

PUBLICATION

Liberalization of Louisiana Foreclosure Law: Cat on a Hot Tin Roof

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Legislation liberalizing Louisiana foreclosure law was signed by Louisiana's governor on June 5. House Bill 697 becomes effective on August 1, 2015.

One particular area where lenders strive to use technology involves the creation of electronic records containing electronic signatures. Thus, the original documents are created on a computer and signed using an electronic signature; there is no original paper document with a handwritten signature.

Historically, Louisiana law provides for two methods to enforce promissory notes secured by collateral. The first method is through an "Ordinary Proceeding," which is a suit to enforce the promissory note and a related request for a judgment recognizing its validity. An Ordinary Proceeding includes the normal attributes of a lawsuit, answer, discovery, trial and appeal. The second is an "Executory Proceeding." The availability of either method depends on whether the creditor exercising its foreclosure rights has certain attributes, including "holder" of the promissory note, valid consideration, and appropriate Louisiana collateral documents.

Further, Louisiana's "Executory Proceeding" requires a heightened level of proof, a confession of judgment incorporated into the mortgage and/or related loan documents, and certain other evidence generally referred to as "authentic evidence." An Executory Proceeding is much harder to halt or appeal, is faster, and is less costly. See, generally, La. C.C.P. Articles 2636 and 2637 and La.R.S. 13:3733.

Louisiana courts and practitioners had consistently equated the requirement for authentic evidence as the *original* (with handwritten signature) promissory note. With the *original* promissory note, the secured creditor has the option to proceed via an Executory Proceeding or via an Ordinary Proceeding. Thus, to save time and money, the normal choice is to proceed via an Executory Proceeding. Conversely, if the secured creditor does not possess the *original* promissory note (possibly lost), the conservative method is to proceed via an Ordinary Proceeding.

Thus, generally, across the state, courts, clerks' offices and sheriff's departments require proof of, or filing with the Executory Proceeding, the *original* promissory note.

This "gold standard" for best practices in seeking enforcement of secured creditor rights via Executory Proceeding is the simplest "authentic evidence." The application of this gold standard is in conflict with the reality of modern technology, commerce and "electronic signatures." Indeed, a need to retain the *original* promissory note conflicts with a lender's desire to reduce costs necessitated by the storage and retention of *original* promissory notes.

In part sponsored by the Louisiana Banker's Association, HB 697 allows secured creditors to proceed via an Executory Proceeding without the existence of an *original* promissory note. The legislation authorizes secured creditors to proceed via an Executory Proceeding, by amending the definition of "authentic evidence" to provide that an e-signature, electronically signed or denominated promissory note, or a *copy thereof*, when accompanied by the form of "certificate" outlined in the legislation, is equal to an *original* promissory note for purposes of the definition of "authentic evidence." It is not clear if a practical consequence of the legislation may be that even existing original promissory notes can be converted to an electronic version of the original

document. Thus, not only may the legislation provide for the elimination of the execution of and retention of original promissory notes in the future, but likewise may allow financial institutions to take the step that they have wished to undertake in Louisiana: to eliminate holding original promissory notes, and, in fact, "convert" those original documents to an electronic version. Of course, further legislation may be needed.

The certification provision of the new law is set forth in an amendment to La.R.S. 13:3733 (new subsection La.R.S. 13:3733.2) which provides that an electronic signature or a reproduction of a document containing an electronic signature, must be accompanied by a certification for it to be admissible into evidence as authentic evidence and, hence, the equivalent of an *original* (handwritten) promissory note. The "R.S. 13:3733.2 Certification" generally provides that it must be signed by a representative of the financial institution or an assignee, certifying that the person's signature is a "genuine electronic signature." In addition, "if the document is an obligation sought to be enforced, the certification must include language that the person is entitled to enforce the obligation."

House Bill 697's legislation declaring that electronically created records and electronically signed records are legally enforceable was the next logical step. In 2001, the Louisiana Legislature enacted a version of the Uniform Electronic Transactions Act (UETA), which provided for the enforceability of electronic signatures and the ability of parties to agree to contract certain types of agreements electronically.