Ambac Assur. Corp. v Countrywide Home Loans, Inc.
2018 NY Slip Op 33398(U)
December 30, 2018
Supreme Court, New York County
Docket Number: 651612/2010
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN** **PART** **IAS MOTION 3**

Justice

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INDEX NO. 651612/2010

AMBAC ASSURANCE CORPORATION, THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Plaintiff,

- v -

COUNTRYWIDE HOME LOANS, INC.,COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP. (N.K.A. BANK OF AMERICA HOME LOANS), BANK OF AMERICA CORP.,

Defendant.

MOTION DATE 08/23/2018, 08/23/2018, 08/23/2018, 08/23/2018, 08/23/2018, 10/03/2018

MOTION SEQ. NO. 048 049 050 051 052 054

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 048) 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1912, 1922, 1923, 1924, 1925, 1926, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 049) 1897, 1898, 1899, 1916, 1917, 1921, 1936

were read on this motion to/for STRIKE JURY DEMAND.

The following e-filed documents, listed by NYSCEF document number (Motion 050) 1900, 1901, 1902, 1913, 1927, 1937

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 051) 1903, 1904, 1905, 1906, 1907, 1908, 1914, 1919, 1938, 1939, 1940, 1941, 1942, 1943, 1944

were read on this motion to/for SEVER.

The following e-filed documents, listed by NYSCEF document number (Motion 052) 1909, 1910, 1911, 1915, 1920, 1945

were read on this motion to/for STRIKE JURY DEMAND.

The following e-filed documents, listed by NYSCEF document number (Motion 054) 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1972, 1973, 1974, 1975, 1976, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1986, 1987

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IS DECIDED

12/30/2018
DATE

HON. EILEEN BRANSTEN
J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- [ ] CASE DISPOSED
- [ ] GRANTED
- [ ] SETTLE ORDER
- [ ] INCLUDES TRANSFER/REASSIGN
- [X] DENIED
- [X] NON-FINAL DISPOSITION
- [ ] GRANTED IN PART
- [ ] SUBMIT ORDER
- [ ] FIDUCIARY APPOINTMENT
- [ ] OTHER
- [ ] REFERENCE

.SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Plaintiffs,

-against-

Index No. 651612/2010

Motion Seq. Nos. 048, 049, 050, 051, 052 and 54

Motion Dates 9/27/18 and 11/05/18

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

Defendants.

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BRANSTEN, J.:

Plaintiff Ambac Assurance Corporation (Ambac), a monoline financial guaranty insurer, agreed to insure payments of principal and interest owed to the holders of residential mortgage-backed securities sponsored by defendants Countrywide Home Loans, Inc., Countrywide Securities Corp. and Countrywide Financial Corp. (collectively, Countrywide, or the Countrywide defendants). Between 2004 and 2006, Ambac insured 17 residential mortgage-backed securities (RMBS) transactions issued by Countrywide. These RMBS transactions were backed by more than 375,000 individual mortgage loans, which Countrywide had originated or acquired, and then put into

securitization trusts. In exchange for substantial premiums, Ambac issued unconditional, irrevocable insurance policies, agreeing to insure certain payments to the investors.

In 2010, Ambac commenced this action against the Countrywide defendants, asserting claims including breach of contract and fraud arising from the 17 RMBS transactions. Ambac alleges that Countrywide fraudulently induced it to enter into the insurance agreements, and that Countrywide breached several contractual representations and warranties in the securitization transaction documents regarding Countrywide's underwriting practices in issuing mortgage loans to borrowers that comprised the securities.

Ambac also asserts successor-liability and alter ego claims against defendant Bank of America Corp. (BAC) to hold BAC jointly and severally liable for all damages arising from Countrywide's alleged wrongdoing.

Motion Sequence Nos. 048, 049, 050, 051, 052 and 54 are consolidated for disposition. In Motion Sequence No. 048, the Countrywide defendants move for an order of preclusion to bar Ambac from using statistical sampling to prove liability or damages for breach of contract.

In Motion Sequence No. 049, the Countrywide defendants move to strike Ambac's jury demand as to its first cause of action.

In Motion Sequence No. 050, the Countrywide defendants move for an order determining the loans at issue on Ambac's breach of contract claims.

In Motion Sequence No. 051, BAC moves to sever Ambac's contingent-liability claims for trial and postpone any trial until after a judgment is entered on the primary-liability claims.

In Motion Sequence No. 052, BAC moves to strike Ambac's jury demand for its claims against BAC.

In Motion Sequence No. 054, the Countrywide defendants move to dismiss, or in the alternative, for summary judgment dismissing Ambac's fraudulent inducement cause of action because damages in the fraud case are the damages as in the contract case.

For the reasons set forth below, all the motions are denied.

I. BACKGROUND

The factual background of this action has been fully set forth in previous decisions of this court and will only be repeated as necessary for clarification. For a comprehensive background see the Court of Appeals decision in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 575 (2018).

II. DISCUSSION

A. *BAC's Motion to Sever Ambac's Contingent-Liability Claims (Motion Sequence No. 051)*

In Motion Sequence No. 051, BAC moves to sever the primary- and successor-liability claims in this action, and to postpone a trial on the latter claims until the primary-liability claims have been resolved. The Countrywide defendants join in BAC's motion. *See* NYSCEF Doc. No 1908.

Ambac's six causes of action against the Countrywide defendants are premised on its allegations that the Countrywide defendants breached their contracts and made materially false or misleading statements between 2004 and 2006 concerning their mortgage origination practices and the characteristics of the loans that were sold in the 17 RMBS transactions that Ambac insured. *See* Second Amen. Comp., ¶¶ 7-15.

Ambac seeks to hold BAC liable on those six causes of action, on the theory that BAC "is jointly and severally liable for any and all damages resulting to Plaintiffs" from that alleged wrongdoing because (1) BAC is "Countrywide's successor in liability" as a result of a "de facto merger," between Countrywide and BAC, accomplished through a series of coordinated transactions that commenced in 2008; and (2) "Countrywide and Bank of America are alter egos of one another". *See id.* at ¶¶ 170-171. Specifically, Ambac alleges that BAC exercised dominion and control to compel Countrywide to (a)

divest its assets in a manner that primarily benefitted BAC and its non-Countrywide subsidiaries to the detriment of Ambac and Countrywide's other contingent creditors; and (b) unreasonably refused to repurchase defective loans that Ambac submitted for repurchase. *See id.* at ¶¶ 174, 175.

In 2011, BAC moved to sever Ambac's successor-liability claims and consolidate them with the successor-liability claims in three other pending RMBS litigations. This court denied BAC's motion, reasoning that severing and consolidating the successor-liability claims would not promote judicial economy, and would cause significant prejudice to the monoline plaintiffs, either because they would be delayed in resolving their claims, or because they would be forced to change their litigation schedule and strategy. *See* November 2, 2011 Decision and Order, at 10-11 (NYSCEF Doc. No. 48).

The court determined that discovery on the successor-liability claims should move forward because Ambac, like the other monoline plaintiffs, "has significant interest in continuing and completing discovery in full, including its claims for successor liability." *See id.* This court held in abeyance the portion of BAC's motion to sever and consolidate trial of the successor-liability claims until the completion of summary judgment briefing. *See id.* at 13.

In May 2015, the parties filed summary judgment motions. BAC and the Countrywide defendants sought summary dismissal of all the respective claims against them. Ambac moved for partial summary judgment on both its primary- and contingent-liability claims. This court denied BAC's motion for summary judgment on Ambac's successor-liability claims, concluding that there were issues of fact regarding Ambac's *de facto* merger and other theories "that must be resolved at trial". *See* October 22, 2015 Decision and Order, at 28, 32, 35 (NYSCEF Doc. No. 1671). The First Department affirmed in relevant part, finding that there are genuine issues of fact with respect to Ambac's *de facto* merger and alter ego claims against BAC that could not be resolved on summary judgment. *See Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 150 A.D.3d 490, 491-492 (1st Dept. 2017).

