Chapter 1

Preliminary Considerations

1-1 REVIEW OF DOCUMENTS

1-1:1 Mortgage Foreclosure

Connecticut does not permit power-of-sale foreclosure. All foreclosures in Connecticut must be prosecuted as civil actions, and consequently a higher level of preparation must precede the commencement of suit than might be the case in a state in which non-judicial foreclosure is the norm.

When a mortgage lender forwards a loan for foreclosure, counsel's first concern is to become familiar with the documentation. A close examination of the lender's file is critical to a successful prosecution of the action. A hurried review is apt to cause counsel to overlook some of the problems that abound in this area of the law, an oversight that can only result in delay and possible embarrassment for the attorney to whom the file has been entrusted.

1-1:1.1 Determining the Proper Plaintiff

The first order of business is to identify the entity to be named as the plaintiff. Is the referring lender still the owner of the debt? In this era of an active secondary mortgage market, it is reckless to simply presume that the forwarding lender will be the plaintiff. Examine the file for assignments of the mortgage, and even if none are to be found, make inquiries. It is somewhat ironic that lenders, who are so particular about loan documentation before and during mortgage processing, are often less than diligent after the fact, especially when it comes to documenting the trail of the loan as it treks from investor to investor in the secondary market. To be sure, there is some statutory comfort available if an assignment either is overlooked or is not disclosed,[1] but life is considerably simplified if the issue is spotted and resolved before suit is begun. In *Dime Savings Bank of Wallingford v. Arpaia*,[2] the borrower claimed that the original plaintiff lacked standing to foreclose the mortgage since it had been assigned to a non-party before the entry of judgment. The court summarily dispensed with this argument, indicating that Connecticut General Statutes § 52-118 permits an assignee to sue either in its name or in the name of the assignor. The court further noted that substitution of parties is permitted under Connecticut General Statutes § 52-109 and that issues regarding the proper parties to an action are subject to the curing provisions of Connecticut General Statutes § 52-123.

1-1:1.1a Trade Name Issues

Counsel representing lenders conducting business under a trade name need to be mindful of the mandates of Connecticut General Statutes § 35-1, which requires entities or persons conducting business under fictitious names to file a certificate with the town clerk where business is to be conducted, and in the case of a corporation using an assumed name, listing in the certificate its full name and principal post office address. Failure to comply with the statute is both a civil and a criminal violation. In *Metro Bulletins*

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1. *See also* Conn. Gen. Stat. § 49-10 and § 49-17, discussed in Chapter 5, § 5-2:1.
2. *Dime Savings Bank of Wallingford v. Arpaia*, 55 Conn. App. 180 (1999).

Corp. v. Soboleski,[3] the Appellate Court stated the following regarding Connecticut General Statutes § 35-1:

> We are further persuaded that the statute was intended to provide constructive notice by its parallels with real property recording and indexing provisions. In requiring a filing and indexing system, § 35-1 is analogous to General Statutes § 7-25, which governs the recording and indexing of real property records.

An important Appellate Court decision holds that a plaintiff lacks standing to prosecute a foreclosure when the action is brought by a corporation solely in its trade name. In *America's Wholesale Lender v. Pagano*,[4] the plaintiff commenced a mortgage foreclosure, identifying itself by its trade name, America's Wholesale Lender, as the sole plaintiff. When the trade name plaintiff later moved to substitute an assignee of the mortgage as the plaintiff, the borrower objected, and also moved to dismiss the action. The trial court granted the substitution, denied the motion to dismiss, and thereafter entered summary judgment as to liability only for the substituted plaintiff. The borrower appealed, and the Appellate Court reversed, holding that a trade name has no independent capacity to sue. Therefore, a corporation that holds a note and mortgage under a trade name would need to bring the action in the name of the corporation, doing business under its trade name.

Pagano highlights the importance of verifying and setting forth in the complaint the proper identity of a plaintiff, especially when the plaintiff is doing business under a trade name, since this issue goes to the heart of the court's subject matter jurisdiction, and cannot thereafter be cured. The *Pagano* plaintiff unsuccessfully sought to salvage the case by invoking the benefit of Connecticut General Statutes § 52-123, which provides that:

> No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or

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3. *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493, 500 (1993).
4. *America's Wholesale Lender v. Pagano*, 87 Conn. App. 474 (2005).

> defects, if the person and the cause may be rightly understood and intended by the court.

In denying the plaintiff the benefit of the statute, the court noted that there is a distinction between the way plaintiffs and defendants are to be treated when they are misidentified in a case. It is appropriate for a plaintiff to correct the name of a defendant where the error is simply a misnomer, and not a misstatement of the legal nature of the defendant's existence. In the case of a plaintiff being misidentified, however, Connecticut General Statutes § 52-123 is not properly invoked, since the plaintiff itself made the election to embark on a case by using a fictitious name.

Procedural difficulties represent only a portion of the issues created by the fictitious name problem. Plaintiff's counsel embarking upon a case in which such an issue exists should also consider the impact this will have upon the title derived through the foreclosure.[5]

In another case addressing the need for the plaintiff to be an actual person or entity in existence, the Appellate Court in *Greco Construction v. Edelman*[6] upheld the granting of a motion to dismiss on the ground that the plaintiff did not have an independent legal existence. The action, in which the plaintiff was seeking to foreclose a mechanic's lien, related to work that was in fact performed by Brian Greco, who did business under the trade name of Greco Construction. The plaintiff unsuccessfully attempted to amend his complaint, under authority of Connecticut General Statutes § 52-123, to correct the name of the plaintiff to "Brian Greco d/b/a Greco Construction," asserting that the misnaming of the plaintiff was a circumstantial defect capable of being corrected under that statute. The plaintiff further asserted that the defendant would not be prejudiced by the amendment, since she had actual notice of the institution of the action and knew the true identity of the plaintiff. The plaintiff also tried to distinguish his case from *America's Wholesale Lender v. Pagano*[7] on the ground that the plaintiff in that case was a national mortgage lender whose name bore no resemblance to the true identity of the actual lender, whereas his

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5. For a further discussion of this issue, *see* Chapter 10, § 10-3.
6. *Greco Construction v. Edelman*, 137 Conn. App. 514 (2012).
7. *America's Wholesale Lender v. Pagano*, 87 Conn. App. 474 (2005).

case involved a sole proprietorship in which his last name was incorporated into the trade name.

None of these arguments carried the day for the plaintiff. The Appellate Court noted that *America's Wholesale Lender* made no such distinction, and "because the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the court."

The decision in *Greco Construction* is completely silent on the question of whether or not the plaintiff had complied with the mandate of Connecticut General Statutes § 35-1 by having filed a trade name certificate with the town clerk of the town in which he conducted business. It appears, however, that the plaintiff's fate was sealed, regardless of whether or not he had filed the certificate. The purpose of the trade name certificate is discussed at length in *Metro Bulletins Corp. v. Soboleski*.[8] The court noted that the mandated disclosure of § 35-1 is "primarily intended to protect creditors by giving them constructive notice of the contents of the trade name certificate." (p. 500) It thus appears that the statute is intended to act as a shield, protecting creditors against claims of debtors that the wrong party was sued, rather than as a sword, enabling a creditor to sue under his trade name. As the *Greco Construction* court noted in footnote 6 (p. 520) of its decision, "The plaintiff, after all, is the author [of his complaint] and presumably ought to know its identity; also it is the plaintiff rather than the defendant who seeks to invoke the jurisdiction of the court."

1-1:1.1b Standing Issues: Note Holder as Plaintiff

Connecticut General Statutes § 49-17 has been part of the state's statutory foreclosure repertoire for many decades, but was seldom needed before the surge in secondary mortgage activity that began in the 1990s. The title of the statute tells it all: "Foreclosure by Owner of Debt without Legal Title." The statute permits a mortgage foreclosure to be prosecuted by "the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed . . ." Since Connecticut follows the title theory of mortgages, heightened importance is placed on maintaining an unbroken chain of assignments of a mortgage.

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8. *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493 (1993).

But for the existence of Connecticut General Statutes § 49-17, any break in that chain would lay a dead hand on the note holder's ability to realize on its security.

The statute does have its limitations, however, and the scope of its relief should be appreciated. An important clarification regarding Connecticut General Statutes § 49-17 was made in *Fleet National Bank v. Nazareth*,[9] in which the borrowers appealed the entry of a judgment of foreclosure by sale. They claimed that the plaintiff lacked standing to foreclose, since the mortgage had been assigned to the foreclosing plaintiff without the note also having been endorsed to it. In analyzing Connecticut General Statutes § 49-17, the Appellate Court ruled that since the foreclosing plaintiff was never the holder of the note, it lacked standing to foreclose the mortgage. The plaintiff argued on appeal that Connecticut General Statutes § 49-17 provides a safe haven under such circumstances, but the Appellate Court did not agree, ruling that Connecticut General Statutes § 49-17 provides a remedy to the holder of a note who has not also received an assignment of the mortgage. The statute, the court held, works only in that one direction; it does not permit a lender who holds only an assignment of the mortgage, and not the underlying promissory note, to foreclose that mortgage.

The lesson to be learned from *Nazareth* should be clear: plaintiff's counsel about to initiate a foreclosure should be doubly careful that the status of the loan documentation is in order. Not only should there be a clean unbroken chain of mortgage assignments from the initial lender down to the plaintiff, but the note, if not endorsed in blank, similarly should be complete in its sequence of special endorsements. Any omission in both of these regards, especially after *Nazareth*, is an open invitation to the defendant to raise valid defenses to the action. *Nazareth* is further discussed in Chapter 5, § 5-2:2.

It is important for the potential plaintiff to be able to establish ownership of the mortgage it anticipates foreclosing, but plaintiffs experiencing difficulties in this regard may have found an ally in the Appellate Court, through its decision in *Connecticut Bank & Trust Co. v. Reckert*.[10] The substitute plaintiff in that case

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9. *Fleet National Bank v. Nazareth*, 75 Conn. App. 791 (2003).
10. *Connecticut Bank & Trust Co. v. Reckert*, 33 Conn. App. 702 (1994).

was Fleet Bank, which had acquired this mortgage asset from FDIC, as receiver for the Connecticut Bank and Trust Company ("CBT"). (The actual chronology of the CBT failure is discussed in the Official Comments to Standard 28.3 of the Connecticut Standards of Title.) At the hearing on judgment, Fleet sought to establish its ownership of the mortgage by means of the testimony of an assistant branch manager. The testimony consisted of only her statement that FDIC had "sold CBT and all of its assets to Fleet," and that she had in her possession the original mortgage documents. Based on this evidence, the trial court ruled that Fleet had established its ownership of the mortgage, and permitted judgment to enter. The Appellate Court upheld this ruling with the following statement, *Reckert's* at 705, "Although Fleet did not submit evidence of an assignment and thereby eliminate every other possibility, the evidence presented permitted the court reasonably to believe in the probability that Fleet owned the mortgage."

Although *Reckert's* "close enough" rule of evidence may be sufficient in such cases to enable the plaintiff to obtain a foreclosure judgment, counsel faced with such a situation should look beyond that ephemeral success and ponder the marketability of the title that will be derived through the foreclosure. Standard 28.5 of the Connecticut Standards of Title is clear in its requirement that a foreclosing plaintiff's title must be established by means of a proper assignment or series of assignments of mortgage.[11] As an alternative, a judicial finding of ownership will establish the same marketable title, but only if the FDIC is named as a defendant in the action, something that apparently was not done in *Reckert.* The rationale for this requirement is discussed in Comment 1 to Standard 28.5 of the Connecticut Standards of Title, discussed in Chapter 27, § 27-3 of this text.

In a 1999 decision, *Dime Savings Bank of Wallingford v. Arpaia*,[12] the Appellate Court addressed the issue of standing in a mortgage foreclosure. Relying on Connecticut General Statutes § 52-118, the Court ruled that a mortgage foreclosure action may be brought in the name of either the assignor or the assignee of the mortgage. This opinion goes a long way in eliminating the frequent challenges

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11. *See* Chapter 27, § 27-3.
12. *Dime Savings Bank of Wallingford v. Arpaia*, 55 Conn. App. 180 (1999).

to standing based upon changes in ownership of a loan occurring through the activity in the secondary mortgage market.

A trial level decision, *Bank of New York v. Gagnon*,[13] presents a worthwhile discussion of the ability of a plaintiff, claiming to be the successor in interest to the original note holder but not having the benefit of a recorded assignment of mortgage, to be able to foreclose that mortgage nonetheless. The defendant sought to have the plaintiff's foreclosure action dismissed, claiming that the plaintiff lacked standing to prosecute the action. The original promissory note ran in favor of Mortgage Lenders Network USA, Inc., and the mortgage given to secure that note ran to MERS, as nominee for Mortgage Lenders. At some subsequent point in time, Morgan Chase Bank, N.A., as Trustee, acquired the note, and the plaintiff, Bank of New York, claimed in its complaint that it was the successor in interest to JP Morgan, having acquired by purchase all of the corporate trust business of JP Morgan. (There is no discussion in the decision of how JP Morgan acquired the note; presumably it was by means of endorsement by Mortgage Lenders Network, or some other predecessor in an unbroken chain of ownership.)

To rebut the defendant's claimed lack of standing, the plaintiff asserted: (1) that it was the holder of the note and entitled to enforce it, and (2) that even though the mortgage had not been assigned to the plaintiff, the plaintiff was entitled to foreclose that mortgage by virtue of the provisions of Connecticut General Statutes § 49-17.

The note was undisputedly a negotiable instrument, but it bore a special endorsement to JP Morgan, not to the plaintiff. Consequently the plaintiff was not a "holder" of the note, the court determined, even though it had possession of it. The court stated:

> Nonetheless, based upon the copy of the note and the affidavit of [an officer of the plaintiff], the plaintiff has proven that it is entitled to enforce the note because as transferee of the corporate trust business of JP Morgan, it acquired the rights of a

[13] *Bank of New York v. Gagnon*, No. CV 08 5003461 S, 2009 WL 1607599 (Conn. Super. May 19, 2009).

> holder of the note, JP Morgan. Even though the plaintiff did not submit the agreement whereby JP Morgan was appointed trustee of the note, the evidence submitted permits the court to believe in the probability that the note was included in the plaintiff's purchase of JP Morgan's corporate trust business and therefore that the plaintiff is "a person entitled to enforce" it . . . . [Consequently, as a person entitled to enforce the note,] the plaintiff has established that it has standing to foreclose on the mortgage even though the mortgage may not have been assigned to it or the assignment of the mortgage to it may not have been recorded on the land records yet.

Challenges to standing in a mortgage foreclosure continue to evolve within our courts, and it appears that the Appellate Court has recently created a new standard in assessing whether a plaintiff has standing to foreclose a mortgage. The new standard requires evidence of the date that physical possession of the note was transferred to the foreclosing lender. *See LaSalle Bank v. Bialobrzeski*.[14] As a preliminary matter, however, a basic understanding of Article 3 of the Uniform Commercial Code is necessary to appreciate the various interests recognized under the Code, such as a "holder"[15] and "transferee."[16] Connecticut General Statutes § 42a-3-203 addresses the transfer of an instrument and goes on to state that a transferee may enforce an instrument, such as a promissory note, even though it is not a holder. Subsections (a) and (b) provide:

> (a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

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14. *LaSalle Bank v. Bialobrzeski*, 123 Conn. App. 781 (2010).

15. A "holder" of a negotiable instrument is defined as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identifiable person that is the person in possession . . . ." Conn. Gen. Stat. § 42a-1-201(b)(21)(A).

16. *New England Savings Bank v. Bedford Realty Corp*., 238 Conn. 745 (1996), *rev'd after remand*, 246 Conn. 594 (1998).

> (b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

Connecticut General Statutes § 42a-1-201(b)(15) provides that "[d]elivery with respect to an electronic document of title means voluntary transfer of control and with respect to instruments, tangible documents of title, chattel paper, or certificated securities means voluntary transfer of possession."

As held in *Ulster Savings Bank v. 28 Brynwood Lane, LTD*,[17] the absence of an endorsement to the plaintiff is without consequence under the UCC, provided the plaintiff qualifies as a transferee, since Connecticut General Statutes § 42a-3-203 provides that the transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument, even without endorsement to the plaintiff. See *Bank of America v. Crumb*.[18] The Uniform Commercial Code Comment to Subsection (b) of § 3-203 states in pertinent part: "If the transferee is not a holder because the transferor did not endorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of the transfer."[19] The evolving case law on standing, however, does not appear to incorporate either a reference to this statutory provision or its impact on the rights of a lender acquiring a debt secured by a mortgage.

In 2010, the Appellate Court decision in *LaSalle Bank v. Bialobrzeski*[20] appears to articulate a new standard and requirement for establishing standing in a mortgage foreclosure. The plaintiff, Long Beach Mortgage Corporation, filed a mortgage foreclosure

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17. *Ulster Sav. Bank v. 28 Brynwood Lane, LTD*, No. CV 05 007323, 2010 WL 5610864 (Conn. Super. Jan. 11, 2010). *See* Chapter 30, § 30-3.

18. *Bank of America v. Crumb*, No. CV 95 0129064S, 1999 WL 435770 (Conn. Super. June 21, 1999).

19. *See also Federal Deposit Ins. Corp. v. Cutler*, No. CV94 0536205, 1997 Conn. Super. LEXIS 126 (Conn. Super. Jan. 8, 1997).

20. *LaSalle Bank v. Bialobrzeski*, 123 Conn. App. 781 (2010).

action in 2007, alleging that it was the holder of the note. The borrower appeared pro se and filed an answer that left the plaintiff to its proof on that allegation. In 2008, the plaintiff filed a motion for summary judgment as to liability only, including an affidavit from Washington Mutual Bank attesting that the plaintiff was the owner of the note and mortgage, with attached copies of the loan documents and the assignment of the mortgage. Notably, the assignment made no mention of the note. The borrower did not oppose the motion for summary judgment and the trial court granted it on February 11, 2008. A month later, the borrower tardily filed an opposition to the motion for summary judgment, stating that the assignment was dated 27 days after the foreclosure action was commenced. The borrower then retained counsel, and sought permission to amend his answer and to assert special defenses. The first proposed special defense alleged that the assignment of mortgage was executed subsequent to the commencement of the action.

On March 20, 2008, the defendant filed a motion to dismiss the action, stating that suit was filed on November 1, 2007 but the subject mortgage was not assigned to the plaintiff until November 27, 2007. Since the plaintiff was not the owner of the mortgage on the date the action was commenced, the argument continued, it lacked standing to bring suit. The plaintiff objected and claimed it was in possession of the subject note and mortgage at the time the action was commenced and that the court could take notice of the endorsement of the note by Long Beach Mortgage Company.

The Appellate Court decision noted that the note and endorsement were not attached to the plaintiff's objection. The plaintiff further argued that Connecticut General Statutes § 49-17 allowed the plaintiff, as a party in possession of the note, to foreclose the mortgage securing that note even if the mortgage had not been assigned. The borrower responded by arguing that even under Connecticut General Statutes § 49-17, the plaintiff was required to prove when it came into possession of the note. On January 5, 2009, the court sustained the plaintiff's objection to the motion to dismiss, stating that the issue was moot, as the court has already ruled on the summary judgment motion. The trial court then entered a judgment of strict foreclosure, from which the

borrower appealed, claiming that the lender did not own the note or mortgage and therefore the trial court lacked subject matter jurisdiction.

The Appellate Court ignored the fact that the trial court had favorably decided plaintiff's motion for summary judgment, which ruling included a finding that the plaintiff had an interest in the loan sufficient to support a judgment of foreclosure. Practice Book § 17-50 appears to be clear that a ruling granting summary judgment as to liability only, while interlocutory, leaves open only the issue of damages:

> A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to damages. In such case the judicial authority shall order an immediate hearing before a judge trial referee, before the court, or before a jury, whichever may be proper, to determine the amount of damages.

It would seem that if a trial court reviewed the evidence in support of a motion for summary judgment and found it sufficient to establish the plaintiff's standing, that decision would become the law of the case. The Appellate Court did not address this issue at all, perhaps because it perceived that the evidence relied upon by the trial court to grant summary judgment was inadequate as it related to ownership of the note, and specifically the date on which physical possession was transferred. The Appellate Court noted in two separate footnotes that: (1) the affidavit did not attest the date the plaintiff acquired the note and (2) that the assignment of mortgage stated that Long Beach Mortgage Company assigned the mortgage to LaSalle Bank National Association as Trustee on November 27, 2007.[21]

The Appellate Court reversed and remanded *Bialobrzeski* to the trial court, stating:

> The key to resolving the defendant's claim is a determination of when the note came into the plaintiff's possession. We cannot review this claim because the court made no factual finding as to

[21] *LaSalle Bank v. Bialobrzeski*, 123 Conn. App. 781, 784 nn.3 & 5 (2010).

> when the plaintiff acquired the note. Without that factual determination, we are unable to say whether the court improperly denied the defendant's motion to dismiss.

Another confusing point is that in 2009 the court had granted the plaintiff's motion to substitute as plaintiff LaSalle Bank NA as Trustee for Washington Mutual Asset Backed Certificates WMABS Series 2006-HE2 Trust. The Appellate Court simply relegated that ruling to a footnote; one would think, however, that a ruling granting a motion to substitute a plaintiff has some preclusive effect. For example, substitution normally means as a matter of law that the action was commenced by the substituted party. It is unclear what documentation was submitted to the Court regarding the motion to substitute. Regardless, *Bialobrzeski*[22] can be considered as "groundbreaking" in that it imposes an additional layer of proof required of a plaintiff to prosecute a mortgage foreclosure action. Regrettably, the Appellate Court did not address whether simple physical possession of the original note, prior to the commencement of the foreclosure, is all that is required for a lender to have standing to foreclose a mortgage. Many trial courts require—regardless of the legislative mandates of the UCC—that a mortgagee have either a blank endorsement on the note or a special endorsement[23] in favor of the foreclosing plaintiff. As the discussion above involving the UCC demonstrates, a party in physical possession of a promissory note may enforce it, provided that the instrument was "delivered" as provided in the Code, prior to commencement of the foreclosure. Moreover, if an assignment of mortgage is executed prior to the commencement of the foreclosure, Subsection (c) of Connecticut General Statutes § 42a-3-204 provides:

> For the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest

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22. A companion decision was issued with essentially the same holding on a different loan involving the same borrower, *Deutsche Bank Nat'l Tr. v. Bialobrzeski*, 123 Conn. App. 791 (2010).

23. Conn. Gen. Stat. § 42a-8-304 states in part, "(a) An endorsement may be in blank or special. An endorsement in blank includes an endorsement to bearer. A special endorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank endorsement to a special endorsement."

> in the instrument is effective as an unqualified endorsement of the instrument.

The effect of this provision is to convert into a note holder a person having only possession of the note, since the mortgage assignment operates also as an endorsement of the note, which is a prerequisite to a person becoming the holder of the note.

In *Equity One, Inc. v. Shivers*,[24] the Connecticut Supreme Court reversed an earlier Appellate Court decision.[25] The Supreme Court granted the lender's petition for certification on the following issue: "Did the Appellate Court properly determine that the trial court should have conducted an evidentiary hearing when the defendant challenged the plaintiff's standing to bring the action?" The lender argued that a full evidentiary hearing was not required on standing because it had presented the note, endorsed in blank, at two prior hearings, thereby creating a presumption of standing that the borrower was then required to rebut. The lender further argued that even if the transcripts of the foreclosure hearings did not expressly refer to the plaintiff's presentation of the note to the trial court, a presumption exists that the court acted in accordance with the legal requirements involving mortgage foreclosures, including the requirement that the court inspect both the note and mortgage prior to rendering a judgment of foreclosure. The borrower argued that the Appellate Court correctly determined that an evidentiary hearing in the form of a trial was necessary to resolve the standing issues. The Supreme Court reversed, holding that, consistent with the trial court's finding, the record established that the plaintiff had standing to commence the foreclosure, and that the defendant failed to demonstrate that the finding was flawed or that the procedure employed by the trial court was inadequate. The specific reason for the reversal was that the Appellate Court had incorrectly concluded that the trial court had deprived the defendant of a fair hearing on the question of whether the plaintiff had standing to bring the foreclosure.

The Supreme Court began its analysis of standing in a mortgage foreclosure by reference to long-standing statutory provisions involving the Uniform Commercial Code and the enforcement

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24. *Equity One, Inc. v. Shivers*, 310 Conn. 119 (2013).
25. *Equity One, Inc. v. Shivers*, 125 Conn. App. 201 (2010).

of a note. The Court then made reference to the September 24, 2007 foreclosure hearing, when plaintiff's counsel provided the court and the borrower, who was self-represented, with copies of the affidavit of debt. At that time, the court asked the borrower whether he had any questions with respect to the affidavit, and he replied that he had a question concerning the escrow balance. After a brief exchange between the judge and the borrower, the court made findings as to the value of the property and the amount of the debt, and rendered a judgment of foreclosure by sale. The borrower requested 90 days to list the property for sale with a realtor. The court granted that request and set a sale date of January 5, 2008. At no time during that hearing did the borrower challenge the plaintiff's standing to bring the action. Significantly, as set forth in footnote 8 of the decision, the record did not expressly indicate that the plaintiff also provided the trial court with a copy of the note and mortgage at the judgment hearing as required under Practice Book § 23-18. Subsequent to relief from stay being granted in connection with the borrower's bankruptcy, the plaintiff filed a motion to open and reenter the judgment, which motion was opposed by the borrower, who claimed that he was not in default and that the plaintiff "may not have standing" to foreclose the mortgage. The borrower also filed a motion to compel production of the original note in order to establish that the plaintiff was the holder of the note when it commenced the action in June 2007. A hearing on the plaintiff's motion to open and reenter the judgment was held on November 24, 2008. At the commencement of the hearing, the plaintiff's counsel presented the court and the defendant with an updated affidavit of debt and advised the court that the borrower had filed a motion to compel. The court inquired as to the nature of that motion, and the lender's counsel explained it was motion to compel "production of the original note as handed up at the time of the original judgment." The note was shown to the borrower.

The lender's counsel presented the court with copies of the original note, the original mortgage and the assignment of the note and mortgage from MERS to the lender. After examining the documents, the court stated:

> All right. So under the mortgage, MERS was the original mortgagee and then MERS assigned the

> mortgage to the plaintiff as servicer for Nomura Home-Equity loan, Inc. and that was on June 7, 2007 so it appears you have a complete chain here.

In rejecting the borrower's argument that an evidentiary hearing on standing was required, the Supreme Court then stated:

> We find no merit in the defendant's contention that the plaintiff failed to produce the original mortgage note at the November 24, 2008 hearing, or that the hearing conducted on that date was inadequate for purposes of demonstrating that the plaintiff was a holder of that note when it commenced the action. In fact, the record clearly reflects that, in response to the defendant's motion to compel and assertion that the plaintiff was not 'the actual note holder at the time the action was commenced,' the plaintiff's counsel produced all of the pertinent documents, including a copy of the original note, which was endorsed in blank, as well as a certified copy of the mortgage and assignment of the note and mortgage from MERS to the plaintiff, dated June 7, 2007. On the basis of these documents, the court reasonably and properly found that the plaintiff had standing to commence the action, the defendant did not dispute that finding or object to the procedure that the trial court followed for purposes of resolving the jurisdictional issue.

The Supreme Court also employed two key concepts in upholding the trial court's decision that was that there was standing to prosecute foreclosure: (1) that the foreclosure judgment was presumed to be proper and that judicial acts and duties have been duly and regularly performed; and (2) that it was proper for the trial court to rely on the representation of the plaintiff's counsel that the note he produced at that hearing was the note that the plaintiff held at the time of the commencement of the action. The Supreme Court found that counsel's representation was sufficient based on his status as an officer of the court and also because the assignment of the note and mortgage from MERS to the plaintiff—which the court examined at the November 24, 2008,

hearing—was executed twenty days prior to the commencement of the foreclosure action. The Supreme Court also noted the absence of any evidence offered by the borrower to challenge the evidence submitted by the lender. The Court noted that on appeal, the borrower did not refer to any evidence indicating that the plaintiff was not in possession of the note when it commenced the action. The Court was clear in footnote 12 that a trial-like hearing may be required when there are contested jurisdictional facts, but that was not the situation in *Shivers*.

