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New York's Appellate Division Revives Breach of Contract Claims in Residential Mortgage Backed Securities Put-Back Action

On May 11, 2017, in *Bank of N.Y. Mellon v. WMC Mortgage, LLC*, 2017 N.Y. Slip. Op. 03381, New York's Appellate Division, First Department, reinstated breach of contract claims in a residential mortgage backed securities put-back action against J.P. Morgan Acquisition Corp. ("JPMAC") and JPMorgan Chase Bank, N.A. ("JPMC"). The revived claims were previously dismissed on statute of limitations grounds, and pursuant to a "sole remedy" clause in a governing contract between the parties.

Pursuant to a Master Loan and Interim Servicing Agreement ("MLSA"), JPMAC purchased a pool of thousands of mortgage loans with a total principal balance of approximately $1.275 billion from WMC Mortgage Corp. ("WMC"), the originator and servicer of the loans. JPMAC then sold the securitized loans to a trust under a Pooling and Servicing Agreement ("PSA"). Bank of New York Mellon ("BNY") was the securities administrator for the trust, and JPMC was the servicer of the trust.

WMC, JPMAC, and JPMC made numerous representations and warranties in the MLSA and PSA regarding the nature and quality of the loans. In pertinent part, the MLSA provided that: (i) upon discovery of a material breach of a representation or warranty, the parties were to provide notice to the other parties, and (ii) the notified parties shall cure the breach by repurchasing or substituting the defective loan or loans. In addition, the PSA contained a so-called "backstop provision," which obligated JPMAC to repurchase defective loans if WMC did not do so.

In May 2012, January 2013, and October 2013, certificate holders provided notice to BNY, JPMAC, and WMC of alleged warranty breaches relating to many loans in the trust. As a result, in June 2012, January 2013, and November 2013, BNY sent breach notices to WMC and JPMAC and demanded that WMC or JPMAC repurchase the defective loans. Neither WMC nor JPMAC, however, repurchased the loans. Accordingly, on November 1, 2013, BNY commenced the underlying action seeking the repurchase of the defective loans and damages from WMC and JPMAC for breach of contract. BNY also sought damages from WMC, JPMAC, and JPMC Bank for failing to provide notice of the defective loans.

The lower court, relying upon the New York Court of Appeals' decision in *ACE Securities Corp. v DB Structure Products, Inc.*, 25 N.Y.3d 581 (2015), dismissed the repurchase claims as untimely since BNY's action was commenced more than six years after the date when the allegedly false representations and warranties were made. The court also held that a "failure to notify" claim was not a viable independent cause of action.

On appeal, the First Department affirmed the dismissal of claims against WMC, but revived (1) the cause of action against JPMAC for breach of the "backstop" provision, and (2) the cause of action against JPMC for failure to notify. While the lower court applied one accrual date for the breach of contract claims against WMC and JPMAC, the First Department applied different accrual dates for the claims against these parties. In particular, the claims against WMC accrued when the MLSA was made whereas the claims against JPMAC

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accrued upon WMC not repurchasing the loans. The court reasoned that "JPMAC's backstop obligation kicked in under the PSA provision stating that in the event WMC 'shall fail' to repurchase a loan in accordance with the Repurchase Protocol, JPMAC 'shall do so.'" The fact that BNY was time-barred from bringing a suit against WMC did not negate JPMAC's backstop repurchase obligation.

With respect to the failure to notify claim, the First Department reinstated this claim based on its recent decisions in *Morgan Stanley Mortgage Loan Trust 2006-13ARX v Morgan Stanley Mortgage Capital Holdings LLC*, 143 AD3d 1 (1st Dept 2016), and *Nomura Home Equity Loan, Inc. Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96 (1st Dept 2015). Those cases hold that equitable principles may give rise to an independent breach of contract cause of action, despite the existence of a sole remedy provision, where cure or repurchase is impossible.

Accordingly, the recent *WMC* decision highlights the need to examine contract provisions governing repurchase disputes to determine if causes of action beyond the standard breach of representations and warranties are potentially viable. To the extent that claims may have been previously viewed as time-barred or precluded under a sole remedy clause, *WMC* suggests that may not be the case. ■

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United States Supreme Court Issues Significant Decision Regarding Patent Venue

Last year, a total of 1647 patent infringement cases – or over 36% of all patent cases filed in the United States – were filed in the Eastern District of Texas, a district well known to be plaintiff-friendly. By contrast, only 455 cases – 10% of the total cases filed – were filed in Delaware, where many companies are incorporated. (*See* 2016 Fourth Quarter Litigation Update, Lex Machina, a LexisNexis® Company.) But these statistics are about to change, due to the United States Supreme Court's May 22, 2017 decision in *TC Heartland LLC v. Kraft Food Brands Group LLC.*

In *TC Heartland*, the Supreme Court held that the proper venue for a patent case is where the defendant is incorporated, or has an established place of business. The Court further held that venue is not proper in a judicial district in which the defendant merely transacts business. This seemingly small change is actually a sea change in the law that will profoundly impact future patent cases.

