The Residential Mortgage-Backed Securities (RMBS) Litigation Landscape: Significant Trends and Developments Explored

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Johnston Thomas is a full suite boutique law firm, which amongst other practices such as real estate and commercial litigation, has a nationally recognized Mortgage Banking Group ("MBG"). With an experienced team of mortgage banking lawyers (including senior litigation attorneys, former in-house General Counsel and in-house Compliance Counsel from a well-known bank and mortgage company, etc.), certified fraud examiner(s) and forensic underwriter(s), and an extremely competent support staff, all of whom are dedicated to aggressively and competently serving the needs of our valued clientele, Johnston Thomas' MBG is known all across the country for the experience and results that it brings to the areas of regulatory compliance, mortgage banking litigation, and a broad range of mitigation services.

Amongst the many legal services Johnston Thomas offers the mortgage banking industry (e.g., brokers, lenders, servicers, vendors and more), such include, but are in no way limited to, as follows:

- Mortgage Repurchase and Make-Whole Indemnification Litigation and Mitigation (e.g., Secondary Market Investors, Agencies, Bankruptcy Trustees, etc.);
- Mortgage Industry Litigation (e.g., Servicer and Sub-Servicer Disputes, 3rd Party Fraud Recovery, CPL and Title Policy Actions, Appraiser E&O Claims, Loan Officer Actions, LOS Disputes, etc.);
- Mortgage Repurchase and Make-Whole Alternative Dispute Resolution (e.g., Arbitration, Mediation, etc.);
- Regulatory Compliance, Administrative and Business Services (e.g., Mock Audits, LO Compensation, MSAs, Licensing, CA Dep't of Business Oversight, HUD Review Board, etc.); and
- Transactional Matters (e.g., Drafting and Negotiating Broker and Correspondent Loan Purchase Agreements, Mergers & Acquisitions, etc.).

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James W. Brody, Esq.

As the Chairman of the Mortgage Banking Practice Group, Mr. Brody actively manages all the complex mortgage banking litigation, mitigation, and compliance matters for Johnston Thomas and its diverse clientele.

Being one of the founding and managing attorneys for his prior mortgage banking firm, as well as having practiced law for close to 20 years, with nearly 15 of those years being spent in the mortgage banking industry, Mr. Brody has been instrumental in the firm's development and in its continued success.

Mr. Brody has successfully resolved hundreds of mitigation and litigation cases that involve complex mortgage fraud schemes, as well as large-scale repurchase and/or make-whole disputes, in connection with loans that were securitized and/or sold to third parties (e.g., Lehman Bros., Aurora, FNMA, Freddie Mac, ResCap, RMBS Trusts, CitiMortgage, JPMorgan Chase, and more).

Mr. Brody's experience centers on those legal issues that arise during and through loan originations, loan purchase sales, loan securitizations, foreclosures, bankruptcies, and repurchase and indemnification claims.

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Part I:

The Rise and Fall of Lehman Brothers Holdings, Inc.

Timeline of Lehman Brothers Holding, Inc. ("LBHI") Filing for Bankruptcy

- Correspondent lenders sold loans to Lehman Bros. Bank, FSB ("LBB") and/or LBB's affiliate, Aurora Loan Services, Inc. ("ALS") between 2003-2007.

- LBB then sold and assigned the rights to loans to Lehman Brothers Holdings, Inc. ("LBHI"), which parties structured their transactions such that LBB was fully compensated for each transaction. (*Security Nat'l Mtg. Co. v. Aurora Bank FSB*, No. 2:11-CV-00434 DN, 2014 WL 7366063, at *1 (D. Utah Dec. 24, 2014).)

- Upon sale and assignment of the loans from LBB, LBHI then packaged the loans for securitization or sale to third parties, including GSEs.

- For a number of reasons that are well documented, LBHI and its affiliated debtors filed for bankruptcy in September of 2008, in the Southern District of New York, which commenced one of the largest and most complicated jointly administered chapter 11 cases in history.

- By order of December 6, 2011 the Bankruptcy Court confirmed the Bankruptcy Plan, which became effective on March 6, 2012.

