Recent Developments in Residential Mortgage-Backed Securities Litigation

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Introduction

In the wake of the 2007–2008 economic crisis, disputes concerning responsibility for loans in default that are pooled in residential mortgage-backed securities ("RMBS") became one of the most active areas of mortgage-related consumer finance litigation. This survey will provide a brief primer on residential mortgage securitization for background purposes, will discuss the landmark decision in *ACE Securities Corp. v. DB Structured Products, Inc.*,[1] and will provide an overview of other noteworthy RMBS-related developments.

Primer on RMBS Transactions

RMBS litigation involves disputes arising from the securitization of residential mortgage loans.[2] One court recently described the securitization process as follows:

> The RMBS process begins when lending institutions, or "originators," make home loans to consumers that are secured by mortgages. An RMBS "sponsor" or "seller"—usually an investment bank affiliate [of the originator]—purchases th[o]se mortgages in bulk from one or more originators. . . . Sponsors [then] sell the loans to a "depositor"—often another affiliate of that same bank. The depositor is also . . . the securities' "issuer." An issuer typically re-underwrites the loans made by the originators, independently assessing the borrowers' ability to meet mortgage obligations. . . . [T]he depositor [then] "deposits" all of the loans into [a] trust.[3]

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1. 36 N.E.3d 623 (N.Y. 2015).

2. *See* Ret. Bd. of Policemen's Annuity & Benefit Fund of City of Chi. v. Bank of N.Y. Mellon, 775 F.3d 154, 156 (2d Cir. 2014).

3. HSN Nordbank AG v. RBS Holdings USA Inc., No. 13-CIV-3303 (PGG), 2015 WL 1307189, at *1 (S.D.N.Y. Mar. 23, 2015) (internal citations and punctuation omitted).

Once a trust is established, the trustee may "hire[] a mortgage servicer to administer the [underlying] mortgages" and, through underwriters, will issue securities ("certificates") to be "sold to investors, called certificateholders."[4] The individual mortgage loans serve as collateral for the certificates, and investors receive income in the form of principal and interest, provided that the borrowers make payments on their loans.[5] Many trusts likewise purchase financial guaranty insurance to guard against borrower non-payment.[6]

Generally, securitization trusts are governed by contracts that address the sale of the loans as well as the creation of the trust and the rights, duties, and obligations of the parties involved.[7] These agreements are typically styled as mortgage loan purchase agreements ("MLPA"), pooling and servicing agreements ("PSA"), and sale and servicing agreements ("SSA").[8]

In such contracts, the depositor will make a variety of representations and warranties regarding the quality and characteristics of the mortgage loans deposited in the trust, which typically include representations about the loan-to-value ratio, appraisals of the subject properties, their occupancy, the accuracy and completeness of the borrower's documentation, compliance with applicable underwriting guidelines, and the absence of fraud in making the underlying loans.[9]

The operative contracts often contain provisions that, when applicable, authorize the trustee to demand that the depositor cure or repurchase loans in the pool that fail to comply with one or more of the representations and warranties, i.e., "non-conforming loans."[10] Where a depositor or its affiliates refuse to cure or repurchase non-conforming loans, litigation may follow.[11]

As significant numbers of borrowers defaulted on securitized loans following the 2007–2008 economic crisis, trustees, certificateholders, and monoline financial guaranty insurance carriers have brought lawsuits arising from alleged breaches of representations and warranties in connection with the sale or securitization of

4. *Ret. Bd. of Policemen's Annuity*, 775 F.3d at 156 (quoting BlackRock Fin. Mgmt. Inc. v. Segregated Acct. of Ambac Assurance Corp., 673 F.3d 169, 173 (2d Cir. 2012)).

5. ACE Sec. Corp., 36 N.E.3d at 625.

6. In this context, financial guaranty policies that are issued by "monoline" insurers are designed to guarantee payments on RMBS. *See* Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 998 N.Y.S.2d 329, 331 (App. Div. 2014).

7. *See Ret. Bd. of Policemen's Annuity*, 775 F.3d at 156.

