

From 'Nomura' to 'Ambac': Where Does the Law on Sole Remedy Clauses Stand?

Plaintiffs Ambac Assurance Corp. and others (collectively, Ambac), an insurer, sought to use contractual remedies other than the sole remedies clause in connection with its claim that defendants Countrywide Home Loans, Inc. and others, (collectively, Countrywide) breached various representations and warranties contained in the insurance and indemnity agreements (the I&I agreements) between the parties.

[David B. Saxe](#), [Danielle C. Lesser](#) and [Michael Mix](#), *New York Law Journal* – August 20, 2018

In the *Ambac Assurance v. Countrywide Home Loan*, No. 79, 2018 N.Y. LEXIS 1542 (Ct. App. June 27, 2018), the Court of Appeals upheld a contractual sole remedy clause, adhering to long-standing precedent.

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Despite Ambac's losses, the Court of Appeals found that the sole remedy clause was sufficiently clear and encompassing to exclude the application of any other remedy, especially where the parties were sophisticated and negotiated at arm's length. The court also rejected Ambac's argument that it was not bound by the sole remedies clause due to a separate clause in the I&I agreements, stating that Ambac's remedies were "cumulative." Causation, justifiable reliance, and entitlement to attorney fees were also addressed by the court but are not discussed here.

FACTUAL BACKGROUND

Ambac issued irrevocable insurance policies for 17 residential mortgage-backed securitizations sponsored by defendant Countrywide. For each securitization, Ambac agreed to insure payments of principal and interest due to the securitization's certificate-holders.

After Ambac issued the policies, there were widespread defaults on the underlying mortgages, and Ambac alleged that it was forced to pay much more in insurance claim payments than it had anticipated. Ambac alleged that Countrywide fraudulently induced it to insure the securitizations, and that Countrywide breached various representations and warranties in the I&I agreements. Both parties moved for summary judgment on Ambac's fraud and breach of contract claims.

THE SOLE REMEDY PROVISION

A central issue focused on whether Ambac's potential damages were limited by a sole remedy provision in the I&I agreements. Section 2.01(l) provided that Ambac's remedy "with respect to any defective mortgage loan . . . shall be limited to" a "repurchase protocol" under which Countrywide will either cure the breached representation or warranty, substitute another mortgage loan, or repurchase the loan at a contractually specified price.

Ambac argued that the repurchase protocol only applied to the subset of Countrywide representations and warranties that were specifically incorporated into the I&I agreements from other transaction documents in Section 2.01(l). Ambac also drew a distinction between "transaction-level" and "loan-level" misrepresentations to argue that different remedies applied to each. Countrywide disagreed, arguing that Ambac could not re-characterize its claim in order to circumvent the repurchase protocol, which analysis would render it superfluous.

The motion court held for Ambac, pointing to Section 5.02(b), the cumulative remedies clause of the I&I agreements, which stated that "[u]nless otherwise expressly provided, no remedy herein conferred upon or reserved is intended to be exclusive of any other available remedy, but each remedy shall be cumulative." Section 5.02(b) also stated that Ambac may take any "action at law or in equity as may appear necessary."

The motion court concluded that "because the sole remedy provision only applies to breaches of Section 2.01(l), to the extent that Ambac can prove breaches of other sections of the I&I agreements, it is not limited to the sole remedy of repurchase." *Ambac Assurance v. Countrywide Home Loans*, No.651612/2010, 2015 N.Y. Misc. LEXIS 5199, at *8-9 (Sup. Ct. Oct. 22, 2015).

The First Department modified this portion of the opinion, explaining that the "plain language of [Section 2.01(l)] indicates that the repurchase protocol applies to a breach of any representation or warranty relating to defective loans, and not just those specifically incorporated into Section 2.01(l)." It stated that "Ambac cannot avoid the consequences of the sole remedy provision by relying on what it terms 'transaction-level' representations about Countrywide's operations and financial condition, because the heart of Ambac's lawsuit is that it was injured due to a large number of defective loans." *Ambac Assurance v. Countrywide Home Loans*, 151 A.D.3d 83, 89 (1st Dep't 2017).

The Court of Appeals agreed with the First Department, outlining broadly that "courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." *Ambac*, 2018 N.Y. LEXIS 1542, at *13 (quoting *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital*, 30 N.Y.3d 572, 581 (2017) (*Nomura*)).

