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Maryland State Counsel, Stewart Title Guaranty Company

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RECENT DEVELOPMENTS IN FORECLOSURES - CLOUDY TITLES: A MESS OR OPPORTUNITY

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November 18, 2010

I. Current and recent litigation:

A. Current: Class actions

1.) Jones v. HSBC, U S DISTRICT COURT OF MARYLAND Case 8:09-cv-02904

2.) Stewart v. Bierman, U S DISTRICT COURT OF MARYLAND Case 8:10-cv-02822

B. Recent:

1.) Lilly v. Bounassissi, No. 1986/08 (Md. May 14, 2010) (unreported)

2.) Mirjafari v. Cohn, 412 Md. 475 (2010)

II. Recent rules changes: effective 10/20/10

III. 2010 legislation:

A.) SB 562 Real Property - Mortgages and Deeds of Trust - Authority to Exercise a Power of Sale

B.) SB 654 Real Property - Tenants in Foreclosure - Conforming to Federal Law

IV. Proposed Legislation: Protection of Purchasers through Foreclosure Act

V. Maryland's New Foreclosure Timeline

VI. Indemnity deeds of trust: recordation and transfer tax implications following foreclosure

VII. Title insurance commitments/binders: What you will encounter.

A.) ALTA Indemnity forms

IN THE UNITED STATES DITRICT COURT
FOR THE DISTRICY OF MARYLAND
(Greenbelt Division)

REGINALD JONES, *

Plaintiff, *

v. * Civil No. 09-2904 RWT

HSBC Bank USA, N.A., et al *

PLAINTIFFS' FIRST AMENDMENT TO
CLASS ACTION COMPLAINT AND JURY DEMAND

COMES NOW, Plaintiff, Reginald Jones (hereinafter "Plaintiff"), by and through his attorneys Jon D. Pels, Esq., Lawrence J. Anderson, Esq., Justin M. Reiner, Esq. and Jennifer Schiffer, Esq., and Pels Anderson, LLC, and all others similarly situated, and makes the following Complaint against Defendants HSBC Bank USA, N.A., as Trustee, (hereinafter "HSBC"), Wells Fargo Bank, N.A. (hereinafter "WELLS FARGO") and Buonassissi, Henning & Lash, P.C. (hereinafter "BH&L")[1] and for his Complaint states as set forth below.

INTRODUCTORY STATEMENT

1. Plaintiff and each putative member of the class herein had their due process violated by the submission of fraudulent Affidavits related to foreclosure proceedings which do not comport with Maryland procedural rules or fundamental fairness. These Affidavits were and are materially false and at best create a significant cloud on title and, more than likely, render the transactions legally defective.

[1] Plaintiff is thus dismissing without prejudice all other Defendants previously identified by prior counsel,

67. Real Prop., §§ 7-105.1 and 7-105.2 mandate that certain notices, documents, statements, and affidavits be provided to mortgagors, homeowners, and third parties during the foreclosure process. Additionally, Real Prop., §§ 7-105.1 and 7-105.2 mandate that certain of these notices, documents, statements, and affidavits be filed with the court in which the foreclosure is to be filed or has been filed.

68. Each requirement of §§ 7-105.1 and 7-105.2 is a statutory condition precedent to docketing a foreclosure, conducting a foreclosure sale, or ratifying a foreclosure sale.

69. Defendants failed to comply with the provisions of Real Prop., §§ 7-105.1 and 7-105.2 in that they knowingly and willfully filed false, fabricated, and counterfeit documents in support of the Order to Docket in every, or virtually every, foreclosure docketed as defined herein.

70. Each such false, fabricated, or counterfeit affidavit was filed in lieu of an affidavit or statement required as a condition precedent.

71. Each such false, fabricated, or counterfeit affidavit or statement is, at best, a nullity and, as a condition precedent, render any foreclosure sale void.

72. In each foreclosure case, Defendants obtained a ratification of the sale by false, fabricated, or counterfeit affidavits in addition to the false, fabricated, or counterfeit affidavits filed with the Order to Docket.

73. As a direct result of the acts of Defendants Maryland courts ratified the foreclosure sale of Stewart's Property and ratified the foreclosure sales of the homes of each member of the § 7-105.1 Sub-Class.

WHEREFORE, Plaintiffs and each member of the Class demand judgment against Defendants, jointly and severally, for:

[a] Certify this civil action as a class action with Reginald Jones as the Class representatives and their attorneys; with Jon D. Pels, Lawrence J Anderson and Pels Anderson, LLC as counsel on behalf of the Class;

[b] A declaration that the actions of Defendant constituted a deceptive act or practice (either negligently or intentionally) and actual damages for each Plaintiff and each member of the Sub-Class (estimated to be not less than $100,000,000.00); an Order declaring that that any such borrower is released from his or her obligation as a result thereof and/or at at a minimum be placed to the *status quo* at which they were when the false Affidavits were submitted

[c] The costs of this civil action; an award of equitable relief to Plaintiff and all class members, including an order requiring Defendant to render to class members: (i) all damages resulting from the Defendant's malfeasance, together with actual damages to the respective consumers, and (ii) other equitable relief to which Plaintiff and the class members may be shown to be entitled; an award to Plaintiff and the class members for all other remedies that equitably and reasonably flow from Defendant's breaches of statutory, common law and contractual obligations including an Order enjoining Defendant from utilizing false Affidavits and declaring that any such borrower is released from his or her obligation as a result thereof.

[d] Other relief as the Court may find necessary and appropriate.

SEVENTH CAUSE OF ACTION

All Defendants

COMMON LAW FRAUD

91. The allegations of the preceding paragraphs are incorporated herein by reference as if fully set forth.

92. Defendant(s) actions and conduct was characterized by evil motive, intent to injure, ill will, or actual malice.

93. Defendant(s) made material misrepresentation as stated herein and the facts that Defendants concealed and the misrepresentations that were made were material to the transaction at hand. These omissions and misrepresentations were made with the

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

(GREENBELT DIVISION)

MARJORIE STEWART 19032 Canadian Court Montgomery Village, Maryland 20886 *and* **JAY NACHBAR** 9958 Forest View Place Montgomery Village, Maryland 20886 *and* **GERALD A. LEMBACH** and his wife, **DEBBIE L. LEMBACH** 220 12th Street Pasadena, Maryland 21122 (Each Plaintiff individually and on behalf of all Maryland residents similarly situated.) **Plaintiffs** ***v.*** **HOWARD NORMAN BIERMAN** 702 North Irving Street Alexandria, Virginia 22201-2006 *and* **GEORGE JACOB GEESING** 6400 East Halbert Road Bethesda, Maryland 20817-5423 *and*	Civil Case Number: *Complaint (Class Action) and Demand for Jury Trial*

Simply put, the Defendants adopted a "robo-signer" methodology and their law firm staff became "robo-notaries." When that system failed to produce enough profits for the Defendants, the Defendants required their employees to fabricate notaries' signatures and use notary seals. In other words, the Defendants' assembly line foreclosure prosecution became to foreclosure misconduct what Henry Ford was to automobile production.

4. The Defendants were so successful in their conduct related to the court filings to initiate the foreclosures that they extended it to the execution of trustee deeds. The Defendants, in their roles as trustees and grantors on post-foreclosure deeds are required to execute each such deed. The Defendants had their "signatures" fabricated by having their clerical employees sign the Defendants' names without the legal authority to do so. At some point, the fabrication of three or four trustees' signatures on each deed became too cumbersome for the Defendants' desire for greater production and even greater profits. The Defendants switched to appointments of substitute trustees that would allow the fabrication of only one trustees' signature on each trustees' deed. In doing so, the Defendants created, intentionally or not, an additional and significant defect to the foreclosure process because each such fabrication of a trustees' deed renders the deed void *ab initio* and is a cloud on the title(s) that flowed from the instrument. The Plaintiffs estimate that there are substantially more than 4,000 Maryland residents who believe that they hold valid title to their homes; however, their chain of title is, at best, clouded and, most likely, fatally flawed.

127. Each requirement of §§ 7-105.1 and 7-105.2 is a statutory condition precedent to docketing a foreclosure, conducting a foreclosure sale, or ratifying a foreclosure sale.

128. Defendants Bierman, Geesing, and Ward failed to comply with the provisions of Real Prop., §§ 7-105.1 and 7-105.2 in that they knowingly and willfully filed false, fabricated, and counterfeit documents in support of the Order to Docket in every, or virtually every, foreclosure docketed from 4 April 2008 through 31 May 2010.

129. Each such false, fabricated, or counterfeit affidavit was filed in lieu of an affidavit or statement required as a condition precedent.

130. Each such false, fabricated, or counterfeit affidavit or statement is, at best, a nullity and, as a condition precedent, renders any foreclosure sale void.

131. In each foreclosure case, Defendants Bierman, Geesing, and Ward obtained a ratification of the sale by false, fabricated, or counterfeit affidavits in addition to the false, fabricated, or counterfeit affidavits filed with the Order to Docket.

132. As a direct result of the acts of Bierman, Geesing, and Ward, Maryland courts ratified the foreclosure sale of Stewart's Property and ratified the foreclosure sales of the homes of each member of the § 7-105.1 Sub-Class.

133. Each member of the § 7-105.1 Sub-Class suffered damages as a direct result of the failure of Defendants Bierman, Geesing, and Ward to comply with the provisions of Real Prop., §§ 7-105.1 and 7-105.2 and their implementing Rules.

162. The Plaintiffs and Class members adopt by reference the allegations contained in all previous paragraphs of this Complaint with the same effect as if herein fully set forth.

163. This is an action for declaratory judgment pursuant to § 3-406 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, for the purpose of determining questions of actual controversy between the parties.

164. The Defendants insist that their conduct in prosecuting foreclosures against homeowners who are owner-occupants of residential real property is lawful and in compliance with Maryland statutes and Maryland Rules; however, the Plaintiffs and Class members insist that the Defendants' conduct is illegal, in contravention of Maryland statutes, and in contravention of Maryland Rules.

WHEREFORE, Plaintiffs and each member of the Class pray that the Court determine the rights of the Plaintiffs and Class members and issue an Order of the Court declaring:

[1] Certify this civil action as a class action with Stewart, Nachbar, and the Lembachs, as the Class representatives and their attorneys; Solomon, Bascietto, Borison, and Morin; as counsel on behalf of the Class;

[2] An affidavit executed by any person other than the affiant is a nullity.

[3] A document or instrument allegedly executed by one person but actually executed by another person and certified by a notary who knows that the

person executing is not the person indicated in the document or instrument, is a fraudulent document or instrument and is void.

[4] An Order to Docket a foreclosure may be executed only by a trustee or an attorney.

[5] An Order to Docket executed by other than a trustee or attorney is void and confers no jurisdiction on the court in the case in which the Order to Docket is filed.

[6] Since 4 April 2008, no foreclosure docketed in Maryland may proceed unless and until each of the documents required by Real Prop., § 7-105.1(d) is filed with the court and served on the mortgagor.

[7] Since 4 April 2008, no foreclosure sale may proceed unless and until 45 days after each of the documents required by Real Prop., § 7-105.1(d) is filed with the court and served on the mortgagor.

[8] No affidavit required by Real Prop., § 7-105.1 is valid if such affidavit is not executed by the affiant. A fabricated or fraudulent affidavit does not meet the requirements of § 7-105.1 and such a document fails as a mandatory condition precedent to a foreclosure sale.

[9] Since 4 April 2008, no foreclosure docketed in Maryland may proceed unless and until each of the documents required by Real Prop., § 7-105.2(c) have been have been sent as required by § 7-105.2(c) and the trustees have complied with § 7-105.2(c)(3).

[10] No foreclosure sale may be ratified until and unless the person authorized to make the sale complies with Rule 14-305.

[11] Any affidavit that appears to bear the signature of the affiant but, in fact is a fabricated document and, when such a document is filed with a court to acquire the jurisdiction of the court, is extrinsic fraud rather than intrinsic fraud.

[12] A trustees' deed, *i.e.*, a deed purportedly executed by a trustee as grantor subsequent to a foreclosure sale and the ratification of the sale by the court, actually executed by a person(s) other than a trustee is void *ab initio* and transfers no interest in real property.

[13] The costs of this civil action; and

[14] Such other relief as the Court may find necessary and appropriate.

SIXTH CAUSE OF ACTION

Respondeat Superior

Plaintiffs and the Class sue Defendant BGWW and state:

165. The Plaintiffs and Class members adopt by reference the allegations contained in all previous paragraphs of this Complaint with the same effect as if herein fully set forth.

166. On all dates relevant to this civil action, Bierman, Geesing, and Ward were the principals of, employees of, or agents of BGWW.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1986

September Term, 2008

PEGGY LILLY

v.

JOSEPH BUONASSISSI, ET AL.

Eyler, James R.,
Woodward,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: MAY 14, 2010

On appeal, appellant presents one question for our review, which we have rephrased: Did the circuit court err in denying appellant's motion to vacate the ratification of the foreclosure sale of appellant's property? For the reasons set forth herein, we shall affirm the judgment of the circuit court.

BACKGROUND

The present dispute arises out of a foreclosure sale of residential property owned by Peggy Lilly, appellant, located at 3309 Shannon Drive, Baltimore, Maryland ("the property"). On August 14, 2007, appellees, Joseph Buonassissi, II, Richard E. Henning, Jr., Richard A. Lash, Keith M. Yacko, and Brian S. McNair, substitute trustees on behalf of Deutsche Bank National Trust Company ("Deutsche Bank") as Trustee for Morgan Stanley Loan Trust 2006-HE4, initiated a foreclosure action against the property by filing an Order to Docket suit in the Circuit Court for Baltimore City. On September 11, 2007, Deutsche Bank purchased the property at a Trustee's sale for $140,600.00. On September 26, 2007, in accordance with Maryland Rule 14-305(a), appellees filed a report of sale with the requisite affidavit attached. Notice of the sale was issued on October 1, 2007, giving appellant until October 31, 2007, to file exceptions to the ratification of the sale. When no exceptions were filed, the court ratified the sale in an order entered on November 7, 2007.

