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Wrongful Mortgage Foreclosure: Lender and Loan Servicer Strategies

Responding to Recent Litigation Trends, State AG Enforcement and Emerging Regulatory Initiatives

TUESDAY, JULY 19, 2011

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

Today's faculty features:

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

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.

Christina Guerola Sarchio, Partner, **Patton Boggs**, Washington, D.C.

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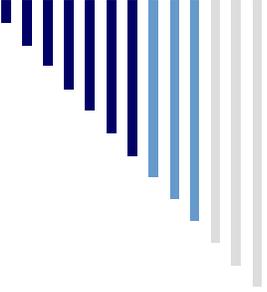
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Wrongful Mortgage Foreclosure: Lender and Loan Servicer Strategies

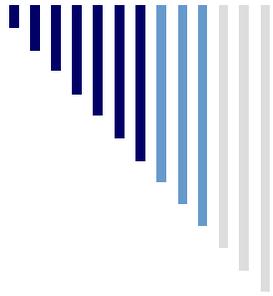
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Michael S. Waldron, Patton Boggs LLP

Panelists:

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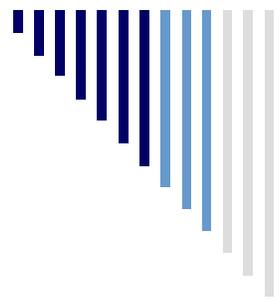
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The Current Landscape

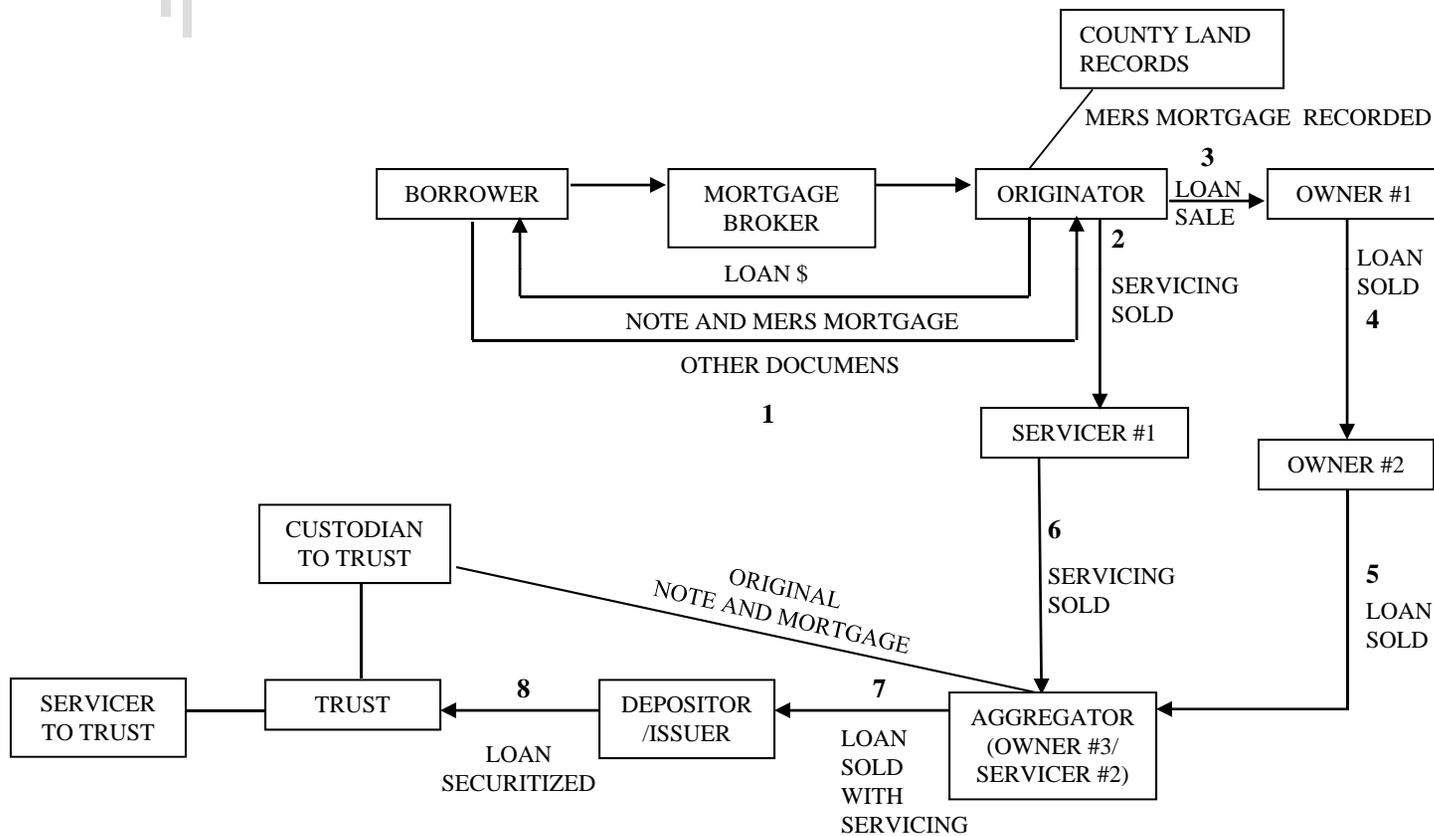
- ❖ Process-oriented problem has fueled a broader and deeper inquiry
- ❖ Understanding the numbers
 - ❖ Over 7 million mortgages 30 or more days delinquent
 - ❖ Of those, more than 2 million have already commenced foreclosure proceedings
 - ❖ Foreclosed homes make up 25% of home sales and 48% of listings
- ❖ Impact of Shadow Inventory (4.2MM foreclosures so far with 6MM more estimated through 2012)
- ❖ Credibility issue for the industry
- ❖ Civil and criminal investigations underway
 - ❖ Mortgage Foreclosure Multistate Task Force and Financial Fraud Enforcement Task Force take center stage