The Supreme Court has finally weighed in on the question of the ability of a note holder to foreclose the mortgage securing that note, notwithstanding the fact that the note holder may not then be the mortgagee of record. In *RMS Residential Properties, LLC v. Miller*,[26] the plaintiff was foreclosing a mortgage that originally ran in favor of Mortgage Electronic Registration Systems, Inc. and secured a promissory note in favor of Finance America, LLC. Prior to commencement of suit, RMS became the holder of the note.

The defendant's claims were expressed in both a cross-motion for summary judgment as well as a motion to dismiss. The summary judgment motion asserted that the mortgage was void *ab initio*, and the motion to dismiss claimed that even if that was not the case, RMS lacked standing because it was not the note holder at the commencement of suit. Ultimately, RMS prevailed on its own motion for summary judgment, and thereafter a judgment of foreclosure by sale was entered.

As seen in the cases discussed above, the Appellate Court has consistently upheld the standing of a non-mortgagee note holder to foreclose a mortgage under the authority of Connecticut General Statutes § 49-17.[27] This was the Supreme Court's first opportunity, however, to pass on the question and to uphold the statute. Further, the Court also noted that the holder of a note is presumed to be the owner of the debt, "and unless the presumption is rebutted, may foreclose the mortgage under § 49-17." Adding to the presumptions at play in such a situation, the Court went on to

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26. *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224 (2011).

27. *See HSBC Bank USA, N.A. v. Navin*, 129 Conn. App. 707 (2011); *Chase Home Finance, LLC v. Fequiere*, 119 Conn. App. 570 (2010); *Bankers Tr. Co. of Cal., N.A. v. Vaneck*, 95 Conn. App. 390 (2008); *Fleet Nat'l Bank v. Nazareth*, 75 Conn. App. 791 (2003).

quote *Garris v. Calechman*[28] for the precept that "[t]he possession by the bearer of a note indorsed in blank imports prima facie that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity."

Yet another unsuccessful attempt to challenge a note holder's standing occurred in *Deutsche Bank National Trust Co., Trustee v. Shivers*.[29] In that case, the mortgage was not assigned to the plaintiff note holder until after the foreclosure action had been commenced, and the defendant asserted that the plaintiff "may not" be the holder of the note. The plaintiff moved for summary judgment before the defendant had answered, and the court's granting of that motion formed the basis of the defendant's appeal. The defendant raised the novel claim that, since the plaintiff's motion was filed before the pleadings were closed, the plaintiff "had a 'heightened burden' in the summary judgment proceeding." Noting that the plaintiff submitted an affidavit and documentation in support of its motion, and that the defendant filed no counter affidavit, the Appellate Court concluded that "[t]he fact that he had not yet filed his answer and special defenses does not, under the circumstances of this case, strengthen the defendant's argument."

A similar unsuccessful challenge based on a post-foreclosure-commencement assignment of mortgage occurred in *Deutsche Bank National Trust Co., Trustee v. Bertrand*,[30] although the decision is more notable for its discussion of a protective order limiting discovery (see § 6-1:8), as well as the time limitations in play with motions for default for failure to plead (see § 6-1:3.2a).

A somewhat different twist on the standing challenge arose in *CitiMortgage, Inc. v. Gaudiano*,[31] where the defendant claimed that the plaintiff "does not have a valid assignment of the note in the land records." Although neither the trial court nor the Appellate Court ascribed any validity to such a claim because the defendant could not cite any authority for his contention, the facts of the case do highlight an inadvertence in the land records that warrants some

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28. *Garris v. Calechman*, 118 Conn. 112, 115 (1934).

29. *Deutsche Bank Nat'l Tr. Co., Tr. v. Shivers*.136 Conn. App. 291 (2012), *cert. denied*, 307 Conn. 938 (2012).

30. *Deutsche Bank Nat'l Tr. Co., Tr. v. Bertrand*, 140 Conn. App. 646 (2013).

31. *CitiMortgage, Inc. v. Gaudiano*, 142 Conn. App. 440 (2013).

discussion. The loan was originally made by Nation's Standard Mortgage Corp. in March 2004. Nation's subsequently sold the note to Lehman Brothers Bank, FSB, which then transferred it to Lehman Brothers Holdings, Inc. That entity then endorsed the note in blank and delivered it to the plaintiff, CitiMortgage, Inc., which subsequently initiated the foreclosure. At the time of suit, the mortgage had not been assigned to CitiMortgage.

The complicating—but not determinative—factor was that, after the transfer of the note from Lehman Brothers Bank to Lehman Brothers Holding, Lehman Brothers Bank then purportedly assigned both the note and the mortgage to MERS by a Corporate Assignment of Mortgage, which was duly recorded in the land records. As the court noted, however, that assignment was ineffective as to the note, since at that time Lehman Brothers Bank no longer held the note and thus had no capacity to transfer it again. The assignment of the mortgage, however, was effective to place title to the mortgage in MERS.

The conflicting circumstances thus created presented a question as to which chain of ownership should control: the off-record transfer of the note, or the recorded assignment of the note and mortgage? The court acknowledged the sloppiness of the filing, but disagreed with the defendant's contention that the land records should control. "What truly controls the issue," the court noted, "is that evidence which the trier of fact deems credible." The trial court had specifically credited the plaintiff's evidence, which established its ownership of the note, and on that basis, coupled with the application of § 49-17, the plaintiff became entitled to its foreclosure decree.

In a concurring opinion, Judge Flynn acknowledged that § 49-17 controlled, but went on to lash out at a situation that resulted in the land records not properly reflecting the status of who was entitled to foreclose the mortgage. "I see some obligation to point out," he stated, "that no title search could find that CitiMortgage, Inc. ever received any assignment of mortgage from the mortgage holder of record at the time CitiMortgage, Inc. commenced this foreclosure action. This raises the obvious question of what interest remains in the mortgage holder of record and why did not the record mortgage holder, rather than CitiMortgage, Inc., commence the foreclosure. The more basic question is what continued reliance can be placed

on public land records to determine title to real property due to the effect of the application of § 49-17."

The concurring opinion also discusses the concept of the chain of title as defined in the Standards of Title of the Connecticut Bar Association, and goes on to comment that the plaintiff's notice of *lis pendens* would be outside that chain. In point of fact, that is not the case, since the chain of title is established through the grantor's index, and a search under the name of the owner in that index would disclose the notice. Having thus discovered the notice of *lis pendens*, the searcher would be charged with the duty of reviewing the foreclosure file, where presumably the complaint would establish the plaintiff's authority to foreclose pursuant to § 49-17. That being said, it must be acknowledged that the chain of ownership of the mortgage debt cannot be established unless and until a foreclosure has been initiated and a notice of *lis pendens* has been recorded; in the absence of such events, anyone concerned with the identity of the note holder secured by the mortgage would have no reason to pursue inquiry beyond the land records.

Another oddity in the facts of this case is that the assignee of the recorded assignment of the "note and mortgage" was MERS. As is discussed at length in Chapter 30, MERS's sole function is to act as the nominee of the original mortgage lender and of subsequent purchasers of the loan; it is beyond the scope of its operating structure for MERS to acquire ownership of the note. This fact demonstrates that the purported assignment of the note and mortgage was an inadvertence, perhaps drafted by someone with insufficient familiarity with the MERS system.

The Appellate Court's ruling in *Gaudiano*, especially the tenor of the concurring opinion, could easily be interpreted as a call for a repeal of § 49-17. Indeed, unsuccessful efforts to that end have been introduced in recent sessions of the General Assembly. The problem with those efforts, however, has been that they have failed to recognize that § 49-17 represents a codification of the common law precept that the security follows the debt. If the statute, in effect for more than a century, were to be repealed, we would still be left with the common law, and thus a note holder would still have standing to foreclose the mortgage securing that note, even if the mortgage had not yet been assigned to the note holder. To date, no proposal has been introduced attempting to enact legislation that

would be in derogation of the common law. It is fair to speculate that such a proposal would be met with strenuous objection by the commercial lending industry, since the common law rule is fundamental to provisions codified in Article 9 of the UCC. Efforts to limit a change in the law to obligations secured by real property would also be problematic, since then we would be confronted with a situation where the law differed solely on the basis of the nature of the security, *viz.* real property or personal property. The issue would be aggravated by the fact that it frequently is the case that a loan is secured by both a real property mortgage and a security interest in personal property.

In *U.S. Bank, N.A. Trustee v. Ugrin*,[32] the defendant's challenge to the plaintiff's standing was based on a claim that the note, previously having been endorsed in blank, was subsequently specially endorsed to the plaintiff. The defendant sought an evidentiary hearing on that point, which the court denied, and that denial formed the basis of the defendant's appeal. The Appellate Court noted that, pursuant to §§ 42a-1-201(b)(21)(A), 42a-3-205(b) and 42a-3-301 of the Uniform Commercial Code, once a note is endorsed in blank, any person in possession of the note is a holder and becomes entitled to enforce the note. Further, the plaintiff having plead ownership of the note, it then became the defendant's obligation to disprove that allegation. Following the holding in *Equity One, Inc. v. Shivers*,[33] the court concluded that a trial court is not required to hold an evidentiary hearing to determine standing if, after being presented with the original note, the court finds that there is evidence that the plaintiff possessed the note at the time the action was commenced and the defendant did not offer any evidence to the contrary.

In *Deutsche Bank National Trust Co., Trustee v. Torres*,[34] the plaintiff successfully challenged the trial court's entry of a motion to dismiss in favor of the defendant. The trial court had granted the defendant's motion because the plaintiff failed to produce evidence that it was the owner of the debt and holder of the note at the time of commencement of suit. On appeal, the plaintiff claimed that

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32. *U.S. Bank, N.A. Trustee v. Ugrin*, 150 Conn. App. 393 (2014).
33. *Equity One, Inc. v. Shivers*, 310 Conn. 123 (2013).
34. *Deutsche Bank Nat'l Tr. Co., Tr. v. Torres*, 149 Conn. App. 25 (2014).

because it alleged in its complaint that it was the holder of the note and the mortgage, the trial court was required to take the facts as alleged, and therefore should have denied the motion to dismiss. The Appellate Court agreed, noting that since the defendant did not proffer any evidence disproving those allegations, she failed to rebut the presumption that the plaintiff, as holder of the note, was the owner of the debt.

A foreclosing lender is unable to take refuge in the entry of a default for failure to plead against a borrower to conclusively establish standing. In *Deutsche Bank National Trust Co. v. Thompson*,[35] the lender filed a mortgage foreclosure by complaint dated March 2009, alleging that it was the owner and holder of a mortgage originally in favor MERS, which subsequently had been assigned to Deutsche Bank National Trust Co. The evidence, however, established that the assignment of mortgage from MERS was dated June 24, 2009, roughly three months after the foreclosure was filed. The note was endorsed to the original lender, New Century Mortgage Company. The plaintiff filed a motion for default for failure to plead, which was granted. Roughly four years later, after extensive mediation sessions and other activities, a judgment of strict foreclosure entered. The law days were stayed by a bankruptcy filing, and then a motion to reset the law days was filed and granted. The borrower then filed an appeal, challenging the plaintiff's standing, claiming that the plaintiff did not own or hold the note when the foreclosure was filed and that the lien did not survive the bankruptcy discharge. The Appellate Court examined the record and determined it had no evidence to establish when the note came into the plaintiff's possession. The court further stated that there was no evidence of when the plaintiff became the owner or holder of the note. Specifically, the court stated "there are no assignment documents with respect to the note." Significantly, there was no transcript in the Appellate Court record of any proceedings that showed ownership of the note or the plaintiff's status as a holder of the note.

The plaintiff argued on appeal that the entry of a default for failure to plead conclusively established standing to prosecute the case. The Appellate Court disagreed, noting that although a default

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35. *Deutsche Bank Nat'l Tr. Co. v. Thompson*, 163 Conn. App. 827 (2016).

establishes liability, it cannot confer jurisdiction. The plaintiff then argued that the borrower failed to present an adequate record for review, which argument the court also rejected, stating: "[e]ven if we were to accept that the record is inadequate, we are not foreclosed from considering the standing issue." The Appellate Court reversed and remanded for a determination of standing and further proceedings. The lesson in this case is that a foreclosing lender should provide a record on appeal to establish standing. Regardless, entry of a default for failure to plead is not a safe harbor to confer jurisdiction.

The Uniform Commercial Code remains the primary basis determining standing in a mortgage foreclosure on behalf of the owner or holder of a mortgage loan. In *US Bank National Association, Trustee v. Schaeffer*,[36] the Appellate Court clarified the test to prove standing for a holder of a note as distinguished from a non-holder transferee of a note. The original note in that case was endorsed in blank. The trial court, however, ordered the production of various documents to prove standing, and after they were produced, dismissed the case for lack of standing. The lender filed an appeal, arguing that the UCC established the lender's standing to foreclose based upon its possession of the original note endorsed in blank. The lender further argued that the test applied by the trial court for proving standing was for a non-holder transferee, as discussed in *J.E. Robert Co. v. Signature Properties, LLC*,[37] discussed in Section 30-3. The Appellate Court reversed, affirming that a foreclosing lender, with possession of an original note endorsed in blank, has standing to prosecute the action. The Court distinguished a holder from a non-holder transferee, referring to the *J.E. Robert Co.* case as follows:

> In footnote 18 of *J.E. Robert Co*., the court laid out an alternative test for cases where the plaintiff is not the holder of the note. Id., 325-26 n. 18. In those cases where a nonholder transferee seeks to enforce a note in foreclosure proceedings, the transferee must be prepared to demonstrate, through means of proper supporting documents, its

36. *US Bank Nat'l Ass'n, Trustee v. Schaeffer*, 160 Conn. App. 138 (2015).
37. *J.E. Robert Co. v. Signature Props., LLC*, 309 Conn. 307 (2013).

> right to seek foreclosure. Id. In this demonstration, the transferee must account for possession of the note by proving the transaction through which it acquired the note from the holder. Id. The court took pains to emphasize, however, that this analysis applied only to *nonholders.*
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> And recently this court reiterated this reading of the *JE Robert Co,* footnote. In *American Home Mortgage Servicing, Inc. v. Reilly*, 167 Conn. App. 130, the foreclosing party was a holder of a bearer mortgage note that was, in fact, owned not by the plaintiff, but by Fannie Mae. This court held that, nonetheless, the plaintiff had standing to foreclose because the evidence showed that Fannie Mae had authorized the plaintiff to enforce the debt. Id., 135. In response to the defendant's claim that the chain of title to the note was insufficient, this court stated: "We reject the defendant's claim that the plaintiff was required to provide a full history of any and all transfers of the note with supporting documentation, as well as documentation of the plaintiff's authority to act on behalf of the owner of the mortgage debt. In support of its claim, the defendant relies on *J.E. Robert Co. v. Signature Properties, LLC*, supra, 309 Conn. 325 n.18. In *J.E. Robert Co.*, our Supreme Court specified that the precept of having the proper supporting documentation in hand *when filing suit* showing the history of the note pertained to cases in which a *nonholder* transferee seeks to enforce a note in foreclosure proceedings.[38]

The *Reilly* case is discussed in Section 1-1:1.1c of this text.

In *JP Morgan Chase Bank, N.A. v. Simoulidis*,[39] the Appellate Court has clarified the evidentiary burden that a borrower must satisfy to defeat a lender's standing to prosecute a foreclosure.

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38. *US Bank Nat'l Ass'n, Trustee v. Schaeffer*, 160 Conn. App. 138, 148-49 (2015).
39. *JP Morgan Chase Bank, N.A. v. Simoulidis*, 161 Conn. App. 133 (2015).

The borrower appealed the denial of a motion to dismiss, largely on the basis of deposition testimony that the plaintiff, JP Morgan Chase Bank, National Association, did not own the note. Rather, deposition testimony showed that it was owned by Freddie Mac. In affirming the trial court's denial of the borrower's motion to dismiss, the Appellate Court, citing *Schaeffer*,[40] stated:

> The defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that *might* give rise to the possibility that a party other than the foreclosing party owns the debt. To rebut the presumption that the holder of a note endorsed specifically or to bearer is the rightful owner of the debt, the defending party must prove that another party is the owner of the note and debt. Without such proof, the foreclosing party may rest its standing to foreclose the mortgage on its status as the holder of the note.

Simoulidis is noteworthy because it holds that inconsistencies in the chain of ownership of a mortgage loan, by themselves, do not mandate dismissal of a mortgage foreclosure. A borrower is required to prove that a third party owns the loan, not simply that the plaintiff's chain of ownership has imperfections.

In 2017, the Appellate Court had an opportunity to expound on the nature of jurisdictional issues as they can arise in our courts. In *Deutsche Bank National Trust Co. v. Cornelius*,[41] the defendant was challenging the plaintiff's standing to prosecute a mortgage foreclosure by asserting that the plaintiff's failure to comply with the mortgage's default notice provisions constituted a defect that deprived the court of jurisdiction to hear the case. Commenting that the defendant "misunderstands the nature of the jurisdiction of our courts," the court went on to state:

> In the present appeal, it is undisputed that the mortgage contains a notice provision. This contractual condition precedent, however, merely

40. *U.S. Bank, Nat'l Ass'n, Trustee v. Schaeffer*, 160 Conn. App. 138 (2015).
41. *Deutsche Bank Nat'l Tr. Co., Tr. v. Cornelius*, 170 Conn. App. 104, 115 (2017).

> implicates the rights and obligations of the parties under the mortgage; it does not implicate the power of our courts to adjudicate a claim based on the terms of the mortgage. Therefore, the plaintiff's purported failure to comply with the mortgage's notice provision did not implicate the jurisdiction of the trial court and does not deprive this court of jurisdiction over this foreclosure action.

In a footnote to this comment, the court also observed that the defendant raising the jurisdictional issue was not even a party to the mortgage; thus, he was not a "Borrower" under its terms and had no right to enforce any of its provisions.

Another 2017 decision, *Valley National Bank v. Marcano*,[42] addressed the question of whether the involvement of the FDIC, as receiver for a failed institution, had any effect on the holder status of the party then seeking to enforce the note. The plaintiff, which was bringing suit on the promissory note (the note was unsecured, so no foreclosure was involved), where the plaintiff acquired the note from the FDIC, as receiver of Park Avenue Bank, the original lender, by means of a Purchase and Assumption Agreement. The defendant claimed that the absence of a specific endorsement of the promissory note operated to break the chain of title to the note and deny the plaintiff its status as holder, which in turn prevented the plaintiff from having standing to maintain the action. The trial court found that the plaintiff did have such standing, and entered judgment in the plaintiff's favor, from which judgment the defendant appealed.

The Appellate Court upheld the judgment, relying on the official comments to the UCC which respect to General Statutes § 42a-3-203(b). Those comments indicate that a person entitled to enforce an instrument is not limited to holders, and that "a nonholder in possession of an instrument includes a person that acquired rights on a holder . . . under [§ 42a-3-203(a)] . . . . Under § 42a-3-203(b), [t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce an instrument." Further, in *Berkshire Bank v. Hartford Club*,[43] the court held that "[a]lthough that

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42. *Valley Nat'l Bank v. Marcano*, 174 Conn. App. 206 (2017).
43. *Berkshire Bank v. The Hartford Club*, 158 Conn. App. 705, 712 (2015).

third party technically is not a holder of the note, the third party nevertheless acquires the right to enforce the note so long as that was the intent of the transferor."

Additionally, the FDIC's Purchase and Assumption Agreement clearly transferred to the purchasing entity "all right, title and interest of the [FDIC] in and to all of the assets (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of [Park Avenue] whether or not reflected on the books of [Park Avenue] as of Bank Closing." Thus, the court concluded, "when the FDIC transferred to [the plaintiff] 'all' of Park Avenue's assets, the plaintiff became a nonholder with the rights of a holder."

1-1:1.1b1 Non-Evidentiary Summary Judgment Upheld

Creditors may find some solace in *HSBC Bank USA, N.A. v. Navin*,[44] which affirmed the entry of summary judgment in favor of the plaintiff without an evidentiary hearing. In that case, the lender filed a mortgage foreclosure action and thereafter moved for summary judgment as to liability only. The lender submitted an affidavit stating that the note was endorsed in blank and was delivered to the plaintiff prior to the commencement of the action. The borrower's objection simply asserted that the plaintiff was not the owner of the promissory note and mortgage at the time the action was commenced. The borrower offered no evidence to support its claim or to counter the plaintiff's sworn affidavit that it was in possession of the note at the time it commenced the action. The trial court granted the plaintiff's motion for summary judgment without a hearing, followed by the entry of a foreclosure judgment, and the borrower appealed. The Appellate Court affirmed, rejecting the borrower's contention that a genuine issue of material fact existed as to whether the plaintiff was the owner of the note at the time the action was commenced. The Court stated that the language in the borrower's affidavit was conclusory and the borrower failed to satisfy his evidentiary burden to present supporting evidence. *Navin* is noteworthy because it affirms the

44. *HSBC Bank USA, N.A. v. Navin*, 129 Conn. App. 707 (2011).

entry of summary judgment on the issue of standing without an evidentiary hearing. It would appear, however, that if contested facts surrounding the issue of possession of the note did exist, an evidentiary hearing would be required.

The Appellate Court continues to hold that a lender can successfully prevail on a standing challenge in the context of a motion for summary judgment. In *Berkshire Bank v. The Hartford Club*,[45] the borrower appealed from a foreclosure judgment, arguing that the entry of summary judgment on liability only on behalf of the lender was erroneous because the evidence submitted was inadmissible to establish the plaintiff's ability to enforce the note. In support of its motion for summary judgment, the lender submitted two affidavits to show that the plaintiff was permitted to enforce the note, which was in the possession of the successor by merger to the original lender. The affidavits stated: that the affiant had personal knowledge of the facts stated; that he reviewed the subject note and mortgage; that the plaintiff was the successor in interest to CBT; that CBT merged with and into the plaintiff under the plaintiff's charter and bylaws; and other aspects of the prima facie claim. The original note was not endorsed to the plaintiff but rather to the original lender, CBT. The note, however, was in the possession of the plaintiff at all relevant times. The trial court determined that the plaintiff was a nonholder in possession of the instrument who had the rights of a holder as the "transferee." The borrower's main argument on appeal was that the affidavits did "not chronicle the chain of title of the note." Addressing that claim, the Appellate Court stated:

> This argument is comparable to the chain of custody argument raised in *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 604-605, 717 A.2d 713 (1998). In that case, our Supreme Court rejected the notion that a proponent must prove a chain of custody in order to authenticate a business record. Id. Any gap or break in the chain of custody goes to the weight of the evidence rather than its admissibility. Id. Our Supreme Court

45. *Berkshire Bank v. The Hartford Club*, 158 Conn. App. 705 (2015).

> provided the following policy reason for adopting such a rule: "To require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans originated by failed institutions." Id., 605. The defendant's arguments that the affidavits were inadmissible evidence because there was no support for Matejek's statement that the plaintiff owned the note and they lacked a statement that CBT was the holder and owner of the note at the time of the merger likewise fail. Matejek's averred statements that he had reviewed the records of CBT and the plaintiff and that CBT had merged into Berkshire Bank, together with the undisputed fact that the plaintiff had possession of the original note and mortgage, supported Matejek's statement that the plaintiff was the owner of the note. The failure to include a statement that CBT was the holder and owner of the note at the time of the merger did not preclude the court from rendering summary judgment as to liability. The defendant has provided no more than a mere allegation that CBT may have divested itself of the ownership of the note before the merger. No evidence whatsoever was provided in support of such an allegation and, significantly, the plaintiff had possession of the original note and mortgage. Accordingly, this allegation, without more, did not create a genuine issue of material fact under the circumstances of this case.

The Appellate Court continues to affirm the entry of summary judgment in mortgage foreclosures in which borrowers and their counsel attack alleged inconsistencies in endorsements and the dates of allonges. In *21st Mortgage Corp. v. Schumacher*,[46] the lender commenced a mortgage foreclosure with physical possession

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46. *21st Mortg. Corp. v. Schumacher*, 171 Conn. App. 470 (2017).

of the original note, which was specially endorsed to the plaintiff. The lender filed a motion for summary judgment as to liability, and the borrower opposed the filing, claiming that two allonges were undated and that a deposition of an agent of the plaintiff revealed an allonge endorsed in blank to a third party involving the subject loan. The deposition had been taken in a prior foreclosure action of this loan that was then dismissed without prejudice. The trial court entered summary judgment for the plaintiff; a foreclosure judgment followed, and the borrower filed an appeal, challenging the entry of summary judgment. During oral argument before the Appellate Court, the borrower claimed that the allonge endorsed in blank created a risk that the holder of that allonge could bring another action against the defendants. The Appellate Court stated as follows:

> We find little merit in such an argument considering the existence of General Statutes 49-1: The foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure and also against any person or persons upon whom service of process to constitute an action in personam could have been made within this state at the commencement of the foreclosure; but the foreclosure is not a bar to any further action upon the mortgage debt, note or obligation as to any person liable for the payment thereof upon whom service of process to constitute an action in personam could not have been made within this state at the commencement of the foreclosure. The judgment in each such case shall state the names of all persons upon whom service of process has been made as herein provided. **We also note that the record establishes that the defendant has been in default since 2009, and that there is neither evidence nor an allegation that some other entity has sought to enforce the note.**[47]

[47.] Note: bold type added by the author and does not appear in the original.

Schumacher is noteworthy because the mantra of borrowers' counsel for nearly the last decade has been that some other party might foreclose on them, and therefore, standing and the capacity to foreclose should be measured by something other than the basic civil burden of proof of a preponderance of the evidence.

The relentless barrage of standing challenges by consumer lawyers has prompted lenders' counsel to seek out cost-effective ways to prove the right to enforce the loan documents. In *Bank of America v. Kydes*,[48] lender's counsel served requests to admit on the defendant in an attempt to establish standing to prosecute the foreclosure. These discovery requests were served after the borrower's motion to dismiss—challenging standing—had been denied for failure to appear in court on the day of the hearing. The borrower failed to respond to the admissions for more than six weeks, although he did file a motion for protective order, which was denied. When the untimely answers to the admissions were filed, the borrower simply denied them all. Adroitly, the lender's counsel then moved for summary judgment on the admissions, after filing a notice of intent to rely on admissions. The trial court granted the motion for summary judgment as to liability.

At the hearing on plaintiff's motion for summary judgment, the lender presented the original note. The trial court granted summary judgment as to liability, and the plaintiff then filed its motion for judgment of strict foreclosure. At that hearing, the borrower did not challenge the plaintiff's standing. Rather, the borrower argued that the lender had an invalid lien. The trial court rejected this argument because it had already ruled on the motion for summary judgment that the plaintiff had the ability to foreclose the mortgage. A foreclosure judgment entered, and the borrower appealed, arguing that the foreclosure judgment was based upon a "procedural default" and that the trial court should have held an evidentiary hearing on standing. The Appellate Court rejected the borrowers claim, solely based on the defendant's failure either to timely answer the admissions or to seek to withdraw or amend. On the challenge to the failure to hold an evidentiary hearing, the Appellate Court ruled that the borrower had failed to present any evidence to challenge standing, and affirmed the trial court. It

48. *Bank of America v. Kydes*, 183 Conn. App. 479 (2018).

appears that if the borrower had presented evidence challenging standing, the trial court would have been required to hold a hearing. It is unclear whether a borrower can "unwind" the effect of untimely responses to requests to admit by offering evidence to challenge standing, even after summary judgment has entered on those admissions.

