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U.S. Bank National Assn. v. Crawford

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
v. JACQUELYN N. CRAWFORD ET AL.
(SC 19903)Palmer, McDonald, Robinson, D'Auria,
Mullins, Kahn and Ecker, Js.**Syllabus*

The plaintiff in error, E, who had been appointed by the trial court as the committee to conduct a foreclosure sale in the underlying foreclosure action brought by the defendant in error bank, U Co., against the defendant in error property owner, C, filed a writ of error, claiming, inter alia, that the trial court improperly denied his motion to recover fees and expenses from U Co. U Co. had sought to foreclose a mortgage on certain of C's real property. The trial court rendered judgment of foreclosure by sale, and U Co. was the successful bidder. Before the sale could be completed, C filed a bankruptcy petition under chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court, which automatically stayed the foreclosure proceedings pursuant to the automatic stay provision (11 U.S.C. § 362 [a] [2012]) of the code. Thereafter, pursuant to statute (§ 49-25), E filed a motion seeking to recover from U Co. the fees and expenses that he had incurred in preparing for the sale. The trial court denied E's motion for fees and expenses on the ground that, pursuant to the Appellate Court's decision in *Equity One, Inc. v. Shivers* (150 Conn. App. 745), the motion automatically was stayed by 11 U.S.C. § 362 (a) and the court was barred from acting on the motion during the duration of the stay. In connection with his writ of error, E claimed, inter alia, that this court should overrule *Shivers* because state courts lack jurisdiction to extend the automatic stay provision to motions for fees and expenses filed by committees for sale seeking expenses from nondebtor plaintiffs in foreclosure actions. *Held:*

1. This court could review E's writ of error because, although the trial court's order denying E's motion for fees and expenses was an interlocutory order, it constituted an appealable final judgment under the second prong of the test for determining the appealability of interlocutory orders set forth in *State v. Curcio* (191 Conn. 27), as the denial of the motion so substantially resolved the rights of the parties that further proceedings could not affect them: E, who was not a party to the underlying foreclo-

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

This case was originally argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn. Thereafter, Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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sure action, had an undisputed right to recover the fees and expenses that he had incurred in preparing for the sale immediately upon the filing of a proper and timely motion, that right was separate from and collateral to the rights being asserted in the foreclosure action, and there was no possibility that his claim could be raised on direct appeal from the trial court's judgment in the foreclosure action without first being rendered moot; moreover, the claim E asserted in his writ of error, which already has arisen on numerous occasions in the courts of this state, involved a matter of public importance, as committees for sale, which are appointed by and act as representatives of the court, may be reluctant to accept appointment if they are unable to promptly recover the fees and expenses they incur in that capacity, and allowing review of the trial court's ruling in the present case would entirely dispose of the issue presented, would not open the floodgates to additional writs of error raising the same issue, and would avoid the bizarre result of allowing *Shivers*, which is inconsistent with the majority of federal bankruptcy decisions, to continue to bind this state's trial courts.

(Three justices dissenting in one opinion)

2. Although E's writ of error was rendered moot because the automatic stay terminated when, during the pendency of the writ of error, C's bankruptcy petition was dismissed, E's claim was reviewable under the capable of repetition, yet evading review exception to the mootness doctrine; because of the limited duration of chapter 13 bankruptcy proceedings, which, on average in the federal bankruptcy court in Connecticut, span approximately ten months, there existed a strong likelihood that the majority of cases challenging a denial of a motion for committee fees and expenses would be moot before appellate litigation could be completed, the issue presented by E's writ of error, which already has arisen on numerous occasions in the courts of this state, was likely to recur, and resolution of that issue was of public importance.
3. This court having determined that a state court lacks subject matter jurisdiction to extend the automatic bankruptcy stay to proceedings against nondebtors, it overruled the Appellate Court's decision in *Shivers*, and, because the trial court relied exclusively on *Shivers* in denying E's motion for fees and expenses, this court granted E's writ of error and remanded the case to the trial court with direction to vacate the order denying E's motion and to consider the motion on the merits; Connecticut and federal case law indicated that the stay provision set forth in 11 U.S.C. § 362 (a), which operates to benefit the debtor and bankruptcy trustee only, does not apply automatically to claims against nondebtors, and that, although state courts have jurisdiction to interpret the provisions of the bankruptcy code and orders of the bankruptcy court to determine whether, under their plain terms, the automatic stay provision applies in a state court proceeding, the bankruptcy court has exclusive jurisdiction to modify a stay by extending it to proceedings to which it does not automatically apply or by barring it in proceedings

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to which it does automatically apply, and, therefore, a state court lacks jurisdiction to extend the automatic stay provision to the motion of a committee for sale to recover fees and expenses from a nondebtor.

Submitted on briefs April 2, 2018—officially released November 26, 2019

Procedural History

Writ of error from the decision of the Superior Court in the judicial district of Hartford, *Robaina, J.*, denying the motion to award interim foreclosure committee fees and expenses filed by the plaintiff in error. *Writ of error granted; remanded with direction.*

C. Donald Neville and *Gregory W. Piecuch* filed a brief for the plaintiff in error (Douglas M. Evans).

Robert A. White, Proloy K. Das, Sarah Gruber, Irve Goldman, Thomas J. Sansone and *Charles A. Maglieri* filed a brief for the Connecticut Bar Association as amicus curiae.

Opinion

ROBINSON, J. The primary issue raised by this writ of error is whether the automatic stay provision of the federal bankruptcy code, 11 U.S.C. § 362 (a) (1),¹ precludes a committee for sale from recovering fees and expenses from a plaintiff in a foreclosure action that has been stayed because the defendant has filed for bankruptcy. The plaintiff, the U.S. Bank National Association, brought the underlying foreclosure action against the defendant Jacquelyn N. Crawford.² The trial

¹ Title 11 of the 2012 edition of the United States Code, § 362 (a), provides in relevant part that a bankruptcy petition “operates as a stay, applicable to all entities, of . . . (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title”

² We note that these parties in the underlying foreclosure action are defendants in error in the present proceeding. For the sake of simplicity, we refer to U.S. Bank National Association as the bank and to Crawford by name. We also note that, although the city of Hartford, the Department of Social Services, and the United States Secretary of Housing and Urban Development were also named as defendants in the underlying foreclosure action, they are not involved in the present proceeding.

court ultimately ordered a foreclosure by sale and appointed the plaintiff in error, Douglas M. Evans, as the committee for sale. Before the sale could be completed, however, Crawford declared bankruptcy, and the foreclosure action was stayed pursuant to 11 U.S.C. § 362 (a) (1). Thereafter, the plaintiff in error filed a motion pursuant to General Statutes § 49-25,³ seeking to recover, from the bank, the fees and expenses that he had incurred in preparing for the sale. Relying on an Appellate Court decision; see *Equity One, Inc. v. Shivers*, 150 Conn. App. 745, 755, 93 A.3d 1167 (2014) (when defendant in foreclosure action has declared bankruptcy, automatic stay provision applies to motions for fees and expenses by committee for sale against nondebtor plaintiff); the trial court concluded that the plaintiff in error's motion for fees and expenses was stayed and issued an order denying the motion on that ground. This writ of error was then filed pursuant to General Statutes § 51-199 (b) (10)⁴ and Practice Book § 72-1.⁵ Specifically, the plaintiff in error contends that this court should overrule *Shivers* because the Appellate Court lacked subject matter jurisdiction to extend the automatic stay provision to motions to recover fees and expenses from nondebtor plaintiffs in foreclosure actions. In the alternative, the plaintiff in error contends that we should overrule *Shivers* on the merits because it is in conflict with the decisions of federal bankruptcy courts addressing this issue. We conclude that state courts lack jurisdiction to extend the automatic stay

³ General Statutes § 49-25 provides in relevant part: “[I]f for any reason the sale does not take place, the expense of the sale and appraisal or appraisals shall be paid by the plaintiff and be taxed with the costs of the case. . . .”

⁴ General Statutes § 51-199 (b) provides in relevant part: “The following matters shall be taken directly to the Supreme Court . . . (10) writs of error”

⁵ Practice Book § 72-1 provides in relevant part: “(a) Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Supreme Court in the following cases: (1) a decision binding on an aggrieved nonparty”

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provision to proceedings against nondebtors and that *Shivers* must be overruled on that ground. Accordingly, we grant the writ of error and remand the case to the trial court with direction to vacate the order denying the plaintiff in error's motion for fees and expenses and to entertain the motion.

The record reveals the following undisputed facts and procedural history. Crawford executed a promissory note in favor of the bank that was secured by a mortgage on property located at 36-38 Baltic Street in the city of Hartford. After Crawford defaulted on the note, the bank commenced a foreclosure action against her. The trial court ultimately rendered a judgment of foreclosure by sale and appointed the plaintiff in error as the committee for sale. The sale was scheduled for February 4, 2017, and the bank was the successful bidder. Shortly thereafter, the plaintiff in error filed his report, in which he listed expenses totaling \$2419.29. He also submitted an affidavit in which he averred that the legal fees incurred in connection with the sale were expected to be \$3420.

Before the sale could be completed, however, Crawford filed for bankruptcy pursuant to chapter 13 of the United States Bankruptcy Code. Because the automatic stay provision applied to the foreclosure action, the sale of the property could not be completed. Accordingly, the plaintiff in error filed a motion to recover his fees and expenses from the bank pursuant to § 49-25. See footnote 3 of this opinion. The plaintiff in error contended in the motion that the trial court should not follow the Appellate Court's decision in *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 755, holding that the bankruptcy stay provision applies to such motions because it was in conflict with the decisions of several federal courts. The trial court concluded that it was bound by *Shivers* and denied the plaintiff in error's motion solely on that ground.

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In the present case, the plaintiff in error contends that this court should overrule *Shivers* on two alternative grounds. First, he contends that the Appellate Court in *Shivers* lacked jurisdiction to extend the automatic stay provision to motions by committees for sale to recover fees and expenses from nondebtors. Second, the plaintiff in error contends that, if we conclude that the Appellate Court had such jurisdiction in *Shivers*, that court incorrectly concluded that the automatic stay provision should be extended to such motions. After the writ of error was filed, this court, sua sponte, ordered the parties to address in their appellate briefs the following two issues: (1) whether the plaintiff in error is aggrieved by a final judgment of the Superior Court such that he has standing to bring the writ of error, and (2) whether the controversy will be rendered moot if the bankruptcy stay terminates during the pendency of the writ of error. We note that the automatic stay terminated on July 27, 2017. The bank has filed no appellate brief.⁶

We conclude that the plaintiff in error has standing to bring the writ of error. We further conclude that, although his claim is moot, it is nonetheless reviewable under the capable of repetition, yet evading review exception to the mootness doctrine. Addressing the merits of the plaintiff in error's claim, we conclude that state courts lack jurisdiction to extend the automatic stay provision to motions by committees for sale to recover fees and expenses from nondebtor foreclosure plaintiffs and, therefore, that *Shivers* must be overruled.

⁶This court also, sua sponte, invited the Litigation Section and the Commercial Law and Bankruptcy Section of the Connecticut Bar Association to file an amicus curiae brief addressing the following question: "Should this court overrule *Equity One, Inc. v. Shivers*, [supra, 150 Conn. App. 745], insofar as that case required the trial court to deny the committee's motion for an interim award of fees and expenses during the automatic bankruptcy stay?" The Commercial Law and Bankruptcy Section, acting on behalf of the Connecticut Bar Association as a whole, accepted our invitation and submitted an amicus curiae brief in support of the plaintiff in error's position that this court should overrule *Shivers*. We thank the Commercial Law and Bankruptcy Section for its comprehensive brief.

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Because it implicates this court's subject matter jurisdiction, we first address the issue of whether the plaintiff in error is aggrieved by a final judgment and, therefore, has standing to bring this writ of error. See *State v. Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983) (“[b]ecause our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim”). The plaintiff in error contends that, because his motion seeking payment by the bank of his fees and expenses was essentially a separate third-party claim, and because it was denied in full, the order denying the motion is not interlocutory in nature but, rather, constitutes an appealable final judgment. We disagree. Although the trial court denied the motion, it is clear that the denial was without prejudice to the plaintiff in error's right to renew the motion after the automatic stay terminated. See *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 755 and n.6 (although order granting committee for sale's motion for fees was void because automatic stay was in place when order was issued, because stay had since terminated, parties could “revisit the question of payment for committee fees on remand”). Accordingly, we conclude that that order is interlocutory.

The plaintiff in error also claims, however, that, if the trial court's order denying his motion for fees and expenses is interlocutory, it is reviewable under *State v. Curcio*, supra, 191 Conn. 31. In that case, we stated that, “[i]n both criminal and civil cases . . . we have determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.” *Id.*

We acknowledge at the outset of our analysis that this court's *Curcio* jurisprudence is hardly a model of clarity or consistency. We further acknowledge that, as a result of this doctrinal confusion, it is possible to identify both cases that provide support for the conclusion that the trial court's denial of the plaintiff in error's motion for fees and expenses is immediately reviewable under *Curcio* and cases that arguably undermine that conclusion. For the following reasons, however, we ultimately are persuaded that the trial court's denial of the motion for fees and expenses is immediately reviewable under the second prong of *Curcio*.

First, immediate review of the trial court's ruling will in no way offend the primary public policy considerations that underlie the final judgment rule. We previously have recognized that the rule's primary policy rationale is "to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level." (Internal quotation marks omitted.) *Mazurek v. Great American Ins. Co.*, 284 Conn. 16, 33, 930 A.2d 682 (2007). In the present case, reviewing the denial of the motion for fees and expenses will have no adverse effect on the speedy and orderly disposition of the underlying foreclosure action because the plaintiff in error is not a party to that action and the issue that he raises in this writ of error implicates a right that is separable from, and collateral to, the rights being asserted in the foreclosure action. See *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 256, 520 A.2d 605 (1987) (observing with approval that, under federal law, review of interlocutory orders is available for claims involving a "right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" [internal quotation marks omitted]); see also *Niro v. Niro*, 314 Conn. 62, 71–72, 100 A.3d 801 (2014) (distin-

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guishing situation in which order was reviewable under *Curcio* because plaintiff in error was not involved in, and challenged order was not intertwined with, underlying litigation, from situation in which *Curcio* did not apply because plaintiff in error was party to, and challenged order was intertwined with, underlying litigation).

Moreover, the policy of discouraging piecemeal appeals carries little weight under the circumstances present in this case, in which there is *no possibility* that the plaintiff in error's claim could be raised in a direct appeal from the judgment in the foreclosure action. See *Lougee v. Grinnell*, 216 Conn. 483, 487, 582 A.2d 456 (1990) (interlocutory ruling was reviewable when underlying proceeding would not result in later judgment from which appellant could appeal). Rather, if we decline to review the trial court's denial of the plaintiff in error's motion for fees and expenses under *Curcio*, the issue of whether the Appellate Court's decision in *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 755, holding that the bankruptcy stay provision applies to such motions—which was the sole basis for the trial court's ruling—may forever evade appellate review. This is so because, if a committee for sale is required to wait until the stay is lifted and the motion for fees and expenses is granted to challenge the initial denial of the motion pursuant to *Shivers*, the claim will be moot, and the committee for sale will no longer be aggrieved. Accordingly, this court would lack jurisdiction to entertain the plaintiff in error's claim. See, e.g., *Soracco v. Williams Scotsman, Inc.*, 292 Conn. 86, 91, 971 A.2d 1 (2009) (“[i]f a party is found to lack [aggrievement], the court is without subject matter jurisdiction to determine the cause” [internal quotation marks omitted]); *Bornemann v. Connecticut Siting Council*, 287 Conn. 177, 181, 947 A.2d 302 (2008) (“it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can

follow” [internal quotation marks omitted]); see also Practice Book § 72-1 (a) (“[w]rits of error for errors in matters of law . . . may be brought [only] from a final judgment of the Superior Court to the Supreme Court in the following cases . . . a decision binding on an *aggrieved* nonparty” [emphasis added]).

The dissent suggests, however, that the initial ruling denying the motion for fees and expenses could be reviewed after the stay is lifted and the motion is granted under the capable of repetition, yet evading review exception to the mootness doctrine. We have some doubt as to whether that is the case in light of this court’s suggestion in *In re Emma F.*, 315 Conn. 414, 428 n.12, 107 A.3d 947 (2015), that cases in which an appellant is no longer *aggrieved* by the judgment of the Superior Court because the judgment is no longer in effect—as distinct from cases in which the judgment is technically still in effect but intervening factual circumstances have rendered the appeal *moot* by depriving the judgment of any practical significance—are not subject to the “capable of repetition, yet evading review” exception to the mootness doctrine. See *id.*, 428–29 n.12 (“[G]iven the trial court’s vacatur of the judgment at issue . . . query whether the [appellant] is still an ‘aggrieved’ party, as is required by General Statutes § 52-263. If we were to hear this appeal on its merits, there does not appear anything left for us to reverse should the [appellant] prevail—even pyrrhically under the capable of repetition, yet evading review exception—insofar as the [appellant] has now received all of the relief it would have obtained by a successful appeal.”). Even if we were to assume that the exception would apply, however, we still can perceive no reason why we should decline to apply an exception to the rule requiring a final judgment for appellate jurisdiction now merely because, at some later time, when the right that the plaintiff in error seeks to vindicate—namely, the right to recover his fees and expenses from the

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bank *while the automatic stay provision is in effect*—will be forever lost, we might be able to apply an exception to the mootness doctrine, which also implicates our appellate jurisdiction.⁷

Second, and relatedly, the trial court’s ruling threatens to abrogate a right that the plaintiff in error *now holds*. See *State v. Longo*, 192 Conn. 85, 91, 469 A.2d 1220 (1984) (party seeking review of interlocutory order “must show that that decision threatens to abrogate a right that he or she *then* holds” [emphasis in original]).⁸

⁷ The dissent also suggests that the plaintiff in error could have filed a declaratory judgment action in state court to obtain the relief that he seeks. As the dissent recognizes, however, the plaintiff in error could not have brought such an action after the trial court ruled on his motion for fees and expenses in the present case because a party may not bring an action in the Superior Court effectively asking that court to review a ruling of another trial court in another case. See *Valvo v. Freedom of Information Commission*, 294 Conn. 534, 543–44, 985 A.2d 1052 (2010) (“[o]ur jurisprudence concerning the trial court’s authority to overturn or to modify a ruling in a particular case assumes, as a proposition so basic that it requires no citation of authority, that any such action will be taken only by the trial court with continuing jurisdiction over the case, and that the only court with continuing jurisdiction is the court that originally rendered the ruling”). With respect to the dissent’s contention that the plaintiff in error could have brought such an action *before* filing his motion for fees and expenses, we are aware of no authority for the proposition that a court may issue an advisory, declaratory ruling on an issue that will arise in ongoing litigation in another case. In our view, the question of whether a committee for sale is entitled to immediate payment properly can be entertained only by the trial court in which such payment can be sought, which is the court in which the foreclosure action is pending. In any event, we fail to see how requiring the plaintiff in error to jump through these procedural hoops would be preferable as a matter of judicial policy to entertaining the writ of error in the present case.

