

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

MBIA INSURANCE CORPORATION,

Plaintiff-Respondent/Cross-Appellant,

—against—

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOMELOANS SERVICING, LP
and BANK OF AMERICA CORP.,

Defendants-Appellants/Cross-Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

BARRY S. LEVIN
*(of the Bar of the
State of California)*
By Permission of the Court
The Orrick Building
405 Howard Street
San Francisco, California 94105
(415) 773-5700
blevin@orrick.com

JOHN ANSBRO, ESQ.
RICHARD A. JACOBSEN, ESQ.
DANIEL W. ROBERTSON, ESQ.
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000
jansbro@orrick.com
rjacobsen@orrick.com
drobertson@orrick.com

*Attorneys for Amicus Curiae The Securities Industry
and Financial Markets Association*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE HOMELOANS SERVICING,
LP AND BANK OF AMERICA CORP.,

Defendants.

Index No. 602825/08

**NOTICE OF MOTION
FOR LEAVE TO FILE
BRIEF AS PROPOSED
AMICUS CURIAE**

PLEASE TAKE NOTICE that upon the annexed affirmation of John Ansbro, dated November 13, 2012, the Securities Industry and Financial Markets Association, by their attorneys Orrick, Herrington & Sutcliffe LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on November 22, 2012 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the Proposed *Amicus* to serve and file a brief *amicus curiae*.

Dated: November 13, 2012
New York, New York

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____

John Ansbro
Richard A. Jacobsen
Daniel W. Robertson
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Barry S. Levin
(of the Bar of the State of California)
By Permission of the Court
The Orrick Building
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

*Attorneys for Securities Industry and
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

MBIA INSURANCE CORPORATION,

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-against-

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COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE HOMELOANS SERVICING,
LP AND BANK OF AMERICA CORP.,

Defendants.

Index No. 602825/08

**AFFIRMATION OF
JOHN ANSBRO IN
SUPPORT OF MOTION
FOR LEAVE TO FILE
BRIEF AS AMICUS
CURIAE**

JOHN ANSBRO, an attorney duly admitted to practice before the courts of the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am a member in good standing of the Bar of the State of New York and a partner with the law firm of Orrick, Herrington and Sutcliffe LLP, attorneys for the proposed *amicus*, the Securities Industry and Financial Markets Association (“SIFMA”). I make this affirmation in support of SIFMA’s Motion for Leave to File Brief as *Amicus Curiae*. SIFMA has a demonstrated interest in the issues in this matter and can be of special assistance to the Court. A copy of SIFMA’s proposed brief is attached hereto as Exhibit A.

2. SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's membership encompasses both sides of the securities industry – those who sell securities (issuers and sponsors) and those who purchase them (institutional investors and asset managers). SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. An important function of SIFMA is to represent the interests of its members in cases addressing issues of widespread concern in the securities and financial markets.

3. SIFMA is heard as *amicus curiae* in cases that raise important policy issues that impact the markets represented by SIFMA or otherwise affect common practices in the financial services industry. SIFMA's case selection is judicious to ensure that its advocacy focuses on the most significant and pressing industry interests. This is such a case. SIFMA makes this motion because the order on appeal in MBIA v. Countrywide (the "Appealed Order") contravenes nearly eight decades of clear New York law and upends the express contractual agreements and long-settled expectations of the participants in the multi-billion dollar securitization industry – from securitization issuers, sponsors and underwriters to investors.

4. SIFMA brings an industry-wide perspective, distinct from that of the parties, with respect to the unintended reallocation of risk which would be imposed on all market participants if the Appealed Order is affirmed. Specifically, the relief allowed by the Appealed Order is contrary to: (i) the premise of the monoline business model and the role financial guaranty insurance plays in RMBS; (ii) the contractual terms negotiated by highly sophisticated parties and their rightful expectations of how they allocated risk; (iii) the New York Insurance Law; and (iv) the fundamental element of loss causation in common law breach of contract and fraud claims.

WHEREFORE, on behalf of SIFMA, I respectfully request that the court grant SIFMA's motion to participate in this appeal as *Amicus Curiae*.

Dated: November 13, 2012
New York, New York

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____


John Ansbro
Richard A. Jacobsen
Daniel W. Robertson
51 West 52nd Street
New York, NY 10019
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(of the Bar of the State of California)
By Permission of the Court
The Orrick Building
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
*Attorneys for Securities Industry and
Financial Markets Association*

EXHIBIT A

New York Supreme Court

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MBIA INSURANCE CORPORATION,

Plaintiff-Respondent/Cross-Appellant,

—against—

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP.,
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and BANK OF AMERICA CORP.,

Defendants-Appellants/Cross-Respondents.

BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS' APPEAL

BARRY S. LEVIN

*(of the Bar of the
State of California)*

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The Orrick Building
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San Francisco, California 94105
(415) 773-5700
blevin@orrick.com

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DANIEL W. ROBERTSON, ESQ.

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51 West 52nd Street
New York, New York 10019
(212) 506-5000
jansbro@orrick.com
rjacobsen@orrick.com
drobertson@orrick.com

*Attorneys for Amicus Curiae The Securities Industry
and Financial Markets Association*

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I. STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s membership encompasses both sides of the securities industry – companies that sell securities, including issuers and sponsors, and those that purchase securities, including institutional investors and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. An important function of SIFMA is to represent the interests of its members in cases addressing issues of widespread concern in the securities and financial markets.

SIFMA is heard as amicus curiae in cases that raise important policy issues that impact the markets represented by SIFMA or otherwise affect common practices in the financial services industry. SIFMA’s case selection is judicious to ensure that its advocacy focuses on the most significant and pressing industry interests. This is such a case. SIFMA supports the appeal of Defendants-Appellants-Cross Appellees (collectively “Countrywide”) because the order on appeal in MBIA v. Countrywide (the “Appealed Order”) contravenes nearly eight decades of clear New York law and upends the express contractual agreements and

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief.

long-settled expectations of the participants in the multi-billion dollar securitization industry – from securitization issuers, sponsors and underwriters to investors.

