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COURT OF APPEALS

STATE OF NEW YORK

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellant,

-against-

NO. 84

BARCLAYS BANK PLC,

Respondent.

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellant,

-against-

HSBC BANK USA, NATIONAL ASSOCIATION,

Respondent.

20 Eagle Street
Albany, New York
October 17, 2019

Before:

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

Penina Wolicki
Official Court Transcriber



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1 CHIEF JUDGE DIFIORE: The first appeal on our
2 calendar this afternoon is appeal number 84, Deutsche Bank.
3 Counsel?

4 MR. HALLWARD-DRIEMEIER: May it please the court,
5 Doug Hallward-Driemeier for the Trust - - - trustee on
6 behalf of the trusts. I would like to reserve three
7 minutes of my time for rebuttal.

8 CHIEF JUDGE DIFIORE: Of course.

9 MR. HALLWARD-DRIEMEIER: Your Honors, this cause
10 of action is timely if it accrued in New York, under New
11 York law, and it is timely under California law if it
12 accrued in California. The only way that the First
13 Department determined that it was untimely was by a
14 Frankenstein monster type - - -

15 JUDGE FAHEY: When you say it's timely in - - -
16 in California, do you mean it's timely under the discovery
17 rule in California?

18 MR. HALLWARD-DRIEMEIER: We have two reasons.
19 The discovery rule certainly is true, but also because it
20 of the accrual rule.

21 JUDGE FAHEY: Can it be timely without the
22 discovery rule being applied?

23 MR. HALLWARD-DRIEMEIER: It could, because of the
24 accrual - - -

25 JUDGE FAHEY: How so?



1 MR. HALLWARD-DRIEMEIER: - - - rule. The - - -
2 the California courts apply a - - - an accrual rule that is
3 different from the - - -

4 JUDGE FAHEY: Um-hum.

5 MR. HALLWARD-DRIEMEIER: - - - rule applied in
6 this state. California would recognize the parties'
7 ability to contract for a later beginning of the - - - of
8 the statute of limitations. And in the BR1 case there is
9 an explicit accrual provision that's the same as this court
10 considered in Flagstar. In Flagstar, of course, the court
11 ruled that under New York law, New York would not give
12 effect to the - - - the choice to run the statute of
13 limitations - - -

14 JUDGE STEIN: Can you commence - - -

15 MR. HALLWARD-DRIEMEIER: - - - from - - -

16 JUDGE STEIN: - - - can you - - - can you have a
17 cause of action until it accrues?

18 MR. HALLWARD-DRIEMEIER: The - - - the cause of
19 action - - - the - - - I think the accrual and the cause of
20 action are simultaneous, Your Honor.

21 JUDGE STEIN: Okay. Okay, so - - - so I guess I
22 have a hard time understanding why accrual would not be a
23 question of substantive law that would - - - under the - -
24 - the provisions here - - - be New York law in this - - -
25 in these cases.



1 MR. HALLWARD-DRIEMEIER: Your - - - Your Honor,
2 the - - - the rule in California about the ability of
3 parties to contract about accrual is part of their
4 procedural law.

5 JUDGE STEIN: Well, I understand that. But - - -
6 but there's a New York choice-of-law provision here. And
7 if New York says it's substantive, then why wouldn't that
8 be controlling?

9 MR. HALLWARD-DRIEMEIER: Well, in the DLJ case,
10 Your Honor, the court addressed the fact that conditions
11 precedent is a procedural rule, and for that reason,
12 Section 202 would pick up the rule of another state with
13 respect to conditions precedent.

14 And so the rule in California, procedural rule of
15 condition precedent, is what has to happen before the claim
16 can be brought.

17 JUDGE WILSON: Can I just - - -

18 JUDGE STEIN: What about - - - go ahead.

19 JUDGE WILSON: I'm sorry. Could - - - could I
20 just leave California aside for a second, and tell me, if
21 you can, what - - - what's wrong with this sort of very
22 simplistic approach. 202 - - - C.P.L.R. 202 applies if the
23 cause of action accrues outside of the state. With me so
24 far?

25 MR. HALLWARD-DRIEMEIER: Yes.



1 JUDGE WILSON: We said in ACE and in Flagstar
2 that the cause of action accrues when the MLPA is signed.

3 MR. HALLWARD-DRIEMEIER: That's right, Your
4 Honor.

5 JUDGE WILSON: When and where was it signed?

6 MR. HALLWARD-DRIEMEIER: The - - - the ML - - -
7 he - - - in this case, the - - - the MLPA was executed in
8 New York. It was - - - the closing occurred in New York.

9 JUDGE WILSON: So why doesn't that - - - why
10 doesn't that just end this?

11 MR. HALLWARD-DRIEMEIER: Your - - - Your Honor,
12 we agree that the cause of action accrued in New York to
13 the Trust, because the - - - all of the activities that are
14 relevant here - - -

15 JUDGE WILSON: I'm not - - - I'm not - - - I
16 understand that argument. I'm not sure why you even need
17 to go through trust, trustee, et cetera. Don't we have
18 holdings in ACE and in Flagstar that say for an RMBS case,
19 the cause of action accrues - - - if the representations
20 and warranties are alleged to be false, the cause of action
21 accrues the date that agreement is signed?

22 MR. HALLWARD-DRIEMEIER: It - - - that - - -
23 that's right, Your Honor. That - - - that's the date.

24 JUDGE WILSON: Okay.

25 MR. HALLWARD-DRIEMEIER: And also, ACE also



1 specifies that it is the trust that is - - - it is the
2 trust that sustains the legal wrong at that moment of
3 closing. And the Trust is created under New York law as a
4 New York express trust. The settlor is a New York entity
5 residing in New York. It creates the Trust in New York on
6 the date of the closing. And all of the - - - the
7 representations - - -

8 JUDGE FAHEY: So - - - so - - -

9 MR. HALLWARD-DRIEMEIER: - - - and warranties are
10 made here as well.

11 JUDGE FAHEY: - - - do we have to - - - in order
12 to go the way that you want to go it seems our choices are
13 either we have a plaintiff residence rule or we have a
14 Madden-like factor test. And you advocate different
15 factors; is that correct?

16 MR. HALLWARD-DRIEMEIER: Well, where the - - -
17 the plaintiff residence rule is state in Global Financial
18 as the usual rule, because usually the plaintiff is suing
19 for its own injury. But Global Financial actually
20 references by a CF a counter-example, the Lang case, in
21 which the - - - the injury was suffered in a place other
22 than - - -

23 JUDGE FAHEY: So that's the financial - - -

24 MR. HALLWARD-DRIEMEIER: - - - residence.

25 JUDGE FAHEY: - - - impact rule, is that what



1 we're talking about?

