

USFN[®] Report

Updates on Mortgage Industry Trends

Winter 2015

Does More Change Mean Less Change?

by **Donna M. Case-Rossato**
 Hunt Leibert
 USFN Member (CT)
 Chair, USFN Legal Issues Committee

AS I PREPARED TO WRITE THIS, my very first “column” as the incoming USFN Legal Issues Committee Chair, I did what every lawyer does: research precedent; I read prior columns. I started with Spring 2012 and worked my way through Autumn 2014. Through three USFN Presidents, and a plethora of Committee Chairs, there was a very

see *Does More Change Mean Less Change?* on page 9



D. Case-Rossato



Foreclosure Law

Uniformity in Our Future?

by **Michael L. Zevitz** by **Wendy Walter**
 South & Associates, P.C. RCO Legal, P.S.
 USFN Member (KS, MO) USFN Member (AK, OR, WA)

YOU MAY NOT BE FAMILIAR with the Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), but you’ve probably had exposure to some of the laws it has helped to promulgate. For instance, there have been many uniform laws that have contributed substantially to the real estate industry over the years: the Uniform Commercial Code, the Consumer Credit Code, the Electronic Transactions Act, the Real Property Electronic Recording Act, the Rules of Evidence ... and the list goes on. The ULC, now in its 123rd year, comprises more than 350 practicing lawyers, governmental lawyers, judges, law professors, and lawyer-legislators who have been

see *Foreclosure Law* on page 5



M. Zevitz



W. Walter

Features

Foreclosure Law	1
Proposed Changes to the CFPB Mortgage Servicing Rules	6

Departments

Legal Issues Update	11
HOA Talk	12
Bankruptcy Update	16

Connections

From the President	2
Members Moves + News	3
Servicers Bulletin Board	4
Calendar	18
Member Directories	18

appointed by state governments to research, draft, and promote enactment of uniform laws in areas of state law where uniformity is desirable and practical.

Pending before the ULC is the Home Foreclosure Procedures Act (HFPA or the Act). In 2012, just a few years after the outbreak of the worst financial crisis since the Great Depression, the ULC drafting committee embarked on a journey to bring some uniformity to the vagaries and variances that abound in foreclosure procedures across the country. The kick-off meeting welcomed 55 stakeholders representing 40 different organizations. Some of the attendees included FHFA, American Bankers Association, Fannie Mae, Freddie Mac, MERS, MBA, and the Federal Reserve Board. The ULC commission has gone to great lengths to involve as many stakeholders as possible, including those representing borrowers and consumer credit organizations.

Recognizing that the nationwide split between judicial and nonjudicial foreclosure is roughly 50-50, the ULC seeks to provide uniformity in select practices and procedures that have commonality in residential mortgage foreclosure actions. Realizing that foreclosure actions are governed by the law in the state in which the property is located, one of the high priorities of the ULC is to achieve “enactability.” In other words, there must be a reasonable probability that the Act (when approved) either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly. It should be pointed out that the scope of the proposed act, as a policy matter, would continue as an overlay to existing state foreclosure laws and not as a replacement to those existing laws. As a consequence, unless expressly repealed or changed, states may continue judicial foreclosure, nonjudicial foreclosure, or a combination of the two.

The HFPA attempts to strike a balance between providing a foreclosure remedy that is undertaken with due care for homeowners and setting up a solid procedural guidepost for the mortgage servicer, bringing clarity and consistency to the forefront of the many hotbed issues that have been raised in the last several years. This article will give a brief summary of the more poignant sections of the model act, as of the latest draft of the Act that is dated November 2014.

Article 2 – Notice of Default and Right to Cure

This section would require a creditor to send, to an obligor, a notice of default and right to cure, 30 days before initiating a foreclosure process. The contents of the notice closely mimic the Acceleration and Remedies paragraph found in the standard Fannie Mae/Freddie Mac Uniform Instrument. The notice can be sent by first-class mail, containing an “itemization of the

amount due” as of the date of the notice. The notice must also contain a statement as to the creditor’s right to foreclose (proof of legal standing) and the name of the legal owner of the obligation, if the creditor is not the legal owner of the note and security instrument. The mortgage obligation may be accelerated by filing a complaint, scheduling a sale, or by separate notice of acceleration. The notice of intent to foreclose does not, by itself, accelerate the debt.

