet Banking Corporation in 1997. NationsBank utilized its increased market value to establish a true national presence. A merger between San Francisco-based BankAmerica and Charlotte's NationsBank in 1998 set the stage for a coast-to-coast financial institution with $570 billion in assets and, most importantly, headquarters in Charlotte. The BankAmerica name, however, would prevail over Hugh McColl's NationsBank moniker, and the combined entity was titled Bank of America. The frenzy of acquisitions by NationsBank and First Union earned a new title for Charlotte: the second largest financial center in the United States, second only to New York City.

Unlike Charlotte's two large banks, Wachovia shied away from mergers after acquiring First Atlanta Bank at the beginning of the Southeastern Regional Banking Compact in 1985. Rothacker notes that "getting bigger" was not Wachovia's goal. Also, unlike the Charlotte banks, Wachovia did not face competition from a cross-town rival. Nonetheless, by 2000, Wachovia had conservatively expanded to Florida, Virginia, and South Carolina and grew its assets to $68.8 billion. Despite Wachovia's conservative success, top executives still sought a merger to create a bigger, more sophisticated institution in 2000.

52. Id.
53. Id. at 26.
54. Id. at 26.
55. Id. at 27.
56. Id. at 27-28.
57. See Rothacker, supra note 1, at 23-24 ("[A]s 1997 came to a close, Charlotte claimed a heady title fueled by the NationsBank and First Union buying binge -- it was the nation's number-two bank city by assets, behind only New York City. With the Barnett, Signet, and CoreStates deals, the Queen City jumped ahead of San Francisco by a margin of $488.9 billion in assets to $415.3 billion.").
58. Id. at 21.
59. Id. at 37 (statement in May 2000 by then-Wachovia CEO Bud Baker: "I think wanting to be the biggest is a perfectly legitimate goal. But that's not what we're about.").
60. Id. at 14 (quoting former Wachovia CEO John Medlin that "[w]e never felt that pressure. We had self-confidence .... We did not have a go-go, keep up with the Joneses worldview. Being in Winston-Salem you didn't look across the street and see someone building a bigger building.").
61. Id. at 37 (highlighting Wachovia's conservative tradition and its entry into Florida and Virginia).
62. Id. at 38 (quoting John Allison that Bud Baker "was interested in creating a
SunTrust, an Atlanta-based bank holding company, emerged as an initial suitor, but talks were called off by mid-December. Charlotte's First Union then began talks with Wachovia executives, and the two North Carolina institutions agreed to a merger in early 2001. After fending off a hostile bid from SunTrust, the deal between First Union and Wachovia closed for $14.5 billion. Leaders of the two financial institutions called the merger a "superior transaction to others in the industry" and noted that it would "set the standard by which other combinations will be judged." The merger of Wachovia by First Union created the nation's fourth largest bank, totaling $324 billion in assets and headquartered in Charlotte with First Union's CEO Kennedy Thompson guiding the new institution, which would continue to carry the Wachovia name.

The merger-craze dust settled, and after the Wachovia deal, the Queen City emerged as a key center for banking, ahead of other Southeastern states. Through decades of bold and ambitious mergers and acquisitions, Charlotte was now home to two of the nation's largest banks, and boasted the second most banking assets in the United States. It was clear, Rothacker notes, that Charlotte's banks had established themselves as worthy

bigger institution than the Wachovia/BB&T merger would create"). Rothacker noted that CEO Baker stated that Wachovia needed to expand into other businesses like mutual funds, and investment banking, and develop more branches to spread out costs. See id. at 38.

63. Id. at 38-39. After initial talks in early November, Wachovia CEO Baker called off discussions after Wachovia executives became worried about SunTrust's earning prospects, strategy disagreements, and the refusal to use a type of accounting in the merger that would permit Wachovia to sell its credit card unit. Id. at 38.

64. Id. at 39-40. During the First Union-Wachovia merger discussions, executives from both banks agreed to a $68.84 price per Wachovia share to be paid by First Union and to retain the Wachovia name over the First Union moniker. Id.

65. See ROTHACKER, supra note 1, at 44 (explaining that after the Wachovia shareholder meeting approving the merger, SunTrust vice-chairman Ted Hoepner officially gave up the fight for Wachovia).

66. Id. at 40.

67. Id.

68. Id. at 45 (noting that First Union's acquisition of SunTrust eliminated a chance for Atlanta to raise its banking profile and cemented Charlotte's profile as a key financial center).

69. See supra note 58 and accompanying text.
competitors to the traditional banking powers headquartered in New York.  

B. Aggressive Growth Culture

Rothacker also correlates the rise of Charlotte’s banks to the competitive acquisition-focused cultures fostered at both Bank of America and First Union. While thriving under North Carolina’s banking laws and subsequent regulatory triumphs, Hugh McColl Jr. and Ed Crutchfield, the revered leaders of Charlotte’s two largest banks, also executed an aggressive growth-minded strategy. McColl correlated a bank’s success with its size and sought to grow his bank. Crutchfield, on the other hand, believed that in a consolidating banking industry an aggressive growth strategy was necessary to survive.

Early in Hugh McColl’s career, he realized that if NCNB was going to be a successful bank, then it was going to have to get bigger. To achieve that success, McColl forecasted that geographic expansion would be key to building a larger financial institution. He stated, “[w]e realized if we didn’t leave North Carolina, we would never amount to anything, that we would not be important.” The awareness of NCNB’s limitations ingrained an aggressive deal-making mindset in McColl, and he implemented a strategy to expand NCNB through interstate banking. Moreover, the notion that bank size correlated with success fueled McColl to instill a decision-oriented growth culture among his top lieutenants. McColl’s previous military experience was evident as

70. Rothacker, supra note 1, at 4.
71. Id. at 4.
72. Id. at 33-34. McColl had built Charlotte’s Bank of America from a $12 billion, two-state bank into a $642 billion, twenty-one state giant during his tenure as CEO. Id. at 34.
73. Id. at 36.
74. Id. at 33.
75. Id. at 15 (quoting McColl, “[s]o we realized that if we were going to be successful we had to get bigger”).
76. See Rothacker, supra note 1, at 15.
77. Id.
78. Id.
79. Id. at 19.
he viewed NCNB’s acquisition strategy as a military campaign. Tellingly, during NCNB’s merger frenzy under the Southeastern Regional Banking Compact, he rewarded those employees who were integral to his bold growth vision and strategy with crystal hand grenades.

Resonating McColl’s vision was the merger of his NationsBank with BankAmerica, which created a financial behemoth. McColl commented that the new combined bank was in fact better due to its newfound size. The Bank of America deal, Rothacker explains, served as the capstone to McColl’s acquisitions over the decades of his leadership. In McColl’s mind, his crowning merger gave Bank of America the framework to finally achieve the large-scale size and success he so desperately sought.