2 MR. HALLWARD-DRIEMEIER: The - - - it's the
3 injury to the party whose wrong is - - -

4 JUDGE FAHEY: Right.

5 MR. HALLWARD-DRIEMEIER: - - - being advanced.
6 And here - - -

7 JUDGE FAHEY: Okay. And one of the difficulties
8 in this case seems to be the distribution of the economic
9 injuries to - - - that makes that a more difficult argument
10 to make.

11 MR. HALLWARD-DRIEMEIER: Well, Your Honor, it - -
12 - it certainly makes it a more difficult argument to make
13 that it's the plaintiff's place of residence, because the
14 plaintiff, the Trust, doesn't stand to - - - to lose
15 anything on the breaches of the representations and
16 warranties that are the subject of this suit.

17 JUDGE FAHEY: One of the things we struggle with
18 is the balance between uniformity and consistency and - - -
19 which you get from a plaintiff's residence rule - - - and
20 but you also get inflexibility to deal with variations
21 between different litigation.

22 So what happens is, when I look at something like
23 this, I say to myself why is this action brought on the
24 last day of the six-year statute of limitations. I mean,
25 you'd have to be living in a hole not to know that this



1 action should have been brought sooner.

2 MR. HALLWARD-DRIEMEIER: Well, Your - - - Your
3 Honor, I - - - to the contrary. With respect to - - -

4 JUDGE FAHEY: Um-hum.

5 MR. HALLWARD-DRIEMEIER: - - - the discovery rule
6 that California would apply, for example, you have to take
7 into account all of the circumstances. And here the
8 circumstances include the fact that the defendants made
9 representations and warranties. They said that the trustee
10 may conclusively rely on the representations and
11 warranties, and they specifically said that the trustee has
12 no ob - - - can only do those things that are obligated to
13 do under the agreement, and then moreover underscored that
14 it has no obligation to investigate the underlying
15 documents.

16 JUDGE FAHEY: When - - - when was the forensic
17 evaluation done of the - - - the mortgages that were
18 involved here?

19 MR. HALLWARD-DRIEMEIER: The - - - the forensic
20 examinations were done, I believe, shortly before the
21 demand was made on the trustee to file suit. The - - - the
22 forensic - - -

23 JUDGE FAHEY: So - - - so - - -

24 MR. HALLWARD-DRIEMEIER: - - - examination - - -

25 JUDGE FAHEY: - - - let me just - - - so I have a



1 time frame in my own mind, so is that four years, six
2 years, after the economic meltdown in 2008?

3 MR. HALLWARD-DRIEMEIER: Well, Your Honor, yes,
4 it was many years after. And of course - - -

5 JUDGE FAHEY: So - - -

6 MR. HALLWARD-DRIEMEIER: - - - the economic
7 meltdown - - -

8 JUDGE FAHEY: - - - why - - -

9 MR. HALLWARD-DRIEMEIER: - - - is only the
10 general - - - the general economic situation. But that's
11 not a basis of a cause of action. There has to be a breach
12 of the representations and warranties about specific
13 mortgages. And that required a loan-by-loan, essentially,
14 re - - -

15 JUDGE FAHEY: Were there ever any actions brought
16 against Deutsche Bank for breach of any fiduciary
17 obligations for waiting for - - - for such a long period of
18 time?

19 MR. HALLWARD-DRIEMEIER: Excuse me, Your Honor?

20 JUDGE FAHEY: Were there any actions brought in -
21 - - involving these mortgages for a breach of fiduciary
22 obligation against your client - - -

23 MR. HALLWARD-DRIEMEIER: No - - -

24 JUDGE FAHEY: - - - as a result of this?

25 MR. HALLWARD-DRIEMEIER: - - - no, Your Honor.



1 And - - - and - - -

2 JUDGE FAHEY: All right.

3 MR. HALLWARD-DRIEMEIER: - - - none could be,
4 because specifically under the agreement, the - - - the
5 trustee has no obligation to investigate, and it - - - and
6 it specifically - - -

7 JUDGE FAHEY: So - - -

8 MR. HALLWARD-DRIEMEIER: - - - is not to take
9 anything that is not - - - that it's not obligated to take.

10 JUDGE FAHEY: - - - give - - - give me your best
11 estimate. If the California discovery rule were - - - were
12 to apply, would you fall within the statute of limitations?
13 And - - - and how do you think that would come out? What
14 do you think that it's possible that discovery would show?
15 Not - - - I'm just - - -

16 MR. HALLWARD-DRIEMEIER: Well - - -

17 JUDGE FAHEY: - - - asking you generally?

18 MR. HALLWARD-DRIEMEIER: - - - Your Honor,
19 specifically under - - - in April Enterprises, the
20 California court made clear that the - - - the statutory
21 period starts to run upon discovery or when they should
22 have discovered.

23 JUDGE FAHEY: Um-hum.

24 MR. HALLWARD-DRIEMEIER: So as long as there - -
25 - it - - - reasonable diligence - - - with reasonable



1 diligence you would not have discovered by two years after,
2 by 2009 - - -

3 JUDGE FAHEY: Um-hum.

4 MR. HALLWARD-DRIEMEIER: - - - then the action is
5 timely in California. And of course, in - - - I know that
6 Your Honor is pointing to and the First Department
7 certainly pointed to the general economic situation. But
8 remember that in these documents - - - New Century had
9 already declared bankruptcy. So these defendants said
10 don't worry about that, we ourselves are going to look at
11 these mortgages. We are going to represent and warrant to
12 you - - - not New Century - - - that these conform.

13 And on that basis, the trustee was able to rely
14 conclusively on those representations, did not have any
15 obligation to undertake an investigation. And so as long
16 as - - -

17 JUDGE STEIN: But does that mean that they could
18 not have discovered these breaches, which - - - I mean, I -
19 - - I read the California rule being a little more strict,
20 which is saying it - - - it has to be that it was - - -
21 that it was secret, that it was hidden, that - - - that
22 there was - - - that there was no way, with reasonable
23 diligence.

24 Now you say we weren't required to exercise
25 diligence, but I don't see the California rule speaking to



1 that.

2 MR. HALLWARD-DRIEMEIER: Well - - -

3 JUDGE STEIN: I see it saying could they have
4 done it reasonably - - -

5 MR. HALLWARD-DRIEMEIER: Well, Your - - - Your
6 Honor, both in the Meherin case that they cite and the
7 Kaplan case that we cite, it's clear that it is a con - - -
8 it is a matter of context. And the context includes, for
9 example, what the agreement says.

