Simpson Thacher

Securities Law Alert

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Simpson Thacher's "[i]mpressive bench is notably well-versed in complex securities class actions."

– ***Chambers USA 2015***

D.C. Circuit: (1) Forward-Looking Statements Fall Within the PSLRA's Safe Harbor Only If Accompanied by Tailored Company-Specific Warnings; and (2) Descriptions Such as "Very Strong" May Be Actionable If Tied to a Specific Product and Time Period

On June 23, 2015, the D.C. Circuit revived a securities fraud action against Harman International Industries. *In re Harman Int'l Indus. Sec. Litig.*, 2015 WL 3852089 (D.C. Cir. 2015) (Rogers, J.). The court found the complaint "plausibly allege[d]" that two forward-looking statements were not entitled to safe harbor protection under the Private Securities Litigation Reform Act ("PSLRA") because the statements were not (1) "accompanied by warnings specific to the [c]ompany" that were (2) "tailored to the specific forward-looking statements" made and (3) "consistent with the historical facts when the statements were made." The court further held that a third statement describing product sales as "very strong" was "plausibly understood" as something other than "mere 'puffery'" because it was "specific about [both] product and time period" and contained "specifics that an investor could use to evaluate the statement's veracity."

Background

Plaintiffs alleged that Harman International Industries and three of its officers had made "materially false and misleading statements" regarding "the status of the [c]ompany's personal navigation device ('PND') products" between April 2007 and September 2007, when the company was being considered for acquisition.

On April 26, 2007, the same day that defendants announced a potential buyout, Harman's CEO said during an analyst conference call that the company "planned to reduce [high PND inventories in Europe] to normal levels at year-end." Specifically,

he stated that the company expected to sell more than 600,000 PND units that year. Several months later, on September 29, 2007, Harman's CFO stated during an analyst conference call that the company was "continu[ing] the growth and expansion of [the PND] business primarily in Europe." Both calls were preceded by announcements that the discussions would include "forward-looking statements" that were "subject to risks and uncertainties."

On August 29, 2007, the company filed its Form 10-K which stated that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal year 2007." The Annual Report "stated that it 'contains forward-looking statements'" and cautioned "that readers should 'not place undue reliance on these statements.'" The Annual Report also "included a detailed account of the 'risk factors'" that "may cause fluctuations in [the company's] operating results."

Plaintiffs alleged that all three statements were "materially false and misleading" in light of "the historical evidence of growing inventory, widespread obsolescence, and stagnant sales" of PNDs. Defendants moved to dismiss plaintiffs' complaint. On January 17, 2014, the district court for the District of Columbia granted defendants' motion to dismiss, finding that "the statements [made] during the conference calls fell within the [PSLRA's] safe harbor for forward-looking statements accompanied by meaningful cautionary statements, and the statement in the FY 2007 Annual Report was 'mere puffery' and inactionable." Plaintiffs appealed.

D.C. Circuit Holds the PSLRA's Safe Harbor Applies Only to Forward-Looking Statements Accompanied by Factually Accurate, Company-Specific Warnings Tailored to the Specific Statements Made

On appeal, the D.C. Circuit explained that in order "[t]o come within the [PSLRA's] statutory safe harbor, a statement must not only be forward looking (and identified as such), but also 'accompanied by meaningful cautionary statements'" (quoting 15 U.S.C. § 78u-5(c)(1)(A)(i)). The court found that "'[t]he requirement for 'meaningful' caution calls for substantive company-specific warnings based on a realistic description of the risks applicable to the particular circumstances'" (quoting *Southland Sec. Corp. v. INSpire Ins. Solutions,* 365 F.3d 353 (5th Cir. 2004)). The court determined that cautionary statements cannot be "mere boilerplate" but must instead be "tailored to the specific future projections, estimates or opinions in the [forward-looking statements]" (quoting *Institutional In'vrs Grp. v. Avaya*, 564 F.3d 242 (3d Cir. 2009)). The court explained that this requirement "follows from the statutory requirement that cautionary language must warn of what 'could cause actual results to differ materially *from those in the forward-looking statement*'" (quoting 15 U.S.C. § 78u-5(c)(1)(A)(i)) (emphasis added by the court).

