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Court of Appeals

STATE OF NEW YORK

ACE SECURITIES CORP., HOME EQUITY LOAN TRUST, SERIES 2006-SL2, by HSBC BANK USA, NATIONAL ASSOCIATION, solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006,

Plaintiff-Appellant,

—against—

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF FINANCIAL GUARANTY INSURERS IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Amicus the Association of Financial Guaranty Insurers ("AFGI") is a trade association whose members are ACA Financial Guaranty Corporation, Ambac Assurance Corporation, American Overseas Reinsurance Company Limited, Assured Guaranty Corp., Assured Guaranty Municipal Corp., CIFG Assurance North America, Inc., Financial Guaranty Insurance Company, MBIA Insurance Corp., Municipal Assurance Corp., National Public Finance Guarantee Corp., Radian Asset Assurance Inc., and Syncora Guarantee. AFGI does not have any parents or subsidiaries.

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The Association of Financial Guaranty Insurers ("AFGI") respectfully submits this amicus brief in support of Plaintiff-Appellant ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2, by HSBC Bank USA, National Association, as Trustee (the "Trustee"). As set forth more fully below, AFGI urges this Court to reverse the decision of the Appellate Division, First Department, dated December 19, 2013, to the extent that it dismissed the Trustee's claims as time-barred based upon the determination that the statute of limitations for breach of the sponsor's contractual cure-or-repurchase obligation accrues at the closing of the transaction and not upon failure to comply with the cure-or-repurchase obligation.

STATEMENT OF INTEREST OF AMICUS CURIAE

AFGI is the national trade association of the leading insurers and reinsurers of municipal bonds and asset-backed securities. AFGI's twelve members are often called "monoline" insurers because their business is singularly focused on financial guaranty and related insurance (*i.e.*, credit, residual-value, and surety insurance).[1] Since its inception in 1971, the financial guaranty insurance

[1] The AFGI member firms are ACA Financial Guaranty Corporation, Ambac Assurance Corporation, American Overseas Reinsurance Company Limited, Assured Guaranty Corp., Assured Guaranty Municipal Corp., CIFG Assurance North America, Inc., Financial Guaranty Insurance Company, MBIA Insurance Corp., Municipal Assurance Corp., National Public Finance Guarantee Corp., Radian Asset Assurance Inc., and Syncora Guarantee.

industry has insured nearly $6 trillion of securities and, by reducing the risk of loss for investors in the covered securities, has helped save over $40 billion in interest costs for the issuers of those securities. Financial guaranty insurers have served an important function in the municipal bond market, providing cost savings and facilitating capital market access for municipal issuers and the communities they serve.

In recent decades, financial guaranty insurers also played a major role in the asset-backed securities market by guaranteeing payments due to investors in asset-backed securities, including residential mortgage-backed securities ("RMBS").[2] In a typical insured RMBS transaction, the insurer enters into an agreement with the sponsor—usually an investment bank or large loan originator—to issue an irrevocable financial guaranty insurance policy for the benefit of certain classes of certificateholders. The policy obligates the insurer to cover amounts due to investors in the insured classes when the cash flows from the underlying collateral—the residential mortgage loans—are insufficient. The insurer's irrevocable obligation continues for the duration of the RMBS

[2] As of February 2008, financial guarantors insured U.S. RMBS and collateralized debt obligations with net outstanding value of $249 billion. *See The State of the Bond Insurance Industry: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 110th Cong. 273 (2008) (Statement of the Association of Financial Guaranty Insurers), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg41182/pdf/CHRG-110hhrg41182.pdf.

transaction, which (like the mortgage loans that collateralize it) is often thirty years or more.

