STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1350
A21-1356

In the Matter of Merrill Lynch Mortgage Investors Trust, Series 2006-RM4 and Merrill Lynch Mortgage Investors Trust, Series 2006-RM5.

Filed May 31, 2022
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-TR-CV-18-43

John B. Orenstein, Jeya Paul, Greene Espel PLLP, Minneapolis, Minnesota (for appellant HBK Master Fund, LP)

Virginia R. McCalmont, Forsgren Fisher McCalmont Demarea Tysver LLP, Minneapolis, Minnesota; and

Uri A. Itkin (pro hac vice), Kasowitz Benson Torres LLP, New York, New York (for appellants Olifant Fund, Ltd., FFI Ltd., and FYI Fund Ltd.)

Michael C. McCarthy, James F. Killian, Michael Sheran, Maslon LLP, Minneapolis, Minnesota (for respondent U.S. Bank National Association)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellants challenge the district court's order granting respondent trustee's petition to approve settlement. Because we conclude that the district court did not err or abuse its discretion, we affirm.

FACTS

This is an appeal of the district court's order in a trust instruction proceeding (TIP) granting respondent trustee U.S. Bank's petition to approve settlement in a residential mortgage-backed security (RMBS) trust lawsuit in New York. We summarize the history of that lawsuit here because it provides helpful context for the issues before us.

The trusts

An RMBS trust is a form of structured financial product that involves pooling numerous residential mortgage loans into a trust, which then issues certificates to investors, called certificateholders. Certificates are divided into classes, with individual classes of certificates entitled to different payment priorities and interest rates as provided in the trust's governing documents. As individual mortgage borrowers make payments on their loans, those payments are eventually transmitted to the trust, which uses that cash flow to pay expenses and make principal and interest payments to certificateholders.

The creation of an RMBS trust has several steps. First, a lender, called the "originator," issues residential mortgage loans to individual borrowers. Second, the originator sells the loans to another entity, called the "sponsor," which bundles the loans into a pool for securitization. Third, the sponsor sells the loans to a special purpose vehicle

called the "depositor." Fourth, the depositor completes the transaction by transferring the loans to a trust, which issues certificates to investors.

This appeal relates to the proposed settlement of underlying litigation surrounding two RMBS trusts: Merrill Lynch Mortgage Investors Trust, Series 2006-RM4 (RM4 Trust) and Merrill Lynch Mortgage Investors Trust, Series 2006-RM5 (RM5 Trust) (collectively, the Trusts). Both Trusts were created with residential mortgage loans that loan originator ResMAE Mortgage Corporation (ResMAE) sold to sponsor Merrill Lynch Mortgage Lending Inc. (MLML) via purchase agreement in 2006. MLML, in turn, grouped the mortgage loans into pools and sold them to depositor Merrill Lynch Mortgage Investors Inc. (MLMI) via sale agreements. MLMI then deposited the mortgage loans into the Trusts, which were created pursuant to Pooling and Servicing Agreements (PSAs) in the same transaction.[1] Per the PSAs, the mortgage loans in each trust were divided into two groups: group one and group two. The differences between the groups are unimportant for the purposes of this appeal.

Wilshire Credit Corporation (Wilshire) served as the initial servicer of the Trusts, and LaSalle Bank National Association (LaSalle) was the initial trustee. The RM4 Trust was originally backed by approximately 3,145 mortgage loans with an aggregate principal balance of approximately $575,264,264. The RM5 Trust was originally backed by approximately 2,944 mortgage loans with an aggregate principal balance of approximately

[1] The RM4 Trust was created on September 1, 2006, and the RM5 Trust was created on October 1, 2006. Both Trusts were created and populated with mortgage loans in the same manner.

$535,628,316. The Trusts issued certificates that were sold to investors, entitling the investors to certain cash flows generated by borrower payments on the mortgage loans held by the Trusts and across both groups of loans within the Trusts. There are several different classes of certificates, which also fall into two groups, colloquially referred to as the senior and junior classes. The senior class certificates generally held higher investment-return priority than the junior classes.

