Chapter 1

Preliminary Considerations

1-1 REVIEW OF DOCUMENTS

1-1:1 Mortgage Foreclosure

With the exception of a very specific instance involving application of federal law, Connecticut does not permit power-of-sale foreclosure. All foreclosures in Connecticut must be prosecuted as judicial 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 proposed plaintiff 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 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 General Statutes § 52-109 and that issues regarding the proper parties to an action are subject to the curing provisions of 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 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 Corp. v. Soboleski*,[3] the Appellate Court stated the following regarding General Statutes § 35-1:

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1. *See also* Conn. Gen. Stat. § 49-10 and § 49-17, discussed in Chapter 3, § 3-4:2, *below*.
2. *Dime Sav. Bank of Wallingford v. Arpaia*, 55 Conn. App. 180 (1999).
3. *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493, 500 (1993).

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

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4. *America's Wholesale Lender v. Pagano*, 87 Conn. App. 474 (2005).

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, 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 before commencing any foreclosure action in such a fashion.

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*[5] 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 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*[6] 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 case involved a sole proprietorship in which his last name was incorporated into the trade name.

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5. *Greco Constr. v. Edelman*, 137 Conn. App. 514 (2012).
6. *America's Wholesale Lender v. Pagano*, 87 Conn. App. 474 (2005).

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 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*.[7] 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."[8] 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 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

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. But for the existence of General Statutes § 49-17, any break in that

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7. *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493 (1993).
8. *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493, 500 (1993).

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 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 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 General Statutes § 49-17 provides a safe haven under such circumstances, but the Appellate Court did not agree, ruling that 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.[10]

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*.[11] The substitute plaintiff in that case was Fleet Bank, which had acquired this mortgage asset from

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9. *Fleet Nat'l Bank v. Nazareth*, 75 Conn. App. 791 (2003).
10. The *Nazareth* case is further discussed in Chapter 3, § 3-4:2, *below*.
11. *Connecticut Bank & Tr. Co. v. Reckert*, 33 Conn. App. 702 (1994).

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: "[a]lthough 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."[12]

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.[13] 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.*

In a 1999 decision, *Dime Savings Bank of Wallingford v. Arpaia*,[14] the Appellate Court addressed the issue of standing in a mortgage foreclosure. Relying on 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 to standing based upon changes in ownership of a loan occurring through the activity in the secondary mortgage market.

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12. *Connecticut Bank & Tr. Co. v. Reckert*, 33 Conn. App. 702, 705 (1994).

13. The rationale for this requirement is discussed in Comment 1 to Standard 28.5 of the Connecticut Standards of Title, discussed in Chapter 28, § 28-3, *below*.

14. *Dime Sav. Bank of Wallingford v. Arpaia*, 55 Conn. App. 180 (1999).

A trial level decision, *Bank of New York v. Gagnon*,[15] 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 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 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

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15. *Bank of N.Y. v. Gagnon*, No. CV085003461S, 2009 WL 1607599 (Conn. Super. May 19, 2009).

> 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 Connecticut courts, and it appears that the Appellate Court created a new standard in 2010 in assessing whether a plaintiff has standing to foreclose a mortgage. This standard requires evidence of the date that the foreclosing plaintiff became the "holder" of the note or, in other words, allegations and proof of the date on which physical possession of a note was transferred to the foreclosing lender.

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"[16] and "transferee."[17] 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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> (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,

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16. 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).

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

> 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.

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.*,[18] the absence of an endorsement to the plaintiff is without consequence under the UCC, provided the plaintiff qualifies as a transferee, since 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.[19] 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."[20] 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.

The Appellate Court's decision in *LaSalle Bank v. Bialobrzeski*[21] appears to articulate the new standard and requirement for establishing standing in a mortgage foreclosure. The plaintiff, Long Beach Mortgage Corporation, filed a mortgage foreclosure 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

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18. *Ulster Sav. Bank v. 28 Brynwood Lane, Ltd.*, No. CV 05 007323, 2010 WL 625565 (Conn. Super. Jan. 11, 2010), *aff'd*, 134 Conn. App. 699 (2012); see additional discussion in Chapter 31, § 31-3, *below*.

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

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

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

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. Complicating this issue on appeal was that the endorsement of the note was stamped on the reverse side of the last page of the note and, therefore, was not visible on the copies of the note appended to various filings within the evidentiary record.

The Appellate Court decision noted that the note and endorsement were not attached to the plaintiff's objection to the motion to dismiss. The plaintiff further argued that 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 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) the assignment of mortgage stated that Long Beach Mortgage Company assigned the mortgage to LaSalle Bank National Association as Trustee on November 27, 2007.[22]

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

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[22] *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*[23] 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[24] 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, General Statutes § 42a-3-204(c) provides:

> For the purpose of determining whether the transferee of an instrument is a holder, an endorsement

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23. 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).

24. 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."

> that transfers a security interest 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.

Subsequent to *Bialobrzeski*, standing law continued to evolve through subsequent cases decided by the Appellate and Supreme Courts. In *Equity One, Inc. v. Shivers*,[25] the Supreme Court reversed an earlier Appellate Court decision.[26] 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.

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

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 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 subsequently 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*,[27] 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 the 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 General Statutes § 49-17.[28] 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

27. *RMS Residential Props., LLC v. Miller*, 303 Conn. 224 (2011).

28. *See HSBC Bank USA, N.A. v. Navin*, 129 Conn. App. 707 (2011); *Chase Home Fin., 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).

