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BEST PRACTICES FOR MANAGED DOCUMENT REVIEW IN RMBS MATTERS

ANDREW GOODMAN AND PHILIP ALGIERI

This article provides an overview of how law firms and managed service providers can devise document review solutions for their clients' residential mortgage backed securities matters.

In the aftermath of the financial crisis of 2008, financial institutions faced an ongoing deluge of regulatory investigations and lawsuits, which were accompanied by extremely burdensome discovery obligations. One of the more high-profile and common types of such matters relate to the securitization of home loans, better known as residential mortgage backed securities ("RMBS"). RMBS matters include regulatory investigations at the federal and state level, litigations brought by specialized monoline RMBS insurers, and actions brought by investors.¹ Each of these requires the review of large quantities of electronically stored information ("ESI") in an efficient and defensible manner.

Performing such reviews is no easy task. RMBS matters are quite complex and highly technical from both a legal and financial perspective. They require a thorough understanding of and ability to analyze loan origination practices, mortgage appraisals, due diligence reviews, credit ratings and title transfers, each of which can be extremely perplexing to a reviewer not familiar with the RMBS lexicon. Further, each type of matter focuses on a myriad of different issues, each of which necessitates approaching a similar subject matter from a different perspective. For example, regulatory investigations typi-

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cally seek to examine how the sample size for due diligence was selected, the credit and regulatory compliance review, data validation/review, and whether the institution took any actions based on the due diligence review. Breaches of representations and warranties are at the heart of actions brought by monoline RMBS insurers and often result in the sponsor institutions filing actions against the loan originators. Investor litigations deal with Securities Act violations related to how offering memoranda and prospectuses dealt with issues such as lax underwriting standards or overly optimistic credit ratings.

Adding to the degree of difficulty in these reviews is the fact that the large volume of data usually requires the assistance of reviewers from outside the core group of attorneys who are actively staffed on the law firm's "case team," which often means turning to a managed legal services provider. In these situations, the client must (i) select a capable provider with appropriate experience in similar matters and advanced understanding of both technology and process, (ii) ensure the outside team is fully trained and can handle the technical nature of an RMBS review, and (iii) work with the provider to design a workflow that allows all teams to function as one cohesive unit despite often working remotely from one another. This article will provide an overview of how law firms and managed service providers can navigate these issues and successfully deploy best practices to drive high-quality, defensible document review solutions for their clients' RMBS matters.

DESIGN A DEFENSIBLE, ROBUST RMBS-SPECIFIC PROCESS

Any review process, whether or not for an RMBS matter, must be "defensible." But what exactly does "defensible" mean? Leading eDiscovery commentators have stated that "[t]he true measure of a defensible e-discovery process is the ability to withstand challenge after-the-fact by the opposing party."² And that to withstand these challenges, practitioners must use, "appropriate methodologies that are reasonable to the particular circumstances of the client and litigation and provide a quality result."³

Courts have weighed in on defensibility as well. As Judge Grimm explained in *Victor Stanley*, "[t]he implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to

the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.”⁴ Similarly, as Judge Peck observed in *Da Silva Moore*, “[c]ounsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI.”⁵

Why does defensibility matter? As Judge Shaffer noted, plaintiffs and regulators will seize on any perceived deficiency to challenge a production. Should a document production be called into question, the producing party must be prepared to respond to a motion to compel or otherwise defend the decisions made during the course of the review. If a party’s production is ultimately deemed insufficient, the party becomes exposed to sanctions. And in high-profile, high-stakes RMBS matters, there is the added element of reputational risk for the client and outside counsel that is hit with sanctions. Therefore, it is essential that the RMBS review process is a defensible one.

Process takes on even greater importance given the complexity and volume of documents in RMBS matters, and the fact that clients often deal with multiple, high-stakes cases at the same time. These cases require coding and analysis for a large number of issues, as well as tailored workflows depending on the type of matter (litigation vs. investigation), type of ESI review (email vs. file-by-file review of scanned copies of the underlying loan documentation), and the party producing the documents (client vs. opposing or third party.) Strong processes help ensure that the review stays on track, even when the client needs to respond to a series of rolling deadlines in simultaneous, related cases.