Over four months later, on March 12, 2008, appellant filed a Motion to Vacate Ratification of Sale and Dismiss Foreclosure Proceedings ("motion to vacate"). In her motion to vacate, appellant argued that Deutsche Bank was not "the real party of interest based on the records available," and thus appellees "engaged in constructive fraud" by

instituting the foreclosure action. Appellant also contended that appellees lacked standing to institute the foreclosure action. Appellees filed an opposition to the motion to vacate on April 15, 2008. The circuit court denied appellant's motion to vacate in an order dated June 20, 2008. The order stated in relevant part:

> **ORDERED** that the motion be, and the same hereby is, **DENIED** on the grounds that [appellant's] claims are untimely. [Appellant] failed to file a motion to stay foreclosure pursuant to Maryland Rule 14-209(b) prior to the sale on September 11, 2007 or exceptions to sale prior to October 31, 2007. **Moreover, this motion was not filed during the 30 days after entry of the judgment of ratification on November 7, 2007, and while [appellant] has claimed "constructive fraud," this is insufficient to show the "fraud, mistake or irregularity" which is necessary for the Court to act after a judgment becomes enrolled. Maryland Rule 2-535(a) and (b).** Reopening a judgment on the grounds of "constructive fraud" is limited to tax foreclosures within one year of the date of judgment. See Maryland Tax-Property Code Ann. § 14-845(a). Otherwise, "extrinsic" fraud must be shown. Jones v. Rosenberg, 178 Md. App. 54 (2008).

(Emphasis added).

One week later, on June 27, 2008, appellant filed a Motion to Alter or Amend Court Decision and for Reconsideration ("motion to alter or amend"). In her motion to alter or amend, appellant argued that the "inability to establish a verifiable chain of title or determine the true parties of interest" qualified as "extrinsic fraud" within the meaning of Rule 2-535(b), and concluded that the court should reopen its foreclosure judgment. In an order dated October 10, 2008, the circuit court denied appellant's motion to alter or amend.

Appellant noted a timely appeal on November 3, 2008.

DISCUSSION

Plaintiffs are afforded two separate opportunities under the Maryland Rules to challenge the legality of a foreclosure sale. *Manigan v. Burson*, 160 Md. App. 114, 119 (2004). Prior to sale, plaintiffs may move to enjoin the foreclosure sale under Rule 14-209(b).[1] *Id.* After the sale but before ratification, plaintiffs have the opportunity to file exceptions under Rule 14-305. *Id.* In the instant case, appellant did neither, and the circuit court ratified the foreclosure sale of the property. Appellant then did not file her motion to vacate until months after the 30 day period following the entry of the order of ratification.

"'[T]he law is firmly established in Maryland that the final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale.'" *Id.* at 120 (quoting *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511 (1969)). Consequently, to attack the legality of a foreclosure in a collateral proceeding, Rule 2-535(b) would apply. *Manigan*, 160 Md. App. at 120. "That is, '[o]n motion of any party *filed at any time*, the court may exercise revisory power and control over the judgment in case of *fraud, mistake, or irregularity*.'" *Id.* (emphasis in original) (quoting Rule 2-535(b)).

"To establish fraud under Rule 2-535(b), a movant must show extrinsic fraud, not intrinsic fraud." *Jones v. Rosenberg*, 178 Md. App. 54, 72, *cert. denied*, 405 Md. 64 (2008).

"[A]n enrolled decree will not be vacated even though obtained

---

[1] "Chapter 200 of Title 14 of the Maryland rules governing foreclosures was substantially amended, effective May 1, 2009." *Bierman v. Hunter*, 190 Md. App. 250, 259 n.2 (2010).

> by the use of forged documents, perjured testimony, or any other frauds which are 'intrinsic' to the trial of the case itself. Underlying this long settled rule is the principle that, once parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation. . . . This policy favoring finality and conclusiveness can be outweighed only by a showing 'that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.'"

Manigan, 160 Md. App. at 120-21 (alterations in original) (quoting *Billingsley v. Lawson*, 43 Md. App. 713, 719 (1979) (citation omitted)). In other words, "[f]raud is extrinsic when 'it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud.'" *Jones*, 178 Md. App. at 73 (quoting *Manigan*, 160 Md. App. at 121).

Irregularity "has been consistently defined as the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not be to be done." *Manigan*, 160 Md. App. at 121 (internal quotations omitted). Thus "irregularity, in the contemplation of the Rule, usually means irregularity of process or procedure . . ., and not an error, which in legal parlance generally connotes a departure from the truth or accuracy of which a defendant had notice and could have challenged." *Id.* (internal quotations omitted) (alterations in original).

Finally, when a judgment is set aside on the basis of "mistake," "the mistake must

necessarily be confined to those instances where there is a jurisdictional mistake involved." *Bernstein v. Kapneck*, 46 Md. App. 231, 239 (1980), *aff'd*, 290 Md. 452 (1981). For instance, "where the court has no power to enter the judgment. The typical kind of mistake occurs when a judgment has been entered in the absence of valid service of process; hence, the court never obtains personal jurisdiction over a party." *Leadroot v. Leadroot*, 147 Md. App. 672, 684 (2002) (citation and internal quotations omitted), *cert. denied*, 373 Md. 407 (2003).

In denying appellant's motion to vacate in the case *sub judice*, the circuit court observed, *inter alia*, that appellant had failed to file the motion to vacate within 30 days after the entry of the order ratifying the sale. The court then found that appellant failed to show "the 'fraud, mistake or irregularity' which is necessary for the Court to act after a judgment becomes enrolled."

On appeal, appellant addresses only the merits of the foreclosure action, arguing that appellees lacked standing to bring the action. According to appellant, appellees failed to meet their burden of demonstrating that they were "the real party in interest," and as a result, there was no "actual, real and justiciable interest susceptible of protection through litigation." Appellant never addresses the issue of whether there was fraud, mistake, or irregularity within the contemplation of Rule 2-535(b).

At oral argument before this Court, appellant's counsel acknowledged that he could not locate any authority in Maryland law for the proposition that an enrolled judgment can

be vacated, absent a finding of fraud, mistake or irregularity under Rule 2-535(b), where the plaintiff, in whose favor the judgment was entered, was not the "real party in interest." Our review of the law also fails to reveal any such authority. *Cf. Pressman v. Mayor & City Council of Balt.*, 222 Md. 330, 334 (1960) ("[W]e think that the appellees' objection as to the [real] interest of most of the opposing parties [to challenge the rezoning of certain parcels], made as it is for the first time in this Court, comes too late to warrant a dismissal of the appeal as to them. (It does not raise any question of jurisdiction to hear and determine the case.)"). Consequently, appellant presents no basis for overturning the decision of the circuit court to deny appellant's motion to vacate.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; APPELLANT TO PAY COSTS.

Circuit Court for Harford County
Case No. 12-C-07-000170

IN THE COURT OF APPEALS

OF MARYLAND

No. 38

September Term, 2009

SEYED MEHRAN MIRJAFARI, et al.

v.

EDWARD S. COHN, et al.

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Adkins
Barbera,

JJ.

Opinion by Harrell, J.
Murphy and Adkins, JJ., Concur.
Bell, C.J., joins judgment only.

Filed: February 16, 2010

We have stated previously that "[b]ona fide purchaser status extends only to those purchasers without notice of defects in title, or in this case, defects *in the foreclosure sale*." *Pizza*, 345 Md. at 674, 694 A.2d at 98 (emphasis added); *see also Baltrotsky*, 395 Md. at 474-75, 910 A.2d at 1093. Likewise, in *Poku*, we noted that "[a]t present, title in the *bona fide* purchaser *at a foreclosure sale* at least is protected partially by the necessity for the filing of a supersedeas bond in order for a mortgagor to stay the proceedings subsequent to the ratification of a foreclosure sale." *Poku*, 403 Md. at 54 n.7, 939 A.2d at 188-89 (emphasis added). In addition, in describing the exceptions to the *supersedeas* bond requirement, we have noted that the exceptions concern actions or statuses of the parties *at the foreclosure sale*. *Baltrotsky*, 395 Md. at 475, 910 A.2d at 1093; *Pizza*, 345 Md. at 674, 694 A.2d at 98. Thus, as noted by the Court of Special Appeals here, *see Mirjafari*, 183 Md. App. at 709, 963 A.2d at 252, our prior decisions imply that the status of a foreclosure purchaser, as *bona fide* (or not) based on knowledge of defects in the foreclosure sale, is determined as of the time of the successful foreclosure sale, not at the time of the exceptions hearing or ratification by the circuit court, or when legal title passes to the foreclosure purchaser upon payment of the full purchase price. As long as the foreclosure purchaser is unaware of defects in the foreclosure proceedings at the time of its successful bid and provides valuable consideration at that time, it is protected as a *bona fide* purchaser. Despite the Mirjafaris' contentions to the contrary, a foreclosure purchaser's status as *bona fide* does not depend necessarily (and especially in the present case) on the timing of payment of the balance of the purchase

price.[11] *See Sawyer*, 206 Md. at 89, 110 A.2d at 521 (noting that the "mere fact that the deed was not executed until after the appeal was taken would not show collusion, or reflect upon the *bona fide* character of [the foreclosure purchaser's] purchase").

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[11]In this regard, the Mirjafaris rely heavily on *Westpark, Inc. v. Seaton Land Co.*, 225 Md. 433, 450, 171 A.2d 736, 743 (1961), in which we stated that "one who purchases the equitable title to real estate is not protected as a bona fide purchaser where he receives notice of a prior equity before he acquires legal title . . . or where he receives notice before he has paid all or substantially all of the purchase price." *Id.* at 450, 171 A.2d at 743 (internal citations omitted). The Mirjafaris fail to acknowledge, however, that *Westpark* did not involve a judicial sale, but rather the competing interests in a conventional contract sale between a contract purchaser and a party with a prior right of first refusal, of which the purchaser knew (or its agent should have known), prior to signing the contract. *Westpark* is inapposite to the present case.

In addition, the Mirjafaris grasp for support in *Grayson v. Buffington*, 233 Md. 340, 196 A.2d 893 (1964), wherein we held that the defendants, purchasers of certain real property, did not enjoy *bona fide* purchaser status because they possessed actual knowledge of a prior conveyance "before they accepted a conveyance of the property or paid the purchase price." *Id.* at 344, 196 A.2d at 896. In that case, "[a]t the time of settlement, no written contract had been entered into by [the parties to the sale], so that either side was at liberty not to consummate the sale." *Id.* at 342, 196 A.2d at 895. In the present case, however, at the time of the foreclosure sale and prior to its participation at the exceptions hearings wherein it acquired knowledge of the alleged defects in the foreclosure proceedings, JSG submitted an $8,000 deposit and became obligated to pay the remainder of the purchase price. Thus, *Grayson* is distinguishable.

Finally, the Mirjafaris direct our attention to *Empire Properties, LLC v. Hardy*, 386 Md. 628, 873 A.2d 1187 (2005), and *Legacy Funding LLC v. Cohn*, 396 Md. 511, 914 A.2d 760 (2007), in which we discussed the foreclosure sale purchaser's right to possession of the property prior to the time he or she pays the full purchase price, to support their argument that payment of the full purchase price also is the proper time to determine *bona fide* purchaser status. Neither case suggests such a proposition as the Mirjafaris' contend, and we decline to broaden significantly their scope from addressing entitlement of a purchaser to possession of property to the proper time for determination of *bona fide* purchaser status in a foreclosure context.

Adopting the Mirjafaris' contention that *bona fide* purchaser status, for determination of whether an appeal bond or security is required to stay the effect of the judgment ratifying the report of sale, is determined at the time of settlement would undercut the purpose of the *supersedeas* bond requirement, namely, to encourage bidding at foreclosure sales. *See Poku*, 403 Md. at 54 n.7, 939 A.2d at 188-89; *Baltrotsky*, 395 Md. at 475-76, 910 A.2d at 1094. If a bidder could bid successfully at a foreclosure sale and submit oftentimes a relatively significant deposit, only to lose their *bona fide* purchaser status because the mortgagor files exceptions to the foreclosure sale prior to settlement, bidding would be discouraged significantly. *See Poku*, 403 Md. at 54 n.7, 939 A.2d at 188-89; *Baltrotsky*, 395 Md. at 475-76, 910 A.2d at 1094. In addition, bidders would be hesitant understandably to participate in exceptions hearings and protect their bids if newly alleged flaws in the foreclosure process (or subsequent flaws in the judicial process) adduced in the hearings could strip away their *bona fide* purchaser status. *See Poku*, 403 Md. at 54 n.7, 939 A.2d at 188-89; *Baltrotsky*, 395 Md. at 475-76, 910 A.2d at 1094. Thus, in order to further the policy behind the *supersedeas* bond stay requirement to promote bids at foreclosure sales and protect bidders from prolonged litigation at their risk and expense, we hold that *bona fide* purchaser status for this purpose is determined based on what is known, or reasonably knowable, by the bidder as of the date of the successful bid at the foreclosure sale.

Any knowledge of relevant facts on the part of JSG as of the time of its successful bid,

and the giving of valuable consideration, namely, the $8000 deposit,[12] could have been proved at the exceptions hearings. Because nothing was found by the Circuit Court to disqualify JSG,[13] it is a *bona fide* purchaser for purposes of determining applicability of the *supersedeas* bond requirement to stay the ratification of the foreclosure sale. As such, under the *Poku*, *Baltrotsky*, and *Pizza* line of cases, the Mirjafaris were required under Rules 8-422 and 8-423 to post a *supersedeas* bond in order to secure their right to pursue appellate review.[14] Their failure to do so rendered their appeal moot.