10 In Kaplan it was at any time. Here, it is a
11 specific - - - a specific provision in the agreement that
12 says the trustee has no obligation to inquire and may
13 conclusively rely on the representations of the defendants.

14 At the very least, it would be a question of
15 fact. In California law, it's clearly a factual question
16 whether one has acted with sufficient diligence. Again,
17 the first - - -

18 JUDGE STEIN: Let me get back for a second,
19 though to the - - - the - - - whether it should be
20 plaintiff's residence or the multifactor test. So it seems
21 to me that there's general agreement that - - - that those
22 who are really being economically harmed are the
23 certificate holders, but that it would be completely
24 impractical to base where accrual is on - - - on that - - -

25 MR. HALLWARD-DRIEMEIER: Yes.



1 JUDGE STEIN: - - - because they're so - - - so -
 2 - - so that - - - that the alternative to that is either
 3 stick with the plaintiff rule, why not? It - - - it seems
 4 to effectuate the - - - the purposes of our borrowing
 5 statute. Or we go with this multifactor test. And what we
 6 have here is three very sophisticated, very well-
 7 represented companies, all arguing for different factors
 8 and which ones are more important, and if we apply these
 9 factors, then it leads to one result, and if we apply these
 10 factors it leads to something else, which seems to me, to
 11 con - - - contradict completely the certainty and the lack
 12 of forum shopping that the statute was meant to achieve.

13 MR. HALLWARD-DRIEMEIER: Well - - -

14 JUDGE STEIN: So why would we go that way when we
 15 never have - - -

16 MR. HALLWARD-DRIEMEIER: Your - - -

17 JUDGE STEIN: - - - in this - - - in this kind of
 18 case and - - -

19 MR. HALLWARD-DRIEMEIER: Your - - - Your Honor,
 20 it may - - -

21 JUDGE STEIN: - - - we have a perfectly
 22 acceptable alternative?

23 MR. HALLWARD-DRIEMEIER: Your Honor, I - - - I'll
 24 point out that in Global Financial itself, the court did
 25 not resolve whether it was the principal place of business



1 or the place of incorporation.

2 In the First Department, they have held that in
3 an instance of a corporation that isn't really active, you
4 would look at the place of incorporation. That's the
5 analogy here.

6 You have a trust that is not itself particularly
7 active. It is created in New York under New York law at
8 the date of the closing. Everything is happening in New
9 York. The representations are being made to it, conveyed,
10 it's a specific separate asset of the trust in New York.
11 It's being breached in New York. The certificates are
12 being issued in New York. The securitization - - -

13 JUDGE STEIN: Well, now you're talking about the
14 factors.

15 MR. HALLWARD-DRIEMEIER: - - - is happening in -
16 - - well, Your Honor, but - - -

17 JUDGE STEIN: You're beyond the place of
18 incorporation.

19 MR. HALLWARD-DRIEMEIER: But - - -

20 JUDGE STEIN: So are you - - - are you suggesting
21 that the rule should be the place of incorporation?

22 MR. HALLWARD-DRIEMEIER: It - - - I - - - I think
23 in an instance where you have an entity that is not itself
24 conducting business, the place of incorporation makes the
25 right sense. And here, the equivalent of that is New York,



1 because it is - - - it is New York law under which this
2 trust is created.

3 JUDGE WILSON: So the - - - so the rule you're
4 proposing is for a New York business trust - - - created
5 under New York law - - - that's the factor you would look
6 at, to the exclusion of all else?

7 MR. HALLWARD-DRIEMEIER: I - - - I - - - I think
8 that's right, Your Honor. Of course here, it - - - it's a
9 little easier, because all of those factors point to New
10 York. Everything that the other side is pointing to is all
11 post-accrual activity.

12 ACE made clear - - - as Your Honor pointed out
13 earlier - - - that it is the closing date that is the date
14 of accrual. And all of the activity in California happens
15 post-accrual. So that is really irrelevant.

16 JUDGE WILSON: Right. But - - - but what I'm
17 getting at is, you know, I take Judge Stein's point, which
18 I think you ought to take as well, that a clear rule is a
19 lot easier for commercial parties to think about than a
20 rule that looks at a whole bunch of different factors that
21 can be weighed who now - - - who knows what way.

22 And so part of the time I'm hearing you say,
23 well, there's a bunch of different factors. And - - - and
24 but another time I heard you say look, this is a New York
25 trust that is - - - you say not functioning, I say a



1 business trust - - - created under New York law. Is that
2 rule sufficient for you?

3 MR. HALLWARD-DRIEMEIER: That - - -

4 JUDGE WILSON: Because that's a clear rule.

5 MR. HALLWARD-DRIEMEIER: - - - that - - - that
6 rule is sufficient. And it is clear, Your Honor. It has
7 the benefit of clarity. Absolutely.

8 I - - - I - - - I merely was saying that in this
9 case the court may not have to - - - to adopt a specific
10 single rule, because all of the factors occurred here. But
11 the rule Your Honor identifies is consistent with Global
12 Financial, with - - - which left open that question. It's
13 consistent with the - - - the case law in the - - - in the
14 Appellate - - - in the Appellate courts that have held that
15 where an in - - - an incorporated entity is not
16 functioning, you would look to the place of incorporation.
17 And it is a clear rule, Your Honor.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 JUDGE FAHEY: Could I - - - Judge, would you
20 mind?

21 CHIEF JUDGE DIFIORE: Yes, of course.

22 JUDGE FAHEY: If it was all right if I just had
23 one more?

24 If we disagreed with you, we adopt 202, we say
25 that California law applies, but since Cal - - - since the



1 discovery rule may apply, would we have to send it back to
2 the Supreme Court for fact-finding on that issue?

3 MR. HALLWARD-DRIEMEIER: Yes - - - yes, Your
4 Honor.

5 JUDGE FAHEY: I see.

6 MR. HALLWARD-DRIEMEIER: There are - - - there
7 are many disputed facts as to the reasonableness of the
8 trustee's activity.

