Practical Guidance

Residential Foreclosure (ME)

A Practical Guidance® Practice Note by
John J. Aromando and Sara A. Murphy, Pierce Atwood, LLP

John J. Aromando
Pierce Atwood, LLP

Sara A. Murphy
Pierce Atwood, LLP

This practice note discusses residential mortgage foreclosures in Maine. Maine is a judicial foreclosure state for residential mortgages, meaning that foreclosures must proceed by civil action under Me. Rev. Stat. tit. 14, §§ 6101–6325. This practice note provides a history of the foreclosure process in Maine, a review of current processes for obtaining a foreclosure judgment, common defenses raised by borrowers in foreclosure proceedings, and special residential foreclosure considerations under Maine and federal law.

For detailed guidance on residential foreclosure defense in Maine, see Common Defenses to Residential Foreclosure (ME). For guidance on commercial foreclosure in Maine, see Commercial Foreclosure (ME). For general guidance on foreclosure, see Foreclosure of Real Property.

History of Residential Foreclosures in Maine

Maine follows the title theory of mortgages. See First Auburn Trust Co. v. Buck, 16 A.2d 258, 260 (Me. 1940). A mortgage is "a conditional conveyance vesting the legal title in the mortgagee," with only the equity of redemption remaining in the mortgagor. Martel v. Bearce, 311 A.2d 540, 543 (Me. 1973).

From before 1967 until 2006, there were several means provided by law for the foreclosure of residential mortgages:

- Foreclosure by possession, which permitted a mortgagee to take possession of mortgaged property upon default in any one of three ways:
  - o By writ
  - o By consent –or–
  - o By peaceable entry (Me. Rev. Stat. tit. 14, § 6201 (2003))
- Foreclosure without possession, which permitted a mortgagee after default to foreclose a mortgage by either giving public notice or personal service of notice of foreclosure (Me. Rev. Stat. tit. 14, § 6203 (2003)) –and–
- Foreclosure by civil action (Me. Rev. Stat. tit. 14, § 6321)

The foreclosing party could proceed by any of these methods in order to extinguish the contractual rights of the defaulting party. Both Me. Rev. Stat. tit. 14, §§ 6201 and 6203 were repealed by P.L. 2007, ch. 391, § 1. At that time, the Legislature comprehensively amended the judicial foreclosure process, and foreclosure by civil action became the exclusive method for foreclosing residential mortgages. See P.L. 2007, ch. 391, § 9.

The Legislature's intervention was driven by the financial crisis of the late 2000s, which caused trial courts in Maine to experience "unprecedented rates of foreclosures, particularly in those loans held by national lenders." See State of Me. Judicial Branch, Report of the Judicial Branch Comm. on Foreclosure Diversion at 7, 18, n.1 (2009). Since then, the Maine Supreme Judicial Court sitting as the Law Court (Law Court) has developed a substantial body of case law addressing all aspects of residential foreclosure litigation in Maine. These decisions have created significant, though not insurmountable, hurdles to obtaining foreclosure judgments, even when a borrower has admittedly defaulted on the loan. The traps for the unwary, if not approached cautiously and with extreme precision, may lead to a borrower obtaining the mortgaged property free and clear from any rightful lien the lender may have, in addition to the lender paying the borrower's attorney's fees.

Initial Steps and Considerations

In Chase Home Finance LLC v. Higgins, 985 A.2d 508, 510–11 (Me. 2009), the Law Court listed the elements necessary for a plaintiff to prove in order to obtain a foreclosure judgment:

- The existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any (Me. Rev. Stat. tit. 14, § 6321)
- Properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage (Me. Rev. Stat. tit. 14, § 6321)
- A breach of condition in the mortgage (Me. Rev. Stat. tit. 14, § 6322)
- The amount due on the mortgage note, including any reasonable attorney's fees and court costs (Me. Rev. Stat. tit. 14, § 6111(1-A))
- The order of priority and any amounts that may be due to other parties in interest, including any public utility easements (Me. Rev. Stat. tit. 14, § 6322)
- Evidence of properly served notice of default and the mortgagor's right to cure in compliance with statutory requirements (Me. Rev. Stat. tit. 14, § 6111)
- After January 1, 2010, proof of completed mediation (or waiver or default of mediation), when required, pursuant to the statewide foreclosure mediation program rules (Me. Rev. Stat. tit. 14, § 6321-A) –and–
- If the homeowner has not appeared in the proceeding, a statement, with a supporting affidavit, of whether or not the defendant is in military service in accordance with the Servicemembers Civil Relief Act (50 U.S.C. § 521)

This section addresses these elements, as well as the corresponding court procedures necessary to successfully litigate a foreclosure action.

Breach of Condition in a Mortgage

The mortgagee must prove that the mortgagor breached a condition or term that is set out in the mortgage document. The circumstances of the breach will be described in the mortgage document, and the breach will most often be missing a payment due on the note. Me. Rev. Stat. tit. 14, § 6321; see Johnson v. McNeil, 800 A.2d 702 (Me. 2002).

Notice of Default and the Mortgagor's Right to Cure

Perhaps the most problematic element of obtaining a foreclosure judgment is the notice of default and a mortgagor's right to cure. Before commencing a foreclosure action against a residential property that serves as the mortgagor's primary residence, the mortgagee must send written notice to the mortgagor and any cosigner informing them of the default and of their right to cure the default by making full payment of the amounts owed without acceleration. Me. Rev. Stat. tit. 14, § 6111(1). The content of the notice must include the following:

- The mortgagor's right to cure the default as provided in Me. Rev. Stat. tit. 14, § 6111(1)
- An itemization of all past due amounts causing the loan to be in default and the total amount due to cure the default
- An itemization of any other charges that must be paid to cure the default
- A statement that the mortgagor may have options available other than foreclosure; that the mortgagor may discuss available options with the mortgagee, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development (HUD); and that the mortgagor is encouraged to explore available options prior to the end of the right-to-cure period
- The address, telephone number, and other contact information for persons having authority to modify a mortgage loan with the mortgagor to avoid foreclosure, including, but not limited to, the mortgagee, the mortgage servicer, and any other agent of the mortgagee

- The name, address, telephone number, and other contact information for all counseling agencies approved by the U.S. HUD operating to assist mortgagors in the state to avoid foreclosure
- Where mediation is available, a statement that a mortgagor may request mediation to explore options for avoiding foreclosure judgment –and–
- A statement that the total amount due does not include any amounts that become due after the date of the notice

Id. The notice requirement codified in Section 6111 is only triggered when three conditions are met: "(1) the mortgage is on a residential property; (2) the property is the mortgagor's primary residence; and (3) the mortgage secures a loan used for personal, family, or household use." Bordetsky v. JAK Realty Trust, 157 A.3d 233, 237 (Me. 2017). The notice freezes any amounts that may come due; thus, the amount stated in the notice of default must be the "precise amount" that the mortgagor must pay during the right-to-cure period. JPMorgan Chase Bank, N.A. v. Lowell, 156 A.3d 727, 733 (Me. 2017) (citing Bank of Am. v. Greenleaf, 96 A.3d 700, 711–12 (Me. 2014)).

The notice does not need to come from the mortgagee directly—the mortgagee may delegate this task to a loan servicer or someone else acting as the mortgagee's agent. Wilmington Savings Fund Soc'y v. Needham, 204 A.3d 1277, 1282 (Me. 2019); see also United States Bank Trust, N.A. v. Jones, 330 F. Supp. 3d 530, 536–37 (D. Me. June 26, 2018).

