APL-2014-00156
New York County Clerk's Index No. 650980/12

Court of Appeals

of the

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 OF NEW YORK LAW PROFESSORS AS *AMICI CURIAE*

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Date Completed: March 13, 2015

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

We are law professors at American Bar Association-accredited law schools in New York State who teach contract law, New York Civil Procedure, or related courses. Pursuant to Rule 500.23(a)(4)(iii), we submit this brief because we expect it to be "of assistance to the Court." None of us has a personal or direct financial stake in the outcome of this litigation.[1] Our teaching and scholarship concerns contract law or New York Civil Procedure, and we have a collective professional interest in the sound and consistent development of New York law. This case presents an opportunity for the Court to render a decision that will reinforce New York's long history and central animating goals of providing sophisticated parties certainty, predictability, and finality under the contract and procedural law of this state. We write here to emphasize this case's importance to the fabric of New York's law of procedure and contract upon which so many in varied professional communities rely.

The scholars joining this brief are:[2]

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[1] Although Professors Leib and Connors are being compensated at their typical rate by Nomura Credit & Capital, Inc. and UBS AG for the time spent preparing the proposed *amicus curiae* brief, the opinions and conclusions expressed in the brief represent their own independent views and the views of the other law professors joining the brief. They do not represent the views of the institutions at which they teach.

[2] Institutions are provided here for identification purposes only.

- Miriam R. Albert, Maurice A. Deane School of Law at Hofstra University
- Patrick M. Connors, Albany Law School
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BACKGROUND

The transactions at issue in this litigation are sales of interests in pooled residential mortgages as security instruments. In such transactions, a sponsor—here, DB Structured Products, Inc. ("Sponsor")—bundles a set of residential mortgage loans and sells them through an intermediary to a trust—here, ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2, which then issues securities that entitle investors to cash flows generated by the loans in the trust. The investment is generally known as a Residential Mortgage-Backed Security ("RMBS") and, in this case, the relevant RMBS is governed by a Mortgage Loan Purchase Agreement ("MLPA") and a Pooling and Servicing Agreement ("PSA") (collectively, "Agreements"), both entered into under New York law.

The relevant Agreements are contracts in which the Sponsor made certain representations and warranties about the nature of the underlying mortgage loans in

the RMBS trust. In addition, the Agreements specify and limit the remedies available to the trustee, on behalf of investors, if it turns out that the representations or warranties about the underlying loans are false or if the documentation for the underlying loans is defective. The remedial provisions in both the MLPA (Section 7) and the PSA (Section 2.03) create a dispute resolution framework under which the "sole remedy" for breaches of representations and warranties and/or defective documentation is that the Sponsor will cure, substitute, or repurchase the individual loans affected. This sole remedy is intended to be in lieu of rescission or expectation damages. Moreover, the remedial clauses do not guarantee the future performance of the underlying loans or protect investors against defaults of those loans.

At issue in this case is whether the dispute resolution framework is a *separate undertaking* under New York law, such that the Sponsor's failure to comply with the Agreements' remedial provisions creates an additional cause of action arising on the subsequent date that the Sponsor refuses to cure, substitute, or repurchase individual loans. Otherwise, the representations, warranties, and the documentation for the underlying loans are defective, if at all, on the date the contract is entered. Under this scenario, any cause of action based on defective representations, warranties, or documentation accrues and the statute of limitations begins to run when the contract is made, and not from the date of discovery, the

date of demand, or the ultimate failure to cure, substitute, or repurchase. *See generally W.90th Owners Corp. v. Schlechter*, 137 A.D.2d 456, 458 (1st Dep't 1988) (explaining that if a "representation . . . was false when made . . . the breach occur[s] at the time of the execution of the contract . . . [and] the cause of action accrues and the [s]tatute of [l]imitations begins to run [when the representation is made]"); *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993) (holding that "'[k]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the [s]tatute of [l]imitations running in [a] contract [action]'") (first, fourth and fifth alterations in original) (citation omitted).

ARGUMENT

I. New York Contract Law Has a Motivating Policy Preferring Certainty, Predictability, and Finality—and the Law Governing the Statute of Limitations Contributes to These Objectives.

