

**To:** William Breetz  
**From:** Steven O. Weise  
**Date:** 05/14/2014  
**Subject:** Home Foreclosure Procedures Act – Comments on May 2014 Draft

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## § 102 – Definitions

- “Abandoned property”: “undergoing substantial construction, etc” – distinguishes a kitchen remodel
- “Creditor” – should this term be limited in all cases to persons with a “right” to foreclose? For example, someone who claims, but does not have, that “right” would thus not violate the prohibitions on misrepresentations (§ 105)
- “Creditor” : in the last sentence, it's not clear whether the five threshold is cumulative for owning, servicing, etc.
- “Foreclosure”: this is tied to “terminating” a “homeowner's” interest in the mortgaged property; but “homeowner” does not include tenant and other mortgagees – shouldn't “foreclosure” refer to them also?
- “Holder”: “the person in possession of a negotiable instrument that is payable either to bearer or to an identified person in possession of ~~a~~ the negotiable instrument”
- “Mortgage registry”: if there is a mortgage registry, it may or may not identify “holders of the right to enforce mortgages and obligations secured by mortgages” – rather it might (roughly speaking) operate as a substitute for possession in favor of the registered person and other law (e.g., Article 3) would determine who has the “right” to foreclose, etc. I'd suggest narrowing the definition
- “Residential property”: “The term does not include ~~a parcel of~~ real property that was used or ~~is~~ was intended to be used primarily for non-residential purposes such as farming ... when a mortgage was created.” – “is” sounds present tense and is inconsistent with the last part of the sentence that applies the test when the mortgage “was” created; the first part of the definition does not use “parcel”, so the last part should not, or the “parcel” should be added to the first part

## § 103 – Scope

- It's a little unclear whether the “foreclosure” or the “residential property” must be “in this state” – presumably the property

## § 107 – Servicers

- “Whenever a servicer takes any action authorized or required to be taken by a creditor under this Act, every duty that the Act imposes on the creditor with respect to such action is also a duty of the servicer.”

## § 108 – Waiver

- It would seem that after default, it might be in the homeowner's interest to waive (for itself) provisions such as notice periods to allow for a faster resolution of the situation

## § 109 – Knowledge and notice

- “Organization”: this definition seems out of place

## § 201 – Notice and right to cure

- (a): Here the Act refers to “each” obligor, other places it refers to “obligor” without the “each” – the Act should be consistent in this regard; I'd think that using “each” is better (same comment for “homeowner”)
- (b): a safe harbor form would be great – otherwise every requirement is an invitation for litigation (see, e.g., UCC § 9-614) (see, e.g., § 403, safe harbor form of lost note affidavit)

## § 202 – Manner of delivery

- This refers to “electronic mail”, other places the Act refers to “e-mail” – should be one or the other (see, e.g., § 3.01(d(2)))
- This might state that a notice given by e-mail can be in an attached document using pdf or something similar (i.e., the notice does not have to be in the body of the e-mail itself)

## § 203 – Right to cure default

- (a) “An obligor may cure a monetary default by tendering in cash, a certified check, a funds transfer, or immediately available funds the amount specified ...” – it would be rare to use “cash” and “immediately available funds” does not have a clear meaning
- (b)(3): when and how does the creditor provide the “record”? The obligor should have some right to get this with a reasonable time to get a certified check etc
- (e): does the “full amount” that is paid include any otherwise enforceable prepayment premium?

## § 303 – Eligibility; Facilitation

- (b): the definition of “family member” should include, in additions to “spouses”, state-recognized partners in states that don't recognize same-sex marriages
- (e): It would be very helpful if the Comments gave examples of “good cause” – in particular is lacking funds “good cause” for the homeowner to fail to accomplish some of the actions?

## § 304 – Foreclosure during facilitation

- (b): should the agree to extend be memorialized in some fashion? Will a creditor be allowed to ask for an agreement that no agreement is enforceable unless in a record?

## § 401 – Right to foreclose

- Comment 1 following (a): “state” should be “stated”
- (b)(2): as observed in my comment on the definition of “mortgage registry”, a registry may not “designate” who is entitled to foreclose; it might only say who has “possession” for purposes of rules in other law

- (c): the Act sometimes spells “indorsement” with an “i” and sometimes with an “e” (see, e.g., § 403, Comment 4) (my iPad does not like the “i” version)
- (c)(1): if the holder has possession through an agent (as will be common), should the statement about “possession” refer to the holder or the agent?
- (c)(2): when the “record” evidencing the obligation is electronic, it should be sufficient to present a print out of some sort
- Comment 8: whether the “owner” is the “trustee” should be determined by applicable trust law (I think in most cases it will be the trustee); otherwise this Act could create inconsistencies with trust law

#### **§ 403 – lost note**

- (b)(1): UCC § 3-309 and subsection © of this section give the maker of the note more than a right to “petition” for “adequate protection” – the maker has a right to adequate protection (whatever it is in the circumstances) – the notice should track the UCC and subsection ©
- Drafter's Note 1: UCC § 9-109, Comment 5 provides a result similar to the 2002 Article 3 amendment (“Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., *Dennis Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997).”); so that's the law everywhere

#### **§ 407 – Confirmation of the sale**

- (a): it would be useful to specify the procedural requirements for the “report” – affidavit or declaration enough?
- (b)(3): does a “fraudulently” conducted sale require intent to deceive? recklessness?
- (d): if the sale is to a wholly-owned subsidiary of the foreclosing creditor is that a sale to a BFP?

#### **§ 501 – negotiated transfer**

- (a)(1): is the agreement made “after ... default” if there was an earlier default that was cured? Does the statute require a new default for this section to apply?
- Note 2: the Note might observe that a really low-priced deal could be a fraudulent transfer (see the pending amendment to the fraudulent transfer act)

#### **§ 502 – Notice of negotiated transfer**

- the reference to “all parties” might add “to the judicial proceeding”
- (b)(2): the person giving the notice should be allowed to rely on the status of an interest holder (subordinate or not) based on the land records (i.e., the holder of an off-record subordination of a senior mortgage is not entitled to the notice)

#### **§ 503 – Hearing on objection**

- (c): Some procedural guidance on the hearing would help – oral testimony? declarations?

### **§ 601 – Effect of violation**

- (a) and (b): it seems that “unfairly” is a pretty low test for making a note permanently unenforceable
- General: If there is a permanent prohibition on enforcement and the homeowner sues the creditor for something related to the loan, can the creditor set off the remaining balance on the note?

### **§ 606 – HDC**

- (d): if the homeowner obtains a judgment on a “claim” (assuming that the creditor's HDC status is not a full defense), can the creditor set off?

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