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COURT OF APPEALS

STATE OF NEW YORK

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DEUTSCHE BANK NATIONAL TRUST COMPANY,

Appellant,

-against-

No. 96

FLAGSTAR CAPITAL MARKETS CORPORATION,

Respondent.

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20 Eagle Street  
Albany, New York  
September 6, 2018

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is appeal number 96, Deutsche Bank v.  
3 Flagstar.

4 Counsel.

5 MR. ROSENBAUM: Good - - - good afternoon, Your  
6 Honors. May it please the court, Zachary Rosenbaum of  
7 Lowenstein Sandler on behalf of the appellant. I would  
8 like to reserve three minutes of my time for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. ROSENBAUM: Thank you, Your Honor. In the  
11 words of this court, New York is a financial capital of the  
12 world, and, "In order to maintain its pre-eminent financial  
13 position, it is important that the justified expectations  
14 of the parties to the contract be protected." That is from  
15 J. Zeevi & Sons, 1975. The case at bar, we submit, is not  
16 one from which to depart from that bedrock principle.

17 JUDGE STEIN: We've also held, though, that  
18 public policy may trump the right of private contract.

19 MR. ROSENBAUM: We - - -

20 JUDGE STEIN: Correct?

21 MR. ROSENBAUM: We do acknowledge that, Your  
22 Honor.

23 JUDGE STEIN: So isn't that - - - isn't that in  
24 some part at least the issue here as to whether it - - - it  
25 does in this particular case?



1 MR. ROSENBAUM: Yes, and we would submit that  
2 Quicken in this case under this provision and this contract  
3 should not receive refuge from the courts of this state  
4 from the contractual bargain it struck. That does not mean  
5 that under no circumstance may a party receive such refuge.  
6 But this contract does not warrant it, nor do the policies  
7 of this state. And what we submit the core question that  
8 this court faces is whether sophisticated parties can  
9 establish by contract the conditions to the existence - - -  
10 and I'll emphasize to the existence - - - of a cause of  
11 action for breach of that very contract.

12 JUDGE FAHEY: Well, that - - - that really begs  
13 two things that Judge Stein referred to. First, it's the  
14 interplay between the concepts of freedom of contract  
15 versus the public policy of this state against contractual  
16 extension. And so when I look at it, I say aren't you  
17 really asking that you could contract for a discovery rule  
18 and - - - and to do so would be a discovery rule to  
19 establish breach of contract accrual date contrary to New  
20 York law? And that even - - - and that's the first part of  
21 my problem. The second part of my problem is let's assume  
22 the plain language of your contract, there's nothing wrong  
23 with it and that - - - that you have a right to say those  
24 things and you - - - so then we're left really with the - -  
25 - Judge Wachtler's analysis in Kassner, and I think those



1 are the two core problems that - - - that are confronting  
2 us now. Go ahead.

3 MR. ROSENBAUM: Thank you, Your Honor. To - - -  
4 to speak to the first issue first, this contractual  
5 provision does not create a discovery rule. Accrual of the  
6 cause of action by agreement of the parties, and therefore  
7 part of the cause of action, is demand for compliance with  
8 the agreement.

9 JUDGE FAHEY: Well, it's - - - it's before - - -  
10 in theory, it's a before clause, so therefore it extends  
11 the time. So any way you slice it, the time - - - you're  
12 picking the time when it starts. It's not accruing on a -  
13 - - on a day, for instance, the date you signed the  
14 contract. But instead, you're establishing conditions that  
15 allow a fungible date for discovery.

16 MR. ROSENBAUM: Well, allow - - - correct, Your  
17 Honor, allow a - - - allow a fungible date for demand, and  
18 the - - - an element prior to demand is either notice or  
19 discovery. So I do agree that among the elements - - -

20 JUDGE FAHEY: Discovery is the first prong of  
21 your three-part test isn't it?

22 MR. ROSENBAUM: It is or notice.

23 JUDGE FAHEY: Okay.

24 MR. ROSENBAUM: So - - - and - - -

25 JUDGE FAHEY: All right.



1 MR. ROSENBAUM: You know, to me that is a truism  
2 because you cannot demand what you haven't discovered.

3 JUDGE RIVERA: You're - - - you're saying it's a  
4 condition precedent, these are all bound together, you  
5 can't decompartmentalize them? Is that what you're trying  
6 to say?

7 MR. ROSENBAUM: Yeah, that each of these are  
8 elements to the existence of a cause of action.

9 JUDGE RIVERA: The - - - the cause includes this  
10 obligation?

11 MR. ROSENBAUM: Correct.

12 JUDGE RIVERA: The obligation of notice and cure,  
13 correct?

14 MR. ROSENBAUM: It - - - it includes as elements  
15 to the existence of a cause of action notice for discovery,  
16 a failure to cure, or repurchase. And then finally, a  
17 demand for ultimately in this case payment of the  
18 repurchase price.

19 JUDGE STEIN: But - - - but isn't the cure or  
20 repurchase - - - I know it's an act, but isn't it really  
21 the remedy? In other words, the - - - the demand that you  
22 talked about for compliance is compliance with what? Isn't  
23 it compliance with the representations and warranties? The  
24 breach of which, of course, ordinarily we said would - - -  
25 would occur at the time of the closing?



