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Applying **N.Y.'s Borrowing Statute** To Asset-Backed Securities Claims **After 'Deutsche Bank'**

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Under New York's borrowing statute, codified in CPLR 202, when a nonresident sues in New York, his or her claim must be timely both in New York and the state where the cause of action accrued. CPLR 202 was expressly intended not only to deter forum shopping by out-of-state plaintiffs, but also to add "clarity" and "predictability" to the law in respect of the limitations periods applicable to non-resident plaintiffs proceeding in New York courts. *Ins. Co. of N. Am. v. ABB Power Generation*, 91 N.Y.2d 180, 187 (1997). A recent First Department decision, however, has potentially injected some uncertainty into limitations periods applicable to claims involving asset-backed securities where the trustee resides outside New York. In *Deutsche Bank Nat'l Trust Company v. Barclays Bank PLC*, 156 A.D.3d 401 (1st Dep't 2017) (the decision), the First Department dismissed claims brought by a corporate trustee on behalf of two mortgage-backed securitization trusts on the grounds that the borrowing statute required application of California's four-year limitations period, not New York's more generous six-year period. Investors and trustees should be aware of the potential ramifications of the decision.

Background and Lower Court's Decision

The two actions adjudicated by the decision are emblematic of

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the bevy of residential mortgage-backed securities (RMBS) actions, generally referred to as "putback" or "repurchase" cases, filed in New York and across the country over the past decade. The trusts at issue were created in 2007 to securitize residential mortgage loans. The certificates issued by the trusts were sold to investors, who are repaid from principal and interest payments made by the borrowers of the underlying loans. Plaintiff Deutsche Bank National Trust Company serves as trustee for both trusts. Defendants, the sponsors of the securitizations, made certain contractual representations and warranties concerning the credit quality and characteristics of the mortgage loans deposited in the trusts.

In 2013, Deutsche Bank filed claims on behalf of both trusts for alleged breaches of defendants' representations and warranties. Defendants moved to dismiss on several grounds, including that the claims were untimely under California's four-year statute of limitations. Defendants argued that the borrowing statute required the application of California's limitations period because Deutsche Bank resides in California and because the trusts had close ties to California.

The Supreme Court denied defendants' motion. 2015 N.Y. Slip Op. 32252(U), 2015 WL 7625829 (Sup. Ct. Nov. 25, 2015). The court ruled that the borrowing statute applied notwithstanding the New York choice of law provision in the securitization agreements, because that provision encompassed only substantive matters, not procedural issues like the statute of limitations. Nevertheless, the court declined to apply California's limitation period to Deutsche Bank's claims.

The court recognized that the borrowing statute generally looks to the place where the plaintiff resides—and consequently sustains the economic impact of the loss—to determine which state's limitations period should apply. The court rejected the plaintiff-trustee's California residence as a reliable indicator of where the injury occurred, however, because the loss was sustained by the trusts (not the trustee) and because the trustee does not make investment decisions for the trusts. Unable to rely on the residence of the geographically dispersed trust investors as a proxy for where the injury was sustained, the court focused on the physical location of mortgage loan documents and the situs of tax liability. In the court's view, neither factor favored California, as mortgage loan notes could be stored in several states and the trusts did not owe or pay any state taxes in California. Based on this analysis, the court declined to "borrow" California's four-year statute of limitations and denied defendants' motion to dismiss.

The First Department Decision

The First Department unanimously reversed. 156 A.D.3d 401 (1st Dep't 2017). The appellate panel held that the claims accrued in California under the general rule of plaintiff's residence, as well as under the multi-factored analysis applied by the court below. In addition to Deutsche Bank's California residence, the panel noted that the majority of the mortgage loans were made by California lenders for California properties, that Deutsche Bank administered the loans in California, and that the trust agreements contemplate payment of state taxes (if any) in California and the storage of loan documents in California.

Having held that the claims accrued in California, the First Department applied California's four-year statute of limitations to bar the claims asserted by Deutsche Bank. The First Department held that plaintiffs' claims accrued in 2007—i.e., when the

allegedly non-conforming mortgage loans were deposited into the trusts—and nearly six years before plaintiffs commenced the actions. The First Department also rejected plaintiffs' tolling arguments under both New York and California law. Applying the contractual New York choice of law provision to substantive issues, the panel rejected Deutsche Bank's argument that a contractual pre-suit notice and demand requirement was a condition precedent to suit that could toll the limitations period. Similarly, applying California's discovery rule, the First Department held that Deutsche Bank could have discovered the alleged breaches within four years from closing based on information available to Deutsche Bank in the trusts' offering documents, as well as in post-closing due diligence and loan performance reports.

The Aftermath

On Jan. 4, 2018, Deutsche Bank requested that the First Department grant leave to appeal to the New York Court of Appeals. Deutsche Bank's motion identified a number of perceived inconsistencies in the First Department's decision and argued that the decision could impact dozens of similar actions pending in New York. Deutsche Bank's motion was fully submitted as of March 1, 2018.

Absent further elucidation by the Court of Appeals or First Department, substantial questions remain regarding the application of the borrowing statute to asset-backed securities claims. For example, the relevance of the trustee's residence to the accrual analysis is unclear, not only with respect to claims filed by trustees on behalf of trusts, but also with respect to (1) claims filed derivatively on behalf of trusts by investors, and (2) claims filed by so-called "separate" trustees appointed solely to pursue litigation. Questions also remain as to whether the borrowing statute requires that conditions precedent to suit contained in securitization agreements be analyzed under New York law, as opposed to the law of the jurisdiction where the claim accrued. And there seems to be no bright line rule for what is necessary under the borrowing statute to show at the pleading stage whether a corporate trustee based in California or another jurisdiction that applies a discovery rule could have discovered alleged breaches.

Until these questions are resolved, trustees and investors seeking to enforce trust rights should take certain precautions whenever possible. For actions relating to existing trusts—even those formed in New York and governed by New York law—litigants should assume the application of the (potentially shorter) limitations periods of other states, particularly states where the trustee resides, trust assets are located, and/or the trusts have state-specific obligations. Litigants should further assume that the claims will not be tolled by contractual provisions or a discovery rule. In the future, deal parties may consider drafting broader choice of law provisions to avoid the borrowing statute altogether, though it is unclear whether courts would abide by such language.

In sum, where the trustee resides outside New York in an asset-backed securities case, the prudent course is to assume the shortest potentially applicable limitations period.