COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on May 14, 2010.

Members present:

Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
John B. Howard, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ashelee Morrow, Rules Committee Intern
C. Matthew Hill, Esq., Public Justice Center
Jacob Geesing, Esq.
Kenneth MacFadyen, Esq.
David Durfee, Esq., Administrative Office of the Courts
Christopher Young, Esq., Office of the Attorney General
Carolyn Quattrocki, Esq.
Kelley O'Connor, Administrative Office of the Courts
Frank Broccolina, State Court Administrator
Anthony C. Depastina, Esq., Civil Justice, Inc.
Suzanne Delaney, Court of Appeals, Office of Government Relations
D. Robert Enten, Esq.
Marjorie Corwin, Esq.
Hon. Denise O. Shaffer, Maryland Office of Administrative Hearings
Jana Burch, Esq., Office of the Attorney General
Andrew Brenner
Mindy Lehman, Vice President, Maryland Bankers Association
Hon. Evelyn Omega Cannon, Circuit Court for Baltimore City

Louise M. Carwell, Esq., Legal Aid Bureau, Inc.
Rebecca Snyder, Maryland Daily Record
Jeff Nadel, Esq.
Brian L. Zavin, Esq.

The Vice Chair convened the meeting, explaining that the Chair was in Russia. She asked if anyone had any announcements. The Reporter introduced the Rules Committee's new intern for the summer, Ashelee Morrow, a first year student at the University of Baltimore School of Law. The Vice Chair welcomed the people who had appeared for the meeting today.

Item 1. Consideration of proposed amendments to Title 14 (Sales of Property), Chapters 100 (General Provisions) and 200 (Foreclosure of Lien Instruments) - New Rule 14-209.1 (Owner-Occupied Residential Property) and Amendments to: Rule 14-102 (Judgment Awarding Possession), Rule 14-202 (Definitions), Rule 14-205 (Conditions Precedent to the Filing of an Action), Rule 14-206 (Petition for Immediate Foreclosure Against Residential Property), Rule 14-207 (Pleading; Court Screening), Rule 14-208 (Subsequent Proceedings if no Power of Sale or Assent to a Decree), Rule 14-210 (Notice Prior to Sale), Rule 14-211 (Stay of the Sale; Dismissal of Action), Rule 14-212 (Alternative Dispute Resolution), and Rule 14-214 (Sale)

The Vice Chair said that the Chair had sent an e-mail to the members of the Committee concerning House Bill 472, passed by the 2010 General Assembly and expected to be signed by the Governor next week. She said that for the benefit of the guests attending the meeting, it would be beneficial to go through the basics of what the Chair had said, so that everyone is on the same page.

The Vice Chair stated that House Bill 472 makes numerous changes to Code, Real Property Article, §7-105.1, which will necessitate changes to the Foreclosure Rules. As the Chair had

written, the heart of the proposed Rules changes is to preclude foreclosure actions against owner-occupied residential property until all statutory impediments to the sale of this property have been satisfied to avoid sales being scheduled, advertised, and then stayed. Part of this is to limit unnecessary judicial involvement. The Chair organized a committee consisting of people interested in the foreclosure process from various perspectives. This Committee has been through from six to eight drafts of the Rules. For the most part, the Committee members reached a consensus as to what the Rules should provide. Other issues subsequently may have arisen that will need to be addressed.

The Vice Chair said that the new law applies, in most, but not all, respects only to owner-occupied residential property, which is a defined term. The broad intent of the bill, which is consistent with the Home Affordable Modification Program known as "HAMP," is to require the lender to provide a loss mitigation analysis, which also is a defined term, to a homeowner before filing a foreclosure action. The e-mail lists six broad items that the bill requires. The Vice Chair told the Committee that she would give a brief summary of these.

The first is that with the 45-day notice of intent to foreclose that is sent to the debtor, the lender must include a loss mitigation application and some other things.

Second, when the loss mitigation analysis has been completed, the order to docket or complaint must contain an

affidavit to that effect. If the analysis has not been completed, other actions have to be taken.

The third item is that once a final loss mitigation affidavit is filed, the homeowner has 15 days to file a request for foreclosure mediation. The lender then has 15 days to file a motion to strike the request, but notwithstanding that right, the court must transmit the request to the Office of Administrative Hearings "OAH," which is the office that is charged with conducting the foreclosure mediations. The court must transmit the request to OAH within five days. This creates a logistical problem for the court clerks and OAH, which hopefully will be resolved by an agreement between the two entities. The intent is that when the clerk dockets the request, Judicial Information System ("JIS"), (the Information Technoligy unit in the Administrative Office of the Courts) ("AOC") JIS becomes informed of the request. JIS then electronically transmits to OAH on a daily basis the batch of requests that is received each day. If a motion to strike is filed and granted, OAH will be informed electronically, and the matter will return to the court.

The fourth item is that OAH has 60 days to conduct a foreclosure mediation. OAH can extend that period for one additional period of 30 days. Within five days after the end of that period, OAH must submit a report which advises that either (a) no mediation occurred because the lender failed to appear or provide documents, (b) no mediation occurred because the homeowner failed to appear or provide documents, or (c) the

mediation occurred but no loss mitigation resulted, or (d) the mediation occurred and resulted in a loss mitigation agreement. In the event of (b) or (c), the lender may proceed to schedule a sale. If (a) or (d) occurred, the court, after opportunity for a hearing, may dismiss the action, or if the agreement contemplates a trial period, a sale may not be scheduled until something else happens. If the lender schedules a sale, the homeowner can then move to stay it for any of the reasons set forth in Rule 14-211, including the new reason that the lender failed to provide loss mitigation in accordance with the statute.

The Vice Chair pointed out that the memorandum also goes through the major changes that were made to the Rules. The Committee will go through these today. Ms. Ogletree, who has been the Chair of the Property Subcommittee since 1986, will lead the Committee through the Rules. Because of the need to transmit the Rules to the court promptly, the Committee will need to reach resolution on any issues raised today. If no resolution is reached, the Court of Appeals will have to decide the issue. It is important that the Committee get through the package today. She asked if the Committee to the fullest extent possible could stick to the issues that are raised by the bill and not get into tangential or other issues that the Committee may have in connection with foreclosure proceedings.

Ms. Ogletree presented Rule 14-102, Judgment Awarding Possession.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-102, as follows:

Rule 14-102. JUDGMENT AWARDING POSSESSION

(a) Motion

(1) If the purchaser of an interest in real property at a sale conducted pursuant to the Rules in this Title is entitled to possession and the person in actual possession fails or refuses to deliver possession, the purchaser or a successor in interest who claims the right of immediate possession may file a motion for judgment awarding possession of the property.

(2) The motion shall state the legal and factual basis for the movant's claim of entitlement to possession.

(3) If the movant's right to possession arises from a foreclosure sale of a dwelling or residential property, the motion shall include averments, made to the best of the movant's knowledge, information, and belief, establishing either that the person in possession is not a bona fide tenant having rights under the Federal Protecting Tenants at Foreclosure Act of 2009 (P.L. 111-22) or Code, Real Property Article, §§7-105.6 and 7-105.9 or, if the person in possession is such a bona fide tenant, that the notice required under that Act has been given and that the tenant has no further right to possession. If a notice pursuant to ~~the~~ Federal ~~Act~~ or State law is required, the movant shall state the date the notice was given and attach a copy of the notice as an exhibit to the motion.

Committee note: Unless the purchaser is a foreclosing lender or there is waste or other circumstance that requires prompt

remediation, the purchaser ordinarily is not entitled to possession until the sale has been ratified and the purchaser has paid the full purchase price and received a deed to the property. See *Legacy Funding v. Cohn*, 396 Md. 511 (2007) and *Empire v. Hardy*, 386 Md. 628 (2005).

The Federal Protecting Tenants at Foreclosure Act of 2009 (P.L. 111-22) requires that a purchaser at a foreclosure sale of a dwelling or residential property give a 90-day notice to a "bona fide tenant" before any eviction and precludes the eviction if the tenant has a "bona fide lease or tenancy," unless the new owner of the property will occupy the property as a primary residence.

(b) Affidavit and Notice

The motion shall be accompanied by:

(1) an affidavit that states:

(A) the name of the person in actual possession, if known;

(B) whether the person in actual possession was a party to the action that resulted in the sale or to the instrument that authorized the sale;

(C) if the purchaser paid the full purchase price and received a deed to the property, the date the payment was made and the deed was received; and

(D) if the purchaser has not paid the full purchase price or has not received a deed to the property, the factual basis for the purchaser's claim of entitlement to possession; and

(2) if the person in actual possession was not a party to the action or instrument, a notice advising the person that any response to the motion must be filed within 30 days after being served or within any applicable longer time prescribed by Rule

2-321 (b) for answering a complaint. A copy of Rule 2-321 (b) shall be attached to the notice.

(c) No Show Cause Order, Summons, or Other Process

The court shall not issue a show cause order, summons, or other process by reason of the filing of a motion pursuant to this Rule.

(d) Service and Response

(1) On Whom

The motion and all accompanying documents shall be served on the person in actual possession and on any other person affected by the motion.

(2) Party to Action or Instrument

(A) If the person to be served was a party to the action that resulted in the sale or to the instrument that authorized the sale, the motion shall be served in accordance with Rule 1-321.

(B) Any response shall be filed within the time set forth in Rule 2-311.

(3) Not a Party to Action or Instrument

(A) If the person to be served was not a party to the action that resulted in the sale or a party to the instrument that authorized the sale, the motion shall be served:

(i) by personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person, or

(ii) if on at least two different days a good faith effort was made to serve the person under subsection (d)(3)(A)(i) of this Rule but the service was not successful, by (a) mailing a copy of the motion by certified and first-class mail to the person at the address of the property and (b)

posting in a conspicuous place on the property a copy of the motion, with the date of posting conspicuously written on the copy.

(B) Any response shall be filed within the time prescribed by sections (a) and (b) of Rule 2-321 for answering a complaint. If the person asserts that the motion should be denied because the person is a bona fide tenant having a right of possession under the Federal Protecting Tenants at Foreclosure Act of 2009 (P.L. 111-22), the response shall (i) state the legal and factual basis for the assertion and (ii) be accompanied by a copy of any bona fide lease or documents establishing the existence of such a lease or state why the lease or documents are not attached.

(4) Judgment of Possession

If a timely response to the motion is not filed and the court finds that the motion complies with the requirements of sections (a) and (b) of this Rule, the court may enter a judgment awarding possession.

(e) Residential Property; Notice and Affidavit

After entry of a judgment awarding possession of residential property as defined in Rule 14-202 (i), but before executing on the judgment, the purchaser shall:

(1) send by first-class mail the notice required by Code, Real Property Article, §7-105.9 (d) addressed to "All Occupants" at the address of the property; and

(2) file an affidavit that the notice was sent.

Cross reference: Rule 2-647 (Enforcement of Judgment Awarding Possession).

Source: This Rule is derived in part from the 2008 version of former Rule 14-102 and is in part new.

A cross reference to Code, Real Property Article, §§7-105.6 and 7-105.9 is suggested for subsection (a)(3) of Rule 14-102, which essentially is the new legislation conforming State law to the federal law. The Reporter asked if the reference to the federal law could be deleted. She and Ms. Morrow had been looking at it yesterday with the idea of eliminating it and simplifying the Rules even more. It seems as if the Maryland statute is broader, with no sunset provision, and it is more encompassing. If there is any risk that the federal act is in any way broader, both references will be left in. Where subsection (a)(3) of the Rule refers to "that Act," it would have to be changed to the words "these laws" to make reference to both laws.

Judge Pierson remarked that he did not know if it makes any difference going forward, but there are different effective dates. The Reporter responded that the effective date of the Senate Bill 654/House Bill 711, which is not the main focus of today's meeting, is June 1, 2010. Judge Pierson commented that there may be a residue of proceedings that may be covered by the federal act. Mr. Hill who said that he was from the Public Justice Center added that the June 1 effective date is for foreclosures that are docketed June 1 and after. Ms. Corwin said that the Maryland law is broader than the federal act. The Reporter observed that ultimately, the reference to the federal act could be eliminated, but it probably is preferable not to delete it at this time.

The Vice Chair noted that Mr. Hill provided a written comment concerning Rule 14-102. (See Appendix 1). He suggested that the Rule should provide in subsection (a)(3) that notice should be provided pursuant to the Federal law and Code, Real Property Article, §7-105.6 for the reasons that Judge Pierson had just pointed out. The Vice Chair noted that if this change were made, it would only apply to a notice that is required by both the federal and State law. She suggested that the word "and" should be "or." Mr. Hill agreed with the Vice Chair's suggested change. The Vice Chair asked if there were any more comments on section (a). Mr. Hill remarked that his comment relating to the Code provision in §7-105.6. also applies in subsection (d)(3)(B), and he suggested that subsection (d)(3)(B) also be amended, using "or" instead of "and." By consensus, the Committee agreed to this suggestion.

Mr. Hill noted that one of his other comments pertains to section (a). Subsection (a)(3) could read as follows: "If the movant's right to possession arises from a foreclosure sale of a dwelling or residential property, the motion shall include averments based on a reasonable inquiry into the occupancy status of the property." Ms. Ogletree said that this is an unreasonable burden. Lenders may not know at this point who is occupying the property, and they may never know. Mr. Hill remarked that if the foreclosure purchaser is going to aver to the court that there is no bona fide tenant, or that the law has been complied with, it seems to imply that there has been some inquiry into whether a

tenant lives on the property. He expressed the view that there should be some inquiry by the foreclosure sale purchaser into whether there is a tenant before the purchaser can make the averments required by Rule 14-102 that, "to the best of the movant's knowledge, information, and belief," there is no bona fide tenant or that there is compliance with the law that protects tenants.

Mr. MacFadyen told the Committee that he is an attorney who represents secured parties in foreclosure actions. As long as that burden is with the purchaser, there is no problem. He agreed that foreclosing lenders will never know who occupies the property at issue. Once the moment of truth arrives after a sale has occurred, and someone knocks on the door stating that he or she bought the property, it is a different issue. To place that burden on the lender is impossible. Unless the lender also is the purchaser, the lender will never know who the occupant is. Often, however, the lender becomes the purchaser at the foreclosure sale. If that occurs, an inquiry as to occupancy is made. Mr. Hill clarified that the burden he is suggesting would be placed on the foreclosure sale purchaser. He commended the members of Mr. MacFadyen's law firm for already making an inquiry as to who lives on the property. They take specific actions to inquire and aver this in their motions for judgment awarding possession. Many firms make no inquiry. They simply file the motion without having conducted any inquiry as to whether a bona fide tenant lives on the property. It is not fair to the tenant,

and it does not comply with the spirit of the law and Rule. The language proposed to be added to Rule 14-102 simply clarifies that some reasonable inquiry should be made before a motion for possession is filed.

The Vice Chair asked Mr. Hill if his suggested change is because he feels it is right or because it is required by the new law. Mr. Hill replied that his suggestion is not required by the change to Code, Real Property Article, §7-105.6. However, the changes to that law are trying to clarify how the federal law should apply in Maryland. The proposed change to Rule 14-102 also clarifies how the federal law should apply in this State. This is the same gap that currently exists. The Vice Chair clarified that the necessity to make the inquiry would always apply to the purchaser at the sale, and not to the seller. Mr. Hill agreed. The Vice Chair remarked that this change sounded reasonable.

Mr. Enten told the Committee that he was present on behalf of the Maryland Bankers' Association. If a motion is filed, a judge will look at it and decide whether or not the movant set forth sufficient facts for him or her to grant the motion. He expressed the opinion that the Rule did not need to be changed. He agreed with Mr. MacFadyen that often it is the lender who is the purchaser. To require by Rule a standard that mandates that the motion has to demonstrate the level of inquiry places an unreasonable burden on the lender. If the court finds that the facts in the motion are not sufficient, the court will deny the

motion. The Vice Chair questioned if Mr. Enten's view is that a reasonable inquiry into the occupancy status of the property is not required. Mr. Enten noted that subsection (a)(3) as it currently is written requires that the averments in the motion are to be made "to the best of the movant's knowledge, information, and belief...". No specific level of inquiry is required.

Judge Pierson commented that what happens now is that the court typically gets a motion that has conclusory allegations, not stated as specific facts, that do not disclose whether any inquiry has been made. Usually, there is a mailing to all occupants. Judge Cannon agreed. The idea that the purchaser would not make a reasonable inquiry does not make sense. The language is a good addition to the Rule, so that there is a clear duty to make a reasonable inquiry. The Vice Chair added that the proposed amendment just clarifies what ought to be true. Mr. Hill remarked that he deals with this issue on a daily basis. A foreclosure sale purchaser will file a motion for possession, claiming that the mortgagor is in possession, and, therefore, there is no need to comply with the law. Then a letter is sent to the occupant, asking whether or not the occupant is a tenant, but this should be complied with before the motion is filed.

Ms. Ogletree asked whether the status of the occupant is evident from the service return if the mortgagor was served on the property. Mr. Hill responded that sometimes the mortgagor is not served on the property, and if the movant avers that the

mortgagor is in possession, the notice is sent by first class mail since the mortgagor is already a party to the action. Judge Pierson moved that Mr. Hill's suggested change be made to the Rule. The motion was seconded. The Vice Chair stated that the motion is to add to section (a) language that would provide for a reasonable inquiry into the occupancy status of the property. The motion carried with two opposed.