1-1:1.1b2 Dual Standing for Assignor and Assignee

Standing also may be demonstrated in part through a chain of recorded assignments of mortgage. In *Wells Fargo Bank v. Murphy*,[49] a borrower challenged a lender's motion for summary judgment based upon an inconsistent series of assignments of mortgage. The substituted plaintiff at the time the summary judgment was filed was GRP. The complaint alleged that Diversified Mortgage had extended a $165,700 mortgage loan on May 1, 1996, and that Diversified thereafter assigned the note and mortgage to Northwest Bank Minnesota, N.A., which later merged with Wells Fargo. The recorded chain of assignments, however, differed from those allegations of the complaint. The chain of assignments indicated that Wells Fargo assigned the note and mortgage to Ocwen Partnership, LP, which in turn assigned the note and mortgage to Bayview Financial Trading Group, LP. Bayview then assigned the loan documents to GRP in April 2006. On February 2, 2009, Wells Fargo assigned its interest in the loan documents to GRP. Yet another chain of assignments, however, ran from Northwest to Wells Fargo to GRP. The borrowers contended that Wells Fargo did not own the note at the time suit was commenced in August 2006, and therefore the court lacked subject matter jurisdiction. The court rejected this argument, however, based upon what it stated was an erroneous interpretation of the law regarding assignments. The court referenced Connecticut General Statutes § 52-118,[50] but emphasized that under the common law, the assignor retains the right to sue even though the legal interest has been assigned to

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[49] *Wells Fargo Bank v. Murphy*, No. TTDCV066000043S, 2009 Conn. Super. LEXIS 2916 (Conn. Super. Oct. 29, 2009).

[50] Sec. 52-118. Action by assignee of chose in action. The assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name. Such a plaintiff shall allege in his complaint that he is the actual bona fide owner of the chose in action, and set forth when and how he acquired title.

another. The court noted that this rule of "dual standing" applies to foreclosures, citing *Joseph v. Donovan*,[51] a 1931 Connecticut Supreme Court opinion. GRP, therefore, was a proper party plaintiff (as substituted) as an assignee, and Wells Fargo also had standing, as an assignor, to commence the foreclosure. *Wells Fargo Bank v. Murphy* is noteworthy because it addresses the common law relating to assignments, an aspect of the law that many superior court judges overlook when assessing standing issues in mortgage foreclosures.

1-1:1.1b3 Status of Surviving Company After Merger

In *Financial Freedom Acquisition, LLC v. Griffin*,[52] the defendant challenged the ability of the substitute plaintiff to continue prosecution of the foreclosure. The name of the entity holding the note—CIT Bank, N.A. —did not match the substitute plaintiff's name—OneWest Bank, N.A. The discrepancy was the result of a corporate merger that occurred during the pendency of the foreclosure. Testimony established that CIT Bank had merged into the substitute plaintiff bank. Both parties to the merger were national banks. Despite the discrepancy in the names of the note holder and substitute plaintiff, the trial court held that the substitute plaintiff was the note holder, and proceeded to enter judgment in favor of the plaintiff.

In reviewing the defendant's claim on appeal, the Appellate Court undertook a comprehensive examination of both federal and state law relating to the effect of corporate mergers—particularly as they relate to banking entities—and concluded that the substitute plaintiff was entitled to continue prosecution of the case. The several aspects of the court's conclusions are set out as follows:

> First, the substitute plaintiff's corporate existence and identity continued in the resulting bank. See 12 U.S.C. § 215 (e) (2012); 12 C.F.R. § 5.33 (l) (1); General Statutes § 36a-125 (g). Second, the substitute plaintiff's assets, including the decedent's note, vested in the resulting bank by operation of law and without any deed or transfer.

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51. *Joseph v. Donovan*, 114 Conn. 79 (1931).
52. *Financial Freedom Acquisition, LLC v. Griffin,* 176 Conn. App. 314 (2017).

See 12 U.S.C. § 215(e)(2012);12 C.F.R. § 5.33 (l) (1); General Statutes §§ 34-197 (4) and 36a-125 (g); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89; Unif. Limited Liability Company Act § 1026 (a), supra, 6C U.L.A. 189. Third, the present action, which was pending at the time of the merger's consummation, was not abated, discontinued, or otherwise affected. See 12 U.S.C. § 32 (2012); General Statutes §§ 36a-125 (g), 33-820 (a) (5), and 34-197 (6); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89; Unif. Limited Liability Company Act § 1026 (a)(7), comment, supra, 6C U.L.A. 191. Last, the substitute plaintiff could have substituted the resulting bank in this action, but it was not required to do so. See General Statutes §§ 36a-125 (g), 33-820 (a) (5), and 34-197 (6); Model Business Corporation Act, supra, § 11.07 (a), p. 11-89; Unif. Limited Liability Company Act § 1026 (a), supra, 6C U.L.A. 189. Thus, the substitute plaintiff's status as holder and owner of the note and this proceeding were not affected by the merger.

Similarly, the resulting bank's change of name affected neither this proceeding nor the substitute plaintiff's status as holder and owner of the note. As a matter of law, the change of name did not (1) create a new corporate entity; (2) alter the resulting bank's corporate identity, which merely was a continuation of the substitute plaintiff's corporate identity; (3) end the resulting bank's corporate existence, which merely was a continuation of the substitute plaintiff's corporate existence; or (4) divest the resulting bank of the substitute plaintiff's assets, which had vested in the resulting bank as a result of the merger. See 12 U.S.C. §§ 30, 32, and 215 (e) (2012); General Statutes § 36a-125 (g); *In re Worcester County National Bank*, supra, 263 Mass. 399–400.

> Furthermore, the change of name did not abate, discontinue, or otherwise affect this proceeding, and it did not require the substitute plaintiff to substitute the resulting bank's new name in this proceeding. See 12 U.S.C. § 32 (2012); General Statutes §§ 33-803, 33-820 (a) (5), 34-197 (6), and 36a-125 (g); *In re Worcester County National Bank*, supra, 263 Mass. 399; Model Business Corporation Act, supra, § 10.09, p. 10-70.[53]

Financial Freedom Acquisition, LLC v. Griffin did not present a standing issue because the merger did not occur until after the foreclosure had begun, and thus the plaintiff clearly had standing to initiate suit. The merger events and issues addressed in the case, however, easily could arise prior to commencement of a foreclosure. Although such circumstances could prompt a defendant to assert lack of standing by the surviving entity, *Financial Freedom* obviously raises doubts as to the likely success of any such challenge.

1-1:1.1c Mortgage Servicers

Lender's counsel should also be familiar with servicing relationships, such as when a local bank acts as a servicer for Fannie May (formerly Federal National Mortgage Association) or Freddie Mac (formerly Federal Home Loan Mortgage Corporation). Challenges to standing may be defeated by demonstrating such a servicing relationship through documents from the lender identifying the existence of the relationship. See Chapter 30 for a more complete discussion of the issues surrounding mortgage servicers and the foreclosure process.

Borrowers and lenders have obtained some much needed clarity regarding standing and the relationship between a "holder" of a mortgage loan and an owner as a result of the appellate court's decision in *American Home Mortgage Servicing, Inc. v. Reilly*.[54] This residential mortgage foreclosure was commenced in the name of American Home Mortgage Servicing, Inc. The note was originally payable to Columbia National, Inc., who then assigned the note

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53. *Financial Freedom Acquisition, LLC v. Griffin,* 176 Conn. App. 314, 332-34 (2017).
54. *American Home Mortgage Servicing, Inc. v. Reilly*, 157 Conn. App. 127 (2015).

and mortgage to Homeward Residential Inc., which changed its name to Homeward Residential, Inc. In its motion for summary judgment, the plaintiff, Homeward Residential, identified that the loan was owned by Federal National Mortgage Association ("Fannie Mae"). The borrower challenged the plaintiff's standing because the owner and the holder were different entities. In response, the plaintiff submitted evidence showing that it was authorized and obligated to foreclose the loan for Fannie Mae. The court granted summary judgment for the plaintiff, holding that the issue of ownership was really a red herring, because the Plaintiff, Homeward Residential, Inc., either had the right to enforce the note from the original lender-Columbia National based on the language of the note and mortgage, or they obtained it from Fannie Mae. A judgment of strict foreclosure then entered, from which the borrower appealed, challenging the plaintiff's standing to foreclose. The Appellate Court began its analysis with a review of Connecticut General Statutes § 49-17. It then proceeded to state that a holder is presumed under Connecticut law to be the owner of the mortgage and may foreclose a mortgage under § 49-17, unless the presumption is rebutted. The court then stated as follows:

> Here, there is no dispute that the plaintiff possessed the note endorsed in blank before initiating this foreclosure action. Specifically, the plaintiff presented to the court the original note, which was endorsed in blank, and Coffron's [employee of the plaintiff] affidavit wherein she attested that the plaintiff was the holder of the note endorsed in blank prior to the commencement of this action. This created a presumption that the plaintiff, as the note holder, was also the owner and could enforce the debt. These documents also satisfied the plaintiff's prima facie case.

The defendant argued that the deposition of Ms. Coffron showed that Fannie Mae, not the plaintiff, was the owner of the note, and therefore it had met its burden of rebutting the presumption that the plaintiff owned the note. The Appellate Court stated, however, that the next step in the inquiry "is whether the plaintiff, despite not owning the note, demonstrated that it had the authority

to foreclose on the mortgage securing the note." The lender argued that it was authorized to foreclose the mortgage, even though it was not the owner of the note, because it was the loan servicer. The defendant argued that the Coffron deposition was inadequate evidence of either Fannie Mae's ownership or the plaintiff's authority to foreclose. The Appellate Court affirmed the entry of summary judgment, holding that if Fannie Mae is considered to be the owner, the plaintiff presented sufficient evidence to show that there is no genuine issue of material fact that Fannie Mae unequivocally manifested its intention to authorize the plaintiff to enforce the debt. Alternatively, the Appellate Court held that if Columbia is considered to be the note's owner, the record supported is the absence of any genuine issue of material fact that Columbia unequivocally manifested its intention to authorize the plaintiff to exercise its rights to enforce the debt by virtue of its possession of the original note endorsed in blank. The borrower challenged the plaintiff's evidence in support of summary judgment–specifically the Coffron deposition–which stated that she had personal knowledge of Fannie Mae's ownership of the note, as well as authorization from Fannie Mae to enforce the debt. This knowledge came from her review of the plaintiff's business records and Fannie Mae's loan servicing guidelines. The Appellate Court concluded that there was no genuine issue of material fact that Fannie Mae authorized the plaintiff to file the foreclosure on its behalf. In simple terms, this case holds that a mortgage foreclosure may be prosecuted in the name of a loan servicer (in this case, Homeward), which is the holder of the note–as defined under the Connecticut General Statutes § 42a-3-104(a)–even if the owner of the loan is a different entity, provided there is evidence that the holder has the authority to enforce the debt. The record did not show that the owner submitted any evidence except through its servicer, the plaintiff. Significantly, the Appellate Court rejected the borrower's contention that a complete chain of ownership needs to be demonstrated when the plaintiff is the holder of the note, as discussed in footnote 10 of the decision.

In 2018, the standing of a servicer to prosecute a foreclosure was upheld in *Aurora Loan Services, LLC v. Condron.*[55] The plaintiff's

[55] *Aurora Loan Servs., LLC v. Condron*, 181 Conn. App. 248 (2018).

standing was primarily established by means of the provisions of the master servicing agreement, which clearly granted the plaintiff the right "to do any and all things that it may deem necessary or desirable in connection with the servicing and administration of the Mortgage Loans, including but not limited to the power and authority . . . to effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan . . ."

1-1:1.1d Plaintiff as Agent for Participating Lenders

It has become common practice in larger commercial transactions for a number of lenders to participate in the making of the loan. Frequently, rather than have the several lenders listed as payees on the note or as mortgagees on the mortgage deed, the lenders will designate a single one of them, or perhaps even a non-participating lender, to act as a designated agent for all lenders for purposes of accepting payments and enforcing the instruments if such becomes necessary.

In Connecticut, the designated agent's standing to foreclose the mortgage on behalf of all lenders was not clearly established until the Appellate Court's decision in *Kennedy Funding, Inc. v. Greenwich Landing LLC*.[56]

The defendant challenged the plaintiff's standing, arguing that the plaintiff's suit was improper because, at the commencement of suit, "the plaintiff (1) did not own the mortgage and (2) was acting as an agent for disclosed principals." Addressing the merits of this claim, the Appellate Court upheld the trial court decision, which relied on *Chase Home Finance, LLC v. Fequiere*[57] and *RMS Residential Properties, LLC v. Miller*,[58] particularly as to the effect of Connecticut General Statutes § 49-17 on the plaintiff agent's standing to foreclose, citing favorably the trial court's holding that "general principles of agency law permit an agent to institute a lawsuit for the benefit of a disclosed principal 'when the agent is a "holder" of a negotiable instrument . . . .'"

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56. *Kennedy Funding, Inc. v. Greenwich Landing LLC*, 135 Conn. App. 58 (2012), *cert. denied*, 305 Conn. 914 (2012).

57. *Chase Home Finance, LLC v. Fequiere*, 119 Conn. App. 570 (2010).

58. *RMS Residential Properties, LLC v. Miller*, 303 Conn. 224 (2011) (discussed in § 1-1:1.1b).

The defendant unsuccessfully argued that the issue was controlled by *Second Exeter Corp. v. Epstein*,[59] in which the Supreme Court had held that a collection agent lacked standing to sue a debtor in his own name. The Court viewed as a distinguishing factor the fact that the plaintiff in *Kennedy Funding* was the payee and holder of a negotiable instrument, and "not merely a collection agent for the principal lenders." Further, by designating the plaintiff as payee and holder, "the principals unequivocally manifested their intention to authorize the plaintiff to exercise the rights that the law of negotiable instruments confers on the holder of a negotiable promissory note," again citing *RMS Residential Properties, LLC v. Miller*.

1-1:1.1e Ownership of a Guaranty

Promissory notes are negotiable instruments under the Uniform Commercial Code, and typically are endorsed so that status as a holder of the instrument can be determined by a review of the endorsements. A guaranty, however, is not a negotiable instrument, and therefore the provisions of the UCC have no application. In 2018, the Appellate Court addressed whether the holder of a note had the right to enforce a guaranty which was not specifically mentioned in the allonge to the note or other assignment documents. In *Jenzack Partners, LLC v. Stoneridge Associates, LLC*,[60] the plaintiff sought to foreclose a mortgage that secured a guaranty. The original note in the amount of $1,650,000 was payable to Sovereign Bank, and was secured by various personal guaranties. As part of a modification agreement, Jennifer and Joseph Tine executed a mortgage and a limited non-recourse guaranty. Sovereign Bank assigned the note and mortgage, as modified, to Jenzack Partners, LLC, which then sought to foreclose the mortgage secured by the guaranty. At trial, the Tines argued that the lender had no standing to foreclose the mortgage secured by the limited guaranty because that guaranty was not expressly assigned to the plaintiff. The trial court rejected this argument, and entered a judgment of foreclosure for the plaintiff.

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59. *Second Exeter Corp. v. Epstein*, 5 Conn. App. 427 (1985).
60. *Jenzack Partners, LLC v. Stoneridge Associates, LLC*, 183 Conn. App. 128 (2018).

The guarantors filed an appeal, arguing that the plaintiff lacked standing to foreclose the mortgage.

In a case of first impression, the Appellate Court affirmed, relying on the Restatement (Third) of Suretyship and Guaranty § 13, which provides that when an obligee assigns its rights under an obligation, that assignment operates as an assignment of any secondary obligations attached to the primary obligation. The court also quoted comment (f):

> A secondary obligation, like a security interest, has value only as an adjunct to an underlying obligation. It can usually be assumed that a person assigning an underlying obligation intends to assign along with it any secondary obligation supporting it. Thus, unless there is an agreement to the contrary or assignment is prohibited pursuant to subsection (1), assignment of the underlying obligation also assigns the secondary obligation.[61]

The Appellate Court then held that the assignment of the note also operated as an assignment of the secondary obligation, the limited guaranty. The guarantors further argued that because there was no specific mention of the limited guaranty in the allonge assigning the note, the guaranty was not assigned. The court also rejected this argument, relying on *Lemon v. Strong*, 59 Conn. 448 (1890), which held that a guaranty can be equitably assigned if it was intended to be included with a note. The Appellate Court then looked to the surrounding circumstances, and determined that the secured guaranty was intended to be assigned with the note, because the note had no value without the guaranty.

1-1:1.2 Determining the Proper Defendants

On the defendant's side, the original makers of the mortgage note should be identified and compared to the identity of the owners who executed the mortgage deed. Certain makers may have had no interest in the realty given as security and thus may not have executed the mortgage deed. Yet, in almost all instances these parties will be cited as defendants with respect to a possible

61. Restatement (Third) of Suretyship and Guaranty § 13 cmt. f.

deficiency judgment.[62] Additionally, the lender may have agreed to a mortgage assumption, in which case an instrument to that effect is, one hopes, to be found in the file. The lender may or may not have agreed to release the original maker at the time of the assumption. If not, then both the assuming party and the original maker are proper parties to the foreclosure. If, however, the original maker has been released and retains no interest in the premises, then that person is clearly not an appropriate party to the action.

1-1:1.3 The Property Description

The property description set out in the mortgage ought to be reviewed carefully for typographical errors or omissions. The deed to the borrower may not be available at this time, but a copy of that deed should be obtained and the property description compared to that appearing in the mortgage. If an error is discovered, it may be that the complaint for foreclosure will have to contain a second count seeking a reformation of the mortgage.[63]

In addition, the property description contained in the mortgage may no longer be the correct one to use in the foreclosure. The most common reason for the divergence is that the lender has partially released some of the originally mortgaged property. Another such situation can arise in a condominium context, where the mortgage precedes the declaration. Thereafter, the condominium is declared, and perhaps some units have been sold. In either of these examples, it is not correct to continue to utilize the original mortgage description; rather, a new description of the mortgaged property should be prepared for the complaint, clearly describing only the remaining property. In a condominium, such a revised description might consist of both declared but unsold units, as well as reserved development rights to create additional units.

1-1:1.3a Unapproved Subdivision

Occasionally, a mortgage may be secured by lots in an unapproved subdivision. Usually, the parties anticipate that the approval will be obtained shortly after the mortgage is placed,

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62. *See* Conn. Gen. Stat. §§ 49-1 and 49-14, and the discussion in Chapter 5, § 5-3:1.3 and Chapter 10, § 10-5.

63. *See* Chapter 5, § 5-7.

but for whatever reason the subdivision is never approved. If the mortgage subsequently goes into default and the lender elects to foreclose, a question can arise as to the status of the mortgage. Has the lack of subdivision approval invalidated the mortgage, so that it cannot be foreclosed without the owner—or the lender—first obtaining the needed approval?

Just such an issue arose in *ARS Investors II 2012-1 HVB, LLC v. Crystal, LLC*,[64] where the lender sought to foreclose a mortgage secured by two lots that had never been submitted for resubdivision approval. The defendant claimed that the plaintiff's mortgage was invalid, and that, before being allowed to foreclose, the plaintiff first needed to seek reformation of the mortgage to have the lot boundaries conform to those appearing on the original subdivision map.

The trial court did not accept that argument, ruling the "[t]he fact that the land described in the mortgage deed may not constitute a legal lot under local zoning regulations is not relevant to the plaintiff's right to foreclose. The court is unaware of any legal precedent [that] bars the holder of an otherwise valid mortgage from foreclosing on land [that] is not in compliance with local zoning regulations."

In upholding the trial court's ruling, the Supreme Court noted that Conn. Gen. Stat. § 8-25 "does not prohibit the mortgaging of parcels in an unapproved subdivision or prevent the court from ordering a foreclosure of those parcels." Although the Court then went on to agree with the defendant's claim that Subsection (a) of the statute does render an unapproved subdivision void, it went on to disagree with the claim that "this nullification applies beyond the context of municipal zoning purposes to also preclude the transfer of ownership in an unapproved subdivision. As a general matter, the zoning statutes and municipal zoning regulations govern the use of property, but do not prevent its transfer to a new owner."

In further support of its conclusion, the Court also took note of another statute, § 47-36aa, commonly known as the "validating act." One of the statute's provisions, Subsection (b)(4), validates a situation where "the instrument conveys an interest in a lot or

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64. *ARS Inv'rs II 2012-1 HVB, LLC v. Crystal, LLC*, 324 Conn. 680 (2017).

parcel of land in a subdivision that was not submitted for approval or that was submitted for approval but was not approved . . . ."

1-1:1.4 Other Loan Documents

Other loan documents in addition to the note and deed may exist. Perhaps the lender insisted on a guaranty, in which event the guarantors are likely to become parties to the foreclosure as potentially liable for a deficiency judgment. It may be that the lender had earlier obtained a guaranty of a continuing nature; although such document may not be contemporaneous with the loan at issue, nonetheless the guarantor may be liable on this debt.

In cases of rental or commercial property, the lender may have obtained collateral assignments of leases and rentals, or a financing statement. In the former instance, a question arises as to the best way to address the collection of rents.[65] If certain personal property was pledged as security for the same debt as was secured by the mortgage, repossession must also be considered, as well as the effect this action will have on the mortgage debt.

1-1:1.5 Verifying the Default and the Debt

Counsel must become familiar with the basis for the default giving rise to the foreclosure. In the great majority of cases, nonpayment is the cause of the default. Counsel should have all pertinent information about the missed payments, the current debt, as well as the status and application of any escrow moneys held by the lender. The default may have occurred, however, by virtue of other covenants in the mortgage, such as nonpayment of taxes or insurance, or the commission of waste on the mortgaged premises. Then again, the default may arise by virtue of a cross-default provision in some other loan of the same borrower. Whatever the nature of the default, counsel should be clear that the lender has a well-documented file to back up its claims, or should be advised that a lack of adequate supportive material may jeopardize the foreclosure.

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65. *See* Chapter 11.

1-1:1.6 Addressing Defective Instruments

A review of the loan documents may disclose any number of defects that were overlooked at the time of closing: the mortgage may have an incorrect property description, or perhaps it was executed by only one of two owners, or errors may have been committed during the recording process. Such errors need to be corrected before the foreclosure proceeds to judgment, and so it may become advisable to add a second count to the foreclosure complaint, such as one seeking a reformation of the mortgage. Once judgment enters on that count, then the matter can proceed to a foreclosure of the mortgage as reformed.

Connecticut National Bank v. Lorenzato[66] presented a situation in which a mortgagee had inadvertently recorded an unsigned copy of the mortgage, although the original had been properly executed. Recorded along with the copy of the mortgage was a properly executed mortgage rider. Thereafter, a creditor recorded a judgment lien. Three weeks later, the mortgagee recorded the original mortgage. Upon foreclosure of the mortgage, the lien creditor asserted that it was entitled to priority over the mortgagee, alleging that the recording statute made the recording of the defective mortgage a nullity. While acknowledging that Connecticut case law has consistently held that the recording of a defectively executed instrument does not give constructive notice to third persons, the Supreme Court also noted a line of cases, notably *Dart & Bogue v. Slosberg*,[67] wherein the effectiveness of a recorded mortgage has been upheld to give constructive notice of its provisions, so long as the recorded instrument sufficiently discloses the real nature of the transaction to enable third parties, exercising common prudence and ordinary diligence, to ascertain the extent of the encumbrance.

Recognizing the tension between these lines of cases, the *Lorenzato* court sought to reconcile the issues, *Lorenzato* at 82, by noting that:

> [t]here is a principled distinction between a mortgage deed that is imperfectly executed and one that is imperfectly recorded. The former is a nullity and is, therefore, incapable of giving constructive

66. *Connecticut National Bank v. Lorenzato*, 221 Conn. 77 (1992).
67. *Dart & Bogue v. Slosberg*, 202 Conn. 566 (1987).

> notice; the latter affords constructive notice to subsequent third party creditors to the extent that the mortgage, as recorded, contains sufficient information to put a title searcher on inquiry.

Stressing that the rider recorded along with the mortgage had been properly executed, the court concluded that was sufficient to put a title searcher on inquiry notice, and consequently the court upheld the priority of the mortgage.

Obviously, little can be done at the time of foreclosure to correct a recording defect, and not every lender can hope to be as fortunate as was Connecticut National Bank in the *Lorenzato* decision. Curiously, the biennial Validating Acts did not figure in the case beyond a footnote indicating that the most recent Act was not dispositive of the issues before the court. The lack of relevance of the Act was attributable to two factors: first, the plaintiff never asserted any claim under the Act; and second, the Act did not validate a defect if that defect had been raised as an issue in any litigation begun before the effective date of the particular Special Act. In 2000, the need for biennial validating acts vanished when Public Act 93-17 became effective, since that public act operated to make most of the earlier special acts' provisions a part of the state's permanent statutory law. The validating provision discussed in *Lorenzato*, for instance, has now been codified as Connecticut General Statutes § 47-36aa, which provides that any deed, mortgage, lease, power of attorney, release, assignment or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in Connecticut recorded after January 1, 1997, is valid even if there are technical defects in the conveyance, unless an action challenging the validity of that instrument is commenced and a notice of *lis pendens* is recorded within two years after the instrument is recorded. Connecticut General Statutes § 47-36aa does not cure all defects in a conveyance. If the conveyance at issue is not specifically validated by the act, it may become necessary to engage in efforts to cure the defect to avoid defenses and claims involving the instruments.

In *Wells Fargo Bank, N.A. v. Fratarcangeli*,[68] the mortgage being foreclosed suffered from a defect in the manner of execution. The

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68. *Wells Fargo Bank, N.A. v. Fratarcangeli*, 192 Conn. App. 159 (2019).

facts of the case disclose that the loan was closed in 2005 by a notary at the residence of the borrower. Although the borrower signed the mortgage deed at that time, the notary did not complete the attestation, nor did she sign as a witness, until she returned to her own home. Further, at that time the notary's husband signed the mortgage as the second required witness. The plaintiff did not initiate a foreclosure until 2015, and at no time prior to that date did the defendant challenge the validity of the mortgage. In the course of the foreclosure, however, the defendant raised special defenses challenging the validity of the mortgage and claiming that the plaintiff's unclean hands should preclude a foreclosure.

The trial court granted the plaintiff's motion to strike the special defenses, based on the plain language of Subsection (a)(2) of Section 47-36aa of the Connecticut General Statutes, familiarly known as the "Validating Act." That provision states that any instrument attested by one witness only or by no witnesses is "valid as if it had been executed without the defect or omission" unless an action challenging the validity of the mortgage is commenced within two years of the date of recording and a notice of *lis pendens* is also recorded within that time frame. Since none of that occurred during the statutory period, the court ruled that the mortgage had been validated and that the defenses did not lie. The Appellate Court agreed with that ruling, and also discounted the defendant's claim that the notary's act of fraud should somehow negate the effect of the Validating Act. Nothing in the Act, the Court observed, gives credence to such a claim; if the legislature intended to include an exception for fraud in the Act, it knew full well how to do so.

While the Validating Act came to the plaintiff's rescue in *Fratarcangeli,* such a result may not always come to the fore, particularly if the foreclosure is commenced early enough within the two-year limitation period to enable the defendant to raise the invalidity of the mortgage as a defense and file a counterclaim challenging the validity of the mortgage, as required by the statute. But it is important to note that an improperly witnessed mortgage is nonetheless valid as between the parties, so the defense ultimately may be to no avail, at least as to the borrower. Another party, however, such as a subsequent encumbrancer, may well be in a position to gain advantage by raising the claim of invalidity.

Finally, the Appellate Court noted that the Validating Act operates only to make the mortgage valid despite the missing witness; it does not validate the act of the witness who effectively made a false statement by signing in the absence of the mortgagor. There may well be criminal sanctions for his actions (although the statute of limitations may come into play in connection with such liability.)

1-1:1.7 Reviewing Incidental Documentation

Reviewing the manner and method of the loan origination also may be a worthwhile exercise, since it may avoid or decrease instances in which defenses and counterclaims may successfully be raised. A review of the origination file often can disclose inflated appraisals, underwriting defects such as an absence of truth in lending disclosures, RESPA violations and the lender's knowledge at the time of the closing about the borrower and the nature of the transaction. As correspondent lending and the use of mortgage brokers funding loans on warehouse lines of credit has increased, many quality control measures have decreased. Counsel foreclosing such loans may be engaging in the most in depth review of the loan since it closed. This provides an opportunity to advise the current holder or the originating lender of the problems it may face in enforcing the loan. If origination issues are identified, efforts can be made to have the loan repurchased by the originating lender. Fannie Mae and Freddie Mac often require loans to be repurchased when the loan was originated in a fraudulent or improper manner.

