IN THE
COURT OF APPEALS OF MARYLAND

Docket Number 40

September Term, 2017

KYLE BLACKSTONE, *et al.,*
Appellants

v.

DINESH SHARMA, *et al.,*
Appellees

TERRANCE SHANAHAN, et al.,
Appellants

v.

SEYED MARVASTIAN, et al.,
Appellees

MARTIN S. GOLDBERG, *et al.,*
Substitute Trustees/Appellants,
v.

MARTHA NEVASIER, *et al.,*
Appellees

Consolidated Appeals from Circuit Court for Montgomery County, Maryland, and Washington County, Maryland
Court of Special Appeals of Maryland, Case Nos. 1524 & 1525, September Term, 2015 and Court of Special Appeals of Maryland
Case No. 0238, September Term, 2017

BRIEF OF AMICUS CURIAE STRUCTURED FINANCE INDUSTRY GROUP, INC. IN SUPPORT OF SUBSTITUTE TRUSTEES/APPELLANTS

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TABLE OF CONTENTS

Page(s)

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

A. ***Blackstone, et al. v. Sharma, et al. and Shanahan, et al. v. Marvastian, et al.*** 3

B. ***Martin S. Goldberg, et al., v. Martha Neviaser, et al.*** 4

QUESTIONS PRESENTED 5

STATEMENT OF THE FACTS 5

ARGUMENT 5

I. UPHOLDING THE CSA'S DECISION WILL REDUCE THE AMOUNT OF CREDIT AVAILABLE FOR MARYLAND HOMEOWNERS, DRIVE UP COSTS AND LIMIT LOSS MITIGATION OPPORTUNITIES 5

A. Background on the Secondary Mortgage and Securitization Markets 5

B. Imposing a Licensing Requirement May Hinder the Sale of Mortgage Loans in the Secondary Market Thereby Driving Up Costs to Consumers and Reducing Loan Rehabilitation Opportunities 11

C. Imposing a Licensing Requirement on Trusts May Prevent Maryland Loans from Being Included in New Securitizations and Thereby Reduce the Flow of Capital Available to Maryland Homeowners 15

II. IMPOSING A LICENSING REQUIREMENT ON TRUSTS THAT HOLD LOANS DOES NOT HELP CONSUMER PROTECTION 17

III. IT IS AN INCORRECT READING OF LAW TO REQUIRE TRUSTS TO BE SUBJECT TO LICENSING UNDER MCALA BECAUSE MCALA ONLY APPLIES TO TRUSTEES AND NOT THE TRUSTS THEMSELVES 22

IV. IMPOSING A LICENSING REQUIREMENT ON TRUSTS IS IMPRACTICAL 24

CONCLUSION 29

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS 31

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112 32

105537399\V-7

105537399\V-7

CERTIFICATE OF SERVICE 33

105537399\V-7

TABLE OF AUTHORITIES

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105537399\V-7

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105537399\V-7

105537399\V-7

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105537399\V-7

105537399\V-7

INTEREST OF AMICUS CURIAE

Structured Finance Industry Group, Inc. ("SFIG") is a member-based trade association, with over 360 institutional members, focused on improving and strengthening the structured finance and securitization market. SFIG provides an inclusive network for securitization professionals to collaborate and drive necessary changes, be an advocate for the securitization community, share best practices and innovative ideas, and educate industry members through conferences and other programs. SFIG members represent all sectors of the securitization market including investors, issuers, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers and trustees. SFIG's website is www.sfindustry.org. A list of SFIG's members appears at http://www.sfindustry.org/membership/institutional.

SFIG is sympathetic to the difficulties faced by Maryland consumers adversely affected by the housing market and the economy and fully supports a foreclosure process that complies with due process and consumer protections. However, the decision by the Court of Special Appeals ("CSA") in the consolidated cases of *Blackstone v. Sharma* and *Shanahan v. Marvastian,* 233 Md. App. 58 (2017), that mortgage loans held in trust require the trust itself to be licensed under the Maryland Collection Agency Licensing Act ("MCALA")[1] in order to foreclose on those loans is an incorrect application of law which will act to materially and adversely affect Maryland consumers by making

[1] Md. Code Ann., Bus. Reg.§ 7-101 et.seq.

105537399\V-7

Maryland the only state in the country that requires trusts to obtain a license or other approval of any kind to foreclose on a loan that a trust owns.

SFIG writes as amicus to respectfully place the legal issue in context: Maryland needs a resilient, sustainable and liquid housing finance system, which (i) encourages the flow of capital into the home mortgage market to decrease the cost of borrowing and thus make homes more affordable; and (ii) minimizes the number of foreclosures through robust programs to help consumers in need; but (iii) when foreclosures are necessary, enables foreclosures, and the sale of homes to new homeowners, to proceed without undue delay and without the threat of wrongful foreclosure actions. Needlessly complicating and prolonging foreclosures by requiring trusts, which act through their trustees and who interact with consumers only through appropriately-licensed or exempt mortgage servicers, to obtain licenses under MCALA hurts homeowners and aspiring homeowners by driving up the cost of borrowing and by increasing the risk of blight by delaying the date when a new homeowner will purchase and take occupancy of the foreclosed home.[2]

[2] All parties have provided their written consent to the filing of this amici-curiae brief without waiver of any statutory, rule, or common law rights to respond. Md. Rule 8-511(a)(1). No person, other than the Amici, their members, and their attorneys, has made a monetary or other contribution to the preparation or submission of this brief. *Id.* at 8-511(b)(1)(E).

