Two Trials and Other Developments as RMBS Litigation Continues Unabated

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Introduction

Almost a decade has passed since the mortgage foreclosure crisis of 2007–08, but the litigation from the economic fallout of the crisis continues. As one court put it, the 2007 residential mortgage-backed securitizations ("RMBS") "earthquake may have subsided, but its aftershocks remain."[1] Despite six-year statutes of limitations and the fact that most "private-label"[2] RMBS were last generated a decade ago, the latest wave of cases has usually been brought by certificate holders, i.e., investors, in RMBS trusts in suits against the trustee;[3] by insurers who allege that they were misled into offering insurance for certain RMBS pools; or by parties that are seeking recovery in indemnity for past losses.[4] The previous two *Annual Surveys* reported on important developments and trends in RMBS case law.[5] This survey discusses rulings from two trials of RMBS cases that went to judgment during

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1. Law Debenture Tr. Co. of N.Y. v. WMC Mortg., LLC, No. 3:12-cv-1538 (CSH), 2017 WL 3401254, at *1 (D. Conn. Aug. 8, 2017).

2. In addition to RMBS issued by a U.S. government-sponsored enterprise or agency, "[s]ome private institutions, such as brokerage firms, banks, and homebuilders, also securitize mortgages, known as 'private-label' mortgage securities." *Fast Answers: Mortgage-Backed Securities*, U.S. Sec. & Exchange Commission, https://www.sec.gov/fast-answers/answersmortgagesecuritieshtm.html (last modified July 23, 2010). Regarding the limitations period, see, for example, N.Y. C.P.L.R. § 213 (Consol. 1999 & Supp. 2017).

3. *See, e.g.*, BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A., 247 F. Supp. 3d 377, 382 (S.D.N.Y. 2017) (describing the "latest wave" of RMBS litigation as certificate holders versus trust litigation).

4. *See* James Skinner, *JP Morgan Settles Ambac Mortgage Backed Securities Litigation*, The Street (Mar. 29, 2017, 7:03 AM), https://www.thestreet.com/story/14063635/1/jp-morgan-settles-ambac-mortgage-backed-securities-litigation.html (reporting on $2 billion settlement between two insurers and a large bank).

5. *See* Richard E. Gottlieb & Brett J. Natarelli, *ACE in the Hole: Developments Since* ACE Securities *in Residential Mortgage-Backed Securities Litigation,* 72 Bus. Law. 585 (2017) (in the 2017 *Annual Survey*); Richard E. Gottlieb, Fredrick S. Levin, Amanda Raines Lawrence & A. Paul Heeringa, *Recent Developments in Residential Mortgage-Backed Securities Litigation*, 71 Bus. Law. 689 (2016) (in the 2016 *Annual Survey*).

the past year instead of being resolved through settlement, several other rulings of interest, and settlements affecting the RMBS industry.

Rulings in Judgment Orders Following Trials

Given the usually high dollars at stake, larger RMBS cases typically have settled before trial, rendering noteworthy the relatively few cases that proceed to judgment.[6] The past year saw two such cases go to judgment. In *U.S. Bank, N.A. v. UBS Real Estate Securities Inc.*,[7] trustee U.S. Bank sued an RMBS sponsor, UBS, for breach of the representations and warranties in the pooling and servicing agreement ("PSA"). The plaintiff trustee alleged that the seller committed such breaches with respect to about half of the relevant pool of loans sold, amounting to over $2 billion in damages.[8] Many of the loans were so-called "Alt-A" or subprime loans, "which generally carried a higher risk of default than prime loans."[9] With too many loans to be tried individually, the court conducted the bench trial on an exemplar basis, followed by loan-specific guidance that was of broad applicability, and then appointed special masters to adjudicate the remaining loans based on the court's guidance from the exemplars.[10]

Western & Southern Life Insurance Co. v. Bank of N.Y. Mellon[11] went to trial in 2017, resulting in an important ruling from a state court in Hamilton County, Ohio. The plaintiff insurance company sued in its capacity as owner of certain securities for which the defendant bank was the trustee.[12] The courts' judgment orders in both cases ruled on a variety of issues that should provide clarifying precedent that will help guide decisions in other RMBS litigation.

