Ambac Assur. Corp. v Countrywide Home Loans, Inc.
2020 NY Slip Op 34044(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 652321/2015
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 60

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AMBAC ASSURANCE CORPORATION, THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION

Plaintiff,

- v -

COUNTRYWIDE HOME LOANS, INC.,

Defendant.

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INDEX NO. 652321/2015

MOTION DATE 07/28/2016

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 35, 36, 37, 38, 65, 66, 67, 68, 75, 76, 77, 85, 93, 101 were read on this motion to dismiss (Motion Seq. No. 002).

This fraud action arises out of the issuance by plaintiff monoline insurer, Ambac Assurance Corporation (Ambac), of five policies insuring residential mortgage-backed securities (RMBS) transactions.[1] (Complaint [Compl.], ¶ 1[NYSCEF Doc. No. 3].) The Ambac insured RMBS transactions at issue securitized pools of mortgage loans originated by defendant Countrywide Home Loans, Inc. (Countrywide). (Id.) The complaint pleads a sole cause of action for fraudulent inducement based on allegations that Countrywide made misrepresentations and omissions that induced Ambac to issue the policies. (Id., ¶¶ 11-12.) Countrywide moves to dismiss this action, pursuant to CPLR 3211 (a) (5), based on the statute of limitations and, alternatively, pursuant to CPLR 3016 (b), 3211 (a) (1), and 3211 (a) (7), for failure to state a

[1] The five policies were allocated to plaintiff The Segregated Account of Ambac Assurance Corporation. (Compl., ¶ 1.) Plaintiffs Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation are collectively referred to in this decision as Ambac.

cause of action and based on documentary evidence. (Notice of Motion [NYSCEF Doc. No. 22].)

A fraud action must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." (CPLR 213 [8].) Under CPLR 203 (g) (1), "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery." Under these sections, the time at which plaintiff "could with reasonable diligence have discovered" the fraud is thus the time of imputed discovery.

It is undisputed that the statute of limitations accrued on the dates the policies were issued and that this action was commenced more than six years after such dates. It is also undisputed that plaintiffs' claims are "untimely if they could have been discovered through the exercise of reasonable diligence by November 21, 2009"—that is, two years prior to the effective date of the parties' tolling agreement. (Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss [Pls.' Memo. In Opp.], at 5 [NYSCEF Doc. No. 35]; Memorandum of Law in Support of Motion to Dismiss [Def.'s Memo. In Supp.], at 2 [NYSCEF Doc. No. 23]; Affirmation In Support of Motion to Dismiss [Def.'s Aff. In Supp.], Ex. 1 [Tolling Agreement] [NYSCEF Doc. No. 24].)

The applicable standard for determining when fraud could with reasonable diligence have been discovered is well established:

> "The test as to when fraud should with reasonable diligence have been discovered is an objective one. Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and

shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him."

(Gutkin v Siegal, 85 AD3d 687, 688 [1st Dept 2011] [Gutkin] [internal quotation marks and citations omitted]; accord CIFG Assur. N. Am., Inc. v Credit Suisse Sec. (USA) LLC, 128 AD3d 607, 608 [1st Dept 2015], lv denied 27 NY3d 906 [2016] [CIFG]; see generally MBI Intl. Holdings Inc. v Barclays Bank PLC, 151 AD3d 108, 115 [1st Dept 2017, lv denied 29 NY3d 99 [MBI] [holding, in a non-RMBS fraud case, that plaintiffs' own allegations established that "plaintiffs were apprised of facts from which fraud could have been reasonably inferred by at least 2008. Accordingly, by at least 2008, New York law imposed on plaintiffs a duty to inquire, and plaintiffs' subsequent failure to pursue a reasonable investigation triggered the running of the statute of limitations at that time"]; Koch v Christie's Intl. PLC, 699 F3d 141, 155 [2d Cir 2012] [cited approvingly in MBI (151 AD3d at 116) and holding that "it is proper under New York law to dismiss a fraud claim on a motion to dismiss pursuant to the two-year discovery rule when the alleged facts do establish that a duty of inquiry existed and that an inquiry was not pursued"].)