105537399\V-7

STATEMENT OF THE CASE

The ultimate question Appellants[3] ask this Court to answer is whether the trust owner of mortgage debt acquired in default must be licensed as a "collection agency" under MCALA before its trustees or substitute trustees can initiate a foreclosure action in Maryland. Based on the well-reasoned arguments of the Appellants, this Court should reverse the CSA's unprecedented opinion[4] and find that MCALA licensing is not required for a trust owner of mortgage debt.

A. *Blackstone, et al. v. Sharma, et al. and Shanahan, et al. v. Marvastian, et al.*

This appeal arises from the dismissal of a foreclosure action by the Circuit Court for Montgomery County. Appellees are borrowers who financed their homes in 2006 through promissory notes secured by deeds of trust (collectively, "mortgages"). (Opinion at *1-2) Ventures Trust 2013-I-H-R ("Ventures Trust"), through its trustee, purchased the mortgages in the secondary market. Ventures Trust, a Delaware statutory trust, is a special purpose vehicle ("SPV") which serves as a repository for an investment portfolio of securitized mortgage assets. (Pet'n 4.) The Appellants are licensed attorneys who Ventures Trusts appointed as substitute trustees to initiate foreclosure proceedings against Appellees. The Appellants have the power to foreclose under the deeds of trust. See id. Appellees challenged Appellants' foreclosure actions because Ventures Trust —that is, the trust—was not licensed as a collection agency under MCALA. The Circuit Court for

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[3] Appellants is the collective Appellants from Maryland Court of Appeals Dockets 40 and 47.

[4] *Blackstone v. Sharma,* 233 Md. App. 58 (2017).

105537399\V-7

Montgomery County agreed with Appellees and dismissed both actions without prejudice. (Pet'n 1.) The CSA affirmed the Circuit Court. (Id. at 2.)

B. *Martin S. Goldberg, et al., v. Martha Neviaser, et al.*

This appeal arises from the dismissal of a foreclosure action by the Circuit Court for Washington County (the "Circuit Court"). Appellants were duly appointed as substitute trustees to foreclose on the Deed of Trust securing a Promissory Note (the "Note") on which Appellees Martha and Marvin Neviaser ("Appellees") defaulted. Appellants initiated the foreclosure action by filing an Order to Docket Foreclosure on October 16, 2015. After briefing and oral argument, the Circuit Court dismissed the action without prejudice on March 31, 2017. The Circuit Court ruled that the LSF9 Master Participation Trust ("LSF9"), a Delaware statutory trust that contains securitized mortgage loans in an investment portfolio was a "collection agency" under MCALA. The Circuit Court further ruled that LSF9's lack of a collection agency license under MCALA precluded the foreclosure action.

Appellants appealed the Circuit Court's ruling to the Court of Special Appeals. In the Court of Special Appeals, the case was consolidated for oral argument, but not briefing, with two others: *O'Sullivan, et al. v. Altenburg, et al.*, No. 1613, September Term, 2016, and *Ward, et al. v. Martinson*, No. 0734, September Term, 2017. While the appeal was pending, and before the parties filed any briefs, the Court of Special Appeals issued its decision in *Blackstone v. Sharma*, 233 Md. App. 58 (2017). *Sharma* held, as a matter of first impression, that a foreign statutory trust must be licensed as a collection agency under MCALA in order for its appointed substitute trustees to file a foreclosure

105537399\V-7

action. Id. at 64-74. Appellants, along with the appellants in *Altenburg* and *Martinson*, filed petitions for review in this Court, which were granted on September 12, 2017.

QUESTIONS PRESENTED

SFIG adopts the questions presented in the respective Appellants' Petitions for Writ of Certiorari in Docket No. 40 captioned *Blackstone, et al. v. Sharma, et al.* and *Shanahan, et al. v. Marvastian, et al.* ("Sharma Petition")(Sharma Petition 2) and in Docket No. 47 captioned *Martin S. Goldberg, et al., v. Martha Neviaser, et al.* ("Neviaser Petition") (Neviaser Petition 2.)

STATEMENT OF THE FACTS

SFIG adopts the proceedings and statement of facts sections presented in the respective Appellants' Petition for Writ of Certiorari in the Sharma Petition (Sharma Petition 1-2,4) and the Neviaser Petition (Neviaser Petition 2-4).

ARGUMENT

I. UPHOLDING THE CSA'S DECISION WILL REDUCE THE AMOUNT OF CREDIT AVAILABLE FOR MARYLAND HOMEOWNERS, DRIVE UP COSTS AND LIMIT LOSS MITIGATION OPPORTUNITIES

A. Background on the Secondary Mortgage and Securitization Markets

Securitization is the foundation of the nation's home mortgage market, and is critical to attracting private capital. The total outstanding household mortgage debt in the United States is $8.69 trillion.[5] All but a fraction of this debt has been financed through

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[5] Federal Reserve Bank of New York, *Household Debt and Credit Report, Second Quarter 2017 Report*, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q2.pdf (visited October 5, 2017).

105537399\V-7

the securitization process that creates Residential Mortgage Backed Securities ("RMBS"). Over $6.0 trillion dollars of this debt[6] has been financed or guaranteed through the United States Government, including through the government-sponsored enterprises ("GSEs"), Fannie Mae[7] and Freddie Mac.[8] Approximately $957.3 billion of this debt has been financed through private label securitization trusts—RMBS neither issued nor guaranteed by the U.S. Government or a GSE.[9] A greater supply of capital makes the mortgage market more competitive, lowers interest rates, and makes homes more affordable.

