

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION,

Respondent,

-against-

NO. 11

DLJ,

Appellant.

20 Eagle Street
Albany, New York
February 8, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
PRESIDING JUSTICE HECTOR D. LASALLE

Appearances:

RICHARD A. JACOBSEN, ESQ.
ORRICK HERRINGTON & SUTCLIFFE LLP
Attorney for Appellant
51 West 52nd Street
New York, NY 10019

KATHLEEN M. SULLIVAN, ESQ.
QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorney for Respondent
51 Madison Avenue
22nd Floor
New York, NY 10010

Cheryl Odom
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. The next appeal on
2 today's calendar is appeal number 11, U.S. Bank National
3 Association v. DLJ.

4 Counsel?

5 MR. JACOBSEN: Good afternoon, Your Honors. And
6 may it please the court, Richard Jacobsen of Orrick
7 Herrington & Sutcliffe, on behalf of the appellant, DLJ.
8 Your Honors, may I request two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. JACOBSEN: Thank you. This lawsuit should be
11 limited on a notice theory to the 1,204 loans that the
12 trustee identified in its two pre-suit notice letters. The
13 First Department erred by treating those letters as
14 providing sufficient notice for each and every loan in the
15 trust.

16 Your Honors, the last time I was here, last
17 April, the court had some specific questions about what
18 this notice requirement means and what the pre-suit notices
19 given in this case looked like. I want to be very clear on
20 both counts, Your Honor. First, the contract requires the
21 trustee's notice to identify each individual loan and also
22 explain the nature of the alleged breach or breaches with a
23 narrative of same. And that's exactly what U.S. Bank did
24 here for the 1,204 loans.

25 The court may recall, after - - -



1 JUDGE RIVERA: Counsel, if I can interrupt you.
2 I'm on the screen.

3 MR. JACOBSEN: Yes.

4 JUDGE RIVERA: Sorry. Yes, my fault.

5 MR. JACOBSEN: You're coming from over there. I
6 apologize.

7 JUDGE RIVERA: Sorry about that. Okay. If they
8 had said, in any of the letters, there are breaches
9 throughout; every single loan is infected, would that be
10 good enough?

11 MR. JACOBSEN: Absolutely not, Your Honor. In
12 fact, I think that would be in contravention of this
13 court's line of cases in Ambac, Nomura, and Deutsche Bank.
14 You'll recall that in Nomura, for instance, the court ruled
15 that allegations of pervasive or systemic breaches could
16 not circumvent the sole remedy provision. What it's - - -

17 JUDGE RIVERA: No, no, no. I'm asking a
18 different question. I'm not asking about - - - I
19 understand your point. I'm not disagreeing with that. If
20 - - - if they had just said, there's so many - - - if they
21 thought to themselves, there's so many loans; what would be
22 the point of giving every single number; I'm just going to
23 say every loan is infected, would that be notice? Why
24 isn't that notice to you? They're telling you every single
25 one of them is infected.



1 MR. JACOBSEN: Absolutely not. That would
2 completely eviscerate the repurchase protocol, which, if I
3 may direct the court's attention to it, is Section 2.03(d)
4 of the pooling and servicing agreement. Judge Rivera, in
5 all instances, it speaks to an individualized process where
6 they have to identify, on a notice theory, the loans they
7 say breached and materially and adversely affected the - -
8 -

9 JUDGE RIVERA: Well, I understand, but my - - -
10 my - - - that is not my point. I understand your point.
11 It'll be the last question, I think, that I'll have to ask
12 you about this. My point is, what's - - - what better
13 notice are you getting between every single one of them is
14 infected; you need to either replace them or repay, versus
15 here's the attachment; I'm listing every single loan? What
16 - - - what - - - why is one notice better than the other?

17 It sounds to me like you're saying, no, they have
18 to do the second one; they have to actually put the number,
19 the identifier for every single loan. What's the
20 difference? You've gotten the notice.