The mortgagee or its agent must send the notice by both certified mail, return receipt requested, and first-class mail. Me. Rev. Stat. tit. 14, § 6111(2-A)(A). The effective date of the notice as given to the mortgagor is the sooner of (1) "the date the mortgagor or cosigner signs the receipt or, if the notice is undeliverable, the date the post office last attempts to deliver it . . . ; and (2) the date the mortgagor or consigner receives the notice" by ordinary first-class mail. Me. Rev. Stat. tit. 14, § 6111(2-A)(B). Moreover, within three days of providing this notice, the mortgagee must file information with the Maine Bureau of Consumer Credit Protection including "(A) The name and address of the mortgagor and the date the written notice . . . was mailed to the mortgagor and the address to which the notice was sent; (B) The address, telephone number and other contact information for persons having authority to modify a mortgage loan with the mortgagor to avoid foreclosure, including, but not limited to, the mortgagee, the mortgage servicer and an agent of the mortgagee; and (C) Other information, as permitted by state and federal law, requested of the mortgagor by the Bureau of Consumer Credit Protection." Me. Rev. Stat. tit. 14, § 6111(3-A).

The mortgagee may not commence a foreclosure action until at least 35 days after the notice of default and right to cure is provided to the mortgagor. See Bordetsky, 157 A.3d at 236–37. If the mortgagor tenders payment before the right-to-cure period expires, the mortgage is treated as having never been in default. Me. Rev. Stat. tit. 14, § 6111(1).

Strict compliance with Section 6111 is required; the consequences for failing to comply are nothing less than draconian. Failure to send a notice of default compliant with Section 6111 results in a dismissal of the foreclosure action on the merits. The dismissal is therefore a valid final judgment for purposes of res judicata, precluding the mortgagee from later asserting any rights to the property. In those circumstances, the "note and mortgage are unenforceable and [the mortgagors] hold title to their property free and clear of the Bank's mortgage encumbrance." Pushard v. Bank of Am., N.A., 175 A.3d 103, 115–16 (Me. 2017) (citing Fannie Mae v. Deschaine, 170 A.3d 230, 236 (Me. 2017), as revised (Dec. 7, 2017)). In other words, even a de minimis error in the notice of default may result in a free home for the mortgagor.

Commencement of the Foreclosure Action

After a breach of condition and 35 days after providing notice to the mortgagor under Section 6111, the mortgagee or any person claiming under the mortgagee may file a foreclosure complaint in the superior or district court of the county where the mortgaged property is located. Me. Rev. Stat. tit. 14, § 6321. Consistent with the Maine Rules of Civil Procedure, a copy of the complaint and summons must then be served on the mortgagor and all parties in interest. Id.

A foreclosure complaint must include the following:

- A certification of proof of ownership of the mortgage note
- Allegations of all assignments and endorsements of the mortgage note and mortgage
- A certification that all steps mandated by law to provide notice to the mortgagor pursuant to Me. Rev. Stat. tit. 14, § 6111 were strictly performed
- Specific allegations of the plaintiff's claim by mortgage on the real estate

- On the first page of the complaint, a specific description of the mortgaged premises, including the street address, if any
- The book and page number of the mortgage as recorded in the registry, if any
- The existence of public utility easements, if any, that were recorded subsequent to the mortgage and prior to the commencement of the foreclosure proceeding and without mortgagee consent
- The amount due on the mortgage
- The mortgage condition breached by the mortgagor –and–
- A demand for foreclosure and sale

Me. Rev. Stat. tit. 14, § 6321. "Certification of proof of ownership" of the note, id., "requires only that a foreclosure plaintiff identify the owner or economic beneficiary and, if it is not itself the owner, prove that it has power to enforce the note." U.S. Bank, Nat. Ass'n v. Thomes, 69 A.3d 411, 414–15 (Me. 2013) (quoting Bank of Am. v. Cloutier, 61 A.3d 1242, 1247 (Me. 2013)). Thus, under Maine's Uniform Commercial Code, the party in possession of the note endorsed in blank is entitled to enforce it as the holder of a negotiable instrument. See Me. Rev. Stat. tit. 11, § 1-1201; Cloutier, 61 A.3d at 1246.

Within 10 days of filing the complaint with the court, the mortgagee must provide a copy of the clerk's certificate or a copy of the complaint to the municipal tax assessor of the municipality where the mortgaged land is located. This document must state, immediately after the title, the address of the premises and the book and page number of the mortgage. Failure to provide such notice, however, does not affect the validity of a foreclosure sale. Me. Rev. Stat. tit. 14, § 6321.

Within 60 days of filing the complaint with the court, the mortgagee must "record a copy of the complaint or a clerk's certificate of the filing of the complaint in each registry of deeds in which the mortgage deed is or by law ought to be recorded and such a recording thereafter constitutes record notice of commencement of foreclosure." Me. Rev. Stat. tit. 14, § 6321. If using a clerk's certificate, it must bear the title "Clerk's Certificate of Foreclosure" and prominently state the street address of the mortgaged premises immediately after that title, in addition to the book and page number of the mortgage. Id.

After filing the foreclosure complaint, the parties may stay the proceedings to allow the mortgagor to bring the mortgage payments up to date, so long as the mortgagee and mortgagor enter into an agreement to allow that result. "If the mortgagor does not make payments according to the agreement, the mortgagee may, after notice to the mortgagor, resume the foreclosure process at the point at which it was stayed." Me. Rev. Stat. tit. 14, § 6321.

Parties in Interest

As stated above, all parties in interest to the foreclosure proceeding must be served in accordance with the Maine Rules of Civil Procedure. A party in interest is any party who has an interest in the mortgaged premises through the time of the recording of the complaint or the clerk's certificate. This may include (as reflected in documents recorded at the time of the recording of the complaint or the clerk's certificate):

- Mortgagors
- Holders of fee interest
- Mortgagees
- Lessees pursuant to recorded leases or memoranda
- Lienors and attaching creditors

Me. Rev. Stat. tit. 14, § 6321. But see Union Trust v. MacQuinn-Tweedie, 767 A.2d 289, 290–91 (Me. 2001) (holding that the holder of an option contract to purchase the land does not have the same rights as a junior mortgagee / party in interest and that the option did not survive the foreclosure). Even if a mortgagor defaults in the foreclosure proceeding, the party in interest is still entitled to litigate the validity of the mortgage of the foreclosing lender to determine the priorities between the foreclosing party and the party in interest. Casco Northern Bank, N.A. v. Estate of Grosse, 657 A.2d 778, 781 (Me. 1995).

If a mortgagee fails to join a party in interest, any result from the foreclosure action remains valid only against those who were properly joined. Me. Rev. Stat. tit. 14, § 6321. "Naming the junior mortgagee as a party in interest in a foreclosure action and serving of process provides notice of the imminent foreclosure proceedings. Once notified of the senior mortgagee's intention to foreclose against the property, the junior mortgagee has the opportunity to appear in the action and have the court determine . . . the 'order of priority and those amounts, if any, that may be due to other parties that may appear.'" Bankr. Estate of Everest v. Bank of Am., N.A., 111 A.3d 655, 660–61 (Me. 2015) (quoting U.S. Dep't of Hous. & Urban Dev. v. Union Mortg. Co., 661 A.2d 163, 165–66 (Me. 1995)). If, upon notice, the junior mortgagee fails to appear in the foreclosure action, the junior mortgagee has no rights to the proceeds from the property once foreclosed. Bankr. Estate of Everest, 111 A.3d at 662–63.

If the mortgage is not one of first priority, the foreclosure action does not affect the rights of those with superior priority, and those with superior priority are not joined to the foreclosure action. However, the mortgagee must notify the parties with superior priority by sending them a copy of the foreclosure complaint by certified mail. Me. Rev. Stat. tit. 14, § 6321.

Finally, failure to join the holder of a public utility easement on the mortgaged premises, even if established after the mortgage, but before the filing of the foreclosure action, is deemed consent to that easement by the mortgagee. Any party whose interest in the property is not recorded by the date the foreclosure complaint is filed need not be joined to the action, and such party has no rights to the mortgaged property after a completed foreclosure sale. This party may move to intervene in the action, however, at any time before final judgment. Me. Rev. Stat. tit. 14, § 6321.

