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COURT OF APPEALS

STATE OF NEW YORK

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DEUTSCHE BANK NATIONAL TRUST CO.,

Respondent,

-against-

No. 84

MORGAN STANLEY MORTGAGE CAPITAL  
HOLDINGS, LLC, et al.

Appellants.

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20 Eagle Street  
Albany, New York  
November 17, 2020

Before:

ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sharona Shapiro  
Official Court Transcriber



1 JUDGE RIVERA: The last case on today's calendar,  
2 number 84, Deutsche Bank National Trust Co. v. Morgan  
3 Stanley Mortgage Capital Holdings.

4 MR. WEINSTEIN: May it please the Court. Brian  
5 Weinstein from Davis, Polk for defendants-appellants,  
6 Morgan Stanley Mortgage Capital Holdings and Morgan Stanley  
7 ABS Capital I.

8 I'd like to reserve two minutes for rebuttal, if  
9 I may.

10 JUDGE RIVERA: Yes, sir.

11 MR. WEINSTEIN: Thank you, Your Honor.

12 This is the third time, in the past several  
13 years, in which this court is addressing efforts to avoid  
14 the sole remedy provision in an RMBS contract. In both of  
15 the prior two cases, Nomura and Ambac, this court held that  
16 you can't avoid the sole remedy provision by alleging  
17 pervasive loan-level breaches - - -

18 JUDGE RIVERA: Counsel, just to be clear, I just  
19 want to make sure I understand your - - - at least one of  
20 your arguments, that they cannot assert this gross  
21 negligence claim unless they can establish an independent  
22 duty?

23 MR. WEINSTEIN: That is - - -

24 JUDGE RIVERA: Is that your - - -

25 MR. WEINSTEIN: - - - correct, Your Honor.



1 JUDGE RIVERA: Okay.

2 MR. WEINSTEIN: And I will certainly get to that  
3 point, but - - -

4 JUDGE RIVERA: Why isn't there - - - if I may  
5 move you along there: why isn't there an independent duty,  
6 given the SEC regulation - - -

7 MR. WEINSTEIN: Because - - -

8 JUDGE RIVERA: - - - of this particular area, and  
9 given the - - - the tremendous public interest in what goes  
10 on with this kind of - - -

11 MR. WEINSTEIN: Your Honor - - -

12 JUDGE RIVERA: - - - securitization.

13 MR. WEINSTEIN: Your Honor, the issue on the SEC  
14 order, and that's the only thing that, in any way, is  
15 different than the standard RMBS case in which there are  
16 allegations of pervasive loan-level breaches, that issue is  
17 a disclosure issue in the offering documents to investors  
18 involving approximately three percent of the loans in the  
19 trust. And - - -

20 JUDGE WILSON: Am I also right that - - - I'm  
21 sorry; over here. Am I also right that the complaint  
22 doesn't plead that as a breach of - - - a gross negli - - -  
23 a grossly negligent breach?

24 MR. WEINSTEIN: I believe that's correct, Your  
25 Honor. They do allege it as a basis for punitive damages



1 which we - - - we obviously don't think is the case.

2 But the - - - the answer to Judge Rivera's  
3 question is that that breach of duty, if there was a breach  
4 of duty, would be a breach of duty to the investors, not to  
5 the trustee. And the investors, as this court is aware,  
6 have brought a whole separate class of cases for those  
7 types of issues, disclosure issues in an - - -

8 JUDGE RIVERA: So there are no promises,  
9 warrantees, guarantees at all made with respect to the  
10 relationship with the trust - - -

11 MR. FOLEY: Well - - -

12 JUDGE RIVERA: - - - is that your position? All  
13 of those representations go right past the trust and the  
14 trustee directly to certificate holders.

15 MR. FOLEY: The disclosure issues do, Your Honor.  
16 The way in which there is some commonality, and this  
17 actually supports our point, is that one of the breaches  
18 that they allege, relating to these three percent of the  
19 loans is that one of the - - - one of the representations  
20 and warrantees in the contracts with the trustee is that  
21 the loans are not in default.

22 So with respect to those loans, they can bring a  
23 breach of contract action, and that involves three percent  
24 of the loans. But that's still a breach of contract claim.  
25 It's not the breach of an independent duty.



1                   With respect to the issues in the SEC order,  
2                   that's a disclosure issue relating to the offering material  
3                   that - - -

4                   JUDGE RIVERA: So there are no representations,  
5                   warrantees, guarantees, promises that are in any way  
6                   intended to address any regulatory requirements?

7                   MR. FOLEY: That's not - - - even if there were,  
8                   Your Honor, I don't know whether there might be one that's  
9                   construed that way. That's not one of the allegations that  
10                  they've made here. The point is that would still be a  
11                  breach of contract. They haven't alleged any breach of  
12                  duty - - -

13                  JUDGE RIVERA: No, but I'm trying - - - my point  
14                  was whether or not this federal regulatory framework  
15                  somehow - - - assuming I agree with this argument that - -  
16                  - that you're making that you must have a separate  
17                  independent duty to be able to argue gross negligence as a  
18                  cause of action.

19                  MR. FOLEY: Yeah, well, there - - - our argument,  
20                  Your Honor, is there needs to be a breach of duty that goes  
21                  outside of the breach of the actual representations in the  
22                  contract.

23                  JUDGE RIVERA: Um-hum.

24                  JUDGE STEIN: Counselor, aren't there two  
25                  different ways we can approach the issue here, one being



1           whether, in order to establish this gross negligence public  
2           policy exception the - - - the provision, the contractual  
3           provision in question has to either exempt liability at all  
4           or - - - or limit it to a nominal sum, or whether that is  
5           the case, that's one way to look at it.

6                       So in other words, if that's the case, then we  
7           might say that there's no cause of action here because the  
8           - - - the sole remedy's provision was intended to - - - to  
9           make - - - to make the trustee whole. So that's one way to  
10          approach it. Another way to approach it to - - - to get to  
11          your result is to say they didn't actually plead - - -  
12          sufficiently plead a gross negligence cause of action - - -

13                      MR. FOLEY: That's exactly - - -

14                      JUDGE STEIN: - - - for a number of reasons,  
15          right?

16                      MR. FOLEY: That's exactly correct, Your Honor.

17                      JUDGE STEIN: Okay. So why should we take one  
18          approach or the other?

19                      MR. WEINSTEIN: Well, either one of those - - -  
20          either one of those approaches means that the court should  
21          rule in our favor, Your Honor. And that's the point I was  
22          trying to lead with, which is that the fundamental key  
23          point, just to start out here, and why this court should  
24          not reach a different result than it reached in Nomura - -  
25          -



1 JUDGE FAHEY: Well, there is a difference,  
2 though, in Judge Stein's question because, in one, we'd be  
3 saying that it is possible for there to be a type of  
4 negligence that can arise from a contract action. In  
5 another, we're saying that your damages - - - that a  
6 limitation of remedies is allowable and - - - even though  
7 it may not make you fully whole, and it represents a  
8 significant policy switch. And I'm asking, I think, if I  
9 follow up on her question is, where do you come down on  
10 either side on those policy questions.

