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## Right To In-Person NY Trial Hangs Over \$2B RMBS Case

By **Frank G. Runyeon**

Law360, New York (December 15, 2020, 9:09 PM EST) -- Ambac Assurance Corp. asserted a right to an in-person civil trial in New York state court on Tuesday, a move that could further delay a multibillion-dollar lawsuit over Countrywide-sponsored toxic residential mortgage-backed securities amid a predicted COVID-19 shutdown.

The argument comes two months before jury selection in a long-awaited trial in a **2010 financial-crisis-era lawsuit** by Ambac seeking over \$2 billion from Countrywide Financial Corp. — which was absorbed by Bank of America Corp. in 2008 — on claims the insurer was duped into backing bad loans that cost it hundreds of millions of dollars. But given the recent resurgence of COVID-19 cases in New York City and new **court-ordered restrictions** on in-person appearances, the judge is considering a virtual trial.

During an off-the-record video conference before New York State Supreme Court Justice O. Peter Sherwood on Tuesday morning, counsel for Ambac, Mark C. Zauderer of Ganfer Shore Leeds & Zauderer LLP, pilloried the idea of a video-linked virtual trial. He invoked warnings of "a total shutdown" by state and local authorities that would make it "virtually impossible for lawyers to function" in the necessary "war room" environment of a high-stakes corporate trial before claiming that Ambac had a right to insist on an in-person proceeding, which would effectively push back the trial.

Introducing his argument, Zauderer praised his opposing counsel's legal skills, joking that he had tried to poach Enu Mainigi of Williams & Connolly LLP for his own legal team, before pulling up an argument she signed just two weeks earlier in a separate civil case before a West Virginia federal court. Zauderer quoted her assertion that any remote video proceedings "will not result in a fair trial."

"As a threshold matter, the proposal will not result in a fair trial. Defendants are entitled to present a full and complete defense in person, not a stilted, stymied defense by videoconference," Mainigi and several other attorneys argued in their reply brief on seeking a continuance for the federal bench trial.

"Zoom and similar services have their uses, but they are no substitute for trying a case in the courtroom, in the presence of the court and of witnesses — especially where the plaintiffs seek potentially billions of dollars," Mainigi said in the brief.

The Ambac attorney said Mainigi's argument was just as applicable to his client and pointedly noted that "of course, in this case, we seek billions of dollars."

Mainigi replied that she appreciated the "kind words" but said, "I think this case is very different." For one, the West Virginia case is set to last 12 weeks, while Ambac's case against Countrywide should only take two weeks, she said. Moreover, much of the testimony will be in the form of video depositions, she noted, and would be viewed on a screen either way. Justice Sherwood's March 2021 retirement date is also just around the corner, she added, indicating that time was running out to try the case before him.

"We don't see any reason why this particular case could not be tried as a Zoom trial," Mainigi said.

But Justice Sherwood wanted to hear more on the constitutional questions raised by Mainigi's federal brief and not just the practicalities of a virtual trial.

"You spoke in terms of your right to an in-person trial as opposed to whether the judge has a discretion to direct a virtual trial. I noticed you said nothing about that," the judge said, prompting her to respond.

"We've looked and we have not found anything that would support a right to an in-person trial in the state of New York," Mainigi said.

"So it's your view there is a right to an in-person trial in West Virginia but as far as you can tell there is no right to an in person trial in New York?" Justice Sherwood pushed back.

"When we're talking about the federal courts, I think that there are a different set —" Mainigi began.

"We all operate under the same Constitution, ma'am," said the judge, cutting in.

"We do! We do," Mainigi said, before doubling down on the fact that her legal team hadn't found any basis for a right to an in-person trial in New York state court.

Zauderer admitted that he knew of no New York state decision enshrining a right to an in-person trial, but said that there was a larger legal issue here: Can a judge order a virtual trial? "I don't think we want to be the test case on that," Zauderer said.

Justice Sherwood asked for the arguments to be put in writing by noon on Thursday and said they would continue discussing the right to an in-person trial on Friday at 11:30 a.m.

Notwithstanding the constitutional questions, however, the trial appears likely to be delayed for another reason.

Justice Sherwood granted Countrywide's longstanding desire to **toss out Ambac's fraud claim** in a renewed motion last week and Ambac vowed to appeal that decision. During the Tuesday conference, Zauderer said he intended to seek a stay and a continuance to delay trial with the hopes of going "forward shooting with two barrels, so to speak" referring to the dismissed fraud claim and the remaining contract claim.

Regardless, the busy courtroom envisioned in recent court filings will not materialize as planned.

A September filing shows 75 prospective jurors were requested for Feb. 18 voir dire at the start of an in-person trial featuring 16 attorneys and 8 others in the room. The ceremonial courtroom at 60 Centre Street would have been packed with computers and a 10-foot wide projection screen.

"So long as we're in the land of Covid," Justice Sherwood noted Tuesday, "that's not a viable option."

At the close of the conference, the judge said he wanted to both safeguard everyone's health and protect the parties due process rights, but that he was loath to further delay the decade-old case.

"I do have a very firm view," Justice Sherwood said. "This case has been around a very long time and at some point it must be resolved — and the way to do that is to go ahead and try it."

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 Emily Kokoll.

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