The Vice Chair noted that Mr. Hill had a few more comments on Rule 14-102 in his memorandum. Mr. Hill said that the additions are carryovers of the amendments that were just discussed. The Vice Chair pointed out that Mr. Hill had suggested that the word "actual" be added into subsection (a)(3) after the word "in" and before the word "possession." Mr. Hill explained that this is a clarification. It is probably not necessary, because it is implied by the Rule. The Vice Chair observed that the word was already added to subsection (b)(1). Mr. Hill commented that in subsection (b)(1)(B), the suggested language clarifies that the movant should state the actions taken in the reasonable inquiry into the occupancy status of the property in the averments in the motion. This addresses what Judge Pierson had pointed out about conclusory allegations. The Vice Chair said that the proposed language in subsection (b)(1)(B) comports with the motion that just passed. She asked whether anyone disagreed with the concept of adding in that the affidavit needs to require some specificity as to the actions taken to conduct a reasonable inquiry into the occupancy status

of the property. By consensus, the Committee approved the language suggested by Mr. Hill.

Mr. Hill told the Committee that the last proposed amendment was in subsection (d)(3)(B) and it was to add a reference to Code, Real Property Article, §7-105.6. By consensus, the Committee approved this addition. By consensus, the Committee approved Rule 14-102 as amended.

Ms. Ogletree presented Rule 14-202, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-202, as follows:

Rule 14-202. DEFINITIONS

In the Rules in this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Assent to a Decree

"Assent to a decree" means a provision in a lien instrument assenting, in the event of a specified default, to the entry of an order for the sale of the property subject to the lien.

(b) Borrower

"Borrower" means:

(1) a mortgagor;

(2) a grantor of a deed of trust;

(3) any person liable for the debt secured by the lien;

(4) a maker of a note secured by an indemnity deed of trust;

(5) a purchaser under a land installment contract;

(6) a person whose property is subject to a lien under Code, Real Property Article, Title 14, Subtitle 2 (Maryland Contract Lien Act); and

(7) a leasehold tenant under a ground lease, as defined in Code, Real Property Article, §8-402.3 (a)(6).

(c) Debt

"Debt" means a monetary obligation secured by a lien.

(d) Final Loss Mitigation Affidavit

"Final loss mitigation affidavit" means an affidavit that:

(1) is made by a person authorized to act on behalf of a secured party of a mortgage or deed of trust on residential property that is the subject of a foreclosure action;

(2) certifies the completion of the final determination of loss mitigation analysis in connection with the mortgage or deed of trust or states ~~**that**~~ **with particularity why** no loss mitigation analysis is required ~~**because the property is not owner-occupied residential property**~~; and

(3) if a loan modification or other loss mitigation was denied, provides an explanation for the denial.

Committee note: The Committee believes that a final loss mitigation affidavit should be filed in every action seeking foreclosure of

a lien on residential property, whether or not the property is owner-occupied. If the affiant has determined that the property is not owner-occupied residential property and, therefore, no loss mitigation analysis is required, the affiant should so state. See Rule 14-207(b)(7). The definition set forth in Code, Real Property Article, §7-105.1 is supplemented to include this requirement. Other modifications to the definition are stylistic, only.

If the property is owner-occupied residential property but the secured party, such as an individual purchase-money mortgagee, is not required to provide or participate in a loss mitigation program, the affiant should so state as an explanation for the denial of a loan modification or other loss mitigation.

(e) Foreclosure Mediation

"Foreclosure mediation" means a conference at which the parties in a foreclosure action, their attorneys, additional representatives of the parties, or a combination of those persons appear before an impartial individual to discuss the positions of the parties in an attempt to reach agreement on a loss mitigation program for the mortgagor or grantor. **~~"Loss mitigation program" has the meaning stated in Code, Real Property Article, §7-105.1 (a)(6).~~**

Committee note: This is the definition stated in Code, Real Property Article, §7-105.1 (a)(3). Code, Real Property Article, §§7-105.1 (i), (j), (k), and (l) require that the foreclosure mediation be conducted by the Office of Administrative Hearings.

~~(f) HAMP~~

~~"HAMP" means the Home Affordable Modification Program, or its successor, of the U.S. Department of Treasury created as a result of the Emergency Economic Stabilization Act of 2008, Pub.L. 110-343.~~

~~(d)~~ **(f)** Lien

"Lien" means a statutory lien or a lien upon property created or authorized to be created by a lien instrument.

~~(e)~~ **(g)** Lien Instrument

"Lien instrument" means any instrument creating or authorizing the creation of a lien on property, including:

(1) a mortgage;

(2) a deed of trust;

(3) a land installment contract, as defined in Code, Real Property Article §10-101 (b);

(4) a contract creating a lien pursuant to Code, Real Property Article, Title 14, Subtitle 2;

(5) a deed or other instrument reserving a vendor's lien; or

(6) an instrument creating or authorizing the creation of a lien in favor of a homeowners' association, a condominium council of unit owners, a property owners' association, or a community association.

(h) Loss Mitigation Analysis

"Loss mitigation analysis" means an evaluation of the facts and circumstances of a loan secured by owner-occupied residential property to determine:

(1) whether a mortgagor or grantor qualifies for a loan modification; and

(2) if there will be no loan modification, whether any other loss mitigation program may be made available to the mortgagor or grantor.

(i) Loss Mitigation Program

“Loss mitigation program” means an option in connection with a loan secured by owner-occupied residential property that:

(1) avoids foreclosure through loan modification or other changes to existing loan terms that are intended to allow the mortgagor or grantor to stay in the property;

(2) avoids foreclosure through a short sale, deed in lieu of foreclosure, or other alternative that is intended to simplify the mortgagor’s or grantor’s relinquishment of ownership of the property; or

(3) lessens the harmful impact of foreclosure on the mortgagor or grantor.

(j) Owner-Occupied Residential Property

“Owner-occupied residential property” means residential property in which at least one unit is occupied by an individual who:

(1) has an ownership interest in the property; and

(2) uses the property as the individual’s primary residence.

~~(f)~~ (k) Power of Sale

"Power of sale" means a provision in a lien instrument authorizing, in the event of a specified default, a sale of the property subject to the lien.

(l) Preliminary Loss Mitigation Affidavit

“Preliminary loss mitigation affidavit” means an affidavit that:

(1) is made by a person authorized to act on behalf of a secured party of a mortgage or deed of trust on owner-occupied residential property that is the subject of a foreclosure action;

(2) certifies the status of an incomplete loss mitigation analysis in connection with

the mortgage or deed of trust; and

(3) includes reasons why the loss mitigation analysis is incomplete.

~~(g)~~ (m) Property

"Property" means real and personal property of any kind located in this State, including a condominium unit and a time share unit.

~~(h)~~ (n) Record Owner

"Record owner" of property means a person who as of 30 days before the date of providing a required notice holds record title to the property or is the record holder of the rights of a purchaser under a land installment contract.

~~(i)~~ (o) Residential Property

"Residential property" means real property with four or fewer single family dwelling units that are designed principally and are intended for human habitation. It includes an individual residential condominium unit within a larger structure or complex, regardless of the total number of individual units in that structure or complex. "Residential property" does not include a time share unit.

Cross reference: See Code, Real Property Article, §7-105.1 (a).

~~(j)~~ (p) Sale

"Sale" means a foreclosure sale.

~~(k)~~ (q) Secured Party

"Secured party" means any person who has an interest in property secured by a lien or any assignee or successor in interest to that person. The term includes:

(1) a mortgagee;

(2) the holder of a note secured by a

deed of trust or indemnity deed of trust;

(3) a vendor under a land installment contract or holding a vendor's lien;

(4) a person holding a lien under Code, Real Property Article, Title 14, Subtitle 2;

(5) a condominium council of unit owners;

(6) a homeowners' association;

(7) a property owners' or community association; and

(8) a ground lease holder, as defined in Code, Real Property Article, §8-402.3 (a)(3).

The term does not include a secured party under Code, Commercial Law Article, §9-102 (a)(3).

~~(l)~~ (r) Statutory Lien

"Statutory lien" means a lien on property created by a statute providing for foreclosure in the manner specified for the foreclosure of mortgages, including a lien created pursuant to Code, Real Property Article, §8-402.3 (d).

Committee note: Liens created pursuant to Code, Real Property Article, Title 14, Subtitle 2 (Maryland Contract Lien Act) are to be foreclosed "in the same manner, and subject to the same requirements, as the foreclosure of mortgages or deeds of trust." See Code, Real Property Article, §14-204 (a). A lien for ground rent in arrears created pursuant to Code, Real Property Article, §8-402.3 (d) is to be foreclosed "in the same manner and subject to the same requirements, as the foreclosure of a mortgage or deed of trust containing neither a power of sale not an assent to decree." See Code, Real Property Article, §8-402.3 (n).

Source: This Rule is derived in part from the 2008 version of former Rule 14-201 (b) and is in part new.

Ms. Ogletree told the Committee that statutory definitions were proposed to be added to Rule 14-202. She asked the Reporter if there were proposed changes. Ms. Ogletree said that section (d) was added addressing the final loss mitigation affidavit. The Reporter stated that she would go through the definitions and explain what was changed. The "final loss mitigation affidavit" has been changed and will be noted later on. The definition of "foreclosure mediation" was taken from page 4 of the statute, subsection (a)(3) of Code, Real Property Article, §7-105.1. The Committee note after section (e) of Rule 14-202 was added to distinguish this process from the mediation in Title 17 and in Rule 14-212, Alternative Dispute Resolution. The process referred to in section (e) affords the parties flexibility, and they will not be governed by Rule 14-212 or Title 17. The definition of "loss mitigation analysis" in section (h) is taken exactly from page 5, subsection (a)(5) of Code, Real Property Article, §7-105.1. The definition of "owner-occupied residential property" in section (j) is taken exactly from page 5 of the statute, subsection (a)(7) of Code, Real Property Article, §7-105.1. The "preliminary loss mitigation affidavit" in section (l) is taken exactly from pages 5-6, subsection (a)(8) of Code, Real Property Article, §7-105.1, but there may need to be some modification in the first line as follows: "'preliminary loss mitigation affidavit' means an affidavit <u>in the form required by regulation of the Department of Labor, Licensing, and Regulation</u>..." after those regulations are issued. Or the new

language could be “in the form required by the statute” before those regulations come out. This language may need some further styling. The Chair had talked with the Reporter before he left. This same new language should be added to the definition of “preliminary loss mitigation affidavit,” and similar language to section (d), which is the final loss mitigation affidavit. This would be an affidavit “in the form required by regulation of the Department of Labor, Licensing, and Regulation (DLLR)” or if the regulations have not been issued by the time this rule goes into effect, in the form required by the part of the statute where the forms are listed as temporary forms. If that gets filed in that form, then in accordance with Mr. Enten’s objection to the words “with particularity,” those words can be deleted from subsection (d)(2), because the form itself requires a great amount of particularity in it.

To clarify, the Reporter listed the changes to what appears in section (d): the addition of the reference to the “Department of Labor, Licensing, and Regulation in the first line of section (d) after the word “affidavit” and before the word “that” and the deletion of the words “with particularity” in keeping with the added reference. The Vice Chair noted that each change will need to be voted on, and she asked the Reporter if the changes should be considered one by one. The Reporter answered that those two changes have to be considered together. She said that she would describe what changes were made because of the statute. The Vice Chair inquired when those changes were made, and the Reporter

replied that they were done at the meeting of the Subcommittee. The Vice Chair asked if the changes were in the current draft, and the Reporter answered affirmatively.

The Reporter noted that the modification is the deletion of the words “owner-occupied.” This flows through the Rules so that the process works. The rest of the Rules flow from the fact that the final loss mitigation affidavit is filed regardless of whether the property is owner-occupied. It is a matter of checking off a box on that form to indicate that the loss mitigation procedure does not have to be done, because the property is not owner-occupied. The reason that this is important is that the statute on page 9, lines 19 and 20, which is section (d) of Code, Real Property Article, §7-105.1, states: “An order to docket or a complaint to foreclose a mortgage or deed of trust on residential property shall...”. This stem goes all the way through to page 21 ending at section (f) of the statute. This stem does not refer to “owner-occupied property.” All of the required documentation gets sent out regardless of whether the property is owner-occupied. The only requirement is that the property is residential. When the borrower receives all of the documents, he or she can check off a box that asks for loss mitigation and ultimately for foreclosure mediation if the borrower is averring that the property is owner-occupied. Many rules are affected by this structural change, and it makes the rest of the rules actually work and in a way actually protects the lenders, because they do not have to go through this whole

process to find out that they have made a mistake as to whether the property is owner-occupied, and they did not send out the necessary documentation. If anyone is thinking about putting the term “owner-occupied” back into the definition, the Reporter asked that this idea be deferred until the rest of the Rules have been considered to see how they work with the deletion of the term “owner-occupied.” This change was highlighted in the Committee note after subsection (d)(3) of the Rule, which was added after the statute. The Committee note refers to the affiant determining that the property is not owner-occupied. If the property is determined to be vacant, this can be checked off on the form. The process then moves forward.

The Reporter said that Ms. Ogletree had requested another addition to the Committee note. This states that if the property is owner-occupied, but the secured party is not required to provide or participate in a loss mitigation program, that fact can be checked off. An example would be a “take-back” mortgage. The seller is not a bank, and the seller sells the property privately, taking back the mortgage. This seller would not be required to have a loss mitigation program. It is a simple “mom and pop” operation. By requiring a final loss mitigation affidavit for any property that is residential, which is easy to determine based on the physical structure of the building, the affiant checks the box. This system works, and the Committee note explains why it works. Ms. Ogletree added that originally the new procedure would have only applied to owner-occupied

property, and then this goes back to the circular argument of how does one determine whether the property is owner-occupied at that point. If it is required to apply to all residential property, all of the owner-occupied property will be included, and the rest will be excluded for various reasons. The Subcommittee chose the all-inclusive approach rather than picking out the owner-occupied property.

The Reporter pointed out that this brings the issues before the court quickly. Any dispute as to owner-occupancy will arise sooner, rather than later, such as after the sale has already happened. If someone claims to be living on the property, and the bank denies it, this will come to a head much more quickly under this structure than it would if the bank was able to deny that the property was not owner-occupied, and it is not necessary to send out the notices. Then the sale gets scheduled, and the borrower states that he or she was entitled to loss mitigation analysis and foreclosure mediation and received none of it. That dispute should arise early in the process and not after the sale. This is what the modification tot he statutory definition accomplishes.

The Vice Chair noted that the Rule is broader than the statute for a reason. She asked if anyone wished to speak against this concept. Mr. Enten responded that he had been planning to speak against this. He had spoken with Ms. Ogletree and the Reporter and consulted with the attorneys who represent his clients. Their concern was that the statute is ambiguous.

Their reading of it was that none of the new procedures, including sending the final loss mitigation affidavit, applies to any property but that which is owner-occupied. From a practical, realistic point of view, this additional piece of paper has to be sent. However, Mr. Enten added that after speaking with Ms. Ogletree and the Reporter, he realized that this does more good than it does harm, even though it is not provided for in the statute.

The Vice Chair commented that what she heard from that description was that a reference to the fact that the affidavits need to comply with regulations and/or State law should be in the Rule. Ms. Ogletree added that the Subcommittee recommends this. The Vice Chair asked if anyone objected to the Subcommittee recommendation. No one objected. The Vice Chair remarked that she would like to hear the language that is being recommended. She preferred that the new language not provide that for a short period of time, the Rule would apply to the new law before it applies to the new regulations. She suggested that the wording be: "affidavit that complies with all regulations and law." The Reporter responded that this can be drafted by the Style Subcommittee. It would be "all regulations promulgated by the Department of Labor, Licensing, and Regulation and applicable State law."

Mr. Enten commented that the statute contains a specific form that was put in as a place-holder until the DLLR promulgates its regulations. That agency is to promulgate a form that is

substantially same as what is in the statute. It will only be a short period of time before the DLLR form is adopted. For now, the Rule could state that it shall be in the form provided for in the uncodified language in House Bill 472. The Rule should state either in a Committee note or someplace else that until the DLLR promulgates the form, the form in House Bill 472 should be used. The Vice Chair asked how people are going to be able to find the form in the uncodified version of the bill. The Reporter replied that it is on the internet.

The Reporter asked Mr. Enten to speak on the issue of the language "with particularity." Mr. Enten responded that this is the point that he was most concerned about. The form is what there is. The thinking was that the form contains a box that is labeled "other." It was agreed that the Rule should also ask for the person filling out the form to state the reasons. It is not a good idea to get into an argument as to whether the affidavit is particular enough. The form of the affidavit had been the subject of a major discussion at the legislature. All of the legislators approved the form. Once it was passed by the House of Delegates, no one offered any amendments to change the affidavit. The idea was to make the procedure simple for the lender and for the tenant/borrower. If it goes to mediation, the hearing officer will get involved in the details. The person filling out the form checks the boxes that apply. If the box labeled "other" is checked, some reason needs to be included. He spoke with the Reporter and Ms. Ogletree who found his

suggestion acceptable. He suggested that next to the box that is labeled “other” the language “state the reasons” should be added.

The Vice Chair inquired if the form of the affidavit that is in the uncodified portion of the law does cover subsections (d)(1), (2), and (3). Mr. Enten answered that the form has at least eight reasons listed. These are: the property is not the primary residence of at least one of the borrowers, the property has more than four dwelling units, the property is vacant or condemned, the mortgage loan is not a first mortgage, the amount of the mortgage loan makes it ineligible under all relevant loss mitigation programs, the borrower’s income makes the borrower ineligible under all relevant loss mitigation programs, the borrower has already failed a modification trial period plan, and other. This is an exhaustive a list as the drafters could come up with. The box labeled “other” was included in case there was some other reason that did not fit within those categories. Ms. Ogletree remarked that the “mom and pop” mortgagees are not required to have a program to engage in loss mitigation analysis.

Mr. Enten told the Committee that his law partner, Marjorie Corwin, was present at the meeting. She had spent a great amount of time working on the legislation. A critical point in the process was to have a form where someone checks the appropriate boxes. The Vice Chair inquired as to what happens if the affidavit is not exactly in the form of the one that is in the uncodified section of the law. Mr. Enten replied that when this law goes into effect, there will be an emergency regulation.

