

New York Court of Appeals Clarifies Accrual of Statute of Limitations for Mortgage Repurchase Agreements

On June 11, 2015, the New York Court of Appeals held that for breach of contract claims arising from customary mortgage loan repurchase agreements, the State's six-year statute of limitations accrues when the agreement is executed.¹

I. Factual Background

As sponsor to the securitization at issue in the case, defendant DB Structured Products, Inc. ("DBSP") purchased over 8,000 mortgage loans from third-party originators. DBSP then sold the pool of loans to plaintiff ACE Securities Corp. To facilitate the transaction the parties executed a mortgage loan repurchase agreement ("MLPA") on March 28, 2006 (the "closing date"). ACE then transferred the pool to a mortgage loan trust (the "trust"), and appointed HSBC bank as trustee under a Pooling and Servicing Agreement ("PSA").

In the MLPA, DBSP made over 50 representations and warranties about the credit quality of the loans as of the closing date of the agreement. The MLPA authorized the trust to examine the mortgage loan pool and exclude any loans that did not comply with these representations and warranties, and obligated DBSP to "cure or repurchase" any non-conforming loans.²

The PSA set forth the procedure for the trust to enforce the repurchase obligation. If the trustee learned of a breach of a representation or warranty, the trustee was required to promptly notify the defendant and request that the defendant cure the breach within 60 days, or repurchase the loans within 90 days. If DBSP failed to do so, the trustee was empowered to enforce the repurchase obligation at law.

Subsequently, borrower defaults and delinquencies on individual mortgages in the trust caused investors in the trust to lose over \$300 million. On March 28, 2012, exactly six years after the execution of the MLPA, two investors brought suit in the New York Supreme Court for breach of contract, alleging that DBSP breached its representations and warranties and failed to comply with the repurchase obligation. Later, HSBC sought to substitute for the investors, and brought suit on behalf of the trust.

In November 2012, DBSP moved to dismiss the complaint, arguing that the trustee's claims accrued on the closing date, and the suit was therefore untimely under New York's six-year statute of limitations for breach of contract claims. The Supreme Court denied the motion, and DBSP appealed. The Appellate Division, First Department reversed the Supreme Court, holding that any claims under the MLPA accrued on the closing date. The plaintiffs sought leave to appeal the decision to the New York Court of Appeals, and the Court of Appeals agreed to hear the case.

II. The Court of Appeals Decision

The Court began with several broad statements of policy, noting that under New York law, statutes of limitations served the objectives of "finality, certainty and predictability," and that New York Courts have consistently rejected "accrual dates which cannot be ascertained with any degree of certainty."³ The Court also

¹ *ACE Securities Corp. v. DB Structured Products, Inc.* 2015 WL 3616244 (N.Y. June 11, 2015).

² *Id.*, at 4.

³ *Id.* at 9, citing *MRI Broadway Rental v. United States Min. Prods. Co.*, 92 NY2 421, 428 (1998).

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noted that New York does not apply a “discovery” rule to statutes of limitations for claims involving the breach of contract, noting that even though the policy may, at times, result in unfair outcomes, the contrary rule would result in subjective and unpredictable determinations of liability.⁴

The Court then evaluated the two key arguments presented by the plaintiffs, which both focused on the construction of the cure and repurchase clause of the MLPA. First, the plaintiffs argued that under the MLPA, a cause of action for breach of contract against DBSP did not accrue until DBSP refused to cure or repurchase the noncompliant loans. In doing so, the plaintiffs construed the cure and repurchase clause as a separate promise of future performance, which continued for the duration of the underlying investment.

While the Court noted that under New York law, parties may “contractually agree to undertake a separate obligation, the breach of which does not arise until some future date”, the Court determined that the cure and repurchase clause in the MLPA did not rise to this level.⁵ The Court emphasized that under the MLPA, DBSP did not guarantee the future performance of the relevant loans, but rather made specific representations and warranties about the loans that expired on the closing date. Thus, the Court concluded that the cure and repurchase clause was an alternative remedy for a breach of these representations and warranties, not an independent guarantee of future loan performance, the breach of which gave rise to an independent cause of action.

The plaintiffs also argued that the cure and repurchase obligation in the MLPA was a “substantive condition precedent to suit”.⁶ Thus, the plaintiffs alleged that a cause of action could not accrue in the present case until the plaintiff notified DBSP of the breach, and DBSP refused to comply with the repurchase obligation.

In rejecting this argument, the Court noted that under New York law, where a plaintiff suffers a legal harm, and the only impediment to bringing suit is discovery of the harm and notification of the defendant, the statute of limitations accrues when the harm takes place. Applying this rule to the present case, the Court reasoned that the plaintiffs suffered harm, if at all, when the MLPA was executed – as any breach of the relevant representations and warranties occurred at that time. In the Court’s view, the cure and repurchase obligation was simply a “procedural”, rather than a substantive, prerequisite to suit that did not relate to the underlying harm. As a result, the cure and repurchase agreement did not alter the plaintiff’s duty to bring suit within New York’s six-year statute of limitations.

III. Significance

By clarifying that New York’s six-year statute of limitations on breach of contract claims begins to run when a mortgage repurchase agreement is executed, the Court of Appeals provided greater certainty to parties to these agreements about the duration of potential liabilities.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

⁴ *Id.* at 9-10.

⁵ *Id.* at 11, citing *Bulova Watch v. Celotex Corp.*, 46 N.Y.2d 606 (1979).

⁶ *Id.* at 14-15.