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COURT OF APPEALS

STATE OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION,
ET AL.,

Respondents,

-against-

NO. 32

DLJ MORTGAGE CAPITAL, INC., ET AL.,

Appellants.

20 Eagle Street
Albany, New York
April 27, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 32, U.S. Bank National Association v. DLJ Mortgage
4 Capital.

5 Counsel?

6 MR. JACOBSEN: Good afternoon, Your Honors, and
7 may it please the court. Richard Jacobsen of Orrick
8 Herrington & Sutcliffe, on behalf of the appellant, DLJ
9 Mortgage Capital.

10 And respectfully, Your Honors, I'd like to
11 reserve three minutes for rebuttal.

12 CHIEF JUDGE DIFIORE: You may, sir.

13 MR. JACOBSEN: Thank you, Your Honor.

14 CHIEF JUDGE DIFIORE: You're welcome.

15 MR. JACOBSEN: Your Honor, DLJ asks for a
16 reversal of the First Department's decision in the
17 Appellate Division and a holding that the plaintiff did not
18 satisfy the pooling and servicing agreement's notice
19 requirement for any loans not listed in the pre-suit
20 letters.

21 JUDGE RIVERA: Counsel, just to clarify the
22 record, what actually did they provide you, other than in
23 those letters, those schedules with loan numbers. What's
24 on the CDs? What information did they provide?

25 MR. JACOBSEN: Your Honor, post-expiration of the



1 statute of limitations, approximately three-plus years
2 after suit was filed and after the expiration - - -

3 JUDGE RIVERA: No, no, no; I'm talking about the
4 pre-filing letters with all those attachments. Other than
5 giving you a loan number, what else did they notify you of?

6 MR. JACOBSEN: I believe they just identified the
7 specific loans that after their review, pre-suit - - - pre-
8 suit, that they allege breached the representations and
9 warranties.

10 JUDGE RIVERA: Okay. So they didn't tell you
11 which representations and warranties?

12 MR. JACOBSEN: In their letters, Your Honor, they
13 identified a number of representations and warranties.

14 JUDGE RIVERA: I recall in the letters referring
15 to the one about the standardized review process. I don't
16 remember all of the other ones, so I'll take your word for
17 it, and I'll look back on it.

18 But let me ask you this. I understand your
19 argument. If all they had done in the letter, in any of
20 these letters, is say you have breached the warranties and
21 representations with respect to every single loan in the
22 pool, and then they didn't give you any loan numbers, is
23 that good enough?

24 MR. JACOBSEN: No, Your Honor. I think they
25 would have had to identify why - - -



1 JUDGE RIVERA: Well, why not? They said every
2 single loan.

3 MR. JACOBSEN: Well, those aren't the facts
4 before this case, but - - -

5 JUDGE RIVERA: No, no, but I'm asking you,
6 hypothetically, would - - -

7 MR. JACOBSEN: Hypothetically - - -

8 JUDGE RIVERA: Would that satisfy the notice
9 requirement?

10 MR. JACOBSEN: Hypothetically - - -

11 JUDGE RIVERA: Yes.

12 MR. JACOBSEN: - - - if they identified every
13 single one of the loans just by saying - - -

14 JUDGE RIVERA: If that's the sentence they used
15 "every single loan in the pool"?

16 MR. JACOBSEN: I don't believe so, Your Honor. I
17 think - - - and that has never been before the court, the
18 whole breadth of what constitutes - - -

19 JUDGE RIVERA: Well, but I'm asking you because
20 your point is they need to identify every single loan
21 number. That's why I'm asking you what information they
22 gave. You basically have told me they've given you loan
23 numbers, and they've identified some of the representations
24 and warranties that they claim were breached. So I'm
25 asking you if, in your interpretation of the PSA's notice



1 requirement, if all they had said, after they said you
2 violated and breached these representations and warranties
3 is, with respect to every single loan, why that wouldn't be
4 good enough.

5 MR. JACOBSEN: Your Honor, it may have been good
6 enough. That's not before the court.

7 JUDGE RIVERA: Okay. So then if that may have
8 been good enough, then why isn't it good enough to say
9 here's some that we're going to tell you specifically the
10 numbers on, and then we want everything else that's
11 breached, everything else, to be cured, pursuant to your
12 obligations under the PSA.

13 MR. JACOBSEN: Your Honor, because it would make
14 a mockery of the sole-remedy provision, a sole-remedy
15 provision that this court has upheld in - - -

16 JUDGE RIVERA: Well, right now we're just working
17 on the notice. Forget the sole-remedy; I'm just talking
18 about notice. That's the only issue right now, notice.

19 MR. JACOBSEN: Yes.

20 JUDGE RIVERA: Why isn't that good enough notice
21 for you to be aware that there's a problem with the loans,
22 beyond the ones that they have identified?

23 MR. JACOBSEN: It may have. They didn't do that
24 here.

25 JUDGE RIVERA: Okay.



1 MR. JACOBSEN: And that's my point here, Your
2 Honor.

3 JUDGE RIVERA: Okay. Okay.

4 MR. JACOBSEN: They did not do that here. What
5 they did do is provide certain notice on 1,200 loans,
6 evidencing that they knew exactly what they had to do and
7 that they were capable of doing it, first of all.

8 And as I was saying before, this follows in a
9 long line of cases from this court - - -

10 JUDGE RIVERA: Well, let me just interrupt you.
11 When you say they're capable of doing it, is that because
12 you're saying they've got six years to figure out what's
13 wrong with the loans because the breach happens at
14 execution?

