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Countrywide, Ambac Spar Over Right To In-Person NY Trial

By **Cara Salvatore**

Law360, New York (December 18, 2020, 10:43 PM EST) -- Countrywide Financial Corp. and Ambac are digging in on opposite sides over whether a trial in their decade-old mortgage securities dispute should be held remotely, with the lender in favor and the insurer demanding an in-person proceeding down the road.

Countrywide wrote to state Justice O. Peter Sherwood on Thursday to say a remote trial is "both appropriate and feasible" at the planned February date. Going to court in person in February "is not an option" and a virtual trial is "far preferable" to a delay, according to Countrywide, which was absorbed by Bank of America in 2008.

Although other state courts have embraced the practice of virtual trials, most notably in Texas and Florida, New York has been more hesitant. A proposed permanent rule in the state's Commercial Division would allow remote trials, but only with the consent of all parties. The public comment window for the rule closes Friday.

Ambac Assurance Corp., **which sued in 2010** after the financial crisis on allegations that Countrywide caused it to lose hundreds of millions of dollars on failed mortgage-backed securities it had insured, cited the proposal in its own letter Thursday fighting a virtual trial.

"Ambac has a right to an in-person trial," the insurer told the court. "This is supported by the [Civil Practice Law and Rules], as well as the recently proposed Commercial Division rule requiring consent of all parties for a remote trial."

Ambac also said remote doesn't actually mean socially distanced.

"Even a 'remote' trial will involve substantial personal interaction," Ambac said. Numerous participants "would need to work together for long hours in the same law firm conference rooms in the weeks leading up to and during the trial. Indeed, many witnesses would balk at appearing under these circumstances, and counsel will face the ethical dilemma of zealously representing their client while placing their health at risk."

Some state **courts** have gotten comfortable with the practice of remote trials, both with juries and without. Federal courts have also begun to dip their toes into the waters of remote jury trials, with Seattle's federal court district taking the lead **this fall**. And a Tampa, Florida, federal court announced plans earlier this month to hold a remote jury trial in January in a case against Northwestern Mutual Life Insurance Co.

In New York, as rates of COVID-19 transmission rise once again, the state's chief judge directed parties earlier this month to **sharply limit in-person proceedings**.

In the case at hand, Justice Sherwood earlier this month granted Countrywide's long-standing desire to toss out Ambac's fraud claim. Ambac vowed to appeal that decision.

Ambac lawyer Mark Zauderer said Friday, "With COVID raging, conducting a so-called remote trial, with dozens of witnesses and lawyers who have to meet in person to effectively participate in the

process — many over the age of 65 — is risking a disaster for the participants and their families."

A representative for Countrywide did not immediately respond to a request for comment.

Ambac is represented by Quinn Emanuel Urquhart & Sullivan LLP, Patterson Belknap Webb & Tyler LLP, Selendy & Gay LLP and Ganfer Shore Leeds & Zauderer LLP.

Countrywide is represented by Williams & Connolly LLP, Goodwin Procter LLP and Simpson Thacher & Bartlett LLP.

Bank of America is represented by O'Melveny & Myers LLP.

The case is Ambac Assurance Corp. et al. v. Countrywide Home Loans Inc. et al., case number 651612/2010, in the Supreme Court of the State of New York, County of New York.

--Editing by Jill Coffey.

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