In the event a comparison of the foreclosure appraisal to the origination appraisal discloses a large discrepancy in the value of the collateral, investigation may reveal that an inflated appraisal was used for the origination of the loan. The Connecticut Department of Consumer Protection regulates residential real estate appraisers and should be advised of appraisal practices which appear to be substandard. The Department of Consumer Protection has the power to investigate such issues and has the power of license revocation. It may be that a review of the prior deeds conveying title reveals that the premises have been sold repeatedly in short intervals, each such occurrence commonly referred to as a "flip." If a larger loan was obtained each time, counsel may have uncovered a fraudulent scheme commonly known as a flip scheme. Although

grounds may exist for civil claims, attention also needs to be given to some federal statutes as well, such as mail and wire fraud.[69] Flip schemes typically involve mortgage brokers who orchestrate the transaction by having an appraiser meet a particular value, which in turn will support a loan-to-value ratio that on its face meets a lender's underwriting requirements. The Consumer Credit Division of the Connecticut Department of Banking licenses and regulates non-depository first and second mortgage brokers under Connecticut General Statutes § 36a-485, *et seq*. Their web site may be accessed at www.state.ct.us/dob. In addition to civil penalties and license revocation, the power to disgorge exists under Connecticut General Statutes § 36a-50, permitting disgorgement of monies derived in an unfair trade practice.

1-1:1.8 Tenants' Rights

New federal legislation, Public Act 111-22, "The Protecting Tenants at Foreclosure Act of 2009," was approved on May 20, 2009, as part of the Helping Families Save Their Homes Act of 2009, and provides enhanced rights to tenants in properties that have gone through foreclosure.[70]

1-1:1.9 Mortgage Securing Contractual Obligation

Although the vast majority of mortgages secure monetary obligations, such as notes, guaranties, letter of credit reimbursement agreements, revolving line of credit agreements, and other such financing devices, occasionally a mortgage is given to secure a promise, such as an obligation to convey property. The appropriateness of a mortgage securing such an obligation has long been recognized; a Connecticut case has reaffirmed the validity of such mortgages, and in so doing provided useful guidelines for the attorney facing the prospect of foreclosing a mortgage of this type. *Devlin v. Wiener*[71] involved the foreclosure of a mortgage that secured an obligation to transfer certain properties to the plaintiff mortgagee. The plaintiff had sold property to the defendant's predecessor in title, and had taken back this mortgage in partial

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69. 18 U.S.C. § 1341; 18 U.S.C. § 1343.
70. *See* a complete discussion of the Act in Chapter 10, § 10-4:1.
71. *Devlin v. Wiener*, 232 Conn. 550 (1995).

payment. The defendant raised a number of defenses to the foreclosure, including a claim that the mortgage was unenforceable against her since she was not a party to the underlying agreement, and that the mortgage was too indefinite as to time for performance, subject matter and method of performance. The Supreme Court found none of these defenses compelling, basing its decision in large part on *Dart & Bogue v. Slosberg.*[72] This seminal case discusses the essential elements of a mortgage in Connecticut, in particular the requirement that the underlying agreement contain a sufficiently definite obligation, whether that obligation be for the payment of a specific dollar amount or for the performance of some act. After a discussion of certain provisions of the agreement that described with particularity the terms of the obligation to convey property, the court concluded that the agreement was sufficiently definite, in that it outlined three alternative forms of transfer that would satisfy the obligation. Additionally, the mortgage was given to secure an obligation that the parties expressly agreed had a value of $84,000. All of these aspects of the underlying agreement prompted the court to uphold the validity of the mortgage.[73]

Counsel faced with a foreclosure of a mortgage securing this type of non-financial obligation should bear in mind both the elements required to establish validity as well as the peculiarities of proving the debt in such a case.

1-1:1.10 Prior Litigation History of the Mortgage

Although the need for review of the mortgage documents is critical, as discussed above, the possible prior litigation history of the loan also warrants inquiry. The advisability of such a review was aptly demonstrated in *Rosenfield v. Cymbala.*[74] Here, the defendant was successful in asserting that the doctrine of *res judicata* should preclude a foreclosure of the plaintiff's mortgage. Obviously, for this situation to arise there had to have been a prior attempted foreclosure, and, from the facts of that action as set out in the following passage, *Rosenfield* at 92, it must have been a sight to behold:

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72. *Dart & Bogue v. Slosberg*, 202 Conn. 566 (1987).
73. *Devlin v. Wiener*, 232 Conn. 550 (1995).
74. *Rosenfield v. Cymbala*, 43 Conn. App. 83 (1996).

> Upon the conclusion of the plaintiff's case in the prior action, the trial court found that the plaintiff failed to establish that consideration for the note and mortgage deed was given by plaintiff's assignor . . . to the defendant. The trial court also determined that the plaintiff failed to produce any evidence as to an appraisal of the mortgaged property or its current market value. Furthermore, the plaintiff did not present evidence of "any default of payment or of other terms of the note nor the amount of any alleged debt presently due and owing from the plaintiff to anyone who has an interest in [the] underlying note."

At the conclusion of the plaintiff's case (such as it was), the court entered a judgment of dismissal under Practice Book § 15-8 (previously § 302) for failure to make out a prima facie case. Thus, the issue in the second action was whether that prior judgment was in fact a judgment on the merits, so that *res judicata* could properly be invoked as a defense. The Appellate Court noted in *Rosenfield* at 88, that "[t]here is no statute or rule of practice that expressly determined whether a judgment of dismissal pursuant to [§ 15-8] operates as *res judicata* precluding subsequent litigation of the same cause of action."

The court also noted that, prior to the 1978 Practice Book amendments, P.B. § 278 of the 1963 Practice Book (now § 14-22) permitted a court to enter a judgment "as in case of a nonsuit" for failure to make out a prima facie case. It is clear that judgments entered under the old rule did not preclude a second action, because the judgment "as in case of a nonsuit" was not a judgment on the merits. The court concluded, however, that the change in language was a substantive one, warranting a different result:

> The prior action was not disposed of by way of a disciplinary nonsuit or a dismissal for failure to prosecute with due diligence, but, rather, the trial court rendered a judgment of dismissal after the plaintiff had an opportunity to give his case his "best shot." It is a judgment that is every bit as worthy of res judicata as is a judgment by default.

Although the procedure followed by the plaintiff in trying the first foreclosure in *Rosenfield* is not likely to be repeated on a regular basis, the possibility exists that more than one mortgage foreclosure has met its fate in a dismissal under Practice Book § 15-8. Accordingly, the case presents a worthwhile lesson not only for counsel about to embark on a foreclosure, but also for prospective purchasers of mortgages, who may otherwise later discover to their dismay that an acquired mortgage is incapable of being foreclosed.

A discussion of *res judicata* occurred in *U.S. Bank, N.A., Trustee v. Foote*,[75] where an earlier attempted foreclosure of the same mortgage ended in a dismissal because the plaintiff was unable to establish to the trial court's satisfaction that it was the holder of the note at the time the action was commenced. The trial court ruled that *res judicata* and collateral estoppel did not apply, and consequently denied the defendant's motion for summary judgment. In upholding the trial court ruling, the appellate court agreed that the dismissal of the prior action was not a judgment on the merits, and consequently did not give rise to a claim of *res judicata.*

Of particular interest is the discussion, in footnote 7 of the decision, of how the ruling in *Rosenfield v. Cymbala* is distinguishable from the circumstances arising in *Foote.* The footnote is brief enough to be included *verbatim*:

> We note that in support of her position that the action is barred by res judicata, the defendant principally relies on this court's decision in *Rosenfield v. Cymbala*, 43 Conn. App. 83, 681 A.2d 999 (1996). The defendant's reliance on that case, however, is misguided. In Rosenfield, this court affirmed the trial court's decision to render the summary judgment sought by the defendant against the plaintiffs on the basis that the foreclosure action was barred by res judicata. The prior judgment in that case, however, dismissed the plaintiff's action because the plaintiff had failed to make out a prima facie case for foreclosure. Id.,

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75. *U.S. Bank, N.A., Trustee v. Foote*, 151 Conn. App. 620 (2014), *cert. denied*, 314 Conn. 930 (2014).

> 84-85. It was not dismissed merely because the plaintiff failed to satisfy its evidentiary burden that it was in possession of the note at the time the action commenced, as in the present case.
>
> In Rosenfield, this court observed that in the prior action, "the trial court found that the plaintiff failed to establish that consideration for the note and mortgage deed was given by the plaintiff's assignor . . . to the defendant. The trial court also determined that the plaintiff failed to produce any evidence as to an appraisal of the mortgaged property or its current market value. Furthermore, the plaintiff did not present evidence of any default of payment . . . nor the amount of any alleged debt presently due and owing from the plaintiff to anyone who had an interest in [the] underlying note . . . . Moreover . . . the trial court characterized the extent of the proceedings as a trial of the issues. The plaintiff had an opportunity to present his case as though the trial would go to conclusion." (Internal quotation marks omitted.) Id., 92. In the present action, the prior judgment was decided solely on the ground of standing, and, specifically, the issue of whether the plaintiff had established its possession of the note at the relevant time. Therefore, it was not a final judgment on the merits.[76]

1-1:1.11 "Bad-boy" Carve Outs

Commercial loan documents often contain language that makes a non-recourse obligation subject to full recourse in the event either the borrower or the owner of the equity of redemption engages in certain types of bad acts, commonly referred to as the "bad boy carve outs." In 2007, the District Court of Massachusetts held that the act of a borrower in settling his zoning appeal by receipt of a $2 million payment from an abutting landowner, in exchange for

[76] *U.S. Bank, N.A., Trustee v. Foote*, 151 Conn. App. 620, 628 n.7 (2014), *cert. denied*, 314 Conn. 930 (2014).

withdrawal of the appeal, constituted a violation of the covenants in the mortgage because of the borrower's failure to obtain the consent of the lender prior to settling the claim. The borrower's failure to notify the lender and obtain its consent resulted in the entire loan becoming full recourse as to all borrowers and guarantors.[77]

A New York court has held that a springing recourse event in commercial loan documents is enforceable and is not a liquidated damages provision. In *G3-Purves St., LLC v. Thompson Purves, LLC*,[78] the loan documents provided that the borrower was required to avoid allowing liens or other encumbrances to be placed on the mortgaged property by paying real estate taxes and other charges when they became due. The loan was generally non-recourse; however, there were carve-outs for full recourse liability upon a triggering event, such as the imposition of a lien on the property. A guaranty was executed with the loan, which provided for absolute and unconditional liability when a springing recourse event occurred. After the borrower failed to pay real estate taxes, the lender accelerated the loan and sued the borrower and the guarantors, seeking full recourse liability based upon a triggering event under the guaranty. The guarantors argued in the trial court that the amount of the mortgage debt was grossly disproportionate to the tax lien, and therefore the springing recourse provision was an unenforceable liquidated damages provision. The trial court disagreed and entered summary judgment for the lender, and on appeal, the guarantors pressed their liquidated damages argument. The appellate court disagreed, noting that the loan was between sophisticated commercial parties and was clear and unambiguous. In addition, the court held as follows:

> Furthermore, the subject provision of the guaranty does not provide for liquidated damages, as the loan agreement only provides for the recovery of actual damages incurred by the lender, to wit, the debt remaining on the unpaid loan at the time of

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77. *Blue Hills Office Park, LLC v. J.P. Morgan Chase Bank*, 477 F. Supp. 2d 366 (D. Mass. 2007).

78. *G3-Purves St., LLC v. Thompson Purves, LLC,* 953 N.Y.S.2d 109 (2012).

> default, which is an amount fixed by the terms of the loan and is not speculative or incalculable.[79]

It is axiomatic that mortgage loans are contracts, which are to be enforced according to their terms. In *51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co., LLC*,[80] the lender made a $17 million mortgage loan to Chesterfield Development Co. secured by a shopping mall. A guaranty of the debt was executed by a principal of the LLC borrower. After foreclosing the collateral, a $12 million deficiency remained, and the lender argued that the springing recourse provisions of the loan documents imposed personal liability on Chesterfield and the guarantor. The lender argued that the loan documents imposed such liability based on terms which stated Chesterfield shall not "become insolvent or fail to pay its debts and liabilities from its assets as the same shall become due." The lender argued that the failure to make payments under the mortgage loan violated this provision, triggering full recourse liability for the deficiency. The borrower argued that this reading of the loan documents violated public policy, because it makes every commercial mortgage-backed securities (CMBS) transaction full recourse, when contrary provisions exist in the loan documents. The district court easily addressed this argument, noting that contracts are to be enforced based on their terms, and there was no ambiguity in the loan documents. The loan stated that the non-recourse provisions become null and void after a springing recourse event. The district court referred to the statutory definition of insolvent under the Michigan Uniform Fraudulent Transfer Act in reaching its conclusion in favor of the lender.

1-1:1.12 Federal Foreclosure Jurisdiction

Lenders relying on diversity jurisdiction under 28 U.S.C. § 1332 to commence a mortgage foreclosure in federal court can face hurdles, including dismissal, if the superior court has otherwise retained jurisdiction over the real property at issue. In a Connecticut district court case, *Credit Based Asset Servicing & Securitization, LLC v.*

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79. *G3-Purves St., LLC v. Thompson Purves, LLC*, 953 N.Y.S.2d 109, 114 (2012).

80. *51382 Gratiot Ave., Holdings, LLC v. Chesterfield Dev. Co., LLC*, 835 F. Supp. 2d 384 (2011).

Lichtenfels,[81] the plaintiff commenced a mortgage foreclosure based upon diversity of citizenship. At the time the suit was filed, the borrowers had a counterclaim pending in the superior court filed in response to a foreclosure action that was later dismissed for failure to comply with discovery. The counterclaim sought a declaratory ruling that the borrowers were not in default under the loan documents. Additionally, the borrowers had commenced a second state court action against the assignee lender, as well as the lender's law firm and the individual attorney who handled the original foreclosure. This second action alleged intentional and negligent infliction of emotional distress, libel and slander, slander of title, violation of the Fair Debt Collection Practices Act, and violation of the Connecticut Unfair Trade Practices Act.

The borrower filed a motion to dismiss the federal foreclosure, relying on the *Colorado River* abstention doctrine. The doctrine employs a six-factor test to assess whether the District Court should refrain from exercising jurisdiction over a claim, the six elements being: (1) assumption of jurisdiction over a res; (2) inconvenience of the federal forum; (3) avoidance of piecemeal litigation; (4) order in which the actions were filed; (5) the law that provides the rule of decision; and (6) protection of the federal plaintiff's rights.

The District Court (Thompson, J.) determined that although elements nos. 2 and 5 weighed in favor of retaining jurisdiction, all the others weighed in favor of abstention, particularly the first element - that of the state court's continuing jurisdiction over the res. Based on that assessment, the court granted the borrower's motion to dismiss. Noting that the state court counterclaim sought a declaratory judgment that the defendants were not in default under the mortgage, the court continued, "[s]uch a declaration by the state court would result in the *Lichtenfels* holding the Property free of claims in the consolidated state action and in this federal action that C-BASS has the right to foreclose on the Mortgage because the Lichtenfels are in default under the Note and the Mortgage. Thus, the state court has *quasi in rem* jurisdiction over the Property."

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81. *Credit Based Asset Servicing & Securitization, LLC v. Lichtenfels*, 658 F. Supp. 2d 355 (D. Conn. 2009).

The District Court's conclusion was based upon a presumption that a default under mortgage documents can only occur during one "snapshot" of time (i.e. a particular month). Obviously, a default very well may be based upon different facts at a subsequent time, which would have no bearing on the validity of a prior default. In addition, a "*quasi-in-rem*" action is one brought to apply the property to satisfy a personal claim.[82] *Quasi-in-rem* jurisdiction provides a means of obtaining some degree of jurisdiction over a defendant when *in personam* jurisdiction is not possible. With respect to the counterclaim, the defendant over whom jurisdiction needed to be obtained was the original lender/plaintiff, who would be hard pressed to assert that the court did not have *in personam* jurisdiction over it. Under these circumstances, it is difficult to appreciate why the court felt the need to resort to a discussion of *quasi-in-rem* jurisdiction as a basis for resolving the abstention issue.

For a more extensive discussion of federal court foreclosures, see Chapter 36, Foreclosures in Federal Court.

1-1:1.13 Special Status of Mortgages Securing Secondary Obligations

Many practitioners believed *Dart & Bogue*[83] aptly restated the rule of general applicability regarding the validity of mortgages in Connecticut, especially as between the actual parties to the transaction. That notion was resoundingly dispelled in *Naugatuck Savings Bank v. Fiorenzi*,[84] in which a mortgagor, whose mortgage secured a secondary obligation, successfully avoided the attempted enforcement of the mortgage on the ground that it failed to comply in all respects with the requirements for such mortgages set out in Connecticut General Statutes § 49-4b. That statute, the court noted, readily distinguished the *Fiorenzi* mortgage from the type of mortgage at issue in *Dart & Bogue.* There, the court had concluded that Connecticut General Statutes § 49-31b, in stating that a mortgage containing only the date, principal amount and maximum term of the note is sufficient to constitute a valid

82. *Hodge v. Hodge*, 178 Conn. 308, 313 (1979).
83. *Dart & Bogue*, 202 Conn. 566 (1987).
84. *Naugatuck Savings Bank v. Fiorenzi*, 232 Conn. 294 (1995).

lien, does not establish a minimum standards test for a valid mortgage, but rather merely operates as a safe harbor. The statute supplements, and does not supplant, the common law regarding the requirements for a valid mortgage.

A mortgage given under Connecticut General Statutes § 49-4b, the *Fiorenzi* court noted, is an altogether different type of instrument, in that it owes its very existence to legislative enactment. The court devotes the final six pages of its decision to an analysis of the several reasons supporting its conclusion that the requirements of Connecticut General Statutes § 49-4b are absolutely necessary for a mortgage to validly secure a secondary obligation.

Even before *Fiorenzi,* the lending community generally had been very cautious with mortgages coming within the purview of this statute, since exact compliance with its several requirements could become quite onerous. In particular, Subsection (d) set out the requirements for properly describing the secondary liability of the mortgagor, including:

> (3) the conditions, if any, which will cause the mortgagor to pay all or part of the loan constituting the underlying obligation; and (4) the conditions, if any, which will relieve the mortgagor of liability for all or any part of the loan constituting the underlying obligation.[85]

Counsel for lenders, perhaps anticipating a decision such as *Fiorenzi*, understandably had been reluctant to attempt to summarize these matters in the mortgage, preferring to take the safer route of incorporating the entire loan agreement or guaranty by reference, and recording the entire loan package on the land records, which would sometimes result in the recording of hundreds of additional pages.

Fortunately, in 1997 the legislature saw fit to reverse *Fiorenzi* by amending Connecticut General Statutes § 49-4b to make it clear that its provisions, as is the case with Connecticut General Statutes § 49-31b as interpreted in *Dart & Bogue*, do not set a minimum standard for a valid mortgage, but rather constitute a safe harbor for mortgages coming under the statute's purview.

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85. *Naugatuck Savings Bank v. Fiorenzi*, 232 Conn. 294, 296 n.1 (1995).

P.A. 97-320, Section 2, amended Subsection (a) of Connecticut General Statutes § 49-4b as follows:

> (a) If an open-end mortgage meets the requirements of this section, such mortgage shall BE DEEMED TO GIVE SUFFICIENT NOTICE OF THE NATURE OF THE OBLIGATION TO secure the obligation of any person who is secondarily liable for an open-end loan . . .

Subsection (c) of the statute was also amended to provide that:

> The loan constituting the underlying obligation for which the mortgagor is secondarily liable, which secondary liability is secured by such open-end mortgage, shall be described in such open-end mortgage deed. A description of such loan meets the requirements of this subsection if such open-end mortgage deed states: (1) The name and address of the person who is primarily liable for such loan; (2) that such underlying obligation specifically permits such advancements and, if applicable, that such advancements are made pursuant to a revolving loan agreement; (3) the full amount of the loan authorized; and (4) the [terms of repayment of such] MAXIMUM TERM OF THE loan.

The amendments to Connecticut General Statutes § 49-4b are meaningful not only for alleviating concerns about a mortgage's validity, but also for the significant savings borrowers will realize in recording fees. The amendment to Subsection (4) of Connecticut General Statutes § 49-4b(c), by changing the former requirement that the mortgage contain the "terms of repayment" of the loan to requiring that it state the loan's "maximum term," has eliminated the need for recording all of the collateral mortgage documents, a practice that in some transactions involved recording costs reaching into thousands of dollars.

Section (e) of Connecticut General Statutes § 49-4b has also been amended to revise the definition of the phrase "any person who is secondarily liable," as used in the Act. Under the prior definition such person "means any person who is secondarily liable

for or who is also liable for, or who has guaranteed or endorsed an open-end loan." The new definition is that such person "includes any person who has guaranteed or endorsed an open-end loan." The new definition broadens the definition by amending "means" to "includes," and also eliminates the prior circular definition. More significantly, however, the deletion of the reference to a person "who is also liable for" the loan eliminates the possibility that the statute could be interpreted as including one who is not secondarily, but rather primarily, liable on the loan.

Finally, the Act amends the statute by adding a new Subsection (f), which provides:

> Nothing in this section, as in effect both before and after the effective date of this act [July 10, 1997], invalidates any mortgage that would be valid without this section.

The concern behind this provision was that the Act could be argued to be a substantive, rather than a procedural, change in the law, so that mortgages in place before the effective date of the amendment could arguably still be bound by the limitations of the *Fiorenzi* interpretation of the statute. The addition of Subsection (f) appears to be a legislative effort at negating the effect of *Fiorenzi* on pre-amendment mortgages, by inserting the implication that such mortgages, even if not satisfying the stringent requirements of the prior statute, may still enjoy validity under the common law, most notably as expressed in *Dart & Bogue.*

1-1:1.14 Conflicts of Interest

Lawyers who elect to "cross the continental divide" between lender and borrower representation should review the decision in *Residential Credit Solutions, Inc. v. Ramirez*.[86] In that case, an associate attorney employed by a law firm representing an institutional lender participated in preparation for a mediation on behalf of the lender. The lawyer then elected to change law firms, and became newly employed with a firm representing the borrower. The associate attorney did not request a waiver of conflict prior

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[86] *Residential Credit Solutions, Inc. v. Ramirez*, No. CV096004361, 2010 WL 3960780 (Conn. Super. Sept. 3, 2010); *see Countrywide Home Loans Servicing, L.P. v. Jose Morales*, No. CV095029078, 2010 WL 3787821 (Conn. Super. Sept. 3, 2010).

to leaving the law firm, and no efforts were made by the new law firm to erect a "Chinese wall" to avoid ethical impropriety. The phrase "Chinese wall" is used to describe procedures employed by a law firm to avoid inadvertent disclosure of confidential information. Generally, there is a presumption of shared confidential information, which presumption must be overcome if the law firm is to avoid disqualification. Creation of a Chinese wall to avoid inadvertent disclosure of confidential information is the preferred method for overcoming the presumption, and is based upon a series of factors, including the size and structure of the law firm in question. Generally, the smaller the law firm, the higher the likelihood the presumption will not be overcome. The Court in *Ramirez* conducted a thorough review of the relevant case law from a number of states, and cited an Ohio opinion, *Kala v. Aluminum Smelting & Refining Co.*,[87] which employed a three part test in determining whether an attorney or law firm should be disqualified:

(1) Is there a substantial relationship between the matter at issue and the matter of the former firm's prior representation;

(2) If there is a substantial relationship between these matters, is the presumption of shared confidences with the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter; and

(3) If the attorney did have personal contact with or knowledge of the related matter, did the new law firm erect adequate and timely screens to rebut a presumption of shared confidences with the new firm so as to avoid imputed disqualification?

Another key factor cited in *Ramirez* is the time at which the Chinese wall is created. The Chinese wall is to be employed as soon as the event creating an issue of disqualification occurs. The longer it takes to create and implement the procedures designed to avoid confidential disclosure, the greater the likelihood that disqualification will occur.

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87. *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St. 3d 1 (1998).

In *Ramirez*, the associate attorney summarily began to represent the borrower in the very same case in which he had acted on behalf of the lender. No Chinese wall was created until after the issue of disqualification was raised in the pending case. The lender filed a motion to disqualify counsel for the borrower, which motion was granted, in part upon reliance on Rule 1.9 of the Rules of Professional Conduct, entitled "Duties to Former Clients," which provides, in part:

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

1-2 EXAMINATION OF TITLE

A fundamental step in the commencement of a foreclosure action is an examination of the land records to ascertain the status of title, because Practice Book § 10-69 requires a foreclosure complaint to set forth all encumbrances of record. Generally, only those encumbrancers whose interests are subsequent in right to that of the foreclosing party become defendants in the action, but the complaint must set forth all encumbrances, even those prior in right to that of the plaintiff. Although a complete search, such as would enable an attorney to issue a certificate of title or a title insurance policy, is not required, it is important to recognize the necessary scope of a foreclosure "bring down" of title. In all instances, it is inadequate and dangerous to use the mortgage or lien being foreclosed as the commencement point of the search; although doing so may be appropriate in cases in which a purchase money mortgage is being foreclosed, do not presume that any given mortgage falls within that category. A refinanced first mortgage, for instance, may be on a standard FNMA/FHLMC form and

may even be preceded by a deed, but that is an insufficient basis for not investigating further. It may be that the refinancing occurred in conjunction with some modification of the title, such as a transfer of an interest to a spouse. Clearly, such a title should be examined back to the original date of acquisition of the subject property by every mortgagor appearing of record on the mortgage being foreclosed.

In examining the title, take care to obtain all the information that ultimately will be necessary to comply with the requirements of Practice Book § 10-69 when drafting the complaint. The salient provisions of that rule are:

> All encumbrances of record upon the property both prior and subsequent to the encumbrance sought to be foreclosed, the dates of such encumbrances, the amount of each and the date when such encumbrance was recorded; if such encumbrance be a mechanic's lien, the date of commencement to perform services or furnish materials as therein recited; and if such encumbrance be a judgment lien, whether said judgment lien contains a reference to the previous attachment of the same premises in the same action, as provided by General Statute § 52-380a.

If the interest being foreclosed is a blanket mortgage, examine the title to all premises with extra care. In many instances, the blanket mortgage will have been given in conjunction with a purchase of one of the mortgaged parcels. The other property may have been owned by the mortgagor for some time, in which case the prior title should be carefully reviewed as to that piece. Similarly, if a search discloses a prior mortgage that appears to be secured by other properties, those additional parcels ought to be examined with a view to the possibility of seeking either marshaling or an equitable apportionment.[88]

Federal tax liens present the only exception to the general rule that title examinations need to date back to when the owner being foreclosed acquired title. Since federal tax liens attach to

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88. *See generally* Chapter 19 for a discussion of blanket mortgages.

after-acquired property, and since they generally enjoy a ten-year limitation period,[89] a diligent search should cover the ten-year period preceding the acquisition of title by the owner. Since federal tax liens are non-specific, they attach to all property of the taxpayer located within the recording area, i.e., the town. Therefore, do not be misled if a tax lien filed within the ten-year period states an address different from the property being foreclosed. Be assured that the lien will attach to all property of the taxpayer, regardless of which property is referenced in the lien.

