

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

ACE SECURITIES CORP.,

Appellant,

-against-

No. 85

DB STRUCTURED PRODUCTS, INC.,

Respondent.

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 30, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

PAUL D. CLEMENT, ESQ.
BANCROFT PLLC
Attorneys for Appellant HSBC
1919 M Street NW
Suite 470
Washington, DC 20036

DAVID J. WOLL, ESQ.
SIMPSON THACHER & BARTLETT LLP
Attorneys for Respondent
425 Lexington Avenue
New York, NY 10017

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 85, ACE
2 Securities.

3 Okay. Counselor, would you like any
4 rebuttal time?

5 MR. CLEMENT: Yes, four minutes, Your
6 Honor, please.

7 CHIEF JUDGE LIPPMAN: You have it. Go
8 ahead.

9 MR. CLEMENT: Mr. Chief Judge, and may it
10 please the court. The contracts at issue here impose
11 an obligation on Deutsche Bank to cure or repurchase
12 loans when they learn of a defect. That obligation
13 arises whether Deutsche Bank learns of the deficien -
14 - - deficiency itself or if it's notified by a third
15 party such as the trustee. And that obligate - - -

16 CHIEF JUDGE LIPPMAN: When - - - counsel,
17 when does the clock start ticking?

18 MR. CLEMENT: The stock - - - the clock
19 starts ticking on the notification obligation on,
20 say, the trustee when they become aware of the
21 information, and then they have to act promptly. But
22 then once they notified the sponsor, in this case
23 Deutsche Bank, then the clock starts ticking on their
24 cure or repurchase obligation. And they have those
25 options, and if they do either, if they either cure

1 within sixty days or they repurchase within ninety
2 days, then there's no breach of the contract
3 whatsoever.

4 And I think if we had tried to sue, for
5 example, on - - - and on this theory that there was a
6 breach of the reps and warranties in the abstract
7 without going through this process, I think Deutsche
8 Bank would be the first to come in and say what are
9 you talking about? You can't do that. There's not a
10 breach of the PSA or the MLPA until we breach our
11 obligation to cure or repurchase.

12 So that is really what we are suing under
13 in this case, and that's an obligation that arises
14 after they fail to cure or repurchase.

15 And I think it's important to recognize
16 they want to tell you, well, there's some language in
17 203 and - - - and Section 7 of the MLPA that talks
18 about the sole remedy. But that just shows that the
19 way that you try to address concerns about the reps
20 and warranties or a missing document or a deficient
21 document is to put them to their obligation to cure
22 or repurchase. And only if they fail to cure or
23 repurchase do you then go to the courts with an
24 action that at that point certainly accrues and then
25 the ordinary statute of limitations would apply.

1 JUDGE RIVERA: And when you bring that
2 action your sole remedy is repurchase or cure?

3 MR. CLEMENT: Well, I think in a case like
4 this I - - - I think we could - - - there might be
5 debates about that, which is to say I think what
6 we've looked for - - -

7 JUDGE RIVERA: I thought that was the
8 agreement, that there's a particular remedy and it's
9 a sole remedy.

10 MR. CLEMENT: Yeah. And I - - - and I
11 think we've - - - we've looked for specific
12 performance here. So we're trying to get them to
13 essentially repurchase because at that point the time
14 period for the cure has expired.

15 JUDGE RIVERA: Um-hum.

16 MR. CLEMENT: Now, you know, whether in - -
17 - in some action based on some action of the - - - of
18 the bank there might be another remedy available. We
19 can have that debate. I mean that's - - - that's - -
20 - I think the important thing, though, about the sole
21 remedy language is that it's - - - it's not like this
22 cure or repurchase obligation is only triggered in
23 those situations where there's been a prelude to
24 litigation because as sugg - - - as suggested, one of
25 the things I think is important about this cure or

1 repurchase obligation is that it's self-executing.

2 If Deutsche Bank comes to its own knowledge
3 that there are documents missing or there are
4 deficient documents or there is a problem with the -
5 - - with the reps and warranties, at that point under
6 the contract they're supposed to cure or repurchase,
7 essentially, on their own. And you could imagine a
8 situation where a regulator comes in and points out a
9 number of flaws and Deutsche Bank says, yeah, we're
10 going to remedy about half of these; we're not going
11 to remedy the other half. Then you could have a suit
12 that would have - - - that wouldn't even be initiated
13 by somebody as a prelude to litigation like the
14 trustee saying, look, we have a problem with these
15 particular loans. And so - - -

16 JUDGE FAHEY: Und - - - under the UCC, it -
17 - - it - - - the warr - - - just to go over the
18 warranty and representation problem, usually the
19 breach would occur when the tender of delivery would
20 occur, but - - - but except if a warranty explicitly
21 extends to a future performance. And isn't that the
22 core problem here? Isn't that the issue that really
23 comes - - - we - - - we have to decide, if - - - if
24 that's the case here, whether this breach occurred in
25 some explicit future performance. And that's where

1 your difficulty is, I think.

2 MR. CLEMENT: I - - - I don't - - -

3 JUDGE FAHEY: As to how explicit the - - -
4 the future performances are, I - - - I don't see it
5 in there.

6 MR. CLEMENT: Well, certainly, some of
7 these reps and warranties, and I'd point you to rep
8 and warranty 22, for example, I think do contemplate
9 future conditions. But I don't think - - -

10 JUDGE FAHEY: The problem is is that I'm
11 assuming everything that's - - - is false in the
12 contract. So if I - - - if I work under that
13 assumption then the breach occ - - - occurred, I - -
14 - I don't know, March 2006, I think?

