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Lender Liability for Wrongful Mortgage Foreclosure

Responding to Attorneys General Investigations and Minimizing Liability Risk

TUESDAY, NOVEMBER 30, 2010

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Michael S. Waldron, Partner, Moderator, **Patton Boggs**, Dallas

Todd R. Harrison, Partner, **Patton Boggs**, New York

Gerald B. Alt, President and CEO, **HEART Financial Services**, Northbrook, Ill.

Patrick F. McManemin, Partner, **Patton Boggs**, Dallas

Anthony J. Laura, Partner, **Patton Boggs**, Newark, N.J.

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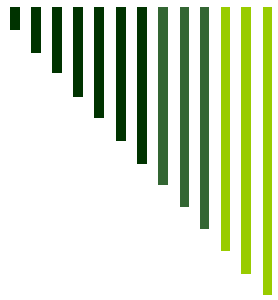
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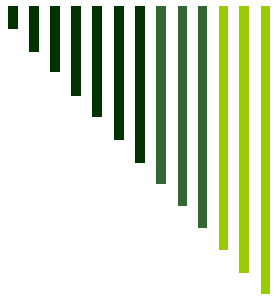


Lender Liability for Wrongful Mortgage Foreclosure - Responding to Attorneys General Investigations and Minimizing Liability Risk

November 30, 2010

Presented by:

PATTON BOGGS LLP
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Moderated by:

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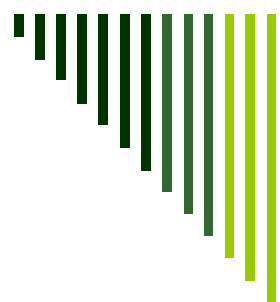
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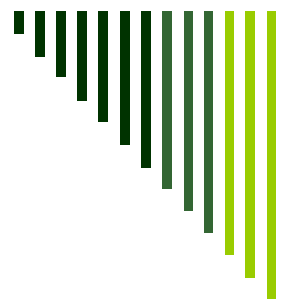
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The Current Landscape