Abbreviated History of LBHI's Litigation and Settlement with the RMBS Trusts

- On March 8, 2018, U.S. Bankruptcy Court Judge Shelley Chapman sided with LBHI, after a 22 day trial, and ruled that certain claims brought by RMBS trustees were valued at $2.38 Billion and not the $11.4 Billion that was estimated by the trustees. This was spelled out in a 100 page decision.

- The RMBS Trustees had complained that LBHI had sold billions of dollars of loans that contained misrepresentations, which loans were securitized before its 2008 collapse. There are approximately 70,000 loans at issue in the dispute and LBHI has now turned to seek indemnification from Lenders in a similar manner as it had with the GSE loans.

- The trustee submitted the loans through a protocol approved by the court back in 2014. The court then estimated the claims for the loans submitted through the protocol in an aggregate amount of $2.38 billion.

- In general terms, to assert a claim, the trustees had to prove: (1) a breach; (2) the breach adversely and materially affected the value of the loan; and (3) that the trustee gave prompt notice of the breach to LBHI. On or around the bar date, September 22, 2009, the trustees filed proofs of claims asserting $37 billion in defective loans.

Abbreviated History of LBHI's Litigation and Settlement with the RMBS Trusts

- In 2010, the plan administrator asked the trustees for evidentiary support for the breaches asserted. Having not received satisfactory support, the plan administrator filed several objections to proofs of claims on that basis and for other reasons. In 2011, while certain of the trustees' claims were dismissed, most of them remained. For the next three years, not much progress was made on resolving these claims.

- In January 2012, after the plan was approved, the debtors moved to estimate the trustees' claims to establish a reserve. While the trustees argued for reserves of at least $15.3 billion, the Court ultimately approved the parties agreed upon reserve of $3.5 billion. Then, in July 2012, the debtors and trustees tried, unsuccessfully, to mediate the claims.

- In December 2014, the Court heard arguments and expert testimony at a hearing on LBHI's motion for a loan level review as required by the trusts' governing agreements.

- Following significant negotiations between the parties, the Court then entered an order approving the plan administrator's five-step protocol to reconcile and determine the RMBS claims on a loan by loan basis.

- After lengthy negotiations, the LBHI plan administrator and institutional investors entered into a modified settlement in March 2017. The settlement provided an estimation process that allows the plan administrator to request allowance of the trustees' claims at a level the institutional investors will accept. The plan administrator agreed to seek estimation in the amount of $2.38 billion as an allowed Class VII general unsecured claim.

Abbreviated History of LBHI's Litigation and Settlement with the RMBS Trusts

- The trustees and the certificate holders could not reach a settlement.
- Note – the certificate holders, who essentially own shares RMBS trusts, differ from the Trustees of those trusts.
- The Court's protocol failed to achieve its objective of narrowing the number of at-issue loans to below 94,000.
- Nonetheless, the parties kept negotiating and in March 2017, the Plan Administrator and the Institutional Investors entered into a modified settlement agreement estimating the claims at $2.38 billion, which was approved by the court, and leading to the Estimation Proceeding.
- Notably, at trial, however, despite the introduction into evidence of millions of pages of loan files, there has been limited loan-level proof for the vast majority of loans at issue.
- The trial was dominated by testimony from each side's expert witnesses.

Abbreviated History of LBHI's Litigation and Settlement with the RMBS Trusts

- Loan review firms conducted 2 levels of review.
- The Plan Administrator provided the Trustees with a formal response to each loan file detailing in 250 words or less its reasoning for accepting or rejecting claims on a loan file.
- Without explanation, the trustees withdrew 72,088 breach claims and 15,017 mortgage loan files.
- LBHI criticized the trustee's evidence and alleged proof of breach methodology and the court found that the Trustees' Loan Review Process suffered from numerous flaws.
- After lengthy discussion of the experts, several flawed exemplar loan files, and comparable settlements, the Court concluded that the Trustees' RMBS Claims at issue in the Estimation Proceeding would be allowed in the amount of $2.38 billion.