A. New York's Contract Law Design

Contract law scholars have a wide variety of views about what might constitute an optimal contract law regime. Some favor formalist rules of formation and interpretation that maximize predictability for contracting parties. Others prefer courts to apply more contextual standards that welcome implied terms and more pragmatic approaches to formation and interpretation. This is sometimes known among contract scholars as the "text/context" debate. *See generally* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23 (2014); Alan

Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010). As a group, the contract law scholars submitting this brief fall at various junctures along the "text/context" spectrum in their normative work about the best contract law design. However, we all agree about one thing: New York's contract law prefers certainty, predictability, and finality for commercial parties—and empirical evidence and doctrinal analysis supports those objectives as animating policy concerns in New York courts. Whatever else scholars disagree about with respect to what the law of contract should be, they agree about what New York contract law is—and the history of New York's effort to induce commercial parties to use its contract law. *See, e.g., IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A.*, 20 N.Y.3d 310, 315-16 (2012) (addressing New York State legislation designed to "promote and preserve New York's status as a commercial center and to maintain predictability for the parties [to contracts]" and "the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law"); *see generally* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009); WILLIAM E. NELSON, THE LEGALIST

REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980, at 80-92 (2001).

Not to put too fine a point on it, New York is widely known among commentators, judges, lawyers, and the sophisticated parties they represent to "follow the traditional Willistonian approach to interpretation, which embodies a hard parol evidence rule, retains the plain meaning rule, gives presumptively conclusive effect to merger clauses, and, in general, permits the resolution of many interpretation disputes by summary judgment." Schwartz & Scott, *supra*, at 932. *See also W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) (in granting summary judgment dismissing the complaint, the Court noted that "[a] familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing"). One commentator put it this way after studying New York courts' approaches to contract law in areas as varied as formation doctrines, validity doctrines, statute of frauds doctrine, and dispute resolution doctrines related to arbitration, settlement, the jury, and class action waivers:

> New York's contract jurisprudence is formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage. The job of the [New York] courts is not to intrude into the contractual relationship but rather to enforce the deal the

> parties actually struck. To this end New York courts place a high value on *clarity* and *predictability*, especially in commercial contracts: . . . [contracts are enforced as written, not reformed or rejected] to satisfy ideas of fairness or equity.

Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1522 (2010) (emphasis added).

This formalist approach is sometimes credited as the reason large numbers of sophisticated parties and their lawyers choose New York law in their choice-of-law clauses: "[t]he revealed preferences of sophisticated parties [by choosing New York law to govern their contracts] support arguments . . . that formalistic rules offer superior value for the interpretation and enforcement of commercial contracts." *Id.* at 1475; *see also* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 508-09 (2004) (highlighting how parties use choice-of-law to opt into formalism). In short, sophisticated parties seem to be drawn to select New York contract law to govern their agreements, knowing and preferring New York's generally formalistic approach to developing its contract law. *See IRB-Brasil Resseguros, S.A.*, 20 N.Y.3d at 315-16. Even if there are other possible explanations for why sophisticated contracting parties choose New York law, New York is independently and self-consciously committed to a formalistic regime for contracts among sophisticated parties.

B. The Statute of Limitations Under New York Law

The statute of limitations promotes objectives of certainty, predictability, and finality for parties who enter into a contract. *See Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). As such, given New York's commitment to developing a contract law that pursues similar objectives, New York courts should prefer applications of statute of limitations rules in contract disputes that will tend, on balance, to allow parties to plan their affairs with certainty, predictability, and finality.

As a general matter, statutes of limitations exist to protect parties against claims where time has eroded access to probative evidence, *see generally Toussie v. United States*, 397 U.S. 112, 114-115 (1970); *Order of Railroad Telegraphers v. R. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (the statute of limitations is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950); Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitations*, 54 U. TORONTO L.J. 129 (2004); or after the passage of time unduly imposes on the courts, *see Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (the

statute of limitations protects the courts by relieving "the burden of trying stale claims when a plaintiff has slept on his rights").

