IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 312
September Term, 2007

JOYCE A. GRIFFIN,
Defendant-Appellant,

v.

HOWARD N. BIERMAN, et al.
Plaintiffs-Appellees.

Appeal from the Circuit Court for Anne Arundel County
(The Honorable Paul Garvey Goetzke, Presiding)

BRIEF FOR APPELLANT JOYCE A. GRIFFIN

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"[W]e do not take any additional steps to notify the borrower, if a certified mail letter is returned to us marked unclaimed by the post office. We wouldn't take any additional steps."
- Foreclosure Trustee Jacob Geesing (E 79)

* * *

"We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so. . . . We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."
- Chief Justice John Roberts,
Jones v. Flowers, 547 U.S. 220 (2006)

A. Nature of the Case

This is an appeal from a circuit court decision refusing to set aside a home mortgage foreclosure sale on the basis of constitutionally defective notice procedures. Joyce Griffin, and her children, lost their home because Ms. Griffin did not receive notice until it was too late to contest the foreclosure. Following the death of her fiancé, Ms. Griffin had difficulty making payments on her home mortgage, which she had refinanced with Ameriquest, a now-defunct predatory subprime lender. Without Ms. Griffin's knowledge, the company, through its trustees, initiated foreclosure proceedings. Ms. Griffin did not learn of the foreclosure until after her house was sold for $223,000 at an auction on the courthouse steps, and then only because the purchaser took it upon herself to tack a handwritten notice on Ms. Griffin's door.

The trustees responsible for prosecuting Ms. Griffin's foreclosure did the bare minimum under the Maryland rules: They published notice in a newspaper and sent letters by certified and regular mail, once after docketing the action and again in the weeks immediately preceding the sale. Even though each one of the certified letters were returned as unclaimed, the trustees did nothing in response during the eight months preceding the sale. They took no additional steps to notify Ms. Griffin and instead held the foreclosure sale just *one day* after one of their certified letters was returned unclaimed. The trustees did not even wait to see whether the official notice of the foreclosure sale itself was delivered; that notice was promptly returned unclaimed fifteen days *after* the sale had already taken place. Indeed, the trustees testified that their official policy is to do nothing in response to certified-mail foreclosure notices that are returned unclaimed by the post office.

That policy contravenes both the U.S. Supreme Court's recent decision in *Jones v. Flowers*, 547 U.S. 220 (2006), and Maryland's own due process jurisprudence. The trustees' practices leave Maryland homeowners in Ms. Griffin's position in a much worse position than the defendants in tax foreclosures, summary eviction proceedings, small-claims disputes, and even routine debt collection actions where the stakes are far, far lower. If she had been a defendant in virtually any other type of legal proceeding in the State of Maryland, in fact, the procedures employed would have been better calculated to provide notice to Ms. Griffin than they were in the proceedings to foreclose on her home. Because a reasonable

person would do more to inform someone of the risk that they may lose their home, the procedures employed here are intolerable under both the United States and Maryland constitutions.

B. Course of Proceedings and Disposition Below

As soon as she learned of the foreclosure sale, Ms. Griffin contacted an attorney, who filed exceptions to the sale on the grounds that that the notice procedures employed by the trustees failed to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. (E 111).

Following an evidentiary hearing, the circuit court issued a five-page opinion holding that the notice procedures employed were adequate. (E 15-19). Adopting the trustees' arguments, the court distinguished *Jones v. Flowers* on the theory that the regular-mail notices—sent at the same time and to the same address as the returned certified mail—excused the trustees' failure to undertake the follow-up efforts that would otherwise have been required by *Jones*. Adopting a sort of *mens rea* test for due process violations, the court further concluded that the notice procedures were adequate because the trustees "did not mail the notice in a manner that they *knew* would fail" and did not act with deliberate ignorance to the detriment of Ms. Griffin's interests. (E 18-19) (emphasis added). The circuit court simultaneously entered an order denying the exceptions (E 14), and, later that

month, entered a final order ratifying and confirming the sale (E 20), from which this appeal is taken.

QUESTION PRESENTED

In *Jones v. Flowers*, 547 U.S. 220 (2006), the Supreme Court held that when notice of a foreclosure sale sent by certified mail is returned unclaimed, due process does not permit the state to sell a person's home without first taking additional reasonable steps to provide notice. In *Miserandino v. Resort Properties*, 345 Md. 43, 691 A.2d 208 (1997), the Maryland Court of Appeals held, in a routine debt collection action, that when initial notice of the proceeding is sent by regular mail alone, due process is not satisfied. The question presented is this:

> When certified-mail notice of a home mortgage foreclosure sale is sent to the homeowner and returned undelivered, is the failure to take any additional steps to notify the owner excused because regular-mail notice had been sent at the same time, and to the same destination, as the certified mail that was returned?

STATEMENT OF THE FACTS

A. The Foreclosure on Ms. Griffin's Home

Joyce Griffin and her fiancé purchased a house located at 70 Bar Harbor Road in Pasadena, Maryland. (E 80-81). They lived in the house together until his death on Christmas Day 2004. (E 81-82). After his death, Ms. Griffin continued to live in the house with her young daughter (E 93). (Her son, who suffers from a neurological disability, resides elsewhere but would visit on weekends. (E 93)). In January 2005, during what Ms. Griffin believed was a routine clerical transaction to

remove her fiancé's name from the deed of trust, she unknowingly entered into a new refinanced mortgage with Ameriquest Mortgage Company. (E 82-83). The closing of the mortgage occurred in highly unusual circumstances: An Ameriquest representative came to Ms. Griffin's home—at midnight—to get her signatures on the mortgage documents, which were mailed to her later. (E 81-83). Ms. Griffin soon found herself having difficulty making the monthly mortgage payments and meeting her household expenses, and fell into default on the loan.[1]

In September 2005, appellees Bierman, Geesing, Ward, and DiPietro, acting as trustees for Ameriquest, docketed a foreclosure action against Ms. Griffin in the circuit court in Anne Arundel County. (E 6). As required by law, the trustees simultaneously mailed identical letters by certified and regular-mail to Ms. Griffin at the Bar Harbor Road address. *See* Md. Code Ann., Real Prop. § 7-105. The letter was not an notice of the foreclosure sale, but a statutorily-required notice