The question then becomes how to design an appropriate process for RMBS reviews. A good starting point is to determine objectives and standards regarding basic review tasks like identifying responsive documents, not producing non-responsive documents, withholding privileged documents, etc. While in an ideal world, a review team would achieve perfection with respect to each of these, that is simply not realistic in terms of cost or time when dealing with huge volumes of ESI, nor does defensibility require such perfection.⁶ Instead, how you assess these elements will depend on a variety of risk factors, including:

- type of matter;

- regulatory body;
- amount in controversy;
- potential for future litigation;
- impact of the outcome on core business functions, etc.

Once parameters are established, the review team can then design a quality control process that ensures the review falls within the bounds of these standards as measured by objective metrics like precision and recall.⁷ By first determining the goals of the review, it becomes possible to design a process that is specifically targeted at meeting these goals and utilizes pre-defined, non-arbitrary metrics to illustrate adherence to these standards (and in turn helps ensure the defensibility criteria discussed above).

If relying on the assistance of a managed review provider, the client or counsel should verify that the provider is capable of designing and executing these processes. One common evaluation tool is to require internationally-recognized third party certifications such as the ISO certification. These certifications are generally accepted as good standards when evaluating the robustness of the provider's processes and serve as an important indicator of quality to clients, courts, and opposing parties as they demonstrate that a review process has been vetted by a reputable, independent third party. Another key factor impacting an outside provider's ability to design a robust, defensible process is the effective use of data driven quality improvement systems like Six Sigma. Notably, many managed service providers have been at the forefront of identifying innovative ways to apply Six Sigma's underlying principles to track and improve quality in the legal arena, particularly with regard to large-scale document reviews. Finally, it is imperative that the entities conducting the review adhere to such processes, document this adherence, and be prepared to testify if required.

HARNESS INSTITUTIONAL KNOWLEDGE

A process is only as strong as its weakest link, and even the most sophisticated process will fail without adequate human capital. In an area requiring in-depth mastery of a highly technical subject matter, such as RMBS, a man-

aged document review process should ideally use permanent, well-trained employees at all levels. In the case of outside providers, the use of experienced, permanent employees means the company has likely invested sufficient time and resources in training its people and holds them to a higher standard of performance as part of their employment, creating a strong combination of training and incentive that is not always present when using a temporary workforce on each matter.

This use of permanent employees offers several unique benefits in the RMBS context. A company embroiled in RMBS litigation will often deal with multiple related RMBS matters over the course of several years, each with similar fact patterns, custodian profiles, and document types. Having teams that retain and apply institutional knowledge of these cases adds tremendous substantive value in terms of (i) approaching each review with a built-in degree of sophistication, fluency in RMBS terminology, and ability to think strategically about the current matter on a granular level, (ii) informing the development of RMBS-specific quality assurance procedures, and (iii) taking best practices developed on previous projects and deploying them on later ones, thereby increasing efficiency and quality in a way that would not be possible with contract or less permanent reviewers. The review team can also seamlessly scale up or down as required with employees familiar with the matter, and can be quickly reallocated as priorities shift with regards to simultaneous matters, productions, or workflows.

This applies beyond the just the reviewers themselves. A more sophisticated review process often incorporates the expertise of search specialists, statisticians, and linguists, who help build and sustain the robust processes described above. Dedicating this level of resources to non-core functions can often enable the review team to more accurately and efficiently handle complex subject matters.

IMPLEMENT APPROPRIATE TECHNOLOGY

It is nearly impossible to accurately and efficiently review large volumes of ESI if document review technology is not effectively used to support the quality, search, and workflow design processes. It is essential for the managed review provider to understand how to maximize the benefits of technology,

be familiar with leading review platforms, including technology-assisted review (“TAR”)⁸ tools, and be able to help clients devise the best suited workflows for a given project. Beyond mastering basic functionality, the review team also must understand how to utilize the review platform to gather the data necessary to measure and drive quality and productivity, employ data-driven processes to help fill in the gaps where technology leaves off, and understand the difference between the search algorithms particular tools employ and the implications these differences have on how to structure workflows and processes.

