

Global Perspectives and Investor Protection Challenges

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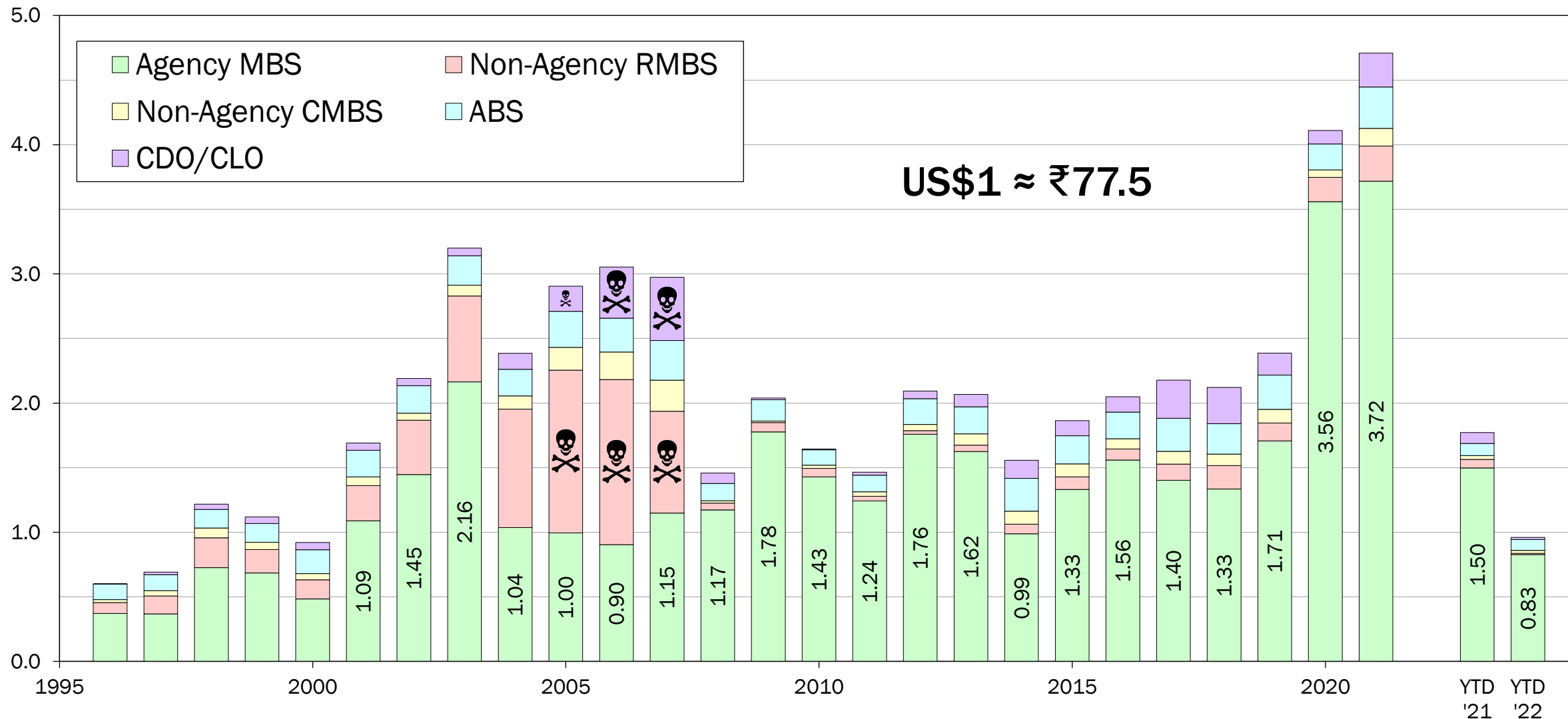
Independent Consultant

