



May 21 2010  
3:40PM

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**BANK OF AMERICA CORPORATION,**  
6 **COUNTRYWIDE FINANCIAL**  
**CORPORATION, COUNTRYWIDE HOME**  
7 **LOANS, COUNTRYWIDE SECURITIES**  
**CORPORATION, CWHEQ and CWABS**

8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES**  
11 **WESTERN DIVISION**

12 MBIA Insurance Corporation, a New York  
corporation,

13 Plaintiff,

14 vs.

15 Bank of America Corporation, a Delaware  
16 corporation, Countrywide Financial  
Corporation, a Delaware corporation,  
17 Countrywide Home Loans, Inc., a New York  
corporation, Countrywide Securities Corp., a  
18 Delaware corporation, CWHEQ, Inc., a  
Delaware corporation, CWABS, Inc., a  
19 Delaware corporation, CWABS Revolving  
Home Equity Loan Trust, Series 2004-P, a  
20 Delaware statutory trust, CWHEQ Revolving  
Home Equity Loan Trust, Series 2005-A, a  
21 Delaware statutory trust, CWHEQ Revolving  
Home Equity Loan Trust, Series 2005-E, a  
22 Delaware trust, CWHEQ Revolving Home  
Equity Loan Trust, Series 2005-I, a Delaware  
23 trust, CWHEQ Revolving Home Equity Loan  
Trust, Series 2005-M, a Delaware trust,  
24 CWHEQ Revolving Home Equity Loan Trust,  
Series 2006-E, a Delaware trust, CWHEQ  
25 Revolving Home Equity Loan Trust, Series  
2006-G, a Delaware trust, CWHEQ Home  
26 Equity Loan Trust, Series 2006-S8, a common  
law trust, CWHEQ Home Equity Loan Trust,  
27 Series 2006-S9, a New York common law trust,  
CWHEQ Home Equity Loan Trust, Series,  
28 2006-S10, a New York common law trust

Case No. BC417572

**NOTICE OF ENTRY OF ORDER ON  
DEMURRERS AND MOTION TO  
STRIKE**

Judge: Hon Emilie H. Elias  
Dept.: 324

Complaint filed: July 10, 2009

1 CWHEQ Revolving Home Equity Loan Trust,  
2 Series 2007-E, a Delaware trust, CWHEQ  
3 Home Equity Loan Trust, Series 2007-S1, a  
4 common law trust, CWHEQ Home Equity Loan  
5 Trust, Series 2007-S2, a common law trust,  
6 CWHEQ Home Equity Loan Trust, Series  
7 2007-S3, a common law trust, Greenwich  
8 Capital Markets, Inc., a Delaware corporation,  
9 HSBC Securities (USA) Inc., a Delaware  
10 corporation, UBS Securities, LLC, a Delaware  
11 limited liability company, Angelo Mozilo, an  
12 individual, David Sambol, an individual, Eric  
13 Sieracki, an individual, Ranjit Kripalani, an  
14 individual, Jennifer Sandefur, an individual,  
15 Stanford Kurland, an individual, and John and  
16 Jane Does 1-100,

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Defendants.

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 17, 2010, the Honorable Emilie H. Elias of the  
3 Superior Court of Los Angeles issued a ruling on matters taken under submission on April 14, 2010  
4 in the above-captioned case. The Order is hereto attached as Exhibit A.

5 The ruling is as follows:

6 The requests of the Individual Defendants and the Underwriting Defendants to join the  
7 demurrer of the Countrywide Defendants and Bank of America are granted.

8 The rulings on the demurrer of Countrywide Defendants and Bank of America are as follows:

- 9 • The demurrer is sustained with leave to amend as to the issues of ripeness and  
10 sufficiency of the allegations.
- 11 • The demurrer is sustained without leave to amend as to the issue of equitable  
12 contribution.
- 13 • The demurrer is overruled as to the issues of contractual contribution, timeliness, and  
14 successor in interest liability.
- 15 • The demurrer is moot as to the issue of the Trust Note holders' alleged injuries/losses.

16 The Motion to Strike of the Countrywide Defendants and Bank of America is denied.

17 The demurrers of the Individual Defendants are sustained leave to amend as to the issue of  
18 the sufficiency of the allegations

19 The demurrer of the Individual Defendants is overruled as to the issue of the applicability of  
20 section 6.10 of the insurance agreement.

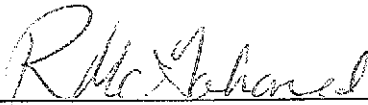
21 The demurrer of the Underwriter Defendants is overruled.

22 The Motion to Stay of the Countrywide Defendants and Bank of America is continued.

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1 Dated: 5/21/10

Respectfully submitted,

2  
3 By: 

4 Robert J. McGahan  
5 *rmcgahan@goodwinprocter.com*  
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11 Attorneys for Defendants  
12 **BANK OF AMERICA CORPORATION,**  
13 **COUNTRYWIDE FINANCIAL**  
14 **CORPORATION, COUNTRYWIDE**  
15 **HOME LOANS, COUNTRYWIDE**  
16 **SECURITIES CORPORATION, CWHEQ**  
17 **and CWABS**

# **EXHIBIT A**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 05/17/10

DEPT. 324

HONORABLE EMILIE H. ELIAS

JUDGE A. MORALES

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. MUNOZ, C.A.