Under the standard set forth above, Countrywide must make a prima facie showing that Ambac was on inquiry notice of its fraud claim prior to November 21, 2009. (See Aozora Bank, Ltd. v Deutsche Bank Sec. Inc., 137 AD3d 685, 689 [1st Dept 2016].) The burden then shifts to Ambac to establish that, or to raise a triable issue of fact as to whether, even if it had exercised reasonable diligence, it could not have discovered the basis for its fraud claims. (Id.)

As discussed in detail below, the undisputed evidence shows that misconduct substantially similar to that alleged by Ambac here was widely disclosed, between 2006 and early 2009, in media reports and highly publicized litigation. It is also undisputed that by February 2009, the certificates in the Ambac insured transactions had all been downgraded to

junk status, with progressive downgrades beginning in June 2008. (Def.'s Aff. In Supp., Exs. 32-36.)

In addressing RMBS fraud claims, the Appellate Division and this court have consistently held that inquiry notice was established based on the existence, more than two years prior to the commencement of the action, of substantially analogous public disclosures accompanied by ratings downgrades to the relevant certificates.

In CIFG, the Appellate Division applied the Gutkin inquiry notice standard to dismiss, as untimely, a financial guarantor's fraud claim involving a collateralized debt obligation (CDO). The Court reasoned:

> "Plaintiff has failed to meet its burden of establishing that even with the exercise of reasonable diligence, it could not have discovered the basis for its claims prior to November 15, 2011. Plaintiff was put on notice of defendant's fraud and scienter as early as 2008, but certainly by 2010, based on certain reports, made public, indicating the alleged actions that form the basis of plaintiff's claims. In addition, plaintiff was put on notice of defendant's alleged fraudulent activities by other lawsuits commenced prior to November 2011. Because plaintiff possessed information suggesting the probability that it had been defrauded, and failed to conduct an inquiry at that time, knowledge of the fraud is imputed."

(128 AD3d at 608.) The Appellate Division addressed the same issue the following year in three separate fraud actions brought by Aozora Bank, Ltd. arising from its investments in CDOs that included RMBS. (Aozora Bank, Ltd. v Deutsche Bank Sec. Inc., 137 AD3d 685, supra [Aozora v Deutsche Bank]; Aozora Bank. Ltd. v Credit Suisse Group, 144 AD3d 437 [1st Dept 2016], lv denied 28 NY3d 914 [2017] [Aozora v Credit Suisse]; Aozora Bank. Ltd. v UBS AG, 144 AD3d 436 [1st Dept 2016] [Aozora v UBS] [together, the Aozora cases].)

In Aozora v Deutsche Bank, the Appellate Division held that "public reports and lawsuits of alleged fraud are sufficient to put a plaintiff on inquiry notice of fraud." (137 AD3d at 689, citing CIFG, 128 AD3d at 608; Aldrich v Marsh & McLennan Cos., Inc., 52 AD3d 435, 436 [1st

Dept 2008], lv denied 11 NY3d 716 [2009].) There, the "wealth of public information" available by June 2011 (two years before the action was commenced) supported dismissal of the action as untimely. (Aozora v Deutsche Bank, 137 AD3d at 689.) As described by the Court:

> "First, in 2008, Blue Edge [the CDO at issue] was downgraded to junk status and plaintiff incurred substantial losses on its investment. Second, there was considerable publicity about the subprime mortgage crisis from news reports, investor lawsuits, and government investigations well before June 2011. Indeed, by April 2011, defendants had been sued multiple times in connection with RMBS and CDOs, including in connection with a Deutsche Bank CDO known as Gemstone, which plaintiff discusses in its complaint as involving wrongdoing by defendants 'identical' to that involved with respect to Blue Edge. Third, one of the most significant sources of public information putting plaintiff on notice of its fraud claims is the Senate Report and its associated emails, which actually form the centerpiece of plaintiff's complaint. In fact, the Senate Report contains a 45-page section on Deutsche Bank entitled 'Running the CDO Machine: Case Study of Deutsche Bank.' Taken with all the other information available in the public domain, the Senate Report is more than sufficient to have placed Aozora on inquiry notice of possible fraud by April 2011 at the latest."

(Id. [internal citations omitted].)