15 MR. JACOBSEN: Well, they have - - - first of
16 all, under the statute of limitations, they have six years,
17 importantly. Second of all, they have every means at their
18 availability to do so. Section 3.08 of the pooling and
19 servicing agreement in this deal, and virtually every deal
20 - - - these are very standardized terms - - - gives U.S.
21 Bank the opportunity and the right to demand immediate
22 inspection and review of any loan file they want, any
23 document they want. That they did or did not do so, or
24 that they waited for five or six years, that should not
25 inure to my client's detriment.



1 And I actually want to speak to the language in
2 the section - - -

3 JUDGE RIVERA: Let me ask you this, when they
4 gave you that last letter that has the 900, the schedule
5 with the 900 loans.

6 MR. JACOBSEN: Yes.

7 JUDGE RIVERA: Does 90 days give you enough to
8 review 900 loans?

9 MR. JACOBSEN: No, Your Honor.

10 JUDGE RIVERA: No.

11 MR. JACOBSEN: I mean - - -

12 JUDGE RIVERA: Okay.

13 MR. JACOBSEN: But still, the contract only gave
14 us 90 days.

15 JUDGE RIVERA: So then the PSA really doesn't
16 anticipate this kind of problem that they've identified,
17 correct?

18 MR. JACOBSEN: No, we could have gotten it done
19 in ninety days. I can't speak to, you know, how long it
20 takes individually. That was the obligation they undertook
21 as a sophisticated party. Whether we could have done it,
22 whether we did do it - - -

23 JUDGE RIVERA: Well, I guess I'm saying if the
24 PSA - - - I understand your interpretation of the PSA is
25 that they've got to give you enough time to do that ninety-



1 day review before the six years expires.

2 MR. JACOBSEN: That's the holding in ACE, Your
3 Honor, yes.

4 JUDGE RIVERA: Yes, okay. Well, let - - - that's
5 your interpretation of that. I'll go with that. So then
6 if you've got - - - we'll stay with the 900 - - - well,
7 it's really 1,200 loans; you've conceded that. 1,200 loans
8 that you've already told me you can't get through 900 in -
9 - - in 90 days, how much time is that supposed to take?

10 MR. JACOBSEN: No, Your Honor, we could have. We
11 could have, and - - -

12 JUDGE RIVERA: You could have? Okay.

13 MR. JACOBSEN: - - - we - - - I'm not saying
14 definitively whether we could; that is what the contract
15 says. And we're here because, fundamentally, what the
16 plaintiffs, U.S. Bank, want to do is rewrite the sole-
17 remedy provision and the notice provision.

18 JUDGE STEIN: Does the record reflect, counselor,
19 why it is, if I recall correctly, that you only agreed to
20 remedy forty of the loans that were noticed? Does the
21 record indicate why you refused to do so with the other
22 loans that were specifically identified?

23 MR. JACOBSEN: I don't believe so, Your Honor,
24 but I also want to put this into context too. They,
25 undeniably, we agree, did give pre-suit notice on 1,200



1 loans. And the point of fact here is we did repi - - -
2 repurchase forty as a result of that notice. But after the
3 case was filed, three years after the statute of
4 limitations had expired, in contravention to the notice
5 provision, they put in expert reports. We're now talking
6 about nine years after the issuance of the security, and
7 we're talking about three years after the expiration of the
8 statute of limitations. They themselves withdrew 75
9 percent of the loans within that first 1,200. Their expert
10 disagreed with it, and they came forward with an additional
11 480 loans. That makes up the whole population of 783. And
12 that's in complete contravention of the sole-remedy
13 provision. And if I may - - -

14 JUDGE STEIN: So can I just get back - - -

15 MR. JACOBSEN: Yes.

16 JUDGE STEIN: - - - for one second to Judge
17 Rivera's question, and that is, does - - - in your view,
18 does the PAC - - - sorry, PSA, require any particular
19 identification of what the particular representations and
20 warranties that were breached were, or is it enough to say,
21 as I think it did here, that for the - - - or maybe you - -
22 - I'm not clear on what you said was in the notices. The
23 notices identified certain loan numbers and said that there
24 was a breach of representations and warranties as to those
25 loans numbers. Did it specify what those representations



1 and warranties were? And if not - - - if so, is that
2 necessary to the - - -

3 MR. JACOBSEN: Your Honor, we would say that the
4 notice must require more than just identifying all of the
5 loans in the trust and the specific loans. They did
6 identify - - - they did identify breaches of certain
7 representations and warranties. And these are large
8 contracts, so there was some notice as to that.

9 Again, you know, the full breadth of what
10 specifically they're saying constituted a breach as to each
11 individual loan, that is not specifically up before the
12 court, but I appreciate your question - - -

13 JUDGE FAHEY: Can I just - - -

14 MR. JACOBSEN: - - - in regards to that more was
15 required.

16 JUDGE FAHEY: Can I just clarify for a second?
17 Are you - - - are you arguing that the trustee must comply
18 with the pre-suit notice before the statute of limitations
19 expires?

20 MR. JACOBSEN: Yes, Your Honor.

21 JUDGE FAHEY: Wasn't that argument specifically
22 rejected by this court in USA Bank - - - or U.S. Bank?

23 MR. JACOBSEN: I apologize, Your Honor. Which
24 U.S. Bank decision? There have been many.

25 JUDGE FAHEY: Let me get you the cite. Hold on a



1 second here. Because it seems like we're engaging in the
2 same argument that this court ruled on in U.S. Bank, N.A.
3 2019 - - - I don't have the cite right in front of me.

