

Corporate Trust Law Update

Thursday, January 23, 2025

Maryland Seeks to Require Licenses for RMBS Trusts: Our Observations

KEY POINTS

- Many securitization trusts may be exempt from being licensed in Maryland.
- Trustees likely not the only choice for “principal officer” on license applications.

OVERVIEW

In *Estate of Brown v. Ward*,¹ the Appellate Court of Maryland vacated an order to dismiss a foreclosure on the grounds that an assignee of a certain type of mortgage loan was not properly licensed. The assignee in that case was a Delaware statutory trust. With explicit reference to the *Brown* case as the reason, on January 10, 2025, the Maryland Office of Financial Regulation (“OFR”) issued [emergency guidance](#) applying its interpretation of the holding of the *Brown* court to all mortgage loans and issued corresponding amendments to the Annotated Code of Maryland (“COMAR”) 09.03.06 (the “Emergency Regulations”) regarding licensure requirements of mortgage lenders.

The Emergency Regulations are modest in scope and simply update some of the licensing application rules to enable what OFR refers to as “passive trusts” to obtain licenses. The Emergency Regulations do not enact the substantive holding of *Brown* that assignees are required to be licensed or change any other provisions in the regulations that determine who must obtain a license. Nonetheless, OFR’s “emergency” guidance states that mortgage trusts must comply with OFR’s licensing requirements. Thus, the Emergency Regulations have sparked much discussion and analysis in the structured finance industry as to the scope and applicability of the regulations to securitization trusts.

Though Richards, Layton & Finger does not provide regulatory or licensing advice with respect to Maryland law matters, based on our experience with respect to the form and function of Delaware statutory trusts and of the typical duties and responsibilities of securitization trustees, we are providing some observations for deal sponsors and their regulatory counsel to consider when evaluating the applicability of the Emergency Regulations. In addition, we believe our observations may be of interest to our trustee clients as they gauge the potential impact of the Emergency Regulations on them.

POTENTIAL EXEMPTIONS FROM LICENSING

Because licensing determinations and decisions are generally not the responsibility of RMBS trustees, we believe deal sponsors and their regulatory counsel should consider whether exemptions to licensing are available to their securitization trusts.

¹ *Estate of Brown v. Carrie M. Ward, et al*, 261 Md.App. 385 (2024).



The principal holding of *Brown* is that an assignee of a mortgage loan needs to be licensed absent an express exemption—not that exemptions to licensing could never apply to a passive trust. The parties in *Brown* did not argue that an exemption applied, and as such, the court did not rule on the applicability of an exemption. However, certain facts in the case and the court’s view of the significance of how title to the mortgage loan was held would suggest that numerous passive trusts may be expressly exempt from the Emergency Regulations. In *Brown*, the mortgage loan was assigned and recorded in the name of the statutory trust (as opposed to the more typical approach of recording title in the name of the trustee). The *Brown* court placed great importance on the record holder of the mortgage loan in determining who had foreclosure and other rights in the mortgage loan. The court expansively read Section 7-103 of Maryland’s Real Property Article, which provides that “[t]he title to any promissory note, other instrument, or debt secured by a mortgage, both before and after the maturity of the note, other instrument, or debt, conclusively is presumed to be vested in the person holding the record title to the mortgage.”² The court further noted that “a ‘conclusive presumption’ is one ‘that cannot be overcome by any additional evidence or argument.’”³

Unlike the statutory trust in *Brown*, where the assignment was recorded in the name of the statutory trust, the vast majority of securitization trusts organized as statutory trusts vest and record title in their trustee (or permit such vesting).⁴ When considering the court’s opinion in *Brown*, this manner of title vesting is potentially significant for at least two reasons: (1) trustees are typically financial institutions that are expressly exempt from being licensed,⁵ and (2) per the *Brown* court’s logic and its read of Section 7-103 of Maryland’s Real Property Article, a trustee with vested title, and not the trust, should logically be conclusively presumed to be the titleholder of the mortgage note for Maryland law purposes. This could lead deal sponsors and their counsel to conclude that, unlike the statutory trust in *Brown*, a trustee of the securitization trust with vested title is the one who has acquired the loan (and not the trust for Maryland licensing purposes), and if that trustee is a financial institution, it need not obtain a license since it is exempt.⁶

² Md. Code (1974, 2015 Repl. Vol.), § 7-103(a) of the Real Property Article (“RP”).

³ *Citing Jackson v. Dackman Co.*, 181 Md. App. 546, 576-77 (2008).

