RESIDENTIAL MORTGAGE-BACKED SECURITIES
LITIGATION UPDATE

Program Abstract

AN OVERVIEW OF RESIDENTIAL MORTGAGE SECURITIES LITIGATION

Residential mortgage-backed securities (“RMBS”) became a household name during the financial crisis. A decade later, litigation brought to the fore in the wake of the financial crisis remains to be decided in multiple jurisdictions. Litigation concerning RMBS has taken on many forms over the years. This program will focus on RMBS repurchase or “put-back” litigation in which plaintiffs seek to enforce the repurchase obligations of sponsors and originators for breaches of the loan-level representations and warranties, as well as cases in which investors have brought claims against trustees for their failure to bring timely repurchase claims.

REPURCHASE AND PUT-BACK LITIGATION

Repurchase cases have arisen both in the context of traditional commercial litigation and during the course of bankruptcy proceedings. Plaintiffs include trustees, monoline insurers and designated representation and warranties enforcement parties. Most plaintiffs in repurchase actions allege, among other claims, that the origination of the mortgage loans underlying a residential mortgage-backed security did not conform to the originator’s underwriting guidelines, had insufficient mitigating or compensating factors to warrant deviations from those guidelines or materially and adversely differ from the representations and warranties made in connection with their securitization.

Over the last decade, trends and significant case law have emerged in connection with these cases. These trends and this case law have wide application to other financial products, as well as to commercial litigation generally.

SIGNIFICANT LEGAL ISSUES CENTRAL TO REPURCHASE CASES

Several significant legal issues have emerged in repurchase cases. Approximately thirty residential mortgage-backed securities repurchase cases are being litigated on a coordinated basis before Justice Marcy Friedman in Part 60 of the Commercial Division of the New York Supreme Court, while many others are being litigated in the United States District Court for the Southern District of New York. In the New York courts, like in other courts across the country, several significant legal issues have emerged during the course of these cases, some of which the New York Court of Appeals has recently ruled on. Perhaps the most significant of these issues are the following:

- challenges to the enforceability of accrual clauses, which bear on the accrual of a cause of action for breach of loan-level representations and warranties;
- the application of New York Civil Practice Law and Rules’ borrowing statute;
• issues concerning the trustee’s claims against defendant originators and securitization sponsors for their failure to notify trustees of loan-level breaches of representations and warranties;

• the propriety of sampling mortgage loans within the securitized population versus re-underwriting the entire loan population to prove breaches when the transaction documents provide that a cure of a breach of the subject representation or warranty or repurchase of the mortgage loan is the “sole remedy” for noncompliant loans; and

• the reimbursement of attorneys’ fees and expenses in connection with repurchase cases.
RMBS Litigation Update

- Residential Mortgage Backed Securities ("RMBS") mortgage loan repurchase ("put-back") cases still ongoing in multiple jurisdictions, with approximately thirty cases being litigated on a coordinated basis before Justice Friedman in Part 60 of the Commercial Division of the New York Supreme Court (the “Part 60 Cases”), and many others in the United States District Court for the Southern District of New York.

- Several significant legal issues are being litigated in, or have recently been decided by, the New York courts, including:
  - the enforceability of accrual clauses
  - the application of New York’s “borrowing statute”
  - the trustees’ claims against originators and sponsors for their failure to notify the trustees of breaches of representations and warranties ("R&Ws")
  - the propriety of sampling versus re-underwriting the entire loan population to prove breaches
  - reimbursement of attorneys’ fees and costs based on standard language across Pooling and Servicing Agreements ("PSA")
RMBS Litigation Update

- “Accrual Clauses”
  - The New York Court of Appeals recently issue a decision in *Deutsche Bank Nat’l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 32 N.Y.3d 139 (2018), finally putting to bed the issue of whether parties can contractually agree to define when a cause of action for breach of representations and warranties accrues.
  
  - The Court of Appeals affirmed the lower courts’ rulings dismissing the case as time-barred, even though they parties had an “Accrual Clause” in their mortgage loan purchase agreement conditioning the accrual of a cause of action for breach of representations and warranties on a repurchase demand being made on the mortgage loan seller.

  - The Court of Appeals held that the Accrual Clause did not create a substantive condition precedent to accrual of the cause of action for breach or representations and warranties, and that to the extent the parties otherwise intended to delay the commencement of the statute of limitations by agreeing when a cause of action “shall accrue,” their attempt to do so was inconsistent with New York law and public policy.

