



2011

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Jacob L. White
University of Baltimore School of Law

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Recommended Citation

White, Jacob L. (2011) "'Robo-Signing': A Symptom of the Shortcomings in Maryland's Policy of Expediting Foreclosure Proceedings," *University of Baltimore Journal of Land and Development*: Vol. 1: Iss. 1, Article 5.
Available at: <http://scholarworks.law.ubalt.edu/ubjld/vol1/iss1/5>

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RECENT DEVELOPMENTS

“ROBO-SIGNING”: A SYMPTOM OF THE SHORTCOMINGS IN MARYLAND’S POLICY OF EXPEDITING FORECLOSURE PROCEEDINGS

Jacob L. White

INTRODUCTION

The foreclosure process in the United States has recently ground to a halt.¹ Unfortunately, this delay has not been brought on by gains in the depressed U.S. housing market.² Instead, a backlog of foreclosure filings has amassed, which stand to further delay the recovery of the real estate market.³ The parties responsible for this backlog of foreclosures are mortgage servicers, who incurred governmental scrutiny after their robo-signing practices came to light.⁴

Robo-signing⁵ drew the national spotlight late last year,⁶ as officials from several mortgage servicing companies admitted to signing

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1. The number of foreclosure filings in United States “dropped 35 percent last month to the lowest level in almost four years.” Dan Levy, *Foreclosure Filings in U.S. Plunge to Lowest in Four Years*, WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/business/foreclosure-filings-in-us-plunge-35percent-to-lowest-in-four-years/2011/08/11/gIQA1qBL8I_story.html.
 2. *Id.* Rather it is a product of “increased efforts to keep delinquent borrowers in their homes.” *Id.*
 3. *Id.*
 4. *Id.*
 5. Unfortunately, robo-signing cannot be pigeon-holed as a monolithic phenomenon. As explained in a July 18, 2011 article from the Associated Press: Robo-signing refers to a variety of practices. It can mean a qualified executive in the mortgage industry signs a mortgage affidavit document without verifying the information. It can mean someone forges an executive’s signature, or a lower-level employee signs his or her own name with a fake title. It can mean failing to comply with notary procedures. In all of these cases, robo-signing involves people signing documents and swearing to their accuracy without verifying any of the information.
Michelle Conlin & Pallavi Gogoi, *Mortgage ‘Robo-Signing’ Goes On*, ASSOCIATED PRESS (July 18, 2011), available at <http://www.abcnews.go.com/US/wirestory?id=14100463>.
 6. Matt Gutman & Bradley Blackburn, *Foreclosure Crisis: 23 States Halt Foreclosure As Officials Review Bank Practices*, ABC NEWS (Oct. 4, 2010), <http://abcnews.go.com/WN/robo-signers-blamed-foreclosure-mistakes/story?id=11798650>.

thousands of affidavits attesting to the accuracy of foreclosure documents without actual knowledge of their validity.⁷ In the wake of these revelations, federal and state agencies, attorneys general, state legislatures, state judiciaries, and lending institutions have all taken measures to ensure that proper procedures were being followed with regard to foreclosure filings.⁸ Nevertheless, the concern remains that the uncertainty surrounding servicers' robo-signing of foreclosure documents "will extend the current housing market woes into 2012 and beyond."⁹

In order to avoid this type of foreclosure backlog, and to promote judicial efficiency and liquidity in the real estate market, Maryland officials have traditionally espoused a strong policy of expediting foreclosure proceedings.¹⁰ However, in light of recent realizations of the widespread use of robo-signing by mortgage servicers, one must question the efficacy of maintaining a policy that emphasizes speed in an atmosphere wrought with fraud. This article asks whether Maryland lawmakers should continue the policy of expediting foreclosure proceedings, and ultimately argues that recent revelations of robo-signing suggest that the policy has gone too far because of (1) cursory judicial oversight of the foreclosure process, (2) a problematic organizational structure in the mortgage servicing industry, and (3) a lack of personal responsibility on the part of individual actors.¹¹ Thus, in order to permanently eliminate robo-signing, Maryland lawmakers must