This would be a fallback. The rule will provide that if someone is an attorney filing a foreclosure case, it would be necessary to look at House Bill 472, especially the forms. The Vice Chair said that normally, when rules have either a form within the rule or because a form is in the statute, typically the rule provides that the affidavit shall be "substantially" in the form of __, so that there is no argument that it is not exact. Would it be appropriate in the Committee note to include a reference to the form of the affidavit that is contained in the law? One of Mr. Enten's points is that this needs to be made known. Mr. Enten replied affirmatively.

Ms. Carwell, an attorney with the Legal Aid Bureau, told the Committee that she was at the meeting on behalf of Kathleen Skullney, Esq., who was unable to be present. She wanted to make sure that the reason "other," which is one of the eight reasons in the statute should not stand alone without something else stated. Some sort of affirmative reason needs to be given. Ms. Ogletree responded that the Committee agrees with this. The Reporter added that she will send a comment over to DLLR to that effect. Ms. Skullney was really concerned about the words "with particularity." It was because of her comment that those words were added to the definition in section (d). Now that those words are being taken out, something should be added to the "other" category in the form. Mr. Enten suggested that language could be added to the Committee note to provide that if the mortgagee or foreclosing party checks the category "other," the

person shall state the reason why. The Vice Chair remarked that the Rule is not promulgating the term "other." Mr. Enten pointed out that in the form in the statute, there is a line next to the word "other." This shows that the legislature contemplated that someone would state the reason if the person checked the box that is labeled "other." It is important to avoid a dispute at the beginning of the case that some reason is not particular enough.

The Vice Chair said she wanted to clarify this. The General Assembly adopted a form for the affidavit that includes a line for "other" but does not have a line after it requiring that reasons be given. Mr. Klein pointed out that the statute does have a line in it, and although it does not state that reasons should be given, it is implicit from the way it is designed. The Reporter remarked that someone could put on it "N/A," meaning not applicable. The Vice Chair observed that there is a very short period of time between when someone might use this form as opposed to when that point would be clarified by the form adopted by the DLLR. Mr. Young told the Committee that he was an Assistant Attorney General and counsel to the Commissioner of Financial Regulation which is within the DLLR. Ms. Corwin asked Mr. Young if he anticipated that in the regulations issued by the DLLR, the category "other" would also include a request for the reasons. Mr. Young replied affirmatively. His department is already working on a draft of those regulations, and next to the box that is labeled "other" is a parenthetical that reads "explain in detail." It may be changed to the language "state

reasons and explain in detail" or something similar.

The Vice Chair said that the definition of the term "final loss mitigation affidavit," is "an affidavit substantially in the form prescribed by the law and the Department of Labor, Licensing, and Regulation regulations." The words "with particularity" will be deleted from subsection (d)(2). Is it necessary to add to the Committee note that the form of the affidavit is contained, and then include the appropriate provision in the bill? Ms. Ogletree replied that this would be lost by the time the Rule is sent to the Court of Appeals. The Vice Chair noted that the language "...means an affidavit substantially in the form required by..." would be necessary. The Reporter commented that the differences between the definition in the Rule and the one in the statute are being highlighted. Some kind of clarification should be put in that to include the requirement that the form of affidavit be pursuant to the regulations to highlight this as one of the changes. There are two basic changes in the Rule to the definition that is actually in the legislation. One is the deletion of the term "owner-occupied" and the other is the reference to "substantially in the form required by regulations." The Vice Chair observed that the Committee note is being used as a legislative history of how the Rule definitions were changed from the statutory definitions.

Mr. Durfee, Executive Director of Legal Affairs for the Administrative Office of the Courts, said that the statute

requires that the affidavit be in the form prescribed by the regulations, and not "substantially in the form...". The Vice Chair inquired if the statute states a consequence if the form is one word different from the form in the statute. Mr. Durfee replied that it does not, but this is an issue that could be litigated. The Vice Chair stated that the problem is that the affidavit itself provides that it should be in a particular form, and the situation with the Rules has always been that unless the form needs to be word for word the same as a statutory form, the Rules have always used the language "substantially in the same form as ..." to allow for slight word modification. However, the forms need to be for the most part substantively in the same form as the statutory one. She asked Senator Stone if this modification from the form set out in the statute is problematic. Senator Stone answered negatively. He agreed with the addition of the word "substantially" to the Rule.

Mr. Young stated that the Commissioner of Financial Regulation in promulgating the forms will use some expression of the sentiment that the notice or form has to be substantially in the same form set out. They will also be using the word "substantially."

Ms. Corwin referred to subsection (i)(2) of Rule 14-202 and asked if the language of the statute could be substituted for this language. The Legal Aid Bureau had made this suggestion. The statutory language is in subsection (a)(6) of Code, Real Property Article, §7-105.1, and it reads as follows: "avoids

foreclosure through a short sale, deed in lieu of foreclosure, or other alternative that is intended to simplify the mortgagor's or grantor's relinquishment of ownership of the property...". The Vice Chair asked why this was being suggested. Judge Norton pointed out that the statutory language is the same as the language in the Rule. The Reporter explained that when this comment was submitted, she had not yet added in the definition of "loss mitigation program," but what Ms. Skullney was describing was a loss mitigation program, so a definition of this term was added to the definitions to encompass her comments. If it not verbatim, it is a typographical error.

The Vice Chair said that the wording of subsection (i)(2) will be checked against the wording of the statute. Ms. Ogletree pointed out that Rule 14-202 contains no other changes, except for renumbering.

By consensus, the Committee approved Rule 14-202 as amended.

Ms. Ogletree presented Rule 14-205, Conditions Precedent to the Filing of an Action, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-205, as follows:

Rule 14-205. CONDITIONS PRECEDENT TO THE FILING OF AN ACTION

(a) Generally

An action to foreclose may not be filed unless (1) the instrument creating or giving notice of the existence of the lien has been filed for record, and (2) there is a default that lawfully allows a sale.

Cross reference: Code, Real Property Article, Title 14, Subtitle 2 (Maryland Contract Lien Act).

(b) Foreclosure of Liens on Residential Property

Unless otherwise ordered by the court pursuant to Rule 14-206, an action to foreclose a lien on residential property may not be filed until the later of (1) 90 days after a default for which the lien instrument lawfully allows a sale, or (2) 45 days after the notice of intent to foreclose required by Code, Real Property Article, §7-105.1 (c), together with all items required by that section to accompany the notice, has been sent in the manner required by that section.

Cross reference: For the form of the notice and any other information that the Commissioner of Financial Regulation requires, see COMAR 09.03.12.01 et seq.

(c) Land Installment Contract

(1) Notice

An action to foreclose a land installment contract on property other than residential property may not be filed until at least 30 days after the secured party has served written notice on the borrower, the record owner of the property, and, if different, the person in possession at the address of the property. The notice shall describe the default with particularity and state that foreclosure proceedings will be filed on or after a designated day, not less than 30 days after service of the notice, unless the default is cured prior to that day.

(2) Method of Service

The secured party shall serve the notice required by subsection (1) of this section by (A) certified and first-class mail to the last known address of the person or (B) personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person.

Cross reference: For the definition of "land installment contract," see Code, Real Property Article, §10-101 (b).

Source: This Rule is derived in part from the 2008 version of Rule 14-203 (a) and is in part new.

Ms. Ogletree explained that since a loss mitigation affidavit is required to be filed, the language “together with all items required by that section to accompany the notice” was added to section (b). This includes all of the documentation, such as envelopes, that the statute requires. By consensus, the Committee approved Rule 14-205 as presented.

Ms. Ogletree presented Rule 14-206, Petition for Immediate Foreclosure Against Residential Property, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206, as follows:

Rule 14-206. PETITION FOR IMMEDIATE

FORECLOSURE AGAINST RESIDENTIAL PROPERTY

(a) Right to File

A secured party may file a petition to be excused from the time and notice requirements of Code, Real Property Article, §7-105.1 (b) and (c) and Rule 14-205 (b) and for leave to file an action for immediate foreclosure of a lien against residential property if:

(1) the debt secured by the lien instrument was obtained by fraud or deception;

(2) no payments have ever been made on the debt;

(3) the property subject to the lien has been destroyed; or

(4) the default occurred after all stays have been lifted in a bankruptcy proceeding.

(b) Contents of Petition

A petition filed under this Rule shall state with particularity the facts alleged in support of the petition and shall be under oath or supported by affidavit.

(c) Notice to Borrower and Record Owner

The secured party shall send by certified and first-class mail a copy of the petition and all papers attached to it to each borrower and record owner of the property at the person's last known address, and, if the person's last known address is not the address of the property, to the person at the address of the property. The mailing shall include a notice that the addressee may file a response to the petition within 10 days after the date of the mailing. Promptly after the mailing, the secured party shall file an affidavit that states with particularity how compliance with this section was accomplished, including the date on which the petition was mailed and the

names and addresses of the persons to whom it was mailed.

(d) Response

(1) Procedure

Within 10 days after the mailing pursuant to section (c) of this Rule, a borrower or record owner of the property may file a written response. The response shall state with particularity any defense to the petition and shall be under oath or supported by affidavit. A person who files a response shall serve a copy of the response and any supporting documents on the petitioner by first-class mail, and shall file proof of such service with the response.

Cross reference: See Rules 1-321 (a) and 1-323.

(2) Non-waiver if No Timely Response Filed

A person's failure to file a timely response to the petition does not waive the person's right to raise any defense in the action to foreclose, including a defense based upon noncompliance with the time or notice requirements of Code, Real Property Article, §7-105.1 (b) and (c).

(e) Hearing

The court may not grant the petition without a hearing if a response presents a genuine dispute of material fact as to whether the petitioner is entitled to the relief requested. Otherwise, the court may grant or deny the petition without a hearing.

(f) Filing of Order to Docket or Complaint

An order to docket or complaint to foreclose shall be filed in the same action as the petition.

Committee note: If this Rule applies in an action to foreclose a lien against owner-occupied residential property, the loss

mitigation analysis and affidavit requirements of Code, Real Property Article, §7-105.1 are not applicable and foreclosure mediation is not available.

Source: This Rule is new.

Ms. Ogletree explained that a Committee note was added at the end of Rule 14-206. Since this Rule addresses petitions for immediate foreclosure against residential property, it was the consensus of the Subcommittee that this Rule does not have to comply with the statute. This is what the Committee note provides. The Vice Chair inquired if the last word of the note should be changed from "available" to "required." Mediation is always available. The word "required" seems to better state the concept. The Reporter commented that the foreclosure mediation at OAH may not always be available. The Vice Chair asked if the meaning of this was that foreclosure mediation under the statute is not available. The Reporter replied affirmatively. The Vice Chair remarked that this is a style issue. It needs to be clear that this refers to foreclosure mediation under the statute. By consensus, the Committee approved Rule 14-206 subject to the restyling of the Committee note.

Ms. Ogletree presented Rule 14-207, Pleadings; Court Screening, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-207, as follows:

Rule 14-207. PLEADINGS; COURT SCREENING

(a) Pleadings Allowed

(1) Power of Sale

An action to foreclose a lien pursuant to a power of sale shall be commenced by filing an order to docket. No process shall issue.

(2) Assent to a Decree or Lien Instrument with no Power of Sale or Assent to a Decree

An action to foreclose a lien pursuant to an assent to a decree or pursuant to a lien instrument that contains neither a power of sale nor an assent to a decree shall be commenced by filing a complaint to foreclose. If the lien instrument contains an assent to a decree, no process shall issue.

(3) Lien Instrument with both a Power of Sale and Assent to a Decree

If a lien instrument contains both a power of sale and an assent to a decree, the lien may be foreclosed pursuant to either.

(b) Exhibits

A complaint or order to docket shall <u>include or</u> be accompanied by:

(1) a copy of the lien instrument supported by an affidavit that it is a true and accurate copy, or, in an action to foreclose a statutory lien, a copy of a notice of the existence of the lien supported by an affidavit that it is a true and accurate copy;

(2) an affidavit by the secured party, the plaintiff, or the agent or attorney of either that the plaintiff has the right to foreclose and a statement of the debt

remaining due and payable;

(3) a copy of any separate note or other debt instrument supported by an affidavit that it is a true and accurate copy and certifying ownership of the debt instrument;

(4) a copy of any assignment of the lien instrument for purposes of foreclosure or deed of appointment of a substitute trustee supported by an affidavit that it is a true and accurate copy of the assignment or deed of appointment;

(5) an affidavit with respect to any defendant who is an individual that the individual is not in the military service of the United States as defined in the Servicemembers Civil Relief Act, 50 U.S.C. app. §§501 et seq., or that the action is authorized by the Act;

(6) a statement as to whether ~~or not~~ the property is residential property and, if so, statements in boldface type as to whether (A) the property is owner-occupied residential property, if known, and (B) a final loss mitigation affidavit is attached;

(7) if the property is residential property that is not owner-occupied residential property, a final loss mitigation affidavit to that effect;

~~(7)~~ (8) in an action to foreclose a lien instrument on residential property, to the extent not produced in response to subsections (b)(1) through ~~(b)(5)~~ (b)(7) of this Rule, the information and papers required by Code, Real Property Article, §7-105.1 (d), except that if the name and license number of the mortgage originator and mortgage lender is not required in the notice of intent to foreclose, the information is not required in the order to docket or complaint to foreclose; and

Committee note: Subsection ~~(b)(7)~~ (b)(8) of this Rule does not require the filing of any information or papers that are substantially similar to information or papers provided in

accordance with subsections (b)(1) through ~~(b)(5)~~ (b)(7). For example, if a copy of a deed of appointment of substitute trustee, supported by an affidavit that it is a true and accurate copy, is filed, it is not necessary to file the original or a clerk-certified copy of the deed of appointment.

~~(8)~~ (9) in an action to foreclose a land installment contract on property other than residential property, an affidavit that the notice required by Rule 14-205 (c) has been given.

Cross reference: For statutory "notices" relating to liens, see, e.g., Code, Real Property Article, §14-203 (b).

(c) Court Screening

As part of its case management plan, a circuit court may adopt procedures for the court to screen orders to docket and complaints to foreclose a lien. If the court determines that the papers filed do not comply with all statutory and Rule requirements, it may give notice to the plaintiff that the action will be dismissed without prejudice if the plaintiff does not demonstrate within 30 days that the papers are legally sufficient or that the deficiency has been cured.

Committee note: Pursuant to subsections (b)(7) and (8) of this Rule, a preliminary or final loss mitigation affidavit must be filed in all actions to foreclose a lien on residential property, even if a loss mitigation analysis is not required.

Source: This Rule is derived in part from the 2008 version of former Rule 14-204 (a) and (c) and is in part new.

Ms. Ogletree told the Committee that the first change to Rule 14-207 is the addition of the words “include or” in section (b). This is not a substantive change, but it is to clarify that

the complaint or order to docket could be one document or it could be separate pieces of paper. In subsection (b)(6), the Subcommittee suggested a change to the statement as to whether the property is residential property. The added language asks for statements in boldface type as to whether the property is owner-occupied residential property, if known, and whether a final loss mitigation affidavit is attached. This is to enable the courts and court personnel who are working with these files to zero on those two requirements and ensure that they were met before the case went any further. Another change is the addition of subsection (b)(7), which provides that if the property is residential property that is not owner-occupied residential property, a final loss mitigation affidavit to that effect must accompany or be included in the complaint or order to docket. There is also the addition of a Committee note explaining why this is added.

Ms. Corwin suggested that the order to docket be titled in a certain way as an order to docket with final loss mitigation affidavit for an owner-occupied residence. This change would go into section (b). Ms. Ogletree pointed out that section (b) pertains to exhibits and not to the titling of the order to docket. The Reporter said that the Chair had looked at this and had considered this. He concluded that while this would assist with Judge Cannon's screening issues, it also complicates the issue of how to title the order to docket. The initial filing would be titled with numerous different options. The conclusion

was that the way the Rule reads now is simpler. Ms. Skullney had made some suggestions to be helpful in trying to make the screening easier. Ms. Ogletree added that everyone agreed that there should be some way to set it off. The idea was that bolding it, enlarging it, and sending it out would enable the screening to go more quickly as opposed to creating a new entity. Since there will likely be litigation over whether an order to docket is a pleading, it seems that it should not be changed any more than it has been. Judge Cannon asked whether the bolded language should go on the front page, so that someone can see it without having to look through the document. Ms. Corwin noted that the idea was to make it easier to look at the orders to docket. Judge Cannon added that this may not need to be a requirement.

Ms. Quattrocki told the Committee that she was from the Governor's Legislative Office. She inquired why the final loss mitigation affidavit or the preliminary loss mitigation affidavit are not required to be in the list of exhibits to be attached to the order to docket. Ms. Ogletree answered that this is addressed in subsection (b)(7). The Vice Chair added that this refers to the final loss mitigation affidavit if the property is not residential. Ms. Ogletree said that subsection (b)(6) provides for a final loss mitigation affidavit if the property is residential. Subsections (b)(6) and (b)(7) address both of the issues raised by Ms. Quattrocki. The Rule does not address a request for mediation, because that comes after the order to

docket is filed. Section (b) of Rule 14-207 provides that a complaint or order to docket shall include all of the requirements necessary. One of these is the envelopes that have to be included. The Subcommittee did not want to list all of the documentation, assuming that people can read the statute. The Reporter pointed out that subsection (b)(8), which has not been modified, refers to all of the other information and papers required by the statute. Two years ago, the same problem of how to refer to all of the other requirements of the statute arose. Subsection (b)(8) is a catchall of all of the other documentation required by the statute. Ms. Ogletree remarked that the Committee note makes it clear that the order to docket is to include all of the other information and papers that are required. The Reporter added that it is not necessary to give the information twice. This issue arose the last time the Foreclosure Rules were modified.