Part II:

General Litigation Considerations and Strategies

Retaining and Management of Counsel

Whenever a party is served with or otherwise becomes aware of a lawsuit that has been filed against that party, it is critical to find and retain legal counsel to represent that party in the underlying dispute. In deciding which counsel will best protect a litigant's best interests, there are a variety of factors to take into consideration, including, but not limited to, the following:

- Experience

In the case of the LBHI disputes, a litigant should consider retaining counsel who has experience in the area of repurchase and make-whole litigation, prior litigation with LBHI and/or its affiliates, and/or bankruptcy law. As many repurchase litigation attorneys are not necessarily experienced in bankruptcy matters, as well as the fact that such attorneys will need local counsel to get admitted *pro hac vice* (allows out of state counsel to practice in the state where any given litigation is venued), it may be helpful to ensure the local counsel is an experienced bankruptcy attorney.

- Economy of Scale v. Resources

As is the case with Johnston Thomas, which represents a large number of lenders who were sued by LBHI in connection with GSE and/or RMBS related claims, the defendant lenders can dramatically benefit from the economy of scale involved in such group representation. For instance, whenever such counsel is engaged in an activity that benefits all or a number of the parties in such a defense group (e.g., omnibus motion practice, attending a hearing, etc.), these lenders stand to save a massive amount on fees and/or costs.

However, it is important to understand that if there is too large of a group and your firm of choice only has 1 or 2 attorneys who are actually doing the work, then you may not get the level of individualized attention you deserve and need. This is why the Johnston Thomas-LBHI Defense Team limits the number of lenders allowed into our group and ensures that there are a sufficient number of attorneys and professional staff to provide both an economy of scale, as well as the individualized attention.

Insurance Claims

- Whenever a party is served with or otherwise becomes aware of a lawsuit that has been filed against that party, it is critical that party supply its chosen legal counsel with copies of any and all insurance policies that may provide for a duty to defend and/or other coverage.

- Although many insurance policies contain specific exclusions with regard to repurchase and/or make-whole litigation, there are those that don't and we have been able to successfully obtain coverage in such suits. Even if a carrier accepts coverage under a reservation of rights, experienced counsel can leverage such coverage to their clients benefit.

- If your counsel decides that there are any bases with which to file claim(s) for insurance coverage, it is critical that such be done at the soonest possible chance, which will help to avoid potential denials of coverage based on timeliness.

- Should an insurance carrier accept your claim(s), then it is important that the insured speak with the carrier about counsel of choice, especially given that defense costs frequently erode the amount of coverage available for settlement.

- In repurchase and/or make-whole lawsuits, as is likely to be the case with the LBHI litigation, Plaintiffs may attempt to obtain copies of any and all such polices in the course of the discovery process.

Status of Business

- Plaintiffs may ultimately sue parties that are no longer conducting active business, that have merged with or been acquired by another company, or, if conducting active business, may be in a bad financial position whereby such parties cannot afford to pay the fees and costs necessary to properly defend themselves and/or afford to pay any judgment that may ultimately be obtained against them.

- Although this is an area where closely tailored counsel is critical, Johnston Thomas has attorneys experienced in guiding companies that have found themselves to be in one of the above-referenced predicaments. Some general thoughts and considerations that should be taken into account when speaking with whichever counsel is chosen to represent such companies that have been sued, include but are in no way limited to, the following:

  - Balance Sheets/Financials: The first thing a plaintiff will do when confronted by a defendant that claims they are no longer doing active business, has been acquired or which is simply in a bad financial position, will be to investigate the defendants claims (e.g., conducting research, requesting financials and other evidence to support such claims, etc.). While plaintiffs cannot generally force defendants to provide financials, plaintiffs will be very skeptical of any such claims of poverty where the defendants are not willing to prove their poverty. Still, if a defendant's attorney advises it to provide financial support for such poverty claims, which is again a strategy decision to discuss with counsel, it is critical that no such support be provided without first entering into an NDA or otherwise ensuring such information is adequately protected from disclosure and/or any improper use.

  - Fraudulent Conveyances/Bankruptcy: In the event a company is not conducting active business and would be forced into a voluntary or involuntary bankruptcy as a result of not defending itself, a bankruptcy court has significant power to delve into the financials of companies and see where the money went. If a company is no longer doing active business AFTER making significant disbursements, then a bankruptcy court could find such disbursements to be fraudulent conveyances and impose liability. Given the risks, it is important that any such party have bankruptcy counsel analyze the specifics and advise based thereon.