21 MR. JACOBSEN: The difference, Your Honor, is
22 that would not put us on notice as to anything. And it's
23 not about what notice would be better or preferable. It's
24 about what these two sophisticated parties agreed to by way
25 of their obligations in the pooling and servicing



1 agreement.

2 If they were just to say, here's a list of all
3 the loan numbers; they've breached reps and warranties;
4 please repurchase, that doesn't put us on notice as to
5 anything. I submit it's exactly - - -

6 JUDGE RIVERA: If they told you which - - - if
7 they told you which breach in - - - warranties were - - -
8 were breached, would that do it?

9 MR. JACOBSEN: They have to do exactly what they
10 did here, which is for each loan they allege breached,
11 identify the loan number. For each one of those loan
12 numbers, identify the representation or representations
13 that breached for each loan. And for every one of those,
14 give the basis for why it's breached. The entire purpose
15 of - - -

16 JUDGE RIVERA: And how - - - and how long would
17 that take to do that if - - - if, indeed, they are correct
18 on this allegation, right? It's their allegation that it -
19 - - that it's so numerous.

20 MR. JACOBSEN: How long would it - - - Your
21 Honor, I submit - - -

22 JUDGE RIVERA: I mean, it - - - could it be - - -
23 could it really be - - - I guess you've started, now, down
24 this road that it is the parties' intent. Again, not
25 disagreeing with you. That's the case law. And then we



1 have to look at the rationality of the point that you're
2 making, the logic of it, given the language that you've
3 used. Is it really your argument that what the parties
4 understood was you've got to go into what you've just
5 described for every single loan, even when we're talking
6 about thousands of thousands, perhaps eighty percent?

7 MR. JACOBSEN: Your Honor, absolutely. Not only
8 - - -

9 JUDGE RIVERA: Okay.

10 MR. JACOBSEN: - - - is that their obligation,
11 not only is that the only way the remedial process in
12 Section 2.03(d) can work, that's what they did. They did
13 that for 1,204 loans, first of all. Second of all, they
14 had access to all of the information at their disposal to
15 do this. In fact, the record is clear that they actually
16 looked at 2,500 loan files prior to the expiration of the
17 statute of limitations.

18 Furthermore, when they have been defendant in
19 cases like this, where they have been accused of breaching
20 the repurchase protocol, U.S. Bank, in numerous cases, has
21 argued for the exact same individualized process that we
22 are arguing here. And that's - - -

23 JUDGE CANNATARO: Counsel, I'm looking - - - I'm
24 looking at 2.03(d) or an excerpt of it, and I actually
25 don't see the word "each" or "individual" in it. So are



1 you saying that's what the section says, or that's what a
2 plausible reading of the section would lead one to believe?

3 MR. JACOBSEN: That is the effect and the reading
4 of the statute, Your Honor. They speak to having, for each
5 loan, to identify how they materially and adversely
6 affected the interest of the certificate holders. It has
7 to be written notice of a breach of any representation and
8 warranty and that they speak of such breach or removal of
9 such mortgage loan. And the only way they can effectuate a
10 repurchase, a cure, or substitution is if they know exactly
11 what loan they're speaking of. And that's why it's an
12 individual process, Your Honor.

13 I'd also add that to the extent there's any
14 argument or suggestion that there could be a quota, a
15 threshold, or percentage, nothing in the pooling and
16 servicing agreement speaks to that at all. He just - - -

17 JUDGE CANNATARO: No, but I'm - - - I'm referring
18 to that earlier question that you heard. You know, if you
19 just say all, why can't you say all if that's what you
20 actually mean?

21 MR. JACOBSEN: Because if all they did was list
22 all of the loan numbers, they would not have identified
23 which breaches, what representation or representations are
24 they alleging is in breach, and they would not have
25 provided the narrative required so they can determine



1 whether or not - - - and this is the language directly from
2 Section 2.03(d), Your Honor - - - whether or not that
3 breach materially and adversely affected the note holders'
4 interest in the loans.

5 In order for the repurchase protocol to operate
6 and to function, we need to be put on notice of exactly
7 what loans they're talking about, and we need to understand
8 what they're alleging is the breach. We have no
9 independent obligation to forensically investigate or look
10 into it. That's their notice requirement.