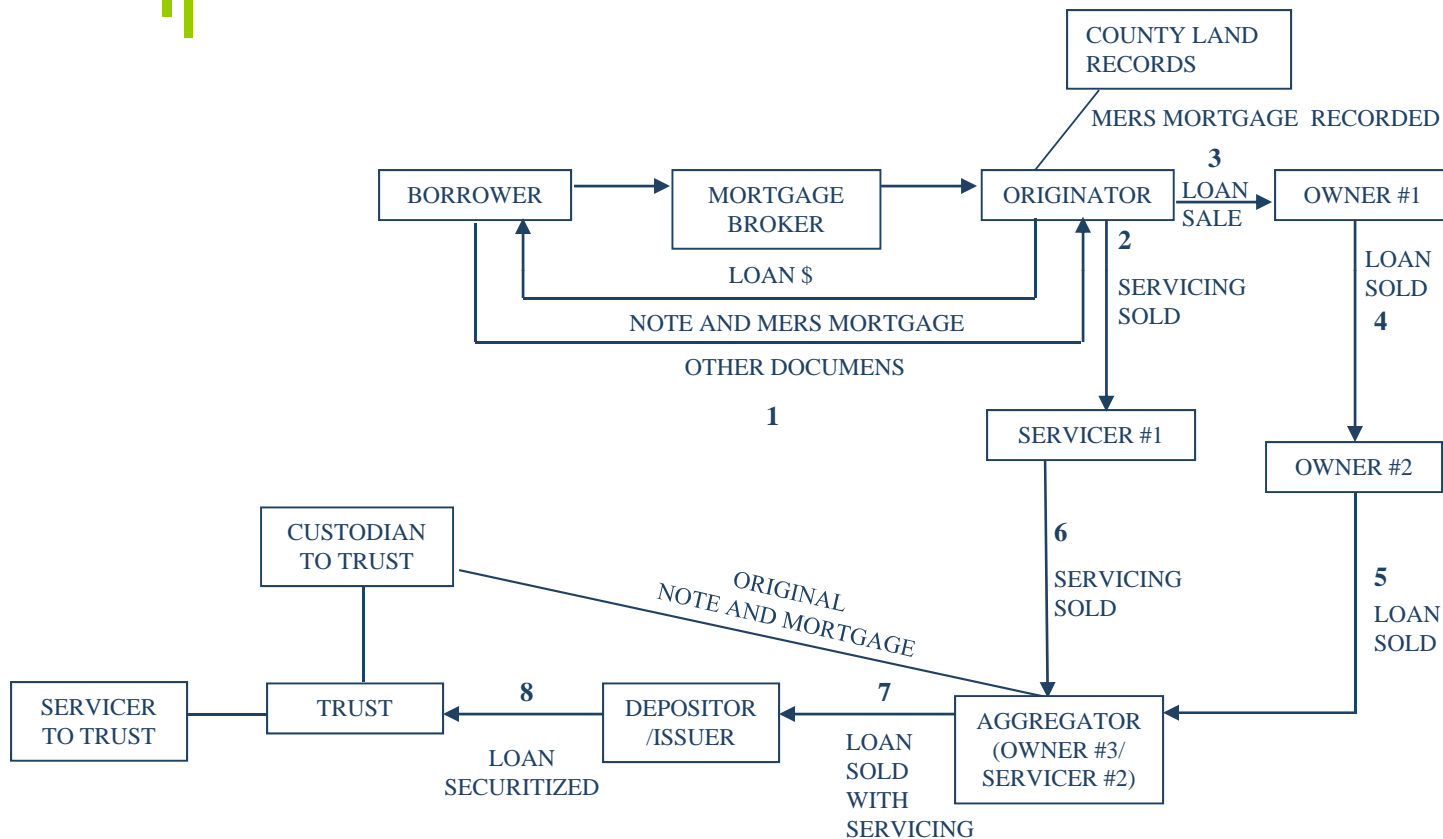
- ❖ Process-oriented problem has fueled a broader and deeper inquiry
- ❖ Understanding the numbers
 - ❖ Over 7 million mortgages 30 or more days delinquent
 - ❖ Of those, more than 2 million have already commenced foreclosure proceedings
 - ❖ Foreclosed homes make up 25% of home sales
- ❖ Moratoriums debated
- ❖ Credibility issue for the industry
- ❖ Civil and criminal investigations underway
 - ❖ Mortgage Foreclosure Multistate Task Force and Financial Fraud Enforcement Task Force take center stage