Sole Remedy Clause Not a Bar to Equitable Recovery in Absence of Other Remedies

Under the governing PSA in *UBS*, the investors' remedies were limited to a cure of the breach, replacement with a substitute loan that was not in breach, or repurchase of the breaching loan.[13] Consistent with other RMBS precedents

6. *See, e.g.*, Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 104 F. Supp. 3d 441 (S.D.N.Y. 2015) (resolving issues during bench trial), *aff'd*, 873 F.3d 85 (2d Cir. 2017); Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 920 F. Supp. 2d 475 (S.D.N.Y. 2013) (same). *See generally* Gottlieb, Levin, Lawrence & Heeringa, *supra* note 5, at 694–96 (discussing the *Flagstar* decision).

7. 205 F. Supp. 3d 386, 399–401 (S.D.N.Y. 2016).

8. *Id.* at 399.

9. *Id.* at 400. Alt-A loans are those made "to otherwise creditworthy individuals who cannot or do not provide documentation of their income, have a higher percentage of debt compared to their income (debt-to-income ratio), or pay less as a down payment than do prime borrowers. These loans are generally considered riskier than prime loans, but not as risky as subprime loans." Slater v. A.G. Edwards & Sons, Inc., 719 F.3d 1190, 1193 (10th Cir. 2013). Likewise, "[s]ubprime loans are loans to individuals with poor credit histories and often require even less as a down payment than do Alt-A loans." *Id.*

10. *UBS*, 205 F. Supp. 3d at 399, 526–27.

11. W. & S. Life Ins. Co. v. Bank of N.Y. Mellon, No. A-13-02490 (Ohio Ct. Common Pleas Aug. 4, 2017) (final judgment order) [hereinafter *W&S Ruling*].

12. *Id.* at 1–2, 6.

13. *UBS*, 205 F. Supp. 3d at 401.

under New York law, however, the court held that a money damages remedy was recoverable in equity in lieu of repurchase of the actual loans due to the absence of any possible remedy were the court to hold otherwise.[14]

In *W&S*, the plaintiff sought to avoid the sole remedy provision in the PSA by arguing that, if the trustee had disclosed the breaches, an enumerated substitution remedy would have occurred, that is, the replacement of the defective loan with a non-defective loan. Thus, the plaintiff argued that it should recover lost-expectation-type damages.[15] The *W&S* court rejected this damages theory because the defendant's expert testified that, if the originator or the trustee "had simply replaced defective loans with similar but non-defective loans, the Trusts would have performed no better."[16]

Automated Valuation Models and Allegedly Erroneous Appraisals Insufficient to Establish Liability

The *UBS* court considered at length whether breaches of warranties that properties have a loan-to-value ("LTV") ratio of a certain amount were provable merely by offering evidence that the property value disclosed to the trusts at origination was higher than the actual value: "The [Mortgage Loan Schedule ('MLS')] Warranty as to LTV ratio is premised upon an opinion and, thus, stands on a different footing than the other MLS warranties. The truth or correctness of an opinion is analyzed differently than the truth or correctness of an objectively verifiable fact."[17] Thus, the trustee could prove a breach based on LTV misrepresentation only if "the appraiser, the underwriter and/or [the sponsor] did not honestly believe that the appraised value reflected in the schedule [was accurate]."[18] The court found that no such evidence was presented.[19] The trustee's evidence of misrepresented property values based on automated valuation models ("AVM") was also unpersuasive to the court for the same reasons, i.e., the AVMs merely suggested that the property values could have been lower than the values that were disclosed, but the AVMs could not shed light on the question of whether the appraiser knowingly committed fraud in coming to a false value opinion.[20]