In rendering this decision, the Supreme Court relied on the patent venue statute, 28 U.S.C. § 1400(b), which states that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." The Court also relied on, and reaffirmed, its 1957 decision in *Fourco Glass Co. v. Transmirra Products Corp.*, which held that "resides" means the place of incorporation.

By contrast, the Court discarded the Federal Circuit's 1990 decision in *VE Holding Corp. v. Johnson Gas Appliance Co.* In *VE Holding*, the Federal Circuit had held that the general venue statute, 28 U.S.C. § 1391 – which interprets "resides" to mean wherever a defendant is subject to personal jurisdiction – applies to § 1400(b) and to patent cases. For the past 27 years, the Federal Circuit's *VE Holding* decision has essentially allowed patent lawsuits to be filed anywhere that a defendant transacts business. This led to widespread forum shopping, including cases being filed primarily in plaintiff-friendly jurisdictions.

With respect to the facts of the underlying case, Kraft sued Heartland in federal court in Delaware. Heartland is incorporated in Indiana, and other than shipping its flavored drink mix products into Delaware, Heartland has no ties to that state. Heartland moved to transfer venue to Indiana, arguing that it was not incorporated in, and did not have a "regular and established place of business" in Delaware. The District Court rejected that argument. Thereafter, the Federal Circuit denied a writ of mandamus, holding that § 1391's broader definition of "resides" applies to the patent venue statute. The Supreme Court then granted certiorari and reversed the Federal Circuit.

The *TC Heartland* 8-0 decision, written by Justice Clarence Thomas, was limited to venue as it pertains to domestic corporations. As such, the Court left undetermined the implications of the decision for foreign cor-

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Since the *TC Heartland* decision, commentators have speculated that forum shopping in patent cases will now become a thing of the past, and the Eastern District of Texas will no longer be a major player in patent litigation.

Indeed, some commentators anticipate large numbers of motions to dismiss for improper venue in currently pending cases, especially in the Eastern District of Texas. In the future, experts anticipate more cases being filed in Delaware, where many companies are incorporated, and in technology centers like California and Massachusetts. And according to the *Wall Street Journal*, the *TC Heartland* decision "could provide a boost to companies that defend against patent claims," many of whom filed amicus briefs urging the Supreme Court to tighten the venue rules. ■

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PIB Law Obtains Favorable Ruling from New York's Appellate Division Regarding Motion to Vacate Default Judgment

On April 28, 2017, New York's Appellate Division, Fourth Department, unanimously affirmed the trial court's order denying the motion filed by defendant borrower to vacate default judgment. The court found that defendant lacked a reasonable excuse for not timely responding to the complaint, and therefore, the court did not need to determine if the defendant had a meritorious defense.

In *Wells Fargo Bank, N.A., Successor by Merger to Wells Fargo Bank Minnesota, N.A. as Trustee v. Dysinger*, defendant defaulted on her loan and plaintiff filed a foreclosure complaint. Defendant failed to respond to the complaint, and the trial court granted an order of reference and appointed a referee to compute the amount due under the loan. The trial court then entered a judgment of foreclosure and sale.

Defendant moved to vacate the judgment pursuant to CPLR 5015. She admitted receiving the complaint, but alleged that she failed to understand that the complaint in any way differed from correspondence she had received in connection with her loan. She requested that the trial court excuse what she described as her "mistake" in failing to respond to the summons and complaint. The trial court denied defendant's motion, and she appealed.

On appeal, the Fourth Department affirmed the trial court's order. It first observed that a party seeking to vacate an order or judgment on the ground of excusable default "must offer a reasonable excuse for its default and a meritorious defense to the action." Next, the Fourth Department held that, with respect to the reasonable excuse prong, whether the moving party's excuse is in fact reasonable "lies within the trial court's sound discretion." The Fourth Department rejected defendant's argument that she was excused from responding based upon her mistaken belief she did not need to respond to the summons and complaint. As the Fourth Department observed, the summons contained mandatory statutory language warning her that, if she failed to answer the complaint, default judgment may result – and advising her that she should speak to an attorney (citing generally RPAPL 1320).

The Fourth Department concluded that, because defendant did not offer a reasonable excuse for her default, it did not need to consider if she had established a potentially meritorious defense. ■

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