

Securities Regulation Daily Wrap Up, SECURITIES OFFERING—SDNY: Mortgage-Backed Securities Under Trust Indenture Act Remain Debt not Equity on Reconsideration , (Feb. 15, 2013)

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By Jay Fishman, J.D.

The United States District Court for the Southern District of New York, on February 14, 2013, denied the defendant Bank of New York Mellon's (BNYM) motion to reconsider the Court's April 3, 2012 order, declaring BNYM violated the Trust Indenture Act of 1939 (TIA) as trustee over the plaintiff's mortgage-backed securities considered "debt" rather than "equity" securities by the Court. The Court, however, certified the order for interlocutory appeal to address the debt vs. equity securities question. (*Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of New York Mellon*, February 14, 2013, Pauley, W.).

Motion for reconsideration. BNYM, in its motion for reconsideration, contended the mortgage-backed security certificates issued to the plaintiff by 25 New York trusts were *equity* rather than *debt* securities and, thus, fell within an exemption under Section 304(a)(1) of the TIA. BNYM, to support its claim, relied on SEC Division of Corporate Finance website interpretations, concluding that the Court overlooked legal and factual issues in denying its motion to dismiss the plaintiff's TIA claims. BNYM sought reconsideration under Federal Rules of Civil Procedure (F.R.C.P.) 59 and 60, as well as Local Rule 6.3.

The Court first determined that BNYM's motion could only be brought under Local Rule 6.3 because the April order was not a "judgment" or "final judgment" as required for F.R.C.P. consideration. The Court then stated that a motion for reconsideration under Local Rule 6.3 will be denied unless "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court."

The Court declared that BNYM's motion must be denied because: (1) BNYM did not ask the Court to consider controlling decisions or data that were overlooked; and (2) BNYM asked the Court to consider new arguments or claims that were not before the Court on the original motion but should have been. Regarding (1) above, the Court said SEC Division of Corporate Finance website interpretations are not controlling decisions especially considering the Division's website caution that interpretations are not rules, regulations or statements of the Commission. Regarding (2) above, the Court said that BNYM relied on SEC staff interpretations to support its Section 304(a)(1) claim that the certificates were equity securities, but BNYM failed to observe that the SEC's support was rooted in TIA Section 304(a)(2), a Section never advocated by BNYM for its claim.

Interlocutory appeal. The Court decided, however, to allow BNYM ten days to file an interlocutory appeal because the matter fell within the "interlocutory appeal test," by involving a controlling question of law with a substantial difference of opinion that may materially advance the ultimate termination of the litigation: "Whether mortgage-backed security certificates are debt or equity securities."

This is Case No. 11 CV. 5459 (WHP).

Attorneys: David R. Scott (Scott & Scott, LLC) for Retirement Board Of The Policemen's Annuity and Benefit Fund Of The City Of Chicago, Westmoreland County Employee Retirement System, City of Grand Rapids General Retirement System and City of Grand Rapids Police and Fire Retirement System. Matthew D. Ingber and Paula Garrett Lin (Mayer Brown, LLP) for The Bank of New York Mellon.

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