11 And I end by begin - - - I end by going back to
12 where I began. Not only is that what they knew was
13 required, that's what they did for 1,204 loans. And that's
14 what they have said in numerous - - -

15 JUDGE RIVERA: So Counsel, when they also said
16 that this infects the rest of the pool, did anyone say to
17 them, I'm sorry; you have to give me an individual number,
18 and you have to explain this loan by loan?

19 MR. JACOBSEN: Your Honor, we have no obligation
20 to engage in any colloquy with them, except to receive the
21 repurchase demands - - -

22 JUDGE RIVERA: Well, other than - - -

23 MR. JACOBSEN: - - - and - - - and - - -

24 JUDGE RIVERA: Other than if they made a demand
25 and you're not complying fully with the demand, don't you



1 have to at least say, we're not complying fully with the
2 demand because we don't think it's encompassed by the
3 mandate - - -

4 MR. JACOBSEN: No. We have - - -

5 JUDGE RIVERA: - - - the mandate's requirement?

6 MR. JACOBSEN: We have - - - we have to respond.
7 And we did, in this case, by repurchasing forty of the
8 loans that they gave us notice on. Your Honor, but if you
9 take their argument to its logical conclusion, what they're
10 essentially advocating here -- - and U.S. Bank is among
11 the most sophisticated entities involved in structured
12 finance products like this in the world - - - they could
13 give notice on one loan on the last day of the statute of
14 limitations, take as many years as they want, identify
15 additional loans they say are in breach - - - in this case,
16 three years after the statute of limitations expired - - -
17 and say that those are basically all part of the same
18 lawsuit, and those were timely noticed. We weren't - - -

19 JUDGE RIVERA: That's actually not what happened,
20 right? I think that - - -

21 MR. JACOBSEN: Well, Your Honor, that's what
22 they're doing - - -

23 JUDGE RIVERA: And that's not what their rule is.
24 Their - - - they'll correct me if I'm wrong; you'll correct
25 me if I'm wrong. Their argument is that they did put you



1 on notice that the - - - the breaches exceeded the specific
2 ones listed. I mean, that was clearly what they were
3 notifying you of. They weren't saying - - - your
4 hypothetical is, I said there's only one loan in breach.
5 Now I file a lawsuit. Oh, by the way, I really meant 1,000
6 loans were in breach. That's not as I understand the
7 argument that they have made.

8 MR. JACOBSEN: Your Honor, respectfully, that's
9 incorrect. In their notice letters, they identified
10 specific loans by attaching the Schedule 1 we've been
11 speaking of.

12 JUDGE RIVERA: Yes.

13 MR. JACOBSEN: They did not say an investigation
14 was ongoing. They did not say that these were - - - there
15 were systemic or pervasive breaches. All they said was,
16 adhere to your obligations under the contract. That does
17 not put us on notice as to anything.

18 And I see that the red lights are on, Your Honor.
19 Can I just make one final point?

20 CHIEF JUDGE DIFIORE: Complete your answer.

21 MR. JACOBSEN: Thank you very much. If their
22 view prevails, that would be in direct contravention of
23 ACE. ACE held that this is not a warranty for the lifetime
24 of the investment. And that's what it would be converted
25 to.



1 Thank you, Your Honor.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel?

4 MS. SULLIVAN: Good afternoon. And may it please
5 the court, Kathleen Sullivan for U.S. Bank in its capacity
6 as trustee.

7 Your Honors, you should affirm the First
8 Department because in our pre-suit notices, we said 1,204
9 loans breach. We gave detailed examples of the breaches
10 and the - - - the reasons why they breached. And we also
11 said in our pre-suit notice letters, we want repurchase of
12 all breaching loans.

13 JUDGE SINGAS: Ms. Sullivan? Ms. Sullivan, once
14 U.S. Bank lists some of the loans, isn't it by extension
15 the fact that they're not listing all the others, that
16 they're not including those?