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7. See, e.g., Matthew B. Banks, Note, *Prima Facie Validity of Proofs of Claim in the Age of "Robo-Signers"*, 29-JAN AM. BANKR. INST. J. 54, 55 (2011) ("GMAC employee Jeffrey Stephan admitted during a deposition that he was signing nearly 10,000 foreclosure documents a month without the requisite first-hand knowledge."). See also Ariana Eunjung Cha, *Ally's GMAC Mortgage Unit Temporarily Halts Evictions in 23 States*, WASH. POST. (Sept. 20, 2010), http://voices.washingtonpost.com/political-economy/2010/09/allys_gmac_mortgage_unit_halts.html ("[An] employee of Ally Financial[, who] may have approved tens of thousands of foreclosures across the country . . . stated that when he put his signature on case files, he did not know what information the file contained. . .").
 8. See generally *Timeline: Foreclosure Debacle*, WASH. POST, 2011, <http://www.washingtonpost.com/wp-srv/business/foreclosure-freeze/timeline.html> (offering a number of examples of lending institutions announcing foreclosure freezes, and also both federal and state level governmental units conducting investigations into flawed foreclosure procedures, between September 20th and November 18th, 2010).
 9. Levy, *supra* note 1 (quoting RealtyTrac Chief Executive Officer James J. Saccacio).
 10. See, e.g., *Bacharach v. Washington United Coop., Inc.*, 29 A.2d 822, 825 (Md. 1943) ("The purpose of [the Maryland Mortgage Act] was to provide a more expeditious, and less expensive, method of enforcing mortgages than the former proceeding by formal bill in equity. . .").
 11. See Lauren E. Willis, *Developments in the Law: The Home Mortgage Crisis: Introduction: Why Didn't the Courts Stop the Mortgage Crisis?*, 43 LOY. L.A. L. REV. 1195, 1203 (2010) (explaining that one of the reasons that U.S. courts failed to stop or slow down the mortgage crisis is the fact "that most courts rubber-stamp foreclosures").

consider a solution that takes into account all of these facets of the problem.

I. HISTORICAL DEVELOPMENT

A. *Introduction to the Foreclosure Process*

Normally, whenever an individual secures a loan for the purchase of real property, the lender will require that the individual execute a mortgage on the property as collateral for the loan.¹² If the mortgagor defaults on the loan by failing to repay the amount set forth in the promissory note in a timely manner, the mortgagee may foreclose on the property.¹³ Foreclosure proceedings are generally governed by state law.¹⁴ Nineteen states require lenders to institute judicial proceedings in order to foreclose on a home.¹⁵ On the other hand, three states employ hybrid formulations of the foreclosure process, and twenty-eight states and the District of Columbia allow foreclosures to occur without the need for formal judicial proceedings.¹⁶

In Maryland, which is a non-judicial foreclosure state,¹⁷ mortgage documents may contain a “power of sale” clause.¹⁸ In the event of the mortgagor’s default, this clause allows the mortgagee, after initially filing an order to docket,¹⁹ to sell the property to recover the amount owed in the note without instituting judicial proceedings, subject only to ratification by the court.²⁰ However, if the mortgage document lacks a power of sale clause, the mortgagee must initiate judicial pro-

12. *See* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 1.1 cmt. (1997) (“The function of a mortgage is to employ an interest in real estate as security for the performance of some obligation.”). What is referred to colloquially as a “mortgage” is actually two separate documents: (1) the promissory note, which is the borrower’s agreement to repay the loan plus interest on the dates and at the times specified in the note; and (2) the mortgage or deed of trust, which is the borrower’s agreement to pledge the property as collateral in order to secure payment of the note. *See generally* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 1.1 (1997) (“A mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation.”).

13. *Id.*

14. David R. Greenberg, Comment, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 261 (2010).

15. Foreclosure Laws and Procedures by State, REALTYTRAC, <http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp> (last visited Oct. 24, 2011).

16. *Id.*

17. *Id.*

18. MD. CODE ANN., REAL PROP. § 7-105(b)(2) (2011) (“A power of sale or assent to decree authorized in a mortgage or deed of trust may be exercised only by an individual.”).

19. MD. R. 14-207(a)(1) (2010).

20. MD. R. 14-207(a)(2) (“An action to foreclose a lien pursuant to an assent to a decree or pursuant to a lien instrument that contains neither a power of sale nor an assent to a decree shall be commenced by filing a complaint to

ceedings in order to foreclose on the property.²¹ It is significant that both processes require that a plaintiff provide notice to the homeowner as to the total sales price of the residence, the total considered to be given or received, the time at which title is to be sold, and other financial and legal obligations.²²

B. Maryland's Policy of Expediting Foreclosure Proceedings

As early as 1943, in *Bacharach v. Washington United Cooperative, Inc.*, the Maryland Court of Appeals articulated its position that the Maryland Mortgage Act, which authorized the use of power of sale clauses to foreclose by mortgagees, was enacted "to provide a more expeditious, and less expensive, method of enforcing mortgages."²³ In *Bacharach*, the Court of Appeals held that where the plaintiff "did not allege specific charges of fraud," the foreclosure sale of the property in question, which was performed under a power of sale clause and was subsequently ratified by the court, should not have been set aside.²⁴ The court explained that mere "harmless errors or irregularities," were not enough, rather, there must be "substantial grounds to justify a court in setting aside a judicial sale."²⁵ Underlying this rule, the court articulated a policy of judicial efficiency, which is the basis for the court's "presum[ption] that the mortgagee . . . has discharged his duty faithfully in the exercise of the power of sale," and that the rationale for placing the burden of proof is on the party challenging the foreclosure sale.²⁶ However, the court stressed that this policy was not intended "to impair or defeat the right of the mortgagor to be heard in defense of his property."²⁷