  - Where does this leave structured finance practitioners whose client’s want to include Accrual Clauses in their contracts?
RMBS Litigation Update

- New York’s “Borrowing Statute”

  - In December 2017, New York’s Appellate Division, First Department, dismissed one of the Part 60 Cases, holding that the trustee’s claims accrued in California and are therefore time-barred because New York’s borrowing statute requires application of California’s four-year statute of limitations. *Deutsche Bank National Trust Company, solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 v. Barclays Bank PLC*, Index No. 651338/2013 (N.Y. Sup)

  - New York Court of Appeals granted trustee’s motion for leave to appeal.

  - Parties currently briefing case, and oral argument is expected to be scheduled for later this year.
RMBS Litigation Update

- **Failure to Notify as Independent Cause of Action**
  
  
  - Justice Friedman held that a claim based on the defendants’ failure to notify the trustee of breaches of representations and warranties is a *separate and independent claim* that accrues upon failure to give prompt written notice to the trustee after the defendant discovers a breach. Thus, the statute of limitations for failure to notify claims – unlike claims for breaches of representations and warranties – does not begin to run at the time the representations and warranties were made.
  
  - However, failure to notify claims will be timely only if based on breaches that the defendant discovered within the six-year period immediately preceding the assertion of the failure to notify causes of action.
  
  - Standard of knowledge left unresolved.
RMBS Litigation Update

- **Sampling**
  - Intra-district split in SDNY:
  - Sampling has not yet been directly addressed by the court in the Part 60 Cases.
RMBS Litigation Update

- Reimbursement of Attorneys’ Fees


  - Following these Appellate Division decisions, the affected Part 60 Cases divided themselves into three groups based on the language relating to attorneys’ fees in their respective transaction documents.

I. GENERAL INSTRUCTIONS
This is an optional form provided for your convenience. The required information may be provided in other formats. When completed, this form is provided to the financial institution where the account is opened. DO NOT SEND TO FinCEN.

Where may I obtain a copy of the form?
A copy (pdf) may be downloaded from the FinCEN website at www.fincen.gov under the “Filing Information” tab. The form may be completed on a computer using the free Adobe Reader software.

What is this form?
To help the government fight financial crime, Federal regulation requires certain financial institutions to obtain, verify, and record information about the beneficial owners of legal entity customers. Legal entities can be abused to disguise involvement in terrorist financing, money laundering, tax evasion, corruption, fraud, and other financial crimes. Requiring the disclosure of key individuals who own or control a legal entity (i.e., the beneficial owners) helps law enforcement investigate and prosecute these crimes.

Who has to complete this form?
This form must be completed by any person opening a new account on behalf of a legal entity with any of the following U.S. financial institutions: (i) a bank or credit union; (ii) a broker or dealer in securities; (iii) a mutual fund; (iv) a futures commission merchant; and (v) an introducing broker in commodities.

For the purposes of this form, a legal entity includes a corporation, limited liability company, or other entity that is created by a filing of a public document with a Secretary of State or similar office, a general partnership, and any similar business entity formed in the United States or a foreign country. Legal entity does not include sole proprietorships, unincorporated associations, or natural persons opening accounts on their own behalf.

What information do I have to provide?
When you open a new account on behalf of a legal entity, the financial institution will ask for information about the legal entity’s beneficial owner(s), including their name, address, date of birth and social security number (or passport number or other similar information, in the case of Non-U.S. persons). The financial institution may also ask to see a copy of a driver’s license or other identifying document for each beneficial owner listed on this form.

Beneficial owners are:
(1) Each individual, if any, who owns, directly or indirectly, 25 percent or more of the equity interests of the legal entity customer (e.g., each natural person that owns 25 percent or more of the shares of a corporation; and
(2) An individual with significant responsibility for managing the legal entity customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer).