4 JUDGE RIVERA: I think it's 34 N.Y.3d.

5 JUDGE FAHEY: Thank you. Judge Rivera wrote the
6 decision, and the court was unanimous on the point.

7 JUDGE RIVERA: There you go.

8 JUDGE FAHEY: And it seems to me that we rejected
9 this argument specifically, that there's a distinction
10 between pre-suit notice and the statute of limitations.
11 And it seems to me that you're arguing the same thing
12 again.

13 MR. JACOBSEN: I disagree, Your Honor. Let me
14 explain why.

15 JUDGE FAHEY: Well, tell me why.

16 MR. JACOBSEN: Yes. And you're referring, I
17 believe, to the - - - what we refer to as the ABSHE case,
18 and so we - - -

19 JUDGE FAHEY: That's fine. Whatever.

20 MR. JACOBSEN: - - - we revert to these monikers.
21 That was a 205(a) case, and the court found, on a
22 completely different fact scenario, where notice was given
23 to the wrong party, or not to both parties. It was
24 required to give it to DL - - - Ameriquest in the first
25 instance. Notice was given to DLJ. The Court found that,



1 under 205(a), they could refile their suit after it had
2 been dismissed. And I think there are a number of
3 important distinctions, Your Honor, that make that
4 completely inapposite and completely inapplicable here.

5 First of all, CPLR 205(a) only deals in the
6 instance where the case is dismissed in its entirety for
7 something other than on the merits. This case cannot, will
8 not, under any scenario - - - if we win everything, will
9 not be dismissed in its entirety. They will go to trial.
10 There will be a trial in October. They will go to a
11 decision on the merits.

12 JUDGE FAHEY: Okay. So let's take it a step
13 further then. Let's assume that was true. Then it would
14 seem to me that your argument on the individual loans would
15 simply be an argument about the measure of damages and not
16 whether or not there's a suit itself allowed to go forward.

17 MR. JACOBSEN: Sorry; can you repeat that, Your
18 Honor?

19 JUDGE FAHEY: Sure. It would seem to me that, if
20 your argument is correct, and that the suit survives no
21 matter what, that we're simply talking about what the
22 damages are and that this is simply a question of the
23 measure of damages not whether or not the litigation can
24 survive.

25 MR. JACOBSEN: What I'm saying, Your Honor, is



1 that - - -

2 JUDGE FAHEY: Stick with my measure-of-damages
3 question.

4 MR. JACOBSEN: Right.

5 JUDGE FAHEY: You've got 1,200 claims that you
6 say that you've been properly noticed on, and it was 5,200
7 in the - - -

8 MR. JACOBSEN: Approximately.

9 JUDGE FAHEY: - - - securitization? Aren't we
10 really then talking about what the measure of damages is?

11 MR. JACOBSEN: Well, yes and no. We would say
12 that on the notice there - - - because there are two ways
13 they can prove breach on notice, under the sole-remedy
14 provision - - - or the repurchase protocol, or upon
15 discovery. We would say that they're limited, on a notice
16 theory, as to the 303 loans that were identified pre-suit.

17 With respect to the 480 that were first
18 identified after the statute of limitations, they're
19 constrained and cannot move forward on a notice theory.
20 But I think it's an important distinction, an important
21 point to make for the court that they, like every
22 plaintiff, irrespective of what happens today, can move
23 forward under the contract, under a discovery theory, on
24 every single loan they allege breached.

25 JUDGE FAHEY: See, here's what I'm struggling



1 with, and I know we're just a little over the time. I'll
2 just clarify for you. It would seem that the argument that
3 would be made is that the 304 established that they have an
4 argument on breach, forgetting about the merits of the
5 argument. They say this securitization, not each
6 individual loan, but the securitization transaction, there
7 was a breach in that securitization transaction. Then
8 after that, if there is a breach, then the next step in
9 establishing liability would say what are the measure of
10 damages. And that's how many loans were somehow defective.
11 That would be the measure of damages, which you may or may
12 not be right on, because I think it was - - - under the
13 sole-remedy provision you may be right on that. But that
14 isn't the same as saying that the securitization wasn't
15 breached. There's a distinction to be drawn there.

16 MR. JACOBSEN: I agree with your distinction,
17 Your Honor, and to sum up our argument on the notice issue
18 - - -

19 JUDGE FAHEY: Sure, go ahead.

20 MR. JACOBSEN: - - - the contract has required an
21 individualized process. And if you'll indulge me, Your
22 Honor, I see the red light's on.

23 CHIEF JUDGE DIFIORE: Please, go ahead.

24 MR. JACOBSEN: At A-445, in every instance, they
25 speak of identifying specific mortgage loans so that they



1 can cure or repurchase such breaches. And these - - - this
2 is a protocol - - - by the way, within the ninety-day cure
3 period.

4 And I'd like to quote one other thing, and this
5 is from U.S. Bank, describing the process, from their
6 perspective as trustee, and what they're required to do.
7 "When a trustee seeks a repurchase from a seller, it must
8 prove each alleged breach for each loan because the PSA
9 provided for an individualized loan-specific obligation to
10 cure, replace, or repurchase a breached loan." That's at
11 the compendium at page 62.

12 So Your Honor, real quick, and I know I have
13 rebuttal, 2 - - - this is not a 205(a) case; it cannot be a
14 205(a) case. The ABSHE case is limited to the specific
15 facts there and the uniqueness of 205(a). And what we're
16 asking for, plain and simple, is as this court said in
17 DBNTC v. Morgan Stanley, that the words mean what they say
18 and the contract will be enforced as written.