Foreclosure Diversion Program

After the housing crisis and the overhaul of statutory foreclosure processes, the Maine Legislature established Maine's Foreclosure Diversion Program. See L.D. 1418, Emergency Preamble (124th Legis. 2009). As part of that legislation, the Legislature instructed the Supreme Judicial Court of Maine to adopt rules to "establish a foreclosure mediation program to provide mediation in actions for foreclosure of mortgages on owner-occupied residential property with no more than 4 units that is the primary residence of the owner-occupant." Me. Rev. Stat. tit. 14, § 6321-A(3); see P.L. 2009, ch. 402, § 18 (emergency, effective June 15, 2009). The Legislature stated that the foreclosure mediation program "must address all issues of foreclosure, including but not limited to reinstatement of the mortgage, modification of the loan and restructuring of the mortgage debt." Me. Rev. Stat. tit. 14, § 6321-A(3). Therefore, to create a straightforward process for unrepresented homeowners to avoid default based on their unfamiliarity with court processes and encourage participation in the Foreclosure Diversion Program, the Legislature requires a foreclosing plaintiff to "attach to the foreclosure complaint a one-page form notice" that must contain the following:

- A statement that failure to answer the complaint will result in foreclosure of the property subject to the mortgage
- A sample answer and an explanation that the defendant may fill out the form and return it to the court in the envelope provided as the answer to the complaint; if the debtor returns the form to the court, the defendant does not need to file a more formal answer or responsive pleading and will be scheduled for mediation in accordance with this section –and–
- A description of the Foreclosure Diversion Program

Me. Rev. Stat. tit. 14, § 6321-A(2). As discussed above in Initial Steps and Considerations, whether a foreclosing plaintiff must attach the one-page form notice required by Section 6321-A when filing a foreclosure complaint in federal court is an "open question." Wilmington Sav. Fund Soc'y FSB v. Segal, 2020 U.S. Dist. LEXIS 269 (D. Me. Jan. 2, 2020).

After the Legislature acted, the Supreme Judicial Court of Maine adopted Rule 93 of the Maine Rules of Civil Procedure in 2010, which governs the Foreclosure Diversion Program. See Me. R. Civ. P. 93. The Foreclosure Diversion Program is intended to be a comprehensive mediation process for residential foreclosures in Maine. See Me. R. Civ. P. 93 (b)(2). In addition to the statutory requirements of Section 6321-A, Rule 93:

- Authorizes implementation of informational sessions for homeowners faced with foreclosure to ensure that homeowners have the necessary information regarding foreclosure proceedings and the diversion program (Me. R. Civ. P. 93 (c)(2))
- Prohibits a mortgagee from filing any dispositive motions or requests for admissions prior to the completion of mediation "or until the court orders that mediation shall not occur" (Me. R. Civ. P. 93 (d)(1))
- Requires a foreclosing plaintiff to provide the borrower with financial forms "requesting information from the defendant that would allow the plaintiff to consider or develop alternatives to foreclosure or otherwise facilitate mediation" (Me. R. Civ. P.93 (c)(4))
- Requires the presence of "the plaintiff, or a representative of the plaintiff, who has the authority to agree to a proposed settlement, loan modification, or dismissal of the action" at the mediation session (Me. R. Civ. P.93 (h)(1)(D)) –and–
- Allows the court, if it finds that a party "fail[ed] to attend or to make a good faith effort to mediate," to order sanctions including, but not limited to, "tolling of interest and other charges pending completion of mediation, assessment of costs and fees," awarding attorney's fees, entry of judgment, dismissal without prejudice, or dismissal with prejudice (Me. R. Civ. P. 93 (j))

Mediation through the Foreclosure Diversion Program is mandatory for those who fall under the ambit of Section

6321-A, and only the mortgagor, upon a finding by the court that there is good cause and that the mortgagor is making a free choice, may waive mediation under the rule. Me. R. Civ. P. 93 (m); see Me. Rev. Stat. tit. 14, § 6321-A(2). If a defendant appears in the case, files an answer, or otherwise requests a mediation, the parties are generally required to engage in a mediation session. It is within the trial court's discretion, however, to deny a request for mediation after entry of default. See Bank of Me. v. Peterson, 107 A.3d 1122, 1124 (Me. 2014). Typically, a case cannot proceed past the Foreclosure Diversion Program until after the filing of the final mediator's report or the court orders that mediation shall not occur. Me. R. Civ. P. 93 (d)(1).

Foreclosing plaintiffs are often sanctioned for failure to comply in good faith with the requirements of the Foreclosure Diversion Program, in addition to failing to comply with other Maine Rules of Civil Procedure. The trial court has discretion pursuant to Rule 93 to impose a wide variety of sanctions for failing to mediate in good faith, as it does pursuant to Maine Rule of Civil Procedure 16(d). See Me. R. Civ. P. 16 (d). Thus, the Law Court is reluctant to hold that a trial court abused its discretion in fashioning an appropriate sanction for noncompliance with the Foreclosure Diversion Program or the Rules of Civil Procedure. For example, in U.S. Bank, N.A. v. Sawyer, 95 A.3d 608, 611 (Me. 2014), the Law Court stated that dismissal with prejudice was a "severe sanction that has constitutional implications." The lender in *Sawyer* continued to request additional documents from the mortgagors and refused to engage in discussions regarding a loan modification over the course of four mediations. Sawyer, 95 A.3d at 609–11. After the trial court dismissed the case with prejudice, Sawyer, 95 A.3d at 611, the Law Court affirmed the sanction based on the lender's "dilatory practices" and further held that evidence of a lender's bad faith is not required—only a lack of good faith. Sawyer, 95 A.3d at 611–12. Similarly, in Bayview Loan Servicing, LLC v. Bartlett, 87 A.3d 741 (Me. 2014), the trial court dismissed the foreclosure case with prejudice when the lender failed to appear at three of four mediation sessions, holding that the lender was engaged in a "pattern of disruptive behavior." Bayview Loan Servicing, LLC, 87 A.3d at 745. On appeal to the Law Court, although the court confirmed that dismissals with prejudice are reviewed closely, it nonetheless affirmed the trial court's sanction of dismissal with prejudice. Bayview Loan Servicing, LLC, 87 A.3d at 743; see also U.S. Bank Nat'l Ass'n v. Manning, 228 A.3d 726, 733 (Me. 2020) (affirming sanction of dismissal with prejudice under M.R. Civ. P. 16 (b) when "the Bank had failed to ensure that a person with 'full authority' to settle attended the settlement conference"); Green Tree Servicing, LLC v. Cope, 158 A.3d 931, 939 (Me. 2017) (holding that a trial court has the discretion to impose the "ultimate sanction of a dismissal with prejudice against a plaintiff in a foreclosure action even when the plaintiff lacks standing"); Financial Corp. v. Gardner, 60 A.3d 1262 (Me. 2013) (upholding trial court's monetary sanctions on the bank and the order by the trial court for the bank to enter into a loan modification agreement pursuant to the terms of the mediation agreement).

Before entering the "ultimate sanction" of dismissal with prejudice, however, a court must ordinarily ensure that the offending party had reasonable notice of the consequences of its actions and an opportunity to be heard before the trial court. Cope, 158 A.3d at 938; see also U.S. Bank Nat'l Ass'n v. Manning, 97 A.3d 605, 611 (Me. 2014) (holding a party must be given adequate notice and an opportunity to be heard before a trial court may impose a sanction of dismissal with prejudice); Wells Fargo Bank, N.A., v. Welch-Gallant, 162 A.3d 827 (Me. 2017) (vacating dismissal with prejudice and remanding to trial court to comply with *Cope* requirements of providing adequate notice and an opportunity to be heard before dismissing case with prejudice).

