

# Residential Foreclosure (CT)

A Practical Guidance® Practice Note by Adam Swanson, McCarter & English, LLP



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This practice note discusses procedures and best practices for completing a residential foreclosure action in Connecticut. Depending on the type of mortgage, much of the foreclosure process can be impacted by both federal and state law, and any failure to follow the statutory or regulatory mandates can result in delay or added expense, or supply defenses to a foreclosure. This practice note helps practitioners on both sides understand these statutory and regulatory obligations. Counsel representing the lender should strictly abide by and ensure that each rule is followed while counsel representing the borrower must safeguard their client's interest.

This note provides a general overview of three primary stages of the foreclosure lawsuit: (1) pre-suit considerations and requirements, (2) filing and conducting the lawsuit, and (3) judgment and sale.

For guidance on the commercial foreclosure process in Connecticut, see [Commercial Mortgage Foreclosure: Preliminary Steps and Considerations \(CT\)](#), [Commercial Mortgage Foreclosure: Commencing the Action \(CT\)](#), and [Commercial Mortgage Foreclosure: Advancing the Suit to Foreclosure Judgment and Deficiency \(CT\)](#).

## Pre-suit Considerations and Requirements

Connecticut is a judicial foreclosure state. To foreclose on a mortgage, a lender must file a civil action with the court and strictly comply with all procedural safeguards in the following statutes:

- Title 49, Chapter 846 (Conn. Gen. Stat. §§ 49-1 to 49-31v)
- Title 8, Chapter 134, Conn. Gen. Stat. §§ 8-265cc to 8-265kk)
- The Fair Debt Collection Practices Act (FDCPA), if applicable (15 U.S.C. §§ 1692 to 1692p) –and–
- Title I and II the National Housing Act, if applicable

Before jumping into the particulars, a brief overview of the Connecticut foreclosure process is important to fully understand each individual part of the process.

A mortgage loan, evidenced by a note and secured by a mortgage of real property allows the lender (mortgagee) to recover against the borrower (usually, mortgagor) in two ways. First, at law the lender may obtain a money judgment on the note against the borrower. Second, in equity the lender may foreclose against the collateral property and appropriate its value against the amount owed on the debt. Because the courts of law and equity have been combined, both of these remedies are pursued in one action that includes foreclosing the mortgage and, if applicable, a deficiency proceeding after the property is appropriated in part payment of the debt.

The purpose of a foreclosure action is to extinguish the equitable right of redemption, or equity of redemption. Connecticut is a strict foreclosure state and under the strict foreclosure regime, when the foreclosure judgment enters each party is assigned a law day by which it must redeem the property by paying the debt owed to plaintiff as determined in an interlocutory judgment, or forever lose its rights in the property. As discussed below, where there is substantial equity in the property after plaintiff's debt, the court will order a sale of the property and it is through the sale that the redemption rights are extinguished.

### **Pre-Suit Considerations**

Prior to commencing the foreclosure action, lender's counsel must address the following non-exhaustive list of matters:

- Identify the necessary defendants to the action and order a title search
- Identify the proper plaintiff to foreclose
- Ensure a notice of default is/was sent to borrower that complies with the terms of the mortgage and any applicable federal, state, or local statutes and regulations
- Ensure a notice is/was sent to borrower of the availability of the Emergency Mortgage Assistance Program (EMAP) under Connecticut state law
- Assess compliance with other potentially applicable notice requirements
- Determine whether borrower has filed for bankruptcy – and–
- Ensure compliance with any applicable federal statute or Consumer Financial Protection Bureau (CFPB) regulations, especially including the FDPCA and/or the Servicemembers Civil Relief Act (SCRA), if applicable.

### **Identify Necessary Defendants**

First, counsel must identify the necessary defendants to the action. Identifying the necessary defendants is one of the most critical steps prior to filing a foreclosure action. Any unnamed defendant with an interest in the property, referred to as an "omitted party," will not lose its rights in the property and will not be subject to the foreclosure judgment. Connecticut has an omitted party statute, Conn. Gen. Stat. § 49-30, that allows a foreclosing plaintiff to later bring a separate action to remedy a defect of this nature, but it is not optimal to rely on this statute in lieu of being diligent at the outset. Generally, the necessary defendants come from two places:

- The loan document defendants –and–
- The property interest defendants

The loan document defendants include the typical players—the borrower, co-borrower, or guarantor under the loan documents. However, any co-borrower is only an essential defendant for foreclosure to the extent the co-borrower is also a mortgagor. The foreclosing lender may choose to not seek a deficiency judgment against a borrower that has signed only the note and not the mortgage, and the co-borrower therefore would not be a necessary party. In addition, lender's counsel should remember that Connecticut does not have an election of remedies statute and therefore a guarantor could be sued in the same lawsuit as the borrower or in a separate lawsuit. A guarantor is much more common in a commercial foreclosure.

The property interest defendants include any person with a known or recorded interest in the real property. Counsel can identify the property interest defendants by reviewing the loan documents and the land records. Land records in Connecticut are generally maintained at the municipal level. The loan documents may disclose, for example, any tenants in possession of the property or other persons who may have expressly subordinated their rights by agreement when the loan closed. Each is a necessary party to the foreclosure.