The D.C. Circuit emphasized that "cautionary language cannot be 'meaningful' if it is 'misleading in light of historical fact[s]'" (quoting *Slayton v. Am. Express Co.*, 604 F.3d 758 (2d Cir. 2010)). "If a company were to warn of the potential deterioration of one line of its business, when in fact it was established that that line of business had already deteriorated, then … its cautionary language would be inadequate to meet the safe harbor standard." The court explained that "there is an important difference between warning that something '*might*' occur and that something '*actually* had' occurred."

The D.C. Circuit recognized that "Congress did not require the cautionary statement warn of '*all*' important factors, so long as 'an investor has been warned of risks of a significance similar to that actually realized,' such that the investor 'is sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preferences for risk and reward.'" The court noted that "[p]erfect clairvoyance may be impossible because of events beyond a company's control of which it was unaware."

D.C. Circuit Finds the Complaint Plausibly Alleged Defendants' Conference Call Statements Were Not Accompanied by Meaningful Cautionary Statements

The D.C. Circuit then turned to the question of "whether the [c]ompany's statements during the two conference calls were accompanied by warnings specific to the [c]ompany and tailored to the specific

forward-looking statements, not mere boilerplate, and consistent with the historical facts when the statements were made." With respect to the cautionary statements, the court determined that the complaint's allegations "plausibly show" that "the general information provided by the [c]ompany about its plan to reduce its substantial inventory did not disclose historical facts that could have affected the success of the plan being discussed" and that "[r]eferences to amassed [PND] inventory did not convey that inventory was obsolete, as opposed to stocked with the latest, cutting-edge models." The court found that the complaint sufficiently alleged "a misleading picture with regard to the impact of 'a large inventory of older generation, obsolete PNDs which [the company] could not sell or was forced to sell at a substantial loss.'"

D.C. Circuit Finds Defendants' Representation of "Very Strong" PND Sales Was Potentially an Actionable Misstatement Rather Than Mere "Puffery" Because It Specifically Described a Particular Product and Time Period

With respect to defendants' representation in the company's 2007 Annual Report of "very strong" PND sales, the D.C. Circuit explained that "'statements of reasons, opinions, or beliefs' can be actionable" (quoting *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991)). The court noted that "'conclusory terms [like 'high' value and 'fair'] in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading'" (quoting *Va. Bankshares*, 501 U.S. 1083).

The D.C. Circuit determined that "given the context in which it was made," "the 'very strong' statement in the FY 2007 Annual Report [was] plausibly understood as a description of historical fact rather than unbridled corporate optimism, *i.e.*, immaterial puffery." The court explained that "PNDs were part of the [c]ompany's largest division and had been the focus of recent public statements." Moreover, the court found that "[t]he 'very strong' statement was specific about product and time period," and not "too vague to be material." The court noted that puffery, on the other hand, encompasses statements that are "'too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision'" (quoting *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir.2005)).

Defendants attempted to rely on the Sixth Circuit's decision in *City of Monroe* to argue that "the 'very strong' statement [was] puffery because it 'lacked a standard against which a reasonable investor could expect [it] to be pegged'" (quoting *City of Monroe*, 399 F.3d 651). Rejecting this contention, the D.C. Circuit found "[n]othing" in the Sixth Circuit's *City of Monroe* decision that "purports to render inactionable any statement that does not contain its own metric." The court explained that the statements at issue in *City of Monroe*—such as claims that "Bridgestone sold 'the best tires in the world'"—were "more in line with generalized boasting" and were "more 'squishy' … than the [c]ompany's report of 'very strong' PND sales" (quoting *City of Monroe*, 399 F.3d 651).

The D.C. Circuit reversed dismissal of plaintiffs' complaint, and remanded the action for further proceedings consistent with its opinion.

Southern District of New York: Plaintiffs' Counsel Should Notify Proposed Confidential Witnesses and Verify Statements to Be Attributed to Those Witnesses Before Quoting Confidential Witnesses in a Complaint

On May 29, 2015, the Southern District of New York considered a case in which plaintiffs had voluntarily dismissed a putative securities class action in light of inaccuracies in and recantations of quotations from confidential witnesses ("CWs") referenced in their complaint. *In re Millennial Media, Inc. Sec. Litig.*, 2015 WL 3443918 (S.D.N.Y. 2015) (Engelmayer, J.). The court found that the case "raise[d] serious questions" as to (1) whether plaintiffs' counsel had "take[n] proper care to verify the statements attributed

to the CWs before the [complaint] was filed;" and (2) whether the CWs were "fairly treated when, without notice, they were designated as CWs in a [c]omplaint." The court stated that the case "underscore[d] why it is a best practice—if not an ethical imperative—for counsel, before designating a person as a CW in a [c]omplaint, to notify that person of counsel's intent to do so and to verify the statements that counsel propose to attribute to him or her."