8. *See, e.g.*, *id.* (describing PSAs and SSAs); Royal Park Invs. SA/NV v. HSBC Bank USA, N.A., No. 14-CV-8175 (SAS), 2015 WL 3466121, at *1 (S.D.N.Y. June 1, 2015) (same); Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., No. 11-CV-6201 (DLC), 2015 WL 2183875, at *10 (S.D.N.Y. May 11, 2015) (describing MLPAs and PSAs), *appeal docketed*, No. 15-1874 (2d Cir. June 10, 2015); *ACE Sec. Corp.*, 36 N.E.3d at 625–26 (same); *see also* Robert T. Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 Rev. Banking & Fin. L. 255, 267–68 (2014) ("[T]he relevant agreement memorializing the sale of the [loans] is often called a[n MPLA whereas the] . . . transaction among the purchaser [i.e., depositor], the trustee, and the servicer is memorialized in an agreement often styled as a [PSA].").

9. *See Nomura*, 2015 WL 2183875, at *10; *HSN Nordbank AG*, 2015 WL 1307189, at *2; *ACE Sec. Corp.*, 36 N.E.3d at 625; Miller, *supra* note 8, at 259–60.

10. *See, e.g.*, *Ret. Bd. of Policemen's Annuity*, 775 F.3d at 156; *ACE Sec. Corp.*, 36 N.E.3d at 625; Miller, *supra* note 8, at 274.

11. *See* Joseph Cioffi & James R. Serritella, *When Is It Too Late for Investors to Bring RMBS-Related Claims?*, 130 Banking L.J. 813, 814 (2013).

large numbers of loans.[12] The theories of liability in those lawsuits have varied, but primarily have been couched in terms of breach of contract based on breaches of representations and warranties and common law fraud.[13]

ACE Securities Corp. v. DB Structured Products, Inc.

The Ruling by the N.Y. Court of Appeals

New York law, including its six-year statute of limitations for contract claims, governs under the choice of law provisions of many, if not the majority of, RMBS trusts.[14] Accordingly, many litigants seeking to pursue repurchase claims arising from the economic crisis of 2007–2008 rushed to the courthouse to file claims within that period.[15] Confronted with those filings, courts have analyzed whether the limitations period began to run when the seller made representations and warranties regarding the securities or when an investor subsequently discovered a breach of those representations and warranties.[16] In June 2015, the New York Court of Appeals issued its decision in *ACE Securities Corp. v. DB Structured Products, Inc.*,[17] which may be dispositive of many pending RMBS lawsuits because of its firm rejection of the "subsequent discovery" accrual theory.

In *ACE Securities*, two RMBS certificateholders filed suit against DB Structured Products, Inc. ("DBSP") in New York state court, arising out of its alleged failure to repurchase non-conforming mortgage loans.[18] DBSP, as sponsor, allegedly made many representations and warranties in the governing documents to ACE Securities Corp., as depositor, regarding the "credit quality and characteristics of the pooled loans 'as of the Closing Date,' March 28, 2006," of the sale of the loans to the trust.[19] The governing agreement provided that the sole remedy in the event of a breach of representations and warranties was for the trustee to request that DBSP cure any defects within sixty days after notice or repurchase non-conforming loans within ninety days after notification.[20] The governing agreement, however, also authorized certificateholders with at least 25 percent of the voting rights to enforce the contract if the trustee refused or neglected to institute action within fifteen days after a written request to the trustee.[21]

Years after March 28, 2006, defaults and delinquencies on the mortgage loans in the pool caused over $300 million in losses to the certificateholders, with over

12. *See id.* at 813–14.
13. *See, e.g.*, Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 920 F. Supp. 2d 475, 477 (S.D.N.Y. 2013) (fraud); *ACE Sec. Corp.*, 36 N.E.3d at 626 (breach of contract); *see also* CMFG Life Ins. Co. v. UBS Sec., 30 F. Supp. 3d 822, 824 (W.D. Wis. 2014) ("common law contractual rescission on the grounds of misrepresentation").
14. Miller, *supra* note 8, at 290 & n.132 (citing N.Y. C.P.L.R. § 213).
15. *See id.* at 260–63.
16. *Id.* at 262.
17. 36 N.E.3d 623 (N.Y. 2015).
18. *See id.* at 624.
19. *Id.* at 625.
20. *Id.* at 625–26.
21. *Id.* at 626.