To identify all necessary property interest defendants, counsel must conduct a thorough title search. The search should generally date back at least to the root of title, to determine what, if any, interests are superior- and subordinate-in-right to the mortgage. Connecticut has adopted the Marketable Record Title Act, Conn. Gen. Stat. § 47-33b et seq. When reviewing the title search, determine whether there are any liens that have priority over the mortgage and any other liens on the property. Then, classify the liens into two categories:

- Liens that are prior in right –and–
- Any other liens or encumbrances that are subsequent in right to the subject mortgage

The liens that have priority over the mortgage (e.g., real property taxes) will be alleged in the complaint, but the holders of those rights/liens should not be joined as a party to the action. Liens against the property to secure real property taxes exist by virtue of statute (Conn. Gen. Stat. § 12-172) and take precedence of all other liens, therefore there may not be any recorded lien for real property taxes. Similarly, liens securing the nonpayment sewer use charges exist by virtue of statute (Conn. Gen. Stat. § 7-258) and take precedence of all liens except taxes and there may not be any recorded lien.

Any liens or encumbrances that are subordinate or subsequent in right to the subject mortgage (i.e., second mortgages, income tax liens, mechanic's liens, or judgment liens) will be alleged in the complaint and the holder of the lien or encumbrance must be named as a defendant in the lawsuit to extinguish their rights.

### ***Determine the Proper Plaintiff***

After identifying the defendants, next determine what party is the right plaintiff to foreclose. The correct plaintiff may not necessarily be the written assignee of the mortgage. The proper foreclosure plaintiff is "the person entitled to receive the money secured" by the mortgage or the "person entitled to enforce" the note. See Conn. Gen. Stat. §§ 49-17, 42a-3-301. Generally, the person entitled to receive the money or enforce the note is the holder of the promissory note, which requires that the person be in possession of the note payable to the bearer or specifically payable to the person in possession. See Conn. Gen. Stat. § 42a-3-201.

If the plaintiff/holder of the note is a person "to whom the legal title to the mortgaged premises has never been conveyed," Conn. Gen. Stat. § 49-17 remedies any issue by vesting title after foreclosure in the foreclosing plaintiff.

Note that, generally, to issue a foreclosure judgment, a Connecticut court requires production of the original note and mortgage at the hearing. Therefore, it is at this time that counsel for the lender should ensure that its client is in physical possession of the original promissory note. In fact, it is not uncommon for the mortgage servicer or lender to send the original collateral documents to counsel prior to commencing the lawsuit and this is a good practice.

### ***Send the Notice of Default or Notice of Intent to Accelerate***

The lender must send a notice of default or notice of intent to accelerate to the borrower. The letter must strictly comply with the terms of the mortgage. In the residential mortgage space, the Fannie Mae / Freddie Mac uniform mortgage has become the ubiquitous form mortgage. That form mortgage (Form 3007 in Connecticut) requires a certain notice under Paragraph 22. This notice is generally a condition precedent to foreclosure and must be sent prior to instituting a foreclosure lawsuit.

### ***If Required, Send an EMAP Notice***

If applicable, a notice must be sent to the borrower informing them of Connecticut's EMAP before an action may be commenced. Conn. Gen. Stat. § 8-265ee. This statute has proven to be particularly problematic for lenders

because compliance is a condition precedent, the failure of which deprives the court of subject-matter jurisdiction. See *MTGLQ Inv'rs, L.P. v. Hammons*, 196 Conn. App. 636, 645 (2020) ("we conclude that the EMAP notice requirement set forth in § 8-265ee (a), when applicable, is a condition precedent to the commencement of a foreclosure action. As such, the failure to comply with the notice requirement deprives the trial court of subject-matter jurisdiction.").

An EMAP notice is required only where the mortgage satisfies the criteria in subdivisions (1), (9), (10) and (11) of Conn. Gen. Stat. § 8-265ff. See Conn. Gen. Stat. § 8-265ee(a). These subdivisions require that:

- The property is a one-four family owner-occupied residence (Conn. Gen. Stat. § 8-265ff(1))
- The mortgagor has not mortgaged the property for commercial or business purposes (Conn. Gen. Stat. § 8-265ff(9))
- The mortgagor has not previously received EMAP assistance or, if the mortgagor has, the mortgage was reinstated and has not been delinquent for six consecutive months immediately following reinstatement (Conn. Gen. Stat. § 8-265ff(10)) –and–
- The mortgagor's default is monetary only (Conn. Gen. Stat. § 8-265ff(11))

Under EMAP, if applicable, a lender must give notice by registered or certified mail, postage prepaid at the address of the property. The notice must:

- Advise the borrower of the delinquency or other default –and–
- State that the borrower has 60 days to:
  - Have a face-to-face meeting, telephone meeting, or other conference with the lender or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise –and–
  - Contact the Connecticut Housing Finance Authority, at an address and phone number contained in the notice, to apply for emergency mortgage assistance payments if the parties are unable to resolve the delinquency or default

Conn. Gen. Stat. § 8-265ee

Since the failure to send notice is a jurisdictional defect, it can create issues even on the eve of trial. See e.g., *Washington Mut. Bank v. Coughlin*, 168 Conn. App. 278, 283 (2016) (although ultimately denied, the dismissal

motion was made on the eve of trial). Before judgment can enter, the EMAP Act requires that the foreclosing lender file an affidavit stating that it has complied with the Act.

### ***Send Any Other Required Pre-Commencement Notices***

There may be other applicable pre-commencement notices that may be required—even if they do not necessarily raise a jurisdictional defect.

To the extent plaintiff's counsel is a debt collector under the FDCPA, the statute requires that the debt collector send what is commonly known as a validation notice. See 15 U.S.C. § 1692g. The notice must include:

- The amount of the debt
- The name of the creditor to whom the debt is owed
- A statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector
- A statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector –and–
- A statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor

See 15 U.S.C. § 1692g. If the consumer disputes the debt, the debt collector must:

[C]ease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

See 15 U.S.C. § 1692g(b). While technically this prohibition is not a defense to foreclosure and is an obligation applicable only to the debt collector and not necessarily the foreclosing plaintiff, this can cause issues if not complied with and it is a best practice to ensure compliance, if applicable.