Summary Judgment

Under Me. R. Civ. P. 56 (j), no summary judgment shall enter in a foreclosure action until a court has determined:

- The service and notice requirements of Me. Rev. Stat. tit. 14, § 6111 were strictly performed
- The foreclosing plaintiff has produced proof of ownership of the note, and evidence of the note, the mortgage, and all assignments and endorsements –and–
- The mediation was completed or waived, or if the defendant failed to appear or respond after proper service

Summary judgment rules are strictly applied in the context of residential foreclosure actions. Ocean Communities Fed. Credit Union v. Roberge, 144 A.3d 1178, 1182 (Me. 2016); see HSBC Mortg. Servs. v. Murphy, 19 A.3d 815, 819–20 (Me. 2011); JPMorgan Chase Bank v. Harp, 10 A.3d 718, 721 (Me. 2011).

"In residential mortgage foreclosure actions, certain minimum facts must be included in a mortgage holder's statement of material facts on summary judgment." Murphy, 19 A.3d at 819; see also Me. R. Civ. P. 56 (h). To succeed at summary judgment, a foreclosing plaintiff must include all of the *Higgins* elements in its statement of material facts, "supported by evidence of a quality that would be admissible at trial." HSBC Bank USA, N.A. v. Gabay, 28 A.3d

1158, 1163–64 (Me. 2011) (citing Murphy, 19 A.3d at 819 n.6; Higgins, 985 A.2d at 510–11; Me. R. Civ. P. 56 (j)); see Wells Fargo Bank, N.A. v. deBree, 38 A.3d 1257, 1259 (Me. 2012); Lubar v. Connelly, 86 A.3d 642, 650 (Me. 2014). Thus, supporting a statement of material fact with an allegation of a foreclosure complaint that has been deemed admitted pursuant to Me. R. Civ. P. 8 (d) is not of sufficient evidentiary quality for summary judgment purposes in the residential foreclosure context. Gabay, 28 A.3d at 1165. Similarly, a mortgagor's averments in opposing a summary judgment motion that he did not receive proper notice will defeat summary judgment absent proof by the foreclosing plaintiff of actual receipt of notice or by filing a certificate of mailing. See Camden Nat'l Bank v. Peterson, 948 A.2d 1251, 1257–58 (Me. 2008).

Trial courts are similarly vested with considerable discretion pursuant to Me. R. Civ. P. 56 (g) to sanction foreclosing parties who file affidavits supporting summary judgments in bad faith. For example, in Fannie Mae v. Bradbury, 32 A.3d 1014 (Me. 2011), the trial court sanctioned Fannie Mae and ordered it to pay the borrower's attorney's fees and costs after the deposition of an affiant revealed that the affiant did not read the affidavit he signed and did not execute his affidavit before a notary. Fannie Mae, 32 A.3d at 1015. After the Law Court stated that the affidavit was "a disturbing example of a reprehensible practice" and that it was both "violative of the rules of court and ethically indefensible," it declined the borrower's invitation to impose greater sanctions than the trial court based on the trial court's inherent discretion to determine appropriate Rule 56(g) sanctions. Fannie Mae, 32 A.3d at 1016, 1017.

Hearing and Judgment

Absent a mediated resolution or settlement, the parties proceed to a hearing. There, the court decides whether there was a breach of the mortgage; the amount owed by the mortgagor; the order of priority and those amounts, if any, that may be due to other parties; and whether any public utility easements survive the proceeding. Me. Rev. Stat. tit. 14, § 6322. Whether the foreclosing plaintiff's evidence is sufficient to establish the *Higgins* elements is always ripe for challenge by the borrower's counsel, as discussed further below in Defenses to Residential Foreclosure Actions. See, e.g., Deutsche Bank Nat'l Trust Co. v. Eddins, 182 A.3d 1241, 1245 (Me. 2018) (vacating judgment of foreclosure following trial and holding that the bank's use of a senior loan analyst could not provide the requisite foundation pursuant to Me. R. Evid. 803 (6) for the required statutory notice as a business record because the notice was prepared by the law firm of the servicer, rather than the servicer itself).

If the court determines the foreclosing plaintiff established the requisite *Higgins* elements, it will issue a judgment of foreclosure ordering that, if the mortgagor does not pay the precise amount determined by the court to be owed within the redemption period, the mortgagee shall proceed with a sale of the property in a manner consistent with Me. Rev. Stat. tit. 14, § 6323. If the mortgagor pays the amount due within the redemption period, the mortgagee must promptly discharge the mortgage and file a dismissal of the foreclosure action. Me. Rev. Stat. tit. 14, § 6322; see Me. Rev. Stat. tit. 33, § 551. If, however, the foreclosing plaintiff has standing but fails to put forward sufficient proof of its claim on the property, the mortgagor is entitled to a judgment in its favor, including, effectively, a discharge of the mortgage. Pushard, 175 A.3d at 116 ("We therefore must vacate the judgment in the Bank's favor on the Pushards' claim for declaratory relief and remand the case to the trial court to *enter a judgment declaring that the note and mortgage are unenforceable and that the Pushards hold title to their property free and clear of the Bank's mortgage encumbrance.*" (emphasis added)). At the hearing, if the court determines that the foreclosing plaintiff lacks standing to pursue the foreclosure action, the court will dismiss the action without prejudice, which means that the property may still be foreclosed upon by the proper party with standing and the mortgage will not be unenforceable under *Pushard*. See U.S. Bank Nat. Ass'n v. Curit, 131 A.3d 903, 906–07 (Me. 2016), as corrected (May 12, 2016).

Redemption Period

The redemption period for a mortgagor to pay the total amount the court determines is owed (with interest) is 90 days from the date of the judgment (unless the mortgage was executed prior to October 1, 1975, in which case the period is one year). Me. Rev. Stat. tit. 14, § 6322. The redemption period begins to run upon entry of the judgment of foreclosure if no appeal of the judgment is taken. Pursuant to the Maine Rules of Appellate Procedure, a party has 21 days from entry of the foreclosure judgment on the docket to appeal the judgment to the Law Court. Me. R. App. P. 2B(c)(1).

A mortgagee must be cautious in accepting any payment toward the mortgagor's indebtedness after commencing a foreclosure action. Acceptance of anything of value by the mortgagee before the right of redemption expires and after the commencement of a foreclosure action is a waiver of the foreclosure unless a contrary agreement is made in writing with the paying party or unless the bank returns the payment to the mortgagor within 10 days. Me. Rev. Stat. tit. 14, § 6321. However, the "receipt of income from the mortgaged premises by the mortgagee or the mortgagee's

assigns while in possession of the premises does not constitute a waiver of the foreclosure proceedings . . . ." Id.

Sale of Property

Assuming the mortgagee obtains a foreclosure judgment and the mortgagor fails to redeem the property, the mortgagee's interest in the real property is "forever extinguished." Duprey v. Eagle Lake Water & Sewer Dist., 615 A.2d 600, 605 (Me. 1992). Ninety days after expiration of the redemption period, the mortgagee must begin to publish notices of the foreclosure sale. Such notice must be published in a newspaper of general circulation in the county in which the property resides for three consecutive weeks. Me. Rev. Stat. tit. 14, § 6323(1). Moreover, the mortgagee must mail the notice of the sale by ordinary mail to all parties who appeared in the foreclosure action or to their attorneys of record. That notice must be mailed no less than 30 calendar days before the sale date. The failure to provide notice to parties in the foreclosure action does not ultimately affect the validity of the sale of the property. Me. Rev. Stat. tit. 14, § 6323(2). However, should the mortgagee proceed with the public sale before allowed pursuant to the statute, the mortgagee may not be entitled to a deficiency judgment "absent unusual or exceptional circumstances." Cadle Co. v. LCM Assocs., 749 A.2d 150, 151, 153 (Me. 2000). Any failure to follow the public sale requirements does not, however, void the foreclosure judgment. See United States v. Harriman, 851 F. Supp. 2d 190, 193–94 (D. Me. 2010).