99 percent of the loans allegedly violating at least one of DBSP's representations and warranties.[22] Thus, in a letter dated January 12, 2012, two certificateholders, citing extremely high breach rates discovered during loan file reviews, demanded that the trustee "put back" to DBSP all of the individual defective loans.[23] When the trustee took no action, the two certificateholders filed suit against DBSP on March 28, 2012, six years to the day from the closing on the sale, alleging a single breach of contract count.[24] Almost six months later, the trustee filed a suit on the trust's behalf, seeking to be substituted as plaintiff.[25] DBSP moved to dismiss the trustee's complaint, arguing that the trustee's claims accrued as of March 28, 2006, and that the lawsuit was time-barred.[26] DBSP also contended that the two certificateholders did not give timely notice before filing their own suit.[27]

The trial court denied the motion, holding that the claims did not accrue until DBSP failed to cure or repurchase and that DBSP's cure-or-repurchase obligations were recurring, so that an independent breach of the PSA resulted each time that it failed to cure or repurchase a defective loan.[28] The New York Appellate Division reversed, holding that the claims accrued as of the closing date of the sale and that the certificateholders failed to comply with a condition precedent for bringing suit, i.e., that the sixty- and ninety-day cure-and-repurchase periods had not elapsed.[29]

On further appeal, the New York Court of Appeals affirmed the Appellate Division's decision.[30] The *ACE Securities* court emphasized that statutes of limitations are designed to meet the "objectives of finality, certainty and predictability" in litigation.[31] Accordingly, the court held that New York does not apply the "discovery rule" in contract cases and, instead, the statute begins to run "when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury."[32] It found that a contrary rule would depend "on the subjective equitable variations of different Judges . . . instead of . . . [being] objective, reliable, predictable, and relatively definitive."[33]

The *ACE Securities* court also determined that, while parties generally may agree to undertake an obligation involving future performance, the repurchase obligations undertaken by DBSP were not such an agreement.[34] Rather, unlike

22. *Id.*
23. *Id.*
24. *Id.*; *see also* Cioffi & Serritella, *supra* note 11, at 814 (referring to repurchase claims as "put-back" litigation).
25. *ACE Sec. Corp.*, 36 N.E.3d at 626.
26. *Id.* at 627.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 628 (quoting Ely-Cruikshank Co. v. Bank of Montreal, 615 N.E.2d 985, 987 (N.Y. 1993)).
33. *Id.* (quoting *Ely-Cruikshank Co.*, 615 N.E.2d at 988).
34. *Id.*

a true promise for "future performance," DBSP did not guarantee the performance of the mortgage loans in the pool and only represented certain facts about the loan characteristics as of the closing date of the sale.[35] And, perhaps more important, the court ruled that the operative documents expressly provided that those representations and warranties did not survive closing and that there was nothing in the contracts that otherwise specified that DBSP's contractual cure-or-repurchase obligation survived closing.[36] Thus, the court concluded that DBSP's cure-or-repurchase obligation was "dependent on, and indeed derivative of, DBSP's representations and warranties, which did not survive the closing and were breached, if at all, on that date."[37]

The *ACE Securities* court rejected what it called the trustee's "strongest argument" that the cure-or-repurchase obligation "delayed accrual" of the cause of action because the PSA required that the trustee demand cure or repurchase as a condition precedent to bringing suit.[38] It found that this argument ignored the "difference between a demand that is a condition to a party's *performance*, and a demand that seeks a remedy for a pre-existing wrong."[39] It reasoned that "a cause of action existed for breach of a representation and warranty" before the trustee made a demand, that a demand was only a procedural prerequisite to filing suit rather than a necessary part of the action, and that the trust "was just limited in its remedies for [DBSP's] breach."[40] Consequently, the court concluded that "DSBP's cure or repurchase obligation was not a separate and continuing promise of future performance; . . . the cure or repurchase obligation was not an independently enforceable right" or a continuing obligation; and any cause of action would have accrued "when the MLPA was executed."[41]