Ms. Quattrocki commented that the addition to the statute that one of the two affidavits be filed and a request for mediation form be attached is critical. Ms. Ogletree explained that the Subcommittee opted to provide that this has to be included, or it could be attached to it, so that the final loss mitigation affidavit has to be with the order to docket as well as everything else that the statute requires in order to file it. The Rule does not specifically state that the envelopes and the mitigation notice have to be included. This is included, because it is part of the statutory requirements that are addressed in

subsection (b)(8).

Mr. Enten referred to the question of whether the affidavit has to be word-for-word the same as the statute. He noted that subsection (b)(7) uses the language "a final loss mitigation affidavit to that effect." The final loss mitigation affidavit form that is in the statute now never refers to "owner-occupied" property. The Reporter noted that the first box that may be checked is "the property is not the primary residence of at least one of the borrowers." Mr. Enten remarked that even though the word "substantially" may cover the omission, he wanted to note that the words "owner-occupied" do not actually appear in the final loss mitigation affidavit anywhere. Judge Cannon suggested that the DLLR could add the term to their regulations. Mr. Enten observed that the import of the wording of the first box is that it is not owner-occupied. The Reporter pointed out that the definition of the term "owner-occupied residential property" in section (j) of Rule 14-202 reads as follows: "...residential property in which at least one unit is occupied by an individual who (1) has an ownership interest in the property; and (2) uses the property as the individual's primary residence." When the first box of the form is checked off, this is covered. By consensus, the Committee approved Rule 14-207 as presented.

Ms. Ogletree presented Rule 14-208, Subsequent Proceedings if No Power of Sale or Assent to a Decree, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-208, as follows:

Rule 14-208. SUBSEQUENT PROCEEDINGS IF NO POWER OF SALE OR ASSENT TO A DECREE

(a) Process and Service

When a complaint is filed to foreclose a lien that has neither a power of sale nor an assent to a decree, process shall issue and be served in accordance with Title 2, Chapter 100 of these Rules, except that in an action to foreclose a lien on residential property, service shall be in accordance with Rule 14-209. Except as provided in section (b) of this Rule, the action shall proceed in the same manner as any other civil action.

(b) Order Directing Immediate Sale

If after a hearing, the court finds that (1) the interests of justice require an immediate sale of the property that is subject to the lien, (2) the requirements of Code, Real Property Article, §7-105.1, if applicable, have been satisfied, and (3) that a sale would likely be ordered as a result of a judgment entered in the action, the court may order a sale of the property before judgment and shall appoint an individual to make the sale pursuant to Rule 14-214. The court shall order that the proceeds be deposited or invested pending distribution pursuant to judgment.

Source: This Rule is derived from the 2008 version of former Rule 14-205 (a) and (b)(2).

Ms. Ogletree explained that Rule 14-208 applies in a sale and a mortgage where there is no power of sale or assent to

decree. This is a minuscule number of cases. New language has been added to section (b), and there is still some discussion as to how to word subsection (2) of section (b). Mr. Geesing told the Committee that he was a foreclosure attorney. Occasionally, a case will arise where a lien on the property exists which is an equitable lien or a lien that has been established by order of the court. It is a mortgage or deed of trust that has not been recorded that someone got by court order establishing the lien. The lien does not have a power of sale or an assent to a decree. The case will proceed under Rule 14-208. In those few cases, a civil suit is filed, and everyone is served. The court is asked to order a sale. With the new language, it would mean that the court could not order a sale until all of the requirements of Code, Real Property Article, §7-105.1 have been satisfied. Is there some way to provide that the court would have discretion to enter an order of sale and to require compliance with the statute? Since a civil suit is being filed that does not require compliance with this statute, it would make more sense that the practitioner would not have to satisfy the requirements until he or she gets that order. The practitioner would ask the court for an order of sale because justice requires it, and if the practitioner wins the case, this is what will happen. The order itself could state that the judge orders that the property can be sold provided that the practitioner complies with the requirements of Code, Real Property Article, §7-105.1.

The Vice Chair commented that this would mean that the court

may order a sale of the property before judgment so long as the requirements of Code, Real Property Article, §7-105.1, if applicable, are met. Mr. Geesing remarked that the judge could put this in the order, rather than foreclosure attorneys having to comply with the statutory requirements before they get the order allowing the sale. The judge may not allow the sale. The Vice Chair noted that all of the requirements would have to be complied with prior to the actual sale. The Vice Chair asked if anyone was opposed to this. Master Mahasa inquired as to who determines compliance with the statute. Mr. Geesing replied that this is determined at ratification. The Vice Chair said that the Rule would be changed to provide that the court can enter an order of sale and then require compliance with the statute. By consensus, the Committee agreed to this change. By consensus, the Committee approved Rule 14-208 as amended.

Ms. Ogletree presented Rule 14-209.1, Owner-Occupied Residential Property, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

ADD new Rule 14-209.1, as follows:

Rule 14-209.1. OWNER-OCCUPIED RESIDENTIAL PROPERTY

(a) Applicability

This Rule applies only in an action to foreclose a lien on residential property that is or may be owner-occupied residential property.

(b) Scheduling of Sale

No sale may be scheduled until the later of: (1) 20 days after a final loss mitigation affidavit is filed or (2) all requirements of Code, Real Property Article, §7-105.1 ~~**and HAMP**~~ that are conditions precedent to the sale have been satisfied and an affidavit to that effect is filed by the secured party.

(c) Request for Foreclosure Mediation

(1) Request; Transmittal

The borrower may file a request for foreclosure mediation within the time allowed by Code, Real Property Article, §7-105.1 (h)(1). **The request shall contain the caption of the case and the names and addresses of the parties.** The ~~**court, by standing order, shall direct the**~~ clerk ~~**to**~~ **shall** transmit ~~**a copy of each timely filed**~~ **notice of the** request to the Office of Administrative Hearings no later than five days after the request is filed. **The notice shall contain all of the information that is required to be in the request.** By agreement between the ~~**court**~~ **Administrative Office of the Courts** and the Office of Administrative Hearings, the ~~**order may direct that the request**~~ **notice may** be transmitted by electronic means, provided that the docket reflects the transmittal, and notice of the transmittal is given to the parties.
Committee note: Code, Real Property Article, §7-105.1 (h)(1)(ii) requires that a fee of $50.00 accompany the request, unless the fee is waived or reduced by the court.

(2) Motion to Strike Request for Foreclosure Mediation

No later than 15 days after service of a request for foreclosure mediation, the

secured party may file a motion to strike the request. The motion shall be accompanied by an affidavit that sets forth **with particularity** the reasons why foreclosure mediation is not appropriate.

(3) Response to Motion to Strike

No later than 15 days after service of the motion to strike, the borrower may file a response to the motion.

(4) Ruling on Motion

Upon expiration of the time for filing a response, the court shall rule on the motion, with or without a hearing. If the court grants the motion, the court shall notify the Office of Administrative Hearings that the motion has been granted.

(d) Notification from Office of Administrative Hearings

(1) If Extension Granted

If, pursuant to Code, Real Property Article, §7-105.1 (i)(2)(ii), the Office of Administrative Hearings extends the time for completing the foreclosure mediation, it shall so notify the court no later than 65 days after the court transmitted the request for foreclosure mediation.

(2) Outcome of Foreclosure Mediation

Within the time allowed by Code, Real Property Article, §7-105.1 (j)(3), the Office of Administrative Hearings shall file with the court a report that states (A) whether the foreclosure mediation was held and, if not, the reasons why it was not held, and (B) the outcome of the foreclosure mediation. The Office of Administrative Hearings shall provide a copy of the report to each party to the foreclosure mediation.

(3) Electronic Transmittal

By agreement ~~**of the court**~~ **between the**

Administrative Office of the Courts and the Office of Administrative Hearings, the notifications to **or from** the court required by this Rule may be transmitted by electronic means **rather than by mail, provided that an appropriate docket entry is made of the transmittal or the receipt of the notification**. If the transmittals are to be made by electronic means, the court shall enter a standing order authorizing the electronic transmittal and requiring the clerk to place a paper copy of each transmittal in the file.

(e) Procedure Following Foreclosure Mediation

(1) If Agreement ~~on Loss Mitigation~~ **Results from Foreclosure Mediation**

If the foreclosure mediation results in an agreement, the court shall take such action as the court finds appropriate, except that an action by the court other than as agreed by the parties may be taken only after the parties have been given notice and an opportunity to be heard.

Committee note: Ordinarily, the action taken by the court will implement the agreement of the parties. The agreement may contemplate a dismissal of the action or a continued stay of the proceeding for a set period of time. Because a stay is discretionary with the court, however, the court, after an opportunity for a hearing, may deny or limit a further stay.

(2) If No Agreement ~~on Loss Mitigation~~

If ~~no agreement on loss mitigation is reached,~~ **the foreclosure mediation does not result in an agreement or** the secured party may file the affidavit required by section (b) of this Rule and schedule a sale, subject to the right of the borrower to file a motion pursuant to Rule 14-211 to stay the sale and dismiss the action.

(3) If Foreclosure Mediation Fails Due to

Fault of Party

(A) If the foreclosure mediation is not held or is terminated because the secured party failed to attend or failed to provide the documents required by regulation of the Department of Labor, Licensing and Regulation, the court, after an opportunity for a hearing, may dismiss the action.

(B) If the foreclosure mediation is not held or is terminated because the borrower failed to attend or failed to provide the documents required by regulation of the Department of Labor, Licensing and Regulation, the secured party may file an affidavit required by section (b) of this Rule and schedule a sale.

(4) Time; Show Cause Order

If the affidavit **required by section (b) of this Rule** is not filed within ~~**120**~~ **60** days after the ~~**request for foreclosure mediation was transmitted to the Office of Administrative Hearings**~~ **filing of a report that the foreclosure mediation did not result in an agreement or was terminated or not held or due to the fault of the borrower**, the court may enter an order to show cause why the action should not be dismissed.

Source: This Rule is new.

Ms. Ogletree explained that Rule 14-209.1 is new. It addresses only owner-occupied residential property. She said that since the Committee has never seen the Rule before, it would be a good idea to go through it section by section. Section (a) states that it applies to an action to foreclose a lien on residential property that is or may be owner-occupied residential property. The Rule will not apply to commercial property.

Section (b) does not allow a sale to be scheduled until the later of 20 days after a final loss mitigation affidavit is filed (and the timing relates to what has to happen after this), all of the requirements of Code, Real Property Article, §7-105.1 that are conditions precedent to the sale have been satisfied and the secured party files an affidavit to that effect. This is the loss mitigation affidavit.

Mr. Maloney questioned whether the word after the word "filed" should be "or" or "and." The Vice Chair answered that it is the later of (1) or (2). Ms. Ogletree expressed the opinion that the word should be "and." The Vice Chair felt that it should be "or." The sale cannot occur until the later of one or the other.

Ms. Ogletree commented that with respect to foreclosure mediation, the Rule gets into the meat of the new statute. The borrower can file a request for foreclosure mediation within the time allowed by the Code. The request shall contain a caption of the case and the names and addresses of the parties. At that point, the clerk shall transmit the notice of the request to the OAH no later than five days after the request is filed. The notice shall contain all of the information that is required to be in the request. By agreement between the AOC and the OAH, the notice may be transmitted by electronic means, provided that the docket reflects the transmittal, and notice of the transmittal is given to the parties.

The Vice Chair expressed the opinion that it would be

preferable to have one section pertaining to electronic transmittals. There are some differences between the two provisions, subsections (c)(1) and (d)(3). The first one states that if an agreement is in place and a transmittal will be sent by electronic means, a docket entry has to be made (this is provided for in the other section), and notice of the transmittal is given to the parties. Why is this provision in subsection (c)(1) but not with respect to other transmittals? Ms. Ogletree answered that the parties later on will know what has happened with the mediation. The Reporter noted another problem. A remnant from a previous draft is the last sentence in subsection (d)(3). This should not be in the Rule. The reason it originally had been included is the thought that the Court would be entering a standing order authorizing the electronic transmittal. If the transmittal is effected by AOC fiat and agreement with OAH, the last sentence of subsection (d)(3) can be deleted, and the Chair suggested that the Rule read: "...receipt of the notification, and a paper copy of each communication is placed in the file."

The Vice Chair pointed out that many rules require the clerk to notify people of other occurrences, but it is rare to notify someone else that the clerk has actually completed this. She asked if there is a good reason for having the requirement in subsection (c)(1) that notice of the transmittal is given to the parties. Mr. Broccolina, State Court Administrator, agreed with the Vice Chair. The Vice Chair remarked that she viewed as a

style matter having only one section in the Rule addressing electronic transmittals of anything. It is not necessary to repeat the language about electronic transmittals in subsection (d)(3), also. The Reporter said that if the Rule is compressed this way, the paper copy issue will have to be addressed. The Vice Chair inquired as to what the paper copy is. The Reporter responded that it is a paper copy of what is being transmitted electronically. The Vice Chair asked if every single e-mail will be required to be printed out and filed as opposed to the clerk making a docket entry "sent by electronic transmission today." The Reporter answered that this is not needed on the original transmittal, because the person is filing it and what will be in that request for foreclosure mediation will be the same documentation that the person filed, so this will be a paper copy in the file. The clerk electronically sends the information. As to the transmittal in subsection (d)(3), a paper copy may be needed in the file depending on the transmittals going back and forth. Currently, there is no electronic filing and storage of these materials. It might be a good idea to have a paper copy in the file of the various communications, particularly if the communication is along the lines of the actual report from the OAH.

The Vice Chair pointed out that Rule 14-209.1 addresses only how one is going to get the information from one place to the other. Once it gets there, the clerk would automatically have to file it. It is not filing a copy of the electronic transmittal,

it is filing whatever it is that comes with it. Mr. Broccolina said that he wanted to explain discussions between the OAH and the courts. Since there are established deadlines on the transmission of documents throughout the statute and the Rules, the courts agreed that when a request for mediation comes in, the clerk would docket that request the same way that a clerk would docket any such pleading coming in to the court. It would be coded in such a way that the automated system would send at the end of every day all the requests for mediation to the OAH, so that they could start scheduling those cases. The Vice Chair inquired if these will appear on the computer screen. Mr. Broccolina answered that it will come in as an email to the OAH at the end of the day with all of the courts that have received requests for mediation. The Vice Chair questioned whether it is a computer-generated e-mail. It is not being done by the clerks. Mr. Broccolina observed that the clerks do not have access to the e-mail that is being generated. It is being generated centrally and within Prince George's and Montgomery Counties, because they are not part of the courts' system.

The Vice Chair commented that the proposed language in the Rule does not really address what is actually going on. Mr. Broccolina agreed. He added that the Rule does not reflect the plans for effecting this electronically. When the clerk receives the paper request from the mortgagor or the person requesting mediation, he or she will docket it as he or she normally docket everything. The clerk then only has five days to provide that

notice to the OAH. To get the notice to the OAH as quickly as possible, as soon as the request is docketed at the closure of that work day, all of those requests will be sent to the OAH electronically. The Reporter asked what information the OAH gets. Mr. Broccolina responded that they would get the names of the parties in the case, the case number, and the jurisdiction. This will be broken out by county, and then the OAH can proceed to schedule this. The Reporter inquired if the OAH gets the addresses of the parties. Mr. Broccolina answered affirmatively, adding that the OAH gets all the information regarding the parties.

Mr. Maloney questioned as to the status of implementing the technology necessary to make this actually happen. Ms. Burch, an employee of the OAH replied that their Information Technology ("IT") team has been meeting about this. They plan to send the information to a central portal, and her office will go to a website, and then the next morning, they will pull the information off the computer. Judge Pierson commented that if the request for mediation is not accompanied by the $50 filing fee as required by section (h) of Code, Real Property Article, §7-105.1, but is accompanied by a request for a waiver, this has to be ruled on. The question is whether the request for mediation is not docketed until after the court has ruled on the request for a waiver. The term "docketing" will have to be defined further. Mr. Broccolina agreed, noting that this issue has not yet been discussed. The directive under which the courts

have been operating is that any kind of issues within clerks' offices in terms of notifying the OAH in the most expedient way possible must be addressed, so that people can get their mediation scheduled within the statutory time frame. The point raised by Judge Pierson about a request for a waiver of the filing fee is correct. Technologically, as soon as the clerk dockets and enters the code for that docket entry automatically at a central location, the e-mails will be prepared and sent at the close of business every day.

The Vice Chair said that subsection (d)(3) states: "By agreement between the Administrative Office of the Courts and the Office of Administrative Hearings, the notifications to or from the court required by this Rule may be transmitted by electronic means rather than by mail provided that an appropriate docket entry is made of the transmittal or the receipt of the notification". Based on the description of the electronic notification process, the Rule should have a period at the end of the word "mail." The clerk cannot make an appropriate docket entry of the transmittal or receipt, because the clerk has not done this. It has happened automatically. Ms. Ogletree pointed out that the transmittal gets to OAH because the clerk enters it on his or her docket. The Vice Chair clarified that the clerk enters what ever happened on the docket, but the fact of the transmittal or what it is does not need to be entered on the docket, because the clerk did not initiate or do this. Otherwise, the clerks will assume that the system functioned as

it was supposed to, that the e-mail was transmitted and a docket entry was made based on something that happened without their involvement. Mr. Broccolina explained that what will happen is that the clerk enters the fact that the clerk has received a request for mediation. The court will docket that request. It would not then necessarily be docketed that the request was sent. There should be some way either in the docket entry or in the code that would indicate that it was sent. The clerk does not necessarily have to do this, the code may do it. The IT system may do this.