In support of its motion to sever, BAC asserts that this litigation involves two distinct cases that have been proceeding in tandem through discovery and summary judgment. In one case, Ambac asserts contract and fraud-based claims against Countrywide, and the court will determine the accuracy of representations and warranties in 2004-2006 securitization contracts. In the other, Ambac asserts equity-based claims against BAC, in which the court will determine the fairness of two sets of 2008 asset sales and assess dealings in 2008 and later between a public bank holding company and its subsidiaries.

BAC contends that, because these two cases involve different time periods, transactions, legal theories, documents and witnesses, the court should sever them for trial. According to BAC, severance would conserve judicial and party resources by avoiding a potentially unnecessary trial on Ambac's contingent liability claims against BAC, since Ambac must first establish the critical prerequisites to these claims – a judgment on the primary-liability claims. Second, severance would promote judicial efficiency because there is no meaningful overlap between the contingent- and primary-liability claims. Third, if the court were to conclude that Ambac's contingent-liability claims must be tried to a jury, severance would avoid the potential for jury confusion and prejudice to BAC in simultaneously trying claims.

Under CPLR 603, the court has discretion "to order a severance of claims, or may order a separate trial of any claim, or of any separate issue." In exercising this discretion, the court's "major purpose [should be] . . . to avoid wasting judicial resources." *See Mercado v. City of New York*, 25 A.D.2d 75, 76 (1st Dept 1966); *see also* 105 N.Y. Jurisprudence Trial § 208 (2d ed. 2018). A court may also order separate trials "to 1) avoid prejudice; 2) provide for convenience; or 3) . . . be economical." *See Ricciuti v. New York City Tr. Auth.*, 796 F. Supp. 84, 86 (S.D.N.Y 1992). Severance is also appropriate to "avoid substantial prejudice. . . arising from potential juror confusion" *Toscani v. One Bryant Park, LLC*, 139 A.D.3d 644, 644 (1st Dept 2016).

This discretion, however, must be exercised "sparingly," as severance "increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one." *Shanley v. Callanan Indus., Inc.* 54 N.Y.2d 52, 57 (1981). For this reason, the general rule is that all claims interposed in an action should be tried at once. *See Williams v. Prop. Servs.*, 6 A.D.3d 255, 256 (1st Dept 2004) (affirming denial of motion to sever into two separate actions because "[i]t is preferable to try related actions together, in order to avoid a waste of judicial resources"); *New York Cent. Mut. Ins. Co. v. McGee*, 87 A.D.3d 622, 624 (2d Dept 2011) ("Severance is inappropriate where the claims against the defendants involve common factual and legal issues and the interests of judicial economy and consistency of verdicts will be served by having a single trial").

Only in unusual circumstances do courts depart from the general rule and order severance, *i.e.*, upon a clear showing that severance will result in a more efficient resolution of the litigation or will avoid an unacceptable risk of unfair prejudice. *See* CPLR 603; *see also Cason v. Deutsche Bank Grp.*, 106 A.D.3d 533, 533 (1st Dept 2013) (affirming denial of severance where unified trial would not result in "prejudice to a substantial right" of the defendants); *Carpenter v. County of Essex*, 67 A.D.3d 1106, 1107 (3d Dept 2009) (unified trial appropriate where conducting separate trials "would not result in a more expeditious resolution of the actions").

BAC fails to offer sufficient justification for this court to grant severance, and, accordingly, its motion must be denied.

First, BAC contends that severance would conserve judicial resources by deferring a potentially unnecessary trial against BAC. The court rejects this argument. New York courts routinely decline to sever claims or conduct separate trials where, as here, there are "complex issues" implicating overlapping issues of law or fact. "Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time." *Shanley v. Callanan Indus.*, 54 N.Y.2d at 57; *see also Mark G. v. Sabol*, 240 A.D.2d 185, 185 (1st Dept 1997) (affirming denial of severance motion where claims "were sufficiently intertwined [so] that one trial is both appropriate and judicially efficient"). In *Barrett v. New York City Health & Hosps. Corp.*, 150 A.D.3d 949, 951 (2d Dept 2017), the 2nd Department held "[s]everance is generally 'inappropriate where the claims against the defendants involved common factual and legal issues, and the interest of judicial economy and consistency of verdicts will be served by having a single trial'".

Likewise, courts have concluded that severance is improper where evidence or witnesses would have to be repeated in two separate trials. *See Andresakis v. Lynn*, 236 A.D.2d 252, 252 (1st Dept 1997) (affirming denial of severance in part due to anticipated

overlap of evidence and "testimony of common witnesses" relevant to both claims); *Pendleton v. City of New York*, 21 Misc. 3d 1141(A) at *8 (Sup. Ct., Kings County 2008) (Miller, J.) (severance unwarranted where separate trials were "unlikely to reduce the time spent at trial and may require witnesses and parties to submit to two separate, and somewhat repetitive, proceedings"); *see also Hopper v. Regulation Scaffolding & Hoisting Co.*, 272 A.D.2d 242, 242 (1st Dept 2000) (affirming denial of severance because claims implicated several common witnesses, even though injury was caused in "two separate incidents").

BAC concedes that there is an overlap of the issues, evidence and witnesses relating to the primary- and successor-liability claims, *see* BAC Memorandum of Law at 5, 10, which completely undermine's BAC's assertion that separate trials would be more efficient. There are also other areas of overlap between the primary and successor-liability claims. The primary-liability claims will depend on large amounts of evidence regarding Countrywide's operations and practices for originating and securitizing mortgages, and the alleged breakdown of those practices leading to the alleged widespread breaches in the transactions that Ambac insured. *See* Affirm. of Harry Sandick, Ex. 05-11 (Expert Report of Michael LaCourt-Little dated 10/1/14 at 4-7 describing Countrywide's failure to comply with its stated policies to manage credit risk and originate quality loans) (NYSCEF Doc. No. 1458).

The same fact and expert testimony and documentary evidence are germane to establishing numerous aspects of the successor-liability claims as well. For example, according to the ruling by the First Department, as part of its *de facto merger* claim, Ambac must show continuity of ownership before and after Countrywide was acquired by BAC. *See Ambac*, 150 A.D.3d at 490, 491-492. This will require an analysis of "whether the transactions were coordinated with the goal of combining BAC's and Countrywide's mortgage businesses while avoiding Countrywide's liability to benefit Countrywide's former shareholders at the expense of its creditors." *Id.* Accordingly, primary-liability evidence – including fact and expert witness testimony and documentary evidence regarding systemic defects in Countrywide's pre-acquisition practices – is directly relevant to Ambac's successor-liability claims, because BAC's discovery of these defects during its pre-acquisition due diligence would have revealed to BAC the magnitude of Countrywide's contingent liabilities, and would have given BAC reason to attempt to structure its acquisition of Countrywide to insulate itself and its non-Countrywide subsidiaries from those liabilities.

Another element of Ambac's *de facto* merger claim is the continuity of Countrywide's pre-acquisition management, personnel, assets and operations following the acquisition. *See Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dept 2001). To demonstrate this element, Ambac asserts that it will present evidence about

Countrywide's activities in the years prior to acquisition to show the materiality of those operations to Countrywide's business, and how completely they were incorporated into BAC post-acquisition. *See* Affirm. of Harry Sandick, Ex. 14-23 (NYSCEF Doc. No. 1488) (Expert Report of Scott Winn dated June 30, 2014 at 106-123; 165-172). Accordingly, evidence about Countrywide's pre-acquisition operations – including mortgage origination, securitization and servicing – will be directly relevant to both the primary and successor liability claims. Similarly, several witnesses closely involved in Countrywide's pre-acquisition operations continued to hold key roles in the combined BAC-Countrywide enterprise after the acquisition. Their testimony is directly relevant to both Ambac's primary and successor liability claims, as BAC concedes, *see* BAC Memorandum of Law at 5, and demonstrates the continuity of personnel before and after the acquisition.