[1]Ameriquest was a notorious subprime mortgage lender. In January 2006, the attorneys general of 49 States, including Maryland, reached a $325 million settlement with Ameriquest, ending a two-year investigation into allegations that the company deceived consumers in numerous ways to sell its mortgages, using high-pressure sales tactics to meet employee sales quotas. H. Tashman, *The Subprime Lending Industry: An Industry in Crisis*, 124 Banking L. J. 407 (2007). The settlement's release does not bar homeowners from asserting "any claim or defense that [they] have with respect to [their] loan with an Ameriquest party in response to a judicial or threatened non-judicial foreclosure, including those [claims and defenses] related to the lending practices listed in the release." S. Rossman, *Selected Hot Topics in Auto, Mortgage, and Subprime Lending*, 1590 PLI/Corp 41 (2007). In defending a foreclosure, the homeowner can take advantage of the road map of possible defenses established by the claims listed in the complaints filed in courts by the attorneys general.

concerning the dangers of foreclosure rescue scams. (E 71-72, 78). The post office returned the certified letter to the trustees marked "unclaimed." (E 78-79).

Seven months later, and just a few weeks before the public sale they had scheduled for May 2, 2006, the trustees published a notice of public sale in the Anne Arundel Edition of the *Baltimore Sun*. On April 5, the trustees again sent the notice required by Md. Code Ann., Real Prop. § 7-105 by certified and regular mail to the Bar Harbor Road Address. (E 27). Like the first letter, the second was also returned to the trustees marked "unclaimed." (E 27). This letter was returned to the trustees' office on May 1, 2006—just one day before the public sale. (E 16). On April 22, 2006—fourteen days before the public sale—the trustees attempted to send Ms. Griffin an official notice of the sale, dated April 19, 2006, again by certified and regular mail to the Bar Harbor Road Address. (E 68). *See* Md. R. 14-206. The notice stated that Ms. Griffin's house would be sold on May 2, 2006 at 10:00 am, on the steps of the courthouse in Annapolis. That letter, like the previous ones, was returned to the trustees marked "unclaimed" on May 17, 2006—fifteen days after the sale had already taken place. (E 52).

On May 2, Elizabeth-Aaron Strasnick purchased Ms. Griffin's house at the public sale for $223,000. (E 16). Ms. Strasnick wrote a handwritten note informing Ms. Griffin that her house had been foreclosed upon, that it had been sold at a public sale, and that Ms. Strasnick had purchased it. (E 16). She posted the note on the front door of the house, where Ms. Griffin saw it when she and her daughter returned to the house one day in May. (E 87-88). Ms. Griffin promptly contacted an

attorney, filed exceptions to the sale, and filed this appeal from the circuit court's order refusing to set the sale aside on the basis of constitutionally inadequate notice.

B. The Trustees' Foreclosure Notice Policy.

One of the substitute trustees responsible for prosecuting Ms. Griffin's foreclosure, Trustee Jacob Geesing, testified at the evidentiary hearing about his firm's notice procedures. He stated that his firm believes that the Supreme Court's recent decision in *Jones v. Flowers*—which requires additional reasonable steps to notify a property owner when a notice of a foreclosure sale is returned unclaimed—does not apply to foreclosures in Maryland. Trustee Geesing described his firm, Bierman, Geesing & Ward, as a high-volume foreclosure mill. (E 77 ("We do a large volume of foreclosures sales. That's all my office does, sad to say. But that's what we do.")). He testified that his firm made no changes to its practices in response to *Jones v. Flowers*—not because they already had a practice of following-up in response to unclaimed letters, but because, in their view, the decision does not apply in a state, such as Maryland, in which notices are sent by regular mail:

> When [*Jones v. Flowers*] came down last year, there was – I attend, you know, since I do foreclosures, I attend a lot of foreclosure conferences of various attorneys around the country. There was quite a [fuss] about this case. But we practitioners in Maryland agreed that it didn't make any new law for us. And it didn't affect us in any way whatsoever.

(E 40-41). Geesing repeatedly acknowledged that, based on that view of the law, his firm does nothing in response to certified letters that are returned unclaimed—that as far as his firm is concerned, "the fact that a certified letter is unclaimed is of no

significan[ce] whatsoever in our practice." (E 76). In the following exchange, Geesing was asked to summarize the firm's procedures with respect to unclaimed letters:

> Q: Mr. Geesing, could you just describe what are the policies and procedures in the normal course of your business when unclaimed mail is returned to your office?
>
> A: Sure. Like I just testified, we do not take any additional steps to notify the borrower, if a certified mail letter is returned to us marked unclaimed by the post office. We wouldn't take any additional steps.

(E 79).

ARGUMENT

Due process, as guaranteed by both the United States Constitution and the Maryland Declaration of Rights, requires "at a minimum" that the "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) ("[N]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."). "'At the core of the procedural due process right is the guarantee of an opportunity to be heard and its instrumental corollary, a promise of prior notice.'" *Golden Sands Club Condo., Inc. v. Waller*, 313 Md. 484, 501, 545 A.2d 1332, 1341 (Md. 1988)

(quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 10-15 at 732 (2d ed. 1988)).[2]

In *Mullane*, the Supreme Court held that "[a]n elementary and fundamental requirement in *any* proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314 (emphasis added). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," that is, they must be "reasonably certain to inform those affected." *Id.* at 315.

I. The Process Due Must Be Commensurate with the Importance of the Interest at Stake, and No Property Interest Is More Important than Home Ownership.

Framed in terms of the *Mullane* standard, the question here is this: Would a reasonable person who really wanted to make sure that Joyce Griffin received notice and a hearing before her house was sold have done something more than what the trustees did here? Would a reasonable person who had sent notices of the sale by regular and certified mail (at the same time and to the same address), take additional steps when the certified mail was returned unclaimed?