10th Indian Securitisation Summit

The LaLit, Mumbai, India, 27 May 2022

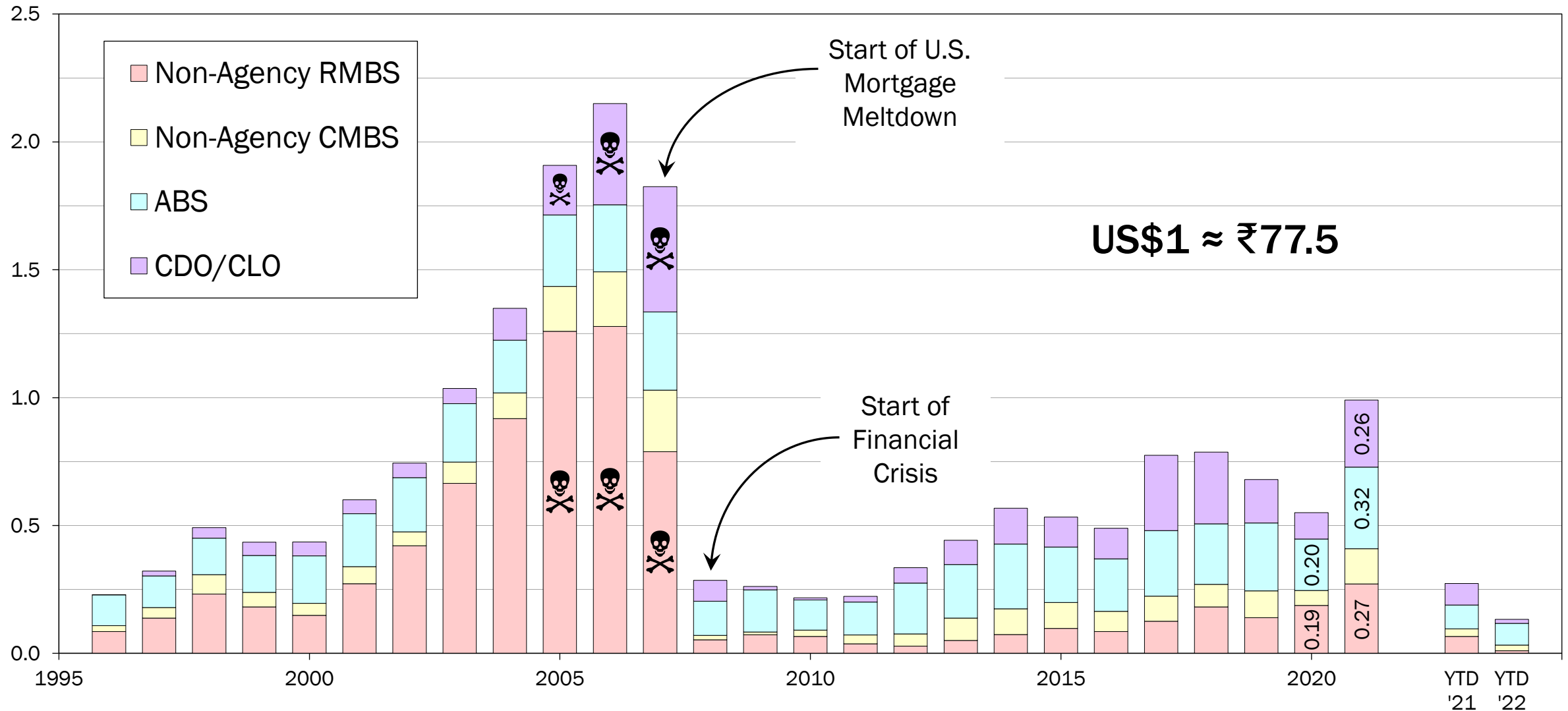
Vinod Kothari Consultants

U.S. Structured Finance Issuance Volume Incl. Agency MBS (US\$ trillions)