11 MR. WEINSTEIN: So I'm not certain I understand  
12 the - - - the question besides the - - -

13 JUDGE FAHEY: You have - - -

14 MR. WEINSTEIN: Let me try to - - -

15 JUDGE FAHEY: - - - gross negligence and damages  
16 that can arise from there. That can be enormous.

17 MR. WEINSTEIN: Correct.

18 JUDGE FAHEY: Then you have damages - - - a  
19 limitation on liabilities contractual damages, which are  
20 limited to the cure and repurchase provision as much as  
21 applicable. Those are much more limited. It's a  
22 significant policy and financial difference.

23 MR. WEINSTEIN: The fundamental point here, Your  
24 Honor, is that this case - - -

25 JUDGE FAHEY: No, no, that's not - - - I



1 understand the fundamental points, sort of, but what I'm  
2 concerned about is where do you come down, what are you  
3 advocating for?

4 MR. WEINSTEIN: And I apologize, Judge Fahey, I'm  
5 not sure that I understand the - - -

6 JUDGE FAHEY: Are you advocating for the cure  
7 repurchase provision is - - - you're limited to that, and  
8 the - - - and the limitation of liability applies, or are  
9 you saying that, even though we - - - we may win on the  
10 gross negligence because there's - - -

11 MR. WEINSTEIN: Well - - -

12 JUDGE FAHEY: - - - not an independent basis in  
13 tort?

14 MR. WEINSTEIN: Oh, sorry, I understand now,  
15 Judge Fahey.

16 JUDGE FAHEY: Sure.

17 MR. WEINSTEIN: And absolutely, we are arguing  
18 that the limitation applies, and the reason is it provides  
19 a full remedy with respect to any breach in - - -

20 JUDGE FAHEY: That's what I wonder, see, because  
21 I had thought that you were conceding, for the purposes of  
22 this case, and that it's the law of the case, that  
23 plaintiff can obtain damages in lieu of specific  
24 performance, if specific performance is impossible for the  
25 loans that have been liquidated. In other words, you





1 wouldn't have any chance, at some future point, to - - - to  
2 really litigate whether those damages, through specific  
3 performance and its failure, is impossible.

4 MR. WEINSTEIN: Yes, Your Honor.

5 JUDGE FAHEY: Is that right?

6 MR. WEINSTEIN: That is right.

7 JUDGE FAHEY: All right. So - - -

8 MR. WEINSTEIN: With respect to - - -

9 JUDGE FAHEY: - - - you're conceding that they  
10 can receive damages, if they're eligible for them, through  
11 equity, if there's a failure of specific performance?

12 MR. WEINSTEIN: That is the governing law in the  
13 First Department now, Your Honor.

14 JUDGE FAHEY: In this case.

15 MR. WEINSTEIN: In this case.

16 JUDGE FAHEY: Right, I see.

17 JUDGE RIVERA: So that position is that the  
18 Appellate Division was incorrect to argue that - - - that  
19 the - - - the sole remedy provision provides an illusory  
20 remedy.

21 MR. WEINSTEIN: That's exactly right.

22 JUDGE RIVERA: That's where you are on that, but  
23 why is - - - why wasn't the Appellate Division correct to  
24 say, well, it's premature for us to determine that?

25 MR. WEINSTEIN: So the reason that it's not



1 premature, Your Honor, it's obviously - - - one of the key  
2 principles of New York contract law is the importance of  
3 predictability and certainty. And so it's important that  
4 litigants not have to wait until the end of a litigation to  
5 know whether or not the contractual remedy provisions are  
6 going to be enforced unless there is a good reason to doubt  
7 it.

8 And here there hasn't been any reason articulated  
9 why, with respect to every breach that they can prove,  
10 they're not made fully whole. The repurchase remedy is  
11 nothing even remotely like limiting them to 250 dollars.  
12 It makes them whole for every breach they can prove. We  
13 have to repurchase the loan at full price plus interest.

14 JUDGE STEIN: Can I just ask - - -

15 JUDGE RIVERA: They say you refused to repurchase  
16 some of those loans.

17 MR. WEINSTEIN: Well, because we dispute that  
18 there are breaches, Your Honor.

19 JUDGE RIVERA: Oh.

20 MR. WEINSTEIN: But the point is, for any breach  
21 that they can prove, they are made whole.

22 JUDGE RIVERA: Okay.

23 MR. WEINSTEIN: And that's why the public policy  
24 exception does not apply. The public policy exception says  
25 you can't immunize yourself from liability based on your



1 own gross negligence. And that's simply not what the sole  
2 remedy provision does. The sole remedy provision says  
3 every breach you prove, we have to buy the loan back. And  
4 there's nothing - - -

5 JUDGE FAHEY: So your point is you're not trying  
6 to change that. What you're simply saying is it doesn't  
7 apply here.

8 MR. WEINSTEIN: Correct, it doesn't apply here  
9 because - - -

10 JUDGE FAHEY: But let me ask one question, it's  
11 just a little - - - a little bit outside of what we've been  
12 talking about. Was there ever a motion to dismiss based on  
13 the statute of limitations ever brought in this case by - -  
14 - by you as a party?

15 MR. WEINSTEIN: There is a pending motion for  
16 summary judgment, Your Honor, on that issue, which has not  
17 been adjudicated yet.

18 JUDGE FAHEY: I see.

19 MR. WEINSTEIN: But the fundamental issue here,  
20 Your Honor, is they haven't identified a single way in  
21 which, for any breaching loan that they identify, that  
22 they're not made whole. What they're really complaining  
23 about here is the burden of complying with the condition  
24 precedent in this contract of having to prove the breaches  
25 loan by loan.



1 JUDGE WILSON: And to be clear, the - - - sorry,  
2 over here again - - - the damages available through the  
3 repurchase provision are contractual, not in equity; is  
4 that right?

5 MR. WEINSTEIN: That's correct, Your Honor. It's  
6 a contractual remedy that makes them whole. It requires  
7 that the repurchase price be paid for any breaching loan  
8 which is a full remedy, in other words, the full unpaid  
9 principal balance plus interest. So they're made whole.

10 And the point is, Your Honors, really what  
11 they're objecting to because there's no - - - there's no  
12 damages for any breaching loan that the sole remedy is  
13 depriving them of that they're otherwise entitled to under  
14 the law. They get - - - they get the same repurchase price  
15 that the loan's been liquidated. They complain that what  
16 about rescission, but the rescission wouldn't be available  
17 to them, irrespective of the sole remedy provision.