The public sale must generally be held not less than 30 and not more than 45 days after the first publication of the sale. If the mortgagee requires more time to sell the property, upon good cause shown and motion by the mortgagee, the court may grant further extensions. The mortgagee has sole discretion in allowing the mortgagor to redeem the property after the period of redemption and before the public sale. Me. Rev. Stat. tit. 14, § 6323(1).

The property must be sold to the highest bidder. The mortgagee must then deliver the winning bidder the deed of sale and writ of possession. The deed conveys the property clear of all interests of the parties in interest properly joined in the foreclosure action. Thereafter, after deducting the mortgagee's expenses from the sale, the mortgagee must disburse the remaining proceeds in accordance with the foreclosure judgment, which will reflect the priority of interests, and file a report of the disbursement with the court. Me. Rev. Stat. tit. 14, § 6324.

Statute of Limitations

There are different statutes of limitation that govern an action on the note and an action for judicial foreclosure on the mortgage. Actions on the note must be commenced within six years of nonpayment. Me. Rev. Stat. tit. 11, § 3-1118(1). However, even when actions on the note are barred under the six-year statute of limitations, a mortgagee may still bring a foreclosure action if commenced within twenty years from the "time limited in the mortgage for the full performance of the conditions there[in]." Me. Rev. Stat. tit. 14, § 6104.

For example, in Johnson v. McNeil, 800 A.2d 702 (Me. 2002), on appeal of the trial court's decision that the mortgagee could not proceed with her foreclosure action because the statute of limitations barred a suit on the underlying note, the Law Court held that a "mortgagee is not precluded from foreclosing on a mortgage deed even though a separate action on the note evidencing the debt is barred." Johnson, 800 A.2d at 703. The Law Court reasoned that "the running of the period of limitations during which the provisions of the note may be enforced does not eliminate the existence of the debt obligation itself, nor does it abrogate the mortgage securing the debt or affect the foreclosure remedies available to the mortgagee." Johnson, 800 A.2d at 704–05; see also Joy v. Adams, 26 Me. 330, 332–33 (1846). The principle that the actions can be separated, however, does not preclude the application of res judicata in appropriate circumstances. See Nationstar Mortg., LLC v. Nelson, 2016 U.S. Dist. LEXIS 136660 (D. Me. Oct. 3, 2016).

Defenses to Residential Foreclosure Actions

Generally, the same defenses that may be asserted in an action on the debt may be made in a suit to foreclose a mortgage. Because of the Law Court's frequent admonition that the statutory procedures governing foreclosure must be strictly adhered to by foreclosing lenders, borrowers have significant latitude in attacking foreclosure proceedings. The following section provides an overview of the defenses most frequently raised by residential mortgagors in Maine, but it is by no means exhaustive. Other possible defenses include an attack on the validity of the note and mortgage, lack of consideration, a mortgagee's prior breach of its obligations, waiver by accepting payment after service of the notice of default, or that an assignment of the mortgage is invalid or void, among others.

For a detailed discussion of residential foreclosure defenses, including more information on many of the cases discussed below, see Common Defenses to Residential Foreclosure (ME).

Standing

In Mortgage Electronic Registration Systems, Inc. v. Saunders, 2 A.3d 298, 295–96 (Me. 2010), the Law Court confirmed that the only party with standing to foreclose is the party with the right to enforce the note. As a negotiable instrument under Maine's Uniform Commercial Code, Me. Rev. Stat. tit. 11, § 3-1301, the person holding or possessing the original note is a "mortgagee" under Section 6321 of Maine's foreclosure statute—"a party that is entitled to enforce the debt obligation that is secured by a mortgage." Saunders, 2 A.3d at 295–96. Thus, the Law Court held that Mortgage Electronic Registration Systems (MERS) did not have standing to foreclose on the property because it did not hold or otherwise own the promissory note—"the only rights conveyed to MERS in either the . . . mortgage or the corresponding promissory note are bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage in the Registry of Deeds." Saunders, 2 A.3d at 295. The Law Court in *Saunders* mentioned in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," citing case law from the 19th and 20th centuries concluding that the beneficial interest in a mortgage follows possession of the note it secures. Saunders, 2 A.3d at 296 n.3 (citing Averill v. Cone, 149 A. 297, 298–99 (Me. 1930); Wyman v. Porter, 79 A. 371, 375 (Me. 1911); Jordan v. Cheney, 74 Me. 359, 361–62 (1883)). Moreover, nowhere in *Saunders* did the Law Court suggest that an assignment from MERS was for any reason ineffective in transferring the interest in the mortgage.

Four years later, in Bank of Am., N.A. v. Greenleaf, 96 A.3d 700, 711–12 (Me. 2014) (*Greenleaf I*), the Law Court ruled that in order for a foreclosing party to have standing, it must demonstrate its possession of the note and ownership of the mortgage. Greenleaf I, 96 A.3d at 706. The Law Court further held that the plaintiff bank lacked standing to seek foreclosure on a mortgage and accompanying promissory note because it had acquired its interest in the mortgage from MERS—a nominee that possessed no interest in the mortgage other than the right to record it under the language of the mortgage at issue in Greenleaf I. Greenleaf I, 96 A.3d at 707. Thus, the subsequent assignments by MERS, ultimately to the foreclosing party Bank of America, assigned only that limited right to record, and nothing more. Id. Although Bank of America held the original promissory note, and therefore had the legal authority to collect the amount due under that note, it could not demonstrate its standing to foreclosure on the property because it lacked evidence that it "owned" Greenleaf's mortgage. Greenleaf I, 96 A.3d at 707–08; see Homeward Residential, Inc. v. Gregor, 122 A.3d 947, 954 (Me. 2015) (applying the *Greenleaf I* analysis and finding that the bank did not have standing because it could not prove that it owned the mortgage, which had been assigned several times). In *Greenleaf I*, the Law Court departed from more than century-old Maine precedent that the mortgage "follows" the note. See Wyman, 79 A. at 375; Jordan, 74 Me. at 361–63 ("Nor is an assignment of the mortgage necessary.").

Following the Law Court's remand in *Greenleaf I*, the trial court issued an order dismissing the plaintiff bank's complaint without prejudice. Bank of Am., N.A. v. Greenleaf, 124 A.3d 1122, 1123–24 (Me. 2015) (*Greenleaf II*). The defendant mortgagor appealed the dismissal, arguing that because the bank's case had been tried to completion, the trial court should have entered a final judgment in its favor and not merely dismissed the complaint without prejudice. Greenleaf II, 124 A.3d at 1124. On appeal, the Law Court affirmed the dismissal without prejudice, holding that "[a] plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable—i.e., incapable of judicial resolution." Id. Therefore, "the court could not have entered a judgment on remand addressing the merits of the Bank's foreclosure claim because the Bank failed to show the minimum interest that is a predicate to bringing that claim in the first place." Id.

Only in cursory comments, or, more often, in footnotes indicating that a financial institution's standing to foreclose under *Greenleaf I* is not implicated, has the Law Court commented on how to circumvent standing issues that arise due to an assignment through MERS. None of the decisions, however, provides guidance on how to obtain an effective assignment from an original lender that is defunct, obsolete, or otherwise unwilling to assign its original rights to the foreclosing party. See Beal Bank USA v. New Century Mortgage Corp., 217 A.3d 731 (Me. 2019).

