

## Judgment of Loss Mitigation

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### Issue

Describe judgment of loss mitigation and the types of relief it provides. This report updates and expands upon OLR Report [2016-R-0334](#).

### Summary

A judgment of loss mitigation is an alternative to foreclosure that a court may enter following a statutorily prescribed process. Generally, a mortgagee may request it, with a mortgagor's consent, at any time after the 15 days following the return date in a pending foreclosure action.

This type of judgment allows certain (1) mortgages on a "residential real property" (generally a one-to four-family dwelling) to be modified without a junior lienholder's consent or (2) mortgagors (i.e., borrowers) to satisfy all or part of their obligations by conveying the property using a transfer agreement. It is specifically available to a mortgagor who:

1. owns a one- to four-family dwelling in Connecticut and occupies it as his or her primary residence;
2. is the borrower of a loan secured by a mortgage (other than a reverse annuity mortgage) on the dwelling that has an amount due, including accrued interest, late charges, and other secured amounts, that exceeds the property's appraised value when added with other priority lien amounts; and
3. has personal net liquid assets, excluding retirement and tax advantaged health savings plans, of less than \$100,000 ([CGS §§ 49-24a](#) & [49-30p](#)).

A judgment of loss mitigation does not eliminate the mortgage debt or any judgment associated with a junior lienholder on the property ([CGS § 49-30w](#)). It also does not prohibit, outside of the

judicial process, a (1) consensual mortgage modification, (2) deed in lieu of foreclosure, or (3) consensual release of a mortgage by a mortgagee for less than the full indebtedness secured by the mortgage ([CGS §§ 49-30t, 49-30u, & 49-30v](#)).

Title transfers resulting from a loss mitigation judgment are exempt from the real estate conveyance tax ([CGS § 12-498\(a\)\(9\)](#)).

## **Prerequisite Actions**

By law, a judgment of loss mitigation is not available until (1) the mortgagee (i.e., the owner or servicer of the debt secured by the mortgage) has initiated a foreclosure action and (2) one of the following agreements are executed or reached: a mortgage modification, conveyance to the mortgagee, or conveyance to a third party ([CGS §§ 49-30t & 49-30u](#)). We describe these agreements separately below.

### ***Mortgage Modification***

By law, any underwater mortgage on applicable residential real property may, subject to a court's approval, be modified to increase the principal loan balance by the amount of any accrued interest, fees, and costs allowed by law, without any (1) junior lienholder's consent and (2) loss of priority to the senior lienholder for the full amount of the modified loan ([CGS § 49-30q](#)). Both the mortgagor and mortgagee must consent to the modification in writing ([CGS § 49-30t](#), see below).

An "underwater mortgage" is one in which the debt associated with the mortgage, along with any senior lien, exceeds the property's fair market value, as determined by a court. A "senior lien" is the first security interest placed on a property to secure payment of a debt or performance of an obligation before one or more junior liens. A "junior lien" is a security interest placed on a property to secure payment of a debt or performance of an obligation after a senior lien is placed on it ([CGS § 49-30p](#)).

### ***Conveyance to Mortgagee***

A mortgagor of an underwater mortgage may satisfy all or part of his or her obligation to the mortgagee by conveying the residential real property to the mortgagee. The mortgagor may do so through a transfer agreement, executed by both parties, that:

1. conveys to the mortgagee all interests in the property except for any interests (a) reserved to the mortgagor in the agreement, (b) held by more senior mortgagees or lienholders, or (c) held by junior lienholders not subject or party to the foreclosure action;

2. considers a discharge of the mortgage after the mortgagor satisfies the agreement's conditions;
3. considers the termination of any other interest in the property subordinate to the lienholder that is party to the transfer agreement following a judgment of loss mitigation; and
4. contains other provisions mutually agreeable to the mortgagor and mortgagee, including either party's cash contribution to the other or the execution of a promissory note by one party in favor of the other ([CGS § 49-30r](#)).

### ***Conveyance to a Third Party***

A mortgagor of an underwater mortgage may enter into a transfer agreement to convey the mortgaged residential real property to a third party and, as a condition of the conveyance, satisfy all or part of the mortgagor's obligation to the mortgagee while paying less to the mortgagee than the outstanding balance on the mortgage debt. The transfer agreement must be executed by the mortgagor and the mortgagee and:

1. consider transferring all the mortgagor's interests in the property to the third party, except for interests (a) reserved to the mortgagor in the transfer agreement, (b) held by more senior mortgagees or lienholders, or (c) held by junior lienholders not subject or party to the foreclosure action;
2. consider discharging the mortgage after the mortgagor satisfies the agreement's conditions;
3. consider terminating any other interest in the property subordinate to the mortgagee following a judgment of loss mitigation; and
4. contain other provisions mutually agreeable to the mortgagor and mortgagee including either party's cash contribution to the other or the execution of a promissory note by one party in favor of the other ([CGS § 49-30s](#)).