In properly using the chosen technology, it is crucial that the client, outside counsel, and managed services provider are collectively aware of both the potential benefits and limitations of the technology. In the RMBS context, for example, the high degree of structured data may render technology-assisted review offerings ineffective for certain data sets. Likewise, technology-assisted review may be able to help identify potentially relevant documents, but not substantively analyze information within those documents. Therefore, the people designing the review process must understand the limitations of the technologies they are using and then employ a skilled human review element to pick up where the technology leaves off. In RMBS cases, where outside counsel will likely rely on the managed review team to handle many core review functions, the combination of a review team’s ability to correctly use such sophisticated technology along with a nuanced understanding of RMBS matters will permit outside counsel to more quickly and effectively assess key documents and integrate them into their overall strategy.

LEVERAGE STATISTICAL CONCEPTS AND SEARCH METHODOLOGIES

Other analytical tools add significant value in RMBS reviews as well. Employing data-based intelligent search and statistical methodologies as part of an overall quantitative approach to RMBS document reviews helps in reaching certain macro decisions during the course of the review, such as culling selected review sets or prioritizing the review of specific portions of the data set. At the outset, counsel and outside providers should work together to leverage their collective knowledge of RMBS matters to drive the use of Early

Data Assessment, and, if applicable, a technology-assisted review solution to both narrow the review pool and to identify and escalate important documents earlier in the process. As the review progresses, search and statistics can be used to tailor quality control protocols to (i) select sample sets, (ii) measure accuracy, and (iii) test and validate searches and search results. This last step is vital from both a quality and legal perspective, as courts have held that the failure to “to assess the accuracy and validity of selected search terms” can constitute negligence.⁹

WORK AS A FULLY-INTEGRATED TEAM

An outside provider's processes should never be a “black box.” A successful review requires that managed service providers stay in constant communication with the client and outside counsel throughout the review, and continuously obtain and apply their feedback. This will ensure that their clients have complete insight into the quality and progress of the review, can make timely changes or improvements to the process, and can appropriately monitor the review team's performance and provide feedback. These are critical on RMBS matters, where the amount of moving pieces, large volumes of documents, and tight time frames magnify the consequences of any delays or errors relating to poor communication.

This communication process should be a two-way street. In order to ensure complete knowledge transfer between outside counsel and the review team, outside counsel must stay substantively involved throughout the matter and provide detailed training and ongoing guidance. The managed review provider must then employ processes designed to efficiently transfer this knowledge to the entire review team. Among other best practices, clients, outside counsel, and the managed review provider should work in concert to:

- initiate and plan project kick-off calls and project-specific training;
- perform Early Data Assessments and search term validation to better understand the documents and reduce risk and cost;
- tailor workflows to account for the client's and counsel's preferences and the project's requirements, and integrate them into the managed review provider's processes;

- customize quality processes and create an issue escalation mechanism;
- create a reporting schedule that allows transparency into the review; and
- participate in comparative review exercises as needed to ensure counsel and the review teams are generally consistent in their interpretations of review guidelines and that they accurately incorporate any changes regarding the focus of the review.

The last element is extremely important in the RMBS context, as the review team often needs to incorporate changed directions based on developments in related cases that cause a shift in overall discovery strategy. Take for example what happened in the *MASTR* case in Minnesota.¹⁰ After the court held that defendants did not have to repurchase loans that allegedly failed to meet the representations and warranties in the applicable pooling and servicing agreement if plaintiff had already liquidated those loans prior to providing notice of the alleged breach, defendants in other cases reacted to this holding by shifting their focus to identifying any loans that may have been liquidated before they received notice of a potential breach so that they could present similar arguments.¹¹ In situations like this, review guidelines often shift mid-stream, adding a new element to consider.

INVESTOR LITIGATIONS

The best practices described above are especially useful with regard to RMBS investor actions alleging violations of the Securities Act. Not only do reviewers need to be able to make quick and accurate assessments of whether documents are important or even relevant, they must do so keeping in mind a myriad of defenses such as actual and/or reasonable reliance, intent, causation, and damages. Key issues that drive their analysis include whether the other side had knowledge of whether the loan originators failed to comply with underwriting guidelines, how representations and warranties were negotiated, if any party had knowledge of any breach of the representations and warranties and identifying any evidence of fraud or improper practices. Continuity in a review team – both at the law firm and the managed review provider – makes it significantly easier to handle this complexity and is therefore a critical factor

in dealing with investor class actions. A team with institutional knowledge of RMBS matters and fluency in the highly-technical language of RMBS will face a lower learning curve and require less ramp-up time.

