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COURT OF APPEALS

STATE OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION,

Appellant,

NO. 6

-against-

DLJ MORTGAGE CAPITAL, INC.,

Respondent.

20 Eagle Street
Albany, New York
January 9, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
PRESIDING JUSTICE ELIZABETH A. GARRY
ASSOCIATE JUSTICE REINALDO E. RIVERA
ASSOCIATE JUSTICE JOHN W. SWEENEY, JR.

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 6, U.S. Bank, National
3 Association v. DLJ Mortgage Capital.

4 Good afternoon, counsel.

5 MR. TORRES: Good afternoon, Your Honors. May it
6 please the court, Hector Torres for the appellants. And
7 I'd like to reserve one minute for rebuttal, please.

8 CHIEF JUDGE DIFIORE: You may.

9 MR. TORRES: The order dismissing the trustee's
10 complaint should be reversed based on well-settled, clear-
11 cut standards with rele - - - with respect to the savings
12 statute and relation back that have been applied by this
13 court and other courts in multiple cases for decades.

14 For the savings statute, the courts have focused
15 on whether the same interest and rights are being
16 vindicated in both the original and the revival actions.
17 Here there can be no dispute or no genuine dispute that the
18 same rights and interests were being vindicated in both the
19 original actions that were filed by FHFA and in the revival
20 actions.

21 JUDGE J. RIVERA: But - - - but you know, the
22 trustee had the opportunity - - - the trustee is informed
23 by this federal certificate-holder. The trustee apparently
24 made a decision not to move forward.

25 MR. TORRES: Your Honor, the - - -

1 JUDGE J. RIVERA: Why - - - why should they now
2 get the benefit of the - - -

3 MR. TORRES: Your - - -

4 JUDGE J. RIVERA: - - - 205(a) savings provision?
5 Really, where's the due diligence? But here it's - - -
6 it's even different to me from the prior case. It's not
7 lack of due - - - it's specifically you're put on notice,
8 and it sounds like the trustee made a decision, which a
9 trustee is allowed to do under the provisions, of course,
10 of these agreements, not to proceed?

11 MR. TORRES: Except, Your Honor, that here what
12 is in the record is that notice was provided to the trustee
13 and - - - and the actions weren't commenced within the
14 period. However, if you look at the rule, it really does
15 not contain a requirement that the notice be provided in a
16 way that is consistent with that standard.

17 In other words, the rule essentially has three
18 elements: one, that you provide - - - that - - - that you
19 indicate that you've provided the action timely, that it
20 was timely commenced. The second is that there hasn't been
21 a dismissal based on the merits. And the third is that it
22 - - - you give notice to the defendant.

23 Here, all of those - - - all of those
24 requirements have been complied with. With respect to - -
25 - there's no additional requirement, because for purposes

1 of determining - - -

2 JUDGE J. RIVERA: Yes, but in terms of the
3 remedial nature of 205(a) and given the role that the
4 trustee plays in this RMBS securitization, it does seem a
5 little bit strange - - - let me just say that - - -

6 MR. TORRES: But that - - -

7 JUDGE J. RIVERA: - - - to allow a trustee to be
8 put on notice within the statute of limitations period, to
9 appear to affirmatively make the decision not to move
10 forward within that time period, therefore the certificate
11 hold - - - certificate-holder acts, and now the trustee
12 wants to say, you know, I want to get the benefit of that;
13 I guess it might be a good action after all?

14 MR. TORRES: I guess the - - - the - - - the only
15 thing I would disagree with there is the - - - where it
16 appears that they intentionally made the decision - - -

17 JUDGE J. RIVERA: Okay.

18 MR. TORRES: - - - not to proceed with the
19 action.

20 I mean, here, what actually happened was that
21 they - - - notice was provided - - -

22 JUDGE J. RIVERA: Um-hum.

23 MR. TORRES: - - - and shortly after the actions
24 were filed, the - - - the trustee substituted as the
25 plaintiffs for all three actions.

1 JUDGE J. RIVERA: Yeah, so I saw that. Um-hum.

2 MR. TORRES: So you can draw whatever inference
3 you can, but the - - - in other words, there's no state-of-
4 mind requirement under the statute - - -

5 JUDGE FAHEY: No, but there is a remarkable lack
6 of urgency. That - - - that's what strikes me across the
7 board in many of these cases.