In Aozora v Credit Suisse, the Appellate Division dismissed the action in reliance on similar public disclosures more than two years prior to commencement of the action:

> "Aozora sustained substantial investment losses in 2007 and 2008, and by August 2008, the Jupiter V notes in which Aozora invested had been downgraded from the highest possible Moody's rating to the lowest. . . . Next, in March 2009, a complaint was filed in the Southern District of New York alleging misconduct by [defendant] Harding similar to that alleged in Aozora's complaint here. . . . This federal lawsuit was discussed in a 2010 article in Bloomberg, which also described another lawsuit alleging that Harding was 'beholden' to a bank 'that allowed it to dump unwanted holdings into their deals.' There were other published reports that should have put a sophisticated financial investor like Aozora on notice of a possible fraud. In March 2009, Time magazine published an article about Jupiter V entitled 'One Bad Bond,' reporting that 59% of its investments were worthless. The article described Jupiter V as a 'toxic asset' and 'one of those financial [instruments] at the root of the economic meltdown.' In 2010, Michael Lewis's best-selling book The Big Short: Inside the Doomsday Machine was published. That book contained allegations presenting a negative portrayal of Harding in its management of CDOs."

(144 AD3d at 438 [internal citations omitted].)

The Court again dismissed the fraud claims as untimely in Aozora v UBS based on substantially similar evidence:

> "The record demonstrates that plaintiff could, with reasonable diligence, have discovered the alleged fraud by April 2010, rendering its fraud claims untimely. By that date, numerous lawsuits had been filed against the UBS defendants for misconduct similar to that alleged in this complaint. Also by that date, the Securities and Exchange Commission had commenced an investigation into UBS's CDO practices. In addition, news articles disclosed the alleged misconduct involving hedge fund Magnetar and the Constellation CDOs [at issue]. The foregoing lawsuits, investigations and articles also sufficed to put plaintiff on 'inquiry notice' of defendant Deutsche's alleged fraud."

(144 AD3d at 437 [internal citations omitted].)

This court has also dismissed RMBS claims upon a showing of inquiry notice based on substantially similar evidence. (See Commerzbank AG London Branch v UBS AG, 2015 NY Slip Op 31051[U] [Trial Order], 2015 WL 3857321, at *2 [Sup Ct, NY County 2015] [downgrades of certificates, extensive publicly available information regarding the poor quality and performance of the loans underlying RMBS securitizations, including media reports dating back to 2007 and 2008, and a January 2011 report by the Financial Crisis Inquiry Commission, and widespread filing of lawsuits alleging similar claims against defendants and originators which involved the majority of the offerings at issue]; IKB Intl. S.A. in Liquidation v Morgan Stanley, 45 Misc 3d 1212[A], 2014 WL 5471650, at *5 [Sup Ct, NY County 2014], affd 142 AD3d 447 [1st Dept 2016] [downgrades of certificates and bankruptcies of and litigation against major originators of the underlying loans]; see also Fed. Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 59 Misc3d 754, 787 [Sup Ct, NY County 2018].)

Here, Ambac's fraud claim is based principally on Countrywide's alleged "pervasive, imprudent, and unlawful origination practices" and "wholesale abandonment of reasonable underwriting standards." (Compl.,¶¶ 53, 199; see also id., ¶¶ 28, 51, 57, 62, 110, 168, 210.)

Ambac alleges that these practices violated representations made by Countrywide prior to issuance of the policies. (Id., ¶¶ 41-48, 53, 54, 56-58, 61-62.) As shown by the record on this motion, substantially similar allegations against Countrywide were made in multiple, highly publicized lawsuits prior to November 2009. (Def.'s Memo. In Supp, at 2-3.) Specifically, in June 2009, the SEC brought a civil fraud action against three senior Countrywide executives alleging, among other things, persistent misrepresentations concerning origination and underwriting guidelines and a pervasive practice of concealing negative information from investors. (SEC v Mozilo, Index No. 09-CV-3994 [CD Cal 2009]; Def.'s Memo. In Supp., at 11, 19; Def.'s Aff. In Supp., Ex. 14 [comparison of allegations in Ambac's complaint with those in the complaint filed in SEC v Mozilo].) Ambac's complaint in fact cites the June 2009 Mozilo complaint in support of its fraud claim. (See, e.g. Compl., ¶¶ 68, 83 n 46, 112 n 81.)