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 quote *Garris v. Calechman*[29] 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*.[30] 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*,[31] although the decision is more notable for its discussion of a protective order limiting discovery, as well as the time limitations in play with motions for default for failure to plead.[32]

A somewhat different twist on the standing challenge arose in *CitiMortgage, Inc. v. Gaudiano*,[33] where the defendant claimed that

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

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

31. *Deutsche Bank Nat'l Tr. Co., Tr. v. Bertrand*, 140 Conn. App. 646 (2013); see additional discussion in Chapter 5, § 5-2:8, *below*.

32. See additional discussion of *Bertrand* in Chapter 5, § 5-2:3.2a, *below*.

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

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 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 31, *below*, 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*,[34] 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*,[35] the Supreme 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.

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34. *U.S. Bank, N.A. Tr. v. Ugrin*, 150 Conn. App. 393 (2014).
35. *Equity One, Inc. v. Shivers*, 310 Conn. 123 (2013).

In *Deutsche Bank National Trust Co., Trustee v. Torres*,[36] 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 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*,[37] 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.

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36. *Deutsche Bank Nat'l Tr. Co., Tr. v. Torres*, 149 Conn. App. 25 (2014).
37. *Deutsche Bank Nat'l Tr. Co. v. Thompson*, 163 Conn. App. 827 (2016).

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 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 *U.S. Bank National Ass'n, Trustee v. Schaeffer*,[38] 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., Inc. v. Signature Properties, LLC*.[39] 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

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38. *U.S. Bank Nat'l Ass'n, Tr. v. Schaeffer*, 160 Conn. App. 138 (2015).

39. *J.E. Robert Co., Inc. v. Signature Props., LLC*, 309 Conn. 307 (2013); see further discussion in Chapter 31, § 31-3, *below*.

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 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.* Id.
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> And recently this court reiterated this reading of the *J.E. Robert Co.*, footnote. In *American Home Mortgage Servicing, Inc. v. Reilly*, supra, 157 Conn. App. 130, the plaintiff 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.[40]

In *JP Morgan Chase Bank, N.A. v. Simoulidis*,[41] the Appellate Court has clarified the evidentiary burden that a borrower must satisfy to defeat a lender's standing to prosecute a foreclosure. 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*,[42] 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.[43]

The *Simoulidis* case 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 Connecticut courts. In *Deutsche Bank National Trust Co. v. Cornelius*,[44] the defendant was challenging the plaintiff's standing to prosecute a mortgage foreclosure by asserting that the plaintiff's failure to

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40. *U.S. Bank Nat'l Ass'n, Tr. v. Schaeffer*, 160 Conn. App. 138, 148-49 (2015); the *Reilly* case is also discussed in § 1-1:1.1c, *below*.

41. *JP Morgan Chase Bank, N.A. v. Simoulidis*, 161 Conn. App. 133 (2015).

42. *U.S. Bank Nat'l Ass'n, Tr. v. Schaeffer*, 160 Conn. App. 138 (2015).

43. *U.S. Bank Nat'l Ass'n, Tr. v. Schaeffer*, 160 Conn. App. 138, 150 (2015).

44. *Deutsche Bank Nat'l Tr. Co., Tr. v. Cornelius*, 170 Conn. App. 104, 115 (2017).

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 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*,[45] 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

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45. *Valley Nat'l Bank v. Marcano*, 174 Conn. App. 206 (2017).

§ 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*,[46] the court held that "[a]lthough that 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."

In *U.S. Bank, National Ass'n, Trustee v. Moncho,*[47] the defendant challenged the plaintiff's standing based on the history of allonges relating to the note. The plaintiff had presented the court with the original note, to which a single allonge was attached by means of a staple. That allonge, which took the form of an endorsement in blank, facially established the plaintiff's standing to maintain the foreclosure. Additionally, an officer of the plaintiff testified that the plaintiff had possession of the note at the time of commencement of the action. The defendant, however, introduced into evidence a number of additional allonges purporting to transfer the note to other parties. The trial court had found that "[a]lthough the defendants introduced several other signed and unsigned allonges, no evidence was offered to show that any of these other allonges were ever affixed to the note." Additionally, General

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46. *Berkshire Bank v. The Hartford Club*, 158 Conn. App. 705, 712 (2015).

47. *U.S. Bank, Nat'l Ass'n, Tr. v. Moncho,* 203 Conn. App. 28, *cert. denied*, 336 Conn. 935 (2021).

Statutes § 42a-3-204 establishes that the plaintiff's allonge, being attached to the note became part of the note itself, Thus, the court concluded, the defendant's evidence failed to overcome the presumption, established by the plaintiff's testimony and evidence, that the plaintiff had possession of the note at the time suit was initiated and thus had standing to prosecute the action.

1-1:1.1b1 Conflicting Authority for Non-Evidentiary Summary Judgment

Creditors may find some solace in *HSBC Bank USA, N.A. v. Navin*,[48] 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.

Although *Navin* did affirm the granting of a summary judgment in the absence of a hearing, a more recent Appellate Court decision has reached a contrary conclusion. In *Chase Home Finance, LLC v. Scroggin*,[49] the Appellate Court reversed a trial court's granting of a summary judgment without having conducted a hearing on the

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

49. *Chase Home Fin., LLC v. Scroggin*, 194 Conn. App. 843 (2009); see additional discussion in Chapter 5, § 5-2:4, *below*.

plaintiff's motion. It is interesting to note that *Scroggin* makes no reference to *Navin*, neither distinguishing nor overruling the prior decision.