15 MR. CLEMENT: Right.

16 JUDGE FAHEY: So not in 2012. So - - - so
17 assuming worst-case scenario for them, how do we get
18 to a - - - a breach of a - - - a warranty that
19 extends to a future performance?

20 MR. CLEMENT: Because I think the critical
21 thing is, Your Honor, we're not here suing for a
22 breach of the rep and the warranty.

23 JUDGE FAHEY: Um-hum.

24 MR. CLEMENT: That's not our cause of
25 action. Our cause of action is to sue on the breach

1 of the cure or repurchase obligation, and that is a
2 distinct obligation. Indeed, it's our only way to
3 try to get any remedy. But as I said, I think it is
4 - - - it's - - - it's not analogous, for example, to
5 a notice of claim provision, because there you have a
6 breach.

7 JUDGE FAHEY: Right.

8 MR. CLEMENT: And there's something you're
9 supposed to do before you sue for the breach. The
10 difference here is, even if in theory we think
11 there's a rep and warranty that's inaccurate, we
12 don't have a breach of the contract until they tell
13 us to go away once we bring it to their attention and
14 ask them to cure or repurchase. And if that - - -

15 JUDGE FAHEY: This is a - - - a torturous
16 intellectual problem because you - - - you get to the
17 next level then. Assuming it does - - - taking it as
18 you say it then it's not a substantive condition prec
19 - - - precedent. So if it's not a substantive
20 condition precedent, then it doesn't delay the
21 statute of limitations. So it's a on - - - on the
22 cure and repurchase argument. So it's a - - - I'm
23 back in - - -

24 MR. CLEMENT: But see, that's why I think
25 it is - - -

1 JUDGE FAHEY: I'm back in law school again
2 and deeply, yeah.

3 MR. CLEMENT: And I hate to induce a
4 headache. But, I mean, I do think that this is
5 better understood as a - - - as a substantive
6 condition precedent, and the reason I say that - - -

7 JUDGE FAHEY: Um-hum.

8 MR. CLEMENT: - - - is precisely - - -
9 because I think the difference is one way of thinking
10 about it is to ask yourself whether there's a breach.
11 And if this were just a condition precedent, which I
12 think a classic form of that would be a notice of
13 claim provision - - -

14 JUDGE FAHEY: Um-hum.

15 MR. CLEMENT: - - - then there is a breach.
16 You just have to do something before you can get into
17 court to - - - to - - - to address it.

18 JUDGE FAHEY: Right. But the other side of
19 it - - -

20 MR. CLEMENT: In a condition - - -

21 JUDGE FAHEY: The other side of it is - - -
22 is - - - is it's either a substantive condition
23 precedent because performance was demanded and not
24 done or it's a remedy for failure to perform, and
25 then you're back into the - - - the procedural

1 condition precedent and doesn't delay the statute of
2 limitations.

3 MR. CLEMENT: But, right. And I - - - I
4 suppose that explains why I'm trying to say that I
5 think it is best understood as a subst - - -
6 substantive condition precedent, and I think that's
7 borne out by the fact that we don't even have a
8 breach until they refuse to do this.

9 And I think it's also borne out, with all
10 due respect, by common sense, because this is a
11 contract that extends for thirty years. It
12 essentially guarantees a payment stream for thirty
13 years, and it would be very odd for the investors to
14 put themselves in a position where they're
15 unprotected for the last twenty-four years of the con
16 - - - contractual relationship. And I think even
17 Deutsche Bank sort of has to concede at least
18 implicitly - - -

19 JUDGE STEIN: But they're not - - - but
20 they're not unprotected for those years. They just
21 have to discover the - - - the - - - the problem, the
22 underlying problem which, if it exists, exists at
23 that time. I mean, you know, your - - - your
24 agreement doesn't place the burden initially on any
25 party to discover the underlying problems with these

1 mortgages, right. But that doesn't mean that - - -
2 that for, you know, for six years or whatever that
3 nobody has to do anything. It just means that, you
4 know, that - - - that - - - that they don't have to
5 do it initially, right? I mean - - -

6 MR. CLEMENT: Well, I - - - I don't think
7 Deutsche Bank really expected or even wanted its
8 potential investors to do due diligence either before
9 they purchased or in the first six years. And just
10 to put that in concrete terms, I mean, we're talking
11 about 8,800 loans here, and we're talking about
12 representations and warranties that go not just to
13 the loans but to the underlying properties.

14 So if you look at rep 24 and rep 25,
15 they're talking about the condition of the underlying
16 property. Now, if you really were expected as an
17 investor to give visit 8,800 properties and make sure
18 that the swimming pool was indeed within the property
19 lines or the - - -

20 JUDGE RIVERA: Well, that just goes to the
21 risk, right? If I choose not to check the underlying
22 aspects of my investment and I - - - and I lose at
23 the casino, I lose.

24 MR. CLEMENT: Right.

25 JUDGE RIVERA: Because the time ends.

1 MR. CLEMENT: But - - - but I don't think
2 the investors here were at the casino taking that
3 risk, and I think - - -

4 JUDGE RIVERA: Well, let me ask you this.
5 Is it possible - - - let - - - let - - - let's go
6 beyond the six years. As you mentioned - - -

7 MR. CLEMENT: Sure.

8 JUDGE RIVERA: - - - it's the thirty-year
9 period. Is it possible that there was not a problem,
10 there's not a breach of the R&Ws within the six-year
11 window but that something happens and then there is a
12 breach later. Is that possible?