In the purchase agreement with MLML, ResMAE made representations and warranties about the quality and characteristics of the mortgage loans and agreed to remedy any breach by, among other options, repurchasing the breaching loan at a specified repurchase price. In the sale agreements, MLML assigned MLMI its rights to enforce ResMAE's repurchase obligations and, in the PSAs, made its own representations and warranties regarding the loans (the guaranty). MLMI then, in the PSAs creating the Trusts, authorized the trustee to enforce all representations and warranties made concerning the loans.

The ResMAE bankruptcy and trustee change

In December 2006, several months after the creation of the Trusts, Wilshire demanded that ResMAE repurchase certain loans in both Trusts that were allegedly in breach of certain representations in the purchase agreements. After disputing Wilshire's allegations, ResMAE filed for bankruptcy, and the Trusts and certain Merrill Lynch entities filed claims against the bankruptcy estate. In July 2008, the Trusts and the Merrill Lynch entities entered into a settlement agreement that treated their claims collectively and resolved them for $10,000,000, holding the funds in escrow while the parties negotiated an

agreement on how the funds would be allocated. During these negotiations, Bank of America, National Association (BANA) acquired LaSalle and became trustee of the Trusts.

On December 31, 2008, BANA, as trustee, and the Merrill Lynch entities executed an allocation agreement, which included a release clause that purported to release the Merrill Lynch entities from all claims of any nature that the Trusts might have against any Merrill Lynch entity (the release). The day after the allocation agreement was executed, BANA closed on its acquisition of Merrill Lynch & Co., including MLML and MLMI. As a result, BANA resigned as trustee of the Trusts, and U.S. Bank was appointed trustee in its place, effective March 31, 2009. U.S. Bank's principal place of business is in Minneapolis, Minnesota.

The putback action

The Trusts suffered massive losses within three years of their creation. In April 2009, the principal balances of certain classes of certificates in the RM5 Trust were reduced to zero due to realized losses, and the same occurred with certain classes of certificates in the RM4 Trust that August.[2] In early 2012, a certificateholder in the Trusts (the directing certificateholder), through forensic review of the mortgage loan files, identified approximately 1,221 loans for the RM4 Trust and 1,411 loans for the RM5 Trust (the identified loans) that allegedly breached various representations and warranties made in the purchase agreement and the sale agreements. U.S. Bank notified MLML, and MLML refused to repurchase any of the identified loans, claiming that its liability to the Trusts had

[2] The total realized losses in the Trusts as of September 25, 2018, were $291,376,254 in RM4 and $288,086,949 in RM5.

been released by BANA, as the preceding trustee, through the release in the allocation agreement for ResMAE's bankruptcy settlement. The directing certificateholder thereafter instructed U.S. Bank to sue MLML and others to enforce MLML's obligations to the Trusts.

In December 2012, U.S. Bank sued MLML, BANA, and MLMI in New York state court, alleging in part that certain mortgage loans conveyed to the Trusts breached certain representations and warranties and seeking to compel MLML and MLMI to repurchase the loans (the putback action).[3] The defendants moved to dismiss the complaint, arguing in part that MLMI should be dismissed from the case and that the release otherwise protected MLML from U.S. Bank's claims. The court dismissed MLMI from the case but held that MLML had guaranteed ResMAE's obligations through the guaranty in the PSAs. BANA and MLML appealed, and the appellate court affirmed the order on different grounds, holding that the guaranty provision was ambiguous, so its meaning needed to be determined with reference to extrinsic evidence.

After the parties engaged in extensive fact and expert discovery, they each moved for partial summary judgment, which the court granted in part and denied in part. The court concluded that the guaranty issue would have to be tried because the extrinsic evidence offered by U.S. Bank did not conclusively resolve the ambiguity of the disputed language in that provision. The court also concluded that the release issue would need to be tried, even though the release unambiguously covered all the Trusts' claims based on

[3] *Merrill Lynch Mortgage Investors Trust, Series 2006-RM4, et al. v Merrill Lynch Mortgage Lending, Inc., et al.*, Index No. 654403/2012.

