

New State motto? (I didn't make this up)


Maryland

If You Can Dream It, We Can Tax It

Nor this.

Indemnity Deed of Trust Law & Legal Definition

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Indemnity Deed of Trust Law & Legal Definitio

An indemnity deed of trust is a real estate recordable document used in Maryland to avoid payment of recordation and transfer taxes in real estate transactions. The state and each local jurisdiction impose recordation taxes and transfer taxes on the recordation documents that transfer an interest in land. Recordation and transfer taxes are due when the deed trust is recorded. The taxes are based on the consideration passing under the document to be recorded, which is usually the amount of the debt secur

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8 November 2007 – Balto. Co. Bar

Topics:

1. Tax Sale Issues
2. Foreclosure Rule Change (Attachment “A”)
3. Fixing Recording Problems (Attachment “B”)
4. Consideration Issues (Attachment “C”)



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2 October 2007

TO: All Clerks of the Circuit Courts

FROM: Stuart Cordish, Courts Unit

SUBJECT: Foreclosure Cases – Md. Rule 14-206 – Bond Requirements and Designations of Purchasers

Dear Folks,

Alethea Shakes in the Foreclosure Unit in Baltimore City recently made me aware of a Rule change (actually, a lot of rule changes) that took effect on 1 July.

After docketing a foreclosure action, and before the sale of the property, the Trustee is required to file a bond. Under old Rule 14-206, unless the court ordered otherwise the bond would be “the amount of the debt plus the estimated expenses of the proceeding.”

The Rules also provided that the trustee, or some other person having an interest in the property could ask the Court to increase or decrease the amount of the bond. As explained in §23.06 of Gordon on Maryland Foreclosures, Third Edition:

Where it is anticipated that the mortgagee will buy-in, there is no real need for the filing of a substantial bond. Most judges will allow the filing of a nominal bond upon motion of mortgagee representing the expectation of a mortgagee or beneficiary buy-in and where the mortgagee agrees to file a supplemental bond in the event a third party purchases.

You started off with the requirement of the higher bond, and if the lender bought in the property at the sale, or if the substitute trustee filed a motion alleging the likelihood of a lender buy-in, the court could approve a lower bond. The new Rule reduces the need for these motions by reversing the procedure.

The new language in Rule 14-206, which applies to all foreclosure actions filed after 1 July 2007, provides:

Unless the court orders otherwise, the amount of the bond shall be \$25,000. If the property is sold to a person other than the holder of the indebtedness or a person designated by the holder in a writing filed in the proceeding to take title on the holder's behalf, the person authorized to make the sale shall increase the amount of the bond, before the sale is ratified, to the amount of the sale price as set forth in the report of sale.

So, the new Rule sets 3 new procedures:

1. The initial bond amount will be \$25,000;
2. The bond amount is increased to the amount of the sale price if the property is sold anyone other than the holder of the debt or a person designated in writing by the holder of the debt to take title on the debt holder's behalf; and
3. It allows the debt holder to designate, in a writing that is filed in the case, someone else to take title on its behalf, without the need for a separate motion to substitute that person as purchaser.

As a practical matter, Ms. Shakes suggested that the file could move more quickly toward ratification if the substitute trustee or assignee either recited in the report of sale or certified in an affidavit that the buyer either was or was not the holder of the indebtedness (or the holder's designee).

I'll be reviewing the rest of the Rule changes, and I'll get back to you. In the meantime, if you have any questions about this or any of the other changes, please let me know.



I. FIXING RECORDING PROBLEMS

A. "Lost" Instruments

1. Substitute Instrument

a. Specific performance – The grantee may compel the grantor to execute and deliver a replacement instrument (Shugars v. Shugars, 105 Md. 336, 66 A. 273 (1907)). The grantor may compel the grantee to accept a replacement instrument (Archway Motors, Inc. v. Herman, 37 Md. App. 674, 378 A.2d 720 (1977)). The filing of the complaint is constructive notice of the lis pendens as to property within that county, and can be extended to another county by filing either a certified copy of the complaint or a notice of lis pendens in the civil docket of the circuit court for such other county. MD. RULE 12-102(b).

b. Agreement of the parties – The parties may generally do voluntarily that which equity would compel. Fertitta v. Bay Shore Dev. Corp., 252 Md. 393, 250 A.2d 69 (1969).

