

TO: The Honorable Members of the Judiciary Committee

FROM: Jonathan Anderson, Senior Title Counsel, CATIC®

RE: Raised Bill 1074

DATE: March 4, 2011

This is testimony in opposition to Raised Bill 1074, An Act Concerning Foreclosure When Legal Title Has Not Been Conveyed. The bill proposes to repeal Connecticut General Statutes Section 49-17.

Connecticut General Statutes Section 49-17 has been a part of Connecticut statutory law for over fifty years. The statute codifies a common law principle, existing long before the legislation's passage, that the security follows the debt, and therefore the owner of the note has the right to enforce the mortgage. This principle was expressed by the Connecticut Supreme Court in 1919, in the case of *Waterbury Trust Company v. Weisman*, 94 Conn. 210, at pages 218-219: "The note and the mortgage are inseparable, the former (note) is essential, the latter (mortgage) an incident. An assignment of the note carries the mortgage with it" Citing *Carpenter v. Longan*, 83 US (16 Wall.), 271, 274 (1872). The principle was cited again with approval by the Connecticut Supreme Court in the 1998 case of *New Milford Savings Bank v. Jajer*, 244 Conn. 251, at page 266. More recently, the Connecticut Appellate Court affirmed this principle when it cited the statute and held that the holder of a note had the standing to enforce the mortgage despite the fact that the mortgage was not assigned to the note holder until after the note holder initiated the foreclosure. See *Bankers Trust Company of California, N.A. v. Vaneck*, 95 Conn. App. 390 (2006) appeal denied 279 Conn. 908 (2006). Just last year, the Connecticut Appellate Court upheld this principle again in *Chase Home Finance, LLC v. Fequiere*, 119 Conn. App. 570 (2010) appeal denied 295 Conn. 922 (2010), where, at pages 576 and 577, it said "Our legislature, by adopting § 49-17, has provided an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him."

The proposal to repeal Conn. Gen. Stat. § 49-17 tries to eliminate the statute, but such a repeal may also have the effect of abolishing the longstanding principle of law that serves as the legal foundation for the existing statute. As such, the proposal goes against judicial authority established at both the state and federal level.

It may be no coincidence that this proposal comes at a time when foreclosures are in the news. Reversing a time-honored principle of law may make the foreclosure process more difficult, but does nothing to actually help people who are defaulting on mortgage loans. It simply hurts those lenders, investors, real estate professionals and even home buyers who rely upon established laws to provide the basis for a judicially supervised means of determining one's legitimate rights to real property. The proposal introduces uncertainty to the area of real estate titles where certainty is key.

Connecticut's existing laws involving judicial foreclosure protect the due process rights of owners of mortgaged property as well as the rights of mortgagees. A mortgage foreclosure must be initiated and then completed in full before title to any property transfers from one party to another. The property owner is served with legal process, has the opportunity to raise legal defenses in the case, and can appeal from final orders of the court overseeing the action.

In a recent article "No Verdict in Judicial Foreclosure Debate, Our Analysis Shows Mass. Process Is Faster, But Conn.'s Process Better For Homeowners," *The Commercial Record* February 2011, the author describes recent efforts by the Massachusetts' Secretary of the Commonwealth to encourage the enactment of a system of judicial foreclosure in that state. The article also describes how lenders foreclosing in Connecticut must prove their case in court. In combination with the separate and mandatory mediation program instituted by Connecticut, this longer wait to foreclose and subsequent court proceeding lead to delays and higher costs for a foreclosing party, but provide significant protections to borrowers. The lengthy judicial process and the deliberate nature of Connecticut's foreclosure procedure also provide an important level of certainty to those interested in purchasing real property after completion of a foreclosure. *Id.* at pages 19 and 20.

Whatever the rationale may be behind the proposal to repeal Conn. Gen. Stat. § 49-17, the negative effect resulting from the statute's repeal would outweigh any possible benefit. The existing law codifies a longstanding legal principle, but the repeal of the statute may create an issue as to whether or not the legislature also intends to eliminate the corresponding common-law principle despite the long line of judicial decisions upholding it. While Connecticut's judicial foreclosure process contains ample protections for those involved in a foreclosure proceeding, the repeal of this statute could result in additional delays and uncertainty about the validity of titles obtained through foreclosure.

CATIC respectfully requests that this bill not be reported out of this Committee. CATIC firmly opposes the repeal of Conn. Gen. Stat. § 49-17.