13 MR. CLEMENT: That - - - that is certainly
14 - - -

15 JUDGE RIVERA: Or only breaches up front,
16 as you're saying, the conditions, there wasn't a
17 pool.

18 MR. CLEMENT: No, I - - - I - - - I think
19 there are situations where the breach would not be
20 actually realized until later. I think that's
21 because some of the reps look to future performance.
22 I also think because with respect to missing
23 documents, defective documents, and breaches, one of
24 the responsibilities is they only count if they're
25 material. And you can imagine something that's not

1 material in the second year but actually only becomes
2 material later, and that's really at the point where
3 I think the parties wanted these provisions to kick
4 in.

5 JUDGE RIVERA: What - - - what might be an
6 example of that materiality developing over time into
7 the future?

8 MR. CLEMENT: Well, I - - - I think the
9 most concrete example is going to be - - - where a
10 lot of this is really going to be material is if a
11 significant number of the loans in the port - - - in
12 the portfolio start to underperform. And I think
13 that's the basic bargain that the parties struck
14 here, which is they really didn't want any - - -
15 either side to spend lots and lots of time doing due
16 diligence on these things beca - - -

17 JUDGE RIVERA: Well, they're making a lot
18 of money. Yeah.

19 MR. CLEMENT: Well, sure. And - - - and -
20 - - and in fairness, if the loans perform and the
21 payment stream is realized then nobody's going to
22 complain.

23 JUDGE PIGOTT: Yeah. But there's no - - -

24 MR. CLEMENT: That's a perfectly rationale
25 - - -

1 JUDGE RIVERA: Um-hum.

2 MR. CLEMENT: - - - economic enterprise to
3 say that's the way we wanted to go. And if there's a
4 big problem - - - and whether it's in year five or
5 year seven, then I think what the parties
6 contemplated, and I think what makes perfect sense,
7 is at that point that you have a reckoning and you
8 figure out, all right, did these loans nonperform
9 because of people losing their jobs that they had?
10 In which case, that's the credit risk that the
11 investors took, and they're on the hook for that. Or
12 did these loans nonperform because the person never
13 had a job in the first place even though it said
14 right there in the reps and warranties that the
15 person had a job and a certain income.

16 JUDGE RIVERA: So then investors are always
17 protecting themselves.

18 MR. CLEMENT: What's that?

19 JUDGE RIVERA: It - - - it sounds like the
20 investor has no downside.

21 MR. CLEMENT: Yes. The - - -

22 JUDGE RIVERA: So what's the risk?

23 MR. CLEMENT: No, no, no. The investor has
24 the downside for the credit risk, which is - - - so
25 if on day one somebody said I'm a dentist and they

1 were, in fact, a dentist but then they lose their job
2 sometime down the line and then can't pay, that's the
3 investor's risk.

4 JUDGE FAHEY: But, no.

5 MR. CLEMENT: The investor's going to take
6 the risk.

7 JUDGE FAHEY: But that's - - - that's what
8 you're saying, though. You're saying is the - - -
9 the underwriting principles that they used here
10 created this situation, right?

11 MR. CLEMENT: Yeah, and if - - -

12 JUDGE FAHEY: So if they're false to begin
13 with, then couldn't they - - - couldn't you cure or
14 repurchase on any of these mortgages in 2007 or 2008
15 because they were all bad? So you could have made
16 the demand at any time. So that - - - so that you
17 get back to the problem of when does it kick in.

18 MR. CLEMENT: It - - - it kicks in when we
19 have notice and when - - - and then at that point
20 it's our obligation to go to Deutsche Bank and say
21 here's the problem; you need to cure or repurchase.

22 JUDGE FAHEY: Well, okay.

23 MR. CLEMENT: And only if they fail to do
24 that is there a breach of the contract at all.

25 JUDGE STEIN: Isn't there a proof problem

1 and - - - and the very reason why we have the statute
2 of limitations we have so seven, eight, nine, ten
3 years later, isn't there a - - - a proof problem
4 with, well, did - - - you know, did they have
5 sufficient income or didn't they have sufficient
6 income.

7 MR. CLEMENT: I - - - I - - - I don't think
8 so, Your Honor, with respect to most of this stuff.
9 I mean if there's - - - take - - - take missing
10 documents. If there's documents missing they're
11 either there or they're not, and that's going to be
12 true in year two and that's going to be true in year
13 eight. With respect to many of these things, I think
14 it's going to be relatively easy to ascertain that
15 either the guidelines weren't what they said they
16 were or people's incomes was radically different than
17 what was reported. I don't think there's a huge
18 problem with that, and you've got to counterbalance
19 that against the fact that I think this is a
20 situation where rationally the parties didn't want
21 there to be a reckoning, didn't want to have to
22 figure all this out unless and until there was a
23 reason to do so.

24 JUDGE RIVERA: They were losing money. And
25 so let me - - - I know your light is out but that

1 example about the - - - the dentist who then is not a
2 dentist.

3 MR. CLEMENT: Right, right.

4 JUDGE RIVERA: Or loses the employment,
5 doesn't get another job that pays more.

6 MR. CLEMENT: Right.

7 JUDGE RIVERA: Or hits the lotto and
8 doesn't need to be a dentist anymore. In any event,
9 how - - - how is that a breach of the R&W? Is it
10 because you're - - -

11 MR. CLEMENT: You're - - -

12 JUDGE RIVERA: - - - promising there will
13 always be enough income?

14 MR. CLEMENT: No, no, no, no. I - - - I -
15 - - I must have misspoke because the point is we take
16 the risk that they lose their job as a dentist. We
17 take the risk that they go off to the Congo. We take
18 the risk - - - all that stuff we take that risk.
19 What we don't take the risk of is they were never a
20 dentist. And that was just a misrepresentation,
21 perhaps by the person.

