



**Vermont Bar Association & National  
Consumer Law Center**

**Foreclosure Defense and Mediation Training  
3-Part Webinar Series**

**April 8, 15, & 22, 2020**

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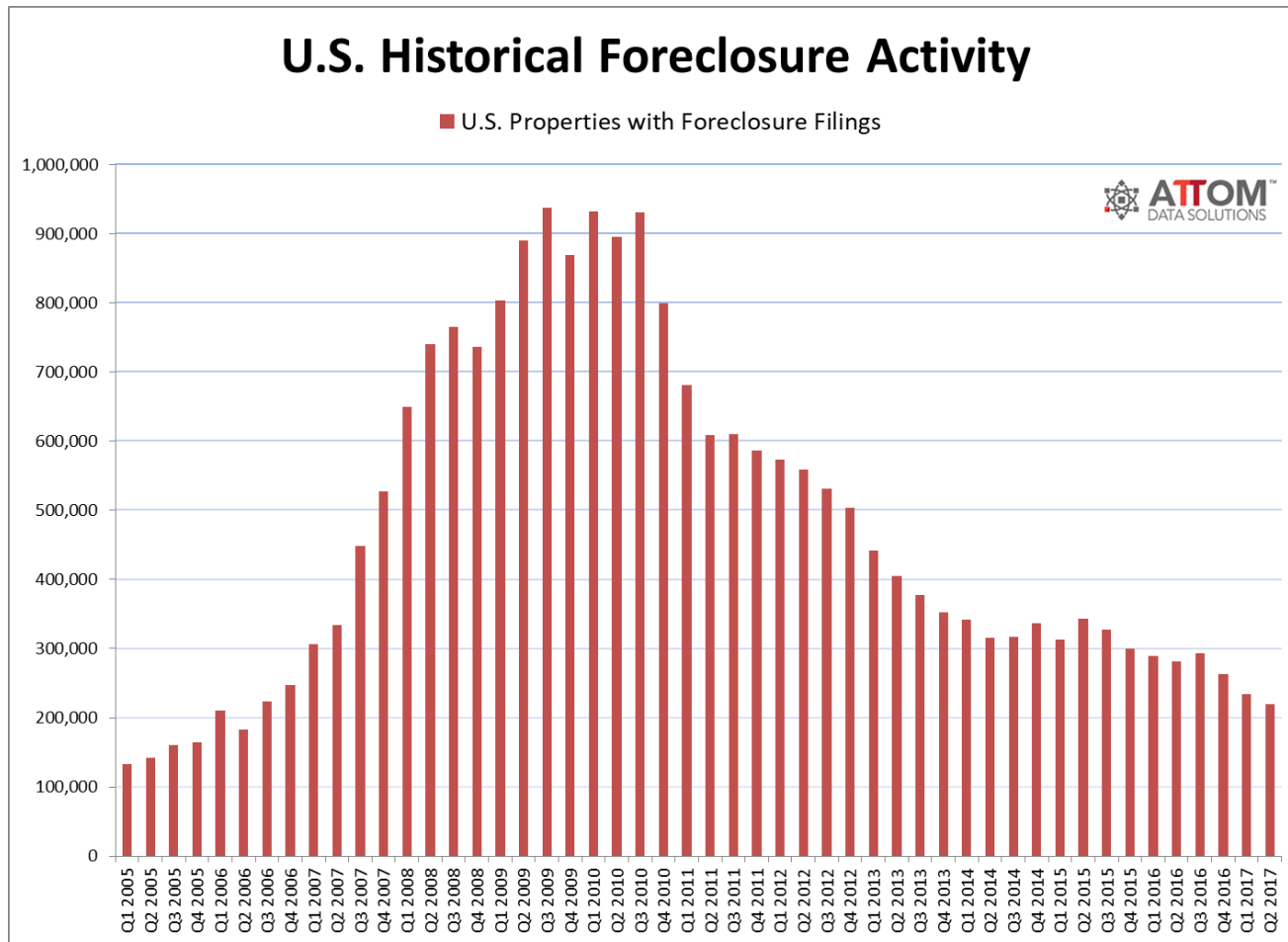
**Andrea Bopp Stark, National Consumer Law Center**

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# Owners, Servicers, Trusts: Identifying and Understanding the Players

# Duration of 2007-2012 Crisis

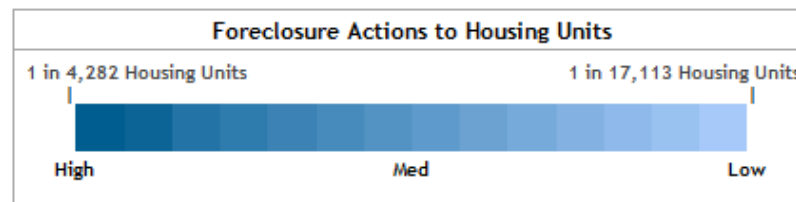
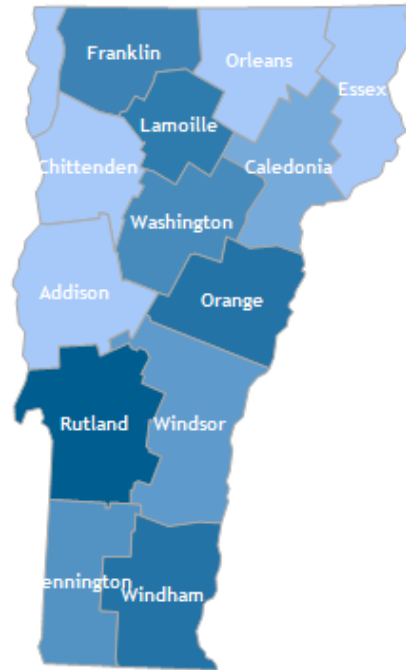


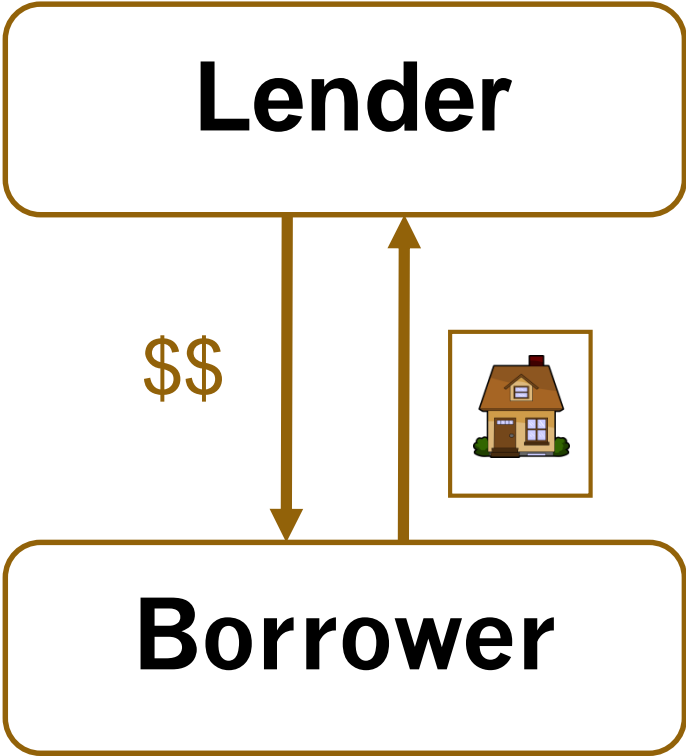
# Vermont Foreclosures

- Past 12 mos., trend was 30-60 foreclosure filings per month statewide
- Highest rates: Rutland, Windham, Orange counties at roughly 1 per 4,000-5000 units
- U.S. average 1 per 2820
- Highest rates: NJ, ILL at 1 per 1500