⁴ It is important to distinguish between statutory trusts that are separate legal entities and trusts, such as common law trusts, that are not. The Emergency Regulations are modifying regulations applicable to business entities such as statutory trusts. *See* Md. Code (1980, 2020 Repl. Vol.), §11-506(b)(4) of the Financial Institutions Article. In Maryland, like most jurisdictions, a common law trust is not considered a legal entity. Though it may be a “person” in some situations, OFR specifically is modifying a section applicable only to business entities (*see also*, Md. Code (1980, 2020 Repl. Vol.), §11-501(p), of the Financial Institutions Article).

⁵ *See* Md. Code (1980, 2020 Repl. Vol.), §11-502(b)(1) of the Financial Institutions Article.

⁶ Sponsors and their counsel should also consider whether federal preemption is applicable should OFR seek to license an RMBS trust with a federally chartered trustee. The Office of the Comptroller of the Currency’s Interpretative Letter #1167 (June 2020) involved a trustee of a Delaware statutory trust where the OCC confirmed acting in a fiduciary capacity did not alter preemption analysis and the OCC did not distinguish between the trustee and the trust in its analysis.

WHO MUST BE LISTED IN THE LICENSE APPLICATION

If a deal sponsor and its counsel conclude no exemption from licensing applies to a particular securitization trust, and such sponsor still wishes to include Maryland loans in its securitization trust, the question as to who is required to be listed in the application as a “principal officer” arises.

We see similarities here with the industry’s approach to analyzing the role of a trustee of a statutory trust in the context of Corporate Transparency Act (the “CTA”) filings. For most statutory trusts used in the securitization industry, the trustee has no discretion, has no implied duties (including fiduciary duties), and acts only at the direction of another party (typically the sponsor or its affiliates). As a result, in addition to not having any contractual or other obligation to make a filing for the trust, the industry concluded in the CTA context that the trustee did not have the indicia of “substantial control” and thus generally would not be included in CTA filings.⁷ We believe the same dynamic will be at play for the Emergency Regulations.

To qualify for a license, an applicant, among other things, is required to demonstrate it has at least three years of experience in the mortgage lending business. If the applicant is a business entity, at least one of its principal officers must have the requisite experience (note that the regulations seem to assume there will be multiple individuals that satisfy the principal officer concept). The regulations prior to the Emergency Regulations had a non-exhaustive list of who could be deemed a principal officer of an applicant, which, like the CTA, included a functional option of an individual, “regardless of title, who has the power to direct the management or policies of the mortgage lending business.” Applicants thus have a choice of selecting between officers, board members, owners or control parties when deciding who to list in the application as the person with the required mortgage lending experience. The Emergency Regulations added an option for a passive trust to list its trustee as a principal officer. The Emergency Regulations are unclear as to whether listing the trustee is an option or a requirement. However, the OFR’s guidance on the Emergency Regulations seems to indicate that the former is intended. The OFR’s guidance says the new rules merely “allow” a passive trust to identify the trustee.⁸ In addition, reading 09.03.06.04 to require a passive trust to list its trustee would result in an interpretation that the rules allow all applicants *except* passive trusts to have multiple options of who to list in the application. There is no indication that the OFR intended to limit the choice for a passive trust when it does not do so for any other person or entity.

Having this choice of who to list will likely be crucial for many securitization trusts if no exemption from licensing is available. In our experience, trustees will not agree to provide personal information about their employees. In addition, it is unlikely that any trustee would have the personnel in its corporate trust business line that would have the requisite mortgage lending experience required by Maryland of any applicant. A narrow interpretation of the rules would then make it virtually

⁷ See [Structured Finance Association Corporate Transparency Act FAQ](#) 2a and 2b.

⁸ New subsection 09.03.06.04(6) in the Emergency Regulations states that “if an applicant is a passive trust, the individual providing the information required by Financial Institutions Article §11-506.1(b) Annotated Code of Maryland, shall be a principal officer as defined in subsection (5) of this section,” which includes the entire ambit of potential principal officers, not merely the trustee. This strengthens the interpretation that the principal officer of a passive trust may, *but need not be*, the trustee.

impossible for securitization trusts to meet the licensing criteria. Thus, we expect that sponsors and their counsel will conclude that the sponsor must either (1) provide an employee of the sponsor, or (2) consider engaging an individual for the benefit of the trust (perhaps as a separate trustee) who, in each case, has the requisite experience for licensing approval.