Other highly publicized litigation in 2008 and 2009 disclosed wrongdoing with respect to Countrywide's origination and underwriting practices. In September 2008 and January 2009, two other monoline insurers brought actions in this court alleging that Countrywide fraudulently induced issuance of policies insuring RMBS transactions. (See Def.'s Aff. In Supp., Ex. 5.E [excerpts from complaint filed in MBIA Ins. Co. v Countrywide Home Loans, Inc., Sup Ct, NY County, Index No. 602825/2008]; id., Ex. 5.F [excerpts from complaint filed in Syncora Guaranty, Inc. v Countrywide Home Loans, Inc., Sup Ct, NY County, Index No. 650042/2009].) Ambac cites these lawsuits in its complaint. (Compl., ¶ 70.) In addition, numerous state consumer protection actions, filed in 2008, made detailed disclosures regarding Countrywide's allegedly predatory lending practices that are a basis for Ambac's fraud claim. (See Compl., ¶¶ 21-23, 86-93; Def.'s Aff. In Supp., Ex. 27 [Oct. 6, 2008 New York Times article regarding $8.4 billion settlement paid by Countrywide to resolve 11 such state actions.) For example, Ambac's

complaint alleges that the specific PayOption ARM loan programs at issue in the 2008 state consumer protection actions "are precisely those pursuant to which loans in the Transactions were originated." (Compl., ¶ 86.) As further alleged, the manner in which such programs were actually conducted, as disclosed in those actions, violated specific representations Countrywide made to Ambac regarding its origination and underwriting standards. (Id., ¶¶ 21-23, 86-93.)

Ambac was also placed on notice of wrongdoing by Countrywide similar to that alleged in this action by widespread media reports concerning the financial crisis and related mortgage fraud. (See Def.'s Aff. In Supp., Exs. 15-30 [media reports dated between August 2006 and June 2009].) Many of these reports addressed alleged wrongdoing at Countrywide. (Id., Exs. 16, 17, 19, 22-27 and 30 [media reports dated between Sept. 2006 and June 2009 regarding Countrywide]; Compl., ¶¶ 36 n 9, 71 n 28, 102 n 67, 130 n 4 [citing media reports dated between January 2008 and March 2009 regarding Countrywide].)

All of the above information was available to Ambac prior to November 2009. In addition, as noted above, the relevant RMBS securities had all been downgraded to junk status by February 2009. (Def.'s Aff. In Supp., Exs. 32-36.) This information should, at the least, have suggested to Ambac, a sophisticated financial institution, that there was a probability that it had been defrauded by Countrywide by the same wrongdoing, including pervasive deviation from origination and underwriting standards.

In so holding, the court rejects Ambac's contention that the public disclosures at issue here are distinguishable from the public disclosures that supported the finding of inquiry notice in the Aozora cases. Ambac argues that the disclosures in the Aozora cases were "directed to either the particular instrument in controversy or the particular collateral backing that instrument." (Plaintiffs' Supplemental Letter Brief [Pls.' Supp. Br.], at 3 [NYSCEF Doc. No.

100].) The Aozora cases do not, however, require public disclosure as to a specific instrument to establish inquiry notice. In each of those cases, there were public disclosures that referenced a specific instrument at issue. (See, e.g. Aozora v Credit Suisse, 144 AD3d at 438 ["There were other published reports that should have put a sophisticated financial investor like Aozora on notice of a possible fraud. In March 2009, Time magazine published an article about Jupiter V [a CDO at issue] entitled 'One Bad Bond' . . . ."].) While the Court considered this information, among other public disclosures, the Court did not state or even suggest that the public disclosures that referenced a specific instrument were determinative of the finding of inquiry notice or given greater weight in the Court's analysis. This court has also found, without relying on evidence of a disclosure of fraud specific to the RMBS instrument or underlying loans at issue, that the plaintiff was on inquiry notice as of November 2009. (IKB Intl. S.A., 2014 WL 5471650, at *5; see also CIFG, 128 AD3d at 608 [CDO].)