9 JUDGE FAHEY: I see. Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.

11 MR. HALLWARD-DRIEMEIER: Thank you, Your Honors.

12 CHIEF JUDGE DIFIORE: Counsel?

13 MR. BOYLE: May it please the court, Nick Boyle
14 from Williams & Connolly for HSBC Bank, respondent.

15 C.P.L.R. 202 turns on the place where a cause of
16 action accrues, and Global Financial - - -

17 JUDGE RIVERA: Okay, so who suffered the injury
18 or what suffered the injury?

19 MR. BOYLE: The trustee in this case suffered the
20 injury.

21 JUDGE RIVERA: How is that?

22 MR. BOYLE: Well, the - - -

23 JUDGE RIVERA: Did the trustee invest? Did the
24 trustee - - -

25 MR. BOYLE: The injury - - -



1 JUDGE RIVERA: - - - put their skin in it, as
2 they say?

3 MR. BOYLE: The - - - the injury at issue in this
4 case is a breach of representations. The representations
5 flow to the trustee.

6 JUDGE WILSON: Well, except - - -

7 MR. BOYLE: This - - -

8 JUDGE WILSON: - - - except that we say in ACE -
9 - - this is the same question I asked earlier, which I'd
10 like you to address - - - I mean, I don't have to restate
11 the question if you know the question.

12 MR. BOYLE: So in the - - - in ACE, Your Honor
13 asked whether the breach, if it occurs in New York, should
14 be dispositive, because ACE says the - - - the breach
15 occurs when the - - - rather the cause accrues when the
16 breach occurs.

17 JUDGE WILSON: The cause accrues when the MLPA is
18 - - - is signed, and that's what Flagstar says as well - -
19 - when it's executed.

20 MR. BOYLE: Well, I understand ACE and Flagstar
21 to say that the cause accrues upon the closing of the
22 trust. In this case that is - - -

23 JUDGE WILSON: Well - - -

24 MR. BOYLE: - - - that was later than the MLPA,
25 at least in the - - - in the case of HSBC. It was a month



1 - - -

2 JUDGE RIVERA: So your point is - - -

3 MR. BOYLE: - - - it was as month - - -

4 JUDGE RIVERA: - - - that may be the timing, but
5 that's not the location?

6 MR. BOYLE: Well - - -

7 JUDGE RIVERA: The situs of the accrual - - -

8 MR. BOYLE: - - - our point is, for example, in
9 the Global Financial, one of the factors considered by the
10 court and rejected was the place of breach. When - - - in
11 Global Financial, one of the four factors that pointed to
12 New York was the place of breach. Bre - - - the place of
13 breach does not tell us where the place of injury is.

14 In this case it's a repurchase action. It's a
15 repurchase of loans based on the breach. The repurchase -
16 - -

17 JUDGE RIVERA: But the - - - but the certificate
18 holder is the one that's invested, right?

19 MR. BOYLE: That's - - - that's true.

20 JUDGE RIVERA: The certificate holder, if they
21 now try to turn in these certificates or whatever might be
22 the appropriate vocabulary to explain what I'm trying to
23 explain - - -

24 MR. BOYLE: Yes, Your Honor.

25 JUDGE RIVERA: - - - they're the ones who are not



1 going to get as much money back, correct?

2 MR. BOYLE: Well, that is true as a consequence,
3 but there's a contractual right at stake in this case, is
4 the purchase right. The party to the contract is the
5 trustee, it's not the trust.

6 JUDGE RIVERA: Yeah, but - - - but the only point
7 of that is the - - - so that the certificate holder, either
8 their injury is mitigated or they suffer no injury, right?

9 MR. BOYLE: Well - - -

10 JUDGE RIVERA: I mean, the trustee is - - - it
11 doesn't matter to the trustee, in that sense. They're - -
12 - they're not - - - what I'm saying is if - - - if the
13 focus is economic loss, I'm still not clear how the trustee
14 suffers an economic loss.

15 I understand your point about the entity, the
16 trust, right - - - so this fictitious entity.

17 MR. BOYLE: As we understand the case, the
18 trustee is suing because the loans don't conform to certain
19 characteristics. There's no allegation, for example, in
20 the complaint, that the trust suffered some economic harm.
21 But - - -

22 JUDGE RIVERA: Yeah, but it's purely for the
23 benefit of the certificate holder, right? The - - -

24 MR. BOYLE: But - - -

25 JUDGE RIVERA: - - - the - - - the - - -



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MR. BOYLE: Excuse me.

JUDGE RIVERA: - - - individual or whatever entity invested. They're the ones who are not getting as much, because you've got the crash.

MR. BOYLE: But the trustee is the entity that holds the loans. The trustee is the entity that has the contractual right to loans with certain characteristics.

And the complaint is: we are not holding - - - we, the trustee, are not holding loans with specific characteristics. We are suing to enforce that right. And in this case, it is a specific-performance case. It - - -

JUDGE WILSON: So let me - - - I don't want to beat a dead horse, but let me just try this one more time. In - - - in ACE we say: "The Trust's claim, subject to the six-year statute of limitations for breach of contract actions, accrued on March 28th, 2006, when the MLPA was executed."

In Flagstar, we say essentially the same thing. And in Fl - - - in - - - in ACE, the PSA and the MLPA are executed on the same date. That's not true in Flagstar. The PSA is executed substantially after the MLPA, and we still say it's the date that the MLPA is executed - - - not when it's closed - - - executed that the cause of action accrues.

So I continue to wonder why 202 applies here at



1 all, because we have two of our recent decisions saying
2 that a case - - - unless there's some distinguishing fact
3 about these contracts that it's different from the ones
4 there, I don't see why we're talking about 202 at all.

5 MR. BOYLE: I - - - I think there's at least a
6 couple other reasons. The trustee is not a party to the
7 MLPA. So the - - - the depositor and sponsor - - -

8 JUDGE WILSON: And wasn't - - - and wasn't in ACE
9 and - - - and Flagstar either.

10 MR. BOYLE: Well, but if - - - if we are looking
11 to that as the time, then that's more than six years before
12 the case was filed, because the MLPA was signed a month
13 before the closing.

14 And - - - and secondly, Deutsche Bank, in
15 footnote 3 of its brief, has said it disclaims any argument
16 that it's looking to the depositor and the timing of the
17 MLPA, I think, because that would be dispositive as to the
18 case.

19 But the trustee, as we understand it from the
20 complaint, is suing based on the restatement of those same
21 representations that are in the MLPA, which are restated as
22 of the date of the closing date. So that is why it is
23 undisputed in the briefs that the date of the closing,
24 which is June as opposed to May, is the correct date.

25 Now, if Your Honor is correct that we should be



1 looking to May, it's more than six years. Even in New
2 York, then the ca - - - the claim would be untimely.

3 JUDGE RIVERA: Where's the location of the
4 closing?

5 MR. BOYLE: The location of the closing is in New
6 York, but the representations are made to the trustee, and
7 the trustee is in California.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. BOYLE: Thank you.

