

To: Sen. Duff and Rep. Tong and members of the Banks Committee

From: Denis R. Caron

Re: SB 159 An Act Concerning the Repeal of the Provision Authorizing Foreclosure by a Holder of a Note Who Does Not Have Legal Title

Date: March 6, 2012

I am a vice president of Commonwealth Land Title Insurance Company, a national title insurer doing business in the state of Connecticut. I am also co-author of *Connecticut Foreclosures: An Attorney's Manual of Practice and Procedure*. I am here today to speak in opposition to SB 159 "An Act Concerning the Repeal of the Provision Authorizing Foreclosure by a Holder of a Note Who Does Not Have Legal Title." The bill proposes to repeal Conn. Gen. Stat. §49-17, which has been part of Connecticut's statutory law for more than a century, having been enacted in 1902.

Conn. Gen. Stat. §49-17 is a codification of the long-established common-law precept that the security follows the debt. Under that rule, the owner of a debt has the right to enforce any mortgage that may secure that debt, even if the mortgage has not yet been assigned to it. The statute's main purpose is to provide some guidance on the procedural elements of a foreclosure suit brought under those circumstances. If the statute were to be repealed, I believe we would still be left with the common law, and the substantive rights of the lender would not have been affected. If the present intent is to change the underlying common law as well, I believe that would require additional legislation affirmatively creating a new rule expressly in derogation of the common law.

A reversal of the common law with respect to mortgages would also cause difficulties in other areas of the law of secured transactions. The common law rule also applies within the context of security interests as regulated by Article 9 of the Uniform Commercial Code. Thus, to be consistent, any change in the common law would have to be addressed within the context of the UCC as well. Otherwise, different rules of law would be in force as to different types of security interests. Even more troubling, this problem would be compounded in the not-infrequent situation where a transaction involves both a mortgage and a security interest securing the same debt.

It is difficult to discern the intent behind this bill, but the difficulties that a number of people have experienced in dealing with Mortgage Electronics Registration Systems (MERS) suggest that anti-MERS sentiment might be at play, since the fundamental premise of the MERS system is that the note can be separated from the mortgage. To the extent that this might be the motivation behind the bill, it effectively has been mooted by MERS's amendment to its own internal rules (Rule 8, Section 1), which now requires that any mortgage held in the name of MERS be assigned to the note holder prior to commencement of the foreclosure.

Another common criticism of MERS is that recording revenues have been adversely affected because MERS has eliminated the need for assignments of mortgages. The proposed repeal of §49-17 would have minimal effect on that situation, because the statute would apply only if a mortgage was going into foreclosure. In the absence of a foreclosure, there would be no need for MERS to assign the mortgage. In the case of a foreclosure, MERS would need to assign the mortgage only once, to the current note holder, and would not need to record assignments tracking all the mesne transfers of the underlying obligation.