The Vice Chair asked if Mr. Broccolina agreed that the language in subsection (d)(3) that reads: "provided that an appropriate docket entry is made of the transmittal or the receipt of the notification" should be deleted. Mr. Broccolina replied affirmatively. The Reporter cautioned that there has to be some reference to a docket entry of events. Ms. Ogletree suggested that this be put into subsection (c)(1). The Reporter responded that it is not limited to subsection (c)(1). There has been discussion of all kinds of electronic transmittals going back and forth. The Vice Chair questioned as to how the process for the return works. Ms. Burch answered that the process for the return is that the administrative law judges will conduct mediations. At the end of the day, they will send a notice to the court electronically as to what happened. The Vice Chair asked if this will be on an e-mail. Ms. Burch responded that it will be on a standard form. The Vice Chair commented that when

the clerk receives this, the clerk would file the attachment, and there would be a docket entry of the fact that the report was received. Ms. Burch said that any triggering event can then go forward. For instance, if a party did not appear for the mediation, the clock will be triggered. Then the agreement will follow if an agreement is involved. Paper copies of any e-mails will be attached when the hard copy is sent back to the courts.

The Vice Chair remarked that she had not heard a reason that the Rule has to address how the transmittal got there. When someone is required to mail something, it is not necessary to state that the document was mailed. What gets docketed is the notification or request. Ms. Burch said that when she had spoken with the Chair, she had expressed the concern about getting these requests from the courts. Since her office has a 60-day time frame, they wanted some kind of documentation that the transmittal went out. They will have the identifying information the day that it was sent to the courts, so that they will be able to know if a jurisdiction is holding onto these requests longer than they should be. Ms. Corwin remarked that part of the transmittal is the notice of the request for mediation that the homeowner has prepared. The Rule states that the notice shall contain all of the information that is required to be in the request. She suggested that the Rule provide that the recipient got it as opposed to what is required. The homeowner may not have provided all of the information. How is this getting over to the OAH? Mr. Broccolina answered that it is not. The OAH

will get that information and has access to it. The courts were told that all that they need to do is provide notice. Ms. Burch pointed out that this information is already part of what the court has, and it will be on a portal. They will pull it up on a website and then extract it. Then they will send out notices based on the information that was extracted.

Mr. Broccolina commented that what is contained in the notice in the e-mail that is going to the OAH at the end of each day has sufficient information for them to start their process and then get all that information from the parties, not from the court. The Vice Chair expressed the concern that the Rules do not reflect what is actually going to happen. Ms. Ogletree responded that the Subcommittee had not been informed as to these procedures. Mr. Broccolina pointed out that these procedures are still evolving. The Vice Chair inquired if it would be a problem with section (c) of Rule 14-209.1 if the fourth sentence were deleted. The fourth sentence now reads: "The notice shall contain all of the information that is required to be in the request."

Mr. Geesing asked if notice of the request for mediation is transmitted five days after the request is filed, or if it is five days from the date that it is docketed. There is a difference between those two dates. In some counties, those two dates can be very far apart. The Vice Chair questioned as to what the statute provides. Mr. MacFadyen replied that subsection (i)(1) of Code, Real Property Article, §7-105.1 provides that the

notice of the request is to be transmitted within five days after receipt of the request for mediation. Mr. Geesing remarked that he could file a paper in circuit court that would not be docketed for one week. The Vice Chair said that this would mean that the borrowers Mr. Geesing is involved with will not have their opportunity to request foreclosure mediation. Mr. Geesing responded that he did not know of a solution to what is a practical problem. Mr. MacFadyen observed that what actually counts is the docketing. The Vice Chair said that when someone hands a paper to the clerk and gets a file stamped "copy," it may not show up on the docket for another three or four days, but it is filed. Mr. MacFadyen noted that in some jurisdictions, it may take 30 days to have the filings docketed.

Mr. Brault inquired if after the paper is docketed, it is given the original date that it was filed, or it is given a new date. Ms. Smith replied that the automated system has a place for both dates, the date of filing and the date of docketing. The file date is automatically done by the system. Mr. Brault asked Mr. Broccolina if the procedures he had described apply everywhere except in Prince George's and Montgomery Counties. Mr. Broccolina responded that the procedures will apply in Prince George's and Montgomery Counties, but they will do it individually, because they have their own automated system. Representatives from these counties have been part of the discussions about the new procedures.

Mr. Brault questioned as to what happens if the notice is

not transmitted within five days. The Vice Chair answered that this is directory, but it is not mandatory. Mr. Broccolina said that he would address this issue, in defense of the Clerks' offices. They have been working with DLLR concerning the envelopes that are being submitted by the borrower to request mediation. Some kind of bold type will be on those envelopes, so that even if a clerk's office workload does not permit the opening of mail, someone in every Clerk's office will go through the mail, and if this boldface type pops up, the clerks will be directed to pull this out and deal with it immediately. In Montgomery and Prince George's Counties as well as in Baltimore City, contractual positions are being made available to dedicate human resources to this issue in the larger jurisdictions where there will be the greatest volume. Clerks' offices are under a great deal of strain in terms of their workload. This is not the only job that they have. The Judiciary will try to do everything possible so that the clerks will get to these in the mail that comes in. These requests are going to be mailed. The focus has been on getting to the mail, opening it, getting the requests docketed that day or at the latest by the next day.

Mr. Brault inquired if the clerks are being furloughed. Mr. Broccolina answered that they are being furloughed. The clerks will have to cope with this. They will get the work done. Despite problem areas and their huge workload, they do an excellent job around this State. Mr. Brault asked what would be the effect of furloughs. Mr. Broccolina answered that it will

have some impact. This is why these contractual positions were requested. The AOC had asked for full-time positions, but these were not granted. It will be a challenge getting contractual people on board without benefits, but the AOC will do its best. This is why they are asking for extra people to help out at least in the larger jurisdictions. Mr. Maloney inquired if the OAH has gotten extra full-time positions. Ms. Burch responded that only contractual positions have been added. Mr. Maloney expressed the view that these positions need to be full-time.

Mr. Enten pointed out that subsection (i)(1) of Code, Real Property Article, §7-105.1, which is lines 4-6 on page 24 of House Bill 472, provides that the court shall transmit the request for mediation to the OAH for scheduling within 5 days after receipt of a request. Each day when the statute was discussed at the legislature the contents were the subject of negotiations. Every time period was included for a reason. He wanted to emphasize that this particular provision has the five-day time period. The Vice Chair commented that the Committee had discussed today two other words to substitute for the word "filed" in subsection (c)(1) of Rule 14-209.1. The words were: "docketed" and "received." The Rule currently uses the word "filed." It has been suggested that the word should be "docketed," and Mr. Enten is suggesting that the word should be "received." Mr. Enten reiterated that this is what the statute explicitly provides. The Vice Chair noted that the word "receipt" and the word "filed" have the same meaning. Case law

supports this. When the document comes in, it is filed. The wording of the Rule provides what the statute provides. The word cannot be changed to the word “docketed,” because this is not what the statute uses. What is being addressed is the clerk giving notice to the OAH. If this is not effected on time, OAH will be hurt, because of its 60-day time frame. If necessary, this time frame can be extended for an additional period. This is not a big problem.

Mr. Brault remarked that he was troubled, because in the Rules, the term “judgment entry” was changed from “filing” to “docketing.” The Rule had to be changed some years ago to use the word “docket” instead of the word “filing” to count the time for motions for a new trial and for appeal, because of problems that were developing in decisions as to whether an appeal was timely or not. The Vice Chair said that the word “enter” was used as in entering on the docket or file jacket. Mr. Brault noted that this is opposed to the date it is filed. This was to cover the delay time. In Montgomery County, it has taken days going from filing and stamping to actually entering the filing on the docket.

The Vice Chair commented that the considerations in the area of a judgment are different from the considerations being discussed today. In the judgment arena, what is being considered is a scenario such as a judge who makes an opinion and enters a ruling on January 1, but puts it aside to think about it. Then the judge takes it out three days later, but leaves it dated

January 1. On January 3 or 4, the judge transmits the opinion and order to the clerk who gets it the next day. Then the clerk holds it for another five days. The question is if the time for altering or amending the judgment begins to run before it has ever been a matter of public record. What is being discussed today is telling the OAH within five days that a case is coming. It is not the same interest behind this, although this is an important interest, also. Mr. Brault remarked that he could foresee a motion to strike the whole foreclosure proceeding, because notice was not timely given. The Vice Chair noted that the only one who would have standing to make this motion would be the OAH, because that office is supposed to get the notice in five days.

Mr. Enten commented that the 60 days for the OAH to act does not run from the date that the clerk receives it, but rather it runs from the date that the OAH receives it. As to standing the fact that the OAH did not get it on time does not negatively impact the borrower, because that time frame of 60 days does not start to run until the notice is transmitted.

The Vice Chair asked if anyone had any other comments on subsection (c)(1), and none were forthcoming. The Vice Chair stated that this subsection is complete with the striking of the fourth sentence pertaining to what the notice would contain.

Mr. Young said that he had a concern about section (b). This is related to the language that reads: “[n]o sale may be scheduled until the later of: (1) 20 days after a final loss

mitigation affidavit is filed...". The concern is putting this timeline into the Rule. It may be more accurate if the language was: "[n]o sale shall be scheduled until all requirements of Code...". The reason is that there are a number of different timelines as to when the sale itself may occur. He was not sure about the interaction with scheduling the sale and with the sale occurring. He and his colleagues felt that the language referring to the 20 days was ambiguous and deleting the reference to it would be advisable. Mr. Geesing objected to this, explaining that the statute does not use the word "schedule." It refers to a sale occurring. The timelines are related to the actual conduct of a sale. Scheduling the sale is a process that goes on inside an individual attorney's office as to how to hire an auctioneer. An attorney can schedule a sale many weeks in the future even though he or she cannot give notice until 30 days prior to sale and cannot advertise until three weeks prior to sale. For internal operational reasons, an attorney will not assign the sale date. The Rules do not need to address when the attorney schedules a sale as opposed to when a sale occurs.

The Vice Chair remarked that she did not think that the "scheduling" of a sale means that someone puts it on his or her calendar to schedule it. Many expenses occur as a result of the scheduling of the sale. Judge Cannon said that the concern is who pays for the scheduling and the advertising. The advertisement is quite expensive. What happens is that the sale gets scheduled, although there has not been compliance with the

Code. Then the sale does not go forward, and it is rescheduled. The homeowner ends up being required to pay for the sales that were scheduled even though no basis existed for scheduling the sale. The question is how to deal with this. One way, which is more complicated, would be to allow the scheduling of as many sales as the attorney would like, but only the one that is scheduled after all the requirements have been met will be paid for. This would slow the process down by not minimizing judicial involvement. The sale can be scheduled whenever, but then there will be a request that the homeowner has to pay for that scheduling even though all of the statutory requirements have not been met. This would be contrary to the whole tenor of this legislation.

Mr. MacFadyen said that in those instances when sales were scheduled improperly, the auditors will not allow the attorneys to get expenses. They are only entitled to expenses for successful sales. This has been his experience over the last 25 years. Judge Pierson inquired if the auditor can pick out this fact on his or her own even if no issues are contested. Mr. MacFadyen replied affirmatively. Judge Pierson inquired as to how the auditor would know. Mr. MacFadyen answered that the auditor is only looking at successful sales. They are disallowing anything that is not related to a completed sale. This is not for the benefit of the borrower or at the request of the borrower. Judge Cannon noted that if the sale is stopped for the benefit of the borrower, because he or she filed a motion

stating that the statutory requirements have not been complied with, the auditor will allow it. It would mean that the auditor would have to know that at the time the sale was scheduled, all the provisions of the statute were complied with. The auditor would have to look back at the file to uncover this. Are the auditors in a position to do this? Mr. MacFadyen replied that in his experience, the auditors are in a position to look back. If the sale is not successful or the borrower is successful in objecting to a sale, the attorneys do not get the expenses.

The Vice Chair inquired what the harm is in prohibiting the scheduling of a sale until the requirements have been complied with. Mr. MacFadyen answered that speaking for himself, he did not like being told how to operate his office. The Vice Chair asked Mr. MacFadyen if scheduling means the formal process of picking the date, preparing the advertisement, etc. An attorney can run his or her office any way the person chooses. The rules do not direct this. All this is intended to say is "Do not start the ball rolling on expenses until the law has been complied with." Mr. Geesing said that the law allows someone to schedule a sale after the person has sent out a final mitigation loss affidavit that states that the property is vacant or that the loss mitigation has been completed. The Vice Chair asked if the Rule states this, and Mr. Geesing answered that it does not, because it provides that there must be a wait of 20 days before the sale can be scheduled. The Rule is creating a 20-day delay that is not provided for in the statute.

The Vice Chair commented that this discussion was started with a suggestion that the 20-day provision come out of the Rule, and that instead the Rule would provide that the sale may not be scheduled until all of the statutory requirements have been met. Mr. Geesing pointed out that the word "scheduled" is not a defined term. The Vice Chair asked if anyone had a problem with removing the 20-day provision and just providing that the law must be complied with. The Reporter responded that she had a problem with it. One of the many drafts of the Rule had the idea put forth by the Chair to put everything on ice to avoid a situation where this is a stay or there is not a stay. The Rule contained a motion to stay. This draft came in after the original draft disappeared. When the final loss mitigation affidavit is filed, there may be other occurrences. They can include other requests for foreclosure, a motion to stay, or any other event that could interfere with the case, and these have to happen within 15 days. The Chair's thought was that 20 days would be calculated by 15 days plus another five, so that the judges are not constantly staying or unstaying the cases. The sales could be scheduled, then unscheduled. The advertising costs would be extensive. This is where the 20-day time period came from. In terms of the final loss mitigation, there might be a day lost here and there, but the sale cannot be scheduled to happen until 45 days after service of process that includes a final loss mitigation affidavit. This is subsection (l)(2)(1) of Code, Real Property Article, §7-105.l. The time period in the

Rule should work out well. No time should be lost. The Reporter asked how long it takes to get these sales going. Ms. Ogletree replied that it would be 21 days. The Reporter noted that this would be 20 days plus 21, and this is within the 45-day time period. No time will be lost if everything flows smoothly.

The Vice Chair said that the Reporter's explanation was excellent. She asked if the Committee agreed to leaving the 20-day time period in section (b). By consensus, they agreed to keep this in the Rule. The Vice Chair told the Committee that the scheduling issue still needed to be addressed. Ms. Corwin commented that the affidavit is new. She did not know what all the statutory requirements referred to in section (b) were. In Code, Real Property Article, §7-105.1, a condition precedent to a sale is the advertising. This is circular. There will never be a foreclosure sale, because the attorney must give an affidavit that he or she complied with the advertising, but the attorney cannot advertise, because the sale cannot be scheduled. The Vice Chair asked if this could be solved if the language were: "...all requirements of Code, Real Property Article, §7-105.1 have been satisfied...". Mr. Enten expressed the view that if the statute does not require it, and the Rule is going to have this language, then it needs to specify what the items are that need to be complied with. This would allow an attorney to have a checklist as to which items have been taken care of. Mr. Geesing added that especially when a report of sale is filed, by implication the person filing is stating that all of the conditions precedent

have been complied with. Why must a rule-based affidavit be created when it is already required in the statute? There are already a number of affidavits provided for.

The Reporter said that this language was intended to implement Mr. Geesing's suggestion that the motion to stay be eliminated. Mr. Geesing responded that his major concern was the scheduling. He did not know what "scheduling" a sale means. It should be that a sale cannot be advertised. The Vice Chair suggested that the language "expenses relating to a sale may not be incurred until the later of...". Mr. Geesing expressed his agreement with this language. He noted that advertising expenses are enormous. An attorney may need to update his or her title search, which is a necessary cost in a foreclosure sale. Some expenses are incurred even though no sale has taken place. Ms. Ogletree noted that what is being addressed is advertising expenses. Mr. Geesing responded that this is the main concern. Judge Cannon agreed with the language "no sale may be advertised until...", because this clarifies precisely the procedure. The Vice Chair stated that the tagline of section (b) will be changed to "Advertising of Sale." The first sentence will read as follows: "A sale may not be advertised until the later of...".

The Vice Chair commented that the other issue that had been raised that had not been discussed was to state specifically which provisions of Code, Real Property Article, §7-105.1 need to be complied with. Ms. Ogletree remarked that these appear in other sections of the Rules. The Vice Chair asked where they

were. Ms. Ogletree answered that they are listed as conditions precedent prior to sale. The Reporter pointed out that this pertains to the actual event of the mediation. It has to be moved even further forward in the timeline. The sale should not be advertised if the case is going to mediation to try to work things out. The sale should not be in the newspaper. Ms. Ogletree noted that the Rule provides that it is the later of the 20 days or the compliance with the Code requirements. The Vice Chair acknowledged that very valid concerns have been raised about the circularity of the term "conditions precedent," so it is necessary to state specifically which parts of the Code must be complied with before a sale can be advertised. Ms. Ogletree said that those items are in the Rules pertaining to conditions precedent. The Reporter observed that there may be more of those items than are listed in the Rules.

Mr. Durfee pointed out that the statute uses the word "scheduled" in terms of a foreclosure sale. Ms. Ogletree responded that she thought that the word "schedule" means "advertise." The Vice Chair stated that the Rule will assume that the word "schedule" means "advertise." Ms. Ogletree added that an event can be scheduled to occur five months from now, and this is not prohibited. What is prohibited is letting everyone know that the property will be sold, including the borrowers. The Vice Chair said that it was not clear to her by looking at Rule 14-205 which parts of this Rule need to go into Rule 14-209.1. Ms. Ogletree agreed that the necessary information would

have to be reviewed and moved to Rule 14-209.1. The Vice Chair asked if during the lunch break, someone would be willing to look at the statute and extract the necessary information. She suggested that the person who inquired about this should research the answer, and Ms. Corwin agreed to do so.

Mr. Enten referred to a comment made earlier by Judge Pierson. Mr. Enten drew the Committee's attention to subsection (h)(1)(II) of Code, Real Property Article, §7-105.1, which provides that a request for foreclosure mediation shall be accompanied by a filing fee of $50 and that the court may reduce or waive the filing fee if the mortgagor or grantor is eligible for a reduction or waiver under the Maryland Legal Services Guidelines. The requests for mediation are an incentive for delay. The longer the sale is put off, the more time the borrower gets to spend in the home. Delay is very beneficial. A payment of $50, or a request for waiver of that payment, makes the foreclosure stop.