Deputy Sheriff

NONE

Reporter

BC417572

Plaintiff

Counsel

MBIA INSURANCE CORPORATION

NO APPEARANCES

VS

Defendant

BANK OF AMERICA CORPORATION ET

Counsel

R/T LEAD CASE BC380698 ON 1-13-  
DEEMED COMPLEX (08-10-09)

**NATURE OF PROCEEDINGS:**

COURT ORDER- NOTICE OF RULING ON MATTERS TAKEN UNDER  
SUBMISSION ON APRIL 14, 2010

In the matters heretofore taken under submission  
on April 14, 2010, the Court hereby issues its  
ruling as set forth in the separate Order Re:  
Demurrers and Motion to Strike signed and filed  
this date.

Counsel for defendant, Bank Of America Corporation,  
is ordered to give notice to all parties.

A copy of this minute order and of the order re:  
demurrers and motion to strike are served upon counsel  
for the defendant as follows:

CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the  
above-entitled court, do hereby certify that I am not  
a party to the cause herein, and that this date I  
served Notice of Entry of the above minute order of  
5-17-10 upon each party or counsel named below by  
depositing in the United States mail at the courthouse  
in Los Angeles, California, one copy of the  
original entered herein in a separate sealed envelope  
for each, addressed as shown below with the postage

|   |
|---|
| <p align="center"><b>MINUTES ENTERED</b><br/>05/17/10<br/><b>COUNTY CLERK</b></p> |
|---|

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 05/17/10

DEPT. 324

HONORABLE EMILIE H. ELIAS

JUDGE A. MORALES

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

E. MUNOZ, C.A.

Deputy Sheriff

NONE

Reporter

BC417572

Plaintiff

Counsel

MBIA INSURANCE CORPORATION

NO APPEARANCES

VS

Defendant

BANK OF AMERICA CORPORATION ET

Counsel

R/T LEAD CASE BC380698 ON 1-13-  
DEEMED COMPLEX (08-10-09)

**NATURE OF PROCEEDINGS:**

thereon fully prepaid.

Date: 5-17-10

John A. Clarke, Executive Officer/Clerk

By: \_\_\_\_\_

A. MORALES

GOODWIN PROCTER LLP

Robert J. McGahan

601 S. Figueroa Street, 41st Floor

Los Angeles, CA 90017

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**ORIGINAL FILED**

MAY 17 2010

LOS ANGELES  
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

MBIA INSURANCE CORPORATION,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION, et  
al.,

Defendants.

Case No.: BC417572

ORDER RE: DEMURRERS AND MOTION  
TO STRIKE

**I.**

**BACKGROUND**

Countrywide Home Loans, Inc. allegedly originated and conveyed pools of mortgage loans to certain depositor entities – CWHEQ, Inc. and CWABS, Inc. – “in exchange for cash.”<sup>1</sup> The depositors allegedly conveyed the pools of mortgage loans to trusts created by the Countrywide enterprise.<sup>2</sup> “The trusts in turn [allegedly] securitized the underlying mortgage

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<sup>1</sup> (Corrected First Amended Complaint (“FAC”), ¶ 55.) CWHEQ, Inc. and CWABS, Inc. are entities within the Countrywide enterprise.

<sup>2</sup> (*Id.*)

1 loans and issued residential mortgage-backed securities<sup>3</sup> . . . which were then sold to public  
2 investors.”<sup>4</sup> This case involves fifteen of the securitizations.

3 The complaint asserts that the Countrywide Defendants<sup>5</sup> “consistently falsely  
4 represented to the investors who purchased the [Trust] Notes that [the Countrywide Defendants]  
5 had originated the mortgage loans in strict compliance with [their] own underwriting standards  
6 and guidelines, which supposedly had been developed over time to screen the creditworthiness  
7 of borrowers and to increase the likelihood that mortgage loans would be repaid.”<sup>6</sup> Instead, the  
8 Countrywide Defendants purportedly abandoned their underwriting standards and failed to  
9 disclose that the Trust Notes were risky since they were backed by mortgage loans issued to  
10 borrowers who did not qualify for the loans.<sup>7</sup> The alleged result is that “tens of thousands of the  
11 mortgage loans underlying the securitizations are in default and/or foreclosure[.]”<sup>8</sup> Moreover,  
12 the present value of the Trust Notes allegedly “is dramatically impaired.”<sup>9</sup>

13 To increase the marketability of the Trust Notes, the Countrywide Defendants allegedly  
14 entered into agreements with Plaintiff MBIA Insurance Corporation (“MBIA”) whereby MBIA  
15 agreed “to provide billions of dollars of financial guaranty insurance in the form of guarantees  
16

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17 <sup>3</sup> Hereinafter, the Court refers to the residential mortgage-backed securities as “Trust Notes.”

18 <sup>4</sup> (*Id.* at ¶ 2.)