At the same time, Ed Crutchfield, Jr. also imbued First Union with an aggressive “growth oriented” strategy. Rothacker notes that the culture Crutchfield instilled within First Union was in-line with this extreme growth goal. Soon after taking over at First Union, Crutchfield forecasted that the future success of banks depended on seizing economies of scale and cost-cutting through growth. Crutchfield would share his views on a consolidating banking industry with his successor, Ken Thompson, stressing that the bank needed to grow through acquisitions, stating that “either you grow, or you die.” To ensure that First Union prospered in that environment, Crutchfield implemented an

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80. Id. at 18.
81. Id. at 21.
82. ROTHACKER, supra note 1, at 27 (noting that the combined institution held eight percent of the country’s total deposits and had corporate relationships with eighty-five percent of the Fortune 500).
83. Id. at 27.
84. Id. at 35-36.
85. Id. at 36.
86. See id. at 20 (explaining that Crutchfield believed if a bank was not on an acquisition path, then the bank would be playing defense).
87. See id. at 33.
88. ROTHACKER, supra note 1, at 21.
89. Id. at 50 (noting that once Thompson became CEO of First Union, Crutchfield urged Thompson to continue to grow the bank through additional deals, viewing interstate banking as requiring continuous growth to keep from being a target).
assertive acquisition strategy. In the merger craze following the passage of Riegle-Neal, Crutchfield led First Union in its acquisition of several large Eastern banks. The rapidity of First Union’s deals earned Crutchfield the nickname “Fast Eddie.”

Rothacker concludes that Crutchfield accomplished his goal for growth. In 2000, by the end of Crutchfield’s sixteen year tenure as the CEO of First Union, he had acquired more than eighty banks and created a financial institution with $258 billion in assets. His peers heralded the growth of First Union under Crutchfield. During his term as CEO, like McColl, Crutchfield steadfastly adhered to his growth and acquisition strategy, believing that the whole was better than the sum of the parts, and would result in long-term success for First Union.

By 2001, both McColl and Crutchfield retired from their respective organizations, leaving behind youthful leaders who embodied the aggressive growth culture instilled by their predecessors. Their successors, Ken Lewis and Kennedy Thompson, inherited the difficult task of ensuring that the now nationwide banks became profit generating machines.

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90. *Id.* at 20.
91. *Id.* at 23.
92. *Id.*
93. *Id.* at 33 (summarizing Crutchfield’s farewell address and noting that Crutchfield believed that “[t]he bank, after some tough decisions, now had a ‘near-perfect’ business model”). Rothacker writes that Crutchfield fulfilled a vision of expanding operations geographically, as well as into new capital markets businesses. *Id.*
94. See *ROTHACKER,* supra note 1, at 33.
95. *Id.* at 33 (quoting Ken Thompson on Ed Crutchfield that “few people in American business history have ever created such a clear and compelling vision and then been able to execute on it”).
96. *Id.* at 33-34.
97. *Id.*
98. *Id.* at 34 (explaining that by January 2001 McColl confirmed that he would leave Bank of America soon after his counterpart, Crutchfield, retired).
99. *Id.* at 56 (explaining that Thompson had grown up in Ed Crutchfield’s deal-making machine).
100. *ROTHACKER,* supra note 1, at 46 (“Hugh McColl had assembled a giant bank with the potential to become a massive moneymaking machine. It was the new CEO’s job to make it purr.”).
C. Struggles During the Financial Crisis

The transition from the respected leaders of Bank of America and Wachovia to their successors was marked by a lull in acquisitions. Both banks faced difficulties digesting the recently acquisitions and focused on improving internally. Nevertheless, both banks continued to expand. Bank of America ventured into new markets and strengthened previous toeholds, and Wachovia began a westward expansion. With additions of mortgage servicing and auto financing in California, Wachovia sought to truly establish a coast-to-coast presence. Bank of America on the other hand expanded its deposit base in the Northeast with an acquisition of FleetBoston, New England’s largest bank, and a new credit card business.

The two banks sought to create larger financial institutions by expanding into a broader range of businesses, and in doing so, nearly dug their own graves. Rothacker hypothesizes that the purchases of Golden West Financial by Wachovia and Merrill Lynch by Bank of America are the principal reasons behind Wells Fargo’s acquisition of Wachovia and Bank of America’s recent struggles. Wachovia’s ill-timed purchase of Golden West

101. Id. at 47 (noting that Bank of America had not made a major acquisition or merger in the four years after the NationsBank-BankAmerica deal). Rothacker also noted that Wachovia was conservatively expanding by pursuing a joint-venture with Prudential Securities and building new branches in Texas without an acquisition. See id.
102. Id. at 46.
103. See id. at 52-56.
104. See ROTHACKER, supra note 1, at 47, 53 (noting that Bank of America entered the credit card market and took an investment stake in China Construction Bank).
105. Id. at 56.
107. Id. at 48.
108. Id. at 53 (explaining that Bank of America purchased MBNA Corporation, a credit card company, for $35 billion to become the nation’s largest credit card company).
109. See supra note 12 and accompanying text.
110. See infra Part III.C.1.
111. See infra Part III.C.2.
112. ROTHACKER, supra note 1, at 215 (noting that the struggle of Bank of America and Wachovia during the financial crisis that was partly a result of economic
Financial came at the peak of the housing market for the California mortgage giant.\textsuperscript{113} Conversely, it was Bank of America’s purchase of Merrill Lynch at a premium that burdened its balance sheet enough to nearly cause it to become a ward of the federal government.\textsuperscript{114}

1. Wachovia

Wachovia planned to expand westward,\textsuperscript{115} enticed by the booming housing market in California.\textsuperscript{116} Wachovia’s expansion into California, Rothacker explains, was supposed to be cautious; the bank originally planned on entering the West Coast market through small mergers with subprime lenders and by building new branches that would establish a toehold in California.\textsuperscript{117} Rothacker notes that Wachovia drastically deviated from these plans when it made its largest acquisition in its history: Golden West Financial.\textsuperscript{118} The acquisition of a California-based mortgage lender was thought to help Wachovia become a key player in California and thereby increase the bank’s geographic market.\textsuperscript{119} Initially priced at $25.5 billion, the acquisition was Wachovia’s largest ever.\textsuperscript{120} The deal further strengthened Wachovia’s status as a national player, increasing the bank’s assets from $542 billion to $669 billion and adding 285 new branches, with at least 120 located in California, a primary motive for the deal.\textsuperscript{121} Wachovia also inherited Golden West’s portfolio of option ARM mortgages, aptly named “pick-a-

\begin{itemize}
\item \textsuperscript{113} Id. at 214 (noting that buying Golden West at the peak of the housing bubble burdened Wachovia with billions in losses).
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. at 56 (explaining that Wachovia had a desire for westward expansion, after which Thompson announced plans to build 200 new branches in California).
\item \textsuperscript{116} See id. at 56 (noting that housing prices in California increased by 117 percent over five years).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} ROTHACKER, supra note 1, at 57 (explaining that “Wachovia’s plan to wade cautiously into California . . . took a dramatic turn in late April” when Thompson began talking to the co-CEOs of Golden West Financial about a possible acquisition).
\item \textsuperscript{119} Id. at 62.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\end{itemize}
payment” loans. The loans offered borrowers the ability to elect different payment options on their mortgage each month. Among the many options, the borrower could choose a minimum payment option that did not cover the accrued interest on the mortgage loan, resulting in an increasing loan principal balance referred to as negative amortization.