Ironically, given the Law Court's other case law requiring, in effect, a discharge of a borrower's mortgage when a mortgagee fails to prove its foreclosure case on the merits, see Pushard, 175 A.3d at 114–16, a decision that a mortgagee does not have standing to foreclose is the best outcome for an unsuccessful foreclosing lender—it means that the dismissal does not have a preclusive effect, and the mortgagee can pursue a new foreclosure action once it cures the standing deficiency (assuming the original lender

is not now defunct or otherwise unwilling to assign the mortgage). Note, however, that in some cases borrowers will move for judgment as a matter of law pursuant to Me. R. Civ. P. 50 (d), or, alternatively, for a dismissal with prejudice, which trial courts may grant. See, e.g., U.S. Bank Trust, N.A. v. Keefe, 237 A.3d 904, 905 (Me. 2020).

In sum, to avoid standing defenses, foreclosing parties must proceed cautiously when MERS appears in the chain of title and obtain the necessary assignments from the originating lender or the lender appearing directly before the transfer to MERS.

Hearsay and the Business Records Exception

The General Rule and Its Application in State Court

To strictly comply with the steps required to properly foreclose, including submitting the eight elements of proof outlined in *Higgins*, foreclosing parties often have to rely on business records to prove the amount due on the mortgage note, including reasonable attorney's fees and court costs. Higgins, 985 A.2d at 510–11. Pursuant to Me. R. Evid. 803 (6), a "custodian or other qualified witness" must testify that:

- The record was made at or near the time of the events reflected in the record by—or from information transmitted by—someone with knowledge
- The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit
- Making the record was a regular practice of that activity –and–
- The opponent of the record does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness

Problems with meeting these requirements are unlikely to arise if the foreclosing party held the note and mortgage since inception. In that situation, supplying a custodian or other qualified witness to establish the Rule 803(6) requirements should be straightforward because all of the necessary records never changed hands.

Complying with Rule 803(6) proves challenging, however, when servicing of the loan changes hands, as it often does. New loan servicers rely on integrated servicing records from previous servicers as evidence of historical loan activity, to confirm the investor's property interest, and to enforce obligations of the mortgage and note.

Until recently, there were two competing interpretations of Me. R. Evid. 803 (6). Prior to 2020, the most recent interpretation, applied in Beneficial Maine Inc. v. Carter, 25 A.3d 96 (Me. 2011), required testimony from *both* the originating and receiving businesses to lay the requisite foundation for the business records exception to the hearsay rule. Under that strict interpretation of Rule 803(6) in the foreclosure context, borrowers frequently successfully challenged records of a prior servicer as inadmissible hearsay. Without those records, it was difficult if not impossible for a foreclosing plaintiff to satisfy the elements of its claim—particularly with respect to proving the precise amount due on the loan. See, e.g., M & T Bank v. Plaisted, 192 A.3d 601, 607–10 (Me. 2018) (vacating judgment of foreclosure when plaintiff's witness could not explain number discrepancies in records that integrated information from multiple previous servicers, and the witness had no knowledge of "both businesses" records); Eddins, 182 A.3d at 1245 (holding that the bank's use of a senior loan analyst could not provide the foundation for the required statutory notice as a business record because the notice was prepared by the law firm of the servicer, rather than the servicer itself).

In The Bank of New York Mellon v. Shone, 239 A.3d 671 (Me. 2020), however, the Law Court effectively overruled *Carter*. In *Shone*, the Law Court unequivocally adopted the integrated business records exception to the hearsay rule under Me. R. Evid. 803 (6), holding that a business record from a receiving entity is admissible so long as the receiving business can establish that (1) the receiving business integrated the record into its own records, (2) the receiving business verified "or otherwise established the accuracy of the contents of the record," and (3) the receiving business relied on the record "in the conduct of its operations." Shone, 239 A.3d at 674. *Shone*'s integration, verification, and reliance test aligns with the nearly identical Fed. R. Evid. 803(6), thereby promoting uniformity of application of the exception and discouraging forum shopping.

It is important to note that even if a custodian or qualified witness testifies to the necessary integration, verification, and reliance elements under *Shone*, the mortgagor may still challenge the trustworthiness of the business records pursuant to Me. R. Evid. 803 (6)(E). It is the mortgagor's burden to demonstrate untrustworthiness, but if it carries that burden, the court may exclude the evidence on that basis. See Wilmington Tr., Nat'l Ass'n v. Berry, 237 A.3d 167, 172 (Me. 2020).

Thus, where multiple servicers are involved, the receiving entity must prove integration, verification, and reliance of the business record before being admissible under Me. R. Evid. 803 (6). Where business records are most often used to prove up the amount due on the mortgage note under

Higgins and Me. Rev. Stat. tit. 14, § 6111(1-A), the loan history offered by the foreclosing plaintiff should include the following information:

- The original amount of the loan
- The date the debt was incurred
- The schedule and due dates for payments; the dates and the amounts of each payment, including any payments made after default; the dates and amounts of each charge assessed (interest, escrow payments, costs, fees, and other charges)
- The balance due on the note after each payment and charge assessed; the date of the last payment before default
- The total amount paid by the mortgagor –and–
- If the loan was serviced by more than one loan servicer, the time during which each servicer was responsible for collecting and recording loan payments and charges

Plaisted, 192 A.3d at 608 n.6. Maine courts prefer this information in chronological order in a form that is "both accessible and admissible." Plaisted, 192 A.3d at 610.

Res Judicata – Preclusive Effect of a Dismissal with Prejudice or Judgment on the Merits

If an initial foreclosure action is dismissed with prejudice or judgment is entered in favor of the borrower, the mortgagee is precluded from bringing a later foreclosure action under the doctrine of res judicata. If a case is dismissed without prejudice, a mortgagee may be able to bring a later action. See Wilmington Savings Fund Society FSB v. Mooney, 2017 U.S. Dist. LEXIS 79628 (D. Me. May 24, 2017). There are two key Law Court cases addressing res judicata and the preclusive effect of previous foreclosure actions.

Fannie Mae v. Deschaine, 170 A.3d 230 (Me. 2017)

In *Deschaine*, Fannie Mae filed an initial foreclosure complaint in 2012, which was dismissed with prejudice for failing to comply with the court's pretrial scheduling order pursuant to Me. R. Civ. P. 16 A(d). Deschaine, 170 A.3d at 230, 232, 236. In 2013, Fannie Mae sent a new notice of default to the Deschaines and thereafter filed a second foreclosure complaint requesting a judgment of foreclosure based on the default that occurred after the previous notice of default. The Deschaines counterclaimed arguing that they held title to the property unencumbered by the mortgage because of the previous action being dismissed with prejudice. Deschaine, 170 A.3d at 234.

After an unsuccessful mediation, the Deschaines moved for summary judgment on their counterclaims and on all counts of Fannie Mae's complaint. The Deschaines argued that Fannie Mae had accelerated the debt in the first foreclosure action, and therefore that Fannie Mae was barred from bringing a second foreclosure claim. Id. The Deschaines relied on the Law Court's previous decision in Johnson v. Samson Const. Corp., 704 A.2d 866, 869 (Me. 1997), where the Law Court held that res judicata bars a lender's second foreclosure action on the debt when the first foreclosure action expressly accelerated the debt under the terms of the promissory note.

Fannie Mae "disputed the assertion that the debt was accelerated" because the language of the mortgage and note at issue in *Deschaine*, unlike *Johnson*, merely gave the lender discretion to accelerate the debt and "Fannie Mae did not indisputably exercise that option." Deschaine, 170 A.3d at 238. Fannie Mae further argued that even an attempt at acceleration "is not effective unless and until the court enters a foreclosure judgment." Deschaine, 170 A.3d at 239.

The Law Court found the facts of *Deschaine* on all fours with *Johnson*, holding that Fannie Mae exercised its option to accelerate the entire debt by filing the first foreclosure action wherein it "declared in its complaint that the entire amount the Deschaines were obligated to pay pursuant to the loan documents was then due." Deschaine, 170 A.3d at 239–40. The Law Court further held that "because acceleration is entirely the lender's prerogative and occurs upon the filing of a foreclosure complaint, it does not depend on any judicial imprimatur in the form of a judgment in the lender's favor." Deschaine, 170 A.3d at 240–41. The Law Court therefore affirmed the trial court's decision in favor of the borrower on the basis of res judicata. Deschaine, 170 A.3d at 232.