19 <sup>5</sup> The “Countrywide Defendants” are Countrywide Financial Corporation, Countrywide Home Loans, Inc.,  
20 CWHEQ, Inc., and CWABS, Inc. Bank of America Corporation (“Bank of America”) is named in the complaint as  
the successor in interest to the Countrywide entities.

21 <sup>6</sup> (*Id.*)

22 <sup>7</sup> (*Id.* at ¶¶ 2-3.) The Countrywide Defendants allegedly “knowingly loaned billions of dollars to borrowers who  
23 could not afford to repay the loans, or who Countrywide personnel knew or should have known were including  
misstatements in their loan applications, often with the assistance and encouragement of Countrywide’s employees  
and brokers, or who otherwise did not satisfy the basic risk criteria for prudent and responsible lending that  
Countrywide claimed to use.” (*Id.* at ¶ 2.)

24 <sup>8</sup> (*Id.* at ¶ 3.)

25 <sup>9</sup> (*Id.*) The Trust Note purchasers purportedly “did not have knowledge of any significant delinquencies or defaults  
on the underlying mortgage loans until November 2007 at the earliest” when the trusts’ trustees began making  
insurance claims relating to the Trust Notes. (*Id.*)

1 of the trust obligations to make principal and interest payments on particular classes” of the  
2 Trust Notes.<sup>10</sup> The complaint alleges that, “[b]ut for MBIA’s provision of financial guaranty  
3 insurance,” the purchasers and/or holders of the Trust Notes “would have been deprived of  
4 payments on the [Trust] Notes.”<sup>11</sup>

5 MBIA contends it has paid, and continues to pay, claims made by the trustees of the  
6 trusts on behalf of the Trust Note holders for missed principal and interest payments. MBIA  
7 here brings a subrogation action, alleging that the Countrywide Defendants and Bank of  
8 America, as well as other Defendants, are liable for the amounts paid to the trusts and the Trust  
9 Note holders.<sup>12</sup>

10 The FAC includes six causes of action: (1) violations of Corporations Code sections  
11 25401 and 25501; (2) violation of Corporations Code section 25504; (3) violation of  
12 Corporations Code section 25504.1; (4) fraud; (5) negligent misrepresentation; and (6)  
13 declaratory relief.

14 The following motions are at issue here:

- 15 • Demurrer of the Countrywide Defendants and Bank of America.
- 16 • Motion to Strike of the Countrywide Defendants and Bank of America.
- 17 • Demurrer of Defendants Ranjit Kripalani and Jennifer Sandefur.
- 18 • Demurrer of Defendant Eric Sieracki.
- 19 • Demurrer of Defendant David Sambol.

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21 <sup>10</sup> (*Id.* at ¶ 2.) The actual insureds here are the trusts, not the Trust Note holders, but the purpose of MBIA’s  
22 insurance claim payments is to provide money to the trusts to transfer to the Trust Note holders to cover any losses  
relating to the Trust Notes.

23 <sup>11</sup> (*Id.* at ¶ 3.)

24 <sup>12</sup> A similar action filed by MBIA is pending in New York. Both the New York action and the California action  
25 involve the same fifteen securitizations. The New York action focuses on the fraud allegedly perpetrated on MBIA  
whereas the California action focuses on the fraud allegedly perpetrated on the Trust Note holders. Stated another  
way, the New York action involves direct claims whereas the California action involves subrogation claims.

- 1 • Demurrer of Defendant Stanford Kurland.
- 2 • Demurrer of Defendant Angelo Mozilo.<sup>13</sup>
- 3 • Demurrer of the Underwriter Defendants.<sup>14</sup>
- 4 • Motion to Stay of the Countrywide Defendants and Bank of America.

5 The Court heard oral arguments on April 14, 2010 and took the matters under  
6 submission to further consider the parties' papers and positions. Having so considered, the  
7 Court now issues its decision.

## 8 II.

### 9 DISCUSSION

#### 10 A. *Demurrer of the Countrywide Defendants and Bank of America*<sup>15</sup>

11 The demurrer of the Countrywide Defendants and Bank of America raises numerous  
12 issues, including, but not limited to, (1) whether the subrogation claims are ripe, (2) whether  
13 MBIA has a contractual or equitable right to bring subrogation claims, (3) whether the holders  
14 of the Trust Notes have suffered injuries/losses sufficient to support the subrogation claims, (4)  
15 whether the claims are adequately alleged, and (5) whether Bank of America can be sued as a  
16 successor in interest.

17 These issues apply with equal force to all causes of action. Thus, the Court will analyze  
18 the issues generally and does not discuss them on a cause of action-by-cause of action basis.

#### 19 1. Ripeness

20 The Countrywide Defendants and Bank of America contend all causes of action fail  
21 because the case is unripe in that MBIA has not yet paid all monies due to the Trust Note

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23 <sup>13</sup> Ranjit Kripalani, Jennifer Sandefur, Eric Sieracki, David Sambol, Stanford Kurland, and Angelo Mozilo are the  
"Individual Defendants." They also join the demurrer of the Countrywide Defendants and Bank of America.