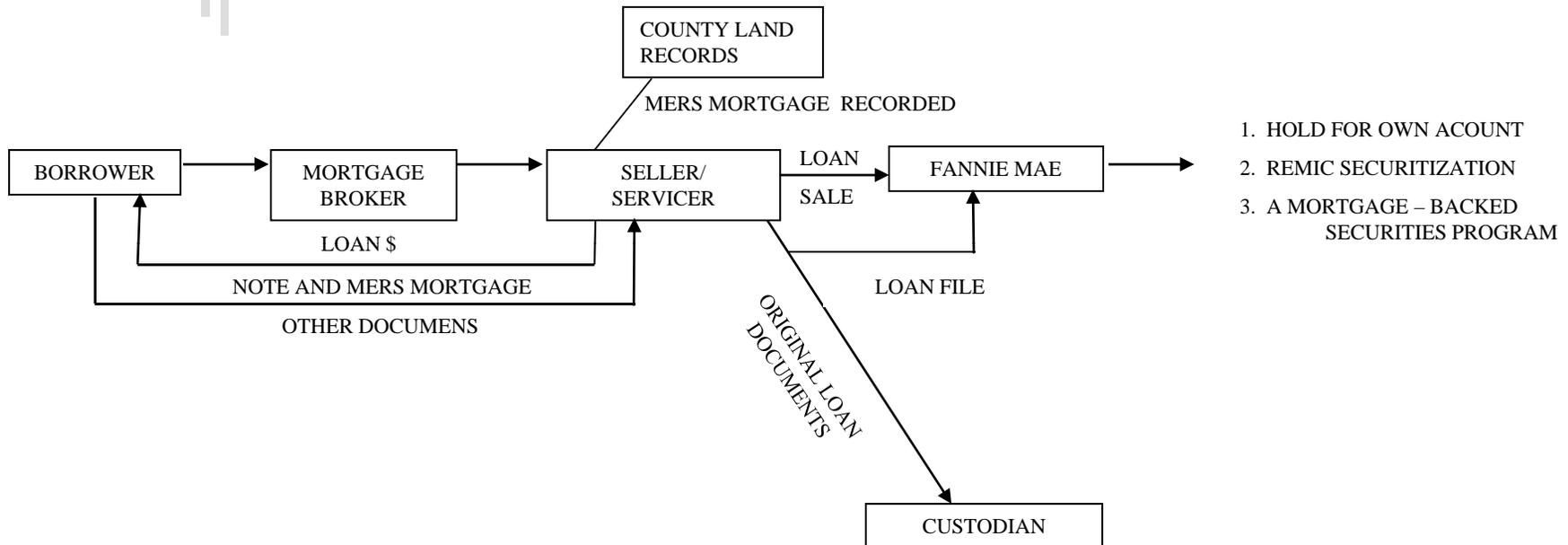
The Current Landscape - continued

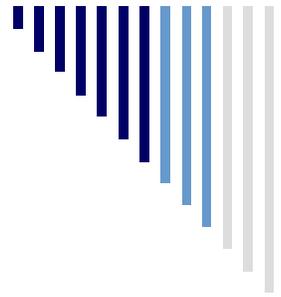
- ❖ Servicing Consent Orders signed
- ❖ Studies recently released (GAO and Interagency)
- ❖ CFPB goes live on July 21, 2011
- ❖ Repurchase demands impacted
- ❖ MERS under on-going scrutiny
- ❖ Title insurance coverage negotiated
- ❖ FHA sending review teams into servicing shops
- ❖ States acting independently in addition to efforts through Multistate Task Force
- ❖ Settlements surfacing (Wells, BofA and 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 (over \$148 billion already injected)

Understanding the Complexity of the Document Flow Process



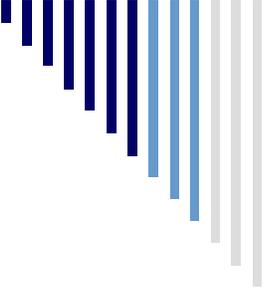
Understanding the Fannie Mae Document Flow Process





Insight from Servicing Insiders

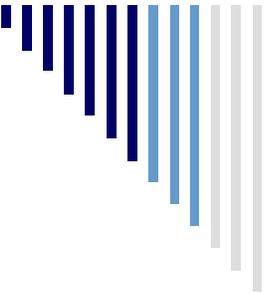
- ❖ Understanding where we are and how we got here
- ❖ Regaining credibility and restoring confidence
- ❖ Best practices going forward



Government Investigations & Enforcement

Corporate Investigations Increased After Mortgage Meltdown

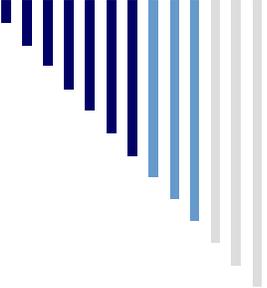
- **Congressional Hearings**
 - Senate Banking Committee
 - House Financial Services Committee
- **Executive Branch Initiatives**
 - Treasury's Financial Crimes Enforcement Network
 - Financial Fraud Task Force
- **State Activities**
 - Attorney General/District Attorney mortgage fraud units



Government Investigations & Enforcement (cont'd)

Civil and Criminal Enforcement Actions All-Time High

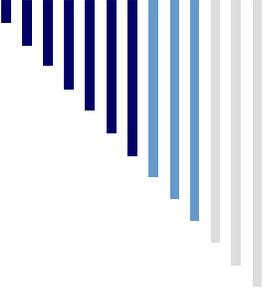
- Operation Stolen Dreams
 - 1200 individuals named as defendants
 - 600 indictments
 - \$147 million recovered
- TBW Chairman sentenced 30-years, pay \$38.5M
- Charges filed against Bankers, Brokers, Investors, Developers, Lawyers, Judges, Ministers



Government Investigations & Enforcement (cont'd)