There is also significant overlap between the primary liability claims and Ambac's alter ego successor liability claim. Ambac's alter ego claim is based in part on allegations that BAC dominated and controlled the repurchase process by improperly delaying or denying claims. *See* Second Amen. Comp., ¶ 175. Ambac asserts that, to show that BAC's domination and control of the repurchase process was used to frustrate the rights of creditors like Ambac, it will offer documentary and testimonial evidence about the structure of the repurchase process in and after 2008, Countrywide's obligations

within that process, and Countrywide's failure – under BAC's control and direction – to comply with those obligations and repurchase loans that Countrywide knew were defective. *See* Winn Expert Report at 211-225 (NYSCEF Doc. No. 1488).

The court rejects BAC's argument that the overlap between these issues is "meaningless" because the legal and factual inquiries are "entirely different". *See* BAC Memorandum of Law at 10. The factual issues are not entirely different – for both the primary and successor liability claims, the fact finders will need to assess whether the Countrywide defendants and BAC improperly denied requests for loans that should have been re-purchased beginning in 2008. Moreover, even if the legal evidence is different, severance is still unwarranted, as courts routinely conduct unified trials addressing both liability and damages where evidence regarding the nature and extent of the plaintiff's injury is relevant to both. *See e.g. Shea v. 5008 Broadway Assocs.*, 292 A.D.2d 292, 292 (1st Dept 2002) (reversing grant of severance where the nature and extent of the plaintiff's injuries were needed to show causal connection between the incident and the injury); *see also Zbock v. Gietz*, 162 A.D.3d 1636-1637 (4th Dept 2018).

Accordingly, the appropriateness of severance turns on whether there is a repetition of evidence, testimony and factual issues in two separate trials, not on the ultimate legal significance of that evidence or testimony.

This court also finds that separate trials would create a risk of inconsistent determinations on overlapping issues, such as whether defendants frustrated the repurchase process, which weighs further in favor of a single trial. *See Sichel v. Community Synagogue*, 256 A.D.2d 276, 276-277 (1st Dept 1998) (reversing trial court order severing action in part due to "the risk of inconsistent verdicts"); *see also News Ltd. v. Australis Holdings Party, Ltd.*, 293 A.D.2d 276, 277 (1st Dept 2002) (severance properly denied in light of the "obvious risk of duplication of resources and inconsistent results").

Severance is also improper where, as here, it is unlikely to "result in a more expeditious resolution of the action []". *See Carpenter v. County of Essex*, 67 A.D.3d at 1107. This action has already been pending for eight years and gone through multiple appeals. Severing the successor-liability claims will likely prolong it even further.

BAC contends that severance would be more efficient because of the possibility that the Countrywide defendants will prevail against all of Ambac's claims, thus rendering a trial on the successor-liability claims unnecessary. *See* BAC Memorandum of Law at 9. However, this is not a basis to grant severance. Courts occasionally sever claims on the basis that the resolution of one issue could obviate the need for a later trial, but only when one of two conditions is satisfied: either the issue prioritized for trial involves disposition of non-merits defenses, such as statute of limitations, release or lack

of jurisdiction, which can "dispose of the entire controversy without going into the merits of the controversy", *see e.g. Morford v. Sulka & Co.*, 79 A.D.2d 502, 503 (1st Dept 1980), or where the issue to be tried first is uncomplicated and can be resolved quickly. *See e.g. Johnson v. Methodist Hosp. of Brooklyn*, 27 Misc.2d 1050, 1052 (Sup. Ct., Kings County 1960) (Schwartzwald, J.) ("It is only where the trial of the issues involved will be a brief one, whereas the trial of the main issue would be prolonged and extensive, should the court exercise its discretion in ordering separate trials").

The facts of this case do not fit either scenario. Both the primary liability and successor liability claims present substantive issues of fact and law that cannot be resolved without considering their merits, and, as BAC itself argues, the primary liability claims are not capable of being resolved quickly through a "brief" trial. *See* BAC Memorandum of Law at 11 (suggesting that the primary-liability claims "would take three weeks alone to try").

BAC also fails to show that severance of Ambac's successor-liability claims is necessary to avoid prejudice. The party seeking severance has the burden to establish that a single trial would result in it suffering "prejudice to a substantial right". *Cason v. Deutsche Bank Grp.*, 106 A.D.2d at 533; *Mothersil v. Town Sports Intl.*, 24 A.D.3d 424, 425 (2d Dept 2005). BAC contends that a separate trial is needed because of the possibility of a "prejudicial spillover" if jurors deciding the successor-liability claim hear

evidence regarding Countrywide's wrongdoing, and vice versa. *See* BAC Memorandum of Law at 11-13. However, the "issue of prejudice or sympathy is routinely and successfully handled by appropriate court instructions". *See Pendleton v. City of New York*, 21 Misc. 3d 1141(A) at *8. Indeed, courts frequently reject requests for separate trials based on concerns of prejudice that can be addressed by jury instructions or other courtroom management strategies. *See e.g. Cason v. Deutsche Bank Group*, 106 A.D.3d at 533 (denying motion for severance based on potential prejudice and noting that "the trial court will have discretion to address any potential danger of 'guilt by association' by appropriate curative instructions"); *Elmira v. Larry Walter*, 111 A.D.2d 553, 555 (3d Dept 1985) (concluding that potential prejudice to defendant "does not outweigh the factors strongly impelling a joint trial" and ordering "a single trial of all of the various disputes between the parties, with curative instructions, jury interrogatories and the presentation of the issues of the jury in an appropriate sequence to minimize the risk of possible confusion and prejudice).

Likewise, Countrywide's concerns that evidence of settlements that BAC has funded on Countrywide's behalf will have a "devastating" "spillover effect" on the Countrywide defendants, *see* Countrywide Joinder Memorandum of Law at 2), can be addressed through appropriate limiting instructions.

BAC's motion to sever is denied.

B. Countrywide's Motion to Strike Plaintiff's Jury Demand (Motion Sequence No. 049)

In motion sequence no. 049, Countrywide moves to strike Ambac's jury demand as to its first cause of action for fraudulent inducement.

Ambac seeks to recover claims payments resulting from its decision to insure 17 RMBS transactions sponsored by Countrywide that closed between 2004 and 2006. In each transaction, Ambac and Countrywide signed an Insurance and Indemnity Agreement (I&I), in which Ambac agreed to provide irrevocable insurance to holders of the securities, guaranteeing the securities' performance.

All of Ambac's claims against Countrywide in this lawsuit concern the I&I agreements. First, Ambac sued for breach of contract based on alleged breaches of Countrywide's representations and warranties. *See* Second Amen. Comp., counts two through six. Second, Ambac sues for fraudulent inducement, *see id.*, count one, on the theory that Countrywide's alleged false representations misled Ambac to enter into the I&I agreements, and provide the insurance.

Each I&I Agreement contains the following jury waiver provision:

> "Each party hereby waives, to the fullest extent permitted by law, any right to a trial by jury in respect of any litigation arising directly or indirectly out of, under or in connection with any of the Operative Documents or the Policy or any of the transactions contemplated thereunder. Each Party hereto (A)

> certifies that no representative, agent or attorney of any party hereto has represented, expressly or otherwise, that it would not, in the event of litigation, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into the Operative Documents to which it is a party (or, in the case of the Policy, the Insurer so acknowledges), by, among other things, this waiver"

I&I Agreements, ¶ 6.09.