### **Judgment Following Agreement**

At any time after 15 days following the return date of a pending foreclosure action, a mortgagee may file a motion for judgment of loss mitigation after entering into a modification or conveyance agreement (see above). By law, (1) the court may not enter this type of judgment without the express written consent of both the mortgagor and mortgagee or (2) a mortgagee need not consider consenting to such a judgment in foreclosure mediation. Failing to consent to a judgment of loss mitigation is not a basis for a claim of bad faith ([CGS §§ 49-30t & 49-30u](#)).

### ***Findings at the Hearing***

Upon the mortgagee's motion and with the mortgagor's consent, the court, after notice and a hearing, may enter a judgment of loss mitigation approving the mortgage modification or property

conveyance. The law prohibits the court from entering this judgment unless it makes express findings that the mortgage is an underwater mortgage and the parties agreed to the transaction in good faith.

All parties to the foreclosure action may participate in the hearing, and the judgment is final for purposes of appeal. The issues at the hearing must be limited to:

1. a finding of the property's fair market value, which may be determined by a written appraisal obtained by the mortgagee and performed by a licensed appraiser;
2. a finding of the outstanding balance of any priority liens on the property, to the extent necessary;
3. the debt owed to the mortgagee secured by the mortgage;
4. whether the mortgage is underwater; and
5. for purposes of mitigation, whether the contemplated transaction was agreed to in good faith ([CGS §§ 49-30t & 49-30u](#)).

For actions involving agreements to modify the mortgage or convey the property to the mortgagee, the hearing must also consider whether the parties to the contemplated transaction other than the mortgagee meet the financial requirements of a mortgagor (i.e., personal net liquid assets that are less than \$100,000, excluding retirement and tax advantaged health savings plans). This must be determined by (1) a financial statement submitted by the proposed mortgagor or mortgagors or (2) other financial information the court requires. The law prohibits the court from entering a judgment of loss mitigation for these agreements unless it expressly finds that the mortgagor meets the above financial requirements ([CGS § 49-30t](#)).

## ***Effect of Judgment***

***Mortgage Modification or Conveyance to Mortgagee.*** If the court enters a judgment of loss mitigation, then immediately after the expiration of any applicable appeal period or after the judgment has been affirmed on appeal, the (1) (a) mortgage must be increased according to the judgment and (b) lien of any junior lienholder subject or party to the action must be deemed subordinated to the mortgage, in the same order as before the judgment, or (2) property must be conveyed to the mortgagee in accordance with the transfer agreement. However, if a conveyance to a mortgagee is later set aside or avoided due to the application of Chapter 11 bankruptcy provisions, the judgment of loss mitigation must be set aside, and all parties must retain the same interests in the property as existed before the judgment to the extent permitted under the applicable bankruptcy laws ([CGS § 49-30t](#)).

***Conveyance to Third Party.*** If the court enters a judgment of loss mitigation, the conveyance must be ordered to take place. It must be done by the date in the transfer agreement, but it may be extended up to 60 days if the mortgagor and mortgagee agree, or longer as ordered by the court after notice and a hearing ([CGS § 49-30u](#)).

## ***Appeals***

In the event of an appeal, the mortgagor and the mortgagee may withdraw their consent to the foreclosure by loss mitigation. If either does so, the foreclosure may continue without any further restriction ([CGS §§ 49-30t & 49-30u](#)).

## **Title Conveyance and Recording**

Within 30 days after a mortgage modification or conveyance to a mortgagee, the mortgagor and mortgagee must record the judgment of loss mitigation with the town clerk ([CGS § 49-30t](#)).

For conveyances to third parties, the mortgagor must submit the judgment of loss mitigation to the town clerk for recording before recording the document conveying title to the third party. After the mortgagee receives the funds and other consideration as specified in the transfer agreement, the mortgagee must file a satisfaction of judgment of loss mitigation with the court ([CGS § 49-30u](#)).

## **Mortgagor's Petition to Enter Foreclosure Mediation**

If the court does not enter a judgment of loss mitigation, then the mortgage modification or property conveyance agreement contemplated by the mortgagor and mortgagee may not be completed. At this point, the (1) mortgagor may, if eligible, petition for inclusion in the Ezequiel Santiago Foreclosure Mediation Program and (2) mortgagee may request a judgment of foreclosure available under existing law, including strict foreclosure.

To be eligible for the mediation program, the mortgagor, in addition to meeting existing law's eligibility criteria for the program, must not have substantially contributed to the events leading to, or other circumstances resulting in, the court's decision to not enter a judgment of loss mitigation. To grant the mortgagor's petition, the court must find that (1) it is highly probable the parties will reach an agreement through mediation and (2) the petition is not motivated primarily by a desire to delay a foreclosure judgment. The court must consider any testimony or affidavits the parties submit supporting or opposing the mortgagor's petition ([CGS § 49-30v](#)).

(The state's foreclosure mediation program helps homeowners and lenders achieve a mutually agreeable resolution to a mortgage foreclosure action through the mediation process (see [CGS § 49-31k](#), et seq.).)

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