Importantly, the Aozora cases affirmed that the objective test for inquiry notice is whether the totality of the given circumstances suggest the probability of fraud. (See, e.g. Aozora v Deutsche Bank, 137 AD3d at 689, citing Gutkin, 128 AD3d at 688.) Here, the circumstances suggest the probability of fraud, even in the absence of evidence of a public disclosure addressed to the Ambac insured RMBS transactions and underlying mortgage loans. Put another way, given the widely publicized disclosures between 2006 and 2009 concerning pervasive fraud at Countrywide, it would have been objectively unreasonable for a person of ordinary intelligence not to conclude that there was a probability of fraud with respect to the Ambac transactions and loans.

The court accordingly holds that Countrywide has met its burden of making a prima facie showing that Ambac was on inquiry notice of its fraud claim prior to November 21, 2009—that

is, more than two years before November 21, 2011. The burden accordingly shifts to Ambac to show that, or to raise a triable issue of fact as to whether, even if it had exercised reasonable diligence, it could not have discovered the basis for its fraud claim. (See Aozora Bank v Deutsche Bank, 137 AD3d at 689.) Ambac fails to meet this burden.

Ambac does not dispute that the information discussed above was publicly available prior to November 2009. Ambac also does not claim that it conducted an investigation at that time based upon the public disclosures. Rather, Ambac contends that the two year period could not begin to run until it "reasonably could have performed a loan-level analysis, which was not until 2010." (Pls.' Memo. In Opp, at 18 [emphasis in original]; see id., at 10-18.) More particularly, Ambac contends that inquiry notice was not triggered until Ambac could reasonably have conducted a loan level analysis to identify individual loans in the RMBS transactions that breached Countrywide's representations. (Id., at 11.) Similarly, Ambac contends that it could not have exercised reasonable diligence without the ability to conduct a loan level analysis. It thus asserts that "[w]ithout loan files, the exercise of reasonable diligence did not enable Ambac to conduct a loan-level analysis of the Transactions by November 2009." (Id.) According to Ambac, until it was able "to identify loan-level misrepresentations, Ambac could not have discovered the basis for a viable fraud claim . . . ." (Id., at 15.) This contention is, in turn, premised upon Ambac's argument that loan level allegations were required to sufficiently plead its fraud claim. (Id.)

Ambac appears to conflate the standard for determining whether a party is on inquiry notice with the standard for pleading a fraud cause of action with particularity. Inquiry notice does not require actual knowledge of the fraud or of each of the elements constituting the fraud. As explained by the Appellate Division, "a plaintiff need only be aware of enough operative

facts so that, with reasonable diligence, [it] could have discovered the fraud." (Lucas-Plaza Hous. Dev. Corp. v Corey, 23 AD3d 217, 218 [1st Dept 2015] [internal citation and quotation marks omitted].) Ambac's contrary argument—that "the statute of limitations does not begin to run until plaintiff is on notice of every element of the claim"—relies principally on Phoenix Light SF Ltd. v ACE Securities Corp. (39 Misc 3d 1218[A], 2013 WL 1788007, at *12 [Sup Ct, NY County 2013]). (See Pls.' Memo. In Opp, at 10.) While Phoenix Light indicates that the statute of limitations is not triggered until the plaintiff has notice of every element of the fraud claim, the decision applies an actual notice standard under foreign (Irish and Caymans and Delaware and German) law. (2013 WL 1788007, at *4-5.) The decision is inapposite, as it does not address the inquiry notice standard.

Ambac's claim that loan level allegations were required to sufficiently plead its fraud claim is also without merit. According to Ambac, as of November 2009 "courts had shut their doors to RMBS plaintiffs unable to connect general allegations of wrongful conduct to the specific transactions or loans at issue." (Pls.' Memo. In Opp., at 15.) Ambac does not cite any New York case decided at or about that time. (Id., at 15.) Nor do the 2009 federal cases cited by Ambac hold that, in order to adequately plead an RMBS fraud claim, the plaintiff must allege deviations from origination or underwriting standards in specific loans. (See id., citing Plumbers' Union Local No. 12 Pension Fund v Nomura Asset Acceptance Corp., 658 F Supp 2d 299, [D Mass 2009], revd 632 F3d 762 [1st Cir 2011]; United Guar. Mtge. Indem. Co. v Countrywide Fin. Corp., 660 F Supp 2d 1163, 1188-1189 [CD Cal 2009].) There was no basis on which Ambac could reasonably have concluded, as of November 2009, that the law was settled that pleading of deviations in specific loans was required, or that a loan level analysis was required to meet such a pleading standard. Nor is there any evidence in the record of this motion

that Ambac actually failed to pursue its fraud claim sooner based on an understanding that it was required to plead loan level deviations.[2]