Finally, the six-year limitation period for enforcing federal tax liens was extended to ten years in 1990.[90]

1-2:1 Granteeing the Mortgagor

In addition to searching the Grantor Index under the name of the mortgagor or current owner of the property being foreclosed, it is prudent to conduct the search in the Grantee Index as well. The main concern lies with appurtenant interests that may have been acquired by the mortgagor after the mortgage was given. Although it is generally recognized that appurtenances pass automatically with title to property being conveyed, even if the appurtenances are not specifically referenced in the deed (Connecticut General Statutes § 47-36*l*), it is not so commonly appreciated that post-mortgage appurtenances acquired by the owner may nonetheless pass to the mortgagee upon foreclosure. See *Gurevich v. Goldman.*[91] In that case, the mortgage's habendum clause contained the usual provision including the appurtenances in the conveyance, but that fact was not the determining factor in the court's decision. The court notes:

> An easement appurtenant to land, created or acquired by a mortgagor or his grantees subsequent to the execution of the mortgage on the dominant estate, passes under the mortgagee, although not specifically mentioned therein, and inures

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89. 26 U.S.C. § 6502.

90. Purchase money mortgages do get some protection from this rule. *See* the discussion at Connecticut Standards of Title, Standard 23.8. *See* 8.21.5.1.2 (04-20-2012) Collection Statute Expiration Date *available at* https://www.irs.gov/irm/part8/irm_08-021-005#idm140310058111936 (last visited Sept. 24, 2019).

91. *Gurevich v. Goldman*, 141 Conn. 281 (1954).

> to the benefit of the mortgagee and his grantees. [Citations omitted].[92]

This seemingly universal statement, however, is immediately qualified by the decision's next sentence:

> The granting clause in a mortgage includes not only the improvements, ways and easements upon or appurtenant to the property at the time but the easements that become *necessarily* appurtenant thereto upon the adjacent property of the grantor. A mortgagor adds to the realty, in favor of his grantee in a mortgage deed previously executed, the rights and privileges in his adjacent land *essential* to the enjoyment of the mortgaged premises. [Emphasis added.]

Thus, the mere fact that a mortgagor holds a post-mortgage appurtenant interest may not be sufficient to enable the mortgagee to acquire that interest in the foreclosure; *Gurevich* appears to require an element of necessity in order for the appurtenance to become encumbered by the mortgage. Since the issue of whether a particular after-acquired appurtenance is necessary to the enjoyment of the mortgaged property ultimately is one to be decided by the court, counsel encountering such a situation should set out appropriate allegations in the complaint to establish the plaintiff's claim, and should be certain that the judgment be explicit in finding that the appurtenance passes to the plaintiff, to a redeeming subsequent encumbrancer, or to a successful purchaser at a foreclosure sale.

1-2:2 Incidental Searches

1-2:2.1 Municipal Tax Liens

The tax status of the property should be reviewed, since the absence of a recorded municipal tax lien cannot be relied on to establish that there are no past due taxes. Municipal taxes enjoy an absolute priority over all encumbrances, so a municipality is never a proper party to any foreclosure of a mortgage or lien, at

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92. *Gurevich v. Goldman*, 141 Conn. 281, 286 (1954).

least where its interest is limited to delinquent real property taxes. The same rule may not apply, however, in the case of blight liens, as one Superior Court Judge has ruled that a mortgage recorded prior to July 1, 1997 has priority over a municipal blight lien.[93] It is important to note, however, that this opinion simply indicates what Connecticut General Statutes § 7-148aa already states: that blight liens have priority over other liens filed after July 1, 1997.

1-2:2.2 Succession or Estate Tax Liens

If the land records disclose, or if counsel is otherwise aware, that the owner is deceased, then a search of the probate files is in order. The lien of the State of Connecticut for succession or estate taxes arises at the moment of death, without any requirement of recording, and consequently the state should be cited as a party with respect to that interest.[94] Additionally, the decedent's heirs and representatives may have to be named as defendants.[95]

1-2:2.3 Bankruptcy Searches

A search of the bankruptcy court files is probably good form in all cases, but certainly it is seldom undertaken unless circumstances are such that there is a real concern about the possibility of bankruptcy. The threshold problem is that a relevant bankruptcy filing could have taken place in any bankruptcy court in the country, and not merely the court in proximity to the subject property. If the record title discloses an inordinate number of liens, and especially if one or more notices of *lis pendens* appear giving notice of foreclosure proceedings, the chances are good that the debtor already may have sought the protection of the bankruptcy laws. A check with the Connecticut bankruptcy courts under such circumstances is imperative.[96] These records are accessible on the internet at www.ctb.uscourts.gov, although an account needs to be established, since a use charge is imposed for accessing the site.

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93. *City of Derby v. Zaim Murtishi*, No. CV01073220S, 2002 WL 31875344 (Conn. Super. Dec. 2, 2002).

94. *See* discussion in Chapter 5, § 5-3:2.9.

95. *See* discussion in Chapter 5, § 5-3:1.1.

96. *See* Chapter 23 for a discussion of the bankruptcy aspects of foreclosures.

1-3 THE NOTICE OF LIS PENDENS ACT

After the Supreme Court ruled in *Kukanskis v. Griffith*[97] that Connecticut's notice of *lis pendens* statute was unconstitutional on due process grounds, Public Act 81-8 was enacted to remedy the constitutional defects of the old statute. Essentially, the scope of actions "intended to affect real estate" is specifically defined within the statutory context. Three types of actions come within the scope of the amended statute: first, actions whose object and purpose are to try title or determine the rights of the parties in the subject property; second, actions enforcing previously acquired interests in the property (e.g. foreclosures); and third, actions possibly affecting title to the property, although their main purpose may be otherwise.[98]

1-3:1 Service of the Notice of Lis Pendens

Connecticut General Statutes § 52-325(c) sets forth the substantive legislative response to the constitutional deficiencies addressed in *Kukanskis*. As originally drafted, the notice of *lis pendens* was invalid unless the recording party caused a true and attested copy of the recorded notice of *lis pendens* to be served upon the owner or owners within thirty days following the date of recording. The requirement for service of the notice of *lis pendens* in a foreclosure action was significantly modified, however, with the passage of Public Act 05-247, which amended Subsection (c) of Connecticut General Statutes § 52-325 to eliminate the former requirement of serving an owner with a copy of the notice of *lis pendens*. The Act now provides (*deletions* are bracketed; *additions* are underlined):

> (c) Notwithstanding the provisions of subsection (a) of this section, <u>in any action except a suit to foreclose a mortgage or other lien</u>, no recorded notice of lis pendens shall be valid or constitute constructive notice thereof unless the party recording such notice, not later than thirty days

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97. *Kukanskis v. Griffith*, 180 Conn. 501 (1980).

98. Conn. Gen. Stat. § 52-325(b). A model form of notice of *lis pendens* appears as Form 6-027. *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material a model form of notice of *lis pendens* appears as Form 6-027.

> after such recording, serves a true and attested copy of the recorded notice of lis pendens upon the owner of record of the property affected thereby. The notice shall be served upon the owner, if [he] the owner resides in the same town in which the real property is located, by any proper officer or indifferent person, by leaving a true and attested copy of such recorded notice with [him] the owner or at [his] the owner's usual place of abode. If the property owner does not reside in such town, such copy may be served by any proper officer or indifferent person, by mailing such copy, by registered or certified mail, to the owner at the place where [he] the owner resides. If such copy is returned unclaimed, notice to such property owner shall be given by publication in accordance with the provisions of section 1-2. If the property owner is a nonresident individual [,] or foreign partnership, or [his or its] the executor or administrator of the nonresident individual or foreign partnership, the notice may be served upon the Secretary of the State as provided in subsection (c) of section 52-59b and if the property owner is a foreign corporation, the notice may be served as provided in section 33-519 or 33-929. When there are two or more property owners of record, a true and attested copy of such recorded notice shall be so served on each property owner. A certified copy of the recorded notice of lis pendens, with the return of the person who served it, endorsed thereon, shall be returned to the party who recorded [such] the notice who shall file a copy of the return with the clerk of the court in which the action is brought. The clerk shall include the copy in the record.

This amendment was motivated by the Connecticut Bar Association's 2005 adoption of new Standards of Title regarding the notice of *lis pendens*. Those new provisions, Standards 5.1 and 19.1, concluded that a title examiner could not pass over a post-*lis pendens* interest without verifying that the notice of *lis pendens* was

valid. Since the validity of the notice was dependent on its proper service upon the owner, the title examiner was required to verify service before concluding that the post-*lis pendens* interest was in fact extinguished. The problem was compounded by the fact that the prior version of the statute required return of service of the notice to the plaintiff's attorney, not to the court.

Although the requirements of Standards 5.1 and 19.1 were simply following existing law regarding the circumstances under which the notice of *lis pendens* extinguished a subsequent interest, admittedly the task of complying with existing law was burdensome in requiring inquiry beyond the public records. The new amendments to the statute are efficacious, since in a foreclosure the validity of a notice of *lis pendens* is no longer dependent on its proper service on the owner.

Prior editions of this treatise stated that it was still necessary to comply with the last sentence of Subsection (c), as amended by P.A. 05-247, requiring a copy of the return of the recorded notice of *lis pendens* to be filed with the court. That statement was in error, since it is clear from the amendment that the limiting language of the first sentence, "in any action except a suit to foreclose a mortgage or other lien" applies to the entirety of Subsection (c), and not just to its first sentence. Thus, a correct statement of the law as it now stands is that, in a foreclosure, no service of the notice of *lis pendens* is required, and nothing needs to be filed with the clerk of the court to evidence the recording of the notice on the land records. Nonetheless, a plaintiff may find it advantageous to make reference in the complaint to the recording of the notice of *lis pendens* in order to substantiate the expense of recording as an element of costs in its Bill of Costs.

In the summer of 2009, the Harford Courant printed a series of articles exposing the practice of marshals in Hartford County whereby they were ignoring the change in the law and were still serving the notice of *lis pendens*, in many cases not just on the owner, as previously was required by statute, but on all of the defendants as well. Additionally, many marshals were charging for serving the notice of *lis pendens* as a separate and distinct service of process, not simply as incidental copies attached to the foreclosure complaint. The newspaper articles caused a sufficient uproar that the chairman of the State Marshal Commission

sought and obtained an official Attorney General Opinion on the issue. Opinion 2009-009 was published September 21, 2009 and reaffirmed the inappropriateness of the marshals' activities in this regard.[99]

1-3:2 Challenging the Notice of Lis Pendens

Connecticut General Statutes § 52-325a provides a procedural framework whereby any owner of the subject property may challenge the validity of the recorded notice of *lis pendens*. Forms are set out in the statute for an Application for Discharge of Notice of Lis Pendens, Order and Summons. Subsection (c) of Connecticut General Statutes § 52-325a permits the filing of a motion to discharge the notice of *lis pendens* in cases in which the action has been returned to court and is pending. In light of the amendment deleting the requirement of service of the notice of *lis pendens* in foreclosure actions, the principal ground for challenging the notice has been eliminated; nonetheless, it must be admitted that a defendant intent on buying time could still challenge the notice on the remaining statutory grounds, if they apply, and the desired delay of the proceedings would be achieved, since the statute mandates a hearing on the motion before the action in chief can proceed.

Once the owner has filed either an application or motion to discharge the notice of *lis pendens*, the plaintiff is required to establish that there is probable cause to sustain the validity of the claim.[100] Under Connecticut General Statutes § 52-325c(b), the court's order, either denying the application or motion or discharging the notice of *lis pendens*, is appealable for a period of seven days following the order. No automatic stay arises by virtue of the filing of the appeal; an application must be filed during the appeal period. The stay becomes effective with the filing of the application and remains in effect until a decision is rendered. The court has the discretion to condition the stay upon the posting of a bond.

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[99] *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material. The Attorney General Opinion is included in the Appendix.

[100] Conn. Gen. Stat. § 52-325b.

Although Connecticut General Statutes § 52-325b grants standing to challenge the validity of the notice of *lis pendens* on the basis of probable cause only to the owner of the property, Connecticut General Statutes § 52-325d does allow any interested party to move for discharge under the following circumstances:

(1) a notice of lis pendens that is not intended to affect real property was recorded;

(2) the recorded notice does not contain the information required by subsection (a) of § 52-325;

(3) service of process or service of the certified copy of the notice of lis pendens was not made in accordance with statutory requirements;[101] or

(4) when for any other reason, the recorded notice of the lis pendens never became effective or has become of no effect.

At first impression, it would appear that Connecticut General Statutes § 52-325d operates to expand both the limited standing and basis afforded by Connecticut General Statutes § 52-325h for challenging the notice of *lis pendens*. Although probable cause is the sole issue permitted under the latter section and addresses the underlying cause of action, Connecticut General Statutes § 52-325d appears to allow a challenge by any party that is based on a defect in the *lis pendens*, in the manner of service, or "for any other reason," notwithstanding the fact that probable cause may exist regarding the action.

Testimony presented before the Judiciary Committee of the General Assembly makes it clear that Section 6 of the Act (Connecticut General Statutes § 52-325d) was not intended to expand the scope of possible challenges to the notice of *lis pendens*. (The new statute was written as a response to *Kukanskis*, faulting the old notice of *lis pendens* statute for its failure to provide the owner with an opportunity to be heard on the issue of probable cause.) Rather, Section 6 was added as a device to facilitate the discharge of a recorded notice of *lis pendens* in situations in which the document is still of record but lacks viability because

[101] Note that this requirement still applies to all appropriate actions except foreclosures.

of subsequent withdrawal, dismissal, or adverse decision in the action to which it relates. Prior to the new act, the only manner by which the notice of *lis pendens* could be released was by a separate petition brought pursuant to Connecticut General Statutes § 49-13. Section 6 expedites this process by permitting any interested party to proceed by motion made in the action to which the notice of *lis pendens* relates and to obtain a recordable order of discharge.

Although such may have been the limited intent of Section 6, it is certainly arguable that the language is sufficiently broad that it enables any party to challenge the notice of *lis pendens* in a still pending action.

The particular significance of the notice of *lis pendens* in mechanic's lien foreclosures was highlighted in *H.G. Bass Associates, Inc. v. Ethan Allen, Inc.*[102]

1-4 THE MORATORIUM ACT

Connecticut General Statutes §§ 49-31d through 49-31i, concerning protection from foreclosure for unemployed persons, require a lender foreclosing a first mortgage on residential property to give notice to the homeowner of the availability of the provisions of the act at the time the action is commenced.[103]

1-5 FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT

1-5:1 Notice of Default

The standard Fannie Mae/Freddie Mac single-family uniform mortgage contains a non-uniform covenant that controls notices to be given the borrower in the event of default. Prior to acceleration, the lender is required to give notice to the borrower specifying (a) the default, (b) the action required to cure the default, (c) a date, not less than 30 days from the date the notice is given to the borrower, by which the default must be cured, (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums covered by the mortgage and

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102. *H.G. Bass Associates, Inc. v. Ethan Allen, Inc.*, 26 Conn. App. 426 (1992). *See* the discussion in Chapter 15, § 15-2.1.

103. For a detailed analysis of the Act, *see* Chapter 17.

foreclosure of the property, and (e) informing the borrower of the right to reinstate after acceleration and the right to assert in court the non-existence of a default or any other defense of borrower to acceleration and foreclosure. If the default is not cured by the date specified in the notice, the lender is then entitled to accelerate the debt and foreclose the mortgage.

Since failure to provide the required notice can give rise to a viable defense to a foreclosure, counsel entrusted with a foreclosure must be certain that the notice, if the covenant is applicable, was properly given and that the period for curing the default has passed before suit is begun.

Two decisions have addressed the issue of the nature of the notice required under paragraph 22 of the mortgage covenants of the standard Fannie Mae/Freddie Mac mortgage, 1/01 edition. That paragraph requires the plaintiff, as a precondition to foreclosure, to notify the mortgagor, specifying (a) the default; (b) the actions he may take to cure the default; (c) a date, not less than 30 days from the date the notice is given to borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration and foreclosure or sale of the property. The provision further states that the mortgagee must inform the borrower of his "right to reinstate after acceleration and the right to assert in court the non-existence of a default or any other defense of Borrower to acceleration and foreclosure or sale."

In *Federal Home Loan Mortgage Corp. v. Bardinelli*,[104] the defendant admitted that the plaintiff had complied with these notice requirements, except for the one requiring that the notice specify a date, not less than 30 days from the date the notice is given, by which the default must be cured. The defendant claimed that the letter was ambiguous, in that the letter's statement "thirty days from the date of this letter" could be construed a number of different ways: It could refer to the date the letter was drafted, or the date it was postmarked, or even the date the defendant received it.

The trial court had no difficulty in concluding that the defendant's claim did not present a genuine issue of material fact, and granted

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104. *Federal Home Loan Mortg. Corp. v. Bardinelli*, 44 Conn. Supp. 86 (1995).

the plaintiff's motion for summary judgment. This case differed markedly, the court noted, from the situation in *Fortune Savings Bank v. Thibodeau*,[105] where the notice stated only "this is your thirty (30) day notice to reinstate your loan," without stating when the time period began to run. Here, the notice was clear and unequivocal, in that it started the period from "the date of this letter."

A different issue arose in *Citicorp Mortgage, Inc. v. Porto.*[106] Here, there was no question regarding the sufficiency of the notice. The defense was raised, however, that the plaintiff had provided notice to only one of the two mortgagors, who were married but who were separated when the notice was given. Only the wife received the notice, since the husband no longer resided at the address to which notice was to be given. A preliminary issue arose regarding an apparent discrepancy between the mortgage note and the deed: The mortgage deed stated that the mortgagee *shall* give notice of default, but the note indicated that the holder *may* send notice of acceleration upon default.

The plaintiff argued that the provision in the note should prevail, and that it had the option of giving or not giving the notice. The court refused to accept that position, concluding that the language in the note did not confer an option regarding the notice itself, but merely "indicates that acceleration is an optional remedy of the plaintiff to pursue upon default by the defendant."

Notwithstanding the plaintiff's failure to prevail on that issue, the court still held that the defendant husband's failure to receive notice did not impair the plaintiff's ability to foreclose. The reason for this conclusion lay in the nature of the joint tenancy by which the parties took and held title. The court relied primarily on this passage from 20 Am. Jur. 2d, Cotenancy and Joint Ownership § 113 (1995):

> While it appears that service of a notice upon one tenant in common is not usually regarded as binding upon the others, unless they are engaged in a common enterprise, the rule is different where

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105. *Fortune Savings Bank v. Thibodeau*, No. CV92-0330358, 1992 WL 360656 (Conn. Super. Nov. 17, 1992).

106. *Citicorp Mortgage, Inc. v. Porto*, 41 Conn. App. 598 (1996).

> the relation is that of a joint tenancy. In such a case, it is said that notice to one of them is binding upon all.

Two points warrant comment regarding this conclusion: First, the decision discusses only notices, and does not appear to extend to the type of notice known as service of process. It could hardly have been the intent of the court to abrogate each defendant's right to receive notice of the commencement of an action against him or her, merely because the defendants were joint tenants. Second, the decision does not address the issue of whether the rule is controlled by the tenancy at the time the mortgage is given, or the tenancy at the time the notice is given. What if the husband had unilaterally severed the joint tenancy, as is his right under Connecticut General Statutes § 47-14j, before the lender was required to give the notice?

In *Deutsche Bank National Trust Co., Trustee v. Ponger*,[107] the facts were similar to those presented in *Porto.* The divorced husband and wife were joint signatories on the mortgage deed, and only the wife resided at the mortgaged premises, where the notice was sent. However, the notice was addressed only to the husband. The defendant wife attempted to distinguish her case from *Porto* on a claim that, unlike that case, she had not signed the mortgage note. Since, however, the mortgage defined the defendant wife as a borrower, and since the mortgage required notice to the borrower as a condition precedent to foreclosure, she contended that the plaintiff was unable to prosecute its foreclosure.

The Appellate Court disagreed, relying on the same principle laid down in *Porto,* that since the two Pongers were identified in the mortgage as joint tenants, notice to one such joint tenants conveyed notice to both.

It is disappointing that the parties and the court did not use the facts in *Ponger* to address the issue, discussed above, regarding the effect of a dissolution decree—which generally severs a joint tenancy and converts it into a tenancy in common[108]—on the joint tenancy provision in the mortgage. Nowhere in these cases is there a discussion of the reasoning behind the "notice to one joint tenant is notice to all" rule; likely, the rule exists because of a presumption,

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107. *Deutsche Bank Nat'l Tr. Co., Tr. v. Ponger*, 191 Conn. App. 76 (2019).

108. *See* Conn. Gen. Stat. § 47-14g.

especially in spousal joint tenancies, that the joint tenant receiving a notice will inform the other. Such a presumption, however, does not carry over to divorced spouses: there is a good possibility that the spouses are not in communication and that the noticed spouse may not ever inform his or her former spouse of the notice. If in fact the rule need not take into consideration events arising post-mortgage, then perhaps the time is right to revisit the rule, either through case law or a revision of § 47-14g, to reduce the potential ill effects that a blind application of the joint tenancy rule may occasion.

The severe consequences of a lender's failure to comply strictly with the mortgage's contractual notice requirement were clearly demonstrated in *Aurora Loan Services, LLC v. Condron.*[109] Although testimony did establish that the lender had in fact sent the notice and that its contents were proper, a question arose as to the manner by which the notice was sent. The plaintiff acknowledged having sent the notice by means of certified mail. Section 15 of the mortgage, however, provided as follows: "[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." This meant, as the court noted, that a notice sent by first class mail was entitled to a presumption of delivery, whereas a notice sent by other means (such as certified mail) enjoyed no such presumption, and required proof of actual delivery.

The defendants testified that they never received the certified mail, and the plaintiff did not submit any evidence of actual receipt. The court concluded that sending the notice by certified mail, without proof of receipt, did not carry the same presumption of actual delivery as did first class mail, and that certified mail fell within the "by other means" provision of § 15, requiring proof of actual delivery.

Other courts have commented on the distinction between first class and certified mail, and with different results. In the United

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109. *Aurora Loan Servs., LLC v. Condron*, 181 Conn. App. 248 (2018).

States Supreme Court decision of *Jones v Flowers*,[110] the court observed that "the use of certified mail might make actual notice less likely in some cases – the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time." The Appellate Court noted that other cases, such as *Gossett v. Federal Home Loan Mortgage Corp.*[111] and *Session v. Director of Revenue*[112] have concluded that since certified mail is a form of first class mail, actual receipt of a notice is not necessary. The appellate court did not find those cases persuasive, however, because they dealt with statutorily required notices, and the notice at issue in *Condron* was contractual, not statutory. The language of § 15 of the mortgage required the lender to show actual delivery for services other than first class mail, and the plaintiff had been unable to do so. That requirement was not a mere formality, but rather constituted a condition precedent to the plaintiff's ability to commence a foreclosure.

The trial court had ruled in the plaintiff's favor on its alternative argument that it had substantially complied with the notice of default provision by sending its letter via certified mail. The Appellate Court reversed, determining that the doctrine of substantial compliance was not appropriate, referring to its earlier decision in *21st Century North America Insurance Co. v. Perez*,[113] where the court stated, "[T]he proper application of the doctrine of substantial performance [which the court had previously noted is closely intertwined with the doctrine of substantial compliance – ed.] requires a determination as to whether the contractual breach is material in nature . . . . [T]he doctrine of substantial performance applies only where performance of a *nonessential* condition is lacking, so that the benefits received by the party are far greater than the injury done to him by the breach of the other party."[114] The several cases cited by the plaintiff, the court continued, all related to the contents of the notice, and not to the question of

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110. *Jones v. Flowers,* 547 U.S. 220, 235 (2006).

111. *Gossett v. Federal Home Loan Mortgage Corp.*, 919 F. Supp. 2d 852, 859 (S.D. Tex. 2013).

112. *Session v. Director of Revenue*, 417 S.W.3d 898, 903-04 (Mo. Ct. App. 2014).

113. *21st Century North America Ins. Co. v. Perez*, 177 Conn. App. 802 (2018).

114. *21st Century North America Ins. Co. v. Perez*, 177 Conn. App. 802, 815-16 (2018).

whether the defendant had actually received the notice. Since the plaintiff failed to prove receipt, the court declined to conclude that the plaintiff had substantially complied with the mortgage's notice provision. Accordingly, the trial court lacked jurisdiction to proceed to judgment in the foreclosure.

1-5:1.1 Defects in Notice not a Defense to Foreclosure

The Appellate Court has ruled that defects in a notice to a borrower regarding reinstatement and the right to contest a foreclosure do not provide a defense to enforcement of the mortgage, if those defects do not result in harm or prejudice to the borrower. In *Fidelity Bank v. Krenisky*,[115] the lender issued a demand letter to the borrowers based upon their failure to furnish receipts confirming payment of real property taxes. After the foreclosure complaint was served and filed, the borrowers alleged as a defense that the notice failed to inform them of their right to reinstate the mortgage after the debt had been accelerated and also failed to advise them of their right to contest the foreclosure in court. The Superior Court granted summary judgment in favor of the lender and, after the entry of a judgment of foreclosure, the borrower appealed.

The Appellate Court ruled that the lender's deficient written notice caused no harm to the defendants, in that there was evidence of actual notice of the right to reinstate since the borrowers had requested and obtained reinstatement figures. In affirming the entry of summary judgment, the Court further held that "literal enforcement of notice provisions when there is no prejudice is no more appropriate than literal enforcement of liquidated damages clauses when there are no damages."

The next challenge to the notice involved the lender's failure to provide an express notice of the right to contest the foreclosure in court, as required by the loan documents. The court ruled that the lender substantially complied with this notice requirement, although it appears the notice issued actually referred to the Fair Debt Collection Practices Act and the rights of the debtors under that act. The opinion also addressed the issue of whether a new demand letter is required after a foreclosure is dismissed under

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115. *Fidelity Bank v. Krenisky*, 72 Conn. App. 700 (2002).

the dormancy program. The court held that the dismissal of the first foreclosure action did not "wipe the slate clean" (at 708), and therefore a new demand letter was not required prior to the inception of the second foreclosure action. The court reasoned that once the debt was accelerated by the first demand letter and institution of the first foreclosure action, the debt remained accelerated even after the original action was dismissed.[116]

Additional recent case law has further refined the developing law on such issues as the content of the notice required under the Fannie Mae/Freddie Mac uniform instrument, as well as the extent of compliance that courts will accept. In *Mortgage Electronic Registration Systems, Inc. v. Goduto*,[117] the issues were whether two notices, neither of which complied individually with the notice requirements of the mortgage, could be evaluated collectively, and whether substantial compliance was sufficient to satisfy the terms of the mortgage.

The lender's first notice was sent on September 12, 2005 and a second on October 17. The owner failed to respond to either notice, and the lender began a foreclosure on December 7, 2005. The mortgage covenant required that the notice specify:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this [mortgage] and foreclosure or sale of the property.

The first notice advised the owner that, in order to avoid acceleration, he needed to pay the arrearage by October 12, 2005 at 2:00 p.m. The notice concluded, "If funds are not received by the above stated date, we will proceed to automatically accelerate your loan." The second notice reiterated the information set out in the first, but set out a reinstatement date of November 16, 2005.

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116. *City Savings Bank of Bridgeport v. Dessoff*, 3 Conn. App. 644, *cert. denied*, 196 Conn. 811 (1985).

117. *Mortgage Electronic Registration Systems, Inc. v. Goduto*, 110 Conn. App. 367 (2008).

Thus, in both instances, the specified date was less than 30 days from the date that the owner received the notices.

The trial court found that the notices were sufficient and entered a judgment of foreclosure by sale, from which judgment the defendant owner appealed.