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[12]The Mirjafaris argue that JSG cannot be a *bona fide* purchaser because its failure to pay the purchase price in full within ten days after ratification of the sale violated the advertisement's terms of sale. The advertisement stated that "[i]f the purchaser . . . fails to go to settlement within ten (10) days of ratification of the sale, the Substitute Trustee *may*, in addition to any other available legal remedies, declare the entire deposit forfeited and resell the property at the risk and cost of the defaulting purchaser." (Emphasis added). Thus, assuming the advertisement's terms of sale were binding on JSG and that violation of such would constitute grounds for reversing ratification of the sale (an issue on which we do not pass judgment today), the language of the advertisement is non-compulsory, granting the Trustees the discretion to permit consummation of a sale beyond the ten day limit. As noted earlier, no claims of collusion between the Trustees and JSG are advanced before us.

[13]The Mirjafaris contend that JSG knew of the defect in the advertisement, namely, that it did not describe fully or accurately the property, before it bid on the property, relying on Gonzalez's testimony that he did not comprehend fully the nature of the property upon initial review of the advertisement and visual inspection of the property. In its oral findings of fact, however, the Circuit Court found that "there was legally sufficient notice from the notice that was published [because] [i]t gave the Deed reference, it gave the plat reference," and that the advertisement "would give any potential buyer, bidder at the auction, more than enough information to find out about the property, and as indicated, it certainly could be easily located from the ad." This finding resolves the question of whether JSG had notice of any deficiency in the advertisement as of the making of its bid, and we have been given no sufficient reason to disturb the finding.

[14]In oral argument, the Mirjafaris posed the rhetorical question of what amount of

(continued...)

IN THE COURT OF APPEALS

OF MARYLAND

No. 38

September Term, 2009

SEYED MEHRAN MIRJAFARI, et al.

v.

EDWARD S. COHN, et al.

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Adkins
Barbera,

JJ.

Concurring Opinion by Murphy, J.
which Adkins, J., joins.

Filed: February 16, 2010

I agree with the majority's holding "that JSG was a *bona fide* purchaser, as of the date of its successful bid at the foreclosure sale, and, thus, the Mirjafaris' failure to file a *supersedeas* bond rendered moot their subsequent appeal of the overruling of their exceptions and ratification of the report of sale." I write separately, however, to emphasize that in the case at bar, at no point in time prior to dismissal of their appeal did Petitioners *ever* request that the Circuit Court exercise its discretion to (1) enjoin the foreclosure,[1] (2) establish the amount of a supersedeas bond, (3) order other reasonable alternative security, or (4) stay enforcement of the judgment pending appeal.[2] Nor did Petitioners request that the Court of Special Appeals enter an order staying the judgment of the Circuit Court.[3] Moreover, on the record before us the Circuit Court would have been clearly erroneous in finding that JSG was *not* a *bona fide* purchaser. Under these circumstances, Petitioners' appeal was properly dismissed.

I am concerned that the majority opinion will be misinterpreted as imposing an absolute requirement that a timely appeal noted by the victim of an equity stripping scheme must be dismissed whenever he or she is unable to comply with the security provisions established by the Circuit Court – regardless of how strongly the evidence indicated that the foreclosure sale purchaser was not entitled to *bona fide* purchaser

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[1] See Md. Rule 14-209(b), and *Wells Fargo v. Neal*, 398 Md. 705, 922 A.2d 538 (2007).

[2] See Md. Rule 2-632.

[3] See Md. Rule 8-425.

status. [4]

In 2005 and in 2008, the General Assembly enacted legislation to protect mortgagors from falling victim to the deceitful practices of certain "foreclosure consultants." Effective May 26, 2005, §7-311(e) of the Real Property Article (RP) provided:

> A BONA FIDE PURCHASER FOR VALUE OR BONA FIDE LENDER FOR VALUE WHO ENTERS INTO A TRANSACTION WITH A HOMEOWNER OR A FORECLOSURE PURCHASER WHEN A FORECLOSURE CONSULTING CONTRACT IS IN EFFECT OR DURING THE PERIOD WHEN A FORECLOSURE RECONVEYANCE MAY BE RESCINDED, WITHOUT NOTICE OF THOSE FACTS, RECEIVES GOOD TITLE TO THE PROPERTY, FREE AND CLEAR OF THE RIGHT OF THE PARTIES TO THE FORECLOSURE CONSULTING CONTRACT OR THE RIGHT OF THE HOMEOWNER TO RESCIND THE

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[4] In *Blondell, et al. v. Turover*, 195 Md. 251, 72 A.2d 697 (1950), this Court stated:

> The law requires reasonable diligence in a purchaser of real property to ascertain any defect of title. . . . When a purchaser has notice of a fact which casts doubt upon the validity of his title, the rights of innocent persons must not be prejudiced as a result of his negligence. . . . In determining whether a purchaser had notice of any prior equities or unrecorded interests, so as to preclude him from being entitled to protection as a *bona fide* purchaser, the rule is that if he had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.

Id. at 257, 72 A.2d at 699.

Judges authorize courts to charge foreclosure firms to pay for audits of foreclosure documents

By Jamie Smith Hopkins, The Baltimore Sun

3:56 PM EDT, October 19, 2010

Maryland courts got the go-ahead Tuesday to conduct sweeping reviews of foreclosure cases to root out those with problematic or fraudulent documentation.

The Court of Appeals, the state's highest court, approved emergency rules to allow the hiring of part-time examiners to scrutinize affidavits and other documents. The courts can charge companies trying to foreclose for the cost of the examiners, except in cases where reviews are needed for documents submitted by homeowners. The rules forbid firms from passing the expense on to the borrowers in foreclosure.

These changes come after revelations that two Maryland foreclosure attorneys did not sign a number of their affidavits but instead directed others to reproduce their signatures.

An affidavit, the written equivalent of court testimony, cannot be signed on someone else's behalf.

Those who sign must also have personal knowledge of the stated facts, which was not the case among "robo signers" at mortgage servicers handling hundreds of documents a day. That national problem also influenced the Court of Appeals committee that recommended rule changes last week.

Committee chairman Alan M. Wilner, a retired judge, wrote in a letter to the court that funds would be needed "to conduct the massive audits likely to occur."

Some Maryland courts, including those in Howard and Prince George's counties, have already begun reviewing cases and say extra resources would help.

"This has become a very labor-intensive process," said Diane O. Leasure, county administrative judge for the Howard County Circuit Court, which has about 1,600 open foreclosure cases.

Under the new rules, judges who come across potentially invalid affidavits can order foreclosure firms to appear and explain why the case shouldn't be dismissed. Judges say they already had that authority, but the rules committee wanted to remove doubt and give judges a roadmap for dealing with such cases.

"Some of the judges are concerned that what has been discovered so far is only the tip of the proverbial iceberg," Wilner told the court Tuesday.

IN THE COURT OF APPEALS OF MARYLAND

R U L E S O R D E R

This Court's Standing Committee on Rules of Practice and Procedure having submitted its One Hundred Sixty-Sixth Report to the Court recommending adoption on an emergency basis of proposed new Rule 14-207.1 and amendments to Rules 1-311 and 14-207; and

This Court having considered at an open meeting, notice of which was posted as prescribed by law, all those proposed rules changes, making on its own motion certain deletions and additions to the proposed rules changes, and finding that an emergency does in fact exist with reference to the proposed rules changes, it is this 20th day of October, 2010,

ORDERED, by the Court of Appeals of Maryland, that new Rule 14-207.1 and amendments to Rules 1-311 and 14-207 be, and they are hereby, adopted in the form attached to this Order; and it is further

ORDERED that the rules changes hereby adopted by this Court shall govern the courts of this State and all parties and their attorneys in all actions and proceedings, and shall take effect and apply to all actions commenced on or after October 20, 2010,

and insofar as practicable to all actions then pending; and it is further

ORDERED that a copy of this Order be published in the next issue of the *Maryland Register*.

/s/ Robert M. Bell
Robert M. Bell

/s/ Glenn T. Harrell, Jr.
Glenn T. Harrell, Jr.

/s/ Lynne A. Battaglia
Lynne A. Battaglia

/s/ Clayton Greene, Jr.
Clayton Greene, Jr.

/s/ Joseph F. Murphy, Jr.
Joseph F. Murphy, Jr.

* Sally D. Adkins

/s/ Mary Ellen Barbera
Mary Ellen Barbera

* Judge Adkins did not participate in the consideration of this matter.

Filed: October 20, 2010

/s/ Bessie M. Decker
Clerk
Bessie M. Decker

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

ADD new Rule 14-207.1, as follows:

Rule 14-207.1. COURT SCREENING

(a) Generally

The court may adopt procedures to screen pleadings and papers filed in an action to foreclose a lien. If the court determines that the pleadings or papers filed do not comply with all statutory and Rule requirements, it may give notice to the plaintiff and each borrower, record owner, party, and attorney of record that the action will be dismissed without prejudice or that some other appropriate order will be entered by reason of the non-compliance if the plaintiff does not demonstrate within 30 days that the papers are legally sufficient or that the deficiency has been cured.

Committee note: This Rule prevails over the provision in Rule 1-321 (a) or any other Rule that purports, where a party is represented by an attorney, to permit service on only the attorney. This Rule requires service on both.

(b) Review of Affidavits

(1) In this section, "affidavit" includes any attestation or certification by an attorney, borrower, record owner, party, or agent of the attorney, borrower, record owner, or party concerning the truth or accuracy of a pleading or paper.

Cross reference: See Rule 1-202 (b) for a general definition of "affidavit."

(2) If the court has reason to believe that an affidavit filed in the action may be invalid because the affiant has not read or personally signed the affidavit, because the affiant does not have a sufficient basis to attest to the accuracy of the facts stated in the affidavit, or, if applicable, because the affiant did not appear before the notary as stated, the court may order the party to show cause why the affidavit should not be stricken, and, if it is stricken, why the action should not be dismissed or other relief granted.

(3) As part of the show cause order, the court may order that the affiant and any notary appear before the court at a time stated in the order for the affiant to attest under penalty of perjury that the affiant read and personally signed the affidavit and had a sufficient basis to attest to the accuracy of the facts stated in the affidavit, and, if applicable, for the affiant and the notary to attest that the affiant appeared before the notary and made the oath stated.

(4) A copy of the order shall be sent to the plaintiff and to each borrower, record owner, party, and attorney of record, together with a notice that they may appear and examine the affiant and notary. The court may further require that the plaintiff serve the order and any response thereto on each borrower, record owner, party, and attorney of record.

Cross reference: See Rule 1-341.

(c) Special Masters or Examiners

The court may designate one or more qualified Maryland lawyers to serve as a part-time special master or examiner to screen pleadings and papers under section (a) of this Rule, conduct proceedings under section (b) of this Rule, and make appropriate recommendations to the court. Subject to section (d) of this Rule, the costs and expenses of the special master or examiner may be assessed against one or more of the parties pursuant to Code, Courts Article, §2-102 (c), Rule 2-541 (i), or Rule 2-542 (i). With his or her consent, the special master or examiner may serve on a pro bono basis.

(d) Assessment of Costs, Expenses, and Attorney's Fees

The costs, expenses, and attorney's fees of any proceeding under this Rule, including any costs or expense of a special master or examiner under section (c) of this Rule, shall not be assessed against the borrower or record owner either directly or as an expense of sale, unless the affidavit in question was filed by or on behalf of the borrower or record owner.

Committee note: The exercise of the authority granted in this Rule is discretionary with the court. Nothing in this Rule precludes the court from using its own personnel for these purposes.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-207 by changing the title of the Rule, deleting current section (c), and adding a new section (c) to require service of affidavits, pleadings, and other papers that amend, supplement, or confirm a previously filed affidavit, pleading or paper, as follows:

Rule 14-207. PLEADINGS~~; COURT SCREENING~~; SERVICE OF CERTAIN AFFIDAVITS, PLEADINGS, AND PAPERS

. . .

~~(c) Court Screening~~

~~As part of its case management plan, a circuit court may adopt procedures for the court to screen orders to docket and complaints to foreclose a lien. If the court determines that the papers filed do not comply with all statutory and Rule requirements, it may give notice to the plaintiff that the action will be dismissed without prejudice if the plaintiff does not demonstrate within 30 days that the papers are legally sufficient or that the deficiency has been cured.~~

Committee note: Pursuant to subsections (b)(7) and (8) of this Rule, a preliminary or final loss mitigation affidavit must be filed in all actions to foreclose a lien on residential property, even if a loss mitigation analysis is not required.

(c) Service of Certain Affidavits, Pleadings, and Papers

Any affidavit, pleading, or other paper that amends, supplements, or confirms a previously filed affidavit, pleading, or other paper shall be served on each party, attorney of record, borrower, and record owner in accordance with the methods provided by Rule 1-321, regardless of whether service of the original affidavit, pleading, or paper was required.

Committee note: This Rule prevails over the provision in Rule 1-321 (a) or any other Rule that purports, where a party is represented by an attorney, to permit service on only the attorney. This Rule requires service on both.

Source: This Rule is derived in part from the 2008 version of former Rule 14-204 (a) and (c) and is in part new.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-311 to add the words "or paper" to section (c), as follows:

Rule 1-311. SIGNING OF PLEADINGS AND OTHER PAPERS

. . .

(c) Sanctions

If a pleading or paper is not signed as required (except inadvertent omission to sign, if promptly corrected) or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading or paper had not been filed. For a wilful violation of this Rule, an attorney is subject to appropriate disciplinary action.

. . .

Department of Legislative Services

Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Revised

Senate Bill 562 (Senator Raskin)

Judicial Proceedings Environmental Matters

Real Property - Mortgages and Deeds of Trust - Authority to Exercise a Power of Sale

This bill clarifies that a power of sale or assent to decree in a mortgage or deed of trust may be exercised only by an individual. The bill establishes that (1) the individual selling the property under a power of sale need not be named in the mortgage or deed of trust; (2) an error or omission concerning the designation of a trustee or individual authorized to exercise a power of sale does not invalidate the instrument or the ability to exercise the power of sale; and (3) if a mortgage or deed of trust allows, a trustee or individual authorized to exercise a power of sale may be appointed or substituted from time to time.

