

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BEAR STEARNS MORTGAGE FUNDING TRUST	:	
2006-SL1, by U. S. Bank National	:	
Association, as Trustee,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action
	:	No. 7701-VCL
EMC MORTGAGE LLC and JPMORGAN CHASE	:	
BANK, N.A.,	:	
	:	
Defendants.	:	

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Chancery Courtroom No. 12C  
 New Castle County Courthouse  
 500 North King Street  
 Wilmington, Delaware  
 Tuesday, August 19, 2014  
 2 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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RULINGS OF THE COURT FROM ORAL ARGUMENT ON DEFENDANTS'  
MOTION TO DISMISS

- - -

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CHANCERY COURT REPORTERS  
 New Castle County Courthouse  
 500 North King Street - Suite 11400  
 Wilmington, Delaware 19801  
 (302) 255-0524

## 1 APPEARANCES:

2 PHILIP A. ROVNER, ESQ.  
Potter, Anderson & Corroon LLP

3 -and-

4 PHILIPPE Z. SELENDY, ESQ.  
ERICA P. TAGGART, ESQ.  
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5 of the New York Bar  
Quinn, Emanuel, Urquhart & Sullivan, LLP  
6 for Plaintiff

7 DANIEL B. RATH, ESQ.  
REBECCA L. BUTCHER, ESQ.  
8 Landis, Rath & Cobb LLP

-and-

9 ROBERT A. SACKS, ESQ.  
of the California Bar  
10 Sullivan & Cromwell LLP

-and-

11 DARRELL S. CAFASSO, ESQ.  
of the New York Bar  
12 Sullivan & Cromwell LLP  
for Defendants

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2                   THE COURT: For the reasons that I'm  
3 about to give you, I am going to grant the motion. I  
4 think that it is an interesting and difficult  
5 analysis, but that given the weight of how decisions  
6 have been coming out, both in this jurisdiction and  
7 elsewhere, I think that it is one that I'm obligated  
8 to grant.

9                   The suit involves an effort to recover  
10 for mortgage loans that were deposited into the Bear  
11 Stearns Mortgage Funding Trust 2006-SL1 that I will  
12 refer to as "the Trust." There are two key  
13 transactional documents: first, a pooling and  
14 services agreement dated July 1, 2006; second, a  
15 mortgage loan purchase agreement dated July 28, 2006.  
16 The transaction closed contemporaneously with the  
17 mortgage loan purchase agreement on July 28, 2006.

18                   This complaint was filed on July 16,  
19 2012, nearly six years later. There's been a motion  
20 to dismiss the complaint made on the basis of laches.  
21 A court of equity applies laches instead of the  
22 traditional statute of limitations analysis.  
23 Nevertheless, it is a maxim of equity that equity  
24 follows the law. The question in the first instance

1 is, therefore, whether the statute of limitations  
2 applies. If it does apply, then laches presumptively  
3 bars the claim unless there's been some equitable  
4 exception shown that would cause the claim to go  
5 forward.

6           In Delaware, the statute of  
7 limitations for a breach of contract claim in a  
8 nonsealed agreement is three years. That's 10 Del.  
9 Code Section 8106. In New York, the statute is six  
10 years. The basic statute of limitations analysis is  
11 to look at when the claim accrues and determine  
12 whether suit was filed within the limitations period.

13           Here, it has been held, both in this  
14 Court and in New York, that the statute of limitations  
15 for a breach of representations and warranties related  
16 to loans put into a trust like the one in this case  
17 arises at the closing of the transfer of the loans to  
18 the trust; in other words, on July 16, 2012. The  
19 authority for that in this Court is then-Chancellor,  
20 now-Chief Justice Strine's decision in Central  
21 Mortgage versus Morgan Stanley Mortgage Capital  
22 Holdings, LLC, 2012 Westlaw 3201139, a decision from  
23 August 7, 2012. And for that proposition, you can  
24 consult page 17 of the slip opinion. Similar

1 authority under New York law is the ACE Securities  
2 Corporation versus DB Structured Products decision  
3 from the First Division of the New York Appellate  
4 Court 2013.

5 I think the critical one for today is  
6 Central Mortgage because, as you will hear, Delaware  
7 statute of limitations applies. In fact, I will tell  
8 you that right now, namely, precedent dictates that  
9 the statute of limitations is established by the law  
10 of the forum, notwithstanding the selection of a  
11 different law to govern an agreement. The idea behind  
12 this is that the selection of the statute of  
13 limitations is not merely a matter for private  
14 contracting but, rather, implicates public policy  
15 rationales such as the access of litigants to the  
16 courts and the burdens that cases place on public  
17 resources like the courts. Put differently, a state  
18 can legitimately determine that it does not want its  
19 courts to entertain cases that are older than a  
20 particular length of time. These are all explained by  
21 Chancellor Strine in the Central Mortgage case.