One of the defendant's principal claims was that the trial court had improperly distinguished this case from an earlier decision, *Bank of America, FSB v. Hanlon*,[118] which sets out perhaps the most definitive discussion of the proper calculation of the 30-day notice period. The *Hanlon* Court commented:

> If the phrase "not less than" is given its ordinary and common meaning in light of the mortgage document, the debtor must be given exactly that specified number of days or more to cure the default before the lender can accelerate the debt. We conclude that where a notice of default requires "not less than" a specific number of days, the period is calculated by excluding the date notice issues and including the last day given to cure the default. [Footnote omitted.] Therefore, the relevant period begins on the day after the date of the notice and ends at midnight on the last day. The mortgage deed mandates that "not less than 30 days from the date the notice is given . . . [is the date] by which the default must be cured . . ." The notice of default was dated July 8, 1999 and the defendant was given until August 7, 1999, to cure the default. Theoretically, the defendant's period to cure began at 12:01 a.m. on July 9, 1999 and ended at midnight on August 7, 1999. [Footnote omitted.] Because the plaintiff provided the defendant with exactly thirty days to cure, the condition precedent was satisfied. The plaintiff could accelerate the debt at any time after 12:01 a.m. on August 8, 1999.[119]

Applying the *Hanlon* rule to *Goduto*, neither notice appeared to be in compliance. Nonetheless, the trial court found that the

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118. *Bank of America, FSB v. Hanlon*, 65 Conn. App. 577 (2001).

119. *Bank of America, FSB v. Hanlon*, 65 Conn. App. 577, 583 (2001).

plaintiff had substantially complied with the notice requirement of the mortgage. In upholding that ruling, the Appellate Court noted that literal enforcement of the mortgage's notice provision would serve no purpose "because the defendant had actual notice of his right to cure his default prior to acceleration." Continuing, the court observed, "[a]ny possible discrepancy between the terms of the mortgage and the plaintiff's notices caused no harm to the defendant because he had sixty-five days of actual notice in which to protect his property rights."[120]

A 2006 U.S. Supreme Court decision, *Jones v. Flowers*,[121] arguably may act to impose additional duties on a prospective foreclosure plaintiff in connection with its obligation to provide a mortgagor with a notice of default. The case involved statutory notices given in a nonjudicial Arkansas tax sale; the facts are more fully discussed in Section 29-3:1 of this text, but for present purposes it is sufficient to note the holding: A state authority proceeding under its tax sale statutes cannot cease further notification efforts if its original notices to the property owner are returned unclaimed. Rather, due process requires the authority to undertake further efforts to ensure that the owner receives actual notice of the impending sale. Those additional efforts, the court suggests, could include such things as: 1) sending the notice by regular mail, because no signature is required; 2) posting notice on the door; and 3) addressing notices to the occupants.

Of course, there is a major difference between notices given as part of state action undertaken in connection with a tax sale and the notices contractually required by the covenants of a mortgage. Since no state action is involved in the latter instance, it would seem that due process is not at issue and the holding of *Jones* is inapplicable. Since, however, the Fannie Mae notices are prerequisites to a valid foreclosure, which most certainly involves state action, might a mortgagor be able to invoke the *Jones* holding, arguing that any default notices required by the mortgage, being prerequisites to a foreclosure, thereby become part and parcel of

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120. *Mortgage Electronic Registration Systems, Inc. v. Goduto*, 110 Conn. App. 367, 375 (2008).

121. *Jones v. Flowers*, 547 U.S. 220 (2006).

the foreclosure, and thus subject to due process? It remains to be seen whether the courts would be receptive to such an argument.

Notice provisions in loan documents remain subject to concepts such as actual notice and substantial compliance. In *Wells Fargo Bank N.A. v. Fitzpatrick*,[122] the borrowers appealed from a judgment of foreclosure by sale. The main argument on appeal was that the notice of default was defective because it was sent to the law firm representing the borrowers, rather than to their property address, as required by the terms of the mortgage. The factual background was that in 2009 the lender sent a default letter to the borrowers, which they actually received, to their property address. The lender subsequently initiated a foreclosure, but it was dismissed for dormancy. In 2014, the lender's agent issued a new demand letter, but sent it to the law firm that had represented the borrowers in the prior foreclosure, rather than to the property address. A second foreclosure was filed, and the borrowers' answer to the complaint admitted the adequacy of the 2014 demand letter; further, at trial the borrowers' counsel even admitted that the letter had been received. On appeal, however, the borrowers relied on the Appellate Court's ruling in *Aurora Loan Services, LLC v. Condron* (discussed in Section 1-5:1, *supra*) and argued that the 2014 demand letter was defective because it was not mailed to the property address, as required by the mortgage.

The Appellate Court distinguished its holding in *Condron* based on a few factors. The Court noted that the borrowers in *Fitzpatrick* had actual notice of the default because of the existence of the first foreclosure and the 2009 demand letter, which they had received prior to the filing of that action. The Court then applied the doctrine of substantial compliance, stating:

> Although generally contracts should be enforced as written, we will not require mechanistic compliance with the letter of notice provisions if the particular circumstances of the case show that the actual notice received resulted in no prejudice and fairly apprised the noticed party of its contractual rights.

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122. *Wells Fargo Bank, N.A. v. Fitzpatrick*, 190 Conn. App. 231 (2019).

In affirming the trial court's judgment, the Court distinguished *Condron* because the borrower in that case had denied receipt of the notice. This opinion is also noteworthy for its discussion of the defense of unclean hands, which is more fully addressed in Section 32-5:1, and laches, discussed in Section 32-5:8.

1-5:1.2 Notice of Default in Commercial Mortgages

Nearly all current residential mortgages are written on some form of Fannie/Mae uniform instrument, all of which provide for notice of default and a right to cure. Despite the prevalence of these protections in the marketplace, the fact remains that they are not statutory rights; rather, they are contractual provisions which the courts will enforce as they would any other contractual provisions. In the realm of non-residential mortgages, however, the majority are not written on any type of uniform paper, and such provisions as a right to notice of default or a right to cure may or may not be found within their four corners.

The issue of whether or not the owner was entitled to a notice of default came to a head in *Antonino v. Johnson.*[123] The commercial mortgage contained this provision, quoted in *Antonio*:

> Each of the following event shall be deemed to be an "Event of Default" hereunder: (a) Failure by Grantor to pay (i) any periodic installment of interest or principal which shall become due and payable under the Note; or (ii) the outstanding principal balance on the Note, together with interest accrued thereon, at final or accelerated maturity or upon prepayment of the Note; or (iii) taxes and assessment or insurance premiums when due; or (iv) any other sums to be paid by Grantor hereunder or under any other instrument securing the Note, when due hereunder or thereunder; or (b) If default shall be made in due observance or performance of any other covenant or condition on the part of Grantor under this Mortgage Deed, the Note or any other document evidencing or securing the

123. *Antonino v. Johnson*, 113 Conn. App. 72 (2009).

> loan transaction which is the subject thereof, and such default shall have continued for a period of fifteen (15) days after written notice specifying such default and demanding that the same be remedied shall have been given to the Grantor by the Grantee, provided that if such default has not been cured but Grantor has commenced and proceeded diligently with good faith efforts to cure, said cure period shall be extended for such additional time, not exceeding forty-five (45) days as is reasonably necessary to effectuate such cure . . .[124]

Thus, the note in *Antonino* differentiated between monetary and non-monetary defaults, a not-uncommon scenario. The borrower's right to notice and right to cure arose only with respect to non-monetary defaults. As to defaults resulting from non-payment of any of the borrower's obligations under the note, there was no right to notice, and the lender could immediately proceed to foreclosure. Since the default at issue involved the nonpayment of the note, the borrower did not appear to have any right to notice, and the Appellate Court upheld the trial court's summary judgment ruling to that effect.

1-6 REINSTATEMENT

Except for reinstatement that occurs upon the successful completion of a program under Connecticut's Protection from Foreclosure statutes (see Chapter 17); reinstatement is a right that exists only by virtue of appropriate covenants in the mortgage. Commercial mortgages rarely provide for a right of reinstatement, but reinstatement is an intrinsic part of the Fannie Mae/Freddie Mac Single Family Uniform Instrument. Covenant 19 of the 1/01 edition of this form of mortgage provides that the borrower, if he or she meets certain conditions, has the right to have enforcement of the mortgage discontinued at any time prior to the earliest of: (a) five days before the sale of the property pursuant to any power of sale contained in the security instrument; (b) such other period as applicable law might specify for the termination of borrower's

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124. *Antonino v. Johnson*, 113 Conn. App. 72, 76 (2009).

right to reinstate; or (c) entry of a judgment enforcing the security instrument. The imposed conditions are that the borrower:

> (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under the Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and Lender's rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged.

As set forth in § 1-5:1.1 of this text and the discussion of *Fidelity Bank v. Krenisky*,[125] a technical defect in a demand letter regarding reinstatement rights may not provide a defense if the borrower cannot show actual harm.

A common occurrence in a foreclosure is the inevitable dispute between the lender and the borrower regarding the amounts to be repaid in a reinstatement or a payoff. Adding to these dynamics is the increasingly short time period within which the courts, counsel and their clients demand that this occur. Connecticut General Statutes § 49-10a grants a lender seven days to comply with a written request for payoff information.

At least one court has held that a borrower who has failed to pay certain application and other fees for a refinance lacks standing to compel a lender, by motion, to have a court determine a payoff amount in the context of a pending foreclosure action. *Citizens Bank of Connecticut v. Quantum 318, LLC*.[126] This decision is important, since a borrower could simply use such proceedings as

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125. *Fidelity Bank v. Krenisky*, 72 Conn. App. 700 (2002).

126. *Citizens Bank of Connecticut v. Quantum 318, LLC*, No. CV04-04001241, 2005 WL 1219861 (Conn. Super. Apr. 4, 2005).

a "free discovery" to later contest the debt. It would seem that, in considering whether to compel a lender to establish payoff or reinstatement amounts, the courts should be able to take into account the absence of a meaningful and realistic ability on the part of a borrower to effectuate a reinstatement or payoff.

Disputes often arise regarding the reasonableness of fees and appropriate charges for costs incurred after a request for reinstatement figures has been made, but prior to payment. A lender has every contractual right to prosecute its case until payment has been made, and delays in foreclosure prosecutions increase lender losses and asset disposition costs, which in turn can have an impact on such matters as servicer ratings on Wall Street, as well as the selection of counsel in foreclosures. A borrower's claims that "mark ups" and "up charges" for reinstatement costs are improper should be viewed in light of *Kruse v. Wells Fargo Home Mortgage, Inc.*[127] This was a class action suit in which borrowers alleged that the billing practices of the defendant lender regarding closings costs violated RESPA because of "up charges," a common industry practice in which a mortgage lender will "outsource" certain jobs, such as property inspections, and that such charges will contain an added fee passed to the borrower, beyond the basic cost of the service itself. The Second Circuit ruled that such "up charges" do not violate RESPA. If such charges are permitted at the closing table, it is difficult to understand how a subsequent default would render such charges "unreasonable," although admittedly RESPA does not expressly apply to foreclosures.

1-6:1 Reinstatement Letters Not a Basis for a Defense to Foreclosure

The Appellate Court has once again held that, absent actual prejudice, technical challenges to a reinstatement letter do not provide a basis for challenging a foreclosure on grounds of a failure to satisfy a condition precedent to initiating suit. In *Emigrant Mortgage Co., Inc. v. D'Agostino*,[128] the lender issued a default notice to the borrower; the notice calculated a reinstatement

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127. *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004), *remanded*, 2006 WL 1212512 (E.D.N.Y. May 3, 2006).

128. *Emigrant Mortgage Co., Inc. v. D'Agostino*, 94 Conn. App. 793 (2006).

amount based upon a default interest rate of 18%. The borrower argued that the notice violated the terms of the note, because the note capped the interest rate at 12.75%. The borrower asserted five special defenses to the ensuing foreclosure, all but one addressing the 18% interest calculation and its impact on the validity of the notice of default. Lender's counsel adroitly withdrew any claim to the 18% interest calculation and at trial stipulated to a lower interest calculation. Undeterred, the borrower challenged the default notice on legal and equitable grounds. First, the borrower claimed that because the interest calculation was defective, so also was the notice defective. The trial court rejected that argument, in part because no evidence was offered that the borrower was in any position to reinstate the mortgage. The further claim, that the default notice was accepted by the housekeeper, also proved unavailing. The borrower then attacked the notice on equitable grounds, arguing that an 18% interest calculation permitted a finding of unclean hands and unconscionability against the lender. The Appellate Court, in affirming the judgment of foreclosure by sale, stated that under the facts of this case, the 18% interest rate was not unconscionable, particularly since the borrower had cited no case law in support of that proposition, and was represented by counsel in the closing of the loan. On the unclean hands argument, the trial court stated that the borrower had failed to offer any evidence on that issue. The Appellate Court sustained that ruling, relying upon the borrower's failure to produce either evidence or case law to support the argument.

1-7 PREJUDGMENT REMEDY TO SECURE DEFICIENCY JUDGMENT

People's Bank v. Bilmor Building Corp.[129] has finally given appellate approval to a long-utilized practice of obtaining a prejudgment remedy at the commencement of a foreclosure to secure an anticipated deficiency judgment. The trial court dissolved a previously granted attachment because it concluded that, as a matter of law, a mortgagee could not obtain additional security for its mortgage debt based solely on its expectation that the property may be inadequate to secure the debt. Until a deficiency judgment

[129] *People's Bank v. Bilmor Bldg. Corp.*, 28 Conn. App. 809 (1992).

is actually rendered, the court reasoned, the plaintiff mortgagee could not establish probable cause to support the attachment.

The Appellate Court began its review by first examining whether a cause of action for a deficiency judgment existed at the time the foreclosure was commenced. The court decided that issue in the affirmative, observing that, at the time the foreclosure was begun, the defendant had already defaulted on the note. That fact gave rise to two distinct kinds of relief, the foreclosure and the deficiency judgment, but that did not alter the fact that there was but one cause of action at the commencement of the foreclosure suit.

In actuality, the court continued, a mortgagee has available two distinct causes of action against a defaulting mortgagor: The lender may pursue a foreclosure, or it can sue on the note. Those actions can be combined in a single suit, the only limitation being that imposed by Connecticut General Statutes § 49-1 if the plaintiff elects to first proceed on the foreclosure count. Under those circumstances, the plaintiff's sole remedy beyond the foreclosure is to seek a deficiency judgment under Connecticut General Statutes § 49-14.

Connecticut General Statutes § 52-279, the court then observed, authorizes the granting of a prejudgment remedy of attachment "upon all complaints containing a money demand against the estate of the defendant, both real and personal." The statute then goes on to list specific instances in which a prejudgment remedy is not obtainable, and foreclosures are not included in that list.

Foreclosures, the court noted, present an easier case for the court to determine probable cause for an attachment than exists in many other cases in which such prejudgment remedies are sought. The plaintiff must comply with the requirement that probable cause be established, and the appraisal usually offered in support of the attachment is generally "accurate enough for the court to determine the propriety of issuing such relief under the probable cause standard of § 52-278e." On this basis, the court expressly held that, at 823, "as a matter of law . . . a mortgagee may obtain additional security for a mortgage debt by means of a prejudgment remedy, if there is probable cause to believe a deficiency judgment will be entered and a court can make an educated prediction as to the probable amount of the deficiency."

1-8 THE AMERICANS WITH DISABILITIES ACT (ADA)

The Americans with Disabilities Act of 1990[130] ("ADA") became effective January 26, 1992. The Act deals with discrimination against persons with disabilities and regulates their right to access business properties. Although much of the ADA is not of primary concern to foreclosing lenders, and will have no impact on the foreclosure proceedings themselves, the Act definitely affects obligations a lender will assume once it takes title to the property, and consequently it deserves mention here.

Essentially, all businesses are required to comply with the Act, but small businesses were given phase-in periods, depending on their size. All of those periods have expired, the last compliance date having been January 26, 1993 for businesses with fewer than ten employees and gross receipts under $500,000.

The initial concern for a foreclosing lender is whether the property to be foreclosed is subject to the Act. If so, it is quite likely that a borrower without funds to carry the mortgage was probably also unable to make repairs or modifications required by the Act. Once the lender takes over the property, it will succeed to these obligations. Since the cost of compliance can become substantial, and the penalties for non-compliance are severe (up to $50,000 for the first violation and $100,000 for subsequent violations), a prudent lender should consider the ADA compliance status of the property before finalizing its decision to foreclose.

The Act covers twelve categories of facilities which, together, are intended to encompass every type of business activity that caters to the public. They are:

1. Places of lodging;
2. Establishments for serving food or drink;
3. Places of exhibition or entertainment;
4. Places of public gathering;
5. Sales or rental establishments;

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130. Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990), 42 U.S.C. §§ 12181-12213; 47 U.S.C. § 225 *and* § 611.

6. Service establishments;
7. Stations used for specified public transportation;
8. Places of public display or collection;
9. Places of recreation;
10. Places of education;
11. Social service center establishments; and
12. Places of exercise or recreation.

Definitions. The Act contains a number of special definitions, but the two most important ones for our present purposes are "place of public accommodation" and "public accommodation."

"Place of public accommodation" means any facility operated by the private entity that is one of the twelve types of businesses set out in the ADA and listed above. Business activities not generally open to the public, such as factories, are not covered by the Act. Properties can be partially exempt, as where a factory maintains a showroom in a portion of the building.

"Public accommodation" is the private entity that owns, leases or operates a place of public accommodation. Thus, most attorneys' offices are places of public accommodation, and the attorney is the public accommodation. The ADA regulates public accommodations, not places of public accommodation.

The ADA's primary purpose is to prohibit discrimination against persons with disabilities in places of public accommodation. Discrimination is defined as any of four types of activities:

1. Imposing eligibility criteria designed to or having the effect of screening out disabled persons;
2. Failing to modify procedures and policies tending to exclude disabled persons;
3. Failing to supply auxiliary aids to patients and customers; and
4. Failing to remove architectural and communications barriers in the places of public accommodation.

A lender who forecloses and ends up operating a place of public accommodation for any length of time runs the risk of becoming

a public accommodation and incurring liability for violating any of the four prohibited activities. The greatest potential for lender liability, however, is in the area of barrier removal, alterations, and new construction.

The Act ties the obligation to remove architectural and communications barriers to whether the removal is "readily achievable." That term is defined in 41 U.S.C. 12181 as "easily accomplished and able to be carried out without much difficulty or expense." One of the factors in the Act for determining whether removing a barrier is readily achievable is the overall financial resources of any parent corporation or entity and the number, type and location of its facilities. This factor presents a hidden risk for the foreclosing lender, since a financially distressed borrower, by that very fact alone, may be exempt from complying with the Act. Once the lender takes over the property, the exemption no longer applies; what was not "readily achievable" for the borrower may become so for the lender by virtue of the lender's increased resources, and the common device of placing title in a subsidiary corporation will not save the lender from liability.

In view of the responsibilities necessarily imposed by the ADA on a foreclosing lender, determining the compliance status of the property before foreclosure becomes an absolute necessity. The fundamental document for making this determination is the ADA Accessibility Guidelines, published at 56 Fed. Reg. 35605-35691 (July 26, 1991). Local architects and engineers also probably have these guidelines in their offices, and are the best qualified professionals to make a preliminary compliance evaluation of the property.

Once the evaluation has been completed, the lender should establish a compliance priority list that is in accord with the ADA's own regulations regarding the order of compliance. In descending order of importance, the order is:

1. Providing access from public streets, sidewalks, parking lots, etc.
2. Providing access to those areas of the place of public accommodation where goods and services are made available to the public;
3. Providing access to public restrooms and the facilities within those restrooms; and

4. Other changes designed to provide access to the "goods, services, facilities, privileges, advantages, or accommodations" of the building.

If required alterations pertain to what the ADA designates a "primary function area", i.e. an area containing a major activity for which the building was intended, then the "path of travel" to that primary function area must be made accessible. The ADA "path of travel requirements" indicate that the path of travel must be brought into compliance so long as the cost of doing so is not "disproportionate" to the cost of alteration. "Disproportionate" is defined as being 20% of the planned cost of alteration.

Since companies could avoid undertaking possibly expensive path of travel improvements by engaging in a series of minor alterations, the ADA contains a three-year look-back provision for determining the total cost of alterations. Thus, a lender acquiring a property must know the extent to which there have been ADA alterations during the preceding three years. If this information is not available from a cooperative borrower, recourse may be had to discovery in the foreclosure action.

With respect to new construction (i.e. where the certificate of occupancy was issued after January 26, 1993), different rules apply. The entire building, not just those portions used by the public, must comply with ADA requirements.

The ADA also imposes obligations, to some extent, on landlords whose tenants fail to bring the leased premises into compliance. This becomes another factor for a lender to consider when foreclosing on commercial property, or when contemplating accepting a deed in lieu of foreclosure.

This review of the ADA has sought only to alert counsel to the need for considering the Act's implications before proceeding to foreclosure. It is hardly a comprehensive analysis of the Act, and counsel should not render advice to a client solely on the basis of this limited discussion. The Act itself should be consulted; in appropriate cases, a competent advisor familiar with the ADA's nuances should be retained as a consultant.

1-9 FORECLOSURE COUNSELING UNDER THE NATIONAL HOUSING ACT

A little-known 1990 amendment to the National Housing Act requires lenders to notify delinquent residential borrowers of the availability of "homeownership counseling" in certain default situations. These provisions apply to conventional mortgages as well as to mortgages insured or guaranteed under federal programs, except for farm loans. The counseling services may be available directly from lenders, or from HUD-approved nonprofit counseling organizations.

Although the Act contains no sanctions for non-compliance, a lender's failure to provide the notification could give rise to a defense to a foreclosure, with resultant delays and additional expense. For that reason alone, prudent counsel should have some familiarity with the Act's requirements and, before commencing foreclosure, should always verify that the lender has given the homeowner proper notification.

Although no Connecticut appellate court has yet addressed the consequences of noncompliance with the Act, a few trial courts have passed on the issue, with differing results. In one instance, the court refused to find that the Act applied in a foreclosure of a $610,000 mortgage on a single family residence, in which the plaintiff had failed to notify the owners of the availability of foreclosure counseling; interestingly, the court based a portion of its decision of the fact that the defendant owners had failed to avail themselves of the benefit of the foreclosure moratorium act, of which they had been notified. The court's main reason for granting the plaintiff's summary judgment, however, is probably best summarized in the following sentence: ". . . [i]t is clear that the Secretary of Housing and Urban Development would not use federal grant money to set up counseling programs for people who own million dollar houses."[131] In another case[132] the court struck a counterclaim based on an alleged noncompliance with the Act, on the ground, *inter alia*, that 12 U.S.C. § 1701x does not create any

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131. *Berkeley Federal Bank & Trust v. Gabel*, No. CV 94-0071109 S, 1995 WL 235104 (Conn. Super. Apr. 12, 1995).

132. *The Talman Home Fed. Sav. & Loan Ass'n v. Abate*, No. CV-92-0513161S, 1994 WL 503880 (Conn. Super. Sept. 7, 1994).

private right of action. Although there is no private right of action under the National Housing Act for a violation of its provisions, one case holds that the failure to comply with HUD requirements in the loan documents does provide a cause of action for breach of contract, which may be plead as an unfair trade practice counterclaim.[133] An additional case holds that a lender's failure to comply with the terms of HUD regulations set forth in the loan documents provides a defense to a HUD mortgage foreclosure, based upon a breach of contract theory.[134]

The foreclosure counseling requirements of the Act are found in 12 U.S.C. § 1701x, Subsection (c). Paragraph (3) sets out a directive to the Secretary to:

> take any action that is necessary–
>
> (A) to ensure the availability throughout the United States of homeownership counseling from homeownership counseling organizations receiving assistance under this subsection . . . and
>
> (B) to inform the public of the availability of the homeownership counseling.

The definitions of terms used in the subsection are critical in appreciating the extent of loans coming within the scope of the Act's counseling requirements. Paragraph (6) contains:

Definitions. For purposes of this subsection:

> (A) The term "creditor" means a person or entity that is servicing a home loan on behalf of itself or another person or entity.
>
> (B) The term "eligible homeowner" means a homeowner eligible for counseling under paragraph (4).
>
> (C) The term "home loan" means a loan secured by a mortgage or lien on residential property.
>
> (D) The term "homeowner" means a person who is obligated under a home loan.

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133. *GE Capital Mortg. v. Choinski*, No. CV9968877S, 1999 WL 391915 (Conn. Super. June 4, 1994).

134. *National City Mortg. v. Pope*, No. CV01168609S, 2002 WL 500645 (Conn. Super. Mar. 13, 2002).

(E) The term "residential property" means a 1-family residence, including a 1-family unit in a condominium project, a membership interest and occupancy agreement in a cooperative housing project, and a manufactured home and the lot on which the home is situated.

The definition of "home loan" is limited to single-family residences, so that duplexes and other multiple-family properties, even if partially owner-occupied, fall outside the definition. Also, "creditor" is specifically defined to include any servicer of the mortgage.

Paragraph (4) details the circumstances under which a homeowner comes within the purview of the Act:

(4) Eligibility for counseling. A homeowner shall be eligible for homeownership counseling under this subsection if -

(A) the home loan is secured by property that is the principal residence (as defined by the Secretary) of the homeowner;

(B) the home loan is not assisted under title V of the Housing Act of 1949 [42 U.S.C. § 1471, et seq.] [Farmers Home Administration]; and

(C) the homeowner is, or is expected to be, unable to make payments, correct a home loan delinquency within a reasonable time, or resume full home loan payments due to a reduction in the income of the homeowner because of-

(i) any involuntary loss of, or reduction in, the employment of the homeowner, the self-employment of the homeowner, or income from the pursuit of the occupation of the homeowner; or

(ii) any similar loss or reduction experienced by any person who contributes to the income of the homeowner . . . .

Paragraph (5) goes on to delineate the lender's obligations once the homeowner's eligibility has been established:

(A) Notification of availability of homeownership counseling

(i) Requirement

Except as provided in subparagraph (C), the creditor of a loan (or proposed creditor) shall provide notice under clause (i) to (I) any eligible homeowner who fails to pay any amount by the date the amount is due under a home loan, and (II) any applicant for a mortgage described in paragraph (4).

(ii) Content

Notification under this subparagraph shall -

(I) notify the homeowner or mortgage applicant of the availability of any homeownership counseling offered by the creditor (or proposed creditor);

(II) if provided to an eligible mortgage applicant, state that completion of a counseling program is required for insurance pursuant to section 203 of the National Housing Act [12 U.S.C. 1709];

(III) notify the homeowner or mortgage applicant of the availability of homeownership counseling provided by nonprofit organizations approved by the Secretary and experienced in the provision of homeownership counseling, or provide the toll-free telephone number described in subparagraph (D)(i); and

(IV) notify the homeowner by a statement or notice, written in plain English by the Secretary of Housing and Urban Development, in consultation with the Secretary of Defense and the Secretary of the Treasury, explaining the mortgage and foreclosure rights of servicemembers, and the dependents of such servicemembers,

under the Servicemembers Civil Relief Act (50 U.S.C. App. 501 et seq.), including the toll-free military one source number to call if servicemembers, or the dependents of such servicemembers, require further assistance.

(B) Deadline for notification. The notification required in subparagraph (A) shall be made-

(i) in a manner approved by the Secretary; and

(ii) before the expiration of the 45-day period beginning on the date on which the failure referred to in such subparagraph occurs.

(C) Notification. Notification under subparagraph (A) shall not be required with respect to any loan for which the eligible homeowner pays the amount overdue before the expiration of the 45-day period under subparagraph (B)(ii).

The 45-day period referenced in this paragraph might pose a dilemma for a lender not wanting to send out the notification with the first past-due notice. Although no notification is required if the homeowner makes the overdue payment during that period, the lender is nonetheless required, by subparagraph (B)(ii), to send the notice prior to the expiration of the same 45-day period. Consequently, a prudent lender is probably well-advised to ignore the exception in subparagraph (C) and to send the notification as part of its routine past-due notice.

In relevant part, paragraph (D) provides:

(D) Administration and compliance. The Secretary shall, to the extent of amounts approved in appropriation Acts, enter into an agreement with an appropriate private entity under which the entity will-

(i) operate a toll-free telephone number through which any eligible homeowner can obtain a list of nonprofit organizations that-

(I) are approved by the Secretary and experienced in the provision of homeownership counseling; and

(II) serve the area in which the residential property of the homeowner is located . . . .