When a consumer seeks funds to purchase a home or refinance their existing mortgage loan, the consumer must solicit a mortgage loan from the primary mortgage market, either through a mortgage broker who submits the consumer's mortgage loan application to a mortgage lender who then makes the loan, or directly from the mortgage lender. Mortgage lenders are generally comprised of bank lenders and non-bank lenders. Significantly, non-bank lenders comprise over 50% of all mortgage dollar volume originated.[10] Once the loan has been originated, the lender will sell the loan to a

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[6] Securities Industry and Financial Markets Association, U.S. Mortgage-Related Issuance and Outstanding, updated October 10, 2017:

https://www.sifma.org/resources/research/us-mortgage-related-issuance-and-outstanding/ (visited October 31, 2017) ("SIFMA Report").

[7] Federal National Mortgage Association

[8] Federal Home Loan Mortgage Corporation

[9] SIFMA Report.

[10] Patrick Barnard, *Significant Milestone: Non-Bank Share of Origination Volume Crosses 50%* (2016).

105537399\V-7

secondary market investor and then use the proceeds from that sale to originate new loans.

In addition to sales into the secondary market by non-bank lenders, similarly, following the financial crisis, the United States Department of Housing and Urban Development ("HUD"), Fannie Mae, Freddie Mac (the "GSEs") and banks often sell loans in their portfolios, that are delinquent or which have defaulted, to other investors. These secondary market sales permits HUD, the GSEs and the banks to clean-up their balance sheet, and further increases liquidity for originating new loans to consumers. In connection with the sale process for non-performing (defaulted) loans ("NPLs"), HUD, the GSEs or the banks will auction one or more pools of NPLs which are generally geographically diversified to multiple bidders, including investment funds, asset managers and mortgage servicers.

Many secondary market investors use a special purpose vehicle trust structure to purchase these loans. In some cases, multiple trusts are used to purchase the loans depending on the financing mechanism used. The trusts that are used to purchase the loans generally have a federally-chartered depository institution trustee, who acts on behalf of the trust that holds the loans. An appropriately state-licensed mortgage servicer or mortgage servicer that is exempt from state-licensing, such as a bank, is also employed by the trust to perform all consumer-facing interactions on behalf of the trust, such as sending out payment slips and receiving payments, handling customer service, performing loss mitigation functions and foreclosing on the loans as a last resort. By forcing these investors to obtain licenses under MCALA, investors may choose to avoid

105537399\V-7

purchasing Maryland mortgage loans, which will reduce the availability of credit and increase prices for Maryland homeowners and prospective homeowners.

Once a secondary market investor has pooled enough mortgage loans, the investor may decide to securitize the loans. As this Court has explained, "[s]ecuritization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. The investment bank bundles together the multitude of mortgages it purchased into a "special purpose vehicle," usually in the form of a trust, and sells the income rights to other investors. A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer who communicates with and collects monthly payments from the mortgagors."[11] This Court has also noted that "[a] SPV [special purpose vehicle] is a business entity that is exclusively a repository for bundled and securitized mortgages; it does not have any employees, offices, or assets other than the loans it purchases."[12]

The concept of securitization is simple—it is a mechanism for raising capital by minimizing and spreading risk and thus offering investors a predictable, stable, prudent return. The securitization trusts raise the capital to purchase the mortgage loans by assembling the mortgage loans into a pool, and issuing "mortgage backed securities" ("MBS"). MBS are certificates or notes which give their holders (the "MBS Holders") the

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[11] *Deutsche Bank Nat'l Trust Co. v. Brock*, 430 Md. 714, 718 (2013) (quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

[12] *Deutsche Bank Nat'l Trust Co. v. Brock*, 430 Md. 714, 718 (2013) (quoting *Anderson v. Burson*, 424 Md. 232, 237 (2011)).

105537399\V-7

right to receive a portion of the payments made by the consumers on the mortgage loans. The securitization trusts own and hold the notes and mortgages (or deeds of trust) for the benefit of the MBS Holders. Much like the trust structure used by investors to purchase loans, each securitization trust has a trustee, usually a federally-chartered bank or trust company, and a mortgage loan servicer responsible for collecting payments from the consumers, and responding when consumers fail to make payment.

The securitization trusts are generally structured to attract investors to prudent and predictable reasonable yields and returns. Mortgage loans assembled into an individual securitization trust are selected from a diverse geographic area to mitigate any potential adverse impact from adverse economic conditions in a specific region or locality. Once mortgage loans are assembled into a securitization trust, and the interests in that securitization trust are sold, the assets are fixed. By design, the securitization trust is not actively managed. Neither the trustee nor the servicer is generally permitted to sell or modify the terms of any performing mortgage loan, except to the extent permitted under the terms of the pooling and servicing agreement's ("PSA’s") provisions regarding loss mitigation and loan modification programs, as described below.

While loans are scrutinized for the creditworthiness of the consumer and the value of the home which is the subject the mortgage (or deed of trust), it is, of course, expected that there will be defaults on some loans. That risk is mitigated through both loan modification programs (which benefit both homeowners, by saving their homes if at all possible, and MBS Holders, by increasing the prospect of loan repayment and delivery of

105537399\V-7

continued cash flows to the securitization trust) and, when necessary, recovery programs, including foreclosure.

With sufficient controls and the necessary infrastructure in place, securitization offers several advantages over the traditional bank lending model. These benefits, which may increase the soundness and efficiency of the credit extension process, can include a more efficient origination process, better risk diversification, and improved liquidity. Securitization also mitigates risk associated with unquantifiable factors, such as fraud or liability associated with violation of certain state anti-predatory lending statutes,[13] recognizing that such risks drive away fiduciaries and other prudent investors which are the source of private capital for securitization trusts.