22 JUDGE RIVERA: And the investor says I - -
23 - I - - - I'm not going to worry myself about it
24 until such time as I'm now losing money. And now I'm
25 going to look to see if there's a problem, because I

1 need them to resolve it. So, again, it doesn't sound
2 like you're ever - - - and you don't want the time
3 frame to apply until - - -

4 MR. CLEMENT: No. Bec - - -

5 JUDGE RIVERA: - - - you tell them to cure
6 or - - - or repurchase and they refuse. So where - -
7 - I - - - I guess I'm still not understanding where
8 is the risk? I understand the - - -

9 MR. CLEMENT: The - - - the - - - the - - -

10 JUDGE RIVERA: - - - other part of the
11 risk.

12 MR. CLEMENT: The risk is - - -

13 JUDGE RIVERA: But related to the breach of
14 the R&W.

15 MR. CLEMENT: The risk is that so we wait
16 and we - - - we wait until there's a problem.

17 JUDGE RIVERA: Right.

18 MR. CLEMENT: At that point we take a look
19 at, look, is this shame on me or is this shame on
20 them. Because - - -

21 JUDGE RIVERA: Right.

22 MR. CLEMENT: - - - is this something that
23 they misrepresented? Is this documents that they
24 said were in the file that aren't there? Or is this
25 something that happened after the fact? So the risk

1 that we bear is, first of all, anything that happens
2 after the fact, that's our risk. And the second risk
3 is when we do that, I mean, at that point we have to
4 bring - - - you know, bring - - -

5 JUDGE RIVERA: But what I'm saying, that
6 risk of the - - - that there was the fraud or they
7 lied, that that R&W up front is - - - is breached,
8 you're not really ever taking any risk, any downside
9 of it, because you're - - - you're saying I always
10 have the opportunity to go back and ask them to
11 repurchase or cure. And I'm trying to figure out why
12 they would ever enter that, other than they're going
13 to make a lot of money off of it, as are you.

14 MR. CLEMENT: No, no. The - - -

15 JUDGE RIVERA: No question in that.

16 MR. CLEMENT: But - - - but - - - but that
17 was the bargain that was struck. And the reason that
18 - - - I mean, they made those representations. They
19 - - - they have an obligation to cure or repurchase.
20 I - - - we think that obligation runs through the
21 course of this. And I - - - and I - - - the last
22 thing I'll say about this because I know my time is
23 up - - -

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 MR. CLEMENT: - - - but I think Judge

1 Kornreich got this right. Which is if you take a
2 thirty-year engagement and then you put, say, they
3 only have six years to figure this out, the only way
4 to understand that disconnect is you are putting an
5 implicit duty of due diligence, and nobody wanted
6 that here. Nobody wanted the investors to have to
7 take the trouble to investigate those 8,800
8 representations and 8,000 properties. They didn't
9 want that at day one, but they didn't want that on
10 day five if there wasn't a problem either.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. CLEMENT: Thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: Thank you. You'll
14 have your rebuttal.

15 Counsel.

16 MR. WOLL: Thank you, Your Honor. May it
17 please the court, David Woll on behalf of defendant-
18 respondent DB Structured Products.

19 CHIEF JUDGE LIPPMAN: Who's taking the risk
20 here, counsel?

21 MR. WOLL: Well, Your Honor, the - - - the
22 risk of nonperformance is clearly the risk of the
23 investors. The reps and warranties did not guarantee
24 performance of the loans. The reps and warranties,
25 which were made as of the closing date, as Judge

1 Fahey was indicating, were as to facts that existed
2 as of the closing date, March 28th.

3 JUDGE PIGOTT: Mr. Clement concedes that,
4 as I understand it. My - - - the - - - the - - - is
5 your argument essentially that the cure and replace -
6 - - or repurchase, pardon me, expires after six
7 years? Then you no longer have an obligation to cure
8 or repurchase?

9 MR. CLEMENT: That's correct, Your Honor.
10 The cure or repurchase remedy is a remedy for breach
11 of rep or warranty that occurred as of the closing
12 date - - -

13 JUDGE PIGOTT: If you have an outlier - - -
14 I - - - I think his argument is if you have an
15 outlier loan for whatever reason, you - - - you
16 didn't intend to include it in the 8,500 or 8,800 but
17 you did, and either the property's not there or the -
18 - - the - - - the - - - the - - - the purchaser is
19 fictional, you're saying you should have had due
20 diligence and found that out. You, the - - - and
21 it's not our obligation that we bundled it with the
22 other 8,500.

23 MR. WOLL: That's - - - that - - - that's
24 true, Your Honor. With respect to the
25 representations and warranties which accrue as of the

1 closing date, which is true in any representation and
2 warranty case, and the law in this state has been
3 this way for over 140 years, the claims accrue on the
4 date that the representations and warranties are made
5 regardless of discovery and regardless of when a loss
6 occurs.

7 JUDGE FAHEY: Well, there are some
8 contracts, though, like - - - like insurance
9 contracts and reinsurance contracts where that
10 doesn't happen. You should address that.

