

Your Loan Repurchase Demand Requires Your Immediate Attention

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Repurchase demands are typically not the kind of problem that improves with age. As tempting as it may be to set one aside and hope it disappears, experience suggests they most often linger, particularly if no one is asserting legal and factual defenses on behalf of the letter's recipient. The longer they fester without resolution, the more expensive they may become.

When a mortgage loan seller receives a repurchase demand from a purchaser or investor, the stakes can be high. A single demand may involve hundreds of thousands of dollars, and multiple demands can quickly threaten the seller's financial stability. But by no means is every demand meritorious. Loan purchase agreements can be complex and may provide protections that sellers overlook under pressure. And the parties making the demand may be wrong about key facts or may be misinterpreting or exaggerating what is really required of the loan seller under the contract.

This article provides practical guidance for mortgage loan sellers and originators evaluating, responding to, and negotiating repurchase demands. It outlines steps sellers can take to respond without waiving any rights under a loan purchase agreement. This article is not intended to cover every step in responding to a repurchase demand; it is a practical starting point for preserving rights, evaluating the demand, and planning a response.

As an initial matter, sellers must preserve all applicable deadlines. Even an apparently baseless demand should not be ignored. Missing a contractual response or cure deadline may waive the seller's objections to the demand. Sellers should therefore acknowledge receipt in writing without admitting fault, limit substantive discussions until the demand has been analyzed, and avoid statements that could be treated as admissions. Whenever possible, the seller should reserve all rights, claims, and defenses in its response.

Before addressing the merits, sellers should confirm that the claimant has the right to demand repurchase. This step is often overlooked. Sellers should request documents tracing loan ownership from the original purchase to the present, including assignments, endorsements, and any other type of transfer. If the demand comes from a loan servicer or trustee, the seller should attempt to confirm that party's right or authority under the governing documents to be the entity making the demand. Sellers should also consider whether a loan modification extinguished or limited the right to demand repurchase. Once the proper claimant is confirmed and the loan is subject to repurchase, the seller can turn to the contract.

Next, the seller should review what the party making the demand alleges is the breach, and whether that alleged breach would be material if in fact it occurred. The demand should clearly state the breach; if it does not, the seller should ask the claimant to identify it with particularity. Once the breach has been identified, the seller should review the operative contract, preferably with legal counsel. Specifically, the seller should review the representation at issue, and check for any materiality thresholds or knowledge qualifiers. Generally, the law requires that the claimant be able to show a causal link between the breach and the alleged loss or default. The key questions are whether the breach was material and whether it caused the alleged loss.

For an early payment default ("EPD") claim, the seller should determine how the contract defines an EPD. For example, does it require a first-payment default within 90 or 120 days after purchase? The seller should confirm when the first payment was due, when the default occurred, and whether the borrower later cured it. The seller should also check for servicing errors by the purchaser or its servicer, including whether the receipt or non-receipt of payments was properly documented. Some EPD provisions may exempt sellers from liability for an EPD caused by servicer errors.

For a fraud or misrepresentation claim, the seller should begin by identifying the alleged wrongdoer. Is it the borrower, broker, appraiser, or another third party? The seller should then determine whether it knew about or participated in the alleged misrepresentation or fraud and whether the agreement's

representations as to fraud or misrepresentation are limited to the seller's knowledge or extend to third-party fraud.

For alleged underwriting deficiencies, it is critical to obtain the complete loan origination file, including the application and income, employment, asset, and credit verifications, as well as the guidelines used to underwrite the loan. In reviewing the file and guidelines, the seller should determine whether any variance was immaterial or within acceptable tolerances. For example, if the debt-to-income ratio exceeded the applicable limit by a few percentage points, the seller should ask whether the loan would have been underwritten anyway.

Once the alleged breach has been evaluated, the seller (with advice of counsel whenever possible) should determine whether the claimant has established its entitlement to repurchase or indemnification. The seller should confirm whether a repurchase or make-whole payment is the claimant's exclusive remedy and whether the loan purchase agreement limits exposure to consequential, punitive, or other damages.

Sellers often assume that the claimant's repurchase or damages figures are accurate. Experience demonstrates that they should not make that assumption. The seller should request documentation supporting the demand, including the loan's status (i.e., whether its collateral has been foreclosed upon), an itemized calculation of the repurchase price with supporting documentation, and any make-whole calculation. The seller should also request pertinent foreclosure records, complete servicing notes, and the loss-mitigation file. In evaluating damages, the seller should consider whether a make-whole or indemnification payment could resolve the issue without a full repurchase and assess the loan's current value and performance.

In sum, a well-drafted response letter can set the right tone and preserve options. It should address the demand, reserve the seller's rights, request the information needed to evaluate it, and explain the seller's investigative process. Responding to a repurchase demand also requires urgency and thoroughness. A seller that meets deadlines, avoids premature admissions,

investigates the facts, and invokes its contractual rights is much better positioned to achieve a favorable result, whether through a successful defense, a reduced settlement amount, or a structured resolution. Ultimately, each repurchase dispute turns on the language of the purchase agreement and the facts of the loan. However, a thoughtful, well-investigated response process helps sellers protect their interests and manage their repurchase and indemnification exposure.



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