Jones v. Flowers holds that the answer is yes—a reasonable person would have done more—and, specifically, a reasonable person would have taken

[2] In Maryland, as the trustees conceded below (E 35), "a mortgage foreclosure . . . constitutes state action." *Knapp v. Smethurst*, 139 Md. App. 676, 607, 779 A.2d 970, 987 (2001) ("[T]he court is the vendor in the case of a sale under the power contained in a mortgage.").

additional steps to notify a homeowner when a notice sent by certified mail was returned unclaimed. 547 U.S. at 229-30. *Jones* holds that such efforts are "especially" necessary "when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house." 547 U.S. at 230. "In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know when the notice letter addressed to him is returned unclaimed." *Id.* at 239. That insight echoes the analytical framework of *Matthews v. Eldridge*, 424 U.S. 319 (1976)—under which the process due must be based on a balancing of the private and governmental interests at stake, the risk of an erroneous deprivation, and the value of additional or substitute safeguards—and is consistent with *Mullane*'s concern that the notice be "appropriate to the nature of the case." 339 U.S. at 313.[3]

Maryland cases follow the same approach: "To determine whether notice in a particular case is constitutionally sufficient, the court 'must balance the interests of the state or the giver of notice against the individual interest sought to be

[3] *See* P. Borchers, *Jones v. Flowers: An Essay on A Unified Theory of Procedural Due Process*, 40 Creighton L. Rev. 343, 349 (2007) ("[T]he *Mathews* cost-benefit analysis is now part of the constitutional standard for notice. Although the *Jones* Court did not cite *Mathews*, *Jones*'s holding that better efforts are required especially when 'the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house' imports that framework. In other words, the Court was saying . . . that it would have been a different case had it involved a twenty-five dollar parking ticket rather than $60,000 worth of equity in a home. The critical insight of *Mathews* is that more is required when a lot is at stake and there is much room for disagreement.").

protected by the fourteenth amendment.'" *Miserandino v. Resort Props., Inc.*, 345 Md. at 53, 691 A.2d at 212, *cert. denied*, 522 U.S. 953 (1997). Put simply, "the more significant the interest at stake, the greater the required certainty that the notice will be effective." *Waller*, 313 Md. at 501, 545 A.2d at 1341; *see St. George Antiochian Orthodox Christian Church v. Aggarwal*, 326 Md. 90, 102, 603 A.2d 484, 490 (1992) (requiring a higher standard of notice "given the importance of the property right that is involved in the foreclosure of a right to redemption").

No property interest is more significant than a person's home. "A land owner's interest in their property is one of the fundamental principles upon which both the United States' and Maryland's Constitutions were created. Great care must be taken in avoiding the erroneous deprivation of such property interests." *Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md. 374, 425, 893 A.2d 1067, 1097-98 (2006). "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance."). In short, "it is clear that a mortgagor possesses a substantial property interest that is significantly affected by a foreclosure sale." *Knapp v. Smethurst*, 139 Md. App. 676, 712, 779 A.2d 970, 990-91 (2001) (citations omitted). The interest is particularly important, and its loss particularly irreversible, in Maryland, which,

unlike most states, provides no postsale statutory right of redemption in mortgage foreclosures.

But in the view of the trustees and the court below, a homeowner like Joyce Griffin deserves *less* notice than is required where the stakes are far less significant than the loss of a home. In the vast majority of legal proceedings in Maryland, including even the smallest of civil disputes, the plaintiff is required to provide notice either by personal service or by restricted certified mail, which is complete *only upon delivery*. Md. R. 2-121; *see also* Md. R. 2-122 (permitting posting or publication in certain actions only where "the plaintiff has shown by affidavit that the whereabouts of the defendant are unknown and that reasonable efforts have been made in good faith to locate the defendant," and then only upon court order).

If Ms. Griffin had been the defendant in a property tax foreclosure proceeding like the one in *Jones*—a proceeding in which the State's interest (in collecting its taxes) is substantially greater than whatever interest it may have in placing its imprimatur on an otherwise private mortgage foreclosure—"nail-and-mail" service would have been required. Md. Code Ann., Tax-Prop. § 14-836(b)(6) (cited in *Jones*, 547 U.S. at 228 n.2). If her property were at risk of seizure for failure to pay federal taxes, IRS agents would have had to try to personally serve her. 28 U.S.C. § 6335(a). And if Ms. Griffin were a tenant in an apartment who was at risk of being evicted, she would have received either personal service or "nail-and-mail" service. Md. Code Ann., Real Prop. § 8-401(b); *see* 86 Md. Op. Atty. Gen. 42 (2001) (interpreting Maryland statutes governing summary ejectment

proceedings in light of due process principles and stating that sheriff must post the notice conspicuously on the apartment door); *Greene v. Lindsey*, 456 U.S. 444 (1982) (requiring nail-and-mail notice in public housing eviction proceedings).

The trustees' position in this case—and their exclusive reliance on regular mail in particular—cannot be squared with the constitutional requirements applicable to the most inconsequential of civil proceedings in Maryland. If, for example, the trustees had brought an action against Ms. Griffin to collect a small debt, their reliance on notice by regular mail alone would not have been constitutionally sufficient. *See Miserandino*, 345 Md. at 67, 691 A.2d at 220 (holding that initial notice by regular first-class mail alone, in an action to collect a $4,211 debt arising out of a loan concerning an interest in real property, was not reasonably calculated to reach the defendants under *Mullane*); *see* T. Beach, *The Constitutionality of Ordinary First-Class Mail as a Method of Initial and Original Service of Process*, 57 Md. L. Rev. 949 (1998). In fact, if the trustees had brought a routine collection action against Ms. Griffin, service by regular mail alone would not have been adequate even as a *substitute* method of service after certified-mail notices had been returned unclaimed and multiple personal service attempts had failed. *See Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 83-84, 775 A.2d 1218, 1227-1228 (2001) (in action to collect a $3,234 credit card debt, where private process server had attempted personal service at least five times and certified mail by restricted delivery was attempted twice and returned unclaimed, substitute nail-and-mail service was constitutionally sufficient only because the trial court properly

"did not sanction service by first-class mail alone," but also required posting at the defendant's residence).

If the process afforded Ms. Griffin in this case would have been constitutionally defective even in the smallest and most routine of debt collection actions—and, indeed, it would have—then what principled basis could there possibly be for tolerating it in a case that, as Chief Justice Roberts put it in *Jones*, 547 U.S. at 230, "concerns such an important and irreversible prospect as the loss of a house"?

A. The process due is based on the personal property interest at risk, not whether the proceeding is labeled "*in rem*" or "*in personam*."