⁸ Again, we acknowledge that it is difficult to discern a clear and consistent pattern in this court’s application of this principle. Compare *State v. Longo*, *supra*, 192 Conn. 91 (“[W]here a defendant plausibly demonstrates that a trial court order threatens his or her double jeopardy right not to be tried twice for the same offense, the appeal is within our jurisdiction. *State v. Moeller*, 178 Conn. 67, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 [1979]. That order is appealable because, at the time of the appeal, the defendant already has an unqualified right to be free from double jeopardy.”), with *Melia v. Hartford Fire Ins. Co.*, *supra*, 202 Conn. 257 (“It is true that a remand for a new trial resulting from an erroneous

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There is no dispute in the present case that a committee for sale ordinarily is entitled to recover fees and expenses immediately upon filing a proper and timely motion for fees. The sole reason that the plaintiff in error's motion for fees and expenses was denied was that the trial court had ruled that, under *Shivers*, the motion was subject to the automatic stay provision. Thus, if *Shivers* was wrongly decided, the plaintiff in error is *now* being unlawfully deprived of an existing right to reimbursement.

order to disclose information protected by the [attorney-client] privilege cannot wholly undo the consequences of its violation Vindication at the appellate level can seldom regain all that has been lost by an erroneous determination of a cause in the trial court." [Internal quotation marks omitted.]; see also *State v. Longo*, supra, 92–93 (ruling denying youthful offender status is not reviewable under *Curcio* even though denial may deprive defendant irretrievably of right to privacy conferred by youthful offender statute); *State v. Longo*, supra, 98 (*Healy, J.*, dissenting) (court's "focal concern for irreparable harm in the final judgment rule is indeed lessened by today's ruling"). It is hard to understand why the constitutional right to be free from double jeopardy is any more "unqualified" at the time of an interlocutory appeal than the common-law right to invoke the attorney-client privilege against disclosure (assuming that the communications at issue are, in fact, privileged) or the statutory right to youthful offender status (assuming that the defendant does, in fact, satisfy the criteria for such status). We recognize that, in *Longo*, the court emphasized that, unlike the right to double jeopardy protection, defendants were, at that time, required to apply for youthful offender status pursuant to General Statutes (Rev. to 1983) § 54-76c, and the granting of the application was within the discretion of the trial court. See *State v. Longo*, supra, 92. Discretion can be abused, however, and, when it is, an *existing right* is violated. Cf. *Gaiimo v. New Haven*, 257 Conn. 481, 509, 778 A.2d 33 (2001) (applicant for statutory benefit "has a protected property interest in the benefit when, under the governing statute, the decision-making body would have no discretion to deny the application if the applicant could establish at a hearing that it met the statutory criteria"). It would appear, therefore, that the real driving force in these cases is this court's judgment regarding the *importance* of the right at issue, not the ontological status of the right at the time the appeal is filed. See, e.g., *Melia v. Hartford Fire Ins. Co.*, supra, 256 (review of interlocutory orders is available for claims involving right "too important to be denied review" [internal quotation marks omitted]). In any event, in the present case, *all* of the relevant considerations weigh in favor of immediate review, including the public importance of the right that the plaintiff in error is attempting to vindicate.

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Third, the plaintiff in error's claim involves a question of some public importance. See, e.g., *Abreu v. Leone*, 291 Conn. 332, 347–48, 968 A.2d 385 (2009) (interlocutory discovery order is reviewable if case involves counterbalancing public policy factor that weighs against policies underlying final judgment rule); *Melia v. Hartford Fire Ins. Co.*, supra, 202 Conn. 256 (review of interlocutory orders is available for claims involving right “too important to be denied review” [internal quotation marks omitted]). “A committee [for] sale functions as an arm of the court in a judicial sale. The committee conducting a sale is an agent or representative of the court.” (Internal quotation marks omitted.) *Citicorp Mortgage, Inc. v. Burgos*, 227 Conn. 116, 123, 629 A.2d 410 (1993). Under the Appellate Court's decision in *Shivers*, attorneys may be more reluctant to serve the courts in this capacity when, through no fault of their own, they are rendered unable to recover their fees and expenses promptly in foreclosure actions in which a defendant has declared bankruptcy, and then must either wait for an indefinite period of time until the stay terminates or seek a judgment from the bankruptcy court declaring that the stay does not bar such recovery, thereby incurring additional fees and expenses for which the committee ultimately may not be compensated.⁹ We further note that this issue has arisen with

⁹ Indeed, this is precisely what happened in *CT Tax Liens 2, LLC v. Tasillo*, Superior Court, judicial district of Hartford, Docket No. CV-12-6035369-S (October 1, 2014). After the trial court in that case denied the committee for sale's motion for fees and expenses on the ground that the motion was subject to the automatic stay, the committee filed a motion in the bankruptcy court seeking a declaratory judgment that the automatic stay did not apply. See *In re Tasillo*, United States Bankruptcy Court, Docket No. 14-21683 (ASD) (D. Conn. January 6, 2015). The bankruptcy court agreed with the committee and rendered a judgment declaring that the automatic stay did not bar the committee from seeking fees and expenses from the nondebtor plaintiff. *Id.* The committee then returned to the Superior Court and renewed its motion for fees and expenses, seeking an additional \$1000 in attorney's fees and a filing fee of \$176 in connection with the bankruptcy court proceeding. See *CT Tax Liens 2, LLC v. Tasillo*, Superior Court, judicial district of Hartford, Docket No. CV-12-6035369-S (January 29, 2015).

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some frequency in this state.¹⁰ Accordingly, it is important to know whether the decision in *Shivers* was correct.

The dissent points out that, in *Melia*, this court stated that it “has no discretionary jurisdiction comparable to that given the federal courts by [28 U.S.C.] § 1292 (b) to entertain appeals from interlocutory orders, except as provided in General Statutes § 52-265a.” *Melia v. Hartford Fire Ins. Co.*, supra, 202 Conn. 256. Although it is true that this court has no *statutory* authority other than § 52-265a to entertain interlocutory appeals, it does have the authority to treat appeals that are otherwise interlocutory in character as appeals from final judgments if they satisfy *Curcio*, and our reading of *Melia* satisfies us that we consider federal court decisions to be persuasive when we are considering the scope of that authority. Indeed, in *Melia*, we dismissed the defendant’s interlocutory appeal pursuant to *Curcio* for the same reason the Chief Justice previously had denied

The trial court granted the motion in part but denied the fees and expenses associated with the bankruptcy court proceeding. Id.

We note that the decision of a federal bankruptcy court in a particular case is not binding on our trial courts in other cases. Thus, as the dissent recognizes, if we do not review the plaintiff in error’s claim, our trial courts will continue to be bound by the Appellate Court’s decision in *Shivers*, despite our shared “concern about the viability of *Shivers* going forward” in light of *Tasillo*.

¹⁰ See, e.g., *In re Hooker*, United States Bankruptcy Court, Docket No. 18-20504 (JJT) (D. Conn. June 27, 2018); *In re Tasillo*, United States Bankruptcy Court, Docket No. 14-21683 (ASD) (D. Conn. January 6, 2015); *In re VMC Real Estate, LLC*, United States Bankruptcy Court, Docket No. 11-20452 (ASD) (D. Conn. March 9, 2012); *In re Rubenstein*, 105 B.R. 198, 201–204 (Bankr. D. Conn. 1989); *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 749–56; *HSBC Bank USA, N.A. v. Schmidt*, Superior Court, judicial district of New Britain, Docket No. CV-14-6024891-S (February 25, 2016); *United States Bank Assn. v. Barber*, Superior Court, judicial district of New Haven, Docket No. CV-13-6037544-S (May 20, 2015); *Citimortgage, Inc. v. Sheehan*, Superior Court, judicial district of New Haven, Docket No. CV-08-5020865-S (February 27, 2015); *CT Tax Liens 2, LLC v. Tasillo*, Superior Court, judicial district of Hartford, Docket No. CV-12-6035369-S (October 1, 2014); *Citimortgage, Inc. v. Hilton*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-14-6015156-S (August 25, 2014).

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the defendant's petition pursuant to § 52-265a, namely, that there were "no significant ramifications affecting the public interest or entailing injustice from delay that cannot be substantially redressed by appellate review of the final judgment after completion of the trial." *Id.*, 257. It would appear, therefore, that, if the interlocutory appeal in *Melia had* involved a matter of significant public interest or the denial of review had entailed injustice that could not be redressed by belated appellate review of the final judgment, we would have taken those considerations into account under *Curcio*. To the extent that *Melia* suggests that § 52-265a provides the *exclusive* mechanism for bringing an interlocutory appeal that involves a substantial public interest, we note that the plaintiff in error in the present case could not have sought recourse pursuant to § 52-265a because he is not a party to the action and, therefore, could not file an appeal. See *State v. Gault*, 304 Conn. 330, 348, 39 A.3d 1105 (2012) ("statutory authorization to bring [an appeal pursuant to § 52-265a] is extended only to 'any party to an action'"). We conclude that, when a nonparty seeks interlocutory review of a decision pursuant to *Curcio*, and the matter satisfies the substantial public interest standard of § 52-265a and also involves a right that is separable from and collateral to the rights being asserted in the underlying action, *Curcio* is capacious enough for us to entertain the writ of error.

Fourth, unlike, for example, a broad rule that a particular *class* of interlocutory discovery rulings, such as those involving privileged communications, are immediately appealable, which would allow a myriad of appeals from many types of rulings, if we review the ruling at issue here, our decision will dispose of that issue once and for all and will not open the floodgates to additional writs of error raising the same issue. Cf. *Brown & Brown, Inc. v. Blumenthal*, 288 Conn. 646, 655–56 n.6, 954 A.2d 816 (2008) (declining to treat denial of motion for summary judgment as final appealable

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judgment because doing so “would open the floodgates to appeals brought from interlocutory orders”).

Finally, we think it is significant that our appellate court system *created for itself* the predicament that it now finds itself in. It would be bizarre to conclude that, once the Appellate Court decided in *Shivers* that a committee for sale must await the lifting of the automatic stay provision to obtain payment for its fees and expenses, our trial courts became *forever* bound by that decision, even though the issue involves the interpretation of the federal bankruptcy code and most of the decisions by bankruptcy courts in this jurisdiction have disagreed with *Shivers*; see *In re Tasillo*, United States Bankruptcy Court, Docket No. 14-21683 (ASD) (D. Conn. January 6, 2015); *In re VMC Real Estate, LLC*, United States Bankruptcy Court, Docket No. 11-20452 (ASD) (D. Conn. March 9, 2012); *In re Rubenstein*, 105 B.R. 198 (Bankr. D. Conn. 1989); see also *United States Bank Assn. v. Barber*, Superior Court, judicial district of New Haven, Docket No. CV-13-6037544-S (May 20, 2015) (noting that “[t]he only certainty is that *Shivers* currently remains binding on trial judges in Connecticut,” and expressing “sympath[y] to the plight of the committee, who, through no fault of her own, finds herself temporarily uncompensated for her labor and unreimbursed for her out-of-pocket expenses”); *United States Bank Assn. v. Barber*, *supra* (recognizing that “bankruptcy judges are known as first-rate jurists [and presumably have far greater experience with technical issues of bankruptcy law]” than nonbankruptcy judges); and even though a committee for sale acts on the court’s behalf. See, e.g., *Citicorp Mortgage, Inc. v. Burgos*, *supra*, 227 Conn. 123. Contrary to the dissent’s contention, our conclusion that the trial court’s ruling pursuant to *Shivers* is reviewable does not further “muddy our final judgment jurisprudence” but merely provides a pragmatic solution to a problem of the courts’ own creation that would otherwise remain forever unresolved.

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We conclude, therefore, that we may review the plaintiff in error's claim under the second prong of *Curcio*, applicable to an order that "so concludes the rights of the parties that further proceedings cannot affect them." *State v. Curcio*, supra, 191 Conn. 31.

II

We next consider whether the plaintiff in error's claim is moot because the automatic stay has terminated. We conclude that the claim is moot but is reviewable under the capable of repetition, yet evading review exception to the mootness doctrine.

We begin with a review of the governing legal principles. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *Wendy V. v. Santiago*, 319 Conn. 540, 544–45, 125 A.3d 983 (2015).

In the present case, the automatic stay terminated when Crawford's bankruptcy claim was dismissed on July 27, 2017, during the pendency of this writ of error. Because the automatic stay provision no longer bars the plaintiff in error from recovering his fees and expenses from the bank pursuant to § 49-25, our decision in this case can have no practical effect on his right to recover, and his claim that the automatic stay provision does not apply to motions for fees and expenses is, therefore, moot.¹¹

¹¹ The plaintiff in error has not renewed his motion to recover the fees and expenses that he sought in his original motion for fees and expenses. Accordingly, the trial court's ruling on that motion is still in effect, and the plaintiff in error is still technically aggrieved. See footnote 5 of this opinion.

An otherwise moot question, however, may qualify for appellate review under the capable of repetition, yet evading review exception to the mootness doctrine. See *id.*, 545. To qualify for this exception, “three requirements must be met. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot.” (Internal quotation marks omitted.) *Id.*, 545–46.

We explained in part I of this opinion that the issue raised by the plaintiff in error has some public importance and that it already has been raised in numerous cases in this state. Accordingly, it is reasonable to conclude that committees for sale who find themselves in the same position as the plaintiff in error will likely continue to raise the issue. We conclude, therefore, that the second and third prongs of the capable of repetition, yet evading review exception are met.

With respect to the first prong, the plaintiff in error has provided information showing that, in 2016, the median time interval between the filing and the closing of an individual debtor’s chapter 13 bankruptcy case in the United States Bankruptcy Court for the District of Connecticut was 248 days. See U.S. Bankruptcy Courts, BAPCPA Table 3 (December 31, 2016), available at http://www.uscourts.gov/sites/default/files/data_tables/bapcpa_3_1231.2016.pdf (last visited November 18, 2019). We note that more recent statis-

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tics from the same source indicate that this interval has increased to 303 days. See U.S. Bankruptcy Courts, BAPCPA Table 3 (December 31, 2017), available at http://www.uscourts.gov/sites/default/files/data_tables/bapcpa_3_1231.2017.pdf (last visited November 18, 2019). In *Sweeney v. Sweeney*, 271 Conn. 193, 202–203, 856 A.2d 997 (2004), this court concluded that, when the challenged action was likely to have a duration of twenty-three months, the first prong of the capable of repetition, but evading review exception was satisfied. See *id.* (“the record in the present case reveals that this dissolution action was litigated vigorously by both parties, resulting in a span of twenty-three months between the commencement of the action and the final judgment of dissolution; such a time frame demonstrates the unlikelihood that appellate resolution regarding a pendente lite order entered during the course of such proceedings could be achieved before the order is superseded”). We conclude, therefore, that the average duration of an individual debtor’s chapter 13 bankruptcy proceeding—303 days, or slightly less than ten months—is sufficiently limited to satisfy the first prong of the capable of repetition, yet evading review exception to the mootness doctrine.

Because we conclude that the plaintiff in error’s claim satisfies all three requirements of the capable of repetition, yet evading review exception to the mootness doctrine, the claim is reviewable.

III

We turn, therefore, to the plaintiff in error’s contention that we should overrule the decision of the Appellate Court in *Equity One, Inc. v. Shivers*, *supra*, 150 Conn. App. 755, holding that the automatic stay provision operates to bar committees for sale from recovering fees and expenses from nondebtor plaintiffs in foreclosure actions that are subject to the stay. As

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we indicated, the plaintiff in error contends that *Shivers* should be overruled on two alternative grounds. First, he contends that the Appellate Court in *Shivers* lacked subject matter jurisdiction to extend the automatic stay provision to motions to recover fees and expenses from nondebtor plaintiffs in mortgage foreclosure actions because the bankruptcy court has exclusive jurisdiction to determine the scope of the automatic stay. Second, he contends that, if the Appellate Court had such subject matter jurisdiction, it incorrectly determined that the automatic stay provision applied to such motions. We conclude that state courts lack subject matter jurisdiction to extend the automatic stay provision to proceedings against nondebtors and, therefore, that *Shivers* must be overruled on that ground. Accordingly, we need not consider whether *Shivers* was correct on the merits.

Whether a court has subject matter jurisdiction to entertain a claim is a question of law subject to plenary review. See, e.g., *Fort Trumbull Conservancy, LLC v. New London*, 282 Conn. 791, 802, 925 A.2d 292 (2007). In making our determination as to whether the courts of this state have subject matter jurisdiction to extend the automatic stay provision to proceedings against nondebtors in the present case, we do not write on a blank slate. The Appellate Court considered this issue in *Metro Bulletins Corp. v. Soboleski*, 30 Conn. App. 493, 496–97, 620 A.2d 1314, cert. granted, 225 Conn. 923, 625 A.2d 823 (1993) (appeal withdrawn June 4, 1993), and concluded that any request to extend the automatic stay provision to proceedings against a nondebtor must be made in bankruptcy court.¹² The Appellate Court in *Soboleski* noted that, although the automatic stay provision ordinarily “does not enjoin litigation against nondebtors,” there is “limited authority for extending the stay to a nondebtor in special circum-

¹² We note that the court in *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 745, did not cite the decision in *Soboleski*.

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stances.” *Id.*, 496; see also 11 U.S.C. § 105 (a) (2012).¹³ The court also noted, however, that “the weight of the case law indicates that a nondebtor, seeking to extend the stay beyond the debtor, must move for the extension in the bankruptcy court.”¹⁴ *Metro Bulletins Corp. v.*

¹³ Title 11 of the 2012 edition of the United States Code, § 105 (a), provides: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.”