Information on HUD may be obtained at its web site, www.hud.gov/ or by writing:

US Department of Housing and Urban Development

451 7th Street, S.W.,

Washington, DC 20410

Telephone 202-708-1112

Subsection (d)(6) of 12 U.S.C. § 1701x requires foreclosure prevention counseling for eligible homeowners who are delinquent 60 days or more. This section requires a written notice to be sent within five days (excluding Saturdays, Sundays and legal holidays) of the triggering event, which under the statute is at the end of the eligible homeowner's 60-day delinquency.

1-10 SINGLE FAMILY MORTGAGE FORECLOSURE ACT OF 1994 (FEDERAL)

This 1994 act appears as Title VIII of P.L. 103-327 and is part the Housing Choice and Community Investment Act of 1994.[135] It applies to single family mortgages held by the Secretary of Housing and Urban Development or that secure loans obligated by the Secretary under Section 312 of the Housing Act of 1994. A single-family property is defined as one on which there is a one-to-four family residence.

Although the Act applies to a limited number of mortgages and is outside the scope of this manual, it is mentioned here only for the sake of alerting practitioners that the Act exists.

The Act provides for a nonjudicial foreclosure of qualifying mortgages. The Secretary designates one or more foreclosure commissioners in each state to implement the auction and sale. The foreclosure commissioners are usually attorneys familiar with foreclosure practice in their community. Although the constitutionality of the Act has been upheld at the federal district court level, it continues to be criticized for alleged shortcomings in its notice provisions and for the fact that there is no judicial

135. 12 U.S.C. § 3751, *et seq*.

forum in which the mortgagee must proceed prior to foreclosure. Additionally, there is a deficiency judgment provision in which the sales price is conclusive on the issue of valuation.

1-11 THE TRANSFER ACT

The Transfer Act[136] applies to the transfer or change in ownership of an establishment, except as otherwise exempted from the act. When an establishment that generated hazardous waste, or handles hazardous waste generated at a separate location, on or after November 19, 1980, is sold or otherwise transferred, the Connecticut Department of Environmental Protection must be notified. In addition, various filing requirements must be met, as more fully set forth in the act. The provisions impose obligations on polluters and establishments as far back as May 1, 1967. Public Act 03-82 amended Connecticut General Statutes § 22a-134a and now provides that:

> (a) No person shall transfer an establishment except in accordance with the provisions of sections 22a-134 to 22a-134e, inclusive. Notwithstanding any provision of sections 22a-134 to 22a-134e, inclusive, a person appointed by the Superior Court or any other court to sell, convey or partition real property or a person appointed as a trustee in bankruptcy shall not be deemed a party associated with the transfer of an establishment and shall not be required to comply with the provisions of sections 22a-134 to 22a-134e, inclusive.

Connecticut General Statutes § 22a-452f makes clear that a judicial foreclosure is exempt from the provisions of the Act. Subsection (b)(4) of the statute states:

> (4) "Foreclosure" and "foreclose" means, respectively, acquiring, and to acquire, a property, business or establishment through (A) purchase at sale under a judgment or decree, a power of sale, a nonjudicial foreclosure sale, a deed in lieu of foreclosure, or similar conveyance from a trustee,

136. Conn. Gen. Stat. § 22a-134, *et seq*.

> or repossession, if the property, business, including its tangible and intangible assets, or establishment was security for an extension of credit previously contracted, including the termination of a lease agreement, or (B) any other formal or informal manner by which a lender acquires, for subsequent disposition, title to or possession of a property, business, including its tangible and intangible assets, or facility in order to protect its security interest.

Subsection (B) of that definition, although somewhat convoluted in its language, is broad enough to include strict foreclosure, so that a lender acquiring property through foreclosure, whether by sale or by strict foreclosure, appears to be exempt from the requirements of the act.

The Transfer Act was amended in 2019[137] to modify the definition of "establishment," but nothing in the amendment alters the exemption for foreclosures found in the original act.

1-12 THE CONNECTICUT ABUSIVE HOME LOAN LENDING PRACTICES ACT

In 2001, Connecticut followed the lead of Massachusetts and New Jersey in enacting legislation designed to place severe limits on what has been commonly referred to as predatory lending. Public Act 01-34, now codified as Connecticut General Statutes § 36a-746, *et seq.*, imposes a number of restrictions and additional requirements on lenders who are in the business of making "high cost home loans." That phrase is defined in the act as:

> [A]ny loan or extension of credit, including an open-end line of credit but excluding a reverse mortgage transaction, as defined in 12 CFR 226.33, as amended from time to time:
>
> (A) In which the borrower is a natural person;
>
> (B) The proceeds of which are to be used primarily for personal, family or household purposes;

137. P.A. 19-75.

(C) In which the loan is secured by a mortgage upon any interest in one-to-four family residential property, as defined in section 36a-485, located in this state which is, or, when the loan is made, is intended to be used or occupied by the borrower as a principal residence; and

(D) In which the APR at consummation is greater than the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the loan or extension of credit is received by the lender, by more than the number of percentage point specified in 12 CFR 226.32(a)(1)(i), as amended from time to time.

As of this writing, 12 CFR 226.32(a)(1)(i) provides:

> The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 10 percentage points for subordinate-lien loans, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

If a loan qualifies as a "high cost home loan," the lender is then required to make certain special disclosures to a prospective borrower. Set out in Connecticut General Statutes § 36a-746b, they are:

(1) The following statement: "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan";

(2) The APR;

(3) The amount of the regular monthly or other periodic payment, and;

(4) For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the maximum interest rate that may be imposed during the term of the loan.

The heart of the new act, however, lies in Connecticut General Statutes § 36a-746(c), which lists a number of provisions that are prohibited in a loan agreement, and Subsection (e), which sets forth a variety of activities which a high cost lender is prohibited from doing. Connecticut General Statutes § 36a-746 through § 36a-746g itemizes several provisions that are unauthorized to appear in any high cost loan agreement. They include:

- If a loan's term is less than seven years, the loan payments must be such that the loan fully amortizes over its term. There are exceptions for bridge loans.
- The loan payments cannot cause the principal balance to increase. The payment schedule cannot consolidate more than two payments to be paid in advance from the loan proceeds.
- Certain refund calculations are prohibited, if they are not as favorable as the actuarial method.
- Prepayment penalties are allowed, but limited.

In addition to prohibited provisions, the act also mandates that the borrower's total monthly debts, including the cost of the new loan, cannot exceed 50% of the borrower's gross income. This provision operates independently from the adequacy of equity in the property to fully secure the new loan, discussed in greater detail below.

Additionally, both mandatory arbitration and call provisions are prohibited, except, of course, in the case of default or a sale of the mortgaged property.

Connecticut General Statutes § 36a-746e sets forth a list of activities prohibited by the high cost lender. Among the more prominent are:

- a limitation on prepaid finance charges of five per cent or two thousand dollars. If the lender is refinancing its own loan within two years, then the aggregate prepaid finance charges on both loans cannot exceed those same limitations.
- The lender cannot impose any fee for modifying, renewing, extending or amending the original loan if, after such event, the loan will still qualify as a high cost loan. An exception exists as to any modification of a loan sixty of more days delinquent, where the modification is part of a work-out process.
- The lender cannot make the loan unless it reasonably believes that the borrower will be able to make the scheduled payments. In making that determination, the lender can take into consideration the borrower's current and expected income, current obligations, and employment status, but *cannot* take into consideration the borrower's equity in the premises to be mortgaged. The statute creates a presumption in favor of the lender if all of the borrower's expenses, including the new loan, do not exceed fifty per cent of the borrower's gross monthly income.

The final major prohibition relates to unconscionability. Paragraph (9) of Connecticut General Statutes § 46a-746e provides:

> (9) Make a loan with an interest rate that is unconscionable. A lender shall base the interest rate for a high cost home loan on proper and reasonable factors including, but not limited to, creditworthiness, other risk related standards and sound underwriting. For purposes of this subdivision, an interest rate that is not based on such factors, or that significantly deviates from

> industry standards for making that type of high cost home loan, shall be deemed unconscionable.

As is the case with any new legislation, it remains to be seen how the courts will interpret its provisions. There are no express sanctions for violation of any of the act's provisions; presumably, a borrower injured by a lender's violation of the act would be able to look to the courts for redress, but nowhere in the act is there any mention of a private right of action. Will the courts conclude that such a borrower is able to use the act, either as a defense to a foreclosure or even as the basis for a counterclaim, or will they decide that the act gives rise only to the state's ability to impose sanctions for a violation?

Although it is important to protect consumers' rights in these types of transactions, it is equally important to recognize that the typical high cost home loan is likely to have been made to individuals with poor credit, perhaps even with prior foreclosures and/or bankruptcies in their history. A limitation on higher charges to such borrowers, intended to offset the greater risk the lender is taking in extending credit to such applicants, may cause the market of funding available to such low and moderate income borrowers to decrease. This may well prove to be an unintended consequence of this legislation. Nonetheless, it does denote a start toward trying to protect consumers from overreaching creditors, provided the act is applied in a reasonable fashion and does not become a "safe haven" for defaulting borrowers.

Wholly apart from a high-cost lender's concerns about making such a loan, the act may also cause it to be troubled by the consequences of *not* making that loan. Will a lender, having rejected an applicant on the basis of the criteria set forth in the act, have to worry about that denial of credit forming the basis for a suit by the rejected borrower? In this regard, the act may find itself at odds with community reinvestment legislation designed to induce the making of certain types of high risk loans. As more states adopt predatory lending legislation and courts begin to interpret these acts, we will see if the absence of unity on how these acts are interpreted will cause Congress to enact legislation to preempt the entire area. Preemption may find supporters among the banking and consumer lobbies, since uniformity would then exist, which

would provide national lenders and servicers with greater ease and certainty in the administration of high cost loan programs.

1-13 PROPERTY AND CASUALTY INSURANCE

Lenders suffering fire damage to a mortgaged property may be faced with greater challenges than they realize, and counsel engaged to foreclose against such damaged real estate will be encountering issues that extend beyond the typical foreclosure. At the trial level, one notable case has held that a lender who receives fire insurance proceeds must complete the foreclosure before seeking any remedy under the note. In *Union Planters Bank, NA v. Butler*,[138] after a borrower had defaulted on a note and mortgage, a fire damaged the premises. As loss payee, the lender received $93,590 in fire insurance proceeds, which left an unsatisfied balance of $26,610.89, plus interest. Instead of foreclosing on the mortgage, the plaintiff then filed suit on the note, presumably because the property was in a damaged condition, which would make it more difficult to sell to satisfy the debt. In denying the plaintiff's motion for summary judgment, the court noted that the affidavit did not identify whether restoration or repair of the property was economically feasible or would lessen the plaintiff's security interest in the property. Relying on *Horton v. Upham*,[139] the court held that the insurance proceeds are in effect "real estate." Accordingly, the plaintiff "started" exercising its foreclosure rights under the mortgage by its acceptance of the insurance proceeds. Once the foreclosure was commenced, the court reasoned, the lender cannot foreclose against only a part of the real estate, by virtue of the limitations of Connecticut General Statutes § 49-1, which states that foreclosure is a bar to any further action on the mortgage note.

Another case suggests that a lender may recover under a multi-peril insurance policy as the loss payee without first having obtained a deficiency judgment. In *Burritt Mutual Savings Bank of New Britain v. Transamerica Insurance Co.*,[140] the plaintiff

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138. *Union Planters Bank, NA v. Butler*, 49 Conn. Supp. 470 (2006).

139. *Horton v. Upham*, 72 Conn. 29 (1899).

140. *Burritt Mutual Savings Bank of New Britain v. Transamerica Insurance Co.*, 180 Conn. 71 (1980).

issued a $30,000 loan in 1971 to the borrower, Pizzuto, secured by a first mortgage on property in Hartford. The property was covered by a multiperil insurance policy listing plaintiff as the first mortgagee. Five months later, on June 17, 1971, a fire occurred on the premises, causing substantial damage. Pizzuto, the named insured and mortgagor, hired a firm of insurance adjusters, and on Oct. 15, 1971, the loss was adjusted in the amount of $15,000. Transamerica then issued a check for $15,000 payable to Pizzuto, the adjuster and the lender. Pizzuto and the adjuster endorsed the check. The lender's endorsement mysteriously appeared on the check, although the lender and its employees were unaware of that endorsement. In 1972, the lender learned for the first time that a check has been issued on the claim. Burritt demanded payment from the insurance company, and when no such payment was forthcoming, the lender filed suit.

Burritt filed a breach of contract action, and the insurance company claimed that the lender had no cause of action because it had failed to obtain a deficiency judgment against the borrower following a judgment of strict foreclosure. The lender argued at trial that it had vested rights under the contract of insurance, which rights were not subject to divestment. The trial court awarded the lender the $15,000, without regard to amounts recovered in the foreclosure. The Connecticut Supreme Court held that the trial court committed error by concluding that Burritt Mutual was entitled to recover $15,000, the amount at which the fire loss was adjusted, without regard to the judgment of foreclosure.

The important aspect of the opinion, however, is the court's remand to determine if the lender had in fact received sufficient funds from its post-foreclosure sale of the property to satisfy its debt. The Court, therefore, clearly approved of the ability of a lender, without first having obtained a deficiency judgment, to prosecute a breach of insurance contract claim if it did sustain an actual loss. Citing Robert Keeton, *Basic Text on Insurance Law*, p. 188 n. 4 (1981), the court agreed that "inequitable results may be produced if a court regards the debt as wholly satisfied when the mortgagee has in fact received less than full payment." The Court appears to have held, however, that a lender who fails to obtain a deficiency judgment is estopped from denying the value ascribed to the property at the foreclosure judgment hearing.

1-14 THE HOPE FOR HOMEOWNERS PROGRAM AND OTHER FEDERAL RELIEF PROGRAMS

On July 30, 2008, the President signed new federal legislation, known as the Hope for Homeowners Program, designed to enhance home ownership by establishing a federal program that allows eligible homeowners to refinance mortgages on their residences, subject to certain loan-to-value and debt-to-income requirements. Participation in this program is voluntary, so the borrower and the borrower's lender need to agree to participate in the program. A borrower is required to have a debt-to-income ratio greater than 31% as of March 1, 2008, taking into consideration all existing mortgages of the borrower at that time. The amount of any new loan cannot exceed 90% of the fair market value of the property. Borrowers saddled with high-interest adjustable-rate loans can find refuge in this program, as all new loans will be based upon fixed-interest rates with a 30-year amortization. A lender faced with foreclosing a home in which the debt exceeds the value of the property may consider participating in this program for the simple reason that it may receive cash rather than a distressed property, with the attendant risks of loss, carrying charges, and diminished capacity to resell in a declining market. The borrower's delinquent mortgage is reduced to an agreed-upon amount, and a new FHA insured loan is established, the proceeds of which are paid to the lender in exchange for a release of that obligation. The new mortgage will contain a shared appreciation provision. As of this writing, it is unclear how the mechanics of the shared appreciation provision will operate.[141]

1-14:1 The Emergency Economic Stabilization Act of 2008

On October 3, 2008, the President signed into law the Emergency Economic Stabilization Act of 2008. Known primarily for its provisions relating to the Wall Street bailout, the act also includes some provisions designed to further implement the provisions of the Hope for Homeowners Program.[142]

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141. *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material. The Hope for Homeowners Program is set forth in the Appendix.

142. *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material, The Hope for Homeowners Program, Title I, Sections 109 and 110 are the relevant provisions of the Act and are set forth in the Appendix.

Section 109 addresses foreclosure mitigation efforts; as to any mortgage assets that the Secretary of the Treasury may acquire under the bailout, the act mandates that the Secretary:

> [I]mplement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program . . . and other available programs to minimize foreclosures. [The Secretary is also empowered to] use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.

Further, the Secretary is directed to coordinate efforts, particularly with HUD, to avoid the displacement of tenants in properties where the landlord's mortgage may be under foreclosure.

Finally, Section 109 directs the Secretary to consent to:

> [R]easonable requests for loss mitigation measures, including term extensions, rate reductions, principal write downs, increases in the proportion of loans within a trust or other structure allowed to be modified, or removal of other limitations on modifications.

Section 110, entitled "Assistance to Homeowners," repeats the directives of Section 109, but goes on to add a provision requiring federal property managers to "develop and begin implementation of the plan required by this subsection not later than 60 days after the date of enactment of this Act." Thus, implementation was required by December 2, 2008.

Section 110 also requires federal property managers to encourage servicers of mortgages that are still privately held to engage in loan modifications designed to avoid foreclosure, and to assist in facilitating any such modifications, to the extent possible.

1-15 NONPRIME LENDER REGULATION

Although much concern has been raised on the impact of the subprime mortgage industry on the economy, until recently there had been no definitive way to determine which lenders fell into

that category, which in turn has hampered efforts at any effective regulation of the industry. As of July 1, 2008, the effective date of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760 *et seq.*, that problem ceased to exist in Connecticut, since a major element of that Act involves the establishment of objective criteria for determining which mortgages qualify as "nonprime." The term "nonprime" is more inclusive than "subprime," since it also includes mortgages falling within the category "Alt-A," which are mortgages considered less risky than subprime but not as secure as prime. The new definitions apply to both categories.

The Connecticut General Statutes § 36a-760(a)(7) defines a "nonprime home loan" as:

> [A]ny loan or extension of credit, excluding an open-end line of credit, and further excluding a reverse mortgage transaction, as defined in 12 CFR 226.33, as amended from time to time:
>
> (A) In which the borrower is a natural person;
>
> (B) The proceeds of which are to be used primarily for personal family or household purposes;
>
> (C) In which the loan is secured by a mortgage upon any interest in one-to-four family residential property located in this state which is, or when the loan is made, intended to be used or occupied by the borrower as a principal residence;
>
> (D) In which the principal amount of the loan does not exceed four hundred seventeen thousand dollars;
>
> (E) Where the loan is not a CHFA loan; and
>
> (F) In which the conditions set forth in clauses (i) and (ii) of this subparagraph apply, subject to any adjustments made pursuant to clause (iii) of this subparagraph:
>
> (i) The difference, at the time of consummation, between the APR for

the loan and the conventional mortgage rate is either equal to or greater than (I) one and three-quarters percentage points, if the loan is a first mortgage loan, or (II) three and three-quarters percentage points, if the loan is a secondary mortgage loan. For purposes of such calculation, "conventional mortgage rate" means the contract interest rate on commitments for fixed-rate mortgages published by the Board of Governors of the Federal Reserve System in its statistical release H.15, or any publication that may supersede it, during the week preceding the week in which the interest rate for the loan is set.

(ii) The difference, at the time of consummation, between the APR for the loan or extension of credit and the average prime offer rate for a comparable transaction, as of the date the interest rate is set, is greater than one and one-half percentage points if the loan is a first mortgage loan or three and one-half percentage points if the loan is a secondary mortgage loan. For purposes of this subparagraph, "average prime offer rate" has the meaning as provided in 12 CFR 226.35, as amended from time to time.

Clause (iii) need not be reprinted here in its entirety; it allows Connecticut's banking commissioner to increase the percentage rates set forth in (i) and (ii) above, after consideration of relevant factors, as set out in the clause.

Part of the impetus for establishing objective criteria for nonprime loans was the fact that the CT FAMLIES program, discussed in Chapter 17, applies only to nonprime loans.

1-15:1 The Good Faith Requirements

Connecticut General Statutes § 36a-760a(a) (Section 22 of P.A. 08-176) imposes on nonprime lenders an obligation that they "not engage in conduct in any transaction, practice or course of business in connection with the making of a nonprime home loan that is misleading, deceptive or untruthful." Subsection (b) of that section goes on to state that "lenders and mortgage brokers shall have a duty of good faith with respect to the performance of any contract with a borrower relative to a nonprime home loan . . . ." The duty of good faith is explicitly keyed to such obligation as it is set forth in § 42a-1-304 of the Uniform Commercial Code, which simply states that "every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."

Subsection (c) of Connecticut General Statutes § 36a-760a requires a lender, in connection with a nonprime mortgage loan, to provide the borrower with a notice or letter that generally describes the transaction. The letter must be provided at least three days prior to closing, unless the borrower requests an expedited closing. The lender must also notify the borrower timely of any material changes to the terms of the transaction.

Subsection (a) of Section 23 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760b, prohibits a lender from making a nonprime loan unless it:

> [R]easonably believes, at the time the loan is consummated, that one or more of the obligors, when considered individually or collectively, will be able to make the scheduled payments to repay the loan, and to pay related real estate taxes and insurance premiums, based upon a consideration of the obligor's current and expected income, current and expected obligations as disclosed by the obligor, or otherwise known to the lender, including subordinate mortgages made contemporaneously, homeowner's fees, condominium fees, employment status and other financial resources, excluding the equity in the dwelling that secures repayment of the loan . . . .

Subsection (b) of Connecticut General Statutes § 36a-760b permits a lender to utilize automated underwriting systems. In the case of an adjustable mortgage loan, the lender must underwrite the borrower's ability to repay using the fully indexed rate and on the basis of a fully amortizing repayment schedule based on the maturity date set forth in the note.

1-15:2 Limitations on Use of Loan Proceeds

A lender cannot make a nonprime loan if any of the loan proceeds will be used to pay off a "special mortgage," unless the borrower has obtained a written confirmation from a HUD-approved counselor that the borrower has obtained counseling. A "special mortgage" is defined as a loan that was "originated, subsidized or guaranteed by or through a state, federal, tribal or local government, or nonprofit organization." (Section 24, Subsection (a), of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760c(a)). Subsection (b) states, however, that the prohibition does not apply if the borrower provides the lender with a statement on a HUD-certified counselor's letterhead stating that counseling is not available for at least 30 days from the date of the request for counseling.

Subsection (c) of Connecticut General Statutes § 36a-760c imposes upon the lender an obligation to make a good-faith effort to determine whether the loan being paid off is a special mortgage, but need not obtain the certification if the lender makes a good-faith inquiry to the current loan holder or servicer and does not receive an affirmative reply confirming that the loan is a "special mortgage."

1-15:3 Prerequisites for Making the Loan

Section 25 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760d, prohibits a lender from making a nonprime loan unless:

(1) With respect to first mortgage loans originating on or after April 1, 2010, the lender requires and collects monthly escrows for taxes and homeowner's insurance. This requirement does not apply, however, if the loan is one that is

generally marketed as a subordinate loan, but in fact is in first priority against the property;

(2) The lender obtains certification under Connecticut General Statutes § 36a-760c, if applicable;

(3) Within three business days after its receipt of a loan application, the lender mailed to the borrower a notice containing a toll-free number to obtain a list of nonprofit HUD-approved counselors. The subsection goes on to provide that a lender's failure to deliver the notice timely shall not provide the borrower with a private cause of action.

1-15:4 Prohibited Provisions

Section 26 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760e, prohibits a lender from making a nonprime loan that contains:

(1) A prepayment penalty (except as to FHA loans);

(2) A provision requiring a borrower to assert any claim or defense in a nonjudicial forum that utilizes principles inconsistent with statutory or common law, or limits any claim or defense, or is less convenient, more costly or more dilatory than a judicial action for foreclosure of the mortgage. Any such provision included in a nonprime mortgage is void and unenforceable.

Subsection (b) of Section 28 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760g(b), prohibits a lender from making a nonprime loan that will refinance a mortgage unless the new loan will provide a "tangible net benefit" to the borrower. Further, the lender cannot recommend or encourage a default on an existing mortgage.

Subsection (c) applies to all mortgages, not just nonprime mortgages, and prohibits the lender from financing any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance. This prohibition, however, does not prevent a lender from collecting funds for insurance premiums or debt cancellation or suspension as part of the borrower's regular monthly payments.

Subsection (d) gives the borrower a statutory right of reinstatement, and requires a lender, after all defaults have been cured, to take all steps necessary to terminate the foreclosure.

1-15:5 Mortgage Broker Obligations

Section 29 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-760h, imposes a number of new restrictions and obligations on mortgage brokers. These apply in all instances, not just nonprime loans. The act requires mortgage brokers to:

(1) Use reasonable care, skill and diligence in performing [his or her duties and to] act in good faith and fair dealing in all transactions with the borrower;

(2) Make reasonable good-faith efforts to secure a mortgage that is in the reasonable interests of the borrower considering all of the circumstances reasonably available to the mortgage broker, including, but not limited to, the rates, points, fees, charges, costs and product type;

(3) Ensure that the cost of credit is reasonably appropriate considering the borrower's level of creditworthiness and other bona fide underwriting concerns; and

(4) Notify, before the closing, each lender of the payment obligations associated with each of the other lender's loans if the mortgage broker knows that more than one mortgage will be made by different lenders contemporaneously to a borrower secured by the same real property.

The section goes on to state explicitly that its provisions cannot be waived.

1-15:6 Borrower Remedies

Subsection (a) of Connecticut General Statutes § 36a-760i imposes a three-year limitation period from the date of closing and limits a borrower's remedies for a lender violation of the nonprime provisions, or for a mortgage broker violation, to the greater of

actual damages or one thousand dollars, as well as costs and reasonable attorney's fees, unless:

(1) Within ninety days of the date of closing and prior to the commencement of any action against a lender, the lender has notified the borrower of the noncompliance failure, has tendered appropriate restitution, and either (A) makes the nonprime loan comply with the Act, or (B) changes the terms of the loan in a manner favorable to the borrower so that the mortgage will no longer qualify as a nonprime loan; or

(2) The lender is able to demonstrate by a preponderance of evidence that the noncompliance was unintentional and resulted from a bona fide error notwithstanding the facts that it had procedures in place reasonably adapted to avoid such errors. The phrase "bona fide error" in this instance is defined as including clerical, printing, computer malfunctioning or programming error, but does not include errors of legal judgment with respect to a lender's obligations under the Act. If the noncompliance has caused material injury to a borrower, the lender is able to show that it cured the compliance failure or otherwise undertook remedial steps to address or compensate for the injury; or

(3) The lender and borrower otherwise reach a mutual agreement on an appropriate remedy or curative action.

Subsection (b) allows the court to also grant an injured borrower such relief as it deems just and equitable.

Subsection (c) allows a borrower to assert, as a counterclaim or defense to a foreclosure, fraud and any violation of the nonprime loan sections of the act that causes material injury to the borrower. The section sets a six-year limitation period for this relief, commencing on the date of closing.

Subsection (d) states that nothing in Section 30 (Connecticut General Statutes § 36a-760i) shall be construed as creating or

permitting a cause of action or defense or counterclaim against an assignee of a nonprime loan with respect to a violation of the nonprime provisions of the act on the part of the original lender or mortgage broker.

1-15:7 Other Provisions—Limitations on Secondary Loans

Subsection (b) of Section 54 of P.A. 08-176, now codified as Connecticut General Statutes § 36a-498a, imposes new restrictions on makers of secondary mortgages. They may not:

(A) Charge, impose or cause to be paid, directly or indirectly, prepaid finance charges that exceed in the aggregate eight per cent of the principal amount of the loan; or

(B) Include in the loan agreement, under which prepaid finance charges have been assessed, any provision that permits the mortgage lender to demand payment of the entire loan amount prior to maturity, except for a provision that allows acceleration if the loan has been in default more than sixty days.

Any lender, mortgage correspondent or broker who fails to comply with the foregoing provisions can be held liable to the borrower in an amount equal to the sum of:

(A) the amount by which the total of all prepaid finance charges exceeds eight per cent of the principal amount of the loan;

(B) eight per cent of the principal amount of the loan or two thousand five hundred dollars, whichever is less; and

(C) the costs incurred by the borrower in bringing an action under this subsection, including reasonable attorney's fees. This relief is available on a per-loan basis; if there is more than one borrower, the defendant still cannot be held liable for more than the elements of damages set forth in the subsection.

Subsection (d) of Connecticut General Statutes § 36a-498a provides that any mortgage deed given to secure a secondary loan must contain the word "mortgage" in the heading, either in capital letters or underscored, and shall also contain the principal amount of the loan.