Rejection of Proof by Statistical Sampling

The weight of current authority on the use of statistical sampling evidence in RMBS litigation has been that it is sufficient to enable the case to survive a motion to dismiss and that it might be sufficient at trial, but the courts have offered no guarantees to plaintiffs that their sampling methodology will ultimately be ad-

14. *Id.* at 414–15.
15. *See W&S Ruling*, *supra* note 11, at 25.
16. *Id.*
17. *UBS*, 205 F. Supp. 3d at 433.
18. *Id.*
19. *Id.* at 434.
20. *Id.* at 436–37.

missible in evidence.[21] But in one New York decision, the court distinguished that authority as applying only to "claims sounding in fraud, which require a critical mass of breaching loans rather than loan-specific breaches. . . . None of these cases counsels this Court to authorize costly expert discovery that will not satisfy the plaintiffs' [loan-by-loan] burden of proof required by the Court of Appeals and the terms of the PSAs."[22]

In keeping with the weight of authority, the *W&S* court evaluated the plaintiff's sampling methodology at trial and found it wanting. It rejected the plaintiff's attempted extrapolation from a sample of allegedly breaching loans because "a breach in one loan says nothing about a breach in another much less whether that breach has a 'material and adverse effect' on Certificateholders."[23] The *W&S* court's ruling appears to rest, however, on the legal concept that the trust contracts, properly read, require loan-by-loan analysis, as opposed to any flaws the court detected in the plaintiff's sampling methodology.[24] The *UBS* court, on the other hand, appears to have accepted and endorsed the general sampling methodology offered by the plaintiffs except as to one subset of the loans for which a lack of sufficient discovery prevented reliable extrapolation.[25]

Evidentiary Rulings with Respect to Reunderwriting Expert Testimony

The *UBS* court made several significant evidentiary rulings as to the weight of the evidence based on expert reunderwriting of the loans and other loan data. In most RMBS cases, experts "reunderwrite" the loans, meaning that they review the documents associated with the loans' origination to determine whether or not the loan originator complied with the applicable underwriting guidelines.[26] One of the documents associated with the loans' origination is a set of data that the originator transmits to the buyer with "hard" data points capable of being reduced to a spreadsheet. Reunderwriting experts typically compare the underlying loan documentation to the data points and note as breaches any inconsistencies.[27]

In *UBS*, the defendant sponsor argued that the plaintiff's evidence proving that some of the data was false was insufficient to establish a breach because the defendant warranted only that it would accurately transcribe the data points pro-

21. *See* BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A., No. 14-CV-09371 (KPF) (SN), 2017 WL 953550, at *6 (S.D.N.Y. Mar. 10, 2017) (collecting cases).

22. *Id.*

23. *W&S Ruling*, *supra* note 11, at 18 (quoting *BlackRock*, 2017 WL 953550, at *5).

24. *Id.*

25. *UBS*, 205 F. Supp. 3d at 475–78.

26. *See, e.g.*, Mass. Mut. Life Ins. Co. v. DB Structured Prods., Inc., No. 11-cv-30039-MGM, 2015 WL 2130060, at *1 (D. Mass. May 7, 2015).

27. *See, e.g.*, Fed. Hous. Fin. Agency v. JPMorgan Chase & Co., No. 11 Civ. 6188 (DLC), 2012 WL 6000885, at *5 n.5 (S.D.N.Y. Dec. 3, 2012) ("A loan tape is a collection of data concerning the individual loans in the securitization compiled by the RMBS sponsor while the securitization is being created. The tape typically includes the LTV ratio, and a borrower's credit score and occupancy status, among many other fields of data.").

vided by the loan originators.[28] The court disagreed and held that the defendant warranted that the data must be factually correct, stating that "the MLS Warranty is not limited to UBS's knowledge or belief; it is an unqualified warranty. The PSAs could have been drafted to state that the MLS reflected only an accurate transcription of the information communicated by the Originators. But there is no such limitation."[29] Thus, the data "may contain an incorrect item of information as a result of an innocent mistake and yet [the sponsor may still] be liable to the Trusts for the untrue and incorrect information. Imputing fraud or fault on the part of a borrower, underwriter or any other person or entity, including [the sponsor], is not an element of the claim."[30]