Background

In the case before the court, plaintiffs' counsel attributed statements in the complaint to "persons identified there[in] as CWs, without ever (1) confirming with the CW the accuracy of the statements attributed to him or her, or (2) notifying the CW that counsel intended to quote him or her as such." Plaintiffs' counsel had never spoken to ten of the eleven CWs mentioned in the complaint. The quotations from those ten CWs were based on interviews with an investigator. When plaintiffs' counsel notified the CWs that they had been quoted in the complaint, after the complaint was filed, "four CWs asked that all references to them be dropped," and "four CWs reported material inaccuracies in statements the [complaint] had attributed to them." Following disclosure of these challenges to the CW quotations, plaintiffs voluntarily dismissed the action.

Southern District of New York Finds Plaintiffs' Counsel Should Have Confirmed the Accuracy of the Confidential Witness Statements Prior to Filing the Complaint

In light of plaintiffs' voluntary dismissal of their suit, the court had "no occasion to rule on the propriety of counsel's practices with respect to quoting persons designated as CWs." The court nevertheless expressed its view that counsel's failure to confirm beforehand the quotations it planned to attribute to the CWs in the complaint "create[d] significant potential for inaccuracy." The court observed that if counsel had verified in advance "the facts and quotations that counsel proposed to attribute to" the CWs, then many of the "deficiencies [in the complaint] could have been avoided." The court explained that "[t]he necessary refinements could have been made to ensure that quotes were used accurately; that information was presented in proper context; and that opinions, assumptions, hearsay, and speculation were not commingled and confused with representations of facts acquired firsthand by a percipient witness."

The court found it "difficult to come up with a good reason why counsel would *not* attempt to confirm with a witness, let alone any of the 11 CWs, the accuracy of the statements that counsel intended to attribute to them in the [c]omplaint." The court surmised that "[p]erhaps counsel feared that, confronted with such statements, the witness might repudiate, or unhelpfully modify or contextualize, the investigator's account of his earlier statements." However, the court explained that these are "not good reasons to refrain from checking factual accuracy."

In the court's view, the failure to make any "attempt to confirm the quotes of a witness on whom counsel proposes to rely in a public filing" does not comport with "Rule 11's command that counsel conduct 'an inquiry reasonable under the circumstances.'" The court stated that Rule 11 "does not require counsel personally to participate in an initial witness interview." However, once counsel is ready to file a complaint, "it is reasonable to expect counsel … to attempt to confirm with the witness the statements that counsel proposes to attribute to him and to assure that the [c]omplaint is presenting these statements in fair context." The court noted that "common sense explains why an investigator's memo of an initial witness interview is an inadequate substitute for counsel's independent confirmation of accuracy." For instance, "[t]he investigator may have taken notes hurriedly while conducting the interview," or "may have mistaken hearsay, opinion, or conjecture for facts." Given "the growing body of cases chronicling the repudiation by CWs of statements attributed to them in securities class-action complaints," the court found it particularly important that plaintiffs' counsel "check, and double-check" the accuracy of CW statements prior to filing a complaint quoting those CWs.

Southern District of New York Finds It Unfair for Counsel to Quote a Confidential Witness in a Complaint Without First Notifying the Witness and Obtaining the Witness's Consent

The court further observed that quoting from CWs in a complaint without their "foreknowledge … raises issues of fairness to [those] witnesses." The court explained that designating a witness as a CW in a complaint "does not by any means assure the witness anonymity throughout the litigation." In fact, there is "a meaningful possibility that a court will order counsel to reveal the names of CWs, so as to enable these presumably knowledgeable fact witnesses to be deposed." During an interview with an investigator, a witness "may be unaware that, even if described as a 'Confidential Witness,' he is at risk of being identified by name if the case proceeds to discovery."

The court stated that there is no "case or ethics canon requiring that plaintiffs' counsel notify a witness of an intention to quote him or of the possibility that being designated as a CW may result in his identification." The court further acknowledged that the "high pleading hurdles" of the Private Securities Litigation Reform Act "no doubt may tempt plaintiffs' counsel not to alert a helpful witness of the risks to him of being quoted as a CW in a [c]omplaint, lest the witness back away."