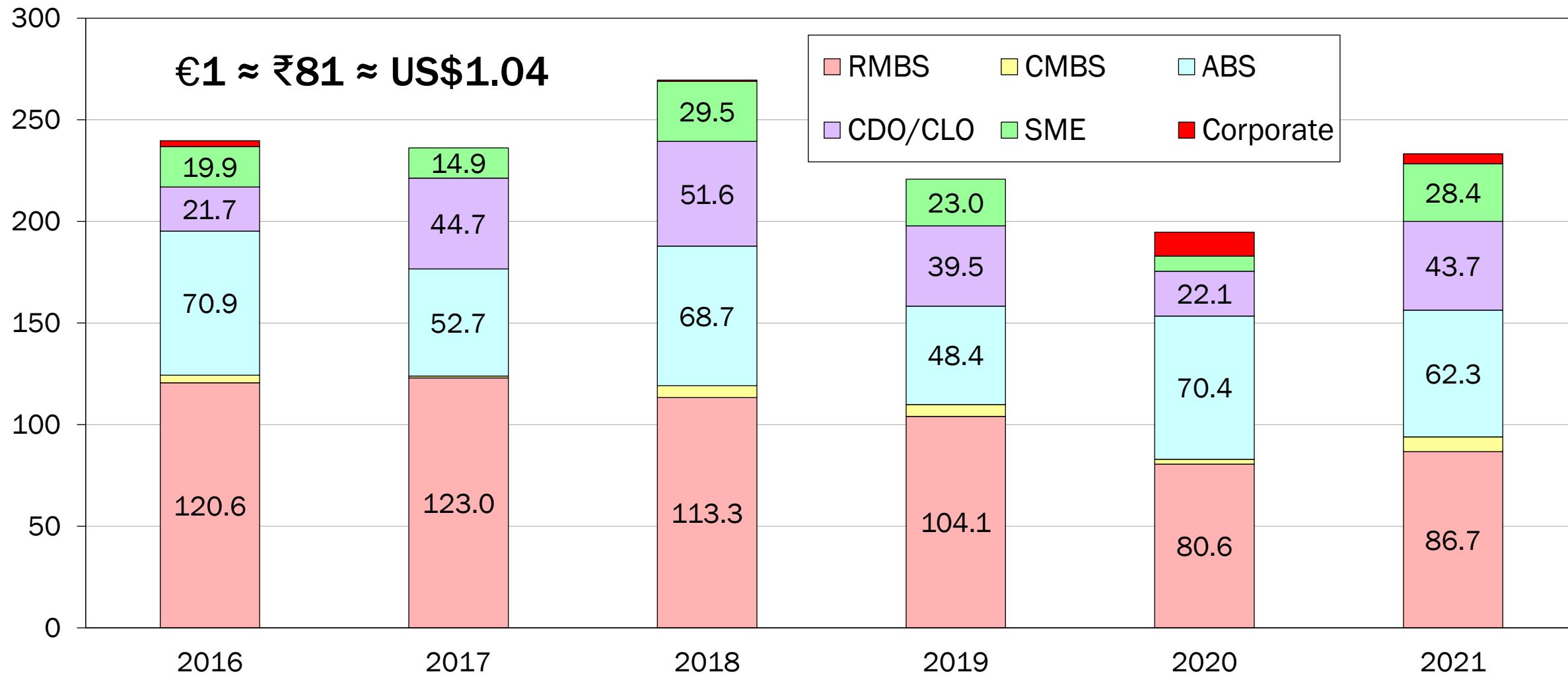
Source: SIFMA. Note: YTD is through April. ☠ symbol denotes troubled vintages.

U.S. Structured Finance Non-agency Issuance Volume (US\$ trillions)