The bill takes effect June 1, 2010, and applies retroactively to a mortgage or deed of trust on record, or recorded on or after the effective date.

Fiscal Summary

State Effect: The bill does not directly affect State finances or operations.

Local Effect: None.

Small Business Effect: Potential minimal.

Analysis

Current Law: A "power of sale" provision or "assent to decree" provision may be inserted in a mortgage or deed of trust. A power of sale provision authorizes any natural person named in the instrument, including the secured party, to foreclose on the property

after a default specified in the mortgage or deed of trust. Likewise, an "assent to decree" provision may be inserted in a mortgage or deed of trust that declares the borrower's assent to the entry of an order for a foreclosure sale of the property after a default specified in the mortgage or deed of trust.

Under the Maryland Rules, any individual authorized to exercise a power of sale may institute a foreclosure action. A secured party may foreclose under an assent to decree provision, except that an action to foreclose a deed of trust must be instituted by the beneficiary of the deed of trust, any appointed trustee, or any successor trustee.

Background: Certain local courts have interpreted deeds of trust that omit the name of the trustee or contain the name of an entity, rather than a natural person, to be void. These courts have, at times, required foreclosing attorneys to file a petition to foreclose rather than allowing a foreclosure to proceed under a power of sale provision. The bill intends to clarify that the person foreclosing must be an individual and that the failure of the lien instrument to properly designate an individual in the lien instrument does not invalidate the ability to foreclose under a power of sale clause.

Additional Information

Prior Introductions: None.

Cross File: HB 633 (Delegate Niemann, *et al*) - Environmental Matters.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation (Office of the Commissioner of Financial Regulation); Department of Legislative Services

Fiscal Note History: First Reader - February 19, 2010
ncs/kdm Revised - Senate Third Reader - April 1, 2010

Analysis by: Jason F. Weintraub

Direct Inquiries to:
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SB 654

Department of Legislative Services

Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 654 (Senator Lenett, *et al.*)
Judicial Proceedings Environmental Matters

Real Property - Tenants in Foreclosure - Conforming to Federal Law

This bill amends existing law governing the rights of residential tenants of foreclosed properties to conform to the federal Protecting Tenants at Foreclosure Act of 2009. Specifically, the bill (1) incorporates the federal definition of a "bona fide" tenant in State law; (2) requires that a 90-day notice to vacate be sent to a bona fide tenant stating the landlord's basis for terminating the tenancy; and (3) alters the contents of notices required to be sent to occupants of residential property subject to foreclosure. The bill applies only prospectively and may not be applied or interpreted to affect any foreclosure docketed before June 1, 2010.

The bill takes effect June 1, 2010.

Fiscal Summary

State Effect: The bill does not significantly affect State finances or operations.

Local Effect: None.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The bill defines a lease or tenancy as "bona fide" only if the mortgagor or grantor or the child, spouse, or parent of the mortgagor or grantor is not the tenant; the lease or tenancy was an arms-length transaction; and the lease or tenancy requires rent payments that are not substantially less than fair market rental rates, unless the rent is reduced or subsidized due to a federal, State, or local subsidy. In the case of a

foreclosure on any residential property, an immediate successor in interest who has acquired legal title to the property assumes the interest subject to (1) notifying any bona fide tenant in writing to vacate at least 90 days before the notice's effective date; and (2) the rights of any bona fide tenant as of the date of transfer of legal title. A bona fide tenant who entered into a lease before the transfer of legal title has the right to occupy the premises until the end of the remaining lease term or 90 days after the notice to vacate is sent, whichever is longer. A bona fide tenant without a lease or with a lease terminable at will has the right to stay for at least 90 days after the notice to vacate is sent. However, a successor in interest may terminate a lease effective on the date of the sale of the residential property to a purchaser who will occupy the property as his or her primary residence.

Current Law: Chapters 614 and 615 of 2009 required notices of foreclosure to be sent to all occupants of a residential property (1) when a foreclosure action is filed; (2) no earlier than 30 days and no later than 10 days prior to the foreclosure sale; and (3) a final notice after the entry of a judgment awarding possession of the property and before any attempt to execute the writ of possession.

After the filing of a foreclosure action, and at the same time the mortgagor is served with all required documents, the person authorized to sell the residential property must send written notice to all occupants of the property. The notice must inform the occupants that a foreclosure sale of the property may occur at any time after 45 days from the date of the notice. The notice must also state that the person could be evicted, even if the person is a tenant and has paid all rent due and otherwise complied with the terms of the lease.

Written notice must also be sent to all occupants no earlier than 30 days and no later than 10 days prior to the date of the foreclosure sale, and a final notice must be sent after the entry of a judgment awarding possession of the property and before any attempt to execute the writ of possession. The person giving each notice must file an affidavit of compliance in the foreclosure proceeding after each notice is sent. If the foreclosure sale is postponed, no additional notice is required to be sent to the occupants of the property.

Background: This bill alters the State-approved notices provided to occupants of residential property subject to a foreclosure proceeding to conform to the federal Protecting Tenants at Foreclosure Act of 2009. The federal Act terminates on December 31, 2012.

Additional Information

Prior Introductions: None.

Maryland Protection of Purchasers Through Foreclosure Act

Explanatory Statement

This bill is designed to address the problems faced by purchasers of foreclosed properties in light of media reports that certain foreclosure proceedings were flawed by procedural problems, including the signing and filing of false affidavits in the foreclosure case. The bill also addresses the problem of foreclosure deeds provided by "REO" (real estate owned) lenders and foreclosure trustees that were not properly executed or acknowledged by those parties. The bill defines an "arms length purchaser" to mean a person that buys the property by, or following, the foreclosure, from the trustees or the REO lender. The term "bona fide purchaser for value" is deliberately avoided as the amount paid by the arms length buyer (which may be small relative to the outstanding mortgage debt) and such buyer's knowledge of the foreclosure issues so widely reported in the media are irrelevant to the right of that purchaser to rely upon a Court's order finally ratifying the foreclosure sale. The term "foreclosure deed" means a deed to an arms length purchaser. The term "lender" is limited to mean an REO lender and/or such lender's designee, servicer or assignee.

The bill provides (with one important exception for arms length purchasers) a general one-year period during which a foreclosed-upon owner may file to upset the ratified sale based on "procedural irregularities." Procedural irregularities" is designed, in most respects, to track the "fraud, mistake or irregularity" referenced in Md. Rule 2-535(b) which provides that a court may exercise revisory power over a judgment procured through "fraud mistake or irregularity" at any time. "Procedural irregularities" in the bill is defined to include the problem of false affidavits and similar procedural issues and would also track what the courts call "intrinsic fraud" meaning a fraud within the procedures of the case (such as a perjured affidavit) and which by case law is generally not grounds for setting aside a judgment. But the definition in the bill would not include "extrinsic fraud" which may go to the essence of the validity of the mortgage or deed of trust (e.g. a forgery of a person's name or fraud in a mortgage via identity theft). The court would be able to exercise revisory power over a judgment procured by extrinsic fraud at any time. "Procedural irregularities" would also include "mistake" which is included in the Rule and could apply in an instance where a foreclosure trustee filed an affidavit that did not meet court guidelines through a mistake as opposed to a deliberate act or omission. Of significance is the fact that the bill would not apply to or cure defects in personal service of the borrower or notification of creditors and owners. Real Property 7-1051(i), 7-105.2(e) and 7-105.3(f) already provide a three-year limitation period during which those parties may file an action regarding failure in notification.

The bill provides that the newly established one-year period in which to challenge a procedural irregularity in a ratified foreclosure sale would not apply if the property had changed hands to an arms length purchaser. This is fair because the procedural irregularities defined by the bill do not go to the substance or merits of the original loan arrangement or mortgage; they only have to do with procedures within the foreclosure case. These procedural issues may be raised during the year following the ratification of the sale as long as title is still held by the foreclosure trustee or the REO lender. But once the title is transferred to the arms length purchaser, such deed cannot be set aside based on procedural irregularities.

The bill also provides relief with respect to previously executed deeds to arms length purchasers where those deeds could be subject to issues regarding the legitimacy of the execution or notary acknowledgement of the signer, which issues have also been reported in the media. Also included is the failure in any power of attorney used by the REO lender, including failure to record a power of attorney which issues are frequent problems in REO closings. The bill provides that a deed to arms length purchaser executed prior to the proposed 7/1/2011 effective date is deemed cured of those defects. (It is believed that heightened media scrutiny of execution of foreclosure deeds will lead to ongoing subsequent remedial measures by foreclosure trustees and REO lenders such that deeds executed following the effective date will meet proper standards.)

AN ACT concerning

Maryland Protection of Purchasers Through Foreclosure Act

FOR the purpose of providing that certain purchasers who obtained title to real property through certain foreclosure sales on or before the effective date of this Act, received title free of claims relating to certain defects in execution in the deed or certain procedural irregularities in the foreclosure proceedings; providing for the time period after which a Court may not set aside an order ratifying a sale of real property based upon procedural irregularities; providing for the application of this Act; and generally relating to limitation of actions as to certain deeds pursuant to ratified foreclosure sales.

BY adding to
Article - Courts and Judicial Proceedings
Section 5-120
Annotated Code of Maryland
(2006 Replacement Volume and 2010 Supplement)

BY adding to
Article – Real Property
Section 4-112
Annotated Code of Maryland
(2003 Replacement Volume and 2010 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Courts and Judicial Proceedings

5-120.

(A) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(1) "ARMS LENGTH PURCHASER" MEANS A PERSON THAT PURCHASES A FORECLOSED PROPERTY FROM A LENDER OR FORECLOSURE TRUSTEE FOR CONSIDERATION BY VIRTUE OF A RATIFIED FORECLOSURE SALE.

(2) "FORECLOSED PROPERTY" MEANS PROPERTY SOLD PURSUANT TO A FORECLOSURE SALE.

(3) "FORECLOSURE DEED" MEANS A DEED EXECUTED BY A FORECLOSURE TRUSTEE OR A LENDER TO AN ARMS LENGTH PURCHASER.

(4) "FORECLOSURE SALE" MEANS A SALE MADE PURSUANT TO AN ASSENT TO DECREE OR POWER OF SALE IN A MORTGAGE.

(5) "FORECLOSURE TRUSTEE" MEANS A PERSON WHO FILES A FORECLOSURE COMPLAINT OR ORDER TO DOCKET IN A COURT IN ORDER TO CONDUCT A FORECLOSURE SALE AND INCLUDES AN ASSIGNEE OF A MORTGAGE.

(6) "LENDER" MEANS A PERSON, OR THE PERSON'S DESIGNEE, NOMINEE OR ASSIGNEE, WHO HOLDS, OWNS OR SERVICES THE DEBT SECURED BY A MORTGAGE AND WHO PURCHASES OR TAKES TITLE TO THE FORECLOSED PROPERTY AT OR FOLLOWING A FORECLOSURE SALE.

(7) "MORTGAGE" MEANS AN INSTRUMENT WHEREBY A PERSON CREATES A SECURITY INTEREST IN REAL PROPERTY AND INCLUDES A DEED OF TRUST.

(8) "PROCEDURAL IRREGULARITY" MEANS ANY DEPARTURE FROM THE ACCEPTED OR REQUIRED RULES OF PROCEDURE OF THE COURT, INCLUDING THE FILING OF AFFIDAVITS FALSELY OR INCORRECTTLY PURPORTING TO BE MADE OR ACKNOWLEDGED BY THE AFFIANT, AND INCLUDES MISTAKE AND INTRINSIC FRAUD.

(B) EXCEPT AS PROVIDED IN SUBPARAGRAPH (C) OF THIS SECTION, A COURT MAY NOT REOPEN OR SET ASIDE ANY JUDGMENT RATIFYING A FORECLOSURE SALE BASED UPON THE GROUNDS OF PROCEDURAL IRREGULARITY UNLESS THE APPLICATION TO SET ASIDE OR REOPEN THE JUDGMENT IS FILED WITHIN 1 YEAR OF THE DATE OF THE ENTRY OF THE JUDGMENT.

(C) A JUDGMENT RATIFYING A FORECLOSURE SALE MAY NOT BE REOPENED OR SET ASIDE ON THE GROUNDS OF PROCEDURAL IRREGULARITY WHERE TITLE TO THE FORECLOSED PROPERTY HAS BEEN TRANSFERRED BY A FORECLOSURE DEED.

SECTION 2. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Real Property

4-112

(A) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(1) "ARMS LENGTH PURCHASER" MEANS A PERSON THAT PURCHASES A FORECLOSED PROPERTY FROM A LENDER OR FORECLOSURE TRUSTEE FOR CONSIDERATION BY BVIRTUE OF A RATIFIED FORECLOSURE SALE.

(2) "DEFECTIVE EXECUTION" MEANS ANY FAILURE IN THE TECHNICAL REQUIREMENTS FOR EXECUTION OR ACKNOWLEGEMENT OF A FORECLOSURE DEED, INCLUDING EXECUTION BY A NON-SIGNATORY, LACK OF NOTARY ACKNOWLEDGEMENT, A DEFECTIVE OR FALSE NOTARY ACKNOWLEDGEMENT, LACK OF A POWER OF ATTORNEY OR FALURE TO RECORD A POWER OF ATTORNEY.

(3) "FORECLOSED PROPERTY" MEANS PROPERTY SOLD PURSUANT TO A FORECLOSURE SALE.

(4) "FORECLOSURE DEED" MEANS A DEED EXECUTED BY A FORECLOSURE TRUSTEE OR A LENDER TO AN ARMS LENGTH PURCHASER.

(5) "FORECLOSURE SALE" MEANS A SALE MADE PURSUANT TO AN ASSENT TO DECREE OR POWER OF SALE IN A MORTGAGE.

(6) "FORECLOSURE TRUSTEE" MEANS A PERSON WHO FILES A FORECLOSURE COMPLAINT OR ORDER TO DOCKET IN A COURT IN ORDER TO CONDUCT A FORECLOSURE SALE AND INCLUDES AN ASSIGNEE OF A MORTGAGE.