Effects of the *ACE Securities* Ruling

By rejecting a "subsequent discovery" rule of accrual and holding that the statute of limitations starts to run upon the making of representations and warranties, the *ACE Securities* court established a bright-line endpoint for bringing contract-based claims related to breaches of representations and warranties, with some caveats noted below. Moreover, the decision clarifies that repurchase provisions in RMBS agreements governed by New York law are likely to be construed as merely remedial and not as an independent legal obligation that is distinct from the representations and warranties. This decision appears to put the onus on investors and trustees to discover and provide notice regarding breaches before the statute runs. Because the contracts governing RMBS transactions are not all identical, a court's interpretation of a particular contract in a particular RMBS transaction will depend on the specific language used in the contract,

35. *Id.* at 629 (citing Bulova Watch Co. v. Celotex Corp., 389 N.E.2d 130 (N.Y. 1979)).
36. *Id.*
37. *Id.*
38. *Id.* at 630.
39. *Id.* (citing Dickenson v. Mayor of N.Y., 92 N.Y. 584 (1883)).
40. *Id.* at 630–31.
41. *Id.* at 631.

as confirmed by the *ACE Securities* ruling. For example, some plaintiffs in RMBS cases have argued that there was a continuing obligation to notify the purchaser of defects in loans.[42] Others have attempted to overcome the statute of limitations by arguing that the later losses triggered an obligation to indemnify.[43]

After the *ACE Securities* decision, one federal district court in New York appears to have found that a supposed "duty to notify" is not an independent obligation distinct from the underlying representations and warranties, with the result that a breach of that duty would not give rise to a separate claim with its own limitations period. In *Bank of New York Mellon v. WMC Mortgage, LLC*,[44] the trustee brought a claim based on the defendants' failure to notify the trustee of breaches of representations and warranties in addition to making a claim for those breaches and for failure to repurchase on demand. Citing *ACE Securities*, the court held that, under New York law, "failure to comply with a presuit remedial provision . . . does not give rise to a breach of contract claim independent of a claim for breaches of [representations and warranties]."[45]

It remains to be seen how *ACE Securities* will be applied in the long run. However, it appears poised to eliminate or reduce the scope of many breach of contract cases involving non-conforming loans sold before the 2007–2008 financial crisis, in New York and perhaps in other states as well.[46]

Other Recent RMBS-Related Private Litigation

Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB

In *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*,[47] the plaintiff ("Assured") alleged that three related Flagstar Bank entities ("Flagstar") breached a

42. *See, e.g.*, *In re* RFC & RESCAP Liquidating Trust Litig., No. 14-cv-3093 (PJS/BRT), 2015 WL 4373666, at *3 (D. Minn. July 15, 2015) (refusing to dismiss where, "as alleged, a breach of the representation and warranty . . . could relate to an event that occurred, if at all, after the sale of a loan"). *But see* Residential Funding Co. v. Mortg. Access Corp., No. 13-cv-3499 (DSD/FLN), 2014 WL 3577403, at *5 (D. Minn. July 21, 2014) (granting motion to dismiss where alleged defects in underlying loans "occur[ed] at the time a loan [was] underwritten, not at some later date" and, as pleaded, did not represent a "breach of a continuing obligation" that would extend the statute of limitations under Minnesota law).

43. *See*, *e.g.*, Residential Funding Co. v. Cmty. W. Bank, N.A., No. 13-cv-3468 (JRT/JJK), 2014 WL 5207485, at *9–10 (D. Minn. Oct. 14, 2014).

44. No. 12-cv-7096 (DLC), 2015 WL 4163343 (S.D.N.Y. July 10, 2015).

45. *Id.* at *2 (addressing the failure-to-repurchase claim).

46. *See, e.g.*, Deutsche Bank Nat'l Trust Co. v. Quicken Loans, Inc., No. 14-3373, 2015 WL 7146515, at *4–5 (2d Cir. Nov. 16, 2015) (RMBS claim untimely under New York law even though the operative contract provided that (i) the representations and warranties were to "survive the sale" of the loans and (ii) "[a]ny cause of action . . . *shall accrue*" upon discovery or notice of a breach, failure to cure or repurchase, and demand for compliance); Bank of N.Y. Mellon v. WMC Mortg., LLC, 17 N.Y.S.3d 613, 616–619 (Sup. Ct. 2015) (rejecting similar "accrual provision" and holding that "the notion that a separate failure to notify claim is viable should be put to rest" after *ACE Securities*); CMFG Life Ins. Co. v. UBS Sec., 30 F. Supp. 3d 822, 824–25 (W.D. Wis. 2014) (finding the RMBS claim for "common law contractual rescission on the grounds of misrepresentation" was untimely because state statute did "*not* allow for the application of the discovery rule, meaning that the six-year limitations period beg[an] to run at the moment of breach," i.e., at purchase).

