

HOW CIVIL & CRIMINAL INVESTIGATORS ARE DESCENDING INTO THE U.S. HOUSING MESS

In the last 120 days, one of the mightiest investigative armadas in our times has been assembled to look into alleged wrongdoing and conflicts of interest in the mortgage and financial industries. So many FBI agents have been assigned to these cases that it's straining the war on terror; the understaffed SEC enforcement division is struggling to keep up; subpoenas are flying from state attorneys general; so many accountants are on it that it's keeping the lights on late in Big Four offices; plaintiffs' law firms are contacting financial firms' former employees to find witnesses; law firms, forensic accountants and private investigators are conducting internal investigations to examine many corners of the mess. ■ While this meltdown has been compared to the Great Depression, there is something different about the trouble these days — there's an investigative overhang extending into the future with unknowable consequences. ■ We thought it would be useful to take a look at some of the most widespread allegations of improper lending practices, undisclosed risk-taking, conflicts of interest and fraud that these armies of investigators are examining.



See page 2 for our sketch of the investigative battleground.

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TIP OF THE MONTH



GAINING GLOBAL ACCESS TO U.S. COURTS

How a New-Old Mechanism Helps Foreign Litigants Seek Evidence

With globalization, a wave of cross-border lawsuits seeking information and assets has crashed onto U.S. shores. For decades, attorneys working on foreign matters had despaired of getting much help from U.S. courts. But unbeknownst to the great majority of foreign and American lawyers, there is a way that cooperation can be gained fairly briskly, and U.S. court rulings have been widening this legal pathway lately. It's all contained in a law called Section 1782.

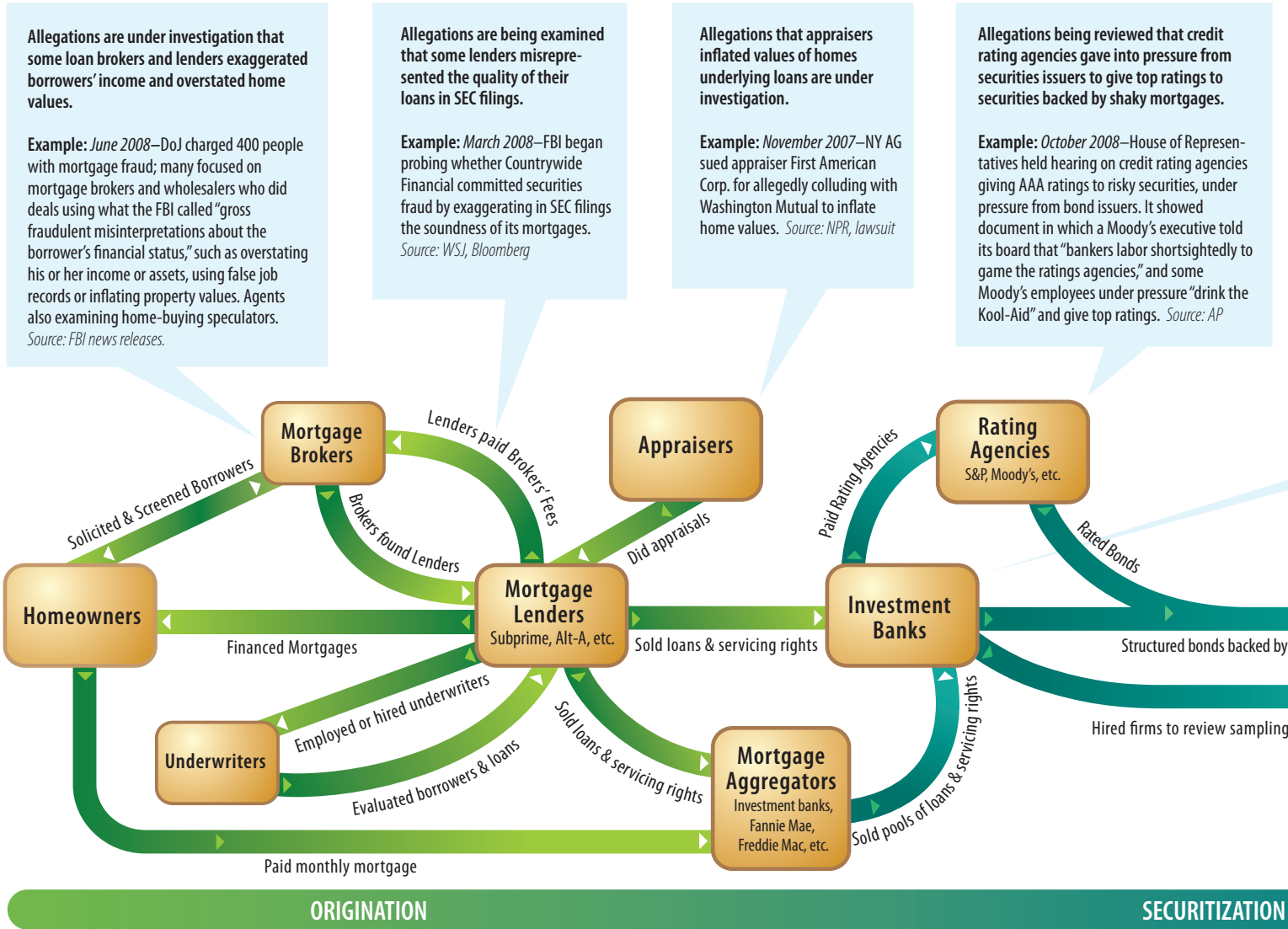
The concept of American judges agreeing to assist foreign courts has been enshrined in U.S. law since 1855. Congress expanded the law in 1948, 1964 and 1996. The current law allows a judge to order someone "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."

