

FDIC's \$695M Mortgage-Backed Securities Suit Tossed

By **Reenat Sinay**

Law360 (March 21, 2019, 6:46 PM EDT) -- A New York federal judge dumped the Federal Deposit Insurance Corp.'s \$695 million residential mortgage-backed securities suit against three banks Wednesday, finding for the second time that the agency lacked standing to bring claims of improper conduct against trustees of the bundled mortgages.

The FDIC had accused Bank of New York Mellon, U.S. Bank NA and Citibank NA of failing to carry out their duties as RMBS trustees in breach of their contracts and in violation of New York's Streit Act and the federal Trust Indenture Act, which require that a trustee follow specific rules and regulations to protect the beneficiaries of the trust.

U.S. District Judge Andrew L. Carter Jr. initially dismissed the FDIC's suit in 2016 for lack of standing since the agency sold its ownership of the RMBS certificates at issue to Wilmington Trust Co. in 2010, with Citibank acting in a separate capacity as receiver for that resecuritization, according to court filings.

Judge Carter allowed the agency a chance to persuade Citibank in its role as indenture trustee to consent to the FDIC's claims and give it standing in its suits, but negotiations fell apart after the bank refused to give its seal of approval without compensation, court records show.

In their joint motion to dismiss, BNY Mellon, Citibank and U.S. Bank argued that without Citibank's ratification, the FDIC had abandoned its interest as receiver when it sold the securities and had no right to sue. The court found their assertions persuasive, granting the motion in its entirety.

"The court holds that plaintiff lacks standing because the real party in interest has not ratified the lawsuit," Judge Carter said. "As plaintiffs' lack of standing deprives the court of subject matter jurisdiction, the court declines to reach the merits of the complaint."

The suit dates back to 2015, when the FDIC accused Citibank, U.S. Bank and BNY of breaching their contractual obligations to Texas-based Guaranty Bank as trustees overseeing billions of dollars' worth of mortgage-backed securities.

The FDIC had stepped in as receiver for Guaranty when the bank tanked during the financial crisis and said in its related complaints that the three banks' actions had caused Guaranty to lose some \$695 million.

Judge Carter tossed the FDIC's claims the following year, finding that its sale of those securities to Wilmington Trust meant the agency forfeited its right to bring suit. He later gave the FDIC a second chance to establish legal standing by getting the resecuritization trust to ratify its claims.

Wilmington ordered Citibank to approve the ratification, but Citibank said it would sign only if the FDIC agreed to indemnify it. The FDIC refused, leaving the ratification unsigned and a suit with no legs, the banks contended in their motion.

Judge Carter on Wednesday agreed with the defendants that without Citibank's ratification, the suit could not go forward.

In an attempt to "save its case," the FDIC had urged the court to examine Citibank's "underlying contractual obligations," Judge Carter said. He declined to get involved, however, ruling that resolving contractual disputes is not part of the court's role in deciding a motion to dismiss.

"Plaintiff cites no authority holding that a district court can (or should) determine the legal sufficiency of allegations unrelated to the original complaint that a plaintiff raises in opposition to a motion to dismiss," he said. "Nor does plaintiff cite any authority holding that a district court resolving a motion to dismiss can conclude as a matter of law that a contract was breached or if remedies, such as specific performance, are warranted."

A spokesman for the FDIC declined to comment Thursday.

Representatives for the other parties did not immediately respond to requests for comment.

The FDIC is represented by David H. Wollmuth, David H. Wollmuth, Steven S. Fitzgerald, Ryan A. Kane and Philip R. Schatz of Wollmuth Maher & Deutsch LLP.

BNY Mellon and Citibank are represented by Christopher J. Houpt of Mayer Brown LLP.

U.S. Bank is represented by Michael S. Kraut and Benjamin P. Smith of Morgan Lewis & Bockius LLP.

The cases are Federal Deposit Insurance Corp. v. The Bank of New York Mellon, case number 1:15-cv-06560, Federal Deposit Insurance Corp. v. U.S. Bank NA, case number 1:15-cv-06570, and Federal Deposit Insurance Corp. v. Citibank NA, case number 1:15-cv-06574, all in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.