More recently, in *G.E. Capital Mortgage Services, Inc. v. Levenson*, the Court of Appeals reaffirmed their policy of expediting foreclosure proceedings in their reversal of a Court of Special Appeals' ruling that would have required a party foreclosing based on an equitably subrogated lien to obtain a declaratory judgment before foreclosing pursuant to a power of sale clause.²⁸ In doing so, the court strongly reiterated its understanding that the "policy of Maryland law [is] to expedite mortgage foreclosures."²⁹

foreclose. If the lien instrument contains an assent to a decree, no process shall issue . . .").

21. *Id.*

22. 15 M.L.E. Mortgages § 128 (2011).

23. *Bacharach v. Washington United Coop., Inc.*, 29 A.2d 822, 824-25 (Md. 1943) (statement of Judge Bryan).

24. *Id.*

25. *Id.* at 825.

26. *Id.*

27. *Id.*

28. *G.E. Capital Mortg. Servs., Inc. v. Levenson*, 657 A.2d 1170, 1178 (Md. 1995).

29. *Id.*

Nevertheless, the court cited Maryland’s foreclosure policy again in *Wells Fargo Home Mortgage, Inc. v. Neal*.³⁰ However, in that case, rather than allowing the foreclosure to go forward, the court instead held that a mortgagee’s failure to comply with U.S. Department of Housing and Urban Development (“HUD”) loss mitigation regulations alluded to in its Federal Housing Administration (“FHA”) insured mortgage was evidence of “unclean hands” on the part of the mortgagee, which would be sufficient for the court to grant an injunction staying the foreclosure under Maryland Rule 14-209.³¹

C. *The Origins of Robo-Signing*

The current robo-signing issue can be traced back to the subprime mortgage crisis of the mid-2000s.³² During the period leading up to the subprime mortgage crisis, the percentage of new mortgages in the U.S., which were considered subprime,³³ had quadrupled,³⁴ largely due to the growing demand for mortgage-backed securities.³⁵ In 1994, in order to accommodate the securitization process, the mortgage industry created a nationwide recording system, known as Mortgage Electronic Registration Systems, Inc. (“MERS”),³⁶ under which companies were able to sidestep the requirement that mortgages be re-recorded in county land records offices every time they were sold.³⁷

30. *Wells Fargo Home Mortg., Inc. v. Neal*, 922 A.2d 538, 550 (Md. 2007).

31. *Id.* at 551-52.

32. Pallavi Gogoi, Robo-Signing Practices Older, More Pervasive Than First Thought, HUFFINGTON POST (Sept. 1, 2011, 8:50 PM), http://www.huffingtonpost.com/2011/09/01/robo-signing-practices-1990s_n_945867.html.

33. Subprime mortgages are loans which banks market to individuals who typically could not qualify for loans in the “prime market[,]” due to factors such as “poor credit history, . . . limited assets, self-employment, and variable income.” Greenberg, *supra* note 14, at 255-56. Furthermore, subprime mortgages typically begin “with a low interest rate[, that] . . . [a]fter the first two or three years . . . increase[s] significantly, often to above-market rates.” Greenberg, *supra* note 14. These factors meant that there was a considerably higher risk that the mortgagors would default on their debt, “thereby making subprime mortgages a riskier investment for banks.” Greenberg, *supra* note 14. However, the securitization process allowed mortgage servicers to dilute this risk by passing it on to investors while continuing to turn a profit from servicing fees. Greenberg, *supra* note 14.

34. See Greenburg *supra* note 14, at 255 (“Between 1994 and 2006, subprime mortgages grew from five percent to over twenty percent of all new mortgages.”).

35. Greenburg *supra* note 14, at 256 (“Securitization of the subprime mortgage market was a significant contributing factor in the rapid increase in subprime lending.”).

36. Yasha Levine, *How an Obscure Outfit Called MERS is Subverting Our Entire System of Property Rights*, ALTERNET (Dec. 16, 2010), <http://www.alternet.org/story/149189/?page=entire>.

37. Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1621-22 (2011).