# Vermont Foreclosure Map Feb. 2020





# Who's Who in Securitization

- Lender/Originator
- Sponsor/Seller
- Depositor
- Underwriter
- Trust/Trustee
- Servicer
- Custodian
- Rating Agencies
- Insurers
- Investors



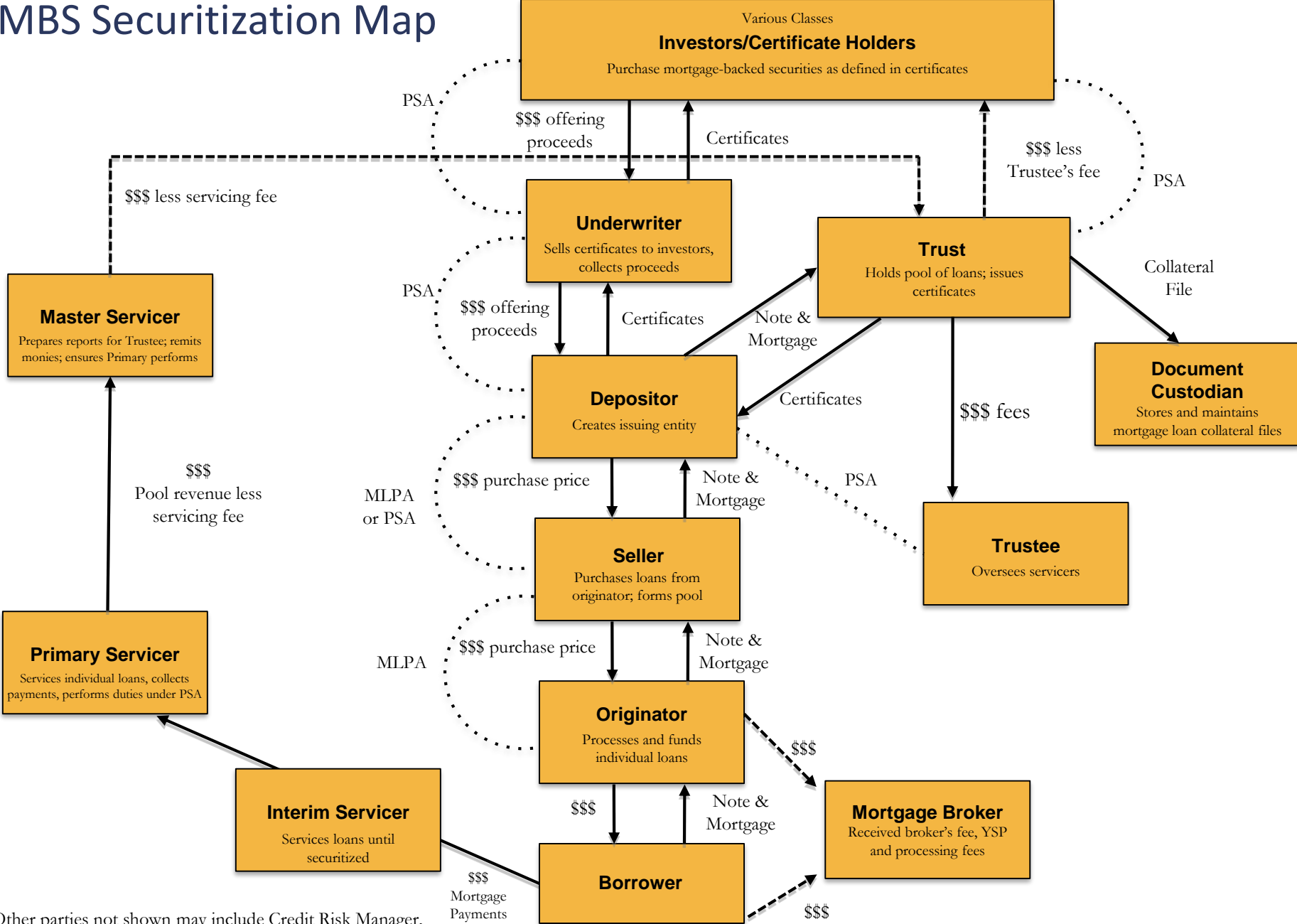
# Key Questions

- Who is the owner of the loan?
- Who is the servicer of the loan?
- Is there an insurer/guarantor of the loan