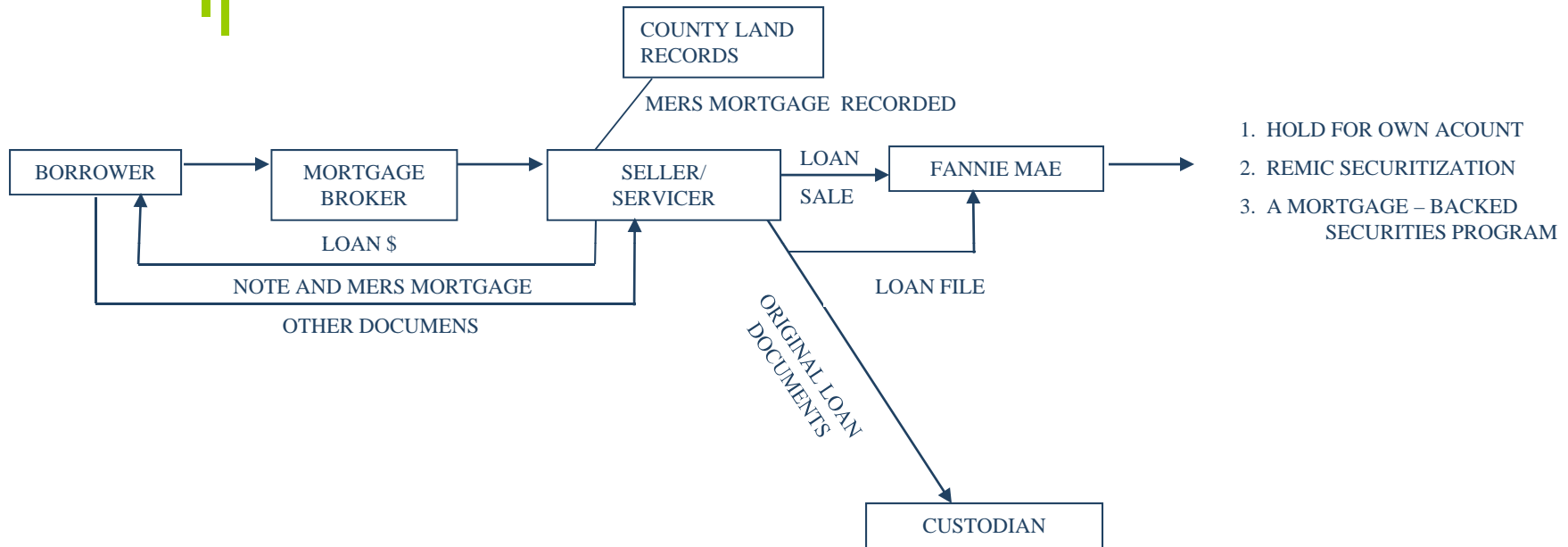
The Current Landscape - continued

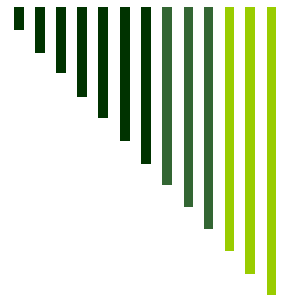
- ❖ Congress has returned and is active
- ❖ Repurchase demands impacted
- ❖ MERS under scrutiny
- ❖ Title insurance coverage negotiated
- ❖ FHA sending review teams into servicing shops
- ❖ States acting independently in addition to efforts through Multistate Task Force
- ❖ Federal Housing Finance Agency estimates another \$73 billion to \$215 billion needed from taxpayers in next 3 years for Fannie and Freddie (\$148 billion already injected)

Understanding the Complexity of the Document Flow Process



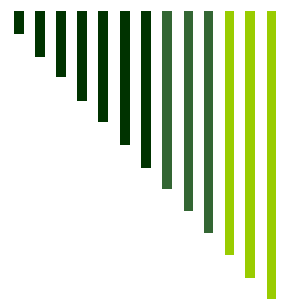
Understanding the Fannie Mae Document Flow Process





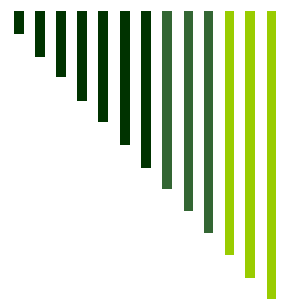
Insight from Servicing Insiders

- ❖ Understanding where we are and how we got here
- ❖ Regaining credibility and restoring confidence
- ❖ Best practices going forward



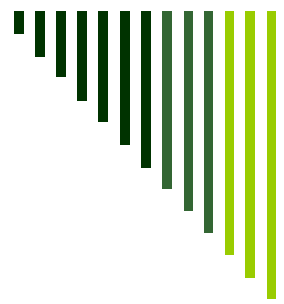
Government Investigations/Enforcement

- ❖ Congressional Investigations
 - ❖ Political appeal
 - ❖ Who is being called to testify?
 - ❖ Tips for handling
- ❖ Federal Agency Investigations
 - ❖ Attorney General Eric Holder has ordered DOJ investigation
 - ❖ Federal Investigators will issue subpoenas and conduct interviews



Government Investigations/Enforcement – continued

- ❖ Department of Justice
- ❖ Federal Reserve
- ❖ Comptroller of Currency
- ❖ Government Accountability Office
- ❖ Tips for handling
- ❖ State Investigations
 - ❖ Multistate Task Force
 - ❖ State AGs/Regulators acting independently
 - ❖ AGs will want to force industry to make concessions on mortgages
 - ❖ Tips for handling