¹⁴ The Appellate Court followed this proposition with citations to several cases. *Metro Bulletins Corp. v. Soboleski*, supra, 30 Conn. App. 497; see *Ingersoll-Rand Financial Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1427 (9th Cir. 1987) (although bankruptcy court may lift stay upon request of party pursuant to 11 U.S.C. § 362 [d], stay was in effect because bankruptcy court had ordered no such relief and no statutory exception to stay provision applied); *Federal Land Bank of Spokane v. Stiles*, 700 F. Supp. 1060, 1063 (D. Mont. 1988) (“[a]lthough 11 U.S.C. § 105 [a] has been held to authorize a stay order as to a [codefendant],” no stay was in effect because bankruptcy court had not ordered one); *B & B Associates v. Fonner*, 700 F. Supp. 7, 9 (S.D.N.Y. 1988) (“[a]lthough a [b]ankruptcy [c]ourt may extend the protection of an automatic stay to a [nondebtor] in some circumstances,” no stay was in effect because bankruptcy court had not ordered one); see also *Rhode Island Hospital Trust National Bank v. Dube*, 136 F.R.D. 37, 39 (D.R.I. 1990); *In re Codfish Corp.*, 97 B.R. 132, 135 (Bankr. D.P.R. 1988); *In re All Seasons Resorts, Inc.*, 79 B.R. 901, 903 (Bankr. C.D. Cal. 1987); *In re MacDonald/Associates, Inc.*, 54 B.R. 865, 867 (Bankr. D.R.I. 1985); *In re Precision Colors, Inc.*, 36 B.R. 429, 431 (Bankr. S.D. Ohio 1984); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350 (Fla. 1989); *Collier v. Eagle-Picher Industries, Inc.*, 86 Md. App. 38, 48, 585 A.2d 256, cert. denied sub nom. *Corhart Refractories Co. v. Collier*, 323 Md. 33, 591 A.2d 249 (1991).

We note that most of these cases do not directly support the Appellate Court’s conclusion in *Soboleski* that a motion to extend the automatic stay provision to a proceeding against a nondebtor must be brought in bankruptcy court. In *Collier v. Eagle-Picher Industries, Inc.*, supra, 86 Md. App. 49–50, the state court’s jurisdiction to extend the stay was not directly at issue, and the court appears to have assumed that it had such jurisdiction, although it ultimately considered and denied a nondebtor’s motion for a stay. In *In re Codfish Corp.*, supra, 97 B.R. 135, *In re All Seasons Resorts, Inc.*, supra, 79 B.R. 903, *In re MacDonald/Associates, Inc.*, supra, 54 B.R. 867–68, and *In re Precision Colors, Inc.*, supra, 36 B.R. 431, the respective bankruptcy courts held only that they had jurisdiction to extend the stay to a proceeding against a nondebtor pursuant to 11 U.S.C. § 105 (a), not that state courts lacked such jurisdiction. In *Rhode Island Hospital Trust National Bank v.*

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Soboleski, supra, 497. The Appellate Court found this case law persuasive “because [i]t is fundamental under federal bankruptcy law that the automatic stay operates for the benefit of the debtor and trustee only, and gives other parties interested in property affected by the automatic stay no substantive or procedural rights. . . . Only the bankruptcy court has the entire picture before it. It would be difficult, if not impossible, for a state trial court, which has only the immediate case before it, to determine the best interests of the bankruptcy estate.” (Citation omitted; internal quotation marks omitted.) *Id.*, 498. Because the defendant in *Soboleski*, a nondebtor who was seeking the protection of the automatic stay provision, had not applied for an extension of the automatic stay in the bankruptcy court, the Appellate Court concluded that the trial court properly had denied his motion for a stay. *Id.* Thus, although the court in *Soboleski* did not expressly conclude that the state trial court *lacked subject matter jurisdiction* to entertain the defendant’s motion for a stay, it did suggest that the bankruptcy court has exclusive jurisdiction to entertain requests to extend the automatic stay to proceedings against nondebtors.

For the reasons that follow, we agree with the Appellate Court’s decision in *Soboleski*. Specifically, we conclude that, although the courts of this state have jurisdiction to determine whether the automatic stay provision, by its own terms, applies to a proceeding in state court, they do not have jurisdiction to *modify* the application of the automatic stay provision pursuant to 11 U.S.C. § 105 (a) or 11 U.S.C. § 362 (d)¹⁵ by *extending*

Dube, supra, 136 F.R.D. 39, the court held only that the automatic stay provision does not apply automatically to nondebtors, and did not address the issue of whether it had jurisdiction to extend the stay.

¹⁵ Title 11 of the 2012 edition of the United States Code, § 362 (d), provides in relevant part: “On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay”

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its application to proceedings to which it does not, by its own terms, automatically apply or by *barring* its application to proceedings to which it does automatically apply.

This issue of whether state courts have jurisdiction to modify the reach of the automatic stay provision was discussed at length by the United States Circuit Court of Appeals for the Ninth Circuit in *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000). In that case, the bankruptcy debtor, Robert Gruntz, was charged in state court with the criminal offense of failing to support his dependent children. *Id.*, 1077. After he was convicted, Gruntz filed an appeal, claiming that the criminal prosecution was barred by the automatic stay provision. See generally *People v. Gruntz*, 29 Cal. App. 4th 412, 35 Cal. Rptr. 2d 55 (1994). The California Court of Appeal concluded that the automatic stay did not apply to criminal prosecutions and affirmed the conviction. See *id.*, 421. Gruntz ultimately filed an “adversary proceeding” in the bankruptcy court, requesting that that court declare the criminal proceedings void because they violated the automatic stay provision. See *In re Gruntz*, *supra*, 1077. The bankruptcy court dismissed the proceeding on the ground that it was collaterally estopped by the judgment of the state court that the automatic stay provision did not apply. See *id.* On appeal, the United States District Court concluded that the bankruptcy court was bound by the state court’s judgment that the automatic stay provision did not apply pursuant to the *Rooker-Feldman* doctrine.¹⁶ See *id.*, 1077–78. The defendant then

¹⁶ “[This] doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). *Rooker* held that federal statutory jurisdiction over direct appeals from state courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of federal district courts. See [*Rooker v. Fidelity Trust Co.*, *supra*, 415–16]. *Feldman* held that this jurisdictional bar extends to particular claims that are ‘inextricably intertwined’ with those a state court has already decided. See [*District of Columbia Court of Appeals v. Feldman*, *supra*, 486–87].” *In re Gruntz*, *supra*, 202 F.3d 1078 n.1.

appealed to the Ninth Circuit, claiming that a state court ruling on the extent of the automatic stay does not bind the bankruptcy court. *Id.*, 1078.

The Ninth Circuit began its analysis by noting that “[t]he automatic stay is self-executing, effective upon the filing of the bankruptcy petition.” *Id.*, 1081. It further noted that “[t]he automatic stay is an injunction issuing from the authority of the bankruptcy court, and bankruptcy court orders are not subject to collateral attack in other courts. See *Celotex Corp. v. Edwards*, 514 U.S. 300, 306–13, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995)]. That is so not only because of the comprehensive jurisdiction vested in the bankruptcy courts . . . but also because persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.” (Citation omitted; internal quotation marks omitted.) *In re Gruntz*, *supra*, 202 F.3d 1082.

The Ninth Circuit concluded that “[a]ny state court modification of the automatic stay would constitute an unauthorized infringement upon the bankruptcy court’s jurisdiction to enforce the stay. While Congress has seen fit to authorize courts of the United States to restrain [state court] proceedings in some special circumstances, such as the automatic stay, it has in no way relaxed the old and [well established] judicially declared rule that state courts are completely without power to restrain [federal court] proceedings in in personam actions.” (Internal quotation marks omitted.) *Id.*

“In sum, by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay. The [s]tates cannot, in the exercise of control over local laws and practice, vest [s]tate courts with power to violate the supreme law of the land. . . . Thus, the *Rooker-Feldman* doctrine is not implicated by collateral

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challenges to the automatic stay in bankruptcy. A bankruptcy court simply does not conduct an improper appellate review of a state court when it enforces an automatic stay that issues from its own federal statutory authority. In fact, a reverse *Rooker-Feldman* situation is presented when state courts decide to proceed in derogation of the stay, because it is the state court which is attempting impermissibly to modify the federal court's injunction." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *Id.*, 1083; see also *id.*, 1084 ("modifying the automatic stay is not the act of a state court merely interpreting federal law; it is an intervention in the operation of an ongoing federal bankruptcy case, the administration of which is vested exclusively in the bankruptcy court").¹⁷ The Ninth Circuit ultimately concluded, however, that, because criminal proceedings against a debtor are expressly excepted from the automatic stay provision pursuant to 11 U.S.C. § 362 (b) (1), no modification of the stay was required for California to prosecute Gruntz, and, therefore, there was no need for the California court to seek the approval of the bankruptcy court before allowing the prosecution to go forward. *Id.*, 1087.

We recognize that some cases addressing this issue may be interpreted as holding that, although the federal bankruptcy courts have the *final* say on whether the automatic stay provision should be modified, they do not have *exclusive jurisdiction* to make that determination. Rather, the state court may make that determination in the first instance, subject to later review by the bankruptcy court. See *Lockyer v. Mirant Corp.*, 398

¹⁷ See also *In re Raboin*, 135 B.R. 682, 684 (Bankr. D. Kan. 1991) ("this court has exclusive jurisdiction to determine the extent and effect of the stay, and the state court's ruling to the contrary does not bar the debtor's present motion"); *In re Sermersheim*, 97 B.R. 885, 888 (Bankr. N.D. Ohio 1989) ("[i]t is the bankruptcy court *alone* that has the exclusive jurisdiction to determine questions involving the automatic stay" [emphasis in original; internal quotation marks omitted]).

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F.3d 1098, 1106 (9th Cir. 2005) (state courts “have the power to decide whether the automatic stay applies to its proceedings,” but if bankruptcy court “later decides that the state court was incorrect, the state court proceedings in violation of the stay are void”); *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 384 (6th Cir. 2001) (“[i]f . . . the suit before the [nonbankruptcy] court may proceed because an exception to the automatic stay authorizes prosecution of the suit, [that] court may enter needful orders not themselves inconsistent with the automatic stay,” but if nonbankruptcy court’s determination is erroneous, bankruptcy court can later declare entire action void). We think the better interpretation of these cases, however, is that a state court has jurisdiction to determine whether, under its plain terms, the automatic stay provision applies to the proceeding before it, not that the court has jurisdiction pursuant to 11 U.S.C. § 105 (a) or 11 U.S.C. § 362 (d) to modify the automatic stay. Indeed, in both *Lockyer* and *Chao*, the issue before the court was whether the proceeding before the nonbankruptcy court came within the statutory exception to the automatic stay provision for proceedings to enforce the government’s “police or regulatory power” under 11 U.S.C. § 362 (b) (4); *Lockyer v. Mirant Corp.*, supra, 1107; *Chao v. Hospital Staffing Services, Inc.*, supra, 385; not whether the court should extend the application of the automatic stay or bar its enforcement pursuant to 11 U.S.C. § 105 (a) or 11 U.S.C. § 362 (d).

We conclude, therefore, that, although state courts have jurisdiction to interpret the provisions of the bankruptcy code and orders of the bankruptcy court to determine whether, under their plain terms, the automatic stay provision applies to a state court proceeding—which interpretations are subject to correction by the bankruptcy court—state courts do not have jurisdiction to change the status quo by modifying the reach of the automatic stay provision either by extending the stay

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to proceedings to which it does not automatically apply or by granting relief from the stay in proceedings to which it does automatically apply. Rather, any modification of the stay must be sought in bankruptcy court.

In *Equity One, Inc. v. Shivers*, supra, 150 Conn. App. 745, the Appellate Court noted that “[c]ourts have extended the application of the automatic stay to non-debtors in unusual circumstances where doing so would further the purpose behind the stay.” *Id.*, 753. The court ultimately concluded that such unusual circumstances existed because the bankrupt defendant would be required to indemnify the nondebtor bank for any payments that the bank made to the committee for sale. *Id.*, 754–55. In each case cited by the Appellate Court to support its conclusion, however, the court had implicitly recognized that the stay provision did not apply automatically to claims against nondebtors. See *id.*, 753–54.¹⁸ Indeed, several courts have expressly held to that effect. See, e.g., *Rhode Island Hospital Trust National Bank v. Dube*, 136 F.R.D. 37, 39 (D.R.I. 1990) (automatic stay

¹⁸ See *Queenie, Ltd. v. Nygard International*, 321 F.3d 282, 287 (2d Cir. 2003) (“[t]he automatic stay can apply to [nondebtors], but normally does so only when a claim against the [nondebtor] will have an immediate adverse economic consequence for the debtor’s estate”); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.) (“there are cases . . . [in which] a bankruptcy court may properly stay the proceedings against [nonbankrupt codefendants] but . . . in order for relief for such [nonbankrupt] defendants to be available . . . there must be unusual circumstances and certainly [s]omething more than the mere fact that one of the parties to the lawsuit has filed a [c]hapter 11 bankruptcy must be shown in order that proceedings be stayed against [nonbankrupt] parties” [internal quotation marks omitted]), cert. denied, 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed. 2d 177 (1986); *In re Jefferson County*, 491 B.R. 277, 284 (Bankr. N.D. Ala. 2013) (“[g]enerally, the automatic stay . . . applies only to certain actions taken or not taken with respect to a debtor, and not with respect to such action or inaction affecting other parties”); *In re North Star Contracting Corp.*, 125 B.R. 368, 370 (S.D.N.Y. 1991) (automatic “stay generally applies only to bar proceedings against the debtor”); *In re Metal Center*, 31 B.R. 458, 462 (Bankr. D. Conn. 1983) (“[g]enerally, the automatic stay does not apply to proceedings against nondebtors”).

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provision “does not apply automatically . . . to actions against a debtor’s principals, partners, officers, employees, guarantors, or sureties” [internal quotation marks omitted]); *In re Richard B. Vance & Co.*, 289 B.R. 692, 697 (Bankr. C.D. Ill. 2003) (“extension of the stay to nonbankrupt parties is not automatic and must be requested affirmatively by the debtor”); *In re Bidermann Industries U.S.A., Inc.*, 200 B.R. 779, 782 (Bankr. S.D.N.Y. 1996) (automatic stay provision “does not apply automatically to stay actions against [nondebtors]”); *In re All Seasons Resorts, Inc.*, 79 B.R. 901, 904 (Bankr. C.D. Cal. 1987) (“the automatic stay does not *automatically* encompass [codefendants]” [emphasis in original]); *Alvarez v. Bateson*, 176 Md. App. 136, 148, 932 A.2d 815 (2007) (automatic stay provision “applies automatically to debtors, but not to [nonbankrupt codefendants]”). We agree with these courts. When the stay provision does not apply automatically to a proceeding, action by the bankruptcy court is required to extend the application of the stay. See *In re Richard B. Vance & Co.*, *supra*, 697 (extension of stay to nonbankrupt parties “must be requested affirmatively by the debtor”); *In re Bidermann Industries U.S.A., Inc.*, *supra*, 782 (to stay action against nondebtor, “[t]he debtor must obtain a stay order from the bankruptcy court”); *In re All Seasons Resorts, Inc.*, *supra*, 903 (extension of automatic stay provision to nondebtors “requires the filing of an appropriate adversary proceeding under [11 U.S.C. § 105 (a) and 11 U.S.C. § 362 (d)] to achieve the desired result”); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350 (Fla. 1989) (nondebtor codefendant “must apply to and obtain [stay] from the bankruptcy court”); *Alvarez v. Bateson*, *supra*, 148 (“[A] court must make a determination as to whether the automatic stay extends to cover a [nonbankrupt] codefendant of the debtor. It follows that each determination should be made by the bankruptcy court supervising the debtor’s estate upon request of

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the debtor, because it is the debtor's interests that are being protected by the stay."). As we explained, the bankruptcy court has *exclusive* jurisdiction to extend the stay to proceedings to which it does not automatically apply. We conclude, therefore, that the Appellate Court in *Shivers* lacked jurisdiction to extend the stay provision to motions to recover a committee for sale's fees and expenses from a nondebtor bank. Accordingly, we conclude that *Shivers* must be overruled.

In the present case, the trial court relied exclusively on *Shivers* when it denied the plaintiff in error's motion for fees and expenses. We conclude, therefore, that the case must be remanded to the trial court so that it may vacate the order denying the plaintiff in error's motion and entertain that motion on the merits.

The writ of error is granted and the case is remanded with direction to vacate the order denying the plaintiff in error's motion for fees and expenses, and to conduct further proceedings according to law.

In this opinion PALMER, D'AURIA and ECKER, Js., concurred.

McDONALD, J., with whom MULLINS and KAHN, Js., join, dissenting. I disagree with the majority that the trial court's decision denying the motion for statutory fees and expenses, *without prejudice to refiling that motion at a later date*, is an immediately appealable ruling under the second prong of *State v. Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). The trial court's determination that the automatic stay provision of the federal Bankruptcy Code, 11 U.S.C. § 362 (a) (1) (2012), applies so as to delay satisfaction of such a request is not one that "so concludes the rights of the parties that further proceedings cannot affect them."¹ *State v. Curcio*, supra, 31. In concluding otherwise, the majority

¹ "An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding,

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substitutes a policy analysis for the limited exceptions to the final judgment rule. This approach exacerbates the already murky state of our final judgment jurisprudence, a consequence that is not only unfortunate but unnecessary given other procedural avenues available to address this matter. For the reasons that follow, I would dismiss the writ of error for lack of a final judgment.

This court has explained that the exception to the final judgment rule on which the majority relies “requires the parties seeking to appeal to establish that the trial court’s order threatens the preservation of a right already secured to them and that that right will be *irretrievably lost* and the [parties] *irreparably harmed* unless they may immediately appeal.” (Emphasis added; internal quotation marks omitted.) *Blakely v. Danbury Hospital*, 323 Conn. 741, 746, 150 A.3d 1109 (2016). Under this “narrow” exception; (internal quotation marks omitted) *id.*, 752; an interlocutory order will be deemed final for purposes of appeal “if it involves a claimed right the legal and practical value of which would be *destroyed* if it were not vindicated before trial.” (Emphasis added; internal quotation marks omitted.) *State v. Bacon Construction Co.*, 300 Conn. 476, 481–82, 15 A.3d 147 (2011). “[E]ven when an order impinges on an existing right, if that right is subject to vindication after trial, the order is not appealable under the second prong of *Curcio*.” *Hartford Accident & Indemnity Co. v. Ace American Reinsurance Co.*, 279 Conn. 220, 231, 901 A.2d 1164 (2006).

Under these parameters, the first step is to identify the existing right at issue. In the present case, that right is prescribed by statute. General Statutes § 49-25 provides in relevant part: “[I]f for any reason the

or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.” *State v. Curcio*, *supra*, 191 Conn. 31. Only the second prong of *Curcio* is at issue in the present case.

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[foreclosure by] sale does not take place, the expense of the sale and appraisal or appraisals shall be paid by the plaintiff and be taxed with the costs of the case. . . .” Thus, the right at issue is simply the right of the plaintiff in error, Douglas M. Evans, as the committee for sale, to be paid such expenses and costs.

