

"Examining Judge Hobson's Choice Approach to Amending Complaints" - by Michael Blatchley (as published in *New York Law Journal*)

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In *Loreley Financing (Jersey) No. 3 Limited v. Wells Fargo Securities*, the U.S. Court of Appeals for the Second Circuit reversed a district court's dismissal of a complaint "with prejudice" because the "procedure by which the district court denied leave to amend was improper." According to the Second Circuit, the error occurred when the district court "presented Plaintiffs with a Hobson's choice" to either immediately amend the complaint after defendants previewed their arguments for dismissal, or forfeit the right to do so later after the court's decision on the motion to dismiss. This aspect of the *Loreley Financing* decision may have an impact on the individual practices of more than a dozen district court judges in the Southern District of New York who have adopted or employed a similar amend-now-or-never approach with respect to dismissals with prejudice. *Loreley Financing* involved allegations of fraud and other common-law violations brought against Wachovia Bank NA (which was later acquired by Wells Fargo) and two collateral managers of collateralized debt obligations (CDOs) by several investors who lost millions of dollars through their investments in the CDOs. On March 28, 2013, Judge Richard Sullivan dismissed plaintiffs' complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure and denied plaintiffs' request to replead. In an extensive 57-page opinion, the Second Circuit reversed the district court's dismissal of the claims against the bank and one of the collateral managers, but upheld the dismissal of claims against the other collateral manager. The Second Circuit also held—"separate and apart from [the dismissal] errors—that the district court exceeded the bounds of its discretion in denying plaintiffs leave to amend their complaint."

The court specifically determined that "the procedure by which the district court denied leave to amend was improper" because it forced plaintiffs to either replead "[w]ithout the benefit of a ruling" or waive the right to do so later.