Part III:

Factual and Legal Arguments

Factual and Legal Arguments

Unilateral vs. Mutual Attorneys' Fees provisions

- Under the American rule the prevailing party is generally not entitled to attorney's fees in the absence of specific statutory authority or a contractual provision to the contrary. Bensen v. Am. Ultramar, 92 Civ. 4420 (KMW)(NRB), 1997 U.S. Dist. LEXIS 8196, at *28 (S.D.N.Y. June 11, 1997)
- In 7 states, unilateral attorneys' fees clauses are automatically treated as bilateral; a reciprocal attorneys' fees right is read into the contract by statute. These include California (Cal. Civ. Code Section 1717); Florida (Fla. Stat. Ann. Section 57.107(7); Hawaii (Haw. Rev. Stat. section 607-14); Montana (Mont. Code. Ann. Section 28-3-704); Oregon (Or. Rev. Stat. Ann. Section 20.096); Utah (Utah Code Ann. Section 78B-5-826); and Washington (Wash. Rev. Code. Ann. Section 4.84.330).
- New York does not have such a statute; in addition the LBHI Seller's Guide indemnification provision includes attorneys fees. However, under New York law, "clauses indemnifying parties for [attorneys] fees must be construed strictly." Protoons Inc. v. Reach Music Publ'g, Inc., 2016 U.S. Dist. LEXIS 20482, at *17 (S.D.N.Y. Feb. 19, 2016)

Lehman Bros. Holdings, Inc. RMBS Settlement and the New Wave of Indemnification Claims

- There are a lot of good facts developed in the RMBS litigation that can then be drawn from as part of an aggressive defense.
- The Notice of Service List, should your company name be listed therein, was likely done to preclude one of the potential defenses that may otherwise be asserted for contractual indemnity claims, which is a "failure to give notice."
- Was your company provided any notice(s) in connection with the LBHI-RMBS litigation, which can generally be given by First Class Mail when relating to a Bankruptcy matter?
- Under FRBP 7004, Service may be by first class mail or by delivering a copy of the summons and complaint to a corporate officer or appointed agent.
- If your company did not directly receive any such notice, was your company being represented by a law firm who advised LBHI of the representation and/or which law firm was served such notice on your company's behalf?
- This will represent the 4th wave of litigation, with the 4 waves including: (1) suing lenders in their home jurisdictions; (2) suing lenders in Colorado; (3) suing lenders in the NY Bankruptcy Court on Agency Loans; and (4) RMBS litigation.

Statute of Limitations for Specific Investor LPAs

- **Lehman Brothers Holdings, Inc.** – there are three potential SOL periods involved:
  - 6 years (N.Y. C.P.L.R. §213 (McKinney) (Lehman LPAs contain a choice of law provision citing NY law).
  - 3 years (N.Y. C.PL.R. §213; 10 Del Code section 8106) (LBB, which purchased most relevant loans and assigned them to LBHI, principal place of business was in Delaware implicating NY 's "borrowing statute").
  - 3 years (Colorado Revised Statutes section 13-80-101) (Aurora Bank, which acquired or merged with Lehman Brothers Bank, FSB has their principal place of business in Colorado).

Statute of Limitations Debate

- Investors often argue that the statute of limitations ("SOL") does not begin to run until a repurchase demand is refused by a lender, while lenders generally argue that the SOL begins to run on the date of breach, generally the date of sale, though this date may be later in the case of an early payment default.

- Certain courts applying New York state law have held a cause of action for breach of contractual representations and warranties that guarantee certain facts as of a certain date—but do not guarantee future performance—accrues on the date those representations and warranties become effective. *Deutsche Bank National Trust Co. v. Quicken Loans Inc.*, 810 F.3d 861, 865 (2d. Cir. 2015). A demand referenced in an accrual clause will only delay accrual if the demand "is a condition to a party's performance" (i.e. substantive) but not when it "seeks a remedy for a preexisting wrong" (i.e. procedural). *Id.* at 866. demand as a prerequisite to **performance** forms a substantive condition precedent, while demand of a **remedy** for a preexisting breach is merely procedural. *Id.* at 867.