Although these policy concerns almost never tell us what the optimal time period would be for designing a statute of limitations for a class of claims in practice, New York's commitments to formalistic contract law and providing repose to human affairs suggest a thumb on the scales in favor of applications of statutes of limitations that contribute to the certainty, predictability, and finality of commercial transactions among parties under New York law. *See John J. Kassner & Co., Inc. v. City of New York*, 46 N.Y.2d 544, 550 (1979) ("Although the [s]tatute of [l]imitations is generally viewed as a personal defense 'to afford protection to defendants against defending stale claims,' it also expresses a societal interest or public policy 'of giving repose to human affairs.'") (citation omitted). Indeed, in New York, "[b]ecause of the combined private and public interests involved [in applying the statute of limitations], individual parties are not entirely free to waive or modify the statutory defense." *Id.* Furthermore, New York courts have been strict in enforcing a public policy against allowing parties to extend the statute of limitations by contract. *See, e.g., Bayridge Air Rights, Inc. v. Blitman Constr. Corp.*, 80 N.Y.2d 777, 780 (1992) (emphasizing that New York law disfavors "plac[ing] courts in the position of construing loosely drafted extensions" of the statute of limitations); *Lehman XS Trust, Series 2006–4N ex rel. U.S. Bank*

Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc., 991 F.Supp.2d 472, 478 (S.D.N.Y. 2014) ("[P]arties may not contractually adopt an accrual provision that effectively extends the statute of limitations before any claims have accrued."); DAVID D. SIEGEL, NEW YORK PRACTICE § 39 (5th ed. 2011) ("An agreement to lengthen the statute of limitations [for breach of contract] is invalid if made before the cause of action accrues . . . .").

There is a neat correspondence between New York's contract law goals and the goals traditionally attributed to statute of limitations law: predictability for parties to order their affairs. Indeed, in *Ely-Cruikshank Co.*, this Court concluded that its "own precedents and the policy considerations relating to the Statute of Limitations" establish a rule under which "'[k]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the [s]tatute of [l]imitations running in [a] contract [action].'" 81 N.Y.2d at 403 (citation omitted).

The discussion above highlights that substantive and procedural contract law rules are informed by New York's policy in favor of predictability and against private alterations of the statute of limitations before accrual of a cause of action. These background principles help reinforce the correct reading of the New York cases and statutes at issue in the current litigation, orienting them towards certainty, predictability, and finality.

II. New York Develops Clear and Precise Rules for How To Approach the Statute of Limitations for Breach of Contract Actions.

A. Summary Rule and Application

New York courts have not had many opportunities to limn the contours of the state's statute of limitations for contract claims. The relevant statutes provide for a six-year or four-year timeframe in which plaintiffs may commence actions for breach of contract, CPLR 213(2); N.Y. U.C.C. LAW § 2-725. Furthermore, the CPLR provides that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete." CPLR 206(a).

Reading these statutes together with the few relevant cases points to a reasonably clear rule that the Court can apply in this case: When a contract provides representations and warranties as to existing facts at the time of entry into the contract, the statute of limitations for breaches of such representations and warranties runs from the date of entry into the agreement because the representations and warranties are either true or false – i.e., breached or not breached – on the day the agreement is made. *See W.90th Owners Corp.*, 137 A.D.2d at 458 (holding that since the relevant representation "was false when made," the breach occurred and the statute of limitations began to run at the time of the entry of the contract). In such cases, CPLR 206(a) applies as written because the statute of limitations runs from the date of entry into the contract,

when the representations or warranties are breached and the right to assert a breach and demand a cure arises. *See Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 771 (2012) ("[T]he statute of limitations in these cases was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand.").

Sometimes, however, New York law finds *separate undertakings* where an obligation is not breached until some future date. Examples include special contracts to pay valid claims, as in some insurance or reinsurance contracts, and independent contracts to guarantee future performance of some good or service. In these classes of contracts, it is easy to see why demand is not merely part of a remedial process but is instead a condition precedent to having a valid claim. In such contracts, no claim for breach arises (and thus no statute of limitations is yet triggered) until after demand is made and refused. These are what New York law would identify as *separate*, *distinct*, or *express* undertakings to guarantee or indemnify.

In this appeal, the Agreements are of the first type. The central purpose of the Agreements is the sale of the RMBS with certain representations and warranties about the underlying loans on the day the parties entered into the Agreements. The remedial clauses therein address how the Sponsor is to handle alleged breaches of those representations and warranties and any defective

documentation in the loans on the day they are sold. In other words, those remedial clauses evidence only the agreement as to how the *underlying* breaches of representations and warranties, or defective documentation, will be remedied. They do not convert the Agreements into a promise to pay upon a future claim, nor are they separate contracts or undertakings that guarantee the performance of the mortgage loans in the RMBS trust into the future. Instead, the remedial clauses are expressly premised on predicate breaches of representations and warranties that occurred, if ever, on the date the contract was entered and thus when the statute of limitations on any potential claim must have been triggered.