Government Investigations/Enforcement – continued

- ❖ Potential Charges
 - ❖ Perjury
 - ❖ Fraud
 - ❖ Contempt of Court
 - ❖ Officer/Director/Employee Exposure



How Courts will Handle Foreclosures Going Forward

- ❖ Courts will become more rigorous in requiring proofs necessary to obtain foreclosure judgment.
- ❖ Written documentation of the chain of title may be demanded as part of the process toward judgment.
- ❖ Foreshadowing in *Bank of New York v. Raftogianis*, Docket No. F-7356-09 (Todd, J. June 29, 2010).
- ❖ Some jurisdictions have already reacted by making foreclosure procedures more rigorous: New York and Maryland; District of Columbia Attorney General.



How Courts will Handle Foreclosures Going Forward – continued

- ❖ The inability to demonstrate the progression of title may compromise the foreclosure plaintiff's ability to use the "holder in due course" protections of UCC Article 3.
- ❖ False affidavits may be a "fraud on the court" leading to sanctions such as the preclusion of evidence or, as an ultimate sanction, dismissal of the action. *Pope v. Federal Express Corp.*, 974 F.2d 982 (8th Cir. 1992); *Combs v. Rockwell International Corp.*, 927 F.2d 486 (9th Cir. 1991).



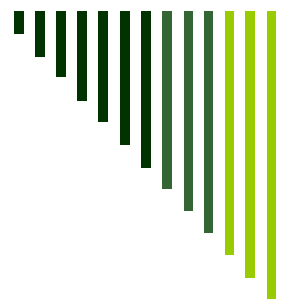
Lawsuits Likely to Stem From This Crisis

- ❖ Borrower v. Lender/Assignee
 - ❖ Equitable defenses against foreclosure
 - ❖ Affirmative claims of fraud (both on owner and the court)
 - ❖ Breach of contract
 - ❖ Statutory damages under consumer protection statutes
 - ❖ Line of Defense--Proving actual damages or ascertainable loss



Lawsuits Likely to Stem From This Crisis

- ❖ Originator v. Assignee v. Trust v. Investor
 - ❖ Claims for breach of contract, breach of warranty and negligence
 - ❖ Deficiencies may also trigger buyback provisions in the governing trust documents—recent buyback demand against Bank of America
 - ❖ *Cogswell v. CitiFinancial Mortgage Co.*, 2010 WL 3927694, Civ. No. 08-2153 (7th Cir., October 5, 2010).



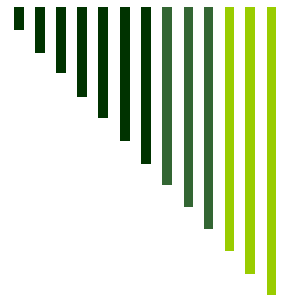
Broader Implications of the Crisis

- ❖ Courts will take a deeper look into MERS' role as the nominee of the mortgage holder.
- ❖ Does MERS have the power of assignment?
- ❖ Can MERS be liable for fraud and abuse of process in prosecuting foreclosure lawsuits in its own name?

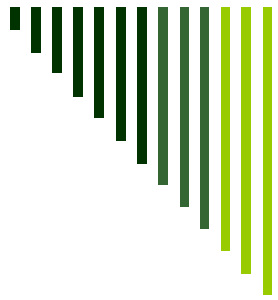


Broader Implications of the Crisis - continued

- ❖ Will we see borrowers pursue a third party beneficiary strategy?
 - ❖ Fannie Mae's Mortgage Selling and Servicing Contract requirements.
 - ❖ Freddie Mac's servicing guidelines as set forth in its Single Family Seller/Servicer Guide.
 - ❖ HUD regulations and handbook requirements for servicers.



Recent Developments



Final Thoughts

On behalf of Strafford and Patton Boggs LLP, thank you for your participation in this webinar.

Please contact Michael Waldron at mwaldron@pattonboggs.com if you have questions for the panel.

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