8 Now, it - - - here, there was a forensic
9 evaluation done here, wasn't there, and they found that
10 ninety percent of the loans failed to comply with the - - -
11 the forensic evaluation said that ninety percent of the
12 underlying loans were bad; is that correct?

13 MR. TORRES: That - - - that is correct.

14 JUDGE FAHEY: And that took four to five years to
15 complete, which is mind boggling to me, when there's
16 billions of dollars at stake. But apparently, that - - -
17 that's what happened. And then still, there was no action
18 that was take - - - taken place after that.

19 And as I understood the factual scenario that
20 Ameriquest shut down in 2007. So everybody knew there was
21 a problem then. So how are we to - - - to view this lack
22 of urgency? Is there a legal basis upon which we should
23 view it?

24 MR. TORRES: Well, Your Honor, first it's
25 important to understand the factual context with respect to

1 these - - - these deals. There - - - there was no
2 independent obligation on behalf of the certificate-holders
3 or the trustee to go out and - - - and examine thousands
4 and thousands of loans in - - -

5 JUDGE FAHEY: All you had to do is just be alive
6 in 2008 to know that there was something wrong, and to - -
7 - and to say to yourself maybe I should check on these
8 particular - - -

9 MR. TORRES: Well - - -

10 JUDGE FAHEY: - - - problems and these
11 investments.

12 MR. TORRES: But the issue - - - that's in
13 retrospect when we see what has happened in the market but
14 - - -

15 JUDGE FAHEY: I don't know. I remember 2008, it
16 wasn't retrospect for me. It was - - - that was - - - it
17 was - - - it was common knowledge. It was in all the
18 media. There was threats that the economy was going to
19 collapse. And these were part and parcel of that economic
20 problem.

21 So - - - so that shouldn't be laid on you. I
22 don't attempt to do that. I'm not - - - I'm not doing
23 that. What I'm saying to you is: how should we view this
24 in a legal context in terms of the awareness and the
25 application of any special benefit?

1 MR. TORRES: Well, Your Honor, in a legal
2 context, it's a question of a straight application of a
3 clear-cut standard as set forth in 205(a) and the way it's
4 been applied by the courts.

5 JUDGE FAHEY: Um-hum.

6 MR. TORRES: And essentially you have the
7 requirements. And - - - and if you have the same party-in-
8 interest that is - - - is - - - that was provided - - -

9 JUDGE STEIN: But haven't - - - haven't we
10 really, I - - - I thought, made kind of clear that - - -
11 that we were reading the statute as it was written, and
12 that we were really talking about the substitution of a rep
13 - - - representative for someone who's deceased, not just
14 people that had similar interests?

15 MR. TORRES: All right, well, this is - - -

16 JUDGE STEIN: Even assuming that - - - that these
17 two parties do have similar interests, and - - - and that
18 obviously is - - - is a question in and of itself.

19 MR. TORRES: The - - - the parties obviously have
20 - - - the trustee has its interest in terms of a - - - of -
21 - - of administrating the claims. But clearly here, the
22 certificate-holders had substantial economic interest in
23 the cases. And what - - - what the rule provides and what
24 the courts have provided in Reliance is that if it's the
25 same interest and - - - and rights that are being

1 vindicated by both the or - - - both the original action
2 and in the revival action - - -

3 JUDGE STEIN: I realize there was some language
4 to that effect in - - - in some cases. But - - - but I
5 think that's sort of taken out of context. I think that
6 we've consistently not applied 205(a) in circumstances
7 other than - - - than where it's a clear representative of
8 - - - of a party who cannot appear. And that - - - that -
9 - - I mean, here you have a contract with very distinct
10 rights between the certificate-holders and the trustee, and
11 a whole - - - and - - - you know, and a whole right of
12 action provision and all of that. And so doesn't applying
13 the rule that you're suggesting really undermine that whole
14 thing?

15 MR. TORRES: Not at all, Your Honor. Because of
16 the fact that you - - - they are the same interests and
17 rights that are being adjudicated - - - and this court has
18 never clearly held that it would not apply this statute.
19 It only requires that the - - - an - - - an administrator
20 or executor.