10 MR. SCOTT: May it please the court, Jeff Scott
11 of Sullivan & Cromwell, for Barclays.

12 Just going back to Your Honor's question, Your
13 Honor is focused on the conduct that caused the injury not
14 where the injury was felt. And New York law has been clear
15 for decades. It adopts the lex loci rule, where you - - -
16 you look for the place of accrual, not when it accrued.
17 And the way that the courts in New York do that, under
18 Global Financial and other cases, is they look for the
19 place of injury.

20 And what this court found in Global Financial was
21 that because it usually occurs where the plaintiff resides,
22 they wanted to adopt what the court had called in the
23 penultimate paragraph, the place of single determination,
24 which is the - - -

25 JUDGE RIVERA: Okay, so where - - - where is the



1 injury? What's your argument for where the injury occurs?

2 MR. SCOTT: The injury in this case clearly - - -
3 and the plaintiff here argues and finally in its reply
4 brief it comes to a resting place - - - that the - - -

5 JUDGE RIVERA: Um-hum.

6 MR. SCOTT: - - - entity that was allegedly
7 injured was the Trust. Well, we know under longstanding
8 New York law that the Trust does not have a tangible locate
9 - - - location. In fact, what New York law says is that
10 the Trust is not separate from the trustees. It is where
11 the trustee resides.

12 So if the Trust was, in fact, injured, it was
13 injured where the trustee resides. And that's the place of
14 injury.

15 In the Barclays case, the Trust's corpus, the
16 mortgage notes and loans, are maintained in California.

17 JUDGE RIVERA: What's the injury to the Trust?

18 MR. SCOTT: The injury to the Trust here is now
19 they're the legal owner of assets which have diminished in
20 value as a result of the breach of representations and - -
21 -

22 JUDGE RIVERA: What's the asset?

23 MR. SCOTT: The assets here - - - and let's be
24 clear on this - - - they talk in their papers all about the
25 certificates and the beneficial owners. None of that is



1 trust property. Not a single piece of that is trust
2 property.

3 JUDGE RIVERA: Well, but the whole point - - -
4 look, but the whole point of this particular financial
5 device and the way it's used and of course the impact the
6 meltdown on so much of the country, is that the certificate
7 holders are the ones who now don't have as much value.
8 Isn't that - - -

9 MR. SCOTT: Right. Those - - -

10 JUDGE RIVERA: - - - they're - - - they're the
11 ones - - - if you really look at Global Financial, where's
12 the economic loss; who are what is suffering the economic
13 loss? It's not the trustee. It's the certificate holders.

14 MR. SCOTT: Right. And as Your Honor knows from
15 the various - - -

16 JUDGE RIVERA: From my understanding of the
17 argument, that's not workable - - - right - - - under
18 Global Financial, it wouldn't be a workable rule to look at
19 every single certificate holder's place of residence. But
20 this is my problem with this case.

21 That's who no longer has the same economic value
22 that they had pre the crash.

23 MR. SCOTT: So there are - - - thank you, Your
24 Honor. So there are two types of cases.

25 JUDGE RIVERA: Um-hum.



1 MR. SCOTT: There are the RMBS-investor cases.
2 And this court knows all too well about those. That's the
3 case you're talking about. They sue on the certificates
4 for injury to themselves in their individual capacity,
5 because they suffered the injury.

6 The Trust here, as they admit in their papers, is
7 suing be - - - on behalf of the Trust corpus, which is
8 located in California. And the reason it's located in
9 California is because that's where the trustee's operations
10 are and the activities. And they are not - - - the Trust
11 is - - - it's - - - you don't make a - - - a persuasive
12 legal point by saying the Trust resides in New York because
13 there's a New York choice-of-law provision. It's not a
14 tangible entity. It's not a legal entity. It resides
15 where - - -

16 JUDGE FAHEY: So let - - - so let - - -

17 MR. SCOTT: - - - the trustee - - -

18 JUDGE FAHEY: - - - me ask you this.

19 MR. SCOTT: - - - resides.

20 JUDGE FAHEY: Where is the injury?

21 MR. SCOTT: The in - - - the injury here is twofo
22 - - - it's manifold. So injury to the certificate holders
23 - - -

24 JUDGE FAHEY: No, but where would you identify
25 the geographic location of the injury, the economic injury



1 here? Say in the context of the Lang case, where would you
2 identify it?

3 MR. SCOTT: I would locate it here in California,
4 where the Trust corpus is sitting. The mortgage notes and
5 loans are no longer of value in California. They're of
6 lower or diminished value. It's where the trustee is
7 located.

8 And this nontangible entity called a trust is - -
9 - under the case law, resides - - - it's at the same
10 location as to where the trustee is. So the first - - -

11 JUDGE FAHEY: No, I - - - I - - - I understand.
12 The Trust is in California. We all agree on that. Now,
13 but moving beyond that, what - - - I - - - I'm trying to
14 get to where the injury is. And it seems to me that the
15 injury here, if it's not in New York, is dispersed
16 throughout the nation, through institutional investors that
17 cover all the states in the country, practically.

18 So it - - - it can be one of three places: it's
19 everywhere, New York, or California. Where do you say it
20 is? You say the injury is in California, correct?

21 MR. SCOTT: I would say the injury is in
22 California - - -

23 JUDGE FAHEY: And I - - - let me just finish the
24 question, then. What basis are you saying that? Tell me
25 what the injury in California is.



1 MR. SCOTT: The ca - - - the plaintiff here is -
2 - -

3 JUDGE FAHEY: Um-hum.

4 MR. SCOTT: - - - the trustee. They're
5 purporting to say the injury was to the Trust. The Trust
6 corpus in the Barclays case is located in California.

7 JUDGE FAHEY: So - - -

8 MR. SCOTT: The injury is - - -

9 JUDGE FAHEY: - - - so - - -

10 MR. SCOTT: - - - in California.

11 JUDGE FAHEY: - - - so what was the diminishment
12 of it? Give me - - - give me an idea of what the nature of
13 the loss was?

14 MR. SCOTT: The mortgage notes, now, and loans,
15 are less valuable, because the credit characteristics with
16 respect to the borrowers - - - the property, which they
17 allege, are no longer as valuable.

18 JUDGE FAHEY: The properties are all throughout
19 the country, so - - -

20 MR. SCOTT: Right. And so the mortgage notes are
21 no longer as valuable. That's the asset that generates the
22 principal and income that gets paid to the beneficiaries.