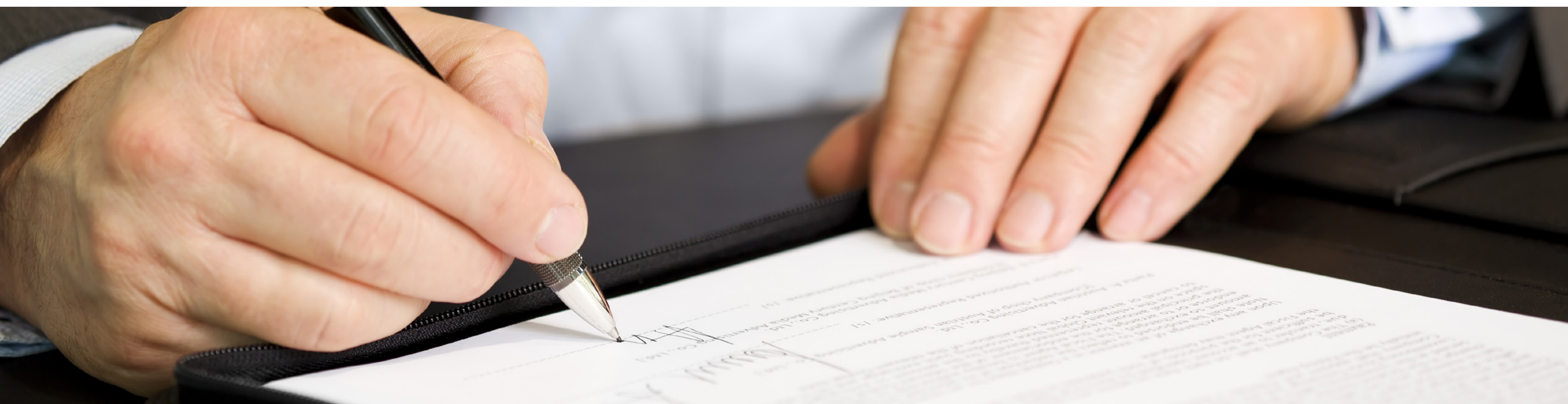
Nevertheless, the court found that "basic decency" requires counsel to notify an individual prior to designating him or her as a CW in a complaint. The court explained that "[w]hen counsel designates an interviewee as a CW, counsel exposes the interviewee to the risk of public disclosure of his name and, potentially, professional or personal tumult." It is possible that the witness "may still work at the defendant company, or in the same industry or community." The court noted that "[d]isclosure of the interviewee as a source of negative information or leads may affect his employment, employability, or reputation," and "may also harm the interviewee's co-workers, friends, or family."

Here, the court found that plaintiffs' counsel had "treated [the CWs] shabbily" with "no consideration given to their situations and interests." The court expressed its "hope and expectation … that, in future cases, counsel will aspire to better."

Southern District of New York: The Second Circuit's Decision in *Newman* Did Not Change the Standard for the SEC to Plead an Insider Trading Claim Against an Alleged Tippee Under the Federal Rules of Civil Procedure

On June 8, 2015, the Southern District of New York found that the Second Circuit's ruling in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014)[1] did not warrant reconsideration of its earlier decision declining to dismiss the SEC's insider trading claims against two alleged tippees. *SEC v. Jafar*, 2015 WL 3604228 (S.D.N.Y. 2015) (Oetken, J.) (*Jafar II*). The court found that "*Newman* did not change the standard" for the SEC to plead an

1. Please click here to read our prior discussion of the *Newman* decision.



insider trading claim "under Rules 8 and 9 of the Federal Rules of Civil Procedure, and that, under this standard, the SEC ha[d] pleaded a plausible insider trading claim" against the alleged tippees.

Background

In the case before the court, the SEC "[knew] neither the identity of the tipper nor how the tip was relayed to [d]efendants." However, the SEC did "plead[ ] 'on information and belief' that the tip was made in breach of a fiduciary duty, and that … [d]efendants knew that the tip was made in breach of a fiduciary duty." The SEC also alleged "specific facts" detailing "a similar [insider trading] scheme involving three of the same actors."