The number of individuals that satisfy this definition of “beneficial owner” may vary. Under section (1), depending on the factual circumstances, up to four individuals (but as few as zero) may need to be identified. Regardless of the number of individuals identified under section (1), you must provide the identifying information of one individual under section (2). It is possible that in some circumstances the same individual might be identified under both sections (e.g., the President of Acme, Inc. who also holds a 30% equity interest). Thus, a completed form will contain the identifying information of at least one individual (under section (2)), and up to five individuals (i.e., one individual under section (2) and four 25 percent equity holders under section (1))

a legal entity may have multiple “beneficial owners,” this form requires you to list only those that own 25% or more (up to five) under each of the two prongs of the definition above. If appropriate, the same individuals may be listed under both prongs.
CERTIFICATION OF BENEFICIAL OWNER(S)

The information contained in this Certification is sought pursuant to Section 1020.230 of Title 31 of the United States Code of Federal Regulations (31 CFR 1020.230).

All persons opening an account on behalf of a legal entity must provide the following information:

1. Last Name and title of Natural Person Opening Account  
2. First Name  
3. Middle Initial  

4. Name and type of Legal Entity for Which the Account is Being Opened

4a. Legal Entity Address  
4b. City  
4c. State  
4d. ZIP/Postal Code

SECTION I

(To add additional individuals, see page 3)

Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above. Check here ☐ if no individual meets this definition and complete Section II.

5. Last Name  
6. First Name  
7. M.I.  
8. Date of birth (MM/DD/YYYY)

9. Address  
10. City  
11. State  
12. ZIP/Postal Code  
13. Country

14. SSN (U.S. Persons)  
15. For Non-U.S. persons (SSN, Passport Number or other similar identification number)

15a. Country of issuance:

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

SECTION II

Please provide the following information for an individual with significant responsibility for managing or directing the entity, including, an executive officer or senior manager (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, Treasurer); or Any other individual who regularly performs similar functions.

16. Last Name  
17. First Name  
18. M.I.  
19. Date of birth (MM/DD/YYYY)

20. Address  
21. City  
22. State  
23. ZIP/Postal Code  
24. Country

25. SSN (U.S. Persons)  
26. For Non-U.S. persons (SSN, Passport Number or other similar identification number)

26a. Country of issuance:

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

I, __________________________ (name of person opening account), hereby certify, to the best of my knowledge, that the information provided above is complete and correct.

Signature: __________________________  
Date: __________________________ (MM/DD/YYYY)

Legal Entity Identifier (Optional) __________________________
Additional Section 1 - Second Beneficial Owner *(If required)*

Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above.

<table>
<thead>
<tr>
<th>5. Last Name</th>
<th>6. First Name</th>
<th>7. M.I.</th>
<th>8. Date of birth (MM/DD/YYYY)</th>
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<tbody>
<tr>
<td>13. Country</td>
<td>14. SSN (U.S. Persons)</td>
<td>15. For Non-U.S. persons (SSN, Passport Number or other similar identification number)</td>
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<td>15a. Country of issuance:</td>
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</tbody>
</table>

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

Additional Section 1 - Third Beneficial Owner *(If required)*

Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above.

<table>
<thead>
<tr>
<th>5. Last Name</th>
<th>6. First Name</th>
<th>7. M.I.</th>
<th>8. Date of birth (MM/DD/YYYY)</th>
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<td>15a. Country of issuance:</td>
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</tbody>
</table>

Additional Section 1 - Fourth Beneficial Owner *(If required)*

Please provide the following information for an individual(s), if any, who, directly or indirectly, through any contract arrangement, understanding, relationship, or otherwise owns 25% or more of the equity interests of the legal entity listed above.

<table>
<thead>
<tr>
<th>5. Last Name</th>
<th>6. First Name</th>
<th>7. M.I.</th>
<th>8. Date of birth (MM/DD/YYYY)</th>
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<td></td>
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<td>15a. Country of issuance:</td>
<td></td>
</tr>
</tbody>
</table>

Note: In lieu of a passport number, Non-U.S. Persons may also provide a Social Security Number, an alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

**Paperwork Reduction Act Notice**

Public recordkeeping burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The OMB control number for this information collection is 1506-0070. You may submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, by calling the FinCEN Resource Center at 800-767-2825 or by email at frc@fincen.gov. Alternatively, you may mail us comments at Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Please include 1506–0070 in the body of the text.

Rev. 6.7 Sept., 2017
FinCEN’s New Customer Due Diligence (CDD) Rule

American Bar Association Business Law Section
Spring Meeting – March 2019

Securitization and Structured Finance Committee

Doneene Keemer Damon
KYC vs. CIP vs. CDD:

*What are Financial Institutions Required to Do?*

- **“Know Your Customer” ("KYC")** – laws introduced in 2001 as part of the USA PATRIOT Act, which was passed after 9/11 to provide a variety of means to detect and deter terrorist behavior.

