

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Assigned to: Kapnick, J.

**PETITIONERS'
REQUEST FOR JUDICIAL NOTICE REGARDING
RESCAP BANKRUPTCY PLEADINGS**

TO THE HONORABLE JUSTICE KAPNICK:

In response to Keller Rohrback's letter of July 1, 2013, and to the cross-examination of Mr. Kravitt concerning the bankruptcy of Residential Capital, LLC (ResCap), *In re Residential Capital, LLC*, No. 12-12020-mg (Bankr. S.D.N.Y. May 14, 2012), Petitioners request that the Court take judicial notice of ten additional pleadings from the ResCap bankruptcy. These pleadings demonstrate that loan file sampling had consequences for the ResCap RMBS Trusts. Sampling data from the same set of 1,500 loans led the parties to form widely divergent views of the size of the RMBS Trusts' claims. Those views varied by billions of dollars, ranging from the Unsecured Creditors' Committee's estimate that the RMBS Trusts' repurchase claims were worth less than \$3.3 billion, at the low end, to the Steering Committee Investors'¹ view that the sampling data supported an estimate of more than \$19 billion, at the high end.

¹ The RMBS Steering Committee investors in ResCap are the same investors, with some additional institutions, that negotiated the settlement at issue in this Article 77 Proceeding. The Bank of New York Mellon is represented by Dechert LLP in the ResCap proceeding.

1. **Background of ResCap Settlement Motion:**

Petitioners first ask the Court to take judicial notice of the ResCap Debtors' motion regarding the RMBS Trust Settlement in ResCap.² This motion recites that the ResCap RMBS Settlement was negotiated among the Debtors and clients represented by Gibbs & Bruns LLP. *Id.* at 9. A parallel and equivalent settlement was negotiated between Debtors and clients represented by Talcott Franklin P.C. *Id.* Both settlements were initially negotiated without the involvement of the RMBS Trustees for the ResCap Trusts.³ Both settlement agreements contemplated an \$8.7 billion Allowed Claim in Bankruptcy against the estates of the ResCap Debtors that would be allocated among 392 RMBS Trusts. *See* Exhibit A (Dkt. No. 320).

2. **Litigation of the ResCap RMBS Settlement.**

When the ResCap Debtors filed their motion to obtain approval of the settlement, the Unsecured Creditors' Committee and other creditors immediately opposed the settlement, arguing that the proposed Allowed Claim was far too high. The Creditors' Committee therefore demanded loan file sampling as a means to reduce the size of the overall claim that would be allowed for the RMBS Trusts. Specifically:

- On August 17, 2012, the Unsecured Creditors' Committee (not the RMBS Trustees) demanded loan file sampling to estimate the size of the Trusts' claims.⁴

² Exhibit A (Dkt. No. 320, Notice of Hearing and Debtors' Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust Settlement Agreements) at 1-2. (the "9019 Motion").

³ Exhibit B (Dkt. No. 857, Submission in Support of Scheduling Order Jointly Proposed by Certain RMBS Trustees) at ¶ 2 (RMBS Trustees noting that "The offer to settle is based upon a negotiation the Debtors conducted with certain certificate holders of certain of the RMBS Trusts, as a result of which the Debtors agreed to offer a settlement of certain claims held by the RMBS Trusts.")

⁴ Exhibit C (Dkt. No. 1395, Response of Official Committee of Unsecured Creditors to Debtors' September 7, 2012 Status Report Regarding Their Initial and Supplemental Motions for Approval of RMBS Trust Settlement Agreement). This pleading confirms it was the Unsecured Creditors' Committee, and not the RMBS Trustees, that sought loan file sampling to assess the ResCap settlement. *See id.* at ¶5 ("After retaining and consulting with its RMBS experts, the Committee on August 17 selected a random sample of 1,500 loans (which it believes is sufficient for a statistically sound extrapolation) and gave the Debtors the list of loan files to be produced.")

