

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

MBIA INSURANCE CORPORATION,

Plaintiff-Respondent-
Cross-Appellant,

-against-

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE HOME LOANS SERVICING,
L.P., and BANK OF AMERICA CORP.,

Defendants-Appellants-
Cross-Respondents.

Index No. 602825/08
IAS Part 3

Hon. Eileen Bransten

PRE-ARGUMENT STATEMENT

Plaintiff-Respondent-Cross Appellant MBIA Insurance Corporation (“MBIA”) submits the following Pre-Argument Statement under Rule 600.17 of the Rules of this Court:

1. The title of the action is accurately set forth in the caption above.
2. The original parties to this action are:
 - a. Plaintiff: MBIA.
 - b. Defendants: Countrywide Home Loans, Inc. (“CHL”), Countrywide Securities Corp., Countrywide Financial Corp. and Countrywide Home Loans Servicing, L.P. (collectively, “Countrywide”), and Bank of America Corp. (“BAC”).
3. The name, address and telephone number of counsel for Plaintiff-Respondent-

Cross Appellant MBIA is:

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4. The name, address and telephone number of counsel for Defendants-Appellants-Cross Respondents Countrywide is:

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The name, address and telephone number of counsel for Defendant-Appellant-Cross Respondent BAC is:

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5. This appeal is taken from the Order of the Supreme Court, New York County, I.A.S. Part 3 (per Justice Eileen Bransten) (the "IAS Court") dated January 3, 2012, and duly entered with the Clerk of the Court on January 3, 2012, granting in part and denying in part MBIA's Motion for Partial Summary Judgment and Motion to Strike Defenses (Mot. Seq. No. 37) (the "Order"). A true and correct copy of the Order is attached hereto as Exhibit A.

6. This action arises out of Countrywide's fraudulent inducement of MBIA to provide financial guaranty insurance on 15 securitizations of home mortgage loans (the "Securitizations"), and Countrywide's breaches of representations and warranties relating to the underlying mortgage loans (the "Mortgage Loans").¹ MBIA alleges that Countrywide fraudulently induced it to provide financial guaranty insurance on the Securitizations by misrepresenting its loan origination, underwriting, and servicing practices, as well as the true risk profiles of the loans included in the pools of Mortgage Loans underlying the Securitizations.

¹ Nine of the Securitizations involve home equity lines of credit ("HELOCs") and six involve closed-end second liens ("CESS").

MBIA also alleges that Countrywide breached certain representations and warranties in the agreements relating to the Securitizations (the "Insurance Agreements"), including that the Mortgage Loans were originated in accordance with Countrywide's underwriting guidelines, that they adhered to federal, state, and local law, and that Countrywide had accurately represented the characteristics of the Mortgage Loans in schedules referenced in the Insurance Agreements. MBIA further alleges that Countrywide breached its obligations under the Insurance Agreements to repurchase certain loans that did not comply with these representations and warranties.

As a direct result of Countrywide's actions, MBIA has already paid out nearly \$3 billion on the financial guaranty policies and is exposed to claims in excess of hundreds of millions of dollars more.

On May 25, 2011, MBIA filed a Motion for Partial Summary Judgment and Motion to Strike Defenses (Mot. Seq. No. 37), seeking a declaration that: (1) on MBIA's claim for fraud against Countrywide, MBIA need establish only that Countrywide's misrepresentations induced MBIA to issue insurance policies on terms to which it would not otherwise have agreed, and MBIA need not further show a causal link between Countrywide's misrepresentations and MBIA's claims payments made under the insurance policies; (2) on MBIA's claim for breach of the Insurance Agreements against CHL, MBIA similarly need establish only that CHL's warranty breaches increased the risk profile of the insurance, and MBIA need not further show a causal link between those breaches and MBIA's claims payments made under the insurance policies; and (3) on MBIA's claim for breach of CHL's repurchase obligations under the Insurance Agreements, MBIA need establish only that a loan breached a representation or warranty in a way that materially affects MBIA's interests, and MBIA need not further show that

the non-compliant loan was non-performing or that the non-performance was caused by Countrywide's breaches of representations and warranties.