18 JUDGE FEINMAN: So - - -

19 MR. WEINSTEIN: - - - when they get made whole.  
20 So what is it that they really - - -

21 JUDGE RIVERA: Does that mean they're entitled to  
22 attorneys' fees? Otherwise, they've lost out on that.

23 MR. WEINSTEIN: Well, attorneys' fees is a whole  
24 separate issue.

25 JUDGE RIVERA: I understand, but isn't it, in



1 reality - - -

2 MR. WEINSTEIN: The repurchase price - - -

3 JUDGE RIVERA: - - - interconnected, and you  
4 can't escape that?

5 MR. WEINSTEIN: The repurchase price include - -  
6 - is where the definition - - - is where the provision - -  
7 -

8 JUDGE RIVERA: Okay.

9 MR. WEINSTEIN: - - - for attorneys' fees comes  
10 in.

11 JUDGE RIVERA: Okay.

12 MR. WEINSTEIN: But the point is, so what is it  
13 that they're objecting to? They're objecting to have to  
14 meet - - - to having to meet the condition precedent  
15 approving their case loan by loan. And that's not a basis  
16 under the public policy exception for rewriting the  
17 plaintiff's contract.

18 JUDGE RIVERA: Are they able to do sampling?

19 MR. WEINSTEIN: I'm sorry?

20 JUDGE RIVERA: Are they able to do it by  
21 sampling?

22 MR. WEINSTEIN: No, well, Your Honor, that's the  
23 issue. That's what they want to do. And there's a  
24 separate appeal that's going to be - - -

25 JUDGE RIVERA: Okay.



1 MR. WEINSTEIN: - - - pending before the court on  
2 sampling. But our point is this is - - -

3 JUDGE RIVERA: But why doesn't that mean perhaps  
4 it's premature - - -

5 MR. WEINSTEIN: No, Your Honor, our point is - -  
6 -

7 JUDGE RIVERA: - - - if that doesn't work out in  
8 their favor, and they're back to what you've just said,  
9 which is they've got to do it one loan at a time?

10 MR. WEINSTEIN: Correct, so if - - - if they are  
11 not allowed to sample then - - - and the contract - - - and  
12 they have to do what the contract says, which is to go one  
13 loan at a time, that's what they're saying could invoke the  
14 public policy exception that allows this contract between  
15 sophisticated parties to be rewritten by the court. And we  
16 would submit the - - -

17 JUDGE RIVERA: Do you concede, if they're going  
18 one load at a time - - - loan at a time, that could be two  
19 decade's worth of litigation at a minimum - - -

20 MR. WEINSTEIN: No, Your Honor.

21 JUDGE RIVERA: - - - not counting the appeals?

22 MR. WEINSTEIN: So two - - - two points to that,  
23 Your Honor. The main point is in this - - - in the A.H.A.  
24 case, decided by this court, the court drew a sharp  
25 distinction between conditions precedent, on the one hand,



1 and exculpatory provisions on another hand. What they're  
2 objecting to is having to comply with the burdensome  
3 condition precedent of having to go loan by loan. That's  
4 not a basis for nullifying the sole remedy.

5 As to your question, Judge Rivera, it is a  
6 burdensome process of going loan by loan, but that's not a  
7 basis for rewriting the parties' contract. There's no  
8 precedent for that. There's no precedent for saying - - -

9 JUDGE RIVERA: But when they entered this  
10 agreement, do you think anyone - - - well, who would enter  
11 an agreement if they thought they'd have to go loan by loan  
12 for ninety-five percent of the loans?

13 MR. WEINSTEIN: Your Honor, both in Nomura and in  
14 Ambac, this case was clear that there's nothing in the  
15 contract that says, above a certain threshold of breaches,  
16 the sole remedy provision just falls away.

17 JUDGE RIVERA: Yeah, but the whole thing breaks  
18 down because no one will buy into this, right? No  
19 certificate holder would buy - - -

20 MR. WEINSTEIN: Your Honor - - -

21 JUDGE RIVERA: - - - a certificate, you lose the  
22 REMIC status. I mean, the reality is everyone is working  
23 on the assumption, apparently without doing appropriate due  
24 diligence, but that's a different case, that there weren't  
25 going to be these massive breaches that lead to the loan by



1 loan, hundreds if not thousands of these loans that you'd  
2 have to do one at a time to go through the breach.

3 MR. WEINSTEIN: Your Honor, again, I believe  
4 that's the issue - - -

5 JUDGE RIVERA: I mean, it seems workable if  
6 you're only - - - I mean, I'm not going to disagree with  
7 you. It seems quite workable if you're talking about one  
8 percent of the loans or - - - or spreading that out over  
9 time. But if you're really talking about, as they say,  
10 this kind of massive breach - - - I know it's allegations;  
11 I appreciate your position on that. But even three percent  
12 is not a small amount.

13 MR. WEINSTEIN: You're right, it's not a small  
14 number, Your Honor. I don't dispute that there is a burden  
15 of complying with this condition precedent.

16 JUDGE RIVERA: Yeah.

17 MR. WEINSTEIN: The point is that you can't say  
18 that because a condition precedent is burdensome - - -

19 JUDGE RIVERA: Okay.

20 MR. WEINSTEIN: - - - under the guise of the  
21 public policy exception we're going to rewrite this  
22 contract between sophisticated parties.

23 JUDGE RIVERA: Fair enough. Thank you, counsel.

24 Counsel?

25 MR. MOLO: Good afternoon. I'm Steven Molo. I'm





1 here with my partner, Justin Ellis. Thank you for - - -

2 JUDGE STEIN: Counsel, can you identify for us  
3 any situations, other situations where we have looked not  
4 to the formation of the contract and - - - and what the  
5 contract says and the intent of the parties, but to its  
6 practical effect, maybe years down the road when, you know,  
7 this kind of situation arises? Can you identify any  
8 precedent for doing that?

9 MR. MOLO: So in this context, with the gross  
10 negligence exception that we're - - - we're invoking here,  
11 or the policy, excuse me, that we're - - - we're invoking  
12 here, the issue arises during the course of the performance  
13 of the contract, not in the formation of the contract, of  
14 course.

15 And my colleague here, Mr. Weinstein, is  
16 absolutely right. There is a strong policy in New York  
17 that favors the idea that sophisticated parties can come  
18 together and decide how they want to conduct their  
19 business, and the Courts are going to interpret that very  
20 closely, okay, and strictly adhere to it.