B. Relevant Caselaw

Bulova Watch Co. v. Celotex Corp., 46 N.Y.2d 606 (1979), contains one of this Court's most informative discussions of statute of limitations rules under New York contract law. In *Bulova*, the Court considered a case in which the seller of roofing materials included "20-Year Guaranty Bond[s]" which "*expressly guaranteed* that [the seller] would 'at its own expense make any repairs . . . that *may become necessary to maintain said Roof*' . . . [and] [i]n the event this obligation was not performed after due notice by [the buyer], the instruments imposed liability on both [the seller] and its surety." 46 N.Y.2d at 608-09 (emphasis added). The central issue in the case was whether, notwithstanding that any claim for breach of implied warranty of fitness of the roofing materials arose at

the time of the sale, the express 20-year repair guarantee created a separate obligation so that a new cause of action arose upon each breach of that undertaking.

Ultimately, the Court held that the guaranty bonds "embod[ied] an agreement distinct from the contract to supply roofing materials." *Id.* at 610. Focusing on the express and distinct guarantee that was reinforced with a surety, *id.* at 611, the Court allowed the bonds—and the failure by the seller to repair under the bond's guarantee—to trigger separate breaches for statute of limitations purposes. The period of limitations was held not to run from the date of sale or delivery, but from the failure to fulfill the repair obligations under the separate Guarantee Bonds. This holding was directly contrasted with the plaintiff's general "warranty of fitness" theory in its suit: since *that* warranty was essentially true or false on the day of the sale of the roofing materials, any claim for breach of that warranty arose at the time of the sale and became time-barred after six years.[3] *Id.* at 610. Not so for the separate promise to guarantee repairs as "*may become necessary to maintain said Roof* . . . in a water-tight condition" for twenty years,

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[3] The U.C.C.'s current four-year statute of limitations on claims for breach of a contract for sale was not applicable to the sale of roofing material in *Bulova* because the contract was entered into in 1953, prior to the U.C.C.'s adoption by New York in 1964. *See Bulova*, 46 N.Y.2d at 610.

which clearly contemplates a future obligation to ensure the performance of the roof. *Id.* at 609 (emphasis added).

In this respect, *Bulova* is consistent with a case decided by this Court two years earlier, which similarly concluded that the "defendant's guarantee was an undertaking separate from the sale[] . . . itself." *See Am. Trading Co. v. Fish*, 42 N.Y.2d 20, 27 (1977). The formulation in *American Trading* is slightly different from *Bulova,* but the basic point is similar: when a remedial clause attempts to guarantee something about an underlying good or service, a separate claim will only run from the breach of that guarantee if the plaintiff can show that the guarantee was either express in a separate or distinct contract or was a separate undertaking.[4] New York's policy favoring certainty, predictability, and finality for

[4] One might analogize the distinction between an ordinary warranty on the one hand (with or without a remedial process built into the contract for breaches of such a warranty) and an express guarantee of future performance, on the other, by looking to the U.C.C. context. There, New York courts distinguish actions based on ordinary breaches of warranty, which are covered by a four-year statute of limitations running from the date of delivery, N.Y. U.C.C. LAW § 2-725(1), from claims based on express guarantees of *future performance*, which are treated as arising on a separate date, i.e., the future date of breaches of those express and separate guarantees, N.Y. U.C.C. LAW § 2-725(2). *See, e.g., Imperia v. Marvin Windows of New York*, 297 A.D.2d 621 (2d Dep't 2002). In the case before the Court here, the Sponsor never made an explicit guarantee about the future performance of the mortgage loans in the RMBS trust (triggering distinct breaches of such a guarantee in the future), just a set of warranties about the state of the loans at the time of contracting.

parties in its contract law is in harmony with this clear statement principle that structures the statute of limitations.