### ***Determine the Borrower's Bankruptcy Status***

The lender must determine if the borrower has ever filed for bankruptcy. If the borrower has filed for bankruptcy and the case is pending or recent, the foreclosure action is automatically stayed. See 11 U.S.C. § 362. The lender should then proceed in the bankruptcy and determine whether a motion or relief is appropriate. To the extent there is an open bankruptcy that is not recent, the lender must ensure that there is not a Chapter 13 plan in place. If the borrower has a bankruptcy discharge but the mortgage was subsequently modified, the lender must determine if the borrower re-affirmed the debt because, if not, the foreclosure action must be limited to the property only and even an allegation that lender will seek a deficiency judgment against the borrower may violate the permanent discharge of bankruptcy. While this may seem an unlikely scenario, especially during and after the 2008 mortgage crisis many residential mortgage loans were modified during or post-bankruptcy.

### ***Comply with Any Other Relevant Consumer Protection Statutes and Regulations***

Other consumer protection statutes and regulations, such as the Real Estate Settlement Procedures Act (RESPA) may place constraints on commencing the foreclosure action. Under Regulation X, implementing the RESPA, the CFPB provides additional limitations on servicers of residential mortgages. For example, servicers cannot make the first notice of filing required for the foreclosure process unless:

- A borrower's mortgage loan is more than 120 days delinquent
- The foreclosure is based on a borrower's violation of a due-on-sale clause –or–
- The servicer is joining the foreclosure action of a superior or subordinate lienholder

12 C.F.R. § 1024.41f(f).

Additionally, if a borrower submits a "complete loss mitigation application" in the aforesaid review period or before making the first foreclosure filing, the servicer cannot make the filing unless:

- The servicer has sent the borrower a notice that the borrower is not eligible for any loss mitigation option and:
  - The appeal process is not applicable
  - The borrower has not requested an appeal within the applicable time period for requesting an appeal –or–
  - The borrower's appeal has been denied

- The borrower rejects all loss mitigation options offered by the servicer –or–
- The borrower fails to perform under an agreement on a loss mitigation option

Practitioners for mortgage servicers should ensure compliance with the CFPB's loss mitigation and notice of error regulations before taking any action to foreclose on the secured loan.

## The Foreclosure Lawsuit

### Summons, Complaint, and Lis Pendens

To commence a foreclosure action, practitioners must serve the following on each defendant, in this exact order, per statute:

1. A form notice stating, "You are Being Sued and You Are in Danger of Losing Your Property" ([Form JD-CV-103](#) and Uniform Foreclosure Standing Orders, [JD-CV-104](#))
2. A Notice of the Foreclosure Mediation Program ([Form JD-CV-127](#))
3. A Foreclosure Mediation Certificate ([Form JD-CV-108](#))
4. A blank appearance form ([Form JD-CL-12](#))
5. A Foreclosure Mediation Notice of Community-Based Resources ([Form JD-CV-126](#))
6. A Mediation Information Form ([Form JD-CV-135](#))
7. A completed writ of summons ([Form JD-CV-1](#))
8. A continuation of parties form listing additional defendants, as needed ([Form JD-CV-2](#))
9. The foreclosure complaint, including a Statement of Amount in Demand at the end –and–
10. A lis pendens, annexed as an exhibit to the complaint

See Conn. Gen. Stat. § 49-311

### Complaint

In addition to the usual pleading requirements, the complaint must include the following:

- A description of the property
- The nature of the property interest being foreclosed (i.e., terms of the note and mortgage)
- The nature of the default
- The principal balance owed

- A list of all interests prior in right to the mortgage being foreclosed and a list of all interests subordinate in right –and–
- The name(s) of all necessary parties, persons, or entities liable on the promissory note or with an interest in the property, including:
  - The borrower
  - The borrower's successors, if any
  - Any other obligors (i.e., guarantors)
  - Any party in possession (i.e., tenants)
  - Widows, heirs, and executors of the borrower's estate, if applicable –and–
  - Other lienholders (e.g., mortgages, attachments, mechanic's liens, judgment liens, federal tax liens, state tax liens, etc.)

See Conn. Gen. Stat. § 52-91, *Webster Bank v. Flanagan*, 725 A.2d 975 (Conn. App. Ct. 1999); see also Conn. Gen. Stat. § 49-1 (stating that a foreclosure of a mortgage is only a bar to any further action against those made party to the foreclosure action).

Section 10-69 of the Connecticut Practice Book specifically requires that the complaint shall set forth, in addition to the other essentials of such complaint, all encumbrances of record upon the property, prior and subsequent to the mortgage being foreclosed upon, including:

- The date of each encumbrance
- The date each encumbrance was recorded
- The amount of each encumbrance
- If there is a mechanic's lien on the property, the complaint must state the date of the services performed or materials furnished –and–
- Any judgment lien on the property

See Practice Book § 10-69. The Connecticut Practice Book is published by the State of Connecticut Judicial Branch and can be accessed on [its website](#).

Attaching a copy of all loan documents as an exhibit to the complaint is a recommended best practice.

### Jurisdiction and Venue

In Connecticut, the superior court has jurisdiction over all foreclosure actions. Conn. Gen. Stat. §§ 51-164s, 51-345(b). Venue is proper for actions to foreclose upon real property in the judicial district where the property is located, either entirely or in part. See Conn. Gen. Stat. § 51-345(b)

## Other Action to Recover Any Part of Mortgage Debt

In Connecticut, foreclosure of the mortgage is a bar to any further action upon the debt, "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." See Conn. Gen. Stat. § 49-1. Thus, once the foreclosure judgment enters, the foreclosing plaintiff must seek a deficiency judgment (as discussed below) or forfeit its right to any further money judgment against the borrower.