21 JUDGE STEIN: So the question is how do we - - -

22 MR. MOLO: But - - -

23 JUDGE STEIN: - - - interpret that? Do we  
24 interpret that as of the time of the formation of the  
25 contract, or do we look to what are the practical effects



1 of it down the road? I mean, wouldn't that create terrible  
2 uncertainty if - - -

3 MR. MOLO: It - - -

4 JUDGE STEIN: - - - it was the latter?

5 MR. MOLO: It would be at both points in time,  
6 but - - - but there is an equally strong, in fact a greater  
7 policy interest that the State of New York has in ensuring  
8 that commercial activity is conducted honestly. So parties  
9 are not allowed to insulate themselves - - -

10 JUDGE FAHEY: Let me ask this. And I wonder  
11 this, honestly, in a lot of the RMBS cases that we've seen,  
12 why isn't there a tort claim for fraud brought in the  
13 complaint here?

14 MR. MOLO: Well, I think, in most instances, the  
15 reason that there isn't a tort claim brought is because  
16 there is a clear contract claim - - -

17 JUDGE FAHEY: Well, okay, but - - -

18 MR. MOLO: And it's a simpler thing to prove a  
19 contract claim.

20 JUDGE FAHEY: But you're saying here that there  
21 isn't. If I'm right - - - you know the timeline better  
22 than me, but you've got a 2007 closing date. The forensic  
23 examination of these 800 properties took place in 2011, the  
24 800-loan sample. We don't see a summons with notice until  
25 2014, seven years after the closing date. And we don't see



1 a summons and complaint until a year after that, eight  
2 years after the - - - the closing date. So why wasn't  
3 there a tort claim for fraud? Wouldn't that make your case  
4 a stronger case when you're arguing for an independent tort  
5 basis for a - - - for a gross negligence claim?

6 MR. MOLO: Well, we don't have to bring a tort  
7 claim.

8 JUDGE FAHEY: Well, forget about - - -

9 MR. MOLO: There's a clear contract claim and - -  
10 - I'm sorry?

11 JUDGE FAHEY: What am I missing?

12 MR. MOLO: I'm sorry.

13 JUDGE FAHEY: Sometimes I feel like there's  
14 shadows on the wall, and things are happening behind me,  
15 and I'm not quite clear why this isn't in front of us since  
16 this seems at the core of the argument that you're making.

17 MR. MOLO: It's not the core of the argument  
18 we're making.

19 JUDGE FAHEY: All right. Why wasn't it - - -

20 MR. MOLO: The core of the - - -

21 JUDGE FAHEY: Why wasn't - - - answer my first  
22 question.

23 MR. MOLO: If I could - - -

24 JUDGE FAHEY: Is there a legal or policy reason  
25 why - - - that you know of, a fraud claim wasn't brought,



1           okay?

2                       MR. MOLO:   If I may?

3                       JUDGE FAHEY:   Sure.

4                       MR. MOLO:   Sure.  So the policy, okay, does not  
5           require for the - - - to invoke gross negligence and to  
6           have the policy say that the parties are not allowed to  
7           insulate themselves for liability, we must plead and then  
8           later demonstrate.  I want to just remind the court we're  
9           at the pleading stage here.

10                      JUDGE FAHEY:   Right, I under - - -

11                      MR. MOLO:   To your point, Judge, this is not - -  
12           - and that's a whole other issue too because when we get to  
13           issues of damages, this court's decision in Sokoloff says  
14           you deal with that later in the cases, not appropriate to  
15           deal with on a motion to dismiss.

16                      But we must plead and prove that the conduct  
17           smacks of intentional wrongdoing and evinces a reckless  
18           indifference to the rights of others.  There's no  
19           requirement that we plead an actual tort claim, separate  
20           and apart from the contract claim, to invoke this  
21           exception.  All we must show is that the conduct smacks of  
22           intentional wrongdoing and evinces reckless indifference to  
23           the rights of others.  And when you look at it, the  
24           restatement - - -

25                      JUDGE RIVERA:   But gross negligence is a tort



1 concept, is it not?

2 MR. MOLO: It is a tort concept, and it's an  
3 importation of this tort concept on the contract claim.  
4 The restatement does a nice job of explaining this. And  
5 it's at restatement eight in the intro to the note. There  
6 it - - - it says that the reason that courts don't enforce  
7 contract provisions that - - - in the face of this kind of  
8 conduct that smacks of intentional wrongdoing and evinces a  
9 reckless indifference, there's two predominant reasons.  
10 One, enforcement of the limitation, this damages  
11 limitation, remedies limitation, would be an inappropriate  
12 use of judicial resources to allow a wrongdoer to proceed  
13 with what they call an unsavory transaction.

14 JUDGE FAHEY: Here, let me take a step back for a  
15 second.

16 MR. MOLO: Sure.

17 JUDGE FAHEY: Let's start with the assumption  
18 that you did plead an independent tort, you pled  
19 negligence.

20 MR. MOLO: Okay.

21 JUDGE FAHEY: All right? All right? Negligence,  
22 you know, you didn't act as a reasonable manner, it's  
23 ordinary negligence, and you're saying, no, we're not - - -  
24 we're not claiming ordinary negligence, we plead the tort  
25 of negligence, and - - - and the standard by which it



1 should be evaluated is gross negligence, willful  
2 misconduct, assuming that you pled that, all right? I - -  
3 - I think that you could make a legitimate argument for  
4 that. Do you understand what I'm saying?

5 MR. MOLO: Yes.

6 JUDGE FAHEY: Yeah, it is an independent tort.  
7 Of course it is. Negligence is an independent tort. The -  
8 - - the question is, is the policy question here is when do  
9 we reach it. That's a separate question. My question to  
10 you was why didn't you plead fraud?

11 MR. MOLO: Why didn't we plead fraud?

12 JUDGE FAHEY: Yes, particularly after the  
13 forensic examination.

14 MR. MOLO: I'm sorry, it's just - - -

15 JUDGE FAHEY: Particularly - - - it's all right -  
16 - - particularly after the forensic examination in 2011.

17 MR. MOLO: Well, I mean, because fraud obviously  
18 has additional requirements - - -

19 JUDGE FAHEY: Right.

20 MR. MOLO: - - - a proof beyond a contract claim,  
21 right? And you know, we do allege, and we seek punitive  
22 damages, which does require - - - now the punitive damages  
23 on a contract claim - - -

24 JUDGE FAHEY: Right.

25 MR. MOLO: - - - does require some form of - - -



1 of a plead - - - pleading a proof of an independent  
2 tortious act. And we - - - we do allege that we've met  
3 that standard again, again, at the early stage of the case,  
4 in terms of setting forth that claim. And you know - - -

5 JUDGE STEIN: What was the act that you pled  
6 then? What was the tortious act you pled?

7 MR. MOLO: It was - - - it was fraudulent  
8 conduct. They admitted or they entered into an agreement  
9 with the SEC.