47. 920 F. Supp. 2d 475 (S.D.N.Y. 2013).

series of contracts providing financial guaranty insurance for two large securitization pools. Assured claimed that the loans underlying the securities either were materially fraudulent or contained material underwriting defects, in breach of Flagstar's representations and warranties.[48]

Assured filed suit in 2011, seeking reimbursement for claims it paid when many of the underlying loans were in default.[49] In early 2013, after a bench trial, the court issued a lengthy order that found, *inter alia*, that Flagstar had breached its contractual representations and warranties as well as its obligation to cure or repurchase defective loans,[50] awarded Assured $89.2 million in damages, plus interest,[51] and required Flagstar to reimburse Assured for "reasonable fees and costs."[52] Reportedly, the parties settled in June 2013, with Assured receiving from Flagstar $105 million in cash and reimbursement for all future claims.[53]

Flagstar is significant primarily because it is the first RMBS repurchase case involving a financial guaranty insurer to go to trial,[54] and because the opinion describes in detail the parties' liability theories, expert methodologies, and damages estimates, thus providing financial guaranty insurers with a roadmap for future cases.[55] Furthermore, because the court awarded damages and potentially millions of dollars in fees and costs incurred not only in the litigation but also in the repurchase demands that precipitated it,[56] *Flagstar* could make lenders hesitant to go to trial.[57]

Flagstar also sets the stage for statistical sampling in RMBS-related cases. The court's ruling relied on Assured's expert, who reviewed a random sample of roughly 800 out of the 15,000-plus loans to determine that over 75 percent of the loans sampled were materially defective.[58] The use of this methodology became an important issue in RMBS-related decisions after *Flagstar*.[59]

FHFA v. Nomura Holding America, Inc.

In September 2011, the Federal Housing Finance Agency ("FHFA") filed sixteen lawsuits against several financial institutions along with their officers and

48. *Id.* at 477.
49. *Id.*
50. *Id.* at 508–09, 513.
51. *Id.* at 515.
52. *Id.* at 516–17.
53. *See Assured Guaranty and Flagstar Settle All RMBS Claims*, Housingwire (June 21, 2013), http://www.housingwire.com/articles/assured-guaranty-and-flagstar-settle-all-rmbs-claims.
54. *See* Jake Simpson, *Assured's MBS Win May Force Wave of Bank Settlements*, Law360 (Feb. 7, 2013, 7:51 PM), http://www.law360.com/banking/articles/413716?nl_pk=a3b26d7a-e06c-4ccd-a9a7-9a4588250fb7&utm_source=newsletter&utm_medium=email&utm_campaign=banking.
55. *See Assured Guar. Mun. Corp.*, 920 F. Supp. 2d at 486–516.
56. *See id.* at 516.
57. *See* Simpson, *supra* note 54.
58. *Assured Guar. Mun. Corp.*, 920 F. Supp. 2d at 478, 510–11.
59. *See, e.g.*, Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., No. 11-CV-6201 (DLC), 2015 WL 2183875, at *38–40 (S.D.N.Y. May 11, 2015), *appeal docketed*, No. 15-1874 (2d Cir. June 10, 2015).

directors, asserting claims under federal and state securities laws relating to $2 billion in RMBS certificates purchased between 2005 and 2007.[60] Only one, against Nomura Holding America and RBS Securities, went to trial by 2015.[61] The FHFA claimed that the defendants made various false representations regarding the origination, underwriting, and other characteristics of loans in the securitizations.[62] After a bench trial, the court ruled in the FHFA's favor, issuing an opinion finding that the banks had fraudulently misrepresented the quality of the securities being sold, and that the offering materials contained "utterly misleading descriptions of the quality and nature of the loans."[63] The court ordered the FHFA to submit a proposed judgment calculating its damages pursuant to formulas supplied by the court.[64] Commentators have suggested that damages, including attorney's fees, "will likely land in the billion-dollar range."[65]

