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Why the “Lost Note Defense” Doesn’t Work That Well in Maryland

by [Brett Weiss, Maryland Bankruptcy Attorney](#) on [March 9, 2010](#) · Posted in [Bankruptcy Myths](#), [Bankruptcy Practice and Procedure](#)

A number of clients facing foreclosure have asked me whether I could use the “lost note defense” to help them save their homes. They’d read about how successful it had been in states like Ohio and Florida, and wondered about whether it could help them here in Maryland. Sadly, the answer is that normally it can’t. Why not? The answer lies in Maryland’s somewhat unusual method of conducting foreclosures, and the explanation is a bit technical.

Unlike Ohio and Florida, Maryland is a “non-judicial foreclosure” state. In “judicial foreclosure” states, a foreclosure is conducted like a typical lawsuit: the lender sues you in state court, serves the suit papers, and must prove to the Court its entitlement to foreclose on the property. In Maryland, however, foreclosures are started by “docketing” a foreclosure action in Court. **It does not have to be served on you (although certain notices must be provided), and no hearing, trial or Court approval is required before the foreclosure occurs. It also means that the lender does not have to prove to you or to the Court that it is the owner of the note before the foreclosure. If you want to stop the foreclosure, the only way (other than a bankruptcy filing) is for you to file a separate declaratory judgment or injunction action in state court and get the court to rule in your favor.**

Maryland is also a “Deed of Trust” state, rather than a “mortgage” state. For both a Deed of Trust and a mortgage, you sign a note agreeing to repay the money loaned. But the way the lien is placed on the

house differs. A mortgage involves two parties, the borrower (you) and the lender (the bank). A Deed of Trust requires three parties: the borrower, the lender, and a trustee. The trustee, usually a lawyer at the title company or a law firm, actually holds legal title to the property for the benefit of the lender. Until the loan is paid, the title is not released to you.

What does this mean in terms of the foreclosure? The Trustee is the party bringing the foreclosure action, not the lender. The Trustee can even appoint a "Successor Trustee," who will conduct the sale. The presence or absence of the Note is irrelevant in these situations, since the lender isn't directly involved and the Trustee's authority to conduct the foreclosure is in the Deed of Trust itself.

So I usually tell my clients that the Lost Note Defense doesn't work as well in Maryland because of the way our state handles foreclosures.

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