

## Calif. Statute Of Limitations Sinks Deutsche Bank RBMS Suits

By **Jon Hill**

*Law360, New York (December 5, 2017, 10:46 PM EST)* -- A New York state appeals court has sunk two suits brought by Deutsche Bank National Trust Co. over thousands of allegedly defective loans in two residential mortgage-backed securities trusts it oversees as trustee, concluding Tuesday that its remaining breach-of-contract claims against Barclays PLC and HSBC were brought too late under its home state's statute of limitations.

Although the Los Angeles-based Deutsche Bank unit's claims would have been considered timely under a six-year time limit in New York, where the trusts were organized, New York's so-called borrowing statute requires out-of-state plaintiffs' cases to be brought within time limits established both under New York law and under the law of the place "where the cause of action accrued."

That place is California, a panel of the Appellate Division of the New York Supreme Court determined, saying the location is the same whether going by where Deutsche Bank National Trust's principal place of business is or where the alleged injury was felt.

"We agree with defendants that the claims are barred by the California's four-year statute of limitations for contract actions," the panel said in its decision.

The ruling marks the first time a case of its kind has been dismissed on this basis, and it comes after a lower state court reached the opposite conclusion in November 2015, finding that Deutsche Bank National Trust's breach-of contract claims weren't time-barred.

The Deutsche Bank unit first brought those claims in 2013 as part of separate put-back actions seeking to force Barclays and HSBC to repurchase thousands of allegedly defective loans that were sold to two trusts in securitization deals in 2007.

In subsequent dismissal bids, Barclays and HSBC argued that the court needed to look at the trustee in determining where the cause of action accrued for these breach-of-contract claims and, therefore, which time limit came into play under the borrowing statute.

But New York Supreme Court Judge Marcy S. Friedman rejected that, saying that the "California residence of the trustees is not a reliable indicator of the place where the injury occurred."

Looking instead at the trusts, she noted that they were organized under New York law, which was

decisive when it came to the rights of the parties to the trusts' pooling and servicing agreements, or PSAs. And while other factors in her injury location analysis didn't necessarily point to New York, they didn't point clearly to California, either, she found.

"The court accordingly concludes that defendants in both actions fail to make a prima facie showing that the cause of action accrued in California, and therefore that the four-year California statute of limitations bars maintenance of these actions," Judge Friedman said in her decision.

But this aspect of her ruling was reversed on Tuesday, with the panel ordering the suits dismissed.

According to the panel, in cases like Deutsche Bank National Trust's, where the alleged injuries are "purely economic," New York's highest court has held that those claims are generally considered to have accrued where the plaintiff is located.

Deutsche Bank National Trust had argued that this so-called plaintiff-residence rule shouldn't apply in its case, given that it was suing not on its own behalf but rather in its capacity as trustee. The panel said, however, that it "need not decide" whether the rule applied; even when looking at a broader set of factors, California is where the alleged injury happened, the panel said.

Most of the mortgages in the trusts were originated in California, the trusts were overseen in California by the Deutsche Bank unit, and each trust's PSA also provides for the possibility of paying state taxes in California, the panel noted.

"To the extent the physical location of the notes memorializing the securitized mortgage loans has relevance to the analysis, each trust's PSA contemplates that the notes may be maintained in California, but neither contemplates maintaining the notes in New York," the panel said.

And while the trusts' PSAs did include choice-of-law clauses that specified New York, the panel found that those clauses don't have any bearing on the time limit question because they do not clearly "incorporate" the relevant New York statute of limitations.

The locations of the trusts' certificate holders — whose notes would stand to lose value in the event of an injury to the trusts — did not factor into the panel's analysis. Given the dizzying number of places where those investors could be, the panel said it was "undisputed" by both sides that these locations "do not provide a workable basis for determining the place of accrual."

Counsel for HSBC and Barclays declined to comment. Counsel for Deutsche Bank National Trust did not immediately return a request for comment late Tuesday.

Judges David Friedman, Rosalyn Richter, Karla Moskowitz, Judith Gische and Barbara Kapnick sat on the panel for the New York State Supreme Court, First Appellate Division.

Deutsche Bank National Trust Co. is represented by Harvey J. Wolkoff of Ropes & Gray LLP.

HSBC is represented by Nicholas Boyle of Williams & Connolly LLP, and Michael O. Ware of Mayer Brown LLP.

Barclays is represented by Jeffrey T. Scott of Sullivan & Cromwell LLP.

The cases are Deutsche Bank National Trust Co. v. Barclays Bank PLC, case number 651338/2013, and Deutsche Bank National Trust Co. v. HSBC Bank USA NA, case number 652001/2013, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

--Editing by Adam LoBelia.

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