11 MR. WOLL: Yes, Judge Fahey.

12 JUDGE FAHEY: Yeah.

13 MR. WOLL: Thank you. And the Second
14 Circuit has the Continental decision, which is
15 discussed in the briefing.

16 JUDGE FAHEY: Right.

17 MR. WOLL: And the insurance relationship
18 addressed in the Continental decision is very
19 different from the relationship here. And - - - and
20 the Second Circuit made clear that they were applying
21 a rule that applies in the insurance context where an
22 insurer is deemed not to have been in breach of the
23 contract until a claim for coverage is made and
24 rejected, which makes sense when you think about it.
25 Even if the insurer covers an accident, the insurer's

1 not in breach the moment the accident occurs. Here
2 in the rep and warranty context, the breach occurs as
3 of the closing date. The reps and warranties are
4 either true or not true as of that date with respect
5 to facts that again existed as of that date.

6 JUDGE RIVERA: He - - - he says the
7 understanding amongst these parties is that you're
8 not going to look at that and that no one intended
9 it, you've got a thirty-year agreement, that - - -
10 that this is only for six years.

11 MR. WOLL: Right. And - - -

12 JUDGE RIVERA: But you're only going to
13 look at that at some point later down the road. And
14 then if they preserve their position because they've
15 got this cure-slash- - - -

16 MR. WOLL: Right.

17 JUDGE RIVERA: - - - repurchase
18 requirement.

19 MR. WOLL: Yes. Your Honor, we
20 respectfully but vehemently disagree with that. I
21 think that's pure speculation as to what the parties
22 intended. I think the parties' intents is clear that
23 they used a represent - - -

24 JUDGE RIVERA: From the language itself,
25 um-hum.

1 MR. WOLL: Pardon me?

2 JUDGE RIVERA: From the language itself.

3 MR. WOLL: Exactly, and from the fact that
4 they used a representation and warranty regime that
5 had long been held in New York to apply accrual at
6 closing rule. And so - - -

7 CHIEF JUDGE LIPPMAN: Counsel?

8 MR. WOLL: Yes?

9 CHIEF JUDGE LIPPMAN: What - - - what's
10 going to be effect if we - - - if we accept your
11 position here. What's going to be the effect in
12 terms of these kinds of transactions and people's - -
13 - investor's willingness to invest money? What's - -
14 - what's the outgrowth from a bigger, more policy
15 perspective of the issues that you're - - - the two
16 of you are grappling with?

17 MR. WOLL: Yes. Thank you, Your Honor. I
18 think from the perspective of affirming the Appellate
19 Division, I think the outgrowth will be that you will
20 reaffirm what the law has been for over a century.

21 CHIEF JUDGE LIPPMAN: They - - -

22 MR. WOLL: And parties will continue to
23 operate on that - - -

24 CHIEF JUDGE LIPPMAN: Well, what's - - -
25 what's - - - yes, but from more a policy perspective.

1 MR. WOLL: Well - - -

2 CHIEF JUDGE LIPPMAN: How - - - how will -
3 - - how's it going to impact these kinds of con - - -
4 transactions and relationships?

5 MR. WOLL: Sure, Chief Judge. Well, so if
6 you adopt the - - - the plaintiffs' theory, the
7 plaintiffs are advocating an accrual on whenever - -
8 -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. WOLL: - - - the plaintiff decides to
11 demand a remedy theory. That would extend the
12 statute of limitations indefinitely. Or at least in
13 this case, according to the plaintiff's theory - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. WOLL: - - - they get twenty-seven more
16 years - - -

17 CHIEF JUDGE LIPPMAN: That's years. Yeah.

18 MR. CLEMENT: - - - to bring their claims.
19 We're here today in 2015. But under their theory we
20 could be here or our grandchildren could be here in
21 2042 try - - -

22 JUDGE READ: Well, these - - - these - - -
23 these contracts are - - - are fairly common?

24 MR. WOLL: Pardon me?

25 JUDGE READ: Is this the way it was done

1 routinely?

2 MR. WOLL: These - - - these contracts are
3 fairly common, and it's important to note, Judge
4 Read, that the independent breach theory which
5 plaintiffs are advocating, essentially nothing starts
6 to run until we request a remedy, that's been
7 repeatedly rejected by close to thirty decisions
8 applying New York law in repurchase cases just like
9 this. And we cite those in our brief, and it
10 includes ten judges from the Southern District. It
11 includes eight justices from the Appellate Division.

12 JUDGE READ: But I suppose - - - I suppose
13 if we find again - - - against you people will start
14 ordering their affairs differently - - -

15 MR. WOLL: Well, that - - -

16 JUDGE READ: - - - in these kinds of - - -
17 in these kinds of deals.

18 MR. WOLL: Well, that's true, Your Honor.
19 Although if you change what's been the law for over a
20 century you will not only undo expectations with
21 respect to representations and warranties, but also
22 with respect to remedial provisions. The - - -

23 CHIEF JUDGE LIPPMAN: Your argument is
24 really pred - - - predictability - - -

25 MR. WOLL: Exactly, Your Honor.

1 CHIEF JUDGE LIPPMAN: - - - in these kinds
2 of - - - I mean that's the thrust of what you're
3 arguing?

4 MR. WOLL: Yes. I mean the court has
5 repeatedly stated in Ely-Cruikshank, for instance,
6 that the obj - - - objective, reliable, and
7 predictable aspects of the statute of limitations are
8 critical, especially in the context of commercial
9 relations, and that we can't leave it up to the
10 subjective equitable variations of different courts
11 and judges to - - - to determine on a - - -

