



## Finance ADVISORY ■

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### New York Appellate Division Affirms Trustee's Discretion and Reliance on Counsel in Trust-Related Decisions

Earlier today, the New York Appellate Division, First Department, issued a significant decision reaffirming the deference a court should observe when reviewing a trustee's discretionary actions. The decision, *In re The Bank of New York Mellon, et al. v. The Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago, et al.*, (Index No. 651786/11), arose from the efforts of Bank of New York Mellon ("BNYM"), in its capacity as trustee for 530 residential mortgage-backed securitization trusts, to obtain court approval for the settlement of trust claims against Countrywide Home Loans and its successor, Bank of America (collectively, BofA) for breaches of representations and warranties made to the trusts, and deficient mortgage loan servicing.

The settlement resulted from negotiations between a group of institutional investors who held securities issued by the trusts, BofA as the prospective defendant, and BNYM as trustee. BNYM retained experienced securitization counsel to provide legal advice, and counsel in turn retained several respected outside experts to evaluate the allegations and the settlement itself. The settlement provides for cash and other benefits for investors valued at approximately \$11.5 billion.

After the parties reached agreement, BNYM brought a special proceeding in New York state court pursuant to NY CPLR Article 77 seeking court approval of the settlement. In the Article 77 proceeding, a group of investors who had not participated in the negotiations objected to the settlement on the grounds that BNYM acted unreasonably, in bad faith, and outside of its discretion. The trial court rejected the majority of those arguments and largely approved the settlement. The trial court, however, rejected a portion of the settlement that called for the trusts to release claims arising from BofA's alleged failure to repurchase modified loans. In doing so, the trial court held that BNYM acted unreasonably in connection with the release of such claims because the court disagreed with BNYM's counsel's assessment—on which BNYM relied—of the strength and value of those claims. Both the proponents and opponents of the settlement agreement appealed.

In today's decision, the Appellate Division concluded that BNYM's decision to enter into the settlement was proper in all respects. It therefore affirmed the trial's court's approval of the vast majority of the settlement, but rejected its finding that BNYM and counsel had acted unreasonably in releasing claims related to modified loans. The appellate court reaffirmed that the proper scope of review was simply whether the trustee exercised its discretion

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reasonably and in good faith, and that the trial court was not permitted to substitute its own assessment or judgment for that of the trustee.

The appellate court further emphasized that, if a trustee has relied on the advice of qualified and competent trust counsel, then “a party challenging the decisions of a trustee who followed the advice of a highly-regarded specialist in the relevant area of the law can prevail only upon a showing that, based on the particular circumstances, the reliance on counsel’s assessment was unreasonable and in bad faith.”<sup>1</sup> The appellate court found no evidence of bad faith, and that reliance on trust counsel’s advice was “eminently reasonable.”<sup>2</sup>

Today’s decision is a strong endorsement of the broad authority enjoyed by trustees when making discretionary decisions on behalf of securitization trusts (especially when those decisions are based on the advice of counsel) and the deference that New York courts should afford a trustee’s exercise of its discretion. Investors and other parties interested in the decisions made by trustees will likely find it more difficult to mount challenges to trustees’ actions in New York courts.

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<sup>1</sup> Decision at 10.

<sup>2</sup> *Id.* Notably, the court found that it would have been *unreasonable* for the trustee to refuse to enter into the settlement with the expectation of obtaining a much greater judgment several years later, since the trustee knew that it would not be able to collect an amount greater than the proposed settlement. *Id.* at 12.

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