Ambac also suggests that numerous cases continued, after 2009, to hold that a fraud claim is not sufficiently pleaded absent allegations tying the alleged misconduct to specific loans. (See Pls.' Memo. In Opp., at 15-17.)[3] As this court has previously explained, although there are cases that have dismissed complaints for failure to plead a sufficient nexus between deviations from underwriting standards and specific loans, the weight of authority holds that allegations of systematic underwriting failure are sufficient to state a fraud claim and need not be accompanied by reference to specific loans in the RMBS securitization. (See e.g. Allstate Ins. Co. v Credit Suisse Securities (USA) LLC, 42 Misc 3d 1220 [A], 2014 WL 432458, at *12 [Sup Ct, NY County 2014] [collecting state and federal authorities].)] Here, the court will not, and need not, again undertake an exhaustive review of the pleading standard because, as held above, the standard for determining whether a plaintiff is on inquiry notice is different than the pleading standard for fraud.

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[2] In fact, it does not appear that the fraud claim that Ambac ultimately pleaded is based, or substantially relies, on the loan level analysis ultimately undertaken by Ambac. Ambac's fraud claim is based principally on allegations of systemic underwriting failures, while the loan specific allegations pleaded by Ambac are limited. Ambac does not plead loan level allegations until page 75 of its 83 page complaint. (Compl., ¶¶ 203-208.) In that section of the complaint, Ambac alleges that an expert analysis of 491 loans from the five transactions (each of which securitized thousands of loans) "revealed 432 loans that conform neither to the description of the loan underwriting characteristics provided by Countrywide in the Prospectus Supplements and loan tapes nor to the representations and warranties made by Countrywide about the mortgage loan collateral." (Id., ¶ 205) Ambac explains that its analysis "confirm[s] Countrywide's abandonment of underwriting guidelines and the falsity of its representations that securitized loans complied with those guidelines." (Id., ¶ 208.) It thus appears that the loan level analysis is offered to provide evidentiary support for Ambac's principal allegations of Countrywide's systemic deviation from underwriting and origination standards, rather than to provide an independent basis for the fraud claim or to supply any element of the fraud claim.

[3] For example, Ambac cites N.J. Carpenters Health Fund v Novastar Mtge., Inc. (No. 08 Civ 5310 [DAB], 2012 WL 1076143, *4 [SD NY 2012], revd 709 F3d 109 [2d Cir 2013]), in which the District Court held that the plaintiff's fraud claims were not pleaded with sufficient particularity because, among other things, the plaintiff failed to identify specific loan level deviations from underwriting guidelines. (Pls.' Memo. In Opp., at 15 n 14.) Ambac notes that this case was reversed but does not address the Second Circuit's rejection of the District Court's reasoning that allegations of loan specific deviations were required to meet the pleading standard. (709 F3d at 121-125.)

The court rejects Ambac's further argument that an issue of fact exists as to whether it could have identified loan level misrepresentations prior to 2010. (Pls.' Memo. In Opp., at 11-15.) Specifically, Ambac raises issues concerning its ability to obtain loan files from the trustee pursuant to the governing pooling and servicing agreements; to compel the trustee to obtain loan files from the servicer; and to compel Countrywide to provide loan files. (Id., at 11-13.) Ambac also raises issues as to whether there was technology reasonably available to it prior to 2010 that would have enabled it to conduct a loan level analysis without the loan files. (Id., at 13-15.) The court need not resolve these issues in order to determine whether Ambac was on inquiry notice prior to November 2009. As discussed above, a finding of inquiry notice does not require evidence that Ambac had knowledge of misrepresentations with respect to specific loans. Put another way, the issue of when Ambac may first have obtained access to loan files or loan analysis technology is irrelevant to the determination as to when Ambac was on inquiry notice.