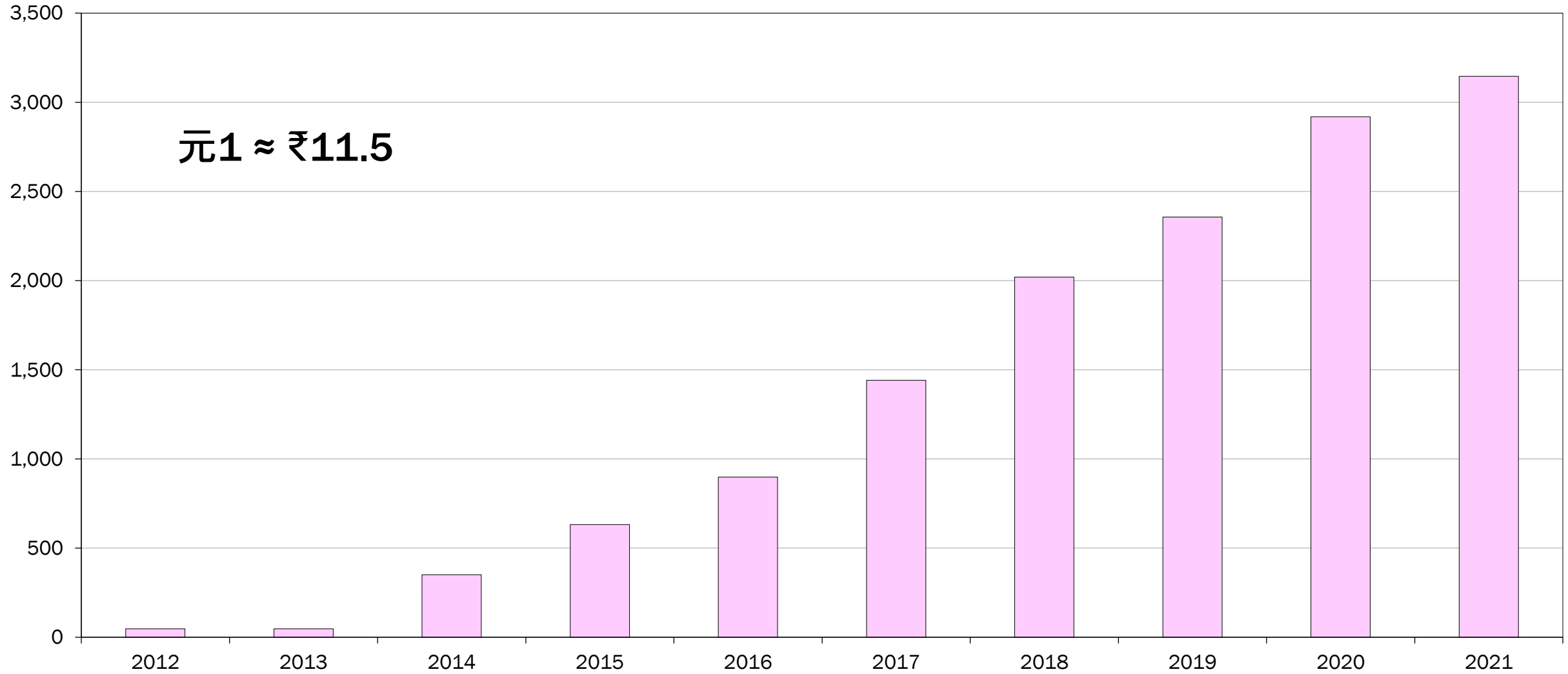
Source: SIFMA. Note: YTD is through April. ☠ symbol denotes troubled vintages.

European Securitisation Volume - Placed & Retained (€ billions)