24 <sup>14</sup> The "Underwriter Defendants" are Greenwich Capital Markets, Inc., HSBC Securities (USA) Inc., and UBS  
25 Securities LLC. They join the demurrer of the Countrywide Defendants and Bank of America.

<sup>15</sup> As noted above, the Individual Defendants and the Underwriter Defendants seek to join the demurrer of the  
Countrywide Defendants and Bank of America. Their requests to join are granted.

1 holders, namely, the full cash flow shortfall that MBIA expects will occur over the life of the  
2 Trust Notes. The Countrywide Defendants and Bank of America say the “made whole  
3 doctrine” prohibits a subrogee from pursuing subrogation claims “until the creditor has been  
4 made whole for its loss[.]”<sup>16</sup>

5 MBIA concedes that the made whole doctrine “precludes an insurer from recovering any  
6 third party funds paid to the insured until the insured has been fully compensated for [his or her]  
7 injuries.”<sup>17</sup> However, MBIA contends the made whole doctrine does not apply here because, at  
8 trial, MBIA will only seek a monetary judgment as to the losses for which, at that point, it has  
9 provided compensation.<sup>18</sup>

10 Additionally, MBIA claims the cases cited by the Countrywide Defendants and Bank of  
11 America are distinguishable because they involved situations where an insured sued the  
12 tortfeasor and the insurer intervened to assert a subrogation claim – i.e., they concerned  
13 subrogation disputes between insureds and insurers, and the situation here does not involve a  
14 subrogation dispute between the insured and the insurer.<sup>19</sup>

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16 <sup>16</sup> (Demurrer, pp. 21-22 (citing, among others, *Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4<sup>th</sup> 533,  
17 536).)

18 <sup>17</sup> (Opposition, p. 16.)

19 <sup>18</sup> (*Id.*) As discussed later in this order, the Countrywide Defendants and Bank of America argue that some causes  
20 of action are time-barred. MBIA argues that the time-barred argument is inconsistent with the claim that the causes  
21 of action are unripe. MBIA asserts that the time-barred argument amounts to a concession that the causes of action  
22 are ripe. (*Id.* at pp. 17-18.)

23 MBIA’s argument is unavailing. The time-barred argument is argued in the alternative. (Reply, p. 10  
24 n.9.) Arguing in the alternative does not necessarily render the initial argument invalid.

25 Furthermore, the arguments are not inconsistent. The time-barred argument is founded on the notion that  
the underlying claims of the Trust Note holders are time-barred in which case MBIA cannot bring subrogation  
claims as, in the subrogation context, it merely stands in the shoes of the Trust Note holders. The ripeness  
argument, differently, does not concern the actions of the Trust Note holders but, rather, MBIA’s failure to fully  
pay the Trust Note holders.

<sup>19</sup> (Opposition, pp. 16-17.) Again, the actual insureds are the trusts, not the Trust Note holders. (*See, supra*, note  
10.)

1 The Court agrees with the Countrywide Defendants and Bank of America. First,  
2 MBIA's assertion – that it only seeks recovery of those losses for which it already compensated  
3 the Trust Note holders – is contrary to the allegations of the FAC. The FAC specifically alleges  
4 that MBIA seeks “to recover . . . any and all past and future payments made under its  
5 policies.”<sup>20</sup>

6 Second, even if the FAC only sought recovery of already paid payments, MBIA fails to  
7 cite case law permitting a subrogation action prior to the full compensation of the insured.

8 Third, MBIA does not materially distinguish cases such as:

- 9 • *Sapiano, supra*, 28 Cal.App.4<sup>th</sup> 533 (finding subrogation claim unripe under the made  
10 whole doctrine since the insured had only been compensated for part of the loss).
- 11 • *American International Specialty Lines Insurance Co. v. United States*, 2005 WL  
12 680159 (finding, under the made whole doctrine, that an insurer could not recover via  
13 subrogation where it paid some but not all of the insured's clean-up costs; the possibility  
14 of future clean-up costs – that had yet to be paid – rendered the subrogation claim  
15 unripe).
- 16 • *California Department of Toxic Substances Control v. City of Chico* (E.D. Cal. 2004)  
17 297 F.Supp.2d 1227 (finding, under the made whole doctrine, that an insurer could not  
18 recover clean-up costs paid to date to insured where future unpaid clean-up costs were  
19 likely).

20 Accordingly, MBIA's subrogation action appears to be unripe. The Court sustains the  
21 demurrer with leave to amend to attempt to allege ripe causes of action.

## 22 2. Contractual and Equitable Subrogation

23 The Countrywide Defendants and Bank of America cite *Knight v. Alefosio* (1984) 158  
24 Cal.App.3d 716 and other cases for the proposition that an insurer's rights of subrogation are

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25 <sup>20</sup> (FAC, Prayer for Relief (emphasis added).)

1 limited to those set forth in the contract. They contend all causes of action in the FAC should be  
2 dismissed because the transaction documents here do not create a contractual right to bring  
3 lawsuits on behalf of the Trust Note holders.