In residential mortgage-backed securitizations (“RMBS”) like those at issue in this case, the transaction sponsor acquires an inventory of residential mortgages that are transferred to a trust. The trust then issues certificates, which are marketed to investors. Payments of principal and interest under the certificates are made from the borrowers’ payments on the underlying mortgages. The sponsor makes certain representations and warranties about the underlying mortgages, and the transaction documents typically provide that where an underlying loan materially and adversely breaches a representation and warranty, the agreed remedy is that the sponsor must either replace the breaching loan with a conforming loan or repurchase it from the trust. This so-called “repurchase protocol” is often the agreed “sole remedy” for breaching loans.

In many RMBS transactions, a monoline insurance company issues a financial guaranty insurance policy that guarantees to investors the payment of principal and interest on certain of the underlying mortgages. Such financial guaranty policies are expressly “unconditional and irrevocable.” Issuing such irrevocable financial guarantees is the sole business of monoline insurers such as MBIA.

MBIA's complaint, like the complaints in the other 26 actions brought in New York by monoline insurers involving RMBS, asserts common law claims of alleged fraudulent inducement and breaches of contract, and seeks money damages. SIFMA takes no position here on the merits of such common law claims. However, what MBIA does not and cannot assert is a claim in equity to rescind and avoid making payments under its policies. To the contrary, years after it issued its policies, MBIA continues to accept premiums and perform by making claims payments – because that is what MBIA and other monoline insurers are contractually obligated to do. It is the bargain they struck.

Indeed, since its beginning in the 1970s insuring municipal bonds, the entire monoline insurance industry has been predicated on providing non-rescindable and non-cancellable financial guarantees. When the monolines moved beyond insuring only government-issued bonds and into private securities backed by returns on mortgages and other commercial assets, their irrevocable promise to pay remained their core business proposition. While the risk of these private securitizations was higher, so were the premiums. The monoline insurers understood the risks involved in insuring RMBS and touted their sophistication and experience in the mortgage and housing markets. All of the participants in the securitization process and market understand the irrevocable nature of financial guaranty insurance,

which is why no monoline plaintiff asserts a claim for rescission in any of the over two dozen monoline RMBS actions pending in New York courts.²

The Appealed Order would change all of this by fundamentally re-writing these contracts and conferring on the monolines a remedy they are contractually and legally barred from pursuing – rescission, in the form of “rescissory damages,” which the Appealed Order held is the financial equivalent of rescission.

² No pending monoline RMBS case in New York seeks rescission. These cases include: Ambac Assur. Corp. v. DLJ Mortg. Capital, Inc., Index No. 600070/2010 (N.Y. Sup. Ct.); Ambac Assur. Corp. v. EMC Mortg. LLC, Index No. 650421/2011 (N.Y. Sup. Ct.); Ambac Assur. Corp. v. EMC Mortg. LLC, Index No. 651013/2012 (N.Y. Sup. Ct.); Ambac Assur. Corp. v. First Franklin. Fin. Corp., Index No. 651217/2012 (N.Y. Sup. Ct.); Assured Guar. Mun. Corp. v. DB Struct. Prods., Inc., Index No. 650705/2010 (N.Y. Sup. Ct.); Assured Guar. Mun. Corp. v. DLJ Mortg. Capital Inc., Index No. 652837/2011 (N.Y. Sup. Ct.); Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc., No. 12 Civ. 1579 (S.D.N.Y.); Assured Guar. Mun. Corp. v. DB Struct. Prods., Inc., Index No. 651824/2010 (N.Y. Sup. Ct.); Assured Guar. Corp. v. EMC Mortg. LLC, Index No. 650805/2012 (N.Y. Sup. Ct.); Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, No. 11 Civ. 2375 (S.D.N.Y.); CIFG Assur. N.A., Inc. v. Goldman, Sachs & Co., Index No. 652286/2011 (N.Y. Sup. Ct.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 0340 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 0338 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 0780 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 0341 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 1601 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 1818 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 12 Civ. 1601 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Ally Fin., Inc., No. 11 Civ. 9729 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Countrywide Home Loans, Inc., Index No. 650736/2009 (N.Y. Sup. Ct.); Fin. Guar. Ins. Co. v. Residential Funding Co., No. 11 Civ. 9736 (S.D.N.Y.); Fin. Guar. Ins. Co. v. Residential Funding Co., No. 11 Civ. 9737 (S.D.N.Y.); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., Index No. 602825/2008 (N.Y. Sup. Ct.); MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC, Index No. 603751/2009 (N.Y. Sup. Ct.); MBIA Ins. Corp. v. GMAC Mortg., LLC, Index No. 600837/2010 (N.Y. Sup. Ct.); MBIA Ins. Corp. v. Morgan Stanley, Index No. 29951/2010 (N.Y. Sup. Ct.); MBIA Ins. Corp. v. Residential Funding Co., Index No. 603552/2008 (N.Y. Sup. Ct.); Syncora Guar. Inc. v. EMC Mortg. LLC, Index No. 650420/2012 (N.Y. Sup. Ct.); Syncora Guar. Inc. v. Countrywide Home Loans, Inc., Index No. 650042/2009 (N.Y. Sup. Ct.); Syncora Guar. Inc. v. EMC Mortg. LLC, No. 09 Civ. 3106 (S.D.N.Y.). Although MBIA’s original complaint in this action sought rescission, MBIA dropped the request in its amended and operative complaint.

The suggestion that “rescissory damages” are available to the monolines is contrary to: (i) the premise of the monoline business model and the role financial guaranty insurance plays in RMBS; (ii) the contractual terms negotiated by highly sophisticated parties and their rightful expectations of how they allocated risk; (iii) the New York Insurance Law; and (iv) the fundamental element of loss causation in common law breach of contract and fraud claims.

The lower court looked to Insurance Law §§ 3105 and 3106, which provide insurers the remedy of rescission in cases of material misrepresentation or breach of warranty, and found that these statutes “informed” MBIA’s common law fraud and contract claims. It held that rescissory damages may be available in lieu of rescission where rescission is “warranted” but “impractical.” This was plain error. The court also held that MBIA could prove its fraud and contract claims without any showing that its alleged losses were caused the alleged wrongdoing. This too was clear error. Indeed, these conclusions are unprecedented in New York decisions and would have perverse consequences.