Judge Pierson stated that he is raising a technical point, because of the meaning of the word "docketed." Now, if the court gets a pleading that is accompanied by a request to waive the fees associated with it, the request is docketed. Nothing is done with it until the court rules on the waiver. He was more concerned with the definition of the word "docketing" than what Mr. Enten was discussing. Mr. Enten remarked that if the request for a waiver does not get ruled on for 60 days, it will delay the proceedings. Judge Pierson responded that the judges rule on

these requests promptly.

Ms. Corwin referred to section (a) of Rule 14-209.1. She expressed the opinion that the words "or may be" are inappropriate. This Rule applies only to an action to foreclose a lien on residential property that is owner-occupied. The words "may be" mean the property is empty. Ms. Ogletree pointed out that it also means that it may not be known if the property is owner-occupied. The Vice Chair commented that if it is not known, but then someone finds out, this Rule never applies, because it was never owner-occupied. Ms. Corwin said that the problem is that every property that has a possibility of being owner-occupied is included. Ms. Ogletree responded that this is what was intended. Mr. Enten said that it could be owner-occupied two weeks from then. It would be preferable for the Rule to refer to property that is owner-occupied or where it is not clear if it is owner-occupied at the time of filing. Ms. Ogletree noted that this provision was intended to cover the situation where a person was living there at some point. Mr. Maloney asked Mr. Enten if his view was that the Rule applies when it is unknown whether the property is occupied. Mr. Enten answered affirmatively. The Vice Chair questioned whether the Rule applies until it is learned whether the property is owner-occupied if this was not known at the outset. The Reporter responded that this is what was intended. The Vice Chair observed that if someone does not know whether the property is owner-occupied, then he or she cannot advertise the sale until

the statute is complied with, but if, in the middle of complying, the person finds out that the property is not owner-occupied, the Rule does not apply any longer. The Reporter noted that then the person would file a loss mitigation affidavit that states that the property is not owner-occupied. It would be a green light for the foreclosure to proceed, unless someone contests the statement in the affidavit.

The Vice Chair commented that she was trying to determine what language should be added to section (a). She suggested that the Rule could provide, as follows: "...that is owner-occupied residential property, or where it is not known and when it becomes known, it is owner-occupied." It does not apply only where it is not known; the minute one learns that it is or is not, then the Rule does or does not apply. The Reporter and Ms. Ogletree confirmed this. Mr. Klein suggested that the wording of section (a) could be: ".. all property other than that which is known to not be residential or...". Ms. Ogletree said that the intention was that if someone did not know, the procedures would have to be followed until the person found out until the property was not owner-occupied. The Vice Chair stated that Rule 14-209.1 would be changed to indicate this, and by consensus, the Committee agreed.

The Vice Chair asked if there were any other comments on sections (a) and (b). The Reporter added that Ms. Corwin would be redrafting the statutory requirements. The Vice Chair inquired if anyone had any further comments on section (c). Mr.

Sykes responded that section (c) provides that notice be transmitted by the clerk to the OAH. This can be effected electronically if the docket reflects the transmittal, and notice of the transmittal is given to the parties. Rule 14-209.1 does not provide who gets the notice. The Vice Chair noted that this provision will be taken out, and there will be one section later in the Rule to address electronic transmittals. Mr. Sykes pointed out that this section may have the same problem.

The Vice Chair drew the Committee's attention to subsection (c)(2). The Vice Chair inquired if the request for foreclosure mediation is required to be served. Ms. Quattrocki answered that it depends on whether the request for mediation accompanies a final loss mitigation affidavit that is served with the order to docket or whether the final loss mitigation affidavit is mailed later. Ms. Ogletree remarked that the Rule requires it to be filed up front, so that issue is solved. The Reporter said that the final affidavit could come after the preliminary affidavit. Ms. Quattrocki responded that in that case, it is not required to be served. Ms. Corwin pointed out that the statute provides that it needs to be mailed, and she was advised that this is what service means.

The Vice Chair questioned where is the requirement in the Rule that the requests be mailed. Ms. Corwin reiterated what Ms. Quattrocki had said that documents may be served, because they accompany the order to docket. If it is later than that, the statute provides that they may be mailed. Ms. Ogletree clarified

that this is the borrower sending in a request for mediation. This does not refer to original service with the complaint or with the order to docket. It is the borrower who after receiving the information about the foreclosure decides that he or she would like mediation. Ms. Corwin noted that the statute provides that the borrower must mail a copy of the request to the secured party's foreclosure attorney. She had been told that service was the same as mail. The Vice Chair confirmed this, adding that this is the case as long as it is not original process. She commented that subsection (c)(1) provides that the borrower files a request which shall contain the caption of the case and the names and addresses of the parties. The borrower shall mail a copy of the request. Ms. Corwin suggested that the Rule should use the word "serve." The Vice Chair asked if the sentence "The borrower shall serve a copy of the request on all parties." should be added in to subsection (c)(1). The Committee agreed to this addition by consensus. The Vice Chair commented that with the additional language, subsection (c)(2) makes sense.

The Vice Chair asked if there were any other comments on subsection (c)(2) or on subsection (c)(3). None were forthcoming. Ms. Ogletree drew the Committee's attention to subsection (c)(4). Ms. Carwell asked if the language of subsection (c)(4) could be changed to read as follows: "[u]pon expiration of the time for filing a response, the court shall rule on the motion, with or without a hearing, unless there is a response." Ms. Ogletree answered negatively, explaining that

some responses will not be meritorious. The court should be able to rule on the motion. If the motion has value, the court will hear it, and otherwise, the court will rule without a hearing. The Vice Chair added that foreclosure mediation is not dispositive of a claim or defense. It is not the kind of issue on which one has the right to a hearing generally under the Rules. She suggested that the word "court" be changed to the word "clerk." By consensus, the Committee agreed to this change.

Ms. Ogletree drew the Committee's attention to section (d). Mr. Enten noted that the statute has time frames which had been the product of much discussion and compromise. The statute provides 60 days for the OAH to notify the court that the time for completing the foreclosure mediation needs to be extended. In Rule 14-211, Stay of the Sale; Dismissal of Action, if the OAH extended the time to complete the foreclosure mediation, the Rule provides a 95-day time period after the borrower's request for mediation for completing it when the statute provides a time of 90 days. The Reporter asked Mr. Enten to hold that argument, noting that the extension period in section (d) of Rule 14-209.1 does not affect his client, because this refers to OAH notifying the court. The 65-day and 95-day time periods pertain to a different aspect of this. When the court finds out what the OAH did is an internal matter.

Ms. Smith asked how the court is going to be notified about the extension. Mr. Broccolina answered it would be by e-mail. There will be an electronic mail box in every clerk's office that

the clerk can determine who has access to. People will be able to open the box and docket the response from the OAH. This will be covered by a blanket order of court in each court. An e-mail will be sent that will contain all of the necessary information. It will be a form listing the actions and results issued by the OAH.

The Vice Chair inquired if there were any other comments on subsection (d)(2). Ms. Corwin replied that in subsection (d)(2), the OAH is going to make a report that states whether the foreclosure mediation was held and if not, why not and if it were held, the outcome. She suggested that the wording of the provision should be "... the outcome of the foreclosure mediation, if held." Ms. Ogletree said that if in place of the word "and," the word "or" was substituted, the concept expressed by Ms. Corwin would be covered. Ms. Corwin pointed out that the last sentence of subsection (d)(2) provides that the OAH shall provide a copy of the report to each party. She suggested that a time period could be added. The Reporter noted that the word "promptly" should be added before the word "shall." Ms. Schafer commented that the plan is for the OAH to hand the reports to the parties at the mediation. The Vice Chair observed that the addition of the word "promptly" would be appropriate. By consensus, the Committee agreed to add the word "promptly" to the last sentence of subsection (d)(2).

Ms. Ogletree remarked that subsection (d)(3) was already discussed. The Vice Chair commented that she had raised the

issue that this provision should be renumbered as section (e) so that it stood on its own. It would be titled “Electronic Transmittals” and would read as follows: “By agreement between the Administrative Office of the Courts and the Office of Administrative Hearings, notifications required by this Rule may be transmitted by electronic means rather than by mail.” The Reporter inquired if the OAH report is a notification or a document. Mr. Broccolina replied that it would be a notification. The report itself would be eventually mailed. Ms. Ogletree asked if the report is going to be handed to the parties and mailed, too. Mr. Sykes asked where the Rule states that the report is going to be handed to the court. The Vice Chair answered that this is not stated in the Rule. The Rule should not require this. This is what the OAH plans to do. Mr. Sykes questioned if the parties should get notice. Ms. Ogletree responded that the parties get a copy of the report, and subsection (d)(2) has now been changed to provide that they will get the report “promptly.”

The Vice Chair said that the Committee should consider whether the word “notifications” in what will become new section “(e),” Electronic Transmittals, is broad enough. Is everything that can be transmitted electronically a “notification?” Mr. Broccolina answered affirmatively. The Vice Chair remarked that this issue need not be considered. Mr. Sykes inquired if the parties should get a copy of the notice of the request for mediation at the beginning. Ms. Ogletree responded that the

parties will get notice. The Rule requires that they be served with notice. The Vice Chair said that what this part of the Rule applies to is the documentation going back and forth between the courts and the OAH. It does not affect all of the other notices that would typically be required by regular mail or hand delivery with respect to the parties.

Mr. Sykes questioned where notice to the parties is required. Ms. Ogletree answered that it was just added in. In subsection (c)(1), the following sentence was added: "The borrower shall serve a copy of the request on all parties."

The Vice Chair remarked that the Reporter seemed to be having some problems with the changes being made to the Rule. The Reporter said that the procedure is filled with time frames. She expressed the concern that when the request gets to the court, it is important to know when the OAH files its report with the court, because the motion for a stay is triggered by this. The Vice Chair pointed out that this will be known, because the filing occurs when the clerk's office receives it. The fact that it is transmitted by e-mail does not mean that it is not known when the clerk received it. Judge Cannon inquired if the report comes by e-mail. If not, could it come by e-mail? Ms. Ogletree responded that it could not. Judge Cannon commented that because time is so tight, she could understand the resistance to doing it. Mr. Broccolina told her that it could not be e-mailed. Ms. Ogletree added that the system cannot send the report by e-mail. The Vice Chair suggested that a clerk could send the report by e-

mail. Mr. Broccolina explained that the idea was that the clerk would get this result, docket it, and the clock would start running. The report would come back to the court, but through the more traditional means. The outcome will be part of the e-mail transmission. When OAH sends back the result of whatever OAH determined from the mediation, there will be a sheet of checkboxes with all of the possible results. This result will also be docketed, but the report itself will have to come the other way.

Ms. Smith inquired if there will be one e-mail per case. Mr. Broccolina answered that it will be one at a time. Ms. Smith remarked that the one transmittal can be docketed. Mr. Broccolina said that the clerk will be able to print this out. The Reporter asked if a paper copy is going to be put into the file. Ms. Smith replied affirmatively, noting that they are returned to the clerk. Mr. Broccolina added that when the report comes, it will be put into the case jacket as well. The Reporter said that it would be a separate docket entry, because it comes in as paper, and the notice comes in electronically. It gets printed out, and the clerk puts it into the file.

Judge Pierson expressed the concern that there is no express requirement that the borrower certify service of the request for mediation. Ms. Ogletree noted that the Rule requires that the borrower serve it. Judge Pierson remarked that this issue arose for a different reason. The requirement that the clerk notify the parties of the transmittal to OAH was taken out. Judge

Pierson commented that many self-represented litigants certify service, but they do not actually serve. The first time the lender may be aware that there has been a request for mediation is when the lender hears from OAH that the agency has received the file. The timeline for filing a motion to strike runs from service. Theoretically, when the lender learns from OAH that there has been a request for mediation, the lender could then file a motion to strike, which probably would be timely, because the request had never been served. The Vice Chair noted that if the borrower certified that he or she had served the request for mediation, even though it had not been served, that would lead to an evidentiary hearing as to whether service had occurred.

Mr. Geesing said that he often gets a call from a court telling him that an emergency motion has been filed, and he needs to respond. He had never received a copy of the motion. The Reporter suggested that language stating that notice of the transmittal of the request for mediation should be put back into the Rule. The Vice Chair responded that it is not the transmittal that the lender cares about, it is knowing that a request for foreclosure mediation has been filed. Judge Pierson pointed out that a notice of transmittal would at least be a failsafe to let the lender know that the request had been filed. The Vice Chair commented that until this was discussed, she would not have understood why notice of the transmittal to the OAH would go to the parties. It is clearer to provide that the clerk shall send to everyone notice of the fact that foreclosure

mediation has been requested.

Mr. Enten remarked that the lenders are going to be paying an additional $300 to file foreclosure actions in every case. They should get notice from the clerk's office. Mr. Broccolina said that he thought that part of the regulations that were being drafted and forms being prepared was to put that responsibility on the person requesting the mediation. The courts do not get a penny of the $300 filing fee. If the court is forced to do this, it will not be electronic. Mr. Enten remarked that he preferred to get it by mail rather than not get it at all.

Ms. Smith remarked that notice is sent to all self-represented litigants. Judge Cannon noted that in administrative appeals, notice is sent out when the record is filed. Ms. Smith responded that this has been set up in the system. Judge Cannon commented that even though it does not have the effect of notifying the lender, the notice is telling the parties about the action taken by the court. Ms. Smith noted that the legacy case management system cannot be changed to do this. Ms. Burch told the Committee that as soon as the OAH gets the requests, the OAH will be sending out notices of the mediation. They may be sent very quickly. Ms. Corwin remarked that the statute provides that they need to be sent no later than 20 days before the date of the mediation. Mr. Nadel said that he wanted to reiterate that it is more common that the lender does not get material from the borrower. Many borrowers are pro se, and they do not know what a certificate of service means. In the federal system, the

attorneys with e-mail addresses automatically get a copy of the notice that is sent to them. He asked if this same procedure could be followed in Maryland. They would have the benefit of knowing that something has been filed. Mr. Broccolina replied that a clerk could not do this. It cannot be effected centrally. The idea was to give timely notice to the OAH that a mediation request was being made. The OAH would begin scheduling that mediation and then would contact the parties. The courts will be receiving by e-mail the findings and results of the mediation. The clerks' offices will have mailboxes. Regarding the legacy systems, there are six old automated systems, including two systems in Prince George's and Montgomery Counties over which Mr. Broccolina has no control or very limited control. The more systems that need to be modified, the longer it is going to take, and it is not going to happen by July.

Judge Cannon suggested that it be left to the OAH to do the notification, which they may be able to do quickly. If this causes problems, then the Rules can always be amended later. The Vice Chair agreed. She said that the language providing that the borrower shall serve a copy of the request on all the parties should be left in the Rule, understanding that in many cases, this may not work. However, this is cured by the fact that notice will be sent by the OAH, or someone can check the docket entries regularly.

The Vice Chair stated that section (f), Procedure Following Foreclosure Mediation, which was former section (e), would be

considered. Mr. Enten referred to the memorandum that he had submitted and to the markup of the Rule. He had discussed this with the Chair before he had left, and with Ms. Ogletree and the Reporter. What this section is supposed to deal with is not the court changing what had been agreed to as to whether there was a modification or what kind of loss mitigation there is. It is open-ended. It provides that if the mediation results in an agreement, the court can take such action as the court deems appropriate. The Rule does not define or limit the action. The courts' concern seems to be that the cases should not sit forever. His experience is that these modifications, while well-intentioned, often fall apart. His suggestion is that the Rule provide that the case may be closed subject to the right of either party to move to reopen in the event that the mediation agreement has been breached. Otherwise, the lender will have to start this process all over again. Ms. Ogletree added that it would also result in more costs to the borrower.

Mr. Enten commented that he had spoken with Mr. Geesing about making this Rule subject to Rule 2-507, Dismissal for Lack of Jurisdiction or Prosecution. The better course is to provide that the case can be reopened for cause shown. If the court believes that ten years after the foreclosure was originally filed, the case should not start over, the court will so rule. If the court believes that it should be reopened, it can do so. Mr. Geesing pointed out that in the last several years, the courts have been having status conferences in cases. The idea is

that the courts do not want cases to be open when nothing is happening. The problem is that the lenders are going to be paying $400 to file a case, and this process is designed to get the parties to reach an agreement. Frequently, the rule, rather than the exception, is going to be that the agreement reached will be contingent upon the borrower performing, making some payments over a period of time. The statistics show that these agreements are growing. The attorneys do not want their cases being dismissed, because the borrower is supposed to make a payment within a few months, and then they do not do so, forcing the attorney to refile. He and the other attorneys understand that the case should not be left open. The language suggested by the Maryland Bankers Association is "If the agreement of the parties does not lead to dismissal of the action within 60 days, the court may, after the parties have been given notice and an opportunity to be heard, close the case statistically with the right of any party to move to reopen the case at any time." This should be subject to good cause shown. The Reporter said that she had already added this language. Ms. Ogletree said that the Subcommittee had approved it.

Mr. Depastina told the Committee that he was from Civil Justice. He pointed out that there can be a modification in a mediation, and the lender approves the modification subject to a review of the documentation. Often, the lender does not review the documents, and the time passes, so that the modification period has ended. Or the lender states that the investors have

disapproved the modification, and therefore the case goes back to the beginning. Mr. Enten responded that this is not how the system works. Under the new statute, there will be a mediator. The parties will work out the terms of the agreement. Someone has to be available to make the decision right then and there. No one will state that he or she has to check with the client before there can be an agreement.