It is no answer to say, as the trustees did below, that a home mortgage foreclosure action is labeled an "*in rem*" rather than an "*in personam*" proceeding. (E 34, 41 ("A foreclosure action doesn't seek any kind of remedy against the borrower. It's actually an action against the secured property. It's *in rem*.")). The same thing could have been said about the tax sale proceeding in *Jones*. Those historical categories may, at least in part, be responsible for the disparity in notice procedures outlined above. But at least since 1950, when *Mullane* was decided, the Supreme Court has repeatedly rejected the notion that such labels—because they do not necessarily correspond to the importance of the private interests at stake, are based on outdated property doctrines, and vary by state—have any significance at all for due process purposes.

"Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues," *Mullane* held emphatically that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Mullane*, 339 U.S. at 312-13. If the Court had held otherwise it would have led not only to a lack of uniformity, but also to circularity, because "American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem*." *Id.* And, most importantly, to hold otherwise would have been to ignore the obvious fact that the effect of an "*in rem*" proceeding may be to deprive a *person* of his or her rights.

Mullane's rejection of the *in rem*/*in personam* distinction for due process purposes was strongly reaffirmed in *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972), which reversed an Illinois decision that had upheld the inadequate procedures used in an automobile forfeiture case "in light of the *in rem* nature of the proceedings." And in *Greene*, 456 U.S. 444, the Court refused to accept the argument that Kentucky's method of service in actions to evict tenants from public housing could be justified on the basis that the actions were *in rem*, as opposed to the nature of the interests at stake:

> '[A]ll proceedings, like all rights, are really against persons.' In this case, appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes. In light of this deprivation, it will not suffice to recite that because the action is *in rem*, it is only necessary to serve notice 'upon the thing itself.' The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.'

456 U.S. at 450-51 (citations and footnotes omitted). The Court, most recently in *Jones*, has frequently analyzed the constitutional adequacy of the procedures used in various proceedings that would generally be deemed "*in rem*" without once suggesting that that classification, as opposed to the private interest in the real property at stake, had any relevance. *See, e.g. Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (foreclosure sale); *Schroeder v. City of New York*, 371 U.S. 208 (1962) (condemnation); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (condemnation); *Covey v. Town of Somers*, 351 U.S. 141 (1956) (foreclosure sale).[4]

[4] A parallel evolution has occurred in the jurisprudence of "minimum contacts." *See Livingston v. Naylor*, 173 Md. App. 488, 504, 920 A.2d 34, 44 (Md. App. 2007) ("The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that '[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of a person in a thing.'") (citations omitted); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (due process "can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form

Historical formalism has no place in due process analysis. To be sure, the Court of Appeals in *Miserandino* noted that the collection action before it was "not *in rem* or *quasi in rem*." 345 Md. at 54, 691 A.2d at 213. But it properly recognized, consistent with the holdings in *Mullane*, *Robinson*, and *Greene*, that "the distinction between *in rem* and *in personam* actions no longer offers a *per se* solution to problems of notice." *Miserandino*, 345 Md. at 54, 691 A.2d at 213; *see* 86 Md. Op. Atty. Gen. 42 (2001) ("The constitutional standard does not depend on whether the type of proceeding is labeled as *in rem* as opposed to an *in personam* action."); A. Gordon, GORDON ON MARYLAND FORECLOSURES § 2.1 (4th ed. 2004) (observing that, for *both in rem* and *in personam* actions, "[t]he rolling ball of constitutional notions of due process, state action, and just plain fair play are moving toward service of process") (citing *Miserandino*). What is instead relevant is "the nature of the action" to the extent that it reflects "the scope of the potential adverse consequences to the person claiming a right to more effective notice." *Miserandino*, 345 Md. at 54, 691 A.2d at 213 (quoting *Greene*, 456 U.S. at 450). The "potential adverse consequences" for those in the position of Joyce Griffin or Gary Jones are obviously far greater than they were for Gerard and Karen Miserandino.

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without substantial modern justification.") (citations omitted). "[A]fter the fiction of *in rem* jurisdiction has been drained of any force in the personal jurisdiction context, one can hardly take seriously a rule that can be explained only by recourse to the *in rem-in personam* distinction." J. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1106 (1994).

B. Assumptions about the steps homeowners can take to safeguard their own interest in their property cannot excuse the failure to provide adequate notice.

The trustees also cannot defend their failure to undertake constitutionally adequate notice, as they did below, by blaming Ms. Griffin for failing to learn of the impending foreclosure proceedings against her. *Jones* foreclosed that line of argument when it rejected the State's contentions that the failure to take follow-up efforts in response to the return of certified mail could be excused on the grounds that (1) Gary Jones had a legal obligation to keep the State apprised of his whereabouts, (2) Jones should have known that his property would be sold if he failed to pay his taxes, and (3) the State is entitled to presume that an owner will learn of actions affecting his or her property. 547 U.S. at 232-3.

First, the Court reaffirmed that "a party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation" to provide notice. *Id.* at 232 (quoting *Mennonite*, 462 U.S. at 799). *Second*, the fact that foreclosure sales often follow when people fall behind on their tax or mortgage payments doesn't excuse the obligation to tell a homeowner that he or she is facing a foreclosure sale; an interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Id.* at 233-34 (quoting *Mennonite*, 462 U.S. at 800). The same should be true of delinquency on a mortgage. And *third*, the Court refused to excuse the State's conduct on the grounds that the State may assume that a property owner will safeguard his or her interests or assign a caretaker to do so. *Id.* at 233 (*citing Mullane*, 339 U.S. at 316). "Mr.

Jones should have been more diligent about his property, no question," but that did not change the fact that "before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." *Id.; see also Knapp*, 139 Md. App. at 710, 779 A.2d at 989 (recognizing, in the mortgage foreclosure context, that the owners' ability to take steps to safeguard property does not relieve the state's due process obligations). In light of *Jones*, there is no question about whether the trustees' inadequate notice procedures may be excused by shifting the blame to the victim of those very procedures. They may not.

II. When the Certified-Mail Notices Were Returned Unclaimed, The Trustees Had A Constitutional Obligation to Take Additional Steps to Notify Ms. Griffin, But They Did Nothing.