The sponsors of these RMBS transactions induced insurers to issue irrevocable policies by, among other things, making warranties attesting to the quality and characteristics of the loans collateralizing the RMBS trust, and by promising to repurchase any loans that do not comply with the warranties *whenever* a breach is *discovered*. The sponsors made the warranties and accepted the repurchase risk because they had the best access to, and opportunity to evaluate, the loan information at the outset of the transaction. The insurers—who lacked commensurate access and an opportunity to review—proceeded in reliance upon the sponsors' warranties and on the agreement that the insurers' claims payment obligations and the sponsors' repurchase obligations were coterminous, both running for the *life of the transaction*.

This alignment in the respective obligations of the financial guaranty insurers and the transaction sponsors was an essential part of the bargain—and essential to preserving the public policy interests implemented by the competitively-negotiated terms. The financial guaranty insurers made risk assessments and reserve determinations (which impact the entirety of their insurance portfolios) based upon the parties' clear understanding and agreement that the sponsors' repurchase commitment was enforceable for the life of the transactions. Moreover, the sponsors' continuing commitment to repurchase loans that do not comply with representations and warranties allowed financial guaranty insurers to avoid the significant expense of re-underwriting mortgage loans to assess their compliance with the sponsors' warranties until—and only if—a claim payment was required. Accordingly, the sponsors' commitment to a continuing obligation under the repurchase provisions furthered important insurance objectives: it facilitated the insurers' assessment of their risk of loss; preserved the insurers' capital; allocated risk to the party in the best position to evaluate that risk; and deterred the grant of false warranties to secure insurance. The public interest strongly supports the achievement of these objectives to preserve the insurers' ability to continue to act as payors of last resort for the certificateholders.

But these sound objectives may be achieved only *so long as the RMBS transactions function according to their bargained-for contractual terms* and the sound risk allocation principles they embody. And there is the rub. From 2004 through 2007, the sponsors of RMBS transactions widely misrepresented the quality and attributes of the mortgage loans they securitized in breach of their warranties. When those loans defaulted at unprecedented rates, financial guaranty insurers covered resultant losses under their irrevocable insurance policies. In contrast, the sponsors thwarted review of securitized loans for compliance with the warranties the sponsors made, and when non-compliant loans were identified, the sponsors refused to comply with their contractual obligations to cure or repurchase those loans from the transactions.

By barring a trustee or insurer from bringing suit to enforce the sponsors' obligation to repurchase defective loans after six years from the date the warranties were made, contrary to the plain reading of standard terms in the governing agreements, the decision on appeal abrogates the premises upon which financial guaranty insurers agreed to participate in RMBS transactions. If allowed to stand, this decision would upset the principled and bargained-for economic and risk allocation that made RMBS transactions feasible, inequitably impose on those financial guaranty insurers (and uninsured investors) that have not commenced suit within six years of closing the losses the sponsors agreed to and should bear, and impair the availability of financial guaranty insurance for RMBS and other long-term transactions. AFGI therefore submits this amicus brief to raise three considerations for the Court, which are not addressed by the parties:

First, financial guaranty insurers have covered losses that otherwise would have been borne by the investing public with the understanding that their continuing obligations to pay claims as they arise are aligned with and matched by the sponsors' continuing obligations to cure or repurchase loans that fail to comply with representations and warranties as they are uncovered—both for the life of the transaction.

Second, the public policy interest in preserving financial guaranty insurance for RMBS transactions strongly favors the accrual of the statute of limitations on claims to enforce the sponsors' obligations to cure or repurchase defective loans as of their breach of their obligation to do so.

Third, curtailing the enforcement of a continuing obligation imposed by the plain terms of the agreements would have a chilling effect on the provision of financial guaranty insurance for long-dated transactions and on the financial markets more generally.

PRELIMINARY STATEMENT

The Trustee appropriately seeks reversal of a decision that has detrimental consequences extending far beyond the particular transaction at issue. The primary question on this appeal is when a claim starts to accrue under a contract that requires an RMBS sponsor to cure or repurchase loans that do not comply with representations and warranties upon notice or discovery of such failure to comply. The answer to this question affects both RMBS transactions without financial guaranty insurance, such as the ACE 2006-SL2 transaction at issue here, and transactions where AFGI members have issued financial guaranty policies guaranteeing amounts due to investors.