Notwithstanding Wachovia’s belief in the wisdom of the Golden West deal, some banking experts sharply criticized it. Chief among the criticisms was the purchase price given concerns about a deteriorating housing market. The final $25.5 billion purchase price faced more scrutiny after Bank of America acquired rival mortgage-lending giant, Countrywide Financial, for $4 billion a little over a year later. The low cost of Countrywide Financial reinforced the speculation that the housing market was collapsing.

Rothacker notes that the departure of key executives in the First Union-Wachovia merger and the retirement of others contributed significantly to Wachovia’s ill-timed purchase of Golden West Financial because those most likely to challenge Thompson on potential mergers and acquisitions had left the bank. In particular, Rothacker notes that when Vice-Chairman Wallace Malone and CFO Bob Kelly left in 2006, the bank lost two key vocal challengers to mergers. The timing of the Golden West deal, coincidentally, occurred shortly after their departure. Rothacker suggests that the merger with Golden West may have played out differently had the two executives remained at

122. Id. at 58.
123. Id. at 55.
124. ROTHACKER, supra note 1, at 62.
125. Id. at 63.
126. Id.
127. Id. at 81.
128. Id. at 101 (noting that Bank of America CEO Lewis even remarked that the purchase of Countrywide obviously had inherent risks due to the contracting housing market, but they were not paying a high cost for the mortgage-servicer like Wachovia had for Golden West Financial).
129. Id. at 60.
130. ROTHACKER, supra note 1, at 55-56.
131. Id. at 56-58. Wallace Malone said he had did not like the Golden West deal. He did not like the company’s focus on real-estate lending, especially in California. See id. at 58.
Wachovia. Other managerial mistakes in the merger, Rothacker notes, included the exclusion of bank executives usually involved in merger discussions and the lack of proper due diligence. Without vocal opposition or challenges to the merits of the merger, Rothacker suggests that Thompson forced Wachovia executives to "make the deal work."

Despite Wachovia's successful conversion of Golden West's branches, concerns over leadership and the option-ARM portfolio still caused consternation among Wachovia's executives and industry experts. Many Wachovia executives questioned the appointment of David Pope as the head of Wachovia's mortgage unit. Without a background in the mortgage industry, Pope seemed ill-prepared for his new position, especially in light of the struggling housing market. Pope's appointment further deteriorated industry experts confidence in the unit. Additionally, Wachovia, unlike its competitors, kept its mortgages instead of selling them to investors, a practice that would have a detrimental impact on the bank's balance sheets if a collapse of the housing market occurred.

Even Wachovia's executives were startled at the deterioration of loans on their books. By 2008, the housing market was in shambles and Wachovia's portfolio of pick-a-payment loans resulted in mounting losses. The growing losses forced Ken Thompson out of office. Wachovia hired Bob Steel, a U.S. Treasury executive, in his place. In a desperate move, Steel

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132. See id. at 57, 59-60, 96 (noting that Kelly was worried about the housing market before his departure, specifically in California).
133. See id. at 59-60. Additionally, in stark contrast to earlier acquisitions, mortgage executives and other technology executives normally in the involved were not consulted by Thompson. See id. at 60.
134. ROTHACKER, supra note 1, at 59 (quoting a former Wachovia executive, Rothacker notes the deal with Golden West was different than other typical acquisitions, and that "[i]t was a done deal" and to "make it work").
135. See id. at 79.
136. See id. at 87.
137. Id. at 82.
138. Id.
139. Id. at 83.
140. ROTHACKER, supra note 1, at 85.
141. See id. at 86.
142. Id. at 86-88.
143. Id. at 92.
announced the creation of a Distressed Asset Resolution Team, an operation that would reduce mortgage losses by downsizing the mortgage unit by over 8,000 positions and attempting to refinance borrowers into new loans.\textsuperscript{144} Rothacker notes that former executives knew the moves were probably too late and that the bank missed an opportunity to reduce its risk and sell down its portfolio in early 2007.\textsuperscript{145}

The option-ARM portfolio caused further concern among investors and the bank’s depositors. Rothacker states that exposure to the declining home market in California’s Inland Empire and Central Valley regions decimated the values of homes securing the pick-a-payment mortgages.\textsuperscript{146} Moreover, the failure of Lehman Brothers and Bank of America’s rescue of Merrill Lynch both contributed to the growing concern over Wachovia’s loans.\textsuperscript{147}

The bankruptcy of the New York investment bank Lehman Brothers increased investor fears about whether the U.S. government would allow additional financial institutions to fail, triggering liquidity issues at Wachovia as interbank financing dried up.\textsuperscript{148} Washington Mutual (WaMu), another mortgage leader, was placed in Federal Deposit Insurance Corporation (FDIC) receivership and sold to JPMorgan Chase & Co. after a bank run\textsuperscript{149} left WaMu illiquid.\textsuperscript{150} As the nation’s largest-ever bank failure to date,\textsuperscript{151} WaMu’s collapse increased concern that Wachovia’s growing losses in its option-ARM portfolio would be bigger than expected.\textsuperscript{152} Experts noted that “Wachovia is facing a number of daunting challenges, particularly the burden of a deteriorating $122 billion option-ARM portfolio” in the aftermath of the WaMu

\textsuperscript{144} Id. at 98.
\textsuperscript{145} Id. at 99.
\textsuperscript{146} ROTHACKER, supra note 1, at 99.
\textsuperscript{147} See id. at 112 (noting that the market’s perception of Wachovia was changing in light of Lehman Brother’s bankruptcy).
\textsuperscript{148} See id. at 123.
\textsuperscript{149} In a bank run customers try to withdraw their bank deposits simultaneously so that the bank’s reserves may not be sufficient to cover the withdrawals. Bank Run, INVESTOPEDIA, http://www.investopedia.com/terms/b/bankrun.asp (last visited Feb. 12, 2011).
\textsuperscript{150} ROTHACKER, supra note 1, at 121.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 122.
The collapse of WaMu affected confidence in Wachovia as depositors with funds in excess of FDIC insurance coverage withdrew funds from their accounts. The silent bank run on Wachovia’s deposits affected the bank’s liquidity position, and coupled with its inability to obtain interbank financing, the bank questioned its ability to meet its day-to-day obligations. With growing market nervousness about Wachovia’s mortgage portfolio, Treasury Secretary Henry Paulson pushed Wachovia to rapidly strike a deal to sell itself to a rescuer.