19 Thank you for allowing me to go over time.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel?

22 MR. TORRES: Thank you, Your Honors. Hector
23 Torres for the appellant trustee.

24 Judge Fahey, you're exactly right with respect to
25 the fact that you have previously decided the precise issue



1 that is being presented here on the notice with respect to
2 the relation back cases.

3 JUDGE GARCIA: I'm sorry, counsel. We decided
4 the 203(a) issue?

5 MR. TORRES: In the ABSHE case, Your Honor, the
6 issue or the argument was made by DLJ, the same argument
7 that they're making here today, which is that pursuant - -
8 - under the repurchase protocol, you needed to comply with
9 the repurchase protocol within the statute of limitations
10 period. That argument was based on the ACE decision.

11 JUDGE GARCIA: But that was a completely
12 different statute. The problem I'm having here is I don't
13 see how you get a relation back theory on a 203(a) basis
14 when this has nothing to do with 203(a).

15 MR. TORRES: Well, Your Honor, there are two
16 issues. One is the notice issue which is - - - there are
17 two alternative basis for affirming the First Department's
18 decision. One is notice, that there's been compliance with
19 the conditional - - -

20 JUDGE GARCIA: Yes.

21 MR. TORRES: - - - precedent. And here there
22 clearly has been compliance with the conditional precedent
23 - - -

24 JUDGE GARCIA: Well, that's the question - - -

25 MR. TORRES: - - - because, no, you have - - -



1 JUDGE GARCIA: - - - whether you have or you
2 haven't, in terms of all of the loans or a certain subset
3 of the loans. What's the other?

4 MR. TORRES: But you meet the requirements with
5 respect to relation back because if - - - there are three
6 requirements, essentially. The first is that you have a
7 timely complaint.

8 JUDGE GARCIA: Right.

9 MR. TORRES: Here there was a timely complaint,
10 and there's no dispute with that.

11 With respect to the complaint, the complaint
12 itself makes it clear that - - - and it relies on the pre-
13 suit notices which identified, as Justice Rivera - - -
14 Judge Rivera indicated, more than 1,200 loans that were
15 specifically identified in the pre-suit notice. And the
16 complaint makes clear that the trustee was seeking
17 repurchase of all of the breaching loans, having stated in
18 the complaint that it conducted a forensic review of some
19 1,500 loans, it discovered that eighty percent - - -

20 JUDGE GARCIA: I'm sorry; before we go down that
21 road, where can you fit in this theory that you can use a
22 statute that applies to relation back in filings in a case
23 where you're talking about whether or not you complied with
24 a contractual provision? And there was no subsequent
25 filing of the complaint that would relate back.



1 MR. TORRES: Well, Your Honor, that gets to the
2 issue in terms of the pleading and the fact that the claim
3 is based on notice that was provided after the action was
4 filed. And no argument has been made that there hasn't
5 been an amended pleading.

6 JUDGE GARCIA: But there hasn't been, right?

7 MR. TORRES: The only argument - - -

8 JUDGE GARCIA: Wait, wait, wait. There has not
9 been an amended pleading.

10 MR. TORRES: Yeah, there has not been.

11 JUDGE GARCIA: So I don't understand how 203(a)
12 applies if it only applies to amended pleadings and there's
13 no amended pleading here.

14 MR. TORRES: Because there's no requirement under
15 the rules, it refers to a claim that is being asserted and
16 - - -

17 JUDGE GARCIA: In an amended pleading - - -

18 MR. TORRES: This precise issue was addressed in
19 the Mong decision where there was no amended pleading and
20 the court addressed the argument and indicated that, with
21 respect to requiring a formal amended pleading, after
22 you've complied with what the essence is of the rule, which
23 is that you give notice to the defendant of precisely what
24 it is you're trying to prove - - -

25 JUDGE GARCIA: But it seems like we're conflating



1 a contractual condition with a pleading issue, right? So
2 yes, if you interpose a later claim or notice, like the
3 Lyon case, which the Appellate Division relied on Koch,
4 yes, you can relate that back because you've gotten notice
5 of the facts giving rise to that claim. But Koch had
6 nothing to do with a contractual provision.

7 MR. TORRES: Right, but - - -

8 JUDGE GARCIA: And so the foundation of this
9 application is troubling to me.

10 MR. TORRES: Well, Your Honor, the - - -

11 CHIEF JUDGE DIFIORE: So just to piggyback on
12 that, wouldn't the application of the relation back
13 doctrine just read out of the contract the repurchase
14 protocol?

15 MR. TORRES: There's nothing in the contract that
16 precludes notice - - - post-suit notice with respect to
17 loans. That's number one.

18 Nor is there anything in the contract that
19 precludes the trustee from providing supplemental notice
20 with respect to additional claims after an action has been
21 filed, where the original actions makes clear that they're
22 seeking repurchase of not only the specifically identified
23 loans but all the breaching loans.

24 So they've complied with the first requirement
25 for relation back, and it's dealing with the same



1 transaction, because as Judge Fahey indicated, you're
2 dealing with a securitization, the HEAT 2007-1
3 securitization, and there was a breach of contract with
4 respect to that securitization. You've given notice, or
5 the defendant is on fair notice with respect to everything
6 that the trustee is seeking to prove in the lawsuit.

7 They're seeking to prove that there's been a
8 breach of contract with respect to the specifically-
9 identified loans, and the other - - - and the other loans,
10 the notice was provided after the lawsuit was started,
11 because that's when they discovered that there were
12 additional breaching loans. But there's no - - -

13 JUDGE STEIN: Counsel?

14 JUDGE GARCIA: Had he filed the lawsuit, and six
15 years go by, and then you say, well, we just discovered it,
16 you'd be out of luck, right?

