CMBS Disputes On The Horizon

US Outlook: Potential CMBS Litigation Arising From the 2020 Downturn

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A key factor contributing to the 2007/2008 global financial crisis was the precipitous decline of the U.S. housing market, which exposed weaknesses in trillions of dollars of residential mortgage-backed securities ("RMBS") and related financial derivatives. A decade later, the world faces a COVID-driven economic slowdown that many believe will expose similar flaws in the market for commercial mortgage-backed securities ("CMBS"). According to Fitch at the beginning of the U.S. outbreak in March, "83% of sector and structured finance asset performance outlooks are negative, up from 21% at the beginning of 2020. There are no positive sector outlooks."[1] This decline will inevitably impact repayments on the commercial mortgages underlying the approximately $500 billion in outstanding CMBS. This is especially true in those sectors most vulnerable to ongoing COVID-related impacts and restrictions, such as retail, hospitality, travel, and student housing. The complex management and payment waterfalls in CMBS have been the source of significant litigation in the past, and we expect the unprecedented (and largely unanticipated) dislocation caused by the global pandemic to bring a new wave of these disputes.

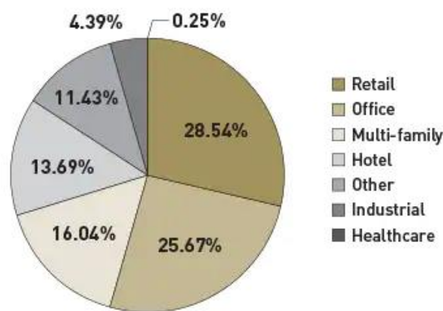
Potentially compounding these vulnerabilities are allegations of CMBS fraud, including a whistleblower complaint filed confidentially with the Securities Exchange Commission earlier this year. That complaint alleges that CMBS borrowers, originators and/or issuers falsely inflated

borrowers' profits and understated their debts to entitle them to larger loans.[2] If true—even in small part—these allegations could potentially further fuel CMBS disputes.

This memorandum surveys the current status of the CMBS market, outlines the participants and structure of CMBS, and considers some of the types of disputes that we expect to arise in the coming months and years.

I. Current Distress in The CMBS Market

A CMBS is a security backed by a pool of commercial mortgage loans, which are held in trust for the benefit of investors. CMBS investors buy certificates with different seniorities entitling them to receive principal and interest payments as they are made by borrowers on the underlying loans. The underlying commercial mortgage loans, in turn, are backed by commercial properties that may be acquired by the CMBS trust in the event of a default. As with RMBS, if borrowers fail to make timely principal or interest payments, and the value of the underlying properties are insufficient to recover the outstanding loan balance in the event of foreclosure, at least some CMBS investors are likely to suffer a loss. CMBS issuance ground to a halt during the financial crisis, but slowly reemerged starting in 2010 and has risen steadily ever since. In recent years (between 2015 and 2019), CMBS issuances have ranged from $70 to $100 billion per annum, with an estimated $500 billion of CMBS currently outstanding. As of January 2017, a typical CMBS was composed of loans issued to borrowers in the following commercial sectors:[3]



CMBS structured and issued before the 2008 financial crisis have suffered heavy losses over the past decade, often reaching the senior mezzanine (or AJ) tranche. In contrast, CMBS issued after the financial crisis (often referred to as "CMBS 2.0") have so far avoided similar losses. That may soon change. COVID-related CMBS loan delinquencies have spiked since March 2020. At the end of April, the overall delinquency rate was approximately 2.3%, but Fitch expects this to climb rapidly to around 8.75% by October 2020.[4] Others have noted that the percentage of loans with late payments (but not yet classified as delinquent) was already as high as 7.6% on April 1, and 8.6% by May 1, and that if these loans remain unpaid the overall delinquency rate will quickly exceed 10%.[5] [6] Certain commercial sectors are predicted to fare far worse than others. For example, delinquencies for loans issued to the retail and hotel sectors, are expected to jump to approximately 23% and 31%, respectively, over the next several months.[7] Other sectors likely to be hard hit include student housing, certain open-plan office spaces, and multifamily properties with high concentrations of tenants employed (or formerly employed) in positions that are hourly wage, public-facing, or in the oil and gas industries.[8] The current delinquency rates do not take short term forbearances into account and are therefore likely understated.[9]