1 MR. ROSENBAUM: We submit, Your Honor, no, in the  
2 following respect. In this contract, different than the  
3 one that this court considered in ACE, the parties set down  
4 that the falsity of a representation and warranty in and of  
5 itself is not a breach of the contract. The breach of the  
6 contract occurs when the conditions, the elements of the  
7 accrual clause, are complete. So we - - - in that sense,  
8 it is not seeking or requiring a remedy for a pre-existing  
9 wrong because by design these parties agreed that the  
10 wrong, the contractual wrong, occurs when the demand is  
11 made for compliance by the purchaser, in this case the  
12 trustee.

13 JUDGE FAHEY: So how does - - - if you had the  
14 authority to do this and the plain language that you set it  
15 out at, how are we not left with a situation where parties  
16 can always contract against - - - or to extend the statute  
17 of limitations and in essence we've created a contractual  
18 discovery rule.

19 MR. ROSENBAUM: Your Honor, and I think that is a  
20 core issue that this court faces. I would submit that in  
21 every contract it is a bundle of rights and obligations.  
22 So in virtually every contract, the parties are by  
23 definition setting forth when the obligations come due.  
24 And this was an elegant way to do that given the commercial  
25 realities of this business transaction. So it brings me



1 back to the fundamental principle of policy in this state.  
2 Is there a overriding policy reason - - - and I'll get to  
3 the extension issue in a moment, is there an overriding  
4 policy reason to deny parties the ability to enter into  
5 that contract?

6 JUDGE RIVERA: What's the public policy in favor  
7 of what ACE decided which is the accrual is at this point  
8 in time, that is when the representations are made. If - -  
9 - and that's when it accrues, that you're not able to make  
10 a decision otherwise.

11 MR. ROSENBAUM: Well, and so my reading of ACE,  
12 Your Honor, is that it - - - it identified or re-identified  
13 the difference between subs - - - at least relevant here it  
14 identified the difference between a substantive and  
15 procedural demand. And it - - - citing this court's case  
16 in Fisher (phonetic) from the late 1800s, it said that a  
17 demand is substantive if it is part of the cause of action.  
18 And it seems clear to me that what the parties set out to  
19 do here was to make the demand part of the cause of action  
20 by using the words "cause of action" and "channel of  
21 proof."

22 JUDGE RIVERA: How is that not also true in ACE?  
23 Don't you have the same thing? You have representations  
24 and you have a cure provision.

25 MR. ROSENBAUM: The - - - the fundamental - - -



1 JUDGE RIVERA: What's the difference?

2 MR. ROSENBAUM: The fundamental difference quite  
3 obviously between this case and ACE is the existence of the  
4 accrual clause. And as we read ACE, the court was  
5 searching for contractual language that made the demands  
6 substantive versus procedural, and there was no such  
7 language. So the takeaway from ACE we - - -

8 JUDGE RIVERA: Yeah, but essentially you want to  
9 do exactly what they wanted to do in ACE. It's not  
10 different, right? You want to do exactly what they do in  
11 ACE reading - - - reading from ACE, "The Trust does not  
12 dispute this precedent, but rather seeks to persuade us  
13 that its claim did not arise until DBSP refused to cure or  
14 repurchase, at which point the Trust, either through the  
15 trustee or the certificate holders, had six years to bring  
16 suit.

17 Thus, the Trust views the repurchase obligation  
18 as a distinct and continuing obligation that DBSP breached  
19 each time it refused to cure or repurchase a non-conforming  
20 loan. Stated another way, the Trust considers the cure or  
21 repurchase obligation to be a separate promise of future  
22 performance that continued for the life of the investment."  
23 Although, I know you're arguing that that's not the case,  
24 right. That it's part and parcel of the cause of action  
25 itself.



1 MR. ROSENBAUM: Right.

2 JUDGE RIVERA: But essentially, you're seeking to  
3 do the same thing, are you not, that every time there's a  
4 refusal to cure you have a new claim. And that's what ACE  
5 says no, you can't do that. There's one accrual point when  
6 those representations are made.

7 MR. ROSENBAUM: In - - - in - - - you're right,  
8 Your Honor, and again, the key distinction between this  
9 case and ACE is what the parties set down clearly in their  
10 - - -

11 JUDGE FAHEY: Well, you seem to have anticipated  
12 the problem in your drafting in a way that wasn't done with  
13 ACE, in fairness I think to your side of the argument. You  
14 know, when you look at the discovery and what you're really  
15 saying is it's got to be knowable before it can accrue.  
16 And I looked at states throughout the country, and there  
17 are seventeen that have a no-discovery rule. The - - -  
18 that is the highest number of any type of rule, but there  
19 is no - - - there is nowhere in the country that your rule  
20 is exactly adopted the way you're asking this court to  
21 adopt it. And it would seem to represent - - - and I'm  
22 assuming your language is correct that the plain language  
23 of the contract would hold but for a public policy. Let's  
24 assume that to be true. It - - - it would represent an  
25 enormous and significant change in New York law and really



1 national law if we were to accept your reading and ignore  
2 previous New York public policy.