12 JUDGE RIVERA: Could - - - could the
13 parties negotiate a longer time frame?

14 MR. WOLL: Pardon me?

15 JUDGE RIVERA: Could the parties negotiate
16 a longer time frame?

17 MR. WOLL: Thank you for that question.
18 They could not have, Your Honor. Not in that - - -
19 this context. New York law specifically prohibits
20 the extension of the statute of limitations at the -
21 - -

22 JUDGE STEIN: Well, what about like under
23 the Bulova Watch case? Didn't they, effectively, do
24 that in Bulova?

25 MR. WOLL: Respectfully, Judge Stein, no.

1 In Bulova - - - and Bulova's I - - - I think a great
2 case for us, because it has the breach of the
3 warranty claim in it. And the court there said that
4 claim accrues on the closing date and was time
5 barred. There was a separate contract in Bulova
6 which was basically a guarantee that the roof
7 wouldn't leak.

8 JUDGE STEIN: That's my point. Couldn't
9 you do that either within this contract or in a
10 separate contract? Couldn't you have an agreement
11 that - - - that you're going to warranty for the life
12 of the - - - of the contract? And - - - and - - -

13 MR. WOLL: Sure, exactly, Judge.
14 Conceivably, you could say whenever a loan breaches,
15 we'll make a payment. That's clearly not what the -
16 - - what the agreement was here. And getting back to
17 the policy point, Your Honor, it would - - - it would
18 great - - - create great uncertainty as to when the
19 statute of limitations would run and when the claim
20 would accrue, because you have to determine - - - it
21 would be up to the plaintiff to determine when to
22 bring the claim or I think counsel said, well, when
23 we discover that there's a breach. That would be
24 importing a discovery rule into the breach of contrac
25 - - - or the statute of limitations from breaches of

1 contract which this court repeatedly rejected.

2 JUDGE PIGOTT: One - - - one - - - one of
3 the concerns of these is what they call garbage
4 loans. And - - - and it would seem to me that if Mr.
5 Clement is right, there'd be - - - there'd be a check
6 on that. In other words, you - - - you would be less
7 inclined to put in bad loans in these things if you
8 knew that ten or fifteen years down the road, if one
9 of them, there's even one, popped up, it would have
10 to either cured or - - - or repurchased, and his
11 argument that we're - - - none of us are doing due
12 diligence at the beginning, none of us. So we're
13 just - - - we're just buying loans and - - - and
14 moving on. Is that true? Shouldn't someone be
15 looking at these? And if you're not - - - if you're
16 not looking at them as a seller, shouldn't they have
17 a remedy because you didn't?

18 MR. WOLL: Well, Your Honor, factually it's
19 not true. But also under the contract whether
20 diligence is done or not doesn't affect the
21 representations and warranties and also doesn't
22 affect when the representation and warranties start
23 to run. And the facts of this case establish that
24 six years is sufficient time to investigate whether
25 nonperformance of a loan gave rise to - - - or - - -

1 or resulted from a breach of a representation and
2 warranty. And - - -

3 JUDGE RIVERA: What about his argument that
4 - - - that there may be a - - - a material breach or
5 a breach that has this material effect that develops
6 past the six years?

7 MR. WOLL: Right. So - - -

8 JUDGE RIVERA: Is that possible?

9 MR. WOLL: It's - - - it's not, Your Honor,
10 in the context of these representations and
11 warranties. They are made as of the closing date
12 with respect to facts that exist as of the closing
13 date. And the plaintiff here specifically alleges in
14 the complaint that all of the breaches of reps and
15 warranties, they allege, materially and adversely
16 affected the loans as of the closing date. So those
17 are the allegations in this case. So there's no - -
18 - no question of some subsequent event affecting the
19 validity of the - - - the representations and
20 warranties. If I - - - if I could just move on for a
21 second, Your Honor.

22 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
23 counsel.

24 MR. WOLL: Oh, and one more thing, I'm
25 sorry, on the statute of limitations accrual point

1 which is there are a number of cases that apply a
2 six-year limitation period with an accrual at closing
3 rule in the context of where the subject matter of
4 the representation and warranty is expected to last
5 more than six years. And I would just point to the
6 Citizens Utilities case from the Court of Appeals
7 where the generators were said to - - - that they
8 were going to last for thirty years. And the court
9 said it doesn't matter what the expectation is;
10 accrual at closing, six-year limitation period.

11 Now, the - - - I just want to mention
12 quickly 205(a) - - - or rather 206(a) reinforces the
13 concept that the pre-suit notice requirement here did
14 not change the accrual date because under 206(a), as
15 Your Honors know, it says that when a demand is
16 necessary before commencing a lawsuit, the date of
17 accrual is the date on which the demand could be
18 made. And the demand - - - the right to make a
19 demand could have been made here on the closing date
20 when the reps and warranties were either true or not
21 true.

22 And then if I may, I'll just move on to the
23 - - - the last point, which is the trustee argues
24 even though we sued six years after the limitation
25 period - - - or six months, sorry, after the

1 limitation period expired, our claims are still
2 timely because the distressed debt funds that
3 commence the action commenced it on the last day of
4 the limitation period. And the Appellate Division
5 rightly rejected that argument. First of all, the -
6 - - the summons was not properly filed and the case
7 was not properly commenced because they did not
8 comply with the pre-suit notice procedures.

9 JUDGE STEIN: So you're saying that the
10 six-year statute of limitations is actually a little
11 shorter than that, because they would have had to
12 leave time for - - - for them to either meet the
13 demand or not.