Rescission is not and cannot be “warranted” because the monoline insurers knowingly and intentionally waived any right to rescind or avoid payments under their policies. Instead, these sophisticated parties agreed to the contractual remedy of repurchase, and the insurers have an adequate remedy at law. And, in any event, rescissory damages as the equivalent to rescission are not warranted because the

monolines continue to accept payment, perform, and affirm their agreements by seeking to enforce the contracts' repurchase remedy and other contractual provisions. Rescission also is not "impractical"; it is impossible because the policies at issue are, by design, expressly irrevocable.

Insurance Law §§ 3105 and 3106 on their face apply only in situations where an insurer seeks to rescind the policy or avoid payments thereunder. Those are not the facts in this or any other monoline RMBS action. The monolines are not seeking rescission, but instead seek damages against the transaction sponsors. Moreover, the Appealed Order's holding that the Insurance Law "informs" MBIA's common law fraud and contract claims runs afoul of longstanding Court of Appeals precedent holding that statutes may never be construed to abrogate the common law, absent clear evidence of legislative intent. There is no such intent. In short, the Appealed Order improperly applies an inapposite statute to create an unprecedented and unwarranted remedy that did not exist at common law.

As a result, the Appealed Order would allow MBIA (and other RMBS insurers) to avoid payment on loans that complied with all of the contractual representations and warranties, yet defaulted due, for example, to the intervening real estate collapse in 2007 and 2008. In other words, it would permit recovery of damages even where no relief is available in fraud or breach of contract. The monolines indisputably accepted the risks that declining housing markets,

recession, or changes in economic conditions could trigger payment obligations under the irrevocable guarantees they issued.

Yet now, as claims mount due primarily to the precise risk they insured against, monoline insurers seek to transfer that risk away from themselves and onto their counterparties. This unprecedented result would allow a monoline insurer to recover 100 percent of its claims payments from securitization counterparties. That remedy is directly at odds with the express terms of their agreements. And it would permit this without the insurer linking any of those payments to a breach of any representation or warranty, and regardless of the actual cause of the loss. All of these unintended consequences would be contrary to the well-defined allocations of risk long embodied in standardized contractual language, and contrary to New York law. This Court should not permit such a result.

II. PERTINENT BACKGROUND: THE NATURE AND EVOLUTION OF UNCONDITIONAL, IRREVOCABLE FINANCIAL GUARANTY INSURANCE

The fundamental premise that underlies financial guaranty insurance is that the monoline insurer's promise to pay is, knowingly and intentionally, unconditional and irrevocable, no matter the cause triggering coverage under the policy. In the RMBS context, the insurers knew full well the systemic risks in the housing market that they were insuring against. When viewed in the context of the unconditional nature of the agreements at issue and the risks knowingly assumed

by the insurer and relied upon by issuers and investors, the Appealed Order cannot stand.

A. Monoline Insurance Expands From Municipal Bonds to Asset-Backed Securities, Taking on Increased Risks in Exchange for Increased Premiums

Monoline insurance companies provide unconditional and irrevocable financial guarantees that insure payments of principal and interest on financial instruments. The industry dawned in the early 1970s, when monoline insurers began to guarantee principal and interest payments on municipal bonds.³ Monoline insurers structured their business model on so-called “zero-loss” opportunities presented by the relatively placid municipal bond markets and other government-backed debt offerings. “Zero-loss” means that the monoline insurer underwrote transactions that minimized its risk of making any policy payments, “even under the worst probable case scenario.”⁴ These financial guarantees reduced the cost of borrowing for municipalities and government entities, as investors were receptive to lower interest rates in exchange for the security provided by a monoline

³ The State of the Bond Insurance Industry: Hearing Before the H. Subcomm. on Capital Mkts., Ins., and Gov’t Sponsored Entities, 110th Cong., Serial No. 110-91 at 3 (2008) (hereinafter “Bond Insurance”).

⁴ MBIA has stated that it has historically underwritten to a “zero loss” standard, in which “[e]very transaction [the company] look[s] at is structured to a no-loss standard to avoid losses even under the worst probable case scenario.” See MBIA Offer of Settlement with the Securities and Exchange Commission, dated Dec. 5, 2006, ¶ 14 (available at <http://www.mbia.com/investor/statements/sec.pdf>).

financial guarantee of payment, sometimes called a “wrap.”⁵ According to MBIA’s CEO, Jay Brown, the monoline industry has saved municipalities more than \$40 billion dollars in interest costs since 1971.⁶ The business of insuring municipal bonds also proved to be low-risk for the insurers, as reflected by relatively small claims payments experience under municipal bond guarantees.⁷

But bond insurance was also relatively low reward in comparison to offering insurance in other emerging securities markets. Beginning in the 1980s monoline insurers entered the private structured finance markets and extended their unconditional guarantees into private asset-backed securitizations.⁸ The core premise of the monoline business, however, remained (and remains) unchanged: monoline insurers issue unconditional financial guarantees of payment which

⁵ Bond Insurance, supra n. 3 at 66 (statement of Charles Chaplin, Chief Financial Officer, MBIA Inc.).

⁶ Testimony of Joseph W. Brown, New York State Assembly Standing Committee on Insurance, Hearing on Financial Guaranty Insurance and Representations and Warranties in Securitized Debt Transactions, Feb. 16, 2011, at p. 2, available at <http://www.mbia.com/about/publications/JBTestimony021611.pdf>.

⁷ MBIA 2008 Annual Report, p. 3, available at <http://files.shareholder.com/downloads/ABEA-363IPQ/1872398003x0x390943/7AE69735-759B-4787-822B-A3B267FBDD08/MBI08AR.pdf>.

⁸ See ABN Amro Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 217 (N.Y. 2011); Gotham Partners Mgmt. Co., Is MBIA Triple A? A Detailed Analysis of SPVs, CDOs, and Accounting and Reserving Policies at MBIA, Inc. at 11-12 (Dec. 9, 2002), available at <http://media.bloomberg.com/bb/avfile/r2fyX2yIcQ.0>.

cannot be revoked or rescinded. As summarized by monoline insurer Assured

Guaranty:

We guarantee timely payment of principal and interest when due. Irrevocably. Unconditionally. We back our promise with \$12.8 billion of claims-paying resources and do not quibble. Investors do not have to wait for—or negotiate for—their rightful recoveries after missed issuer payments, because we pay investors first and seek transaction-related recoveries separately. In turn, investors gain confidence, creating greater market access and reduced borrowing costs for issuers.⁹

The monolines’ expansion into asset-backed securitizations featured an aggressive push to issue financial guarantees of RMBS.