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*,[50] 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 provided the following policy reason for adopting

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

> 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.[51]

The Appellate Court also 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*,[52] the lender commenced a mortgage foreclosure with physical

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51. *Berkshire Bank v. The Hartford Club*, 158 Conn. App. 705, 713-14 (2015).
52. *21st Mortg. Corp. v. Schumacher*, 171 Conn. App. 470 (2017).

possession 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.[53]

[53] *21st Mortg. Corp. v. Schumacher*, 171 Conn. App. 470, 482 n.10 (2017).

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*,[54] 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 borrower's 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

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54. *Bank of Am. v. Kydes*, 183 Conn. App. 479 (2018).

evidence to challenge standing, and affirmed the trial court. It 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.

Based on provisions of federal law, a foreclosing plaintiff may establish its standing to enforce a mortgage, even in the absence of an endorsement on a promissory note. In *Wells Fargo Bank, N.A. v. Caldrello*,[55] the Appellate Court affirmed the entry of summary judgment for the foreclosing lender. The plaintiff was a national bank, and the note it was enforcing, originally payable to World Savings Bank, FSB, lacked an endorsement at the time the foreclosure was filed. The history of the loan was as follows: The borrower executed and delivered to World Savings Bank, FSB an adjustable rate mortgage note dated February 9, 2007, in the amount of $480,000. On December 31, 2007, ten months after the making of the note and mortgage, World Savings merged and changed its name to Wachovia Mortgage, FSB (Wachovia). This event was documented by correspondence annexed to an affidavit submitted in support of summary judgment, and included a letter from the Office of Thrift Supervision within the United States Department of the Treasury. The affidavit further stated that, on the basis of an examination of the plaintiff's business records, on November 1, 2009, Wachovia converted to a National Bank named Wells Fargo Bank, Southwest, N.A., and that on the same date Wells Fargo Bank Southwest, N.A., merged into Wells Fargo Bank, N.A., the plaintiff. These changes of corporate names and status were documented by correspondence from the Office of the Comptroller of the Currency annexed to an affidavit in support of summary judgment.

In affirming the trial court's order granting summary judgment on liability only, the Appellate Court looked to federal law, stating:

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55. *Wells Fargo Bank, N.A. v. Caldrello*, 192 Conn. App. 1 (2019).

> Title 12 of the United States Code, § 215a (e) provides in relevant part:
>
> The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests . . . in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger . . . .

The foreclosing lender also supported its argument as the owner of the loan with business records identifying the investor number on the loan and its relationship to the owner of the loan. In addition, the plaintiff's affidavits demonstrated that Wells Fargo Bank N.A. acquired the assets of Wachovia on November 1, 2009 after World Loan Company, LLC, formerly known as World Loan, transferred the note back to Wachovia on January 23, 2009. The borrower used this evidence to argue that an endorsement was necessary. The Appellate Court rejected this argument as well, stating as follows:

> The undisputed evidence before the court reflects that, in 2007, World Savings transferred the note to its subsidiary, World Loan. After World Loan converted to a limited liability company, it transferred the note back to World Savings, then

> renamed Wachovia, in 2009. Wachovia maintained its status as holder because it reacquired the note pursuant to the Uniform Commercial Code, § 42a-3-207. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." If the entity that was the original named payee on the note reacquires it, there is no cloud on that entity's title. See General Statutes Annotated § 42a-3-207, comment (West 2018). This statute applied to reestablish Wachovia, as the holder following the intercorporate transfer from World Loan Company, LLC, which resulted in Wachovia's reacquisition of the note. It allows a prior holder of a negotiable instrument to become a person entitled to enforce the instrument upon reacquiring such instrument without having to be burdened with any endorsements that might have occurred between the time of the first undertaking of liability and the reacquisition of the instrument. Under § 42a-3-207, "[r]eacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise." "Holder" is defined in General Statutes § 42a-1-201 (21) (A) as "[t]he person in possession negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."[56]

Parties that may be ordered by the court to have an evidentiary hearing related to a pending motion for summary judgment should pay special attention to *Wells Fargo Bank, N.A. v. Ferraro*,[57] in which the Appellate Court reversed the granting of a motion for summary judgment because the trial court heard testimonial evidence regarding a challenge to an EMAP notice. In a per curiam opinion, the Court held that by hearing live testimony, the trial court decided a question of fact, which was improper, and reversed the judgment of foreclosure on that basis.

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56. *Wells Fargo Bank, N.A. v. Caldrello*, 192 Conn. App. 1, 26-27 (2019).
57. *Wells Fargo Bank, N.A. v. Ferraro*, 194 Conn. App. 467 (2019).

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*,[58] 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 General Statutes § 52-118,[59] but emphasized that under the common law, the assignor retains the right to sue even though the legal interest has been assigned to another. The court noted that this rule of "dual standing" applies to foreclosures, citing *Joseph v. Donovan*,[60] 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

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

59. Conn. Gen. Stat. § 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.

60. *Joseph v. Donovan*, 114 Conn. 79 (1931).

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.[61]

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

In *Financial Freedom Acquisition, LLC v. Griffin*,[62] 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. 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

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61. *Ion Bank v. J.C.C. Custom Homes, LLC*, 189 Conn. App. 30 (2019); see additional discussion in Chapter 3, § 3-4:3, *below*.

62. *Financial Freedom Acquisition, LLC v. Griffin*, 176 Conn. App. 314 (2017).

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.[63]

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, *Griffin* obviously raises doubts as to the likely success of any such challenge.