Multiple CMBS have already been downgraded or placed on watch lists, and others are likely to follow. In late March, for example, Fitch placed some $8 billion of hotel-backed securities containing 81 classes of notes on watch,[10] and in April it affirmed and withdrew 17 classes in two securities issued

by J.P Morgan and Morgan Stanley as the trust balances were reduced to zero.[11] Numerous further negative adjustments were made in May.[12] Such adjustments will impact investors in lower tranches.[13]

CMBS delinquencies have been exacerbated by the federal government's decision to generally exclude—so far—the commercial mortgage markets from its various COVID-related stimulus and relief packages. While multi-family borrowers with federally-backed mortgages can receive forbearance from Fannie Mae and Freddie Mac under the Term Asset-Backed Securities Loan Facility,[14] prominent industry figures have sought far wider relief to protect the commercial loan industry and the estimated 9 million jobs it supports.[15] Without federal intervention or a significant multi-sector market turnaround, the industry-wide average CMBS delinquency rate may approach or surpass the all-time high of 10.3% reached during the last recession (July 2012).[16]

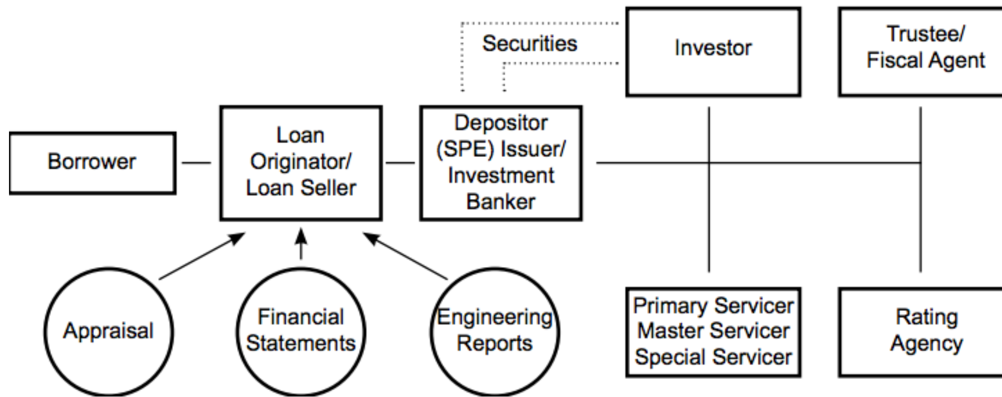
II. CMBS Structures And Participants

As described above, CMBS notes are issued to investors in tranches, each of which has different payment priorities, credit qualities, and credit ratings. The senior-most tranche has the highest priority in the payment "waterfall" and is the last to take losses; thus, it has the highest credit quality and pays the lowest coupon. Lower tranches, conversely, are less protected and have lower credit quality, but receive higher coupon payments. The allocation of risk within CMBS changed between "legacy" CMBS (issued prior to 2009) and "CMBS 2.0" (issued after 2009). The loans within CMBS 2.0 were widely thought to be less risky than those in legacy CMBS, with lower loan-to-value ratios and higher debt-service ratios.[17] The most significant structural change for CMBS 2.0 was the removal of the Junior AAA bonds, and increased credit protection for almost all other tranches:[18]

Losses and Shortfalls ↑ / Payments and Recoveries ↓

Bond Class Original Ratings	Legacy CMBS Typical Original Subordination (%)	CMBS 2.0 Typical Original Subordination (%)
Super Senior AAA	30	30
Mezzanine AAA (AM/AS)	20	20-25
Junior AAA (AJ)	12-14	N/A
AA	9-12	14-18
A	6-9	10-14
BBB	4-6	6-8
BB	2-4	4-5
B	1-2	2-3
Unrated CMBS	0	0

