

US Bank, BNY Mellon Escape \$280M RMBS Trustee Suit

By Jon Hill

Law360 (March 9, 2018, 8:22 PM EST) -- A New York federal judge ruled Thursday that three Triaxx collateralized debt obligation issuers have run out of chances on their \$280 million suit alleging U.S. Bank NA and the Bank of New York Mellon dropped the ball as trustees to several dozen residential mortgage-backed securitization trusts.

U.S. District Judge Naomi Reice Buchwald dismissed the Triaxx case for what she said would be a final time on Thursday, almost two years to the day after the suit was initially filed. A third amended complaint filed by the Triaxx special-purpose investment vehicles in July still didn't fix the problems with standing that got an earlier iteration of their suit thrown out the first time, the judge found.

"Plaintiffs have already been given their final opportunity to amend the complaint," Judge Buchwald wrote in her ruling. "No subsequent amendments will be permitted."

The Triaxx suit alleged in its July complaint that U.S. Bank and BNY Mellon failed to follow through on their contractual duties as trustees to 45 RMBS trusts, which originally had a face value of \$4.26 billion and were purchased by the Triaxx entities in 2006 and 2007 for inclusion in three namesake collateralized debt obligations they issued — Triaxx Prime CDO 2006-1, Triaxx Prime CDO 2006-2 and Triaxx Prime CDO 2007-1.

According to the Triaxx plaintiffs, U.S. Bank and BNY Mellon knew by 2011 that these RMBS trusts had a large number of defective loans and other problems but didn't take adequate steps as trustees to fix these problems and protect the trusts' investors. Doing so "would have conflicted with their own interests," the Triaxx plaintiffs said, because they didn't want to risk upsetting the mortgage sellers that gave them so much business.

Alleging breaches of contract, breaches of fiduciary duty and negligence, the Triaxx plaintiffs claimed they had been damaged to the tune of \$280 million.

This July complaint was filed after Judge Buchwald dismissed a previous version in March 2017, finding in part that the Triaxx entities lacked standing to bring their contract claims because they had given away those litigation rights when they handed over the RMBS to a so-called CDO indenture trustee.

"Each CDO issuer's 'grant' of 'all of its right, title and interest' in 'any and all ... property' is broad enough to include the transfer of the right to bring contract claims," Judge Buchwald wrote at the time, quoting from the CDOs' indenture agreements.

After the complaint was revised, U.S. Bank and BNY Mellon urged the judge in July to dismiss the suit again, saying the Triaxx plaintiffs still lacked standing. They “continue to press claims they do not have, based upon certificates they do not hold, for damages they have not sustained,” the banks said.

The Triaxx plaintiffs argued back in August that an intervening New York state court ruling had “clarified New York law as to standing and did so in Triaxx’s favor,” and they pointed to another section of the indenture agreements that they said authorized issuers like them to “take such other action as may be necessary or advisable or desirable to ... enforce any of the pledged securities or other instrument or property included in the collateral.”

But Judge Buchwald on Thursday sided with U.S. Bank and BNY Mellon. The court ruling singled out by Triaxx wasn’t relevant because it involved a plaintiff who was “explicitly granted by contract the right to bring claims to address a failure to repurchase a breaching loan on behalf of the trust,” the judge said, and the indenture language doesn’t do anything to narrow the rights turned over to the CDO indenture trustee.

The Triaxx plaintiffs’ negligence and breach of fiduciary duty claims likewise came up short on standing in Judge Buchwald’s view. Those claims required pleading that the banks owed duties to Triaxx, but there weren’t any such allegations in the latest complaint, the judge said, citing multiple instances where Triaxx’s complaint referred to duties owed to the RMBS “trusts and their certificate holders.”

“Plaintiffs ceased to be certificateholders when they entered into the CDO indentures,” Judge Buchwald wrote. “No current certificate holder or [RMBS] trust is a plaintiff in this action, and none has sought to intervene or otherwise expressed support for the claims in this litigation to the court. This failure to plead the existence of a duty owed by defendants to plaintiffs must result in the dismissal of these claims.”

Counsel for both sides did not immediately return requests for comment late Friday.

The Triaxx plaintiffs are represented by Charles R. Jacob III, John G. Moon, Nicholas Cutaia and Kerrin T. Klein of Miller & Wrubel PC.

U.S. Bank is represented by Michael T. Marcucci, Keith Kollmeyer, David F. Adler, Andrew S. Kleinfeld and James S. D’Ambra Jr. of Jones Day.

BNY Mellon is represented by Matthew D. Ingber, Christopher James Houpt and Silvia Araxie Babikian of Mayer Brown LLP.

The case is Triaxx Prime CDO 2006-1 Ltd. et al. v. The Bank of New York Mellon et al., case number 1:16-cv-01597, in the U.S. District Court for the Southern District of New York.

--Editing by Alanna Weissman.