23 The beneficiaries are taken care of in the RMBS
24 investor cases. And in those cases, Your Honor, just to be
25 clear, all of the courts - - - the lower courts - - - found



1 that the injury in those cases was where the beneficiaries
2 were located, because they were suing on their
3 certificates.

4 But here the certificates are not trust property.

5 JUDGE RIVERA: Okay, so let's - - - let's say we
6 go with this. How is the trustee enriched?

7 MR. SCOTT: They are not enriched - - -

8 JUDGE RIVERA: By - - - by this arrangement?

9 MR. SCOTT: - - - they are not - - - they - - -

10 JUDGE RIVERA: Because at the end of the day they
11 - - - whatever fee they may charge - - - I'm not talking
12 about the fee - - - it's the certificate holders, right,
13 who - - - whatever investment they have rises and falls
14 with this market and how these mortgages play out.

15 MR. SCOTT: The - - - the Trust here is the legal
16 owner of assets that are now diminished in value. And in
17 the case cited, the Toronto General Trust case, it has long
18 been held in New York - - - no one has ever reversed that
19 case from 1898 - - - that the right to sue - - -

20 JUDGE RIVERA: Who owns - - -

21 MR. SCOTT: - - - is in their own - - -

22 JUDGE RIVERA: - - - who owns equitable title?

23 MR. SCOTT: Pardon?

24 JUDGE RIVERA: Who owns equitable title?

25 MR. SCOTT: Who owns equitable? The beneficial



1 ownership interest resides with the beneficiaries - - -

2 JUDGE RIVERA: Right.

3 MR. SCOTT: - - - which are the certificate
4 holders.

5 JUDGE RIVERA: Right.

6 MR. SCOTT: The legal interest resides with the
7 Trust. And that's why the - - -

8 JUDGE RIVERA: Why - - - why should we not be
9 looking at who actually - - - as Global Finance instructs -
10 - - who actually suffers the economic loss? Because it's
11 the equitable holder.

12 MR. SCOTT: And our point is there is multiple
13 loss here, including to the trustee. The trustee is now -
14 - - injury is defined in Black's Law Dictionary - - -

15 JUDGE WILSON: Well, let me ask you - - -

16 MR. SCOTT: - - - as a wrong committed - - -
17 sorry, Your Honor.

18 JUDGE WILSON: That's okay. If all of the
19 beneficial owners were located in New York, would you still
20 say it's - - - either the trustee or the Trust corpus - - -
21 I'm not sure which now is the rule you're saying we ought
22 to adopt - - - would be California, even if all of the
23 beneficiaries are here?

24 MR. SCOTT: They have a separate injury which
25 they can bring in their own right on behalf of the actual



1 certificates. And they did that. They filed hundreds of
2 cases in New York State. And so their rights are protected
3 through their action.

4 JUDGE STEIN: Can - - -

5 MR. SCOTT: We're talking about a different
6 action here.

7 JUDGE STEIN: I'm just going to ask you to shift
8 gears for a minute before - - - I know you're light's not
9 on yet - - -

10 MR. SCOTT: Yeah, right.

11 JUDGE STEIN: - - - but it probably will be - - -

12 MR. SCOTT: Almost.

13 JUDGE STEIN: - - - soon. And just if you would
14 be willing to address the discovery rule?

15 MR. SCOTT: So I think the discovery rule is
16 quite easy. And I think Judge Wilson, you were - - -

17 JUDGE FAHEY: Fahey.

18 MR. SCOTT: Oh, sorry.

19 JUDGE FAHEY: Wilson.

20 MR. SCOTT: Sorry. You were - - - you were
21 focused on - - - you were focused on, in your question, did
22 they comply with the discovery rule. And the answer is
23 absolutely no.

24 There is nothing in the complaint - - - they say
25 there's these factual disputes. Well, we know, under



1 California law, that they need to plead and prove
2 reasonable diligence that they undertook during the
3 limitations period, to actually discover.

4 Now, what they knew here is the trusts were
5 suffering - - - suffering hundreds of millions of losses.
6 So they knew there was injury. And what California law
7 says - - - and it's crystal clear, and that's why the First
8 Department was correct - - - you have to plead you can - -
9 - you exercised reasonable diligence during the limitations
10 period. And they don't say one thing that - - -

11 JUDGE FAHEY: So during - - -

12 MR. SCOTT: - - - they did - - -

13 JUDGE FAHEY: - - - the four-year limitations
14 period, it has to be pled?

15 MR. SCOTT: Yes, that they took one step. They
16 haven't pled one step they took. And what they say - - -
17 and this is telling - - -

18 JUDGE FAHEY: Um-hum.

19 MR. SCOTT: - - - the trustee really didn't want
20 to get involved in litigation. So they point to the - - -

21 JUDGE FAHEY: Why is that?

22 MR. SCOTT: - - - provision - - -

23 JUDGE FAHEY: Why - - - why - - -

24 MR. SCOTT: They - - - because they - - - what
25 they say in their papers is there is a contractual



1 provision that says we don't have a - - - we have a limited
2 duty of investigation and don't need to investigate unless
3 the certificate holders give us a direction.

4 But nowhere in their complaint have they alleged,
5 in light of the massive injury that the trusts were
6 actually suffering, did they reach out to certificate
7 holders and say indemnify us and give us an instruction to
8 investigate, so we can pursue the claims of the trust.
9 Instead, they remained silent until a certificate holder
10 stepped forward, after the statute of limitations in
11 California had expired.

12 And because they didn't take any steps, the
13 contractual provision doesn't excuse them from compliance
14 with California law. If they want to rely on the discovery
15 rule - - -

16 JUDGE RIVERA: Let's say we agree with you on
17 that. What about their alternative argument about the
18 tolling?

19 MR. SCOTT: The accrual clause. And I see my
20 light - - - my time is up, but let me answer this question,
21 because I think Your Honor was mentioning this earlier.

22 You are - - - there's this whole phrase: mixing
23 and matching, that the First Department somehow mixed and
24 matched.

25 Their argument is not based on California tolling



1 or accrual law. It's based on New York substantive law.
2 And the reason we know that is because they're not looking
3 to the discovery rule or some common law with respect to
4 accrual. What they do is they look to the contracts and
5 they say these contractual provisions, the accrual clause
6 in my case and the repurchase protocols in both cases, they
7 mean this under the law, that the claim is accrued.

8 But the contracts have New York choice-of-law
9 provisions, which are substantive choice-of-law provisions.
10 So if the trustee had brought this case in California, a
11 California court would have said to the trustee, so I see
12 your argument is that this accrual clause and this
13 repurchase protocol toll it, because they're a condition
14 precedent. But I also see that the parties selected New
15 York substantive law.

