

October 15, 2010

The Honorable Robert M. Bell,
Chief Judge
The Honorable Glenn T. Harrell, Jr.
The Honorable Lynne A. Battaglia
The Honorable Clayton Greene, Jr.
The Honorable Joseph F. Murphy, Jr.
The Honorable Sally D. Adkins
The Honorable Mary Ellen Barbera,
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this, its One Hundred Sixty-Sixth Report, and recommends that the Court adopt, on an emergency basis, proposed new Rule 14-207.1 and amendments to Rules 14-207 and 1-311.

The need for these changes emanates from recent revelations regarding the filing in residential foreclosure actions of affidavits as to which the affiant either did not have sufficient knowledge of the facts stated in the affidavit to validly attest to their accuracy or did not actually read or personally sign the affidavit. Preliminary audits have shown that hundreds of such affidavits have been filed in Maryland circuit courts. Up to this point, courts, with good reason and really of necessity, have relied on the accuracy of affidavits, especially when filed by attorneys, unless there is something on the face of the document to suggest otherwise or the validity of the affidavit is challenged. Evidence that has recently come to light, largely

through admissions under oath by the affiants themselves, has shaken the confidence that the courts have traditionally given to those kinds of affidavits.

In the Committee's view, the use of bogus affidavits to support actions to foreclose liens on property, apart from prejudice to the homeowners, constitutes an assault on the integrity of the judicial process itself. Proposed Rule 14-207.1 is intended to authorize the courts, as part of the screening process now provided for in Rule 14-207 (c), to examine and audit affidavits and certificates more closely. When there is some reason to believe that the affidavit, though perhaps facially compliant with legal requirements, may not be accurate, the court may enter an order requiring the party who filed the affidavit to show cause why the affidavit should not be stricken and, if it is stricken, why the action should not be dismissed or other appropriate relief granted. This approach, in the Committee's view, addresses directly the problem that has surfaced -- assuring that these cases may proceed only upon documents that are, in fact, genuine and valid.

The courts may already have the authority to do what the proposed Rule would authorize, and some have issued show cause orders, but a Rule would be helpful to provide a template for the courts to follow and to give clear notice to the litigants and others that affidavits in these cases will be subject to scrutiny. It would also constitute a clear statement by the Court of Appeals that the Maryland Judiciary recognizes the seriousness of the problem and has provided an appropriate and measured response to it.

It is evident that, with or without a Rule, the courts will not be able to implement this kind of review without additional resources. Based on what has been revealed so far, thousands of files may need to be examined. Section (c) of proposed Rule 14-207.1 attempts to deal with that problem by specifically authorizing the courts to designate special part-time masters or examiners to review the files and conduct proceedings to determine the validity of documents and to assess the costs of those masters or examiners.

Section (d) of the Rule precludes any of the costs, expenses, or attorney's fees incurred by reason of proceedings under the Rule, including the fees and expenses of special masters or examiners, from being assessed against a borrower or record owner unless it was the borrower or record owner's affidavit that was being reviewed. With that exception, it is the Committee's intent that the costs to the court be assessed against the plaintiff -- the secured party whose agents brought the action.

Notwithstanding the assessment of actual costs against the secured party plaintiffs, the fact is that additional resources will be needed to conduct the massive audits likely to occur and efforts must be made to obtain those resources.

The proposed amendment to Rule 14-207 is in part a conforming one - to delete the existing subsection concerning screening. A new section (c) is proposed - to require service of all affidavits, pleading, and other papers that amend, supplement, or confirm one that was previously filed.

The proposed amendment to Rule 1-311 is to correct what the Committee believes was an inadvertent omission and which also is of a conforming nature.

Respectfully submitted,

Alan M. Wilner
Chair

AMW:cdc

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, and party 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.

(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 or because the affiant does not have a sufficient basis to attest to the accuracy of the facts stated in the affidavit, 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. As part of the show cause order, the court may order that the affiant appear before the court at a time stated in the order and attest under penalty of perjury that the affiant read and personally signed the affidavit and has a sufficient basis to attest to the accuracy of the facts stated in the affidavit. A copy of the order shall be sent to the plaintiff and to each borrower, record owner, and party, together with a notice that they may appear and examine the affiant. The court may further require that the plaintiff serve the order and any response thereto.

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, 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.

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.

. . .