Securities issued by these securitization trusts are sold at initial issuance, and trade in the secondary market, on the basis of computer models that take into account the loan and pool characteristics, and the cash flow structure (or "waterfall") for the transaction. These models incorporate the ability to specify assumptions about factors such as prepayment speed, prevailing market rates, home price appreciation/depreciation rates, default frequency, effectiveness of recovery through loan modification and foreclosure, and loss severity. Investors who buy and sell RMBS rely on these models to provide an indication of fair value of these securities. An adverse change in these factors—for example, making recovery on defaulted mortgage loans more difficult through undue

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[13] *See e.g.*, New Jersey Homeowners Security Act, N.J.S.A. 46:10B-22 et seq.; Rhode Island Home Loan Protection Act, R.I. Gen. Laws § 34-25.2-1 et seq.

105537399\V-7

complications in and delay of foreclosure proceedings by, for instance, forcing the securitization trusts to become licensed under MCALA, as further explained *infra*—would have a detrimental effect on both the value of RMBS securities, and the ability to attract capital to securitization trusts.

B. Imposing a Licensing Requirement May Hinder the Sale of Mortgage Loans in the Secondary Market Thereby Driving Up Costs to Consumers and Reducing Loan Rehabilitation Opportunities

Although MCALA on its face only applies to the purchasers of loans that are in "default" at the time the loans are acquired by the investor,[14] the CSA's ruling[15] may nevertheless chill the secondary market even for non-defaulted, current loans. As a threshold matter, the CSA's ruling[16] will mean that Maryland is the only state in the nation that requires trusts to obtain a license or other approval of any kind. There is no other state that requires a trust to obtain a license or other approval to foreclose on a loan that the trust owns or for any other purpose.

Being the only state in the country that requires licenses for SPV trusts may mean that investors may be more reluctant to purchase even non-defaulted, current loans because if an investor were to purchase a current loan, there is always the possibility that the loan could later default while the investor owns the loan. If a default occurs, the ability of the investors to sell that loan as well as the price the investor is able to obtain for that loan sale may be adversely impacted even if the investor can find a willing

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[14] Md. Code Ann., Bus. Reg. § 7-101(d)(1)(ii).

[15] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

[16] *Id.*

105537399\V-7

purchaser. The reluctance of investors to purchase loans will in turn decrease the availability of credit in the market, which will in turn drive up costs to consumers because lenders will attempt to recoup their costs through various measures, include raising interest rates on their loans.[17] Notably, this will most significantly impact consumers who are lower on the credit spectrum and who thereby pose the most risk to lenders.[18]

MCALA also does not define the term "defaulted" as used in its definition of a "collection agency." This ambiguity imposes a cost as some investors may also decide it is too difficult or simply may not want to undertake the necessary diligence to determine whether a loan is in "default" at the time the investor is bidding on pools of mortgage loans and may instead decide to simply stop purchasing loans in Maryland as a result of improper application of law, especially when there is otherwise no difference between mortgage loans in Maryland and another given state. For instance, in the past in Georgia, investors, including Fannie Mae and Freddie Mac, stopped purchasing home loans in that state for a period of time in 2003 as a result of the poor initial drafting of the Georgia Fair

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[17] See Zvi Bodie et al., Investments, 16 (McGraw-Hill 8th ed. 2009) (the ability to sell loans increases credit availability). See Office of the Comptroller of the Currency, Comptroller's Handbook: Mortgage Banking, 12 (Feb. 2014), https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/ch-mortgage-banking.pdf

[18] See Todd J. Zywicki et al., The Law and Economics of Subprime Lending, 80 U. Colo. L. Rev. 1, 9 (2009).

105537399\V-7

Lending Act ("GAFLA"), which provided that an assignee of any residential mortgage loan originated in Georgia could be subject to potentially unlimited assignee liability.[19]

Even if investors are willing to obtain a license under MCALA, the time it takes to obtain a license (as discussed *infra* in Section V) may make it impractical or unfeasible to do so. Bidding on loan pools is a competitive and time-sensitive process. Investors who quickly need to create trusts to bid on pools may find that the process to obtain a license under MCALA is too time-consuming or costly. As a result, investors' appetite to participate in the secondary market for Maryland loans may be significantly diminished.

Finally, reduced activity in the secondary market will also negatively impact loss mitigation opportunities that are available for Maryland consumers to help repay their loans and avoid foreclosure.[20] As noted above, many bank originators was well as other investors often sell loans in their portfolios, that are delinquent or which have defaulted, to other investors. Absent costly and specialized loss mitigation activities, NPLs do not provide a return to investors, as no payments are being made by the consumers, and lenders are forced to pay the costs to carry the property, including property taxes,

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[19] See Georgia Bankers Association, *Georgia Fair Lending Act: The Unintended Consequences: Real-World Experiences Effects on Credit Availability Reaction by the Secondary Market Legislative Solutions* (Jan. 2003), at http://www.namb.org/government_affairs/fair_lending/GBAissuespredatorylendingwhitepaper.pdf ("Federal high-cost mortgage lending laws restrict that liability only to those purchasers of high-cost mortgage loans, and there is only a limited national market where those loans are securitized. However, with GAFLA [The Georgia Fair Lending Act] extending this liability to every home loan originated in Georgia, this increased liability risk has sent shockwaves throughout the secondary market.").

[20] See George M. Cohen, *The Financial Crisis and the Forgotten Law of Contracts*, 87 Tul. L. Rev. 1, 9 (2012).

105537399\V-7

property maintenance and insurance. Similarly, re-performing loans ("RPLs"), which are NPLs that have been rehabilitated through loan modification and for which consumers are making their mortgage payments under those modified terms, are also a risk for holders because there is a history of default already on the loan, and depending on the consumer's circumstances, default may occur again, which puts these loans in the same position as NPLs. The secondary market provides an outlet where lenders are able to sell the NPLs and RPLs to investors utilizing the trust structure at issue, which employs "high touch" servicers specializing in loss mitigation activity designed to reestablish payments benefitting both consumers and investors, reducing their overhead and bad debt.