MLML's alleged guaranty of ResMAE's repurchase liability, because material questions of fact existed as to whether the release was enforceable given that BANA and MLML were not in a true arm's-length posture when negotiating the allocation agreement, which was incompatible with BANA's obligations as trustee at that time. Finally, the court ruled that BANA and MLML could not contest the existence of breach for a portion of the identified loans but could contest whether the breaches were material and adverse. BANA and MLML served notice of their intent to appeal the court's summary judgment order in May 2018.

The settlement agreement and the TIP underlying this appeal

On June 18, 2018, U.S. Bank was presented with a settlement agreement that the directing certificateholder and BANA, MLML, and MLMI (henceforth, the BANA parties) had negotiated without U.S. Bank's knowledge or involvement (the settlement agreement). The settlement agreement would resolve all claims asserted in the putback action, as well as any potential claims related to servicing obligations and BANA's administration of the Trusts as the prior trustee. The BANA parties would pay $69,500,000 to U.S. Bank for the benefit of the Trusts, allocating these funds approximately evenly to the outstanding certificates backed by group two mortgage loans in each Trust.[4] BANA would also pay the Trusts $7,500,000 as reimbursement for litigation expenses. At that time, the Trusts had incurred approximately $30,000,000 in expenses for the putback action. The parties

[4] The settlement agreement does not provide for a comparable payment to certificates backed by the group one loans because the certificates that would benefit from such a payment are owned entirely by an affiliate of BANA.

agreed to stay the proceedings of the putback action pending the Trustee's evaluation of the settlement agreement. The putback action remains stayed.

U.S. Bank provided notice of the settlement agreement to the Trusts' certificateholders and solicited their votes regarding the Trustee's acceptance or rejection of the settlement. For the RM4 Trust, certificateholders with 88.7% of the voting rights directed U.S. Bank to accept the settlement agreement. For the RM5 Trust, certificateholders with 92.8% of the voting rights directed U.S. Bank to accept the settlement agreement. And excluding certificates held by the BANA affiliate, approximately 85.1% and 92.6% of the outstanding principal balance of the RM4 Trust and the RM5 Trust, respectively, voted to accept the settlement agreement.

U.S. Bank also retained Compass Lexecon (Compass) to provide an independent opinion on the reasonableness and adequacy of the settlement agreement as it pertained to certificates backed by group two loans and to suggest factors for U.S. Bank to consider in evaluating the settlement overall. An executive vice president of Compass, Dr. Lumer, served as U.S. Bank's economic expert. Compass concluded that there was substantial uncertainty about the amount that the Trusts would recover on their claims if the putback action proceeded to trial, so it put substantial weight on the views of the certificateholders, which demonstrated overwhelming support for the settlement agreement. Compass also considered significant the fact that the directing certificateholder had negotiated and supported the settlement agreement. Finally, Compass compared the settlement agreement to recent public settlements that released similar claims concerning RMBS trusts backed by the same type of collateral (i.e., sub-prime mortgage loans). In conclusion, Compass

opined that the terms of the settlement agreement were reasonable and adequate as to certificates backed by group two loans and suggested several factors U.S. Bank should consider in evaluating the settlement agreement as a whole.

U.S. Bank then conducted its own evaluation of the settlement agreement and concluded it was reasonable and adequate. On September 4, 2018, U.S. Bank filed the underlying TIP petition in Ramsey County District Court, seeking court approval of its evaluation of the settlement agreement and instruction to accept the settlement, among other related relief. Thereafter, appellants HBK Master Fund (HBK) and Olifant Funds (Olifant)—both certificateholders in the Trusts—objected to the petition, arguing that the settlement was inadequate. U.S. Bank asked Dr. Lumer to evaluate HBK's and Olifant's objections, and he concluded that the objections did not affect any of the opinions or advice Compass had previously provided.