Observing that many state and federal statutes on notice in various property foreclosure and forfeiture proceedings increasingly require steps in addition to mailing, either at the outset or after the return of initial mailing—such as personal service, posting, and notice to the occupants—the Supreme Court in *Jones* declared: "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." 547 U.S. at 229. That is precisely what happened here: The trustees did *nothing* to try to reach Ms. Griffin when their letters to her were returned unclaimed, even though they had six months to try to notify her after the first letter was returned. Instead, the trustees went ahead with a public foreclosure sale the very next day after receiving yet another returned letter.

And, as if to demonstrate that their attempt at notice was a mere gesture, they did not even wait to see whether the official certified-mail notice of the sale itself would reach Ms. Griffin before selling her house on the courthouse steps. That notice, too, was returned undelivered, a full fifteen days after the sale had already taken place.

The trustees argued below that *Jones* has no effect at all on the procedures governing mortgage foreclosure proceedings here because the Maryland statutes require the sending of both regular and certified mail, whereas the State in *Jones* had sent only certified mail. In their view, the simultaneous sending of regular and certified mail will always excuse any obligation to take follow-up steps that would otherwise be required under *Jones* when the certified mail is returned. Hence, the trustees' policy is to systematically disregard certified-mail notices that are returned as unclaimed. (E 76 ("[T]he fact that a certified letter is unclaimed is of no significan[ce] whatsoever in our practice.")). The circuit court's opinion is framed in perhaps slightly less sweeping terms, but it has basically the same effect. (E 18-19 (concluding that trustees' failure to take any follow-up steps in response to return of certified mail was excused by the fact that "the regular mail copy was mailed before the certified copy was returned")).

The trustees and the circuit court have misread both *Jones* and Maryland's due process jurisprudence. For two reasons, the obligation to take additional steps cannot be cast aside so lightly: (1) the return of the certified mail provided good reason to suspect that the regular mail likewise would not be received, and (2) as an independent matter (discussed in Part III, *infra*), regular mail alone is not a

constitutionally adequate means of providing initial notice of a proceeding where the stakes are as high as they are here.

A. The constitutional obligation to follow up is not triggered only when there is absolute certainty that prior attempts at notice have failed to reach the property owner.

Jones did not hold, as the circuit court's opinion suggests, that the obligation to undertake follow-up efforts is triggered only when the State knows with 100% certainty that *all* of its efforts thus far have failed. (In *Jones* itself, the State of Arkansas could not have known for certain that Gary Jones had not learned of the impending sale; there was a chance that he might have been found the notice in the newspaper, or heard about it from a friend who saw it, or learned about it in some other way.) What the Supreme Court actually said is that the State's obligation to do more was triggered by the fact that "[a]lthough the State may have made a reasonable calculation of how to reach Jones, *it had good reason to suspect* when the notice was returned that Jones was 'no better off than if the notice had never been sent.'" 547 U.S. at 230 (emphasis added) (quoting *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992)). *Malone*, the decision quoted by *Jones*, put it this way: "The return of the certified notice marked 'unclaimed' *should have been a red flag* for some further action." 614 A.2d at 38 (emphasis added). Notably, in *Malone* the government *had* "previously sent by ordinary mail an unreturned letter" to the same address, but that did not discharge the obligation to take "further action." *Id.* at 38 n.10. Later, the Court makes it perhaps even clearer that the obligation to follow-up is triggered not by absolute knowledge, but by the suggestion that something has

gone awry: "In response to the returned form *suggesting* that Jones had not received notice that he was about to lose his property, the State did—nothing." 547 U.S. at 234 (emphasis added).

Thus, the obligation described in *Jones* is triggered when the State receives a "red flag" "suggesting" the homeowner has not received notice and therefore has "good reason to suspect" that the homeowner may not know of the impending foreclosure. *See In re Meyer*, 373 B.R. 84, 92 (9th Cir. B.A.P. 2007) ("*Jones* emphasizes the need for 'reasonable additional steps' when a property right would be extinguished and there is *reason to doubt the efficacy of notice*." (quoting *Jones*, 126 S.Ct. at 1718)); *id.* at 94 (additional steps are required under *Jones* "[i]f there is *reason to think that notice may not have been effective*") (emphasis added).

To the extent that the holding in *Jones* depends on what the State "knows," it is not the absolute standard of knowledge embraced by the trustees and the lower court in this case. Rather, the principle behind *Jones* is closer to the one already employed by the Maryland courts in assessing sufficiency of notice in the tax sale context. As the Court of Appeals has explained, "there is more than one mental state that may constitute 'knowledge'" and one of those is "willful blindness," in which a person "deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth." *Aggarwal*, 236 Md. at 102, 603 A.2d at 490. Under that standard, the party charged with giving notice may not "engage in deliberate ignorance to the detriment of the owner's interest in the land." *Id.* "Subsequent cases have expanded even further, the concept announced in

Aggarwal." *Nichol v. Howard*, 112 Md. App. 163, 684 A.2d 861 (1996) (holding notice was inadequate where the mailed notice was returned and "[n]o effort was made to effectuate personal service at the property's address"); *see also Slattery v. Friedman*, 99 Md. App. 106, 636 A.2d 1 (1994); *Kennedy v. Cummings*, 91 Md. App. 21, 603 A.2d 1251 (1992).

In *Nichol*, this Court explained that a notice returned undelivered is "although not conclusive, indicative of a potential problem" and triggers an obligation to follow up by attempting personal service and inquiring of the occupants. 112 Md. App. at 174, 684 A.2d at 866. Significantly, this line of cases instructs Maryland courts to go further than federal jurisprudence in ensuring the due process rights of property owners. The Maryland cases impose "a standard of notice much stricter than the constitutional notice requirements stated in the federal cases. While notice in a particular case may satisfy the Supreme Court's definition of constitutional notice, and comply with the literal language of the Maryland notice statute found to be constitutional by both appellate courts," it may nevertheless be constitutionally inadequate under the Maryland Declaration of Rights. *Id.* at 176, 684 A.2d at 868 n.6.

B. The return of the certified mail in this case called into question both the certified and regular mail notice, and therefore should have triggered follow-up efforts.