1-1:1.1b4 Mortgage Note Subject to Federal Law

For a discussion of the distinction between a challenge to standing on a motion for summary judgment as opposed to addressing the merits of a cause of action where the note is stated to be subject to federal law, the discussion of *Wachovia Mortgage, F.S.B. v. Toczek*[64] is germane.

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 Mae (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.[65]

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*.[66] This

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63. *Financial Freedom Acquisition, LLC v. Griffin*, 176 Conn. App. 314, 332-34 (2017).

64. *Wachovia Mortg., F.S.B. v. Toczek*, 196 Conn. App. 1 (2020); discussed further in Chapter 6, § 6-4:6, *below*.

65. See Chapter 31, *below*, for a more complete discussion of the issues surrounding mortgage servicers and the foreclosure process.

66. *American Home Mortg. Servicing, Inc. v. Reilly*, 157 Conn. App. 127 (2015).

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 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 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.[67]

[67] *American Home Mortg. Servicing, Inc. v. Reilly*, 157 Conn. App. 127, 134 (2015).

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 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.*[68] The plaintiff's 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*.[69]

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*[70] and

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

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

70. *Chase Home Fin., LLC v. Fequiere*, 119 Conn. App. 570 (2010).

RMS Residential Properties, LLC v. Miller,[71] particularly as to the effect of 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 . . . .'"

The defendant unsuccessfully argued that the issue was controlled by *Second Exeter Corp. v. Epstein*,[72] 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*,[73] 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

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

72. *Second Exeter Corp. v. Epstein*, 5 Conn. App. 427 (1985).

73. *Jenzack Partners, LLC v. Stoneridge Assocs., LLC*, 183 Conn. App. 128 (2018).

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. 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.[74]

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.

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[74] Restatement (Third) of Suretyship and Guaranty § 13 cmt. F.

The Supreme Court subsequently granted the defendant's petition for certification,[75] limited to the following question: "Did the Appellate Court properly conclude that [Jenzack] had standing to foreclose the Tine mortgage because Sovereign Bank had assigned the Stoneridge note to [Jenzack], even though Sovereign Bank did not assign the Tine guarantee, for which the Tine mortgage was collateral, to [Jenzack]?" In upholding the Appellate Court ruling, the court stated: "Although this court has not addressed this exact issue of the interpretation of a guarantee that was not explicitly assigned to a subsequent party seeking to enforce the guarantee, we are persuaded by the Appellate Court's reasoning in applying the foregoing principles."

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 deficiency judgment.[76] 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

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75. *Jenzack Partners, LLC v. Stoneridge Assocs., LLC*, 330 Conn. 921 (2018).

76. *See* Conn. Gen. Stat. §§ 49-1 and 49-14, and the discussions in Chapter 3, § 3-4:1 and Chapter 9, § 9-5, *below*.

be that the complaint for foreclosure will have to contain a second count seeking a reformation of the mortgage.[77]

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, 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*,[78] 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.

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77. See generally Chapter 3, § 3-9, *below*.
78. *ARS Invs. II 2012-1 HVB, LLC v. Crystal, LLC*, 324 Conn. 680 (2017).

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 General Statutes § 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, General Statutes § 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 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.[79] 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.

1-1:1.5a Transfer of Title as Event of Default

Although "due-on-sale" or "due-on-transfer" clauses have long been a nearly universal element of institutional mortgages, they have yet to provide a basis for inquiry by our appellate courts. Interestingly, a 2020 decision, *Castle, Trustee v. Dimugno*,[80] involved an attempt by a mortgagee to enforce such a clause in a private mortgage, and gave both the trial court and the Appellate Court an opportunity to explore the scope of such provisions. Ultimately, the Appellate Court determined that the plaintiff lacked standing to foreclose, and so the due-on-sale issue did not play a role in the outcome of the case. Nonetheless, the discussions in both the trial and appellate court decisions do present a worthwhile examination of the issue.

The mortgage in question came about as part of the settlement of a dissolution of marriage action, whereby the husband agreed

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79. See generally Chapter 4, *below*.
80. *Castle, Tr. v. Dimugno,* 199 Conn. App. 734 (2020).

to transfer to the wife his interest in the marital home. The wife, in turn, agreed to execute a mortgage note and deed in favor of the husband. The note stated: “The undersigned promises to pay the said principal and interest as follows: 1. The sale of the [property]; or 2. The death of the [m]aker hereof.” The note then continued: “[i]f any payment due hereunder shallnot have been paid within [fifteen] days after the same is due . . . or if title to said property is transferred, then the entire unpaid principal, with accrued interest, shall, at the option of the holder hereof, become due and payable forthwith.”

Some nine years later, as part of an estate plan, the wife transferred title to the property by quit claim deed to her daughter, retaining life use. As the decision recites, “The life use deed did not purport to release or extinguish [the husband’s] mortgage on the property.” Shortly afterwards, the plaintiff commenced the foreclosure, claiming the transfer of the property as a breach that caused the mortgage to go into default. The defendant moved to strike the complaint, claiming that the transfer to her daughter did not fall within either of the two circumstances enumerated in the note: the sale of the property, or the death of the defendant, and consequently there was no default. The court refused to strike the complaint, however, concluding: “[w]hen the express terms of the note are construed in a light most favorable to the plaintiff, the defendant’s ‘transfer’ to her daughter could be considered an event of default.”

The defendant later moved for summary judgment, claiming that the term “transfer” as used in the note needed to be construed within the context of the dissolution decree and the events surrounding it. One salient aspect was a stipulation that the parties signed and incorporated into the decree, which stated that the note “shall be payable on the first of the following events: the sale of [the property] by the wife and/or death of the wife.” In discussing this provision, the Appellate Court also noted that “[t]he stipulation makes no mention makes no mention of any other event, including a transfer for no consideration, as triggering the defendant’s obligation to pay any amounts due under the note.”