The sponsor's commitment to cure or repurchase loans that do not comply with its warranties is a standard provision in the agreements governing RMBS transactions. Typically, the sponsor gives warranties attesting to the quality and attributes of the mortgage loans that it originates or aggregates and sells to a trust. To induce participation in the transaction, the sponsor agrees to cure or repurchase loans that breach the sponsor's warranties. By its plain terms, this repurchase obligation is not triggered until the sponsor discovers or receives notice that the warranties are false. There is no deadline by which the repurchase obligation must be triggered, if at all, over the standard thirty-year life of such transactions. Failure to comply with the cure or repurchase obligation is a separate and distinct breach.

Nonetheless, the Appellate Division truncated the sponsor's repurchase obligation at less than six years from the closing of the RMBS transaction by characterizing the Trustee's claim as one for breach of the *underlying warranties*, as opposed to breach of the sponsor's *repurchase obligation*. The Appellate Division acknowledged that the Trustee could not sue until the sponsor "discovered or received notice of a breach and the cure period lapsed," *i.e.*, until the cure or repurchase obligation was triggered. *ACE Sec. Corp. v. DB Structured Prods.*, 112 A.D.3d 522, 522 (1st Dep't 2013). But the court went on to hold that the statute of limitations begins to run as of the closing of the transaction, regardless of when or if the sponsor discovers or receives notice of breaches and fails to cure or repurchase. *Id.*

If upheld, the Appellate Division's decision would eviscerate the basic bargain struck in RMBS transactions, leaving a financial guarantor and uninsured investors without recourse if deviations from warranties are not unearthed and suit is not commenced within six years. This is precisely the problem the repurchase obligation was intended to avoid. Further, this rule creates perverse incentives, encouraging sponsors to disregard and conceal defective loans for six years after closing. Both of these adverse consequences directly contravene the insurance principles and law that were the predicate of the financial guaranty insurers' participation in these transactions.

There is a strong public interest in ensuring financial guaranty insurance is available at the most-efficient rates attainable, and that the insurers remain viable and able to provide the contracted coverage. The efficient administration of financial guaranty insurance allows insurers to avoid incurring the significant costs of re-underwriting mortgage loans to assess their compliance with contractual warranties until, and only if, claim payments need be made. By denying the financial guaranty insurers the right to challenge in court the sponsors' refusal to cure or repurchase breaching mortgage loans after six years from closing, the Appellate Division's decision compels insurers to undertake breach reviews within the six-year window, regardless of the deal performance, simply to protect against the statute of limitations expiring. That is an inefficient use of the insurers' capital. The insurers issued *irrevocable* policies with the understanding and intent that they would have the right to make such breach determinations if and when necessary over the life of the deal. The insurers made risk and reserve determinations for their *entire portfolios* based on the agreed upon alignment of the sponsors' cure or repurchase obligations and the insurers' payment obligations. The Appellate Division's *post hoc* release of the sponsors' obligations fundamentally increases the insurers' risk of loss, not only on the insured RMBS transactions, but across their portfolios.

By upsetting insurers' settled expectations about the availability of sponsors' cure or repurchase obligations for the life of the transaction, the Appellate Division decision creates coverage risk regarding existing transactions for which lawsuits were not filed within six years of closing, and makes it impractical to provide financial guaranty insurance for similar long-term transactions in the future.

RELEVANT FACTS

A. Financial Guaranty Insurers Play a Vital Role in Protecting Investors

Financial guaranty insurance policies protect investors in the securities markets. In a typical RMBS transaction, the sponsor acquires a pool of loans, which it transfers to a securitization trust. The trust then issues certificates to investors that are paid from the cashflows of the securitized mortgage loans. Without financial guaranty insurance, investors alone bear the risk of borrowers failing to make their mortgage payments. With financial guaranty insurance, investors have a guaranteed return in case the trust experiences a shortfall, *even if the sponsor's representations and warranties about the loans prove false*.