The trustees' approach to the task of mailing notice to Ms. Griffin—and their stated policy in all mortgage foreclosure cases—exemplifies the sort of willful blindness condemned in both *Jones* and *Aggarwal*. The whole point of certified

mail is that it provides a constitutionally-sufficient level of reliability by offering "a solution to the problem of proof of service." *Miserandino*, 345 Md. at 58, 691 A.2d at 215. "When process is mailed in this fashion a return that includes a postal receipt bearing the signature of the defendant or his authorized agent and a copy of the process that was mailed is filed, and the court can proceed with a high level of confidence that the requisite notice has been given." *Id.; W.S. Frey Co., Inc. v. Heath*, 729 A.2d 1037, 1039 (N.J. 1999); *Shah v. HealthPlus, Inc*., 116 Md. App. 327, 344, 696 A.2d 473, 481 (Md. App. 1997) ("[I]t is ordinarily customary and reasonable for a correspondence of significance, in particular documentation regarding financial or legal matters . . . to be sent by a form of delivery that can insure and provide acknowledgement of receipt.").[5] By contrast, it should go without saying that certified mail that goes unclaimed (as opposed to affirmatively refused by the designated recipient) cannot possibly provide that "high level of confidence" and thus "an 'unclaimed' letter will not suffice." *Misernandino*, 345 Md. at 59, 691 A.2d at 216; *see* Note, *Service of Process by Mail*, 74 Mich. L. Rev. 381, 387-91 (1975); Note, *The Validity of Service of Process by Mail When There Is*

[5]In some cases the Court of Appeals has equated a requirement of notice by certified mail with an intent to require actual receipt. *See Rockwood Cas. Ins. Co. v. Uninsured Employers' Fund*, 385 Md. 99, 121, 867 A.2d 1026, 1039 (2005) (holding, with respect to statute requiring service of notice of cancellation of workers' compensation insurance by personal delivery or certified mail, that "service by certified mail . . . is not complete upon mailing" because "[t]he statute contemplates actual delivery of notice"); *Lee v. State*, 332 Md. 654, 665, 632 A.2d 1183, 1188 (1993) ("If the drafters of the rules had wanted to guarantee that the defendant actually received a copy of the notice . . . the rule would have required

No Return Receipt: The Outer Limits of Due Process, 25 Okla. L. Rev. 566, 567-70 (1992); *cf. Lohman v. Lohman*, 331 Md. 113, 626 A.2d 384 (1993) (unclaimed certified letter insufficient to sustain jurisdiction over defendant).

But any added value that certified mail has as a means to reliably "apprise interested parties of the pendency of the action," *Mullane*, 339 U.S. at 314, is lost where, as here, the sender simply doesn't care whether it is actually received. It is undisputed that the trustees' policy is to turn a blind eye to certified-mail notices that are returned unclaimed. (E 79). At the same time, the trustees acknowledge that the legislature must have had a purpose in requiring certified mail, but contend that the only purpose is to provide *evidence*—to courts, to purchasers, to borrowers—that the notice has actually been received, if in fact it was. (ER 50 ("[T]he purpose of sending something by certified mail is so that there is some proof independent of the parties to the action . . .")). The trustees, in other words, want to be able to get credit for using certified mail when it works, but want relief from the obligation to follow up where the use of certified mail informs them that their efforts may have failed. Like the Arkansas Land Commissioner in *Jones*, the trustees want certified mail to benefit everyone but the person whose home is at risk of being sold. That is not a procedure that a person "desirous of actually informing the absentee might reasonably adopt." *Mullane*, 339 U.S. at 314-15; *see* R.M. Quinn, *Florida Tax Deed Sales Are Getting Risky*, 81 Fla. B.J. 45, 47 (2007) (warning that, following *Jones*,

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personal service, certified mail, or some other means of . . . assuring actual receipt.").

"[s]imply putting return receipts in the file showing notice was sent but not received may comply with the Florida statutory notice procedure, but it will not satisfy constitutional due process requirements.").

Under *Jones*, the "added security" of certified mail "comes at a price." 547 U.S. at 237. If, as here, "a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice," it is consistent with *ex ante* due process analysis "to consider what the government does with that information." *Id.*

More to the point, the "additional information" here necessarily called into question the effectiveness not just of the certified mail, but of *the regular mail as well*. "Certified Mail is dispatched and handled in transit as ordinary mail." United States Postal Service, *Domestic Mail Manual* § 503.3.2.1 (2006). So if the return of a certified letter as unclaimed raises a red flag about whether the property owner has failed to receive notice for any number of reasons—because the address is bad (because the intended recipient has moved away permanently, or is on an extended absence, or is in the hospital), or because the mail is being misdelivered, or because weather conditions or physical obstructions are getting in the way, or because someone else is stealing from the mailbox or accidentally misplacing the recipient's mail—then, as a matter of common sense, a regular letter sent at the same time and to the same destination as the certified letter that is returned unclaimed will also be rendered suspect. *Cf. Miserandino*, 345 Md. at 58-66, 691 A.2d at 215-219 (extensively discussing unreliability of regular mail as an exclusive method of

notice); *Greene,* 456 U.S. at 455 n.9 (observing that regular mail is "far from the ideal means of providing the notice the due process clause of the Fourteenth Amendment requires"); *id.* at 460 (O'Connor, J., dissenting) (citing the risk that regular mail "might fail due to loss, misdelivery, lengthy delay, or theft" and observing that "[i]t is no secret, after all, that unattended mailboxes are subject to plunder by thieves."); *Jones*, 547 U.S. at 247 (Thomas, J., dissenting) (discussing unreliability of service by regular mail). In fact, the trustees acknowledge that regular mail will inevitably be misdelivered, but nevertheless hide behind the fact that its receipt cannot be ascertained, and that—as a result of their own decision to maintain blind indifference to the return of unclaimed certified letters—they will receive no "additional information . . . about the effectiveness" of the mail they have sent out, *Jones,* 547 U.S. at 237:

> Even if the post office took the regular mail and misdelivered it, which we all know can happen and does happen in the real word, that wouldn't impose any additional duty on we, the trustees, under the *Jones v. Flowers* case, because we wouldn't know about that. It would be unfortunate, but it wouldn't be unconstitutional.

(E 39). By interpreting their legal obligations in this narrow and myopic manner, the trustees have managed to combine the belt-and-suspenders approach of the Maryland rules—which insist on both regular and certified mail—with the robust protection for the due process rights reflected in Supreme Court and Maryland case law, and, paradoxically, produce a legal justification for adopting precisely the stance the court criticized in *Aggarwal*. The trustees are no different from someone

who "deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth." 236 Md. at 102.