Ambac alleges that Countrywide fraudulently induced Ambac to issue the policies and enter into the I&I Agreements and breached numerous express contractual representations and warranties about the loans in the RMBS transactions at issue. *See* Second Amen. Comp., ¶¶ 8-10 (NYSCEF # 107). The Second Amended Complaint also demanded "a trial by jury for all issues to triable as a matter of right". *See id.* at ¶ 110.

On July 8, 2015, Ambac filed an amended Note of Issue and Certificate of Readiness, demanding a jury trial on its first cause of action for fraudulent inducement. Ambac did not seek a jury trial on its causes of action for breach of contract. Countrywide did not object or file any motion to strike the jury demand at that time, or at any time during the following three years. The amended Note of Issue also included a jury demand on its de facto merger and alter ego liability claims against BAC.

Countrywide contends that, given the jury waiver provision in the I&I Agreements, Ambac's jury demand for the fraudulent inducement claim must be stricken.

Parties may expressly waive their right to a jury trial on any claim by written agreement. *See Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 34 A.D.3d 791, 791 (2d Dept 2006). "[A] motion to strike an improper demand for [a] jury trial may be made at any time up to the opening of trial". 73A N.Y. Jur.2d *Jury* § 32 (2d Edition West 2018); *see also Fordham Univ. v. Manufacturers Hanover Trust Co.*, 145 AD2d 332, 333 (1st Dept 1988).

Countrywide argues that it is well settled that contractual jury waivers are broad enough to cover fraud claims, including claims for fraudulent inducement, associated with the contract that contains the jury waiver. *See* Countrywide Memorandum of Law at 2. However, in making this argument, Countrywide completely ignores the precedent set by *Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.* 102 A.D.3d 487 (1st Dept 2013), which is strikingly similar to the instant action. In that case, the First Department held that the jury waiver provision in a contract Ambac entered into in connection with its insurance of an RMBS transaction did not deprive Ambac of its right to a jury trial on its fraudulent inducement claim related to the same RMBS transaction. Ambac brought breach of contract and fraudulent inducement claims against *DLJ* that are virtually identical to its claims against Countrywide in this case, and the defendants made essentially the same arguments in support of their motion to strike Ambac's jury demand that Countrywide makes here.

In *DLJ*, Ambac alleged that it was fraudulently induced by defendants to enter into an insurance agreement and provide financial guaranty insurance on certain RMBS transactions, and, in the alternative, that the defendants had breached representations and warranties in the parties' insurance agreement. Ambac requested a jury trial on its fraudulent inducement claim, but not on its breach of contract claims. The defendants moved to strike Ambac's jury demand, and the trial court granted that motion. *Ambac Assur. Corp. v. DLJ Mortg. Capital, Inc.* 33 Misc. 3d 1208(A) *14-15 (Sup. Ct. N.Y. County 2011) (Kornreich, J.). On appeal, the First Department reversed, holding that "the complaint alleges repeatedly that the insurance agreement was obtained through various types of fraud, making it clear that fraudulent inducement is plaintiff's primary claim. Thus, the provision of the agreement that waives the right to trial by jury does not apply." *See Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 102 A.D.3d 487, 487-88 (2013).

Although Countrywide seeks to discount *DLJ* as a "brief decision," containing "scant reasoning", *see* Countrywide Memorandum of Law at 8, in fact, under New York law, it has long been well-settled that a jury waiver clause does not apply where, as here, the party alleging fraudulent inducement challenges the validity of the contract. *See e.g. Zohar CDO 2003-1 Ltd. v. Xinhua Sports & Entertainment Ltd.*, 158 A.D.3d 594, 594 (1st Dept 2018) ("a party alleging fraudulent inducement that elects to bring an action for

damages, as opposed to opting for rescission, may, under certain circumstances, still challenge the validity of the underlying agreement in a way that renders the contractual jury waiver provision in that agreement inapplicable to the fraudulent inducement cause of action"); *China Dev. Indus. Bank v. Morgan Stanley & Co. Inc.*, 86 A.D.3d 435, 436-437 (1st Dept 2011) (holding that a challenge to the validity of the contract as a whole also invalidates the jury waiver clause in the contract); *Wells Fargo Bank, N.A. v. Stargate Films, Inc.*, 18 A.D.3d 264, 265 (1st Dept 2005) (same holding).

Here, as in *DLJ*, Ambac's claim for fraudulent inducement challenges the validity of the parties' I&I Agreements. *See* Second Amen. Comp, ¶¶ 8-11 (describing Countrywide's fraudulent representations and omissions that induced Ambac to enter into the I&I Agreements and the transactions), *id.* ¶¶ 103-110 (identifying representations and omissions that form the basis for fraudulent inducement), *id.* ¶ 272 ("Countrywide made materially false statements and omitted material facts with the intend to defraud Ambac through pre-contractual communications between Ambac and Countrywide officers), *id.* ¶ 263 ("on numerous occasions between 2004 and the present, Countrywide knowingly and with the intent to defraud, caused its employees and agents to submit materially false and misleading documents to induce Ambac to enter into the I&I Agreements and issue the Policies), *id.* ¶ 266 ("As a result of Countrywide's statements

and omissions, Ambac insured certain payments of principal and interest to the Noteholders from seventeen pools of loans that had a risk profile far higher than Countrywide led Ambac to understand").

Accordingly, under well settled law, Ambac is entitled to a jury trial on its fraudulent inducement claim because that claim challenges the validity of the I&I Agreements that contain the jury waiver provision that Countrywide invokes *See Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.* 102 A.D.3d at 487-488. Ambac need not allege that the waiver itself was fraudulently induced. *See Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.* 102 A.D.3d at 487.

Countrywide also argues that the jury waiver clauses in the I&I Agreements apply to Ambac's fraudulent inducement claim even if Ambac is not required to challenge the validity of the clauses specifically, because Ambac seeks to enforce the I&I Agreements by asserting a breach of contract claim against Countrywide. This argument is baseless. In *DLJ*, the First Department specifically rejected the defendants' argument that the jury waiver provision in the governing contracts at issue applied to Ambac's fraudulent inducement claim, even though Ambac had opted to pursue a breach of contract claim in parallel with its fraudulent inducement claim. *See Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.* 102 A.D.3d at 487-488.

Accordingly, Countrywide's motion to strike Ambac's jury demand as to the first cause of action is denied.

C. BAC's Motion to Strike Plaintiff's Jury Demand (Motion Sequence No. 052)

In motion sequence No. 052, BAC moves to strike Ambac's jury demand for its claims against BAC. BAC argues that Ambac is not entitled to a jury trial on its *de facto* merger and alter ego secondary-liability claims against BAC because Ambac's successor-liability claims are equitable and must be tried to a judge. According to BAC, "New York law is clear that a party has no right to a jury trial for equitable claims". *See* BAC Memorandum of Law at 2.

Article I, Section 2 of the New York State Constitution, however, guarantees a right to trial by jury in "all cases afforded a jury trial under common law." *See* NYS Const. Art. 1 §2. Under the common law, "a jury trial was required if the nature and substance of the relief requested was legal". *See Motor Vehicle Mfrs. Assn. of U.S. v. State of New York*, 75 N.Y.2d 175, 180-181 (1990). CPLR 4101(1) also codifies the right to a jury trial in "an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only." *See* CPLR 4101(1).

Thus, a party's right to a jury trial pivots on whether the "main thrust" of the action is "legal" or "equitable". If an award of money damages affords full relief to the plaintiff, the action is one at law, and thus triable by jury. *See Hudson View II Assoc. v.*

Gooden, 222 A.D.2d 163, 168 (1st Dept 1996). Because the thrust of Ambac's claims against BAC is likewise pursuing an award of money damages, *see id.*, ¶ 170, those claims are legal as well, and therefore triable by jury.