4 The Countrywide Defendants and Bank of America argue that, in a similar context in  
5 *MBIA v. Spiegel*, 2004 WL 1944452 (“*Spiegel*”), a federal district court rejected MBIA’s  
6 assertion of a right to bring subrogation claims on behalf of insureds. The district court found  
7 that the transaction documents did not provide such a right.<sup>21</sup>

8 MBIA claims it has both a contractual right and an equitable right to bring subrogation  
9 claims. As to the contractual right, MBIA cites various indenture provisions in the contracts.  
10 The provisions, which are basically the same, state that MBIA “is fully subrogated to the rights  
11 of the Noteholders to receive . . . principal and interest from the Mortgage Loans of the related  
12 Loan Group . . . and [MBIA] shall be paid that principal and interest[.]”<sup>22</sup> MBIA contends these  
13 are non-exclusive subrogation provisions that should not be read narrowly to bar the instant  
14 lawsuit.<sup>23</sup>

15 It is true that there are two sources of subrogation rights – contract and equity. In terms  
16 of the alleged contractual subrogation right, the Court finds that the issue cannot be decided at  
17 the demurrer stage. While in *Spiegel, supra*, 2004 WL 1944452 the district court found the  
18 policy language clear and unambiguous, this Court does not agree. Though MBIA does not cite  
19 specific language establishing a right to bring subrogation lawsuits, the Court cannot say that  
20 the contractual language is clear and unambiguous. The Court finds that determining the reach  
21 and meaning of the subrogation provisions necessitates consideration of evidence. Therefore,  
22

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23 <sup>21</sup> (Demurrer, pp. 14-17.)

24 <sup>22</sup> (Opposition, pp. 10-11; *see also* McGahan Decl., Ex. 29, section 4.03; Olivar Decl., Ex. C, section 5.08; *id.* at  
25 Ex. D, section 4.02; *id.* at Ex. E, p. S-38; McGahan Decl., Ex. 23, p. 287.)

<sup>23</sup> (*See, e.g.*, 4/14/10 Tr., pp. 7-9.)

1 on the issue of MBIA's purported contractual right to bring a subrogation action, the demurrer is  
2 overruled.

3 As to the alleged equitable right, MBIA says it has an equitable right to bring  
4 subrogation claims because it paid insurance claims relating to debts caused by the Countrywide  
5 Defendants' alleged fraud.<sup>24</sup>

6 The Court rejects MBIA's argument. The decision in *Knight, supra*, 158 Cal.App.3d  
7 716 instructs that equitable subrogation is not available where the party asserting the  
8 subrogation right negotiated specific, different subrogation rights in a contract and failed to  
9 reserve the asserted subrogation right under the policy. To hold otherwise, according to *Knight*,  
10 would permit the party to rewrite the contract to the detriment of the other contracting party.<sup>25</sup>  
11 *Knight* remains good law<sup>26</sup> and operates against MBIA's reliance on equitable subrogation  
12 given the parties' negotiation of specific contractual subrogation provisions.

13 Equitable subrogation also appears unavailable because MBIA is pursuing direct claims  
14 in New York. In other words, there appears to be an adequate legal recourse.

15 The Court sustains the demurrer without leave to amend as to the issue of MBIA's  
16 alleged equitable right of subrogation.

### 17 3. Injury/Loss

18 The Countrywide Defendants and Bank of America argue that all causes of action fail  
19 because the Trust Note holders have not suffered any loss of principal or interest payments on  
20 their Trust Notes. They say MBIA may only stand in the shoes of the subrogors. Consequently,  
21 for MBIA to have subrogation claims, the Trust Note holders must have a claim for damages.

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23 <sup>24</sup> (Opposition, pp. 8-10.)

24 <sup>25</sup> (*Knight, supra*, 158 Cal.App.3d at 723.)

25 <sup>26</sup> (See, e.g., Croskey, et al., Cal. Prac. Guide: Ins. Litig. (The Rutter Group 2010) section 9:115 (citing *Knight* for the proposition that subrogation is waived as to income continuation benefits where the policy only expressly provides subrogation as to damages).)

1 The Countrywide Defendants and Bank of America contend the Trust Note holders do not have  
2 a claim for damages because, even assuming the alleged fraud occurred, they were insulated  
3 from the fraud by the MBIA guaranty contracts.<sup>27</sup>

4 MBIA contends the argument – that an insurer is barred from pursuing claims in  
5 subrogation whenever it makes its insureds whole – should be rejected as nonsensical. MBIA  
6 claims the argument, if true, would cause of the doctrine of subrogation to cease to exist.<sup>28</sup>

7 On one hand, the nature of the causes of action – the fact that they sound in fraud –  
8 arguably lends credence to the argument of the Countrywide Defendants and Bank of America.  
9 The allegations fail to demonstrate actual injuries to the Trust Note holders resulting from the  
10 alleged fraud. Yet, MBIA attempts to pursue fraud claims as a subrogee, arguably in  
11 contravention of the well established rule that a subrogee cannot assert greater rights than the  
12 subrogors could assert.