## Methods of Foreclosure

In Connecticut, a lender may foreclose upon a residential mortgage by the following methods:

- Strict foreclosure
- Foreclosure by public judicial sale –or–
- Foreclosure by market sale

The court will determine the type of foreclosure proceeding based on the amount of value or equity in the real property as compared to the debt. For example, if the fair market value of the property being foreclosed does not substantially exceed the amount of the mortgage debt, then a strict foreclosure, which is the "normal method of foreclosure," will enter. See Conn. Gen. Stat. § 49-24; *Argent Mortg. Co., LLC v. Huertas*, 288 Conn. 568, 573 (2008).

### Strict Foreclosure

A decree of strict foreclosure finds the amount due under the mortgage; orders its payment within a designated time; and provides that, should such payment not be made, the debtor's right and equity of redemption will be forever barred and foreclosed. Most significantly, the effect of strict foreclosure is to vest title to the real property absolutely in the mortgagee and to do so without any sale of the property. "A judgment of strict foreclosure, when it becomes absolute and all rights of redemption are cut off, constitutes an appropriation of the mortgaged property to satisfy the mortgage debt." *Nat'l City Mortg. Co. v. Stoecker*, 92 Conn. App. 787, 793 (2006).

### Foreclosure by Judicial Sale

Where the value of the property substantially exceeds the debt owed on the mortgage, a public foreclosure sale will be ordered instead. Whether there is "substantial equity" in

the property such that the court must order a sale is a gray area. See *Town of Voluntown v. Rytman*, 27 Conn. App. 549, 555 (1992). If the court orders a public foreclosure sale, the court will appoint a committee—one person (a local lawyer)—to auction and sell the property, and an appraiser to determine the value of the property. The judgment will also establish a time and place for the sale, which is generally always on a Saturday at noon. The terms of sale and bidding are controlled by a statewide standing order. See [JD-CV-81](#).

### Foreclosure by Market Sale

A relatively new method of foreclosure, established in 2014, is foreclosure by market sale. A foreclosure by market sale may be allowed for a first lien mortgage on a one–four family owner-occupied residence. Conn. Gen. Stat. § 49-24. A market sale is appropriate only when parties mutually agree. Once parties agree, the court may order the sale. However, once the court orders the market sale, subordinate lienholders have a right-of-refusal to preserve their interest by paying the amount of the agreed-upon sale contract. See Conn. Gen. Stat. § 49-24g.

## Service of Foreclosure Complaint

The summons and complaint must be served by a marshal, a constable, or other proper officer. Conn. Gen. Stat. § 52-50(a). If the complaint names defendants residing in different counties, service may be made by a disinterested person. Conn. Gen. Stat. § 52-50(b).

Service upon an individual within the state is proper when made either upon the person or at their usual place of abode. Conn. Gen. Stat. § 52-57(a). Service upon a nonresident individual living outside of the state is proper when made upon the secretary of state, and when the officer mails a copy of all documents, by registered or certified mail return receipt requested, to the defendant's address. Conn. Gen. Stat. § 52-57(c). Nonresident individuals are "deemed to have appointed the [Connecticut] Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual." Conn. Gen. Stat. § 52-59b(c).

### Record a Notice of Lis Pendens

A lis pendens gives notice that there is a lawsuit pending affecting the real property. The lis pendens serves as

notice to all subsequent purchasers or persons who take any interest in the property of the pendency and, in turn, binds them to the result. The lender's counsel must file a lis pendens with the town clerk containing:

- The names of the parties
- The nature of the action
- The court to which it is returnable
- The date of process –and–
- A description of the property

Conn. Gen. Stat. § 52-325. The lis pendens should be filed by the marshal making service and should also be annexed as an exhibit to the complaint and served upon the defendants with the other process. By using the marshal for this purpose, a prudent plaintiff can avoid disputes concerning whether the lis pendens was properly filed and served.

## Response to the Foreclosure Complaint

### Notice of Appearance

Before any party may appear or be heard in court, the party must file an appearance. Practice Book § 3-7(a). A party who files an appearance is then entitled to receive copies of all notices required to be given to parties. However, the filing of an appearance, by itself, does not waive the right to attack defects in jurisdiction or any claimed violations of constitutional rights. Practice Book § 3-7(c).

Appearances should be filed on or before the second day following the return day. Appearances should be filed on or before the second day following the return day. If an appearance is not filed in a timely manner, a default can be automatically set aside and cured by entry of an appearance, so long as the judgment after default or nonsuit has not entered. Practice Book § 3-2(a).

A party filing an appearance must complete the judicial branch [Form JD-CL-12](#), including:

- The name and number of the case
- The name of the court location
- A legible signature of the individual preparing it, with the individual's own name
- The name of the party for whom the appearance is being entered –and–
- The official firm, professional corporation, or individual whose appearance is being entered, together with their juris number, mailing address, and their telephone number

Practice Book § 3-3. The form must be filed with the clerk of court in the location where the matter is pending. The party filing the appearance is responsible for notifying other parties and counsel of the filing of the appearance. Also, the filing party must mail a copy of any appearance to all counsel and self-represented parties. Practice Book § 3-4.

### Request for Foreclosure Mediation

Connecticut has an established foreclosure mediation program, named the Ezequiel Santiago Foreclosure Mediation Program. Conn. Gen. Stat. § 49-31m. The program exists to address issues in a foreclosure of residential real property. Residential real property is a one–four family dwelling, occupied as a residence by a mortgagor. A mortgagor is the owner-occupant of residential real property in Connecticut, which is the primary residence of such mortgagor and who is also the borrower under a mortgage encumbering the property or permitted successor in interest.