Like many other structured finance products, CMBS are issued by statutory or common law trusts and are sold to investors by one or more underwriting banks. With the inflow of cash from the certificates, issuers recoup the costs of issuing the initial loans to the commercial borrowers, and investors receive a slice of the cash flow generated by the underlying commercial mortgage loans. The underlying loans generate income from interest and principal payments, which is collected by servicers and provided to the trustee. The trustee then directs the payments (net of certain specified fees and expenses) to investors via a distribution "waterfall" in accordance with the seniority of the investors' notes. When defaults occur, servicing responsibilities are transferred to a special servicer. The special servicer is typically appointed (and can be replaced) by a junior certificateholder, known variably as the controlling class representative, directing certificateholder, or operating advisor. This controlling certificateholder also has significant rights vis-à-vis the appointed special servicer, including the right to approve the special servicer's remediation strategies, and to sign-off on key actions taken by the special servicer in respect of defaulted assets. The following chart outlines a common structure for CMBS participants, and their roles:[19]



Commercial loans backing CMBS typically have a shorter term than the residential mortgage loans backing RMBS, and a different amortization schedule. For example, a standard CMBS loan will have a 10-year term during which it will pay mostly interest and very little (or no) principal, with a large "balloon" payment of principal at the end. Often, the loan is refinanced at the end of its term, meaning that some or all of the balloon payment becomes the subject of a new loan, with a new term, which is frequently then secured in a new CMBS. CMBS loans are therefore subject to two forms of default: "term default" (where a borrower is unable to pay interest as it falls due during the loan term), and "maturity default" (where the borrower is unable to make their principal balloon payment, including because they are unable to refinance at the end of the initial loan term). The default risk posed to CMBS investors thus depends on the maturity of the underlying loans, and the market circumstances at the time that the loans mature and any balloon payments (and refinancing) are due.

III. Differences Between RMBS and CMBS

RMBS litigation exploded following the financial crisis, with originators, sponsors, underwriters, servicers, and trustees collectively paying tens of billions of dollars in settlements or financial penalties in civil and regulatory proceedings—some of which are still ongoing. While future CMBS lawsuits may bear similarities, there are also several important ways in which CMBS differ from RMBS.

Historically, plaintiffs in RMBS cases asserted two kinds of claims: (1) contract-based "repurchase" or "put-back" claims alleging breach of loan-level representations and warranties made by originators, loan sellers, and RMBS sponsors in the governing transaction documents, or (2) fraud/wrongful disclosure claims based on alleged false statements and material omissions in the offering documents. A typical "repurchase" claim is one alleging breach of the warranty that all securitized loans complied with applicable underwriting guidelines,[20] and that information relating to each loan—such as the loan's "debt-to-income" ("DTI") ratio, its "loan-to-value" ("LTV") ratio, and whether it was secured by the borrower's primary or secondary residence—was accurately reported in the transaction documents.[21] Many repurchase claims also allege breach of the warranty that no loan was originated with any material misrepresentations or fraud.[22] Successful common law fraud or federal securities claims typically assert that certain aggregate statistics for the securitized loans—as disclosed in the applicable securities offering documents—were inaccurate or misleading, including statistics as to the number of mortgage loans that complied with certain underwriting guidelines, or that had LTV ratios within specified ranges.[23]

While CMBS transaction documents contain some representations that are similar to RMBS disclosures, CMBS transaction documents generally contain fewer, or narrower, representations. For example, CMBS typically do not expressly represent (as in RMBS) that the individual loans were

underwritten in compliance with a given set of underwriting guidelines. Similarly, CMBS mortgage loan schedules often do not include characteristics such as LTV and DTI ratios at the loan level.[24] CMBS do, however, provide loan characteristics that may form the basis of put back or securities-related claims such as debt service coverage ratios ("DSCR") and LTV ratios.[25] DSCR measure the commercial property's cash flow against debt (specifically, the property's net operating income as a multiple of debt obligations due within one year, including principal, interest, taxes, and related costs). Like DTI in the RMBS context, DSCR indicate the borrower's ability to service their debt. As in the RMBS context, CMBS LTV ratios rely on appraised value relative to outstanding loan amounts. Similarly, where the note for the underlying mortgage loans provides that a misrepresentation by the borrower triggers an event of default, courts have also interpreted the "no material default" representation in CMBS deals as being breached where a borrower makes misrepresentations or commits fraud as part of the origination of the loan.[26] CMBS (like RMBS) also include warranties that the servicing and collection practices used in relation to each commercial mortgage will meet customary commercial mortgage servicing practices and industry standards,[27] and that the loan-level information provided for each loan in the deal "is true and correct in all material respects."[28]