Defendants moved to dismiss the SEC's complaint for failure to state a claim. On September 29, 2014, the Southern District of New York denied defendants' motion to dismiss. *SEC v. One or More Unknown Traders in the Securities of Onyx Pharmaceuticals,* 2014 WL 5026153 (S.D.N.Y. 2014) (Oetken, J.) (*Jafar I*). The court found the allegations "sufficient to state a plausible claim that [defendants] [were] liable for insider trading."

Following the Second Circuit's decision in *Newman*, defendants moved for reconsideration of the court's decision. Defendants contended that the *Newman* decision "'redefine[d] the SEC's burden of proving tippee liability' in such a way that 'compels reconsideration' of the [court's] denial of their motion to dismiss." *Jafar II*, 2015 WL 3604228.

Southern District of New York Rejects Defendants' Contention That *Newman* Heightened the Pleading Requirements for SEC Insider Trading Claims Against Tippees

In considering defendants' motion for reconsideration, the Southern District of New York rejected defendants' contention that "*Newman* established a more burdensome standard for proving tippee liability" in insider trading cases brought by the SEC. The court explained that *Newman* addressed the Government's burden of proof with respect to the "personal benefit" requirement of tippee liability. Under *Newman*, the Government must establish that "'the tippee [knew] of the personal benefit received by the insider in exchange for the disclosure'" of material nonpublic information (quoting *Newman*, 773 F.3d 438). Moreover, "the mere fact of a casual or social friendship is not enough; there must be evidence of the relationship between tipper and immediate tippee that 'suggests a *quid pro quo* from the [immediate tippee] … or an intention to benefit [the immediate tippee]'" (quoting *Newman*, 773 F.3d 438).

The *Jafar II* court acknowledged that "the Second Circuit's holding in *Newman* may make it more difficult for the SEC to ultimately prevail on its insider trading claims in this action." However, the court "agree[d] with the SEC that *Newman* did not change the standard for pleading a claim under Rules 8 and 9 of the Federal Rules of Civil Procedure."

Southern District of New York Finds Rule 9(b)'s Particularity Requirements Are "Relaxed" for SEC Insider Trading Claims Against Tippees If the Scheme's Details Are Known Only by the Tippees and the Tipper

Turning to the allegations of the complaint, the court found that "the SEC [had pled] a plausible insider trading claim." The court noted that the SEC had not pled "specific facts that illuminate[d] whether the tip was part of a *quid pro quo* relationship and whether … [d]efendants knew that the tip was exchanged as part of a *quid pro quo* relationship." However, the court found that because "[t]his information [was] peculiarly within the knowledge of [d]efendants and the tipper," "it would be 'impractical' … to require the SEC to allege with particularity these details of the alleged insider trading."

The court determined that in these types of situations, "the standard under Rule 9(b) is relaxed." The court held that the SEC may satisfy Rule 9(b)'s requirements in cases like this by simply "plead[ing] a belief about the nature of the tip and [d]efendant's knowledge of the nature of the tip, coupled with particular facts supporting that belief."

Applying this standard to the complaint before it, the court deemed the SEC's allegations "sufficient to state a plausible claim that [d]efendants [were] subject to tippee liability as defined in *Newman*." The court found it significant that the SEC had alleged "two similar instances in which [d]efendants … [had] placed substantial, well-timed, risky bets that two different companies would experience sudden increases in their stock prices." Both "trades proved highly profitable," and "both involved a newspaper article written by the same journalist." The court found it "plausible to infer from the similar nature of the two events that the person who tipped the confidential information received a personal benefit of the *quid pro quo* variety required by *Newman*." Finally, the court found that "the parallel nature of the alleged events, just six months apart, strongly support[ed] an inference that [d]efendants, experienced traders, knew or should have known that the tipper received a personal benefit in exchange for the tip."

The court therefore denied defendants' motion for reconsideration of its earlier order denying their motion to dismiss.

New York Court of Appeals Holds Claims for Breach of Representations and Warranties in Connection with the Sale of Mortgage-Backed Securities Accrue on the Date Those Representations and Warranties Are Made

On June 11, 2015, the New York Court of Appeals held that a cause of action "for breach of representations and warranties" in connection with the sale of residential mortgage-backed securities "accrued at the point of contract execution." *ACE Sec. Corp. v. DB Structured Products, Inc.*, 2015 WL 3616244 (N.Y. Ct. App. 2015) (Read, J.).[2] The court further held that the seller's "refusal to repurchase the allegedly defective mortgages" pursuant to a contractual cure or repurchase obligation "did not give rise to a separate cause of action" for purposes of determining whether the statute of limitations had run. The court ruled that the "cure or repurchase obligation was not a separate and continuing promise of future performance," nor was it an "independently enforceable right" that "continue[d] for the life of the investment."