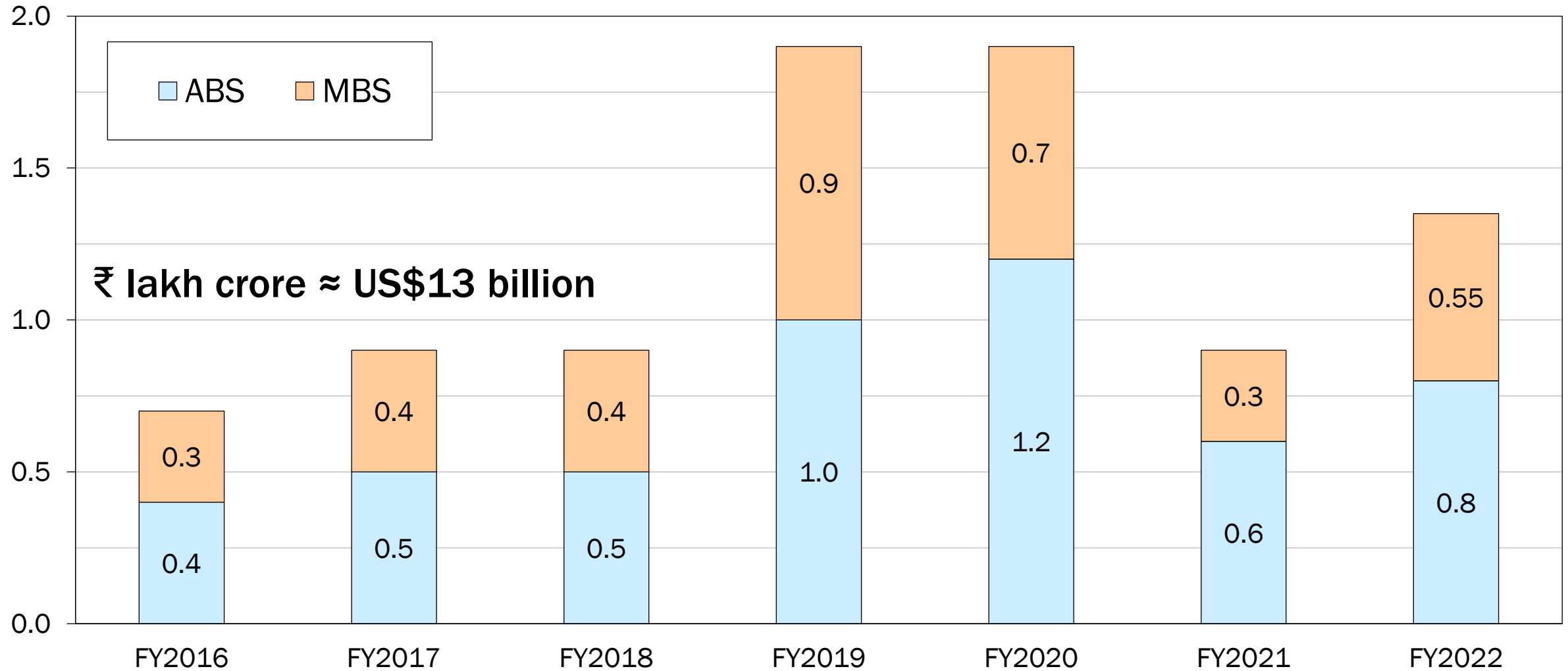


Source: AFME Annual Q4 Securitisation Data Reports.

Chinese Securitisation Issuance Volume (元 billions)



Indian Securitisation Volume (₹ lakh crore)



Source: CRISIL

Investor Protection (for when things go wrong)

- Securities laws
 - strong remedies
 - short time limits
- Contractual protections
 - limited remedies
 - contractual traps
 - examples...

U.S. Bank v. DLJ Mortgage Capital (HEAT 2007-1)

- Compel repurchase of breach loans only if the issuer knows of breaches or receives notice of them before the start of the lawsuit
- Effectively eliminates the use of litigation discovery process to identify breaches (unless plaintiff starts a new lawsuit)
- Ignores the issue of degree of certainty

U.S. Bank v. DLJ Mortgage Capital, No. 11 (N.Y. Mar. 17, 2022)