The *UBS* court also rejected the plaintiff trustee's allegation that the mere presence of multiple credit inquiries on a borrower's pre-origination credit report is evidence of fraud or undisclosed debts "[s]tanding alone," but the multiple inquiries could be taken into account by the expert in "forming an opinion" about whether the debt-to-income ratio disclosed by the sponsor to the trusts was in fact accurate.[31] The *W&S* court likewise found "document delivery failure" allegations irrelevant because there was no evidence presented that the investor plaintiff would have acted any differently if the documents were present, and the experts all agreed that missing documents were very common in the industry at the time, so common that the relevant PSA referred not to missing documents automatically being a breach but rather, something that the sponsor should "cure" when discovered.[32]

As one vehicle to attempt to show borrower misrepresentation, RMBS plaintiffs often point to borrower bankruptcy petitions, signed under penalty of perjury, that purported to show that the borrower's income was less than what was represented at the time of the loan's origination.[33] The *UBS* court recognized that these allegations are of little utility because the borrower's circumstances could have changed, and while "[a] borrower has an incentive to overstate income on a 'stated income' loan application . . . there is also an incentive to understate income in a bankruptcy petition."[34]

In the course of reunderwriting loans, expert witnesses also often turn to commercial data sources such as Lexis-Nexis.[35] Over objection and despite various limitations in these sources, the *UBS* court held that these types of data sources used by the experts were admissible under Federal Rule of Evidence 803(17), the hearsay exception that permits "[m]arket quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular

28. *UBS*, 205 F. Supp. 3d at 428–29.
29. *Id.* at 429.
30. *Id.*
31. *Id.* at 442.
32. *W&S Ruling*, *supra* note 11, at 27–29.
33. *See, e.g.*, Bank of N.Y. Mellon v. WMC Mortg., LLC, No. 12-cv-7096 (DLC), 2015 WL 4887446, at *3 (S.D.N.Y. Aug. 17, 2015) (stating that reunderwriter consulted bankruptcy petitions).
34. *UBS*, 205 F. Supp. 3d at 446.
35. *See, e.g.*, *Bank of N.Y. Mellon*, 2015 WL 4887446, at *3 (stating that reunderwriter consulted "commercial salary databases").

occupations."[36] After deeming the evidence admissible as an exception to hearsay, the court added: "Alternatively, it is the type of material that an expert in underwriting relies upon in the ordinary course of his work as an underwriter and thus may form the basis for the expert witness's opinion."[37]

Finally, with regard to determining breaches, the *UBS* court had to address an applicable PSA provision that stated that some loans may not fully comply with the relevant underwriting guidelines due to "exceptions."[38] The sponsor's expert opined that, if a loan was purchased from an originator by the sponsor that did not comply with underwriting guidelines, an exception must have been made because the sponsor was engaged in due diligence on the loans that it was buying. The court rejected that view, but it also held that exceptions to underwriting guidelines could be proven by sufficient written indicia that an exception had been granted.[39]

Proof of Loan-Level Causation

The *UBS* court rejected the plaintiff's argument, common to many RMBS cases,[40] that any breach that materially increased the risk of loss on the loan created an obligation that it be repurchased when it otherwise may have been rejected, and that this is sufficient to show causation.[41] Some breaches, such as "misrepresentation of income by a borrower," have "an effect that continues to the time of discovery or notice."[42] By contrast, if the breach was a failure to verify the borrower's employment, such a breach "would have no continuing effect if, for example, the verification would have confirmed the employment."[43]