With the creation of MERS, when a lender records a new mortgage in the records office, “instead of listing [themselves] as the owner of the mortgage, the lender names MERS as mortgagee, but ‘solely as nominee’ - meaning only as an agent - for the lender, and for the lender’s ‘successors and assigns.’”³⁸ Then, if the lender later assigns that mortgage to another member of MERS, “the assignment need not be recorded because the new owner is among the original lender’s ‘successors and assigns.’”³⁹ Since the vast majority of both prime and subprime mortgages underwent securitization,⁴⁰ and mortgages changed hands multiple times, it eventually became difficult to determine who actually owned individual mortgages.⁴¹

When the housing market declined, the U.S. was hit with millions of foreclosures.⁴² Due to the complexities of the securitization process coupled with widespread shoddy record-keeping practices in the mortgage industry,⁴³ obtaining proper mortgage documents began to present a problem for lenders attempting to foreclose, resulting in the widespread filing of unverified and fraudulent documents, in other words, robo-signing.⁴⁴

38. *Id.* at 1622.

39. *Id.* at 1623.

40. Greenberg, *supra* note 14, at 256 (“By 2006, 80.5% of all subprime loans were packaged into mortgage-backed securities.”).

41. Greenberg, *supra* note 14, at 257-58. The process normally works as follows: (1) a mortgage broker issues a subprime loan to a traditionally “risky” mortgagor in exchange for a mortgage on their property; (2) the mortgage broker would then sell the mortgage to “an issuer or arranger”; (3) the issuer then “pools thousands of mortgages together and sells them as securities to . . . investors[, who each] . . . [receive] a fractional interest . . . [in a] trust’s pool of mortgages.” Greenberg, *supra* note 14.

42. See Willis, *supra* note 11, at 1195 (“Roughly 6.4 million home foreclosures were initiated between 2007 and 2009 . . .”). See also Scot J. Paltrow, *Special report: Banks Continue Robo-Signing*, REUTERS (July 18, 2011), available at <http://www.reuters.com/article/2011/07/18/us-foreclosure-banks-idUSTRE76H5XX20110718> (“In 2010, 2.5 million foreclosures were initiated . . .”).

43. See *Mortgage Electronic Registration Systems (MERS) Inc.*, N.Y. TIMES (Oct. 14, 2010), http://topics.nytimes.com/top/news/business/companies/mortgage_electronic_registration_systems_inc/index.html (“In the fall of 2010, as evidence mounted that many foreclosures may have been mishandled, the system was faulted for sloppiness and questions were raised about whether it was used to sidestep legal requirements.”).

44. See Paul Kiel, *Internal Doc Reveals GMAC Filed False Document in Bid to Foreclose*, PROPUBLICA (July 27, 2011), <http://www.propublica.org/article/gmac-mortgage-whistleblower-foreclosure> (providing one example of how a mortgage servicing company, lacking proper documentation to foreclose, resorted to filing a fraudulent document).

D. *Immediate Reactions to and Consequences of the Robo-Signing Crisis*

Private groups and governments, at the state and local levels, have reacted to the emerging crisis.⁴⁵ Ally Financial, Inc. was the first of a number of companies to halt foreclosures as a result of revelations of robo-signing.⁴⁶ At the state level, attorneys general from across the country have taken notice of the problems presented by robo-signing, and have taken varying levels of action.⁴⁷ Also, all fifty attorneys general have announced that they are conducting a cooperative inquiry into the mortgage servicing industry.⁴⁸ State-level judicial systems have reacted by adopting stricter filing requirements and exercising greater scrutiny of documents in the foreclosure process.⁴⁹ At the federal level, the Office of the Comptroller of the Currency, the Federal Reserve, and the Office of Thrift Supervision reached a settlement with some of the largest banks, in which the banks agreed “to compensate borrowers who were wrongly foreclosed upon and to overhaul their operations[, but leaving the] [f]ines . . . to be determined later.”⁵⁰

The recent drop in foreclosure filings, which fell “to the lowest level in almost four years,” are representative of a delay that will likely extend the economic rut that the U.S. housing market is experiencing through at least 2012.⁵¹ Also, recent reports claiming that banks have continued to robo-sign⁵² signal that this backlog of foreclosures may last significantly longer, as officials will be forced to further scrutinize

45. For a number of reactions to the robo-signing crisis by both private groups and government see *Timeline: Foreclosure Debacle*, *supra* note 8.

46. Debra Cassens Weiss, *How 2 Pro-Bono Lawyers Uncovered ‘Robo-Signer,’ Halting Foreclosures in 23 States*, A.B.A. J. (Sept. 23, 2010), http://www.abajournal.com/news/article/how_2_pro_bono_lawyers_uncovered_robo-signer_halting_foreclosures_in_23_sta/. Other banks which followed suit included J.P. Morgan Chase, Bank of America, PNC Bank, and Goldman Sachs. Bank of America has since announced that it would resume foreclosures as normal. See *Timeline: Foreclosure Debacle*, *supra* note 8.

