

New York's Highest Court Relieves Debt Trading Market From Uncertainty Regarding The Application Of Champerty

By Lucinda O. McConathy and Brian S. Fraser

On October 15, 2009, the New York Court of Appeals issued its decision in a high-profile case involving the proper interpretation of New York's champerty statute, which prohibits an assignment of a claim "with the intent and for the purpose" of bringing suit. Participants in the debt trading market had been concerned that the Court of Appeals might issue a decision that clouded the ability of assignees to assert claims in court to protect their rights and interests in related debt instruments. Richards Kibbe & Orbe LLP partners Brian S. Fraser and Lucinda O. McConathy filed an *amicus curiae* brief in the case on behalf of The Loan Syndications & Trading Association, Inc. ("LSTA") to address this concern.

A syndicated loan consists of a complex bundle of rights, including not only the obligor's promise to pay back the loan but also the right to assert claims or causes of action relating to the loan and its issuance. The ability to assert a claim to recover for losses arising from a borrower's default or misconduct in the underlying credit transaction is an essential component of the value of the financial instruments traded in the syndicated loan market. Secondary market buyers – assignees of debt and related claims – have long relied on the validity and enforceability of the assigned claims in valuing the debt and managing their assets.

Any cloud on the ability to assign enforceable claims along with related debt instruments has now been largely removed. The Court of Appeals said, "New York cases agree that if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation." It summarized, "In short, the champerty statute does not apply when the

purpose of an assignment is the collection of a legitimate claim."

The Court of Appeals explained that the statute was primarily focused on "preventing attorneys from filing suit merely as a vehicle for obtaining costs." In that context, the Court then clarified earlier decisions, saying, "In describing champerty in terms of an acquisition made with the purpose of bringing a lawsuit...we intended to convey the difference between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it."

The Court of Appeals held that an assignee does not violate the statute "if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument in which it holds a pre-existing proprietary interest." In that case, the assignee already held an interest in the related debt instrument when it acquired the claims in a settlement of litigation.

The case is *TRUST FOR THE CERTIFICATE HOLDERS OF THE MERRILL LYNCH MORTGAGE INVESTORS, INC., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1999-C1, by and through ORIX Capital Markets, LLC v. Love Funding Corp.*, Appeal No. 107 (oral argument held September 9, 2009; decision issued October 15, 2009).

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Memorandum

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Lucinda O. McConathy

Washington, DC
202 261 2992
lmconathy@rkollp.com

Brian S. Fraser

New York, NY
212 530 1820
bfraser@rkollp.com

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