Then in 2004 the U.S. Supreme Court decided that Advanced Micro Devices should have rights of discovery from Intel in an antitrust action AMD filed before a European Commission tribunal. Since then, other federal courts have furthered codified the ways foreign litigants or foreign officials can enter U.S. courthouses in search of evidence.

Joshua Rievman, a lawyer who has become a specialist in Section 1782, recalled asking attendees at a speech he gave last year at an international law conference in Colorado, how many of you know anything about Section 1782? Two hands, out of the approximately 70 lawyers present, went up. "They didn't have any idea what it was," said Rievman, a partner with Hoguet Newman Regal &

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TIP OF THE MONTH

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Kenney LLP in New York. Since then he's gotten calls from a number of lawyers asking advice on how to exploit the law.

"It's grown a lot with globalization and international commerce," he said. "Parties here have information that bears on disputes in Germany or Australia or England."

New York attorney Barry Fischer has been using Section 1782 for many years. Eighty percent of his clients, mostly in Latin America, are searching for money in this country, and 20 percent need depositions or documents.

Fischer, of Fischer & Mandell, recalls first using the section in 1993, representing a woman from Bogota in a divorce case who was convinced her husband had money stashed in the U.S. "I stumbled on the section, and studied it," he said. Then he persuaded a federal judge to issue an order allowing for subpoenas.

Allegations being investigated that some investment managers misled investors about the riskiness of their investments in sub prime-mortgage related securities.

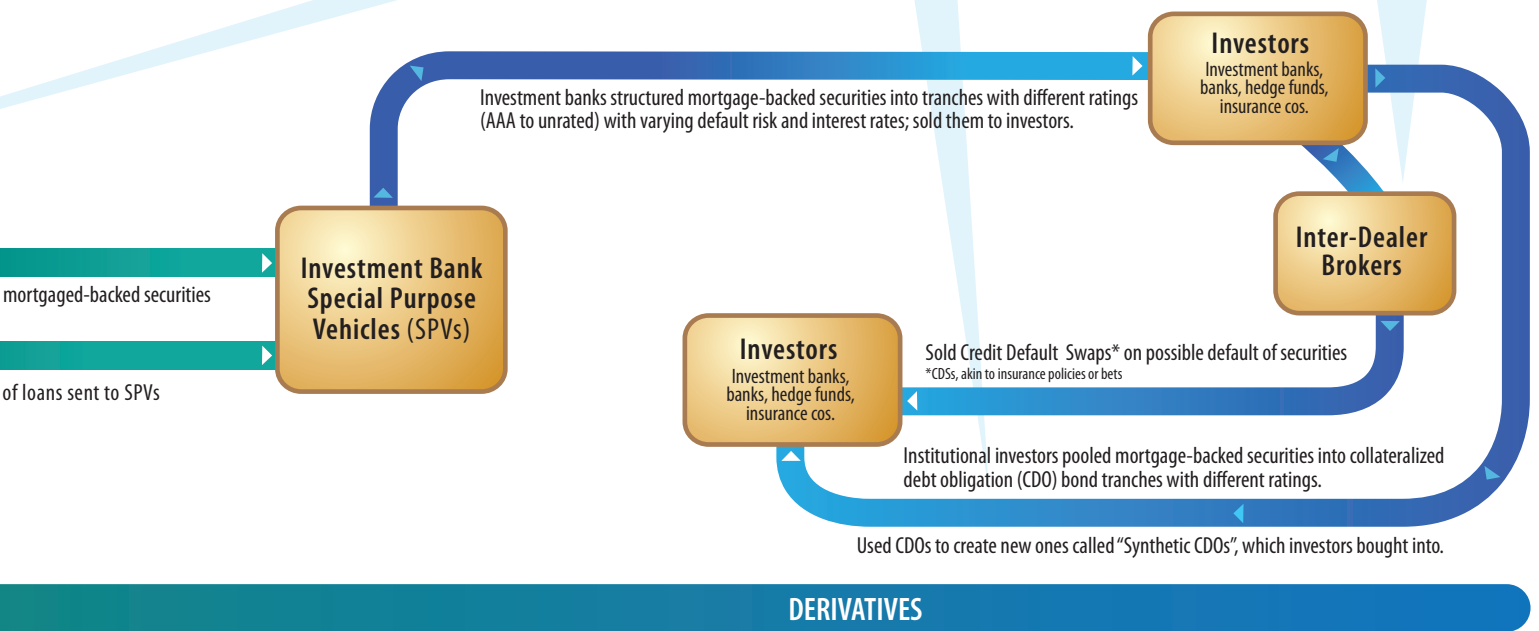
Example: June 2008—Two Bear Stearns hedge fund managers were charged with fraud for allegedly painting a rosy picture in 2007 of mortgage-backed assets that they were worried about, in order to stave off withdrawals. The funds collapsed weeks later, leading to \$1.2 billion in losses. *Source: FBI news release*