- Sampling of even this limited number of loan files precipitated wide dispute over the size of the RMBS Trusts’ claims. Based on sampling data regarding the same set of 1,500 loan files:
 - The Unsecured Creditors’ Committee objected that the RMBS Trust Settlement was “Unreasonably High” – taking the position that the sampling allegedly established the Trusts’ claims did not exceed \$3.3 billion and were worth “a level more in line with the Debtors’ own earlier publicly disclosed estimate of zero to \$4 billion.”⁵
 - The RMBS Trustees asserted that the same sampling supported the view that the \$8.7 billion settlement “falls within a reasonable range.”⁶
 - The Debtors asserted the range of their repurchase exposure was from \$7.8 billion to \$10.2 billion.⁷
 - Wilmington Trust, as Trustee for senior noteholders of Residential Holdings, LLC, claimed the RMBS Trusts’ claims were worth no more than \$811 million to \$4.852 billion.⁸
 - Triaxx asserted the Trusts’ repurchase claims were worth \$11.3 billion.⁹

⁵ Exhibit D (Dkt. No. 2825, Objection of the Official Committee of Unsecured Creditors to the Debtors’ Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements) at 22, 28.

⁶ Exhibit E (Dkt. No. 2833, RMBS Trustees’ Statement Regarding Debtors’ Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust Settlement Agreements) at 3.

⁷ Exhibit F (Dkt. No. 2807, Reply Declaration of Frank Silliman in Support of Debtors’ Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements) at 3. *See also* Exhibit G (Dkt. No. 2803, Debtors’ Reply Brief re *Iridium* Factors in Support of Motion for Approval of RMBS Settlement Agreements) at 6-8 (summarizing the wide range of the parties’ contentions concerning the size of the RMBS Trusts’ claims after sampling).

⁸ *See* Exhibit H (Dkt. No. 2814, Objection of Wilmington Trust National Association to the Debtors’ Second Supplemental Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust Settlement) at ¶ 11.

- The RMBS Steering Committee asserted the Trusts' claims were worth between \$18.4 billion and \$19.6 billion.¹⁰
- The wide divergence of views caused by the sampling in ResCap confirms the testimony of Mr. Kravitt and others in this case that sampling and reunderwriting does not produce helpful information – it produces disputes. *See* Tr. (Kravitt) 1445:10-11, 1415:24-1416:7, 1446:26-1447-2, 1447:19-22, 1753:11-14; Tr. (Waterstredt) 893:23-894:8, 892:11-20; Tr. (Smith) 381:3-11.
- Sampling was costly, including the direct expense of retaining the Trustees' financial expert, Duff & Phelps, to, among other things, review the 1,500 loan files that the Creditors' Committee sampled, collate data and evaluate it for purposes of resolving the RMBS Trusts' claims, and to review an additional 5,000 loan files to, among other things, respond to allocation objections.¹¹
- The RMBS Trustees also alleged that sampling of all 1.6 million loans in the ResCap Trusts was a practical impossibility, even setting aside its dramatic potential cost¹² and uncertainty. As the RMBS Trustees put it, “Based on Duff & Phelps' conservative estimate of two hours per loan to review both the loan file and governing documents and to determine whether there is a breach of the representations and warranties, a review of all 1.6 million loans in the Original

⁹ *See* Exhibit G (Dkt. No. 2803) at 7 (reporting Triaxx statement).

¹⁰ *See* Exhibit I (Dkt. No. 1739, Steering Committee Investors' Statement in Support of Settlement and Response to [RMBS] Settlement Objections) at ¶ 19.

¹¹ *See* Exhibit J (Dkt. No. 4061, Omnibus Reply of Certain RMBS Trustees to Responses to the Debtors' Motion for an Order Under Bankruptcy Code Sections 105(a) and 363 (b) Authorizing the Debtors to Enter Into and Perform Under a Plan Support Agreement with Ally Financial Inc., the Creditors' Committee, and Certain Consenting Claimants) at ¶ 12. This document has been marked as R-4065 in this proceeding.

¹² At a cost of \$400 per loan file, a review of all 1.6 million files in the ResCap Trusts would have cost \$640 million.

Settling Trusts ... would take a team of eight analysts approximately 50 years of non-stop work day and night for every day of the week.¹³

¹³ See *id.* at ¶ 15.

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