December 27, 2013

New York Appellate Court Holds that Claims for Breach of RMBS
Representations and Warranties Accrue on Issuance

In an important decision last week, a New York appellate court ruled that claims for breach of representations and warranties made in connection with residential mortgage-backed securities (RMBS) accrue when the representations and warranties are made, which typically occurs when the securitization closes. *ACE Securities Corp.* v. *DB Structured Products, Inc.*, No. 650980/12 (N.Y. App. Div. 1st Dep't Dec. 19, 2013). The court held that the six-year contract statute of limitations begins to run at that time, instead of when a defendant refuses to comply with a plaintiff's demand for a contractual remedy.

The defendant in *ACE* had sold mortgage loans to an RMBS trust, and had made contractual representations and warranties about the loans when the securitization closed. The trustee for the trust asserted that the representations and warranties as to certain of the loans were false, and that the defendant accordingly was required to repurchase those loans—the sole remedy under the contract. The plaintiff trustee did not bring suit until more than six years after the securitization, however, and as a result, the Appellate Division held that the claims were time-barred under New York's six-year statute of limitations for contract claims. The court rejected the trustee's argument that the claims "did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan" under the remedy provisions of the contract. It concluded instead that the claims accrued when the securitization closed, as that was "when any breach of the representations and warranties contained therein occurred."

The Appellate Division also ruled that, for two reasons, the trustee could not rely on the fact that individual RMBS certificate holders had sued before the limitations period expired. First, the investors had sued before the contractual cure or repurchase period had elapsed; because the running of that period was a "condition precedent to commencing suit," the court held that the investors' suit was "a nullity." Second, the court held that, under its landmark decision last year in *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, the certificate holders "lacked standing to commence the action on behalf of the trust," and that, for this reason as well, their prior suit could not make the trustee's suit timely.

As we explained in the *amicus curiae* brief we submitted on behalf of the Securities Industry and Financial Markets Association in support of the defendant, New York's statute of limitations plays a vital role in allowing parties to order their affairs predictably through private contracts. The Appellate Division's decision correctly upholds that important public policy.

Theodore N. Mirvis
George T. Conway III
Elaine P. Golin
Jeffrey D. Hoschander
Justin V. Rodriguez