10 JUDGE STEIN: Did you show - - - did you plead  
11 the elements of a fraud cause of action?

12 MR. MOLO: The allegations in the complaint - - -

13 JUDGE STEIN: Yeah, that's what I'm - - -

14 MR. MOLO: - - - make out - - - they make out a -  
15 - - we don't actually have a count for fraud in the  
16 complaint. We seek punitive damages on the contract claim.  
17 New York law says that for us to be able to get the  
18 punitive damages on the contract claim, we've got to have  
19 some kind of tortious act beyond the mere breach of the  
20 contract.

21 JUDGE STEIN: So that's what I'm asking. So the  
22 tortious act is fraud; is that - - -

23 MR. MOLO: Correct.

24 JUDGE STEIN: - - - what you're saying?

25 MR. MOLO: Correct.



1 JUDGE STEIN: Okay. But - - -

2 MR. MOLO: In the form - - -

3 JUDGE STEIN: But you're calling it a tortious  
4 act of fraud, doesn't that mean that you have to allege the  
5 elements of a fraudulent cause of action? I'm just talking  
6 about the punitive damages.

7 MR. MOLO: No, it's not required.

8 JUDGE STEIN: So you can just say it was fraud  
9 they - - - they misled us; that's enough.

10 MR. MOLO: Yes.

11 JUDGE STEIN: That's enough.

12 MR. MOLO: The case - - -

13 JUDGE FAHEY: The problem there - - -

14 MR. MOLO: The case law, the NYU case - - -

15 JUDGE FAHEY: Counselor, the problem there is  
16 you're equating fraud with negligence. Do you see what I'm  
17 saying, logically?

18 MR. MOLO: It isn't, Your Honor, and let me  
19 explain why.

20 JUDGE FAHEY: Okay.

21 MR. MOLO: Let me explain why - - -

22 JUDGE FAHEY: Go ahead.

23 MR. MOLO: - - - okay? You have a concept in  
24 contract law that says that if parties enter into an  
25 agreement and - - - and that agreement has a provision that



1 allows them - - - either of them, I guess, to insulate  
2 themselves from liability, in some way, all right, it  
3 doesn't matter if it's liquidated damages, it doesn't  
4 matter whether they're a hundred percent - - - I'm sorry,  
5 it doesn't matter whether it's nominal damages or - - - or  
6 it's, you know, a hundred percent insulated. And your  
7 cases, by the way, do not draw that kind of distinction.  
8 But just from a policy standpoint, okay, the law says - - -  
9 and this is where, again, I go back to what the restatement  
10 says - - - that if in fact, in performing the contract, the  
11 parties engage in something that is - - - smacks of  
12 intentional wrongdoing, evinces a reckless indifference to  
13 the rights of others, they're not entitled to that  
14 protection, even though they contracted for it, even though  
15 they had lawyers, even though they laid it down in, you  
16 know, thousands of pages of document, it doesn't matter  
17 because - - -

18 JUDGE RIVERA: So why - - - why - - -

19 MR. MOLO: - - - at that point it goes beyond - -  
20 -

21 JUDGE RIVERA: Why is the - - -

22 MR. MOLO: - - - it's beyond just those parties.

23 JUDGE RIVERA: I'm sorry. So why isn't the  
24 remedy - - - let's get now to - - - to the point that he  
25 was making before. Why isn't the remedy that was



1 negotiated enough to compensate you for the kind of - - -

2 MR. MOLO: It's - - -

3 JUDGE RIVERA: - - - harm you're - - - you're  
4 saying occurred?

5 MR. MOLO: So Your Honor, it's - - - it's not  
6 enough for several reasons.

7 JUDGE RIVERA: Okay.

8 MR. MOLO: First of all, once we get into the  
9 land of them engaging this conduct, their protections,  
10 their limitations go away, right? And the clause that  
11 they're seeking to enforce is called the sole remedies  
12 clause. By its name, it - - -

13 JUDGE STEIN: Yes, but if the sole remedies  
14 clause gives you full and complete recovery - - -

15 MR. MOLO: No, it doesn't.

16 JUDGE STEIN: I'm saying, if it does - - -

17 MR. MOLO: Okay.

18 JUDGE STEIN: - - - then - - - the fact that it's  
19 called the sole remedies clause doesn't make a difference,  
20 does it? And - - - and let me just take this one step  
21 further. Talking about certainty of results in contracts,  
22 doesn't it lead to terrible uncertainty if - - - if, in  
23 order to determine whether to apply this public policy  
24 exception, you can look to any limitation, regardless of  
25 how small that limitation is, and say that's enough because



1           you're limiting the remedies, even if it's just a little  
2           bit less than you think you otherwise might be entitled to  
3           get?

4                       MR. MOLO: Well, again, we go back to why should  
5           a party - - - and this is just - - - this is the policy of  
6           the State, it's the policy across the country, it's the  
7           policy set forth in restatement, why should a party be able  
8           to insulate itself from liability - - -

9                       JUDGE STEIN: I'm not talking about insulating  
10          from liability. I am saying you choose what the measure of  
11          your damages will be - - -

12                      MR. MOLO: Right.

13                      JUDGE STEIN: - - - okay? And it may be a little  
14          more or less than what they otherwise might be, but they  
15          don't insulate the other party from damages. That's the  
16          question here. We - - - you know, we - - - we know we have  
17          cases that talk about exempting from liability. That's a  
18          total exemption. It doesn't matter what I do, you don't  
19          get any recovery. Then there's providing a nominal sum and  
20          - - - whatever that may be, and - - - and clearly there are  
21          cases that said, you know, 250 dollars when the claim is  
22          for a million, that's a nominal sum.

23                      Now, I think if I understand you, you're trying  
24          to expand that so that any time there is an agreement in a  
25          - - - in a intelligently negotiated contract that doesn't



1 leave all possible damages open to you, that provides an  
2 opportunity to come in and say you were grossly negligent  
3 and therefore all bets are off. Why - - - why does that  
4 make sense?

5 MR. MOLO: It makes sense for - - - for two  
6 reasons. First, we're held to a pleading standard here,  
7 right? We just can't - - - no - - - this isn't going to  
8 mean that every party to a contract can come in and make  
9 that allegation. We've made allegations at this stage that  
10 support us going forward on that point.

11 JUDGE STEIN: So you don't concede - - -

12 MR. MOLO: Secondly - - -

13 JUDGE STEIN: Hold on one second.

14 MR. MOLO: Okay.

15 JUDGE STEIN: You do not concede that this  
16 provides more than nominal damages, that this contract  
17 provides - - - this provision, the sole remedies provision  
18 provides more than nominal damages?

19 MR. MOLO: It does. I'd like to address - - -  
20 can I answer the question, because I want - - - I do want  
21 to answer your question.