16 So I need to look to New York substantive law as
17 to whether or not these provisions actually delay the
18 running of the statute of limitations. And that's an easy
19 - - -

20 JUDGE RIVERA: Is that - - - is that what you
21 think the legislature and what we've interpreted 202 to
22 anticipate?

23 MR. SCOTT: Well, with respect - - -

24 JUDGE RIVERA: That - - - that one is going to
25 look to the non-New York state, obviously - - - right, the



1 other state, the other jurisdiction's statute of
2 limitations and then look back again to New York's law?

3 MR. SCOTT: So they're - - - so they're not
4 looking back, because this argument in this case - - - so I
5 will - - - I will grant that the discovery rule is based on
6 the common law of California, but this argument, the
7 accrual provision and the repurchase protocol, is not
8 really based on California law, it's based on New York law,
9 because it's a substantive choice-of-law - - -

10 JUDGE RIVERA: But the - - - the argument is that
11 when you look to California, in this case, for purposes of
12 202, you look to the entire way that California would
13 determine if something is, indeed, timely, which would
14 include their tolling provision.

15 MR. SCOTT: You would look to their tolling law.
16 But this is not an argument based on their tolling law.
17 The argument is actually based on the - - - the
18 interpretation and meaning of the contract.

19 And New York law is clear on this, and so is
20 California law. Whether or not a contract has a condition
21 precedent is a substantive issue of contract
22 interpretation. And so if you're going to interpret a
23 contract, you need to say first of all, does the contract
24 have a choice-of-law provision. These contracts have
25 choice-of-law provisions. They're New York. And the court



1 actually already reviewed these repurchase protocols, they
2 reviewed - - - reviewed an identical accrual clause, in a
3 case, mind you, brought by Deutsche Bank - - - Flagstar
4 brought the Deutsche Bank case - - - with an identical
5 accrual clause. And New York choice of law was - - - the
6 substantive law was New York, and the court found it
7 doesn't delay it.

8 They can't cite to a single case that says we
9 need to look to California law with respect to how to
10 interpret condition precedents, because there's no basis to
11 say that a California court would - - - would ignore the
12 New York choice-of-law provision. It would not, and that's
13 why they lose on that argument.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. SCOTT: You're welcome. Thank you, Your
16 Honors.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. HALLWARD-DRIEMEIER: Your Honor, there are
19 several things I'd like to clarify. The first is that in
20 DLJ the court held that the claims accrual (sic) on the
21 closing date not the execution date, because the
22 representations and warranties are made as of the closing
23 date. And that's the critical date.

24 The - - - the Trust, under the Restatement
25 (Third) Section 2, the - - - it recognizes that the common



1 law and statutory law implicitly recognizes a trust as a
2 legal entity. And the rule, of course, that you have to
3 look through the representative-plaintiff to the actual
4 underlying party that suffered the injury is evident in
5 many types of cases, such as bankruptcy trustees,
6 subrogees, and the like.

7 Here we're asking that the same law - - - rule be
8 applied with respect to a trust which is created in New
9 York, under New York law. The representations and
10 warranties, which are the asset of the trust - - - it's a
11 separate asset - - - and that's at A-100, A-567, that's the
12 asset that's - - - that is diminished by their breach. And
13 that is made in New York on the date of the closing.

14 JUDGE RIVERA: So - - - so - - - so then who or
15 what suffers an injury as a result of the diminishment of
16 the value of these assets?

17 MR. HALLWARD-DRIEMEIER: Well, Your Honor, the
18 Trust suffers the injury, and as a consequence, of course,
19 the certificate holders, because they are the beneficial
20 owners of the Trust.

21 JUDGE RIVERA: So - - -

22 MR. HALLWARD-DRIEMEIER: It's not the trustee.

23 JUDGE RIVERA: - - - the Trust invested something
24 that now is worth less?

25 MR. HALLWARD-DRIEMEIER: The - - - exactly. The



1 trust has assets. Among those assets - - - and they're
2 listed in - - -

3 JUDGE RIVERA: But who - - -

4 MR. HALLWARD-DRIEMEIER: And they - - - to
5 include the - - -

6 JUDGE RIVERA: - - - so the - - -

7 MR. HALLWARD-DRIEMEIER: - - - representations
8 and warranties.

9 JUDGE RIVERA: - - - did the Trust purchase
10 assets?

11 MR. HALLWARD-DRIEMEIER: The - - - the Trust - -
12 -

13 JUDGE RIVERA: Just to be clear.

14 MR. HALLWARD-DRIEMEIER: - - - I mean, that's - -
15 - I mean, there may be a bit of a legal fiction here, just
16 as there is with respect to - - -

17 JUDGE RIVERA: Yes, indeed.

18 MR. HALLWARD-DRIEMEIER: - - - corporations, Your
19 Honor. But in ACE it specifically says, and repeatedly,
20 page 591, the breaches "caused the trust and the
21 certificate holders to lose 300 million." At page 597,
22 "The trust suffered a legal wrong at the moment the sponsor
23 breached." So - - -

24 JUDGE RIVERA: So then you also see it as the
25 certificate holders have their own kinds of claims and then



1 the Trust has its own claim?

2 MR. HALLWARD-DRIEMEIER: That's right, Your
3 Honor. And the - - - and the Trust provides that clarity
4 that the court is looking for, because the Trust is created
5 under - - -

6 JUDGE FAHEY: The only thing I'm a - - -

7 MR. HALLWARD-DRIEMEIER: - - - New York law.

8 JUDGE FAHEY: - - - little - - - I struggle with
9 a little bit on that is I understood that the trustee is -
10 - - is of course authorized to bring an action on behalf of
11 the certificate holders.

12 MR. HALLWARD-DRIEMEIER: And that's true in the
13 case of a bankruptcy trustee or the subrogee, any of those
14 representative-plaintiffs. That's true. But you have to
15 look through that to the actual injury.

16 JUDGE FAHEY: So - - -

17 MR. HALLWARD-DRIEMEIER: Who's injured and - - -
18 and where.

19 JUDGE FAHEY: - - - so nonetheless, we get back
20 to the problem before: the initial obligation to do
21 something about this. And that seems to have been your
22 obligation.