<https://nycourts.gov/ctapps/Decisions/2022/Mar22/11opn22-Decision.pdf>

Previous New York Cases Limiting Contractual Claims

- Set 6-year time limit for contractual remedies
ACE Securities Corp. v. DB Structured Products, 25 N.Y.3d 581, 36 N.E.3d 623, 15 N.Y.S.3d 716 (N.Y. 2015)
<https://govt.westlaw.com/nyofficial/Document/lf9e5ab7b102911e590d4edf60ce7d742>
- Nullified R&W about no untrue statement in sale of loans
Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, 30 N.Y.3d 572, 92 N.E.3d 743, 69 N.Y.S.3d 520 (N.Y. 2017)
<https://govt.westlaw.com/nyofficial/Document/l26b09f20df4b11e7ac2edcbde0ddb12c>
- Limited bond insurer's claim for fraudulent inducement to repurchases
Ambac Assurance v. Countrywide Home Loans, 31 N.Y.3d 569, 106 N.E.3d 1176, 81 N.Y.S.3d 816 (N.Y. 2018)
<https://govt.westlaw.com/nyofficial/Document/le51ca2707a0e11e8bc31fad2079b1d82>
- Must comply w/ conditions precedent for enforcement of repurchases
U.S. Bank Nat'l Ass'n v. DLJ Mortgage Capital, 33 N.Y.3d 72, 122 N.E.3d 40, 98 N.Y.S.3d 523 (N.Y. 2019)
<https://govt.westlaw.com/nyofficial/Document/l3b8c76c0345011e99810b61cd66fda28>
- Requirements of the repurchase process apply even if gross negligence
In re Part 60 Put-Back Litigation, 36 N.Y.3d 342, 165 N.E.3d 180, 141 N.Y.S.3d 410 (N.Y. 2020)
<https://govt.westlaw.com/nyofficial/Document/l10d29040446611eb9aff98ba9c2472b0>

LCM XXII v. Serta Simmons Bedding

- Potentially protects lenders, including CLOs, from shady “trap door” financings by borrowers on covenant lite loans
- Borrower circumvented pro rata payment requirement by amending loan agreement to favor certain lenders over others
- Trial court denied borrower’s motion to dismiss
 - Interpretation of “open market” purchases
 - Breach of implied covenant of good faith and fair dealing
- Case is moving forward

LCM XXII v. Serta Simmons Bedding, No. 21-Civ-3987 (S.D.N.Y. Mar. 29, 2022)

<https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2021cv03987/559620/34/0.pdf>

Finkelstein v. U.S. Bank

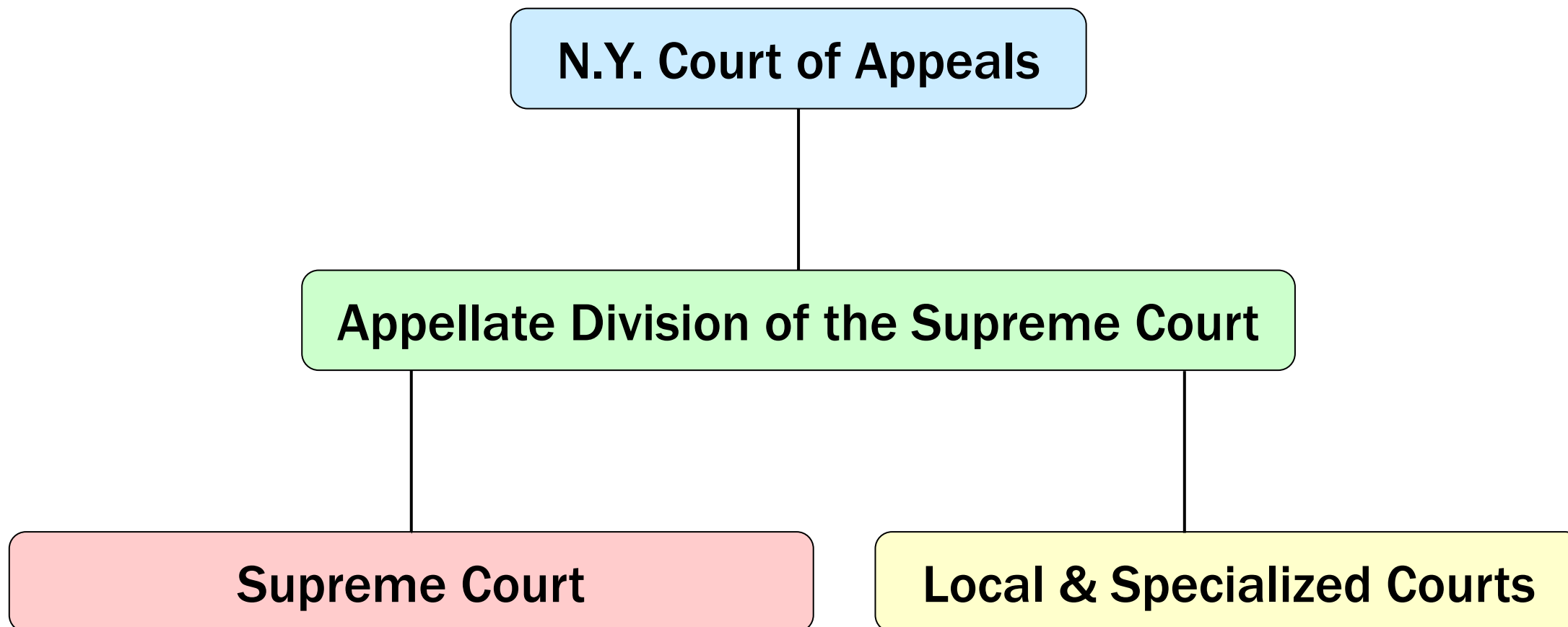
- Recognizes duty of securitization trustee to enforce obligations of other transaction parties
- Analysis of contractual language
- Focus on “belt and suspender” provisions
- Trial court denied trustee’s motion to dismiss
- Case is moving forward