In RMBS, a party (often called the “sponsor”) first acquires a pool of mortgage loans, either through direct origination or by purchase on the open market from mortgage originators. In the RMBS transaction, the sponsor transfers these pooled loans through another entity (a “depositor”), which in turn transfers the loans to a special purpose trust. The trust then issues securities to investors. The payments of principal and interest on these securities are funded by the underlying mortgage loan payments. To reduce the credit risk to investors, the sponsor often contracts with a monoline insurer to issue financial guaranty insurance that guarantees payment on some or all of the securities. The insurer is paid a substantial premium, usually based on the aggregate amount insured. By

⁹ Assured Guaranty 2011 Annual Report, at p. 2, available at http://assuredguaranty.com/images/uploads/AR_2011.pdf.

design, these insurance policies are expressly irrevocable and noncancellable. In other words, in exchange for a significant premium, the insurer enters the transaction having knowingly and intentionally relinquished the right to rescind coverage for any reason.

For its part, the sponsor typically provides certain representations and warranties regarding the credit quality and underwriting guidelines and standards used in originating the underlying mortgage loans. RMBS transactions in general, and the transactions at issue here, contain “repurchase protocols.” When it is shown that a loan in the pool breaches a representation or warranty and such breach “materially and adversely” affects the interests of the Certificateholders and/or insurers, the repurchase protocols require the sponsor to repurchase the loan from the trust (or replace it with a nonbreaching loan). This standard process reflects the agreed-upon allocation of risk among the transaction parties. Indeed, this bargained-for repurchase remedy is the express “sole remedy” in many RMBS transactions, including the transaction at issue here. In other words, not only do insurers knowingly waive any right to rescind their policies, but in many deals they bargained for and accepted the sole contractual remedy of repurchase.

Monoline insurers aggressively and successfully marketed their unconditional financial guaranty product to the residential mortgage-backed securities industry by touting their depth of knowledge and sophistication in the

mortgage markets. MBIA trumpeted its “rigorous underwriting process proving no losses will arise,” and its status as a “market leader” in the mortgage-backed markets. MBIA touted that it obtained “additional rights, special protections . . . and information access beforehand as the senior creditor.”¹⁰ MBIA grew to be the world’s largest monoline insurer.¹¹ From 1988 to 2007, it insured over 275 RMBS transactions totaling over \$69 billion in original insured balances.¹² Further, MBIA and other monoline insurers uniformly recognize the irrevocability of their obligations and their inability to avoid payments under them.¹³

¹⁰ See “Fixed Income Investor Presentation, 3rd Quarter – 2006” by MBIA, at 3, 6, available at <http://library.corporate-ir.net/library/88/880/88095/items/217914/FixedQ306.pdf>.

¹¹ Id. at 11; Bond Insurance, supra note 3, at 114 (written testimony of MBIA). Other monoline insurers include Ambac Assurance Corp. (“Ambac”), Assured Guaranty Corp. (“Assured”), Financial Guaranty Insurance Company (“FGIC”), and Syncora Guarantee Inc. (“Syncora”).

¹² See MBIA Insured Structured Finance Portfolio, available at <http://www.mbia.com/investor/structfin.html>.

¹³ Statements made in public filings and marketing materials underscore the nature of the monoline industry’s understanding:

- From MBIA’s 2011 10-K, at 29: “The financial guarantees issued by [MBIA] insure the financial performance of the obligations guaranteed over an extended period of time, in some cases over 30 years, under policies that we have, in most circumstances, no right to cancel Moreover, although the second-lien RMBS obligations we insure typically include contractual provisions obligating the sellers/services to cure, repurchase or replace ineligible loans . . . we are required to pay losses on these securities irrespective of any proceeding we initiate to enforce our contractual rights.” (emphasis added).
- From Syncora’s 2006 10-K, at 37: “Because our financial guarantee insurance and reinsurance policies are unconditional and irrevocable, we may incur losses from fraudulent conduct relating to the securities that we insure or reinsure Financial guarantee insurance and reinsurance provided by us is unconditional and does not provide for any exclusion of liability based on fraud or other misconduct” (emphasis added).
- From Assured’s 2007 10-K, at 48: “The financial guaranties issued by us insure the financial performance of the obligations guaranteed over an extended period of time, in

B. Monoline Insurers Admit That They Irrevocably Assumed the Risk of Loss for Loans that Meet Representations and Warranties, but Nevertheless Default as a Result of Market Volatility or for Any Other Reason

Financial guaranty insurance in RMBS transactions protects investors not only from individual loan defaults, but more importantly, it guarantees investment returns against the risk of systemic underlying loan defaults caused by a housing market decline, recession, widespread unemployment and the like. The monoline insurer, not the other transaction participants, contracted to assume such risks in exchange for substantial compensation. In its 2006 Form 10-K, issued at the time of unprecedented housing declines and mortgage delinquencies, MBIA summarized the nature of the risks it retained:

Changes in general economic conditions can adversely impact the Company's business. Recessions, increases in corporate, municipal or consumer default rates, changes in interest rates, changes in law or regulation and other general economic and geopolitical conditions could adversely impact the Company's prospects for future business, as well as the performance of MBIA Corp.'s insured portfolio and the Investment Portfolio In addition, certain other sectors in which the Company has insured exposure, such as consumer loan securitizations (e.g., home equity, auto loan and credit card

some cases over 30 years, under policies that we have, in most circumstances, no right to cancel." (emphasis added).

- From "Credit Enhancement in Securitization," August 15, 2006 presentation by FSA (now Assured) to the Asia Pacific Finance and Development Center: "What is the Value Provided by Monoline Insurers? * * * Irrevocable and unconditional guaranty of the principal and interest FSA waives ALL defen[s]es, including fraud and non-payment of premiums." (available at <http://www.afdc.org.cn/upload/383/downloads/Session%208%20K.Y.%20Lam.pdf>) (emphasis added).

transactions), have experienced increased delinquencies and defaults in the underlying pools of loans and could experience further defaults in the event of future global unrest.

MBIA 2006 10-K, p. 25 (emphasis added).