The financial guaranty insurance provided by AFGI members confers substantial benefits on investors and sponsors alike. By providing credit enhancement for insured securities, it reduces borrowing costs, improves market access, and facilitates deal execution. *See generally* Robert D. Aicher *et al.*, *Credit Enhancements: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 Bus. L.J. 897, 930-31 (2004) (describing the marketplace "crav[ing]" for financial guarantee products). "Financial guaranty insurance products are viewed as attractive because they enhance the desirability of certain financial transactions by reducing risk." New Appleman N.Y. Ins. L. § 31.02 (2d ed. rev. 2014). Moreover, like all forms of insurance, financial guaranty insurance provides a societal benefit by spreading risk. *See, e.g.*, *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) ("The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."); 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959) ("It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it."). Investors benefit not only by having a guaranteed return, but also from the ongoing transaction surveillance and remediation performed by financial guaranty insurers. Financial guaranty insurers perform these useful functions, which improve transaction performance, because they bear the ultimate risk of loss from defaults in the securitized mortgage loans.

Financial guaranty insurance has several unusual features that are relevant to AFGI's interest in this appeal. First, the policy beneficiaries (the investors) are different from the party procuring the insurance and providing warranties to the insurer (the sponsor). Second, financial guaranty insurance policies are irrevocable, meaning that a material breach of the sponsor's warranties does not void coverage for the beneficiaries. *See* N.Y. Ins. Law § 6901 (defining "financial guaranty insurance"); Aicher, *supra*, at 950 (noting that monolines have adhered "scrupulously" to their obligation to pay claims regardless of the reason for the shortfall, even where other types of insurers have refused to pay). Thus, while most insurers can protect themselves from false representations by denying coverage when claims arise, financial guaranty insurers cannot do the same.

B. A Functional Financial Guaranty Market Requires an Alignment of the Obligations of the Insurer and the Obligor

Financial guaranty insurers issued policies lasting for the lives of RMBS trusts—often thirty years or more because of the long-term nature of the mortgage loans being securitized. Given the duration of their irrevocable obligation to pay claims whenever they should arise, it was essential to the monolines to secure a corresponding obligation from transaction sponsors to cure or repurchase loans that do not comply with representations and warranties whenever they are uncovered.[3] The sponsor's promise to cure or repurchase such defective loans promptly *upon discovery or notice* was fundamental to a financial guaranty insurer's assessment of the risk of insuring an RMBS transaction.

[3] The party discovering warranty breaches must typically notify the other parties, including the sponsor.

Insurers priced their policies and determined their reserves based on the assumption that this repurchase obligation would be enforced for the life of the RMBS transaction.

Indeed, the cure or repurchase obligation was an essential component of the parties' bargain that afforded protections incremental to those provided by the warranties alone. That is, while contractual representations and warranties are crucial to an insurer's assessment of risk,[4] these assurances alone were not sufficient in the case of financial guaranty insurance for RMBS. First, financial guaranty insurers cannot exercise the form of self-help available to most insurers when a policy is procured through false warranties: denial of the insured's claim.[5] Second, it would be commercially unreasonable for an insurer to determine the accuracy of dozens of warranties provided about the thousands of mortgage loans included in a typical RMBS transaction unless and until there are claims made on its policy. Requiring the insurer to do so, either before closing or after closing when a transaction is performing, would have rendered financial guaranty

[4] *See* Emrick Fischer & Peter Nash Swisher, *Principles of Insurance Law*, ch. 3 (2d ed. 1994) (recognizing that the insurance industry developed the concept of representations and warranties "in order to control the kind and degree of risk to be insured.").