17 MR. TORRES: But that assumes that the statute of
18 limitations precludes there being additional notice
19 afterwards. And this decision was addressed in ABSHE where
20 the court was construing the ACE decision, and the court
21 made the distinction between a repurchase protocol that's a
22 substantive element of the claim and a repurchase protocol
23 that's a procedural condition precedent.

24 JUDGE RIVERA: So counsel, can I just clarify
25 something that you were responding to Judge Garcia, and it



1 doesn't seem to jive with the record, and I need this
2 clarified. There is an amended complaint? There's a
3 second amended complaint?

4 MR. TORRES: Yes, there is.

5 JUDGE RIVERA: So you have filed an amended
6 pleading?

7 MR. TORRES: Yes.

8 JUDGE RIVERA: Okay. I thought your argument was
9 the amended pleading is making assertions for a remedy with
10 respect to loans that were not listed in the pre-filing
11 letters; is that correct?

12 MR. TORRES: There are 480 loans that were not
13 listed in the pre-filing letters, and those were the ones
14 that were discovered - - -

15 JUDGE RIVERA: Yes.

16 MR. TORRES: - - - after the lawsuit was filed
17 during discovery.

18 JUDGE RIVERA: I'm saying that's what - - - your
19 amended pleading is seeking relief for loans discovered
20 post the filing of the original complaint.

21 MR. TORRES: Well, both the - - - yeah, the
22 amended complaint is clearly seeking relief for - - -

23 JUDGE RIVERA: Yeah, so that's the point, because
24 I understood Judge Garcia's point; it's an important one,
25 that if you don't have an amended pleading, 203(f) is not



1 going to apply.

2 MR. TORRES: No, I - - -

3 JUDGE RIVERA: And I thought your argument was
4 we've got an amended pleading, we're trying to seek relief
5 from DLJ, pursuant to the PSA, for loans that are
6 discovered and identified post the pre-filing notice and
7 post the original filing.

8 MR. TORRES: Exactly correct.

9 JUDGE RIVERA: And that's why you need 203(f) to
10 apply so that those claims relate back to the original
11 filing, which every party involved agrees is timely filed.

12 MR. TORRES: Right, exactly, Your Honor.

13 JUDGE RIVERA: Okay. I just need to clarify
14 that.

15 JUDGE FAHEY: Counsel, how many - - -

16 JUDGE RIVERA: So now, having said that - - -
17 it'll be my last question; I know others have questions for
18 you. I just - - - this I really do need clear. What is it
19 that was included in the letters? Is it - - - in the pre-
20 filing letter; is it only the loan number, or what else did
21 you give them to put them on notice of the breaches?

22 MR. TORRES: Your Honor, we had in - - - at page
23 718 to 821 of the - - - or 821 of the record, you'll see
24 there's a reference to the repurchase demand - - -

25 JUDGE RIVERA: Yeah.



1 MR. TORRES: - - - that was made in the - - - in
2 connection with the breaches that were identified at that
3 point, and they referred - - - it included a CD with
4 detailed information regarding each breach claim.

5 JUDGE RIVERA: Okay. But was that about the
6 loans that were listed?

7 MR. TORRES: Yes.

8 JUDGE RIVERA: So it's information about the
9 loans, and then you also set out in that CD and therefore
10 that breached this representation and warranty?

11 MR. TORRES: Correct, Your Honor.

12 JUDGE RIVERA: So you connected those dots in
13 those CDs?

14 MR. TORRES: Correct.

15 JUDGE RIVERA: Okay. Thank you.

16 JUDGE FAHEY: Counsel - - -

17 JUDGE STEIN: As I understand your argument,
18 correct me if I'm wrong, you seem to be saying that there's
19 a different rule as to what notice must be given depending
20 upon who the plaintiff is and who the respondent is. Am I
21 understanding that correctly? Because your adversary
22 asserts that you have cited and argued for the same rule
23 that they're now seeking to impose, and you say, yes, but
24 that's a different situation because the trustee was the
25 defendant or some - - - somebody else was the defendant,



1 not them. So I'm having a hard time understanding what the
2 difference is and why there should be - - - and where it is
3 in the documents that would indicate that a different rule
4 would apply.

5 MR. TORRES: Your Honor, that's an apples and
6 oranges comparison, and let me explain why.

7 JUDGE STEIN: Well, yes, please.

8 MR. TORRES: Let me explain why. The reason is
9 that there - - - there's a fundamental difference between
10 actions where the trustee is sued as a defendant and
11 actions where the trustee - - -

12 JUDGE STEIN: And what's that difference?

13 MR. TORRES: - - - as in this case. And the
14 difference is the following that in actions where it's sued
15 as a defendant, the whole issue with respect to notice and
16 identifying the loans is a substantive condition of the
17 liability of the trustee. In other words, there's no
18 liability unless you identify specifically, and that
19 defines the scope of the trustee's obligations and
20 responsibilities, and that is necessary because, under the
21 PSA, the duties of the trustee are extremely narrow,
22 they're extremely limited. The trustee had no access to
23 the loan file, they had no obligation to review loan files.

24 JUDGE STEIN: Okay. But here you have - - -
25 we've said it was a procedural - - -



1 MR. TORRES: Well, that - - -

2 JUDGE STEIN: - - - conditional - - - condition
3 precedent, right, which means that it has to be complied
4 with before you bring an action. Isn't that - - -

5 MR. TORRES: But the question is what has to be
6 done in terms of compliance, and it's important to take it
7 into context to determine whether you're looking at the
8 trustee as a defendant, with actually a substantive element
9 of the claim, or where you're dealing with the trustee as
10 the plaintiff where it's a condition - - - a condition
11 precedent.