Accordingly, some monoline insurers' pleadings in RMBS litigations filed in the wake of the worst real estate meltdown in United States history since the Great Depression, admit (as they should) that they – not their RMBS counterparties – assumed the risk that loans satisfying representations and warranties might nevertheless fail to perform. As MBIA has admitted in one RMBS complaint, this “fundamental allocation of risk was the heart of the parties’ bargain.” See, Complaint, MBIA v. Credit Suisse Securities (USA) LLC, et al., Index No. 603751/2009 at ¶ 8.).¹⁴ Specifically, MBIA has correctly alleged:

[Defendant] . . . assumed the risk in the event its representations were inaccurate. MBIA, in turn, assumed the market risk that loans *that were originated pursuant to the represented practices and bearing the represented attributes* might not perform as expected. This fundamental allocation of risk was the heart of the parties’ bargain.

Id. (italics in original, underscore emphasis added). This admission acknowledges the basis of the financial guaranty bargain – that monoline insurers, in exchange

¹⁴ The Court may properly take judicial notice of official court records. Kinberg v. Kinberg, 85 A.D.3d 673, 674 (1st Dep’t 2011). Statements made by parties in pleadings are considered judicial admissions. Bogoni v. Friedlander, 197 A.D.2d 281, 291-92 (1st Dep’t 1994).

for premiums, assume the risk that economic decline or market forces will cause delinquencies, even among properly underwritten loans.

Unfortunately, the risks that monoline insurers acknowledged in their disclosures occurred. The Court of Appeals has recognized that the economic downturn unsurprisingly triggered significant payments by MBIA under its financial guaranty insurance policies:

Beginning in 2007 and continuing through 2008, the health of the real estate market deteriorated. In turn, the risks associated with certain financial products tied to real estate, such as structured-finance products, increased concomitantly. Not surprisingly, MBIA Insurance's exposure to liability with respect to its structured-finance policy portfolio grew exponentially as the real estate market crumbled during this period.

ABN Amro, 17 N.Y.3d at 217. Now, faced with having to make good on its policies that cover the precise risks that it (and other monolines) insured against, MBIA seeks to evade the unconditional and irrevocable obligations it agreed to by shifting to transaction counterparties the full amount of those risks.

MBIA is doing so by seeking the very equitable remedy that it knowingly, purposely, and expressly gave up in negotiating its contracts: “rescissory damages,” which the court below conceded in the Appealed Order is the equivalent of rescission. Moreover, the Appealed Order would permit this unavailable remedy absent any showing that the monoline's past or future payments under the policies was caused by the alleged breaches of representations or warranties.

III. THE APPEALED ORDER IMPROPERLY USES THE INSURANCE LAW TO ABROGATE COMMON LAW REQUIREMENTS OF CAUSATION AND AWARD “RESCISSORY DAMAGES” THAT ARE BARRED BY THE AGREEMENTS AND NEW YORK LAW

The Appealed Order alters the market understanding of risk allocation in two fundamental respects. First, it finds that “no basis in law exists to mandate that MBIA establish a direct causal link between the misrepresentations allegedly made by Countrywide and claims made under the policy.” Second, it holds that should MBIA prove its case (which it could do without any showing of loss causation), it may be entitled to “rescissory damages in the amount that it has been required to pay pursuant to the Insurance Policies, less premiums MBIA received” The practical result of these holdings is that the Appealed Order abrogates the common law requirements of proximate cause by reference to Insurance Law §§ 3105 and 3106. Those statutes, however, must be and have always been read narrowly and applied only where an insurer actually seeks rescission or to avoid payments under a policy. On their face they do not apply here because MBIA cannot (and does not try to) rescind its irrevocable and unconditional policies, which bar rescission by their express terms. To the contrary, MBIA and other insurers continue to accept premiums, make claims payments, and otherwise affirm the contracts by seeking to enforce the repurchase protocols and contractual indemnity provisions. Until the Appealed Order, no other New York court had ever permitted rescissory damages in the absence of a claim for rescission.

A. MBIA and Other Monoline Insurers Cannot Rescind Their Policies and Are Not Entitled to “Rescissory Damages” as a Matter of Law

While it may be permissible to obtain certain damages “incident” to rescission, such damages are predicated and dependent upon a viable action for rescission. See Equitable Life Assur. Soc’y v. Kushman, 276 N.Y. 178, 184 (N.Y. 1937) (“This action is clearly an action in equity for rescission Damages may be recovered as incident to an action in equity for a rescission.”). MBIA does not seek rescission, and even if it did, rescission is unavailable. Consequently, it may not obtain “rescissory” damages because “[t]he unavailability of the rescission remedy vitiates, as well, the right to recover damages collateral to rescission.” Clearview Concrete Prods. Corp. v. S. Charles Gherardi, Inc., 88 A.D.2d 461, 466 (2d Dep’t 1982). Thus, MBIA and other monoline insurers are limited to compensatory damages.

Courts generally award “rescissory damages” to provide a purchaser of securities that were sold in violation of the securities laws with a remedy in the event that rescission is unavailable because the purchaser no longer owns the security. Friedman v. Arizona World Nurseries Ltd. P’ship, 730 F. Supp. 521, 541 (S.D.N.Y. 1990) (setting forth the statutory remedy provisions of Section 12(2) of the Securities Act). Even in the context of actions by investors based on securities laws – and the monolines that insured RMBS are no such investor and cannot

invoke such laws – New York courts reject “rescissory damages” under these statutes when there is no primary and viable request for rescission. See Grace v. Rosenstock, 228 F.3d 40, 45 (2d Cir. 2010) (rejecting “rescissory damages” in the absence of any equitable claim, affirming that “equitable relief must be the primary request, and such damages must be incidental to a grant of equitable relief”).

This limitation is illustrated by Raymond Weil, S.A. v. Theron, 585 F. Supp. 2d 473 (S.D.N.Y. 2008). There, the plaintiff sought rescissory damages for the alleged breach of an exclusive advertising agreement. Id. at 488. Specifically, the plaintiff sought “a return of all monies paid under the Agreement and spent in promoting the . . . advertising campaign,” which was “equivalent to damages that would be awarded if the contract were rescinded.” Id. The district court held that the plaintiff could not state a claim for rescission and, therefore, was “not entitled to the re[sci]ssory damages it seeks. ‘Absent grounds for rescission . . . [plaintiff] has only the right to compensatory damages for breach of the agreement.’” Id. The same result should obtain here: if the monoline insurer can prove its case, it is limited to compensatory damages.