- A four judge appeals panel in New York unanimously ruled that repurchase claims, "did not accrue until defendant either failed to timely cure or repurchase defective mortgage loan, but rather, "accrued on the closing date of the [LPA]." ***Ace Securities Corp. v. DB Structured Products, Inc.*, 2013 WL 6670379 (New York Supreme Court, Appellate Division, No. 11384 and M-5893, M-6111 and M-6133, December 19, 2013).**

Statute of Limitations Debate contd.

- A federal judge in Washington State, applying New York state law, ruled that the SOL for repurchase claims commenced on the date upon which the investor could have initially demanded payment for the alleged misrepresentations – i.e., the date the investor purchased the loan from the originator. See *LBHI v. Evergreen*, 793 F. Supp. 2d 1189 (2011).

Statute of Limitations Debate (…Continued)

- See also, ***Hahn Automotive Warehouse, Inc. v. Am. Zurich Ins. Co.*, 81 A.D.3d 1331, 916 N.Y.S.2d 678, 680 (2011)**, holding that "[a] cause of action for breach of contract accrues when the party making the claim possesses a legal right to demand payment….To find otherwise would allow an Investor to circumvent the statute of limitations by deferring its demand."

- See also, ***Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 2014 WL 1259630 (S.D.N.Y. March 27, 2014)** holding that, when a contract involves a repurchase clause, "the general rule in New York is that 'the cause of action accrues when the party making the claim possesses a legal right' to make the demand, not when the demand actually occurs."

- Conversely, Investors point to ***LBHI v. National Bank of Arkansas ("NBA")***, which supports the position that a separate breach occurs when the originator fails to repurchase a loan, as required by contract.

- Note that much of the current SOL debate applies to NY state law and therefore only is controlling as to LPA's which are governed by New York law, such as LBHI and Chase.

2015 Motion to Dismiss based on SOL

- In February 2015, Hometrust Mortgage brought a motion to dismiss based on the New York statute of limitations
- Hometrust argued that LBHI was merely recharacterizing a breach of contract claim as a claim for indemnification and that New York law does not recognize pre-suit remedial provisions in contracts (such as indemnification) as constituting separate promises to serve as the basis for independent causes of action.
- LBHI argues that a right to a separate claim for indemnification is explicitly set forth in section 711 of the Seller's Guide.
- The Court found Hometrust's interpretation of the Agreement to be at odds with these fundamental principles of contract interpretation in several respects and stated, "As noted by LBHI, Hometrust's interpretation of section 711 of the Seller's Guide places undue emphasis on the word remedies, and ignores the fact that the sentence containing the word remedies is introducing the rights of the Purchaser under section 711 of the Seller's Guide as "in addition to" "any and all other remedies available to Purchaser under this [Agreement]".
- The Court denied the motion.
- The District Court confirmed the decision.
- In a later ruling involving a third defendant, the Court confirmed its prior rulings.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue

Defendants' Arguments on Subject Matter Jurisdiction:

- Defendants argued that LBHI's non-core, state law claims did not arise under Title 11 of the Bankruptcy Code and the BK court therefore did not have subject matter jurisdiction. (Certain Defendants Omnibus Motion to Dismiss for lack of Subject Matter Jurisdiction and Venue 14 (March 31, 2017) ("Motion"). Docket No. 16-01019 (SCC).
- Defendants argued that the a party seeking to establish subject matter jurisdiction on the basis of "related-to" jurisdiction must demonstrate that "the matter has a close nexus to the bankruptcy plan." *Id.* at 16. This means the matter must be closely related to the bankruptcy plan.
- The Close Nexus test factors looks at:
  - (1) whether the claim or dispute arose before or after confirmation;
  - (2) what provisions in the confirmed plan exist for resolving
  - disputes and whether there are provisions in the plan retaining
  - jurisdiction for trying these suits;
  - (3) whether the plan has been substantially consummated;
  - (4) the parties involved in the dispute;
  - (5) whether state law or bankruptcy law applies;
  - (6) whether the claims require the interpretation of the plan or the Court's orders; and
  - (7) evidence of forum shopping.