Purchasers of NPLs will, thereby, generally attempt to rehabilitate the loan by ensuring the servicers, employed by the trust, offer loan modifications or other loss mitigation options to help the consumer stay in their home and convert the NPL into a stabilized cash-flowing loan. However, in some cases, despite their best efforts to work out a solution for the consumer, investors will need to foreclose on the defaulted loans. The goal of the NPL purchaser is to convert NPLs, which are non-cash flowing assets into RPLs, as cash flowing assets, through loan modifications. While modification is the primary goal for NPL purchasers, the NPLs are often severely delinquent, with consumers not having made a payment in years or having had abandoned the properties, leaving foreclosure as the last alternative to recover on the investment.

As a result, despite the primary goal of modification, a portion of NPLs that are purchased in the secondary market ultimately go through the foreclosure process. The investors who purchase these NPLs and RPLs which re-default, rely heavily on the

105537399\V-7

default mechanisms available, such as loss mitigation, foreclosure alternatives, and foreclosure to recover their investment. By making recovery on defaulted mortgage loans more difficult by requiring these investors to obtain licenses under MCALA, it further increases the risk that investors will choose to not purchase and instead pass on, pools of non-performing Maryland loans. If these investors do not purchase Maryland loans, the related consumers will have significantly less opportunities to obtain loan modifications and rehabilitate their mortgage loans and re-establish their credit, thereby dramatically reducing their chances of staying in their homes and significantly increasing their foreclosure risk.[21] Fewer investors participating in the secondary market will reduce access and raise costs for mortgage loans for all Maryland residents.

C. Imposing a Licensing Requirement on Trusts May Prevent Maryland Loans from Being Included in New Securitizations and Thereby Reduce the Flow of Capital Available to Maryland Homeowners

The CSA's ruling[22] will also make it less likely that Maryland loans will be included in new securitizations. As a direct result of the CSA's ruling in *Sharma*[23], recent securitizations that include Maryland loans now contain a risk factor disclosure in their offering memoranda that warns investors in the RMBS that the servicer may not be able to realize on defaulted Maryland mortgage loans through foreclosure. Some issuers of RMBS now include this risk factor disclosure not only in deals that contain Maryland

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[21] See Anna Gelpern et al., *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. Cal. L. Rev. 1075, 1077 (2009) (modification "rigidities can fuel foreclosures on a large scale").

[22] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

[23] *Id.*

105537399\V-7

NPLs and RPLs, but even in securitization deals that contain only performing, current, loans. Including such risk factor disclosure may discourage MBS Holders/security holders from purchasing RMBS that are backed by Maryland loans in the future, which will cause the sponsors to avoid placing Maryland loans in future securitizations, thereby lessening the demand for Maryland mortgage loans in the secondary market. Lowering demand for Maryland mortgages on the secondary market will increase borrowing costs, reduce available credit for new mortgage loans and increase credit risk for mortgage lenders.[24]

The CSA's ruling in *Sharma*[25] has also affected existing securitizations which contain defaulted Maryland loans. Sponsors of the existing securitizations are unable to determine whether they will be able to foreclose on defaulted Maryland mortgage loans given that the securitization trusts in which the loans are held are not licensed under MCALA. Further, because of the pre-existing contractual relationships and obligations to the MBS Holders/security holders, loans are unable to be removed from the securitization trust and sold to an entity that is licensed under MCALA so that the loan may be foreclosed upon. As a result, the defaulted Maryland loan becomes a worthless asset to the securitization trust as there are no cash flows from the consumers nor is there

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[24] See Zvi Bodie et al., Investments, 16 (McGraw-Hill 8th ed. 2009) (the ability to sell loans increases credit availability). See Office of the Comptroller of the Currency, Comptroller's Handbook: Mortgage Banking, 12 (Feb. 2014), https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/ch-mortgage-banking.pdf

[25] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

105537399\V-7

an ability for the securitization trust to realize upon that asset through foreclosure. Indeed, the loan can be a net negative to the trust because the securitization trust remains responsible for the carrying costs of the loan, including advancing property taxes, hazard insurance, and excess depreciation costs for the maintenance of the home.

By discouraging the placement of Maryland loans in new securitizations as well as affecting the ability of securitizations to foreclose on Maryland loans, the amount of private capital available will be reduced, thereby increasing costs and reducing opportunities for Maryland homeowners and prospective homeowners.

II. IMPOSING A LICENSING REQUIREMENT ON TRUSTS THAT HOLD LOANS DOES NOT HELP CONSUMER PROTECTION

Despite reducing the amount of capital and increasing costs for Maryland consumers by reducing demand in the secondary and securitization markets for Maryland mortgages by making it more difficult for investors to foreclose on defaulted loans in Maryland, the CSA's ruling in *Sharma*[26] does nothing to improve the consumer protections intended by MCALA.

As noted above, there are generally two categories of market participants that use trusts to hold mortgage loans: (i) secondary market investors; and (ii) securitization trusts. Significantly, the same general trust structure is used in both instances. The trusts have a federally-chartered trustee to administer the loan assets (usually a national bank or a federal savings and loan association) and hire an appropriately-licensed or exempt mortgage servicer to service the mortgage loans. This is because these trusts are unable to

[26] *Id.*

105537399\V-7

act on their own, and instead they only can act through their trustee or substitute trustee. *See, e.g., Higdon v. Lincoln Nat. Ins. Co.,* No. CIV.A. ELH-13-2152, 2014 WL 6951290, at *10 (D. Md. Dec. 8, 2014) ("It is well established that, generally, only a trustee has standing to bring actions at law on behalf of a trust."); *see also Deutsche Bank Nat'l Trust Co. v. Brock, 430 Md. 714, 718 (2013) (quoting Anderson v. Burson, 424 Md. 232, 237 (2011))* (special purpose vehicles, such as trusts, are asset repositories with no employees or officers).