(7) "LENDER" MEANS A PERSON, OR THE PERSON'S DESIGNEE, NOMINEE OR ASSIGNEE, WHO HOLDS, OWNS OR SERVICES THE DEBT SECURED BY A MORTGAGE AND WHO PURCHASES OR TAKES TITLE TO THE FORECLOSED PROPERTY AT OR FOLLOWING A FORECLOSURE SALE.

(8) "MORTGAGE" MEANS AN INSTRUMENT WHEREBY A PERSON CREATES A SECURITY INTEREST IN REAL PROPERTY AND INCLUDES A DEED OF TRUST.

(9) "PROCEDURAL IRREGULARITY" MEANS ANY DEPARTURE FROM THE ACCEPTED OR REQUIRED RULES OF PROCEDURE OF THE COURT, INCLUDING THE FILING OF AFFIDAVITS FALSELY OR INCORRECTTLY PURPORTING TO BE MADE OR ACKNOWLEDGED BY THE AFFIANT, AND INCLUDES MISTAKE AND INTRINSIC FRAUD.

(B) A FORECLOSURE DEED EXECUTED AS A RESULT OF A RATIFIED FORECLOSURE MAY NOT BE CHALLENGED IN A JUDICIAL PROCEEDING BASED UPON A CLAIM OR ASSERTION THAT THE FORECLOSURE SALE WAS SUBJECT TO A PROCEDURAL IRREGULARITY.

(C) IF A FORECLOSURE DEED WAS EXECUTED PRIOR TO JULY 1, 2011, ANY FAILURE OF THE FORECLOSURE DEED DUE TO DEFECTIVE EXECUTION HAS NO EFFECT ON THE VALIDITY OR ENFORCEABILITY OF THE FORECLOSURE DEED.

SECTION 3. BE IT FURTHER ENACTED That Section 1. of this Act shall be construed to apply retroactively and shall be applied to, and interpreted to, affect any judgment ratifying a foreclosure sale entered by a court prior to, on and after July 1, 2011.

SECTION 4. BE IT FURTHER ENACTED That 4-112(B) of Section 2. of this Act shall be construed to apply retroactively and shall be applied to, and interpreted to, affect any foreclosure deed executed prior to, on and after July 1, 2011 and that 4-112 (C) of Section 2. shall be construed to apply retroactively and shall be applied to, and interpreted to, affect any foreclosure deed with a defective execution executed prior to July 1, 2011.

SECTION 5. BE IT FURTHER ENACTED That this Act shall take effect on July 1, 2011.

MARYLAND'S NEW FORECLOSURE TIMELINE - RESIDENTIAL

The process leading up to foreclosure begins when you receive a "Notice of Intent to Foreclose" in the mail. You are not yet in foreclosure at this point but you should act immediately! Complete the packet you receive in the mail and return it in the envelope that was included.

45 days after you get the Notice of Intent to Foreclose in the mail, a foreclosure may be filed in Court. When a foreclosure is filed against you, you will be served with a packet of papers called an "Order to Docket". Maryland law requires that your mortgage company reviews your circumstances to see if you are eligible to avoid foreclosure before they can sell your house at foreclosure. This review is called loss mitigation analysis. If this analysis is completed before your foreclosure is filed and you have a document called a "Final Loss Mitigation Affidavit" in the packet of paper that you receive, you should refer to column 1 below. If the analysis was not completed, you will have a "Preliminary Loss Mitigation Affidavit" in your packet of paper and you should look at column 2 below to understand the foreclosure process.

Timeline # 1

Where the Order to Docket or Complaint to Foreclose includes the "Final Loss Mitigation Affidavit." (Times in this chart are for general information. The timing of specific events in an actual foreclosure action may vary as permitted by law.)

- Day 1 Missed mortgage payment.
- Day 45 Notice of Intent to Foreclose must be mailed by regular & certified mail.
- Day 90 Order to Docket or Complaint to Foreclose filed in circuit court.
- Day 105 Last day for homeowner to request foreclosure mediation.*

  * If foreclosure mediation is not requested by day 105, or if a motion to stay the sale has not been filed, the property may be sold on day 135 and the remainder of this timeline is inapplicable.

- Day 110 If foreclosure mediation is requested, circuit court sends the request to the Maryland Office of Administrative Hearings by this day.
- Day 170 If requested, foreclosure mediation must take place by this day unless postponement is requested.
- Day 185 Foreclosure sale can be held unless a motion to stay the sale is filed.

Timeline #2

Where the Order to Docket or Complaint to Foreclose includes the "Preliminary Loss Mitigation Affidavit." (Times in this chart are for general information. The timing of specific events in an actual foreclosure action may vary as permitted by law.)

- Day 1 Missed mortgage payment.

- Day 45 Notice of Intent to Foreclose mailed regular & certified mail.
- Day 90 Order to Docket or Complaint to Foreclose filed in circuit court.
- Day 118 "Final Loss Mitigation Affidavit" and form to request foreclosure mediation sent by regular & certified mail.
- Day 133 Last day for homeowner to request foreclosure mediation.*

  * If foreclosure mediation is not requested by day 133, or if a motion to stay the sale has not been filed, the property may be sold on day 148 and the remainder of this time line is inapplicable.

- Day 138 If foreclosure mediation is requested, the circuit court sends the request to the Maryland Office of Administrative Hearings by this day.
- Day 198 If requested, foreclosure mediation must take place by this day unless postponement is requested.
- Day 213 Foreclosure sale can be held unless a motion to stay the sale is filed.

OFFICE OF THE ATTORNEY GENERAL
Munsey Building, Second Floor
Seven North Calvert Street
Baltimore, Maryland 21202
(301)576-7292

M E M O R A N D U M

TO All Clerks of the Circuit Court

FROM Julia M. Freit, Assistant Attorney General JMF

DATE April 5, 1989

RE INDEMNITY DEEDS OF TRUST/MORTGAGES

Recently it was discovered that actions were filed in three different counties to foreclose indemnity deeds of trust. In each case, the borrower had defaulted on the loan, the guarantor had therefore become liable, and the lender was foreclosing on the guarantor's property encumbered by the deed of trust as security for the guaranty. Efforts are now being made by this office to collect the recordation taxes due on those indemnity deeds of trust; the total amount of tax due is approximately $174,000.

The rationale for not collecting recordation tax when an indemnity deed of trust/mortgage is first recorded is based on Tax-Property Article, §12-105(f) (formerly Article 81, §277(k)). See 58 Opinions of the Attorney General 792, 794 (1973). Because the guarantor's liability for the debt is contingent upon the debtor defaulting, the guarantor will not "incur" a debt unless and until there is a default by the debtor. However, in those cases in which the debtor does default on the loan, the guarantor becomes liable for the balance due on the loan at the time of default.

Although the guarantor is required by §12-105(f)(2) to report to the Clerk when the debt is incurred by the guarantor, i.e. when the default has occurred, and to pay tax on the amount of debt incurred, i.e. the balance due on the loan at the time of default,this rarely,if ever,happens in practice. Therefore, in order to assure that applicable recordation tax is collected, it is necessary for your equity department to notify your land records department when an action is filed to foreclose an indemnity deed of trust/mortgage. It should not be too burdensome for the equity department to ascertain wehn the instrument being foreclosed is an indemnity mortgage/deed of trust inasmuch as an order to docket or petition for foreclosure must always be accompanied by the original mortgage/deed of trust or a certified copy. See Rules W72c and Rule W77a. The mortgage or deed of trust will reveal on its face, usually in the title, if it is an indemnity mortgage/deed of trust. Once the land records department is notified about the foreclosure, steps may be taken to notify the proper parties of the necessity to pay recordation tax.

If you have any questions about this matter, please do not hesitate to contact me.

AFFIDAVIT for IDEMNITY DEED OF TRUST

(to accompany IDOT presented to Baltimore County Transfer Office)

*For Transfer Office Use Only – **NOT FOR RECORDING***

By signing below, I herby certify, affirm, and declare, under penalty of perjury, that the accompanying Indemnity Deed of Trust in the amount of $_____ meets the following requirements for exclusion from Recordation Tax:

- The grantor of the IDOT is a separate and distinct entity from the maker of the note,
- The grantor of the IDOT has signed a guaranty of the note,
- The IDOT secures only the guaranty; and
- The grantor of the IDOT is not primarily liable for the indebtedness.

Signed this _____ day of _____ 2010

By_____

Print Name_____

Signer is (please check one choice below):

Lender's Attorney _____

Settlement Attorney_____

Party to the IDOT _____

INDEMNITY AGREEMENT

This **INDEMNITY AGREEMENT** (hereinafter "Agreement") made and entered into as of the _____day of _____, 20____, by and between _____[SERVICER] hereinafter "Indemnitor"), and Stewart Title Guaranty Company (Title Insurer, hereinafter "Company").

W I T N E S S E T H:

WHEREAS, Company has been asked to issue its commitment, title insurance policy or policies (collectively hereinafter "Policy") insuring against loss or damage to the named insured or insureds under the Policy (collectively hereinafter "Insured") by reason of defects, liens or encumbrances in the title to property described as follows (hereinafter "Property"):

WHEREAS, Company is aware of general allegations or concerns regarding the processes or procedures utilized by or on behalf of Indemnitor which could lead to potential claims of damages, challenges to title to the Property being other than as insured in the Policy or challenges to the priority of the lien insured under the Policy (hereinafter "Title Matter") as set forth below:

A claim by the former owner or other person(s) with a current or past interest in the Property challenging the validity of or right to conduct the underlying foreclosure sale and/or determination by a court of competent jurisdiction that the underlying foreclosure action in the chain of title to the Property is invalid by reason of the submission of incompetent or erroneous affidavit testimony or documentation prepared in connection with the underlying foreclosure action and related proceedings.

WHEREAS, Indemnitor has reviewed all documentation, procedures, and/or notices related to the foreclosure of the Property and related proceedings and represents that the same comply with applicable state, federal and local law and practice;

WHEREAS, Indemnitor desires that Company issue its Policy without exception to or providing affirmative coverage for the Title Matter; and

WHEREAS, Company is willing to issue its Policy without exception to or providing affirmative coverage for the Title Matter only if indemnified as herein set forth.

NOW, THEREFORE, for and in consideration of the issuance of said Policy and other good and valuable consideration, the receipt of which is hereby acknowledged, Indemnitor does hereby agree with Company as follows:

1. Indemnitor agrees to defend Company, at Indemnitor's own cost and expense on behalf of and for the protection of Company (but without prejudice to the right of Company to defend at the expense of Indemnitor if Company so elects), any and every suit, action or proceeding in which the Title Matter is asserted, established or enforced in, to, upon, against or in respect to the Property, or any part thereof, or interest therein ("Action").

2. Indemnitor agrees to indemnify and hold Company harmless of and from any and all liability, loss, costs, damage and expense of every kind, which Company shall incur or become liable for as a result of the Title Matter, directly or indirectly, including but not limited to costs, attorneys' fees and expenses incurred by Company, diminution in value, unmarketability of title, displacement of lien priority, failure of title and actions to enforce this Agreement.

3. Company will notify Indemnitor in the event Company receives written notice of a Title Matter or Action and failure to do so will relieve Indemnitor of its obligations to the extent Indemnitor establishes that it has been prejudiced by such failure. Indemnitor will cooperate with Company, at Indemnitor's expense, in the defense or settlement of the Title Matter or Action.

4. Each and every provision of this Agreement shall extend to and be in force concerning any and every other Policy Company may at any time or times hereafter issue insuring without exception to and providing affirmative coverage for the Title Matter subject to the applicable limitations period set forth in paragraph 8 below.

5. Without waiving any other rights and remedies it may have under the Policy or otherwise, Company agrees that its sole and exclusive remedy for a Title Matter is with the Indemnitor pursuant to this Agreement and Company specifically waives any rights of subrogation or remedy for breach of warranty against the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation arising from a Title Matter.

6. This Agreement contains the entire agreement of the parties concerning the subject matter thereof and there are no representations, inducements, or other provisions other than those expressed here in writing. All changes, additions or deletions hereto must be in writing and signed by all parties.

7. This Agreement shall be governed by and construed in accordance with the laws of the State of _____. It is made to induce the issuance of a Policy relating to the purchase of and/or an acceptance of a security interest in the Property described herein. Indemnitor acknowledges that Company is relying upon the representations and indemnifications contained herein in issuance of said Policy. The provisions of this Agreement shall survive the disbursement of funds and closing of the transaction wherein the Policy is issued and shall be binding upon Indemnitor, its/their successors and/or assigns.

8. Company and Indemnitor agree that this Agreement will automatically expire upon the determination of a court of competent jurisdiction that the underlying foreclosure action is valid and enforceable or a cloud on title created by the underlying foreclosure action is otherwise removed.

By:_____

_____ (office)

State of _____:

County of_____ :

On this_____ day of _____, 20__, before me, the under-signed officer, personally appeared _____ [*name(s) of person(s) who made acknowledgment on behalf of the corporation*], a corporation, and that he/she/they, as such _____ [*title of corporate officer or other description of legal capacity*], being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself /herself/themselves as _____ [*title of corporate officer or other description of legal capacity*].

In witness whereof I hereunto set my hand and official seal.

_____

[*Signature of notary public*]

_____

[*Name of notary public typewritten or printed*]

Notary Public

My commission expires_____

Seventh Judicial Circuit of Maryland
COURTHOUSE
P.O. BOX 3060
LA PLATA, MARYLAND 20646

STEVEN G. CHAPPELLE
ASSOCIATE JUDGE

(301) 932-3430
(301) 753-1970

MEMORANDUM

TO: Esq.