3 MR. ROSENBAUM: Well, I know I'm out of time. If  
4 I - - - I could speak to Kassner if - - -

5 JUDGE FAHEY: Whatever the Chief says that's what  
6 you can do. Yeah.

7 CHIEF JUDGE DIFIORE: Please do. Yes, of course.

8 MR. ROSENBAUM: The - - - the Appellate Division  
9 found - - -

10 JUDGE FAHEY: I'm -- - I'm going a little  
11 different path than the Appellate Division here, and I'm  
12 saying that the Appellate Division isn't quite on the same  
13 path. I'm saying I'm assuming your language is all right,  
14 that contractually let's assume the plain language rule  
15 applies, it's okay. Now let's go to the Kassner problem,  
16 the public policy problem. I think that's - - - that's why  
17 I'm asking you doesn't this represent an enormous and  
18 significant change in - - - in New York law?

19 MR. ROSENBAUM: I actually don't believe so  
20 because I look to the - - - to the first part of Kassner  
21 where the court stated, "When a right is subject to a  
22 condition, the obligation arises, and the cause of action  
23 accrues only when that condition has been fulfilled." And  
24 the court was stating a general principle of New York law  
25 that - - - New York law that was long-existing, and it's



1 the same principle that the Delaware court in the Bear  
2 Stearns case applied to the same contractual language to  
3 find it perfectly acceptable as a matter of Delaware court.  
4 The court in Kassner went further and said on page 550,  
5 "The contract" - - - and I'll go back. "The contract does  
6 not state that plaintiff's right to final payment is  
7 conditioned on filing of a certificate of final payment."  
8 So it - - - it - - - I read that portion of Kassner to be  
9 focused on the contract, and the contract, unlike this one,  
10 did not establish - - -

11 JUDGE FAHEY: Yeah, but it does go on to say that  
12 it - - - it would apply in this situation; doesn't it?

13 MR. ROSENBAUM: It - - - would it - - -

14 JUDGE FAHEY: Kassner specifically says it would  
15 apply in this situation. I agree with you it says what you  
16 say it says, but it also says some other things.

17 MR. ROSENBAUM: It says that it - - - what it - -  
18 - what it stands for, and this is codified in New York  
19 under 17-103 of the General Obligations Law, that  
20 commercial parties pre-accrual cannot extend the statute of  
21 limitations. I mean that - - - that is - - - you know,  
22 that is codified. What we submit is that this contractual  
23 clause fits into the general rule espoused by Kassner which  
24 is a condition to accrual and therefore does not extend the  
25 statute of limitations. The extension, in my mind, is if



1 we put down in a contract that a - - - that notwithstanding  
2 the - - - the statute of limitations in New York our  
3 statute of limitations is ten years, and what the court was  
4 concerned about ultimately in Kassner was the plaintiff was  
5 trying to apply what was very clearly a limitations  
6 provision. One that was intended to shorten the statute of  
7 limitations because it required the plaintiff to file a  
8 certificate of completion or it required that the - - -  
9 that the plaintiff could not bring suit after six months.

10 JUDGE FAHEY: Until the controller had filed the  
11 certificate of completion.

12 MR. ROSENBAUM: And the - - - right. And the  
13 plaintiff was trying to use that provision to say that - -  
14 - that the cause of action based on that provision extended  
15 beyond the six years from accrual of the actual cause of  
16 action for breach. That is not our case. It goes back to  
17 my fundamental point which I - - - which I recognize this  
18 court has to accept, but I don't think it stretches beyond  
19 national precedent. And I - - - frankly, I don't think it  
20 stretches beyond this court's precedent that where  
21 commercial parties, sophisticated commercial parties,  
22 decide in a contract to set down when the contract is  
23 breached that as a general matter is honored. And if that  
24 breach may occur, you know, well at more than six years  
25 from the date of contracting - - -



1                   JUDGE STEIN: Well, it seems more to me like the  
2                   - - - what you're trying to contract was not when the  
3                   contract was breached but when you had a right to sue for  
4                   that breach. And those to me are two very different things  
5                   because I still get back to - - - I'm still having  
6                   difficulty with the distinction between the breach - - -  
7                   the breach isn't - - - well, the question is is the breach  
8                   the failure to meet the representations and warranties or  
9                   is the breach the failing to cure and repurchase?

10                  MR. ROSENBAUM: In the best analogy I've come up  
11                  with - - - and you can imagine I've thought about this a  
12                  lot - - - is that there's no dispute that a replevin action  
13                  accrues upon demand. So in a replevin action, the wrongful  
14                  act is typically theft, right. So there is a pre-existing  
15                  wrongful act, but - - - but it's been the law of this state  
16                  for many, many years that notwithstanding the - - - the  
17                  pre-existing wrongful act the right of action accrues upon  
18                  demand and then there are three years from there to sue.  
19                  So what these parties designed, elegantly I'd add, is a  
20                  contract where the falsity of a representation and warranty  
21                  is not a breach of their contract. And what we submit to  
22                  the court is that the - - - the parties in the state of New  
23                  York are and should be free to do that.

24                  JUDGE RIVERA: But - - - but doesn't the accrual  
25                  provision say it's a breach? What did I miss?