2. Lost Instrument Agreement, With or Without a Photocopy

a. Photocopy alone is not recordable – The Clerk is only authorized to accept an original instrument or a clerk-certified copy of an original instrument. (MD. CODE, REAL PROP. §§ 3-101, 3-102, 3-104(e)(1)(last sentence), & 3-104(e)(2).) Some states provide that any one party to an instrument may make a photocopy of such instrument recordable by attaching an affidavit of such party that the photocopy is a true, correct, and complete copy of the lost original (a "lost instrument affidavit"), but Maryland law does not yet provide for such an affidavit.

b. Agreement signed by all the parties – Under longstanding interpretation and practice, if all parties to a lost instrument execute an agreement either restating the terms of the lost instrument or attaching and incorporating a photocopy of the lost instrument, then such lost instrument agreement (and photocopy with it, if applicable) can be recorded.

c. Photocopy re-signed by the applicable party or parties – Such photocopy is no longer viewed as merely a photocopy of the original instrument, but rather becomes a substitute instrument as discussed above.

3. Court Order

a. Broader authority & power of judges – The Clerks have only ministerial and administrative authority as conferred by law or judicial order, but the judges of the Circuit Courts have broad equitable and revisory powers over all court records (except to the extent constrained by statute, rule, and general equitable principles).

b. Specific Performance – In addition to the authority to order specific performance, the court may appoint a trustee to execute the instrument on behalf of the grantor or order that the court's order be recorded in the Land Records in lieu of the instrument itself. (Shugars v. Shugars, 105 Md. 336, 66 A. 273 (1907); *compare* FED. R. CIV. P. 70.)

c. Quiet title / declaratory judgment – A photocopy or other evidence of a lost instrument can be authenticated or otherwise proven in a quiet title or declaratory judgment action. As with an action for specific performance, the filing of the complaint can impose a lis pendens against the subject property during the litigation. If the action is successful, the court can order that the photocopy be recorded as if an original, that the order be recorded in lieu of the instrument, or that some other document be recorded, as determined within the discretion of the court.

B. Bad Recordings

1. Mistake in the Recorded Instrument

a. Corrected instrument not a "re-recording," but can be used as a supplemental instrument – "The clerk may refuse to accept for recording, a previously recorded deed or document that has been corrected or altered by a strike-through, interlineation, or similar corrective measures, and that has not been re-executed, initialed, or otherwise ratified in writing by the party or parties affected by the correction." (MD. CODE, REAL PROP. § 3-301(c)) Thus, the original instrument (or a clerk-certified copy of the original instrument as recorded) can be used as a corrective instrument if the affected party or parties re-execute, initial, or otherwise ratify the correction. Except in very limited circumstances, all parties to the instrument are "parties affected by the correction."

b. Reformation by the court – As part of the relief in an action for reformation of an instrument, the court can order that a corrective document be recorded or, in extreme cases, order that the original recording be corrected or otherwise revised.

c. Separate corrective instrument – As noted above, a party may generally do voluntarily that which the court could order the party to do in equity. However, as noted in the Fertitta case, a simple corrected version of the original instrument may not be as effective as one intends. An amendatory agreement signed by all the parties and cross-referenced to the original recording may be the safer route. Fertitta v. Bay Shore Dev. Corp., 252 Md. 393, 250 A.2d 69 (1969).