FROM: Jonathan P. Beattie, Law Clerk to Judge Chappelle

DATE: May 20, 2010

RE: Case No. MD 20616

After reviewing the file in the above referenced case, the Court is not inclined to sign the proposed Final Order of Ratification. The Maryland Rules require several affidavits to be filed by the individuals carrying out a foreclosure sale throughout the life of a foreclosure action. These affidavits must be "proper affidavits" under Maryland Rule 1-304, mainly that they are either signed before an individual authorized to give an oath or signed after providing either of the approved affirmations to ensure that the contents of the affidavit are verified as "true." The above referenced case contains documents which purport to be affidavits in title and contain the proper affirmation under Maryland Rule 1-304, but do not properly identify who is "affirming under the penalties of perjury" their contents. These documents all identify the maker of the "affidavit" as the "undersigned Substitute Trustee," provide an illegible signature, and have three names listed under the signatory line, It is impossible for the Court to tell who exactly is verifying the contents of these documents, and therefore it is impossible to treat them as proof of anything that is required under Maryland law. Specifically, the Court cannot accept the following documents:

(1) "Affidavit, Pursuant to MD Rule 14-207(b)(4) Regarding Copy of Deed of Appointment of Substitute Trustee" filed on January 22, 2010
(2) "Affidavit, Pursuant to MD Rule 14-207(b)(1) Regarding Copy of Lien Instrument" filed on January 22, 2010
(3) "Affidavit of Deed of Trust Debt and Right to Foreclose" filed on January 22, 2010

Received Time Aug. 24. 2010 1:59PM No. 0208

Seventh Judicial Circuit of Maryland
COURTHOUSE
P.O. BOX 3060
LA PLATA, MARYLAND 20646

STEVEN G. CHAPPELLE
ASSOCIATE JUDGE

(301) 932-3430
(301) 753-1970

(4) "Affidavit Pursuant to Servicemembers Civil Relief Act" filed on January 22, 2010
(5) "Affidavit of Mailing of Notice to Occupant(s)" filed on January 22, 2010
(6) "Report of Sale" filed on March 29, 2010
(7) "Affidavit of Notice by Mail Prior to Sale" filed on March 29, 2010
(8) "Amended Report of Sale" filed on April 22, 2010

You may reach me at 301-932-3429 if you have any questions or concerns. Thank you.

Jonathan P. Beattie

cc: Counsel

84636

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND

et al *
Substitute Trustees *
Plaintiffs *
*
vs. *
LISA K. * Case No. [illegible]
DAVID *
*
*
Baltimore, MD 21209 *
Defendant(s) *
* * * * * * * * * *

CORRECTIVE AFFIDAVIT

Substitute Trustee, does hereby affirm, under penalties of perjury, that the following statements are based on his personal knowledge, and are true and accurate:

1. I have previously filed certain papers/affidavits in this case bearing my signature.

2. The facts contained therein are true and correct; however, notwithstanding the signature and notarization, I neither signed, nor personally appeared when certain of those documents were being signed.

3. The aforesaid papers were prepared under my supervision and signed at my direction. The process was implemented through an inappropriate view that it would be sufficient.

4. I hereby declare and affirm that the contents of the prior papers and affidavits are true and correct. I further declare and affirm that I have caused a copy of this corrective affidavit to be mailed, postage prepaid, to the adverse party in this matter.

2/4/10
Date

[illegible] Suite 200
[illegible]esda, MD 20814

RECEIVED AND FILED
2010 FEB -2 AM 9:55
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

1645

"In *Bethlehem Steel v. G. C. Zarnas & Co., supra,* we recently reviewed the public policy exception to the *lex loci contractus* principle. That case involved a construction contract, executed in Pennsylvania, in which the 'promisor agreed to indemnify the promisee against liability for damages resulting from the sole negligence of the promisee.' 304 Md. at 185, 498 A.2d at 606 [(1985)]. In that case we held that the contract provision was so contrary to Maryland's statutorily declared public policy that it was unenforceable in our courts." *Kramer v. Bally's Park Place, Inc.,* 311 Md. 387, 390–91, 535 A.2d 466, 467–68 (1988).

The court has also said:

"When presented with choice-of-law questions, Maryland courts generally follow the rule of *lex loci contractus,* which requires that the construction and validity of a contract be determined by the law of the state where the contract was made. *Allstate Ins. Co. v. Hart,* 327 Md. 526, 529, 611 A.2d 100 (1992); *Kramer v. Bally's Park Place, Inc.,* 311 Md. 387, 390, 535 A.2d 466 (1988); *Comstock Ins. Co. v. Thomas A. Hanson & Assocs.,* Inc., 77 Md. App. 431, 438, 550 A.2d 731 (1988). For choice-of-law purposes, a contract is made where the last act necessary to make the contract binding occurs. *Sting Sec., Inc. v. First Mercury Syndicate, Inc.,* 791 F. Supp. 555, 558 (D. Md. 1992); *Travelers Indem. Co. v. Allied-Signal, Inc.,* 718 F. Supp. 1252, 1253 (D. Md. 1989). Typically, '[t]he *locus contractu* of an insurance policy is the state in which the policy is delivered and the premiums are paid.' *Aetna Casualty & Sur. Co. v. Souras,* 78 Md. App. 71, 77, 552 A.2d 908 (1989). *See also Sting Sec.,* Inc., 791 F. Supp. at 558 (citing *Aetna Casualty & Sur. Co.*); *Allstate Ins. Co. v. Hart,* 327 Md. 526, 529, 611 A.2d 100 (1992) (Maryland courts ordinarily apply the law of the jurisdiction where the contract was made); *Mutual Life Ins. Co. v. Mullan,* 107 Md. 457, 463, 69 A. 385 (1908) (insurance contract was made where premium was paid and policy was delivered)." *Commercial Union Ins. v. Porter Hayden Co.,* 97 Md. App. 442, 451–52, 630 A.2d 261, 266 (1993), *vacated and remanded,* 339 Md. 150, 661 A.2d 691 (1995).

§ 36.21 ELECTION OF REMEDIES: NO LONGER

The court has said:

"Both in the circuit court and again before us, Garliss asserts that, having elected to foreclose its mortgage, Key should not have been permitted to confess judgment on the mortgage note. That assertion is without merit.

"Although we have no quarrel with Key's simultaneous pursuit of all of its remedies against Garliss, *See Parks v. Skipper,* 164 Md. 388, 165 A. 319 (1933); *Herring v. Citizens Bank & Trust Co.,* 21 Md. App. 517, 321 A.2d 182, *cert. denied,* 272 Md. 742 (1974), Key's failure to credit the net sums it received from the foreclosure sale against its judgment by confession troubles us. We shall explain.

"Rule 2-611(a) contains the procedure for confessing judgment. Confession of judgment is not a judicial act, but rather the *pro forma* entry of a judgment by the clerk of the circuit court. *EMI Excavation, Inc. v. Citizens Bank of Maryland,* 91 Md. App. 340, 604 A.2d 518, *cert. denied,* 327 Md. 523, 610 A.2d 796 (1992). Upon receiving the notice required by Rule 2-611(b), a defendant may move to

open, modify or vacate a judgment by confession, offering evidence constituting a defense to the note upon which judgment was confessed. *Id. See* Rule 2-611(c).

"Judgments by confession are not favored in Maryland, *See Alger Petroleum, Inc. v. Spedalere*, 83 Md. App. 66, 573 A.2d 423, *cert. denied*, 320 Md. 800, 580 A.2d 219 (1990), because **Maryland courts have long recognized that the practice of including in a promissory note a provision authorizing confession of judgment lends itself far too readily to fraud and abuse.** *Keiner v. Commerce Trust Co.*, 154 Md. 366, 141 A. 121 (1927). Thus, judgments by confession are freely stricken 'on motion to let in defenses.' *Id.* 154 Md. at 370, 141 A. 121, *quoting, Phillips v. Taylor*, 148 Md. 157, 163, 129 A. 18 (1925).

"Although motions to vacate or strike judgments by confession must be supported by satisfactory evidence of defenses supporting the vacation of such judgments, trial judges must assure themselves that improper advantage has not been taken of the maker of the note. *Remsburg v. Baker*, 212 Md. 465, 129 A.2d 687 (1957).

"One moving to strike a judgment by confession has the burden of presenting evidence satisfactorily supporting its purported defense, *Keiner*, *supra*, and the burden is met if persons of ordinary judgment and prudence could fairly draw different inferences from the evidence presented. *Williams v. Johnson*, 261 Md. 463, 276 A.2d 95 (1971). In other words, the evidence presented should be sufficient to persuade the trial court that the movant has a meritorious defense. *Shafer Brothers v. Kite*, 43 Md. App. 601, 406 A.2d 673 (1979). What constitutes a meritorious defense is a question of law. *Id.* Consequently, presenting evidence of a valid set-off constitutes a meritorious defense, requiring the judgment to be opened. *Gelzer v. Scamoni*, 238 Md. 73, 207 A.2d 655 (1965). Moreover, an assertion that the movant is entitled to a credit may well entitle the moving party to have the matter submitted to a trier of fact. *Cropper v. Graves*, 216 Md. 229, 139 A.2d 721 (1958). In any event, one against whom judgment has been confessed is given an opportunity to present whatever defense may be available. *Billingsley v. Lincoln National Bank*, 271 Md. 683, 320 A.2d 34 (1974).

"In the case *sub judice*, Garliss moved to vacate the judgment confessed against him by Key, asserting that his complaint in action 91CV7444 had been recently amended to include a claim against Key, entitling him to a set-off. Nevertheless, at the hearing on his motion to vacate, Garliss was unable to produce any evidence that he had been damaged by Key's having wrongfully honored the forged checks.

"In fact, when the hearing judge asked Garliss whether he was contending that the forged checks had gone to anyone other than the subcontractor, counsel for Garliss responded, 'we have no idea.' Thus, Garliss' motion to vacate was properly denied.

"On the other hand, we believe the hearing judge erroneously denied Garliss' motion to alter or amend. In Maryland, circuit judges are given wide discretion when called upon to revise a judgment, 'lest technicality triumph over justice.' *J.B. Corp. v. Fowler*, 258 Md. 432, 435, 265 A.2d 876 (1970). In the case *sub judice*, we believe neither technicality nor justice has triumphed.

"The purpose of foreclosing a mortgage is to satisfy the debt secured by the mortgage. M.L.E. Mortgages, § 302. *See also Rollins v. Bravos*, 80 Md. App. 617, 565 A.2d 382 (1989). When, as was the case here, a mortgagee holds a mortgage and a

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note securing the debt, upon foreclosure of the mortgage, both the mortgage and the note should be satisfied to the extent of the net sums mortgagee receives from the foreclosure sale. *See* 59 C.J.S. Mortgages, § 463. Consequently, Key's judgment by confession should be reduced by the net sums Key received from the foreclosure sale.

"According to Key, the net sum it received from the foreclosure sale had no effect on its judgment by confession, since Key was entitled only to the amount of the debt due it secured by the mortgage. While that is true, we think Key has missed the point.

"**In his motion to alter or amend, Garliss informed the court of the foreclosure and sought a re-hearing to establish the amount now due Key on its judgement by confession. In other words, Garliss's motion raised the question of whether Key's judgment against him by confession was partially satisfied by the net proceeds Key received from foreclosing its mortgage. For that reason, we believe that Garliss' motion should have alerted the hearing judge that Garliss was entitled to a credit against Key's judgment by confession. Moreover, we believe that if Garliss is allowed such a credit attorney's fees for confessing judgment on the mortgage note should be substantially reduced.**

"Garliss's motion to alter or amend also asserted that counsel for Key had withheld from the hearing judge evidence of the foreclosure during the hearing on Garliss's motion to vacate the judgment. While we see nothing in the record before us to support that bald assertion, we are nonetheless troubled by it, for we fear that, if so, counsel withheld that information in order to receive the entire attorney's fees permitted by having confessed judgment on the mortgage note. If that be the case, **confessing judgment on the mortgage note after foreclosing the mortgage securing the same debt would constitute an unfair method of saddling Garliss with additional attorney's fees.** In any case, we believe that the net proceeds Key received from the foreclosure sale should be credited against Key's judgment by confession.

"Under the circumstances, the hearing judge should satisfy himself that improper advantage was not taken of Garliss for having executed both a mortgage and a mortgage note containing a provision permitting Key to confess judgement on the note, in addition to foreclosing the mortgage. Therefore, we vacate the judgment and we remand this case for further proceedings.

"On remand, Garliss should be permitted to produce evidence of the net amount realized by Key from the foreclosure sale, and that amount should be credited against Key's judgment by confession as well as against the balance due on the mortgage, **so that counsel for Key receive no more than 15% of the net balance calculated to be due on the judgment by confession, after deducting the amount paid as a result of the mortgage foreclosure.** In so directing the court, we are not to be considered as criticizing the hearing judge. We are well aware that the circumstances of this case are unusual and that such circumstances have not heretofore been addressed either by us or by the Court of Appeals. **We trust that this case neither exemplifies nor foreshadows future tactics by counsel for lenders, seeking to obtain additional attorney's fees by confessing judgment on a mortgage note while foreclosing on the mortgage.** If so, we wish to make our disapproval known." *Garliss v. Key Fed. Sav. Bank*, 97 Md. App. 96, 103–06, 627

SHOW ME THE MONEY
CURRENT STATE OF THE CAPITAL MARKETS

Nancy Ferrell
Senior Vice President

NOVEMBER 18, 2010

NORTHMARQ

General Economic Outlook

- US Economy is expanding although slowly
- Need jobs; 900,000 added in 2010 but no improvement in unemployment. Need 1 million jobs each year just to cover new entries into workforce
- Consumers/Businesses are deleveraging
- Capital is opening up
- Home prices down 32%; 25% of households have negative equity
- Mortgage delinquencies/foreclosures- more to come
- Rates will stay low
- Double dip recession seems less likely

General Commercial Real Estate Outlook

- Vacancy appears to be peaking across property types
- Apartments remain the property of choice
- Industrial lagging due to inventory contraction and lack of consumer spending
- Retail is recovering slowly. The strong retailer is stronger. Secondary locations are weaker. Internet competition stronger.
- Office is filling in vacancies. Primary markets remain strong. New construction is low until employment numbers recover.