Finkelstein v. U.S. Bank, Case No. 650849/2021 (N.Y. Sup. Ct. May 2, 2022)

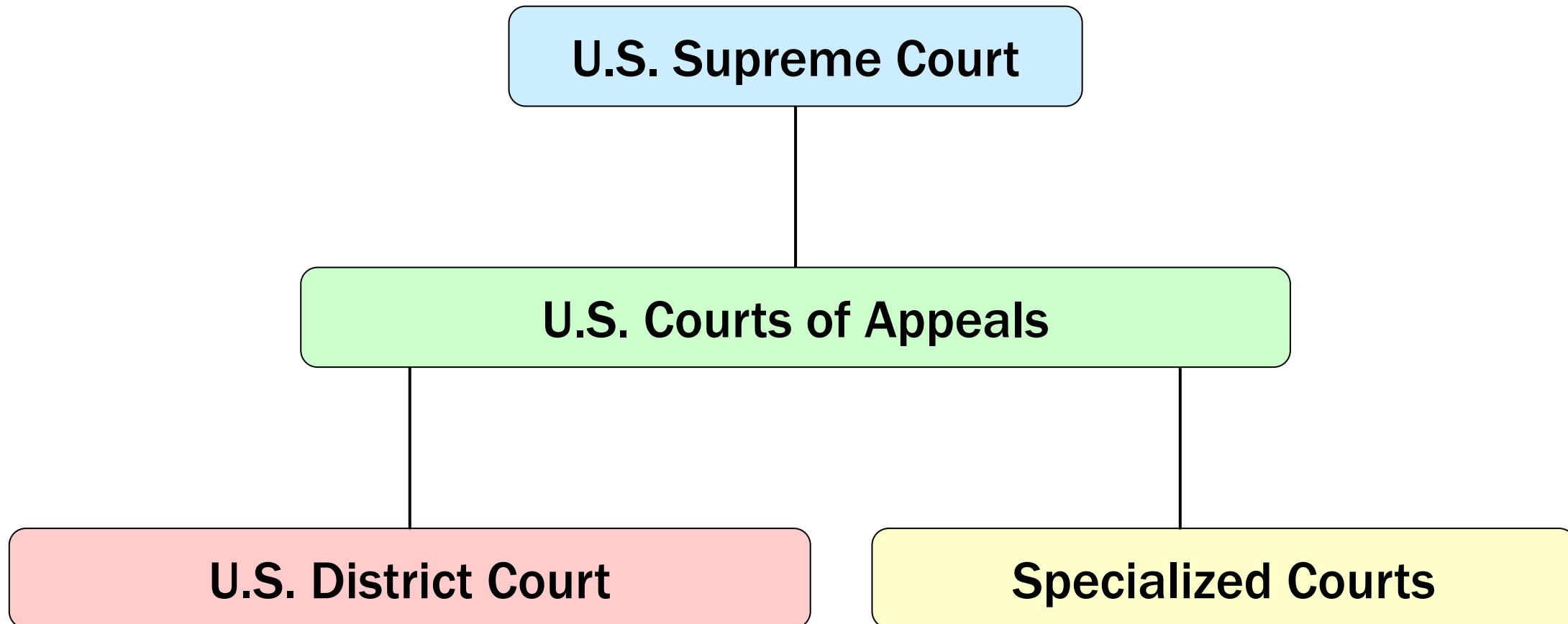
https://scholar.google.com/scholar_case?case=17290646117279024384