The next step is to determine whether that right is irretrievably lost and the plaintiff in error is irreparably harmed due to the trial court’s decision denying his request for payment of such fees and costs, without prejudice to renewing that request once the automatic bankruptcy stay is lifted. The answer to that question is “no.” The plaintiff in error’s right to recover fees and expenses remains intact, undiminished in any respect. Compare *Perry v. Perry*, 312 Conn. 600, 620, 95 A.3d 500 (2014) (trial court’s order granting only portion of fees that children’s attorney owed to another attorney who represented her in related postjudgment proceeding substantially impaired her right to her own fees and she could not vindicate that right in separate proceeding should other attorney sue to recover his fees), and *Hartford Accident & Indemnity Co. v. Ace American Reinsurance Co.*, supra, 279 Conn. 232–34 (order denying plaintiffs’ motion for prepleading security under statute prohibiting unauthorized insurer without assets in Connecticut from defending action until it posts security would cause irreparable harm if plaintiffs cannot appeal until conclusion of trial because court will be unable to restore plaintiffs’ right either to have defendants post security or to obtain default judgment against defendants if they fail to do so), with *Incardona v. Roer*, 309 Conn. 754, 756–57, 763, 73 A.3d 686 (2013) (trial court’s order imposing monetary sanctions on plaintiffs for failure to comply with discovery order did not so conclude rights of parties that further proceedings could not affect them when court indicated that it was prepared to modify order if later developments warranted

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such action), and *New England Savings Bank v. Nicottra*, 230 Conn. 136, 139–40, 644 A.2d 909 (1994) (trial court’s order appointing receiver of rents in foreclosure action did not so conclude rights of parties because, “[a]lthough a receivership takes designated funds out of the control of the mortgagor, it does not vest their control in the foreclosing mortgagee, who has no claim upon the income and profit in [the receiver’s] hands as such; since the funds are legally in the possession of the court subject to whatever disposition it may order” [internal quotation marks omitted]).

The mere delay in the plaintiff in error’s receipt of his fees and costs does not destroy the legal and practical value of the right to recover them. It may impinge on the *existing* right, but that right is subject to vindication once the stay is lifted. See generally *Rostad v. Hirsch*, 128 Conn. App. 119, 125, 15 A.3d 1176 (2011) (“to decide whether an interlocutory ruling has caused an appellant to suffer irreparable harm, it is relevant to inquire whether the trial court, at the time of the final judgment, will be able to provide remedial relief”). If a delay in obtaining relief was, in and of itself, an injury sufficient to authorize an interlocutory appeal, we would not have held, for example, that “the denial of a statute of limitations defense is not itself an appealable final judgment” *Santorso v. Bristol Hospital*, 308 Conn. 338, 354 n.9, 63 A.3d 940 (2013); accord *Blakely v. Danbury Hospital*, supra, 323 Conn. 744, 753 (denial of motion for summary judgment on ground that jurisdictional time limitation had lapsed did not satisfy second prong of *Curcio*). Instead, vindication of the defendant’s right not to have to defend against a stale claim must await the close of trial. We strictly adhere to the final judgment rule even though the defendant may incur significant litigation expenses defending against the merits of a claim that ultimately is deemed time barred.

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The majority's decision that the second prong of *Curcio* is satisfied characterizes the right sought to be vindicated as the plaintiff in error's "entitle[ment] to recover fees and costs *immediately upon filing a proper and timely motion for fees.*" (Emphasis in original.) The statute giving rise to the plaintiff in error's right, however, includes no such temporal requirement, and it is not the proper function of this court to engraft that language.² See *State v. Obas*, 320 Conn. 426, 436, 130 A.3d 252 (2016) (noting that, "[i]n the absence of any indication of the legislature's intent concerning this issue, we cannot engraft language onto the statute for [i]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language" [internal quotation marks omitted]). The majority points to no authority that entitles the plaintiff in error to interest on those fees and costs during the intervening period between the filing of the motion and the court's order granting that motion, or until payment is made, either of which might imply the right to immediate payment.³

On the basis of its characterization of the right as one to immediate payment, the majority concludes that, in the absence of an interlocutory appeal, there will be irreparable harm to that right because, if the plaintiff in error cannot seek review of the order until the automatic stay is terminated and the trial court rules on the merits of his motion, that right will be "forever lost

² Section 49-25 obviously does not specify a time limitation in which to make payment. Even if we could infer that payment must be made within a "reasonable" period of time in the absence of a specified period, the question would remain whether the typical duration of an automatic bankruptcy stay; see footnote 4 of this dissenting opinion; would constitute an unreasonable delay.

³ Of course, if the plaintiff in error were entitled to interest, then he clearly could not show that the delay in payment while the stay is pending would cause irreparable harm.

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. . . .”⁴ The fact that the plaintiff in error will have to wait to vindicate his right to receive fees is precisely what is required. This is so because future developments in the trial court, namely, the receipt of his fees, will render the interlocutory appeal unnecessary.

In reality, the majority does not apply the second prong of *Curcio* but instead creates a third, public policy prong. That approach raises three problems. First, the legislature could have authorized immediate review of a writ of error implicating a matter of public interest in the absence of a final judgment, as it has for the parties to the case, but it did not. See General Statutes § 52-265a (a) (“any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court”).

Second, this court has emphatically rejected the majority’s approach: “To be clear, policy concerns are not a factor under either prong of *Curcio*, and, accordingly, it would be inappropriate to rely on policy alone to justify allowing an appeal under *Curcio*.” *Woodbury*

⁴ Ironically, but for the filing of the present writ of error, the plaintiff in error would have received his fees and costs long before this court could have issued its decision on this writ. The defendant in error, the named defendant in the underlying foreclosure action, Jacquelyn N. Crawford, filed for chapter 13 bankruptcy protection on February 8, 2017, and the bankruptcy stay was lifted less than six months later, on July 28, 2017. The committee deed was approved by the trial court on September 26, 2017, and an amended motion for supplemental judgment was filed on November 15, 2017, at which time the defendant in error, the plaintiff in the underlying foreclosure action, U.S. Bank National Association, as Trustee, requested that the committee’s fees and costs of \$5839.39 be paid. The trial court denied that motion because of the pendency of this writ of error, and ordered no payment until the conclusion of this appeal. Although the automatic bankruptcy stay lasted less than six months, a period of five months lapsed between the time that the trial court denied the plaintiff in error’s motion for the fees and the date on which he filed his appellate brief in this court.

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Knoll, LLC v. Shipman & Goodwin, LLP, 305 Conn. 750, 762 n.10, 48 A.3d 16 (2012). Although this court has previously cited public policy reasons to bolster our conclusion that immediate review is warranted under the first prong of *Curcio*, we have made clear that those reasons did not displace the requirement of satisfying *Curcio*. See *id.*, 773 (“The discovery order in the present case constitutes a final judgment because it terminated a separate and distinct proceeding and thus satisfied the first prong of *Curcio*. Additionally, it implicates important policy considerations that militate against requiring an officer of the court who also is not a party to the underlying action to be held in contempt of court in order to be able to seek appellate review.”); see also *id.*, 762 (“[f]or these reasons alone, then, the discovery order in the present case is a final judgment because it satisfies the first prong of *Curcio*, just as the discovery order in *Abreu v. Leone*, 291 Conn. 332, 968 A.2d 385 (2009)] constituted a final judgment because it arose out of a separate proceeding brought by a nonparty”). Public policy has been considered in our analysis under the second prong of *Curcio* only insofar as such policy illuminated the contours of a common-law right claimed to be harmed. See, e.g., *Chadha v. Charlotte Hungerford Hospital*, 272 Conn. 776, 785–87, 865 A.2d 1163 (2005) (explaining why purpose of absolute immunity under common law, protecting against threat of suit, compels conclusion that denial of summary judgment on ground of such immunity gives rise to immediately appealable final judgment due to irreparable harm). The majority’s suggestion that this court’s decision in *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987), sanctioned such an approach misconstrues that case. See *id.*, 255–56 (explaining that, although in some instances federal courts of appeals have entertained appeals from discovery orders presenting issues of claimed violations of certain privileges, “[t]his court has no discretionary

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jurisdiction comparable to that given the federal courts by [28 U.S.C.] § 1292 [b] to entertain appeals from interlocutory orders, except as provided [for public interest appeals] in . . . § 52-265a”). Although our final judgment jurisprudence may not be a model of clarity, we should not muddy those waters further to accommodate the present case.

The only unusual feature of the present case is that the legal issue—whether the automatic stay provision of the Bankruptcy Code applies to § 49-25—could avoid review in every case because a reviewing court would never be able to afford any practical relief once the stay has been lifted. However, if the legal issue were rendered moot once the stay is lifted, for all of the reasons identified by the majority, such a circumstance would appear to satisfy the capable of repetition, yet evading review exception to mootness. See *Wendy V. v. Santiago*, 319 Conn. 540, 545–46, 125 A.3d 983 (2015) (setting forth parameters of exception). Insofar as the majority contends that the issue might not be reviewable because the plaintiff in error would no longer be aggrieved by the time judgment is final, this result proves my point.⁵

⁵ There is case law from this court suggesting that, even in the absence of aggravement, we could exercise jurisdiction if the party seeking review is in a class whose interests are capable of repetition, yet evading review. See *Kulmacz v. Kulmacz*, 177 Conn. 410, 412–13, 418 A.2d 76 (1979) (“A requisite element of appealability is that the party claiming error in the decision of the trial court be aggrieved . . . for if a party attempting to appeal can by no possibility suffer injury by the judgment, he should not be permitted to appeal. . . . There are few exceptions to this basic tenet of appellate practice, and those anomalies involve either representatives of parties . . . or persons whose interest, albeit terminated, is capable of repetition, yet evading review. . . . The plaintiff . . . is not an aggrieved person whose interests will be adversely affected by an unfavorable judgment. . . . There is nothing in the record to show that the plaintiff has appeared for other interests in a representative capacity; nor is she in a class whose interests have been described as capable of repetition.” [Citations omitted; internal quotation marks omitted.]); see also *Loisel v. Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995) (explaining that, in context of capable of repetition, yet evading review requirement, “[t]he doctrine of mootness

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This brings me to the third problem with the majority's approach. There is no reason to expand and muddy our final judgment jurisprudence in this case because there were other avenues of relief available to the plaintiff in error. Counsel for the plaintiff in error was aware of our Appellate Court's decision in *Equity One, Inc. v. Shivers*, 150 Conn. App. 745, 93 A.3d 1167 (2014), on which the trial court relied to conclude that the automatic stay applies to a motion for fees and expenses by a committee for sale. As his firm had done in a similar case, counsel could have sought a declaratory judgment from the bankruptcy court that the stay does not apply to the fees and costs in the present case. See *In re Tasillo*, United States Bankruptcy Court, Docket No. 14-21683 (ASD) (D. Conn. January 6, 2015) (declaratory judgment in favor of committee of sale); *CT Tax Liens 2, LLC v. Tasillo*, Superior Court, judicial district of Hartford, Docket No. CV-12-6035369-S (January 29, 2015) (granting motion for fees before stay was lifted in light of declaratory judgment). If the plaintiff in error wanted to have *Shivers* overruled so as to avoid such proceedings in other cases, he could have filed an action for a declaratory judgment in state court to obtain such relief.⁶ The time and expense of pursuing such avenues surely are not greater than if pursuing an appeal.

is rooted in the same policy interests as the doctrine of standing, namely, to assure the vigorous presentation of arguments concerning the matter at issue"). I express no opinion on this matter.

⁶ I am not suggesting that a trial court would have authority to overrule *Shivers* in a declaratory judgment action or that such an action properly would be pursued by the plaintiff in error after his request for fees had been denied without prejudice. I am simply suggesting that, knowing that the trial court would have been bound by *Shivers*, the plaintiff in error could have sought a declaration that *Shivers* conflicts with federal law, before filing a request for fees that inevitably would be denied, and that there would have been no jurisdictional impediment to appellate review of that decision, as there is under the present procedural posture. See *Bysiewicz v. DiNardo*, 298 Conn. 748, 756, 6 A.3d 726 (2010) (A declaratory judgment action "requires that the plaintiff be in danger of a loss or of uncertainty as to [his] rights or other jural relations and that there be a bona fide and substantial question or issue in dispute or substantial uncertainty

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I concede that there is ample reason to question the vitality of *Shivers*, as it is in conflict with the conclusions reached by several federal bankruptcy courts, whose primary charge is to interpret and apply federal bankruptcy law. See *In re Tasillo*, supra, United States Bankruptcy Court, Docket No. 14-21683; *In re VMC Real Estate, LLC*, Docket No. 11-20452 (ASD), 2012 WL 836724, *2 (Bankr. D. Conn. March 9, 2012); *In re Rubenstein*, 105 B.R. 198, 204 (Bankr. D. Conn. 1989); see also *In re Danise*, 112 B.R. 492, 494 and n.2 (Bankr. D. Conn. 1990). But see *In re Hooker*, United States Bankruptcy Court, Docket No. 18-20504 (JJT) (D. Conn. June 27, 2018) (concluding that stay applies but relief may be afforded). Given such tension, I share the majority's concern about the viability of *Shivers* going forward. However, in the absence of jurisdiction over the writ, this court is compelled to dismiss the writ of error without reaching its merits.

Accordingly, I respectfully dissent.

of legal relations [D]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated." [Internal quotation marks omitted.]

Although we have not yet had occasion to address this question, it appears to me that the plaintiff in error also could have asked the trial court to certify the question to this court of whether *Shivers* was properly decided. See General Statutes § 52-235 (a) ("[t]he Superior Court, or any judge of the court, with the consent of all parties of record, may reserve questions of law for the advice of the Supreme Court or Appellate Court in all cases in which an appeal could lawfully have been taken to said court had judgment been rendered therein"). Although this statute limits such reservations to "cases in which an *appeal* could lawfully have been taken to said court had judgment been rendered therein"; (emphasis added) General Statutes § 52-235 (a); it appears that this limitation is simply intended to preclude reservations in cases in which review is not available after final judgment. In *Redding Life Care, LLC v. Redding*, 331 Conn. 711, 726, 207 A.3d 493 (2019), this court recently concluded that General Statutes § 51-197f, which governs petitions for certification to appeal after a final determination of "any appeal" from the Appellate Court, included a writ of error.

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CARMINE CENATIEMPO ET AL. v. BANK
OF AMERICA, N.A.
(SC 20150)Robinson, C. J., and Palmer, McDonald, D'Auria,
Mullins, Kahn and Ecker, Js.*Syllabus*

The plaintiffs, who had defaulted on a residential mortgage for which the defendant financial institution was the loan servicer, sought to recover damages for the defendant's alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and for negligence in connection with conduct that had occurred during postdefault negotiations. After the plaintiffs defaulted on their mortgage, the defendant instituted a foreclosure action. In an effort to avoid foreclosure, the plaintiffs made repeated, unsuccessful attempts, over the course of two and one-half years, to obtain a loan modification from the defendant pursuant to a federal loan modification program known as HAMP. The defendant then withdrew the foreclosure action without explanation. The plaintiffs continued to seek a loan modification, but the defendant instituted a second foreclosure action. The defendant continued to mishandle the loan modification process for approximately three additional years before it finally provided the plaintiffs with a permanent loan modification. The terms of the modification increased the principal amount that the plaintiffs owed by including attorney's fees for mediation, default fees, fees for commencing the second foreclosure action, and accrued interest in excess of what the plaintiffs would have paid if their initial loan modification application had been timely and properly evaluated. The plaintiffs alleged in count one of their complaint that, during the course of seeking a loan modification, the defendant committed unfair or deceptive acts in the conduct of trade or commerce with the intent of preventing them from receiving a loan modification in that the defendant failed to exercise reasonable diligence in reviewing and processing completed loan modification applications, repeatedly requested duplicative and unnecessary updates to financial information, erroneously denied applications on the basis of purported failures to provide requested documentation, misrepresented the status of the plaintiffs' loan modification applications, erroneously denied applications on the basis of investor restrictions that did not apply, and repeatedly changed the personnel responsible for communicating with the plaintiffs. The plaintiffs also alleged that the defendant had failed to engage productively in approximately eighteen mediation sessions conducted pursuant to Connecticut's foreclosure mediation program. The plaintiffs claimed that the defendant's conduct offended the public policy reflected in HAMP, the federal Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. § 2601 et seq. [2012]), a 2011 consent order

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that the defendant had entered into with the Office of the Comptroller of the Currency, a national mortgage settlement to which the defendant was a party, and this state's foreclosure mediation statutes (§§ 49-31k through 49-31o), and caused them to suffer substantial financial and emotional injuries. In addition, the plaintiffs claimed that the defendant had a corporate culture of intentional conduct designed to prevent mortgagors from receiving HAMP modifications. With respect to the negligence count of the complaint, the plaintiffs asserted that the defendant owed them a duty of care arising out of the servicing standards imposed by the same federal and state statutes, consent order and mortgage settlement agreement, and that the defendant breached that duty. The defendant moved to strike both counts of the complaint, claiming, *inter alia*, that the allegations pertaining to the manner in which a lender or loan servicer reviews a loan modification application are insufficient to state a cognizable CUTPA claim and that no duty of care exists between a lender or loan servicer and a borrower to support a negligence claim. The trial court granted the motion to strike the complaint, reasoning that the alleged conduct focuses on negotiation of relief from existing contractual obligations and that the parties are adversarial given the pendency of the foreclosure action. The trial court further reasoned that allowing such actions could discourage mortgage companies from negotiating loan modifications, lead to increased litigation, and subject mortgage companies to liability, even in the absence of material misrepresentation or malfeasance. The trial court finally noted that other remedies, such as sanctions for misconduct during the course of mediation, were available. On appeal from the trial court's judgment in the defendant's favor, *held*:

1. The plaintiffs' allegations having been sufficient to support a claim under CUTPA, this court reversed the judgment of the trial court insofar as that court struck the plaintiffs' CUTPA claim: the defendant's conduct in connection with its loan modification activities occurred in the conduct of trade or commerce; moreover, the plaintiffs' allegations included conduct and actions by the defendant that involved a conscious, systematic departure from known, standard business norms, and described practices that fell within the penumbra of some established concept of unfairness, as the alleged conduct was contrary to the public policies embodied in HAMP, RESPA, the consent order, the national mortgage settlement, and this state's foreclosure mediation statutes; furthermore, the defendant's allegedly improper practices, if proven at trial, could be found to be immoral, unethical, oppressive or unscrupulous and the cause of substantial injury to the plaintiffs, an injury that was not one that the plaintiffs or other consumers could have reasonably avoided and that was not outweighed by any countervailing benefits to loan servicers in escaping liability for such actions or to consumers or competition.
2. This court concluded that the defendant did not owe a common-law duty of care to the plaintiffs, and, accordingly, the trial court properly granted the defendant's motion to strike the plaintiffs' negligence count of the

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complaint: assessing the relationship between the plaintiffs and the defendant under the totality of the circumstances, this court determined that, although the defendant should reasonably have been expected to review loan modification applications in a timely and accurate manner and to follow the loan servicing industry standards and rules regarding the loan modification process imposed by federal and state statutes, the consent order, and the national mortgage settlement, the law does not impose a duty on lenders to use reasonable care in commercial transactions with borrowers because the relationship between lenders and borrowers is contractual and loan transactions are conducted at arm's length, and to impose a duty of care on loan servicers, such as the defendant, could inhibit participation in the loan modification process, increase litigation, and have far-reaching consequences that extend beyond anything implicated under CUTPA; moreover, the consent order and the national mortgage settlement, to which the defendant was a party, did not create a special relationship between lenders and borrowers that would give rise to a legal duty, the plaintiffs, as incidental third-party beneficiaries of that order and settlement, did not have standing to sue to protect the benefits that the order and settlement confer, loan servicers already are subject to liability for violations of RESPA's implementing regulations and civil penalties for violations of the national mortgage settlement, making it unlikely that imposing a new duty on loan servicers would provide them with further incentive to carry out their review of loan modification applications with more due care, and numerous jurisdictions have concluded that neither the provisions of HAMP nor the relationship between a borrower and a lender or a loan servicer result in the imposition of any duty of care in the present context; furthermore, this court declined to consider the plaintiffs' claim that their negligence count could be construed to extend to a theory of negligence per se on the basis of the allegations in their complaint that the defendant breached a duty imposed by federal regulations and state statutes and that such breach caused their injuries, the plaintiffs having failed to raise this claim distinctly before the trial court, as they did not specifically allege negligence per se in their complaint, did not identify the particular legal provisions that the defendant allegedly violated or that established the standard of care, did not seek an articulation from the trial court, and did not mention such a theory in their motion to reargue.