7. By its Order dated January 3, 2012, the IAS Court ruled that (1) MBIA's motion for partial summary judgment was granted to the extent that MBIA must establish for its claim of fraud that the Countrywide Defendants' misrepresentations induced MBIA to issue insurance policies which it might otherwise have not issued, or would have issued on different terms, and that MBIA is not required to establish a direct causal link between the Countrywide Defendants' misrepresentations and MBIA's claims payments made pursuant to the insurance policies at issue; (2) MBIA's motion for partial summary judgment was granted to the extent that MBIA must establish for its claim for breach of the Insurance Agreements against CHL that CHL's breach of warranties in the issued insurance policies' transaction documents increased the risk profile of the issued insurance policies, and MBIA is not required to establish a direct causal connection between proven warranty breaches by CHL and MBIA's claims payments made pursuant to the insurance policies at issue; and (3) MBIA's motion for partial summary judgment was granted to the extent that MBIA may seek rescissory damages upon proving all elements of its claims for fraud and breach of representation and/or warranty. The IAS Court recognized that "[i]t is without basis in case law to require MBIA to provide a causal link between the alleged misrepresentations and payments made pursuant to the policies. The elements of the claims are well-established and make no such holding; it is well-settled that it is upon the misrepresentation that induces action resulting in damages that fraud or breach occurs." (Order at 18.)

The IAS Court denied MBIA's motion for partial summary judgment as to its claim for breach of the repurchase obligation. The IAS Court denied MBIA's motion for partial summary judgment that its claim for breach of CHL's repurchase obligation under the Insurance

Agreements is not limited to non-performing loans, and does not require MBIA to demonstrate that CHL's alleged breach of representations and warranties caused the non-performance of loans. Although the IAS Court recognized that MBIA "posited a strong argument" (Order at 23), it found that summary judgment was not appropriate because MBIA's contention was "wholly based upon the Revolving Home Equity Loan Asset Backed Notes, Series 2006-E, and that securitization's Sale and Servicing Agreement," and "the applicable provisions of the SSA and PSA [Pooling and Servicing Agreement] are subject to varying interpretations regarding 'interest' and affect [sic] on interest . . ." (Order at 24).

The IAS Court also denied MBIA's motion to strike Countrywide's and BAC's Fourteenth and Fifteenth Affirmative Defenses, in which Countrywide asserts that it was not the cause of any alleged injury, loss or damages suffered by MBIA (Fourteenth) and that MBIA's claims are barred, in whole or in part, by superseding or intervening causes of any alleged damages, and that any damages which MBIA did suffer resulted directly from causes other than Countrywide's alleged acts or omissions (Fifteenth).

8. On January 25, 2012, BAC filed a Notice of Appeal against the IAS Court's Order to the extent that it granted the relief sought by MBIA. MBIA has filed herewith a Notice of Cross-Appeal against the Order to the extent that it denied the relief sought by MBIA.

MBIA respectfully submits that the IAS Court erred in denying MBIA's motion for partial summary judgment with respect to the repurchase remedy provision in the Insurance Agreements. Despite acknowledging that MBIA "has posited a strong argument," the IAS Court held that additional evidence was necessary to confirm MBIA's position on the meaning of the provision. This holding contravenes the clear and unambiguous language of the repurchase

provision in the Insurance Agreements and the prevailing case law interpreting similar repurchase provisions.

By its plain terms, the repurchase remedy provision provides that “[t]he cure for any breach of a representation and warranty relating to the characteristics of the Mortgage Loans . . . shall be a repurchase of or a substitution for . . . the Mortgage Loans . . .”² This provision does *not* state that the Mortgage Loans must be in default or that the breach have caused such default. In fact, neither “default” nor “cause” appears anywhere in the provision. If the parties had intended that repurchase would be required only if a Mortgage Loan had defaulted, they would have explicitly said so in the contracts.