Background

On March 28, 2006, ACE Securities Corp. executed a Mortgage Loan Purchase Agreement (the "MLPA") with DB Structured Products, Inc. ("DBSP") for the purchase of certain residential mortgage-backed securities ("RMBS"). That same day, ACE "transferred the loans and its rights under the MLPA" to the ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2 (the "Trust") pursuant to a Pooling and Servicing Agreement (the "PSA"). DBSP made numerous representations and warranties in the MLPA "regarding the credit quality and characteristics of the pooled loans 'as of the Closing date.'" The MLPA provided that "the Trust's '*sole remedy*' in the event DBSP 'breach[ed] any of the representations and warranties contained in' the MLPA was for DBSP to cure or repurchase a non-conforming loan."

Six years after the execution of the MLPA, two investment funds that held certificates in the Trust brought suit, alleging "breaches of representations and warranties" in connection with the RMBS and that DBSP had "refus[ed] to comply with its repurchase obligation." Several months later, on September 13, 2012, the Trustee of the Trust substituted itself for the funds as plaintiff. The Trustee claimed that "it had promptly notified DBSP of the breaches of representations and warranties on" various dates beginning on February 8, 2012, and asserted that "each of these notices specified the defective or non-conforming loans, detailed specific breaches for each loan and supplied supporting documentation." In response, "DBSP moved to dismiss the Trust's complaint as untimely" in light of the six-year statute of limitations applicable to contract causes of action in New York. *See* N.Y. CPLR § 213(2). DBSP argued that the Trust's "claims accrued as of March 28, 2006, more than six years before the Trust filed its complaint." DBSP also argued that the complaint filed by the Trustee on behalf of the Trust could not be deemed timely by virtue of the funds' earlier

2. Simpson Thacher represents DB Structured Products and argued the appeal in this action.

filing, since the funds lacked standing to sue under the PSA's "no action" clause, and had not afforded DBSP a 90-day pre-suit notice period, as required under the PSA.

On May 13, 2013, the New York Supreme Court denied DBSP's motion to dismiss. The court "reasoned that DBSP could not have breached its repurchase obligations until it 'fail[ed] to timely cure or repurchase a loan following discovery or receipt of notice of a breach of a representation or warranty'" (quoting *ACE Sec. Corp. v. DB Structured Products, Inc.*, 40 Misc. 3d 562 (N.Y. Sup. Ct. 2013) (Kornreich, J.)). The court found that "DBSP's cure or repurchase obligation was recurring and that DBSP committed an independent breach of the PSA each time it failed to cure or repurchase a defective loan." DBSP appealed.

On December 19, 2013, the New York Appellate Division, First Department, reversed the Supreme Court's decision. The First Department "held that 'the [Trust's] claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred,'" and also sided with DBSP on its standing and pre-suit notice arguments (quoting *ACE Sec. Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522 (N.Y. App. Div. 2013) (Tom, J.P., Andrias, DeGrasse, Richter, JJ.)). The Trust appealed.

New York Court of Appeals Holds That DBSP's Cure or Repurchase Obligation Was Not "Independently Enforceable" as a "Separate and Continuing Promise of Future Performance"

On appeal, the Trust contended that "its claim did not arise until DBSP refused to cure or repurchase, at which point the Trust … had six years to bring suit." The Trust argued that "the repurchase obligation [was] a distinct and continuing obligation that DBSP breached each time it refused to cure or repurchase a non-conforming loan." In essence, the Trust claimed that "the cure or repurchase obligation [was] a separate promise of future performance that continued for the life of the investment (i.e., the mortgage loans)."

The New York Court of Appeals found that "DBSP's cure or repurchase obligation could not reasonably be viewed as a distinct promise of future performance." The court underscored that DBSP "never guaranteed the future performance of the mortgage loans." Rather, DBSP "represented and warranted certain facts about the loans' characteristics as of March 28, 2006, when the MLPA and PSA were executed." The court explained that "DBSP's cure or repurchase obligation was the Trust's remedy for a breach of *those* representations and warranties, not a promise of the loans' future performance." The court emphasized that "nothing in the contract specified that the cure or repurchase obligation would continue for the life of the loans."