An additional important distinction is that CMBS deals are generally collateralized by a smaller number of mortgages. This may allow plaintiffs to focus their analysis on a limited number of large mortgages rather than, as in RMBS, thousands or tens of thousands of small sized residential mortgages. For example, an RMBS transaction might hold thousands of individual loans (with an average principal balance of $300,000), while a typical CMBS transaction will be collateralized by only a couple hundred loans, each with balances in excess of $10 million, and some in excess of $100 million. Accordingly, while RMBS put back claims are only economical if they can be asserted against a significant portion of the defaulting loans in the overall pool, a CMBS put back claim can be economical on a single defaulted loan.

IV. Types of Potential CMBS-Litigation

Below we discuss the types of significant CMBS-related disputes that we expect to arise as CMBS loans begins to default and suffer losses. We think these disputes will raise a host of new issues given the changes made in the governing representations and warranties ("R&Ws") for CMBS 2.0 transactions[29] and the regulatory and disclosure requirements that have been added for issuers[30] since the last economic downturn. As with other structured finance products, we are carefully studying these differences and their implications.

A key gating issue is the statute of limitations. For CMBS R&W claims (discussed below) it has already been held under the law of certain states that such claims will accrue when the CMBS transaction's governing document is entered into, and will be time-barred six years after that date.[31] Depending on which state's law applies, this cut off may already bar these types of claims in CMBS deals from mid-2014 and earlier regardless of when the alleged breach was discovered. Investors in older CMBS should, thus, be particularly vigilant in evaluating their rights.

a. Control Disputes, And CMBS Conflicts Of Interest

One unique feature of CMBS is the degree of control placed in a class of junior certificates—known variably as the "controlling class," "directing certificateholder," or "operating advisor." As noted above, CMBS governing documents give the controlling certificateholder significant authority, including the ability to appoint and replace the special servicer responsible for remediating defaulted mortgage loans; to approve the remediation strategy and actions undertaken by the special servicer; and to consult with the special servicer throughout the remediation process. These control rights have significant value, particularly in circumstances where the balance of specially serviced mortgage loans

is high. Unsurprisingly, disputes over control have resulted in litigation in a number of circumstances. *See, e.g.*, *LNR Partners, LLC v. C-III Asset Mgmt. LLC*, 2014 WL 1312033 (Del. Ch. Mar. 31, 2014) (finding control provisions in CMBS PSA ambiguous); *LNR Partners, LLC v. Torchlight Loan Services, LLC*, Case No. 9417-VCP (Del. Ch.) (lawsuit seeking reformation of control provisions in two CMBS PSAs).

Historically, control rights sat with the holders of the junior-most class of certificates, where these holders would change over time as losses were realized and the number of outstanding classes of certificates were reduced. However, because there was often a lag between the accrual of losses and their recognition as "realized losses," this structure created significant conflicts of interest. Specifically, a certificateholder could obtain control over the trust as the holder of the junior-most class of certificates outstanding, despite the fact that they were economically "under water" given accrued but as yet unrecognized losses. In these circumstances, the holder would be incentivized to maximize fee income to the special servicer (which is routinely shared with the controlling holder)—or otherwise to take value outside the trusts' normal priority of payments—rather than maximize recoveries on the underlying loans for the benefit of all holders.[32] Many pre-2008 crisis CMBS trusts feature this type of structure, and control disputes therefore seem particularly likely to rise as losses are recognized for such trusts.

To address these perceived conflicts of interest, more recent CMBS have been structured to account for unrealized losses when identifying the controlling class. In particular, the governing documents for post-crisis CMBS often provide that control can shift up the capital structure based on appraisal-based reductions in certificate balances, placing control with the class that is economically incentivized to maximize value of the CMBS trust's entire loan portfolio.[33] It remains to be seen how successful this new structure will be at addressing conflicts of interest. But, even if it serves this purpose well, the new control structure gives rise to its own problems because appraisal reductions are subject to disagreement and controlled by the incumbent special servicer—who has an incentive to keep its sponsoring controlling holder in control.