Although the foregoing discussion suggests that the Appellate Court was leaning in the defendant’s favor regarding the issue, the court did not rule on the question, since the appeal ultimately was dismissed for lack of standing on the plaintiff's part.[81] Nonetheless, *Castle* offers perhaps the only Connecticut reported decision on due-on-sale issues, and is worthy of study for that reason.

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[82] 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*,[83] 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.

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81. This aspect of the decision is discussed in § 1-1:1.1b, *above*.
82. *Connecticut Nat'l Bank v. Lorenzato*, 221 Conn. 77 (1992).
83. *Dart & Bogue v. Slosberg*, 202 Conn. 566 (1987).

Recognizing the tension between these lines of cases, the *Lorenzato* court sought to reconcile the issues 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 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.[84]

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 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

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84. *Connecticut Nat'l Bank v. Lorenzato*, 221 Conn. 77, 82 (1992).

years after the instrument is recorded. 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*,[85] the mortgage being foreclosed suffered from a defect in the manner of execution. The 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 General Statutes § 47-36aa(a)(2), 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

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

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.)

JPMorgan Chase Bank v. Virgulak[86] presented a situation where only the husband signed the promissory note, and only the wife signed the mortgage intended to secure the note. Title to the property was only in the wife's name. When the loan went into default, the lender initiated suit, and sought a foreclosure, as well as a reformation of the mortgage. The trial court held for the wife, concluding that the mortgage was not capable of being reformed because of the absence of a mutual mistake, and further that the mortgage was invalid because it secured a nonexistent debt.[87]

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

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86. *JPMorgan Chase Bank v. Virgulak*, 192 Conn. App. 688 (2019).

87. See additional discussion in Chapter 3, § 3-5:1.6 and § 3-9, *below*.

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.[88] 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 General Statutes § 36a-485, *et seq*.[89] In addition to civil penalties and license revocation, the power to disgorge exists under General Statutes § 36a-50, permitting disgorgement of monies derived in an unfair trade practice.

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88. 18 U.S.C. § 1341; 18 U.S.C. § 1343.

89. The Consumer Credit Division of the Connecticut Department of Banking licenses website is *available at* https://portal.ct.gov/DOB/Consumer-Credit-Licensing-Info/Consumer-Credit-Licensing-Information/Consumer-Credit-Licensing-Information (last visited Sept. 13, 2024).

1-1:1.8 Tenants' Rights

Federal legislation, Public Law 111-22, "The Protecting Tenants at Foreclosure Act of 2009," ("PTFA") 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. The Act was subsequently extended by Public Law 111-203 and made permanent by Public Law 115-174. The Act is codified as 12 U.S.C. § 5201 note; 12 U.S.C. § 5220 note; and 42 U.S.C. § 1437f note.[90]

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*[91] 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 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.*[92] 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

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90. See more detailed discussion of the PTFA in Chapter 9, § 9-4:1, *below*.
91. *Devlin v. Wiener*, 232 Conn. 550 (1995).
92. *Dart & Bogue v. Slosberg*, 202 Conn. 566 (1987).

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.[93]

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.*[94] 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, it must have been a sight to behold:

> 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

93. *Devlin v. Wiener*, 232 Conn. 550 (1995).

94. *Rosenfield v. Cymbala*, 43 Conn. App. 83 (1996).

> and owing from the plaintiff to anyone who has an interest in [the] underlying note."[95]

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*, 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."[96]

The court also noted that, prior to the 1978 Practice Book amendments, Practice Book § 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.[97]

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

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95. *Rosenfield v. Cymbala*, 43 Conn. App. 83, 92 (1996).
96. *Rosenfield v. Cymbala*, 43 Conn. App. 83, 88 (1996).
97. *Rosenfield v. Cymbala*, 43 Conn. App. 83, 92 (1996) (citation omitted).

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*,[98] 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., 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.
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> In Rosenfield, this court observed that in the prior action, "the trial court found that the plaintiff

[98] *U.S. Bank, N.A., Tr. v. Foote*, 151 Conn. App. 620, *cert. denied,* 314 Conn. 930 (2014).

> 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.[99]

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 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

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

the entire loan becoming full recourse as to all borrowers and guarantors.[100]

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*,[101] 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 default, which is an amount fixed by the terms of the loan and is not speculative or incalculable.[102]

It is axiomatic that mortgage loans are contracts, which are to be enforced according to their terms. In *51382 Gratiot Ave.*

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

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

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

Holdings, LLC v. Chesterfield Dev. Co., LLC,[103] 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. Lichtenfels*,[104] 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

103. *51382 Gratiot Ave., Holdings, LLC v. Chesterfield Dev. Co., LLC*, 835 F. Supp. 2d 384 (2011).

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

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."[105]

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

[105] *Credit Based Asset Servicing & Securitization, LLC v. Lichtenfels*, 658 F. Supp. 2d 355, 362 (D. Conn. 2009).

property to satisfy a personal claim.[106] *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.[107]

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

Many practitioners believed *Dart & Bogue*[108] 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*,[109] 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 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 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 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 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

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106. *Hodge v. Hodge*, 178 Conn. 308, 313 (1979).

107. For a more extensive discussion of foreclosures in federal court, see Chapter 19, *below*.

108. *Dart & Bogue v. Slosberg*, 202 Conn. 566 (1987).