Appendix

New York State Court System



U.S Federal Court System



Additional Resources

- [Handbook of Mortgage-Backed Securities](#) (2016)
- OTS [Examination Handbook § 221](#) (2003) (related [materials](#))
- Federal Reserve, [Introduction to Asset Securitization](#) (1990)
- FDIC [Risk Management Manual](#) (2017) (related [materials](#))
- OCC securitization [web page](#)
- SIFMA [statistics](#)
- U.S. Senate [report and materials](#) on the financial crisis (2011)
- Financial Crisis Inquiry Commission [report and materials](#) (2009)

Additional Resources (2)

- Agarwal et al., [Determinants of Automobile Loan Default and Prepayment](#), Chicago Fed. (2008)
- Behrens, [Commercial Bank Activities in Urban Mortgage Financing](#), NBER (1952)
- Ferguson, [The Ascent of Money](#), Penguin Press (2008)
- Heitfield & Sabarwal, [What Drives Default and Prepayment on Subprime Auto Loans?](#) (2004)
- Hemple, [The Postwar Quality of State and Local Debt](#), NBER (1971)
- Hickman, [Corporate Bond Quality and Investor Experience](#), NBER (1958)

Additional Resources (3)

- Holthausen et al., [The Volume of Consumer Instalment Credit, 1929-38](#), NBER (1940)
- Moore & Klein, [The Quality of Consumer Instalment Credit](#), NBER (1967)
- Olney, [Spendthrift, or Sophisticated Borrower?: Institutional Response to the Twentieth Century Evolution of Consumer Credit](#), working paper (2002)
- Saulnier, [Urban Mortgage Lending by Life Insurance Companies](#), NBER (1950)
- Shay, [New Automobile Finance Rates, 1924-62](#), NBER (1963)

Additional Resources (4)

- Sullivan, [Economic Factors Associated with Delinquency Rates on Consumer Instalment Debt](#), working paper (1987)
- Wheaton et al., [100 Years of Commercial Real Estate Prices in Manhattan](#) (2007)
- [S&P-DOJ Settlement](#) (2015) ([complaint](#) 2013) ([order](#) 2013)
- [Moody's-DOJ Settlement](#) (2017)
- [Assured Guar. Mun. Corp. v. Flagstar Bank](#) (S.D.N.Y. 2013)
- [FHFA v. Nomura](#) (S.D.N.Y. 2015)
- [MBIA v. Credit Suisse](#) (NY Sup. Ct 2020)



Mark Adelson is an independent consultant, the editor of [*The Journal of Structured Finance*](#), and the content director at [Portfolio Management Research](#) (f/k/a Institutional Investor Journals). He was chief strategy officer of The BondFactor Company LLC from November 2012 to April 2016. Adelson served as S&P's chief credit officer from May 2008 until December 2011 and then held a research position at the company through August 2012. As S&P's chief credit officer he supervised the overhaul of the company's rating criteria in the wake of the financial crisis. He previously worked at Nomura Securities and Moody's. He started his career in the MBS department of Thacher Proffitt & Wood. He is a frequent author and speaker on securitization topics, with particular emphasis on MBS and CDOs/CLOs, and he is a member of the [Structured Finance Committee](#) of the NYC Bar Association.