- **“Customer Identification Program” (“CIP”)** – As part of the KYC regulations, institutions are required to have a CIP.

- **“Customer Due Diligence” ("CDD")** – Also as part of the KYC regulations, institutions are required to perform CDD prior to opening an account and an ongoing basis based on the risk profile of the account.
KYC vs. CIP vs. CDD:

*What are Financial Institutions Required to Do?*
Four Key Elements of CDD

There are four key elements of customer due diligence (CDD):

I. Customer Identification and Verification
   - Current CIP

II. Beneficial ownership identification and verification
   - NEW! 31 CFR 1010.230
   - Amends BSA to add “5th Pillar” but viewed as restating existing expectations [31 CFR 1020.210]

Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

III. Understanding the nature and purpose of customer relationships to develop a customer risk profile; and

IV. Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk-basis, to maintain and update customer information
New CDD Rule:

*Beneficial Ownership Identification and Verification*

- Under the CDD Rule's new beneficial ownership requirement, "covered financial institutions" must establish procedures to:
  - identify each natural person that directly or indirectly owns 25% or more of the equity interests of a "legal entity customer" (the "ownership prong");
  - identify one natural person with "significant responsibility to control, manage or direct" a legal entity customer, including an executive officer or senior manager, or any other individual who regularly performs similar functions (the "control prong"), which may be a person reported under the ownership prong; and
  - verify the identities of those persons according to risk-based procedures.
CDD Rule Definitions

- “Covered financial institutions”
  - Banks and trust companies that are federally regulated
  - Brokers or dealers in securities
  - Mutual funds and
  - Merchants and introducing brokers in commodities

The new CDD Rule will be extended to state-regulated banks and trust companies through a Notice of Proposed Rulemaking published August 25, 2016 (not yet final). The Delaware Bank Commissioner follows federal guidance, however, and he is expecting (and it is considered best practices for) state-regulated banks and trust companies to have policies and procedures that conform to the final CDD Rule.
CDD Rule Definitions

- **“Legal entity customers”**
  - includes a "corporation, limited liability company or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership and any similar entity formed under the laws of a foreign jurisdiction that opens an account."
  - This includes Delaware statutory trusts. It does NOT include common law trusts.
  - **Exclusions** include:
    - banks and trust companies
    - Any entity (other than a bank) whose equity interests are listed on the NYSE, the NYSE MKT or NASDAQ
      - This includes Delaware statutory trusts that are publicly traded ETFs
    - Any entity organized under U.S. or state law held by a listed entity (that is, 51% of its equity interests are held by a listed entity).
    - Clearing agencies
      - This includes DTC
Beneficial Ownership Identification and Verification

Ownership
Each individual, up to four and as few as zero, who, directly or indirectly, owns 25 percent or more of the equity interests of a legal entity customer

Control
A single individual with significant responsibility to control a legal entity customer
Who “Owns” a Delaware Statutory Trust?

- It depends
  - Who is named as the beneficial owner in the trust agreement?
  - Who holds the trust certificate(s)?
  - If uncertificated interests (but not held through DTC), who holds the beneficial interests under the trust agreement?
Who “Controls” a Delaware Statutory Trust?

- **It depends**
  - Who has management authority or the ability to direct the trustee to act?
    - Often the administrator or depositor
    - Could be “a majority of certificate holders” – if numerous holders that each hold less than 25%, who has the ability to “break the tie” if no majority approval?
New CDD Rule

Second Component AML Program Rule Amendments

- Financial institutions are now also required to develop "risk-based procedures for conducting ongoing customer due diligence, to include understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile."
  - Must **update** beneficial ownership information if normal monitoring indicates a possible change of beneficial ownership.
  - Must also **obtain** beneficial ownership information for accounts opened before the effective date of the CDD Rule (May 11, 2018) if normal monitoring indicates a possible change of beneficial ownership – otherwise not required to obtain for existing accounts.
Delaware statutory trusts are "legal entity customers" for whom financial institutions must obtain beneficial ownership information.

- Ownership and control of a Delaware statutory trust depend on the specifics of the deal and require looking at the trust agreement.