The few New York courts have held that a plaintiff is entitled to a jury on a successor-liability claim where, as here, the underlying claim is one for money damages. *See Cioffi v. S.M. Foods, Inc.,* 129 AD3d 888, 894 (2d Dept 2015) (holding that plaintiffs suing to recover money damages for personal injuries have a right to try alter ego claims against defendants' corporate parents to a jury); *Klein v. Loeb Holding Corp.*, 24 Misc.3d 899, 902 (Sup. Ct. N.Y. County 2009) (Schlesinger, J) (holding that an action to enforce a money judgment against the judgment debtor's alleged alter ego was triable by jury).

In *Cioffi*, the court denied the defendants' motion to strike the plaintiffs' jury demand, and the Second Department affirmed, holding that although the plaintiffs "relied upon the equitable theory of piercing the corporate veil," they "seek only legal relief in the form of money damages," and therefore had not waived their right to a jury trial. *See Cioffi v. S.M. Foods, Inc.,* 129 A.D.3d at 894. In *Klein*, because the plaintiff's alter ego claims "primarily and exclusively" sought "a factual determination that [the judgment debtor's alter ego] was responsible for a specified sum of money owed to him," the court held that the plaintiff had stated a claim that "would permit a judgment for a sum of money only," which is triable by jury. *See Klein v. Loeb Holding Corp.*, 24 Misc.3d at

905, citing *William Passalacqua Builders, Inc. v. Resnick Devs. S., Inc.*, 933 F.2.d 131 (2d Cir 1991).

Ambac's successor-liability claims seek to enforce a money damages award against BAC, which "indicates a legal action". *See William Passalacqua Builders, Inc. v. Resnick Devs. S., Inc.*, 933 F.2d at 136. Accordingly, Ambac is entitled to try its successor-liability claims to a jury, and BAC's motion to sever is denied.

D. Countrywide's Motion to Preclude Statistical Sampling (Motion Sequence No. 048)

In motion sequence No. 048, Countrywide moves for an order precluding statistical sampling to prove liability or damages with respect to Ambac's breach of contract claims.

For each of the 17 RMBS transactions at issue in this case, the contractual relationship between Countrywide and Ambac is governed by the I&I Agreements. Section 2.01(l) of each I&I Agreement incorporates certain representations and warranties that Countrywide made in other securitization documents about the characteristics of the individual securitized mortgaged loans and provides that Ambac's remedy for breach of those representations and warranties is a contractual repurchase protocol. Ambac seeks to enforce the repurchase protocol with respect to alleged breaches of Section 2.01(l) and under Section 3.03(b) of the I&I's to obtain

reimbursement of insurance-claims payments "arising as a result of Countrywide's failure" to repurchase breaching loans.

With respect to the 17 RMBS transactions at issue here, Ambac has paid and is expected to pay approximately $2 billion in insurance claims to cover payment shortfalls. The transactions comprise more than 375,000 loans, of which Ambac's experts have opined that almost 80% materially breached Countrywide's representations and warranties. When, before filing suit, Ambac notified Countrywide of thousands of individual breaching loans and demanded that Countrywide repurchase them in accordance with its contractual obligations, Countrywide rebuffed these demands, ultimately agreeing to repurchase barely 5% of the put-back loans.

Ambac asserts that, given the enormous value of loans in the transactions and the extraordinarily high incidence of breaches, it intends to offer statistical sampling data to prove liability and damages on those claims.

Statistical sampling is a science that has been used successfully for centuries to draw reliable conclusions about the characteristics of large populations. "A representative or statistical sample, like all evidence, is a means to establish or defend against liability", *see Tyson Foods, Inc. v. Bouaphakeo*, __ U.S. __ (2016); 136 S. Ct 1036, 1046 (2016), and is currently in widespread use in the numerous RMBS actions pending in the Commercial Division of this court. In *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.* 30 Misc.3d 1201[A], *4-6 (Sup. Ct., N.Y. County 2010) (Bransten, J.)

(*MBIA I*), this court held that "[s]tatistical sampling is a widely used method to present evidence from a large population of data. - - - [MBIA] has shown its methodology to be scientifically accepted, valid and reliable." The court explained:

> The use of sampling does not obviate Plaintiff's need to prove each element of its claims for breach of contract or fraud, and Plaintiff must prove entitlement to any damages. Should sampling be used, Plaintiff retains its obligation to demonstrate to the trier of fact that each element of each cause of action has been met. Plaintiff's possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof.

Id. at *3.

In 2012, Countrywide and Ambac entered into a stipulation in which they agreed to treat the *MBIA I* sampling ruling as if rendered in this action. *See* Tomlinson Affirm., Exhibit A ¶5 (NYSCEF Doc. No. 1924). It is, therefore, the law of the case.

In that same stipulation, the parties also agreed to an explicit protocol for sampling, which purported to benefit both parties by allowing for more efficient discovery and advance disclosure of the samples to be used at trial. The parties' stipulation provided that Countrywide would supply loan origination files for all sampled loans, *see id.* at ¶ 1, thus obviating the need for Ambac to obtain loan files and other information for all 375,000 loans at issue. Ambac contends that, relying on that stipulation and on *MBIA I*, it structured its re-underwriting efforts throughout this case around the use of representative samples to determine the portion of materially defective

loans in the RMBS transaction loan population, and constructed its damages model based on those findings.

Ambac retained Dr. Charles Cowan, who used the same methodology here as the one presented to this court in *MBIA I*. Dr. Cowan selected a representative sample of loans in each of the 17 RMBS transactions at issue, totaling approximately 7,200 loans. In accordance with the parties' stipulation, Countrywide produced loan files and other information as to these loans, and Ambac's re-underwriting experts reviewed the information, and used it to make detailed findings as to which loans in the samples contained material defects. Dr. Cowan then used those findings to estimate the proportion of materially defective loans in the loan populations from which the representative samples were drawn, together with the margins of error for those estimates.

In May 2015, Countrywide and Ambac filed cross motions for summary judgment. At summary judgment, after obtaining the reports of Ambac's experts, Countrywide sought to preclude Ambac from using statistical sampling at trial, relying on arguments virtually identical to the ones it made in *MBIA I*, as well as one it presents now in support of its motion (Mot. Seq. 48). Countrywide argued that sampling was incompatible with the repurchase protocol, which, Countrywide argued, was Ambac's "sole remedy" for breach of warranty.

Citing its summary judgment ruling in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220[A] (Sup Ct, N.Y. County 2013) (Bransten, J.) (*MBIA II*), this court once again rejected those arguments. As this court noted then, "Countrywide has failed to distinguish this case from *MBIA*, or to present any new arguments entitling it to a ruling that Ambac is barred from using sampling as a vehicle of proof at trial". *See* Decision on Mot. Seq. 27 of 10/22/15 at 9) (NYSCEF Doc. No. 1672). While Countrywide appealed several aspects of the Court's Summary Judgment ruling, it neither appealed nor sought this Court's reconsideration of the sampling ruling.

Countrywide contends that, on appeal, the First Department held that the repurchase protocol is Ambac's sole contractual remedy, and that the Court of Appeals affirmed. *Ambac Assurance Cop. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018). Countrywide argues that, now that the Court of Appeals has held that the repurchase protocol provides Ambac's sole remedy for its breach of contract claim, Ambac cannot use statistical sampling to prove contract liability or damages.

According to Countrywide, the contractual repurchase protocol operates on a loan-by-loan basis, and thus requires loan-specific proof to determine which loans are subject to repurchase. Hence statistical sampling cannot provide loan by loan proof.

The court rejects this argument, as Countrywide's motion seeks to relitigate issues this court has already decided and is thus barred by the doctrine of the law of the case.