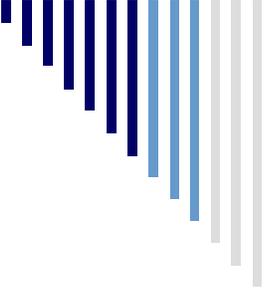
Suggestions Going Forward

- Rigorous Compliance Program
 - Be able to identify “unfair” and fraudulent mortgage servicing practices
 - Incentivize employees
- Rapid Response Plan
 - Responding to civil investigative demand/subpoena
 - When search warrant executed
- Sufficient Insurance
- Know Your Rights



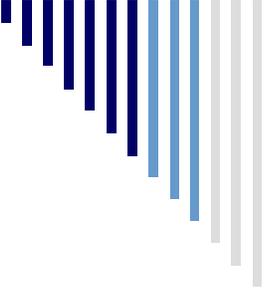
Increased Scrutiny of the Foreclosure Process

- ❖ Tremors began about a year ago, in *Bank of New York v. Raftogianis*, 417 N.J. Super. 467 (Ch. Div. 2010)
- ❖ Courts have become more rigorous in requiring proofs necessary to obtain foreclosure judgment.
- ❖ Written documentation of the chain of title is being demanded as part of the process toward judgment.
- ❖ A number of jurisdictions have already reacted by rewriting their foreclosure and loss mitigation procedures to be more rigorous: New York, New Jersey, Maryland, District of Columbia, South Carolina, Vermont, Indiana, Hawaii.



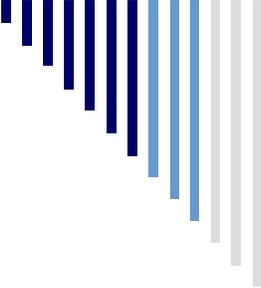
Increased Scrutiny of the Foreclosure Process– cont.

- ❖ Standing Problems: Borrowers (and courts *sua sponte*) are raising the issue of whether the foreclosing entity has standing to pursue the foreclosure, often raised when there has been an assignment of the loan document(s).
- ❖ Some jurisdictions are adhering to UCC Article 3 “holder” provisions relating to negotiable instruments: e.g., New Jersey (*Wells Fargo v. Ford* 1/31/11 - Plaintiff could not demonstrate it was a “Person entitled to enforce” the instrument under UCC 3:301); Nevada (*Leyva v. National Default Servicing Corp.*, 7/7/11 – requiring negotiation or other valid transfer under UCC 3:301)
- ❖ Some jurisdictions are looking to traditional legal or equitable principles to determine standing to foreclose: e.g., New York (*BONY v. Silverberg*, 6/7/11 – finding lack of standing due to putative assignor’s inability to legally assign the mortgage note)



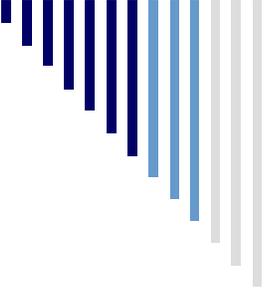
Increased Scrutiny of the Foreclosure Process– cont.

- ❖ The inability to demonstrate the progression of title will either compromise the plaintiff’s ability to foreclose or, if standing is conferred, to claim “holder in due course” status (e.g., *HSBC Bank USA v. Taher*, 7/1/11 – assuming the standing issue can be resolved by curative assignment, foreclosing entity now on notice of borrower’s claims and not a holder in due course).
- ❖ Proof Problems: Some jurisdictions are subjecting affiants (and notaries) to court jurisdiction to test their statements and formalities of the affidavits, with sanctions available for irregularities (e.g., New York, Maryland, New Jersey).



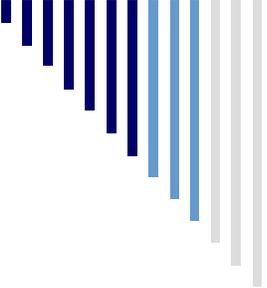
Increased Scrutiny of the Foreclosure Process– cont.

- ❖ One court has recently ordered a plaintiff's President/CEO to appear, along with plaintiff's counsel of record, to show cause why sanctions should not be awarded against them for "frivolous conduct" in allowing inaccurate proofs and pleadings to be filed in a foreclosure action (*HSBC v. Taher, supra*).
- ❖ False affidavits may also 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)*.