47. *Timeline: Foreclosure Debacle*, *supra* note 8. On September 20, 2010, California’s Attorney General ordered Ally Financial to freeze all foreclosures within the state. *Timeline: Foreclosure Debacle*, *supra* note 8. On October 6, Ohio’s Attorney General became the first to file a lawsuit against Ally Financial, alleging fraud in foreclosures across Ohio. *Timeline: Foreclosure Debacle*, *supra* note 8.

48. *Timeline: Foreclosure Debacle*, *supra* note 8.

49. See ALAN M. WILNER, MD. CT. OF APP. COMM. ON RULES & PRACTICE, 166TH REP., at 1 (Oct. 15, 2010), available at <http://www.courts.state.md.us/rules/docs/166threport.pdf> (proposing the adoption of Rule 14-207.1 and the amending of Rules 1-311 and 14-207 in light of “recent revelations regarding the filing in residential foreclosure actions.”). See also, e.g., N.J. CT. R. 1:5-6 (West 2011) (amended 2011).

50. John W. Schoen, *Mortgage Lenders Settle But Still Face Probe*, MSNBC (Apr. 13, 2011), http://www.msnbc.msn.com/id/42577451/ns/business-eye_on_the_economy/.

51. Levy, *supra* note 1.

52. Paltrow, *supra* note 42.

foreclosure filings, adding further delay to the recovery of the U.S. housing market.

II. ANALYSIS

Traditionally, Maryland courts have espoused a strong policy in favor of expediting mortgage proceedings.⁵³ Likewise, the widespread practice of robo-signing has its basis in the mortgage industry's obsession with efficiency.⁵⁴ However, in light of the crisis at hand, one is forced to question whether maintaining the current policy, which emphasizes speed, is still viable in an atmosphere wrought with fraud. This article argues that robo-signing is evidence that the policy of expediting mortgage proceedings has gone too far, due to (1) cursory judicial oversight of the foreclosure process, (2) a problematic organizational structure within the mortgage servicing industry, and (3) a lack of personal responsibility on the part of individual actors.⁵⁵ Therefore, any attempt to eliminate robo-signing must address each of these elements of the problem. While one may contend that greater regulation will delay the processing of current foreclosures, and thus possibly add further delay to the recovery of the housing market,⁵⁶ such delay is necessary to rid the industry of an organizational culture which emphasizes expediency and profit over compliance with the relevant statutory provisions.⁵⁷

53. See, e.g., Levenson, *supra* note 28.

54. Banks, *supra* note 7, at 55 ("In today's climate, automation is the key to efficiency. However, efficiency in the mortgage-service industry has led to robo-signing, a lack of human interaction and due diligence . . .").

55. See Willis, *supra* note 11, at 1197 (explaining that one of the reasons that U.S. Courts failed to stop or slow down the mortgage crisis is the fact "that most courts rubber-stamp foreclosures"). See also Andrew J. Kazakes, Comment, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1393 (2010) ("[T]he structural characteristics of mortgage securitization and foreclosure create incentives for mortgage servicers to prefer foreclosure . . ."), and Victoria V. Corder, *Homeowners and Bondholders as Unlikely Allies: Allocating the Costs of Securitization in Foreclosure*, 30 BANKING & FIN. SERVS. POL'Y REP., no. 5, 2011, at 19, 23 ("[A]t least one bankruptcy court in Massachusetts has invoked its power . . . to sanction a plaintiff where the court had evidence that the plaintiff was not the holder of the note but had misrepresented itself as the holder to the court.").

56. See Levy, *supra* note 1.

57. See Kazakes, *supra* note 55, at 1400 ("Foreclosing parties—generally servicers—routinely file incomplete or unreviewed legal documents with courts, while borrowers and their advocates often struggle with those same servicers to obtain loan documents crucial to foreclosure defense. Understaffed to minimize overhead, servicers . . . are generally uncooperative with borrower requests. . . .").

A. Cursory Judicial Oversight of the Foreclosure Process

Courts throughout the U.S. have traditionally approved foreclosures without a great degree of scrutiny.⁵⁸ The Maryland judiciary has been an adherent of this tradition, as evidenced by its procedures which place the burden on the party opposing the foreclosure⁵⁹ in the interest of promoting judicial efficiency.⁶⁰ However, robo-signing presents a unique challenge to this policy in non-judicial foreclosure states such as Maryland, since the majority of foreclosures are done pursuant to power of sale clauses, which “[do] not involve any hearings prior to, or meaningful judicial supervision of, the sale.”⁶¹ As a result, Maryland is especially susceptible to robo-signing, as it threatens courts’ reliance on affidavits submitted by the foreclosing party,⁶² many of which are now known to have been fraudulent.⁶³