Argued November 9, 2018—officially released November 26, 2019

Procedural History

Action to recover damages for, inter alia, the defendant's alleged violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator, J.*, granted the defendant's

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motion to strike and rendered judgment thereon, from which the plaintiffs appealed. *Reversed in part; further proceedings.*

Jeffrey Gentes, with whom, on the brief, was *David Lavery*, for the appellants (plaintiffs).

Pierre-Yves Kolakowski, with whom was *Zachary Bennett Grendi*, for the appellee (defendant).

Opinion

McDONALD, J. This appeal requires us to determine whether allegations that a residential loan servicer engaged in systematic misrepresentations, delays and evasiveness over several years of postdefault loan modification negotiations with the mortgagors can suffice to state a claim for a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and a claim for negligence. The plaintiffs, mortgagors Sandra Cenatiempo and Carmine Cenatiempo, appeal from the judgment of the trial court, which granted the motion of the defendant loan servicer, Bank of America, N.A.,¹ to strike the plaintiffs' complaint. The plaintiffs' principal contention is that their allegations were legally sufficient to support their CUTPA and negligence claims because the defendant's pattern of misconduct violated clearly defined standards and policies reflected in Connecticut, federal, and national statutory and regulatory requirements² aimed at preventing foreclosure that were binding on the

¹ At the time of the plaintiffs' default, their loan was serviced by Wilshire Credit Corporation, a predecessor of the defendant. Wilshire merged with and into BAC Home Loans Servicing, LP (BACHLS), effective March 1, 2010, and the defendant is the successor to BACHLS as a result of a July 1, 2011 de jure merger with BACHLS. Because the defendant does not contest that it assumed BACHLS' liabilities as a matter of law, we reference all of the conduct alleged to be that of the defendant.

² The plaintiffs claim that federal and national statutory and regulatory requirements and this state's foreclosure mediation statutes form a comprehensive policy framework that supports the imposition of liability under CUTPA and a claim for negligence. We refer to these requirements as federal and national because certain of the requirements are federal statutes and policies, whereas the national mortgage settlement was a joint settlement

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defendant and that this conduct caused them substantial financial and emotional injury. We agree with the plaintiffs that the alleged facts could support a claim under CUTPA. We disagree with the plaintiffs, however, that the alleged facts would support a claim of negligence. Accordingly, we reverse the judgment of the trial court insofar as it struck the CUTPA claim.

I

The plaintiffs' thirty-nine page complaint includes 179 paragraphs of allegations relating to the defendant's conduct, spanning approximately five years. Because much of the alleged conduct repeats throughout this time period, we recite the plaintiffs' factual allegations in a summary fashion and provide specific allegations where necessary as part of our analysis. We construe those facts in the manner most favorable to sustaining the legal sufficiency of the complaint. See, e.g., *Bohan v. Last*, 236 Conn. 670, 674, 674 A.2d 839 (1996).

In April, 2003, Carmine Cenatiempo executed a promissory note in exchange for a loan in the original principal amount of \$550,000 secured by a mortgage, given by both plaintiffs, on property located in Weston. The plaintiffs began experiencing financial hardship in 2008 and, subsequently, were declared in default on their mortgage by the defendant. In October, 2009, the defendant, as the servicer³ of the loan, instituted a foreclosure

between the United States and the attorneys general of forty-nine states and the District of Columbia and several loan servicers. These statutes and agreements will be discussed in greater detail in part II of this opinion.

³“A servicer is neither a lender nor investor but is often a third-party financial institution that is hired by investors to manage and account for the loan. In other words, a servicer is tasked with interacting with borrowers and collecting and managing the borrower's monthly mortgage payments. Servicers primarily profit from a monthly servicing fee, which is a fixed percentage of the outstanding principal balance, but when a loan becomes delinquent, the amount and nature of servicing changes. . . . [I]t is the servicer that decides whether to foreclose or modify a loan. In some cases, a servicer can make a greater profit from initiating foreclosure than from granting a permanent loan modification.” (Footnotes omitted.) A. Sarapinian, “Fighting Foreclosure: Using Contract Law To Enforce the Home Affordable Modification Program (HAMP),” 64 *Hastings L.J.* 905, 913 (2013).

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action. The next two and one-half years were marked by the plaintiffs' repeated attempts to obtain a loan modification from the defendant under a federal program, discussed in part II of this opinion, known as HAMP—Home Affordable Modification Program. In response to the plaintiffs' efforts, the defendant failed to timely review completed applications, repeatedly requested updated and new financial information, erroneously denied applications based on purported failures to provide that requested documentation, erroneously denied applications based on investor restrictions that did not apply, and engaged in flawed evaluations of the applications. Concurrent with this pattern of conduct, the defendant failed to engage productively in the approximately eighteen mediation sessions conducted pursuant to the state's foreclosure mediation program.

The defendant's treatment of one such application is emblematic of the way it handled many of the plaintiffs' applications. In response to an April 17, 2010 letter from the defendant soliciting the plaintiffs for a HAMP modification, the plaintiffs submitted a modification application. Two weeks later, the defendant notified the plaintiffs that it did not have all of the documents it needed to review the application but did not explain what was missing. Rather, it listed all of the documents required for a HAMP application and gave the plaintiffs thirty days to respond. The plaintiffs sent additional documents, and the defendant confirmed receipt in August, 2010, and noted that its review could take forty-five days. Rather than undertaking its review, however, the defendant again requested additional documentation, which the plaintiffs provided. Thereafter, at the mediation session held for the purpose of discussing if the plaintiffs qualified for the HAMP modification in light of the submissions, the defendant for the first time claimed that the investor actually holding the loan did not allow modifications. At the plaintiffs' request, the

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defendant asked the investor about the purported restriction, and the investor indicated that no such restriction existed. Nevertheless, the defendant refused to substantively review the modification application, again returning to the familiar request for a new application. The plaintiffs submitted numerous applications during this period with similar results. Then, in February, 2012, the defendant withdrew the foreclosure action without explanation or apparent reason.

Despite withdrawing the action, the defendant remained unresponsive to the plaintiffs' continued efforts to obtain a loan modification. The defendant provided evasive or opaque answers to the plaintiffs' inquiries about the status of their modification applications, failed to return the plaintiffs' repeated phone calls or to follow up with the plaintiffs as promised. Moreover, when the plaintiffs were able to speak with the designated representatives, they provided inconsistent information concerning the plaintiffs' eligibility for a "settlement" and denied their applications without explanation.

In October, 2012, the defendant instituted a second foreclosure action. Following the plaintiffs' election to once again participate in the state's mediation program, the parties engaged in mediation. For the next three years, including while the parties were purportedly engaged in mediation, the defendant continued to mishandle the loan modification process in a fashion similarly characterized by delay, repeated requests for documents previously provided, opaque denials, and a general evasiveness and nonresponsiveness.

In 2015, the defendant finally provided the plaintiffs with a trial period modification plan under HAMP, which became a permanent loan modification when that period was successfully completed. The terms of the permanent modification, however, increased the principal owed by including the defendant's attorney's fees for mediation sessions, default fees, fees for com-

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mencing the second foreclosure action, and accrued interest in excess of what the plaintiffs would have paid if their initial loan modification application had been timely and properly evaluated.

Over the course of this five year odyssey leading to the permanent loan modification, the plaintiffs submitted at least nine separate workout applications. Several applications never resulted in decisions by the defendant, and some applications were pending before the defendant for hundreds of days—specifically, 263 days, 110 days, and 333 days. During the review process of one application, the defendant ignored thirteen of the plaintiffs' phone calls. Two applications were denied based on erroneous claims of investor restrictions, and one was also denied based on an incorrect net present value calculation for the property.⁴ These two applications were pending before the defendant for a combined 352 days. Two other applications were denied based on a feigned lack of documentation after thirty-seven and sixteen days. While one application was pending, the plaintiffs provided updated documentation seven times, and the defendant refused to speak with the plaintiffs' counsel and discouraged participation in mediation.

In June, 2016, the plaintiffs commenced the present action against the defendant, alleging, in count one,

⁴ "A borrower who requests a loan modification under HAMP is entitled to a net present value calculation—that is, a determination of whether modifying the loan is worth more to the lender than proceeding to foreclosure. If modification is worth more, the [net present value] is positive and the lender is required to modify the loan, but if foreclosure is worth more, the [net present value] is negative and the lender may decline to modify." *Neil v. Wells Fargo Bank, N.A.*, 686 Fed. Appx. 213, 215 n.3 (4th Cir. 2017). The defendant initially estimated the net present value of the plaintiffs' property at \$677,467. The plaintiffs' appraiser valued it at \$585,000. Thereafter, the defendant ordered its own appraisal and concluded it was worth even less than the plaintiffs claimed, valuing it at \$525,000. The defendant refused to change its analysis to reflect the accurate valuation.

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violations of CUTPA and, in count two, negligence. In count one, the plaintiffs alleged that the defendant committed unfair or deceptive acts in the conduct of trade or commerce by failing to exercise reasonable diligence in reviewing and processing the plaintiffs' loan modification applications, repeatedly requesting duplicative, unnecessary updates to documentation, causing an undue delay of at least four years in offering the plaintiffs a trial and permanent loan modification, repeatedly changing the personnel responsible for communicating with the plaintiffs, repeatedly sending the plaintiffs vague, confusing and contradictory letters, misrepresenting the applicability of investor restrictions, misrepresenting its ability to proceed with conducting a foreclosure sale, misrepresenting the status of the plaintiffs' loan modification applications, and discouraging the plaintiffs from participating in foreclosure mediation. The plaintiffs alleged that this conduct offended the public policy reflected in HAMP, the federal Real Estate Settlement Procedures Act of 1974 (RESPA); see 12 U.S.C. § 2601 et seq. (2012); a 2011 federal consent order; see *In re Bank of America, N.A., Charlotte, NC*, Enforcement Action No. 2011-48, Docket No. AA-EC-11-12, 2011 WL 6941540 (OCC April 13, 2011) (consent order between federal Office of the Comptroller of the Currency and Bank of America, N.A., Charlotte, NC); a national mortgage settlement to which the defendant was a party; *United States v. Bank of America Corp.*, United States District Court, Docket No. 1:12-cv-00361 (RMC) (D.D.C. April 4, 2012); and this state's foreclosure mediation statutes. See General Statutes §§ 49-31k through 49-31o. The plaintiffs further alleged that the defendant's conduct caused them substantial injury because it led to a considerably higher principal balance resulting in a higher monthly payment and a lost opportunity to earn \$5000 in borrower incentive payments under HAMP, which severely impacted their emotional and financial well-being. The plaintiffs alleged that they

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reasonably could not have avoided these injuries because they were in a “relatively powerless bargaining position,” their refusal to comply with the defendant’s demands would have put them “at grave risk of losing their home,” and the injuries caused to homeowners, like the plaintiffs, are not outweighed by any countervailing benefits. The plaintiffs also alleged that the defendant profited from the plaintiffs’ financial injury through increased interest rates, default fees and attorney’s fees, and that its conduct in failing to adequately train its employees about loss mitigation and in failing to provide sufficient staff to handle modifications in a timely and ethical manner saved it money and increased its profits.

The plaintiffs also alleged that the defendant’s improper conduct extended beyond their case. Specifically, they alleged that the defendant had a corporate culture of intentional conduct designed to prevent homeowners from receiving HAMP modifications. Such common conduct included requiring customers to return documents on short notice and then waiting months before reviewing such documents, training employees to falsely tell homeowners that it had not received their documents, allowing employees to remove documents from homeowners’ files in order to make the accounts appear ineligible for modification, training employees to perform a “blitz” twice a month, during which the defendant would order case managers and underwriters to deny any HAMP applications in which the financial documents were more than sixty days old, and failing to adequately train and staff the departments responsible for processing HAMP modifications.⁵

⁵ These allegations are based on affidavits from employees of the defendant and its controlled subsidiaries taken in connection with a motion for class certification in an action filed in federal court against the defendant. See *Sheely v. Bank of America, N.A.*, 36 F. Supp. 3d 1364, 1372 (2014); see also *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, Docket No. M.D.L. 102193 (RWZ), 2013 WL 4759649 (D. Mass. September 4, 2013).

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The second count of the complaint, sounding in negligence, alleged that the defendant owed the plaintiffs a duty of care arising out of servicing standards imposed by RESPA, the 2011 federal consent order, the national mortgage settlement, and the Connecticut foreclosure mediation statutes.⁶ The plaintiffs further alleged that the defendant breached its duty based on the foregoing conduct, which caused the plaintiffs to suffer significant financial and emotional injury.

The defendant moved to strike both counts of the complaint. It asserted that the allegations pertaining to the manner in which a lender reviews a loan modification application are insufficient to state a cognizable CUTPA claim and that no duty of care exists between a lender and a borrower, including in processing mortgage loan modifications, to support a negligence claim. The defendant also moved to strike the complaint on the grounds that the plaintiffs lacked standing to enforce alleged violations of agreements to which they are not parties or third-party beneficiaries, and that their claims are improperly based on settlement negotiations.

The trial court granted the defendant's motion to strike. The trial court reasoned that the conduct in question "focuses on negotiation of relief from existing contractual obligations, a situation that the plaintiffs concede does not require any specific outcome, and in which the parties are adversarial given the pendency of litigation. . . . The court does not believe it to be appropriate or productive to adopt a requirement of 'just right' pacing of foreclosure mediation and negotiations, where too fast or too slow (including inefficiency

⁶ The plaintiffs also alleged that the defendant "assumed a duty to diligently review [their] loan modification applications when it solicited and invited them to apply for such assistance." The plaintiffs' brief does not address a theory of assumed duty, and, thus, we deem any argument based on this allegation to be waived. Cf. *MacDermid, Inc. v. Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]).

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and perhaps some level of incompetence) might result in negligence or CUTPA based liability.” The trial court also expressed the concern that allowing such actions could discourage mortgage companies from negotiating loan workouts, lead to increased litigation, and subject mortgage companies to liability, even in the absence of material misrepresentations or malfeasance.⁷ Finally, the court noted the availability of other remedies, namely, court imposed sanctions for misconduct during the course of mediation under General Statutes § 49-31n (c) (2). The trial court ultimately held that, “based on the available authorities and policy considerations, the court can only conclude that, however sympathetic the plaintiffs’ situation may be, it cannot support the negligence and CUTPA claims articulated in the plaintiffs’ operative complaint.”

The plaintiffs filed a motion to reargue and reconsider. They claimed, among other things, that there are already fixed timetables for servicer decision making, that public policy regarding loan modifications favors the plaintiffs’ cause of action, and that sanctions are imposed too rarely to be an effective remedy or deterrent. The trial court granted reconsideration but denied the plaintiffs any relief. The trial court subsequently rendered judgment for the defendant on the plaintiffs’ claims. The plaintiffs appealed from the trial court’s judgment to the Appellate Court, and, pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2, we transferred the appeal to this court.

The essence of the plaintiffs’ argument on appeal is that the trial court improperly struck their complaint “largely because [the trial court] reached the wrong conclusions with respect to the public policy implications of allowing them to proceed.” It is the plaintiffs’

⁷ Although not raised in the defendant’s pleadings, the trial court injected a concern that allowing such actions could interfere with a mortgage servicer’s relationship with the loan investor. The defendant similarly does not advance that argument to this court, and, consequently, we decline to address it.

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position that HAMP, RESPA, the 2011 federal consent order, the national mortgage settlement, and this state's foreclosure mediation statutes form a comprehensive policy framework that supports the imposition of liability under CUTPA and under a negligence claim. More specifically, the plaintiffs contend that the foregoing programs and policies prescribe the defendant's obligations, including the speed and accuracy with which mortgage servicers must evaluate customer loan workout applications. The defendant's conduct in contravention of those obligations, the plaintiffs contend, was immoral, unethical, oppressive, and unscrupulous, and, as such, violated CUTPA. Additionally, the plaintiffs assert that the totality of the circumstances weigh in favor of allowing them to proceed on their negligence claim. Finally, the plaintiffs assert that the trial court did not consider the negligence per se aspects of their negligence claim and contend that the negligence count also should not have been stricken on the basis of that theory.

We reverse the judgment of the trial court insofar as it granted the defendant's motion to strike the CUTPA count but affirm insofar as it struck the negligence count of the complaint.

