

Judge Chides Atty For Blaming Client In \$371M RMBS Suit

By **William Gorta**

Law360, New York (March 1, 2017, 9:29 PM EST) -- A New York federal judge on Wednesday scolded an attorney for blaming his client for submitting a second amended complaint in the middle of briefing on a motion to dismiss the first complaint, which alleges breach of contract and breach of fiduciary duty by US Bank and BNY Mellon as trustees of mortgage-backed securities.

The suit by a group of funds known as the Triaxx entities alleges that US Bank and BNY Mellon were derelict in their duties as third-party trustees of trusts and for not catching the malfeasance in time, allowing the statute of limitations to run out on the Triaxx funds' potential claims against issuers for much of the loss — leaving the trustees liable for those losses. The suit lists breach of contract and breach of fiduciary duty claims against both banks, demanding \$291 million from U.S. Bank and \$80 million from BNY.

Amid the exchange of memoranda in the motion to dismiss by the banks, Triaxx submitted without leave a proposed second amended complaint that dropped the fiduciary duty claims against the banks and inserted instead breach of duty to avoid conflicts claims, alleging the trustee banks were economically beholden to the issuers of the faulty RMBS.

U.S. District Judge Naomi Reice Buchwald asked Triaxx's attorney, Nicholas Cutaia of Miller & Wrubel, PC, why these new claims popped up in 2016 mid-brief since they had been around since 2012.

"I can't tell you why the client didn't bring ...," Cutaia began.

"Client! Please! You're the lawyer," Judge Buchwald interjected. "You went to your client and said, 'Client, what should I plead, did you read all these decisions from the smart judges of the Southern District?' Give me a break."

Cutaia wasn't able to get an answer in before Judge Buchwald asked him to explain why Triaxx wants to drop the breach of fiduciary duty claims and replace them with breach of duty to avoid conflict of interest claims. Both banks argued in pre-argument letters that the breach of fiduciary duty claims were duplicative of the breach of contract claims.

"I'm not sure whether you're getting leave" to file the SAC, Judge Buchwald said. "There are just questions about the tactic you're using."

She had more.

“Didn’t you effectively waive your so-called conflict?” Judge Buchwald asked. “You didn’t pick a bank that was dealing with you and you only.”

“That’s a fact question, Your Honor,” Cutaia replied.

“The securities here have a notional value of \$5 billion,” the judge said. “You’re as sophisticated as it gets. You didn’t know that US Bank played a lot of roles?”

She said it seemed lied a “major weakness” in Triaxx’s argument that it didn’t pick “some tiny little bank in the middle of nowhere” to avoid a conflict of interest problem.

The initial suit included claims against JP Morgan, the creators of the securities trust, but those claims were voluntarily dismissed in April, prompting the first amended complaint, alleging US Bank and BNY Mellon were on notice of problems with the trusts since at least 2010, and since December 2011 have been on notice of “Events of Default” per the terms of the pooling and servicing agreements covering the trusts.

BNY is represented by Christopher James Houpt of Mayer Brown LLP.

US Bank is represented by Michael T. Marcucci of Jones Day.

The Triaxx funds are represented by Nicholas Cutaia and Charles R. Jacob III of Miller & Wrubel PC.

The case is Triaxx Prime CDO 2006-1 Ltd et al v. JP Morgan Chase & Co., et al, case number 1:16-cv-01597 in the U.S. District Court for the Southern District of New York.

--Editing by Joe Phalon.