Municipalities and local authorities allege they were misled into putting money in investments unsuitable for them.

Example: September 2008—Five Wisconsin school boards sued a local investment bank and Royal Bank of Scotland after the school boards invested \$200 million in complex “synthetic collateralized debt obligations,” and lost almost all of it; school boards allegedly had been told the investments were safe. *Source: NYT*

Allegations are under investigation that “inter-dealer” securities brokers, (in concert with short sellers betting that some mortgage-backed securities would collapse) manipulated the unregulated market for credit-default swaps.

Example: October 2008—Federal and New York agencies launched probes into whether brokers, acting in concert with short sellers, reported investments in credit-default swaps that in fact were never made; the investments in question essentially were bets that certain mortgage-backed securities (that the short sellers had sold short) would collapse. *Source: NYT, WSJ*



SECTION 1782

Since then he’s won the right to examine bank records on specific accounts, or take depositions, in 15 district courts around the country. Few lawyers ever heard about these cases because the opinions were not published.

His biggest victory, he said, came in 2002, representing a faction of a Brazilian family warring with kin over disputed funds. His clients were desperate to find a document establishing their rights in an entity involved in the fight, and guessed it was filed in a bank, but didn’t know which one. Fischer issued Section 1782 subpoenas for account-opening documents to eight banks in New York, and two in Miami. Finally a Florida bank acknowledged it had a key document. “We got the smoking gun,” he said, and it was worth about \$100 million to his clients.

“It’s a very powerful section,” he said. ■

DATA ON BRIBE DEMANDS IN CHINA

YOU WILL MEET PEOPLE WITH THEIR PALMS UP

When you decide to do business in China, how many times will you be solicited for a bribe, and by whom?

An anonymous online survey by a bribe-reporting organization found that, of those business people visiting China who were asked for more than one bribe, almost 20 percent reported that they had been solicited more than 100 times.

That was just one of a number of eye-opening findings recently reported by TRACE International, a non-profit membership association that advises multinational companies and their intermediaries on avoiding overseas bribes. TRACE set up an online bribe-reporting system that allows people to file reports in different languages about bribe demands. The first report by its online system (called BRIBELine) covered data it collected in China from July 2007 to June 2008.

Eighty-five percent of the bribes were solicited by someone tied to the Chinese government, it added. That includes 11 percent requested by a Communist Party official, 11 percent by a police officer, 11 percent by someone in the court system and 52 percent by

“Many companies have a blind spot when it comes to (non-monetary) bribes like these because they have a respectable social veneer,” said TRACE President Alexandra Wrage in a statement. “What has been reported this first year is probably just the tip of the iceberg when it comes to representing the amount of bribery which occurs.”



officials from another government branch.

“These reports represent the first look at the demand side of bribery that has influenced business transactions in

China for centuries,” TRACE said in a statement.

Seventy-three percent of people who reported being asked for a bribe in China said they were asked more than once, TRACE said.

The bribe requests ranged from less than \$20 (3 percent) to more than \$500,000 (6 percent), with 22 percent of them asking for more than \$10,000. Some 12 percent asked for gifts, entertainment or hospitality, while 4 percent asked for more business, and 3 percent requested sex.

Fifty-four percent of the demands were to induce action to which the business was entitled, such as timely service or avoidance of some kind of trouble. ■

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G R O U P

James Mintz Group, Inc.
32 Avenue of the Americas
21st Floor
New York, NY 10013