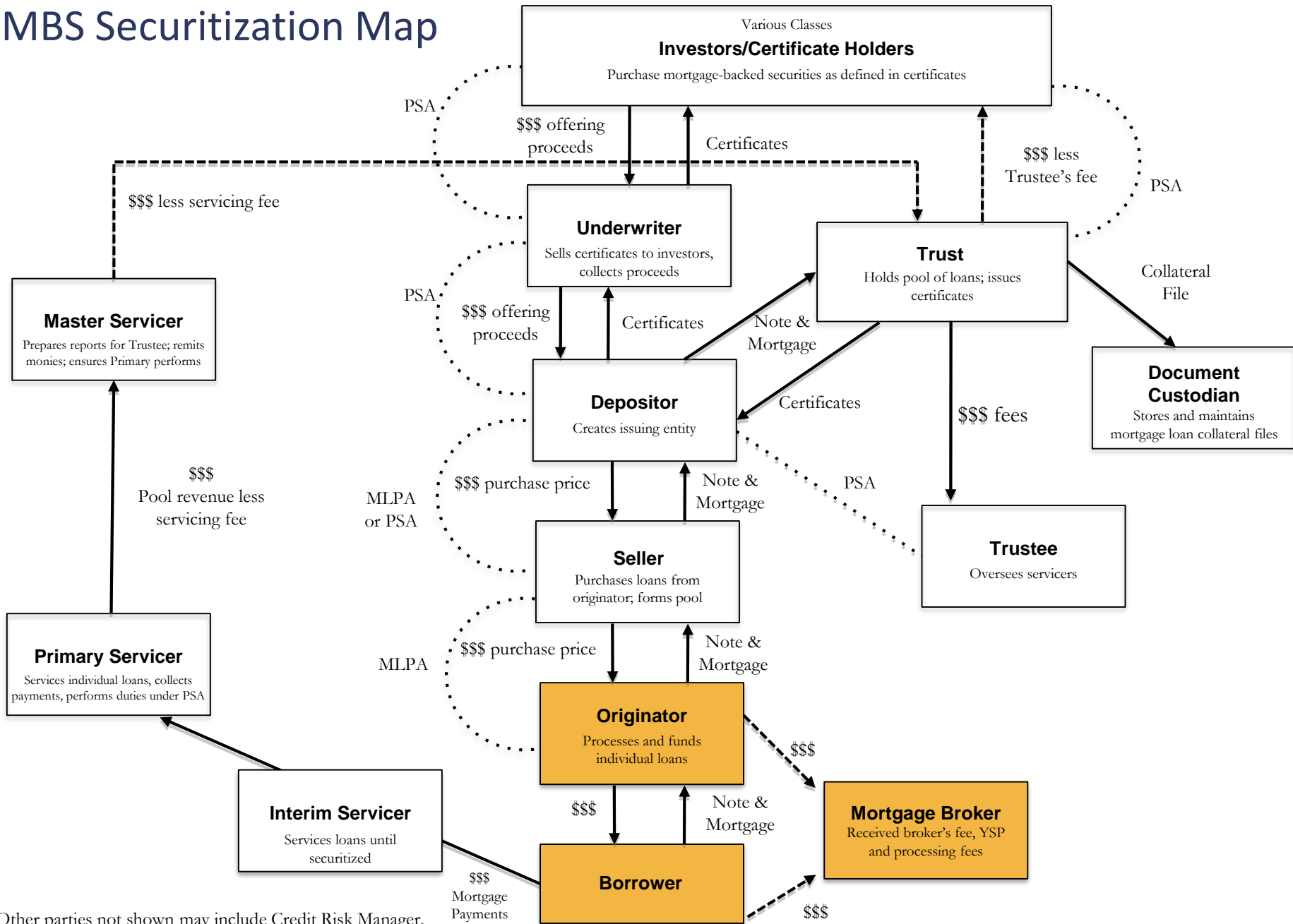


# RMBS Securitization Map



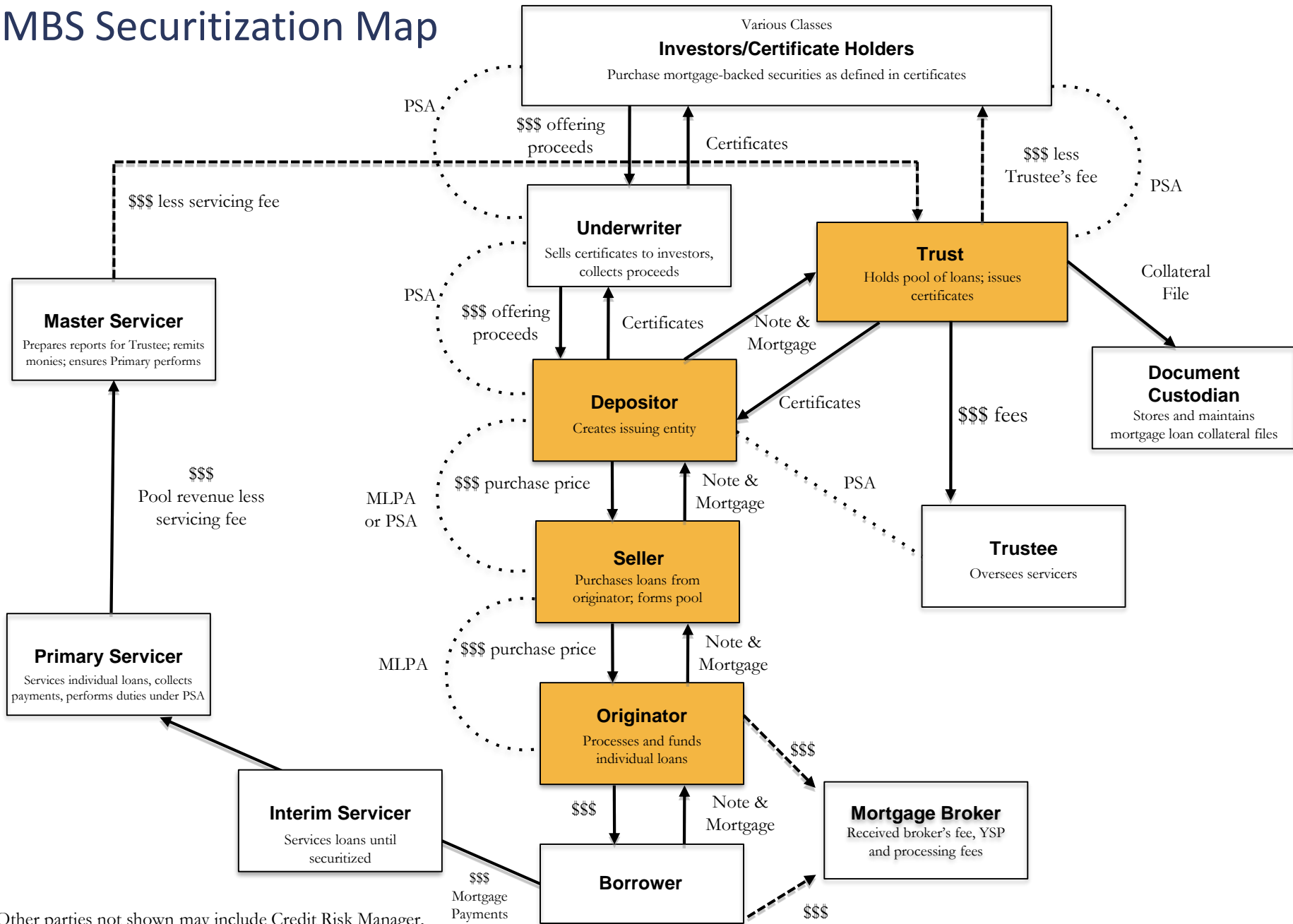
Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

# RMBS Securitization Map



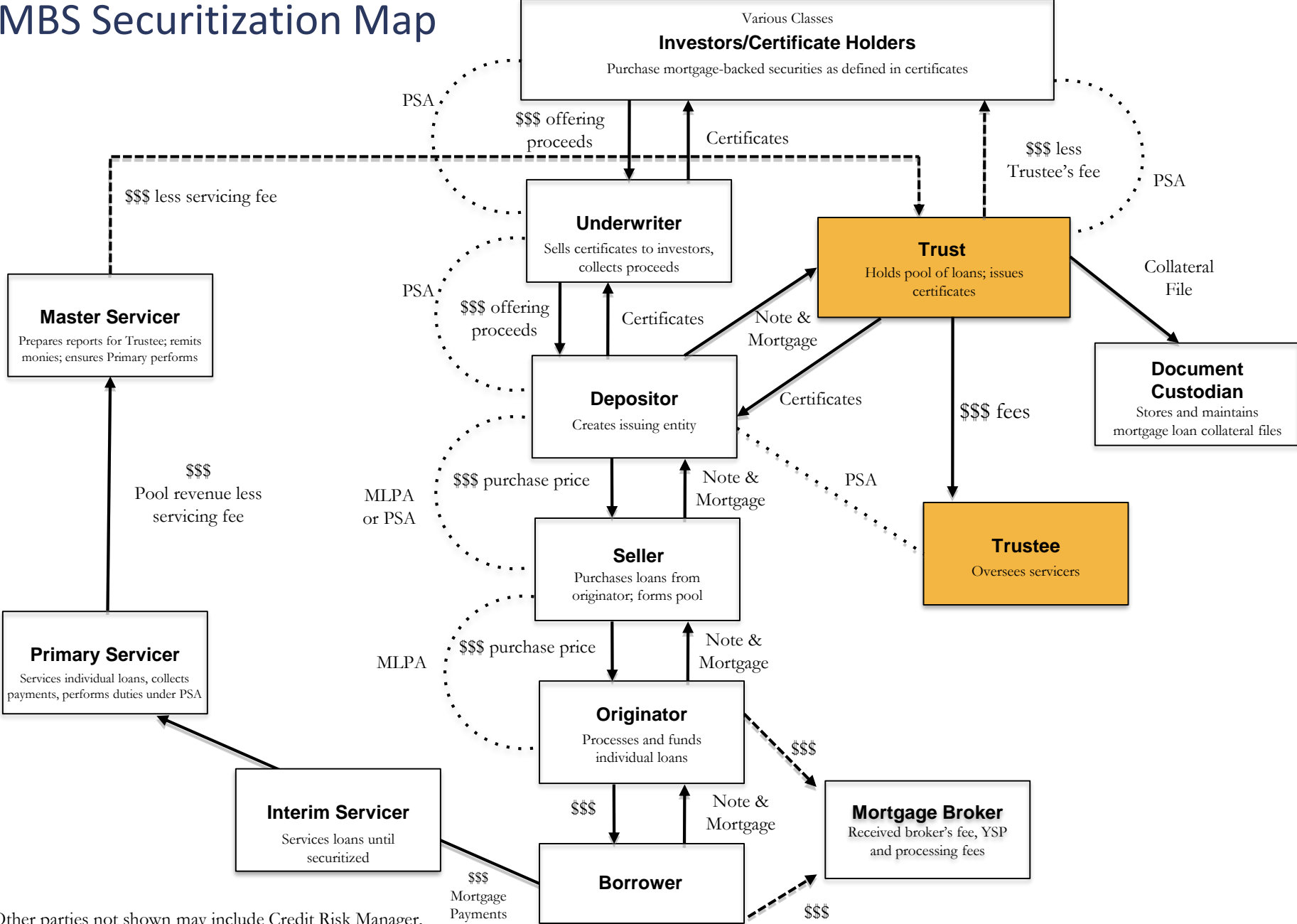
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# RMBS Securitization Map