- Must report the ultimate owner and controller – so if the owner is a depositor that is an LLC, must go "up the chain" to determine an individual that controls the LLC.
For Additional Information

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damon@rlf.com
This presentation and the material contained herein are provided as general information and should not be construed as legal advice on any specific matter or as creating an attorney-client relationship. Before relying on general legal information or deciding on legal action, request a consultation or information from a Richards, Layton & Finger attorney on specific legal needs.
RMBS Put-Back Litigation Update

RMBS repurchase (“put-back”) cases are still ongoing in multiple jurisdictions, with approximately thirty-five cases being litigated on a coordinated basis before Justice Marcy Friedman in Part 60 of the Commercial Division of the New York Supreme Court (the “Part 60 Cases”), and many others in the United States District Court for the Southern District of New York. Several significant legal issues are being litigated in the New York courts, including the enforceability of accrual clauses, issues concerning the trustee’s claims against defendant originators and sponsors for their failure to notify the trustee of breaches of representations and warranties (“R&Ws”), the propriety of sampling versus re-underwriting the entire loan population to prove breaches in put-back cases when the transaction documents provide that cure or repurchase is the “sole remedy” for breaching loans, the application of N.Y. C.P.L.R.’s borrowing statute, and the reimbursement of attorneys’ fees. These issues are discussed in more detail below.

Enforceability of accrual clauses in RMBS transaction documents: The New York Court of Appeals recently issue a decision in Deutsche Bank Nat’l Tr. Co. v. Flagstar Capital Mkts. Corp., 32 N.Y.3d 139 (2018), finally putting to bed the issue of whether parties can contractually agree to define when a cause of action for breach of representations and warranties accrues. Lowenstein Sandler served as co-counsel for the appellant in Flagstar. The Court of Appeals affirmed the lower courts’ rulings dismissing the case as time-barred, even though they parties had an “Accrual Clause” in their mortgage loan purchase agreement conditioning the accrual of a cause of action for breach of representations and warranties on a repurchase demand being made on the mortgage loan seller. The parties agreed that the relevant statute of limitations was six years, but disagreed on whether the trustee had timely filed the action. The case had been initiated within six years of a repurchase demand being made, but not within six years of the closing of the deal. The Court of Appeals held that the Accrual Clause did not create a substantive condition precedent to accrual of the cause of action for breach or representations and warranties, and that to the extent the parties otherwise intended to delay the commencement of the statute of limitations by agreeing when a cause of action “shall accrue,” their attempt to do so was inconsistent with New York law and public policy.

The impact of this case raises several questions for structured finance practitioners. Should they continue to designate New York as the governing law in their contracts? Should there be efforts made to change the New York law regarding contractual tolling that the Court of Appeals felt bound it?
**New York’s Borrowing Statute:** In December 2017, New York’s Appellate Division, First Department, dismissed one of the Part 60 Cases, holding that the plaintiff Trustee’s claims accrued in California for purposes of N.Y. C.P.L.R. 202’s borrowing statute, and are, therefore, time-barred under California’s four-year statute of limitations.

The Trustee filed a motion for leave to the New York Court of Appeals, which defendants opposed. In its motion for leave, the Trustee argued that the question of how to determine the place of accrual under N.Y. C.P.L.R. 202 in the RMBS trust context, with a trustee suing in its representative capacity, is a novel issue under New York law, and is a question of significant public importance. The Trustee also argues that the First Department’s decision is in direct conflict with well-settled New York law regarding claim accrual. The Court of Appeals granted the motion for leave to appeal, and the matter is currently being briefed. Oral argument is expected to be scheduled later this year. When the Court of Appeals finally issues its opinion, that decision may impact more than a dozen other Part 60 Cases, which were all filed in New York with the understanding that New York’s six year statute of limitations applies.

The case is *Deutsche Bank National Trust Company, solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BRI v. Barclays Bank PLC*, Index No. 651338/2013 (N.Y. Sup Ct.).

**Accrual of and damages associated with failure to notify claim:** On March 7, 2018, Justice Friedman issued her decision with respect to failure to notify claims in two bellwether cases. *Fed. Hous. Fin. Agency for Fed. Home Loan Mortg. Corp. v. Morgan Stanley ABS Capital I Inc.*, 59 Misc. 3d 754, 73 N.Y.S.3d 374 (N.Y. Sup. Ct. 2018). Justice Friedman held that a claim based on Defendants’ failure to notify the Trustee of breaches of representations and warranties is a separate and independent claim that accrues upon Defendants’ discovery of a breach, and failure to give prompt written notice to the Trustee. The court rejected Defendants’ argument that the statute of limitations for failure to notify claims – like that applicable to claims for breaches of representations and warranties – begins to run at the time the representations and warranties were made.