Importantly, the mortgage servicer hired by the trust conducts all consumer-facing functions including receiving payments, sending out disclosures, notices and other correspondence, handling customer service, engaging in any loss mitigation activities as well as moving forward with foreclosures when necessary. The mortgage servicer can be a bank or a non-bank servicer. For instance, the largest servicer in the country in the first quarter of 2017 is Wells Fargo Bank, N.A., a national bank, and the fourth-largest servicer is Nationstar Mortgage, LLC, a non-bank mortgage company.[27] In either case, the mortgage servicer performing consumer-facing functions is heavily regulated either by a federal or state regulator or both.

In the case of bank servicers, the servicer is regulated by its federal functional regulator, most commonly the Office of the Comptroller of the Currency (the "OCC"). In addition to the extremely in-depth and intense application process to initially obtain a federal charter as a bank or federal savings and loan, once the charter is granted, the OCC

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[27] Inside Mortgage Finance, (June 16, 2017)

105537399\V-7

generally conducts a hands-on, full-scope, on-site review of its supervised institutions every 12-18 months in addition to reviewing any specialty areas.[28] Bank servicers are also regulated by the Consumer Financial Protection Bureau ("CFPB"), the federal financial consumer protection watchdog, which has supervisory authority, including examination authority, over insured depository institutions with over $10 billion in assets.[29]

Similarly, in the case of non-bank servicers, such servicers are regulated by a state banking or financial institutions regulator as well as the CFPB. For instance, in the case of non-bank servicers who service Maryland mortgage loans, such servicers are generally regulated as "mortgage lenders"[30] pursuant to the Maryland Mortgage Lender Law, Md. Code Ann., Fin. Instit. § 11-501 et. seq. ("MMLL") Significantly, in addition to the detailed and rigorous initial licensing process,[31] "mortgage lenders" are subject to a comprehensive supervisory framework under the Mortgage Lender Law, including regular examination by the Maryland Department of Labor, Licensing & Regulation,

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[28] *See* *https://www.occ.treas.gov/topics/examinations/examinations-overview/index-examinations-overview.html; see also Comptroller's Handbook on Large Bank Supervision: https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/large-bank-supervision/pub-ch-large-bank-supervision.pdf*

[29] 12 U.S.C. § 5515(a)(1)

[30] Md. Code Ann., Fin. Inst. § 11-501(j)(1)(iii).

[31] *See* Maryland Commissioner of Financial Regulation, Maryland Collection Agency License New Application Checklist at: https://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/MD_Collection_Agency-Company-New-App-Checklist.pdf (last visited October 30, 2017)

105537399\V-7

Office of the Commissioner of Financial Regulation ("Commissioner").[32] The Non-Depository Supervision Unit of the Commissioner conducts compliance examinations of licensed mortgage lenders and evaluate their compliance with both Maryland lending and credit laws, foreclosure laws as well as with federal law.[33]

Both bank and non-bank servicers are also required to comply with a panoply of consumer protection statutes. For instance, both types of servicers must comply with, among other laws, the federal Truth-in-Lending Act and its implementing regulation, Regulation Z,[34] the Real Estate Settlement Procedures Act and its implementing regulation, Regulation X,[35] the Fair Debt Collection Practices Act and its implementing regulation, Regulation F,[36] the Gramm-Leach-Bliley Act financial privacy provisions and their implementing regulation,[37] the Secure and Fair Enforcement for Mortgage Licensing Act and its implementing regulations,[38] the Fair Credit Reporting Act and its

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[32] Md. Code Ann., Fin. Inst. § 11-515

[33] See page 27, Non-Depository Supervision Overview: https://www.dllr.state.md.us/finance/finregannrep2016.pdf

[34] 15 U.S.C. 1601 *et seq.* and 12 C.F.R. Part 1026.

[35] 12 U.S.C. 2601 *et seq.* and 12 C.F.R. Part 1024.

[36] 15 U.S.C. 1692 *et seq.* and 12 C.F.R. Part 1006.

[37] 15 U.S.C. §§ 6801-6809 and 12 C.F.R. Part 1016.

[38] 12 U.S.C. § 5101-5116 and 12 C.F.R. Parts 1007 and 1008.

105537399\V-7

implementing regulation, Regulation V,[39] and statutory provisions regarding Unfair, Deceptive or Abusive Practices.[40]

Significantly, MCALA's purpose is to protect consumers from unscrupulous behavior in the debt collection industry, *see Old Republic Ins. Co. v. Gordon*, 228 Md. App. 1, 18-19 (2016) (interpreting legislative history), by prohibiting certain collection practices, and establishing a licensing system to ensure collection agencies are legitimate businesses. *See,* e.g., Md. Code Ann., Bus. Reg. §§ 7-301, 7-308. Notably, however, because of the close supervision and examination by the Commissioner, the legislature has determined that it would be duplicative to require that mortgage lender licensees who engage in collection activities to also be licensed under MCALA, and as a result, provided an express exemption from licensing for mortgage lender licensees under MCALA.[41] This stands in stark contrast to collection agencies, who do not have an equivalent exemption under the MMLL. Indeed, the Collection Agency Licensing Board has issued an advisory stating that collection agencies who act as mortgage servicers must become licensed as mortgage lenders under the MMLL.[42]

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[39] 15 U.S.C. § 1681-1681x and 12 C.F.R. Part 1022.

[40] Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X, Subtitle C, § 1036.

[41] Md. Code Ann., Bus. Reg. § 7-102(b)(3).