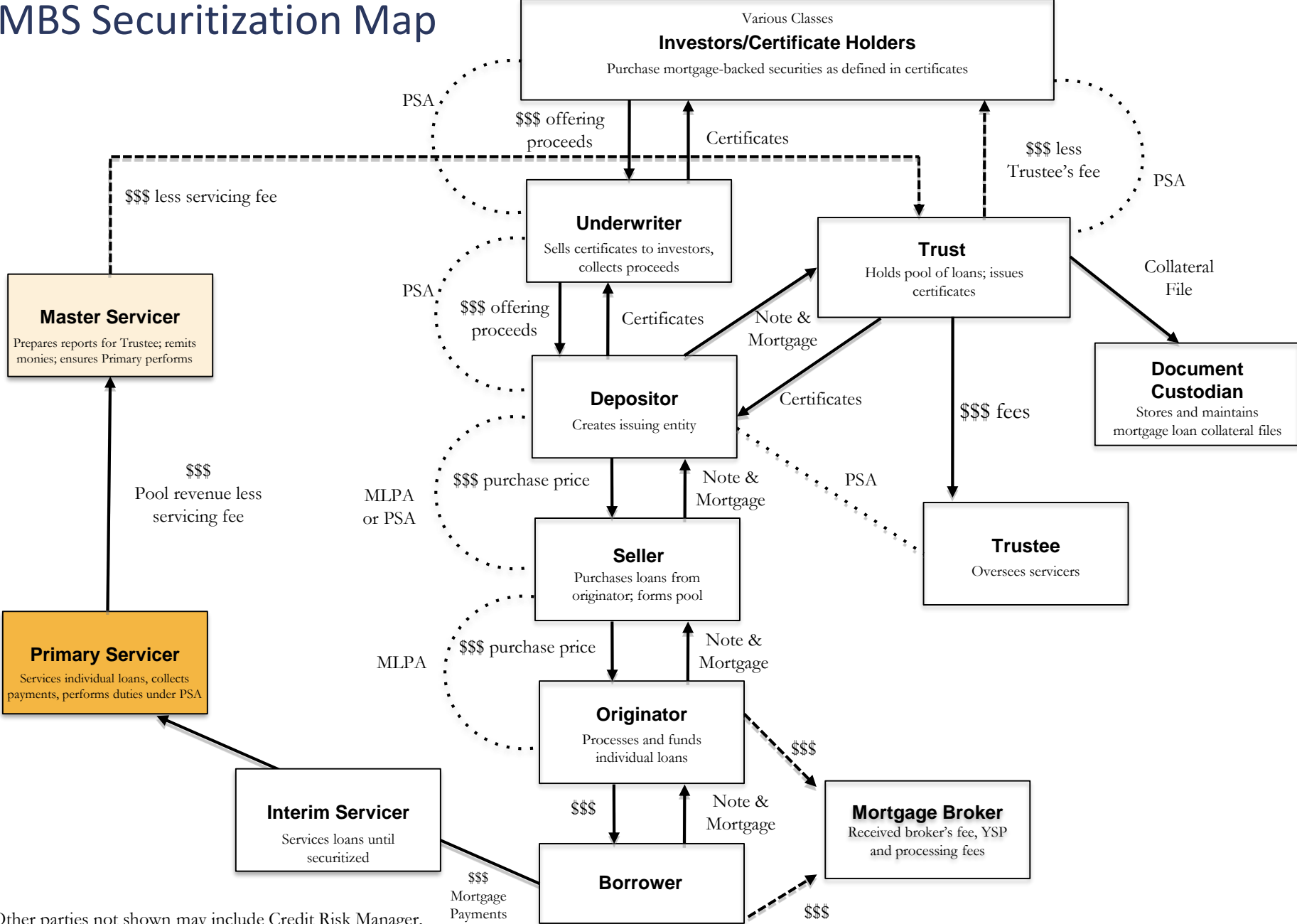
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# RMBS Securitization Map



Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

# RMBS Securitization Map



Other parties not shown may include Credit Risk Manager, Securities Administrator, Swap Counterparty, and Rating Agencies

# Key Documents

- The note
- The mortgage
- Pooling and Servicing Agreement
- Recent correspondence from servicer
  - Default/acceleration notices
  - Loss mitigation communications
  - TILA monthly statements



# TILA Monthly Statement

- If at least 45 days delinquent, statement must include:
  - Date to which account paid up
  - Amount needed to cure (*incl.* fees & costs)
  - Principal balance due (*incl.* fees & costs)
  - Account history for shorter of either six months or start of delinquency
  - Address for sending Request for Information to servicer
    - 12 C.F.R. § 1026.41(c),(d)



# Identifying the Owners

- May not be the named plaintiff in the foreclosure complaint
- Send RESPA Request for Information to servicer
  - Expedited response time
- Send TILA request to identify loan owner. Servicer must, upon written request, provide borrower with contact information for the owner. TILA 15 U.S.C. § 1641(f)(2)
- New Note owner must inform borrower of change in ownership within 30 days. TILA 15 U.S.C. § 1641(g) (effective May 20, 2009).





# MERS

- Mortgage Electronic Registration Systems, Inc.
- Established early 1990s by GSEs, large lenders to save money on recording fees
- MERS sells two basic services:
  - Loan IDs (MIN Numbers) for members to use
  - Signing authority - 20,000 individuals (employees of servicers & foreclosure mills) can sign documents as secretaries or vice presidents of MERS



# MERS

- What can be done in MERS' name?
- Conduct a foreclosure sale?
- Provide a foreclosure notice?
- Assign a mortgage?
- Transfer a note?