[5] Additionally, New York Insurance Law gives insurers the right to avoid an insurance contract procured through a material misrepresentation or to "defeat recovery thereunder" when a breach of warranty materially increases the risk of loss. *See* N.Y. Ins. Law §§ 3105, 3106. Insurers' common law fraud and breach of contract claims are informed by these insurance law concepts. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 412 (1st Dep't 2013).

insurance prohibitively expensive for RMBS transactions. The sponsors accepted the risk of loss with respect to the veracity of the warranted loan attributes because they were best situated to test and control for those variables. That allocation of risk was consistent with the parties' and the public's interest in minimizing transaction costs. But the allocation was dependent on the financial guaranty insurer having the ability to assess whether a warranty was breached when the issue became ripe for the financial guaranty insurer, *i.e.*, at the time a claim is made on the insurance policy. Given the thirty-plus year duration of these financial guaranty policies, and the structural protections built into the deals to allow for and absorb certain levels of losses (*e.g.*, overcollateralization and excess spread), the first claim on a policy might not be made until many years after closing, long after the six-year anniversary of the closing of the transaction.

The RMBS market developed a solution for the inability of warranties alone to provide adequate protection: the sponsor's cure or repurchase obligation. This obligation is triggered *only* upon the sponsor's discovery of warranty breaches (which requires the sponsor to provide notice to the other parties) or the sponsor's receipt of notice of breaches from another party. After discovery or notice that a loan does not comply with representations and warranties, the sponsor generally is allowed a "cure period" to rectify the breach. For example, if the defect arose from a failure to record title documents, recordation may cure the defect. If the defect remains uncured at the end of the cure period, however, the sponsor is obliged to repurchase the loan. A sponsor's acceptance of this obligation both protected the insurer against false warranties and prevented the cost of insurance from being prohibitive, which served the interest of transaction sponsors. Indeed, the cure or repurchase obligation avoided litigation over warranty breaches by requiring sponsors to address them through a cure or repurchase mechanism.

Failing to enforce sponsors' cure or repurchase obligations would upset the agreed risk allocation that made financial guaranty insurance feasible where it otherwise would not have been. Financial guaranty insurers conditioned their participation in RMBS transactions on the availability of this repurchase obligation. *See Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 265 (1937) (an insurer "is free to choose the risks which it will assume"); Edwin W. Patterson, *Warranties in Insurance Law*, 34 Colum. L. Rev. 595, 599 (1934) ("The conditions of an insurer's promise are thus highly important; to ignore them entirely would mean inevitable ruin for the insurance enterprise."). Limiting the cure or repurchase obligation to the first six years of the transaction, contrary to the terms of the governing contracts, would force a financial guaranty insurer to bear the risk of the defective loans for most of the duration of the financial guaranty insurance policy.

Even under normal market conditions, such *post hoc* limitation would be deleterious to the insurers' risk and reserve assessments, which were premised on the veracity of the sponsors' warranties and the expectation that the aberrant loans that circumvented the sponsors' controls would be repurchased. Where, as here, the sponsors pervasively breached their warranties with respect to the vast majority of the loans in their portfolios, the release of the sponsors' liability after just six years imposes a dramatic and inequitable reallocation of the loss to the financial guarantors and the investing public they represent.

The decision on appeal upsets the parties' agreements and expectations long after the contracts were signed and the irrevocable policies issued, leaving financial guaranty insurers (and uninsured investors) in a weaker position than what they bargained for. The allocation of risk that forms the basis of an RMBS transaction was dependent on the financial guaranty insurer's ability to assess whether a warranty was breached when the issue became ripe, *i.e.*, at the time a claim is made on the insurance policy. It would not have made economic or practical sense for the parties to an RMBS transaction to have limited the monoline's right to establish warranty breaches to only the first six years of a transaction, for two reasons.