II

Because the plaintiffs' appeal rests largely on the requirements of various federal, national, and state obligations and the policies that undergird them, it is useful to begin with an overview of these obligations, all of which were imposed in response to a national foreclosure crisis prompted by the Great Recession.⁸

⁸ "The Great Recession began in December 2007 and ended in June 2009, which makes it the longest recession since World War II. Beyond its duration, the Great Recession was notably severe in several respects. . . . Home prices fell approximately 30 percent, on average, from their mid-2006 peak to mid-2009, while the S&P 500 index fell 57 percent from its October 2007 peak to its trough in March 2009." R. Rich, *The Great Recession*, available at https://www.federalreservehistory.org/essays/great_recession_of_200709

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A primary federal response to the foreclosure crisis was HAMP, which was established in 2009 by the United States Department of the Treasury and was designed to encourage loan servicers to modify loans for qualified borrowers. See U.S. Dept. of the Treasury, Making Home Affordable, (last updated January 30, 2017), available at <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx> (last visited November 18, 2019); see also *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 772 (4th Cir. 2013); *U.S. Bank National Assn. v. Eichten*, 184 Conn. App. 727, 733, 196 A.3d 328 (2018). “HAMP was a national home mortgage modification program aimed at helping [at risk] homeowners who were in default or at imminent risk of default by reducing monthly payments to sustainable levels through the restructuring of their mortgages without discharging any of the underlying debt. . . . It was designed to create a uniform loan modification process governed by federal standards that could be used by any loan servicer that chose to participate.” (Citation omitted.) *U.S. Bank National Assn. v. Eichten*, supra, 733. Because many servicing agreements between loan servicers and investors in residential mortgage backed securities predated the creation of HAMP, servicers that agreed to participate in the program were required to use reasonable efforts to get investors to waive any restrictions on HAMP loan modifications that existed in the agreements. See United States Dept. of the Treasury, HAMP Supplemental Directive 09-01: Introduction of the Home Affordable Modification Program (April 6, 2009) p. 1 (HAMP Supplemental Directive 09-01), available

(last visited November 18, 2019). Foreclosure actions soared during this time period. See generally *Equity One, Inc. v. Shivers*, 310 Conn. 119, 145 n.7, 74 A.3d 1225 (2013) (*McDonald, J.*, dissenting) (noting mortgage foreclosure crisis during this period). Nationwide, between 2007 and 2011, foreclosures were initiated on 11 million properties. See A. Sarapinian, “Fighting Foreclosure: Using Contract Law To Enforce the Home Affordable Modification Program (HAMP),” 64 *Hastings L.J.* 905, 906–907 (2013).

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at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf (last visited November 18, 2019). The defendant, through a servicer participation agreement,⁹ voluntarily elected to participate in HAMP. It thereby became contractually obligated to review and process HAMP applications according to a uniform process. See *id.*, pp. 12, 13–14.

The HAMP application process consists of several components. Relevant to the present case, a borrower first completes a HAMP application to which the borrower must append certain financial documents, such as income verification. *Id.*, pp. 7–8, 13. Financial information must be obtained from the borrower less than ninety days from the date of the eligibility determination. *Id.*, p. 5. HAMP provides specific timetables for each stage of the application process, which helps to ensure that an application is not denied simply because the financial information is no longer current. For example, the servicer must acknowledge receipt of a completed application within ten business days and must notify the borrower of its eligibility determination within thirty calendar days. See United States Dept. of the Treasury, HAMP Supplemental Directive 09-07: Home Affordable Modification Program—Streamlined Borrower Evaluation Process (October 8, 2009) p. 7 (HAMP Supplemental Directive 09-07), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0907.pdf (last visited November 18, 2019). The content of such notices are prescribed by HAMP. See Dept. of the Treasury, HAMP Supplemental Directive 09-08: Home Affordable Modification Pro-

⁹ “Mortgage lenders approved by [the Federal National Mortgage Association, known as] Fannie Mae must participate in HAMP. . . . Lenders servicing mortgages not owned or guaranteed by Fannie Mae or [the Federal Home Loan Mortgage Corporation, known as] Freddie Mac may elect to participate in HAMP by executing a [s]ervicer [p]articipation [a]greement with Fannie Mae in its capacity as financial agent for the United States.” (Citations omitted; footnote omitted.) *Markle v. HSBC Mortgage Corp. (USA)*, 844 F. Supp. 2d 172, 176–77 (D. Mass. 2011).

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gram—Borrower Notices (November 3, 2009) pp. 2–4 (HAMP Supplemental Directive 09-08), available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0908.pdf (last visited November 18, 2019).

As part of its eligibility determination, the servicer must conduct a net present value test, which is a “formula that determines whether it would be more profitable for servicers and the loan’s investors to approve a modification or to foreclose on the property.” A. Sarapinian, “Fighting Foreclosure: Using Contract Law To Enforce the Home Affordable Modification Program (HAMP),” 64 *Hastings L.J.* 905, 918 (2013); see HAMP Supplemental Directive 09-01, *supra*, pp. 4–5 (describing test). If the test result favors modification, “the servicer MUST offer the modification,” provided all other requirements are met. HAMP Supplemental Directive 09-01, *supra*, p. 4. If the borrower meets those requirements, they are offered a trial period plan. *Id.*, pp. 14–15. Borrowers who satisfy all of the requirements for the trial period, which is typically three months, must be offered a permanent modification. *Id.*, pp. 17–18.

It quickly became apparent that servicers were not executing HAMP modification reviews with the “high standard of care” required by the program. See HAMP Supplemental Directive 09-08, *supra*, p. 1. Common problems included loss of borrower paperwork, failure to follow program standards, and unnecessary delays that harmed borrowers while financially benefiting servicers. See A. Sarapinian, *supra*, 64 *Hastings L.J.* 914. Consequently, the Office of the Comptroller of the Currency, an independent bureau of the United States Department of the Treasury, examined the mortgage foreclosure processes of numerous servicers, including the defendant. An examination of the defendant’s mortgage foreclosure processes found, among other deficiencies, that the defendant “failed to devote sufficient

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financial, staffing and managerial resources to ensure proper administration of its foreclosure processes” and “failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, [third-party] management, and training”¹⁰ *In re Bank of America, N.A., Charlotte, NC*, supra, 2011 WL 6941540, *2. As a result of the Comptroller’s investigation, in April, 2011, the defendant consented to an order that obligated it to remediate what the Comptroller had termed “unsafe or unsound” foreclosure practices.¹¹ *Id.*, *1. The consent order required the defendant to implement procedures to ensure compliance with the timelines in HAMP, and the defendant reaffirmed its obligation to comply with HAMP. *Id.*, *3.

Approximately one year later, in April, 2012, in a national mortgage settlement, the defendant and several other mortgage servicers entered into a consent judgment with the United States and the attorneys general of forty-nine states and the District of Columbia related to complaints alleging various foreclosure abuses. See *United States v. Bank of America Corp.*, supra, United States District Court, Docket No. 1:12-cv-00361 (RMC); see also P. Lehman, “Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims,” available at http://www.nationalmortgagesettlement.com/files/NMS_Executive_Summary-7-23-2012.pdf (last visited November 18, 2019). The national mortgage settlement was brought in part under the “[u]nfair and [d]eceptive [a]cts and [p]ractices laws of the [p]laintiff [s]tates

¹⁰ The defendant neither admitted nor denied the Comptroller’s findings. See *In re Bank of America, N.A. Charlotte, NC*, supra, 2011 WL 6941540, *1.

¹¹ Enforcement actions concerning other servicers were also resolved in April, 2011. See Office of the Comptroller of the Currency, Correcting Foreclosure Practices (last modified January 31, 2017), available at <https://www.occ.gov/topics/consumers-and-communities/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html> (last visited November 18, 2019).

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. . . .” *United States v. Bank of America Corp.*, supra, United States District Court, Docket No. 1:12-cv-00361 (RMC). Relevant to the present case, the national mortgage settlement, as a “comprehensive reform of mortgage servicing practices,” was intended to prevent the defendant from continuing to engage in “improper foreclosure practices” by imposing numerous controls and standards on the servicing of its loans. P. Lehman, supra, p. 3. For example, the settlement required the defendant to designate a continuing single point of contact for borrowers and provide detailed reasons for the denial of a modification. *Id.*

Despite these efforts, “pervasive problems with servicers’ performance of loss mitigation activity in connection with the financial crisis” continued to be of widespread concern. See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,814 (February 14, 2013), codified at 12 C.F.R. § 1024 et seq. (2014). Of particular concern were lost documents, nonresponsive servicers, and an unwillingness to work with borrowers to reach an agreement on loss mitigation options. *Id.* As a result, the federal Consumer Financial Protection Bureau amended the implementing regulation for RESPA, a consumer protection statute governing the settlement process for residential real estate; see Regulation X, 12 C.F.R. § 1024 et seq. (2014); and created national mortgage servicing standards. See 78 Fed. Reg. 10,696, 10,815 (February 14, 2013). The RESPA amendment adopted much of the timing and staffing requirements of HAMP, the 2011 consent order, and the national mortgage settlement. See *id.*, 10,814, 10,815. Loan servicers that participate in HAMP are required to comply with RESPA. See HAMP Supplemental Directive 09-01, supra, p. 12.

RESPA’s Regulation X requires a loan servicer to evaluate a complete loss-mitigation application within

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thirty days of receipt of the application. See 12 C.F.R. § 1024.41 (c) (1) (2014); see also *Urdaneta v. Wells Fargo Bank, N.A.*, 734 Fed. Appx. 701, 704–705 (11th Cir. 2018). If an application is not complete, servicers must use reasonable diligence to obtain documents and information to complete the application. See 12 C.F.R. § 1024.41 (b) (1) (2014); see also *Urdaneta v. Wells Fargo Bank, N.A.*, supra, 705. Regulation X also requires that loan servicers maintain policies and procedures to ensure, for example, that they can provide borrowers with timely and accurate information in response to requests for information concerning a borrower’s mortgage loan; 12 C.F.R. § 1024.38 (a) and (b) (2014); loss mitigation options; 12 C.F.R. § 1024.40 (b) (1) (i) (2014); and the status of a loss mitigation application. 12 C.F.R. § 1024.40 (b) (1) (iii) (2014).

In addition to the federal response to the foreclosure crisis, many states took their own action to address the problem. Connecticut enacted a statutory scheme that established a court administered and supervised foreclosure mediation program. See General Statutes §§ 49-31k through 49-31o. Under the mediation program, neutral mediators assist eligible homeowners facing foreclosure and their lenders or mortgage servicers to achieve a mutually agreeable resolution to a foreclosure action. See General Statutes §§ 49-31k through 49-31o. Mediation shall “address all issues of foreclosure,” including, but not limited to, modification of the loan and restructuring of the mortgage debt. General Statutes § 49-31m. Although a servicer is not required to modify the mortgage or change the payment terms if a mortgagor elects to participate in the program; see General Statutes § 49-31o (a); the mortgagee is obligated to engage in some form of loss mitigation review with the mortgagor before foreclosure proceedings can proceed. See General Statutes §§ 49-31l and 49-31n.

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III

With this background in mind, we turn to the merits of the plaintiffs' challenge to the trial court's decision to strike their complaint. Our review of a trial court's decision to grant a motion to strike is plenary. See, e.g., *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 398, 119 A.3d 462 (2015). This is because a "motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766, 771–72, 802 A.2d 44 (2002).

A

CUTPA

We begin with the plaintiffs' claim that the defendant's alleged misconduct during the course of the loan modification negotiations violated CUTPA. The basic contours of a CUTPA claim are well settled. "CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . To give effect to its provisions, [General Statutes] § 42-110g (a) of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b" (Internal quotation marks omitted.) *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015). When interpreting

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CUTPA, § 42-110b (b) directs us to consider the interpretations given by the Federal Trade Commission and the federal courts to the Federal Trade Commission Act, 15 U.S.C. § 45 (a) (1), “as from time to time amended.”

To successfully state a claim for a CUTPA violation, the plaintiffs must allege that the defendant’s acts occurred in the conduct of trade or commerce.¹² See *Artie’s Auto Body, Inc. v. Hartford Fire Ins. Co.*, 287 Conn. 208, 217, 947 A.2d 320 (2008). On the record before us, this requirement undoubtedly has been met. It is well settled that CUTPA applies to banks and banking activities. See, e.g., *Normand Josef Enterprises, Inc. v. Connecticut National Bank*, 230 Conn. 486, 521, 646 A.2d 1289 (1994); *Smithfield Associates, LLC v. Tolland Bank*, 86 Conn. App. 14, 27, 860 A.2d 738 (2004), cert. denied, 273 Conn. 901, 867 A.2d 839 (2005). Federal courts have specifically held that a bank’s “lending and loan modification activities involve the ‘conduct of any trade or commerce.’” *Compton v. Countrywide Financial Corp.*, 761 F.3d 1046, 1056 (9th Cir. 2014); see *Tanasi v. CitiMortgage, Inc.*, 257 F. Supp. 3d 232, 275 (D. Conn. 2017) (“Connecticut courts have held that CUTPA applies to unfair or deceptive conduct by mortgage companies and other holders of mortgage notes” [internal quotation marks omitted]).¹³

¹² “‘Trade’ and ‘commerce’ means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.” General Statutes § 42-110a (4). The parties do not dispute that the plaintiffs, as loan borrowers, are consumers within the meaning of CUTPA. See, e.g., *Compton v. Countrywide Financial Corp.*, 761 F.3d 1046, 1053 (9th Cir. 2014) (loan borrowers are consumers within meaning of Hawaii’s consumer protection statute).

¹³ The defendant contends that the plaintiffs’ CUTPA claim relies on settlement negotiations and that such interactions do not fall within CUTPA’s trade or commerce requirement. The defendant provides no relevant authority to support this proposition, and it appears to be directly in conflict with the authority previously cited, as well as authority discussed later in this opinion.

The defendant also appears to make a more sweeping argument that “settlement negotiations” cannot provide the basis for a CUTPA claim because Connecticut law generally does not permit evidence of such negotia-

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The plaintiffs also must establish that the alleged acts or practices are unfair or deceptive. “[W]e have adopted [certain] criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.¹⁴ . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy.” (Footnote added; internal quotation marks omitted.) *Ulbrich v. Groth*, 310 Conn. 375, 409, 78 A.3d 76 (2013).

We are mindful that our legislature “deliberately chose not to define the scope of unfair or deceptive

tions to be admitted at trial. See, e.g., *Tomasso Bros., Inc. v. October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992) (“[t]he general rule that evidence of settlement negotiations is not admissible at trial is based upon the public policy of promoting the settlement of disputes” [internal quotation marks omitted]). If the defendant were right, this argument would preclude any theory of liability, not simply under CUTPA, and would permit the defendant to engage in conduct manifestly in conflict with its obligations under federal and state law. We need not concern ourselves with this outcome, however, because there is no authority that supports construing this evidentiary rule regarding settlement negotiations to apply to the plaintiffs’ allegations. The plaintiffs plainly are not relying on the substantive terms of any modification offer made or any concessions made by the defendant to resolve the default issue. Rather, they are relying on the defendant’s lack of compliance with procedural requirements.

¹⁴ The trial court did not specify which prong or prongs of the cigarette rule served as the basis for its decision. As such, we evaluate each prong.

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acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints. . . . Predictably, [therefore] CUTPA has come to embrace a much broader range of business conduct than does the [common-law] tort action. . . . Moreover, [b]ecause CUTPA is a self-avowed remedial measure . . . § 42-110b (d), it is construed liberally in an effort to effectuate its public policy goals. . . . Indeed, there is no . . . unfair method of competition, or unfair [or] deceptive act or practice that cannot be reached [under CUTPA].” (Citations omitted; internal quotation marks omitted.) *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 157–58, 645 A.2d 505 (1994). Thus, it has been held that a violation of CUTPA does not “necessarily have to be based on an underlying actionable wrong” *Hartford Electric Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334, 369, 736 A.2d 824 (1999). Nonetheless, “[u]nder CUTPA, only intentional, reckless, unethical or unscrupulous conduct can form the basis for a claim.” *Ulbrich v. Groth*, supra, 310 Conn. 410 n.31.

The plaintiffs’ CUTPA claim is grounded in the theory that the business of loan servicing is regulated by certain industry standards imposed by statutes, regulations, and court orders that form a comprehensive policy framework. The plaintiffs contend that the defendant made a conscious decision to depart from these standards and deliberately engage in a pattern of conduct intended to prevent homeowners, like the plaintiffs, from receiving HAMP modifications, which in turn drives up borrower debt.¹⁵ Taken as a whole, and viewed in the light most favorable to sustaining the complaint’s legal sufficiency, we agree with the plaintiffs’ characterization of their complaint and conclude that these alle-

¹⁵ Indeed, the plaintiffs’ complaint alleges that “[t]he foregoing conduct of [the defendant] demonstrates wilful, knowing, calculated, deceitful, and unfair conduct, and reckless indifference to [the plaintiffs’] rights.”

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gations describe conduct that was not merely a technical violation of these provisions or negligent or incompetent, but involved a conscious, systematic departure from known, standard business norms. The plaintiffs' allegations describe practices that are certainly within the "penumbra of some . . . established concept of unfairness . . ." *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, supra, 317 Conn. 609 n.9.

1

Turning to the first criterion of the cigarette rule, we must consider whether the alleged practices offend public policy expressed in statutes, the common law, or elsewhere, that establishes a benchmark of fairness. See *Ulbrich v. Groth*, supra, 310 Conn. 409. "Connecticut courts have held that . . . federal . . . lending statutes can demonstrate a 'public policy' as required by [CUTPA]." *Tanasi v. CitiMortgage, Inc.*, supra, 257 F. Supp. 3d 275; see also *CitiMortgage, Inc. v. Rey*, 150 Conn. App. 595, 609, 92 A.3d 278 ("there are reasons well grounded in public policy . . . to find that a mortgagee who enters into a forbearance agreement during foreclosure litigation . . . should not be permitted to pursue the remedy of foreclosure when the borrower has fully complied with its terms"), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). We agree with the plaintiffs that the defendant's alleged violations of HAMP, RESPA, the 2011 consent order, the national mortgage settlement, and this state's foreclosure mediation statutes offend the public policies embodied in these provisions.