After trial, the district court granted U.S. Bank's petition. Specifically, the district court concluded that New York law governed U.S. Bank's conduct as trustee, U.S. Bank acted reasonably and in good faith in evaluating and seeking approval of the settlement agreement, and neither HBK nor Olifant offered a legitimate basis for the court to instruct U.S. Bank to reject the settlement agreement. This appeal followed.

DECISION

I. The district court applied the correct legal standard.

The district court concluded that New York law governs U.S. Bank's conduct and requires it to prove only that it acted "reasonably and in good faith." HBK and U.S. Bank agree that the substantive issues in this case are governed by New York law in accordance

with the choice-of-law provisions in the PSAs. Olifant disagrees, arguing Minnesota law applies. A district court's resolution of a choice-of-law issue is a question of law, which we review de novo. *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 4 (Minn. App. 2003), *rev. denied* (Minn. Dec. 16, 2003). We conclude that the district court did not err here.

The PSAs contain identical New York choice-of-law provisions. We uphold choice-of-law provisions "and will interpret and apply the law of another state where such an agreement is made." *Milliken & Co. v. Eagle Packaging Co.*, 295 N.W.2d 377, 380 n.1 (Minn. 1980) (citing *Combined Ins. Co. of Am. v. Bode*, 77 N.W.2d 533, 536 (Minn. 1956)); *see also U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 429 (Minn. App. 2000) ("Because the indenture contains a choice-of-law clause providing that New York law governs, we apply New York contract law to this dispute."). The choice-of-law provision in the PSAs provides:

> THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE SUBSTANTIVE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED IN THE STATE OF NEW YORK AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF THE PARTIES HERETO AND THE CERTIFICATEHOLDERS SHALL BE DETERMINED IN ACCORDANCE WITH SUCH LAWS WITHOUT REGARD TO THE CONFLICTS OF LAWS PRINCIPLES THEREOF.

This TIP involves the obligations, rights, and remedies of the parties to the PSAs and the certificateholders of the Trusts. Thus, the TIP action fits squarely within the PSAs' choice-of-law provision.

Olifant argues the district court should have applied Minnesota law because U.S. Bank did not sign the settlement agreement before seeking court approval and, thus, did not exercise its discretion concerning the settlement agreement. In other words, Olifant asserts that what is really at issue is the reasonableness of the settlement agreement itself, not the reasonableness of U.S. Bank's actions as trustee relating to the settlement agreement. So, the district court should have applied the objective standard articulated in the supreme court's decision in *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982), to evaluate the proposed settlement. This argument fails.

First, *Miller* is inapposite here. In *Miller*, the supreme court evaluated whether a settlement between a personal-injury plaintiff and a defendant was "the product of fraud or collusion" where recovery could only be had from the defendant's insurer. 316 N.W.2d at 732-33. In those situations, the concern is that in settling "the exposed insured has no incentive to drive a hard bargain," *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 280 (Minn. 1990), and may therefore be "quite willing to agree to anything as long as plaintiff promise[s] them full immunity," *Miller*, 316 N.W.2d at 735.

Here, as U.S. Bank argues, this settlement is not a "*Miller-Shugart* settlement" because it arose in a different context and implicates none of the concerns addressed by *Miller*. The settlement agreement does not implicate a third-party payer and there is no concern that U.S. Bank, as trustee, has overreached; Olifant objects to the settlement as too low. Moreover, we have previously refused to apply *Miller* where a contractual insured-insurer relationship does not exist. *See St. Michel v. Burns & Wilcox, Ltd.*, 433 N.W.2d 130, 135 (Minn. App. 1988) (stating that "[i]t is evident that in *Miller* the supreme court