13 On the other hand, as a matter of policy, MBIA's position may have merit. The  
14 Countrywide Defendants and Bank of America raise a *Catch-22* scenario. If MBIA did not pay  
15 the trusts to cover the Trust Note holders' claims, then the Trust Note holders would have  
16 sufficient injuries, but subrogation would be unavailable, and MBIA might be subject to legal  
17 actions for failure to pay. Here, differently, MBIA allegedly pays the claims, but, in the view of  
18 the Countrywide Defendants and Bank of America, the payments preclude subrogation. The  
19 Court is doubtful that the doctrine of subrogation was intended to be unavailable in this  
20 fashion.<sup>29</sup>

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21  
22 <sup>27</sup> (Demurrer, pp. 18-21 (citing *American Surety Co. of New York v. Tannhauser* (1942) 37 N.Y.S.2d 450).)

23 <sup>28</sup> (Opposition, pp. 15-16.) As stated earlier, the true insureds here are the trusts rather than the Trust Note holders.  
24 (See, *supra*, notes 10, 19.)

25 <sup>29</sup> *Tannhauser* does not hold that an insurer is barred from pursuing claims in subrogation whenever it has made its  
insured whole. The *Tannhauser* court held that the insured had not been harmed by the alleged fraud – since no  
mechanic's lien had been filed against the insured's property – such that the insurer did not obtain a subrogation  
fraud cause of action. (*Tannhauser, supra*, 37 N.Y.S.2d at 453-54.) The *Tannhauser* court did not address the

1 Still, the Court is mindful that MBIA currently is litigating direct claims against the  
2 Countrywide Defendants in New York. MBIA's counsel admitted on the record that, if MBIA  
3 is awarded all requested relief in the New York action, this subrogation action will be moot.

4 The Court thus declines to decide this issue at this time. The Court finds the demurrer  
5 moot in light of the above ruling regarding ripeness, but the parties are free to re-raise the issue  
6 during the next demurrer round. Any subsequent discussion of the issue should be coupled with  
7 a discussion of the points highlighted by the Court.

#### 8 4. Sufficiency of the Allegations

9 The Countrywide Defendants and Bank of America argue that the individual causes of  
10 action are not sufficiently alleged. They argue, for example, that the claims are based on fraud  
11 but are not alleged with particularity. They also argue that MBIA fails to allege sales of the  
12 Trust Notes in California, that MBIA fails to allege facts demonstrating control person liability,  
13 privity, reliance, and damages, and that some of the causes of action are time-barred.<sup>30</sup>

14 With one exception, the Court declines to address the arguments on an issue-by-issue  
15 basis. For the reasons stated on the record during oral arguments, the Court agrees that the  
16 allegations are insufficient and grants leave to amend as to each cause of action.

17 The exception is the time-barred argument. The Countrywide Defendants and Bank of  
18 America argue that a two year statute of limitations applies to the first three causes of action and  
19 that the claims are time-barred since MBIA filed the case more than two years after the last  
20 alleged misrepresentation and omission occurred on May 31, 2007.<sup>31</sup>

21  
22 effect of an insurer's payment of claims on the injury element of the insured's fraud claim, and the Countrywide  
23 Defendants and Bank of America cite no other case on point.

24 <sup>30</sup> (Demurrer, pp. 24-39.)

25 <sup>31</sup> (*Id.* at pp. 26-27.) The first three causes of action are (1) violations of Corporations Code sections 25401 and 25501, (2) violation of Corporations Code section 25504, (3) violation of Corporations Code section 25504.1.

1 The Court rejects the argument. The argument is entirely based on speculation and  
2 factual assertions – e.g., “MBIA had access to the underlying loan files for each Second-Lien  
3 Loan and, with reasonable diligence, could have easily discovered the quality of the loans it was  
4 guaranteeing, MBIA could have inspected these loans both before and after the closing of each  
5 Securitization.”<sup>32</sup> The Court cannot determine the truth or falsity of these assertions at the  
6 demurrer stage, especially because it is undisputed that the delayed discovery rule applies to the  
7 two year limitations period.<sup>33</sup> The demurrer must be overruled as to the time-barred issue  
8 because application of the delayed discovery rule involves questions of fact.

#### 9 5. Successor Liability

10 In the FAC, MBIA alleges that Bank of America should be held vicariously liable as a  
11 successor in interest to Countrywide Financial Corporation. The Countrywide Defendants and  
12 Bank of America contend the allegation fails – and that all causes of action should be dismissed  
13 – because Bank of America is Countrywide Financial Corporation’s parent company as opposed  
14 to a successor in interest.<sup>34</sup>

15 MBIA says the FAC sufficiently alleges liability against Bank of America by alleging  
16 that (1) Countrywide Financial Corporation consolidated and merged its business operations  
17 with Bank of America, (2) Bank of America assumed Countrywide Financial Corporation’s  
18 liabilities, and (3) Countrywide Financial Corporation ceased operating as an independent  
19 company. MBIA contends these facts are sufficient under *Marks v. Minnesota Mining and*  
20 *Manufacturing Co.* (1986) 187 Cal.App.3d 1429 to hold Bank of America liable.<sup>35</sup>

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21  
22 <sup>32</sup> (*Id.* at p. 26 (emphasis added).)