In addition to being the first, and thus far only, instance of a bank requiring the FHFA to go to trial,[66] *Nomura* is notable for several other reasons. It is not surprising that, perhaps given the potential damages exposure, several banks settled with the FHFA around the time that *Nomura* was decided.[67] Moreover, prior to trial, the court denied Nomura's statute-of-limitations defense under the federal Securities Act, holding that the "limitations period commences not when a reasonable investor would have begun investigating, but when such a reasonable investor conducting such a timely investigation would have uncovered the facts constituting [the] violation . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation."[68] Finally, as in *Flagstar*, the *Nomura* court not only conducted an extensive analysis and assessment of the various experts' methodologies and credibility, but it also permitted the plaintiff's experts to support the loan defect claims through statistical sampling.[69]

RFC/RESCAP Litigation

In December 2013, the successor to the former Residential Funding Company ("RFC") filed more than eighty lawsuits, many of which are still pending,[70]

60. *Id.* at *1, *5.
61. *Id.* at *1.
62. *Id.* at *2.
63. *Id.* at *74.
64. *Id.* at *136.
65. *See* David F. Herr & Steven Baicker-McKee, *A Look at the Impact of* CTS Corp. v. Waldburger *on Extender Statutes, Statutes of Repose, and Tolling Agreements*, Fed. Litigator Newsl. (Thomson Reuters), June 2015, at 3.
66. *See Banks Liable in First-Time MBS Suit*, Com. Lending Litig. News, July 6, 2015, at 13.
67. *See* Peter H. Hamner, *Wall Street Banks Found Liable in Mortgage-Backed Securities Suit*, Westlaw J. Derivatives, June 15, 2015, at *2; Bob Van Voris, *Nomura, RBS Defective-Bond Suit Loss Seen Spurring Deals*, Bloomberg (May 12, 2015, 2:46 AM), http://www.bloomberg.com/news/articles/2015-05-11/nomura-loses-trial-over-toxic-mortgage-after-16-banks-settle.
68. Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 60 F. Supp. 3d 479, 502–03 (S.D.N.Y. 2014) (internal citations and punctuation omitted) (discussing 15 U.S.C. § 77m).
69. *Nomura*, 2015 WL 2183875, at *38–40.
70. *See, e.g.*, *In re* RFC & RESCAP Liquidating Trust Litig., No. 13-cv-3451 (SRN-JJK-HB) (D. Minn.); Residential Funding Co. v. HSBC Mortg. Corp. (USA), No. 14-01915-MG (Bankr. S.D.N.Y.); Residential Funding Co. v. Quicken Loans Inc., No. 27-CV-14-3111 (D. Minn.).

against numerous major financial institutions from which RFC had acquired mortgage loans. These cases arose from the 2012 bankruptcy of Residential Capital, LLC ("RESCAP") and its former RFC subsidiary.[71] Prior to bankruptcy, RFC was in the business of acquiring and securitizing residential mortgage loans purchased from an array of originators ("correspondent lenders").[72] RFC's suits were not RMBS lawsuits as such because the defendants were not parties to the RMBS transactions, but stemmed from loans that the defendants originated and sold to RFC, which then pooled the loans into RMBS trusts.[73]

RFC asserted the same two claims against each defendant: breach of contract and indemnification.[74] In essence, RFC claimed that many of the loans it purchased from the defendants, all former correspondent lenders of RFC, were defective when sold, and that the defendants breached various representations and warranties contained in RFC-crafted client guides, allegedly causing RFC to incur billions of dollars in losses or liabilities to purchasers of these loans when they were resold to investors, including securitization trusts, losses and liabilities for which it sought contractual indemnification.[75] Some courts dismissed RFC's breach of contract claims regarding loans sold before May 14, 2006, based on statutes-of-limitations grounds.[76] Other courts denied motions to dismiss made on those grounds, ruling that the applicability of the statute of limitations for the breach of contract claims was a fact question.[77]