In response to the prevalence of robo-signing, the Maryland Court of Appeals’ Standing Committee on Rules and Practice reported to the Court of Appeals that “the use of bogus affidavits to support actions to foreclose liens on property, apart from [being a] prejudice to . . . homeowners, constitutes an assault on the integrity of the judicial process itself.”⁶⁴ The Committee proposed three amendments to the Maryland Rules aimed at rooting out robo-signing,⁶⁵ by enhancing judicial oversight of the foreclosure process.⁶⁶ Maryland Rule 14-207.1 strengthens the judicial screening process by allowing Maryland courts to issue a “show cause order,” which requires that a party who submitted an affidavit that the court reasonably believes is somehow deficient “show cause [as to] why the affidavit should not be stricken, and if it is stricken, why the action should not be dismissed or other relief granted.”⁶⁷ Furthermore, the Rule allows courts to appoint Maryland attorneys as “special master[s]”, who “screen pleadings and papers” and provide the court with suitable recommendations.⁶⁸ Lastly,

58. See Willis, *supra* note 11, at 1203 (“[M]ost courts rubber-stamp foreclosures.”).

59. See MD. R. 14-305 (1997). For example, the Maryland procedure for ratifying a sale after a foreclosure states “that the sale will be ratified unless cause to the contrary is shown within thirty days after the date of the notice.” *Id.*

60. See, e.g., Bacharach v. Washington United Coop., Inc., 29 A.2d 822, 825 (Md. 1943).

61. Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538, 550 (Md. 2007).

62. See MD. R. 14-207(b) (2010).

63. See Banks, *supra* note 7.

64. Wilner, *supra* note 49, at 2 (emphasis added).

65. See Wilner, *supra* note 49. These amendments were ultimately adopted by the Court of Appeals on October 20, 2010. See MD. RULES ORDER (Oct. 20, 2010), available at <http://www.courts.state.md.us/rules/rodocs/ro166.pdf> (adopting MD. R. 14-207.1, and amending MD. R. 1-311 & MD. R. 14-207).

66. See Wilner, *supra* note 49, at 2 (“This approach . . . addresses directly the problem that has surfaced – assuring that these cases may proceed only upon documents that are, in fact, genuine and valid.”).

67. MD. R. 14-207.1 (2010).

68. *Id.*

the Rule prevents the costs associated with the screening process from being assessed against the borrower, unless they were the party proffering the document.⁶⁹ Other states have taken similar steps to assure the validity of documents submitted during the foreclosure process.⁷⁰

However, more is likely needed to stem the tide of robo-signing, because as previously noted, recent reports show that servicers continue to engage in the practice.⁷¹ In order to correct this problem, Maryland courts may consider raising the degree of showing required by the party attempting to foreclose on a home, and also by requiring a further showing by the foreclosing party prior to the ratification of the sale.

B. A Problematic Organizational Structure within the Mortgage Servicing Industry

Another factor that led to the advent of robo-signing, and thus revealed that the policy of expediting foreclosure proceedings has gone too far, was the organization of the mortgage servicing industry itself.⁷² Since the policy of expediting foreclosure proceedings did not sufficiently scrutinize foreclosure documents, the mortgage servicing industry was free to push their practices consistently further towards maximizing profits, without worrying about complying with the relevant regulations.⁷³ Thus, in order to permanently eliminate robo-signing, reform must extend to the organizational structure of the industry from which the problems arose.⁷⁴ The servicing industry is organized in a fashion that emphasizes expediency and profit-maximization over compliance with applicable regulations.⁷⁵ This is evidenced by the fact that mortgage servicers are generally “[u]nderstaffed to minimize overhead,”⁷⁶ as well as “incentiv[ized]. . . to prefer foreclosures[.]”⁷⁷ since their profit is generally derived from

69. *Id.*

70. *See, e.g.*, Washington Mut. Bank v. Phillip, No. 16359/08, 2010 WL 4813782, at *1 (N.Y. Sup. Ct. Nov. 29, 2010) (granting plaintiff leave to correct deficiencies in an affidavit attesting to the truthfulness of documents submitted to the court, as required by an October 20, 2010 Administrative Order).

71. Paltrow, *supra* note 42.

72. *See generally* Andrew J. Kazakes, Comment, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1404 (2010) (explaining that the organization and procedures of the mortgage servicing industry create incentives for servicers to foreclose on homeowners, and do so quickly, as they must front legal fees; in other words, they have an incentive to robo-sign and fabricate essential documents when originals are unavailable).

73. *Id.*

74. *Id.*

75. *Id.* at 1391-92 (referring to the incentives to foreclose created by the structure of the mortgage industry and also to the “‘chain of plausible deniability’” that shields brokers from liability).

76. *Id.* at 1400.

77. *Id.* at 1391.