  (*In re New Eng. Nat'l LLC*, No. 02-33699 LMW, 2013 WL 812380, at *20 (Bankr. D. Conn. Mar. 5, 2013)
- Because these indemnification claims are based on settlements that were executed years after the BK Plan and have nothing to do with the Plan itself, they do not satisfy the Test. Motion at 9
- All the factors weighed in favor of finding that the Close Nexus test did not apply. Motion at 9-18.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

- **Defendants' Arguments on Venue:**
- Because LBHI's claims arose after the commencement of the bankruptcy and from the operation of the business of the debtor, the Court must look to applicable nonbankruptcy venue provisions to determine whether venue would be proper in this jurisdiction. Motion at 19.
- No Defendant joining in this improper venue motion is incorporated or has its principal place of business in this District. Motion at 20.
- Focusing on the basic federal venue provision, 28 U.S.C. § 1391(b), defendants argued that no jurisdiction exists against Defendants that would be subject to diversity jurisdiction because none of the defendants resided in the district and none of the events took place in SDNY, and no state court in the SDNY would have jurisdiction over the defendants. Motion at 28.
- Defendants allegedly contracted with LBB, a Delaware entity, not LBHI therefore there was no jurisdiction under New York's long-arm statute as to any defendants. Motion at 28-29.
- There is also no personal jurisdiction over the defendants in SDNY under the Due Process Clause. Motion at 29.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Plaintiff's Arguments on Subject Matter Jurisdiction:

- Defendants' arguments to the contrary misinterpret the law, the Plan, and the facts, and rely on inapposite authority from outside this Circuit and District . (Memorandum of Law of Plaintiff Lehman Brothers Holdings Inc. in Opposition to Certain Defendants' Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue 3 (May 31, 2017) ("Opposition").
- The Plan Administrator's Indemnification Claims were contingent, unmatured rights against the Defendants that are based on pre-petition events, which did not mature until the GSE Settlements were approved. Opposition at 3.
- The Plan provided that the Court retained jurisdiction over adversary proceedings to recover Debtors' assets, wherever located. Opposition at 5-6.
- The Court retained jurisdiction over matters arising from or related to the implementation of the GSE Settlement orders, which required Fannie Mae and Freddie Mac to assist LBHI in pursuing Rep and Warranty Default Claims. Opposition at 8.
- Defendants ignore the well-developed case law in this District that squarely supports this Court's continued exercise of jurisdiction over the Indemnification Claims. Opposition at 11.
- The Second Circuit has repeatedly confirmed that related to jurisdiction is exceedingly broad, encompassing any action in which the outcome . . . could conceivably have any effect on'the bankrupt estate. *City of Ann Arbor Emps. Ret. Sys. v. Citigroup Mortg. Loan Trust Inc.*, 572 F. Supp. 2d 314, 317 (E.D.N.Y. 2008). Opposition at 11.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Plaintiff's Arguments on Subject Matter Jurisdiction contd.:

- The close nexus test has not been applied by all courts in the district. Opposition at 12.
- Because this is a liquidation plan, the close nexus test is easily satisfied because the BK court is expected to be involved in the liquidation process. Opposition at 13.
- The Plan requires all assets, including litigation claims to be liquidated and expressly provides that the BK Court retain jurisdiction over the indemnification claims. Opposition at 15-16.
- Defendants' case law was distinguishable because it relied on cases from outside the District and/or relied on reorganization not liquidation plans. Opposition at 17.
- The 7-factor test relied upon by defendants comes from outside the district. Opposition at 19-20. Nonetheless, this test actually favors a finding of post-confirmation jurisdiction. *Id.*
- Where the plan contains broad jurisdictional provisions, the Bankruptcy Court's post-confirmation jurisdiction is as broad as the statutory grant -- that is, it extends to all proceedings related to the bankruptcy. *In re Ionosphere Clubs, Inc.*, 1999 Bankr. LEXIS 1875, at *21. Opposition at 26

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Plaintiff's Arguments on Venue