Significantly also, notwithstanding the ratings downgrades to the certificates and the extensive public disclosures available by November 2009, Ambac does not submit evidence that it undertook any efforts to conduct an investigation in or prior to November 2009, when it was put on inquiry notice. (See Affidavit of Patrick McCormick in Opposition to Defendant's Motion to Dismiss [McCormick Aff.] ¶¶ 5-8 [NYSCEF Doc. No. 38].)[4] Nor does Ambac persuasively argue that it could not have conducted a sufficient inquiry in 2009 or that any inquiry that it did conduct, or could have conducted, was or would have been insufficient to identify the fraud. For the reasons discussed above, an adequate investigation of Ambac's fraud

[4] As set forth in Countrywide's Reply, Ambac made public disclosures in 2008 that it was investigating certain claims against originators such as Countrywide. (Def.'s Reply Memo., at 8 [NYSCEF Doc. No. 65].) In opposition to the motion, however, Ambac does not contend that it undertook an investigation at that time or in 2009.

claim did not require a loan level analysis to identify loan level misrepresentations.[5] Ambac does not, however, advance any basis, other than its alleged inability to conduct a loan level analysis, for its failure to conduct an investigation at the time it was put on inquiry notice. Nor does Ambac make any showing that an investigation other than a loan level analysis would not have uncovered the fraud, particularly given the breadth of the public disclosures as to Countrywide's pervasive deviation from origination and underwriting standards. Here, as in prior RMBS cases, "[b]ecause [Ambac] possessed information suggesting the probability that it had been defrauded, and failed to conduct an inquiry at that time, knowledge of the fraud is imputed" to it. (Aozora v Credit Suisse, 144 AD3d at 410, citing CIFG, 128 AD3d at 608; see also Gutkin, 85 AD3d at 688.)

The court holds that Ambac does not otherwise raise a question of law or fact that precludes determination on this motion of whether Ambac's fraud claim is time-barred. (Pls.' Supp. Letter Br., at 2.) Dismissal on this motion is proper because, as held above, the undisputed facts establish that Ambac was on inquiry notice as of November 2009, and Ambac fails to establish that, or to raise a triable issue of fact as to whether, the exercise of reasonable diligence would not have uncovered the basis for Ambac's fraud claim. (See MBI, 151 AD3d at 116 [holding that it is proper "'to dismiss a fraud claim on a motion to dismiss pursuant to the two-year discovery rule when the alleged facts do establish that a duty of inquiry existed and that an inquiry was not pursued,'" quoting Koch , 699 F3d at 155-156].) This case accordingly is not one in which "it does not conclusively appear that a plaintiff had knowledge of facts from which

[5] The court further notes that even if it were to credit Ambac's contention that it needed to "identify loan-level misrepresentations" in order to discover the basis for its fraud claim, Ambac concedes that it could have obtained loan files or conducted a loan level analysis starting in 2010 but makes no showing that it did so even then. (Pls.' Memo. In Opp., at 12-13, 15, 18.) Ambac also does not specifically identify any efforts to obtain loan files prior to 2012. (McCormick Aff. ¶¶ 5-8.)

the fraud could reasonably be inferred," and the issue of timeliness must therefore be left to the trier of fact. (See Sargiss v Magarelli, 12 NY3d 527, 532 [2009] [internal quotation marks and citation omitted]; see also Norddeutsche Landesbank Gironzentrale v Tilton, 149 AD3d 152, 161 [1st Dept 2017] [denying a motion to dismiss based on the statute of limitations, the court reasoning that the evidence of public disclosures presented by the defendants "can be interpreted in a myriad of ways and does not facially clash with plaintiffs' position"].) As in CIFG and the Aozora cases, resolution of the inquiry notice issue is proper on this motion to dismiss.

Ambac's opposition also relies on the doctrine of judicial estoppel. (Pls.' Memo. In Opp, at 5-10.) "The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. . . . The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise." (Jones Lang Wooten USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 177 [1st Dept 1998] [internal citations and quotation marks omitted].)