# Who Are Servicers?

- Servicers are often divisions of large national Banks (BofA, Wells, Citi)
- One servicer may service loans originated by many other banks
- There are also growing numbers of “non-bank” servicers (Ocwen/PHH, Nationstar/“Mr. Cooper”)
- Servicers’ compensation largely independent of loan pool performance



# The Importance of the servicer

- The servicer makes most important decisions regarding the loan
- They are distinct from holders, investors, guarantors
- Borrowers don't pick their servicers
- Servicers are highly regulated today (RESPA, TILA federal rules)
- Servicing rights are transferred frequently



# Identifying the Servicer

- The borrower usually knows
- MERS database identifies servicer
- TILA monthly statements, default letters, loss mitigation solicitation



# Role of Insurer/Guarantor

Identifying the investor is critical:

- GSE?
- Federal agency like the FHA?
- None of the above? (typically a mortgage pool)



# Government Sponsored Enterprises (GSEs)

- Fannie Mae and Freddie Mac placed in government “conservatorship” in September 2008
- Federal Housing Finance Agency (FHFA) designated as federal agency to regulate the GSE’s
- Great influence over industry practices



# Government Insured Loans

- Three Federal agencies *guarantee* loans:
- Federal Housing Administration (FHA), a department of HUD
- Rural Housing Service, part of USDA
- Veterans Administration
- RHS/USDA also makes *direct* single family home loans



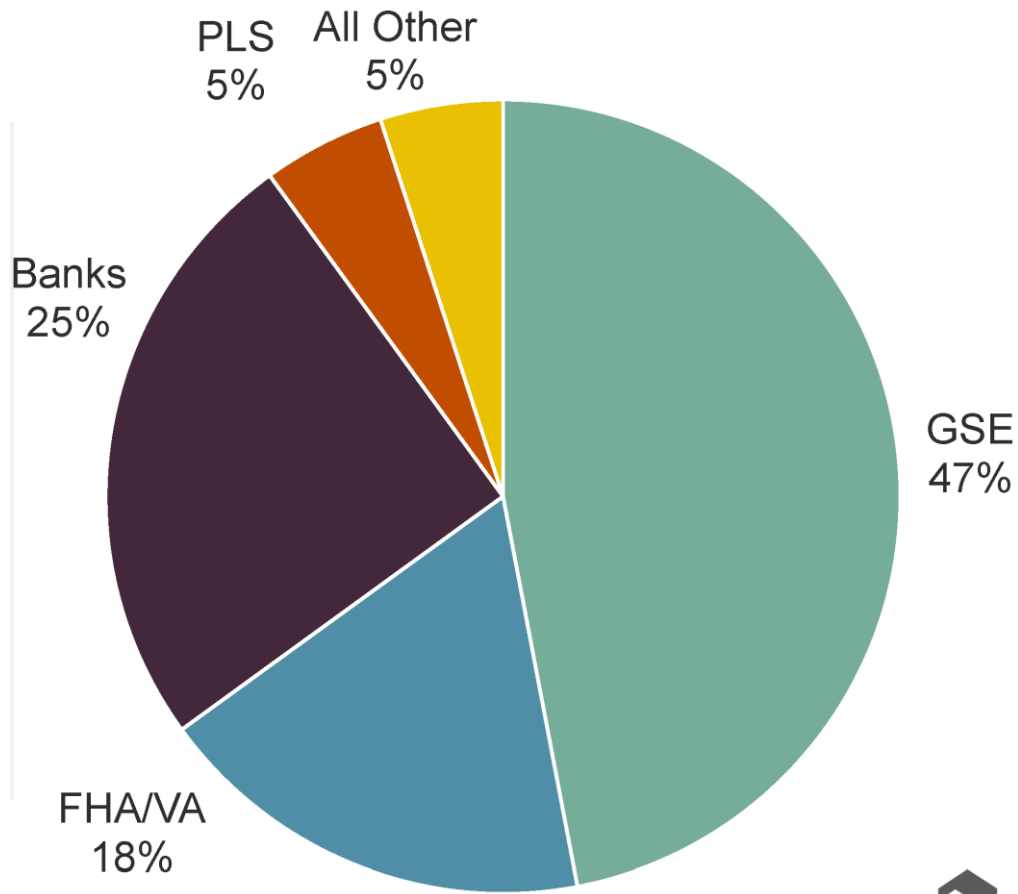


# “CARES Act” of March 2020

- Covid-19 Federal emergency legislation
- Forbearance and moratorium rights apply to a “federally backed mortgage loan”
  - “purchased or securitized” by Fannie Mae or Freddie Mac
  - Insured by FHA, VA, USDA
  - Made directly by USDA
    - H.R. 748 § 4022(a)(2)



# “Federally Backed Mortgage Loan”



# Pooling and Servicing Agreement

- Usually attached to a “prospectus,” filed with SEC for public securitizations, available at [www.sec.gov](http://www.sec.gov). See specific instructions in the materials.
- Prospectus identifies the players and is a good source of information on the underwriting standards and characteristics of the loans anticipated to be in the pool.
- PSA will usually specify who can institute foreclosure proceedings.
- PSA will set out guidelines and authority for modifying loans or approving other workout options.
- Role of PSAs, “investor restrictions” for loss mitigation