HAMP was "aimed at helping 3 to 4 million [at risk] homeowners—both those who are in default and those who are at imminent risk of default—by reducing monthly payments to sustainable levels."¹⁶ HAMP Sup-

¹⁶ We note that, although a borrower does not have a private right of action under HAMP; *Condel v. Bank of America, N.A.*, United States District Court, Docket No. 3:12CV212 (HEH) (E.D. Va. July 5, 2012); a plaintiff may predicate a CUTPA claim on violations of statutes or regulations that

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plemental Directive 09-01, *supra*, p. 1. In support of this policy, RESPA's implementing regulation, Regulation X, establishes obligations for how a loan servicer must handle a borrower's loss mitigation application under HAMP.¹⁷ See 12 U.S.C. § 2601 (2012); 12 C.F.R. § 1024 (2014). Regulation X requires servicers to timely evaluate loss mitigation applications; 12 C.F.R. § 1024.41 (c) (1) (2014); use reasonable diligence to obtain documents if an application is not complete; 12 C.F.R. § 1024.41 (b) (1) (2014); and maintain policies and procedures to ensure that they can provide borrowers with timely and accurate information. See 12 C.F.R. §§ 1024.38 and 1024.40 (b) (1) (i) and (iii) (2014). At least one federal district court has held that allegations of a loan servicer's "confusing and deceptive communications with vulnerable borrowers violated an important public policy" embedded in HAMP and RESPA. *Tanasi v. CitiMortgage, Inc.*, *supra*, 257 F. Supp. 3d 275.

themselves do not allow for private enforcement. See *Eder Bros., Inc. v. Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 381–82, 880 A.2d 138 (2005). Recovery under CUTPA for violations of HAMP is compatible with the objectives of HAMP, which is to help homeowners avoid foreclosure by obtaining a loan modification. See, e.g., *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 579–86 (7th Cir. 2012) (action under Illinois consumer protection act is consistent with HAMP); *Morris v. BAC Home Loans Servicing, L.P.*, 775 F. Supp. 2d 255, 261 (D. Mass. 2011) (recovery under Massachusetts consumer protection act is consistent with HAMP). Indeed, "the [s]ervicer [p]articipation [a]greement between servicers and the government provides that participating servicers must covenant to act consistent with state consumer protection laws." *Morris v. BAC Home Loans Servicing, L.P.*, *supra*, 261.

¹⁷ Permitting recovery under CUTPA for violations of RESPA is compatible with RESPA's objectives and enforcement mechanisms. RESPA is a consumer protection statute; 12 U.S.C. § 2601 (2012) (Congressional findings); which, by way of Regulation X, establishes obligations concerning how a loan servicer must handle a borrower's loss mitigation application. See 12 C.F.R. § 1024 et seq. (2014). By providing a private right of action pursuant to 12 U.S.C. § 2605 (f), it is the intent of RESPA that borrowers have the ability to enforce compliance. There is nothing about recovery under CUTPA that actively conflicts with this enforcement scheme.

With respect to the national mortgage settlement, the intent of the new servicing standards it imposed was, in part, to “increase the transparency of the loss mitigation process, impose time lines to respond to borrowers, and restrict the unfair practice of ‘dual tracking,’ where foreclosure is initiated despite the borrower’s engagement in a loss mitigation process.” P. Lehman, *supra*, p. 3. In pursuit of these goals, banks and servicers agreed to adopt numerous controls and standards in the servicing of loans, including maintaining adequate documentation of borrower account information and designating a continuing single point of contact to coordinate document submissions and inform borrowers of the status of their loss mitigation applications. *Id.* Likewise, through the 2011 consent order, the defendant agreed to substantially similar requirements, including compliance with all applicable federal laws such as HAMP. See *In re Bank of America, N.A., Charlotte, NC*, *supra*, 2011 WL 6941540, *3. Mortgage practices in contravention of the terms of the national mortgage settlement and the 2011 consent order have been held to offend public policy for purposes of state consumer protection laws. See *Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 630 (N.D. Ill. 2019) (“standards of conduct imposed by consent decrees and settlement agreements” sufficiently reflect public policy), appeal filed sub nom. *Saccameno v. U.S. Bank National Assn.*, United States Court of Appeals, Docket No. 19-1569 (7th Cir. March 29, 2019); *id.*, 630–31 (loan servicer’s conduct offended public policy embodied in national mortgage settlement for purposes of Illinois’ consumer protection act); *Lowry v. Wells Fargo Bank, N.A.*, United States District Court, Docket No. 15-C-4433 (N.D. Ill. September 2, 2016) (mortgage practices in contravention of terms of national mortgage settlement and 2011 consent decree offended public policy); see also *Morris v. BAC Home Loans Servicing, L.P.*, 775

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F. Supp. 2d 255, 262 (D. Mass. 2011) (concluding that recovery under state’s consumer protection law similar to CUTPA is consistent with HAMP).

This state’s foreclosure mediation statutes were similarly designed to help homeowners remain in their homes by avoiding foreclosure. See 51 S. Proc., Pt. 17, 2008 Sess., p. 5061, remarks of Senator Bob Duff (“[Foreclosure mediation] . . . will help our consumers in the state very much. And I think it will also help the banks quite a bit too because . . . no bank likes to foreclose on a loan.”); *id.*, p. 5085, remarks of Senator Robert J. Kane (“[t]he mediation process, although not perfect, is very good because it will get people to maybe stay in their homes a bit longer”). Foreclosure mediation was intended to “address all issues of foreclosure,” including modification of the loan and restructuring of the mortgage debt. General Statutes § 49-31m. Our statutes governing the foreclosure mediation program are a source of public policy. See, e.g., *Bloomfield Health Care Center of Connecticut, LLC v. Doyon*, 185 Conn. App. 340, 359, 197 A.3d 415 (2018) (“our statutes themselves are a source of public policy”).

The plaintiffs have alleged conduct by the defendant that is contrary to the policies of HAMP, RESPA, the national mortgage settlement, the 2011 consent order, and this state’s foreclosure mediation statutes. They alleged that the defendant failed to timely review completed applications, erroneously issued denials based on failures to provide requested documentation that had previously been supplied, erroneously issued denials based on investor restrictions that did not exist, and conducted flawed evaluations of applications. They also alleged that, throughout the loan modification process, the defendant was often nonresponsive, failing to return the plaintiffs’ phone calls or follow up with the plaintiffs as promised. When the plaintiffs did receive a communication from the defendant regarding the status of their

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modification applications, it was often evasive or inconsistent, or it was in the form of a denial without explanation. In contravention of the national mortgage settlement's requirement that the plaintiffs must have a single point of contact for their applications, the defendant designated a number of different employees to respond to the plaintiffs' inquiries in seriatim. The plaintiffs further alleged that, contrary to the policies in this state's foreclosure mediation statutes, the defendant charged them attorney's fees despite its failure to comply with its duties under the mediation statutes. These allegations, if proven at trial, are sufficient to establish the defendant's violations of the public policies embodied in the aforementioned sources of legal obligations because the defendant's alleged actions made it much more difficult for the plaintiffs to reduce the amount of their mortgage payments to sustainable levels in order to avoid foreclosure. Accordingly, we conclude that the plaintiffs have alleged violations of public policy sufficient to satisfy the first criterion of the cigarette rule.

2

Turning to the second criterion of the cigarette rule, we must consider whether the defendant's allegedly improper practices are "immoral, unethical, oppressive, or unscrupulous" *Ulbrich v. Groth*, supra, 310 Conn. 409. The plaintiffs allege that the defendant's misrepresentations in violation of HAMP, RESPA, the 2011 consent order, the national mortgage settlement, and this state's foreclosure mediation statutes satisfy this criterion. Specifically, they allege that, by "capitalizing inflated past due interest along with attorney's fees and costs, the defendant ultimately profits from the excessive delay at the cost of the consumer through servicing fees." It is well settled that a "trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights comes under the second prong of the cigarette rule." *Votto v. American*

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Car Rental, Inc., 273 Conn. 478, 485, 871 A.2d 981 (2005); see *Johnson Electric Co. v. Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 357, 805 A.2d 735 (defendant general contractor was held liable for CUTPA violation under second prong of cigarette rule after listing plaintiff subcontractor as successful bidder but failing to honor contract), cert. denied, 262 Conn. 922, 812 A.2d 864 (2002).

We are mindful that “not every technical violation of HAMP” should expose a servicer to liability under a state’s consumer protection laws. See *Morris v. BAC Home Loans Servicing, L.P.*, supra, 775 F. Supp. 2d 263. Plaintiffs that have sufficiently alleged unfair or deceptive actions based on HAMP violations “have alleged a pattern of misrepresentations, failure to correct detrimental errors, and/or dilatory conduct on the part of the servicer and/or bank” (Internal quotation marks omitted.) *Ayoub v. CitiMortgage, Inc.*, United States District Court, Docket No. 15-cv-13218 (ADB), 2018 WL 1318919, *4 (D. Mass. March 14, 2018); see *Hanrahan v. Specialized Loan Servicing, LLC*, 54 F. Supp. 3d 149, 155 (D. Mass. 2014) (“a pattern or course of conduct involving misrepresentations, delay, and evasiveness in evaluating a HAMP application” sufficiently alleges unfair conduct); *Hanrahan v. Specialized Loan Servicing, LLC*, supra, 155 (citing cases discussing such pattern or course of conduct). “[T]he relevant conduct is the entirety of [the defendant’s] actions, not each action viewed in isolation.” (Internal quotation marks omitted.) *Hanrahan v. Specialized Loan Servicing, LLC*, supra, 156.

We agree with the plaintiffs that the defendant’s alleged violations of HAMP, RESPA, the 2011 consent order, the national mortgage settlement, and this state’s foreclosure mediation statutes, if proven at trial, could be found to be immoral, unethical, oppressive, or unscrupulous. As discussed, the plaintiffs alleged that the defendant repeatedly switched their primary point

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of contact and they were often unable to get the assigned point of contact on the phone. When the plaintiffs did speak with an individual, that person often made inaccurate statements or could not locate anything the plaintiffs had previously submitted. The defendant also repeatedly required resubmission of documents previously provided. With respect to the defendant's evaluation of the plaintiffs' modification applications, the defendant repeatedly provided ambiguous explanations for denying their modifications or denied modifications on the pretext of an inability to contact the plaintiffs, nonexistent investor restrictions, and an inaccurate net present value calculation based on an inflated property value. The defendant also repeatedly failed to provide the plaintiffs with a response to a complete loss mitigation application within the proscribed time frame, often resulting in applications pending for *hundreds* of days. These allegations go beyond mere negligence and amount to a conscious departure from known, standard business norms.¹⁸ See, e.g., *Ulbrich v. Groth*, supra, 310 Conn. 435–37 (jury reasonably could have found bank's failure to inform potential buyers that some items of property did not belong to debtors was “not merely negligent or incompetent, but involved a conscious departure from known, standard business norms and was therefore unscrupulous, ‘within at least the penumbra of some . . . statutory, or other established concept of unfairness’ ”); id., 435 (bank's actions were “the result of a conscious decision not to perform a known obligation”).

We note that other courts have concluded that allegations of improper handling of loan modification applica-

¹⁸ We are mindful that Regulation X did not come into effect until January 10, 2014. As such, the plaintiffs' reliance on conduct in violation of RESPA must be limited to actions that occurred on or after that effective date. See *Campbell v. Nationstar Mortgage*, 611 Fed. Appx. 288, 297 (6th Cir.) (Regulation X's effective date reflects intent not to apply it to conduct occurring prior to that date), cert. denied, ___ U.S. ___, 136 S. Ct. 272, 193 L. Ed. 2d 137 (2015).

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tions are sufficient to state a claim under state consumer protection laws. See, e.g., *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 574–75 (7th Cir. 2012) (ineffectual implementation of HAMP was sufficient to state claim under Illinois consumer protection act); *Tanasi v. CitiMortgage, Inc.*, supra, 257 F. Supp. 3d 275 (allegations that bank deceptively solicited modification agreements and that bank’s communications were confusing and deceptive was sufficient to state CUTPA claim); *Walker v. Deutsche Bank National Trust Co.*, United States District Court, Docket No. 3:16-cv-697 (AWT) (D. Conn. March 24, 2017) (allegations that bank repeatedly asked for documents over six year period, bad faith use of mediation program and breached modification agreements was sufficient to state CUTPA claim); *Ayoub v. CitiMortgage, Inc.*, supra, 2018 WL 1318919, *5 (allegations of repeated “ambiguous and opaque explanations” for denying loan modification applications was sufficient to state Massachusetts consumer protection act claim); *Kirtz v. Wells Fargo Bank, N.A.*, United States District Court, Docket No. 12-10690 (DJC) (D. Mass. November 29, 2012) (allegations that bank’s history of requiring borrower to resubmit same documents to support HAMP loan modification coupled with repeatedly changing bank officials in charge of requested modification and closing file on pretext of inability to contact borrower was sufficient to state claim under Massachusetts consumer protection act).

In addition to their allegations that the defendant improperly had handled loan modification applications, the plaintiffs alleged that the defendant had discouraged them from participating in the state’s foreclosure mediation program by misrepresenting the program’s utility. The defendant allegedly sent the plaintiffs a letter claiming that it is a “‘common misconception’” that a borrower will receive a better resolution in mediation and

encouraging the plaintiffs to work outside of court so as “to avoid the inconvenience of holding a hearing.’” The defendant allegedly engaged in a statewide practice of sending similar letters to borrowers in an attempt to reduce the extent of supervision the court could exercise over the defendant’s loan modification review process. Viewed in the light most favorable to the plaintiffs, this claim alleges that the defendant used an unscrupulous and deceptive practice to induce the plaintiffs, and other borrowers, into forgoing their right to elect to participate in the state’s foreclosure mediation program. See, e.g., *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597, 577 A.2d 1009 (1990) (“[A]n act or practice is deceptive if three requirements are met. ‘First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct.’” [Footnote omitted.]), cert. denied, 498 U.S. 1088, 111 S. Ct. 966, 112 L. Ed. 2d 1053 (1991).

With regard to the effect of these violations, the plaintiffs allege that the permanent HAMP loan modification agreement provided to them by the defendant included “tens, if not hundreds, of thousands of [dollars in] new principal consisting of improper and illicit charges such as attorney’s fees . . . other default fees that should never have been [in]curred, commencing a second foreclosure action for no reason, and accrued interest . . . far [in] excess of what [the plaintiffs] would pay had [the defendant] timely and properly evaluated their initial loan modification application.” These allegations provide additional support for the conclusion that the defendant’s conduct was immoral, unethical, oppressive, or unscrupulous. See, e.g., *Votto v. American Car Rental, Inc.*, supra, 273 Conn. 485; see also *Monetary*

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Funding Group, Inc. v. Pluchino, 87 Conn. App. 401, 413, 867 A.2d 841 (2005) (mortgagee’s intentional misconduct with respect to transaction in order to obtain excessive fees and costs satisfied second cigarette rule criterion).

The plaintiffs further allege that the defendant’s conduct was a result of a widespread policy that prevented borrowers from receiving HAMP modifications. This allegation is based on affidavits from employees of the defendant taken in connection with a motion for class certification in a federal action filed against the defendant. See *Sheely v. Bank of America, N.A.*, 36 F. Supp. 3d 1364, 1372 (2014); see also *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, Docket No. M.D.L. 10-2193 (RWZ), 2013 WL 4759649 (D. Mass. September 4, 2013). Specifically, the plaintiffs alleged that the defendant had a corporate culture of intentional and wrongful conduct. Such conduct included requiring customers to return documents on short notice but waiting months before reviewing such documents, training employees to falsely tell homeowners that it had not received their documents, allowing employees to remove documents from homeowners’ files in order to make the accounts appear ineligible for modification, training employees to perform a “blitz” twice a month, during which the defendant would order case managers and underwriters to deny any HAMP applications in which the financial documents were more than sixty days old, and failing to adequately train and staff the departments responsible for processing HAMP modifications. Such an allegation further supports a determination that the defendant’s conduct was immoral, unethical, oppressive, or unscrupulous. Cf. *Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 729, 652 A.2d 496 (1995) (statutory noncompliance was not unfair, deceptive or oppressive when it was “isolated instance of misinter-

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pretation by the defendant of its obligations due to the unique circumstances of this particular case as distinguished from unfair or deceptive acts or practices in the defendant's trade or business"); see *Nickerson-Reti v. Bank of America, N.A.*, Docket No. 13-12316 (FDS), 2018 WL 2271013, *17 (D. Mass. May 17, 2018) ("sworn statements from Bank of America employees made in connection with a different Massachusetts lawsuit" that employees were instructed to delay action on applications, offer more expensive in-house options, and deny applications in which financial documents were more than thirty or sixty days old constituted sufficient evidence from which fact finder could conclude that bank engaged in unfair and deceptive practices). As such, viewed in the light most favorable to sustaining the complaint's legal sufficiency, we conclude that the plaintiffs have sufficiently alleged immoral, unethical, oppressive, or unscrupulous actions that satisfy the second criterion of the cigarette rule.

3

Finally, we turn to the third criterion, which requires us to consider whether the alleged conduct caused substantial injury to the plaintiffs. See *Ulbrich v. Groth*, supra, 310 Conn. 409. In evaluating whether the third criterion is satisfied, we have explained that "not . . . every consumer injury is legally unfair To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." (Internal quotation marks omitted.) *McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, 569–70, 473 A.2d 1185 (1984).

The plaintiffs have sufficiently alleged that they suffered substantial injury from the defendant's conduct. They alleged that the permanent HAMP loan modifica-

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tion agreement “called for a balance that included tens, if not hundreds, of thousands of [dollars in] new principal” Specifically, the plaintiffs alleged that they incurred an accumulation of interest, default fees, significant arrearages, attorney’s fees, and a much higher monthly mortgage payment, lost the opportunity to earn \$5000 in borrower incentive payments under HAMP, and suffered emotional distress. Further, the plaintiffs alleged systematic defects with the defendant’s loan servicing practices, which had the potential to injure a large number of other consumers. See *Stephens v. Capital One, N.A.*, Docket No. 15-cv-9702, 2016 WL 4697986, *6 (N.D. Ill. September 7, 2016) (“[d]efendant’s expansive consumer base . . . allows the [c]ourt to reasonably infer that a large consumer base may be at risk for similar conduct that has been alleged to qualify as ‘unfair’ under the [state’s consumer protection act]”).

There is also a sufficient basis to infer that the defendant’s practices are not outweighed by countervailing benefits to consumers or competitors, as the legal requirements prescribed under HAMP, RESPA and the other obligations have already been weighed in that balance. The defendant has identified no benefit that inures to the consumer by allowing it to provide untimely, incomplete, and inaccurate information. Insofar as the defendant asserts that requiring servicers to timely and appropriately process HAMP modification applications will deter such entities from engaging in the modification process, that might be the case if we were concluding that minor, infrequent, unintentional delays and/or errors in processing applications provide a basis for a CUTPA claim. We plainly are not.¹⁹ The

¹⁹ As previously discussed, the plaintiffs alleged that the defendant had engaged in numerous, systematic abuses of the mortgage modification process. The defendant not only violated the public policies embodied in HAMP and RESPA but also the 2011 consent order and the national mortgage settlement, to which it was a party. Indeed, the 2011 consent order and the national mortgage settlement were the result of findings that the defendant had not been executing HAMP modification reviews with the “high standard of care” required by the program. See *United States v. Bank of America*

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defendant's alleged practices could hardly be characterized as simply a "technical violation" of a statute; *Normand Josef Enterprises, Inc. v. Connecticut National Bank*, supra, 230 Conn. 524; an inadvertent violation of a statute; *Gaynor v. Union Trust Co.*, 216 Conn. 458, 483, 582 A.2d 190 (1990); or an isolated incident of a good faith mistake. *Jacobs v. Healey Ford-Subaru, Inc.*, supra, 231 Conn. 728–29.²⁰ There continues to be a financial incentive for investors to have their loan servicers modify loans rather than undertake foreclosure in appropriate cases. See, e.g., A. Levitin, "Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy," 2009 Wis. L. Rev. 565, 568 (2009) ("lenders are estimated to lose from 40 to 50 percent of their investment in a foreclosure situation"). Indeed, that is the purpose of HAMP's net present value test. See J. Chiles & M. Mitchell, "HAMP: An Overview of the Program and Recent Litigation Trends," 65 Consumer Fin. L. Q. Rep. 194, 196 (2011) ("[net present value] test is a mathematical formula used to determine whether the mortgage investor would make more money by approving a modification or by allowing the subject property to go into foreclosure"); A. Sarapinian, supra, 64 Hastings L.J. 918 (net present value test "is a formula that determines whether it would be more profitable for servicers and the loan's investors to approve a modification or to foreclose on the property"). Permitting recovery based on allegations that a servicer made continuous and systematic departures from known standards is not outweighed by any benefits to loan servicers in escaping liability for such actions.