[42] *See* http://www.dllr.state.md.us/finance/advisories/advisory10-09.shtml (last accessed October 30, 2017).

105537399\V-7

Given that both secondary market and securitization trusts act through their trustees who are expressly exempt from MCALA[43] and that the trusts' mortgage servicers perform all consumer-facing functions, and are themselves heavily regulated both at a federal and state level as indicated above, requiring the trusts to obtain licenses under MCALA will do nothing to help consumer protection. However, requiring licenses under MCALA will only act to affect the willingness of investors to purchase Maryland loans and place such loans into securitizations, thereby decreasing the availability of credit as well as increasing costs as explained *supra* in Section I.

III. IT IS AN INCORRECT READING OF LAW TO REQUIRE TRUSTS TO BE SUBJECT TO LICENSING UNDER MCALA BECAUSE MCALA ONLY APPLIES TO TRUSTEES AND NOT THE TRUSTS THEMSELVES

The CSA's ruling that trusts must be licensed as collection agencies under MCALA in order to hold mortgage loans is an incorrect application of law that would lead to Maryland being the only state in the country that requires trusts to be licensed or approved in any manner in order to hold loans.

MCALA provides that "a *person* must have a license whenever the *person* does business as a collection agency in [Maryland]."[44] (Emphasis added). MCALA defines a "collection agency" to mean "a *person* who engages directly or indirectly in the business of…collecting a consumer claim the *person* owns, if the claim was in default when the

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[43] See *infra* Section III.

[44] Md. Code Ann., Bus. Reg. § 7-301(a).

105537399\V-7

person acquired it."[45] (Emphasis added). While MCALA requires "persons" who engage in certain activities to be licensed as a collection agency, notably, MCALA does not define the term "person" itself. Instead, for the definition of "person," MCALA defaults to the general definitions set forth in Title 1 of the Maryland Business Regulation Article.

There, Section 1-101, "Definitions", defines a "person" to mean " an individual, receiver, *trustee*, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, association, corporation, or other entity."[46] (Emphasis added). Given that a trustee only exists by virtue of the existence of a trust, with respect to trusts, it seems clear that their trustees are the "persons" to whom the provisions of the Business Regulations Article applies. Therefore, the trustees and not the trust themselves, would be the "persons" that are subject to, or exempt from, any potential licensing requirements, including the collection agency licensing requirements under MCALA.

As noted *supra*, MCALA requires that "persons" who engage in certain activities such as acquiring claims in default must be licensed as collection agencies. Importantly, however, MCALA also provides that it, including any licensing requirements, does not apply in its entirety, to certain enumerated persons, including banks or savings and loan associations.[47] If the trustees of a trust are the "persons" to whom any licensing requirements would apply, any exemption provisions under MCALA should logically also apply to such persons. As discussed, the trustees of the trusts used by both

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[45] Md. Code Ann., Bus. Reg. § 7-101(d)(1)(ii).

[46] Md. Code Ann., Bus. Reg. § 1-101(g).

[47] Md. Code Ann., Bus. Reg. § 1-102(1); Md. Code Ann., Bus. Reg. § 1-102(6).

105537399\V-7

secondary market investors as well as securitization trusts are almost always a national bank or federal savings and loan association. If the trustees of such trusts then are the "persons" to which MCALA's licensing requirements would apply, MCALA's exemption provisions should also apply then to the trustees. As discussed, MCALA specifically exempts banks and savings and loan associations in their entirety from MCALA's purview, including any licensing requirements.

Accordingly, the trusts that are used by secondary market investors as well as by securitization trusts should be exempt from MCALA's licensing requirements because the trusts can only act through their trustees. Their trustees, who are defined by the Business Regulation Article as the "persons" to which any licensing requirements under MCALA would apply, are however specifically exempt from MCALA as banks or savings and loan associations.

IV. IMPOSING A LICENSING REQUIREMENT ON TRUSTS IS IMPRACTICAL

Even if secondary market investors or securitization sponsors were willing to obtain a collection agency license under MCALA, the process is impractical and infeasible. As a threshold matter, while the Commissioner has issued unofficial guidance regarding "Frequently Asked Questions" for the licensing of trusts ("FAQ"),[48] in order to presumably address some of the industry concerns in licensing a trust, potential applicants must know of its existence as the FAQ is inaccessible simply by clicking

[48] *See* https://www.dllr.state.md.us/finance/industry/frnmlstrantrustfaqs.pdf (last accessed October 30, 2017).

105537399\V-7

through the Commissioner's website nor is it available on the Nationwide Multistate Licensing System and Registry ("NMLS"), which is the online centralized licensing and regulatory platform that almost all state regulators use to manage their licensees, including Maryland.

In order to obtain a collection agency license under MCALA, applicants must generally apply through the NMLS and create a basic NMLS profile using its federal tax identification number which contains basic corporate information. Applicants must then also complete state specific licensing items.[49] While the FAQs attempt to address the practical objections to licensing a trust by providing that trust applicants need not provide certain items that may be inapplicable to trusts, the FAQs nonetheless miss the point that trusts are not separate "persons" under Maryland law that must be licensed. Instead, the mere need for any FAQs at all demonstrates how impractical and unrealistic it is to license a trust.

For instance, the FAQs eviscerate what it is presumably among the core and most important items in reviewing a person for licensure, and state that state-specific items which are required for all other collection agency license application including the business plan, staffing and internal policies and sample documents are not required for trust applicants. Further, the FAQs provide that no information on officers or directors is required, nor is there any information required for any "control persons," as defined in the

[49] See Maryland Collection Agency Company New App Checklist at: https://mortgage.nationwidelicensingsystem.org/slr/PublishedStateDocuments/MD_Collection_Agency-Company-New-App-Checklist.pdf (last visited October 30, 2017).