These types of disputes may become more prominent as a result of the coronavirus pandemic for two reasons. *First*, the pandemic is resulting in higher volumes of specially serviced mortgage loans that are subject to appraisal reductions. *Second*, in the unprecedented circumstances presented by the coronavirus pandemic, appraisals of commercial properties are now subject to more disagreement than usual. Both of these factors may cause incumbent controlling certificateholders to take liberties in the assessment of commercial property values in order to retain control of the associated CMBS trust.

b. <u>Waterfall Disputes</u>

Waterfall disputes are a long-standing feature of CMBS deals. The waterfall provisions are typically complex, necessarily favor some certificateholders over others, and—ultimately—directly determine the allocation of cashflows to CMBS investors. Even the most careful contractual drafting typically leaves ambiguities that can be difficult to resolve without court assistance. For a variety of reasons, we expect that CMBS waterfall disputes will become more frequent as a result of the global pandemic. As just one example, an area that has been a flashpoint for waterfall disputes is the treatment of modified mortgage loans under the PSA waterfall provisions. *See U.S. Bank, N.A. v. SBMC Holdings LLC*, 177 A.D.3d 443 (N.Y. App. Div. 1st Dept. 2019) (finding certain waterfall provisions unambiguous as to treatment of modifications, and remanding for consideration of other disputed waterfall issues); *In the Matter of Banc of America Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2007-1* (62-TR-CV-19-25), Petition to the Second Judicial District (seeking a ruling regarding the allocation of losses following the modification of CMBS loans).

Modifications are likely to accelerate due to the disruption caused by coronavirus, creating fertile ground for further waterfall disputes.

Waterfall disputes have also arisen from the manner in which losses arising from borrower-level disputes are allocated among CMBS certificateholders. *See In re Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-C30,* Civ. Nos. 19-1387, 19-2416 (D. Minn.) (suit brought by master servicer seeking clarification where "certain Certificateholders have requested that the Master Servicer and/or the Trustee, among other things, take action . . . in contrary and mutually exclusive ways"); *U.S. Bank v. Keybank, N.A.*, Case No. 20-3577 (S.D.N.Y.) (suit brought by current special servicer alleging master servicer and subservicer should bear the cost of litigation brought by a borrower). These borrower disputes, and corresponding losses, are likely to increase due to the global pandemic.

Another recent decision involving the proper allocation of *excess* cashflow is *Matter of Trusts Established under Pooling & Servicing Agreements relating to Wachovia Bank Commercial Mortg. Tr. Commercial Mortg. Pass-Through Certificates, Series 2007-C30*, 2020 WL 1304400 (S.D.N.Y. Mar. 19, 2020). In this case all the certificateholders had been paid in full, and the issue was who should receive $614 million in excess funds that resulted from sale of the subject Stuy Town property: the certificateholders, or the Special Servicer. The servicer argued the disputed funds were "Penalty Interest" and should be distributed to it pursuant to the regular payment waterfall. The certificateholders argued the disputed funds were "Gain-on-Sale Proceeds" and should be distributed to them. After a year of discovery, the court agreed with the servicer's proposed interpretation and held that the $614 million was payable to the Special Servicer prior to any distribution of Gain-on-Sale Proceeds to certificateholders. The decision addressed a number of issues related to excess recoveries on CMBS loans, but is currently on appeal and may be modified or reversed.

c. "Busted Deal" Disputes

Like many structured finance products, the CMBS securitization process starts well before investors are given the opportunity to participate and is based on the predicted future market demand for product. Litigation has already arisen between CMBS securitization participants seeking to halt or unwind the securitization process in light of the sudden lack of demand for CMBS and the distress many commercial borrowers are currently experiencing. *Casacde Funding, LP – Series 6 v. The Bancorp Bank* (N.Y. Sup. Ct.) May 25, 2020, recently filed in the New York Commercial Division, is an example. There, the plaintiff CMBS issuer is seeking the return of a $12 million deposit that it paid to defendant originator for $900 million worth of commercial loans that the parties intended to offer to investors in a CMBS issuance in April 2020. The dispute involves whether a "market disruption" clause written into the contract has been triggered by the coronavirus-related downturn in the CMBS market. With 2019 CMBS issuance at approximately $100 billion, this dispute is unlikely to be the only litigation that will arise as a result of CMBS being halted mid-securitization.