“collect[ing] late fees and servicing charges.”⁷⁸ In addition, instituting foreclosure proceedings allows servicers to “[recoup] fees and cash outlays immediately.”⁷⁹ Also, mortgage servicers are incentivized to expedite the foreclosure process once it has begun, as they generally “must front legal fees and borrower payments to investors.”⁸⁰

This organizational structure juxtaposes the best interests of homeowners, investors, and servicers, creating a basis for robo-signing.⁸¹ First, servicers profit from pushing as many mortgagors as possible into foreclosure, which undoubtedly is the reason employees have been caught robo-signing thousands of foreclosure documents.⁸² Moreover, servicers stand to lose profit if foreclosures are drawn out.⁸³ When problems arise with lost documents and the foreclosure process is stalled, servicers are under pressure to clear the impediment that is damaging their profit margin; thus, they will employ any means necessary to prevent the hold up, including forging necessary documents which is another symptom of robo-signing.⁸⁴

Until the cost created by robo-signing surpasses the potential for profit created by quickly pushing through foreclosures using faulty documents, servicers have little incentive to end the practice.⁸⁵ Al-

78. See Andrew J. Kazakes, Comment, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 *LOV. L.A. L. REV.* 1383, 1416 (2010). “[A] servicer’s compensation comes from three primary sources”: (1) “a base fee for servicing the loan[,] . . . [and they] are compensated at twice this rate to service loans in default”; (2) “interest earned on payments prior to disbursement to investors”; and (3) “any fees collected, including late payment fees and fees associated with default.” (footnote omitted). *Id.* at 1404.

79. *Id.* at 1405.

80. *Id.*

81. See Kazakes, *supra* note 78, at 1403-04 (explaining that the structure of the mortgage industry places the best interest of servicers and investors in conflict).

82. See Gutman, *supra* note 6 (“[A] Florida . . . robo-signer . . . somehow managed to vet 150,000 mortgages in three years. If she worked every day of every year, that would amount to over 130 mortgages a day.”).

83. See Kazakes, *supra* note 78, at 1405. As mortgage servicers must generally “front legal fees and borrower payments to investors” when borrowers enter default, servicers are incentivized to move through the foreclosure process quickly, because “the servicer recoups fees and cash outlays immediately” with a foreclosure sale. Kazakes, *supra* note 78, at 1405.55

84. See Carrick Mollenkamp, *Probe Targets Foreclosure Paperwork*, *WALL ST. J.* (Oct. 13, 2010), <http://online.wsj.com/article/SB10001424052748704164004575548580189204898.html> (“The Florida attorney general’s office is looking at possible use of ‘fabricated documents’ used in foreclosure actions in court.”).

85. In response to these concerns, the Federal Deposit Insurance Corporation (“FDIC”) adopted a new rule aimed at reducing servicer incentive to robo-sign, by eliminating “the obligation for servicers to continue funding payments missed by borrowers . . . [by] strictly limit[ing] advances to just three payments unless there is a way to repay the servicer that does not rely on foreclosure.” Kerry Curry, *FDIC’s Blair say Robo-Signing Points to Incentives Issue in Mortgage Servicing*, *HOUSINGWIRE* (Oct. 13, 2010), <http://www.hous->

though the current backlog in foreclosures may achieve this effect in the short term,⁸⁶ for it to continue into the long-term, mortgage servicers must be held accountable by both the government⁸⁷ and investors.⁸⁸

C. *A Lack of Personal Responsibility on the Part of Individual Actors*

Another factor that contributed to robo-signing, and thus pointed out the shortcomings in a policy of expediting foreclosure proceedings, is the lack of personal responsibility on the part of individuals working within mortgage servicing firms. In early 2011, testimony by one of the most notorious robo-signers, Jeffrey Stephan, led to Ally Financial postponing around 250 Maryland foreclosures.⁸⁹ The court's traditional reliance on the validity of affidavits attested to by individuals, such as Jeffrey Stephan, shows that a policy of expediting foreclosure proceedings relies too greatly on the honesty of individual actors. While Stephan never received a sanction for his fraudulent signing of the affidavits in question,⁹⁰ "federal and state officials are seeking penalties of \$20 billion to \$25 billion from . . . financial firms under investigation" in connection with the "robo-signing" crisis.⁹¹ In

ingwire.com/2010/10/13/fdics-bair-says-robo-signing-points-to-incentives-issue-in-mortgage-servicing (statement of FDIC Chairman Sheila Blair). However, this rule is limited to banks. *Id.*