Wachovia, now on the brink of failure, faced pressure from federal regulators to forge a deal with Citigroup or Wells Fargo. Both banks, however, stated to regulators that a Wachovia deal would not be possible without some form of government assistance. Shortly thereafter, the FDIC and the Federal Reserve were prepared to make a systemic risk determination related to Wachovia, which would provide government assistance to Citigroup for the purchase of Wachovia. As negotiations moved forward between the two banks, Wachovia signed a non-binding exclusivity agreement with Citigroup. However, no formal merger agreement between the two banks was signed. This allowed Wells Fargo to reformulate an unassisted bid on the Charlotte-bank after obtaining a favorable tax ruling that would allow Wells Fargo to deduct Wachovia’s losses from the San Francisco-bank’s profits. With this tax benefit, Wells Fargo made a competing bid for Wachovia at $7 a share. The Wachovia board met and accepted this bid, recognizing that

153. Id.
154. Id. at 123.
155. Id. at 123 (explaining that Wachovia executives reviewed their liquidity position after the silent bank run and their ability to engage in banking activities).
156. ROTHACKER, supra note 1, at 119.
157. Id. at 124 (noting that FDIC executives told Wachovia executives that if a deal could not be reached by the following Monday, the FDIC would place Wachovia in receivership).
158. Id. at 132-134.
159. Id. at 134 (stating that the agreement was for the FDIC to share in losses of $312 billion in assets with Citigroup taking the first $42 billion in losses).
160. Id. at 136.
161. ROTHACKER, supra note 1, at 136.
162. Id. at 143.
163. Id.
Citigroup would sue it for violating the exclusivity agreement.\textsuperscript{164} Wells Fargo announced the acquisition by the smaller San Francisco-bank of the nation’s fourth largest bank on October 3, 2008.\textsuperscript{165} In a conference call shortly after the merger agreement, Wells Fargo stated it planned to mark down Wachovia’s option ARM portfolio by $32 billion, making the mortgage portfolio approximately a third of the write-downs that Wells Fargo would make on Wachovia’s books.\textsuperscript{166}

Rothacker notes the irony of Wachovia’s acquisition by Wells-Fargo. On October 3, the day the merger agreement was signed by both banks, President Bush signed the Emergency Economic Stabilization Act (EESA) into law.\textsuperscript{167} The EESA provided $700 billion to purchase troubled assets via the Troubled Asset Relief Program (TARP).\textsuperscript{168} Rothacker notes that if Wachovia had been able to stay independent for a week longer, it may have qualified for an injection of capital by the government’s purchase of preferred stock and survived as a stand-alone bank.\textsuperscript{169} Additionally, the acquisition by the San Francisco bank would ultimately lead to the closure of 122 Wachovia branches, almost identical to the 123 total branches acquired by Wachovia in its acquisition of Golden West, but overlapping significantly with the existing Wells Fargo branch network.\textsuperscript{170} The final sense of irony was felt by original Wachovia supporters who believed that the conservative Winston-Salem’s bank would never have failed if a merger with First Union had never been consummated.\textsuperscript{171} Under the Wachovia veneer was a riskier First Union that tarnished the conservative banking traditions embodied by Winston-Salem’s bank.\textsuperscript{172}

\textsuperscript{164} Id. at 145-46.  
\textsuperscript{165} Id. at 146.  
\textsuperscript{166} Id.  
\textsuperscript{167} Id. at 149.  
\textsuperscript{169} ROTHACKER, supra note 1, at 153.  
\textsuperscript{170} Id. at 197.  
\textsuperscript{171} Id. at 159.  
\textsuperscript{172} Id. at 2.
Bank of America’s purchase of Merrill Lynch amidst the pending failure of the investment bank in September 2008 was the primary source of Bank of America’s struggles.\textsuperscript{173} The fire sale of Wall Street’s Bear Sterns and the impending bankruptcy of Lehman Brothers caused panic among executives not only at Merrill Lynch, but across Wall Street.\textsuperscript{174} The possibility of another major investment bank failure had the potential to cause widespread market disruption, both domestically and globally.\textsuperscript{175} As fears grew over the next troubled financial institution,\textsuperscript{176} Merrill Lynch CEO John Thain pursued the possibility of a merger to ensure the survival of the brokerage firm.\textsuperscript{177} Bank of America appeared to be the best suitor for Merrill Lynch. The Charlotte-based commercial bank would provide a stable foundation of deposits, and Merrill would make Bank of America a major player in investment banking and wealth management.\textsuperscript{178} As Lehman’s impending failure loomed over Wall Street in mid-September 2008, executives from both Bank of America and Merrill hastily began initial merger talks.\textsuperscript{179} The two banks agreed in principle to a deal before markets opened on September 19, 2008 – merely thirty-six hours after their initial talks began.\textsuperscript{180}

As the deal drew to a close, it became apparent that Bank of America would have to absorb billions in losses emanating from Merrill Lynch as the bank’s assets were pounded by the collapsing housing market and the credit crunch.\textsuperscript{181} In the days leading up to shareholder approval of the acquisition, Merrill Lynch adjusted its losses to $9 billion, up from its previous $7 billion estimate.\textsuperscript{182} At the shareholder meeting to approve the merger, Rothacker

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173. Id. at 4.
174. Id. at 104 (“Lehman’s troubles didn’t worry the government only. Rival investment banks also feared the fallout.”).
175. ROTHACKER, supra note 1, at 173.
176. Id. at 104.
177. Id.
178. See id. at 165.
179. Id. at 108.
180. Id.
181. ROTHACKER, supra note 1, at 163-64.
182. Id. at 164.
\end{flushleft}
indicates that the growing loss estimate was not disclosed. Nor did bank executives discuss the compensation and bonuses of Merrill Lynch employees, a cause of concern to many Bank of America shareholders. Despite the growing losses, shareholders approved the acquisition in December 2008.

The rushed deal and the growing losses at Merrill Lynch drew speculation about improper actions by executives at Bank of America. New York State Attorney General Andrew Cuomo investigated Merrill Lynch’s loss estimates and sought to determine whether there was proper disclosure by Bank of America to its shareholders. Regulators at the Federal Reserve also questioned whether Bank of America executives should have known about Merrill Lynch’s losses sooner. In addition, regulators and experts suspected that Bank of America failed to properly investigate Merrill Lynch’s books, which indicated a lack of proper due diligence prior to the merger agreement.