One final objection can be easily dispensed with. Adopting a distinction manufactured by the trustees, the circuit court (E 18) distinguished between this case and *Jones* based on the Supreme Court's discussion of the reasonable follow-up steps that the Arkansas Commissioner of Lands *could have taken* in response to the return of the unclaimed certified letter—such as resending the notice by regular mail, posting notice on the front door, or personal service of a notice on the occupants (or some combination of these methods or others). *Jones*, 547 U.S. at 235. Because the Court suggested that *one* of the steps the Commissioner *could* easily have taken was to "resend the notice by regular mail," 547 U.S. at 234, the circuit court reasoned, the fact that the trustees' initially sent regular mail here means that *Jones* is inapplicable. But in naming the various steps that the State could have taken, the Supreme Court was *not* doing what the circuit court believed it was doing, which was to "prescribe the form of service that the government should adopt," either as a follow-up measure or as an initial method of service. 547 U.S. at 234 (quoting *Greene*, 456 U.S. at 455); *see id.* at 238 (quoting the same statement again, and stating that in prior cases, "we have not attempted to redraft the State's notice statute. The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question.") (citations omitted). In fact, as we explain below, Maryland's highest court has already held that service by regular mail

alone—in a proceeding where far less process was due than here—is constitutionally defective.

III. As An Independent Matter, the Trustees' Reliance on Regular Mail Alone Cannot Satisfy Due Process.

In *Miserandino*, the Court of Appeals held that initial notice (as opposed to substitute notice) by first-class mail, in an action filed by a Virginia resort against two Marylanders who had defaulted on a loan relating to their interest in time-share properties, did not satisfy due process. 345 Md. at 46-48, 691 A.2d 209-210; *see also* Beach, *Constitutionality of Ordinary First-Class Mail*, 57 Md. L. Rev. at 950-952 (discussing case background). Although original "service by first class-mail would not have been sufficient under Maryland law," the then-operative Virginia statute permitted notice by first-class mail alone on nonresidents. 345 Md. at 56, 691 A.2d at 214. (The statute has since been amended.) Concluding that such service violated due process, the court refused to give full faith and credit to the Virginia judgment.

After exhaustively surveying due process jurisprudence and the relative reliability of first-class mail versus personal service and certified mail, the court conducted the following inquiry:

> Turning to the case before us, we consider whether there are any special or unique circumstances that would justify relaxation of the ordinary and available methods of service that offer a considerably higher degree of probability of actual notice. In other words, given the availability of personal service by officials or private process servers, or service by restricted delivery mail, what state interest is present in this case that would justify resort to the significantly less certain procedure of first-class mail?

Id. at 65, 691 A.2d at 219. The court could identify only one possible state-interest justification—that the state might have an interest in differentiating between residents and nonresidents—but did "not view the factor of nonresidency as being of such significance or compelling interest as to justify the shifting of the balance to a point where notice by first-class mail alone will be sufficient." *Id.* at 66, 691 A.2d at 219. The court acknowledged that "there may be some additional inconvenience or expense when dealing with officials or private process servers in another state," but concluded cost concerns alone could not justify the use of regular mail: "[T]his small difference hardly justifies the significant step of permitting first-class mail service." *Id.*

In closing, the court explained that the "heart of the question" is one of reliability under the *Mullane* standard: Is the method a reliable means of the type that a person would use if she actually desired to inform the defendant, and reasonable, with reference provided to the "feasible and customary alternatives and supplements" to the form of notice chosen? *Id.* at 67, 691 A.2d at 219-220. Because Virginia could not produce a sufficiently "significant" or "compelling interest" to override the reliability of customary service of process, first-class mail failed to satisfy due process.[6]

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[6] *Compare Miserandino*, 345 Md. at 46-48, 691 A.2d 209-210 (service by regular mail impermissible in action to collect $4,211); *and Miles v. District of Columbia*, 354 F. Supp. 577, 585 (D.D.C. 1973), *aff'd*, 510 F.2d 188 (D.C. Cir. 1975) (service by regular mail impermissible in property condemnation action); *with State v. King*, 199 Or.App. 278, 111 P.3d 1146 (Or. App. 2005) (service of a

Here, as in *Miserandino*, the trustees can produce no state interest that is "significant" or "compelling" enough to justify their reliance on first-class mail as an initial method of notice. Indeed, in the Maryland case law analyzing the implications of procedural due process in the mortgage foreclose sale context, it is hard to discern any significant state interest *at all* in providing a forum for private mortgage foreclosures that competes with the very weighty property interests often at stake. *See, e.g.*, *Island Financial v. Ballman*, 92 Md. App. 125, 607 A.2d 76 (1992) (emphasizing importance of vigorous due process protection in the mortgage foreclosure context, identifying no countervailing state interest, requiring foreclosing party to conduct title scan to find addresses, and stating that "[c]ertainly, this process is not oppressive to the foreclosing party in terms of the amount of time, money, or effort expended"); *Knapp v. Smethurst*, 139 Md. App. at 712, 779 A.2d at 990 (2001) (recognizing that "a mortgagor possesses a substantial property interest that is significantly affected by a foreclosure sale," and that "in the absence

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photo-radar traffic citation by first-class mail to the registered owner of the offending vehicle did not violate due process because (1) the maximum fine was only $150, so the "effect on the private interest potentially affected" was "not grievous" and was only "pecuniary in nature" and (2) the defendant could move to set aside a default judgment for lack of actual notice, so the risk of erroneous deprivation was nonexistent); *and Matter of Park Nursing Center, Inc.*, 766 F.2d 261 (6th Cir. 1985) (concluding that service by first-class mail is constitutionally permissible in bankruptcy proceedings—in which numerous creditors and debtors must be notified and in which "the rights of many persons and entities may be delayed in bankruptcy proceedings"—but only because "[i]f a default judgment in bankruptcy proceedings is entered against an individual who, through no fault of his own, *failed to receive actual notice by first-class mail*, then that judgment" would be set aside) (emphasis added).

of meaningful notice, [the mortgagee] is denied the opportunity to exercise" his rights, and identifying no countervailing state interest) (citations omitted).