The courts that allowed the contract claims to survive typically did so based on the "continuing notification" theory that RFC advanced. Under this theory, RFC alleged that the lender breached a specific representation and warranty that the lender would "promptly notify GMAC-RFC of any occurrence, act, or omission regarding [lender], the Loan, the Mortgaged Property or the Mortgagor of which [the lender] has knowledge, which . . . may materially affect [the lender], the Loan, the Mortgaged Property or the Mortgagor."[78] Accordingly, courts have ruled that whether a lender allegedly breached its supposed notification duty is a "question of fact that goes beyond the pleadings" that cannot be resolved on a motion to dismiss.[79] In January 2015, most of the lawsuits pending

71. *See In re* Residential Capital, LLC, No. 12-12020-MG (Bankr. S.D.N.Y.).

72. *See, e.g.*, Residential Funding Co. v. Cmty. W. Bank, N.A., No. 13-cv-3468 (JRT/JJK), 2014 WL 5207485, at *1 (D. Minn. Oct. 14, 2014); Residential Funding Co. v. Mortg. Outlet, Inc., No. 13-CV-3447 (PJS/JSM), 2014 WL 4954645, at *1 (D. Minn. Oct. 1, 2014).

73. *See, e.g.*, *Residential Funding*, 2014 WL 5207485, at *1.

74. *See, e.g.*, *id.*

75. *Id.* at *1; Residential Funding Co. v. Broadview Mortg. Corp., No. 13-cv-3463 ADM/SER, 2014 WL 4104819, at *1–2 (D. Minn. Aug. 19, 2014).

76. *See, e.g.*, Residential Funding Co. v. HSBC Mortg. Corp. (USA) (*In re* Residential Capital, LLC), 524 B.R. 563, 571–72 (Bankr. S.D.N.Y. 2015).

77. *See, e.g.*, *In re* RFC & RESCAP Liquidating Trust Litig., No. 13-cv-3451 (SRN/JJK/HB), 2015 WL 3756476, at *11 (D. Minn. June 16, 2015).

78. *In re* RFC & RESCAP Liquidating Trust Litig., No. 14-cv-3093 (PJS/BRT), 2015 WL 4373666, at *3 (D. Minn. July 15, 2015) (quoting Client Guide).

79. *Id.*

in the District of Minnesota were consolidated for pre-trial purposes.[80] The parties are undertaking discovery, with trial set for January 2017.[81]

Lawsuits Against Trustees

RMBS mortgage originators, sponsors, and depositors are not the only parties that have been targeted in RMBS litigation. RMBS investors have also sued the trustees of the securitization trusts for violating enforcement obligations against other parties for breaches of representations and warranties.[82] The amounts at stake in these cases have been significant, perhaps even more so than in other cases. Several cases were filed in New York state court in 2014 against six leading trustees, one of which involved 841 "private label" RMBS trusts containing over $700 billion in loans that allegedly suffered over $74 billion in losses.[83]

Two significant rulings were made in other cases against trustees. First, an "extender provision" under federal law can extend the applicable statute of limitations for state law claims brought by government investors in some instances.[84] Second, investors must state only enough facts at the pleading stage to raise a "plausible inference" that the trustee had knowledge of breaches of representations and warranties by RMBS sponsors to state a breach of contract claim against an RMBS trustee relating to those breaches under New York law.[85] These holdings increase the likelihood that similar claims against trustees will survive at the pleading stage.

Government Involvement in RMBS Litigation

The federal government also has been active in RMBS litigation since it launched the RMBS Working Group ("Working Group") in 2012 comprised largely of investigators and attorneys from the U.S. Securities and Exchange Commission, the U.S. Department of Justice, and the New York State Attorney General's Office.[86] The Working Group "investigate[s] those responsible for misconduct contributing to the financial crisis through the pooling and sale of res-

80. *In re* RFC & RESCAP Liquidating Trust Litig., No. 13-cv-3451, slip op. at 2–3 (SRN/JJK/HB) (D. Minn. Jan. 27, 2015) (administrative order).

81. *In re* RFC & RESCAP Liquidating Trust Litig., No. 13-cv-3451. slip op. at 10 (SRN/JJK/HB) (D. Minn. July 20, 2015) (amended consolidated case management order).