12 And under this court's decisions, it's clear
13 that, if there's a condition precedent, then that is not
14 something that needs to - - - you need to identify each and
15 every breaching loan before the lawsuit is filed. I mean,
16 that's what the First Department repeatedly has held in
17 these cases, and that's consistent with the ABSHE decision
18 which - - - where this court made it clear that there is no
19 requirement under the condition precedent that the
20 condition precedent be complied with within the six-year
21 statute of limitations period. Nor is there anything, by
22 the way, in the PSA.

23 JUDGE STEIN: I thought we said that the ninety-
24 day period doesn't have to expire before the statute of
25 limitations.



1 MR. TORRES: No, Your Honor. The ABSHE decision
2 makes it explicit that there is no time restriction, and
3 the court was referring - - - because in the context of the
4 ACE decision, the court was referring to the - - -

5 JUDGE STEIN: So if we - - -

6 MR. TORRES: - - - ACE holding that it's a
7 condition.

8 JUDGE STEIN: If we disagree with you, does that
9 change your position as to whether relation back applies?

10 MR. TORRES: I'm sorry; Your Honor, I'm not - - -

11 JUDGE STEIN: If we disagree with you about what
12 you say we said in ABSHE - - -

13 MR. TORRES: Oh, Your Honor, all I'm saying is
14 I'm just quoting there is a reference there where the court
15 actually says that with respect to - - - and you're
16 referring specifically to a - - - a notice and repurchase
17 protocol that's very similar to the one here, and where
18 the court explicitly states that there is no time
19 restriction, and it's in response to the argument that DLJ
20 made there that you needed to comply with the condition
21 precedent before the statute of limitations expired, and
22 the court - - -

23 JUDGE STEIN: And my question - - -

24 MR. TORRES: - - - categorically rejected that
25 argument.



1 JUDGE STEIN: - - - to you is, if we disagree
2 with how you view that language in ABSHE, then does your
3 relation back argument fail?

4 MR. TORRES: Well, not at all, Your Honor,
5 because it's still relating to the fundamental principal,
6 as this court found the lynchpin of relation back is
7 notice, fairness to the defendant that it's received notice
8 with respect to - - -

9 CHIEF JUDGE DIFIORE: Where does meaningful
10 opportunity to cure the breach fit in there?

11 MR. TORRES: Well, Your Honor, there - - -
12 there's no requirement in the rule that that - - - or
13 there's no - - - there's no prohibition in the rule that
14 that opportunity to cure can't arise after an action has
15 been filed. Zero. There's nothing in the PSA that states
16 that.

17 CHIEF JUDGE DIFIORE: So it's not - - -

18 MR. TORRES: And so here they - - - they've had
19 notice for more than four years now with respect to the
20 specific loan - - - the specific additional loans that they
21 should have cured, 480 of them. They've done nothing to
22 cure any of them. So this argument that they're somehow
23 being deprived of an opportunity to cure is completely
24 baseless because, it's clear by their own action, that
25 that's irrelevant.



1 But the more critical point is that, under the
2 clear terms of the agreement, there is absolutely nothing
3 in there that precludes post-suit notice. Nor is there
4 anything that requires that in your pre-suit notice you
5 have to specifically identify every single loan.

6 The only requirement with respect to notice, and
7 if you look at the rule, it's fairly clear. I mean the - -
8 - the textual plain meaning of the rule essentially says
9 that you have an obligation to provide prompt notice, and
10 the prompt notice has to relate to breaches that materially
11 and adversely affect the interest of the certificate
12 holders. They have complied with that. All of these
13 additional requirements are just rules that are being
14 created now by counsel to try to avoid their - - -

15 JUDGE RIVERA: So I'll ask you a hypothetical
16 question. So under your understanding of the PSA notice
17 requirement, could you just have written you've breached
18 the following warranties - - - representations and
19 warranties and it has infected every single loan.

20 MR. TORRES: Absolutely.

21 JUDGE RIVERA: Repurchase every single loan. And
22 you didn't name any loan.

23 MR. TORRES: Yep.

24 JUDGE RIVERA: That would be enough?

25 MR. TORRES: If you name every single loan, they



1 - - - they're on notice.

2 JUDGE GARCIA: Why didn't you do that?

3 MR. TORRES: It's obviously discrete because in
4 this deal there were 5,100 loans. So okay, so now you're
5 on notice - - -

6 JUDGE RIVERA: Just to be - - -

7 MR. TORRES: - - - that they might be - - -

8 JUDGE RIVERA: I'm sorry.

9 MR. TORRES: - - - they've charged you with - - -
10 or the trustee has charged you with breaching all of the
11 loans. So now they - - - there's an obligation on the - -
12 -

13 JUDGE GARCIA: So counsel, why didn't you do
14 that?

15 MR. TORRES: Excuse me?

16 JUDGE GARCIA: Why didn't you do that? The fact
17 that you didn't do that, doesn't that indicate that you
18 didn't think that was the case?

19 MR. TORRES: Well, no, Your Honor - - -

20 JUDGE GARCIA: Isn't that the notice they have?

21 MR. TORRES: - - - we didn't do that because they
22 were operating in good faith based on the ones where they
23 concluded that there had been a breach.