The purpose of the law of the case doctrine is to prevent re-litigation of legal issues that have already been determined at an earlier stage of the proceeding. *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 14 (1976); *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975); *Brownrigg v. New York City Hous. Auth.*, 29 A.D.3d 721, 722 (2d Dept 2006). Thus, where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation of that issue. *See Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dept 2005); *Holloway v. Cha Cha Laundry*, 97 A.D.2d 385, 386 (1st Dept 1983) ("once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation"); *see also Hass & Gottlieb v. Sook Hi Lee*, 11 A.D.3d 230 (1st Dept 2004).

In its summary judgment decision in this case, in which the court refused to bar Ambac from using statistical sampling, this court considered and rejected the same arguments that Countrywide now makes. For example, on summary judgment, as here, Countrywide argued "that the repurchase protocol is only applicable on a loan-by-loan basis" and that "[w]ithout loan-specific proof . . . [Countrywide] cannot prove that a loan did not materially breach a R&W or that it cannot calculate damages properly". *See* Decision on Mot. Seq. 27 of 10/22/15 at 9 (NYSCEF Doc. No. 1672); *see also* Countrywide's corrected Memorandum of Law In Support of motion for summary judgment, at 18 (arguing that Ambac should not be permitted to rely on sampling because

it would deny Countrywide "90-day period in which it may attempt to cure a breach in all material respects") (NYSCEF Doc. No. 1592). The summary judgment decision thus necessarily resolved on the merits the issue of whether Ambac is permitted to use statistical sampling in this action, thus requiring denial of this Motion Seq. 48. *See Martin v. City of Cohoes*, 37 N.Y.2d at 165 ("when an issue is once judicially determined, that should be the end of the matter"); *see also Matter of Oak St. Mgt., Inc.*, 20 A.D.3d 571, 571 (2d Dept. 2005), *lv granted* 5 N.Y.3d 711 (2005), *appeal withdrawn* 6 N.Y.3d 808 (2006) ("Our prior resolution of this issue constitutes the law of the case and the appellants failed to show any basis for changing our prior determination").

The recent Court of Appeals decision in this case, which is the sole basis offered by Countrywide in support of its motion, does not even mention sampling, and neither explicitly nor implicitly rejects its use. (Countrywide admitted in oral argument on the motions that it not raised the sampling issue before the Court of Appeals). It therefore does not change the applicable law of the case permitting Ambac to use sampling. Although Countrywide suggests that the Court of Appeals' decision as to the "sole remedy" of repurchase means that this court's prior decisions authorizing the use of sampling are no longer valid, See Countrywide Memorandum of Law at 3-4, this Court rejects this argument. Nowhere in its prior decisions did this Court state that its ruling about the admissibility of sampling was limited to "transaction level breaches" that

Ambac had argued were outside the scope of the sole remedy provision. To the contrary, in its summary judgment ruling, the court quoted from its decision in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc.3d 895 (2012), which it held that the plaintiff was permitted to use sampling specifically to establish its entitlement to damages under the repurchase protocol. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc.3d at *12 (noting, in section entitled "Breach of the Repurchase Protocol," that plaintiff was permitted "to use statistical sampling as a means to prove both its fraud and breach of contract claims"); *see also MBIA I* at *5 (approving the use of sampling for, inter alia, MBIA's claims under the "repurchase contract").

Consequently, the Court of Appeals' recent decision limiting certain of Ambac's claims to the "sole remedy" of the repurchase protocol does not vitiate this court's prior decisions in these cases, and others, authorizing the use of sampling. Indeed, this court and others have routinely allowed RMBS plaintiffs whose remedies for breaching loans were limited to a repurchase protocol to rely on sampling to establish liability and damages at trial. S*ee e.g. Deutsche Bank Natl. Trust Co. [MSST 2007-1] v. Morgan Stanley Mtge. Capital Holdings LLC*, 289 F.Supp.3d 484, 504 (S.D.N.Y. 2018) (court was "persuaded that statistical sampling is consistent with [plaintiff's] obligations under the Repurchase Protocol, even if one credits [defendant's] interpretation" of the sole remedy provision).

Thus, the Court of Appeals' "sole remedy" decision does not preclude Ambac from employing sampling here. Accordingly, Countrywide's motion No. 48 is denied.

E. Motion to Determine Loans at Issue on Breach of Contract Claims (Motion Sequence No. 50)

In motion sequence No. 050, Countrywide moves for an order determining the loans at issue on Ambac's breach of contract claims. Countrywide contends that, after the Court of Appeals "sole remedy" ruling, in which the Court of Appeals held that the repurchase protocol is the sole remedy available to Ambac on its breach of contract claims, as well as this Court's rulings (which were not appealed) concerning the contractual repurchase protocol, the universe of loans properly at issue in this case is far narrower, and that the court should enter an order confirming the scope of loans at issue for trial.

The repurchase protocol is triggered in one of two ways. Ambac can fulfill its obligation to "give prompt notice, upon discovering a materially breaching loan," or Countrywide can "discover [] a breach of any of the foregoing representations and warranties" on its own. *See* I&I Agreements, § 2.04(c). Either scenario triggers a 90-day period during which Countrywide may "cure in all material respects any breach".

See id., § 2.04(d). If Countrywide does not cure within 90 days, it must repurchase or replace the breaching loan. *See id.*

Before this litigation began, Ambac sent dozens of breach notices to Countrywide. Each of those identified, and demanded repurchase of, a set of allegedly breaching loans. Each represented that Ambac's investigation was continuing, and that Ambac would "communicate additional issues or concerns if, as and when [Ambac] considers it appropriate to do so". *See* Podoll Affirm., Ex. 48 at 2 (NYCEF Doc. No. 1892). Countrywide does not contest that the loans specifically identified in those pre-suit notices are properly at issue in this case.

Ambac filed this lawsuit on September 28, 2010. Starting less than two months after it filed its complaint, Ambac sent a multitude of post-complaint breach notices. Most of these notices demanded repurchase of a specific set of loans. *See* Podoll Affirm, Ex 49 at 2 (NYSCEF Doc. No. 1893). The last set of notices, which Ambac sent in October 2014, demanded repurchase of specifically identified loans and **"every Mortgage Loan . . . that breaches one or more of the representations and warranties"** in the parties' agreements, whether or not the loan was specifically identified *See* Podoll Affirm. Ex. 50, at 2 (NYSCEF Doc. No. 1894) (Emphasis added).

In support of its motion, Countrywide argues that the Court of Appeals held that the repurchase protocol is the sole remedy available to Ambac, and that that protocol

requires that Ambac give "prompt notice," or that Countrywide independently discover, a breach of its representation and warranties. According to Countrywide, Ambac must show "one or the other" of those things before it can proceed under the repurchase protocol. Countrywide contends that, under binding Court of Appeals precedent set forth in *ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Products,* 25 N.Y.3d 581, 598 (2015), compliance with the notice and cure period is "a procedural prerequisite to suit."

Countrywide asserts that, therefore, the only loans at issue for trial on Ambac's breach of contract claim are (1) those loans for which Ambac gave prompt notice of a material breach at least 90 days before it filed suit; and (2) any loans in which Countrywide had discovered a material representation and warranty breach more than 90 days before Ambac filed suit. Countrywide seeks an order limiting the loans at issue for trial on Ambac's breach of contract claim to these two categories. Countrywide contends that claims based on Ambac's post-suit breach notices cannot proceed.