Other courts likewise have applied more scrutiny to RMBS plaintiffs' causation evidence. In *MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC*,[44] for example, the court explained that, for purposes of merely surviving early motion practice, no direct link between the breach and the loss need be shown; however, to prove damages at trial, a causative link is necessary.[45] Consistent with that analysis, the court denied any recovery based on non-breaching but non-performing loans even though the insurer would not have insured them had it known of the widespread breaches among the population as a whole.[46] The plaintiff argued that no "evidence" was needed on causation because any breach increases the risk of loss and is thus a "material and adverse" effect.[47] The court

36. *UBS*, 205 F. Supp. 3d at 441–42 (quoting Fed. R. Evid. 803(17)).
37. *Id.* at 442.
38. *Id.* at 449.
39. *Id.* at 449–51.
40. *See, e.g.*, Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A., 643 F. App'x 44, 46 (2d Cir. 2016) (following ACE Sec. Corp. v. DB Structured Prods., Inc., 36 N.E.3d 623 (N.Y. 2015)).
41. *UBS*, 205 F. Supp. 3d at 466.
42. *Id.* at 466–67.
43. *Id.* at 467.
44. No. 603751/2009, 2017 WL 1201868 (N.Y. Sup. Ct. Mar. 31, 2017).
45. *Id.* at *15.
46. *Id.* at *19–20.
47. *Id.* at *5–6, *19–20.

denied summary judgment because what those parties meant by "material and adverse" could differ from what has been found applicable in other cases.[48] The court also denied summary judgment for loans for which the defendant could not provide the underwriting guidelines that it claimed were applicable, holding that evidence of intentional bad-faith destruction would be necessary to award something like a default judgment.[49]

In *Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Management Co.*,[50] the court reversed summary judgment on a similar basis, i.e., that the plaintiff had failed to prove that the misrepresentations about the mortgages led to the economic losses suffered on those loans, especially in the face of the defendant's evidence that much or all of the loss nevertheless would have occurred due to the market's collapse in 2008.[51] The court rejected the plaintiff's argument that it was enough to show that it would not have bought the mortgage securities but for the misrepresentations.[52]

The *W&S* court went even further by consistently rejecting the plaintiff's claims based on proof that the trusts would not have fared better had they been populated with non-breaching loans in light of the macro-economic reality of the 2008 financial crisis. It held that the plaintiffs failed to prove damages because the trusts would not have performed any better if non-breaching loans had been substituted shortly after origination,[53] or if cleaner and more complete loan files had been delivered.[54] The court also found it persuasive that the repurchase rate between the parties over time was less than 10 percent although the breach rate was alleged to be much higher,[55] and that there was no statistically significant relationship between loan breaches and whether the loan failed to perform.[56]

Investors Lose Standing When They Sell Their Interests

The *W&S* court held that, to the extent that a plaintiff sold its interest in the securities, it had no standing to assert contractual claims because those claims passed to the buyer.[57] The court relied on New York and Ohio statutes that it characterized as "automatically" transferring claims against the trustee with the sale of the associated security.[58]

48. *Id.* at *5–6 (citing U.S. Bank, N.A. v UBS Real Estate Sec. Inc., 205 F. Supp. 3d 386 (S.D.N.Y. 2016); MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v UBS Real Estate Sec. Inc., No. 12-cv-7322 (PKC), 2015 WL 764665, at *15 (S.D.N.Y. Jan. 9, 2015); Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 920 F. Supp. 2d 475, 509 (S.D.N.Y. 2013)).
49. *Id.* at *6–8.
50. 48 N.Y.S.3d 654 (App. Div. 2017).
51. *Id.* at 657.
52. *See id.*
53. *W&S Ruling*, *supra* note 11, at 23–25.
54. *Id.* at 29–30.
55. *Id.* at 24.
56. *Id.* at 22.
57. *Id.* at 9.
58. *Id.* at 8 (citing N.Y. Gen. Oblig. Law § 13-107(1) (Consol. 2006); Ohio Rev. Code Ann. § 1308.16 (LexisNexis 2012)).

