

The Map of the Iceberg of Toxic Foreclosure

The inappropriate use of toxic documents which has become the subject of extensive media coverage is only the tip of the iceberg of toxic foreclosure, what some legal experts describe as a fundamentally-flawed and fraud-ridden mortgage market — fraudulently-underwritten loans that passed through a maze of institutions that failed to properly maintain basic paperwork or follow legal procedures in bundling, securitizing and ultimately selling those mortgages to investors. A mountain of liabilities has been created as a result the process for funding, originating, selling, conveyancing, servicing and insuring the sale of mortgages to mortgage backed securities trusts (MBST) which issued certificates to investors. Below is a catalogue of liability exposures precipitated by toxic foreclosure of securitized mortgages. It is likely incomplete, and others might choose a different classification system. Nevertheless it does provide a broad, accurate overview of the entire spectrum of problems. It seeks to allow the user to fit a piece of the puzzle into the greater whole.

The organizing principal for the catalogue was to ask the question “Who is liable to whom for what?” The response is displayed in the two tables shown below.

<i>Who was injured by foreclosure?</i>	<i>Who is liable?</i>
(a) Borrower.	Originator, Depositor, MBST/Trustee, Servicer, party bringing foreclosure and attorney bringing foreclosure and attorney’s document recovery service, MERS.
(b) Holder of the note. Mortgage backed securities trust (MBST).	Borrower, Depositor, Originator, Servicer, hedge counterparty, MERS and attorney bringing foreclosure.
(c) Investors.	Borrower, Depositor, Originator, Servicer, Trustee, MERS, security rating service, hedge counterparty and Underwriter.
(d) Servicer	Borrower and Trustee.
(e) Guarantors, quasi-insurers and indemnifiers.	Depositor, Originator, Servicer and upstream guarantors, quasi-insurers and indemnifiers,
(f) Depositor.	Originator, Servicer, upstream guarantors, quasi-insurers and indemnifiers and MBST and Trustee.
(g) States-civil and criminal liability.	Originator, Depositor, MBST/Trustee, Servicer, MERS, party bringing foreclosure and attorney bringing foreclosure and attorney’s document recovery service.
(h) Federal Government –civil and criminal liability.	Originator, Depositor, MBST/Trustee, Servicer, party bringing foreclosure and attorney bringing foreclosure and attorney’s document recovery service.

Who was hurt?	What was the cause of the injury?
(a) Borrower.	<ul style="list-style-type: none"> (I) Wrongful Foreclosure. (II) Mortgage Fraud. (III) Breach of Contract. (IV) Abuse of Process/Malicious Prosecution. (V) Consumer Abuse. (VI) Tortious interference in a contract (MERS). (VII) Slander of title (MERS)
(b) Holder of the note. MBST.	<ul style="list-style-type: none"> (I) Default by Borrower. (II) Breach of representations and warranties by Depositor. (III) Breach of repurchase and redemption agreement by Depositor, Originator or Servicer. (IV) Malpractice. (V) Breach of due diligence requirements by securitization sponsors and rating agencies regarding mortgages sold to MBST. (VI) Breach of payment obligation by Hedge Counterparty. (VII) Making mortgage unenforceable (MERS).
(c) Investors.	<ul style="list-style-type: none"> (I) Items (I)-(VI) except (IV) in subparagraph (b). (II) Violation of state and Federal (SEC) provisions for the protection of investors by the trustee as issuer, Depositor and underwriter. (III) Violation of disclosure requirements and duties and responsibilities of sponsors of securitization involved in either the selection of mortgages for the MBST portfolio or due diligence review of mortgages that also shorted the MBST certificates in separate investment transactions. (IV) Violation of Master Pooling and Servicing Agreement requirements.

	<ul style="list-style-type: none"> (V) Maling mortgage unenforceable (MERS). (VI) Failure to protect assets by managing parties. (VII) Improper rating of securities.
(d) Servicer	<ul style="list-style-type: none"> (I) Breach of Servicer contract with Trustee. (II) Failure to repay advances.
(e) Guarantors, insurers and quasi indemnifiers.	<ul style="list-style-type: none"> (I) Breach of representations and warranties by Counterparty. (II) Breach of repurchase and redemption agreement by Counterparty. (III) Breach of representations and warranties by Counterparty. (IV) Breach by upstream guarantor, quasi-insurer or indemnifier. (V) Other forms of fraud, deceit and racketeering.
(f) Depositor	<ul style="list-style-type: none"> (I) Failure to complete sale of mortgage portfolio from Depositor to MBST. (II) Breach of indemnification agreement with Counterparty. (III) Breach of indemnification and warranties by Counterparty. (IV) Breach of representations and warranties by Originator. (V) Breach of repurchase and redemption agreement by Originator.
(g) Federal Government-civil and criminal liability.	
(h) State Government –civil and criminal liability.	

Forecast Criteria to estimate amount and risk of liability.

1. How likely is the cause of action to prevail?
2. How much will it cost to prosecute?
3. Who pays the cost of litigation?
4. What is the probable award of recovery?
5. Is the award recoverable from the judgment debtor? If so, what will be the settlement discount?
6. What will be the cumulative impact on a specific financial sector?