Corp., supra, United States District Court, Docket No. 1:12-cv-00361 (RMC); *In re Bank of America, N.A., Charlotte, NC*, supra, 2011 WL 6941540, *2; HAMP Supplemental Directive 09-08, supra, p. 1. We do not have occasion to address whether a servicer would be liable if any of these aggravating factors were not present.

²⁰ The trial court's concern that it is not "appropriate or productive to adopt a requirement of 'just right' pacing of foreclosure mediation and negotiations, where too fast or too slow (including inefficiency and perhaps some level of incompetence) might result in . . . CUTPA based liability" is therefore misplaced.

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Undoubtedly, the plaintiffs could have avoided their injuries had they not defaulted on their mortgage. But that is the case in every situation involving a modification process for a financially troubled borrower. Borrowers, however, generally do not choose their loan servicer, and, consequently, any injuries sustained as a result of the improper handling of a loan modification process are not ones that consumers could have reasonably avoided. Thus, we conclude that, on balance, the plaintiffs have alleged conduct that caused them substantial injury.

Mindful that CUTPA is a broad remedial statute, and given the degree to which the defendant's alleged conduct, viewed in the light most favorable to sustaining the legal sufficiency of the complaint, violates each cigarette rule criterion, we conclude that the plaintiffs have alleged a CUTPA violation sufficient to survive a motion to strike. Accordingly, we reverse the judgment of the trial court insofar as that court struck the CUTPA count of the plaintiffs' complaint.

B

Negligence

We now turn to the plaintiffs' claim that the defendant's alleged misconduct during the course of the loan modification negotiations was negligent. Although it is not clear from the complaint, the plaintiffs, on appeal, contend that they have alleged two theories of negligence: (1) they were owed a common-law duty of care arising out of HAMP, RESPA, the state's foreclosure mediation statutes, the 2011 consent order, and the national mortgage settlement; and (2) the requirements imposed by RESPA and this state's foreclosure mediation statutes establish a duty of care, the violations of which constitute negligence per se.

We begin with the plaintiffs' common-law theory. "The essential elements of a cause of action in negli-

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gence are well established: duty; breach of that duty; causation; and actual injury. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action. . . . Thus, [t]here can be no actionable negligence . . . unless there exists a cognizable duty of care.” (Internal quotation marks omitted.) *Mazurek v. Great American Ins. Co.*, 284 Conn. 16, 29, 930 A.2d 682 (2007). A duty of care “may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act.” *Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 375, 441 A.2d 620 (1982). “[T]he test for the existence of a legal duty [of care] entails (1) a determination of whether an ordinary person in the defendant’s position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant’s responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in this case.” (Internal quotation marks omitted.) *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 328–29, 107 A.3d 381 (2015).

The plaintiffs contend that we should recognize a common-law duty requiring a loan servicer to use reasonable care in the review and processing of a mortgagor’s loan modification applications. We decline to do so.

We agree with the plaintiffs that, based on the defendant’s extensive experience servicing defaulted mortgages, it was foreseeable that, if the defendant failed to timely and efficiently review their loan modification applications, the plaintiffs would suffer financial harm as a result. Foreseeability that harm may result if a duty of care is not exercised does not mean “that one charged

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with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result" (Internal quotation marks omitted.) *Jarmie v. Troncale*, 306 Conn. 578, 590, 50 A.3d 802 (2012). A sophisticated loan servicer, like the defendant, should reasonably foresee that an unnecessarily prolonged period of default caused by the negligent handling of loan modification applications would cause a borrower to suffer financial injury, such as attorney's fees and additional interest and default fees. In fact, as we explained in part III A of this opinion, this effect is alleged to have been the defendant's objective.

"[A] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Munn v. Hotchkiss School*, 326 Conn. 540, 549–50, 165 A.3d 1167 (2017).

"[I]n considering whether public policy suggests the imposition of a duty, we . . . consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoid-

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ance of increased litigation; and (4) the decisions of other jurisdictions. . . . [This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence.” (Citation omitted; internal quotation marks omitted.) *Ruiz v. Victory Properties, LLC*, supra, 315 Conn. 337. The second and third factors are analytically related and considered together. See *Lawrence v. O & G Industries, Inc.*, 319 Conn. 641, 658, 126 A.3d 569 (2015). “[I]n considering these two factors, [we] at times [have] employed a balancing test to determine whether, in the event that a duty of care is recognized by the court, the advantages of encouraging participation in the activity under review outweigh the disadvantages of the potential increase in litigation.” *Bloomfield Health Care Center of Connecticut, LLC v. Doyon*, supra, 185 Conn. App. 371. “We acknowledge that as in any case that involves the question of whether our public policy, as a matter of common law, should recognize a new cause of action, the ultimate decision comes down to a matter of judgment in balancing the competing interests involved.” *Mendillo v. Board of Education*, 246 Conn. 456, 495, 717 A.2d 1177 (1998), overruled in part on other grounds by *Campos v. Coleman*, 319 Conn. 36, 37–38, 123 A.3d 854 (2015).

As a general matter, the law does not impose a duty on lenders to use reasonable care in its commercial transactions with borrowers because the relationship between lenders and borrowers is contractual and loan transactions are conducted at arm’s length. See *Saint Bernard School of Montville, Inc. v. Bank of America*, 312 Conn. 811, 836, 95 A.3d 1063 (2014) (“[g]enerally there exists no fiduciary relationship merely by virtue of a borrower-lender relationship between a bank and its customer” [internal quotation marks omitted]); *Southbridge Associates, LLC v. Garofalo*, 53 Conn. App.

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11, 19, 728 A.2d 1114 (“[a] lender has the right to further its own interest in a mortgage transaction and is not under a duty to represent the customer’s interest”), cert. denied, 249 Conn. 919, 733 A.2d 229 (1999). The question, therefore, is whether to treat a relationship between an investor’s loan servicer and a mortgagor differently in the context of the former’s review and processing of a loan modification application.

With respect to the normal expectations of the participants in the activity, the plaintiffs argue that they “reasonably expected that the defendant, a large national institution with dozens of retail banking branches in their own state, would review their loan workout applications in a timely and accurate manner” and that the defendant “should reasonably expect that it will need to follow the rules to which it is subject.” We agree. This factor, however, is just one in the totality of the circumstances assessment.

As to the second and third factors, we agree with the defendant that imposing a duty of care could inhibit participation in the loan modification process and increase litigation. Recognizing a duty of care and, consequently, a negligence cause of action, would have far-reaching consequences that extend beyond anything implicated under CUTPA.²¹ In part III A of this opinion, we concluded that the plaintiffs’ allegations, if credited, would allow a jury to conclude that the defendant engaged in numerous, systematic abuses that prevented homeowners from receiving HAMP modifications and, as such, were sufficiently unfair and deceptive to state a claim under CUTPA. If the court were to recognize a common-law duty of care, however, it could result in

²¹ As we discuss in greater detail in part III A 1 of this opinion, the policy considerations implicated in our CUTPA analysis are different from those implicated in the negligence context. Loan servicer misconduct is more appropriately addressed by a statute targeted at business practices, like CUTPA, rather than a generic common-law principle, like negligence.

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loan servicer liability for isolated violations or far less consequential violations of the loan modification process, which would hinder servicer participation in the modification process. Indeed, several courts have explained that recognizing a private right of action under HAMP for mere negligence “would likely chill servicer participation based on fear of exposure to litigation.” *Miller v. Chase Home Finance, LLC*, 677 F.3d 1113, 1116 (11th Cir. 2012); see *Zoher v. Chase Home Financing*, Docket No. 10-14135-CIV, 2010 WL 4064708, *4 (S.D. Fla. October 15, 2010) (no implied private right of action because servicers would be discouraged “from participating in the program because they would be exposed to significant litigation expenses”). “[B]y creating a compliance vehicle through [the Federal Home Loan Mortgage Corporation, known as] Freddie Mac and by including reporting requirements, the HAMP [g]uidelines already designated a scheme to correct . . . any mortgagee wrongdoing.” (Internal quotation marks omitted.) *Zoher v. Chase Home Financing*, supra, *4.

With respect to the national mortgage settlement and the 2011 consent order, although the defendant agreed to comply with the more stringent servicing standards when it entered into these settlements, they do not create a special relationship between lenders and borrowers that would give rise to a legal duty. See *Miller v. Bank of New York Mellon*, 379 P.3d 342, 348 (Colo. App. 2016) (“courts across the country have held that the [national mortgage settlement] did not create a special relationship between lenders and borrowers”); *id.* (citing cases holding that no such relationship was created). Furthermore, as incidental third-party beneficiaries of the national mortgage settlement and the 2011 consent order, individual borrowers do not have standing to sue to protect the benefits that they confer. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,

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750, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975) (consent decree is “not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it”); *Securities & Exchange Commission v. Prudential Securities, Inc.*, 136 F.3d 153, 159 (D.C. Cir. 1998) (“[w]hen a consent decree or contract explicitly provides that a third party is not to have enforcement rights, that third party is considered an incidental beneficiary even if the parties to the decree or contract intended to confer a direct benefit upon that party”). Indeed, courts have rejected claims by individual borrowers under the national mortgage settlement. See, e.g., *Ghaffari v. Wells Fargo Bank, N.A.*, 6 F. Supp. 3d 24, 30 (D.D.C. 2013) (“claims by individual borrowers . . . are excluded from the [national mortgage settlement]”); *Miller v. Bank of New York Mellon*, supra, 347 (“numerous federal and state courts . . . have unanimously rejected homeowner claims against their lenders premised on the [national mortgage settlement], holding that homeowners lack standing to enforce it”). If we were to find that the national mortgage settlement or the 2011 consent order gives rise to a duty owed to incidental beneficiaries, it would discourage parties from resolving issues in this manner and run afoul of our strong public policy in favor of the voluntary settlement of civil suits. See *Allstate Ins. Co. v. Mottolese*, 261 Conn. 521, 531, 803 A.2d 311 (2002).

Moreover, loan servicers are already exposed to liability for violations of RESPA’s implementing regulation, Regulation X; see 12 U.S.C. § 2605 (f) (2012); 12 C.F.R. § 1024.41 (a) (2014); and civil penalties for violations of the national mortgage settlement; see P. Lehman, supra, p. 3; and 2011 consent order; see *In re Bank of America, N.A., Charlotte, NC*, supra, 2011 WL 6941540, *16. This state’s foreclosure mediation statutes similarly allow for the use of sanctions to deter and

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punish inappropriate conduct during the course of mediation. See General Statutes § 49-31n (c) (2). As such, it is not likely that imposing a new duty on loan servicers will further incentivize them to carry out their review of loan modification applications with any more due care, but it will increase litigation. See, e.g., *Lawrence v. O & G Industries, Inc.*, supra, 319 Conn. 659 (“[W]e observe that expanding the defendants’ liability in this industrial accident context to include the purely economic damages suffered by other workers on site appears likely to increase the pool of potential claimants greatly. At the same time, the recognition of such a duty fails to provide a corresponding increase in safety, given that companies like the defendants are subject to extensive state and federal regulation, and already may be held civilly liable to a wide variety of parties who may suffer personal injury or property damage as a result of their negligence in the industrial or construction context.” [Footnote omitted.]). Thus, we agree with the defendant that, under the second and third factors, imposing a duty on a loan servicer would frustrate the loan modification process and lead to increased litigation.

Finally, the plaintiffs concede that the fourth factor, the decisions of other jurisdictions, does not cut in either party’s favor. See *Blanco v. Bank of America, N.A.*, Superior Court, judicial district of Hartford, Docket No. CV-15-6060162-S (April 20, 2016) (“[a]lthough this court’s own independent research reveals that some jurisdictions have imposed a duty of care on entities in the defendant’s position, it is apparent that no clear consensus exists”). We note, however, that numerous courts have concluded that neither HAMP nor the relationship between a borrower and servicer/lender imposes any duty of care owed by lending banks and servicers to borrowers. See, e.g., *MacKenzie v. Flagstar Bank, FSB*, 738 F.3d 486, 495–96

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(1st Cir. 2013) (relationship between borrower and lender does not give rise to duty of care, and failure to abide by servicer participation agreement or HAMP when processing loan modifications does not give rise to negligence claim); *Legore v. OneWest Bank, FSB*, 898 F. Supp. 2d 912, 918 (D. Md. 2012) (plaintiff could not rely on alleged violation of HAMP guidelines as sole basis for negligence claim because Congress did not intend to create private right of action); *Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 800 (S.D.N.Y. 2011) (servicer participation agreement and HAMP did not impose duty on financial institutions with respect to borrowers, and banks do not owe duty of care to borrowers); *Brown v. Bank of America Corp.*, United States District Court, Docket No. 10-11085 (D. Mass. March 31, 2011) (HAMP guidelines do not create duty of care); *U.S. Bank, N.A. v. Phillips*, 318 Ga. App. 819, 826, 734 S.E.2d 799 (2012) (“[t]he provisions of HAMP do not plainly impose a legal duty intended to benefit homeowners, so as to authorize a private negligence cause of action”); *Santos v. U.S. Bank National Assn.*, 89 Mass. App. 687, 699, 54 N.E.3d 548 (“[i]t is now [well established] that, as a matter of law, HAMP does not create a duty of care owed by mortgagees to mortgagors”), review denied, 476 Mass. 1103, 63 N.E.3d 387 (2016).

As we have observed, “[c]ourts operating in the quintessential common-law context—that is, when they are asked to recognize a new common-law cause of action—function best, and command the most respect, when their decisions can be defended on grounds of reason and principle.” *Mendillo v. Board of Education*, supra, 246 Conn. 486. Thus, we “should demand a very strong showing of policy reasons before doing so.” *Id.*, 487. In our view, on balance, that showing does not exist here. Thus, because we conclude that the defendant did not owe a common-law duty of care to the plaintiffs,

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the trial court properly struck the plaintiffs' common-law negligence count.²²

The plaintiffs contend, however, that their negligence count also may be construed to extend to a theory of negligence per se. The defendant contends that this claim is not properly before us. It points out that the plaintiffs did not allege negligence per se in their complaint and did not allege the violation of any specific statute by the defendant that would support a negligence per se claim. The plaintiffs also did not raise the issue of negligence per se in their motion to reargue, seek an articulation from the trial court on this purported claim, or seek to plead it in a revised complaint.

In response, the plaintiffs contend that they adequately pleaded negligence per se in paragraph 174 of their complaint, wherein they alleged that the defendant "breached a duty imposed by federal regulations and state statutes," and in paragraph 177 of their complaint, wherein they alleged that "such breach caused their injury." The plaintiffs also contend that they defended their negligence per se claim in their opposition to the defendant's motion to strike.

To state a claim of negligence per se, the plaintiffs must satisfy a two-pronged test: (1) they are within the class of persons intended to be protected by the statute; and (2) their injury is the type of harm that the statute was intended to prevent. See, e.g., *Gore v. People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995). "The doctrine of negligence per se serves to superimpose a legislatively prescribed standard of care on the general standard of care." *Staudinger v. Barrett*, 208 Conn. 94, 101, 544 A.2d 164 (1988).

²² We note that the plaintiffs concede in their brief that, if we determine an increase in litigation is likely and decline to find a common-law duty of care, "the solution would be to strike the common-law aspects of the negligence claim"

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Nowhere in the complaint do the plaintiffs specifically allege negligence per se. Nor do they identify particular legal provisions that the defendant violated. Even in their opposition to the defendant's motion to strike, on which the plaintiffs rely, they did not identify which statutory provisions established the standard of care that the defendant violated.²³ The plaintiffs were required to plead their claim of negligence per se with greater specificity. See, e.g., *White v. Mazda Motor of America, Inc.*, 313 Conn. 610, 631, 99 A.3d 1079 (2014) (“an issue must be ‘distinctly raised’ before the trial court, not just ‘briefly suggested’”). As the plaintiffs acknowledge in their brief, the violation of a statute may constitute negligence per se, or create a presumption of negligence, or make out a prima facie case of negligence, or constitute evidence of negligence. See, e.g., *Ward v. Greene*, 267 Conn. 539, 548, 839 A.2d 1259 (2004); see also *Vermont Mutual Ins. Co. v. Fern*, 165 Conn. App. 665, 672 n.7, 140 A.3d 278 (2016). The plaintiffs' simple assertion in their opposition to the defendant's motion to strike that the defendant violated RESPA and this state's foreclosure mediation statutes was not sufficient to put the defendant and the trial court on notice that they were advancing a theory of negligence per se. This lack of notice is reflected in the trial court's failure to address negligence per se in its decision granting the motion to strike. The plaintiffs could have but failed to seek an articulation and made no mention of negligence per se in their motion to reargue. We conclude that the plaintiffs did not raise this claim distinctly before the trial court. “The requirement that [a] claim be raised distinctly [before the trial court] means that it must be so stated as to bring to

²³ Similarly, in their brief before this court, the plaintiffs broadly argue that the defendant “routinely flouted the statutory objectives of the mediation program” and “did not comply with [Regulation X's] requirements to provide accurate information about loss mitigation options, exercise reasonable diligence in reviewing the [plaintiffs'] loss mitigation applications, or comply with the appeal requirements of the regulation.”

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the attention of the court the *precise* matter on which its decision is being asked.” (Emphasis in original; internal quotation marks omitted.) *Remillard v. Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010). Accordingly, it would not be appropriate for this court to consider this claim as a basis to reverse the trial court’s decision granting the motion to strike the negligence count.

The judgment is reversed with respect to the claim alleging violations of CUTPA and the case is remanded with direction to deny the defendant’s motion to strike that claim and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.