23 MR. HALLWARD-DRIEMEIER: Up - - - upon the demand
24 of the certificate holders. That's right, Your Honor.

25 JUDGE FAHEY: So you're saying the trustee has -



1 - -

2 MR. HALLWARD-DRIEMEIER: Or - - - or notice - - -

3 JUDGE FAHEY: No, let me just get this straight.

4 You're saying the trustee has no obligation, absent the
5 demand of the certificate holders, to do anything here?

6 MR. HALLWARD-DRIEMEIER: Well, no, Your Honor,
7 because - - -

8 JUDGE FAHEY: Because we're talking about every
9 bank in the world is about to collapse - - - no, let me
10 just finish, you know. Every bank in the world is about to
11 collapse. We've gone through the largest economic meltdown
12 or on the verge of it since the Great Depression. And the
13 trustee has to wait for the certificate holders to ask him
14 to do something to try and protect their investments?

15 MR. HALLWARD-DRIEMEIER: No, Your Honor. Because
16 the defendants also said that they would provide notice to
17 the trustee upon their discovery, and that would also
18 trigger the obligation to act.

19 JUDGE FAHEY: That's why I initially asked you
20 about whether or not there had been any actions for breach
21 of fiduciary duty, and you said none on this; is that
22 right?

23 MR. HALLWARD-DRIEMEIER: No, Your Honor. But of
24 course, the defendants can't escape the timeliness of this
25 action by themselves breaching their other obligation to



1 provide notice to the trustee.

2 JUDGE FAHEY: No, I - - - I understand your other
3 argument. I - - - I'm just - - - I'm curious about the
4 inaction here on your part.

5 MR. HALLWARD-DRIEMEIER: I do want - - -

6 JUDGE RIVERA: What - - - what's the source - - -
7 okay. The certificate holders have their own claim.
8 What's the source of the trustee's claim?

9 MR. HALLWARD-DRIEMEIER: It is purely
10 contractual, Your Honor. Under the - - - the - - - the
11 settlors of this trust are the depositors in New York
12 acting. They create the Trust under New York law as a New
13 York trust. The - - - the rights and responsibilities of
14 the trustees are solely those that are specified in the
15 contract.

16 They're not supposed to do anything that they are
17 not obligated to do - - -

18 JUDGE RIVERA: But - - -

19 MR. HALLWARD-DRIEMEIER: - - - under the
20 contract.

21 JUDGE RIVERA: - - - then again, isn't that going
22 back to: it's not really the Trust that's suffering any
23 injury? Any action they bring is because someone else or
24 something else is - - - has lost value.

25 MR. HALLWARD-DRIEMEIER: If - - -



1 JUDGE RIVERA: In their investment.

2 MR. HALLWARD-DRIEMEIER: And - - - and I think
3 that's why ACE phrases it as the trust and the certificate
4 holders, because the certificate holders are the beneficial
5 owners of the trust. It's not the trustee. The trustee is
6 not going to see a dime if there's any recovery here. It's
7 the certificate holders.

8 JUDGE RIVERA: So let me ask you what may seem to
9 be a - - - a silly question. So I'm a certificate holder.
10 How do I cash in? What do I do?

11 MR. HALLWARD-DRIEMEIER: Well, Your Honor, it - -
12 - in terms of asking that his happen, I mean, you could
13 sell on - - - on the market - - -

14 JUDGE RIVERA: That's what I mean.

15 MR. HALLWARD-DRIEMEIER: - - - your certificate.
16 But with respect - - -

17 JUDGE RIVERA: You sell on the market?

18 MR. HALLWARD-DRIEMEIER: You could - - - you
19 could sell the certificate on the market.

20 JUDGE RIVERA: I go to my broker and say sell
21 this thing?

22 MR. HALLWARD-DRIEMEIER: You could, yes. But you
23 - - - what you can't do - - - and even the trustee cannot
24 do - - - is sell the underlying mortgage notes. That's not
25 property of the trustee - - -



1 JUDGE RIVERA: Sure.

2 MR. HALLWARD-DRIEMEIER: - - - in any way.

3 Because again, that is all constrained by the - - - the
4 agreement. And so it's - - - the - - - to say that the
5 trustee is legal owner of the notes, they have no interest
6 whatsoever. They can't even sell the notes.

7 And I - - - I want to make clear that the - - -
8 the notes, if we're going to look to the notes, in the NCI
9 case are in Minnesota, which has a six-year statute of
10 limitations, unlike California. But with respect to
11 California law, the Smith Barney case involved a contract
12 that also had a New York choice-of-law provision, and yet
13 in that case the court held that "in borrowing the foreign
14 statute, all of the extensions and tolls applied in the
15 foreign state must be imported so that the entire foreign
16 statute of limitations applies, not merely its period."

17 JUDGE STEIN: It didn't address these accrual
18 rules like we have here?

19 MR. HALLWARD-DRIEMEIER: Well, Your Honor, in the
20 DLJ case and in Flagstar, both, the court characterized
21 these types of conditions precedent as procedural, not
22 substantive. So you would pick up the law of California,
23 which is part of its limitations period, because it's the
24 procedural rule that it applies.

25 And Smith Barney says you have to pick up all of



1 those rules, because of course the statute of limitations
2 is, in a sense, a balance. New York starts with a very
3 long statutory period - - - six years - - - and then says
4 but that's it, we're not going to allow you to extend it,
5 discovery, by contract, anything.

6 California makes a different judgment. They say
7 four years, a very short statute of limitations, but then
8 they say you can adjust it by contract, through accrual
9 provisions, as it was explicit in the BR1 case, but also
10 through - - -

11 JUDGE STEIN: But don't you have to - - -

12 MR. HALLWARD-DRIEMEIER: - - - conditions
13 precedent.

14 JUDGE STEIN: - - - bring that within the four
15 years?

16 MR. HALLWARD-DRIEMEIER: You - - - that's not a
17 categorical rule. The - - - the - - - the Mayer (ph.) case
18 that they rely on says that that is the case where the
19 plaintiff was itself injured and knew of its injury on the
20 moment of the injury. But that is - - - it says explicitly
21 that it's all of the circumstances.

22 And in the Kaplan case, one of the circumstances
23 that you would look to is have the parties, in their
24 agreement, suggested that - - - some greater liberality
25 about that. In the Kaplan case it was "at any time"



1 language. Here the language is explicitly saying, trustee,
2 you have no obligation; rely on us.

3 And now the - - - now the defendants are saying,
4 having said we represent this, you can trust this, you can
5 take it to the bank, now they say nope, sorry, you had to
6 go and do what the agreement explicitly says you had no
7 obligation to do.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. HALLWARD-DRIEMEIER: Thank you, Your Honors.

10 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Deutsche Bank National Trust Company v. Barclays Bank PLC, and Deutsche Bank National Trust Company v. HSBC Bank USA, National Association, No. 84 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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