However, in 2015, Countrywide similarly sought a ruling on summary judgment that *ACE Securities* required the dismissal of Ambac's claims as to breaching loans for which Ambac did not provide Countrywide with notice and an opportunity to cure prior to suit. Countrywide argued that this court should disregard Ambac's post-complaint breach notices because they were untimely, and because Ambac had failed to "satisfy the

condition precedent to commencing suit" for the loans referenced therein. *See* Countrywide Memorandum of Law at 21-23 (NYSCEF Doc. No. 1592); *see also* Countrywide Reply Memorandum of Law at 12-14 (NYSCEF Doc. No. 1622). There, as here, Countrywide largely relied on *Ace Securities*.

On October 22, 2015, this court denied Countrywide's motion, and held that any issues concerning the scope of the loans at issue should be resolved following presentation of the evidence at trial. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2015 N.Y. Slip Op. 32703(U), *11-12 (Sup. Ct., N.Y. County 2015). Thus, the court declined to limit this action to loans specifically noticed by Ambac prior to filing suit. The court also noted that factual disputes remained as to issues such as whether Countrywide had independently discovered breaching loans. *See id.* at *11-13. Countrywide did not timely move to reargue or perfect an appeal concerning this ruling.

Countrywide's "motion for an order determining the loans at issue" is barred by the law of the case. S*ee Chanice v. Federal Express Corp.*, 118 A.D.3d 634, 635 (1st Dept 2014). Countrywide contended at summary judgment that the Court of Appeals' decision in *Ace Securities* required this court to dismiss Ambac's claims concerning loans that were noticed after commencement of suit and expiration of the statute of limitations claiming Ambac failed to satisfy the condition precedent to suit. Countrywide makes those exact same arguments again. Indeed, Countrywide cites *Ace Securities* on almost every page of its brief. *See* Countrywide Memorandum of Law at 1, 2, 3, 4, 6, 7 and 8.

The prior summary judgment ruling constitutes the law of the case, and the issue of the "loans at issue" cannot be relitigated. S*ee Chanice v. Federal Express Corp.*, 118 A.D.3d at 635.

To the extent that Countrywide believed that this court "overlooked or misapprehended" *Ace Securities* in its ruling on summary judgment, Countrywide could have brought a motion to reargue pursuant to CPLR 2221(d)(2). However, it failed to do so. Countrywide could also have appealed this Court's decision. Again, it failed to do so. In fact, although Countrywide included this Court's rulings on timeliness and notice in its pre-argument statement before the First Department. *See* NYSCEF Doc. No. 1695, ¶ 9), it abandoned its appeal on those points by failing to address them in its brief.

While Countrywide also mentions the Court of Appeals recent "sole remedy" ruling in this case, that decision has no bearing on the notice requirements. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578 (2018). The Court of Appeals limited certain of Ambac's claims to the "sole remedy" of the repurchase protocol but said nothing about what a plaintiff must do or prove to obtain relief pursuant to this remedy. *Id.* It did not suggest that Ambac's relief would be limited to only a subset of Countrywide's breaching loans. *Id.* As Countrywide's brief makes clear, its argument for limiting the "universe" of loans is based solely on the

holdings in *Ace Securities* concerning the contractual condition precedent to suit, and the statute of limitations.

In any event, Countrywide's arguments for limiting the universe of loans at issue lack merit. Countrywide is incorrect that *Ace Securities* required Ambac to provide pre-suit notice for every breaching loan in order to satisfy the contractual condition precedent to suit. *See* Countrywide Memorandum of Law at 4. The Court of Appeals in *Ace Securities* was not presented with, and did not decide, that issue. In *Ace Securities*, unlike here, the plaintiff had not sent the defendant any repurchase demands at least 90 days prior to commencing suit. *See ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.* 25 N.Y.3d at 592-593. Accordingly, the Court of Appeals affirmed the dismissal of the plaintiff's repurchase claim, reasoning that the plaintiff had failed to comply with the condition precedent to suit of providing notice and an opportunity to cure breaching loans. *See id.* at 589.

Multiple First Department decisions have since held that a plaintiff satisfied the condition precedent to suit recognized in *Ace Securities* by providing the defendant with pre-suit notice and an opportunity to cure at least some breaching loans. For instance, in *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.* 133 A.D.3d 96 (1st Dept 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), the plaintiffs had sent some repurchase demands to the defendant more than 90 days before filing a timely

suit, and had sent additional demands within 90 days of filing suit, as well as after commencing litigation. *See Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.,* 133 AD3d at 108. The First Department held that the trial court "correctly refused to dismiss claims" as to loans "that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions," as well as "loans that plaintiffs failed to mention in their breach notices" *See id.*

The court reasoned that, "[u]nlike in the situation in [*Ace Securities*], there were some timely claims in these cases". *See id.* The court further stated that the plaintiffs' "pre-suit letters put defendant on notice" that the plaintiffs were "investigating the mortgage loans and might uncover additional defective loans for which claims would be made". *See id.* Thus, "a complaint amended to add the claims at issue would have related back to the original complaints". *See id.* Accordingly, the court rejected the defendant's argument that the plaintiff's claims concerning those additional loans were untimely, and that the plaintiffs had failed to satisfy the condition precedent to suit. *See id.*

The First Department reaffirmed its holding in *Nomura* in *U.S. Bank N.A. [JPALT 2007-A2] v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79, 85 (1st Dept 2016). There, the court affirmed the dismissal of a repurchase claim because the plaintiff did not send *any* breach notices to the defendant until *after* filing suit. *See id.* at 86 citing *Ace*

Securities, 25 N.Y.3d at 581. The court explained that *Nomura* was "factually distinguishable" because in that case "the [plaintiff] trustees actually sent pre-suit breach notices to the defendant" and therefore," complied with the condition precedent of providing that defendant with notice of its default". *See id.* at 88. The court acknowledged that the pre-suit breach notices in *Nomura* " identified some, but not all, of the nonconforming mortgages for which the trustees ultimately sought relief" but stressed that those notices "expressly stated that the trustees were still investigating the matter and that further nonconforming mortgages might be discovered". *Id.*

These cases refute Countrywide's argument that *Ace Securities* requires a plaintiff to notice every single breaching loan that it intends to pursue in litigation prior to filing a timely action. Accordingly, it is consistent with *Ace Securities*, Ambac satisfied the contractual precedent to suit by providing Countrywide with notice as to "some, but not all" of the breaching loans in the Transactions at least 90 days prior to suit. That is all that was required under *Ace Securities*, as confirmed by the First Department's subsequent decision in *Nomura*.

Ambac's pre-suit breach notices also informed Countrywide that Ambac was still investigating the RMBS transactions and might pursue claims concerning additional breaching loans. Pursuant to *Nomura*, Ambac's post-complaint notices — including those demanding that Countrywide repurchase "every" breaching loan in the Transactions

— relate back to the initial complaint and are timely. Ambac thus properly noticed all breaching loans and may pursue its claims concerning those loans at trial.

Moreover, as Countrywide admits, *see* Countrywide Memorandum of Law at 2, Ambac's pre-suit repurchase demands also "put [Countrywide] on notice" that Ambac was "investigating the mortgage loans and might uncover additional defective loans for which claims would be made". *See Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.* 133 A.D.3d at 108; *see* 12/22/08 Repurchase Demand (NYSCEF Doc. No. 1892) ("Ambac is continuing its investigation of the Transaction . . . and will communicate additional issues or concerns if, as and when it considers it appropriate to do so"). Under *Nomura*, Ambac's subsequent repurchase demands relate back to its initial complaint and are just as effective as its pre-suit demands. *See U.S. Bank Natl. Assn. v. UBS Real Estate Secs., Inc.*, 205 F.Supp.3d 386, 421 (S.D. N.Y. 2016) ("*Nomura* concluded that the existence of timely, pre-suit breach notices was sufficient for the trustees to purse later-noticed breach claims").

Accordingly, Countrywide's motion for an order limiting the loans at issue on Ambac's breach of contract claims (Mot. Seq. 50) is denied.

