If there are no problems with the origination of the loan, and the borrower has no difficulty making regular payments according to the loan terms, securitization will not affect the borrower after the loan has been closed. For most borrowers, securitization’s biggest impact is likely to be found in how it influences which loan products lenders decide to market. But if a borrower needs to assert a claim or defense related to the originating lender’s misconduct, or finds herself in foreclosure, securitization can cause a number of problems.413

Identifying the proper defendant or the “real party in interest” becomes more complex when a loan has been securitized, because securitized loans are managed by multiple agents with different layers of responsibility. A securitized loan is usually held by a trust, which is supervised by a trustee. But the servicing of the loans is often handled by another entity and possibly even subcontracted to yet another entity. As a result, the entity pursuing foreclosure may not be the entity that actually holds the loan. This problem may be compounded by questions of who owns the loan. The question of who has authority to foreclose is addressed in NCLC’s *Home Foreclosures* treatise.413

When the wrongdoing lender goes out of business or becomes insolvent, the existence of a consumer remedy may depend on evaluating liability theories against other participants in the securitization transaction. Perhaps more importantly, in defending against foreclosure, the borrower will want to raise defenses that she could raise against the originating lender. Whether the borrower can raise these defenses and claims against subsequent note holders in a securitization transaction requires thorough analysis, because one of the very purposes of securitization is to insulate participants from legal responsibility for the liability producing activity of the originating lender.414

Securitizations generate extensive transactional documentation and extensive ongoing reporting. Reading this paperwork with an understanding of the securitization process can provide important sources of information about the companies involved and about the underlying loans.

**Footnotes**

412 [412] See § 1.3.2 [1], *supra* (discussing securitization’s role in the foreclosure crisis of the late 2000s).


**Source:** National Consumer Law Center, Mortgage Lending [3rd ed.], updated at www.nclc.org/library

**Source URL:** https://library.nclc.org/ml/010503-0

**Links**

[1] https://library.nclc.org/nclc/link/ML.01.03.02

[2] https://library.nclc.org/nclc/link/HF.02