From a practical perspective, the court explained that "it makes sense that DBSP, as sponsor and seller, would not guarantee future performance of the mortgage loans." The court observed that "[a] sponsor does not guarantee payment for the life of the transaction because loans may default 10 or 20 years after they have been issued for reasons entirely unrelated to the sponsor's representations and warranties." In view of this possibility, "[t]he sponsor merely warrants certain characteristics of the loans, and promises that if those warranties and representations are materially false, it will cure or repurchase the non-conforming loans within the same statutory period in which remedies for breach of contract (i.e., rescission and expectation damages) could have been sought."

Had DBSP not agreed to a cure or repurchase obligation, the court explained that "the Trust's only recourse would have been to bring an action against DBSP for breach of the representations and warranties … within six years of the date of contract execution." The court determined that DBSP's cure or repurchase obligation simply provided the Trust with an "alternative remedy" for alleged breaches of representations and warranties, not an entirely separate cause of action. The court found no basis for the Trust's contention that "the cure or repurchase obligation transformed a standard breach of contract remedy, i.e. damages, into one that lasted for the life of the investment—decades past the statutory period." The court

determined that "nothing in the parties' agreement evidences such an intent."

New York Court of Appeals Rejects the Trust's Contention That the Cure or Repurchase Obligation Was a Substantive Condition Precedent to the Trust's Claim for Breach of DBSP's Representations and Warranties

The Trust also contended that "the cure or repurchase obligation was a substantive condition precedent to suit that delayed accrual of [its] cause of action" against DBSP. According to the Trust, "it had no right at law to sue DBSP until DBSP refused to cure or repurchase the loans within the requisite time period."

Rejecting this argument, the New York Court of Appeals found that "[t]he Trust suffered a legal wrong at the moment DBSP allegedly breached the representations and warranties." From that point forward, "a cause of action existed for breach of a representation and warranty." The court explained that "[i]f DBSP's purchase obligation were truly the separate undertaking the Trust alleges, DBSP would not have breached the agreement until after the Trust had demanded cure and repurchase." But in the case at hand, the court determined that "DBSP breached the representations and warranties in the parties' agreement, if at all, the moment the MLPA was executed." The court found that "[t]he Trust simply failed to pursue its contractual remedy within six years of the alleged breach."

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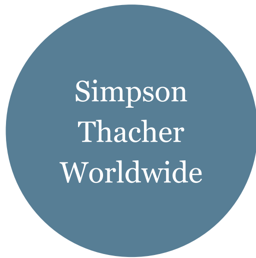

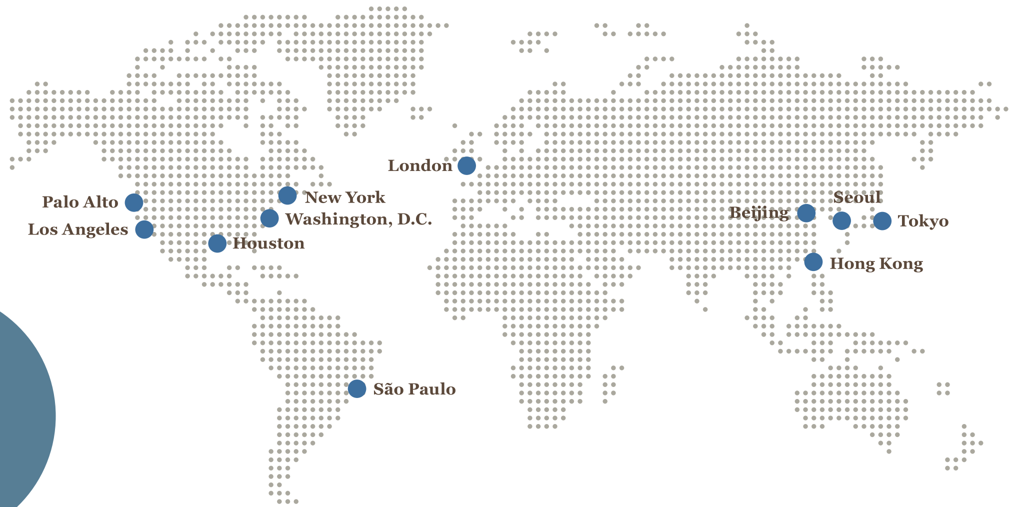

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