

**MBIA Ins. Corp. v Countrywide Home Loans, Inc.**

2013 NY Slip Op 34135(U)

April 29, 2013

Supreme Court, New York County

Docket Number: 602825/08

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: HON. EILEEN BRANSTEN, JUSTICE PART 3

-----X  
MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08  
Motion Date: 12/14/12  
Motion Seq. No.: 062

COUNTRYWIDE HOME LOANS, INC.,  
COUNTRYWIDE SECURITIES CORP.,  
COUNTRYWIDE FINANCIAL CORP.,  
COUNTRYWIDE HOME LOANS  
SERVICING, LP AND BANK OF AMERICA  
CORP.,

Defendants.

-----X  
The following papers, numbered 1 to 3, were read on this motion to strike.

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, this motion is decided in accordance with  
the accompanying memorandum decision.

Dated: April 29 2013

  
Hon. Eileen Bransten

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMITORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08  
Motion Date: 12/14/12  
Motion Seq. No.: 62

COUNTRYWIDE HOME LOANS, INC.,  
COUNTRYWIDE SECURITIES CORP.,  
COUNTRYWIDE FINANCIAL CORP.,  
COUNTRYWIDE HOME LOANS  
SERVICING, LP and BANK OF AMERICA  
CORP.,

Defendants.

-----X

**BRANSTEN, J.**

This matter comes before the Court on Defendants Countrywide Home Loans, Inc. (“CHL”), Countrywide Securities Corporation (“CSC”), Countrywide Financial Corporation (“CFC”) and Countrywide Home Loans Servicing, LP’s (“CHLS”, and, with CHL, CSC and CFC, “Countrywide”) motion to strike the Butler Underwriting Report, the Butler Rebuttal Report, and the Butler Affidavit. Plaintiff MBIA Insurance Corporation (“MBIA”) opposes. For the reasons that follow, Countrywide’s motion is denied.

## I. Background

The facts of this matter have been discussed extensively in previous decisions of this court. Thus, only details necessary to the instant motions are referenced herein.

## II. Analysis

In Motion Sequence No. 62, Countrywide asserts that Butler's Underwriting Report and the Butler Affidavit are inadmissible because Butler is not an expert in the underwriting of HELOC and CES loans, automatic underwriting systems or appraisals of residential mortgage loans. Countrywide further contends that the Underwriting Report is inadmissible because Butler's conclusions are unreliable and not based on facts in the record. Finally, Countrywide argues that Butler improperly opines on legal conclusions in the Underwriting Report. The court will address each argument in turn.

### 1. Butler's Expertise

"Generally speaking, a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable."

*Matott v. Ward*, 48 N.Y.2d 455, 459 (1979).

MBIA has shown that Butler has sufficient experience, training and knowledge in the loan industry and in the banking industry at large to serve as an expert in this case. See Servicing Report, pp. 3-6. “[A]ny alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony.” *Bd. of Managers of 195 Hudson St. Condo. v. 195 Hudson St. Assocs.*, 63 A.D.3d 523, 524 (1st Dep’t 2009) (internal quotations omitted).

## 2. Reliability

Countrywide claims that Butler’s methods in reaching his conclusions in the Underwriting Report are unreliable, and thus the Underwriting Report is inadmissible. Specifically, Countrywide asserts that Butler did not devote enough time to reviewing each individual loan comprising the sample on which Butler based his analysis.

Countrywide estimates that Butler spent 1,429 hours compiling the various reports he submitted on MBIA’s behalf and composed 275 pages of detailed expert reports. As MBIA points out, Butler had a sizeable team of underwriters that spent thousands of hours sifting through primary data and distilling it into a format that would permit Butler to quickly evaluate each loan. Countrywide can hardly claim that Butler’s methods and analysis were so cursory as to be inadmissible merely because he devoted, by Countrywide’s estimates, 8.5 minutes to reviewing each loan file. Whether Butler’s

methods or conclusions were faulty goes to the weight, not the admissibility of his testimony, and is thus an issue for the finder of fact. *See Harding*, 182 A.D.2d at 370.

### 3. Legal Conclusions

Countrywide next asserts that Butler impermissibly opines on legal conclusions in the Underwriting Report.

“If the jury requires the benefit of the expert’s specialized knowledge, the expert’s opinion should be allowed even when it bears on an ultimate question.” *Dufel v. Green*, 84 N.Y.2d 795, 798 (1995). The complex factors that must be considered when deciding whether Countrywide complied with contractual and regulatory requirements in underwriting the loans in the Securitizations call for “professional . . . knowledge or skill not within the range of ordinary training or intelligence.” *Id.* Butler’s opinion on ultimate issues in the Underwriting Report is, therefore, permissible.

### 4. Rebuttal Report

Countrywide claims that it would be prejudiced by the admission into evidence of Butler’s Rebuttal Report because it is not a rebuttal, but rather an untimely primary report that re-underwrites a new sample of loans. MBIA contends that the Rebuttal Report was merely a response to the report of Countrywide’s expert, Aaron Stern.

Even if the Rebuttal Report were an untimely primary report, a belated expert opinion is admissible absent surprise or prejudice to the opposing party. *See Moreno v. Fabre*, 46 A.D.3d 254, 255 (1st Dep't 2007). Countrywide fails to demonstrate that it was surprised or prejudiced by the Rebuttal Report. It is undisputed that Countrywide had access to the sample of loans Butler analyzed in the Rebuttal Report, and that Countrywide had the opportunity to depose Butler on the Rebuttal Report. The Rebuttal Report is, therefore, admissible.

### III. **Conclusion**

For the foregoing reasons, Countrywide's motion to strike the Butler Underwriting Report, Rebuttal Report, and Affidavit is denied.

*(Order follows on next page.)*

**ORDER**

Accordingly, it is hereby

ORDERED that defendants Countrywide Home Loans, Inc., Countrywide Securities Corporation, Countrywide Financial Corporation, and Countrywide Home Loans Servicing, LP's motion to strike is denied.

This constitutes the decision and order of the court.

Dated: New York, New York

April 29, 2013

**ENTER**

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.