24 JUDGE GARCIA: Right. So how many amended
25 complaints were filed here?



1 MR. TORRES: I believe there were two.

2 JUDGE GARCIA: And how many additional loans were
3 named in those complaints, the amended complaints, specific
4 loans?

5 MR. TORRES: In the amended complaint, I think
6 the loans - - - the additional loans were first discovered
7 in the - - - in the expert discovery. And so the notice
8 with respect to the additional - - -

9 JUDGE GARCIA: No, but just my question is how
10 many additional loans did you identify in the amended
11 complaints - - -

12 MR. TORRES: I don't believe there were - - -

13 JUDGE GARCIA: - - - by number?

14 MR. TORRES: I don't believe there were any
15 specific additional loans that were identified in the
16 amended complaint because those additional loans were not
17 discovered until discov - - - were not uncovered until
18 discovery.

19 JUDGE GARCIA: So there's no amended complaint
20 where you're saying these additional loans are breached and
21 we want to relate these additional loans by number back to
22 our original - - -

23 MR. TORRES: Well, what the amended complaint
24 does make clear is that it makes a reference to the
25 forensic study which indicated that eighty percent of the



1 loans - - - or the forensic review of more than eighty - -
2 - or a forensic review of 1,500 loans revealed that eighty
3 percent had breached the rates that that meant that there
4 was a very high breach rate and that it - - -

5 JUDGE STEIN: But the defendant would - - -

6 MR. TORRES: - - - was reasonable to infer that
7 every loan - - - it was reasonable to infer that there were
8 breaches throughout the entire loan pool.

9 JUDGE STEIN: But so that would put the burden
10 then on them to figure out which eighty percent of the rest
11 of the loans were the ones that were in breach; is that - -
12 - is that your position?

13 MR. TORRES: Well, absolutely. I mean, they
14 would have that burden, but more - - - more importantly, if
15 - - - because you've given them the more than 1,200 that
16 were specifically identified, and it's clear that what
17 we're saying is that there are going to be additional loans
18 that are going to be identified. And there's nothing in
19 the agreement that precludes - - -

20 JUDGE STEIN: But they can't repu - - -

21 MR. TORRES: - - - providing the supplemental
22 notice.

23 JUDGE STEIN: They can't cure or repurchase a
24 loan until you identify what - - - or until somebody
25 identifies what they are.



1 MR. TORRES: Agree. Agree. No, I agree.

2 JUDGE STEIN: Okay.

3 MR. TORRES: Yeah, absolutely.

4 JUDGE RIVERA: Let me just understand. I thought
5 you identified a representation and warranty, that you
6 allege was breached, that did apply across the whole pool
7 which was with respect to the standards of that review
8 process. So it does apply to every loan in the pool, does
9 it not?

10 MR. TORRES: That's correct.

11 JUDGE RIVERA: Okay.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel, your rebuttal?

14 MR. JACOBSEN: Thanks, Your Honor. Lots to
15 discuss. I want to pick up on something, Chief Judge, you
16 mentioned, and Judge Garcia, you were asking my friend
17 about. ACE stands for the proposition that these were not
18 warranties for the lifetime of the investment. That's a
19 direct quote from ACE. And that's exactly what they'd be
20 converting the sole-remedy provision, 2.03(d), into if
21 their view prevails. And this is not hypothetical. Under
22 their view, taken to its logical conclusion, they could
23 take the entirety of the six years statute of limitations,
24 give one timely notice ninety days before the expiration of
25 the statute of limitations, asking us to cure repurchase.



1 They then could follow on for years.

2 I want to clarify one thing that I think Mr.
3 Torres was clear about.

4 JUDGE RIVERA: Yeah, but if they've identified -
5 - - and you were sued anyway; you were already in a
6 lawsuit. FHFA had already sued you. They've identified
7 representations and warranties that have a full, wide
8 impact. You are on notice that there's more than just a
9 problem with 306 loans.

10 MR. JACOBSEN: True.

11 JUDGE RIVERA: I mean, it can't be that a sponsor
12 doesn't know what that means.

13 MR. JACOBSEN: No, Your Honor, I respectfully
14 disagree. The repurchase protocol requires a loan-by-loan
15 process.

16 JUDGE RIVERA: Well, I don't know that I read it
17 that way, so let's say I disagree with you about that.
18 What if they identify a representation and warranty that
19 would apply across the loan pool; why wouldn't that be
20 enough for you to be on notice that there's something very,
21 very wrong with this securitization?

22 MR. JACOBSEN: Because this court has already
23 ruled that there can't be violations of transaction-wide
24 reps; it has to be done on a loan-by-loan basis.

25 JUDGE RIVERA: No, no, that's not what we ruled.



1 We ruled that those occurred at the point of execution. No
2 one has said that they couldn't exist only that the time
3 limit begins to count at the moment of execution. They may
4 be time barred; that's a different story.

5 MR. JACOBSEN: Because that would completely read
6 out this provision out of the contract. They could, as
7 they did in HSBC v. Merrill Lynch, give notice on two loans
8 and then take years. By way of example, in one of - - -

9 JUDGE RIVERA: Yeah, but if they only refer two
10 loans, they only refer two loans. But if they're telling
11 you - - - first of all, it's not two loans, it's - - - it's
12 like twenty percent of the pool. And then they're saying
13 to you that this infects the securitization. They've - - -
14 the FHFA specifically twice says we're reserving our
15 rights, we continue to look for the damage in the
16 securitization. In fairness, why isn't that notice? I
17 mean, you didn't define notice in the PSA, and you could
18 have, but you didn't. So why isn't that good enough to put
19 you on notice?

