

**A National  
mortgage loan  
registry**

# My presentation covers:

---

- What's wrong with the present system for documenting secondary market sales of mortgages:
  - Problems with the law
  - Practical problems in using the system
  - Problems with MERS
- What to replace the present system with?
- Draft statute

# A mortgage borrower signs two documents:

- Promissory note (promising to pay back the loan)
- Mortgage (imposing a lien on the real estate as security for repayment of the loan)



# What can a lender do with a mortgage loan?

---



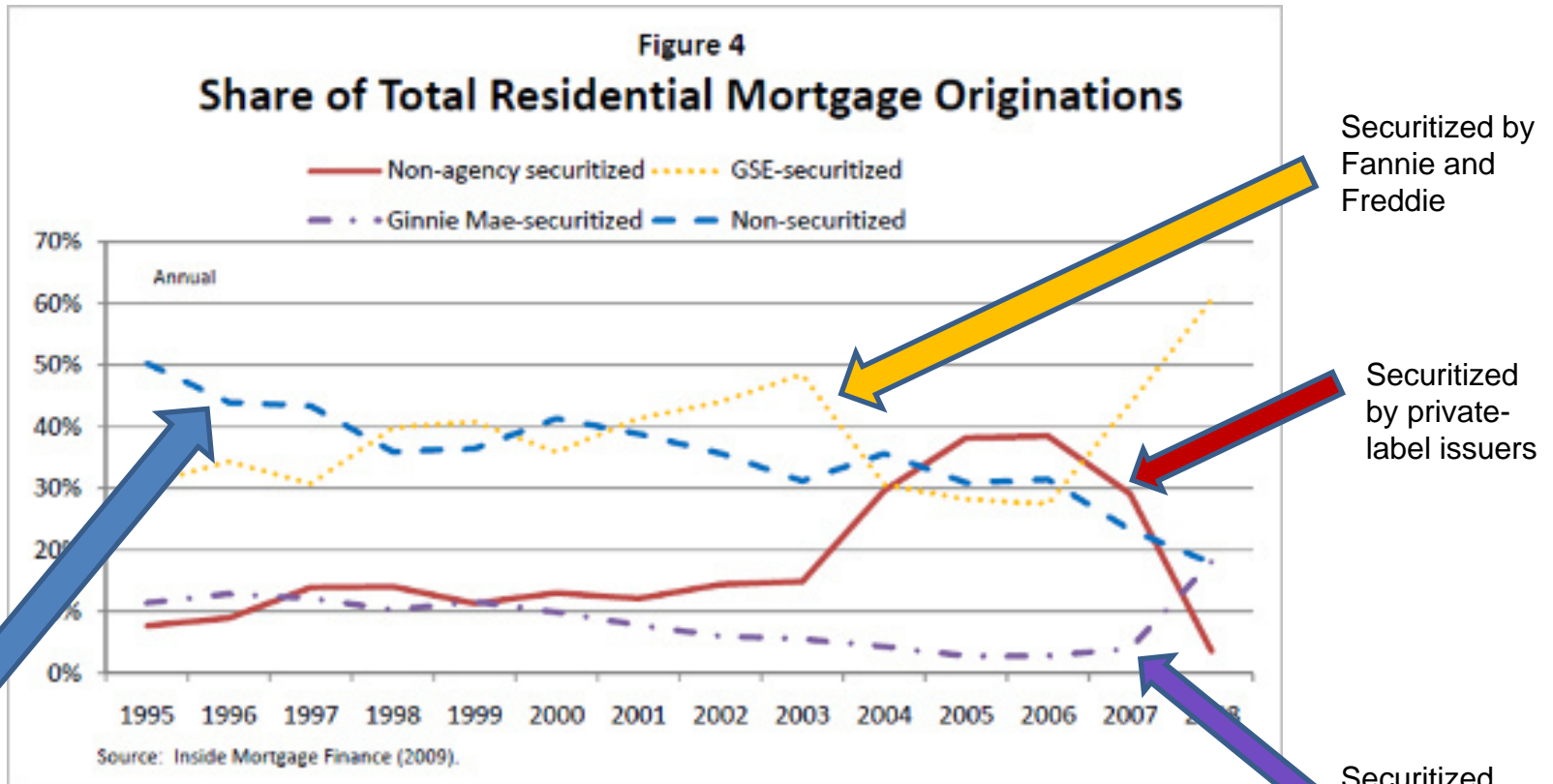
- Keep it “in portfolio” and collect the interest on it. (Banks sometimes do this.)
- Sell it to another investor for cash. (Mortgage companies usually do this.)
- Securitize it (use it as collateral for the issuance of bonds). The securities may be:
  - Pass-throughs
  - Multi-class bonds