undertook a delicate balancing of burdens and risks and resolved them against the interest of an insurer" and "[d]ifferent questions are involved in applying the same rule of law to a case which does not involve existing contractual responsibilities between an insured and insurer"), *rev. denied* (Minn. Mar. 17, 1989); *Nichols v. Meilahn*, 444 N.W.2d 872, 874-75 (Minn. App. 1989) (refusing to apply *Miller* when settlement did not involve an insured party—the "necessary conduit" to a *Miller-Shugart* settlement), *rev. denied* (Minn. Nov. 15, 1989); *Burbach v. Armstrong Rigging & Erecting, Inc.*, 560 N.W.2d 107, 109-10 (Minn. App. 1997) (refusing to apply *Miller* because "*Miller-Shugart* settlement is a narrowly-crafted remedy that protects an insured against a plaintiff's claim").

Olifant points to *In re RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804 (D. Minn. 2019) (*RFC*), in which the United States District Court for the District of Minnesota recently applied the objective reasonableness test from *Miller* in the RMBS context. But that is not binding authority on this court. And, in *RFC*, the structure of the settlement implicated the concerns that *Miller* addresses: RFC, an insolvent securitizer of residential mortgage loans, settled the bankruptcy claims against it on the condition that it "be permitted to seek contractual indemnification from the mortgage lenders, or 'insurers,' who sold RFC the underlying defective loans, and whose breaches of the . . . representations and warranties . . . contributed to RFC facing such claims." 399 F. Supp. 3d at 812-13. That is not the case here.

Second, even if the objective reasonableness of the settlement itself was at issue here, Olifant offers no convincing argument as to why that issue is procedural and not subject to New York law through the PSAs' choice-of-law provision. Olifant asserts that

"TIPS are procedural in nature" per *Hartzell v. Schuster*, 100 N.W.2d 513, 515 (Minn. 1959). But it does not necessarily flow from *Hartzell* that every issue *within* a TIP is procedural. In *Hartzell*, the supreme court described the TIP statutes as providing a method "whereby trustees could proceed to have their actions reviewed and a conclusive determination rendered," stating the TIP statutes "in no way detract from the substantive law of trusts but are merely procedural." *Hartzell*, 100 N.W.2d at 515. The objective reasonableness of the settlement agreement implicates the obligations, rights, and remedies of the parties to the PSAs and, therefore, falls within the PSAs' choice-of-law provision, just as the reasonableness of the trustee's actions does. The only thing separating those two issues is, according to Olifant, a signature.[5]

We agree with the district court that this is "a distinction without a difference" because, "[w]hile [U.S. Bank] did not execute the Settlement Agreement before seeking [the district c]ourt's approval, it did determine that the Settlement Agreement is reasonable" and " asked that the [district c]ourt approve its decision to move forward" with the settlement. Olifant acknowledges in its briefing that "where . . . a trustee accepts a proposed settlement," Minnesota courts have evaluated whether the trustee's conduct complied with the governing agreements by applying the choice of law provision therein,

[5] At oral argument, U.S. Bank stated that the reason it had not yet accepted the settlement agreement was because there was no provision in the settlement agreement conditioning acceptance on a TIP approval. Instead, had U.S. Bank signed the settlement agreement, the agreement would have taken effect immediately and payment would have been due soon thereafter. While we do not express opinion on the merits of this argument, we note that there is no provision in the settlement agreement conditioning acceptance on a TIP approval.

which is often the "trustee-conduct standard" from New York. And under New York law, the "ultimate issue for determination" when evaluating "a proposed settlement agreement" is "whether the trustee's discretionary power was exercised reasonably and in good faith." *In re Bank of N. Y. Mellon*, 127 A.D.3d 120, 125 (N.Y. App. Div. 2015) (*Mellon*). The district court applied that standard in granting U.S. Bank's petition here. Thus, the district court applied the correct legal standard.

II. The district court did not err by concluding that U.S. Bank acted reasonably and in good faith.

The district court concluded that U.S. Bank acted reasonably and in good faith as trustee under New York law. Olifant does not dispute this point beyond the choice-of-law argument discussed above. HBK argues that U.S. Bank abused its discretion as trustee because (1) U.S. Bank failed to assess the value of the claims relative to the settlement amount and (2) U.S. Bank's reliance on the preferences of certain certificateholders was improper.