82. *See, e.g.*, *Quick Takes on Notable Decisions Related to Commercial Lending Issues*, Com. Lending Litig. News, June 5, 2015, at 5; Jonathan Stempel, *HSBC Must Face US Lawsuits Over $34 Bln Mortgage Debt Losses*, Reuters (June 1, 2015, 3:55 PM), http://www.reuters.com/article/2015/06/01/hsbc-mortgage-lawsuit-idUSL1N0YN20720150601.

83. *See* John Hintze, *New Target for RMBS Lawsuits: The Trustees*, Asset Securitization Rep. (Aug. 1, 2014), http://www.structuredfinancenews.com/news/residential_mbs/new-target-for-rmbs-lawsuits-the-trustees-251440-1.html.

84. *See* Nat'l Credit Union Admin. Bd. v. HSBC Bank USA, N.A., No. 15-cv-2144 (SAS), 2015 WL 4429265, at *4–5 (S.D.N.Y. July 20, 2015) (citing 12 U.S.C. § 1787(b)(14)(A)); *see also* FDIC. v. Morgan Stanley Capital I Inc., No. 14-cv-00418-PAB-MJW, 2015 WL 1381875, at *4 (D. Colo. Mar. 24, 2015) (citing 12 U.S.C. § 1821(d)(4)).

85. Royal Park Invs. SA/NV v. HSBC Bank USA, N.A., No. 14-cv-8175 (SAS), 2015 WL 3466121, at *6–7 (S.D.N.Y. June 1, 2015).

86. *Report Residential Mortgage-Backed Securities Fraud*, Stop Fraud, http://www.stopfraud.gov/rmbs.html (last visited Nov. 12, 2015).

idential mortgage-backed securities."[87] The Working Group has brought cases alleging violations of state law and of two federal statutes, the False Claims Act[88] and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[89] The ten-year statute of limitations in FIRREA[90] gives the Working Group considerable reach, allowing it to bring claims regarding mortgages sold and securitized prior to the 2007–2008 economic crisis. The Working Group's labors have garnered many significant civil and criminal settlements since its inception, which have reportedly often been in the multi-billion dollar range.[91] More settlements like these are anticipated.[92] Settlements have also been substantial in civil litigation.[93]

87. Press Release, U.S. Dep't of Justice, *U.S. Attorney General Holder, State and Federal Officials Announce Collaboration to Investigate Residential Mortgage-Backed Securities Market* (Jan. 27, 2012), http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-ag-120.html.

88. 31 U.S.C. §§ 3729–3733 (2012).

89. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of the U.S.C.); *see* Office of Inspector Gen., Fed. Hous. Fin. Agency, Semiannual Report to Congress 59–60 (Apr. 30, 2014), http://origin.www.fhfaoig.gov/Content/Files/SeventhSemiannualReport_0.pdf; Mark S. Nelson, *BofA and FHFA Settle Mortgage-Backed Securities Row for Over $9 Billion*, Corp. Governance Guide Update, Apr. 15, 2014, at 1, 2014 WL 8772370.

90. 12 U.S.C. § 1833a(h) (2012).

91. *See, e.g.*, Nelson, *supra* note 89, at 1; Kat Greene, *Morgan Stanley to Shell Out $2.6B to End MBS Probe*, Law360 (Feb. 25, 2015, 6:45 PM), http://www.law360.com/articles/625361/morgan-stanley-to-shell-out-2-6b-to-end-mbs-probe?article_related_content=1; Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis (Aug. 21, 2014), http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

92. *See* Emily Glazer & Christina Rexrode, *Justice Department Readies New Bank Settlements*, Wall St. J. (June 4, 2015, 6:39 PM), http://www.wsj.com/articles/justice-department-readies-new-bank-settlements-1433457596.

93. *See, e.g.*, *In re* Bank of N.Y. Mellon, 4 N.Y.S.3d 204, 206–09 (App. Div. 2015) (approving $8.5 billion cash settlement and other relief worth $3 billion); Trustee's Brief in Support of Settlement at 1–2, *In re* U.S. Bank N.A., No. 652382/2014 (N.Y. Sup. Ct. Aug. 3, 2014) (seeking approval for $4.5 billion settlement).