# The “Secondary Mortgage Market”

---

- Some mortgage loans are held “in portfolio” by their originators (e.g., commercial banks)
- But a high percentage of mortgage loans is sold on the secondary market. The purchaser may hold the loans in its portfolio or securitize them:
  - The GSEs: Fannie Mae and Freddie Mac (hold some and securitize some)
  - Other investors (pension funds, savings banks, etc.) that hold the loans in their investment portfolios
  - GNMA mortgage-backed securities (federally guaranteed)
  - Securitizers (“conduits”) who use the pools of mortgages as collateral for bonds they issue (“private label mortgage-backed securities”)

# Fannie, Freddie, and Private-label Securitization Shares



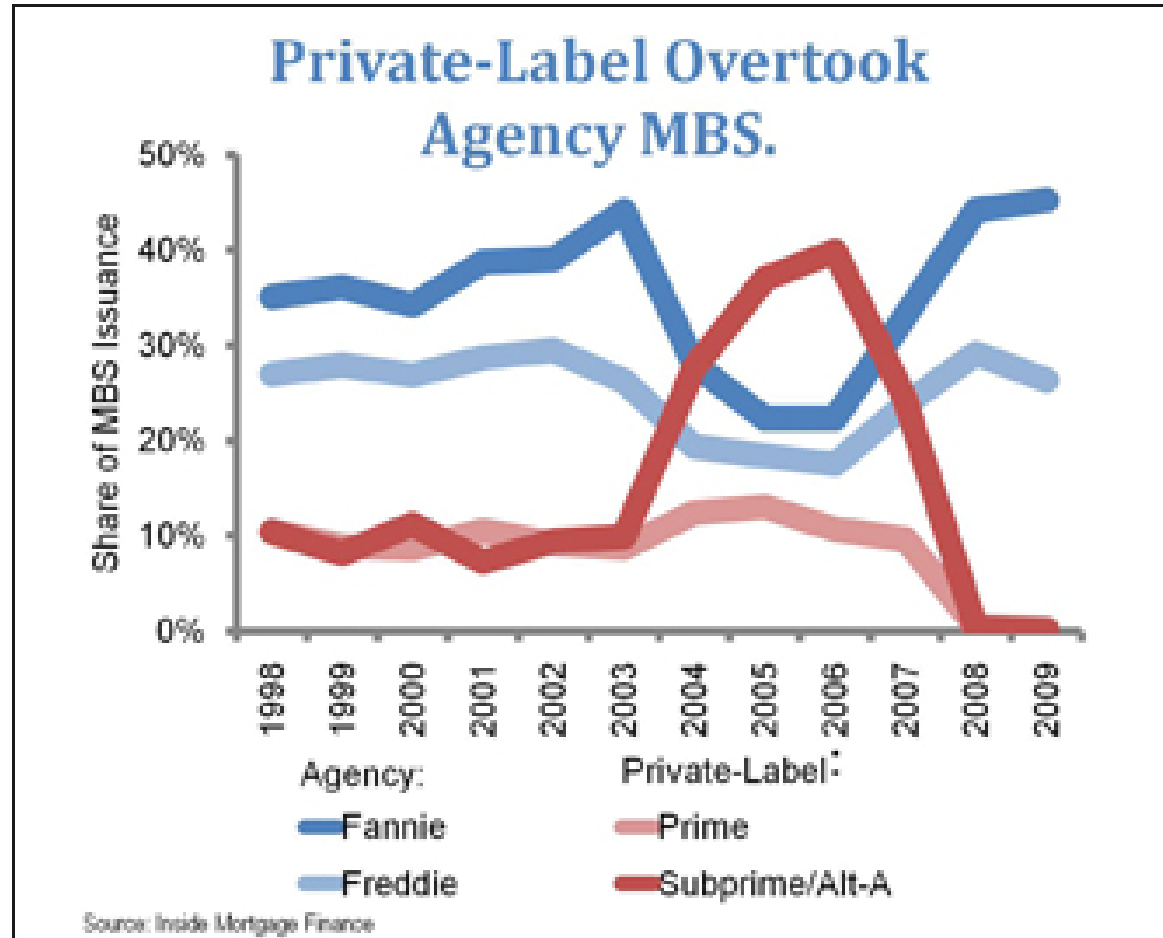
Not securitized; held in portfolio by the originator or secondary market investor.