21 But more importantly, in the George decision,
22 where the court did make the statement that it should be
23 applied if there is - - - if - - - if the - - - if the
24 subsequent claimant is acting in a representative capacity
25 relative - - - vis-a-vis the original action - - - the

1 plaintiff in the original action, then it should be
2 applied, and here that - - - that is precisely what
3 occurred.

4 JUDGE FAHEY: Judge?

5 CHIEF JUDGE DIFIORE: Yes.

6 JUDGE FAHEY: Could I ask - - - I know his red
7 light's on, but there's - - -

8 CHIEF JUDGE DIFIORE: Yes, please.

9 JUDGE FAHEY: - - - a question I didn't want
10 counsel to not be aware that I had in my mind.

11 There's a difference between arguing that 205(a)
12 would be improper because of the identity of the plaintiff
13 versus 205(a) would be improper because the original action
14 was untimely. Follow me?

15 MR. TORRES: Yes.

16 JUDGE FAHEY: Okay. You're - - - are you arguing
17 - - - you're not - - - are you arguing identity or
18 untimeliness? You're arguing - - -

19 MR. TORRES: Well, we're arguing that both - - -

20 JUDGE FAHEY: One or the other?

21 MR. TORRES: - - - with - - - with respect - - -

22 JUDGE FAHEY: No, no, no. My question is you're
23 arguing one or the other, identity or untimeliness. You
24 didn't argue both below.

25 MR. TORRES: Well, we are - - - okay. We're not

1 addressing the timeliness issue, because we're - - -

2 JUDGE FAHEY: All right, so - - - so - - -

3 MR. TORRES: - - - basically taking the position
4 that - - -

5 JUDGE FAHEY: - - - so let me just ask this
6 question. If you didn't argue the untimeliness issue
7 below, but you argued the identity issue below, is the
8 untimeliness issue preserved for this court?

9 MR. TORRES: Yes, Your Honor. It was argued at
10 the - - - at the Supreme Court level. So that issue has
11 been preserved. And - - -

12 JUDGE FAHEY: I didn't see it there - - -

13 MR. TORRES: - - - with respect - - -

14 JUDGE FAHEY: - - - and the Appellate Division
15 didn't address the timeliness issue - - - or - - - yeah, I
16 don't believe they addressed the timeliness issue.

17 MR. TORRES: Well, they - - - they just addressed
18 the relation back and the condition precedent issues.

19 JUDGE FAHEY: Right.

20 MR. TORRES: But they're related. And one of the
21 premises of - - - of both relation back and the savings
22 statute is that there be a timely action. And for purposes
23 of a timely action, here clearly that was complied with,
24 because the three actions, when they were filed by FHFA,
25 were filed within the statute of limitations period.

1 JUDGE FAHEY: I see. Okay, thank you.

2 CHIEF JUDGE DIFIORE: JUDGE RIVERA?

3 JUDGE R. RIVERA: Yes.

4 CHIEF JUDGE DIFIORE: One more question, sir,
5 before you leave.

6 JUDGE R. RIVERA: Chief, thank you very much.
7 Sorry - - - if you don't mind? The action has to be
8 commenced but the initial plaintiff has to be the right
9 plaintiff?

10 MR. TORRES: Yes.

11 JUDGE R. RIVERA: That being the case, how do you
12 survive the precedent of the court in Reliance on these
13 facts given the identity of the initial plaintiff versus
14 the subsequent plaintiff - - -

15 MR. TORRES: Well, the - - -

16 JUDGE R. RIVERA: - - - in the context of 205(a),
17 assuming you don't have a preservation issue?

18 MR. TORRES: Well, the - - - the question is - -
19 -

20 JUDGE R. RIVERA: Preservation problem.

21 MR. TORRES: Correct. Assume - - - the question
22 is how you define the plaintiff for purposes of 205(a).
23 And what we're submitting is that under Reliance and the
24 other cases that have been decided in the New York courts,
25 the courts have made clear that you look at whether the

1 same interests and rights are being vindicated by the
2 original plaintiff and by the revival plaintiff. And here,
3 that clearly is the case.

