

To: Sen. Cassano and Rep. Rojas and members of the Planning and Development Committee
From: Denis R. Caron
Re: HB 6325 An Act Concerning the Assignment of Mortgage Debts
Date: March 11, 2013

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 HB 6325 "An Act Concerning the Assignment of Mortgage Debt." The bill proposes to amend subsection (g) Conn. Gen. Stat. §49-10 to require the recording of an assignment whenever a mortgage debt is transferred.

This bill is an obvious attack on the manner in which a large part of the national secondary mortgage market operates under a program known as Mortgage Electronic Registration Systems ("MERS"). The MERS model involves separating the mortgage note from the mortgage deed. The note is payable to the original lender, and the mortgage is given in favor of MERS as nominee for that lender. As the note is sold in the secondary market, the note is endorsed to the new purchaser, but the mortgage remains in the name of MERS, and when the loan is paid, the release of mortgage is given by MERS. This business model has had a tremendous effect in reducing the number of title issues that can arise at the closing table, as I describe below.

If this bill were to become law, the MERS model would effectively be outlawed in Connecticut. The expressed policy reason for this bill is that the MERS system prevents a borrower from discovering the true identity of his lender. The perceived issue is also the motivation behind Section 8 of Governor's Bill 6355, which also seeks to amend subsection (g) of Conn. Gen. Stat. §49-10, as well as Raised Bill 1102, which seeks to repeal Conn. Gen. Stat. §49-17.

I believe that all of these proposals, which presumably are intended to assist borrowers in their relationships with their lenders, are ill-advised, and will result in borrowers being faced with additional expenses and delays when they attempt to sell or refinance their properties. This is because imposing a requirement that all assignments of mortgage be recorded will inevitably result in a title defect, known in my business as a break in the chain of title, which occurs if one of the assignees of the mortgage neglects to record its assignment. When the mortgage is finally paid, a release of mortgage is issued by the lender who receives the payment, and that release is recorded in the land records to clear title and to enable a sale or refinance to proceed. If there was a break in the chain of mortgage assignments, however, then the release is of no effect and title to the property becomes unmarketable.

This is not an unusual or even uncommon event. Not all lenders participate in MERS, and those non-participating lenders encounter this problem on a regular basis. The usual way to resolve it is for the title insurance company to agree to insure over the defect, but only if the owner executes an indemnity agreement with the company, whereby the owner agrees to chase down and record the missing assignment. The title company generally will also exact a security deposit, usually in the amount of \$2500-\$4000, to ensure that the owner fulfills his obligations. Although the owner will be able to recover the funds later on, this is always an unexpected and unwelcome surprise. Sometimes, especially in a short sale, there are no funds available, and this can kill the deal. On a resale, the seller may have been counting on the proceeds from the sale as part of the equity to be reinvested in the purchase of a new property. The presence of MERS has greatly reduced the frequency of such unfortunate incidents; if MERS were to be eliminated from the equation, without doubt many homeowners would be seriously prejudiced. This is a classic case of possibly well-meaning legislation resulting in unintended consequences that would seriously harm the very people the bill is intended to help.

Talking Points in Opposition to Connecticut HB 6355 & HB 6325
(Requiring that (1) a fee be paid for every mortgage assignment not recorded in the municipal land records and (2) any assignment of debt be recorded in the municipal land records.)

- **The bill is unnecessary.** Public policy rationales for the bills are unsupportable. The main reason usually cited in support of these bills is that homeowners need to be able to find out who owns their loan from the public land records. The land records have not provided disclosure of the ownership of loans since the advent of the secondary market. Agents (like MERS or the servicer) have generally held the mortgage lien on behalf of the owners of the loan; a concept well recognized by the law. Moreover, Federal law already requires disclosure to homeowners about the owners of their loan.¹ The MERS® System also provides free access (through a toll free telephone number or the internet) to the general public to identify the current servicer for loans registered on the MERS® System, and the identity of the owner of the loan to the homeowner.
- **Better means of increasing state and local receipts are available.** The fiscal rationale of increased government revenues from recording fees for assignments ignores (1) the costs that will be incurred to process the increased work-load in a timely manner and (2) disruptions in existing processes causing other unintended consequences (see last bullet). The better fiscal solution is to increase recording fees for in a more efficient manner that does not result in additional work for town registers or require a new process of reporting and collecting a new fee.² Examples could include increasing the fee for recording subsequent pages, which has not been substantially increased in recent years, or increasing the fee to record the mortgage.
- **The bill is anti-consumer.** Costs associated with additional recording fees and the need for additional infrastructure for lenders and servicers (to process these assignments) will be borne by homeowners. The cost of the first assignment is directly charged to the homeowner at closing and the costs of subsequent assignments will be passed on indirectly through higher fees and interest rates charged by lenders.
- **The bill will make lending in Connecticut uncompetitive.** No other state has this requirement. Higher costs and more complexity in the law, which will result if the bill is enacted, will cause national lenders to deploy their more of their capital in those states where market conditions are more favorable, and less capital in Connecticut.
- **Missing intervening assignment will result in title issues that will have to be cleared by homeowners at their cost.** This bill overturns existing state law that has been in place for hundreds of years. Recording liens is for the benefit of creditors to provide notice to third parties of their lien. There are often intervening transfers that do not impact the homeowner; they are often for short periods of time and creditors elect not to record them for reasons of cost and efficiencies. Regardless of any statute, in many cases, intervening transfers will not get recorded because people will make mistakes.³ In these cases, when the homeowners go to refinance his loan or sell his home, he or she will bear the case of fixing the title (inevitably some of the parties may not be in business so the homeowner will not have recourse against them). Title agents may also have difficulty identifying all of the intervening transfers, which may prevent them from being able to insure title.

¹ Federal legislation passed in 2009 (Section 404 of the Truth in Lending Act) requires that anyone who acquires ownership of a mortgage loan must provide the borrower with a notice that the acquirer is the new owner (and if they use a servicing agent to collect payments, the name of the servicer). The Section 1463 of the Dodd-Frank legislation enacted in 2010 also requires servicers to disclose the owner of the loan within ten days upon written request from the borrower.

² Enactment of GB 6355 contemplates that a new infrastructure would be established to collect fees at the state level.

³ Contrary to many assertions otherwise, MERS was created because of problems in the industry arising from problems associated with missing intervening assignments.