d. REIT, Repo, and Margin Call Disputes

CMBS are also likely to feature prominently in disputes involving real estate investment trusts ("REIT") and the repurchase ("repo") agreements they have entered. REITs are often formed to acquire real estate debt—including through their investment in CMBS—and often finance such investments through repo agreements under which they borrow money from banks on a short term basis using the CMBS as collateral for the repo loan.[34] However, repo agreements typically grant the lending banks the right to make "margin calls," *i.e.*, to require the REITs to post additional collateral in the event that the secured collateral declines in value. Given recent events in the CMBS market, and the fact that repo agreements have become a common tool for REIT investment in CMBS, margin call disputes have already arisen.

For example, in *AG MIT CMO, LLC, v. RBC (Barbados) Trading Corporation*, 2020 WL 1486675 (S.D.N.Y. March 25, 2020), two affiliated REITs filed suit against the Royal Bank of Canada ("RBC") alleging that RBC breached a repo agreement by issuing margin calls and scheduling an auction of the underlying CMBS. In particular, the complaint alleges that RBC unilaterally marked down the value of the CMBS collateral to allow it to issue the margin calls, rather than valuing it via a "generally recognized source agreed to by the parties," as required by the repo agreements. Similar claims were asserted during the periods of market illiquidity that followed the last financial crisis. Such claims will raise important issues regarding how CMBS should be valued in current market conditions, and the rights and duties of the parties to the repo agreements that serve as a major source of investment financing for the CMBS industry.

e. Fraudulent Selling Or Misrepresentation Claims

A recent SEC whistleblower complaint filed by CMBS veteran John Flynn alleges that recently-issued CMBS are the subject of significant misstatements or fraud. Flynn's complaint (which is not public) purportedly asserts that some of the world's largest banks, with the assistance of CMBS servicers, have engaged in a systemic practice of misstating CMBS borrower data in order to grant larger loans than those borrowers deserved. Independent journalists at ProPublica claim to have reviewed the loan documentation for a sample of recent CMBS and to have confirmed the types of misrepresentations alleged by the Flynn complaint.[35] The misstated data allegedly include CMBS borrowers' net operating income ("NOI"), occupancy rates, and levels of debt.[36] Academic studies on pre-2015 CMBS have concluded that not only was the NOI overstated for CMBS loans of that vintage, but that every 1% of overstatement resulted in a 20% higher rate of delinquency.[37]

While many CMBS are not publicly offered—and are not subject to the disclosure laws in the Securities Act 1933—the parties involved in marketing and selling CMBS must be truthful in their dealings, and issuers are bound to any contractual R&Ws they offer to investors. If the allegations in the Flynn complaint are true—even in part—they could potentially give rise to a range of fraudulent selling or misrepresentation claims against CMBS issuers and sellers. Such claims have been brought in the past, both successfully and unsuccessfully. For example, in *SEC v. Im*, 2018 WL 840094 (S.D.N.Y. Feb. 12, 2018), the SEC accused the co-head of Nomura's CMBS trading desk of misleading CMBS customers as to Nomura's prices, profits, and positions on certain CMBS securities. The Court denied the trader's motion to dismiss, noting (among other things) a motive to commit fraud given his $3.8 million annual bonus was based on the CMBS desk's performance. The court also held that Nomura was potentially liable for the trader's actions as his employer. Nomura eventually paid $26.5 million in 2019 to settle this and a related charge involving four other traders.

