

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

MBIA INSURANCE CORPORATION,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

Index No. 602825/08

IAS Part 3

Hon. Eileen Bransten

PRE-ARGUMENT STATEMENT

Defendants-Appellants Countrywide Home Loans, Inc., Countrywide Securities Corp., and Countrywide Financial Corp., and Bank of America, N.A., solely in its capacity as successor by July 2, 2011 *de jure* merger to BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.) (“Countrywide”) submit the following Pre-Argument Statement under Rule 600.17 of the Rules of this Court:

1. The title of the action is accurately set forth in the caption above.
2. The original parties to this action are:
 - a. Plaintiff-Respondent: MBIA Insurance Corporation, Inc. (“MBIA”).
 - b. Defendants-Appellants: Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., and Bank of America, N.A., solely in its capacity as successor by July 2, 2011 *de jure* merger to BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.)
 - c. Defendant: Bank of America Corp. (“BAC”).

3. The name, address, and telephone number of counsel for Defendants-Appellants

Countrywide is:

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4. The name, address, and telephone number of counsel for Defendant BAC is:

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5. The name, address, and telephone number of counsel for Plaintiff-Respondent

MBIA is:

QUINN EMANUEL URQUHART & SULLIVAN, LLP
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6. This appeal is taken from the Order of the Supreme Court, New York County, I.A.S. Part 3 (per Justice Eileen Bransten) dated January 3, 2012, and duly entered with the Clerk of the Court on January 3, 2012, granting in part and denying in part MBIA's Motion for Partial Summary Judgment and Motion to Strike Defenses (Mot. Seq. No. 37) (the "Order"). A true and correct copy of the Order is attached hereto as Exhibit A.

7. This case was brought by MBIA, a monoline bond insurer that issued financial guaranty insurance policies in connection with securitizations of residential second-lien mortgage loans. Countrywide sponsored the securitizations and contributed the mortgage loans underlying the securitizations. MBIA alleges that a significant percentage of mortgage loans underlying each of the fifteen securitizations at issue failed to comply with representations and warranties in the governing agreements and alleges claims for fraudulent inducement and breach

of contract. MBIA seeks to recover monies paid out on its financial guaranty policies as a result of allegedly noncompliant loans.

8. On May 25, 2011, MBIA filed a Motion for Partial Summary Judgment and Motion to Strike Defenses (Mot. Seq. No. 37), seeking a declaration that: (i) to be entitled to what it terms “rescissory damages” on its fraudulent inducement claim (measured, in MBIA’s view, by the total claims it has paid or may pay on the insurance it issued, less premiums it received), MBIA need only establish that it was induced to insure the Securitizations by fraudulent misrepresentations or omissions, and nothing about whether the alleged misrepresentations proximately caused the claims payments that MBIA seeks to recover; (ii) to prevail on its claim of breach of the Insurance and Indemnity Agreement, MBIA need only establish that an alleged misrepresentation was untrue or misleading in a material respect at the time it was made, and nothing about whether the alleged misrepresentations proximately caused the claims payments that MBIA seeks to recover; and (iii) to prevail on its claim that Countrywide was required to repurchase allegedly defective mortgage loans under its contract claims under the governing agreements for the Securitizations, MBIA need only establish that a loan breached a representation or warranty in a way that increased the risk profile of the insurance, and nothing about whether that breach caused the loan to default (and therefore caused a claims payment under the policy) or even that the loan ever defaulted (*i.e.*, MBIA contends that it is entitled to seek repurchase even of loans that have always been fully performing to date).

9. On July 15, 2011, Defendants-Appellants opposed MBIA’s Motion arguing that: (i) MBIA cannot evade its burden of proving causation on its claims for fraudulent inducement and breach of the Insurance and Indemnity Agreement because (a) to recover damages at law,

MBIA must prove that its losses were caused by Countrywide's actual wrongdoing, and not by other causes, such as the intervening housing and financial markets collapse, and (b) under New York law, MBIA may not recover "rescissory damages"; and (ii) to prevail on its claim that Countrywide breached its obligation to repurchase certain allegedly defective loans in the securitizations, MBIA must establish that it has suffered actual, material harm as a result of each alleged representation or warranty breach, *i.e.*, MBIA must show that a particular representation or warranty breach caused a loan to default—and forced MBIA to pay more in claims—for repurchase to be required under the governing agreements.