105537399\V-7

NMLS Policy Handbook, assuming there are no individuals that meet that definition, which a trusts would generally not have. With respect to the management chart requirement, the FAQs simply provide that the management chart would only be required to show the trustee, the agent and the entity servicing accounts for the trust. As a result, the Commissioner appears to waive submission of information by trust applicants that would otherwise form the core of a review for non-trust collection agency applicants.

The requirements that remain, such as requiring the trust to have a registered agent, having a certificate of authority/good standing certificate, surety bond, or submitting the trust documents, are impractical or contrary to law. For instance, the requirement that a trust submit its registered agent or provide its certificate of authority appears to be a superfluous requirement that appears to be contrary to what is set forth in the Foreign Statutory Trusts subtitle of Maryland's Statutory Trust Act, Md. Corp. & Bus. Assoc. Code § 12-901 et seq.

The Foreign Statutory Trusts statute generally requires that foreign statutory trusts be registered with the State Department of Assessments and Taxation ("DAT") and submit the name and address of its registered agent in Maryland prior to engaging "in any interstate, intrastate, or foreign business" in Maryland.[50] Importantly, however, Section 12-908 of the Foreign Statutory Trusts statute also provides, among other things, that "foreclosing mortgages and deeds of trust on property in [Maryland]" does not constitute

[50] Md. Corp. & Bus. Assoc. Code § 12-902(a).

105537399\V-7

"doing business" in Maryland.[51] As a result, under Maryland's Foreign Statutory Trust provisions, the trusts used by secondary market investors and securitization sponsors are statutorily exempt from needing to register with the DAT or having a registered agent when they are foreclosing on mortgages and deeds of trust that they own. However, the FAQs state that the "Commissioner will not issue a license to an entity that is not authorized to conduct business in [Maryland]." This requirement to be authorized to conduct business in Maryland appears to be in clear contravention of what is required under Maryland law.

Further, we note that for surety bond requirements, surety companies usually want a financial backstop or guaranty prior to issue such bonds. For a trust, which usually exists independently of any owners, there is generally no owner which can provide this financial guaranty and any trustees are unlikely to agree to do so. In addition, with respect to trust documents, these documents can be heavily negotiated and are generally considered confidential. As a result, trusts are unlikely to produce them for regulator inspection. In the unlikely event a trustee even agreed to permit trust documents to be released for licensing purposes, the trustee would likely demand additional compensation that would make using the structure for Maryland loans impractical from an economic perspective. Rather than paying the trustee fees to submit information about the trust and its role, investors and securitization sponsors are more likely to simply not purchase Maryland loans or not include them in their securitizations.

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[51] Md. Corp. & Bus. Assoc. Code § 12-908(a)(5).

105537399\V-7

Even assuming that such hurdles were negotiated and investors, securitization sponsors and trustees were willing to obtain collection agency licenses, requiring trusts to obtain collection agency licenses would simply overwhelm the Commissioner with new applications. Secondary market investors are constantly in the process of creating new trusts to bid on and purchase pools of mortgage loans and depending on who is financing the purchase of the mortgage loans, may create more than one trust to acquire different portions of the pool. Further, each new securitization transaction requires the creation of a new trust to act as the issuer of the RMBS. In 2016 alone, almost 8 million mortgage loans were originated[52] and there was approximately $1.691 trillion in new MBS issuance.[53] In Maryland, over 106,000 loans equaling over $31 billion dollars was originated in 2016 just by state-licensed originators and not including bank originators, which can easily double that number.[54] As a result, if the CSA's ruling in *Sharma*[55] is upheld and investor and securitization trusts are required to obtain collection agency licenses, the sheer volume of loans that are purchased and sold through the secondary market by investors and placed into securitizations using trusts would overwhelm the

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[52] *See* Ben Lane, *CoreLogic's preview of HMDA data shows how good 2016 was for mortgages (2017)* at: https://www.housingwire.com/articles/41066-corelogics-preview-of-hmda-data-shows-how-good-2016-was-for-mortgages (last visited October 19, 2017).

[53] *See* Securities Industry and Financial Markets Association, *U.S. Securitization 2016 Year in Review,* p. 5 at: https://www.sifma.org/wp-content/uploads/2017/05/us-securitization-2016-year-in-review.pdf (last visited October 19, 2017).

[54] See 2016 NMLS Mortgage Industry Report, p. 12 at: https://mortgage.nationwidelicensingsystem.org/about/Reports/2016%20Mortgage%20Report.pdf (last visited October 19, 2017).

[55] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

105537399\V-7

Commissioner with new collection agency license applications, even considering the smaller subset of Maryland mortgage loans.[56] In 2015 and 2016, the Commissioner has averaged about 205 new collection agency licenses each year, which would be a small fraction compared to the new applications the Commissioner would receive if the CSA's ruling in *Sharma*[57] is upheld.

CONCLUSION

This Court should reverse the CSA decision in *Sharma*[58] and find that trusts do not require collection agency licenses in order to foreclose on Maryland loans.

Dated: November ____, 2017 Respectfully submitted,

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[56] *See* https://www.dllr.state.md.us/finance/finregannrep2016.pdf (200 new collection agency licensees in 2016 v. 1,571 altogether.

[57] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

[58] *Blackstone v. Sharma*, 233 Md. App. 58 (2017).

105537399\V-7

105537399\V-7

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105537399\V-7

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

[Please see the following pages. "Et seq." citations were not included.]

105537399\V-7

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Dated: November____, 2017

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105537399\V-7

CERTIFICATE OF SERVICE

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105537399\V-7

105537399\V-7