1-16 FORECLOSURE RESCUE SCAMS—INTRODUCTION

As the economy has deteriorated in recent years, the volume of foreclosures has substantially increased, and we have witnessed a rising number of "foreclosure rescue scams." Loosely defined, foreclosure rescue scams typically involve a borrower who is in default under an existing mortgage and lacks funds to reinstate the loan or sufficient credit to obtain a refinance to save the residence. An entire industry has been created that seeks to strip these delinquent borrowers of title to their property, or in some instances, their remaining equity. Typically, the scam involves a company offering to assist the delinquent borrowers by "selling" their home to someone acting in concert with the company to pay off the existing delinquent mortgage, thereby avoiding a foreclosure of that mortgage. The buyer of the property is typically a straw-buyer who never occupies the property, so the original owner has the ability to remain in occupancy, notwithstanding the sale of the premises. Regrettably, the new buyer, who obtained conventional financing to purchase the home, defaults on the purchase money mortgage, and the prior owner is faced with an ejectment or a summary process action by the new lender, with whom he had no direct contact. This type of fact pattern gives rise to a variety of legal issues that are currently working their way through our courts, and which are appropriate for discussion at this time.

At the outset, it should be noted that certain provisions of P.A. 08-176 contain new licensing requirements for loan originators, the scope of which is beyond this text. A person faced with attempting to "unravel" a foreclosure rescue scam may wish to consider the implications of the licensing requirements of mortgage brokers and originators under the act. Specifically, Connecticut General

Statutes § 36a-486 was amended effective July 1, 2008, and now provides:

> (a) No person shall engage in the business of making [first] mortgage loans or act as a [first] mortgage broker in this state unless such person has first obtained the required license for its main office and each branch office where such business is conducted in accordance with the provisions of sections 36a-485 to 36a-498f, inclusive, 36a-534a and 36a-534b . . . . A person, other than a licensed mortgage loan originator acting on behalf of the mortgage lender or mortgage correspondent lender, shall be deemed to be engaged in the business of making mortgage loans if such person advertises, causes to be advertised, solicits or, offers to make residential mortgage loans, either directly or indirectly . . . .

As more fully discussed in Chapter 32, an unlicensed lender that makes loans runs the risk that the obligation will be entirely unenforceable, when the issue is raised as a special defense.

1-16:1 The Scam

Often, the owner of the premises conveys the property at closing to a third party by a warranty deed. The owner is typically motivated by an existing default on a mortgage loan, and perhaps even a pending foreclosure. The purchaser, who is often a straw-buyer, obtains a third party mortgage and acquires title, but usually does not take possession of the property. The seller has his delinquent mortgage paid off, and the foreclosure is withdrawn. The new buyer never occupies the property, but rather the former owner remains in possession, albeit with a new mortgage in which the straw buyer is obligated to make payments. A variation on this scheme is that the seller receives money to reinstate the loan, and unwittingly conveys title to the entity that provides the reinstatement funds. These situations usually occur when there is equity in the property to be realized upon a private sale of the premises, after payment of the first mortgage.

1-16:2 Does the Former Owner Retain Any Interest in the Property?

The question to be answered in a foreclosure scam is whether the homeowner who has conveyed the property by a warranty deed retains any interest sufficient to confer standing either to intervene in a subsequent foreclosure of the purchaser's mortgage, or perhaps in a quiet title action. If the former owner is an occupant of the property, that possessory interest may be a sufficient basis to intervene in a new foreclosure brought by the lender against the straw-buyer. That right of intervention, however, would be limited to a possessory interest only. Therefore, the former owner is not a proper party to the foreclosure proceedings by the new lender, except to the extent that the lender seeks to eject the former owner from the premises. An interesting question is whether the former owner of the property should be assigned a law day for purposes of redemption. In theory, an occupant of a property could exercise redemption rights, because his interest is sought to be extinguished as a named defendant in the action. Assigning the occupant a law day, however, should not be viewed as elevating the status of that interest to anything other than a possessory one.

A New York court has held that a victim of a foreclosure rescue scam lacks standing to invalidate the purchase money mortgage that is obtained by the straw-buyer, due to an absence of privity.[143] In an unrelated case, another New York court has utilized an entirely different analysis in connection with assessing the duty of the original lender in extending a mortgage loan to a straw buyer in a foreclosure rescue scam. In *Mathurin v. Lost & Found Recovery, LLC*,[144] the previously scammed plaintiff commenced an action following a "foreclosure rescue" scheme involving defendants Lost & Found Recovery, LLC (LFR), its principals, Maurice McDowall, and Dumo Opuiyo. The plaintiff alleged that sometime around October 2004 she was approached by McDowall, who offered to provide refinancing of the mortgage on her property, which was in default at the time.

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143. *Modeste v. Lost & Found Recovery, LLC*, 2008 NY Slip Op. 50626(U) (N.Y. Sup. Ct. 3/26/2008).

144. *Mathurin v. Lost & Found Recovery, LLC*, 19 Misc. 3d 756 (Sup. Ct. Kings Cnty. 2008).

She further alleged that McDowall represented to her that LFR was a company that originated mortgage loans and would be able to offer the plaintiff a mortgage with favorable terms, including a lower rate of interest, sufficient to satisfy the mortgage in default and also to provide a "significant cash out." The plaintiff claimed that based on McDowall's representation, she attended a "closing" on October 29, 2004, where McDowall insisted that she be represented by counsel provided by LFR. At the closing, the plaintiff was informed that her credit was not sufficient to obtain a mortgage in her own name, and that in order to obtain financing she would have to transfer title to the property to a third party.

The plaintiff further asserted that she was told that LFR would make monthly mortgage payments for one year, after which time the property would be deeded back to the plaintiff. The plaintiff thereafter executed a deed to Opuiyo, who executed a mortgage in favor of Greenpoint in the amount of $562,500.00. This mortgage was recorded with Mortgage Electronic Registration Systems ("MERS") as nominee. Funds from the Greenpoint mortgage were used to satisfy the first mortgage on the property. Opuiyo made no payments under the Greenpoint mortgage, causing that mortgage to become delinquent and resulting in a foreclosure action. The plaintiff claimed that she was stripped of the equity in her property in that a "substantial remainder" ($133,904.16) of the funds of the Greenpoint loan, following the payment to satisfy the first mortgage, were disbursed to LFR for "services rendered" and further used to pay "bogus" closing costs and settlement expenses. The mortgage and note issued by Greenpoint were assigned to defendant Christiana Bank & Trust Co.

In her amended complaint, Mathurin alleged causes of action with respect to Greenpoint/MERS. The plaintiff alleged that at the time of the mortgage transaction, as well as immediately prior thereto, Greenpoint/MERS failed to take measures to verify that Opuiyo would be able to remain current on the subject loan; failed to conduct a reasonable background investigation on Opuiyo, LFR and McDowall, and as such, failed to discover multiple mortgage loans involving Opuiyo as a "straw buyer;" failed to take measures to verify that LFR and/or McDowall were licensed and/or empowered to conduct broker services and/or to render services designed to facilitate mortgage financing; took no measures to

prevent the subject transaction, all of which constituted "negligent underwriting;" and allowed Opuiyo, LFR and McDowall to perpetrate a fraud upon the plaintiff. Mathurin also alleged that the negligence of Greenpoint/MERS in processing the loan constituted "gross negligence," and as such they should be enjoined from enforcing the note. This, coupled with the underlying fraud in the transfer of the deed, should render the mortgage void.

In denying the motion to dismiss by Greenpoint, the court stated:

> Here, plaintiff has sufficiently plead a prima facie causes of action against Greenpoint/MERS sounding in negligence in underwriting the loan. Here, MERS identifies itself as a separate corporation that is acting solely as a nominee for the lender and the lender's successors and assigns. However, MERS has a separate address and telephone number than the lender. Moreover, for purposes of recording the mortgage, MERS is the mortgagee of record. Prior to the initiation of foreclosure actions, MERS assigns the mortgage back to the initial lender to commence proceedings. Therefore, it is safe to assume that MERS, a separate entity, holds the right, title and interest to the mortgage and the lender is a separate entity that cannot proceed without resuming its right pursuant to an assignment. Considering the present difficulties faced in the subprime mortgage market, a lender underwriting a mortgage has a duty to investigate and ascertain the economic status of the purchaser/mortgagor and whether the purchaser/mortgagor may be committing a fraud against the seller in the underlying transaction - especially in this instance, where it is alleged that LFR, McDowall and Opuiyo perpetrated other foreclosure rescue schemes involving mortgages which had been recorded with MERS as the nominee of record.

This analysis is troubling, because a lender generally has no common-law duty to its borrower under Connecticut law, and

in most other jurisdictions, although recent state and federal legislation has modified that principle somewhat. Nevertheless, the *Mathurin* court has extended any potential duty of the lender to the seller of the premises, which appears to be an overly broad judicial reaction to the current economic climate. Although it makes solid business sense to conduct prudent loan underwriting, that is an entirely different issue from recognizing a legal duty from a lender to a third party, with whom the lender has had no contact and no privity.

Some foreclosure rescue scams involve another component, in which the former owner is permitted to remain in the property by paying "rent" to the new owner, commonly referred to as a "sale-leaseback" type of arrangement. If this agreement is not disclosed to the third party lender, and the settlement agent has no knowledge of the same, then such an arrangement would not elevate the former owner's interest in the property to anything other than a possessory interest. There may be grounds to argue for a constructive trust or an equitable mortgage, however, if the former owner pays rent to the straw-buyer, who then fails to pay the mortgage. From the standpoint of lien priority, however, an equitable mortgage or a constructive trust would still be junior to the third party mortgage, assuming that the transfer of title was supported by adequate consideration, such as payment of the former owner's mortgage.

1-16:3 Quiet Title Actions

An interesting scenario arises, however, if the former owner records a notice of *lis pendens* on the property and commences an action to rescind the sale on the basis of fraud, or fraud in the inducement. For an interesting discussion of how a deed from the seller may be deemed void in a rescue scam, *see Watson v. Melnikoff.*[145] If such an action were filed prior to a foreclosure by the third party lender, the creditor either would need to name the former owner as a defendant to extinguish any potential interest or would have to complete its foreclosure and ignore the rescission action altogether. If the foreclosing purchase money lender obtains title absolute prior to a determination of

145. *Watson v. Melnikoff*, 2008 NY Slip OP. 50954(U) (N.Y. Sup. Ct. May 6, 2008).

the rescission action, would the foreclosing lender have marketable title? A rescission of the underlying fee interest from the seller to the straw buyer would invalidate the transfer of title, which as a matter of law would void the third-party mortgage, and would require a title insurer (assuming that a title policy was obtained) to pay the lender in accordance with the policy limits.

In the event a former homeowner were to bring a quiet title action against the new owner and the third party lender, various problems would arise in prosecuting such an action. First, a plaintiff in a quiet title action is required to prevail on the strength of his own title and not the weakness of his adversary's claim.[146] Simply put, the deed of conveyance, assuming there was consideration, would appear to divest the former owner of an equitable interest in the property. Second, under Connecticut General Statutes § 47-31, a plaintiff in a quiet title action must have an interest in the property sufficient to confer standing, and a temporary occupancy of the property appears insufficient.[147] In *Brill v. Ulrey*, executors of an estate who were in possession of land filed a quiet title action. The *Brill* court held that Connecticut General Statutes § 47-31 requires a plaintiff to have an interest in the property, which requirement had not been met because the executors had no interest in the land other than their right of temporary possession and control.

1-17 NEW REGISTRATION REQUIREMENT FOR RESIDENTIAL PROPERTIES

With the passage of Public Act 09-144, entitled *An Act Concerning Neighborhood Protection*, a new level of regulation was introduced into Connecticut's foreclosure process. The act has been codified as Connecticut General Statutes § 7-148ii and Connecticut General Statutes § 7-148jj. In its original manifestation, the act required registration of certain residential properties that had gone through a foreclosure, where the property consisted of a structure that was vacant (uninhabited) at the time foreclosure was concluded, or became vacant through tenant ejectment or eviction within 120 days after the conclusion of the foreclosure.

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146. *Koennicke v. Maiorano*, 43 Conn. App. 1 (1996).
147. *Brill v. Ulrey*, 159 Conn. 371 (1970).

Although such a provision was new to Connecticut, it already had been implemented in several other states, being seen by municipalities as a tool for fighting blight by facilitating the sometimes difficult process of locating a party to take responsibility for a functionally abandoned property.

With the enactment of Subsections 13 and 14 of Public Act 11-201, the scope of the act was greatly expanded. Registration now must occur at the commencement of a qualifying foreclosure, rather than at its conclusion, and is not limited to vacant properties. This provision alone will result in the number of registrations being multiplied perhaps a hundredfold, if not more.

Subsections (a) and (b) of Connecticut General Statutes § 7-148ii set up the registration requirements and process. Subsection (a) merely defines some of the operative terms found in the more substantive Subsection (b), but even the definition portion of the act gives a telling indication of the act's new scope. A "Registrant" was originally defined as "the owner of vacant residential property who is required to register such property pursuant to section 2 of this act." Section 13 of Public Act 11-201 amended that definition by simply deleting the word "vacant." Thus, by elimination of that single word, the act went from requiring registration in only a small percentage of foreclosures to making it a requirement as part of nearly every action. As will be seen by examining other key definitions, however, that was hardly the extent of the expansion.

"Residential property," originally defined as a "one-to-four family dwelling," now is "a building containing one or more dwelling units and includes a commercial building containing one or more dwelling units." This new definition obviously now brings within the act such properties as mixed use buildings and multi-unit apartment buildings.

The term "vacant" was originally defined as "uninhabited." Public Act 11-201 did not revise that definition; it was simply eliminated, and replaced by a newly defined term, "Dwelling unit." That term is defined as "any house or building, or portion thereof, which is occupied, designed to be occupied, or rented, leased or hired out to be occupied, exclusively as a home or residence or one or more persons."

1-17:1 Registration Now Required Only for Institutional Mortgage Foreclosures

In one respect, the registration requirements have been relaxed rather than expanded. Connecticut General Statutes § 7-148ii originally stated that registration was required with respect to the foreclosure of any type of interest; thus, mechanic's lien, judgment lien, and even tax lien foreclosures, as well as mortgage foreclosures, came within its purview. The 2011 amendment now provides that registration is required with respect to "any person" who commences "an action to foreclose a mortgage on residential property." The terms used in that sentence are also ascribed specific meanings under Connecticut General Statutes § 7-148hh; "Mortgage" is defined as "a mortgage on residential property that is held by a person other than a natural person." "Person" is defined as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity."

1-17:2 Registration Now Required at Commencement of Suit

The structure of the original act was that a person who acquired vacant residential property through foreclosure, whether by strict foreclosure or a judicial sale, was required to register that property within the act's time limitations and in accordance with its provisions. The 2011 amendments changed that structure in two fundamental respects: first, registration is not limited to vacant properties; it applies to all qualifying (i.e. residential) property. Second, P.A. 11-201 had the effect of requiring registration *both* at the commencement of suit and at its conclusion. This requirement applies to all qualifying foreclosures commenced after October 1, 2011. Other provisions, discussed below, address actions that were pending on that date.[148]

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148. *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material. Public Act 11-201 is reprinted in the Appendix.

1-17:3 The Registration Process

The prior version of the act permitted alternative means of registering: the party acquiring title could register with the town clerk (at the rate of $100 per property) or could register with MERS. The MERS provision has been repealed, and the 2011 act provides for a different method of registration with the town clerk than formerly was the case. It also repeals the $100-per-registration fee, and substitutes the standard fee for recording documents in the land records.

Subsection (a) of Connecticut General Statutes § 7-148ii requires the plaintiff in a qualifying mortgage foreclosure to register with the town clerk. The provision specifies that registration must be accomplished "at the time and place of the recording of the notice of *lis pendens* as to the residential property being foreclosed in accordance with section 52-325." The final sentence of the subsection states, "Such registration shall be maintained by the municipality separate and apart from the land records."

The foregoing provision raises an interesting point: although it is extremely unlikely that a lender would commence a foreclosure without recording a notice of *lis pendens*, there is no actual statutory requirement that the plaintiff do so. By keying the registration to the recording of the notice of *lis pendens*, the question arises whether this new provision operates as a back door means of mandating the recording of a *lis pendens*.

Note that registration is not the same as recording, and thus these registrations will not be recorded in the land records; rather, they will be maintained in a separate data base that will be maintained by the town clerks. The town clerks have been provided with no guidance on how to maintain such registrations: will they be indexed, and if so, under what headings? Registrant? Property address? Since there are no statutory requirements, it is possible that town clerks will differ in how they address the matter.

The required content of the registration is regulated by Subsection (b) of Connecticut General Statutes § 7-148ii, which now provides:

> b) Registration made pursuant to subsection (a) of this section shall contain (1) the name, address, telephone number and electronic mail address of

> the plaintiff in the foreclosure action and, if such plaintiff is an entity or an individual who resides out-of-state, the name, address, telephone number and electronic mail address of a direct contact in the state, provided such a direct contact is available; (2) the name, address, telephone number and electronic mail address of the person, local property maintenance company or other entity serving as such plaintiff's contact with the municipality for any matters concerning the residential property; and (3) the following heading in at least ten-point boldface capital letters: NOTICE TO MUNICIPALITY: REGISTRATION OF PROPERTY BEING FORECLOSED. The plaintiff in the foreclosure action shall indicate on such registration whether it prefers to be contacted by first class mail or electronic mail and the preferred addresses for such communications. Such plaintiff shall report to the town clerk of the municipality in which the property is located, by mail or other form of delivery, any change in the information provided on the registration not later than thirty days following the date of the change of information. At the time of registration, such plaintiff shall pay a land record filing fee to the municipality as specified in section 7-34a.

The Connecticut Town Clerks Association has promulgated new forms to address the requirements of Public Act 11-201. The first, Form 1, is to be filed by the Plaintiff who commences an action to foreclose a mortgage on residential property. Additionally, Form 2 addresses the statutory requirement for registration of post-foreclosure acquisition of title.[149] These forms may be printed from the Town Clerks Association web site, www.ctclerks.com.

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[149] *See* Appendix material, available online. Please see the Digital Access page at the beginning of this volume for complete instructions for downloading the Appendix material. Forms 6-001 and 6-002 are included in the Appendix.

1-17:4 Sanctions for Noncompliance

Another major addition of the new act is the inclusion of sanctions in the event a plaintiff fails to comply with the registration requirements. These new provisions are found in three new subsections of Connecticut General Statutes § 7-148ii. They are:

> (h) Any plaintiff in a foreclosure action who fails to register in accordance with this section shall be subject to a civil penalty of one hundred dollars for each violation, up to a maximum of five thousand dollars. Each property for which there has been a failure to register shall constitute a separate violation.
>
> (i) Any person in whom title to a residential property has vested on or after October 1, 2011, through a foreclosure action pursuant to sections 49-16 to 49-21, inclusive, or 49-26, and who has not registered in accordance with subsection (c) of this section within thirty days of absolute title vesting in such owner shall be subject to a civil penalty of two hundred fifty dollars for each violation, up to a maximum of twenty-five thousand dollars. Each property for which there has been a failure to register shall constitute a separate violation.
>
> (j) An authorized official of the municipality may file a civil action in Superior Court to collect the penalties imposed pursuant to subsections (h) and (i) of this section, which penalties shall be payable to the treasurer of such municipality. Such penalties shall not create or constitute a lien against the residential property.

1-17:5 No Lender Liability Prior to Completion of Foreclosure

Subsection (k) makes it clear that the foreclosing lender incurs no liability as to the property "prior to the time that title passes to the foreclosing party."

1-17:6 The Challenge of Municipal Blight

P.A. 09-144 was entitled "An Act Concerning Neighborhood Protection," and its first two subsections, discussed above, were codified as Connecticut General Statutes § 7-148hh and Connecticut General Statutes § 7-148ii, which is currently entitled, "Registration and Maintenance of Vacant Foreclosed Residential Properties." In light of the 2011 revisions to the statute, it is obvious that its name ought to be changed. Interestingly, in light of the 2011 deletion of the reference to vacant property, the statutory intent is not readily discernible. That intent, to facilitate monitoring of blighted properties, has not changed. It will be recalled that P.A. 09-144 contained additional provisions beyond those codified into the referenced statutes. Except for Section 10 of the Act, which will be discussed later in greater detail, the remaining sections consist of amendments of previously existing statutory provisions to now permit various notices to be given to those persons who have registered pursuant to the new requirements. The amended statutory provisions are:

- Section 3 of the Act amends Connecticut General Statutes § 7-148ff, which deals with housing blight. The blight lien is discussed at greater length in Chapter 5, § 5-3:2.22.
- Section 4 of the Act amends Connecticut General Statutes § 7-152c, which relates to the citation procedures for the violation of any municipal ordinances enacted pursuant to Connecticut General Statutes § 7-148.
- Section 5 of the Act amends Connecticut General Statutes § 19a-206, which permits municipalities to seek injunctive relief against owners for maintaining nuisances and sources of filth.
- Sections 6, 7 and 8 of the Act amend Connecticut General Statutes § 47a-52, Connecticut General Statutes § 47a-53 and Connecticut General Statutes § 47a-58, which relate to the abatement of conditions in rented dwellings constituting a danger to life or health.

- Section 9 of the Act amends Connecticut General Statutes § 49-73b, pertaining to municipal liens for certain work done by a municipality. The lien now applies to expenses for "the inspection, repair, demolition, maintenance, removal or other disposition or any real estate in order to secure such real estate, to remedy a blighted condition on such real estate or to make it safe and sanitary under any provision of the general statutes or any municipal building, health, housing or safety codes or regulations . . ."

Section 10 is new, and has been codified separately as Connecticut General Statutes § 7-148jj. Its content warrants being reproduced *verbatim*. The statute provides:

> (a) No municipality shall adopt a property maintenance ordinance or regulation that applies only to the property maintenance activities of a person who holds a mortgage on or title to real property located within this state and obtained by foreclosure, provided nothing in this section shall preclude a municipality from enacting or enforcing an ordinance or regulation that applies generally to all owners of real property within such municipality, without regard to how the owner acquired title. For purposes of this section, property maintenance activities include, but are not limited to, activities related to the repair, maintenance, restoration, alteration, removal or demolition of any part of real property.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, any municipal property maintenance ordinance or regulation that applies only to the property maintenance activities of a person who holds title or a mortgage to real property located within this state and obtained by foreclosure shall continue to be effective provided such ordinance or regulation was adopted on or before passage of Public Act 09-144.

> (c) Nothing in this section shall prohibit or limit a municipality from adopting or enforcing an ordinance or regulation relating to the prevention of housing blight pursuant to subparagraph (H)(xv) of subdivision (7) of subsection (c) of section 7-148 of the general statutes, the maintenance of safe and sanitary housing as provided in subparagraph (A) of subdivision (7) of subsection (c) of section 7-148 of the general statutes, or the abatement of nuisances as provided in subparagraph (E) of subdivision (7) of subsection (c) of section 7-148 of the general statutes.

1-18 TRUSTS AS EQUITABLE INTERESTS CAPABLE OF FORECLOSURE

Typically, a party foreclosing a mortgage has the benefit of a written mortgage deed recorded on the land records. There are, however, other types of interests in land which may be foreclosed. One such interest which may provide a basis for foreclosure is a resulting trust.

> A resulting trust arises by operation of law at the time of a conveyance when the purchase money for property is paid by one party and the legal title is taken in the name of another . . . . The presumption of the existence of such a trust, however, is one of fact rather than law and may be rebutted by proof of contrary intent . . . . The existence of a resulting trust is an issue of fact . . . . If it can be proved that the intention of the parties was otherwise, there is no resulting trust . . . . In deciding . . . what the intent of the parties was at the time of the conveyance, the court [must] rely upon its impression of the credibility of the witnesses. Intent is a question of fact, the determination of which is not reviewable unless the conclusion drawn by the trier is one which could not reasonably be drawn." (Citations omitted; internal quotation marks omitted.) *Neubig v. Luanci Construction, LLC*, 124 Conn.

> App. 425, 434-35, 4 A.3d 1273 (2010); Levinson v. Lawrence, 162 Conn. App. 548 (2016).

In *Levinson v. Lawrence*,[150] the plaintiff commenced an action claiming a one-half interest in property based upon an alleged resulting trust. The factual background is relevant to the claim and is recited from the Appellate Court decision based upon the trial court findings as follows:

> [The parties] have known each other since college. They had a relationship in 1990 and resumed it in 2002. It has always been a tumultuous one although the plaintiff has been generous with his money throughout the relationship. For example in 2006 [the plaintiff] paid off [the defendant's] car loan of about $9000. [The defendant] bought the subject property with her [former] husband. They were divorced on March 10, 2003. As part of the divorce judgment, the property was quitclaimed to [the defendant] and she became obligated to execute a note to her [former] husband in the amount of $58,750 payable on February 4, 2007, unless certain other events occurred earlier. Interest on the note was to accrue from February 4, 2005 at the rate of 2 percent per year. A mortgage on the property was placed to secure the note. When the note became due, [the plaintiff] offered to give [the defendant] the money to pay her [former] husband the amount owed him on the note. [The defendant] agreed to accept the money as the easiest option for her. On February 16, 2007, [the defendant] gave [the plaintiff] a check for $61,123.50. Even though [the plaintiff] is a law school graduate, no documentation was prepared or executed by either party at that time evidencing the nature of the transaction. [The defendant] believed that it was a loan that she would repay when the house was sold, if the parties were no longer together.

150. *Levinson v. Lawrence*, 162 Conn. App. 548 (2016).

> [The defendant] then gave her [former] husband a check in the same amount on February 17, 2007, to satisfy the note. [The defendant] claimed that she would never have agreed to give [the plaintiff] a portion of the house. The house had been a point of contention in her divorce.
>
> In June, 2008, [the plaintiff] moved into the property with [the defendant]. Although he did not pay the utilities, which increased significantly after he moved in because he worked from home, he was, as [the defendant] described it, 'financially generous,' during their relationship. [The plaintiff] contributed to the expenses of the household and paid for certain work to be done on the house, which [the defendant] could not afford, such as painting, replacing windows, building a closet, remodeling a porch, which [the plaintiff] used as an office. He also purchased a piano as well as a new washer, dryer and dishwasher for the house, as well as contributed to the purchase of a couch and loveseat.
>
> From June to December, 2008, the parties' relationship continued to be tumultuous even resulting in violence by [the plaintiff] against [the defendant]. In December, 2008, the parties broke up, but [the plaintiff] refused to move out of the property, creating an intolerable situation for [the defendant] and her daughter, who also lived in the property. In January, 2009, the parties went to counseling where [the plaintiff] presented [the defendant] with a multipage document entitled 'Agreement' in which he claimed to have made significant monetary contributions for improvements to the property during the period of the parties' cohabitation, and that stated that they had orally agreed, at the time [the plaintiff] made the $61,000 payment to [the defendant], that [the plaintiff] would be entitled to a 50 percent interest

> in the property. The Agreement also provided that [the plaintiff] would remove himself from the property within seventy-two hours of the execution of the Agreement. [The defendant] did not sign the Agreement. [The plaintiff] would not leave the property voluntarily so [the defendant] started eviction proceedings against him in February, 2009. There was another violent confrontation between the parties that month and [the plaintiff] was arrested and a protective order issued against him and he agreed to move out of the property.

The trial court rendered judgment in favor of the defendant on all counts of the complaint and on her counterclaim alleging slander based upon a notice of *lis pendens*. On appeal, the plaintiff claimed that the trial court committed error by failing to find a resulting trust. He argued that the parties mutually agreed that the defendant would pay the plaintiff $61,123.50 in return for a 50% ownership interest in the property. The defendant testified that the parties' relationship was unstable, that she was conflicted and reluctant to accept the money but did so to avoid either burdening her family members or selling the property. The defendant also testified that there were no terms involving the money except the statement from the plaintiff that "if this relationship goes south then you'll just pay me when you sell the house." The Appellate Court affirmed that there was no resulting trust, based upon the absence of documentary evidence signed or approved by both parties regarding the intent of the transaction. It rejected the plaintiff's argument that $45,000 in checks with the word "mortgage" written in the memorandum section, provided during the period of cohabitation, was to safeguard his interest in the property when that conduct was unilateral.