22 JUDGE STEIN: Um-hum.

23 MR. MOLO: The second point, okay, this court's  
24 decision in Abacus - - - in Abacus said that exculpatory  
25 clauses - - - now there was an issue of only nominal



1 damages there in Abacus, but that holding of the court says  
 2 that explor - - - exclu - - - excuse me - - - exculpatory  
 3 clauses and liquidated damages clauses are not enforceable  
 4 against the allegations of gross negligence. Liquidated  
 5 damages, by law, are supposed to approximate the actual  
 6 damages that a party would experience. The law professors  
 7 that they recruited, who I would give an effort to their  
 8 brief, but the law professors even said that you have to at  
 9 least approximate what the actual damage would be, so that  
 10 means that it's not - - -

11 JUDGE RIVERA: Okay. So then why isn't it  
 12 enough? You were there, and you didn't get a chance to  
 13 answer it. Your light is on. I want to give you the  
 14 opportunity to answer it.

15 MR. MOLO: Okay.

16 JUDGE RIVERA: Why isn't the sole remedy clause  
 17 enough? What - - -

18 MR. MOLO: The reason the sole remedies clause -  
 19 - -

20 JUDGE RIVERA: Why does it fall short?

21 MR. MOLO: - - - is not enough here - - -

22 JUDGE RIVERA: Yes.

23 MR. MOLO: - - - is that we have a question, an  
 24 open question, about whether and to what extent we can  
 25 recover for liquidated loans. Now, the law in the First



1 Department is that we can, but this court has not ruled on  
2 that question yet. There's an open question about whether  
3 we can use sampling, and the courts are split on that.  
4 There is a question about whether, as Your Honor noted, a  
5 loan by loan review, in these circumstances, would be so  
6 time consuming and so burdensome that it effectively limits  
7 our relief. And we are relatively early in the stage of  
8 the proceedings. Damages are issues that are addressed - -  
9 - is an issue that's addressed late in the case. And we  
10 don't know what arguments the defendants are going to make  
11 when they get to that damages issue and how they might try  
12 to say that we're limited from somehow receiving our full  
13 recovery.

14 JUDGE RIVERA: So counsel, your red light is on,  
15 so let me just give you a moment, really a moment - - -

16 MR. MOLO: Sure.

17 JUDGE RIVERA: - - - to address the punitives;  
18 how, indeed, was the trust injured as opposed to the  
19 certificate holders?

20 MR. MOLO: And I'm so sorry, but with the mask, I  
21 just didn't quite understand the question. Could you  
22 repeat it?

23 JUDGE RIVERA: I'm sorry. I wanted you to have  
24 an opportunity to address punitive damages, but your red  
25 light is on.



1 MR. MOLO: Oh, sure.

2 JUDGE RIVERA: And it appears - - -

3 MR. MOLO: Sure.

4 JUDGE RIVERA: - - - Judge Wilson has a question.  
5 We want to give him an opportunity - - -

6 MR. MOLO: Sure.

7 JUDGE RIVERA: - - - to ask that too.

8 MR. MOLO: Can - - - can I finish the sentence  
9 that I was saying - - -

10 JUDGE RIVERA: Very quickly.

11 MR. MOLO: - - - on that last point too?

12 JUDGE RIVERA: Very quickly.

13 MR. MOLO: Okay, just briefly. This court noted,  
14 as I mentioned in the Sokoloff case, we shouldn't be  
15 precluded now from being able to pursue this issue of the  
16 policy exception to the limitations clause. That's  
17 something for later in the case and something that we're  
18 still going to be held accountable to the proof on.

19 On the question of punitive damages, the NYU case  
20 sets forth the four-part test. We've met the first part,  
21 and that is actionable and the tort as fraud, as we  
22 mentioned before. The facts that are alleged are extrinsic  
23 to the contract. The existing status of the trust, how  
24 many people were in default. The conduct did address the  
25 trustee specifically. And the representations about the



1 delinquency rates were made to the certificate holders.

2 JUDGE RIVERA: Well, that was my question about  
3 the - - - the trustee.

4 MR. MOLO: Right.

5 JUDGE RIVERA: How is it targeting the trustee -  
6 - -

7 MR. MOLO: So - - - so - - -

8 JUDGE RIVERA: - - - as opposed to certificate  
9 holders or someone else?

10 MR. MOLO: The same representations were made to  
11 certificate holders in the offering documents as were made  
12 to the trustee in the representations and warranties.

13 In response to the question about was there any  
14 representation concerning - - - concerning having met all  
15 legal requirements, there was an allegation in the  
16 complaint, if you go to the appendix A-55, paragraph 25 of  
17 the complaint, it mentions some of the specific  
18 representations and warranties made to the trustee,  
19 including that the information on the Morgan schedule  
20 delivered to the trustee was complete, true, and correct,  
21 that any and all requirements of any federal, state, or  
22 local law had been complied with, that there was no fraud,  
23 error, omission, negligence, or similar occurrence with  
24 respect to the mortgage loan. I could go on, but - - -

25 JUDGE RIVERA: Okay.





1 MR. MOLO: But the points were made, and also  
2 that there was no default, breach, violation, or event  
3 which would permit the acceleration existing under the  
4 mortgage or mortgage note.

5 JUDGE RIVERA: Thank you, counsel. I believe  
6 Judge Wilson has a question.

7 JUDGE WILSON: Yes. So the only place in your  
8 complaint that I see gross negligence alleged is paragraph  
9 82. Otherwise it simply reads as negligence to me. You  
10 can correct me if I'm wrong. Paragraph 82 says "On  
11 information and belief, MSMCH and MSAC were grossly  
12 negligent in failing to identify and cure breaches of their  
13 representations and warranties."

14 I don't see any allegation in the complaint that  
15 the representations and warranties were made with gross  
16 negligence. And so the way I read your complaint as to  
17 gross negligence is to say they were grossly negligent in  
18 failing to perform their contractual duty. That's a  
19 strange concept because we allow people intentionally to  
20 breach their contract and pay contract damages, and we  
21 think of that in some cases efficient breach. So you seem  
22 to be asking for a very strange expansion of the law of  
23 contract.