Securitized by Fannie and Freddie

Securitized by private-label issuers

Securitized with a GNMA guarantee

# In the mid-2000s, private-label MBS became dominant:





- The secondary market investor should get:
  - The right to enforce the note
  - The right to enforce (foreclose) the mortgage



# How to transfer a loan:

---

- Note: method depends on whether it is “negotiable” or not (under UCC Article 3).
  - If non-negotiable, can transfer by a separate document of assignment.
  - If negotiable, can only transfer by delivery of the original wet-ink signature document.
- Mortgage: transfer by a separate assignment, recorded in the real property records.
  - (Assignment is not necessary to transfer the right of foreclosure; “the mortgage follows the note.”)

# Why bother executing and recording a mortgage assignment?

---

- To prevent the assignor from fraudulently releasing the mortgage.
- To get notice of any suit by a superior interest-holder (e.g., foreclosure of a prior mortgage, eminent domain action).
- In 10 states, nonjudicial foreclosure is permitted only if the foreclosing party has a “chain of title” of recorded assignments.

# In recent years:

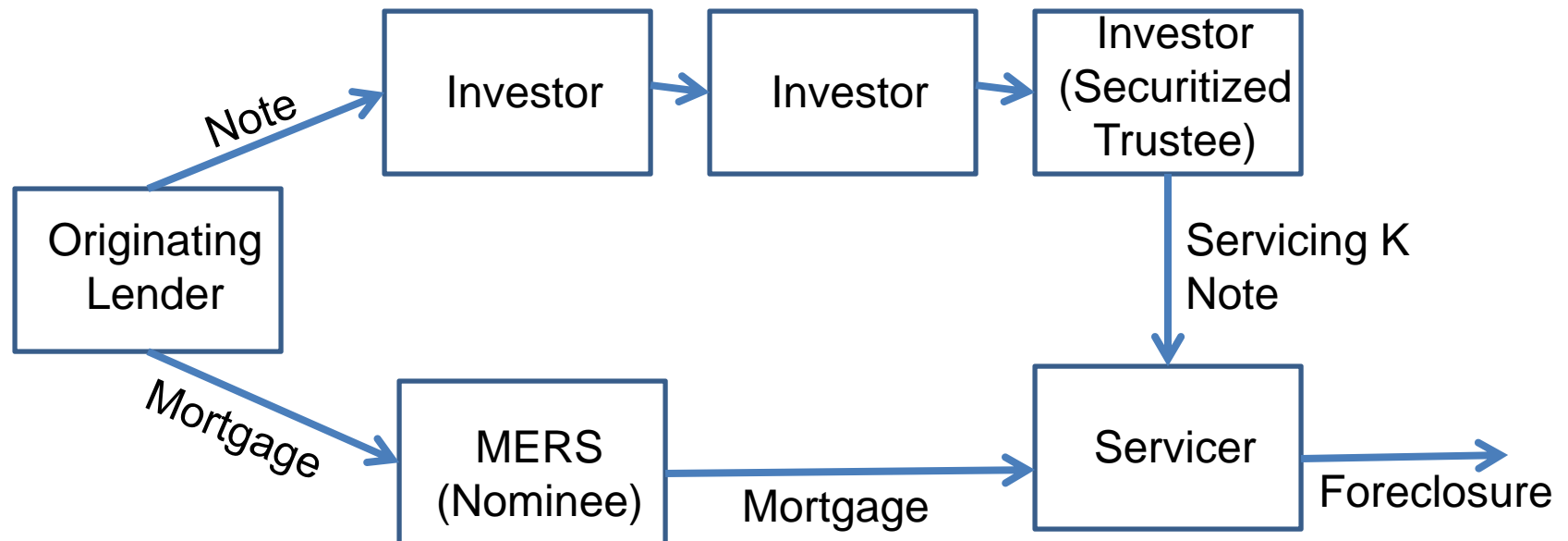
---

- Secondary market investors quit recording mortgage assignments when loans were transferred.
  - (They set up MERS to take an initial assignment, and then hold the mortgage as “nominee” for the the actual holder of the note.)
- They also quit, in many cases, insisting on a transfer of the original notes.
  - The notes were often destroyed.