As the outlook on Merrill Lynch’s assets continued to decline and the investment banking firm readjusted quarterly losses again from $9 billion to $12.5 billion, Bank of America’s lawyers examined the possibility of pulling out of the merger. The losses concerned Ken Lewis. He and other Bank of America executives vocalized their concern over the stability of the franchise. The merger agreement contained a material adverse change (MAC) clause, which would allow Bank of America to abandon the deal before it closed. Lawyers examining the MAC clause noted that to exercise the clause Bank of America would have to show a long term detriment as a result of the merger, as it could not be invoked because of “general

183. Id. at 165.
184. Id.
185. Id.
186. Id. at 164.
187. ROTHACKER, supra note 1, at 164.
188. Id. at 174.
189. Id. at 174-175.
190. Id. at 169-70.
191. Id.
192. Id. at 170.
193. ROTHACKER, supra note 1, at 164.
business, economic, or market conditions.” However, Rothacker explains that pressure from regulatory authorities at the Federal Reserve Board (FRB) and the Treasury forced Bank of America to follow through with the merger without exercising the MAC clause. Rothacker notes that there was a growing sense of urgency among regulators to prevent another systemically significant institution like Merrill Lynch from failing. To ensure that the original merger agreement with the Wall Street firm would close, regulators promised Lewis additional government assistance for Bank of America in addition to the TARP funds Bank of America had already received. The assurance of additional government support satiated the fears of Bank of America executives and the deal closed on January 1, 2009.

Bank of America received an additional TARP injection of $20 billion and a government guarantee of $118 billion on toxic assets mostly inherited from Merrill Lynch. Notwithstanding the new government-provided capital, Bank of America continued to struggle. The fourth-quarter financial results for Bank of America were dismal as the bank posted a loss of $2.4 billion, its first quarterly loss since 1981. Moreover, the Merrill Lynch assets’ impact on Bank of America’s earnings was immediately apparent as the Wall Street firm posted losses of $15.3 billion. Investors, reacting to the stunning losses by Merrill Lynch, pummeled Bank of America’s share price, dropping it forty-five percent from the beginning of the week.

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194. Id. at 168.
195. Id. at 177.
196. Id. at 171.
197. Id. at 178 (noting that the preliminary guarantee from the government included assistance promised by the Treasury and the FRB involved an additional capital injection of $15 billion, as well as a guarantee of approximately $120 billion in toxic assets held by the bank).
198. Id. at 175 (explaining conversations between Bernanke and Lewis aimed at reassuring the Bank of America CEO that the government would provide the bank with assistance without being specific about what type of aid would be provided for the Charlotte bank).
199. See ROTHACKER, supra note 1, at 180-81 (noting that Bank of America’s stock price dropped almost fourteen percent to $7.18 by the Friday after Bank of America released its 2008 fourth quarter results).
200. Id. at 180-181.
201. Id.
202. Id.
Some experts, Rothacker notes, compared Bank of America's acquisition of Merrill Lynch to Wachovia's notorious purchase of Golden West.\textsuperscript{203}

The Merrill Lynch deal would ultimately cost Bank of America more than the $50 billion purchase price.\textsuperscript{204} In the months following the acquisition, the share price for Bank of America fell to all-time lows, dropping nearly eighty-five percent of the market value since the merger with Merrill Lynch was announced.\textsuperscript{205} Losses continued to mount for Bank of America and by 2009 the bank's market capitalization fell to $42 billion, down from a heady $183 billion in 2007.\textsuperscript{206} Moreover, the government aid taken by the bank came at a high cost. The bank's TARP funding of $45 billion cost Bank of America $402 million in dividends to taxpayers by March 2009.\textsuperscript{207} In two short years, the nation's largest bank went from a banking behemoth to a ward of the federal government.\textsuperscript{208}

### III. Understated Factors in the Banks' Struggles

Rothacker's Banktown offers a compelling story steeped in the financial history of North Carolina's two most famous banks. Rothacker attributes the primary reasons for the struggles and near collapse of the two financial institutions to the toxic assets inherited from poorly-timed mergers.\textsuperscript{209} However, he understates an important factor for each bank: (i) the use of the discount window and other FRB lending programs by Wachovia, and (ii) the comparative value added to Bank of America from the Merrill Lynch acquisition.\textsuperscript{210} The analysis of these overlooked issues that follows addresses these two facets of the acquisitions.

\textsuperscript{203} Id.
\textsuperscript{204} Id. at 112 (explaining that Ken Lewis had to answer questions regarding the $50 billion purchase price in an investor conference call).
\textsuperscript{205} See ROTHACKER, supra note 1, at 182.
\textsuperscript{206} Id. at 186.
\textsuperscript{207} Id. at 192.
\textsuperscript{208} Id. at 180.
\textsuperscript{209} See infra Part II.C.
\textsuperscript{210} See infra Part III.A-B.
A. The Discount Window and Other Government Lending Programs

In response to severe economic contraction during the Great Depression, both the FRB\textsuperscript{211} and the FDIC\textsuperscript{212} retained tools to effectively quell market disruptions at depository institutions.\textsuperscript{212} More specifically, the two agencies have the ability to protect the nation’s depository institutions from bank runs and liquidity issues.\textsuperscript{213} The FRB assists struggling banks with liquidity issues by providing access to the discount window, where a bank may obtain a low-interest, short-term loan to help it meet its daily obligations.\textsuperscript{214} By providing short-term loans, the FRB can temporarily prevent a bank from collapsing by relieving market pressures until liquidity returns.\textsuperscript{215} Discount window loans are predicated, however, on the depository institution having adequate collateral to guarantee the loans.\textsuperscript{216} Therefore, for a bank to qualify for a discount window loan, the bank must be adequately capitalized, and thereby solvent.\textsuperscript{217} The FDIC, on the other hand, prevents runs on bank deposits by insuring deposits in the bank up to a designated amount.\textsuperscript{218} Because deposit insurance makes bank

\textsuperscript{211} The Federal Reserve Discount Window, BD. OF GOVERNORS OF THE FED.\textsuperscript{212} RESERVE SYs., http://www.frbdiscountwindow.org/discountwindowbook.cfm (last visited Feb. 19, 2010) [hereinafter Federal Reserve] (explaining that the FRB’s discount window is used primarily as a safety valve for relieving liquidity pressure at financial institutions).

\textsuperscript{212} Who is the FDIC?, Federal Deposit Insurance Corporation http://www.fdic.gov/about/learn/symbollindex.html (Aug. 11, 2010) [hereinafter Who is the FDIC] (explaining the mission and purpose of the FDIC in respect to promoting confidence in the nation’s banks by guaranteeing deposits to prevent bank runs).