22 One certainly could have a different  
23 regime. One could have a pure contract regime. One  
24 could even have a statute of limitations regime where

1 the statute of limitations followed the choice of law  
2 provision in the agreement. If I were writing on a  
3 blank slate, that's what I'd favor. I'd say that if  
4 you select a governing law in the agreement, you've  
5 selected a statute of limitations and your ability to  
6 sue wouldn't vary depending on which court you went  
7 around and sued in. But that's not the law. The law  
8 is that the statute of limitations is governed by the  
9 law of the forum, notwithstanding the selection of a  
10 different law to govern the agreement.

11           And the law is also in Delaware, under  
12 10 Del. Code Section 8121, that if one has a choice  
13 between two statutes of limitations such that the  
14 claim might arise under the longer one but one would  
15 sue under it here, Delaware applies the shorter  
16 statute of limitations. So assuming that the claim  
17 arose under New York law and would otherwise be  
18 governed by the New York statute of limitations, under  
19 the borrowing statute, the Delaware law period  
20 applies. This is something, again, that was  
21 explicated in Central Mortgage.

22           Once again, you could have a different  
23 regime. The plaintiffs basically argue for a  
24 different regime in which you only get cut back. And

1 if you could bring a claim -- I'm sorry. It's not  
2 that you get cut back. You can't take advantage of a  
3 longer forum statute of limitations. In other words,  
4 if you could have brought in your home court the  
5 claim, the borrowing statute would not apply. That's  
6 not what I read Central Mortgage to say. I read  
7 Central Mortgage to say that you take the opposite  
8 approach.

9 Under Central Mortgage, the statute of  
10 limitations begins to run on the date of breach  
11 regardless of the plaintiff's knowledge. The  
12 question, therefore, is whether the plaintiff sued  
13 within the three-year period. They didn't.

14 Now we have to consider whether there  
15 are bases for tolling. The first argument is  
16 essentially an argument for contractual tolling.  
17 Under the mortgage loan purchase agreement, Section 7,  
18 there is a provision that could be interpreted as an  
19 effort at contractual tolling. It says, "Any cause of  
20 action against the Mortgage Loan Seller or relating to  
21 or arising out of a breach of the Mortgage Loan Seller  
22 of any representations and warranties made in this  
23 Section 7 shall accrue as to any Mortgage Loan upon  
24 (i) discovery of such breach by the Mortgage Loan

1 Seller or notice thereof by the party discovering such  
2 breach and (ii) failure by the Mortgage Loan Seller to  
3 cure such breach, purchase such Mortgage Loan or  
4 substitute a qualifying Mortgage Loan pursuant to the  
5 terms thereof."

6 Note that this provision seems to  
7 specifically contemplate a time when a cause of action  
8 would accrue based on two conditions being met: the  
9 first condition being either the discovery of a breach  
10 by the mortgage loan seller or, alternatively, notice  
11 thereof by another party discovering the breach, and  
12 the second being the failure by the mortgage loan  
13 seller to cure such a breach.

14 From what I understand, it makes  
15 eminent sense in the context of the transaction why  
16 the parties would have bargained for an accrual regime  
17 that would not be triggered off the closing of the  
18 transaction but, rather, would envision accrual to  
19 happen later on down the line. Based on extant law,  
20 however, I do not believe that it is possible to give  
21 Section 7 effect along those lines.

22 So the first issue is what law applies  
23 to this provision. If this provision is construed  
24 under New York law, then we have learning from Judge



1 Scheindlin that says that this condition is procedural  
2 and unrelated to the underlying substance of the claim  
3 and, therefore, does not affect the time at which suit  
4 can be brought. As to matters of New York law, the  
5 Southern District is, of course, closer to that state  
6 than I, and I am inclined to be guided by her views.  
7 I would note, of course, the well-understood  
8 malleability of the substance/procedure distinction  
9 and the number of occasions in our law when a  
10 condition such as this, quite similar to this, is, in  
11 fact, deemed to be substantive and trigger a statute  
12 of limitations running only upon satisfaction of the  
13 condition. Nevertheless, it's my view that to the  
14 extent that this condition is deemed to be interpreted  
15 under New York law, I would be ill-advised to discount  
16 the views of New York jurists who are closer to that  
17 state's jurisprudence. So assuming it's governed by  
18 New York law, the Section 7 conditions do not alter  
19 the accrual analysis.