A case involving similar allegations where the CMBS seller prevailed, is *Northern Group Inc. v. Merrill, Pierce, Fenner & Smith Inc.*, 2014 WL 3728501 (N.Y. Sup. Ct. July 25, 2014). There, a real estate investment firm brought fraud claims against a CMBS seller on the basis that it misrepresented the safety and liquidity of some $40 million of CMBS purchased by plaintiff in 2008. The court granted defendants' motion to dismiss, holding that plaintiffs did not identify any actionable false statements regarding the CMBS, or establish reliance on any representations regarding the CMBS's value or risk. The "general" statements to which plaintiffs pointed to support their claims as to the safety and liquidity of the CMBS were held to be "statements of opinion of value, future expectations or 'puffery' not rising to the level of fraud." Significantly, the statements at issue were not representations about the features and value of any particular CMBS bond at the time plaintiffs were considering purchasing it, and the risks plaintiffs complained of "were disclosed in the prospectuses and other publicly available documents." The Appellate Division, First Department, affirmed the Supreme Court's ruling in its entirety. *See* 135 A.D.3d 414 (N.Y. App. Div. 2016).

These decisions suggest that claims based on false CMBS borrower data—as alleged in the Flynn whistleblower complaint—will likely need to identify specific data "misrepresentations" and establish, at least for misrepresentation claims, that the data were materially inaccurate. Plaintiffs will also need to establish (for fraud claims) that the seller held the requisite degree of knowledge and intent at the time of the misrepresentations, and that Plaintiffs relied upon the misrepresentations at issue.

f. Repurchase Claims Against Originators

As discussed above, the loans in CMBS are often issued by originators before being sold to CMBS sponsors or issuers to be pooled and securitized with other loans. To ensure the credit quality of the loans, the sale and purchase agreements between CMBS loan originators and issuers or sponsors often contain R&Ws that mirror those provided by issuers and sponsors to CMBS investors. For this reason, it is likely that for any successful claim of R&W breach by investors against issuers or sponsors, those issuers and sponsors will have a similar "repurchase" claim under a mirroring R&W against the originator. In the wake of the 2007/2008 global financial crisis, this right (with the notable exceptions of a number of cases litigated by Quinn Emanuel) was often of limited value as many issuers and originators became insolvent and defunct. Given the size of the CMBS loans at issue, and depending on the originator, we may see some similar examples in CMBS, which could push repurchase claims into bankruptcy court where creditors will vie for priority over the originator's remaining assets.

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If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

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[12] *See, e.g.,* S&P Global, COVID-19 Activity In Global Structured Finance For The Week Ending May 8, 2020 https://www.spglobal.com/ratings/en/research/articles/200514-covid-19-activity-in-global-structured-finance-for-the-week-ending-may-8-2020-11486787

[13] Certain investors, responding to post-financial crisis CMBS regulations, specifically focused on investing in lower-ranked CMBS tranches. *See, e.g.*, Real Estate Capital, The B-Piece Niche in CMBS, September 20, 2019, https://www.recapitalnews.com/b-piece-niche-cmbs/

[14] National Real Estate Investor, CMBS Market Grapples with Developing COVID-19 Effects, March 31, 2020, https://www.nreionline.com/cmbs/cmbs-market-grapples-developing-covid-19-effects

[15] Thomas J. Barak, "Preventing Covid-19 From Infecting the Commercial Mortgage Market," https://medium.com/@tombarrackjr/preventing-covid-19-from-infecting-the-commercial-mortgage-market-e7444701745e

[16] Fitch, CMBS Delinquencies Predicted to Reach Near "Great Recession Peak", https://commercialobserver.com/2020/04/cmbs-delinquencies-predicted-to-reach-near-great-recession-peak/

[17] Adam Piore, CMBS 2.0 (January 1, 2011) https://therealdeal.com/issues_articles/cmbs-2-0/

[18] *Source*: Principal Global Investors.

[19] Weis, A., & Njoku, J. (2009), CMBS: An Introduction, Cornell Real Estate Review, 7(1), 1-10., https://scholarship.sha.cornell.edu/crer/vol7/iss1/15/ Note, while some CMBS are structured as statutory trusts (which are SPEs, as indicated in this diagram), many are issued by trustees who hold title to the underlying CMBS pursuant to a New York common law trust (which is not a separate entity or an SPE).

[20] *See, e.g.*, *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 510 (S.D.N.Y. 2013).