1 MR. ROSENBAUM: I - - -

2 JUDGE RIVERA: You used the word breach. This is  
3 my problem with your argument.

4 MR. ROSENBAUM: I recognize that, Your Honor, and  
5 - - -

6 JUDGE RIVERA: You're saying it's a breach of the  
7 representations but not a breach of the agreement qua 9.03?

8 MR. ROSENBAUM: Look, that's to me the only way  
9 to harmonize the provision because it uses - - - right, a  
10 colloquial term, you know, that the rep and warranty is  
11 breached is false. It's not true. But the - - - the  
12 object or the design of the accrual clause, because it says  
13 - - - it says plainly that any cause of action relating to  
14 or arising out of that breach or that falsity. I think you  
15 - - - shall accrue dot, dot, dot.

16 JUDGE RIVERA: Well, to the - - - get to the term  
17 of art too, you know. You're - - -

18 MR. ROSENBAUM: Correct. And I think, Your  
19 Honor, quite frankly if they said falsity, you know, we  
20 wouldn't have that, you know, linguistic issue, but I - - -  
21 but it doesn't change the meaning of what was intended.  
22 And I think the intention is very clear on the face, and I  
23 think the - - -

24 JUDGE STEIN: But you go beyond just using the  
25 word "breach." You also say that - - - that cure and



1 repurchase are the sole remedies for that. So whether you  
2 use falsity or you use breach, I'm not - - - I'm not sure  
3 that that would make a difference.

4 MR. ROSENBAUM: Well, correct. But the - - - the  
5 performance - - - we submit under this provision and this  
6 contract as a whole for purpose of the dichotomy between  
7 substantive and procedural that the performance - - -  
8 right, the element to the cause of action only becomes ripe  
9 upon demand, and that's what the - - - the parties intended  
10 to set forth in the contract. And that's why they used the  
11 word "accrue" which means to come into existence as an  
12 enforceable legal claim or right. So it - - - it's very  
13 difficult to read this provision without that statement and  
14 that - - - it - - - I mean the word accrue. And the word  
15 accrue has really indisputable meaning and - - - and we've  
16 yet to hear from the respondent what it means if not what  
17 the trustee proffers it to mean.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. ROSENBAUM: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MR. SIDMAN: Good afternoon; Howard Sidman from  
22 Jones Day for respondent Quicken Loans. A total of four  
23 New York courts, including the Second Circuit - - -

24 JUDGE RIVERA: Counsel, why - - - why doesn't  
25 this fit under what is arguably a distinction set out in



1 ACE that the parties may contractually agree to undertake a  
2 separate obligation, right?

3 MR. SIDMAN: Well, there - - -

4 JUDGE RIVERA: And just a moment.

5 MR. SIDMAN: Sure.

6 JUDGE RIVERA: And what they've done - - - what  
7 the parties did here was make a promise of the loan's  
8 future performance as opposed to just set out a remedy,  
9 right?

10 MR. SIDMAN: So - - -

11 JUDGE RIVERA: Why doesn't it fit that?

12 MR. SIDMAN: It doesn't fit that because here the  
13 - - - there is no promise of future performance of the  
14 loans. What this - - - what this provision does - - - and  
15 the appellant talks about - - -

16 JUDGE RIVERA: What about by the use of the term  
17 discovery? Doesn't that suggest that something down the  
18 road might present itself?

19 MR. SIDMAN: Maybe - - -

20 JUDGE RIVERA: Arguably, at least there's some  
21 ambiguity, no?

22 MR. SIDMAN: No, I don't think so. I think that  
23 - - - I think that what this - - - what this provision does  
24 - - - and it's in the remedy section of the contract,  
25 reference page 98 of the - - - of the record here - - -



1 says that any cause of action against the seller relating  
2 to or arising out of the breach of representations and  
3 warranties made in prior sections relating to or arising  
4 out of the breach of representations and warranties shall  
5 accrue upon discovery and notice and then a demand for  
6 compliance with the contract.

7 JUDGE RIVERA: Why can't it be that the breach is

8 - - -

9 MR. SIDMAN: That's - - -

10 JUDGE RIVERA: - - - at a later point - - -

11 MR. SIDMAN: Because the - - -

12 JUDGE RIVERA: - - - in time?

13 MR. SIDMAN: I'm sorry. You may finish your  
14 question.

15 JUDGE RIVERA: You think there's not an argument  
16 that the breach could be at a later point in time?

17 MR. SIDMAN: No, Your Honor, the breach - - -

18 JUDGE RIVERA: Not just discovery?

19 MR. SIDMAN: The breach - - - the breach here is  
20 the same breach that was in ACE. It's the breach of a  
21 representation and warranty. And those - - - those  
22 breaches, if ever, were made the days that - - - the day on  
23 which those loans were sent - - - were - - -  
24 representations and warranties were made and the loans were  
25 sold.



1 JUDGE FAHEY: So your argument is per ACE that  
2 the breach occurred on such-and-such date, and that - - -  
3 and that no conditions in the contract can modify the date  
4 of the breach - - - shall accrue - - - shall accrue has  
5 taken place and that's what that means.

6 MR. SIDMAN: That's correct, Your Honor. And - - -  
7 -

8 JUDGE RIVERA: In other words, the breach is at  
9 the point that the warranties and the representations are  
10 effective which is upon the closing of the loan?

