HOW THE GLOBAL FINANCIAL CRISIS IMPACTED NEW YORK LAW FOR DECADES TO COME

Program Abstract

AN OVERVIEW OF RESIDENTIAL MORTGAGE BACKED SECURITIES LITIGATION

Residential mortgage-backed securities (“RMBS”) and collateralized debt obligations (“CDOs”) became household names during the financial crisis. More than a decade later, litigation brought in the wake of the financial crisis continues to proliferate in New York state and federal courts. This program will focus on significant developments in New York law that were borne of crisis-related litigation. 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.

Litigation concerning RMBS and CDOs has taken on many forms over the years. Plaintiffs in these matters have advanced contract and fraud claims, and governmental plaintiffs have taken advantage of statutory authority to pursue alleged wrongdoing by RMBS and CDO originators and sponsors. For example, in RMBS repurchase or “put-back” litigation, plaintiff trustees seek to enforce the contractual repurchase obligations of defendant sponsors and originators for breaches of loan-level representations and warranties. Most plaintiffs in these actions allege, among other claims, that the origination of the mortgage loans underlying RMBS 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. Relatedly, fraud plaintiffs make similar allegations about the poor quality of the underlying mortgage collateral, and allege that defendants made knowing representations or omissions about those deficiencies. Federal and state authorities have wielded powers under the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) and analogous state laws to prosecute wrongdoing by RMBS and CDO originators and sponsors.

SIGNIFICANT LEGAL ISSUES CENTRAL TO RMBS CASES

Several significant legal issues have emerged in RMBS and CDO cases in the New York courts, some of which the New York Court of Appeals and the U.S. Court of Appeals for the Second Circuit have recently ruled on. Perhaps the most significant of these issues are the following:

- the accrual of a claim for breaches and representations and warranties;
- 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 impact of a sole remedy clause on a putback plaintiff’s potential recovery;
• the application of New York Civil Practice Law and Rules’ borrowing statute to claims brought by a RMBS trustee;

• defendants’ obligation to reimburse plaintiffs’ attorneys’ fees and expenses pursuant to indemnification clauses and other contractual provisions;

• the pleading standard for loss causation in the fraud context;

• the applicable statute of limitations for claims brought pursuant to the Martin Act;

• issues concerning application of the principle of relation back and the New York savings statute;

• the scope of the common interest privilege;

• 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; and

• 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.

This program will discuss the impact of these cases and trends on practitioners going forward.