10. The Supreme Court of the State of New York, County of New York (the "IAS Court") granted in part and denied in part MBIA's Motion for Partial Summary Judgment and Motion to Strike Defenses by a decision and order decided January 3, 2012, entered in the Clerk's Office of the Supreme Court, New York County, on January 3, 2012.

a. The IAS Court granted MBIA's motion seeking a declaration that to be entitled to rescissory damages on its claims of fraudulent inducement and breach of the Insurance and Indemnity Agreement, MBIA need only establish that it was induced to insure the Securitizations by Countrywide's alleged misrepresentations, and does not need to show a direct causal link between Countrywide's alleged misrepresentations and MBIA's claims payments. The IAS Court placed several key limitations on this holding, finding that MBIA must prove that: (i) "Countrywide made misrepresentations that were material to [MBIA's] decisions to issue the Insurance Policies"; (ii) "[MBIA] relied on Countrywide's alleged misrepresentations in that the alleged statements induced MBIA to take action which MBIA might otherwise not have taken, or would have taken in a different manner"; (iii) "[MBIA] was damaged as a direct result of the material

misrepresentations. As has been aptly pointed out by Countrywide, this will not be an easy task”; and (iv) “[u]pon reaching its burden of proof for each claim . . . the amount of its damages.”

b. The IAS Court denied MBIA’s motion to strike Countrywide’s fourteenth and fifteenth defenses, stating “[t]he burden of proof remains upon MBIA to prove all elements of its causes of action. Defendants’ fourteenth and fifteenth affirmative defenses are not dismissed.”

c. The IAS Court denied MBIA’s motion seeking a declaration that to prevail on its claim that Countrywide was required to repurchase certain allegedly defective loans in the securitizations, MBIA need only establish that a loan breached a representation or warranty in a way that materially and adversely affected MBIA by increasing the risk profile of the insurance at the time of making the allegedly inaccurate representation or warranty. The IAS Court concluded that summary judgment was not appropriate because, among other reasons, the relevant provisions of the governing agreements “are subject to varying interpretations.” The IAS Court found that MBIA failed to show that “the language of the contract is unambiguous and reasonable minds could not differ as to its meaning.”

11. The IAS Court erred in law and fact and in the exercise of its discretion in granting MBIA’s motion in part. Defendants-Appellants seek the reversal of the Order to the extent that it declares that:

a. MBIA may seek “rescissory damages” upon proving all elements of its claims for fraudulent inducement and breach of the Insurance and Indemnity Agreement;

b. To be entitled to rescissory damages on its claims of fraudulent inducement and breach of the Insurance and Indemnity Agreement, MBIA need not establish a direct causal link between Countrywide's alleged misrepresentations and the claims payments made by MBIA pursuant to the insurance policies and, instead, need only establish (i) that it was induced to insure the securitizations on terms to which it otherwise would not have agreed, and/or (ii) that Countrywide made misrepresentations that increased the risk profile of the issued insurance policies; and

c. Such other issues that may become apparent upon review of the papers on appeal.

12. The following related actions are pending:

a. *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc., et al.*, Index No. 650042/09, is pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York, County of New York. The *Syncora* case has been designated as related to this action by the Court below. On January 3, 2012, the Supreme Court of the State of New York, County of New York also granted in part and denied in part Syncora's substantially similar motion for partial summary judgment. Syncora has noticed an appeal and Defendants-Appellants have cross-noticed an appeal from the IAS Court's Order on Syncora's substantially similar motion.

b. *Financial Guaranty Insurance Company v. Countrywide Home Loans, Inc., et al.*, Index No. 650736/09, is also pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York, County of New York. The *Financial Guaranty* case has been designated as related to this action by the Court below.

c. *Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al.*, Index No.: 651612/2010, is also pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York. The *Ambac* case has been designated as related to this action by the Court below.

13. Two appeals currently are pending in this action.

a. A consolidated appeal taken by Countrywide from the Decisions and Orders of the IAS Court denying Countrywide's Motion to Compel Disclosure Concerning Plaintiffs' Remediation Efforts (Mot. Seq. No. 17), granting Plaintiff MBIA's Motion to Compel (Mot. Seq. No. 29) and denying Countrywide's Cross-Motion for a Protective Order (Mot. Seq. No. 31) is pending in this Court. Exhibit B is a copy of the Notice of Appeal and Pre-Argument Statement for the appeal on Motion Sequence Number 17. Exhibit C is a copy of the Notice of Appeal and Pre-Argument Statement for the appeal on Motion Sequence Numbers 29 and 31.

b. A notice of appeal, dated November 3, 2011 and attached hereto as Exhibit D, was filed by BAC with this Court appealing the order of Justice Eileen Bransten, dated and entered on October 31, 2011, denying BAC's motion to sever and consolidate successor liability claims.

Dated: January 25, 2012
New York, New York

Respectfully submitted,

By: /s/Mark Holland
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