Pushard v. Bank of Am., N.A., 175 A.3d 103 (Me. 2017)

Only a few months later, the Law Court took preclusion one step further in Pushard v. Bank of Am., N.A., 175 A.3d 103 (Me. 2017). In *Pushard*, the bank initiated a foreclosure action against the borrowers, and after a trial, the court entered a judgment in favor of the Pushards because the court concluded that the bank failed to meet its burden on the elements of foreclosure—namely, that a breach occurred, the amount due on the mortgage note, and that the notice of default complied with statutory requirements under Me. Rev. Stat. tit. 14, § 6111. Pushard, 175 A.3d at 108. A few months later, the borrowers initiated an action against the bank seeking "(1) a discharge of the mortgage and (2) an order enjoining the Bank from enforcing the note and mortgage and compelling the bank to record a release of the mortgage," among other claims. Id. On cross-motions for summary judgment in the borrowers' action,

the trial judge entered judgment in favor of the bank holding that the previous foreclosure judgment in favor of the Pushards "does not, and could not, preclude a claim by the Bank for amounts coming due on the note after the 2014 foreclosure judgment" because the bank did not accelerate the payments on the note (thus distinguishing the case from Johnson). Pushard v. Bank of Am., N.A., 2016 Me. Bus. & Consumer LEXIS 23. Analyzing Section 6111, the trial court concluded that "[t]he defective notice of the right to cure meant the Bank could not accelerate payments on the note or claim the entire balance due on the note." Id. Thus, the trial court denied the Pushards' motion for summary judgment, concluding that the bank "is not required to release its mortgage, either under 33 M.R.S. § 551 or on any other basis." Pushard, 2016 Me. Bus. & Consumer LEXIS 23, at *6.

On appeal, the Law Court vacated the trial court's judgment and remanded for the trial court to enter judgment in favor of the Pushards on their claim for declaratory relief "that the note and mortgage are unenforceable and that the Pushards hold title to their property free and clear of the Bank's mortgage encumbrance." Pushard, 175 A.3d at 116. The Law Court rejected the trial court's analysis that the defective notice under Me. Rev. Stat. tit. 14, § 6111 prevented the bank from accelerating the debt on the note. Pushard, 175 A.3d at 114–15. Instead, the Law Court applied its reasoning in *Deschaine* to hold that the bank accelerated the debt by "exercis[ing] its option to put the entire remaining balance in issue in its foreclosure action, instead of simply demanding payment of past due amounts." Id. Thus, the Law Court concluded that "notwithstanding that the foreclosure court determined that the Bank failed to prove that its notice of default complied with section 6111 . . . the Bank triggered the acceleration clauses of the note and mortgage when it filed the foreclosure action demanding immediate payment of the entire remaining debt." Pushard, 175 A.3d at 115–16. With a declaratory judgment in hand, the Pushards were then free to record the judgment with the registry of deeds to quiet title to the property. Pushard, 175 A.3d at 116.

Avoiding the Deschaine/Pushard Trap

As discussed above, the consequences of a foreclosing plaintiff failing to meet its burden on the elements of its claim are significant—the borrowers are thereafter entitled to quiet title on the property free of the mortgage encumbrance.

The most common errors in a foreclosing plaintiff's case relate to insufficient evidence of the amount due on the note based on the inadmissibility of evidence as hearsay, as discussed above, and a defective notice of default and right to cure pursuant to Me. Rev. Stat. tit. 14, § 6111(1-A). Failure to strictly comply with Section 6111 operates as a "substantive defect" in the mortgagee's case that will give rise to a dismissal with prejudice or the right to summary judgment in favor of the mortgagor, which will have preclusive effect going forward. See, e.g., Lowell, 156 A.3d at 733. Thus, strict compliance with Section 6111's requirements is imperative.

Moreover, if a foreclosing plaintiff's evidence is excluded for any reason, and the excluded evidence necessarily results in the plaintiff failing to prove its foreclosure claim, before entry of an adverse judgment, the foreclosing plaintiff must make an offer of proof or report the case to the Law Court pursuant to Me. R. App. P. 24(c) to preserve its right to appeal the exclusion of that evidence and avoid the preclusive effect of the judgment. See, e.g., Wilmington Sav. Fund Soc'y, FSB v. Abildgaard, 229 A.3d 789 (Me. 2020).

Finally, it is an open question whether a deceleration clause in the mortgage and note, and proper procedures taken by the foreclosing plaintiff to decelerate the debt pursuant to those instruments, could avoid the "free home" result under *Deschaine* and *Pushard*.

Necessary Parties – Dismissal without Prejudice

Finally, a mortgagor may raise the defense that necessary parties are absent from the foreclosure proceeding. A foreclosure action may be dismissed without prejudice if a necessary party has not been joined, such as the original executor of the note or a municipality when a tax lien is challenged. See, e.g., MTGLQ Investors, L.P. v. Alley, 166 A.3d 1002 (Me. 2017).

Special Foreclosure Considerations

Special Foreclosure Protections in Maine

Maine law provides special protections against foreclosure for the following borrowers:

- Certain military servicemembers –and–
- Borrowers who take out a type of loan that is called a "high-cost home loan"

Servicemembers

The Maine Servicemembers' Civil Relief Act, Me. Rev. Stat. tit. 37-B, § 389-A, provides certain military servicemembers (including state military forces on active state service) with the opportunity to stay (postpone) foreclosure proceedings in which the servicemember is involved, either as a plaintiff, defendant, or attorney. (A federal law, the Servicemembers'

Civil Relief Act, 50 U.S.C. § 3901 et seq., provides comparable protections for military servicemembers who are facing foreclosure.)

High-Cost Home Loans

Protections for high-cost loans are found in Maine's statutory truth in lending provisions of the Maine Consumer Credit Code, Me. Rev. Stat. tit. 9-A, § 8-501 et seq. High-cost loans are defined as those that have particular characteristics and the annual percentage rate or points and fees exceed certain amounts. Me. Rev. Stat. tit. 9-A, § 8-506(H). For these loans, Maine law imposes certain restrictions on lenders. For example, among other restrictions, the lender cannot charge a prepayment penalty and cannot make a high-cost mortgage loan without first receiving certification from a counselor with a third-party, nonprofit organization approved by the U.S. HUD, a housing financing agency of this state or the Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection that the borrower has received counseling on the advisability of the loan transaction. Me. Rev. Stat. tit. 9-A, § 8-506(2). If the lender violates the law, the borrower may bring suit for injunctive relief, actual and punitive damages, statutory damages, and further recover costs and reasonable attorney's fees. Me. Rev. Stat. tit. 9-A, § 8-506(6).

Section 8-506 does not apply to any supervised financial organization as defined in Section 1-301(38-A) or to the Maine State Housing Authority. Me. Rev. Stat. tit. 9-A, § 8-506(7).