4 So the court has never really applied a strict
5 rule that - - - that relies solely on the identity of the
6 plaintiff. If that were the case, then Reliance would not
7 provide the analysis concerning the same rights and
8 standards, and you wouldn't have decisions like Pinto and
9 Genova and Green, where you had a situation where you had a
10 debtor versus a bankruptcy trustee; and in those cases,
11 even though nominally they were distinct plaintiffs, the
12 courts permitted the revival action, because it was clear
13 that the bankruptcy trustee was representing and seeking to
14 defend the interest and the rights of the debtor on behalf
15 of the estate.

16 JUDGE R. RIVERA: But are you - - - but are you -
17 - - excuse me - - - but are those conclusory statements
18 that you have just made, are they in the ambit of what an
19 advocate must state in order to advance the client's
20 position, or is it a reasonable, rational, and balanced
21 reading of what the court says in Reliance?

22 MR. TORRES: It's a reason - - - it's a
23 reasonable and - - - and balanced reading - - -

24 JUDGE R. RIVERA: It's - - - it's not as if we
25 have a third party whose rights are being - - - are being

1 aggravated and sought to be vindicated by two different
2 entities.

3 MR. TORRES: No, that - - -

4 JUDGE R. RIVERA: In the context - - - context of
5 205(a) you need to have the proper plaintiff.

6 MR. TORRES: Exactly. And you have the proper
7 plaintiff here for the reasons I stated before, and because
8 here, the certificate-holders - - - and this was initially
9 filed as a derivative action by FHFA on behalf of all of
10 the certificate-holders - - - the certificate-holders have
11 always held and retained economic and equitable rights to
12 the claim. The certificate-holders are the key - - - the
13 real parties-in-interest.

14 JUDGE J. RIVERA: Yeah, but the problem really
15 with that argument is - - - and - - - and the court has
16 said this before - - - that - - - that there are different
17 certificate-holders. They take different priorities.

18 And so the trustee's interest, even in - - -
19 under your analysis, might very well vary across these
20 various certificate-holders. The case is not going to boil
21 down to Freddie Mac's particular certificates - - -

22 MR. TORRES: But - - -

23 JUDGE J. RIVERA: - - - and its status, right?
24 It's about the breach of the warranties and guaranties and
25 the impact and what might be the recovery for all

1 certificate-holders.

2 MR. TORRES: I agree with that, Your Honor, with
3 the exception that in this case, FHFA, when it filed the
4 action, was not filing it on behalf of FF - - - FHFA only,
5 and was not only seeking recovery on behalf of that entity.
6 When it filed the action, it filed the action in a
7 derivative capacity, on behalf of all the certificate-
8 holders.

9 JUDGE J. RIVERA: But it had - - - it could not
10 do that. It could not do that.

11 MR. TORRES: It could - - - in a derivative - - -

12 JUDGE J. RIVERA: Your red light is on.

13 MR. TORRES: - - - capacity - - - in a derivative
14 capacity, that's the way the action was filed. And what's
15 critical is for purposes of notice, once they provided
16 notice that it was on behalf of all certificate-holders,
17 you served - - - you - - - you basically complied with one
18 of the cardinal principles and purposes served by the
19 savings statute, which is to ensure that timely notice is
20 provided to the defendant.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 Counsel?

23 MR. LOEB: Mr. Selendy referenced then Judge
24 Cardozo's - - - talked about it being a liberal statute.
25 But it - - - the - - - Judge Cardozo also spoke to that

1 it's to protect the diligent suitor. And this court, in
2 Norex, echoed that and said that 205(a) relief was not
3 intended where the proper party was unwilling to prosecute
4 its claim in a timely manner.

5 JUDGE J. RIVERA: Well, why - - - why isn't the
6 trustee in an - - - in an RMBS securitization like a
7 bankruptcy trustee?

8 MR. LOEB: Oh, it's very different. So in the
9 bankruptcy, you have a legal transition from one entity to
10 the other. Here you have - - - here, the trustee was
11 always - - - so in a bankruptcy trustee situation, it was
12 not able to sue before. Now it's do - - - the estate, it's
13 a new entity, now the first time the bankruptcy trustee is
14 the proper party representing the same entity.

15 This court in Reliance said where there's a
16 commonality of - - - of the identity of the party from A to
17 B, that the rule can still apply. But it doesn't apply in
18 a situation where it's different parties.