The court re-emphasized that “[c]ontract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that part of the transaction ... especially when entered into at arm’s length by sophisticated contracting parties.” *Ambac*, 2018 N.Y. LEXIS 1542, at *13 (quoting *Nomura*, 30 N.Y.3d at 582) (ellipses in original).

The Court of Appeals rejected the idea that there was a difference between transaction-level breaches and loan-level breaches and rejected *Ambac*’s attempt to re-characterize its claims to fall outside Section 2.01(l) because all of the “transaction-level” allegations would also violate the “loan-level” representations and warranties under Section 2.01(l), “despite the attempt to label the claims otherwise.” *Id.* at *15.

The court rejected the argument that the cumulative remedies provision of Section 5.02(b) “somehow overrides Section 2.01(l)’s limitation on remedies.” *Id.* at *16. The court explained that “Section 5.02(b) provides that contractual remedies are cumulative ‘unless otherwise expressly provided;’ Section 2.01(l) expressly provides otherwise for breaches of that section, making the repurchase remedy exclusive for recovery on *Ambac*’s breach of contract claims.” *Id.* To hold otherwise would “render the sole remedy provision meaningless.” *Id.* *Nomura* is the leading recent Court of Appeals case on the issue of a sole remedies clause.

Just like *Ambac*, *Nomura* was also a case concerning an RMBS transaction, and the underlying loans allegedly did not conform to the representations and warranties made by the defendant. The Court of Appeals rejected the plaintiff’s arguments that the defendant’s breaches did not fall into the sole remedy provision in the agreements in question. The court reiterated several fundamental precepts of contract construction and concluded that it would honor sole remedies clauses, especially when drafted by sophisticated parties. *Nomura*, 30 N.Y.3d at 581-82.

The *Ambac* court reasoned that the sole remedies provision in the I&I agreements was “arguably broader than the one at issue in *Nomura*, which provided that the repurchase protocol was the sole remedy for the ‘purchaser against [defendant] respecting a missing document or a breach of the representations and warranties’ contained in the governing contract.” *Ambac*, 2018#7983313 v10 \099997 \07584 N.Y. LEXIS 1542, at *15 (quoting *Nomura*, 30 N.Y.3d at 579) (brackets in original).

The broader sole remedies provision in *Ambac* concerned “any defective mortgage loan.” Court of Appeals Judge Jenny Rivera dissented with respect to the portion of *Ambac* concerning the sole remedies provision. Disagreeing with the majority, she concluded that *Ambac*’s allegations of “transaction-wide misrepresentations concerning the respective loan pools are not mere duplicative recitations of [the representations and warranties.]” *Ambac*, 2018 N.Y. LEXIS 1542, at *19.

APPLICABILITY OF A CUMULATIVE REMEDIES CLAUSE

Ambac raises the question of when a court will apply a cumulative remedies provision to limit the reach of a sole remedies clause. One recent case where a court applied a cumulative remedies clause is *Fin. Guar v. Credit Suisse Sec. (USA) LLC*, No. 651178/2013, 2015 N.Y. Misc. LEXIS 2850 (Sup. Ct. N.Y. Cty. Aug. 3, 2015).

Similar to *Ambac*, the plaintiff Financial Guaranty Insurance Co. (FGIC) was a monoline insurer suing a sponsor of a securitization it guaranteed, and the defendant argued that FGIC's recovery was limited by a sole remedies provision providing for a repurchase protocol. But unlike in *Ambac*, the sole remedies provision in *Fin. Guar.* was contained in a contract to which FGIC was not a party, but merely an "express third-party beneficiary." *Id.* at *2-3. The sole remedies clause expressly listed the parties bound but did not list FGIC. *Id.* at *10. Moreover, the insurance agreement to which FGIC was a party contained a cumulative remedies provision stating that it only applied "[u]nless otherwise expressly provided." *Id.* at *13.

The state Supreme Court, in an opinion by Justice Marcy S. Friedman, read the cumulative remedies provision together with the sole remedies provision and concluded that "FGIC's remedies are not limited to the repurchase protocol." *Id.*

[David B. Saxe](#) is a former associate justice of the Appellate Division, First Department, where he served for 19 years before becoming a partner at Morrison Cohen. [Danielle C. Lesser](#) is a partner at the firm and chair of the business litigation group. [Michael Mix](#), an associate at the firm, assisted in the preparation of this article.