Another court questioned former owners' standing in a securities class action context. Initially, consistent with other cases,[59] the complaint in *Royal Park Investments SA/NV v. Deutsche Bank National Trust Co.*[60] survived a motion to dismiss but the plaintiffs' claims later hit a roadblock when class certification was denied.[61] Under New York law, class certification requires "'an implied requirement of ascertainability' . . . that . . . mandates that the class be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'"[62] The proposed class definition included former investors, and this presented an ascertainability problem in part because historic interests may not be readily tracked.[63] More fundamentally, however, determining whether former owners had standing under New York law would require a case-by-case analysis of whether the right to sue was transferred with the sale, consistent with the analysis the *W&S* court undertook.[64]

Statute of Limitations Issues

The timing of breach notices was another key issue in *UBS*. The defendant sponsor argued that the trustee was limited to recover solely on loans for which a breach allegation had been identified in a pre-suit letter. However, the trustee sought recovery both for those loans and for loans with newly discovered breaches that were found in the course of preparing the reunderwriting expert report before trial.[65] The court permitted the trustee to seek recovery as to all of the loans, relying on another case that was decided under New York law, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*[66] However, the *UBS* court rejected the trustee's contention that, because notice of some breaches was provided by letter, the defendant sponsor somehow had "constructive" knowledge of "pervasive" breaches in loans throughout the securitization.[67]

The *UBS* court's statute of limitations rulings may not survive appeal, however, given a more recent New York state court ruling.[68] In *U.S. Bank, N.A. v. GreenPoint Mortgage Funding, Inc.*,[69] decided after the *UBS* judgment order, the plaintiff trustee filed its complaint on the last possible day under the statute of limitations but without any loan-level detail.[70] After filing the complaint, the

59. *See* Gottlieb & Natarelli, *supra* note 5, at 593–94.
60. No. 14-CV-4394 (AJN), 2017 WL 1331288 (S.D.N.Y. Apr. 4, 2017).
61. *Id.* at *2, *4.
62. *Id.* at *3 (quoting Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015)).
63. *Id.* at *8. The plaintiff's witness in support of class certification merely stated in conclusory fashion that identification could be done but stated he "had neither attempted nor been asked to attempt" to do so. *Id.*
64. *Id.* at *6–7.
65. U.S. Bank, N.A. v. UBS Real Estate Sec. Inc., 205 F. Supp. 386, 420–21 (S.D.N.Y. 2016).
66. *Id.* at 420–23 (citing *Nomura*, 133 A.D.3d 96, 98–108 (N.Y. App. Div. 2015)).
67. *Id.* at 424–25.
68. UBS reserved its right to appeal but has not actually done so, pending further proceedings. *See* Stipulation and Order at 2–3, U.S. Bank, N.A. v. UBS Real Estate Sec. Inc., No. 12-cv-7322 (S.D.N.Y. Apr. 21, 2017).
69. 147 A.D.3d 79 (N.Y. App. Div. 2016).
70. *Id.* at 82–83.

trustee issued repurchase demands under the repurchase protocol in the applicable contracts.[71] A New York state appellate court held that these post-suit notices were untimely for statute of limitations purposes and did not relate back to the first filing.[72] In so holding, the court distinguished *Nomura*, which had held that loans first identified as breaching after the complaint was filed related back on the basis that other loans had been identified as breaching before suit was filed.[73] In *GreenPoint*, by contrast, the first notices were sent post-suit, but the *GreenPoint* court nonetheless allowed the suit to survive dismissal, to the extent that the plaintiff could show that the post-suit notices were superfluous because the defendant had previous knowledge of the breaches.[74] While *GreenPoint* will not be binding should UBS appeal to the Second Circuit, the U.S. Supreme Court has observed that "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."[75]

Another limitations ruling was made in *Grika v. McGraw*,[76] in which the derivative plaintiff argued that its breach of fiduciary duty claims did not accrue until the corporation first suffered damages by entering into a $1.375 billion settlement with the U.S. Department of Justice ("DOJ") in 2015.[77] The court rejected the argument and held that the claims accrued not when damages became a fixed number, but rather when RMBS lawsuits began to be filed against the corporation that could result in damages.[78] The import of this ruling is clear: an RMBS plaintiff's claims accrue when the likelihood of losses becomes apparent, and not later, when the bulk of its losses are incurred. For most cases, this will coincide with 2007–08 due to the timing of the mortgage foreclosure crisis.