11 MR. SIDMAN: Correct, Your Honor.

12 JUDGE FAHEY: So May - - - May 31st - - - I  
13 forget the year - - -

14 JUDGE RIVERA: The last one, 2007.

15 JUDGE FAHEY: Right.

16 MR. SIDMAN: Yes, May 31st of 2007 was - - - was  
17 the last date, and there's no dispute in the record between  
18 the parties as to when their breaches or representations  
19 and warranties were met.

20 JUDGE FAHEY: So - - - so even if we call it post  
21 - - - even - - - no matter how you characterize it it still  
22 moves the date unless the public policy of New York is - -  
23 - is changed somehow.

24 MR. SIDMAN: That's - - - that's correct, Your  
25 Honor. And - - -



1 JUDGE WILSON: Can I ask you about the same  
2 sentence that Judge Rivera asked you about but not - - -  
3 not with regard to interpretation of the contractual  
4 language but the public policy. The thing I'm struggling  
5 with is what is the public policy of New York that would  
6 prevent parties contractually from setting a later accrual  
7 date unless they have two separate causes of action in a  
8 contract? Because the way I read the sentence that Judge  
9 Rivera just read it says that the parties may contractually  
10 agree to a separate obligation, the breach of which doesn't  
11 arise until later. That sounds like a very odd public  
12 policy. I mean the - - - you can do it if you've got two  
13 or more but not if you have one.

14 MR. SIDMAN: Well, I think in this case, Your  
15 Honor, I would say that here we have - - - we're talking  
16 about breaches of representations and warranties. There  
17 could have been a later agreement between the parties to do  
18 something different. For example, in the Bulova case,  
19 right, you have - - - this court decided some years back.  
20 You had a - - - you had a roof contract, and there was also  
21 a separate maintenance contract. And in that case, the  
22 court held that those were two separate promises of  
23 performance. And that's - - - that's - - -

24 JUDGE WILSON: But my - - - my question is about  
25 public policy.



1 MR. SIDMAN: Yeah.

2 JUDGE WILSON: What is the public policy that  
3 would allow parties - - - so what - - - what a party is  
4 doing in the circumstances contemplated in that sentence is  
5 they're entering into a single contract at a given point in  
6 time and saying there are going to be two causes of action  
7 here, one of which is not - - - is going to accrue now and  
8 the other is not going to accrue until much later. They  
9 can do that contractually. Why?

10 MR. SIDMAN: They -- - they could, but here they  
11 did not. I guess that's - - - that's my concern. I think  
12 - - - right, you have - - - talk about ACE, you know, and  
13 the - - - the point this court makes in ACE, among other  
14 things, is that the - - -

15 JUDGE WILSON: So to put it differently, there's  
16 - - - there's not a public policy in New York - - - you  
17 don't - - - I think and correct me if I'm wrong, you're not  
18 reading the public policy underlying the six-year statute  
19 of limitations as preventing parties from entering into  
20 contracts where the - - - it doesn't accrue until ten years  
21 later. There's no public policy against that.

22 MR. SIDMAN: Well, I guess it depends on I guess  
23 on when the breach occurs, right. Under - - - under the  
24 Kassner decision and General Obligations Law you certainly  
25 can't agree to extend out the - - - the time period for a



1 breach of contract, and you certainly can't provide an  
2 indefinite period of time.

3 JUDGE WILSON: That is to lengthen the period.

4 MR. SIDMAN: Right.

5 JUDGE WILSON: I understand why that's against  
6 public policy but I'm - - - I'm still struggling with why -  
7 - - is there a public policy that says you and I can't  
8 agree to a contract where the cause of action doesn't  
9 accrue until ten years from now? We can do that I think,  
10 right?

11 MR. SIDMAN: That may be true. I - - - I guess  
12 my answer is it's possible but I guess didn't happen here.  
13 That - - -

14 JUDGE STEIN: But isn't that because there's no  
15 breach of that provision - - -

16 MR. SIDMAN: Right.

17 JUDGE STEIN: - - - provision of the contract  
18 until ten years later?

19 MR. SIDMAN: Right, that's my - - - I guess  
20 that's my point. I guess there - - - there could be a  
21 situation where, for example, in insurance contracts where  
22 you don't provide a - - - a notice of a - - - of a claim,  
23 you know, until - until the loss occurs. Those types of  
24 situations where maybe a demand could - - - could trigger a  
25 running of the statute of limitations. But here in this



1 contract, the language is very, very clear that it talks  
2 about a breach of a - - - of any representation and  
3 warranty, and that's - - - that has already happened. And  
4 in fact, and if you look closely at the - - - the accrual  
5 provision that - - - that the appellant discussed  
6 previously in Section 9.03, all those things pre-suppose a  
7 breach in the first place.

8 JUDGE RIVERA: But - - - but isn't what the  
9 parties agreed to that - - - let's take off the table my -  
10 - - my questioning to you about the discovery. Let's just  
11 hold on for one moment. That whatever are the  
12 representations that are effective on that last closing  
13 date, the May 2007 date - - -

14 MR. SIDMAN: Yes.

15 JUDGE RIVERA: - - - the parties are agreeing  
16 that if down the road - - - could be ten years, could be  
17 ten months, it's obviously important here if it's past six  
18 years.