Where the state's interest is as minimal as it is here, the fact that notice concerns "the important and irreversible prospect of the loss of a house," *Jones*, 547 U.S. at 230, tips the scale decidedly against allowing trustees to rely on first-class mail alone (especially when they intentionally ignore the return of certified mail sent simultaneously to the same address). Indeed, the prospect of the loss of a house is particularly "important and irreversible" in Maryland, because Maryland, unlike most states, allows for unusually quick foreclosure proceedings and has no post-sale statutory redemption period.

CONCLUSION

The orders of the circuit court denying Ms. Griffin's exceptions and ratifying the foreclosure sale should be reversed with instructions to set aside the foreclosure as defective for lack of constitutionally adequate notice.

Respectfully submitted,

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Dated: October 23, 2007
Font: Times New Roman, 13 point

TEXT OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The Fourteenth Amendment to the U.S. Constitution:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law"

Article 24 of the Maryland Declaration of Rights:

> "[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

Maryland Rule 14-206. Procedure Prior to Sale.

(b) Notice.
(1) *By Publication.* After commencement of an action to foreclose a lien and before making a sale of the property subject to the lien, the person authorized to make the sale shall publish notice of the time, place, and terms of sale in a newspaper of general circulation in the county in which the action is pending. "Newspaper of general circulation" means a newspaper satisfying the criteria set forth in Code, Article 1, Section 28. A newspaper circulating to a substantial number of subscribers in a county and customarily containing legal notices with respect to property in the county shall be regarded as a newspaper of general circulation in the county, notwithstanding that (1) its readership is not uniform throughout the county, or (2) its content is not directed at all segments of the population. For the sale of an interest in real property, the notice shall be given at least once a week for three successive weeks, the first publication to be not less than 15 days prior to sale and the last publication to be not more than one week prior to sale. For the sale of personal property, the notice shall be given not less than five days nor more than 12 days before the sale.

(2) *By Certified and First Class Mail.*
(A) Before making a sale of the property, the person authorized to make the sale shall send notice of the time, place, and terms of sale by certified mail and by first class mail to the last known address of (i) the debtor, (ii) the record owner of the property, and (iii) the holder of any subordinate interest in the property subject to the lien.
(B) The notice of the sale shall be sent not more than 30 days and not less than ten days before the date of the sale to all such persons whose identity and address are actually known to the person authorized to make the sale or are reasonably

ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale.

(3) *To Counties or Municipal Corporations*. In addition to any other required notice, not less than 15 days prior to the sale of the property, the person authorized to make the sale shall send written notice to the county or municipal corporation where the property subject to the lien is located as to:

(A) the name, address, and telephone number of the person authorized to make the sale; and
(B) the time, place, and terms of sale.

(4) *Other Notice*. If the person authorized to make the sale receives actual notice at any time before the sale is held that there is a person holding a subordinate interest in the property and if the interest holder's identity and address are reasonably ascertainable, the person authorized to make the sale shall give notice of the time, place, and terms of sale to the interest holder as promptly as reasonably practicable in any manner, including by telephone or electronic transmission, that is reasonably calculated to apprise the interest holder of the sale. This notice need not be given to anyone to whom notice was sent pursuant to subsection (b)(2) of this Rule.

(5) *Return Receipt or Affidavit*. The person giving notice pursuant to subsections (b)(2), (b)(3), and (b)(4) of this Rule shall file in the proceedings an affidavit (A) that the person has complied with the provisions of those subsections or (B) that the identity or address of the debtor, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given pursuant to subsection (b)(4), the affidavit shall state the date, manner, and content of the notice given.

MD Code, Real Property, § 7-105. Sale upon default

(a) A provision may be inserted in a mortgage or deed of trust authorizing any natural person named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made. A sale made pursuant to this section or to the Maryland Rules, after final ratification by the court and grant of the property to the purchaser on payment of the purchase money, has the same effect as if the sale and grant were made under decree between the proper parties in relation to the mortgage or deed of trust and in the usual course of the court, and operates to pass all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust.

(a-1)(1) In this subsection, “record owner” means the person holding record title to residential real property as of the date on which an action to foreclose the mortgage or deed of trust is filed.

(2) In addition to any notice required to be given by provisions of the Annotated Code of Maryland or the Maryland Rules, the person authorized to make a sale in an action to foreclose a mortgage or deed of trust shall give written notice of the action to the record owner of the property to be sold.

(3)(i) The written notice shall be sent no later than 2 days after the action to foreclose is docketed:

1. By certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service, to the record owner; and

2. By first-class mail.

(ii) The notice shall state that an action to foreclose the mortgage or deed of trust may be or has been docketed and that a foreclosure sale of the property will be held.
(iii) The notice shall contain the following statement printed in at least 14 point boldface type:

“NOTICE REQUIRED BY MARYLAND LAW

Mortgage foreclosure is a complex process. Some people may approach you about “saving” your home. You should be careful about any such promises.

The State encourages you to become informed about your options in foreclosure before entering into any agreements with anyone in connection with the foreclosure of your home. There are government agencies and nonprofit organizations that you may contact for helpful information about the foreclosure process. For the name and telephone number of an organization near you, please call the Consumer Protection Division of the Office of the Attorney General of Maryland at 1-888-743-0023. The State does not guarantee the advice of these organizations.

Do not delay dealing with the foreclosure because your options may become more limited as time passes.”

(b)(1)(i) In this subsection, “record owner” means the person holding record title to property as of the later of:

1. 30 days before the day on which a foreclosure sale of the property is actually held; and
2. The date on which an action to foreclose the mortgage or deed of trust is filed.

(ii) In addition to any notice required to be given by provisions of the Annotated Code of Maryland or the Maryland Rules, the person authorized to make a sale in an action to foreclose a mortgage or deed of trust shall give written notice of the proposed sale to the record owner of the property to be sold.

(2)(i) The written notice shall be sent:

1. By certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service, to the record owner; and
2. By first-class mail.

(ii) The notice shall state the time, place, and terms of the sale and shall be sent not earlier than 30 days and not later than 10 days before the date of sale.

(iii) The person giving the notice shall file in the proceedings:

1. A return receipt; or
2. An affidavit that:

A. The provisions of this paragraph have been complied with; or
B. The address of the record owner is not reasonably ascertainable.

(iv) The person authorized to make a sale in an action to foreclose a mortgage or deed of trust is not required to give notice to a record owner whose address is not reasonably ascertainable.