The decision in *Continental Casualty Co. v. Stronghold Insurance Co.*, 77 F.3d 16 (2d Cir. 1996)—although not necessarily binding on New York state courts—is instructive as it relies on several pronouncements from this Court in reaching its conclusion. Insurance and reinsurance contracts that contain conditions precedent to the liability of the insurer or reinsurer (such as filing proof of loss documents or other forms of notice) are at their core promises to pay claims or to indemnify upon certain conditions that are satisfied in the future. Therefore, breaches cannot occur—and the statute of limitations cannot run—until after the insurer or reinsurer refuses to pay on a valid claim or demand once those conditions are met.[5] The court's holding in *Continental Casualty* helps to explain

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[5] *Hahn*, 18 N.Y.3d at 772 n. 5, in a footnote attempting to respond to the dissent in that case, seems to acknowledge the validity of *Continental Casualty* as an interpretation of New York contract and statute of limitations law. But the footnote emphasizes the need for "time to investigate and pay . . . claim[s]," *id.* (citation omitted), to explain why breaches of insurance and reinsurance contracts trigger a limitations period only after the refusal of the insurer or reinsurer to pay claims. This isn't the clearest way to characterize the application of the rule in *Continental Casualty*: the reason *Continental Casualty* gets New York law right is because of the type of undertaking that was breached, not because breaches of such undertakings require time for investigation and payment *per se*. *Hahn* still reaches the right result, however, because the claims were not based in a separate undertaking or express guarantee, as New York law requires under *Bulova* and *American Trading Co.* Therefore, the statute of limitations there ran from when demand could have been made, not from when it was made and refused.

the rule that in contracts when the separate undertaking is to, for example, repair, guarantee, indemnify, or pay claims upon a valid demand or proof of loss, the claim arises upon the failure to perform after the demand. Since the promise in those contexts is the promise to perform only after a demand in the future, the breach of contract claim can only arise at the time when the right of the promisee ripens: after demand and refusal by the promisor.

We apply these rules of New York contract and statute of limitations law to the RMBS Agreements below, in light of New York's policy favoring certainty, predictability, and finality in commercial contractual relationships governed by New York law.

III. The Cure, Substitute, or Repurchase Remedial Provisions in the Agreements Are Not Express Guarantees of Future Performance or "Separate Undertakings" That Give Rise to Separate Claims Under New York Law.

In this case, the Agreements effectuate the sale of the RMBS loans to the trustee for the benefit of investors. The Agreements contain remedial provisions for, among other things, breaches of representations and warranties made as of the date of the sale of the loans. But since these remedial provisions are not express guarantees of future performance of the underlying loans or separate undertakings under New York law, any claim based on the predicate representations and warranties arises on the date the loans are sold and is time-barred after six years. CPLR 213(2); CPLR 206(a). Stated otherwise, because any defect in the

representations, warranties, or documentation arose on the date of the Agreements, any breach of contract action based on predicate representations, warranties, or documentation—as here—is barred after six years from entry into the Agreements.

The Agreements detail the Sponsor's representations and warranties. The Agreements also direct exclusively how the Sponsor will remedy breaches of those representations and warranties. These remedial provisions specify how to make demands upon the Sponsor and limit the forms of remediation delineated in the Agreements as the "sole remedy" available. Those provisions are not, under *Bulova*, express guarantees of future performance or distinct contracts that embody separate and distinct obligations, giving rise to separate breaches. Indeed, the remedial obligations are tied directly to defaults in the representations and warranties or in the relevant documentation on the date the Agreements are entered and are not free-standing obligations, express guarantees of future performance, or separate undertakings. There is nowhere in the Agreements, as there was in the relevant agreements in *Bulova*, any independent guarantee about the future performance of the underlying product, i.e., the mortgage loans in the RMBS trust.

Even the Complaint that commenced this lawsuit is clear: although it speaks of the "failure to repurchase loans" as the relevant breach of contract at the outset, Complaint at p.1, the remainder and the gravamen of the Complaint alleges breaches of the representations and warranties, *see id.* at p.7 (highlighting the

relevant representations and warranties that were purportedly breached); *id.* at p.8-19 (emphasizing the relevant breaches as breaches of representations and warranties). Indeed, the Complaint focuses on the Sponsor's failure to repurchase only when specifying its preferred remedy of specific performance from the sole remedy clauses, *see id.* at 19-20, reinforcing the remedial clauses' role in the Agreements as remedies for breaches of representations and warranties, rather than express guarantees or separate undertakings. Thus, even the plaintiff understands that the central promise in the Agreements was the sale of the loans with representations and warranties; there was no separate undertaking or an express guarantee of future performance as *Bulova* requires for the statute of limitations to extend beyond six years from entry into the Agreements.