Three days after process is returned to the court, the court issues a notice to the borrower instructing the borrower to, inter alia, file an appearance and foreclosure mediation certificate forms no later than 15 days after the return date. Conn. Gen. Stat. § 49-31(c)(2). The certificate requests the requisite information necessary for the court to determine the applicability of foreclosure mediation. The court will send a notice to the parties that the action meets the requirements and has been assigned for mediation.

After receiving the notice of assignment and no later than the 35th day following the return date, the lender shall deliver to the mediator by email and to the borrower, by first class, priority, or overnight mail:

- An account history of all credits and debits on the loan account and escrow account in the immediately preceding 12 months and a reinstate quote with accompanying information, written in plain language, to explain any codes used in the history and statement which are not otherwise self-explanatory
- The name, business mailing address, email address, fax number, and direct telephone number of an individual able to reasonably respond to questions about the information submitted to the mediator pursuant to this subdivision
- Current versions of all reasonably necessary forms and a list of all documentation reasonably necessary for the lender to evaluate the borrower for common alternatives to foreclosure that are available through the lender, if any
- A copy of the note and mortgage, including any modification agreements

- A summary of information concerning any pending foreclosure avoidance efforts being undertaken by the lender
- A copy of any loss mitigation affidavit filed with the court –and–
- At the lender's option, the following:
  - The history of foreclosure avoidance efforts with respect to the borrower
  - Information regarding the condition of mortgaged property –and–
  - Such other information as the lender may determine is relevant to meeting the objectives of the mediation program

Conn. Gen. Stat. § 49-31l.

The new rules of mediation allow for an 84-day pre-mediation period. By 40 days after the return date, the mediator must seek to have a meeting with the borrower to discuss foreclosure alternatives, pending loss mitigation, etc. The mediator must report on the meeting to the lender, including whether no meeting is conducted by the 84th date after the return date. At that time, the mediator must file a report indicating, inter alia, whether mediation sessions will be scheduled with the lender. The mediator may seek an extension of the pre-mediation period for good cause shown. Conn. Gen. Stat. § 49-31l (c)(4). If the mediator decides to schedule a mediation session, the court will send notice to the lender.

After a mediation is scheduled, by statute, the mediation period ends after the earlier of the third mediation session or seven months after the return date. The court may, on motion and for good cause, extend the mediation period. Conn. Gen. Stat. § 49-31n(c)(1). At the mediation, the party must appear unless represented by counsel in which case the party may appear by phone. The parties begin to mediate, and the statute provides timeframes for the lender to respond to a borrower's request for a foreclosure alternative. The mediator must file a report with the court within three days after each mediation session, including specific information and a determination of whether the parties might benefit from further mediation. The court is empowered to issue bad-faith sanctions against parties who act contrary to the intention of the mediation.

The mediation period terminates upon a mediator's report that the parties would not benefit from further mediation or after the third session or seven months from the return date, without an extension from the court. The parties may file form motions to extend or terminate the mediation

period. See [JD-CV-96](#). There is no right of appeal from a decision of the mediator.

The statute stays all motion practice during the mediation period, except for motions addressed to the mediation and a borrower's challenge to jurisdiction. The statute also allows a borrower to file an answer eight months after the return date, or if the mediation period expires in less than eight months, then within 15 days after the mediation period terminates or 15 days of a decision denying a motion to extend the mediation. Conn. Gen. Stat. § 49-31l(c)(6).

## Answer and Affirmative Defenses, Cross-claims, and/or Counterclaims

A defendant must file its answer to the foreclosure complaint within 15 days after receiving the summons and complaint, within 15 days after the mediation period terminates under Conn. Gen. Stat. § 49-31l, or eight months after the return date, whichever is sooner. Practice Book § 10-8. While drafting the answer, the defendant must determine whether she has any valid defenses to foreclosure. Historically, the defenses available in a foreclosure action have been limited to:

- The full payment of the mortgage
- Discharge
- Release or satisfaction –or–
- Challenging the validity of the lien

See *White v. Watkins*, 23 Ill. 48; *Petterson v. Weinstock*, 106 Conn. 436, 441 (1927). The defendant should also consider whether she has certain equitable defenses, including:

- Accident
- Mistake
- Fraud
- Unconscionability
- Abandonment of security –and/or–
- Usury

See *Petterson v. Weinstock*, 106 Conn. 436, 442; *Hamm v. Taylor*, 180 Conn. 494-96; *Glotzer v. Keyes*, 125 Conn. 227, 233, 5 A.2d 1 (1939); *Atlas Realty Corp v. House*, 120 Conn. 661, 669–70 (1936); *Ferrigno v. Cromwell Development Associates*, 244 Conn. 189, 20 (1998);

Southbridge Assoc. v. Garofalo, 53 Conn. App. 11, 15–16 (1999); GMAC Mortg., LLC v. Ford, 73 A.3d 742, 753–754 (Conn. App. Ct. 2013).

### **Motion to Dismiss**

A motion to dismiss in Connecticut can challenge only the jurisdiction of the court. As to waivable grounds (e.g., personal jurisdiction), the motion must be filed within 30 days of the filing of the appearance. Practice Book § 10-30. However, claims of lack of subject-matter jurisdiction cannot be waived. See, e.g., CitiMortgage, Inc. v. Tanasi, 176 Conn. App. 829 (2017), cert. denied, 327 Conn. 978 (2017) (stating that issues of standing implicate subject-matter jurisdiction).

