

How to Beat a Predatory Servicer: Part 1

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This is the first paper in a new series which will serve as an introduction to giving a rough outline as to how to beat a predatory Servicer, such as ORIX. Straight off the bat it is important for you to understand who you are dealing with – a mere Servicer¹. The typical Servicer receives Principal and Interest payments from the borrowers monthly, deposits them into the Certificate Account, transfers the money to the Distribution Account, and then the Paying Agent forwards the money to investors, down the Waterfall¹, as Interest on/or return of MBS bond investments.

If you are being harassed, it is most likely by the Special Servicer. Depending on the Pooling and Servicing Agreement of the trust that your mortgage is in, the requirements for transferring your loan to Special Servicing vary. Most often, the Event of Transfer occurs when you repeatedly default on the loan payments. As defined by the PSA, a default is when a borrower has been delinquent “in an amount equal to at least two Monthly Payments (not including the Balloon Payment) or is delinquent thirty days or more in respect of its Balloon Payment”. The reason the Servicer does this is because the PSA, which governs these trusts, strictly states that the Servicer must either advance money or issue a certificate of nonrecoverability within a very specific and limited time window (see PSA Section 4.03 for exact wording). One of the first things you should do if you are engaged in litigation against a predatory Servicer is to ask (during the discovery phase) if a Certificate of Non-recoverability has been issued regarding to your loan. If so, you should be off the hook, as this means that the trust has declared the loan nonrecoverable and has passed the losses (and tax credit) to investors.

If you aren't so lucky, no biggie, there are several other ways to defeat a predatory Servicer. One of which is pointing out the fact that the only party that can pursue a borrower/guarantor is the “holder and owner of the Note and Mortgage *as of the date the complaint was filed*,” or “the court would enter a dismissal”². Further, “to satisfy the requirements of Article II of the United States Constitution, the plaintiff must show he has *personally suffered some actual injury* as a result of the illegal conduct of the defendant”, as ruled by the Honorable Judge Christopher A. Boyko of the Northern District Court of Ohio, and again confirmed by the Honorable Judge Thomas M. Rose of the Southern District Court of Ohio³. This means that a REMIC (which is a pass-through entity) **cannot** pursue a borrower/guarantor for damages, as it is a PASS-THROUGH

¹ To learn more about the mechanics of a REMIC trust and MBS servicing, see <http://www.predatorix.com/files/studies/cmsa/CMSAintroCMBS.ppt>

² This means the Trust should enforce the MLPA and return the loan to the Depositor and only the Depositor (after repairing the Trust by Cure, Substitution or Repurchase) would have to foreclose and pursue collection against the borrower/guarantor. The Special Servicer is mandated by Servicing Standards to pursue “Workout” strategies and cannot foreclose except under rare circumstances unlike the scams pursued by Wells Fargo and its Servicers in violation of REMIC statues, IRS codes, and SEC regulations.

³ See also, POTW 1-29-08, <http://www.predatorix.com/potw1-29-08.htm>

entity (hello!) without capacity to experience Gains or Losses. The only party that can bring forth any claim for damages are the Certificateholders who have already foregone that option by accepting investment risks with regards to the underlying mortgages by accepting MLPA warranties. This means, a Servicer has no right to sue a borrower/guarantor, let alone based on bogus technical defaults⁴ or non-monetary fabricated accusations based on loan origination documents which are private documents that the Servicer should have never been able to get their hands on in the first place. Wells Fargo's Servicers routinely abuse these documents in their insatiable pursuit of equity stripping, as seen in the Judgment Pipeline and Litigation Pipeline (jointly dubbed the Extortion Pipelines).

⁴ See Michael Wurst of ORIX's paper on how to screw borrowers, Pre-empting the Workout, <http://www.predatorix.com/files/documents/miscellaneous/WurstPaperPre-EmptyingWorkouts.doc>