- 28 U.S.C. § 1409(a) governs the venue of adversary proceedings related to title 11 cases. Opposition at 27.
- Section 1409(a) states:
  - Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.
- The most suitable venue for a matter related to a bankruptcy case pursuant to Section 1409(a) is the district where the bankruptcy is pending. See, e.g., *Enron Corp.*, 317 B.R. at 637. Opposition at 28
- None of the exceptions in subsection (d) of Section 1409 applies because that only limits jurisdiction based on a claim arising out of the operation of the debtor's business. Opposition at 29. Defendants' cases are readily distinguishable because, for example, they are about claims that arose out of post-petition actions relating to an ongoing business. Opposition at 31.
- Regardless of whether LBHI's claims arose after the commencement of the bankruptcy, Section 1409(d) does not apply because LBHI's claims do not arise from the operation of the business of the debtor. Opposition at 31. Defendants ignored authority from the SDNY for this rule. Opposition at 35.
- Even if Section 1409(d) were to apply, venue is proper in the SDNY under 28 U.S.C. 1391: Opposition at 37.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Plaintiff's Arguments on Venue contd.:

- Venue is proper where any defendant resides, if all defendants are residents of the State in which the district is located. 28 U.S.C. § 1391(b)(1). Section 1391(c) defines residency for venue purposes as any district where a defendant is subject to the court's personal jurisdiction with respect to the civil action in question. 28 U.S.C. § 1391(c)(2). Opposition at 37.
- Personal jurisdiction in the Southern District of New York exists over all defendants pursuant to the nationwide service of process provision of Fed. R. Bankr. P. 7004(d), which permits a bankruptcy court to exercise personal jurisdiction under Rule 7004(d) as long as the exercise of jurisdiction is consistent with the Constitution and laws of the United States. Fed. R. Bankr. P. 7004(f). Opposition at 37.
- All Defendants have also consented to personal jurisdiction in this District by failing to contest jurisdiction within their motion to dismiss. Opposition at 39.
- Congress has clarified that if an entity-defendant fails to contest personal jurisdiction it ha[s] also consented to venue . . . as they are subject to the court's personal jurisdiction with respect to the civil action in question. (citing 28 U.S.C. § 1391(c)(2))); see also *Underberg v. Employers Mut. Cas. Co.*, No. 15-cv-112, 2016 WL 1466506, at *5 (D. Mont. Apr. 14, 2016). Opposition at 40.
- Venue is Proper Under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in this District. Opposition at 41. LBHI is undeniably headquartered in and had its major business operations in New York.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Memorandum Decision and Order Denying Omnibus Motion to dismiss for Lack of Subject Matter Jurisdiction and Venue August 13, 2018 ("Order")

Subject Matter Jurisdiction:

- The Court has jurisdiction over title 11 proceedings pursuant to the Amended Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York (M431), dated January 31, 2012 (Preska, C.J.). Order at 7.
- "Related-to" jurisdiction is broad. Order at 7.
- Some courts have rejected the "conceivable effects" test in favor of the more stringent "close nexus test". Order at 8.
- The Plan stated that the BK court retained exclusive jurisdiction over adversary proceedings arising under, out of or related to the Ch. 11 cases and Plan.
- The applicability of the close nexus test rather than the conceivable effects test is an open question in the Second Circuit. Order at 11. Nonetheless the court did not need to resolve which test applied because the Court found that a close nexus existed between the indemnification claims and the Plan. Order at 12.
- The *ResCap* case is persuasive because, as in the present case, it involved a plan administrator that also brought state law indemnification claims against loan originators and the plan provided for retention of jurisdiction over such claims, resulting in a finding of jurisdiction over the indemnification claims. Order at 13.
- Pursuit of Adversary Proceedings affects the implementation and administration of the Plan because any recoveries from such proceedings will be paid to creditors. These facts create a close nexus between the Indemnification Claims and the Plan that easily meets the standard for related to jurisdiction pursuant to 28 U.S.C. § 1334(b) and applicable law in this District. Order at 20.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Memorandum Decision and Order Denying Omnibus Motion to dismiss for Lack of Subject Matter Jurisdiction and Venue, August 13, 2088 ("Order")

Venue:

- Section 1409 of title 28 of the United States Code governs the venue of a proceeding arising under title 11 or arising in or related to a case under title 11which, except as otherwise provided in subsections (b) and (d), . . . may be commenced in the district court in which such case is pending. 28 U.S.C. § 1409(a).29. Subsections (b) and (d) of section 1409 operate as exceptions to the general rule under subsection (a). Order at 21.
- Unlike the permissive nature of subsection (a), the venue provisions of section 1409(d) are exclusive; a debtor must look to applicable non-bankruptcy venue provisions to determine proper venue if the claim arises after the bankruptcy petition was filed and from the operation of the business of the debtor. Order at 22. Section 1409(d) only applies in the context of a debtor continuing ongoing business operations, which is not the case here. Order at 22-24.
- The Court distinguished between arising and accruing of claims, and found that the indemnification claims did not arise from post-petition business of LBHI and that section 1409(d) therefore did not apply and that venue was proper in the district court.

2017 Omnibus Motion to Dismiss for Lack of Subject Matter Jurisdiction and Improper Venue Contd.

Appeals:

- Defendants filed various Motions for Leave to Appeal the Court's Order in September, 2018.
- These interlocutory appeals were denied.

Client Reviews – Pros & Cons

- Some defendants have 20, 30 or even 40 loan claims against them. Reviewing and analyzing the loan file is a considerable cost, therefore some clients may want to do their own reviews.
- Pro: Saves Money
- Con: Your analyses may be discoverable by opposing counsel, especially if you routinely conduct repurchase demand analysis in the ordinary course of business.
- Attorney-Client Privilege:
  - "A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. *Deutsche Bank Nat'l Tr. Co. v. WMC Mortg., LLC,* No. 3:12 - CV - 933 (CSH), 2015 U.S. Dist. LEXIS 49158, at *15 (D. Conn. Apr. 14, 2015).
  - Therefore, communications to attorneys for business advice are not protected. *Id.*
- Attorney Work Product Rule:
  - Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). Rule 26(b)(3)(A), Fed. R. Civ. P.
- However, in the RMBS litigation context, where there breach analysis documents are created due to contractual obligations, only those that are authored by an attorney and specifically directed to litigation strategy or possible litigation defenses are eligible for protection under the work product doctrine. *Deutsche Bank Nat'l Tr. Co. v. WMC Mortg., LLC*, No. 3:12 - CV - 933 (CSH), 2015 U.S. Dist. LEXIS 49158, at *60 (D. Conn. Apr. 14, 2015)

Part IV:

Third Party Loss Mitigation Strategies

Third Party Loss Mitigation Strategies

Whenever you are faced with a demand to repurchase and/or indemnify an investor or agency, companies should do more than merely look at defensive strategies and should always consider whether there are any options to recover on alleged claims from other potentially culpable third-parties.

In other words, as losses attributable to the actions and/or inactions of third parties have been accumulating on lenders' balance sheets for years, lenders have been forced to analyze how and against whom they may seek redress from. Factors to consider include, but are not limited to, the following:

- Balancing defense strategy against third-party recovery strategy
- Cost v. benefit
  - What are ALL the potential costs of pursuing a third party (e.g., the investment of time, money and resources). How much is at stake?
- Picking your targets
  - First, identify the responsible third parties based on the underlying facts (i.e., appraisers, brokers, borrowers, etc.). You may be able to assert contractual indemnification claims against brokers.
  - Second, confirm the third party is still in existence.
  - Third, identify and gather relevant documents, including: broker agreement, loan application, settlement statement, audit report, repurchase demand and damages calculation

Part V:

RMBS Litigation on the Horizon - JPMorgan Chase and EMC

Part VI:

Concluding Thoughts

Concluding Thoughts

- Depending on the investor, repurchase claims settle for an average of 30-40 cents on the dollar.
- Claims involving indemnification agreements often settle for 50-60 cents on the dollar.
- Due to the high cost of litigation, investors are often more willing to negotiate once litigation has commenced.
- Challenge the loss figures claimed by the investor.
- Request that the investor remove all prejudgment interest for the purposes of settlement negotiations.
- Consider a global settlement with the investor to resolve all known and unknown claims.

QUESTIONS & ANSWERS

At the conclusion of this webinar, in the event we do not have sufficient time for Q&A, please submit your questions directly to the moderator, at jbrody@johnstonthomas.com.

THANK YOU!