First, given the thirty-plus year duration of financial guaranty policies, as well as additional credit enhancement built into the transactions (*e.g.*, overcollateralization and excess spread) which absorb certain levels of loss before a financial guarantor must pay a claim, the first claim on the policy might not be made until many years after closing. Second, a mortgage loan that breaches a representation and warranty may not cause an actual loss to the RMBS trust until years after the closing. Take, for example, a borrower who simultaneously takes out mortgages on several investment properties, falsely representing on each application that he intends to use the property as a primary residence. The borrower may be able to successfully juggle the multiple mortgages for years until something upsets the balance and causes a string of defaults. Despite the fact that each mortgage loan was materially riskier than the borrower represented because the borrower did not in fact live in the home, the breach may not cause actual loss immediately. A financial guaranty insurer would have no reason to investigate such a loan until it had a basis to believe the loan had a defect; the sponsor, on the other hand, is in possession of the loan file and may also have been involved in the origination and review of the loan, putting the sponsor in a better position to identify the breach early on.

C. Sponsors' Refusal to Honor Cure or Repurchase Obligations Has Had a Dire Impact on Financial Guaranty Insurers

Financial guaranty insurers collectively have made, and will continue to make, as required, billions of dollars of claim payments to investors in RMBS transactions in which there were rampant breaches of the sponsors' representations and warranties. Like DB Structured Products, the Defendant-Respondent here, many of these sponsors played a leading role in causing the mortgage crisis of 2008 and the resulting "Great Recession" that required hundreds of billions of dollars in government bailouts and led to millions of job losses. In these dire circumstances, the financial guaranty industry has continued to pay claims to investors, despite the enormous strains such payments have placed on many industry participants. A number of monolines have faced financial restructurings or statutory rehabilitation in order to preserve claims-paying resources. Recoveries from sponsors, whether through the effective functioning of the cure or repurchase provisions or litigation to enforce them, will help add to insurers' claims-paying resources because, under the governing contracts, the repurchase price paid by the sponsors for defective loans reimburses insurers for claims paid.

D. The Decision on Appeal Disincentivizes the Issuance of Insurance for, and Impedes the Recovery of, the Mortgage Market

The securitization of residential mortgage loans is essential to the recovery of the residential mortgage market. Mortgage banking institutions simply do not have the capacity to make—and maintain on their balance sheets—the volume of mortgage loans needed to support the United States real estate market, due to capital requirements that attach to their loan portfolios. The securitization market is one of the tools available to facilitate the market recovery by allowing banks to sell off part of their exposure through securitization.[6] But reasonable financial guaranty insurers and investors will not participate in securitization if they cannot rely on the sponsors' plain and continuing commitments, including the obligation to cure or repurchase non-conforming loans. Without the vital participation of the financial guaranty insurers and their beneficiaries, the *appropriate* financing of residential properties will be unduly constrained for a significant percentage of the public.

[6] *See, e.g.*, Financial Crisis Inquiry Commission, The Financial Crisis Report 100, *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (securitization enables banks to reduce capital they are required to hold for mortgages).

ARGUMENT

I. A Claim for Breach of the Repurchase Obligation Accrues Upon the Sponsor's Failure to Cure or Repurchase

As the Trustee argues, RMBS contracts are not limited to representations and warranties by the sponsor made at closing. They also impose a continuing covenant by the sponsor to cure or repurchase any loan not conforming to the sponsor's representations and warranties. This "cure or repurchase obligation" is distinct from the sponsor's representations and warranties, and is triggered only by discovery or notice of warranty breaches, whenever that occurs. Thus, in *Bulova Watch Co. Inc. v. Celotex Corp.*, where a roofing material supplier promised both that the materials had been properly applied at the time of installation and that it would make any repairs necessary in the future, the Court of Appeals held there were two covenants—one addressed "only with those [labors and materials] provided at the time of installation," and the other to "furnish whatever labor and materials [were] required for future repairs." 46 N.Y.2d 606, 610-11 (1979). The latter covenant to provide materials to make repairs as required gave rise to a claim "each time a breach of the obligation to repair the bonded roof occurred." So too, here, RMBS sponsors not only warranted to the quality and attributes of the loans at the time of closing, but also agreed that, if any defective loans were securitized despite the warranty, they would cure or repurchase non-conforming loans throughout the life of the transactions.