20 MR. JACOBSEN: Because they're required to put us
21 on notice as to each individual loan. And if I may answer
22 your question - - -

23 JUDGE RIVERA: Well, I think that it does say
24 about the representation and warranties and how it affects
25 the loans.



1 MR. JACOBSEN: But as Judge Garcia noted, that's
2 what they did, because they knew that was their obligation.
3 That's what they said - - -

4 JUDGE RIVERA: Yeah, and then they said there are
5 more. The securitization is tainted.

6 MR. JACOBSEN: Your Honor, respectfully, they did
7 not. This is not like the Nomura case. They reserved
8 their rights. They did say an investigation was ongoing.

9 JUDGE RIVERA: Yeah.

10 MR. JACOBSEN: They didn't allege systemic or
11 trust-wide breaches. They identified the 1,200 loans and
12 reserved their rights, and they said, basically, you have
13 an obligation to abide by the contract. That doesn't put
14 on notice as to anything. And if their view does prevail,
15 they would be able to - - -

16 JUDGE RIVERA: So if they said in the letter that
17 these representation and warranties have been breached and
18 they infect the loans, the infect the securitization and
19 infect the loans, is that enough?

20 MR. JACOBSEN: Absolutely not.

21 JUDGE RIVERA: No?

22 MR. JACOBSEN: The issue or take back - - -

23 JUDGE RIVERA: Then why didn't you write that in
24 the PSA? If that's your definition of notice - - - because
25 nothing in the notice says they couldn't do what I've



1 suggested as hypotheticals.

2 MR. JACOBSEN: I disagree, Your Honor. I think
3 it's very clear in Section 2.03(d). They speak about
4 identifying individual loans. It's defined, mortgage loan.
5 They refer back to "such breach". The entire way the
6 repurchase price and the repurchase protocol works is you
7 have to know what loan you're talking about. Is it loan A
8 originated - - -

9 JUDGE RIVERA: Well, let me ask you this. The
10 December 6th letter from U.S. Bank to DLJ, you're now - - -
11 they included the FHFA letters, but you had already seen
12 those. It says: "We write to reiterate the demand that
13 DLJ repurchase all loans that breach representations and
14 warranties, including the 112 and 192 of the loans that did
15 not comply with the representation and warranty that the
16 loans were underwritten in accordance with the underwriting
17 guidelines."

18 So that's a specific reference to loans
19 specifically identified by the FHFA, though not limited by
20 those letters. Why - - - why isn't that telling you, we
21 want you to - - - we want you to repurchase all the loans
22 that are in breach?

23 MR. JACOBSEN: Because it hasn't identified them,
24 first of all. Second of all, there's no threshold or
25 significance referenced in the repurchase protocol. They



1 just as easily could have negotiated that as well.
2 Instead, it speaks to an individualized process. Two and
3 three, it would make a complete mockery, I respectfully
4 submit, of the statute of limitations and of the repurchase
5 protocol. Any investor or trustee, in fact when they - - -

6 JUDGE RIVERA: Were they a party to the original
7 PSA?

8 MR. JACOBSEN: Absolutely. U.S. Bank?
9 Absolutely, and they're one of the most sophisticated - - -

10 JUDGE RIVERA: They're both sophisticated
11 parties.

12 MR. JACOBSEN: Yes.

13 JUDGE RIVERA: You both knew how to define
14 notice, but you chose not to.

15 MR. JACOBSEN: Well, we did, Your Honor.

16 JUDGE RIVERA: And now the courts are trying to
17 work that out, right?

18 MR. JACOBSEN: No, Your Honor, and I respectfully
19 disagree. We did - - -

20 JUDGE RIVERA: Well, does it say specifically in
21 the provision you're referring to what the content of the
22 notice is supposed to be? Does it say it has to be a
23 written notice? Does it say the date by which it must be
24 submitted?

25 MR. JACOBSEN: It says that they have to identify



1 the individual loans. That's what all of the language
2 speaks to.

3 JUDGE RIVERA: Yeah, but does - - -

4 MR. JACOBSEN: And their own course - - -

5 JUDGE RIVERA: - - - it say what they need to
6 tell you?

7 MR. JACOBSEN: Their own course - - - it does not
8 - - - their own course of dealings, however, as Judge
9 Garcia noted - - -

10 JUDGE RIVERA: Okay.

11 MR. JACOBSEN: - - - indicates for every
12 individual loan - - -

13 JUDGE RIVERA: Okay.

14 MR. JACOBSEN: - - - they said it's loan 146, and
15 here's what we're saying it breached.

16 JUDGE RIVERA: Okay.

17 MR. JACOBSEN: And if I may just conclude on this
18 point; you've been very indulgent, Your Honors. I've gone
19 over a lot. If their view controls, basically, why
20 wouldn't every trustee or every investor, on the last day,
21 send a letter saying, hey, here's one loan we think
22 breached, we're reserving our rights, and we think all of
23 the loans breached. There are hundreds maybe thousands of
24 issuances that have gone out, since the financial crisis,
25 where this language exists. I think it would make a



1 mockery of this state's statute of limitations. I think it
2 would make a mockery of this court's interpretation and
3 application of contract law, and it would basically be an
4 invitation to bring these suits every time. In fact, why
5 not put in notice before the statute of limitations to
6 reserve your rights? I think it would completely
7 eviscerate the contract and the statute of limitations.
8 Thank you very much for indulging.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of U.S. BANK NATIONAL ASSOCIATION, INC. v. DLJ MORTGAGE CAPITAL, INC., No. 32, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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