Mr. Depastina asked if the lenders are committing to the fact that whoever is present at the mediation will be able to give a permanent non-discretionary answer. Mr. Enten answered that this is what the statute requires. Someone has to be available in person or available electronically to make the decision. If the decision cannot be made that day, the mediation would be continued until the decision can be made. The agreement that is made will be incorporated into the court record. Mr. Depastina remarked that this has not been what his agency has experienced. Ms. Ogletree responded that this will no longer be the case if the procedure is what the statute requires.

Judge Cannon commented that she had understood that one of the concerns was that the parties may reach a tentative agreement and then ask for a stay in the case to bring it before the court. The intention was not that the court would change the agreement. However, if the parties agree contingent upon a stay for a certain period of time, it is proper for the parties to enter into the agreement, but it does not mean that the court is going to give them what they agreed to. If they do not get it, there

may be no agreement. It should be clear that to the extent that what the parties agreed to requires the court to take an action, whether it is a stay or something else that the parties come up with, there is no promise that the court will take the action. The parties should not be able to enter into an agreement that is binding on the court. This is very important. The parties cannot decide what the court is going to do. Ms. Ogletree pointed out that the only request that would be made of the court would be that the case be closed statistically for those purposes, but remain open if the parties should need to bring it back.

The Vice Chair remarked that she was appalled by the idea that subsection (e)(1) appears to contemplate that the court could approve some agreement other than the one worked out in mediation. This is not what mediation is supposed to be about. She expressed the opinion that the Committee note should be worked into subsection (e)(1) itself. It would provide that if the parties reach an agreement, they come back to the court to adopt the agreement, except that if the agreement includes something for the court to do, such as a dismissal or a stay, then the court has discretion to deny or limit whatever it is that is being asked. Judge Cannon added that the court should not automatically have to agree to whatever the parties ask for.

Mr. Enten said that he did not have a problem with this. The parties' agreement could be to some outrageous action. The key for him and his clients would be to adopt the language that

they suggested that provides that if the case is statistically closed, either party has the right to reopen it for good cause shown. Mr. Broccolina inquired as to how long these cases would remain open. He assumed that Rule 2-507 would be applied to these cases, so the clerk is going to be sending out notices that for 20 years have remained stayed. Ms. Ogletree responded that if the case remained stayed, it would be closed statistically. Mr. Broccolina argued that the case is still open. Ms. Ogletree noted that this scenario is happening now in Queen Anne's County. The case is statistically closed, but it is not closed. Mr. Geesing remarked that any party can move to file to have the case reopened. Ms. Ogletree observed that a party can pay $150, or in a foreclosure case $450, or the party can pay $25 on a motion. The borrowers and the lenders are better served by a motion being allowed.

The Vice Chair inquired if the proposal is that the court be required to statistically close the case if the parties agree to it. Mr. Enten replied that his idea came from a letter from the Honorable William Missouri, County Administrative Judge for Prince George's County. The idea was to address the concern about these cases remaining open. It makes no difference how it is closed, whether statistically or non-statistically, as long as the Rule provides that a motion can be filed to reopen the case for good cause. A motion filed three weeks later may be granted, but one filed eight years later will probably be denied. The Vice Chair said that this procedure should be governed by the

usual Rules that apply when parties go to a mediation in any case. If an agreement is reached, including dismissal of the case, then the case goes away.

Judge Norton pointed out that Rule 3-506, Voluntary Dismissal, allows for dismissal in the District Court on stipulated terms with an ability to reopen upon violation of any agreement. No corollary rule exists in circuit court. It appears that the Rule is trying to encompass something similar to the District Court Rule. Ms. Ogletree added that this would apply only to foreclosure mediation. Judge Norton said that the language of Rule 3-506 is in section (b), Dismissal Upon Stipulated Terms. It reads as follows: "If an action is settled upon written stipulated terms and dismissed, the action may be reopened at any time upon request of any party to the settlement to enforce the stipulated terms through the entry of judgment or other appropriate relief." The case is dismissed, so it is dead for statistical purposes, but it can be filed to be reopened upon petition.

Mr. Nadel commented that there is a serious difference between a dismissal and a case that can be reopened after having been closed statistically. It is appropriate to be able to close a case statistically, but to use the term "dismiss" causes problems as opposed to "statistically closing" a case. Ms. Smith noted that the clerks do not statistically close cases. Mr. Nadel observed that in Prince George's County, cases are closed statistically. If he files a suggestion of bankruptcy,

effectively the case is closed. Ms. Smith countered that it is not closed. Mr. Nadel acknowledged that it may not be closed from the perspective of the clerk, but Casesearch indicates that it is closed statistically. The Vice Chair stated that the Rule will not contain the term "statistically closed."

Delegate Vallario suggested that the case be placed on a stet docket. The Reporter responded that a civil case cannot be placed on a stet docket. The Vice Chair noted that the court has the power to stay a case for some period of time. Ms. Ogletree said that the issue is for how long the case can be stayed. The Vice Chair responded that this would be up to the court. The Reporter told the Committee that the drafters had come up with a compromise: "If the foreclosure mediation results in an agreement, the court shall take any action necessary to implement the agreement, except that after notice to the parties and an opportunity to be heard, the court may deny or limit any agreed-upon stay." Ms. Ogletree agreed with this proposed language. Mr. Enten remarked that his main concern would be that a motion to reopen can be filed, so that the case does not have to start over. The Vice Chair noted that the suggested language means that the court can hold that since the parties agreed to a stay for five years, the court will not allow it. A stay would only be allowed for 12 months or some other time period. During that time, the parties can come back in and ask for the case to be reopened. If the parties do not come back in within that time frame, the case is over.

Mr. Enten commented that no one would want the lenders to have a disincentive to enter into repayment plans, because of the concern that the agreement could fall apart. The key is that the court can do whatever it wants as long as he has the right to come back in and reopen the case, because otherwise he would be very hesitant to agree to any long-term payment plan. Even with an agreement, the court could say that if the agreement falls apart on the 91st day, it would be necessary to pay another $400, to send out the 45-day notice of intent to foreclose, and to go through the mediation process all over again.

The Vice Chair asked for a motion to adopt the language suggested by the Reporter. Ms. Ogletree moved to adopt the language, the motion was seconded, and it passed unanimously. The Vice Chair told Mr. Enten that the issue he had raised was a valid issue that needs to be addressed, but it should be raised with the Court of Appeals.

After lunch, the Vice Chair asked the Reporter to read again the language pertaining to the stay provision that was voted upon. The Reporter read the new language: "If the foreclosure mediation results in an agreement, the court shall take any action necessary to implement the agreement, except that after notice to the parties and an opportunity to be heard, the court may deny or limit any agreed-upon stay." Mr. Sykes moved to amend this language to the effect that it would read: "...the court shall dismiss the action reserving jurisdiction however, to reopen the action for good cause shown." The Vice Chair asked if

the case is able to be reopened forever. Mr. Sykes answered that it would be forever, for good cause shown relating to the performance of the mediated agreement. The Vice Chair said that this is essentially Rule 3-306. The motion is to adopt the District Court Rule that allows the court to reopen a case when the agreement is not being fulfilled. Mr. Sykes clarified that his motion was to change the language to the language of the District Court Rule. Judge Norton re-read section (c) of Rule 3-306. He noted that the language "entry of judgment" would have to be changed. He added that the concept of "good cause shown" could be added to the new language.

The Vice Chair stated that the motion is that after a mediated agreement is reached, the court can do anything it needs to do to approve that agreement and then dismisses the case. Then for whatever reason, the parties can come back in at any time to have the case reopened. Mr. Brault added that this would be only for good cause, not for any reason. Ms. Corwin noted that this would be dismissing the case immediately upon an agreement, but even under HAMP, there is a three-month trial period. She expressed the view that there needs to be some time to see if the agreement even works before there is a dismissal. The Vice Chair asked Ms. Corwin if she had proposed language to add. She responded that she was working on the other language in section (b) that she had been assigned to draft. Mr. Brault suggested that to fit in with the Reporter's suggested language, to add a stay or if the agreement was for a dismissal, the court

would retain jurisdiction, which is what Mr. Sykes had proposed. Delegate Vallario said that he objected to the word “dismissal.” The proceedings should be stayed. The Reporter said that those two ideas could be incorporated. If the agreed-upon stay is longer than 90 days (which is similar to the HAMP provision), then the court can modify it. Ms. Ogletree commented that the court can impose limitations on this, but the case can be reopened by the parties at any time after that for good cause shown.

The Vice Chair asked the Reporter to read the language again. The Reporter answered that she had been working on the language based on the discussion. It would read as follows: “If the foreclosure mediation results in an agreement, the court shall take any action necessary to implement the agreement, except that after notice to the parties and an opportunity to be heard, the court may deny or limit any agreed-upon stay that is greater than 90 days.” Then language would be added providing for dismissal with the right to reopen, which the Reporter had not yet drafted. The Vice Chair said that after a period of 90 days, the case gets dismissed, and then anyone can come back in for good cause and reopen it. Judge Pierson noted that after 90 days, the case may get dismissed. The Vice Chair inquired whether the court should get involved in all aspects. The Reporter remarked that the court gets another look at the case. The Vice Chair questioned whether the court would look at the file again, and at some point, affirmatively dismiss the case.

Judge Pierson answered in the affirmative. The Vice Chair asked why this would happen. Judge Pierson responded that there could be a variety of agreements, and it may not be known what all of those agreements are going to be. Are all of these cases going to be automatically dismissed after 90 days?

The Vice Chair replied that this was not what she was saying. She thought that whatever period of stay is granted by the court, the point of that period would be to see how whether the agreement works. During the period or even outside of it for good cause, someone could ask for the stay to be extended and to not have a dismissal, but if the parties do this, the stay is up, and there is nothing else to be done. Judge Pierson added that the foreclosure would not go forward. Ms. Ogletree noted that the parties can come back in and reopen the case for good cause after that period of time. The Vice Chair said that someone can come in during the period of the stay and state that the other party has not done what that party had promised, then ask for the foreclosure to proceed. It should be the parties who have to come in and say something to the court, because once a stay of a certain period of time has been decided, unless the parties come in, there would be no need for the court to look at the file again.

Judge Cannon inquired as to what would happen to the file. The case would sit on the docket and not be subject to Rule 2-507. This is not a good way to manage administration of the court. It should be something that comes back to the court for

some kind of action. Sometimes, the parties reach an agreement, and they do not tell the court. The case simply sits there. The Rule ought to provide that the parties agree to a stay for 90 days, but it should not provide that the court has to agree to a stay for 90 days. Ms. Ogletree pointed out that 90 days is what the federal statute provides for. Judge Cannon reiterated that the court should not be required to grant a stay. If there are good reasons, the court will grant the stay. People take actions that make no sense, and the court should have the discretion to not have to go along with this. The Vice Chair questioned as to whether 90 days is required. The Reporter replied that the court may deny or limit any agreed-upon stay that exceeds 90 days. Why would the court not agree to a 30-day stay? Judge Cannon noted that no other rule sets a time limit where the court has to agree to a stay. She added that it may not be known what the various situations are, and she was not sure why a time limit should be added to the Rule.

Ms. Ogletree remarked that she did not think that the Rule required that the court would have to agree to a stay that is less than 90 days. What the Rule provides is that if the stay is over 90 days, the court can do whatever it wishes. The Vice Chair asked the Reporter to repeat part of the new language. The Reporter read from the Rule: "...except that the court may deny or limit any agreed-upon stay that exceeds 90 days." The Vice Chair suggested that the language "that exceeds 90 days" could be deleted. The Reporter explained that this addresses the

HAMP issue. Ms. Corwin added that what will happen is that secured parties are not going to be willing to make agreements if they know that they will have to come in and ask the court to take action. No agreements will be reached at the mediations, which is the point of the statute. The secured parties need to know that there is an amount of time that they can try to live with these agreements. The Vice Chair asked if a 90-day time period after an agreement is reached is required by HAMP. Ms. Corwin answered negatively. What HAMP provides is that almost everyone who has income can have 90 days in a trial period to see if he or she can come up with the payments that get worked out according to the HAMP arrangement. If a party cannot live up to the trial period, the party will not get a permanent modification.

Delegate Vallario expressed the opinion that no period should be mentioned at all in the Rule. The parties may agree that one sum will be paid one year, and then another the next year. If the terms are violated, they should be able to come back into court under the same proceedings or go forward to foreclosure. Ms. Ogletree noted that what the Rule is providing is that the court has control over any stay that is over 90 days. It does not refer to what happens within the 90 days. If the parties agree to 30 days, that is all that they will get. Judge Pierson pointed out that if the Rule provides that the court can do something with the stay if it is more than 90 days, it implies that the court cannot take action if the stay is less

than 90 days. The Reporter questioned as to why this would be a problem if the case is using the HAMP period of 90 days. Judge Pierson noted he did not know why the court's power to look at the stay should be tied to a particular time period.

Judge Cannon commented that from a practical standpoint, the court is going to grant the stay. The Reporter noted that not every court will grant it. Judge Cannon reiterated that the court will grant the stay. Why is a requirement that the court grant the stay being put into a rule? In no other rule is the court's discretion taken away. It is assumed that the only category under which someone will request the 90 days is because the parties reached an agreement under HAMP. It appears that all possibilities have been exhausted. Other possibilities may happen, and there is no reason to tie the judge's hands. Ms. Ogletree said that the 90-day time period should stay in. She asked if it would be a problem leaving in the language providing that any party can come back into court for good cause shown if it is within the period of their agreement. Judge Pierson responded that language should be added similar to the language in Rule 3-506. It gives the parties the power to agree on dismissals with the understanding that they can come back in and reopen the case.

Mr. Enten said that he had two points to make. The first was that the proposed language did not focus on whether the case can be stayed or not. He did not feel that a period of time was needed in the Rule. It may not be a modification of payments.

It could be an agreement to try to do a short sale. The key is that there is the ability to be able to come back and reopen the case without having to start the foreclosure procedures all over again. It should be up to the discretion of the court to assess the nature of any violation of the agreement. It could be that the borrower missed one payment. However, if eight, 10, or 12 months has elapsed, and the stipulation has broken down, why would the court, the lender, or the borrower be put back to square one, starting the case all over? His concern is that there is a mechanism in the Rule to avoid this.

The Vice Chair pointed out that this right is not available in every civil case in circuit court. It is available in the District Court but not in circuit court. What was agreed to first in subsection (e)(1) was that if foreclosure mediation results in an agreement, the court shall take whatever action it needs to take to implement the agreement, and that to the extent that any part of the agreement included any action by the court, such as a dismissal or a stay, the court retains the power to accept, reject, or impose whatever terms it deemed appropriate under those circumstances. This is the basic concept of what was agreed to previously. She suggested that another sentence be added that would read as follows: "When a case is dismissed as a result of an agreement arising out of a foreclosure mediation, the parties can come back in for good cause and have it reopened." Mr. Brault agreed with this additional language. He commented that this is not unique, because all civil cases have a

motion for a new trial or a writ of coram nobis. These are on restricted grounds, but the fact is that the court can reopen a civil judgment years later.

Mr. Depastina asked whether the case can be reopened if two years later, the borrower defaults on the loan. The Vice Chair answered that this is true if the court allows it. Ms. Ogletree noted that this is a motion. Anyone can come in and argue that this should not be. Mr. Depastina inquired whether the party would have to file with the motion an updated cost as to what it takes to pay off any deficiency and would a party have to produce documentation as he or she would have done in the order to docket originally. His point of view was that when he gets an order to docket, the payoff amount is paid, and the various required documents are filed to initiate the proceedings. Two years have passed, and a party receives a modification. The amounts have been paid down, but new costs are involved. Does the borrower have to pay this again? The Vice Chair said that the Rules will not address this. The attorney can argue in the motion. Judge Pierson commented that if the terms of Rule 3-506 are incorporated into the Rule, it works very well, because it provides that it is to enforce the conditions of the agreement. It is the mediated agreement. If the borrower has complied with the mediated agreement, then the case cannot be reopened. If a new default occurs four years later, this is not an issue of non-compliance with the mediated agreement, it is an issue beyond the scope of this. Mr. Sykes questioned whether it is a violation or

a breakdown of the settlement agreement if the borrower misses a payment. Judge Cannon agreed with Judge Pierson. The language of the Rule should be clear as to what is being protected. There is an agreement that provides that certain things will happen over the next 18 months. The borrower agrees to take certain actions. Then the borrower does not comply with the terms of the settlement agreement. This is when it is appropriate to move to reopen the case. But if the borrower does not do something that had nothing to do with the settlement agreement, it would be a new case. The language in the Rule should be as Judge Pierson had suggested. In the District Court, it is clear that if someone claims that the terms of the settlement agreement are violated, it is not a new default being claimed. Mr. Enten commented that the court will look at the facts and circumstances and decide whether this should be a new filing or whether it comes under the old filing. The Vice Chair noted that language is being added to the end of subsection (e)(1) that goes beyond her last restatement of the proposed language which is if the case that had been settled through the mediated agreement is dismissed, the parties can come in for good cause and ask to have the case reopened to enforce the terms of the mediation agreement.

Judge Norton said that it is not to reopen the case to enforce the terms of the mediation, it is to reopen the case period. The Vice Chair asked if this is for any reason whatsoever. Mr. Klein responded that it can be reopened because

of a breach of the agreement. The Reporter expressed the view that this should not be able to be done five years later. Judge Norton noted that the "devil is in the details." If the first four payments in a row are missed that may be different than if 10 years later four payments are missed. The latter ought to be a new case. Where is the line drawn? Ms. Ogletree added that this is up to the court. Delegate Vallario commented that the agreement probably will state what amounts are to be paid for the next few years, so it is technically a violation of the agreement if someone does not make the payments. The Vice Chair remarked that if the case is dismissed, the parties can come in for good cause to reopen the case for breach of the mediated agreement. Ms. Ogletree questioned if the mediated agreements are going to provide that the borrower has to comply with all of the rest of the terms of the deed of trust. Mr. Enten suggested that if there is an allegation that the mediated agreement has been breached, then either party can come in and for good cause shown have the case reopened. The court will look at the case and decide after looking at all of the facts and circumstances whether there should be a new filing or whether the lender should be able to proceed under the original foreclosure.