17 MS. SULLIVAN: No, Your Honor. But I'd like to
18 spend my limited time saying why we win for a second
19 reason, even if my colleague were right that we have to
20 list all the loans. So let me take your question, Justice
21 Singas.

22 We list 1,204. They're specific. We also - - -
23 if the contract does require loan-by-loan notice, which you
24 don't need to decide here, we also provided loan-by-loan
25 notice of the additional 480 loans in the expert report.



1 The expert report identifies loan by loan, with backup,
2 Judge Rivera, with backup as to what the breaches of reps
3 and warranties were for the 480 new loans. So we provided
4 loan-by-loan notice in this case, on this record, of the
5 1,204 in the pre-suit letters and the 480 in the expert
6 report.

7 So Judge - - - Judge Singas, the only question
8 is, was it too late? The question is not, was it loan by
9 loan. We had loan-by-loan notice of the 480. It's in the
10 expert report. That's not contested that it's loan by
11 loan. My colleague simply says, it's too late. But here's
12 - - -

13 JUDGE GARCIA: So those - - - I'm sorry. Just to
14 be clear, those are the only other loans you're interested
15 in?

16 MS. SULLIVAN: That's right, Your Honor. This is
17 a case where the only loans at issue are 783 loans. 303
18 are the ones left over from the 1,204 in the pre-suit
19 letters. 480 are new in the expert report.

20 There's no question, in answer to Judge Singas'
21 question, that these were loan by loan. The 480 in the
22 expert report are just as individually specified, with
23 backup as to what they breached, as the 1,204.

24 JUDGE CANNATARO: But doesn't - - - doesn't the
25 480 that weren't included in the initial pre-litigation



1 letter deprive them of their opportunity to do the cure
2 provisions - - -

3 MS. SULLIVAN: And it - - -

4 JUDGE CANNATARO: - - - of the section?

5 MS. SULLIVAN: It does not, Your Honor, and
6 here's why. They had ninety days from the expert report,
7 which came out in - - - you know, it - - - they had ninety
8 days from the expert report. In fact, they've had five
9 years from the expert report to cure.

10 JUDGE GARCIA: But as part of that expert report,
11 did you ask for a cure?

12 MS. SULLIVAN: We did in the complaint, Your
13 Honor. The expert report - - - the complaint, the prayer
14 for relief in both the first and second amended complaint
15 plainly says, we want the remedy of cure or repurchase, or
16 in the alternative, in the second complaint, we wanted
17 equitable damages because you didn't repurchase.

18 And what I want to get to is ABSHE, Your Honor,
19 because ABSHE is the key to this case. This court decided
20 in ABSHE that the notice that's required by the contract
21 does not need to occur - - - as a matter of contractual
22 interpretation, it does not need to occur in the six-year
23 limitations period.

24 ABSHE, you'll recall, that's the case where in -
25 - - in March of 2012, there's contractual notice to the



1 wrong party, DLJ. The statute runs out in November of
2 2012. But this court held that because the contractual
3 notice is a procedural prerequisite to suit - - - it's not
4 substantive; it doesn't have to happen for the claim to
5 accrue - - - this court held that it was okay to have post-
6 statute of limitations period notice to the right party,
7 Ameriquest.

8 So just to recap, ABSHE holds that the trustee
9 was permitted to refile under CPLR 205(a), even though it
10 gave the contractual notice to the proper party after the
11 expiration of the six-year limitations period. Why?
12 Because the trustee had earlier filed the timely claim,
13 before the statute ran, right? The trustee files the
14 timely claim against DLJ. The statute runs. Then it's the
15 wrong party. The contract said you had to notice
16 Ameriquest, in the first instance, to cure because it was
17 the originator.