24 MR. MOLO: No, it would not at all. You go back  
25 to Abacus, and Abacus says the only time - - - the only



1 time we get to invoke this is when the conduct smacks of  
2 intentional wrongdoing or evinces a reckless indifference  
3 to the rights of others. So you could have a situation  
4 where there might even be an intentional brief - - - breach  
5 by someone that's done for an economic self-interest that  
6 doesn't necessarily rise to the level of - - - of smacking  
7 of intentional wrongdoing, having that kind of moral  
8 culpability that the law should not facilitate and courts  
9 should not facilitate by enforcing these limitations of  
10 liability and limitations of remedy, really, clauses. And  
11 you certainly should not do it at the outset of the case  
12 which is what happened here. We should at least be allowed  
13 - - - we pled it. They paid 300

14 JUDGE WILSON: But what is - - - what is - - -

15 MR. MOLO: - - - million dollars to the SEC based  
16 upon - - -

17 JUDGE WILSON: What is the moral - - -

18 MR. MOLO: - - - their product in this case,  
19 which found them to be deceitful.

20 JUDGE WILSON: What is the moral culpability  
21 here?

22 MR. MOLO: What is their moral culpability?

23 JUDGE WILSON: Moral culpability, yes.

24 MR. MOLO: How about the SEC having said that  
25 they engaged in deceitful conduct and - - - and as a result



1 of the SEC investigation, they understated - - - well, one  
2 of the things revealed in the SEC under investigation, they  
3 understated the loans that were then in default, at the  
4 time that the deal was coming together, by a factor of  
5 four. They reported one-fourth of the defaulting loans.  
6 And that's a significant factor, as the SEC found, as to  
7 whether or not a mortgage loan will perform and whether or  
8 not the transaction will succeed if you have a large number  
9 of nonperforming loans because - - -

10 JUDGE STEIN: So any time where there's - - -

11 MR. MOLO: - - - early on these defaults were  
12 occurring.

13 JUDGE STEIN: So any time there's a fraud on a  
14 wide scale, that's enough to get you punitive damages?

15 MR. MOLO: Absolutely, because the - - - when we  
16 come to - - - to the factor period of damages and the  
17 broader effect - - -

18 JUDGE STEIN: I'm not just limiting it to this -  
19 - - this scenario of - - - of the RMBS transactions, I'm  
20 saying out there in the world, anytime somebody commits a  
21 fraud which is widespread, that entitles the plaintiff to  
22 punitive damages.

23 MR. MOLO: If it's so widespread that a pre-  
24 investigation - - - I'm sorry, a pre-filing investigation  
25 in this case, a survey of 800 loans found that 100 percent



1 of them breached the representations and warranties, a - -  
2 - a situation - - -

3 JUDGE STEIN: What about seventy-five percent?

4 MR. MOLO: - - - where 495 million dollars were  
5 the losses at the time that we filed the complaint.  
6 They're much greater now. A situation in which they paid  
7 their primary regulator 300 million dollars to resolve this  
8 transaction - - - to resolve the investigation of this  
9 transaction, which was a billion-dollar transaction, a  
10 situation in which they paid 2.6 billion dollars to the  
11 Department of Justice based upon their 250 RMBS  
12 transactions, this being one of them included in that,  
13 which contributed to the extraordinary financial crisis  
14 that this state felt the brunt of greater than any other  
15 part of the world.

16 JUDGE RIVERA: So is that - - -

17 MR. MOLO: So yes, in that circumstance - - -

18 JUDGE RIVERA: Counsel - - -

19 MR. MOLO: - - - we're entitled to punitive  
20 damages.

21 JUDGE RIVERA: Counsel, is that perhaps a bit of  
22 a difference, that it's not just that it's widespread, it's  
23 that the consequences were so dramatic and significant for  
24 so many people, not just the certificate holders, because  
25 of the nature of the securities?



1 MR. MOLO: Certainly in this case, yes.  
2 Absolutely yes. In this situation, the conduct of the  
3 defendant had far-reaching consequences on the public and  
4 far greater than the consequences of the situation where a  
5 fire alarm - - - I don't mean to diminish that - - - may  
6 not have been working and the court said that, you know,  
7 that's something that has a - - - had a - - - as a broader  
8 - - - broader consequence in the context of the gross  
9 negligence being applied just for the public policy  
10 exception to limit the limitation of liability clause.

11 But in the punitive damages consequence, this is  
12 precisely the kind of case for which the punitive damages,  
13 the general exception to the rule that punitive damages are  
14 not allowed in contract cases applies.

15 JUDGE FEINMAN: The only - - -

16 JUDGE RIVERA: Thank you, counsel.

17 JUDGE FEINMAN: Oh, sorry.

18 JUDGE RIVERA: Go ahead, yes, yes.

19 JUDGE FEINMAN: Thank you, Judge Rivera.

20 Did you want to say anything about the attorneys'  
21 fees issue?

22 MR. MOLO: About attorneys' fees?

23 JUDGE FEINMAN: Yeah.

24 MR. MOLO: We would like them, and the Court of  
25 Appeal - - - the First Department said that we're - - -



1 we're - - - we're entitled to them. The - - - the basic  
2 point that we make and - - - is that - - -

3 JUDGE RIVERA: Well, if in other parts of the  
4 agreement it mentions attorneys' fees, and doesn't here,  
5 why should attorneys' fees be encompassed?

6 MR. MOLO: Because - - -

7 JUDGE RIVERA: How does that provision - - -

8 MR. MOLO: Because we're entitled to our - - -  
9 our costs for enforcing the repurchase remedy that gets  
10 built into what's called a repurchase price. The  
11 repurchase price and - - - and our enforcement of - - - of  
12 the repurchase remedy is all about legal fees. It's all  
13 about legal action. The only action that occurs outside of  
14 that is some very ministerial mailing of notices of breach.  
15 And - - -

16 JUDGE RIVERA: But if that - - - if it's so  
17 consequential and - - -

18 MR. MOLO: It absolutely is consequential.

19 JUDGE RIVERA: And really - - - and as you say -  
20 - - as you say, really the cost associated, why not use  
21 those two words, if it's used elsewhere?

22 MR. MOLO: Well, you know, the - - -

23 JUDGE RIVERA: It seems a bit odd.

24 MR. MOLO: The Breed, Abbott case that we cite in  
25 our brief is a good example of why you don't have to do



1 that because the parties just understand that that's going  
2 to be part of it. In the Breed, Abbott case, there was a  
3 question about indemnification. And the word indemni - - -  
4 in the clause that related to indemnification didn't  
5 actually include the term attorneys' fees as part of the  
6 indemnification and the court concluded - - - this court  
7 concluded that it would make no sense to not include  
8 attorneys' fees just because they weren't mentioned.

9 So when you use the term "enforcement", and we  
10 cite several cases in our brief to this point, enforcement  
11 implies a legal action, the enforcement of the rights. And  
12 that is what the action is here. So for - - - for that  
13 simple reason, we're entitled to fees. And the - - - and  
14 the First Department found as much.

15 JUDGE RIVERA: Thank you.

16 Sir?

17 MR. MOLO: Thank you very much.

18 MR. WEINSTEIN: I'd like to start by addressing  
19 Judge Fahey's question, which I think is very illuminating,  
20 which is why didn't they bring a tort claim here or a fraud  
21 claim here. And Your Honors, there have been scores of  
22 these RMBS trustee cases brought, as you're well aware, by  
23 many of the finest law firms in the world. Not a single  
24 one of them has brought a tort case by the trustee. Not a  
25 single one has sought punitives, except for this one, and



1 the reason is very clear which is that there is no tort  
2 against the trustee.