19 Here, the trustee always could have sued. And as
20 you recognized, the certificate-holder recognized it
21 itself. They knew that they were barred by the no-action
22 clause from suing. They were barred from the no-action
23 clause from giving the notice and cure notice. And they
24 sent a demand letter - - - that's in page 1549 of the
25 record - - -

1 JUDGE J. RIVERA: And could they have sued
2 derivatively? What about his argument at the very end,
3 before he sat down?

4 MR. LOEB: No, they - - - they have no authority
5 to bring an action on behalf of themselves or other
6 certificate-holders. That's what the no-action clauses
7 allowed.

8 They want to incentivize and reward the
9 certificate-holder for bar - - - for breaching this key
10 term, the no-action clause. And if you reward it here,
11 you're going to incentivize other minority holders of bonds
12 and certificates to do likewise, to extend both the
13 limitations period and to put pressure on the trustee to
14 bring an action.

15 So the trustee here was given a demand letter.
16 It has the fiduciary responsibility to the jen - - - junior
17 holders, the senior holders, to the trust itself, and to
18 future holders. And it knew how to give notice and seek
19 notice and cure. It knew how to sue within the six years.
20 It knew the six years was expiring, because the demand
21 letter said you better sue within eight days or we're - - -
22 our rights are going to be compromised.

23 JUDGE J. RIVERA: So is the 205(a) argument even
24 preserved? Could you address the preservation issue?

25 MR. LOEB: The preservation argument?

1 JUDGE J. RIVERA: The preservation issue.

2 MR. LOEB: Their arg - - - their argument is
3 preserved?

4 JUDGE J. RIVERA: No, the preserva - - - whether
5 it's preserved or not?

6 JUDGE STEIN: In other words, did - - - did they
7 - - -

8 JUDGE J. RIVERA: Can we even consider this
9 argument in this appeal?

10 MR. LOEB: Well, the - - - it was dismissed by
11 the - - - by the trial court as time barred.

12 JUDGE J. RIVERA: Um-hum.

13 JUDGE FAHEY: So that's timeliness, that's not
14 identity.

15 MR. LOEB: And they - - - and they - - - they
16 then appealed that. They - - - they did not seek to
17 reverse that holding. They said instead of being a
18 dismissal with prejudice, we'd like it to be a dismissal
19 without prejudice.

20 JUDGE STEIN: Yeah, but did they make that
21 argument in the Supreme Court? In other words, when - - -
22 when you moved to dismiss and they opposed that motion, did
23 they say: if it has to be dismissed, it should be
24 dismissed without prejudice?

25 MR. LOEB: Not - - - not to my knowledge, Your

1 Honor. And then - - -

2 JUDGE STEIN: Because of 205(a), did - - - was
3 Reliance cited by anybody in those - - -

4 MR. LOEB: They never - - - they never sought - -
5 -

6 JUDGE STEIN: - - - papers?

7 MR. LOEB: - - - 205(a) relief in - - - in - - -
8 in the trial court. And - - - and on the - - - on the
9 appeal, they said change it to a dismissal without
10 prejudice so we can, at a later time, seek relief under
11 205(a).

12 JUDGE J. RIVERA: So just - - - just to clarify
13 for me the - - - the record. As I understood it on your
14 motion to dismiss, you did - - - albeit in a footnote - - -
15 raise the 205(a) and said they can't rely on that; did you
16 not?

17 MR. LOEB: That - - - that's correct, Your Honor.

18 JUDGE J. RIVERA: And they never responded to
19 that argument?

20 MR. LOEB: They didn't respond to that. It was
21 then dismissed - - -

22 JUDGE J. RIVERA: Never mentioned 205(a); it's
23 not anywhere found in their brief in response?

24 MR. LOEB: And never - - -

25 JUDGE J. RIVERA: Correct.

1 MR. LOEB: - - - filed a 205(a), you know,
2 complaint. They filed a consolidated complaint after - - -
3 the only time the trustee filed was after the limitations
4 period had already run, and the trial court correctly
5 dismissed that as - - -

6 JUDGE J. RIVERA: As I understood it, they were -
7 - - they were arguing that they should have been allowed to
8 file an amended complaint, but they didn't make this
9 argument over 205(a) - - -

