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## Court of Chancery Permanently Enjoins Sale That Would Violate Trust Indentures

In *In re BankAtlantic Bancorp, Inc. Litig.*, the Delaware Court of Chancery permanently enjoined the acquisition of BankAtlantic, a federal savings bank ("BankAtlantic"), from its bank holding company parent BankAtlantic Bancorp ("Bancorp") by BB&T Corporation because the transaction would run afoul of the standard successor obligor provisions of the indentures related to Bancorp's trust preferred stock ("TruPS"). Such provisions, governed by New York law, provide that a sale of all or substantially all of the company's assets is only permissible if the acquiror assumes Bancorp's obligations under the indenture. The court found the transaction at issue, intended to segregate Bancorp's performing assets from its non-performing assets by creating a "good bank" and a "bad bank" and then selling off the "good bank", was a sale of all or substantially all of Bancorp's assets and would violate Bancorp's indentures (resulting in full acceleration of the debt) because BB&T, the acquiror, would assume none of the obligations under the indentures. Because the court also found that Bancorp would be unable to repay the accelerated debt after closing, the court permanently enjoined the transaction.

Between 2002 and 2007, Bancorp had used TruPS to raise approximately \$285 million in capital which, at the time, had the advantage of qualifying as equity for bank regulatory purposes and debt for tax purposes. As in other TruPS arrangements, Bancorp issued unsecured notes under an indenture to trusts which issued the preferred securities. Each of the relevant indentures included typical successor obligor provisions requiring the assumption of the obligations under the indentures in a sale of all or substantially all of the assets of Bancorp. A failure to so assume the obligations would result in an event of default triggering an immediate right to full repayment.

While BankAtlantic had built a strong brand and was successful in attracting deposits, when the Florida real estate market collapsed, Bancorp's real estate lending business suffered. As a result, Bancorp began selling selected assets in 2010. Certain bidders for the selected assets expressed interest in acquiring all of Bancorp, and in response, Bancorp began to explore a sale of the whole company. Initial bids were deemed to be too low. Under increasing pressure to sell the company (including an order from the Office of Thrift Supervision), Bancorp's Chairman, who also controlled its majority stockholder, sought to enhance the attractiveness of Bancorp as a target via a "good bank/bad bank" transactional structure. Under this structure, bidders would acquire Bancorp's "good assets" and leave Bancorp with the rest of the company's assets as consideration for the transaction.

The court held that the assets being sold (i.e., the BankAtlantic business) were both quantitatively and qualitatively all or substantially all of Bancorp's assets – according to the court, BankAtlantic was the principal asset of Bancorp, accounting for 85-90% of Bancorp's assets using a "conservative metric." As such, to comply with the indentures, the acquiror would have to assume the obligations under the indentures, which BB&T had not agreed to do

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and which would therefore, if the sale were consummated, result in an event of default that accelerated debt that Bancorp could not satisfy with the remaining "bad bank" assets.

Employed with frequency before the advent of the credit crisis, there are a number of companies that would face similar difficulty in dealing with the overhang of accrued obligations on TruPS. While this transactional structure was rejected, it can be expected that other structures will be devised as the outstanding obligations on TruPS securities continue to present a hurdle to desired transactions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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