Moreover, the Transaction Documents relating to several of the HELOC Securitizations contain a further term which states that “with respect to any Mortgage Loan that is *not in default* or as to which default is not imminent, no repurchase . . . shall be made *unless*” certain conditions are satisfied (emphasis added). By its plain terms, this provision makes clear that the repurchase provision may apply to a loan which is not in default, and thus that default—much less causation with respect to such default—is not a condition of a repurchase claim.

In addition, courts addressing similar contracts have rejected attempts to impose extra-contractual conditions on a plaintiff’s repurchase remedy. *See, e.g., Resolution Trust Co. v. Key Fin. Serv.*, 280 F.3d 12, 17 n.11 (1st Cir. 2001) (under New York law, evidence of injury to plaintiff was irrelevant to plaintiff’s ability to invoke repurchase remedy); *Morgan Guar. Tr. Co. of N.Y. v. Bay View Franchise Mortg. Acceptance Co.*, No. 00 Civ. 8613, 2002 WL 818082, at *15 (S.D.N.Y. Apr. 30, 2002) (enforcing repurchase remedy due to material breach of warranties without even discussing whether the loan had gone into default); *Orrix Capital Mkts., LLC v.*

² Similar language appears in each of the Insurance Agreements.

Love Funding Corp., No. 04 Civ. 9890, 2005 WL 2582177, at *7 (S.D.N.Y. Oct. 11, 2005)

(same). As one federal court recently explained:

Evidence regarding the post-securitization meltdown is relevant only if Plaintiff asserts material and adverse effects occurred after the securitization closing date. So long as Plaintiff asserts material and adverse effects as of the closing date, evidence regarding the post-securitization market conditions is inadmissible.

Wells Fargo Bank, N.A. v. LaSalle Bank N.A., No. Civ-08-1125-C, 2011 WL 1303949, at *8 (W.D. Okla. Apr. 1, 2011). So too here, MBIA asserts that Countrywide's misrepresentations regarding the loans underlying the Securitizations breached Countrywide's repurchase obligations as of the closing date, and that, upon this showing, Countrywide must repurchase such loans.

The following related actions are pending before the IAS Court (Bransten, J.):

a. *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc., et al.*, Index No. 650042/09. The *Syncora* case has been designated as related to this action by the IAS Court. On January 3, 2012, the IAS Court also granted in part and denied in part Syncora's substantially similar motion for partial summary judgment. Syncora has noticed an appeal and Defendants-Appellants-Cross Respondents have cross-noticed an appeal from the IAS Court's Order on Syncora's substantially similar motion.

b. *Financial Guaranty Insurance Company v. Countrywide Home Loans, Inc., et al.*, Index No. 650736/09. The *FGIC* case has also been designated as related to this action by the IAS Court.

c. *Ambac Assurance Corp., et al. v. Countrywide Home Loans, Inc., et al.*, Index No. 651612/2010. The *Ambac* case has also been designated as related to this action by the IAS Court.

Two appeals are currently pending in this action:

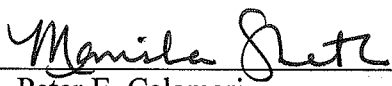
a. A consolidated appeal taken by Countrywide from the Orders of the IAS Court denying Countrywide's Motion to Compel Disclosure Concerning Plaintiffs' Remediation Efforts (Mot. Seq. No. 17), granting MBIA's Motion to Compel (Mot. Seq. No. 31) and denying Countrywide's Cross-Motion for a Protective Order (Mot. Seq. No. 31). Exhibit B is a copy of the Notice of Appeal and Pre-Argument Statement for the appeal on Motion Sequence Number 17. Exhibit C is a copy of the Notice of Appeal and Pre-Argument Statement for the appeal on Motion Sequence Numbers 29 and 31.

b. A notice of appeal, dated November 3, 2011 and attached hereto as Exhibit D, taken by BAC from the IAS Court's Order denying BAC's motion to sever and consolidate successor liability claims.

Dated: February 6, 2012
New York, New York

Respectfully submitted,

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