10 MR. LOEB: No, they did not.

11 JUDGE J. RIVERA: - - - in response to your
12 motion?

13 MR. LOEB: They did not, Your Honor.

14 JUDGE J. RIVERA: Okay. Thank you.

15 MR. LOEB: Now, as you noted that - - - the
16 parties here are - - - are very distinctly different.
17 There's a fiduciary responsibility of the trust - - - of
18 the trustee to all the certificate-holders and to the
19 trust. The certificate-holder has only a fiduciary
20 responsibility to itself and to its own economic interest.
21 They have different rights and they have different
22 interests. And the reason they have different rights is
23 because they have different interests.

24 And - - - and finally, he, in essence, is trying
25 to have this court overrule the Reliance decision. So in

1 Reliance, this court said that it explicitly and
2 exclusively applies to where it's the same party that
3 initiated the action. It need - - - it is the only party
4 who can then invoke - - -

5 JUDGE STEIN: How about the same - - -

6 MR. LOEB: - - - 205(a).

7 JUDGE STEIN: - - - the same rights language, the
8 same rights test, what do you - - - what's your response to
9 that?

10 MR. LOEB: It was simply referencing and quoting
11 from another opinion but then went on to clarify that - - -
12 that even where, in that case there was a hundred percent
13 the same interest. It was a wholly owned - - - so it was a
14 parent wholly owning a hundred percent of the subsidiary.
15 So the economic interests were completely aligned.

16 In this court in Reliance said that's not enough,
17 because the subsidiary is not the parent. They are
18 different parties.

19 JUDGE STEIN: What's the problem with that test?

20 MR. LOEB: Different part - - - it - - - it - - -
21 as my colleague here said, you need to have clarity under
22 the rules. He's asking this court to adopt a very fuzzy
23 test about an alliance of interests, and here the alliance
24 of interests between the certificate-holder, a minority,
25 who's just looking after its own economic interest, and the

1 trustee, who is the only party - - - the sole party who can
2 look after the interests of all the certificate-holders, is
3 quite different.

4 So this court should stick to Reliance and say
5 you need to have a commonality of identity between who
6 brought the initial action and who's filing it, or 205(a),
7 with the only exception being the representative in the
8 estate or, as Reliance recognized, where as a matter of
9 law, it now has a new label, but it's still really the same
10 identity, the same party.

11 Here it wasn't the same party. The party who
12 initiated it was a party who had no authority to, as
13 certificate-holder, who's not the same party as the
14 trustee. Did he say yes, we are the certificate-holder
15 bringing it - - - trying to bring it on behalf of - - - of
16 the trustee? Sure, they said that. But they had no
17 authority to do that.

18 The party who was initiating it under Reliance
19 is, in fact - - - is the certificate-holder and a different
20 party. And the First Department correctly, therefore, said
21 it was dismissed and properly dismissed with - - - as time
22 barred, and then no 205 relief could be sought.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. LOEB: Thank you.

25 CHIEF JUDGE DIFIORE: Mr. Torres?

1 JUDGE SWEENEY: Mr. Torres, can I ask you a
2 question? Your adversary brought up the point about the
3 no-action clause. If we accept your argument that in fact
4 there's the relation between the certificate-holder and the
5 trustee, are we, in essence, abrogating the obligation
6 under the PSA that has the no-action clause?

7 MR. TORRES: Well, not at all, Your Honor. And -
8 - - and the reason for that is that in this case, the - - -
9 the trustee actually has filed - - - in the amended
10 complaint they actually submitted an amended complaint, in
11 paragraph 7 that includes a reference to compliance with a
12 no-action clause.

13 JUDGE SWEENEY: But of course, all that's after
14 the fact. The certificate-holder is the one who commenced
15 this?

16 MR. TORRES: Right, it is - - - it is after the
17 fact. But the fact is that to the extent that they're
18 relying on the no-action clause: a) that's been complied
19 with and notice was provided more than four - - - more than
20 five years ago, and they have - - - and they have not
21 purchased the overwhelming number of these loans. But
22 secondly, to the extent - - - the no-action clause really
23 boils down to this. There was a defect in the original
24 action because you didn't comply with this requirement. It
25 was a condition precedent requirement. We admit that. We

1 didn't comply with it. And for purposes of 205(a),
2 however, the fact that it's a defect, even if classified as
3 a fatal defect, is not dispositive.