Mr. Depastina said that it could be a trial period modification which often happens. He has clients who are in their sixth trial period modification, and they have never gotten their permanent modification. There is a 90-day period for modification, more documents and information are requested from

the lender. Then there is a new trial period for modification requiring new documentation all of the time. Then there is another 90-day trial period for modification. Is the lender in violation? Mr. Enten responded that he did not think that this is where the matter is going to end up. This is what the borrower will argue in front of the court. The borrower can state that this is the sixth trial modification. Before the case can be reopened, the court would require certain information to make the decision.

Mr. Brault remarked that this is similar to a diversionary agreement in a grievance proceeding. If an attorney has done something wrong, there is a probation agreement that in the future the attorney will stop drinking or doing drugs, etc. If the attorney violates that agreement, then he or she is automatically subject to discipline. That same proceeding continues without being reinitiated. There is nothing unique about this. It is more efficient for all the parties. He moved the question about changing subsection (e)(1).

The Vice Chair stated that subsection (e)(1) will state the following concept, without being bound by the words: If the foreclosure mediation results in an agreement, the court shall do whatever it needs to implement the agreement, except that to the extent that the implementation of the agreement includes discretionary actions that the court could take such as stays or dismissals, the court retains the power to do those and is not bound by the parties' agreements. If a foreclosure case is

dismissed after the agreement, the parties can come back in for good cause to reopen the case for a breach of the foreclosure mediation agreement. Mr. Brault moved that this amendment be adopted. The motion was seconded, and it passed unanimously.

Ms. Corwin told the Committee that she had been working on language for section (b). This pertains to when the sale may be advertised. The Vice Chair told the Committee that what is being discussed is the language that reads that no sale may be advertised until the later of the 20-day period or after all of the Code, Real Property Article requirements that are conditions precedent have been satisfied. It is a problem because it is a circular argument. Instead of the words "conditions precedent," it was suggested that the conditions precedent in the Real Property Article actually be named. Ms. Corwin said that she and Mr. Young looked at the purpose of the Rule which seems to be that costs should not be incurred until certain events have taken place. The following is the language they suggested: "No sale may be advertised until 20 days after a final loss mitigation affidavit is filed unless a request for mediation is filed within that 20 days, in which case no sale may be advertised until the report from the Office of Administrative Hearings is filed with the court."

The Vice Chair inquired whether the report from the OAH is the last event that would happen before the lender can begin advertising. Ms. Corwin replied that after the report, there are 15 days in which the mortgagor/grantor could file some type of

motion to stay and dismiss, but there are times when one advertises. The sale will not occur before that time. Mr. Enten noted that no one can advertise until after the mediation has been concluded. Ms. Corwin commented that what the statute provides is that a sale may not occur until at least 15 days after the mediation is held, or if there is no mediation, then the report is filed. The Rule provides for more time than the statute. The Reporter said that the suggested language is appropriate. By consensus, the Committee approved the language proposed by Ms. Corwin for section (b).

The Reporter told the Committee that Mr. Klein had suggested a change to section (a). The new language would be: "This Rule applies only in an action to foreclose a lien on residential property other than that which is known to not be owner-occupied residential property." The Vice Chair remarked that the problem with this language is that it does not apply at any point when someone learns at any point that it is not owner-occupied. It does not cover the concept that the Rule only applies to the point where one learns that the property is not owner-occupied residential property.

The Vice Chair drew the Committee's attention to subsection (e)(2). The word "schedule" should be changed to the word "advertise." The Reporter pointed out that a comma should be added after the word "agreement." The Vice Chair noted that the word "or" should be deleted. Ms. Corwin added that the words "file the affidavit required by section (b) of this Rule and"

should be deleted. By consensus, the Committee agreed to these changes.

The Vice Chair said that in subsection (e)(3)(B), the language "file an affidavit required by section (b) of this Rule and" should be deleted, and the word "schedule" should be changed to the word "advertise." The Vice Chair pointed out that in subsection (e)(4), some changes should be made. Ms. Ogletree commented that the language referring to the affidavit required by section (b) of this Rule is not filed. The Reporter explained that this provision was added to try to address the timeliness standards. The Vice Chair observed that the Court of Appeals needs to decide if this is necessary. Judge Pierson expressed the opinion that subsection (e)(4) does not add anything.

The Vice Chair asked if this is where the concept of "after the case is dismissed, the parties can come back in and request that the case be reopened" should be added in. Ms. Ogletree pointed out that the affidavit concept has been removed from the Rules. The Vice Chair noted that this means that if the foreclosure mediation did not result in an agreement or was terminated or not held due to the fault of the borrower, the court may enter an order to show cause. In other words, the language referring to the affidavit should be taken out, so that it would read that if the mediation did not result in an agreement or was terminated, then the court can dismiss the case. Ms. Ogletree said that the court will not dismiss the case because the borrower wants to dismiss, the court will leave the

case in, and the sale should go forward. Judge Pierson stated that what this provision means is that if the lender does not proceed to sale within 60 days after the termination of the mediation, the case is going to be dismissed. The Reporter clarified that it is within 60 days of getting the green light to move forward; if they do not move forward, the case should not languish for the full period provided for in Rule 2-507. If the lender has the green light to go ahead and does not for whatever reason, this provision was added to let the lender know that after 60 days, the case cannot proceed.

The Vice Chair expressed the opinion that this is not appropriate. Ms. Ogletree suggested that subsection (e)(4) should be deleted. The Vice Chair asked if anyone disagreed, and there was no response. By consensus, the Committee approved the deletion of subsection (e)(4).

By consensus, the Committee approved Rule 14-209.1 as amended.

Ms. Ogletree presented Rule 14-211, Stay of the Sale; Dismissal of Action, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-211, as follows:

Rule 14-211. STAY OF THE SALE; DISMISSAL OF ACTION

(a) Motion to Stay and Dismiss

(1) Who May File

The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.

Cross reference: See Code, Real Property Article, §§7-101 (a) and 7-301 (f)(1).

(2) Time for Filing

(A) Owner-Occupied Residential Property

In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:

(i) the date the final loss mitigation affidavit is filed;

(ii) the date a motion to strike foreclosure mediation is granted; or

(iii) if foreclosure mediation was requested and the request was not stricken, the first to occur of:

(a) ~~**the date the foreclosure mediation was held;**~~

~~**(b)**~~ the date that the Office of Administrative Hearings files with the court a report stating **the result of the foreclosure mediation or** that no foreclosure mediation was held; or

~~**(c)**~~ **(b)**the expiration of sixty**-five** days after transmittal of the borrower's request for foreclosure mediation, unless the

Office of Administrative Hearings extended the time to complete the foreclosure mediation, in which event, ninety-**five** days after the date the of the transmittal.

(B) Other Property

In an action to foreclose a lien on ~~residential~~ property, other than owner-occupied residential property, a motion by a borrower or record owner to stay the sale and dismiss the action shall be filed within 15 days after service pursuant to Rule 14-209 of an order to docket or complaint to foreclose. A motion to stay and dismiss by a person not entitled to service under Rule 14-209 shall be filed within 15 days after the moving party first became aware of the action.

(C) Non-compliance; Extension of Time

For good cause, the court may extend the time for filing the motion or excuse non-compliance.

Cross reference: See Rules 2-311 (b), 1-203, and 1-204, concerning the time allowed for filing a response to the motion.

(3) Contents

A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action;

Committee note: The failure to grant loss mitigation that should have been granted in an action to foreclose a lien on owner-occupied residential property may be a defense to the right of the plaintiff to foreclose in the pending action. If that defense is raised, the motion must state

specific reasons why loss mitigation **pursuant to a loss mitigation program** should have been granted.

(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;

(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely. Except as provided in Rule 14-212 (a), ~~The~~ the motion may include a request for referral to alternative dispute resolution pursuant to Rule 14-212.

(b) Initial Determination by Court

(1) Denial of Motion

The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:

(A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;

(B) does not substantially comply with the requirements of this Rule; or

(C) does not on its face state a valid defense to the validity of the lien or the

lien instrument or to the right of the plaintiff to foreclose in the pending action.

Committee note: A motion based on the failure to grant loss mitigation in an action to foreclose a lien on owner-occupied residential property shall be denied unless good cause why loss mitigation **pursuant to a loss mitigation program** should have been granted is stated in the motion.

(2) Hearing on the Merits

If the court concludes from the record before it that the motion:

(A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,

(B) substantially complies with the requirements of this Rule, and

(C) states on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action, the court shall set the matter for a hearing on the merits of the alleged. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

(c) Temporary Stay

(1) Entry of Stay; Conditions

If the hearing on the merits cannot be held prior to the date of sale, the court shall enter an order that temporarily stays the sale on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff. Conditions may include assurance that (1) the property will remain covered by adequate insurance, (2) the property will be adequately maintained, (3) property taxes, ground rent, and other charges relating to the property that become due prior to the hearing will be paid, and (4) periodic

payments of principal and interest that the parties agree or that the court preliminarily finds will become due prior to the hearing are timely paid in a manner prescribed by the court. The court may require the moving party to provide reasonable security for compliance with the conditions it sets and may revoke the stay upon a finding of non-compliance.

(2) Hearing on Conditions

The court may, on its own initiative, and shall, on request of a party, hold a hearing with respect to the setting of appropriate conditions. The hearing may be conducted by telephonic or electronic means.

(d) Scheduling Order

In order to facilitate an expeditious hearing on the merits, the court may enter a scheduling order with respect to any of the matters specified in Rule 2-504 that are relevant to the action.

(e) Final Determination

After the hearing on the merits, if the court finds that the moving party has established that the lien or the lien instrument is invalid or that the plaintiff has no right to foreclose in the pending action, it shall grant the motion and, unless it finds good cause to the contrary, dismiss the foreclosure action. If the court finds otherwise, it shall deny the motion.

Committee note: If the court finds that the plaintiff has no right to foreclose in the pending action because loss mitigation should have been granted, the court may stay entry of its order of dismissal, pending further order of court, so that loss mitigation may be implemented.

Source: This Rule is new.

Ms. Ogletree told the Committee that changes were made to

Rule 14-211 to ensure that failure to file the loss mitigation affidavit or go through the loss mitigation program was a reason to stay the case. The timing of the motion to stay was moved up so that it fits in to allow the borrower to raise that problem up front. She said that other timing issues were in the Rule which the Reporter could explain. The Reporter said that she and the Chair had discussed this provision at great length. The time periods of 65 and 95 days were put in because if a foreclosure mediation happens on the last day that it possibly could, such as on day #60 if no extension had been granted or on day #90 if an extension had been granted, then would the report get out of OAH when ordinarily OAH has five days to file its report with the court. The five days were added in to make this happen.

Mr. Enten observed that the timeline for foreclosures when there is a mediation has been greatly extended. The Rule is adding five more days. The legislature was clear that the time frames were 60 and 90 days. These are the times in the statute. The Vice Chair commented that she agreed with the Chair that adding in a few days to allow for these events to happen causes no problems, despite what the statute provides. She asked if anyone wanted to move to amend Rule 14-211. Ms. Ogletree added that the Rule could be changed to state exactly what the statute provides for. The Reporter noted that the language of the statute was on page 26, lines 9 to 13, which is Code, Real Property Article, §7-105.1 (k)(2)(II) l. and 2. The reason the Rule was changed was because of the idea that the OAH for

whatever reason may not have ever submitted the report. The Rule would have a failsafe provision in it to allow the sale to move forward. This is in subsection (a)(2)(A)(iii) (b). Most of the time the OAH is going to timely file the report. Hopefully, the mediation will not be on day #60 or day #90. This is for the exception rather than the rule.

Judge Kaplan moved to conform the Rule to the statute. The motion was seconded. The Vice Chair said that the motion is to change the 65-day and 95-day time periods to 60 and 90 days, respectively. Senator Stone remarked that this issue of the additional five days should have been brought up during the hearings on the statute. He said that he did not feel strongly about this.

The Vice Chair called for a vote on the motion, and it carried on a vote of seven to four.

The Vice Chair drew the Committee's attention to subsection (a)(2)(B). Ms. Ogletree explained that this provision brings the case back to where the Rule was before the new statute was enacted. This is that all stays have to be done in accordance with this other than one that can be filed up front by an owner of owner-occupied property. A new Committee note has been added after subsection (a)(3)(B), which provides that if the reason for asking for a stay was that loss mitigation should have been granted, the person who requests the stay has to state specifically why this is a problem. The Reporter added that this conforms to the basic content of the statute which is on page 26,

lines 14 to 16, and is Code, Real Property Article, §7-105.1 (k)(2)(III). That provision states: "A motion to stay under this paragraph must allege specific reasons why loss mitigation should have been granted." Ms. Ogletree added that this is repeated twice more in the Rule.

The Reporter pointed out that in subsection (a)(3)(F) of the Rule, the language "except as provided in Rule 14-212 (a)" has been added. This is the "one bite of the ADR apple" provision. Ms. Ogletree drew the Committee's attention to the Committee note after subsection (b)(1)(C). Ms. Corwin commented that the motion should be supported with reasons. Ms. Ogletree pointed out that this provision refers to showing "good cause" as to why loss mitigation should have been granted. She asked Ms. Corwin if that addresses her comment. Ms. Corwin said that she was satisfied that this solves the problem she brought up.

Judge Pierson suggested that the language that was added to subsection (a)(3)(F), which reads "[e]xcept as provided in Rule 14-212 (a)" should be "[t]o the extent permitted in Rule 14-212 (a)." By consensus, the Committee approved this change.

Ms. Ogletree referred to the Committee note at the end of the Rule after section (e). There was no discussion. By consensus, the Committee approved Rule 14-211 as amended.

Ms. Ogletree presented Rule 14-212, Alternative Dispute Resolution, for the Committee's consideration.

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-212, as follows:

Rule 14-212. ALTERNATIVE DISPUTE RESOLUTION

(a) Applicability

This Rule applies to actions that are ineligible for foreclosure mediation under Code, Real Property Article, §7-105.1.

(b) Referral to Alternative Dispute Resolution

In an action in which a motion to stay the sale and dismiss the action has been filed, and was not denied pursuant to Rule 14-211(b)(1), the court at any time before a sale of the property subject to the lien may refer a matter to mediation or another appropriate form of alternative dispute resolution, subject to the provisions of Rule 17-103, and may require that individuals with authority to settle the matter be present or readily available for consultation.

Cross reference: For qualifications of a mediator other than one selected by agreement of the parties, see Rule 17-104 (f).

Source: This Rule is new.

Ms. Ogletree explained that the changes to Rule 14-212 clarify that Alternative Dispute Resolution only allows one bite of the apple. If the case has loss mitigation, court-annexed Alternative Dispute Resolution is not allowed later on. By consensus, the Committee approved Rule 14-212 as presented.

Ms. Ogletree presented Rule 14-214, Sale, for the

Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-214, as follows:

Rule 14-214. SALE

(a) Only by Individual

Only an individual may sell property pursuant to the Rules in this Chapter.

(b) Under Power of Sale

(1) Individual Authorized to Conduct a Sale Other Than Under a Deed of Trust

Except as provided in subsection (b)(2) of this Rule, a secured party authorized by the lien instrument to make the sale or any other individual designated by name in the lien instrument to exercise the power of sale shall conduct the sale.

(2) Individual Authorized to Conduct a Sale Under a Deed of Trust

An individual appointed as trustee in a deed of trust or as a substitute trustee shall conduct the sale of property subject to a deed of trust.

(3) Payment Terms

A sale of property under a power of sale shall be made upon the payment terms specified in the lien instrument. If no payment terms are specified in the lien instrument, the sale shall be made upon payment terms that are reasonable under the

circumstances.

(c) Under Assent to a Decree

(1) Individual Authorized to Sell

An individual appointed as a trustee in a lien instrument or as a substitute trustee shall conduct the sale of property pursuant to an assent to a decree.

(2) Payment Terms

A sale of property under an order of court entered pursuant to an assent to a decree shall be made upon the payment terms provided in the order.

(d) No Power of Sale or Assent to Decree

(1) Individual Authorized to Sell

If there is no power or sale or assent to a decree in the lien instrument, or if the lien is a statutory lien, the sale shall be made by an individual trustee appointed by the court.

(2) Payment Terms

The sale shall be made upon payment terms that are reasonable under the circumstances.

Cross reference: For requirements concerning the timing of the sale of residential property, see Code, Real Property Article, §7-105.1 (l).

Source: This Rule is derived in part from the 2008 version of former Rule 14-207 (b) and (c) and is in part new.

Ms. Ogletree explained that a cross reference was added at the end of Rule 14-214 after subsection (d)(2). By consensus, the Committee approved Rule 14-214 as presented.

Delegate Vallario inquired whether loss mitigation is

required if someone has a judgment of $10,000, and the title to the property is free and clear, and the person cannot collect the judgment but wishes to foreclose. Ms. Ogletree answered that executing on a judgment is different from foreclosure of a lien instrument.

The Reporter announced that the Rules will be heard by the Court of Appeals on June 7, 2010 at 2 p.m. The Vice Chair and the Reporter thanked everyone who worked on the Rules.

Mr. Bowen said that he wished to suggest a few style changes. He noted that in Rule 14-202, there are two references to "party of a mortgage." These are in subsections (d)(1) and (l)(1). This language came directly out of the statute, and it should be changed to "party to a mortgage," or the person "has a mortgage." The Vice Chair agreed, and she added that she had suggested style changes that she would be giving to the Reporter. The Vice Chair commented that if anyone else had style comments, these should be given to the Reporter.

There being no further business before the Committee, the Vice Chair adjourned the meeting.