### **Common Defenses in a Foreclosure Action**

#### ***Oral Modification***

Borrowers may allege that they reached a modification agreement with the lender. However, the agreement must meet the statute of frauds and evidence consideration. See Connecticut General Statute § 52-550(a).

#### ***Usury***

Conn. Gen. Stat. § 37-4 provides that no person may loan money to another person and charge, demand, accept, or make an agreement to receive an interest rate greater than 12% per annum. A borrower may seek to claim that the interest rate on the note violates this statute. This statute applies to independent actions on a note, but not to deficiency judgments. See Ferrigno Trustee v. Cromwell Development Associates, 44 Conn. App. 439 (1997).

#### ***Receiver of Rents***

Although uncommon in residential foreclosures, if the property is in danger of waste or loss during foreclosure, the lender may move for the appointment of a receiver to protect and preserve the property. Practice Book § 21-1; Hartford Fed. Sav. & Loan Ass'n. v. Tucker, 491 A.2d 1084, 1086 (Conn. 1985); Federal Deposit Ins. Corp. v. Main Street Properties, 2 Conn. L. Rptr. 234, 1990 Conn. Super. LEXIS 806 (Conn. Super. Ct., Aug. 10, 1990) (stating that appointment of a receiver is not a matter of right, notwithstanding a specific provision in the mortgage for such). When the court is considering whether to appoint a receiver of rents, the court considers the following:

- Whether waste or loss is occurring
- The risk to the foreclosing party that he will recover less than the full amount of his debt, including whether deficiency is certain or only threatened –and–

- Whether there is a provision in a mortgage deed which allows for the appointment of a receiver in the event of the borrower's default

People's Bank v. 418 Meadow Street Associates LLC, 2007 Conn. Super. LEXIS 3283, \*3 (Conn. Super. Ct., Dec. 7, 2007) (citation omitted); see also Bank of Hartford v. Partners Management, 3 Conn. L. Rptr. 14, 1990 Conn. Super. LEXIS 1919 (Conn. Super. Ct., Dec. 3, 1990).

If a receiver is appointed, then the receiver must file a surety bond with the court, for an amount set by the court and conditioned on the faithful performance of their official receiver duties. See Conn. Gen. Stat. § 52-506; Practice Book § 21-4.

## **Default, Judgment, and Sale**

### **Default Motions**

If an attorney appears for a defendant, plaintiff may make a demand for disclosure of defense, which is a unique procedure in Connecticut available in certain actions, including foreclosure actions. See Practice Book § 13-19. If a defense is not disclosed, the plaintiff may seek a default for failure to disclose a defense. Other default motions include default for failure to appear (Practice Book § 17-20) or default for failure to plead (Practice Book § 14-32). Where a default enters for any one of these reasons, the plaintiff may proceed to judgment of foreclosure.

Where the default is for failure to plead, the party in default may cure the default as of right even after it enters by filing its pleading. Practice Book § 14-32. However, if a motion for judgment on the default has already been filed then only the court may set aside the default.

### **Summary Judgment**

If a defendant files an answer to the foreclosure complaint contesting liability, the plaintiff must move for summary judgment. See Practice Book §§ 11-10, 17-44–17-51. Unless otherwise ordered, the adverse party must file and serve a response within 45 days of the motion. See Practice Book § 17-45. The determination on summary judgment is limited to liability only, nothing else should be in issue. Any other issue, such as the quantum of plaintiff's debt or the order of priorities should be determined after summary judgment enters.

### **Foreclosure Judgment**

If the court finds that defendant is in default or enters summary judgment as to liability, the plaintiff must then file

a motion for judgment of foreclosure, which may not be filed less than 30 days from the return date. See Practice Book § 17-33A. The motion must be supported by the following:

- The affidavit of compliance with EMAP
- A preliminary statement of monetary claim (See Practice Book § 23-18(b))
- An affidavit of debt (which may be included in the preliminary statement of monetary claim)
- A military affidavit to show compliance with the SCRA
- An appraisal and affidavit of appraiser –and–
- An affidavit of attorney's fees

The foreclosing lender generally always seeks a judgment of strict foreclosure. Even where there appears to be substantial equity in the property, plaintiff's counsel is advised to move for a judgment of strict foreclosure, or else any deficiency judgment may later be reduced under Conn. Gen. Stat. § 49-28, as follows:

[I]f the property has sold for less than the appraisal provided for in section 49-25, no judgment shall be rendered in the suit or in any other for the unpaid portion of the debt or debts of the party or parties upon whose motion the sale was ordered, nor shall the same be collected by any other means than from the proceeds of the sale until one-half of the difference between the appraised value and the selling price has been credited upon the debt or debts as of the date of sale.

When moving for a foreclosure judgment, counsel should review the Uniform Procedures for Foreclosure Judgment. See [JD-CV-78](#), Rev. 7-09. It requires that documents submitted to the court be placed in the following order at the hearing:

1. Completed Foreclosure Worksheet ([JD-CV-77](#))
2. Signed copies of any open motion for default
3. Affidavits of compliance with EMAP (Conn. Gen. Stat. § 8-265ee)
4. Military affidavits (Practice Book § 17-21)
5. Original note, copy of the note for the court, mortgage deed, assignments, etc.
6. Updated affidavit of the debt, including interest that is due and there is not setoff or counterclaim thereto (Practice Book § 23-18)

7. Appraisal report of the property being foreclosed

8. Itemized affidavit of attorney's fees

The motion must be served on each defendant, as required by Practice Book §§ 10-12–10-17, and include a certification that service was made. Practice Book § 23-16.