19 MR. SIDMAN: Right.

20 JUDGE RIVERA: If at that point Quicken notices  
21 or the trustee discovers that they have a claim based on a  
22 misrepresentation related to the representation of the  
23 warranties or based on some of that language that at that  
24 point something has to happen before they can sue, why  
25 aren't they correct that what the parties agreed to was the



1 way they craft what is truly a breach?

2 MR. SIDMAN: Because - - -

3 JUDGE RIVERA: The breach is the promise to do  
4 something when that happens.

5 MR. SIDMAN: That's - - - that could have been  
6 what we - - - they contracted to do, but that's not what  
7 they contracted to do here. I think - - -

8 JUDGE RIVERA: So why not?

9 MR. SIDMAN: Because it says - - - because the  
10 provision itself refers to a breach of - - - of a  
11 representation and warranty. And the breach here - - - and  
12 that - - - and the notice and demand requirement that  
13 follows from that - - - from that breach are all pre-  
14 supposes the breach in the first place. And this court in  
15 ACE set down a very clear rule.

16 JUDGE RIVERA: Yes, but you certainly have - - -  
17 have causes of actions that have conditions precedent.

18 MR. SIDMAN: Absolutely.

19 JUDGE RIVERA: Right?

20 MR. SIDMAN: That's - - - this is - - -

21 JUDGE RIVERA: And isn't that really what he's -  
22 - - what he's really arguing - - - or at the end of the day  
23 essentially arguing is these are conditions precedent.

24 MR. SIDMAN: We - - -

25 JUDGE RIVERA: The parties agreed there's no



1 claim unless these condition precedents are met.

2 MR. SIDMAN: Yes, I think that's right. That's  
3 what they are.

4 JUDGE RIVERA: Or a violation of these  
5 conditions.

6 MR. SIDMAN: And we would agree there is  
7 conditions precedents, these are condition precedents to  
8 file - - - to file a lawsuit. But I think the court in ACE  
9 and other - - - and in other decisions as well have  
10 distinguished between what we call substantive - - -

11 JUDGE RIVERA: Procedural.

12 MR. SIDMAN: Procedural versus - - -

13 JUDGE RIVERA: Procedural not substantive.

14 MR. SIDMAN: Exactly.

15 JUDGE RIVERA: Tell me where that fine line is in  
16 this case.

17 MR. SIDMAN: The fine line here is the - - - the  
18 procedural - - - what the procedural condition precedent -  
19 - - what this court has defined as a procedural condition  
20 precedent. It means the legal wrong has occurred, and here  
21 - - -

22 JUDGE RIVERA: But that's their argument. The  
23 legal wrong is there's some misrepresentation. We now know  
24 about it.

25 MR. SIDMAN: Right.



1 JUDGE RIVERA: And you've promised to do  
2 something about it.

3 MR. SIDMAN: Right, no, that - - -

4 JUDGE RIVERA: Argue it's not like ACE, it's not  
5 these separate - - -

6 MR. SIDMAN: I understand but - - -

7 JUDGE RIVERA: Right, it's not a separate  
8 obligation.

9 MR. SIDMAN: But the plain - - - I guess my point  
10 is the plain language of the contract just talks about - -  
11 - already pre-supposes a breach and that's the breach.  
12 That - - - that is the legal wrong that has occurred. The  
13 legal wrong for the trust.

14 JUDGE RIVERA: So you're saying because of the -  
15 - - the use of that one word - - -

16 MR. SIDMAN: Right.

17 JUDGE RIVERA: - - - that has signaled that what  
18 the parties intended were separate obligations as opposed  
19 to this is part and parcel of the claim.

20 MR. SIDMAN: Well, I would say this. I would say  
21 that first of all, that this is of course in the remedial  
22 section of the contract. This is part of the remedies  
23 provision - - -

24 JUDGE RIVERA: Yes.

25 MR. SIDMAN: - - - in ACE - - - similar to ACE.



1 And I would say that the breach has already occurred. So  
2 what follows - - - the legal wrong has already happened.  
3 So what follows necessarily must be a procedural - - -

4 JUDGE STEIN: So could - - - could they by  
5 contract have agreed - - - defined breach not as the  
6 falsity of the representations and warranties but the  
7 defined breach within the contract itself as the failure to  
8 cure and repurchase? Would - - - would that have a  
9 different result?

10 MR. SIDMAN: It's possible, Your Honor. That's -  
11 - - again, that's not this contract. I think there are  
12 ways you could possibly - - -

13 JUDGE RIVERA: Well, how would they have said  
14 that? What language - - -

15 MR. SIDMAN: I don't think - - -

16 JUDGE RIVERA: - - - would express that  
17 understanding.

18 MR. SIDMAN: I think you would have to have a  
19 separate provision that says a breach - - - you know,  
20 there's a - - - there's a breach of representation and  
21 warranty. And there would have to be a separate provision  
22 that would say a breach of - - - the failure to repurchase  
23 or, you know, make whole on a loan would be a separate  
24 breach of contract.