20           The separate issue is whether this is  
21 a matter of Delaware law. What the plaintiffs say is  
22 that if the defendants want to move to dismiss on the  
23 basis of the shorter statute of limitations --  
24 obviously it was the plaintiffs who came to Delaware.

1 But if the defendants want to invoke the shorter  
2 statute of limitations, the defendants need to accept  
3 the accoutrements that come with it. One of those  
4 accoutrements is the accrual period.

5           What the plaintiffs say is that in  
6 Delaware, when one has a condition of this nature,  
7 that the statutory limitations period does not run  
8 until the condition is met. It's, frankly, not clear  
9 to me that Delaware law stands for that provision.  
10 And again, I think Central Mortgage, which dealt with  
11 a quite similar transaction involving a quite similar  
12 structure -- admittedly, there the provision did not  
13 use the word "accrual," but it had a notice and cure  
14 provision that figured prominently in then-Chancellor  
15 Strine's decision -- provides the best authority. And  
16 so I will follow Central Mortgage and hold that  
17 notwithstanding the accrual provision, this  
18 transaction accrued at the time of closing.

19           This ruling finds support in the  
20 Delaware cases which hold that parties cannot agree  
21 prospectively by contract to extend the statute of  
22 limitations. For that proposition you can see Shaw  
23 versus Aetna Life Insurance. You can also see the  
24 Chancellor's decision in GRT -- and I forget the rest

1 of the case, but it's the GRT private equity case  
2 about indemnification under a reps and warranties  
3 provision in a private company acquisition agreement.

4           Now, technically Section 7 is not an  
5 agreement to extend the limitations period. It's an  
6 agreement regarding when the accrual period starts.  
7 But that is a distinction which, at least in Judge  
8 Scheindlin's view under New York law, was held not to  
9 make a difference. That's the U. S. Bank versus  
10 GreenPoint Mortgage case. And, again, in my view,  
11 given the similar structure that was at issue in  
12 Central Mortgage, if Chancellor Strine had thought it  
13 made a difference, he would have focused in on it.

14           There is an anomaly in Delaware law  
15 that this highlights; namely, that's the ability under  
16 a sealed contract to get a statute of limitations of  
17 20 years. In other words, had the parties simply  
18 written the word "sealed" beside their signatures,  
19 then under controlling Delaware Supreme Court  
20 precedent in the Whittington case, the statute of  
21 limitations would have been 20 years. That one word,  
22 "sealed," would have the effect of lengthening the  
23 statute of limitations from three years to 20 years.  
24 I'm sure the defendants would say "Silly, Vice

1 Chancellor Laster. That's not lengthening the statute  
2 of limitations. That's selecting a different statute  
3 of limitations that applies to a sealed document."

4 But I think those of us who grew up or at least  
5 studied under law professors steeped in the American  
6 realist movement would recognize that that type of  
7 distinction is not one that holds sway under American  
8 legal realism or what Judge Posner refers to as  
9 pragmatism. The question is the substance, the  
10 outcome, not the form. We should respect different  
11 forms if the forms matter for other reasons, but not  
12 solely as a means of circumventing a substantive rule.

13           It seems to me that if you could get a  
14 longer statute of limitations and then dial back on it  
15 simply by putting "sealed" on the signature line, it  
16 would make eminent sense to let parties, particularly  
17 sophisticated parties, contract, as they have here,  
18 for an accrual period suitable to the specifics of  
19 their agreement. I would actually think it more  
20 persuasive to give effect to a provision like this  
21 than to give effect to the word "sealed" at the  
22 signature line of a document.

23           So if I were writing on a blank slate,  
24 that's what I'd do. I'd allow sophisticated parties

1 either to shorten or extend the statute of limitations  
2 up to some outer limit. If Delaware law, as it does,  
3 believes the outer limit is 20 years, well, that would  
4 be an appropriate range, and then I would give effect  
5 to an accrual provision, like something like this, to  
6 operate within that statute of limitations, that  
7 extendible statute of limitations period.

8           But nobody is asking me to write on a  
9 blank slate. It's not my prerogative to write on a  
10 blank slate. And what we instead have in Delaware is  
11 established case law, including the Shaw case, the  
12 Central Mortgage case, and the GRT case, which all say  
13 you can't extend the statute of limitations. So as a  
14 result, I do not believe, either as a matter of New  
15 York law or as a matter of Delaware law, that  
16 Section 7 of the MLPA alters the statute of  
17 limitations analysis.