At the judgment hearing, the plaintiff must present the court with the original: promissory note, mortgage, and assignments of the mortgage, if any. See Practice Book § 23-18. At the hearing, the court will use its discretion to determine which method of foreclosure is appropriate. See Methods of Foreclosure.

### Strict Foreclosure

After finding the debt owed to the lender (inclusive of costs and attorney's fees), if it exceeds the fair market value of the property the court will enter a judgment of strict foreclosure. Note that if the United States is a party (e.g., the Internal Revenue Service (IRS), etc.) then the property **must** be sold at public auction by federal statute. The court will appoint a specific law day to the owner of the equity of redemption (usually the borrower). The other defendants also have law days, but those come after the appointed law day and are assigned to each defendant in their inverse order of priorities. Connecticut National Bank v. L & R Realty, 40 Conn. App. 492 (1996).

Illustration. Joe is a defendant in a foreclosure action brought by his first mortgage holder, XYZ Bank for a mortgage he took out in 2006. The other defendants are: (1) Bank 1, which has a mortgage from 2007; (2) Undercapitalized Credit Card Co., which has a judgment lien from 2017; and (3) Rusty Oil Company which has a judgment lien from 2019. Assume all the defendants properly recorded their mortgages or liens and there is no fight among the defendants as to priority. If the court enters strict foreclosure and appoints a law day of January 25, 2021 for Joe, as the owner of the equity of redemption then the law days will be as follows:

1/25/2021: Joe

1/26/2021: Rusty Oil Company

1/27/2021: Undercapitalized Credit Card Co.

1/28/2021: Bank 1

Note that a defendant who redeems takes title to the property and a defendant who does not redeem only loses its interest in the property if their law day passes and

neither they nor a defendant prior to them redeems. Thus, in the illustration above, if Rusty Oil redeems title on its law day, then Rusty Oil takes title to the property subject to the lien of Undercapitalized Credit Card Co. and the mortgage of Bank 1. Similarly, if Bank 1 redeems, then it takes title to the property free and clear of all interests. If no defendant redeems, title vests with the foreclosing lender.

To memorialize the redemption and transfer on-record title, the party must obtain a certified copy of a Certificate of Judgment of Strict Foreclosure ([JD-CV-47](#)) and record that, together with a Certificate of Satisfaction of Judgment from the plaintiff. See Conn. Gen. Stat. § 49-21. Where no party redeems, the court has promulgated a single form to accomplish both the above for the foreclosing lender. See [Form JD-CV-150](#).

Connecticut has a strong policy against opening judgments of strict foreclosure. Conn. Gen. Stat. § 49-15(2) provides that no judgment may be opened after title has become absolute unless all the appearing parties agree and provided that:

- The judgment may not be opened more than four months after the date of judgment or 30 days after title vests, whichever is longer –and–
- The rights of all parties, regardless of whether they appeared in the action, may be restored

Section 49-15(2) is a constraint on the court's power. Therefore, there are only very limited and rare exceptions where the judgment may still be opened. *Real Estate Mortg. Network, Inc. v. Squillante*, 184 Conn. App. 356, 361 (2018). See, e.g., *New Milford Savings Bank v. Jajer*, 244 Conn. 251, 258–60 (1998) (to correct scrivener's error in foreclosure complaint); *Wells Fargo Bank, N.A. v. Melahn*, 148 Conn. App. 1, 12 (2014) (encumbrancer falsely certified compliance with court's judgment of strict foreclosure); *Deutsche Bank Nat. Trust Co. v. McKeith*, 156 Conn. App. 36 (2015) (if the trial court lacked jurisdiction to render the judgment).

### **Sale Process: Conducting a Foreclosure by Public Sale**

If the court orders a foreclosure by public sale, the court will appoint a committee that will be responsible for preparing the foreclosure sale and conducting the foreclosure action. The committee is a mere agent of the court and must carry out the court's orders. *First Connecticut Capital, LLC v. Homes of Westport, LLC*, 112 Conn. App. 750, 766 (2009). Thus, unlike some other jurisdictions, the committee is not in the control of either

party. Where the committee receives conflicting demands from the parties or encounters an issue, the committee's discretion is extremely limited, and the committee must make a motion for advice to receive orders from the court. See Motion for Advice, [Form JD-CV-100](#).

The committee is charged with taking the following actions:

- **Advertising the public sale.** Beginning 45 days before the foreclosure sale, the committee may begin to incur fees and expenses; this is called the bar date. Then, 20 to 30 days before the sale, the committee may place a sign in front of the property to advertise the sale. The committee must also advertise the sale in the newspaper, and the advertisement should include:
  - The docket number
  - The case name
  - The property address
  - The property type
  - The date of sale
  - The committee's identity and contact information – and–
  - A statement directing the reading to review all foreclosure sales on the Connecticut Judicial Branch website
- **Conducting and managing the sale.** There is no specific method to conduct a foreclosure auction. However, the uniform procedures, [JD-CV-81](#), address certain matters. For example, the committee is responsible for keeping a list of all prospective bidders who register to bid. [JD-CV-81](#). The committee is also responsible for providing interested parties with copies of the Fact Sheet-Notice to bidders and answer all questions regarding the process for the court approval of sale and the transfer of title.
- **Holding the deposit.** The highest bidder must post a deposit in an amount equal to 10% of the property's fair market value, which is specifically ordered in the judgment. The deposit must be paid to the committee at the conclusion of the auction in immediately available funds. In fact, the committee will generally only allow a person to bid if a bank or certified check is presented to the committee to hold pending the auction. The most common way bidders accomplish this is to appear with a bank or certified check in the amount of the deposit payable to themselves. If they win the bid, the check can be indorsed in blank and transferred to the committee pending the sale. The committee holds the deposit until closing of the sale.