25 JUDGE RIVERA: Well, do they have to say it as



1 separate? Can't they say a breach does not occur on the  
2 represent - - -

3 MR. SIDMAN: Well - - -

4 JUDGE RIVERA: When - - - when the  
5 misrepresentation is discovered or noticed but when there's  
6 a failure to cure?

7 MR. SIDMAN: I think - - - first of all, I think  
8 that would be violative of this court's decision in ACE  
9 because it's - - - this court - - -

10 JUDGE RIVERA: Well, ACE - - - doesn't ACE say  
11 you could make such an agreement?

12 MR. SIDMAN: I think it says - - - it talks about  
13 separate obligation, and I'm not sure it meant that you  
14 could have a separate breach for the failure to comply with  
15 the remedial provision.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 MR. SIDMAN: Can I say one more point?

18 CHIEF JUDGE DIFIORE: Yes, please.

19 MR. SIDMAN: Thank you, Your Honor. I also want  
20 to make the point under the General Obligations Law as well  
21 that even if you take as true the appellant's point here  
22 that - - - that it operate - - - the contract operates as  
23 they suggest, there's two points. One is this would  
24 operate - - - this would in effect create a lengthening of  
25 the statute of limitations because under the General



1 Obligations Law - - - well, first of all, let me take a  
2 step back. The contract at issue was made - - - the MLPWA  
3 was - - - was executed in June 2006. That's the date the  
4 representations and warranties were actually made.

5 But the - - - the representations and warranties  
6 for these particular loans were not made until a later  
7 date. So if - - - if it operates to - - - that's from  
8 December of 2006 to May of 2007. So if it's true that it  
9 operates the way they say then this would automatically be  
10 a - - - an agreement to lengthen the - - - the statute of  
11 limitations for breach of contract before the contract - -  
12 - before the breach has even occurred which is violative -  
13 - -

14 JUDGE FAHEY: Which would be a clear violation of  
15 the GLL.

16 MR. SIDMAN: Right. And also - - -

17 JUDGE FAHEY: As opposed to after which is maybe  
18 - - - a maybe question, right?

19 MR. SIDMAN: Right, exactly. And the second - -  
20 -

21 JUDGE RIVERA: What if they were simultaneous?  
22 Is that breach of the statute?

23 MR. SIDMAN: I don't - - - I don't - - -

24 JUDGE RIVERA: What if they're simultaneous?

25 MR. SIDMAN: Your Honor, I'm not - - - I don't



1 know. I don't know the answer to that question. I think  
2 it is certainly possible because I think what came first -  
3 - -

4 JUDGE RIVERA: It's possible it's a violation of  
5 the statute or it's not?

6 MR. SIDMAN: Yes, it's possible it's a violation  
7 of the statute, Your Honor. But that didn't happen here,  
8 and that's the point. And the second point is if you wait  
9 - - - if - - - by allowing the statute not to run until the  
10 appellant makes a demand that could delay the statute of  
11 limitations indefinitely.

12 JUDGE FAHEY: Well, it postpones it.

13 MR. SIDMAN: Yes.

14 JUDGE FAHEY: It postpones it for - - -

15 MR. SIDMAN: Postpones it for sure.

16 JUDGE FAHEY: Right.

17 MR. SIDMAN: And that's violative of the public  
18 policy articulated by this court in ACE which requires  
19 finality and certainty involving statute of limitations  
20 cases. Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 Mr. Rosenbaum.

23 MR. ROSENBAUM: Thank you. So to respond to  
24 Counsel's points, what we say in our briefs and what we'll  
25 say again here is that in this contract the use of the word



1 "accrue" in the accrual provision equals the intent that  
2 demand is a substantive condition. And under this court's  
3 long-standing principles, again dating back to the late  
4 1800s, if demand is a substantive condition then by  
5 definition it is not an extension of the statute of  
6 limitations for purposes of - - - of the General  
7 Obligations Law because the claim doesn't accrue until  
8 demand is made. So we're not extending anything, and it's  
9 clearly what the parties were attempting to do here - - -

10 JUDGE FAHEY: Of course - - -

11 MR. ROSENBAUM: - - - in this provision.

12 JUDGE FAHEY: - - - we're still stuck with the  
13 argument that you're talking about the contractual  
14 language, and my questions to you before still fall in the  
15 same category. I'm assuming that the contractual language  
16 in and of itself - - - or let me step back. It's not that  
17 the contractual language itself is insufficient to  
18 establish that there's a delay in the accrual of the cause  
19 of action.

20 The question for this court really is whether or  
21 not the contract language itself is unenforceable because  
22 it violates public policy. That - - - that's the - - - it  
23 seems to me the more profound question. So when we - - -  
24 when we keep going back in the contractual language I'm  
25 thinking, well, maybe the First Department's right about



1 that and maybe not. But really, there's a broader question  
2 here, and that's the public policy question.

3 MR. ROSENBAUM: And I agree, Your Honor, and we -  
4 - -

5 JUDGE FAHEY: So - - - so is everything you're  
6 doing, no matter how you slice it, it extends the statute  
7 of limitations. It doesn't shorten it. That seems to be  
8 clear on what's in front of us. I - - - that's a  
9 reasonable argument. It's - - - so even if it's not a  
10 discovery rule, it's a postponement rule, and I - - - it's  
11 hard for me to draw a distinction between those.