18 They then issued - - - the trustee then, in
19 ABSHE, issues contractual notice that says, please
20 repurchase our loans. It was after the statute of
21 limitations has run. So Your Honors, if I could just put
22 this all together - - -

23 JUDGE CANNATARO: But counsel, the foundation of
24 the decision that you're appealing is a relation back
25 theory.



1 MS. SULLIVAN: That's right, Your Honor.

2 JUDGE CANNATARO: And - - - and ABSHE's not 205.
3 It's not really relation back.

4 MS. SULLIVAN: Your Honor, what I would like to
5 ask this court to do is take ABSHE, the 205(a) reasoning,
6 and the contractual interpretation in ABSHE, and take one
7 more small step to affirm in this case by saying the same
8 reasoning in ABSHE that led to 205 revival suit also means
9 that in this case, we can have 203, 203(f) relation back.
10 And here's why.

11 203(f) and 205(a) are based on the same test.
12 They say, was the timely complaint about the same
13 transaction and occurrence or series of transactions or
14 occurrences as in the 205(a) case, the revival case, or in
15 the 203(f) case, the newly pled claims?

16 Now, Your Honor, you're exactly right. What I'm
17 asking you to do is say, this is a case where there's loan-
18 by-loan notice. The only issue is, is it allowed to come
19 after the statute of limitations has run? And the answer
20 to that question, from ABSHE, is yes. There is no
21 requirement that there be pre-limitations period
22 contractual notice, this court held as much as ABSHE. And
23 all you need to say here is, just as we held that 205(a)
24 revival action could happen because it was based on the
25 same transaction and occurrence in the timely - - -



1 JUDGE RIVERA: Okay. But says that that's not
2 what the parties agreed to - - -

3 MS. SULLIVAN: Well - - -

4 JUDGE RIVERA: - - - and that that's what
5 controls. Can you address that argument?

6 MS. SULLIVAN: Absolutely, Your Honor. We
7 believe the parties agreed to a repurchase protocol that
8 was the self-help remedy. It's what we're supposed to do
9 before we come to court. We satisfied that condition
10 precedent to suit by saying, here's 1,204 breaching loans;
11 we're still investigating, and we actually want you to
12 repurchase all defective loans. But here, we went further.
13 We went in discovery, and we identified, specifically, 480
14 more loans.

15 So I think you don't have to decide today if
16 loan-by-loan notice is always required. All you need to
17 decide today is if loan - - - even if, assuming arguendo,
18 loan-by-loan notice is required, here you had it as to
19 every one of the 783 loans. There's 303 left over from the
20 1,204 in the pre-suit letters; there's 480 new ones.
21 You've got individual listing of the loan numbers. All the
22 breaches in warranties are specified.

23 As to those 28 - - - 783 loans, the only question
24 is, are the 480 - - - is the notice too late? So if we had
25 to give you loan-by-loan notice, DLJ, we did. It's been



1 not only ninety days. It's been 826 days since our expert
2 report. That's five years. They haven't repurchased.

3 So Your Honor, if you - - - you know, it's a very
4 fair question, are we using relation back to read the
5 contractual notice provision out of the contract. And the
6 answer is, we are not. We are using relation back because
7 once we properly get into court with our pre-suit letters,
8 which said 1,204 loans, individually identified - - - they
9 satisfied everything Mr. Jacobsen asked for. Once we're
10 properly in court, I'm sorry, but it's an RMBS case, but
11 it's like any other case.

12 JUDGE TROUTMAN: So you're arguing that each
13 individual loan is a separate cause of action?

14 MS. SULLIVAN: No, Your Honor. And I'm glad you
15 asked that because the key to our 203(f) argument is the
16 transaction here is the securitization. We didn't file 783
17 different lawsuits against every mortgage originator who
18 gave out a bad mortgage and it was foreclosed on. We're
19 suing DLJ as the sponsor because the transaction was
20 securitizing all these different mortgages - - -

21 JUDGE TROUTMAN: But one transaction?

22 MS. SULLIVAN: One transaction, Your Honor.

23 JUDGE TROUTMAN: So then isn't that the
24 difficulty with applying relation back?

25 MS. SULLIVAN: No, Your Honor, because the 480



1 are not 480 separate causes of action. There's one cause
2 of action here, which is the security contained defective
3 loans. And in fact, even if you view the loans as a series
4 of transactions, they're still all rolled up into the one
5 security that closes.