23 <sup>33</sup> (*Id.*)

24 <sup>34</sup> (*Id.* at pp. 40-41.)

25 <sup>35</sup> (Opposition, pp. 39-42.)

1 The Court agrees with MBIA. The Countrywide Defendants and Bank of America  
2 primarily rely on an unpublished federal district court decision – *Argent Classic Convertible*  
3 *Arbitrage Fund L.P. v. Countrywide Financial Corporation* (C.D. Cal. 2009) No. CV 07-7097  
4 MRP. In that decision, the district court held that, based on the allegations and the judicially  
5 noticeable documents before it, the plaintiff failed to show that Bank of America was a  
6 successor in interest to Countrywide Financial Corporation.<sup>36</sup> However, the district court noted  
7 that, in the presence of factual exceptions, the result may have been different.<sup>37</sup> The FAC  
8 includes facts that were not present before the district court.

9 More importantly, in the pending, related New York action between MBIA and the  
10 Countrywide Defendants, the New York court has reserved decision on the successor in interest  
11 issue and has indicated intent to allow discovery on the merger and relationship between Bank  
12 of America and the Countrywide Defendants. The New York court indicated that MBIA alleged  
13 a basis for successor liability by alleging that a de factor merger occurred.<sup>38</sup> The same result is  
14 appropriate here as this case and the New York case have basically the same allegations.

15 The demurrer regarding the successor in interest issue is overruled.

16 ***B. Motion to Strike of the Countrywide Defendants and Bank of America***

17 The Countrywide Defendants and Bank of America move to strike the request for jury  
18 trial in the FAC. Defendants argue that (1) the agreements into which MBIA entered include an  
19 express waiver of the right to a jury trial, (2) the parties selected New York law to govern their  
20 contracts, and (3) New York law, unlike California law, enforces jury trial waivers.<sup>39</sup>

21  
22 <sup>36</sup> (McGahan Decl., Ex. 48, pp. 7-9.)

23 <sup>37</sup> (*Id.* at Ex. 48, p. 7.)

24 <sup>38</sup> (Opposition, p. 42; Olivar Decl., Ex. B, pp. 32-42.)

25 <sup>39</sup> (Motion to Strike, pp. 2-5.)

1 MBIA contends California law applies because the case is pending in California. MBIA  
2 says the motion to strike should be denied because California law does not enforce jury trial  
3 waivers.<sup>40</sup>

4 As MBIA notes, California courts – even in the presence of a foreign choice of law  
5 clause – do not apply the foreign law if doing so would result in violation of a fundamental  
6 California public policy. MBIA contends the right to jury trial is fundamental in California such  
7 that the New York choice of law clause cannot be enforced.<sup>41</sup>

8 In reply, the Countrywide Defendants and Bank of America argue that the rule  
9 articulated by MBIA is inapplicable here. The rule, they contend, is that California courts must  
10 honor the parties' contractual choice of law unless (1) application of the foreign state's law  
11 would be contrary to a fundamental California policy, and (2) California has a materially greater  
12 interest than the foreign state in the determination of the particular issue. They claim California  
13 does not have a materially greater interest because MBIA and Countrywide Home Loans, Inc.  
14 are incorporated in New York, many of the underlying events allegedly occurred in New York,  
15 and MBIA's principal place of business is in New York.<sup>42</sup>

16 The Court denies the motion to strike for the following reasons:

- 17 • The California Supreme Court held in *Grafton Partners L.P. v. Superior Court* (2005)  
18 36 Cal.4th 944 that the constitutional right to a jury trial may only be waived via the  
19 means listed in Code of Civil Procedure section 631. Any other type of waiver is not  
20 enforceable. The Supreme Court reasoned that (1) entrance into a contractual jury trial  
21 waiver prior to any dispute arising between the contracting parties is not one of the  
22 means authorized by section 631, and (2) such contractual waivers are thus

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24 <sup>40</sup> (Opposition, pp. 2-5.)

25 <sup>41</sup> (*Id.* at p. 4.)

<sup>42</sup> (Reply, p. 1-5 (quoting *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466).)

1 unenforceable. *Grafton*, reasonably read, suggests that the fundamental policy of  
2 California is against enforcement of jury trial waivers unless they comply with section  
3 631. Because the contractual jury trial waiver here is a pre-dispute waiver, it does not  
4 comply with section 631.

5 • California has a materially greater interest than New York in determination of the jury  
6 trial waiver issue.

7 **C. *Demurrers of the Individual Defendants***

8 For the reasons stated at the hearing – primarily, insufficient factual allegations – the  
9 Court sustains the demurrers of the Individual Defendants with leave to amend.

10 The Court notes that the Individual Defendants argue that section 6.10 of the insurance  
11 agreements eliminates liability against directors and officers. The argument is based on contract  
12 interpretation. It can be accepted at the demurrer stage only if the plain language clearly and  
13 unambiguously supports the argument.