109. *Naugatuck Sav. Bank v. Fiorenzi*, 232 Conn. 294 (1995).

the final six pages of its decision to an analysis of the several reasons supporting its conclusion that the requirements of 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.[110]

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 General Statutes § 49-4b to make it clear that its provisions, as is the case with 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. Public Act 97-320, Section 2, amended General Statutes § 49-4b(a) as follows:

> 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 . . .

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

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 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 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.

General Statutes § 49-4b(e) 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*.[111] 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 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

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111. *Residential Credit Sols., 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).

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.*,[112] 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.

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:

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

(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 Statutes § 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.[113]

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 after-acquired property, and since they generally enjoy a ten-year limitation period,[114] 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

113. See generally Chapter 29 for a discussion of blanket mortgages.

114. 26 U.S.C. § 6502.

that the lien will attach to all property of the taxpayer, regardless of which property is referenced in the lien.[115]

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,[116] it is not so commonly appreciated that post-mortgage appurtenances acquired by the owner may nonetheless pass to the mortgagee upon foreclosure.[117] 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 to the benefit of the mortgagee and his grantees. [Citations omitted].[118]

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.

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115. 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 Aug. 21, 2024).

116. *See* Conn. Gen. Stat. § 47-36*l*.

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

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

> 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.[119]

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 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.[120] It is important to note, however, that this opinion simply indicates what General Statutes § 7-148aa already states: that blight liens have priority over other liens filed after July 1, 1997.

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119. *Gurevich v. Goldman*, 141 Conn. 281, 287 (1954) (emphasis added).

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

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 named or cited as a party with respect to that interest.[121] Additionally, the decedent's heirs and representatives may have to be named as defendants.[122]

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.[123] 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.

1-3 THE NOTICE OF *LIS PENDENS* ACT

After the Supreme Court ruled in *Kukanskis v. Griffith*[124] 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

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121. See discussion in Chapter 3, § 3-5:2.9, *below*.
122. See discussion in Chapter 3, § 3-5:1.1, *below*.
123. See Chapter 26, *below*, for a discussion of the bankruptcy aspects of foreclosures.
124. *Kukanskis v. Griffith*, 180 Conn. 501 (1980).

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.[125]

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

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 General Statutes § 52-325(c) to eliminate the former requirement of serving an owner with a copy of the notice of *lis pendens*.

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

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125. 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.

the validity of a notice of *lis pendens* is no longer dependent on its proper service on the owner.

Thus, the current stance 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 and for purposes of obtaining an execution for ejectment after completion of the foreclosure.

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.[126]

1-3:2 Challenging the Notice of *Lis Pendens*

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. General Statutes § 52-325a(c) 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

126. 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.

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.[127] Under 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.

Although 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, 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;[128] 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 General Statutes § 52-325d operates to expand both the limited standing and

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127. Conn. Gen. Stat. § 52-325b.

128. Note that this requirement still applies to all appropriate actions except foreclosures.

basis afforded by 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, 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 (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 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 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.*[129]

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129. *H.G. Bass Assocs., Inc. v. Ethan Allen, Inc.*, 26 Conn. App. 426 (1992). See the discussion in Chapter 16, § 16-2:2, *below*.

1-4 THE PROTECTION FROM FORECLOSURE ACT

General Statutes §§ 49-31d through 49-31i, concerning protection from foreclosure for under or unemployed persons, previously required a lender foreclosing a 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. The notice provision, General Statutes § 49-31e(a), was eliminated with the passage of Section 85 of Public Act 16-65, which repealed the provisions of the statute requiring such notice.[130]

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 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.

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130. For a detailed analysis of the Act, see Chapter 18, § 18-1, *below*.

Multiple 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*,[131] 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 the plaintiff's motion for summary judgment. This case differed markedly, the court noted, from the situation in *Fortune Savings Bank v. Thibodeau*,[132] 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."

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

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

A similar issue arose in *The Bank of New York Mellon, Trustee v. Madison*,[133] where the defendant claimed that the notice failed to satisfy the mortgage's requirement that it inform the borrower of the date by which the default needed to be cured. Noting that precedent has established that substantial compliance is sufficient to satisfy the notice requirement, the court went on to discuss the particulars of the notice at issue in the case:

Upon a careful review of the notice, we conclude that the notice substantially complied with paragraph 22 of the mortgage insofar as that provision requires the notice to specify "a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured." The notice is plainly dated February 22, 2016, and set forth the sum necessary to bring the mortgage loan current "[a]s of 02/22/2016 . . . ." The notice further provides in relevant part that if the default was not cured "within Thirty Days (30) days of this notice, Shellpoint [Mortgage Servicing] intend[ed] to accelerate the sums evidenced by the Note and Security instruments and declare same due and payable in full and to take other legally and contractually permitted action to collect the same . . . ." (Emphasis added.) Moreover, the notice provides that "[a]ny partial payment received by [Shellpoint Mortgage Servicing's] office on the Loan after the date of this letter may not be applied to the reduction of the Amount Due and may be returned however any such acceptance does not waive the right to proceed with foreclosure and a new demand letter may not be sent." (Emphasis added.) The language of the notice was sufficiently clear and unambiguous so as to alert the defendants that the plaintiff was demanding that they cure the default within thirty days of February 22, 2016.[134]

A different issue arose in *Citicorp Mortgage, Inc. v. Porto.*[135] 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

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133. *The Bank of New York Mellon, Tr. v. Madison*, 203 Conn. App. 8 (2021).

134. *The Bank of New York Mellon, Tr. v. Madison*, 203 Conn. App. 8, 25-26 (2021).