14 MR. WOLL: Well, Judge Stein, respectfully,
15 no. We're not saying it's a shorter limitations
16 period and if they had served a - - - a demand in
17 year four or five then they couldn't sue on the last
18 day of the limitation period. And - - -

19 JUDGE STEIN: Right. But if - - -

20 JUDGE FAHEY: But the problem was - - - oh,
21 I'm sorry, Judge. Go ahead.

22 JUDGE STEIN: No, go ahead.

23 JUDGE FAHEY: The problem as I saw was that
24 - - - was that the funds had no standing to comm - -
25 - commence. Only the trustee did.

1 MR. WOLL: Correct, Your Honor.

2 JUDGE FAHEY: And - - - and - - - and
3 that's the way I understood your argument.

4 MR. WOLL: Yes. That - - - that is
5 definitely - - - that is definitely our argument.

6 JUDGE FAHEY: So there's just no standing
7 there? It's - - - and then the statute was blown.

8 MR. WOLL: Exactly, and you can't relate
9 back to a - - - a case that's commenced by somebody
10 without standing, and that's the Goldberg decision.

11 JUDGE FAHEY: The plaintiff argues an
12 exception, though - - - I think Goldberg's the case -
13 - - if the parties are - - - are - - - are related in
14 some way. I don't know if it's - - - it's exactly on
15 point here, but it's - - -

16 MR. WOLL: Well - - -

17 JUDGE FAHEY: - - - it's an arguable point,
18 anyway.

19 MR. WOLL: Right. Thank - - - thank you,
20 Judge Fahey.

21 JUDGE FAHEY: Yeah.

22 MR. WOLL: So the - - - the situation here
23 has nothing to do with Goldberg. Here, the trustee
24 knew that the statute of limitations was about to
25 expire, was told by counsel for the distressed debt

1 funds you need to get a tolling agreement or you need
2 to file a lawsuit, and the trustee declined to do so
3 before the limitation period.

4 JUDGE STEIN: But if it was the trustee
5 that had - - - that had filed on - - - on the six-
6 year date but the time for which performance had to
7 be completed hadn't run yet, wouldn't you then say
8 sorry, it's too early?

9 MR. WOLL: Well, Your - - - Your Honor, if
10 they did not comply with the pre-suit notice
11 requirements, it wouldn't be a question of too early
12 in terms of the statute of limitations. It would be
13 a failure to have complied with the pre-suit notice.

14 JUDGE STEIN: Right. So they - - - so even
15 if it were the trustee rather than the shareholder -
16 - -

17 MR. WOLL: Um-hum, yeah.

18 JUDGE STEIN: - - - the trustee would have
19 actually have had to make the demand more than six
20 month - - - or - - - or within the six-month period
21 but not up until the six-month period.

22 MR. WOLL: It's a - - - it's - - - it's a
23 ninety-day period, Your Honor.

24 JUDGE STEIN: Ninety.

25 MR. WOLL: And I think that's true in any

1 case where there's a pre-suit demand requirement.
2 And 206(a) makes clear that that doesn't change the
3 accrual rule. It's - - - it's frankly an irrelevant
4 - - -

5 JUDGE RIVERA: Well, that's what you
6 negotiated.

7 MR. WOLL: Pardon me?

8 JUDGE RIVERA: That's what you negotiated.

9 MR. WOLL: Yes. That's true.

10 JUDGE RIVERA: That's the time frame - - -

11 MR. WOLL: That's - - -

12 JUDGE RIVERA: - - - the parties
13 negotiated.

14 MR. WOLL: Exactly. And it's - - - it's
15 kind of an irrelevant argument in the context of what
16 actually happened here, because the trust didn't file
17 its claims until six years and six months after the -
18 - - the claims had accrued. So whether it got
19 another ninety days or didn't get another ninety
20 days, it wouldn't have made a difference here.

21 So we submit that there's no relation back
22 in this context. The Goldberg case makes that clear,
23 especially in the context of a party that makes a
24 conscious decision not to commence an action and then
25 subsequently changes its mind after the limitation

1 period runs. And - - -

2 JUDGE READ: If we find for you on the
3 statute, though, do we have to reach that? Do we - -
4 - if we find for you in the statute of limitations,
5 do we have to reach that argument still?

6 MR. WOLL: Well - - - well, Your Honor, I
7 think it's still - - - still something the court
8 would have to address just to answer the appellant's
9 argument that the statute of limit - - - even if the
10 claims accrue on the closing date - - -

11 JUDGE READ: Closing, yeah.

12 MR. WOLL: - - - that they get to relate
13 back to the - - - the fund summons.

14 JUDGE READ: They - - - they - - - they
15 brought another suit, right, to - - -

16 MR. WOLL: Well, they didn't br - - - yes.
17 There's a - - -

18 JUDGE READ: 205(a)?

19 MR. WOLL: And - - - and that's under
20 205(a). And that point, Your Honor, we submit the
21 court does not have to address. The 205(a) action
22 and whether that's valid should be addressed in the
23 context of a 205(a) action, which, as you just noted,
24 is already pending in New York County. So that's - -
25 - I mean I would note that this court's decision in

1 Reliance Insurance v. PolyVision says that you can't
2 have a 205(a) action when the plaintiff in the second
3 action is different from the plaintiff in the first.