\textsuperscript{213} Federal Reserve, supra note 211; Who is the FDIC, supra note 212 (explaining that one purpose of the FDIC is so limit the effect of financial market disruptions on depository institutions).

\textsuperscript{214} See supra notes 211 and 212 and accompanying text.

\textsuperscript{215} See Federal Reserve, supra note 211 (noting that extensions of credit can help relieve liquidity strains in a depository institution and in the banking system as a whole).

\textsuperscript{216} Id.

\textsuperscript{217} Id. The Federal Deposit Insurance Corporation Improvement Act of 1991 amended the Federal Reserve Act to restrain extensions of Federal Reserve credit to an FDIC-insured depository institution that has fallen below minimum capital standards or has received a composite CAMELS rating of 5 (or its equivalent) from its federal regulator. Id.

deposit accounts a safe place for depositors to store their funds, the FDIC prevents bank runs and maintains the stability of banking and financial systems. Together, the two institutions serve as buffers to the disastrous effects of bank runs and lack of liquidity.

However, many investors and bankers viewed financial institutions that borrowed from the discount window as troubled institutions. To remove the stigma of borrowing from the discount window, the FRB urged Bank of America, Wachovia, JP Morgan Chase, and Citibank to take loans from the window in 2007. Despite government assurances to banks that the discount window loans would not demonstrate weakness to other financial institutions, the FRB created several other short-term lending facilities to ease liquidity pressure during the financial crisis. Among them was the Term Auction Facility (TAF) program. Under TAF, depository institutions could borrow funds for a longer term, ranging from twenty-eight to eighty-four days, without the stigma of borrowing from the discount window.

Rothacker overlooks the use of the discount window, TAF, and the other FRB liquidity programs as an alternative for Wachovia to remain independent. Rothacker notes that Wachovia considered borrowing from the discount window when interbank lending dried up in September, but he does not discuss why the bank did not tap the discount window to survive the run on the bank. During September 2010 hearings concerning

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220. See infra Part III.A.

221. Term Auction Facility, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/newsevents/reform_taf.htm (Jan. 24, 2011) [hereinafter Term Auction Facility] (stating that many banks were reluctant to borrow at the discount window out of fear that their borrowing would become known and would be erroneously taken as a sign of financial weakness).


223. Term Auction Facility, supra note 221.

224. Id.

225. Id.

226. See ROTHACKER, supra note 1, at 124 (noting that Wachovia could not raise
systematically significant institutions and the issue of "too-big-to-fail," FRB Chairman Ben Bernanke and FDIC Chairman Sheila Bair shed additional light on the precarious liquidity situation facing Wachovia.\footnote{Rick Rothacker & Christina Rexrode, Panel sheds light on rescue of Wachovia, CHARLOTTE OBSERVER (Sept. 2 2010), http://www.charlotteobserver.com/2010/09/02/1661670/panel-sheds-light-on-rescue-of.html.} With an approximately $29 billion loss in deposits in the month of September, the Financial Crisis Inquiry Commission (FCIC) asked whether the bank was still considered solvent, and if so, why Wachovia did not utilize the discount window.\footnote{FINANCIAL CRISIS INQUIRY COMMISSION, TOO BIG TO FAIL: EXPECTATIONS AND IMPACT OF EXTRAORDINARY GOVERNMENT INTERVENTION AND THE ROLE OF SYSTEMIC RISK IN THE FINANCIAL CRISIS DAY 2 (2010), available at http://c0182412.cdn1.cloudfiles.rackspacecloud.com/2010-0902-Transcript.pdf [hereinafter FINANCIAL CRISIS INQUIRY COMMISSION].} The two stated that at the time of the sale of Wachovia, although faced with severe credit issues, the Charlotte-based bank was still considered solvent by regulatory standards.\footnote{See id. (recounting Commissioner Peter Wallison questioning Bair and Bernanke regarding Wachovia’s status and solvency); ROTHACKER, supra note 1, at 122 (explaining that if Wachovia took write-downs similar to WaMu, it would be on the edge of being considered well-capitalized).} Another key federal official, Scott Alvarez, General Counsel for the FRB, stated that he believed Wachovia to be “well-capitalized” during the first day of the FCIC hearing.\footnote{See FINANCIAL CRISIS INQUIRY COMMISSION, supra note 228, at 1 (detailing Bernanke explaining that Wachovia’s decision not to borrow from the discount window was decided by Wachovia’s executives, which they relayed to their regulators at the FRB in Richmond).} This suggests that Wachovia would have been able to reach the discount window for temporary overnight or short-term loans to continue its day-to-day operations.\footnote{See ROTHACKER, supra note 1, at 122 (explaining that if Wachovia took write-downs similar to WaMu, it would be on the edge of being considered well-capitalized); Federal Reserve, supra note 211 (explaining that the Federal Reserve cannot extend the discount window to any institution that falls below “well-capitalized”).} However, Bernanke stated that the decision not to tap the FRB’s discount window was not forced by the FRB, but by Wachovia executives.\footnote{See FINANCIAL CRISIS INQUIRY COMMISSION, supra note 228, at 228 (2010).} The conscious decision to not borrow from the discount window was made by Wachovia’s top brass who
felt that even using the discount window, the bank would not be able to stay operational for more than a day or two. While Wachovia did not borrow from the discount window, disclosures from the FRB in December 2010 reveal that Wachovia received $72 billion in loans from the TAF program throughout 2008. It is unknown whether this emergency lending was necessary to keep the bank solvent or whether it was just used to prevent bank runs. The loans, which were all repaid, supported the bank as it continued to post losses throughout 2008. Despite the loans from the TAF program, the run on Wachovia in September 2008 exacerbated the bank’s liquidity pressures. Tony Plath, a finance professor at the University of North Carolina at Charlotte, speculates that if Wachovia had elected to use the discount window, it would have, perhaps, survived the deposit run until TARP was passed the same day as the Wells Fargo acquisition was announced. Moreover, Wachovia continued to borrow from the TAF program through March 2009 despite the Wells Fargo acquisition, even borrowing an additional $15 billion the day of the acquisition announcement. If the TAF loans were used to support the bank during the financial crisis, then the post-acquisition loans suggest even larger liquidity

233. See FINANCIAL CRISIS INQUIRY COMMISSION, supra note 228.
235. See id. (explaining that the purpose of the loans were not disclosed, however it was used to either support the bank amidst growing losses or to secure liquidity during bank runs in 2008).
236. Id.
238. See Craver, supra note 234 (quoting Tony Plath’s questioning why Wachovia did not have the discount window open to them during the bank run, “my reaction is why in the hell the Fed couldn’t offer (Wachovia) discount-window advances in September 2008 so it could survive the brokered deposit run it was experiencing during the final days of the bank’s life).
239. See Craver, supra note 234 (noting that on the day of the merger agreement, Wachovia took an additional $15 billion TAF funding and a total six additional loans worth $75 billion after the Wells Fargo takeover).
struggles within Wachovia than previously addressed by Banktown.