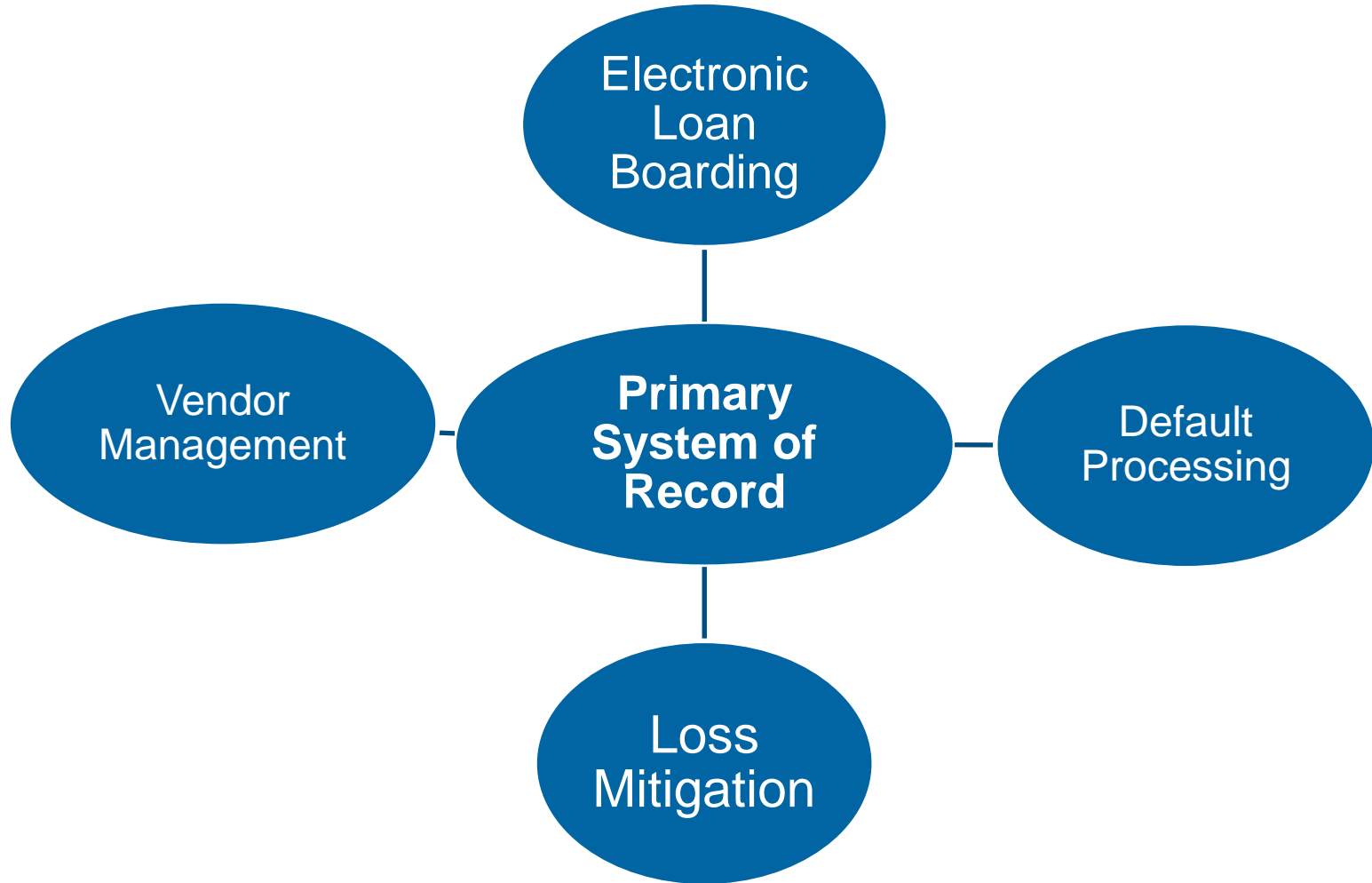
# Identifying the Owner/Investor



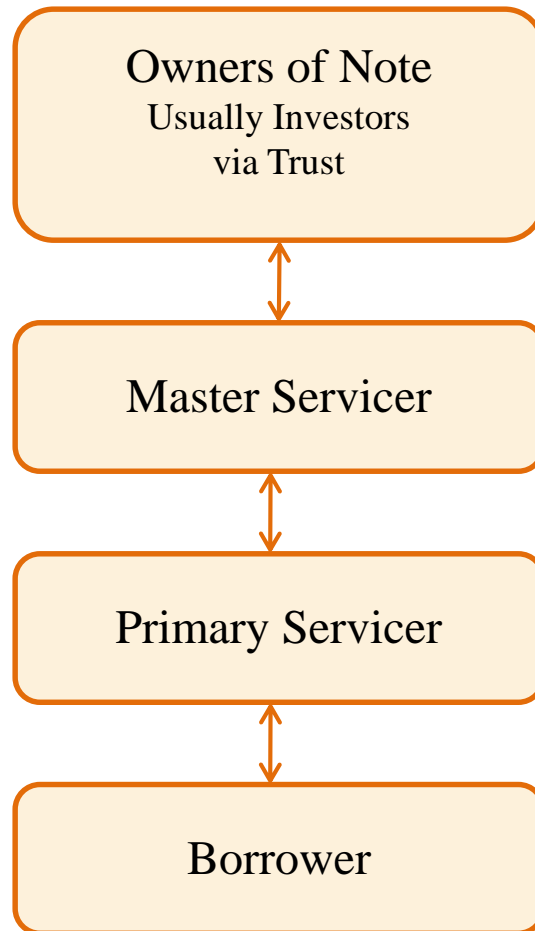
- [www.mersinc.org](http://www.mersinc.org)
- [freddiemac.com/mymortgage/](http://freddiemac.com/mymortgage/)
- [fanniemae.com/loanlookup/](http://fanniemae.com/loanlookup/)
- TILA § 1641(f)(2)
- RESPA § 2605(k)(1)(D)
- RESPA § 2605(e)



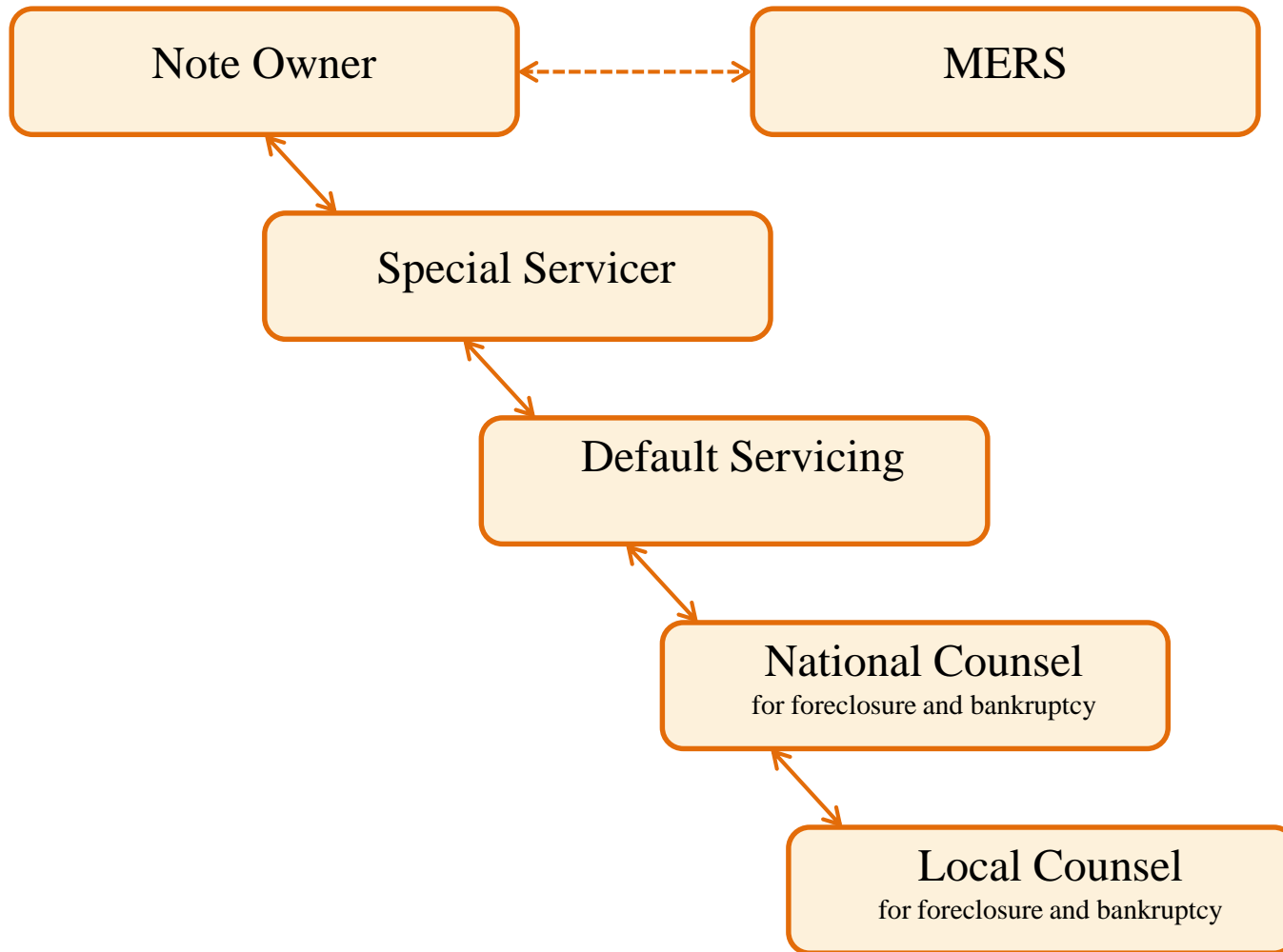
# Servicing Modules



# Servicer of Performing Loans



# Servicing in Foreclosure (or Bankruptcy)



The Vermont Bar Presents  
**FORECLOSURE DEFENSE AND MEDIATION TRAINING**

*Presented by*

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# STATUTORY FRAMEWORK FOR FORECLOSURE

Vermont's foreclosure statute is codified at 12 V.S.A. § § 4931—70. Note that the foreclosure statute received a significant overhaul in 2012. Vermont has three methods of foreclosure:

- Strict foreclosure under 12 V.S.A. § 4941;
- Judicial sale foreclosure under 12 V.S.A. § § 4945-4954;  
and
- Nonjudicial foreclosure under 12 V.S.A. § § 4961-70.