# Problems with the law

- Two operative documents: note and mortgage
- In theory they can't be separated, but they appear to be separated:



# Problems with the Note

---

- Difficult to tell if it's "negotiable" or not.
- This dictates whether UCC Art. 3 governs.
- If Art. 3 applies, the original document must be delivered to transfer the right of enforcement.
- This is extremely inconvenient
- Many notes are now "unfindable."
- Filing a "lost note affidavit" is problematic.

# Practical difficulties with transferring notes and mortgages:

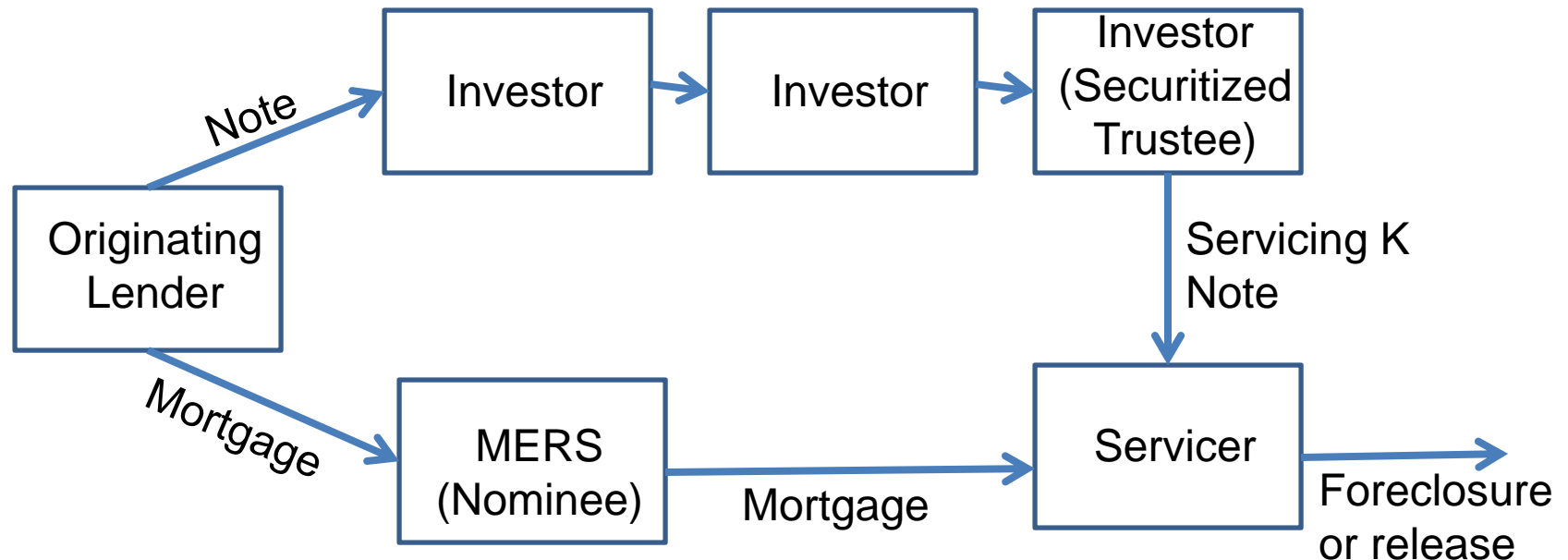
---

- The note:
  - Store, track & move notes (65 million of them)
  - Make endorsements and allonges if needed.
- The mortgage (recording an assignment):
  - Determine appropriate recording jurisdiction
  - Determine recorder's document standards
  - Determine recorder's fee (depends on pages)
  - Prepare & execute assignment
  - Transmit with check for proper fee
  - Redo if incorrect.



Our system for transferring notes and mortgages was developed in the 18<sup>th</sup> century – it's archaic!

MERS was designed to eliminate the need for recording mortgage assignments (except when foreclosing or releasing the mortgage):





# MERS Problems

---

- No statutory foundation; does not track notes
- Courts confused by “nominee” status
- Courts confused over apparent separation of note and mortgage
- Use of non-employee corporate “officers”
- Foreclosure in the name of MERS
- Lack of transparency (identification of investors)
- Lack of accuracy of records
- Negative reputation

# Overall...

- Both in legal and practical terms, the system of secondary market mortgage transfers in the US is highly confused, dysfunctional and inefficient. It cries out for reform.