The statute of limitations was not directly at issue in *W&S* but the court did touch on a related concept: the level of knowledge required to establish discovery of the misrepresentation claims. The *W&S* trustee was under a duty to disclose breaches to investors, but the court rejected extending this duty beyond merely an obligation to report on loan-level breach discoveries.[79] Like the *UBS* ruling, the *W&S* ruling held that "general" or "constructive" knowledge of breaches is not enough to trigger a duty to notify the investor, stating that "the Trustee's knowledge must be loan-specific, not general . . . . [C]laims against trustees 'must be proved loan-by-loan and trust-by-trust.'"[80] The *W&S* court found that the discovery doctrine did not apply because the trustee had no duty to investigate

71. *Id.* at 83.
72. *Id.* at 87–88.
73. *Id.* at 87–89.
74. *Id.* at 85–86.
75. West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940).
76. No. 650459/2016, 2016 WL 8716417 (N.Y. Sup. Ct. Dec. 21, 2016).
77. *Id.* at *12.
78. *Id.* at *12–13.
79. *W&S Ruling*, *supra* note 11, at 16–20.
80. *Id.* at 16–17 (quoting Ret. Bd. of Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon, 775 F.3d 154, 162 (2d Cir. 2014)).

for breaches and, except as to a small number of loans determined to be in breach after various third-party audits were conducted and for which the trustee fulfilled its disclosure obligation, the trustee did not discover any other loan-level breaches.[81]

In other statute of limitations rulings, the plaintiffs have successfully avoided the usually ironclad bar of *ACE Securities Corp. v. DB Structured Products, Inc.*[82] by using New York's borrowing statute to invoke foreign statutes of limitations and accrual principles where the contract is governed by a New York choice of law provision.[83] As reported in the previous *Annual Survey*,[84] government actors generally have a longer statute of limitations due to an extender provision in Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[85] In 2016, the Ninth Circuit, joining the Tenth Circuit, ruled in *National Credit Union Administration Board v. RBS Securities, Inc.*[86] that the extender provisions of FIRREA operate even to extend statutes of repose.[87]

RMBS Settlements

In addition to the two trials, two major settlements took place during the past year. A New York bankruptcy court approved a settlement agreement in a case between the defunct Lehman Brothers and institutional investors and trustees. The settlement set a $2.416 billion floor, "subject to [the plaintiffs'] right to seek a higher amount" from Lehman Brothers.[88] The court analyzed the standard *Iridium* factors typically used by bankruptcy courts to determine whether a bankruptcy settlement between debtors and creditors is reasonable:

> In deciding whether a particular settlement falls within the "range of reasonableness," courts consider the following "*Iridium*," factors: (i) the balance between the

81. *Id.* at 16–17, 19–20; *see also* Law Debenture Tr. Co. of N.Y. v. WMC Mortg., LLC, No. 3:12-cv-1538 (CSH), 2017 WL 3401254, at *19 (D. Conn. Aug. 8, 2017) (denying summary judgment and deferring "knowledge" issues for trial).

82. 36 N.E.3d 623, 625 (N.Y. 2015) (holding that claims for breach of representations and warranties accrue when contract was executed); *see also* Gottlieb & Natarelli, *supra* note 5, at 585–91 (analyzing *ACE Securities Corp.*); Gottlieb, Levin, Lawrence & Heeringa, *supra* note 5, at 691–94 (same).