The statutory framework for judicial sale and strict foreclosures is supplemented by the procedures set forth in Vt. R. Civ. P. 80.1.



# MORTGAGE LOAN DOCUMENTS

- Prior to commencing the foreclosure, the mortgagee's attorney should gather and review all documentation regarding the loan and mortgaged property:
  - The note, with all endorsements;
  - Any allonges;
  - The recorded mortgage and all riders
  - Assignment of the mortgage;
  - Any loan modifications; and
  - The notice of default letter and proof of mailing



# MORTGAGEE'S RIGHT TO FORECLOSURE

- Rule 80.1 (b) of the Vt. R. Civ. P. requires that
  - The plaintiff shall attach to the complaint copies of the original note and mortgage deed and proof of ownership thereof, including copies of all original endorsements and assignments of the note and mortgage deed. The plaintiff shall plead in its complaint that the originals are in the possession and control of the plaintiff or that the plaintiff is otherwise entitled to enforce the mortgage note pursuant to the Uniform Commercial Code.



# STATUTE OF LIMITATIONS

- The statutes of limitations for both the note and the mortgage must be reviewed. Enforceability of the mortgage is not barred just because the statute of limitations may have run on the note. An enforceable mortgage debt can survive when the statute of limitations has run on the underlying promissory note. *Huntington v. McCarty*, 174 Vt. 69 (2002). The mortgage and the note are governed by different statutes of limitations. The statute of limitations period for enforcement of a note in a civil action is six years. 12 V.S.A. §511, or fourteen years after the cause of action accrues if the note was witnessed. 12 V.S.A. §508. The statute of limitations period for enforcement of a mortgage, an action in land, is fifteen years. 12 V.S.A. §502. The mortgagee has an action on the note and one on the mortgage. *Houghton v. Tolman*, 74 Vt. 467, 469-70 (1902) (“the [s]tatute of [l]imitations does not extinguish the debt, but only bars the remedy; and that a mortgagee ... the debt is not extinguished by barring the remedy on the note, but continues to exist for all purposes of foreclosing the mortgage until that remedy is barred also”).



## NOTE

- A mortgagee is the holder of the note when it has possession, and the note is made payable to the mortgagee or, on transfer, made payable either to the mortgagee or to the bearer. The note is negotiated when transferred by the transferor directly to the transferee or in blank to the bearer. The note is either endorsed to the mortgagee or in blank, written on the note, or by an allonge affixed to the note.



## NOTE

- A plaintiff must show that it is the holder of the note at the time the complaint is filed so that it has standing to proceed with the foreclosure. *U.S. Bank v. Kimball*, 2011 VT 81.
- The “mortgage follows the note.” See *Dernier v. Mortgage Network, Inc.*, 2013 VT 96. This common law rule has been codified in the Uniform Commercial Code (UCC). A note is a negotiable instrument subject to the requirements of the UCC.



# MORTGAGE AND ASSIGNMENTS

- To be valid under Vermont law, a mortgage must be signed by the party granting the same, acknowledged by the grantor before a town clerk, a notary public, a master county clerk, or a judge or register of probate, and recorded in the clerk's office of the town in which such lands lie. 27 V.S.A. §341(a). (There are many decisions issued by the Bankruptcy Court for the District of Vermont addressing varying fact patterns where a mortgage has not been properly executed or the property properly described.)



# NOTICE OF DEFAULT

- The Vermont foreclosure statute does not require a particular notice of default or demand except if one is proceeding under a nonjudicial foreclosure.





# TITLE SEARCH

- Superior liens
- Municipal liens
- Junior liens
- Title concerns



# SERVICEMEMBERS CIVIL RELIEF ACT

- The Servicemembers Civil Relief Act (SCRA), formerly called the Solders' and Sailors' Civil Relief Act, codified at 50 U.S.C. §§ 3901—4043, is a federal law that protects members of the uniformed services while they are on active duty.



# TYPES OF FORECLOSURE-OVERVIEW

- Strict Foreclosure
- Foreclosure auction is not required
- Less costly and more cost effective
- Strict foreclosure is available only when there are no federal liens on the property and the mortgagee can establish that there is no significant equity in the mortgage property.



# TYPES OF FORECLOSURE-OVERVIEW

- Nonjudicial Foreclosure
- Limited to property that is not a dwelling house owed
- Vacant commercial
- Commercial entities
- Rental properties



# PROCEDURES COMMON TO JUDICIAL SALE FORECLOSURE AND STRICT FORECLOSURE

- Under Vt. R. Civ. P. 80.1(b)(1), the complaint must set forth
  - The name of the mortgage and mortgagee, the date of the mortgage deed, the description of the premises, the debt or claim secured by the mortgage, any attorney's fees, claimed under an agreement in the mortgage or other instrument evidencing indebtedness, any assignment of the mortgage, the condition contained in the mortgage deed alleged to have been breached, the names of all parties in interest and, as to each party in interest, the date of record of the instrument upon which the interest is based, shall pray that defendants' equity of redemption in the premises be foreclosed and explain that the defendant or defendants must enter their appearance in order to receive notice of the foreclosure judgment which will set forth the amount of money they must deposit to redeem the premises and the period of time allowed them to deposit this amount.



# PROCEDURES COMMON TO JUDICIAL SALE FORECLOSURE AND STRICT FORECLOSURE

- The plaintiff shall attach to the complaint copies of the original note and mortgage deed and proof of ownership thereof, including copies of all original endorsements and assignments of the note and mortgage deed.
- The plaintiff shall plead in its complaint that the originals are in the possession and control of the plaintiff or that the plaintiff is otherwise entitled to enforce the mortgage note pursuant to the Uniform Commercial Code.



## FILING AND SERVICE OF COMPLAINT

- All judicial foreclosures are commenced by filing a foreclosure complaint with the Civil Division of the Superior Court for the county in which some or all of the mortgaged property is located. 12 V.S.A. § 4932(a), and serving the complaint on all parties claiming an interest in the mortgaged property that is subject and subordinate to the mortgage being foreclosed.



## RECORDING OF COMPLAINT

- Under 12 V.S.A. § 4932(b), a copy of the complaint must be recorded in the land records of each town where the mortgaged property is located.
- The town clerk is directed to note the recording of the foreclosure complaint in the margin of the mortgage.
- Recording of the complaint in the land records provides record notice to all those who subsequently acquire an interest in the property.
- Any liens or interests in the mortgaged property that are acquired after the complaint is recorded are automatically foreclosed without joining such party in the foreclosure action.