In fairness to Rothacker, the disclosures regarding Wachovia’s precarious liquidity situation were released after the publication of Banktown. However, as the government continues to question regulators and bank executives regarding the financial crisis through FCIC hearings and mandatory disclosures, a clearer picture surrounding Wachovia will emerge in the coming years.

B. Merrill Lynch Boosts Bank of America’s Bottom Line

1. Merrill Lynch Aiding Bank of America’s Revenues

Rothacker is correct that the ill-timed purchase of Merrill Lynch was a primary cause of Bank of America’s struggles. There is little doubt that the Merrill Lynch acquisition, in the short-term, severely distressed the bank. The merger damaged the bank’s reputation, its share price, and its market value.\(^240\) The toxic assets on Merrill Lynch’s books forced Bank of America to seek additional government aid, which cost the bank millions in dividends.\(^241\) However, he understates the ability of the firm to stabilize Bank of America’s earnings in the continuing turmoil of the financial crisis. As other Bank of America businesses like home loans and credit cards continued to produce significant losses, Merrill Lynch began to produce considerable revenue, aiding the bank’s earnings reports.

Many critics believed that the Merrill Lynch deal would be the undoing of Bank of America.\(^242\) In large part, critics, including

\(^{240}\) See Rothacker, supra note 1, at 220 (documenting that Bank of America’s market capitalization slumped to $130 billion at the end of 2009 from $238 billion at the end of 2006).

\(^{241}\) See id. at 192 (noting that by March 2009, Bank of America had already paid the government $402 million in dividend payments as a result of accepting TARP funds).

Rothacker, questioned whether the merger would produce profits for the bank in the long run. Despite an increase in revenue from Merrill Lynch in early 2009, the investment bank’s portfolio of mortgage-backed securities and other risky investments produced greater losses than anticipated. The losses on the structured notes led critics to state that Merrill Lynch might be “the gift that keeps taking” from Bank of America.

However, despite initial losses and costs related to the merger, Merrill Lynch’s businesses began to produce significant gains while other Bank of America businesses posted losses. By the end of 2009, a full year after the Merrill Lynch merger, Bank of America losses grew $1.8 billion from the year before. In particular, the market reacted to growing consumer credit issues as home loans and credit cards became sources of large losses for Bank of America, posting $3 billion in combined losses. During the same period, Merrill Lynch’s profits were seen as a stabilizer to the growing consumer credit losses by Bank of America. In contrast to the losses in those businesses, Merrill Lynch posted strong profits through businesses in securities, bond trading, and

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243. See Rothacker, supra note 1, at 214 (noting that the Merrill Lynch merger has caused the current struggles for Bank of America, and that time will only tell if it the merger will pay off for the Charlotte-bank).
246. Id.
248. See David Mildenberg, Bank of America Posts Third-Quarter Loss on Defaults, Bloomberg (Oct. 16, 2009, 5:34 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6Qs7hYA5D30 (noting that losses on home lending and insurance widened to $1.6 billion from $724 million, and the loss on credit cards expanded to $1.04 billion from $1.67 million).
249. See Joe Nocera, Incompetent? No, Just Not A Leader, N.Y. Times (Oct. 3 2009), http://www.nytimes.com/2009/10/03/business/03nocera.html?pagewanted=all (noting that while Ken Lewis was not the right leader at Bank of America to guide the bank through the financial crisis, Merrill Lynch’s profits propped up Bank of America which was awash in credit card and other losses in 2009).
wealth management, throughout the 2009 year.\textsuperscript{250} The profits of Merrill Lynch aided Bank of America’s quarterly earnings reports throughout 2009, and experts stated that “Merrill’s profits are propping up Bank of America, which is awash in credit card and other losses.”\textsuperscript{251}

Continuing losses in Bank of America’s consumer credit businesses further signified the importance of Merrill Lynch’s profits in 2010.\textsuperscript{252} Through the third quarter of 2010, Bank of America posted an $8.1 billion loss in its credit card business.\textsuperscript{253} Home loan losses also increased in the third quarter of 2010, rising to $4 billion, up from a $2.9 billion loss in 2009.\textsuperscript{254} The Merrill Lynch investment banking assets, on the other hand, accounted for $5.6 billion in net income through the same quarter.\textsuperscript{255} Additionally, Merrill Lynch’s brokerage unit produced revenues of $1.1 billion in the third quarter of 2009, resulting in $6.7 billion in revenue from the two Merrill businesses in the third quarter of 2010.\textsuperscript{256} Merrill’s acquisition by Bank of America, which initially drew strong criticism, was viewed as a key factor in propping up Bank of America’s earnings through the first three quarters of 2010.\textsuperscript{257}

Moreover, although the Merrill deal resulted in short-term losses for Bank of America, Rothacker understates the potential profitability of the combined unit. As the credit crunch wanes and liquidity returns to financial markets, experts believe that Bank of

\begin{itemize}
  \item[\textsuperscript{250}] See Mildenberg, supra note 248.
  \item[\textsuperscript{251}] Nocera, supra note 249.
  \item[\textsuperscript{252}] See Martin, supra note 242 (noting that industry experts believed that the Merrill Lynch acquisition was paying off sooner than expected for Bank of America).
  \item[\textsuperscript{253}] Hugh Son, Still Fighting Fires at Bank of America, Bus. Wk. (Jan. 5, 2011), http://www.businessweek.com/magazine/content/11_03/b4211039415141.htm (explaining that Bank of America’s credit-card unit posted an $8.1 billion loss, driven by a $10.4 billion write-down related to debit-card regulation that will squeeze revenue by about $2 billion a year starting in this year’s third quarter).
  \item[\textsuperscript{254}] Id.
  \item[\textsuperscript{255}] Id.
  \item[\textsuperscript{256}] Id.
\end{itemize}
America will post profits sooner than anticipated from the Merrill Lynch acquisition. As the nation’s largest brokerage house and consumer banking franchise, Bank of America has the potential to generate $40 billion in profits annually (even after repaying TARP and costs associated with the Merrill Lynch merger). Former Bank of America CEO Ken Lewis forecasted that the merger with Merrill Lynch, if realized to its full potential, could result in $30 billion in revenue annually. Through April 2010, Merrill Lynch generated approximately $17 billion in trading gains, repaying the majority of Bank of America’s $20 billion acquisition cost. Looking forward, the acquisition of Merrill Lynch has the potential to accomplish Lewis’s vision of a strengthened global Bank of America franchise capable of generating large profits.