The Trustee's claim for breach of this repurchase obligation, in turn, accrues only when the sponsor refuses to cure or repurchase a loan within 90 days of its discovery or notice of a breach. That is, the sponsor's failure to cure or repurchase a non-conforming loan is a condition precedent to any claim for breach of the cure or repurchase obligation. *See John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544, 550 (1979) (where a contractual right is subject to a condition, "the obligation . . . arises and the cause of action accrues only when the condition has been fulfilled"). And because the cure or repurchase obligation is a continuing obligation that requires the sponsor to repurchase or cure any non-conforming loan upon discovery or notice of warranty breaches, a claim for breach accrues "each time a breach of the obligation . . . occur[s]." *Bulova*, 46 N.Y.2d at 611; *see generally* Br. of Plaintiff-Appellant at 22-25; Reply Br. of Plaintiff-Appellant at 4-11.

The Appellate Division recognized that the sponsor's failure to cure or repurchase a non-conforming loan within the specified timeframe was "a condition precedent to commencing suit," yet, inconsistently, failed to recognize that the cause of action therefore could not accrue until that condition precedent had been fulfilled. *See ACE Sec. Corp.*, 112 A.D.3d at 523. As a result, its decision not only ignored the longstanding rule that a cause of action for breach of a contractual obligation occurs only upon satisfaction of all conditions precedent, but also upended the bargain underlying an RMBS transaction.

II. Public Policy Favors Enforcing the Bargained-For Risk Allocation Over the Life of the Transaction

In interpreting the RMBS contracts at issue here, the Court should consider the public policy implications of its decision. *See, e.g.*, 5-24 Corbin on Contracts § 24.25 ("[P]ublic contracts and other contracts by which the public interest is affected should be interpreted in the manner most favorable to the public"). The interpretation adopted by the Appellate Division not only contradicts the plain language of the agreements and the expectations of the contracting parties, but also would have dire consequences for the availability of financial guaranty insurance for RMBS and other transactions of similar duration.

Financial guaranty policies benefit the investing public by protecting against market uncertainties and, more recently, rampant misconduct by transaction sponsors. Insurers, in turn, rely upon enforcement of sponsors' promises to cure or repurchase defective loans. Without the knowledge that they can structure and enforce repurchase obligations of this nature, financial guaranty insurers will be hesitant to issue policies for similar long-term transactions in the future. The unavailability of financial guaranty insurance would harm not only investors, but also the transaction sponsors that obtain this insurance to facilitate their transactions, and the economy as a whole, which benefits from a more liquid residential mortgage market.

Finally, contrary to Defendant-Respondent's alarmist predictions, reversing the Appellate Division's decision will not open the floodgates of litigation. On the contrary, the decision impacts only those actions not commenced within six years of closing. The true risk lies in permitting the Appellate Division's decision to stand. If investors and insurers cannot rely upon a bargained-for contractual obligation, which provides an out-of-court procedure for the good-faith resolution of warranty breaches, they will be forced prematurely into court, fearful that their right to require loan repurchases will be lost forever if they do not sue within six years of closing, even if the transaction is performing well. The Appellate Division's decision frustrates the abilities of parties to structure their contracts to include a continuing obligation to abide by a cure or repurchase provisions of the governing agreements that, if followed, would eliminate the need for litigation.

CONCLUSION

For the foregoing reasons, AFGI joins with Plaintiff-Respondent in respectfully requesting this Court reverse the decision of the Appellate Division and hold that a claim for breach of an RMBS cure or repurchase obligation starts to accrue upon the sponsor's failure to cure or repurchase loans that do not comply with the sponsors' representations and warranties.

Dated: March 12, 2015
New York, New York

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