83. *See* Commerzbank AG v. Deutsche Bank Nat'l Tr. Co., 234 F. Supp. 3d 462, 469, 473 (S.D.N.Y. 2017) ("The challenged claims plainly accrued in Germany and, pursuant to the New York borrowing statute, are subject to any relevant German statute of limitations . . . . Under German law, [plaintiff] must have had sufficient knowledge of each element of each of its claims with respect to each Trust [ ] to bar all of the claims that accrued in Germany."); *see also* BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A., 247 F. Supp. 3d 377, 419–20 (S.D.N.Y. 2017) (denying motion to dismiss where the court could not determine, from the complaint, whether plaintiff had requisite knowledge of each element of each claim to trigger statute of limitations period under governing German law).

84. *See* Gottlieb & Natarelli, *supra* note 5, at 590–91.

85. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 U.S.C.).

86. 833 F.3d 1125 (9th Cir. 2016).

87. *Id.* at 1129–30; *see* Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc., 900 F. Supp. 2d 1222 (D. Kan. 2012), *aff'd sub nom.* Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246 (10th Cir. 2013), *vacated*, 134 S. Ct. 2818 (2014), *aff'd on remand*, 764 F.3d 1999 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015).

88. Order Approving RMBS Settlement Agreement at 10, *In re* Lehman Bros. Holdings Inc., No. 08-13555 (SCC) (Bankr. S.D.N.Y. July 6, 2017), *approved*, *In re* Lehman Bros. Holdings Inc., No. 1:17-cv-05889 (PKC) (S.D.N.Y. Aug. 28, 2017).

> litigation's possibility of success and the settlement's future benefits; (ii) the likelihood of complex and protracted litigation, "with its attendant expense, inconvenience, and delay"; (iii) the paramount interests of creditors; (iv) whether other parties in interest support the settlement; (v) "the nature and breadth of releases to be obtained by officers and directors"; (vi) the "competency and experience of counsel" supporting, and "[t]he experience and knowledge of the bankruptcy court judge" reviewing the settlement; and (vii) "the extent to which the settlement is the product of arm's-length bargaining."[89]

Notably, the court overruled all objections, including an objection that the settlement agreement did not contemplate what portion of the settlement would be allocated to each debtor.[90] The approval of the settlement is a major step forward in a matter that has lasted for years since its filing in 2008.

Several other sizeable RMBS settlements were also entered into during the past year. In July 2017, the Royal Bank of Scotland Group PLC and its subsidiaries entered into a $5.5 billion settlement with the Federal Housing Finance Administration ("FHFA"), the seventeenth financial institution to enter into an FHFA settlement.[91] In addition, Credit Suisse entered into a settlement with the DOJ arising out of alleged RMBS mismanagement worth more than $5 billion, with $2.48 billion paid as a penalty and $2.8 billion being offered to consumers as payment relief.[92] Finally, Deutsche Bank settled with the DOJ in January 2017 for $7.2 billion, an amount that the DOJ reported was the largest RMBS settlement to date.[93]

89. *Id.* at 6 n.2 (quoting Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007)); *see id.* at 6–10 (applying *Iridium*).

90. *Id.* at 8.

91. *See* Press Release, Royal Bank of Scotland, Settlement Reached with the Federal Housing Finance Agency Regarding US RMBS Claims (July 12, 2017), http://www.rbs.com/news/2017/07/settlement-reached-with-the-federal-housing-finance-agency-regar.html.

92. *See* Jacob Gaffney, *Credit Suisse Reaches RMBS Settlement from 2007 Housing Boom*, Housing Wire (Dec. 28, 2016), https://www.housingwire.com/articles/38839-credit-suisse-reaches-rmbs-settlement-from-2007-housing-boom.

93. Ben Lane, *It's Official: Deutsche Bank Reaches $7.2 Billion RMBS Settlement*, Housing Wire (Jan. 17, 2017), https://www.housingwire.com/articles/38974-its-official-deutsche-bank-reaches-72-billion-rmbs-settlement.