B. Common Law Claims Sounding in Fraud and Breach of Contract Require a Showing of Causation

A party faced with fraud or a material breach of contract has two choices: to rescind, or to continue with the contract and bring suit in damages. See Bernstein v. Cooke, 103 A.D.2d 725, 728 (1st Dep’t 1984) (“One elects either to continue

with the contract fraudulently induced or to rescind it. If one elects to continue with it, one accepts all the burdens contained in the contract as well as the benefits.”); Awards.com, LLC v. Kinko’s, Inc., 42 A.D.3d 178, 188 (1st Dep’t 2007) (“When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses the right to terminate the contract because of the default.”). Having elected to perform their agreements, MBIA and the monoline insurers are limited to “compensatory damages for breach of the agreement[s],” or alternatively for damages proximately caused by the alleged fraud. Raymond Weil, S.A. v. Theron, 585 F. Supp. 2d 473 (S.D.N.Y. 2008); Assured Guar. Mun. Corp. v. DLJ Mortg. Capital, Inc., 2012 WL 5192752 (N.Y. Sup. Ct. Oct. 11, 2012) (dismissing monoline insurer’s claim for “rescissory damages” on this basis).

With respect to fraud, this Court previously and correctly found in this very case that “[t]o demonstrate fraud, a plaintiff must show, inter alia, that a defendant’s misrepresentations were the direct and proximate cause of the claimed losses.” MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287, 295 (1st Dep’t 2011). In fact, other RMBS cases state the exact same controlling rule in addressing claims of fraud by monoline insurers. See Fin. Guar Ins. Co. v. Countrywide Home Loans, Inc., Index No. 650736/2009 (N.Y. Sup. Ct. June 15,

2010) (Bransten, J.) (“To establish causation, plaintiff must show both that defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation).”) (emphasis in original) (quoting Laub v. Faessel, 297 A.D.2d 28, 31 (1st Dep’t 2002)); see also Friedman v. Anderson, 23 A.D.3d 163, 167 (1st Dep’t 2005) (“To establish a fraud claim, a plaintiff must demonstrate that a defendant’s misrepresentations were the direct and proximate cause of the claimed losses.”).

The same causation requirement applies to claims sounding in breach of contract. Kenford Co. v. County of Erie, 73 N.Y.2d 312, 319 (N.Y. 1989) (“It is well established that in actions for breach of contract, the nonbreaching party may recover general damages which are the natural and probable consequence of the breach.”); Fruition, Inc. v. Rhoda Lee, Inc., 1 A.D.3d 124, 125 (1st Dep’t 2003) (holding that breach of contract damages “are such as ordinarily and naturally flow from the non-performance” and “must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent”).

C. The Insurance Law Must Be Read Narrowly and Cannot Change the Common Law of Fraud and Breach of Contract by “Implication”

New York statutes and Court of Appeals precedent mandate a narrow reading of the Insurance Law. On their face, Sections 3105 and 3106, relied upon

by MBIA, apply to claims for rescission and cancellation only – specifically, when an insurer seeks to “avoid an insurance contract or defeat recovery thereunder.”

N.Y. Ins. Law § 3106(b). As noted, no monoline insurer seeks to avoid or rescind their policies by litigation. Rather, consistent with their core business model and the express terms of their agreements, they continue to make policy payments when due.

“Generally, statutes in derogation of the common law receive a strict construction.” McKinney’s Cons. Laws of N.Y., Book 1, § 301(a). “The common law is never abrogated by implication, but on the contrary it must be held no further changed than the clear import of the language used in a statute absolutely requires.” *Id.*, § 301(b). The Court of Appeals and the First Department hold that these principles apply to the Insurance Law. In re Midland Ins. Co., 16 N.Y.3d 536, 547 (N.Y. 2011) (applying § 301 to the Insurance Law, narrowly construing statute); LMWT Realty Corp. v. Davis Agency Inc., 205 A.D.2d 479, 479 (1st Dep’t 1994) (applying § 301 and refusing to apply the Insurance Law to abrogate common law; “a long established . . . common-law rule . . . cannot be abrogated merely by implication”). Other than the Appealed Order, the cases that squarely examine the issue hold that §§ 3105 and 3106 apply only when a party states a viable claim to rescission. In GuideOne Specialty Mutual Ins. Co. v. Congregation Adas Yereim, 593 F. Supp. 2d 471, 486 (E.D.N.Y. 2009), the court held:

In point of fact, § 3105(b) lacks any language creating causes of action relating to misrepresentations by an insured or defining any defenses to such an action Where an insurer complains solely about misrepresentations during contract formation, as GuideOne does here, New York law arms the insurer only with the hatchet of rescission and not the scalpel of unilateral modification. By its inconsistent conduct [i.e., the acceptance of premiums], GuideOne has forfeited its right to the hatchet – its only weapon under § 3105(b).

Id. (emphasis added); see also Gluck v. Exec. Risk Indem., Inc., 680 F. Supp. 2d 406, 418 (E.D.N.Y. 2010) (“The case that comes closest to addressing whether [3105’s standard for] materiality applies to [policy] exclusions is [GuideOne] There, it was determined that Insurance Law § 3105 applies only when an insurer is seeking the remedy of rescission.”).

The Appealed Order ignores and directly contravenes these authorities because its practical effect is to extend §§ 3105 and 3106 to abrogate the common law and create remedies where at common law there were none. It does so by stripping the fundamental element of causation from common law claims by implication based on an expansive reading of the statute. It finds that MBIA’s “common law claims for fraud and breach of warranty are informed” by Insurance Law §§ 3105 and 3106. Slip Op. at 13. Despite the statutes’ plain language, the Appealed Order rejects any limitation to claims seeking rescission because “Countrywide has made no showing that MBIA may only use Sections 3105 and 3106 in a request for declaratory judgment or as an affirmative defense

and New York Insurance statutes make no such statement.” *Id.* at 12 (emphasis added). This approach to the statutes is the precise opposite of what the law requires. By applying the Insurance Law far outside of its unambiguous, limited scope, the Appealed Order contravenes fundamental principles of statutory interpretation, the black-letter elements of common-law fraud and contract claims, and the controlling holdings of this Court.