Ultimately, New York's policy favoring certainty, predictability, and finality for parties in its contract law is best served by continuing to require plaintiffs to demonstrate distinct and express guarantees of future performance or separate undertakings if they wish to pursue claims that allegedly arise upon every refusal to repair, cure, substitute, or repurchase. *See* David D. SIEGEL, NEW YORK PRACTICE § 41 (noting that to avoid application of New York's settled rule that a breach of warranty claim accrues at the moment of sale, parties should "see to it that in the sales contract itself the warranty 'explicitly extends to future

performance.' If that is done, 'the cause of action accrues when the breach is or should have been discovered.''' (citation omitted)).

In this case, the dispute resolution framework under the Agreements addresses the predicate breaches of representations and warranties and defective documentation that occur on the day the Agreements are entered. The statute of limitations exists at least in part because evidence tends to get less reliable over time.; Any suit based on a refusal to cure, substitute, or repurchase under the Agreement would need first to refer back to the predicate breaches of representations and warranties, or defective documentation, which necessarily occurred—if ever—on the date of the Agreements. There is no good reason to construe the remedial framework here to be a separate undertaking that effectively would allow actions to be commenced under the Agreements for an additional 30 years, especially since the relevant evidence about the predicate breaches would always need to refer back to the date of entry into the Agreements. To adopt the alternative rule would deprive New York's statute of limitations law of the certainty, predictability, and finality it seeks to provide and impose an undue burden on the courts to try stale claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should hold that the statute of limitations on the plaintiff's claims began to run upon entry into the Agreements and, therefore, the Complaint should be dismissed as time-barred under New York law.

Dated: March 13, 2015
New York, New York

By: _____

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Eloy G. Echeguren, being duly sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age and am employed by Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036.

2. On March 30, 2015, I served three true copies of the

- ***Brief of New York Law Professors as Amici Curiae***

by hand delivery upon:

Marc Kasowitz, Esq.
Michael E. Fay, Esq.
Zachary W. Mazin, Esq.
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Eloy G. Echeguren

Sworn to before me this
30th day of March 2015.

Richard Gomez
Notary Public, State of New York
No. 01GO6201183
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 9, 2017

COURT OF APPEALS
OF THE 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.*	APL-2014-00156 New York County Clerk's Index No. 650980/12

AFFIDAVIT OF SERVICE

City of Washington
District of Columbia

I, Judith A. Jackson, being duly sworn, deposes and says:

1. I am over the age of 18, am not a party to this litigation, and am employed by Skadden, Arps, Slate, Meagher & Flom LLC, 1440 New York Avenue, N.W., Washington, D.C. 20005.

2. On March 30, 2015, I served true copies of the following document:

- **Brief of New York Law Professors as Amici Curiae**

to the law firm of Bancroft PLLC, located at 1919 M Street, N.W., Suite 470, Washington, D.C. 20036; by delivering three (3) copies of the above-referenced document to the receptionist Mr. Matous Steele for service upon:

Paul D. Clement, Esq.
Erin E. Murphy, Esq.
Stephen V. Potenza, Esq.
Bancroft PLLC
1919 M Street NW, Suite 470
Washington, DC 20036

Mr. Steele is described herein as:

Gender: Male Race/Skin: White Hair: Blonde Age: 30- 35 years old Height: 5' 7"

3. I declare under the penalty of perjury that I have read the foregoing information contained in this Affidavit of Service and that the facts stated in it are true and correct.

Dated: March 30, 2015

Judith A. Jackson
Senior Docket Clerk
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1440 New York Avenue, N.W.
Washington, D.C. 20005

Sworn to before me this
30th day of March 2015.

Amber Thornhill
Notary Public, District of Columbia: SS
My commission expires Sept. 30, 2017

AMBER N. THORNHILL NOTARY PUBLIC EXP. 9-30-2017 DISTRICT OF COLUMBIA