# A National Mortgage Loan Registry

---

- Adoption by Act of Congress
  - Necessary to preempt state law and create a uniform national system



# A National Mortgage Loan Registry

---

*Objectives of federal preemption:*

1. Make “negotiability” of promissory notes irrelevant.

- All notes secured by mortgages would be governed by the same rules.



# A National Mortgage Loan Registry

*Objectives of federal preemption:*

2. Eliminate the need for physical delivery of notes as a means to transfer the right of enforcement.



# **A National Mortgage Loan Registry**

---

*Objectives of federal preemption:*

3. Eliminate the uncertainty over the nature of proof needed to foreclose a mortgage.



# **A National Mortgage Loan Registry**

---

*Objectives of federal preemption:*

4. Eliminate arguments based on the note and mortgage being separated from one another.





# A National Mortgage Loan Registry

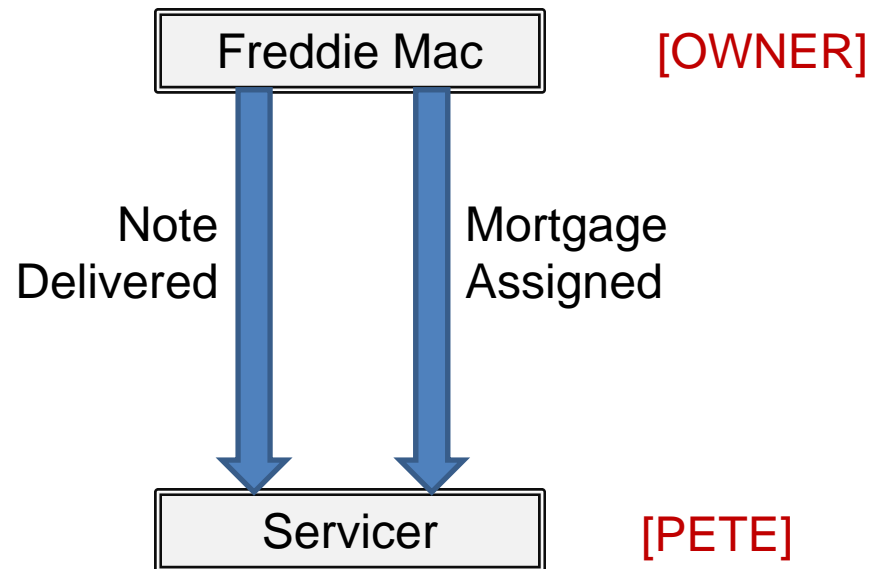
---

- What is being registered?
- The UCC distinguishes between
  - “Ownership” of the note (the right to the proceeds of enforcement) and
  - “Entitlement to enforce” (the right to sue on the note or foreclose the mortgage)
- The “Person Entitled to Enforce” (“PETE”) can sue, foreclose, modify, release or discharge the note. These are the rights to be registered.



# For example:

- Fannie Mae and Freddie Mac have their servicers conduct their foreclosures.



# Registration vs. Recording

---

- **Recording** is like operating a library. People can review the documents and decide for themselves who has rights to the property.
- **Registration** is a averment by the government as to who has rights to the property:
  - Motor vehicle registration
  - The Torrens system of land titles
  - The FAA's registry of aircraft ownership
- The proposed mortgage system would be **registration**, not recording.

# A National Mortgage Loan Registry

---

- Only mortgages that are first recorded locally under state law could be registered.
- The local recording would establish the mortgage's priority (as at present).



# A National Mortgage Loan Registry

---

- Registration would be done on-line electronically, with appropriate verification of identity.



# A National Mortgage Loan Registry

---

- The holder of the mortgage could also register the servicer's identity and authority.



# A National Mortgage Loan Registry

---

- Any member of the public could search a mortgage on-line and determine its holder and servicer.



# A National Mortgage Loan Registry

---

- The entire loan file could be maintained by the registry (loan application, appraisal, credit report, etc.)
- But these documents would not be available to the public.



# A National Mortgage Loan Registry

---

- The registry would issue certificates that would be conclusive evidence of the identity of the mortgage holder.
- The certificates would be acceptable in all courts.





# A National Mortgage Loan Registry

---

- When the loan is paid off or foreclosed, a certificate from the registry would be recorded in the local real estate records.



# A National Mortgage Loan Registry

---

- Fees for registration of mortgages would allow the registry to be financially self-supporting.



# A National Mortgage Loan Registry

---

- A bureaucratic home?



**The end**