CRE Good News

Signs of Improvement & Stabilization

- Greater sales transaction volume in 2010 (already higher than 2009)
- Cap rate compression
- More money flowing into CRE for yield opportunities.
- Supply/Demand balance better due to lack of construction

Who's Lending Today?

BANKS:

- Large banks: servicing existing clients; minimal construction lending; conservative terms – 60% LTC

- Mid-size and community banks are more active
  - Will do construction with some pre-leasing; acquisition and refinance takeouts
  - Guarantor strength is important

Who's Lending Today?

LIFE INSURANCE COMPANIES:

- Very active; cash has built up and need to deploy it
- Spreads range 250-325 bps resulting in 5.00-5.75% rates depending on deal; Apt spreads much lower.
  - Floor rates are in effect with some lenders
- LTV increasing to 70% with some lenders at 75%
- Want stabilized assets; still not ready to add a lot of structure
- All property types except hospitality; still gun shy on retail – being selective

Who's Lending Today?

CONDUITS ARE BACK:

- Becoming more active by the day; reopening offices. Morgan Stanley, Goldman Sachs, RBS, CitiGroup, Cantor Fitzgerald
- Started doing larger single-asset or minimal asset securitizations
- Now doing more typical deals but with underwriting similar to Life Companies
- Will do more unique property types and deals in secondary locations.
- Spreads range 250-325 bps resulting in 5.00-5.75% rates depending on deal

Who's Lending Today?

CONDUITS ARE BACK:

- LTV 70% to 75%
- All property types except hospitality; selective on retail
- Volume: $12 Billion in 2010; $40 Billion projected in 2011
  - Peak volume was close to $300 Billion
  - New regulations require issuer to retain a 5% ownership position if American company; regulators want risk retention; problem for public & institutional bond funds
  - Mainly private rated bonds which limits the buyers

Who's Lending Today?

AGENCIES ARE BOOMING:

- Freddie Mac, Fannie Mae and FHA/HUD are all busy
- Multi-family is product of choice today.
- Rates are 4-5% for 10 yr deal; spreads 180-190 bps for 65% LTV and 200 – 210 bps for 75% LTV
- FHA/HUD is most competitive on construction financing or higher leverage deals. Changed terms to 35 year amortization from 40 years.
- Cap rates have stayed low on apartments – sub 6% on property in prime markets. Sales have been competitive.
- Process is slow…especially FHA/HUD deals.

Who's Lending Today?

CTL (Credit Tenant Lease) DEALS:

- Long term leases to credit tenants (AAA – BBB ratings) with NNN or NN bondable lease
- Spreads range 250+/- bps
- Leverage is based on debt service coverage which depends on credit rating – 1.0 x DSC for A rated credits. Walgreens, CVS, Banks etc.
- Borrower can end up with 100%+ leverage
- Loan must be self-amortizing
- Higher closing costs due to private bond placement transaction costs

Who's Lending Today?

NEW GUYS IN TOWN:

- There's a ton of cash out there looking for returns:
  - Opportunity Funds
  - Joint Venture Equity Funds
  - Preferred Equity
    - Debt structure with preferred return after debt service, then split; ownership conversion upon default or other triggers
  - Participating Mortgages
    - 1st mortgage debt structure with fixed coupon and split of cash flow typical
- These new funds will help with recapitalization needs to rebalance the CRE maturity and risk issues.

Cap Rates

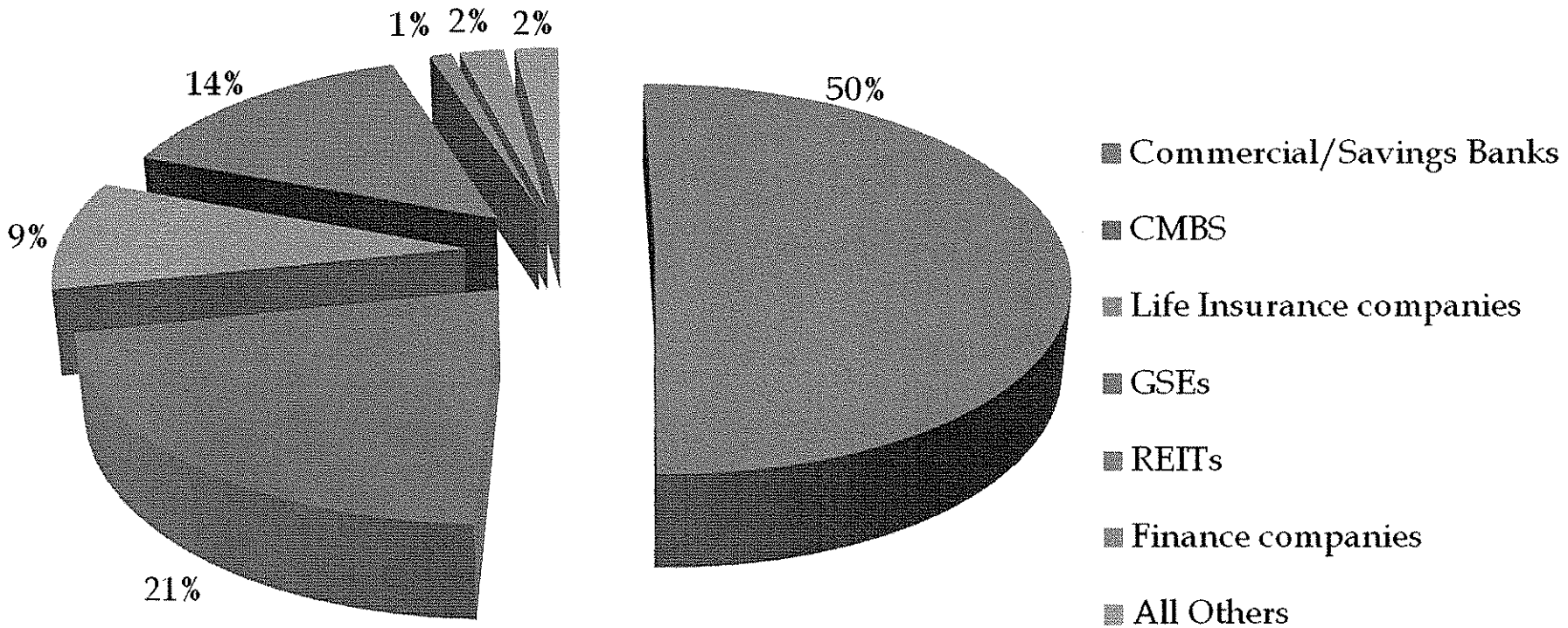
Ballpark Cap Rates for the Baltimore Market:

- Apartments: 6.5 – 7.0% for Class A, B+ properties
- Office (good location; Class B or better):
  - CBD: Trophy – sub 8.0%; otherwise weak market right now; 8.25-9.0%
  - Suburban: 8.25-8.75%
- Industrial (good location; Class B or better):
  - Bulk Warehouse: 8.0 – 8.5%
  - Flex: 8.25 – 8.75%
- Retail (good location; Class B or better)
  - Grocery-anchored: 7.5 -8.5%
  - Unanchored strip: 8.25 – 8.75%

Underwriting Guidelines:

- Rents lower of contractual or market – will look at concessions and effective rents.
- Vacancy at higher of actual or market
- Expenses based on historical operating numbers
- Tenant rollover risk is assessed carefully
- Tenant credit quality under scrutiny
- Capital Reserves for apartments are $250-$300 per unit
- Reserves for other property types $0.15-.20 per sq ft. for capital plus TI & LC reserves

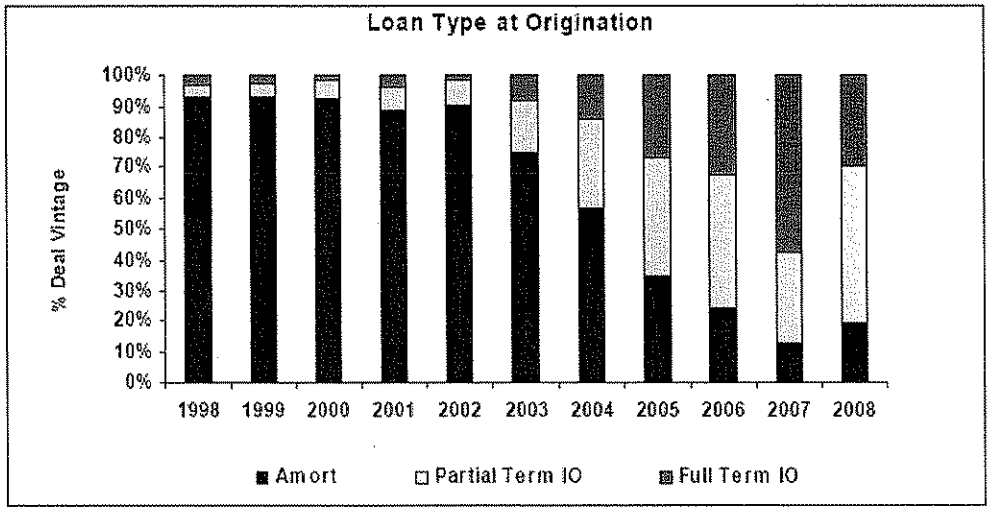
U.S. Commercial Real Estate Debt Markets - $3.5 Trillion

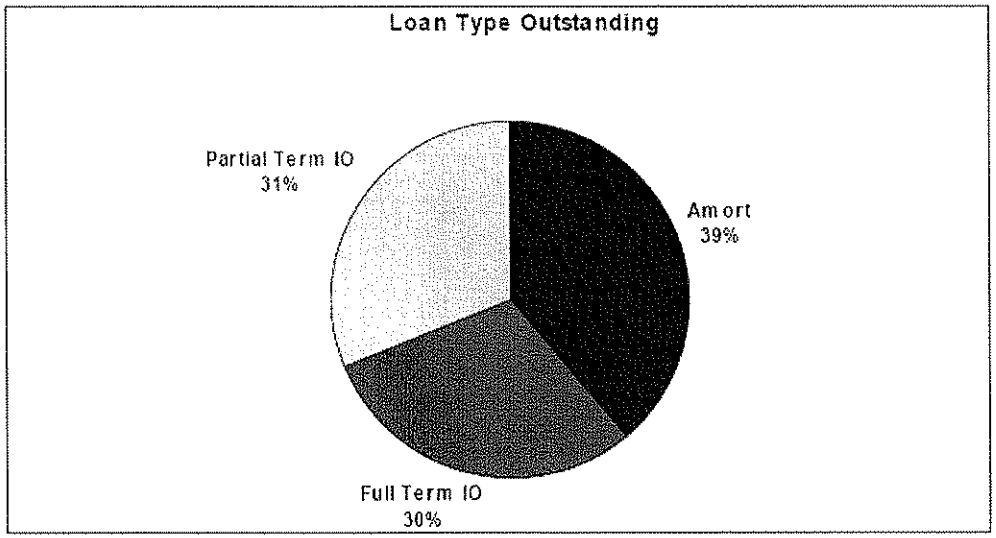


Source: Mortgage Bankers Association

NORTHMARQ

How Did We Get Here?

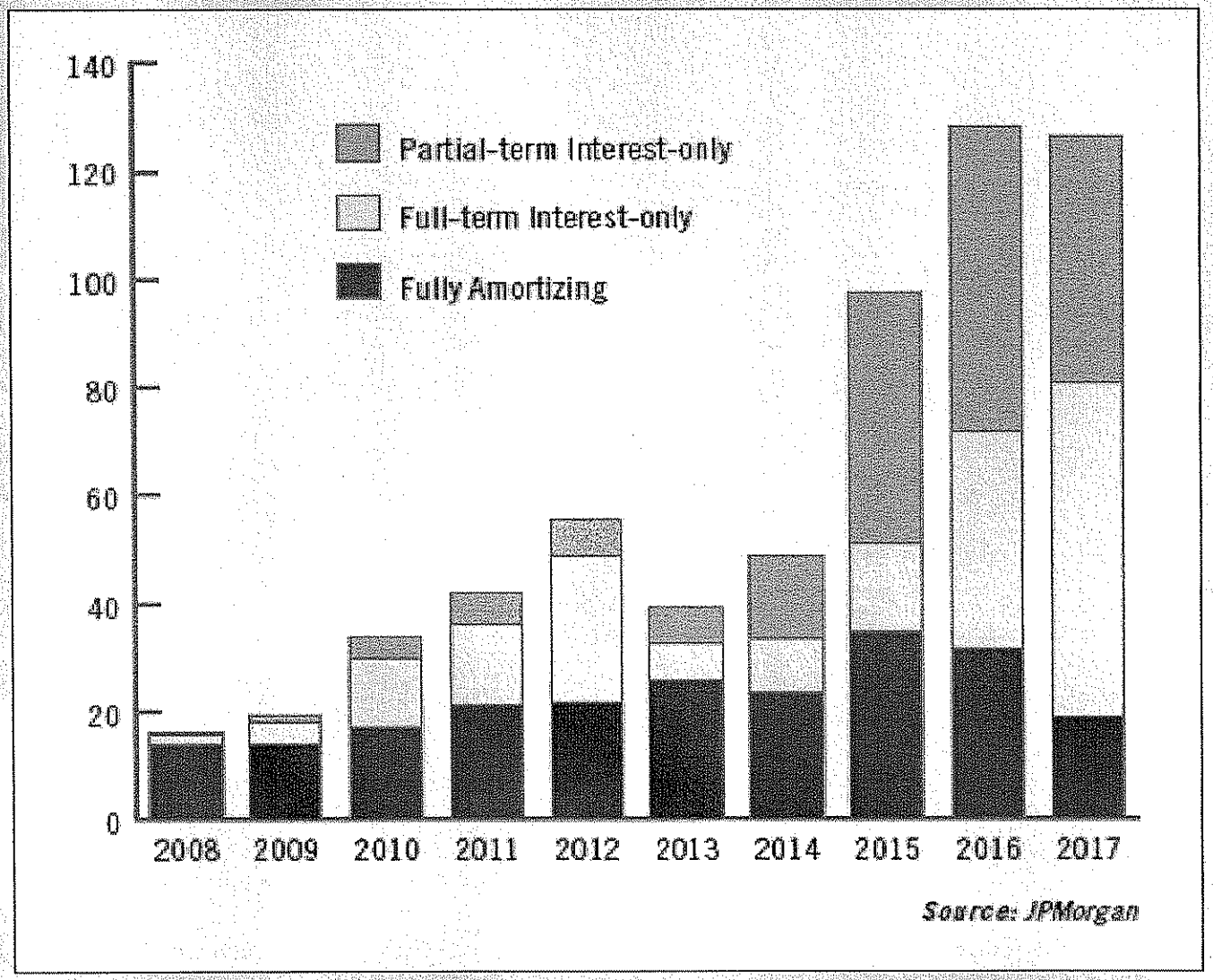




Source: JP Morgan

- Since 2004 increase in full and partial term IO loans.
- 61% of total loans outstanding have some IO component.
- Term risk is mitigated with lower DSCR payment.
- Balloon default risk high.
- Potential for loss severities to increase.