3 To the extent there is a tort alleged, based on  
4 these allegations, it would be against certificate holders.  
5 And in fact, the certificate holders did bring fraud claims  
6 and did bring securities claims. And if there was going to  
7 be a punitive damages award of any kind, even in the  
8 picture, you could have a debate about whether it should be  
9 merited in the certificate holder cases. But it would have  
10 to be brought on behalf of the certificate holders.

11 The relationship with the trustee is purely a  
12 contractual relationship, Your Honors, and that's why they  
13 haven't brought fraud or tort claims.

14 JUDGE RIVERA: But why would they have - - - why  
15 would they associate themselves with a - - -  
16 representations that are fraudulent? Aren't they also  
17 depending on the veracity of the representations? I mean,  
18 it's their represent - - - it's their reputation on the  
19 line also - - -

20 MR. WEINSTEIN: Your Honor - - -

21 JUDGE RIVERA: - - - is it not?

22 MR. WEINSTEIN: - - - they simply have no tort  
23 claim, and that's why none of them have brought it. The  
24 relationship between the bank and the trustee is purely a  
25 contractual one. And in that contractual relationship, for





1 any breach they can show, they're given a complete remedy.  
2 There is no tort claim vis-a-vis the trustee. There is no  
3 representations collateral to the contract, which is  
4 another reason why they just couldn't bring the tort claim.  
5 If there is any - - -

6 JUDGE RIVERA: Am I misunderstanding - - - I may  
7 be misunderstanding the argument. Is that just another way  
8 of saying they don't care whatever the alleged fraud is  
9 because only the certificate holders really end up  
10 suffering a consequence from that?

11 MR. WEINSTEIN: That's absolutely right, as has  
12 been discussed in many arguments before this court. The  
13 trustee has no financial, you know, dog in the fight, so to  
14 speak.

15 JUDGE RIVERA: Okay.

16 MR. WEINSTEIN: The money gets passed through to  
17 the certificate holders. And so that's why - - - and I'm  
18 glad that Mr. Molo brought up the restatement because it  
19 makes our point precisely. What the restatement says is  
20 that the term "exempting a party from tort liability for  
21 harm caused intentionally or recklessly is unenforceable on  
22 grounds of public policy".

23 JUDGE RIVERA: What section are you reading, sir?

24 MR. WEINSTEIN: That's restatement of contract  
25 Section 195 - - -



1 JUDGE RIVERA: Oh, 195.

2 MR. WEINSTEIN: - - - restatement second.

3 JUDGE RIVERA: Thank you.

4 MR. WEINSTEIN: And that's precisely what this  
5 court has cited, along with some other contract treatises,  
6 when it described what this public policy exception is in  
7 all of its cases. And that's precisely right. And it  
8 stands to reason, as - - - as Judge Wilson said, even an  
9 intentional breach of contract - - - and this was the  
10 court's decision in Metropolitan Life - - - even an  
11 intentional breach of contract for the parties' own  
12 financial gain doesn't nullify a sole remedy provision or a  
13 limitation on remedies. That doesn't give rise to the type  
14 of gross negligence that you need.

15 And that stands to reason, Your Honor, is because  
16 a - - - a limitation on remedies in a contract already  
17 assumes that there is a breach of contract. And so you  
18 have to have something besides a breach of contract. You  
19 have to have some kind of other breach of duty from outside  
20 the contract in order to invoke the public policy  
21 exception.

22 JUDGE RIVERA: But if you do, then if it was an  
23 intentional breach is not a factor in the equation,  
24 correct?

25 MR. WEINSTEIN: Well, if you have an independent



1 tort that you can claim - - -

2 JUDGE RIVERA: Right.

3 MR. WEINSTEIN: - - - and you have a provision  
4 that is immunizing the defendant from liability, that's  
5 when the public policy exception - - -

6 JUDGE RIVERA: So I'm just saying that comparison  
7 to the intentional action sort of falls away and is not  
8 really relevant, given what you yourself say is the state  
9 of the law, what the rule is. If you've got an independent  
10 basis for a standard of a duty of care, it doesn't matter  
11 if it was intentional; if there's also gross negligence,  
12 they can proceed with their claim.

13 MR. WEINSTEIN: If there is a separate basis  
14 outside the contract - - -

15 JUDGE RIVERA: Yes, correct.

16 MR. WEINSTEIN: - - - to say that the - - -

17 JUDGE RIVERA: Yes.

18 MR. WEINSTEIN: - - - that the defendant is  
19 guilty of a tort or something akin to a tort, some kind of  
20 a breach of a duty outside the black and white - - -

21 JUDGE RIVERA: Yes.

22 MR. WEINSTEIN: - - - terms of the contract, and  
23 if the limitation on remedies immunizes the defendant from  
24 liability, that's precisely when the public policy  
25 exception comes in. And the problem with plaintiff's



1 argument here, again, Your Honor, there's two fundamental  
2 aspects of it. The first is that the defendants are not  
3 immunized from liability, and the remedy is a full remedy  
4 for every breach that they can show. And they haven't  
5 identified any basis to say that they get less than a full  
6 remedy for any breach that they identify.

7 What they're objecting to is the burden of having  
8 to go loan by loan to meet the condition precedent. And  
9 this court was clear in A.H.A. that a condition precedent  
10 is entirely distinct from a provision that immunizes a  
11 party from liability. For every breach that they actually  
12 prove, they are made whole. And they haven't indicated one  
13 basis for saying that that's not the case other than  
14 liquidated damages which, again, under the current law, we  
15 have conceded, they're entitled to liquidate loans, I  
16 should - - - I should say. They're entitled to the  
17 repurchase price under the First Department law, whether  
18 the loan's been liquidated or not.

19 So it makes them completely whole, and they  
20 haven't alleged any breach of duty outside of the contract.  
21 And that's both why the gross negligence arguments fail,  
22 and it's also why the punitive damages arguments fail,  
23 because they haven't alleged any breach of duty outside the  
24 contract. Again, that's why, in the scores of other RMBS  
25 trustee lawsuits, no other trustee has even sought punitive



1 damages.

2 JUDGE RIVERA: Um-hum. Okay. Your light is on.  
3 Do you want to quickly address this question about the  
4 attorneys' fees?

5 MR. WEINSTEIN: I would, Your Honor, briefly. As  
6 you said, Judge Rivera, the relevant provision here does  
7 not refer to attorneys' fees; it refers to costs and  
8 expenses. Seventeen other places in the contract do refer  
9 explicitly to shifting attorneys' fees. This court set a  
10 very high bar for departing from the American rule on  
11 attorneys' fees in the Hooper Associates case. That high  
12 bar is not met here when the contract is read as a whole.

13 JUDGE RIVERA: Thank you both.

14 MR. WEINSTEIN: Thank you, Your Honors.

15 (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 Deutsche Bank National Trust Co. v. Morgan Stanley Mortgage Capital Holdings, LLC, et al., No. 84, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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