The court explained that failure to notify claims will be timely only if based on breaches that the defendant discovered within the six-year period immediately preceding the assertion of the failure to notify causes of action. Not resolved by Justice Friedman’s opinion, however, is whether discovery of a breach is triggered by Defendants’ actual knowledge or, rather, when the Defendant was put on inquiry notice of such a breach.

The court also held that the bellwether complaints sufficiently alleged damages for the failure to notify claims because they pled facts sufficient to support the inference that Defendants’ failure to notify the Trustee was a “substantial factor” in the Trustee’s failure to bring timely claims for breach of R&Ws. The court cautioned that this holding “does not suggest
that the Trustee’ claims for these damages will ultimately be successful [because] [a] legitimate question is raised as to whether, and to what extent, the Trustee and the certificateholders are themselves responsible for their failure to commence timely put-back litigation.” *Id.* at 786. The decision also expressly does not address the viability of the measure of damages appropriate for failure to notify claims, other than repurchase damages and nominal damages.

**Sampling versus re-underwriting the entire loan population:** Sampling has been accepted in other repurchase cases, including in cases brought by monoline insurers in New York federal and state courts. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512–13 (S.D.N.Y. 2013) (Rakoff, J.) (“Sampling is a widely accepted method of proof in cases brought under New York law, including in cases relating to RMBS and involving repurchase claims.”). In that case, the defendant argued that sampling was inappropriate given that determinations of material breaches needed to be made on an individual basis. Judge Rakoff found that argument “unpersuasive,” noting that the purpose of creating a representative sample was to make such a sample reflective of the trust as a whole. Accordingly, the court accepted the plaintiff’s sample and concluded that the loans pervasively breached Flagstar’s representations and warranties. Similarly, in *Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.*, No. 650705/2010, Justice Kornreich noted that “forcing” the plaintiff “to re-underwrite all of the loans is commercially unreasonable” and held that “sampling may be used to compute damages.” 2014 WL 3282310, at *6 (N.Y. Sup. Ct. July 3, 2014. *See also MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2015, 2010 WL 5186702, at *5 (N.Y. Sup. Ct. Dec. 22, 2010) (Bransten, J.) (holding that sampling may be used at trial).

However, in one of the few trustee-filed put-back cases to have addressed the issue of sampling, the Southern District of New York rejected plaintiffs’ motion for summary judgment based on sampling. *MASTR Adjustable Rate Mortgs. Trust 2006-OA2 v. UBS Real Estate Secs. Inc.*, No. 12-cv-7322 (PKC), 2015 WL 764665 (S.D.N.Y. Jan. 9, 2015). The court found that the plaintiff’s re-underwritten sample did not “adequately distinguish between breaches that are material and adverse as to a particular loan and those that are not.” *Id.* at *10. Judge Castel concluded that the plaintiff’s “pervasive breach” theory based on the re-underwritten sample was inconsistent with the “sole remedy” clause in the relevant Pooling and Servicing Agreement, which stated that the only remedies available to the trustee are the cure or repurchase of individual loans. On that basis, and also citing the breach notices that the trustee sent to the defendants that identified specific breaching loans rather than any “pervasive breach” across the trust at issue, the court declined to accept the plaintiff’s re-underwritten sample. *Id.* at *12. Instead, Judge Castel permitted the plaintiffs to go back and re-underwrite the rest of the loans in the trusts at issue in order to prove breaches of representations and warranties on a loan-by-loan basis.