Substantively, under New York law, "[t]he ultimate issue for determination . . . is whether the trustee's discretionary power was exercised reasonably and in good faith." *Id.* "It is not the task of the court to decide whether [it] agree[s] with the [t]rustee's judgment; rather, [the court's] task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of [the trustee's] discretion." *Id.* An RMBS trustee can satisfy this standard by relying on the advice of qualified outside experts. *See id.* at 127 ("In evaluating the elements of the settlement, the trustee properly obtained and considered the opinions of several highly respected outside experts . . . ."). And

procedurally, under Minnesota law, U.S. Bank, as the petitioner and trustee, bears the burden of proving that it is entitled to an order "instruct[ing] the trustee" to enter the settlement. Minn. Stat. § 501C.0202(24) (2020); *see Malcolmson v. Goodhue Cnty. Nat'l Bank of Red Wing*, 272 N.W. 157, 160 (Minn. 1937) ("[T]he burden of proving that [the trustee's] actions conformed to the standard of his duty falls upon the trustee and not upon the beneficiaries.").

We review the district court's application of the law de novo. *Alpha Real Est. Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003). And we review the district court's findings of fact for clear error, giving "due regard" and showing deference to the district court's credibility findings. Minn. R. Civ. P. 52.01; *see Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). This means that, here, we review de novo the district court's conclusion that U.S. Bank did not abuse its discretion as trustee while giving due regard to the district court's credibility determinations.

A. U.S. Bank did not abuse its discretion by failing to assess the value of claims relative to the settlement amount.

HBK argues that U.S. Bank abused its discretion as trustee by failing to perform a risk-adjusted valuation of the putback action as part of its evaluation process for the settlement agreement. In other words, HBK argues U.S. Bank was required to consider the settlement agreement amount against the overall value of the claims being settled and did not do so. This argument fails.

HBK asserts that courts look to balance the value of the settlement against the present value of the anticipated recovery of the claims in class actions, derivative actions,

bankruptcy court, and *Miller-Shugart* settlements. HBK then notes several cases in which U.S. Bank itself has acknowledged this principle in the RMBS context. *See In re MASTR Asset Backed Sec. Tr. 2006-HE3*, No. 62-TR-CV-14-59, 2016 WL 3949845 (Minn. Dist. Ct. July 11, 2016); *In re MASTR Adjustable Rate Mortgs. Tr. 2006-OA2*, No. 62-TR-CV-18-35, 2020 WL 8813681 (Minn. Dist. Ct. Jan. 3, 2020). But HBK cites to no authority that says balancing the settlement value against the anticipated recovery value is *required* for the trustee to reasonably evaluate a settlement agreement. What is required is that U.S. Bank exercise its discretionary power "reasonably and in good faith," *Mellon*, 127 A.D.3d at 125, and satisfy its burden in the TIP by proving that it is entitled to an order "instruct[ing] the trustee" to enter into the settlement, Minn. Stat. § 501C.0202(24). The district court did not err by concluding that U.S. Bank acted reasonably and met its burden here.

At trial, Dr. Lumer testified that Compass considered conducting a "risk-adjusted" or "net present value" analysis in connection with its evaluation of the settlement agreement and concluded there was insufficient information to reliably do so because of the nature of the release and guaranty issues and the significant fact issues involved in determining the scope of the breach claims. The district court expressly credited that testimony in its order granting U.S. Bank's petition and concluded U.S. Bank's reliance on Dr. Lumer and Compass was reasonable. HBK's expert, Mr. Cyrulnik, opined that the release and the guaranty did not preclude a risk-adjusted analysis but admitted that he had not reviewed any of the expert reports from the putback action nor was he aware of any RMBS case in which similar issues had been adjudicated by a court. The district court

found "that Mr. Cyrulnik's testimony on the likelihood that [U.S. Bank] would prevail at trial on the [g]uaranty and [r]elease issues is speculative and unsupported." Moreover, though HBK did not bear the burden of showing U.S. Bank's conduct was unreasonable, it is noteworthy that Mr. Cyrulnik opined that a risk-adjusted analysis was feasible, but there is no such risk-adjusted analysis on this settlement agreement anywhere in the record.