135. *Citicorp Mortg., Inc. v. Porto*, 41 Conn. App. 598 (1996).

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 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 under the loan instruments, 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 General Statutes § 47-14j, before the lender was required to give the notice?

In *Deutsche Bank National Trust Co., Trustee v. Ponger*,[136] 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[137]—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, 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.*[138]

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

137. *See* Conn. Gen. Stat. § 47-14g.

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

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 States Supreme Court decision of *Jones v Flowers*,[139] 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.*[140] and *Session v. Director of Revenue*[141] 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

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

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

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

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*,[142] 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."[143] The several cases cited by the plaintiff, the court continued, all related to the contents of the notice, and not to the question of 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.

In *The Bank of New York Mellon, Trustee v. Mazzeo*,[144] the issue was not whether the notice of acceleration was defective or whether it was properly given, but rather the case hinged on the plaintiff's ability to prove a prima facie case by submitting sufficient proof that the plaintiff's predecessor, Bank of America, had provided the notice. At the time the mortgage went into default, the plaintiff was not the owner of the mortgage, and the notice of acceleration was processed by the Bank of America, the then owner. At trial, the plaintiff submitted the testimony of a litigation manager for

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142. *21st Century N. Am. Ins. Co. v. Perez*, 177 Conn. App. 802 (2018).
143. *21st Century N. Am. Ins. Co. v. Perez*, 177 Conn. App. 802, 815-16 (2018).
144. *The Bank of N.Y. Mellon, Tr. v. Mazzeo*, 195 Conn. App. 357 (2020).

Bayview, the plaintiff's servicer. That witness testified that the loan had had a number of prior servicers, and that Bayview was not the entity that sent the notice to the defendant borrowers. Through the witness's testimony, the plaintiff introduced into evidence a screenshot of the file in Bank of America's mortgage servicing platform. The witness further testified that the default notice was mailed first class mail to one of the defendants at the address of the mortgaged property, but on cross-examination she acknowledged that "she did not have direct knowledge of whether the notice was properly stamped and placed in a mailbox or handed over to the postal service, but, rather, that she based her assertion that the notice was mailed on the existence of the notice itself and the accompanying screenshot."[145] Finally, she acknowledged that she did not have firsthand personal knowledge of Bank of America's process for generating notice of default letters.

The trial court ultimately ruled that the plaintiff had produced sufficient evidence to establish a prima facie case. In reversing the trial court on that ruling, the Appellate Court concluded that the introduction of the screenshot, even coupled with the servicer's testimony, "did not provide sufficient facts for a trier of fact to reasonably infer that the default notice was mailed to the defendants. [The witness], as a representative of Bayview, was not able to testify as to the particular practices used by Bank of America to generate default notices, or to mail default notices. Although she testified that she was 'familiar with industry standards,' she admitted that she was not familiar with the default notice practices used by Bank of America . . . . [She] was not able to testify that it was 'customary' or the 'course of habit' for Bank of America to mail default notices following generation of such notices because she had no personal knowledge of Bank of America's specific procedures of policies."

Continuing its assessment of the plaintiff's case, the court observed: "Her sole basis for claiming that the default notice was mailed to the defendants was the mere existence of the notice and accompanying screenshot, and the fact that they had been boarded into Bayview's system when Bayview became the loan subservicer . . . . She provided the court with no pertinent details

[145] *The Bank of N.Y. Mellon, Tr. v. Mazzeo*, 195 Conn. App. 357, 373 (2020).

regarding the boarding process or its methods of verification."[146] Finally, the court noted that she "admitted that she lacked personal knowledge of the policies and procedures used to generate the screenshot. Therefore, her reliance on the screenshot to prove Bayview's verification process is insufficient evidence of Bank of America having mailed the default notice to the defendants."[147] Based on these conclusions, the Appellate Court reversed the judgment of foreclosure by sale and remanded with direction to render judgment for the defendants.

Mazzeo promises to be a sobering decision for the many lenders who acquire mortgages post-default, and who have been comfortable in relying on the contents of their predecessor's file. At the very least, an acquiring lender may prefer to disregard any prior default notices shown in the file and to initiate its own notice. It is worthwhile to note that the defendant borrowers in *Mazzeo* did not even deny the allegations of the complaint regarding the notice of acceleration. Rather, they merely left the plaintiff to its proof on that question. So what initially might have seemed like straightforward task for the plaintiff turned out to be its nemesis, and may portend similar difficulties for future lenders acquiring loans under like circumstances.

Mazzeo may also prove to have added a valuable arrow to the quiver of defendants facing foreclosure, since it is likely that the files of most lenders will not be at great variance from what was disclosed in this case. It is also interesting to observe that the question of actual receipt of the notice never came to the fore; rather, the case revolved exclusively on the lender's inability to prove that it had sent the notice. A similar situation arose in *Hudson City Savings Bank v. Hellman*,[148] where the trial court granted the lender's motion for summary judgment on liability only. The lender's affidavit in support of summary judgment stated that the default notice was sent by certified mail only. The borrower's affidavit in opposition to the motion alleged that the notice of default was not delivered to him and that there was no proof of receipt. Following a foreclosure judgment, the borrower filed an

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146. *The Bank of N.Y. Mellon, Tr. v. Mazzeo*, 195 Conn. App. 357, 377 (2020).
147. *The Bank of N.Y. Mellon, Tr. v. Mazzeo*, 195 Conn. App. 357, 378 (2020).
148. *Hudson City Sav. Bank v. Hellman*, 196 Conn. App. 836 (2020).

appeal. The Appellate Court reversed, citing *Aurora Loan Services, LLC v. Condron*,[149] discussed above, that there was no evidence that the notice was sent by first class mail, or that the notice was received by the defendants. The mortgage stated that any notice was deemed to have been given when mailed by first class mail or when actually delivered to the borrower's notice address if sent by other means. The Appellate Court held that the lender failed to satisfy a condition precedent, and remanded the case to the trial court with direction to deny the motion for summary judgment.