18           In terms of more traditional tolling  
19 doctrines that do not rely on contractual language,  
20 the first one implicated is a claim for fraudulent  
21 concealment. I haven't seen anything in the complaint  
22 about fraudulent concealment. The complaint claims  
23 fraud and the complaint alleges concealment in the  
24 sense of a failure to produce documents. But the

1 complaint doesn't allege misleading communications to  
2 throw one off the scent, so to speak, as fraudulent  
3 concealment historically has required.

4           In terms of unknowable injury, these  
5 injuries were not unknowable. They were knowable.  
6 One could have sued back in the day or done due  
7 diligence consistent with the agreement. That's what  
8 Central Mortgage recognizes at page 23 of that  
9 decision. I recognize and am sympathetic to the  
10 plaintiff's point of view that that level of due  
11 diligence is inconsistent with the way that these  
12 transactions were set up and priced, and that, really,  
13 to expect retrospectively the trustee to have acted  
14 earlier is somewhat unrealistic. Nevertheless, when  
15 you're analyzing the issue of unknowable injury, the  
16 test is not unrealistically knowable injury. It's  
17 unknowable injury. And here, the injury was not  
18 unknowable.

19           Faced with a statute of limitations  
20 that has, therefore, run to the extent that the claim  
21 accrued at the time of closing, the alternative for  
22 the trust is to find a different breach of contract  
23 that could give rise to a later statute of  
24 limitations, such as the failure to comply with a

1 repurchase obligation. This argument was rejected in  
2 Central Mortgage at page 20. It has also been  
3 rejected by New York authorities.

4 Another alleged failure is the claim  
5 of breach in the form of a failure to notify once a  
6 breach was known. This theory also has been rejected  
7 on the grounds that when the remedy is repurchase and  
8 when that remedy is based upon a breach of reps and  
9 warranties that occurred at closing, when the  
10 underlying breach is untimely, the failure to notify  
11 cannot be used to revive the suit. That was the  
12 conclusion reached by Chancellor Strine in an early  
13 decision in a Bear Stearns trust matter, 2013 Westlaw  
14 164089 at \*3. Once again, there are also New York  
15 authorities that speak to those issues.

16 I am going to dismiss the accounting  
17 claim. I don't think it's governed by the statute of  
18 limitations analysis, but I don't think there's  
19 anything there at this point, at least as pled.

20 By contrast, although I don't know  
21 what at this point they can get out of it, I do think  
22 that the failure to provide documents continues to  
23 state a claim as pled. So I'm not going to dismiss  
24 that. Again, I don't know what happens to it at this

1 point, but I do think, at least on a pleading stage  
2 basis, it is well-pled and it's not barred by the  
3 statute of limitations theory.

4 That's all I can think of right now.

5 What questions do people have?

6 MR. SELENDY: Your Honor, thank you  
7 for the opinion. I --

8 THE COURT CLERK: Come to the podium,  
9 please.

10 MR. SELENDY: I do have a question. I  
11 don't believe you raised the unjust enrichment --

12 THE COURT: Oh.

13 MR. SELENDY: -- claim.

14 THE COURT: I'm not dismissing that.  
15 I just don't know enough about it at this point. And  
16 I do think that it is fairly pled. There aren't  
17 allegations in the complaint sufficient to let me  
18 know, you know, when things happened. But given the  
19 interlinks, at least as pled, between the agreements  
20 by which these loans were purchased from third parties  
21 and then turned around and sold to the trust, it does  
22 strike me, at least in theory, there can be some  
23 unjust enrichment there such that I can't deal with it  
24 on a pleading stage.



1                   MR. SELENDY: The second question,  
2 would Your Honor entertain any post-hearing  
3 submissions, for example, on the borrowing statutes?

4                   THE COURT: No.

5                   MR. SELENDY: Thank you.

6                   THE COURT: Mr. Sacks, any questions?

7                   MR. SACKS: Nothing further, Your  
8 Honor. Thank you.

9                   THE COURT: Okay. What I would like  
10 you-all to do, since I was rambling based on notes  
11 that I made in preparation for today as well as based  
12 on your-all's arguments, it would be helpful if the  
13 Delaware folks would put their heads together and come  
14 up with a stipulated order that would memorialize  
15 which few claims -- I guess two claims -- remain in  
16 the case and then put that in. Obviously, if for some  
17 reason you-all can't figure out what I meant or what I  
18 said or have other reasons why you can't come to  
19 agreement, you know where to find me.

20                   Thank you very much. We stand in  
21 recess.

22                   MR. SELENDY: Thank you.

23                   (Court adjourned at 4:04 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 17 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 20th day of August 2014.

/s/ Neith D. Ecker  
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Chief Realtime Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Delaware Notary Public