6 JUDGE GARCIA: Yeah, but I think Judge Troutman,
7 actually - - - it's interesting. Can't - - - you're trying
8 to have it both ways. I mean, relation back applies to the
9 cause of action. And now you're trying to apply it here to
10 say, yes, it's that cause of action, and that's a great
11 question, but you want to shoot in these 400-odd extra
12 loans under the notice provision. How does that relate
13 back as a cause of action?

14 MS. SULLIVAN: Your Honor, it's a constructive
15 amendment to the complaint. And you know, you know well
16 the CPLR 3025(b) and (c) says we - - - there's liberal
17 leave in New York State to amend your pleading. And in
18 fact, you know, 3025(c) - - - CPLR 3025(c) says we can
19 amend, but the trial courts, the Commercial Division, in
20 its expert discretion, can allow you to amend the pleading
21 to conform to the proof.

22 So it's routine in these cases that the proof
23 turns up some new loans, and then so you amend the
24 complaint. We could amend it at any time. We could move
25 for leave at any time. You amend the complaint under 203-4



1 to show that these new damages - - - it's really,
2 basically, we're increasing the damages. They relate back
3 to the original complaint.

4 JUDGE LASALLE: Ms. Sullivan, I see your - - -
5 your time's running out, but I - - -

6 MS. SULLIVAN: I'm sorry, Your Honor.

7 JUDGE LASALLE: - - - wanted to ask you this
8 question really quickly, okay? In your - - - in the brief,
9 it's discussed, but I want to give you a chance to flesh
10 this out. How can interest accrue in a loan that's been
11 liquidated?

12 MS. SULLIVAN: May I answer the question, even
13 though my red light is on?

14 CHIEF JUDGE DIFIORE: You may.

15 MS. SULLIVAN: Your Honor, the interest doesn't
16 have to actually accrue. When the contract wanted to say
17 that interest actually accrues, it said so. It did not say
18 that in the repurchase price definition of 101.1. That
19 definition said a hundred percent of the unpaid principal
20 balance plus accrued and unpaid interest thereon. But it's
21 the balance that the interest is paid on. It doesn't say,
22 actually accrued.

23 So they want to read accrued literally, even
24 though it doesn't say, actually accrued. They don't want
25 to read unpaid principal balance, which is just a fixed



1 amount of money. It doesn't mean that the loan still has
2 to be in the charge. And it would be, you know, terrible
3 policy to say, oh, the more defective your loans and the
4 more you load up your security with junk mortgage, the - -
5 - you get away from your interest obligations because
6 you've been a bad actor.

7 But I just want to close, Your Honor, by saying
8 there are two ways for us to win. Number one, we win
9 because the earlier questions show we - - - when we make
10 pre-suit notice and we say we want all the defective loans
11 repaid, that's pre-suit notice. And within the meaning of
12 the contract, saying 1,204 loans plus, repay us on all,
13 that's good enough.

14 But I want to give you a narrower way to rule on
15 this case, and I want to just be very clear why you can
16 accept everything my colleague said and still rule for us
17 and affirm. We gave individual loan-by-loan notice of
18 every one of the 783 loans that are issue in - - - in this
19 case. 480 of those came up in our excerpt - - - expert
20 report. They had ninety days. They had 1,826 days to
21 repurchase them. They didn't.

22 That was good enough to satisfy, Judge Garcia,
23 our contractual obligation.

24 JUDGE GARCIA: Just so I'm clear, when did you
25 hand them the expert report?



1 MS. SULLIVAN: I actually - - -

2 JUDGE GARCIA: I mean - - -

3 MS. SULLIVAN: Well, the rebut - - -

4 JUDGE GARCIA: - - - the complaint filed, how
5 long after that?

6 MS. SULLIVAN: The rebut - - -

7 JUDGE GARCIA: Because you filed on the last day
8 of the statute of limitations, I believe, right?

9 MS. SULLIVAN: No, the - - - no, the rebuttal - -
10 - the - - - the case was filed on the - - - let me give you
11 the dates, Your Honor. Pre-suit letters are long before
12 the statute runs. Pre-suit letters are December 6th, 2011,
13 and March 30th, 2012. We filed the case on February 1st,
14 2013. Yes, that's six days from the origin. But Your
15 Honor, we obviously gave them the pre-suit notice far
16 before.

