As originators and brokers of mortgage loans continue to get served with new lawsuits (or threatened with potential suits) related to loans that they conveyed to aggregators prior to the financial crisis of 2008, questions almost inevitably arise as to how this is even possible: aren’t such claims time-barred under the applicable statute of limitations? The answer is more complicated than the originator or broker might have initially thought. It can depend on what state’s law applies under the pertinent contract, for example. For many judges, it can also depend on whether the aggregator plaintiff characterizes its claim as one for “indemnification,” rather than “breach of contract” or “repurchase.”

Law firms have had numerous successes in helping clients defeat claims by aggregators, including on statute of limitations grounds. But we have also encountered many situations in which judges conclude that a plaintiff’s claim is one for “indemnification,” did not arise until the aggregator made a settlement payment to a third party, and is not barred by the statute of limitations. Among the various concerns we have with such rulings, two in particular are at the forefront.

First, why and how does it make sense to recognize that a claim for “breach of contract” or “repurchase” arises when false contractual representations and warranties were made (as courts have indeed consistently recognized) and thus
would be time-barred, but a claim for “indemnification” related to the same alleged loan defects or misrepresentations is somehow timely?

- Second, and relatedly, isn’t the typical claim for “indemnification” really dependent on showing that the originator breached a contractual representation or warranty — and, if so, isn’t that just a repackaged claim for breach of contract (and thus time-barred)?

Last week, the United States Court of Appeals for the Second Circuit (which directly oversees the federal courts of New York, Connecticut and Vermont, and at times seems to have significant indirect influence over the thinking of other courts in other jurisdictions on certain issues) issued a new decision on statute of limitations issues in the mortgage sale-and-securitization context. In *Lehman XS Trust v. Greenpoint Mortgage Funding, Inc.*, the Second Circuit affirmed a lower court’s dismissal of the plaintiff’s claims for breach of contract and indemnification, agreeing with the lower court that those claims were time-barred under New York’s six-year statute of limitations. Part of the appellate court’s ruling flowed from its conclusion that the plaintiff (U.S. Bank, in its capacity as trustee for the Lehman trusts) had not paid any third party for harms to that third party stemming from the loan originator’s alleged breaches. Thus, the Second Circuit determined, the plaintiff-appellant’s “indemnification” claims simply were not true indemnification claims. But the Second Circuit, helpfully, went farther. It reiterated the principle that “[a]n action does not become [one] for indemnity merely because the pleader has so denominated it,” and it held that the plaintiff-appellant’s supposed “indemnification” allegations were no different from what it cited to support its allegedly separate “breach of contract” claims. Citing to a decision by New York’s highest state appellate court, the Second Circuit directed that, “even if two sections of the contract provide alternative remedies for the same breach, ‘the underlying act the Trust complains of is the same: the quality of the loans and their conformity with the [representations and warranties].’ Thus, U.S. Bank’s ‘indemnification’ claim is in reality a repackaged version of its breach of contract claims.”

The Second Circuit’s *Greenpoint* decision illuminates a path forward for defendants greatly frustrated by the fact that they are still being required to defend claims related to loans that they brokered or sold well over a decade ago. Among many other potential defenses, establishing either the absence of payments by an aggregator to a third party, or that any payments that were made were not in fact attributable to a breach or misrepresentation by the originator or broker, should be prioritized in the aftermath of this new decision. So should demonstrating that an “indemnification” claim is in reality indistinguishable from a “breach of contract” claim, such that the claim should be treated for statute of limitations purposes as if it had been pled as a breach of contract suit all along.

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