There is one somewhat unique aspect of RMBS investor litigations where a managed services provider can add additional value. In a typical investor litigation such as a shareholder derivative suit, discovery is asymmetrical – the defendants are asked to produce copious volumes of ESI whereas the plaintiff faces a minimal discovery burden, if any. However, the typical RMBS investor plaintiff is a sophisticated, large institution. When faced with a reciprocal discovery request from the defendants, they must produce all communications related to reliance, negotiations, and damages, among other subjects. A review team that has already gained expertise working on the client's production is obviously best positioned to review these productions. As a result, continuity among this team and the ability to staff essentially the same team for all reviews, even if there is a substantial gap in time between productions, takes on even greater importance in these situations. Without having to re-staff, educate, and train a new pool of reviewers, the review team can more quickly identify highly relevant documents that flesh out the story the client wants to tell or that cause them to re-think their litigation strategy, and can turn the defensibility argument around on the plaintiffs, utilizing their knowledge of the client's production to assess the sufficiency of plaintiffs' production.

CONCLUSION

Document reviews for RMBS matters involve reviewing large volumes of ESI for a large, highly-complex set of issues. By employing the best practices discussed above, RMBS clients attain a higher level of quality, adopt a defensible approach to document review, reduce costs, and logically minimize any concerns as to whether their processes are appropriate and reasonable.

NOTES

¹ For a more granular discussion of RMBS, *see generally*, C. Gambino, D. Goldberg, A. Hakki, et. al., "An Overview of Significant Recent Developments in Mortgage and

RMBS Litigation” presented at the SIFMA Compliance & Legal Society 2013 Annual Seminar.

² C. Shaffer, J., “*Defensible*” by *What Standard*, The Sedona Conference Journal (Fall 2012) at 3.

³ *Id.* at 2.

⁴ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008).

⁵ *Da Silva Moore*, No. 11 Civ. 1279 (S.D.N.Y. Feb. 24, 2012) (No. 96), at 25-26 (Opinion & Order approving the use of predictive coding).

⁶ In another context, Judge Grimm stated with regard to Federal Rule of Evidence 502 and potential waiver of privilege that, “Reviewing courts must remember that the bellwether test under Rule 502(b)(2) is reasonableness, not perfection.” (Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, Federal Rule of Evidence 502: Has It Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8 (2011), *available at* <http://jolt.richmond.edu/v17i3/article8.pdf>, at 45).

⁷ The Grossman-Cormack Glossary of Technology Assisted Review defines precision as: “The fraction of documents identified as relevant by a search or review effort, that are in fact relevant” and defines recall as: “The fraction of relevant documents that are identified as relevant by a search or review effort.” (The Grossman-Cormack Glossary of Technology-Assisted Review (2013 Fed. Cts. L. Rev. 7) at 25, 27).

⁸ The Grossman-Cormack Glossary of Technology Assisted Review defines TAR as: “A process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection. (The Grossman-Cormack Glossary of Technology-Assisted Review (2013 Fed. Cts. L. Rev. 7) at 32).

⁹ See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-62 (D. Md.2008)).

¹⁰ *MASTR Asset Backed Securities Trust 2006-HE3, ex rel. U.S. Bank, N.A. v. WMC Mortg. Corp.*, No. 11-2542 JRT/TNL, 2012 WL 4511065 (D. Minn. Oct. 1, 2012).

¹¹ See, e.g., *Deutsche Alt-A Securities Mortgage Loan Trust, ex rel. HSBC Bank USA v. DB Structured Products, Inc.*, No. 12-Civ-8594 (S.D.N.Y. Jan. 14, 2013) and *Morgan Stanley Mortgage Loan Trust v. Morgan Stanley Mortgage Capital Holdings LLC*, No. 652763/2012 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 9, 2012).