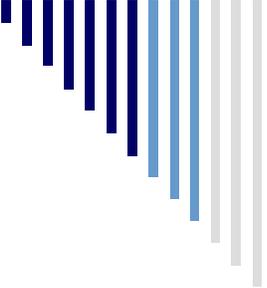
Litigation Stemming from this Crisis

- ❖ Borrower v. Lender/Assignee
 - ❖ Equitable defenses against foreclosure
 - ❖ Affirmative claims of fraud (both on homeowner and the court)
 - ❖ Breach of contract
 - ❖ Claims of violation of consumer protection statutes
 - ❖ Mortgagee's Line of Defense—Borrower unable to prove actual damages or ascertainable loss



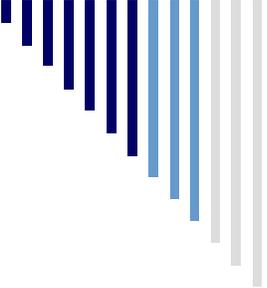
Litigation Stemming from this Crisis – cont.

- ❖ Investor Suits brought by purchasers of MBSs
 - ❖ Claims for breach of contract, breach of warranty and negligence.
 - ❖ Deficiencies have triggered buyback provisions in the governing trust documents—liabilities are in the billions.
 - ❖ Allstate Insurance has been particularly aggressive, with suits against Countrywide/BofA, Citigroup, Deutsche Bank, Credit Suisse, Merrill Lynch and JPMorgan Chase.
 - ❖ Recent proposed settlement by Bank of America with BONY-Mellon/Blackrock valued at \$8.5 billion.
 - ❖ On July 7, Wells Fargo announced \$125 million settlement with various pension fund investors. Sure to be more to come.



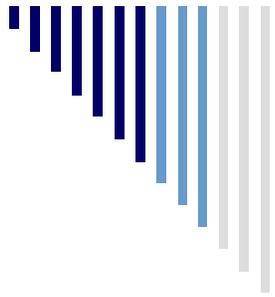
Broader Implications of the Crisis – The Role of MERS

- ❖ Courts are taking a deeper look into MERS' role as the nominee of the mortgage holder.
- ❖ Does MERS have the power of assignment? Some say yes, some say no.
- ❖ Courts in New York (*In Re Agard, BONY v. Silverberg, Aurora Loan Services v. Weisblum*) and Oregon (*Hooker v. Northwest Trustee Services, Inc.*) giving the MERS system particularly harsh treatment.
- ❖ MERS issues relate primarily to powers (or lack thereof) as “nominee”
- ❖ MERS advises members that they should not foreclose in the name of MERS.
- ❖ Can MERS be liable for fraud and abuse of process in prosecuting foreclosure lawsuits in its own name?



Broader Implications of the Crisis – New Borrower Theories

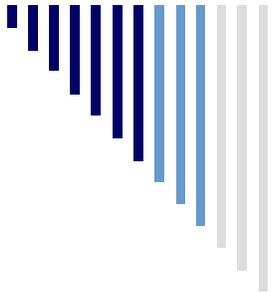
- ❖ Will we see borrowers pursue a third party beneficiary strategy under:
 - ❖ Fannie Mae's Mortgage Selling and Servicing Contract requirements?
 - ❖ Freddie Mac's servicing guidelines as set forth in its Single Family Seller/Servicer Guide?
 - ❖ HUD regulations and handbook requirements for servicers?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



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.



Moderator:
Michael S. Waldron, Patton Boggs LLP
mwaldron@PattonBoggs.com
214.758.3436

Panelists:
Gerald B. Alt, Heart Financial Services
jalt@logs.com
(847) 770-4130

Christina Sarchio, Patton Boggs LLP
csarchio@pattonboggs.com
202-457-7527

Anthony J. Laura, Patton Boggs LLP
alaura@pattonboggs.com
973.848.5608

Patrick F. McManemin, Patton Boggs LLP
pmcmanemin@pattonboggs.com
214.758.6675