17 JUDGE GARCIA: Okay. So it is filed in February.
18 When do they get this expert report with the notice?

19 MS. SULLIVAN: There's a back and forth on the
20 experts, but the amended reply expert report with - - - is
21 February 8th, 2017. So Your Honor - - -

22 JUDGE GARCIA: So I'm sorry. And you filed 20 -
23 - -

24 MS. SULLIVAN: February - - - February 8th, 2017
25 is the rebuttal expert report.



1 JUDGE GARCIA: And when did you file the
2 complaint?

3 MS. SULLIVAN: February 1st, 2013.

4 JUDGE GARCIA: So four years later - - - four
5 years after the statute's expired, you file an expert
6 report with them and now saying, now, that's notice under
7 the contract?

8 MS. SULLIVAN: I'm saying that, Your Honor,
9 because this court said so in ABSHE. Remember in - - -

10 JUDGE GARCIA: No, what we said in - - - was
11 very different there. And we - - - you - - - even in your
12 argument, it'd have to accept that we'd have to expand that
13 ruling and apply it in a very different circumstance. But
14 what you're saying - - - and I still am having trouble with
15 203(f) because 203(f) applies to a claim. The claim is the
16 breach of the overall contract. But now you're saying,
17 we're going to use this 203(f) to get in 400-odd new
18 notices of individual breaching loans.

19 MS. SULLIVAN: But Your Honor, as I said in - - -
20 in answer to Judge Troutman's question, the 480 newly
21 identified loans are not 480 new causes of action. They
22 just go to the quantum of damages for what we claimed in
23 our original complaint. And just to be clear, the
24 complaint was about the securitization. It wasn't about
25 the originators giving out 783 bad mortgages. It was about



1 DLJ packaging those different loans as a single transaction
2 or as a single series of transactions. And that's what we
3 are adding to.

4 It - - - it's routine to amend the pleadings to
5 conform to the proof, under 203(f), they - - - when they
6 relate back. And Your Honor, you don't have to expand
7 ABSHE in a very different circumstance. It's the same
8 test. 203(f) and 205(a) each say, transaction or
9 occurrence. They're - - - they're fair notice statutes,
10 Your Honors. They're due process statutes.

11 In New York, we have to let them know why we're
12 suing them. We did. We said, your security is riddled
13 with bad loans. Here's 1,204 of them. Now we're giving
14 you 480 more of them. But it's all the same transaction or
15 series of transactions. And so relation back, if - - - if
16 - - - if it was good enough - - -

17 JUDGE GARCIA: What's the new - - -

18 MS. SULLIVAN: - - - for ABSHE, it's good enough
19 for here.

20 JUDGE GARCIA: What's the new claim that's based
21 on a series of transactions?

22 MS. SULLIVAN: Your Honor, it's a new damages
23 claim. It's saying, we found all these junk mortgages that
24 you owe us - - -

25 JUDGE GARCIA: And - - -



1 MS. SULLIVAN: - - - back, and we found some
2 more. So it increases our quantum. That's all that the
3 issue is here. We're going to go to trial on the 303
4 anyway, or the theory they should've been covered.

5 JUDGE GARCIA: An example of 203(f) being used
6 for that?

7 MS. SULLIVAN: An example? Well, Your Honor,
8 it's you know, it's typically done under the discretion of
9 the Commercial Division, just through 3025(c). You don't
10 even ask the question whether it has to relate back. You
11 say that we're amending the pleadings to conform to the
12 proof. You've got - - -

13 JUDGE RIVERA: So Counsel, if I'm understanding
14 your argument, although here the number 480 is, of course,
15 less than the original pre-notice number, the over 1,200,
16 but under your theory and your approach, you - - - it could
17 have been reverse, right? You could have - - -

18 MS. SULLIVAN: Absolutely, Your Honor.

19 JUDGE RIVERA: - - - only given notice of 480,
20 and then the expert could have found the 1,204, and you
21 would say they all relate back; is that correct?