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*,[150] 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."[151]

The next challenge to the notice involved the lender's failure to provide an express notice of the right to contest the foreclosure

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149. *Aurora Loan Servs., LLC v. Condron*, 81 Conn. App. 248 (2018).
150. *Fidelity Bank v. Krenisky*, 72 Conn. App. 700 (2002).
151. *Fidelity Bank v. Krenisky*, 72 Conn. App. 700, 712 (2002).

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 the dormancy program. The court held that the dismissal of the first foreclosure action did not "wipe the slate clean",[152] 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.[153]

Additional, more 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*,[154] 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.[155]

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152. *Fidelity Bank v. Krenisky*, 72 Conn. App. 700, 708 (2002).

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

154. *Mortgage Elec. Registration Sys., Inc. v. Goduto*, 110 Conn. App. 367 (2008).

155. *Mortgage Elec. Registration Sys., Inc. v. Goduto*, 110 Conn. App. 367, 371 (2008).

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. 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*,[156] 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

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156. *Bank of Am., FSB v. Hanlon*, 65 Conn. App. 577 (2001).

> 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.[157]

Applying the *Hanlon* rule to *Goduto*, neither notice appeared to be in compliance. Nonetheless, the trial court found that the 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."[158]

A 2006 U.S. Supreme Court decision, *Jones v. Flowers*,[159] 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 Chapter 29, Section 29-3:1, *below*, 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

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

158. *Mortgage Elec. Registration Sys., Inc. v. Goduto*, 110 Conn. App. 367, 375 (2008).

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

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 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*,[160] 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*[161] 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

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

[161] *Aurora Loan Servs., LLC v. Condron*, 81 Conn. App. 248 (2018), discussed in greater detail in § 1-5:1, *above*.

> 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.[162]

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 and laches, which are more fully addressed in Chapter 6, §§ 6-5:1 and 6-5:8, respectively, *below*.

1-5:1.1a Notice of Default Given by Person Other Than Mortgagee

In *U.S. Bank, National Ass'n, Trustee v. Moncho*,[163] the defendants unsuccessfully challenged the validity of the notice of default that they admittedly received, claiming that it had not been sent by the mortgagee. The mortgagee's servicer had mailed the notice, prompting the defendants to claim that the servicer was "a stranger to the loan," thus rendering the notice invalid. The Appellate Court found no merit in that argument, noting that the defendants were provided with a letter, at the time of closing of the loan, informing them of the identity of the servicing agent and advising them to send all payments to it. Further, as the court noted, "the fact that the defendants received notice from the servicer of the loan rather than from the plaintiff caused them no prejudice."

The fact that the court looked to notification provided at the time of closing, identifying the servicer, might prompt further challenges on this basis in cases where there is a successor servicer who has no direct connection to the closing documents. Such an argument would likely fail, however, in light of the court's additional, and probably more significant, finding that the defendants suffered no prejudice because the notice had not been sent by the lender.

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162. *Aurora Loan Servs., LLC v. Condron*, 181 Conn. App. 248, 275 n.15 (2018).

163. *U.S. Bank, Nat'l Ass'n, Tr. v. Moncho*, 203 Conn. App. 28, *cert. denied*, 336 Conn. 935 (2021).

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.*[164] 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 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

[164] *Antonino v. Johnson*, 113 Conn. App. 72 (2009).

> 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 . . .[165]

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;[166] 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 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;

[165] *Antonino v. Johnson*, 113 Conn. App. 72, 76 (2009).

[166] See Chapter 18, § 18-1, *et seq.*, *below*.

> (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, *above*, and the discussion of *Fidelity Bank v. Krenisky*,[167] 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. General Statutes § 49-10a(a) permits the *requesting party* to specify the date on which the payoff or reinstatement statement must be received, provided the date is at least seven business days after the receipt of the request by the lender (or such longer time if specified in the request). General Statutes § 49-10a(b) further goes on to penalize the lender for failing to comply with such a request by stating the "mortgagee shall not be entitled to the payment of any interest on the mortgage loan which is secured by such mortgage which accrues after the expiration of such request date."[168] Fortunately, the effect of the penalty is not permanent and the lender is entitled to resume accrual of interest after the payoff or reinstatement statement is received by the requesting party.[169]

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

168. Conn. Gen. Stat. § 49-10a(b).

169. For a discussion of the workings of Conn. Gen. Stat. § 49-10a, *see GE Cap. Consumer Card Co. v. Clancy*, No. CV106008956, 2011 WL 1473621 (Conn. Super. Ct. Mar. 29, 2011).

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*.[170] This decision is important, since a borrower could simply use such proceedings as 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.*[171] 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.

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

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

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*,[172] the lender issued a default notice to the borrower; the notice calculated a reinstatement amount based upon a default interest rate of 18 percent. The borrower argued that the notice violated the terms of the note, because the note capped the interest rate at 12.75 percent. The borrower asserted five special defenses to the ensuing foreclosure, all but one addressing the 18 percent interest calculation and its impact on the validity of the notice of default. Lender's counsel adroitly withdrew any claim to the 18 percent 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 percent 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 percent 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.

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