CMBS Market: Maturities Through 2017



Estimated Commercial Mortgage Maturities

Year	CMBS Fixed Rate	CMBS Floating Rate	Insurance Company	Bank/ Thrift*	Total (bn) by Year
2009	17.6	1.5	16.8	168.1	204.0
2010	32.2	6.2	19.8	188.3	246.5
2011	44.1	17.8	23.1	210.9	295.9
2012	57.6	17.7	26.1	236.2	337.6
2013	40.9	0.7	24.8	264.6	331.0
2014	54.2		20.6	205.2	280.0
2015	104.5		25.7	134.8	265.0
2016	133.9		27.3	78	239.2
2017	148.2		21.4	70.4	240.0
2018	6.1		16.3	102.6	125.0
Total (bn) by Type	639.3	43.9	221.9	1659.1	

**Maturity timing is estimated*

Source: Deutsche Bank, Intex, Trepp, Mortgage Bankers Association, Federal Reserve

ssuming $200 billion of new originations per year (derived from origination projections based on the average 3-year historical gross originations from all non-commercial CMBS lenders), starting in 2010, loan maturities will continue the deleveraging trend with total shortfall from 2010 through 2013 projected to be approximately $400 billion.

CMBS Maturing Loan Bubble:

- Billions of maturing loans will be difficult to refinance
  - Add in the "pretend and extend" bank debt
- Top 10% is quality and easily taken out
- Bottom 10% will be in foreclosure
- In between is basic real estate overleveraged
  - Borrower will likely need restructuring
  - High yield opportunity lenders, JV equity, preferred equity and participating mortgages are probable takeouts
  - CMBS pool may take a discounted payoff or note sales
  - Extra effort will be required to deal with special servicers

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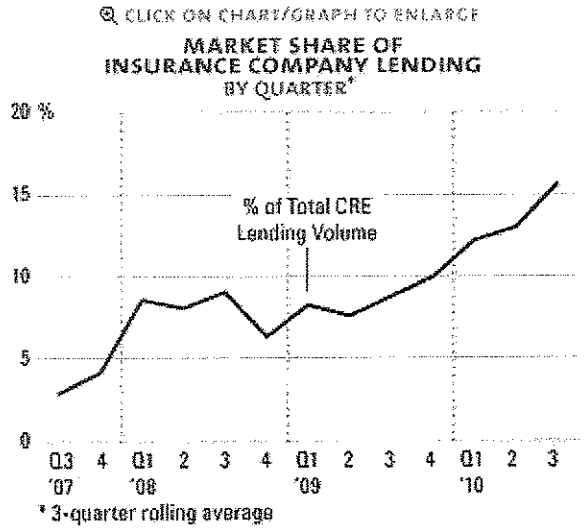
REAL CAPITAL ANALYTICS
Transactions. Trends. Tools.

US CAPITAL TRENDS

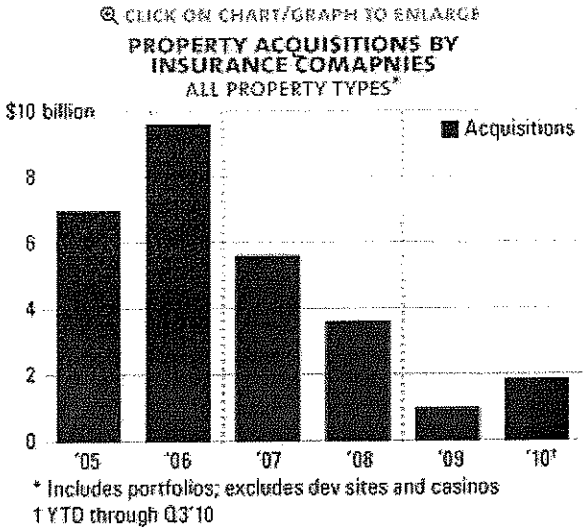
Insurance Companies Leading Wave of Capital Back Into CRE

US Capital Trends - November 11, 2010

Insurance companies, traditionally the most conservative of lenders, have seized the initiative presented by a rare confluence of market factors and are growing both their loan output and market share faster than any other debt source. At the same time, insurance companies have also doubled their acquisition activity so far in 2010, in line with overall market volume gains.



Attracted to the market by a host of conditions favorable to their unique footprint, life companies' commercial real estate lending activity has increased this year on both an absolute and relative basis. Through the third quarter of 2010 (Q3'10), insurance companies have doubled their lending market share to 18%. They are currently the third most active lender group after government agencies and national banks.



The underpinnings of this unusual move by insurance companies include those that have given REITs an edge on the property acquisition front: insurers have access to very low-cost and extensive capital resources. They also have far lower default and delinquency rates on existing loans, meaning insurance fund managers are relatively more able to focus on deploying capital and less on working out legacy trouble, a situation that certainly bears out the insurers' traditional cautious approach. According to the ACLI at mid-year, the 60-day delinquency rate for life company CRE mortgages was just 0.29%. Compare that to CMBS delinquencies of 60 days or more at greater than 7.0% according to Realpoint and banks at 4.28% based on our analysis of FDIC-insured depository institutions. With premiums rolling in, they face pressure to deploy capital. Prevailing low return expectations throughout the market are also a boost to this group, as insurer return hurdles are traditionally less aggressive than those of many other lender groups.

LENDER COMPARISON - INSURANCE VS ALL OTHERS
ALL PROPERTY TYPES (2010 YTD*)

	INSURANCE	ALL OTHER LENDERS
Mean LTV	59%	63%
Mean Loan Term (Months)	120	120
Mean Interest Rate	5.99%	5.78%
Mean Loan Size ($M)	$23.3	$11.5
% Core Props by Vol	81%	64%
% Core Props by Count	84%	59%
% Refinancing by Vol	73%	62%
% Refinancing by Count	59%	38%

*YTD through Q3'10

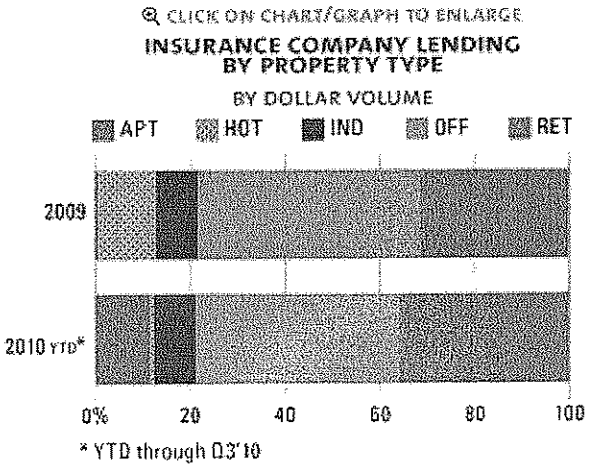
Further highlighting this advantage, the current heavy bias of investors toward large core assets is extremely well-tuned to the conservative tilt of insurance fund management parameters. Although 67% of overall lending from all sources has gone for core/stabilized assets this year, insurance lending has been weighted 81% toward core and only 19% for value-add deals.

Insurance firms have been the funding engine for some marquee deals, as well as driving some more bread-and-butter transactions in all property sectors. Metropolitan Life Insurance Co provided the $350 million first mortgage for KBS REIT's record-setting purchase of 300 North LaSalle in Chicago, at a rate of just 4.25% over five years. Met Life also loaned $350 million to Thomas Properties Group for its refinance of City National Plaza in downtown Los Angeles, at a rate of 5.9% for ten years. On the retail front, Northwestern Mutual and Prudential Real Estate Investors formed a joint venture for the $375 million refinancing of Simon Property Group's Florida Mall in Orlando. Clearly, publicly-traded Simon and Thomas were willing to accept a higher rate in exchange for a longer term.

Just two insurers, Met Life and Prudential, have accounted for roughly half of the lender group's loan volume, with the former achieving the highest total volume ($1.9 billion) and average loan size ($126 million) year-to-date in 2010. However, numerous insurers have been active at a broad spectrum of lower loan amounts. The most prolific lender, Standard Life, has made 25 loans averaging just $3 million. In contrast, the second most active lender, Prudential, has made 22 loans averaging $54 million.

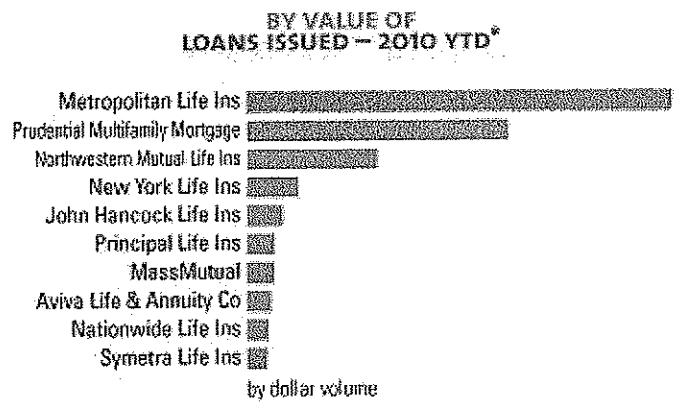
In most recent years, life companies have allocated at least 70% of their loan originations in the office and retail property sectors, with another 10%-plus going to multifamily. Similar proportions are being followed this year, with the one deviation being a resurgence of activity in the apartment sector. In 2009, insurers uncharacteristically steered clear of apartment debt as government agencies dominated the sector.

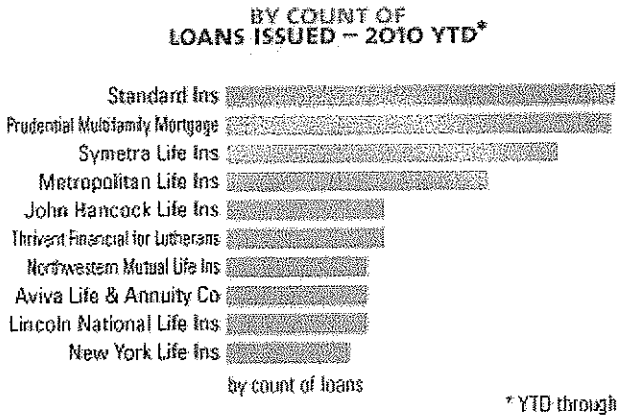
One aspect of insurance lending this year has been in sync with historical patterns for the group: refinancings have been both more common and larger. So far in 2010, the number of refinancing- to-sale loans is at a 3:2 ratio, but the dollar volume is tipped toward refinancing by 3:1, somewhat higher than the ratio in recent years.



The sustainability of insurance lending at current levels remains an open question. Among the challenges for continued high activity will be the likely growth of CMBS, a return to health for bank balance sheets and the spread of deals outside the core spectrum. There will also be new players in the market. For example, Brookfield Office Properties confirmed in early November that the Bank of China is providing $800 million to refinance 245 Park Avenue. As banks and other lenders ramp up, insurers will either have to keep pace or take their more accustomed role as cautious players.

Top 10 Insurance Lenders





* YTD through

Recent Commercial Property Loans Made By Insurance Lenders

Deal Name Location	Units/SF Yr Blt/Rnv	$ Lender B Borrower	Trans Type	Loan ($M)	LTV†	Interest Rate	Term (Yrs)
The Florida Mall * Orlando, FL	1,834,732 1986	$ Prudential Insurance B Simon Property Group	Refi	$375.0		5.75%	10
City National Plaza Los Angeles, CA	2,200,000 1972	$ Metropolitan Life B Thomas Properties Group	Refi	$350.0		5.90%	10
300 North Lasalle Chicago, IL	1,302,901 2009	$ Metropolitan Life B KBS REIT	Sale	$350.0	53%	4.25%	5
San Felipe Plaza Houston, TX	959,466 1984	$ Metropolitan Life B Thomas Properties Group	Refi	$110.0		4.78%	8
2500 CityWest Houston, TX	574,216 1982	$ Northwestern Mutual B Thomas Properties Group	Refi	$65.0		5.53%	9
Mission West Refi Portfolio Silicon Valley, CA	484,437 Various	$ Hartford Life Insurance B Mission West Properties	Refi	$40.0		6.05%	20
Exeter Commons Reading, PA	361,000 2009	$ New York Life Insurance B RioCan REIT	Sale	$30.0	57%	5.30%	10
2200 Larsen Rd Green Bay, WI	633,150	$ Unum Life Ins Co America B Green Bay Converting, Inc	Refi	$17.0		6.70%	13
Pocatello East Pocatello, ID	76,415 2007	$ Sun Life America B Grubb & Ellis Healthcare REIT II	Sale	$8.0	50%	6.00%	10
83 McNaughten Rd Columbus, OH	73,331 2001	$ Transamerica Life Insurance Co B Healthcare Realty Trust	Sale	$4.2	29%	5.53%	8

* JV †LTV shown only where transaction type is a sale

Data subject to future revision; based on properties & portfolios $5 mil and greater.