

BNY Mellon Ducks \$100M RMBS Case 'Full Of Holes'

By **Jack Newsham**

Law360, New York (August 7, 2017, 4:09 PM EDT) -- The first case against a residential mortgage-backed securities trustee to go to trial was spiked Friday by an Ohio judge, who said insurers' \$100 million suit against BNY Mellon was “full of holes” and relied on a “grossly inappropriate” way of calculating damages.

Western & Southern Life Insurance Co. and other insurers had invested heavily in RMBSs before the financial crisis, but lost out when default rates spiked and a wave of foreclosures swept the U.S. The insurers in 2013 sued Bank of New York Mellon Corp., which held the loans in trust, for allegedly failing to reject dud mortgages that did not measure up to investment criteria. Dozens of investor suits filed in recent years against BNY Mellon and other banks have advanced similar legal theories.

But Hamilton County Judge Steven E. Martin did not buy it. Although he had allowed the case to survive dismissal and summary judgment, he said Friday that the pooling and service agreements, or PSAs, used to set up the trusts did not saddle the bank with many responsibilities. The judge slammed the insurers' argument that damages could be calculated by examining a sample of mortgages — an approach that plaintiffs have also pushed for in similar cases — instead of looking at them loan-by-loan for trustee wrongdoing.

“In exhibit after exhibit, the plaintiffs internally blamed a bad market, underwriting issues, real estate values, unemployment rates, borrower behavior, etc. for the downturn in the RMBS market. There was simply nothing indicating that the defendant was even remotely a cause of the losses suffered by the plaintiffs,” the judge wrote. “Given the limited contractual role of the trustee as outlined in the PSAs, this is not surprising.”

The decision could be a bad sign for other investors suing banks that held thousands of mortgages in trust for the investors, to recover some of the billions of dollars they lost when the financial crisis hit. Lawyers for HSBC Bank USA NA, another trustee, cited Judge Martin's decision approvingly in several filings Friday.

In his decision the judge closely scrutinized actions by Western & Southern in the lead-up to and aftermath of the financial crisis, concluding that the insurers knew what they were getting into and what the risks were when they invested in riskier home loans that Countrywide Financial Corp. was starting to package together.

Although a top official at Western & Southern had claimed to have read at least a few of the agreements that underlay the trust structures, the judge said Friday that the insurer's employees did not seem to understand what they did and did not say, and did not require BNY Mellon to do much. The plaintiffs did not even turn to what limited remedies the PSAs allowed, he wrote.

"None of the market problems had anything to do with the PSAs in this case," he wrote. "[They] had everything to do with a market collapse that was historic in nature."

Western & Southern and a lawyer for the company said in a statement that they "respectfully disagree with the court's decision and are in the process of considering all of our options."

A lawyer for BNY Mellon declined to comment. The bank said in a statement that it was "gratified that the court found we fulfilled our duties as trustee and are pleased to put this matter behind us. We remain fully focused on continuing to provide valuable services to our clients and earning their continued trust."

The insurers are represented by David P. Kamp and Jean Geoppinger McCoy of White Getgy & Meyer Co. LPA and David H. Wollmuth, Thomas P. Ogden, Michael C. Ledley, Steven S. Fitzgerald and Ryan A. Kane of Wollmuth Maher & Deutsch LLP.

BNY Mellon is represented by James E. Burke of Keating Muething & Klekamp PLL, John P. Gilligan, Victoria Powers and Nicole R. Woods of Ice Miller LLP, and Matthew D. Ingber, Michael Martinez, Allison J. Zolot, Silvia A Babikian and Christopher Houpt of Mayer Brown LLP.

The case is Western & Southern Life Insurance Co. et al. v. Bank of New York Mellon, case number A1302490, in the Court of Common Pleas of Hamilton County, Ohio.

--Editing by Edrienne Su.

Update: This story has been updated to include the year the lawsuit was originally filed.