The sale procedures are governed by Standing Orders. See Foreclosure Standing Orders, [JD-CV-79](#), and Uniform Procedures for Foreclosure By Sale Matters, [JD-CV-81](#).

### **Approval of the Sale and Disbursement of Sale Proceeds**

Once the property is sold, the proceeds will be placed into escrow and the committee must file a report of sale with the court. The court will approve of the sale and determine how the proceeds of the sale will be divided by issuing supplemental orders. See Conn. Gen. Stat. § 49-27. The court will use the proceeds to satisfy all debts and obligations on the property. Conn. Gen. Stat. § 49-27.

In Connecticut, a foreclosure action is an equitable proceeding. *Water Pollution Control Auth. of City of Bridgeport v. Johnson*, 130 Conn. App. 692, 701 (2011). Therefore, when determining whether a sale was equitable, the court will use its discretion with "fairness to the party foreclosing and the subsequent encumbrancers," *Town of Hamden v. Flanagan*, 243 Conn. 633, 633 (1998), and consider "all relevant circumstances to ensure that complete justice is done" 243 Conn. 633, citing *Morgera v. Chiappardi*, 74 Conn. App. 442, 457 (2003). If the court finds that the sale was inequitable, the court may set aside the sale. See *Town of Hamden*, 243 Conn. 633, 633 (1998).

### **Right of Redemption**

Connecticut ascribes to the title theory of mortgages. When a mortgage is given, the borrower has equitable title and the lender has legal title to the mortgaged property. The mechanism for the borrower to exercise their right to redeem legal title depends on the judgment entered in the foreclosure action. For example, if the court entered a judgment for strict foreclosure, any defendant may redeem on its law day and pay the debt as well as costs, after all other interests are foreclosed. See Conn. Gen. Stat. § 49-19. If the court entered a judgment for foreclosure by sale, the borrower has the right to redeem until the court approves the sale. *Wells Fargo Bank of Minnesota, N.A. v. Morgan*, 909 A.2d 526, 530 (2006). Note that when a party exercises redemption after a committee has been appointed, the party must pay the committee's fees. See Conn. Gen. Stat. § 49-25.

Once a party exercises a right to redemption, it must obtain a certificate of satisfaction of the judgment of foreclosure stating the name and residence of the defendant. Exercising redemption includes both paying the debt and costs as well as the title of the mortgage becoming absolute in the persons claiming redemption. See Conn. Gen. Stat. § 49-21.

The certificate of satisfaction must be filed with the court where the judgment was rendered. The defendant should also file in the land records a certified copy of one the following certificates:

- A certificate of satisfaction and the judgment
- The certification of judgment of strict foreclosure –or–
- A certificate of judgment of foreclosure of sale

### **Deficiency Judgment**

If the proceeds from a foreclosure sale are insufficient to satisfy the mortgage or lien or after a decree of strict foreclosure has vested title to the property with the lender, the lender may move for a deficiency judgment after the time for redemption has expired.

### ***Preservation of Right to Seek Deficiency***

Within 30 days after the time limited for redemption has expired, any party may motion the court seeking a deficiency judgment. Conn. Gen. Stat. § 49-14(a). Since the party filing the motion has control over it, it is recommended that the motion for deficiency be filed to preserve the right even if the lender has not yet decided to pursue a deficiency judgment.

### **The Hearing**

A hearing on the motion will be scheduled 15 days after the filing of the motion. See Conn. Gen. Stat. § 49-14. The party claiming the deficiency judgment must file and serve the following documents with the court:

- A preliminary computation of the debt
- The name of any expert on whose opinion the party will reply to prove the value of the date of vesting –and–
- A statement of the party's claims as to the value

Practice Book § 23-19(a).

A party contesting the debt or valuation of the property must file an objection at least five days before the hearing and disclose the name of any expert who it will call to testify to the value of the property. Practice Book § 23-19(c).

### **Surplus Proceeds**

If the proceeds from the foreclosure sale exceed the amount necessary to satisfy the mortgage or lien, the liens of the "junior encumbrances are transferred to the surplus fund, and the court determines the claims asserted by the junior encumbrancers." See *Bryson v. Newtown Real Estate & Dev. Corp.*, 153 Conn. 267, 269–70 (1965) citing

Markey v. Langley, 92 U.S. 142, 155, 23 L. Ed. 701; Gault v. Bacon, 142 Conn. 200, 203; Glenn, Mortgages, pp. 519, 520; 59 C.J.S. Mortgages § 800, p. 1529. Then, the remaining proceeds are distributed to the borrower.

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Adam M. Swanson represents major financial institutions in disputes brought by consumers, including those concerning consumer mortgage lending and servicing and consumer credit, as well as major title companies in real property, land title, and title insurance litigation.

Adam's extensive experience resolving real property matters includes those concerning deeds, easements, ownership disputes, land titles, and real property acquisitions. Because of his deep understanding of the consumer mortgage sector, He is regularly retained by the nation's largest title insurers to provide them with efficient and cost-effective solutions to their most complex real property disputes.

Adam's experience in the consumer mortgage lending and servicing sectors includes handling legal challenges concerning agency and non-agency mortgages, large mortgage portfolios, and residential mortgage-backed securities products. Whether a client hopes to achieve victory at the individual loan level or set new legal precedent to protect its industry practices, Adam works closely with each client to focus on their goals. Adam represents all of the major players in the consumer mortgage lending and servicing space in the full range of claims arising from origination, servicing, default servicing, foreclosure, bankruptcy, evictions as well as concerning real estate owned properties.

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