F. Motion to Dismiss or, in the alternative, Summary Judgement on Ambac's Fraud Claim (Motion Sequence No. 54)

On October 3, 2018, Countrywide brought an Order to Show Cause to dismiss, or in the alternative, to grant it Summary Judgment to dismiss Ambac's Fraud Claim. The Court heard the arguments on the motion on November 5, 2018.

Countrywide argues that two recent decisions by the First Department created "new law" in its decisions on *MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC,* 165 A.D.3d 108 (1st Dept. 2018), and *Financial Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc.*, 164 A.D.3d 1126 (1st Dept. 2018). Both decisions, issued on September 13, 2018, found that MBIA's and FGIC's request for "compensatory damages" as relief for its fraud claims were "no different from rescissory damages, to which plaintiff is not entitled." Therefore, the fraud claims had to be dismissed. *Financial Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc.*, 164 A.D.3d at 1128. *MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC,* 165 A.D.3d at 114.

Therefore, Countrywide argues that the Ambac cannot recover for fraud damages as they are merely duplicative of a cause of action for breach of contract. *See Financial*

Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc., 164 A.D.3d at 1128; *see also Mañas v. VMS Assoc., LLC,* 53 A.D.3d 451, 454 (1st Dept. 2008).

Ambac vigorously challenges Countrywide's assertion, arguing that Countrywide's has already conceded the fact that Ambac's fraud damages are distinct from breach of contract damages before the New York Court of Appeals. (1) *See Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc, et al.* 31 N.Y.3d 568 (2018).

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1 At oral argument before the Court of Appeals, in fact, it was Countrywide, *not* Ambac which argued that Ambac's fraud and breach of contract claims were distinct. In its argument before the Court of Appeals, Countrywide answered Judge Garcia question in the following manner:

> Judge Garcia: My question, though, is so there is some measure of compensatory damages that wouldn't be tied to the repurchase protocol, nor would it be all of payments, two billion, or whatever they've made under the contract, that would be available to them under the tort claim?
>
> Mr. McLaughlin (Countrywide): The appropriate measure of damages for the tort claim is that which this court has prescribed for decades and decades, which is the out-of-pocket loss standard. That's not what they're going for here.
>
> Judge Garcia: And what would that be here?
>
> Mr. McLaughlin: Here it would be - - - it would be would be damages that are attributable, as this court said in the *Reno* case, like a hundred years ago, that "indemnity for the actual pecuniary loss as a direct result of the wrong." So they have to identify nonconforming loans that breached a specific covenant in a fraud - - -fraudulent - - - in a fraudulent manner, and then they would have to have someone – an expert come in and calculate what the damages are." *Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc, et al.* 31 N.Y.3d 568. (2018), NYSCEF Doc. No.: 1974; Record of the Proceedings at p.24 – 25.

Notably, the Court of Appeals held:

> With respect to the method of damages calculation for ***any claims not subject to the repurchase protocol***, Ambac's request for compensatory damages in the form of all claims payments made to investors must be rejected. - - - Instead, any compensatory damages should be measured only by reference to claims payments made based on nonconforming loans. *Id.* at 581 (emphasis added).

Thus, the Court of Appeals clearly recognized a distinct damage for fraudulent inducement which arose separately from the contract. *See e.g. Mañas v. VMS Assoc., LLC,* 53 A.D.3d 451, 454 (1st Dept. 2008) (finding fraud claims duplicative of breach of contract claims where they sought the same measure of damages as the breach of contract claims).

The Court of Appeals further distinguished between the fraud and breach of contract claims stating:

> The Appellate Division correctly determined that justifiable reliance and loss causation are required elements of a fraudulent inducement claim; that Ambac may only recover damages on its fraudulent inducement claim that flow from nonconforming loans; that the remedy for Ambac's contract claims is limited to the repurchase protocol provided for in the contract's sole remedy provision, and that Ambac is not entitled to attorneys' fees. Id. at 584 – 585.

In holding this way, the Court of Appeals recognized Ambac continued to have two distinct causes of action. The Appellate Division, First Department, decisions in *MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC,* 164 A.D.3d 108 (1st Dept. 2018) and *Financial Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc.*, 164

A.D.3d 1126 (1st Dept. 2018), are distinguishable in that there, the court held the measure of damages, in those cases, was identical for both the fraud and the contract claims.

The Appellate Division, First Department, decisions in *MBIA Insurance Corp. v. Credit Suisse Securities (USA) LLC,* 164 A.D.3d 108 (1st Dept. 2018) and *Financial Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc.*, 164 A.D.3d 1126 (1st Dept. 2018) cannot supersede the decision by the New York Court of Appeals in Ambac. Each decision is based on the facts presented in that case. While the issues may appear to be the same, and the arguments put forward by the parties may be similar, a decision by a court, be it at the trial level, Appellate Division level or the Court of Appeals is always distinguishable by the facts in that particular case.

When appearing before the Court of Appeals, Countrywide decided to distinguish Ambac's fraudulent inducement cause of action from its contract cause of action. Countrywide's goal was to have the Court of Appeals declare that Ambac can only use the repurchase protocol to measure the damages in the contract cases.

Countrywide prevailed:

"Factual questions as to whether the damages it seeks to recover are identical to rescissory damages may not be resolved on this motion to dismiss." *Syncora Guarantee Inc. v. Macquarie Sec. (USA) Inc.*, 164 A.D.3d 1141, 1141 (1st Dep't 2018) *citing Ambac*

Assur. Corp. v. Countrywide Home Loans, Inc., 31 N.Y.3d 569, 577-81 (2018); *Deerfield Communications Corp. v. Chesebrough–Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986). (2)

Since it is a question of fact whether the measure of damages for the fraudulent inducement cause of action will be (1) provable at trial; (2) rescissory in nature or (3) duplicative of the measure of damages for the contract cause of action, the issue is one for the trier of fact to determine at trial.

Having considered Countrywide's remaining arguments, the Court finds them to be without merit. Countrywide's motion to dismiss or, in the alternative, for Summary Judgment to dismiss Countrywide's Fraud claim is denied.

(Please see next page for Conclusion and Orders)

2 In *Syncora*, the Court relied upon the Court of Appeals Decisions in both *Ambac* and *Deerfield Communications Corp. v. Chesebrough–Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986), in holding that, having sufficiently pleaded distinct measures of damages for both the fraud and contract claims, it becomes a question of fact in determining whether the fraud damages were merely duplicative rescissory damages.

III. CONCLUSION

Upon the foregoing, it is

ORDERED that the Countrywide defendants' motion for an order of preclusion barring plaintiffs from using statistical sampling to prove liability or damages for breach of contract (Motion Sequence No. 048) is denied in its entirety; and it is further.

ORDERED that the Countrywide defendants' motion for an order striking Ambac's jury demand as to its first cause of action (Motion Sequence No. 049) is denied in its entirety; and it is further;

ORDERED that the Countrywide defendants' motion for an order determining the loans at issue on plaintiffs' breach of contract claims (Motion Sequence No. 050) is denied in its entirety; and it is further

ORDERED that the motion of defendant Bank of America Corporation for some order severing plaintiffs' contingent-liability claims for trial, and postponing any trial until after a judgment is entered on the primary-liability claims (Motion Sequence No. 051) is denied in its entirety; and it is further

ORDERED that the motion of defendant Bank of America Corporation for an order striking plaintiffs' jury demand for its claims against Bank of American Corporation (Motion Sequence No. 052) is denied in its entirety; and it is further

ORDERED that Countrywide defendants motion to dismiss, or in the alternative for Summary Judgment to dismiss Ambac's Fraud claim (Motion Sequence No. 054) is denied in its entirety.

Dated: December 30, 2018

ENTER:

EILEEN BRANSTEN J.S.C.