

Jury, Not Judge, Must Decide Meaning of Representations

Thursday, October 18, 2018

Last month, New York's intermediate appellate court reversed a grant of summary judgment in favor of plaintiff MBIA Ins. Corp.^[1] MBIA, an insurer of RMBS trusts and a common plaintiff in this type of litigation, had sued Credit Suisse, the sponsor of the trusts.

The trial court had ruled as a matter of law that a "No Monetary Default" representation and warranty (R&W) encompassed borrower misrepresentation. The trial court also had ruled as a matter of law that the "Mortgage Loan Schedule" R&W guaranteed not just that the Mortgage Loan Schedule (MLS) had accurately transcribed information from the loan file, but also the underlying accuracy of the information in the MLS.

In a unanimous panel opinion authored by Judge Manzanet-Daniels, the Supreme Court Appellate Division reversed on both points. The Court held that both issues should be decided by the jury.

Regarding the "No Monetary Default" R&W, the Court followed its prior decision in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.* interpreting a materially-identical R&W.^[2] The First Department had concluded that "the better course is to hold a trial to inquire into and develop the facts to clarify the relevant legal principles and their application to the [R&Ws]."^[3]

Regarding the "Mortgage Loan Schedule" R&W, the Court again looked to previous case law, this time turning to Delaware. In *Bear Stearns Mtge. Funding Trust 2007-AR2 v EMC Mtge., LLC*, the Delaware Chancery Court had held that a trial was required to determine whether a materially-identical MLS Rep guaranteed "underlying truthfulness," as opposed to "accurate transcription."^[4]

Both of these R&Ws, "No Monetary Default" and "Mortgage Loan Schedule", have been frequently litigated in mortgage cases, and likely will be again in the future. The *MBIA v. Credit Suisse* ruling provides defendants (whether sponsors, originators, or others) with additional authority to resist summary judgment and, at a minimum, argue their cases to the fact-finder at trial.

[1] *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 2018 BL 330243 (App Div, 1st Dept Sept. 13, 2018).

[2] 151 AD3d 83 (1st Dept 2017)

[3] *Id.* at 89

[4] 2014 Del Ch LEXIS 300, *5 (Del. Ch. 2014).

© 2019 Bilzin Sumberg Baena Price & Axelrod LLP

Source URL: <https://www.natlawreview.com/article/jury-not-judge-must-decide-meaning-representations>



Article By [Bilzin Sumberg](#)
[Kenneth Duvall](#)
[Finance & Restructuring Blog](#)

[Financial Institutions & Banking](#)
[Litigation / Trial Practice](#)
[New York](#)