Ambac contends that Countrywide successfully argued in a separate federal action "that public knowledge about its general practices in 2009 did not permit an inference of fraud in a specific RMBS transaction," and that Countrywide is accordingly "estopped from maintaining the contrary here." (Pls.' Memo. In Opp., at 8, citing Footbridge Ltd. Trust v Countrywide Home Loans, Inc., Index No. 09 Civ 4050 [PKC], 2010 WL 3790810 [SD NY Sept. 28, 2010] [Footbridge].) Contrary to Ambac's contention, the doctrine of judicial estoppel is inapplicable because the positions taken by Countrywide in the two actions are not actually inconsistent.

In Footbridge, the District Court granted Countrywide's motion to dismiss federal securities and common law fraud claims brought by an RMBS investor. The Court undertook a detailed analysis of the specific factual allegations pleaded in the plaintiff's complaint and determined that the plaintiff had failed to plead its claims with the particularity required by the heightened pleading standards imposed by the Private Securities Litigation Reform Act and Federal Rules of Civil Procedure rules 9 (b) and 12 (b) (6). (2010 WL 3790810, at *6-8.) While the Court noted that "[m]any of the allegations are taken from press reports relating to charges against Countrywide that have no relation to the claims in this case," it did not address the sufficiency of such allegations to disclose, or put the plaintiff on notice of, circumstances indicating the probability of fraud—the relevant issue on this motion. (Id., at *5.) Rather, the Court's holdings in Footbridge that were favorable to Countrywide concerned whether the plaintiff's allegations were sufficiently specific under the applicable pleading standard.

The issues before the court here and before the District Court in Footbridge are not sufficiently similar to render Countrywide's positions inconsistent. In order to prevail on this motion, Countrywide is not required to establish that the publicly available information supporting inquiry notice prior to November 21, 2009 states a claim for fraud. Likewise, the Footbridge plaintiff could not have prevailed by arguing that its allegations were adequate to state a claim for fraud merely because they would "suggest to a person of ordinary intelligence the probability that he has been defrauded." (See Gutkin, 85 AD3d at 688.) Thus, even assuming that the publicly available information supporting inquiry notice here is similar to the public disclosures pleaded by the Footbridge plaintiff in support of its fraud claim, the different

legal standards at issue render the comparison irrelevant. There is no basis for the application of judicial estoppel here.[6]

The court has considered plaintiffs' remaining contentions regarding the statute of limitations, and finds them to be without merit. As the court holds that the action is time-barred, the court need not address the additional bases for defendant's motion to dismiss[7] (Def.'s Memo. In Supp., at 21-25.)

It is accordingly hereby ORDERED that the motion of defendant Countrywide Home Loans, Inc. to dismiss the complaint of Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation is granted to the extent of dismissing the complaint with prejudice.

This constitutes the decision and order of the court.

Dated: December 8, 2020
New York, New York

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE

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[6] The cases cited by Ambac only support the application of the doctrine where the issues are the same. (Pls.' Supp. Letter Br., at 2, citing Matter of Brooke, 28 NY3d 1, 17 [2016] [judicial estoppel precluded respondent's position in visitation proceeding "that petitioner did not have standing [as a legal parent] to seek custody or visitation" where respondent prevailed in prior support proceeding by establishing "that petitioner was the child's legal parent"]; Centech LLC v Yippie Holdings, LLC, 138 AD3d 569, 569 [1st Dept 2016] [holding that judicial estoppel applied where defendant obtained prior rulings that the transfer of the deed was null and void and thus defendant was "judicially estopped from now contesting such nullification simply because it suits its current litigation posture"]. Compare Ferring v Merrill Lynch & Co., Inc., 244 AD2d 204, 204 [1st Dept 1997] ["The court properly refused to dismiss the third cause of action alleging disability discrimination. The purportedly inconsistent position that plaintiff took before the Social Security Administration in applying for disability benefits was not asserted against defendant and did not involve the same standard as the one at issue herein."].)

[7] These issues were previously addressed by the court in Ambac Assur. Corp. v Countrywide Home Loans, Inc, 54 Misc 3d 1215(A), 2016 WL 8254810, at *4-12 (justifiable reliance), *12-14 (rescissory damages) (Sup Ct, NY County 2016). At oral argument on this motion, the court asked the parties to provide additional argument as to any factual or other significant differences between that action and this action with respect to the common issues. (November 18, 2015 Transcript, 2:21-3:2 [NYSCEF Doc. No. 75].) The parties did not bring any differences to the court's attention.