Article 3 – Early Resolution

Yesterday’s mediation has become today’s “Early Resolution.” In the wake of the 2008 foreclosure crisis, 18 states have installed mediation programs aimed at preventing foreclosures. The CFPB has adopted regulations that will require mortgage servicers to notify homeowners of foreclosure alternatives prior to foreclosure sales. The HFPA would establish a uniform structure for mediation programs, leaving many details to a court or agency rulemaking process, and deferring to the CFPB the rules as to servicer duties to notify homeowners about foreclosure alternatives, and handling homeowner loss mitigation applications appropriately. Ideally, the HFPA would encourage mediation to occur between the notice of default (Article 2) and the first legal notice or filing. The draft Act establishes a framework outlining the contents of the notice, eligibility for the program, and proscribes conduct during the meeting. The HFPA leaves broad latitude to the responsible state agency in designing the program. The Act provides additional guidance by appending 30 rules that would help govern the Early Resolution process.

Article 4 – Right to Foreclose and Sale Procedures

To address later possible challenges to legal standing or real party in interest, the HFPA proposes that only a person entitled to enforce the obligation secured by the mortgage may commence foreclosure. Here’s a potential game changer: if the obligation is registered in a “Mortgage Registry,” the only person who may commence a foreclosure is the person designated as owner or holder of the obligation by the registry, as of the time that foreclosure is commenced. A national mortgage registry does not presently exist, but there is substantial interest in its creation. The foreshadowed Mortgage Registry would exist if a number of federal agencies (including the Federal Reserve, FHFA, and Treasury) create a new federally-mandated system for the electronic recording and tracking of promissory notes, mortgages, and other related mortgage documents.

The “Notice of Public Sale” must be mailed to the property address at least 30 days prior to the sale. The creditor must

see Foreclosure Law on page 9

pronounced theme: Change, with a capital “C.” There was everything from “Seasonal Changes” to “Changing for the Better” to “Change and Evolution” to “Make Way for Change,” and even a nod to Bob Dylan’s song about changing times. It appears that this theme is not about to stop — or change!

All of us who have weathered the storm these last five years in the industry have done so by adapting and changing. Whether we are lenders, servicers, investors, insurers, or their counsel, we have all developed new processes, new procedures, and even entirely new outlooks. This is due to changes in regulations, statutes, case law, consent orders, and rigorous policy standards. But where has all of this change led us: Are we moving toward a future of uniformity? Have we finally reached the “just tinkering” stage?

The feature articles in this Winter issue highlight these prospects. Michael Zevitz and Wendy Walter have done an excellent job presenting information on the Uniform Law Commission’s attempt to focus on injecting some uniformity (hence “Uniform”) to the patchwork quilt of state laws governing the foreclosure process. The commission has done so by way of the proposed Home Foreclosure Procedures Act (HFPA). Some form of consistency and clarity is exactly what we all need at this point, and the possibilities posed by HFPA are intriguing, to say the least.

And the tinkering continues with the CFPB and Mortgage Servicing Rules. Wendy Walter has been a very busy author. She

has provided us with an important discussion of the 492-page proposed amendments to the servicing rules released by the CFPB late last year. I know: 492 pages seems to be more than “tinkering,” but let’s hope that this is the last of it. Stay tuned; there is more to come on the topic as 2015 progresses.

Lastly, I’d like to thank two individuals whose help has been, and will continue to be, invaluable. My predecessor as committee chair, Lee Perres, has offered guidance and set a precedent that is hard to match. We have worked together a lot over the last several years and have become good friends. Good friends can be tough to find in this industry, and I am ever grateful for Lee’s help and words of encouragement. Moreover, thank goodness for Wendy Walter’s endless energy, dedication and, most importantly, her willingness to be Vice Chair of the Legal Issues Committee. She is everywhere you need her to be and is always volunteering to assist. I sometimes think that there are actually two of her, because one person could not do this much. I look forward to my partnership with Wendy over the next few years. There is much to do.

The USFN Legal Issues Committee hopes that you find the content of this edition helpful as you move through this New Year. There is a lot more out on the horizon. Please feel free to contact us at any time at info@usfn.org with suggestions, questions, or comments. We’d love to hear from you. ■

publish a commercially reasonable public advertisement of the sale, either by publishing in a newspaper once per week for three consecutive weeks, not more than 30 days prior to sale; or by posting on an internet website that is reasonably expected to be viewed by persons having an interest in purchasing the property, at least 21 days before the sale. This is an acknowledgment that traditional printing methods may no longer be the best means of generating the highest and best bids in a public auction, and that there may be more effective technology solutions available (the internet being the most obvious). Furthermore, the full legal description would no longer be required in the Act, and the drafters highlight the fact that legal descriptions are seldom of importance to a person who reads a foreclosure advertisement with an eye toward purchasing the property. The Act requires the creditor to send a copy of the advertisement (or internet posting) to the homeowner and to each obligor, no later than the date of the first publication.