In a ruling concerning several cases brought by investor plaintiff Blackrock – part of a broader set of coordinated cases brought by certificateholders of 53 RMBS trusts against
common trustee Wells Fargo – Magistrate Judge Sarah Netburn of the Southern District of New York looked to the relevant contractual language of the Pooling and Servicing Agreements (“PSAs”) to reject the use of sampling. Judge Netburn denied Blackrock’s motion to re-underwrite a sample of loans to prove its claim that Wells Fargo, in its capacity as Trustee, breached its obligations to enforce the originator or seller’s obligation to cure or repurchase the loans upon discovery or notice of a material breach. *BlackRock Allocation Target Shares v. Wells Fargo Bank Natl. Assn.*, 2017 WL 953550 (S.D.N.Y. Mar. 10, 2017) (the “Blackrock Sampling Opinion”). Judge Netburn held that the operative agreements require “loan-specific proof” and that “[s]ampling may fail to capture whether the nature of the breach had a material and adverse effect at the time a repurchase obligation, if any, was triggered.” *Id.* at *5. The court also found that the agreement’s sole remedies of cure and repurchase are loan-specific, and that sampling is inconsistent with the parties’ agreement that the cure or repurchase obligation is triggered based on loan-level, not categorical, analysis. *Id.*. Plaintiffs in the coordinated cases brought a motion to vacate the Blackrock Sampling Opinion, which was denied by District Judge Katherine Failla. *BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, Nat'l Ass'n*, No. 14CIV10067KPFSN, 2017 WL 3610511, at *1 (S.D.N.Y. Aug. 21, 2017). See also *Royal Park Investments SA/NV v. HSBC Bank USA, N.A.*, No. 14 CIV. 8175 (LGS), (S.D.N.Y. Feb. 23, 2018) (same reasoning applied in substantially similar case brought by certificateholders against HSBC Bank USA, N.A. as trustee).

However, in a recent RMBS trustee-filed put-back case to address sampling, Judge Forrest of the Southern District of New York denied defendant Morgan Stanley’s motion for summary judgment based on sampling. *Deutsche Bank National Trust Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 289 F. Supp. 3d 484 (S.D.N.Y. 2018). Morgan Stanley argued that the relevant sole remedy provision requires loan-by-loan notice and evidence of breach, and therefore, plaintiff Deutsche Bank National Trust Company is precluded from using sampling to prove liability and/or damages. *Id.* at 12. Judge Forrest upheld sampling, finding that “Deutsche Bank’s breach of contract claims must proceed to trial, and that statistical sampling is an appropriate means of attempting to prove both liability and damages in this case.” *Id.* at 13.

The use of sampling to prove liability has not yet been addressed by the court in the Part 60 put-back cases. However, in a recent decision in late January 2018, Justice Friedman affirmed the Special Discovery Master’s ruling that plaintiff trustee HSBC Bank failed to demonstrate good cause for its request to modify its loan reunderwriting population to add several hundred loans for underwriting, and to restrict sampling to liquidated loans. (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, Index No. 653783/2012 (N.Y. Sup. Ct.)). Justice Friedman found plaintiff’s delay was prejudicial to defendants and unfounded as there has been no change in relevant case law, and that “issues as to the sampling can and will be addressed on an appropriately developed record…” *Id.* at 2.)
**Reimbursement of attorneys’ fees:** Three recent Appellate Division, First Department decisions in *U.S. Bank Nat’l Ass’n v. DLJ Mortg. Capital, Inc.*, 34 N.Y.S.3d 428, 429 (1st Dep’t 2016) (“HEAT”), *Wilmington Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 152 A.D.3d 421 (1st Dep’t 2017) (“MSM”), and *Deutsche Bank Nat. Tr. Co. v. EquiFirst Corp.*, 154 A.D.3d 605 (1st Dep’t 2017) (“EQLS”) have upheld RMBS trustee plaintiffs’ right to recover attorneys’ fees and expenses from defendants. The *HEAT* decision involved a provision in the operative pooling and servicing agreements that required the defendant to reimburse the Trustee for expenses incurred. In *MSM*, the First Department enforced the trustee’s right to attorneys’ fees based on language in a loan purchase agreement obligating defendants to indemnify the trustee for attorneys’ fees and expenses. The *EQLS* case involved indemnification obligations in two operative agreements, one nearly identical to the language in the *MSM* case, the other found in the applicable pooling and servicing agreement’s definition of “repurchase price.”

Following these Appellate Division decisions, the affected Part 60 Cases divided themselves into three groups based on the language relating to attorneys’ fees in their respective transaction documents. The “Group 1” cases contained reimbursement language analogous to the at-issue language in *HEAT*, and parties to those cases stipulated to the reinstatement of attorneys’ fees claims. The “Group 2” cases involved transaction documents containing indemnification language analogous to the relevant language in the *MSM* case. The transaction documents in “Group 3” cases defined “purchase price” or “repurchase price” in a similar manner as the relevant language in the *EQLS* decision.