Federal Law – Special Foreclosure Considerations

Federal Jurisdiction – Diversity Jurisdiction, 28 U.S.C. § 1332

Given some of the Law Court decisions unfavorable to foreclosure plaintiffs during the past decade, for example, with respect to the application of the business records exception under Me. R. Evid. 803 (6) (discussed above in Commencement of the Foreclosure Action), foreclosure filings in federal court where diversity jurisdiction exists under 28 U.S.C. § 1332 have been on the rise. According to PACER, the following reflects foreclosure actions filed in the U.S. District Court for the District of Maine:

- 2013: 5 filings
- 2014: 5 filings
- 2015: 4 filings
- 2016: 31 filings
- 2017: 28 filings
- 2018: 35 filings
- 2019: 162 filings
- 2020: 43 filings (moratoria in effect due to COVID-19 pandemic)

Burford Abstention *Residential Mortg. Loan Trust 2013-TT2* v. Lloyd, 183 F. Supp. 3d 189 (D. Me. April 29, 2016)

It is an open question to what extent, if at all, the Foreclosure Diversion Program statutory requirements and rules outlined in Me. R. Civ. P. 93 must be followed if a lender files its foreclosure action in federal court. For the time being, however, the Maine federal court has rejected the suggestion it should abstain from exercising jurisdiction over foreclosure cases given the comprehensive scheme created by the Legislature through the Foreclosure Diversion Program.

In 2016, in *Residential Mortg. Loan Tr. 2013-TT2*, after Residential Mortgage filed its complaint in federal court seeking to foreclose on the mortgage, Lloyd responded by filing a motion to dismiss, arguing that the federal court should abstain under the principles enunciated by the Supreme Court in Burford v. Sun Oil Co., 319 U.S. 315, 320 (1943). (See Residential Mortg. Loan Trust 2013-TT2 v. Lloyd, 183 F. Supp. 3d 189, 190 (D. Me. April 29, 2016).) Lloyd argued, with supporting evidence in the form of affidavits and requesting the court to take judicial notice of certain other facts related to the program, that the "Maine Legislature and Judiciary [] create[d] a comprehensive framework for foreclosure cases in Maine," which were "impossible to replicate in the federal system." Lloyd, 183 F. Supp. 3d at 190–91.

Judge Brock Hornby of the District Court for the District of Maine denied Lloyd's motion on abstention grounds. After reviewing Supreme Court and First Circuit precedent, Judge Hornby stated that "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them," and that *Burford* abstention is only for "exceptional circumstances." Lloyd, 183 F. Supp. 3d at 194 (quoting Chico Serv. Station Inc. v. Sol Puerto Rico Ltd., 633 F.3d 20, 29 (1st Cir. 2011)). Such exceptional circumstances exist "when the matter before the federal court involves a state administrative scheme or the review of substantive orders from state administrative agencies." Id. The Foreclosure Diversion Program, in contrast, is a construct of the judicial branch—not an administrative proceeding. Judge Hornby stated:

> I would be delighted to leave Maine home foreclosures to the state courts, and I am sympathetic to the defendant's judicial and public policy

> argument—it is clear that the mediators in Maine's Foreclosure Diversion Program have been trained and have developed specialized knowledge in this area of law. Absent explicit waiver by the defendant homeowner, mediation is required, M.R. 93(c), (m), and Maine's trial courts have accumulated a body of case law, developing rapidly, to determine when financial institutions are mediating in good faith, as required by Maine Rule of Civil Procedure 93(j), and if not, have ordered appropriate sanctions . . . .
>
> Nevertheless, at the end of the day, Maine has chosen to have a foreclosure system that uses court lawsuits, not administrative proceedings, and when the parties to a lawsuit are diverse in their citizenship, the Constitution and Congress have chosen to give federal courts jurisdiction (if the jurisdictional amount in controversy is satisfied). U.S. Const. art. III, § 2; 28 U.S.C.A. § 1332.

Lloyd, 183 F. Supp. 3d at 195. Judge Hornby acknowledged that "the First Circuit has questioned whether a 'comprehensive framework' established by a state to handle a certain area of law, in and of itself, 'creates a state administrative agency, as opposed to a judicial structure, to which deference under Burford may be paid,'" Lloyd, 183 F. Supp. 3d at 195–96 (quoting Fragoso v. Lopez, 991 F.2d 878, 883 (1st Cir. 1993)), "or whether certain state 'schemes' could be 'analogized to an agency' for purposes of applying the Burford doctrine," Lloyd, 183 F. Supp. 3d at 196 (quoting Sevigny v. Empls. Ins. of Wausau, 411 F.3d 24, 28 (1st Cir. 2005)). Nevertheless, absent a determination by the Supreme Court or the First Circuit on those issues, Judge Hornby determined it was his constitutional duty to exercise jurisdiction over the case.

There was no interlocutory appeal taken by Lloyd from the dismissal of the motion to dismiss, and the issue about whether *Burford* abstention would be appropriate in these circumstances has not been revisited since by the Supreme Court or the First Circuit.

Truth in Lending Act – 12 C.F.R. § 1024.41

The federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., was enacted in 1968 and implemented Regulation Z (12 C.F.R. § 1026.1 et seq.), effective in 1969. TILA creates loss mitigation procedures that certain lenders are required to follow depending on the type of loan at issue and the number of loans the lender makes, as well as when a borrower requests a loss mitigation application. 12 C.F.R. § 1024.41. The TILA requires notification to the borrower regarding loss mitigation options and deadlines for providing such notices. The appendix to 12 C.F.R. § 1024.39 contains model clauses that can be included in the notice to the borrower. See TILA Appendix to Part 1024—Model Clauses for the Written Early Intervention Notice.

For delinquent loans on a primary residence, the TILA notice must include:

- A statement encouraging the borrower to contact the lender or servicer
- A telephone number to access servicer personnel assigned and the servicer's mailing address
- If applicable, a statement providing a brief description of examples of loss mitigation options that may be available from the servicer
- If applicable, either application instructions or a statement information the borrower how to obtain more information about loss mitigation options from the servicer –and–
- The website to access either the Bureau list or the U.S. HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations

12 C.F.R. § 1024.39(b). Lenders should confirm that any required notices regarding available loss mitigation options under the TILA have been presented to the borrower prior to filing the foreclosure complaint.

HUD

As a mortgage is security for a debt obligation, prior to bringing a foreclosure action, it is imperative that the lenders' counsel review the mortgage and promissory note or other security instrument to ensure compliance with any contractual pre-suit requirements contained in these documents. In particular, many of these instruments have HUD requirements, which are beyond the scope of this practice note. See HUD's website for more information about HUD and its programs.

John J. Aromando, Partner, Pierce Atwood, LLP

John J. Aromando is the Chair of Pierce Atwood's Litigation Practice Group. A partner at the firm with more than 30 years of diverse trial practice experience, John currently focuses on the defense of businesses in complex commercial litigation and class actions. He also advises lawyers and law firms with respect to professional conduct matters including the defense of professional liability claims. Recently, he has handled several cases in state and federal court involving constitutional challenges to municipal and state legislation.

John represents clients from a number of different industries including financial services, health care, energy, pulp and paper, manufacturing, insurance, and professional services. He has tried cases in both state and federal courts and argued appeals before the Maine Supreme Judicial Court and the First Circuit Court of Appeals.

John also appears on behalf of clients at mediations and in arbitrations and contested administrative proceedings. In recent years, he has served as a mediator for a variety of civil disputes and continues to offer those services in addition to his regular trial practice.

Sara A. Murphy, Associate, Pierce Atwood LLP

Sara A. Murphy is an associate in Pierce Atwood's Litigation Practice Group, where she focuses her practice on complex commercial litigation and class action defense.

Sara represents clients from a number of different industries, including financial services, health care, energy, pulp and paper, insurance, and professional services. Sara's litigation practice includes disputes related to breach of contract, unfair trade practices, claims under the Racketeer Influenced and Corrupt Organizations Act, and other business-related torts. She also handles cases involving claims for civil conspiracy, consumer fraud, insurance coverage, and defending lawyers and law firms with respect to professional services rendered.

Sara dedicates significant pro bono legal services representing CASA guardians ad litem in complex child protection cases and currently serves as a member of the Maine CASA Advisory Panel. Sara was also recently appointed by the Maine Supreme Judicial Court to serve as a commissioner for the Maine Civil Legal Services Fund, which annually distributes funds to support civil legal services to persons who otherwise are not able to afford counsel.

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