# OBTAINING JUDGMENT

- If the Defendant does not answer the complaint with 21 days of service:
  - The plaintiff is entitled to entry of a default judgment against any defendant who does not file a verified answer, or an answer supported by an affidavit that discloses facts alleged to constitute a defense to the plaintiff's claim for foreclosure. Vt. R. Civ. P. 80.1(c).
  - If the answer is served, the plaintiff may, within fourteen days thereafter, move for summary judgment and the complaint will be treated as if it were supported by an affidavit. Vt. R. Civ. P. 80.1(c).



# OBTAINING JUDGMENT

- In requesting a default judgment, the plaintiff must comply with the SCRA. Vermont Rule of Civil Procedure 55(b)(5) provides that an affidavit is required for a default judgment to enter.
- No judgment by default shall be entered until the filing of an affidavit as required by section 201(b)(1) of the Servicemembers Civil Relief Act, 50 U.S.C. app. 521, stating whether or not the defendant is in military service and showing necessary facts to support the affidavit or, if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. If it appears that the defendant is in military service, the court shall take appropriate action as provided in that Act.



# OBTAINING JUDGMENT

- The plaintiff may move for summary judgment under Vt. R. Civ. P. 56 or judgment on the pleadings under Vt. R. Civ. P. 12. If moving for summary judgment under Vt. R. Civ. P. 56, the plaintiff must supply a supporting affidavit as well as a statement of uncontested material facts. The mortgagor and other defendants then have thirty days to respond to the motion and file affidavits in opposition.



## STRICT FORECLOSURE SPECIFICS

- In an action for strict foreclosure, the mortgagee obtains title to the mortgage property once the redemption period in the decree expires and a certificate of nonredemption is issued by the court and recorded in the appropriate land records with a certified copy of the strict foreclosure judgment and a property transfer tax return. 12 V.S.A. § 4941 (g). No public sale is required.
- Under 12 V.S.A. § 4941 (c), strict foreclosure is permissible only when the court finds that there is no “substantial value” in the mortgaged property in excess of the amount due the foreclosing mortgagee and other lienholders, “plus assessed by unpaid property taxes.” The foreclosure decree must include a summary of the evidence in support of the court’s finding of no equity.



## STRICT FORECLOSURE SPECIFICS

- In a strict foreclosure action, the redemption period is six months from the date of the foreclosure judgment unless the parties agree or the court orders a shorter redemption period. In setting the redemption period, the court considers whether there is any equity in the mortgaged property in excess of the amounts owed under the mortgage and junior liens, any unpaid taxes, the condition of the property, and any other equities. 12 V.S.A. § 4941(d).



# STRICT FORECLOSURE SPECIFICS

- Pitfalls For Strict Foreclosure
- Fraudulent transfer Cases Analysis
- *In re Chase*, 328 B.R. 675 (Bankr. D.Vt. 2005)



# MANDATORY MEDIATION

- There is a mandatory mediation program for all mortgages, except commercial mortgages. On owner occupied dwelling houses of four or fewer units, 12 V.S.A. § 4931, loans that are not subject to any government loss mitigation program requirements are exempt from mediation provided that a representative of the mortgagee “met with or made reasonable efforts to meet with the mortgagor in person in Vermont to discuss applicable loss mitigation options” before starting the foreclosure action. 12 V.S.A. § 4931(b).



# MANDATORY MEDIATION

- Unless the subject loan is a commercial loan or is otherwise exempt, the mortgagee must attach a notice of right to mediation to the foreclosure complaint and serve two copies on the mortgagor. 12 V.S.A. § 4632(c).
- If the mortgaged property is an owner-occupied dwelling house but the loan is exempt from mediation, the mortgagee must attach and serve a notice to the homeowner that informs the mortgagor of resources available to homeowners facing foreclosure. Vt. R. Civ. P. 80.1 (b)(3).





# MANDATORY MEDIATION

- If the mortgagor requests mediation at any time before four months have passed after the entry of the foreclosure decree and prior to expiration of the redemption period in the decree, the court must order mediation unless the mortgagor requests mediation after judgment has entered and the court finds that the mortgagor is attempting to delay the case, or for other good cause. 12 V.S.A. § 4632(a).
- Unless otherwise agreed by the parties or ordered by the court for good cause, the mediation must “be completed prior to the expiration of the redemption period and within 120 days of the mediator’s appointment.” 12 V.S.A. § 4632(b).



# MANDATORY MEDIATION

- If mediation is requested, the Vermont Bar Association sends a list of three mediators to the parties.
- If the parties do not agree on a mediator within five days, the court selects a mediator and issues an order of referral to foreclosure mediation.
- The court's order of referral requires that, if the plaintiff claims that the mortgage is not subject to foreclosure mediation, the plaintiff must file an objection within fifteen days; otherwise, foreclosure mediation will proceed.



# MANDATORY MEDIATION

- The mediator must hold a premediation status conference within forty-five days after appointment and must file a report with the court within seven days after the conclusion of the mediation. A copy of the report and any “loss mitigation program criteria, inputs and calculations” must also be submitted to the attorney general’s office for data collection purposes. The report must state whether any party required to participate failed to
  - i. attend the mediation;
  - ii. make a good faith effort to mediate; or
  - iii. supply documentation, information, or data as required by subsections 4633(a)-(c) of this title.



# MANDATORY MEDIATION

- Under 12 V.S.A. § 4635, if the mediator makes a statement under Section 4634, the court may impose appropriate sanctions against the noncomplying party, including:
  - 1) tolling of interest, fees and costs;
  - 2) reasonable attorney's fees;
  - 3) monetary sanctions;
  - 4) dismissal without prejudice; and
  - 5) prohibiting the mortgagee from selling or taking possession of the property tax that is the subject of the action with or without opportunity to cure as the court deems appropriate.



# JUDICIAL SALE FORECLOSURES

- The procedures for a judicial sale foreclosure are set forth in 12 V.S.A. §§ 4945—4954. In a judicial sale foreclosure, the foreclosure judgment sets forth a redemption deadline for the mortgagor and successive redemption deadlines for all subordinate lienholders in reverse order of the priority of their liens.
- If no one redeems prior to the expiration of the redemption period set forth in the decree, the plaintiff must sell the property at a public auction. The rights of junior lienholders are extinguished if they do not redeem prior to expiration of the redemption deadline in the decree.
- The mortgagor may still redeem any time prior to the judicial sale by paying the amounts due under the foreclosure decree and the costs and expenses of sale.



# JUDICIAL SALE FORECLOSURES

- The notice of sale must include:
  - the date, time, and place of the sale;
  - the terms of the sale (including the terms on which the sale could be adjourned);
  - the recording information concerning the mortgage;
  - the identity of the mortgagor and the original and current mortgagees and any assignments;
  - the legal description of the premises;
  - a statement that the mortgagor is entitled to redeem until the date of sale; and
  - information about where to inquire for additional terms.



# JUDICIAL SALE FORECLOSURES

- Service of Notice of Sale
- Publication of Notice of Sale
- Redemption Periods
- Auction
- Key Cases
- Report of Sale
- Motion for Confirmation and Process