12 MR. ROSENBAUM: And fair point, Your Honor. And  
13 - - - and I think the - - - the commission report that gave  
14 rise to the General Obligations Law - - -

15 JUDGE FAHEY: Are you talking about the Law  
16 Commission report that - - -

17 MR. ROSENBAUM: Yeah, from 1961 that gave rise -  
18 - -

19 JUDGE FAHEY: Yeah.

20 MR. ROSENBAUM: - - - to 17-103.

21 JUDGE FAHEY: Judge Wachtler quoted it in his - -  
22 - in his decision.

23 MR. ROSENBAUM: Correct. And the - - - the  
24 statute says extend, right, you cannot extend. The  
25 commission report says postponement. The statute doesn't



1 pick up the word postponement which, you know, arguably  
2 means that the - - - that the legislature made that choice  
3 that - - - that you can postpone, you can extend. And  
4 those are two different things.

5 JUDGE RIVERA: Meaning you can't make it longer  
6 than six years, but you can change the points when you  
7 start - - - when you trigger that statute of limitations.

8 MR. ROSENBAUM: Correct, and I - - - I keep going  
9 back to the premise that that is the fundament - - - that  
10 is the fundament of contracting.

11 JUDGE FAHEY: Well, let me quote you what - - - I  
12 got the Law Revision here because this question you brought  
13 up, it was in your papers. Before I - - - I looked into  
14 it. It says, "The public policy represented by the statute  
15 of limitations becomes permanent where the contract not to  
16 plead the statute is in form or effect the contract to  
17 extend the period as provided by statute or to postpone the  
18 time from which the period of limitation is to be  
19 computed." That's at 551, quote in the 1961 Law Commission.

20 MR. ROSENBAUM: And I - - - I am familiar with  
21 that quote. What I was - - - the point I was making that -  
22 - - was that in the subsection (3) of 17-103, the - - - the  
23 only word that - - - that is actually used by the  
24 legislature is "extend." There is no reference to  
25 postponement. So that in and of itself may be a

1 legislative choice not to - - -

2 JUDGE FAHEY: So are we down to does extension  
3 mean postponement?

4 MR. ROSENBAUM: No.

5 JUDGE FAHEY: Or does postponement mean  
6 extension?

7 MR. ROSENBAUM: No, Your Honor.

8 JUDGE FAHEY: Is that's what's going on?

9 MR. ROSENBAUM: No, Your Honor. I just wanted to  
10 make that point because I - - - because I think - - - I do  
11 think courts and - - - and counsel have conflated it. But  
12 - - - but I don't think - - - again, it goes back to the  
13 basic premise that contracting parties are free to, by  
14 design of their contract, determine when the breach occurs.

15 JUDGE FAHEY: I see.

16 MR. ROSENBAUM: If I lend Judge Smith money, and  
17 he owes it back to me in ten years, we've just decided - -  
18 -

19 JUDGE FAHEY: Good luck getting that back.

20 MR. ROSENBAUM: I know. We've just decided that  
21 a breach occurs ten - - - ten years out. To one final  
22 point, and I think it hits the - - - the core point that  
23 this court has seized upon which is a matter of policy.  
24 And counsel cited Bulova and we cited Bulova. We don't - -  
25 - we don't contend that this case is Bulova precisely. But



1 Bulova sets forth a very important recognition in this  
2 state of policy which is if the parties set down in their  
3 contract that a cause of action can arise sometime out in  
4 the future well beyond six years, that they are free to do  
5 so. And the court has not hesitated since Bulova to - - -  
6 to enforce contractual provisions that are clear on their  
7 face between sophisticated parties - - -

8 JUDGE RIVERA: Let me ask you this. What was the  
9 - - - I know the red light is on. My last question. What  
10 was the state of the law when the parties entered this  
11 agreement? It was pre-ACE.

12 MR. ROSENBAUM: Pre-ACE.

13 JUDGE RIVERA: So what would have been the  
14 understanding of the parties of what they could and could  
15 not contract - - - agree to, rather.

16 MR. ROSENBAUM: It's another question I've asked  
17 myself, and I think that the parties here - - - I mean this  
18 is New York. It's - - - it's the most sophisticated, you  
19 know, contracting parties and lawyers. And I think by  
20 design these parties created a provision that fits into the  
21 general rule that's - - - that's set out by Kassner, the  
22 general rule being that where there's a condition to  
23 performance, here payment of the repurchase price, the  
24 cause of action does not accrue until demand is made if  
25 that's what the parties set down in their contract. And we



1           - - - we submit that was the justified expectation of these  
2 parties when they made this contract.

3                       And what Quicken is trying to do, successfully to  
4 this point, and we ask that your - - - this court reverse,  
5 is get protection, get refuge from this court from the very  
6 contract it struck. And that we submit is anathema in the  
7 state of New York so long as there's not an overriding  
8 contravening public policy. Thank you, Your Honor.

9                       CHIEF JUDGE DIFIORE: Thank you, Counsel.

10                      MR. ROSENBAUM: Thank you, Your Honors.

11                      (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Deutsche Bank National Trust Company v. Flagstar Capital Markets Corporation, No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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