The Act provides for the postponement of the sale for “any reason;” however, the committee dropped the “good faith” qualifier on this postponement section. The sale date does not need

to be republished, unless the rescheduled sale is more than 30 days after the date from which it is postponed. What is not clear is whether this relates back to the original sale date, or if it only looks back to the previous sale date and the gap in time between those two dates. Notice of the postponement must be given to the homeowner and obligor, but if they are present at the sale, an oral notice of the new date would suffice. If there is not a subsequent date given, the Act defines this as a “cancellation,” and a notice of the cancellation must be provided to the homeowner and obligor.

Article 5 - Negotiated Transfer

A homeowner and a creditor may negotiate a transfer of mortgaged property to the creditor, in full satisfaction of the obligation to the creditor secured by the mortgaged property, if the homeowner and creditor agree to the transfer in writing. This section authorizes a transfer from the homeowner to the creditor in full satisfaction of the debt. There is a due process element to

see Foreclosure Law on page 10

give notice and an opportunity for hearing to junior lienholders as well as other types of creditors. In so doing, it provides a framework for existing workout arrangements such as cash-for-keys and deeds-in-lieu of foreclosure transactions. This section provides for a safe harbor by specifying the effect of a transfer that meets certain requirements. The important innovations here are, first: to provide an expedited procedure to discharge junior liens on the property without the need for a foreclosure sale; and, second: to resolve a number of collateral issues that flow from the expedited procedure.

Article 6 – Abandoned Property

The Act also addresses vacant and abandoned properties by authorizing an expedited foreclosure procedure for both judicial and nonjudicial foreclosures. An expedited procedure addresses the social impact that defaults bring to society. By providing for an expedited foreclosure procedure, this section seeks to return abandoned properties to the stock of occupied, well-maintained housing as soon as reasonably possible. The Act defines “abandonment” and outlines procedures for determining whether property is abandoned in both the judicial and nonjudicial foreclosure settings, and it provides a process for withdrawing those proceedings as well. If property is determined abandoned, the judicial foreclosure procedure would allow the court to order the sale of the property no later than 30 days after the entry of the judgment of foreclosure. For a nonjudicial foreclosure, the process contemplates having a governmental agency make the determination on abandonment, and the Act provides that the sale of the abandoned property may occur within 30 days (but not later than 60 days) after the determination. The determination process will allow for expedited foreclosure, but imposes a duty on the creditor to maintain the abandoned property up until the foreclosure sale, or release of the mortgage or security interest.

Article 7 - Remedies

In a judicial foreclosure proceeding, if a creditor is shown to have committed a material violation of the Act, the court may dismiss the action, stay the action on appropriate terms and conditions, or impose other appropriate sanctions until the violation is cured. In a nonjudicial foreclosure proceeding, a

homeowner may initiate an action to enjoin or restrain the foreclosure on the grounds that a creditor committed a material violation of this Act. If the court finds that a material violation occurred, the court shall nevertheless allow foreclosure to continue after the violation is cured, unless the court determines that continuation of the foreclosure action would unfairly burden the homeowner. If a material violation is established, the creditor may not add to the amount of the obligation any attorneys’ fees or costs incurred as a result of the violation, before it cures the violation. A homeowner injured by a violation may bring an action for actual damages. In addition to actual damages, a homeowner may recover statutory damages not exceeding \$15,000 in the case of a pattern or practice of noncompliance.

The ULC continues to refine the HFPA and has plans to meet again in February 2015 to further discuss and revise the Act.

Conclusion

At each committee meeting, the ULC is engaging in debates that are also occurring in many legislatures, courts, and mediation hearings taking place in this country every day. The ULC continues to refine the HFPA and has plans to meet again in February 2015 to further discuss and revise the Act. Naturally, writing the rules of the game while it is being played is no easy task.

USFN plans to follow up with another article in the Spring *USFN Report*, diving further into the contemplated Mortgage Registry, as well as to provide an update on the political dialogue about this concept. There is little argument that uniform state and federal laws would be enormously helpful to the mortgage markets; uniform and clear standards would reduce the costs of tracking and complying with myriad state laws and could reduce the cost of housing finance for consumers. This proposed Act may turn out to be the panacea that has been so elusive in the past. ■