[21] *See, e.g.*, *U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, 205 F. Supp. 3d 386, 429 (S.D.N.Y. 2016).

[22] *See, e.g.*, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2013 WL 1845588, at *23-26 (N.Y. Sup. Ct. 2013).

[23] *See, e.g.*, *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 559, 566 (S.D.N.Y. 2015.

[24] *See, e.g.*, JPMCC Commercial Mortgage Securities Trust 2016-JP4 Dec. 22, 2016 MLPA at A-1; *see also* Citigroup Commercial Mortgage Trust 2015-GC29 Apr. 1, 2015 MLPA at A-1.

[25] *See, e.g.*, JPMCC Commercial Mortgage Securities Trust 2016-JP4 Prospectus at Annex A-2 (disclosing stratification tables reflecting DSCR and LTV ratios).

[26] *See, e.g.*, *Tr. for Certificate Holders of Merrill Lynch Mortg. Passthrough Certificates Series 1999-C1 v. Love Funding Corp.*, 2005 WL 2582177, at *6–7 (S.D.N.Y. Oct. 11, 2005) (holding that a CMBS representation was breached where the loan borrower committed fraud during origination); *Countrywide Home Loans, Inc.*, 2013 WL 1845588, at *23-26 (finding it unambiguous that RMBS sponsor's "no default" representation was breached by borrower misrepresentations); *see also MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 165 A.D.3d 108, 115 (N.Y. App. Div. 2018) (holding that scope of RMBS "no material default" representation was to be determined by the jury).

[27] *See, e.g.*, JPMCC Commercial Mortgage Securities Trust 2016-JP4 Dec. 22, 2016 MLPA at B-16; *see also* Citigroup Commercial Mortgage Trust 2015-GC29 Apr. 1, 2015 MLPA at B-16.

[28] *See, e.g.*, JPMCC Commercial Mortgage Securities Trust 2016-JP4 Dec. 22, 2016 MLPA at B-20; *see also* Citigroup Commercial Mortgage Trust 2015-GC29 Apr. 1, 2015 MLPA at B-18.

[29] Dechert, Industry Considers CMBS 2.0 Rep Package, August 4, 2010, https://www.crunchedcredit.com/2010/08/articles/securitization/industry-considers-cmbs-2-0-rep-package/

[30] U.S. Securities Exchange Commission, CMBS Investor Feedback on Proposed Rulemaking Regarding the Dodd Frank Act and Regulation AB, February 25, 2011, https://www.sec.gov/comments/s7-08-10/s70810-189.pdf

[31] *See Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.*, No. 12 CIV. 6168 MGC, 2014 WL 1259630 (S.D.N.Y. Mar. 27, 2014) which involved a 2002 CMBS upon which plaintiffs sued in 2012. The Second Circuit affirmed the District Court's decision that plaintiff's claims were time-barred. *See Wells Fargo Bank, NA v. JPMorgan Chase Bank, N.A.*, 643 F. App'x 44 (2d Cir. 2016).

[32] For a more in depth analysis of a certain type of control dispute in pre-crisis CMBS—the fair-value purchase option dispute—see our prior publication from September 2019: *CMBS Fair-Value Purchase Option Litigation: Current Issues and Trends*, available at https://www.jdsupra.com/legalnews/september-2019-securities-and-58721/

[33] Alston & Bird, "The Dawn of CMBS 4.0: Changes and Challenges in a New Regulatory Regime," October 3, 2016 https://www.alston.com/-/media/files/insights/publications/2016/10/the-dawn-of-cmbs-40-changes-and-challenges-in-a-ne/files/thedawnofcmbs40/fileattachment/thedawnofcmbs40.pdf

[34] Bloomberg, How Repo Agreements Juiced Securitized-Debt Leverage, April 15, 2020, https://www.bloomberg.com/news/articles/2020-04-15/how-repo-agreements-juiced-securitized-debt-leverage-quicktake

[35] ProPublica, Whistleblower: Wall Street Has Engaged in Widespread Manipulation of Mortgage Funds, May 15, 2020, https://www.propublica.org/article/whistleblower-wall-street-has-engaged-in-widespread-manipulation-of-mortgage-funds

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