86. Since mortgage servicers must front legal fees for investors, they are currently losing profits while the foreclosure system is backed up. *Id.* However, in the long run, servicers will still be incentivized to "cut corners" again unless investors hold them accountable. See Levy, *supra* note 1.
87. See Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 CHAP. L. REV. 171, 173-74 (2011) ("[T]hrough the dearth of effective federal regulation, mortgage servicers have been acting as a law unto themselves, to the detriment of both the borrowers they collect from and the investors whom they are supposed to serve.").
88. Investors recently sued Wells-Fargo executives for failing "to promptly address robo-signing and documentation issues tied to the mortgage securitization process, resulting in a situation where 'liabilities appear to be hanging like the sword of Damocles over Wells Fargo and its shareholders.'" Kerry Panchuk, *Pension Funds Sue Wells Fargo, Alleging Executives Breached Fiduciary Duties*, HOUSINGWIRE, June 22, 2011, <http://www.housingwire.com/2011/06/22/pension-funds-sue-wells-fargo-alleging-executives-breached-fiduciary-duties>.
89. Dina ElBoghdady & Ariana Eunjung Cha, *Ally Financial to withdraw Maryland foreclosures signed by Jeffrey Stephan*, WASH. POST (Jan. 19, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/18/AR2011011806433.html?wpisrc=nl_headline.
90. However, Jeffrey Stephan has been sanctioned for robo-signing in Florida. See *Deutsch Bank Trust Co. v. Cumbess*, Fifth Judicial Circuit of Florida, Marion County, case no. 2008-CA-002663 (order dated Mar. 9, 2011), available at <http://www.scribd.com/doc/50884586/Motion-for-Relief-GRANTED-Attorney-s-Fees-Awarded-on-Affidavit-Made-in-Bad-Faith>.
91. Ruth Simon, Vanessa O'Connell & Nick Timiraos, *Foreclosure Talks Snag on Bank Liability*, WALL ST. J., Aug. 22, 2011, at C1, available at <http://online.wsj.com/article/SB10001424053111904070604576521282894534152.html>.

order to create an environment of accountability within the mortgage servicing industry, individual decision-makers must be held accountable. Placing some responsibility for cursory and deliberately fraudulent practices on individuals working within mortgage servicing firms would likely translate into added diligence in handling documents and greater emphasis on following proper procedures.⁹²

Recently, the New York Supreme Court for Kings County, threatened HSBC Bank USA President and CEO Irene M. Dorner with sanctions stemming from a foreclosure action in which, after submitting an affidavit attesting to the validity of the foreclosure documents, the documents were found to contain “false statements of [material] facts, [coupled with] the use of robo-signers.”⁹³ In doing so, Justice Schack explained that Dorner “bears a measure of responsibility for [the] plaintiff’s actions,” due to her “particular knowledge of HSBC Bank USA’s operations.”⁹⁴ The Maryland judiciary should follow a similar course, as a means of putting the pressure on decision-makers to ensure that their processes are in compliance with the law.

In order to effectively increase individual accountability, Maryland’s legislature must also take part in the process by enacting legislation increasing the penalties for submitting fraudulent affidavits. In Nevada, for example, a recently enacted bill will increase civil and criminal penalties associated with robo-signing.⁹⁵ The bill requires foreclosing parties to not only submit an affidavit attesting to the validity of the foreclosure documents, but also provides for a civil action against individuals who foreclose under power of sale clauses without complying with the relevant statutory provisions.⁹⁶ Furthermore, the bill makes the crime of “making a false representation concerning title” a felony.⁹⁷ If Maryland enacted a similar statute, it would place significantly greater pressure on individual actors to comply with relevant regulations when attesting to the validity of affidavits in Maryland foreclosure cases.

CONCLUSION

The current robo-signing crisis is the result of a severe lack of effective regulation and an industrial culture focused on pushing the limit in terms of expediency in order to maximize profits, both of which can be seen as pointing out the shortcomings in maintaining a policy

92. See Conlin, *supra* note 5 (“So far, no individuals, lenders or paperwork processors have been charged with a crime over the robo-signed signatures found on documents last year.”).

93. HSBC Bank USA v. Taher, No. 9320/09, 2011WL 2610525, at *1, *15 (N.Y. Sup. Ct. July 1, 2011).

94. *Id.* at *17.

95. See Assemb. B. No. 284, 76th Gen. Assemb. (Nev. 2011).

96. *Id.*

97. *Id.*

of expediting mortgage proceedings.⁹⁸ The increase in efficiency gained by an expedient foreclosure process is simply not worth the sacrifice of individuals' procedural rights. By increasing judicial oversight of the foreclosure process, reorganizing the servicing industry to reduce incentives to robo-sign, and emphasizing individual accountability, it may be possible to salvage the mortgagor/mortgagee relationship.

98. See Eggert, *supra* note 87, at 184 ("For too long, mortgage servicing has been relatively unregulated[;] . . . [f]ederal regulation of mortgage servicing has been, in the words of the Government Accountability Office (GAO) 'limited and fragmented.'"). See also discussion *supra* Section II.B.