14 Section 6.10 states that directors shall not be personally liable “for breaches . . . of any  
15 obligations under any Transaction Document[.]”<sup>43</sup> One reasonable construction of the terms  
16 “breaches,” “obligations,” and “Transaction Document” is that the parties merely intended to  
17 waive director liability as to contractual breaches of the transaction documents. After all, the  
18 plain language mentions nothing about claims sounding in fraud. The Court finds, therefore,  
19 that section 6.10 does not clearly and unambiguously waive director liability as to the statutory  
20 and common law fraud and negligent misrepresentation claims in the FAC. The demurrers are  
21 overruled in this respect.

22 **D. *Demurrer of the Underwriter Defendants***

23 The Underwriter Defendants claim all causes of action against them should be dismissed  
24 because the indemnification agreements to which they are a party only permit certain breach  
25

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<sup>43</sup> (See, e.g., Demurrer of Ranjit Kripalani and Jennifer Sandefur, p. 5.)

1 claims and do not allow MBIA to bring the common law and statutory fraud claims alleged in  
2 the FAC.<sup>44</sup>

3 The Court overrules the demurrer because the cited contract language does not clearly  
4 and unambiguously waive or otherwise prohibit MBIA's common law and statutory fraud  
5 claims.

6 *E. Motion to Stay*

7 The Court continues the hearing on the motion to stay. The Court will hear further  
8 arguments, and will decide the motion to stay, at the next demurrer hearing.

9 **III.**

10 **CONCLUSION AND ORDER**

11 The requests of the Individual Defendants to join the demurrer of the Countrywide  
12 Defendants and Bank of America are granted.

13 The requests of the Underwriter Defendants to join the demurrer of the Countrywide  
14 Defendants and Bank of America are granted.

15 The Court's rulings regarding the demurrer of the Countrywide Defendants and Bank of  
16 America are as follows:

- 17 • The demurrer is sustained with thirty days leave to amend as to the issues of ripeness and  
18 the sufficiency of the allegations.
- 19 • The demurrer is sustained without leave to amend as to the issue of equitable  
20 contribution.
- 21 • The demurrer is overruled as to the issues of contractual contribution, timeliness, and  
22 successor in interest liability.
- 23 • The demurrer is moot as to the issue of the Trust Note holders' alleged injuries/losses.

24 \_\_\_\_\_  
25 <sup>44</sup> (Demurrer of the Underwriter Defendants, pp. 2-3.)

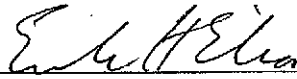
1 The motion to strike of the Countrywide Defendants and Bank of America is denied.

2 The demurrers of the Individual Defendants are sustained with thirty days leave to  
3 amend as to the issue of the sufficiency of the allegations and are overruled as to the issue of the  
4 applicability of section 6.10 of the insurance agreements.

5 The demurrer of the Underwriter Defendants is overruled.

6 The motion to stay of the Countrywide Defendants and Bank of America is continued.

7  
8 Dated: **MAY 17 2010**

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10 EMILIE H. ELIAS  
11 Judge of the Superior Court  
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1 PROOF OF SERVICE

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
3 and not a party to the within action. My business address is 601 South Figueroa Street, 41st Floor,  
4 Los Angeles, California 90017.

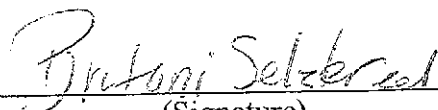
5 On May 21, 2010, I served the **NOTICE OF ENTRY OF ORDER ON DEMURRERS**  
6 **AND MOTION TO STRIKE** by placing a true copy thereof in a sealed envelope(s) on the persons  
7 listed on the attached Service List as follows:

8  **(ELECTRONIC TRANSMISSION VIA LEXISNEXIS® FILE & SERVE)** Based on a  
9 court order or an agreement of the parties to accept service by electronic transmission via  
10 LexisNexis® File & Serve, I caused the documents to be sent to the persons at the e-mail  
11 addresses listed above. I did not receive, within a reasonable time after the transmission,  
12 any electronic message or other indication that the transmission was unsuccessful.

13 I declare under penalty of perjury under the laws of the State of California that the foregoing  
14 is true and correct.

15 Executed on May 21, 2010, at Los Angeles, California.

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17 Britani N. Selzler  
18 \_\_\_\_\_  
(Type or print name)

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(Signature)

**SERVICE LIST**

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Los Angeles County Superior Court, Central District

Case No. BC417572

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2006-E**, a Delaware trust; **CWHEQ  
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As Trustee to the following Trusts:

**CWHEQ HOME EQUITY LOAN TRUST,  
SERIES 2006-S8**, a common law trust;  
**CWHEQ HOME EQUITY LOAN TRUST,  
SERIES 2006-S9**, a New York common law

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trust; **CWHEQ HOME EQUITY LOAN TRUST, SERIES 2006-S10**, a New York common law trust; **CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2007-E**, a Delaware trust; **CWHEQ HOME EQUITY LOAN TRUST, SERIES 2007-S1**, a common law trust; **CWHEQ HOME EQUITY LOAN TRUST, SERIES 2007-S2**, a common law trust; and **CWHEQ HOME EQUITY LOAN TRUST, SERIES 2007-S3**, a common law trust.