2. Acquisition Costs Associated with Merrill Lynch

Rothacker notes that the Merrill Lynch acquisition came at a high cost to shareholders and taxpayers alike. In *Banktown*, Rothacker highlights the additional costs associated with the Merrill Lynch deal, but the book overlooks other large costs associated with Bank of America’s acquisition with Countrywide Financial. In addition to a $15.8 billion loss by Merrill Lynch that affected Bank of America’s earnings, the acquisition also resulted in lawsuits against the bank, penalties levied by federal regulators, and public embarrassment in Congressional hearings. Bank of America shareholders and the Securities Exchange

258. See id.
261. See Rothacker, *supra* note 1, at 192.
262. See Mildenberg, *supra* note 257.
263. See Rothacker, *supra* note 1, at 175.
264. See id. at 212.
265. See id. at 191.
266. See id. at 218-20 (noting the litigation ensuing after the Merrill Lynch merger from New York Attorney General Andrew Cuomo and other SEC related actions).
Commission (SEC) both filed separate lawsuits alleging that Bank of America and its executives negligently withheld information regarding Merrill Lynch’s bonuses, as well as the extent of Merrill Lynch losses prior to seeking shareholder approval of the acquisition.267 The shareholder suit, while still pending at the time of publication of this Note, exposes the bank to much less liability after the presiding judge dismissed a majority of the claims asserted in it.268 In February 2010, Bank of America settled with the SEC, paying approximately $150 million and neither admitted nor denied liability.269 New York State Attorney General Andrew Cuomo also initiated suit claiming that the bank, along with certain executives, including Ken Lewis, fraudulently misled investors to approve the merger.270 The suit is still pending.

After closing the Merrill Lynch merger, critics hypothesized that it would not be Merrill Lynch that would cause the most post-acquisition difficulty for Bank of America, but rather, it would be the Countrywide Financial acquisition.271 Since the acquisition of Countrywide Financial in 2008,272 the combined home loans unit has accrued losses upwards of $12 billion.273 Although Banktown correctly attributes the near collapse of Bank of America to the Merrill Lynch acquisition, it fails to reflect the costly acquisition of Countrywide by Bank of America in its recent struggles.

The Countrywide Financial acquisition has subjected Bank of America to large penalties and litigation costs.274
Countrywide Financial deal has forced Bank of America to settle or litigate home mortgage buybacks of bad mortgages to Fannie Mae (Fannie) and Freddie Mac (Freddie), as well as insurers and other private investors.\(^2\) Pressure from investors to repurchase over $21 billion in bad mortgages sold to the government sponsored entities forced Bank of America to settle with the Federal Housing Finance Agency (FHFA).\(^2\) Of the $3.3 billion settlement with the FHFA, $2.8 billion is attributed to mortgages sold to Fannie and Freddie by Countrywide Financial.\(^2\) Moreover, the settlement with the FHFA only represents a portion of increasing costs related to Countrywide Financial. Bank of America took an additional $2 billion goodwill charge related to the declining mortgage business, primarily stemming from poor mortgages made by Countrywide, bringing the total cost of the settlement to $5.3 billion.\(^2\) While the settlement ends the exposure to Freddie and Fannie, Bank of America still faces litigation related to the sale of Countrywide’s mortgage-backed securities to private investors and mono-line insurers.\(^2\) The settlement with insurers and private investors could cost the bank up to $35 billion, although most experts expect the total not to


\(^{278}\) See Rothacker, *Bank of America pays $2.8 billion*, supra note 274 (explaining that Bank of America is taking a $2 billion goodwill charge to down value the mortgage unit).

\(^{279}\) See Fitzpatrick, supra note 275 ("But the settlement doesn’t affect the roughly $6 billion in repurchase requests from insurers and private investors who purchased Countrywide and Bank of America loans. Compounding the problem of uncertainty, analysts are divided about how damaging the private requests could be. Their estimates of the bank’s ultimate exposure vary wildly, ranging from $8 billion to $35 billion.").
reach beyond $15 billion.\textsuperscript{280} As the settlements regarding buybacks of mortgages continues, the cost of the Countrywide Financial acquisition could ultimately result in higher losses and costs than those associated with Bank of America’s absorption of Merrill’s huge 2008 losses.\textsuperscript{281}

\section*{IV. Conclusion}

\textit{Banktown} provides a window to the drama surrounding Charlotte’s giant banks from their historical roots to national prominence, and then details the subsequent unraveling of Wachovia and Bank of America in the financial crisis.\textsuperscript{282} Although Wachovia did not technically fail, the shotgun marriage to Wells Fargo had reaching implications to the Queen City.\textsuperscript{283} Once home to two of the nation’s largest banks, the city must deal with the disappearance of hundreds of jobs and vast amounts of wealth resulting from the loss of Wachovia’s headquarters.\textsuperscript{284} Bank of America, too, must deal with the immense loss of wealth and a civic partner in the development of Charlotte.\textsuperscript{285} As the Queen City attempts to rebuild and attract new businesses, the crippling effects of the recession remain evident in light of Charlotte’s deep dependency on the banking industry.\textsuperscript{286} It remains to be seen whether Charlotte, a city that has reinvented itself from a railroad city, to a cotton and textile center, and ultimately a bank-town, can once again redefine itself and diversify its economic landscape.\textsuperscript{287} It should be noted that Charlotte is still home to the second most

\begin{footnotesize}
\textsuperscript{280} See id.
\textsuperscript{281} See supra note 135 and accompanying text.
\textsuperscript{282} See supra Part II.A-C.
\textsuperscript{283} See ROTHACKER, supra note 1, at 220 (noting that Wachovia’s acquisition resulted in the loss of thousands of banking jobs and wealth).
\textsuperscript{284} See id. at 196 (noting that the impact of the deal on the losses Charlotte would experience, notably layoff notices to over 4,000 Wachovia employees and to cut $5 billion in costs from the combined merger).
\textsuperscript{285} See id.
\end{footnotesize}
banking assets in the country and banking will still play an outsized role in the redefinition of the Queen City.\textsuperscript{288} Although this Note points out that Rothacker overlooks significant factors contributing to the struggles of Wachovia and Bank of America, \textit{Banktown} provides a thorough analysis of the rise and near-fall of the giant Charlotte banks.\textsuperscript{289} As new details continue to emerge about the financial crisis and role of government intervention to prevent the collapse of the nation’s financial systems during the financial crisis, \textit{Banktown} will serve as a useful source to examine Charlotte’s outsized role during the crisis.\textsuperscript{290}

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\textsuperscript{288} See id.
\textsuperscript{289} See supra Part III.A-B.
\textsuperscript{290} See generally ROTHACKER, supra note 1.

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