2. Mistaken or Fraudulent Release of a Mortgage or Deed of Trust

a. Equitable mortgage – Generally, if a mortgage or deed of trust is mistakenly or fraudulently released, the mortgage or deed of trust continues as an equitable lien with its original priority, but subject to an intervening purchasers or creditors who relied on the recorded release.

b. Revival by the court

i. Generally, revival will be granted by the court:

- Schaik v. Schaik, 35 Md. App. 19, 369 A.2d 133 (1977).
- Dreisonstok v. Hoffman, 209 Md. 98, 120 A.2d 373 (1956).
- Meyers v. Murphy, 181 Md. 98, 28 A.2d 861 (1942).
- Mays v. Mays, 176 Md. 159, 4 A.2d 121 (1939).
- Bond v. Dorsey, 65 Md. 310, 4 A. 279 (1886).

ii. But not always:

- Shaffer v. Cowden, 88 Md. 394, 41 A. 786 (1898).

c. Revival by agreement of the parties – The mortgagor and mortgagee (or grantor and trustee and/or beneficiary) can agree to revoke the release and revive the mortgage (or deed of trust), but subject to equitable subordination to intervening purchasers and creditors as applicable.

3. Other Mistakenly, Fraudulently, or Otherwise Inappropriately Recorded Instruments

a. Rescission by court or parties – Generally, if an instrument is voided by the court or the parties, a supplemental instrument is recorded reflecting such action.

b. Expungement – However, when appropriate, a court can order that a document, or part of a document, recorded in the Land Records be expunged (and a copy of the expungement order inserted in place of each of the deleted pages). Expungement has been approved in the following reported appellate decisions:

- Marquardt v. Papenfuse, 92 Md. App. 683, 610 A.2d 325 (1992).
- General Inv. Funds Real Estate Holding Co. v. Gildenhorn, 260 Md. 169, 271 A.2d 650 (1970).

- McGrath v. McGrath, 213 Md. 442, 132 A.2d 109 (1957).

However, the experience in this office is that expungement is more commonly sought and granted in situations that would never come before an appellate court. Some of those situations do not even produce adversarial proceedings, but rather are handled by *ex parte* motions. (A redacted copy of a successful motion for expungement is attached as **Exhibit A.**) Please note, however, that expungement is not automatically granted for every document inadvertently recorded – there must be some good cause for the court to disturb the public record.

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I. What is "consideration payable"?

A. "Consideration payable" means "consideration paid or to be paid"

B. "Consideration" includes anything of value given in exchange for the real property

1. Cash

2. Debt assumed (or "effectively" assumed) or debt paid off

[Pritchett v. Kidwell, 55 Md. App. 206(1983); 25 Op. Att'y Gen. 589 (1940);
22 Op. Att'y Gen. 799 (1937)]

4. Increase in the value of grantor's ownership interests in grantee

[Dean v. Pinder, 312 Md. 154 (1988); Scott v. Clerk, 112 Md. App. 234 (1996)]

5. Reduction of grantee's capital account in grantor (deemed equal to assessed value)

[Tax-Prop. §§ 12-105(g)(1), 12-106, 13-205(d)(1), 13-206 & 13-405]

6. Agreement to provide services

[23 Op. Att'y Gen. 624 (1938)]

7. Exchange of property

[36 Op. Att'y Gen. 259 (1951)]

II. Indemnity Mortgages and Indemnity Deeds of Trust

A. Tax-Prop. § 12-105(f)(1) provides that "if the total amount of secured debt has not been incurred at the time of recording or filing the instrument of writing, the recordation tax applies only to the principal amount of debt incurred at that time"

1. If a deed of trust only secures contingent obligations, no debt is "incurred" as of the time of recording – so no recordation tax is due at the time of recording

2. However, if the contingency occurs and the debt is "incurred," then the grantor of the deed of trust owes recordation tax in accordance with Tax-Prop. § 12-105(f)(2)

[74 Op. Att'y Gen. 281 (1989)]

B. Most common mistake: X grants a deed of trust that directly secures Y's note