Insurance Law sections 3105 and 3106 provide no cause of action for damages. In fact, the Insurance Law’s legislative history demonstrates that these provisions were intended as consumer protection laws, not as offensive weapons for an insurer. The legislature amended the Insurance Law in 1938 to “abolish the technical rule that an immaterial breach of warranty avoids an insurance contract,” in order to protect insureds from improper policy cancellations. N.Y. Ins. Law § 150, Ins. Dep’t Revision Note (McKinney 1949). Consequently, the New York cases invoking those provisions address cancellation or the refusal to pay (typically, under policies of life, health, or auto insurance), not an insurer’s common law claims for breach of contract or fraud. The legislature did not intend to create a new cause of action for insurance companies or to ease their burden of proof. The Appealed Decision thus cuts against both the letter and the spirit of the New York Insurance Law.

D. MBIA and Other Monoline Insurers Have an Adequate Remedy at Law Through Contract Damages and the Repurchase Protocol, and the Status Quo Cannot Be Restored

Rescission is available only where a party “lacks a complete and adequate remedy at law and where the status quo may be substantially restored.” Alper v. Seavey, 9 A.D.3d 263, 264 (1st Dep’t 2004); Ellington v. Sony/ATV Music Publ. LLC, 85 A.D.3d 438, 439 (1st Dep’t 2011) (“The extraordinary remedy of rescission was unwarranted since, among other reasons, there was an adequate remedy at law.”). The Repurchase Protocol provides monoline insurers, including MBIA, with an adequate remedy at law, and monoline insurers therefore are not entitled to the “extraordinary remedy” of rescission, much less its equivalent, rescissory damages.

In Merrill Lynch, another action brought by MBIA, MBIA sought rescission of its financial guarantee insurance policies at the trial and appellate level. MBIA Ins. Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 81 A.D.3d 419, 419 (1st Dep’t 2011) (hereinafter “Merrill Lynch”). Both the trial court and the First Department rejected MBIA’s claim to rescission. The First Department held that “[t]he court correctly found that plaintiffs could not seek rescission since they failed to demonstrate that they could not be compensated by damages.” Id. at 420. This limitation to legal remedies rings doubly true when the transaction documents spell out that the “sole remedy” for breach of representation is the Repurchase

Protocol. MBIA Ins. Corp. v. Residential Fund. Co., 906 N.Y.S.2d 781, 2009 WL 5178337, at *7 (N.Y. Sup. Ct. Dec. 22, 2009) (holding that a monoline insurer “cannot be permitted to circumvent the express provisions of the Insurance Agreements through the assertion of quasi-contractual and equitable remedies that go beyond the negotiated terms of those agreements”).

Further, the equitable remedy of rescission may “be invoked only . . . where the status quo may be substantially restored.” Rudman v. Cowles Commc’ns Inc., 30 N.Y.2d 1, 13-14 (N.Y. 1972). The Appealed Order’s award of “rescissory damages” as the equivalent of rescission does not restore the status quo. Instead of placing the parties in their original positions, the order effectively substitutes the transaction counterparties as insurers on the transactions. They never occupied that role at any time, and it is impossible to unwind these complicated transactions and return the parties to their pre-closing positions. These perverse results are illustrated below by two hypothetical examples.

IV. THE APPEALED DECISION IMPERMISSIBLY TRANSFERS THE ENTIRETY OF THE RISKS THE MONOLINES ADMITTEDLY ACCEPTED ONTO SECURITIZATION COUNTERPARTIES

Any award of “rescissory damages” impermissibly shifts the risks expressly assumed by monolines onto other securitization parties, effectively substituting another party as insurer. The Decision holds that monoline insurers may be entitled to recoup all payments made under their policies, even if those payments

were made in respect of loans that did not breach any representation or warranty. The inherent fallacy of this ruling and the perverse, unintended results are illustrated by two simple hypotheticals.

In the first scenario, assume that a typically structured RMBS transaction securitized 1,000 underlying mortgage loans, and that payments to the trust from all of the loans are wrapped by a monoline insurers' unconditional, irrevocable financial guaranty insurance policy like the policies at issue in this action. Further assume that 80 percent of the loans, or 800, fully comply with all contractual representations and warranties (e.g., the loans were extended to highly qualified borrowers and conform to underwriting guidelines, etc.). The other 200 loans, however, breach representations and warranties in ways that "materially and adversely" affect the insurer's interest in the loans. At some point after the transaction closes, all 1,000 loans default, requiring the insurer to make payment to the trust covering the entire pool of 1,000 defaulted loans. Under the Appealed Order, the insurer may recover 100 percent of its policy payments, despite the facts that: (i) only 20 percent of the loans materially breached representations and warranties, and (ii) only 20 percent of the insurer's payments could have been caused by those breaches, even though (iii) the insurer explicitly accepted the market risk of default on the 80 percent of the loans that met all contractual guidelines. This result flies in the face of the RMBS participants bargained for

allocation of risk and contravenes settled New York law that a party asserting common law claims for fraud and breach of contract must prove that its alleged losses were caused by the alleged wrongdoing.

A second scenario illustrates an even more absurd result that would be permitted by the Appealed Order. Assume the same transaction facts above, except that after the transaction closes, only the 800 fully-compliant loans default. The 200 breaching loans continue to perform, despite their failure to meet representations and warranties. Under the Appealed Order, the insurer may still recover all of its policy payments, assuming it meets the reduced burden of simply showing that the 200 breaching loans increased its risk of loss at the time of the transaction, notwithstanding that this alleged increased risk of loss caused no actual loss. It may recover these payments despite its explicit acceptance of risk on those 800 loans. The bizarre upshot is that the insurer would be permitted to avoid the exact risk it expressly agreed in the transaction documents to insure against: the market risk of default on conforming loans.