4 In fact, as George stated, that's the precise
5 reason why you have 205(a), to deal with situations like
6 this where you have a - - - a fatal defect in a claim,
7 whether for a condition precedent or for some other reason
8 as long as it doesn't - - -

9 JUDGE J. RIVERA: So why didn't you argue that -
10 - - why didn't you argue that in response to the motion to
11 dismiss? I'm having a problem with the preservation issue
12 here.

13 MR. TORRES: Well, Your Honor, it was to - - - it
14 was argued in - - - in connection with - - - it - - - when
15 - - - when the case came up, there were two arguments that
16 essentially were made. One was the relation-back document
17 (sic) under 203(f). And under the relation-back doc - - -
18 doctrine, by virtue of the close relationship between the
19 FH - - - the FHFA as the derivative plaintiff for the trust
20 - - - for the certificate-holders, and the trustee, were
21 closely related, so they clearly meet the requirements.

22 With respect to 205(a), an alternative argument
23 was presented that they - - - that - - - that you wouldn't
24 even have to get to relation back. In other words, you had
25 two options for purposes of getting to the same resolution,

1 which is sustaining a lawsuit.

2 JUDGE J. RIVERA: I'm sorry. This was presented
3 on the motion to dismiss?

4 MR. TORRES: Yes, that was the argument that was
5 presented. There - - -

6 JUDGE J. RIVERA: You - - - you argued - - - I'm
7 sorry, you argued on the motion to dismiss - - -

8 MR. TORRES: Yes.

9 JUDGE J. RIVERA: - - - that you had the
10 opportunity to invoke 205(a)?

11 MR. TORRES: Well, we made the - - -

12 JUDGE J. RIVERA: Where would I find that in the
13 record?

14 MR. TORRES: No, we - - - we made the argument in
15 the papers. There were - - - there were basically two
16 grounds for - - - for - - - for - - -

17 JUDGE J. RIVERA: I'm sorry. Where would I find
18 that in the record?

19 MR. TORRES: That's in - - - in the briefs.

20 JUDGE J. RIVERA: In - - - in opposition to his
21 motion to dismiss?

22 MR. TORRES: Yes.

23 JUDGE J. RIVERA: All I saw was your argument
24 that it was timely filed - - - the original action was
25 timely filed, and in the alternative, you wanted the

1 opportunity to amend the complaint.

2 MR. TORRES: No, Your Honor, the - - -

3 JUDGE J. RIVERA: Pursuant to a different section
4 of the CPLR.

5 MR. TORRES: Right, right, no. The - - - the - -
6 - the - - - it's clearly - - - if you looked at the briefs,
7 it's clearly that two - - - there were two grounds
8 essentially were argued for purposes of reversing the - - -
9 the order below. One was that 203 - - -

10 JUDGE J. RIVERA: Oh, you're saying you argued to
11 the Appellate Division?

12 MR. TORRES: Correct.

13 JUDGE J. RIVERA: No, I'm - - - I'm asking you
14 about the Supreme Court. Did you put this in your briefs
15 to the Supreme Court?

16 MR. TORRES: Well, in - - - in this - - -

17 JUDGE J. RIVERA: You have to preserve it at - -
18 - at the trial level, before this court can review the
19 argument.

20 MR. TORRES: In - - - in - - - in the Supreme
21 Court - - -

22 JUDGE J. RIVERA: Um-hum.

23 MR. TORRES: - - - it was decide - - - it was - -
24 - the 203(f) argument was made. It was not made in the
25 Appellate Division, because the ACE decision had come down,

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JUDGE J. RIVERA: At Supreme - - - at Supreme Court?

MR. TORRES: Well, at Supreme Court, it wasn't an issue at Supreme Court. So - - - so the point is, is that it was - - - it was an issue that was decided by the Appellate Division, and it was connected to the re - - - to the findings that were in the record with respect to the - - - the structure of the transactions and the actions of FHFA as a derivative plaintiff.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. TORRES: Okay.

(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 U.S. Bank National Association v. DLJ Mortgage Capital, Inc., No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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