22 MS. SULLIVAN: That's absolutely right, Your
23 Honor. That's absolutely right. And let's remember, you
24 know, where did this contract come from? Where did this
25 repurchase protocol come from? DLJ assumed the risk of bad



1 underwriting. So if we come to them and we say, we found
2 some - - - some defective loans here and we also want you
3 to pay for all the other ones we may find, and we put them
4 on notice in the pre-suit letters and in the complaint, if
5 the complaint says, over and over and over again, we're
6 looking for more, it doesn't matter what the numbers are.

7 But putting the numbers aside, Your Honor, I
8 think the other crucial point is time. And if - - - what I
9 wanted to just stress is the - - - this court's decision in
10 ABSHE gives us time, Judge Garcia. It doesn't say, you run
11 out of time. The contract provision doesn't have a six-
12 year limitations period in it. It's not a substantive pre-
13 condition to suit. It doesn't have any time limit in it.
14 It just says, give us ninety days. We gave them ninety
15 days. It's now been 826 days since the expert report.
16 They haven't repurchased.

17 And any delay in the discovery process was
18 certainly not our fault. We've been trying to get this
19 information out of them this whole time. And they have the
20 files. We - - - the reason - - - Judge Rivera, the reason
21 we sometimes find more files in discovery is they have the
22 files. We have to do forensic investigation to try to get
23 our first number. They have all the information on their
24 side. We need discovery to pry it out of them. That it
25 took some time was because they have the information. I



1 mean, they're not very keen on sharing it.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 MS. SULLIVAN: Thank you, Your Honor. So for two
4 - - - either of two independent reasons, we respectfully
5 request you affirm on both points. Thank you.

6 CHIEF JUDGE DIFIORE: Thank you.

7 Counsel?

8 MR. JACOBSEN: Your Honor, time is, in fact, the
9 issue. And as Ms. Sullivan, I think, articulated, there's
10 no limit. They can take as much time as they want.

11 There's absolutely zero information in the record about
12 delay of discovery. In fact, Freddie Mac was an original
13 investor in these. They had over twenty-five percent of
14 the trust. They could have commanded U.S. Bank, get access
15 to the loan files immediately.

16 In fact, it's in the record that they had access
17 to the loan files throughout. Section 3.02 and 8.02 also
18 gave them immediate access to the loan files. With all due
19 respect, that is a nonissue.

20 JUDGE GARCIA: Why can't they just give you
21 notice four years after they file suit?

22 MR. JACOBSEN: Because there - - - there would be
23 no repose, Your Honor. As you pointed out in your
24 discussion with Ms. Sullivan, they waited three years after
25 the statute of limitations. ACE - - - ACE stands for the



1 proposition that there is a statute of limitations, it
2 applies, and these aren't warranties for the lifetime of
3 the investment. And to the extent she's arguing for an
4 expansion of 205(a) or ABSHE, that cannot happen.

5 ABSHE was unique to the very specific
6 circumstances in that case, where it was dismissed in its
7 entirety. That's the only way Section 205(a) operates.
8 Furthermore, it would require this court overturning its
9 decision in Carrick. Carrick very articulately goes
10 through and explains how 205(a) and 203(f) are two separate
11 statutes, dealing with two separate scenarios, and they do
12 not inform one another. That's what Ms. Sullivan is
13 arguing for here, and that would be or would result in an
14 overturn of Carrick.

15 Furthermore, with respect to 203(f), they don't
16 cite a single 203(f) case for the proposition that you can
17 use relation back to overturn, circumvent, eviscerate a
18 contractual requirement. Your Honor, I see the red light's
19 on. Thank you very much for the time.

20 CHIEF JUDGE DIFIORE: You're welcome. Thank you,
21 Counsel. Thank you.

22 (Court is adjourned)

23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of U.S. Bank National Association v. DLJ, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: February 11, 2022