Thus, the record before the district court contained competing testimony about the feasibility of conducting a risk-adjusted analysis, and the district court credited Dr. Lumer's testimony over Mr. Cyrulnik's. We give due regard and show deference to the district court's credibility determinations. *Goldman*, 748 N.W.2d at 284; Minn. R. Civ. P. 52.01. Therefore, the record supports the district court's conclusion that U.S. Bank acted reasonably and in good faith by not assessing the value of the claims relative to the settlement amount. Thus, HBK's argument to the contrary fails.

B. U.S. Bank did not abuse its discretion by soliciting votes on the settlement from only certain certificateholders.

HBK argues that U.S. Bank's reliance on the preferences of certain certificateholders was improper because it violated the duty of impartiality. U.S. Bank, as trustee, has the duty to be "impartial with respect to the various beneficiaries of the [T]rust[s]." Restatement (Third) of Trusts § 79; *Redfield v Critchley*, 252 A.D. 568, 573 (N.Y. App. Div. 1937) (quoting Restatement (First) of Trusts § 183 for the principle that "[w]hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them"). HBK's argument essentially takes issue with U.S. Bank's solicitation of senior certificateholders but not junior certificateholders regarding the

acceptance of the settlement agreement. This issue depends on the construction of the PSAs. HBK asserts that nothing in the PSAs "provides for a vote on the resolution of litigation," and the PSAs only authorize six specific and exclusive matters that may be decided by a vote. U.S. Bank argues that HBK does not point to "any provision of the PSAs that precludes the [t]rustee from doing so. Nor does it point to a different metric by which the [t]rustee can measure [c]ertificateholder direction consistent with the PSAs' terms."

"It is not the task of the [district] court to decide whether [it] agree[s] with the [t]rustee's judgment; rather, [the district court's] task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion." *Mellon*, 127 A.D.3d at 125; *Haynes v. Haynes*, 72 A.D.3d 535, 536 (N.Y. App. Div. 2010) ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith." (citation omitted)). Even if HBK was correct that U.S. Bank could have somehow analyzed the settlement agreement "without regard to which holders would benefit and which would be dissatisfied," that does not mean that U.S. Bank's decision to solicit a certificateholders vote on the settlement agreement was unreasonable or contrary to the terms of the PSAs. The PSAs provide that certificateholders with voting rights can request that the trustee take certain actions, such as enforcing the representations and warranties made concerning the mortgage loans and initiating litigation. In interpreting and applying the PSA's terms, U.S. Bank made a judgment call, as it is entitled to do as trustee. *See Haynes*, 72 A.D.3d at 536.

And in doing so, we conclude that U.S. Bank has not acted unreasonably or in bad faith. Thus, HBK's argument to the contrary fails.

III. The district court did not abuse its discretion by denying Olifant's motions to exclude certain evidence.

Olifant also argues that the district court should have granted its pretrial motions to exclude Dr. Lumer's testimony and the solicitation notices. We "afford the district court broad discretion when ruling on evidentiary matters" and "will not reverse the district court absent an abuse of that discretion." *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). Both of Olifant's arguments fail.

A. The district court did not abuse its discretion in denying Olifant's motion to exclude Dr. Lumer's testimony.

Olifant again relies on *Miller* and argues Dr. Lumer does not qualify as an expert who possesses "the legal expertise required to opine on the reasonableness of a proposed settlement" because he "is an economist, not a lawyer." Olifant asserts that, in *RFC*, the district court found that "no reasonable juror could conclude" that the testimony of a non-lawyer expert could be "probative of the reasonableness of the RMBS Trust settlement" in that case. *See RFC*, 399 F. Supp. 3d at 817. This argument fails for several reasons.