4 JUDGE FAHEY: But that's litigation for
5 another day.

6 MR. WOLL: But - - - exactly, Your Honor.
7 I appreciate that. So we respectfully request that
8 the court apply the - - - the longstanding rule in
9 New York and dismiss the claims and affirm the
10 Appellate Division.

11 CHIEF JUDGE LIPPMAN: Thank you, counsel.

12 Counsel, rebuttal. Let me ask you the same
13 question I asked your adversary. What are the policy
14 implications for these kinds of commercial
15 transactions if we find for your adversary?

16 MR. CLEMENT: I - - - I think the policy
17 implications are quite significant, because if you
18 listen to my adversary, he not only says that this
19 particular contract is fixed with a six-year statute
20 of limitations, but he suggested you can't even
21 extend it. Now, I think he's wrong about that and
22 the Bulova case demonstrates that. But I think if
23 you accepted his argument, I think what you do is
24 you'd essentially freeze up these kinds of
25 transactions because people are not going to take

1 discovery rule here. We're not importing anything.
2 The text of the relevant provision, 203, says
3 discovery. It says "upon discovery".

4 So I would think that in - - - in
5 conformity with what he said the rule you want to set
6 here is that parties actually can write contracts and
7 contract in a way that makes commercial sense. What
8 made commercial sense here was not to have anybody do
9 due diligence on day one but to defer that until a
10 problem arose. And then if somebody discovered a
11 problem, whether it was Deutsche Bank or us, at that
12 point, there would be a reckoning and at that point
13 you could determine - - -

14 JUDGE RIVERA: So - - - so - - - so then -
15 - - I'm a little confused now about your due
16 diligence argument. So - - - but if - - - but if it
17 arises on the date of the closing, you don't disagree
18 that the six years applies at that point?

19 MR. WOLL: Well, it - - - it - - - it - - -

20 JUDGE RIVERA: From that point.

21 MR. CLEMENT: It - - - it would if there
22 were notice at that point. I mean so if there was a
23 problem and everybody knew it at that point - - -

24 JUDGE FAHEY: Or you did due diligence.

25 JUDGE RIVERA: Including - - - including

1 your client.

2 MR. CLEMENT: Including my client and then
3 we could give notice. So I think it would actually
4 be - - - end up being six years and three months,
5 because we'd give notice immediately. That would
6 trigger the cure or repurchase obligation and it
7 would be at the end of the ninety days that we would
8 be able to sue. And, again, I think they would look
9 at it that way and say, yeah, we agree with the part
10 you couldn't sue. But our action doesn't even arise
11 - - -

12 JUDGE RIVERA: And he says - - - but he
13 says all your claims are about breaches at the - - -
14 the time you entered the contract.

15 MR. CLEMENT: No.

16 JUDGE RIVERA: He says that - - - that your
17 - - - your issue or your answer to me earlier, answer
18 to someone, about the potential mat - - - breaches
19 that have material effect happening in the future are
20 irrelevant because all your claims are about breaches
21 of the R&W at the time you entered the contract.

22 MR. CLEMENT: With respect, all of our
23 claims are about the breach of their obligation to
24 cure - - -

25 JUDGE RIVERA: To cure.

1 MR. CLEMENT: - - - or repurchase which
2 didn't arise until they refused to cure or repurchase
3 contrary to what they contracted to do in this
4 particular contract. I would - - - I would close
5 with saying I really do think Deutsche Bank has a
6 problem here. And the problem is they have to
7 recognize that these cure or repurchase obligations
8 were in there for a reason. They were important to
9 people. They were important to investors who weren't
10 going to do due diligence on 8,800 properties. And
11 they didn't stop being important after sixty-nine
12 months. It's a thirty-year contract. If - - -

13 JUDGE RIVERA: Is your client the original
14 investors?

15 MR. CLEMENT: Our - - - our contr - - - our
16 - - - our clients are not entirely - - -

17 JUDGE RIVERA: They didn't have the same
18 expectation then, obviously.

19 MR. CLEMENT: My client is the trustee, and
20 my client represents all of the investors which, of
21 course, includes some of the original investors.

22 JUDGE RIVERA: Some of the original, okay.

23 MR. CLEMENT: And - - - and any benefit
24 here is going to apply ratably to every one of these
25 investors.

1 JUDGE RIVERA: No, no. I understand but
2 other investors were not party to - - - to this
3 negotiation and didn't have that understanding.

4 MR. CLEMENT: No. But - - -

5 JUDGE RIVERA: Although I understand your
6 argument is on the plain face of the agreement that
7 would be their understanding.

8 MR. CLEMENT: Exactly, and the people who
9 bought these on the secondary market looked at these
10 agreements, saw the terms of the agreements. They
11 didn't see the word pre-suit notice. They saw the
12 words obligation to cure or repurchase. They read
13 that consistent with New York law.

14 JUDGE RIVERA: So that - - - they - - -
15 they take the rest that this court may decide
16 otherwise, but I understand your point.

17 MR. CLEMENT: Right. But we think we have
18 the better argument, and with all due respect to my
19 friend on the other side, you know, he talks about
20 longstanding New York precedent. I mean this case is
21 here because there's not a precedent directly on
22 point. I think Bulova's on - - - as on point as any
23 other case.

24 CHIEF JUDGE LIPPMAN: Okay. Thank you
25 both.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CLEMENT: Thank you, Your Honors.

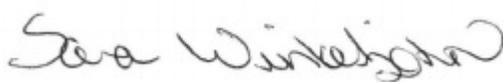
CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of ACE Securities Corp. v. DB Structured Products, Inc., No. 85 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 5, 2015