Monoline insurers admit that perfectly underwritten collateral will nevertheless incur some default. See, e.g., Financial Security Assurance (now Assured), “A Guide to Insured Asset-Backed Securities,” October 1999, at 9 (“Asset risk is present because some losses are expected to occur in any large pool

of receivables.”).¹⁵ Similarly, the securitization industry recognizes that not all origination defects result in defaults, and consequently, in losses. The American Securitization Forum (“ASF”) includes MBIA and other monolines insurers among its participants.¹⁶ In 2009, the ASF surveyed practices in the RMBS industry and published Model Representations and Warranties for future RMBS transactions. The ASF recognized that “[g]enerally, if a borrower has been current for an extended period of time, the chances of the borrower defaulting due to a latent origination defect or the loan having been fraudulently originated become considerably smaller.” ASF Model Reps at 6 (emphasis added). The Appealed Order would now permit monoline insurers to evade this reality by absolving them of the longstanding burden of proof of loss causation.

V. THE APPEALED DECISION WRITES CONTRACTUAL REMEDIES AND RISK ALLOCATION OUT OF BARGAINED-FOR AGREEMENTS IN FAVOR OF A QUASI-EQUITABLE REMEDY THAT WAS NEVER INTENDED BY THE PARTIES

The practical consequences that would flow from the Appealed Decision were never intended by the RMBS participants. Instead, these sophisticated parties negotiated and agreed upon terms, which not only bar rescission by the insurer, but

¹⁵ Available at <http://www.securitization.net/pdf/book.pdf>.

¹⁶ American Securitization Forum, “ASF Model RMBS Representations and Warranties” at 1, Dec. 15, 2009, available at http://www.americansecuritization.com/uploadedFiles/ASF_Project_RESTART_Reps_and_Warranties_121509.pdf (hereinafter, “ASF Model Reps”). Monoline insurers MBIA, Assured, CIFG, and Syncora are all members of the ASF.

provide an express remedy that reflects the bargained-for risk allocation: repurchase for breach of representations and warranty that “materially and adversely” affects the insurer.¹⁷ Contrary to this risk retention mechanism, the Appealed Order writes it out of the parties’ agreements in favor of a “quasi-rescission” remedy never anticipated by transaction participants. Remarkably, this is despite the fact that MBIA and other monolines continue to accept premiums, continue to perform under their policies, and, as plaintiffs in litigation, seek to enforce the very repurchase protocol that is undermined by the Appealed Order.

The representations and warranties ubiquitous in RMBS securitizations are generally part of a “repurchase protocol,” which in many cases provides the “sole remedy” available to certain transaction participants. See, e.g., Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 2011 WL 4343805 (S.D.N.Y. Sept. 8, 2011) (amended in part Oct. 31, 2011) (limiting monoline to “sole remedy” of repurchase in accordance with parties’ agreements). Even where insurers are not held by contract to the “sole remedy” of repurchase and are entitled to assert claims for damages, monoline insurers are permitted to assert repurchase claims and have aggressively pursued those contractual rights. See, e.g., Am. Compl. ¶ 81 (detailing MBIA’s demands that Bank of America repurchase 4,689 allegedly defective loans). The CEO of MBIA acknowledged the risk retention and

¹⁷ SIFMA takes no position here as to the meaning and application of the “material and adverse” trigger for repurchase.

allocation that underlies the repurchase protocols in testimony before the New York State Assembly:

[T]he sponsor of the securitization and the insurer each took on certain risks regarding the subject loans As a monoline insurer, MBIA accepted the risks that the collective pools of loans – having the characteristics represented and warranted by the sponsors – would not perform as anticipated and perhaps lead us to have to satisfy the trusts’ obligations to its note holders. MBIA insured only the risks for which we bargained and for which insurance was solicited. Notably, we did not accept the risk of loss on loans that should never have been in the transaction in the first place. While the insurance coverage we provide bondholders is unconditional and irrevocable, we do have recourse, and have pursued it, against the originators when the pools have been misrepresented. This allocation of risk was confirmed by the remedy provisions identified in the documents for breaches of the reps and warranties.

See supra n. 6, at 4-5 (emphasis added).

The recognition of the risk allocation implemented by repurchase protocols is likewise reflected in the ASF’s model representations and warranties. The ASF “continues to advocate that risk retention or skin in the game for originators and issuers of RMBS be implemented through the representations and warranties that originators and issuers provide with respect to the mortgage loans sold into the securitization trust coupled with meaningful remedial [repurchase] mechanisms designed to ensure their enforcement.” ASF Model Reps, supra n. 16, at 4. If permitted to stand, however, the Appealed Order marginalizes this regime in favor

of an equitable remedy that is flatly inconsistent with the parties' contractual rights.

But now, despite the admitted unavailability of rescission-type remedies and the acceptance of the risk allocation inherent in transactional repurchase protocols, MBIA seeks to achieve the very remedies monoline insurers surrendered in issuing irrevocable policies. The availability of this unintended remedy ensures one thing: that rather than comply with contractual repurchase standards, monolines will instead attempt to litigate and avoid their obligations entirely. Why would any monoline insurer review transaction loans and comply with the terms of repurchase protocols, when it could instead seek to establish a baseline level of breach of representations and warranties that would completely absolve it of any liability? The answer is simple: it would not.

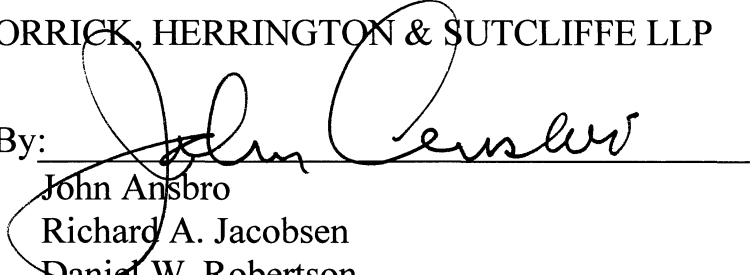
CONCLUSION

For the reasons and upon the authorities set forth above, this Court should reverse the Appealed Decision insofar as it holds that (i) Insurance Law §§ 3105 and 3106 apply to abrogate a monoline insurer's burden of proving proximate causation in common law claims sounding in fraud and breach of contract, and (ii) "rescissory damages" are recoverable in such actions.

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ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____


John Ansbro
Richard A. Jacobsen
Daniel W. Robertson
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Barry S. Levin
(of the Bar of the State of California)
By Permission of the Court
The Orrick Building
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

*Attorneys for Securities Industry and Financial
Markets Association*

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