First, even ignoring the fact that *RFC* is not binding on this court, Olifant's quotation of *RFC* is misleading. There, the court found that only a lawyer-expert could be probative because "the reasonableness of these settlements could only be evaluated by analyzing the exposure, the litigation risks, and the legal strength of the claims and defenses, *together*," and the expert witness in question "expressly disavowed the expertise to engage in that

analysis." *Id.* at 816 (emphasis in original). Here, Dr. Lumer has not "expressly disavowed the expertise to engage in [the relevant] analysis." *Id.*

Second, we "apply 'a very deferential standard' to the district court when reviewing a determination as to expert qualification, reversing only if there has been a clear abuse of discretion." *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 427 (Minn. 2002) (quoting *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998)). "These determinations 'demand a case by case analysis' that is 'best left to the trial judge familiar with the setting of the case.'" *Marquardt v. Schaffhausen*, 941 N.W.2d 715, 719 (Minn. 2020) (quoting *Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 446 (Minn. 1990)). There is no such clear abuse of discretion here.

Dr. Lumer has been extensively involved in RMBS litigation in the past decade, has advised RMBS trustees in multiple cases and the defendant in the bankruptcy litigation between Lehman Brothers and various RMBS trustees, has substantial experience evaluating RMBS settlements relating to representations and warranties claims, and has been involved in the largest settlements of such claims, including some settlements that involved hundreds of trusts. Further, he has previously advised RMBS trustees and provided expert opinions on the adequacy of RMBS settlements in Minnesota trust proceedings. *See, e.g.*, *In re Structured Asset Sec. Corp.*, No. 27-TR-CV-12-51, 2018 WL 4201086, at *3 (Minn. Dist. Ct. Aug. 23, 2018) (approving RMBS settlements based in part on Dr. Lumer's "independent, expert evaluation" and concluding that the settlements were "reasonable"). Given this, we discern no abuse of discretion in concluding that Dr. Lumer's significant RMBS experience qualifies him to assess the reasonableness of the

settlement agreement here. *Gross*, 578 N.W.2d at 761 (stating the expert witness requirements "may be satisfied by either formal education or sufficient occupational experience").

Olifant also argues that Dr. Lumer impermissibly speculated about the state of mind of unidentified non-parties when he testified about the potential knowledge and investment objective of non-party certificateholders, including the directing certificateholder. But the single purportedly improper passage of testimony that Olifant identifies was elicited on cross-examination, not direct. That testimony cannot form the basis for reversal. *See State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979) ("We do not mean to imply that a defense counsel could bootstrap a reversal by eliciting improper testimony from a prosecution witness on cross-examination. Such a tactic would be highly improper and would not be favorably received by this court."). Thus, the district court did not abuse its discretion in denying Olifant's motion to exclude Dr. Lumer.

B. The district court did not abuse its discretion by denying Olifant's motion to exclude the solicitation notices.

Olifant also argues that the district court erred in denying its motion to exclude the solicitation notices because "the subjective views of any party are irrelevant to the objective evaluation of a proposed settlement." This argument, again, relies on Olifant's argument that Minnesota law and *Miller* apply to the settlement agreement. As explained above, that is incorrect.

Olifant also asserts the solicitation notices should have been excluded because they did not disclose that $30,000,000 of the approximately $77,000,000 settlement-agreement

payment would be used to pay the litigation fees that U.S. Bank had incurred in connection with the putback action. This argument fails because Olifant's witness, a certificateholder, conceded on cross-examination that U.S. Bank had disclosed the litigation-fee amounts in its monthly reporting of Trust expenses to certificateholders. Therefore, Olifant cannot show how it was harmed by the solicitation notices' failure to include that information and the district court's admission of them. Thus, the district court did not abuse its discretion by denying Olifant's motion to exclude the solicitation notices.

Affirmed.